THE WAVERING LINE BETWEEN MEDICAL MALPRACTICE AND ORDINARY NEGLIGENCE IN ELDER ABUSE LITIGATION

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Elder abuse is a broad term that encompasses several different forms of neglect, abuse, and exploitation of an older person, typically over the age of 62. This article focuses on cases of institutional elder abuse and neglect, and whether such lack of care is deemed to be common law negligence or medical malpractice. Understanding these distinctions is key to handling these cases and properly representing our kupuna.

I. INTRODUCTION

It is often difficult 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."[2] 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 Hawaii. Depending on the circumstances of the alleged tort, either or both may apply.

The nature of litigation may be impacted in any many different ways depending on whether a plaintiff's claims are characterized as ordinary common law negligence or medical malpractice. In Hawaii, a medical malpractice claim must establish the statutory elements through the testimony of an expert who meets the qualifications set forth in HAW. REV. STAT. Chapter 671.[3] 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. In fact, providing expert testimony on such a straight-forward issue could even be insulting to a jury. Moreover, Hawaii plaintiffs asserting a medical malpractice claim are required to present their case to a three-member Medical Inquiry and Conciliation Panel ("MICP") and, per HAW. REV. STAT.

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[2] *Weiner v. Lenox Hill Hosp.,* 88 N.Y.2d 784, 650 N.Y.S.2d 629, 673 N.E.2d 914, 916 (1996) (quoting *Scott v. Uljanov,* 74 N.Y.2d 673, 543 N.Y.S.2d 369, 541 N.E.2d 398, 399 (1989)).

[3] *See Craft v. Peebles*, 78 Haw. 287, 298, 893 P.2d 138, 149 (1995) ("It is well settled that in medical malpractice actions, the question of negligence must be decided by reference to relevant medical standards of care for which the plaintiff carries the burden of proving through expert medical testimony.").

§ 671-16, cannot file a complaint until the MICP proceedings have been terminated. Of course, this adds time and cost considerations that do not come with ordinary negligence claims.

Actions fall under the jurisdiction of HAW. REV. STAT. Chapter 671 when they involve a medical tort committed by a medical professional. Some, but not all care provided to elderly residents at senior care facilities will fit the scope of HAW. REV. STAT. Chapter 671. 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. Failure to comply with the statutory requirements of HAW. REV. STAT. Chapter 671 - namely failure to submit medical tort claims to the MICP prior to filing a complaint - may lead to dismissal and even sanctions.[4]

A. General Scope of HAW. REV. STAT. Chapter 671

The term "medical tort" is defined by Haw. Rev. Stat. § 671-1(2) as:

> [P]rofessional negligence, the rendering of professional service without informed consent, or an error or omission in professional practice, by a health care provider, which proximately causes death, injury, or other damage to a patient.

Thus, HAW. REV. STAT. Chapter 671 applies to claims: 1) against health care providers; 2) for errors and/or omissions in rendering professional services.[5]

The majority of this article is dedicated to assessing: 1) what types of senior care homes and/or caregiver positions at senior care homes might be deemed "health care providers;" 2) what type of tortious conduct might be deemed "professional negligence."

In *Tobaso v. Owens*, the Supreme Court of Hawaii discussed the legislative history of HAW. REV. STAT. Chapter 671:

> The perception of a "crisis in the area of medical malpractice" caused the enactment of the statutory provisions now codified in HRS Chapter 671. Among other objectives, the legislature sought thereby to "[s]tabilize the medical malpractice insurance situation by reintroducing some principles of predictability and spreading of risk" and "[d]ecrease the costs of the legal system and improve the efficiency of its procedures to the end that awards are more rationally connected to actual damages." A significant aspect of the legislative effort to make the system less costly and more efficient was the creation of "medical claim conciliation panels [to] review and render findings and advisory opinions on the issues of liability and damages in medical tort claims against health care providers." HRS § 671–11(a). The panels undoubtedly were established "to encourage early settlement of claims and to weed out unmeritorious claims."[6]

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[4] *Dubin v. Wakuzawa*, 89 Haw. 188, 195, 970 P.2d 496, 503 (1998), *as amended on reconsideration in part* (Jan. 12, 1999).

