

Medical Malpractice

2 credits

Fall, 2010/11

Professor Alex Stein

This course examines the liability of medical practitioners, institutions and manufacturers for iatrogenic injuries sustained by patients.

Specifically, it focuses on the following issues:

- 1) DEFINITION OF "MEDICAL MALPRACTICE": why it matters?
- 2) LEGAL FRAMEWORKS: tort, contract, and consumer protection.
- 3) MEDICAL CARE STANDARDS: doctors' duties and standards of care; customs, practices and the locality rule; "error in judgment," "schools of thought" and "respectable minority" defenses.
- 4) EVIDENCE: medical expert testimony and other special evidentiary rules; special jury instructions.
- 5) MEDICAL DUE PROCESS: informed consent and documentation duties.
- 6) CAUSATION: indeterminate causation; liability for the patient's lost chances to recover.
- 7) DAMAGES: caps, collateral-source deductions and other limitations.
- 8) INSTITUTIONAL LIABILITY: vicarious and corporate liability of hospitals and MCOs; liability for negligent credentialing; charity immunity.
- 9) STATUTES OF LIMITATIONS AND REPOSE.

Please read only bulleted materials.

Additional materials are included for reference purposes only.

SYLLABUS AND READING ASSIGNMENTS

WEEK 1

1 MEDICAL MALPRACTICE DEFINITION

- Chandler v. Opensided MRI of Atlanta 682 S.E.2d 165 (Ga. App. 2009)

2 POLICY ANALYSIS: EFFICIENCY AND FAIRNESS OF MEDICAL LIABILITY – not covered by a 2 credit course

Patricia M. Danzon, Liability for Medical Malpractice, in Handbook of Health Economics (Anthony J. Culyer & Joseph P. Newhouse, eds.) (2000)

CHARLES E. PHELPS, HEALTH ECONOMICS 432-64 (3rd ed., 2003)

Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463, 487-97 (2002)

3 LEGAL FRAMEWORKS: TORT, CONTRACT, AND CONSUMER PROTECTION

- Sullivan v. O'Connor, 296 N.E.2d 183 (Mass. 1973)
- Hawkins v. McGee, 146 A. 641 (N.H. 1929)
- Ambach v. French, 216 P.3d 405 (Wash. 2009)

WEEK 2

- Tunkl v. Regents of University of California, 383 P.2d 441 (Cal. 1963)
- Porubiansky v. Emory University, 275 S.E.2d 163 (Ga. App. 1980)
- Tatham v. Hoke, 469 F.Supp. 914 (1979)
- Schneider v. Revici, 817 F.2d 987 (2d Cir. 1987)

Gary T. Schwartz, *Medical Malpractice, Tort, Contract, and Managed Care*, 1998 U. ILL. L. REV. 885

4 MEDICAL CARE REQUIREMENTS

4.1 Duty of Care

4.1.1 Duration

- Tresemer v. Barke, 86 Cal.App.3d 656 (Cal. App. 1978)
- Ricks v. Budge, 64 P.2d 208 (Utah 1937)
- Payton v. Weaver, 182 Cal. Rptr. 225 (Cal. App. 1982)

WEEK 3

4.1.2 Nature

- Franklin v. Gupta, 567 A.2d 524 (Md. App. 1990)

4.1.3 Scope

- Perry-Rogers v. Obasaju, 282 A.D.2d 231 (App. Div. 1st Dep't 2001)
- Rivera v. New York City Health & Hospitals Corporation, 191 F.Supp.2d 412 (S.D.N.Y. 2002)
- Tarasoff v. Regents of University of California, 17 Cal.3d 425 (Cal. 1976)

WEEK 4

4.1.4 Customs and Practices

- Hall v. Hilbun, 466 So.2d 856 (Miss. 1985)
- Helling v. Carey, 519 P.2d 981 (Wash. 1974)

Gideon Parchomovsky & Alex Stein, *Torts and Innovation*, 107 MICH. L. REV. 285 (2008)

4.1.5 The Locality Rule

- Sheeley v. Memorial Hospital, 710 A.2d 161 (R.I. 1998)
- Nestorowich v. Ricotta, 767 N.E.2d 125 (N.Y. 2002)
- Chapel v. Allison, 785 P.2d 204 (Mont. 1990)

