

Medical Negligence vs. Premises Liability *When Harm Occurs in a Hospital*

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When a patient is harmed during a medical procedure, a patient may elect to file a medical negligence claim against his physician and the health care facility in which the procedure occurred. However, when a patient is harmed during a hospitalization, should the claim still be pursued as one of medical negligence or is it more appropriately a premises liability claim?

Indiana courts have been asked to determine the substance and resulting remedies of these claims, which decisions have been as varied as the unique factual circumstances presented to the courts. What about a patient who slips and falls in the hospital hallway; a patient who falls to the floor when a hospital bed breaks; or a patient who physically attacks or engages in an unwanted sexual encounter with another patient? How should these claims be pursued?

The answer as to whether a claim sounds in medical negligence or premises liability has far-reaching implications for the attorney. Which insurance carrier and insurance coverage is applicable: the hospital's general liability coverage or its medical malpractice insurance? Procedurally, should the case proceed through the medical review panel process pursuant to the requirements of Indiana's Medical Malpractice Act or can it be filed directly in state court as an ordinary negligence claim? Are there any limits to the amount of recoverable damages? If the claim is properly a medical negligence claim, then the Medical Malpractice Act limits recoverable damages. With an ordinary negligence claim, there is no ceiling on a potential judgment and potential liability.

The substance of the claim also necessarily affects the type of discovery that can and should be conducted. If a medical negligence claim, then the injured patient's medical records are relevant. If a premises liability claim or failure to protect a patient from another patient's attack, then do the nonparty patient's records become relevant; and if so, are they appropriately discoverable under HIPAA? Knowing whether you are defending a medical malpractice claim or a premises liability claim affects every other decision in the litigation, which makes it imperative to resolve the answer as soon as possible.

Indiana courts have given us no definitive answer yet as to whether any given set of facts will be treated as a medical negligence claim or as a premises liability claim. The Indiana Supreme Court's recent decision in *McSwane v. Bloomington Hospital*, 916 N.E. 2d 906 (2009), refused to extend a hospital's duty of care to an off-premises attack of a patient. However, when the

attack occurs on hospital premises, aren't the hospital staff's decisions as to where to house the patient, what medications to give the patient, and what level of supervision or protection to give to a patient medical decisions? The Medical Malpractice Act defines *health care* as decisions with respect to a patient's treatment or confinement, which will be treated as a medical negligence claim. IND. CODE § 34-18-2-13. On the other hand, the Indiana Court of Appeals has held that the Medical Malpractice Act was designed to exclude conduct "unrelated to the promotion of a patient's health or the provider's exercise of professional expertise, skill, or judgment." *Murphy v. Mortell*, 684 N.E.2d 1185, 1188 (Ind. Ct. App. 1997).

Which decisions regarding patient care and safety are medical decisions? As defense lawyers, our argument is that all decisions regarding a patient's care and safety that occur on hospital premises are necessarily medical decisions. And with that determination, the claim can be pursued as a medical negligence claim with all of the duties, protections, and liability limitations afforded a hospital or health care facility by the Indiana Medical Malpractice Act.

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