

LESSONS LEARNED FROM MALPRACTICE CLAIMS



SVMICTM
Mutual Interests. Mutually Insured.

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About the Speaker

F. Laurens “Larry” Brock, JD

F. Laurens “Larry” Brock is a partner in the law firm of Adams and Reese with offices in Nashville, Chattanooga, and Memphis. He brings an extensive background of litigation experience.

Mr. Brock has been practicing law for over 35 years, including 15 years in South Florida, before moving to Tennessee in 1995. He received his undergraduate degree from Emory University and law degree from the Cumberland School of Law and has successfully defended numerous jury trials throughout the United States involving allegations of catastrophic injury, total disability, disfigurement and wrongful death.

In addition to being an accomplished trial lawyer, Mr. Brock is a national speaker on medical malpractice and successful thematic strategies at trial. His law practice has also included Coordinating Counsel on pharmaceutical drug litigation and National Counsel for various consumer safety products.



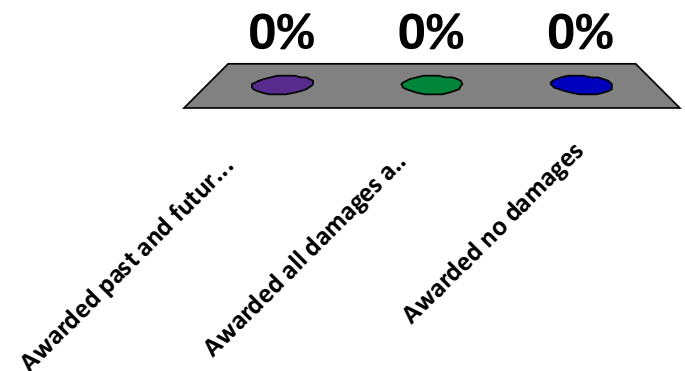
When the jury walked in with the
verdict...

...the jury was ***crying***



What happened?

1. Awarded past and future medical expenses **only**
2. Awarded all damages and **more** than requested
3. Awarded **no** damages



Why was jury crying?





What happened?

3. Awarded *no* damages

Jury science *shows*

Benefit of the doubt

goes to...

healthcare provider

***If...*Healthcare Provider**

- ◆ Not too *busy*
- ◆ *Listens* to patient
- ◆ Not *arrogant*

Shown by...

...2 C's



II. Course Objectives

Looking at real world claims and lawsuits

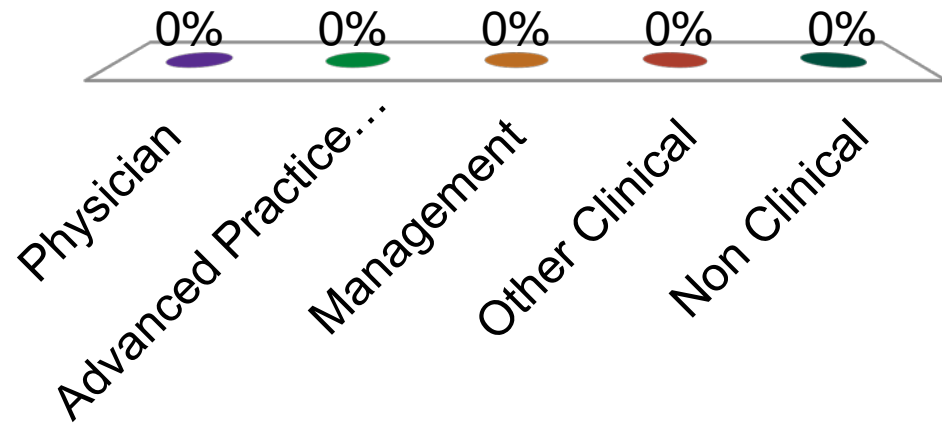
Share “lessons learned”

- ◆ Vicarious Liability
- ◆ Informed Consent
- ◆ Staff Services
- ◆ Multiple Caregivers



What best identifies you?

