

# Medical Professional Liability: Physicians' Guide to Understanding Professional Negligence Claims

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The topic of medical professional negligence, also known as medical malpractice, is important and relevant to all practicing physicians, yet physicians are often not familiar with the legal aspects of many functions in their clinical practice. Physicians who understand the essential elements of medical negligence are better equipped to navigate the considerable difficulties a lawsuit presents. This article, therefore, aims to educate residents, house staff, and inexperienced attending physicians about the workings of the legal system and its potential impact on their medical careers, by focusing on what constitutes medical negligence and how it is proven in courts of law. This information provides a vital foundation for understanding the legal consequences of clinical decisions and medical actions and inactions.

“Being sued, whether reasonably or not, often creates the most stressful time in a doctor’s professional life. A looming medical malpractice case is always fraught with anger, depression, self-righteous indignation, and unfortunately in a few cases, suicide....Most physicians maintain a very high standard of practice. And when, as human beings are apt to do, they commit errors of judgment, omission or commission, they are devastated when assaulted by the seemingly unfeeling malpractice attorneys.”<sup>1</sup>

—Joel Berman, MD, surgeon and author of *Scalpel*

## PRACTICE POINTS

- Physicians’ acts or omissions that cause or aggravate a patient’s injury can constitute medical negligence.
- The standard of care is the key element for determining medical negligence. The standard for a procedure or treatment is the level of care generally used by reasonably competent physicians under similar conditions.
- Failure to properly diagnose or treat a disease or to produce promised results or to get informed consent from the patient can all constitute medical negligence.
- Inexperience is not a defense.

As this quote indicates, one of the most dreaded events in the professional career of a physician is a lawsuit alleging medical professional negligence, or as it is more often referred to, medical malpractice. From a legal standpoint, malpractice is essentially a mistake that a reasonable physician would not make, which causes an injury that a patient would otherwise not have suffered. Although most unfavorable medical outcomes do not constitute malpractice, and most lawsuits do not ultimately result in a finding of negligence against the physician, those determinations often cannot be made until after a lawsuit is filed and additional information is obtained.

Physicians who understand the essential issues of medical professional negligence are better able to navigate the acknowledged difficulties a lawsuit presents. To clarify these matters and reduce some of the angst surrounding the issue, this article outlines the definition and theories of medical professional negligence and discusses alternative theories of liability that form the basis for most claims against physicians.

## What Constitutes Medical Negligence?

Medicine is generally recognized as an art rather than an exact science, and although errors in judgment may result in injury to a patient, not all medical

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errors are actionable as negligence. Certain allegations of actions do, however, suggest medical negligence. The main types of such allegations include:

- Acts or omissions by a medical professional that cause or aggravate a patient's injury
- Failure to properly diagnose a particular disease, either by not ordering the proper tests, not consulting with a specialist, or not monitoring the patient properly
- Failure to properly treat a particular disease by improperly administering prescription or nonprescription drugs or improperly using a medical device or implant
- Failure to gain proper or informed consent from a patient before proceeding with a test or a procedure
- Failure to produce promised results (breach of contract or breach of warranty).

When any of these allegations are made, physicians are understandably concerned with how their actions or inactions will be judged, and whether they will be considered negligent. The legal definition of negligence is “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.”<sup>2</sup> When judged by a reasonably prudent person, represented in many cases by the jury, this is the objective standard of negligence. In general, if conduct falls below this standard, a breach of duty is said to have occurred.

Once a physician–patient relationship is established, the physician's general duty is to provide due care—what a reasonably prudent person would do under the circumstances. But the “standard must be modified in situations where physicians are alleged to have caused injuries to patients, because it has long been recognized that the average layperson is incapable of judging what the acceptable level of medical care ought to be. In these situations, the law therefore adopts the position that the standard is that level of care expected of the reasonably competent doctor instead of the reasonably prudent person.”<sup>3</sup> That definition is relatively consistent from state to state, but physicians are advised to be familiar with the specific definition in the state where they practice.

For purposes of this discussion, to prevail in a malpractice suit, a plaintiff has the burden of proving 3 points:

1. The proper standard of care against which the physician's conduct should be measured, as well as whether there was unskilled or negligent failure to comply with that standard (ie, a breach)
2. Whether the resulting injury was “proximately caused” by the lack of skill or care
3. Whether the damages incurred resulted specifically from the injury.

### Proving Medical Negligence

An allegation of malpractice is not ultimately about a physician's bad judgment, bad faith, or intentional mal-

feasance. It is about a breach of an objective standard of medical practice. The key element in determining negligence lies in the often-misunderstood concept known as the standard of care. Physicians frequently use this term imprecisely in a clinical context.

