

**MEDICAL MALPRACTICE  
IN NEBRASKA**

**A LEGAL PRIMER**

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## I. INTRODUCTION

Medical Malpractice is one of the most controversial and politically-charged topics in contemporary American society. To many Americans, doctors are god-like men and women that can do no wrong. Malpractice claims, the argument goes, are just an excuse used by unsatisfied patients who had unrealistic expectations to begin with. On the other side are those who have suffered from gross and obvious negligence on behalf of doctors or their staff. The woman recently left dead on waiting room floor in New York provides a graphic and disturbing example. While there can be no doubt that the large majority of doctors and nurses are competent medical providers, mistakes are still made. Even the best doctors will make mistakes during his or her career - doctors are human beings, after all. Unfortunately, the consequences of mistakes in the medical industry are often severe. Malpractice can leave patients to suffer a lifetime with a debilitating injury or condition. Those cases with truly egregious conduct and catastrophic results can make even the most skeptical of souls sympathetic.

While some patients have suffered due to bona fide malpractice, the medical profession as a whole has likewise suffered from the rising costs of malpractice insurance and legal fees. While egregious cases of malpractice do exist, even the most plaintiff-friendly jury must recognize the importance and general professionalism of the medical community. The vast majority of doctors are compassionate and caring people – qualities lending themselves to a career serving those in need. Every American has been impacted in a positive way by the expertise employed by the medical community. Even if you've never been to a doctor in your adult life, you likely receive vaccinations for otherwise debilitating and deadly diseases had an attending physician assist your mother during her pregnancy and your birth, etc. Many people owe their very life to the skill and diligence of our nation's medical providers. For these gracious and caring acts, the medical profession is due our eternal thanks.

As American society became more urban and impersonal during the twentieth century, the relationship between doctor and patient suffered. The result was a less personal relationship which, many argue, is an underlying cause of the explosion in medical malpractice claims. Patients are more likely to sue a doctor they only recently began to see for their medical needs. While the technology, ability, and skill of the medical community has grown tremendously, relationships with patients have begun to drift further from the traditional close-knit family doctor and closer and closer to something akin to a service. The result has been an explosion in medical malpractice lawsuits across the country.

This article exams the state of the law of medical malpractice as it is currently expressed in the state of Nebraska. It is intended to be a beginning guide to understanding medical malpractice claims; their elements, procedure, and outcomes.

## II. Nebraska Statutes Impacting Malpractice Litigation:

The Nebraska Revised Statutes contain several chapters and sections that impact malpractice litigation. Nebraska has enacted a comprehensive statutory scheme governing malpractice litigation. First, Nebraska, like many other states, has enacted a statutory cap on the recovery allowed by a plaintiff succeeding on a malpractice claim. Second, Nebraska has limited the liability of individual health care providers to plaintiffs in malpractice. Second, Nebraska Law requires that malpractice claims be pursued within a certain time period, depending on the circumstances of the case. Plaintiffs, defendants, and their attorneys must be

diligent to comply with these timing requirements or risk having an otherwise “slam dunk” case barred from court.

### **The Nebraska Hospital-Medical Liability Act.**

In 1976, the Nebraska Unicameral enacted the Nebraska Hospital-Medical Liability Act (the “Act”)<sup>i</sup>. The beginning of the Act contains the Unicameral’s statement of its intent and findings. According to the Legislature, the public interest requires that “prompt and efficient methods be provided for eliminating the expense as well as the useless expenditure of time of physicians and courts in nonmeritorious malpractice claims and for efficiently resolving meritorious claims.”<sup>ii</sup>

The Act was passed “to address a perceived medical liability crisis.”<sup>iii</sup> Since it took effect in the mid 1980s, most subsequent medical malpractice suits have been brought under the Act’s provisions. Before digging in to the substantive provisions of the Act, it is important to first understand how the Legislature defined the Act’s key terms.

