Understanding Malpractice Suits

LORMAN®

Published on www.lorman.com - October 2017

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you UNLIMITED access to Lorman's ever-growing library of training resources:

- ☑ **Unlimited Live Webinars** - 120 live webinars added every month
- ☑ **Unlimited OnDemand and MP3 Downloads** - Over 1,500 courses available
- ☑ **Videos -** More than 700 available
- ☑ **Slide Decks -** More than 1700 available
- ☑ White Papers
- ☑ Reports
- ☑ Articles
- ☑ ... and much more!

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.

Get Your All-Access Pass Today!

SAVE 20%

Learn more: www.lorman.com/pass/?s=special20

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

The majority of people believe that malpractice refers solely to doctors. Increasingly, however, nurses are being sued for malpractice as well. This white paper defines malpractice in general and how it applies to the nursing profession, as well as steps nurses can take to minimize their liability in the event they are named in a malpractice suit.

Negligence and Malpractice Defined

When referring to malpractice, there are actually two different actions that are viewed; negligence and malpractice. Each has its own definition and burden of proof. An individual can be negligent, but not be charged with malpractice. However, someone charged with malpractice is always negligent in their duties.

Both refer back to the definition of "standard of care." Standard of care refers to the care that a patient should expect to receive under similar circumstances based on professional literature, protocols and expert opinion (Reising & Allen, 2007). Since many lawsuits are not filed for years after the incident occurred, the court will use the standard of care in place at the time of the incident, not the time the lawsuit is filed.

The Joint Commission on Accreditation of Healthcare Organizations (JCAHO) defines negligence as "a failure to use such care as a reasonably prudent and careful person would under similar circumstances." (Croke, 2003). To prove negligence, the patient or their representative – generally referred to as the plaintiff – must meet the burden of proof in each of the following four areas. (Ferrell, 2007)

1. The defendant owed the plaintiff a specific duty which is defined in nursing as the standard of care.
2. The defendant breached this duty.
3. The plaintiff was harmed.
4. The defendant's breach of duty is the reason for the harm incurred by the plaintiff.

Malpractice is generally defined as "improper or unethical conduct or unreasonable lack of skill by a holder of a professional or official position; it denotes negligent or unskillful performance of duties when professional skills are obligatory." (Croke, 2003) Actions of malpractice call for damages.

What is Nursing Malpractice?

A charge of negligence against a nurse can arise from nearly any action or any failure to act that result in the injury of a patient (Croke, 2003). In nursing, this is generally an unintentional failure to follow the standard of clinical practice and it can lead to a charge of malpractice.

There are generally four factors that establish a case of nursing malpractice (Giordano, 2003).

1. There is an established relationship between the nurse and the patient. This is where the duty to the patient begins. The burden of proof is satisfied by using hospital documents that show the nurse participating in the care of the patient. Once this is established, a duty to the patient is created.
2. The scope of duty owned to the patient by the nurse is established by expert testimony about the care required.
3. The patient must establish the nurse departed from "good and accepted practice" (Giordano, 2003). Good and accepted practice is defined as care that would have been provided by an ordinarily prudent nurse practicing in a particular circumstance. It is important to note that the care does not need to be exceptional or the best provided it is consistent with accepted practices (Giordano, 2003).
4. A "causal relationship between act or acts that departed from accepted nursing care and the patient's injury." (Giordano, 2003) This factor is established using probability. If a nurse is not negligent, then it's likely that the patient would not have suffered harm. Expert testimony is used to support any assertions.

Most malpractice suits filed against nurses are for alleged violations of tort or an act or omission that harms someone under the law. There are two types of tort law; unintentional tort and intentional tort. Unintentional tort results from negligence. Intentional tort is a "deliberate invasion of someone's legal rights" (Ferrell, 2007). In cases of intentional tort, the plaintiff is not required to show a duty was owed. Duty is defined by the law and the nurse is presumed to owe the patient a duty. The plaintiff must show that the nurse breached his/her duty and that breach of duty caused harm. Harm is defined as assault, battery, invasion of privacy or slander (Ferrell, 2007).

