

Malpractice Issues for Nurses and Advanced Practice Nurses: Navigating Stormy Waters



Christopher W. Blackwell, Ph.D., APRN, ANP-BC, AGACNP-BC, CNE, FAANP, FAAN

Associate Professor & Program Director

Adult-Gerontology Acute Care Nurse Practitioner Programs

Department of Nursing Practice

College of Nursing

University of Central Florida

Orlando, Florida

2021 Conference of the Florida Association of Enterostomal Therapists, Inc.

Anatomy of a Nursing Malpractice Suit

- Breach of Duty:
 - As the first element of a lawsuit, duty must be established before the remaining elements-breach, causation, and harm-can be analyzed.
 - In most cases, duty applies when nurses are rendering care to patients.
 - There are circumstances, however, in which it is not clear that a duty existed, and that must be litigated before the plaintiff can move forward.



Anatomy of a Nursing Malpractice Suit

- Breach of Duty:
 - **Duty of reasonable care.**
 - The duty of reasonable care refers to the obligation nurses have to adhere to current standards of practice.
 - This includes following organizational policies and procedures, maintaining clinical competency, and confining activities to the authorized scope of practice, as defined by the state practice act and organizational policies.
 - Nurses also have a legal duty to be fit for practice.
 - Fitness for practice refers to physical, mental, and moral fitness.
 - When nurses do not meet these professional obligations, they are said to have *breached* their duties to patients.



Anatomy of a Nursing Malpractice Suit

- Breach of Duty:
 - **Duty to rescue.**
 - Although health care professionals do not generally have a duty to render services to all people solely by virtue of holding a license, there are cases in which they do have an obligation to render assistance.
 - A legal duty can exist either through common law (court decisions) or through statute (laws enacted by the legislature).



Anatomy of a Nursing Malpractice Suit

- Breach of Duty:
 - **Duty to rescue.**
 - In common law, nurses have a duty to help someone if the nurse created the danger from which the person needs to be rescued—in other words, the nurse’s negligence created the dangerous situation.
 - the nurse started helping the person—in other words, other people might not intervene because they see that the nurse has already done so, requiring the nurse to finish the rescue once started.
 - the nurse has a *special relationship* with the person in need, creating a *special duty*.

A special relationship exists when one individual is dependent upon another. A parent–child or spouse–spouse relationship is a special relationship, as is an employer–employee relationship. These relationships impose a *duty to rescue*. Nurses who create dangers for people or who begin rendering assistance can be held to the special relationship duty to act. In the absence of that special duty, a nurse cannot be held liable. Although it can be argued that a nurse has a

Anatomy of a Nursing Malpractice Suit

- Breach of Duty:
 - **Implications for Nurses**
 - Duty can be established in many ways:
 - Nurses certainly have a duty of reasonable care for any patients to whom they provide care.
 - They should be aware that they can also have a duty in other circumstances.
 - Nurses should:
 - assume that on-call or supervisory responsibilities create a duty to patients, even in the absence of an express nurse-patient relationship
 - understand that a nurse-patient relationship is established upon acceptance of responsibility for a patient, whether the nurse has received an endorsement report in the workplace or volunteered services
 - know whether there is a duty to rescue statute in your state and, if so, what it demands (Florida has none)
 - adhere to organizational policies and procedures so as not to relieve employers of responsibility.



Anatomy of a Nursing Malpractice Suit

- Breach of Duty:
 - Once the plaintiff has established the first element in a malpractice suit-that the provider owed a *duty* to the plaintiff-she or he must then demonstrate that the provider *breached* that duty.
 - In a nursing malpractice case, the plaintiff must demonstrate that the nurse failed to comply with the duty of reasonable care.
 - Breach of duty is often referred to as *departure*.
 - Unlike in a simple negligence case, in which lay jurors can understand events without assistance, in a professional malpractice case, experts are needed to explain things that are outside the knowledge of non-nurse jurors.

