

Legal Topics for Medical Physicists

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Stare Decisis

Similar outcomes for similar facts and questions.



“Let the decision stand.”

Malpractice

Professional misconduct, improper discharge of professional duties, or failure to meet the standard of care of a professional that resulted in harm to another.



Standard of Care

Acts performed or omitted that an ordinary prudent person would have performed or omitted.



Standard of Care for Medical Professionals

- **Expectation of skill and knowledge beyond ordinary individuals.**
- **Conduct evaluated in terms of standards determined by the profession.**



Strict Liability

- 1) Standard for abnormally dangerous activities (A tiger escapes from the circus causing injury).
- 2) Strict Liability *does not* apply to Radiation Therapy (Brown v. Comerford - 1989).



Negligence



- 1 A duty, recognized by law, requiring the actor to conform to a certain standard of conduct, for the protection of others from unreasonable risk.
[Duty]
- 2 A failure on the part of the actor to conform to the standard required.
[Breach of duty].
- 3 A reasonably close connection between the conduct and the resulting injury. This is what is commonly known as “proximate cause.”
[Cause of Injury]
- 4 Actual loss or damage.
[Damage]

Negligence Elements

- 1) **Duty**
- 2) **Breach of Duty**
- 3) **Proximate Cause**
- 4) **Damages**



Subpoena Duces Tecum

A court order which requires a person to bring certain papers or records to court.



Subpoena

A court order requiring a person to come to court.



Deposition

The recorded testimony of a person taken prior to trial either for use at the trial or for discovery purposes.



Deposition

A lawyer can command anyone who can be served with proper notice to appear in person and answer questions.



Deposition

The witness is sworn in, so that the testimony can be given under oath, under penalty of perjury.



Deposition

A court reporter prepares a written copy of everything said and the deposed person will be asked to sign in front of a notary.



Deposition Tips

You must be as prepared for the deposition as you would be for the trial.



Deposition Tips

**You are under oath and must tell
the truth!**



Deposition Tips

Do not allow yourself to be intimidated into answering in an untruthful way.



Deposition Tips

Don't be a smart aleck! Don't have cute answers. The deposition is a serious part of the lawsuit.



Deposition Tips

**Don't volunteer any information!
Answer as courteously and briefly
as possible ("yes" and "no" if you
can).**



Deposition Tips

Don't rush your answers. Opposing council may speed to get you to blurt something out.



Deposition Tips

Read the transcript before you testify at trial. Any inconsistencies need to be corrected as soon as possible.



MALPRACTICE AND MEDICAL PHYSICS

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WARNING!

- Your mileage may vary
- The laws of physics may be the same everywhere in the universe, but that's not true of the laws that apply to malpractice

How We Will Proceed

- Civil Procedure Issues
- Substantive Law Issues
- Examples From Case Law
- Litigation Trends Impacting Radiation Oncology

Civil Procedure Issues

- Discovery
- Motion Practice

Discovery: Definitions

- Interrogatories
 - Written questions to a party which must be answered in writing and under oath. Generally prepared with the assistance of a lawyer
- Requests For Admissions
 - Written demand to admit or deny some fact which is relevant to a claim or defense in the action.

Discovery: Definitions (Cont.)

- Depositions
 - Questions answered under oath and recorded by a stenographer.
 - In the case of expert witnesses, frequently videotaped
 - In the case of expert witnesses, frequently used in court in place of live testimony

Discovery: Why is it important?

- Discovery is where you find out about the other side's case
- Discovery is how you decide your strategy at trial, and whether to settle
- Discovery is where your case can fall apart
- Discovery forms the basis for your motion(s) to dismiss

Discovery: Important Issues

- Expert Opinions and the Work Product Rule
- Privileges and Patient Confidentiality
- Trade Secrets and other Intellectual Property laws

Discovery: An Example

Alyce Murphy and Bill Murphy, Plaintiffs v. Dr. Frederick Wood, III; Dr. S. J. Kassis, and Joe Dokes I Through V., the Cassia Memorial Tumor Board, John Does I Through XXX, the Cassia Memorial Hospital and Medical Center, Intermountain Health Care Services, Inc., and ABC Corporation, Defendants

Example (Cont.)

