Medicolegal Terms

Agency – Legal arrangement where one party (agent) may act on behalf of another party (principal). The agent’s actions are binding on the principal just as if the principal had performed them. Employees are usually considered agents of the employer. Independent contractors are generally NOT considered agents of the entities who hire them. A hospital that employs a physician may be liable for the physician’s actions through an agency relationship. To remember the concept, think of a real estate agent who acts on your behalf when buying a house. When reading questions, ask yourself whether someone is acting on behalf of an absent third party.

Apparent Agency – Even when no agency arrangement exists, if it appears to the general public that an agency relationship exists, the principal may still be held liable for a third party’s actions. An emergency physician who works as an independent contractor at a hospital, but who wears a hospital jacket and hospital ID may be considered an apparent agent of the hospital.

Assumption of Risk – One of several defenses to claim of negligence. Plaintiffs may not be able to recover for injuries they sustain when participating in a dangerous activity if the extent and nature of the risks are disclosed and the plaintiff willingly participates in the activity. Think of a skydiver who assumes the risk of the effects of gravity when jumping from a plane. Similar to informed consent.

Breach – To violate a law, right, duty or obligation by either performing an action that is prohibited or by failing to perform an action that is required.

Capacity – Retrospective determination made by court in assessing patient competency. Legal capacity occurs when patient reaches 18 years of age or when patient meets state-specific statutory definitions (such as pregnancy, parenthood, marriage). Clinical capacity determined by whether patient can act on own behalf, understand information presented, appreciate consequences of acting of failing to act, make rational decision.

Captain of the Ship – In medical context, usually applies to surgeons during an operation. The law may impose liability on the surgeon for actions of surgical assistants under the surgeon’s control during the operation – even though the assistants are hospital employees. The “captain of the ship” is liable for the actions of the “crew.” In this case, the law assumes that the surgeon is “borrowing” the employees from the hospital and is therefore liable for the actions of the employees.

Contributory Negligence – Unreasonable conduct by a plaintiff that contributes to the plaintiff’s injuries. Conduct outside the scope of actions a reasonable person would take to protect himself from injury. Used as a defense in medical malpractice cases. For example, failing to fill a physician’s prescription for antibiotics may be used of evidence of contributory negligence if the patient later develops an infection. The patient “contributes” to his own injury.

Damages – Compensation for loss or injury that was sustained because of the negligence of another entity. If there is no injury and no loss, there are generally no damages and a lawsuit cannot proceed. To remember the concept, remember “no harm (no damages), no foul (no lawsuit).”

Duty to Warn – An obligation to warn an identifiable third party of an imminent danger which is substantially likely to occur. For example, a psychiatrist may have a duty to warn a patient’s spouse if a patient threatens to kill the spouse. The same psychiatrist would not have a duty to warn the public of a patient’s threats to “go out and kill someone” (although the psychiatrist may have a duty to hospitalize the patient to protect the public). Similarly, a physician generally doesn’t have a duty to warn the public about a patient who is a chronic alcoholic and may cause a drunk driving accident.
**Good Samaritan Defense** – One who *volunteers* to help another person in danger will usually not be held liable for negligence unless the volunteer’s acts are reckless. For example, performing CPR on a patient who is unresponsive will probably not invoke liability. Several exceptions to this defense. For example, defense isn’t valid if patient is charged for services. Performing a thoracotomy on the floor of a grocery store with a can opener would likely be considered reckless and the Good Samaritan defense therefore would probably not apply.

**Informed Consent** – Agreement between patient and physician in which patient allows treatment to be performed after physician has disclosed all information a reasonable person would want to know before making a decision. In general, information disclosed should include the nature of the treatment as well as the risks, benefits, and alternatives of the treatment.

**Intentional Tort** – Civil harm committed where actor wants harm to occur or knows that harm is substantially likely to occur. Examples include assault, battery, defamation, false imprisonment. May result in criminal charges. May not be covered by malpractice insurance. May result in loss of licensure.

**Malfeasance** – Term used to define medical malpractice. Strict definition implies a breach of contract with intent to do damage to other party. Compare with *misfeasance* which is a failure to properly perform a contractual duty or *nonfeasance* which is a failure to perform a contractual duty at all.

**Medical Malpractice** – Theory of negligence requiring proof of five elements:
- Duty to the patient (establishing a physician-patient relationship)
- Breach of the duty to the patient (acting below the “standard of care”)
- Actual causation of damages
- Proximate causation of damages
- Damages

If plaintiff cannot prove each of these elements, the physician is not liable.

Any time there is a question about malpractice liability, think about whether there is a relationship between the physician and the patient, whether the physician did something wrong, whether damages occurred, and whether the physician caused the damages. Unless each of these conditions has been met, there is no liability. Duty → Breach → Causation → Damages

**Negligence** – Failing to use the care that a reasonably prudent person would use under similar circumstances. Conduct outside that which one ought to exhibit in a given situation. Acting below the “standard of care.”

