DEFENSE OF PATIENT'S CONTRIBUTION TO FAULT IN MEDICAL MALPRACTICE ACTIONS

INTRODUCTION

Medical malpractice is a major area of tort litigation and a growing concern for both the medical and legal professions. Throughout the late 1960s and the early 1970s, a marked rise developed in the amount of medical malpractice litigation, the damages awarded, and the cost of medical malpractice insurance. In the late 1980s, another escalation occurred, with further increases in insurance rates, physician boycotts, and public demands for legislative reform. This Comment examines the defense of a patient's contribution to fault in medical malpractice actions.

This Comment first details the recent Supreme Court of Nebraska case, Jensen v. Archbishop Bergan Mercy Hospital. This Comment will then examine the analyses of situations in which the patient's actions create a bar to recovery, the patient's actions serve to reduce the damages awarded, and the patient's actions are not the proximate cause of the injury suffered and, thus, do not affect the malpractice claim. The varying actions that may constitute the defense of patient's contribution to fault are categorized, and these categories are discussed in relation to tort doctrines. This Comment then discusses the potential effect of implementing the Nebraska comparative negligence statute, Legislative Bill 88, on decisions like Jensen. Finally, this Comment examines methods of utilizing pa-

1. See generally Phelan, Two Hot Areas in Medical Malpractice for the 1990s, 24 CREIGHTON L. REV. 1261 (1991) (exploring the two “hot areas” in medical malpractice law of gatekeeper liability and medical education liability).
7. See infra notes 106-233 and accompanying text.
8. L.B. 88, 92d Leg., 1st Sess., 1991 Neb. Laws 185. This Comment is not intended to provide an exhaustive discussion of the ramifications of L.B. 88 on tort litigation, but briefly addresses the initial problems posed by the adoption of this statute. See infra notes 251-52, 254-55 and accompanying text.
tient's contribution to fault in medical malpractice actions.9

FACTS AND HOLDING

THE MEDICAL HISTORY OF LAWRENCE JENSEN

In 1976, Lawrence Jensen, a twenty-one-year-old, six-foot-three-inch tall male who weighed 263 pounds, sought medical assistance from Dr. Richard E. Peters after suffering a back injury while playing college football.10 Jensen underwent back surgery, following which Dr. Peters diagnosed Jensen as having a pulmonary embolism.11

In 1978, two years after Jensen's back surgery, Dr. Peters treated Jensen, then weighing 291 pounds, for abdominal difficulties.12 Dr. Peters instructed Jensen to lose weight.13 Three years later, Dr. Peters admitted Jensen to Archbishop Bergan Mercy Hospital ("Bergan Mercy Hospital") in Omaha, Nebraska, for abdominal and back pains.14 At that time, Jensen weighed 326 pounds.15 Dr. Peters diagnosed Jensen as having acute colitis, and Jensen remained hospitalized for several days.16

THE DEMISE OF LAWRENCE JENSEN

In January of 1983, Jensen injured himself in a sledding accident and was admitted, under Dr. Peters's care, to Bergan Mercy Hospital.17 At that time, Jensen weighed 290 pounds.18 Jensen had suffered a compression fracture of a lumbar vertebra, and he received heparin to prevent blood clots.19 A few weeks later, Jensen was readmitted to Bergan Mercy Hospital because he was suffering from

9. See infra notes 236-44 and accompanying text.
11. Id. A pulmonary embolism is an obstruction in the arteries or branches of the lungs. The cause of a pulmonary embolism is when a thrombosis, a blood clot, detaches and becomes an embolism, a mass of undissolved blood clots, which travels through the bloodstream to the lungs. AM. JUR. P.O.F. 3D Taber's Cyclopedic Medical Dictionary 531, 1731 (15th ed. 1988).
12. Jensen, 236 Neb. at 2, 459 N.W.2d at 180.
13. Id.
14. Id. at 2-3, 459 N.W.2d at 180.
15. Id. at 2, 459 N.W.2d at 180.
16. Id. at 3, 459 N.W.2d at 180. Colitis occurs when the colon is inflamed. AM. JUR. P.O.F. 3D Taber's Cyclopedic Medical Dictionary 352 (15th ed. 1988).
17. Jensen, 236 Neb. at 3, 459 N.W.2d at 180.
18. Id.
19. Id. Heparin sodium prevents or delays blood coagulation and is used in the treatment and prevention of embolism and thrombosis. AM. JUR. P.O.F. 3D Taber's Cyclopedic Medical Dictionary 103, 754 (15th ed. 1988).
pain in his left leg. After four days, Jensen continued to complain of pain in his leg and discomfort in the chest area. On February 15, 1983, Jensen began to suffer nausea, his blood pressure dropped, and he suffered a “petit mal” seizure. The attending nurse telephoned Dr. Peters, who ordered that Jensen be treated with morphine and moved to the intensive care unit. Shortly after, Jensen became cold, clammy, cyanotic, and eventually unresponsive. Efforts to revive Jensen were unsuccessful. Lawrence Jensen died at age twenty-seven from a cardiac arrest due to a pulmonary embolism.

THE ACTION FOR THE WRONGFUL DEATH OF LAWRENCE JENSEN

C.E. Jensen, father of the decedent and special administrator of the estate of Lawrence Jensen, brought a medical malpractice action against Bergan Mercy Hospital in the District Court for Douglas County, Nebraska. The plaintiff alleged that the hospital nursing staff had negligently failed to monitor Jensen's condition, had failed to inform Dr. Peters about Jensen's condition, had failed to treat Jensen, and had failed to obtain further professional medical care for Jensen during Dr. Peters's absence from the hospital. The hospital denied any negligence and alleged that “the injuries, complications and subsequent death of [Lawrence Jensen] was [sic] partially due to his own negligence which caused and contributed to cause said injuries and complications and death.”

Evidence presented at trial indicted that Dr. Peters had noted Jensen's weight problem and that he had advised Jensen to reduce his weight. Expert testimony established the health risks of obese-
ity, including increased possibility of blood clots if an overweight patient is injured and inactive, thromboembolic disease, hypertension, and decreased life expectancy.\textsuperscript{32} The plaintiff and defendant presented conflicting evidence on whether the hospital staff had met the appropriate standard of care in treating Lawrence Jensen.\textsuperscript{33}

Notwithstanding the plaintiff's objections, the trial court instructed the jury on the issue of contributory negligence as follows: "Defendant alleges that the injuries, complications and subsequent death of Mr. Jensen were partially due to his own negligence which caused and contributed to cause said injuries and complications and death, and whose negligence was more than slight and sufficient to bar recovery."\textsuperscript{34} The court further instructed:

It is the duty of a patient to follow all reasonable and proper advice and instructions given him by his physician regarding the patient's care, activity and treatment. If the death of the plaintiff's decedent resulted in whole or in part because the patient failed to follow his physician's instructions, then to that extent the plaintiff may not recover damages against the defendant hospital.\textsuperscript{35}

The jury awarded a general verdict for the defendant, Bergan Mercy Hospital.\textsuperscript{36} Jensen's administrator appealed the verdict to the Supreme Court of Nebraska.\textsuperscript{37}

The supreme court held that the defense of a patient's contributory negligence is inapplicable if the patient's conduct merely furnishes the need for medical attention.\textsuperscript{38} The court stated that Jensen's failure to lose weight merely furnished the occasion or condition for medical attention, which later became the grounds for a medical malpractice action against Bergan Mercy Hospital.\textsuperscript{39} The court found that although Jensen's weight problem may have been a causal factor in his subsequent pulmonary embolism, his conduct was not the proximate cause with respect to the medical malpractice com-

\textsuperscript{32} Id. at 4, 459 N.W.2d at 181. See supra note 21.
\textsuperscript{33} Jensen, 236 Neb. 4, 459 N.W.2d at 181.
\textsuperscript{34} Id. at 5, 459 N.W.2d at 181.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 2, 459 N.W.2d at 179.
\textsuperscript{38} Id. at 15, 459 N.W.2d at 187. Because this Comment considers only the issue of patient's contribution to fault, the court's discussion and review of the proposed jury instruction regarding hospital liability will be only summarily addressed. In dicta, the court examined the plaintiff's argument that the trial court should have instructed the jury that hospital employees have a duty to intervene when a physician provides improper treatment. The court stated the general rule that the hospital staff lacks the authority to depart from the attending physician's orders for a patient. Id. at 7-8, 459 N.W.2d at 182-83.
\textsuperscript{39} Id. at 15, 459 N.W.2d at 187.
mitted by the Bergan Mercy Hospital staff. The court held that because the evidence did not support a finding of contributory negligence, the trial court had erred in submitting the issue of contributory negligence to the jury. The trial court's judgment was reversed and the action was remanded for a new trial.

BACKGROUND

In resolving a medical malpractice case, the interwoven complexities of contributory negligence or comparative negligence, proximate cause, and avoidable consequences must be clarified. The following sections provide a short summary of tort law definitions that apply to the defense of medical malpractice cases.

It is also useful to examine a series of cases that demonstrate types of patient behaviors that are alleged to be grounds for patient's fault. Illustrative cases in these varying categories of patient actions and behaviors that provide the basis for plaintiff's fault will follow the discussion of tort doctrines.

TORT DOCTRINES

CONTRIBUTORY NEGLIGENCE IN MEDICAL MALPRACTICE ACTIONS

Contributory negligence exists when a plaintiff fails to act with the care required of a reasonably prudent person, and the plaintiff's conduct cooperates and contributes as the legal cause of the harm suffered. Various policy theories have attempted to account for the

40. Id. at 15-16, 459 N.W.2d at 187. See supra note 11.
41. Jensen, 236 Neb. at 16, 459 N.W.2d at 187.
42. Id.
44. See infra notes 47-59, 75-80, 82-86, 88-102 and accompanying text. The plaintiff must plead and prove the following elements in a medical malpractice action: that the physician owed a duty to exercise a certain degree of care in treating the patient; that the treatment fell below this standard and proximately caused the patient to suffer injuries; and that these injuries entitle the plaintiff to an award of damages. Corlett v. Caserta, 204 Ill. App. 3d 403, —, 562 N.E.2d 287, 261 (1990).
45. See infra notes 109-233 and accompanying text.
46. Id.
47. RESTATEMENT (SECOND) OF TORTS § 463 (1965). See Weinstock v. Ott, 444 N.E.2d 1227, 1239-40 (Ind. Ct. App. 1983) (holding that in assessing contributory negligence, if the patient suffered from a physical infirmity which impaired his ability to act as an ordinary reasonable person, then the proper test is a reasonable person under the same infirmities and disabilities in like circumstances); PROSSER AND KEETON ON TORTS § 65, at 451 (W. Keeton 5th ed. 1984); 61 AM. JUR. 2D Physicians, Surgeons, and Other Healers § 302, at 448 (1981). The Restatement defines contributory negligence as "conduct on the part of the plaintiff which falls below the standard to which he should
impetus behind the common-law doctrine of contributory negligence. Nevertheless, the effect of contributory negligence is to serve as a "gatekeeper." Any breach of plaintiff's duty to exercise care to protect himself prevents recovery.