- Mrs. Murphy was examined and found to have cervical cancer.
- Subsequently her physician, Dr. Wood, participated in a meeting of the Cassia Memorial Tumor Board, and presented the case.
- Dr. Wood later performed a hysterectomy.

FOR MORE INFO...

Murphy v. Wood, 105 Idaho 180, 667 P.2d 859 (1983)

Example (Cont.)

- Mrs. Murphy complained she suffered deterioration of both memory and speech.
- She alleged her prior condition made her a poor candidate for surgery; that radiation therapy would have been a better choice.
- She also alleged that the standard of care required *obtaining a second opinion*.

FOR MORE INFO...

Murphy v. Wood, 105 Idaho 180, 667 P.2d 859 (1983)

Example (Cont.)

- The doctor's defense?
- I did get a "second opinion." The Tumor Board considered the case and agreed that surgery was appropriate.
- He claimed that the local "standard of care" was to seek recommendations from the Board as a substitute for specialists.

FOR MORE INFO...

Murphy v. Wood, 105 Idaho 180, 667 P.2d 859 (1983)

Example (Cont.)

- The result?
- On a motion, the Plaintiffs (and the Tumor Board) blocked access to *any evidence* concerning the tumor board meeting.
- This effectively denied the doctors any testimony that a “second opinion” was obtained.

FOR MORE INFO...

Murphy v. Wood, 105 Idaho 180, 667 P.2d 859 (1983)

Example (Cont.)

- How did that happen?
- Idaho has a medical privilege statute that forbids disclosure of records of in-hospital staff committees engaged in research, discipline and medical study.
- Unless the Tumor Board, or the Plaintiffs, open the door, the testimony is forbidden.

FOR MORE INFO...

Murphy v. Wood, 105 Idaho 180, 667 P.2d 859 (1983)

Moral Of The Story:

- **DON'T ASSUME** that the testimony or evidence YOU need to defend yourself will be automatically available.
- A substantial part of trial practice is devoted to **KEEPING EVIDENCE OUT**.
 - This is doubly true when the question concerns scientific evidence on causation.

Motion Practice

- Motion practice determines what can be said at trial.
- Motion practice determines whether the case goes to trial.
- Motion practice determines whether you hang on to what you won at trial.
- Remember Mrs. Murphy's doctor?

A Sampler Of Available Motions:

- **Pretrial**
 - Summary Judgment
 - In Limine
- **During Trial**
 - Directed Verdict
- **Post Trial**
 - Judgment NOV

Summary Judgment

Elements:

- No genuine issue of material fact
- Moving party entitled to judgment as a matter of law
- Any inferences drawn **AGAINST** the moving party

Caveat...

Motions To Dismiss, Directed Verdicts and NOV have features in common with SJ, but won't be discussed here because of time constraints.

Summary Judgment

Uses:

- Narrow the case by knocking out multiple counts in the complaint
- Narrow the case by eliminating parties
- Narrow the case by eliminating multiple items of damages
- Kill the entire case

Anatomy Of A Malpractice Claim

- Causation in fact
- Duty
- Breach of that duty
- Proximate Cause
- Damages

Causation

- Means just what it says -- did the Defendant's act, or omission, cause an injury?
- Causation may be rather obvious
 - Example: Therac-25 accidents
- Causation frequently requires expert testimony
 - Example: General Electric Co. v. Joiner

Admissibility of Scientific Evidence

- Joiner was a PCB exposure case.
- Expert testimony failed to show a link between exposure to PCBs and small-cell lung cancer and did not rise above "subjective belief or unsupported speculation."
- "Gatekeeper" role of the judge discussed.

FOR MORE INFO...

General Electric Co. v. Joiner, et ux., ___ U.S. ____ (No. 96-188, 12/15/1997)

Admissibility of Scientific Evidence (Cont.)

- The old rule of admissibility (Frye v. United States) required the proposed scientific evidence meet a standard of
 - general consensus in the relevant scientific community

FOR MORE INFO...

General Electric Co. v. Joiner, et ux., ___ U.S. ____ (No. 96-188, 12/15/1997)

Admissibility of Scientific Evidence (Cont.)

- The present day standard is Daubert v. Merrell Dow Pharmaceuticals
 - The focus must be solely on principles and methodology, not on the conclusions that they generate.
 - The trial judge must function as a "gatekeeper".

