Malpractice: The Legal Point of View

by Norman F. Slenker, Esq.
Senior Partner, Slenker, Brandt, Jennings & O'Neal
Arlington, Virginia
From a Speech Given at the AmSECT Region III Perfusionist Workshop
Bethesda, Maryland, May 15, 1976
One of a Series of Workshops Cosponsored by the
SURGIKOS Company of Johnson & Johnson

The definition of Malpractice is given in the dictionary as the treatment of a case by surgeon or physician in a manner contrary to accepted rules and with injurious results. You'll notice this definition is tied to the medical profession. However, it has been expanded over the last several years to include all professions. Medical malpractice is certainly the focus of that definition. There is legal malpractice, however, dental malpractice, CPA malpractice, and engineering malpractice. Malpractice, therefore, is a term that is attached to the activities of any professional person who pursues the profession at less than the standard.

In reality, it's a negligence case. A negligence case, as you know, involves inadvertence. A definition of negligence simply is, from a positive point of view, that a defendant did something which a reasonably prudent person would not do; or translated to the passive or negative definition, is that the defendant failed to do something that a reasonably prudent person would have done. That is the traditional definition of negligence. Negligence can consist, as we see from those definitions, of acts of commission or acts of omission. You should notice also that it refers to the "reasonably prudent person," which is inherently a subjective test; i.e., a subjective fictitious person against whom all of our daily activities and actions are to be judged -- in areas where matters of common knowledge are involved. A prime example of such would be in driving automobiles. We know that the "reasonably prudent person" will adhere to the speed limit. We know that the "reasonably prudent person" will give signals for turns, that he will keep a proper lookout, and so forth. Those are examples of things for which we all have knowledge or as to which the law charges us with having that degree of knowledge. A lay jury can sit in judgement of litigants involving common knowledge matters without any expert criteria or evidence of professional standards.

This same lay jury will sit in judgement of professional people in a malpractice case, whether it involves a doctor, lawyer, Indian Chief, or Perfusionist. These professionals, therefore, ask the question immediately (as do all doctors that are sued, as do all lawyers that are sued), "what does this lay jury know about my profession?" If a Perfusionist were sued he or she would probably make the same inquiry. I can attest that they probably know very little. Since being approached to participate in this program, I've mentioned the name Perfusionist not only to my partners and associates, but to many of my colleagues, and not a single one of them knew what it meant. A lay jury knows nothing or very little about a profession, generally speaking, and probably less about Perfusion. Actually, they will admit to knowing more about the law than they will about medicine, dentistry and so forth because it is easy for anyone to be a backyard lawyer.

Article available at https://ject.edpsciences.org or https://doi.org/10.1051/ject/197684165

With such a lack of knowledge, how then is this lay jury going to sit in judgement of professionals? Really, the reasonable man, and the concept of the "reasonably prudent person," test has no relevancy to a professional liability or malpractice case. When you talk about negligence, the ultimate issue confronting the jury, you have to determine what constitutes negligence within the confines of the law suit. There are three basic elements to a negligence case, regardless of whether it's automobile negligence, homeowner negligence, or professional negligence. First of all, the existence of a duty; second, a breach of that duty; and thirdly, that the breach proximately and directly caused injury or damage. Abstract negligence is not actionable. For example, as you drove to this place you may have exceeded the speed limit by one mile. Technically that's negligent. However, you didn't hit anyone, so nobody can sue you. That's an illustration of the point.

In a malpractice action as in any other negligence case the plaintiff has the burden of proof. The burden being with the plaintiff, he is given the advantage of opening and closing. The defense gets one shot at everything that takes place. There is one area where that's not true and that's in the Opening Statement to the jury where you give the jury a preface as to what the evidence is going to show. Each side has one shot there. Thereafter, the plaintiff produces all the evidence available for presentation, after which the attorney announces to the court that the plaintiff rests. At this point the defendant has the first opportunity to challenge the legal sufficiency of the case. Also, at this point it is possible the case may be thrown out, dismissed by the court as a matter of law. If not, then the defendant produces all the evidence that he or she may have available, announcing afterwards that he or she rests. The plaintiff then has the opportunity to come back with rebuttal evidence after which all the evidence is in and the case is closed. At this juncture the defendant can again challenge the legal sufficiency of the case for the second time. If he fails in this, the court then considers what principles of law would govern the case and gives them to the jury. They are called instructions. Then, after final arguments by counsel, the jury gets the case for deliberation and ultimate verdict.

