

Medical Jurisprudence

Behavioral Sciences Term
St. Georges University
School of Medicine

Visiting Professor
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05-11-16

Tuesday August 2

Medical Malpractice

(Causation, Damages,
Defenses)

Segment 5 of 8

Objectives

At the conclusion of this unit, the medical student should be able to answer the following 10 questions

1. What is **“but for” causation** (regular causation)
2. What **money damages** are recoverable if “but for” causation is established

3. What is **“lost chance” causation**
4. What **money damages** are recoverable if “lost chance” causation is established

5. What are the 4 **types of damages** (money recovery)
6. Which is the **“main” type of damages** that comprises most verdicts & settlements

- 7. What are 5 key **affirmative defenses**
- 8. What is the difference between a **statute of limitations** and a statute of repose

- 9. What is **assumption of the risk**
- 10. What is **comparative negligence**

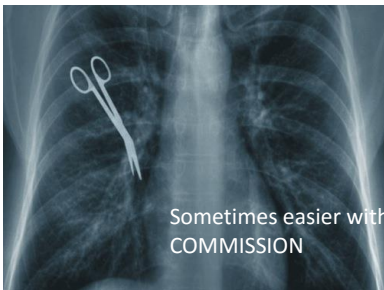
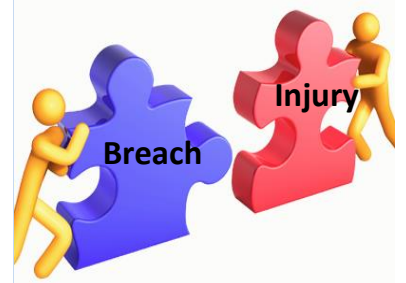
Causation

PTF is suing because she is injured

PTF **already** established that DEF breached the applicable SOC

BUT

Is the injury the result of the malpractice



- Fail order test
- Fail read results
- Fail inform Pt
- Fail make referral

2 types

“But for”

Lost chance

**But for
causation**
Definition

Main type of
causation in
the law

Rest. 3d 26

Conduct is a factual
cause of harm when
the harm would not
have occurred absent
the conduct.

But for (without)
DEF’s negligence

PTF would not be
injured

Sine qua
non

Not enough that
DEF negligence
increased the
risk of harm

DEF negligence
must be **most
likely** cause

But for causation

Consequences

> 50% chance that injury came from DEF negligence

→ 100% damages

50% or < 50% chance injury from DEF negligence

→ 0% damages



But for causation

Math problems

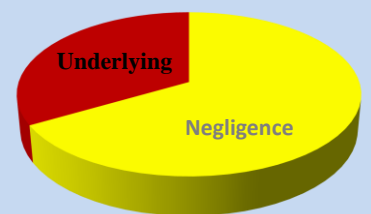
Negligence **increases** risk of adverse outcome

Adverse outcome obtains

Was injury **probably** the rest of DEF negligence (as opposed to alternative cause, e.g. underlying illness)

Baseline risk death **10%**

After DEF negligence risk of death **30%**



Dies. Why? 30% chance death most of that from negligence

1% → 3%

Risk from negligence > other risk

30% → 70%

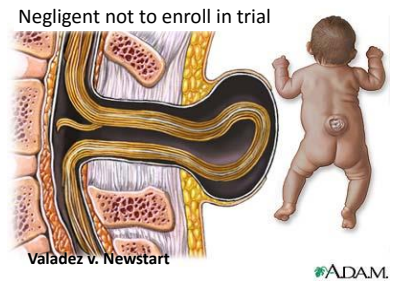
Risk from negligence > other risk

40% → 70%

Risk from negligence < other risk → no but for causation

Often no statistics, just expert opinion on probability

But for causation Cases



But even if experimental treatment works, denial did not "cause" injury

w/o negl.

___ % in prenatal surgery group

with negl.

