



LEGAL ASPECTS OF INFECTION CONTROL

Statewide Program of
Infection Control and Epidemiology

DONNA R. RUTALA, B.S.N., J.D.

Young Moore and Henderson, PA
Glenwood Avenue,
Raleigh, North Carolina 27607

Our legal system of American jurisprudence is adopted from the English common law system.

Generally, there are two major types of legal proceedings:

CRIMINAL

CIVIL

CRIMINAL PROCEEDING

TWO ADVERSARIAL PARTIES:

Criminal Defendant: The defendant commits the crime.

The State of North Carolina/Prosecutor: The prosecutor represents the state and seeks to prove that the defendant committed the crime.

CRIMINAL PROCEEDING

STANDARD OF PROOF:

The defendant must be found guilty “beyond a reasonable doubt”.

CIVIL PROCEEDING

An action brought to enforce, redress
or protect private rights.

CIVIL PROCEEDING

Two Adversarial Parties:

Plaintiff: The plaintiff is the injured or damaged party. The plaintiff initiates the lawsuit by filing a ***complaint*** setting out allegations and a claim for damages within an appropriate ***statute of limitations period***.

Defendant: The defendant is the party “allegedly” responsible for causing the plaintiff's injury or damage.

CIVIL PROCEEDING

STANDARD OF PROOF:

The defendant must be found guilty by the greater weight of the evidence or by the preponderance of the evidence.

CIVIL PROCEEDING

Statutes of Limitations:

The statutory time period within which a lawsuit must be filed or within which certain rights must be enforced or the claim will be barred.

COMMON STATUTORY PERIODS OF LIMITATION

- Wrongful death action—2 years
- Action involving minor— “before the minor attains the full age of 10 years.”
- Action involving retained foreign body—1 year after discovery, but not more than 10 years from the last act of the defendant
- Most other actions—3 years

APPLICATION OF STATUTES OF LIMITATION

- Patient “X” gets a medication overdose while in the hospital and *dies*.
- The heirs of Patient “X” have **two years** within which they may file a “wrongful death” claim in Superior Court.

APPLICATION OF STATUTES OF LIMITATION

- Patient “X” is a minor child and *does not die* from the medication overdose, but lost all of her hair as a result.
- Patient “X” has until age 10 years to make a claim.

APPLICATION OF STATUTES OF LIMITATION

- Patient “X” is an adult and *does not die* from the overdose.
- Patient “X” had an extended hospital stay due to the overdose. Patient “X” has 3 years to make a claim for damages.

APPLICATION OF STATUTES OF LIMITATION

- Patient “X” had abdominal surgery on *1-1-95*.
- On *1-1-99*, Patient “X” has a second surgery to remove an abdominal mass. The mass was found to be a blue surgical towel
- Patient “X” has 1 year after the date of discovery of the sponge to make a claim.

Statutes of Limitation

Claims:	NC	SC	TN	VA	OH
Personal Injury	3 yrs	3 yrs	1 yr	2 yrs	2 yrs
Wrongful Death	2 yrs	3 yrs	1 yr	2 yrs	2 yrs
Medical Malpractice	3 yrs	3yrs	1 yr	2 yrs	6 yrs



MEDICAL MALPRACTICE

“Alleged” medical malpractice
or
medical negligence
is the area of civil litigation most likely to
affect health care personnel.

“Alleged” Medical Malpractice

Negligence is the predominate theory of liability.

WHAT IS NEGLIGENCE?

The failure to use such care as a reasonably prudent and careful person would use under the same or similar circumstances.

**HOW DOES THE
PLAINTIFF PROVE NEGLIGENCE?**

FOUR ELEMENTS OF NEGLIGENCE

- Duty
- Breach of duty
- Causation (proximate cause)
- Damage

DUTY

There exists a duty on the part of the defendant to conform to specific ***standards of practice*** or conduct for the protection of the plaintiff against an unreasonable risk of injury.

DUTY

Every health care provider must:

use **best judgment** in patient care and treatment

use **reasonable care and diligence**

and

provide health care in accordance with the
**standards practice among members of the same
health care profession with similar training and
experience situated in the same or similar
communities**

BREACH OF DUTY

1. The failure to conform to specific ***standards of practice***
2. The failure to use your ***best judgment*** in care and treatment of the patient.
3. The failure to provide care in a **reasonable and diligent** manner.

