

A TEACHING RESOURCE FOR PSYCHIATRY RESIDENTS

VIEW FROM THE JURY BOX: Clark v. Stover

A Psychiatric Malpractice Mock Trial

LITIGATION GLOSSARY

Actuary

A statistician who computes the degree of financial risk a physician/office/facility may incur from future malpractice claims.

Admission

The acknowledgement by a party of the existence of a fact.

Affidavit

A written *ex parte* statement made under oath before an officer of the court or a notary public. An affiant (person who swears to an affidavit) is subject to prosecution for perjury for making a false statement under oath.

Alternative Dispute Resolution (ADR)

Any procedure or method for resolving disputes between persons that does not involve the courts. Unlike a dispute in civil litigation, ADRs do not have to be based upon a claim of the type that courts will handle. The primary methods of ADR are arbitration and mediation.

Arbitration

A procedure by which the parties submit their dispute to another person or tribunal for a decision. The submission may be voluntary or pursuant to a contract or statute that requires arbitration.

Mediation

A procedure in which an intermediary facilitates communication between the parties, helps the parties overcome barriers in the negotiation process, and identifies the parties' real interests and needs so that they can make their own agreement. The mediator does not have the authority to impose a solution on the parties.

Appellant

An aggrieved party who appeals to a higher court to review the proceedings of the trial court's order or judgment on the grounds that the trial court committed an error of law or procedure that adversely affected the outcome.

Appellate Court

A court having jurisdiction to review the law as applied to a trial court's orders and judgments. The court's function is limited to reviewing the lower court's handling of the case; it does not "re-try" the case.

Appellee

The prevailing party in a lower court who argues against the appellant's appeal to a higher court to set aside the determination of the lower court.

Attorney-Client Privilege

The client's privilege to refuse to disclose and to prevent others from disclosing confidential communications between himself and his attorney. Such privilege protects communications between an attorney and client made for the purpose of furnishing or obtaining professional legal advice or assistance.

Attorney Work Product

A doctrine that prevents one party from discovering what another party's attorneys have tried to do and have accomplished in preparation for trial. The work that attorneys have done for a client.

Burden of Proof

The requirement that a plaintiff in a civil lawsuit show by a "preponderance of the evidence" or "weight of the evidence" that all the facts necessary to win a judgment are presented and are probably true. The ultimate decision as to whether the plaintiff has met the burden of proof rests with the jury or the judge if there is no jury. There are situations in which the burden of proof shifts to the defendant, but these are not common.

Cause of Action

A claim that is recognized by law and enforceable through the courts; a claim upon which a court may grant relief. A cause of action presumes that the defendant has breached a legal duty and in doing so directly caused the plaintiff to sustain an injury or property damage or other loss.

Claim

A demand for compensation or restitution for personal injury, property damage, or loss of profits. A claim may be made without actually starting a lawsuit or having a lawsuit pending. A mere claim may or may not be based upon a legal right. A claim may or may not qualify as a cause of action.

Claims Evaluation

The determination, through review of the claim and discussion with the claimant, of what the insurance company or physician/office/facility is willing to pay on the claim, or whether the claim will be denied.

Claims Management

The process of responding to claims and potential claims.

Closing Argument

The final statements by the attorneys to the jury and the court summarizing the evidence that they think they have established and the evidence that they think the other side has failed to establish.

Common Law

A system of law that is based upon precedent rather than a civil code of laws. The law is derived from court decisions that evolve into rules of law that are followed as precedent unless or until the court that established them decides to replace or modify them. Most states rely upon the common law to resolve disputes in civil litigation.

Complaint

The legal document which formally initiates a lawsuit. A complaint contains 1.) a statement of the grounds upon which the court's jurisdiction depends, 2.) a statement of the claim showing that the plaintiff is entitled to relief, and 3.) a demand for judgment for the relief to which the plaintiff deems himself entitled. The complaint, together with the summons, is required to be served on the defendant.

Contribution

The sharing of a loss by each of several persons who may be jointly responsible for injury to a third party. Quite often this arises when one responsible party pays more than his share of the judgment and then demands contribution from the others in proportion to their share of the obligation.