___ % in prenatal surgery group

"But for" causation is always sufficient

Let's move from
"but for" to
"lost chance"
causation

Lost chance causation

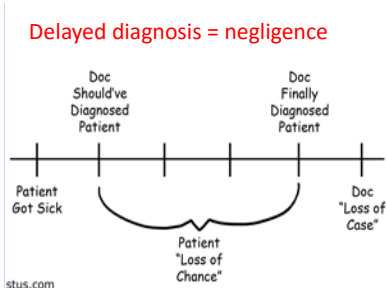
An alternative
(backup) to "but
for" in some
states

Malpractice PTFs often
start out sick

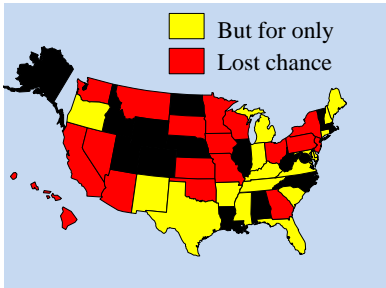
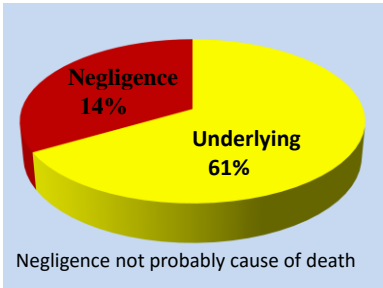
Bad baseline

Hard to show "but for"
causation

Herskovits v. Group Health



	Chance survive	Chance death
Without negligence	39%	61%
With negligence	25%	75%



Lost chance causation

Definition

PTF can recover **even if** DEF negligence is **not** probable cause of injury

Negligence does not change probable outcome

With negligence
Probably dead

Without negligence
Probably dead

Suing for an injury that was **probably** going to happen **anyway** – even without DEF negligence

DEF just made a probable outcome (e.g. death) **even more** probable

Injury **IS** the lost chance itself



PTF **not** claim DEF negligence caused **death**

PTF claim DEF negligence caused X% greater chance of death (or Y% lower **chance** survival)

Jury must think DEF breach **probably** (>50%) caused PTF to lose X% chance of better outcome

Lost chance causation

Consequences

If you can establish “but for” causation, do that. Get 100% of damages.

PTF has 45% chance recovery

DEF negligence reduces that to 15%

DEF negligence reduced chance recovery by 30% (45% - 15%)

55% risk death

Negligence raised to 85%

No but for

$55 > 30$

Full (but for) damages \$600k

Lost chance = \$600k x 0.30 = \$180k

Wendland

v.

Sparks

Hospital cancer patient codes – but doc says: **no CPR** “I just can’t do it to her”

CPR is the only procedure MD needs consent **NOT** to perform

Need consent to DNR

No but for

CPR probably was not going to work

Cannot sue for causing death

But can sue for depriving of chance / opportunity

Dickhoff

v.

Green



DEF failure to diagnose cancer of Jocelyn Dickhoff

40% die



60% die

Negligence **increases** risk
of adverse outcome

Adverse outcome obtains

Of 60% total risk

DEF negligence
contributed only 20%

No but for causation

DEF negligence **did**
deprive PTF of 20%
chance of avoiding injury

Can recover for that lost
chance

Causation Examples (on your own)

Problem 1

Negligent delay diagnosis reduces
patient's chances of avoiding injury
from 40% to 10%.

Could describe as
Chance injury 60%
After negligence, chance injury
raised to 90%

No but for causation

Injury already probably
going to happen

Only 1/3 of 90% risk from
DEF negligence

Problem 2

Physician negligence
reduced Greg's chances of
survival from 49% to 9%.
Greg died and suffered
\$4 million in damages.

Without negligence	49% recovery	51% injury
With negligence	9% recovery	91% injury

Total risk injury now = 91%
 >50% NOT from malpractice
 51 > 40 → no but for causation

Under "**but for**" causation,
 Greg can recover:

\$4 m \$2.4 m
 \$1.6 m **\$0**

Under **lost chance**
 causation, Greg can
 recover:

