

Tort Law for Paralegals: Chapter 3

Chapter Outline

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Chapter Outline

Chapter 3

Proving Breach of Duty, Medical, and Legal Malpractice

Summary: This chapter focuses on proving breach of duty, as well as the burden of proof, res ipsa loquitor, violation of a statute, and in-depth coverage of medical malpractice actions.

CHAPTER OUTLINE

I. PROVING BREACH OF DUTY

A. Proof is an essential aspect of all litigation.

B. Neqliqence claims are normally proven through

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CHAPTER OUTLINE

I. PROVING BREACH OF DUTY

- A. Proof is an essential aspect of all litigation.
- B. Negligence claims are normally proven through the typical evidentiary processes.
- C. Evidentiary processes include oral testimony, written transcripts of discovery depositions, documentary evidence, and demonstrative evidence (such as photographs or computer simulations).
- D. Affirmative defenses must be alleged or proven by the defendant. Unless alleged and proven, the law will presume that no defense exists.

II. BURDENS OF PROOF AND REJOINDER

- A. The plaintiff has the burden of proving that the defendant was negligent.
- B. The plaintiff must prove all negligence elements to state a prima facie case.
- C. Once the plaintiff meets the proof burden, the defendant has the burden of rejoinder to disprove the plaintiff's case and show that defendant was not negligent (or had negligence defense).

III. RES IPSA LOQUITUR

- A. Res ipsa loquitur: "the thing speaks for itself"; evidentiary doctrine used in cases in which the plaintiff is in a disadvantaged position for proving the defendant's negligence.
 - B. Under this doctrine, the defendant's negligence is presumed, shifting the burden to the defendant to disprove negligence.
 - 1. Elements:
 - a. The defendant (or employee) must have been in exclusive control of object or action that produced the plaintiff's injury.
 - b. The plaintiff's injury must be of a type that ordinarily would not have happened unless negligence had been involved.
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c. The defendant must be in a better position to prove his or her lack of negligence than the plaintiff is to prove the defendant's negligence.

d. Some courts add a fourth element, that the plaintiff cannot have contributed to his or her own injuries.

IV. VIOLATION OF A STATUTE

A. Was a statute violated?

B. Did the violation of the statute cause the harm?

C. Was the person who was injured the kind of person the statute was designed to protect?

D. Also see "Negligence Per Se" in text.

V. DEFENDANT'S RESPONSE TO PLAINTIFF'S CLAIM OF NEGLIGENCE A. There are a variety of ways to respond to a plaintiff's allegations of negligence:

1. The defendant can use a demurrer, file a motion for summary judgment, or file a motion to dismiss.

2. The defendant must show that one or more of the four elements needed for a negligence case are missing.

3. Most likely, the key to a case will revolve around duty and causation. Without these, any case quickly falls apart.

VI. MALPRACTICE

A. There are many different kinds of professional malpractice. A professional's negligent failure to observe the appropriate standard of care in providing services to a client or patient is malpractice.

1. Any professional, such as a lawyer, accountant, teacher, doctor, priest, or pharmacist, can be sued for malpractice.

2. The standard of care for professionals is now a national standard for the most part, rather than based on a particular locale.

B. A specialist would need to possess the degree of skill and competence that any specialist in the United States would possess, without regard to location.

VII. MEDICAL MALPRACTICE

A. Medical malpractice occurs where a medical provider's treatment falls below the standard of care and causes injury or death.

B. Medical malpractice might involve:

1. Abandonment
2. Improper diagnosis or errors in diagnosis
3. Medical instruments or foreign objects left in patient
4. Lack of informed consent
5. Failure to supervise, failure to diagnose, or failure to advise of diagnosis
6. Medication errors.

C. Deciding whether to proceed with a case

1. Generally, one or more medical expert witnesses will be needed at the time of trial.
2. Expert witnesses are a major expense.

