

# ***Anatomy of a Lawsuit: The Process of Litigation in Medical Malpractice Cases***

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## **Objectives**

At the end of this presentation, the participant will be able to:

1. list the steps in the litigation process,
2. identify situations in the care setting that can put the nurse at risk for liability claims, and
3. explain the nurse's role during deposition testimony from the perspectives of fact witness, defendant, and nursing expert.

## **I. Introduction**

Nurses are increasingly being named in medical malpractice cases. Understandably, this can be a stressful and overwhelming experience. An understanding of the legal process can help alleviate some of the stress and anxiety associated with being involved in the litigation process. In this lecture we will discuss current legal issues affecting perinatal, neonatal, and pediatric nursing practice, and will explore the nurse's role during deposition testimony from the perspectives of fact witness, defendant, and nursing expert.

## **II. Definitions**

### **A. Nursing**

*"Nursing is the protection, promotion, and optimization of health and abilities, prevention of illness and injury, alleviation of suffering through the diagnosis and treatment of human response, and advocacy in the care of individuals, families, communities, and populations."*

Nursing's Social Policy Statement, 2003

### **B. Professional Registered Nurse**

*"A registered nurse (RN) is licensed and authorized by a state, commonwealth, or territory to practice nursing. Professional licensure of the healthcare professions was established to protect the public safety and authorize the practice of the profession...The registered nurse's experience, education, knowledge, and abilities establish a level of competence. The registered nurse is educationally prepared for competent practice at the beginning level upon graduation from an approved school of nursing...and qualified by national examination for RN licensure."*

American Nurses Association, 2004

C. Advanced Practice Registered Nurse

*“Advanced practice registered nurses are RNs who have acquired advanced specialized clinical knowledge and skills to provide health care. These nurses are expected to hold a master’s or doctorate degree. They build on the practice of registered nurses by demonstrating a greater depth and breadth of knowledge, a greater synthesis of data, increased complexity of skills and interventions, and significant role autonomy.”*

American Nurses Association, 2004

D. Licensure and Certification

- Licensure establishes knowledge in a certain field
- Requires graduation from an accredited program in nursing and successful completion of a state-administered national licensing exam
- Certification is the recognition by a non-governmental body that the nurse has demonstrated specialized knowledge and competence in a specific area

E. Nursing Standard of Care

- The minimum criteria by which nursing proficiency is defined in the clinical area
- Legally, what a reasonably prudent nurse would have done in the same or in similar circumstances
  - Reasonably Prudent
  - Similar Circumstances
- Nursing Standard of Care is established according to:
  - State and Federal regulations
  - Institutional policies, procedures, and protocols
  - Testimony from expert witnesses
  - Standards of professional organizations
  - Current professional literature

F. Nursing Malpractice

- Defined as negligence in a professional act whereby the nurse’s actions fall below the standard of care
- Four elements must exist:
  - The nurse had a duty to the patient
  - There was a breach of that duty
  - Harm or damages occurred to the patient
  - That harm or damage occurred as a result of the breach (also known as “proximate cause”)
- It is the plaintiff’s attorney who must prove these four elements exist in a case

G. Duty

- In the case of a perinatal/neonatal intensive care nurse, the following imply duty to the patient:
  - Employment by a health care facility
  - Assignment to the specific patient care setting
  - Direct or supervisory care over the patient

H. Breach of Duty

- Established by evidence of deviation from the expected standard of care through an action or omission of care

I. Negligence

- The failure to use reasonable care
- A careless act or omission by an individual that results in harm to the person to whom the caregiver has a duty

J. Liability

- The responsibility and accountability of nurses for the care they give to patients
- Liability implies legal responsibility for harm caused to the patient
- The harm must result from the specific act, or there is no legal liability

K. Proximate Cause

- Violation of the standard of care must be causally tied or connected to the actual injury

L. Statute of Limitations

- The Statute of Limitations is a time limit for malpractice suits—the allowable time after an injury has occurred in which the plaintiff may file suit
- Determined by state laws; generally 2 – 4 years from the date the injury was discovered
- In the case of minors, the statute of limitations is often added to the age of majority, which allows for filing suits up until the child reaches the age of 18 or 21
- In cases of extreme brain injury, there have been court rulings that the age of majority is never reached
  - *in such cases, there may be no statute of limitations*

