ELDER ABUSE vs. MEDICAL MALPRACTICE – A Practical Solution

BY MATT HOFFMAN, ESQ.

In 1997, Senate Bill 80 (SB 80) was introduced on behalf of the Office of the Attorney General and would go on to become what is now known as NRS 41.1395. The statute provides a civil remedy for causes of action involving abuse, neglect or exploitation of "older" or "vulnerable" persons in Nevada.

The purpose of SB 80 was to "encourage private attorneys to take up the fight on behalf of elder victims."[1] The "incentive" for private attorneys was a provision calling for the right to recover fees and costs as well as triple damages payable to the victim (or their estate) upon conclusion of the suit.[2]

During committee hearings regarding SB 80, questions arose regarding differences between "abuse" and "neglect." Deputy Attorney General Pamela Roberts acknowledged that potential for liability under the proposed law would primarily fall in the "neglect" category, dealing with failures to meet obligations to maintain an older person's physical or mental health.[3] As for "abuse," Roberts acknowledged a criminal statute already existed for cases of intentional abuse.

When questioned by legislators as to who would potentially be liable for "neglect" under the statute, Roberts stated the context of the bill meant liability would fall upon "someone who had assumed a legal responsibility, such as a nursing professional, or a contractual responsibility such as a long-term care facility, group home, family member or caregiver who had assumed responsibility for taking care of the person." Roberts also clarified the civil cause of action proposed in SB 80 "belonged to the victim – the older person."

SB 80 was codified as NRS 41.1395 and became effective in July 1997. The only major modification to the proposed legislation was a reduction in the damages multiplier from treble damages to "two times the actual damages incurred by the older person or vulnerable person."

KODIN Initiative

In 2004, Nevada voters approved Ballot Question No. 3, an initiative petition known as "Keep Our Doctors In Nevada" (KODIN). KODIN resulted in a cap on non-economic damages (pain, suffering, disfigurement, grief, sorrow) of $350,000 in medical malpractice cases. It also eliminated joint and several liability in medical malpractice cases and created an exception to Nevada's collateral source rule, allowing defendants to introduce evidence of the amounts paid by a victim's insurance company at trial.

In the nearly 16 years since KODIN passed, many challenges to the law have made their way to appellate courts. As a result, the $350,000 cap has been held to be a "global" cap, regardless of the number of defendants or plaintiffs involved. In other words, no matter how many defendant health professionals were negligent in causing injury, the total amount recoverable for noneconomic damages is $350,000. The same holds true for victims in the context of wrongful death caused by medical malpractice. This is opposed to caps on government entities, in which each heir may recover up to the statutory maximum.

Regarding collateral source evidence, there exists an unequal application of the law depending upon what kind of health insurance the victim carried. If the victim carried a federally regulated insurance plan, such as Medicare, then the collateral source exception does not apply. This is because the statute calls for the abolition of an insurer's subrogation/lien rights should a defendant introduce collateral source evidence at trial. Due to federal pre-emption, a federally regulated insurer's subrogation lien cannot be extinguished by state law. But for any victim covered by any other plan, such evidence may still be introduced at trial, thus greatly prejudicing a victim's ability to obtain a significant recovery at trial, absent future medical expenses.

Older Persons & Medical Malpractice – Which Law Applies?

Since KODIN became law, practitioners have recognized that victims over 60, who are defined as an "older person" pursuant to NRS 41.1395(4)(d), may claim elder neglect pursuant to NRS 41.1395 and medical malpractice pursuant to NRS 41A.

For example, putting aside the obvious financial advantage a claim for neglect under NRS 41.1395 has over a claim for medical malpractice, the practical outcome of a claim for elder neglect is that the victim's *estate* has a statutory right to recover damages that otherwise would go to heirs in a wrongful death lawsuit.

