A Case Study of *Taylor v. Brill*

BY GREGG HUBLEY, ESQ.

To the busy practitioner, navigating the evolving professional negligence law in Nevada – and the gaps left in the legislative direction – can be like navigating an uneven desert path in the dark of night. The professional negligence landscape in Nevada has undergone dramatic changes recently, which is examined in other articles in this issue. But attorneys in the trenches still bemoan the lack of legislative guidance, which renders it difficult to properly inform and advise the client. To those lawyers stumbling along the trail of medical malpractice in Nevada: take heart! The Nevada Supreme Court provided some much-needed orientation on a few important topics.

Where Plaintiff's Consent is Uncontested, Defendant Cannot Introduce Evidence of Assumption-of-the-Risk Evidence or Informed Consent

In *Taylor v. Brill*[1], the plaintiff filed suit for professional negligence against her OB-GYN, contending that he negligently perforated her uterus and bowel during a hysteroscopy. The plaintiff did not claim that she was uninformed of the risks or that the defendant failed to obtain her consent. The defendant did not present an assumption of the risk defense at trial, though he did assert an affirmative defense in his answer that the plaintiff assumed the risks of the procedures performed.

While the plaintiff attempted to exclude any reference to known risks or complications at trial, the district court held that the defendant could elicit testimony from the plaintiff to introduce evidence of her knowledge of the risks and complications associated with the procedure but could not introduce her signed informed consent form. The Supreme Court reversed, holding that if the plaintiff does not challenge consent, the defendant cannot introduce any evidence about assumption of the risk or to show that the plaintiff provided informed consent because it is irrelevant in professional negligence actions where the plaintiff does not dispute that they provided consent.

In professional negligence actions, the plaintiff must show a deviation from the standard of care, medical causation, and damages. The Supreme Court reasoned that, where consent is unchallenged by the plaintiff, evidence and argument about consent is irrelevant to showing conformity to the standard of care or medical causation. The Supreme Court went on to explain that the medical provider's duty to provide treatment in accordance with the standard of care does not change in a case where a plaintiff gave informed consent.

Importantly, *Taylor* did not preclude *any* evidence that could support an assumption of the risk defense, even in cases where a plaintiff does not dispute that they gave informed consent. Rather, the court allowed expert witnesses to provide testimony concerning the known risks and complications of the procedure but concluded that lay witness testimony and "hospital literature" such as consent and discharge forms were not suitable showing a standard of care or breach. Consequently, the Supreme Court found that the district court abused its discretion by permitting evidence of the *plaintiff's* knowledge of the risks and

consequences of the hysteroscopy or evidence probative of her informed consent.

It is also notable that in a later, unpublished decision, the Supreme Court reinforced that evidence of risks and complications can be admissible through experts when it may help the jury to determine whether there has been a standard of care breach.[2]

Practical Applications on Informed Consent Post-Taylor

Post-*Taylor*, the decision of whether to challenge consent must be carefully evaluated by plaintiffs' counsel. This is not always an easy line to draw. There are fact patterns alleging that a medical provider said – or did not say – something that could impact the patient's decision to undergo a procedure. For example, a plaintiff may allege the medical provider downplayed the seriousness of a procedure and claim that this impacted their decision to consent. Counsel will need to determine in those cases whether this evidence – which will almost always come solely from the plaintiff's testimony – is important enough to the theory of the case to make the informed consent challenge. Once this door is opened, the defendant will be permitted to assert evidence related to assumption of the risk and will be allowed to show the jury the signed consent form.

From the defense perspective, *Taylor* makes it more difficult to use evidence that tends to show assumption of the risk at trial if the plaintiff does not challenge informed consent. However, this difficulty is not absolute. While the defense will be prevented from introducing the signed consent form or eliciting the plaintiff's knowledge of the risks of the procedure if consent is not at challenged, the defendant can use expert testimony to introduce evidence of the procedure's risks and complications if it is arguable that such expert evidence will assist the jury in determining whether the harm claimed by the plaintiff was more or less likely to be the result of negligence. For instance, in *Lathbury v. Jones*, the defense medical expert was properly allowed to provide testimony that a femoral nerve injury during hip replacement surgery was one of the risks that could occur even in the absence of negligence.[3]

Expert Testimony Not Required to Establish Reasonableness and Necessity of Special Damages

Special damages in professional negligence actions often arise in the form of invoices or bills for medical services that the injured plaintiff claims to have needed following the negligent medical care. To receive special damages, a plaintiff must demonstrate that the amounts she claims are both reasonable and necessary. Generally, the plaintiff's expert will testify that the medical care was reasonable and necessary, but some courts in Nevada require the plaintiff to establish reasonableness through a retained expert or physician.

