

Negligence Is Key

Failing to perform a particular duty the law requires is what opens the door to malpractice suits.

by Ken Ross, JD, DC

Negligence is the most important area in tort liability law because of its importance in a practice and it requires special care in applying the rules for each situation.

The key element in any malpractice case is negligence. To understand medical malpractice, we must first understand negligence. Negligence is defined as a non-intentional tort with fault by the defendant, in that the defendant failed to perform some duty that the law requires under the circumstances. Depending on the circumstances, there may be either one or both of two types of duties owed to the plaintiff. The first is the duty to conduct oneself as a reasonable person would under the same or similar circumstances – duty of due care – and second, special duty imposed by state statute or case law which may be in addition to or in place of duty of due care. Negligence, based upon duty of due care, a plaintiff must prove, in order to establish negligence and liability, the following:

1. An actionable omission by the defendant;
2. Duty of care;
3. Breach of that duty (lack of due care) exposing a patient to unreasonable risk or harm;
4. Actual cause (cause in fact);
5. Proximal cause (legal causes);
6. Damages.

The liability for negligence of an act or actionable omission by the defendant may be predicted on a willful omission to act when under an affirmative duty to act in situations involving patient care. Duty of due care, means that a doctor owes a duty to behave as a reasonable person would under the same or similar circumstances. It is immaterial that the doctor believed he or she acted in good faith or that he or she was being careful. The issue is not what the doctor believes, but how a reasonable person of ordinary prudence would have acted under the same or similar circumstances.

Generally, this duty of due care does not apply in emergency situations. The good samaritan laws justify acts that otherwise could or would be considered unreasonable.

Once it is shown that the defendant

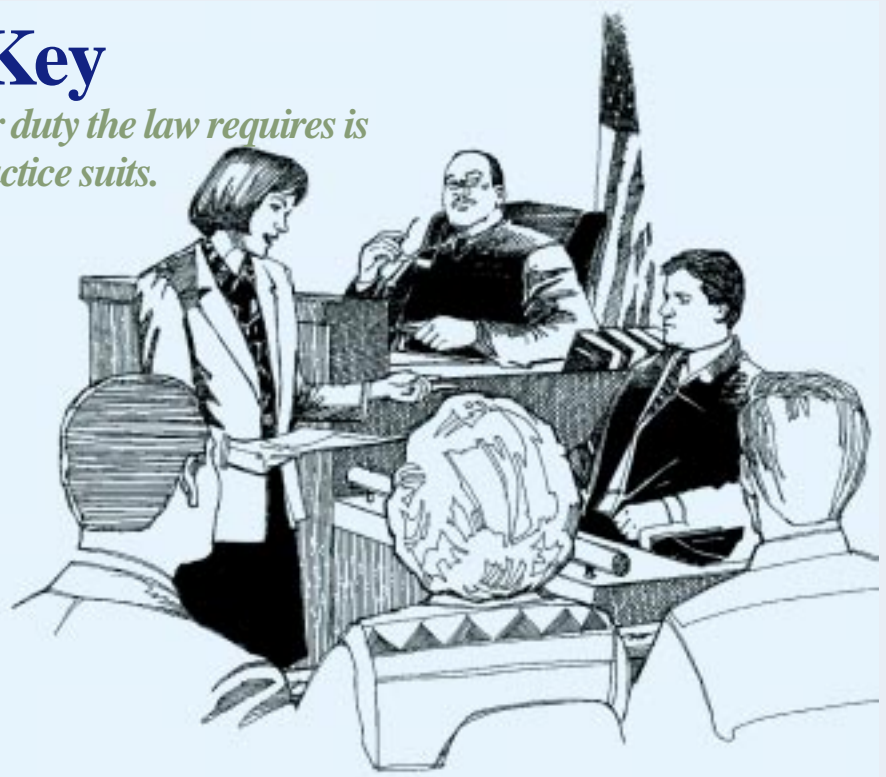
owed a duty of care, the plaintiff must show that the defendant breached that duty through an act or omission exposing the patient to unreasonable risk of harm. The actual act or omission by the defendant, duty of due care and the breach of that duty constitute a negligent act. However, the elements of causation and damages must also be satisfied to establish the liability. The breach of duty also requires two steps: (1) Proof of what actually happened, by direct or circumstantial evidence, and (2) it must be shown that the defendant acted unreasonably under those circumstances. Actual cause (cause in fact) happens when the defendant's negligent act caused the plaintiff's injuries. If the plaintiff would not have been injured but for the defendant's act, then the act is the cause in fact to the plaintiff's injuries. If the plaintiff would have sustained the same injuries regardless of the defendant's act, the act is not the cause in fact of the injury, and the defendant is usually not liable.

In addition to actual causes, the plaintiff must also show proximal cause. Proximal cause deals with the defendant's liability for unforeseeable or unusual occurrences or consequences following the defendant's act. For example, if the defendant's act was a manipulation and the plaintiff later experiences dizziness, numbness and headaches, and is taken to the hospital, this is unforeseeable by the doctor following his act of manipulation. This is probably one of the hardest elements of

negligence to prove, as it must be shown it was caused by the defendant's act. Once negligence and causation has been established, the plaintiff must show actual damages from the negligent act by the defendant to impose liability. In the case of damages, special damages are awarded which the patient is entitled to recover economic and expenses for the losses. Examples of this would be medical bills, lost wages, cost for hiring household help and expenses the plaintiff would have incurred in the future.

The other type of damages that can be recovered are damages inherent to the injury itself. Examples of this would be pain and suffering, disfigurement, and/or disability. The purpose of awarding damages in negligence cases is compensatory rather than punitive, and to restore a patient as close to his status of health prior to the injury. With respect to punitive damages, these type of damages are not usually awarded in medical malpractice cases.

Sometimes, and this is the trend that I am seeing, punitive damages are allowed with respect to medical malpractice when intentional torts and/or reckless conduct by the defendant is proven. This type of damage award is intended to punish the defendant for his intentional tort or reckless misconduct. As I mentioned, negligence is a non-intentional tort that results in an infliction of injury to the plaintiff and where special and general damages can be awarded providing



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the plaintiff proves a negligent act and establishes liability. In a negligence, non-intentional tort, medical malpractice case, the doctor may face board action that may include: restriction on his or her license, fines and additional costs of medical malpractice defense. In several of the medical malpractice cases I reviewed, especially where sexual misconduct is an issue, the doctor was also charged with an intentional tort of battery, which is a criminal charge. To prove battery, the plaintiff must show: (1) an act by the defendant of unwanted touching; (2) intent on the defendant's part to inflict some sort of harm on the plaintiff; (3) harmful or offensive touching; (4) causation; and (5) lack of consent by the plaintiff. In medical malpractice cases, involving this type of an issue,

there is a possibility of not only board action for the malpractice/negligence case, but criminal charges and fines, and possibly incarceration if the defendant is found guilty of battery. In most states, simple battery is a misdemeanor, but in Florida it can carry up to one year in the county jail, plus fines and court costs. In reviewing medical malpractice cases, I have seen an increase in these types of cases, and in all probability, will see more. ■

About The Author

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