Supervising Doctors May Be Held Liable in Malpractice Suits

Urgent Message: A supervising physician can be named in a lawsuit for malpractice against a nurse practitioner or physician assistant, however, there are steps supervising physicians can take to protect themselves against such actions.

Alan A. Ayers, MBA, MAcc

In urgent care settings, physicians are often responsible for supervising and overseeing a team of other healthcare employees, including nurse practitioners (NPs), physician assistants (PAs), and medical assistants (MAs). If any member of this team is found to be negligent, the doctor may be held liable.

Up to 85% of urgent care patients are seen only by an NP or PA, rather than a physician.[1] And while most states require an NP or PA to work under the "supervision" of a physician, court cases show that physicians underestimate their liability in supervising nurse practitioners and physician assistants.[2]

Even in states that have done away with requirements that NPs be physician-supervised, physicians in urgent care settings may still be liable by virtue of employing the NP. In fact, the vast majority of negligence actions against NPs and PAs also name the supervising physician.[2]

In addition to medical malpractice suits, state licensure boards may sanction doctors for improperly supervising NPs and PAs.

Vicarious Liability

Vicarious liability is based on the legal idea of *respondeat superior*, which is Latin for "let the master answer." Under vicarious liability, an employer is liable for the acts of an employee that are performed within the course of their employment.[3] This doctrine has been used to hold physicians liable for the negligence of nurse practitioners and physician assistants.

The law states that "[a]n employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit."[4] Negligence liability will be imposed upon the employer if it "knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes."[4] As such, California follows the rule set forth in the Restatement Second of Agency section 213, which provides in pertinent part: "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: … in the employment of improper persons or instrumentalities in work involving risk of harm to others[.]"[5] Liability for negligent supervision and/or retention of an employee is one of direct

Author affiliations: Alan A. Ayers, MBA, MAcc, is President of Experity Consulting and Practice Management Editor of *The Journal of Urgent Care Medicine*. The author has no relevant financial relationships with any ineligible companies.

liability for negligence, not vicarious liability.[4]

If the requirements are met, a supervising physician may be held liable for the following forms of negligence or errors committed by an NP or a PA:

- Misdiagnosis
- Administering wrong or untimely medication, or not administering one at all when required
- Errors with medication dosing
- Failure to monitor a patient
- Failure to follow up with a patient

Kansas (2022), New York (2022), and Utah (2023) no longer require supervision for all or most NPs. Twenty-seven states now have eliminated these requirements.[2] However, PAs lag well behind NPs in achieving independence. To that end, the American Academy of Physician Associates is calling to eliminate a mandated relationship with a specific physician.[2]

In *Zeh v. Maso*, for example, the Georgia Court of Appeals held that a supervising physician is not legally liable for the negligent conduct of a physician assistant practicing under them.[6] The plaintiff in that case tried to use Georgia's Physician Assistant Act to establish legal liability as the statute defined a PA's scope of practice with the literal text ascribing "responsibility" to the supervising physician.[6] In *Strickland v. Wellstar Health Sys.*, the plaintiff referenced similar "responsibility" language, but only from non-legal sources.[7] The court opined that if a Georgia statute literally ascribing "responsibility" to a supervising physician does not impose legal liability on the supervising physician, fact testimony and medical literature regarding responsibility will not impose legal liability on a supervising physician either.[7]

The court said: "As the Court of Appeals has made clear, 'responsibility' and 'liability' are not interchangeable, and if the Georgia Legislature wanted to proscribe liability on supervising physicians, they know the language to use."[7]

Steps Supervising Physicians Can Take to Protect Themselves

When considering the addition of an NP or PA to your practice, ask the state medical board about diagnosing and prescribing rules, as well as the required amount of supervision.[8] Physicians should also make certain to verify the credentials of the NP or PA under consideration. Contact the relevant state licensing board or professional association and verify that the applicant graduated from an accredited program.

Urgent care owners and operators should clearly detail the entire relationship between the doctor and other health professionals. The job description and practice protocols should be written to adequately describe the type of patients to be seen and the level of treatment to be provided.[9] In addition, supervising physicians should explain to the PA or NP how they see the role. Define what conditions and complaints are appropriate for first-level care, and when he or she must refer the patient to the supervising physician or a specialist.[8]

The most counterproductive thing a supervising physician can do is create an environment in which the NP or PA is discouraged from asking questions or asking for help.

"Urgent care owners and operators should clearly detail the entire relationship between the doctor and other health professionals."

Conclusion

It's important to note that the greatest malpractice risks exist when a PA or NP practices beyond their level of training and waits too long to contact the physician.[10] ■

References

1. Benjamin Barlow, Monte Sandler; and Alan Ayers, *How Urgent Care Can Address Its Degrading Scope of Practice*, The Journal of Urgent Care Medicine (November 30, 2022). Retrieved at https://www.jucm.com/how-urgent-care-can-address-its-degrading-scope-of-practice/.
2. Leigh Page, *Malpractice Risks for Docs Who Oversee NPs or PAs*, Medscape (April 06, 2023). Retrieved at https://www.medscape.com/viewarticle/990494?form=fpf.
3. *Burton v. Chen*, 2023 UT 14, ¶ 1, 532 P.3d 1005, 1007 (Utah 2023).
4. *Delfino v. Agilent Techs., Inc.*, 145 Cal. App. 4th 790, 815, 52 Cal. Rptr. 3d 376, 397 (2006), *quoting Roman Catholic Bishop v. Superior Court*, 42 Cal.App.4th 1556, 1564–1565, 50 Cal. Rptr. 2d 399 (1996)
5. *Evan F. v. Hughson United Methodist Church*, 8 Cal.App.4th 828, 836, 10 Cal. Rptr. 2d 748 (1992).
6. *Zeh v. Maso*, 366 Ga. App. 890, 890, 884 S.E.2d 563, 565 (2023).
7. *Strickland v. Wellstar Health Sys.*, 2023 Ga. State LEXIS 734, *2-4 (Ga. St., Fulton County (2023).
8. Mark Crane, *NPs and PAs: What's the malpractice risk?* Medical Economics (March 20, 2000). Retrieved at https://www.medicaleconomics.com/view/nps-and-pas-whats-malpractice-risk.
9. Christina Moore and Sydney Miller, *Stop, Collaborate, and Listen: Missouri Requirements Regarding Collaboration With and Supervision of Advance Practice Nurses*, Missouri Medicine (July-August 2023). Retrieved at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10441260/.
10. *Heinrich v. Serens*, 2023 NY Slip Op 03086, ¶ 1, 217 A.D.3d 1320, 1321, 191 N.Y.S.3d 236 (N.Y. App. Div. 4th Dept.).