CHAPTER 3

The Law

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The purpose of this chapter is to provide a brief overview of the structure that regulates, controls, restricts, punishes, and compensates individual behavior and interaction among individuals within a society. It is that intangible social structure that has developed over time, through trial and error, and reflects each society's particular values. This structure is commonly referred to as the *legal system* or the *law*.

It is also the purpose of this chapter to show—through examples from actual cases or from state laws—how this society's legal system affects the *medical practitioner*—specifically, the practitioner in the field of diagnostic imaging and therapeutic radiology.[1]

THE EVOLUTION OF ORDER

Conflict is inevitable wherever groups of people live together or come in contact with one another on a regular or sporadic basis. History has demonstrated that such groups, both large and small, create or adopt external systems of control to regulate human behavior in order to minimize conflict. For example, some political groupings known as states write documents commonly referred to as constitutions, which form governments to conduct the business of a nation:

> **We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.**[2]

Colleges or universities write charters to conduct the business of education and to regulate student behavior during matriculation; religious institutions develop written articles of faith to govern their members; and hospitals formulate articles of incorporation and adopt by-laws to conduct their affairs.

The end products of these formal systems developed to control or regulate the behavior of group members are called *laws, rules,* or *codes.* These laws define conduct that is acceptable or prohibited. They may also establish a predetermined method of resolving conflict and may set forth punishments for unacceptable conduct. For example, a state may choose to regulate the practice of medicine by requiring a physician to obtain a license to practice.[3] If a physician practices without obtaining the required document, he or she may face sanctions from the state but may also be able to take advantage of a predetermined procedure for resolving the dispute.[4]

Laws, like houses, lean on one another.

Edmund Burke (1729–1797)
Irish philosopher, statesman

As was previously stated, but is worth reemphasizing, *laws develop over time.* In the United States, our legal system includes laws brought from England by the early English colonists (the *common law*).[5] These laws had in turn developed over time in England by the influence of invading armies, by competing interests between the people, by the Crown, by the church, and by the gradual evolution of judicial wisdom.

In this country, laws pertaining to whether or not a physician or other health professional can be charged with medical malpractice have also evolved slowly. These laws have culminated in certain requirements, such as that a lawsuit must be brought against a physician within a specific period of time (commonly known as a *statute of limitations*[6]), but only after a reasonable inquiry has been made prior to bringing the lawsuit.[7]

The term *malpractice* encompasses the legal concept of *negligence.* Before a determination can be made of whether a physician is negligent in her delivery of care in a particular circumstance, the applicable standard of care must be examined. The standard of care for a physician may vary from state to state or from jurisdiction to jurisdiction, but in general, it refers to the level of care given by a physician in the same or similar circumstances. The physician "must have and use the knowledge, skill, and care ordinarily possessed and employed by members of the profession in good standing."[8]

If we examine the duty of a radiologist when dealing with a patient, it is easy to see how laws addressing that duty have evolved over time. When x-rays were first used to diagnose and treat illness, it was unknown what harm could result from incorrect procedures. Now it is known that

x-rays can harm a fetus. A physician who fails to determine in a routine situation whether a female patient is pregnant before ordering her to be x-rayed may be found to have violated the accepted standard of care and therefore held liable (financially accountable) for any harm suffered by the pregnant patient or by her offspring as a result of the radiation exposure.[9]

DEFINITIONS OF LAW

There are numerous definitions of the term *law*. Some are amusing:

> **The law is sort of hocus pocus science, that smiles in yer face while it picks your pocket.**
>
> *Charles Macklin (1697–1797)*
> *Irish actor, dramatist*

> **If the law supposes that, said Mr. Bumble, "the law is a ass, a idiot."**
>
> *Charles Dickens,* Oliver Twist

Some are ponderous:

> **The law in its majestic equality, forbids rich and poor alike to sleep under bridges, beg in the streets, or steal bread.**
>
> *Anatole France (1844–1924)*

And some are moralistic:

> **The good of the people is the greatest law.**
>
> *Cicero (106–43 B.C.)*

Law in its generic sense is defined as a "body of rules of action or conduct prescribed by controlling authority, and having binding legal force," represented as the "solemn expression of will of the supreme power of the State" and "that which must be obeyed and followed by citizens subject to sanctions or legal consequences."[10]

While the concept of the law is an intangible, there are tangibles that have resulted directly from people's attempts to activate that concept. For example, informed consent documents must be explained to a patient and signed by the patient or a personal representative of the patient before certain diagnostic tests or therapeutic procedures may be conducted (see Appendixes). Other examples of tangibles include voice-activated dictating machines, which were invented and developed in part for the use of physicians dictating medical reports and for lawyers to accurately transcribe a witness's testimony during a deposition (oral interrogation or questioning). Physical structures such as jury rooms, where a jury retires

to deliberate the facts of a case in order to arrive at a verdict, are other examples of such tangibles.

It is not an overstatement to say that virtually *every* aspect of the medical practitioner's educational and professional life will be affected by both the intangible concept of the law and the tangible manifestations of that idea. The interweaving of law and medicine in American society requires the medical professional—whether radiologist or radiographer, medical school professor or vocational teacher, designer or manufacturer of x-ray equipment, hospital administrator or supervisor of radiographers—to have an understanding of how the legal system *mandates certain standards of care in the performance of professional duties.*

The very fact that most readers of this text either are now, or soon will be, licensed medical practitioners in a professional specialty, indicates exposure to certain laws or regulations that control practice. The schools in which professionals are educated, the hospitals in which they practice, and the physicians who order procedures are regulated by either state laws, local ordinances, or administrative regulations which dictate specific requirements as to funding, size of student or patient population, hospital location, training, licensing, insurability, and many other aspects of education and health care delivery.

Upon completion of an educational program, the legal system continues to regulate both individual and group behavior through medical licensing or certification. Health professionals are required in many states to complete continuing education credits on a regular basis.[11] Professionals registered by the American Registry of Radiologic Technologists (ARRT) must meet certain continuing education requirements to remain on the registry. Hospitals and schools must undergo periodic evaluations from regulators and accrediting agencies.

Medical professional behavior is further regulated when lawsuits are filed as a result of the negligent performance of duties. Ask *any* medical professional who has been sued what impact that lawsuit has had on his or her professional behavior.

The foregoing is admittedly only a cursory view. A multitude of books, articles, and published judicial decisions are available in law, medical, and public libraries for more in-depth exploration of the subject.

The following is a brief synopsis—by lighthearted example—of how the major broad categories of the law develop.

CRIMINAL AND CIVIL LAW

Criminal Law: The substantive criminal law is that law which, for the purpose of preventing harm to society, (a) declares what conduct is

criminal and (b) prescribes the punishment to be imposed for such conduct.[12]

Civil Law: Laws concerned with civil or private rights and remedies.[13]

Ideally, a democratic society will decide through its various representatives the rules to control its individual members. As an example, consider rock and roll music, arising in our American musical heritage in the last half of this century. There is no question that society in general has accepted such music. But assume that a certain community has deplored the loudness of rock and roll and passed laws regulating such music which is so noisy or vibratory that it is considered harmful to others.

Imagine that a band playing next door at 3:00 A.M. disturbs a person's sleep. The individual who is affected by the music is aware that the community has passed laws prohibiting loud music in a residential area between 12:00 A.M. and 7:00 A.M. (or at any time the noise is so loud that it disturbs the peace). Feeling disoriented and exhausted, the individual registers a complaint with local law enforcement officials. If upon investigation the police find that the music is too loud, a charge will be filed in the criminal courts alleging a violation of the law banning the playing of loud music after hours.

Assume that the law which has been violated has been classified by the state as a criminal law. A criminal law is meant for the protection of *all* society within a geographic community, not just for the protection of a single individual. Therefore, although one individual was affected by the loud music, he becomes a victim or a witness to the fact that society as a whole has been wronged. The noise makers must therefore be punished by the state that has made the law (*State v. Noise Makers* or *People versus Loud Band*).

