

LAW & MEDICINE

Standard of Care

Question: A 56-year-old man was admitted to the hospital with pneumonia. He had told the triage nurse on initial presentation that he was allergic to penicillin, but the hospitalist subsequently administered ampicillin. Shortly after receiving the first dose, the patient developed progressive respiratory distress and required intubation. At trial, the hospitalist testified that he had misread the triage note because of poor handwriting. Which of the following statements best describes this hypothetical case?

- A. The triage nurse, rather than the hospitalist, is negligent; but for her illegible handwriting, there would have been no injury.
- B. The hospitalist is negligent because he should have retaken the allergy history.
- C. Illegibility is an unimportant source of serious mistakes.
- D. This is a case of medical error, which is the same as medical negligence.
- E. The man's respiratory distress was most likely antibiotic-induced because of the time sequence of events.

Answer: B. Illegible handwriting can lead to serious mistakes, and although the nurse's poor handwriting may have contributed to the injury, that does not get the

hospitalist off the hook, as he should have rechecked the allergy history. The facts in this case do raise the issue of medication error, which often but not always amounts to negligence. However, in order to win a malpractice lawsuit, the plaintiff has to affirmatively prove causation—i.e., that the antibiotic proximately caused respiratory distress—and cannot simply rely on an unsupported assumption. The defendant is likely to argue that the respiratory distress was the result of pneumonia rather than a reaction to the antibiotic.



BY S.Y. TAN,
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A tort is a civil wrong affecting private citizens that is not based on a breach of contract. Negligence is a tort that deals with harmful conduct not ordinarily expected of a reasonably prudent person. It has nothing to do with the good or bad intentions of the perpetrator, although there is a separate class of legal wrongs termed intentional torts where the wrongdoing is intentional, such as assault and battery. When professionals such as physicians, dentists, engineers, and lawyers commit negligence, it is called malpractice. Medical malpractice is conduct by a health care provider that breaches the standard of care, resulting in harm to the patient.

Medical malpractice, also called medical negligence, is an act or omission by a health

care professional that departs from the defined health care standard. As articulated by the Supreme Court of Nebraska: "In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was a proximate cause of the plaintiff's alleged injuries" (*Hamilton v. Bares*, 678 N.W.2d 74, Neb. 2004, citing an earlier Nebraska case).

It is incorrect to say that medical negligence means an adverse outcome, a wrong judgment, or even a medical error. Some authors have defined medical error to denote a preventable adverse event, which in turn is defined as an injury caused by medical management rather than by the underlying condition of the patient. The Institute of Medicine defines error as "the failure of a planned action to be completed as intended (e.g., error of execution) or the use of a wrong plan to achieve an aim (e.g., error of planning)" (Kohn L.T. et al., eds. "To Err Is Human: Building a Safer Health System." Washington: National Academy Press, 2000, p. 54).

Although a medical error can lead to patient harm, it is not synonymous with negligence. If the error or misjudgment is one that a reasonably competent professional would not commit, the standard of care is breached and there is medical negligence. On the other hand, if a reasonably skilled practitioner could commit such an error

or misjudgment, it would not amount to medical negligence. As one court put it: "An honest error of judgment in making a diagnosis is insufficient to support liability unless that mistake constitutes negligence" (*Dotson v. Hammerman*, 932 S.W.2d 880, Mo. App. 1996). Several courts have cautioned against the use of terms such as "error in judgment" and "best judgment," as they may confuse the jury (*Hirahara v. Tanaka*, 959 P.2d 830, Haw. 1998; *D'Orazio v. Parlee & Tatem Radiologic Associates, Ltd.*, 850 A.2d 726, Pa. 2004).

Nor is an adverse outcome necessarily the result of negligence. The Supreme Court of Virginia put it this way: "The mere fact that the physician has failed to effect a cure or that the diagnosis and treatment have been detrimental to the patient's health does not raise a presumption of negligence" (*Bryan v. Burt*, 486 S.E.2d 536, Va. 1997). Some medical conditions end up with bad results that are wholly independent of the doctor's actions—hence the commonly stated axiom that the doctor is neither an insurer nor a guarantor of the patient's health. ■

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THE REST OF YOUR LIFE

After Cancer, a Second Act

After Dr. Joshua Grossman underwent his second neck dissection for papillary carcinoma of the thyroid gland in 1986, he believed he might not have much time to live. So, at age 45, he decided to audition for a role in a Johnson City (Tenn.) Community Theater production of Irving Berlin's "Annie Get Your Gun."

"I'd always wanted to do community theater," said Dr. Grossman, a Johnson City-based internist. "I got a kick in my fanny from my cancer, and I figured, well, I'll get in a couple of shows, and then I'll croak. I actually thought I was dying."

He was cast as Chief Sitting Bull and went on not only to beat his cancer, but also to earn roles in several subsequent productions staged by area theaters, including Gonzales in Tennessee Williams's "Summer and Smoke," Padre Perez in "Man of La Mancha," and Mario in "Ballroom"—all while serving as a full colonel in the U.S. Army Medical Corp., from which he retired in 2000.

"When I did 'Annie Get Your Gun,' the night work was being taken over by the interns and residents," recalled Dr. Grossman, who spent most of his career working at a local Veterans Affairs Medical Center. "The workload was more than 40 hours a week, but it wasn't quite as heavy as a practicing physician's, which is one of the reasons why I was in the VA: so I could spend a little more time with my wife and kids."

He has served, too, as a theater usher, worked the lighting and other technical jobs, and helped build and disassemble sets. "I also tidied up the theater so much that one of our late community theater actors and volunteer set builders called me the garbage man," he said. "I did more than empty our garbage. I would sift through it because angle brackets and other things were mistakenly thrown



Dr. Joshua Grossman, with his wife Mickey (far left) and Proud Annie Mystery Theater cast members, began acting after undergoing treatment for thyroid cancer.

in there that could be reused in future productions. The community theater has a strict budget. None of the theater members are paid. Only guest musicians and guest directors, who may drive long distances, are paid."

Along the way he learned to respect the talents of master playwrights such as Tennessee Williams. He and his fellow cast members held frequent discussions in the green room about what message Williams was trying to convey in his plays. "We could never reach consensus as to what he was trying to get at," he said. "There's a feeling in general that the IQ of poets and playwrights is off the scale."

Dr. Grossman also learned the challenges of sticking to a character. His role as Gonzalez in "Summer and Smoke" called for his character to forcefully grab the shirt of a young doctor, who was being played by a man who had

been one of Dr. Grossman's former Cub Scouts when he was a scout leader. "It took many hours of blocking rehearsal before I could do that," said Dr. Grossman, whose most recent role was that of Joey "the Lump" Marzetti in a fall 2007 dinner theater production of "Funeral for a Gangster," penned by playwright Eileen Moushey.

Dr. Grossman said his brush with cancer also motivated him to take up another avocation. Prior to starting his undergraduate studies at Johns Hopkins University, Baltimore, he had appeared as a ballroom dancer for 1 week on "The Buddy Dean Show," a Baltimore-based teen dance television program that featured appearances by the Cordettes, Johnny Mathis, and Frankie Avalon, but Western square dancing had always intrigued him. So he and his wife, Mickey, enrolled in classes at a local university to develop their ballroom dancing and learn Western square dancing. They continue to build on their skills by attending local Western square dancing events.

Looking back, Dr. Grossman credits his brush with cancer for motivating him to pursue the avocations he'd long wished to take a crack at. "It's fair to say that my cancer gave me a fairly swift kick in my bottom and got me out into my community," he said. ■

By Doug Brunk, San Diego Bureau

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