4.1.6 “Schools of Thought” and “Respectable Minority” Defenses

- Jones v. Chidester, 610 A.2d 964 (Pa. 1992)
- Gala v. Hamilton, 715 A.2d 1108 (Pa. 1998)
- Savoie v. Daoud, 919 A.2d 1080 (Conn. App. 2007)

WEEK 5

4.1.7 “Error in Judgment” Defense

- Pringle v. Rapaport, 980 A.2d 159 (Pa. Super. 2009)
- Nestorowich v. Ricotta, 767 N.E.2d 125 (N.Y. 2002)
- Parke v. Harbert, 738 N.W.2d 510 (S.D. 2007)

5 Evidence

5.1 Expert Testimony

- Locke v. Pachtman, 521 N.W.2d 786 (Mich. 1994)
- Sami v. Varn, 535 S.E.2d 172 (Va. 2000)
- Thompson v. Carter, 518 So. 2d 609 (Miss. 1987)
- Trower v. Jones, 520 N.E. 2d 297 (Ill. 1988)
- Marcum v. Adventist Health System/West, 193 P.3d 1 (Or. 2008)
- Ivey v. Carraway, --- So.3d ----, 2009 WL 2997501 (Ala.)
- Smith v. Pavlovich, 914 N.E.2d 1258 (Ill. App. 5 Dist. 2009)

5.2 Publications and Practice Guidelines – not covered by a 2-credit course

Michelle M. Mello, *Of Swords and Shields: The Role of Clinical Practice Guidelines in Medical Malpractice Litigation*, 149 U. PA. L. REV. 645 (2001)

Stang-Starr v. Byington, 532 N.W.2d 26 (Neb. 1995)

Rosenberg v. Tavorath, 800 A.2d 216 (N.J. Super. A.D. 2002)

WEEK 6

5.3 Evidentiary Privileges: Peer Review and Preventive Measures

- Riverside Hosp., Inc. v. Johnson, 636 S.E.2d 416 (Va. 2006)
- Fox v. Kramer, 994 P.2d 343 (Cal. 2000)
- Chicago Trust Company v. Cook County Hospital, 698 N.E.2d 641 (Ill. App. 1998)
- Logue v. Velez, 699 N.E.2d 365 (NY 1998)
- Tuer v. McDonald, 701 A.2d 1101 (Md. App. 1997)

5.4 Special Jury Instructions – not covered by a 2-credit course

Neade v. Portes, 739 N.E.2d 496 (Ill. 2000)

Shea v. Esensten, 622 N.W.2d 130, 135-36 (Minn. Ct. App. 2001)

McPherson-Corder v. Chinkhota, 835 A.2d 1081 (D.C. App. 2003)
Schrempf v. State of New York, 487 N.E.2d 883 (NY 1985)

5.5 Res Ipsa Loquitur

- Ybarra v. Spangard, 154 P.2d 687 (Cal. 1944)
- Locke v. Pachtman, 521 N.W.2d 786 (Mich. 1994)
- Miller v. Jacoby, 33 P.3d 68 (Wash. 2001)
- States v. Lourdes Hospital, 792 N.E.2d 151 (N.Y. 2003)
- Barrett v. Emanuel Hospital, 669 P.2d 835 (Or. App. 1983)
- Ripley v. Lanzer, 215 P.3d 1020 (Wash. App. Div. 1 2009)

ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY 84-100 (2001)

WEEK 7

6 Medical Due Process

6.1 Informed Consent

- Ashe v. Radiation Oncology Associates, 9 S.W.3d 119 (Tenn. 1999)
- Pauscher v. Iowa Methodist Med. Ctr., 408 N.W.2d 355 (Iowa 1987)
- Matthies v. Mastromonaco, 733 A.2d 456 (N.J. 1999)
- Baird v. American Medical Optics, 713 A.2d 1019 (N.J. 1998)
- Morgan v. MacPhail, 704 A.2d 617 (Pa. 1997)
- McKinney v. Nash, 120 Cal.App.3d 428 (Cal. App. 1981)
- Henderson v. Milobsky, 595 F.2d 654 (D.C. Cir. 1978)
- Moore v. Baker, 989 F.2d 1129 (11th Cir. 1993)
- Albany Urology Clinic, P.C. v. Cleveland, 528 S.E.2d 777 (Ga. 2000)
- Duttry v. Patterson, 771 A.2d 1255, 1257 (Pa. 2001)
- Johnson v. Kokemoor, 545 N.W.2d 495 (Wis. 1996)
- Allan v. Levy, 846 P.2d 274 (Nev. 1993)
- Schreiber v. Physicians Insurance Company of Wisconsin, 588 N.W.2d 26 (Wis. 1999)
- Shine v. Vega, 709 N.E.2d 58 (Mass. 1999)
- Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972)
- Estrada v. Jaques, 321 S.E.2d 240 (N.C. Ct. App. 1984)

Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899 (1994)

Aaron D. Twerski & Neil B. Cohen, *The Second Revolution in Informed Consent: Comparing Physicians to Each Other*, 94 NW. U. L. REV. 1 (1999)

Lars Noah, *Informed Consent and the Elusive Dichotomy between Standard and Experimental Therapy*, 28 AM. J.L. & MED. 361 (2002)

WEEK 8

6.2 Documentation Duties

- Sweet v. Sisters of Providence in Wash., 881 P.2d 304 (Ala. 1994)
- Public Health Trust v. Valcin, 507 So.2d 596 (Fla. 1987)
- Welsh v. United States, 844 F.2d 1239 (6th Cir. 1988)
- Bondu v. Gurvich, 473 So.2d 1307 (Fla. App. 1984)
- Smith v. United States, 128 F.Supp.2d 1227 (E.D. Ar. 2000)
- Keene v. Brigham and Women's Hosp., Inc. 786 N.E.2d 824 (Mass. 2003)
- Jost v. Lakeland Regional Medical Center, Inc. 844 So.2d 656 (Fla. App. 2003)

ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY 160-84; 195-201 (2001)

7 Causation

7.1 Indeterminate Causation

- Zuchowicz v. United States, 140 F.3d 381 (2nd Cir. 1998)
- ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY 1-83 (2001)

WEEK 9

7.2 Liability for the Patient's Lost Chances to Recover

- ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY 100-29 (2001)
- Wendland v. Sparks, 574 N.W.2d 327 (Iowa 1998)
- Herskovits v. Group Health Cooperative of Puget Sound 664 P.2d 474 (Wash. 1983)
- Alberts v. Schultz, 975 P.2d 1279 (N.M. 1999)
- Jorgenson v. Vener, 616 N.W.2d 366 (S.D. 2000)
- Kilpatrick v. Bryant, 868 S.W.2d 594 (Tenn. 1993)

8 DAMAGES: caps, collateral-source deductions, and other limitations

- Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391 (2005)

WEEK 10

- Evans v. State, 56 P.3d 1046 (Ala. 2002)
- Lucas v. United States, 757 S.W.2d 687 (Tex. 1988)
- Gourley v. Nebraska Methodist Health System, Inc., 663 N.W.2d 43 (Neb. 2003)
- Fein v. Permanente Medical Group, 695 P.2d 665 (Cal. 1985)
- Smith v. Botsford General Hosp., 419 F.3d 513 (6th Cir. 2005)

9 Institutional Liability

9.1 Corporate Liability

- Adamski v. Tacoma General Hospital, 579 P.2d 970 (Wash. App. 1978)
- Darling v. Charleston Community Memorial Hospital, 211 N.E. 2d 253 (Ill. 1965)
- Strubhart v. Perry Memorial Hospital Trust Authority, 903 P.2d 263 (Okla. 1995)
- Ripley v. Lanzer, 215 P.3d 1020 (Wash. App. Div. 1 2009)
- Boyd v. Albert Einstein Medical Center, 547 A.2d 1229 (Pa. Super. 1988)

WEEK 11

- McClellan v. Health Maintenance Organization, 604 A.2d 1053 (Pa. Super. 1992)
- Petrovich v. Share Health Plan of Illinois, Inc., 719 N.E.2d 756 (Ill. 1999)

Alex Stein, *Healthcare Intermediaries*, 29(4) REGULATION 20 (2006)

9.2 Vicarious Liability

- Hardy v. Brantley, 471 So. 2d 358 (Miss. 1985)
- Baptist Memorial Hospital System v. Sampson, 969 S.W.2d 945 (Tex. 1998)
- Sword v. NKC Hospitals, Inc., 714 N.E.2d 142 (Ind. 1999)

WEEK 12

9.3 Negligent Credentialing

- 42 U.S.C. §11135(b) (2000) (The Healthcare Quality Improvement Act of 1986 (HCQIA), setting up the National Practitioner Data Bank)
- Welsh v. Bulger, 698 A.2d 581 (Pa. 1997)