Anatomy of a Nursing Malpractice Suit

- Breach of Duty:
 - When a lawsuit is filed and the defendant is served with the complaint, the defendant will answer that complaint, assert any defenses, and make certain demands.
 - One of those demands will be for the plaintiff to provide a *bill of particulars*.
 - A bill of particulars is intended to advise the defendant of the specific nature of the complaint.
 - It is not sufficient, for example, for the plaintiff to state that an ED failed to provide an adequate workup for a patient.
 - The plaintiff must explain to the ED which specific diagnostics should have been performed and were not.

Anatomy of a Nursing Malpractice Suit

- Breach of Duty:
 - Defendants must know the specific nature of the departure from standards that is being claimed.
 - In the interests of reducing frivolous lawsuits, some states require that a report written by an expert be filed along with the complaint.
 - That report must provide a fair summary of the expert's opinion about the standard of care and the manner in which she or he believes the provided care did not meet that standard.



Anatomy of a Nursing Malpractice Suit

- Evaluating Standards of Care:
 - To demonstrate that a nurse breached her or his duty to a patient, the plaintiff must prove that the nurse departed from acceptable practice.
 - The standard of practice must be established as a baseline in order to demonstrate how the defendant departed from it.
 - The standard of reasonable care is the skill and care ordinarily possessed and exercised by nurses, as defined by an expert witness.
 - Most states follow national standards in determining the standards of care, although "locality rules" in some jurisdictions require that the nurse's practice be evaluated by customary practice in the community.



Anatomy of a Nursing Malpractice Suit

- Evaluating Standards of Care:
 - The plaintiff must establish how a reasonably prudent nurse in the same or similar circumstances would act, then show that the defendant nurse departed from that standard of practice.
 - The plaintiff must claim that the nurse did something a reasonably prudent nurse would not have done (an act of *commission*) or failed to do something a reasonably prudent nurse would have done (an act of *omission*).
 - In reaching their opinions, experts review many materials, including organizational policies, to determine whether the nurse adhered to them.



Anatomy of a Nursing Malpractice Suit

- Expert Witnesses

- In a trial, jurors cannot evaluate the facts presented unless they understand the underlying scientific and technical aspects of those facts.
- To determine whether a nurse comported with the standards of practice, a juror needs to be assisted in understanding the specialized knowledge, skills, and training required for nursing practice.
- This takes the form of expert testimony.



Anatomy of a Nursing Malpractice Suit

- Expert Witnesses
 - **Qualifications for experts.**
 - To qualify as an expert in the field, the person testifying must have sufficient relevant experience, education, skill, and knowledge.
 - Because attorneys want to present expert witnesses whom they believe will be persuasive to the jury, the experts used in medical malpractice cases are likely to have advanced degrees in their fields, to have published in the literature, to have spoken at professional conferences, and to belong to professional societies.
 - Experts are also required to provide opinions based on information and substantial evidence, and not solely on speculation.

Anatomy of a Nursing Malpractice Suit

- Expert Witnesses
 - **Qualifications for experts.**
 - State Requirements:
 - Medical malpractice trials take place primarily in state courts, which means experts are deemed qualified on the basis of state requirements.
 - Some states only accept nurses as expert witnesses in nursing malpractice lawsuits involving nursing standards of practice and breach of duty.
 - Other states permit non-nurses (particularly physicians) to testify as experts in nursing care.



Anatomy of a Nursing Malpractice Suit

- Breach Implications for Nursing
 - Nurses defending themselves against allegations of professional malpractice must demonstrate that their actions conformed with acceptable standards of practice.
 - They must convince a jury that they acted as another reasonably prudent nurse would have in the same or similar circumstances.
 - The following are suggestions for doing so:
 - Adhere to organizational policies and procedures:
 - Work-arounds can create liability. The standard of practice is to conform to policies.
 - Failing to do so creates an assumption of departure from standards.
 - Maintain professional boundaries:
 - Personal relationships with patients or their families can be red flags for juries and might evidence departure from professional standards.
 - Ensure that properly trained interpreters are used and document who the interpreter was:
 - The use of ad hoc interpreters is unsafe practice and not consistent with acceptable standards of practice.
 - Maintain competency through continuing education, participation in professional conferences, membership in professional organizations, and subscriptions to professional journals.
 - Document in a manner that permits accurate reconstruction of patient assessments and the sequence of events, particularly notification of physicians regarding clinical concerns.