Within the same example, let's assume that the music was so loud that it damaged the person's eardrum, and he therefore decides to consult with his lawyer. The lawyer informs her client that he has personally suffered a civil wrong; that is, apart from the noise makers' criminal act, some "duty" may exist on their part not to cause injury to others. The lawyer explains that, where such a duty exists, it was breached when the eardrum ruptured. The cost for the repair of the eardrum is a part of the "damage" suffered. And, if it can be shown that the ruptured eardrum was in fact caused by the noise makers, this cost should be rightfully borne by them—even if their intent at 3:00 A.M. was only to entertain house guests and not to rupture their neighbor's eardrum. In contrast to criminal law, civil law now applies because the individual alone will be compensated *for the injury*, not all of society. The injured person becomes the plaintiff or the complainant, and the noise makers have become the defendants in a civil lawsuit (*Mr. A. Hurt Eardrum, Plaintiff v. Evil Noise Makers, Defendants*).

CONSTITUTIONAL LAW

Constitutional Law: "That branch of the public law of a nation or state which treats of the organization, powers and frame of government. . . ."[14]

The compact, agreement, or master plan considered by a society when establishing itself as a formal body is usually called a *constitution*. It may be likened to the largest common denominator, inclusive of all individually enumerated rights, which seeks not to abridge any of those rights unless done so within stated parameters. For example, the Constitution of the United States protects individual expressions of speech, assembly, and religion unless for some reason the higher good of the country or state permits them to be abridged for specific reasons. (One cannot stand and freely scream, "Fire!" in a crowded theater.)

Within the framework of its constitution, a society's representatives—the legislature—constantly enact or repeal laws so as to further the society's governmental interests (again, while attempting to preserve the constitutionally given rights of individuals). Continuing with our imaginary rock music example, that society's constitution may permit people to have the right to assemble at any time. So the loud noise makers may argue, "We assembled, played good music for those who wanted to listen—and the constitution says we can. Therefore, the local law, restricting our playing after 11:00 P.M., is unconstitutional because it violates our right to assemble, as well as our right of free speech." The noise makers then bring their own lawsuit on constitutional grounds, alleging that their constitutional right has been violated.

ADMINISTRATIVE LAW

Administrative Law: Body of law created by administrative agencies in the form of rules, regulations, orders, and decisions.[15]

The legislature, or congress, decides that, rather than dictating when loud music may or may not be played, it should pass a bill stating that *all* loud music is unlawful, but leaves it to the "secretary of music and noise" to define loud music. This passing of power to decide matters from a statutory body to an agency or department is known as *delegation*. The legislature presumes that the secretary is knowledgeable in the area of music and will draft regulations that are both acceptable and reasonable. Laws and regulations so drafted are within the realm of administrative law.

Although all of the above is simplistic and based on a rather far-fetched

example, the purpose is to demonstrate a few basic concepts of the very broad discipline known as the law.

Health care regulation has also evolved over time to control the activity of health care practitioners. Let us now consider the practice of radiologic technology. A radiographer at a large metropolitan hospital interacts all day with doctors, hospital administrators, nurses, and other technologists. The radiographer takes orders, gives orders, observes and interacts with patients, and records professional actions. Who makes the rules concerning these activities? From the moment an employee arrives in the hospital's parking lot, rules guide behavior. Who decides where people will park? Who decides when it's time to go home? Who decides when conduct is less than professional? Is it professional to spit on the floor? Who says not to? Does it even need to be said? When differences arise, how are they to be resolved?

For example, if a state law prohibits the administration of pharmaceuticals by anyone other than a physician or registered nurse and a radiographer administers medication, even on the order of a physician, he or she may be liable for any injury to the patient resulting from that action. If the prohibitive statute carries a criminal penalty and the radiographer is found guilty of violating the statute, the radiographer may be required to pay a fine or be incarcerated for a period of time dictated by the statute. The radiographer may also be held civilly liable and may be required to financially compensate the injured patient. If an administrative agency has been given the power to control the practice of radiation machine operators within the state, the agency may determine that this radiographer is unfit to practice professionally and can remove the license or certificate that permits him or her to work within the jurisdiction.

THE ANATOMY OF A LAWSUIT

In primitive society, direct, physical, confrontational acts resolved problems. However, civilized society has developed laws providing for the nonviolent settlement of differences. In earlier times, truth sometimes hinged on the successful performance of physical acts to ascertain who was telling the truth. These physical acts were known as *trials*. The modern usage of the term *trial* is accorded much the same status; that is, the party who manages to convince a judge or jury of her version of the truth will usually prevail.

One who believes he or she has been wronged and has a "cause of action" against a wrongdoer must still run a gamut of hurdles—the historical term being *feats*. These contemporary hurdles are dictated by specific procedures. The first is to determine exactly the nature of the complaint. For instance, in our example of the ruptured eardrum, the injured

person's attorney must investigate the facts to determine whether the law imposes any duty on the band not to rupture the eardrums of unwilling listeners and then whether the ruptured eardrum was actually the result of the loud music played by the alleged lawbreakers. All this must be investigated and accomplished *prior* to the filing of a lawsuit. One must name the correct parties and allege, at least minimally, the facts known at the time of filing. This can be accomplished only after an inquiry. A "reasonable" inquiry into the matter, which demonstrates a legal foundation for bringing the lawsuit, is sufficient and all that is required for a lawsuit in most jurisdictions.[16] Once a reasonable inquiry has been made, a lawsuit may be filed in good faith. The requirement of reasonable inquiry may explain why some in the medical profession have been interviewed, had their hospital records examined, or otherwise been questioned about an event by an attorney, a paralegal, or an insurance adjustor prior to the filing of a lawsuit.

The second hurdle is the lawsuit itself. Who or what individuals should be named as defendants? Which court will have jurisdiction of the case? What matters are to be alleged as the negligent acts causing injuries? What damages have been caused? Were the injuries caused totally by the wrongful conduct? (For example, is it relevant that, because of inadequate radiographs, a doctor failed to diagnose a condition that later resulted in injury or death of a patient? Must the radiographer be named as a defendant in the lawsuit? The radiographer's supervisor? The hospital administrator? The hospital itself? Is there in fact a negligent act to which the death can be traced?

The Complaint

When considering a lawsuit, it is always important to review it from within the four corners of the originating document, the *complaint*. The complaint will display in an abbreviated fashion the "who, what, where, why, and sometimes how" of the action. The cursory nature of the complaint may leave the defendant with many questions concerning his involvement in the cause of action. Therefore, the plaintiff must develop proof to solidify issues from the sketchy material of the complaint—that is, how he will prove the charges in his complaint.

Some allegations asserted in a complaint are "boilerplate" (standard form) assertions, which are remnants of a past era that encouraged the art of rhetorical, legalized writing over plain language in a legal document.

But over time most jurisdictions have adopted rules of civil procedure that simplify the preparation and language of a complaint. These rules, generally referred to as the "civil rules," instruct attorneys as to the highly rigid and formalistic means of initiating a lawsuit and the precise procedural steps necessary for the conduct of a lawsuit through trial and the appellate process.

Attorneys are not hampered in their preparation of a complaint by matters relating to copyrights or plagiarism. Copying successful complaints is usually encouraged. In fact, most attorneys use form books containing standard complaints when drafting legal documents. Lawyers proudly exchange copies of their complaints with their colleagues. What has developed, much to the chagrin of the nonlawyer world, are documents whose phrases and terms more closely emulate words and statements used by courts or statutory sources than language familiar to the layperson. (See appendixes for sample complaints: form complaints and one specifically drafted for a lawsuit.)

When the defendant receives the complaint, an investigation must begin so that an appropriate answer and defense can be developed. This investigation is the third step of the lawsuit and is generally called the *discovery* period.

Discovery

Remember, the first step in the lawsuit is the prospective plaintiff's duty to make a reasonable and independent inquiry *prior* to filing the complaint, to ascertain whether an action can properly be brought and maintained against the alleged defendant. Next is the preparation of a complaint that lodges the matter in the appropriate court, with the proper parties identified, and alleges at least a disputable cause of action. (The defendant, upon receipt of a lawsuit filed against him or her must answer within a certain number of days—usually 20—or a default judgment can be obtained against him or her.)

Discovery permits the parties to flesh out the more common elements of what actually occurred before going on to the next stage, the trial.[17] Discovery presents an opportunity to uncover facts, take sworn testimony from parties and witnesses, obtain documentary evidence, ask written questions, get the opinion of experts, and determine whether to attempt to settle or to try the case.

The media world may give high marks to presentations based on the element of surprise; as a moviegoing public, we like courtroom drama. We prefer complex plots with last-minute testimony by surprise witnesses. In the real world, especially in the law, surprise is abhorred.

The first lesson for attorneys in discovery is very simple: no surprises. A failure to be open, a failure to investigate, a failure to avail oneself of the tools of discovery can lead to sanctions, monetary punishments, or loss of a case.

