

Liability for EMS Providers

Ryan Stark, Esquire



We'll try to help you reduce the
stress brought on by legal
concerns . . .



...AND YOU THINK YOU HAVE STRESS..

Our goal is to help you deal with
your legal risks. . .



extreme sports



I'll Try to Keep This
Presentation
STIMULATING
BUT PAINLESS !



The Bottom Line on EMS Lawsuits

- *Successful* Malpractice Suits Against EMTs and Paramedics are Very Uncommon
 - Many suits dismissed, settled
- But, Incidents of Litigation are Increasing

Last Comprehensive Nationwide Study

Total of 76 cases over 5 years:

- Just over 40% of the cases were dismissed
- Five cases with plaintiffs' awards or settlements greater than \$1 million

Source: Prehosp Disaster Med. 1994 Oct-Dec;9(4):214-20; discussion 221.

The Major Liability Concerns

- Vehicle Accidents
- Bad Refusals and Consent
- Abandonment
- Improper Restraint

Other Areas

- Inadequate Spinal immobilization
- Failure of / inadequate equipment
- Getting lost or delayed response
- Poor Airway Management
- Dropping patients

Why So Few Successful Lawsuits?

- Immunity Statutes
- Public Perception of EMS Providers
- Monetary Issues

So, Why Should I Worry?

- Lawsuits that are *filed* are expensive
- Your job and reputation are on the line
- Public perception
- Lawyers are finding ways around immunity statutes
- ***Apathy*** leads to an increase in successful suits

