

RECENT MEDICAL MALPRACTICE CASES

By
Judge Bryan C. Dixon

1. MERE TELEPHONE CONVERSATION WITH TREATING DOCTOR DOES NOT ESTABLISH DUTY TO PATIENT

Jennings v. Badgett, 2010 OK 7

Facts: Plaintiffs are parents of a minor child born prematurely with complications. Dr. Badgett was the treating physician during the pregnancy and delivery. During the pregnancy, Dr. Badgett called Dr. Schlinke seeking his advice. Dr. Schlinke gave his advice which Dr. Badgett followed.

Dr. Schlinke never sees the patient, never sees the chart, never conducts any tests, never is asked by the patient to be her doctor and never agrees to be her doctor, never is asked to consult on the case, never prepared any reports and never billed for his advice.

The trial court granted summary judgment that Dr. Schlinke owed no duty to the patient as he was never the physician for the patient.

Holding: A telephone conversation between a non-treating physician and the treating physician concerning the patient, even when the treating physician relies on the non-treating physician's opinion, without more, is insufficient to establish a physician-patient relationship.

The Supreme Court held that a physician-patient relationship must be established as a prerequisite to a medical malpractice case. This relationship is a contractual one formed when the physician consents to provide services to the patient and the patient agrees to receive those services from the physician. This can be either on express or implied contract.

Importance: Many professionals contact their fellow professionals seeking their advice. This opinion allows this traditional exchange of information and does not chill such free and voluntary advice.

2. ORAL COMMUNICATIONS ALLOWED WITH ATTORNEYS AFTER MEDICAL MALPRACTICE CASE FILED

Holmes v. Nightingale, 2007 OK 15

Facts: After a medical malpractice case was filed, the defendant health care providers sought a court order that oral communications with other health care providers was permissible and did not violate HIPPA's confidentiality requirements.

Holding: A trial court may enter an order permitting, but not mandating, oral communications between health care providers and attorneys for the parties to a medical malpractice lawsuit. This does not contravene HIPPA's confidentiality requirements. The order should reflect a physician may have an ex parte communication (not all parties or their representatives are present) but this is "purely voluntary and may not be compelled by any party."

Importance: This allows a treating physician to discuss a patient's care and treatment with less than all attorneys being present only if there is a Court Order permitting this and if the physician so elects.

3. RES IPSA LOQUITUR – “THE THING SPEAKS FOR ITSELF”

Norman v. Mercy Memorial Health Center, Inc., 2009 OK CIV APP 55

Facts: Plaintiff is admitted to hospital for laparoscopic abdominal surgery. After regaining consciousness, she complains of pain in her right shoulder. She is discharged but returns the same day complaining of this pain. An examination reveals a Type II posterior labral tear to her right shoulder.

In a non-jury trial, Plaintiff testifies she had no pre-operative injury nor had any pre-operative pain to her right shoulder. Doctors had examined her shoulder four days before the surgery and found no injury. There was evidence from doctors that treated her shoulder injury that dropping of the arm during surgery can cause such an injury but the doctor could not say that her injury was due to such negligence to a reasonable degree of medical certainty. The doctor said he could only speculate on the cause of the injury.

The trial judge found in favor of the Defendant hospital because Plaintiff had failed to prove the Defendant was negligent, that Plaintiff had not proven that an accident occurred while under Defendant’s control. The judge further found that her physician treating her shoulder could not give an expert opinion on causation.

Holding: The evidence presented established a prima facie case of res ipsa loquitur as set forth in 12 O.S. §21. This established a presumption of negligence against the health care provider shifting the burden of proof to the Defendant Hospital. Since the trial judge failed to properly apply the presumption of negligence, the case was reversed and remanded for a new trial.

Generally, expert testimony is necessary to establish a health care provider has breached the standard of care and that this breach has caused an injury. However, when a health care provider’s lack of care has been such that common knowledge or the experience of laymen is extensive enough to recognize or infer negligence from the facts, expert medical testimony is not required.

The doctrine of res ipsa loquitur is codified at 12 O.S. §21 which creates a presumption of negligence if the following three foundational facts are established:

1. The plaintiff sustained any injury;
2. Said injury was proximately caused by an instrumentality solely within the control of the defendant or defendants; and
3. Such injury does not ordinarily occur under the circumstances absent negligence on the part of the defendant.

Importance: Res Ipsa Loquitur can be used under very limited factual circumstances to create a presumption of negligence and shift the burden to the defendant health care provider to prove there was no negligence.

4. EXPERT TESTIMONY IS GENERALLY NECESSARY

Roberson v. Waltner, 2005 OK CIV APP 15

Facts: Plaintiff sued defendant orthopedic surgeon claiming he improperly performed a hip replacement. Defendant filed a Motion for Summary Judgment claiming that the doctor's care did not fall below the acceptable standard of care. Defendant attached to the motion an affidavit from the defendant doctor that his care did not fall below the acceptable standard of care and included the medical records. Plaintiff did not respond to the motion but had admitted in her answer to interrogatories that she had no expert witness. The trial court granted summary judgment to Defendant.

