

PROFESSIONAL LIABILITY UPDATE

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Professional Liability Case Elements

- ▶ Duty
- ▶ Breach - Negligence
- ▶ Causation
- ▶ Damages

Duty – A medical malpractice case is only cognizable if the health care provider owes a duty to the patient (Page 61)

- ▶ Normally, but not always this requires privity
- ▶ **Long v. Ostroff**, 854 A.2d 524 (Pa. Super. Ct. 2004), appeal denied, 871 A.2d 192 (Pa. 2005)
- ▶ **Thierfelder v. Wolfert**, 978 A.2d 361 (Pa. Super. Ct. 2009), vacated and remanded, 52 A.3d 1251 (Pa. 2012)
- ▶ **K.H. v. Kumar**, 122 A.3d 1080 (Pa. Super. Ct. 2015)

Duty (cont.) (Page 61)

- ▶ **Althaus** Factors – *Pennsylvania has moved away from bright line tests for duty and now uses the “Althaus Factors”*
 - ▶ Relationship between the parties
 - ▶ Social utility of actor’s conduct
 - ▶ Nature of risk involved and foreseeability of harm incurred
 - ▶ Consequences of imposing a duty
 - ▶ Overall public interest

Althaus v. Cohen, 756 A.2d 1166 (Pa. 2000)

Duty of Health Care Providers to Non-Patients and Third Parties (Page 63)

- ▶ *DiMarco v. Lynch Homes-Chester County*, 583 A.2d 422 (Pa. 1990)
- ▶ *Emerich v. Philadelphia Center for Human Development*, 720 A.2d 1032 (Pa. 1998)
- ▶ *F.D.P. ex. Rel. S.M.P. v. Ferrara*, 804 A.2d 1221 (Pa. Super. Ct. 2002), appeal denied, 847 A.2d 1286 (Pa. 2004)
- ▶ *Ward v. Most Health Services*, No. 06-4646, 2008 U.S. Dist. LEXIS 61573 (E.D. Pa. Aug. 8, 2008)
- ▶ *Walters v. UPMC Presbyterian Shadyside*, 144 A.3d 104 (Pa. Super. Ct. 2016) aff'd, 187 A.2d 214 (Pa. 2018)
- ▶ *Maas v. UPMC Presbyterian Shadyside*, 192 A.3d 1139, 1149 (Pa. Super. Ct. 2018).

Standard of Care (Page 69)

- ▶ Expert Testimony Required to Establish Breach of Standard of Care
 - ▶ *Rose v. Annabi*, 934 A.2d 743 (Pa. Super. Ct. 2007)
 - ▶ *Papach v. Mercy Suburban Hospital*, 887 A.2d 233 (Pa. Super. 2005), vacated and remanded, 914 A.2d 868 (Pa. 2007)
 - ▶ *Seminara v. Dershaw*, 2018 Pa. D. & C. LEXIS 314 (Pa. C.P. Feb. 8, 2018)
 - ▶ *Stang v. Smith*, 39 D. & C. 5th 428 (Pa. Ct. Com. Pl. 2014)
 - ▶ *Crew v. Penn Presbyterian Med. Ctr.*, 2017 Phila. Ct. Com Pl. LEXIS 188 (Pa. Ct. Com. Pl. 2017) affirmed 192 A.3d 231 (Pa. Super. Ct. May 9, 2018)

Board Certification and Standard of Care for Physicians (Page 70)

- ▶ *Hawkey v. Peirsel*, 869 A.2d 983 (Pa. Super. 2005)
- ▶ Board Certification is not a requirement to practice medicine –
 - ▶ Lack of Board Certification not probative of defendant's compliance with standard of care

Medical/Scientific Literature (Page 81)

- ▶ *Aldridge v. Edmunds*, 750 A.2d 292 (Pa. 2000)
- ▶ *Klein v. Aronchick*, 85 A.3d 487 (Pa. Super. 2014)

Expert Qualifications (Page 87)

▶ *Freed v. Geisinger Medical Center*, 601 Pa. 233, 971 A.2d 1202 (Pa. 2009), reargument granted, 602 Pa. 207, 979 A.2d 846 (2009), aff'd, 5 A.3d 212 (Pa. 2010)

▶ *Green v. Pa. Hosp.*, 123 A.3d 310 (Pa. 2015)

▶ *Tong-Summerford v. Abington Mem. Hosp. & Radiology Grp. of Abington, P.C.*, 190 A.3d 631 (Pa. Super. Ct. 2018)

▶ *Glasgow v. Duncan*, 2018 Pa. Super. Unpub. LEXIS 3595 (Pa. Super. Ct. September 25, 2018)

Expert Qualifications (cont.)

