

ANATOMY OF A PROFESSIONAL LIABILITY CASE

Jeff Masten MA MS JD DABR
Chief Medical Physicist
Aspirus Regional Cancer Center
Wausau, WI 54401

How We Will Proceed

- Civil Procedure Issues
- Substantive Law Issues
- Examples From Case Law
- Law and Litigation Trends Impacting Radiation Oncology

Civil Procedure Issues

- The pleadings (Summons & Complaint, Answer, Cross Claims, Counter Claims and Third Party Claims) get served. Then what?
- Discovery
- Motion Practice

Discovery: Definitions

- Interrogatories
 - Written questions to a party which must be answered in writing and under oath. Generally prepared with the assistance of a lawyer
- Requests For Admissions
 - Written demand to admit or deny some fact which is relevant to a claim or defense in the action.

Discovery: Definitions (Cont.)

- Depositions
 - Questions answered under oath and recorded by a stenographer.
 - In the case of expert witnesses, frequently videotaped
 - In the case of expert witnesses, frequently used in court in place of live testimony

Discovery: Why is it important?

- Discovery is where you find out about the other side's case
- Discovery is how you decide your strategy at trial, and whether to settle
- Discovery is where your case can fall apart
- Discovery forms the basis for your motion(s) to dismiss

Discovery: Important Issues

- Expert Opinions and the Work Product Rule
- Privileges and Patient Confidentiality
- Trade Secrets and other Intellectual Property laws

If I change my testimony in court after a deposition can that act by itself affect the trial outcome?

- 0% 1. Yes
- 0% 2. No
- 0% 3. Only if my counsel doesn't notify the judge.
- 0% 4. Only if my counsel doesn't notify the other side.
- 5. Only if my counsel doesn't notify both the judge and opposing counsel.

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Answer: (2) No, it will affect the trial (if anyone pays attention to your testimony).

Federal Rule of Evidence 801.

The opposing lawyer can, and most likely will, challenge your truthfulness for giving two different answers to the same question. Discovery testimony is as important as the trial itself.

Civil Procedure: An Example

Alyce Murphy and Bill Murphy, Plaintiffs v. Dr. Frederick Wood, III; Dr. S. J. Kassis, and Joe Dokes I Through V., the Cassia Memorial Tumor Board, John Does I Through XXX, the Cassia Memorial Hospital and Medical Center, Intermountain Health Care Services, Inc., and ABC Corporation, Defendants

Example (Cont.)

- Mrs. Murphy was examined and found to have cervical cancer.
- Subsequently her physician, Dr. Wood, participated in a meeting of the Cassia Memorial Tumor Board, and presented the case.
- Dr. Wood later performed a hysterectomy.

FOR MORE INFO...

Murphy v. Wood, 105 Idaho 180, 667 P.2d 859 (1983)

Example (Cont.)

- Mrs. Murphy complained she suffered deterioration of both memory and speech.
- She alleged her prior condition made her a poor candidate for surgery; that radiation therapy would have been a better choice.
- She also alleged that the standard of care required *obtaining a second opinion*.

FOR MORE INFO...

Murphy v. Wood, 105 Idaho 180, 667 P.2d 859 (1983)

Example (Cont.)

- The doctor's defense?
- I did get a "second opinion." The Tumor Board considered the case and agreed that surgery was appropriate.
- He claimed that the local "standard of care" was to seek recommendations from the Board as a substitute for specialists.

FOR MORE INFO...

Murphy v. Wood, 105 Idaho 180, 667 P.2d 859 (1983)

Example (Cont.)

- The result?
- On a motion, the Plaintiffs (and the Tumor Board) blocked access to *any evidence* concerning the tumor board meeting.
- This effectively denied the doctors any testimony that a "second opinion" was obtained.

FOR MORE INFO...

Murphy v. Wood, 105 Idaho 180, 667 P.2d 859 (1983)

Example (Cont.)

- How did that happen?
- Idaho has a medical privilege statute that forbids disclosure of records of in-hospital staff committees engaged in research, discipline and medical study.
- Unless the Tumor Board, or the Plaintiffs, open the door, the testimony is forbidden.

FOR MORE INFO...

Murphy v. Wood, 105 Idaho 180, 667 P.2d 859 (1983)

Moral Of The Story:

- DON' T ASSUME that the testimony or evidence YOU need to defend yourself will be automatically available.
- A substantial part of trial practice is devoted to KEEPING EVIDENCE OUT.
 - This is doubly true when the question concerns scientific evidence on causation.

Motion Practice

- Motion practice determines what can be said at trial.
- Motion practice determines whether the case goes to trial.
- Motion practice determines whether you hang on to what you won at trial.
- Remember Mrs. Murphy' s doctor?