In order for a defendant to establish either contributory or comparative negligence, every element of negligence must be proven. The defendant must establish that the patient owes himself a duty of care, that the patient breached that duty, and that this breach was the proximate cause of the injuries sustained.

### Comparative Negligence in Medical Malpractice Actions

Comparative negligence is a legislative creation designed to alleviate the severe results of contributory negligence to plaintiffs. The elements of comparative negligence are the same as those of contributory negligence. Courts have recognized that a patient's negligent behavior, or "victim fault," becomes a complicated issue when analyzing whether the patient's negligence constitutes a bar to recovery.

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48. PROSSER AND KEETON ON TORTS, supra note 47, § 65, at 451. These explanations include: that contributory negligence is designed to punish the plaintiff's misconduct; that contributory negligence stems from the equitable principle of coming to the court with "clean hands"; and that contributory negligence is explained by many courts as an issue of proximate cause. Id. (citing Ware v. Saufley, 194 Ky. 53, 237 S.W. 1060 (Ct. App. 1922); Exum v. Atlantic Coast Line R.R., 154 N.C. 408, 70 S.E. 845 (1911); Davis v. Guarnieri, 45 Ohio St. 470, 15 N.E. 350 (1887); Gilman v. Central Vermont Ry., 93 Vt. 340, 107 A. 122 (1919); Chesapeake & Ohio Ry. v. Wills, 111 Va. 32, 68 S.E. 395 (1910); Wakelin v. London & S. W. Ry., 12 App. Cas. 41, 45 (1886)).

49. Ostrowski, 111 N.J. at —, 545 A.2d at 151.

50. Id. The author uses the pronouns "he," "his," "him," and "himself" throughout this Comment to avoid awkward grammatical structure. Such usage is not intended to convey only one gender.


52. Borenstein, 401 So. 2d at 886. See Mandery v. Chronicle Broadcasting Co., 228 Neb. 391, 400, 423 N.W.2d 115, 120-21 (1988) (noting that "[o]ne who is capable of understanding and discretion but fails to exercise ordinary care and prudence to avoid obvious dangers is negligent or contributorily negligent").

53. Ostrowski, 111 N.J. at —, 545 A.2d at 151. The Restatement notes that "In several states general statutes applicable to all negligence actions . . . have abrogated the rule stated in this Section [§ 467 Bar Against Negligent Defendant], and have substituted reduction of the damages to be recovered by the negligent plaintiff in proportion to his fault." RESTATEMENT (SECOND) OF TORTS § 467, at 516 special note (1965).

54. See supra notes 51-52 and accompanying text.

55. Argus v. Scheppegrell, 459 So. 2d 238, 242 (La. Ct. App. 1984) (rev'd, 472 So.2d 573 (La. 1985). See Ostrowski, 111 N.J. at —, 545 A.2d at 153-54. The Supreme Court of Louisiana commented that a patient's reasonably foreseeable conduct could not constitute a bar to recovery; however, the court also noted that the legislative adoption of the doctrine of comparative fault may necessitate a reexamination of this reasoning. Argus, 472 So. 2d at 574 (La. 1985).
It has been suggested that the doctrine of comparative negligence makes resolution of these problems easier because a patient's fault only serves to reduce, not bar, recovery. The preceding statement may imply that comparative negligence provides a different and more lenient standard than contributory negligence. In fact, comparative negligence leaves an avenue open to a plaintiff whose fault was less than that of the defendant, but comparative negligence does not create a distinct analytical framework. Comparative negligence serves to qualify, not to transform, contributory negligence.

NEBRASKA'S MODIFICATION OF THE COMPARATIVE NEGLIGENCE STATUTE

Throughout this country, the doctrine of comparative negligence has markedly changed the practice of tort law. One commentator noted that the principle of apportioning damage by comparative fault "is veritably sweeping the land, gobbling up much of traditional tort law as it goes."

The Legislature of Nebraska recently adopted a comparative negligence statute, Legislative Bill 88 ("L.B. 88"). The adoption of L.B. 88 will affect medical malpractice litigation in Nebraska, dra-

56. Ayus, 459 So. 2d at 243.
57. See id.
58. See Ostrowski, 111 N.J. at —, 545 A.2d at 151 (stating that comparative negligence "was designed only to leave the door open to those plaintiffs whose fault was not greater than the defendant's, not to create an independent gate-keeping function").
59. Id.
60. PROSSER AND KEETON ON TORTS, supra note 47, § 67, at 479.
61. Id.

Sec. 1. ... Actions accruing prior to such date shall be governed by the laws in effect immediately prior to such date. ... Sec. 2. ... (2) Economic damages shall mean monetary losses, including, but not limited to, medical expenses, loss of earnings and earning capacity, funeral costs. ... (3) Noneconomic damage shall mean subjective, nonmonetary losses, including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress ... Sec. 3. Any contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery. ... Sec. 4. ... In any other action involving more than one defendant, the liability of each defendant for noneconomic damages shall be joint and several and the liability of each defendant for noneconomic damages shall be several ...

Sec. 5. (1) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable ... the person's fault, if any, shall be considered in accordance with section 4 of this act [liability for economic dam-
matically revising the contributory negligence jury instructions. However, the Professional Malpractice Instructions included in Chapter 12 of the Nebraska Jury Instructions will remain unchanged.

The new comparative negligence statute, L.B. 88, affects causes of action that accrue on or after January 1, 1992. The general rule of tort law states that actions accrue at the time of injury, but this rule has been modified in some instances to provide that accrual does not begin until "the injury has manifested itself." The action accrues when the plaintiff learns, or in the exercise of reasonable diligence should have learned, of the injury and the actions that caused it. This proposition is known as the "discovery rule." The adoption of the discovery rule in Nebraska for professional negligence has been codified at Nebraska statute § 25-222, entitled "Actions on professional negligence." The discovery rule governs the accrual of a cause of action in medical malpractice actions. In medical malpractice litigation, a cause of action accrues when the plaintiff discovers the malpractice, or in the exercise of reasonable diligence, should have discovered it.

The statutory language and legislative history of L.B. 88 leave many ambiguities concerning interpretation. A threshold question is, "To which tort actions does L.B. 88 apply?" The relevant portion of the statute reads: "[T]his act shall apply to all civil actions to which
contributory negligence is a defense that accrue on or after the operative date of this act for damages arising out of injury to or death of a person or harm to property regardless of the theory of liability. There are four potential applications of L.B. 88. It may apply: (1) if the jury finds contributory negligence; (2) if the judge decides that the pleadings and evidence support contributory negligence; (3) if the defendant pleads contributory negligence as an affirmative defense; or (4) if the case is the kind of tort action that could raise a contributory negligence issue, whether or not it is present in the particular action. Legislative history indicates that L.B. 88 was intended to apply to any type of tort action where the defense of contributory negligence could apply. In other words, L.B. 88 applies to any case within the category of tort action where the defense of contributory negligence could be raised.

DISTINGUISHING COMPARATIVE NEGLIGENCE FROM AVOIDABLE CONSEQUENCES

Under the doctrine of avoidable consequences, “a plaintiff who has suffered an injury as a proximate result of a tort cannot recover for any portion of the harm that by the exercise of ordinary care he could have avoided.” The theory of avoidable consequences is rooted in a public policy—aborrence of waste. The injured party does not have a duty to act and the tortfeasor remains the proximate cause of the harm suffered, but damages recovered are limited due to the injured party's lack of care. The doctrines of comparative negligence and avoidable consequences are often confused because the common effect of each is to reduce the damages awarded. The distinction between the doctrines of comparative negligence and avoidable consequences has been further blurred by the Uniform Comparative Fault Act, which defines fault as including an “unrea-

73. Fenner interview, supra note 63.
74. Floor Debate on L.B. 88, Neb. Unicameral, 92d Leg., 1st Sess., 827 (1991) (statement of Doug Kristensen) (stating that Senator Kristensen notes “LB 88 and its joint and several provisions, with the economic, noneconomic, those will remain in there, will apply to actions to which contributory negligence is a defense.”) Senator Doug Kristensen asked, “[i]t is your intention that the phrases 'to which contributory negligence is a defense' means to the classes of torts, not the individual case at issue and at bay?” Senator Brad Ashford answered the question, “Yes, Senator Kristensen . . . that language that you referred to applies to the class of torts which are covered by the bill.” Id. at 1149-50.
75. Ostrowski, 111 N.J. at —, 545 A.2d at 151.
76. Id.
77. Id.
78. Id. at —, 545 A.2d at 151-52.
sonable failure to avoid an injury or to mitigate damages." The


80. Ostrowski, 111 N.J. at —, 545 A.2d at 152.

81. See infra notes 131-38 and accompanying text.


83. GREENING v. SCHOOL DIST. OF MILLARD, 223 Neb. 729, 735, 741, 393 N.W.2d 51, 56, 60 (1986) (holding that the evidence did not establish that the defendant's conduct of continuing physical therapy exercises was a proximate cause of the plaintiff's injuries).

84. WHITEHEAD v. LINKOUS, 404 So. 2d 377, 379 (Fla. Dist. Ct. App. 1981) (stating that the defendants confused the difference between a contributing cause in fact and a contributing proximate cause when they asserted comparative negligence based on the

PROXIMATE CAUSE IN MEDICAL MALPRACTICE CASES

Whether the controversial element of proximate cause exists is best determined by asking, "Was the defendant under a duty to protect the plaintiff against the event which did in fact occur?" Courts have stated that the three basic requirements to establish proximate cause are: (1) that the injury would not have occurred "but for" the actor's negligence; (2) that the injury was the probable and natural result of the actor's negligence; and (3) that no efficient intervening causes existed.

In deciding cases involving medical malpractice, courts have distinguished between a contributing "cause in fact" and a contributing "proximate cause." A patient's conduct may furnish the need for
medical attention—a contributing cause in fact of the condition; however, the patient’s conduct might not be the proximate cause once he enters the physician’s treatment. This distinction is relevant to medical malpractice cases because the forces set in motion by the patient come to rest in apparent safety—the expert care of a physician—and the physician’s negligence may then intervene.

