



MondayMonday

No Prescription For Liability

March 14, 2016

For almost 20 years now, we have served as a member of a suburban school board. While we've also held region-wide positions related to school boards, nothing quite compares to being responsible for the education of the children of your neighbors. In many ways, it's a selfish job, for if you do it well, you get to live among largely responsible and polite young people.

Last week, sitting at a presentation by the Curriculum Committee of our cadre of teachers, we learned how character was being taught to our elementary school children; how the elements of good character moved from "here's what you do" to "here's what we do" to "here's what I do." Being polite and nice to others; being honest and having integrity; being a leader and caring about your community; these were all qualities a child not only had to learn, but to *own*. The innocence of youth is not a handicap; to a teacher it's an opportunity, like a freshly-washed chalkboard.

Then 14 (for this is our job as the lawyer/curmudgeon/éminence grise school board member that we have become) we asked: "What do you do about Donald Trump? What elementary school did he go to?"

The question was rhetorical, for we knew the answer. Trump is not the problem. He is only the avatar of bad behavior. Trump says nothing that we haven't said ourselves. We make rude comments about the physical shortcomings (whether real or imagined) of others; we brand people as "stupid"; we use bad



words because of their cheap effect. Now, we don't do these things in public, because it is ill-mannered. But we do all these things, and worse, in private; in front of our children; in our homes; riding in our cars. *And the children hear everything.* We have met the enemy of good character and it is us.

We have talked in past issues about the standard of medical care and suggested that it seems skewed in the wrong direction. Though we know quite well what a medical professional needn't do, we can't seem to put our finger on what he should.

The First Department clears up that question a bit in *Abrams v. Bute*, 2016 NY Slip Op 01627 (3/9/16). In an opus opinion by Justice Miller, the Court deals with the professional obligations of a pharmacist to his client. Noting that there was "limited precedent" on the subject, Justice Miller exhaustively examined the issue, concluding that "when a pharmacist has demonstrated that he or she did not undertake to exercise any independent professional judgment in filling and dispensing prescription medication" he could not be held liable except in two situations, *viz.* "he or she failed to fill the prescription precisely as directed" by the doctor" or "the prescription was so clearly contraindicated that ordinary prudence required that pharmacist to take additional measures before dispensing the medication."

The facts of the case were clear. The doctor administered 6 mg of hydromorphone to the patient in the hospital for pain and gave him a prescription for 8 mg of the substance to be taken later at home. The prescription was filled at CVS in Hicksville. Within an hour or two after taking the drug, the patient was dead.

CVS moved for SJ contending that the pharmacist had no duty to warn or take any steps other than fill the prescription as written. The responsibility was solely the physician's. You see, under the "learned intermediary" doctrine, it's the physician who's supposed to know better, not the patient or the pharmacist. All the pharmacist needs is "technical accuracy" in filling the order, unless the drug is "clearly contraindicated". In this state, CVS argued, a pharmacist has no duty to warn the patient or even contact the prescribing physician to inquire. While this was basically true, the Court held, a pharmacist could be held liable "under certain circumstances", such as when the pharmacy's records indicate a contraindication.

Plaintiff's expert said that an 8 mg dosage of hydromorphone should only have been dispensed to a patient who has built up tolerance to the drug from long-term exposure. This patient had none, but there was no evidence in the record of this CVS to show that it knew that. So, the Court rejects the expert's opinion as unsupported by the record. There is no question of fact and SJ is affirmed.

The "standard of care" then, at your local pharmacy anyway, is akin to that of your local diner. In the diner, however, when they louse up your eggs, at least you live long enough to send them back.