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# Original Contributions

## SHARED LIABILITY? CONSULTANTS, PHARMACISTS, AND THE EMERGENCY PHYSICIAN: LEGAL CASES AND CAVEATS

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☐ **Abstract—In caring for patients in the Emergency Department (ED), the emergency physician (EP) will often utilize consulting specialists and pharmacists. In the event of an untoward patient outcome, disagreement may arise regarding the liability of each provider. Here, we review a series of malpractice cases involving consulting physicians and pharmacists to illustrate the legal principles of physician-patient relationships and physician duty. Determination of liability in the courts will rest, in part, on whether a physician-patient relationship was formed via an "affirmative act". Consulting physicians may establish a relationship through an overt or implied agreement to participate in a patient's care, or by reviewing specific tests and studies for the purpose of diagnosis and treatment. The courts have defined the duty of the pharmacist to safely dispense medication, and have ascribed the duty to warn of medication side effects to the prescribing physician. Published by Elsevier Inc.**

☐ **Keywords—medicolegal; malpractice; physician–patient relationship; lawsuit; liability; pharmacist; consultant; duty to warn**

### INTRODUCTION

In caring for patients in the Emergency Department (ED), the emergency physician will often utilize consulting specialists and pharmacists. In the event of an untoward patient outcome, subsequent disagreement may arise regarding which provider maintains liability. Determination of liability in the courts will rest, in part, on what particular duty the consultant or pharmacist has toward the patient. Also, the relationship of the professional to the patient is critically analyzed. A physician–patient relationship is broadly defined as an affiliation in which the patient seeks care, and the physician agrees to provide care. The patient, in essence, says directly or via a representative, "I want you to take care of me," and the physician agrees via an "affirmative act." This affirmative act is a clear expression of intent to participate in a patient's care. When a physician takes an affirmative action to treat a patient, the physician's consent to establish a physician–patient relationship can be implied. In essence, the professional is implying, "I agree to take care of you."

The creation of the relationship is the physician's agreement, to an overt or implied request, to become responsible for the patient's care. In the ED setting, consultants may be involved peripherally or indirectly, and the circumstances by which a physician–patient relationship is established may be less clear. It may be difficult to determine whether the consulting specialist knowingly attempted to provide care for the patient or the patient knowingly sought care from the physician. It is important for providers to recognize their legal exposure in various professional relationships. The following malpractice cases, involving ED and other specialty physicians, demonstrate how liability

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is determined by the courts. The overriding key concept is whether a provider–patient relationship has been established. Similarly, we will also explore the relationship between pharmacists, patients, and physicians, using representative cases that clearly delineate respective responsibilities when prescribing medications.

## DISCUSSION

### *Can a Physician Establish a Patient Relationship and Resultant Liability without Seeing a Patient?*

In *Walters v Rinker*, the court ruled that the examination of a culture or tumor establishes a physician–patient relationship. In this case, the patient had a mass excised, and the specimen was sent to a pathologist for examination. In his report, the pathologist stated, "conclusive evidence of malignancy was not present, and changes in the lymph node from the thigh area were of an active rather than a neoplastic nature" (1). Based on the pathologist's report, the mass was determined to be benign. The patient's health declined, and he was diagnosed with large cell lymphoma 2 years later.

The court ruled that the pathologist established a physician–patient relationship in this case. Although the pathologist never personally saw or treated the patient, he provided professional input for the patient's care. The court stated that the tissue examination and diagnosis were clearly performed for the purpose of evaluating for possible treatment (2). In such instances, a physician–patient relationship can be created without direct patient contact.

This legal analytical approach was again applied in *Diggs v Arizona Cardiologists, Ltd*. Here, the court decided that the interpretation of test results by a specialist establishes a duty to the patient. The plaintiff presented to the St. Luke's Medical Center ED with severe chest pain. The emergency physician ordered an electrocardiogram (ECG) and an echocardiogram. The computerized ECG interpretation indicated a myocardial infarction (MI), however, the emergency physician determined the clinical picture to be more consistent with pericarditis. The emergency physician asked Dr. Valdez (a cardiologist who was in the ED visiting a different patient and not on call) for an informal consultation aimed at better interpretation of the echocardiogram. Dr. Valdez reviewed the patient's clinical history, physical examination results, and ECG. He did not choose to physically see the patient. Dr. Valdez agreed with the diagnosis of pericarditis and advised discharge with a prescription for antiinflammatory medications. Three hours later, the patient suffered a cardiac arrest and died. A second cardiologist reviewed the ECG and echocardiogram from earlier in the day and concluded that the results were consistent with an MI.

Dr. Valdez argued that his consultation with the emergency physician was informal and that he owed no duty of care to the patient. Multiple prior courts had ruled that no duty could exist without a contractual relationship and that an informal consultation did not establish a physician–patient relationship. Yet, in this case, the court ruled that a doctor providing consulting services has an implied contract of employment, which therefore establishes a duty to the patient. The court opined that the duty of care goes to the doctor most capable of preventing possible harm due to others' negligence (3). Dr. Valdez was thus determined to be most qualified to make treatment decisions in this case, and his qualifications provided him with authority to do so. Therefore, he had a responsibility to recommend admission to the hospital so that the patient could receive proper care. This court ruled that the negligent care of Dr. Valdez resulted in the patient's death (3).

In this case, Dr. Valdez took specific information on a particular patient, reviewed results, and provided definite recommendations for care. In the court's view, this established a relationship with the patient and thus, liability for his actions. Again, a physician was held liable when they examined specific test information but did not see the patient.

## DOES INFORMAL CONTACT BY A PATIENT OR A PHYSICIAN CREATE A PHYSICIAN–PATIENT RELATIONSHIP?

*Clanton v Von Haam* demonstrated that answering a telephone call from a patient does not create a physician–patient relationship. The plaintiff presented to an ED complaining of back pain. During the visit she developed numbness in her legs. She was examined by an emergency physician, who prescribed pain medicine and released her. Upon arrival home, her pain worsened and she called the ED. The physician that had previously seen her was no longer on duty. The patient then called the answering service of Dr. Appellee and his partner, both of whom had previously treated her for unrelated issues. Dr. Appellee returned her call but refused to make a house call and told the patient that she would have to wait until the morning to see him. The patient's condition worsened, and several hours later she was admitted to another hospital and suffered eventual paralysis. The patient alleged that Dr. Appellee should have known that her condition was serious and could result in paraplegia. She asserted that his failure to recognize the need for immediate treatment and advise her to return to the hospital directly resulted in her adverse outcome.

As with many such cases, contradicting testimony was presented. Dr. Appellee argued that no physician–patient relationship existed prior to or after the telephone call.