

CHAPTER FIVE

Defenses to Negligence or Malpractice



FIGURE 5-1

After a lawsuit is filed against a nurse, various defenses can be raised (see **Figure 5-1**). These defenses may absolve the defendant completely or may limit the plaintiff's (or

patient's) claim. They are based on various statutes or common-law doctrines, and more than one can be raised against a claim.

Failure to Prove Elements of Claim

In negligence or malpractice actions, four elements must be proved for a successful claim: (1) a duty to the plaintiff, (2) a breach of the duty or failure to act reasonably, (3) damage or resultant injury to the plaintiff because of this breach of duty, and (4) proximate (or legal) causation between the breach of duty and the resultant injury, sometimes referred to as a causal connection. Failure to prove even one of these elements will cause the plaintiff's claim to fail and thus would be a valid defense. In *Hollywood Medical Center, Inc. v. Alfred* (2012) the court reversed a previous court's ruling of the hospital's liability for negligence by the nursing staff, citing that the plaintiff's claim against the nurses lacked proof of the element of causation, or proximate cause. Even though there was evidence that the nurses breached the standard of care by not recording the patient's vital signs earlier and more frequently and not questioning the physician regarding the administration of valium when the patient's vital signs were compromised, the hospital was not held vicariously liable for the nurses' conduct. The district court of appeals, in reversing the finding of the lower court, found there was no evidence that these various failures proximately caused the patient's death. Rather, the evidence showed that the patient, more likely than not, would have survived had the physician intubated her when her vital signs were crashing. In other words, the fourth element of a negligence of malpractice claim failed, as there was no proximate causation between the nurses' breach of duty (and the standard of care) and the patient's resultant injury. This is an example of the fact that every error by the nurse does not automatically

result in a finding of negligence unless all of these four elements are proved.

Voluntary Release or Waiver of Claim

In the process of settling a claim, a patient may sign a release absolving the defendant of all future claims or limiting claims based on the incident in question. Another means of voluntarily relinquishing rights is for a patient to have signed an exculpatory agreement or clause, serving as a release to future claims before they arise. The court may overrule these agreements if it feels that patients have been coerced or misinformed about their rights.

Immunities

An immunity from suit will act as a shield in case of a lawsuit. Examples of these are statutes or common-law doctrines that may apply to governmental or charitable organization employees. However, many of these doctrines, especially charitable immunity, have been eroded over the years to allow legitimate claims to go forward. Most healthcare institutions are in reality profit-making organizations, even if part of their mission is charitable.

An example of federal immunity is the Federal Tort Claims Act (FTCA). Under this act the exclusive remedy for patients' claims while under the care of employees in governmental institutions is against the government and not the employees themselves. The government is substituted for the defendant, and individual employees, including nurses, are protected. There are some exceptions to this rule. Also limited under the act is the right of active military service personnel to bring claims against the government. The rationale for this is

that these service personnel receive free medical care and disability pensions and that this is their exclusive remedy. However, civilian recipients of military medical care may sue the federal government, and military personnel may sue civilian medical caregivers.

Each state has its own statute called the Good Samaritan Act or Law, which provides for some form of personal immunity for acts or omission of medical care rendered by a volunteer who in good faith provides emergency medical assistance. Each state further defines what constitutes an “emergency,” but it usually involves potential loss of life or limb so pressing that immediate action must be taken. These acts encourage citizens and healthcare practitioners to assist in emergencies without fear of civil or criminal liability for their actions if a mistake is made. However, it is important to recognize that most often one is protected from ordinary negligence only and not from gross negligence or reckless behavior. Nurses who render assistance are expected to follow accepted standards of nursing as guidelines. This doctrine applies when there is no nurse–patient relationship that would imply a duty of care under the circumstances (e.g., when a nurse is rendering care as a volunteer).