D. Hospital responsibility and nonresponsibility

1. Hospital responsibility: Hospitals are liable for the negligence of doctors, nurses, and other staff they employ.

a. This is considered vicarious liability under the theory of respondeat superior.

2. Hospital nonresponsibility: A hospital is not responsible for an independent contractor's medical malpractice.

E. Tort reform

1. Caps have been placed on the amount of money an injured plaintiff can collect

2. States have enacted statutes limiting the amount a plaintiff can receive from certain lawsuits.

F. Certificate of merit

1. Many states require each case to be "certified" by a medical doctor as having "merit," and a certificate of merit must be filed with the court.

G. MALPRACTICE PANELS

1. A medical malpractice panel usually consists of a neutral lawyer, doctor, and judge who evaluate the case for malpractice. The plaintiffs' attorneys consider this as an added hurdle to jump before bringing a malpractice claim.

VIII. LEGAL MALPRACTICE

A. Sometimes the client will look toward the attorney for money if his or her case was not successful.

1. Other types of malpractice actions involve use of client funds, commingling of client funds with attorney funds, or when an attorney places her own interests before that of the client.

2. Malpractice can also involve cases where an attorney misses a deadline, forgets about a court appearance, fails to keep up with changes in the law, or fails to perform any of the services promised in the retainer agreement.

3. Some clients might claim they were unduly pressured to take a settlement that was not in their best interest.

4. Drugs or alcohol can play a factor in legal malpractice.

5. Clients might sue an attorney for malpractice to delay payment.

B. Refusal of case and disengagement

1. Should a lawyer refuse to take a case, or a client wishes to substitute attorneys (disengagement), it is important that the attorney send a letter advising of the time limit for bringing the action with another attorney.

C. Judging attorney conduct

1. An attorney/client relationship is a fiduciary relationship.
2. The attorney has a client's trust and confidence, and in return must act in good faith, being honest and loyal.
3. Attorney conduct is governed by a code of ethics and professional standards established by the American Bar Association (ABA).
4. These rules merely provide guidance for attorneys.
5. Attorneys may be disciplined for not complying with the rules.
6. Since the rules were not enacted by a legislative body, they are not used in the courts as proof of malpractice.

D. Suing a colleague

1. An attorney who accepts a malpractice case is put in the position of suing a fellow member of the bar.
2. Experts are not always needed to prove legal malpractice.

E. Elements of legal malpractice claim

1. Duty owed: attorney/client relationship
2. Breach of duty: failure to properly represent the client
3. Causation: attorney's acts caused harm
4. Damages: outcome of case was affected

F. Case within a case

1. This is the original case for which the malpractice action is being sought. It is also referred to as the "underlying case."
2. There are two cases, the case within the case, and the malpractice case concerning this case.

G. Attorney judgment rule

1. Just because an attorney does not use the best of judgment, that does not constitute malpractice. There must be some gross error in judgment.
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H. Loss of attorney/client privilege

1. Attorney/client privilege is lost during a malpractice action.



Lecture Hints

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Lecture Hints	Lecture Hints
Answers to Case Questions	<ol style="list-style-type: none">1. For most students, negligence will continue to seem like an inexact science. For other topics, student memorization may be all that is required to almost fully master the subject. Negligence requires a thought process with the reasonable person at its center, a weighing of interests, and the need to determine whether the four elements required to find negligence have been met.2. As students continue to handle hypotheticals and read negligence cases, they should become more comfortable with this topic.3. Depending on your jurisdiction, you might wish to spend less time on medical or legal malpractice, and focus more on proving breach of duty.
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Answers to Case Questions

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Answers to Case Questions

Lacy v. Wal-Mart Stores, Inc.

1. There was no proof that the shelves and monitor were in the exclusive control of the defendant.
2. The plaintiff failed to submit pictures of the scene, and the alleged video of the incident was not submitted into evidence.

Winn v. Sunrise Hosp. & Medical Center et al.

