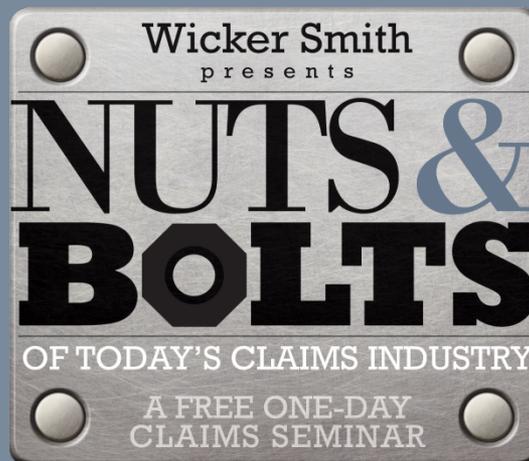


2016



Medical Malpractice 10 Minute Drills

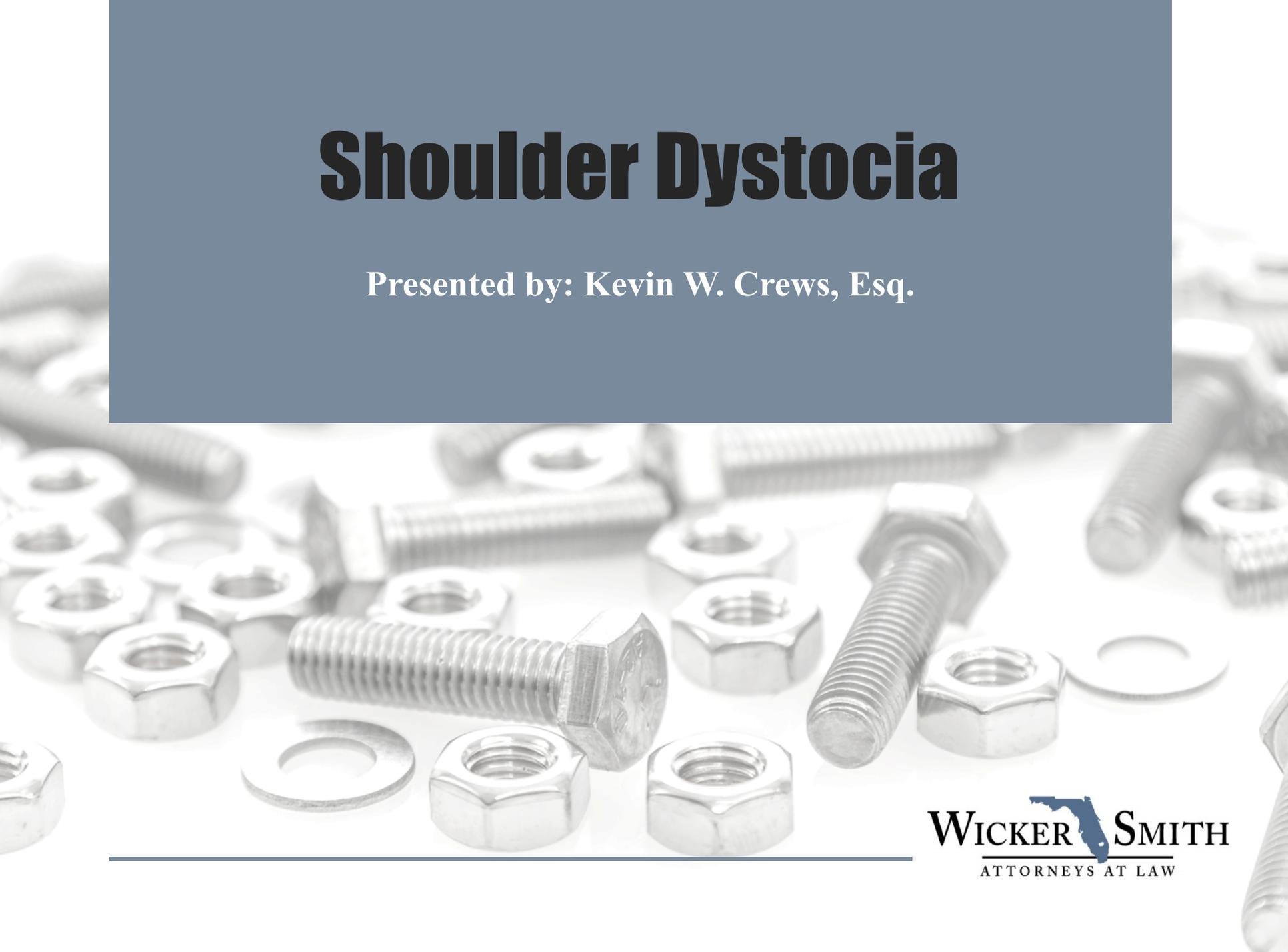
Presented by: Kevin W. Crews, Esq., Robert E. Paradela, Esq., Adam W. Rhys, Esq., Richards H. Ford, Esq. and Leslie A. McCormick, Esq.

