

LEGAL ISSUES

Burkhardt - Chapter 7 - *Legal Issues*

RELATIONSHIP BETWEEN ETHICS AND THE LAW

Law: system of binding rules of action or conduct

- Govern behavior of people in respect to relationships with others
- Govern behavior in relation to government

Laws meant to reflect moral beliefs of given population

Devised by groups of individuals serving in official capacity

Four basic functions of law in society

1. Define relationships among members of society and to state
 - Which activities are permissible
 - Which activities are not permissible
2. Describe which force may be applied to maintain rules and to whom applied
3. Provide solutions to problems
4. To redefine relationships between persons and groups when conditions of life change

FUNCTIONS OF LAW

- Establishes rules that define rights and obligations
- Establishes penalties for violations of law
- Describes modes of enforcement - rules and penalties
- Levels: state, federal, local
- Insure safety: citizens, property
- Promote nondiscrimination
- Regulate professions
- Provide for distribution of public goods and services
- Protect economic and environmental interests of society

OTHER RELEVANT CONSIDERATIONS

- Intended to reflect popular belief about "rightness or wrongness"
- Laws built upon moral foundation (similar to ethics)
- Laws represent attempt to codify ethics
- Expected to be congruent with moral values of society
 - Example: where murder is considered immoral, law prohibits murder
 - Murder of innocent is ethically and legally prohibited in every culture
- Occasionally governments create laws that populace views as unjust
- Democratic societies provide constitutional means to change laws viewed as unjust
- Professional code of ethics viewed by some as a "safety net" for conduct
 - Usually true but not necessarily always true
 - Laws may exist which some consider unethical
 - Certain illegal acts may be considered ethical to some

REASONS FOR DISCREPANCY BETWEEN LEGAL AND ETHICAL PERSPECTIVES

Differences in ethical point of view

Example: Deontology vs utilitarianism where deontology might require life preserved at all costs vs utilitarianism which might support abortion or euthanasias to provide good of many

Human motivation and behavior too complex to be fairly reflect in law

Same act might be differentially perceived as right or wrong pending on stage of development

Legal system may seem to judge actions vs motivation

Example: professional ethics code may be at odds with employer or institutional policies; institution may legally dismiss nurse who does not comply with policy even if done for reasons of ethical issues

Laws change as a function of political climate and other variables

- Expanded role of nurses
- Abortion, fetal tissue use
- Organ transplantation
- Self determination, confidentiality for AIDS patients

Comment: integrity is defined as adherence to moral norms sustained over time.

Accordingly, nurses may not change basic moral beliefs in response to changes in law - creates framework for discrepancy between ethics and legality.

GENERAL LEGAL CONCEPTS

Law authorizes and regulates nursing practice

- Nurse practice acts of individual states
- Define activities and boundaries of nursing

Legal system scrutinizes nursing action and omissions

Dynamic changes

- Advanced practice nursing
- Critical care nursing performing complex and vital tasks

Litigation is very high in health care - nurses must have knowledge of laws/legal process

Knowledge legal principles necessary component of ethical decision-making

SOURCES OF LAW

Constitutional Law

- Formal set of rules and principles
- Describe powers of government and rights of people
- **Constitutional Law** is principles plus description of interpretation and how enacted
- Constitutional law supercedes all other laws
- **Bill of Rights** of US Constitution - applies to patients and nurses
 - Nursing action must account for these rights
 - Nurses cannot be forced to forfeit rights

Statutory/Legislative Law

- Formal laws written and enacted by federal, state or local legislatures
- Statutory or legislative law are formal written laws of federal, state or local legislatures
- Congress and state pass thousands of laws each year added to volumes in existence
- "More and more laws to satisfy the demands of society and special-interest groups"
- Examples: Medicare and Medicaid law, prescriptive authority

Administrative Law

- Operation of government agencies
- National, state and local governments set up administrative agencies
- Regulate education, public health, social welfare, professions
- Legal powers granted to administrative agencies by legislative bodies and rules
- Example: State boards of nursing (rules carry same weight as law)
Role is to protect public vs advocate for nursing
NJ controversy of nurses home addresses on websites

Common Law

- English -speaking countries - all states except Louisiana
- Constitutes basis of judicial system
- Case law - decisions based on earlier court rulings in similar cases
- Precedents** - case law - over time precedents take force of law

TYPES OF LAW

Public Law

- Defines persons rights and obligations in relation to government
- Describes various divisions of government and powers
- **Criminal Law**: deals with crimes - actions considered harmful to society
- Crime against one member considered crime against society
- Federal government and each set has own set of criminal laws
- Criminal laws must be consistent with rights and freedoms of constitutions
- Criminal law defines offenses and sets rules for arrest, due process and punishment
- Nurses can be accused of criminal offenses
 - Directly injuring patient either intentional or unintentional
 - Falsifying narcotic records, fraudulent billing, failing to renew licence

