Nursing Home Abuse and Neglect Personal Injury Claims: Ordinary Negligence or Professional Negligence?

by Anthony Carr, Esq.

It is important to determine whether the standard of care owed by a senior care facility is a professional standard of care or an ordinary negligence standard of care. As the Court of Appeals of New York noted in the oft-cited *Weiner* case, "[T]he distinction between medical malpractice and negligence is a subtle one, for medical malpractice is but a species of negligence and no rigid analytical line separates the two."[1] In short, there is no blanket answer as to whether medical malpractice or ordinary negligence will apply to a civil case involving elder abuse or neglect in New Hampshire. Depending on the circumstances of the alleged tort, either or both may apply.

The nature of litigation will be significantly impacted depending on whether a Plaintiff's claims are characterized as ordinary common law negligence or medical malpractice. In New Hampshire, a medical malpractice claim must establish the statutory elements through the testimony of an expert who meets the qualifications set forth in RSA 507-E. Ordinary common law negligence claims have no such requirement. Jurors do not need to be told that allowing a resident to remain soiled and soaked in feces is a deviation from the standard of care. Moreover, New Hampshire Plaintiffs asserting a medical malpractice claim are required to go through the additional procedural steps outlined in RSA 519-B, including presenting their case to a Screening Panel, the findings of which are admissible if unanimous in either party's favor. Of course, these additional requirements add time and cost considerations that do not come with ordinary negligence claims.

Actions fall under the jurisdiction of RSA 507-E and 519-B when they involve an "action for medical injury." RSA 507-E:1 defines "medical injury" as "any adverse, untoward or undesired consequences arising out of or sustained in the course of professional services rendered by a medical care provider." Thus, one should start with the assumption that a nursing home abuse claim will sound in ordinary negligence, unless it can be shown that the damages: 1) arose out of or were sustained in the course of professional services; and 2) such professional services were provided by a health care

provider as that term is defined under RSA 507-E:1. The majority of this article is dedicated to assessing: 1) what type of tortious conduct might be deemed "professional services" or "professional negligence;" and 2) what types of senior care homes and/or caregiver positions at senior care homes might be deemed "health care providers;"

To ensure adequate representation of victims of elder abuse who choose to pursue justice in the civil system, it is critical to accurately assess the appropriate standard of care as early as possible, and certainly before filing a complaint.

1. PUBLIC POLICY BEHIND HEIGHTENED REQUIREMENTS FOR MEDICAL MALPRACTICE ACTIONS

RSA 519-B:1 details the public policy behind creating a heightened burden for claimants who bring forth an action for medical injury:

> Availability and affordability of insurance against liability for medical injury is essential for the protection of patients as well as assuring availability of and access to essential medical and hospital care. This chapter affirms the intent of the general court to contain the costs of the medical injury reparations system and to promote availability and affordability of insurance against liability for medical injury. Claims for medical injury should be resolved as early and inexpensively as possible to contain system

costs. Claims that are resolved before court determination cost less to resolve than claims that must be resolved by a court. Meritorious claims should be identified as quickly as possible, as should non-meritorious claims.

Overlooked here is the emphasis on "the protection of patients," including the quick resolution of meritorious claims – a purpose which is not advanced if a claimant is unnecessarily subjected to the heightened procedural and evidentiary requirements for medical malpractice actions. The other objective is to help control the affordability of insurance. Of course, if a claim does not implicate this policy of controlling the cost of insurance for health care providers – which largely includes physicians and hospitals – then there is again no reason it should be subject to the extra requirements for medical malpractice actions.

The legislative history of New Hampshire's medical malpractice laws is consistent with the majority of case law across the country which tends to liberally deem a wide range of claims involving physicians or hospitals as medical malpractice actions. Conversely, when a claim is either not asserted against a physician, or involves minimal to nonexistent physician contact, courts are more likely to rule the claim as sounding in ordinary negligence.

Senior care homes present a unique issue to the courts because many types of facilities do not even offer skilled nursing services, and rarely employ a physician. Similarly, many types of senior care homes are custodial and nonmedical in nature. Thus, courts have wrestled with determining which types of facilities and caregiver positions should be deemed "health care providers," and what types of conduct should be deemed "professional services." New Hampshire has hardly on any case law on these issues, and nothing directly in the context of nursing home abuse claims, so this article examines analogous case laws from jurisdictions around the country.

II. "PROFESSIONAL SERVICES" IN A SENIOR CARE HOME SETTING

In the seminal case Estate of *French v. Stratford House* (Tenn. 2011), the Supreme Court of Tennessee held: "[i]f the alleged breach of the duty of care set forth in the complaint is one that was based upon medical art or science, training, or expertise, then it is a claim for medical malpractice. If, however, the act or omission complained of is one that requires no

specialized skills, and could be assessed by the trier of fact based on ordinary everyday experiences, then the claim sounds in ordinary negligence."

