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Admissibility of Custom and Practice Evidence in Medical Malpractice Cases

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Can evidence of a health care provider's custom and practice be admissible as habit evidence to prove a fact in malpractice cases? Can such evidence be proof in support of or against the standard of care sufficient to support or oppose a motion for summary judgment for or against a party? Can such evidence arise from a creative imagination and be a poor excuse for medical negligence? The simple answer to all is yes. Therefore, the courts must choose to exercise much scrutiny and discretion before allowing such evidence to be admissible.

The discussion begins with the seminal Court of Appeals decision in *Halloran v. Virginia Chemicals*,[1] a products liability case in which the defense sought to introduce evidence of plaintiff's "usage and practice" to use an immersion coil to heat the water into which the freon (the product) was placed, causing the explosion seriously injuring the plaintiff.

On cross-examination by defense counsel, the plaintiff, an automobile mechanic, denied ever doing this. The defense offered a witness prepared to testify that he not only saw plaintiff using the immersion coil to heat the freon on previous occasions, but also warned plaintiff of the danger as well. Plaintiff's objection to this proposed testimony was sustained by the trial judge relying on the well-settled rule that extrinsic evidence cannot be used to impeach a witness on collateral matters. The Second Department affirmed, and a question of law was certified for review.

The Court of Appeals, in reversing judgment for plaintiff and granting a new trial, held for the first time that habit evidence of carelessness or carefulness may be admissible under limited circumstances to prove the actor was negligent or not negligent on the occasion in question. In this case, if the auto mechanic had habitually or regularly used the immersion coil to heat water into which the refrigerant container was placed, evidence of that habit was admissible with a proper foundation to prove that plaintiff followed such a procedure on the day of the explosion, and that such evidence in this case was not collateral since it would explain the explosion, and therefore, did not violate the rule against using extrinsic evidence solely to

impeach credibility on a collateral issue.

The court reasoned:

> Evidence of habit or regular usage, if properly defined and therefore circumscribed, involves more than unpatterned occasional conduct, that is, conduct however frequent yet likely to vary from time to time depending upon the surrounding circumstances; it involves a repetitive pattern of conduct and therefore predictable and predictive conduct. On this view, the excluded evidence was offered to show a particular method of executing a task followed by the mechanic, who, on his own testimony, had serviced "hundreds" of air-conditioning units and used "thousands" of cans of the refrigerant. If on remittal the evidence tends to show that the mechanic used an immersion coil a sufficient number of times to warrant a finding of habit, or regular usage, it would be admissible to aid the jury on its inquiry whether he did so on the occasion in question.

However, the court cautions that on no view, under traditional analysis, can conduct involving other persons or independently controlled instrumentalities produce a regular usage because of the likely variation of the circumstances in which such conduct will be indulged. Proof of a deliberate repetitive practice by one in complete control of the circumstances is quite another matter and it should therefore be admissible because it is so highly probative. Such conduct is more predictive than the frequency (or rarity) of jumping on streetcars or exercising stop-look-and-listen caution in crossing railroad tracks.

In certain dental malpractice actions, custom and practice evidence has been allowed as circumstantial evidence in defense of the claim. In *Rigie v. Goldman*,[2] a claim based on lack of informed consent regarding removal of an impacted wisdom tooth, the Second Department held that evidence of a dentist's routine practice of advising patients of risks associated with the surgical procedure, such as permanent numbness, was admissible as circumstantial evidence that he acted in conformity with routine practice.

In *Rigie*, the plaintiff testified at trial that defendant Dr. Levin, the oral surgeon, told her that the surgical procedure might cause her to experience some pain and numbness for a week or two. Plaintiff claimed that she was not otherwise informed of the dangers of the procedure and that extraction of the wisdom tooth was the only course of treatment for her condition. As a result of the surgical procedure, plaintiff claimed she suffers from permanent paresthesia of the lip, chin and tongue, which can only arise by the severing or injuring of a nerve in the oral cavity.

