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?

Castle

Team

Silos
Which image best describes your practice?

1. Castle
2. Silos
3. Team
How jury sees you

Castle or Silos
The Law is…

Team
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*
1. Compensatory damages only
2. Compensatory and punitive damages
3. Doctor not at fault
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
Advanced practice provider supervision

- Physician or substitute physician must be available for consultation at all times.
- 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.

TN Board of Medical Examiners Rule 0880.06
Supervising physicians must...

Review 100% of records if controlled substance prescriptions are given

#discoveryaudit

TN Board of Medical Examiners Rule 0880.06
IV. 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.
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
Informed Consent is…

- Risks/benefits/alternatives
- Clear
- Documented (> 1x)
- Choice/personal responsibility

#medicalbattery
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))*
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
- *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

Castle

or

Team
VI. Multiple Caregivers
Who was responsible?

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

*Select All That Apply*
Who was responsible?

All of the above
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 2\(^{nd}\) abnormal EKG
How do you defend the failed last chance?
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*...