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**Medical Malpractice**

What It Is, What It Isn't, and Why It Matters in Everyday Practice

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**What is medical malpractice?**

Medical malpractice falls under tort law. A tort is a civil wrong that causes someone suffering or loss.


Malpractice occurs when a hospital, doctor or other health care professional deviates from standards in their profession, causing an injury to a patient.

The negligence might be the result of errors in diagnosis, treatment, aftercare or health management.



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1. Duty – an obligation to the patient
2. Negligence – a deviation from the standard of care
3. Damages - physical, emotional, functional, relational, and monetary loss resulting from the alleged malpractice
4. Proximate cause – a causal link between the negligence and the alleged harm

### Burden of Proof

The plaintiff has the burden of proof. It must be proven that if the negligence had not occurred, the patient would likely have had a better outcome.

The rule on this in New York is “more likely than not” – the plaintiff must prove a 51% chance of a better outcome had negligence never occurred. There are also circumstances when a plaintiff can use the “loss of chance” doctrine, such as in cases where the likelihood of survival is less than 50% even with appropriate care.

Medical malpractice cases are

- Time consuming
- Expensive
- Rigorously defended

For these reasons, it is not worth pursuing a frivolous claim.

### Medical Malpractice Law

Malpractice law plays a part in protecting the medical community from non-meritorious claims.

The law errs on the side of the health care provider.

- Statute of limitations
- Restrictive wrongful death statute

Juries often err on the side of the health care provider.

- Public perception of a health care provider vs. a trial attorney



### What does not constitute medical malpractice?

- An untreatable condition
- A poor outcome in the setting of reasonable care
- Occurrence of a known risk, on condition that reasonable precautions were taken or otherwise in the setting of proper care

### Examples of known risks/complications:

- Jaw bone damage from tooth extraction
- Injury to adjacent structure during surgery
- Rib fracture during CPR
- Retinal detachment after cataract surgery
- Compromise of perfusion resulting from pressor use
- Post-operative infection
- Perforation of the colon during colonoscopy
- Radiation related cardiac damage
- Nerve damage from a steroid injection
- Nonunion after a broken bone
- Dural tear during spinal surgery
- Tooth damage during intubation
- Compartment syndrome after revascularization of a limb
- C-diff during or after taking antibiotics

### High Profile Medical Malpractice

#### *Girl in Transplant Mix-Up Dies After Two Weeks*

By RANDAL C. ARCHIBOLD FEB. 23, 2003

A girl died today after two long weeks in which she received the wrong heart and lungs in one transplant operation and then suffered brain damage and complications after a rare second one.

The girl, Jéssica Santillán, 17, a Mexican immigrant who came to America three years ago seeking medical treatment for a life-threatening heart condition, was declared dead at 1:25 p.m. at Duke University Hospital after tests performed today confirmed her brain was not functioning, her family's lawyer said. Her heart stopped at 5:07. Doctors removed her from a respirator at 5:10 p.m.

### High Profile Medical Malpractice

Duke transplant case: 17 year old given heart-lung transplant with incorrectly matched blood type. She suffered complications after a second transplant and died.

- ✓ Duty
- ✓ Deviation from a standard of care
- ✓ Damages
- ✓ Proximate cause

### High Profile Medical Malpractice

#### **Melissa Rivers Reaches Settlement in Medical-Malpractice Suit over Joan Rivers's Death**

The iconic comedian passed away in September 2014.



### High Profile Medical Malpractice

Joan Rivers's case: Joan underwent a routine endoscopy, and medical professionals on hand failed to realize that her vital signs were deteriorating for a period of 15 minutes. She went into cardiac arrest due to lack of oxygen, and died seven days later.

- ✓ Duty
- ✓ Deviation from a standard of care
- ✓ Damages
- ✓ Proximate cause

### High Profile Medical Malpractice

#### Los Angeles Times **Bill Paxton didn't have to die, according to family's wrongful death lawsuit**



Bill Paxton's widow and children are suing Cedars-Sinai Medical Center and the heart surgeon who performed the operation that preceded the actor's death in February 2017.