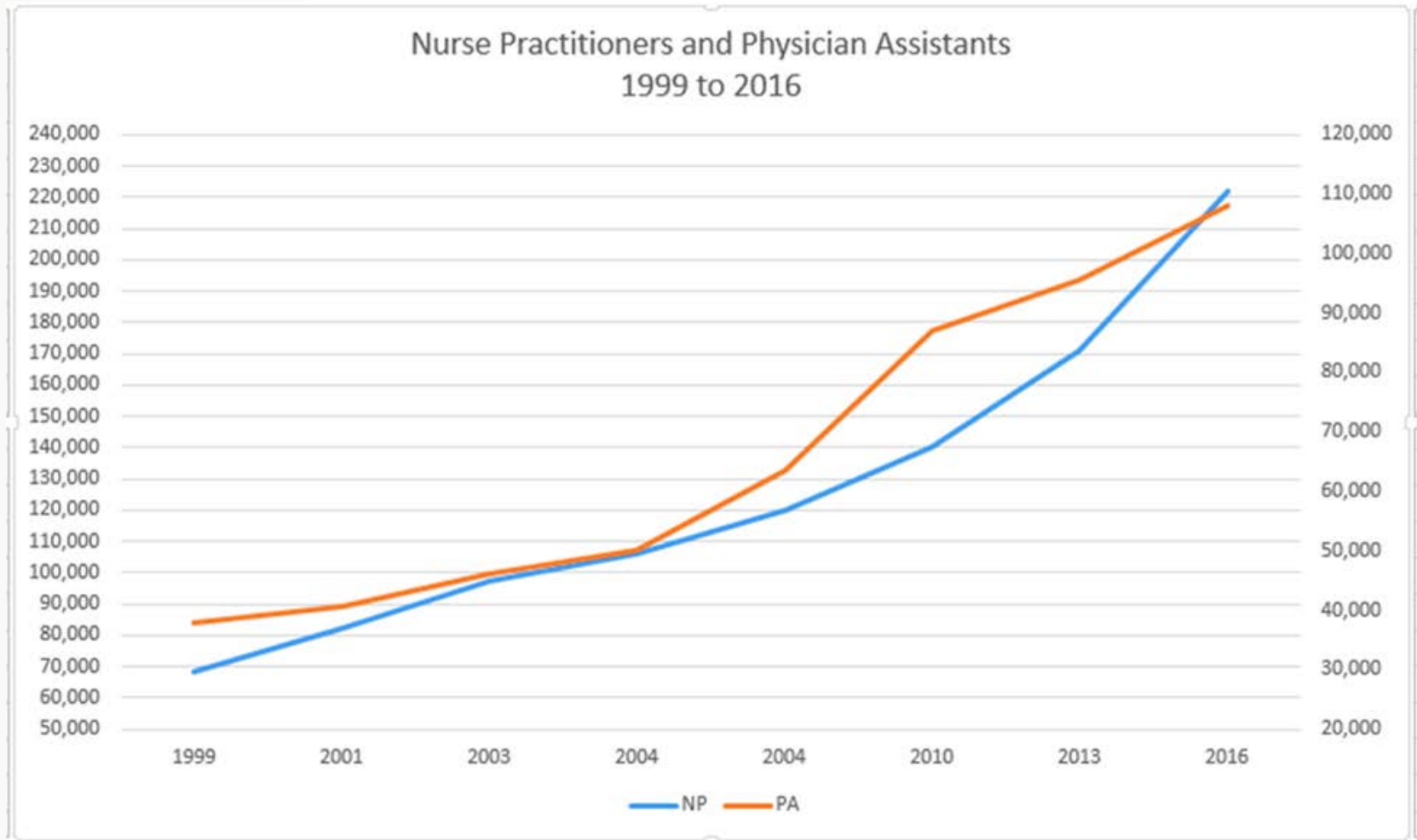
1. Physician
2. Advanced Practice Provider
3. Management
4. Other Clinical
5. Non Clinical



