A Plaintiff's Prior Negligence is Not Admissible to Establish Contributory Negligence

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I. Introduction

In a recent medical malpractice case, the defendant argued at mediation that the plaintiff was contributorily negligent for the recurrence of her cancer after the defendant failed to completely resect her tumor, leaving behind cancerous cells, and did nothing more to prevent recurrence. The defendant contended that the plaintiff was comparatively at fault for failing to obtain genetic testing years earlier. In other words, the defendant claimed that our client was not entitled to competent medical care because she failed to obtain the recommended genetic testing, which more than likely would have led to diagnosis and treatment. Most courts, however, prohibit defendants in medical malpractice cases from making this very argument. We were able to reach a successful resolution for our client after presenting the substantial case law on this issue to defense counsel and the mediator and indicated our intention to file a motion in limine to preclude the defendant from introducing evidence of the plaintiff's fault if the mediation failed. This article will review the governing case law we cited at mediation.

II. Law

Although the New Hampshire Supreme Court has never addressed this issue,

> The majority of courts generally agree that evidence of a patient's negligent or intentional conduct that occurs prior to the negligent treatment and provides only the occasion for a subsequent malpractice claim is inapplicable to the assessment of damages between the patient and the negligent health care provider.[2]

This is true because "[t]hose patients who may have negligently injured themselves are nevertheless entitled to subsequent non-negligent treatment and to an undiminished recovery if such subsequent non-negligent treatment is not afforded."[3]

> It would be anomalous to posit, on the one hand, that a healthcare provider is required to meet a uniform standard of care in its delivery of medical services to all patients, but permit, on the other hand, the conclusion that, where a breach of that duty is

> established, no liability may exist if the patient's own preinjury conduct caused the illness or injury which necessitated the medical care.[4]

Because prior negligent conduct that merely provides the occasion for subsequent negligent medical treatment is not legally significant, "as a matter of law, a jury may not consider events that occur before the medical treatment that are relevant only insofar as they explain that the plaintiff is responsible for the events that led to his medical treatment."[5]

Courts in other jurisdictions regularly preclude medical malpractice defendants from introducing evidence and argument intended to show that the plaintiff negligently injured himself.[6] For example, in *Larson v. Belzer Clinic*,[7] the plaintiff, a 3.5 year old, fractured his femur after escaping his yard and was further injured by the negligent treatment he received for his leg.[8] During closing arguments, defense counsel argued that if the 3.5 year old plaintiff had not been left alone and had not escaped his yard, there would have been no occasion for his medical care providers to provide the negligent medical care.[9] The court disagreed and found that defense counsel's argument "was an ill-conceived attempt on the part of counsel to shift the blame for [the plaintiff's] disability from [the defendant] to [the plaintiff] himself."[10] Accordingly, the court found that the "circumstances of the injury were irrelevant and the argument was improper."[11]

Similarly, in *Eiss v. Lillis*,[12] the plaintiff's decedent died from intracranial bleeding as a result of a blood thinner overdose.[13] The plaintiff sued the decedent's medical providers alleging that their failure to appropriately monitor and treat the intracranial bleeding caused the decedent's death.[14] The defendants argued that the decedent was contributorily negligent for taking another blood thinner in conjunction with the other blood thinner. The court disagreed, finding that it was "irrelevant and legally insignificant" that the plaintiff took two blood thinners simultaneously in a malpractice case arising from a doctor's treatment of the subsequent condition caused by this combination of drugs. Furthermore, the court explained that in order for a plaintiff's negligence to bar recovery in the medical malpractice context, "the plaintiff's contributory negligence must be contemporaneous with the main fact asserted as negligence on the doctor's part."[15]