[5] *Campos v. Marrhey Care Home, LLC*, 128 Haw. 405, 411, 289 P.3d 1041, 1047 (Ct. App. 2012); *Garcia v. Kaiser Found. Hospitals*, 90 Haw. 425, 438, 978 P.2d 863, 876 (1999).

[6] *Tobosa v. Owens,* 69 Haw. 305, 311–12, 741 P.2d 1280, 1285 (1987) (brackets in original)(citations omitted).

The legislative history of HAW. REV. STAT. Chapter 671 is consistent with the majority of case law which tends to liberally deem a wide range of claims involving physicians or hospitals as "medical torts." Conversely, when a claim is either not asserted against a physician, or involves minimal to nonexistent physician contact, courts are 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."

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

A. Seminal Hawaii Case - *Campos v. Marrhey Care Home, LLC*

The only case in Hawaii that directly addresses the distinction between medical malpractice and ordinary negligence in cases of institutional elder abuse is *Campos v. Marrhey Care Home, LLC*.[7] In *Campos*, the Plaintiff was an elderly woman who was in need of assistance with daily activities.[8] She was placed in a Type I expanded Adult Residential Care Home ("ARCH").[9] Plaintiff alleged that while at the ARCH, she was "mistreated, physically and mentally abused, not provided proper basic care, and deprived of prescribed medications, access to doctors, and a proper diet."[10] Plaintiff alleged negligence, false imprisonment, assault and battery, intentional infliction of emotional distress, and negligent infliction of emotional distress.[11] The Circuit Court dismissed the complaint for lack of subject matter jurisdiction because Plaintiff had failed to submit her claim to the medical panel prior to filing her complaint.[12]

The issue on appeal was whether Plaintiff's claims against the ARCH defendant constituted "medical torts," thus triggering the statutory requirements to submit the claims to the medical panel prior to filing suit. After noting that the statutory language of HAW. REV. STAT. Chapter 671 did not provide an answer to the issue on appeal, the Campos court held, "…in light of the Legislature's intent in enacting HAW. REV. STAT. Chapter 671, as revealed by HAW. REV. STAT. Chapter 671's legislative history, and viewing the statutory provisions as a whole, we conclude that the claims raised in [Plaintiff's] complaint do not constitute 'medical torts' within the meaning of HRS § 671-1."[13]

The *Campos* Court construed the term "medical tort" as generally encompassing claims "against physicians and related medical professionals arising out of the practice of medicine and the provision of medical care or treatment to patients."[14] The Court concluded that Plaintiff's claims against the ARCH defendant did not arise "out of their practice of medicine and their provision of

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[7] 128 Haw. 405, 289 P.3d 1041 (Ct. App. 2012).
[8] *Id.* at 406, 1042.
[9] *Id*.
[10] *Id*.
[11] *Id.* at 407, 1043.
[12] *Id.* at 406, 1042.
[13] *Id* at 411, 1047.
[14] *Id*.

medical care or treatment to Campos."[15] The Court furthered reasoned that its conclusion was supported by HAW. REV. STAT. § 671-11, which states that one member of the MICP must be a licensed "physician or surgeon."[16] No physicians were employed at the defendant ARCH or involved in any way in the tortious conduct. Moreover, the Court noted that HAW. REV. STAT. § 671-12.5 requires that the claimant must first consult with a licensed "physician" to provide a basis for concluding that the medical tort claim is meritorious.[17] The Court reasoned that these physician-related requirements confirm that:

> HRS Chapter 671 is directed at medical malpractice claims and does not encompass [Plaintiff's] claims against Defendants. There is no basis for believing that a physician would be qualified to render an opinion on the standard of care applicable to an expanded ARCH…or an opinion on whether there had been a breach of that standard of care. The required involvement of physicians in the process of submitting and resolving MCCP medical tort claims establishes that the Legislature intended the MCCP to address medical malpractice claims, and not claims involving breaches of duty by expanded ARCHs…[18]