\$4 m \$2.4 m
\$1.6 m \$0

Recap med mal

Duty - owed
 because in a
 treatment
 relationship

Duty - defined by
 standard of care
 established by
 expert witnesses

Right way to **prove**
 standard of care
depends - on DEF
 geography,
 specialty

Breach – DEF
 failure to conform
 to **applicable**
 standard of care

Causation – PTF
 injury results
 from DEF breach

But for

Always sufficient

Lost chance

Alternative sufficient
in some states

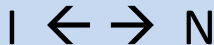
Never sufficient

Speculative
Merely possible

PTF must **always**
establish injury more
probable than not
resulted from DEF
negligence

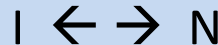
What really changes
in “but for” vs. “lost
chance” is the harm
(injury vs. LC)

But for



Physical
harm

Lost chance



Let’s move from
causation to
damages

Damages

4 types of
damages

Economic
Non-economic
Punitive
Nominal

Economic Damages

Measurable
Quantifiable

Past lost wages
Future lost wages
Past medical
Future medical

Saber Tehrani AS, et al. *Quality and Safety in Health Care* 2013;0:1-9. doi:10.1136/bmjqs-2012-001550

Malpractice allegation group	n (%)	Mean, US\$
Diagnosis related	100249 (28.6)	386849
Treatment related	95635 (27.2)	196960
Surgery related	84980 (24.2)	280257
Obstetrics related	22951 (6.5)	651670
Medication related	18697 (5.3)	257333
Anesthesia related	10525 (3)	419126
Monitoring related	7101 (2)	354131
Other miscellaneous	6929 (2)	176781
Equipment/product related	1872 (0.5)	128204
Intravenous and blood-products related	1080 (0.3)	294011
Behavioural health related	687 (0.1)	212494
Total	350706 (100)	313813



Is she now
alive or dead?

Alive →
Much higher economic
damages: future
medical expenses =
\$5 million (\$250,000 x
20 years)



No future
medical
expenses

Non- economic damages

Pain & suffering
Loss of enjoyment
of life

Often capped
by state law at
\$250,000

Punitive damages

Usually, damages =
economic
+
non-economic

Rarely, also
punitive (aka
exemplary)
damages

2008 medical liability costs
\$3.15b economic damages
\$2.40b non-economic
\$0.17b punitive

Requires **more** than
just negligence or
gross negligence

Negligence

No awareness or
consciousness required

Just a lack of care

Most medical
malpractice is
ordinary
negligence

Gross negligence

No awareness or
consciousness required

Greater lack of care than
with negligence

Not even the care of a
careless person

Still not enough

Reckless disregard

Aware that conduct
probably creates risk

Consciously disregard
substantial risk

DEF realized
dangerous,
done anyway

Willful ignorance

Aware of conduct very
probably creates risk

Not just probability but
practical certainty

Deliberately avoid knowledge

Battery
Abandonment

Fit here

Actual knowledge**Deliberate intent**

Conscious objective to
harm

Subjective hope

Determining
amount of
punitive
damages

About
punishment, not
compensation

Likelihood serious harm
Degree DEF aware of likelihood
Profitability DEF conduct
Duration
Attitude and conduct on discovery
Financial condition DEF

**Nominal
damages**

Like punitive
damages,
very rare

Normally
just \$1

Not worth
transaction
costs of
litigation

PTF **not** physically
injured

But **rights** were
violated

Battery – procedure
without consent

But PTF better off

Abandonment – physician
fired patient without
notice

But PTF found new
physician to address
needs

Affirmative Defenses

DEF can avoid
liability **even if**
PTF establishes
prime facie case

Good Samaritan
Statutes of Limitation
Statutes of Repose
Assumption of Risk
Comparative Negligence

Good Samaritan

Provide **immunity**
from civil damages
for personal injuries
that result from
ordinary negligence.

No protection from
liability for “gross”
negligence - willful,
wanton, even
malicious

4 requirements

Outside medical
setting (accident
scene, choking in
restaurant, natural
disaster)

No pre-existing duty to provide care

No expectation of remuneration

Recipient does not object

SOL
SOR

Effect & Impact

Bright-line deadline for filing lawsuit

Complete bar to liability

Length varies from state to state

Medical malpractice
1yr state A

Medical malpractice
2yr state B

Length varies
by COA within
a state

Medical malpractice
2yr state A

Battery
1yr state A

SOR / SOL Analysis

3 key inquiries
to determine if
your lawsuit is
time-barred

1. Date triggered
2. Length
3. Date lawsuit filed

SOL and SOR
differ in **trigger**
date

SOR

Date of
malpractice

Tenn. Code Ann. § 28-1-106

“no such action may be
brought more than three
years after the date on which
the negligent act or omission
occurred . . .”