Motion Practice

- With teleded, cyber practices and hospital systems that extend over multiple jurisdictions you may want to keep Mrs. Murphy' s doctor in mind.
- Another issue may be foreign jurisdictions – think about jurisdiction and services like NightHawk for a minute.

Lex Locus Delictus

- The problem encountered in multi-jurisdictional cases is what law to apply.
- This area is called either conflicts or choice of law and forms a semester long course in law school.
- Traditional form is "lex locus delictus" – the place of the wrong

Lex Locus Delictus

- This can determine the statute of limitations that applies
- This can determine what negligence standard applies
- This can determine what damages may be available
- In other words it can determine whether a case exists at all

Lex Locus Delictus

- You must always think through the legal implications to your practice of crossing local, state and federal jurisdictional boundaries.

FOR MORE INFO...

Heidemann v. Rohl, 192 NW2d 164 (SD 1972)

A Sampler Of Available Motions:

- Pretrial
 - Summary Judgment
 - In Limine
- During Trial
 - Directed Verdict
- Post Trial
 - Judgment NOV

Summary Judgment

Elements:

- No genuine issue of material fact
- Moving party entitled to judgment as a matter of law
- Any inferences drawn AGAINST the moving party

Caveat...

Motions To Dismiss, Directed Verdicts and NOV have features in common with SJ, but won't be discussed here because of time constraints.

Summary Judgment

Uses:

- Narrow the case by knocking out multiple counts in the complaint
- Narrow the case by eliminating parties
- Narrow the case by eliminating multiple items of damages
- Kill the entire case

Anatomy Of A Malpractice Claim

- Causation in fact
- Duty
- Breach of that duty
- Proximate Cause
- Damages

— *Palsgraf v. Long Island Rail Road Co.* (1928) 162 N.E. 99

Anatomy Of A Malpractice Claim

The central idea in negligence litigation is that one has a duty to use something resembling “reasonable care” in their activities.

Here’s the classic statement of the issue

Anatomy Of A Malpractice Claim

“those who go personally or bring property where they know that they or it may come into collision with the persons or property of others have by law a duty cast upon them to use reasonable care and skill to avoid such a collision.”

Fletcher v. Rylands (1866) LR1 Ex 265

Causation

- Means just what it says -- did the Defendant's act, or omission, cause an injury?
- Causation may be rather obvious
 - Example: Therac-25 accidents
- Causation frequently requires expert testimony
 - Example: General Electric Co. v. Joiner

Admissibility of Scientific Evidence

- Joiner was a PCB exposure case.
- Expert testimony failed to show a link between exposure to PCBs and small-cell lung cancer and did not rise above "subjective belief or unsupported speculation."
- "Gatekeeper" role of the judge discussed.

FOR MORE INFO...

General Electric Co. v. Joiner, et ux., ___ U.S. ___ (No. 96-188, 12/15/1997)

Admissibility of Scientific Evidence (Cont.)

- The old rule of admissibility (Frye v. United States) required the proposed scientific evidence meet a standard of
 - general consensus in the relevant scientific community

FOR MORE INFO...

General Electric Co. v. Joiner, et ux., ___ U.S. ___ (No. 96-188, 12/15/1997)

Admissibility of Scientific Evidence (Cont.)

- The present day standard is Daubert v. Merrell Dow Pharmaceuticals
 - The focus must be solely on principles and methodology, not on the conclusions that they generate.
 - The trial judge must function as a “gatekeeper”.

FOR MORE INFO...

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)

Scientific Evidence: An Example

- Claimant was given radiation therapy in doses which were an order of magnitude larger than ordinarily prescribed.
- The physician defended his action on the basis of *one paper* which he *had heard* discussed at *a conference*.
- The Court awarded substantial damages.

FOR MORE INFO...

Ahern v. Veteran’s Administration, 537 F.2d 1098 (CA10 1976)

Scientific Evidence: An Example

- That was 1976. It does not appear that there was an attempt to block admission of that testimony.
- Today, the Defendant might not be permitted to testify at all! (And keep in mind, it’s his own trial)

FOR MORE INFO...

Ahern v. Veteran’s Administration, 537 F.2d 1098 (CA10 1976)

Which statement about scientific evidence is true?

- 0% 1. The court will determine its admissibility and the weight to be accorded to it.
- 0% 2. The jury will determine the admissibility and the weight to be accorded to it.
- 0% 3. The court will determine its admissibility and the jury will determine its weight.
- 0% 4. The court will determine its weight and the jury will determine its admissibility.
- 0% 5. Scientific evidence is admissible under all circumstances.