One can analogize an attorney's use of discovery to an actor's approaching opening night. To be believable, the actor must learn as much about the plot as possible; know the props, the stage settings, the lighting, the characters, and the lines—until the time of the performance. A trial is much the same. By the time of the trial, the case should be so thoroughly

investigated and analyzed that virtually nothing is left to chance. The selection of a jury and its final composition is the one area in which chance is the most difficult to control. However, if discovery is used to the fullest, jury results can be more predictable. Jury selection is a course in and of itself, and whole texts are available on the subject. It is interesting to know that, in important cases, mock trials are conducted using paid volunteers to "listen" to the case, render a verdict, and answer questions about the presentation. The end result may not be far distant from what a true jury may decide, assuming that discovery has permitted a thorough "dress rehearsal" and the attorney has properly prepared for the matter.[18]

The Professional as a Party

The question of greatest concern to health professionals is what happens if they are sued or called as witnesses. If a lawsuit has been filed, the professional will receive a summons and a copy of a complaint, which names the party—in this case, the defendant whom the plaintiff has sued. (Remember that, although this chapter references the law of Kentucky, the procedure is generally the same in other states.) The defendant is advised that the law permits twenty days in which to answer the complaint and of the possible penalties for failing to file an answer. The named party should immediately contact an attorney to represent and protect the defendant's interests. Whether working for a hospital, a clinic, or a private physician, the radiographer should be aware of what provisions have been made if an employee is personally sued as a result of professional activities while working for the employer. Many employers will provide legal representation, but some will not. There are a multitude of factors involved in medical negligence or malpractice actions, which are discussed in other chapters of this book. Of necessity, such actions can be discussed only in a cursory fashion in an introductory text, but the health professional should at least be familiar with the legal ramifications of a lawsuit. The health professional should *never* treat a lawsuit lightly. He or she should notify superiors at once and seek the advice of an attorney even if the employer provides representation.

Once representation has been verified, the attorney will guide and direct the defendant's participation in the legal action through its conclusion. He or she will confer with the client, answer questions, and give advice on the proper course based on the best interests of the defendant. This is what the attorney has been trained and paid to do. If the defendant radiographer is sued along with the doctor who ordered the medical procedure, the hospital where the procedure was conducted, and/or the manufacturer of the equipment used, it is imperative to consider obtaining separate counsel. Otherwise, the technologist may become the scapegoat to whom the other defendants point as the responsible party.

Radiographers and other radiologic science professionals should decide if obtaining personal liability insurance is in their best interests. The need for coverage can best be determined by asking what coverage the employer has for the employee and how that coverage will affect the technologist if named separately in a lawsuit. Hospitals, clinics, and offices all maintain different types of coverage for employees. Therefore, it is in the employee's best interests to ascertain the terms of coverage and make an independent judgment about the need for individual coverage.

The Professional as a Witness

Suppose the radiologic science professional has received a notice to take a deposition "upon oral examination" at a stated time and place. The professional may be considered a witness to an event that is of concern in a filed lawsuit. Perhaps the complaining party, the plaintiff, wants to know if the physician ordered a certain radiographic procedure and wants to determine what the radiographer knows about the procedure. Under the rules of civil procedure, a party may obtain discovery (in this example, by asking questions in person) regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action.[19] The most widely known privilege is the *attorney-client privilege,* which protects communications between attorney and client. Even though the radiographer has not been sued and is merely being asked questions about an event, the witness should have an attorney present to protect his or her best interests. Discussions with the attorney will fall within the "privileged" classification.[20]

It is important to understand that the rules of discovery vary from jurisdiction to jurisdiction and may vary from state courts to federal courts. Thus, specific questions about the local rules of the jurisdiction in which the lawsuit has been filed should be directed to an attorney familiar with the area or may be obtained from a law library or the clerk of the court in the city or county.

The Deposition

The process of deposition can be very intimidating. Nevertheless, the witness must be prepared to answer all questions in a clear and concise manner. The following synopsis will explain the usual process for deposition of a witness:

1. The supervisor or other representative in the facility will inform the radiologic science professional that Dr. Kildare has been sued and that the technologist may be called as a witness to answer questions concerning the procedure requested by the physician. The technologist will probably be asked to review notes and recollections of the incident and

discuss this information with a representative of the hospital, perhaps even the hospital's attorney. The technologist will probably also be asked to provide specific details about the event.

2. The technologist will receive a notice or summons to take a deposition "upon oral examination." These documents may be sent by registered or certified mail or delivered by a person such as a special bailiff, process server, or deputy sheriff. This document will explain what the matter concerns, as well as what might happen if the technologist fails to appear at the time and date specified. For example, if a summons has been issued in the Commonwealth of Kentucky to appear for a deposition and if the individual served fails to appear, the person may be held in contempt of court, which could result in a fine or jail time. The document may be entitled a *subpoena duces tecum,* which means that it is asking the witness to bring to the deposition hospital books, records, or personal papers which may have a bearing on the event in question. (See Appendixes for sample forms.)

3. Despite a common misconception, attorneys have learned, either through training or from experience, to be accommodating. The witness will probably have been contacted in advance to determine whether a certain date and time for deposition is acceptable; or if, having received notice without advance arrangement, the witness is unable to attend, he or she will probably be permitted to reschedule where possible. The problem with scheduling depositions is that several persons' schedules must be accommodated—those of all parties to the action, their respective attorneys, and the court reporter or videotape technician who will record the sworn testimony.

4. The technologist must arrive at the deposition as scheduled. Several people will be present: the court reporter, who will make a complete transcript of the event including identifying and swearing of the witness, other parties and their counsel, and perhaps hospital personnel and the attorney representing the witness. After being sworn in, the attorney who is seeking to discover the witness's information about the event will explain the questioning process and will carefully and specifically request that the witness ask for clarification if a question is not understood. The witness needs to be alert and able to understand all that is being asked. The witness will be asked some preliminary identifying information such as name, address, workplace, work experience, and educational background. (The technologist may want to prepare in advance a curriculum vitae which outlines education and experience; see Appendix for sample form.) The witness may be asked if he or she is currently taking any medications and, if so, to identify the drug. The witness may also be asked if he or she is under the influence of any narcotics or mood-altering drugs.

Such questions are asked to ensure that the witness's mind is clear and focused and that nothing has been taken that might influence the witness's ability to respond to questions. If a request for records was part of the subpoena, the witness will be asked if such documents are present at the deposition. The lawyer will want to know if the witness has discussed the event with anyone. If the witness has discussed the case with an attorney, the witness's attorney may say, "Objection, privileged" and instruct the witness not to answer the question. The two attorneys will then discuss the objection, and the witness may be advised to respond, or another question will be asked. The meat of the deposition as a witness is personal recollections of the event and information from any contemporaneous written or taped documents made at the time of the incident. (See Appendix for a sample deposition taken regarding a radiograph.)

5. Once the deposition has been completed, the witness will be advised that he or she may be expected to testify at trial, which may be either before a jury or before a judge without the jury, which is known as a *bench trial*. The attorney, who is calling the witness, has the duty to inform the person and the court that he or she intends to call that individual as a witness. The technologist will again receive a written document, most likely entitled a *summons*, and will be ordered to attend or face legal consequences.

6. Until the time of trial, the technologist may be periodically contacted by the attorney who is relying on the witness's testimony, to keep the technologist advised of the current status of the litigation. In some circumstances, the witness may be called upon to complete the deposition or to review the testimony to determine its accuracy before trial.

Most lawsuits are settled during or upon completion of the discovery phase. Presiding judges encourage settlement negotiations by conducting pretrial conferences in advance of the trial, so that preliminary matters can be disposed of and issues can be defined. Pretrial motions, including *motions in limine* which seek to exclude certain evidence from being presented at trial, will be presented at this time. The attorneys will advise the court of the witnesses to be called, and the court will try to accommodate time schedules when setting a trial date.

A lawsuit can be settled at any time during the trial or before, as long as a verdict has not been rendered. Therefore, witnesses may be called to appear, only to be sent home because a settlement has been reached.

