

Best Practices in Determining Whether a Claim Sounds in Ordinary Negligence or Medical Malpractice

By Donna M. MacKenzie and Jules B. Olsman

When a surgeon operates on the wrong extremity—or even worse, the wrong patient—is it medical malpractice or ordinary negligence? If a nursing home recognizes that a resident who needs assistance is getting up on her own but does nothing to protect her, is it medical malpractice or ordinary negligence?

Medical errors are now the third-leading cause of death in the United States.¹ Medical malpractice tort reform in Michigan, however, has resulted in a significant decrease in the number of medical malpractice cases that are actually filed in our state.² Tort reform also brought with it strict procedural requirements that, if not followed, can be fatal to a plaintiff's case.³

As a result, before filing a lawsuit involving a licensed healthcare professional or entity, it is critical to consider whether the allegations sound in ordinary negligence or medical malpractice.

Defendants often seek a ruling that the plaintiff's claims sound in medical malpractice to take advantage of the limitations on noneconomic damages.⁴ Unlike medical malpractice claims, there is no statutory limit on damages that can be recovered for ordinary negligence.

In addition to the potential for a more substantial recovery, the procedural requirements differ markedly. The statute of limitations for an ordinary negligence claim is

three years, whereas a claim for medical malpractice expires after two years.⁵ In addition, a plaintiff in a medical malpractice case must notify a potential defendant 182 days before a complaint can be filed.⁶ The complaint must be accompanied by an affidavit of merit signed by a health professional whom the plaintiff's attorney reasonably believes meets the requirements for an expert witness.⁷ These procedural requirements do not apply to cases of ordinary negligence.

Determining the nature of a plaintiff's claims

Distinguishing between medical malpractice and ordinary negligence claims is critical, and sometimes difficult. Because of the significant procedural differences between the two, opposing litigants are rarely able to stipulate to the nature of the plaintiff's claims. As a result, this decision is usually made by the trial court. The motion to determine the nature of the allegations can be filed by either the plaintiff or the defendant.

In *Bryant v Oakpointe Villa Nursing Centre, Inc.*, the Michigan Supreme Court solidified a two-part test that must be satisfied for an allegation to sound in medical malpractice:

- (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and
- (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience.⁸

Fourteen years later in *Trowell v Providence Hospital and Medical Centers, Inc.*, the Michigan Supreme Court affirmed the *Bryant* test.⁹ However, the *Trowell* Court determined that looking beyond the complaint to establish the nature of the plain-

tiff's claims was unnecessary.¹⁰ Instead, the *Trowell* Court determined that the nature of a plaintiff's claims may be ascertained from the complaint alone.¹¹

Claims that occur within the course of a professional relationship

In considering whether a claim pertains to an action that occurred within the course of a professional relationship, the Michigan Supreme Court in *Kuznar v Raksba Corporation* recognized that “[a] professional relationship exists if a person or an entity capable of committing medical malpractice was subject to a contractual duty to render professional health-care services to the plaintiff.”¹²

The *Kuznar* Court recognized that the legislature has defined who can be liable for medical malpractice.¹³ In fact, MCL 600.5838a(1) provides that medical malpractice claims can only be brought against “a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency.”¹⁴

Claims that raise questions of medical judgment beyond the realm of common knowledge and experience

The *Bryant* and *Trowell* holdings demonstrate that claims arising out of staffing decisions, assessments, and staff training and supervision can all fall within the realm of medical malpractice because each implicates medical judgment.¹⁵

On the other hand, claims that do not implicate medical judgment, knowledge, or skill will be deemed ordinary negligence. For example, in *Lawrence v Battle Creek*

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Health Systems, a patient was injured when he fell from an x-ray table.¹⁶ The Michigan Court of Appeals determined that no special expertise or knowledge is required to help a patient get on and off an x-ray table.¹⁷

In *Crozier v Henry Ford Hospital*, the plaintiff alleged that the defendant pharmacist failed to acknowledge a decimal point in the dosage of medication, resulting in a much greater dosage and causing harm.¹⁸ The Court held that the reasonableness of the pharmacist's conduct was something that could be evaluated by a lay juror without resorting to expert testimony.¹⁹

