

Legal Aspects of Infection Prevention in Long Term Care

Statewide Program of
Infection Control and Epidemiology

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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

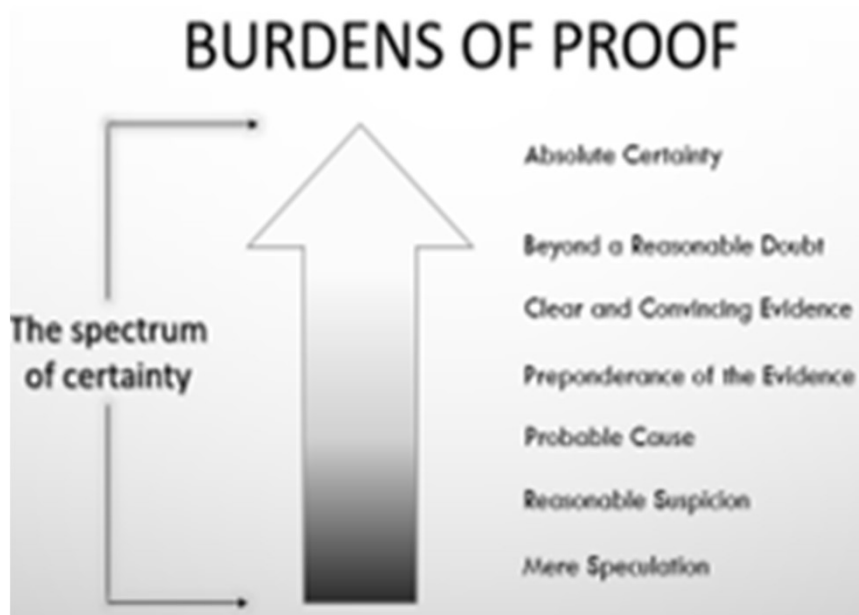
TWO ADVERSARIAL PARTIES:

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 proceedings are initiated by the filing of a Complaint in civil court and serving the defendant with the Complaint and Summons.

STATE OF NORTH CAROLINA

File No. _____

CountyIn The General Court Of Justice
☐ District ☐ Superior Court Division

Name Of Plaintiff

Address

City, State, Zip

VERSUS

Name Of Defendant(s)

Date Original Summons Issued

Date(s) Subsequent Summons(es) Issued

CIVIL SUMMONS☐ **ALIAS AND PLURIES SUMMONS (ASSESS FEE)**

G.S. 1A-1, Rules 3 and 4

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1

Name And Address Of Defendant 2



IMPORTANT! You have been sued! These papers are legal documents, **DO NOT** throw these papers out! You have to respond within 30 days. You may want to talk with a lawyer about your case as soon as possible, and, if needed, speak with someone who reads English and can translate these papers!

¡IMPORTANTE! ¡Se ha entablado un proceso civil en su contra! Estos papeles son documentos legales. **¡NO TIRE** estos papeles!

Tiene que contestar a más tardar en 30 días. ¡Puede querer consultar con un abogado lo antes posible acerca de su caso y, de ser necesario, hablar con alguien que lea inglés y que pueda traducir estos documentos!

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22 CVS 123

JOHN DOE,
Plaintiff,

v.

LONG TERM CARE FACILITY,
Defendant.

COMPLAINT

NOW COMES Plaintiff John Doe, complaining of Defendant Long Term Care Facility, alleges and says as follows:

1. Plaintiff John Doe is a citizen and resident of Wake County, North Carolina.
2. Defendant Long Term Care Facility is a limited liability company duly organized and existing under the laws of the State of North Carolina.
3. This Court has jurisdiction over this cause of action and personal jurisdiction over Defendant.
4. Venue for this case is proper.
5. At all times relevant hereto, Defendant Long Term Care Facility was an Adult Care Home licensed and regulated by the State of North Carolina pursuant to North Carolina General Statutes 131D, as well as Subchapter 42D of the Rules for the Licensing of Adult Care Homes and the rules promulgated under 10A NCAC Subchapter 13F.
6. At all times relevant hereto, Defendant Long Term Care Facility owed a duty to Plaintiff John Doe to use reasonable care for his safety while he resided at the facility.