B. Seminal National Case - Estate of French v. Stratford House

The *Campos* Court's ruling that claims relating to failure to provide proper basic care are not "medical torts" is consistent with other case law across the country. As the Supreme Court of Tennessee held in the seminal case *Estate of French v. Stratford House*, "[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."[19]

In *Estate of French v. Stratford House*, the plaintiff was admitted to a skilled nursing facility. Due to her lack of mobility, she was at risk of developing pressure ulcers.[20] 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.[21] The certified nursing assistants ("CNAs"), however, failed to comply with the care plan's instructions due to a lack of training and understaffing, among other reasons.[22] 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

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[15] *Id*.
[16] *Id*.
[17] *Id.* at 410, 1046.
[18] *Id.* at 412, 1048.
[19] 333 S.W.3d 546, 556 (Tenn. 2011); *See Conley v. Life Care Ctrs. of Am., Inc.,* 236 S.W.3d 713, 729–30 (Tenn.Ct.App.2007).
[20] 333 S.W. 3d 546, 550 (Tenn. 2011).
[21] *Id.*
[22] *Id.* at 558.

judgment and held that the Tennessee Medical Malpractice Act applied to the ordinary negligence claims.[23]

On appeal, the Supreme Court of Tennessee held that Plaintiff's claims were a hybrid of professional negligence and ordinary claims.[24] 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."[25] 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."[26] 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."[27]

Read together, *The Estate of French* and *Campos* decisions offer Hawaii 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 negligence" or ordinary negligence. As the *Estate of French* Court reminds us: "Of course, making that distinction is not always an easy task."[28]

C. How Specific Types Of Elder Abuse Torts Fit Within "Professional Negligence"

i. Elder Abuse Torts Held Sounding in Ordinary Negligence

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.[29] 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.[30] 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."[31]

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[23] *Id.* at 553.
[24] *Id.* at 558.
[25] *Id*.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 556.
[29] *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.").
[30] *McGraw v. St. Joseph's Hosp.,* 200 W.Va. 114, 488 S.E.2d 389, 396 (1997).
[31] *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).

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."[32]

In *Kujawski v. Arbor View Health Care Ctr,* the Plaintiff sued a nursing home for injuries resulting when she fell from a wheelchair.[33] The plaintiff had poor vision, poor hearing, arthritis and was overweight and unable to walk.[34] The nursing home caring for the plaintiff noted multiple incidents involving the plaintiff during her stay, including several falls from her wheelchair.[35] Testimony revealed that the nursing home failed to use safety belts on wheelchairs to keep the residents from slipping and falling.[36] 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.[37] Connecticut courts, which are the forum for a large number of 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."[38]

ii. Elder Abuse Torts Held Sounding in Professional Negligence

In *Hernandez v. Diversified Healthcare-Abbeville, LLC*, 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.[39] 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.[40]

Intentional sexual assault appears to be the only relevant elder abuse tort directly addressed in a Hawaii opinion. In *Doe v. City & Cnty. of Honolulu*, the Intermediate Court of Appeals of Hawaii held that a physician's sexual assault of a patient is a "medical tort" as defined in HAW. REV.

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[32] *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)).

[33] 139 Wis.2d 455, 407 N.W.2d 249, 252.

[34] *Id.* at 459, 251.

[35] *Id.* at 460, 251.

[36] *Id*.

[37] *Id.* at 467, 254.

[38] *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).

[39] 24 So. 3d 284, 289 *writ denied*, 2009-2629 (La. 2/12/10).

[40] *Id*.

STAT. Chapter 671.[41] The Court held that, "[t]he statutory definition of a 'medical tort' includes intentional acts and negligent acts and acts for proper purposes and acts for improper purposes."[42]

There are several distinctions to be made in a case of sexual assault of an elder. First, the defendant tortfeasor in *Doe* was a physician. As stated above, courts have liberally deemed a wide range of torts committed by a physician as "medical torts," which is consistent with the legislative history behind HAW. REV. STAT. Chapter 671. If the individual who commits the assault is a nurse aide or a nurse, the result is less clear. These scenarios may raise issues of forseeability and respondeat superior that are beyond the scope of this article.[43]

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

Of course, in order to invoke HAW. REV. STAT. Chapter 671, 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 falls outside the scope of Haw. Rev. Stat. Chapter 671.

