DETERMINING ORDINARY NEGLIGENCE VERSUS PROFESSIONAL NEGLIGENCE

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Most of the cases dealing with this issue concern determining whether the claim is for malpractice which has a shorter statute of limitations versus ordinary negligence which has a longer statute of limitations.

The Supreme Court has set forth a two-part test in *Bryant v Oakpointe Villa Nursing Center*, 471 Mich 411; 684 NW2d 864 (2004). However, the application of the test is not clear-cut as can be seen from the following cases. Further, these cases as indicated above deal with issues of the statute of limitations and not insurance coverage. However, we have cited several cases which do deal with insurance coverage for a professional services exclusion which involves a similar argument.

Whether a claim of negligence is properly based in medical malpractice rather than ordinary negligence is based on the underlying facts of the claim. "'[A] complaint cannot avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence.'" *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999), quoting *McLeod v Plymouth Court Nursing Home*, 957 F Supp 113, 115 (ED Mich, 1997). Instead, the court must determine the gravamen or nature of the claim to determine if it is based on the medical judgment of the professional. *Dorris*, 460 Mich at 45-46. To accomplish this goal, the Michigan Supreme Court set forth a two-part test for determining whether a cause of action sounds in ordinary negligence or malpractice in *Bryant v Oakpointe Villa Nursing Center*, 471 Mich 411; 684 NW2d 864 (2004). The application of this test is a fact intensive process that must be done on a case by case basis. The central conclusion to draw from the Michigan case law is that, if the act involves professional judgment, then it will sound in medical malpractice instead of ordinary negligence.

A. The *Bryant* Test

The Supreme Court stated the following two-part test for distinguishing between ordinary negligence claims and medical malpractice:

> Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or 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. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions. [*Bryant, Bryant*, 471 Mich at 422.]

Both questions must be answered in the affirmative to have a malpractice claim. It is not enough that a professional relationship was involved. "The 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." *Id*. at 421 (emphasis original).

Bryant involved a claim of negligence causing the death of a nursing home patient. The patient died due to position asphyxiation due to falling between the bed and a bed rail. The plaintiff alleged negligence for the nursing home failing to provide an accident free environment, failing to train Nursing Assistants regarding position asphyxiation and bed rails, failing to take adequate corrective measures after finding the patient tangled in her sheets the day before her death, and failing to inspect the decedent's bed for the potential of position asphyxiation. *Id*. at 414, 417. In addressing the first question of the two-part *Bryant* test, the Court explained:

> A professional relationship sufficient to support a claim of medical malpractice exists in those cases in which a licensed health care professional, licensed health care facility, or the agents or employees of a licensed health care facility, were subject to a contractual duty that required that professional, that facility, or the agents or employees of that facility, to render professional health care services to the plaintiff. [*Id*. at 422.]

The Court concluded that the nursing home met this requirement. "Because defendant, Oakpointe Villa Nursing Centre, Inc., a licensed health care facility, was under a contractual duty requiring both it and its employees to render professional health care services to plaintiff's decedent, a professional relationship existed". *Id*. at 425. Under Michigan law, a nursing home is a "health facility or agency" that must be licensed. MCL 333.20106; MCL 333.20141.

Regarding the second question in the *Bryant* test, the Court explained:

> After ascertaining that the professional relationship test is met, the next step is determining whether the claim raises questions of medical judgment requiring expert testimony or, on the other hand, whether it alleges facts within the realm of a jury's common knowledge and experience. If the reasonableness of the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence. If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved. [*Id*. at 423.]

In applying this test to *Bryant*, the Court noted that the use of bedrails involved medical judgment because defendants had to know the potential risks and benefits of using particular models in particular situations:

> This much is clear: in order to determine whether defendant adequately trained its CENAs to recognize the risks posed by particular configurations of bed rails and other prescribed restraint systems, therefore, the fact-finder will generally require expert testimony on what specialists in the use of these systems currently know about their risks and on how much of this knowledge defendant ought to have conveyed to its staff. [*Id*. at 428.]

This conclusion must be contrasted with the Court's decision regarding the plaintiff's claim that the nursing home failed to take steps to rectify the dangers presented to the decedent when they found her entangled the day before her death. The Court ***found that this count sounded in ordinary negligence.*** It reached this conclusion because the average juror could assess whether or not a person should alleviate a danger once it becomes know to him:

> This claim sounds in ordinary negligence. 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.
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> Suppose, for example, that two CENAs employed by defendant discovered that a resident had slid underwater while taking a bath. Realizing that the resident might drown, the CENAs lift him above the water. They recognize that the resident's medical condition is such that he is likely to slide underwater again and, accordingly, they notify a supervising nurse of the problem. The nurse, then, does nothing at all to rectify the problem, and the resident drowns while taking a bath the next day.
>
> If a party alleges in a lawsuit that the nursing home was negligent in allowing the decedent to take a bath under conditions known to be hazardous, the *Dorris* standard would dictate that the claim sounds in ordinary negligence. No expert testimony is necessary to show that the defendant acted negligently by failing to take any corrective action after learning of the problem. A fact-finder relying only on common knowledge and experience can readily determine whether the defendant's response was sufficient. [*Bryant*, 471 Mich at 430-431.]