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Question 2

Answer: (C)

General Electric Co. v. Joiner, et ux., 522 U.S. 136 (No. 96-188, 12/15/1997)

You're going to testify as an expert witness. What rule governs the admissibility of your testimony?

- 0% 1. Frye
- 0% 2. Daubert
- 0% 3. Brown v. Comerford
- 0% 4. Both Frye and Brown apply.
- 0% 5. Both Daubert and Brown apply.

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Question 3

Answer: (2) Daubert

If you're going to be an expert, you absolutely need to know what that rule requires!

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); *General Electric Co. v. Joiner, et ux.*, 522 U.S. 136 (No. 96-188, 12/15/1997)

Moral:

- Novel procedures, and departures from default, or standard, settings carry an obvious claims risk.
- Is there support for the approach in the scientific literature, or at least other qualified witnesses to back YOU!?

Duty

- There are many sources of "duty" which give rise to "negligence."
- In general, any action which carries a risk of injury, gives rise to a duty to use care in a commensurate degree.
- Low risk of injury - ordinary care
- High risk of injury - great care

“Other” Approaches To Duty

- Warranty Theories
 - Express Warranty
 - Implied Warranties
 - Fitness For A Particular Purpose
 - Merchantability
- Strict Liability (No Fault)
- Ultrahazardous Activity

“Other” Approaches To Duty

- To date, the courts uniformly HAVE NOT permitted these theories.
- Warranty/Strict Liability apply to the “sale” of “goods” by a merchant; they do not apply to “services.”
- Radiation therapy is sufficiently beneficial to avoid ultrahazardous classification. (Brown v. Comerford)

Breach of Duty

Malpractice cases fall into two general classifications:

- Informed Consent
- Standard of Care

- We will skip over Informed Consent issues for this talk.

Standard of Care

General Rule

- The reasonableness of a professional defendant's conduct is determined in accordance with the standards of care exercised or expected by others in the same profession.

Standard of Care (Cont.)

- Proof of standard of care requires expert testimony
- It is the Plaintiff's burden to show a departure from the standard of care by a preponderance of the evidence
- Reasonable reliance on a defective product does not excuse a professional from using due care

Standard of Care (Cont.)

- Res Ipsa Loquitor
- "The thing speaks for itself"
- Used as a substitute for testimony for proof of the standard of care element, and its breach
- Usually not permitted in malpractice cases.

Example: Standard of Care

- Patient sued a radiologist and the hospital for malpractice after statute of limitations had run.
- Hospital cross-claimed against the radiologist for indemnity.
- Judgment for patient against both, and for the hospital against the radiologist.

FOR MORE INFO...
Ragan v. Steen and McKeesport Hospital, 229 Pa. Super. 515, 331 A.2d 724 (1974)

Example: Standard of Care

- Patient referred to radiologist employed by the hospital for treatment of plantar warts on right foot.
- After two treatments patient returned to school.
- 2 years later foot tissue began to decompose.

FOR MORE INFO...
Ragan v. Steen and McKeesport Hospital, 229 Pa. Super. 515, 331 A.2d 724 (1974)

Example: Standard of Care

- 3 years after treatment surgery was required, and patient filed suit.
- Pennsylvania had a 2 year statute of limitations on malpractice.
- Patient avoided it under the "Discovery Rule." Runs from the time he knew or should reasonably have known.

FOR MORE INFO...
Ragan v. Steen and McKeesport Hospital, 229 Pa. Super. 515, 331 A.2d 724 (1974)

Example: Standard of Care

- Patient attempted to argue that the injury was so unusual that it could not have occurred without the negligence of the treating physician.
- Court: A BAD RESULT IS NOT EVIDENCE OF NEGLIGENCE IN A MALPRACTICE CASE.

FOR MORE INFO...
Ragan v. Steen and McKeesport Hospital, 229 Pa. Super. 515, 331 A.2d 724 (1974)

Example: Standard of Care

Rule

- There can be no inference of negligence due to a bad result which might have occurred despite the use of reasonable care.

FOR MORE INFO...
Collins v. Hand, 431 Pa. 378, 246 A.2d 398 (1968); Ragan v. Steen, *supra*.

Which states permit the proof of a breach of duty without the use of expert testimony?

- 0% 1. California
- 0% 2. Texas
- 0% 3. Minnesota
- 0% 4. Florida
- 0% 5. It is not permitted in any state

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Answer: (5) No state permits this.

The rule in Ragan v. Steen and McKeesport Hospital, 229 Pa. Super. 515, 331 A.2d 724 (1974) is still good law.