Cross Examination

The examination of an adverse party or hostile witness in which the examiner may ask leading questions and may seek to limit answers by asking very narrow, circumscribed questions.

Damages

(1) The injury, loss, or other harm to a person or property that is proximately caused by another person's breach of a legal duty. (2) An abbreviation of the term "money damages", which is compensation for the injury, loss, or other harm caused by another person's breach of a legal duty. There are several types of damages, including:

Economic

In a medical malpractice case, the sum of money that is awarded to a person to reimburse him or her for economic loss due to the doctor's wrongful conduct. This may include such things as compensation for past and future medical expenses and past and future lost wages.

Non-economic damages

Money damages awarded to compensate for those losses to which a precise dollar amount may not be determined such as pain and suffering, disfigurement, wrongful death, permanent impairment, and loss of consortium.

Punitive Damages

Money damages awarded to a plaintiff in a civil action to punish the defendant for willfully committing a wrongful act that injured the plaintiff. Punitive damages are recoverable in addition to other damages and are typically excluded from coverage under a professional liability policy.

Decedent

Any deceased person.

Defendant

The person defending or denying; the party against whom relief or recovery is sought in a civil action or suit, or in a criminal case.

Deponent

A person who gives testimony under oath in an affidavit in an oral deposition, in a written deposition, or in court.

Deposition

Both the procedure for taking a person's testimony and the transcript of a person's testimony. A formal question and answer session in which one party to the lawsuit asks oral questions of the other party or parties or witnesses under oath. It enables a party to obtain testimony for the purpose of discovering information or to preserve the testimony for use at trial. The deponent may be compelled to testify by serving a subpoena on the deponent.

Directed Verdict

A ruling by the court in favor of a party when the opposing party fails to present a sufficient case or a necessary defense.

Discovery

The pre-trial process by which the plaintiff and the defendant obtain facts and information about the case from each other and conduct an investigation in order to fully ascertain the facts and to further develop the legal theories involved in the case. Tools of discovery include: depositions, interrogatories, production of documents or things, physical or mental examinations, and admissions.

Evidence

Anything that tends to prove a fact, especially testimony and exhibits at a trial.

Ex parte

Done for, on behalf of, or on the application of one party only. An *ex parte* judicial proceeding is one initiated on behalf of and for the benefit of one party, in which the opposing party does not participate and of which the opposing party receives no notice.

Expenses

Costs incurred in bringing or defending a claim or malpractice suit which may include, but are not limited to, attorneys' fees, expert witness fees, deposition costs, court reporters' fees, court costs, and filing fees.

Expert Opinion

An opinion given by an expert witness. The opinion must have a foundation in the evidence presented by the parties.

Expert Witness

A person with special education, training, and experience in a particular subject or field, who possesses superior knowledge respecting a subject about which persons having no particular training are incapable of forming an accurate opinion or deducing correct conclusions.

Fact Finder

The person or persons who resolve disputed facts and the ultimate questions of fact from the evidence presented by the parties. When the trial is by jury, the jury is the fact finder. When there is no jury, the judge is the fact finder.

Hearsay

Evidence proceeding not from the personal knowledge of the witness, but from the mere repetition of what the witness has heard others say. The very nature of hearsay evidence shows its weakness, and it is received at trial only in limited situations owing to necessity.

Impeachment

The casting of doubt on the credibility of a witness or exhibits by showing inconsistencies in what the witness says or in the use of the exhibits.

In camera

A judicial proceeding is said to be heard *in camera* either when the hearing is had before the judge in his private chambers or when all spectators are excluded from the courtroom.

Incident/Occurrence

An episode of harm or potential harm.

Incompetent

Lacking the capacity, fitness, qualifications, or abilities to act.

Indemnity

The obligation to compensate another for any loss or damage incurred, or that may incur, as the result of one's negligence.

Interrogatory

A written question to another party to a civil action that must be answered under oath.

Judgment

(1) A court's ultimate determination of the parties' rights and obligations concerning a particular matter. (2) The official decision of the court regarding the respective rights and claims of the parties. (3) The clerk of court's record of the court's declaration(s) in a particular action.

