

Physician Assistants: A Jurisprudence Review

Health Professions Regulatory Advisory
Council (HPRAC)



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Health Professions Regulatory
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Physician Assistants: A Jurisprudence Review

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Table of Contents

Objective:	3
Search Methodology:	3
Summary of Findings	4
Case Descriptions.....	5

Objective:

This jurisprudence review explores legal cases relevant to the Physician Assistant (PA) profession, to support a determination of the need for regulation of PAs under the *Regulated Health Professions Act, 1991 (RHPA)*. More specifically, this review aims to provide insight into the risk posed to the public by PAs. Statutes and regulations are not included in this review, as they are discussed in detail in a jurisdictional review of the profession. This review was conducted between August 19, 2011 and September 19, 2011.

Search Methodology:

HPRAC used a snowball search process in order to identify the majority of the PA cases for this review. This process was accomplished as follows. Dr. Jeffrey G. Nicholson is and has been throughout his career a leader in the physician assistant profession providing local, state and national contributions to PA education, employment, and research in the United States. He currently serves in numerous leadership positions and on numerous boards. He is particularly well known as an expert on the topic of PA liability claims. A research paper authored by Nicholson entitled; *Physician Assistant Medical Practice in the Health Care Workforce: A Retrospective Study of Medical Malpractice and Safety, Comparing Physician Assistants to Physicians and Advanced Practice Nurses*¹, published in 2008, makes reference to numerous profound court cases involving PAs. HPRAC felt it was appropriate to extract the major/relevant cases from this research review and use them in our review.

All of the cases in this review are from jurisdictions in the U.S. As explained in more detail in the jurisdictional review, the U.S. is the only country where the PA profession is highly developed, as it is regulated in all 50 U.S. states. While two provinces in Canada (Manitoba and New Brunswick) do have PA regulation, New Brunswick is still in it's infancy with just two PA registrants (personal communication, August 10, 2011). As a result, a separate completed review did not find any relevant Canadian PA cases and therefore Canadian jurisdictions are not included in this review. Internationally, the maturity of PA regulation is similar to that of Canada.

While the above strategy looked at court level cases, HPRAC was also interested in reviewing the disciplinary decisions of the governing regulatory bodies of PAs. For this, HPRAC utilized the New York State Department of Health, Office of Professional Medical Conduct website containing public documents regarding professional misconduct and discipline actions taken against Registered PAs. HPRAC also utilized the Arizona Regulatory Board of Physician Assistants website to access recent Board disciplinary actions. Due to time restraints and availability and accessibility of information, New York and Arizona were the only jurisdictions where this search strategy was used. However, HPRAC feels that the topics of the cases reviewed, reflect the overall professional misconduct charges and disciplinary actions in other regulated PA jurisdictions.

¹ Dr. Jeffrey G. Nicholson's biography and research may be found on his website at <http://www.paexperts.com/>.

Summary of Findings

Cases retrieved from the search methodology described above yielded 12 pertinent cases (5 court cases and 7 discipline decisions). Topics relevant to risk of harm, supervision, standard of care and regulation of PAs include:

- failure to accurately diagnose, allegedly leading to patient injuries (see *Cox v Primary and Urgent Care Clinic et. al.*);
- providing care below the proper standard of care (see *Macdonald v United States of America*);
- failure to properly supervise PAs (see *Macdonald v United States of America*);
- sexual misconduct (see *Andrews and Andrews v United States of America and New York State Board for Professional Medical Conduct v William Race*);
- unlicensed PA performing medical services while portraying himself as a certified PA (see *Khan v Medical Board of California*);
- revocation of license on the grounds of professional misconduct, for the conviction of committing an act constituting a crime under New York State Law (see *New York State Board for Professional Medical Conduct v Robyn Marie Emery*);
- inappropriate/excessive prescribing including: providing patients/family members with controlled substances without adequate medical indication for the prescriptions, without maintaining a medical record for the patient and in exchange for a portion of the controlled substance prescription (see *New York State Board for Professional Medical Conduct v Jennifer DeFilippo, Arizona Regulatory Board of Physician Assistants v Robert Mitchelson and Arizona Regulatory Board of Physician Assistants v Jef B. Esquerra*);
- practicing outside of the scope of practice, i.e. without proper supervision (see *New York State Board for Professional Medical Conduct v Garth E. Brink*);
- inability to perform medical services due to PA's medical condition (see *Arizona Regulatory Board of Physician Assistants v Dale J. Bingham*); and
- disciplinary action taken in one state leading to sanctions in another state based on prior disciplinary sanctions (see *Arizona Regulatory Board of Physician Assistants v Robert Mitchelson*).

