

Criminal Malpractice??

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Overview of the law

- Where do we get our laws from?
- The US is based on a common law system: Law that originates from customs and court decisions, rather than from statutes.

Sources of Law

- Constitution
- Stare Decisis – Judicial System – common law
- Congress
- State Legislature
- Administrative Law

Administrative Law

- Administrative law: Law made by government agencies that have been granted the authority to pass rules and regulations. For example, each state's Board of Nursing is an example of administrative law.

Chevron Doctrine

- The U.S. Supreme Court issued a significant ruling on June 28, 2024, that changes the respective roles of administrative agencies and the courts in interpreting statutes. *Loper Bright Enterprises v. Raimondo*

How this affects nursing boards remains to be seen

Overview of nursing and the law

- So where does nursing regulation fit in?
 - Every state and territory in the US set laws to govern the practice of nursing.
 - These laws are defined in the Nursing Practice Act (NPA).

NPA

- NPAs include:
 - definitions
 - authority, power, and composition of a Board of Nursing (BON)
 - educational program standards
 - standards and scope of nursing practice
 - types of titles and licenses
 - protection of titles
 - requirements for licensure
 - grounds for disciplinary action, other violations, and possible remedies

Board of Nursing (BON)

- Mission: protect the public
- Authority to penalize a nurse who may be a public safety risk.

How are the rules made?

- Congress passes laws
- Federal administrative agencies to fill in the details of new or amended laws with rules and regulations.
- Regulations/rules are used to clarify definitions, authority, eligibility, benefits, and standards with the ongoing involvement and input of professional associations like ANA, other providers, third party payers, consumers and other special interest groups.

Will you be sued?

- Among the respondents to a Medscape survey in 2016, 62 percent of men and 42 percent of women in anesthesia had been sued, usually with other co-defendants.

Medical Malpractice

- Most lawsuits are settled out of court or dismissed.
- Lawsuit can be very stressful and challenging to be a party to one.
- The most common reasons that a CRNA might face a lawsuit are:
 - Improper intervention or treatment during a procedure.
 - Inadequacies in the overall anesthesia plan.
 - Medication errors.
 - Failure to properly monitor the condition of the patient.

Medical Malpractice

- Where does Medical Malpractice fit into the law?
- Types of Law
- There are many categories but a few examples include:
 - Contract law, constitutional law, criminal law, torts

Tort Law

- What is a Tort: A civil wrong that causes another party harm.
- Defamation
- Intentional Torts
- Negligence

Negligence

- Conduct that falls below the expected standard of care that a reasonably prudent person would have exercised under like circumstances.

Elements of Negligence

- The four basic elements of negligence are as follows:
- (1) the defendant must owe a duty to the particular plaintiff to conform the defendant's behavior to a particular standard of care,
- 2) the defendant must breach that duty; said breach of duty must
- (3) actually and proximately cause
- (4) legally cognizable harm to the plaintiff, usually consisting of harm to the plaintiff's person or property

Element 1: Duty

- there must be a legal duty on the part of the defendant to conform his behavior to a particular standard of care.
- in order to make out a *prima facie* case for negligence, the plaintiff must actually prove that under the particular circumstances surrounding the defendant's stupid action, the defendant owed that particular plaintiff a duty under the law not to act stupidly
- Majority view – not owed to the world
- where the law does recognize a duty, the substance of that duty is that the defendant must exercise "reasonable care under the circumstances."
- A plaintiff is only owed that duty by us when we should reasonably foresee that someone in that particular plaintiff's position might be hurt by, or fall within the foreseeable zone of danger created by, our unreasonably risky conduct

Medical malpractice

- The clinician patient relationship establishes the duty
- No duty existed if someone overheard you talking somewhere regarding treatment.

Duty

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Rescue Doctrine

- A rescuer will always be a foreseeable plaintiff.
- Based on theory that danger invites rescue
- it is always foreseeable that rescuers will get hurt trying to help someone that our negligence has placed in jeopardy. Thus, I owe a duty not only to the plaintiff I injured, but to anyone else who is injured trying to save him
- If I injure myself through my own negligence and put myself at risk, and a Good Samaritan comes along and gets hurt trying to rescue me, then I owe a duty to the rescuer and might be liable to him for his injuries.
- Watch out: the Good Samaritan who actually exacerbates the victim's injuries may be found liable, because he was under a duty to use reasonable care in helping.

What if I don't help someone

- There is no duty to rescue. You Don't have to help.
- Exceptions:
 - you have some special fiduciary obligation to the victim, like a teacher to a student;
 - a special relationship with the perpetrator (or “tortfeasor,” if you want to get fancy, lawyer-style) as a parent whose child causes harm;
 - you yourself created the risk, though innocently;
 - you have already started trying to help the person.

