LAW AND MEDICINE

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Course Outline

- Overview of the legal system and terms you need to know
  - Trial procedure from summons to verdict sheet
  - NY Statutes that govern your conduct
- The patient/doctor relationship-when does it begin and when does it end
- The constitutional implications of medicine: involuntary commitment, guardianship,
- Abortion, right to die; statutes of limitations; continuing treatment doctrine; foreign objects
- Law of medical malpractice: case studies

Burnout & Medical Errors Among American Surgeons (Annals of Surgery, June 2010)

- 1999 Institute of Medicine reported up to 100,000 US patients die of preventable adverse events each year.
- Other studies suggest medical errors affect up to 10% of hospitalized patients: commission or omission with potentially negative consequences for the patient that would have been judged wrong by skilled knowledgeable peers
- Of 7,905 surgeons who responded 9% reported making a ‘ major medical error’ in the last 3 months
- 31% identified a ‘lapse in judgment as greatest contributing factor
- Physician job satisfaction may influence quality of care and patient
- Relationship (Williams & Skinner, Health Care Manage Rev. 2003)

Medical Malpractice Statistics

- From 2013-2016 about 6,000 claims filed NYS; 1500 per year
- 2011- $13,790,000 in claims paid out/ $454,726 per claim
- 2016-ready trial cases 55% settled; 12% disposed by motion
- P successful in 23%; consistent with statewide average of 25%
- Average length of disposition: 1,119 days; double complex commercial case

Beginning a civil lawsuit

Supreme court- Appellate divisions-court of appeals by permission

Summons & complaint

Answer

Discovery procedures- [CPLR 3101]: bill of particulars; expert demand and exchange; depositions; certification

Motion practice: summary judgment/motions to dismiss

Common law v. statutory law/ *stare decisis*

State and Federal jurisdictions

Negligence is the establishment of:

-a duty
-breach of that duty that is a substantial factor in causing
-injury that is reasonably foreseeable to the person injured
(Palsgraff v LIRR, 1928)

The physician–patient relationship: When does it begin?

- When the physician affirmatively treats or advises the patient as to a course of treatment:
  - may be established by mutual consent, express or implied contract;
  - regardless of whether rendered gratuitously or at request of 3rd party
  - *Eiseman v. State of New York (1987)*
  - *Purdy v. Public Administrator (1988)*
  - *Tenuto v. Lederle Labs (1997)*
  - *Davis v. South Nassau Community Hosp (2015)*

Criminal Prosecutions

- Defenses- New York does not have an "insanity defense"
- Required element of criminal conviction is that defendant had intent to commit the act accused of
- Proven ONLY through psychiatric testimony, New York has defense of 'not responsible by reason of medical disease or defect'

Domestic Relations Law DRL Sec 236

- Grounds-no longer contested
- Custody-legal & physical; child support
- Maintenance-does your spouse stay at home?
- Equitable Distribution-Marital property-what is and what is not
- Significant change in the law 2016 New York no longer values 'enhanced earnings' capacity of the degree of a spouse who obtains a professional license during the course of the marriage
- Practices are still valued and distributed

DO YOU NEED A PRE-NUP??????????????????

The Fourth Amendment

- The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probably cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The 5th Amendment to the Constitution (1789)

No person shall be held to answer for a crime unless on a **presentment or indictment of a grand jury**;

nor shall be subject for the same offense to be **twice put in jeopardy of life or limb**;

nor shall be compelled in any criminal case to be **a witness against himself**;

nor be deprived of life, liberty or property, ***without due process of law****….*

The 14th Amendment to the US Constitution (1866)

All persons **born or naturalized** in the United States…are **citizens of the United States** and of the State wherein they reside.

No state shall make or enforce any law which shall **abridge the privileges or immunities of any citizens** of the United States

Nor shall any State **deprive any person of life, liberty, or property, without due process of law**, nor deny to any person within its jurisdiction the equal protection of the laws.