It is evident from the findings above that the PA profession presents a risk of harm to the public. From using their power to engage in a sexual relationship with a patient to misdiagnosis and providing sub-standard care particularly regarding prescribing medications, the risks are evident according to the case law and disciplinary actions reviewed.

*Please see the case descriptions below for further details of each reviewed case.

Case Descriptions

Title	<i>Melissa Michelle Cox v Primary and Urgent Care Clinic et. al.</i>
Court	Supreme Court of Tennessee, at Nashville
Citation	<i>Cox v Primary and Urgent Care Clinic et. al., 313 SW 3d 240 (Tenn Sup Ct 2010)</i>
Relevance	Standard of Care
Summary	OPINION: We granted permission to appeal in this case to address the standard of care that applies to a physician assistant in a medical malpractice case. The plaintiff sued for injuries she allegedly suffered as a result of physician assistant Michael Maddox's failure to diagnose her condition accurately. The plaintiff did not sue Maddox, but sued the clinic which he owned and in which he practiced and Dr. Austin Adams, Maddox's supervising physician. The defendants filed a joint motion for summary judgment, supported by their testimony that (1) Maddox did not violate the standard of care applicable to physician assistants and (2) Dr. Adams did not violate the standard of care applicable to physicians. The plaintiff responded with her cardiologist's testimony that Maddox violated the standard of care applicable to primary care physicians. The cardiologist testified that he was not familiar with physician assistants or their supervision. The trial court granted the defendants' motion for summary judgment on the basis that the plaintiff had failed to establish that Maddox violated the professional standard of care applicable to him. The Court of Appeals reversed the trial court, holding that the standard of care applicable to physician assistants is the same as that applicable to physicians. We reverse the Court of Appeals and hold that the standard of care applicable to physician assistants is distinct from that applicable to physicians. The trial court's summary judgment in favour of the defendants is reinstated, and the case is dismissed.

Title	<i>Debra Macdonald v United States of America</i>
Court	United States District Court for the Middle District of Georgia, Valdosta Division
Citation	<i>Macdonald v United States of America</i> , 853 F Supp 1430 (MD Ga 1994)
Relevance	Standard of Care, Supervision
Summary	<p>PROCEDURAL POSTURE: Plaintiff, a dependent of an active duty member of the United States Air Force (patient), sought a judgment against defendant, the United States, in an action for medical negligence under the Federal Tort Claims Act, 28 U.S.C.S. § 1346(b).</p> <p>OVERVIEW: The patient was treated by physician's assistants at the Moody Air Force Base (AFB) for a hiatal hernia with reflux for several months. When the patient went to the AFB hospital complaining of upper abdominal pain, a physician determined that the patient was constipated and gave her a laxative. When the patient refused to go home, an EKG was conducted, which revealed that the patient was suffering an evolving myocardial infarction. Because the AFB was not capable of providing thrombolytic therapy, the patient was transferred to another hospital. By the time thrombolytic therapy was approved by the other hospital, the patient had suffered extensive heart damage. The patient filed a negligence action against the United States for failure to diagnose her heart condition and hypothyroidism, and for failure to supervise physician's assistants or to provide thrombolytic therapy. After a bench trial, the court found that the United States was negligent for failing to diagnose the patient's hypothyroidism. However, the court held that the United States negligently failed to diagnose the patient's heart disease, to supervise its physician's assistants, and to provide thrombolytic therapy.</p> <p>OUTCOME: After a bench trial, the court held that the United States did not breach its duty of care in failing to diagnose the patient's hypothyroidism but that it had negligently failed to diagnose and treat the patient's heart condition. A hearing was scheduled on the issue of damages to be awarded to the patient.</p>

