

Legal Case Review

Melissa Lucas JD, DNP, MBA, CRNA

Will you be sued?

- ▶ Among the respondents to a Medscape survey in 2016, 62 percent of men and 42 percent of women in anesthesia had been sued, usually with other co-defendants.

Poll time

- ▶ Have you ever had vomiting on induction?

Iowa 2017

- ▶ Iowa medical malpractice jury returned its verdict in the amount of **\$10 million in favor** of the plaintiff for the wrongful death of an 80-year-old patient at an Iowa hospital due to the alleged medical negligence of a certified registered nurse anesthetist

What happened?

- ▶ The elderly man had surgery to address his bladder cancer on January 5, 2015 at an Iowa hospital. The man developed complications from his surgery that required follow-care at the hospital. The man died on January 11, 2015, after he had an additional surgery.
- ▶ Hmmmm, Additional surgery??

- ▶ The man's wife of 55 years filed an Iowa medical malpractice wrongful death lawsuit in which she alleged that the certified registered nurse anesthetist (CRNA) who participated in her husband's second surgery breached the standard of care by failing to empty her husband's stomach before the surgical procedure that resulted in the contents of his stomach aspirating into his lungs during the surgery, and by failing to timely seal his airway after the CRNA inserted the breathing tube.

- ▶ The widow stated after the Iowa medical malpractice trial, “Oh, it was hard. [The doctor] came in, he said, ‘I have some bad news, you have a very, very sick husband.’ And then he said, ‘but you’re not gonna be taking him home.’”
- ▶ WHHHHHHHYYYYYY say it like that?

Here is the pt's course:

- ▶ The surgery was successful in eradicating the bladder cancer, but Richard subsequently developed an ileus and abdominal distention.
- ▶ recommended that pt undergo an exploratory laparotomy to rule out injury to the bowel or an anastamotic leak.
- ▶ sustained an aspiration, and subsequently developed aspiration pneumonia, and hypoxic/hypercarbic respiratory failure

Here's what the P says:

- ▶ CRNA knew or should have known the pt presented with nausea, a bloated and distended abdomen, distended bowel loops with air fluid levels, stool coming out of his Jackson-Pratt drain, and a full stomach; therefore, every precaution should have been taken to avoid aspiration at induction.
- ▶ defendants did not pass a nasogastric tube into Richard prior to the induction of general anesthesia.
- ▶ CRNA did not perform a rapid sequence induction of general anesthesia, he did not apply cricoid pressure during the induction of anesthesia, and he did not suction the tracheal bronchia tree down the endotracheal tube with soft suction catheter after the emesis and aspiration occurred.
- ▶ CRNA was negligent in failing to order diagnostic and therapeutic fiberoptic bronchoscopy of the tracheal bronchial tree after emesis and aspiration, and failing to order chest X-rays of Richard.

Here's what the D says:

- ▶ filed an answer, denying that any negligence occurred
- ▶ Asserting any damages sustained were the result of pre-existing conditions and/or actions or failures to act on the part of others.
- ▶ plaintiffs subsequently filed an amended complaint adding allegations that CRNA waited too long for the 1mg/kg of administered succinylcholine to take effect, failed to seek an immediate pulmonary consult, failed to do a proper preoperative anesthesia evaluation, and failed to know the interval medical history of pt

Here's the kicker:

- ▶ On Sept. 20, 2017, with Judge Thomas A. Bitter presiding, a jury rendered a verdict in favor of the plaintiffs in the amount of \$ 10,000,000.
- ▶ *Plaintiffs' pre-suit demand was \$325,000.*

Time to hit the polls

- ▶ Have you ever had a pt wake up crying and distraught?

Colonoscopy gone wrong??

The instant the anesthesia had worn off from a colonoscopy, the 60-year-old Portland-area woman felt something wasn't right. She was inexplicably distraught and crying.

- ▶ For the next few days, the woman felt intense discomfort in her vaginal area, thought she might have an infection and debated what to do, she said. She ultimately went to her gynecologist.
- ▶ “One of the staffers listens to her and looks at her and says, ‘I’m sending you to the emergency room’ and (tells the ER) ‘Be prepared for a sex-abuse victim,’”
- ▶ Four days had passed since the alleged sexual assault, and ER staff members didn’t believe that they were able to collect any viable DNA evidence from the woman. But according to police reports, an ER doctor who examined the woman noted that the woman had internal and external bruising and abrasions – signs of a possible sexual assault.