### **III. Legal Climate in Recent Years**

#### **A. Medical/Legal Climate in the 1980s – 1990s**

- Nurses rarely named individually in law suits
- Common defense for nurses was that they were “just following orders” and couldn’t be held liable

#### **B. Medical/Legal Climate Today**

- Nursing as an independent profession
- Nurse as employee of a hospital or institution

#### **C. Trends Malpractice Cases**

Top states for OB malpractice litigation

- Illinois
- New York
- DC
- Pennsylvania
- New Jersey
- Delaware

#### **D. High Costs of Legal Liability in OB/NICU/Pediatrics Claims due to:**

- The costs of healthcare are high for an affected newborn or child with a normal life expectancy
- The longer statute of limitations for minors may allow for additional claims to be made
- Sympathy of the jury often goes toward the family and infant rather than the hospital

### **IV. Legal Issues Affecting Perinatal/Neonatal/Pediatrics Nurses**

#### **A. Common Areas of Litigation for Perinatal/OB Claims**

- Failure to assess, failure to monitor, failure to document adequately
- Failure to perform appropriate telephone triage
- Failure to appropriately interpret fetal monitoring strips
- Improper use of induction agents
- Improper management of shoulder dystocia
- Failure to initiate a Cesarean Section in a timely manner

B. Common Areas of Litigation for NICU Claims

- Intravenous complications (infiltration, infection)
- Brain damage
- Medication errors
- Falls (infant dropped)
- Failure to recognize and treat hypoglycemia
- Circumcision without consent
- Infant given the wrong breast milk
- Detached retinas
- Death

C. Common Areas of Litigation for Pediatrics Claims

- Intravenous complications (infiltration, infection)
- Brain damage
- Medication errors
- Falls
- Infant given the wrong breast milk
- Death

D. Other/General Allegations against the Nurse

- Failure to obtain informed consent
- Failure to initiate/perform appropriate resuscitation
- Failure to recognize/treat neonatal infection
- Failure to notify the physician/APN of change in the patient's condition
- Delays in treatment
- Failure to act
- Failure to possess proper knowledge and competency
- Did not follow proper procedures
- Negligence by staff
- Improper use of equipment
- Failure to follow the chain of command

**V. The Process of Litigation in Medical Malpractice Cases**

A. Allegation of Harm

- The patient, parent, or legal guardian is dissatisfied with the outcome of care provided to the patient

B. Seeking Legal Counsel

- A plaintiff's attorney is consulted by the patient, parent, or legal guardian to evaluate if the allegations have merit

- The plaintiff's attorney must ascertain if the legal elements of negligence are present in order to proceed with the lawsuit:
  - The nurse had a duty to the patient
  - There was a breach of that duty
  - Harm or damages occurred to the patient
  - That harm or damage occurred as a result of the breach
- If these four elements are present, the attorney will file the complaint

#### C. Review by Medical Experts

- Medical records are obtained from the health care institution and providers involved in the case with the patient's/parent's/legal guardian's consent
- Medical experts are consulted to help determine if a breach has occurred and the lawsuit has merit

#### D. Initiation of a Lawsuit

- If the plaintiff's attorney, along with the advice of medical experts, finds that the medical records indicate that the legal elements of negligence are present, a complaint is filed in the appropriate court of law
- The defendant(s) is (are) served a copy of the complaint
- The insurance carrier is notified by the defendant(s)/health care facility
- The defense lawyer is notified by the defendant(s) and/or the insurance carrier

#### E. Discovery Period

- Consists of both sides gathering information about the circumstances surrounding the case
- Depositions are taken during this process
- This period of time allows both sides to prepare for trial, should it come to that point
- The discovery period can take months, even years to complete
- Often leads to settlement in the case

#### F. Settlement or Trial

- Settlement can occur at any time, up to and including trial and/or jury deliberation
- Trial is the formal process where the case is presented before a judge and a jury
  - Includes testimony from fact and expert witnesses
  - May include testimony from actuaries to establish damages

#### G. The Verdict Stage

- After all evidence is presented, the jury decides which side presented more favorable evidence
- A judge may reverse the jury's judgment (rare)

