

LAW & MEDICINE

What Every Physician Should Know

Victor R. Cotton, MD, JD

Volume 1, Module 1



THE DOCTOR-PATIENT RELATIONSHIP

All malpractice related liability begins and ends with the doctor-patient relationship. The importance of this statement can be more fully appreciated by starting with an overview of the medical malpractice system.

Technically speaking, malpractice is nothing more than negligence that occurs in the performance of a profession. And, negligence is a very simple area of the law. In order to sue someone successfully for negligence, or to sue a physician for malpractice, the plaintiff (i.e., the patient), must prove four things:

- Duty Owed - the existence of an obligation or responsibility
- Duty Breached - failure to deliver on the obligation
- Causation - a link between breach and damage
- Damages - loss of bodily function, lost wages, medical bills, pain and suffering

INSIDE THIS ARTICLE

- 1 GENERAL OBLIGATION TO OUR FELLOW MAN
- 2 CREATION OF THE DUTY
- 6 EXCEPTION TO THE RULE
- 7 EXTENT OF THE DUTY
- 7 ENDING A DOCTOR-PATIENT RELATIONSHIP
- 10 TERMINATION DILEMMAS

Every medical malpractice lawsuit is about the same four elements and the plaintiff must prove each of them in order to win. The corollary is that a physician who has been sued for medical malpractice (and thus becomes the defendant) must defeat any one of the four elements in order to prevail.

Although there are technically four elements, the whole system actually hinges on the first element, the duty owed. For, once the duty is established and its scope defined, it is relatively easy to assess whether it was breached and whether this caused the patient's injuries.

The first element of negligence, the duty owed, is the only element that matters at the bedside.

The duty owed element, is thus the key to the whole system. It is the element on which malpractice attorneys focus most of their attention, and it is the only element that matters to a clinician. In fact, a clinician who understands the duty owed element does not need to worry about the other three elements.

GENERAL OBLIGATION TO OUR FELLOW MAN

The American legal system does not impose any general duty upon us with respect to helping our fellow man. In other words, the mere fact that another person happens to be in need, whether he is ill, has been injured, or simply has a

flat tire at the roadside, does not create an obligation for a passerby to help him. This is true everywhere in America, and it is true even if assistance could be rendered easily and would avert great loss.

Case #1

Dr. A is driving his car. Along the highway, he comes across a motor vehicle accident. The accident has just occurred, there are no emergency vehicles on the scene and it is obvious that people have been seriously injured. And, the events take place in a state where Dr. A is licensed to practice medicine.

Analysis

Dr. A is not required to stop or assist in anyway, and he cannot be successfully sued if he chooses to not do so. The law is clear: Simply being a physician, being available, and being in the area of persons who are in need does not create a duty to help those persons. This is true even if Dr. A is a licensed, board certified trauma surgeon and the persons at the roadside are in great need.

Simply being a physician, being available, and being in the area of persons who are in need does not create a duty to help those persons.

Although the American Medical Association's position is that physicians have an ethical duty to assist whenever feasible in such a situation, this does not create a legal duty. Ironically, many physicians will no longer place a license plate on their car that indicates they are a doctor. The concern is that a license plate which displays the letters "MD" will alert persons at the scene of an accident that the driver is a physician, and thus make him the target of a lawsuit. But, this concern is misplaced. Simply being a physician does not create an obligation, regardless of one's license plate.

An additional concern regarding motor vehicle accidents is the physician's obligation under a Good Samaritan Law. The Good Samaritan Laws vary slightly from state to state, but they all share the same basic elements:

- They do not require physicians to assist in any way. Physicians remain free to choose whether to become involved;
- They apply only if the physician's involvement is voluntary (as opposed to being paid to be in attendance);
- They apply only if the situation is an emergency (and not merely a routine medical problem); and,
- They provide an added layer of legal protection, but

the physician can still be sued for malpractice (and thus it remains legally safer not to become involved in the first place).

Good Samaritan laws do not require a physician to assist in any way.

In short, a physician who voluntarily chooses to assist at the scene of an emergency (i.e., be a Good Samaritan) will almost always receive the protection afforded by the Good Samaritan laws. However, from a legal perspective, it is safer to not become involved at all. Of course, for those of us who feel morally compelled to assist, the Good Samaritan Laws provide a valuable protection.

CREATION OF THE DUTY

A legal duty does not exist simply because one person has a medical need and the other person is a physician. Something more is required. Specifically, the two of them must be in a doctor-patient relationship. It is the doctor-patient relationship that creates the critical link, the duty, and with it the first element of negligence.

In order to sue a physician successfully for medical malpractice, the patient must prove four elements, the first of which is duty owed. In order to establish this duty, all that the person must do is demonstrate that he was in a doctor-patient relationship with the defendant physician. Once he does that, the first element of a malpractice lawsuit is established. But, if he cannot do so, then he has no case against the physician.

Thus, if an individual is not a physician's patient, the physician does not (legally) owe the person anything with respect to his healthcare and that person can never successfully sue the physician for malpractice. But, once he becomes the physician's patient, the situation changes entirely.

The first critical question, then, with respect to potential malpractice exposure, is a simple one: Is the person in question actually your patient? The entire system hinges on the answer, which can be readily ascertained by application of the following legal principle: A doctor-patient relationship is established when a doctor has professional contact with a patient.

A doctor-patient relationship is established when a doctor has professional contact with a patient.

The contact can occur anywhere at any time. It can be in person or over the phone. It can be direct or via a mes-