- ▶ All male providers
- ▶ CRNA, GI. Tech

Possible explanations?

- ▶ Existing Gyn issue?
- ▶ Coumadin?

- ▶ Investigators dropped the case due to lack of evidence
- ▶ Have to defend though

Poll time

- ▶ Have you ever used a vial of propofol on more than one pt with a clean needle and syringe each time?

Las Vegas Physician

- ▶ Health inspectors visited an endoscopy center.
- ▶ The inspectors filed a complaint with the Nevada State BOM after the visit.
- ▶ They had interviewed the anesthesiologist regarding his practices w Propofol.
- ▶ First interview claims he said that he uses the same syringe but not needle on subsequent patients.
- ▶ Hour later, claims to change syringe and needle but may use the same vial.

- ▶ Neither interviewer witnessed these practices.
- ▶ Doc clarified during BOM hearing that he will use same syringe and needle in the vial of prop on the same pt. but then tosses that vial.
- ▶ If only used clean needle and syringe once on vial, he will reuse vial on new pt.
- ▶ BOM found that unacceptable and he faced repercussions.

Additional fall out

- ▶ A Las Vegas endoscopy center that had its license revoked for unsafe infection control practices is suing the anesthesiologist whom health inspectors cited for reusing syringes and single-dose propofol vials.

Poll time

- ▶ Can we be charged Criminally?

Civil v Criminal Charges

- ▶ Criminal malpractice cases are historically rare in the United States. Between 1809 and 1981, there were only about 15 appellate cases of criminal medical malpractice.
- ▶ The pursuit of a civil case is clearly more lucrative for the plaintiff as the damages are monetary versus punitive (jail time/fines) in a criminal case.

- ▶ The usual cases of malpractice resulting in criminal negligence charges typically revolve around narcotic distribution, fraud, illicit sexual contact and fairly obvious criminal behavior of sorts.
- ▶ However, the door to criminal prosecution in overtly negligent professional decision making is not closed and should be an awareness in practitioner's minds.

How does a negligence case become criminal

a civil case claiming medical malpractice needs the following elements including:

duty,

breach of duty,

actual and proximal cause

harm.

- ▶ To make a criminal claim, one needs to have an additional element which deals with the practitioner's state of mind known as mens rea.
- ▶ The state of mind is necessary for the criminal side in order to apply some moral blame and thus, worthy of punishment.
- ▶ The state of mind required can range from recklessness to premeditation.
- ▶ A charge of manslaughter or murder could be possible if the injury is lethal and the state of mind is proven.

States of Mind (Mens Rea)

- ▶ The model penal code recognizes four basic states of mind for criminality including
- ▶ purpose,
- ▶ knowledge,
- ▶ recklessness
- ▶ negligence

Purpose

- ▶ Purposely taking an action is the highest level of mens rea.
- ▶ Traditionally, this is known as intentional acting.
- ▶ When someone acts purposely to hurt another, the state of mind element for criminal liability is fulfilled.
- ▶ Seems straightforward?? Consider the following scenario

Poll Time

- ▶ Imagine a practical joking CRNA that fills a syringe with saline and labels it Anectine.
- ▶ The CRNA then pushes the syringe on a wide-awake patient in front of an anesthesia coworker to illicit a shocked response.
- ▶ Unbeknownst to the CRNA, the fake syringe had been discarded accidentally and was replaced with an actual Anectine syringe.
- ▶ Is the practical joking CRNA criminally liable? Wasn't it just a mistake? After all, the intent to harm was not present.

- ▶ The answer is possibly. The intent to push the syringe was in fact present, the mistake of fact was concerning the actual contents of the syringe. The mistake could possibly negate the purposeful intent; however, it would be evaluated for reasonableness.
- ▶ Was it reasonable to believe that syringe wasn't Anectine?
- ▶ These are questions the prosecution would consider when evaluating a case.