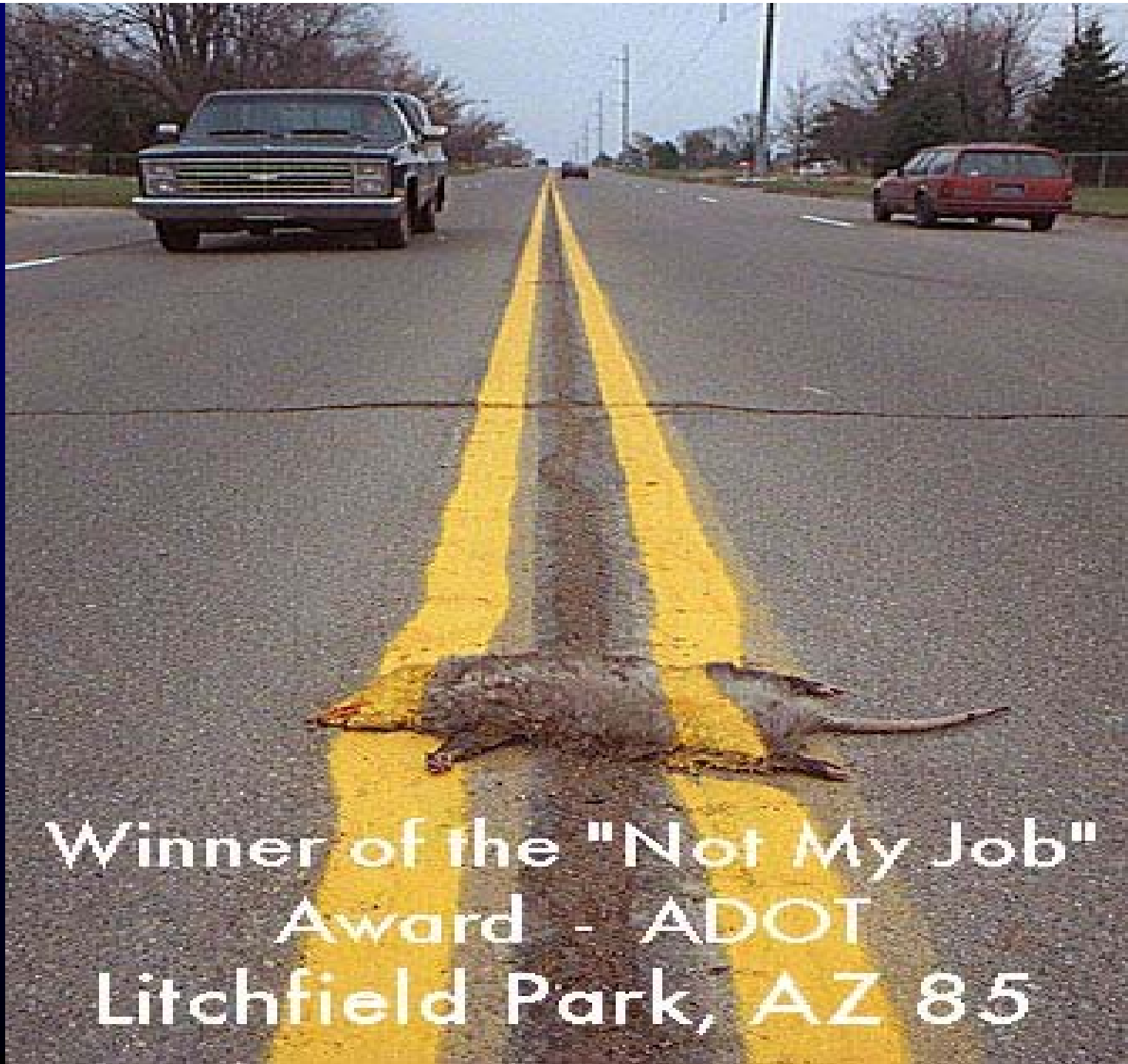
Key Issues

- Virtually 95% of EMS lawsuit “root cause” relates to BAD ATTITUDE!
- *Rudeness, laziness and not communicating effectively* are major contributors to dissatisfaction and lawsuits

Case Study

The Liability of Apathy?

**Can you spot
apathy in your
organization?**



Winner of the "Not My Job"
Award - ADOT
Litchfield Park, AZ 85

The runner up...



A Case of Apathy (2002)

- James Smith, 24 yrs old, went to his aunt's residence after a night of drinking and couldn't get into the house
- Sat down on a wall in front of the house and fell asleep and fell from the wall and dropped 8 feet to the sidewalk below

A Case of Apathy

- Paramedics DiFrancesca and Morfitt responded to the 911 call
- Medics approached pt and asked him his name and what was wrong
- Pt responded that he hurt his head and said several times that he hurt his neck

A Case of Apathy

- One medic said: "Get up. Are you drunk?" and "Get up or we're going to call the police."
- They "snatched him up and threw each arm over their shoulders and dragged him to the stretcher"

Alleged Facts

- Pt did not move his arms or legs after this point
- In pt's own words, his neck "snapped back" and "it was like somebody hit a light switch and I just went completely numb" below the neck

Medical Expert Testimony

- *“The paramedics should have immobilized his cervical spine prior to moving him. [What they did was] unconscionable. Mr. Smith’s quadriplegia is directly attributable to the actions of the paramedics.”*

Case Outcome

- Paramedics made a motion to dismiss the case on the basis of “qualified immunity”
- Trial court denied the motion
- Appeals court affirmed the denial of the motion
- Case settled

How Are We Found Liable under the Legal System?

The Legal System

- Regulation of EMS and Paramedic Practice
 - Local
 - State
 - Federal

The Legal System

- Types of Law
 - Administrative
 - Civil
 - Criminal

The Legal System

- Tort Law – Civil
 - Unintentional torts
 - Malpractice actions
 - Other Negligence actions
 - Intentional torts
 - False imprisonment
 - Assault/Battery, etc.

NEGLIGENCE

- “The failure to act as a reasonably prudent EMT or paramedic would act under similar circumstances.”
- Professional negligence = malpractice

NEGLIGENCE

- Elements
 - Duty
 - Breach
 - Damages
 - Proximate Causation

DUTY TO ACT

- When does duty arise?
 - Legal duty vs. moral duty
- Hypotheticals – Duty?
 - Driving by scene of accident?
 - If you stop and render aid?
 - On the way to work?