In *Estate of French*, the Plaintiff was admitted to a skilled nursing facility. Due to her lack of mobility, she was at risk of developing pressure ulcers. The facility accounted for the Plaintiff's susceptibility to pressure ulcers in their resident care plan and established a plan to prevent pressure ulcers from forming. The certified nursing assistants, however, failed to comply with the care plan's instructions due to a lack of training and understaffing, among other reasons. Plaintiff brought suit against the Defendant nursing home for ordinary negligence, among other claims. The trial court granted the Defendant's partial motion for summary judgment and held that the Tennessee Medical Malpractice Act applied to the ordinary negligence claims.

On appeal, the Supreme Court of Tennessee held that Plaintiff's claims were a hybrid of professional negligence and ordinary claims. First, the Court held that Plaintiff's claims that the Defendant nursing home was negligent in "assessing [Plaintiff's] condition, developing her initial plan of care, and properly updating that plan to conform to changes in her condition do indeed sound in medical malpractice." Second, the Court observed that Plaintiff also alleged that the Defendant "failed to administer basic care in compliance with both the established care plan and doctors' subsequent orders regarding [Plaintiff's] treatment." The Court held that "these alleged acts and omissions pertain to basic care and do not substantially relate to the rendition of medical treatment by a medical professional. Because no specialized medical skill is required to perform those tasks, the trier of fact could assess the merits of the claim based upon everyday experiences. Thus, this component of the claim sounds in ordinary negligence."

Estate of French offers New Hampshire litigants a solid introduction to the distinction between elder abuse claims sounding in medical malpractice as opposed to ordinary negligence. While the rule is stated differently in each state, courts will generally focus on the level of skill and expertise required to perform the act or omission at issue to determine whether it should be deemed "professional services" or ordinary negligence. As the court reminds us in *Estate of French*: "Of course, making that distinction is not always an easy task."

a. How Specific Types Of Elder Abuse Torts Fit Within "Professional Services"

The Alabama Supreme Court held that a nurse's failure to respond to a patient's call for assistance "clearly f[ell] within the category of routine hospital care," and thus the claim arising from the act was one of negligence, not medical malpractice.[2] Likewise, the West Virginia Supreme Court held that a suit brought for injuries suffered when the plaintiff fell out of his hospital bed sounded in ordinary negligence, because the failure to monitor him constituted routine care.[3] Other courts have similarly held that a claim sounds in common law negligence when the care out of which the claims arose was "'administrative,' 'ministerial,' 'routine,' or the like, as distinguished from medical or professional."

The Wisconsin Supreme Court took a similar position: "If the patient requires professional nursing or professional hospital care, then expert testimony as to the standard of that type of care is necessary. However, if the patient requires nonmedical, administrative, ministerial or routine care, the standard of care need not be established by expert testimony."[5] In *Kujawski*, the Plaintiff sued a nursing home for injuries resulting when she fell from a wheelchair. The Plaintiff had poor vision, poor hearing, arthritis and was overweight and unable to walk. The nursing home caring for the Plaintiff noted multiple incidents involving the Plaintiff during her stay, including several falls from her wheelchair. Testimony revealed that the nursing home failed to use safety belts on wheelchairs to keep the residents from slipping and falling. The court stated that a determination of whether a nursing home is negligent in situations such as those where a nurse or aide leaves a patient unattended or under inadequate restraint, is a determination of routine, not professional care.

Connecticut courts, which are the forum for many opinions on this issue, have routinely held that a health care provider's negligent failure to train or supervise its employees is administrative and not of a "specialized medical nature."[6]

Conversely, in *Hernandez v. Diversified Healthcare-Abbeville, LLC* (La. 2/12/10), the court found that allegations that the Defendant failed to provide adequate staff at the nursing home, and specifically, that the staff was improperly trained and did not monitor or observe the resident for adequate care, sounded in professional negligence. The court, however, emphasized that the allegations involved care and treatment beyond custodial care, and that extensive expert testimony was required to explain

the issues to the jury.

III. "HEALTH CARE PROVIDER" IN A SENIOR CARE HOME SETTING

Of course, in order to invoke RSA 507-E or RSA 519-B, a claim must be against a "health care provider," in addition to arising out of the rendering of professional services. Thus, if the type of senior care facility and/or caregiver at issue in a case does not fit within the definition of "healthcare provider," the claim will sound in ordinary negligence.

RSA 507-E:1 defines a "health care provider" as: "a physician, physician's assistant, registered or licensed practical nurse, hospital, clinic or other health care agency licensed by the state or otherwise lawfully providing medical care or services, or an officer, employee or agent thereof acting in the course and scope of employment."

This language, which largely focuses on physicians and hospitals, is consistent with the legislative history of combating the rising costs of malpractice insurance. Notably, neither nurse aides nor assisted living facilities are expressly included in the definition of "health care providers."

In *Estate of French*, the Supreme Court of Tennessee questioned whether nursing assistants fell within the definition of "health care provider." The Court noted that "those staff members who allegedly failed to follow the care plan were CNAs. While CNAs are required to receive a course of training that is regulated by the state, they are not medical professionals and their qualifications do not approach the more extensive and specialized training of a doctor or registered nurse."