In a traditional wrongful death case, the estate may recover all economic damages and punitive damages, while heirs may recover damages for pain and suffering of the decedent as well as their own grief and loss of probable support. Under NRS 41.1395, however, the victim's estate is the sole beneficiary. In other words, NRS 41.1395 creates an exception to the wrongful death statute, allowing the estate to recover for the pain and suffering of the decedent, along with medical expenses and punitive damages. And there are no caps on pain and suffering damages in cases brought pursuant to NRS 41.1395.

Attempts to assert claims for both elder abuse and medical malpractice have been met with predictable opposition from the defense bar. Yet there are essentially[4] no Nevada Appellate Court decisions dealing with this issue.

The Arizona Method

In 1989, Arizona adopted a separate statute dealing with elder abuse: the Arizona Adult Protective Services Act (APSA). While Arizona is one of the few states that does not have a cap on non-economic damages in medical malpractice cases, there are various nuances in the law that make a claim pursuant to APSA more attractive than a traditional medical malpractice case. Most notably, the survivors in a wrongful death action cannot recover for the pain and suffering experienced by the decedent before death. The APSA, however, provides an exception to this general rule, allowing recovery for the pain and suffering of a decedent before death. For this reason alone, numerous cases have made their way through the trial and appellate court levels in Arizona, where claims under APSA have been brought against providers of health care. The result is a clear common law doctrine based upon common sense.

The seminal case involving claims for elder abuse and neglect made against healthcare providers is *Estate of McGill v. Albrecht*, 203 Ariz. 525, 57 P.3d 384 (Ariz. 2002). In that case, the estate of Norma McGill sued various medical practitioners alleging elder abuse and neglect pursuant to APSA and medical malpractice. Defendants moved to dismiss the APSA claim on the grounds that acts of medical negligence could not form the basis for an APSA action and that Arizona's Medical Malpractice Act was the *exclusive* statute governing medical malpractice actions. *Id.*

In addressing the questions, the McGill court discussed that APSA was designed to protect the most vulnerable from mistreatment by caregivers. In differentiating between acts that would properly be limited to acts of "medical malpractice" versus those of "elder abuse" or "neglect," the court discussed various factual scenarios. First, the court raised the hypothetical scenario where a surgeon negligently fails to remove an instrument or fails to discover an internal perforation following surgery. *See McGill*, 57 P.3d 384, 388 (Ariz. 2002). The court noted that such an act could happen to anyone, not just those who are elderly or incapacitated. *Id.* In such

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a situation, the court held, any claims brought against a provider of healthcare would properly be limited to a claim for medical malpractice. *Id.*

The McGill court went on, however, to discuss a scenario where a nurse places an older or incapacitated person in a bathtub, turns the water on at a high temperature, and is distracted, leading to injury. The court held that in this scenario, a single act of neglect by a healthcare provider would be directly related to the caregiver's responsibility in caring for an older or incapacitated patient who may not be able to protect him or herself. *Id.*

Given these two scenarios, the court held it could neither automatically limit the negligent act or omission wording of APSA to a series of negligent acts nor say that a single act of negligence involving an incapacitated person will never give rise to an APSA action. The McGill court held instead that to hold a healthcare provider responsible for a claim made pursuant to APSA, "the negligent act or acts (1) must arise from the relationship of caregiver and recipient, (2) must be closely connected to that relationship, (3) must be linked to the service the caregiver undertook because of the recipient's incapacity, and (4) must be related to the problem or problems that caused the incapacity." *McGill*, 57 P.3d 384, 388 (Ariz. 2002).

With regard to claims of medical malpractice being the "exclusive" remedy for actions brought against healthcare providers, even by the elderly, the court held "we would eviscerate APSA and completely defeat legislative purpose" by adopting such a position. *Id.* The court further dismissed the argument that something more than negligence, such as a mens rea element, is required to hold a healthcare provider responsible for actions brought pursuant to APSA. Instead, the court looked to the plain language of the APSA statute, where no such requirement exists. *Id.*

Following *McGill*, the Arizona legislature amended APSA, exempting physicians, podiatrists, nurse practitioners and physician assistants from liability. *See* 2003 Ariz. Sess. Laws, ch. 129 SS 462 (1st Reg. Sess.). Even the revised statute, however, specifically allows exempted providers to be held liable under APSA if they are the medical director for a non-exempted provider. *Id.*