BREACH OF DUTY

- Provider failed to uphold standard of care
- Standard of care
 - Scope of practice
 - National standard curriculum
 - Local or regional protocols or standing orders
 - Expert witnesses

BREACH OF DUTY

- Malfeasance
 - Performing a wrongful act
- Misfeasance
 - Performing a legal act in a harmful manner
- Non-feasance
 - Failing to perform a required act or duty

DAMAGES

- Compensable losses
 - Medical expenses
 - Pain and suffering
 - Lost wages
 - Funeral expenses
 - Loss of consortium
 - Punitive damages

PROXIMATE CAUSATION

- Factual Causation (but for)
 - But for your failure to stabilize, patient would not be a quadriplegic
- Legal Causation
(foreseeable consequences)
 - You failed to place the barricade in place that the patient knocked over when he fell

Who ultimately decides if
you were negligent?



Immunity Laws Generally

- Does not stop filing of lawsuit - makes it more difficult party to recover
- Raises the threshold the plaintiff must meet to prove the elements of negligence

Immunity Laws Generally

- Generally plaintiff must prove EMT's conduct was more extreme
 - Ex: gross/intentional conduct, willful/wanton; reckless disregard or
- State laws differ greatly!
 - Cover different types of people and different acts

Potential Immunity Layers for EMS

- Good Samaritan
- EMS Act
- Government
- Others

Immunity Laws Generally

- How does it work?
 1. EMS provider is sued
 2. EMS counsel will review the complaint to raise any immunity statutes and file a motion to dismiss
 3. If case proceeds to trial, plaintiff will then have to prove that the EMT or Paramedic acted egregiously

Good Samaritan Immunity

- Most States
- Both Medical and Nonmedical Good Samaritan Immunity
- *May* cover EMS
- Generally:
 - Care at scene of an emergency
 - Individuals not liable except for gross negligence

EMS Act Immunity

- Most States
- EMS providers not liable for injuries caused while acting in good faith within the scope of their employment...unless they were grossly negligent
- Watch for exceptions:
 - Driving an Ambulance
 - Coverage for only volunteers

Local Government Immunity

- Statutes will vary
- Sometimes absolute immunity from suit
- Sometimes protection if acting in scope of employment and in good faith

What About My Organization's Liability?

- Vicarious Liability
 - Acts within scope of employment
 - When organization directed you to do it
- Direct Liability
 - Failure to have protocols
 - Failure to adequately supervise

The Big EMS Liability Risks

© Copyright 2006 Page, Wolfberg & Wirth, LLC



Number One: Ambulance Accidents

- Tens of thousands every year
- Overuse of lights and sirens
- Not covered under many immunity statutes
- Held to standard of driver in an emergency situation

Five die in fiery ambulance crash

July 21, 2007

ANTWERP An accident Friday evening which killed five area residents three of whom were Antwerp EMS workers and injured two others when an Antwerp ambulance, operating with lights and sirens, hit a tractor-trailer rig in Paulding County remains under investigation.



In 2005, fire department emergency vehicles were involved in an estimated 15,885 collisions while responding to or returning from incidents. These collisions resulted in 1,120 firefighter injuries!

Source: firefighterseccalls.com

Fire engine responding to call hits, kills pedestrian in Fort Worth

(2/20/07 - FORT WORTH, TX) - A fire engine rushing to a reported blaze hit and killed a man as he walked across a street, police said.

the truck's lights were flashing and siren sounding about 7:45 p.m. Monday as it responded to a report of a structure fire that turned out to be a trash bin fire, said Lt. Kent Worley, a Fire Department spokesman. A witness said the man, whose name was not released, was walking across West Rosedale Street and stopped in the middle before walking in front of the truck before the driver could react, Worley said.

Because of construction, the westbound lanes of Rosedale are closed, and two-way traffic is channeled into the eastbound lanes.

