What is Medical Malpractice?

The Nuanced Existence Between Ordinary and Professional Negligence Claims

BY SHANNON WISE, ESQ.

Every day, courts across Nevada are met with Motions to Dismiss and Motions for Summary Judgment requesting one thing: that a plaintiff's ordinary negligence claim be dismissed because the allegations contained therein are based in medical malpractice (now known as professional negligence) instead of ordinary negligence claims. The current state of Nevada law on the subject leaves ample room for interpretation. This situation ultimately leads the district courts that are deciding these issues to come to vastly different conclusions. This article explains what professional negligence claims encompass and the nuanced existence between professional and ordinary negligence claims.

What is Professional Negligence?

Stated simply, professional negligence occurs when a medical professional fails to do what a reasonable healthcare provider would do and causes injury to a patient. Stated legally, a professional negligence claim exists when there is a "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."[1] What seems simple enough is actually rife with many nuances that have attorneys fighting over these concepts every day.

Why Does it Matter if the Claim Falls within Professional Negligence or Ordinary Negligence?

It matters because, when a claim falls within professional negligence, a different set of laws apply. In 2004, the laws of Nevada pertaining to what is now known as professional negligence were changed by ballot question. The Keep Our Doctors In Nevada (KODIN) tort reform initiative passed, and shaped the face of medical malpractice law for nearly 20 years. And this law is what makes medical malpractice actions unique. To file a medical malpractice lawsuit, you must have an affidavit by a medical expert in the same or similar practice area outlining the malpractice by the defendant provider.[2] This lawsuit, until recently, had to be filed within one year.[3] This requirement recently changed due to AB 404, which extends the statute of limitations to two years.

Once in litigation, there are numerous other laws that limit these cases. For example, liability is several, and not joint and several; collateral sources are admissible, unless preempted by federal law; there is a mandatory settlement conference requirement; and you have three years to get your case to trial—to

name a few.[4] These limitations are unlike those in an ordinary negligence case.

But perhaps the biggest impact of a case sounding in medical malpractice versus ordinary negligence cases is that they have a unique effect on recovery. There is a cap on non-economic damages. Prior to the last legislative session, the cap was $350,000 for pain and suffering no matter how many healthcare providers were involved in the case.[5] The cap has now been raised by $80,000 per year for five years until it reaches $750,000 in 2028. Then the cap will increase by a flat rate of 2.1 percent per year starting in January 2029.[6] There is also a cap on attorney's fees. Prior to the last legislative session, these fees were a tiered contingency fee—not amounting to the normal 40 percent to which most attorneys are accustomed. AB 404 allows for a flat 35 percent contingency fee.

But what actually constitutes professional negligence?

Professional Negligence in a Nutshell

Imagine a person is injured in a hospital. It is automatically professional negligence, right? While the plaintiff and defense bars disagree on the answer, the law is clear. The answer is: not necessarily. It depends on numerous other factors. A couple of recent decisions have really helped to shape professional negligence cases as we know them. But how does someone know if an action is professional or ordinary negligence?

First, the defendant at issue must be a provider of healthcare. A provider of healthcare is a "physician … physician assistant, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractic physician, doctor of Oriental medicine, holder of a license or a limited license issued under the provisions of chapter 653 of NRS, medical laboratory director or technician, licensed dietitian or a licensed hospital, clinic, surgery center, physicians' professional corporation or group practice that employs any such person and its employees."[7] If a person does not fall within this category, the action is not professional negligence. It is that simple.

Second, that person must be performing medical judgment, diagnosis, or treatment on the plaintiff.[8] The *Szymborski* and *DeBoer* courts recognized that hospitals often perform nonmedical services, and those would fall outside the realm of professional negligence. Other things happening in a hospital could be ordinary negligence. Examples include unsafe discharge of a patient, dropping a patient, fraud, administrative issues, and failure to follow doctor's orders.[9] The problem is that the law is not clear on all these examples. Many of the cases that have been decided have been unpublished opinions, and many others are awaiting appellate review. And even more nuanced, many of the aforementioned examples can also fall within professional negligence.

How? Let's take the failure to follow doctor's orders. If a nurse (who is a provider of healthcare) blatantly ignores the fact that there is an order, that would be ordinary negligence because it did not take medical diagnosis, judgment, or treatment in that failure. On the flip side, if a nurse is using medical judgment in not performing a doctor's order (standard of care issues aside), this act would likely fall within professional negligence. The Nevada Supreme Court has tried to give some guidance to flesh out this difference. In the *Estate of Curtis*, the court looked

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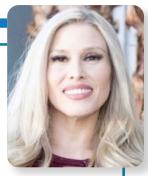
to a common-knowledge exception to determine if a case falls within professional or ordinary negligence.[10] This exception was an extension of NRS 41A.100, the res ipsa loquitur exception, which is statutory and allows a rebuttable presumption of negligence in very rare circumstances. In *Syzdel*, the court expanded this exception and held that a "common knowledge exception provides that where lay persons' common knowledge is sufficient to determine negligence without expert testimony" and in such cases the affidavit requirement does not apply.[11] The *Curtis* court then held that this rationale can be used in determining whether a claim falls within professional or ordinary negligence. Stated slightly differently, if a lay person's common knowledge can determine the negligence, the case or claim falls within ordinary negligence.

Simple enough right? Unfortunately, not. What seems simple requires a heavily fact-intensive analysis. This analysis often leads to claims such as negligent hiring to be split—with half being subsumed into a professional negligence claim while the other remains a product of ordinary negligence. In short, the law on professional negligence is complicated. These cases are even more complicated when elements of ordinary negligence exist. The law will likely continue to change, fleshing out this very interesting area of law.



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ENDNOTES:

1. NRS 41A.015.
2. NRS 41A.071
3. NRS 41A.097.
4. NRS 41A.045; NRS 42.021; *McCrosky v. Carson Tahoe Regional Medical Center*, 133 Nev. 930, 937-38, 408 P.3d 149, 155-56 (2017); NRS 41A.081; NRS 41A.061.
5. NRS 41A.035; *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 799, 358 P.3d 234, 239-240 (2015).
6. AB404.
7. NRS 41A.017.
8. *Estate of Curtis v. South Las Vegas Medical Investors, LLC*, 136 Nev. 350, 466 P.3d 1263 (2020); *Szymborski v. Spring Mt. Treatment Ctr.*, 133 Nev. 638, 641, 403 P.3d 1280, 1284 (2017); *DeBoer v. Senior Bridges of Sparks Family Hosp.*, Inc., 128 Nev. 406, 411, 282 P.3d 727, 731 (2012).
9. *Id.*
10. *Id.* at 350, 466 P.3d 1263.
11. *Szydel v. Markman*, 121 Nev. 453, 459, 117 P.3d 200, 204 (2005).