

# Duty of Care; Standard of Care

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# Negligence Law: Analytical Framework

Plaintiff must prove on balance of probabilities:

- Defendant owed Plaintiff a duty of care;
- Defendant breached standard of care required by law;
- Defendant's breach caused Plaintiff injury;
- Injuries not too remote in law;

Defendant has burden of proving any defences.

# Duty of Care

- M.D.-patient relationship = well recognized category in law in which duty of care owed;
- Duty of care includes both avoiding acting in ways that harm patient + taking affirmative steps to protect patient;
- Scope / Extent of duty of care more likely to be contentious than its existence.

# Standard of Care

- An obligation to take reasonable care to avoid risk of foreseeable harm to patients;
- Held to standard of reasonably competent member of their profession (eg. physicians; lab technologists);
- Higher degree of skill & care expected of specialists;
- Not a standard of perfection.

# Establishing Breach of the Standard of Care

- Expert evidence (i.e. professional judgment) usually required to determine;
- Unless standard practice is fraught with “obvious risks” such that anyone can judge (rare);
- If practice is followed by responsible & competent body of practitioners, even if in minority, will not constitute negligence.

# Errors in Judgment

- Errors in judgment do not necessarily equate with negligence;
- Unless the error is one that a reasonable professional would not have made in similar circumstances;
- Error in judgment & negligence can be difficult to distinguish.

# Timing of Assessment

- Standard of care is judged on basis of state of knowledge at the time of the allegedly negligent act or omission, not on basis of later advances.

# Duty of Care Owed by M.D.'s

- Common but non-exhaustive aspects: duty to attend, diagnose, refer, treat & instruct; depending on circumstances, may include duty to reconsider diagnosis and to re-test as needed;
- M.D.'s and others can rely on each other to act non-negligently.

# Duty of Disclosure

- An aspect of duty of care owed when health professional has caused a patient harm, if reasonable person in plaintiff's position would want to know (& broader in some instances);
- Bases: (i) duty to obtain informed consent;  
(ii) fiduciary nature of relation with patient;  
(iii) duty to disclose risks, and warn patient

# Laboratory Testing & Standard of Care

- Standard of care will be affected by nature of lab testing and any limits on its reliability;
- *Penney v. East Kent* analysis (U.K., 2000): (1) what did the tests show?  
(2) Could a screener exercising reasonable care at the relevant time fail to see what the tests showed?  
(3) Could reasonably competent screener, aware of what a competent screener would observe, treat the results / tests as negative?

# Hospital / Health Authority Duty of Care & Standard of Care

- Direct liability: Plaintiffs must prove all the elements of a negligence action;
- Responsibilities include selecting competent staff and monitoring competence, and establishing safe systems (broad scope);
- Can be liable for acts & omissions of hospital committee.

# Hospital / Health Authority Vicarious Liability

- **Vicarious liability:** imposed when one person or entity is responsible for the torts of another because of relationship between them. No need for wrongdoing by person held vicariously liable. Example: employer / employee.
- Generally not imposed on principal & independent contractor (eg. hospital & non-employed M.D.); some indications from other areas of law of openness to change.

# Hospitals, Health Authorities and Non-Delegable Duties of Care

- Imposed when nature of Defendant's relationship with Plaintiff is such that duty of care cannot be met by delegating performance to another; duty is to ensure that care is taken;
- Unclear which duties are non-delegable, and scope of such duties.

# Linking Patient Safety, Systemic Analysis and Legal Frameworks

- Need to take into account in analysis: (i) how care is delivered; (ii) role of systemic factors in how errors occur;
- Significance of factors at “sharp end” and those at “blunt end” of system for care delivery;
- Role of legal system in concentrating attention on individual actors and isolated events.

# Looking forward

- Legal analysis can accommodate multiple causes (and hence, systemic analysis);
- May more accurately reflect factors that contributed to injury, allowing better solutions;
- Importance of ensuring genuine accountability, both individual and systemic, and determining how best to do so, to improve patient safety.