

A wooden gavel and a stethoscope are shown on a white surface. The gavel is in the upper left, and the stethoscope is in the lower left. The background is a soft, out-of-focus white.

# Medical Malpractice or Ordinary Negligence – Why the Distinction is Crucial

BY EMILY D. ANDERSON, ESQ.<sup>1</sup>

Not all injuries that occur in a medical facility, such as a doctor's office or hospital, are medical malpractice.<sup>2</sup> If a health-care provider, such as a doctor or nurse, is negligent, but his or her negligence is not related to providing health-care services, the proper claim is common-law negligence.<sup>3</sup>

There are many circumstances where the type of service provided is clearly related to health-care services, such as prescribing the wrong medication or failing to diagnose a serious disease. Occasionally, however, there are actions that are more difficult to characterize, such as when a patient suffers a fall within a medical facility. In these situations, the line between the two claims is blurred because there are facts that support ordinary negligence and those that support professional negligence (malpractice). At first, the distinction may not seem important, but there are protections available to health-care providers who are accused of malpractice that are not available to defendants accused of ordinary negligence.

The most well-known protection is the "affidavit of merit requirement."<sup>4</sup> In general terms, the affidavit must:

- 1) support the allegations in the complaint;
- 2) come from a medical expert who practices in a substantially similar area as the defendant(s);
- 3) identify each defendant alleged to have been negligent; and
- 4) identify how each defendant was negligent.

Because medical experts are expensive, this requirement may bar lower-value lawsuits.

The breadth of Nevada Revised Statute (NRS) 41A.071 is routinely underestimated. Often, if there are multiple health-care providers who are named as defendants, multiple experts will be necessary to satisfy NRS 41A.071. For example, if the defendants consist of one nurse, one medical assistant, one medical doctor who does oncology and another who does anesthesiology, it may be necessary to retain an expert or experts to opine on the standard of care for each defendant. The consequence of failing to provide a sufficiently detailed affidavit of merit is bad. The complaint is void – meaning that it cannot be amended; it must be refiled.<sup>5</sup> If the statute of limitations expires while litigating the sufficiency of the affidavit of merit, the claim is lost.

Another statutory protection is the limitation on the amount of non-economic damages a patient may recover.<sup>6</sup> Non-economic

damages generally include: pain, suffering, impairment/disfigurement, depression/anxiety and inability to engage in or enjoy hobbies/life.<sup>7</sup> The definition of non-economic damages is intended to cover injuries that cannot be easily quantified. Because non-economic damages cannot be easily quantified, the purpose of the statute is to prevent juries from awarding astronomically high amounts for pain and suffering. The result is that irrespective of the actual severity of the patient's pain and suffering, the statute limits the recovery to no more than \$350,000 as compensation for it. NRS 41A.035 has caused attorneys in Nevada to reconsider whether they will take malpractice cases where the potential recovery hinges on pain and suffering.

Not only do attorneys have these issues to consider, but they also have less time in which to file the lawsuit. NRS 11.190(4) (e) provides a two-year statute of limitation for regular negligence. In a professional negligence case, the statute of limitations expires three years after the date of the injury or one year after the plaintiff discovers the injury, whichever occurs first.<sup>8</sup> Sometimes, the patient's injury will not be discovered for many months. In that situation, the attorney has less than one year to weigh all of the factors; obtain the necessary medical records; retain a competent, experienced expert to provide an affidavit; and file a complaint. Thus, if a medical error is suspected, it is imperative to move quickly.

Because the consequences of running afoul of NRS 41A *et seq.* are severe, it is essential to accurately predict which type of services were being rendered when the patient's injury occurred. As a refresher, professional negligence is "the failure of a provider of health care, *in rendering services*, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." The sole direction provided by 41A.015 is that professional negligence may occur only when a provider is rendering his or her services to a patient. This definition, however, leaves many questions unanswered.