The Court of Appeals subsequently examined the Supreme Court's discussion of the known danger in *David v Sternberg*, 272 Mich App 377; 726 NW2d 89 (2006). In that case, the plaintiff complained that the dressing on her foot after surgery was too tight. As it turns out, it was, and plaintiff suffered permanent damage to the foot. *Id*. at 379. Plaintiff brought negligence claims arguing that, in light of *Bryant's* above referenced discussion of known dangers, her cause of action should survive because a layperson could know of the ramifications of cutting off blood supply. *Id*. at 383. The Court noted that the doctor's response to plaintiff's complaints did involve medical judgment. A doctor checked and removed parts of the bandage at various times. He also assessed the capillary fill in plaintiff's toes. Based on this, the Court found that the claim was actually for medical malpractice even though it involved a failure to respond. *Id*. at 384.

From this, medical expert testimony will likely be necessary to assess a hazard to a patient in the first place, but once the danger is known and obvious to a layperson, the failure to prevent the harm will sound in ordinary negligence. Generally, if the assessment of the problem and danger involves medical judgment, then the proper claim will be one of medical malpractice.

B. Supervision of Patients and Staff

In the companion case of *Dorris*, *Gregory v Heritage Hosp*, Gregory was allegedly attacked and beaten by another patient in a hospital. *Dorris*, 460 Mich at 31. She alleged in her complaint that the hospital had a duty to protect her from other psychiatric patients, monitor violent patients, and have adequate staffing to monitor and control the patients. *Id*. at 46. The Court concluded that such claims were based in malpractice rather than ordinary negligence.

> [T]hese allegations concerning staffing decisions and patient monitoring involve questions of professional medical management and not issues of ordinary negligence that can be judged by the common knowledge and experience of a jury. The ordinary layman does not know the type of supervision or monitoring that is required for psychiatric patients in a psychiatric ward. Thus, the trial court erred in not requiring that plaintiff provide a notice of intent to sue and an affidavit of merit as required by §§ 2912b and 2912d. [*Dorris*, 460 Mich at 47.]

In reaching this decision, the Supreme Court followed the reasoning of three Court of Appeals decisions: *Bronson v Sisters of Mercy Health Corp*, 175 Mich App 647, 438 NW2d 276 (1989), *Starr v Providence Hosp*, 109 Mich App 762, 766, 312 NW2d 152 (1981), and *Waatti v Marquette Gen'l Hosp*, 122 Mich App 44, 49, 329 NW2d 526 (1982). Each of these cases found that the plaintiff's claim was based in malpractice rather than ordinary negligence.

In *Bronson*, the patient claimed that she suffered cardiorespiratory arrest due to the actions of an anesthesiologist. She sued the hospital alleging negligence in providing staff privileges to the doctor, failing to supervise its staff physicians, and failing to discipline the

doctor. *Bronson*, 175 Mich App at 648-649. The Court concluded that this was actually a malpractice claim. "The key to a malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship. The providing of professional medical care and treatment by a hospital includes supervision of staff physicians and decisions regarding selection and retention of medical staff." *Id*. at 652-653 (citation omitted).

In *Starr*, the patient claimed psychological injury from another patient mistakenly attempting to crawl into the plaintiff's hospital bed while she was recovering from surgery. *Starr*, 109 Mich App at 763. The Court concluded that the question presented by the case was the supervision necessary in a special care unit and the adequacy of restraints. *Id*. at 765. It found that these questions involve the assessment of professional judgment that is beyond the common knowledge of a layperson. *Id*. at 766.

In *Waatti*, the plaintiff suffered a seizure while in the hospital, which allegedly caused a fracture by jamming his shoulder into the bed rail. *Waatti*, 122 Mich App at 47. The Court concluded that the necessity for supervision of the patient was a medical question. "[Plaintiffs] claim that to leave a seizure patient unattended with the hospital bed's side rails down is so obviously negligent as to present issues cognizable by an ordinary layman. We disagree. Whether a seizure patient requires constant medical attendance or restraints is an issue of medical management to be established by expert testimony." *Id*. at 49, citation omitted.

In *Wilson v Stilwill*, 411 Mich 587, 610; 309 NW2d 898 (1981), the plaintiff claimed that the hospital was negligent in failing to require a doctor or other qualified person to remain on location after surgery to ascertain whether an infection developed. The Court concluded that this was an "issue which cannot be determined by common knowledge and experience, but rather raises a question of medical judgment." *Id*. at 611.

In *Bryant*, The Supreme Court appears to have somewhat limited this line of precedent. It noted that not every case of supervision and training would automatically be a question of medical malpractice. It noted that *Dorris* involved the special situation of the proper supervision and training for a psychiatric patient. The Court stated:

> That is not to say, however, that *all* cases concerning failure to train health care employees in the proper monitoring of patients are claims that sound in medical malpractice. ***The pertinent question remains whether the alleged facts raise questions of medical judgment or questions that are within the common knowledge and experience of the jury***. [*Bryant*, 471 Mich at 426 (emphasis original.]