Friday, May 20, 2016 | 7:00AM – 5:00PM
Orlando World Center Marriott

WICKER SMITH
ATTORNEYS AT LAW

Shoulder Dystocia

Presented by: Kevin W. Crews, Esq.



Complications and Risk Factors

- There are 5 literature-supported risk factors for shoulder dystocia:
 - History of previous shoulder dystocia;
 - Macrosomia;
 - Gestational Diabetes;
 - Small Maternal Stature;
 - Use of Vacuum or Forceps at delivery;

Reduction Maneuvers

- McRoberts maneuver
- Suprapubic Pressure
- The Woods or Corkscrew Maneuver
- Delivery of posterior arm

Common Claims and Defenses

- Claims involving shoulder dystocia are one of the two most common types of claims brought against Ob-Gyns.
- When a child suffers a permanent brachial plexus injury, the Ob-Gyn is exposed to a potential malpractice claim.
- These cases are very attractive to plaintiff attorneys because they involve a very young child who has an obvious and permanent injury.

Common Claims and Defenses

- *Lack of Informed Consent:* Enough risk factors present that mother should have been given option of cesarean section
- *Defense:* Standard of Care is *not* to discuss *all* risks with patients. There is a general consensus, however, that the level of risk a physician is obliged to discuss possibility of a complication with patient is roughly 1 in 100.
- This does not mean for a patient a with gestational diabetes and a suspected very large baby, no consideration should be given to discussing C-section.

Common Claims and Defenses

- *“Excessive” Traction*: Permanent brachial plexus injury suffered by the plaintiff could only have occurred because doctor pulled too hard encountering a shoulder dystocia
- **Defense**: No reliable study has shown a linkage between traction applied to the fetal head and permanent brachial plexus injury. A plaintiff’s expert must speculate as to when actual injury occurred.

