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PHARMACY LAW:
IT COULD HAPPEN TO YOU
A Knowledge Based Course for Technicians

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Total number of pharmacy continuing education hours: 2 hours (0.2 CEU’s)

Course Cost: $9.00 (to be paid at time of testing)
Average time to Complete: Approximately Two hours including testing
Course Value: Two Contact Hours
Reading: 19 Pages
Final Exam: 20 Questions
Completion Requirements: Answer 70% of the questions correctly. Evaluation
Course Objectives

1. Identify the elements of a professional malpractice action against a pharmacist.

2. Describe the legal standard of care for processing prescription medication.

3. Define the element of causation, both actual and proximate.

4. Discuss what constitutes damages in a malpractice action.

5. Discuss the available defenses to a claim of professional negligence.
Introduction

As a pharmacy technician one of the undisputable truths that we are taught early on is:

The pharmacist maintains control over all pharmacy activities. The ultimate responsibility rests with the licensed pharmacist.

The liability and risk of malpractice will always fall to the licensed pharmacist. It is they that put their careers at risk everyday. The pharmacy technician is a relatively recent addition to the health care team and is a position growing in scope, as well as in practice. As such, the role and responsibilities of pharmacy technicians continue to change dramatically.

While our operational duties continue to grow, it becomes important that we have a fuller understanding of the laws and standards that govern our practice. This is further illustrated by the fact that the Pharmacy Technician Certification Board requires at least 1 hour of continuing education to be in the area of pharmacy law. This course will give an overview of malpractice liability and risk management strategies.

While most of these laws were written with the pharmacist in mind, it is the technician who performs more and more of the daily operational activities involved with the processing of prescriptions. While your license may not be on the line, certainly your credibility and possibly your job are always at some risk. Therefore, I hope you will take to heart, this discussion of malpractice laws as they concern the day to day operations of pharmacy practice.
About the Court Cases

This course primarily contains summaries of reported cases (published written opinions issued by judges in the United States and its territories) that are relevant to the practice of pharmacy. The cases listed in each of the topic headings should not be considered a complete or authoritative source for any given issue considered.

The vast majority of cases included here are the result of actual judicial opinions that decide a legal issue with some degree of finality.

Negligence (Malpractice)

Like other professional people, pharmacists can be held legally accountable for the consequences of their conduct. A pharmacist who unintentionally causes harm to a patient through inattentiveness or carelessness, for example, can be considered legally negligent. Negligence is classified in the law as a “tort\(^1\)”, a civil wrong rather than a criminal wrong. It is different from an intentional tort, however, which occurs when one person consciously causes harm to another. Allegations of intentionally torts occur infrequently in pharmacy.

Malpractice law serves two purposes: compensation and deterrence. It operates to compensate the victim of a person’s negligent conduct by placing them back in the position in which they would have been (as near as possible) had the negligence not occurred. It also operates as a constant reminder that actions have consequences, so the specter of legal liability deters people from acting carelessly and irresponsibly toward one another.


The court explained the underlying rational for malpractice law. The court was asked to rule that a pharmacist could be held liable for dispensing Nardil, a monoamine oxidase inhibitor, to a woman whose prescription has been for Norinyl, an oral contraceptive. The woman gave birth to a healthy child, and the pharmacist argued that no real harm had occurred. The court responded:

> In theory at least, the imposition of civil liability encourages potential tortfeasors\(^2\) to exercise more care in the performance of duties, and hence, to avoid liability-producing negligent acts. Applying this theory to the case before us, public policy favors a tort scheme which encourages pharmacists to exercise great care in filling prescriptions. To absolve defendant liability here would remove one deterrent against the negligent dispensing of drugs.

\(^1\) Tort – A civil wrong usually arising out of a breach of duty.

\(^2\) Tortfeasor – One who commits a tort.
The pharmacist was held liable for the medical expense of the pregnancy and for the cost of rearing the child.

A legal cause of action for negligence has four elements:

1. Duty of Care
2. Breach of Duty
3. Causation
4. Damages

The plaintiff must prove each of these elements. If any one element cannot be proved, there will be no legal liability.

