

**Law for Medical Students and Physicians:
Medical Malpractice
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I. Learning Objectives

Upon assimilating the course material you should:

- 1) Know what a tort is
- 2) Know the difference between intentional and negligent torts
- 3) Know the general statute of limitations in Ohio for medical malpractice
- 4) Know what a doctor-patient relationship is
- 5) Have some understanding of the standard of care
- 6) Have some understanding of expert witnesses

II. Pre-Lecture Questions: True or False?

- 1) There are no rules in medical malpractice except: if things go badly, you pay.
- 2) Any old expert can testify in a medical malpractice suit, even a professor of Garbage-ology, if that subject is relevant to the case.
- 3) "Daubert" is a French comic strip about lawyers.
- 4) A tort suit with damages imposed is the worst thing that can happen to you if your case goes wrong.
- 5) Every year in Ohio there are hundreds of multi-million dollar medical malpractice verdicts handed down.
- 6) If you release private medical information without authorization or justification, this is an independent tort in Ohio.
- 7) If a tile falls on your head from a house, you probably can sue and collect in negligence.

III. What is a Tort and why is it Good to have Tort Suits?

Last month, we got you licensed to practice medicine.

Now, you have decided to become a surgeon, specializing in removing diseased legs. A patient comes to you with cancer in her right leg. You remove her other right leg, generally known as her left leg. She still has cancer; you realize this; and remove the real right leg. Now she has not got a leg to stand on.

Her husband is a primitive guy, who has a collection of 800 guns at home, and tattoos of scary dead people. He says, energetically, that you should not have cut off both of his wife's legs, and because you did, he is going to kill you.

At this point, you suggest that he sue you instead, and in fact you call the lawyer for him. He spares your life -- for now -- and you realize, in one of those little epiphanies of which life is so full, that there really are worse things than malpractice suits in this life of ours.

So now that we have established one reason for tort law, let us review some others. If there is a procedure for grievances to be settled in court, with money, instead of the streets, with guns, a number of other things generally good for civilization are also spawned: there is a mechanism to get those with power to stop doing bad things, there is a way to get people to be more careful, and there is a way for the ordinary citizen to be heard when he or she is wronged.

Examples:

1) International Farm Co. develops a meat-eating lady-bug, which it releases to help farmers control pests which would otherwise devour their sweet-potato crops in Georgia. These bugs swarm north and carry off your Chihuahua dog, not incidentally biting you and all of your friends. It turns out that passage through sulfuric acid smog, as produced in Ohio, turns these little critters into man-eaters. What can you do? Sue the lady bug company in **products liability** for releasing these beasts without having properly tested them, for the price of the titanium screens which everyone will now need on their homes. Of course, the lady bug company will sue the sulfuric acid smog company, saying that it is partly their fault that the lady-bugs turned vicious.

2) Your employer, Big Hospital Co., wants to get rid of you because you don't see twelve patients per hour, which is necessary for them to attain their profit projections. They publish an article in the local paper, which they own, which says that you are a pedophile, a drug addict, and that you smell because you never bathe. The people mob the hospital with torches, and demand that you be fired lest their children be in danger. Big Med Co. fires you. What can you do? Sue them in **defamation** because they maliciously lied about your professional competence and told scurrilous lies about you.

3) Your granny is a little forgetful, but really nice. She gets pneumonia, and because she forgets to take her medicine, it gets worse. She checks into Giant University Hospital, where an intern tells her to "You sign this form, it not make no difference." She does sign it because he seems like a nice young man, and he is studying to be a doctor like you (her favorite grandchild). It turns out that the form is a DNR order. The resident gives her intravenous steroids instead of the penicillin which would have cured her pneumonia. She gets very sick and lapses into a coma; no one resuscitates her (because it wastes money for Giant) and she dies. You are sad, and angry, but no one will talk to you about this situation, because you are from Athens, Ohio, and therefore probably a redneck. What do you do? Sue Giant University Hospital in tort for **medical malpractice**

and for **failure to obtain informed consent**. You win an award and give the proceeds to OUCOM for a special "Humane Doctors of America" course. The resident never does that bad thing again. The hospital revises its policy.

IV. How Long does a Plaintiff Have to Bring a Tort Action in Ohio, and Does it Matter?

Intentional torts: one year

Intentional torts are civil wrongs wherein one intends the action that harms the victim. Of course this doesn't make any sense, because when you cut off the wrong right leg in the hypothetical above, you intended the action of cutting. But what you did not intend was to cut the wrong leg; we hope you intended to cut the right right leg. What you did not intend was to harm the patient. On the other hand, if you are angry with someone and hit them, you intend to hit out of anger, irregardless of whether you know whom you are hitting.

The intentional torts of relevance to medicine are battery, defamation, and fraud. Battery is the uninvited touching of another. This includes the touching of their clothing; and in medicine it includes touching someone (for whatever purpose) without their consent. In general, intentional torts in Ohio require that the victim of the wrong bring suit within one year. The exception is Fraud, which, because it may be harder to discover, carries a longer statute of limitations, which in Ohio is four years. *Gaines v. Pre-term Cleveland, Inc.* (1987) 33 Ohio St. 3d 54. *McCully v. Good Samaritan Hospital* (1998) 131 Ohio App. 3d 341.

General Negligence: two years

The general time in which a plaintiff must bring a suit in negligence in Ohio is two years. This would include negligent credentialing by a hospital, and also some careless situation such as failure to keep up a machine, which negligence might cause an injury. *Browning v. Burt* (1993) 66 Ohio St. 3d 544.

Medical malpractice: one year

Studies have shown that the most effective way to reduce malpractice payouts is to reduce the number of suits brought, and the most effective way to reduce the number of suits brought is to reduce the statute of limitations. Connors, Patrick M. *Litigating a Medical Malpractice Action in New York* National Law Foundation, 2003 (in tapes, not in booklet). Ohio is a real winner in that department, with one of the shortest statutes of limitations in the nation at one year. ORC 2305.113.

This short statute, lobbied for and zealously protected by physicians, may work injustice, and so is tempered in a number of ways. The statute only starts to run upon a "cognizable event" such that a plaintiff becomes aware that she has been

injured. *Allenius v. Thomas* (1989) 42 Ohio St. 3d 131. This "cognizable event" basically is something whereby the plaintiff knew, or should have known had they applied due diligence to figuring it out, that they had been done wrong. The cognizable event is an appreciation of the injury, not of the whole legal theory of what was wrongful about the injury. *Flowers v. Walker* (1992) 63 Ohio St. 3d 546.

Example: Mary has a laparotomy on October 31st, 1998. She feels funny afterwards, but not too bad. Two years later, on October 31st, 2000, she boards an airplane to go to Miami for a vacation, and cannot get through the metal detector. She gets an X-ray on May 14th, 2001, and lo and behold, there are some clamps from the surgery, still in her abdomen. She has one year from the date of discovery to sue. Must she sue by October 31st, 2001, or on May 14th, 2002? Probably May 14th, 2002. *Allenius v. Thomas* (1989) 42 Ohio St. 3d 131 (appreciation of the injury only upon later papanicolaou smear) and *Browning v. Burt* (1993) 66 Ohio St. 3d 544. (Only knew when saw TV show about others who had been surgically mutilated).

What if Mary fails to discover the clamps until November 1st, 2002? In that case, the statute of repose kicks in, and she may not sue no matter how occult the injury was. ORC 2305.113 (C) (2). Now we know, however, from our first lesson in law in September of this year, that the Ohio Supreme Court does not like statutes of repose, and overturned one looking very much like the above-cited statute twice, once in *Brenneman v. R.M.I.Co.* (1994) 70 Ohio St. 3d 460, and once in *State ex rel. OATL v. Sheward* (1999) 86 Ohio St. 3d 451. We do not know the future of ORC 2305.113 (C) (2). However, to fail to bring an action in time, banking on the overruling of the statute of repose, could be legal malpractice.

What if Mary is 14 when she has the surgery, and discovers the scissors in her belly on her eighteenth birthday? For a minor, the statute of limitations is tolled for Mary, and only starts up on her 18th birthday, so she must run down to the courthouse no later than her nineteenth birthday and file the suit, or lose the cause of action.

But Mary is a foolish creature, and although she discovers that she has been done wrong, she waits until three days before her nineteenth birthday and still has not filed. And, she is in Mexico. What does she do? She files a notice of intent to sue, by certified mail, or perhaps hires a process server to deliver it, to the doctor who did the surgery, and this gives her another 180 days from the date of receipt by the doctor of the letter, to bring her suit. A risky game on Mary's part.

Let us jump out of the colorful hypothetical for a moment and just tabulate what we have so far:

- 1) Allegedly negligent act occurs.

2) At some point, but less than four years later, plaintiff experiences a "cognizable event" and realizes she has been injured.

