PHARMACIST MALPRACTICE LIABILITY:
SCOPE AND OUTCOMES

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As part of the allied health team, pharmacists perform many functions that may expose them to the risks of civil and criminal liability. No longer responsible for merely dispensing medications, pharmacists practice the duties of prescription consultation, medication therapy management, immunization administration, blood pressure screening, cholesterol checks, drug compounding, drug interaction safeguarding, and anticoagulation therapy oversight, among others. As the field progresses, increased awareness and understanding of legal responsibilities must run parallel to educational and employment objectives. Undertaking the practices noted above increases the scope of liability that pharmacists are subject to. Viewing the pharmacist as a "learned intermediary" is eroding in the courts as the profession simultaneously evolves.

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I. INTRODUCTION

Pharmacists are subject to both criminal and civil liability actions. Criminaly, pharmacists may be prosecuted for involvement in the illegal distribution or consumption of drugs (especially controlled substances) and for gross negligence up to and including involuntary manslaughter. Overreacting to being robbed has likewise resulted in serious criminal charges and career consequences, including first degree murder conviction and employment termination. Civilly, pharmacists are most commonly

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charged with the same negligence actions that ring under tort law for many professionals. Pharmacists are held to a standard of care that must be met. This standard is commonly defined as a reasonable pharmacist with customary skill and knowledge under same or similar circumstances. Pharmacists may find themselves liable for injuries resulting from a breach of said standard if causation and damage elements are also present. Pharmacist employers are also often subject to liability under the doctrine of respondeat superior. This doctrine holds that employers are responsible for the actions of their employees when employees are acting within the normal course of employment.

In addition, pharmacist errors are commonly reported to the appropriate State Board of Pharmacy for punitive action that is separate from any court processes. State Boards of Pharmacy carry the authority to suspend, revoke, or place on probation the license of any pharmacist registered with the respective Board. Consequently, pursuit of a pharmacist for criminal or civil wrongs commonly results in simultaneous Board detriments originating from the same complainant. These penalties may include professional probation, suspension from practice, fines, mandatory continuing education stipulations, and revocation of a license to practice pharmacy.

II. CRIMINAL LIABILITY

Criminal liability is found where the defendant is responsible for acts forbidden by the corresponding municipal, state, or federal code. One may draw obvious conclusions for some situations in which pharmacists encounter criminal charges, such as consuming or distributing drugs without a prescription\(^1\) and converting money or inventory. What may not be so conspicuous, however, is that pharmacists have been culpable for committing filling errors without intent\(^2\), excessive use of force in response to a robbery\(^3\), and the diluting of critical medication in order to increase profit.\(^4\)

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A. Filling Errors – Involuntary Manslaughter

Filling errors initially appear to be an obvious source of criminal action. When the term “filling error” is mentioned, the general impression is that the pharmacist filled the prescription/order with the wrong medication. But, what if we alter the facts from that which is first presumed? What if the pharmacist purchased a product that was adulterated when delivered or altered unbeknownst to him/her while in stock? What if the pharmacist was supervising the compounding of an intravenous medication bag and did not actually commit the error in question? Should these changes of fact affect the ability to prosecute a pharmacist?

Errors in filling a prescription have likely occurred since the practice has existed. It logically follows that the pharmacist of record who participates in an error, even negligently, is subject to criminal action if the error or its consequences are egregious enough. Manslaughter of various degrees has often been charged when death is the result of the error. The Eighth Edition of Black’s Law Dictionary defines involuntary manslaughter as “Homicide in which there is no intention to kill or do grievous bodily harm, but that is committed with criminal negligence or during the commission of a crime not included within the felony-murder rule.” Importantly, the actual definition of involuntary manslaughter within the controlling jurisdiction will rule and may vary slightly.