Damages

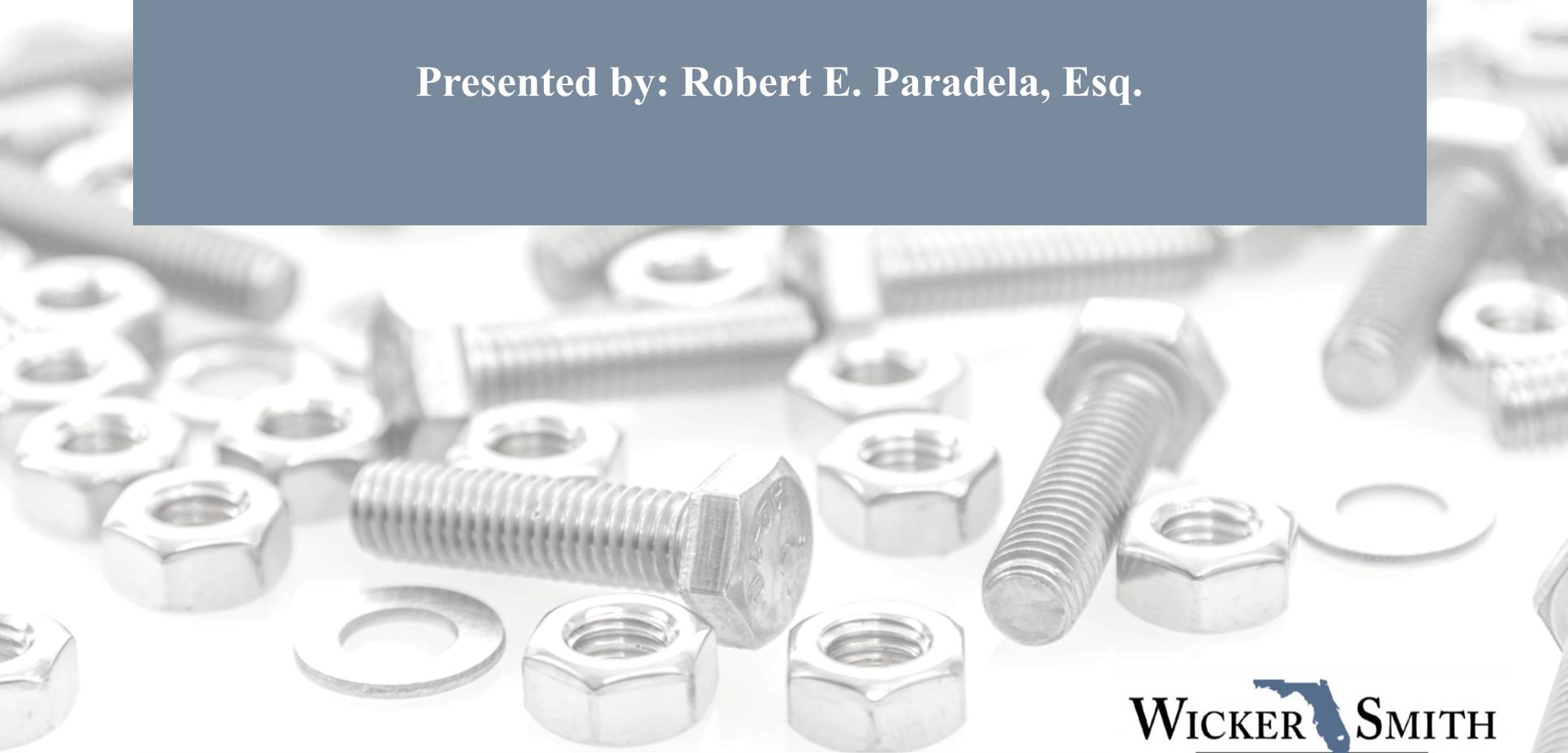
- “Repair Surgeries”
 - Dr. John Grossman
 - Dr. Andrew Price
- Botox Injections
- Occupational Therapy
- Muscle Transfer Surgeries

Typical Verdict Ranges

- It can often seem like an uphill battle convincing a lay jury that a young child facing a lifetime disability should not be awarded money whether or not negligence was involved.
- When payouts at jury trials do occur, they are often in the \$1–\$3 million range, after taking into account future therapy and additional surgeries.
- Claims for reduction in wage earning capacity are speculative for child with no demonstrated cognitive deficits.
- When an adequately prepared defense team with knowledgeable expert witnesses and a physician who can convincingly show that he or she provided excellent care presents its case, outcomes are overwhelmingly favorable for the defense.

Medical Negligence: Hip Replacement

Presented by: Robert E. Paradela, Esq.