The Nevada Supreme Court has provided some guidance. In *Szymborski v. Spring Mountain Treatment Center*, the court was faced with a situation where one of the negligent acts pled by the plaintiff against the medical facility focused on its administrative duties in complying with certain regulations.<sup>9</sup> The plaintiff's adult son was admitted to a medical facility for treatment due to self-inflicted injuries. The plaintiff and his son had a difficult relationship, and as such, the plaintiff did

not want his son to return home. Upon discharging the son, however, the health-care provider gave the son gas money to reach plaintiff's house and failed to notify plaintiff that his son had been discharged and was heading home. Because the plaintiff was unaware of the situation, his son took the opportunity to vandalize plaintiff's home, causing \$20,000 in property damages. Plaintiff sued for both negligence and professional negligence, among other claims.

Because this scenario is not directly covered by the statutory definition, the Nevada Supreme Court determined that it was necessary to adopt a more detailed standard to determine when a health-care provider is rendering services; the court held that the appropriate question to ask is: "whether [Plaintiff's] claims involve medical diagnosis, judgment, or treatment or are based on [the medical facility's] performance of nonmedical services."<sup>10</sup> The court emphasized that a situation states a claim for professional negligence if the fact-finder will require an expert to testify to and establish the standard of care. On the other hand, a claim is for ordinary negligence when the fact-finder can evaluate the claim and the reasonableness of the defendant's actions based on his or her experience and common knowledge. The court's analysis based on the newly adopted standard found that the provider's failure to correctly discharge the son was a "nonmedical service" because the breach resulted from a failure to follow certain Nevada administrative regulations when discharging the patient.

There are certain circumstances where it can be even more difficult to tell which type of service was being rendered, such as when a patient suffers a fall in a medical facility. Falls within medical facilities are common enough that there is a variety of literature discussing the best ways to prevent patient falls. One such article asserts that "[e]ach year, somewhere between 700,000 and 1,000,000 people in the United States fall in the hospital."<sup>11</sup>

When a patient falls, it can be difficult to predict whether the fall will state a claim for professional or ordinary negligence because the analysis is fact-intensive. To determine the character of the patient's fall, it is necessary to determine which type of service was being rendered immediately prior to the fall. If the health-care provider was rendering services related to the patient's medical diagnosis, judgment or treatment, then the fall likely will be considered professional negligence. If the patient was on his or her way to the bathroom, however, and slipped, then the fall may be considered ordinary negligence.

As such, when a fall happens, the question becomes: what was the patient doing when the fall occurred? Although the distinction created in *Szymborski* does not apply as directly to falls, it does provide guidance on which facts are material. Indeed, facts that go to whether the patient was undergoing services related to medical diagnosis, judgment or treatment may include: the location of the patient, the physical proximity of the health care provider to the patient, the reason the patient was in that precise location at that certain time, whether the patient was preparing for or undergoing a procedure and whether the patient had any stability issues known to the health-care provider.

Ultimately, the question of whether a fall states a claim for ordinary or professional negligence is heavily fact-dependent. Despite the difficulty in determining at the outset which negligence claim is appropriate, it is imperative to accurately predict whether a certain situation is professional or ordinary negligence because the consequences of being wrong are severe.

1. The author would like to thank Phil S. Aurbach, Esq., Christian T. Balducci, Esq., and Collin M. Jayne, Esq. for their constructive criticism of the manuscript.
2. In Nevada, medical malpractice is actually called professional negligence. [See](#) 41A.015.
3. [See](#) NRS 41A.015.
4. [See](#) NRS 41A.071.
5. [See](#) NRS 41.071; [see](#) *Washoe Med. Ctr. v. Second Judicial Dist. Court of State of Nev. ex rel. County of Washoe*, 122 Nev. 1298, 1302, 148 P.3d 790, 793 (2006).
6. NRS 41A.035. The current limit is \$350,000.
7. NRS 41A.011.
8. NRS 41A.097(2).
9. 403 P.3d 1280, 1284 (Nev. 2017).
10. [Id.](#)
11. [See](#) Ganz DA, Huang C, Saliba D, et al. Preventing falls in hospitals: a toolkit for improving quality of care. (Prepared by RAND Corporation, Boston University School of Public Health, and ECRI Institute under Contract No. HHS2902010000171 TO #1.) Rockville, MD: Agency for Healthcare Research and Quality; January 2013. AHRQ Publication No. 13-0015-EF.

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