

## LEGAL CAPSULES

By

Lt Col David W. Bobb, RPh, JD, MA

Let me ask you a question. Would you consider driving a vehicle that was not equipped with seat belts? For those of you with children, would you consider allowing them to ride in a vehicle without seatbelts or a car seat? If you are like most mentally competent and reasonably prudent people, you would have to answer “no” to both. Despite the fact that it takes extra time to put in a car seat, get your children buckled up, and yourself buckled up, the risk attendant with not doing this is not worth the time saved. In essence, it’s a balance of the benefit to risk ratio that determines your actions and response. In the legal world (not necessarily the “real” world) risk-benefit ratios are examined constantly in trying to determine what someone should have done when a bad outcome has occurred. This retrospective review always makes more sense after something bad has happened than it may have before the incident surfaced.

In this day and age no one would consider operating a pharmacy without having a good pharmacy computer system in place that checks for duplications, interactions, dosage warnings, etc. Even though the information provided by these systems may mean it takes more time to fill a prescription (clearing screens, pulling up profiles, prompting patient counseling) than just typing a label and placing it on a bottle, we gladly use these systems to provide a better level of care to our patients. In fact, courts have recognized that as technological advancements have increased our ability to provide an enhanced level of care, our legal duties and liabilities have expanded as well to mirror the technological enhancements (see for example, *Baker v. Arbor Drugs, Inc.*, 544 N.W.2d 727, 1996). Let me be clear that I’m not saying if a system is inoperable, production should come to a halt; we need to use our best professional judgment regarding how to proceed in those cases, but when a system is operational, it needs to be used. With this in mind, I now turn to a related topic that I have presented several times in this column, that of punitive damages.

Punitive damages are generally awarded by a court not to compensate the injured party, but to punish, or make an example of the wrongdoer. In many cases, it appears juries have started to award punitive damages almost routinely as savvy lawyers include them in their claims for damages, and sympathetic juries award them. While there are many theories behind this transformation, the fact remains that punitive damages are/should be awarded when there is evidence of the defendant’s wanton and reckless disregard for a patient’s safety or rights, or morally culpable conduct. One court has defined wantonness as “conduct which is carried on with a recklessness or *conscious disregard of the rights or safety of others*” (*Harco Drugs v. Holloway*, 669 So. 2d 878, 1995), and I think this is a good, straightforward definition. Classic examples include filling prescriptions while intoxicated, a cover-up of a dispensing error, engaging in procedures that are so careless an error is almost sure to occur, a failure to follow established procedures when filling prescriptions, or negligent supervision of support personnel.

Now that I’ve set the stage, here’s the scenario. Let’s imagine that you have technology that enables you to utilize bar-coding capabilities to ensure accuracy when filling prescriptions. Let’s further assume that you use this technology for all new prescriptions you process, but fail to use it for refills because you believe it takes too long, or any other reason you choose. Now, suppose

you severely injure or kill someone, perhaps a child, because of a dispensing error from a refill prescription. How do you think that will fare in front of a jury? I submit that not only will you pay compensatory damages, but substantial punitive damages will be awarded as well. The argument can easily be made that this conduct would fit the definition of “wantonness” described above as it shows a conscious disregard for the safety of others. In other words, you have a system available that is designed and proven to decrease errors through bar code technology. You make the conscious decision to bypass that technology when processing refills because you believe it takes too long to run the refills. Folks, I can tell you it will be hard to justify that decision in front of a jury, judge, and grieving relatives. The perfect example is this; everyone either already has, or will soon have PharmAssist® technology installed in their pharmacies. This equipment was purchased and installed for one reason only; to decrease errors, and it is extremely efficient at doing just that. Anytime you bypass the system, whether for refills or new prescriptions, you are increasing your liability exposure exponentially and setting yourself up for punitive damages. You absolutely must let patient safety guide your procedures and you cannot tolerate variance from them.

In summary, make sure that when you formulate your pharmacy policies and procedures you consider the legal ramifications of your decisions. When it comes to policies that affect patient safety, courts and juries will take a jaundiced view of any policy that ranks time as a substantial benefit that may outweigh safety. Until next time, practice safely!