SOR Rationale

Tort reform

Protect med mal
insurance

SOL

Date injury
discovered (or
should have been)

Tenn. Code Ann. § 29-26-116

A medical malpractice
action must be brought
within one year after the
date upon which the
claimant **discovered** the
injury.

SOL

Rationale

Deterioration of evidence

Witnesses die

Memories fade

Risk of error increases

Ability to throw out trash

Avoid re-ignition of
conflicts quieted by time

Peace of mind for
potential defendants

Lawsuit barred as
soon as **either** SOL
or SOL runs,
whichever runs
first

SOL

SOR

Lawsuit can be
barred by **both**

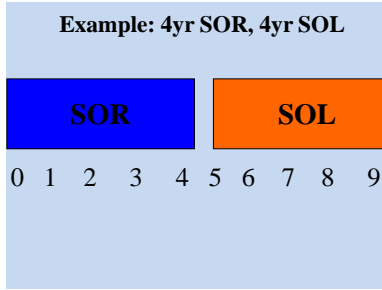
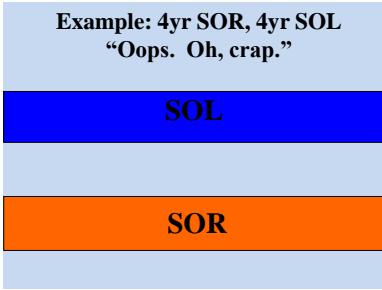
Data points for analysis

Date malpractice starts SOL

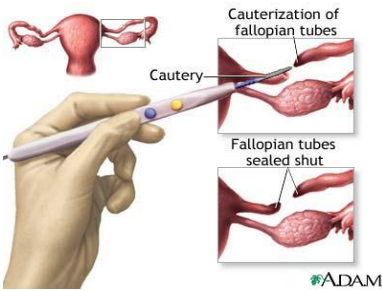
Date of discovery starts SOL

Length of SOL & SOL

Date lawsuit filed



**Teeters
v.
Currey**



06-05-70 Tubal ligation
12-06-72 Pregnant
03-09-73 Delivery
11-15-73 Lawsuit

**Assume
1-year SOL**

Discovered malpractice 12-06-72, so not barred by SOL

**Assume
1-year SOL +
3-year SOR**

Malpractice more than 3 years before lawsuit, so barred by SOR

Lawsuit barred
if **either** SOR
or SOL run

SOL & SOR Problems

Tyler suffered a malpractice injury on Sept. 4, 2013. He discovered his injury on Oct. 26, 2015. The jurisdiction has a 2-year SOL and a 3-year SOR. What is the LATEST date on which Tyler can file a non-time-barred lawsuit?

Lawsuit is already barred.
September 4, 2015
September 4, 2016
October 26, 2017

Example: Laughlin v. Forgrave

4yr SOR, 2yr SOL

1951: surgical operation
(instrument left inside)

1962: plaintiff discovers
instrument

SOL runs 1964
SOR already ran 1955

Example: Kenyon v. Hammer

2yr SOR

1980: Prenatal exam – chart as
Rh+ not Rh- blood

1981: Birth – no RhoGam

1986: Second child stillborn

Claim barred 1983

SOR is harsh

Claim barred before
patient even knew
had claim

Let's move to
defenses

Assumption of Risk

Complete defense

100% bar to damages

Not about PTF **fault**

About PTF **consent**

BELLEVUE CHALLENGE COURSE
AT EASTGATE PARK



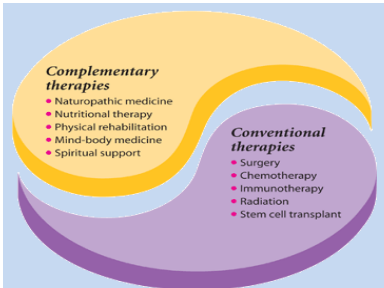
**ASSUMPTION OF RISK/
WAIVER OF LIABILITY**