Fairfield firefighter found guilty of vehicular manslaughter

Judge suspends 90-day jail sentence, issues \$750

Tuesday, March 06, 2007

FAIRFIELD — A Fairfield firefighter was found guilty of vehicular manslaughter Tuesday in the August death of a 73-year-old woman. Matt Schumann, 24, was sentenced to 90 days in jail suspended pending two years of probation, a \$750 fine, a 90-day drivers' license suspension, 250 hours of community service and counseling until he is released by a physician. Shumann also received a 30-day suspension from the fire department, which started 7 a.m. Tuesday, Fire Chief Don Bennett said. On Aug. 2, just after 2 p.m., Schumann was driving a fire truck north on Ohio 4 responding to a reported structure fire with the vehicle's lights and siren activated. The fire truck and a car driven by Rayann Cavin collided in the Michael Lane intersection. Police said the signal there should have given Schumann a green light and stopped other traffic. Instead, the light malfunctioned and signaled both Schumann and Cavin to go through.

© Copyright 2010 Page, Wolfberg & Wirth, LLC



Ambulance driver's trial in crash begins

Meridianville teen was killed in collision in October 2005

Tuesday, September 25, 2007 Huntsville Times

By DAVID HOLDEN

Testimony is scheduled to begin today in the trial for a Tennessee ambulance driver charged with felony manslaughter in a wreck that killed a Meridianville teen in 2005. A federal jury awarded Bowden's family \$3.1 million in damages in April after determining that Eakes was liable in the crash. The lawsuit alleged that Eakes was negligent, careless and was exceeding the speed limit . . . Eakes was driving the ambulance while **transporting a patient on a non-emergency basis**, according to the testimony during the federal civil trial. A team of Alabama state trooper accident investigators estimated the ambulance was traveling 81 mph in a 60 mph speed zone when it ran a signal light at the intersection and T-boned Bowden's 1996 Dodge Neon. According to the testimony, the 10,000-pound ambulance pushed the 3,000-pound Neon 217 feet before both vehicles came to a halt.

© Copyright 2010 Page, Wolfberg & Wirth, LLC



Drunken ambulance driver killed 2 in car crash - Pennsylvania

Nov 5, 2007 - 10:33:39 AM

A 22-year-old ambulance driver drank before her shift and was impaired when she collided with a car in Marshall, killing two men instantly, Allegheny County District Attorney Stephen A. Zappala Jr. said today. Shanea Leigh Climo, 22, of Evans City, is charged with two counts of homicide by vehicle and involuntary manslaughter, driving under the influence and several traffic offenses in the Sept. 23 collision at Perry Highway and Brush Creek Road. She was arrested this morning, arraigned and released on her own recognizance, authorities said.

Police said an on-board camera system in the ambulance helped them decide to file charges. The camera allegedly shows the face of the driver, Shanea Climo. Zappala said Climo was traveling south on Route 19, transporting a patient with a do-not-resuscitate order to UPMC Passavant, when she ran a red light and hit a Chevrolet Cavalier driven by Douglas Stitt. Stitt and a passenger, Phillip Bacon, were killed. The patient later died, but his death was not believed to be related to the crash, Zappala said.

© Copyright 2010 Page, Wolfberg & Wirth, LLC



Vehicle Accident Prevention

- Refocus “attitudes” about driving!
- EVOOC and simulation training
- Use of Vehicle Monitoring Systems
 - DriveCam
 - Road Safety

Obey Vehicle Laws

- Some states grant special privileges:
 - May proceed through stop signs, traffic lights after ascertaining right-of-way
 - proceed through red light or stop sign
 - May be permitted to exceed speed limit
- But, getting there safely is priority number one!