Today's reality



Backdrop: Growth of Non-Physician in Healthcare 1999-2016



Source: AAPA.ORG AND AANP.ORG (NP/PA NATIONAL ORGANIZATIONS)



III. Vicarious Liability

Jury Instruction-Vicarious Liability

T.P.I. – CIVIL 6.17 Vicarious Liability of *Physician*

1. The [staff][nurse][assisting physician] was ***negligent*** in the performance of required duties during treatment of the plaintiff; and
2. The [staff][nurse][assisting physician] was under the direction or control of defendant at the time of the negligence, ***regardless of who employed or paid the [staff][nurse][assisting physician].***

Which image best describes your practice?





Which image best describes your practice?

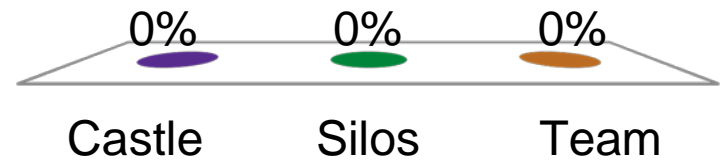
1.



2.



3.



How jury sees you



or



The Law is...



Vicarious Liability Lawsuit Video



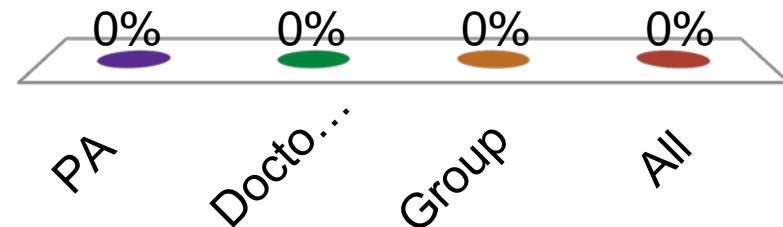
Fentanyl Case Additional Facts

- ◆ Fentanyl **80 x's** more powerful than Morphine
- ◆ PA did not start ***smallest*** available patch dose
- ◆ Explicit ***“Black Box”*** Warning ***not*** followed
- ◆ Patient ***not opioid tolerant***



Who was in lawsuit?

1. PA
2. Doctor (Pain Management)
3. Group
4. All





Who was in lawsuit?

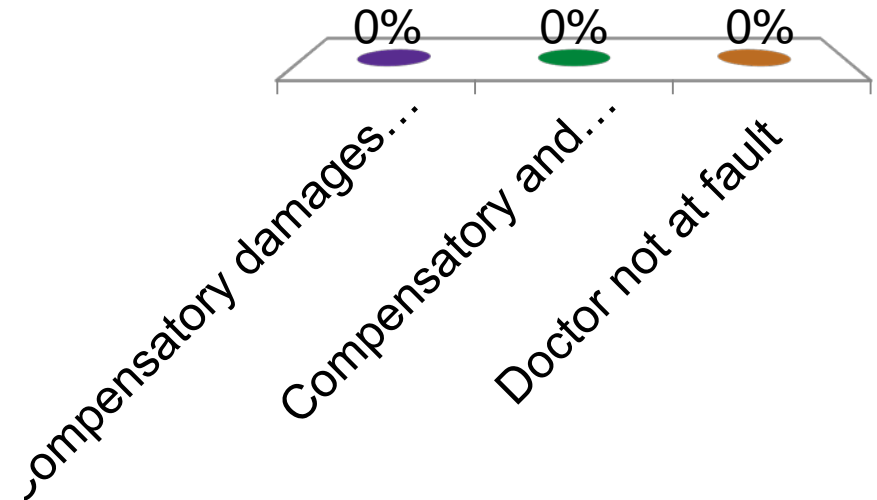
2. Doctor

That's Vicarious Liability



Outcome

1. Compensatory damages **only**
2. Compensatory and **punitive** damages
3. Doctor **not** at fault





Outcome

3. Doctor *not* at fault

Why Doctor prevailed?

