Abstracts

Workers' Compensation

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Wrongful Life/Birth

Chapman JS, *Torts: Wrongful Death of a Minor Child: Contributory Negligence of Decedent Spouse Does Not Bar Recovery by Non-negligent Spouse in the Wrongful Death of a Minor Child,* FLORIDA STATE UNIVERSITY LAW REVIEW 9(1): 201-08 (Winter 1981).

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Medical Malpractice

Vogel, J., Delgado, R., *To Tell the Truth: Physician's Duty to Disclose Medical Mistakes,* UCLA LAW REVIEW 28(1):52-94 (October 1980) [9-055].

This article asserts that the real "malpractice crisis" is the plight of malpractice victims who remain uncompensated because they are unaware of the cause of their injuries. Citing reported cases, the authors suggest that successful "coverups" obscure the magnitude of a widespread problem. They urge the judicial creation of an affirmative duty upon those who make or observe treatment errors to tell patients about them.

Medical ethics theoretically impose such a duty; the authors state that the law must also do so. They maintain that self-regulation by the medical profession has proved inadequate. Currently, physicians who reveal mistakes or testify against their peers risk harrassment, ostracism, or having their malpractice insurance cancelled. Disclosure in conformance with a legal duty would offer protection from such retaliation.

The law typically places burdens of disclosure on parties with greater access to information — this is one basis for the doctrine of informed consent. Expanding the duty of disclosure would simply make the medical relationship legally equivalent to other fiduciary relationships. Patients need to know what has happened to them to prevent further physical harm and to prevent economic loss from uncompensated injury or from malpractice suits rendered unsuccessful by delay.

The authors draw analogies to other tort doctrines: duties to warn and not to impede rescue, hospitals' duty to supervise, and notions of responsibility for collective undertakings. They outline the elements of a *prima facie* case for, and defenses to, a breach of duty to disclose. Finally, they examine possible objections to creation of this duty based on its potential impact on interpersonal trust.

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Workers' Compensation

Jenkins, G., *The No-Duty Rule in New York: Should Company Doctors Be Considered Co-Employees?* HOFSTRA LAW REVIEW 9(2):665-89 (Winter 1981) [9-066].

This article addresses whether employees should be able to sue company physicians for negligent treatment of a work-related injury, as well as to receive workers' compensation benefits. In the mid-1970s, New York courts held that by demonstrating "minimal indicia" of employment, company physicians, like other co-employees, achieve tort immunity from workplace negligence under the workers' compensation statute.

The author criticizes this "no-duty" rule as incompatible with the objectives of workers' compensation statutes, which assume absence of fault, the intimate connection between the injury and workplace, and equality of risk among co-employees, and aim to encourage employers to practice accident deterrence. However, where company physicians provide negligent treatment, it is possible to determine fault, the injury is not an inherent risk of the production process, and the risks of being injured by and of injuring the physician/co-employee are not equivalent. Moreover, the company lacks sufficient control to deter negligent acts.

Additionally, the no-duty rule weakens the concept of professional accountability and undermines the common law duty of physicians. The liberal application of the concept of "control" sidesteps the issue of whether a company can indeed control a physician's medical acts.

The author proposes a "dual capacity" doctrine which would recognize that the company physician is both an employee and a medical professional with personal responsibility. Thus, an employee whose workplace injury was aggravated by a physician's treatment could receive workers' compensation benefits and sue the physician for medical negligence.

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