Felonies: serious crimes carrying significant fines and jail sentences

First or second degree murder, arson, burglary, extortion, kidnap, rape, robbery

Punishable with **jail terms**

Nurses rarely accused in course of practice, however it does occur

- Removal of life support regardless of motivation
- Unintentional causing death e.g. administering med to pt with allergy
- Occasional media reports of intentional injury e.g. "Angel of Death"

Misdemeanor - less serious crime usually punishable by fine or short-term jail or both

Examples: disturbing peace, assault, battery, solicitation

Nurse: slapping patient, giving injection without consent

Assault and battery considered torts; can be decided by private or civil law

Private Law aka Civil Law

Determines legal rights and obligations in many kinds of activities involving others

Examples: borrowing money, lending money, signing contract

Over one million civil suites tried in US per year

Six branches of private law:

Contract and commercial law

Tort law

Property law

Inheritance Law

Family Law

Corporate Law

Contract and tort law most relevant to nursing practice

Non-compliance with private law leads to monetary compensation to plaintiff

Plaintiff refers to complainant or injured party

Contract Law

Rights and obligations of people who make contracts

Contract: agreement between two or more people which can be enforced by law

May be written or oral however written takes precedence

Expressed contract occurs when two parties agree explicitly to terms

Example: employment contract

Implied contract: no discussion between parties but law considers contract exists

Example: nurse-patient relationship

Tort Law

Wrong or injury one suffers because of someone else's action

Examples:

Bodily harm, invasion of privacy

Damage to property, business or reputation

Unauthorized use of personal property

Rights and obligations of persons involved in cases involving torts

Many torts are unintentional e.g. damage resulting from an accident

If deliberate with serious harm tort may be a treated as a crime

Purpose of tort law is to make person whole again primarily via **monetary damage**

Involves **negligence** and **malpractice** thus branch most familiar to nurses

Unintentional torts omission causes unintended injury or harm to another

Negligence

"The omission to do something that a reasonable person, guided by those ordinary considerations which ordinarily regulate human affairs, would do or something which a reasonable and prudent person would not do" (Creighton, 1986, p 141)

Negligence:

Law requires that every person behave in a reasonable way - held to standard of **reasonable and prudent individual**

Example: no law contradicting throwing rocks into air but it is not reasonable to do so within a crowd of people

Nurse is expected to go beyond reasonable and prudent person and held to **standard of reasonable and prudent nurse** - nursing knowledge is broad, technical and specific - criteria go far beyond those required of ordinary person

Example: nurse spills liquid on floor resulting in patient fall - reasonable person would anticipate fall and clean spill immediately; no difference if patients spills liquid and nurse observes it - she has duty to prevent harm

Reasonable person might not be expected to know drug interaction and could reasonable administered two prescribed drugs to a person even though harm might ensue but nurse who administers same two drugs (even with order) would be held to a higher standard and would be considered to be at fault.

Malpractice: inappropriate professional conduct causes harm to patient

- Professional misconduct
- Unreasonable lack of professional skill
- Nonadherence to accepted standards of care
- Lack of fidelity, evil practice, illegal or immoral conduct

Section of tort law which is specifically reserved for professional person

Nurse must fail to act as other reasonable and prudent professional nurses with same knowledge and education would act under similar circumstances (Catelano 1991, p 69)

Four components of malpractice

1. Duty owed to patient
2. Breach of standards of care or failure to carry out duty
3. Actual harm or injury suffered by patient
4. Causal relationship between breach of standards of care/duty and injury

Several sources of traditional malpractice litigation

- **Medication errors** (most common area for nursing liability)
- Falls, burns
- Loss/damage to patient property
- Incorrect sponge counts
- Intentional infliction of emotional distress

Medication Errors:

Nurse responsible for safe administration of medication regardless of physicians orders, workload, unusual circumstances, institutional policy

Example: nurse puts meds into bag of feeding tube is liable regardless of how busy she is or regardless of whether institution condones practice

Example: nurse unfamiliar with pediatrics giving lethal or high dose of drug to child even if so ordered due to failure to check dosing in literature

Falls in Nursing Home

Nursing responsible to account for patient risk factors with respect to fall

- Ambulatory abilities, cognitive abilities, emotional states
- Medication affecting alertness

Side rails and restraints

- Use of professional judgement
- Adherence to institutional policy

Patient Belongings: nurse expected to take reasonable measures to protect property

