

Theories of A Medical Negligence Case

Hon. Richard S. Gottlieb, District 21
January 28, 2022



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Richard S. Gottlieb - Forsyth County




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Are you feeling ...

Angry because medical malpractice claims confuse you? Like you're being pointed in different directions?




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What is a Medical malpractice Matter?

Since 2011, is largely Defined by Statute: G.S. § 90-21.11



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What is a Medical (negligence) malpractice Matter?

BACKGROUND

- Medical malpractice reform legislation
- Implemented in 2011
- Heightened Burden of Proof
- Limits to Liability (G.S. § 1.19B)
- Bifurcation of Trial
- Evidence of Medical Negligence
- Other tort related



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What is a Medical (negligence) malpractice Matter?

Article 1B.

Medical Malpractice Actions.

§ 90-21.11. Definitions.

- (2) Medical malpractice action. – Either of the following:
- A civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.
 - A civil action against a hospital, a nursing home licensed under Chapter 131E of the General Statutes, or an adult care home licensed under Chapter 131D of the General Statutes for damages for personal injury or death, when the civil action (i) alleges a breach of administrative or corporate duties to the patient, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision and (ii) arises from the same facts or circumstances as a claim under sub-subdivision a. of this subdivision. (1975, 2nd Sess., c. 977, s. 4; 1987, c. 859, s. 1; 1995, c. 509, s. 135.2(o); 2011-400, s. 5; 2017-131, s. 1.)



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What is a Medical (negligence) malpractice Matter?

Article 1B.
Medical Malpractice Actions.

§ 90-21.11. Definitions.

- The following definitions apply in this Article:
- (1) Health care provider. Without limitation, any of the following:
 - a. A person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, audiology, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, toxicology, laboratory analysis, counseling assistance to a physician, dental hygiene, psychiatry, or psychology.
 - b. A hospital, a nursing home licensed under Chapter 131E of the General Statutes, or an adult care home licensed under Chapter 131D of the General Statutes.
 - c. Any other person who is legally responsible for the negligence of a person described by sub-subdivision a. of this subdivision, a hospital, a nursing home licensed under Chapter 131E of the General Statutes, or an adult care home licensed under Chapter 131D of the General Statutes.
 - d. Any other person acting at the direction or under the supervision of a person described by sub-subdivision a. of this subdivision, a hospital, a nursing home licensed under Chapter 131E of the General Statutes, or an adult care home licensed under Chapter 131D of the General Statutes.
 - e. Any paramedic, as defined in G.S. 131E-155(15a).



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Standard of Care

§ 90-21.13. Standard of health care.

(a) Except as provided in subsection (b) of this section, in any medical malpractice action as defined in G.S. 90-21.11(2)(a), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action; or in the case of a medical malpractice action as defined in G.S. 90-21.11(2)(b), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the act or omission of such health care provider was not in accordance with the standards of practice among similar health care providers situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

(b) In any medical malpractice action arising out of the furnishing or the failure to furnish professional services in the treatment of an emergency medical condition, as the term "emergency medical condition" is defined in 42 U.S.C. § 1395501(d)(A), the claimant must prove a violation of the standards of practice set forth in subsection (a) of this section by clear and convincing evidence. (1975, 2nd Sess., c. 977, s. 4, 2011-283, s. 4.11a; 2011-400, s. 6.)

- For "non-emergency" - preponderance of evidence
- For Emergency - clear and convincing evidence
- For both - community standard (ie. not a national or regional standard)



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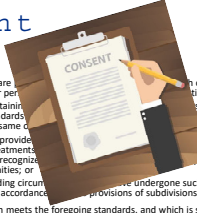

Informed Consent



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Informed Consent

- Governed by statute – G.S. 90-21.13
- (a) No recovery shall be allowed against any health care provider for any health care treatment rendered without the informed consent of the patient or other person authorized to give consent to the health care profession with the patient where:
 - (1) The action of the health care provider in obtaining the consent of the patient or other person authorized to give consent for the patient was in accordance with the standards of the health care profession with similar training and experience situated in the same community; or
 - (2) A reasonable person, from the information provided to the patient or other person authorized to give consent, would have a general understanding of the procedures or treatments proposed and the risks and hazards inherent in the proposed procedures or treatments which are recognized by the health care profession with similar training and experience situated in the same field of practice in the same or similar communities; or
 - (3) A reasonable person, under all the surrounding circumstances, would have undergone such treatment or procedure had he been advised by the health care provider in accordance with the provisions of subdivisions (1) and (2) of this subsection.
- (b) A consent which is evidenced in writing and which meets the foregoing standards, and which is signed by the patient or other authorized person, shall be presumed to be a valid consent. This presumption, however, may be subject to rebuttal only upon proof that such consent was obtained by fraud, deception or misrepresentation of a material fact. A consent that meets the foregoing standards, that is given by a patient, or other authorized person, who under all the surrounding circumstances has capacity to make and communicate health care decisions, is a valid consent.