## H. The Process of Appeal

- Verdicts may be appealed
- Appellate courts often will rule on issues of law
  - For example—whether proper procedure was carried out during the trial

## VI. Deposition Testimony

### A. Definition and Purpose

- A deposition can be thought of as a “fact-finding mission”
- It is a formal legal proceeding that includes oral testimony under oath led by the opposing attorney
- The attorneys for both the defense and the plaintiff seek to establish the facts of the case from the perspectives of both fact witness and medical experts not directly involved in the case
- The goal is to gather the facts of the case and put them on the record
- The deposition is conducted in the presence of a court reporter and the attorneys for both the plaintiff and the defense
- Attorneys representing other parties involved in the case may also be present
- Although a judge or a jury are not present, the deposition is conducted in the same manner as any legal proceeding
- The deponent is sworn in under oath and must answer truthfully
- Answers given at deposition are recorded in the legal record and may be presented during trial

### B. The Role of the Nurse Called to Testify as a Fact Witness

- A nurse may be contacted by a claim representative or by an attorney as a potential witness who was involved in the patient’s care but is not being named as a defendant
- Fact witnesses have first-hand knowledge of the facts of a case
- Fact witnesses are able to testify only as to what was directly observed in the clinical situation

### C. The Nurse as Defendant in a Claim

- A nurse also may be contacted by a claim representative or by an attorney as a named defendant in the case
- The first step is to contact the Risk Management department of the facility where the alleged incident occurred
- The initial investigation will focus primarily on documentation in the medical record, but will also include the defendant’s recollection of the case, independent of what is documented in the medical record

#### D. The Role of the Nurse Called to Testify as an Expert Witness

- The role of the expert witness nurse is to evaluate, analyze, and give informed opinions about nursing care in a case
- Expert witnesses help educate the court about matters that are not generally known to laypeople
- Two key elements of a good expert are honesty and objectivity
- Expert witnesses are qualified by their knowledge, training, and expertise to offer opinions on a case based on the standard of care
- Sources of written standards of care may include:
  - Nurse practice acts, accreditation and licensing standards
  - Federal and state laws and regulations
  - Textbooks and other publications
  - Facility or agency policies and procedures
  - Equipment or product information
- Qualifications of an Expert Witness Nurse
  - The most qualified expert witness is one with a solid background in his/her area of clinical practice
  - Though no set standard exists, a minimum of two years' experience in the specialty area is a good guide
  - Expert witnesses may only testify to the standards to which they, themselves are qualified to practice
- Certification as a Legal Nurse Consultant
  - Formal education or training as a Legal Nurse Consultant (LNC) is not necessary, although several programs and classes do exist
  - Since 1998, certification as an LNC is available through the American Legal Nurse Consultant Certification Board (ALNCCB)
  - Successful completion of the certification exam allows the nurse to use the designation *LNCC*
- Fees for Services
  - Generally, expert witnesses charge an hourly rate for their work based on years of nursing experience and training
  - Advanced degrees or specialty certification add to the credibility of an expert witness nurse and should be considered when establishing fees

#### E. Deposition Basics

- ***Be prepared***—read all the information provided to you *before* you sit for a deposition. Make sure you know the case and what the issue is that has resulted in the lawsuit.
- ***Be professional***—that means not only conducting yourself in a professional manner, but presenting yourself in that way as well. Excellent communication skills, both written and verbal, are a must.
- ***Be calm***—you need to remain poised under pressure. Depositions can create much anxiety—whether you are the nurse involved in the lawsuit or you just happened to be working that day.

## **VII. Tips for Successful Deposition Testimony**

- Be prepared
- Be on time—better yet, be early
- Relax
- Listen carefully to the questions being asked
- If you can't remember the question, ask that it be repeated before answering
- If you don't understand the question, ask that it be rephrased before answering
- Take your time answering questions
- Answer only the question being asked
- Refer to the medical record when needed
- Know what you know
- Know what you don't know
- Say what you mean
- Mean what you say
- Don't argue with the attorney
- Don't take things personally
- If you need a break, ask for one
- Ask to review the transcripts once they are available