**Elements of Negligence**

**Duty of Care**

The well-established rule is that a pharmacist must use the degree of care that a reasonable and prudent person would use under similar circumstance. Recognizing the dangerousness of the products that pharmacists dispense, courts have described the pharmacist’s duty of care as “a high degree of care” and “great care.” The potential for serious harm that drugs present, combined with the fact that patients usually cannot fully appreciate that harm, creates a special situation in which pharmacists must be particularly cautious. Yet, the duty of care expected of pharmacists is not excessive. A pharmacist is bound simply to exercise the skill generally possessed by well-educated pharmacists who are considered competent in the profession of pharmacy.

As a practical manner, however, pharmacist (and pharmacy technicians by extension) may be the only health care professionals who are legally required to practice in a completely error-free manner. Pharmacists have traditionally adopted a “no mistake” approach to practice, and legal standards have reflected this impossible-to-achieve and self-imposed standard.

**Case: McLaughlin v. Hook-SupeRx Inc.** 642 N.E. 2d 514 (Ind. 1994)

The plaintiff, Patrick McLaughlin, injured his back while working as a lumberjack in the state of Washington. In the course of treatment for that injury, he became addicted to propoxyphene, the active ingredient in Davocet and Darvon. He was treated for the addiction in 1982, 1983, and 1987, but did not stop using the drug.

Over a period of months, the plaintiff obtained prescription drugs containing propoxyphene from his physician. Most of these prescriptions were filled at Hook’s Pharmacy in South Bend. The prescriptions were dispensed on the basis of written

**Case (Continued): McLaughlin v. Hook-SupeRx Inc.** 642 N.E. 2d 514 (Ind. 1994)

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3 Plaintiff – one who starts a lawsuit; the initial complaining party in a legal action.
prescriptions brought to the pharmacy by the plaintiff, via telephone calls to the store from the doctor’s office, or as refills.

In late 1988, the physician apparently became aware that McLaughlin was consuming the drugs at a much faster rate than prescribed. He refused to furnish any more prescriptions. Shortly, thereafter, McLaughlin’s wife found her husband holding a shotgun to his head during a time of depression. He did not pull the trigger. The plaintiff sought recovery against the pharmacy on the theory that it breached its duty of care by failing to refuse to dispense the prescriptions because the pharmacists knew or should have known that McLaughlin was consuming the drugs so frequently that it posed a threat to his health.

The court responded:

> Despite Hook’s lamentations to the contrary, we do not perceive that the physician and pharmacist will become adversaries if pharmacists are expected to cease refilling prescriptions where the customers are using the drugs much more rapidly than prescribed. First, pharmacists currently possess that authority by statute (law). Second, physicians remain ultimately responsible for properly prescribing medication, and recognition of a duty on the part of pharmacists will not replace the physician’s obligation to evaluate a patient’s needs. We believe recognition of a legal duty will encourage pharmacists and physicians to work together in considering the best interest of their customers and patients.

The court recognized that there was concern over increased health care costs that might result from imposing new duties on pharmacists. However, a Hook’s district manager testified that the company used a computerized information system that permitted pharmacies to review the prior history of a patient’s prescriptions. The existence of such a system led the court to conclude that the capital investment necessary to comply with the duty has already been made.

The court concluded that the pharmacy did breach the duty of care because the court was confident that skilled pharmacists, particularly when aided by computer records, would be able to readily determine when a prescription is being refilled at an unreasonably faster rate than the rate prescribed.

**Case:** Chiney v. American Drug Stores No WD 56895 (May 2, 2000), 2000 Mo App.

The patient entered a pharmacy that she had never been in before. She has a history of severe asthma and she believed she was suffering an attack when she went to the pharmacy. Her physician has prescribed an albuterol inhaler in the past. She was out of medication and did not have a prescription with her. She asked the pharmacist to provide her with an inhaler or call her doctor or the hospital to verify that the medication had been prescribed. For reasons that are not explained, the pharmacist did not make the call and he refused to provide the requested medication. As a result, the patient was taken to a hospital by ambulance. She claims that she has suffered additional breathing problems

from the delay in her treatment caused by the pharmacist’s refusal to assist her. The defendants, the pharmacy and the pharmacist, moved to dismiss the complaint on the grounds that the pharmacist had no duty to supply prescription-only medication without a prescription and that there is no duty for a pharmacist to call a physician for a prescription when there is not current prescription on file for the patient in the pharmacy.

