Veterans Caucus

Medical Malpractice
You Be The Judge!

A Workshop

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Learning Objectives

By the conclusion of this workshop, attendees will:

1. understand the four (4) primary areas of malpractice risk,
2. understand common definitions in malpractice, i.e., error, adverse event, and preventable adverse event,
3. understand the four elements of a malpractice suit, i.e., duty, standard of care, proximate causation, and damages, and
4. discuss and provide opinions about selected cases after hearing both the plaintiff and defendant arguments.

INTRODUCTION

PAs have increased liability with

- The increasing scope of practice
- Greater patient care responsibility
- More independence/autonomy

PAs must comply with:

- Federal Law
- State Law
- Regulations (i.e.- State Practice Act)
- Hospital Policies and Procedures
- Standing Orders
- Standard of Care

- **The Health Care Quality Improvement Act, passed by Congress in 1986, requires that all malpractice payments (losses, paid claims) made on behalf of any clinician a state licenses, registers, or certifies must be reported to the NPDB.**

Source: The National Practitioner Data Bank Research as maintained by the Division of Quality Assurance, Bureau of Health Professions, Health Resources and Services Administration, US Department of Health and Human Services.

Recent Research

- Of 54,772 claims,
  - PAs were defendants without APRNs or physicians in 26 claims;
  - APRNs were defendants without PAs or physicians in 63;
  - physicians were defendants without PAs or APRNs in 37,354.
- Approximately 75% of claims naming APPs co-named physicians.

Source: Myers L, Sawicki D, Heard L, Camargo C, & Mort E. A description of medical malpractice claims involving Advanced Practice Providers *Journal of Healthcare Risk Management.* Vol 40, Number 3. November 10, 2020.

Recent Research

- More claims naming PAs and APRNs were paid on behalf of the hospital/practice
  - (38% and 32%, respectively) compared with physicians (8%, P <0.001).
- Payment was less likely for inpatient care (OR 0.89, 95% CI 0.85-0.93, P < 0.001)
  - but higher when APRNs were defendants (1.82, 1.09-3.03),
  - when procedure-related (1.31, 1.25-1.38, P < 0.001)
  - or patients died (1.09, 1.03-1.16, P =0.003).

Source: Myers L, Sawicki D, Heard L, Camargo C, & Mort E. A description of medical malpractice claims involving Advanced Practice Providers Journal of Healthcare Risk Management. Vol 40, Number 3. November 10, 2020.

- Claims against PAs usually fall into four primary areas of risk:

Lack of adequate supervision

Untimely referral

Failure to diagnose

Inadequate examination

- *Each health provider is responsible for his or her own negligent acts.*
- While in most cases you are covered under your employers policy, you may still be liable for your own negligence and may still be liable for all or part of a plaintiff's award or settlement.

What is Medical Malpractice?

- Malpractice is another word for "negligence"
  - which means that a health care provider did not measure up to the standard of care expected of reputable and careful health care providers under similar circumstances.
- If the malpractice caused harm, a lawsuit or claim may be filed to recover damages for the harm that was suffered.

Negligence

- To win a negligence case and recover damages from a PA, a patient must prove each of three elements:

The PA owed the patient a duty of care

The PA breached that duty

The patient was harmed as a result of the PAs action or failure to act

First Element: Duty

- Plaintiff must prove that there was a Physician/PA-patient relationship.
- Physician/PA-patient privity is essential because it establishes the legal duty to conform to a standard of conduct- take care of patients

Second Element: Breach of STANDARD OF CARE

- **Standard of care**
  What a reasonable person should do under the same or similar circumstances
- **Development of a recognized accepted risk or known complication is not negligence.**
- **There is no requirement of a perfect result.**
- **Cannot blame the PA or Physician solely because of a bad result, no matter how bad the result.**
- **Only experts can say what Standard of Care is in given situation**

STANDARD OF CARE

- How is standard of care determined?

