

The Doctor's Duty to a Patient

More than providing good health care to the patient

by Richard A. Black, D.C., J.D.

With the onset of high tech/high touch health care there is also high expectations of the patient from their health care providers. The patient of the later twentieth century has been conditioned to expect successful treatment. The media coverage of every new advancement in "modern medicine" has fueled this expectation. The successful results of these new procedures are reported with enthusiasm while rarely, if ever, does one hear or read of an unsuccessful procedure or treatment. The notable exception being attacks by organized medicine upon conservative or alternative methods.

Technology exists now that was not even dreamed of a decade ago, and was not needed five years ago. The MRI, CT Scans, lithotripsy with lasers, artificial hearts and laser surgery for cataracts are just a few of the marvels that strains the layman's imagination. In such an environment of high tech tools, if a Chiropractor fails to recognize pathology, his patient may conclude the doctor must have done something wrong and should suffer the financial consequences.

Fortunately, the law is more demanding upon the patient. The requirement is the convergence of four separate and distinct elements of what is commonly called "Negligence." These four elements are: duty, breach of that duty, direct causation of injuries resulting from that breach, and resultant damages. Once these four elements have been shown by the patient, a claim for malpractice can be prosecuted. The burden for proof rests with the plaintiff/patient. The absence of any of the four elements will allow the doctor to prevail in any litigation. This process prevents a frivolous lawsuit simply because the medical results were not as expected or desired.

Black's Law Dictionary defines a Tort as a legal wrong committed upon the person or property, independent of contract. The first element essential to any tort litigation is duty. In a malpractice action it must be shown that the doctor owed a duty to that patient. Critical to the showing of duty owed is the issue of whether a doctor-patient relationship has been established. The ordinary requirement to provide health care that complies with the prevailing standard of care only arises if a doctor-patient relationship has been established.

The doctor-patient relationship may arise with far less formality than the physician realizes. Written contracts are not needed, documentation is not necessary, the patient need not even visit the doctor's office. Surprisingly enough, the patient may not even need to have talked directly with the doctor.

Reliance upon the doctor's advice can arise in very informal settings. Consider the person who approaches the doctor before church services on Sunday with a stiffness in his neck and a nagging headache. The doctor recommends, "come by the office on Tuesday and we will check it out." (The doctor is playing golf in a charity fund raiser on Monday and cannot see this man then). Monday morning the headache is worse and the man's wife encourages him to visit the local emergency room. His reply is that Dr. Jones said he would check it at his office on Tuesday. If this man

suffers a stroke, his widow will most certainly believe that her late husband could have been saved if the chiropractor had not reassured him and "convinced him to wait." When a person foregoes treatment in reliance upon advice of a physician, that doctor has a duty to comply with the standards of the profession. In other words, this man did not seek attention when his condition worsened because he believed the doctor also thought it could wait until Tuesday. He believed this because the conversation with the doctor lead him to that conclusion. It is not going to sound any better to the jury when the plaintiff's lawyer asks Dr. Jones, "What were you doing when this poor man's serious condition deteriorated?" Not a very pretty set of circumstances, but remember Murphy's Law.

Tip #1 - do not give advice to anyone during social engagements. You may show your concern. You may even offer to arrange an office visit for that person. But explain that you are unable to determine whether immediate aid is needed without appropriate examination, and warn that the problem should be checked if the symptoms worsen. The doctor may be liable for the actions of staff members who give advice. When a concerned staff member makes suggestions over the phone vicarious liability may arise. The doctor may be liable for the resultant problems. As your staff members listen to symptoms they may be prone to sympathy, well-meaning advice, and an offer of an appointment next Tuesday. The caller may interpret such a message as a reliable professional opinion that aid is not necessary immediately. This forms a professional relationship with ensuing liability.

Tip #2 - train staff not to give advice on care. Employees of the doctor should not attempt to elaborate or expand upon the doctor's advice. It is the doctor's job to give advice. The doctor has a duty to train his staff not to give advice.

The existence of the doctor-patient relationship may not depend upon the doctor's intent. The relationship comes into existence when the impression is created in the mind of a reasonable patient. If there is any doubt as to the emergency nature of a patient's condition that patient should be seen as soon as possible or referred to an emergency facility.

The doctor-patient relationship is not dependent upon the charging of a fee. The charity or indigent patient has just as much right to competent care as the most wealthy and influential. With or without a fee the duty is the same, even if the patient is a family member from whom you would never seek compensation. Refunding a fee after the relationship has been established and a problem arises will not void the relationship. It affords no defense.