The Court of Appeals recently released a decision on this issue in *Sibley v Borgess Med Center*, unpublished opinion per curiam of the Court of Appeals, issued July 15, 2008 (Docket No. 277891). In that case, the plaintiff claimed negligent nursing care when he was in defendant's cardiac unit for post surgical observation. Relying on *Dorris*, the Court of Appeals found that the claim actually sounded in medical malpractice:

> Plaintiff alleges that defendant's nursing staff was negligent in failing to properly respond to his use of the "call button" and to accurately report information that plaintiff was bleeding from his catheterization site to plaintiff's treating physicians. Plaintiff opines that these actions did not require medical judgment. However, our Supreme Court has determined that "allegations concerning staffing decisions and patient monitoring involve questions of professional medical management and not issues of ordinary negligence that can be judged by the common knowledge and experience of a jury." *Dorris, supra* at 47. Jurors cannot be expected to know the appropriate level of monitoring required for a patient in plaintiff's condition. Rather, resolution of this issue would require expert testimony as to the appropriate level of monitoring, the proper protocol for responding to patient requests, appropriate response times and staffing levels, and additional factors that might affect a nurse's response to patient requests, including factors such as patient priority and the risks associated with managing competing patient requests.
>
> Similarly, whether it was appropriate to clean the blood from plaintiff's catheterization site and change his clothing and bedding, or whether there was some reason pertinent to his treatment to leave the site uncleaned and his blood-stained clothing and bedding in place, whether a physician should have been

> contacted immediately upon discovery that plaintiff had been bleeding, and whether the nursing staff conveyed appropriate information to plaintiff's physicians to facilitate his medical treatment, each required plaintiff's nurses to make medical judgments, and are not questions within "the common knowledge and experience of a jury." *Id.* Expert testimony would be required for their proper resolution. [*Sibley*, slip op p 3.]

Sibley makes clear that the courts will analyze supervision/observation cases in the context of the *Bryant* requirement that the case involve medical judgment, but, following *Dorris*, such decisions will more than likely involve medical judgment given the wide ramifications and factors involved.

In *Ohannesian v Butterworth Hosp,* unpublished opinion per curiam of the Court of Appeals, issued November 16, 2004 (Docket No. 245933), the plaintiff raised claims against the hospital alleging negligent selection, retention, and supervision of staff physicians, sufficiency of liability insurance for a doctor, and the decision to allow a doctor to retain staff privileges. The Court applied both *Bryant* and *Bronson* and concluded that all of the claims sounded in malpractice. It concluded that each of the topics were beyond the average layperson's knowledge.

In *Doe v Shapiro,* unpublished opinion per curiam of the Court of Appeals, issued March 4, 2008 (Docket No. 273950), the patient was allegedly sexually assaulted by a certified registered nurse anesthetist when she was under anesthesia. The Court concluded that her vicarious negligence claims against the institute actually sounded in medical malpractice:

> Mary Doe's complaint raises substantially similar questions to those raised in *Dorris, supra,* involving Silverton and Silverton Skin Institute's medical judgment specifically regarding both the selection and retention of medical personnel and the monitoring and supervision of patients throughout the course of their operative and post-operative care. Mary Doe further argued that the failure to supervise and protect her was a deviation in the standard of care. We conclude that like *Dorris, supra,* questions involving the proper monitoring and supervision required by a physician for either a certified registered nurse anesthetist or a

> patient under general anesthesia are beyond the "realm of common knowledge and experience" of a layperson. *Bryant, supra, at 422-423*; *Dorris, supra* at 46-47. Mary Doe admits that her claim was unsupported by any affidavit of merit pertaining to Silverton and Silverton Skin Institute. To the extent that the trial court granted summary disposition to Silverton and Silverton Skin Institute on this basis, we affirm. [*Id*. at slip op p 12.]

But in *Ostrom v Manorcare Health Services Inc*, unpublished opinion of the United States District Court for the Eastern District of Michigan (Docket No. 06-CV-12041), the Court applied *Bryant*'s discussion of a known danger to a case in which the facility knew that an Alzheimer's patient needed more supervision due to a increased likelihood of escape. The patient went out through an unlocked courtyard door, tripped, and suffered a severe head injury. The Court found that the claims for insufficient supervision and staffing sounded in ordinary negligence:

> Plaintiff has produced evidence that Defendant's employees were aware, around the date of the incident itself, of the likelihood of an attempted escape from the nursing home and were thus instructed to monitor Plaintiff more closely**.**
>
> The fact that Plaintiff had Alzheimer's disease does not necessarily transform the issues related to Defendant's alleged negligence into questions of medical judgment. Other courts considering similar issues have stated that even though limited medical testimony may be required on the issue of (1) a plaintiff's capacity for "self-control" to demonstrate a defendant's negligence in its "supervision or custodial care" or (2) failure to protect a plaintiff from a known danger, the need for that limited testimony, by itself, is insufficient to translate an ordinary negligence claim into medical malpractice claim. See Reiss v The Stamford Hosp., No. 010276557S, 2005 WL 2009560, *8- 9 (Conn.Super. Ct. Aug 2, 2005) (unpublished); see also Beauvais v. Connecticut Subaccute Corp. of Waterbury, No. 990270390S, 2000 WL 1657845 (Conn.Super.Ct. Sept.29, 2000) (unpublished) (finding that the plaintiff properly stated an ordinary negligence claim, where the defendant's staff had notice that a particular Alzheimer's patient had a tendency to become agitated and violent and subsequently struck another patient). Therefore, the Court holds that Plaintiff has properly stated a claim for ordinary negligence and DENIES Defendant's Motion for Summary Judgment based upon the statute of limitations for a medical malpractice action. [*Ostrom*, at slip op p 7.]

