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# Legal Briefs

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## Hospital regulations: Potential evidence of negligence

In a recent "Legal Briefs" column, a Georgia Supreme Court decision about a violation of a statute governing the supervision of student nurse anesthetists administering anesthesia was discussed. The legal principle focused on in that article was negligence *per se*. By way of review, when a legislature establishes a minimum standard of conduct embodied in a statute intended to protect a certain class of persons from a foreseeable harm or injury, a violation of that statute constitutes negligence as a matter of law. Thus, negligence is not a matter to be decided by a jury, but rather is a legal conclusion derived solely from the violation.

This current column will explore first, whether the principle of negligence *per se* can be extended to violations of hospital regulations and second, what role hospital regulations play in establishing negligence.

### Can negligence *per se* be extended to hospital regulations?

The issue of whether the principle of negligence *per se* can be extended beyond statutes to hospital regulations has come before courts in numerous states and at the federal level. Although the case law represents a wide range of hospital regulations, the result is the same. Courts are unwilling to expand the principle of negligence *per se* beyond its application to statutes and governmental regulations. One possible rationale for this result is that the courts grant deference to the legislature's determination of what constitutes a particular standard of conduct as a matter of public policy. The courts do not recognize nongovernmental regulations as rising to the level of public policy.

### **Williams v. St. Claire Medical Center**

For example, in *Williams v. St. Claire Medical Center*, 657 S.W.2d 590 (Ky. Ct. App. 1983), the issue presented to the court was whether a hospital owes a duty to its patients to enforce its policies and bylaws and if so, whether a violation of these policies and bylaws constituted negligence *per se*. The patient in this case suffered permanent brain damage while being administered an anesthetic by an uncertified nurse anesthetist.

The hospital's policy at the time of the incident was that anesthetics were to be administered by a CRNA or a qualified physician. In addition, CRNAs were required to be supervised by the chairman of Anesthesia Services and be in communication with an anesthesiologist and surgeon or obstetrician, except in emergency procedures when an anesthesiologist was not available. At the time of the incident, the hospital, contrary to its own policies, did not have an anesthesiologist on staff and the nurse anesthetist was not a CRNA. The nurse anesthetist graduated from school one month prior to the incident and had not yet taken the examination for certification. He was, however, authorized by the hospital to administer anesthesia under the supervision of a CRNA.

The *Williams* court held that when a patient consents to and authorizes an operation, she or he thereby accepts all the rules and regulations of the particular hospital at which the operation is performed. The *Williams* court further held that while a patient must accept the hospital's particular rules and regulations, the patient should be able to rely on the hospital to

follow its rules and regulations, ostensibly established for the patient's care. After the *Williams* court concluded that the hospital owed a duty to its patients to adhere to its own policies, it allowed the admission of written hospital policies as evidence of the hospital's negligence. The plaintiff in this case argued that the hospital's violation of its own policies constituted negligence *per se*. The *Williams* court, however, refused to extend this principle to the hospital's policies and allowed only that the policies be admitted as evidence of negligence.

### **Castillo v. U.S.**

In *Castillo v. U.S.* 406 F. Supp. 585 (N.M. 1975), a federal court rejected the argument that violations of a hospital manual governing psychiatric services constituted negligence *per se*. The manual required notification of patients' guardians and/or next of kin when the staff discovers that a patient is missing. The plaintiff sued the hospital for the staff's failure to notify her of her brother's departure from the hospital's psychiatric ward prior to his suicide. The plaintiff claimed that the violation of this policy was negligence *per se* and that the hospital, therefore, was liable for her brother's death.

The *Castillo* court rejected this argument and interpreted the manual to require notification only in certain circumstances. The *Castillo* court did note, however, that even if the manual was interpreted as the plaintiff requested, the principle of negligence *per se* did not apply. The *Castillo* court held that this principle only applied to cases in which a New Mexico state statute or municipal ordinance has been violated. The *Castillo* court did say that the regulations should have been considered as a factor relevant to determining the extent of the duty owed to the patient and whether the duty was breached. The regulations were not regarded as conclusive but rather as evidence of negligence.

Although the plaintiff appealed this case, the appeals court affirmed the trial court's decision and reiterated that the manual did not rise to the level of a legislative statute, ordinance or administrative agency regulation and that "any failure on the part of the hospital staff to strictly follow the procedure is, at most, only some evidence of negligence . . . *Castillo v. U.S.*, 552 F.2d 1385, (10th Cir. 1977).

