Fundamentals of Respiratory Care

LEGAL ISSUES IN RESPIRATORY CARE
Historical Perspective

- Extension of authority given physicians by local state medical practice act.

- Two main legal concerns for the “Inhalation Therapist”
  - Appropriate order from duly licensed physician
    - In compliance with hospital standards, department policy and procedure, and physician peer review committee
  - Appropriate competency to carry out the order
    - Knowledge base and judgment of therapist ensured by the hiring and supervisory process of the institution.
Respondeat Superior

- **Master / servant relationship**
  - Person with superior knowledge is responsible (MD)
  - Therapist was the “borrowed” servant
    - Employed by hospital to carry out physician’s orders
    - Physician has power and right to control the activities of the therapist
  - Hospital / physician held liable if therapist actions were within scope of instructions given and job description.
    - Liability less clear if therapist acted outside this scope
  - Therapist not sued directly
    - Not profitable
State Licensing

- Scope of practice set by state statutes
- RCP must meet minimum competencies as set by state law
- RCP legally responsible to perform duties in a competent manner and held accountable by state licensing act.
- Action taken or failed to take by RCP determines type of liability and consequences.
  - Assess or evaluate and treat orders increase liability risk
- Have something of value to lose - ability to work!
Basic Elements of a Practice Act

- Scope of professional practice – general guidelines and parameters
- Requirements & qualifications for licensure
- Exemptions
- Grounds for administrative action
- Creation of examination board & processes
- Penalties and sanctions for unauthorized practice
Tort Law

A CIVIL WRONGDOING COMMITTED TOWARD SOMEONE RESULTING IN HARM OR INJURY

INDIVIDUAL AGAINST ANOTHER INDIVIDUAL

MONEY FOR DAMAGES
Types of Torts

- NEGLIGENCE: CARELESSNESS
- INTENTIONAL
- QUASI-INTENTIONAL
- STRICT LIABILITY
NEGLIGENCE TORT

- Failure of a professional to perform a duty in a competent manner.
  - Commission or Omission
- Often involves foresee-ability - duty to anticipate harm
- 4 D’s of negligence
  - Had duty to perform (duty to patient)
  - Failed to perform @ an acceptable level of competence (derelict with that duty)
  - Direct cause of damages
  - Damage or harm actually occurred
- Are actions reasonable & prudent?
  - Guidelines established by professional group
  - Direct expert testimony
  - Circumstantial evidence
*Res Ipsa Loquitor – thing speaks for itself*

3 basic conditions:

1. Harm was such that it would not normally occur w/o someone’s negligence
2. Action responsible for injury was under control of defendant
3. Injury did not result from any contributing negligence or voluntarily assumed risk on the part of the injured party.
INTENTIONAL TORT

- Deceit, infliction of mental distress
- Intentional interference with one’s person, reputation or property

- Assault
- Battery
- False imprisonment
- Intentional infliction of emotional distress
- Trespass

- Punitive and actual damages
- To be liable must meet all elements of the tort
ASSAULT

• Assault?
  ○ Action that places someone in fear of personal injury. Threat accompanied by physical manifestation to do bodily harm to someone.

• Elements
  ○ Immediate fear or apprehension of a harmful or noxious touching w/o consent.
  ○ Must be aware that they are about to be touched.
Battery

- **Battery?**
  - Actually carrying out a threat / can be as simple as touching someone without his / her consent

- **Elements**
  - Harmful/offensive touching of another w/o consent or w/o legally justifiable reason (emergency situation)
General Consent

- **General Consent on admission**
- When presenting for treatment, patients give implied consent for procedures that are considered ordinary for the condition being treated.
- **Touching indicated by treatment**
- **Most RCP procedures will not have specific permission forms**
- **Important to:**
  - Explain procedure to patient (all procedures to all patients, even if there is a reason to believe that a patient is incapable of understanding)
  - Pay close attention to any efforts the patient makes to refuse procedure or to withdraw consent
Informed Consent

- Emergency situations – life threatening, pose risk of significant injury to patient if procedures not performed

- **Competent** consent must be obtained asap
Competency

Ability to understand the nature and consequences of procedure or treatment patient is asked to undergo

- Presumed competent unless there is a valid reason to believe otherwise
Incompetency

- Under legal age (<18)
- Court determined lack of capacity (conservator appointed)
- Elderly with diminished mental functions – written statement from physician
- Extreme condition

**Decision Maker**
- Adult appointed by patient (healthcare poa)
- Court appointed conservator
- Nearest relative
**False Imprisonment** – unlawful detention of a person
- Involuntary admit
- AMA – cannot prevent a competent pt from refusing tx or leaving
- Restraints

**Intentional Infliction of Emotional Distress**
- Outrageous conduct, beyond bounds of common decency
- Actions must be egregious

**Trespass to Land** – care providers are guests in pt’s home
Quasi-Intentional Torts

Based on speech not actions

Invasion of privacy
  - Injury to feelings

Defamation of Character
  - Using information in a manner harmful to a patient - must be untrue & must be seen / heard by 3rd party, injury to reputation
Invasion of privacy

- Purposely seeking information about a patient that the RCP does not need to know in order to perform his/her duties, or publicly revealing information
- Appropriating name or likeness
- Unreasonably interfering with seclusion
- Placing in false light
Breach of Confidentiality

- When someone who has legitimate access to health information about a patient shares it with others who have no reason to know
Defamation of Character

- **Libel?**
  - Written statement

- **Slander?**
  - Spoken statement

- **Must have known or should have known statements were false**

- **Must prove actual harm to reputation – public hatred, contempt, ridicule, or degradation**
  - Greatest liability – statements made about co-employees
Defamatory per se

