



Malpractice 101: Strategies for Defending Your Practice



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ABSTRACT: If you work in the medical field, you probably fear that someday you may be sued. Lawsuits are scary, and the process is intimidating. Lawsuits can take years to resolve. You may spend a significant amount of time reviewing records and imaging studies, meeting with insurance claims investigators, risk managers, and your own lawyer. As the lawsuit progresses, you may have to give a deposition under oath. If there is no resolution of the matter, it will proceed to trial. The trial will typically last between 1 and 2 weeks, depending on the complexity of the issues involved. If you are named in the lawsuit, you are expected to attend the trial every day. You will gain a new respect for the jury system and will look at a jury summons in a whole new light. The purpose of this article is to help radiology nurses understand litigation, especially malpractice. Having this information will allow the radiology nurse to examine his or her own practice and assess if one can make small changes to everyday activities to improve the chances of successfully preventing or defending any malpractice suit and, more importantly, to improve patient outcomes. The rules governing litigation vary by jurisdiction. These are some general rules but, of course, your attorney will tell you what you need to know in your area. (J Radiol Nurs 2015;34:13-24.)

KEYWORDS: Nursing; Malpractice; Litigation; Malpractice insurance; Medical records and documentation.

WHAT IS LITIGATION?

Litigation is a lawsuit. It is a dispute or contest brought before a court. One or more parties sue one or more parties for something. There are various types of lawsuits (matrimonial, contract, libel, etc.).

One very common type of lawsuit is for negligence. Someone claims (alleges) they suffered property dam-

age, physical damage, or even death because someone was negligent. For example, suppose you make a bad turn and hit a parked car. The owner of the parked car may sue you for the damage to the car. Let us also suppose there is a passenger in the car who claims he now has whiplash because you struck this car. He may sue you for his personal injury.

Elements

The elements of a lawsuit or of a cause of action are those basic things a plaintiff (the party that initiates a lawsuit) must prove to establish a *prima facie* case. A *prima facie* case means that the plaintiff has legally sufficient evidence to require a jury or trier of fact to decide each element of the case. Every case of negligence has the same four elements. This is true whether the claim involves negligently maintaining your sidewalk or

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whether it involves malpractice in performing brain surgery. These four elements are always present:

- Duty
- Breach
- Proximate cause
- Injury

Negligence is the failure to use reasonable care. For example, if a driver follows too closely behind another vehicle or a home owner fails to shovel his walkway, the plaintiff may allege that the defendant (the party against whom a lawsuit is brought) is liable because he failed to use reasonable care. Negligence is the failure to do something a reasonable person would do or failing to do something a reasonable person would do under the same or similar circumstances. It is a reasonable person standard.

MALPRACTICE

Malpractice is a special kind of negligence (New York Pattern Jury Instructions Civil, 2014). Malpractice is negligence by a professional (New York Pattern Jury Instructions Civil, 2014). For example, there can be architectural malpractice or accounting malpractice (New York Pattern Jury Instructions Civil, 2014). There is, of course, medical malpractice, which we will be discussing.

Negligence Versus Malpractice

Malpractice is negligence by a professional (New York Pattern Jury Instructions Civil, 2014). Sometimes, there is a dispute about whether an action is for ordinary versus medical negligence. The determining factor is whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by laypersons or whether the conduct complained of can be assessed on the basis of everyday experience (New York Pattern Jury Instructions Civil, 2014). Another basis of medical malpractice can be that the duty allegedly breached arose from or is substantially related to the physician-patient relationship (New York Pattern Jury Instructions Civil, 2014). It is sometimes very important to determine if an action is for ordinary negligence or malpractice. The statute of limitations may be different, the damages available may be capped for one cause of action but not the other, and most importantly, in most jurisdictions, the plaintiff must produce expert proof of the applicable standard of care in a medical malpractice case and that the medical provider breached or deviated from that standard of care (New York Pattern Jury Instructions Civil, 2014).

Burden of Proof

The plaintiff has the burden of proof. That means that the plaintiff must establish by a fair preponderance of the credible evidence that the claim the plaintiff makes

is true (New York Pattern Jury Instructions Civil, 2014). If the evidence is balanced on both sides, then a finding in favor of defendant is required. Whether the plaintiff has made out a *prima facie* case is a question for the court to decide. The plaintiff must establish a *prima facie* case for each element of the cause of action before the case even goes to a jury.

Duty

To establish a *prima facie* case, the plaintiff must plead and prove that the defendant owed some duty to the plaintiff (New York Pattern Jury Instructions Civil, 2014). For example, suppose you are sitting by the pool, reading your book as a person drowns. You do nothing to help, and do not even try to bring the situation to anyone's attention. Can you be sued? No, because there was no duty. In a medical malpractice case, the court looks to whether there was a duty owed to the person injured (New York Pattern Jury Instructions Civil, 2014). For example, a nurse sued a doctor who ordered a patient out of bed. The patient was obese, and the nurse hurt his or her back trying to move the patient. The nurse could not sue her employer (the hospital) because she was barred from doing so by Worker's compensation. So, being creative, she tried to sue the doctor who gave the order. The judge dismissed the case. The judge held that the doctor owed a duty to the patient but did not owe a duty to the nurse.

NURSING MALPRACTICE

A nurse may be sued for malpractice. The definition of nursing malpractice is as follows:

Doing something that a reasonably prudent nurse would not do or failing to do something that a reasonably prudent nurse would do under the circumstances (New York Pattern Jury Instructions Civil, 2014). It is a deviation from accepted nursing practice.

There are two parts to this issue. First, the plaintiff must present proof of the standard of care; then, there must be proof that the defendant breached the standard (New York Pattern Jury Instructions Civil, 2014).

Establishing a Deviation

How does the plaintiff prove to a jury, not one of which has any medical experience, that there was a deviation from accepted standards of nursing care? The plaintiff must present legally sufficient proof from which a rational jury may conclude that there was a deviation from accepted standards of nursing practice (New York Pattern Jury Instructions Civil, 2014). This can be done in one of several ways:

- Through the testimony of one or more experts;

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