NEGLIGENCE OF HEALTH CARE PROVIDERS: MALPRACTICE OR ORDINARY NEGLOGENCE? *

> The appellate courts have stated the distinction between medical malpractice and negligence is a subtle one, for medical malpractice is but a species of negligence and no rigid analytical line separates the two. This distinction is often critical where the defense has raised the shorter medical malpractice statute of limitations defense to specific negligence claims against hospitals and health care providers often resulting in the dismissal of cases.
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> This article will discuss the factors and principles used by the appellate courts in making this determination. Application of these factors and principles in particular cases Is often troubling and unpredictable. Therefore, when in doubt the practitioner should plead and proceed under malpractice statutes and case law.

Whether an action is determined to raise claims of medical malpractice or ordinary negligence affects the application of the relevant statute of limitations (SOL). As per CPLR section 214, ordinary negligence actions are governed by the 3 yr. SOL while medical malpractice actions fall under CPLR section 214-a which generally specifies a 2 and ½ yr. SOL. Therefore, in the context of specific negligence claims against doctors, health care professionals

and hospitals what tests, factors and legal principles have the courts applied to make this distinction?

As stated by the Court of Appeals "the distinction between medical malpractice and negligence is a subtle one, for medical malpractice is but a species of negligence and no rigid analytical line separates the two," **Scott v. Uljanov,** 74 N.Y 2d 673 (1989); **Weiner v. Lenox Hill Hosp.,** 88 N.Y. 2d 784 (1996). Medical malpractice includes negligent conduct that constitutes medical treatment to a particular patient or bears a substantial relationship to medical treatment by a licensed physician. **Bleiler v. Bodnar,** 65 N.Y. 2d 65 (1985); **Davis v. South Nassau Communities Hosp.,** 26 N.Y. 3d 563 (2015). Thus, the alleged negligent treatment by hospital's ER physician and nurse in failing to take a proper history related to plaintiff's eye injury and detect metal fragment in eye constituted medical malpractice granting dismissal of those specific claims as time barred under CPLR section 214-a. **Bleiler,** supra. However, the claims regarding negligent hiring and failing to promulgate proper emergency room rules to take a history and be seen by a specialist do not refer to any specific patient falling under CPLR section 214 the ordinary negligence SOL and survived dismissal. **Bleiler,** supra.

The Second Department has held that the critical factor to consider is the nature of the duty to plaintiff that defendant is alleged to have breached. **Stanley v. Lebetkin,** 123 A.D.2d 854 (2nd Dept. 1986); **Jeter v. New York Presbyt. Hosp.,** 172 A.D.3d 1338 (2nd Dept. 2019); **Rabinovich v.Maimonides Med.Ctr.,** 179 A.D.3d 88 (2nd Dept. 2019). The analyses examines whether the negligent acts or omissions involve a matter of medical science or art requiring

specialized skill not ordinarily possessed by lay persons. **Jeter, supra.** If medical judgement is involved in supervision or treatment decisions the action falls under medical malpractice. See **Smee v. Sisters of Charity Hosp.,** 210 A.D.2d 966 (4th Dept. 1994); **Martusello v. Jensen,** 134 A.D.3d 4 (3rd Dept.2015).

Contrary to common belief among many lawyers the determinative test is not whether expert testimony is necessary to prove the claims. **Weiner, supra.,** (E.g., the need for expert testimony to understand blood collection procedures is not determinative of the nature of the duty breached and therefore, does not convert ordinary negligence claims to medical malpractice claims); **Stanley, supra.** In **Payette v. Rockefeller Univ.,** 220 A.D.2d 69 (1st Dept. 1996) claims involving negligent design, prescription, control and supervision of a dietary program involving a series of iodine injections to the plaintiff were held to be ordinary negligence claims governed by the 3 yr. SOL notwithstanding the need for expert testimony to prove the claims. The court gave the example of leaving a surgical scalpel in a patient does not require expert testimony but the nature of the duty breached involves the physician patient relationship during medical treatment and therefore sounds in medical malpractice.