- Do not need to prove actual damage
  - Loathsome disease
  - Sexual misconduct,
  - Serious criminal behavior
Truth

Absolute defense to defamation

- Qualified privileges – reporting abuse
Strict Liability

- Products and techniques
  - Medical equipment manufacturers
  - Hospitals and institutions
Professional Malpractice

- Breach of Contract:
  - Professional – patient contract
  - Pt’s welfare primary
  - Act only in patient’s behalf
  - Protect pt’s life, preserve health
  - Relieve suffering, protect privacy
Misconduct

- Professional failed to provide care expected of that type of professional and that the substandard care resulted in harm to someone.
  - Performing procedures beyond scope of one’s training and education
  - Attempting to treat too many patient’s simultaneously, resulting in harm to one or more patients – staffing shortages
  - Unreasonable lack of skill or fidelity in professional duties
  - Evil practice
  - Unethical conduct
Types of Malpractice

1. Criminal malpractice: assault and battery, euthanasia (criminal)

2. Civil malpractice: negligence, practice below reasonable standard

3. Ethical: censure or disciplinary actions by licensure boards, violation of professional ethics
Preventing Malpractice

- Maintain appropriate standard of care (care that is reasonable and ordinary for the professional and the condition. Type of care any other practitioner would be expected to offer under the same circumstances in that community.)
  - Policies and Procedures
    - Clinical Practice Guidelines for standards of care for all duties / tasks that are to be performed
    - Should also cover unexpected duties or tasks
    - Protect RCP & institution – standardize type and quality of care to be delivered
  - Adhere to quality assurance standards – detect flaws in procedures that result in low-quality care
  - Comply with risk management recommendations – evaluate risks faced by dept / institution
How to Avoid Liability

- Have pt’s consent to perform specific procedures
  - Do not exceed consent
- Always maintain pt’s confidentiality
- Understand pt has absolute right to refuse
  - Ability to change person’s mind limited to your verbal skills
- Must always demonstrate respect for all patients
  - Difficult patients
    - Noncompliant, demanding, undesirables
  - Disapproval of the patient’s behavior, attitude, or lifestyle is not a legitimate reason for denying the patient the highest possible standard of care
  - Chronic illness / communicable diseases
- Provide same standard of care to all patients
  - Generally – may not refuse to treat patients simply because of diagnosis. Exception – if fear is so strong so as to interfere with care provided.
  - Hospital should have policy statement to clarify practitioners rights / obligations.
1. **Insurance portability** - continuity of coverage

   Change plans and not be denied due to pre-existing condition

2. **Fraud enforcement** - increased government authority

3. **Administrative simplification** – decrease healthcare costs (phased-in beginning 2001)
**Privacy and Security rules**

- Required institutions to have policies to protect patient’s privacy and confidentiality
- Provides federal framework to protect patient information from being exploited for personal gain.
- Enforced by the Office for Civil Rights, Department of Health and Human Services
Sanctions

- Civil – “inadvertent violation”
  - Not necessarily resulting in personal gain
  - Fines up to $100/violation/individual
  - $25,000 annual limit for violating each identical requirement or prohibition

- Criminal – “wrongful disclosure” fines and imprisonment
  - Knowingly releasing pt information 1 year jail / $50,000 fine
  - Gaining access to health information under false pretenses 5 years jail / $100,000
  - Releasing pt information with harmful intent or selling information 10 years / $250,000

- Failure to protect information by not following organizations policy can impact your ability to do your job
  - Lose your job
  - Lose your license to practice
Individually Identifiable Information

Any information, including demographics, that identifies an individual and meets the following criteria:

- Created or received by provider, health plan, employer
- Relates to past, present or future physical / mental health or condition of individual
- Describes past, present, or future payment for provision of healthcare to an individual

HIPAA regulates any communication of information – written, electronic, spoken
What is confidential information?

Name
Address
Employer
Relative’s Names
Date of birth
Telephone #’s
Email address

SS#
MR #
Account #
Photos
Occupation

Email address
Five Ways to Protect Patient Privacy

- Close patient room doors when discussing tx’s and administering procedures
- Close curtains and speak softly in semi-private rooms
- Avoid discussions about patients in elevators, cafeteria, (public places)
- Do not leave messages on answering machines regarding patient conditions, test results
- Avoid paging patient’s using identifiable information that could reveal their health issues.
What types of information receive heightened protection?

- Highly sensitive (sensational)
  - Substance Abuse
  - Mental illness
  - STD
  - Genetic makeup
How do you protect data?

**Paper record:**
- Do not leave unattended in areas where others can see
- Dispose of papers by shredding or in secure bins

**Electronic:**
- Secure password protected access to CHR (computerized healthcare record)
- Screen savers – best to log off then to leave unattended
- Position monitors so information cannot be viewed by public
- Send and store information on public networks only in encrypted form

In no case should you release confidential patient information outside the facility or discuss it with anyone if it is not needed for therapy, billing or organization operation.
Exceptions for release of information

Public good -
- Report certain communicable diseases to state health agencies
- Failure of medical devices to FDA
- Suspected child abuse / domestic violence
- Information requested by police from suspects in a criminal investigation
- Court ordered
- Suspicious deaths i.e. gun shot wounds
- Death’s – coroners, funeral directors
HIPAA abuse reporting

Noncompliance of organization

- Patient, member of public, or employee may file complaint with Office of Civil Rights.

- Must be in writing (paper or electronic) within 180 days of date complainant knew about violation

- Organizations must have a policy for complaints and a designated privacy officer who handles complaints
  - Employee should report suspected violations to privacy officer