**Res ipsa loquitur** – The thing (*res*) itself (*ipsa*) speaks (*loquitur*). “The thing speaks for itself.” Theory of liability used when an injury occurs, the injury is beyond the plaintiff’s control, and the injury does not usually occur in the absence of negligence. Using this theory, a plaintiff doesn’t need to prove negligence – the injury “speaks for itself,” and negligence is assumed simply by the presence of the injury. Examples include a surgical instrument left in patient’s abdomen or chipped teeth after an intubation. To remember the concept, recall that *loquacious* people talk a lot.

**Respondeat superior** – Literally “let the superior respond.” Similar to vicarious liability. An employer (the “superior”) is responsible for (must “respond to”) the actions of his employees. If the employee causes an injury, the employer may be held responsible for the employee’s actions.

**Strict Liability** – Liability occurs even if injuries occur through no fault of the defendant. Some actions are so dangerous to the public that laws are made even more “strict” in order to deter people from engaging in the actions. For example, even if you keep a pet alligator behind a barbwire fence, you may still be strictly liable for injuries other people sustain from alligator bites.
Tort Law – Theory of law based upon one party causing a legal injury to another through violation of some duty. Medical malpractice suits are a subset of tort law. Defendants are generally liable for monetary damages as opposed to criminal law where defendants may face incarceration.

Vicarious Liability – One party may be liable for the actions of another party by virtue of an agency relationship. For example, hospital employers can be liable for the actions of their physician employees. Physician employers can be liable for the actions of their office staff. Unrelated entities are generally not vicariously liable for each other’s actions (such as a physician being liable for the actions of a pharmacist – unless the pharmacist is the physician’s employee).

Warranty – A promise or guarantee. Manufacturers may provide a warranty that their products will work as advertised for a given period of time. Physicians may unknowingly provide a warranty that a patient will achieve a certain outcome from a course of treatment (“I guarantee you will have a fully functional hand after I fix it.”) If the patient does not achieve the guaranteed results, the physician may be liable for “breach of warranty.”

ACRONYMS

COBRA – Consolidated Omnibus Reconciliation Act
Lengthy statute dealing with employee benefits and ability to maintain health insurance after leaving a job

EMTALA – Emergency Medical Treatment and Active Labor Act
Statute designed to prevent “patient dumping.” Any patient requesting care in an ER must be evaluated and, in an emergency medical condition exists, must be stabilized to the best of the facility’s ability. Patient can be transferred if other receiving facility has available beds and accepts transfer. Receiving facility cannot refuse transfer based upon insurance status.

HCQIA – Healthcare Quality Improvement Act
Statute protecting peer review committees from retaliation by physicians who have been sanctioned by the committee

HIPAA – Health Insurance Privacy and Accountability Act
Statute designed to balance unimpeded delivery of quality health care with protection of patient privacy. Requires use of reasonable safeguards, disclosure of minimum necessary information, and implementation of other procedures to protect an individual’s privacy. In general, protected health information may be disclosed if made for treatment purposes, if made to patient or at patient’s request, if required by law, or if made for certain public policy reasons (aid law enforcement, protect third parties, worker’s compensation, etc.)

Required disclosures: to individuals upon request, to HHS when requested for compliance or enforcement action

Permitted disclosures: Disclosures to individual; for entity’s treatment, payment, and health care operations; required by law; public health necessity; audits; judicial proceedings; funeral directors; research; workers’ compensation; law enforcement activities – investigate crimes, identify suspects, court orders.

TJC – The Joint Commission (formerly JCAHO – Joint Commission on Accreditation of Healthcare Organizations)
Sets standards for healthcare delivery in healthcare setting. Creates patient safety goals that hospitals must follow in order to be accredited. Performs site evaluations of hospitals to determine whether hospitals are meeting standards and are eligible for accreditation. Non-accredited hospitals risk losing federal funding.
Miscellaneous Topics

Criminal Law versus Civil Law

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<th>Criminal Law</th>
<th>Tort Law</th>
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<td>- Defendant against the government</td>
<td>- Plaintiff against defendant</td>
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<td>- Guilty beyond a “reasonable doubt”</td>
<td>- Liable by more than 50% of evidence (tipping of scales)</td>
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<td>- Goal is to punish and deter (can be incarcerated)</td>
<td>- Goal is to compensate and occasionally to punish (cannot be incarcerated)</td>
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When patient is unable to make decision, there is a hierarchy of decisionmakers
Guardian > Durable Healthcare Power of Attorney > Spouse > Parent > Adult Child > Sibling > Other relatives > Friend

Function of State Medical Boards – In general, provide licensing and credentialing of physicians who wish to practice medicine in each state. Overview activities of physicians practicing in state. Disciplinary boards have the ability to revoke or suspend licenses of physicians who do not meet standards of licensure. May be involved in peer review.

Function of Specialty Societies (example: American College of Obstetricians and Gynecologists, American College of Emergency Physicians, etc.) – Represent the interests of the physicians in each specialty. May grant “fellowship” in society meaning that physician has achieved certain predefined practice benchmarks within the physician’s career. May be involved in peer review of physicians within specific specialty.

*If you have seen a medicolegal term in your studies or have come across a medicolegal term on an exam that you don’t understand, please contact me so that I can include the term on this handout in the future.*