Title	<i>Sandra B. Andrews and Kenneth M. Andrews v United States of America</i>
Court	Unites States Courts of Appeals for the Fourth Circuit
Citation	<i>Andrews and Andrews v United States of America</i> , 732 F.2d 366 (4 th Cir 1984)
Relevance	Risk of Harm- Sexual Abuse, Supervision
Summary	<p>PROCEDURAL POSTURE: Appellant United States sought review of the judgment of the United States District Court for the District of South Carolina that held in favour of appellee injured patient and her spouse in a medical malpractice action.</p> <p>OVERVIEW: An injured patient received psychological care from a military physician's assistant while her husband was in the United States Navy. The physician's assistant eventually persuaded the injured patient to have sex with him, allegedly as part of her treatment. The injured patient brought an action against the government for medical malpractice and prevailed in the district court. The United States appealed, and the court affirmed. The court held that the government could not be liable for the acts of the physician's assistant in coercing the injured patient to have sex because the actions were outside the scope of his employment. However, the acts of the physician's assistant's superiors in negligently supervising him following reports of improper contact did occur in the scope of their employment. The Federal Tort Claims Act, specifically 28 U.S.C.S. § 1346(b), allowed such claims. The court also found that the action was a medical malpractice action, not an assault and battery, and the action was not barred by 28 U.S.C.S. § 2680(h).</p> <p>OUTCOME: The court affirmed the judgment for the injured patient and her husband.</p>

Title	<i>Hameed A. Khan v Medical Board of California</i>
Court	Court of Appeal of California, Second Appellate District, Division Two
Citation	<i>Khan v Medical Board of California</i> , 12 Cal App 4th 1834 (App Ct 1993)
Relevance	Risk of Harm- Unlicensed PA, PA Title
Summary	<p>CALIFORNIA OFFICIAL REPORTS SUMMARY A physician employed an unlicensed medical assistant to assist in treating patients. The physician also advertised that his sister, who was licensed to practice medicine in Pakistan but not in California, worked for his clinic, and he advertised that the unlicensed employee was a "physician's assistant certified." A panel of the Division of Medical Quality of the Medical Board of California found that the physician had violated Bus. & Prof. Code, § 2271 (false or misleading advertising), Bus. & Prof. Code, § 2234 (unprofessional conduct), and Bus. & Prof. Code, § 2264 (employment of unlicensed person). The physician's approval to supervise physician's assistants was revoked, and his physician's and surgeon's certificate was also revoked, but the revocation was stayed for three years during which time he was placed on probation. The physician's petition for a writ of administrative mandamus was denied. (Superior Court of Los Angeles County, No. BS008682, William W. Huss, Judge.)</p> <p>The Court of Appeal affirmed. It held that Bus. & Prof. Code, § 2264, does not, as the physician asserted, merely prohibit the aiding or abetting of an unlicensed person to practice medicine, but may be violated either by employing an unlicensed person, or by aiding or abetting an unlicensed person. It also held that intent or guilty knowledge is not an element of a violation of Bus. & Prof. Code, § 2264. It further held that Bus. & Prof. Code, § 2271, can be violated through negligence. (Opinion by Nott, J., with Boren, P. J., and Fukuto, J., concurring.)</p>