There does appear to be one case that deviates from the general line of precedent that staffing and supervising decisions are based in malpractice. In *Baldyga v Independent Health Plan*, 162 Mich App 441, 413 NW2d 30 (1987), the plaintiff contracted with defendant to provide healthcare services with pre-selected doctors. She claimed that two of these doctors committed malpractice. Plaintiff sued defendant for breach of contract. *Id*. at 442. The Court stated that the portion of the claim stating vicarious liability sounded in malpractice, but it also stated: "we hold that plaintiff's claims that defendant was negligent in hiring these doctors and in failing to supervise them was not based on the parties' express contract but was implied in law, making a three-year period of limitation applicable." *Id*. at 445. No case has subsequently cited *Baldyga* on this point. Since it predates *Dorris,* its value as precedent is questionable.

Staffing and supervising decisions would have to be judged in light of the *Bryant* test for the appropriate determination of a plaintiff's cause of action.

C. Transferring/Moving Patients

Byrant explained that injuries stemming from transferring/moving a patient must be judged on a case-by-case basis:

> [I]njuries incurred while a patient is being transferred from a wheelchair to an examining table (to take one example) may or may not implicate professional judgment. The court must examine the particular factual setting of the plaintiff's claim in order to determine whether the circumstances-for example, the medical condition of the plaintiff or the sophistication required to safely effect the move-implicate medical judgment as explained in *Dorris.* [*Id*. at 421 n9.]

In *McLeod v Plymouth Court Nursing Home*, 857 F Supp 113 (ED MI, 1997), the plaintiff fell when attempting to move into a wheelchair. Plaintiff claimed defendant was negligent in leaving the wheelchair unlocked and unstable. *Id*. at 114. The Court concluded that the case

properly sounded in ordinary negligence because it was within the common understanding of a layperson. *Id*. at 115.

In *Harrier v Oakwood Skilled Nursing Ctr-Trenton*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (Docket No. 273729), the plaintiff required assistance in all personal care, including using the bathroom. But she was left alone on the toilet. In attempting to go back to bed, she fell and broke a hip. *Id.* Plaintiff's complaint alleged "only that the defendants knew of the fall hazard but did not act properly in response to it." *Id.* at slip op p 2. The Court concluded that this claim involved only ordinary negligence. "The complaint does not allege any question involving medical judgment, but, rather, comes within the common knowledge and experience of lay jurors." *Id*.

In *Regalski v Cardiology Ass'n, PC*, 459 Mich 891; 587 NW2d 502 (1998), the plaintiff alleged negligence by a technician helping the patient from a wheel chair to an examination table. The Court of Appeals concluded that "neither medical expertise nor professional training or supervision is required to appreciate that in lifting a patient from a wheelchair to an examining table, the task should be accomplished without perpetrating a personal injury." *Regalski v Cardiology Ass'n, PC*, unpublished memorandum opinion of the Court of Appeals, issued September 19, 1007 (Docket No. 195425.) The Supreme Court reversed:

> In the present action, the plaintiff has alleged Elisabeth Regalski was injured because the defendant's technician was negligent in assisting the patient's movement out of a wheelchair and onto the examination table where the technician then performed the cardiac test for which the defendant had been consulted. Like the trial judge, we are persuaded that the technician was "engaging in or otherwise assisting in medical care and treatment" in the performance of the act that is the basis of the lawsuit and that the case, therefore, is governed by the 2-year period of limitations applicable to medical malpractice claims. [*Regalski*, 459 Mich at 891.]

The Supreme Court stressed that the movement of the patient was in the course of medical treatment. *Id*. The Supreme Court later reviewed the meaning of *Regalski* in *Bryant*. "[W]e interpret this Court's *Regalski* holding to mean that the facts in that case led to the conclusion that the particular assistance rendered to that patient involved a professional relationship and implicated a medical judgment." *Bryant*, 471 Mich at 421 n9.

The Court of Appeals in *Regalski* relied on *Fogel v Sinai Hospital of Detroit*, 2 Mich App 99; 138 NW2d 503 (1965), and *Gold v Sinai Hospital of Detroit, Inc*, 5 Mich App 368; 146 NW2d 723 (1966). In *Fogel*, a nurse's aid was helping the patient to the bathroom. The patient slipped and the nurse's aid could not prevent a fall by herself. *Fogel*, 2 Mich App at 101. The Court simply concluded that this was a matter of ordinary negligence that did not require a standard of care instruction. It did not offer analysis on its means of reaching this conclusion. *Id*. at 102.

