

Duty of Care; Standard of Care

Joan M. Gilmour, LL.B., J.S.D.
Osgoode Hall Law School,
for the
Commission of Inquiry on
Hormone Receptor Testing

Negligence Law: Analytical Framework

Plaintiff must prove on balance of probabilities:

- Defendant owed Plaintiff a duty of care;
- Defendant breached standard of care required by law;
- Defendant's breach caused Plaintiff injury;
- Injuries not too remote in law;

Defendant has burden of proving any defences.

Duty of Care

- M.D.-patient relationship = well recognized category in law in which duty of care owed;
- Duty of care includes both avoiding acting in ways that harm patient + taking affirmative steps to protect patient;
- Scope / Extent of duty of care more likely to be contentious than its existence.

Standard of Care

- An obligation to take reasonable care to avoid risk of foreseeable harm to patients;
- Held to standard of reasonably competent member of their profession (eg. physicians; lab technologists);
- Higher degree of skill & care expected of specialists;
- Not a standard of perfection.

Establishing Breach of the Standard of Care

- Expert evidence (i.e. professional judgment) usually required to determine;
- Unless standard practice is fraught with “obvious risks” such that anyone can judge (rare);
- If practice is followed by responsible & competent body of practitioners, even if in minority, will not constitute negligence.

Errors in Judgment

- Errors in judgment do not necessarily equate with negligence;
- Unless the error is one that a reasonable professional would not have made in similar circumstances;
- Error in judgment & negligence can be difficult to distinguish.

Timing of Assessment

- Standard of care is judged on basis of state of knowledge at the time of the allegedly negligent act or omission, not on basis of later advances.

Duty of Care Owed by M.D.'s

- Common but non-exhaustive aspects: duty to attend, diagnose, refer, treat & instruct; depending on circumstances, may include duty to reconsider diagnosis and to re-test as needed;
- M.D.'s and others can rely on each other to act non-negligently.

Duty of Disclosure

- An aspect of duty of care owed when health professional has caused a patient harm, if reasonable person in plaintiff's position would want to know (& broader in some instances);
- Bases: (i) duty to obtain informed consent;
(ii) fiduciary nature of relation with patient;
(iii) duty to disclose risks, and warn patient

Laboratory Testing & Standard of Care

- Standard of care will be affected by nature of lab testing and any limits on its reliability;
- *Penney v. East Kent* analysis (U.K., 2000): (1) what did the tests show?
(2) Could a screener exercising reasonable care at the relevant time fail to see what the tests showed?
(3) Could reasonably competent screener, aware of what a competent screener would observe, treat the results / tests as negative?

Hospital / Health Authority Duty of Care & Standard of Care

- Direct liability: Plaintiffs must prove all the elements of a negligence action;
- Responsibilities include selecting competent staff and monitoring competence, and establishing safe systems (broad scope);
- Can be liable for acts & omissions of hospital committee.

Hospital / Health Authority Vicarious Liability

- **Vicarious liability:** imposed when one person or entity is responsible for the torts of another because of relationship between them. No need for wrongdoing by person held vicariously liable. Example: employer / employee.
- Generally not imposed on principal & independent contractor (eg. hospital & non-employed M.D.); some indications from other areas of law of openness to change.

Hospitals, Health Authorities and Non-Delegable Duties of Care

- Imposed when nature of Defendant's relationship with Plaintiff is such that duty of care cannot be met by delegating performance to another; duty is to ensure that care is taken;
- Unclear which duties are non-delegable, and scope of such duties.

Linking Patient Safety, Systemic Analysis and Legal Frameworks

- Need to take into account in analysis: (i) how care is delivered; (ii) role of systemic factors in how errors occur;
- Significance of factors at “sharp end” and those at “blunt end” of system for care delivery;
- Role of legal system in concentrating attention on individual actors and isolated events.

Looking forward

- Legal analysis can accommodate multiple causes (and hence, systemic analysis);
- May more accurately reflect factors that contributed to injury, allowing better solutions;
- Importance of ensuring genuine accountability, both individual and systemic, and determining how best to do so, to improve patient safety.