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INFORMED CONSENT AS A SOLUTION TO DEFENSIVE MEDICINE? THE LEGAL IMPACT OF GOOD COMMUNICATION

PREVENTING OVERDIAGNOSIS – Québec, August 18th 2017

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THIS PERSON IS NOT ME !



WHAT WILL I DISCUSS ?

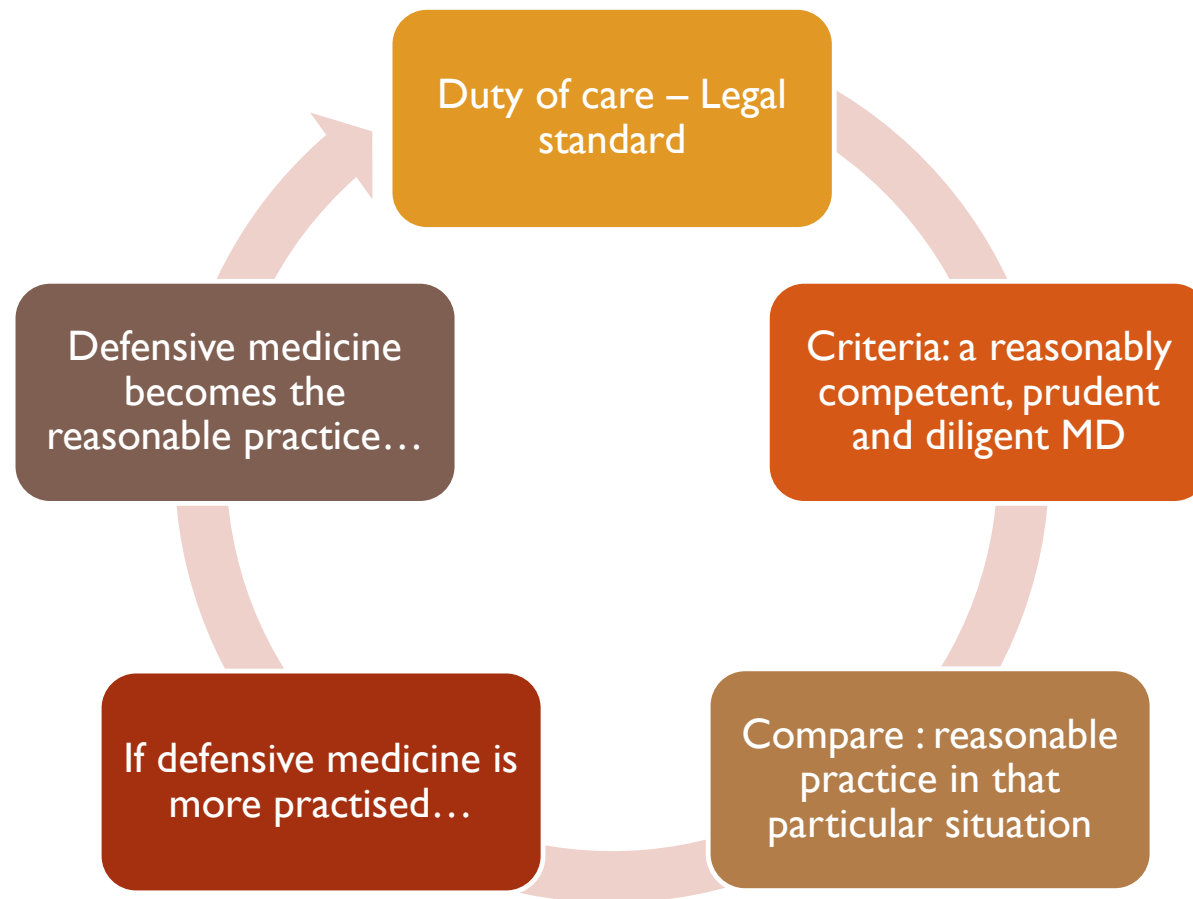
- Why defensive medicine?
- Why do patients sue their doctors?
- Are there « risk factors » to a litigation?
- Can informed consent be part of the solution?
- An exemple

MEDICAL LIABILITY

- Fault
- Prejudice
- Causation



DUTY OF CARE AND DEFENSIVE MEDICINE



LITIGATION

2015 – The year in numbers

	National	Québec	Ontario	British Columbia and Alberta	SK, MB, Atlantic & Territories
Membership	93,426	19,202	37,445	24,115	12,664
Commenced cases					
Legal actions	862	163	444	166	89
Threats	725	206	316	140	63
College (medical regulatory authority) matters	4,723	731	2,314	1,113	565
Hospital matters	1,611	534	533	328	216
Paying agency matters	198	96	29	43	30
Advice to members	19,267	3,026	9,665	4,427	2,149

* On December 31st 2015, **20 465** physicians registered as « working » at the Collège des médecins du Québec

PATIENTS ASK FOR TESTS... OR DO THEY?