COURTS’ USE OF EFFICIENT INTERVENING CAUSE

Embodied in the concept of proximate cause is the notion of the absence of efficient intervening causes. Courts have described an intervening cause as a new and independent conduct or event that is a proximate cause of the resulting injury. If an intervening cause severs the causal connection between the original conduct and the injury, it is an efficient intervening cause. In order for an act to constitute an efficient intervening cause, the actor must intervene in full control of the situation, must directly produce an injury, and the negligence must be unanticipated by the original party.

66. Whitehead, 404 So. 2d at 379; Jensen, 236 Neb. at 15-16, 459 N.W.2d at 187.
67. PROSSER AND KEETON ON TORTS, see supra note 47, § 42, at 278. See infra notes 201-26 and accompanying text.
68. RESTATEMENT (SECOND) OF TORTS § 441, at 465 (1965). The Restatement defines an intervening cause as “one which actively operates in producing harm to another after the actor’s negligent act or omission has been committed.” The Restatement defines a superseding cause as an act that breaks the connection and prevents the actor from being liable. “A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.” Id. However, courts often refer to a superseding cause as an efficient intervening cause. See infra notes 89-91 and accompanying text.

The independent intervening cause that will prevent a recovery of the act or omission of a wrongdoer must be a cause which interrupts the natural sequence of events, turns aside their cause, prevents the natural and probable results of the original act or omission, and produces a different result, that could not have been reasonably foreseen.

Foreseeability does not mean that the precise hazard or the exact consequences which were encountered should have been foreseen. Id. (quoting Harless v. Ewing, 80 N.M. 149, 151, 452 P.2d 483, 485 (Ct. App. 1969)).
71. See Zeller, 227 Neb. at 673-74, 419 N.W.2d at 658-59 (stating that the driver’s failure to use caution, not the negligence of the county in placing the stop sign, was the proximate cause of the accident); Shelton v. Board of Regents, 211 Neb. 820, 823, 320 N.W.2d 748, 752 (1982) (holding that the third party’s criminal acts constituted an intervening cause that destroyed the proximate cause of the first negligent act).
APPLICATION OF CONTRIBUTORY NEGLIGENCE AND RELATED PRINCIPLES IN MEDICAL MALPRACTICE ACTIONS

If a plaintiff fails to exercise ordinary care to ensure his own welfare, the law regards that plaintiff as the author of his own injuries.92 As with most tort actions, the issue of the plaintiff’s contribution to the harm suffered is recognized as a defense in medical malpractice cases.93

The issue of plaintiff’s fault is particularly difficult to resolve in medical malpractice actions.94 In medical malpractice cases, contributory or comparative negligence, avoidable consequences, and proximate cause are interwoven and dependent upon events that occur over time.95 Courts have noted that the general rules relating to contributory negligence must be sharpened considerably when applied to medical malpractice cases.96 Before deciding a case involving the defense of patient’s fault, courts must first clarify the sequence of events in relation to the doctrines of contributory or comparative negligence, proximate cause, and avoidable consequences.97

The general rule, set forth in Sauers v. Smits98 and reiterated in many cases and commentaries, states that in a medical malpractice action,

[the contributory negligence which prevents recovery for an injury is that which co-operates in causing the injury—some act or omission concurring with the act or omission of the other party to produce the injury (not the loss merely), and without which the injury would not have happened. A negligence which has no operation in causing the injury, but

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93. See Skar v. City of Lincoln, 599 F.2d 253, 260 (8th Cir. 1979) (stating that “[i]t is settled under Nebraska law that contributory negligence is a valid defense in a medical malpractice case”); 61 AM. JUR. 2D Physicians, Surgeons, and Other Healers §§ 302-03, at 448-50 (1981).
96. Flynn v. Stearns, 52 N.J. Super. 115, 122, 145 A.2d 33, 37 (App. Div. 1958). See also Cowan, 215 N.J. Super. at —, 522 A.2d at 448-49 (stating that the sharpening of the contributory negligence rules in medical malpractice actions has particular efficacy in instances where the defendants’ duty encompasses the responsibility to safeguard the patient from the risk of self-inflicted injury which was reasonably foreseeable to the defendants); Bird v. Pritchard, 33 Ohio App. 2d 31, —, 291 N.E.2d 769, 771-72 (1973) (discussing the sharpening of the general rules of contributory negligence and noting that in medical malpractice cases, care must be taken to tailor the jury instructions to fit the facts of a particular case).
97. Ostrowski, 111 N.J. at —, 545 A.2d at 151.
98. 49 Wash. 557, 95 P. 1097 (1908).
which merely adds to the damages resulting, is no bar to the action, though it will detract from the damages as a whole.

DEFENDANTS’ BURDEN OF PROOF IN MEDICAL MALPRACTICE ACTIONS

The defense of contributory negligence in medical malpractice actions is limited due to the disparity in medical knowledge between the patient and the physician, and to the patient’s justifiable reliance on the expert’s recommendations and care. The defendant bears the burden of pleading and proving the plaintiff’s contributory negligence. In some cases, the court has held that the defendant must

99. Sauers, 49 Wash. at 561, 95 P. at 1099 (quoting Gould v. McKenna, 86 Pa. 297 (1878)). See Flynn, 52 N.J. Super. 115, 145 A.2d 33 (1958). See also Bird, 33 Ohio App. 2d at __, 291 N.E.2d at 771 (stating that in order to constitute a defense in medical malpractice actions, the contributory negligence must be “concurrent, direct and proximate”); Sendejar v. Alice Physicians & Surgeons Hosp., Inc., 555 S.W.2d 879, 885 (Tex. Civ. App. 1977) (finding that there was no indication that the plaintiff was guilty of any negligence that “occurred simultaneously with or co-operating with” the fault of the defendants); 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers § 302, at 449 (1981); Annotation, Contributory Negligence or Assumption of the Risk as Defense in Action Against Physician or Surgeon for Malpractice, 50 A.L.R.2d 1043, 1059 (1956). In order for a patient’s negligence to bar to recovery it: (1) must occur simultaneously and in cooperation with the defendant’s fault; (2) must constitute an efficient contributing cause of the injury; and (3) must comprise an active element in the creation of the cause of action claimed. If the patient’s fault occurs after the physician malpractice and merely aggravates the harm caused by the physician, then only the amount of the patient’s damages are affected. Flynn, 52 N.J. Super. at __, 145 A.2d at 137.

100. See Fairchild v. Brian, 354 So. 2d 675, 680 (La. Ct. App. 1978) (finding plaintiff’s failure to seek further medical attention did not constitute contributory negligence because her optometrist had led her to believe that a qualified medical doctor had diagnosed her problem). See also Johnson v. United States, 271 F. Supp. 205, 211 (W.D. Ark. 1967) (finding no patient fault for not consulting another physician as the patient had no reason to believe that his continued distress was caused by the physician’s negligence); Owens v. Stokoe, 140 Ill. App. 3d 355, 485 N.E.2d 337, 340 U.S. 892 (1950). The court stated in a medical malpractice action against a “drugless healer”:

It is not a part of the duties of a patient to distrust his physician, or to set his judgment against that of the expert whom he has employed to treat him, or to appeal to other physicians to ascertain if the physician is performing his duty properly. The patient is not bound to call in other physicians, unless he becomes fully aware that the physician has not been, and is not, giving proper treatment.

Kelly, 36 Wash. 2d __, 219 P.2d 90 (quoting Halverson v. Zimmerman, 60 N.D. 113, 125, 232 N.W. 754, 759 (1930)).

101. Maertins v. Kaiser Found. Hosps., 162 Cal. App. 2d 661, 328 P.2d 494, 497 (1958) (finding that when a defense is neither raised in the pleadings nor at trial, it is erroneous to instruct the jury on the defense of contributory negligence); Largess v. Tatem, 130 Vt. 271, __, 291 A.2d 398, 403 (1972) (stating that the burden of establishing plaintiff’s negligence is on the defendant); PROSSER AND KEETON ON TORTS, supra note 47, § 65, at 451; RESTATEMENT (SECOND) OF TORTS § 477, at 528 (1965).
provide expert testimony to prove contributory negligence.\textsuperscript{102}

In \textit{Borenstein v. Raskin},\textsuperscript{103} a Florida District Court of Appeal reversed the jury finding of comparative negligence and awarded the patient the entire amount of damages sought.\textsuperscript{104} The court held that the jury should not have been instructed on the issue of comparative negligence when the defendant had presented no evidence that the patient was negligent in caring for himself, no testimony that the patient deviated from the physician's instructions, and no testimony linking the patient's actions to the injuries sustained.\textsuperscript{105}

\textbf{Categories of Patient's Fault}

1. \textbf{Patient's Failure to Follow Physician's Advice and Instructions}

Courts look at the reasonableness of a patient's conduct and at proximate cause when analyzing the issue of a patient's failure to follow the physician's instructions.\textsuperscript{106} The first two cases below examine the differing outcomes that courts have reached when a patient leaves the hospital without authorization.\textsuperscript{107} The next two cases demonstrate the varying results on damages reached when a patient fails to follow the physician's directions.\textsuperscript{108}

In \textit{Musachia v. Rosman},\textsuperscript{109} the patient, Jack Musachia, was hos-
hospitalized for severe injuries he received in a fight.\textsuperscript{110} Several days later, Musachia left the hospital without being discharged and against his physicians' advice.\textsuperscript{111} He spent the afternoon at his home drinking alcohol with a friend.\textsuperscript{112} Despite his unauthorized departure from the hospital, Musachia remained under his physicians' care.\textsuperscript{113} One physician called and recommended that Musachia adhere to a diet consisting of strained baby food.\textsuperscript{114} Musachia died the next day from fecal peritonitis resulting from perforations in his small intestine.\textsuperscript{115}

In affirming the jury judgment in favor of the defendant physicians, the District Court of Appeal of Florida looked at several factors that the jury had considered in reaching its verdict.\textsuperscript{116} The court noted that a reasonable person would not have consumed alcohol while on a diet of strained baby food and that evidence existed suggesting alcohol as the contributing cause in creating the holes in Musachia's intestinal lining.\textsuperscript{117} The court noted, moreover, that the patient had removed himself from the observation and care of the medical personnel who could have performed the emergency procedure necessary to save his life.\textsuperscript{118} The court denied recovery, finding sufficient evidence to support the jury decision that the patient was contributorily negligent.\textsuperscript{119}