Sponge Counts: nurse held responsible for count held liable for the ensuing injury

Emotional Distress

Callous or inappropriate remarks to another worker within earshot of patient

Inappropriate remarks or conversation with patient

Actions showing insensitivity to patient's emotions or likely reactions

Burns

Common source: fires, baths, showers, hot water bottles, heating pads

Diminished capacity patients are particularly prone

Examples:

- Placing infant on heating pad
- Allowing impaired or paralyzed patient to smoke unattended

Intentional Torts - willful or intentional acts which violate another's rights/property

Three elements necessary to be considered intentional

1. Intended to interfere with plaintiff or his property
2. Intent to bring about consequences of act
3. Act must substantially cause the consequences

No legal requirement that damages or injury result; proof of intent is sufficient

Examples:

Fraud, invasion of privacy, assault, battery, false imprisonment, slander, liable

Fraud - deliberate deception for purpose of securing unfair or unlawful gain

Nurses seldom so accused; prosecuted as crime when it occurs

Examples involving nursing

Falsification of info on employment application

Untruthful billing procedures

False representation of patient condition to induce service contract

Falsifying records to cover up error or avoid legal action

Can lead to civil and criminal actions

Court decisions tend to be harsh

Invasion of Privacy - Right of Privacy

Right to be left alone or left free of unwanted publicity

Individuals have right to withhold selves and lives from public scrutiny

Tort of invasion of privacy occurs when person's privacy is invaded

Four types of invasion of privacy

1. Intrusion on physical or mental solitude or seclusion
2. Public disclosure of private facts
3. Publicity placing person in false light in public eye
4. Appropriating person's name or likeness for defendant's benefit

Examples:

Surgeon repeatedly photographed patient dying of cancer of larynx even on day of his death when patient requested not to be photographed

Nursing home permitted Right to Life advocates to interview a demented patient on dialysis during a court battle wherein family was attempting to have court-ordered d/c of dialysis which interviews were subsequently published. Family sued 4 nurses and nursing home for \$80 million with jury awarding \$2.5million

Assault and Battery

Used together but have different legal meanings

Both are intentional torts

Assault: unjustifiable threat or attempt to touch person without consent which results in fear of immediately harmful or threatening contact

Touch need not actually occur; threat is sufficient

Battery unlawful, harmful or unwarranted touch of another or enacting physical harm

- Willful, angry, violent or negligent touching of body or clothes

- Includes anything held by or attached to person

Nurses have been accused of assault and battery

- Nurse threatens injection to unruly patient without consent
- Battery: slapping, shoving, pinching patients but can be more subtle

Touching without consent is always battery even if intent beneficent
Surgery without consent are most common example

Example: quadriplegic patient refused Foley whereupon nurses told patients to “shut-up” and inserted catheter. Removed after repeated requests by patient and family after which it was reinserted by nurses. Case was settled for \$25,000

Example: Christian Scientist refused meds which were subsequently forced upon her. Court permitted recovery for assault

Exception to consent: where blood or specimens requested by police for persons under arrest

False Imprisonment

Unlawful, unjustifiable detention of person within fixed boundaries

Acts intended to result in unlawful confinement

Includes physical restraints of person

Includes acts intended to accomplish confinement: refusing clothing or car keys

Where physical restraint use can also be assault and battery

States have procedures to restrain certain classes of patients

Mentally incompetent

Disoriented

Substance abusers

Persons with contagious diseases

Hospitals permitted to transiently restrain patients in seeking legal avenues

- Reports incident to police
- Obtain commitment or custody orders

Examples of nurses/institutions convicted of false imprisonment

- Locking patients in rooms
- Detaining patients pending payment of bills
- Nursing home detaining patient who wished to leave

Courts have upheld hospital detaining intoxicated patient

Defamation

Harm to a person's good name, reputation, diminishes others' value or esteem or arouses negative feelings toward person in others via communication of false, malicious, unprivileged or harmful words

Occurs only when words communicated to a third party

Defamation does not occur when two persons directing remarks to one another

Slander: speaking unprivileged or false words

Libel: printed defamation

Examples of slander applying to nurses

Slander: voicing value judgements or voicing opinion that patient is uncooperative, malingering, unintelligent or drug-seeking

Voicing inappropriate defamatory remarks against another professional

Examples of libel applying to nurses

Writing information in patient's chart which is damaging, judgmental, critical or speculative

"Patient is drug seeking" "patient is rude"

Proof of damage not needed if remarks have potential of harming business prospects

Example: nurse, a guest at someone's party, told party's hostess that caterer had syphilis which damaged her business. Caterer did not have syphilis

Two circumstances (defenses) where defamatory remarks may not constitute defamation

1. Truth

2. Privilege

Example: nurses have responsibility to report child abuse

Example: nursing director must be truthful to other potential employers

Example: Peer review groups

Required to discuss privileged info for purposes of improving services, disciplining providers etc.