The courts will examine the specific allegations of the complaint and the bill of particulars and not the label on the action. **McNally v. Montefiore Nyack Hosp.,** 168 N.Y.S.3d 700 (2nd Dept. 2022). Consider **Stanley, supra.,** where plaintiff fell while alighting from her physician's examination table fracturing her ankle. The complaint and bill of particulars claimed negligence in failing to supervise plaintiff's placement on the exam table, failing to keep plaintiff under constant surveillance in view of her complaints, failing to assist her in getting off

the table and failing to respond to her request for assistance. The court affirmed summary judgement for defendant based on expiration of the medical malpractice statute of limitations holding these allegations established the duty the defendant is charged with violating arose from the physician-patient relationship and was substantially related to the treatment of the plaintiff.

Compare to the facts in **Reardon v. Presbyterian Hosp.,** 292 A.D.2d 235 (1st Dept. 2002), where plaintiff's decedent's fell alighting from examination table suffering a fractured hip while being assisted by defendant physician after he performed biopsy in Cardiac catheterization lab on this heart transplant patient. There was a nurse in the room who could have assisted but the defendant chose not to request her help. The court reversed the trial court's dismissal of the action at the close of plaintiff's case stating no expert testimony was required as the allegation was the failure to exercise ordinary and reasonable care to safeguard plaintiff which can be determined by the jury based on common knowledge and thus the action sounds in simple negligence. The court distinguished **Stanley, supra,** based on the allegations of the complaint implicating the professional skill and judgement of the physician as plaintiff in **Stanley** alleged that defendant should have kept her under constant surveillance in view of her complaints.

Where plaintiff's decedent fell from a chair after doctor ordered she could be up out of bed as tolerated suit against hospital was ultimately dismissed as untimely. The Fourth Department held this action sounded in medical malpractice as plaintiff's allegations challenged the defendant hospital's assessment of decedent's need for supervision based on her medical

condition. **Smee, supra.** The court stated placing decedent in a chair for a period of time without supervision after she complained of light-headedness and nausea involved medical judgement and was an integral part of the process of rendering medical treatment.

The same holding was applicable to fall of plaintiff's decedent, age 81 who slipped and fell off exam table at her doctor's office after she alleged medical assistant left the exam room and she felt insecure both of which were denied by the medical assistant. **Martuscello, supra.** The Third Department found plaintiff's allegations related to assessing fall risk and inadequate assistance and supervision in view of decedent's age and medical conditions raised the question of medical judgement making this a medical malpractice action. The appellate court found lower court's jury charges applicable to premises liability were not appropriate and prohibition of plaintiff's medical experts' testimony constituted reversible error.

However, where plaintiff's decedent fell off wheelchair while being placed on lift in ambulette to be transported from nursing home to doctor's office due to lack of proper restraint the Second Department found this negligent conduct to be ordinary negligence. **Kaziyeva v. Temana Assoc., Inc.,** 168 A.D. 3d 851 (2nd Dept. 2022). The appellate court found no allegation of inadequate medical assessment was involved and the general duty violated was based on the failure to render reasonable care to safeguard the plaintiff's decedent during transportation from the facility. The court affirmed the denial of defendant's motion to require plaintiff to file a medical malpractice certificate of merit and transfer the action to the medical malpractice part.

Similarly, patient falls from hospital beds in which there are specific allegations of lack of supervision and negligent fall risk assessment or lack of specific additional restraints generally fall under medical malpractice. **Scott, supra; Bell v. WSNCHS N., Inc.,** 153 A.D.3d 498 (2nd Dept. 2017). In **Scott, supra.,** the plaintiff presented to hospital's emergency room and found to be intoxicated. He was placed in bed with siderails up and mother was at his bedside. Some 30 minutes later plaintiff climbed out of bed, fell and hit his head. Plaintiff was evaluated by a psychiatrist who determined plaintiff was a substantial risk to himself and others. The Court of Appeals reversed the order of the Appellate Division and dismissed the action on SOL grounds holding that the cause of action against the hospital was based on medical malpractice as it involved the assessment of degree of supervision and treatment needs of the patient. In **Bell, supra.,** plaintiff's decedent who was on fall prevention protocol with restraints ordered fell out of hospital bed with siderails up suffering distal radial fracture. The Second Department affirmed summary judgement for the defendant dismissing the action on SOL grounds. The Court found the allegations challenged the assessment of supervisory and treatment needs of the plaintiff's decedent which fall under medical malpractice.