- ▶ *Wexler v. Hecht*, 928 A.2d 973 (Pa. 2007)
- ▶ *Anderson v. McAfoos*, 57 A.3d 1141 (Pa. 2012)
- ▶ *Weiner v. Fisher*, 871 A.2d 1283 (Pa. Super. 2005)
 - ▶ 5 year requirement – measured from time expert testifies

Expert Qualifications (cont.)

- ▶ *Weiner v. Fisher*, 871 A.2d 1283 (Pa. Super. 2005)
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Two Schools of Thought (Page 91)

- ▶ *Jones v. Chidester*, 610 A.2d 964 (Pa. 1992)
- ▶ *Gala v. Hamilton*, 715 A.2d 1108 (Pa. 1997)
- ▶ *Thomas v. Evans*, 2018 Pa. Super. Unpub. LEXIS 469 (Pa. Super. Ct. 2018)

Causation (Page 94)

- ▶ Reasonable Certainty
- ▶ Increased Risk of Harm
 - ▶ *Hamil v. Bashline*, 392 A.2d 1280, 1284 (Pa. 1978)
 - ▶ § 323 Restatement Second
 - ▶ (1) Deviation from standard of care
 - ▶ (2) Deviation increased risk of harm
 - ▶ (3) The harm in fact occurred
 - ▶ *Klein v. Aronchick*, 85 A.3d 487 (Pa. Super. 2014)

Informed Consent (Page 96)

- ▶ Battery Concept
- ▶ Prudent Patient Standard
- ▶ Expert Testimony
 - ▶ (1) Existence of Risks of Procedure
 - ▶ (2) Alternative Method
 - ▶ (3) Risks of Alternatives
 - ▶ (4) Jury determines if risk is material

Informed Consent (cont.)

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- ▶ ***Mcare 40 P.S. § 1303.504(a)***
 - ▶ *Consent necessary*
 - ▶ *(a) Surgery (including anesthesia)*
 - ▶ *(b) Radiation/chemotherapy*
 - ▶ *(c) Blood transfusion*
 - ▶ *(d) Inserting surgical device or appliance*
 - ▶ *(e) Experimental medicine*
 - ▶ *Only material risks must be disclosed*

Informed Consent (cont.)

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- ▶ Plaintiff must prove
 - ▶ (1) failure to disclose relevant risks or alternatives
 - ▶ (2) undisclosed information would have been a substantial factor in patient's decision
- ▶ Defendant can present evidence of what accepted medical practice would provide
- ▶ Overrules *Duttry v. Patterson*, 771 A.2d 1255, 1259 (Pa. 2001)
 - ▶ Knowingly misrepresents (40 Pa. C.S. § 504(d)(2))

Informed Consent (cont.) (Page 100)

- ▶ **Fitzpatrick v. Natter**, 961 A.2d 1229 (Pa. 2008)
- ▶ **Brady v. Urbas**, 111 A.3d 1155 (Pa. 2015)
- ▶ Consent to treatment after being informed of the risks is generally not relevant to cause of action for medical negligence
- ▶ **Thomas v. Evans**, 2018 Pa. Super. Unpub. LEXIS 469 (Pa. Super. Ct. 2018)

Informed Consent (cont.)

- ▶ *Shinal v. Toms*, 162 A.3d 429 (Pa. 2017)
 - ▶ The Court narrowly construed section 504 of the MCARE Act, ultimately exposing physicians to civil liability for failure to personally obtain informed consent through direct, in-person, communication with the patient.

Institutional Liability (Page 103)

- ▶ Vicarious Liability
 - ▶ *Valles v. Albert Einstein Medical Center*, 758 A.2d 1238 (Pa. Super. Ct. 2000), aff'd, 805 A.2d 1232 (Pa. 2002)
- ▶ Ostensible Liability
 - ▶ Mcare 40 Pa. 1303.516
 - ▶ (1) reasonable justification
 - ▶ (2) advertised or represented
 - ▶ *Green v. Pa. Hosp.*, 123 A.3d 310 (Pa. 2015)
 - ▶ *Oscarson v. Moses Taylor Hosp.*, No. 13 C.V. 1523, 2016 WL 409712 (Lackawanna 2016)

Institutional Liability (cont.)