Dr. Levin testified that he had no independent recollection specifically of what he told the plaintiff regarding the risks associated with removal of an impacted wisdom tooth. The court permitted Dr. Levin to testify, over objections from plaintiff's counsel, as to his routine practice developed over 19 years of practice as a specialist in oral and maxillofacial surgery and followed in every instance of thousands of wisdom teeth extractions that he invariably tells his patients prior to removal of an impacted wisdom tooth of the risks and complications

of the procedure, including the possibility of permanent numbness of the tongue, chin and lip. He also tells those patients that no alternative to extraction exists to alleviate the condition but that he could treat the condition with antibiotics or by cleaning the infected area. Although Dr. Levin could not recall the specifics of the conversation with plaintiff prior to the extraction, he remembered delivering a warning to her concerning the dangers attendant to oral surgery.

Further, Dr. Levin's dental assistant for the prior eight years was permitted to testify as to Dr. Levin's consistent practice of informing patients of the usual risks associated with an extraction of an impacted wisdom tooth including the admonition that temporary or permanent numbness of the lip, tongue or chin may result. The dental assistant testified that in the hundreds of surgical procedures she witnessed involving extraction of wisdom teeth, Dr. Levin, without exception, had issued a warning to the patient of the dangers associated with the surgical procedure prior to the administration of anesthesia to the patient. Following Dr. Levin's disclosures, the dental assistant's routine was to ask the patient if he or she had any further questions, and if not, she would present the informed consent form to the patient to sign in her presence, and the dental assistant would then date and sign the form as witness. The signed informed consent was admitted into evidence, and signature identified.

The Second Department, in affirming judgment for the defendant and upholding the admissibility of the aforesaid testimony as circumstantial evidence of habit followed by the defendant, explains:

> The choice of legal theory has important ramifications with respect to the evidentiary ruling at issue in this case. Because the conduct of the parties is measured by the standard negligence analysis, the habit evidence at issue must be reviewed within the context of the principles espoused in Halloran rather than within the traditional rule applicable to routine business or professional tasks. Considering the trial record in that context, we are of the opinion that the testimony to which the plaintiff objects provided an adequate number of prior instances of specific, repetitive conduct by Dr. Levin when confronted with a patient presenting a similar condition to rise to the level of habit. Moreover, Dr. Levin was in complete control of the circumstances in which the operative procedure was performed. Thus, while creating no presumption that the practice was followed in the particular instance at issue, the testimony of Dr. Levin as to his routine practice, corroborated by his dental assistant, was properly admissible to support an inference by the jury that the practice was followed on the particular occasion in question (Halloran v. Virginia Chems, supra, 41 N.Y.2d at 386, 393 N.Y.S.2d 341, 361 N.E.2d 991). The weight and value to be accorded such testimony as well as the resolution of the plaintiff's contradictory testimony that Dr. Levin did not warn her of the dangers associated with the surgical procedure were for determination by the jury.

In *Rigie*, the court was careful to point out that expert testimony was required in order to establish the applicable standard of care to be followed in determining whether informed consent was obtained.

However, in *Gushlaw v. Roll*,[3] the Third Department, in distinguishing the holding in *Rigie*, held that defendant, a maxillofacial surgeon, was not permitted to offer testimony of himself and his dental assistant as to the general custom and practice of the manner in which they handle patients during surgery.

In *Gushlaw*, the defendant performed an extraction of the lower right wisdom tooth and molar, following which plaintiff's decedent experienced pain in his jaw, neck and left shoulder. Ultimately, plaintiff's decedent was diagnosed with two cervical herniated discs and underwent surgery to remove them. The plaintiff also sought to rely on the doctrine of res ipsa loquitur raising an inference of negligence, which was rejected by the court.