The court addressed the issue of negligence as applied to volunteer activities in the case of *Boccasile v. Cajun Music Limited* (1997). A physician and Nurse Champoux were volunteering in a first-aid station at a festival attended by more than 1,000 people. An attendee began to have symptoms related to a food allergy. The doctor left the station to attend to him and eventually administered an EpiPen of epinephrine. The patient, Mr. Boccasile, continued to have symptoms, required cardiopulmonary resuscitation (CPR) at the scene, and died the next day after transport to the hospital. In a wrongful death action, the decedent’s widow claimed gross negligence

on the part of the physician and of Nurse Champoux. The Supreme Court of Rhode Island affirmed the lower court’s grant of summary judgment for the defendants and against the plaintiff. The physician and Nurse Champoux contended they were protected as volunteers under the state’s Good Samaritan Act. The act protects from liability any care given voluntarily and gratuitously unless it is gross, willful, or wanton negligence. The plaintiff did not produce any credible evidence to support what the standard of care should have been in this situation, or any evidence that the defendants’ conduct failed to meet that standard, and thus the grant of summary judgment was upheld. Even though the plaintiff did not win this case, it underscores the importance of who may be liable for volunteer activities and whether a caregiver’s individual liability insurance policy will cover volunteer acts. Many individual liability policies for nurses do cover any negligence or malpractice claim related to volunteer service, while employer policies typically do not. This is another important reason nurses should have an individual liability policy.

In almost all states there is no duty to render emergency assistance to strangers, but it could be argued that health professionals have an ethical duty to do so. In Vermont, in an exception to this rule, persons are required to provide reasonable emergency assistance as long as it poses no danger to them.

Plaintiff’s Negligence or Conduct

Contributory Negligence

Another valid defense that can bar or limit the patient’s claim of negligence against a nurse is the plaintiff’s conduct, which can be viewed by the court as contributory negligence and in some jurisdictions is a complete bar to recovery of damages. The idea

behind this is that the patient contributed to his or her own injury by not acting as a reasonably prudent person would in the circumstances and thus should not profit. Examples include patients not following instructions, not following warnings about side effects from medications, providing false information that led to improper treatment, and failure to return for follow-up appointments. Nurses must carefully document patients' failure to follow instructions or to keep appointments.

Comparative Negligence

Some jurisdictions have not held to the strict standards of contributory negligence but have adopted a more flexible approach that incorporates comparative negligence. Using this doctrine the court would apportion the percentage of the injury from the plaintiff's own negligence to reduce any damage award. This puts responsibility on both persons to act reasonably under the circumstances. In some jurisdictions this rule is modified so that when the patient's negligence exceeds that of the defendant, the defendant's recovery of damages is barred altogether.

Assumption of the Risk

This defense incorporates the idea that the patient voluntarily assumes the risk of treatment and therefore has no claim against any resultant outcome that he or she specifically agreed to. It is conceptually similar to the informed-consent doctrine. It should be pointed out that the patient never assumes the risk of negligent treatment by a health professional, so in this situation, the defense may be of limited use if actual negligence can be shown.

Procedural Defenses

Failure to State a Proper Claim

Failure to state a claim upon which relief can be granted may incorporate various flaws in the plaintiff's action (e.g., failure to show that a nurse-patient relationship existed or the claim does not allege or prove negligence but rather some other type of claim against the nurse).

Statute of Limitations

Most states have enacted statutes of limitations that limit the time in which a plaintiff may file an action for negligence or malpractice. Many of these are limited to a 2- or 3-year period. The actual time it takes for the case to come to trial may be several years, but the claim must be filed within the statutory period.

Various exceptions to the statute of limitations have evolved and vary from state to state. A generally accepted one is that the time limit may be extended to when the patient would reasonably have known of the injury (e.g., a patient had radiation treatment that caused fertility problems 10 years later). Nurses need to be aware of this when considering malpractice liability insurance needs because claims may arise many years later.

Some states have a statute of repose, which sets absolute time limits for claims to be made. These cover the "should have known" concept and may apply to cases involving diagnoses of cancer.

Another way of working around the statute of limitations is for the patient to claim the action as ordinary negligence, rather than malpractice, because the time limit may be longer. Also, the claim may be asserted as a contract claim that may not be affected by the statute.

REFERENCES

Boccasile v. Cajun Music Limited, 694 A. 2d 686 (1997).

Hollywood Medical Center, Inc. v. Alfred, 82 So.3d 122 (2012).