Testimony of other PAs, known as expert witnesses, concerning what a reasonable and prudent PA would do in the defendant's circumstances

Whether the PA violated any laws or regulations

Whether the PA followed any clinical practice guidelines or protocols

Whether the PA violated any hospital or other internal policies

Third Element: Proximate Causation

Plaintiff must prove that he or she suffered injuries as a result of the defendant's negligent act or omission and injuries would not otherwise have occurred.

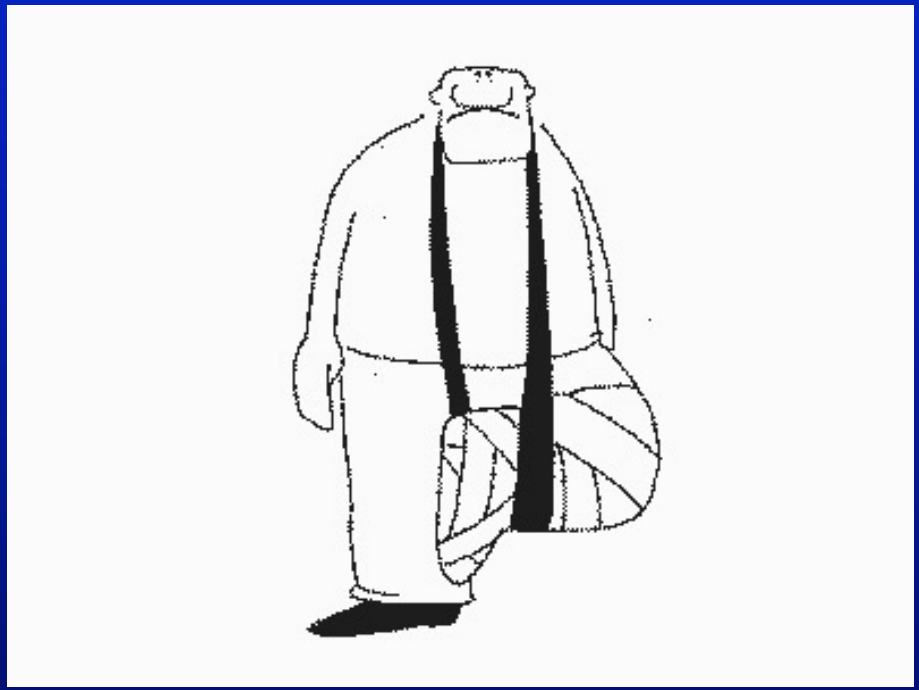
proximate

cause

Proof to reasonable degree of medical certainty = ***more likely than not***

Fourth Element: Damages

- If duty, breach in the standard of care, and proximate cause are proven, the defendant will be liable for the resulting damages



CONDUCT THAT MAY LEAD TO LIABILITY

- **Failure to properly diagnose**
- **Failure to refer**
- **Exceeding the scope of practice**
- **Negligent monitoring**
- **Failure to question a physician's abnormal order**
- **Failure to follow-up**