After the doctor-patient relationship has been established the duty arises in several forms. Duties arise by contractual obligations. The service contracted for is that the doctor use his best effort and skill in treating the patient. The doctor is contractually obliged not to abandon the patient; including weekends and holidays, vacations, and retirement scenarios. The disclosure of patient records

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without prior patient approval is a breach of contract by the doctor. Under contractual obligations the doctor must also fulfill any treatment representations made, such as; frequency, duration, cost and probable results of the care.

Today there are duties imposed by law that the pioneers of the profession did not bear. Laws, case opinions, rules and regulations often supplement, replace or alter the traditional requirements of good health care.

Most states have mandated the reporting of child abuse cases by doctors of chiropractic. There is no discretion or choice in such a matter. If the suspicions fit the statutory framework, the doctor is required to report his observations. Neglect and abuse of the elderly is becoming more abundant. As this proliferates throughout society more states will mandate reporting elderly abuse cases the same as child abuse cases. Often all that is necessary to impose a duty to report is that the doctor has "reasonable cause to suspect" that abuse or neglect is happening.

Tip #3 - if there is any suspicion of neglect or abuse of a child or elderly person refer that patient for a second opinion, preferably a discipline other than the one you practice. Call that doctor to inform him of your suspicions prior to the second opinion visit. This does not, however, absolve you of the duty to report this suspicion...report it!

The doctor may also encounter the duty to warn a patient that he is unable to safely operate a vehicle. The potential for harm to the patient is obvious here. The safety of other motorists and pedestrians as well as passengers in the patient's car will also be a concern of the prudent physician. Even the obvious dangers should be warned about.

Tip #4 - never assume that the patient "would not do something that foolhardy." They will if they think of it! Warn against even the obvious, such as a severely hypoglycemic patient driving when he has not eaten properly and feels dizzy. This is especially true if you do any nutritional recommendations. Make the notation in the file immediately after you make the warning.

A doctor's duty to the patient may be altered or defined by several forces. Professional associations that propose "guidelines" may change the standard of care even if the doctor does not belong to that association. Licensing boards may issue "ethical guidelines" that would alter (most likely raise) the standard of care owed to the patient. Chiropractic is unique in that there is a different standard of care from one state to the next. Some are similar but none like all the way through. Advanced study with certification, degrees, or official recognition will raise the standard of care the doctor owed to the patient. A doctor's advertising practices may also alter his duty to his patients. especially if the doctor notes that he specializes in 'difficult cases,' 'has special equipment,' or specializes in 'sports medicine.' If you advertise "Gentle, effective pain relief," you better produce excellent results every time.

Tip #5 - stay abreast of the developments in the profession and the guidelines being pushed on the profession by the state and national organizations.

The final alteration of duty is from failure to refer a patient when other care is appropriate for the condition. The Minnesota Supreme Court explained this in a ruling:

"One of the requirements which the law exacts of the general practitioners of medicine is that if, in the exercise of the care and skill demanded...such a practitioner discovers, or

should know or discover, that the patient's ailment is beyond his knowledge or technical skill, or ability or capacity to treat with a likelihood of reasonable success, he is under a duty to disclose the situation to his patient, or to advise him of the necessity of other or different treatment."

Larsen v. Yelle, 246 N.W. 2d 841 (Minn. 1976).

This particularly interesting language because it suggests that the medical orthopedists would be negligent if he failed to refer to or disclose the availability of chiropractic or other non surgical procedures. (This assumes that an orthopedist would consider any condition beyond his expertise). In 1976 when this opinion was written by that Court the orthopedist could probably have hidden behind some official AMA or Orthopedic Council position that referral to "unscientific practitioners" was not within the accepted standard of care orthopedic surgeons. That is not the situation is 1997. I expect to see an emergence of cases, and therefore case law, dealing with the failure to refer outside the field of allopathic medicine. Officially, chiropractic is no longer an unscientific cult, Chiropractic is not even alternative. Officially, Chiropractic is mainstream conservative care.

This case also states that the general practitioner (also chiropractor) will be held to the standard of care of the orthopedic surgeon if he fails to inform or refer appropriately. That is to say, if you undertake the treatment of a patient who should have been referred to a specialist, then you will be held to a standard of care that is equal to that medical specialist. The theory is that the patient has the right to expect the best possible care for his condition.

Tip #6 - when in doubt refer for a second opinion. Remember that you can refer a patient for a second opinion to another chiropractor. If you detect a not of lack of confidence from the patient, offer to make the referral. Make the entry on your office notes regarding the discussion whether the patient desires a referral or not.

The General Rule is, "A chiropractor must exercise that degree of care, diligence, judgment, and skill which is exercised by a reasonable chiropractor under same or similar circumstances and in the same or similar geographic location."

Remember two things:

- (1) Love thy neighbor as thyself (treat your patient as you want to be treated).
- (2) "Do all things as unto the LORD."