Medical Malpractice: An Introduction to Tort Law

Part 2—The Four Elements: Duty, Breach of Duty, Causation, and Damages

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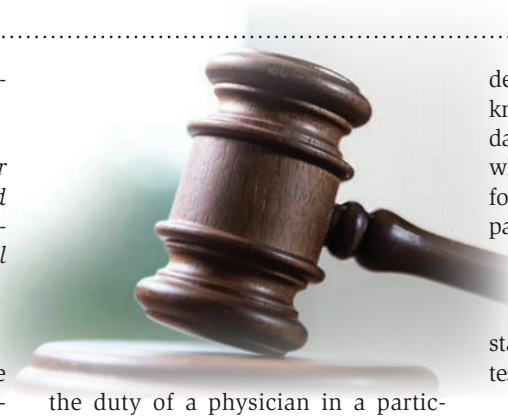
This article is the second of four parts. Part I of this series presented an introduction to basic nomenclature and concepts pertinent to medical malpractice law.



Duty

Duty,[1] the first element of the negligence theory of liability, is inherent to the physician–patient relationship. The sustenance of medical practice is a contract between the physician and the patient called the physician–patient relationship. Both medically and legally it is considered a fiduciary relationship. The physician–patient contract also may occur when a party representing the patient, as in the case of managed care organizations, enters into a contract with a physician.

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.[1] The physician owes the patient a duty to act in accordance with the specific standards of care established by the profession and to protect the patient against unreasonable risk. The physician may fail to exercise the required care, skill, or diligence by either commission or omission. It may not matter that the physician has performed at her or his full potential and in good faith if that falls below the accepted standard of care.

There is no clear definition of the duty of a physician in a particular case. Most medical malpractice cases are highly technical, so witnesses with special medical or surgical qualifications are necessary to provide the jury and judge with the knowledge necessary to render a fair and just verdict. As a result, in nearly all cases, the standard of care of a prudent physician must be determined based on expert medical testimony. In the case of a specialist, the standard of care by which the defendant is judged is the care and skill commonly possessed and exercised by similar specialists under similar circumstances. The specialty standard of care may be higher than that required by a generalist.

The law recognizes that medical care is not within the common realm and therefore requires expert testimony. The standard of care is an objective standard against which conduct of a physician sued for malpractice may be measured, and therefore it does not depend on any individual physician's knowledge. In attempting to set a standard by which the jury may determine whether a physician has properly performed the requisite duty toward the patient, expert medical testimony usually is offered for both the prosecution and the defense. The jury or judge ultimately determines the standard of care after listening to the testimony of the medical experts.

Breach of Duty

The plaintiff must prove breach of duty,[1] the second element of medical negligence. The plaintiff alleges the physician failed to act in accordance with the applicable standard of care and did not comply, and hence breached, the requisite duty. The applicable standard of care must be defined before the plaintiff can prove the physician breached that duty. In most cases, expert witnesses for the prosecution and the defense address the question of breach of duty while testifying to the standard of care owed.

There are exceptions to the need for expert witnesses identifying the standard of care. Expert testimony may not be required if the plaintiff presents evidence exposing the defendant physician's substandard care that is so apparent and discernible as to be within the comprehension of a layperson.

If event B would not have occurred, but for event A, then causation exists.

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Causation

The plaintiff alleging medical negligence also must prove causation,[1] the third element of the negligence theory of liability. 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. The concept of causation refers to a single causative factor, and not necessarily the major cause, or even the most immediate cause of the injury.

Causation commonly is the most challenging and elusive concept for the jury to understand because of the multifaceted and complex medical issues involved in the case. Legal causation consists of two factual issues: causation in fact and foreseeability.

Causation in fact can be best understood under the umbrella of "but for." An event A is the cause of another event B. If event B would not have occurred, but for event A, then causation exists. The "but for" test is obvious in some cases, but opaque in others. Two contrasting examples illustrate how the "but for" test applies:

- Consider the patient with an intestinal perforation resulting from a surgeon's failure to remove an instrument from the abdominal cavity and a subsequent abdominal abscess and subsequent death. But for the retained instrument, such complications would not have occurred.
- In contrast, a physician's delay in diagnosing an aggressive malignant neoplasm might not necessarily have affected the patient's outcome.

Foreseeability

Foreseeability is the second causation issue. A patient's injuries and other damages must be the foreseeable result of a physician's substandard practice. Usually the plaintiff must prove that her or his injuries were of a type that would have been foreseeable by a reasonable physician as a likely result of the breach of the medical standard of care.

The law of causation varies from jurisdiction to jurisdiction. In Daubert v. Merrel Dow Pharmaceuticals, the United States Supreme Court addressed admissibility of scientific evidence in a case involving expert testimony concerning causation (Daubert v. Merrel Dow Pharmaceuticals. 509 U.S. 579 (1993)). This landmark decision, which is followed in most jurisdictions, allows judges boundless discretion in deciding what scientific evidence is or is not admissible as applied to the causation element.