WHAT ARE “STANDARDS OF PRACTICE”?

(Often referred to as
“*standards of care*”)

THESE STANDARDS ARE OUTLINED IN N.C. GEN. STATS. 90-21.11 & 90-21.12 DEFINITIONS & STANDARD OF HEALTH CARE:

In any medical malpractice action as defined in G.S. 90-21.11(2)(a), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the care of such health care provider was not in accordance with the *standards of practice* among members of the

1. same health care profession with similar training and experience
2. situated in the same or similar communities
3. under the same or similar circumstances

at the time at the time of the alleged act and giving rise to the cause of action.

THESE STANDARDS ARE OUTLINED IN N.C. GEN. STATS. 90-21.11 & 90-21.12 DEFINITIONS & STANDARD OF HEALTH CARE:

2011 CHANGES IN THESE STATUTES:

- An action may be brought against an individual health care provider and a hospital/ nursing home... for “breach of administrative or corporate duties to the patient, including but not limited to, negligent credentialing or negligent monitoring and supervision.”
- Defendant may be liable for action or “inaction”.
- In an action for the furnishing of professional services in the treatment of an emergency condition, the claimant must prove a violation of the standards of practice by clear and convincing evidence.

THESE STANDARDS ARE OUTLINED IN N.C. GEN. STATS. 90-21.11 & 90-21.12 DEFINITIONS & STANDARD OF HEALTH CARE:
2011 CHANGES IN THESE STATUTES

- \$500,000 cap on noneconomic damages:
 - “damages to compensate for...”
 - Pain
 - Suffering
 - Emotional distress
 - Loss of consortium
 - Inconvenience
 - And any other nonpecuniary compensatory damage.

THESE STANDARDS ARE OUTLINED IN N.C. GEN. STATS. 90-21.11 & 90-21.12 DEFINITIONS & STANDARD OF HEALTH CARE:
2011 CHANGES IN THESE STATUTES

- \$500,000 cap on noneconomic damages:
No \$500,000 cap if:
 1. The jury finds punitive damages.
 2. The jury finds that the claimant suffered “disfigurement, loss of use of a part of the body, permanent injury or death and the jury finds that the acts of the defendant proximately caused or committed the acts in reckless disregard of the rights of others.”
- *The \$500,00 cap is subject to an increase every 3rd year beginning in 2014 based on the Consumer Price Index*

**FROM WHERE DO THESE
“*STANDARDS OF PRACTICE*”
ORIGINATE?**

FROM WHERE DO THESE “*STANDARDS OF PRACTICE*” ORIGINATE?

Regulatory Agencies

JCAHO

OSHA

National Guidelings or Recommendations

CDC

Professional Associations

APIC, AORN

- **Hospital Policies and Procedures**

Hospital and/or Departmental Policies are GUIDELINES!!

(If policies are not followed, then the health care provider must document why policies are not followed.)

CAUSATION

The breach of the duty by the defendant must **proximately cause** the plaintiff's injury.

CAUSATION or PROXIMATE CAUSE

A natural and continuous sequence produces a person's injury

and

A reasonable and prudent health care provider could have foreseen that the event would probably produce such injury or some similar injurious result

DAMAGE

There must be **damage** to the plaintiff's *person or property* to recover for the defendant's negligence.

There can be breach of duty by the defendant, but if there's no damage, then there is no negligence.

CASE EXAMPLE #1

- Baby Boy Doe born on January 1, 2005
- After birth, he developed NEC
- To OR for bowel resection
- After OR, developed abdominal distention
- Returned to OR; found to have leakage at anastomosis site and rents in remaining portion of his good bowel
- Repair and resection of bowel performed and insertion of permanent feeding tube;

CASE EXAMPLE #1

- After a lengthy hospitalization, Baby Boy Doe was discharged home
- Parents sued hospital and doctor for permanent deficits of Baby Boy Doe.
- Family claimed that had the good bowel not been damaged that son would not need a feeding tube.
- During discovery learned that attending did not participate in procedure.