3) Plaintiff must sue within one year after the later to occur of:

- a) Negligent event
- b) Cognizable event
- c) Attainment of majority

OK, no problem. But there are four more things that may toll the statute of limitations in medical malpractice:

1) Fraud: defendant covers up the injury. *McCully v. Good Samaritan Hospital* (1998) 131 Ohio App. 3d 341. In that case, plaintiff had one day surgery on his throat. He was anesthetized, but only incompletely. He was paralyzed, but awake. He told the doctor later (when he could talk again) but no one believed him, and they re-assured him that this was a rare event: "operative recall." Meanwhile, it turned out later that no enflurane had been passed by a defective or otherwise broken anesthesia machine. The hospital personnel continued to cover this up. The patient figured out what had happened after the statutory period had run, but the active dissimulation and cover up tolled the statute (or gave rise to a cause of action in fraud which has a four year statute of limitations).

2) Insanity: If the plaintiff is of unsound mind such that she cannot appreciate the nature of her injury or cannot figure out what to do about it, then the statute is also tolled but only for up to four years. ORC 2305.16, "Tolling of limitations due to minority or unsound mind." Hey great -- so then does psychiatric malpractice have a longer statute of limitations? No, it is the same as any medical malpractice action, *Watley v. Ohio Department of Rehabilitation and Corrections* (2003) 122 Ohio Misc. 2d 38. (In this case, a prisoner sued because he was dropped from psychiatric care, his illness having been relieved).

3) A continued Doctor-patient relationship in this limited sense: the same doctor treats the same patient for the same condition. *Frysiner v. Leach* (1987) 32 Ohio St. 3d 38, clarifying *Oliver v. Kaiser Community Health Foundation* (1983) 5 Ohio St. 3d 111. As you might imagine, this has been the area of much litigation, because of the chance to "save" a case otherwise time-barred by proving an ongoing doctor-patient relationship. The Supreme Court of Ohio has stepped in not once but three times to overrule itself twice in formulating the current iteration of this doctrine. In *Oliver v. Kaiser Community Health Foundation* (1983) 5 Ohio St. 3d 111, a patient had a biopsy of an axillary node which was incorrectly diagnosed as non-malignant, when in fact it was malignant, and she went on to get breast cancer and died of it. The court overruled the previous rule (the case must be brought in one year or at the termination of the doctor-patient relationship, whichever is latest [*De Long v. Campbell* (1952) 157 Ohio St. 22] cited by [*Wyler v. Tripi* (1971) 25 Ohio St. 2d 164]). However, *Oliver* seemed to elaborate the rule as follows: suit to be brought at the later of statute of limitations or discovery. So in *Clark v. Hawkes Hospital*

(1984) 9 Ohio St. 3d 182, the court clarified this a little in a surgical infection case, with multiple doctors (not Same-same-same); this didn't quite capture it, so in *Frysiner v. Leach* (1987) 32 Ohio St. 3d 38, the rule was reformulated: case to be brought at the later of a) one year, or b) cognizable event plus one year, or c) termination of doctor patient relationship plus one year. The finished rule is applied in *Miller v. Paulson* (1994) 97 Ohio App. 3d 217, a case involving a seventh nerve tumor which, because removed late, resulted in disfiguring paralysis of the face.

Especially in cancer cases, the plaintiff wants to sue on the earliest missed diagnosis, because the earlier the error on a progressive condition, the greater the chance of recovery was at that time; and, under the lost chance doctrine, the greater the award.

Got it? Not quite. If the plaintiff's cognizable event occurs more than three years, but less than four years after the medical intervention alleged to be negligent, then the plaintiff gets a whole year to prepare and bring the suit. *Gaines v. Pre-term Cleveland, Inc.* (1987) 33 Ohio St. 3d 54. Therefore, the maximum time you can have (except in the case of an injured infant, living alone on a desert island) is 4 years, 364 days. Can you extend that by filing notice to four years, plus 364 days (because you must discover one day before the start of the fourth year) and plus 180 days (if you file notice on the treating physician at four years, 364 days from the medical intervention)? I don't know.

That's not bad. The rule in New York is 2 1/2 years from the injury, unless you knew or should have known of a foreign body (but not a chemical or drug) but, if you sue a state or municipality hospital, then you must make a notice in ninety days, then sue within 1 year and ninety days, but except in either case if you are an infant, you have ten years if under ten or 2 1/2 years from the age of majority; and continuing doctor-patient relationship (same doctor, same condition) also tolls the statute but for no more than ten years (unless you are an infant) and you can't add tolls (knew or should have known PLUS infancy or incompetence).[NY CPLR article 2].

V. Who can sue, and whom may they sue?

Plaintiff. The person who feels they have been injured and brings a lawsuit is called the plaintiff. A plaintiff may be any **natural person**, but not a corporation in medical malpractice because corporations cannot get sick and need doctors.

Someone under eighteen years of age is called an **infant**, literally meaning "not speaking" in Latin (*infans, infantis*) and by virtue of their incapacity (lack of power) they cannot sue someone. However, a guardian or their next friend (usually a parent) or sometimes a guardian *ad litem* (for the lawsuit) can sue on their behalf.

If someone takes the concerns of the infant under their care, the statute of limitations may not be able to be tolled, because now someone is helping the infant. This varies by state and even in different circumstances in the same state, and you should assume that the infant has a three to ten year infancy toll.

A whole group of people may sue as a **class** when they are very numerous and yet may be precisely certified to the class; where they have issues of law or fact in common; and where to not create a class would waste time, energy, or be unjust. *Howland v. Purdue Pharma LP* 2003-Ohio-3699.

A **dead person** cannot sue, of course, because they are dead; but certain actions, specifically personal and property injury, loss of certain rents (*mesne profits*, or the rents received by a tenant wrongfully in possession, or blocked from being received by the rightful owner, between two certain dates), and deceit, do survive the death of an injured person, and can be sued upon, by the administrator of their estate or another trustee, after they are dead, but within the statute. *Richards v. Broadview Heights Harborside* (2002) 150 Ohio App. 3d 537. Obviously, the conditions under which a toll of the statute of limitations would exist for a dead person are hard to imagine.

In the case of a dead person, those close to him may sue for loss of his company; except that in Ohio, loss of consortium in the case of a child does not exist. Also, pain and suffering of the dead person, called the decedent, can be sued upon; and these two are called non-economic damages. *Estates of Morgan v. Fairfield Family Counseling Center* (1997) 77 Ohio St. 3d. 284

Defendant. The person who is accused of being negligent is called a defendant. This may be a corporation, a natural person, a hospital, and also a government, but only under certain conditions.

1) **Natural person:** only a physician, a podiatrist, or a dentist may be sued in medical malpractice in Ohio.

2) **A hospital.** Initially charitable organizations were immune from suit, but after *Klema v. St. Elizabeths Hospital of Youngstown* (1960) 170 Ohio St. 3d 519, this so-called charitable immunity was abrogated. Also, a hospital does not practice medicine, so usually it can be responsible for a number of medical torts, but not for medical malpractice. A hospital can commit negligence (did not sweep floor, someone tripped), negligent credentialing, *Browning v. Burt* (1993) 66 Ohio St. 3d 544; or negligent release of privileged information, *Biddle v. Warren General Hospital* (1999) 86 Ohio St. 3d 395. *Kanjuka v. Metro Health Medical Center* (2002) 151 Ohio App. 3d 183. These are actions in ordinary negligence and have the two year statute of limitations, without any tolls.

3) **A corporation** can only practice medicine under strict regulations by the laws of each state; and the same goes for any business association. Therefore, only certain qualified corporations may be sued in medical malpractice. *Taylor v. C. Lawrence Decker, MD, Inc.* (1986) 33 Ohio App. 3d 118

4) **A government.** A government cannot be sued unless it wants to be sued, in American law (remember *lese majeste?*). All states, territories, and the United States have enacted court of claims acts such that, under certain specific circumstances, a person may sue a government. The Ohio statute is quite liberal, using the standard statutes of limitation, and ample damages, but all such claims must be brought in the Court of Claims, a special court whose sole function is to hear cases against the governments of Ohio (state, county, local). ORC 9.86 "Civil Immunity of Officers and employees; exceptions". The people who work for a government, if they are doing their job and are neither malicious nor reckless, in general cannot be sued individually for their own negligence. The "boss" takes responsibility for the "employees" under the doctrine of *respondeat superior* (Latin for "let the boss be responsible"). *James H. v. Department of Mental Health and Mental Retardation* (1980) 1 Ohio App. 3d 60. Sometimes it is hard to figure out whether a given doctor is an employee of the state [*Johns v. Horton* (2002) 149 Ohio App. 3d 252; *Nicholls v. Villareal* (1996) 113 Ohio App. 3d 343] but it is the exclusive province of the court of claims to make that determination [*Conley*] and that does not violate due process. It is definitely advised, however, for an employee to be present at the hearing determining employment status, which also gives him a right to appeal same (and protect himself from an individual malpractice suit). *Johns v. Horton* (2002) 149 Ohio App. 3d 252.