#### **A. Definitions.**

The Act contains the following definitions:

**Health Care** is any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient’s care, treatment, or confinement.<sup>iv</sup>

A **Health Care Provider** is a physician, certified registered nurse anesthetist (“CRNA”), an individual, partnership, limited liability company, corporation, association, facility, institution, or other entity authorized by law to provide professional medical services by physicians or CRNAs, or a hospital. The definition also includes personal representatives who are a successor or assignee of any of the above entities.<sup>v</sup>

Until December 1, 2008, a **Physician** is anyone licensed to practice medicine and/or osteopathic medicine and surgery in Nebraska. After December 1, 2008, the definition of **Physician** cross references the Medicine and Surgery Practice Act.<sup>vi, vii</sup>

A **Patient** is any natural person who receives or should have received health care from a licensed health care provider under an express or implied contract.<sup>viii</sup>

A **Hospital** is a public or private institution licensed under the Health Care Facility Licensure Act.<sup>ix, x</sup>

**Malpractice** describes when, in rendering professional services, a health care provider has failed to use the ordinary and reasonable care, skill and knowledge ordinarily possessed and used under like circumstances by members of his profession engaged in a similar practice in his or similar localities.<sup>xi</sup>

An **Occurrence** is the event, acts, or omissions incident thereto which proximately cause injuries or damages for which reimbursement is or may be claimed by the patient or his representative.<sup>xii</sup>

**Informed Consent** is consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers. Failure

to obtain informed consent is failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained consent.<sup>xiii</sup>

Those are the key definitions of terms used in the Act. The Act's substantive provisions contain the real impact on medical malpractice litigation. These provisions include a cap on recoverable damages in medical malpractice actions, a cap on liability for those health care providers qualifying under the act, establishment of the "Excess Liability Fund," special procedures for initiating and settling medical malpractice suits, and establishment of the "Residual Malpractice Insurance Authority" providing coverage to health care providers who cannot otherwise find malpractice insurance. Before gaining the protections provided by the Act, however, health care provider must qualify.

## **B. Qualifying under the Act.**

Before a health care provider can take advantage of any of the provisions of the Nebraska Hospital-Medical Liability Act, two preconditions must be met. First, the health care provider must be **qualified** under the Act. Second, the patient must be covered by the Act (see part "c" below). Only those malpractice suits based on occurrences while the health care provider was qualified and while the patient was subject to the Act will be regulated by its provisions.

### **1. Step one to Qualification: "Proof of Financial Responsibility"**

The first step health care providers must take to qualify under the Act requires the provider to file proof of financial responsibility with the Director of the Nebraska Department of Insurance.<sup>xiv</sup> Proof of financial responsibility can only be established by proof that the health care provider is insured by the Residual Malpractice Insurance Authority *or* by a policy of professional liability insurance offered by an authorized insurance company licensed in Nebraska.<sup>xv</sup> The policy must meet the following minimum requirements:

- Include insurance in the amount of \$500,000 *per occurrence*, AND
- In the case of physicians or CRNAs, include an aggregate liability of at least \$1,000,000 per year.
- In the case of hospitals and their employees, include an aggregate liability amount of at least \$3,000,000 per year.<sup>xvi</sup>

The filing must state the premium paid for the insurance policy. A special "risk-loss trust" was set up for university-based hospitals and their physician employees.<sup>xvii</sup> For those health care providers who cannot obtain private insurance, the Act grants the option of being insured through the Residual Malpractice Insurance Authority (see section X below).

### **2. Step two to Qualification: The Statutory Surcharge.**

The second step a health care provider must take in order to qualify under the Act involves payment of a statutory "surcharge" levied on all qualifying health care providers.<sup>xviii</sup> The surcharge is determined by the Director of the Nebraska Department of Insurance, with some statutory limitations.<sup>xix</sup> For 2008, the surcharge is set at 35% of the premium paid by the health care provider to maintain the required malpractice insurance.<sup>xx</sup> This surcharge goes to

fund the “Excess Liability Fund,” (the “Fund”), another important creation of the Act (see section “E. The Excess Liability Fund” below). The surcharge is generally levied once annually.<sup>xxi</sup> However, if the Director determines that the Fund’s resources are inadequate to pay the claims allowed for a given calendar year, the Director has authority to levy a special surcharge on qualifying providers to bring the Fund back up to fiscally-sound levels.<sup>xxii</sup>