Knowledge

- ▶ means that there is an awareness in the defendant that the harmful result is almost certain to be the product of the defendant's conduct.
- ▶ It is important to realize that intent is not necessary here, the defendant may not intend the harmful result to occur.
- ▶ The defendant just needs to know that it's highly certain.
- ▶ Knowledge can also exist when an individual should know the likely outcome but fails to acknowledge it or investigate it.
- ▶ In other words, knowledge criteria is met if the defendant is willfully blind or deliberately ignorant to the facts.

Recklessness

- ▶ An act is reckless where the defendant is aware of a substantial and unjustifiable risk that the defendant's conduct will cause a harmful result.
- ▶ It is important to remember that the risk must be both substantial and unjustifiable. This may require a bit of a balancing test as some risks may be reasonably discarded that have a social benefit or are considered acceptable conduct.
- ▶ Another aspect to keep in mind is that the defendant is not certain harm will occur, but chooses to take the risk anyway.

Negligence

- ▶ A defendant is negligent when he or she should have been aware of a substantial and unjustifiable risk.
- ▶ Therefore, a key distinction between recklessness and negligence turns on knowledge of the risk.
- ▶ Recklessness is when the defendant is actually aware versus negligence which is when the defendant ought to have been aware.
- ▶ Look at criminal negligence like civil negligence taken to a more extreme level.
- ▶ If liability for civil negligence is based on the defendant's departure from the conduct of an ordinarily careful and prudent person, then
- ▶ liability for criminal negligence often looks like the defendant's **extreme** departure from the conduct of an ordinarily careful and prudent person.

Poll Time

- ▶ Have you ever worked with a horrible surgeon?

State of Texas v Christopher Daniel Duntsch

- ▶ Dr. Duntsch was a neurosurgeon in Texas
- ▶ the vast majority of the surgeries he performed had untoward events occur
- ▶ indicted in 2012 on charges of **intentionally or knowingly** causing serious bodily injury to an elderly individual while using or exhibiting **a deadly weapon**.
- ▶ The prosecution chose to center their case around a particular surgery because the patient was considered elderly and the aggravated assault charge against an elderly person carried a greater sentence.

- ▶ Although the evidence from his behavior and prior surgery mishaps were extremely persuading, the following excerpt from the surgeon that preformed follow up surgery on the elderly person certainly summed up the issues:



► “There were holes where they shouldn’t be in the bone, there were holes in the dura leaking cerebral spinal fluid. There was an amputated nerve root, meaning a portion of the nerve root was just gone, and he put a screw in at the S1 level on the right side that was barely on the right side. It actually crossed the midline and went right through the dural sac, the fluid sac that holds the nerves, and one of the implants that he was planting, that was the purpose of the operation to put between the vertebral bodies for stability and fusion, was placed to the left side of the spine. It wasn’t even in the spine. It was just laying in muscle, muscle that he had destroyed, to some extent, to make a tunnel to put the device into and had injured additional nerves.”

- ▶ The defendant was convicted by a jury and punishment was assessed by the jury at **life imprisonment**

Conrad Murray

- ▶ famed doctor of pop star Michael Jackson.
- ▶ Dr. Murray had administered propofol in the bedroom of Michael Jackson with the intent to induce sleep.
- ▶ He was charged with involuntary manslaughter as opposed to murder.
- ▶ Murder requires a specific intent of causing death.
- ▶ Involuntary manslaughter required **displaying a recklessness** about the way he administered medical treatment to his patient.

- ▶ The judge in the case, instructed the jury as follows:
- ▶ “Criminal negligence” involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:
- ▶ He or she acts in a reckless way that creates a high risk of death or great bodily injury;

AND

- ▶ A reasonable person would have known that acting in that way would create such a risk.

- ▶ The jury found Dr. Murray guilty of manslaughter and sentenced him to 4 years in prison.