## **VIII. Malpractice Insurance for Nurses**

### **A. Claims-made**

- Pays damages only for claims brought during the policy period
- Even if the event occurred many years ago, the claim is covered

### **B. Occurrence**

- Provides for claims brought many years after the event occurred, even if the nurse no longer carries the insurance

### **C. Tail policy**

- Recommended once a claims-made policy is no longer carried

#### **IV. The Nurse's Role in Risk Management**

- A. Identify Areas of Risk
- B. Mechanisms in Place to Control or Limit Risk
- C. Ongoing Review and Assessment
  - Know and follow your state's nurse practice act and your facility's policies and procedures
  - Stay current in your field of practice
  - Assess your patients in accordance with policy and their physicians' orders and, more frequently, if indicated by your nursing judgment
  - Promptly report abnormal assessments, including laboratory data, and document what was reported and any follow-up
  - Follow up on assessments or care delegated to others
  - Communicate openly and factually with patients and their families and other health care providers
  - Promptly report and file appropriate incident reports for deviations in care

*From: <http://www.nursingcenter.com/upload/static/403753/ch03.html>*

#### **X. Documenting in the Medical Record**

- A. Key Elements of Nurse Charting
  - Clear, Complete, and Accurate
    - Document according to hospital policy
    - Use proper grammar
    - Texting-type of documentation is unacceptable
    - Watch for spelling mistakes
    - Watch for math errors
  - Timely
    - Should be contemporaneous
    - Try not to chart everything at the end of your shift
    - Never chart prior to assessing the patient or providing care
  - Addenda
    - Try to avoid if possible—do it right the first time
    - Clearly label as a late entry
    - Date and time when making the addendum
    - Be consistent with previous charting

B. Correcting Charting Errors

- Follow your hospital's policy
- Use of the word "error"
- Know proper methods for paper and EMR

C. Computerized Charting

- Protect your sign-on code
- Be aware of hospital policies regarding charting
- Should help with legibility issues
- Know how much you can deviate from pick-lists and narratively chart

D. Two Main Forms of Documentation

- Charting by Exception
  - Charting based on standards, protocols, and care plans
  - Negative responses do not need to be charted
  - May not be adequate for non-routine situations or with unanticipated outcomes
  - Must appropriately reflect the patient's status and nursing care rendered
- Charting by Inclusion
  - Provides a more complete picture of the patient
  - More time consuming than charting by exception
  - Must appropriately reflect the patient's status and nursing care rendered
- Consider a Narrative Note When There Has Been:
  - Significant change in patient's condition
    - Vital signs
    - Mental condition
  - Unplanned transfer to higher level of care
  - Physician contact regarding condition
  - Physician contact regarding critical result
  - Patient/family non-compliance
  - Refusal of treatment
  - Patient injury or fall

E. Incident Reports, Variances, Situation or Unusual Occurrences

- Unfavorable deviation of expectations involving patient care
- Must match the medical record
- May or may not be discoverable
- Used for quality improvement
- Serve as indicators of potential problems

F. Common Pitfalls in Charting

- Failure to Document Care
- Failure to Document Vital Signs or Other Assessment Data
- Failure to Document Discontinued Medications or Treatments
- Failure to Document Informed Consent
- Failure to Document Physician Notification
- Incomplete Records
- Inconsistent or Erroneous Entries
- Unwarranted Conclusions about the Patient's Condition
- Recreating or Reconstructing the Medical Record
- Failure to Document Treatment of Pain or Response to Treatment
- Improper Disclosure of Confidential Patient Information

G. What Not to Chart

- Personal opinions
  - Information not related to the patient's care, including the fact that a UO was filed
- Descriptions of conflicts between nursing staff and physicians regarding management decisions or interpretation of data

H. What is Acceptable to Chart

- When technology/equipment is not available and cannot be utilized even though it was ordered
  - Requires a statement that the ordering physician was notified, what alternatives are available, what will be done until it becomes available, and the time when it does become available and put into use
- Invocation of the chain of command
- Adverse or unexpected outcomes or events
- The truth

**XI. Use of Social Media**

- Be aware of and consistent with your hospital's policies
- Maintain professional relationships with your patients and work colleagues at all times
- Consider HIPAA regulations when posting pictures or information about your job or your patients
- Do not access personal social media while on duty

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