HEALTH LAW

A Short Course in Tort

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I just completed teaching a semester of Health Law and Ethics at the W.P. Carey School of Business at Arizona State University. Over the next few months in this column, my goal is to distill the 40-hour course down to a few pages chock full of practical legal information.

Hopefully, as a result of this overview, you will garner enough practical knowledge to keep out of overt danger!

Lesson 1: Torts

A *tort* is a civil wrong committed against a person or property interest for which the court provides a remedy in the form of damages.

Malpractice

We're all familiar with the tort known as *malpractice*. Breaking it down to its essence, malpractice occurs when a professional performs in a careless or negligent manner within the context of that profession, compared with a reasonable person with similar background and training in a similar situation. This definition assumes there is proof of actual injury, without which a defendant cannot be found liable.

A "negligent manner" is characterized by the unintentional commission or omission of an act that a reasonably prudent person would or would not commit under given circumstances. The right vs. wrong standard is, what would a person of average intelligence and common sense do in the similar circumstance?

To prove malpractice, a plaintiff must show that the practitioner did not live up to his "duty to care," which exists when there is a legal obligation of care. Generally speaking, in privately held urgent care centers, there is no duty to care for the unestablished patient who presents demanding treatment. If you or your center has already been treating the patient during the course of illness, however, you are required to continue the treatment through completion.

Breach of that duty is the failure to meet a prevailing standard of care, which is defined nationally, not locally. Expert witnesses often are used to help determine what a reasonably prudent person would or would not have done in such a case.

Some other terms and concepts that it may behoove you to understand:

- *Causation* refers to the idea that the defendant's negligence (or other action) must be a substantial and foreseeable factor in having caused an injury for which damages are being assessed.

  In this context, "foreseeable" means a reasonable person should be able to anticipate that the action or inaction in question could reasonably lead to the injury.
- The legal doctrine of *respondeat superior*, loosely translated as "let the master respond," holds employers liable for the wrongful acts of their employees. This doctrine is also referred to as *vicarious liability*, whereby employers are accountable for the negligent acts of their employees while the employees are carrying out their job-related duties or any activities while "on the clock."
- *Res ipsa loquitur* means the "thing speaks for itself." The broader concept is that a negligent act can be inferred merely from the occurrence of an injury (for example, leaving a clamp in the abdomen after surgery or amputating the wrong appendage).

  Three elements are necessary to prove *res ipsa*; if they are present, the burden of proof is shifted from the plaintiff to the defendant:
  - The event would not have occurred in the absence of negligence.
  - The defendant must have exclusive control over the cause of the injury.
  - The plaintiff cannot have contributed to the injury.

Of course, not every bad outcome is the result of negligence on the part of the provider. And just because you've been accused of negligence does not mean that you actually were negligent, or that you will be found culpable.

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There a number of viable defenses to such charges.

Patients bear a certain degree of inherent risk every time they seek treatment in any practice setting. They know some degree of danger exists and voluntarily expose themselves to it in order to get medical care. This is known as *assumption of the risk*.

Similarly, the *borrowed servant* and *captain of the ship* doctrines hold that the employer is not liable for injury negligently caused by the servant (i.e., her employee) while that servant is being directed by another individual. Operating rooms are a good example of how the captain of the ship doctrine is applied, with the surgeon being the one in command and the hospital's staff filling the roles of "borrowed servants."

There are other situations in which, as they say, "there's plenty of blame to go around."

Comparative negligence simply means that each defendant is responsible for his or her proportional share of any damages awarded, while *contributory negligence* can be defined as any lack of ordinary care on the part of the person injured that, when combined with the negligent act of another, caused the injury and without which the injury would not have occurred.

A person is contributorily negligent when that person does not exercise reasonable care for his or her own safety. For example, a drunk person wanders across a busy highway outside of the cross walk and is struck by a speeding car. The drunk has contributed to his own injuries and without his negligent act, the injury would not have occurred.

There are also situations in which physicians and other healthcare professionals may be relieved of liability altogether. "Good Samaritan" laws fall under this category, unless the provider had a pre-existing duty to care.

Intervening cause means that the act of a third party, independent of the defendant's original negligent act, is the actual and proximate cause of the injury.

The terms *ignorance of fact* and *unintentional wrongs* are the legal equivalent of "the sun was in my eyes" and will not work as a defense.

Finally, while not a defense, the term *statute of limitations* may bring some degree of relief to clinicians who otherwise might find themselves on the wrong end of a judgment; this refers to the legislatively enacted constraints that limit the period of time after an incident during which a legal action must be commenced.

Defamation

In our profession, malpractice is likely to be the tort we fear most, and the one with the potential to inflict the most damage on our ability to practice medicine. It is not the only route to incurring damages by virtue of our actions, however.

The Constitution may guarantees us freedom of speech, but that doesn't speech is always "free." Ill-advised words can come with a price tag if you are guilty of *defamation of character*—a false oral or written communication that subjects a person's reputation to scorn and ridicule in the eyes of a substantial number of people in the community. Speaking negatively about someone to that person's face without anyone else present, on the other hand, is not defamation.

There are two ways to defame someone:

- *Libel* is the written expression of defamation. It can be presented in the form of signs, photographs, letters, and cartoons. To be actionable, defamation must be communicated to a third person.
- *Slander* is oral expression of defamation. It is presumed that any slanderous reference to someone's professional capacity is damaging. However, there are very few slander lawsuits because of the difficulty in proving defamation, the small awards, and high legal fees associated with recovery.

Damages

If you are found guilty of a tort, there are a number of different types of damage awards you may face:

- *Nominal* damages are simply a token in recognition that a wrong has been committed.
- *Compensatory* damages are intended as compensation for the damage or injury sustained.
- *Hedonic* damages are awarded to compensate the plaintiff for the loss of enjoyment of life. This is in addition to the compensation offered by compensatory damages.
- *Punitive* damages are additional recompense when an injury is caused by gross negligence or wanton indifference.

Until next month, keep your torts to yourself and get geared up for an overview of contract law! ■

Editor's note

JUCM would like to again congratulate Dr. Shufeldt for receiving a Bronze Award in the American Society of Healthcare Publication Editors 2009 Annual Awards Competition. This is the second year in a row the Health Law column has been recognized in the category of Regular Column: Contributed, which is open to non-staff authors who regularly contribute columns to healthcare-related magazines and journals in the U.S. We appreciate Dr. Shufeldt's ongoing support of JUCM, as well as that demonstrated by all our contributors.