The court found that a pharmacist has no legal duty to protect the patient unless there is some established relationship that existed. The court also considered state and federal laws dealing with the rights and obligations of pharmacists. The state’s definition of the “practice of pharmacy” includes the “dispensing of drugs pursuant to prescription orders.” The court interpreted the statute and found it does “not describe or anticipate the practice of pharmacy to include calling a doctor or hospital to see if a potential customer is entitled to a prescription medication when he or she requests prescription medication due to immediate need.

The court affirmed dismissal of the case concluding that the pharmacist had no legal duty to the patient because she had never had a prescription filled at the pharmacy and did not present the pharmacist with a prescription.

Breach of Duty – Dispensing Errors

It is generally accepted that a pharmacist who fills a prescription in a manner other than the way it was ordered by a prescriber has breached a duty of ordinary care owed to the patient. This principle is so well established that, even though the plaintiff technically bears the burden of proof in pharmacist malpractice litigation, evidence of a misfiling error is virtually sufficient for a presumption of negligence.

Courts have clearly established the pharmacists’ responsibility to dispense the correct medication to patients, and pharmacists accept this responsibility. One of the most common reasons for a wrong drug error by pharmacists is a misunderstanding between the prescriber and the pharmacist, either because of sloppy handwriting or because of slurred speech. In either case, the pharmacist who mis-fills the prescription has breached the duty, because the pharmacist always has the last opportunity to clarify an unclear communication. Attempting to focus blame on physicians who issue unclear orders or manufacturers who use similar drug names does not effectively relieve the pharmacist of responsibility. As the last link in the drug distribution chain, the responsibility for the failure to clarify ambiguity stays with the pharmacist.

Case: Hoar v. Rasmussen 282 N.W. 652 (Wis. 1938)

This civil action was brought against a pharmacist for an injury resulting to the plaintiff when the pharmacist dispensed the plaintiff’s prescription with “Cala-zine” instead of the calamine lotion with 1% phenol as prescribed by the plaintiff’s doctor.
The plaintiff was suffering from a skin disorder and received a prescription from a Madison, WI physician for “calamine lotion 1% phenol.” He took the prescription to the pharmacist in his hometown of Spooner, WI. The pharmacist filled the prescription with a commercial preparation called “Cala-zine” which was similar to the calamine lotion with phenol but which contained a small amount of mercury. The plaintiff was allergic to mercury and eventually sustained such severe skin injury that he could not wear clothing for 2 months. The injury was sustained shortly after applying the lotion, and the plaintiff’s wife contacted his family physician who told her that her husband should discontinue use of the prescription. The family physician then contacted the pharmacist and asked if the prescription written by the Madison doctor contained mercury. The pharmacist answered “no” even though he knew it did. He believed it was not his duty to reveal the contents of another doctor’s prescription. Eventually, it was brought to light that the prescription contained mercury.

At the trial of the case, the defendant’s legal counsel produced evidence that it was customary in the area for a pharmacist to vary from the standard formula. The Wisconsin Supreme Court rejected this defense as wholly unavailable since the prescription was written by a Madison doctor from outside the county.

The court concluded that a pharmacist must exercise a high degree of care and skill and that the pharmacist had violated the standard of care required by the profession.

In ruling in favor of the plaintiff and against the pharmacist, the court laid down the rules:

Although the druggist may have had reason to suppose that the medicine which he supplied was just as good as what the doctor prescribed, it must be held that the risk of harm from the act of making the substitution without informing the purchaser outweighs any possible utility that the act may have had. It is even more apparent that an unreasonable risk was involved in misinforming the physician. The druggist could easily have refused to answer at all if he believed that to be his duty.

The circumstances of a pharmacist’s or druggist’s calling demand the exercise of a high degree of care and skill, such care and skill as an ordinarily prudent person would exercise under those circumstances, the highest degree of care and prudence consistent with the reasonable conduct of the business. The effect of a mistake may be swift and disastrous for injuries resulting from negligence in filling a prescription or supplying a remedy.