1. Winn's claim against the doctors must fail. The one-year discovery period passed. The doctors were not involved in withholding or concealing records.
2. The case is remanded for further hearings as to whether the one-year statute of limitations that Winn had to proceed against Sunrise should be tolled, depending on whether there is evidence that Sunrise deliberately withheld records, and whether this would have delayed a diligent person from

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Martino v. Miller

1. No, the plaintiff failed to show that the doctor violated the standard of acceptable medical practice.
2. The plaintiff's expert did not state which standards of practice the doctor deviated from, and in what manner he fell below such practices.
3. It is possible that the plaintiff's injuries might have appeared a lot worse following the initial surgery. After five years have elapsed, the plaintiff might have healed well, and her injuries might not appear as severe or serious as initially reported.

Brumaghim v. Eckel v. Rite Aid

1. Assuming the pharmacist at the pharmacy filled the prescription as written, there would be no liability or negligence. The prescription filled was "within the medically accepted range," and the pharmacy had no reason to believe that it would not be appropriate for the patient.
2. Opinion answer. Some students might be surprised that the pharmacy has no duty to contact the physician when a drug filled is at the high or low end of the medically accepted range.

Matter of Discipline of Weigel

1. The attorney was required to pay the full costs of the proceeding (\$17,447.28), in addition to being given a public reprimand. Again, this is an opinion answer. Some students might be surprised that the attorney was not suspended from the practice of law for a fixed time period.
2. A paralegal can protect him- or herself from an unethical payment arrangement by making sure that bonuses are not tied to a specific case or class of cases. The potential ethical concern here stems from the fact that the employee's bonus is based upon the net profits of a specific law practice area, rather than upon the net profits of the law firm's entire practice.

Snolis v. Clare

1. Opinion answer. Had one firm retained the case for the duration of the case, most likely the case would have progressed more quickly. Additionally, the attorney initially handling the case would most likely have been the person most familiar with the facts of the case. Sometimes it is difficult to take over the file of another firm. Firms organize files differently, so it
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might be hard to find information or understand its significance in cases where the substituted attorney did not initially interview the client and the witnesses to the case.

2. Every effort is made to review files, but if an attorney is handling a lot of files, or does not pay attention to detail, errors or omissions can occur.

3. In some areas of the country, there might not be any attorneys handling malpractice cases. In a small town, an attorney might be uncomfortable suing another attorney, where they are in the courthouse on a daily basis, and frequently run into each other. Although attorneys are required to provide representation for both popular and unpopular causes, some attorneys might be biased against other attorneys who they feel are giving the profession a bad name.

Problems

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Problems

In the following hypotheticals, determine if negligence exists and if the tortfeasor will be liable to the injured party. Identify the plaintiff(s) and the defendant(s).

1. Mrs. Sanders works as a paralegal for a firm that occupies six floors at the top of the Hunt Center. She works on the 30th floor. She often travels from one floor to another within the firm by way of elevators. On October 10, 2013, Mrs. Sanders took an elevator to the 32nd floor. When she went back to the elevator to return to her office, the elevator went up to the 34th floor instead, and the doors would not open. Mrs. Sanders again pushed the button for the 30th floor. This time, the elevator moved downward, and began to drop intermittently, falling approximately 20 times. Mrs. Sanders used the intercom system to call the lobby clerk, Larry Leven, for help. The clerk immediately called Houston and

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clerk immediately called Houston and West, the company that designed and installed the elevator and has a weekly maintenance contract for its care. Mrs. Sanders was trapped for two hours before the elevator descended rapidly to the ground, injuring her during the landing.

2. A gynecologist failed to detect breast cancer in his patient who came in for a yearly physical examination. Three months later, when another physician detects the highly aggressive cancer, it is too late for treatment and the patient is advised that she has missed the chance to be cured of the disease. Her life expectancy is greatly diminished.