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 negligent 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- NC

- Wrongful death action – 2 years from the date of death.
- Action involving insane/incompetent person – 3 years after disability is removed (or guardian appointed)
- Most other actions—3 years



APPLICATION OF STATUTES OF LIMITATION

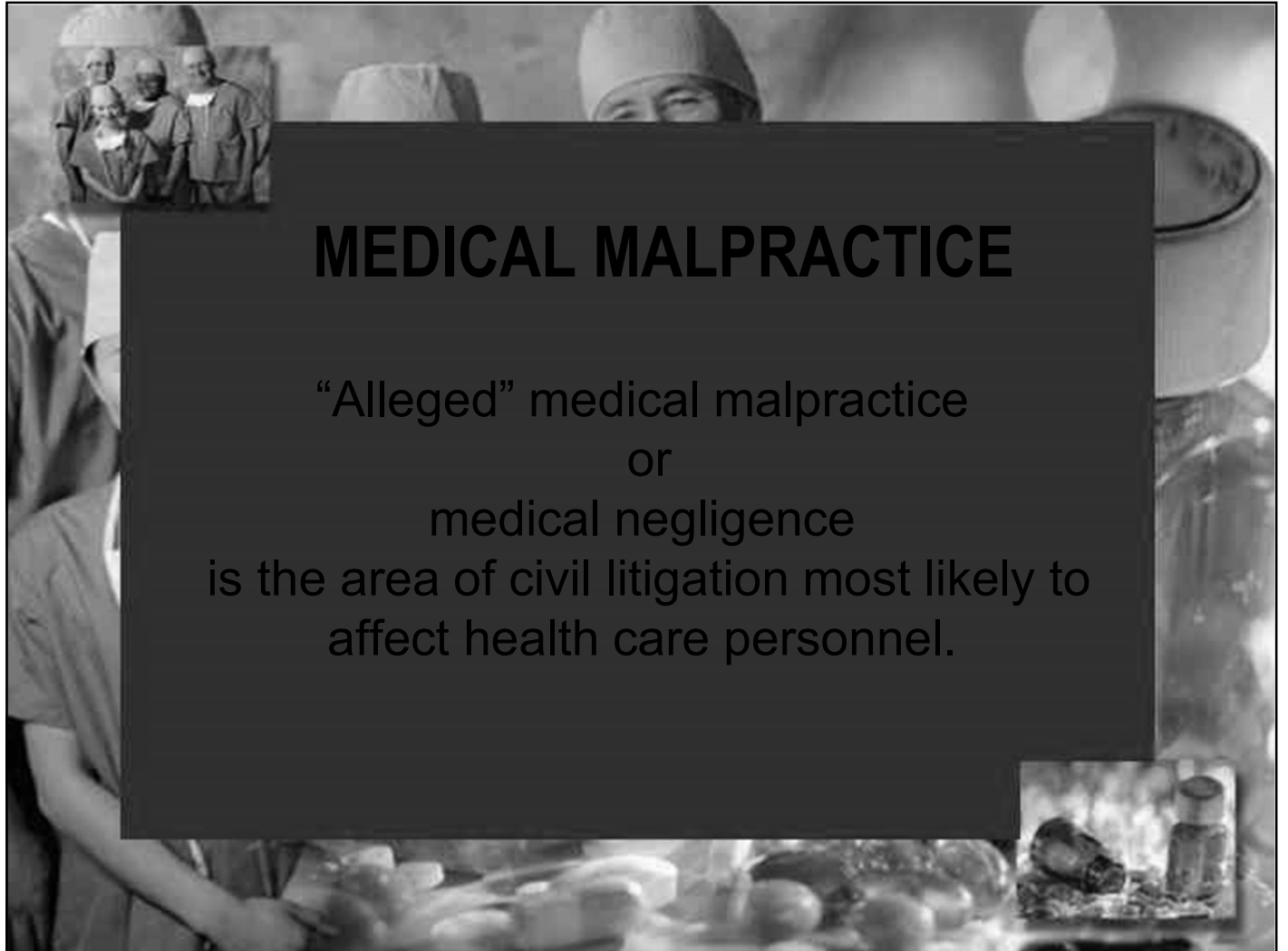
- Resident “X” gets a medication overdose while in the nursing facility and *dies*.
- The heirs of Resident “X” have **2 years** within which they may file a “wrongful death” claim in Superior Court.