The court, in citing *Halloran* and *Rigie*, reasoned as follows:

> Defendant further contends that Supreme Court erred in not allowing him and his dental assistant to testify as to their general practice in the manner in which they handle patients during surgery. We disagree, "New York courts have long resisted allowing evidence of specific acts of carelessness or carefulness [, except in carefully circumscribed instances,] to create an inference that such conduct was repeated when like circumstances were again presented" (Halloran v. Virginia Chems., 41 N.Y.2d 386, 391, 393 N.Y.S.2d 341, 361 N.E.2d 991). The cases permitting the use of such evidence traditionally have been "limited to situations involving the performance of routine business or professional tasks" (Rigie v. Goldman, 148 A.D.2d 23, 26 543 N.Y.S.2d 983), which includes the repetitive manner in which a physician informs his or her patients of the risks involved in a particular type of surgery (see, id., at 29, 543 N.Y.S.2d 983). However, the repetitive "hornbook" warnings conveyed by a physician to prospective surgical patients "is scarcely analogous to that of [an oral surgeon] performing surgery wherein each patient and the nature of his or her medical condition is unique as are the actions of the operating doctor" (Glusaskas v. Hutchinson, 148 A.D.2d 203, 206, 544 N.Y.S.2d 323.

In *Glusaskas v. John E. Hutchinson, III, M.D., P.C.*,[4] the First Department held that the trial court's decision to permit the jury to view videotape of the defendant performing a similar operation to that performed upon plaintiff's decedent was highly improper, inflammatory and prejudicial, requiring a new trial.

The plaintiff's decedent died in the operating room from a "laceration of aorta sustained during surgical repair of infected prosthetic mitral valve. Internal hemorrhage." The defendant performed this surgery as well as a prior surgery for aortic and mitral valve stenosis with replacement of both valves. During the surgery in question, the defendant used an oscillating saw to cut the sternum and marked hemorrhaging occurred and caused the patient's death.

During direct examination of the defendant surgeon, defense counsel was permitted to introduce into evidence a videotape of defendant's performance of another heart valve replacement operation six years after the fatal surgery and two to three weeks before the

start of this trial. Over strong objection by plaintiff's counsel, the trial judge, after viewing the videotape in camera and conducting a voir dire on its admissibility, ruled that it was relevant to show the jury how the procedure was done. Not surprisingly, a defense verdict ensued.

The First Department, in reversing this decision and granting a new trial, explained the holding in *Halloran* as follows:

> Indeed, the holding in Halloran v. Virginia Chemicals Incorporated, supra, relaxes the traditional rule only to the extent of accepting that in certain instances, such as products liability litigation, proof of regular usage or habit might be warranted where deliberate and repetitive practice is involved. The instant allegation of medical malpractice certainly does not present a situation comparable to that of a purportedly defective packaged refrigerant, the subject of the dispute in Halloran v. Virginia Chemicals Incorporated, supra. The manufacture or use of an inanimate object is scarcely analogous to that of a physician performing surgery wherein each patient and the nature of his or her medical condition is unique as are the actions of the operating doctor.

It is crucial that evidence of a person's specific acts of carelessness or carefulness on other occasions is generally inadmissible even when the underlying circumstances of the prior or subsequent conduct was similar to the one in contention. Here, the circumstances of the surgery performed in Glusaskas and that depicted in the videotape were not alike. Not only was the tape prepared exclusively for the trial, thus providing Dr. Hutchinson with an opportunity to use special, if not extraordinary, care in the filmed operation (and defendant admits that more time was taken on the demonstrated procedure than is normally done), but the medical and physical condition of the two individuals involved was, as heretofore noted, different.

The Court of Appeals in *Rivera v. Anilesh*,[5] reversed the Appellate Division, First Department, in holding evidence of dentist's routine procedure for administering injections of anesthesia prior to tooth extraction admissible pursuant to habit evidence rule, allowing inference that the same procedure was used in treating the plaintiff.