Overview

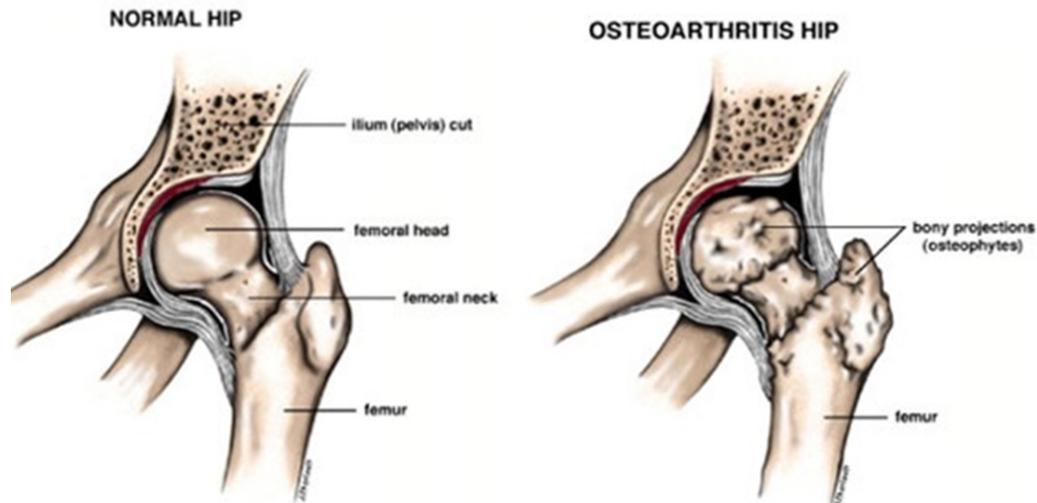
This seminar will focus on Medical Malpractice claims in relation to Hip Replacements.

Who can be held liable?

We will Discuss:

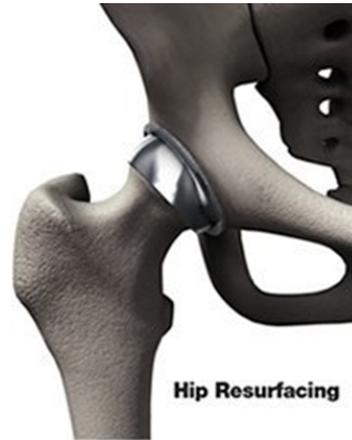
- Anatomy/Medicine
- Types of replacements
- Approaches for replacements
- Risks & Potential Med Mal Issues
- Statute of Limitations
- Cause of Action
- Strict Liability

