CHAPTER FOURTEEN

PROFESSIONAL LIABILITY

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Instruction No. 14.1

**STANDARD OF CARE — NON-SPECIALIST**

In [(diagnosing the condition of)/treating/(operating upon)] a patient, a physician must use [his/her] best judgment and apply with ordinary care and diligence the knowledge and skill that is possessed and used by members of [his/her] profession in good standing engaged in the same field of practice at that time. A physician's standard of care is measured by national standards. A physician does not guarantee a cure and is not responsible for the lack of success, unless that lack results from [his/her] failure to exercise ordinary care or from [his/her] lack of that degree of knowledge and skill possessed by physicians in the same field of practice.

**Notes on Use**

This Instruction should be preceded by Instruction Nos. 9.1 and 9.2, as modified for a professional malpractice case.

**Comments**


This and subsequent instructions may also be adapted for use in malpractice cases brought against other medical personnel, such as interns, physician's assistants, and nurses. For example, the following instruction would be appropriate for a nurse:

In treating a patient, a nurse must use [his/her] best judgment and apply with ordinary care and diligence the knowledge and skill that is
possessed and used by members of [his/her] profession in good standing
engaged in the same field of practice at that time. A nurse's standard of
care is measured by national standards.

*Boyanton v. Reif*, 798 P.2d 603, 604-05 (Okla. 1990); *Runyon v. Reid*, 510 P.2d
943, 950 (Okla. 1973) (standard for a specialist); *Sisler v. Whitten*, 393 P.2d 497, 502
(Okla. 1964); *McBride v. Roy*, 177 Okla. 233, 234, 58 P.2d 886, 888 (1936); *Reeg v.
Shaughnessy*, 570 F.2d 309, 314-15 (10th Cir. 1978) (standard for a non-specialist). See
also 76 O.S.1991 § 20.1 (national standard of care).

**Instruction No. 14.2**

**Standard of Care — Specialist**

In [(diagnosing the condition of)/treating/(operating upon)] a patient, a specialist
must use [his/her] best judgment and apply with ordinary care and diligence the
knowledge and skill that is possessed and used by other specialists in good standing
engaged in the same special field of practice at that time. This is a higher degree of
knowledge and skill than that of a general practitioner. A specialist does not guarantee a
cure and is not responsible for the lack of success unless that lack results from [his/her]
failure to exercise ordinary care or from [his/her] lack of knowledge and skill possessed
by other specialists in good standing in the same field.

**Notes on Use**

This Instruction prescribes the degree of skill required of a physician who is a
specialist. It should be given in place of Instruction No. 14.1, which deals with the duty
of a general practitioner.

**Comments**

For a discussion of a psychiatrist's duty to exercise reasonable care in the
discharge of a mental patient, see *Wofford v. Eastern State Hosp.*, 1990 OK 77, ¶¶ 16-17,
795 P.2d 516, 520.
**Instruction No. 14.3**

**ALTERNATIVE METHODS OF DIAGNOSIS OR TREATMENT**

Where there is more than one medically accepted method of [diagnosis/treatment], a physician has the right to use his/her best judgment in the selection of the [diagnosis/treatment], after securing the informed consent of the patient, even though another medically accepted method of [diagnosis/treatment] might have been more effective.

**Comments**

The Oklahoma Supreme Court explained in *Graham v. Keuchel*, 1993 OK 6, ¶ 30, 847 P.2d 342, 355:

A physician, facing a range of competing options which are all medically acceptable, may choose one which later proves to have been less effective than another might have been. Selection of any one of these options is not negligence. The choice is said to be a matter of judgment and choosing a less effective option is considered a mistake of judgment. (emphasis in original)

*See also* *Eckels v. Traverse*, 1961 OK 138, ¶¶ 6-9, 362 P.2d 680, 682-83; *McBride v. Roy*, 177 Okla. 233, 234, 58 P.2d 886, 888 (1936).*
Instruction No. 14.4

**REFERRAL OF PATIENT TO ANOTHER PHYSICIAN**

A physician who refers the patient to another physician for treatment and care is not liable for any negligence on the part of the other physician, unless [he/she] has failed to exercise ordinary care in selecting the other physician or the other physician is [his/her] agent, employee, or partner.