The Court of Appeals of Indiana, in \textit{Weinstock v. Ott},\textsuperscript{120} examined the problem of a patient who believed that she was being treated improperly and left the hospital against her physicians' orders.\textsuperscript{121} The patient had endured years of poor health, pain, and a plethora of unsuccessful testing.\textsuperscript{122} The court held that the appropriate test to determine negligence was that of a reasonable person under the same or similar circumstances, including the same infirmities and disabilities.\textsuperscript{123} The court held that in considering a patient in these circumstances, the jury could have found that the patient was

\begin{itemize}
  \item \textsuperscript{110} \textit{Id.} at 48.
  \item \textsuperscript{111} \textit{Id.}
  \item \textsuperscript{112} \textit{Id.}
  \item \textsuperscript{113} \textit{Id.} The physician visited the Musachia home and prescribed medication. \textit{Id.}
  \item \textsuperscript{114} \textit{Id.}
  \item \textsuperscript{115} \textit{Id.} Fecal peritonitis is spillage from an opening in the bowel into the peritoneal cavity. \textit{Id.} at 50.
  \item \textsuperscript{116} \textit{Id.} at 50.
  \item \textsuperscript{117} \textit{Id.} (noting that the perforations did not exist when Musachia was discharged from the hospital, but rather, they developed within hours of his death).
  \item \textsuperscript{118} \textit{Id.}
  \item \textsuperscript{119} \textit{Id.}
  \item \textsuperscript{120} 444 N.E.2d 1227 (Ind. Ct. App. 1983).
  \item \textsuperscript{121} \textit{Id.} at 1240.
  \item \textsuperscript{122} \textit{Id.} at 1239-40.
  \item \textsuperscript{123} \textit{Id.}
not unreasonable in failing to follow physicians’ recommendations and in leaving the hospital. The court affirmed the jury verdict in favor of the plaintiff, stating that when reasonable minds could differ, the issue of a patient’s contributory negligence is a question for the jury, not a matter of law.

The Appellate Court of Indiana considered a patient’s contributory negligence in *Shirey v. Schlemmer*. This medical malpractice action, later superseded by the Indiana Supreme Court, was based on a physician’s allegedly negligent setting and treatment of the patient’s fractured arm. Evidence was presented that the patient had failed to follow the physician’s instructions not to lift heavy objects. The patient had attempted to lift a fifty-pound bag with his injured arm. The appellate court upheld the jury finding for the defendant because the plaintiff had been contributorily negligent.

The patient, in *Songer v. Bowman*, brought a medical malpractice action alleging that the physician, a dermatology specialist, had negligently prescribed Oxsoralen and had failed to warn the patient about the hazards associated with the medication. The plaintiff and defendant disputed whether the patient’s application of the medication to his skin and the exposure of the patient’s skin to sunlight conformed with the physician’s directions. Upon finding that the patient had failed to follow the physician’s instructions, the jury re-

124. *Id.* at 1239. See Suria v. Shiffman, 107 A.D.2d 309, —, 486 N.Y.S.2d 724, 727 (1985) (holding that under either doctrines of contributory or comparative negligence, patient’s post-surgical action of leaving the hospital contrary to medical advice would warrant only a reduction in damages to the extent that patient’s negligence increased the amount of the injury). *But see* Mecham v. McLeay, 193 Neb. 457, 464-65, 227 N.W.2d 829, 833-34 (1975) (finding that it was reasonable for the jury to conclude that the patient was contributorily negligent in leaving the hospital before discharge and that this conduct was a proximate and contributing cause of the delay in diagnosing her condition).


128. *Id.* at 611-12, 223 N.E.2d at 762-63.

129. *Id.* at 612, 223 N.E.2d at 763. The court also referred to the two-month lapse between the patient’s firing of the first physician and the consultation with a second physician. The court noted that this delay in seeking treatment was another factor that decreased the possibility of proper healing. *Id.*

130. *Id.* at 612-13, 223 N.E.2d at 763. *But see* Harris v. Cacdac, 512 N.E.2d 1138, 1140 (Ind. App. 1987) (holding that contributory negligence does not apply to post-surgical conduct, rather, the proper instruction when post-surgical conduct is involved is for mitigation of damages).


132. *Id.* at 262. Oxsoralen is a medication used to treat skin conditions. *Id.*

duced the patient’s damage award.134

The defendant appealed the trial court’s refusal to give a jury instruction on the plaintiff’s intentional acts.135 The Colorado Court of Appeals upheld the verdict, holding that the trial court’s jury instruction on contributory negligence had sufficiently encompassed the defendant’s requested instruction concerning the plaintiff’s intentional conduct.136 The court held that the essence of the instructions was the same—to permit the jury to consider the patient’s conduct.137 The court ruled that the physician was not liable for injuries which were the result of, or aggravated by, the patient’s failure to follow the physician’s instructions.138

2. PATIENT’S DELAY IN SEEKING OR RETURNING FOR MEDICAL ATTENTION

The cases of a patient’s delaying return for treatment are similar to cases of a patient’s disobeying a physician’s directions. The first case below illustrates the court’s reluctance to find a patient, who delayed seeking medical attention, contributorily negligent.139 The next two cases involve patients who neglected follow-up treatment and were barred from recovery.140 The last case illustrates a different result when a patient failed to comply with follow-up appointments.141

The patient, in LeBlanc v. Northern Colfax County Hospital,142 was injured during a fight when he was kicked or hit in the stomach.143 In the early morning hours, LeBlanc went to the Northern

134. Id. at 264. See Wheatley v. Heideman, 251 Iowa 695, 712, 102 N.W.2d 343, 354 (1960) (indicating that despite parents’ failure to take their child to a specialist as recommended, this did not bar recovery because the physician’s negligence may have been a substantial factor in causing the child’s injury). But see Faile v. Bycura, 297 S.C. 58, —, 374 S.E.2d 687, 689 (App. 1988) (affirming contributory negligence where patient refused to wear a post-operative device and expert testimony indicated that patient’s condition required this treatment).
135. Songer, 804 P.2d at 264.
136. Id.
137. Id.
138. Id. See also Quinones v. Public Adm’r, 49 A.D. 2d 889, —, 373 N.Y.S.2d 224, 226 (1975) (holding that failure to follow physician’s instructions does not destroy a malpractice action if the improper medical treatment precedes the patient’s negligent conduct; in this instance, recovery is reduced to the extent that the patient’s own negligence increased the degree of the injury); Morse v. Rapkin, 24 A.D.2d 24, —, 263 N.Y.S.2d 428, 430 (1965) (reversing the judgment because patient’s poor oral hygiene should not lessen the effect of the dentist’s original negligence; however, to the degree that the patient’s negligence exacerbates the injury, the recovery should be decreased).
139. See infra notes 142-59 and accompanying text.
140. See infra notes 160-72 and accompanying text.
141. See infra notes 171-76 and accompanying text.
142. 100 N.M. 494, 672 P.2d 667 (Ct. App. 1983).
143. Id. at 494, 672 P.2d at 667.
Colfax County emergency room, where the nurse on duty determined that his symptoms did not indicate an emergency and that he could wait until the next morning to see a doctor.\textsuperscript{144} Two days later, LeBlanc attempted to visit a physician, who was too busy to examine him and instead referred LeBlanc to the Northern Colfax County Hospital.\textsuperscript{145} There was no doctor on duty at the emergency room, and personnel suggested that LeBlanc see Dr. Floersheim.\textsuperscript{146} Four days later, LeBlanc was taken to Dr. Floersheim, who immediately admitted him to the hospital.\textsuperscript{147} LeBlanc died the following day due to a traumatic laceration of the liver and a gastrointestinal hemorrhage.\textsuperscript{148}

The plaintiff, the personal representative of LeBlanc's estate, brought a medical malpractice action.\textsuperscript{149} After the trial court entered summary judgment, the plaintiff appealed.\textsuperscript{150} The Court of Appeals of New Mexico addressed the issue of patient's fault in terms of proximate cause and intervening cause.\textsuperscript{151} The plaintiff conceded that LeBlanc's own negligence was a proximate cause of his death because he had delayed seeking medical attention, and he had used alcohol and illegal drugs to quell his pain; however, the plaintiff argued that the defendants' negligence formed a concurrent basis for liability.\textsuperscript{152} Agreeing with the plaintiff, the court stated, "Proximate cause need not be the last act or the nearest act to the injury; it need only be one which actually aided in producing the result as a direct and existing cause."\textsuperscript{153} The court held that in order to form proximate cause, a negligent act need not constitute the sole or last cause, but may merely furnish a concurring cause.\textsuperscript{154}

The court next addressed the issue of whether LeBlanc's negligence created an independent intervening cause that was unforeseeable to the defendants.\textsuperscript{155} The court stated that because the nurse did not detect and alert LeBlanc to the seriousness of his condition, a

\textsuperscript{144} Id. The nurse notified the physician on call, Dr. Floersheim, at home and related LeBlanc's condition. Dr. Floersheim agreed with the nurse's assessment of the situation, and he prescribed a pain killer for LeBlanc with directions that if the pain persisted, LeBlanc should visit a physician the following morning. Id. at 494-95, 672 P.2d at 667-68.

\textsuperscript{145} Id. at 495, 672 P.2d at 668.

\textsuperscript{146} Id. The court noted that although LeBlanc drove to Dr. Floersheim's office, he did not in because the parking lot was too full. Id.

\textsuperscript{147} Id.

\textsuperscript{148} Id.

\textsuperscript{149} Id. at 494, 672 P.2d at 667.

\textsuperscript{150} Id.

\textsuperscript{151} Id. at 496-97, 672 P.2d at 669-70.

\textsuperscript{152} Id. at 496, 672 P.2d at 669.

\textsuperscript{153} Id.

\textsuperscript{154} Id.

\textsuperscript{155} Id. at 497, 672 P.2d at 670.
reasonable patient might have been unaware of the dangers of not returning for treatment. On the matter of foreseeability, the court noted that Dr. Floersheim had previously treated LeBlanc, and he knew that LeBlanc was a drug abuser and alcoholic. Although the court admitted that the case was a close one, the court reasoned that a jury might find it reasonably foreseeable to the defendant that this particular patient would use illegal drugs to lessen his pain and that this use would in turn cause his irresponsibility. The court reversed the summary judgment and remanded the case for trial.

In *Sorina v. Armstrong*, the patient brought an action for injuries based on her physician's alleged negligence in performing post-abortion care. The physician who performed the abortion had instructed the patient to return for follow-up care, but the patient had told him that she preferred to see her own physician. The defendant argued that the plaintiff was negligent in failing to visit her own physician and in canceling two follow-up appointments that had been scheduled with the defendant when the plaintiff began to experience problems.