In the present case, the liability is more apparent than in most, because the substitution was deliberately made under the mistaken impression that the prescription could be changed in accordance with the druggist’s judgment.

Dispensing errors may involve the wrong strength or dosage of the correct drug. In Lou v. Smith, 685 S.W. 2d 809 (Ark. 1985), the defendant pharmacist changed a prescription for Reglan from the prescribed dosage of 1mg daily to 10mg daily because the product
was distributed as 10-mg tablets. The higher dosage would have been correct for an adult, but the patient was a 4-month-old child, who has a sever reaction. The pharmacist was held liable.

Assumption of Duty


Although the pharmacist’s duty to process prescriptions correctly is clear, Michigan courts had held that pharmacist’s had no duty to warn the patient of possible side effects of medication or to monitor drug use. The Baker opinion adopted a different perspective on the issue in part on the basis of the compelling facts of the case.

The plaintiff in Baker was a patient who suffered from depression and was prescribed the drug tranylcypromine after an attempted suicide in October of 1989. The patient was well aware of the dangers of adverse reactions with tranylcypromine, and he had strictly followed instructions given by his physician and the drug’s manufacturer. On February 26, 1992, the patient developed a cold and went to see a different physician. This physician’s records indicated that the patient was taking tranylcypromine. In addition, the patient later told his wife that he had twice told the physician that he was taking the drug. The physician prescribed two products for the patient. One product contained the drug phenylpropanolamine.

The patient took his prescription to the pharmacy where he normally had his prescription for tranylcypromine filled. A prescription for that drug had been filled for him at this pharmacy 11 days earlier. A computer at the pharmacy detected a potential interaction between the previously prescribed tranylcypromine and the newly prescribed phenylpropanolamine. However, a pharmacy technician overrode the computer prompt, and a pharmacist filled the prescription without becoming aware that the patient was also using a drug with which the prescribed drug could interact.

The patient ingested his prescribed cold remedy. Later that evening he complained to his wife that he was not feeling well. The two of them referred to literature that had been provided to them with tranylcypromine and concluded that the patient was suffering from a hypertensive attack. The patient was taken to the hospital, where he was diagnosed as having suffered a stroke. The stroke was a result of having ingested both the monoamine oxidase inhibitor and phenylpropanolamine. The patient eventually died.

The defendant pharmacy had advertised that its computer system was designed in part to detect harmful drug interactions such as the one that led to Baker’s death. Despite providing the assurance in its advertising, the defendant did not prevent the plaintiff’s drug interaction. The available technology was not used correctly because the pharmacy technician over-rode the interaction indicated on the computer.

The Michigan Court of Appeals held that the pharmacy “voluntarily assumed a duty to utilize the computer technology with due care (544 N.W.2d at 731). Citing prior case law for the precedent that a defendant can be held liable when it voluntarily assumes a function that it was under no legal obligation to assume, the court expanded pharmacist
responsibilities in Michigan beyond technical accuracy to include drug therapy monitoring with the assistance of computer systems.

**Causation**

Even if a pharmacist owes a duty of care and that duty is breached, malpractice under the law requires proof that the pharmacist’s misconduct caused the alleged damage. Proof of causation is a two-step process. First, the plaintiff must prove that the defendant’s conduct was a substantial factor in the harm that occurred (actual causation). Second, the plaintiff must fix liability with the party or parties whose misconduct most directly caused the damages (proximate causation). It would be unfair to hold people responsible for every consequence of their conduct, no matter how remote the consequence might be, so proximate causation operates to limit the liability of a person whose conduct was a substantial factor in the harm of another.

**Actual Cause**

One major problem with proving causation in drug-related cases is that the dispensed drug has often been ingested and eliminated from the body by the time a investigation can be conducted. There may be nothing to do but speculate as to what really happened. This determination is a question of fact that the jury must resolve on the basis of expert testimony. The standard of proof requires an expert’s reasonable degree of scientific certainty that the drug dispensed probably caused the adverse effect. The plaintiff does not have to disprove all other possible causal factors, but simply must establish the reasonableness of a causal inference by a preponderance of the evidence.