Example: nurses must report illegal or incompetent practice to others

In the absence of privilege, truth is a good defense to defamation

RECENT LEGAL TRENDS

Three recent legal trends:

1. Litigation involving managed care organizations
2. Increasing numbers of malpractice claims against nurses
3. Movements toward criminalization of malpractice

Legal Trends Involving Managed Care Organizations

- Managed care has begun to supplement traditional fee-for service providers for health care
- Promise efficiency and economy of health care delivery
- Policies which restrict expensive services have resulted in corporate liability losses
- MCOs have vested interest in providing the most cost-efficient services
- Focus on cost-efficiency can lead to **diminution of quality of care**
- Jury awarded \$45 million to Georgia family whose son had hands amputated
 - Plaintiff: Kaiser Permanente who attempted to minimize health care costs
 - Mom called MCO's ER to report infant had temp 104 degrees
 - Nurse on duty told mom to give tepid bath
 - Mom was advised to take child to Kaiser Permanente affiliate instead of closer hospital
 - Child had cardiac arrest en-route; gangrene from compromised circulation (extremities)
 - Argued as example of **sequelae of cost-conscious provider cutting corners**
- MCOs choose clinicians which can lead to liability under corporate negligence doctrine
 - Courts have held that there is an unreasonable risk of harm if incompetent providers
 - MCOs limit members choice of providers to a select group
- MCOs must weigh cost cutting measures against risk of liability if negative impact on care

Malpractice Claims Against Nurses

- Nurses becoming target of increasing number of malpractice changes
- Individual liability increasing as well as corporate liability claims
- Traditional errors seem to be increasing (burns, falls, medications errors)
- Speculation that stress and increased workload may contribute to increased errors
 - Stress in workplace; decreased morale distracts nurses
 - Traditional areas of liability combined with new areas of risk exposures
- Validated trends in malpractice litigation
 1. Nurses continue to be named as defendants - professionally accountable for actions
 2. Telephone call situations continue to indicate high levels of liability
 - Potential for miscommunication
 - Lack of documentation to support defendant's version of conversation
 3. Failure to communicate and to access the chain of command continues to be liability
 4. OB cases continue to present high monetary losses when negligence is established

Criminalization of Nurses' Professional Negligence

- Traditionally nurses making errors charged with unintentional tort of professional negligence
- Previously negligence (malpractice) has not resulted in criminal prosecution
- Trend emerging to charge nurses with criminal negligence in certain cases

- Example of criminal negligence case (per Cathy A Klein, NP and JD)
 - April 1997 3 nurses indicted by Colorado grand jury
 - Criminally negligent homicide - death of newborn regarding penicillin med error
 - 1st nurse assigned to care, 2nd nurse offered to assist, 3rd NP working in hospital
 - Physician ordered 150,000 unit of IM penicillin requiring 5 separate IM
 - Same day infant had LP was resulted in 6 painful attempts
 - To avoid further pain, 2nd nurse asked NP if another available route for penicillin
 - NP searched references and determined that IV would be acceptable
 - NP had authority to change route and directed 2nd nurse to give med IV
 - Pharmacy erroneously delivered medication prepared in dose 10X greater than ordered
 - Baby died as 2nd nurse administered dose IV
 - CO Board of Nursing instituted disciplinary proceedings vs 2nd nurse and NP (not 1st)
 - Grand jury indicted all 3 nurses but did not indict pharmacy

- Reminiscent of witch hunts where bad childbirth outcome results in execution of midwife

RISK MANAGEMENT

How can nurses limit risk of lawsuits?

Many suits occur resultant to events regarding which nurses have little control

- Institutional circumstances
- Incompetence of other professionals
- Unpredictable or intractable physical phenomena

Other litigations occur secondary to thoughtless or negligent acts of nurses (other professionals)

REDUCING THE RISK OF LAWSUITS

Maintaining open communication with patients

- Be courteous, show respect, take time to listen
- Do not belittle patients or make value judgements
- Involve patients in decision making
- Assess patient's level of understanding
- Explain in language that patients can understand
- Clarify and verify telephone orders
 - Avoid telephone orders as much as possible
 - Avoid giving advise over phone

