TORTS "101"

HOW THE JUDICIAL SYSTEM ADDRESSES MEDICAL ERROR AND HOW IT INTERSECTS AND COLLIDES WITH COMMUNICATION AND RESOLUTION PROGRAMS

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LEARNING OBJECTIVES

Describe the basics of how the tort system operates in a medical error/adverse outcome situation.

2

Describe the basics of how, when, and why CRP, "apology laws," "mandatory disclosure" laws/requirements, and healthcare licensing systems intersect and/or collide with the tort system.

3

Identify one or two key points to assist quality/patient safety/risk personnel, liability coverage carriers, patient advocates, and physician leaders respectively in navigating these intersections/collisions.

MEDICAL MALPRACTICE CLAIM

WHAT IS A MEDICAL MALPRACTICE CLAIM?

- "Professional" negligence claim filed against a "health care provider"
  - Anyone licensed, certified, or registered as a health care provider under state law
- "Civil" lawsuit
  - As opposed to criminal

WHAT IS THE "BURDEN OF PROOF"?

- Plaintiff must prove all the "elements" of their claim by a "preponderance of the evidence"
  - Jury must believe plaintiff's evidence is true on a "more likely than not" basis
- "Elements" are fairly standard across the country
  - Four typical elements, usually found and interpreted via state case law (court opinions)
  - Washington has "codified" its elements in statutory law
    - Still interpreted by the courts

WHAT ARE THE LEGAL ELEMENTS OF A CLAIM? (EXAMPLE: WASHINGTON)

1. Existence of a Duty to the Patient/Plaintiff
   - Usually a given
2. **Breach of Duty by Health Care Provider**
   - **Expert opinion required (rare exceptions)**
3. Patient is Damaged
   - Expert opinion required (rare exceptions)
4. Damages Caused by Breach
   - Expert opinion required (rare exceptions)

WAS THERE A BREACH?

- The "Standard of Care" question
  - Did the health care provider fail to act as a "reasonable and prudent practitioner in the class or profession to which he or she belongs, acting in like or similar circumstances?"

DETERMINING THE STANDARD OF CARE: SOURCES OF EVIDENCE PRESENTED TO JURY

- Expert testimony regarding current standards of practice
  - Standards of professional organizations
  - Accreditation standards (TJC, etc.)
  - Literature
  - Specific applicable policies and procedures

EVIDENTIARY STANDARDS/ADMISSIBILITY

- Evidentiary standards apply regardless whether a CRP has taken place
  - Admissions of liability/fault
  - “Sympathetic gestures”
  - Offers to settle
  - Remedial measures

WHAT CAN YOU SAY AND WHEN CAN YOU SAY IT? EXAMPLE: WASHINGTON

- Apology Laws
- Disclosure Protection laws

“FULL” APOLOGY LAW: WITHIN THIRTY DAYS

- Health care providers may make any statement or other gesture expressing apology or even fault
  - e.g., "We made an error.”
- Statement would not be admissible in court as an "admission of liability."
- Change in Washington law as of 2006

“PARTIAL APOLOGY LAW: ANY TIME

- Actions to prevent recurrence
  - Any statement about "remedial actions" that may be taken after an adverse event.
- “Sympathetic gestures”
  - Statement or gestures expressing sympathy or a general sense of benevolence, made to the person or family.
  - General apology (“I am very sorry that this happened") would be protected, but statement of fault would not.
    - Unless made within 30-days by a health care provider—full apology law would apply

DISCLOSURE PROTECTION LAWS FOR FACILITIES

- Hospitals and ambulatory surgery centers must have policies to assure that, when appropriate, **information about unanticipated outcomes** is provided to patients/families/surrogate decision makers.
- Notification of unanticipated outcomes is not an acknowledgement or admission of liability.
- The fact of notification, the content disclosed, or any and all statements, affirmations, gestures, or conduct expressing apology is not admissible in a civil action.

OTHER STATE LAWS

- 32-34 states and the District of Columbia have partial apology laws
- 5-7 states have “full” apology laws
  - List variably includes Arizona, Colorado, Connecticut, Georgia, South Carolina, Vermont, and Washington

TRIAL OPTIONS

- Bifurcated trial
  - Try on liability only, then proceed to damages trial if liability is found
  - Allocation of fault among defendants
    - Joint and several liability
  - "Contributory negligence"—sometimes argued regarding non-compliant patients
- "Causation defense"
  - Admit liability and try on the issue of causation

TRIAL OPTIONS

- Damages only trial
  - Admit liability and causation and try on the issue of damages
- Available damages
  - Special damages—healthcare costs, lost income, etc.
  - General damages—pain, suffering, etc.
  - Punitive damages—only if state law allows