The Court of Appeals of Ohio stated that in order for the defendant's negligence to be the proximate cause of the plaintiff's injuries, the plaintiff must prove that the intervening causes—her own physician's failure to diagnose her problem and her reluctance in seeking further treatment from the defendant—were foreseeable to the defendant. Evidence indicated that the plaintiff's own physician had advised her to return to the defendant. Thus, the court held that it was not foreseeable to the defendant that the plaintiff would refuse to follow the advice of her own physician. In affirming the summary judgment for the defendant, the appellate court surmised that reasonable minds could not differ—the proximate cause of injury was the patient's disregard for her own health.

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156. *Id.*
157. *Id.*
158. *Id.* The court stated that foreseeability does not require that the exact consequences or precise hazard which is encountered must have been foreseen. *Id.*
159. *Id.*
161. *Id.* at 114, 554 N.E.2d at 944.
162. *Id.*
163. *Id.*
164. *Id.* at 115, 554 N.E.2d at 945.
165. *Id.* at 115-16, 554 N.E.2d at 945. But see Bird v. Pritchard, 33 Ohio App. 2d 31, —, 291 N.E.2d 769, 771 (1973) (holding that the patient was not contributorily negligent because she refused to revisit her physician and, instead, consulted another physician on the same day as her scheduled follow-up appointment).
166. *Sorina*, 51 Ohio App. 3d at 115, 554 N.E.2d at 945.
167. *Id.* at 116, 554 N.E.2d at 945.
The patient, in *Myers v. Estate of Alessi*, 168 claimed that the physician was negligent for not diagnosing the patient's throat condition.169 The physician claimed that the patient was contributorily negligent because the patient had returned to the physician's office only once in fourteen months, although the physician had instructed her to return if her sore throat persisted.170 The jury was instructed that if an ordinary person in similar circumstances would have sought medical assistance, the patient would be negligent in not returning to the physician.171 The Court of Special Appeals of Maryland agreed with the trial court's jury instruction on contributory negligence and affirmed the jury decision in favor of the defendant.172

In *Wells v. Woman's Hospital Foundation*, 173 the patient alleged damages because the physicians left a gauze pad inside the patient's abdomen during the treatment of a post-surgical infection.174 The defendant hospital was unsuccessful in proving that the plaintiff was contributorily negligent because the patient did not return for a follow-up appointment.175 The Court of Appeals of Louisiana stated there was no evidence that the patient's failure to keep an appointment contributed to the injury suffered and that there was no proof that, had she attended this appointment, the gauze pad inside the patient's abdomen would have been detected and removed.176

3. **PATIENT'S FURNISHING FALSE, INCOMPLETE OR MISLEADING INFORMATION**

In determining whether a patient was contributorily negligent, courts examine whether patients have cooperated with their physicians.177 The grave, and sometimes fatal, consequences of providing

169. Id. at 127-28, 560 A.2d 60-61.
170. Id. at 129, 133, 560 A.2d at 61, 63. See Grippe v. Momtazee, 705 S.W.2d 551, 556 (Mo. Ct. App. 1986) (affirming that the jury instruction on contributory negligence was proper in the case where a patient delayed in returning for breast examination).
172. Id. at 134, 141, 56 A.2d at 64, 67. But see Sanderson v. Moline, 7 Wash. App. 439, —, 999 P.2d 1281, 1284 (1972) (holding that the plaintiff's termination of treatment and the possible relationship to the deterioration in her condition until she resumed treatment was merely a factor to be considered in assessing damages once the jury had determined that defendant was liable).
174. Id. at 440.
175. Id. at 442-43.
176. Id. at 443.
177. *Skar*, 599 F.2d at 260 (stating that to the extent he is able, a patient has the duty to cooperate with his physician); 61 AM. JUR. 2D Physicians, Surgeons, and Other Healers § 302, at 448 (1981).
false information to a physician are illustrated by Rochester v. Katalan.\textsuperscript{178} Rochester and his companion, who were in the custody of the police, were taken to the emergency room because they claimed to be heroin addicts suffering from withdrawal.\textsuperscript{179} At the hospital, Rochester told medical personnel that he had a daily narcotic habit requiring four or five bags of heroin and that he had previously participated in a methadone clinic program.\textsuperscript{180} He requested medication to relieve his discomfort and manifested addiction symptoms, including being loud, abusive, uncooperative and agitated, rolling his head and clutching his stomach, moaning, and exhibiting bodily tremors.\textsuperscript{181} After receiving a dosage of methadone, he became violent and self-abusive and told the physician that he needed more methadone.\textsuperscript{182} After receiving a second dosage of methadone, Rochester quieted and was moved to a cell by the police.\textsuperscript{183} The next morning, he was found unconscious in his cell and was later pronounced dead.\textsuperscript{184} Investigation disclosed that Rochester was not a heroin addict, had never attended a methadone program, and had consumed beer and librium pills shortly before entering the hospital.\textsuperscript{185}

The Delaware Supreme Court distinguished Rochester from cases in which the patient’s actions occurred after the physician’s negligence.\textsuperscript{186} In Rochester, both the Delaware Superior Court and the Delaware Supreme Court found that the decedent’s behavior was an “efficient, active, contributing . . . cause of his death.”\textsuperscript{187} Even assuming that the defendants were negligent in failing to determine whether Rochester was truly a heroin addict, the court found that

\begin{footnotes}
\footnote{178}{320 A.2d 704 (Del. 1974).
\footnote{179}{Id. at 706.\footnote{180}{Id. at 706. Methadone is used experimentally in the treatment of drug dependency. AM. JUR. P.O.F. 3D Taber’s Cyclopedia Medical Dictionary 1041 (15th ed. 1988).\footnote{181}{Rochester, 320 A.2d at 706.\footnote{182}{Id.\footnote{183}{Id.\footnote{184}{Id.\footnote{185}{An autopsy revealed death by multiple drug intoxication. Id. at 706.\footnote{186}{Id. at 707. See King v. Soloman, 323 Mass. 326, —, 81 N.E.2d 838, 840 (1948) (stating that although the patient admitted to lying about her condition in order to receive more drugs, this occurred after the point she became addicted); Los Alamos Medical Center v. Coe, 58 N.M. 686, 691-92 275 P.2d 175, 178-79 (1954) (affirming the jury decision that the physician was negligent and responsible for the patient’s addiction because the physician continually prescribed morphine to relieve the patient’s pain, rather than attempting to diagnose the cause of her complaints, despite the fact that after she was addicted she complained of pain when none was present in order to get more prescriptions and admittedly used drug to “just to feel good”).\footnote{187}{Rochester, 320 A.2d at 708. See Skar, 599 F.2d at 256, 260 (finding that psychiatric patient’s denial of prior mental hospitalizations and denial of suicidal inclinations generated an issue of contributory negligence because the patient was uncooperative in his treatment by furnishing false and incomplete information).}


Rochester's conduct contributed to his own demise when he fabricated a drug history, demonstrated the symptoms associated with withdrawal, and failed to inform the medical staff that he had been drinking and had ingested librium.188

Another case illustrating the importance of a patient's providing correct information is Ray v. Wagner.189 In Ray, a patient sought recovery from her physician because the physician had failed to notify her of her abnormal Pap smear results.190 The defendant alleged that the plaintiff was contributorily negligent because she did not furnish the defendant with correct information regarding her and her husband's occupations, and did not promptly notify the defendant of her change of address.191 Testimony revealed that the physician's attempts to notify the plaintiff of her test results were unsuccessful because the occupations she had listed were false and because she had moved from the address listed.192 The Supreme Court of Minnesota stated that a patient can usually depend on the physician informing her if test results are positive; however, this may not be possible where the patient gives false information.193 The court affirmed the jury verdict in favor of the defendant.194

Although the court in Ray held the patient responsible for furnishing incorrect personal information, other courts have discussed the extent of information that a patient must provide.195 In O'Neil v. State,196 the court found that a patient who had told medical personnel that she was taking the barbiturate Nembutal but neglected to tell them that she was addicted, was not contributorily negligent.197 The Court of Claims of New York held that patients are not required to diagnose their own ailments.198

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188. Rochester, 320 A.2d at 708.
189. 286 Minn. 354, 176 N.W.2d 101 (1970). See Mackey v. Greenview Hosp., Inc., 587 S.W.2d 249, 257 (Ky. Ct. App. 1979) (concluding that the patient knew or should have known of her heart condition and that her misleading the physician about her medical history was a substantial factor in her resulting heart attack during surgery).
190. Ray, 286 Minn. at —, 176 N.W.2d at 102-03. A pap smear (Papanicolaou test) detects cancer cells by studying cells collected from the cervix or vagina. AM. JuR. P.O.F. 3D Taber's Cyclopedic Medical Evidence 1218, 1220 (15th ed. 1988).
191. Ray, at —, 176 N.W.2d at 103.
192. Id. at —, 176 N.W.2d at 103.
193. Id. at —, 176 N.W.2d at 104.
194. Id. at —, 176 N.W.2d at 104.
195. Id. at —, 176 N.W.2d at 104. See infra notes 227-33 and accompanying text.
197. Id. at —, 323 N.Y.S.2d at 61.
198. Id. at —, 323 N.Y.S.2d at 61. See also Favalora v. Aetna Casualty & Surety Co., 144 So. 2d 544, 550 (La. Ct. App. 1962) (finding that the patient undergoing testing was not under a duty to reiterate her complete medical history to every medical person she encountered).
4. PATIENT'S BEHAVIOR PRIOR TO SEEKING MEDICAL ATTENTION

Case law is replete with instances where the physician charged the plaintiff with contributory negligence for behavior that occurred before the patient sought treatment.\(^{199}\) The courts generally agree that the patient's prior conduct should not be considered in assessing damages.\(^{200}\)

In *Eiss v. Lillis*,\(^{201}\) the patient's executrix brought a medical malpractice action alleging that the physician was negligent in diagnosing, treating, monitoring, and caring for the patient, who died from intracranial bleeding.\(^{202}\) The defendant claimed that the patient was at fault for taking aspirin in conjunction with the drug Coumadin.\(^{203}\) The Supreme Court of Virginia stated that the patient's conduct before seeking medical treatment is merely a factor the physician considers in treating the patient.\(^{204}\) The court stated that in order to find the patient contributorily negligent, the patient's conduct must have been contemporaneous and concur with the physician's negligence.\(^{205}\)

The court criticized as illogical the defendant's argument that, had the patient not engaged in a particular behavior, the patient would not have required a physician.\(^{206}\) The court surmised, "Were we to accept Dr. Lillis' argument, in any case where the patient was responsible for events that led to his hospitalization, the treating phy-

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199. *E.g.*, *Whitehead*, 404 So. 2d at 379 (holding patient's conduct before entering the hospital, which contributed to his heart attack, was not a proximate cause of the damages sought); *Matthews v. Williford*, 318 So. 2d 480, 482-83 (Fla. Dist. Ct. App. 1975) (stating that the patient's conduct of smoking, being overweight, and delaying treatment may have contributed to his medical condition or illness; but this is not a defense to the physician's medical malpractice causing a distinct subsequent injury); *Allman v. Holleman*, 233 Kan. 781, —, 667 P.2d 296, 300 (1983) (finding no contributory negligence when a patient engaged in behavior that may cause a risk to health, such as taking birth control pills despite a warning label on the package, when that risk was slight enough to be commonly disregarded); *Sendejar*, 555 S.W.2d at 885 (finding that where defendant alleged that the patient's injuries were sustained due to patient negligently crashing his automobile, the patient is not contributorily negligent because his conduct is not an active and efficient cause of the injury in question).