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▶ EMTALA

- ▶ *Torretti v. Main Line Hospitals, Inc.*, 580 F.3d 168 (3rd Cir. 2009)
- ▶ *Byrne v. The Cleveland Clinic*, 684 F. Supp. 2d 641 (E.D. Pa. 2010)
- ▶ *Baney v. Fick*, 2015 U.S. Dist. LEXIS 21118 (M.D. Pa. Feb. 23, 2015)
- ▶ *Gillmore v. Holland*, 2018 U.S. Dist. LEXIS 32750 (M.D. Pa. Feb. 28, 2018)
- ▶ *Dean v. Bowling Green-Brandywine*, 192 A.3d 1177 (Pa. Super. Ct. 2018)
- ▶ *McClure v. Parvis*, 294 F. Supp. 3d 318, 328 (E.D. Pa. 2018)

Institutional Liability (cont.)

- ▶ *Dicioccio v. Chung*, No. 14-1772 (E.D. Pa. 2017)
 - ▶ Stabilization period was extended beyond the emergency room where patient was not assigned “inpatient” or “outpatient status” but was instead placed on “observation” status.

Corporate Negligence (cont.)

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- ▶ Notice and Causation
- ▶ *Scampone v. Highland Park Care Center LLC*, 57 A.3d 582 (Pa. 2012)
- ▶ *Valles v. Albert Einstein Medical Center*, 758 A.2d 1238 (Pa. Super. Ct. 2000), aff'd, 805 A.2d 1232 (Pa. 2002)

Peer Review Protection Act (Page 121)

- ▶ *Reginelli v. Boggs*, 181 A.3d 293 (Pa. 2018)
- ▶ The Supreme Court held that the evidentiary privilege does not apply to contract based hospital services such as physician services groups, hospitalist services, anesthesiology, radiology, emergency medicine laboratory medicine, and other service providers
- ▶ The Court interpreted the PRPA narrowly and held that the physician group was not a professional health care provider as defined by the PRPA, despite the fact that it was comprised of hundreds of professional health care providers, because the group is “unregulated and unlicensed.”
- ▶ Additionally, the Court went beyond the question presented on appeal and held that hospital credentialing review activities are not privileged under the PRPA.

Statute of Limitations (Page 128)

- ▶ *For medical malpractice/informed consent, the statute is two years – 42 Pa. CSA § 5524(2)*
- ▶ *Discovery Rule*
 - ▶ *Plaintiff knows or reasonably should know*
 - ▶ *(1) He has been injured*
 - ▶ *(2) Injury caused by another*

Statute of Limitations (cont.) (Page 129)

- ▶ *Fine v. Checcio*, 870 A.2d 850 (Pa. 2005)
- ▶ *Ayers v. Morgan*, 154 A.2d 788 (Pa. 1959)
- ▶ *Bickford v. Josen*, 533 A.2d 1029 (Pa. Super. 1987)
- ▶ Two year period begins to run when injury becomes ascertainable.
 - ▶ *Fine supra.*
 - ▶ *Ward v. Rice*

Statute of Limitations (cont.)

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- ▶ *Williams v. Wexford*, No. 16-991 (E.D. Pa. 2016)
 - ▶ Statute is tolled by filing writ of summons, but statute only tolled if there is a good faith effort to serve the writ
- ▶ *Delgado v. U.S.*, No. 16-1765 (E.D. Pa. 2016)
- ▶ *Brady v. Urbas*, 80 A. 3d 480, 484 (Pa. Super. Ct. 2013)
- ▶ *Dubose v. Quinlan*, 173 A.3d 634 (Pa. 2017)
- ▶ *Nicolaou v. Martin*, No. 44 MAP 2017, 2018 Pa. LEXIS 5468 (Pa. Oct. 17, 2018)

Dragonetti Act (Page 202)

- ▶ *Villani v. Siebert*, 159 A.3d 478 (Pa. 2017)
 - ▶ Supreme Court considered whether the Dragonetti Act infringes on the Court's power to regulate the practice of law, insofar as wrongful-use actions may be advanced against attorneys.
 - ▶ The Court declined to recognize general attorney immunity under the Act.
 - ▶ Court held Appellee failed to establish that the Dragonetti Act violated the Pennsylvania Constitution, as evidenced by the Legislature's prerogative to enact the substantive legislation, or that attorneys should be *per se* immunized from application of the substantive law promulgated by the Legislature in enacting the Dragonetti Act.