Article 9 Mental Hygiene Law The treatment of the mentally ill in New York

The constitutional implications of involuntary commitment

Article 9 definitions

As used in this article:

- "in need of care and treatment" means that a person has a **mental illness for which in-patient care and treatment in a hospital is appropriate**. (voluntary standard)
- "in need of involuntary care and treatment" means that a person has a mental illness for which care and treatment as a patient in a hospital is **essential to such person's welfare and whose judgment is so impaired that he is unable to understand** the need for such care and treatment.
- "likelihood to result in serious harm" or "likely to result in serious harm" means (a) **a substantial risk of physical harm to the person** as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that the person is dangerous to himself or herself, or (b) a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm. (9.39)
- "need for retention" means that a person who has been **admitted to a hospital** pursuant to this article is in need of involuntary care and treatment in a hospital for a further period.

Bringing the involuntary commitment proceeding

- person living with one diagnosed with mental illness
- immediate family member
- officer of a recognized health institute, agency or home where such person lives
- director of community services or social services officer
- director of hospital where person is presently hospitalized
- director of substance abuse/alcohol facility proving care to person
- By court order-the guardian or custodian of person
- Certification by two doctors required; alternatives must have been considered

§ 9.27 Involuntary admission on medical certification

- Certificates of two examining physicians, accompanied by an application for the admission; exam must have been executed within ten days prior to such admission
- A statement of the facts upon which the allegation of mental illness and need for care and treatment are based
- Consider alternative forms of care and treatment
- Prior to admission, examined by a physician who shall be a member of the psychiatric staff of such hospital who certifies
- No patient may be sent to another hospital by any form of involuntary admission unless the mental hygiene legal service has been given notice
- Separately certified that he or she is mentally ill and in need of involuntary care and treatment in a hospital, either physician is authorized to request … members of an authorized police department … to take into custody and transport such person to a hospital

IF involuntary admitted on med cert, then what?

- If patient does not consent to stay, hospital needs court order within 60 days
- At any time prior to 60th day, the person, relative, friend or MHLS may in writing **demand a hearing;** hearing within 5 days
- Court **hears testimony and examines the person** if deemed advisable; Court may **retain or release**
- If held, **retention is for 6 months**
- Person may ask for **re-hearing within** 30 days to different Judge or
- **Jury** may determine mental illness

The Emergency Room Admission
on medical certificate of comm director

- This admission is for **15 days**
- Must be alleged that person has mental illness and **needs immediate observation** and which is likely to **result in serious harm** to himself or others if not admitted
- Substantial risk of physical harm:
  - threat of or attempt at suicide/serious bodily harm/danger to himself
  - risk of physical harm to others/homicidal behavior or other violent behavior which places others in reasonable fear of physical harm

Requirements

- Need 1 doctor at admission
- Overt act /threat of violence
- Next 72 hours need a second certificate
- After 72 hours need 3rd PC
- Hearing within five days if requested
- If held, rules regulating involuntary adm apply

Emergency Admission for immediate care/treatment

- Period is 15 days
- Requires likelihood of serious harm to himself or others
- Retention for 48 hours then 2d PC required
- Written notice required
- Hearing, if requested, within 5 days; if reasonable cause found then rules of involuntary commitment apply

14 NYCRR 27.8

- Care and Treatment- the Right to Object and Appeal
- Emergency treatment- over objection care may be given where "appears necessary to avoid serious harm to life or limb of the patients themselves or others"
- Patients on voluntary or informal status MAY NOT be given treatment over objection. Director may discharge the patient with recommendations for outpatient care or attempt to convert patient to involuntary status as per MHL.
- Patients on involuntary status- may be treated over objection if head of service approves; if patient seeks to appeal, then to director.
- Patient is entitled to counsel who may bring application to Court to stop treatment.
- Religious objection automatically requires court order.