In *Fritts v. McKinne*,[16] the decedent was injured in a car accident after drinking and driving. Five days later, the decedent underwent an operation during which the surgeon severed an artery, resulting in the decedent's death. At trial, defense introduced evidence of the decedent's drinking and driving that caused the accident that necessitated the surgery. The trial court gave a comparative negligence instruction to the jury, which returned a defense

verdict. On appeal, the court reversed, "conclud[ing] that the interjection of the issue of Fritts' possible negligence *in the automobile accident*, a matter unrelated to the medical procedures, was a substantial error that removed the jury's consideration from the relevant issues and led to an erroneous excursion into irrelevant and highly prejudicial matters."[17] As the *Fritts* court succinctly stated, "[u]nder the guise of a claim of contributory negligence, a physician may not avoid liability for negligent treatment by asserting that the patient's injuries were originally caused by the patient's own negligence."[18]

Likewise, in *Sendejar v. Alice Physicians & Surgeons Hospital, Inc.*,[19] the plaintiff was injured in a car accident while driving under the influence of alcohol and brought to a hospital.[20] The plaintiff alleged that as a result of the hospital's negligence in treating his injuries, he became paraplegic. The defendant argued that the plaintiff's injuries were caused by his own contributory negligence in driving drunk and getting into an accident.[21] The court found, however, that the jury was not entitled to attribute fault to patient for negligently causing the automobile accident that led him to require medical treatment.[22]

As the foregoing cases demonstrate, defendants in medical malpractice cases may not introduce evidence of the plaintiff's prior negligent conduct to shift fault away from their own negligence.

III. Conclusion

Judge Nottingham of the federal district court in Colorado summarized the issue aptly:

> Persons providing medical treatment . . . should expect to treat not only patients who fall ill or are injured through no fault of their own, but also those whose own neglect or intentional conduct has placed them in the precarious position of requiring medical treatment. Indeed, the latter category of patients is probably as numerous as the former category. All patients, regardless of how they sustain an illness or injury, may reasonably expect competent treatment from those into whose hands they have placed themselves. It would be inconsistent with the reasonable and normal expectations of both parties for the court to excuse or reduce the provider's liability simply because it was the patient's own fault that she required care in the first place.[23]

All patients are entitled to and should be able to expect quality medical care that meets the standard of care.

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Elie joined Abramson, Brown & Dugan in 2017 after graduating from Suffolk University Law School, where he served as an editor on the Suffolk University Law Review. Since then, Elie has represented numerous medical negligence victims and their families in cases involving catastrophic injuries and wrongful death. In addition to his practice, Elie serves on the New Hampshire Association for Justice's Board of Governors and Publications Committee. He is also the editor of the Verdicts and Settlements Report in the New Hampshire Trial Lawyer's Quarterly.

[2] *Harvey v. Mid-Coast Hospital*, 36 F.Supp.2d 32, 36 (D.Me. 1999).
[3] *Martin v. Reed*, 409 S.E.2d 874, 877 (Ga.App. 1991).
[4] *Harvey*, 36 F.Supp.2d at 38.
[5] *Id.*, 36 F.Supp.2d at 35.
[6] *See e.g., Jensen v. Archbishop Bergan Mercy Hospital*, (trial court erred in submitting issue of contributory negligence to jury based on argument that patient negligently disregarded physician's instruction to lose weight).
[7] 195 N.W.2d 416 (Minn. 1972).
[8] *Id.* at 418-19
[9] *Id.* at 419.
[10] *Id.*
[11] *See Larson,* 195 N.W.2d at 419.
[12] 357 S.E.2d 539, 543 (Va. 1987).
[13] *Id.*
[14] *Id.*
[15] *Id. see also Lawrence v. Wirth*, 309 S.E.2d 315 (1983) (precluding the defendant from raising defense of contributory negligence where plaintiff's negligence preceded the doctor's negligent conduct).
[16] 934 P.2d 371 (Okla.App. 1996); *see also Yuscavage v. Jones*, 446 S.E.2d 209, 211 (Ga.App. 1994) (medical malpractice plaintiff's blood alcohol test results were properly excluded because cause of underlying automobile accident was irrelevant).
[17] *Id.* at 374.
[18] *Id.*
[19] 555 S.W.2d 879 (Tex.App. 1977).
[20] *Id.*
[21] *Id.*
[22] *Id.* at 885.
[23] *Spence v. Aspen Skiing Company*, 820 F.Supp. 542, 544 (D.Colo. 1993) (citation omitted).