The Trial

Suppose the parties cannot reach a settlement and the case continues to trial. The radiographer who has carried out the physician's order is now set to appear at trial as a witness. Testimony at trial will include

evidence of what orders were received and how and in what form they were received. If the orders came by written instruction from the physician, the technologist will be requested to identify the order, testify that it was the one received on the date in question, and answer questions about the order or procedure. The document itself must be admitted into evidence through a specific procedural process carefully followed by the attorney who is seeking the admission. Most states have rules of evidence which guide evidentiary admission or have adopted the Federal Rule of Evidence.[21]

If the radiologic science professional is asked to provide testimony as an expert, the answers to questions asked will be used to instruct the judge or jury about scientific or technical knowledge which will help them better understand the evidence.[22] In order to be permitted to testify as an expert, the radiographer must be qualified. The expert must demonstrate to the court through the answers to specific questions that he or she has the specific knowledge, skills, education, and experience necessary to testify concerning the event in question. Only upon the court's determination of qualification will a witness be asked to state an opinion as to how a specific radiologic procedure should be conducted or what the procedural requirements are for performing an MRI, a sonogram, a nuclear scan[23] or another radiographic procedure.[23]

After both sides have presented their evidence, the judge or jury will render a verdict for the party who has made the most convincing argument based on evidence presented. The decision must be based solely on information presented through sworn testimony. Information brought in from outside may not be used, and the jury should not allow their emotions to lead them to a decision that goes against the weight of the evidence presented.

CONCLUSION

Being sued or being a witness in a lawsuit is not to be treated lightly. An employee should be familiar with what, if any, protections an employer will provide in the event that the employee is named individually in a lawsuit arising from the performance of employment duties. Will the employer cover legal expenses? Does the employer's liability policy cover employees named individually? Is liability insurance available for your profession? Is it in the best interests of the employee to maintain professional liability coverage? Will the employer's counsel advise the employee and be present at depositions or other fact-finding endeavors?

Employers must be concerned for their employees as well as their organization. Ignoring the concerns of employees may cause them to go else-

CHAPTER 4

Civil Liability

Mark Webster

Civil liability covers not only acts that a person intends to commit, but also negligence, which includes acts and consequences that might not have been intended. Both theories arise from a body of law known as torts. A *tort* is a civil wrong in which liability is based on unreasonable conduct. The most famous treatise on torts defines a tort as a "civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages."[1] In short, if radiologic technologists do something unreasonable in the course of their practice, it could cost them money. This chapter will cover the nature and extent of such financial liability.

Before beginning a discussion of liability, one might reasonably ask how a technologist could be sued. Wouldn't the medical institution that hired the technologist, the doctors who gave the orders, or other medical personnel who supervised the work be ultimately responsible if anything went wrong? Not necessarily. Remember who deals with the patient on the front lines in the imaging or therapy department: the technologist or therapist.

According to one professor of anthropology, "Medicine is a social drama as well as a physical science."[2] In this drama, the technologist or therapist will act as the human link representing the face of medicine to the public. These personnel will greet patients, walk them to the diagnostic center, perform testing, and send them on their way. Since technologists will have the most personal contact with the patient, they may be the most likely to be sued should anything go wrong or should the patient perceive that anything went wrong. The technologist could be sued just as readily as the hospital, the doctor, or the nurse.

Plaintiffs in civil lawsuits seek money damages. In filing a suit, they will sue as many individuals and entities as could conceivably be liable

for any wrongs committed. Not only will plaintiffs look for a "deep pocket" for compensation, they will join all the pockets of all persons who have been associated with this case. If a jury makes an award in a trial, it will apportion the award according to who is at fault. Being the low figure on the health care totem pole is no defense. That is why technologists need to know the nature and extent of liability.

INTENTIONAL TORTS

Intentional torts are acts that a person *intends* to commit. These torts are sometimes called "intentional interference with the person." All people have a right to freedom from interference with their person. In return, all people have a duty not to interfere with others. The specific intentional torts covered here will be assault, battery, false imprisonment, intentional infliction of emotional distress, and defamation. It is highly unlikely that a technologist would ever intend to commit one of these torts. But if the patient feels the professional intentionally committed the tort, it will ultimately be up to a jury to decide the intent of the action and the extent of the patient's damages.

According to one expert, "the most common health care problem isn't heart disease, it's miscommunication."[3] Many problems could be lessened or avoided altogether with the proper amount of communication with the patients.

Assault

One usually thinks of the term *assault* in the criminal sense, in which a person intentionally or wantonly causes physical injury to another person by means of a deadly weapon or a dangerous instrument. *Assault* is usually coupled with the term *battery*. In the sense of civil liability, however, the term *assault* means "acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and the other is thereby put in such imminent apprehension."[4]

As can be deduced from the definition, the emphasis here is on possible psychological injury, not physical injury. No touching is required in this tort, only apprehension of the harmful or offensive touch. Some everyday examples of this tort would be a person shaking a fist at another person or a person swinging at another person and missing. Pointing a loaded or unloaded weapon at a person is also a good example of the civil sense of assault. There must be a real apprehension of imminent contact. A mere exchange of words, while unprofessional, would not constitute an assault.

Some institutional examples of assault, particularly in a diagnostic im-

aging setting, might be patients' fears that the therapist or technologist is going to slam an x-ray machine down on them or is about to force them to receive injections or ingest some substance they do not want. Other examples might be threats, particularly to juvenile, senile, or recalcitrant patients, that they will be disciplined somehow if they do not cooperate in the diagnostic process.

Technologists might protest that surely this could not happen in an imaging or therapy department. But remember that patients, particularly those who must undergo an MRI or other sophisticated procedure, enter the department with a great deal of fear and apprehension. According to one psychiatrist, "There's no question that for some people it's [MRI procedure] the most horrible medical procedure they've ever had."[5] In one study, 35 percent of patients undergoing an MRI reported feeling anxious.[6] In another study, more than half of the patients said they should have been better informed, particularly about the noise, the temperature, the degree of confinement, and the duration of the procedure.[7] This study suggested an orientation giving more information to patients and training in relaxation techniques.[8] In yet another study, one in ten patients experienced anxiety severe enough to require that the procedure be halted.[9] The authors of this last study concluded that simply talking to patients will relieve anxiety: "If you explain things to people and take the time to tell them what to expect, they do a lot better than if you don't."[10]

Consider two actions that create apprehension in a patient: haste and lack of preparation. A technologist in a hurry, pushing and pulling machinery in a loud and boisterous manner, could produce fear of contact, particularly in a very young or very old patient. A patient who is not properly prepared for the procedure through conversation with the technologist or through some orientation booklet or film might see all movements as a potential assault. Slow, efficient movements around a patient and a thorough explanation of the physical requirements of the procedure would certainly ease any fear or apprehension that a patient, at least a reasonable patient, might have.

Of course, such torts are not limited to patients. It is possible that technologists could assault each other or that a radiologist could assault a technologist.

Usually the tort of assault will not occur without a resulting battery. Mere emotional disturbance without some sort of injury is not enough to create civil liability for the tort of assault. Likewise, an overly timid or exceedingly nervous patient is not more likely to recover in a lawsuit based on an assault. On the other hand, a stoic, courageous patient should not be any less likely to recover for the tort of assault. Ultimately a jury will decide what is a reasonable apprehension of physical contact. If the jury finds the technologist liable for assault, payment may include money for lost wages, medical treatment, and pain and suffering.

Battery

The tort of battery will probably be the most common used for recovery against technologists. Technologists are liable to a patient for *battery* if (a) they act "intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) an offensive contact with the person of the other directly or indirectly results."[11]

In short, the tort of battery consists of unwanted contact. The contact has to be more than the occasional bumps and rudeness experienced in everyday activities. A contact is offensive "if it offends a reasonable sense of personal dignity."[12] In short, it is the intention to bring about a contact more offensive than the casual contacts of daily life that is the basis for the tort of battery. A battery could be something originally intended as a practical joke. Just think of people who have been injured as a result of a chair being pulled out from under them. Of course, there is no room for horseplay in the diagnostic imaging or treatment center.

A technologist can be liable for a battery even if the act is intended for the patient's benefit. A technologist who performs a procedure on a patient who has refused to submit to or who has not been properly informed about a procedure will not be relieved of liability for battery even if the technologist believes the procedure would be helpful to the patient.[13] Of course, the key here is to inform the patient properly about the upcoming procedure. Patients should be assessed for the possibility of an anxiety attack. They should be given information about the procedure, the noise, the tight spatial limitations, the temperature, and the duration of the procedure.[14] Many patients do not realize that they do not have to submit to the procedure merely because their doctor has ordered it.