- ◆ Doctor caring, competent, compassionate and exceptionally well trained **#juriesnoticeeverything**
- ◆ Doctor clearly explained (10+) prior medical modalities used prior to Fentanyl Patch
- ◆ ***Physician showed excellent teamwork and formal processes established in practice***
- ◆ Patient on Fentanyl Patch 21 days without symptoms or problems
- ◆ Used “Black Box Warning” to advantage
- ◆ Fentanyl Patch toxicity post-mortem unreliable



Takeaways

Advanced practice provider supervision



- ◆ Physician or substitute physician **must** be available for consultation at **all times**
#SVMICRESOURCES
- ◆ **Must** have experience and/or expertise in the **same area** of medicine as the Advanced Practice Provider
- ◆ **Must** authorize drugs on the formulary
- ◆ **Jointly** developed protocols

Supervising physicians *must*...



Review 100% of records if controlled substance prescriptions are given

[#discoveryaudit](#)



IV. Informed Consent

Jury Instruction-Informed Consent

T.P.I. – CIVIL 6.25 Informed Consent

1. A (physician) has a **duty** to give a patient certain information **before** treating the patient; the information the physician **must** disclose is that information about the treatment involved and its attendant **risks** to enable the patient to make an **intelligent** decision about whether to undergo the treatment.

Jury Instruction-Informed Consent

T.P.I. – CIVIL 6.25 Informed Consent

2. In determining how a reasonable patient would have acted under the circumstances, you should consider the testimony of the plaintiff, the plaintiff's [*idiosyncrasies*], [*fears*], [*age*], [*medical condition*], [and] [*religious beliefs*], the presence or absence of alternative [procedures], [treatments] and the potential risks and benefits thereof, and the impact of no [treatment], [procedure] on plaintiff's health.

Dr. Rushmore

v.

Dr. Goodfellow

Informed Consent

Who Prepared the form?



#Nondelegableduty

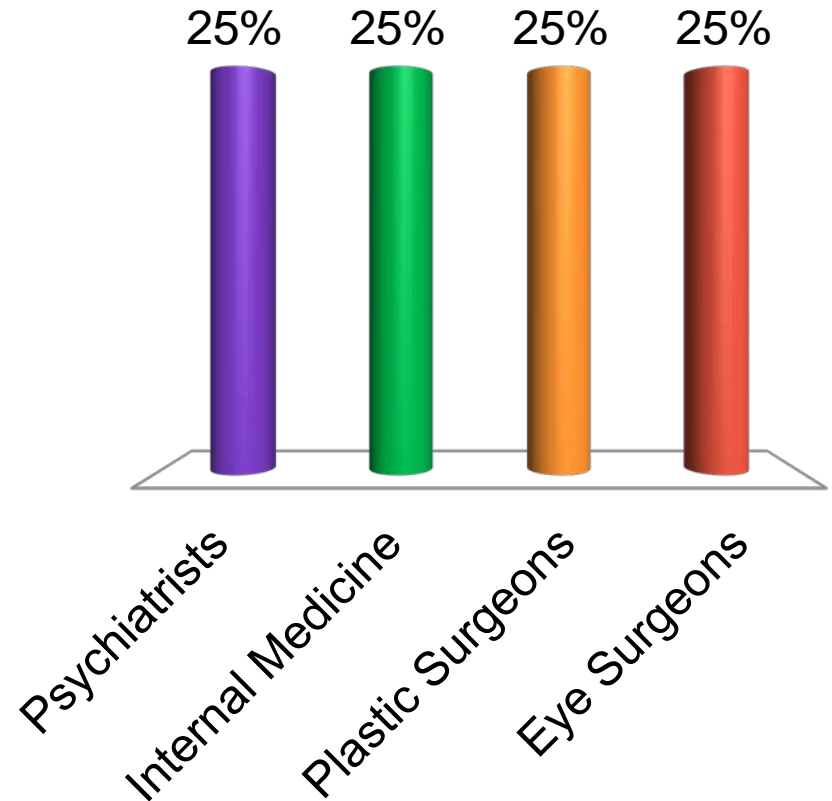
#SVMIC Resources

Dr. Goodfellow Video



Who does Informed Consent best?