Social Media (Page 176)

- ▶ ***Brogan v. Rosenn, Jenkins & Greenwald, LLP***, 2013 Pa. Dist. , & , Cnty. Dec. LEXIS 171 (Ct. Com. Pl. Lackawanna Cty. April 22, 2013)
- ▶ ***Perrone v. Lancaster Regional Medical Center***, No. CI-11-14933 (Ct. Com. Pl. Lancaster Cty. May 3, 2013)
- ▶ ***Hunter v. PRC, Inc.***, No. 2010-SU-3400-71 (Ct. Com. Pl. York Cty. Nov. 13, 2013)
- ▶ ***Nicolaou v. Martin***, No. 44 MAP 2017, 2018 Pa. LEXIS 5468 (Pa. Oct. 17, 2018)

Deposition-Questions of Defendant(Page 186)

▶ Karim v. Reedy, et al., 2011-Civ-4598 (Nealon, J.)

- ▶ The court considered other cases holding to the contrary, including
 - ▶ *Pa. Co. for Ins. v. City of Philadelphia*, 105 A. 630 (Pa. 1918)
 - ▶ *Evans v. Otis Elevator Co.*, 168 A.2d 573 (Pa. 1961) (Distinguished)
 - ▶ *Neal v. Lu*, 530 A.2d 103 (Pa. Super. Ct. 1987) (Distinguished)
 - ▶ *Jistari v. Nappi*, 549 A.2d 210 (Pa. Super. Ct. 1988)
 - ▶ *Belan v. Ward*, CCP Allegheny Co. GD02-10738 (2004) (Wettick, J.)
 - ▶ *Meyers v. Carey*, CCP Lycoming Co., 11-01-166 (Gray, J.)
 - ▶ *McLane v. Valley Medical Facilities*, CCP Allegheny Co., GD08-00566 (Wettick, J.)
 - ▶ *Caldwell v. Banton*, CCP Lycoming Co., 08-00, 80 (2009) (Anderson, J.)
- ▶ The court also compelled the defendant doctor to answer questions about his prior lawsuits

▶ *Other cases to consider:*

- ▶ *Turner v. Mann*, CCP Phila. Co. (2015) (Rau, J.)
- ▶ *Rodriguez v. Siskin*, CCP Chester Co. (2014) (Griffith, J.)
- ▶ *Schoengle v. Voutsnias*, CCP Luzerne Co. (2002) (Burke, J.)

Testimony of Treating Physician (Page 186)

- ▶ **Polett v. Public Communications**, 126 A.3d 895 (Pa. 2015)
 - ▶ If physician reached his conclusion during treatment and not in anticipation of litigation, may testify and Rule 4003.5 does not apply
- ▶ **Deeds v. Univ. of Pa. Med. Center**, 110 A.3d 1009 (Pa. Super. 2015)
- ▶ **Mina v. Mei**, No. 2012 Civ. 7781 (Lackawanna Co. 2013)
- ▶ **Crespo v. Hughes**, No. 3490, 1005 (Phila. 2016)
- ▶ **Thomas v. Evans**, 2018 Pa. Super. Unpub. LEXIS 469 (Pa. Super. Ct. 2018)

Jury Selection (Page 190)

- ▶ ***Cordes v. Assoc. of Internal Med.***, 87 A3d 829 (Pa. Super. Ct. 2015) (en banc evenly divided Court)
 - ▶ Applied *Colon* Rule
 - ▶ 1. Potential juror has such a close relationship (family, financial, situational) with parties, lawyers, victims, witnesses (ordering review) that prejudice is presumed
 - ▶ 2. Likelihood of prejudice based upon conduct, answers credibility, demeanor observed by trial judge (abuse of discretion)
 - ▶ Indirect or vicarious relationship - Category #1
 - ▶ Dissent mere potential not *per se*

Jury Selection Cont... (Page 191)

- ▶ *DeFrancesco v. Lehigh Valley Health Network*, 122 A.3d 457 (Pa. Super. Ct. 2015)
 - ▶ Does not recognize *Cordes* as binding. Not a majority decision. Trial judge entitled to discretion – partner of defense lawyer in other office – represented juror in an estate matter
 - ▶ Expert witness not permitted to testify beyond parameters of report
 - ▶ Cross examination using expert's surgeon book as to emergency room physician not permitted

Jury Selection Cont...