Proximate Cause

- Last element in Plaintiff's case. It's different from cause-in-fact.
- Was the injury a *forseeable* result of the act, or omission?
- Eliminates the Butterfly Catastrophe as a basis of liability.
- Almost always a jury question.

Proximate Cause

- Butterfly catastrophe? Remember that given the nonlinearities in weather processes, a butterfly flapping its wings in the Amazon could theoretically produce a tornado in Kansas.
- We need some sort of rule to limit liability to injury from more "immediate" causes, and that rule is "forseeability."

Which case element provides the LEGAL connection between an act and its resulting injury?

- 0% 1. Causation-in-fact
- 0% 2. Duty
- 0% 3. Breach of duty
- 0% 4. Proximate cause
- 0% 5. Damages

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ANSWER: (5) Proximate cause
Proximate cause, or “foreseeability”, is the legal connection between an act and the resulting injury. It’s the glue that holds the case together.

Palsgraf v. Long Island RR Co. (1928) 162 N.E.99
Never forget the guy with a box of fireworks.

Finally

Hypothetical Case

- Fred is a medical physicist employed by the Hospital. The Radiation Oncologist who is not a hospital employee asks Fred to do a procedure involving the Radiation Oncologist's patient which is within the scope of Fred's employment, but Fred makes a mistake and the patient is injured.

Hypothetical Case

- The patient sues naming Fred, the Radiation Oncologist and the Hospital as defendants. Which outcome below is most likely the correct one?

Hypothetical Case – Outcome 1

- a. Fred tenders his defense to the hospital leaving the Hospital and the Radiation Oncologist to pay as the judgment defendants for the patient's injury.

Hypothetical Case – Outcome 2

b. The Hospital and the Radiation Oncologist cross-claim against Fred leaving Fred to pay as the sole judgment defendant for his mistake.

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Any opinions expressed are those solely of the author, and not of any affiliated institution or organization

Hand Out

- Topics for further consideration
- Legal Research Resources

Advances In Medical Physics

- Don't expect the rules applicable to professional negligence to change anytime soon.
- But there are some factors in medical physics that may impact the issue of liability in the future.

Advances In Medical Physics

- Medical physicists are shielded from the principal attack in a medical case by the doctrine of respondeat superior, or master-servant relationship.
- This means the physician is ultimately responsible, not the nurses and other medical professionals that assist the physician

Advances In Medical Physics

- As long as they are acting **WITHIN THE SCOPE OF THEIR EMPLOYMENT!**
- But consider the impact of the push for professionalism and the exercise of independent judgment by physicists.
- At some point a trial lawyer, and possibly a court may point at independent judgment and assess an independent liability?

Advances In Radiation Therapy

- Here are a few other items that have changed in the past few years
 - Form of business entity
 - Unbundling services and charges
 - Board Certification and professionalism
 - Hardware and software
 - Willingness to litigate

Changes In Business Entity Form

- Employer/employees to spin-offs, consulting groups and
 - C Corp., Sub S, partnerships and sole p.
 - LLCs, LLPs, PMGs, etc.
- New parties to name as Defendants
 - Additional insurance policies to stack
 - Tactical advantage of cross-claims and defendant disputes

Unbundling Services and Charges

- Along with the obvious advantages of separate billing comes the dubious honor of being a potential named Defendant.
- Regardless of whether the claim survives, legal services arena' t free.

Board Certification and Professionalism

- Industry, or association, standards are simply minimum requirements.
 - Compliance doesn't mean a jury will necessarily find in your favor
- Along with individual recognition could come individual responsibility, i.e., lawsuits.

Hardware/Software Considerations:

- Remember, the standard is "reasonable reliance" and due care.
- Should you acquire Version 1.0 of anything for a mission critical app?
- How long do you wait before an upgrade?
- Did you read the warranty exclusions?

Hardware/Software Considerations:

- In-house systems and work-arounds
 - Distribution outside the organization can invoke product liability claims
 - Can it be defended?
 - Percussive maintenance is not a joke for a jury
 - Therac-25 operating history

Hardware/Software

- Ownership and intellectual property issues may be determinative in third party actions.
 - Enforceability of warranty exclusions
 - License -v- title
 - Subcontract Development/Vendor/Distributor status and statutes of limitation

FOR MORE INFO...

Leveson and Turner, "An investigation of the Therac-25 Accidents", IEEE Computer Magazine 18 - 41 (1993)

Hardware/Software

- Consider the "Disclaimer" on the next slide.
 - Do you think the Disclaimer would protect the individual who wrote the software?
 - Do you think the Disclaimer would protect you, or your institution if you use the software and there is an injury?