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Damages

Damages[1] is the fourth element of the medical negligence lawsuit. Proof of damages is essential to the injured party being "made whole" through compensation. Damages encompass the actual loss to the interests of the patient caused by the physician's breach of the standard of care.

There can be no recovery of damages if the patient is not harmed. The exception to this rule is nominal damages, where a symbolic sum is awarded a plaintiff who has had her or his virtue challenged and is vindicated by having the gratification of having her or his claim honored. A nominal damages award may serve as a prerequisite to the award of punitive damages (damages exceeding simple compensation are awarded, usually pursuant to state statute, to punish the defendant).

The purpose of granting damages in a tort action is to ensure that the person who is harmed is made whole again—or returned to the position or condition that existed before the tort of negligence. Because it usually is difficult to alleviate the effect of the injury resulting from medical malpractice, public policy demands redress through the award of pecuniary compensation to the plaintiff. The legal fiction is that money makes an injured and impaired person whole.

Damages may serve as recompense for a wide range of financial, physical, or emotional injuries to the plaintiff patient. The jurisprudential community has recognized certain categories of damages, but classification often is vague and inconsistent, because some of these categories overlap and are not strictly followed by courts of all jurisdictions.

Compensatory damages are awarded to counterbalance the injuries and losses the patient has incurred. There are two types of compensatory damages: general and special:

- General damages are awarded for non-economic losses, including pain and suffering, mental anguish, grief, and other related emotional ailments without any reference to the patient's specific physical injuries.
- Special damages are those that are the actual, but not necessarily the foreseeable, result of the injury caused by the defendant, and that follow the injury as foreseeable and natural consequences of the substandard medical care.
- Typical elements of special damages that are compensated by a monetary judgment include past and future medical, surgical, hospital, and other healthcare-related expenses; past and future loss of income; funeral expenses in a case involving a death; and unusual physical or emotional consequences of the alleged injury.

If a wrong was aggravated by special circumstances, punitive or exemplary damages may be awarded in addition to actual losses, depending on the particular state's law. Punitive damages, which rarely are awarded in medical negligence cases, are intended to make an example of the defendant physician, or to chastise and admonish the physician for her or his egregious behavior. Such damages generally are awarded when a defendant's conduct has been intentional, grossly negligent, violent, fraudulent, or with reckless disregard for the consequences of that conduct.

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Discussion

The purpose of this article is to introduce the reader to an overview of the different types of medical negligence recognized by the jurisprudential system:

- *Ordinary negligence:* the failure to meet the standard of care owed to another person. It can refer to any act or omission that another person, who was reasonable and prudent, would not have committed in the same or similar circumstances.
- *Per se or statutory negligence:* the defendant's acts caused the type of harm the statute was intended to prevent.
- *Judicially-imposed negligence:* case law forming the precedent imputing negligence.
- *Gross negligence:* behavior that lacks even slight diligence or care, or a behavior that is a conscious and voluntary act or omission that is in reckless disregard of a legal duty and the consequences to another party.
- *Criminal negligence:* conduct in which a person ignores a known, obvious risk, or disregards the life and safety of others.

These different types of negligence represent various degrees of carelessness, probability of harm, and the imputed mindset of the person causing that harm.[2]

Negligence

Negligence is carelessness. Ordinary human behavior is fraught with careless actions, most of which cause no or little harm, and can therefore be forgiven or forgotten. Ordinarily, as long as behavior does not cause harm, and as long as the person who was careless apologizes, negligent acts are forgiven and forgotten as part of the normal social structure of our society.

To err is human. Medical practice is an error-prone human enterprise.[4,5] As admirable as the frequently stated goal of eliminating all medical error might be, to avoid all error in medicine would necessarily remove both the patient and the doctor from the equation. Arguably, medical practice today is safer than at any other time in our history of medical practice, despite the increase of harm associated with technology and disease intervention. However, as medical practice has become safer, the public has come to expect perfect medical and surgical outcomes.

An adverse outcome often is initially viewed as a likely, or probable, blunder, subject to investigation and proof. Malpractice case law is fashioned by the tension between acts that are potential causes of medical mishap and acts that are probable causes of medical accidents. Liability is imposed only when it is more probable than not that the act caused the harm.

Ordinary negligence does not include reckless or intentional behavior.

Practical Definitions of Negligence

The definition of medical negligence most recognizable to physicians is the definition of ordinary negligence. 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. The characterization of ordinary negligence involves the exposure of a patient to an excessive and unreasonable risk of harm, as adjudicated by a jury or judge after expert testimony has been given to establish the ever-changing standard of care. It is imperative to understand that ordinary negligence may occur for both acts of commission and acts of omission.[6]

In the United States, common law (derived from custom and judicial precedent case law) and statutory law (law passed by the state legislature and signed by the governor) are interlocking and complementary set of rules and standards that define all the forms of negligence, including medical negligence.

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 (i.e., arrange laws and rules into a systematic code) case law or create new law. Most statutory medical malpractice law reflects or implements previous appellate court rulings, and does not create new liabilities for physicians.