Similarly, in *Davis v Botsford General Hospital*, the plaintiff claimed that the defendant failed to bathe plaintiff's decedent on a regular basis and, particularly, failed to properly clean and change her after she soiled herself.²⁰ The Court determined the claim did not require expert testimony.²¹

Bryant and *Trowell* also state that a lay juror can evaluate the actions of a defendant who fails to take corrective action in the face of a known risk or harm. For example, in *Bryant*, nursing assistants observed a resident tangled in bedding and dangerously close to asphyxiating herself in the bed rails.²² The staff untangled the resident and informed their supervisor.²³ However, nothing was done to protect the resident from this incident's occurring again.²⁴ As a result, the next day the resident slipped between the rails of her bed and became wedged between her mattress and bed rails, resulting in positional asphyxia and death.²⁵

The *Bryant* Court held that the plaintiff's allegation that the defendant acted negligently by "failing to take any corrective action after learning of the problem" sounded in ordinary negligence.²⁶ The Court explained:

No expert testimony is necessary to determine whether defendant's employees should have taken some sort of corrective action to prevent future harm after learning of the hazard. The fact-finder can rely on common knowledge and experience in determining whether defendant ought to have made an attempt to reduce a known risk of imminent harm to one of its charges.²⁷

Likewise, in *Trowell*, the Court found that after dropping a resident one time, the aide

knew the dangers of moving the resident unassisted.²⁸ Yet the aide again attempted to move the resident on her own.²⁹ The Court held that because the aide recognized the resident was likely to fall again but failed to take corrective action, the claim did not raise questions of medical judgment.³⁰

Similarly, in *McIver v St. John Macomb Oakland Hospital*, the hospital had notice that the plaintiff suffered from debilitation and dementia and had a history of falls.³¹ Despite this knowledge, the staff left her unattended on a chair on a wet floor.³² The Court of Appeals held that "this decision clearly was not a professional one; rather, it involved an ordinary action in surroundings that a layperson can readily understand."³³

Likewise, in *McDonald v W. Branch Regional Medical Center*, the hospital was aware of the patient's risk of falling. Despite this knowledge, the staff had the patient stand unassisted.³⁴ The Court of Appeals held that "a lay juror could observe that one who is unable to stand on his own may fall if told to stand on his own."³⁵

Best practices

It is imperative to consider both parts of the *Bryant* test in determining whether a claim sounds in ordinary negligence or medical malpractice. It is also important to recognize that some allegations in a complaint may sound in ordinary negligence while others sound in medical malpractice.³⁶

Also, simply because the first prong of the *Bryant* test is satisfied does not mean the claim sounds in medical malpractice. In fact, the *Bryant* Court cautioned that "[t]he fact that an employee of a licensed health care facility was engaging in medical care at the time the alleged negligence occurred means that the plaintiff's claim may *possibly* sound in medical malpractice; it does not mean that the plaintiff's claim *certainly* sounds in medical malpractice."³⁷

Unlike the first prong, the line between ordinary negligence and medical malpractice under the second prong of *Bryant* is not always easily distinguishable. As a result, in *Bryant*, Justice Stephen Markman instructed that "plaintiffs are advised as a matter of prudence to file their claims alternatively in medical malpractice and ordi-

nary negligence within the applicable period of limitations."³⁸

In addition to pleading in the alternative, it is important to remember that pursuant to *Trowell*, the decision about the nature of the claim may be made on the pleadings alone. Therefore, when faced with a claim that sounds in ordinary negligence, it is advisable to carefully plead the facts in support of such a claim.³⁹ ■



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ENDNOTES

1. Makary & Daniel, *Medical error—the third leading cause of death in the US*, *The BMJ* (May 3, 2016) <<https://www.bmj.com/content/353/bmj.i2139>> [<https://perma.cc/FS9K-SZVQ>]. All websites cited in this article were accessed April 25, 2019.
2. Tucker, *Michigan's Medical Malpractice Tort Reform—"The Juice Isn't Worth the Squeeze," Mich Ass'n for Justice* (April 7, 2014) <<https://michiganjustice.wordpress.com/2014/04/07/michigans-medical-malpractice-tort-reform-the-juice-isnt-worth-the-squeeze/>> [<https://perma.cc/4CM5-TJTP>]. According to the Tucker article, in 1986, eight years before tort reform, more than 3,600 medical malpractice cases were filed. In 2009, there were 707 new malpractice cases filed.