Anatomy of a Nursing Malpractice Suit

- Causation
 - Once the plaintiff has established that the provider owed a *duty* to the plaintiff, or to the patient on whose behalf the plaintiff is suing (here we will refer to either as the plaintiff), and that the provider *breached* that duty, she or he must then demonstrate that damages or harm were *caused* by that breach.
 - Plaintiffs cannot prevail by only demonstrating that providers departed from acceptable standards of practice.
 - They must also prove that such departures were the *cause* of any injuries.

Anatomy of a Nursing Malpractice Suit

- Causation
 - Plaintiffs must be able to link the defendant's acts or omissions to the harm for which they are seeking compensation.
 - This requires expert testimony from a physician because it involves diagnosis.
 - In determining whether the defendant's actions caused the plaintiff's injuries, several concepts are considered, and an understanding of certain terms is required.



Anatomy of a Nursing Malpractice Suit

- Causation

- Actual and Proximate Cause

- *Actual cause* is also referred to as *cause in fact* or *factual cause*.

- The determination of actual cause requires the use of a *but for* test, meaning that *but for* the defendant's departure from the standard of care, the injury would not have occurred.
 - If the injuries or harm could only have occurred because of the defendant's actions, those actions are the *actual cause* of those injuries or harm.



Anatomy of a Nursing Malpractice Suit

- Causation

- Actual and Proximate Cause
- *Proximate cause* is a legal concept referring to the primary cause of a plaintiff's injury, but not necessarily the *only* cause of that injury.
 - Some jurisdictions use a *but for* test to determine proximate cause, again meaning that the plaintiff would not have been injured *but for* the actions of the defendant, although the defendant's actions might not have been the initial or final actions in a cascade of events.
 - Other jurisdictions use a *substantial factor* test.
 - A substantial factor is one that contributes materially to the injury but is not necessarily the only factor that did.
 - Proximate cause requires foreseeability, and there can be more than one proximate cause of an injury.

Anatomy of a Nursing Malpractice Suit

- Causation
 - Standard of Proof
 - Unlike in criminal cases, in which the standard of proof is that elements of a prosecution must be proven "beyond a reasonable doubt," the elements of a malpractice lawsuit must be proven by a "preponderance of the evidence."
 - This means it is more likely than not that the nurse owed a *duty* to the patient, more likely than not that the nurse *breached* that duty, and more likely than not that the nurse's breach was the (or a) *cause* of an actual injury.
 - With causation, it must be more likely than not that the patient's harm was due to the nurse's departure from standards of care.
 - Expert testimony is required to demonstrate this with what is referred to as "medical certainty."
 - The expert's opinion cannot be mere conjecture but must be grounded in evidence, and the opinion must be expressed with reasonable certainty.

Anatomy of a Nursing Malpractice Suit

- Causation
 - Loss-Of-Chance-Doctrine
 - In some jurisdictions, a plaintiff can use a *loss-of-chance theory* to argue that a defendant's departure from standards of care reduced the likelihood of the patient's recovery or survival.
 - Expert testimony can be provided that the plaintiff lost the chance to avoid harm because of the defendant's negligence.



Anatomy of a Nursing Malpractice Suit

- Causation

- **Intervening act and superseding cause.**

- After a nurse breaches her or his duty to a patient by departing from acceptable standards of care, there may be new forces or actions-referred to as *intervening acts*-that, combined with the nurse's breach, cause an injury to the patient.
 - If the intervening act relieves the nurse of liability, it becomes a *superseding cause*.
 - To give an oversimplified example, if a nurse neglects to put up a side rail for a fall-risk patient, she or he has departed from the standard of care. If the patient falls, the nurse is liable.
 - If, however, while the side rail is down, another actor deliberately pushes the patient onto the floor, the nurse is no longer liable.

SUPERSEDING CAUSE

- A unforeseeable, intervening act that breaks the causal link between Defendant's act and Plaintiff's injury, relieving Defendant of liability.