Original Investigation

Patient Demands and Requests for Cancer Tests and Treatments

Keerthi Gogineni, MD, MSHP; Katherine L. Shuman, MSN, RN; Derek Chinn, BS;
Nicole B. Gabler, PhD, MHA; Ezekiel J. Emanuel, MD, PhD

The Myth of the Demanding Patient

Anthony L. Back, MD

WHY DO PATIENTS SUE THEIR DOCTORS?

THE LANCET

Volume 343, Issue 8913, 25 June 1994, Pages 1609-1613

Litigation

Why do people sue doctors? A study of patients and relatives taking legal action

C. Vincent PhD ^a, A. Phillips ^a, M. Young BSc ^b

- 1) Prevent similar incidents
- 2) Need for an explanation
- 3) Compensation
- 4) Accountability

RISK FACTORS

BAD COMMUNICATION

■ Verbal

- Tone of voice
- Lack of explanations/ use of a medical jargon
- Attempting to influence unduly

■ Non verbal

- Attitude
- Lack of empathy
- Not listening

« Simply put, patients do not sue doctors they like and trust. This observation tends to hold true even when patients have experienced considerable injury as a result of a 'medical mistake' or misjudgement. »

Communication gaffes: a root cause of malpractice claims, *BUMC Proceedings*, 2003;16:157-161

INFORMED CONSENT

Quebec legal informed consent

Explain diagnosis

Explain options

Present risks/benefits

Answer patient's questions

Offer a recommendation

Check/clarify understanding

Shared decision making essential elements

Define/explain problem

Present options

Discuss risks/benefits

Clarify patient values/preferences

Offer a recommendation

Check/clarify understanding

INFORMED CONSENT

- In the vast majority of cases, allegations of "technical" fault will come with an allegation that consent was not adequately obtained - that the disclosure of the information was not complete
 - Generally, the physician's fault in matter of the informed consent is recognized, even if it does not lead to liability
- Informed consent helps setting **REALISTIC EXPECTATIONS** about the risks and benefits of different therapeutic options

COMMUNICATION AND REDUCING OVERUSE

[CMAJ](#) July 30, 2012 First published July 30, 2012, doi: 10.1503/cmaj.120568

Original Articles

Training family physicians in shared decision-making to reduce the overuse of antibiotics in acute respiratory infections: a cluster randomized trial

France Légaré, Michel Labrecque, Michel Cauchon, Josette Castel,
Stéphane Turcotte, Jeremy Grimshaw

COMMUNICATION AND REDUCING OVERUSE

1253

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Patient Decision Aids Improve Decision Quality and Patient Experience and Reduce Surgical Rates in Routine Orthopaedic Care

A Prospective Cohort Study

Karen Sepucha, PhD, Steven J. Atlas, MD, MPH, Yuchiao Chang, PhD, Janet Dorrwachter, DNP, Andrew Freiberg, MD, Mahima Mangla, MPH, Harry E. Rubash, MD, Leigh H. Simmons, MD, and Thomas Cha, MD, MBA

Investigation performed at Massachusetts General Hospital, Boston, Massachusetts

COMMUNICATION AND REDUCING OVERUSE

PSA blood testing
for prostate cancer



Decision aids for people facing health treatment or screening decisions (Review)

Stacey D, Légaré F, Lewis K, Barry MJ, Bennett CL, Eden KB, Holmes-Rovner M, Llewellyn-Thomas H, Lyddiatt A, Thomson R, Trevena L

AN EXAMPLE

Reactions of Potential Jurors to a Hypothetical Malpractice Suit Alleging Failure to Perform a Prostate-Specific Antigen Test

*Michael J. Barry, Pamela H. Wescott, Ellen J. Reifler, Yuchaiio Chang,
and Benjamin W. Moulton*