Judgment *N.O.V.*

A ruling by the judge which reverses the jury's verdict when it is obvious that the verdict was not supported by the facts or was contrary to the law. Abbreviated from the Latin meaning "not withstanding the verdict".

Jurisdiction

The power and authority of a court to determine a case. Also the geographic area over which a court's authority extends.

Jury

A body of people selected according to the law and sworn to inquire of certain matters of fact and declare the truth based upon the evidence presented to them.

Legal Duty

A duty that the law imposes upon a person to act or refrain from acting. The breach of a legal duty gives rise to a cause of action against the violator for compensation for any injuries or damages caused by the breach.

Liability

The legal responsibility for one's acts or omissions. It also refers to the legal obligation to make restitution or pay compensation.

Malpractice

Negligence committed by a person while rendering professional services. The elements of a malpractice case are almost always the same: (1) the defendant owed a legal duty to the plaintiff, (2) the defendant breached that legal duty, and (3) the breach of that duty proximately caused (4) the injury to the plaintiff.

Material

Having to do with matters of substance, as distinguished from mere form. In a civil action, evidence is material if it relates to the issues raised by the pleadings.

Motion

An application to a court for a ruling or order concerning a matter of procedure or law.

Negligence

A failure to exercise the degree of care that a person of ordinary prudence would exercise under the same circumstances. All persons owe the legal duty to conduct themselves with reasonable care so as not to injure another person or another person's property. However, a person does not have a duty to act to protect another person from harm unless the person has a special relationship recognized by law that imposes upon that person a duty to act and protect.

Notice

(1) In legal proceedings, information, usually in writing, of all documents filed, decisions, requests, motions, petitions, upcoming dates, etc. Notice is a vital principle of fairness and due process in legal procedure and must be given to both parties, to all those affected by a lawsuit or legal proceeding, to the opposing attorney, and to the court. (2) In general terms, having been informed of a fact, having reason to know it, or should know it, based on the circumstances. Subsequently, one cannot claim ignorance.

Opening Statement

A lawyer's statement to a jury made at the beginning of a trial, in which the lawyer outlines the evidence that she or he expects to present on behalf of the client. The opening statement is not supposed to be an argument.

Party

A natural person, corporation, or other legal entity that is the plaintiff or defendant in a civil action.

Plaintiff

A person who brings an action; the party who sues in a civil action.

Polling the Jury

A trial procedure in which the judge asks each juror whether the juror agrees to the verdict after it has been read in open court.

Potential Incident

An occurrence or series of occurrences, a situation or set of circumstances, which, if allowed to continue, may give rise to harm to patients, visitors, or staff, or which may give rise to serious patient dissatisfaction and complaints.

Potentially Compensable Events

A problem, incident, or occurrence that has caused harm and that may possibly expose the physician/office/facility to professional or general liability claims and may possibly require the physician/office/facility to pay damages to the persons(s) injured.

Premium

The sum of money paid for an insurance policy.

Preponderance of the Evidence or Weight of the Evidence

As a standard of proof in a civil action, it means evidence which is of greater weight or is more convincing than the evidence which is offered in opposition to it. Although not quantifiable, basically, it is the amount of evidence necessary for the plaintiff to win the case.

Pretrial Conference

A conference ordered by the court for the purposes of expediting a disposition of the case, establishing a plan for managing and moving the litigation toward trial and avoiding unnecessary delay, determining the state of preparedness of the parties and encouraging full preparation, and helping the parties to avoid unnecessary expense.

Privileged Communication

A communication that is protected by law from disclosure. A court will not require a party to a privileged communication to disclose it to another party, another person, or even the court. However, there are exceptions to privileged communications, and the party who holds the privilege may waive it voluntarily.

Procedural Law

The rules of law that govern the conduct of a legal procedure or process, as distinguished from the law that determines the parties' substantive rights.

Proximate Cause

A cause that has a direct and substantial part in bringing about an occurrence, injury, loss, or harm for which a party seeks a remedy in court.

Relief

The generic term for all types of benefits which an order or judgment of court can give to a party to a lawsuit, including a money award, an injunction, the return of property, property title, alimony, and many other possibilities.

