# When Healthcare and Law Intersect: a Primer on Common Legal Actions

Save to myBoK

*by Linda A. Russell, EDD, JD, RHIA*

---

*This excerpt from AHIMA's textbook,* Health Information Management: Concepts, Principles, and Practice*, offers a basic look at the legal actions most commonly affecting the healthcare industry.*

---

To understand the role of the HIM professional in protecting confidential health information, one must first understand the principles for disclosing such information. Because many disclosures are made as part of litigation, the HIM professional should be very comfortable with the legal process. Additionally, the HIM professional can better serve patient privacy interests if he or she has an understanding of the legal process. This understanding should cover both the civil and criminal processes, even though healthcare facilities are rarely affected by criminal cases.

**Civil law** involves relations between individuals, corporations, government entities, and other organizations. Most actions encountered in the healthcare industry are based in civil law. Typically, the remedy for a civil wrong is monetary in nature but also may include carrying out some action.

The party bringing the action or complaint in a civil case is the **plaintiff**. (In "Case Study: Mayor's Records Appear in Tabloid," below, the mayor is the plaintiff.) The plaintiff has the burden of proving the wrong, the harm from the wrong, and the expected **restitution**. The plaintiff presents evidence before a judge or a jury that must be more compelling than that of the opposing side, the **defendant**. The plaintiff or an attorney on the plaintiff's behalf begins the process by filing a complaint in the appropriate court. The plaintiff has a summons, including a copy of the complaint filed, served on the defendant. The defendant or an attorney on the defendant's behalf prepares an answer and files it in the same court where the original complaint was filed. In this discussion, "plaintiff" will refer collectively to the individual or entity bringing the action and that individual or entity's attorney and "defendant" will refer collectively to the person or entity against whom an action has been brought and that person or entity's attorney.

The healthcare industry is involved most often in civil cases and less often in criminal cases. (However, because government is increasing its investigations into and prosecutions for healthcare fraud and refusing to treat patients based on financial status, the healthcare industry will be faced with more criminal cases.) The types of civil legal actions that most typically affect the healthcare industry are torts and contracts. Many claims founded in tort and contract law are resolved without appearing in court.

### Torts

A tort is an action brought when one party believes that another party caused harm through wrongful conduct and the party bringing the action seeks compensation for that harm. In addition to compensation, a second reason for bringing a tort action is to discourage the wrongdoer from committing further wrongful acts. Three categories of tort liability exist: negligent torts, intentional torts, and liability without fault. Most healthcare incidents arise in the negligent tort category. (In the case study, the hospital and the MSO director were held liable for a negligent tort whereas the data-entry clerk was held liable for an intentional tort.)

### Negligent Torts

Negligence results when a person does not act the way a reasonably prudent person would act under the same circumstances. A negligent tort may result from a person committing an act or failing to act as a reasonably prudent person would or would not

do in the given circumstances. Typically, negligence is careless conduct that is outside the generally accepted standard of care. **Standard of care** is defined as what an individual is expected to do or not do in a given situation. Standards of care are established in a variety of ways: by professional associations, by statute or regulation, or by practice. Such standards are considered to represent expected behavior unless a court finds differently. Therefore, standards also are established by case law. Regulations are different from standards in that they have the force of law, whereas those standards established by other than statute or regulation do not.

In healthcare, the standard of care is the exercise of reasonable care by healthcare professionals having similar training and experience in the same or similar communities. However, some courts may define standards of care on a national level versus a community level.

Negligence also may occur in cases where an individual has evaluated the alternatives and the consequences of those alternatives and has exercised his or her best possible judgment. Thus, a person can be found negligent when he or she has failed to guard against a risk that he or she knew could happen. Furthermore, negligence can occur in circumstances where it is known, or should have been known, that a particular behavior would place others in unreasonable danger.

Negligence can further be categorized in other ways. For example, negligent torts can be categorized as:

- **Malfeasance:** the execution of an unlawful or improper act
- **Misfeasance:** the improper performance of an act
- **Nonfeasance:** the failure to act when there is a duty to act
- **Malpractice:** negligence or carelessness of a professional person, such as a nurse, pharmacist, physician, or accountant
- **Criminal negligence:** reckless disregard for the safety of another; the willful indifference to an injury that could follow an act

Applying this categorization to the case study, the hospital and MSO director would have committed nonfeasance and the data-entry clerk would have committed either malfeasance or misfeasance.