A. Types Of Senior Care Home Caregiver Positions As "Health Care Providers"

The two most common types of caregiver positions in senior care homes are: (1) nurse; and (2) nurse aide, also commonly referred to as resident care aide. Senior care homes rarely employ physicians; generally it is the skilled nursing homes or intermediate care homes that employ physicians.

HAW. REV. STAT. § 671-1 defines a "health care provider" as:

> [A] physician, osteopathic physician, surgeon, or physician assistant licensed under chapter 453, a podiatrist licensed under chapter 463E, a health care facility as defined in section 323D-2, and the employees of any of them. Health care provider shall not mean any nursing institution or nursing service conducted by and for those who rely upon treatment by spiritual means through prayer alone, or employees of the institution or service.

The language of HAW. REV. STAT. § 671-1, which largely focuses on physicians, is consistent with the legislative history behind HAW. REV. STAT. Chapter 671 which was squarely focused on combating the rising costs of malpractice insurance. Neither nurses nor resident care aides are explicitly identified as "health care providers" under HAW. REV. STAT. § 671-1, nor are

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[41] 93 Haw. 490, 499, 6 P.3d 362, 371 (Ct. App. 2000).

[42] *Id*.

[43] *See Regions Bank & Trust v. Stone Cnty. Skilled Nursing Facility, Inc.*, 345 Ark. 555, 567, 49 S.W.3d 107, 115 (2001) ("[W]e agree with the trial court that McConnaughey's sexual assault of Elder was unexpectable. As in *Porter*, McConnaughey was not, by any stretch of the imagination, acting within the scope of his duties as a CNA when he assaulted Elder. Rather, McConnaughey's actions were purely personal. Because McConnaughey's actions were not expectable in view of his duties as a CNA, Stone County Skilled Nursing Facility may not be held liable for the sexual assault and was thus entitled to summary judgment as a matter of law.").

they required to carry medical malpractice insurance. Clearly, the plain language of HAW. REV. STAT. § 671-1 does not expressly include claims against the two most likely positions to be involved in a case of institutional elder abuse or neglect.

Nurse aides are commonly referred to as certified nurse aides, or resident care aides. In Hawaii, however, there is no requirement that one be a certified nurse aide in order to serve as a nurse aide or resident care aide.

Per Hawaii Administrative Rules ("HAR") § 11-100.1-2 (2006), a "nurse aide" in Hawaii:

> [M]eans a person who performs a variety of duties relating to patients and patient care under the supervision of a nurse, including but not limited to assisting patients in all activities of daily living. A nurse aide may also assist a nurse by changing bed linens, delivering messages, and sterilizing instruments, serving and collecting food trays, and helping patients get out of bed, bathe, and dress.

In *Estate of French*, the Supreme Court of Tennessee questioned whether CNAs fell within the definition of "health care provider."[44] 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."[45]

The holding in *Estate of French* is consistent with the definition of nurse aide, as well as the position's duties and responsibilities, which are typically related to basic care and nonmedical in nature. A viable argument can be made that all personal claims relating to the acts or omissions of CNA's should be exempt from HAW. REV. STAT. Chapter 671. 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 negligence."

It is unlikely that a similar argument could be successfully made for claims relating to the acts or omissions of nurses. The author is aware of no published opinions stating that a nurse is not a healthcare provider. The more appropriate argument when the acts or omissions of a nurse are involved is whether they amount to "professional negligence," or instead relate more to "nonmedical, administrative, ministerial or routine care."[46]

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

HAW. REV. STAT. § 671-1, which defines "health care providers," incorporates by reference "health care facilit[ies] as defined in section 323D-2." This includes:

> [H]ealth care facilities and health care services commonly referred to as hospitals, extended care and rehabilitation centers, nursing homes, skilled nursing facilities, intermediate care facilities, hospices for the terminally ill that require licensure or certification by the department of health, kidney disease

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[44] 333 S.W.3d 546, 558 (Tenn. 2011).

[45] *Id*.

[46] *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)).

