

CHAPTER 20

NURSING LIABILITY AND NURSING MALPRACTICE

I. INTRODUCTION

A wrongful act that causes harm to a person for which the law allows a person to recover is called a "tort." The most common type of tort is one based on negligence. In order to recover for a tort based on negligence, there are four elements which must be met are that there is an act (or failure to act) in which the following are present: 1) a duty owed by the one performing the act to the one who is harmed; 2) an act (or failure to act) which breaches that duty; 3) actual damage or harm sustained; and causation (in other words, the act or failure to act caused the damage or harm).

Malpractice is just another name for professional negligence. Professional negligence is a tort committed by a licensed professional, in this case a nurse. In order to show nursing malpractice, one must show all of the elements of a negligence tort. The only difference is that in professional negligence, the duty that must be shown is the professional duty that the licensed professional owes to the one injured, in this case, her patient. Accordingly, the duty owed will be one of the nurses professional duties as a nurse.

The concept of nursing malpractice is discussed further in this chapter. Since nursing malpractice and medical malpractice are so closely related, these will be discussed together.

II. DEFINING NEGLIGENCE

Negligence is the failure to use such care as a reasonably prudent person would use under similar circumstances.

The law of negligence is part of what is known as "tort" law. The term "tort" originates from the French word meaning "wrong." The law of negligence therefore deals with injuries or a wrong caused by one person towards another. Most negligence lawsuits are civil, not criminal, cases. A person can be found negligent even though they did not actually intend to harm the inured party, because negligent conduct is the behavior which results in unintended harm.

III. DEFINING MEDICAL MALPRACTICE

Medical malpractice can occur when a health care professional fails to exercise the degree of care that a reasonable health care professional would exercise under the same or similar circumstances. In other words, medical malpractice is negligence committed by a health care professional.

Medical malpractice is a specialized area of law that deals with negligence claims against health care professionals. Medical malpractice is often perceived as conduct which is somehow more egregious than mere negligence. This perception is erroneous because medical malpractice is simply ordinary negligence by a healthcare provider that causes some injury to the patient.

Several years ago nurses were only liable for negligence. Although as nurses exercise more autonomy, their legal liability has changed. Courts in a number of states recognize and identify nursing negligence as a form of medical malpractice. A Florida lawsuit helps to illustrate this point. In this case, a mother made a routine prenatal visit to the hospital. While in the waiting room the mother complained to the nurse of severe abdominal pain. Over the next hour and a half the mother complained of pain five times, each time she was told that she would have to wait to be examined. When the mother was finally examined her unborn child's fetal heart rate was only 60 to 70 beats per minute. An emergency cesarean section was performed but the baby was born severely depressed, hypoxic, suffered from severe brain injury and developed seizures within the first hour.

In this case the nurse did not intend to cause harm to the baby or the mother, however the nurses failure to have the patient examined when she complained of severe abdominal pain and her failure to recognize the onset of fetal distress was negligent. A reasonably prudent nurse would have had the patient examined by a physician and recognized sings of fetal distress when the patient complained of acute abdominal pain. The hospital settled this case for \$2 million.

IV. THE FOUR ELEMENTS OF MEDICAL MALPRACTICE

In order to prevail in a medical malpractice lawsuit, the plaintiff must prove each of these four elements:

1. the defendant owed the plaintiff a duty of reasonable care;
2. the defendant breached her duty;
3. the plaintiff incurred an injury, loss or harm; and
4. the defendant's acts or omissions caused the plaintiff's injury, loss or harm.

The plaintiff must prove each of these four elements by a preponderance of the evidence. A preponderance of the evidence means that it is more likely that the defendant committed the medical malpractice than not.

A. THE DUTY OF REASONABLE CARE

The plaintiff must first show that the nurse had a duty to provide care for the plaintiff. The element of duty is usually straightforward and relatively easy for the plaintiff to prove because once nurses undertake care for their patients they have a clear duty to provide care for that patient in a competent and reasonable manner. Nurses owe a clear duty of care to all of their patients.

B. BREACH OF DUTY

When applied to nursing, a breach of a duty occurs when a nurse does, or does not do, what a reasonable nurse would have done under the same, or similar, circumstances. This would mean that the nurse's care fell below the acceptable standard of care.

The standard of care is a legal concept which reflects how a nurse is expected to act professionally. It incorporates the expectation that nurses conduct themselves with the degree of care, skill and knowledge that reasonably competent nurses would exhibit in a similar situation. It is important to remember that the standard represents a minimum level of practice to which nurses must adhere in order to avoid being found negligent. In other words, nurses do not have to exert heroic efforts to perform their job satisfactorily; they are expected to exercise their good judgment, education and training to the best of their ability, under the circumstances. Nursing care that falls below the acceptable standard of care may result in a medical malpractice lawsuit against the nurse.

The standard of care is particular to each field of nursing practice. For instance, orthopedic nurses determine the standard of care for orthopedic nurses.

C. INJURY OR DAMAGE

To prove the element of injury the plaintiff must be able to establish that, in addition to pain and suffering, they have experienced a physical injury, lost money or have an actual reduction in the quality of their life. The injury which the plaintiff suffered will help to determine the monetary damages that will be awarded if the plaintiff succeeds at trial.

D. CAUSATION

Causation is often the most difficult element of medical malpractice to prove. In order to prove that the defendant caused their injury, loss or harm, the plaintiff must show that the defendant's act or omission either caused, or was a substantial factor in causing, harm to the plaintiff. If the defendant proves that the harm would have occurred anyway, irrespective of the defendant's act or omission, then the negligence action will fail for lack of causation.

V. SOURCES FOR THE STANDARD OF CARE

Where do nursing standards come from, and who decides what the standard of nursing care should be in each particular medical malpractice case? The answer is that the sources for nursing practice standards are varied. The court relies on some or all of these sources to help determine the applicable standard of care in each individual case. Some of these sources for nursing standards include:

1. Florida Nurse Practice Act, Chapter 464, Florida Statutes;
2. Other Florida Statutes and the Florida Administrative Code;
3. Case law;

4. Principles, guidelines and standards of professional associations such as the American Nursing Association (ANA);
5. The Joint Commission on Accreditation of Healthcare Organizations (JCAHO);
6. Hospital Policies;
7. Standards of Care as testified to by other members of the profession; and
8. Authoritative Nursing Texts and Journals.

VI. NURSE'S ACCOUNTABILITY FOR THE STANDARD OF CARE

As a licensed nurse, you are expected to know what the generally accepted standard of care entails and follow that general standard in your daily practice. The policy and procedure manual of your facility should contain nursing care guidelines. However, if the facility you are working in does not adhere or comply with the generally accepted standard of nursing care, then, following the facility's policies and procedures will not protect you from a charge of malpractice. This is because all nurses are accountable for the nurse's standard of care.

If you are aware that your facility's policies and procedures are below the generally accepted standard of care, then you should promptly notify your nurse-manager or the risk-control committee of your concerns.

VII. CONCLUSION

Over the years nurses are becoming ever more likely targets for plaintiffs, and their attorneys, in medical malpractice cases. It is extremely important for a nurse to know the malpractice laws that encompass the nursing profession. By knowing each element of medical malpractice and the different standards of care that a nurse is held to. A nurse who can adhere to the different standards of care can avoid being held liable for medical malpractice.