### High Profile Medical Malpractice

Bill Paxton case (ongoing): Bill had an aortic aneurysm repair and aortic valve replacement, and had a stroke less than two weeks later. He died from stroke-related complications. It is alleged that the surgeon used an unconventional surgical approach that was beyond his scope of expertise.

- ✓ Duty  
Deviation from a standard of care?
- ✓ Damages  
Proximate cause?

### Nursing negligence – close calls

A 20meq bag of potassium was given through a peripheral IV. The patient complained of pain after the infusion, but her symptoms resolved and there was no long term damage.

A 250cc bag of insulin was infused into a patient within a very short period. Dextrose was given and no permanent harm was done to the patient.

Upon morning assessment, a patient's central line was found to be disconnected from his line of IV medications which included vasopressors. His hemodynamics were unstable for a short time but he suffered no long term consequence.

A bag of paralytic was hung in place of insulin by mistake. The patient was vented and suffered no consequence, and the mistake was found after the patient showed significant clinical changes.

### What medical malpractice litigation does not do

- Fix the consequence of the malpractice
- Make people rich
- Discipline a provider
- Change policies within an institution
- Put someone out of business
- Bankrupt a provider by taking personal assets

### What medical malpractice litigation does do

- Deters unsafe practices
- Provides monetary compensation for physical, emotional, functional, relational, and monetary losses resulting from the negligence - past, present, and future
- Shows us noticeable trends, which can influence policy and practice standards

## Why does it matter?

### Implications on documentation: your paper trail

- Document the truth.
- Document in a timely manner.
- Document and report anything abnormal.
- If you deviate from a standard of care, explain why.
- If a patient's decisions or actions could result in their own harm, document it.
- Document responses to your requests and interventions.
- Double documenting is unnecessary.
- Never alter the record.
- Be aware of the capabilities of the EHR.



### FAQ: What information can be accessed during a lawsuit?

Anything relevant to the case at hand that is reasonable and not unduly burdensome can be requested. This includes but is not limited to medical records, the audit trail, email, patient portal, phone/text logs, office correspondence, and social media accounts.

In general, documents that fall under QA are not discoverable. Personnel files of providers are generally not discoverable unless there is a negligent hire or retention claim.

### FAQ: How long does a person have to file a medical malpractice lawsuit?

This varies state to state. In New York, the statute of limitations (SOL) is 2.5 years from the date of the alleged malpractice or from the conclusion of the course of treatment, and for wrongful death the SOL is 2 years from the date of death.

The SOL for children in medical malpractice cases does not begin running until the child's eighteenth birthday, but the SOL cannot be extended more than 10 years after the alleged malpractice occurred.

In cases involving the delayed diagnosis of cancer, the SOL is 2.5 years from the date of discovery of the cancer. If a patient is injured due to a foreign object left inside the body, they must file a medical malpractice claim within one year of the date the object was or should have been found, whichever comes first.

### FAQ: What if there was negligence but the case can't be litigated?

Complaints can be filed with the Office of Professional Medical Conduct or the Office of the Professions. The DOH or NYSED investigates claims and can implement policy change or disciplinary measures.

<https://www.health.ny.gov/professionals/doctors/conduct/>  
<http://www.op.nysed.gov/opd/complain.htm>

### Criminal negligence: How does malpractice become a criminal act?

Most crimes involve intentional conduct. For negligence to be considered criminal instead of civil in nature, the negligence must be considered "gross negligence" or a very high degree of negligence. The negligence is of such a high degree that it is seen as recklessness (when a person appreciates a potential risk but proceeds regardless) or criminal negligence (when a person should have been aware of the risk but was not).

### Purpose of criminal charges

The purpose of criminal charges is not primarily to prevent error in the future or to compensate a victim, but to penalize the negligent party if they are found guilty. Guilt must be established beyond a reasonable doubt.

Examples outside of medicine: vehicular manslaughter, child endangerment

### High Profile Criminal Negligence

#### *Doctor Is Guilty in Michael Jackson's Death*


By *Associated Press* - 10/11/2011



## In the news...

**Former Vanderbilt nurse arrested, charged with homicide for medication error**

Feb 08 2019  
Critical Care, Policy, Ethics, Education 10 Comments



Tennessee law enforcement agents announced they had arrested and charged a nurse with reckless homicide and patient abuse for a fatal medication error she allegedly committed while working at Vanderbilt University Medical Center in December 2017.