Risk Management

The dynamic process of systematically identifying and anticipating risk and acting to minimize and/or prevent actual or potential loss. The emphasis is on being proactive; it involves balancing the chance of an unfavorable outcome with the costs involved in reducing that risk.

Sanction

A penalty a court imposes upon a party who fails to comply with the court's order or rules.

Scheduling Conference

A court-ordered conference convened to create a schedule that will keep the case moving toward trial and meet the needs of the case and of the parties.

Service of Process

The delivery of legal documents relating to the lawsuit - such as the summons and complaint. Depending upon the rules of the particular jurisdiction, service may be made by personal delivery to the person to whom the documents are directed, left at that person's address with another adult, or mailed.

Settlement

An agreement between parties that results in a resolution of their dispute. Settlement agreements are usually made on the basis of a compromise between parties and are arrived at without a judicial order or decree. Where money is paid as a result of a settlement agreement, the sum is often also referred to as the settlement. A jury verdict is not a settlement.

Spoliation of Evidence

Spoliation occurs when evidence needed for the discovery process is destroyed or significantly altered. In a medical malpractice action, intentional or negligent hiding, altering, destroying or withholding a medical record would constitute spoliation of evidence.

Standard of Care

In the law of negligence, that degree of care which a reasonably prudent person should exercise in same or similar circumstances. If a person's conduct falls below such a standard, he may be liable for injuries or damages resulting from his conduct. In medical/professional malpractice cases, the standard of care is applied to measure the competence of the professional. The traditional standard for doctors is that they exercise the average degree of skill, care, and diligence exercised by similar physicians practicing in light of the present state of medicine. The standard may be either a local standard or a national standard depending upon the jurisdiction.

Statute of Limitations

A statute that limits the time during which a lawsuit may be brought against a person.

Subpoena

A process commanding a party, witness, or deponent to set aside all pretenses and excuses, and appear before a designated lawyer, court, or magistrate at a specified time and place to testify. Failure to comply places the person under penalty by the court. The document used to command the appearance is also called a *subpoena*.

Subpoena duces tecum

A *subpoena* that directs a witness to bring and present specified documents or things to be reviewed when the witness testifies at court or in a deposition.

Substantive Law

Law that creates, defines, and regulates legal rights between persons.

Summary Judgment

A procedure by which a party may avoid a trial by showing the court that the material facts are not in dispute. The procedure allows the court to apply the law to the undisputed facts and order entry of a judgment for a party. A summary judgment may be dispositive of the entire action or resolve only part of the dispute.

Summons

A court mandate that informs a person that a civil action has been commenced against him or her and requires that person to appear in the case and defend. The summons is almost always served with the complaint.

Testimony

Evidence given by a competent witness speaking under oath; as distinguished from evidence derived from writings and other sources.

Third Party

Someone other than the plaintiff or the defendant.

Trial

A lawful judicial examination of a cause, either civil or criminal, of the issues between the parties, whether of law or fact, before a court that has proper jurisdiction. The trial process involves the selection of a jury, opening statements, the introduction of evidence through the testimony of witnesses and the presentation of exhibits, closing statements, jury instruction and deliberation, and the rendering of a verdict.

Venue

The judicial district in which an action is brought for trial and from which the panel of jurors is drawn.

Voir dire

The questioning of potential jurors in which competency, interest, bias, and so forth are tested. During *voir dire*, potential jurors may be dismissed for either of two reasons: (1) for cause (i.e. for a reason) or (2) in a peremptory challenge (i.e. without a reason given). The number of peremptory challenges is limited. The number of for cause dismissals is unlimited.

Witness

A person whose declaration under oath is received as evidence for any purpose, whether such declaration is made on oral examination or by deposition or by affidavit. A witness may be compelled to testify by serving a *subpoena* on the witness.

Work Product

A doctrine that protects from discovery the impressions, mental processes, legal theories, and strategies that a party and the party's attorney formulated while preparing to prosecute or defend a civil action. The doctrine is separate from but complements the attorney-client privilege.

Wrongful Death Action

An action at law, created by statute, that permits the heirs and next of kin to recover money damages for the pecuniary losses resulting from the decedent's death.