200. See supra note 210-11 and accompanying text. *But see* *Berry v. Friday*, 324 Pa. Super. 499, 504, 472 A.2d 191, 194 (1984) (stating that although the case did not strongly favor the inference that the patient was contributorily negligent because he was overweight and smoked, even a slim possibility of contributory negligence was enough to present the issue to the jury).


202. *Id.* at 546, 552, 357 S.E.2d at 539, 543.

203. *Id.* at 553, 357 S.E.2d at 543. Coumadin is a blood thinner. *Id.* at 546, 357 S.E.2d at 539.

204. *Id.* at 553-54, 357 S.E.2d at 543.

205. *Id.* at 553, 357 S.E.2d at 544.

206. *Id.* at 553, 357 S.E.2d at 543-44.
sician would not be liable for negligent treatment."\(^{207}\)

The Louisiana Court of Appeals in *Bourne v. Seventh Ward General Hospital*\(^{208}\) addressed the defendants’ argument that a young woman was contributorily negligent due to her deliberate, self-inflicted injuries.\(^{209}\) The decedent, a twenty-year-old woman, had attempted suicide by ingesting pills from two bottles of prescription pain medication.\(^{210}\) She was hospitalized and began to exhibit bizarre and violent behavior, and she was later transferred to a psychiatric facility where she died the next day.\(^{211}\) The testimony of expert witnesses at trial described the physician’s substandard care and conduct.\(^{212}\)

The court first addressed the element of causation and found, “If the action or inaction of the health care provider destroyed any substantial possibility of the patient’s survival, the trier of fact is warranted in finding that the health care provider’s conduct was a proximate cause of the patient’s death."\(^{213}\) The court stated that although there was another “cause in fact” of the patient’s death—the ingestion of a lethal dose of prescription medication—there can be more than a single cause in fact in a particular case.\(^{214}\)

The court held that because the attempted overdose had preceded the negligence of the medical care providers, the medical care providers’ negligent acts ensued between the overdose and death, depriving the decedent of an 80% chance of survival.\(^{215}\) The court determined that the defendants’ negligence was an intervening force and superseding cause, thus, their negligence supplanted the suicide attempt as the cause of death.\(^{216}\) The Louisiana Court of Appeals affirmed the trial court’s finding that the plaintiff’s recovery was not barred by the doctrine of contributory negligence.\(^{217}\)

A factually similar case, *Cowan v. Doering*,\(^{218}\) involved an action

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207. Id. at 553, 357 S.E.2d at 543.
209. Id. at 203.
210. Id. at 198.
211. Id. at 199-200.
212. Id. at 200. The court noted that the decedent should have been transferred to a medical facility with a psychiatric unit; that the physician should have recognized the potential of liver toxicity from the drugs the decedent had ingested; that the patient should have been monitored for signs of hepatitis; that the decedent should have been on intravenous fluids; and that the physician should have detected the decedent’s hypoglycemia. Id.
213. Id. at 202.
215. *Bourne*, at 204.
216. Id. at 203-04.
217. Id. at 203.
based on the defendants' failure to take precautionary measures to prevent the plaintiff's suicide attempt. The trial court refused the defendants' request for a jury instruction that the plaintiff was contributorily negligent due to her allegedly "manipulative" conduct. In refusing to instruct the jury on the issue of contributory negligence, the trial court noted that the plaintiff's suicidal behavior was the reason for her hospitalization. The trial court explained to the jury that the causal connection between the patient's wrongful act and the resulting injuries can be destroyed by an independent and intervening agency. The trial court instructed the jury that the plaintiff could recover for her injuries if her suicidal behavior was reasonably foreseeable under the circumstances. The Superior Court of New Jersey affirmed the trial court's refusal to instruct the jury on contributory negligence.

5. EXTENT OF PATIENT'S DUTIES AND RESPONSIBILITIES

Although a patient does not have a duty to submit to further medical procedures aimed at correcting the physician's original negligence, the patient is responsible for any aggravation of his injuries.

219. Id. at —, 522 A.2d at 446. The patient attempted to overdose on sleeping pills. Id. at —, 522 A.2d at 447.

220. Id. at —, 522 A.2d at 448. An expert witness testified that the plaintiff's ingesting pills and jumping from the second-story window was designed to gain attention, not an attempt to kill herself. Id. at —, 522 A.2d at 448.

221. Id. at —, 522 A.2d at 448. The Superior Court of New Jersey commented, "Simply stated, plaintiff committed the very act that defendants were under a duty to prevent." Id. at —, 522 A.2d at 450.

222. Id. at —, 522 A.2d at 448.

223. Id. at —, 522 A.2d at 448. The Superior Court of New Jersey noted that "the duty of the physician and the hospital encompasses the responsibility to safeguard the patient from the reasonably foreseeable risk of self-inflicted harm." Id. at —, 522 A.2d at 449.

224. Id. at —, 522 A.2d at 450.


227. Corlett v. Caserta, 204 Ill. App. 3d 403, 410-11, 562 N.E.2d 257, 261-62 (1990) (holding that the plaintiff's duty to mitigate damages resulting from the defendant's negligence should reduce, but not bar, recovery when a patient refuses to submit to a procedure designed to alleviate the aftermath of a physician's negligence). See Martineau v. Nelson, 311 Minn. 92, 247 N.W.2d 409, 416 (1976) Although the Martineau court agreed that the patient might have acted unreasonably by not using birth control in light of the questionable success of her tubal ligation, the court stated that the plaintiffs were not negligent in refusing abortion or failing to put the child up for adoption. The court stated, 'The policy of the law would be thwarted if plaintiffs were forced to make such moral and ethical choices regarding themselves and their child under a
This category of defense illustrates the application of the doctrine of avoidable consequences.\textsuperscript{228} The limited extent of a patient's duties was described in \textit{Stager v. Schneider}.\textsuperscript{229} The patient in \textit{Stager} brought a medical malpractice action against the radiologist who studied and interpreted her chest X-ray.\textsuperscript{230} Although the defendant found an increased density in one area of Stager's lung and his report recommended that Stager undergo further testing, the defendant never furnished Stager or her physician with these test results.\textsuperscript{231} The defendant alleged that the patient was contributorily negligent for failing to call and inquire concerning her test results.\textsuperscript{232} While the District of Columbia Court of Appeals agreed with the trial court's opinion that a patient has a duty to cooperate and assist the physician in appropriate diagnosis and treatment, the court found that a patient in Stager's circumstances is under no duty to telephone and inquire about test results.\textsuperscript{233}

\textbf{ANALYSIS}

\textbf{POTENTIAL PROBLEMS IN THE APPLICATION OF THE DEFENSE OF PATIENT'S CONTRIBUTORY NEGLIGENCE}

Comparative negligence statutes are not necessarily "plaintiff's law," as might be assumed.\textsuperscript{234} In fact, comparative negligence instructions may assist the defense because juries may now apportion the damages, rather than awarding the plaintiff full recovery.\textsuperscript{235}

One difficulty in medical malpractice actions is determining the time sequence of the physician's and patient's alleged negligence.\textsuperscript{236} Unlike a typical tort incident where the plaintiff and defendant meet and the injury occurs, medical treatment is often an ongoing pro-

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\textsuperscript{228} See supra notes 75-82 and accompanying text.
\textsuperscript{229} 494 A.2d 1307, 1312 (D.C. 1985).
\textsuperscript{230} Id. at 1310.
\textsuperscript{231} Id.
\textsuperscript{232} Id. at 1311.
\textsuperscript{233} Id. at 1312.
\textsuperscript{234} Interview with G. Michael Fenner, Professor of Law at Creighton University, in Omaha, Nebraska (September 19, 1991) (Reporter for Pattern Civil Jury Instructions, Nebraska Supreme Court Committee on Practice and Procedure).
\textsuperscript{236} 2 S. FAGALIS & H. WACHSMAN, AMERICAN LAW OF MEDICAL MALPRACTICE \S 6.1, at 3 (1981). See infra notes 236-37 and accompanying text.
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Isolating the time sequence of the actions of each party is essential in a medical malpractice action.\textsuperscript{237} Patient's fault should not be pled without reasonable expectation that the defense is applicable.\textsuperscript{238} Because the application of this doctrine presupposes that the physician has, in fact, been negligent, the defense of patient's contributory negligence should only be asserted when the defendant has been negligent.\textsuperscript{240} The patient accused of contributory negligence must have the capacity to be capable of responsibility for his own actions.\textsuperscript{241} Each case requires examination and evaluation as to whether the better course of action might be to focus on the defendant's innocence, rather than appearing to concede the defendant's fault.

THE NEW COMPARATIVE NEGLIGENCE STATUTE IN NEBRASKA

Comparative negligence is legislative relief from the harshness of the common-law doctrine of contributory negligence, which absolutely barred recovery when a jury found any fault on the plaintiff's part.\textsuperscript{242} However, the underlying analysis of determining the negligence of each party is not marred.\textsuperscript{243}

The new Nebraska comparative negligence statute affects negligence causes of action that accrue on or after January 1, 1992.\textsuperscript{244} One significant consequence of L.B. 88 will be the defendant's ability to attempt to move the "negligence spotlight" to co-defendants, and even non-defendants.\textsuperscript{245} The relevant Nebraska statutory provision states:

(2) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall preclude that person from being made a party or, if an action is pending, shall be a basis for that person's dismissal, but the person's fault, if any, shall be considered

\textsuperscript{237} See Lawrence v. Wirth, 226 Va. 408, 411-12, 309 S.E. 2d 315, 317 (1983) (discussing how the patient-physician relationship is substantially different from the usual plaintiff and defendant).