Anatomy of a Nursing Malpractice Suit

- Causation
 - **Common knowledge exception.**
 - Although plaintiffs must generally prove causation through the testimony of an expert witness, an exception can be made when the information a jury needs can be understood by laypeople.
 - When the allegations of departures from the standard of care and causation of harm are within the common knowledge of lay-people, another evidentiary standard, the common knowledge exception can be used.
 - This exception is called *res ipsa loquitur*, which means "the thing itself speaks," or as we would say, "the thing speaks for itself."

Anatomy of a Nursing Malpractice Suit

- Causation

- **Common knowledge exception.**

- Unlike the malpractice elements duty, breach, cause, and harm, *res ipsa loquitur* is circumstantial evidence and requires a showing of three things:
 1. The injury the plaintiff sustained does not ordinarily occur in the absence of negligence.
 2. The defendant was in exclusive control of the instrumentality of harm.
 3. The plaintiff did not contribute to her or his own injury.
 - The classic illustration is a case in which a patient complaint alleges that a sponge from surgery has been left inside a patient.
 - In such cases the plaintiff can argue that:
 1. Sponges are not ordinarily left in a body cavity in the absence of negligence.
 2. The operating room team was in exclusive control of the sponges.
 3. The patient did not contribute to the sponge being left in her or his body.
 - In this situation, negligence could be inferred by the jury

Anatomy of a Nursing Malpractice Suit

- Causation

- **Foreseeability.**

- The *res ipsa loquitur* cases discussed also illustrate the concept of *foreseeability*, that one should predict the consequences of departing from standards of practice (the possibility of harm).
 - The foreseeability test in a nursing negligence case is whether the nurse could anticipate the risk of harm that any nurse of ordinary skill, care, and diligence would foresee under similar circumstances.
 - Foreseeability in a negligence claim against a nurse does not mean that the precise injury sustained by the patient was predictable.



Anatomy of a Nursing Malpractice Suit

- Causation

- **Implications for Nurses**

- Nurses can reduce their liability by adhering to professional standards and documenting their observations and communications.
 - It is important that usual and customary practice include the following:
 - Involve management when you have concerns about improper orders.
 - Engage the chain of command and pursue concerns to resolution, documenting precisely which people are notified and precisely at what times.
 - Charting by exception-charting only things that vary from the norm-also known as variance charting, does not provide sufficient evidence of compliance with the standards of care. Observations must be recorded to justify clinical decisions-and to provide an adequate defense, should you need one.
 - Adhere to organizational policies and procedures with the understanding that a failure to do so creates foreseeable harm to patients.

Anatomy of a Nursing Malpractice Suit

- Harm

- Once a plaintiff has established that a nurse departed from the standards of practice, she or he must then prove that the departure caused actual harm to the patient.
- The purpose of a civil lawsuit is to make a person whole or put that person in a place she or he would have been in without the injury.
- Specific personal harm must have been incurred to make compensation necessary.



Anatomy of a Nursing Malpractice Suit

- Harm
 - Nursing malpractice can harm patients by causing many types of injuries for which patients or their representatives seek compensation.
 - Injuries can be physical, emotional, financial, professional, marital, or any combination of these.
 - Physical injuries can include loss of function, disfigurement, physical or mental impairment, exacerbation of prior medical problems, the need for additional medical care, and death.
 - Economic injuries can include lost wages, additional medical expenses, vocational rehabilitation, the need for architectural changes to one's home, durable medical expenses, loss of earning capacity, the need to hire people to do things that the plaintiff can no longer do, and the loss of financial support.
 - Emotional injuries can include psychological damage, emotional distress, or other forms of mental suffering.

Anatomy of a Nursing Malpractice Suit

- Harm

- **Damages**

- Plaintiffs suing to be compensated for their injuries or harm are seeking *damages* from the defendants.
 - They are asking to be repaid for what they have lost.
 - Determining the specific amount they need can require the expert witness evaluation and testimony of a person trained in analyzing and evaluating medical costs, known as a life care planner, as well as the subjective determination of a jury.
 - Damages fall into several categories.

Anatomy of a Nursing Malpractice Suit

- Harm

- Damages

- **Compensatory (economic) damages.**

- Compensatory damages are also called *actual* damages.
- They are concrete damages that can be quantified and are also referred to as economic damages.
- They are intended to restore the plaintiff to the position she or he was in before being injured.
- Compensatory damages are objectively calculated to provide the plaintiff with the amount of money necessary to replace what was lost.