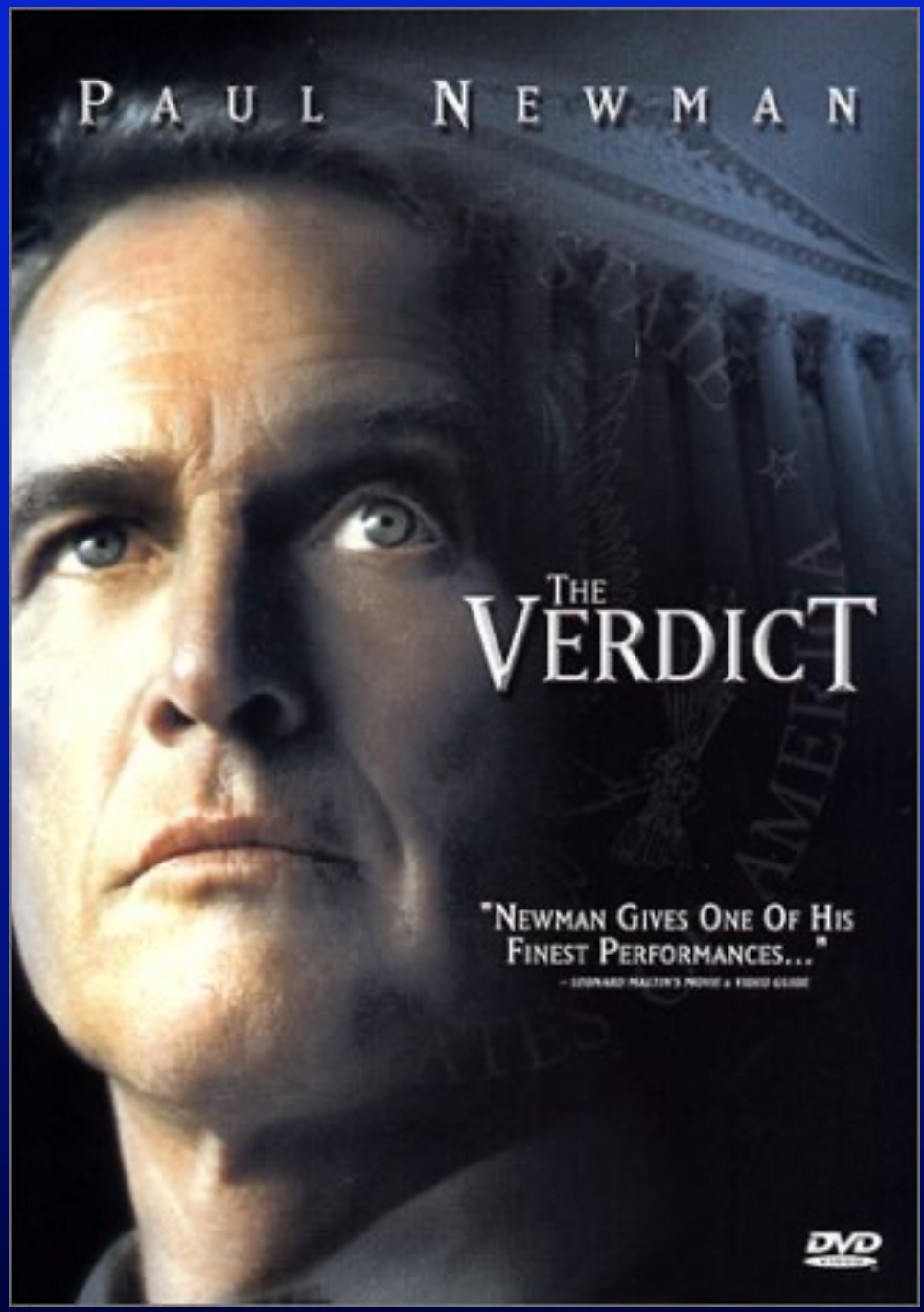
Anatomy of a Lawsuit

- Complaint, Summons
  - Answer within 30 days
- Discovery (possibly a Scheduling Order)
  - Interrogatories/ Requests for Documents/Admissions
  - Obtain medical records, interviews, meetings
  - Obtain expert witness reviews
  - Deposition of the parties, witnesses (can subpoena)
  - Deposition of experts
- IME (independent medical examination)
- Motion for Summary Judgment
- ADR: Arbitration, Mediation, Negotiation
- **Trial**

