



## Medico-Forensis Consilium Newsletter ©

### The Editor's Corner

Sherry S. Martin, PA-C, DFAAPA

Unless you've been lying on the beach on some remote island, you know there is a highly-charged, national discussion concerning the proposed changes in the NCCPA recertification process. I'm not here to promote any agenda or to imply that I am a formal educator & understand the science behind exam development. I expect that whatever procedural changes are made, it will be important to identify and measure the impact on effectiveness and cost of health care provided by PAs as a result of the new recertification model. PAs would have less angst if we knew the proposed changes will improve patient outcomes, improve standard of care, and reduce medical risk.

We all practice the standard of care (SOC) in both primary care and specialty care. But first, how would you measure SOC if no single definition exists? Mr. Peter Bergé looks at the definition

and nature of SOC in his article titled, "The Standard of Care: Universal Concept or Mythical Creature." Read it online, starting on page 16 at <http://www.aalnc.org/page/the-journal-of-legal-nurse-consulting>

In November 2013, the Health Resources & Service Administration published a report, "Projecting the Supply and Demand for Primary Care Practitioners Through 2020." It states that utilizing PAs and NPs in primary care (PC) will help improve access for the aging during a time of PC physician shortfall. However, more than 70% of PAs are employed in specialty practice. If we're trained as entry-level generalists, perhaps PAs should consider our healthcare footprint and look at ways to retain our presence in the primary care "specialty." <http://bhpr.hrsa.gov/healthworkforce/supplydemand/usworkforce/primarycare/>

#### Medical Provider Legal Consultant Certificate

The MPLC course is now "live" and offered online by A.T. Still University. Course description can be found <http://www.legalstudies.com/syllabi/mplc.html>. If questions, contact Jim Burkett at [jburkett@atsu.edu](mailto:jburkett@atsu.edu)

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## Are you a "Hired Gun"?

Marcos A. Vargas, MSHA, PA-C

Shortly after becoming an expert witness consultant, I had an experience unlike any other up to that point in my new role. Half way through a very grueling and intense deposition, the opposing counsel suddenly stood up and angrily asked, "Mr. Vargas, are you a hired gun for your attorney-client?"

I vividly recall the sudden and tense reaction that came over the room as if a lightning bolt struck the deposition table. I immediately wondered why I was not hearing one of the many "objections" that I had heard earlier from my client. For a moment I felt trapped, abandoned, and at a loss for I did not recall being briefed nor prepared for this type of questioning. As I looked at my attorney-client for immediate salvation and guidance, he quietly and confidently nodded affirmatively for me to proceed and answer what I thought was "the" ultimate loaded question.

Luckily, I immediately regained my composure and clear thinking after the verbal fastball was launched straight at me. I articulated the fact that I was not another amoral consultant seeking

to benefit my coffers by "prostituting" my services. However, and for the record, I established that we are all "hired guns" but with a few minor differences to the commonly held view by many attorneys in the business. I immediately added the fact that my consultancy was not skewed for plaintiff nor defense cases, rather I sought to engage in a balanced practice by being first and foremost an "unbiased educator" to the legal community, judges, jurors, and even insurance companies for that matter.

And even though opposing counsel refocused his strategic questioning by asking about my consulting fees, etc., it was very clear he lost momentum and was trying to resuscitate his failed approach. Suddenly, the rabid intonation, posturing and rapid-fire questioning vanished and I was surprisingly stunned.

So, what had I learned? By remaining poised, focused, and confident, as hard it might be in the moment, you will emerge victorious if you can remain truthful to the call and show them you're not just another "hired gun."

*Marcos A. Vargas, MSHA, PA-C is a PA practicing in Orthopedics at Hurley Medical Center (Level 1 Trauma Center in Flint, MI) who has been a medicolegal consultant since 1996.*



## INJURY vs. DAMAGES

Peter I. Bergé, PA, JD

In the Spring 2013 issue (of Medico-Forensis Consilium), I discussed the various types of damages, principally compensatory (economic and noneconomic) and punitive. It is important, in my opinion, to distinguish *injuries* from *damages*, which are distinct concepts, although some very good lawyers use the terms interchangeably.

In the context of medical malpractice claims, **injury** is, essentially, the harm that comes to or the loss suffered by the plaintiff as the result of negligence, which includes bodily injury, pain and suffering and residual disability, as well as such harm as loss of enjoyment of life and emotional distress, and financial loss, such as loss of income and out of pocket expenses.

**Damages**, per Black's Law Dictionary, 7th ed., is "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." In other words, damages is what one would attempt to obtain in a settlement or would be awarded by a verdict, whether by judge or jury.

In my opinion, medicolegal consultants should primarily opine on liability (deviation from the standard of care), injury and causation. Analyzing the injury

includes opinions as to the degree of permanency and residual disability likely to be associated with the physical and psychological injuries. Using her or his knowledge of the law and the practice, and the information provided by the consultant or expert, the attorney calculates factors such as which carriers are more or less likely to settle, and in what ranges, what the ultimate damages might be, and what the anticipated costs of litigation are, in determining whether to pursue a claim.

Remember that economic damages (compensation for financial loss) is only one factor to consider. Pain and suffering, and impaired quality of life, can be worth hundreds of thousands of dollars, depending on the facts of the case and the consequences to the plaintiff.

For instance, I had a matter in which the only significant injury was an enterocutaneous fistula. There were no significant economic losses. The case settled for \$400,000. Then there was a plastic surgery case (we usually do not take those) with really impressive scarring but no pain or disability that settled for \$350,000.

## PER QUOD OR LOSS OF CONSORTIUM CLAIMS

Peter I. Bergé, PA, JD

*Per quod consortium amisit* is an old fashioned term that once was used to refer to the losses that a husband sustained if someone injured his wife. See <http://www.duhaime.org/LegalDictionary/P/PerQuodConsortiumAmisit.aspx>

The term has generally been replaced by the claim of **loss of consortium**, which in effect refers to the loss of anything that a spouse offers or contributes to, or shares in the spousal relationship. In some jurisdictions, such as New Jersey, the old term is still in use but is shortened to *per quod*, and has the broader meaning associated with loss of consortium.

Therefore, the *per quod* or loss of consortium claim arises from the harm to the spouse (of the injured patient) that results from the patient being unable to make her or his contribution to the activities of the household and in the relationship. That includes participating in house work, shopping, child care, etc. as well as renovations and such, not to mention the effect on the quality of the relationship and on physical intimacy. The spouse is entitled to compensation for those injuries. Compensation is also sought for expenditures made necessary to replace the services of the patient, i.e. hiring someone to do what the patient used to do, whether in the home or in a family business.

*Peter Bergé has been licensed as a PA in New York State since 1987 and is an*

*attorney admitted in the State of New Jersey, whose practice is concentrated in medical malpractice matters.*



**Disclaimer** We hope this newsletter is informative, educational, and useful. Please note that neither AAPALM as an organization nor its members offer legal advice. We are generally not attorneys. We recommend that patients or health care practitioners involved in a malpractice matter consult with a licensed litigation attorney in your state

## Calendar

AAPA Conference

### AAPA Legal Medicine Annual Meeting

Monday, May16, 2016

8am – 10am

213B Henry B Gonzalez  
Convention Center

San Antonio, TX





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## Calendar

AAPA Conference  
San Antonio, TX  
May 14 – 18, 2016

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