The holding in *Estate of French* is consistent with the duties and responsibilities of a nursing assistant, including the scope of their practice under RSA 326-B. A viable argument can be made that all personal injury claims relating to the acts or omissions of nursing assistants should be deemed as sounding in ordinary negligence. Of course, if the acts or omissions at issue were not committed by a "healthcare provider," it becomes unnecessary to make the more nuanced argument as to whether the conduct at issue was one of "professional services."

a. Types Of Senior Care Home Facilities As "Health Care Providers"

There are three main types of senior care homes in New Hampshire: (1) Assisted Living Resident Care Facilities (2) Assisted Living Supported Residential Care Facilities; and (3) Nursing homes. None of these are expressly identified in RSA 507-E:1.

Similar to nursing assistants, a viable argument remains to be made that all personal injury claims against all types of senior care facilities should sound in ordinary negligence. This is especially true where there is no requirement that any New Hampshire senior care home facility carry any type of liability insurance, never mind the type of medical professional liability insurance that represents the basis for these heightened medical malpractice requirements in a civil action.

RSA 151:9 VII(a)(1) succinctly breaks down the varying levels of care offered by these three different types of facilities. AL-RC facilities "require a minimum of regulation and reflect the availability of assistance in personal and social activities with a minimum of supervision of health care, which can be provided in a home or home-like setting." AL-SRC facilities "reflect the availability of social or health services, as needed, from appropriately trained or licensed individuals, who need not be employees of the facility, but shall not require nursing services complex enough to require 24-hour nursing supervision." Lastly, nursing homes "provide a range of social and health services, including 24-hour-a-day supervision and the provision of medical care and treatment, according to a plan of care, by appropriately trained or licensed individuals who are employees of or who are under contract to the facility."

AL-RC facilities are very loosely regulated in New Hampshire, per New Hampshire regulation HE-P 804: Assisted Living Residence-Residential Care Licensing. AL-SRC facilities are regulated by HE-P 805: Supported Residential Health Care Facility Licensing Rules. Nursing Homes are regulated by HE-P 803: New Hampshire Nursing Home Rules as well as RSA 151.

IV. CONCLUSION

Most cases of elder abuse or neglect should be deemed as sounding in ordinary negligence. A claim will be only subject to RSA 507-E and RSA 519-B when it is against a health care provider for errors and/or omissions in rendering professional services. The legislative history illustrates that these additional requirements for medical malpractice actions were largely enacted to combat rising costs of medical malpractice insurance for physicians and hospitals. Very few cases of institutional elder abuse or neglect are likely to involve even minimal physician involvement because the bulk of care is provided by nurse aides. One should also not overlook the additional policy objective to provide for "the protection of patients."

In New Hampshire, nurse aides should not be considered "healthcare providers." The same argument can be made for the three different types of senior care facilities, especially as it relates to the two types of assisted living facilities.

More often, the main issue will likely be the extent to which the acts or omissions "aris[e] out of the practice of medicine and the provision of medical care or treatment to patients." When the acts or omissions relate to non-medical, administrative, ministerial or routine care, ordinary negligence will apply. Conversely, when the acts or omissions relate to or involve conduct that requires specialized skill or training, professional negligence will apply.

ENDNOTES

1. *Weiner v. Lenox Hill Hosp.,* 88 N.Y.2d 784, (1996).
2. *Ex parte HealthSouth Corp.,* 851 So.2d 33, 39 (Ala.2002) ("A jury could use 'common knowledge and experience' to determine whether the standard of care was breached in this case, where custodial care, not medical care, is at issue.").
3. *McGraw v. St. Joseph's Hosp.,* 200 W.Va. 114, 488 S.E.2d 389, 396 (1997).
4. *Bennett v. Winthrop Cmty. Hosp.,* 21 Mass.App.Ct. 979, 489 N.E.2d 1032, 1035 (1986); *see also Kastler v. Iowa Methodist Hosp.,* 193 N.W.2d 98, 101 (Iowa 1971); *Golden Villa Nursing Home, Inc. v. Smith,* 674 S.W.2d 343, 349 (Tex.App.1984).
5. *Kujawski v. Arbor View Health Care Ctr.,* 139 Wis.2d 455, 407 N.W.2d 249, 252 (1987) (quoting *Cramer v. Theda Clark Mem. Hosp.,* 45 Wis.2d 147, 172 N.W.2d 427, 428 (1969)).
6. *See, e.g., Dzialo v. Hospital of Saint Raphael,* Superior Court, judicial district of New Haven, Docket No. CV 10 6014703 (June 21, 2011) (plaintiff's allegations that defendant hospital failed to train and supervise its emergency room employees properly were not of a specialized medical nature); *Cotton v. Benchmark Assisted Living, LLC,* supra, 50 Conn. L. Rptr. 248-49 (plaintiff's allegations that assisted living facility failed to train and supervise, warn and remedy the dangerous situation of employee handling a patient too forcefully "do not require a specialized medical nature"); *DeJesus v. Veterans Memorial Medical Center,* Superior Court, judicial district of New Britain, Docket No. CV 99 0498385 (October 19, 2000) (28 Conn. L. Rptr. 522) ("[n]egligent supervision by health care providers constitutes ordinary negligence, not malpractice" because issues are not uniquely medical in nature).

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