
809.75 MEDICAL NEGLIGENCE—INSTITUTIONAL[1] HEALTH CARE PROVIDER'S LIABILITY FOR SELECTION OF ATTENDING PHYSICIAN.

(Use for claims arising before 1 October 2011. For claims arising on or after 1 October 2011, use either N.C.P.I.—Civil 809.00A or N.C.P.I.—Civil 809.06.)

The (*state number*) issue reads:

"Was the plaintiff [injured] [damaged][2] by the negligence of the defendant?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things: (1) that the defendant was negligent; and (2) that such negligence was a proximate cause of the plaintiff's [injury] [damage].

As to the first thing that the plaintiff must prove, negligence refers to a person's failure to follow a duty of conduct imposed by law. Every institutional health care provider[3] is under a duty to use care when referring or assigning a patient[4] for treatment of a particular [illness] [injury] to a (*describe attending health care provider*) in accordance with the standards of practice used by other similar hospitals[5] situated in the same or similar communities under the same or similar circumstances at the time the referral or assignment is made.[6]

A health care provider's violation of this duty of care is negligence.[7]

As to the second thing that the plaintiff must prove, the plaintiff not only has the burden of proving negligence, but also that such negligence was a proximate cause of the [injury] [damage].

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and is a cause which a reasonable and prudent health care provider could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that the defendant's negligence was the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's negligence was a proximate cause.

In this case, the plaintiff contends, and the defendant denies, that the defendant was negligent in that, when the plaintiff went to the defendant for treatment of a particular [illness] [injury], the defendant referred or assigned the plaintiff to (*name attending physician*), and that such referral or assignment was not in conformity with the standards of practice among other like hospitals situated in the same or similar communities at that time. You must determine what standards of practice are applicable in making such a referral or assignment, that is, what the standards of practice were among other like hospitals situated in the same or similar communities at the time the defendant referred or assigned the plaintiff to (*name attending physician*). On the question of what standards of practice apply to the defendant's conduct, only witnesses who purport to have knowledge of those standards are permitted to testify as to the applicable standards.[8] Therefore, in determining the standards of practice applicable to this case,[9] you must weigh and consider the testimony of [this witness] [these witnesses] and not your own ideas of the standards.

NOTE WELL: Use the following language only if these factors have been addressed and substantially supported by expert testimony presented by the plaintiff:[10]

In determining what the applicable standards of practice are, you may consider these:

(A) the seriousness of the plaintiff's [illness] [injury] upon arrival at the defendant's facility seeking care;

(B) the availability and competency of specialists at the facility and in the surrounding service area; and

(C) the type of hospital according to the level of care offered by the defendant.[11]

While you may consider the factors I have just mentioned, you may also consider any other factor testified to by [that witness] [those witnesses] who purport[s] to have knowledge of the standards of practice applicable to this case.)

The plaintiff further contends, and the defendant denies, that the defendant's negligence was a proximate cause of the plaintiff's [injury] [damage].

I instruct you that negligence is not to be presumed from the mere fact of [injury] [damage].[12]

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant was negligent and that such negligence was a proximate cause of

the plaintiff's [injury] [damage], then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

---

1. This charge may be used where institutional health care providers (*e.g.*, hospitals, clinics and nursing homes) are alleged to have been negligent in making a referral or in selecting a physician to treat a patient.

This instruction must be modified to add additional elements of proof if there is a question of fact as to whether the defendant is a health care provider as defined by N.C. Gen. Stat. § 90-21.11 or whether the defendant was engaged in furnishing professional health care services to the plaintiff or plaintiff's decedent.

2. In death cases, this instruction can be modified to refer to the "decedent's death."

3. A "health care provider" is defined by N.C. Gen. Stat. § 90-21.11 as, "without limitation":

> "[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, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, or psychology"; "[a] hospital, a nursing home licensed under Chapter 131E . . ., or an adult care home licensed under Chapter 131D"; "[a]ny other person who is legally responsible for the negligence of" such person, hospital, nursing home or adult care home; "[a]ny other person acting at the direction or under the supervision of" any of the foregoing persons, hospital, nursing home, or adult care home; or "[a]ny paramedic, as defined in G.S. 131E-155(15a)".

N.C. Gen. Stat. § 90-21.11.

4. If the health care provider is not a hospital, specify what it is [*e.g.*, clinic, group practice, nursing home, etc.]. *See supra* note 1. For the purposes of this instruction,

"hospital" is used throughout, but a different designation should be used if the case involves a health care provider other than a hospital.

5. If the case warrants, the following statement may be inserted at the end of this sentence: "By 'other similar hospitals' I mean hospitals which are of the same class or type of hospital as the defendant according to the level of care it offers." The use of this additional language would be warranted where expert evidence has been received which shows that the applicable level of care varies with the class of hospital, *e.g.*, primary, secondary, tertiary or specialty. *See infra* notes 7, 9.