Title	<i>Clarence N. Paris and Ethel Paris v Michael Kreitz JR., Dr. Leland S. Averett JR., and High Point Memorial Hospital, Incorporated</i>
Court	Court of Appeals of North Carolina
Citation	<i>Paris and Paris v Kreitz, Jr., Averett, Jr., and High Point Memorial Hospital, Incorporated</i> , 75 N.C. App. 365 (App Ct 1985)
Relevance	Standard of Care, Supervision
Summary	<p>PROCEDURAL POSTURE: Plaintiffs, patient and associated individuals, sought review of a judgment of the Superior Court, Randolph County (North Carolina), which entered a directed verdict in favour of defendants, doctor and hospital, in a medical malpractice action seeking punitive damages for gross negligence or wanton or wilful conduct by defendants.</p> <p>OVERVIEW: Plaintiffs, patient and associated individuals, initiated a medical malpractice action against defendants, doctor and hospital, seeking punitive damages for defendants' gross negligence or wanton or wilful conduct. The trial court entered a directed verdict in favour of defendants, and plaintiffs sought review. The court held that in order to recover punitive damages, plaintiffs must have proven that defendants' negligence was gross or wanton. The court held that a physician was an acceptable expert witness with regard to the standard of care for nurses. The court held that, although counsel was permitted liberal cross-examination, plaintiffs' counsel's questions had no basis in the evidence of the record. Pursuant to N.C. Gen. Stat. § 90-21.12, a health care provider was subject to the standards of practice among members of the same health care profession. The court determined that defendant physician assistant was not subject to the same standard as defendant doctor. The court affirmed a judgment of the trial court.</p> <p>OUTCOME: The court affirmed a judgment of the trial court, which entered a directed verdict in favour of defendants, doctor and hospital, in a medical malpractice action initiated by plaintiffs, patient and associated individuals. The court held that physician was an acceptable expert witness with regard to the standard of care for nurses. Plaintiffs failed to establish requisite negligent wanton or wilful conduct to recover punitive damages.</p> <p>EXCERPT FROM SYLLABUS: Plaintiffs instituted this suit by filing a complaint on 3 August 1982. Plaintiffs alleged that Michael Kreitz (PA) was negligent in that (1) he failed to exercise reasonable care and due diligence, (2) he attempted to diagnose Mr. Paris' problem without proper medical training, (3) his diagnosis was obviously incorrect, (4) he failed to consult a physician or other qualified medical professional in making his diagnosis, and (5) he prescribed improper treatment. Plaintiffs alleged that Dr. Averett was negligent in that (1) he failed to exercise reasonable care and due diligence, (2) he failed to attend personally to Mr. Paris, (3) he permitted defendant Kreitz to diagnose and prescribe treatment for Mr. Paris, and (4) he failed to treat Mr. Paris properly or promptly. Plaintiffs also alleged as a basis for punitive damages against Dr. Averett, that his</p>

negligence amounted to a reckless disregard of Mr. Paris' rights and safety. Plaintiffs alleged that the Hospital was negligent in that (1) it failed to adopt or enforce accepted rules and procedures regulating the practice of physician's assistants in emergency cases, (2) it failed to assure that plaintiff was seen and treated by a licensed and trained physician, and (3) the Hospital's agent, Nurse Garrett, failed to see that Mr. Paris received required medical treatment by a trained physician though she knew that he required treatment by a trained physician. Plaintiffs claimed that the negligence of defendant was the proximate cause of Mr. Paris' leg amputation and of the physical, mental and emotional suffering that accompanied it.

In a second count, Ethel Paris alleged that the amputation had adversely affected her relationship with Mr. Paris that she had been deprived of love, affection and conjugal relations, and that defendants' negligence was the proximate cause of her loss. Plaintiffs claimed compensatory damages in excess of \$ 10,000 and punitive damages.

Defendants Kreitz and Averett filed a response and defendant Hospital filed a separate response. Both responses denied the material allegations of the complaint. The matter was tried before a jury. Both sides presented expert testimony, discussed *infra*. Having found no negligence, the jury did not reach the issues of proximate cause or damages. Plaintiffs' motions for judgment n.o.v. and for a new trial were denied and plaintiffs appealed. Appeals Court found no abuse of discretion in the trial court's denial of plaintiff's motion for a new trial.