Now the burden of proof upon the plaintiff is by preponderance; not beyond a reasonable doubt — because that's the evidentiary standard in a criminal case. Very simply, the "preponderance" means the heavier or greater weight of the evidence. The preponderance can exist in the testimony of one person in whom the jury has confidence. It is defined generally by the law as being that evidence which is more convincing to the impartial and open mind. If it, therefore, can reside in the testimony of one person, this, in effect, means that the jury believes that individual. Believing that individual brings into account the element of credibility. And credibility simply means believability or acceptance of a statement as being probably or reasonably true; i.e., the one who tells the more reasonable story.

The plaintiff has a further burden of proof: that is, to prove the claimed negligence directly and proximately caused the injury or the damage. Proximate cause is the key technical term. That's defined simply as the one cause without which the injury would not have occurred. For example, "proximate cause" might be illustrated by an orthopedic surgeon carrying out a simple surgical procedure in a grossly negligent way, but the patient has cardiac arrest, respiratory arrest, or an embolic catastrophe from which he dies. There is no proximate cause between the surgery, that is negligently done, and the death.

A malpractice case is different in many respects from a common, ordinary negligence case, although it is in the same category. In professional negligence no matter what the field, there has to be proof that a departure from a standard has occurred. How will the lay jury, therefore, determine what the standard is? In an orthopedic case, for example, how does the jury know what steps the orthopedic surgeon must pursue if he is to meet the standard of medical care which prevails in his area. The jury handles the point in the same way it handles every other issue in a court of law: based on evidence. What type of evidence, therefore, and from whom? It can be in many different and diverse forms, but generally consists of the testimony of another expert in the same field of endeavor as the defendant. We refer to it as calling an expert witness. If it's a doctor you do it the same way. Books and writings are, for an obvious reason, not admissible as evidence by a plaintiff to establish what the standard is. The author of the book is not there to be cross-examined and cross-examination is one of the most powerful tools of our legal system for any defendant. So writings are not admissible; you can't bring in text books; you cannot bring in the Bible; or the recognized authoritative book that was written by Professor So-and-So. You can't turn these over to the jury and say "read what the standard is there, then you'll know the defendant did not meet the standard — therefore, he is guilty of negligence." Instead, the law requires individuals, witnesses who are experts in the field.

Here is an example of an instruction which contains the law, and the law of the nation is fairly standard in this respect, although this particular instruction is for use in Virginia.

> It was the duty of the defendant to exercise such reasonable and ordinary skill, care, and diligence as is ordinarily exercised by the average of the members of his profession in good standing in his community or similar localities and in the same general line of practice with regard being had to the state of medical science at the time.
>
> If you believe from a preponderance of the evidence that in examining and treating the plaintiff the defendant violated the foregoing duty, then the defendant was guilty of negligence, and if you further believe from any such evidence that any such negligence was the proximate cause of the plaintiff's injuries, then you should find your verdict in favor of the plaintiff.

That is the general duty which exists for a medical practitioner.

In my work generally I like to have it a little more specific. For example:

> The court instructs the jury that since this is an action for damages based upon the alleged malpractice of the defendant, or in other words an action predicated upon a lack of skill or negligence upon the part of the defendant, the plaintiff must, if she is to recover, prove by a greater weight of the evidence that the defendant in his care and treatment of her either: (1) did some particular thing or things that physicians of ordinary skill, care and diligence practicing in Arlington County, Virginia area or a similar locality, at the same time

> would not have done in like circumstances; or (2) failed to do some particular thing or things that physicians of ordinary skill, care and diligence practicing in the Arlington County, Virginia area, at the same time would have done in like circumstances."

