

Medical Malpractice: An Introduction to Tort Law

Part 1: Legal Basis of Malpractice Law

BY TIMOTHY E. PATERICK, MD, JD

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It is prudent for every physician to understand tort law and the foundations of medical negligence, because medical negligence is the most common basis for a medical malpractice action. The term malpractice refers to any professional misconduct that arises from an unreasonable lack of care, skill, or judgment in carrying out professional or fiduciary duties. The term medical malpractice is used because it is the common and traditional term used in claims alleging medical negligence by healthcare professionals.

Medical negligence is the most common basis for a medical malpractice action imposing liability upon a physician. Medical negligence is a breach of a physician's duty to behave reasonably and prudently under the circumstances that causes a foreseeable harm to another. For a successful lawsuit under the theory of negligence, an injured patient must prove, by the preponderance of the evidence, each of the following essential elements: duty; breach of duty; causation; and damages. Under the preponderance standard, the burden of proof is met when the party with the burden convinces the fact finder that there is greater than a 50% chance that the claim is true.

The cases in this series of articles reinforce the importance of understanding the concepts detailed in each part. Case studies are offered to allow the reader to experience real-world clinical cases with the legal impact of "missteps" in clinical care.

Key Points

The physician-patient relationship is an example of what is known as a fiduciary relationship. The fiduciary relationship is characterized by expectations of trust and confidence by a vulnerable party (patient) in the other party (physician), who holds herself/himself out as possessing specialized knowledge, expertise, and experience. The fiduciary nature of the physician-patient relationship is fundamental to equalizing the asymmetry in knowledge between a physician and patient.

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Legal Concepts

The following legal concepts underlie medical malpractice cases and judgments:

- The foundation of tort law is to rectify a wrong done to a person by providing relief, customarily by awarding monetary damages as restitution.
- The fiduciary relationship is characterized by expectations of trust and confidence by a vulnerable party (patient) in the other party (physician) who holds herself or himself out as possessing specialized knowledge, expertise, and experience.
- For a lawsuit to be successful under the theory of negligence, an in-

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cal negligence, because medical negligence is the most common basis for a medical malpractice action.

Negligence is carelessness. Ordinary human behavior is fraught with careless actions, most of which causes no or little harm, so as to be forgiven or forgotten. Ordinary negligence is the failure to exercise that degree of medical care, skill, and judgment that a careful, prudent physician would have exercised under similar circumstances.

A number of strategies for avoiding errors, surviving allegations of negligence, and limiting liability have been proposed. The medical and legal literature is voluminous on this topic, but there are no fail-safe strategies or schemes to avoid medical errors or limit liability.

jured patient must prove, by the preponderance of the evidence, each of the following essential elements: duty; breach of duty; causation; and damages.

- Under the preponderance standard, the burden of proof is met when the party with the burden convinces the fact finder that there is greater than a 50% chance that the claim is true.
- Duty requires that a physician possess and bring to bear on the patient's behalf that degree of knowledge, skill, and medical care that would be exercised by a reasonable and prudent physician under similar circumstances.
- Under breach of duty, the plaintiff alleges the physician failed to act in accordance with the applicable stan-

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dard of care and did not comply, and hence breached, the requisite duty.

- The plaintiff must establish that a causal connection (nexus) exists between the alleged negligent act or omission and the resulting injury or harm. This connection is referred to as the proximate cause.

- Damages encompass the actual loss to the interests of the patient caused by the physician's breach of the standard of care.

- Common law is case law: rules and standards applied to a set of facts by appellate court decisions in specific cases.

- Statutory law is law made by the legislature of any given state that is intended to codify (arrange laws and rules into a systematic code) case law or create new law.

- Negligence per se (on its face obvious to all observers) is behavior that can be said without vacillation or hesitation that no careful person would have committed.

Case Study: Allegation of Malpractice in a Case of Malignant Melanoma

This short case illustrates the need for all physicians to appreciate the importance of understanding tort law.

It was an ordinary day at the Middlesex County Superior Court. In courtroom 3B, Dr. K. Lane faced

charges of medical malpractice. Lane was a Harvard-trained dermatologist with 31 years of clinical experience, and this was his first encounter with the justice system. That day he was being questioned about two office visits and a telephone call that had taken place five years earlier.

JA was an actor who had been referred to him by her internist about a dark warty nodule a quarter-inch

telephone to go over the new findings.

None of this was in dispute; what was in dispute was what happened during the phone call. According to JA, Lane told her she did not have melanoma after all—the second opinion revealed no further surgery was indicated or needed. Lane recalled the phone conversation differently. “I (Lane) indicated to JA that the second opinion could not be certain the lesion

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wide on her left leg. Lane shaved off the top of the nodule for a biopsy. The pathology report came back with a diagnosis of malignant melanoma. At a follow-up appointment, Lane told the actor that the growth would need to be completely removed, including a 2-cm margin of healthy skin beyond the lesion. Lane worried about metastasis and recommended immediate surgery. JA balked, because the incision would be three inches across and would be disfiguring, affecting her acting career as she often appeared in swimsuit scenes. She had a friend, also an actor, who had received an erroneous cancer diagnosis and undergone unnecessary surgery. Lane and JA compromised and agreed to remove the remaining visible tumor with only a 1/2-inch excision. Lane agreed to have a second pathologist review the biopsy.