Title	<i>New York State Board for Professional Medical Conduct v William Race</i>
Board	New York State Board for Professional Medical Conduct
Citation	<i>New York State Board for Professional Medical Conduct v William Race</i> , 02-2221, online: New York State Department of Health Office of Professional Misconduct http://w3.health.state.ny.us/opmc/factions.nsf/58220a7f9eeaafab85256b180058c032/6cdace91dfd2f62a85256b110064091c?OpenDocument
Relevance	Risk of Harm-Sexual Misconduct, Professional Misconduct
Summary	<p>William Race, Registered Physician Assistant (RPA), provided medical care to the patient for the duration of nearly two years. RPA attempted to initiate a social/sexual relationship with the patient. RPA was charged with moral unfitness, harassing, abusing or intimidating a patient and revealing of personally identifiable facts.</p> <p>License of the RPA was suspended for a period of 12 months (3 months actual suspension and 9 months stayed suspension). RPA was placed on probation for a period of three years, commencing with the period of stayed suspension. During probationary period. RPA must only examine or treat a female patient in the presence of a chaperone.</p>

Title	<i>New York State Board for Professional Medical Conduct v Robyn Marie Emery</i>
Board	New York State Board for Professional Medical Conduct
Citation	<i>New York State Board for Professional Medical Conduct v Robyn Marie Emery</i> , Order 11-26, online: New York State Department of Health Office of Professional Misconduct http://w3.health.state.ny.us/opmc/factions.nsf/0522fed2dd2160ff852568c0004e894a/dea3381a0c2bba878525765500585117?OpenDocument
Relevance	Risk of Harm- Public Safety, Professional Misconduct
Summary	<p>Robyn Marie Emery was authorized to provide medical services as a PA in the state of New York. In May 2009. Emery was found guilty to the charge of unlicensed driver and attempted criminal possession of a controlled substance in the seventh degree. Emery was sentenced on both convictions by the Newfane Town Court of Niagara Country in New York State. Approximately a year later, Emery pled guilty to violating her probation based on continued illegal drug use and sentenced to 90 days incarceration.</p> <p>Emery was charged by the Board with Professional Misconduct. As a penalty, the Hearing Committee determined that a revocation of Emery's PA license would best serve to protect the public interest.</p>

Title	<i>New York State Board for Professional Medical Conduct v Jennifer DeFilippo</i>
Board	New York State Board for Professional Medical Conduct
Citation	<i>New York State Board for Professional Medical Conduct v Jennifer DeFilippo</i> , Order 10-01, online: New York State Department of Health Office of Professional Misconduct http://w3.health.state.ny.us/opmc/factions.nsf/0522fed2dd2160ff852568c0004e894a/8308ad2b58fd3b2d8525763300602ae6?OpenDocument
Relevance	Prescribing, Standard of Care, Professional Misconduct
Summary	<p>Jennifer DeFilippo, an RPA, was sentenced to three years probation in May 2009, for forgery in the third degree by the Johnston Town Court of Fulton County, New York, for writing a prescription for Lortab, a controlled substance, for a patient in exchange for a portion of the drug. From in or around September 2007 to November 2008, DeFilippo provided patients with controlled substances without adequate medical indication for the prescriptions and without maintaining a medical record for the patients. In April 2008, DeFilippo failed to provide the proper standard of care to a patient suffering from abdominal pain. In September 2005, DeFilippo, also provided medical care below the standard of care to a patient suffering from a high pressure injection finger injury.</p> <p>For all of the above allegations, DeFilippo was charged by the Board with twenty specifications of professional misconduct. Her license was suspended for 24 months stayed and she was placed on probation for five years subject to terms of probation. She was also charged with a fine.</p>