**Case: Holbrook v. Rose** 458 S.W.2d 155 (Ky. 1970)

A man was informed that his family should be treated for worms, and he asked a pharmacist for a medicine for such. The pharmacist sold him an over-the-counter (OTC) drug called *Jayne’s PW Vermifuge*. The adult preparation and the pediatric preparation were both purchased. The pediatric preparation was labeled by the manufacturer with the following warning: “Caution – Tablets must be swallowed WHOLE – not chewed or crushed. Examine the mouth thoroughly to make sure children do not hide tablets under the tongue or in the cheeks.” The preparations were sold by the pharmacist in the manufacture’s labeled containers. The tablets were coated so that the drug would be released in the intestinal tract, as the active therapeutic ingredient of the *PW Vermifuge* was hexylresorcinol, a drug which causes superficial erosion of the mucus membranes of the mouth and gastric irritation of the stomach.

The father read the instructions on the *Vermifuge* aloud to his family and the 3-year-old member of the family was given 3 tablets of the pediatric preparation in accordance with he labeled dosage directions. The child was told not to chew the tablets but she did nevertheless. Later the same day, she complained of discomfort in the mouth and her lips became sore but otherwise she acted much as usual. On the next day, the child began to vomit. On the day following, she was acutely ill and was taken to the hospital. She died the next day of respiratory failure preceded by convulsions. A toxicology report showed
that another drug called Darvon was found in the child’s stomach and a trace amount of resorcinol was found in the child’s kidneys. But neither drug was present in quantities, which the toxicologist believed would be sufficient to cause death, and the cause of death could not be determined.

The appellant court reasoned that regardless of the plaintiff’s alternative claims for recovery, the issue of causation or whether the vermifuge caused the death must be established by the evidence to a degree of “probability” or that it was “more likely than not” that the drug caused the death. Despite some conflict in the medical testimony at trial, no medical witness could testify that the drug taken in the dosages the plaintiff said it was taken could have caused the death, either alone or in combination with the other drug.

**Proximate Cause**

The rules of proximate cause relate primarily to limiting the liability of a defendant whose conduct has been shown to be the actual cause of harm to the plaintiff. Most proximate cause cases address the liability of a defendant who breached a duty of care when the defendant’s negligent conduct had an unforeseeable result. For example, assume a pharmacist dispenses the wrong medication to a patient that has a side effect of drowsiness. The patient takes the medication and while driving on a city street, falls asleep, hitting an oncoming car that in turn swerves into a house injuring the occupant. Clearly the pharmacist’s negligent act was the cause of the accident. The issue under proximate cause would be the extent to which the pharmacist would be liable. Should the pharmacist be liable for the injuries of the occupants of the other car? To the occupant of the house? The extent of liability often depends upon a determination of foreseeability. Because foreseeability is such an important factor in most proximate cause determinations, sometimes the issue is indistinguishable from that of duty. Thus, instead of asking if the pharmacist was the proximate cause of the injury to the occupant of the house, one could also ask whether the pharmacist owed a duty to the occupant of the house.

The rules of proximate cause define the circumstances that break the chain of causation between the defendant’s act and the plaintiff’s harm. If causation is viewed as a chain of events, with the defendant’s conduct at one end of the chain and the plaintiff’s harm on the other end, the links in the chain connect the defendant’s conduct with the plaintiff’s harm. If the defendant is to be liable for the harm, each of the links must be foreseeable to the defendant. Any unforeseeable link in the chain operates as an intervening act between the negligence of the defendant and the harm to the plaintiff; it breaks the chain of causation, so the defendant is no longer responsible for the harm. Most cases in which a pharmacist is relieved of liability on the issue of proximate cause involve unforeseeable misuse of the drug by the patient.
Case: January v. Peace 738 S.W.2d 355 (Tex. App. 1987)

Billy Jack Peace, a licensed pharmacist and owner of Peace Drug Store in Canton, Texas, received a telephone call on Nov. 5, 1982, from Murry January who requested some strychnine for the purpose of killing wolves. January told Peace that wolves had been attacking his cattle while they were calving. Peace advised January that he did not stock strychnine but January could contact area farm and ranch stores to procure the product.

Later the same day, January called Peace back and reported he had been unable to purchase the strychnine. Peace concluded that January wanted the strychnine “immediately” to prevent further loss of livestock. In order to accommodate his customer, Peace called Behren’s Drug at their Tyler, Texas, wholesale warehouse and arranged for January to go to the warehouse and pick up a quantity of the poison. The poison was delivered to January in person, but charged to the account of a pharmacy owned by Peace.