EXTRA-JUDICIAL MEDICAL ERROR SYSTEM

MANDATORY ADVERSE EVENT REPORTING

- TJC Sentinel Event Reporting
  - A sentinel event is a patient safety event (not primarily related to the natural course of the patient's illness or underlying condition) that reaches a patient and results in any of the following:
    - Death
    - Permanent harm
    - Severe temporary harm

MANDATORY ADVERSE EVENT REPORTING

- An event is also considered sentinel if it is on a list of 15 specific types of events. Examples include:
  - Suicide of any patient receiving care, treatment, and services in a staffed around-the clock care setting or within 72 hours of discharge, including from the hospital's emergency department
  - Unanticipated death of a full-term infant
  - Discharge of an infant to the wrong family
  - Abduction of any patient receiving care, treatment, and services
- Accredited organizations are encouraged though not required to report sentinel events, but they must document investigation and review according to TJC criteria.

MANDATORY ADVERSE EVENT REPORTING

- Washington state reporting
  - When a medical facility (childbirth center, hospital, psychiatric hospital, correctional medical facility, or ambulatory surgical facility) confirms that an adverse event has occurred, it shall submit to the department of health:
    - (a) Notification of the event, with the date, type of adverse event, and any additional contextual information the facility chooses to provide, within forty-eight hours; and
    - (b) A report regarding the event within forty-five days.
  - Also must conduct root cause analysis
  - "Adverse event" = NQF list, as amended (29 total Serious Reportable Events)
  - Individual reporting details covered by statutory QI privilege are not public, but basic reporting fields (e.g., date, facility, event category, etc.) and aggregate data are publicly available.

MANDATORY DISCLOSURE OF ADVERSE EVENTS

- Common characteristics
  - Referred to as "unanticipated outcomes"
  - No requirement to admit fault or disclose "error"
- TJC
  - Patient safety standards require that hospitals provide the patient or surrogate decision-maker with information about the following:
    - Outcomes of care, treatment, and services that the patient needs in order to participate in current and future health care decisions.
    - Unanticipated outcomes of the patient's care, treatment, and services that are sentinel events as defined by The Joint Commission. This information is provided by the licensed independent practitioner responsible for managing the patient's care, treatment, and services, or his or her designee.
- Washington DOH hospital licensing laws
  - RCW 70.41.380 Notice of unanticipated outcomes.
    - Hospitals shall have in place policies to assure that, when appropriate, information about unanticipated outcomes is provided to patients or their families or any surrogate decision makers.

DEFINING "UNANTICIPATED OUTCOMES"

- "The rub": circular definitions—if any
- Example:
  - Outcome(s) not anticipated in advance as being a desired outcome of care, treatment or services, including those that:
    - Result in a significant change in patient's condition.
    - Require a significant new level of monitoring.
    - Create need for unforeseen medical care or nursing interventions.

STATE LAW

- States that mandate reporting of NQF SREs: CA, CT, IL, IN, MN, NJ, OR, VT, WA, WY
- States that mandate reporting of other serious adverse events lists: CO, FL, GA, KS, MA, MD, ME, NV, NY, PA, OH, RI, SC, SD, TN, TX, UT

LIMITS ON EXTRA-JUDICIAL SYSTEM BY TORT SYSTEM

- Tort system trumps alternative dispute resolution (unless parties agree to binding arbitration)
- Law may not **require** admissions of liability
  - Similar to admissions of guilt in criminal context
- Law may **encourage** admissions of fault/liability within the extra-judicial context, but as a practical matter must also offer protection from admissibility if the matter moves to the tort system

ATTEMPTS AT TORT REFORM EXAMPLE: WASHINGTON

- Tort reform attempts began in 1986
  - Damages caps found unconstitutional
- Additional attempts in later years also found to be unlawful
  - Certificate of merit
  - Parental knowledge imputed to minor (preventing tolling of the statute of limitations)
- Are apology laws "the latest attempt at tort reform"?
  - Less likely to be struck down than previous attempts? Why?

WHAT'S THE ANSWER?

- "No-fault" system for medical malpractice cases?
  - Similar to worker's compensation
  - Potential problems
    - No general damages
    - Conflicts with state constitutions that guarantee the right to trial (would apply to any option that mandates substituting CRP for a civil lawsuit)

OR

- Continue to support and broaden laws that encourage CRP as an alternative dispute resolution pathway
  - Tort system remains available, so as a practical matter these laws would need to provide incentives such as non-admissibility, even though apology laws may not significantly decrease medical malpractice tort claims (see Stanford Law Review article—February 2019)

TAKE-AWAYS?

- Don’t focus on a goal of reducing “claims” frequency or severity
- CRP is the right thing to do
  - Patient-centered
  - Consistent with a commitment to quality
- Other reasons to avoid the tort system
  - Adversarial and punitive in nature
  - Inconsistent with just culture principles
- Incentives presumably will help avoid the tort system and drive resolution to the CRP pathway
  - E.g., not being able to use CRP admissions and apologies outside of the CRP pathway

QUESTIONS