

# What is the Difference Between an Allegation of Professional Negligence VS. Ordinary Negligence?

## Avoiding Liability Bulletin –June 1, 2018

In past Bulletins, I have focused on the requirement of experts in any case alleging professional negligence. An expert for the patient (plaintiff) and a nurse expert for the nurse and/or hospital (defendants) must provide testimony as to whether professional negligence occurred; that is, whether a nurse's standard of care in the particular case before the court was breached or was met.

Such testimony is necessary because professional negligence involves medical and/or nursing judgment within a professional relationship with the patient.

In contrast to a professional negligence allegation, some cases filed where a nurse allegedly injured or caused the death of a patient pursue the case as ordinary negligence.

Ordinary negligence is defined as the failure to act as a reasonably prudent *person* in the same or similar circumstances. In short, it is the failure to exercise ordinary care. The standard of care, then, is whether the individual met or breached this ordinary standard, one most persons would exercise in the same or similar circumstances.<sup>1</sup>

In the following unpublished case<sup>2</sup>, the Court of Appeals of Michigan evaluates an expert's credentials and analyzes which standard should apply based on the facts of the case.

The patient's wife took her husband to the medical center for a scheduled chest-x-ray. The husband had several chronic diseases or conditions at the time. The wife asked the staff of the hospital for a wheelchair due to these chronic conditions and when she received one, she wheeled her husband to the radiology department.

Once there, she told the hospital staff her husband was unable to stand on his own. Even so, when the patient was taken into an X-Ray room, a Radiology staff member told him to stand up and started to wheel the wheelchair away.

The patient fell to the ground and suffered a severe foot/ankle injury. The husband told only his wife of his fall.

The patient was taken to the ED the next day after complaining of pain in his ankle. His wife thought the pain was from an ankle sprain. However, the pain was caused by a fracture of the ankle and a blood clot in the peroneal vein.

The wife filed a law suit against the medical center after her husband died from an unrelated condition.

The wife's allegations at the trial level included both a professional negligence count and an ordinary negligence count, so if professional negligence was not present, she argued, ordinary negligence was present and that should allow her negligence claim to survive.

The medical center filed a Motion for Summary Judgment challenging the wife's only expert as not meeting the required criteria for testifying to the standard of care. The trial court denied the medical center's Motion and the medical center appealed that decision.

A second Summary Judgment Motion alleged that the case involved professional negligence, not ordinary negligence, and since no expert witness testimony was available, they were entitled to a Summary Judgment in their favor. The trial court denied that Motion and granted the medical center leave to appeal that decision.

The Appeals Court first ruled on the qualifications of the plaintiff's expert and what allegations a professional negligence case requires.

The Court carefully analyzed the applicable law and the testimony of the wife's expert witness, who was a radiology technologist. Although the expert was involved in some small measure to orienting and teaching nurses and overseeing technologists, 98% of her time was spent in administrative work in contrast to 2% of her time assisting in or performing X-Rays. As such, she did not meet the required statutory requirements for an expert witness in this professional negligence case.

Because the plaintiff failed to provide an expert witness to testify as to the standard of care, the denial of the medical center's Summary Judgment was incorrect, and the ruling was reversed by the Appellate Court.

The Court then evaluated the medical center's second argument. The center claimed that because there was a professional relationship between the radiographer and the patient, the allegations of professional negligence were applicable to the case and because no expert testimony was present, their Motion for Summary Judgment should be granted. Moreover, the Center reasoned, the plaintiff's claim for ordinary negligence should also fail.

To rule on this issue, the Court carefully reviewed the allegations of the plaintiff. She said she told the radiology staff that her husband was unable to stand by himself and then, in her ordinary negligence claim, asserted that the staff was required to identify her husband as a fall risk, take all reasonable fall precautions, and help ambulate him. Because the staff did not do so, she alleged the staff was negligent, careless, and breached their duties in these circumstances.

After also reviewing applicable case law, the Court opined that the radiology staff was aware of the patient's limitations. A lay juror could determine that if a person could not stand on his own, he may fall if told to stand on his own.

The decision of the radiology staff to have the decedent stand on his own was not a professional one; rather it involved an *ordinary* action in surroundings that a layperson could easily understand. If proven, no expert testimony is required, the Court opined, because lay jurors can determine the reasonableness of the allegedly negligent act by using their own common knowledge and experience.

The Court ruled that the late patient's wife did set forth a claim for ordinary negligence. As a result, the trial court correctly denied the medical center's Summary Judgment Motion and sent the case back to the trial court for further proceedings under an ordinary negligence claim.

Although this case did not involve a nurse or nursing staff, it is instructive about the difference between the two claims a patient may allege against you as a nurse, licensed practical nurse, or nursing assistant. Useful take away points include:

1. Although in most instances, an allegation against you as a health care provider when providing care to patients and an injury occurs, will be a professional negligence accusation, an ordinary negligence claim is also possible;
2. Ordinary negligence can be pled in addition to professional negligence and, as in this case, still allows the plaintiff to go forward with a filed case against you;
3. The standard of care in ordinary negligence is different than the standard of care in a professional negligence case;
4. State case law and/or state statutes determines if ordinary negligence is applicable to a particular situation;
5. If you undertake the role of an expert witness in a case focusing on nursing care, be certain you meet the requirements of an expert witness as defined by the applicable state statute;
6. If a judgment for ordinary negligence is returned by the jury against you, you can still face possible disciplinary proceedings by the state board of nursing and the agency that regulates nursing assistants;
7. The line between the difference of ordinary negligence and professional negligence may not be so bright; and
8. When caring for patients, avoid *any* conduct that can be characterized in a lawsuit as ordinary or professional negligence.

1. "Ordinary Negligence Law and Legal Definition", USLegal, Inc., <https://definitions.uslegal.com/o/ordinary-negligence/> .
2. McDonald v. West Branch Regional Medical, No.'s 337173 and 338487, Ogemaw Circuit Court, LC 15-659591-NH.

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