

# NU668: Roles and Issues in Advance Practice Nursing

## Concepts of Malpractice Transcript

### Slide 1:

Welcome back to Roles and Issues in Advanced Practice Nursing. In Module 6 we will be exploring the legal aspects of being an NP. This module will take place over 2 weeks. You will first want to view the video by attorney Jennifer DiFronzo. This is located in the Lectures Resources section. The practicum for this module is to write one of the legal cases. A word of caution: you only need to write one legal case, and the case you choose needs to be based on your NP tract. Please see the instructions in the assignment Dropbox for clarification. This brief PowerPoint on the elements of negligence has been developed to help you understand medical malpractice. You will need to identify these elements in your legal case study.

### Slide 2:

The legal system in the United States developed out of natural law theories. Natural law proposes to identify principles of right action or moral principles. The first and most general principle is that one should choose and act in ways consistent with respect for the rights people possess simply by virtue of their humanity; rights, which is a matter of justice, others are bound to respect and governments are bound not only to respect but to the extent possible to protect.

### Slide 3:

Most malpractice suits involve civil law. In a civil suit, one party (the plaintiff) who feels they were harmed brings a complaint against another party—the defendant. Sometimes the government is one of the parties. In a civil case, reasonable doubt is not required. Rather, a preponderance of evidence is enough in most cases. The plaintiff can either ask for monetary relief or equitable relief. Monetary relief is when the plaintiff asks for a cash award to remedy the situation. Equitable relief is when the plaintiff asks for the court to order the other party to do or not to do something.

### Slide 4:

For the case to be a criminal one, it would involve a major difference with regard to intent and would be prosecuted entirely differently.

### Slide 5:

In Module 6 we will be concerned with civil malpractice. This means the legal question is fault. Negligence analysis looks only at fault.

### Slide 6:

Classic guidelines or standards, when analyzing fault, are:

1. Duty.
2. Breach of duty.
3. Causation.
4. Damages.

In civil cases, intent is not relevant unless proving gross negligence.

## Slide 7:

The first standard of negligence legal theory is duty. Duty is an interesting concept. There was a court case that alleged TV violence watched by a boy caused him to develop a sociopathic personality. The argument was made that when this boy committed a violent act it was the result of viewing violence on TV, so he sued the TV networks. What do you think happened? Yeah, that complaint was dismissed for failure to state a claim. The court was unable to hold a recognizable standard for the TV industry to follow; thus, no duty found to support the claim. Of course, this is not a medical case but it points out that a standard duty must be there in order for there to be malpractice.

## Slide 8:

Considerations as to whether duty exists bring into play the following concepts; for example, foreseeability. Foreseeability of harm to the plaintiff requires that the damage suffered by the plaintiff be reasonably foreseeable as a consequence of the defendant's breach of duty. Rather than go down this list, I would like you to think about how scope of practice and standard of care apply to establishing duty. For example, if the primary care office in which you work has seen an infant for a well visit and weight check and subsequently the mother of the 14-day-old infant calls your office and reports her baby has a fever and wonders if she should bring him into be seen, I know you will all say absolutely—a febrile, 14-day-old infant needs to be seen ASAP.

Okay, what about it is 5 p.m. on Friday in the office is closing? There is more than one acceptable management plan to assure the infant is seen. One option is the primary care provider educate the mom on how important it is that her baby be seen for the paper and directs her to the hospital ED that has an in-house 24/7 pediatrician. That provider would also call the in-house pediatrician hospitalist to give him or her a heads up about the febrile infant and give report on any pertinent information. It is not mandated that they personally give the care as long as appropriate care is provided. That provider then would also follow-up post ED visit. If, on the other hand the provider advised the mother on the dose of Tylenol and told her to wait until the morning, bring the infant to the office then—clearly, in this case, the provider has not followed the standard of care and is in breach of duty. It is foreseeable that afebrile, 14-day-old infant could have a bad outcome of harm if not seen properly for a fever workup. It would be a breach of duty to not provide or facilitate an expeditious fever workup.

For duty to be established, it means there must be a legal duty on the part of the defendant to conform to the standard of conduct established by law for protection of the plaintiff. In the Buppert text for this course in Chapter 7 Attorney Buppert makes the point that duty is established when there is a provider/patient relationship. However, there need not be an office visit to establish duty. Duty can be established by a casual discussion with a patient or with someone who is not officially a patient. If an NP gives professional advice or treatment in any setting, a duty may be established, an important point to keep in mind with your future practice and social interactions.

A word about standard of care: an NP is held to the standard of care of a reasonably prudent NP—not necessarily to the standard of care expected of a physician. In many situations, however, the standard of care for physicians and NP's will be identical. For example, an NP providing primary care can be held to the same standard as a physician providing primary care.

## Slide 9:

Breach of duty equals failure of the defendant to conform to the standard of conduct. At the risk of sounding pretentiously didactic, it seems opportune to point out that objectives of the rules and issues course is to direct NP students to the sources which define role and scope of practice for NPs as well as standard of care. Ignorance is not an excuse. NPs need to be aware of the laws and regulations which govern the practice.

## Slide 10:

The third standard of negligence legal theory regards causation. For there to be malpractice, the breach of duty must be the cause of damages. Consider a situation where there is doubt about the breach of duty causing damages. Such a situation may fall under superseding intervening cause. This is where an intervening cause relieves a defendant of liability by showing that a subsequent act or event or intervening cause was the real cause of the injury. For example, an NP prescribes penicillin to a patient whose medical record lists a penicillin allergy. The patient leaves with a script, but before taking it she is stung by a bee and she has an allergic reaction to the bee

sting and falls and hits her head causing a permanent scar on her face—unfortunate. The patient sues the clinic and the NP claiming that the NP had a duty to the patient, which of course she has a duty, and that she breached the standard of care, but in fact in this case there is no malpractice because the breach of the standard of care (prescribing penicillin to somebody who is allergic to it, which is a clear breach of standard of care) did not cause injury. In this case, the injury would be the permanent scar to her face or the trauma that she was submitted to that wasn't caused by the penicillin.

### **Slide 11:**

The fourth standard of negligence legal theory regards damages. For there to be malpractice, the patient must have suffered some legally cognizable harm, so let's go back to that penicillin prescribed to the patient with the penicillin allergy. Let us speculate that after recovering from the bee sting the patient takes the penicillin and has an anaphylactic reaction. Now there would be a causal relationship between breach of standard of care and injury.

### **Slide 12:**

In conclusion, malpractice is the failure to exercise that degree of skill and learning commonly applied by a reasonably prudent healthcare provider. Negligence is the predominant legal theory of malpractice liability. It includes duty, breach of duty, causation, and damages. The most common causes include failure to follow up, failure to refer when necessary, failure to disclose necessary information to a patient, and failure to give necessary care.

Attorney Buppert gives some noteworthy advice. How do you prevent lawsuits? She tells us know the standard of care and practice within it. If practice guidelines/protocols have been adopted, follow them. When in doubt, take a conservative approach. Rule out the worst diagnoses early on. Know the limits of training and expertise. Follow-up. Lastly, be careful about establishing patient-provider relationships in a social situation.

Thank you. I hope you will find this helpful when you write your legal case studies.