Obey Vehicle Laws

- Use of lights and sirens
 - Mainly limited to emergency situations
 - Food runs, routine transports, etc. are NOT emergencies
 - May use lights OR sirens in ambulance
 - But, no big advantage in outcomes by using lights and sirens

**“If You Arrive at The Scene 30
Seconds Late, No One Will
Remember. But If You Arrive 30
Seconds Early AND KILL
SOMEONE IN THE PROCESS No
One Will Ever Forget!”**

Consent and Refusals

Goal: Informed Consent and Refusal

- Patients must have the capacity to consent to treatment and refuse it
- EMS providers have a duty to provide information so that patients know the benefits and risks of doing both

CONSENT

Definition:

Informed authorization given by a patient, who is both mentally and legally competent, to emergency medical services personnel for the provision of medical care and/or transportation.

Consent

- Prerequisites for consent
 - Legal capacity
 - Mental capacity
 - Knowledge
- Together, the elements of INFORMED CONSENT must be present AND DOCUMENTED!

Legal Capacity

- **Minority**
 - Generally, persons under the age of 18
 - State laws typically contain some exceptions
- **Adjudication of incapacity**

Mental Capacity

- Intoxication
- Organic brain disease
 - Alzheimers
 - Senile dementia

Mental Capacity

- Situational medical crises
 - Hypoxia
 - Hypoglycemia
 - Head trauma
- A finding of mental incapacity should require a relatively high threshold

Knowledge

- Information that a reasonable person would find necessary and material to medical decision-making

Methods of Consent

- Express
 - Verbal
 - Physical
- Implied
- Legal/involuntary

Implied Consent

- Exception to informed consent doctrine
- Recognized in all states
- Elements
 - Pt unconscious/otherwise incapable of consent
 - Harm of failure to treat outweighs harm of proposed treatment
 - Impracticality of obtaining consent

Scope of Consent

- Scope of consent
 - Limitations on treatment or transport
 - Withdrawal of consent

Patient Refusals

© Copyright 2006 Page, Wolfberg & Wirth, LLC



Refusal of Emergency Care

Basic Rule:

A properly informed patient who is both legally and mentally competent has a right to refuse any and all medical care, even if that medical care would save his life.

Refusal Guidelines

A3 E3 P3

- A3:
 - Assess (capacity)
 - Advise (of condition/proposed tx)
 - Avoid (confusing terminology)

Refusal Guidelines

■ E3:

- Ensure (refusal is knowing/voluntary)
- Exploit (uncertainty)
- Explain (alternatives)

Refusal Guidelines

- P3:
 - Persist (don't give up easily)
 - Protect (by documentation)
 - Protocols (comply)

Case Study
*Should Have Taken Her
The First Time!*

Browning v. West Calcasieu Cameron Hospital

(La. Ct. App. Nov. 12, 2003)

Alleged Facts

- Jewell and her husband Billy were visiting their daughter when Jewell became ill
- Jewell refused to go to the hospital and daughter called an ambulance
- Ambulance from West Calcasieu Cameron Hospital (WCCH) arrived with two paramedics

Alleged Facts

- Paramedics assessed Jewell's condition, and she refused to be transported to the hospital
- Paramedics asked Jewell about her medical history and told her she was probably suffering from a "heat related illness"

Alleged Facts

- Paramedics had Jewell sign a form stating she refused to be transported to the hospital
- A few hours later, the daughter again called for an ambulance
- When the paramedics returned Jewell did not have a pulse and was in ventricular fibrillation

Alleged Facts

- Paramedics started CPR and shocked Jewell once, which started her heart back on a regular rhythm
- Jewell was taken to the hospital where she died the next day

The Lawsuit

- Billy and the children (plaintiffs) filed suit alleging WCCH was liable for the paramedic's negligence in their treatment of Jewell
- WCCH moved for summary judgment, which the trial court denied
- WCCH appealed

Court's Ruling

- Court of Appeal ruled the trial court had correctly refused to dismiss the case
- WCCH argued it was entitled to immunity under LA. REV. STAT. ANN. § 40:1233, which states that immunity can apply “if the care was provided while the paramedic was performing his duties and the paramedic was following the instructions of a physician”