In one of the earliest noteworthy cases concerning a pharmacist charged with manslaughter, People v. Stuart, the pharmacist compounded an injury-causing suspension by retrieving the proper bottles. The error occurred because one of the ingredients in question was adulterated either prior to purchase or while in inventory at the pharmacy. Regardless, even chemical experts could not differentiate between the two substances, one offending and one intended, contained therein without the help of microanalysis. Even so, the pharmacist’s criminal charge had to proceed to appeal before it was overturned and he was exonerated. The Court of Appeal in Stuart noted that laws were not intended “to impose criminal liability without fault for accidents having no relation to a failure to use the knowledge and skill required for the dispensing of drugs.” Such culpability has been found, however, under other circumstances.

In 2009, then-Ohio pharmacist Eric Cropp was found guilty of manslaughter in a case that gained much national attention. The unfortunate victim was a young child who was undergoing chemotherapy.

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5 People v. Stuart, 47 Cal.2d 167 (Cal. Sup. Ct. 1956).
6 Cohen, supra note 2.
8 People v. Stuart, supra note 5.
9 Cohen, supra note 2.
treatment as an inpatient. As part of her therapy, the child was to receive a saline solution intravenously. The pharmacy technician on duty compounded the saline solution at a concentration greater than twenty times that intended. Cropp, the only pharmacist on a day with noted volume concerns and staff call-outs, failed to catch the error committed by the technician. The court found that it was the pharmacist’s duty to catch the error and the pharmacist served jail time, underwent probation, and paid a fine for his crime. Notably, the pharmacy technician who actually compounded the solution was not charged with a crime and even testified against Cropp at his hearing. Pharmacy technician certification is not required in all states and, in those which it is, the standards vary considerably. At that time, Ohio was a jurisdiction in which the State Board of Pharmacy does not “license, register, or certify pharmacy technicians.”

It is this last fact that has many inside and outside the field of pharmacy concerned and calling for required pharmacy technician training and a national standard of education and registration.

B. Intentional Adulteration and Murder

Adulteration of a drug occurs when the ingredients are detrimentally altered from their original form. Murder is often defined as the killing of another with malice aforethought. Pharmacists may be the default perpetrator image when adulteration is mentioned. Pharmacists are not, however, the stereotypical example of a murderer. Nonetheless, pharmacists have been accurately charged with each while performing duties within the scope of their practice.

Pharmacist Robert Courtney was found to have adulterated the contents of chemotherapy drugs while practicing to the detriment, and possibly death, of his patients. Specifically, Courtney diluted the contents of approximately 98,000 chemotherapy prescriptions in order to fraudulently extend his inventory and thereby increase his profits. Over 4,200 patients were affected by Courtney’s actions. Following the DEA investigation of Courtney’s pharmacy, he was charged and found guilty of 20 federal counts of adulterating. Courtney, at least partially due to his criminal practices, had an accumulated wealth of $20 million at the time of his arrest. He is now serving thirty years in federal prison for the intentional adulteration of drugs that he dispensed. Money is not always the motive, however, when pharmacists commit acts worthy of serious criminal

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10 Ohio State Board of Pharmacy, Pharmacy Technicians in Ohio, (June 2009), http://www.pharmacy.ohio.gov/Pharmacy_Technicians_060109.pdf.
12 Draper, supra note 4.
As the most easily-accessible holders of controlled substance inventory, pharmacies are common targets for robberies. Though rarely killed during attempts, pharmacists and their staff are frequently held at gunpoint during such crimes and threatened with their lives. In 2009, an Oklahoma pharmacist found himself being robbed in such a manner by three armed men. Instead of complying with the assailants’ requests and filing an insurance claim for the loss, however, then-pharmacist Jerome Ersland chose to fire back with his own handgun. Two of the perpetrators fled in response and one was actually hit by Ersland’s return fire. After returning from pursuit of the two fleeing robbers, Ersland proceeded to shoot the already downed criminal an additional five times and ensured his demise. Although victims do have a right to self-defense in the face of grave danger, their response must include a reasonable amount of force under the circumstances. Ersland was probably within his rights until he converted his defense into an excessively aggressive action against a person already disarmed and disabled by the initial response. Due to his excessive use of force, Ersland was found guilty of first degree murder and is currently serving that sentence. Even in situations where pharmacists use deadly force reasonably as allowed by law, they may face employment penalties for using such force in self-defense.