Credentials committee members are held harmless (you can't sue them) for libel or other torts of publication (including the prima facie tort or interfering with business relations) if they make disclosures under the statutory procedures: disclosed only to committee or proper agency, and only what is asked for. This also applies to getting those records for a law suit (called discovery). *Trangle v. Rojas* (2002) 150 Ohio App. 3d 549. There is an interesting case where a podiatrist is requested to give information to the Virginia board of podiatry, and does; the information is negative; and the former intern sues the podiatrist. The defendant was held harmless because there was proof that the bad things he said about the intern were not said with malice, and were true, and relevant to the Virginia board. *Jacobs v. Frank* (1991) 60 Ohio St. 3d 111.

Academic supervisors may be liable to suit for the negligence of their students or supervisees, even where they never laid eyes on the patient. One example, from New York, held that, if it was part of his job to supervise residents, the chairman of the Surgery department at New York Hospital, could be held to have a doctor-patient relationship with a patient whom he had never seen. *Lownsbury v. Van Buren* (2002) 94 Ohio St. 3d 231. *Maxwell v. Cole* (1984) 482

N.Y.S. 2d 1000. Similarly, a cardiologist whose job was, in part, to be on call for residents' cardiology questions, was held to have a doctor-patient relationship with a patient who died of an unsuspected dissecting aortic aneurysm, even though he never saw the patient. *McKinney v. Schlatter* (1997) 118 Ohio App. 3d 328. In a different circumstance, however, where an expert gave treating physicians information and ideas on their difficult cases, for no money; no doctor patient relationship was found, and that doctor could not be joined in suit. *Hill v. Kokosky* (1990) 186 Mich. App. 300.

Finally, in general a nurse or anesthesia assistant or surgical assistant is not liable in malpractice in Ohio, under the doctrine of *respondeat superior*: the doctor is. *Sanders v. Mount Sinai Hospital* (1985) 21 Ohio App. 3d 249. The situation may be different in other states. And a nurse (or his employer the hospital) may be liable for failing to report such information as he is required to report to the doctor as part of his job. *McMullen v. Ohio State University Hospital* (2000) 88 Ohio St. 3d 332.

VI. Intentional Torts: Battery, Defamation, False Imprisonment

You remember that, in the olden days, when I was a kid, you had to be 21 to be an adult. It so happened that Martha Lacey, in 1951, was displeased with the shape of her nose, and noticed an advertisement in the telephone book:

"Reshape your nose, Plastic surgery"

under the heading of Arthur W. Laird, MD. The patient presented herself to the office manager, explained she was eighteen, and that she had no money to pay for the operation. A loan was arranged for her, and within a week, she was operated on. The patient presented for surgery, and then, when she found out that needles hurt when placed in the nose, she became scared.

"I was scared, I made an attempt to jump off the chair...at first, when he was sticking the needles in my nose, he was hurting me and I told him to stop it. He says, 'No, you will be all right, sit back.' And after that, he stuck another needle in it, and I was crying. He told me it wasn't hurting me, but it was."

The operation was a success, but one suspects that the parents were annoyed and did not want to pay the bill for it. So they sued the doctor, saying, that because Martha was under 21 years of age she could not consent to surgery, even minor surgery; and therefore, under common law, the doctor had assaulted, then battered her.

Assault is the placing of another in fear of being touched against their will (they must see it coming, even if it does not arrive); **battery** is the unprivileged touching of another (whether they saw it coming or not). "Unprivileged " means there is no excuse, the common excuses being permission, informed consent to

a doctor, or emergency aid if the patient is in danger of permanent or serious injury and is not in a position to consent. (This would include moving an unconscious person out of the highway, out of harm's way, and is not limited to medical treatment). [*Restatement of Torts 2* section 892].

The court agreed with Martha's parents, but did not agree that the damages were \$3,500, but rather that only nominal damages may be awarded in a medical battery case: "Even though a surgical operation is beneficial or harmless, it is, in the absence of proper consent to the operation, a technical assault and battery... The plaintiff may recover damages, but only nominal damages, and the defendant is entitled to have the jury so instructed... "Nominal damages " are those recoverable where a legal right is to be vindicated against an invasion which has produced no actual loss...defined...as some small sum of money, some nominal amount, as \$1." *Lacey v. Laird* (1956) 166 Ohio St. 12, at 21.

Well, now, just between you and me, that isn't much of a deterrent, is it? Why would anyone bring a battery case when malpractice, as in failure to obtain informed consent, is available, and the damages would be higher?

There are three special things that make a battery cause of action alluring as against a physician

- 1) Intentional torts support punitive damages
- 2) Physical harm is not required to be proved
- 3) Intentional torts may not be covered by the tort reform act **ORC 2305.113** "Limitation of actions for medical malpractice; statute of repose".

There is a case, already cited above, in which two doctors performed some kind of bizarre "Love surgery" on the introiti and vaginas of many women, in several states. A large verdict was obtained in some of these cases, and some women figured out that they had been maimed surgically when they saw a TV show called *West 57th Street*, years after the injury. *Browning v. Burt* (1993) 66 Ohio St. 3d 544. Setting aside the timing issues, if that case were brought timely in Ohio today, the damages would be limited to \$250,000; but where actual malice or intent could be proved, the defendant doctor would be liable, in my opinion, for punitive damages, and outside of the tort reform statute. The purpose of punitive damages is not to restore the plaintiff to the position in which they would have been had the injury not occurred, but to punish the agent who caused the injury so that they do not do it again. *Restatement of Torts 2d* section 908(1).

The cause of action for assault and battery in the case of offensive touching without consent, where no emergency exists, is alive and well, as evidenced by *Berrios v. Our Lady of Mercy Medical Center* 20 App. Div. 3d 361

(2005), a New York case in which a radiologist saw foreign bodies on x-ray which he suspected to be narcotics packets; and ordered an enema to retrieve them, over the patient's objection.

Another intentional tort is **False Imprisonment**, which is defined as depriving someone of their liberty under some semblance of authority, but when in fact there was no authority. Two typical examples are when an employer interrogates an employee for some false charge; or where a doctor makes a patient stay in a hospital when in fact it was improper to do so. An example of the latter is *Lynskey*, wherein a doctor wrongfully detained a patient for several hours in a psychiatric facility. The wrongfulness was that there was no evidence of a mental disease with dangerousness arising from it. *Linskey v. Bailey* 8 Misc. 3d 107 (2005)

There are other intentional torts, but the big one for physicians is **Defamation**. "Defamation is an invasion of one's interest in his good reputation and his good name" Kionka, E *Torts in a Nutshell* 3d West Group, St. Paul, MN (1999) at 433. When defamation is written, it is libel, and when it is only verbal it is slander.

In Ohio, and many common law states, defamation comes in two delicious flavors: *per se* and *per quod*. *Kanjuka v. Metro Health Medical Center* (2002) 151 Ohio App. 3d 183. The first type is defamation, in which a statement, if made at all, and if published (meaning you tell someone who should not know) and if maligning the person's qualifications to do their professional job, is actionable without a showing that the defamed person was injured in any way other than the allegation of professional incompetence. The defamation is made "by the very words spoken" regardless of any context. *McCartney v. Oblates of St. Francis DeSales* (1992) 80 Ohio App. 3d 345 at 353. The only defense to defamation *per se* is truth.

Brigitte Kanjuka, RN, was a nurse working for MetroHealth Cancer Care Center who, in 1997, was promoted to practice care coordinator, whereby she supervised and scheduled staff nurses, and performed clinical duties when needed. *Kanjuka, infra*. The nurse's supervisor changed from Dr. Carter to an operations manager (of unstated professional degree) as the cancer care center grew. All of the clinical staff liked Kanjuka (physicians and nurses alike) as did the patients; but Haas, the manager, felt that Kanjuka was not doing a good job, and instituted a performance improvement plan in July, 1999; then publicly berated Kanjuka in August, 1999; after which Kanjuka reported the perceived abuse. Upon the nurse's report of the manager's alleged abusiveness, the nurse was transferred to another site.

Clinical staff were upset about Kanjuka being "forced out" as they saw it; and on August 27th, 1999, Dr. Carter and the manager spoke with eleven

physicians, and, according to one or more of them, alleged that Kanjuka was depressed or otherwise mentally ill. In a similar meeting, Dr. Carter met with thirteen to fifteen nurses and other nonphysician personnel, and told them that Kanjuka had resigned, and that she was very sad and depressed.

