

Legal Considerations for Respiratory Therapists

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Legal Disclaimer:

The content of this presentation is ***NOT*** formal legal advise. Rather, it is intended to help familiarize the audience with terminology and trends in medical malpractice, as well as some discussion on how respiratory therapists may be able to lessen their legal exposure "*on the job.*"

Learning Objectives

- ▶ Discuss trends in medical malpractice as related to respiratory therapists
- ▶ Describe general legal concepts & terms
- ▶ Review a typical time-line for Med-Mal cases
- ▶ Discuss where RTs tend to be exposed to being sued
- ▶ Describe how RTs may be able to limit their legal exposure "on the job"
- ▶ Review a few cases (fictitious or closed) which illustrate the above points.

Some Questions to Think About!

- ▶ Do you need do anything wrong to be sued?
- ▶ Do you think you could ever be named in a Med-Mal suit?
- ▶ Is malpractice insurance a waste of money?
- ▶ If I'm named in a Med-mal suit, will the hospital protect me?

Some Myths & *Myth-busters*

- ▶ I'm covered by my hospital's liability insurance.
 - You may be indirectly if both you and the hospital are co-defendants. If you are the lone defendant, you may well not be covered.
- ▶ If I'm going to be named in a malpractice (med/mal) lawsuit, I'll know quickly.
 - Statute of limitations may be up to 3 years after the incident.
- ▶ My "friend" the nurse (or another RT or MD) would never try to blame me.
 - Happens all the time!

More Myths... *Busted*

- ▶ The less I document, the better. And, if they can't read my writing, better yet!
 - Documentation often becomes the main focus of a lawsuit. The lack of it (or poor/inaccurate documentation) often works against the defendant.
- ▶ Having Malpractice insurance makes me a target in med/mal lawsuits!
 - Malpractice Insurance has no effect, there is no central registry and often such info is only revealed after the lawsuit is filed.
- ▶ If I'm sued, I'm screwed!!!
 - Not necessarily so, There are things which you can do to minimize your exposure to being sued or an unfavorable outcome is you are.

Trends in in General Medicine Med/Mal.

- ▶ General Medicine Med/Mal: (Studdert, et al, NEJM, 2006)
 - Reviewed 1452 randomly selected, closed med/mal claims.
 - 72% of cases involved medical errors.
 - 73% of cases involving both medical error and injury/death did result in a judgment or were settled in favor of the plaintiff.
 - 54% of compensation went to administration of the lawsuit
 - ▶ Lawyers
 - ▶ Expert witnesses
 - ▶ Courts

Trends in Respiratory Therapy Med/Mal.

- ▶ Respiratory Therapy Med/Mal: (Sittig, AARC Times, 2001)
 - RTs tend to be named as plaintiffs in Lawsuits much less frequently than MDs or RNs.
 - In recent years, RTs have begun being named more frequently in such cases.
 - The majority of cases involve airway management in an emergency setting.
 - ▶ Intubation
 - ▶ CPR
 - An increasing number of med/mal cases involve breach of confidentiality (e.g., George Clooney).

Relevant Terms

- ▶ **Plaintiff:** The party making allegations of negligence and filing the suit.
 - Has the burden of proof
 - Judgment is based on the preponderance (51%) of the evidence
- ▶ **Defendant:** The party(s) named/accused of negligence and named in the suit.
- ▶ **Negligence:** A deviation (breach) from accepted *standards of care* that causes/contributes to injury/death of another.
- ▶ **Medical Error:** Failure to perform an intended diagnostic or therapeutic action that was correct, given the circumstances and info available.
 - Acts of commission:
 - ▶ Wrong patient, medication or time/frequency
 - ▶ Breach of confidentiality
 - Acts of omission: Missed Treatment

More Terms/Definitions

- ▶ **Standard of Care:** What a person of the defendant's profession would do under the same/similar circumstances
 - "What we expect a clinician to do in a given situation."
 - Generally a national standard such as AARC Clin. Practice Guidelines
- ▶ **Causation:** Where negligence by the RT caused or contributed to a patient's injury or death
- ▶ **Statute of Limitations:** A time frame within which a medical negligence lawsuit may be brought by the plaintiff.
- ▶ **Sovereign Immunity:** Many state hospitals have limited exposure to being sued for negligence. Clinicians working there may *not* have that protection.

Burden of Proof Lies with the Plaintiff

- ▶ Plaintiff Must Prove *all Three* of the Following
 - Negligence: The Defendant breached the standard of care.
 - Causation: That the negligence caused damage, harm or death to plaintiff.
 - Damage: How much the damages are worth.

