

Professional negligence or malpractice consists of the failure to act in accordance with accepted standards of healthcare practice. When an error or omission in the delivery of care results in personal injury to a patient or resident, a professional liability lawsuit based upon the tort of negligence may follow.

This resource briefly describes the basics of a malpractice action, including the parties to the lawsuit and the major legal principles involved. A table on page 2 outlines the process of determining negligence.

Defining the Parties

A professional negligence action typically has two opposing parties:

- The *plaintiff* is the aggrieved party – generally the injured patient or resident, or a relative of the injured individual – who files the lawsuit. In cases involving an allegation of wrongful death, legal action may be initiated by an executor of the decedent's estate.
- The *defendant* is a healthcare professional alleged to have caused the injury. Hospitals, clinics, aging services organizations and allied healthcare facilities also may be named as defendants for the acts or omissions of employees and agents, under the legal theory known as *vicarious liability*.

Proving Negligence

Litigation begins when the plaintiff files a formal complaint in a court of law alleging that the defendant failed to adhere to professional standards. To succeed in the claim, the plaintiff must prove the following four elements of the tort of negligence through a preponderance of the evidence, as generally determined by a judge, jury or arbitrator:

1. Was a duty of care owed? When healthcare practitioners agree to treat, diagnose and/or manage the condition of a patient or resident, they have entered into and created a legal relationship with the individual – e.g., a physician-patient relationship. The legal duty of care thus assumed requires the physician, nurse, therapist, technician or other provider to exercise the level of knowledge, skill and care ordinarily possessed and employed by members of that profession – i.e., the “standard of care.” The plaintiff therefore must demonstrate that a professional relationship existed between the plaintiff and defendant.

2. Was the duty breached? In general, practitioners are considered reasonably competent if they stay abreast of the relevant literature, use methods commonly accepted in the profession, and protect patients or residents from unreasonable risk of harm. A breach of duty to the patient or resident occurs when conduct fails to adhere to the standard of care. Thus, a healthcare professional who lacks the requisite skill or knowledge, or does not deliver the level of care of a reasonably qualified healthcare professional in the same or similar circumstance, is deemed to have breached the duty of care. In determining whether the defendant's actions were those of a reasonable healthcare professional, the court may consider several factors, including the likelihood of the harm, its potential for long-term effects and/or disabilities, the ease or difficulty of avoiding the harm, and the intellectual and ethical basis for the defendant's conduct.

Because healthcare professionals may disagree on the most effective course of action in a given situation, both parties to a lawsuit customarily present expert witnesses in the relevant clinical field to testify regarding the reason-

able care standard. Expert witness opinion is not needed in cases where the negligence is self-evident to jurors, such as a sponge retained in a surgical cavity.

3. Did the breach cause the injury? It is generally not sufficient for the plaintiff's attorney to prove only that the provider caused recognizable harm. Evidence also must be presented demonstrating that the defendant's actions or omissions caused the injury (known as *actual causation*) and that the injury was a foreseeable and proximate result, rather than a remote consequence, of the defendant's actions (generally called *legal causation*).

For example, if a patient or resident dies due to ventilator failure following a citywide power outage, the treating physician may be considered in some manner responsible. However, the chain of events leading up to the injury may be so complex and convoluted that the physician would not be expected to foresee the risk to the plaintiff. In such cases, the court generally will relieve the defendant physician of liability.

4. Are there compensable damages? Regardless of fault, there is no basis for a claim without pecuniary or emotional losses. Plaintiffs who successfully sue for professional liability may be entitled to receive *compensatory damages* for their losses, including disability, lost wages, and medical and life care expenses. Non-economic losses – such as pain and suffering, reduced enjoyment of life, physical impairment and disfigurement – are also compensable, but may be subject to statutorily imposed limits. Plaintiffs may additionally be entitled to *punitive damages*, if it is determined that the defendant engaged in conduct beyond the level of ordinary negligence, through wanton and reckless negligence or indifference in delivering or failing to deliver healthcare.

(For more information about the malpractice litigation process, see CNA HealthPro *inBrief*® 2009 – Issue 1, "Legal Defense Preparation: A Review of the Fundamentals," available at www.cna.com.)

Professional Negligence:

Five Questions to Establish a Claim

	Yes	No
1. Did the healthcare provider owe the patient/resident a duty of care?	Continue to question 2	No recovery
2. Did the healthcare provider breach the duty?	Continue to question 3	No recovery
3. Was the breach the actual cause of the injury?	Continue to question 4	No recovery
4. Was the breach the proximate cause of the injury?	Continue to question 5	No recovery
5. Are there compensable damages based on pecuniary or emotional losses?	Patient/resident may potentially receive <ul style="list-style-type: none">■ compensatory damages (for economic and non-economic losses)■ punitive damages (for wanton and reckless conduct)	No recovery



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