Introduction to Professional Malpractice
Richard Clem Continuing Legal Education

Historical Background

A malpractice action against a health care professional can be framed either as a case of battery or of negligence. The traditional view is that medical malpractice is a form of battery:

> We have found doctors liable in battery for failure to secure the consent of a patient. See, Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905), overruled on other grounds; Bang v. Charles T. Miller Hospital, 251 Minn. 427, 88 N.W.2d 186 (1958); Genzel v. Halvorson, 248 Minn. 527, 80 N.W.2d 854 (1957). An action for battery is appropriate where the treatment consists of a touching that is of a substantially different nature and character from that to which the patient consented. In Mohr, for example, a physician was held liable for operating on a patient's left ear after obtaining consent to operate on her right ear. When the patient substantially understands the nature and character of the touching, an action for negligent nondisclosure will lie if the patient was not properly informed of a risk inhering in the treatment, the undisclosed risk materialized in harm, and consent to the treatment would not have been secured if the risk were disclosed. Today we recognize a cause of action for negligent nondisclosure of risks attendant to proposed or alternative methods of treatment.

Cornfeldt v. Tongen, 262 N.W.2d 684 (Minn. 1977).

To prevail on the negligent nondisclosure claim, the plaintiff must prove the following elements:

> A plaintiff must demonstrate (1) a duty on the part of the physician to know of a risk or alternative treatment plan; (2) a duty to disclose the risk or alternative program, which may be established by a showing that a reasonable person in what the physician knows or should have known to be the plaintiff's position would likely attach significance to that risk or alternative in deciding whether to consent to treatment; (3) breach of that duty; (4) causation (the undisclosed risk must materialize in harm); and (5) damages.

Plutshack v. University of Minnesota Hospitals, 316 N.W.2d 1 (Minn. 1982).

Negligent Treatment

> To establish a prima facie case of medical malpractice for negligent treatment, a plaintiff is required to demonstrate "(1) the standard of care recognized by the medical community as applicable to the particular defendant's conduct; (2) that the defendant departed from that standard; * * (3) that the defendant's departure from that standard was a direct cause of [the patient's] injuries;" and (4) damages. *Plutshack v. University of Minnesota Hospitals*, 316 N.W.2d 1, 5 (Minn.1982). In establishing this prima facie case, the plaintiff must introduce expert testimony to establish the standard of care, the defendant's departure from that standard, and causation, when these issues are not within the common knowledge of laymen. *See Smith v. Knowles*, 281 N.W.2d 653, 655 (Minn.1979).

Reinhardt v. Colton, 337 N.W.2d 88 (Minn. 1983).

Negligence: Duty of Care and Breach

In general, there is no duty to treat any person seeking treatment. There must be a physician-patient relationship:

> Under the facts of this case there was no relationship between appellant and Dr. Van Beek. Appellant was not a patient of Dr. Van Beek so as to impose liability under a theory of medical malpractice. There was no contractual relationship between appellant and Dr. Van Beek as to the emergency treatment of her brother. Therefore, appellant may not rely upon the decision in Skillings to impose liability. The trial court was correct in holding as a matter of law that Dr. Van Beek owed no duty to appellant and therefore dismissal of the claim by summary judgment was proper. Our decision is in accord with the only other decision involving substantially similar facts and circumstances. See Sacks v. Thomas Jefferson University Hospital, 684 F.Supp. 858 (E.D.Pa.1988), aff'd, 862 F.2d 310 (3rd. Cir.1988) (mother may not recover for injuries received after fainting in emergency room in absence of physician-patient relationship).

McElwain v. Van Beek, 447 N.W.2d 442 (Minn. Ct. App. 1989)

However, note that circumstances might give rise to a duty in other situations. For example, even cursory contact with a patient might give rise to a patient relationship. See, e.g., O'Neill v. Montefiore Hospital, 11 A.D.2d 132, 202 N.Y.S.2d 436 (1960).

Cf. Minnesota Good Samaritan Law, Minn. Stat. 604A.01:

> Subdivision 1.Duty to assist. A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. A person who violates this subdivision is guilty of a petty misdemeanor.