In 2014, a challenge was made to the Arizona Supreme Court regarding liability under APSA against an acute care hospital. *See Estate of Wyatt v. Vanguard Health Sys., Inc.*, 235 Ariz. 138, 329 P.3d 1040 (Ariz. 2014). There, an acute care hospital argued it should be exempt from liability under APSA because it is engaged in acute care rather than long-term care. *Id.* The court ruled "the statute does not suggest that APSA liability should apply if such an injury occurs in a nursing home, but not if it occurs in an acute care hospital. Nothing in APSA indicates legislative intent to protect vulnerable adults from abuse, neglect, or exploitation only when they are housed in particular facilities." *See Estate of Wyatt*, 239 P.3d 1040, 1042 (Ariz. 2014).

In 2017, the Arizona Supreme Court clarified and revised *McGill*, resulting in a more concise test to determine whether a claim for APSA exists. *See Delgado v. Manor Care of Tucson AZ, LLC*, 395 P.3d 698 (Ariz. 2017). The new test adopted is as follows: (1) a vulnerable adult, (2) has suffered an injury, (3) caused by abuse, (4) from a caregiver. *Id.* The court rejected the defendants' arguments that without the *McGill* test, "APSA will apply to virtually all medical malpractice cases arising from care provided to adults in inpatient healthcare institutions," including care of "acute conditions." *Id.* The court recognized that "the broad language of APSA creates considerable overlap between medical malpractice claims arising under the [medical malpractice] and abuse claims under APSA. However, we will not engage in a 'narrow construction' of APSA that 'thwart[s] the legislature's goal of protecting vulnerable adults.'" *Id.*

Comparing NRS 41.1395 and APSA

It is undisputed that the purpose of NRS 41.1395 is to protect the elderly and those most vulnerable from abuse and neglect by caregivers. Decisions from the Arizona Supreme Court make it clear that APSA has the same purpose. Both statutes assign liability for "abuse," "neglect" and "exploitation," and the statutes assign this liability "against any person or enterprise that has been employed to provide care, that has assumed a legal duty to provide care" (Arizona) or "a person who has assumed legal responsibility or a contractual obligation for caring for an older person or a vulnerable person" (Nevada).

One key difference is that APSA has been modified to exclude "[a] physician licensed pursuant to title 32, chapter 13 or 17, a podiatrist licensed pursuant to title 32, chapter 7, a registered nurse practitioner licensed pursuant to title 32, chapter 15 or a physician assistant licensed pursuant to title 32, chapter 25, while providing services within the scope of that person's licensure." *See* ARS 46-455(B). NRS 41.1395 has no such exclusions.

Thus, APSA is *more* restrictive than Nevada's when it comes to "who" can be liable.

The Arizona approach demands that the facts attributable to the victim must be examined when determining whether a claim for elder abuse and neglect may be made against a healthcare provider. And that is exactly what should occur in Nevada, where the legislature created a protected class of *victim* at the urging of the Attorney General.

1. *See* Legislative History of NRS 41.1395, SB 80, p. 10, February 10, 1997 correspondence to Judicial Committee from Bonnie Brand, Deputy Attorney General. [https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1997/SB080.1997.pdf]
2. *Id.*
3. *See* Legislative History of NRS 41.1395, SB 80, pp. 24-27.
4. *But see Wheble v. Eighth Judicial Dist. Court*, 128 Nev. Adv. Rep. 11, 272 P.3d 134 (2012) (dismissing a case for medical malpractice for failure to attach a supporting affidavit, but allowing the matter to proceed to trial on NRS 41.1395 claims against providers of healthcare).

MATTHEW HOFFMANN

is an AV Preeminent-rated litigator whose practice focuses on plaintiff's personal injury. He is active in several professional organizations, including the Clark County Bar Association, Nevada Justice Association and Citizens for Justice. He is a court-appointed arbitrator and is licensed to practice in Nevada, California and North Dakota.