In *Taylor*, the plaintiff had worked in the medical billing industry for more than 20 years, and sought to testify as to reasonableness of the charges, along with calling a chief financial officer of the hospital where she treated, a healthcare billing representative, and a healthcare customer service billing manager. The district court excluded most of the evidence that the plaintiff sought to admit in support of her special damages claim on the basis that testimony about the reasonable and customary nature of medical charges was beyond the knowledge of a layperson and required an expert witness. The Supreme Court reversed, finding that this was an abuse of discretion that affected the plaintiff's substantial rights as it prevented her from proving a prima facia case for damages. Ultimately, where there is other evidence that demonstrates the reasonableness of medical charges, expert testimony is not required after *Taylor*.

Practical Applications of Proving Reasonableness of Special Damages Post-Taylor

Unlike the plaintiff in *Taylor*, very few litigants will be able to provide testimony as to the reasonableness of medical charges at trial, but it is now clear that neither a retained expert nor even a physician is necessary to establish this element at trial. Still, the careful plaintiff's practitioner will ensure that there is a live witness at trial, with the requisite background, experience, and knowledge, to testify that each item of special damages is reasonable in price. If a plaintiff chooses not to offer evidence of reasonableness of special damages through a physician or retained expert, counsel for defendants will be able to challenge any lay witness offering testimony as to reasonableness.

Insurance Write-Downs Inadmissible

In *Taylor*, the district court excluded most of the medical billing that was offered by the plaintiff on the grounds that the plaintiff failed to show reasonableness through an expert. However, the district court did admit evidence for some of the medical charges offered, and permitted the defendant to present evidence of insurance write-downs, interpreting Nevada Revised Statute (NRS) 42.021(1) to permit this. While collateral source evidence is prohibited in most tort actions in Nevada, NRS 42.021(1) allows the defendant to introduce evidence that the amount paid to a medical provider for the plaintiff's care was handled by insurance and paid at a rate less than the amount charged by the medical provider. The *Taylor* court found that NRS 42.021(1) only concerns evidence of "actual benefits paid to the plaintiff by collateral sources," and further determined that insurance write-downs do not create any payable benefit to the plaintiff. Consequently, the court held that insurance write-downs are inadmissible.

The *Taylor* decision helps to fill in some gaps and steer Nevada attorneys who are handling a professional negligence claim in the right direction. Before *Taylor*, it was unclear whether evidence concerning assumption of the risk could be used in cases where the plaintiff did not allege any informed consent issue, and there are now clear limits on that evidence. Likewise, plaintiffs have more leeway in choosing their path to prove-up special damages post-*Taylor*. Finally, the *Taylor* decision allows for more fruitful pretrial negotiations as counsel grapples with what will and won't be admissible collateral source evidence. Ultimately, the *Taylor* decision shines some helpful light on navigating the terrain of professional negligence in Nevada.

GREGG HUBLEY is a partner of Arias Sanguinetti, which has offices in Las Vegas, Los Angeles, and Emeryville, California, and which represents injured parties in medical malpractice, traumatic personal injury, school abuse/civil rights, and employment discrimination matters. He manages the Las Vegas office of Arias Sanguinetti and has extensive trial experience in medical malpractice, personal injury, and business law matters. He can be reached at gregg@aswtlawyers.com or 702-789-7529.

ENDNOTES:

1. *Taylor v. Brill*, 139 Nev. Adv. Op. 56, 539 P.3d 1188 (2023).
2. *Lathbury v. Jones*, 544 P.3d 236, 2024 WL 761840 (Nev. 2024) (*unpub.*).
3. 544 P.3d 236, 2024 WL 761840 (*unpub.*) (2024).