In *Gold*, a nurse was helping a patient onto an examination table. The patient said she was nauseated and dizzy. The nurse indicated that she would brace the patient, but the patient moved from a sitting position to a prone position before the nurse could do so. This led to the patient's fall. *Gold*, 5 Mich App at 369. The Court stated that it was bound by *Fogel* and concluded that the claim sounded in ordinary negligence. Again, the Court offered no analysis on this point. *Id*. at 369-370.

Despite their lack of analysis, *Gold* and *Fogel* have been repeatedly cited by subsequent courts. In *Adkins v Annapolis Hosp*, 420 Mich 87; 360 NW2d 150 (1984), the Supreme Court cited to them for the proposition that "[s]ome hospital errors in patient treatment may, of course, be ordinary negligence rather than malpractice." *Id*. at 95 n10. The Court of Appeals specifically relied on *Gold* and *Fogel* in *Digiovanni v St John Health Sys*, unpublished opinion

per curiam of the Court of Appeals, issued October 30, 1998 (Docket No. 200398). In that case, the plaintiff suffered a broken arm in the process of two hospital employees moving her from a chair to her bed. The trial court granted defendants summary disposition noting that a training course existed to teach nurses how to move patients. The Court of Appeals reversed:

> The amended complaint does not allege that the physical act of moving plaintiff involved any medical questions or the exercise of professional medical judgment, nor does it assert that plaintiff's underlying medical condition was such that only a person with professional medical training would have been authorized to undertake the act of moving her. We conclude that the factual allegations, when taken as true, present issues within the common knowledge and experience of the jury rather than those of expert medical judgment. *Wilson, supra; McLeod, supra.* The injuries allegedly sustained while plaintiff was being assisted from a chair to a bed closely resemble the facts of *Fogel* and *Gold.* Although defendants did not allow plaintiff to *fall* and sustain injuries, whether one allows a patient to fall during a transfer or instead breaks a patient's arm during a transfer, is a distinction without a difference. We are satisfied that the allegations in the first amended complaint advance a theory of ordinary negligence and that expert testimony as to the standards of due care prevailing among hospitals and the nursing profession in similar situations is not necessary to develop the issue of negligence for the jury. The trial court therefore erred in granting defendants' motion for summary disposition. [*Digiovanni*, at slip op p 3.]

The Court of Appeals subsequently distinguished *Digiovanni* in *Campins v Spectrum Health Downtown Campus*, unpublished opinion memorandum of the Court of Appeals, issued September 9, 2004 (Docket No. 247024). In that case, the patient was being treated for a broken pubic bone. She alleged negligence in defendant's employee moving her from the bathroom to her bed. *Id.* The Court of Appeals noted that the broken pubic bone changed things. "The acts that formed the basis of plaintiff's complaint occurred in the context of plaintiff's professional relationship with defendant. Plaintiff was hospitalized for treatment of a broken pubic bone. The act of assisting a patient in plaintiff's condition in moving required training and the exercise of medical judgment to minimize discomfort and to guard against further injury." *Id.*

The Court of Appeals reached a similar conclusion in *Lewandowski v Mercy Mem Hosp Corp*, unpublished opinion per curiam of the Court of Appeals, issued December 2, 2003 (Docket No. 241046). In that case, the plaintiff was treating for a head injury and had not stood for several months. Defendant's employees told her to stand so that they could help her dress. When she attempted to do so, she fell and broke a leg. *Id*. The Court found that the claim was for malpractice rather than ordinary negligence:

> In this case, the act that formed the basis of plaintiff's complaint occurred in the context of plaintiff's professional relationship with defendant. *Dorris, supra.* Plaintiff's physician had ordered that nurses were to assist plaintiff in moving to a specialized chair and in getting some form of exercise twice per day. The act of assisting a patient in plaintiff's condition, i.e., recovering from a head injury and bedridden for a prolonged period of time, to stand or to move from a bed to a chair required training and the exercise of medical judgment both to minimize plaintiff's discomfort and to guard against further injury. The trial court correctly determined that plaintiff's complaint sounded in medical malpractice rather than in ordinary negligence, *Dorris, supra; Regalski, supra,* and that plaintiff was required to file suit in accordance with the notice and waiting period provisions applicable to medical malpractice actions. [*Lewandowski*, slip op p 2.]

In *Kurc v McLaren Regional Med Ctr*, unpublished opinion per curiam of the Court of Appeals, issued November 8, 2002 (Docket No. 233936), plaintiff was treating for a broken leg. The defendant's employees were moving plaintiff from a gurney to her bed for testing, when they re-broke the leg. *Id*. at slip op p 1. The Court of Appeals concluded that the claim sounded in medical malpractice rather than ordinary negligence:

> Here, the act that formed the basis of plaintiff's complaint occurred in the context of plaintiff's professional relationship with defendant. *Dorris, supra.* Plaintiff had undergone surgery to repair her broken leg. The act of transferring plaintiff from a gurney to a bed required training and the exercise of medical judgment both to minimize discomfort and to guard against re-injuring the leg. Plaintiff's assertion that *Regalski, supra,* is distinguishable because the negligence occurred prior to the procedure being performed is without merit. The *Regalski* Court did not indicate that such a temporal distinction was the basis of its decision. The trial court correctly determined that *Regalski, supra,* controlled and that plaintiff's complaint sounded in medical malpractice rather than in ordinary

> negligence. The complaint was not filed within the two-year limitations period applicable to medical malpractice actions. MCL 600.5805(5). Summary disposition was proper. [*Kurc,* slip op p 2.]