After the meeting on the 30th, two staffers whom Kanjuka did not know well and with whom she rarely spoke, approached her and consoled her on her "condition" and praised her for being so brave.

Kanjuka sued both Dr. Carter and MetroHealth; settled with Carter, and pursued the claim against MetroHealth. The court ruled that slander *per se* was not proved because there was evidence that the plaintiff was depressed (medical records from the therapist).

On the other hand, there is the second delicious flavor of defamation, in this case, slander *per quod*. In this one, if one proved actual malice or recklessness as to the truth, and that the plaintiff has been damaged by the utterance, (so called "false light" defamation) then the defamation is actionable. In fact (at p. 194) the court found that Kanjuka had met her burden of proving actual malice, they therefore reversed the trial court, which had thrown Kanjuka's winning verdict for \$122,000, based on slander *per quod*, out of court. That means that Kanjuka won on slander *per quod*.

So what does all this mean for doctors? Well, I want you to put yourself in Dr. Carter's shoes, as I imagine them: popular nurse, schedules and yet sometimes allows staffing shortages to occur, does not do write ups on other nurses on time. Meanwhile, professional manager wants NO OVERTIME and wants a tougher, more "bottom line" person in Kanjuka's place, to make more money. You, Dr. Carter, have a good job and want to keep it, because you make more money administrating than doctoring. Maybe you feel conflicted about Kanjuka, but you agree she costs too much and has to go. So you hold the meetings, and you say things which are privileged (the things you found out, the conclusions you made, when you were evaluating Kanjuka). This could happen to you, so pay attention.

Now, put yourself in Kanjuka's shoes, as I imagine them. You believe that patients need the best care, and you order some extra tests; you go the extra mile. Also, you believe that staff must be happy to do a good job, so you are pretty easy on them when they need time off; when you can, you take up the slack, otherwise you use overtime. You have a happy and motivated staff, therefore, and are providing excellent care, and your center is growing, in part because of the excellent care and happy staff. Your manager tells you to stop doing so much (because it costs money). You remind the manager that you must spend money to make money. They fire you. This could happen to you, so pay attention.

VII. Negligent Torts

Negligence means making a mistake that harms someone. In this type of tort, you need not have had a malevolent intent, but only have had a duty to act in a certain way, to have fallen below that duty, and by that sub-par performance to have proximately caused someone to be injured.

Proximate cause is a can of worms, and one of the most famous early cases about it says that, when fireworks went off accidentally at a railroad stop, causing a scale to tip over on a lady (named Mrs. Palsgraff) and hurting her thereby, the explosion did proximately cause the injury.

Proximate cause is highly fact specific, and that is what makes tort law so interesting. We shall not discuss it here, except to say that in Ohio, it means that *but for* the negligence of the defendant, the plaintiff would not have been injured.

We will concern ourselves here with five types of negligence actions: negligent credentialing, negligent release of privileged information, medical negligence (medical malpractice), negligent failure to obtain informed consent, and negligent design, specifically of a drug.

A) Negligent Credentialing

The leading case in Ohio on negligent credentialing is *Albain v. Flower Hospital* (1990) 50 Ohio St. 3d 251. In that case, Sharon Albain, a seventeen year old eight-months pregnant woman was hemorrhaging vaginally; her Family physician, Dr. Crayne, turned over her care to Flower Hospital, where the resident on call examined the patient and called the attending Dr. Abbo, who did not show up until 830 PM, the initial call having been at 2:30 PM. The baby was born with hypoxic encephalopathy, and the mother sued the hospital a) as if Dr. Abbo were its employee (which plea was denied on appeal), b) as if the nurse employees of the hospital were negligent (which claim was allowed on appeal) and c) as if the hospital were negligent in credentialing Dr Abbo (which claim was allowed, without comment on the merits).

An agent (like a hospital) may be liable for the negligence of an independent contractor in three situations:

1) Negligent selection of an independent contractor: in medicine, this usually means negligent credentialing.

2) In the case of non-delegable duties: for instance, a town would be liable for the negligence of an independent contractor in fixing its streets, because it is the statutory duty of the town to fix the streets..

3) In agency by estoppel: for doctors, this would mean that any reasonable person would suppose that the doctor was an employee of the hospital, especially if the hospital held itself out as providing the type of services

which the doctor provided. Emergency room and radiology physicians often are treated as employees of a hospital in agency by estoppel, where the hospital holds itself out as providing such and such community care.

However, a hospital also may be negligent in credentialing a doctor for its staff. The elements of this cause of action are:

- a) Hospital negligently failed to scrutinize the qualifications of the staff physician in question
- b) But for such negligence the physician would not have been credentialed at the hospital
- c) Had the physician not been credentialed at the hospital, the plaintiff would not have been injured. *Albain*, at 258.

In another case, *Browning v. Burt* (1993) 66 Ohio St. 3d 544, a surgeon performed a bizarre surgery on women with vaginal or bladder prolapse, which he called "love surgery", which deformed and maimed the vaginas of many who had it. The hospital made people sign a special informed consent, saying that Drs. Burt and Blue were performing non-mainstream surgeries. This was initially a negligent credentialing case against a hospital in Cincinnati. It is worth noting that the defendant doctor had fled the jurisdiction, was being sued by many other people, and probably would have no money to pay a judgment, so only the hospital was left, to pay the judgment.

It is also important to remember that negligent credentialing is not a medical malpractice claim, so the ordinary negligence statute of limitations of 2 years applies, giving the plaintiff more time in which to sue. Note however, that the *tolls* usually do not apply in ordinary negligence.

It is also important to remember that, although doctors who serve on credentialing committees are not liable to those they scrutinize for the things they say, and such things which they say are not discoverable in general; that nevertheless, in a negligent credentialing case, such records are discoverable. This is a way, in a dual malpractice-credentialing case, to get otherwise privileged information. *Trangle v. Rojas* (2002) 150 Ohio App. 3d 549. *Wilson v. Barnesville Hospital* (2002) 151 Ohio App. 3d 55.

B) Negligent Release of Privileged Information

The leading case in Ohio for negligent release of privileged medical information is *Biddle v. Warren General Hospital* (1999) 86 Ohio St. 3d 395. In this case, a law firm which worked for a hospital asked the hospital to send all of its patients' records to the firm, where such records were screened for possible eligibility for social security disability. Those deemed eligible were contacted by the law firm, and became clients of the law firm, as they tried to get disability status. Although the patients had never consented to that use of their

information, many of them accepted the offer, and many of them apparently thought the law firm was working for the hospital in this matter, too. The case broke when a disgruntled secretary stole the records and released them to a local Youngstown TV station. The court "found" that in Ohio a separate tort exists for the unauthorized, unprivileged disclosure of nonpublic medical information. The disclosure which was complained of in this case was of the patient records to the law firm. The dissent was concerned, because a lawyer and its client are generally regarded as one entity, and the general release signed by the patients would cover release to the hospital's attorney in the ordinary course of business. In fact, the purpose of the move to obtain disability status was to get Medicare so that the hospital could get paid.

Under this Ohio cause of action, much larger awards would be obtainable than under an action under the Federal HIPAA act. But it may be, that the HIPAA act "pre-empts" all such state actions (makes them illegal, because you can only sue under HIPAA). We shall see as time goes on whether this tort survives HIPAA in Ohio.

The elements of negligent unprivileged and unauthorized release of nonpublic medical information are: 1) defendant knew, or reasonably should have known, of the existence of a doctor-patient relationship; 2) defendant intended to induce the physician to disclose such information; and 3) the defendant could not reasonably have believed that the doctor could disclose such information without breaching confidentiality. *Biddle* at 407-408.

It is permitted (privileged) to give specific medical information about someone even without consent in a few specific circumstances: if one suspects child or elder abuse (may call child or elder protective services, not local newspaper); or if a patient makes a credible and specific threat against a specified victim (so called "Tarassof" warning) ORC 5122.31.

One should remember that there may be a law against release of medical information, such as HIPAA or as in the *Tatta v. the State of New York* case. In that case, the disclosure of a patient's HIV status to his children was illegal and warranted a fine, but the evidence did not support any actionable emotional injuries.

C) Medical Negligence leading to Personal Injury

The leading case in medical malpractice in Ohio is *Bruni v. Tatsumi* (1976) 46 Ohio St. 2d 127. In that case, Mrs. Brunni had a red and swollen, and painful eye; was admitted to the Aultman General Hospital, where Dr. Tatsumi, a neurosurgeon, diagnosed carotid artery cavernous sinus fistula. Dr. Tatsumi operated the fistula using a Selverstone clamp on the right carotid artery (which one: internal or external, or common?) which was held to be the cause of a subsequent stroke, which stroke was alleged to be caused by the use of the

clamp and which stroke was alleged to have caused the brain injury complained of.