3. *Zwiers v Growney*, 498 Mich 910; 870 NW2d 918 (2015) (holding that a medical malpractice complaint filed before the expiration of the 182-day notice period is ineffective to toll the statute of limitations).
4. MCL 600.1483(1). The applicable limitation depends on the nature of the plaintiff's injury. The current lower tier limitation is \$455,000 and the higher limitation is \$812,500. These limitations are based on 1994 inflation rates and are adjusted yearly (typically mid-January) to reflect changes to the consumer price index. Limitation on Noneconomic and Product Liability Determination of Economic Damages, certification statement from Mich Dep't of Treasury (January 19, 2018) <https://www.michigan.gov/documents/treasury/2018_limitation_on_Noneconomic_Damages-Product_Liability_Determination_on_Economic_Damages_611822_7.pdf> [<https://perma.cc/TA5C-TQ7X>]. There are only three, very limited circumstances in which the higher limitation applies. The first situation is when the plaintiff has been rendered "hemiplegic, paraplegic, or quadriplegic" as a result of an injury to the brain or spinal cord. MCL 600.1483(1)(a). The second situation is when the plaintiff has suffered permanently impaired cognitive capacity and is incapable of making independent, responsible life decisions and is permanently incapable of independently performing the activities of normal, daily living. MCL 600.1483(1)(b). The third and final scenario that qualifies is when the plaintiff has suffered permanent loss of or damage to a reproductive organ resulting in the inability to procreate. MCL 600.1483(1)(c). Notably, an injury that results in death does not enable a plaintiff to recover the high cap.
5. MCL 600.5805(2) and MCL 600.5805(8). These timeframes may be extended in cases of wrongful death. MCL 600.5852(1). Medical malpractice claims may also be extended by the discovery rule and fraud. MCL 600.5838a. Special timeframes also apply to claims involving disability due to infancy or insanity. MCL 600.5851. See also *Trowell v Providence Hosp and Med Ctrs, Inc*, 502 Mich 509; 918 NW2d 645 (2018) (recognizing that the statute of limitations for ordinary negligence against a licensed healthcare provider or entity is three years).
6. MCL 600.2912b. If the defendant does not respond to the notice of intent in writing, the claimant may file a complaint after 154 days. MCL 600.2912b(8).