The defendant, prior to extracting plaintiff's lower molar tooth for complaints related thereto, performed a "lower left mandibular block injection" in order to numb the area by this tooth. According to plaintiff, she continued to have sensation in the area and defendant gave her a second injection in the same area, at which time plaintiff experienced extreme pain like electric shock. However, the injections numbed plaintiff's mouth, and defendant performed the tooth extraction. Subsequently, the plaintiff purportedly developed fever, pain and swelling in her mouth, received follow-up care and treatment from defendant, and two oral surgeons (the first diagnosed TMJ) and ultimately was diagnosed with severe infection requiring a three-week hospitalization.

Plaintiff asserted causes of action for malpractice and lack of informed consent, alleging defendant negligently performed the injections of anesthesia and tooth extraction, and failed to properly manage the tooth extraction.

Defendant moved for summary judgment dismissing the complaint, relying on her deposition testimony and affirmation from another oral surgeon. Defendant testified she did not recall treating plaintiff for the lower molar tooth problem and therefore could not recall what occurred during the extraction. She did state that the administration of this type of injection was a "routine procedure" that she did "every day" to "at least three to four or five" patients and that she was a practicing dentist since 1982. Defendant further explained that a second injection of anesthesia was required in 15-20 percent of her cases. She provided a step by step description of the procedure she used to give injections to patients, and claimed that when a second injection was necessary, she administered it at the same site as the first injection. Defendant noted that if a patient complained of unusual pain or any other unexpected events occurred during treatment she would make a notation in the medical chart and no such note existed for plaintiff.

The Court of Appeals, in reversing the Appellate Division and allowing such habit evidence by defendant to support summary judgment under *Halloran* and shift the burden to plaintiff, states the following rationale:

> The Appellate Divisions have generally adopted the proposition that normal documentation and notification protocols, routine warnings to patients and the processes for undertaking certain noninvasive medical procedures can qualify as habit evidence. In contrast, evidence concerning a physician's surgical practices has been deemed inadmissible under the theory that every surgery is necessarily unique and varies depending on the nature of the patient's medical condition and the actions of the doctor.
>
> Without commenting on the propriety of these decisions, the record here supports the admissibility of Dr. Anilesh's routine procedure for administering injections of anesthesia under the standard articulated in Halloran in light of the frequency that this technique was used in Dr. Anilesh's dental practice and the nature of the routine conducted. Dr. Anilesh explained that she gave this type of injection every day to three to five patients and that she had been practicing as a dentist since 1982. Even by a conservative estimate, this testimony would indicate that Dr. Anilesh performed this procedure in the same manner thousands of times.
>
> Nor do we believe that the nature of this injection process renders it unsuitable for consideration as habit evidence. Dr. Anilesh described the specific procedure that she used when injecting an anesthetic and her expert confirmed that this procedure was within the accepted standard of care for dentistry. Relatedly, there is no evidence suggesting that Dr. Anilesh's pre-extraction injection procedure would vary from patient to patient depending on the particular medical circumstances or physical condition of the patient. This record therefore contains "proof of a deliberate and repetitive practice"—the mundane administration of a local anesthetic prior to a relatively routine tooth extraction—by a trained, experienced professional "in complete control of the circumstances" (Halloran, 41 N.Y.2d at 392, 393 N.Y.S.2d 341, 361 N.E.2d 991). We conclude that Dr.

> Anilesh's habit evidence was properly considered by Supreme Court in conjunction with the motion for summary judgment and that it was sufficient to shift the burden to Rivera to provide evidence creating an issue of fact as to whether Dr. Anilesh committed malpractice."

In *Soltis v. State*,[6] the Third Department, in a case involving the issue of vicarious liability, held that the state should have been permitted to introduce evidence that it was the custom and practice of physicians' assistants and nurses at a correctional facility clinic to advise inmates that treating physicians were not state employees. In its opinion, the court states:

> There is nothing in the Halloran decision, however, to suggest an intent to narrow the traditional evidentiary rule respecting the admissibility of business, professional or other institutional custom or practice on matters other than negligence or due care.