### **Johnson v. St. Bernard Hospital**

In *Johnson v. St. Bernard Hospital*, 399 N.E.2d (Ill. 1979), the court was asked to determine the role of the hospital's bylaws in determining the duty owed by the hospital to its patients. In *Johnson*, a patient was taken to the emergency room of the hospital after an automobile accident. Approximately two and a half months after admission to the hospital, it was discovered

that the patient was suffering from a fractured hip. The staff neurosurgeon requested a consultation from the staff orthopedic surgeon. For some reason, the orthopedic surgeon refused this request. In accordance with the hospital's bylaws, the neurosurgeon notified the hospital administration of the orthopedic surgeon's refusal. The hospital administration advised the neurosurgeon that it could not force the orthopedic surgeon to do the consultation and that someone from outside the hospital should be brought in.

The hospital bylaws imposed an obligation on all physicians granted staff privileges to comply with requests for consultation and granted the hospital administration authority to take corrective action whenever the professional conduct of a staff physician was considered lower than the standards of the medical staff or when action was required to be taken immediately in the best interests of patient care. In citing *Darling v. Charleston Community Memorial Hospital* (1965), 33 Ill.2d 326, 211 N.E.2d 253, cert. denied, 383 U.S. 946, 86 S.Ct. 1204, 16 L.Ed.2d 209, the *Johnson* court stated the following:

*. . . the court in Darling first determined that regulations, standards and bylaws were admissible on the issue of the standard of care which the hospital owes its patient . . . The bylaws performed the same function as evidence of custom and practice. Although the bylaws did not conclusively determine the standard of care, they were evidence of the responsibility which the hospital assumed for the care of the patient.*

Thus, the *Johnson* court held that the violation of the hospital bylaws did not constitute negligence *per se*, but that they were evidence of the standard of care established by the hospital.

### **Lucy Webb Hayes National Training School for Deaconesses and Missionaries v. Perotti**

In *Lucy Webb Hayes National Training School for Deaconesses and Missionaries v. Perotti*, 419 F.2d 704 (D.C. Cir. 1969), the plaintiff suing for the death of her husband caused by a suicidal leap through a window after he walked out of the closed psychiatric ward of a hospital, introduced hospital directives that require a staff member to accompany any patient who left the closed ward. The plaintiff argued that failure to follow this policy constituted negligence *per se*.

While the court did not recognize negligence *per se* in this case, it did find that the hospital directives were evidence which a jury could reasonably consider in determining whether the hospital was negligent.

## The role hospital regulations play in establishing negligence

While courts refuse to extend the principle of negligence *per se* to hospital regulations, the fact that courts are willing to allow them to be admitted as evidence of negligence should put hospitals on notice that these regulations ought to be carefully scrutinized. Hospitals should promulgate regulations and establish policies only to the extent that the public's health and safety is protected.

In bringing a cause of action for negligence against a hospital, a plaintiff will first look at any statutes that establish a standard of care as determined by the legislature. If such a statute exists, the plaintiff will argue that a violation of that statute is negligence *per se*. If a statute does not exist, then the plaintiff will look to the standard of care as established by the custom and practice in the community. In order to demonstrate such a standard of care, a plaintiff may introduce hospital regulations as evidence. Thus, by adopting regulations that are not strictly designed to protect a patient's health and safety, a hospital may be acting against its own interests.

Even when a hospital complies with its own standards, it does not necessarily avoid liability. The court in *St. Louis-San Francisco Railroad Company, et al. v. White*, 369 So.2d 1007 (D. Ct. of App., 1st D. of Fl., 1979), held that evidence of non-compliance can be considered by the jury which may, but need not, find negligence as a result of the failure to follow a generally recognized safety rule. Conversely, it held that "it would appear proper to instruct that compliance with a standard is non-conclusive evidence of freedom of liability." Thus, even though a hospital may promulgate regulations and strictly adhere to them, this does not necessarily mean that the hospital has avoided liability. The hospital may have acted negligently in some other man-

ner or the rules and regulations promulgated by the hospital may not rise to the standard of conduct established in that community.

These principles have direct application in the area of anesthesia. Some hospitals have adopted restrictions on nurse anesthetists. These restrictions, having no relevance to patient safety, are ignored. In the event of an otherwise unavoidable accident, the plaintiff's attorney can be expected to argue that the failure to observe hospital rules, even those with only an economic and not a patient safety rationale, is evidence of negligence.

## Conclusion

In conclusion, the principle of negligence *per se*, which states that a violation of a statute that establishes a standard of care conclusively establishes negligence, does not apply to nongovernmental regulations. A violation of these regulations, however, is admissible in court as some evidence of negligence. For this reason, among others, hospital regulations and policies should be carefully scrutinized.

A hospital should not promulgate regulations under the illusion that by having them in place, it can avoid liability altogether or shift liability to the health care providers practicing in that hospital. Regulations should be promulgated by a hospital only when it can identify a clear and specific protection for patient health and safety. Otherwise, a hospital may be adding to a plaintiff's case by promulgating unnecessary regulations that may be admitted into evidence to establish negligence.

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