Title	<i>New York State Board for Professional Medical Conduct v Garth E. Brink</i>
Board	New York State Board for Professional Medical Conduct
Citation	<i>New York State Board for Professional Medical Conduct v Garth E. Brink</i> , Order 00-43, online: New York State Department of Health Office of Professional Misconduct http://w3.health.state.ny.us/opmc/factions.nsf/0522fed2dd2160ff852568c0004e894a/61e7a76327a7129b85256a4a0047c60e?OpenDocument
Relevance	Practicing outside scope of practice (without supervision), Standard of Care
Summary	<p>Garth E. Brink a licensed PA provided care below the proper standard of care and practiced beyond the scope of practice permitted by law, by evaluating and treating patients without proper physician supervision.</p> <p>The Board sanctions included a three year "stayed" suspension, on condition that Brink, comply with the terms of probation.</p>

Title	<i>Arizona Regulatory Board of Physician Assistants v Robert Mitchelson</i>
Board	Arizona Regulatory Board of Physician Assistants
Citation	<i>Arizona Regulatory Board of Physician Assistants v Robert Mitchelson</i> , Order PA-07-0052A, online: Arizona Regulatory Board of Physician Assistants http://azpa.gov/GLSuiteWeb/Repository/0/0/5/0/0b6b85c0-ce99-4297-bc82-b75f1d3426d8.pdf
Relevance	Prescribing, Practising Without Delegation and Treating a Family Member
Summary	<p>A complaint from the patient's primary care physician was initiated against Mitchelson for his failure to maintain adequate records, inappropriate prescribing (including: prescribing controlled substances to an immediate family member) prescribing prescription medication without delegation and failure to maintain a log of all schedule II and III administered medications, all while treating his wife..</p> <p>Mitchelson was charged with unprofessional conduct in three counts and sentenced to 10 years probation with "stayed revocation" (meaning that any failure to comply with the terms of probation is cause for revocation). Mitchelson will be subject to practice limitations and chart reviews as terms of probation.</p>

Title	<i>Arizona Regulatory Board of Physician Assistants v Dale J. Bingham</i>
Board	Arizona Regulatory Board of Physician Assistants
Citation	<i>Arizona Regulatory Board of Physician Assistants v Dale J. Bingham</i> , Order PA-10-0022A, online: http://azpa.gov/GLSuiteWeb/Repository/0/0/9/4/b496e255-b051-4b71-91cd-49e625493844.pdf
Relevance	Risk of Harm-Public Safety
Summary	<p>Dale J. Bingham, a licensed PA, recognized that he has a medical condition that may limit his ability to safely engage in the performance of health care tasks. As a result, the Executive Director determined that a consent agreement was needed to mitigate imminent danger to the public health and safety.</p> <p>Bingham's practice was limited in that he shall not perform health care tasks and may not prescribe any form of treatment until he applies to the Board for permission.</p>

Title	<i>Arizona Regulatory Board of Physician Assistants v Jef B. Esquerra</i>
Board	Arizona Regulatory Board of Physician Assistants
Citation	<i>Arizona Regulatory Board of Physician Assistants v Jef B. Esquerra</i> , Order PA-09-0029A, online: http://azpa.gov/GLSuiteWeb/Repository/0/0/7/4/1d2ff5cc-fdee-4d1f-ad4c-5ea9e58bace5.pdf
Relevance	Prescribing and Labour Mobility
Summary	<p>Jef B. Esquerra, is a licensed P.A. in Arizona. Esquerra treated a patient in Utah from 2001 to 2005 for mental illness and chronic pain. Despite being aware of the patient's past alcohol abuse issues, he proceeded to prescribe excessive amounts of Fentanyl, Alprazolam and ethanol. The patient died in 2005, and the autopsy revealed mixed drug poisoning involving the medications prescribed by Esquerra. The Utah Board found that Esquerra failed to follow chronic pain management guidelines and to produce a "delegation of services agreement with his supervising physician from 2001 to 2005. As a result, Esquerra surrendered his Utah license based upon the disciplinary sanctions imposed by the Board for unprofessional conduct.</p> <p>Subsequently, the Arizona Regulatory Board of Physician Assistants, charged Esquerra with unprofessional conduct based on the sanctions he received in state of Utah. Esquerra was issued a Decree of Censure, 15 year probation with terms including the prohibition of prescribing, administering and dispensing any controlled substances.</p>

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