In 2011, a Walgreens pharmacist was being robbed at gunpoint when the attacker, as shown by video, clearly tried to shoot the pharmacist at point-blank range. The assailant’s gun, however, malfunctioned and no bullets ever emanated from the weapon. The pharmacist drew his own legally carried and concealed handgun in response and fired back. The perpetrator and his colleague, who was holding up the store manager, fled the scene without any injuries occurring. Although it was decided that the pharmacist acted legally under the circumstances, Walgreens terminated him for responding with a weapon that violated the company code of conduct simply by being on the premises and for allegedly “escalating” the situation. Walgreens requires an evasive, as opposed to confrontational, response to active shooter situations. Hence, pharmacists may still experience significant penalties outside of the law even when acting within their legal rights in a hostile situation.

III. CIVIL LIABILITY

Pharmacists most often encounter civil liability under the tort of negligence. Negligence may be found where the pharmacist owes a duty to

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13 Staff, supra note 3.
the plaintiff, this duty is breached, the pharmacist is the actual and proximate cause of said breach, and damage to the plaintiff results. Duty is often generically referred to as acting like a reasonable pharmacist under same or similar circumstances. Naturally, this definition is subject to fluctuation over time and jurisdiction. No different than other professionals, when pharmacists fail to meet their duty it is often called malpractice.

A. Traditionally

While there have been many good papers and cases dealing with common acts of negligence\textsuperscript{15,16,17,18,19}, our focus will be on the evolution to less apparent suits. A good starting point would be the case of Jones v. Walgreens in 1932.\textsuperscript{20} Here, a pharmacist was presented with an unclear prescription for strontium salicylate. Strontium salicylate was used as a salicylate salt to treat inflammation, pain, and fever at therapeutic doses. An overdose, however, could cause gastrointestinal distress and internal bleeding, among other injuries. Instead of calling the prescriber for clarification, the pharmacist selected the most similar available product and dispensed it. The patient received a product ten to twelve times more potent than the one intended for her and she suffered harm as a result. Importantly, as used by Walgreens' defense, it was common at that time for a pharmacist’s responsibility to the patient not to exceed accurately dispensing what was written on the prescription. Hence, no professional judgment was required to be exercised on the part of the pharmacist, and any errors on the prescription that led to patient harm were the fault of the prescriber. Pharmacists were essentially viewed as professional vending machines. The court in Jones, however, held that a pharmacist might know when a prescription had been written in error and understand that filling an erroneous prescription could result in harm. The court was partially swayed by the plaintiff’s expert, who testified that “when a doctor has prescribed an overdose it is the duty of the pharmacist to refuse to fill the prescription.”\textsuperscript{21} Other courts have also held that a pharmacist owes a duty of care to recognize an inappropriate prescription and obtain clarification prior to dispensing it or simply refuse to fill it.\textsuperscript{22} Although these types of

\textsuperscript{15} James O'Donnell, Pharmacist Practice and Liability, 10 J. NURS. L. 201, 201 (2005).
\textsuperscript{19} Nesci v. Angelo, 249 Mass. 508 (Mass. 1924).
\textsuperscript{20} Jones v. Walgreen, Co., 265 Ill.App. 308 (Ill. App. 1932).
\textsuperscript{21} Id.
cases started a trend of recognizing the professional responsibility and role of a pharmacist long ago, the legal evolution that parallels that trend continues today.