How is a Breach of the Standard of Care Proven?

- ▶ Generally by "Expert" Testimony
 - Deposition: Answers to questions under oath. Become evidence in the case.
 - Testimony in court.
- ▶ "*res ipsa loquitur*" : Negligence which so profound, that it can be shown by circumstantial evidence.
 - Examples:
 - ▶ Surgeon leaves a foreign object in a patient.
 - ▶ An MD connects an IV to oxygen tubing causing an immediate gas embolism and death.
 - ▶ During an aerosol treatment., a young pediatric patient aspirates the top of an albuterol unit dose, codes and dies!

Defending Against the Breach of the Standard of Care

- ▶ The **Professional Judgment** Defense:
 - An RT can use his/her to choose one of several actions that is within the *standard of care*.
 - Example: To ventilate during CPR, the RT can ventilate via a Mask w/manual resuscitator bag or first intubate (depending upon the institution) with MDs order.
- ▶ Therapist's **Independent Duty** to the Patient: If the RT disobeys and MD's order that may hurt the patient.
 - Example: RT does not implement an MD orders a tidal volume of 1500 mls for a 12 YO patient or Control mode with a RR of 3.
- ▶ Defense is generally also supported by Expert Testimony

Two Other Relevant Terms: Assumption of Risk vs Assumption of Liability

- ▶ Assumption of Risk:
 - Generally applies to a plaintiff who knowingly assumes risk by consenting to a procedure with inherent risk.
 - Is predicated on proper "informed consent" process.
- ▶ Assumption of Liability:
 - May apply to an RT who makes a mistake due to a heavy assignment. If they accept the assignment, they may be deemed to have accepted some of the liability for mistakes linked to workload.

Damages

- ▶ Types:
 - Economic:
 - ▶ Actual medical expenses
 - ▶ Future cost of care: Based on "Life Care Planner"
 - ▶ Lost earnings: Based on earnings ability
 - Punitive: Particularly egregious malpractice
- ▶ Magnitude of Economic Damages:
 - Wrongful death don't necessarily result in the largest awards
 - Those brought close to the brink of death, requiring custodial care for the rest of their lives tend to generate exceptionally large verdicts.
 - ▶ Example: An RT who intubates the esophagus, resulting in an anoxic brain damage. A \$30 Mil. verdict is quite possible.

Statute of Limitation: Time during which a lawsuit may be brought by a plaintiff

Statute Time Frame

▶ 1 Year:

▶ 2 Years:

▶ 3 Years:

▶ 4 Years:

State

▶ California, Kentucky, Louisiana, Tennessee

▶ **New Jersey**, Oregon, Pennsylvania, Texas, Alabama, Alaska, Florida

▶ **New York**, New Hampshire, Maryland

▶ Nebraska, Utah, Wyoming

The Med/Mal. Lawsuit Timeline: A Plausible Example

9-5-01	9-30-01	9/10/03	9-29-03	1-5-04	6-6-04
Patient Admitted to Hosp. for CHF.	Patient Expires due to failed CPR after repeated intubation attempts by RT.	Lawsuit Filed. RT, RN and MD named.	Statute of Limit. = 2 Yrs in New Jersey.	Discovery Starts. Plaintiff's attorney seeks evidence.	Depositions Begin: Sworn statement from involved parties.

Factors Which Influence RTs' Exposure to Med/Mal Lawsuits

▶ Setting: If Acute Care, exposure is higher!

▶ Types of Cases: Based on closed med/mal cases

- Airway Mgt.
- Medications (Atrovent & Narrow Angle glaucoma)
- Vents/Alarms
- Infection Control

▶ Other Potential Exposure:

- Improperly stored O2 Cylinder, you were in the room
- Fall after you lowered the bedrail for ABG

▶ Both Acts of Omission & Commission

- Omission: Missed Tx. Due to heavy workload.
- Commission: Gave albuterol to a pt allergic to it.

Factors Which Influence RTs' Exposure (cont.)

- ▶ System Error:
 - Arise from multiple persons.
 - Example: RT claims he told the nurse, nurse claims she left a message for the physician, who claims that he was not informed.
 - Initially tend to be difficult to sort through. "Depos" tend to contradict, one another.
- ▶ Errors Related to Procedures:
 - Lack of a formal policy/procedure exposes the institution.
 - Procedures should be evidence-based and not seemingly arbitrary.
 - Failure to follow procedures exposes the RT.
- ▶ Product Liability: If product such as ventilator or humidifier fails, RT involved may well be named.
 - Example: Redfield v Beverly Health Services Inc. Home ventilator company tried to blame malfunction on the RT. Jury did not buy it.