To Lane's surprise, the new tissue specimen was found to contain no cancer. The second pathologist reviewed the first specimen and concluded the first specimen did not reveal cancer, saying, “I doubt this is melanoma, but I cannot completely rule it out.” Lane and JA spoke over the

was benign. I explained it would be safest to proceed with surgery allowing for two-centimeter margins.” JA was furious with the initial wrong diagnosis, and she did not want further surgery. Then Lane recommended close and careful follow-up. She refused follow-up and refused to pay his bill.

Two years later the growth reappeared, and the biopsy revealed deeply invasive melanoma. A complete excision, she was told, should have been done the first time. At this time the cancer had spread to her lymph nodes and lungs. After a year of chemotherapy and radiation she had a seizure. The melanoma has spread to her brain. Shortly thereafter JA died. Before she died, she had hired a malpractice attorney. Three years later, on behalf of JA's children, the attorney stood up in the courtroom and called Lane as his first witness.

Malpractice suits are a feared, exasperating, and possible event for every practicing physician. The average physician in a high-risk practice (e.g., surgery) may be sued as often as every five years. Although many suits are dropped or won by the defendant in court, the cost of defense is high and the emotional toll often is exorbitant. The jurisprudential system seems irrational to most physicians. Providing medical care is complex

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and has the potential for any of a thousand missteps. This complexity should motivate every practicing physician to become familiar with the landscape of medical negligence law. Let's start now.

Background

Tort law covers most civil lawsuits. A civil lawsuit is the court-based process through which Person A can seek to hold Person B liable for harm or a wrongful act. The foundation of tort law is to rectify a wrong done to a person by providing relief, customarily by awarding monetary damages as restitution. The original intent of tort law was to provide full compensation for proven harms.

Medical malpractice law in the United States made a transition in the 20th century. World War II, on the heels of Franklin Roosevelt's New Deal, brought unprecedented social change. The GI Bill allowed a large subset of society to pursue college and professional school education. This created more critical thinking among the populace, which led to supplanting an aging judiciary with a younger judiciary, who had a fair compensatory-based mentality. New critically thinking juries had the desire and the freedom to compensate harmed plaintiffs adequately.¹

These post-World War II social and educational changes worked together with the following legal transformations:

- The locality rule, which protects small town physicians from potentially unfair medical malpractice charges, on the premise that it would be unfair to hold these doctors to the same standard of care as big city experts, was abolished.
- Charitable immunity, the legal doctrine that holds that a charitable organization is not liable under tort law, was limited or abolished.
- There was a change from contributory negligence (i.e., failure of an injured plaintiff to act prudently, considered to be a contributory factor in the injury suffered, that could potentially preclude the compensation recovered from the defendant) to comparable negligence (comparative negligence states that when an accident occurs, the negligence of each party and compensatory award is based upon their

respective contribution to the harm).

- The development of informed consent—which stated patients have the right to receive information and ask questions about recommended treatments so they can make well-considered decisions about their care—negated the assumption of risk by patients.
- Statutes of limitations—a statute prescribing a period of time limitation for bringing certain kinds of legal action were relaxed.
- Effective discovery rules—the formal process of exchanging information between parties about the evidence they will present and the witnesses they will use—were adopted.
- There are fewer long-term doc-

confidence an obligation to act solely in the interests of the vulnerable party, and to use their (physician) expertise only so as to promote the other party's (patient) interests and well-being. The fiduciary nature of the physician-patient relationship is fundamental to equalizing the asymmetry in knowledge between a physician and patient.^{2,3}

Therefore, despite health policy discussions about the appropriateness of individual physicians taking into account the costs of medical procedures and treatments to a health plan or society, such considerations cannot, as a matter of prevailing law, properly influence a physician's decision whether or not to offer or recommend

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tor-patient relationships.

- Innovations in medical technology, along with a surge in medical marketing, led to unrealistic patient expectations.
 - Several well-publicized large medical malpractice awards were reported across a wide swath of the United States.
- These changes combined to create the new medical malpractice world that physicians confronted regarding allegations of negligence.¹

Understanding the Fiduciary Nature of the Physician-Patient Relationship

To appreciate the underpinning of medical negligence law, it is critical for every physician to understand the establishment and nature of the physician-patient relationship.² The physician-patient relationship is an example of what is known as a fiduciary relationship.² The fiduciary relationship is characterized by expectations of trust and confidence by a vulnerable party (patient) in the other party (physician) who holds herself or himself out as possessing specialized knowledge, expertise, and experience.

Society, through laws and codes of professional ethics, imposes upon the party (physician) in whom the vulnerable party (patient) entrusts this faith and

such procedures and treatments to patients when necessary or appropriate to diagnose or treat medical conditions. The fiduciary duty that a physician owes a patient flows from the physician-patient relationship.⁴

In their attempt to understand the underpinning of medical malpractice,⁵ it is essential and prudent that readers have a firm understanding of each element necessary to prove negligence in a court of law. **PM**

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Dr. Timothy Paterick is a cardiologist at Methodist Hospital, Dallas, Texas; e-mail: tpa-terick@gmail.com.