A health care provider is not liable for an unavoidable accident. In Stearns v. Plucinski, 482 N.W.2d 496 (Minn. Ct. App. 1992), the Minnesota Court of Appeals approved the following jury instruction in a medical malpractice case: "The mere fact that an injury has happened does not of itself mean that anyone has been negligent." However, the court also approved the use of the "res ipsa loquitur" jury instruction:

> From the happening of the injury itself you may find that the defendant was negligent if you find that the following condition has been satisfied:
>
> 1) That the accident was the kind which does not occur without someone's negligence.
>
> 2) That the needle was in the exclusive control of defendant at the time that the negligent act, if any, must have happened.
>
> 3) That the condition which resulted in the injury was not due to the conduct of plaintiff or some third person.
>
> If you find that plaintiff has established all of the above three elements, you are permitted, but you are not required to find negligence.

The court held that these two instructions were not inconsistent:

> This is not inconsistent with the instruction that "the mere fact that an injury has happened does not of itself mean that anyone has been negligent." The trial judge instructed the jury that if they found that the three res ipsa conditions existed they could infer that respondent was negligent, but that just because appellant was injured does not mean that anyone was negligent. This is a correct statement of the law.

Generally, expert testimony is required to establish these elements of the cause of action, although there might be exceptions.

> We have repeatedly held that plaintiff, in order to prove negligence in a malpractice action, must offer expert medical testimony both to state the standard of medical care and the treatment recognized by the medical community and to establish that the defendant physician in fact departed from that standard, it being settled that a physician is not responsible for the consequences of an honest mistake or error of judgment in his diagnosis or treatment. Yates v. Gamble, 198 Minn. 7, 12, 268 N. W. 670, 673 (1936); Berkholz v. Benepe, 153 Minn. 335, 337, 190 N.W. 800 (1922); Moeller v. Hauser, 237 Minn. 368, 376, 54 N.W.2d 639, 644 (1952); Manion v. Tweedy, 257 Minn. 59, 70, 100 N.W.2d 124, 132 (1959); Hoffman v. Naslund, 274 Minn. 521, 531, 144 N.W.2d 580, 588 (1966); Swanson v. Chatterton, 281 Minn. 129, 134, 160 N.W.2d 662, 666 (1968). There are situations in which the negligence of the physician is obvious even to laymen. See, Miller v. Raaen, 273 Minn. 109, 114, 139 N.W.2d 877, 880 (1966), but we are persuaded that the situation here does not constitute such an exception to the usual rule.

Silver v. Redleaf, 194 N.W.2d 271 (Minn. 1972).

> Clearly, expert testimony is crucial to plaintiff's claims. To establish a prima facie case in an action such as this, the plaintiff here must introduce expert testimony as to both the standard of care and the defendant doctor's departure from that standard. See e.g., Cornfeldt v. Tongen, 262 N.W.2d 684 (Minn.1977); Lhotka v. Larson, 307 Minn. 121, 238 N.W.2d 870 (1976); Todd v. Eitel Hospital, 306 Minn. 254, 237 N.W.2d 357 (1975). Moreover, plaintiff's claims required expert testimony to show that Dr. Knowles' action or inaction was a direct cause of the decedents' deaths. Silver v. Redleaf, 292 Minn. 463, 194 N.W.2d 271 (1972).
>
> Here, plaintiff called no independent medical witnesses. Instead, he chose to prove his case through his cross-examination of Dr. Knowles and the introduction of excerpts from several recognized medical treatises. The trial court carefully reviewed this evidence and concluded that it was legally insufficient. We agree.

Smith v. Knowles, 281 N.W.2d 653 (Minn. 1979).

Causation

> An even greater impediment to plaintiff's recovery is the absence of any proof that Dr. Redleaf's action or inaction was the direct cause of decedent's death. Plaintiff had the burden to show that it was more probable that death resulted from some negligence for which defendant was responsible than from something for which he was not responsible. Yates v. Gamble, 198 Minn. 7, 14, 268 N.W. 670, 674 (1936); Hoffman v. Naslund, 274 Minn. 521, 532, 144 N.W.2d 580, 589 (1966). This could be proved only by expert testimony. Hoffman v. Naslund, supra; Stahlberg v. Moe, 283 Minn. 78, 85, 166 N.W.2d 340, 345 (1969); Miller v. Raaen, 273 Minn. 109, 120, 139 N.W.2d 877, 883 (1966).
>
> Hindsight may impel lay speculation that decedent's illness was incorrectly diagnosed and that, had he been hospitalized from the outset, a correct diagnosis and cure might have resulted. But a layman might as well speculate that, in view of the short time between the onset of this elderly decedent's illness and his death, such action would nevertheless have been unavailing. Only expert testimony could support a finding of fact on this critical issue. Thorkeldson v. Nicholson, 154 Minn. 106, 191 N.W. 269 (1922). Without such testimony the trial court had no alternative but to direct a verdict for defendant.