3. Thomas Warren was in a car accident in which he was rear-ended by a car driven by a teenager. He believes the damage to his car is minor, and that his headaches from the concussion he suffered during the accident should go away any day and are not that serious. The day before the statute of limitations to bring his action is about to expire, Thomas wakes up and decides he better see a lawyer. Thomas gets the last appointment available with the law firm early that evening. An associate listens to his recitation of the facts, and then tells Thomas he is going to check with one of the partners the next day to see whether the firm will take the case. The next day the associate has a family emergency that takes him out of state, and he doesn't follow up on the case. One week later, Thomas calls to see how his suit is progressing.

4. A man is admitted to a hospital for a hip transplant. His wife advises during the admission process that her husband falls often, as he has Parkinson's disease and frequently becomes confused. She requests that restraints be used on her husband during his recovery. The day after surgery, the man was in good spirits and in a stable condition when seen by his physician. The next morning the man was found between the side rails of his bed, and had suffered a fracture of his femur. He did have a vest restraint on. The man's spouse is angered to learn of his injury, and that there was no formal order in the chart for restraints. She feels that her husband was not properly supervised and wants to bring a lawsuit.

Problem Answers

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Problem Answers

1. The plaintiff in this case is Ms. Sanders, the injured paralegal. The defendant Houston and West designed the elevator, installed it, and was responsible for the weekly servicing of the elevator. This case provides an example of *res ipsa loquitur*. Ordinarily, elevators do not free fall in the course of normal operation. The elevator was in the exclusive control of Houston and West, the defendant. Passengers do not expect to be injured while riding in an elevator unless negligence is involved. The defendant who has serviced the elevator is in the best position to prove that Houston and West is not negligent.
2. Had the defendant not breached the professional standard of care for gynecologists, the plaintiff's breast cancer would more likely than not have been cured. This is a clear case of medical malpractice.
3. The issue here is whether there was legal malpractice, a form of professional malpractice. With only one day left until the running of the statute of limitations, time was of

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2. Had the defendant not breached the professional standard of care for gynecologists, the plaintiff's breast cancer would more likely than not have been cured. This is a clear case of medical malpractice.

3. The issue here is whether there was legal malpractice, a form of professional malpractice. With only one day left until the running of the statute of limitations, time was of the essence. The legal associate should have made an effort to contact one of the partners that night and had the partner speak with Thomas Warren and advise if it is the kind of case the firm wishes to handle. Alternatively, Mr. Warren should have been advised that it is not something the firm can handle on such short notice and that there was no one around that could help him, and a brief written statement should have been prepared for Mr. Warren to take with him, confirming that he had been advised of the urgency of the matter, as his last chance to bring an action would be lost at the end of the next day.

4. The hospital was advised of the need for restraints, and even though restraints were placed on the patient, he was injured. No matter the type of negligence case, there is a question of reasonableness. Had the patient been totally restrained so that he could not move, he would most likely have been badly injured struggling against the restraints, and could have suffered bed sores and a host of other problems. Here, there were restraints, but the patient was injured notwithstanding. In the actual court case this problem is based on, the patient's spouse claimed he should have been more closely monitored. The question becomes whether the restraint used was a standard restraint, and whether it deviated from accepted medical practices. The plaintiffs would have had to show that another physician would have used a different type of restraint, and that it would have prevented the fall. Proof would also need to be submitted by the plaintiffs concerning staffing at the facility and monitoring of the patient. No such proof was ever introduced.

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Project

1. Find a recent court opinion in your state that defines the elements of medical malpractice. Do these elements differ from those discussed in this chapter? If so, in what ways?
2. As a class or in study groups, create your own hypotheticals using the formula in this chapter for a res ipsa loquitur situation, and a legal malpractice case. Then change the facts to alter the outcomes of the cases.
3. Go online and research whether your jurisdiction has any caps on medical malpractice awards. Find out whether or not a certificate of merit and a malpractice panel are required for malpractice actions.
4. Research whether there have been any tort reform efforts in your state. If so, describe at least two of the more significant changes that have been made.

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Project Answers

1. State-specific.
2. Hypothetical
3. State-specific
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