There are three social goals of malpractice litigation (McCarthy, 2014): To deter unsafe practices., to compensate an injured party through negligence, and to exact corrective justice

It is important to remember that a claim filing or a payment being made on a potential claim is **not** an admission of guilt. Often insurers or hospitals will make a payment to avoid publicity even if there is no evidence of malpractice on behalf of the nurse or institution.

Who Malpractice Affects

The National Practitioner Data Base (NPDB) conducted a study from September 1, 1990 through December 31, 2001 of 3,615 malpractice payments (Croke, 2003). The majority of the occurrences took place in an acute care hospital, with the remaining occurring in long-term care facilities, psychiatric hospitals, home health care agencies and individual practices. The study looked at four classes of nurses.

• Non-specialized nurses incurred 2,311 of the payments or 63.9% of the claims. The claims involved monitoring, treatment, medications, obstetrics and surgery. Adverse drug events were, by far, the most common error. These adverse events made up 30% of all the cases in this class (Giordano, 2003). Errors included the wrong dose, the wrong drug, wrong administration method and failure to assess for side effects and toxicity (Giordano, 2003).
• Certified Nurse Anesthetists incurred 820 payments or 22.7% of the claims. All claims were directly related to the administration of anesthesia or patient monitoring during anesthesia.
• Certified Nurse Midwives incurred 296 payments or 8.2% of claims. All claims were directly related to obstetrical issues.
• Nurse Practitioners incurred 188 payments or 5.2% of all claims. These claims were mainly involved diagnosis or treatment.

The study found that the more skilled the nurse, the lower the incidence of malpractice. The NPDB concluded that nurses with a great degree of specialization and training were less likely to become a defendant in a malpractice suit.

Contributing Factors

There are themes that are prevalent in the documentation of negligence or malpractice issues. The negligent behavior is often described using terms such as failure to, lack of, incomplete, ineffective or improper (Croke, 2003). There are factors that contribute to the increase in malpractice claims against nurses.

• Nurses often find they must delegate more tasks to unlicensed assistive personnel. This can be due to labor shortages or insurance requirements. When delegating patient care to an LPN, STNA or PCA, the nurse must be sure that the task is not beyond the scope and practice of the individual who will be performing the task (Reising & Allen, 2007).
• Insurance companies often have strict rules regarding the number of days a patient can remain in an acute care setting. As a result, some patients are discharged despite the need for continued acute care. Nurses can be sued for failing to make the appropriate referrals or for failing to provide adequate care (Croke, 2003).
• The continued downsizing of hospital staff forces nurses to work longer hours and have an increased patient load. This combination can make it easier for errors to occur.
• Healthcare technology continues to become increasingly complex. While technology can make patient monitoring easier, it also requires more technical knowledge on the part of the nursing staff. Nurses must be aware of the capabilities, limitations and safety features of the equipment used with each patient and make sure equipment is used in a safe and appropriate manner.
• Nurses in acute care hospitals are given increased autonomy and responsibility. Without adequate training, this makes for a greater risk of errors and liability.
• Patients are becoming better-informed consumers regarding healthcare. The increases the probability that they will deem the care they receive to be inappropriate or insufficient (Croke, 2003).
• The expanded legal definitions of liability hold all healthcare professionals to higher standards of accountability (Croke, 2003).

While factors such as insurance requirements and staffing are often beyond the control of nursing staff, nurses can take steps to ensure they are current on equipment and are taking steps to document the care provided to each patient. In fact, documentation often ends up being the lynch pin in a malpractice suit.

Categories of Negligence

There are six distinct categories of negligence that results in lawsuits against nurses (Croke, 2003).

Failure to Follow the Standard of Care

Failure to follow the standard of care will fall into one of three categories:

- The failure to perform a complete admission assessment or design a care plan.
- The failure to adhere to standard protocols or the institution's policies and procedures.
- A failure to follow physician's orders.