*** You (and, your parent or guardian, if you are under age 18) must complete all parts and sign this Assumption of Risk/ Waiver of Liability, including a Photo Release before participating in any Bellevue Challenge Course activities.***

Participant Name: _____ Date of Birth: _____
 Home Address: _____ Hm Tel: _____
 City, State, Zip: _____ Wk Tel: _____

**ASSUMPTION OF RISK
PLEASE READ CAREFULLY**

PTF understood and voluntarily agreed to confront risks (subjective standard)



Informed consent re inherent risks of treatment

Waiver of liability



Physicians **cannot** make patients waive right to sue

Such contracts are void as contrary to public policy

Partial waivers

Complete waivers
prohibited

But **partial** waivers
allowed

Discharge AMA

UW Medicine
HARSHBERRY MEDICAL CENTER - UW MEDICAL CENTER
UNIVERSITY OF WASHINGTON PHYSICIANS
SEATTLE, WASHINGTON

DISCHARGE - AGAINST MEDICAL ADVICE

I, _____, am voluntarily leaving and signing out
(Name of patient)

(OR)

I, _____, am voluntarily taking _____
(Name of person signing) (Name of patient)

from the Medical Center, contrary to the advice of the medical staff in attendance. This is to certify that I, in so doing, assume full responsibility for any and all risks of this action, and hereby agree to hold the Medical Center and its' staff free from any liability of any consequences that may result directly or indirectly by reason of such removal.

(Signature of patient or person assuming responsibility) (Relationship of person assuming responsibility)

Other partial waivers allowed

Deviation from
standard of care for
religious reasons



Patient participates in experiment

A research study for Irritable Bowel Syndrome (IBS).

Frustrated by your IBS and endless bathroom stops?

A local research study seeks people with Irritable Bowel Syndrome.

- ✓ No-cost investigational medication
- ✓ No-cost study-related care

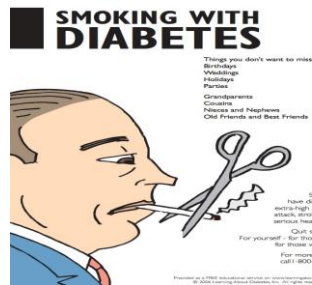
SEE IF YOU QUALIFY. CLICK HERE.
www.StudyIBS.com

Comparative Negligence

Not about PTF
consent (like AR)

About PTF **fault**

PTF not do what
reasonable person
would do (objective
standard)



No provide contact
information (to get
rest result)

No follow-up on test

No provide
information (allergy)

Fail follow advice

Contrast SOR,
SOL, AR
(100% bar)

Usually partial (not
complete) defense

Only **reduces**
damages

(1) Was DEF negligent?

Answer "yes" or "no." _____

If your answer to Question No. 1 was "no", do not answer any further questions on this **form**.

(2) Was the negligence of DEF a legal cause of injury to PTF?

Answer "yes" or "no." _____

If your answer to Question No. 2 was "no," do not answer any further questions on this **form**.

(3) Was PTF negligent?

Answer "yes" or "no." _____

If your answer to Question No. 3 was "no," you must now complete Question 7.

(4) Was negligence of PTF a legal cause of injury to him/her?

Answer "yes" or "no." _____

If your answer to Question No. 4 was "no," you must now complete Question 7.

(5) What . . . damages . . . caused . .**(6) Determine percentage of fault for PTF and DEF for damages identified**

Defendant	____%
Plaintiff	____%
TOTAL	<u>100%</u>

Arbitration

Only changes
where the
conflict is
resolved

Arbitration agreements change the forum, tribunal from a government court to private dispute resolution

Cal Civ. Proc. Code 1295(a)

"Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence . . . shall have . . . as the **first article** of the contract . . . in the following language:"

"It is understood that any dispute as to medical malpractice, . . . will be determined by submission to **arbitration** . . . and not by a lawsuit or resort to court process . . ."

(b) Immediately before the signature line . . . in at least 10-point bold **red** type:

"NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT."

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