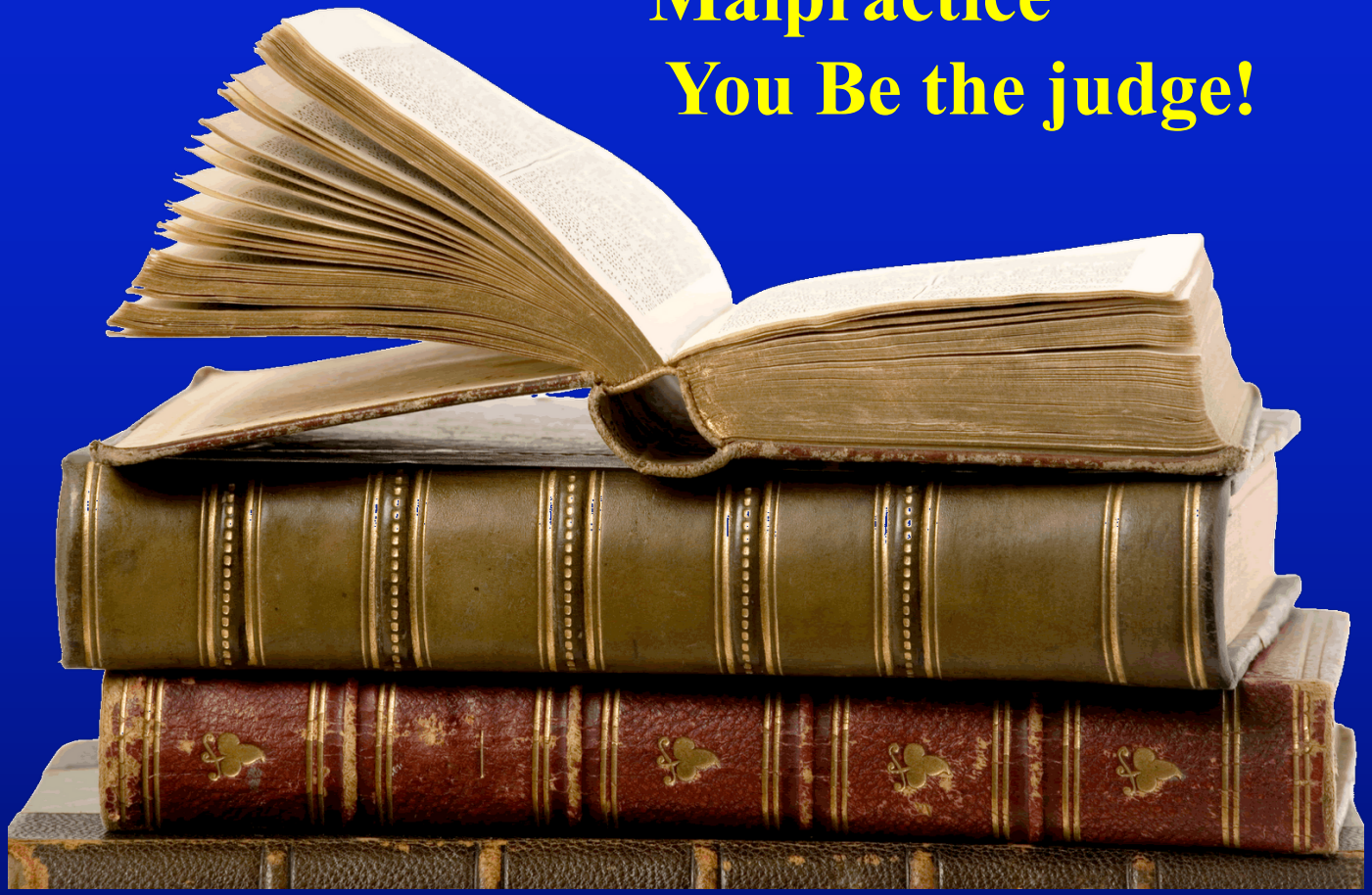
The verdict – 2 parts

1. Judgment (Guilty or Not Guilty)
2. If against the defendant, the penalty

After the trial, the appeals process



Malpractice
You Be the judge!



Let's Look at Six (6) Cases

Case #1

- A 76-year-old female presented to the dermatology practice complaining of an unexplained pink, scaly, and itching rash on her arms, palms, and legs.
- She is a resident in an extended-living center and was seen a week earlier by her primary care clinician for an itchy rash on her torso and was placed on Benadryl.
- She was also placed on Fluconazole for "oral thrush" by her PCP on the same date.