1. Psychiatrists
2. Internal Medicine
3. Plastic Surgeons
4. Eye Surgeons





Who does Informed Consent best?

3. Plastic Surgeons
4. Ophthalmologists

But why?

- ◆ Handout materials
- ◆ Video
- ◆ Patient takes test
- ◆ Staff asks if any questions
- ◆ Doctor goes over risk/benefits/alternatives with patient **#bleeding&infection**

When and what is enough?

- ◆ Verbal or written?
- ◆ Patient specific or macros?
- ◆ One time or multiple?
- ◆ All drugs or high risk drugs?
- ◆ All procedures or out-patient procedures?

Informed Refusal - Other side of coin

Examples:

- ◆ **Vaccines**
- ◆ **Refusal** radiation/chemotherapy
- ◆ **Refusal** cardiology consult
- ◆ **Refusal** screening colonoscopy

Informed Refusal Action Items

- ✓ Ask **reasons** for refusal.
- ✓ Emphasizing **consequences** of refusal.
- ✓ **Document** patient's refusal.
- ✓ Obtain patient's **signature** on "informed refusal".
- ✓ If patient referred by consult, **document** refusal to any referring physician.

Informed Consent in lawsuit

Rare...

lawsuit **focus** Informed Consent

Rarer still...

Informed Consent **not** part of the case

Always goes...

to show standard of care



Takeaways

Informed Consent is...

- ◆ Risks/benefits/alternatives #medicalbattery
- ◆ Clear
- ◆ Documented (> 1x)
- ◆ *Choice/personal responsibility*

The existence of a written consent form gives rise to ***a presumption of consent*** in the absence of proof of misrepresentation, inadequate disclosure, forgery, or lack of capacity. (*Church v. Perales*, 39 S.W.3d 149, 2000 Tenn. App. LEXIS 567 (Tenn. Ct. App. 2000) [#lawsuitnotfiled](#))





V. Staff Services: Barrier or Access?

Additional Facts

- ◆ Front desk receptionist *fired*
- ◆ *Unwritten* policy to never turn away patient
- ◆ Doctor and nurses will *always* see anyone who comes to office
- ◆ *Never* tell patient to come to office same day of induction



Could lawsuit have been avoided?

1. Yes

2. No





Castle



Takeaways

- ◆ ***Written*** Protocols

...reviewed by physicians

- ◆ ***Repeat*** training

- ◆ Importance following up **hospitalizations**
- ◆ Importance following up office **no-shows (clinical vs. staff)**
- ◆ Duty commensurate with potential **consequences** of missed treatment
- ◆ Importance following up **transition** of healthcare providers

Will you be...



or





VI. Multiple Caregivers



Who was responsible?

1. Dr. John Cho
(University Student Health) 0
2. NP Ariana Thomas
(University Student Health) 0
3. Dr. Susan Williams
(Urgent Care) 0
4. NP Rose Fellowes
(Medical Center) 0
5. Dr. Jim Coleman
(Medical Center) 0

****Select All That Apply***



Who was responsible?

All of the above



Takeaways

- ◆ Failure consider PE ***differential diagnoses***
- ◆ Poor ***discharge instructions***
- ◆ Failure insist immediate ER ***transfer***
- ◆ Failure obtain ***medication history*** other than cold medicine
- ◆ Failure ***communicate*** other medical providers
- ◆ Failure ***supervise*** and ***evaluate*** following 2nd abnormal EKG



Silos

How do you defend the failed
last chance?



Closing

Not one of you...

Regardless...

- ◆ Practice of medicine *requires...*
- ◆ Patient's expectations *requires...*
- ◆ Jury Instructions' *requires...*
- ◆ Juries *demand...*



How will you run your practice?



My personal medical malpractice where *physician exceeded scope of practice...*

