

Medical, Hospital & MCO Negligence Theories

Judge Bryan C. Dixon

I. Negligence Claim

A. Definition

A claim for negligence is made by a party claiming to be injured (the Plaintiff) as a result of another party (the Defendant) failing to exercise ordinary care. Ordinary care is the care that a reasonably careful person would use under the same or similar circumstances.

B. Elements in Medical Malpractice Claim:

1. Plaintiff was injured;
2. Defendant was negligent; and
3. Defendant's negligence was the direct cause of the injury.

C. Burden of Proof:

Plaintiff must prove his claim by the greater weight of the evidence. This is also known as the preponderance of the evidence.

D. Negligence of a Physician

1. **Breach of the standard of care.** A breach is where the physician did something or did not do something that a physician would or would not have done exercising his duty of ordinary care.
2. **A Specialist's Duty** – A Physician who holds himself out to be a specialist must use ordinary care and possess and use the knowledge and skill possessed by other specialists in the same field.
3. **A Non-specialist's Duty** – A physician who does not hold himself out to be a specialist (a general practitioner) must use ordinary care and

possess and use the knowledge and skill possessed by other general practitioners.

4. An **expert witness** must establish the standard of care and testify as to whether the Defendant breached this standard or complied with the standard.
5. The **standard of care** is based on national standards. There is no locality rule. 76 O.S. Section 20.1.

E. Negligence of a Hospital – Same Elements as a Physician

1. Based on acts of employees – *respondeat superior*
2. Duty of Ordinary Care (e.g. Negligent Credentialing)
3. Ostensible Agency (e.g. Emergency Room Physicians)
4. Premises Liability

F. Res Ipsa Loquitur (76 O.S. Section 21 – The thing speaks for itself)

1. Elements:

- i. Plaintiff was injured;
 - ii. The injury was directly caused by a device or procedure solely within the control of the Defendant; and
 - iii. The injury does not ordinarily occur under the circumstances absent negligence on the part of the Defendant.
2. Creates a **presumption of negligence** for medical malpractice on the Defendant. Defendant must then prove he was not negligent.
 3. Usually does not requires an expert witness.

II. Informed Consent

- a. **Informed Consent** – Before a physician can treat or operate on a patient, the physician must disclose all relevant information so that the patient can make either an informed consent to or reject the proposed treatment or surgery.
- b. **Relevant information includes** the nature of the ailment, nature of the proposed treatment or operation, and the material risks

involved in the proposed treatment or operation. This would include the known risk of death or serious bodily harm and the possibilities of such outcome. It includes explaining complications that might occur in understandable terms. It should also include any alternatives to the proposed treatment or surgery and their risks. It should also include the risk of foregoing all treatment or surgery.

c. **Consent of the Patient.** This can be either oral or in writing. It can also be implied by the patient's words or conduct leading to a belief the patient has consented.

d. **No duty to Disclose if:**

- i. The risks are already known to the patient or commonly understood by the average person;
- ii. When full disclosure would be detrimental to a patient's total care and best interest, or where this would alarm an emotionally upset or apprehensive patient so that the patient would not be able to weigh rationally the risks of refusing to undergo the recommended treatment or operation; or
- iii. When an emergency exists and the patient is unconscious or incapable of determining whether the treatment should be administered. Scott v. Bradford, 1979 OK 165

e. **Causation** – The patient must prove that he would have chosen no treatment or surgery or a different course of treatment or surgery had the material risks and alternatives been made known to him. The patient also must have been injured by the undisclosed risk resulting from the treatment or surgery.