**Comments**


Instruction No. 14.5

**PHYSICIAN’S LIABILITY FOR PATIENT ABANDONMENT**

[Unless there is an emergency or there are other special circumstances,] a physician has a duty not to leave a patient at a critical stage when the patient needs further medical treatment without giving the patient reasonable notice so that the patient has a reasonable opportunity to obtain the necessary medical treatment from another physician.

**Notes on Use**

The introductory clause should be included only if there is evidence of some type of an emergency or other special circumstances that would excuse the physician from liability for patient abandonment.
Comments

Instruction No. 14.6

**JOINT DUTY OF PHYSICIANS**

Where two or more physicians owe the same duty to a patient, and the acts of each contribute to the same breach of duty, the wrong and injury, if any, to the patient are regarded as the result of joint action of the physicians, and both physicians are liable.

Comments


Instruction No. 14.7

**DUTY OF PATIENT TO FOLLOW INSTRUCTIONS**

NO INSTRUCTION SHOULD BE GIVEN

Notes on Use

This Instruction is deleted, because the patient’s duty to exercise reasonable care is covered by the general instructions relating to comparative negligence and/or mitigation of damages, Instructions No. 9.2, 9.17 *et seq.*, and Instruction 5.3, *supra*, if there is evidence to support these defenses.
Comments

If the patient's negligence was limited to causing the injury that required the medical attention, it will not support a contributory negligence defense to a medical malpractice claim. *Fritts v. McKinne*, 1996 OK CIV APP 132, ¶ 16, 934 P.2d 371, 374 ("Under the guise of a claim of contributory negligence, a physician simply may not avoid liability for negligent treatment by asserting that the patient's injuries were originally caused by the patient's own negligence.").

Instruction No. 14.8

**TREATMENT WITHOUT CONSENT OF PATIENT**

Any [(operation on)/(treatment of)] a patient's body is a battery, unless it is consented to by the patient. A physician who so [(treats a patient)/(operates in any manner on a patient)] without [his/her] consent commits a battery, and [he/she] is liable for the injuries directly resulting therefrom, even though skill is used in the [operation/treatment].

[If a physician has been instructed by a patient to perform a certain [operation/treatment] and [he/she] performs a different [operation/treatment] without the patient's consent, the physician commits a battery and is liable to the patient for the injuries, if any, directly resulting therefrom.]

**Notes on Use**

This Instruction would not apply to situations governed by the Good Samaritan Act found at 76 O.S.1991 § 5. See also Instructions 14.11, "Informed Consent — Physician's Duty"; 14.12, "Informed Consent — Exceptions to Duty"; and 14.13, "Informed Consent — Causation."
Instruction No. 14.9

CONSENT OF PATIENT

Express consent to [perform an operation/administer treatment] may be given orally or in writing. Consent may also be implied where the words or conduct of the patient would lead an ordinary person to the belief that the patient consented to the [operation/treatment].

Notes on Use


Comments


Instruction No. 14.10

INFORMED CONSENT REQUIRED

For a patient's consent to be effective, whether express or implied, the physician must have informed the patient as to the nature of the ailment, the nature of the [operation/treatment] and the material risks, if any, involved in undergoing the [operation/treatment].
Notes on Use


Comments


Instruction No. 14.11

INFORMED CONSENT — PHYSICIAN'S DUTY

It is the duty of the physician to disclose to [his/her] [patient] all relevant information to enable that [patient] to make an informed decision on whether to consent to or reject the physician's proposed treatment or surgery.

This duty of disclosure includes advising a [patient], when a proposed treatment or surgery involves a known risk of death or serious bodily harm, of the possibility of such outcome and explaining in understandable terms the complications that might occur. The disclosure shall include any alternatives to the proposed treatment or surgery and the risks of each, including the risk in foregoing all treatment or surgery.

Notes on Use

The proper person acting as representative of the patient should be substituted for [patient] when appropriate, i.e., guardian of minor patient.
Comments


Instruction No. 14.12

**INFORMED CONSENT — EXCEPTIONS TO DUTY**

1. A physician has no duty to disclose risks that are already known to the patient, or which are commonly understood by the average person to be involved in the proposed treatment or operation.

2. A physician has no duty of disclosure when [he/she] relies upon facts which would demonstrate that full disclosure would be detrimental to a patient's total care and best interest, or where such disclosure would alarm an emotionally upset or apprehensive patient so that the patient would not be able to weigh rationally the risks of refusing to undergo the recommended treatment or operation.