MHL Article 81 The Power to Appoint a Guardian of the person and property

- To provide for the **personal needs of that person**, including food, clothing, shelter, health care, or safety and/or to manage the financial affairs of that person.
- The determination of capacity is based upon **CLEAR AND CONVINCING EVIDENCE**
  - person is likely to suffer harm because a) person is unable to provide for their personal needs/property management AND
  - person cannot adequately understand and appreciate the nature and consequences of such inability.
- Court shall consider the **FUNCTIONAL LEVEL AND LIMITATIONS OF SUCH PERSON**:
  - management of ADL's & ability to understand limitations of any inability
  - preferences, wishes and values of the person
  - nature and extent of person's property and ability to manage them
- Court must assess:
  - extent of demands placed on the person; any illness & prognosis; mental disability; substance dependency; medications
  - all other relevant facts and circumstances of functional limitations & ability of person to appreciate same

Commencing Art. 81 Proceeding

- Petition May Be Brought By:
  - AIP self
  - Distributee
  - Anyone who is concerned with welfare of AIP
- Factual allegations demonstrating inability to provide for one's own needs
- Court, upon signing Order to Show Cause (OTSC), appoints court evaluator to conduct investigation & produce report
  - May seek permission from court to obtain medical records
- If AIP is contesting, shall have counsel.
- Hearing to be held **within 28 days** of OTSC signing
- AIP has **5th Amendment rights**: need not participate in the hearing; petitioner has burden by C & C
- AIP may consent, converting status to PING
- Guardian, Temporary, Special- options for court
- Powers granted should be least restrictive means necessary to protect IP

Compare with Public Health Law Sec. 2994-c: Determination of capacity

- Attending physician determines decision making capacity to a reasonable degree of medical certainty
- Is subject to a concurring determination
- In general hospital health/social services practitioner must independently determine capacity
- If patient objects court must decide

The Family Health Care Decisions Act Public Health Law 2994

- determination of incapacity
- decision making by surrogates
- obligations of attending physician
- decision making w/o surrogate

Rivers v. Katz, 67 NY2d 485 (1986)

- The issue presented in this Article 78 proceeding emanated from a Dutchess County class action brought by involuntarily committed mental patients alleging that the forcible use of antipsychotic medication violated both common law and Constitutional right to determine one's own course of treatment.
- **NY CA** held that the due process clause of state constitution affords such population fundamental right to refuse such medication.
- **Facilities argued** that such population is presumptively incompetent to control own course of treatment
- **Court:** We conclude that neither the fact that they are mentally ill nor that they have been involuntarily committed, without more, is a sufficient basis to conclude that they lack the mental capacity to comprehend the consequences of their decision to refuse medication that poses a significant risk to their health.
- There must be a judicial determination of whether the patient has the capacity to make a reasoned decision with respect to proposed treatment before the drugs may be administered pursuant to the State's *parents patriae* power.
- Treatment must be narrowly tailored to give substantive effect to patient's liberty interest

14 NYCRR 27.9

- Surgery and certain other treatments
- ECT therapy, surgery, major medical treatment or use of experimental drugs or treatment may be administered to the patient **only upon informed consent** of patient or a person authorized to act on their behalf.
  - if under 18 and no parent or legal guardian OR if one parent objects, director must obtain court order
  - if over 18 but in opinion of director of service does not have the mental capacity to give consent, consent may be obtained from spouse, parent, adult child or if none a court of competent jurisdiction.
  - if over 18 and director unsure of medical capacity, opinion may be obtained from independent consultant who is not employee; director may then determine appropriate steps to be taken
- Emergency doctrine applies
- Facility must have standard procedures in place

Medicine and the Fourth and Fourteenth Amendments

-When does life begin

-When does it end

-Assisted suicide in New York

- *Roe v. Wade,* 93 S.Ct. 705 (1973)
- *Matter of Father Phillip Eichner,SM* 73 AD2d 431(1980)
- *Myer, Seiff et al v. Schneiderman*

CPLR 214, 214–a
Statute of limitations in medical, dental and podiatric malpractice