APPLICATION OF STATUTES OF LIMITATION

- Resident “X” is an adult and *develops a pressure ulcer that becomes infected but does not die.*
- Resident “X” has **3 years** to make a claim for damages.

Overview of the Litigation Process

- Plaintiff files a Complaint.
- Defendant files an Answer.
- The parties engage in “discovery.”
 - Written requests for information (Interrogatories, Requests for Production of Documents, Admissions, etc.)
 - Depositions (sworn testimony)
- Hearings
- Court-ordered mediation
- Trial



“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?



4 ELEMENTS OF NEGLIGENCE

- Duty (standards of practice)
- Breach of duty
- Causation
- Damage

DUTY

The defendant has a duty 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

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:

The defendant health care provider shall not be liable for the payment of damages unless the jury 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.

STEPPING
INTO MY
SHOES



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

National Guidelines or Recommendations:

CDC

Professional Associations:

APIC, AORN

Facility Policies and Procedures

North Carolina Administrative Code

Federal Regulations

Facility Policies and Procedures are GUIDELINES!!

(If policies are not followed, then facility staff must document why policies are not followed.)



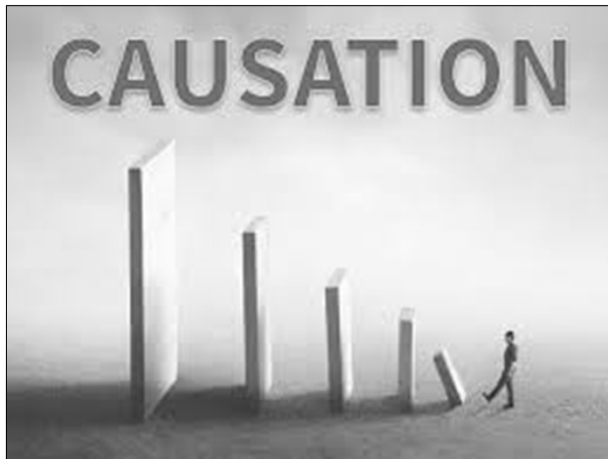
4 ELEMENTS OF NEGLIGENCE

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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.

CAUSATION



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

DAMAGE

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

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



Infection Control Liability



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

- By using an outdated or inappropriate disinfection or sterilization process for disinfecting and sterilizing various equipment in the facility.
- 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 - Continued

- By failing to correctly isolate patients or follow the proper protocol when entering/exiting isolation areas.
- Confidentiality issues, HIPAA.
- Outbreak investigation and proper precautions and isolation, e.g. failure to recognize pattern of problems in a facility thus delaying appropriate precautions and isolation.

EXAMPLES OF INFECTION CONTROL LIABILITY – Duty to Inform of Nosocomial Infection

Facilities 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 facility or an outside provider. 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. A facility owes an individual who visits during regular visiting hours and remains in those parts of the premises open to visitors a duty of exercising ordinary care.

If a third party develops an infection from a patient because of the facility'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.

Infection Control Liability Case Examples



CASE EXAMPLE #1 OF INFECTION CONTROL LIABILITY

- Resident developed several wounds on his right leg. One of the wounds became infected.
- Resident's right leg continued to progressively worsen, leading to an amputation.
- Resident's family filed a lawsuit alleging that the facility's failure to implement proper wound care measures and timely send the resident to an outside provider led to the infection and eventual amputation.