But even the patient who wants to cooperate and submit to the procedure may be frightened by the cold room, the complex machinery, and the various restraints used during the procedure. Pushing or pulling patients to better position them for diagnostic imaging could be a battery. Although restraints will be discussed below with the tort of false imprisonment, the act of restraining a patient, particularly a difficult or immature patient, by use of tape, velcro strips, ropes, collars, or safety belts could constitute a battery.

Since parents can be overprotective of their children and since federal regulations warn radiation workers against continuous exposure to radiation, many hospitals permit the parent, after donning an apron, to hold a child during some procedures, such as an upright x-ray. Parents also may hold their children during other procedures. While this sounds like a foolproof way of avoiding a possible battery against the infant patient, care must be taken not to commit a "double" battery. For example, if the technologist somehow pushes the parent against the child and causes injury to the child, the technologist could be subject to liability to both

the parent and the child, should an injury result to one or both. Even if the parent is not injured but the child is, the technologist would still be liable to the child because he or she would be the actor whose act started the chain of events resulting in injury to the child.[15]

In some hospitals, technologists sedate patients before conducting imaging or treatment. The injection itself could be considered a battery if the patient does not want the shot or does not understand that it will be given. Second, even if the patient is asleep, drugged, or anesthetized, a battery could occur. The recipient of the battery does not have to be aware that a battery occurred. For example, there have been cases in which female patients have been abused while sleeping or under anesthetic.[16]

The contact is not limited to touch alone. Any substance that the technologist causes to come into contact with the patient, such as fluids, electric shock, medical instruments, and so on, could constitute a battery. Leaving tape lines on a patient, particularly a child, could be used as evidence that a battery occurred. Likewise, the contact could be with some extension of the patient's body, as in hitting a cane or a walker.

For civil liability to exist, there must be some sort of real injury that can be translated into money damages of the type mentioned in the section on assault. A wrong without damage will not result in liability. Most wrongs, however, do cause damage, ranging from concrete, out-of-pocket expenses to abstract damage for pain and suffering or the loss of services of a spouse or parent.

False Imprisonment

Closely aligned to the tort of battery is the tort of false imprisonment. On first reflection this sounds slightly ridiculous. How or why would a technologist "imprison" a patient? The basis of the tort is that the patient's right to freedom from confinement is somehow violated. A brief definition of false imprisonment might be "unwanted confinement." According to the legal definition, technologists are subject to liability to a patient for *false imprisonment* if (a) they act "intending to confine the other or a third person within boundaries fixed by the actors, (b) their act directly or indirectly results in such a confinement of the other, and (c) the other is conscious of the confinement or is harmed by it."[17]

The word *confinement* conjures up images of what would happen only in jail. But medical providers also confine patients to small rooms, beds, tables, chairs, and the like. Sometimes, of course, technologists restrain patients for the patients' own good. This tort is somewhat like the tort of assault in that the patient's subjective impression controls whether or not a tort exists. If the patient *feels* confined, then the patient *is*. For example, if a patient believes he or she is locked in a room, even if the room is not locked, the patient could bring a suit for false imprisonment.[18] The tort is unlike the tort of battery in that patients must have some awareness

or belief that they are confined. A patient who might have been confined during sleep or while under anesthesia could not sue for false imprisonment. In cases of children or other persons who are not legally competent, this may not be true.

In a hospital setting, patients could think that they were confined if they could not exit the imaging center either because the door was locked or a hospital employee blocked the door. Again, patients should be informed that they have a right to stop a procedure at any time or at any reasonable time during the procedure and that they have a right to leave. In addition, not permitting a patient to communicate with people outside the hospital might constitute false imprisonment.[19]

Probably the most common source of confinement issues will revolve around the use of restraints during testing or treatment involving children. Some diagnostic or treatment centers use no patient restraints; others go to great lengths to restrain patients to ensure a good-quality diagnostic image as well as to prevent injury to the patient and liability on behalf of the medical facility. Some hospitals always restrain infants, while other hospitals see this practice as cruel and unusual.

A quick walk through any imaging center will reveal the instruments of confinement: sandbags, tapes, head sponges, chucks, arm bands, and paper absorbers. No doubt about it: sometimes patients must be confined. Sometimes the use of force to restrain a patient is justified.

As with the other torts, patients might recover damages due to imprisonment if a jury finds the technologist's actions to be unreasonable, unjustified, and unprivileged. The type of damages a patient might receive could be money for "bodily injury, physical discomfort or inconvenience, loss of time and wages, emotional distress, harm to reputation and the loss of the company of one's family."[20] Punitive damages could be awarded if the imprisonment were extremely unreasonable.[21]

Intentional Infliction of Emotional Distress

A relatively new tort is the intentional infliction of emotional distress, sometimes known as the tort of *outrage*. This chapter will not discuss *negligent* infliction of emotional distress. The tort of *intentional infliction of emotional distress* is defined as follows: "(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."[22] Another legal treatise lists four elements of this tort: (1) conduct of the defendant was outrageous, (2) the defendant acted intentionally or recklessly; (3) severe emotional distress was suffered by the plaintiff; and (4) the defendant's conduct was the proximate cause of emotional distress suffered.[23]

This tort might have limited applicability to technologists because the conduct would have to be so extremely outrageous that it would be totally unexpected. The conduct in this tort must be so bad that any reasonable person would describe it as outrageous. This is conduct that is "beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community."[24] For example, perhaps as a practical joke, a technologist might falsely imply or falsely state to a patient that a certain diagnostic test shows some horrible disease or condition. If this causes the patient to suffer nervous shock and resulting illness, the technologist would be liable to the patient for this illness.[25]

If a technologist threatens to beat up or harm a patient and this causes the patient to become extremely frightened and emotionally distressed, then the technologist could become liable to the patient for any resulting illness. Also, if a technologist ridiculed or embarrassed the patient for some reason, perhaps in a feeble attempt to encourage cooperation, and this caused the patient injury, liability for the intentional infliction of emotional distress might result.

With this tort, the relationship between the parties is assumed to be such that, if one party is responsible for the other or has some apparent authority over the other, the person in authority might more likely be held liable for intentional infliction of emotional distress as a result of the abuse of that position. This tort is most often seen with police officers, school principals, and debt collection agents. Arguably, technologists are also in a position of apparent authority because patients give over, at least symbolically, their bodies for clinical testing and are put in a somewhat vulnerable position. If a technologist for some reason threatens to have the patient arrested or bullies the patient, who then becomes distressed, the technologist might be liable to the patient for any damages or resulting illness.

Even worse is the health professional who takes advantage of a weaker person or someone who is more susceptible to emotional distress. An example of this might be the elderly patient who already suspects the presence of a fatal problem, only to have a technologist make light of it. Rough or flagrant treatment of such an elderly person which causes illness from emotional distress might result in a lawsuit.

It is not enough that the conduct be merely insulting or cause hurt feelings; it has to be outrageous and humiliating. A not very far-fetched example might be one in which a pregnant woman brings her child into the department. If the technologist mistreats the child to such a degree that the mother suffers emotional distress, which induces a miscarriage, then the technologist would be liable for the results of the miscarriage or other illness.[26]

Likewise, comments about a patient's physical problems or deformities could bring about a claim for intentional infliction of emotional distress.

Since grossly obese patients are often more difficult to scan or image, and because the resulting imagery is often not clear, technologists should refrain from making any comments about a patient's obesity.

It is possible to be liable for conduct directed at third parties. This section will not discuss actions by unrelated bystanders recovering from emotional distress caused by the negligence of the defendant. However, the law is growing in this area. This is most often seen when a mother sees her child hit by a car or when anyone sees a tragic accident and in turn is damaged physically or psychologically by the sight.

Defamation

Closely related to the tort of intentional infliction of emotional distress is the tort of defamation. The very same outrageous conduct that serves as a basis for an action for intentional infliction of emotional distress could support a defamation action.[27] The right protected in the tort of *defamation* is the right to one's good name. Usually this tort is associated with tabloid stories about the private lives of movie stars. The tort of defamation, however, has everyday applications, particularly in the hospital workplace. The tort of defamation has four elements: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of a publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[28] Basically this tort consists of telling a lie about someone or putting them in a false light.