Example: Disclaimers

CLOSE CONTACT DOSE SPREADSHEET TEMPLATES

Version 2, February, 1998

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Protecting Yourself

- “Reasonable reliance” are the magic words. How can this be proved?
 - What independent investigation was made by you before acquisition?
 - Any independent standards group evaluation?
 - In-house verification and cross-checks?
 - Literature search?
 - Incident reporting and review?

FOR MORE INFO...

Leveson and Turner, “An investigation of the Therac-25 Accidents”, IEEE Computer Magazine 18 - 41 (1993)

Protecting Yourself

- And Most of All

Documentation

Further Reading and Research

TEXT

- Shalek and Gooden, Medical Physicists and Malpractice, Medical Physics Publishing 1996

WEBSITES

- FindLaw www.findlaw.com
- lexisOne www.lexisone.com
- Legal Information Institute www.law.cornell.edu
- American Bar Association www.abanet.org
- Federal Judiciary Homepage www.uscourts.gov
- Library of Congress <http://thomas.loc.gov>
- Your state bar association example: www.sdbar.org

Further Reading and Research

- For the interested physicist, Shalek and Gooden's book offers an excellent introductory survey of the legal principles we have discussed.

Further Reading and Research

- [Bibliographies Resources of the Law Firms Working Group](#)
– firms.law.indiana.edu/research/index.shtml
- [Emory Law School Library Home Page](#)
– www.law.emory.edu/law-library/library-home-page.html

More Sites to Google

- [State of South Dakota Official Home Page](#)
- [The Lectric Law Library's Entrance, Welcome & Tour - legal resources and definitions](#)
- [The American Lawyer](#)
- [The Federal Judiciary](#)
- [The Securities Law Home Page](#)
- [United States Department of Justice](#)
- [Vernor Law Research Database](#)
- [Villanova University School of Law - Library](#)
- [Get the Law | Lit / Legal Information Institute](#)
- [THOMAS \(Library of Congress\)](#)
- [Free Legal Research Sites - George Mason Law](#)
- [Major Legal Research Sites](#)
- [Justia - Law & Legal Information for Lawyers, Students, Business and the Public](#)
- [All-Purpose Sites - Free Legal Research Sites - LibGuides at University of San Francisco School of Law](#)
- [Welcome, lexisONE Users to your new LexisNexis Community! - Portal](#)
- [Legal Research Links](#)
- [NYU Law - Research, Legal Websites](#)
- [Westlaw Sign-On](#)

Keep in Mind

- Every State Bar Association maintains a site that is publicly available
- Every law school maintains at least part of its library for public access
- Every state Supreme Court maintains at least part of its library for public access
- Every state, of course, maintains its laws, rules and legislation for public access

Disclaimer

Any opinions
expressed are those
solely of the author,
and not of any
affiliated institution
or organization

Further Reading and Research

- Shalek and Gooden, **Medical Physicists and Malpractice**, Medical Physics Publishing 1996 [An excellent introduction to personal injury law and how it relates to accidents involving medical physics]
- For an overview (very brief) of the “how to” of legal research see www.law.cornell.edu/wex/legal_research
- FindLaw www.findlaw.com
- lexisOne www.lexisone.com
- Legal Information Institute www.law.cornell.edu
- American Bar Association www.abanet.org
- Federal Judiciary Homepage www.uscourts.gov
- Library of Congress <http://thomas.loc.gov/home/thomas.php>

Reference Sites Continued

- [www. Nolo.com/legal-research](http://www.Nolo.com/legal-research)
- www.duke.edu/lib/researchguides/intresearch
- www.hg.org/index.html
- www.justia.com
- www.plol.org/Pages/search.aspx
- www.washlaw.edu/
- <https://gsulaw.edu/metaindex/>
- Libguides.law.ucla.edu/onlinelegalresearch
- www.fastcase.com
- www.versuslaw.com
- www.abajournal.com/..../
[tips_on_doing_legal_research_online_for_free](#)
- www.loc.gov>Law Library>Research & Reports

More Help on How To Do It

- Levitt and Rosch, **The CyberSleuth's Guide to the Internet: Conducting Effective Investigative & Legal Research on the Web** (9th Ed., KF242.A1 L485 2008)
- A free site that relates specifically to the law applicable in your jurisdiction is your State Bar Association. The extent and quality can vary, but this frequently is a good starting point.
- Another useful resource is your state's law school library, or the nearest law school library to you. They frequently offer both assistance in forming your search terms, and possibly free searches. There is absolutely no harm in asking.
- Free and Low Cost Legal Research Guide
www.law.georgetown.edu/library/research/guides/freelowcost.cfm