Case #1

- When the rash did not improve and actually worsened, the RN, at the extended-living center, suggested a referral to a dermatologist.
- The patient was seen the next day.
- History revealed hypertension, hypercholesterolemia, and the patient was a former smoker.

Case #1

- The patient was seen by both the PA and the physician in the dermatology practice.
- The patient stated the rash had started a week earlier and is getting worse and had moved to the hands, arms, and palms.
- The Benadryl has not helped the rash nor the itching.
- She denied any cough or sore throat. No SOB, dyspnea, or orthopnea.
- No GI or GU symptoms were noted.

Case #1

- Medications:
  - Lisinopril 10mg h.s.
  - Rosuvastatin calcium (Crestor) 10mg once a day
  - Benadryl (OTC) 25mg every six hours
  - Fluconazole 200mg on the first day then 100 mg daily for two weeks

Case #1

- Physical examination revealed a BP of 106/72, Pulse of 80, Resp 16.
- HEENT WNL, no oral lesions found.
- The neck is supple.
- Lungs are clear to auscultation without rales, wheezes, or rhonchi.
- The abdomen is soft and non-tender with normal bowel sounds.

Case #1

- Examination of the skin reveals geographic macular lesions on both arms, palms, and trunk.
- The patient was given topical hydrocortisone cream 2.5% to apply to the rash three times a day and increased the Benadryl to 50mg TID.
- The patient was told to return if she got worse, otherwise to return in a week.

Case #1

- Three days later, as the rash got worse, painful, and sloughing occurred,
- the patient was taken to the emergency center, and the patient was found to have large blistering areas of the epidermis with several bullae over the back, trunk, and lower extremities already having been lysed by pressure over the sites.
- She also had a fever of 104 degree F.

Case #1

- She was diagnosed with Stevens-Johnson Syndrome (SJS) and topical epidermal necrolysis (TEN) due to the peeling blisters, which was confirmed by biopsy.
- Because of the acuteness of the symptoms, she was admitted to the burn unit but unfortunately died the next day.

Case #1

- The PCP, Dermatologist, and the PA were all sued for malpractice for missing the diagnosis of SJS/TEN leading to her demise.
- Plaintiff experts opined that the cause of SJS/TEN was likely Fluconazole.
- The medication should have been discontinued by the PCP but certainly by the physician and PA in the dermatology practice.

Case #1

- Because SJS/TEN is a rare mucocutaneous disease with significant mortality and morbidity, the diagnosis should be on a differential list when severe dermatitis presents following the administration of medications.

Case #1

- When reviewing the medical records of the dermatology practice, it was noted that a medication list was not present.
- The PA does describe asking the patient about her medication history.
- The PA testified that he saw the patient alongside the physician, although the notes were created and posted solely by the PA.
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Questions for Case #1

1. Did the PA have a duty to care? Yes, No
2. Did the PA breach that duty? Yes, No, Don't know
3. If the PA breached that duty, was the breach a proximate cause of the injury/death? Yes, No, Don't know
4. I would vote: In favor of the defendant, in favor of the Plaintiff, Don't know

OUTCOME?

Case #2

- A 56-year-old female was referred to the ER by her primary care clinician after calling in with complaints of two days of lower back pain and pain and difficulty with urination.
- In the ER, she was examined by the PA on duty. The patient complained of lower back pain with numbness into the buttocks and perineal area.

Case #2

- The patient was able to ambulate without difficulty.
- The PA ordered LS Spine Films which revealed only degenerative changes.
- The PA notified the ER physician and the neurosurgeon on call, neither of which elected to see or examine the patient.

Case #2

- The neurosurgeon's advice was to have the patient follow up with him the next day following a scheduled MRI at 1 p.m.
- An indwelling catheter was placed, and 1 liter of urine was received.
- The patient was given the above instructions and was discharged to home.
- The ER physician, due to the scheduled neurology appointment the next day, did not see the patient.

Case #2

- Unfortunately, the next day the MRI was postponed until 10 p.m., awaiting insurance coverage approval.
- The MRI subsequently showed intervertebral disc herniation, lumbar spine spondylosis, and stenosis of the spinal canal.