The "publication" is a communication made either intentionally or negligently to a third person. There is no defamation when the alleged defamatory remark is made directly and only to the patient. The communication can be either written or spoken. Again, there must be some sort of resulting injury. In this case, the injury is the harm to the reputation of another which results in the lowering of that person's reputation in the community or would result in deterring third persons from associating or dealing with the defamed person.[29]

Libel and slander are two forms of defamation. *Libel* concerns publication of defamatory matter by writing. *Slander* concerns publication of defamatory matter by any other means, most commonly by the spoken word. In the context of the radiologic technologist, defamation could occur in what the technologist says about the patient to a third party, such as a fellow employee, a patient's family member, or a bystander; or in what the technologist writes about the patient, usually in the form of hospital or lab notes. Interestingly, anything can be said about dead people. Deceased persons cannot be defamed.[30] It is possible to defame a group or class, but this division of the tort will not be discussed here because it is unlikely that it would occur in a hospital setting.

hospital setting concern statements made about *physicians* by other hospital personnel.

Although truth is a defense in defamation cases, it might take a trial to determine which version of the truth will prevail. Likewise, one can use the idea of privilege as a defense against a charge of defamation. Privileges can be either absolute, qualified, or conditional. These privileges are almost nonexistent in hospital settings. An example of an absolute privilege would be remarks made by legislators within their legislative function.[34] Likewise, statements made in the pleading of a lawsuit which are relevant to the issues of the suit are sometimes considered absolutely privileged from liability. The common law identified three types of conditional or qualified privileges: (1) conditional privilege arising from an occasion; (2) privileged critics or "fair comment"; and (3) special privileges concerning reports at special proceedings or public meetings.[35] These privileges generally are applicable to the media only and will not be discussed here.

VICARIOUS LIABILITY

It is possible for someone to be liable for negligence they did not commit. Sometimes the negligence of one person can be *imputed*, or placed upon, another, even if the other is not present. The other person is said to be *vicariously liable* for the action of the actor. For example, in a recent case, a hospital employee bandaged an injured child's finger so tightly that the finger eventually had to be amputated. The mother, who was a nurse, pleaded with a doctor she knew who was in the emergency room to treat her daughter. The doctor, who was not a hospital employee and had no duty to treat the child, performed the necessary treatment and told an emergency room employee to wrap the wound. The kind doctor was sued under the theory that the hospital was working under his direction and was therefore a "borrowed servant."[36]

The most common type of vicarious liability is known as *respondeat superior*. The meaning of this Latin term is almost obvious. A superior may be called upon to respond to the actions of his servant. Briefly, the master may be liable for the acts of the servant. In hospital settings, there are few masters and many servants. For example, a doctor could become liable for the actions of hospital personnel; hospital superiors in an imaging center might become liable for the actions of other department workers. Likewise, if a student technologist caused an x-ray machine to overheat and burn a patient, the hospital and the doctor in charge of the procedure could be liable.[37] The basic idea is that one who orders a thing done by another is acting as if the orderer did it. The supervisor usually has the deeper pocket; therefore, the more financially blessed superiors

hospital might be liable under another theory for hiring such an emotional employee!) Likewise, if an employee misuses equipment or an instrument which is highly dangerous in and of itself and hurts the patient, the harm could be imputed to the hospital on a theory of negligent use of an instrument.

It is unlikely that a technologist will be employed in a joint enterprise, but the law treats joint enterprises the same way as partnerships. Each partner or joint member is the agent of all the others and could be liable for the actions of all the others.

ELEMENTS OF TORTS

In general, torts are said to have four elements which must be proved in order to win a judgment: (1) duty, (2) breach of duty, (3) damages, and (4) damages proximately caused by the breach. Legal matters are divided into civil cases and criminal cases. As mentioned earlier, this chapter deals only with civil cases, which are cases brought to win money damages. In these cases, the plaintiff or the injured party must prove the case by a preponderance of the evidence. In other words, the plaintiff does not have to prove negligence beyond a reasonable doubt. This burden of proof is substantial but not as great as it is in criminal cases.

Some cases, however, can be proved by circumstantial evidence. What if, after adjusting the collimator of an x-ray machine, a technologist walks back to the booth to begin the x-ray, and the machine falls on top of the patient. Well, "the thing speaks for itself." The technologist has control of the x-ray machine. X-ray machines do not normally collapse on patients. The reasonable conclusion is that, because the technologist was the last one who adjusted the machine, some negligent act on the part of the technologist caused the machine to fall. In effect, the burden of proof shifts to the defendant technologist or hospital to prove that no negligence in fact occurred. This theory of negligence based on circumstantial evidence is known as *res ipsa loquitur,* or literally "the thing speaks for itself." A recent example involved a patient who discovered after surgery that she still had the tip of a surgical instrument in her right leg.[38] The outcome of this case is obvious.

There are usually four conditions that must exist before the doctrine of *res ipsa loquitur* can be applied: (1) the element must be one that ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. Later, a fourth condition was added: evidence as to the explanation of the event must be more readily accessible to the defendant than to the plaintiff.[39] A famous application

of the *res ipsa loquitur* doctrine in hospital cases occurred in a California hospital. In that case, a patient undergoing an appendectomy suffered traumatic injury to his shoulder, an unusual happening in an abdominal surgery. The doctrine of *res ipsa loquitur* was applied against all the doctors and hospital employees connected with the injury.[40] This is understandable because someone in that group had to have acted negligently to cause a shoulder problem resulting from an appendectomy.

JURISDICTION

Although most medical professionals may not realize it, they live simultaneously in two kingdoms. They live in a single state and at the same time in the United States. What this means in terms of civil liability is that, in the event of a claim of negligence, the technologist may be sued in state or federal court. Obviously, plaintiffs will try to sue where they are most likely to win. Usually in civil liability cases, the claimant will sue in the location where the injury occurred. This is the easiest choice because obviously a local court would have jurisdiction over a wrong done in its state. Problems arise when an injured person from another state brings a suit in his or her own state. In other words, the defendant ends up being sued in the court of a state he or she has never visited. It is also possible to be sued in a federal court. When a citizen of one state sues a citizen of a different state, this situation is known as *diversity jurisdiction* and vests a federal court with jurisdiction over the case when the matter and controversy exceed the sum or value over $50,000 exclusive of interest or costs. Even if a matter starts in state or federal court, it might be *removed*, or transferred, to a different state or federal court.

CONCLUSION

Technologists are trained to be competent health professionals, not defendants in lawsuits. Being professional at all times, understanding what is required, understanding the technology, and communicating with patients will help avoid civil liability and keep both technologist and facility out of court.

NOTES

1. W. Prosser and R. Keeton, *The Law of Torts*, 5th ed. (St. Paul, Minn.: West Publishing Co., 1985).
2. Bob Kronemeyer, "Both Sides of the Stethoscope," *Notre Dame News*, Summer 1993, pp. 12–13.

CHAPTER 5

Medical Negligence and Malpractice

J. Thomas Galle

There are many variables in the concepts of medical negligence and malpractice. The purpose of this chapter is to acquaint the reader with some of the familiar and perhaps not so familiar concepts. The particular cases used are generally within the author's jurisdiction, but the overall issues are fairly consistent in other jurisdictions. It is always a good idea to learn the basic rule in the practitioner's own local jurisdiction.

One of the first concepts in this area is the general idea of negligence. The 1990 edition of *Webster's Illustrated Dictionary* defines *negligence* as:

> **1. The state or quality of being negligent.**
> **2. Any negligent act or failure to act.**
> **3. The omission or neglect of any reasonable precaution, care, or action, resulting in accident, injury or loss.**[1]

Black's Law Dictionary defines *negligence* as:

> **The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do. . . .**
> **The law of negligence is founded on reasonable conduct under all circumstances of (a) particular case. Doctrine of negligence rests on duty of every person to exercise due care in his conduct toward others from which injury may result.**[2]

The former definition states simply that an action occurs but does not go much further regarding the consequences of such actions or omissions. The legal concept in the latter definition considers the results of an action (or an omission). The latter definition is what will be briefly explored here.

NEGLIGENCE

The legal concept of negligence necessarily involves three steps. The first step involves that which regulates human behavior toward others. This means essentially what duties are owed to others. If an action is required, for example, then there is a duty to perform that action in a reasonable and prudent manner. Failure to act reasonably and prudently could be considered negligence. Acting in a manner inconsistent with accepted norms could also be considered negligence.

If a patient is brought to the radiology department, the responsibility for that patient's well-being passes to the radiographers and any other personnel assigned to the department or patient. It is their duty to see that the procedures performed follow the accepted guidelines. A failure to follow these norms of practice could constitute negligence. If a procedure calls for restraints to be used, to prevent a fall or to prevent harm to the patient or others, the need to restrain should be explained and the restraints should be properly applied. Failure to properly apply restraints could result in injury to the patient or others, for which the radiographer and the facility may be liable.