Anatomy of a Nursing Malpractice Suit

- Harm

- **Damages**

- **Noneconomic damages.**

- Noneconomic damages (those injuries not directly related to specific costs) are more difficult to quantify than economic damages.
 - They are more subjective and include such things as emotional distress; pain and suffering; loss of enjoyment of life; reputation damage; and loss of companionship, parental guidance, or consortium.
 - Juries don't have the benefit of an exact sum of money provided by an expert and must determine the required amount to provide redress for the claims.
 - Most medical malpractice lawsuits will seek both economic and noneconomic damages

Anatomy of a Nursing Malpractice Suit

- Harm
 - **Damages**
 - **Punitive (exemplary) damages.**
 - Punitive, or exemplary, damages are awards that are not related to the actual injury but are intended to punish the defendant (or defendants) and deter others from engaging in similar conduct.
 - In professional malpractice cases, punitive damages are difficult for plaintiffs to obtain because they must be related to outrageous conduct, such as gross negligence, recklessness, willful actions, or fraud.
 - They are not available at all in some jurisdictions.

mon
sum of mon
damages. nou
awarded in
loss or an i
of m

Anatomy of a Nursing Malpractice Suit

- Harm

- **Damages**

- **Damage Reductions**

- Juries must determine what damages have been incurred and who is responsible for them.
 - When there is more than one defendant, the jury must allocate the percentage of responsibility to each.
 - Jury awards can be reduced in several ways.
 - *Damage caps, remittitur, and findings of comparative or contributory negligence* can all reduce the amount of an award to a plaintiff.

Anatomy of a Nursing Malpractice Suit

- Harm
 - Damages
 - Damage Reductions
 - Damage caps.
 - Some states have enacted legislation to limit the amount of money that can be awarded for noneconomic damages.
 - These laws have been put in place to protect the economy and to help manage the escalating costs of health care.
 - Some states have applied damage caps to lawsuits against governmental defendants, but not to private ones.



Anatomy of a Nursing Malpractice Suit

- Harm
 - Damages
 - Damage Reductions
 - Remittitur.
 - Juries can return verdicts for the plaintiff that a judge might consider excessive.
 - The amount of discretion a judge has to reduce that verdict varies, but the process of ordering a new trial or a reduction in damages is known as *remittitur*.

Anatomy of a Nursing Malpractice Suit

- Harm

- Damages

- Damage Reductions

- Comparative and contributory negligence.

- Sometimes defendants assert that the patient's conduct contributed to the harm she or he experienced.
 - Patients who do not provide accurate medical histories, do not adhere to the care plan, or engage in activities that aggravate their medical problems, for example, are partly responsible for their injuries.
 - Defendants who successfully demonstrate that the plaintiff is responsible for some of their harm can have damage awards reduced or eliminated entirely.
 - In these cases, the defendants demonstrate that, even if they are liable to the plaintiff, they are not exclusively liable.
 - They ask that the plaintiff's negligence be considered in assessing responsibility for damages.
 - Professional malpractice lawsuits are generally litigated in state courts, so specific state laws apply.

Anatomy of a Nursing Malpractice Suit

- Harm

- Damages

- Damage Reductions

- Comparative and contributory negligence.

- Some states use a *pure contributory negligence* method.
 - In these states, if the plaintiff has any responsibility for the harm, she or he cannot recover any damages.
 - Because this is very severe for plaintiffs, a *last clear chance* doctrine might still permit the plaintiff to recover damages if the provider being sued had the last clear chance to prevent the injury but failed to do so.
 - Some states use a *modified comparative negligence* method with a 50% or 51% bar. A 50% bar means a plaintiff cannot recover damages if she or he is at least 50% responsible for the harm.