However, the Second Department reversed summary judgement for the defendant on SOL grounds where the hospital's alleged negligence was in violating its duty to exercise ordinary and reasonable care to protect and prevent harm to the patient. **Wesolowski v. St. Francis Hosp.,** 175 A.D. 3d 1461 (2nd Dept. 2019). Here the doctor issued no orders for restraint and plaintiff's decedent was able to get out of bed in a confused state, refuse

assistance and strike hospital staff. A similar rationale was expressed in **D'Elia v. Menorah Home and Hosp. for the Aged and Infirm,** 51 A.D.3d 848 (2nd Dept. 2008) in which plaintiff's decedent age 91 with history of congestive heart failure and prior fall trying to go to the bathroom and identified as a fall risk fell again while trying to go to the bathroom fracturing her hip. She was unattended and had no restraints or other devices at the time. The daughter was staying with her mother but was told to go home by employees of the facility who would watch out for her mother. The Second Department in a 3-2 majority opinion over a vigorous dissent by J. Covello affirmed summary judgement for the defendant solely as to that portion of the plaintiff's cause of action based on defendant's failure to use restraints. This claim requires a physician's order and therefore is based on medical malpractice requiring expert testimony in opposition to the motion. However, the majority reversed summary judgement as to that portion of the cause of action based on failure to utilize any other available tools to safeguard plaintiff's decedent as this allegation is based on ordinary negligence. As such no opposing expert affidavit was required. The Plaintiff could rely on the deposition testimony of the nurse supervisor as to the availability of safety tools other than restraints none of which required a doctor's order and none of which were utilized. The majority opinion reiterates that the determinative test is whether the alleged negligent conduct constitutes medical treatment not whether expert testimony is required.

Where a 79yo patient who was weak, appeared chronically ill with 105-degree fever and had IV tubes in place fell from hospital bed which had no elevated siderails the Second Department found this claim based on ordinary

negligence in failing to provide any safeguards while patient remained in bed and affirmed lower court's denial of defendant's motion to strike monetary ad damnum clause (impermissible to state amounts in medical malpractice complaint at the time CPLR 3017 (c). **Halas v.Parkway Hosp., Inc.,** 158 A.D.2nd 516 (2nd Dept. 1990). Similarly, the Second Department also affirmed lower court's order striking defendant's affirmative defense based on monetary amount set forth in ad damnum clause of complaint finding that plaintiff's geriatric decedent's claims based on fall from hospital bed with siderails up constituted ordinary negligence. **Papa v. Brunswick General Hospital,** 132 A.D. 601 (2nd Dept. 1987). This case appears wrongly decided as Plaintiff's decedent had history of heart attack, arteriosclerotic heart disease, congestive heart failure, renal insufficiency and hypertension for which she was receiving medications and plaintiff alleged defendant hospital failed to properly restrain the patient from falling from bed. It would appear that assessment of this patient's risk factors for fall and additional safeguards would involve the exercise of medical judgement and sound in medical malpractice.

In general, where the specific allegations involve the degree of supervision owed by a hospital to a particular patient based on the patient's medical history the courts find these claims to fall under medical malpractice. **Jeter v. New York Presbyterian Hosp.,** 172 N.Y.3d 1338 (2nd Dept. 2019). In **Jeter, supra.,** the Plaintiff went missing from the hospital premises after she had surgery followed by memory loss, threatened to leave the hospital and had been placed on 1 on 1 supervision or in a cluster room. The plaintiff was found 5 days later suffering injuries. Plaintiff's complaint raised specific allegations of failure to

properly supervise and treat but did not contain a certificate of merit under CPLR 3012-a required in medical malpractice actions. The defendant moved to dismiss the action for failure to serve a certificate of merit and plaintiff cross moved to serve an amended complaint with certificate of merit. The lower court held that a certificate of merit was required and permitted plaintiff to amend the complaint but only to add a cause of action for medical malpractice. The Second Department agreed as to the first part holding the complaint challenged the hospital's assessment of the plaintiff's supervisory and treatment needs sounding in medical malpractice but modified the lower court's order allowing the plaintiff to amend the entire complaint.