What if I acted reasonably?

- Duty Resulting from Creation of Risk
- A situation where we subjectively perceive that our actions, even though not negligent or careless in any way, happen to have the effect of causing bodily harm to another person and thereby putting that other person at further risk of harm. Do we have a duty to act then? YES
- Example: I hit you with my car while exercising reasonable care. You are lying injured on the road. I drive away and you get hit again. I am liable for the second hit not the first because I had no duty then I had duty.

Good Samaritan Laws

- Every state has Good Samaritan laws. These laws protect lay rescuers from lawsuits. Rescuers are protected if they act voluntarily (without specific compensation for the resuscitation itself) to try to help a person who is having a medical emergency.
- BUT REMEMBER the Reasonable action requirement.

Interesting Case

- B.R. v. West
- Utah Supreme Court
- 275 P.3d 228 (2012)

Facts

- A nurse practitioner named Trina West (defendant) prescribed David Ragsdale at least six medications. With all of these drugs in his system, Ragsdale killed his wife. Ragsdale pled guilty to the murder. Ragsdale's children (plaintiffs) brought a negligence suit against West. The district court granted West's motion to dismiss, finding that West did not owe a duty to Ragsdale's children, because the children were not her patients. Ragsdale's children appealed.

Issue

- Do healthcare providers have a duty to non-patients to exercise reasonable care in the affirmative act of prescribing medications that pose a risk to third parties?

Holding

- Yes. Healthcare providers have a duty to non-patients to exercise reasonable care in the affirmative act of prescribing medications that pose a risk to third parties.
- In determining whether a duty exists, courts look to several factors, including: (1) the legal relationship of the parties; (2) the foreseeability of the injury; and (3) public policy. The most important factor in such a determination, however, is whether there was an affirmative act of the plaintiff involved. Generally, an affirmative act, such as misfeasance, imposes a duty. On the other hand, if there is no affirmative act, as in the case of nonfeasance, there generally must be a special relationship between the actor and the injured party to impose a duty. In this case, the court analyzes the above factors and determines that healthcare providers owe a duty to non-patients in the act of prescribing medications that pose a risk to third parties. Prescribing medication is an affirmative act that can result in harm caused to third parties. That this is an affirmative act weighs heavily in favor of establishing a duty to those third parties.
- In terms of foreseeability, it is foreseeable that a negligent prescription of drugs could result in a patient causing harm to third parties. While not all medications have a foreseeable risk of injury, whether a particular medication does or not is a question of breach of duty, not whether a duty exists. Further, while healthcare providers serve an important public policy role in their prescription of medications, this does not mean that they should be insulated from liability if they negligently prescribe medications and that prescription injures a non-patient third party

Element 2: Breach

- Breach is the conceptual heart of negligence.
- Breach means that the defendant has breached his duty to behave as would an objectively, reasonably prudent person under all the circumstances.
- Breach is the "neglect" in "negligence."
- It is what the defendant did wrong, so as to subject him to liability for negligence.

Breach

- There are three basic ingredients the plaintiff must usually show in order to establish breach.
- (1) The plaintiff must establish the events that actually transpired at the time of the alleged breach.
- (2) The plaintiff must establish what the standard of care was to which the defendant should have conformed his conduct. This is usually "reasonable care under the circumstances,"
- (3) The third, and most important, ingredient is that the plaintiff must show that the defendant's conduct was unreasonable.

Alternative Course of Action

- In order to show that the defendant breached his duty, usually the plaintiff must show that there was available to the defendant some alternative course of action which, had the defendant taken it, more likely than not would have prevented, or at least mitigated, the plaintiff's injury.
- The plaintiff must show that the alternative was reasonable under the circumstances

Is the alternative course reasonable?

- Equitable balancing of factors like:
- (1) The cost of making the defendant's activity safer—is it unfair to expect the defendant to incur the cost of the plaintiff's proposed alternative course of conduct?
- (2) The social usefulness of the activity in which the defendant engaged and which produced the risk. Here, it is good to ask: Is the defendant's activity beneficial to society, so that we don't want to discourage it by imposing the costs associated with the plaintiff's proposed alternative course of conduct?
- (3) Courts also consider the probability that some harm will result to persons in the plaintiff's position from the defendant's activity, as well as the risk of harm from the plaintiff's proposed alternative conduct.
- (4) The likely degree or scope of harm the plaintiff will suffer, in the event that harm actually occurs as a result of the defendant's conduct.