> treatment centers including freestanding hemodialysis units, outpatient clinics, organized ambulatory health care facilities, emergency care facilities and centers, home health agencies, health maintenance organizations, and others providing similarly organized services regardless of nomenclature.

There are four main types of senior care homes in Hawaii: (1) skilled nursing and intermediate care facilities ("SNF and ICF"); (2) traditional and expanded adult residential care homes ("ARCH"); (3) assisted living facilities ("ALF"); and (4) community care foster family homes. Only the first type of senior care home - skilled nursing facilities and intermediate care facilities – is expressly identified in HAW. REV. STAT. § 323D-2.

Skilled nursing facilities ("SNF") and intermediate care facilities ("ICF") provide the highest level of care and widest range of services among senior care facilities. There are approximately 50 SNFs and ICFs housing approximately 4,300 residents in Hawaii.[47] Skilled nursing facilities have routinely been held as "health care providers." As noted above, the primary issue for most cases of institutional abuse or neglect involving direct nurse involvement or a facility that offers nursing level care is whether the conduct at issue is one of "professional negligence."[48]

There are two types of ARCHs: 1) traditional; and 2) expanded. Both are largely regulated by HAR § 11-100 (2006). Traditional ARCHs are very similar to assisted living facilities in terms of standard of care, although they are very limited in terms of how many residents they can house.[49] Expanded ARCHs are very similar to skilled nursing facilities in terms of standard of care, but again can only admit a limited number of residents.[50] Although Expanded ARCHs are licensed to offer skilled nursing, there are important distinctions between ARCHs and SNFs and/or ICFs. First, Expanded ARCHs are not required to employ a physician. Second, there is even limited nursing involvement in expanded ARCHs as the "primary caregiver" can simply be a nurse aide, and nurses are only generally required to "train and monitor primary care givers and substitutes in providing daily personal and specialized care to residents as needed to implement their care plan."[51]

There are approximately 500 ARCHs housing approximately 3,500 residents in Hawaii.[52] The qualifications needed to obtain an ARCH license in Hawaii to open up one's own care home are stunningly minimal – one needs to simply be a certified nurse aide ("CNA") over the age of 21 and

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[47] List of Skilled Nursing/Intermediate Care Facilities at http://health.hawaii.gov/ohca/medicare-facilities/skilled-nursingintermediate-care-facilities/.

[48] *See Richard v. Louisiana Extended Care Centers, Inc.*, 2002-0978 (La. 1/14/03), 835 So. 2d 460, 468 ("In the case of a nursing home, the nursing home resident is not always receiving medical care or treatment for any specific condition, but can always be said to be "confined" to the nursing home. However, in our view, it was not the intent of the legislature to have every "act . . . by any health care provider . . . during the patient's . . . confinement" in a nursing home covered by the MMA.").

[49] Haw. Admin. Rules § 11-100.1-2 (2006).

[50] *Id*.

[51] Haw. Admin. Rules § 11-100.1-83 (2006).

[52] Combined ARCH/Expanded ARCH Vacancy Report at http://health.hawaii.gov/ohca/files/2013/06/Combined-ARCH-Expanded-ARCH-Vacancy-Report-By-Area3.pdf.

take a handful of courses at Kapiolani Community College.[53] Expanded ARCHs carry additional requirements, but the "administrator" who opens the home still faces the same minimal hurdles.[54]

In *Campos*, the Intermediate Court of Appeals of Hawaii questioned in dicta whether the ARCH defendant even fell within the definition of "health care provider."[55] First, the Court noted that ARCHs are not "listed among the various facilities that qualify as health care providers by virtue of being health care facilities."[56] The Court also noted that "the level of direct physician involvement in the operation of an extended ARCH is less than that of the other facilities listed under the definition of 'health care facility,' such as skilled nursing facilities or intermediate care facilities," and that HAR § 11-94 (1985) required a skilled nursing facility to have a physician serve as a medical director before it was repealed and replaced by HAR § 11-94.1 (2011).[57]

Thus, similar to RCAs, a viable argument remains to be made that all personal injury claims against all types of ARCH facilities are exempt from Haw. Rev. Stat... Chapter 671 because ARCHs do not fall within the meaning of "health care provider."