Case #2

- The neurologist saw the patient the following morning and after removal of the catheter was unable to void; the neurologist immediately admitted the patient to the hospital for spinal decompression surgery. Following the surgery, the patient's pain improved significantly.
- However, bladder and bowel deficits persisted, and a diagnosis of Cauda Equina Syndrome was made.

Case #2

- Three days later, the patient was discharged with follow-up appointments scheduled with GU and Neuro.
- Given the delay in diagnosis and treatment, the patient experienced permanent bowel and bladder dysfunction.
- Fortunately, the patient did not require a catheter or colostomy.

Case #2

- The patient brought suit against the hospital, PA, ER physician, and neurologist, alleging the condition should have been diagnosed during the initial ER visit.

Case #2

- According to the patient and her medical experts if the condition had been diagnosed during the first admission to the ER, physicians could have performed surgery to prevent further pressure and compression of the nerves.

Case #2

- Furthermore, the patient alleged that the PA failed to adequately examine her by performing and documenting an extensive motor examination or assessing her lower extremities' sensory function.

Questions for Case #2

1. Did the PA have a duty to care? Yes, No
2. Did the PA breach that duty? Yes, No, Don't know
3. If the PA breached that duty, was the breach a proximate cause of the injury/death? Yes, No, Don't know
4. I would vote: In favor of the defendant, in favor of the Plaintiff, Don't know

OUTCOME?

Case #3

- 30-year-old man
- Hard right axillary lump X 2 weeks
- PA saw pt, consulted with SP
- CT scan ordered
  - *No abnormality*
  - "*Consider an MRI scan for better soft-tissue definition*"
- Reviewed with SP who said *"Why don't we just wait and see"*

Case #3

- Lump grew very slowly over next 1 ½ yrs.
- Saw PA again, ordered MRI
  - (3 wks. wait—so referred to surgeon for axillary biopsy
  - DX: histiocytoma
- 1 Yr. later- hard lump in right thigh- biopsied
  - *leiomyosarcoma*
- *Patient referred to Cancer Center*

Case #3

- Oncologists reviewed the original biopsy slides of right axillary growth
  - Found it to be **leiomyosarcoma**
- Pt underwent chemotherapy and radiotherapy for Stage 4 **leiomyosarcoma**
  - and died several months later

Case #3

- PA was served with malpractice suit stating she was a provider of **"Careless and negligent medical care who had caused the patient severe and grievous damages resulting in his death"**
- **Should have ordered the MRI when first suggested**
- **1 ½ year delay**

Questions for Case #3

1. Did the PA have a duty to care? Yes, No
2. Did the PA breach that duty? Yes, No, Don't know
3. If the PA breached that duty, was the breach a proximate cause of the injury/death? Yes, No, Don't know
4. I would vote: In favor of the defendant, in favor of the Plaintiff, Don't know

Case #4

- An active and healthy 40-year old man presented to the clinic with a sore throat and muscle pain across the back of his shoulders.
  - **At times the pain extended to his arms on both sides.**
  - **The PA had seen many cases like this since it was the Flu season.**
  - **Vital signs were normal.**

Case #4

- The PA told the patient that in all likelihood he had the Flu but did put him on a course of Amoxicillin.
  - **Her charting was brief and to the point, noting**
    - **"Viral Syndrome: muscle aches and pains in chest and shoulders".**
  - **The patient was sent home to rest.**

Case #4

- The patient called 2 days later to tell the PA that his symptoms were unchanged and that he had not been able to return to work.
  - **The PA reassured the patient that "the infection would have to run its course"**

Case #4

- Two weeks later, the patient went to the hospital ER, where he was assessed for cardiac chest pain.
  - **His ECG showed changes indicative of an acute anterolateral MI.**
  - **He was admitted and experienced a routine recovery.**

Case #4

- Because of the amount of myocardium damaged, the patient:
  - **temporarily experienced symptoms of CHF**
  - **and had restrictions imposed on his activity after he was discharged.**