Silver v. Redlear, 292 Minn. 463, 194 N.W.2d 271 (1972).

Expert Affidavit Statute

Minnesota Statute 145.682:

> 145.682 CERTIFICATION OF EXPERT REVIEW; AFFIDAVIT.

Subdivision 1.Definition. For purposes of this section, "health care provider" means a physician, surgeon, dentist, or other health care professional or hospital, including all persons or entities providing health care as defined in section 145.61, subdivisions 2 and 4, or a certified health care professional employed by or providing services as an independent contractor in a hospital.

Subd. 2.Requirement. In an action alleging malpractice, error, mistake, or failure to cure, whether based on contract or tort, against a health care provider which includes a cause of action as to which expert testimony is necessary to establish a prima facie case, the plaintiff must: (1) unless otherwise provided in subdivision 3, paragraph (b), serve upon defendant with the summons and complaint an affidavit as provided in subdivision 3; and (2) serve upon defendant within 180 days after commencement of discovery under the Rules of Civil Procedure, rule 26.04(a) an affidavit as provided by subdivision 4.

Subd. 3.Affidavit of expert review. The affidavit required by subdivision 2, clause (1), must be by the plaintiff's attorney and state that:

(a) the facts of the case have been reviewed by the plaintiff's attorney with an expert whose qualifications provide a reasonable expectation that the expert's opinions could be admissible at trial and that, in the opinion of this expert, one or more defendants deviated from the applicable standard of care and by that action caused injury to the plaintiff; or

(b) the expert review required by paragraph (a) could not reasonably be obtained before the action was commenced because of the applicable statute of limitations. If an affidavit is executed pursuant to this paragraph, the affidavit in paragraph (a) must be served on defendant or the defendant's counsel within 90 days after service of the summons and complaint.

Subd. 4. Identification of experts to be called. (a) The affidavit required by subdivision 2, clause (2), must be signed by each expert listed in the affidavit and by the plaintiff's attorney and state the identity of each person whom plaintiff expects to call as an expert witness at trial to testify with respect to the issues of malpractice or causation, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. Answers to interrogatories that state the information required by this subdivision satisfy the requirements of this subdivision if they are signed by the plaintiff's attorney and by each expert listed in the answers to interrogatories and served upon the defendant within 180 days after commencement of discovery under the Rules of Civil Procedure, rule 26.04(a).

(b) The parties or the court for good cause shown, may by agreement, provide for extensions of the time limits specified in subdivision 2, 3, or this subdivision. Nothing in this subdivision may be construed to prevent either party from calling additional expert witnesses or substituting other expert witnesses.

(c) In any action alleging medical malpractice, all expert interrogatory answers must be signed by the attorney for the party responding to the interrogatory and by each expert listed in the answers. The court shall include in a scheduling order a deadline prior to the close of discovery for all parties to answer expert interrogatories for all experts to be called at trial. No additional experts may be called by any party without agreement of the parties or by leave of the court for good cause shown.

Subd. 5.Responsibilities of plaintiff as attorney. If the plaintiff is acting pro se, the plaintiff shall sign the affidavit or answers to interrogatories referred to in this section and is bound by those provisions as if represented by an attorney.

Subd. 6.Penalty for noncompliance. (a) Failure to comply with subdivision 2, clause (1), within 60 days after demand for the affidavit results, upon motion, in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case.

(b) Failure to comply with subdivision 2, clause (2), results, upon motion, in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case.

(c) Failure to comply with subdivision 4 because of deficiencies in the affidavit or answers to interrogatories results, upon motion, in mandatory dismissal with prejudice of each action as to which expert testimony is necessary to establish a prima facie case, provided that:

(1) the motion to dismiss the action identifies the claimed deficiencies in the affidavit or answers to interrogatories;

(2) the time for hearing the motion is at least 45 days from the date of service of the motion; and

(3) before the hearing on the motion, the plaintiff does not serve upon the defendant an amended affidavit or answers to interrogatories that correct the claimed deficiencies.