After the health care provider has filed its proof of financial responsibility and paid all applicable surcharges, the provider has taken all the necessary steps to qualify for the protections offered by the Nebraska Hospital-Medical Liability Act. One more condition, however, must be met before those provisions will have any force against a given plaintiff. To be protected by the Act, it is necessary that the patient was “covered by” the Act at the time he or she obtained treatment from the health care provider.

### **C. Patients Covered by the Act.**

Before a malpractice suit will be subject to the provisions of the Act, the plaintiff must have been a patient covered by the Act at the time of the occurrence forming the basis for the lawsuit. Luckily for health care providers, patients are generally presumed to be covered by the Act.<sup>xxiii</sup> To overcome this presumption, the patient must file an election not to be bound by the Act with the Director of the Nebraska Department of Insurance before any treatment and notify the health care provider of this election “as soon as is reasonable under the circumstances.”<sup>xxiv</sup> Parents can make this election for an unborn or newborn child.<sup>xxv</sup> Health care providers must post a provision in the waiting room or other suitable location informing patients that the health care provider is qualified under the Act and that patients will be subject to the Act unless they file the election reference above.<sup>xxvi</sup> A patient’s election to be exempt from the act is effective for a period of two years unless revoked by the patient sooner.<sup>xxvii</sup>

Failure of the patient to file his or her election not to be bound by the Act is “conclusive and unqualified acceptance” of the Act’s provisions.<sup>xxviii</sup> The fact that a patient has to take affirmative steps to avoid being subject to the provisions of the Act underscores the importance the Legislature attached to the goals of the Act. Quite frankly, few patients are going to take the time to file the election to exempt themselves from the Act before undergoing treatment for a medical condition.

### **D. Cap on Plaintiff’s Recovery / Provider’s Liability.**

Perhaps the largest impact the Act has on malpractice litigation is the establishment of a limit on the amount a plaintiff can potentially recover in a malpractice suit. The act limits the amount recoverable based on the date of the occurrence forming the basis for the lawsuit. For any occurrence after December 31, 1992 but before December 31, 2004, the limit is \$1,250,000. For occurrences after December 31, 2004, the limit is raised to \$1,750,000.<sup>xxix</sup> This represents a limit on the total amount recoverable by a plaintiff in a medical malpractice suit from any and all sources. The Act also limits qualified a health care providers’ liability to a patient or his representative covered by the Act to \$500,000.<sup>xxx</sup>

The Act thus limits both the total amount a plaintiff may recover *and* the total amount for which a qualified health care provider may be held liable. You have probably noticed that a even if a plaintiff’s case is subject to the Act (i.e. the health care provider is qualified and the patient had not elected out of the Act at the time of treatment), a patient can still recover an amount far greater in total than that for which a qualified health care provider can be held liable. This is

where the Excess Liability Fund comes in. If the plaintiff is awarded an amount in excess of the total liability of all health care providers, the excess is paid out of the Excess Liability Fund.<sup>xxxii</sup>

### **E. The Excess Liability Fund.**

The Excess Liability Fund is a creation of the Nebraska Medical-Hospital Liability Act. The Fund is financed through the annual surcharge levied on all qualified health care providers. This allows Nebraska's health care providers to essentially pool the risk of malpractice liability together in order to better withstand large judgments and enjoy the benefits of economies of scale.