How many of you out there know what a Selverstone clamp is? Medical malpractice lawyers love special and arcane names for procedures and instruments and tests.

“Under Ohio law, as it has developed, in order to establish medical malpractice, it must be shown by a preponderance of the evidence that the injury complained of was caused by the doing of some particular thing or things that a physician or surgeon of ordinary skill, care, and diligence would not have done under like or similar conditions and circumstances, and that the injury complained of was the direct result of such doing or failing to do some one or more of such particular things.” *Bruni* at 131.

The *Bruni* case is also important because it held Tatsumi to the standard of care applicable to neurosurgeons in any large city, thereby abolishing the locality rule in Ohio. Under the old locality rule, a doctor was held to the standard of care of doctors practicing in a similar locale (whereby country doctors would not be judged by city doctors’ standards). New York still adheres to the locality rule for physicians, but not for lawyers in legal malpractice.

Finally, *Bruni* made clear that in a medical malpractice case, expert testimony is almost always required to prove a) the standard of care; b) that the physician in question negligently departed from it; and c) that such departure proximately caused the injury. Ohio has a special evidence rule, Ohio Rules of Evidence 601(D), for a) and b) above; such that only a clinically active physician can testify as to the standard of care and the deviation therefrom; but that causation may be proved by non-clinical experts (such as pharmacologists, or physiologists). *McCrary v. State* (1981) 67 Ohio St 2d 99; *Wise v. Doctors’ Hospital North* (1982) 7 Ohio App. 3d 331; *Wheeler v. Wise* (1999) 133 Ohio App. 3d 564; *Thomas v. Lude* (1990) 67 Ohio App. 3d 832; *Steele v. Buxton* (1994) 93 Ohio App. 3d 717; *Sarnovsky v. Snyder, Evan, and Anderson, Inc.* (1987) 38 Ohio App. 3d 33; and *Crosswhite v. Desai* (1989) 64 Ohio App. 3d 170.

Rarely, the standard of care may be so obvious, that an expert is not needed to prove breach [*Whiteleather v. Yosowitz* (1983) 10 Ohio App. 3d 272] but I have found no actual case of such a breach.

A defense to medical malpractice is the **professional judgment** rule. Under that rule, where a doctor may reasonably choose between two equally effective alternative treatments, she cannot be held in hindsight as negligent for choosing the one, and not the other. The most interesting case elaborating that rule, and construing it most favorably for physicians in Ohio, is *Littleton v. Good*

Samaritan Hospital and Health Center (1988) 39 Ohio St. 3d 86. In that case, a mother became depressed and infanticidal towards her newborn; she was hospitalized twice in rapid succession, and upon release the second time; she killed her 2½- month old daughter with an overdose of aspirin. The court held that, since the physician had considered dangerousness and in good faith come up with a treatment plan involving release, no liability could obtain in the specific instance of a voluntary patient who, although having been violent towards another in the past, was evaluated and, in view of competing interests of the patient and various appropriate treatment courses, was deemed safe to return home under certain conditions. This case is encrusted with numerous words of limitation, but if generally construed makes a subjective good faith rule the rule of the professional judgment defense in Ohio. *Littleton* appears still to be good law. *Davis v. Liebson* 154 Ohio App. 3d 333, 2003-Ohio-4965.

Sometimes, professional judgment defense is pleaded, but there is just no way, even in a subjective standard state like Ohio, that it is valid. Dr. De Silva gave over one hundred fifty sodium pentothal interviews to a patient (at \$75 to \$100 each) in a PTSD case secondary to childhood sexual abuse. He also had the patient unbutton her clothes and masturbate in front of him. The professional judgment rule did not apply in that case. *Joyce-Couch v. DeSilva* (1991) 77 Ohio App. 3d 278.

Another defense against a medical malpractice claim is that there is no doctor-patient relationship. *Garafolo v. State of New York* 17 App. Div 3d 1109 [A] (2005). In that case a patient claimed injury from being made to wait for an appointment with a clinic. The clinic, however, when it made a non-emergency appointment for patient, did not create a doctor-patient relationship by that act.

Of course, failure to bring the action timely is an absolute bar to the action, which will be discussed more in detail next year. *Fragosa v. Haider* 17 App.Div. 3d 526 [A] (2005). The *Fragosa* case is interesting because it claims injury because of sexual assault by the doctor. Were it not time-barred, it is not clear how sexual assault could be medical malpractice, being both intentional and not in the course of medical treatment. *DiPietro v. Lighthouse Ministries* 159 Ohio App. 3d 766 (2005).

Damages for medical malpractice may be reduced by the loss of chance doctrine. This means that, where a patient was very sick and might die anyway, you are liable for your mistakes, but the value of the mistake is reduced to that chance to live that the plaintiff might have had, had the mistake never been made. The primary current exemplar in Ohio of this doctrine is, in my opinion, *McMullen v. Ohio State University Hospital* (2000) 88 Ohio St. 3d 332, construing and amending *Cooper v. Sisters of Charity of Cincinnati* (1971) 270 Ohio St. 2d 242 and *Roberts v. Ohio Permanente Medical Group Inc.*(1996) 76 Ohio St. 3d 483. See also *Taylor v. C. Lawrence Decker, MD, Inc.* (1986) 33 Ohio App. 3d 118.

The plaintiff in a medical malpractice suit often seeks to implicate others, especially the hospital, in the suit as a defendant, because hospitals have more money than most doctors. In *Satterfield v. St. Elizabeth Health Center* 159 Ohio App. 3d 616 (2005), the anesthesia caught fire during an operation. The hospital actually cross-claimed (sued back) the doctors, trying to get indemnification from them, and this was held improper under the circumstances.

Sometimes the plaintiff has not sued the doctor in time, and is time barred by the statute of limitations. In such cases, the plaintiff may try to sue the hospital under a general negligence theory; but of course a hospital cannot practice medicine so it cannot commit medical malpractice, so rather abstruse theories are often relied on, usually either negligent credentialing or agency by estoppel. This latter is where the patient claims, "I thought the doctor was the employee of the hospital; so since I reasonably thought that, I may sue the hospital as if it were true". *Comer, Adm Estate of Clark*, (2005) 106 Ohio St. 3d 185.

There is no cause of action in Ohio for **wrongful life** (wrongfully allowing a healthy baby to come to term and be born alive)[*Johnston v. University Hospitals of Cleveland* (1989) 44 Ohio St. 3d 49] but there may be an action for negligence and wrongful life where a baby is born deformed and the parents would have aborted the child had they known in time [*Flanagan v. Williams* (1993) 87 Ohio App. 3d 768]. There is no cause of action in Ohio for **wrongful living** (unauthorized or wrongful application of life-saving maneuvers). *Anderson v. St. Francis--St. George Hospital, Inc.*(1996) 77 Ohio St. 3d 82., overruling *Leach v. Shapiro* (1984) 13 Ohio App. 3d 393. There is a cause of action for **wrongful birth** (or wrongful pregnancy) where a sterilization procedure fails because of negligence. *Johnston v. University Hospitals of Cleveland* (1989) 44 Ohio St. 3d 49. In *Johnston*, the plaintiff sued the University Hospitals for performing a tubal ligation negligently such that she became pregnant. A normal healthy baby was born, but \$300,000 damages were requested (to pay for raising the child). The court held that limited damages (of \$12,500) were appropriate, and that the mother was not required to limit her damages by an abortion. If a prospective parent is not apprised of a birth defect through negligence of the physician, but there is no damage flowing from that negligence except the **birth of a child with a birth defect**, a case in medical malpractice does not lie. *Hester v. Dwivedi* (2000) 89 Ohio St. 3d 575. The *Hester* case seems to overrule *Flanagan*.

In New York, there is an added complexity. A child who is stillborn through medical negligence has no cause of action under the New York wrongful death statute, but its mother does for emotional injury. But a child born alive because of medical negligence has a cause of action for its own injuries (but not for its being born); but the mother does not have a derivative claim of her own. *Sheperd-Mobley v. King* 4 N.Y.3d 627 (2005)

As always, remember that actions outside the scope of a professionals' duty cannot be professional negligence. They could be an assault, but not professional negligence. An example is *DiPietro*, wherein a minister was alleged to have sexually importuned a parishioner. This activity was deemed not to be professional negligence, as it was outside the accepted scope of professional activities for a minister.

D) Negligent Failure to Obtain Informed Consent

The leading case in Ohio for the negligent failure to obtain informed consent is *Nickell v. Gonzalez* (1985) 17 Ohio St. 3d 136, citing and construing *Wells v. Van Nort* (1919) 100 Ohio St. 101 and *Leach v. Shapiro* (1984) 13 Ohio App. 3d 393.