- Johnson v. Misericordia Community Hospital, 301 N.W. 2d 156 (Wis. 1981)
- York v. Rush-Presbyterian-St. Luke's Medical Center, 854 N.E.2d 635 (Ill. 2006)
- Albain v. Flower Hosp., 553 N.E.2d 1038 (Ohio 1990)
- Schelling v. Humphrey, 916 N.E.2d 1029 (Ohio 2009)
- Larson v. Wasemiller, 738 N.W.2d 300 (Minn. 2007)
- Archuleta v. St. Mark's Hosp., --- P.3d ----, 2010 WL 1929556 (Utah 2010)
- Moreno v. Quintana, --- S.W.3d ----, 2010 WL 797921 (Tex. App. - El Paso 2010)

9.4 Charity Immunity

- Keene v. Brigham and Women's Hosp., Inc. 786 N.E.2d 824 (Mass. 2003)
- Chamley v. Khokha, 730 N.W.2d 864 (N.D. 2007)

9.5 Statutory Immunity

- Hui v. Castaneda, 130 S.Ct. 1845 (2010)

10 ERISA – not covered by a 2-credit class

Employee Retirement Income Security Act, 29 U.S.C.A. §§1132, 1144 (ERISA, §§506, 514)

John H. Langbein, What ERISA Means for Equitable: The Supreme Court's Trail of Error in Russell, Mertens and Great West, 103 Colum. L. Rev. 1317 (2003)

Aetna Health Inc. v. Davila, 542 U.S. 200 (2004)

Pegram v. Herdrich, 530 U.S. 211 (2000)

Corporate Health Insurance, Inc. v. Texas Department of Insurance, 215 F.3d 526 (5th Cir. 2000)

Cicio v. Does, 321 F.3d 83 (2nd Cir. 2003)

11 Liability for Defective Drugs and Medical Devices – not covered by a 2-credit class

11.1 General Principles

In re Zyprexa Products Liability Litigation, 489 F.Supp.2d 230 (E.D.N.Y. 2007)

Edwards v. Basel Pharmaceuticals, 933 P.2d 298 (Okla. 1997)

Vassallo v Baxter Healthcare Corp., 696 N.E.2d 909 (Mass. 1998)

11.2 FDA Preemption

Food, Drug and Cosmetic Act, 21 U.S.C.A. §§202, 360, 396
Medtronic Inc. v. Lohr, 518 U.S. 470 (1996)
Riegel v. Medtronic, Inc., 552 U.S. 312 (2008)
Buckman Company v. Plaintiffs' Legal Committee, 531 U.S. 341 (2001)
Wyeth v. Levine, 555 U.S. ____, 129 S. Ct. 1187 (2009)
Baird v. American Medical Optics, 713 A.2d 1019 (N.J. 1998)
Slater v. Optical Radiation Corp., 961 F.2d 1330 (7th Cir. 1992)

WEEK 13

12 Statutes of Limitations and Repose

- Baird v. American Medical Optics, 713 A.2d 1019 (N.J. 1998)
- Cunningham v. Huffman, 609 N.E.2d 321 (Ill. 1993)
- Schlote v. Dawson, 676 N.W.2d 187 (Iowa 2004)
- Rudenauer v. Zafiropoulos, 837 N.E.2d 278 (Mass. 2005)
- Chitty v. Terracina, 16 So.3d 774 (Miss. App. 2009)
- Kerr v. Richland Memorial Hospital, 678 S.E.2d 809 (2009)
- Rathje v. Mercy Hospital, 745 N.W.2d 443 (Iowa 2008)
- Schramm v. Lyon, 673 S.E.2d 241 (Ga. 2009)

13 Alternatives to Tort Liability and ADR – not covered by a 2-credit class

13.1 Insurance

Virginia Birth-Related Neurological Injury Compensation Act, Va. Code Ann. § 38.2-5002

Florida Birth-Related Neurological Injury Compensation Plan, West's F.S.A. § 766.302

Kenneth S. Reinker & David Rosenberg, *Unlimited Subrogation: Improving Medical Malpractice Liability by Allowing Insurers to Take Charge*, 36 J. LEGAL STUD. 261 (2007)

13.2 Arbitration

Madden v. Kaiser Foundation Hospital, 552 P.2d 1178 (Cal. 1976)

Rodriguez v. Superior Court, 98 Cal.Rptr.3d 728 (Cal. App. 2009)

WEEK 14

Make-ups and exam guidance.