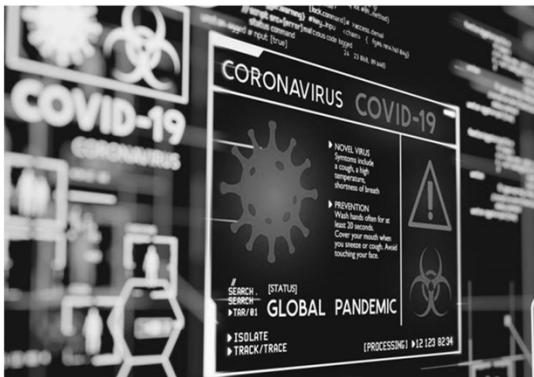
CASE EXAMPLE #2 OF INFECTION CONTROL LIABILITY

- A nurse discovered an open wound with purulent drainage and odor in a resident's abdominal fold. Three days later, resident became unresponsive and was sent to the hospital.
- She was diagnosed with MRSA and died approximately a week later due to sepsis.
- Resident's family claimed that facility should have recognized signs and symptoms of infection earlier.

CASE EXAMPLE #3 OF INFECTION CONTROL LIABILITY

- A resident was admitted for short-term rehab. The resident developed a UTI that went undiagnosed. The resident then developed pneumonia, leading to sepsis and death.
- In addition to failing to timely recognize and evaluate signs and symptoms of a UTI, the lawsuit claimed that the UTI was a result and worsened due to improper hygiene, bathing, and changing practices.

OTHER POTENTIAL LIABILITY CLAIMS AGAINST LONG TERM CARE PROVIDERS?



Claims Based on RSV, Influenza, and Covid-19

- Hand hygiene
- Isolation procedures
- Mask requirements when levels of respiratory virus spread are increasing
- Surveillance
- Influenza and pneumococcal immunization policies and resident records of immunization status
- Sick leave policies

CASE EXAMPLE #4 OF INFECTION CONTROL LIABILITY

- Facility failed to properly screen residents for COVID-19 and admitted symptomatic residents without placing them in isolation.
- Facility staff and visitors were not regularly screened.
- Per the visitor and staff screening form, anyone with a fever or symptoms was supposed to stay out. The facility allegedly allowed people into the facility with screening forms that left multiple questions blank.

CASE EXAMPLE #5 OF INFECTION CONTROL LIABILITY

- Facility used iPads for admissions paperwork and allowed residents to hold and sign documents on the iPad.
- Facility staff used the same iPad for residents in the COVID isolation unit and the regular halls, allegedly without cleaning the iPads and donning appropriate PPE.
- The resident's family contended this led to the spread of infection across the facility.

DHSR Surveys

Commonly cited

Interview direct care staff to determine:

- *Whether they are aware of and have reported any signs or symptoms exhibited by the resident that may be associated with an infection;*
- *Whether they are aware of and have been instructed on any special precautions that are applicable to any resident on transmission based precautions;*
- *Whether they are familiar with the indications for washing hands and/or using alcohol based products and understand the basis for the use of gloves and when they are to be removed;*
- *How staff know which residents are covered by transmission-based precautions; and*
- *Whether staff is aware of what specific actions are required for each type of transmission-based precautions.*

DHSR Surveys and Infection Control

- The facility failed to prevent an infection control system failure when employees entered the facility by using all 3 entrances which did not have screening stations and accessed resident hallways and common areas without being screened for COVID. (IMMEDIATE JEOPARDY)
- Failure to test all residents for TB prior to admission.
- Failure to wear PPE according to facility policy when entering two isolation rooms and failed to wash their hands between the two rooms where residents were under enhanced droplet precautions.
- Failure to implement an infection prevention and control program consistent with CDC guidelines including a written policy and procedure for infection prevention and control within the facility specific to procedures for finger stick blood sugar checks done by residents and staff.

COVID-19 Immunity - “Emergency or Disaster Treatment Protection Act”

Provides immunity from civil liability for any harm or damages caused by acts or omissions in rendering health care services if those health care services:

- (1) occurred during the emergency declaration;
- (2) are in response to or as a result of the COVID-19 pandemic; and
- (3) are provided in good faith.

This protection expired on August 15, 2022.

COVID-19 Immunity & Takeaways from *Land v. Whitley*

1. Health care providers are unlikely to obtain a dismissal of the lawsuit before discovery takes place.
2. To establish immunity, health care providers must present evidence of how the COVID-19 pandemic impacted each allegation of negligence specifically. A causal link between the pandemic and the plaintiff's care is required.
3. Courts will interpret the statute as a "limited immunity".