3. A physician has no duty to inform a patient of the risks of a medical procedure when an emergency exists and the patient is unconscious or otherwise incapable of determining for [himself/herself] whether treatment should be administered.
Notes on Use

Where the evidence established any of the exceptions to duty, use the applicable paragraph or paragraphs.

Comments

See Scott v. Bradford, 1979 OK 165, ¶ 16, 606 P.2d 554, 558, wherein the following three exceptions are set out: (1) there is no need to disclose risks that either ought to be known by everyone or are already known to the patient; (2) there is no duty for full disclosure if it is not in the best interest of the patient and full disclosure would be detrimental to a patient's total care; and (3) where an emergency exists and the patient is in no condition to determine for himself whether treatment should be administered. These exceptions are considered affirmative defenses with the burden of proof resting upon the physician or surgeon.

Instruction No. 14.13

INFORMED CONSENT — CAUSATION

Before a physician may be held liable for a breach of [his/her] duty to disclose, the patient must establish that [he/she] would have chosen no treatment or surgery or a different course of treatment of surgery had the alternatives and material risks of each been made known to [him/her]. In addition, the patient must have been injured by the undisclosed risk as a result of submitting to the treatment or surgery.

Comments

Instruction No. 14.14

RES IPSA LOQUITUR — PRESUMPTION OF NEGLIGENCE — MEDICAL MALPRACTICE

In addition to the rules which have been stated with respect to negligence, there are situations in which negligence may be presumed.

[Plaintiff] contends that this case involves such a situation and consequently has the burden of proving by the weight of the evidence all of the following:

1. [Plaintiff] suffered an injury;
2. The injury was directly caused by a [device/procedure] that was solely within the control of [Defendant]; and
3. The injury is one that does not ordinarily occur under the circumstances in the absence of negligence on the part of [Defendant].

This presumption places the burden of proof on [Defendant] to prove by the weight of the evidence that [he/she] was not negligent.

Notes on Use

76 O.S.1991 § 21 creates a presumption of negligence for medical malpractice cases where the elements set forth in the Instruction are established. Before giving this Instruction, the trial court must determine whether sufficient evidence for each of these elements has been offered. Expert testimony will normally be required for the third element: that the injury would not normally occur in the absence of negligence. See Little v. Arbuckle Memorial Hosp. Bd. of Control, 1983 OK CIV APP 28, ¶ 3, 665 P.2d 1227, 1228.

Comments

The doctrine of res ipsa loquitur for medical malpractice cases is codified in 76 O.S.1991 § 21, which provides:
In any action arising from negligence in the rendering of medical care, a presumption of negligence shall arise if the following foundational facts are first established:

1. The plaintiff sustained injury;
2. Said injury was proximately caused by an instrumentality solely within the control of the defendant or defendants; and
3. Such injury does not ordinarily occur under the circumstances absent negligence on the part of the defendant.

If any such fact, in the discretion of the court, requires a degree of knowledge or skill not possessed by the average person, then in that event such fact must be established by expert testimony.

This statute differs from the common law rule of *res ipsa loquitur* in that it creates a presumption of negligence, instead of merely an inference of negligence. Also, one of the elements for an inference of negligence under the common law rule was that the plaintiff must not have offered evidence of negligence, but this element is not required under the statutory presumption for medical malpractice cases. *Middlebrook v. Imler,* Tenny & Kugler, M.D.’s, Inc., 1985 OK 66, ¶¶ 7-9, 713 P.2d 572, 578; *Little v. Arbuckle Memorial Hosp. Bd. of Control,* 1983 OK CIV APP 28, ¶ 4, 665 P.2d 1227, 1228. See also *Sisson By and Through Allen v. Elkins,* 1990 OK 123, ¶ 7, 801 P.2d 722, 724-25 (dictum).