There has been a great deal of discussion and case law over the years involving just what is "reasonable," and, suffice it to say, the general meaning is its everyday, common-sense definition. If an action falls outside the bounds of common sense, chances are that it will fit the definition of negligence. The rule of thumb is to decide whether the action makes sense. If it doesn't, it shouldn't be done. Of course, there are many exceptions to this rule, but the concept is grounded in the fact that humans are rational creatures capable of making rational decisions.

The second step necessarily involved in the issue of negligence is failure or breach of the duty owed to the individual. Once duty to the individual is established, the actor has the obligation to perform that duty in a manner that will bring it to a successful conclusion. If the actor fails in that duty, he or she may be responsible to the individual to whom that duty was owed for any injury resulting from that failure.

This brings us to the third and final step in the concept of negligence. This step involves damage to the individual for breach of duty. For the legal concept of negligence to apply, there must be some damage to the person or property resulting from breach of the duty owed. If the patient falls because of improper restraint or monitoring and suffers a fractured

cervical spine, for example, the damages could be enormous. On the other hand, that same fall could result in no injury. Other than an apology and an appropriate review of the situation, no damages could accrue. There would be no additional medical expense or other nonspecific damages. If there is no damage, then, under the legal definition, there may be no negligence.

There are also notions of *nominal damages,* which indicate a willingness to find someone at fault and that there is a consequence for acting in a negligent manner. There are those cases in which very small or nominal damages are awarded. These types of cases are brought because of the principle involved. This could be a legal point which may need clarification, or it may be simply one's dedication to a cause which needs to be defined in a court of law. If, in the noninjury fall, for example, there is found to be a complete disregard for the patient's well-being, that negligence might be utilized to effect a change in the procedure or attitude of the institution. There may not be a great deal of money at stake, but the principle may be the key motivating factor.

The entire legal system in the negligence arena has developed through years of cases attempting to define this concept, and it will continue to evolve. Depending on one's point of view, the system may be for the better or for the worse. In any event, it will continue to undergo change and refinement. It is imperative for professionals to keep up with major changes in this area, and changes that affect professional practice should be updated regularly through proper channels of communication.

Before *medical* negligence can be discussed, there are two further areas of negligence which need to be explored. These two concepts, depending on the jurisdiction, are important to know because of the legal and financial consequences of each.

Contributory Negligence

As the principle of negligence evolved, it was considered that, for a party to recover, he or she should be free of any negligence. It was felt that a party making a claim for damages should not have contributed to his or her own injury and then recover for it. This doctrine of negligence became known as *contributory negligence.*

Thus, if the injured party shared the blame in an accident, recovery is denied. This concept itself has undergone many refinements, and several exceptions have arisen in order to get around being completely barred. In many jurisdictions, the concept of *slight versus gross* has become the accepted practice. This concept is basically what it says. If the contributory negligence is "slight," or minimal, recovery can be had. Conversely, if the contributory negligence is considered "gross," then the grounds exist for no recovery.

The above concept has worked as a practical matter, but still involves making judgments regarding liability. Juries have been asked to determine whether the contributory negligence of the plaintiff was sufficient to deny recovery. The most common examples of contributory negligence barring recovery are in cases of slipping and falling. The reported cases are too numerous to cite, but the overriding principle in many cases was the argument that the plaintiff should have been looking, or should have known of a step, or should have seen the carton in the aisle. Many juries denied recovery because they felt the plaintiff should have been aware of where they were going and that their contributory negligence was sufficient to deny all recovery. This concept was the majority rule for many years.

There was one exception to this rule which developed as a way of recovering in spite of contributory negligence. This doctrine became known as the *last clear chance* doctrine. Essentially, this doctrine means that the plaintiff can still recover damages if, while in a position of peril, the defendant had the last clear chance to avoid the accident. An obvious example of this doctrine is the case of a plaintiff who is hit by a car. If that plaintiff is found to be contributorily negligent for crossing against the light, he or she may not recover damages. However, the plaintiff may still recover if it can be shown that the defendant was a block away and had plenty of time to slow down or stop. This means that the defendant had the "last clear chance" to avoid the accident but failed to do so.

Comparative Negligence

Many jurisdictions have felt that there was something inherently wrong with a doctrine of negligence that completely barred recovery for damages because of negligence by both parties. There should be a way to lessen the burden and still maintain judicial fairness. From this concern arose the second doctrine of negligence, known as *comparative negligence.*

Comparative negligence developed because there was a need to address the apparent inequities in denying recovery for shared fault. Many jurisdictions felt that this resulted in a windfall for either the plaintiff or the defendant, depending on the degree of fault found and against which party.

The courts and legislatures then embarked on a quest to define this new doctrine. Comparative negligence developed into two basic forms: pure and modified. *Modified comparative negligence* depends on the degree of fault, but recovery may be barred if the degree of fault is high enough.

Recovery under the modified comparative fault system may be barred completely if the plaintiff's negligence is equal to the defendant's fault. This is sometimes referred to as the *50 percent rule.* Under this theory, a plaintiff's recovery diminishes proportionately to his or her degree of

fault. When fault is considered equal (50/50), both parties can recover 50 percent of damages, but once the degree of fault exceeds 50 percent, there is no recovery for the plaintiff.

Another version holds that the plaintiff's fault must be "less than" that of the defendant. This is sometimes called the 49 percent rule. As long as the plaintiff was less negligent than the defendant, recovery is allowed. Thus, a 50/50 case could result in no recovery.

Pure comparative negligence, on the other hand, means just that: pure. Each party shares the blame to the degree to which he or she contributed to the accident. There is no cut-off point that completely bars recovery. Theoretically, it is possible to collect 1 percent of the plaintiff's damages if the defendant is deemed 1 percent negligent.

The watershed case in Kentucky, *Hilen v. Hayes,* is a concise history of the doctrine of negligence.[3] The facts of this case show the inequities in applying contributory negligence as a complete bar to recovery. Ms. Hilen was severely injured in an automobile accident. There was no doubt that the fault for the collision was that of the driver of the car in which she was a passenger. The defendant argued, however, that Ms. Hilen was contributorily negligent because she failed to exercise reasonable care by riding with a person whom she knew or should have known was too intoxicated to drive. The jury found that Ms. Hilen was contributorily negligent and barred her completely from recovering any of her damages.

The Kentucky Supreme Court found that this system was not fair and determined that comparative negligence would apply. The court went further, to state that the form of comparative negligence in Kentucky would be the "pure" form.

Under this form, and given the same facts as above, the jury could determine the total damages and the degree of the plaintiff's fault. The recovery in that instance would be the total amount reduced by the degree of fault. A case worth a total of $100,000 with the plaintiff 25 percent at fault would result in a $75,000 recovery, for example.

It should be kept in mind that the defendant can recover damages as well. If the plaintiff's negligence played a part in damaging the defendant, the defendant can collect his or her pro-rata share.

MEDICAL NEGLIGENCE

All of the concepts in negligence apply to medical negligence as well. There is another step involved, however: there must be a relationship between the provider and the patient giving rise to the duty owed. The general rule is that, when one sees a doctor for a particular condition or examination and the physician agrees to perform the necessary services, the implication is that the physician will render those services with requi-

site skill and care. This service is rendered in exchange for the payment of the normal charges for providing this care.[4] The physician's failure to provide those services with that requisite skill and care gives rise to action in medical negligence.[5]

Element of Duty

Once the relationship is established, there is a duty to use that degree of care and skill expected of a reasonably competent practitioner in the same class to which the physician belongs, acting in the same manner and under similar circumstances.[6] Thus, the medical professional is expected to perform his or her duty to the patient according to the standards in the field in which the medical professional practices. A "reasonably competent" practitioner is one who should, at a minimum, know the basics in treating a patient. The same is true in related fields. There are professional standards in all areas of health care, and diagnostic imaging and radiation therapy are no exception. Those standards are to be followed, and the practitioner may be accountable for any deviation from them.

This represents a departure, to some degree, from previous standards. Although the concept is consistent with past standards, it eliminates the geographical reference. Decisions in the past usually included a statement to the effect that the degree of skill and care was confined to the locality, largely because information was not readily available in all areas. Now that communications have vastly improved, information is readily available, almost at the touch of a computer key.