In *Sheridan v West Bloomfield Nursing & Convalescent Center*, unpublished opinion per curiam of the Court of Appeals, issued March 6, 2007 (Docket No. 272205), the Court reversed summary disposition granted to defendants. It concluded that the case did not involve any special knowledge in moving the defendant. Instead, the case simply involved whether the nurses should have used a better grip:

> We conclude that the trial court erred in dismissing the claims alleged in plaintiff's amended complaint. Those claims alleged that defendants were negligent when two nurse assistants dropped plaintiff's decedent while moving her from her bed to a wheelchair using a "gait belt." Plaintiff is not challenging the decision to move the decedent from her bed, the decision to use a gait belt, or the manner in which the gait belt was fastened to her body. The sole issue is whether, having decided to use and having secured the gait belt, defendants acted reasonably when they failed to maintain a secure grip on plaintiff's decedent and dropped her or allowed her to fall on the floor. Resolution of this issue is within the common knowledge and experience of an ordinary juror and does not require expert testimony concerning the exercise of medical judgment. [*Id*. at slip op p 1.]

In *Howell v Macomb MRI*, unpublished opinion per curiam of the Court of Appeals, issued October 11, 2005 (Docket No. 260774), the plaintiff alleged that an MRI technician pushed or otherwise rolled the patient off a table, which caused him injury. The Court found that this sounded in ordinary negligence.

> Plaintiff's allegations do involve the positioning of a patient on an MRI table for testing. The reasonableness of the technician's actions, however, do not involve medical judgment. It takes no specialized knowledge to evaluate whether the technician unreasonably caused plaintiff to fall from the table, or whether the technician actually pushed plaintiff. Therefore, we find that plaintiff's claims sound in ordinary negligence. Accordingly, we reverse the trial court's order dismissing plaintiff's complaint. [*Id*.]

Thus, from this line of cases, the Courts have recognized a distinction between simply assisting an ordinary patient with movement and assisting someone with a complicating

condition in his or her movements. If the movements require special training, the cause of action will sound in malpractice. Generally, injuries in moving a typical patient will fall under ordinary negligence.

D. Restraints

Bryant, 471 Mich at 428 noted that use of restraints required special training. Other cases reached similar decisions. In *Flavo v Munson Med Ctr*, unpublished opinion per curiam of the Court of Appeals, issued July 29, 1997 (Docket No. 193308), a doctor ordered that the patient be restrained in a Posey restraints at all times and that his extremities be restrained as needed. A nurse apparently removed the retrains and was called out of the room briefly. The patient fell out of the bed and eventually died from the injuries. *Id*. at slip op p 1. The Court found that the claim sounded in medical malpractice:

> Furthermore, the standard of care for diagnosing, treating, observing and restraining plaintiff's decedent would not fall within the common knowledge and experience of a layperson. The proper use and selection of restraints for the decedent was a matter of professional judgment. See *Starr*, *supra*. For example, the nature and proper use of a Posey vest would not be a matter of common knowledge. In addition, the physician's orders contained the qualification "PRN," which suggests that certain types of restraints should only be used as needed. This qualification grants discretion to defendant's staff; thus, expert testimony would be required as to the appropriate exercise of that judgment. The trial court did not err in granting defendant summary disposition on plaintiff's ordinary negligence claim upon a finding that the claim should have been brought as a medical malpractice claim. [*Flavo*, slip op p 2.]

In *Brown v Henry Ford Health Sys*, unpublished opinion per curiam of the Court of Appeals, issued May 3, 2007 (Docket No. 273441), the Court reached the same conclusion regarding the plaintiff's claims that the hospital committed the intentional torts of false imprisonment and assault and battery. The plaintiff's claims were based on the hospital's decision to forcibly restrain plaintiff to a gurney. *Id*. The Court of Appeals concluded that,

because the hospital raised the defense that the restraints were medically required at the time, plaintiff could not "avoid implicating whether such confinement was medically necessary." It granted the defendants summary disposition. *Id*. at slip op p 3.[1]

In *Jackson v Harper Hosp*, unpublished opinion per curiam of the Court of Appeals, issued September 12, 2006 (Docket No. 262466), the plaintiff claimed it was negligence for the defendant not to put the bedrails back up after examining her. The Court noted that there was no evidence that the bedrails were medically required and that the claim properly sounded in ordinary negligence:

> However, the trial court properly denied the claim for summary disposition with regard to the failure to re-secure the bed railings after examination of a patient. Again, the first criterion is satisfied because a professional relationship between a patient and medical personnel is at issue. However, this issue does not necessarily raise a question involving medical judgment, but rather, comes within the common knowledge and experience of the jury. . . It should be noted that plaintiff does not allege that her medical condition required that specialized bed railings or other restraints be imposed based on her medical condition. Rather, plaintiff merely alleges that it was error to fail to return the bed railings after a check of her vital signs. [*Id*. slip op p 4.]