The standard of care rules are designed to protect all patients from substandard care. Acceptable care is "the ordinary and reasonable care required to ensure that no unnecessary harm comes to the patient." (Croke, 2003) As previously mentioned, the standard of care is derived from JCAHO, state nursing boards, professional organizations and hospital policy.

Failure to Act as a Patient Advocate

Failing to act as a patient's advocate combines both legal and ethical issues. Nurses are required to know both. Failure to advocate on behalf of one's patient includes:

- The failure to question discharge orders as a patient's condition warrants.
- The failure to question incomplete or illegible orders from a physician.
- The failure to provide a safe environment for the patient.

The American Nursing Association's (ANA) issued the *Code of Ethics for Nurses with Interpretive Statements* to provide "a framework for ethical decision making and defines the role of the nurse as a patient advocate." (Croke, 2003) Nurses are often charged with caring for patients whose healthcare decisions may conflict with their own ethical beliefs. Nurses must suspend their own beliefs and act on behalf of their patient.

Failing to advocate for a patient is an increasingly common element in malpractice suits filed against nurses (Reising & Allen, 2007). Most relate to the failure to challenge a physician's order. Nurses are chiefly responsible for the clinical monitoring of their patients. If they notice changes and the physician's order would tend to worsen that condition, nurses must advocate on behalf of their patient by discussing the order with their nursing supervisor or the physician. This can be difficult given that many physicians use intimidation tactics with nurses to ensure compliance. Alternately, hospital administration may prevent nurses from being able to fully advocate on behalf of their patients (Reising & Allen, 2007). Nurses must work within these parameters to ensure they are continually acting in the best interests of their patients.

Failure to Use Equipment in a Responsible Manner

The Safe Medical Devices Act of 1990 requires all medical device-related adverse incidents that result in the serious illness or death of a patient to be reported to the manufacturer and the FDA within ten working days (Croke, 2003). Nurses must work to keep their knowledge of medical equipment up to date by attending in-service training and asking questions if they are unfamiliar with a particular function.

Failure to use equipment responsibly has four basic components.

- Failure to follow manufacturer's recommendations for the equipment and its use.
- Failure to check the equipment for safety prior to its use.
- Failure to place the equipment properly during treatment.
- Failure to educate oneself as to how the equipment functions.

By simply staying up to date on medical equipment used in their day to day practice, nurses can avoid accusations of malpractice by failing to use equipment properly. If a nurse is unsure of how to use a particular device, they must notify their supervisor and receive assistance in using the equipment.

Failure to Assess and Monitor

Nurses must accurately assess and monitor their patients on the schedule stated in the care plan or in the physician's orders. Any changes in the patient's status must be reported immediately to the physician. Failure to assess and monitor a patient includes the following items.

- The failure to complete a shift assessment.
- The failure to implement a plan of care.
- The failure to observe ongoing progress of the patient whether it is stable, improving or deteriorating.
- Failure to interpret patient signs and symptoms of distress.

Simply following unit protocol or assessing vitals every four hours is not good enough. If a patient's condition needs closer monitoring, the nurse is responsible for documenting the changes, following up with the patient as needed and reporting these changes to the attending physician (Reising & Allen, 2007). The best way to assure whether assessment and monitoring meet the requirements is to ask what a reasonably careful and prudent nurse would do in the same situation, then follow that course of action (Reising & Allen, 2007).

Failure to Communicate

Failure to communicate includes both the patient and the attending physician. It is closely tied to assessment and monitoring. Since health status changes can be either sudden or gradual, nurses are generally the first to see the changes and are responsible for taking action by communicating these changes. Failure to communicate encompasses the following.

- The failure to notify a physician in a timely manner as the changes in a patient's condition warrants.
- The failure to listen to a patient's complaints and act on them.
- The failure to communicate effectively with a patient.
- The failure to seek higher medical authority for treatment.