Court's Ruling

- A “factual dispute” existed about whether the paramedics adhered to WCCH's protocols because one paramedic testified that he did not read the form about refusing transport to the hospital to Jewell and failed to inform her that she might have a heart problem

Court's Ruling

- Appeals court said Jewel's signing of the refusal form did not waive her right to claims against WCCH (as WCCH argued) because the paramedics failed to include required information in the refusal form about possible dangers and outcomes of refusing to go to the hospital

Lessons Learned

- You never want to get called back to a residence you just left!
- Must ensure that the patient is FULLY INFORMED of all the risks and consequences of refusing care
- Follow A3, E3, P3 approach

Lessons Learned

- Follow ALL applicable protocols when dealing with refusals
- Consult medical command on line in difficult cases or those that don't feel right

Lessons Learned

- Make sure refusal form is *completely* filled out and *fully explained* – leave a copy with the patient
- Consider placing patient in police custody or possible mental health commitment in serious cases

“Duty to Terrify!”



Who is a “Patient?”

- Example
 - Busload of people involved in a minor, low-speed crash
 - None of the patients wish to be treated or transported
 - All are competent adults
- “Do we need to obtain refusal signatures from each patient?”

Who is a “Patient?”

- If time and circumstances permit, it is preferable to have more signatures rather than none!
- The more refusal signatures you obtain in this situation, the more protection you have
- If not possible to obtain all signatures, at least attempt to document names/conditions and refusals on one PCR

Cancellations

- Document agency which canceled
- Document reason for cancellation
- Document all relevant times

Abandonment

- Termination of care without patient's consent
- Termination of care without provisions for continued care when care is needed
- If higher level of care is needed, care cannot stop unless someone of equal or higher training takes over

Improper Patient Restraint



Patient Restraint

- Possible restraint situations
 - Violent patients
 - Patients who pose a threat to themselves or others
 - Restraints ordered by medical director and/or law enforcement

Patient Restraint

- Types of restraints
 - Physical
 - Chemical
- Restraints should typically be employed as a last resort
 - Attempt verbal de-escalation first

Patient Restraint

- Avoid physical confrontation
- Ensure scene safety
 - If scene cannot be made safe, retreat (either with or without the patient) is permissible
 - Request law enforcement assistance if required

Patient Restraint

- Fully document use of restraints
 - Type of restraints
 - Duration
 - Pt response
 - Reason for restraints
 - Medical direction
- Carefully monitor pt condition while restrained

Patient Restraint

- Never restrain patients in a manner that compromises their airway
 - Monitor closely for positional asphyxia
- Ensure adequate personnel prior to attempting restraint
 - Typically a minimum of 4 people

The Importance of Documentation

Documentation and Litigation

- Legal record
 - Substituted memory
 - Documentation of standard of care
 - Lawsuit prevention

Good documentation will be your savior!

Case Study

**“So *Where* Does it Say
That On Your
Patient Care Report?”**

The Case

- *Sally Henslee, Administrator of the Estate of Shirley Johnson, Deceased v. Provena Hospitals, et al.*, 369 F. Supp. 2d 970 (N.D. Ill., May 12, 2005)

Alleged Facts

- On July 14, 2002, Shirley Johnson experienced an anaphylactic reaction to peanut oil after eating Chinese food
- Began having trouble breathing
- Her husband took her by car to an immediate care center (ICC)
- ICC called 911 immediately

Alleged Facts

- EMS dispatched at 1653, arrived on scene at 1656
- Upon arrival, found pt seated in passenger seat of her car, in severe respiratory distress

Patient Assessment

- Parties disagree over key aspects of the pt's condition
- EMS says pt's jaw was clenched, plaintiff says it wasn't
- Plaintiffs say that the ICC doctor told EMS that pt needed immediate intubation and that the doc offered to intubate, EMS denies these allegations

Transport

- Parties also disagreed on several key facts about the loading and transport of the pt
 - Failed IV attempts
 - Failed intubation attempts
 - Amount of time before intubation was attempted
 - Whether the tube was misplaced