US v. Caronia

- ▶ the defendant was a pharmaceutical salesman that was telling practitioners that they could prescribe a particular FDA approved drug for narcolepsy for off label use for fibromyalgia, chronic pain and muscle disorders
- ▶ A jury found him guilty of conspiracy to introduce a misbranded drug into interstate commerce
- ▶ He appealed the case and the conviction was overturned under freedom of speech arguments
- ▶ However, this was a recent case in 2012 and should give all practitioners pause to consider the ramifications of questionable professional behaviors

George Nichopoulos

- ▶ Dr. Nichopoulos was charged with 14 counts of overprescribing medications to Elvis Presley, Jerry Lee Lewis, himself and eight others.
- ▶ The State alleged that Nichopoulos **unlawfully, willfully and feloniously** overprescribed narcotics.
- ▶ They further claimed that he dispensed the drugs with knowledge that ... Elvis Presley was addicted to the habit of using the controlled substances without making a bona fide effort to cure the habit
- ▶ Each of the 14 counts carried a maximum penalty of a 10-year prison term and a \$20,000 fine.

- ▶ Interestingly, the defense tried to get the charges dismissed based on the theory that prosecutors were practicing selective prosecution because patient was the world-renowned Presley.
- ▶ However, that effort was denied.
- ▶ The autopsy listed the cause of death as heart failure as opposed to an overdose which ultimately hurt the prosecution's case.
- ▶ The jury acquitted the doctor.

What happens in Vegas.....

- ▶ Ronald Lakeman CRNA
- ▶ Endoscopy outpt center in Las Vegas
- ▶ Lakeman stood trial with 28 charges, including criminal neglect, reckless disregard, theft, insurance fraud and **murder** in the death of one infected former patient
- ▶ What the heck happened??

- ▶ July, 2007, the clinic's first patient of the day informed staff that he had hepatitis C before his procedure began. Later that day, a pt had a procedure performed at the clinic and was subsequently dx'd diagnosed with hepatitis C.
- ▶ September, 2007, the clinic's first patient of the day informed a nurse that he had hepatitis C before his procedure began. Subsequent 5 pt's that day were later diagnosed with hepatitis C.
- ▶ One received some treatment following his diagnosis, but failed to adequately complete any treatment and eventually died as a result of the disease.

- ▶ This Prompted a CDC investigation
- ▶ Blood samples of the infected patients were sent to the Centers for Disease Control and Prevention (CDC). The CDC determined that the sources for the strains of hepatitis C contracted the pt's were related to the first pt of the day.
- ▶ The CDC also concluded that the outbreak was the result of the clinic's nurse anesthetists reentering vials of propofol after injecting a patient and then reusing those vials of propofol on a subsequent patient.

- ▶ The GI doc (Dr Desai), tried to claim the CRNAs did this on their own on appeal.

CRNA that testified for the prosecution

- ▶ On direct:
- ▶ When the State questioned Mathahs about reentering a propofol vial in order to redose a patient, Mathahs testified that he would replace the needle before reentering the vial. Mathahs further testified on direct examination as follows:
- ▶ [STATE]: Are you aware that there is at least a risk of potential contamination even changing out the needle in that situation?
- ▶ [MATHAHS]: Yes, there is.
- ▶ [STATE]: Did you ever express your concerns about doing this to Dr. Desai?
- ▶ [MATHAHS]: Yes.

- ▶ [STATE]: What was his response?
- ▶ [MATHAHS]: It's to save money, just go ahead and do it.
- ▶ [STATE]: So he instructed you to do it even though you made him aware of the risk?
- ▶ [MATHAHS]: Yes

On redirect

- ▶ [STATE]: Did you not testify on direct examination that when Desai told you to do this, reuse stuff that you had never done before, that you expressed the risk to him and that he told you to do it anyway?
- ▶ [MATHAHS]: I don't remember the exact conversation but, yes, I'm sure it was had, yes.
- ▶ [STATE]: So you expressed—just so we're clear, in whatever words, you expressed that there was a risk in doing that to Dr. Desai and he ordered you to do it anyway and you did it.
- ▶ [MATHAHS]: Yes.

- ▶ Mathahs testified that Desai checked the disposal containers and, if he found any unused propofol remaining in the syringes or vials of propofol, he would yell at the responsible nurse anesthetist for being wasteful. Mathahs “guess[ed]” that Desai wanted any unused propofol to be used on a subsequent patient and testified that he would likely be fired if Desai found a discarded vial still containing propofol.