The constitutionality of the statutory presumption was challenged in *Sisson By and Through Allen v. Elkins,* 1990 OK 123, 801 P.2d 722, but the Oklahoma Supreme Court decided that the statute was not applicable to the case before it, and therefore, it declined to provide an advisory opinion on the statute's constitutionality. 1990 OK 123, ¶ 11, 801 P.2d at 725.
Instruction No. 14.15

DUTY OF HOSPITAL

A hospital must exercise ordinary care and attention for its patients. Ordinary care means that care and attention required under all the circumstances that is appropriate to the physical and mental condition of each patient. A hospital has a duty to [(supervise care rendered to a patient by hospital employees)/(use reasonable care when providing the patient with a nurse/physician/(other health care provider))/(ensure that staff privileges are granted only to competent physicians)/(protect patients from staff physicians that it knows or reasonably should know are incompetent)].

Notes on Use

The last sentence sets out possible examples of a hospital's duty of care. The list is not intended to be complete, nor would a hospital necessarily have the duties to its patients that are set out in the sentence. For example, although a hospital ordinarily does not have a duty to furnish a patient with a physician, if it does do so, such as sometimes occurs in emergency room situations, the hospital must exercise reasonable care. Under certain circumstances, such as where a hospital has knowledge of substandard care, a hospital may even have a duty to review the work of a doctor whom the hospital did not furnish to the patient. See Strubhart v. Perry Memorial Hosp. Trust Auth., 1995 OK 10, ¶ 42, 903 P.2d 263, 278. The trial judge should select the appropriate language according to the evidence presented at trial.

Comments

A hospital's liability for negligence may extend beyond liability based on respondeat superior for the acts of nurses and other employees who treat its patients. See Eversole v. Oklahoma Hosp. Founders Ass'n, 1991 OK 80, ¶ 17, 818 P.2d 456, 461 (affirming patient's verdict against hospital that also exonerated the nurse who had treated him). In Weldon v. Seminole Mun. Hosp., 1985 OK 94, ¶ 9, 709 P.2d 1058, 1061, the Oklahoma Supreme Court described a hospital's duty of care, as follows: "Oklahoma has adopted the rule that a hospital has an implied duty to exercise ordinary care and attention in proportion to the physical condition of the patient." For other cases applying
the same standard, see *Rogers v. Baptist Gen. Convention*, 1982 OK 69, n.1, 651 P.2d 672, 674; *St. John's Hosp. & School of Nursing, Inc. v. Chapman*, 1967 OK 126, ¶ 26, 434 P.2d 160, 168; *Hillcrest Medical Ctr. v. Wier*, 1962 OK 158, ¶ 16, 373 P.2d 45, 48; *Flower Hosp. v. Hart*, 178 Okla. 447, 448, 62 P.2d 1248, 1250 (1936); *Tulsa Hosp. Ass'n v. Juby*, 73 Okla. 243, 247, 175 P. 519, 523 (1918); *Warner v. Kiowa County Hosp. Auth.*, 1976 OK CIV APP 11, ¶ 32, 551 P.2d 1179, 1186. In addition, the Oklahoma Supreme Court ruled in *Strubhart v. Perry Memorial Hosp. Trust Auth.*, 1995 OK 10, ¶ 39, 903 P.2d 263, 277, as follows: "A hospital should have a duty to ensure that staff privileges are granted only to competent physicians. Hospitals should also have a duty to take reasonable steps to protect hospital patients from staff physicians who have exhibited a pattern of incompetence." The Supreme Court also noted that in some circumstances a pattern of incompetence may be established by one prior episode that was so egregious that the hospital should have known it was dealing with an incompetent physician. 1995 OK 10, n.14, 903 P.2d at 277.

**Instruction No. 14.16**

**STANDARD OF CARE OF ARCHITECT — NEGLIGENCE**

An architect must possess that degree of knowledge and ability ordinarily possessed by other members of that profession, and further, must exercise ordinary care, diligence, and judgment in the performance of any service undertaken as an architect.

**Comments**

Instruction No. 14.17

**STANDARD OF CARE OF ACCOUNTANT — NEGLIGENCE**

An accountant must possess that degree of knowledge and ability ordinarily possessed by other members of that profession, and further, must exercise ordinary care, diligence and judgment in the performance of any service undertaken as an accountant.

**Comments**


Instruction No. 14.18

**STANDARD OF CARE OF ATTORNEY — NEGLIGENCE**

An attorney must possess that degree of knowledge and ability ordinarily possessed by other members of that profession, and further, must exercise ordinary care, skill, diligence, and knowledge in the performance of any service undertaken as an attorney.

**Comments**