Case #4

- Following his recovery period, he consulted a plaintiff attorney and decided to sue the PA for "missing his heart attack"
  - **The medical record was obtained and sent to an expert witness who determined that the PA had missed the cues of cardiac pain and caused the patient to proceed to a massive MI, resulting in subsequent severe disability.**

Case #4

- **During deposition the plaintiff (patient) reported that he had told the PA about another pain that went across his chest and down his arms.**
- Medical records were very brief. Under subjective she had listed “feels bad”

Questions for Case #4

1. Did the PA have a duty to care? Yes, No
2. Did the PA breach that duty? Yes, No, Don't know
3. If the PA breached that duty, was the breach a proximate cause of the injury/death? Yes, No, Don't know
4. I would vote: In favor of the defendant, in favor of the Plaintiff, Don't know

OUTCOME?

Case #5

- ER PA saw a 48-yr-old man who presented to the ER with a skin laceration across the front (anterior) of his left wrist and symptoms of agitation and anxiety
  - **Pt stated he had injured himself while using a carpentry chisel**
  - **One prior admission for anxiety**

Case #5

- Wound was sutured & dressed
- Patient discharged with follow-up instructions
- **Next day pt. was found dead in his apartment after an overdose of barbiturates**

Case #5

- His estate sued the PA
- Testimony from friend who had accompanied pt. to ER stated pt. was afraid he had AIDS and needed to speak with a psychiatrist immediately
- **Allegation was the PA had failed to recognize this wound as a warning sign—had he done so the pt. would still be alive**

Case #5

- Nurse testified that the pt. had told her that he had cut his wrist while working with a carpentry chisel
  - **Was documented as such on the chart**
  - **Settlement negotiations failed**

Questions for Case #4

1. Did the PA have a duty to care? Yes, No
2. Did the PA breach that duty? Yes, No, Don't know
3. If the PA breached that duty, was the breach a proximate cause of the injury/death? Yes, No, Don't know
4. I would vote: In favor of the defendant, in favor of the Plaintiff, Don't know

OUTCOME?

Case # 6

- 61 yr.-old-male presents to Occupational Medicine clinic to see PA after MVA complaining of neck pain
  - Driver of 18 wheeler
  - Ran in to car ahead of him
    - Fender bender
  - Neck pain, achiness
  - Paramedics saw him at scene and he declined treatment
    - Safety officer required at visit at Occ Med Clinic

Case # 6

- PA took good hx
  - pt. only complained of neck pain
  - On Tagamet for “mild ulcers”
- **PA took good PE**
  - **PE normal**
  - **Vital signs normal**
- Patient discharged to home

Case # 6

- Pt ended up in ER in middle of night
  - **Dx of severe myocardial infarction**
- Loss of significant amount of cardiac tissue
  - **Plaintiff attorney consulted**
- Malpractice suit filed

Case # 6

- Expert witness (cardiologist) testified that MI had probably started 24-48 hours earlier based on enzymes
- **Expert witness (PA) stated that PA should have done an ECG**
  - Fell below standard of care
  - Negligence caused severe disability of patient

Polling Questions for Case #4

1. Did the PA have a duty to care? Yes, No
2. Did the PA breach that duty? Yes, No, Don't know
3. If the PA breached that duty, was the breach a proximate cause of the injury/death? Yes, No, Don't know
4. I would vote: In favor of the defendant, in favor of the Plaintiff, Don't know

OUTCOME?

Reminder
HOW TO AVOID MALPRACTICE SUITS

1. **Be Courteous**
2. **Do Your Homework**
3. **Avoid the EHR Trap**
4. **Remember to Follow Up**
5. **Communicate Clearly and Effectively**
6. **Ensure Patients Fully Understand**
7. **Listen and Learn**
8. **Expand your Educational Horizons**
9. **Think Like a Patient**
10. **Be Consistent**

Veterans Caucus

Thanks for your time!