NORTH CAROLINA PATTERN JURY INSTRUCTIONS Civil 810.02

Actual damages are the fair compensation to be awarded to a person for any [past] [present] [future] injury [proximately caused by the negligence] [caused by the wrongful conduct] of another. In determining the amount, if any, you award the plaintiff, you will consider the evidence you have heard as to (each of the following types of damages):

[medical expenses]

[loss of earnings]

[pain and suffering]

[scars or disfigurement]

[(partial) loss (of use) of part of the body]

[permanent injury]

[state any other type of damage supported by the evidence].(fn1)

The total of all damages are to be awarded in one lump sum.(fn2)

Contributory Negligence Prevents Recovery by the Plaintiff



- NC is a contributory negligence jurisdiction

Our Supreme Court states, “a patient has an active responsibility for his own care and well-being”

- “failure to keep appointments and to report symptoms constitutes sufficient evidence”

INFECTION CONTROL LIABILITY

(article on 2014 website of Plaintiff's law firm)

“Historically, the belief was that infections were unavoidable and hospitals were not liable. Now, hospital infections are said to be the next asbestos litigation...

In some hospitals, MRSA is rampant—it is very easy to contract. A study by *Infection Control and Hospital Epidemiology* reports that if you are placed in a room previously occupied by a patient with MRSA, your risk of infection increases, because the bacteria linger on floors and furniture long after the patient carrying these bacteria is discharged. As well, 70 to 90 percent of patients carrying MRSA are never identified.

Lawsuits that penalize those who violate hand-hygiene rules and fail to screen incoming patients for MRSA, combined with the correct implementation of precautions, may be the best way to improve patient care and prevent hospital infections.”

INFECTION CONTROL LIABILITY

(advertisement on 2014 website of Plaintiff's law firm)

- “Most recently, between January 18 and February 6, 2014, at least 18 patients at a North Carolina Hospital underwent surgical procedures with surgical equipment that had been used on another patient with CJD.
- When a person is exposed to CJD due to the negligence or carelessness of another, that person may be entitled to compensation for the harm that the exposure has caused. This would include not only situations where a person actually acquires this horrible disease but also the emotional stress, worry, and anguish of finding out that you were exposed to a fatal disease that could manifest itself at any time in the future
- The Winston Salem attorneys at _____ are highly experienced in medical and surgical cases.
- If you or someone you know has contracted or been exposed to Creutzfeldt-Jakob disease and you believe that a hospital or surgery may have been responsible, please contact _____ to help you.”

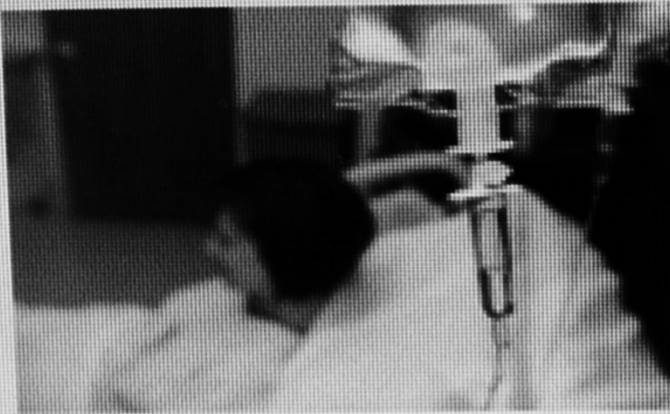
INFECTION CONTROL LIABILITY **(advertisement on 2014 website of Plaintiff's law firm)**

“Proving Negligent Hospital-Acquired Infection Through Bacterial Genes

Imagine you are a medical malpractice attorney. Your client, in the hospital for surgery or childbirth or some other invasive procedure, developed an nasty infection, resulting in permanent injuries or death. You order their medical records and their billing records, and you notice that their insurer (it can be a private insurer or Medicare) refused to even pay for treatment of the infection as a “never event.” You settle on two negligence theories to investigate: whether the hospital-acquired infection was preventable and whether the infection was properly treated.”

EXAMPLES OF INFECTION CONTROL LIABILITY

Nine Dead from Infected IV Feeding Bags



Birmingham, AL: Investigators working with the Centers for Disease Control and Prevention (CDC) in Atlanta are working

to determine what might have been the source of an **infection** passed along to 19 patients fed intravenously in six Alabama hospitals [[READ MORE](#)]

EXAMPLES OF HOW THE ICP COULD BREACH THE ACCEPTED STANDARDS OF PRACTICE

- By recommending that the hospital use an outdated or inappropriate disinfection or sterilization process for disinfecting and sterilizing various hospital equipment.
- By failing to have a policy for IV tubing changes when there is documented scientific literature to demonstrate that tubing should be changed every 48 to 72 hours.