The courts have been somewhat slow in picking up on this, but they are coming to recognize that advances in medical science and the means of communicating these findings have improved to the point where standards are basically national in nature. Accepted principles of practice are available in various professional publications, and changes wrought by advances and new discoveries are seen everywhere from newspaper articles to television programs. A rural area is just as capable of keeping up with these advances as a large metropolitan area.

Element of Breach

What, then, constitutes a breach of this duty owed to the patient? That breach occurs when the conduct drops below the ordinarily recognized standard of care for that particular treatment.

This does not mean, however, that an error of judgment on the part of the physician will result in liability. A physician who conducts his or her treatment within the accepted medical practice, but who nonetheless has a bad result, will not be held liable.[7] The courts recognize that medical science is not exact and that not every result will be favorable. Sometimes,

even within accepted standards, judgment calls must be made. These judgment calls will not always turn out right.

Element of Injury

Everyone understands that medical negligence occurs when the wrong limb is amputated or when the improper medication has been prescribed after it was known to be harmful. This brings us to the area of injury and damage.

In the first case, it is easy to see that the injury was inflicted because of malpractice. The patient has been wrongfully injured due to failure to follow accepted standards of practice. The wrong instructions were given, or the right instructions were not followed. Regardless, it is obvious that the patient was injured as a direct result of this negligence. It is also easy to see that the patient has suffered damage as a result of this action. The damage includes not only the immediate effect of the loss of the limb and its attendant medical bills and treatment, it also includes potential loss of earning capacity and pain and suffering. If the behavior was outrageous, then punitive damages may be added to the other damages.

The second case may seem obvious at first, but it lends itself to several areas of discussion. The first and most obvious scenario is one that results in serious injury or death. If this is the case, then the outcome is very similar to that in the first case. There was a duty of prescribing the right medication, a duty of providing the right medication, a breach of that duty, a direct causal relationship between the taking of the wrong medicine, and the injury and loss resulting from the wrong medication. This would meet the criteria for bringing an action for medical negligence.

However, if any of these criteria are missing, then the chances of bringing a medical negligence case are reduced substantially. If there was no duty to prescribe or provide the medication, then there can be no breach of that duty. In this case, there may still be a breach, since medication was given.

If the medication does not cause the injury, there is no actionable case. This is so, even if it was the wrong medication. If there was no injury as a result of the breach, there are no damages to recover under a negligence theory. There may, however, be other legal causes of action available to the plaintiff.

Burden of Proof

What then, does the party have to show, and how can it be shown? In our legal system, the burden of proof is on the party making the charge. This burden never changes. The party making the allegations must prove, in a civil court, all of the elements described above.

This evidence must be reliable and probative. Reliable and probative

evidence is that which can be depended upon and which goes to prove the matter at hand. If it is neither, then it cannot be used.

The Kentucky Supreme Court stated in 1982 that

> **In medical malpractice cases the plaintiff must prove that the treatment given was below the degree and skill expected of a reasonably competent practitioner and that the negligence proximately caused the injury or death. . . . The bare possibility of causation will not suffice.**[8]

As this finding shows, there must be, again, a deviation from the standard of care *and* this deviation must be the proximate cause of the injury or death. There cannot be one without the other.

The courts have been straightforward as to how this is to be shown by the plaintiff. In these types of actions, the opinions of experts are not only needed, they are required. In most medical negligence cases, proof of causation requires testimony of an expert witness, because the nature of the inquiry is such that jurors are not competent to draw their own conclusions from the evidence without the aid of such expert testimony.[9]

The court repeated the basic exception to that rule in a footnote:

> **As an exception to the general rule, expert testimony is not necessary "where the common knowledge or experience of laymen is extensive enough to recognize or infer negligence from the facts."**[10]

Res Ipsa Loquitur

The previously stated case reiterated the fact that the doctrine of *res ipsa loquitur* may be applicable to those situations where the particular injury is of the kind that could be reasonably found would not occur in the absence of negligence. This simply means that the injury could not have occurred unless there was negligence.

An example of this would be a patient who is burned by hot packs while being prepared for surgery. These hot packs are designed to warm the patient but must be removed. If they are not removed, a burn results. Since the patient is semiconscious or unconscious, the only explanation for the result is failure to properly monitor the patient. This is a simple example but nevertheless illustrates the point.

The same analogy could be drawn with the anesthetized or sedated patient in the radiology department. If that patient has not been properly restrained or monitored (if required by policy and the circumstances) and suffers an injury, and there is no plausible way to explain the injury other than negligence on the part of the department personnel, the principle of *res ipsa loquitur* would preclude a defense. The radiographer was negligent, the patient was injured, case closed.

The general rule is that expert medical testimony is required to establish

that the standard of care was below accepted practice and that the breach of this standard of care was the proximate cause of injury or death. Other cases may not warrant expert testimony as it may be clear to a layperson, after presentation of the facts, that a breach occurred.

In the fields of diagnostic imaging and therapeutic sciences, there may be some latitude in the area of expert testimony. If the injury occurs from substandard care, expert testimony regarding the standard of care may be required. Were restraints required, and what is the appropriate method for application? Other cases may not warrant expert testimony. Such cases may be as simple as whether negligence can be found for failure to keep the floor clear of materials over which a patient trips, falls, and suffers injury.

STANDARD OF CARE

That physicians and other professionals are held to a higher standard is a fact of the legal world. In the area of medicine and its related fields, the impression is that there is substantial training and expertise involved in obtaining a degree or certification. Professional organizations have developed particular standards of practice which evolve over time. If the practitioner violates these standards and causes harm or injury, there is the potential for a claim of negligence.

There are guidelines for the procedures to be used by many of the associated fields in medicine. There are guidelines written for hospitals. There are professional standards for medical technology, radiologic sciences, nursing, and other health-related fields. All individuals educated in these fields are expected to know the procedures and guidelines of their respective fields. They are expected to maintain a working knowledge of the advancements made in their fields. When these standards are violated, these individuals may be held accountable for their actions and the consequences of these actions.

One other point which must be made at this juncture is that the courts have held as recently as 1989 that the administration of medical care is a ministerial function and not a discretionary one. This means that employees of a state-owned or -operated medical facility will not be protected under the principle of sovereign immunity.[11]

Sovereign immunity, in simple terms, means that government entities or their employees are not susceptible to suit when they are acting in their official capacities. There are many exceptions to this rule, and although these concepts will not be covered here, it is important for individuals working in these types of facilities to understand special liability issues which apply to the performance of their professional practice.

Thus far, this discussion has been confined primarily to physicians, be-

cause the majority of cases involve the physician-patient relationship. However, as mentioned previously, there are standards to which other professionals are held. These may be in conjunction with the treating physician or completely independent of the physician's actions.

As an employee of a hospital or other care provider, the individual must maintain the degree of care required for that particular profession. If there is a deviation from that standard of care, which results in injury to the patient, there is exposure to liability.

RESPONDEAT SUPERIOR AND PERSONAL LIABILITY

The general rule is that the employer is responsible for the damages if the employee was acting in the course and scope of his or her employment. The negligence is imputed to the employer through a legal principle known as *respondeat superior*.

What is not generally known is that there is another principle known as *indemnity*, which the employer can use to obtain restitution from the employee for any damages it may have to pay. Most of the time it is not used, but it is a recognized principle. There is the exposure to an employee on a personal basis for damages paid by the employer due to the employee's negligence.

Practically speaking, the application of these concepts of negligence to the diagnostic imaging and therapeutic science professions is essentially the same. These professionals have a duty to perform on behalf of the patient. There are recognized standards of care promulgated for the accepted practice in each field. These standards continue to be updated, and it is the technologist's or therapist's duty to keep informed. Failure to keep up with change can expose a professional to unwanted and expensive legal problems.

As has been pointed out in the previous discussion of negligence in general, there is no longer the complete defense, in many jurisdictions, of claiming that the patient was contributorily negligent. It may reduce the damages assessed, but it will not let a defendant off the hook. In fact, this concept may allow the plaintiff to pull in as many potential defendants as possible. This reduces the plaintiff's share of liability when it can be shown that other players are at fault. It no longer is a doctor-patient lawsuit. It becomes doctor-nurse-technologist-technician-therapist-orderly-and-anyone-else-who-participated-in-the-patient-care-and-subsequent lawsuit.

CONCLUSION

As an attorney, I have had occasion to interview many individuals regarding potential medical negligence cases. There were those cases that,