The notice of intent must state the factual basis for the claim, the applicable standard of care, the manner in which the standard of care was breached, the action that should have been taken, and how the breach proximately caused the injury. MCL 600.2912b(4). The notice of intent must be mailed to the health professional or health facility's last known professional business address or residential address. MCL 600.2912b(2). Although the mailing of the notice of intent will toll the underlying two-year statute of limitations set forth in MCL 600.5805(8), the notice will not toll the wrongful death savings provision in MCL 600.5852. *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004).
7. MCL 600.2912d. The expert witness requirements are set forth in MCL 600.2169.
8. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004) (citing *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 46; 594 NW2d 455 (1999)).
9. *Trowell*, 502 Mich at 516.
10. Although *Trowell* affirmed the *Bryant* two-part test, it did not affirm *Bryant's* holding that a court determines whether the nature of a claim is ordinary negligence or medical malpractice pursuant to MCR 2.116(C)(7). *Bryant*, 471 Mich at 419. Instead, the *Trowell* Court stated that it did not need to decide whether the nature of the claims should be ascertained under MCR 2.116(C)(7) or (C)(8). *Trowell*, 502 Mich at 519. The court rule used to analyze the nature of a plaintiff's claim is important because pursuant to MCR 2.116(C)(8), the court is only permitted to consider the pleadings, while MCR 2.116(C)(7) allows the court to consider materials outside the pleadings.
11. Although the *Trowell* Court limited its review to the complaint alone, it pointed out that neither party submitted materials beyond the complaint concerning the nature of the claims. *Trowell*, 502 Mich at 519. Presumably, the plaintiff in *Trowell* did not file an affidavit under MCR 2.116(H)(1) alleging that other critical affidavits are unavailable, which would have made summary disposition premature or inappropriate.
12. *Kuznar v Raksha Corp*, 481 Mich 169, 177; 750 NW2d 121 (2008). The Michigan Supreme Court reaffirmed its holding in *Kuznar* one year later in *Potter v McLeary Eyeglasses*, 484 Mich 397, 415; 774 NW2d 1 (2009) (stating "*Kuznar* correctly opined that only those health care providers and facilities designated within § 5838a could be sued for malpractice. Therefore, only those providers and facilities covered by § 5838a can meet the professional relationship prong of the test.").
13. *Kuznar*, 481 Mich at 177.
14. *Id.* (citing MCL 600.5838a(1)). A "licensed health facility or agency" is defined as "a health facility or agency licensed under article 17 of the public health code [MCL 333.20101 *et seq.*]." MCL 600.5838a(1)(a). A "licensed health care professional" means "an individual licensed or registered under article 15 of the public health code [MCL 333.16101 *et seq.*]." MCL 600.5838a(1)(b). In *Kuznar*, the Court held that because a pharmacy and a nonpharmacist employee were not licensed health facilities, agencies, or professionals, they could not be subject to medical malpractice claims.
15. *Bryant*, 471 Mich at 425–433 and *Trowell*, 502 Mich at 522–524.
16. *Lawrence v Battle Creek Health Sys*, unpublished per curiam opinion of the Court of Appeals, issued June 4, 2002 (Docket No. 224874). The Supreme Court ordered that *Bryant* and *Lawrence* be argued and submitted to the Court together. *Bryant v Oakpointe Villa Nursing Centre*, 468 Mich 943; 664 NW2d 221 (2003). After issuing its opinion in *Bryant*, the Supreme Court vacated its order granting appeal and denying leave to appeal in *Lawrence*, effectively allowing the Court of Appeals decision to stand. *Lawrence v Battle Creek Health Sys*, 469 Mich 1051; 679 NW2d 71 (2004).
17. *Lawrence v Battle Creek Health Sys*, unpublished per curiam opinion of the Court of Appeals, issued June 4, 2002 (Docket No. 224874).
18. *Crozier v Henry Ford Hosp*, unpublished per curiam opinion of the Court of Appeals, issued December 11, 2008 (Docket No. 279924). The plaintiff alleged that due to a pharmacy error, he was given 5 mg of ProGraf instead of the prescribed amount of 0.5 mg, which resulted in an overdose that caused him to suffer diffuse impairments in cognitive functioning.
19. *Id.*
20. *Davis v Botsford Gen Hosp*, unpublished per curiam opinion of the Court of Appeals, issued May 24, 2005 (Docket No. 250880).
21. *Id.*
22. *Bryant*, 471 Mich at 430.
23. *Id.*
24. *Id.*
25. *Id.* at 417.
26. *Id.* at 431.
27. *Id.* at 430–431.
28. *Trowell*, 502 Mich at 522.
29. *Id.*
30. *Id.*
31. *Mclver v St. John Macomb Oakland Hosp*, unpublished per curiam opinion of the Court of Appeals, issued October 2, 2012 (Docket No. 303090).
32. *Id.*
33. *Id.*
34. *McDonald v W. Branch Regional Med Ctr*, unpublished per curiam opinion of the Court of Appeals, issued March 29, 2018 (Docket No. 337173).
35. *Id.*
36. In *Bryant*, the Court held that two of the plaintiff's claims sounded in medical malpractice, while one claim sounded in ordinary negligence. *Bryant*, 471 Mich at 426–433. Similarly, the Court in *Trowell* determined that four of the plaintiff's allegations sounded in medical malpractice, while one of the allegations sounded in ordinary negligence. *Trowell*, 502 Mich at 520–524.
37. *Bryant*, 471 Mich at 421.
38. *Id.* at 433.
39. It should be noted, however, that the three concurring justices in *Trowell* also noted that "we look beyond the labels given to the claims and instead read the complaint as a whole, seeking the gravamen of the claims. This not only prevents 'artful pleading,' but also accounts for the risk that a party honestly, though 'incorrectly[,] invoke[s] language that designates a claim as either medical malpractice or ordinary negligence, when the opposite is in fact true.'" *Trowell*, 502 Mich at 658 (internal citations omitted).

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