The same argument can be made for all personal injury claims against assisted living facilities, and community care foster homes as these too are not identified as "health care facilities" by HAW. REV. STAT. § 323D–2. Moreover, these types of senior care homes similarly involve minimal or nonexistent direct physician involvement, and are not required to employ physicians.

Assisted living facilities, which are regulated in Hawaii by HAR Rules § 11-90 (1999), do not offer skilled nursing, and are merely "designed to respond to individual needs, to promote choice, responsibility, independence, privacy, dignity, and individuality."[58] While there are 13 ALFs in Hawaii, housing approximately 2,250 residents, they are very loosely regulated and the setting for many cases of elder abuse and neglect.[59] ALF staff are only required to complete six hours of in-service training a year, there are no specific staffing requirements, and there are no specific training or disclosure requirements for facilities that offer Alzheimer's Units, commonly marketed as "Memory Care Units."[60] Assisted living facilities generally do not employ any physicians, and usually employ many more resident care aides than nurses.

Lastly, community care foster homes are very similar to expanded ARCHs in terms of size and the fact they also offer skilled nursing. Per HAW. REV. STAT. § 321-481 and Haw. Admin. Rules § 17-1454**,** community care foster homes cannot house more than two adults at any time, and at least one of them must be a Medicaid recipient. Again, however, the "primary caregiver" may be a nurse aide with as little as one year's experience.[61]

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[53] Minimum Qualifications for Adult Residential Care Home License at http://health.hawaii.gov/ohca/files/2013/06/Min-Qualif-for-ARCH.pdf.

[54] Haw. Admin. Rules §§§ 11-100.1-80; 11-100.1-82; 11-100.1-83 (2006).

[55] 128 Haw. 405, 412, 289 P.3d 1041, 1048 (Ct. App. 2012).

[56] *Id*.

[57] *Id*.

[58] HAW. REV. STAT. § 321-15.1.

[59] List of Assisted Living Facilities in Hawaii at http://health.hawaii.gov/ohca/files/2013/06/ALF-in-Hawaii1.pdf.

[60] Haw. Admin. Rules § 11-90-7 (1999).

[61] Haw. Admin. Rules § 17-1454-41 (2002).

IV. CONCLUSION

Cases of institutional elder abuse or neglect may be deemed as sounding in professional negligence, ordinary negligence, or a hybrid of both. It is critical to understand the distinction between the two because HAW. REV. STAT. Chapter 671 imposes unique requirements on professional negligence claims, or "medical torts."

Failure to submit medical tort claims to the MICP prior to filing a complaint may lead to dismissal and even sanctions. HAW. REV. STAT. § 671-12.5 further requires that the claimant must first consult with a licensed "physician" to provide a basis for concluding that the medical tort claim is meritorious.

A claim will be subject to HAW. REV. STAT. Chapter 671 and be deemed a "medical tort" when it is against a health care provider for errors and/or omissions in rendering professional services. The legislative history of HAW. REV. STAT. Chapter 671 illustrates that it was largely enacted to combat rising costs of medical malpractice insurance for physicians. 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 and nurses.

In Hawaii, it is unlikely that nurse aides or ARCHs will be deemed "healthcare providers." Due to the similarities between ARCHs and ALFs and community care foster homes, a viable argument could be made that ALFS and community care foster homes should also not be deemed "healthcare providers."

Therefore, the main issue as it relates to the implications of HAW. REV. STAT. Chapter 671 in cases of institutional elder abuse or neglect is the extent to which the acts or omissions of a nurse or a facility offering skilled nursing level of care "aris[e] out of the practice of medicine and the provision of medical care or treatment to patients."[62]

When the acts or omissions relate to nonmedical, 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. Jurors do not need expert testimony to understand that a facility is negligent when it allows an elderly resident to develop a significant pressure ulcer from living and sleeping in a wheelchair around the clock for weeks. When the failure to provide care is so basic, the imposition of HAW. REV. STAT. Chapter 671 and its unique requirements will be improper.

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[62] 128 Haw. 405, 411, 289 P.3d 1041, 1047 (Ct. App. 2012).