Another excellent case in failure to obtain informed consent, with a battery cause of action sustained on appeal, is *Guth v. Huron Road Hospital* (1987) 43 Ohio App. 3d 83. In that case, a man was transferred from one hospital to another, where he was given medicines including psychiatric medicines, despite his repeated demands not to be given these medicines, and despite the demands of his wife that such medicines not be given. This suit also proceeded on a battery claim, and the court held that no expert witness was needed to prove battery (thereby making the case more certain of result, see the professional judgment rule in *Littleton*).

A very current case, being decided last week, is *Davis v. Liebson* 154 Ohio App. 3d 333, 2003-Ohio-4965. This case deals with three issues: professional judgment rule, punitive damages in a failure of informed consent case; and failure of informed consent. The patient went to a podiatrist, to have her feet evaluated. The podiatrist felt she had hammer toes and needed surgery. Her employer (an ophthalmologist) thought that didn't sound right, and recommended the plaintiff get a second opinion. The second opinion said no surgery was indicated. Meanwhile, however, the first podiatrist had obtained blood work preparatory to surgery, including a syphilis and HIV test, both of which, incidentally, turned out to be negative.

The patient sued the first podiatrist for failure to obtain informed consent (for the HIV and syphilis test); and as you know, HIV is governed by a specific statute RC 3701.242. The court held that, assuming that consent was not obtained, nevertheless (even though this would thereby be a technical battery) under the operative statute, only compensatory damages and equitable relief could be obtained. (Give the blood back?).

E) Negligent design

Negligent design is a complex part of something called products liability law, and the case we are going to use to understand it is not a leading case, but

rather, a very recent and evolving case, *Howland v. Purdue Pharma, LP* 2003 -- Ohio – 3699.

Products liability law is big business in the legal world, but it all evolved out of cases having to do with the escape of abnormally dangerous forces: flooding by artificial lakes, depredations by ferocious wild animals kept captive, or explosions. The law of products liability has evolved two distinct branches of case law: strict liability if you do something abnormally dangerous (not dealt with in this section); and liability to all foreseeable users if you design something negligently which will be placed into commerce for general use.

Negligent design is used when a car, or a drug, or a medical prosthesis, or any manufactured item, is deemed to have harmed others either 1) because it wasn't designed right or 2) because the instructions were no good.

"Instructions" cases in medicine mostly have to do with the package insert, which is regarded in that sense as part of the design. That is why the PDR mentions every side effect known to man: the drug companies (who supply the information to make up the PDR) want to warn of every major risk, no matter how unlikely; and of every more common risk, even if minor.

An important defense to negligent design liability can be the learned intermediary rule. This means that, where a drug company makes a drug, but it can only be dispensed by prescription, and where physicians have been warned about the risk of use of the drug, then the drug company is not liable if something goes wrong. *Tracey v. Merrell Dow Pharmaceuticals* (1991) 58 Ohio St. 3d 147. Do you think that television advertising for prescription drugs might break down the learned intermediary rule?

A good negligent design case, which is just beginning in Ohio, is *Howland v. Purdue Pharma, LP* 2003 -- Ohio – 3699. In this case, a bunch of people, of whom Howland was a very average example, said that they became addicted to Oxycontin, and would not have if Oxycontin had also contained Naloxone to prevent abuse by crushing the pill, and if Purdue had told doctors of its dangers.

To understand this case you need a little basic pharmacology. Oxycontin is nothing but oxycodone, an excellent opioid analgesic, in a mechanical time-release formulation to make it last long enough to be used in twice daily dosing. Naloxone is not absorbed from the GI tract (except the buccal mucosae) and would not decrease the analgesic property of the oxycodone, if the latter were taken orally. But if one takes the oxycodone intravenously, or even otherwise parenterally, the naloxone would block the action of the oxycodone and render it both non-abusable and harmless in overdose. There is a drug with such a formulation, called buprenorphine, which has been licensed to be used for office-based narcotic dependence treatment.

In addition, the class in Howland felt that the drug company, through some of its Doctor-lecturers, had vigorously and essentially negligently over-promoted the drug, such that it was over prescribed, and such that many people became addicted to it, regardless of whether they crushed it up and snorted or injected it.

To understand this case you also need a little basic law. A class action is an action where there are many defendants (perhaps millions) who all have a basically similar legal complaint against a single defendant, or a group of defendants who are similarly situated. Furthermore, since to have millions of law suits to litigate this issue over and over is wasteful and may evolve inconsistent results, a form of action called the class action was invented in the middle of the twentieth century to permit all the aggrieved plaintiffs to band together and sue the usually large defendant. But you can't just declare yourself and all your friends a class; a judge has to declare that you are a class.

That is where the Howland case picks up.

In the Howland case, the drug company, and a doctor who was named as a co-defendant, (because he had promoted Oxycontin in those drug-company sponsored luncheon meetings that we all know and love) said that the class suing them was not a class. The class was defined as:

“(a) All persons in the state of Ohio that were prescribed Oxycontin and thereafter suffered , and/or continue to suffer, the effects of the drug such as the risk of addiction, actual addiction, and the consequences of addiction;”

“(b) All persons in the state of Ohio that were prescribed Oxycontin and thereafter suffered , and/or continue to suffer the effects of the drug such as physical, mental, and/or emotional harm , death and/or loss of consortium as a result of the use of Oxycontin;

“(c) All persons in the state of Ohio that suffered, and/or continue to suffer, the effects of the drug such as physical, mental, and/or emotional harm, death and/or loss of consortium, as a result of the use and abuse of Oxycontin by others.” *Howland* at 5.

The court set out seven requirements for a class certification:

- 1) Identifiable class whose definition is unambiguous
- 2) Named representatives are members of class
- 3) Class so numerous that joinder of all members impracticable.
- 4) Questions of law or fact common to class
- 5) Claims of representative typical of class
- 6) Representatives must protect interests of whole class
- 7) *{One of three specific procedural requirements must be met}*

Howland at 7.

The long and the short of it is, the court threw out the doctor as a defendant; kept in Abbot Labs and Purdue Pharma; and told the plaintiffs to clean up the complaint especially c) above so as to only include people who obtained Oxycontin legally.

This case will be interesting for you to watch as it winds its way through the courts of Ohio.

VIII. Expert Witnesses

There are two basic theories which govern the admission of expert testimony: **Frye** and **Daubert**. The **Frye** standard holds that an expert's subject of expertise must be generally accepted by a substantial number of scientists in his field. The **Daubert** standard holds that, to be admissible, an expert's testimony must be testable, with a known error rate and reliability; and springing out of generally recognized scientific principles.

A) Ohio is a *Daubert* State

In the pretest, I asked if a professor of garbage-ology could testify in a case. In New York, and more generally in "the old days" under the rule of *Frye v. United States* 54 App. D.C. 46, 293 F. 1013 (1923) such an expert would not be permissible unless his theories were endorsed by a substantial majority of scientists. Courts and lawyers hated that rule, and so, in the big class actions claiming that Bendectin caused birth defects (which were scientifically demonstrated not to be the case) a Federal court for the District of Columbia found a way to get some alternative scientists admitted as experts. These people used some doubtful meta-analytic techniques which tended to strengthen the (tenuous) connection of Bendectin with birth defects. This was the *Daubert* case [*Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 US 579 (1993)] which forever changed the face of scientific evidence in those states that accepted it (which New York has not).

The *Daubert* case postulated that the Federal Rules of Evidence had preempted the field of Federal evidence, and that the standard for expert testimony in the Federal Rules is, if testimony might be helpful to the trier of fact, let it in; and the jury can figure out if it is junk science or not. A lot of states had adopted the Federal Rules of Evidence, or some iteration thereof, as their own evidence rules, and so, over the next 5 years, adopted the *Daubert* standard for admission of expert testimony (see below).

The rule of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 US 579 (1993) was accepted into Ohio law by *Miller v. Bike Athletic Company* (1998) 80 Ohio St. 3d 607. In this case, a young man on a high school football team became paralyzed when he made a tackle, using a helmet supplied by the Bike Athletic Company. An expert was retained to test the helmet; and his test showed

that, in the helmet's status as supplied to the plaintiff (i.e., not properly inflated) it was the cause of his injury. The defendant said there was no such thing as a "drop the helmet off a building" test by a "no-good helmet-ologist". The court said yes there was.

Read the first lines of this case, and see if you think that the court wanted to find a way to compensate young Mr. Miller:

"On September 7, 1990, John Patrick Miller was seriously injured while playing football for St. John's Central Catholic High School in Bellaire, Ohio. Attempting to make a tackle, Miller collided head-on with another player who was running toward him at full speed. Miller sustained a comminuted fracture of the vertebral body of C5, with severe spinal cord injury, and was rendered quadriplegic."

The court will find a way to compensate this victim, whom it lovingly describes with extra detail. One knows this from the first sentence of the case.