In *Nigro v. Benjamin*,[7] the Fourth Department, in citing *Halloran*, held that the court below did not err in admitting limited testimony concerning the protocol defendant followed when conducting breast examinations upon the plaintiff. The specific facts and evidence is not recited in the court's brief opinion.

In reversing an order granting summary judgment to the defendant on call physician, the Fourth Department held in *Gier v. CGF Health Sys.*[8] that affidavits submitted by plaintiff of the admitting surgical resident, and chief surgical resident, neither of whom had a specific recollection whether defendant was notified of decedent's admission, that it was "normal procedure and protocol" as well as "routine practice" to notify the on-call attending physician at the time of an admission, and that the chief surgical resident recalled no incident in the past five years as a resident in which an on-call attending had not been notified constitutes competent and admissible evidence concerning routine professional practice to raise a triable issue of fact as to whether defendant was timely notified of the admission.

In affirming judgment upon a jury verdict in favor of defendant, the Fourth Department, in *Biesiada v. Suresh*,[9] rejected plaintiff's argument that it was error for the court below to allow defendant to testify concerning her usual practice in transferring stroke patient from supine to seated positions. "Proof of a deliberate repetitive practice by one in complete control of the circumstances" is admissible provided the proof demonstrates "a sufficient number of instances of the conduct in question," citing *Halloran*. Here, although defendant had no specific recollection of the circumstances of the incident at issue, her testimony concerning her protocol was properly admitted to establish her conduct during the incident at issue.

In *Orloski v. McCarthy*,[10] the Third Department, in affirming judgment upon a jury verdict in favor of the defendant, held that nurses' testimony regarding their custom in documenting patient complaints and maintaining medical records, based upon lack of notations contained in patient's medical records, was admissible.

This court also allowed defendant's medical expert to testify as to the procedure Jonathan Schwartz followed in performing a routine rectal examination on decedent when rendering a

second opinion.

Conclusion

In sum, the above case law demonstrates that habit evidence, a form of circumstantial evidence, may be admissible in limited malpractice cases by proof of custom and practice to prove carelessness or carefulness of an act or occurrence when there is no recollection of the facts. Such evidence may be used to support or deny summary judgment to a party. However, circumstantial evidence is no substitute for medical expert opinion to prove the relevant standard of care and whether good and accepted medical practice was complied with or violated by the defendant(s).

Moreover, courts must consider whether such habit or circumstantial evidence belongs to the creative imagination of the party or attorney and is being used in such a way to unjustifiably excuse an act or omission of carelessness or negligence where the party has no recollection of the events. One can only imagine the unlimited circumstances where meritorious claims or defenses may be defeated by abuse of circumstantial evidence. Otherwise, we may one day be faced with evidence of a party's custom and practice to do the right thing and never be wrong, despite the facts of the case. As the well-known song says: "But it was just my 'magination, once again. Running away with me. Tell you it was just my 'magination, running away with me."

Endnotes:

1. 41 N.Y.2d 386, 393 N.Y.S.2d 341, 361 N.E.2d 991 (1977).

2. 148 A.D.2d 23, 543 N.Y.S.2d 983 (2d Dept. 1989).

3. 290 A.D.2d 667, 735 N.Y.S.2d 667, 2002 N.Y. Slip Op. 00166.

4. 148 A.D.2d 203, 544 N.Y.S.2d 323 (1st Dept. 1989).

5. 8 N.Y.3d 627, 838 N.Y.S.2d 478, 869 N.E.2d 654 (2007).

6. 188 A.D.2d 201, 594 N.Y.S.2d 433 (3d Dept. 1993).

7. 155 A.D.2d 872, 547 N.Y.S.2d 710 (4th Dept. 1989).

8. 307 A.D.2d 729, 762 N.Y.S.2d 472 (4th Dept. 2003).

9. 309 A.D.2d 1245, 764 N.Y.S.2d 739 (4th Dept. 2003).

10. 274 A.D.2d 633, 710 N.Y.S.2d 691 (3d Dept. 2000).