\textsuperscript{238} Id. at 412, 309 S.E.2d at 317 (attempting to determine the sequence of events).

\textsuperscript{239} 2 S. PEGALIS & H. WACHSMAN, supra note 235, § 6.1, at 3.

\textsuperscript{240} 1 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE ¶ 9.03 (1990).

\textsuperscript{241} See Fabianke v. Weaver, 527 So. 2d 1253, 1258 (Ala. 1988) (finding no error in striking the defendant's plea of contributory negligence because, obviously, an unborn child can not be charged with contributory negligence); Wheatley v. Heideman, 251 Iowa 695, 711, 102 N.W.2d 343, 353 (1960) (holding that a two-year-old plaintiff could not be contributorily negligent); Allman v. Holleman, 233 Kan. 781, 667 P.2d 296, 301 (1983) (holding that the patient in intensive care was not negligent for inadvertently removing her life support equipment).


\textsuperscript{243} Id. at 429, 545 A.2d at 151.

\textsuperscript{244} L.B. 88, 92d Leg., 1st Sess., §§ 1, 7, 1991 Neb. Laws 185.

\textsuperscript{245} See infra notes 246-50, 257-60 and accompanying text.
in accordance with section 4 of this act.\textsuperscript{246}

As this Comment previously emphasized, a defendant should not plead contributory negligence without a reasonable belief that the plaintiff may be found negligent.\textsuperscript{247} With the adoption of L.B. 88, a caveat to this recommendation is necessary. Despite legislative history to the contrary, courts might adopt the position that defense counsel must plead contributory negligence before L.B. 88 applies.\textsuperscript{248} This may make a significant difference in an action where non-party "phantom" defendants could be assessed a portion of the liability.\textsuperscript{249} The best practice may be to plead contributory negligence as an affirmative defense until the uncertainty surrounding the application of L.B. 88 is resolved.\textsuperscript{250}

**APPLICATION OF L.B. 88 TO THE JENSEN CASE**

With so many interpretive problems still unresolved, it is difficult to predict the effects of L.B. 88 on Nebraska tort law and medical malpractice law in particular.\textsuperscript{251} The court in *Jensen* held that Jensen's conduct furnished only a condition for the resulting medical malpractice.\textsuperscript{252} Although Jensen's behavior may have been causally related, it was not a proximate cause of his death because it simply provided the occasion for the hospital's supervening negligence.\textsuperscript{253} The implementation of L.B. 88 should not mar the underlying tort analysis.\textsuperscript{254} Jensen's conduct in not losing weight may have produced foreseeable risks, including health hazards such as the greater likelihood of blood clots, but the inattentiveness and negligence of hospital personnel is not one of these foreseeable risks.\textsuperscript{255} Even under the revised comparative fault analysis set forth in L.B. 88, Jensen's behavior does not meet the criteria of contributing to fault.\textsuperscript{256}

While the analysis of Jensen's contribution to fault would probably remain unchanged, cases like *Jensen* may be dramatically af-

\textsuperscript{247} See supra note 239 and accompanying text.
\textsuperscript{248} See supra notes 73-74 and accompanying text. The statutory language and legislative history of L.B. 88 leave many ambiguities concerning interpretation. As previously discussed, L.B. 88 creates a question as to which type of tort cases the statute applies. See supra notes 73-74 and accompanying text.
\textsuperscript{249} See supra note 246 and accompanying text.
\textsuperscript{250} See supra notes 73-74 and accompanying text.
\textsuperscript{251} See infra note 63-64 and accompanying text.
\textsuperscript{252} *Jensen*, 236 Neb. at 15, 459 N.W.2d at 187.
\textsuperscript{253} Id. at 15-16, 459 N.W.2d at 187.
\textsuperscript{254} See supra notes 51-59 and accompanying text.
\textsuperscript{255} *Jensen*, 236 Neb. at 4, 13, 459 N.W.2d at 181, 185-86.
\textsuperscript{256} Id. at 4, 15-16, 459 N.W.2d at 180-81, 186-87. See infra notes 297-98 and accompanying text.
MEDICAL MALPRACTICE

fected by L.B. 88.257 Juries may now consider the negligence of "phantom" or non-party actors.258 Although Dr. Peters was not a party to the action, the jury would still be able to assess a portion of the liability to his actions.259 It will become increasingly important as a defense tactic to redirect blame not only toward the plaintiff and co-defendants, but also toward non-defendant parties who had involvement in producing the injury.260

CATEGORIES OF PATIENT'S FAULT

The patient's behaviors usually fall into several different categories or combinations of categories.261 It is useful to look at the similarities between several of these categories and to examine why the courts' decisions differ in factually similar cases. It is also useful to explore alternative modes of defending medical malpractice actions.

1. PATIENT'S FAILURE TO FOLLOW PHYSICIAN'S ADVICE OR INSTRUCTIONS

The most commonly alleged type of contributory negligence is that the patient failed to follow the physician's instructions.262 The patient who disregards the physician's advice and discharges himself from the hospital is an example.263 Although the facts of Musachia v. Rosman264 and Weinstock v. Ott265 are similar, the courts reached different results.266 The court in Musachia noted that a reasonable person suffering from serious injuries would not have left the hospital and spent the day imbibing alcohol while still on a diet of strained baby food.267 In deciding whether the patient in Weinstock was at fault for discharging herself from the hospital, the court affirmed the jury decision that a reasonable person in the same situation as the frustrated and ailing patient may have also left the hospital.268 The common thread in these two cases is that both courts emphasized

258. See supra note 246 and accompanying text.
259. See supra note 246 and accompanying text.
260. See supra note 246 and accompanying text.
261. See infra notes 264-327 and accompanying text. This is not intended to be an exhaustive list of patient behaviors, but merely provides a useful categorization.
262. See supra notes 106-08 and accompanying text.
263. See supra notes 109-25 and accompanying text.
266. Musachia, 190 So. 2d at 50; Weinstock, 444 N.E.2d at 1240. See supra notes 108-24 and accompanying text.
267. Musachia, 190 So. 2d at 50. See supra notes 109-19 and accompanying text.
268. Weinstock, 44 N.E.2d at 1240. See supra notes 120-25 and accompanying text.
that the patient’s behavior must be examined according to the standard of a reasonable person in like circumstances. Contributory negligence is the counterpart of negligence, and the same rule applies—an individual must behave as a reasonably prudent person under the same or similar circumstances. While engaging in identical behavior, one plaintiff, like Musachia, may be found negligent for leaving the hospital; while another, like Weinstock, may not. The patient’s circumstances are a key element in ascribing negligence. It would have been useful for the defense in Weinstock to emphasize that the patient was not behaving reasonably in leaving the hospital because of her frustration, and that she was not so ill as to be impaired from making a reasonable choice.

Another example of disregarding the physician’s advice is the patient’s failure to follow treatment instructions. The court in Shirey v. Schlemmer agreed with the jury finding of contributory negligence because the patient had disobeyed the physician’s directions and had attempted to lift a heavy object. On the other hand, the court in Songer v. Bowman ruled that the patient’s improper application of his medication and exposure of his skin to sunlight could be considered by the jury in reducing damages recovered. The court in Shirey stated that “[t]he general rules with respect to the effect of contributory negligence on the right to recover for personal injuries apply in actions for injuries alleged to have been caused by the malpractice of a physician or surgeon.” The court did not consider, however, the “sharpening” of the contributory negligence rules.

Many courts have held that when the patient’s alleged fault occurs after the defendant’s negligence, the patient’s conduct merely

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269. See supra notes 117-18, 124 and accompanying text.
270. See supra notes 48, 51-52 and accompanying text.
271. See supra notes 109-25 and accompanying text.
272. See supra notes 122-24 and accompanying text.
273. See supra notes 121-22 and accompanying text.
275. Shirey, 140 Ind. App. at 612-13, 223 N.E.2d at 762-63. The court also looked at the patient’s delay in returning for medical attention. The jury’s finding for the defendant was affirmed. Id. at 612, 223 N.E.2d at 763.
277. Id. at 262, 264. See infra notes 284-86 and accompanying text.
278. Shirey, 140 Ind. App. at 611, 223 N.E.2d at 762.
279. Id. at —, 223 N.W.2d at 762 (failing to discuss the Flynn sharpening of the rules of contributory negligence in medical malpractice actions). See supra notes 94-97 and accompanying text.
serves to reduce, not prevent, the damages recovered by the plaintiff.\textsuperscript{280} Rather than arguing that the plaintiff is contributorily negligent and perhaps losing on this issue, the better defense position is to assert that the patient's conduct exacerbated the injuries.\textsuperscript{281} The defense can then argue either that the plaintiff's conduct formed an intervening cause that was not foreseeable to the physician, or alternatively, that the injuries complained of would have been substantially less and damages should be reduced accordingly.\textsuperscript{282} This "sharpening" of the rules of contributory negligence results in a recovery that looks like comparative negligence (because the damages are being divided by percentages) but is actually an application of the doctrine of avoidable consequences.\textsuperscript{283}

The \textit{Jensen} case should be distinguished from cases where the patient fails to follow the physician's instructions.\textsuperscript{284} In actions where the patient fails to follow instructions, the alleged fault of the plaintiff occurs \textit{after} the physician's negligence.\textsuperscript{285} In \textit{Jensen}, the patient's alleged fault of not following the physician's directions to lose weight \textit{preceded} the hospital's negligence.\textsuperscript{286} Consequently, the court properly considered Jensen's conduct as furnishing the occasion for medical treatment, not the proximate cause of his resulting death.\textsuperscript{287}

2. \textbf{PATIENT'S DELAY IN SEEKING OR RETURNING FOR TREATMENT}

The category of a patient delaying or failing to return for follow-up care is closely analogous to that of a patient failing to follow physician's recommendations. The cases in this area center around three legal issues: (1) whether the patient's behavior was a causal factor in the result; (2) whether the patient's behavior was reasonable; and (3) whether the patient's behavior was foreseeable to the physician—proximate cause.\textsuperscript{288}