There's a third point which I've omitted from this instruction and the third element is: If the defendant did something that is new and has not been, therefore, pursued by other members of his profession. I have left this out because if you incorporate it in the instruction it would exclude a number of cases where there are experimental therapeutic measures taken. I think a jury would not truly appreciate number three.

And then the concluding paragraph.

> If either of the above is proved by the evidence it must be further proven that such conduct was the proximate cause of the plaintiff's injury or damage.

Now then, what about the experts? Obviously, if an expert is to come into Court and testify to the standard, he has to show he is familiar with the standard of practice that prevails in the locality. There is a great split of opinion on this specific issue throughout the states. The state of Maryland recently departed from the locality rule and its highest court adopted the national standard of medical care. Therefore, a Board Certified Obstetrician from the state of Utah can come into Maryland and testify as an expert on the national standards by which OB-GYN practitioners ought to be governed. Not so in Virginia. About three weeks after the Maryland Court of Appeals made its determination, the Court of appeals in Virginia said that it would not depart from the locality rule. For years in Virginia the law has been that the expert must be familiar with the standards which prevail in the same area as the defendant or in a similar area to the one in which the defendant practices.

Further, as to expert testimony in malpractice cases, the court tells the jury that the defendant's conduct is to be judged by them on the basis of *expert testimony alone.* This means that in the absence of expert testimony in a malpractice case involving matters that are not things within the common knowledge of people, you have to have expert testimony. Otherwise, the case will be dismissed — thrown out as a matter of law.

With these points in mind, who is it that can be held liable? I think you probably are interested in your own particular situation. Basic principles of law state that one who commits an act is always responsible for its consequences. If you are the one who has turned the wrong knob, and that's not within the standard, you are the one who can be held liable. Also, you may be held liable *for* the acts of another if he is your agent, servant, or employee. An example of that, would be in the "Captain of the Ship" doctrine which is recognized in this country. Under that doctrine in surgical suites and in doing procedures the surgeon is the captain of the ship. Everyone is presumably working under his direction and control and, if they do something wrong, he can be held liable. This does not mean that the one who actually committed the act is not also liable. The surgeon's liability rests upon principles of a master-servant relationship. It involved principles of vicarious liability: where one is held liable not because of his affirmative acts but by virture of the

relationship between the one committing the act and the one above him as a supervisor, or a boss, for example.

You may also be held responsible because of anothers' acts. The "borrowed servant" doctrine is another concept recognized within the law by which vicarious liability can be imposed. In an operating room, particularly in this day and age with the sophisticated medical specialties which are arising, (the classic ones being the anesthesiologist and the surgeon) one might well find that a circulating nurse, a scrub-tech, or any other individual in the OR could be a servant of both the anesthesiologist and the surgeon. One might find, as a matter of fact, that the individual would be the servant of the hospital within which the procedure is taking place, the surgeon who is doing the procedure, and the anesthesiologist. When you enter upon a determination of these relationships and the resulting vicarious liability, you're really getting into the nitty-gritty of the law.

There are four elements to the master-servant relationship. You can recall these and see how they apply to your particular sphere and scope of operation. The first is: the hiring; i.e., the right to hire and fire. The second is: the payment of wages, the withholding of taxes, and so forth. The third is: the master has the right to dictate details of the work; the jobs which are to be done, when they are to be done, and essentially all the details of the task. The fourth, and most important of them is: the right to control the individual. If those four elements occur at once, the fourth being the most significant, then one can either be your servant or you may be another's servant. Thus, if you are the servant and you commit a negligent act, then the master; i.e., hospital, surgeon, anesthesiologist, or whomever, may be held liable. If he has to pay, he can sue you for indemnity on the basis that he did not hire you to be negligent and to commit injurious acts. If he has to pay, he can come back and get the money from the one who actually committed the tort or committed the wrong. What has been said up to this point refers primarily to diagnoses and treatment cases but it might well have application to your sphere of operation as a Perfusionist.

