

More and Better Patient Information = More Lawsuits for Physicians

By Robert J. Mintz

A recent lawsuit against the major pharmacy chains highlights the liability risks of having too much information about a patient. Essentially, the more information you have at your desktop computer, the more you know or really *should* know about your patient. But as the amount of information you are expected to know increases, the greater your legal responsibility and lawsuit risk becomes.

For example, as Electronic Medical Records are widely adopted and the quantity of information about a patient expands dramatically, does provider liability increase even if the quality of care is vastly improved?

What happens if the quality of care really does get better but because of all the new and easily accessible information, the standard of care for legal responsibility increases? With EMR's plaintiffs lawyers will certainly try to make the case that greater access to patient information, should result in more accurate diagnoses by physicians and treatment outcomes should be more successful. As a result, even as quality increases, the legal standard of care will keep rising too so that rather than fewer mistakes and fewer lawsuits there are more of each since the information you "should have known" is now right there - at your desk.

An example of how theories of liability expand along with available information is illustrated in a new case now before the Nevada Supreme Court. (*Sanchez vs. Wal-Mart Stores*) The case is reportedly the first legal test of whether a pharmacy can be liable if a customer causes a fatal car crash after taking medication dispensed by the pharmacy. As recently reported in the Wall Street Journal, over a period of several years and using multiple pharmacies, Patricia Copenig, a 35 year old medical receptionist, repeatedly obtained and filled prescriptions for a variety of pain-killers. On June 4, 2004, after apparently mixing Soma and hydro codeine into a potent combination known as a "Las Vegas Cocktail", Ms. Copenig was seen driving erratically, then swerving off the road, crashing into 21 year old Gregory Sanchez who had pulled over to the side of the road to repair a flat tire. A friend of Mr. Sanchez, helping him out, was also seriously injured in the accident. Ms. Copenig was not hurt.

Although pharmacies can be held liable for mistakes they make in preparing prescriptions, generally they are not responsible for the specific effect of the medication on the patient or third parties who may be injured by the patient. The general rule is that the pharmacist is not legally required to make an independent evaluation of the potential consequences of a medication prescription written by a physician. The pharmacist's obligation is to correctly fill the prescription.

What happens when the provider of the medication, the pharmacy, has reason to know that the medication may cause injury to the patient or another person? Should the standard of legal responsibility be altered in some respects? This is a similar question to

that posed by the so called “dram shop” laws which impose liability on bartenders and liquor stores (and party hosts) that serve alcohol to minors or intoxicated patrons. In most states these bars and liquor stores can be liable to third parties injured by such a patron because someone who is a minor or is intoxicated can often be identified or observed by behavior. The potential danger to the intoxicated patron himself and innocent third parties from drunken driving is obvious. But how would the pharmacist know that the medicine for a particular customer might pose a danger to anyone?

This is the dispute at the heart of the Sanchez case. According to the Wall Street Journal article a total of 33 states now offer online prescription tracking data bases. Although the type of information maintained differs between the states, Nevada, for example, requires pharmacies to report their patients controlled substance prescription records and this information is shared among pharmacists, doctors and law enforcement with the goal of identifying potential drug abuse. When Ms. Copenig filled her prescription prior to the fatal accident, the pharmacist failed to check the available computer records which showed that she had filled similar prescriptions for more than 4500 doses of the drug at various pharmacies within the same year. The State Board had in fact notified this particular pharmacy as well as 14 others that based on the quantity of prescriptions she obtained, Ms. Copenig was suspected of drug abuse violations.

The lawsuit filed by the victim’s family alleged that based on the available information in the database, the pharmacy should have known that Ms. Copenig was a danger to herself and others and that this negligence led to the death of Mr. Sanchez. Unlike an intoxicated patron whose behavior provides observable evidence of his condition, a drug abuser may exhibit no noticeable behavior in the few minutes it takes to fill a prescription. But if the evidence of dangerous abuse is readily available at a convenient computer along with the patients’ records, the availability of this information may be sufficient to raise the legal standard of responsibility. That’s what the plaintiffs in the case are arguing and the Nevada Supreme Court is considering at this time.

In many states physicians already have an established duty to third parties who might be injured by a patient. The obvious relevance of this case is the potential expansion of liability for physicians based upon increasing access to patient health records. Ultimately these records will cover a lifetime of medical care and the legal standard of care for medical decisions is likely to encompass knowledge of this medical history and its potential impact on the current diagnosis and treatment options. For many time constrained physicians new standards and responsibilities will certainly be a difficult challenge to meet and planning for EMR adoption will involve not only business and medical concerns but serious legal issues as well.

Certainly one of the powerful arguments for EMR’s is that easy and complete access to a patients’ Electronic Medical Records will improve efficiency and quality of care while substantially reducing costs. And as the supply of patient information increases, there

should be fewer errors and a decline in lawsuits and liability costs. At least that's the argument.

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