Holding: In all but an extraordinary medical malpractice case, the plaintiff has the burden of producing expert testimony to support a prima facie case of negligence. To support a prima facie case of negligence, the plaintiff must prove three elements. They are:

- 1.) Defendant owed a duty to protect the plaintiff from injury;
- 2.) a failure to properly exercise or perform that duty (breach of the duty); and
- 3.) an injury to plaintiff proximately caused (causation) by the defendant's breach of that duty.

In a medical malpractice case, the defendant physician can establish the standard of care. In this case, plaintiff failed to establish a question of fact as to the breach of the standard of care by the defendant. The summary judgment was properly granted and the trial court was affirmed.

Importance: Expert witnesses are critical to a medical malpractice case. The failure of the Plaintiff to have an expert witness to establish negligence will result in a dismissal of the case or a judgment in favor of the defendant physician in all but the most extraordinary case (*res ipsa loquitur*).

5. EXPERT WITNESS NEED NOT USE “MAGIC WORDS” TO ESTABLISH CAUSATION

Jones v. Mercy Health Center, Inc.,
2006 OK 83

Facts: Christopher Williams, age 20, went to defendant hospital’s emergency room complaining of significant abdominal pain and constipation. His pulse rate and white blood cell count were elevated. X-rays showed a large amount of stool in his colon. He was diagnosed with fecal impaction and was prescribed an enema. He left the hospital five hours after his arrival.

Less than an hour later, Mr. Williams arrived at the Edmond Hospital emergency room. He was in shock, his abdomen was distended, and he was in critical condition. He was rushed to surgery to relieve pressure on his colon but died during surgery.

Mr. William’s mother sued defendant Mercy Hospital and the Mercy ER physicians and nurse practitioner who cared for him.

Defendants filed motions for summary judgment claiming Plaintiff could not establish that defendants’ actions caused Mr. Williams to die from a cardiac arrest. The trial court granted summary judgment to Defendants that Plaintiff failed to have any testimony from experts to establish the element of causation.

Holding: In evaluating the evidence of causation for purposes of summary judgment, a trial court should view the totality of the evidence and not focus on a single word –“causation”- or a single piece of evidence. Where, as here, the plaintiff has presented evidence leading to the reasonable inference that the injury has resulted from defendant’s conduct and there is a total lack of evidence to support any other reasonable inference, the trial court should deny summary judgment on the issue of causation.

The Supreme Court specifically focused on the following evidence. Mr. Williams was young, athletic and in generally good health. After being given an enema at Mercy, he had several large bowel movements but was never examined again at Mercy before being released. The amount of the enema given and the amount of the bowel movement were never recorded by Mercy.

At Edmond Hospital, Mr. Williams' abdomen was recorded as appearing "approximately the size of an eighth month pregnancy." Before surgery, the surgeon found he had a "marked distended sigmoid colon." When the surgeon opened the colon, "Feces spewed violently to the ceiling of the operation room and covered much of the operating room." His blood pressure then dropped to a critically low level. As the operation neared conclusion, Mr. Williams went into cardiac arrest and died.

The doctor conducting the autopsy found the cause of death to be "Constipation secondary to intestinal obstruction, with megacolon, megarectum and fecal impaction."

Plaintiff's experts testified that when he appeared at Mercy, he had a chance of death at 20 to 25%, but that after the enema, his chance of survival was reduced to less than 5%. However, Plaintiff's experts would not state that defendants categorically "caused" Mr. Williams' death as this would be speculation.

Importance: Rarely will the Plaintiff's expert in a medical malpractice decline to give an opinion as to causation. However, when no clear opinion is rendered on causation, the trial court must review the entire record to determine if there is a reasonable inference that the injury resulted from the negligence of the defendant.

6. REGISTERED NURSE CAN TESTIFY AS AN EXPERT WITNESS IN LIMITED CIRCUMSTANCES

Gaines v. Comanche County Medical Hospital, 2006 OK 39

Facts: While hospitalized for multiple gunshot wounds, Plaintiff developed bedsores. Plaintiff sued the hospital for negligence. Defendant filed a motion for summary judgment claiming that Plaintiff did not have an expert physician witness to support his negligence claims. Plaintiff relied on a registered nurse with 18 years experience in caring for the elderly, the critically ill and wound care. The Plaintiff used an affidavit from this R.N. that stated the hospital's nurses failed to reposition the Plaintiff and use heel protectors on his feet. The R.N. stated that this conduct by the hospital's nurses breached the standard of care and was a direct cause of the bedsores. The only physician testimony was that he did not consider himself an expert on bedsores. The trial court granted summary judgment to the defendant hospital.

Holding: Under these facts, a registered nurse with expertise on the standard of care is qualified as an expert witness to give testimony on the issue of bedsores, their cause, treatment and avoidance. This creates a question of fact. The trial court's summary judgment was reversed and the case was remanded for a trial.

Importance: In limited circumstances, a Registered Nurse can be offered as an expert witness. As a practical matter, cases involving nurses in nursing homes and hospitals always have nurse experts testifying as to the standard of care and any breach of that standard.