Angry patients more likely to file lawsuits

Avoid belittling patients, paternalism, inattention - angers patients

Genuine regard for others reduces lawsuits

Suits result when negative outcomes result from lack of understanding

Treatment options, self-care, side effects, potential outcomes

Must assess patient understanding

Telephone advise or teaching is especially risky

Conscientious practice - Maintain Expertise in Practice

- Keep up-to-date in both knowledge and skills
- Do not attempt any task or give any medication that is unfamiliar
- Practice within the professional and statutory scope of practice
- Be familiar with and follow institutional and professionals standards of care
- Be attentive to patients' changing health status
- Pay close attention to detail; avoid distraction
- Document objectively, thoroughly and in a timely fashion

Standards of care have become very stringent

Society expects nurses knowledge and abilities to be high

Maintain up-to-date knowledge and technical skills

Lack of knowledge is no defense in court of law

Lack of knowledge is tantamount to admission of negligence

Must know and uphold professional and institutional standards of care

Never attempt unfamiliar task (without training) or administer unfamiliar med

"I did the best I could" or "Everyone does it that way" will not protect nurse

Attention to detail will avoid many errors

Avoid becoming over-fatigued or distracted (implications for mandated overtime)

Maintain Autonomy and Empowerment

- Challenge questionable orders
- Seek attention for patients with changing health status
- Challenge bureaucratic structures that threaten patient welfare
- Avoid institutional settings which produce systematic threats to patient welfare

Courts have demonstrated that **society expects nurses to be patient advocates**

- Courageously question physician orders esp telephone orders
- Vigorous seeking attention for patients with changing status
- Challenge bureaucratic structures which threaten patient welfare

Society expects nurses to protect patients from harm

In some institutional settings nurses can protect themselves only by leaving

Liability Insurance

Despite competence patient's get injured

Nurses are increasingly vulnerable to claims of malpractice

Even if claim has no merit, **process of defense is costly**

Emotionally exhausting

Time consuming

Costly

Liability insurance is important risk management strategy

Provides mechanism of accountability - nurse have ability to pay for errors

Nurses should not be without personal liability coverage

Need liability insurance even if employer coverage is provided

TYPES OF INSURANCE COVERAGE

Occurrence-based policies - provide broad coverage

Cover nurses for claims arising from incidents that occur during time policy in effect
Protect nurses when lawsuits filed after policy has expired even if not renewed
Nurses working with children and infants risk suits many years later
Preferable for most nurses

Claims-made policies

Coverage only where both injury and claim made during time frame when policy in effect
Adequate if nurse maintains continuous coverage and purchases a tail policy

Tail policy - provides uninterrupted extension for period after policy expires

Malpractice policy - coverage exclusively for claims of malpractice

Professional liability - protection vs various injuries not directly related to malpractice

Individual coverage policy

- Individual policy provides 24 hr protection within scope of nursing practice
- Includes paid or volunteer services
- Attorney fees and monetary damages
- Offers nurse control over details of defense strategy

Group coverage - infrequently used by nurses

- Purchased by professionals with essential the same job descriptions
- Covers only those activities performed during office hours
- Less expensive and sometimes attractive to NPs in group practice

Employer-sponsored coverage

- Purchased by employing agency to protect business concerns
- Protection limited to activities performed within scope of employment
- Employers claim it is adequate but it is the most limited form of coverage
- Nurse found negligent may be required to repay employer a portion of loss
- Greater chance of inadequate monetary protection and legal counsel
- **Hospital pursues own interest (settle) even if contrary to nurses interest**

NURSES AS EXPERT WITNESSES

Role is relatively new to nursing profession
Complexity and technical nature of nursing results in attorneys seeking expert witnesses
Expert witness is knowledgeable and experienced in nursing
May be hired by either plaintiff or defendant
Neither parties to the dispute nor patient advocates
Remain honest and give objective opinion in court
Role supports autonomy and professional nature of role of nursing
No other professional can appropriately judge the practice of nursing

Tasks of expert witness

- Complex and extensive task of examining evidence
- Reviewing pertinent nursing literature
- Giving depositions
- Testifying in court

Witness expected to be familiar with the following documents

- All medical records of patient during time of incident
- Pertinent written policies and procedures of institution
- Nursing care plan: assessment, diagnosis, plan, intervention, evaluation
- State Nurse Practice Act
- Joint Commission on Accreditation of Healthcare Organizations manual
- Applicable nursing standards
- Current professional literature outlining accepted practice at time of incident
- Opinions from the State Board of Nursing

Witness must be able to do the following

- Describe standards of care to the court
- Evaluate nurse's actions against standard of care
- Discuss conclusions relative to the accusation of malpractice

Effectiveness of expert witness

- Breadth of experience
- Degree of preparation
- Depth of knowledge
- Confident delivery