Subd. 7.Consequences of signing affidavit. The signature of the plaintiff or the plaintiff's attorney constitutes a certification that the person has read the affidavit or answers to interrogatories, and that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry, it is true, accurate, and made in good faith. A certification made in violation of this subdivision subjects the attorney or plaintiff responsible for such conduct to reasonable attorney's fees, costs, and disbursements.

For a summary of similar statutes in other states, see:

http://www.ncsl.org/research/financial-services-and-commerce/medical-liability-malpractice-merit-affidavits-and-expert-witnesses.aspx

Neither Wisconsin nor Iowa has a similar statute. But see Iowa Code 147.139, relating to limitations on the use of expert testimony in malpractice actions against physicians or dentists.

4. Statute of Limitations

Minnesota Statute 541.076:

541.076 HEALTH CARE PROVIDER ACTIONS.

(a) For purposes of this section, "health care provider" means a physician, surgeon, dentist, occupational therapist, other health care professionals as defined in section 145.61, hospital, or treatment facility.

(b) An action by a patient or former patient against a health care provider alleging malpractice, error, mistake, or failure to cure, whether based on a contract or tort, must be commenced within four years from the date the cause of action accrued.

(c) A counterclaim may be pleaded as a defense to any action for services brought by a health care provider after the limitations described in this section, notwithstanding it is barred by the provisions of this chapter, if the counterclaim belonged to the party pleading it at the time it became barred and was not barred at the time the claim sued on originated, but no judgment on the counterclaim except for costs can be rendered in favor of the party so pleading it.

When does the statute of limitations "clock" begin?

Minnesota does not follow a "discovery rule." However, the injury must have occurred before the statute of limitations begins to run:

> Ranheim argues that if we allow this action to proceed, we would in effect be adopting a "discovery rule," which would toll the medical-malpractice statute of limitations until the plaintiff became aware of the injury for which he seeks compensation. The Minnesota Supreme Court has expressly declined to adopt such a rule, Johnson, 291 Minn. at 149, 190 N.W.2d at 80, and it is not within our purview to alter that determination. St. Aubin v. Burke, 434 N.W.2d 282, 284 (Minn.App.1989) (noting that only in absence of statutory or judicial precedents will court of appeals make new law), review denied (Minn. Mar. 29, 1989). But our decision in this case rests not on Uetz's failure to discover a medical injury that may have been attributable to Ranheim's negligence, but rather on the proposition that no injury existed until Uetz suffered cardiac arrest in September 2000. Thus, our analysis reflects an objective standard-ascertainable evidence of injury-rather than a subjective standard-the plaintiff's personal knowledge of such an injury. See Dalton v. Dow Chem. Co., 280 Minn. 147, 154, 158 N.W.2d 580, 585 (1968) (rejecting "subjective determination" of accrual of cause of action).

Broek v. Park Nicollet Health Services, 660 N.W.2d 439 (Minn. Ct. App. 2003).

Representative Dental Malpractice Cases

I. Statute of Limitations

Ciardelli v. Rindal, 582 N.W.2d 910 (Minn. 1998).
Statute began to run, at the latest, on the date that the patient last returned to dentist for follow-up care. It did not start to run on the later date when the dentist was contacted by a pharmacy to renew a prescription.

Doyle v. Kuch, 611 N.W.2d 28 (Minn. Ct. App. 2000).
Even though plaintiff's injuries might have been caused by an earlier "single act," she was entitled to bring her case to the jury alleging that the injuries were the result of continuing treatment. Therefore, the case was not barred by the statute of limitations.

II. Expert Testimony and Affidavits

Anderson v. Donabauer, unpublished (Minn. Ct. App. 2014).
Expert testimony. General practice dentist's expert affidavit regarding failure to prescribe antibiotic for extraction was insufficient, since he was unable to testify as to causation, since he had no expertise as to post-extraction meningitis.

Cristescu v. McGowan, unpublished (Minn. Ct. App. 2007).
Plaintiff, who had practiced dentistry in Romania, brought malpractice claim against dentist with no expert affidavit. She argued that she was qualified as an expert in her own right. The court held that she was not qualified to testify as to the standard of care of an American dentist.

Tollefson v. Keck, Unpublished (Minn. Ct. App. 2014).
Plaintiff's expert was qualified to testify as to duty of care regarding placement of orientation marker on x-ray.