However, statutes also can be a reaction to a finding by a court that is contrary to public policy as defined by the legislature. Such statutes are the legislature's effort to correct court decisions with which they disagree. Some states have statutes that create safe havens for physicians who follow protocols in the treatment of selected diseases, but these statutes have not been challenged in court and seemingly have had limited jurisprudential impact.

Negligence per se (on its face, obvious to all observers) is behavior that can be said unequivocally that no careful person would have committed. Some states have defined certain medical acts or omissions to be negligent as a matter of law (per se).

Committing an act or omission defined by such statutes eliminates the plaintiff's need to prove the act was negligent. Operating on the wrong part of the body or leaving surgical instruments inside the body are classic examples of negligence per se. These cases typically are obvious on the facts, and settlement is routine.

Ordinary negligence does not include reckless or intentional behavior. Nor does it include the legal concept of battery (at common law, battery is an intentional, unpermitted act causing harmful or offensive contact with the person of another). Battery is defined as unpermitted touching, with or without injury. Up until the mid-20th century, many successful malpractice cases included some aspect of battery, especially those cases bringing informed consent issues to the allegations. A battery was felt to occur in the absence of informed consent. Under current law, it is possible for a patient's consent to be so substandard as to be absent.[7]

Sometimes a plaintiff may allege

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in her complaint that a physician exhibited reckless behavior to create a shock effect when the case involves only ordinary negligence. This often is done to allow the plaintiff's attorney to argue later that the facts support a charge of gross negligence. Gross negligence is a matter of degree, just as is reckless or wanton or malicious behavior. For example, it is gross negligence and reckless/wanton behavior to perform surgery while intoxicated, but is not gross negligence or reckless behavior to do the same surgery while sleep-deprived (although that may be determined to be ordinary negligence).

defendant physician, but if a secondary motive--such as profit or fame--can be shown, gross negligence is easier to prove in a court of law. Any motive, other than the general well-being, safety, and benefit of the patient, can be enough to turn an inattentive or careless slip-up into a claim of reckless and wanton behavior. Finally, negligence that is both belligerent and of a type that a non-professional lay juror would consider reckless often is found to be gross negligence.

Informed Consent

A patient's permission granted with the knowledge of the possible risks and consequences—law is a complex topic. Although this is not our main topic, it plays a role in understanding ordinary negligence.[7] If the physician takes the time to inform the patient of risks associated with the procedure or treatment, it is much more difficult to impute an improper motive to any act of alleged negligence.[8] Therefore, true informed consent indirectly protects the physician against a charge of ordinary or gross negligence by showing a deference to the patient's welfare, evidenced by obtaining her or his informed consent to a reasonable medical or surgical risk, even when the risk materializes.[7]

Informed consent is not a permission slip to act carelessly or recklessly.

If carelessness of an extreme degree can be proven, punitive damages can be sought. Punitive damages are damages assessed in order to punish the defendant and to deter the defendant and others from engaging in such conduct. Punitive damages rarely are awarded, because they are both defined and limited by statutory law. It is unusual to see punitive damages awarded against competent physicians. Because the purpose of punitive damages is to teach the responsible party a lesson they and others will never forget, the court reserves such measures for the most egregious behavior of culpable physicians.

Black letter laws (i.e., well-established rules that are no longer disputed) are a legal fiction—the law in general exists in a "gray zone," and following that theme there is no bright line between ordinary negligence and gross negligence. It typically is feasible to characterize careless medical practice as either ordinary or gross negligence. Gross negligence has important defining characteristics: it is behavior that involves a known or obvious risk of harm that is done with a conscious indifference to the welfare of another, a close equivalent to a recklessness that causes harm. Such behavior requires a proof of the actual motivation of the

Informed consent is not a permission slip to act carelessly or recklessly. Do not assume an informed consent shields a physician from all allegations of negligence. No person, acting on one's behalf or on behalf of a minor, can legally permit another to intentionally cause them harm. That is, if an injury is the undeniable or logical outcome of a high-risk intervention, and the harm is far more likely than any other intended benefit, no amount of informed consent can legally permit the act.[8]

For instance, a physician cannot avoid civil or criminal liability for a patient's death by obtaining the patient's consent to act in a high-risk manner with a high likelihood of death, even if the patient's death has some benefit for the patient. Reckless or indifferent behavior can completely rescind the liability protection afforded by informed consent, creating instead a battery (Miller v. HCA, Inv., 118 S.W. 3d 758 (Supreme Court of Texas, 2003).

It is a short step from battery as an act of gross negligence to an act that is prosecuted under the criminal law. Prosecution for criminal negligence associated with medical care is at the discretion of the public prosecutor, who often looks for patterns of behavior, or a single behavior that offends all public decency, and is an offense defined by the criminal statutes of the state (K.A.C. v. Benson, 527 N.W. 2d 553 (Supreme Court of Minnesota, 1995). **PM**

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