6. N.C. Gen. Stat. § 90-21.12 provides the following about the "Standard of health care": In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied "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."

7. *Wall v. Stout*, 310 N.C. 184, 192, 311 S.E.2d 571, 577 (1984).

8. *Jackson v. Sanitarium*, 234 N.C. 222, 227, 67 S.E.2d 57, 61 (1951); *Vassey v. Burch*, 45 N.C. App. 222, 225, 262 S.E.2d 865, 867 (1980), *rev'd on other grounds*, 301 N.C. 58, 269 S.E.2d 137 (1980); *Whitehurst v. Boehm*, 41 N.C. App. 670, 675, 255 S.E.2d 761, 766 (1979). "There are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise." *Gray v. Weinstein*, 227 N.C. 463, 465, 42 S.E.2d 616, 617 (1947), quoted in *Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118. *See also* other cases cited in *Schaffner*.

9. For cases filed on or after 1 October 2011, Rule 702(a) of the *North Carolina Rules of Evidence* requires that before an expert can testify "in the form of an opinion, or otherwise": (1) the testimony must be "based on sufficient facts or data"; (2) the testimony must be the product of "reliable principles and methods"; and (3) the "witness has applied the principles and method reliably to the facts of the case." N.C. R. Evid. 702(a) (2011). *See also* N.C. R. Evid. 702(b)–(f) (setting forth the specific qualifications required of an expert witness testifying on the appropriate standard of health care). In proper cases, lay opinion testimony may be used. *See* N.C. R. Evid. 701 and *Schaffner*, 77 N.C. App. at 691, 336 S.E.2d at 118 (stating that expert testimony is not invariably required in all cases). Further, for cases filed on or after 1 October 2011, Rule 702(h) of the *North Carolina Rules of Evidence* specifies that in a medical malpractice case based on alleged breach of administrative or corporate duties to the patient, a witness "shall not give expert testimony on the appropriate standard of care

. . . unless the person has substantial knowledge, by virtue of his training and experience, about the standard of care among . . . medical facilities[ ] of the same type as the . . . medical facility[ ] whose actions or inactions are the subject of the testimony situated in the same or similar communities at the time of the alleged act giving rise to the cause of action."

10. Institutional health care providers such as hospitals may have some particular duties with regard to some of their ordinary functions. For example, hospitals routinely assign or refer patients to (a) staff (or "agent") physicians and (b) non-staff (or "non-agent") physicians for care and treatment. The hospital's duty to the patient in either case might depend on several factors, including (a) the gravity of the patient's condition upon arrival at the hospital, (b) the availability and competency of physicians at the facility and in the surrounding service area, and (c) the level of care offered at the hospital (primary, secondary or tertiary). Because of the variables, and because of the medical or quasi-medical judgments that must be made in making a patient assignment or referral (whether to a staff or non-staff physician), the hospital's standard of care is appropriately determined in relation to what other like hospitals in the same or similar communities would do. This approach would seem to be consistent with some recent North Carolina decisions which, though not directly on point, suggest that an institutional health care provider has a duty with regard to physician selection and that it varies in accordance with the three factors mentioned above. *See Rucker v. High Point Mem'l Hosp.*, 285 N.C. 519, 206 S.E.2d 196 (1974); *Bost v. Riley*, 44 N.C. App. 644, 262 S.E.2d 391 (1980). While these factors could be relevant, they cannot be communicated to the jury unless and until a foundation has been laid by the testimony of experts. Furthermore, great caution should be exercised to avoid the implication that these factors are the *only* factors to be considered.

11. In this regard, a [primary] [secondary] [tertiary] care hospital is one which (*here state the appropriate definition as supported by the evidence*).

12. The application of the doctrine of *res ipsa loquitur* in medical negligence actions is "somewhat restrictive." *Schaffner v. Cumberland Cnty. Hosp. Sys.*, 77 N.C. App. 689, 691, 336 S.E.2d 116, 118 (1985). There must be proof that the injury or death would rarely occur in the absence of medical negligence. *Id.* However, expert testimony is not invariably required in all cases. *Id. See also Tice v. Hall*, 310 N.C. 589, 592–94, 313 S.E.2d 565, 567 (1984). *Cf. Koury v. Follo*, 272 N.C. 366, 373, 158 S.E.2d 548, 554 (1967); *Starnes v. Taylor*, 272 N.C. 386, 391, 158 S.E.2d 339, 343 (1967); *Cameron v. Howard*, 40 N.C. App 66, 68, 251 S.E.2d 900, 901–02 (1979); *Thompson v. Lockhart*, 34 N.C. App. 1, 7, 237 S.E.2d 259, 263 (1977). If the case involves issues both of direct and circumstantial proof of negligence (*i.e., res ipsa loquitur*), N.C.P.I.-Civil 809.05 should be used in conjunction with this charge.