Anatomy of a Nursing Malpractice Suit

- Harm
 - Damages
 - Damage Reductions
 - **Comparative and contributory negligence.**
 - A 51% bar means a plaintiff cannot recover damages if she or he is at least 51% responsible for the harm.
 - Still other states use a *pure comparative negligence* method.
 - In these states, a patient who is partly at fault can still recover damages, but the damages are reduced by the proportion of the plaintiff's responsibility.
 - If the plaintiff is assigned a percentage of fault, the total judgment against the defendants is reduced by that amount.
 - A patient who is 40% responsible for the injury, for example, can only recover 60% of the total damages.

Anatomy of a Nursing Malpractice Suit

- Harm

- Implications for Nurses

- Nurses can reduce their liability exposure by understanding the elements of a malpractice lawsuit and practicing in accordance with acceptable standards of practice. Nurses should
 - Maintain professional liability insurance to provide coverage for off-duty events and licensure defense: Occurrence vs. Claims Based
 - Be aware of what creates a nurse-patient relationship and triggers the duty of reasonable care.
 - Avoid work-arounds or deviations from organizational policies and procedures.
 - Maintain clinical competency including awareness of standard-of-practice changes.
 - Engage the chain of command with patient concerns and pursue concerns to resolution.
 - Document in a manner that permits accurate reconstruction of patient assessment, notification of others, and the sequence of events.



Case Examples: Dr. Blackwell's Expert Experience

- Case in Florida:
 - 60 year-old died after going septic after an intestinal perforation during ABD surgery
 - NP was accused of malpractice in directing code in ICU
 - ICU RN provided impeccable documentation of interventions during code
 - Dr. Blackwell provided affidavit, indicating NP met standard of care for directing code via ACLS protocols
 - NP was dropped from suit

Case Examples: Dr. Blackwell's Expert Experience

- Case in Arizona:
 - 55 year-old had multiple amputations to lower EXTs from pressor Tx after going septic after intestinal perforation during uterine mass removal
 - FNP was accused of malpractice for multiple reasons:
 - **Working outside of scope of practice in hospital setting**
 - FNP didn't understand proper scope of practice for FNP
 - Hospital had own policy against allowing FNPs to work in hospital yet still credentialed the FNP
 - FNP failed to recognize septic condition in timely manner
 - FNP failed to communicate with surgeon on-call to get the patient emergent surgical care
 - FNP kept postponing need for surgical intervention and downplayed the severity of the patient's condition
 - Dr. Blackwell testified to the breaches in the standard of care through deposition
 - Case settled for **MILLIONS** of dollars

Case Examples: Dr. Blackwell's Expert Experience

- Case in Florida:
 - FNP accused of practicing medicine without a license
 - FNP was running a “wellness clinic” and was administering platelet-rich plasma (PRP) to patients with a multitude of conditions
 - Patient with chronic lumbago had multiple injections of PRP without relief
 - He filed a complaint with FDOH accusing the FNP of operating a scam clinic
 - FDOH completed investigation and charged FNP with practicing medicine without a license
 - Dr. Blackwell reviewed all of the FNP's patient education literature, consent documents, and other documentation and provided an affidavit to FDOH defending the NP
 - FDOH reversed action and dropped case against FNP

Case Examples: Dr. Blackwell's Expert Experience

- Case in Florida:
 - 60 year-old died from massive pulmonary embolism after being seen on two different occasions during the same week by two different FNPs for SOB
 - FNP accused of malpractice for failing to complete appropriate PE, order appropriate Dx, and refer the pt for emergency Tx
 - Pt was recently Tx in hospital for MI and was given anticoagulation Tx
 - Pt ID cause of symptoms as being familiar, being associated with “anxiety” and requested anxiolytic Rx
 - Post-mortem showed MASSIVE PEs and large DVT, resulting in the death of the pt
 - Dr. Blackwell testified the FNP met the standard of care for the presentation
 - Case settled for hundreds of thousands of dollars.



Malpractice Issues for Nurses and Advanced Practice Nurses: Navigating Stormy Waters



Christopher W. Blackwell, Ph.D., APRN, ANP-BC, AGACNP-BC, CNE, FAANP, FAAN

Associate Professor & Program Director

Adult-Gerontology Acute Care Nurse Practitioner Programs

Department of Nursing Practice

College of Nursing

University of Central Florida

Orlando, Florida

2021 Conference of the Florida Association of Enterostomal Therapists, Inc.