#### Standard of care

The standard of care for a medical procedure, or treatment, is that degree of care or skill ordinarily used by the medical profession generally under similar conditions and like circumstances. In other words, it is the proper treatment generally accepted by the medical profession for a given medical condition in similar situations. In many situations, the law recognizes that there is not a single right answer—more than one mode of treat-

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ment could be considered standard of care.

A crucial aspect of a medical malpractice action is establishing the standard of care that should be applied to a physician's actions. As a rule, expert testimony is required to establish standard of care. Both the complaining patient and the defendant doctor are required to produce experts to establish legally what constitutes standard, as opposed to substandard, care. Experts are expected to use their skill, knowledge, experience, and education, supported by authoritative texts and treatises as necessary, to articulate the standard as it applies to the particular case. In reaching their verdict, jurors and judges listen to and evaluate all the evidence and decide which expert and, therefore, which party is more credible.

In legal proceedings addressing the standard of care, doctors are judged according to the customs of their specialty. In other words, a nonspecialist physician will not be held to the same standard of care as a specialist. A surgeon will be judged according to the community standard of the ordinarily skilled surgeon, not the world-class expert.

The standard of care against which a physician's conduct is measured is not the highest degree of skill possible but the reasonable skill that a physician in the community would use under similar circumstances.<sup>4</sup>

Where alternative proper methods of treatment exist, there is no deviation from the standard of care if a physician chooses one method over another and an injury results.<sup>4</sup> However, if a case falls outside the doctor's field of expertise, a separate duty exists to refer to a specialist. If the standard of care requires referral to a specialist, the nonspecialist who does not refer but undertakes to treat the patient within that specialty would be held to a higher standard.

Inexperience is not necessarily a defense. This works to the disadvantage of the trainee and house officer who cannot be expected to perform at the level of a fully trained or experienced physician. The current trend, however, is to hold medical trainees to the same standard as qualified doctors in that particular specialty. House officers and trainees should be aware of this and tailor their actions accordingly.

**Evidence-based medicine.** The advent of evidence-based medicine has added another variable to the equation. In recent years, various medical specialty organizations, and governmental and commercial enterprises, have issued guidelines based on best practices from evidence-based medicine. In some cases, the courts have used these guidelines as reflective of current medical standards, since they are usually arrived at by consensus of an objective, authoritative body of clinicians (eg, the American College of Surgeons). Some states, notably Maine and Kentucky, have passed legislation allowing doctors the choice of being covered by practice guidelines, with compliance constituting evidence against an allegation of negligence.<sup>5</sup> In contrast, Maryland has ruled that practice guidelines are inadmissible as evidence in the courts of law.<sup>6</sup> There are strengths and weaknesses to both approaches.

Another development is the Mulder rule, according to which some courts have accepted package inserts as setting the standard for drug or device use and will hold a physician liable, if it can be shown that the product as used by the patient was contrary to issued instructions.<sup>7</sup>

**Res ipsa loquitur.** Occasionally, there are cases of medical negligence that may not require expert testimony to establish the standard of care. The 2 most common exceptions to this requirement for expert testimony are (1) the doctrine of common knowledge, and (2) when there is a violation of statutes. The technical name for the doctrine of common knowledge is *res ipsa loquitur*, Latin for "the thing speaks for itself." It refers to certain obvious examples of medical injury, such as amputation of the wrong limb, a surgical instrument left inside the abdomen, or removal of the wrong vertebral disc. These are considered situations where the plaintiff's evidence of injury creates a probability so strong that a layperson can form a reasonable belief without hearing from an

expert. In these cases, a plaintiff may be entitled to a waiver of the requirement for expert testimony.

The *res ipsa loquitur* doctrine is infrequently invoked, and some states actually prohibit its use in medical negligence cases. *Res ipsa loquitur* is used when the plaintiff has insufficient evidence of who or what caused the negligent act, but circumstances clearly indicate the defendant was negligent. It can be applied only when 3 conditions are met:

1. The event in question ordinarily does not occur in the absence of someone's negligence
2. The event must be caused by means within the defendant's exclusive control
3. The plaintiff did not contribute to the event.

Once *res ipsa loquitur* is successfully invoked, the typical burden of proof shifts from plaintiff to defense. The plaintiff no longer must show how the defendant was negligent; rather, the defendant must show she was not negligent. A classic example is a sponge or other medical instrument left inside a person postsurgery. Even in these cases, where fault would appear to be obvious, questions of negligence may need to be established. For instance, if an attending physician, who happened to be an independent contractor rather than an employee of a hospital, was able to demonstrate that he left the operating room and instructed a surgical nurse, who was a hospital employee, to remove and account for all surgical instruments before the patient was closed, the hospital, instead of the physician, may be held liable for the negligence of its employee (the nurse).