Documentation Discrepancies

Providers Testified:

- Epinephrine was administered

BUT, PCR Says:

- No such indication in the PCR

Documentation Discrepancies

Providers Testified:

- Pt was in the ambulance 3-5 mins before intubation was attempted

BUT, PCR Says:

- Pt was on board the ambulance for 12 minutes before first intubation attempt was made

Arrival at Hospital

- Upon arrival, pt was in cardiac arrest, abdomen distended
- E.D. physician determined that E.T. tube was in the esophagus instead of the trachea

Arrival at Hospital

- EMS asserted that tube became displaced when her head “jostled” while taking pt out of the ambulance
- Plaintiffs assert that the 60 seconds or so for offloading would not be enough time for a misplaced E.T. tube to cause marked abdominal distention

Applicable Law

- In Illinois, as with most states, EMS providers enjoy “qualified immunity” from civil liability
- No civil liability as long as the providers act in good faith, and not with “willful and wanton misconduct”
- Issue: what is “willful and wanton?”

Applicable Law

- Illinois Supreme Court: must have been *intentional*, or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others

Court Ruling

- Court *denied* the summary judgment motion by the EMS agency
- “The case law strongly suggests that a fact-finder can find that a defendant’s conduct is willful and wanton if the defendant fails to follow applicable guidelines and procedures”

Lessons Learned

- All interventions must be documented – whether successful or unsuccessful
- Absent documentation, the “after the fact” testimony can appear to be self-serving and an attempt to “cover up”

Documentation

- Other purposes of patient care report
 - Effective patient care
 - QA
 - Data collection
 - Reimbursement

Good Documentation

- Identify service and crew
- Specify date and response times
- Identify origin and destination of transport
- Specify nature of the call
- Describe the scene (in emergency)

Good Documentation

- Identify patient's chief complaint
- Identify mechanism of injury/onset of illness
- Describe patient's condition/symptoms
- Describe treatment and patient's response
- Establish timeline of care

Good Documentation

- Describe patient's pertinent medical history
- Identify medications / allergies
- Include observations of the responders
- Include observation of the first responders / bystanders
- Include all vital signs / assessments

Good Documentation

- Reflect patient's mental status (consent)
- If a minor, identify authorization for care
- Describe command consult, orders and adherence to protocol
- Describe patient's condition at hospital
- Describe transfer of care

Good Documentation

Is the documentation:

- Concise, but thorough?
- Factual and objective?
- Written using correct terminology, spelling and abbreviations?
- Organized and legible?
- Complete and accurate?

Actual EMS PCR . . .

- “Responded to 911 call for abdominal pain. Found 88 y/o patient sitting in chair in living room, waiting for ambulance. Patient had no complaints. This patient didn’t need an ambulance no way, no how. This was a waste of my time. Transferred to stretcher, transport uneventful.”

Other Risk Areas

DNR Cases

- Do Not Resuscitate (DNR) orders.
- Understand your protocols and state law
- “When in doubt, resuscitate.”

Confidentiality

- Your obligation to every patient is to maintain as confidential
- HIPAA Issues – State AGs

Obligation to Provide Care

- EMS provider...
 - Has a responsibility to help others
 - Is obligated to provide care without regard to the ability to pay or other criteria.
 - Has a strong ethical obligation to help others even while off-duty

Student Medics

- Two possible ethical questions are raised when a student is caring for patients:
 - Whether or not patients should be informed that a student is working on them
 - How many attempts a student should be allowed to have in performing an intervention

To avoid problems...

- Clearly identify students as such.
- The preceptor should, when appropriate, inform the patient of the student's presence and obtain the patient's consent
- Take the student's experience and skill level into account and have a pre-determined limit identified for the number of attempts at a procedure

The Best Litigation Strategy. . .



© Copyright 20

Apologies DO Sometimes Work!



© Copyright 2011

Sign up for our free
EMS Law Bulletins at
www.pwwemslaw.com