Journal of Law, Medicine & Ethics, Summer 2008

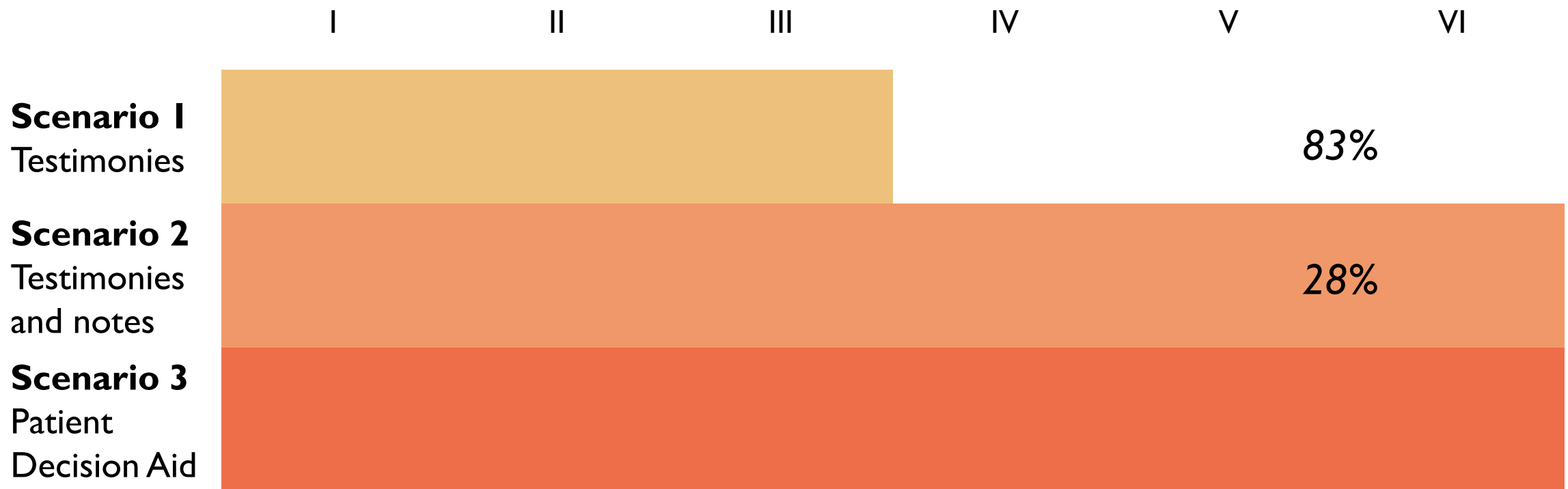
AN EXAMPLE

Proof of duty of care

Plaintiff's arguments	Defense's arguments
4 experts testified about the duty of care in Virginia (<i>customary practice</i>): just do the test.	All practice guidelines and scientific literature indicate that PSA screening should not be done routinely: requires a thorough informed consent process.

AN EXAMPLE

Fictional Juries



AN EXAMPLE

Table 4

Focus Group Voting Results for Scenario Three

Finding	Group I	Group II	Group III	Subtotal (%) Groups I-III	Group IV	Group V	Group VI	Subtotal (%) Groups IV-VI	Total (%)
Yes, the standard of care was met	6	9	7	22 (96%)	6	8	8	22 (92%)	44 (94%)
No, but no harm	0	0	0	0	0	0	0	0	0
No, and harm resulted	0	0	1	1 (4%)	1	0	0	1 (4%)	2 (4%)
No, and abstained on harm	0	0	0	0	1*	0	0	1 (4%)	1 (2%)
Total	6	9	8	23 (100%)	8	8	8	24 (100%)	47 (100%)

*One member of Group IV voted the defendant did not meet the standard of care in scenario 3, but abstained from voting on whether harm was caused as a result.

A note appears in the medical record for the key visit that documents discussion that the patient watched the PSA decision aid. Groups I-III were presented with this scenario after considering scenarios one and two; Groups IV-VI were presented with this scenario after considering scenario two.

CONCLUSION

- Know the applicable law in country/ state /province - definitely annoying, but a bit of training in law can be very helpful!
- Patients don't sue that much – cognitive bias?
- A patient actively engaged in the clinical relationship is the best ally!



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THANK YOU

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