Some patients are difficult to communicate with. They can have a physical impediment such as hearing loss as well as mental or emotional barriers to effective communication. A patient with who is constantly complaining to staff can be difficult to talk with, however nurses need to be certain they are listening to the patient's complaints and acting on them. Nurses must also keep the lines of communication with family open in these cases. Family members can be a nurse's greatest ally or enemy in these situations.

Timeliness in communicating with the physician is vital. Both the change itself and the accuracy of the communication regarding the change in status given to the physician must be accurate and timely to avoid failures in communication (Croke, 2003).

Failure to Document

From the time one enters nursing school to the time of retirement, nurses are continually reminded about the importance of documentation. Documentation is the single best element to fight allegations of negligence and malpractice. The purpose of documenting is to primarily communicate patient information to providers. Documentation must accurately reflect the nursing process and show evidence of the nursing assessment, plan for nursing intervention, implementation and evaluation of planned interventions and the patient's response to these interventions (Croke, 2003).

Failure to document encompasses the following areas.

- The failure to document the patient's progress and response to treatment.
- The failure to document any injuries the patient incurs while in the nurse's care.
- The failure to document pertinent nursing assessment data such as allergic reactions to medication.
- The failure to document any physician orders.
- The failure to document information from the doctor received via a telephone conversation.

Failure to document leaves other nursing staff and members of the patient's healthcare team at a disadvantage when creating a care plan for the patient. It's important to remember that "[I]n the eyes of the court, if something wasn't documented, it wasn't done." (Reising & Allen, 2007). All documentation should follow FACT; Factual, Accurate, Complete and Timely.

Role of Documentation

In medical negligence cases, “discrepancies include disputes over symptoms complained of, signs that did or did not exist and care or treatment that was received” are all aspects of determining negligence ((Giordano, 2003). Judges and juries use documentation to obtain facts about the case presented. Juries will not assume a patient received care if there is no record of that care. “Each record is unique in that it is contemporaneous to the events and is usually created at a time when there was no interest in a legal outcome.” (Giordano, 2003). Documentation is the sole record of the care provided and is the best evidence that the patient was provided with appropriate care (Ferrell, 2007).

Documentation must be specific as to who did what when and how it was done (Ferrell, 2007). Patient assessments generally occur every 2-4 hours unless otherwise ordered or warranted. Any gap in the documentation of several hours will raise a red flag with the jury. Nurses must document even if there is no change in status. When in doubt, document.

Avoiding Malpractice

Aside from documenting all care, utilizing nursing processes and critical thinking skills in the assessment, needs/problem identification, planning, implementation and evaluation of each patient. In each step, reflect on actions with critical thinking to decrease the risk of an adverse medical event (Giordano, 2003). Maintaining competencies in skills is vital to avoiding malpractice. Utilize in-service events and continuing education to ensure skills are current. Knowing the scope of one’s license and staying within the bounds of that license should be incorporated in daily practices.

Maintaining an open, honest and respectful relationship with staff, patients and family members is, by far, the best way to avoid malpractice. When communicating with patients and their families, nurses must refrain from sharing negative opinions the medical staff, avoid diagnosing illnesses and maintain patient confidentiality under HIPAA regulations. If a patient and/or family members believe that a nurse is listening and truly advocating on behalf of his/her patient, they are far less likely to be sued for malpractice. Maintaining a therapeutic relationship based on trust and placing the care of the patient in the forefront is vital.

Conclusion

There is no doubt that society is becoming more demanding of healthcare providers, particularly nursing staff. As the demands on a nurse's time increase so do the odds of being named in a malpractice suit. As the front line caregiver in acute care settings, nurses are squarely in the crosshairs of a malpractice lawsuit. Documentation, open communication and maintaining competency can go a long way in helping nurses avoid lawsuits. While there are no guarantees, solid and complete documentation is a nurse's advantage in disproving a charge of malpractice.