Anatomy / Medicine

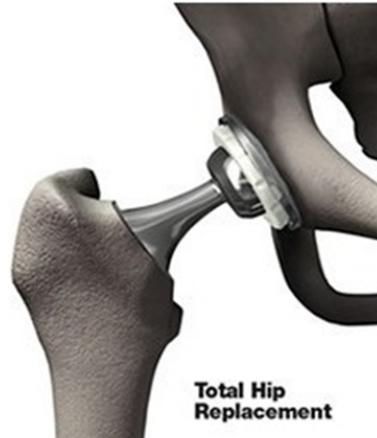


Types of Replacements

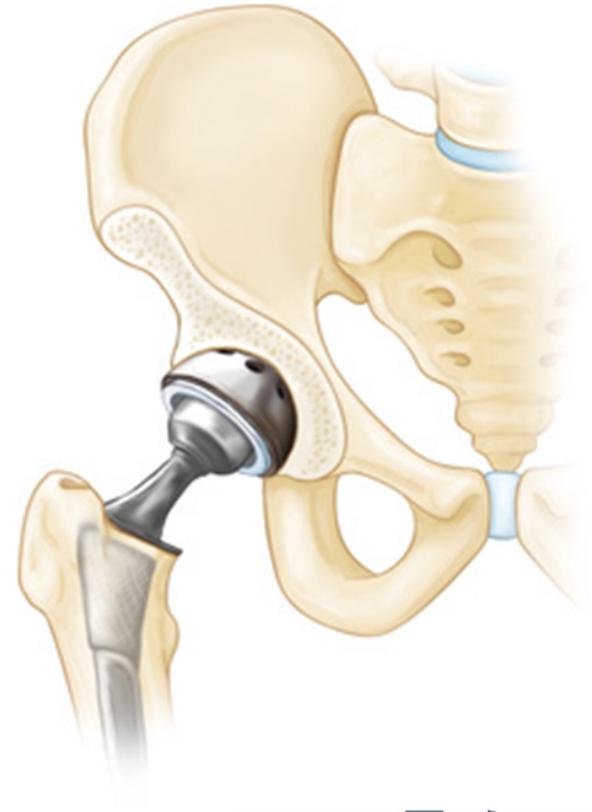
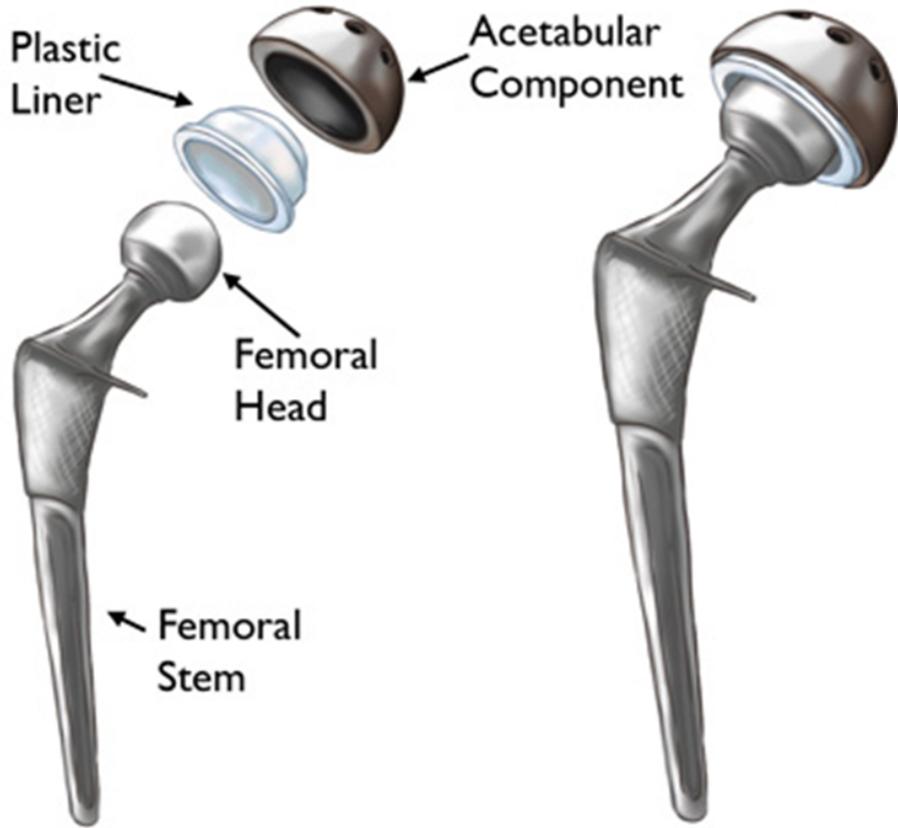
- Partial



- Total



Parts and Pieces



Approaches for Replacements

Traditional Replacement

v.

Minimally Invasive Techniques

Posterior

Anterior

Lateral

Anterolateral

Superior

Micro-Posterior Tissue Sparing

Risks & Potential Med Mal Issues

- Blood clots
- Infection
- Fracture
- Dislocation
- Change in leg length
- Loosening of Hardware
- Osteolysis

Statute of Limitations

- Fla. Stat. § 95.11
 - 2 Years (Med Mal)
 - 4 Years (Negligence)
 - 12 Years
 - Section 95.031(2)(b) provides a twelve-year statute of response to products liability claims based upon injuries or death caused by a product with an expected useful life of ten years or less, except in certain instances.

Cause of Action

- Elements of Negligence
- Who Manufactured/Designed?

Vincent v. C.R. Bard, Inc., 944 So. 2d 1083,
1085-86 (Fla. 2d DCA 2006)

Strict Liability

N. Miami Gen. Hosp., Inc. v. Goldberg, 520 So. 2d 650, 652
(Fla. 3d DCA 1988)

- Hospital
- Physician
- Manufacturer/Designer

Conclusion

- Who can be held liable?
- What can they be held liable for?

Physicians, Cell Phones & Discovery

Presented by: Adam W. Rhys, Esq.

Standard of Care

- Communication is often a component of whether a health care provider met the standard of care.
- What happens if the communication is made via text message?
 - Texting can be an efficient form of communication for many providers, however, texting protected health information without adequate safeguards can create HIPAA violations and may result in adverse legal and financial consequences

Standard of Care (contd.)