Peace stated in his affidavit that at no time did he ever have idea that January was going to use the strychnine to harm or kill his wife. There were no circumstances, inferences, statements or any other actions that would have led Peace to believe that January would use the strychnine for that reason.

The plaintiffs alleged in their petition that January used the strychnine, which he obtained from the wholesaler after contacting the pharmacy, to kill his wife. It was further alleged that the defendants assisted January in obtaining the strychnine contrary to federal and state law and were guilty of negligence per se, which was the direct and proximate cause of the death of January’s wife.

The appellant court ruled that even if the pharmacist and drug wholesaler were negligent in providing the customer with the poison, they did not proximately cause the wife’s death and were not liable to the wife’s survivor.

The court noted the long-standing rule that an act must be the proximate cause of injuries in order to constitute negligence or negligence per se. The negligent act must be a substantial factor in bringing about the injury and without which no harm would have been incurred. The act must also be foreseeable. Foreseeability is satisfied by showing that a person or ordinary intelligence should have anticipated the danger to others by his negligent act.

**Damages**

There is no recovery for malpractice if no harm was done. The law does not deal in hypothetical cases. A patient may actually be distressed over a mistake that a pharmacist made, and the distress may actually cause emotional problems. If the mistake was

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4 Negligence per se – Negligence that involves no questionable issue because the duty of the defendant toward the plaintiff has been violated by the defendant to the injury of the plaintiff, negligence that occurs through breach of standard of conduct imposed legally.
detected and rectified before any physical harm could occur, however, there are unlikely to be any compensable damages.

**Actual Damages**

The purpose of actual damages is compensation. When a patient loses a week of wages, suffers impaired vision, or has severe pain for a month because of a pharmacist’s negligence, the legal system seeks to compensate the patient for the harm. The goal is to return the patient to the position in which the patient would have been if the pharmacist had not been negligent.

Reimbursement for lost wages or for medical expenses incurred to treat the problem is relatively easy to determine. A dollar-for-dollar repayment can be arranged to shift the financial burden of the problem from the party who suffered the harm to the part who caused the harm. Compensation for physical injuries, emotional injuries, or pain and suffering are much more difficult to calculate. Usually, it is impossible to correct the injury, remove the pain, and simulate a return to the pre-injury status quo. Instead, a second-best approach must be adopted – providing a financial payment to the harmed person. The goal is not to remove the harm (because that cannot be done) but to make the harm more bearable.


A pharmacy erroneously filled a prescription for *Lasix* with *Inderal* for a 76-year-old patient with a complex medical history. Shortly thereafter, she was hospitalized for treatment of congestive heart failure. The dispensing error was found and corrected. Approximately one month later, she was admitted to the hospital for treatment of obstructive pulmonary disease, and later placed in a nursing home at her adult children’s insistence. In answer to the patient’s complaint for malpractice, the pharmacy admitted liability, but claimed that damages should be limited to those associated with the first hospitalization. The trial court judge, without a jury found the pharmacy liable for both hospital admissions and the nursing home placement. He awarded $875,000 to the patient and her children.

The Louisiana Court of Appeals examined the medical records and physician testimony in great detail, emphasizing the patient’s preexisting medical problems. The court reduced the verdict to $56,000, agreeing with the pharmacy that it should not be liable for preexisting health problems that continued after the effects of the dispensing error were treated and resolved.

**Punitive Damages**

Under certain circumstances, the law allows recovery for damages in an amount greater than that necessary to compensate the plaintiff for harm actually suffered. Such damages are known as punitive or exemplary damages because their purpose is to punish or to make an example of the defendant. The plaintiff receives punitive damages only if there is evidence of the defendant’s wanton and reckless disregard of the plaintiff’s rights or morally culpable conduct. The most likely reasons for punitive damages in a pharmacist
malpractice case are a cover-up of a dispensing error; carelessness so significant that an
error is almost inevitable; failure to follow a standard procedure in dispensing
medications, such as not appropriately supervising technical support personnel; or
ignoring the rule that pharmacists observe a compounding machine while a solution is
being prepared.