FOR MORE INFO...

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)

Scientific Evidence: An Example

- Claimant was given radiation therapy in doses which were an order of magnitude larger than ordinarily prescribed.
- The physician defended his action on the basis of one paper which he had heard discussed at a conference.
- The Court awarded substantial damages.

FOR MORE INFO...

Ahern v. Veteran's Administration, 537 F.2d 1098 (CA10 1976)

Scientific Evidence: An Example

- That was 1976. It does not appear that there was an attempt to block admission of that testimony.
- In 1998, the Defendant might not be permitted to testify at all.

FOR MORE INFO...

Ahern v. Veteran's Administration, 537 F.2d 1098 (CA10 1976)

Moral:

- Novel procedures, and departures from default, or standard, settings carry an obvious claims risk.
- Is there support for the approach in the scientific literature, or at least other qualified witnesses to back YOU!?

Duty

- There are many sources of "duty" which give rise to "negligence."
- In general, any action which carries a risk of injury, gives rise to a duty to use care in a commensurate degree.
- Low risk of injury - ordinary care
- High risk of injury - great care

"Other" Approaches To Duty

- Warranty Theories
 - Express Warranty
 - Implied Warranties
 - Fitness For A Particular Purpose
 - Merchantability
- Strict Liability (No Fault)
- Ultrahazardous Activity

"Other" Approaches To Duty

- To date, the courts uniformly have not permitted these theories.
- Warranty/Strict Liability apply to the "sale" of "goods" by a merchant; they do not apply to "services."
- Radiation therapy is sufficiently beneficial to avoid ultrahazardous classification. (Brown v. Comerford)

Breach of Duty

- Malpractice cases fall into two general classifications:
 - Informed Consent
 - Standard of Care

Informed Consent

RULE

- Obtaining the informed consent of the patient is the **non-delegable** duty of the treating physician. The hospital has no such duty of disclosure....nor is it required to secure a patient's informed consent prior to surgery.

FOR MORE INFO...

Boney v. Mother Francis Hospital, 880 S.W.2d 140, 143 (TX 1994)

Informed Consent (Cont.)

- "Hospital" in the context of radiation therapy means
 - RTTs
 - CMDs
 - Medical Physicists

FOR MORE INFO...

Boney v. Mother Francis Hospital, 880 S.W.2d 140, 143 (TX 1994)

Informed Consent (Cont.)

- There is no duty to disclose to the patient, BUT
- What about your (legal) relationship with the treating physician?
 - What he, or she, doesn't know can hurt YOU.
 - What he, or she, doesn't tell the patient *will* hurt YOU.

FOR MORE INFO...

Boney v. Mother Francis Hospital, 880 S.W.2d 140, 143 (TX 1994)

Standard of Care

General Rule

- The reasonableness of a professional defendant's conduct is determined in accordance with the standards of care exercised or expected by others in the same profession.

Standard of Care (Cont.)

- Proof of standard of care requires expert testimony
- It is the Plaintiff's burden to show a departure from the standard of care by a preponderance of the evidence
- Reasonable reliance on a defective product does not excuse a professional from using due care

Standard of Care (Cont.)

- Res Ipsa Loquitor
- “The thing speaks for itself”
- Used as a substitute for testimony for proof of the standard of care element, and its breach
- Usually not permitted in malpractice cases.

Example: Standard of Care

- Patient sued a radiologist and the hospital for malpractice after statute of limitations had run.
- Hospital cross-claimed against the radiologist for indemnity.
- Judgment for patient against both, and for the hospital against the radiologist.

FOR MORE INFO...

Ragan v. Steen and McKeesport Hospital, 229 Pa. Super. 515, 331 A.2d 724 (1974)

Example: Standard of Care

- Patient referred to radiologist employed by the hospital for treatment of plantar warts on right foot.
- After two treatments patient returned to school.
- 2 years later foot tissue began to decompose.

FOR MORE INFO...

Ragan v. Steen and McKeesport Hospital, 229 Pa. Super. 515, 331 A.2d 724 (1974)

Example: Standard of Care

- 3 years after treatment surgery was required, and patient filed suit.
- Pennsylvania had a 2 year statute of limitations on malpractice.
- Patient avoided it under the “Discovery Rule.” Runs from the time he knew or should reasonably have known.