B. Modern Trends

The role of a pharmacist is developing as fast, if not faster, than any other discipline. What used to be, and is sometimes still thought of as filling prescriptions accurately has evolved to prescription consultation, medication therapy management, immunization administration, blood pressure screening, cholesterol checks, drug compounding, drug interaction safeguarding, and anticoagulation therapy oversight, among others. Pharmacists currently practice all of these roles and often do so even in your local retail location, unbeknownst to the unaware patient. The expansion of their scope of practice, however, inevitably exposes them to previously unseen liability. Failure to meet the standard of care in any of the aforementioned roles may result in a negligence claim for actions not performed by pharmacists thirty years ago. Many of these recent roles are also performed by other health care professionals, including nurses, physicians, physician assistants, nurse practitioners, and naturopaths. One result is that pharmacists may be held to at least the capabilities and/or competence of any of the other noted professionals when performing new practices within their expanded scope. And yet, in the midst of growth and change, some courts have refused to recognize pharmacists as the experts in drug knowledge, despite the fact that they have more medication-related schooling than any other professional. A Doctor of Pharmacy degree carries 130 pharmacy, and thus drug-related, professional credits alone, in addition to two years of required pre-professional schooling.

As recently as 2008, the Alabama Supreme Court held that the pharmacist was a “learned intermediary” who was not adjunct to a physician in terms of drug dosing. The learned-intermediary doctrine, when and where applicable, bars that there is any duty of care owed by said intermediary to a patient. The doctrine seems to defy current allied health team approaches to patient care, and supports the decades-passed practice of placing sole responsibility and liability on the physicians in care.

23 Milenkovich N. Patient Harm and Pharmacist Liability, 155 Drug Topics 60, 60 (2011).
27 Professional Program Curriculum, University of Montana Skaggs School of Pharmacy, http://www.health.umt.edu/schools/pharmacy/professionalprogram.htm#curriculum.
Ironically, and more in tune with current practice, it was the physician in the Larrimore case who solicited the pharmacist for advice on colchicine dosing. Even though it was the pharmacist alone who supplied the wrong total daily dose information, no malpractice on the part of the pharmacist was found. Hence, even though the natural response of the pharmacy profession may be to contest the learned-intermediary label, they may want to allow it begrudgingly for liability reasons. A fortiori, it could be argued that other courts have long recognized pharmacists as owing more than what is expected of a learned-intermediary.

Indeed, in a series of cases focusing on a pharmacist’s duty to warn, pharmacists have been held to a duty of counseling patients on the interactions and addiction potential of controlled substances and found liable for continuing to fill such substances on a regular basis without a counseling intervention of some form. Pharmacists have also been found to owe a duty not to fill a prescription that is contraindicated by the patient’s allergies, and have been deemed negligent when continuing to dispense legitimately prescribed opiates to a known alcoholic due to known increased liver damage. Similarly, malpractice exists when a pharmacist undertakes a duty to warn of side effects and fails to counsel on an important, though rare, side effect, and negligence is found where pharmacists undertake counseling a patient on drug allergies and fail to give correct information. In such cases, pharmacists undertaking a duty to counsel, warn, or provide information on a topic may create a duty of accuracy in performing that action. Consequently, pharmacists who practice in mandatory counseling states (states which legally require a pharmacist to counsel on some, usually new, prescriptions) may encounter more liability than those practicing in a non-mandatory counseling state due to the increased obligation to provide warnings and information. It is also important to note that pharmacists, like other professionals, may incur detrimental action outside the realms of traditional law in addition to any civil and criminal penalties they may incur.

IV. PROFESSIONAL DISCIPLINE

Pharmacists must accumulate certain qualifications (i.e. college degrees, licensing exams, legal exams, etc.) and present them to the State Board in the jurisdiction they wish to practice in for the granting of a

license. The Board of Pharmacy endorses the professional as fit for practice, while holding them accountable for practicing their profession. Accordingly, the failure to practice competently, ethically, or legally may result in professional discipline from that State Board that has licensed the pharmacist. Penalties commonly include fines, probation, suspension, assignment of continuing education, and possibly being barred from future practice. It is common for a State Board of Pharmacy to monitor pharmacists practicing in multiple jurisdictions and require self-reporting of any penalties received in other states. Thus, pharmacists prosecuted with any of the criminal or civil actions noted supra are also simultaneously disciplined by the State Board of Pharmacy in that jurisdiction and possibly any other that they are licensed in.