#### Causation

After a deviation from the standard of care has been demonstrated, the second element for consideration in medical negligence is causation. Did the alleged deviation from the standard of care (substandard act) directly or indirectly cause the unfavorable outcome?

- ▶ Establishing causation does not require a plaintiff to prove that the act or omission is the sole cause, only that it is "a" proximate cause of the alleged injury. ◀

Establishing causation does not require a plaintiff to prove that the act or omission is the sole cause, only that it is "a" proximate cause of the alleged injury. It is not sufficient to show merely that an injury occurred; evidence of a bad result does not constitute evidence of lack of skill or negligence.<sup>8</sup> Also, there is no claim if the outcome would have been the same with the administration of care within the standard. The plaintiff's in-

jury must be the natural, and not merely the remote, consequence of the physician's act. Thus, the plaintiff must prove that the physician's actions were substandard and that the substandard action caused an unfavorable outcome that would not have occurred in the absence of negligence.

### Damages

Even if the first 2 considerations—deviation from standard of care and causation—are met, the viability of the plaintiff's claim still rests on the nature and severity of the disability. Medical claims are extremely expensive to pursue, sometimes running more than \$100,000. This expense includes the cost of medical experts, depositions, and the trial, in addition to the attorneys' fees.

If there is no lasting disability resulting from the negligence, or if the disability is small, the award may not be large enough to warrant the expense of pursuing the case. This economic angle creates a bias in the types of cases that are filed and pursued. Cases where larger sums are at stake are likely to be contested more aggressively. Cases where negligence may be more obvious but which have less at stake may not be pursued as aggressively or be settled more expeditiously.

### Conclusion

Much has been written regarding the fairness, or unfairness, of the medical liability system. It is beyond the scope of this article to judge the merits of those arguments or the associated calls for tort reform. Too often, these polemic policy questions distract physicians from understanding the “nuts-and-bolts” issues confronting them when they are involved in a medical malpractice lawsuit. This lack of understanding is an impediment not only to providing an effective defense but also to tailoring their medical practice so as to avoid potentially litigious situations. This article has been a general attempt to provide physicians with a basic understanding of what constitutes professional negligence, as well as those points—deviation from standard of care, causation, and damages—that must be established at trial. ■

### SELF-ASSESSMENT TEST

1. Which of the following situations does not suggest medical negligence?
  - A. Something a doctor fails to do that aggravates a patient's injury
  - B. Ordering the wrong diagnostic tests

- C. Failure to counsel the patient on preventive measures
- D. Failure to follow standard of care

2. Which of these descriptions is closest to the legal definition of standard of care?

- A. Level of care expected of the reasonably competent doctor
- B. What a reasonably prudent person would do under the circumstances
- C. Same care that would be provided by the majority of physicians in the community
- D. Level of care expected by the patient

3. Which of these behaviors most accurately describes malpractice?

- A. Breach of objective standard of medical practice
- B. Physician's bad judgment
- C. Physician's bad faith
- D. Intentional malfeasance

4. How is the standard of care usually established?

- A. Plaintiff's case
- B. Defendant's case
- C. Jury verdict
- D. Expert testimony

5. Which of the following situations is not required to invoke the *res ipsa loquitur* doctrine?

- A. The event in question does not usually occur without an individual's negligence
- B. The event was caused by means within the defendant's exclusive control
- C. The event caused serious, permanent harm
- D. The plaintiff did not contribute to the event

(Answers at end of references list)

### References

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2. Restatement (Second) of Torts § 282 (1965).
3. Tan SY. *Medical Malpractice: Understanding the Law, Managing the Risk*. Hackensack, NJ: World Scientific; 2006:37.
4. *Bennett v. United States*, 2006 U.S. Dist. LEXIS 10966, at \*39 (N.D. Ill. Feb. 24, 2006).
5. Me. Rev. Stats. Ann. § 2975; Ky. Rev. Stat. § 342.035.
6. Md. Code. Ann., Health-Gen. § 19-1606.
7. *Mulder v. Parke Davis & Co*, 181 N.W.2d 882, 887, 288 Minn. 332 (Minn. 1970) (a deviation from a drug manufacturer's recommendation is considered *prima facie* evidence of negligence if injury is proven).
8. *Bennett*, 2006 U.S. Dist LEXIS 10966, at \*38.

Answers: 1. C; 2. A; 3. A; 4. D; 5. C.