FOR MORE INFO...

Ragan v. Steen and McKeesport Hospital, 229 Pa. Super. 515, 331 A.2d 724 (1974)

Example: Standard of Care

- Patient attempted to argue that the injury was so unusual that it could not have occurred without the negligence of the treating physician.
- Court: A bad result is not evidence of negligence in a malpractice case.

FOR MORE INFO...

Ragan v. Steen and McKeesport Hospital, 229 Pa. Super. 515, 331 A.2d 724 (1974)

Example: Standard of Care

Rule

- There can be no inference of negligence due to a bad result which might have occurred despite the use of reasonable care.

FOR MORE INFO...

Collins v. Hand, 431 Pa. 378, 246 A.2d 398 (1968); Ragan v. Steen, supra.

Proximate Cause

- Last element in Plaintiff's case. It's different from cause-in-fact.
- Was the injury a *foreseeable* result of the act, or omission?
- Eliminates the Butterfly Catastrophe as a basis of liability.
- Almost always a jury question.

Advances In Medical Physics

- Don't expect the rules applicable to professional negligence to change anytime soon.
- *Reasonably* rely
- *Due* care
- *Relevant* professional community

Advances In Radiation Therapy

- What has changed
 - Form of business entity
 - Unbundling services and charges
 - Board Certification and professionalism
 - Hardware and software
 - Willingness to litigate

Changes In Business Entity Form

- Employer/employees to spin-offs, consulting groups and
 - C Corp., Sub S, partnerships and sole p.
 - LLCs, LLPs, PMGs, etc.
- New parties to name as Defendants
 - Additional insurance policies to stack
 - Tactical advantage of cross-claims and defendant disputes

Unbundling Services and Charges

- Remember *Brown v. Comerford*?
- Along with the obvious advantages of separate billing comes the dubious honor of being a potential named Defendant.
- Regardless of whether the claim survives, legal services aren't free.

Board Certification and Professionalism

- Industry, or association, standards are simply minimum requirements.
 - Compliance doesn't mean a jury will necessarily find in your favor
- Along with individual recognition comes individual responsibility, i.e., lawsuits.

Hardware/Software Considerations:

- Remember, the standard is “reasonable reliance” and due care.
- Should you acquire Version 1.0 of anything for a mission critical app?
- How long do you wait before an upgrade?
- Did you read the warranty exclusions?

Hardware/Software Considerations:

- In-house systems and work-arounds
 - Distribution outside the organization can invoke product liability claims
 - Can it be defended?
 - Percussive maintenance is not a joke for a jury
 - Therac-25 operating history

Hardware/Software

- Ownership and intellectual property issues may be determinative in third party actions.
 - Enforceability of warranty exclusions
 - License -v- title
 - Subcontract Development/Vendor/Distributor status and statutes of limitation

FOR MORE INFO...

Leveson and Turner, “An investigation of the Therac-25 Accidents”, IEEE Computer Magazine 18 - 41 (1993)

Example: Disclaimers

CLOSE CONTACT DOSE SPREADSHEET TEMPLATES

Version 2, February, 1998

DISCLAIMER NOTICE

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Protecting Yourself

- “Reasonable reliance” are the magic words. How can this be proved?
 - What independent investigation was made by you before acquisition?
 - Any independent standards group evaluation?
 - In-house verification and cross-checks?
 - Literature search?
 - Incident reporting and review?

FOR MORE INFO...

Leveson and Turner, “An investigation of the Therac-25 Accidents”, IEEE Computer Magazine 18 - 41 (1993)

Protecting Yourself

- And Most of All

Documentation

Further Reading and Research

TEXT

- Shalek and Gooden, *Medical Physicists and Malpractice*, Medical Physics Publishing 1996

WEBSITES

- FindLaw www.findlaw.com
- LexisOne www.lexisone.com
- Legal Information Institute www.law.cornell.edu
- American Bar Association www.abanet.org
- Federal Judiciary Homepage www.uscourts.gov
- Library of Congress <http://thomas.loc.gov>
- Your state bar association example: www.sdbar.org

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