Further, negligence can be categorized by the degree of wrongdoing. Ordinary negligence is failure to do what a reasonably prudent person would do, or doing something that a reasonably prudent person would not do, in the same circumstances. Gross negligence is intentionally omitting care that would be proper or providing care that would be substandard or improper.

To recover damages caused by negligence, the plaintiff must show that all four elements of negligence are present:

- There must be a **duty to use due care**. For this element to be present, a physician–patient, nurse–patient, therapist–patient, or other caregiver–patient relationship must exist at the time of the alleged wrongful act
- There must have been a **breach of the duty to use due care**. The plaintiff must present evidence that the defendant acted unreasonably under the circumstances
- The plaintiff must have **suffered an injury** as a result of the defendant's negligent act or failure to act. Injury includes not only physical harm, but also mental suffering and the invasion of a patient's rights and privacy
- The plaintiff must show that the defendant's conduct **caused** the plaintiff's harm. As an example, varying from a recognized procedure is insufficient to justify the plaintiff's recovery of damages. The plaintiff must show that the variance was unreasonable and that it caused the harm

In the case study, the MSO director had a duty to ensure that MSO staff followed policy. The director breached that duty by not ensuring that the data-entry clerk entered new physician information into the physician database immediately upon receipt. The mayor suffered actual harm from an inappropriate disclosure of confidential health information. And failure to change the fax number in the physician database caused the harm that the mayor suffered.

When no statute exists to define what is reasonable, the trier of fact (the judge or jury) determines what a reasonably prudent person would have done. The reasonably prudent person is generally defined in terms of the hypothetical person that a community believes exhibits ideal behavior in a given situation. The trier of fact considers characteristics such as age, sex, training, education, mental capacity, physical condition, and knowledge in defining the reasonably prudent person. After the behavior of a reasonably prudent person is defined for the given circumstances, the trier of fact compares the defendant's

behavior against that definition. If the defendant's behavior meets or exceeds the definition, no negligence has occurred. On the other hand, if the defendant's behavior does not meet the reasonably prudent person standard, negligence has occurred. In such a case, the trier of fact must determine whether:

- The harm that would result from the failure to meet the reasonably prudent standard could have been foreseen
- The negligent act caused harm to the plaintiff

**Intentional Torts**

Although most torts experienced in healthcare are based on negligence, an occasional intentional tort is committed that includes actions such as assault, battery, libel, slander, invasion of privacy, and false imprisonment. The element of intent is the difference between the intentional tort and the negligent tort. Intent means the person committed an act knowing that harm would likely occur. A quick review of several intentional torts gives the reader an idea of how they may occur in a healthcare setting. (In the case study, the data entry clerk's conscious and intentional decision not to enter the new fax number into the physician database in a timely manner is an example of an intentional tort.)

Assault is a deliberate threat that is combined with the apparent ability to cause physical harm to another person. For example, a large male nurse in the emergency department tells a frail elderly woman that he will break her arm if she does not do what he tells her to do. His comment is a deliberate threat, and his size gives him the apparent ability to harm the woman. **Battery** is intentionally touching another person's body without that person's consent. In healthcare, laws regarding battery are especially important because of the requirement for consent for medical and surgical procedures. The hospital and the treating healthcare professionals may be held liable for harm caused by the lack of a proper patient consent. Even if the outcome of the procedure benefits the patient, touching the patient without proper consent may make the healthcare professional liable for battery.

**False imprisonment** is another intentional tort. A healthcare provider's efforts to prevent a patient from leaving a hospital may result in false imprisonment. This is not the case when a patient with a contagious disease or a mentally ill patient is compelled to remain in the hospital. There are limits to the actions staff can take to compel a patient not to leave a hospital. For example, restraints can be used on mentally ill patients only to the extent necessary to protect them from harming themselves or others. The patient's insistence on leaving the facility should be documented in his or her health record, and the patient should be asked to sign a discharge against medical advice form that releases the facility from responsibility. When excessive force is used to restrain a patient, the healthcare provider may be held liable for both false imprisonment and battery.