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▶ *Shinal v. Toms*, 162 A.3d 429 (Pa. 2017)

- ▶ the Supreme Court considered whether the plaintiffs were entitled to strike jurors for cause where they had some relationship with the defendant's employee
- ▶ The Court held that the decision depends on whether the relationship is sufficiently close to presume the likelihood of prejudice, or whether the juror reveals a likelihood of prejudice through conduct and answers to questions
- ▶ *Walker v. Lancaster Gen.*, 141 A.3d 585 (Pa. Super. Ct. 2016), app. denied, 141 A.3d 482 (Pa. 2016)
 - ▶ the court relied on *Shinal*, and further found that the juror issue was waived where the appellant did not argue that the jurors should be stricken for cause, nor did appellant object during *voir dire*, or request the trial court to ask additional questions
- ▶ *Trigg v. Children's Hosp. of Pittsburgh of UPMC*, 187 A.3d 1013, 1015 (Pa. Super. Ct. 2018)

Deeds v. Univ. of Pa. Med. Ctr., 110
A.3d 1009 (Pa. Super. Ct. 2015)
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- ▶ Error to suggest medical bills paid by Medicaid-ACA
- ▶ Separate counsel involved – active/inactive defendant
- ▶ Attending physician – fact vs. opinion
 - ▶ ***But see, Polett v. Public Communs., Inc.***, 83 A.3d 205 (Pa. Super. 2013)

Legal Malpractice (Page 193)

- ▶ (1) Employment of lawyer or other basis for duty
- ▶ (2) Breach of duty
- ▶ (3) Causation
- ▶ Breach of Contract
 - ▶ Gist of the action

Buyer's Remorse (Page 196)

- ▶ *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346, 1348 (Pa. 1991), reargument denied, 598 A.2d 27 (Pa. 1991), cert. denied, 502 U.S. 867 (1991)
- ▶ *Silvagni v. Shorr*, 2014 Phila. Ct. Com. Pl. LEXIS 152 (Pa. C.P. 2014)
- ▶ *Gordon v. Herman*, 2014 Phila. Ct. Com. Pl. LEXIS 378 (Pa. C.P. 2014)
- ▶ Fees not disgorged

Buyer's Remorse (cont.) (Page 197)

- ▶ *Kilmer v. Sposito*, 146 A.3d 1275 (Pa. Super. 2016)
- ▶ *Muhammad* not followed – flawed advice.

Statute of Limitations (Page 203)

- ▶ 2 Year Torts
- ▶ 4 Year Breach of Contract
- ▶ Occurrence Rule – when harm is done or damages suffered
- ▶ Continuing representation rule rejected
 - ▶ *Glenbrook Leasing Co. v. Beausang*, 2003 PA Super 489, 839 A.2d 437, 441-42 (Pa. Super. Ct. 2003), appeal granted, 870 A.2d 318 (Pa. 2005), aff'd, 881 A.2d 1266 (Pa. 2005)
 - ▶ *Communications Network Int'l. v. Mullineaux*, 187 A.3d 951 (Pa. Super. Ct. 2018)

Legal Malpractice (cont.)

(Page 227)

- ▶ *Coleman v. Duane Morris, LLP*, 58 A.3d 833 (Pa. Super. 2012) (consequential damages)
- ▶ *Knopick v. Downey*, 963 F. Supp. 2d 378 (M.D. Pa. 2013)
- ▶ *Frantz v. Fasullo*, Civ. Act. No. 3:13-CV-02345, 2014 WL 6066020 (M.D. Pa. Nov. 13, 2014)
- ▶ *New York Central Mut. Ins. Co. ["NYCMI"] v. Margolis Edelstein*, Civ. Act. No. 3:14-0829 (M.D. Pa. Jan. 30, 2015) aff'd. No. 15-1541 (3d Cir. 2016) (Non Published)

Conclusion

- ▶ Questions?
- ▶ Comments??