How to Reduce Med/Mal Risk

- ▶ Prevention:
 - Know and Follow the Standard of Care
 - Keep current with Standard of Care (via CEUs)
 - Know and Follow Hospital & Department Policies
 - ▶ Example: HIPAA as it relates to Patient confidentiality
 - Proper Documentation
 - Minimize Assumption of Liability: If you need help, ask for it and document that you did so.
 - Obtain malpractice insurance

How to Reduce Med/Mal Risk (cont.)

- ▶ Damage Control, if you are named.
 - Consider getting your own attorney
 - Review your charting before giving testimony.
 - Review your testimony before giving more testimony
 - Base your testimony on fact not opinions and supposition

Malpractice Insurance for RTs

- ▶ A must have!!!
- ▶ Is generally a great value!
 - Standard coverage (\$1 million per incident) is generally less than \$100 annually.
 - Supplemental coverage (\$5 million per incident) may only be another \$25-\$50 per year.
- ▶ Generally the insurance company furnishes an attorney if you are named in a lawsuit.
- ▶ Is offered by several firms including Princeton Insurance and Seabury-Smith.

Proper Documentation

- ▶ Reasons for Documentation
 - Billing
 - Communication
 - Create a legal record
- ▶ Always keep in mind: Documentation becomes the central focus of every Med/Mal negligence case
 - What's in your charting becomes the rationale for proceeding

Documentation (cont.)

- ▶ What/How should you document?
 - SOAP
 - ▶ Subjective: What the Pt says.
 - ▶ Objective: What you observe and measure
 - ▶ Assessment: What you assess & measure
 - ▶ Plan: What the plan
 - SCALP
 - ▶ Simple
 - ▶ Clear
 - ▶ Accurate
 - ▶ Legible
 - ▶ Prompt
- ▶ What not to Document
 - Irrelevant
 - Inflammatory
 - Inaccurate/contradictory
- ▶ Remember to read your own documentation
 - Immediately after you write it.
 - If named in a suit: Prior to giving testimony

Case 1

- ▶ Case Summary: An RT accepts an exceptionally heavy assignment, with 31 patients receiving aerosol txs and two BiPAP patients on three different floors. The RT completes her assignment but does not chart on any of her patients and just signs the MAR documenting the txs were given. Shortly after the end of her shift, one of her asthmatic patients has a severe attack and dies.
- ▶ Outcome: Nine months later, the RT, the nurse and the hospital are named in a Med/mal lawsuit. In a sworn deposition, the plaintiff's attorney inquires about their client's respiratory status during that day. The RT says she was in no distress, however, there is no documentation regarding the patient's respiratory status nor how well she tolerated the therapy during that shift. The case was eventually settled in favor of the plaintiff for several million dollars.
- ▶ Discussion: What could have been done differently and where is the RT exposed from a legal standpoint?

Case 2

- ▶ Case Summary: Per MD order, RT obtains and ABG from a 50 YO COPD patient but accidentally leaves the bedrail down. Minutes later, the patient falls out of bed, hits his head, has and ICH and is rendered in a vegetative state.
- ▶ Outcome: Eighteen months later, the RT, the nurse and the hospital are named as defendants in a suit. The nurse was eventually dropped as a defendant and "testifies" that about two minutes after the RT left the room, she heard a "thud" and quickly found the patient on the floor. The case was settled one year later for several million \$ in favor of the plaintiff.

Case 3

- ▶ Case Summary: Just after being brought to the ICU for CHF, 67 YO patient goes into cardiopulmonary arrest. Per attending MDs verbal order, RT intubates the patient by first placing them in a sniffing position. Intubation is successful, patient survives but patient is rendered a ventilator dependent quadriplegic due to dislodgment of previously fused (5 years ago) C-3 to C-4 vertebrae. Nurse never told the RT about the fused neck prior to or during the intubation.
- ▶ Outcome: One year later, the RT, MD, several nurses and the hospital are named as defendants in a med/mal lawsuit. Case was settled two years later in favor of the plaintiff for over \$10 million.

Take Home Messages

- ▶ Anyone can be sued for almost anything...it doesn't mean you'll lose.
- ▶ Almost anything can happen in a court of law
- ▶ Myths on this topic are just that!!!
- ▶ Roughly 70-80% of all med/mal cases ruled for the defendant.
- ▶ There are areas where RT may be more exposed to being sued.
- ▶ There are things that RTs can do to minimize there exposure in a suit.
 - Stay current with CPGs and policy/procedures.
 - Avoid common pitfalls on the job.
 - Understand the process.
 - Maintain malpractice insurance.

Selected References

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