**Defamation of character** is a communication about someone to a person other than the person defamed that tends to injure that person's reputation. **Libel** is the written form of defamation, and **slander** is the spoken form. To recover in an action for libel, the plaintiff is not required to prove actual damage or harm. Yet, in cases involving slander, the plaintiff must show actual damage or harm to be compensated for that harm. However, there are four recognized exceptions to the general rule for slander. To recover damages for slander, the plaintiff is not required to show proof of actual harm to his or her reputation when the defendant allegedly performs one of the following acts:

- accuses the plaintiff of a crime
- accuses the plaintiff of having a loathsome disease
- uses words that affect the plaintiff's profession or business
- calls a woman unchaste

With regard to the third exception, the professional is not required to show actual harm because slanderous references to a person's professional capacity are presumed to be damaging to that person's professional reputation. As to the first and second exceptions, healthcare professionals are protected against claims of libel when complying with the law regarding the reporting of communicable diseases that the patient may consider loathsome.

The defendant (the one being accused of defaming another) has two defenses available to a defamation action. The person making an alleged defamatory statement that harms another's reputation will not be liable for that statement if he or she shows that the statement was true. The person making the allegedly defamatory communication can claim privilege if he or she is making the communication:

- in good faith

- on the proper occasion
- in the proper manner
- to persons who have a legitimate reason to receive the information

The defense of privilege is based on the person making the communication being charged with a higher duty. For example, in one case, a director of nurses wrote a letter to a nurse's professional registry stating that the hospital wanted to discontinue a particular nurse's services because narcotics were disappearing whenever the nurse was on duty (*Judge v. Rockford Memorial Hospital* 1958). The court found the communication to be privileged because the director of nurses had a legal duty to make the communication in the interests of society. Thus, the court denied the nurse's claim for damages.

**Fraud** is a prevalent concern in today's healthcare environment. It is defined as "a willful and intended misrepresentation that could cause harm or loss to a person or property." For example, physicians can be held liable for fraud if they claim that a particular procedure will cure a patient's ailment when they know it will not.

**Invasion of privacy** is another major concern in healthcare. A person's right to privacy is the right to be left alone, to be free from unwarranted publicity and exposure to public view, and to live one's life without having one's name, picture, or private affairs made public against one's will. The courts recognize that absolute privacy is not a reality in the medical or nursing care of a patient. However, they hold healthcare providers liable for negligent disregard for patient right of privacy, especially when patients cannot adequately protect themselves because of unconsciousness or immobility. One major actionable offense of concern in healthcare involving invasion of privacy is the release of health information without patient authorization in circumstances when it is required.

The **willful infliction of mental distress** for which a person can be held liable includes mental suffering resulting from such things as despair, shame, grief, and public humiliation. If the plaintiff shows that the defendant (the one inflicting the distress) intended to cause mental distress and knew that his or her actions would do so, the plaintiff can recover damages even in the absence of physical harm. To provide this relief, the courts are struggling with the fine line between negligent and intentional infliction of mental distress.

### Liability without Fault

The principle of liability without fault, strict liability, is most prevalent in product liability wherein a manufacturer, seller, or supplier of equipment or supplies is liable to one with whom there is no contractual relationship and who suffers harm from the equipment or supplies. Recovery for product liability under the principle of strict liability can occur even in the absence of negligence by the manufacturer. The plaintiff must only show that he or she was injured while using the product in a proper manner. Recovery for product liability also can be based on negligence for an unsafe product design or breach of warranty. The plaintiff can recover from the manufacturer for injury caused by a device or supply even though he or she did not purchase the device or supply. The concepts of care, negligence, and ignorance are not defenses for the defendant.

### Contract

Although on a more limited basis than torts, contracts are the second basis for a claim arising in the healthcare industry. A contract is an agreement, written or oral, that, in most cases, is legally enforceable through the legal system. Illegal contracts include those that courts view as against public policy, specific oral contracts that the law requires be in writing, and unconscionable contracts. Unconscionable contracts are contracts that courts view as coercive. **Contract law** is based on common law. However, some states have replaced common law with statutory law or administrative agency regulations. In those states, the statutes or administrative regulations control. A hospital contract with patients that attempts to limit their right to sue could be a contract to which a court would apply the unconscionable concept and hold the hospital liable. Another example of how contractual issues affect healthcare is a contract for services between the hospital and a contracting physician or physician group, such as pathologists, radiologists, anesthesiologists, and emergency medicine physicians.