In *Sinclair v William Beaumont Hosp*, unpublished opinion per curiam of the Court of Appeals, issued December 18, 2003 (Docket No. 242485), the plaintiff claimed that the hospital committed negligence in failing to supervise and restrain the decedent. The Court concluded that the claim sounded in malpractice:

> When and under what circumstances a patient subject to bouts of dementia requires supervision is beyond the knowledge of the ordinary layman. In addition, because the physician's orders specified the use of restraints on an as-needed

[1] But see *Lewis v St John Hosp*, unpublished opinion per curiam of the Court of Appeals, issued June 23, 2005 (Docket No. 252712) where the patient was killed while struggling with a security guard that was attempting to restrain him. The Court noted that there was evidence that a doctor ordered the patient restrained. But it concluded that the claim sounded in ordinary negligence because the doctor did not order "*the particular facedown restraining procedure that was employed by the security guards.* The security guards, and not medical professionals, allegedly caused the problems and asphyxiation that occurred during the restraining procedure." *Id.* at slip op p 3 (emphasis original).

> basis, the decision whether to restrain plaintiff's decedent at any given time involved the exercise of independent judgment also beyond the ken of the ordinary layman. [*Id*.]
>
> From these cases, the key point is the medical necessity of the restraints.

E. Keeping the Patient Clean

In *Davis v Botsford Gen Hosp*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2005 (Docket No. 250880), the Court addressed whether the following claims sounded in ordinary negligence or medical malpractice:

> h. The defendant failed to adequately and competently provide proper hygiene for plaintiff's decedent in that defendant failed to bathe plaintiff's decedent on a regular basis and failed to properly clean and change her after she soiled herself;
>
> i. The defendant failed to adequately and competently keep plaintiff's decedent's surroundings clean and sterile as necessary for a patient in plaintiff's decedent's medical condition;
>
> j. The defendant failed to adequately and competently change and clean plaintiff's decedent's bed linens and clothes as is necessary for a patient in plaintiff's decedent's medical condition [*Id*. at slip op p 1.]

The Court concluded that the latter two issues sounded in medical malpractice because "those allegations would require assessment of the risks and benefits of the level of sterility and cleanliness needed for a patient 'in decedent's medical condition.'" *Id*. at slip op p 2. But it concluded that count h sounded in ordinary negligence:

> As in the "fail to take steps" claim in *Bryant,* "the fact finder can rely on common knowledge and experience in determining whether defendant ought to have made an attempt to reduce the a known risk of ... harm to one of its charges ." *Bryant, supra* at 431. Further, "no expert testimony is required here in order to determine whether defendant was negligent in failing to respond after its agents noticed" the conditions plaintiff claims existed. *Id*. at 431. While the causation and damages elements of plaintiff's claim may require medical-expert testimony, it is the element of "risk assessment" that is determinative of whether an action sounds in medical malpractice or ordinary negligence, i.e., whether medical judgment is necessary to determine if there was a breach of duty. See *Bryant,*

supra at 429-430. Therefore, we conclude that allegation "h" sounds in ordinary negligence. [*Davis*, slip op p 2.]

F. MCPA

In *Tipton v William Beaumont Hosp*, 266 Mich App 27; 697 NW2d 552 (2005), the plaintiff attempted to bring a Michigan Consumer Protection Act claim against the hospital and doctor that delivered her child. Plaintiff alleged a common law and statutory duty to warn her that the doctor, who was recommended by the hospital, had been involved in past medical malpractice claims based on birth trauma. *Id*. at 30. Following the guidance of *Bryant*, the Court concluded that the case sounded only in medical malpractice, but it indicated that claims could be made under the MCPA in some situations. "This is not to say that claims against medical professionals could never be brought under the MCPA. Nonetheless, where the representations or omissions implicate a medical professional's ability to provide medical care and damages resulting from that care, the case raises questions of medical judgment and the gravamen of the case is medical malpractice." *Id*. at 36. The Court indicated that the commercial side of the medical business could give rise to a MCPA claim:

> The conduct plaintiff explicitly complained of in her complaint is Beaumont and Check's failure to inform her of Check's prior involvement in medical malpractice lawsuits, while they each made representations about his qualifications. This conduct, by itself, relates to the commercial aspect of the practice of medicine because the representations are used to induce a prospective patient to choose a doctor. The alleged representations and omissions did not occur within the course of a professional relationship because they occurred before plaintiff chose Check as her doctor. [*Id*. at 34-35.]

But the Court stated that the gravamen of the plaintiff's complaint did not focus on the commercial side of the relationship. Instead, she raised claims of loosing the child and other pain and suffering that arose during the course of the professional relationship. *Id*. at 35-37.