The Court of Appeals has held that a hospital's negligence in blood collection procedures causing patient to contract HIV infection and die after receiving contaminated blood transfusion for treatment of small bowel obstruction during hospitalization constitutes ordinary negligence affirming the orders below striking the hospital's affirmative defense and denying motion to dismiss based on the shorter medical malpractice statute of limitations. **Weiner, supra.** The Court opinion per J. Ciparick states the alleged negligence in failing to properly screen, test and safeguard the blood supply constitutes ordinary negligence as such negligence is not linked to the treatment of an individual patient but applies to the whole blood supply. The Court specifically states that the need for expert testimony to understand the nature of the blood collection procedures is not determinative of the nature of the duty breached and does not convert an ordinary negligence action into a medical malpractice action.

However, where Plaintiff donated blood to hospital's

blood bank drawn by a phlebotomist and had an adverse reaction just after leaving the facility causing her to fall the Second Department held that this action sounded in medical malpractice and plaintiff was granted an extension of time to serve a certificate of merit as required by CPLR 3012-a. **Rabinovitch, supra.** The appellate court referred to plaintiff's specific allegations that the defendant failed to follow NYS protocols and standard procedures for screening for adverse reactions; failed to take a medical history; failed to give a complete examination; failed to monitor hemoglobin blood levels and observe plaintiff for adverse reaction for a period of time. These allegations were found related to medical treatment and judgement notwithstanding that employee(s) other than physicians were involved with the blood donation procedures. The court made it clear that health care providers other than physicians may be subject to liability for medical malpractice and the fact that nonphysicians were involved with treatment does not convert the action to one for ordinary negligence.

Does physical injury to a plaintiff caused during physical examination performed by a physician hired by the defense during litigation to examine plaintiff (commonly referred to by the misnomer IME) fall under the medical malpractice or ordinary negligence SOL? The answer according to the majority opinion of the Court of Appeals is that this negligent conduct by the defendant's hired physician constitutes medical malpractice and reversed the Appellate Division order and dismissed the action as time barred. **Bazakos v. Lewis.,** 12 N.Y.3d 631 (2009). The pertinent facts of the examination were that the hired physician took plaintiff's head in his hands and forcefully rotated the head while simultaneously pulling causing injury. The 4-3 majority opinion by J.

Smith found that this IME examination created a limited physician-patient relationship and that it should make no difference that the physician was not treating the patient as the same standards of care should apply to physical examinations identical to both situations. J. Lippman wrote a vigorous dissenting opinion stating that the so-called IME doctor only has a limited duty to refrain from injuring the patient during the physical examination. The IME physician is not responsible for diagnosis or treatment and in fact no medical treatment is rendered by the IME. Therefore, the dissent concludes under previously established principles that the ordinary negligence 3 yr. SOL should apply.

Claims of ordinary negligence against hospital that have been upheld include failure to limit the number of surgeries performed by defendant orthopedist and failure of hospital staff to respond to complaints involving other surgeries performed by said defendant. **Tracy v. Vassar Bros. Hosp.,** 130 A.D.3d 713 (2nd Dept. 2015); failure to protect supply of toxic anesthesia drug Pavulon that was wrongly administered by unknown person(s) to two different surgical patients causing temporary respiratory paralysis. **Morris v. Lenox Hill Hosp.,** 232 A.D.2nd 184 (1st Dept. 1996), aff'd 90 N.Y. 2nd 953 (1997); and failure of nurses to act upon observations of resident physician to prevent sexual assault involving unauthorized internal and rectal examination of female patient following vaginal surgery. **N.X. v. Cabrini Med. Ctr.,** 97 A.D. 2nd 247 (2002).