In January 1993, a physician wrote a prescription for thyroid 1 grain to be taken by the
patient once daily. He prescribed 100 tablets and 4 refills, intending that the patient have
a 1 year supply of the medication. At the local pharmacy, the pharmacist misread the
dose and dispensed 3 grain tablets. The erroneous dose was typed into the computer
prescription database that was used to generate refills on 4 occasions over the following
year until April 1994, when the mistake was detected. The patient had preexisting history
of depression for many years, including a hospitalization for depression and anxiety in
1992 (prior to the thyroid prescription error). While taking the excessive dose of thyroid,
her symptoms were again hospitalized with a diagnosis of major depression with
psychotic features. On admittance, she was considered suicidal and possibly even
homicidal.

She filed a lawsuit claiming the pharmacy and pharmacist were negligent in filling the
prescription with the wrong dose of the prescribed drug. The case was tried before a jury
in May 1996. The pharmacist testified that the original prescription is kept in the
pharmacy and is available for review at any time if she or any other pharmacist had any
questions. She stated that she did not review the original prescription after it was initially
dispensed because she did not have any questions. Instead she used information from the
computer screen to dispense the refills. After taking this testimony, the plaintiff’s
attorney asked the trial court judge for permission to amend the original complaint to
allege the pharmacist was negligent and wanton for each refill that was dispensed. Over
the objections of the defendants, the amendment was granted. The jury returned a verdict
of $10,000 in actual damages and $190,000 in punitive damages.

The evidence showed that during the period when the pharmacy had filled her
prescriptions, the pharmacy also mis-filled prescriptions for 3 other patients, yielding a
total of 14 prescription errors. This evidence was sufficient to permit the jury to award
substantial punitive damages.

Defenses to Negligence

Even if the plaintiff can prove the four elements of an action for negligence, the
defendant may be able to prove affirmative defenses that will absolve the defendant of
liability. Alternatively, of course, the defendant may be able to disprove one of the four
initial elements and avoid liability without needing to prove an affirmative defense. The
plaintiff bears the burden of proof, and the defendant often chooses to contest every point
vehemently.
**Contributory and Comparative Negligence**

Tort law requires that a plaintiff must act as a reasonable, prudent person in the same or similar circumstance. If the plaintiff could have avoided the consequences of the defendant’s negligence by ordinary care, then there is no recovery under the defense of contributory negligence. Until the 1970s, contributory negligence was a complete bar to recovery, even if the plaintiff’s fault was slight and the defendant’s fault was great. This harsh rule resulted in some unusual verdicts, in which obviously negligent plaintiffs were found not to be at fault because the unfair effect would have been to deny recovery altogether. If a pharmacist refilled a prescription with the wrong drug, for example, and the physical dissimilarity between the correct drug and the dispensed drug was so obvious that any thoughtful patient should have recognized it as a problem, a court trying to avoid a complete bar to recovery might have pointed out that the patient who did not notice the difference was obviously ill or would not have been taking medication. There could be no contributory negligence, therefore, because people who are ill cannot be expected to think clearly. The unfairness of a complete bar to recovery was a strong bias against finding any contributory negligence whatsoever.

The harshness of the complete bar to recovery for the slightest negligence by the plaintiff, combined with the absurdity of some judicial efforts to contrive explanations of the innocence of plaintiffs who were obviously somewhat at fault, led to a new rule. Comparative negligence has now replaced contributory negligence (i.e., plaintiffs suing a defendant who harmed them are held accountable for the harm that they themselves caused), the complete bar to recovery has been replaced. It is now possible to reduce a plaintiff’s recovery by the percentage that corresponds with the percentage of fault attributed to the plaintiff. Thus, assume that a patient was harmed and the dollar value of the harm was determined to be $100,000. If the patient was assigned 20 percent of the fault, and the defendant was assigned 80 percent of the fault, the plaintiff’s recovery would be reduced by $20,000.

Most jurisdictions permit recovery under “modified” comparative negligence, in which the plaintiff is permitted to recover whatever percentage of the damages corresponds with the defendant’s percentage of fault, provided that the plaintiff is less than 50 percent at fault. In a few jurisdictions, “pure” comparative negligence permits a recovery against defendant no matter how much at fault the plaintiff was.