The court in \textit{Wells v. Woman's Hospital Foundation}\textsuperscript{289} stated

\begin{itemize}
\item \textsuperscript{281} See supra notes 75-82 and accompanying text.
\item \textsuperscript{282} See supra notes 86-91, 98-99 and accompanying text.
\item \textsuperscript{283} See supra notes 82, 92, 97 and accompanying text.
\item \textsuperscript{284} See infra notes 109-38 and accompanying text.
\item \textsuperscript{285} See Shiry, 249 Ind. at —, 223 N.E.2d at 759; Songer, 804 P.2d at 261. See supra notes 126-38 and accompanying text.
\item \textsuperscript{286} Jensen, 236 Neb. at 15-16, 459 N.W.2d at 187.
\item \textsuperscript{287} Id.
\item \textsuperscript{288} See supra notes 151-158, 164-167, 171, 176 and accompanying text.
\item \textsuperscript{289} 286 So. 2d 439 (La. Ct. App. 1973), writ denied, 288 So. 2d 646 (La. 1974).
\end{itemize}
that the defendant had failed to prove the element of causation.\textsuperscript{290} While a patient’s failure to keep an appointment may increase pain and suffering, in \textit{Wells} there was no evidence that the physician would have discovered and removed the gauze pad that had been negligently left in the patient’s abdomen.\textsuperscript{291} Unlike other tort claims where a plaintiff is a participant in the occurrence, the patient is inactive in most instances of medical malpractice, and the patient’s conduct does not concur with the physician’s negligence.\textsuperscript{292} Therefore, it is vital that the defense establish the causal connection between the patient’s actions, or failure to act, and the resulting injuries.\textsuperscript{293} Thus, the defense must prove that “but for” the plaintiff’s acts, the injury would not have occurred or would not have been as egregious.\textsuperscript{294}

The problem of a patient’s reasonableness was considered by the courts in \textit{LeBlanc v. Northern Colfax County Hospital}\textsuperscript{295} and \textit{Myers v. Alessi}.\textsuperscript{296} In \textit{LeBlanc}, the court held that because the nurse did not make LeBlanc aware of the seriousness of his injuries, LeBlanc’s failure to return for further treatment might not have been unreasonable.\textsuperscript{297} The court in \textit{Myers} affirmed the jury decision because it was determined that a reasonable patient would return if her sore throat persisted.\textsuperscript{298} The defense must attempt to prove that a reasonable person in the patient’s circumstances would not have delayed in seeking or returning for medical attention.

The foreseeability of a patient’s conduct was discussed by the courts in \textit{LeBlanc} and in \textit{Sorina v. Armstrong}.\textsuperscript{299} In \textit{LeBlanc}, the court stated that, given the physician’s knowledge that LeBlanc was a substance abuser, LeBlanc’s resorting to illegal drugs to relieve his pain rather than returning to the hospital may have been foreseeable to the defendant.\textsuperscript{300} The \textit{Sorina} court stated that the plaintiff’s intervening conduct—the patient’s failure to return when her own physician directed her to see the physician who had performed the abortion—was not reasonably foreseeable to the defendant.\textsuperscript{301} The defense must prove that the patient’s conduct intervened and dis-

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\textsuperscript{290} \textit{Id.}\textsuperscript{ at 443.}
\textsuperscript{291} \textit{Id.}\textsuperscript{ at 443. See Allman v. Holleman, 233 Kan. 781, —, 667 P.2d 296, 301 (1983).}
\textsuperscript{292} \textit{1 D. LOUISELL & H. WILLIAMS, supra note 240, ¶ 9.03.}
\textsuperscript{293} \textit{Id.}
\textsuperscript{294} \textit{Id.}
\textsuperscript{295} 100 N.M. 494, 672 P.2d 667 (Ct. App. 1983).
\textsuperscript{296} 80 Md. App. 124, —, 560 A.2d 59, 63 (1989); \textit{LeBlanc}, 100 N.M. at —, 672 P.2d at 670.
\textsuperscript{297} \textit{LeBlanc}, 100 N.M. at —, 672 P.2d at 670.
\textsuperscript{298} \textit{Myers}, 80 Md. App. at —, 560 A.2d at 63, 67.
\textsuperscript{299} 51 Ohio App. 3d 113, 115, 554 N.E.2d 943, 945 (1988); \textit{LeBlanc}, 100 N.M. at —, 672 P.2d at 670.
\textsuperscript{300} \textit{LeBlanc}, 100 N.M. at —, 672 P.2d at 670.
\textsuperscript{301} \textit{Sorina}, 51 Ohio App. 3d at 115-16, 554 N.E.2d at 945.
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ruptured the causal connection.\textsuperscript{302} On remand, the defense in \textit{LeBlanc} should have asserted that regardless of whether the physician knew LeBlanc was a substance abuser, LeBlanc's behavior was unreasonable and unforeseeable.\textsuperscript{303} In situations like LeBlanc's, physicians should not be regarded as the patient's keepers when the patient fails to return as he was instructed.\textsuperscript{304}

3. \textbf{Patient's Furnishing False, Incomplete or Misleading Information}

In the process of analyzing fault in medical malpractice actions, the patient has a duty to cooperate and assist the physician in providing proper diagnosis.\textsuperscript{305} The patient's accuracy and completeness in furnishing information is an important factor in determining whether the physician provided proper care.\textsuperscript{306} The patient in \textit{Rochester v. Katalan}\textsuperscript{307} knew or should have known the potentially dangerous consequences of misleading a physician into believing that he was a heroin addict.\textsuperscript{308} Likewise, the patient in \textit{Ray v. Wagner}\textsuperscript{309} acted unreasonably in providing misleading information concerning her and her husband's occupations and her address.\textsuperscript{310}

On the other hand, the patient's contributory negligence in describing his medical history is related directly to the attentiveness of the physician or nurse obtaining the information.\textsuperscript{311} The importance of eliciting complete and detailed information is illustrated by \textit{O'Neil v. State},\textsuperscript{312} where the patient was held not at fault for failing to tell medical personnel that she was addicted to a particular drug.\textsuperscript{313} Patients are not responsible for diagnosing their own condition.\textsuperscript{314} When a medical person acts negligently in eliciting the patient's history, the patient is contributorily negligent only if he knows that the physician is unaware of the potential danger, and the

\textsuperscript{302} See supra notes 142-67, 299-301 and accompanying text.
\textsuperscript{303} See supra notes 142-67, 299-301 and accompanying text.
\textsuperscript{304} See supra notes 142-67, 299-301 and accompanying text.
\textsuperscript{305} 2 S. Pegalis & H. Wachsman, \textit{supra} note 236, at § 6:2, at 10. See \textit{supra} note 177 and accompanying text.
\textsuperscript{306} \textit{Id.}
\textsuperscript{307} 320 A.2d 704 (Del. 1974).
\textsuperscript{308} \textit{Id.} at 409-09.
\textsuperscript{309} 286 Minn. 354, 176 N.W.2d 101 (1970).
\textsuperscript{310} \textit{Id.} at --, 176 N.W.2d at 104.
\textsuperscript{312} 66 Misc. 2d 936, 323 N.Y.S.2d 56 (1971).
\textsuperscript{313} \textit{Id.} at --, 323 N.Y.S.2d at 61.
\textsuperscript{314} \textit{Id.} at --, 323 N.Y.S.2d at 61.
patient acts unreasonably in failing to inform the physician.\textsuperscript{315}

4. **Patient's Behavior Prior to Seeking Medical Attention**

Although the defense in *Jensen* asserted that Jensen had failed to follow the physician's instructions, the court analyzed Jensen's conduct as a "patient's behavior prior to seeking medical attention" case.\textsuperscript{316} In *Eiss v. Lillis*,\textsuperscript{317} where the patient negligently took aspirin in conjunction with his heart medication, the court stated that the patient's antecedent behavior is merely one factor the physician considers in treating the patient.\textsuperscript{318} Even when the patient's behavior is intentionally self-destructive, the negligent acts of the health care providers may intervene and destroy the likelihood of a patient's recovery.\textsuperscript{319}

The court in *Eiss* compared instances where the patient's negligence occurred before the physician's malpractice with cases where the patient's fault occurred after the physician's malpractice.\textsuperscript{320} The court stated "[t]he result must be the same in both cases, because the patient's conduct and the main act of negligence ascribed to the doctors were not contemporaneous and could not concur."\textsuperscript{321} The court glossed over the distinction that when a patient's fault occurs after the physician's malpractice, damages may be reduced to the extent that the patient's conduct enhanced his injuries.\textsuperscript{322} When a patient's alleged negligence occurs before entering the physician's treatment, the contributory negligence defense is inapplicable because the patient's conduct merely furnished the occasion for medical care.\textsuperscript{323}

5. **Extent of Patient's Duties and Responsibilities**

A patient has a right to rely on the knowledge and expert skill of his physician.\textsuperscript{324} The patient does not have a duty to consult another physician for a second opinion, call for test results, or submit to further medical procedures designed to correct the physician's negli-
However, a patient's damages may be diminished to the extent that his refusal to undergo additional medical procedures enhances his injuries. The reduction in damages is not technically contributory negligence, but rather, reflects the patient's failure to avoid consequences that were in his control.

CONCLUSION

With the continuing inundation of medical malpractice litigation, precise and innovative defense tactics become increasingly important. The issue of whether or not the patient was at fault in a medical malpractice action depends on the individual circumstances presented by each case. The sequence of events is crucial. In order for a patient to be considered contributorily negligent, the patient's negligent conduct must have concurred with the physician's negligent conduct. When a patient's negligence occurs after the physician's malpractice, the damages a patient recovers may be reduced to the extent that he caused or exacerbated his injuries. While some courts refer to this as "sharpening the rules of contributory negligence," the reduction in damages recovered is better termed "avoidable consequences."

The following categories are particularly successful defenses: the patient's failure to follow a physician's instructions, the patient's failure to return for follow-up care, and the patient's furnishing of false or misleading information. Conduct that the patient engaged in prior to visiting the physician is generally an unsuccessful basis of defense. This is exemplified by the recent Supreme Court of Nebraska case, Jensen v. Archbishop Bergan Mercy Hospital.

The defense of patient's contribution to fault will be increasingly scrutinized in light of the continued escalation in medical malpractice litigation. The arguments concerning patient's fault are often confused because of conflicting terminology. When the patient's negligent behavior occurs after the physician's malpractice, the defense is better framed in terms of the patient's failure to avoid consequences, rather than in terms of contributory negligence. The defense theory should be formulated in a manner that clearly reflects the patient's contribution to his own injuries.

Madelynn R. Orr—'93

325. See supra notes 100, 227, 229-33 and accompanying text.
326. See supra note 227 and accompanying text.
327. See supra note 82 and accompanying text.