The last theory I would like to mention to you is that of "informed consent." I'm not too sure that you encounter this in your every day activities. Normally the surgeons, the hospitals, and the admission people are the ones who encounter it most frequently. So far as the professional people are concerned, it has become a thorn in their side. The theory has changed within the last four-to-five years. Back in 1970, 1971, 1972, at a seminar in New York where medical malpractice cases were discussed in depth, the experts there said that if the only theory of recovery you have available is that of informed consent, GIVE IT UP! That is because juries are loathe to award a verdict simply based on what the doctor told the patient or didn't tell the patient. In the intervening years, it has become probably the most significant theory of recovery, primarily because it's the easiest to prove. All the patient has to say is that the "doctor didn't tell me anything," and the case goes to the jury for possible recovery based on lack of "informed consent."

There is a split throughout the country on whether "informed consent" ought to remain a viable theory of recovery available to plaintiffs in medical malpractice cases. In some states they have by legislative enactment wiped it completely off the books as a theory of malpractice recovery. Some states have said you don't need expert testimony to prove a lack of informed consent. Other states, including Virginia,

say you do have to have expert testimony. The expert testimony consisting of what a doctor should have told the patient about the treatment plan to enable that patient to give a meaningful and informed consent to it. There is a fine line as to whether you should tell them about risks that have an incidence of 1%, 3%, 10%, or whatever. You can see that all shades of the spectrum would be involved in such a consideration. The state of Tennessee, for instance, has decided that there is no responsibility on any practitioner to tell the patient about a risk or complication if the incidence thereof is less than 3%. The law in that state has arbitrarily set that figure.

These remarks which I have made have reference to professionals; i.e., those who practice in areas that are recognized academically, as professions. I perceive, based on what I know about your profession, that they would have equal application to you. One possible difference which I see is perhaps you do not have the personal relationship or contact with the patient which perhaps the surgeon, the anesthesiologist, or the other health professionals have. However, my remarks should be evaluated by you as they refer to your field of endeavor.

In my experience with the field of malpractice, I have found that the reason for the increased number of cases is perhaps because the professions have lost touch with the people they serve. The doctors and medically-related professionals have received the thrust of emphasis in these remarks, but they do not stand alone as accused. I can tell you, and you'll probably love to hear it — as do the doctors, that malpractice cases against the lawyers are increasing at about twice the rate of those against the medical profession and health care service facilities. I have found that probably one of the greatest reasons for this is lack of public relations or social concern. The doctors and lawyers do not take sufficient time to receive, consider, and attempt to accommodate the needs of the patient and the family, purely on a social basis and frequently on a medical or legal basis. That is too bad, but I believe it's being remedied. I see evidence that they are doing a little better at this. Also, I think the public, because of the increased number of malpractice cases and the publicity that they have received, is becoming more knowledgeable as compared with several years ago when people expected that everything being done was going to restore them to complete and total health. They are no longer of that view, and I also believe they are beginning to realize that malpractice premiums are on the increase. Daily rates at hospitals have to be increased to accommodate the increase in malpractice premiums. However, I believe within the next few years, we will see a leveling off and a change in the situation. Even so, this won't change the fact that those of you, who deal in medical and health care services are, based on what I've observed about your activities, in a high risk business.

In time malpractice will get around to you as it will get around to everybody who is involved: If people drive enough miles per year, they will be involved in an automobile accident. In the same way, malpractice will come to you in time. You must compete with it, as others have had to compete with it. Education of the public, as I mentioned before, is essential from your point of view, and from all the points of view of all health care professionals, if our system is to be sustained and expand over the years. In knowledge there is great stability, in confidence and competency there is security. No matter what, if you are professional, and carry out your job at all times in a competent manner, you need not fear malpractice. On the

Education point, medical societies — as most of you know — are now making continuing legal education mandatory for those in their membership. Many of the bar associations are doing the same thing. Virtually all of the professions are doing that. I have noticed that you perfusionists are doing it, as is evidenced by your attendance here. Participation in Workshops devoted to continuing education is indicative of one's serious and conscientious purpose in the pursuit of betterment in any field of endeavor, and more particularly, this is true in areas where attainment of perfection is impossible. Thank you.