**Conclusion**

Most pharmacist malpractice cases do not reach a jury verdict. This is not unusual for any type of litigation, because out-of-court settlements commonly make it unnecessary to carry the case through to completion. Although law established by a jury verdict that is affirmed on appeal is binding within the same jurisdiction and persuasive outside the jurisdiction, settlements carry no such authority and establish no precedent. Thus, settlement before the trial of a pharmacist malpractice case, with a payment being made by the defendant pharmacist, does not in any way obligate the same court or another court to decide a similar case in the same way at a later time.
Final Exam

1. The pharmacist maintains control over all pharmacy activities. The ultimate responsibility rests with the licensed pharmacist.
   a. True
   b. False

2. Malpractice law serves two purposes:
   a. Compensation
   b. Deterrence
   c. Both A and B
   d. None of the above

3. Which of the following is not a element of negligence?
   a. Duty of care
   b. Causation
   c. Damages
   d. Negligence per se

4. In the case of McLaughlin v. Hooks-SupeRx, the court concluded that the pharmacy did breach the duty of care because the court was confident that skilled pharmacist, particularly when aided by computer records, would be able to readily determine when a prescription if being refilled at an unreasonably faster rate than the rate prescribed.
   a. True
   b. False

5. In the case of Chiney v. American Drug Stores, the court found that a pharmacist has a legal duty to protect the patient, even if there is no established relationship.
   a. True
   b. False
Final Exam

6. It is generally accepted that a pharmacist who fills a prescription in a manner other than the way it was ordered by a prescriber has breached a duty of ordinary care owed to the patient.
   a. True  
   b. False  

7. If the pharmacist makes an error due to “sloppy handwriting” or “slurred speech”, the liability for the error shifts to the prescriber.
   a. True  
   b. False  

8. Dispensing errors may involve the wrong strength or dosage of the correct drug.
   a. True  
   b. False  

9. In the case of Baker v. Arbor Drugs, the pharmacy was held responsible to warn the patient of drug interactions, because they were using a computerized system designed to catch such interactions. The legal term for this is:
   a. Duty of care  
   b. Breach of duty  
   c. Assumption of duty  
   d. Damages  

10. In order to prove causation, a plaintiff must:
   a. Prove that the defendant’s conduct was a substantial factor in the harm that occurred.
   b. The plaintiff must fix liability with the party or parties whose misconduct most directly caused the damages.
   c. Both A and B  
   d. None of the above
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11. If the defendant’s conduct was a substantial factor in the harm that occurred, this is called:
   a. Damages
   b. Actual cause
   c. Proximate cause
   d. Breach of duty

12. To fix liability with the party or parties whose misconduct most directly caused the damages is called:
   a. Damages
   b. Actual cause
   c. Proximate cause
   d. Breach of duty

13. Most proximate cause cases address the liability of a defendant who breached a duty of care when the defendant’s negligent conduct had an *unforeseeable* result.
   a. True
   b. False

14. If causation is viewed as a chain of events, the links in the chain connect the defendant’s conduct with the plaintiff’s harm.
   a. True
   b. False

15. In the Case of January v. Peace, the appellant court ruled that because the pharmacist and wholesaler were negligent in providing the customer with the poison, they did proximately cause the wife’s death and were liable.
   a. True
   b. False
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16. Even if no harm was done, there may still be a recovery for malpractice.
   a. True
   b. False

17. The goal of _____ damages is to punish the defendant for their misconduct.
   a. Punitive
   b. Actual
   c. Both A and B
   d. None of the above

18. The purpose of ________ damages is to return the patient to the position in which
    the patient would have been if the pharmacy had not been negligent.
   a. Punitive
   b. Actual
   c. Both a and B
   d. None of the above

19. The plaintiff receives punitive damages only if there is evidence of the
    defendant’s wanton and reckless disregard of the plaintiff’s rights or morally
    culpable conduct.
   a. True
   b. False

20. If the plaintiff could have avoided the consequences of the defendant’s negligence
    by ordinary care, this is called:
   a. Duty of care
   b. Assumption of duty
   c. Contributory negligence
   d. None of the above