State Boards of Pharmacy are generally charged with regulating the practice of pharmacy in order to protect the people within their jurisdiction. Some State Boards of Pharmacy have been aggressive in upholding their oath by preventing employers from overloading pharmacists in the face of obvious indicators, such as an aging “baby boomers” population, retail chain pharmacy growth, and increased prescribing. North Carolina’s Board of Pharmacy, for example, requires that employers cannot make pharmacists work more than 12 continuous hours per day. In addition, a 30-minute meal break and an additional 15-minute break must be offered to pharmacists during shifts of eight hours or more. North Carolina pharmacists are also capped at dispensing 150 prescriptions per pharmacist per day. Employers who violate these mandates are subject to penalties including fines and suspension of license to operate a pharmacy. These actions are not soft suggestions to employers, but rather firm requirements that seek to uphold the Board’s duty. The majority of pharmacists agree that employers will not voluntarily enact such limitations and that state or federal laws will have to intervene for relief to be granted. This is a profession that carries a very narrow margin for mistakes. Even the most rarely occurring oversight can produce dire consequences. If we can agree that employing simple steps similar to those noted would rest intensely-focused minds, allow time for stress decompression, and result in error reduction, what could a State Board gain by not requiring such basic rights when employers are reluctant to?

It is a fact that pharmacist workload is increasing while business incentives are simultaneously decreasing budgets and subsequent

34 Gianutsos, supra note 17.
pharmacist help in an age of “do more with less.” In the year 2000 alone, retail pharmacies filled 2.9 billion prescriptions in the U.S.\textsuperscript{37} This reflects an increase of 62\% from the previous ten year period. Many pharmacists feel that increased obligations have detrimentally impacted their error rate.\textsuperscript{38} While entire papers and studies have addressed the issue of what errors occur and how often\textsuperscript{39}, it is a logical conclusion within any field that errors will increase as workload does. This is not a novel discovery. Other fields that produce fatal outcomes when reasonable work limits are exceeded have required federal and state regulation before safety standards became reality. The Department of Transportation, for example, limits the amount of time truck drivers are able to work and imposes mandatory rest breaks in recognition of the dangers that result when drivers become fatigued.\textsuperscript{40} Likewise, the Federal Aviation Administration restricts the overworking of pilots to prevent obvious fatalities that occur when the person in charge of an aircraft is not fully alert.\textsuperscript{41} Yet, pharmacists have a higher error rate than either of the two aforementioned occupations and death has often been the result of pharmacist mistakes. Why, then, are similar regulatory mandates not imposed upon the practice of pharmacy? In addition to increasing demands, pharmacists are often not given relief of any kind during their shift. While other healthcare professionals are granted multiple breaks, a lunch, and the ability to sit down for at least a portion of their shift, no such gratuities are mandated for pharmacists in almost any state. Although other states have found the courage to challenge employers in some of these regards, none has put forth the combination of patient protection safety regulations that North Carolina’s Board has. It is a logical conclusion that until more State Boards of Pharmacy codify rules mandating breaks, workload caps, and/or mandatory assistance (i.e. minimum technicians per pharmacist), error percentages, total errors, and preventable patient deaths may not decrease in the foreseeable future.

V. CONCLUSION

Modern pharmacists find themselves employed during a time of unprecedented evolution within their field. This metamorphosis carries

\textsuperscript{38} Growing Prescription Workload is Worrying Pharmacists, Pharmacy Times, May 1, 2006.
\textsuperscript{39} Gianutsos, supra note 34.
fresh legal consequences within the realms of civil liability, criminal law, and professional discipline. The expansion in scope of practice may parallel an increase in claims for negligence, sometimes egregious enough to qualify for manslaughter. Regardless of the categorical semantics, any legal action brought against a pharmacist may result in professional consequences via the respective State Board of Pharmacy.

An escalating workload filled with new responsibilities will likely multiply errors and subsequent detriments unless regulatory action is taken.