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Informed Consent

- Under subsection (b) of the statute, a signed written consent is presumed valid only if it "meets the foregoing" standards contained in subsection (a).
- Once a health care provider shows these elements, then the burden shifts to the plaintiff to produce evidence to rebut the validity of the consent.
- To obtain summary judgment on the issue of a signed written consent, a health care provider must show (1) the circumstances surrounding the consent, (2) the risks inherent in the procedures offered, (3) the standard in the community for obtaining consent and (4) that the standard was met under the circumstances. *Estrada v. Jaques*, 70 N.C. App. 627, 321 S.E.2d 240 (1984).
- Expert medical testimony is required by the party seeking to establish the standard of care.




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Breach of Warranty or Guaranty

- A health care provider may be liable for breach of warranty if promised a particular result or that the injury suffered would not occur.
- The cause of action is narrow. The health care provider has to expressly and specially contract and guarantee particular results. The existence of a contract will not be inferred where a practitioner merely offers an opinion regarding the effect of a course of treatment.
- A diagnosis or prognosis that is a medical opinion not related to a specific undertaking or a promised specific result or cure through a course of treatment or a procedure generally will not create liability for breach of contract.



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Breach of Warranty or Guaranty

- Claim for breach of warranty or guaranty is governed by a "statute of fraud"
 - G.S. § 90-21.13(d)
- (d) No action may be maintained against any health care provider upon any guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment unless the guarantee, warranty or assurance, or some note or memorandum thereof, shall be in writing and signed by the provider or by some other person authorized to act for or on behalf of such provider.
- Cause of action for breach of contract, warranty, or guaranty is *very unusual*.
 - Raises interesting questions about damages and economic loss doctrine



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Res Ipsa Loquitur

Res Ipsa Loquitur

Or

Res Ipsa Loquitur



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Res Ipsa Loquitur

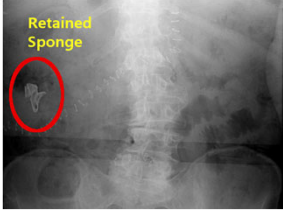
- Res ipsa loquitur applies when:
 - (1) direct proof of the cause of an injury is not available,
 - (2) the instrumentality involved in the accident [was] under the defendant's control, and
 - (3) the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission.
- For the doctrine to apply, "an average juror must be able to infer, through his common knowledge and experience and without the assistance of expert testimony, whether negligence occurred."
- If applies – does not require expert testimony.
- BUT – it rarely applies




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Res Ipsa Loquitur Generally found to apply only in the cases of:



Retained Sponge



Retained Instrument




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Medical Malpractice Does Not Include

- Loss of Chance
 - Claim that defendant's negligence diminished patient's likelihood of full recovery.
 - Is recognized as a cause of action in other states.
 - Example – failure to diagnose or a different treatment lessened likelihood of a positive outcome.
 - BUT expert cannot say more likely than not would have been better outcome.
 - Mere loss of chance is not sufficient - plaintiff must present expert testimony that defendant's negligence was more likely than not to have caused plaintiff's injury.




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Medical Malpractice Does Not Include

- Ordinary Negligence
 - Just because the claims arise from health care setting, does not necessarily mean is medical negligence
 - Medical negligence arises from "professional services"
 - Professional services are an act or service "arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor [or] skill involved is predominantly mental or intellectual, rather than physical or manual." *Lewis v. Setty*, 130 N.C. App. 606, 608, 503 S.E.2d 673, 674 (1998).




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Medical Malpractice Does Not Include

- Ordinary Negligence
 - But remember - "Medical malpractice action" includes breaches of "administrative or corporate duties to the patient" (such as negligent credentialing and negligent monitoring or supervision) that arise from the same set of facts as a traditional ("professional services") medical malpractice claim.
 - In the past – these issues could fall under ordinary negligence
 - G.S. 90-21.11(2)b heightened standards for these claims
 - Medical Malpractice v. Ordinary negligence can be confusing
 - Slip and fall, nursing home cases, guidance/supervision of techs. etc.
 - Different standards of proof
 - Potentially different statutes of limitation and repose
 - Different pleading requirements (i.e. N.C. R. Civ. P. 9(j))



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Thank You

Richard S. Gottlieb
Resident Superior Court Judge, District 21

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