

Defenses to a Professional Negligence Suit

written by Nancy Brent | August 31, 2012

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The statute of limitations, discussed in an earlier bulletin, is one of the defenses to a professional negligence action. A second, important defense your attorney will scrutinize is if the person filing the suit, the plaintiff, has plead, and is able to prove, the essential elements of the case against you.

As you may recall, there are four (4) essential elements to a professional negligence case that *must* be plead in the complaint and must be proven by the plaintiff in order for the case to survive. Those four elements are:

1. A duty exists between the nurse and the patient;
2. A breach of the duty by the nurse;
3. The breach of the nurse's duty is the *proximate* or *legal cause* of injury to the patient (also called the *causal connection*); and
4. Injuries and/or damages that are recognized by law. (1)

When the case is initially filed, if these four elements are not clearly pled in the complaint against you, your attorney can file a *motion* that the case be *dismissed with prejudice* (meaning it cannot be filed again). Most often, a judge will not grant such a motion on the first filing, since granting it at this juncture is quite unfair to the plaintiff. So, the judge will often allow the plaintiff (patient) to file an *amended complaint* so that the attorney can truthfully plead what is needed to be included in the complaint.

If the second or third *amended complaint* does not include details concerning the four essential elements, a judge may dismiss the case with prejudice. If, however, the essential elements are pled correctly, the case can proceed to trial.

The plaintiff must then be able to prove those essential elements during a trial or before a settlement is reached. If the essential elements are not met once the plaintiff has rested its case, your attorney may ask for the case to be dismissed. A judge might grant that motion or the judge may require the case be sent to the jury.

During the closing arguments, your attorney would then point out that the essential elements of the case were not met and ask that a verdict be returned in your favor. Because of the plaintiff's failure to prove all four elements, a verdict would most probably be returned in your favor and against the plaintiff.

Surprisingly, this situation often occurs when a case is filed against a nurse or when a nurse's conduct

brings his or her employer into the suit under the theory of *respondeat superior* (also discussed in an earlier bulletin).

In an interesting case (2), the daughter of a deceased 61-year-old diabetic filed a wrongful death suit against the physician and the medical center due to a recovery room nurse's negligence that she alleged caused her mother's death. The daughter alleged that the nurse failed to timely recognize the mother's blood loss and the nurse's failure to notify the doctor (thus causing a delay in a surgical intervention that would have stopped the bleeding) caused her death. The circuit court entered a verdict for the medical center and the daughter filed an appeal.

The appellate court stated that the first two elements of professional negligence—duty and breach of duty—were not at issue in the appeal. What was at issue was the trial court's directed verdict that the daughter had failed to present sufficient evidence on the issue of proximate cause. (3)

After discussing what proximate cause is, the appellate court upheld the verdict of the trial court.

Although there was testimony during the trial as to the proximate cause of death of the patient, the expert witness who testified was *not* an expert who had experience in surgery. Moreover, the court continued, because the expert witness was not a surgeon but an expert in emergency and family medicine, the expert could *not* testify to what a surgeon would have done, or if surgery would have stopped the bleeding, had the patient's doctor—a surgeon—been timely notified by the nurse. (4)

This case is just one example of how a plaintiff must prove *all* the elements of a professional negligence claim. If he or she does not do so, the case will be decided in the defendant's favor. The case also illustrates the importance of utilizing an expert witness who is credentialed and has expertise in the medical or nursing specialty that is at the heart of the case.

FOOTNOTES

1. Dan Dobbs (2001). *The Law of Torts*. Volume I. St. Paul, MN: West Group, 270-273 (with regular updates).
1. Griffin v. North Mississippi Medical Center, 66 So. 3d 670 (2011).
1. Id. at 673.
2. It is important to note that this case also deals with a doctrine called "the last chance of recovery". Briefly, in order to meet the element of proximate cause in such a case, the plaintiff (patient) must prove that had proper care been provided, it is more likely than not that a better outcome would have occurred for the patient. The plaintiff did not prove this either so the essential element of proximate cause was not met.

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