- ▶ Finally, Ralph McDowell, a nurse anesthetist at the clinic, testified that Desai told him to pretend that he did not know what a multiuse vial was if he was asked. And an LVMPD detective testified that a nurse anesthetist told him that Desai told her to inject patients “the way [Lakeman] did it.”
- ▶ Clinic employees testified that Desai complained that the nurse anesthetists used too many supplies, told employees that supplies should not be wasted, told a nurse anesthetist that he used too much propofol, and promised the nurse anesthetists a bonus if they brought the cost of propofol down.

- ▶ Lakeman was convicted of six counts of insurance fraud, four counts of reckless disregard of persons or property resulting in substantial bodily harm (NRS 202.595), four counts of criminal neglect of patients resulting in substantial bodily harm (NRS 200.495), one count of obtaining money under false pretenses, and one count of theft. The district court imposed a sentence of 8-20 years in prison.

- ▶ Five certified registered nurse anesthetists (CRNAs) reportedly voluntarily surrendered their licenses because of the incident.
- ▶ Additional CRNA charged criminally and cooperated to testify against Lakeman.
- ▶ Nine cases of hepatitis C have been linked to Desai's clinics, and lawyers say hundreds of their clients have also contracted the disease there.

On appeal

- ▶ Lakeman did phone interview w a CDC investigator,
- ▶ They promised not to use his name, and asked him questions about the clinic's practices.
- ▶ Lakeman agreed to talk because of the promised anonymity, but stated that he would deny talking to her if asked.
- ▶ At trial, Lakeman moved to suppress the testimony, and the district court denied the motion.
- ▶ On appeal Lakeman argues that if the CDC is allowed to breach its promises of anonymity, other medical professionals will be reluctant to speak with investigators.

- ▶ Lakeman provides no authority for his position that the testimony should be suppressed on public policy grounds. We therefore decline to consider this argument.

Appealed on other issues, but ultimately judgment was affirmed

Poll time

- ▶ Do you include the possibility of awareness in your consent?
- ▶ Do you include the possibility of death in your consent?
- ▶ Do you include the possibility of broken teeth?

Kiljian v Grimes

- ▶ Awareness
- ▶ Case ultimately was dismissed for failure by the P to provide expert testimony consistent with their claims.
- ▶ BUT the court did not write an opinion regarding the substantive issues in the case.
- ▶ The P Claimed that awareness was not covered in the informed consent.
- ▶ D claims it happens so seldom that it doesn't need to be.

- ▶ What about death? Broken teeth? They don't happen often but do we include them?

Washington v. Washington Hospital Center

- ▶ 1990 case
- ▶ plaintiff, 36, underwent an abortion and tubal ligation which required general anesthesia at the Washington Hospital Center
- ▶ CRNA placed the OETT in the esophagus
- ▶ During the operation, the surgeon noticed that Thompson's blood was unusually dark
- ▶ Thompson's heart rate dropped and she went into cardiac arrest.

- ▶ She was resuscitated but had suffered significant oxygen deprivation.
- ▶ Consequently, Thompson was in a persistent vegetative state, totally incapacitated.
- ▶ Thompson's representatives brought a medical malpractice action against the physicians for negligence in inserting the tube and against WHC for its failure to provide the anesthesiologists with a monitor that provided early detection of insufficient oxygen being delivered in time to prevent brain injury

- ▶ At trial, Thompson's expert witness, Dr. Steen, testified that the "emerging" national trend was for hospitals to use the monitors and that some facilities already used them. Steen also testified that several medical and scientific journals recommended, **but did not mandate, the use of the monitors.**

- ▶ WHC's expert witness was the hospital's chair of the anesthesiology department, Dr. Murray, who testified that he had requisitioned monitors to be used at WHC.
- ▶ Otherwise, Murray testified, the hospital would "fail to meet the national standard of care." Murray further testified that at the time of Thompson's surgery, there was no national standard of care regarding the use of the monitors.

- ▶ This case was a battle of the expert witnesses
- ▶ ETCO₂ was on the forefront but not standard yet
- ▶ The nail in the coffin was the D's own expert witness (the dept chair) had emailed the hospital suggesting they use ETCO₂ and even procured the machines but weren't using them yet.