- Is the sender deviating from the standard of care by using text as a means of communication?
- Is the receiving health care provider negligent if he or she does review the text?
 - In 2011, JCAHO cited HIPAA concerns in determining that the use of SMS text messages by medical professionals to communicate patient health information was “not acceptable.”

Standard of Care (contd.)

Is a hospital deviating from the standard of care if it does not have a policy and procedure governing the use of text messaging as a means of communication?

- The HIPAA Security Rule requires covered entities to implement appropriate physical, administrative and technical safeguards to ensure the confidentiality, integrity and availability of all electronic protected health information it creates, receives, maintains or transmits. 45 CFR 164.306(a)

Safeguards to Communication

Text messages are neither secure nor encrypted by default.

- Passcode protection is insufficient
- Encryption is key

Safeguards and security controls can be implemented to protect data transmitted between mobile devices. Examples of security controls include:

- a) Use of a vendor-supplied secure messaging technology solution
- b) Secure disposal or sanitation of old devices
- c) Inventory of devices used for texting, including personally-owned devices

- The American Health Information Management Association

Evidentiary Concerns

- Is the text admissible into evidence?

- Fla. Stat. § 90.803

(6)(a): A memorandum, report, record, or data compilation, in any form, of acts, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term “business” as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.”

Evidentiary Concerns (contd.)

- How do you authenticate the text?

- Fla. Stat. § 90.902

(11) An original or a duplicate of evidence that would be admissible under s. 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by a certification or declaration from the custodian of the records or another qualified person certifying or declaring that the record:

(a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters;

(b) Was kept in the course of the regularly conducted activity; and

(c) Was made as a regular practice in the course of the regularly conducted activity, provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed.

What Becomes a Communication?

Is a text message a medical record?

- If text messages includes protected health information such as physicians or practitioners conferring about medical treatment, it should be memorialized in the record just as a telephone call would be.

Is an instant message treated the same way?

- Any information regarding the treatment of patients should be included as part of the medical record.

Does it become a part of the patient's chart?

Types of Information Shared

- Does it make a difference what type of information is being texted?
 - Positive or negative diagnostic test
 - Lab values that require immediate attention
 - Physician orders

Illustration

Nurse claims that he placed 3 phone calls and sent 3 text messages to Doctor's cell phone to advise of a patient's decline and obtain orders. Doctor's call service has no record of the calls and Doctor denies ever receiving calls or texts.

Legal analysis:

- a) How did Nurse know that his texts were, in fact, received by Doctor?
- b) HIPAA concerns: Were the text messages sent using encryption or other secure, protected means?

Illustration

Nurse claims that Doctor sent him a text message with orders for medication and diagnostic testing. Nurse documented in the medical record that the orders for medication were “received via text message from Doctor at 4:17 a.m. from (718) 555-1212.”

The medication ultimately causes injury to the patient.

Doctor continues to deny receiving any texts or sending any orders via text.

Legal analysis:

- Compared to phone call, the content of the text message is more easily verifiable than the content of the phone call because the content of the text messages may be preserved on the devices or on servers.

Illustration

What if Nurse and Doctor both have disposed of their old cell phones since this incident?

Legal analysis:

- a) No means of recovering the content of the text messages from the devices; however, the servers may still have the messages stored. Discovery would be more time-consuming and costly, and no guarantees that the data would be recoverable, particularly if the hospital had appropriate safeguards in place.
- b) Nurse's documentation in the medical record arguably becomes the most reliable evidence relating to this dispute.

Conclusion

Timely and appropriate communication of medical information is essential to the standard of care.

With appropriate policies and procedures and adequate network security controls, text messaging can be permissible under HIPAA as a means of communicating protected health information.

Expert Witness Testimony in the Catastrophic Injury Case

Presented by: Richards H. Ford, Esq.

Catastrophic Injury Action

- Catastrophic injury case in which Plaintiff will be able to board tens of millions of dollars.
- Plaintiff will attempt to argue that Plaintiff's life expectancy is normal notwithstanding the nature of the injuries.
- What can Defendant do?