## Case Study: Mayor's Records Appear in Tabloid

The Mid-America Medical Center (MAMC) is a Level III, 1,000-bed acute care hospital. The center's medical staff office (MSO) maintains all demographic, credentialing, and privileging information for every medical staff member in a physician database. The demographic information includes items such as the physician's name, educational degrees, professional license number, liability insurance information, office address, and office phone numbers, including any office fax numbers. The MSO has a policy and procedure for immediately updating the physician database upon receiving notice of any changed demographic information.

MAMC maintains all dictated medical reports, radiologic reports, lab/pathology reports, emergency department notes, and workers' compensation reports in a clinical data repository (CDR). It also maintains radiologic, EEG, and EKG images in digital format in the CDR. As the documents become available from medical transcription, they are uploaded immediately to the CDR and made available to caregivers. Further, as the digital images become available through the testing equipment, they likewise are uploaded immediately to the CDR and made available to caregivers. Upon loading into the CDR, the documents are autofaxed to the dictating physician and the attending physician, if different. The fax numbers in the CDR are updated on a real-time basis from the MSO physician database. This means that as soon as an MSO staff member updates the physician database with a new fax number, the number is automatically and immediately uploaded to the CDR for autofaxing purposes. The autofax cover sheet contains a confidentiality statement instructing anyone receiving material erroneously to call the director of the HIM department.

On December 28, the HIM director received a call from an individual who had never been a patient at MAMC, but who indicated that he had just received a faxed history and physical, operative report, and discharge summary on a patient with AIDS and related conditions. It turned out that the patient was the mayor of the city where MAMC was located. He had acquired AIDS from a blood transfusion three years earlier during open-heart surgery. The HIM director instructed the caller to mail the documents to her attention by certified mail, and the caller complied.

However, before mailing the documents, the caller copied them and sold the copies to a local tabloid press. The information in the reports was "revised," and a printed story gave sordid details about how the mayor had acquired AIDS. The mayor called the HIM director in a rage.

The HIM director immediately contacted the risk manager and the CEO. The HIM director and the risk manager investigated the matter together and ascertained that the dictating physician had notified the MSO of a fax number change on December 21. The MSO staff had not followed policy and procedure for updating this information in the physician database because the fax number was not changed until December 30. Thus, the CDR was not updated and reports continued to be autofaxed to the old fax number. The fax number had actually been valid for the physician until December 27 at midnight. On December 28, the phone company assigned the number to the anonymous caller at his request. The physician database had a feature that allowed entering information such as a fax number and inputting an effective date. On that date, the updated information would automatically be in effect and uploaded to the CDR.

The mayor suffered significant harm from the misleading publication. He filed a lawsuit in the state trial court, suing the hospital, the MSO director, and the MSO data-entry clerk personally for breach of confidentiality. After considerable pretrial discovery was conducted, the case went to trial. The jury found in favor of the mayor against the hospital and the MSO director, stating that MAMC had breached the mayor's confidentiality by failing to follow its own policies and procedures for protecting his confidential health information. The jury based its decision on the tort of negligence.

The jury also found the data-entry clerk personally liable because pretrial discovery showed that she was angry with the mayor and intentionally had not entered the physician's updated fax number into the physician database. She knew that any reports regarding the mayor would continue to be automatically faxed to the old fax number, which her boyfriend had taken as of December 28. She

shared in the money received from the tabloid for the information. The jury's decision was based on the intentional tort of invasion of privacy.

The hospital's liability insurance paid the $4 million judgment on behalf of the hospital and the MSO director. However, the hospital's insurance company refused to pay the $8 million judgment against the data-entry clerk, reasoning that her actions were intentional and not within her scope of work.

## References

Clarkson, K. W. et al. *West's Business Law*. St. Paul, MN: West Publishing Company: 1992.

Miller, R. D. *Problems in Hospital Law*. Rockville, MD.: Aspen Publishers: 1986.

Pozgar, G. D. *Legal Aspects of Health Care Administration*. Gaithersburg, MD: Aspen Publishers: 1999.

To order *Health Information Management: Concepts, Principles, and Practice* (AB103302), go to www.ahima.org and click on "Professional Development," then "Bookstore" or call (800) 335-5535.

**Source**: Excerpt, *Health Information Management: Concepts, Principles, and Practice* (Chicago: American Health Information Management Association, 2002)