Causation

- Needs actual and Proximate cause
- Actual cause: known as “cause in fact,” is straightforward.
- Proximate cause: “legal cause,” or one that the law recognizes as the primary cause of the injury.

Actual Causation

- Courts have developed four basic tests to deal with the issue of actual causation. They are:
 - (1) the but-for test,
 - (2) the concurrent causes doctrine,
 - (3) the substantial factor test, and
 - (4) the alternative causes doctrine.

Harm

- physical harm
- emotional harm
- economic harm.

Medical Malpractice

- The breach portion in a medical malpractice case deal with behavior that falls below the standard of care and replaces the responsible person standard
- Standard of care: The type and level of care an ordinary, prudent, health care professional, with the same training and experience, would provide under similar circumstances in the same community.

Standard of care

- The standard of care is established through the use of an expert witness.
- This expert will usually need to be trained and experienced in the same field as the health care professional that treated you
- The expert will need to:
 - establish what the standard of care is
 - testify as to exactly how your treatment was below the standard of care, and
 - testify as to exactly how you were harmed by the sub-standard treatment.
- **REMEMBER THERE MUST BE HARM**

Expert witness

- This is because the courts have decided that the technical information the jury must consider in a medical malpractice case is too complicated to sort through without help.
- Reasonable degree of medical certainty
- Threshold for expert medical testimony, which must often be met in a medical malpractice case.

Expert Witness

- There are no hard-and-fast rules about the standard of care in any given field, so the expert may use evidence like medical publications or medical board guidelines to assist. The jury does not have to take the publications or the expert opinion as the final word in its decision.
- Live testimony gives opportunity for impeachment
- Practice guidelines alone cannot be cross examined

How can you avoid a malpractice case?

- Maintain all your competencies.
- Document important information in patient records.
- Obtain informed consent for any procedure.
- Report any incidents promptly.
- Document any change in the practitioner's orders.
- Document patient status and treatment response.
- Have malpractice insurance in place

CRNAs

- COA: The Council on Accreditation of Nurse Anesthesia Educational Programs (COA) accredits nurse anesthesia programs
- NBCRNA: The National Board of Certification and Recertification for Nurse Anesthetists: nation's certifying body for the initial, continued and subspecialty certification of the more than 56,000 Certified Registered Nurse Anesthetists (CRNAs). (CPC program)
- AANA: American Assoc of Nurse Anesthesiology (recent name change)

Document condition changes will avoid:

- Allegations such as a
 - nurse's failure to monitor for changes,
 - failure to recognize changes in condition,
 - failure to report changes to the physicians
 - failure to intervene on behalf of the patient in a timely manner
 - Great case reviews in the text highlighting this topic

- Schumann v. COLLIER ANESTHESIA,
- SRNAs sued Wolford College and Collier Anesthesia for undue wages.
- Interesting read
- Plaintiffs claim they were employees and sued for back wages
- Eventually won after long drawn out process. Damages were paid approx. 420k spread over 25 students

- Respondeat Superior
- Agency Law
- Vicarious Liability

CRIMINAL?

- When does it rise to criminal?

Criminal negligence

- Criminal negligence involves acting with a high degree of carelessness or recklessness that results in serious harm or death to another person.
- It goes beyond a simple mistake or accident. The behavior is so egregious that it is considered a criminal offense.
- The standard is judged against what a "reasonable person" would have known or done in the same situation.

4 elements

- **A substantial and unjustifiable risk:** The defendant's actions or inaction created a significant and unjustifiable danger to others.
- **Failure to perceive the risk:** The defendant should have been aware of the danger that a reasonable person would have recognized.
- **Gross deviation from the standard of care:** The defendant's failure to perceive the risk constitutes a "gross deviation" from the care that a reasonable person would observe.
- **Causation:** The defendant's negligent conduct must be the direct cause of the resulting harm or death.

Basic differences

- Criminal vs civil negligence
- Criminal:
 - Purpose: to punish the offender; Parties: Govt vs individual
 - Standard of proof: Beyond a reasonable doubt; consequences: Incarceration
- Civil:
 - Purpose: to compensate the individual; Parties: individual vs individual
 - Standard of proof: Preponderance of evidence; Consequences: monetary damages

Criminal Negligence Examples

- Examples include:
- vehicular manslaughter by a drunk driver,
- a caregiver leaving a child in a hot car,
- unsafe firearm handling,
- failure to provide necessary care to a dependent,
- workplace safety violations.

- Criminal negligence involves failing to perceive a substantial risk that should have been recognized.
- Recklessness is when someone is aware of a risk but consciously disregards it.
- Intentional acts are done with the specific purpose of causing harm.