- To be commenced within **two years and six months** with exceptions:
  - The two years and six months is from the time of the act, omission or failure complained OR
  - last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure;
  - if the action is based upon discovery of a foreign body in the patient, the action may be commenced **within one year** of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.
- **Continuous treatment** does not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient's condition.
- **CPLR 3012-a Certificate of Merit unique to medical malpractice actions**

Continuous treatment Doctrine- tolling the statute of limitations

- Flint v. Zielinksi, 130 AD3d 1460 (4th, 2015)
- Toth v. Community Hosp at Glen Cove, 22 NY2d 255 (1968)
- McDermott v. Torre,et.al, 56 NY2d 399 (1982)
- Borgia v. City of New York, 12 NY2d 151
- Lohans v. Luzi, 30 NY3d 752 (2018)

Foreign object v. fixation device

- Walton v. Strong Memorial (2015)- the polyvinyl catheter; provides history
- Flanagan v. Mt. Eden (1969)- Dr. leaves surgical clamps in plaintiff's body during 1958 gall bladder surgery
- 1996- abdominal pains begin; x rays show clamps
- Note- this is PRIOR to CPLR 214 a; opens the flood gates
- Rodrigues v. Manhattan Med Group (1990)- the IUD cases
- Rockfeller v. Moront (1993)- the improper suture
- LaBarbera v. NY Eye & Ear (1998)- silastic stents

Committee on Pattern Jury Instructions Association of Supreme Court Justices

PJI 2:150 Malpractice—Physician

- Malpractice is professional negligence and medical malpractice is the negligence of a doctor.
- Negligence is the failure to use reasonable care under the circumstances, doing something that a reasonably prudent doctor would not do under the circumstances, or failing to do something that a reasonably prudent doctor would do under the circumstances. It is a deviation or departure from accepted practice.
- A doctor who renders medical service to a patient is obligated to have that reasonable degree of knowledge and skill that is expected of an (average doctor, average specialist) who (performs, provides) that (operation, treatment, medical service) in the medical community in which the doctor practices. *[[If there is evidence that the doctor should have complied with standards that exceed the standards of the medical community in which the doctor practices, the following should be charged:]* The doctor must also comply with minimum (statewide, national) standards of care.)

- By undertaking to perform a medical service, a doctor does not guarantee a good result. The fact that there was a bad result to the patient, by itself, does not make the doctor liable. The doctor is liable only if (he, she) was negligent. Whether the doctor was negligent is to be decided on the basis of the facts and conditions existing at the time of the claimed negligence.
- *[This paragraph should only be charged when there is evidence that the doctor made a choice among medically acceptable alternatives. See Caveat 2 below:] A doctor is not liable for an error in judgment if (he, she) does what (he, she) decides is best after careful evaluation if it is a judgment that a reasonably prudent doctor could have made under the circumstances. In other words, a doctor is not liable for malpractice if he or she chooses one of two or more medically acceptable courses of action.*
- If the doctor is negligent, that is, lacks the skill or knowledge required of (him, her) in providing a medical service, or fails to use reasonable care in providing the service, or fails to exercise his or her best judgment, and such failure is a substantial factor in causing harm to the patient, then the doctor is responsible for the injury or harm caused.
- [Where appropriate, add:]
- A doctor's responsibility is the same regardless of whether (he, she) was paid.

N.Y. Pattern Jury Instr.-Civil 2:150

- The law recognizes that there are differences in the abilities of doctors, just as there are differences in the abilities of people engaged in other activities. To practice medicine a doctor is not required to have the extraordinary knowledge and ability that belongs to a few doctors of exceptional ability. However every doctor is required to keep reasonably informed of new developments in (his, her) field and to practice (medicine, surgery) in accordance with approved methods and means of treatment in general use. A doctor must also use his or her best judgment and whatever superior knowledge and skill (he, she) possesses, even if the knowledge and skill exceeds that possessed by the (average doctor, average specialist) in the medical community where the doctor practices.