THE CURRENT PROFESSIONAL LIABILITY DILEMMA

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The Question: Would a reasonable well trained physician in the same or similar circumstances, possessing the required skills and judgment...
MEDICAL NEGLIGENCE
Foreseeability II

- . . .have been able to foresee that the conduct which caused the injury (Defendant’s alleged negligence) would have caused the injury which is the subject of the litigation.

- E.G. Did the Plaintiff have the right to expect to be protected from this consequence through adherence to the standard of care.
PROVIDER/PATIENT
RELATIONSHIP
Creation of the Duty I

Fiduciary in Nature – No lay person can be expected to make effective decisions based on their own understanding of the medicine. Instead, they do have a right to rely on the judgment of the physician.

Provider must put patient’s interest above his/her own when necessary
Provider/patient relationship must exist before any professional liability attaches.
PROVIDER/PATIENT RELATIONSHIP Creation of the Duty III

- Provider/patient relationship* may be
  - Express

- Implied
- Mutual Assent
- Not to be confused with consent

*Bystander/Good Samaritan Exception & Rules
HEALTHCARE AT THE CROSSROADS

Strategies for improving the Medical Liability System and Preventing patient injury

JCAHCO – 2/2005
MAJOR THEMES

- Promote open communications between patients and practitioners
- Pursue patient safety initiatives that prevent medical injury
- Create an injury compensation system that is patient-centered and serves the common good
“AFTER THE FACT” APPROACHES

- Arbitrarily declaring most lawsuits “frivolous”
- Harvard Medical Practice Study
  - 2% of negligent injuries result in claims
  - Only 17% of claims were clearly negligent
  - Similar results in Colorado and Utah studies
## “AFTER THE FACT” APPROACHES II

- “Cap” on economic/non-economic awards for damages
- Constitutional issues
- Failure to decrease incidence of preventable patient injury
- Not consistently associated with Professional Liability Premium reduction
- Arbitrary and not case specific
TOP FIVE CAUSES OF CLAIMS

- Failure to diagnose
- Error in diagnosis
- Procedure improperly performed
- Procedure not performed when indicated
- Associated issues
FOUR CAUSES OF DIAGNOSTIC ERROR

- Problematic clinical presentation
- Difficult patient
- Physician distractions
- Systems breakdowns
EXAMPLES OF ASSOCIATED ISSUES

- Abandonment
- Breach of confidentiality
- Consent issues
- Practicing beyond privileges
- Unnecessary treatment
### EXAMPLES OF ASSOCIATED ISSUES II

- Examples based on JCAHCO Sentinel Event Report/Root Cause Analysis
- Communication failure
- Inadequate orientation/training
- Abbreviated assessment
- Inadequate staffing levels
- Non-available prior information/data
A COMPLICATION IS

- An outcome or result of a medical intervention that was not expected because it was not the usual outcome or result
A SIGNIFICANT COMPLICATION

- Occurs when the unexpected effect is a long lasting or permanent adverse outcome
SENTINEL EVENT: FUNCTIONAL DEFINITION

Unexpected event that results in loss of life or limb, significant permanent injury, or has the potential of having caused significant injury (the “near miss”)
## COMPLICATION EVALUATION SUMMARY

- Know what a complication is
- Be honest with yourself and others about what did and did not happen
- Evaluate the complication for liability
- Decide whether liability attaches
- Notify everyone who needs to know if there is a significant complication
- Understand what your role is in a law suit
ELEMENTS OF DISCLOSURE

PROCCESS

Apology with prompt explanation of what happened

Realistic prognosis

Assurance of thorough analysis of what went wrong

Follow-up dialogue indicating corrective measures that have been taken
Attorneys do not injure patients
How providers respond to adverse outcomes is a major factor in likelihood of suit
Major reform in compensation process is unlikely