The guidelines for expert testimony in Ohio as elaborated by the *Miller* court, are exactly the wording of Ohio Rule of Evidence 702:

"A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among laypersons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony; [*and*]

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result."

In this test, the court decides if the criteria are met: that is, the court becomes a junior science review board. This is the same Supreme court that so jealously guarded its expertise in the realm of law and legal procedure in *State ex rel. OATL v. Sheward* (1999) 86 Ohio St. 3d 451 as to overturn a complex and well-thought-out statute made by the Ohio legislature. So only the Supreme

Court is an expert on the constitution, but all of the little sub-courts of the state are experts on scientific methodology?

One rather interesting case from New York (which, remember, is a *Frye* state, not a *Daubert* state) held that an undercover policeman could appear as an expert witness in drug trafficking terminology and procedure, where such knowledge would be beyond the ken of the ordinary juror AND where such testimony would be helpful to the trier of fact. *People v. Brown* 743 NYS 2d 374 (2003). This is actually a hybrid ruling: part New York state common law (necessary) and part *Daubert* (helpful). Even smart judges get confused.

Another case showing these principles is *Sweeny v. Purcell Construction Corp.* In that case Sweeney sued Purcell for making her house in such a way that it was moldy; and that this mold gave her asthma. The causation issue was whether if the plaintiff claimed multiple chemical sensitivities as the etiology of her injuries, was this a generally accepted illness? IN fact, the plaintiff claimed asthma, and so the *Frye* issue in fact was moot. *Sweeny v. Purcell Construction Corp.* 20 App. Div. 3d 872 (2005)

B) Special Requirements for liability witnesses

As mentioned above, there is an exception to the *Daubert* standard in medical malpractice with respect to a witness who seeks to elucidate the standard of care, or the breach thereof, whereby he or she must be a clinical physician, spending at least 50% of his or her time in clinical medicine. Evidence R. 601 (D). *Steele v. Buxton* (1994) 93 Ohio App. 3d 717.

C) Causation witnesses

Even before *Daubert*, the issue of causation was held to be open to testimony by non-clinical physicians. In *McCrorry v. State* (1981) 67 Ohio St 2d 99 in which a research scientist, who spent only 15% of his time in clinical practice, but who was the world expert on Dilantin, was allowed to testify as to the unlikelihood that dilantin caused cerebellar damage in a given case. With the ruling in *Miller v. Bike Athletic*, adopting *Daubert*, I would imagine more and more creative approaches to causation will become common in Ohio medical malpractice cases.

D) *Res ipsa loquitur*

Res Ipsa Loquitur is Latin for “the thing speaks for itself” or, “the thing bespeaks itself.” In Ohio this is an evidence rule to prove negligence, and the court decides if it applies and if the jury may infer the existence of negligence from it. *Golec v. Fairview General Hospital* (2000) 139 Ohio App. 3d 788; *Martin v. St. Vincent Medical Center* (2001) 142 Ohio App. 3d 347. This is a way to prove that something is the fault of someone else’s negligence, when you really

cannot particularly prove that. The mother of all *Res Ipsa Loquitur* cases involved a fellow being injured by a barrel which rolled out of a warehouse attic, onto his head. No one ever proved how the barrel became airborne, but the general legal theory was: "Barrels don't oughta go out the window onto peoples' heads; therefore, whoever owned the building MUST have done something careless to let that happen."

The elements of *Res Ipsa Loquitur* in Ohio are:

1) The instrumentality causing the injury was, at the time of the injury or at the time of the creation of the condition causing the injury, under the exclusive control of the defendant; and

2) That the injury occurred under such circumstances that in the ordinary course of events, it would not have occurred if ordinary care had been observed.

Golec v. Fairview General Hospital (2000) 139 Ohio App. 3d 788 at 793.

In most states, you don't actually need expert testimony to prove *Res Ipsa Loquitur*, and since expert testimony can run you \$40,000 or \$50,000 in a medical malpractice action, it can be a really tempting theory. In Ohio, it appears, the invocation of *Res Ipsa Loquitur* does not relieve the plaintiff from the need to use expert testimony. *Golec* at 793 citing *Johnson v. Hammond* (1988) 47 Ohio App. 3d 125. Furthermore, an untoward event for which no cause is shown does not necessarily present a *res ipsa loquitur* or if it does, the court is not required to infer negligence. *Schmidt v. University of Cincinnati Medical Center* (1997) 117 Ohio App. 3d 427.

I believe that an interesting current case in Ohio on *Res Ipsa Loquitur* in medical negligence is *Martin v. St. Vincent Medical Center* (2001) 142 Ohio App. 3d 347. In that case, a thoracic surgeon performed a CABG on a man who subsequently was noted to have a perforation in his trachea, which unfortunately suppurated, necrosed, and was the cause of his death. Adequate evidence was put forth that a CABG never involves use of the scalpel near that part of the trachea; that (for various factual reasons) the anesthesiologist and assistant was not the cause of the puncture; and that "We cannot determine what caused the injury to [the]... trachea, and we believe negligence occurred." *Martin* at 363. The court said that the *res ipsa loquitur* theory probably was not operative in this case, but even if it could have been, the defendant did not preserve a certain objection such that the court could review the lower courts actions. Furthermore, the court stated that the lower court did not abuse its discretion with respect to certain instructions which seemed to negate the *res ipsa loquitur* instruction.

This is a complicated case, but if I read it right, it reinforces the following points about *res ipsa loquitur*:

a) You must produce expert testimony

b) Acceptance of a *res ipsa loquitur* ruling is in the sound discretion of the trial court.

IX: What is Really Going on Here?

When I was in law school, there was a "new" jurisprudential movement called an economic analysis of law. A law professor from the University of Chicago, Posner, was the chief proponent of this school. This school of thought was an offshoot of the larger jurisprudential school, active since the 1920's in the US, called "legal realism." I will not elaborate legal realism further in this section, but the economic analysis of law stated that, when cases seem to come down in a confusing or counter-intuitive way, there is almost certainly an economic pressure causing the "deformation" in the logic of the law.

I happen to adhere to that philosophy, and so therefore it is only fair to warn you that what follows, while supported by various literature which I shall not cite, is nevertheless to some extent pure opinion, rank speculation, and impeachable thereby.

I postulate to you, that medicine is a gigantic industry, and that the idea that physicians are "in control" of it is a fantasy which, for some reason, we as a society wish to foster. On the other hand, as a giant industry, we feel the need to have recourse when it "does us wrong".

Yet, because we foster the idea that doctors are personally in charge of medicine, we do not sue the giant industrial or economic powers that control medicine, but persist in suing the doctor.

But, to shore up our illusion, we demand that doctors carry high liability policies, and this accelerates the conversion of medical practitioners into employees of a giant medical system.

At some point, the illusion and the reality will have to be harmonized.

X: Post-Lecture Questions: True or False?

- 1) Tort law has a lot of rules, and there are a lot of special rules to protect doctors.
- 2) The one year statute of limitations for medical malpractice is one of the most powerful "tort reforms" in the country.
- 3) Negligent credentialing is a tort in negligence, not medical malpractice.
- 4) Ohio is a "Daubert" state.
- 5) If you depart from the standard of care and are negligent, but cause no harm, you are liable in medical malpractice.

- 6) Failure to obtain informed consent can lead to liability under two different tort theories.

XI: Cases and Statutes Cited

Cases are cited only with the US or State citation. This is because this booklet is for use within Ohio, but also because I do my own typing. Full cites are available, upon request, if you ask nicely. Cases may have other import in addition to the use made of the case in this report. Unlike medical papers, which try to make one scientific point, appellate cases may have several points of law in them. Many of these cases are appellate cases, litigating an abstruse procedural issue.

."US" means a United States Supreme Court case; "Ohio St. (1-3)" means a Supreme Court of Ohio case; "Ohio App.1-3" means an appellate case (first level of review in most cases). The New York cases have a different semiology, which it is not necessary for you to know.

The date of the case is in parentheses. If the case is older than ten years, it is probably a "landmark" case in New York, Ohio, or the US, signaling a major turning point in some area of the law.

Some of the older cases are not good law anymore, having been overruled by the very active Supreme Court of Ohio; but they are cited to show an evolution in the law, or for some point of law still valid. An example is Roberts v. Ohio Permanente, which overruled Cooper v. Sisters of Charity, but was itself partly overruled by McMullen v. OSU, in the fast evolving area of "loss of chance."