In **Morris., supra,** the Court of Appeals by memorandum upheld the 3-2 majority opinion of the First Department who found that plaintiff made prima facie showing of ordinary negligence for criminal acts of unknown

person (s) who intentionally poisoned two patients during surgery by injecting into anesthesia solution the drug Pavulon, a neuromuscular blocking agent causing respiratory paralysis. This drug was only accessible to authorized hospital staff and stored unlocked in the Department of Anesthesia. Remnants of the drug vials, needles and IV solution bags were found in the anesthesia storage unit.

The First Department majority found that,

"Questions of fact are raised by the testimony of plaintiffs' experts that the hospital's failure to secure anesthetic drugs constitutes a deviation from accepted practice. But even ignoring this issue, dismissal of the causes of action for ordinary negligence asserted against the hospital is unwarranted. The circumstances of this incident afford sufficient basis for an inference of negligence under the doctrine of res ipsa loquitur: it involves injury which would not have occurred in the absence of negligence in safeguarding a dangerous substance, admittedly under the hospital's exclusive control (Richardson, Evidence § 93 [Prince 10th ed]). In view of the concession by the hospital that access to the Pavulon was restricted to its agents, plaintiffs have established a prima facie case of negligence (Fisch, New York Evidence § 1137, at 654 [2d ed]), and summary

judgment dismissing their claims for ordinary negligence must be denied."

In **N.X.,** supra, the Court of Appeals upheld ordinary negligence claims against defendant hospital based on nurses' observations of unauthorized resident entering recovery room who admitted to performing unauthorized internal and rectal examination of female patient who just underwent vaginal surgery and nurses failed to take any action to prevent the sexual assault. Issues of credibility of the nurses remained as nurses acknowledged that the plaintiff was in 4 bed recovery unit and curtain was not drawn around plaintiff's bed. Nurses further acknowledged that resident was not one of plaintiff's physicians and performance of internal examination required the presence of a nurse. In finding factual issues exist the Court of Appeals states

"We conclude, however, that under the settled hospital-patient duty equation there are issues of fact as to whether the nurses actually observed or unreasonably ignored events immediately preceding the misconduct which indicated a risk of imminent harm to plaintiff, triggering the need for protective action."

"A hospital has a duty to safeguard the welfare of its patients, even from harm inflicted by third persons, measured by the capacity of the patient to provide for his or her own safety (see Morris v Lenox Hill

Hosp., 232 AD2d 184, 185, affd for reasons stated 90 NY2d 953.This sliding scale of duty is limited, however; it does not render a hospital an insurer of patient safety or require it to keep each patient under constant surveillance (see, Killeen v State of New York, 66 NY2d 850, 851). As with any liability in tort, the scope of a hospital's duty is circumscribed by those risks which are reasonably foreseeable (see, Hamilton v Beretta U.S.A. Corp., 96 NY2d 222, 232; see also, Di Ponzio v Riordan, 89 NY2d 578, 583)."

"We simply hold that observations and information known to or readily perceivable by hospital staff that there is a risk of harm to a patient under the circumstances can be sufficient to trigger the duty to protect. This commonsense approach safeguards patients when there is reason to take action for their protection and does not burden the practice of medicine or intrude upon the traditional relationship between doctors and nurses (see, Toth v Community Hosp. at Glen Cove, 22 NY2d 255, 265, rearg denied 22 NY2d 973). "

In case involving failure to diagnose bilateral hip dysplasia

in an infant, the alleged negligent failure by defendant doctor to inform plaintiff parents of significant abnormal finding by radiologist in x-rays constituted medical malpractice and action was held time barred under CPLR 208 (infancy toll limited to 10 years). **Giordano v. Scherz.,** 99 A.D.3d 968 (2nd Dept. 2012). Allegations of negligent treatment by defendant hospital's occupational therapist in failing to supervise and provide appropriate instructions during administration of heat and cold pack therapy for plaintiff's gunshot wounds sounded in medical malpractice requiring expert affidavit to oppose summary judgement motion by defendant. As such affidavit was not supplied the Second Department affirms lower court's grant of defendant's motion. **Jean-Paul v. Jamaica Hosp. Med. Ctr.,** 2022 N.Y. App. Div. LEXIS 4685 (8/3/2022).