EXAMPLES OF HOW THE ICP COULD BREACH THE ACCEPTED STANDARDS OF PRACTICE

- By failing to correctly isolate patients.
- Confidentiality issues, HIPAA.
- Outbreak investigation and proper precautions and isolation, e.g. failure to recognize pattern of problems in a hospital unit thus delaying appropriate precautions and isolation.

EXAMPLES OF INFECTION CONTROL LIABILITY

Exposure to Contagious Patients

- Hospital licensure regulations in most states require isolation facilities for patients with communicable disease.
- Liability may be imposed for failure to isolate patients with communicable diseases or for failure to guard against cross-infection. Courts have held that defendants are liable when a patient contracts an infection after being negligently exposed to a contagious patient.

EXAMPLES OF INFECTION CONTROL LIABILITY

Exposure to Contagious Patients – (Continued)

- In Ryan v. Frankford Hosp., the minor plaintiff, Sean Ryan, was hospitalized and placed in a room with another minor. A sign above the bed read "Enteric Conditions and/or Precautions."
- In their complaint, the plaintiffs alleged that at no time throughout Ryan's hospitalization at the defendant hospital were they advised that their child's roommate had a contagious infection, shigellosis. Interaction between the minor patients was encouraged, and meals were served to them at the same table.

EXAMPLES OF INFECTION CONTROL LIABILITY

Exposure to Contagious Patients – (Continued)

- Sean's pregnant mother, presumably as a result of her contact with contagious patient or her son, was admitted to another hospital with the diagnosis of shigellosis. Shortly thereafter, she underwent a therapeutic abortion. Court documents show that the case was settled.

EXAMPLES OF INFECTION CONTROL LIABILITY

Obligation to Inform Patients of Nosocomial Infection

Providers should inform patients when a nosocomial infection has occurred. Courts have become increasingly insistent that physicians have a duty to disclose fully all pertinent facts concerning their patient's condition, even if the physician is convinced that he or she is acting in the patient's best interest by remaining silent.

This obligation exists regardless of whether the condition is the result of negligence of the physician, a colleague, or the hospital. Failure to inform patients in such situations may result in liability for fraud , negligence, or conspiracy. Punitive as well as compensatory damages may be awarded in such situations.

EXAMPLES OF INFECTION CONTROL LIABILITY

Duties to Non-Patients

Providers' obligations extend to persons other than their patients. A duty of reasonable care extends to all employees, volunteers, and visitors on the premises. An individual who visits during regular visiting hours and remains in those parts of the premises open to visitors is an invitee to whom the hospital owes the duty of exercising ordinary care. If a third party develops an infection from a patient because of the provider's negligence, case law has established that damages may be awarded to the third party. Visitors of isolation patients, for example, should be warned of the risk of contracting the disease, and documentation should be made indicating the visitor was so advised.

OTHER POTENTIAL LIABILITY CLAIMS AGAINST HEALTH CARE PROVIDERS

- Breach of contract
- Fraud
- Libel/Slander
- Product liability
- Premises liability

INFECTION CONTROL PROFESSIONAL AS A DEFENDANT

Probability: The chance that an ICP will be sued is low compared to clinicians with "hands-on" patient care.

What should you do if you are served with a civil summons and Complaint stating that you have been sued?

- Contact the hospital attorney or your administrator immediately.
- Deliver summons and complaint to attorney for hospital or its insurance carrier immediately.
- An answer must be filed on your behalf by you and your attorney within 30 days of receipt of the Complaint.
- Do not talk to anyone about the incident in question outside the presence of hospital attorney or administrator .

MEDICAL MALPRACTICE INSURANCE

Do you need your own personal policy?

Questions to ask under your administrator or hospital attorney:

- Am I covered under my hospital's professional liability policy?
- Who provides the coverage?
- What are the policy limits?

MEDICAL MALPRACTICE INSURANCE

(Continued)

- Is the policy an occurrence or claims made policy?
 - Occurrence policy: It does not matter when the claim is made as long as there was coverage at the time of the injury .
 - Claims made policy: The claim must be made during the time the insurance policy is in effect or during the time you are covered by the policy.