Life Expectancy Expert

- Defendant may utilize a life expectancy expert and present counter evidence to argue that the injuries reduce Plaintiff's life expectancy, thereby lowering the economic damages claim for future medical expenses.

Factual Scenario Example 1

- Plaintiffs allege medical negligence against the hospital for the care and treatment provided to Plaintiff (mother) during her labor and delivery of her son.
- Plaintiffs allege that as a result of this care and treatment, their son was born with significant and permanent neurologic deficits.
- Plaintiffs' initial demand was **above \$50 million**.

Expert Evaluation

- Expert evaluated past and present family history for possible factors for and against a prolonged life expectancy.
- Expert conducted an in-person examination of the child in order to give opinions as to what the child's current status is, what the child's ongoing, probable needs and care will be, and the child's life expectancy.
- Based on the risk factors of the child, expert gave an opinion – to a reasonable degree of medical certainty – that the child had a life expectancy between 11 to 13 years of age.

Evaluated Specific Nature of injuries

Expert evaluated the specific nature of the child's injuries and the impact such injuries would have on curtailing the child's life expectancy:

- Severe neurological impairment and brain abnormality;
- Abnormal hormonal control, which may give rise to increased seizures;
- Increased difficulty in controlling basic systems, such as cardiovascular system;
- Inability to interact with environment voluntarily without a great deal of support (inability to walk, crawl, and/or position himself);
- Elevated respiratory rates, even at rest;
- Elevated blood pressure; and
- Increased exposure to infections.

Factual Scenario Example 2

- Plaintiff was driving a motorcycle and illegally passed two lanes of stopped traffic on the right. Plaintiff's motorcycle hit Defendant's vehicle when Defendant was turning left into a driveway.
- Plaintiffs filed a complaint asserting claims for: (1) negligence; (2) vicarious liability; (3) loss of parental consortium; and (4) uninsured motorist claims.

Expert Evaluation

- Expert opinion was based on the following:
 1. Expert's review of Plaintiff's medical records;
 2. A large body of scientific literature and statistical data;
 3. Standard scientific methods; and
 4. Expert's own education, training, experience, and expertise
- Expert did not conduct an in-person evaluation of Plaintiff.
- Expert determined Plaintiff's life expectancy was 12 years after accident with a median survival time of 10 years.

Evaluated Specific Nature of Injuries

- Expert evaluated the specific nature of Plaintiff’s injuries:
 - History of epilepsy
 - Cognitive awareness
 - Ability to engage in self-care
- Expert opined that Plaintiff “was very disabled, having little purposeful motor function or ability to communicate and requires feeding tube for nourishment”

Possible Results

- Reduction in economic damages claim by millions of dollars.
- Can have the derivative impact of lowering the jury award for non-economic damages, to the extent the jury awards non-economic damages in proportion to the economic damages claim.

Considerations

- Evidentiary issues with Expert:
 - The admissibility of expert witness testimony in Florida is governed by Fla. Stat. § 90.702.
 - Fla. Stat. § 90.702 comports with the United States Supreme Court's opinion in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
- Is taking the hit worth it?
 - Will establishing a shorter life expectancy have a *worthwhile* impact on the monetary damages involved?
- Defendant must carefully demonstrate that Plaintiff is *overreaching* with damages claim
 - Double edged sword: Defendant's use of a life expectancy expert must be done in a way not to alienate the jury.
 - If not done properly, Defendant runs risk of angering the jury and provoking a runaway verdict.

Evidence is Admissible & Required

- The trier of fact must be given some evidence from which it can intelligently consider life expectancy.

McQueen v. Jersani, 909 So. 2d 491 (Fla. 5th DCA 2005)

Chapter 768, Florida Statutes

- “Florida’s Wrongful Death Act”
- Fla. Stat. § 768.21 – Damages available to potential beneficiaries of a recovery for wrongful death

In-service Highlights

Presented by: Leslie A. McCormick, Esq.





THANK YOU!

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