What about allegations against a resident OBGYN and other health care provider in delivery room that they were negligent in dropping a baby after birth in the delivery room? Does this negligent conduct fall under the medical malpractice or ordinary negligence SOL? In a recent decision the Second Department finds this conduct to fall under medical malpractice and reversed the court below and dismissed the action as time barred as the infancy toll CPLR section 208 in medical malpractice actions is limited to 10 years from the date of the incident. **Rojas v. Tandon.,** 2022 N.Y. App. Div. Lexis 4853 (2nd Dept. August 17, 2022). The briefs on appeal further reveal that after the birth the baby was being handed over a blanket and device from the resident to the pediatrician and slipped off the device. The Second Department's opinion only refers to the baby being dropped in the delivery room after birth. Plaintiff claiming allegations of ordinary negligence commenced the action within 3 years of her attaining

majority age which was well after the expiration of the 10-year infancy toll applicable to medical malpractice actions. In reversing the court below and dismissing the action, the opinion summarizes the applicable inquiry as follows:

"In determining whether conduct should be deemed medical malpractice or ordinary negligence, the critical factor is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached (see Jeter v New York Presbyt. Hosp., 172 AD3d 1338, 1339, 101 N.Y.S.3d 411; Pacio v Franklin Hosp., 63 AD3d 1130, 882 N.Y.S.2d 247). A negligent act or omission by a health care provider that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician to a particular patient constitutes medical malpractice (see Davis v South Nassau Communities Hosp., 26 NY3d 563, 580-581, 26 N.Y.S.3d 231, 46 N.E.3d 614; Rabinovitch v Maimonides Med. Ctr., 179 AD3d 88, 93, 113 N.Y.S.3d 198).

Here, the defendant established, prima facie, that the conduct at issue derived from the duty owed to plaintiff by the defendant as a result of the physician-patient relationship and was substantially related to the plaintiff's medical treatment (see Scott v Uljanov, 74

NY2d 673, 675, 541 N.E.2d 398, 543 N.Y.S.2d 369;
Estate of Bell v WSNCHS N., Inc., 153 AD3d 498, 499-
500, 59 N.Y.S.3d 475). In opposition, the plaintiff failed
to raise a question of fact as to whether the allegations
sound in ordinary negligence. "

CONCLUSION

As appellate court opinions have shown the distinction between medical malpractice and negligence is a subtle one, for medical malpractice is but a species of negligence for which no rigid analytical line separates the two. However, the difference between the two has often decided the fate of an action based on SOL grounds. The determinative factors and principles consider the nature of the duty the defendant is alleged to have breached and whether the negligent conduct constitutes medical treatment or bears a substantial relation-ship to medical treatment by a licensed physician. Was medical judgement involved? If yes, the action will fall under the medical malpractice umbrella. Medical malpractice may encompass treatment by many different specialists and health care providers who are not licensed physicians such as nurses, phlebotomists and technicians. The duty breached must be directed to a particular patient. Claims of ordinary negligence against a hospital involve breach of its general duty to exercise reasonable and ordinary care to protect and safeguard patients from foreseeable harm based on patient's ability to protect himself / herself under the circumstances. Claims against hospital for negligent policies and procedures asserting negligent hiring, failure to take medical histories, refer to specialists or scheduling of surgeries generally apply to

all patients and will fall under the ordinary negligence umbrella. The need for expert testimony is not alone a determinative factor. Whether the negligent conduct involves a matter of medical science or art requiring specialized skills not ordinary possessed by lay persons is a factor to consider. As the cases show the application of these factors and legal principles to specific fact patterns is often difficult and troublesome with outcomes unpredictable. Therefore, when in doubt the practitioner is better to be safe than sorry and plead and proceed under medical malpractice rules and statutes.

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