The charges allege that the nurse intended to provide an ordered dose of midazolam (Versed) to an anxious patient with a subdural hematoma who was going into a radiology scanner. The nurse could not find the medicine where it was supposed to be, so she used an override function on a dispensing cabinet and distractedly took out vecuronium (the first "VE" entry) instead of Versed. The patient received the paralyzing drug, then experienced respiratory and cardiac arrest and died a day or two later.

## Deviations from the standard of care

- In a non-emergent situation, failure to consult a physician when the medication she needed was not available under the patient's profile in the medication dispensing unit (i.e. Pyxis).
- Failure to read the Pyxis screen to ensure the identity of the medication being overridden.
- Failure to heed multiple flags on the Pyxis screen regarding the medication she was removing.
- Failure to read the label of the medication she was reconstituting.
- Failure to read the "Danger: Paralytic" warning on the medication vial.
- Failure to read the label of the medication she was drawing into a syringe.
- Failure to read the label of the medication she was administering.
- Failure to monitor the patient for response after administering a sedative medication.

## Response to criminalization of medical errors

### The American Medical Association Is Opposed To Prosecution For Medical Negligence

The American Medical Association (AMA) strongly opposes criminal prosecution of medical negligence but acknowledges that recklessness or a gross deviation from the standard of care should be criminally culpable. On the other hand, negligence is when the healthcare provider was taking an unnecessary risk unbeknownst to him. Many believe recklessness should be criminally prosecuted, but the matter of negligence should remain a civil matter.

One can't ignore that criminal punishment is a growing trend, and navigating the lines between recklessness and negligence is a tricky road to travel. This truth remains: No health care provider should be given a free pass from being liable for the mistakes made when treating their patients.

## Response to criminalization of medical errors ANA Responds to Vanderbilt Nurse Incident

Feb 19th 2019

ANA supports a full and confidential peer review process in which medical errors can be examined and system improvements and corrective action plans can be established to ensure that errors such as this do not occur in the future. Swift and appropriate action should and must always be taken when medical errors occur.

Health care is highly complex and ever-changing resulting in a high risk and error-prone system. However, the criminalization of medical errors could have a chilling effect on reporting and process improvement. The Code of Ethics for Nurses states that while ensuring that nurses are held accountable for individual practice, errors should be corrected or remediated, and disciplinary action taken only if warranted. When error occurs, whether it is one's own or that of a coworker, nurses may neither participate in, nor condone through silence, any attempts to conceal the error.

ANA acknowledges that the full facts and circumstances of this incident are still developing. This tragic incident should serve as a reminder to all nurses, other health care professionals, and administrators that we must be constantly vigilant at the patient and system level. ANA stands ready in support of patients, nurses, and other healthcare providers in achieving high reliability in organizations to prevent these types of incidents from recurring.

## Response to criminalization of medical errors

### Leadership & Management

### Viewpoint: If Vanderbilt nurse is arrested for homicide, leadership should be too

Emily Rappleye (Twitter | Google+) - Monday, February 11th, 2019 Print | Email

### Some nurses worry criminal charges for former Vanderbilt nurse set dangerous precedent

By Katherine Jacob - Tuesday, February 12th 2019

HEALTH INC.

### When A Nurse Is Prosecuted For A Fatal Medical Mistake, Does It Make Medicine Safer?

April 10, 2019 - 9:44 AM ET

MARIA SORESON

## Takeaways from today's talk

- Integrity, competence, and safety in practice are of the utmost importance.
- Advocate for excellent care in both personal and professional settings, and encourage others to do the same.
- Communicate, communicate, communicate!
- Transparency, genuine concern, and prompt response to errors decreases the likelihood of litigation, and most importantly communicates to a patient that their well-being is being taken seriously.
- Health care providers will make mistakes, and will continue to do so because they are human. Learn from mistakes, examine the "how" and "why" of errors, and foster an environment where dialogue about errors is encouraged.
- You are greatly respected for the job you do – thank you!

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