Statutes:

ORC 9.86 "Civil Immunity of Officers and employees; exceptions"
ORC 109.36 "Definitions"
ORC 2151.421
ORC 2305.011 *Legislative History: Overruled. "Certificate of Merit"*
ORC 2305.113 "Limitation of actions for medical malpractice; statute of repose"
ORC 2305.15 "Tolling of limitation during defendant's absence, concealment, or imprisonment."
ORC 2305.16,"Tolling of limitations due to minority or unsound mind."
ORC 2305.51, "Immunity of mental health professional or organization as to violent behavior by client or patient."
ORC 2743.02 "State waives immunity from liability."
ORC 2743.16 "Statute of limitations; claimant must seek to have claim compromised or satisfied by state's insurance."
ORC 2921.22 "Failure to report a crime, or knowledge of a death or burn injury."
ORC 3701.24 "Report as to contagious or infectious disease; AIDS and HIV."
ORC 3701.242 }
ORC 3701.244 } HIV testing statutes

ORC 3701.247 }
ORC 3701.25 "Occupational Diseases; report by physician to Department of Health."
ORC 3701.52 "Duty to report condition"
ORC 3707.99 "Penalties"
ORC 4123.71 "Time for report of physician."
ORC 5122.31 "Disclosure of Information" (in a mental health setting).
ORC 5122.32 "Confidentiality of quality assurance records; immunity."
Ohio Rules of Evidence 601(D)
Federal Rule of Evidence 702 and 703
NY CPLR Article 2 section 208.
"State of Ohio Living Will Declaration"

Cases:

Albain v. Flower Hospital (1990) 50 Ohio St. 3d 251
Allenius v. Thomas (1989) 42 Ohio St. 3d 131
Anderson v. St. Francis--St. George Hospital, Inc.(1996) 77 Ohio St. 3d 82
Berrios v. Our Lady of Mercy Medical Center 20 App. Div. 3d 361 (2005)
Biddle v. Warren General Hospital (1999) 86 Ohio St. 3d 395
Brennaman v. R.M.I. Co. (1994) 70 Ohio St. 3d 460
Browning v. Burt (1993) 66 Ohio St. 3d 544
Bruni v. Tatsumi (1976) 46 Ohio St. 2d 127
Clark v. Hawkes Hospital (1984) 9 Ohio St. 3d 182
Comer, Adm Estate of Clark, (2005) 106 Ohio St. 3d 185
Conley v. Shearer(1992) 64 Ohio St. 3d 284
Cooper v. Sisters of Charity of Cincinnati (1971) 270 Ohio St. 2d 242
Crosswhite v. Desai(1989) 64 Ohio App. 3d 170
Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 US 579 (1993)
Davis v. Immediate Medical Services (1997) 80 Ohio St. 3d 10
Davis v. Liebson 154 Ohio App. 3d 333, 2003-Ohio-4965
DiPietro v. Lighthouse Ministries 159 Ohio App. 3d 766 (2005)
Estates of Morgan v. Fairfield Family Counseling Ctr. (1997) 77 Ohio St. 3d 284
Flanagan v. Williams (1993) 87 Ohio App. 3d 768
Flowers v. Walker (1992) 63 Ohio St. 3d 546
Fragosa v. Haider 17 App.Div. 3d 526 [A] (2005)
Frye v. United States 54 App. D.C. 46, 293 F. 1013 (1923)
Frysinger v. Leach (1987) 32 Ohio St. 3d 38
Gaines v. Pre-term Cleveland, Inc. (1987) 33 Ohio St. 3d 54
Garafolo v. State of New York 17 App. Div 3d 1109 [A] (2005)
Gilbert v. Okawara 17 App. Div. 3d 1033 [A] (2005)
Golec v. Fairview General Hospital (2000) 139 Ohio App. 3d 788
Guth v. Huron Road Hospital (1987) 43 Ohio App. 3d 83
Hester v. Dwivedi (2000) 89 Ohio St. 3d 575
Hill v. Kokosky (1990) 186 Mich. App. 300.
Holeton v. Crouse Cartage Co. (2001) 92 Ohio St. 3d 115

Hopper v. University Hospital, Inc. (2000)
Howland v. Purdue Pharma, LP 2003 -- Ohio -- 3699
Jacobs v. Frank (1991) 60 Ohio St. 3d 111
James H. v. Department of Mental Health and Mental Retardation (1980) 1 Ohio App. 3d 60
Johns v. Horton (2002) 149 Ohio App. 3d 252
Johnston v. University Hospitals of Cleveland (1989) 44 Ohio St. 3d 49
Joyce-Couch v. DeSilva (1991) 77 Ohio App. 3d 278
Klema v. St. Elizabeths Hospital of Youngstown (1960) 170 Ohio St. 519
Kumho Tire Co. Ltd. v Carmichael __ US ____ (1999)
Kanjuka v. Metro Health Medical Center (2002) 151 Ohio App. 3d 183
Lacey v. Laird (1956) 166 Ohio St. 12
Leach v. Shapiro (1984) 13 Ohio App. 3d 393
Littleton v. Good Samaritan Hospital and Health Center (1988) 39 Ohio St. 3d 86
Lownsbury v. Van Buren (2002) 94 Ohio St. 3d 231
Linskey v. Bailey 8 Misc. 3d 107 (2005)
Martin v. St. Vincent Medical Center (2001) 142 Ohio App. 3d 347
Maxwell v. Cole (1984) 482 N.Y.S. 2d 1000
McCartney v. Oblates of St. Francis DeSales (1992) 80 Ohio App. 3d 345.
McCrary v. State (1981) 67 Ohio St 2d 99
McCully v. Good Samaritan Hospital (1998) 131 Ohio App. 3d 341
McGarry v. Horlacher (2002) 149 Ohio App. 3d 33
McKinney v. Schlatter (1997) 118 Ohio App. 3d 328
McMullen v. Ohio State University Hospital (2000) 88 Ohio St. 3d 332
Miller v. Bike Athletic Company (1998) 80 Ohio St. 3d 607
Miller v. Paulson (1994) 97 Ohio App. 3d 217
Nickell v. Gonzalez (1985) 17 Ohio St. 3d 136
Nicholls v. Villareal (1996) 113 Ohio App. 3d 343
Oliver v. Kaiser Community Health Foundation (1983) 5 Ohio St. 3d 111
People v. Brown 97 NY2d 500, 743 NYS2d 374 (2002)
Richards v. Broadview Heights Harborside (2002) 150 Ohio App. 3d 537
Roberts v. Ohio Permanente Medical Group Inc.(1996) 76 Ohio St. 3d 483
Sanders v. Mount Sinai Hospital (1985) 21 Ohio App. 3d 249
Sarnovsky v. Snyder, Evan, and Anderson, Inc. (1987) 38 Ohio App. 3d 33
Satterfield v. St. Elizabeth Health Center 159 Ohio App. 3d 616 (2005)
Schmidt v. University of Cincinnati Medical Center (1997) 117 Ohio App. 3d 427
Sheperd-Mobley v. King 4 N.Y.3d 627 (2005)
Sorrell v. Thevenir (1994) 69 Ohio St. 3d 415
State ex rel. Corn v. Russo (2001) 90 Ohio St. 3d 551
State ex rel. Franks v. Industrial Commission (2003) 99 Ohio St. 3d 35
State ex rel. OATL v. Sheward (1999) 86 Ohio St. 3d 451
State ex rel. Sanquily (1991) 60 Ohio St. 3d 78
Steele v. Buxton (1994) 93 Ohio App. 3d 717
Sweeny v. Purcell Construction Corp. 20 App. Div. 3d 872 (2005)
Tatta v. State of New York 20 App. Div. 3d 825 (2005)
Taylor v. C. Lawrence Decker, MD, Inc. (1986) 33 Ohio App. 3d 118

Thomas v. Lude (1990) 67 Ohio App. 3d 832
Tracey v. Merrell Dow Pharmaceuticals (1991) 58 Ohio St. 3d 147
Trangle v. Rojas (2002) 150 Ohio App. 3d 549
Tschantz v. Ferguson (1989) 49 Ohio App. 3d 9
Watley v. Ohio Department of Rehabilitation and Corrections (2003) 122 Ohio Misc. 2d 38
Wells v. Van Nort (1919) 100 Ohio St. 101
Wheeler v. Wise (1999) 133 Ohio App. 3d 564
Whiteleather v. Yosowitz (1983) 10 Ohio App. 3d 272
Wilson v. Barnesville Hospital (2002) 151 Ohio App. 3d 55
Wilson v. Kenton Surgical Group (2001) 141 Ohio App. 3d 702
Wise v. Doctors' Hospital North (1982) 7 Ohio App. 3d 331

Treatises

Connors, Patrick M. *Litigating a Medical Malpractice Action in New York* National Law Foundation, Montchanin, Delaware, (2003).
Hutter, Michael J. "Expert Testimony in New York Courts" National Law Foundation, Montchanin, Delaware, (2002)..
Kionka, E *Torts in a Nutshell 3d* West Group, St. Paul, MN (1999).