G. Misdiagnosis/Misinforming Patient

Given the above-discussed precedent, mistakes in diagnosis obviously fall under malpractice rather than ordinary negligence. Expert testimony would be necessary to arrive at a correct diagnosis. The Court of Appeals found this point obvious in *Adkins v Annapolis Hosp*, 116 Mich App 558; 323 NW2d 482 (1982), affirmed *Adkins*, 420 Mich 87. In that case, the patient went to the hospital with a broken foot. The hospital failed to find the break and told him that his foot was not broken. *Adkins*, 116 Mich App at 560-561. The plaintiff alleged negligence in the failure to diagnose and inform him of the break. The Court rejected the claim. "In order to prove this allegation, expert testimony is probably required to establish the standard of care expected in examining x-rays." *Id*. at 564.

H. Professional Liability Insurance and "Professional Service"

In *Hilderbrandt v Rumzey and Sons Construction*, unpublished decision *per curiam* of the Court of Appeals, issued June 5, 2001 (Docket No. 220340), the Court of Appeals dealt with a general liability insurance policy that excluded coverage for professional liability in the context of engineering and construction work. The policy had an exclusion which stated that no coverage applied for bodily injury, property damage, personal injury, or advertising injury arising out of "the rendering or failure to render any professional service by or for you." *Id*. at slip op p. 5. The question before the Court was whether the project engineer's monitoring of a project to ensure compliance with contract specifications amounted to a professional service. *Id.* at slip op p. 4. The Court concluded that it did. In reaching this decision, the Court indicated that the specific activity involved should be the focus of the Court's analysis rather than a review of all the activities performed or failed to be performed by the insured. In addition, the Court examined the nature of the act or omission involved, rather than the title or character of the

person who performed or failed to perform the act. Under this specific view, the case involved a professional service:

> Application of the exclusion requires an examination of the nature of the act or omission involved, rather than the title or character of the person who performed or failed to perform the act . . . .
>
> We agree with defendant that although one must look to the act or omission involved, the Michigan cases reveal a broad view of the term "professional services," and that it is not dispositive that one need not be an engineer to recognize a MIOSHA violation in trenching. Assuming ETC had a duty to recognize and advise regarding such a violation, the failure to do so involves a failure to render the professional inspection and supervision services assumed under the contract. The recognition of such a violation involves some specialized knowledge and expertise in the area of trenching for water main replacement, which was allegedly to have been provided by ETC under the contract. We conclude that under Michigan case law the exclusion is not ambiguous, and the circuit court erred in concluding that the allegation in the underlying complaint did not fall within the exclusion. [*Id.* at slip op p. 13-14.]

While this case dealt with a distinct concept from the cases discussed above, the general focus is very similar. The Court focused on whether expertise and specialized knowledge were involved in the decision. Generally, this is the same focus that the *Bryant* test seeks to discern.

In *Bernthal v Aetna Cas & Surety Co,* 195 Mich App 501; 491 NW2d 236 (1992), nullified by 444 Mich 1216 (1994)[2] the Court of Appeals addressed a general liability insurance policy purchased by an optometrist. The insurance policy excluded coverage for an accident or injuries caused by rendering or failing to render a "professional service." *Id.* at 502. The case

[2] The Court of Appeals decision in *Bernthal* was not vacated. Instead the Supreme Court merely held that the opinion no longer carried precedential effect. 444 Mich 1216. *Bernthal* falls into a string of 18 cases in which the Michigan Supreme Court decided to "depublish" Court of Appeals opinions. See *People v Eullah,* 216 Mich App 669, 680, n 3; 550 NW2d 586 (1996). The Supreme Court gave no reason why it decided to turn these cases into unpublished opinions. And decision to do so was highly contested. See statement of Levin, J., 444 Mich 1216. Given that the opinion was not vacated and the Supreme Court gave no explanation for its actions, the order cannot be seen as a disapproval of the Court of Appeals ruling. Instead, more likely explanation is that the Supreme Court felt that the opinion did not meet the requirements of MCR 7.215(B), which sets the standard for publication. That is, the Supreme Court likely believed that the case did not deal with a new rule of law requiring publication. This view is supported by the fact that subsequent Court of Appeals cases has found *Bernthal* to be persuasive precedent.

involved an underlying accident in which the optometrist's patient fell while attempting to sit down in the examination chair. The lock on the chair was not put in place to prevent it from rotating. *Id*. at 502-503. The Court of Appeals concluded that the use and maintenance of the examination chair was part of the "professional service." The Court reasoned:

> In the underlying action, Hugaert was injured when the examination chair rotated as she was attempting to sit down to have her eyes examined by plaintiff. The examination chair was a piece of specialized equipment used by plaintiff in examining his patients. We believe that, as in *Michota*, the safe operation of the examination chair was part of the plaintiff's professional service. Therefore, Hugaert's injuries arose from the rendering of or the failure to render a professional service. [*Id.* at 504.]

In *Bernthal* like in *Hildebrandt*, the Court noted the specialized nature of the service. *Bernthal* also focused on the fact that the plaintiff was injured in the course of treatment. In this way, it is similar to the above noted cases dealing with the *Bryant* test.

I. Summary

As can be seen from this review, many of these cases could go either way.

See *Centennial Ins Co v Nayer, Tiseo and Hindo, Ltd*, 207 Mich App 235, 239; 523 NW2d 808 (1994) and *Hildebrandt.*