The Act tentatively sets \$5 million as the desired balance of the Fund, but allows the Director to reevaluate the necessary amount on an annual basis.<sup>xxxiii</sup> The Director can also acquire "re-insurance" for the fund, which will help to maintain its solvency and requires the Director to re-evaluate the surcharge imposed to finance the Fund.<sup>xxxiii</sup>

Once a plaintiff obtains either a final judgment or a settlement award in his or her malpractice suit, the Act specifies the required procedure for making a claim against the Fund. If there is an award in excess of \$500,000 against a health care provider and in excess of the amount recoverable from all health care providers, the plaintiff must deliver to the Director a certified copy of the final judgment for such award.<sup>xxxiv</sup> Settlements in which the plaintiff demands an amount more than the \$500,000 limit on the provider's liability must file a motion if the action is pending in court, or a complaint if the action is not pending, seeking approval of the agreed settlement and demanding payment of damages from the Excess Liability Fund.<sup>xxxv</sup> The complaint or motion must be served on the director, the health care provider, and the health care provider's insurer.<sup>xxxvi</sup> If the director, provider, and the plaintiff cannot agree on the amount to be paid from the Fund, the court will determine the amount in a trial.<sup>xxxvii</sup> An approved settlement cannot be appealed, but the court's determination of damages may.<sup>xxxviii</sup> This all assumes that a suit has been filed or otherwise pursued. As examined below, the Act also contains provisions impacting a malpractice case prior to its filing in court.

### **F. Requirement of Prior Review.**

One of the stated goals of the Act was to eliminate the wasted time and expenses incurred in defending against "nonmeritorious" malpractice claims. Although the Act establishes medical review panels to examine and tender an opinion on a plaintiff's malpractice suit before the suit is filed in court, this part of the act is largely toothless.<sup>xxxix</sup> This is so because the Act allows for the plaintiff to waive out of this provision and file his or her action directly in court.<sup>xl</sup> Most plaintiffs, understandably, exercise this waiver.

If the plaintiff does not waive panel review of his or her action, then the panel must first be composed. The panel consists of one non-voting attorney and three physicians.<sup>xli</sup> Those physicians must hold unlimited licenses to practice medicine in Nebraska.<sup>xlii</sup> Each side picks one physician, and then those two physicians appoint the third panel member.<sup>xliii</sup> After reviewing the parties' evidence and hearing argument by the parties' respective counsel, the panel issues a written expert opinion on whether the defendant was negligent.<sup>xliv</sup> The report and any minority report of the panel must be admitted in a subsequent action in a court of law.<sup>xlv</sup>

It should be somewhat apparent why plaintiffs rarely fail to waive panel review. First, although the plaintiff is allowed to appoint one of the reviewing physicians, that physician will be working with the defendant's appointee and another physician. As reluctant as a single

physician is to turn on a colleague, three are even more so. Second, while experts may be admitted at trial regardless of their state, the limitation on the panel that the physicians be licensed in Nebraska greatly increases the chance that the panel will know the defendant and be reluctant to turn on a colleague from the community. Finally, the fact that the panel's report must be admitted if the plaintiff decides to file a lawsuit is particularly chilling. If the panel were to conclude that the defendant had not been negligent, this opinion would carry great weight at trial and likely doom the plaintiff's case.

### **G. Constitutionality.**

The Nebraska Hospital-Medical Liability Act did not have to wait long before being challenged. The Act was passed in 1976, and by July of 1977 the constitutionality of the Act was being questioned before the Nebraska Supreme Court. In *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977), the Supreme Court of Nebraska upheld various provisions of the Act as constitutional. The statutory cap on plaintiff's damages was specifically challenged and upheld in a more recent decision of the Supreme Court. *Gourley v. Nebraska Methodist Health Sys., Inc.*, 256 Neb. 918, 663 N.W.2d 43 (2003).

Absent a landmark reversal of precedent, the Act is and will remain constitutional in its present form.

### **H. Failure to qualify / retention of common-law liability.**

If a health care provider fails to qualify or the patient files a valid election opting out of the Act's coverage, any action for malpractice will not be subject to the provisions of the Act.<sup>xlvi</sup> Thus, if a health care provider fails to qualify under the Act, the plaintiff's damages will not be limited to the \$1.75 million amount, the provider's liability will not be limited to \$500,000, and no amount will be paid out of the Excess Liability Fund.<sup>xlvii</sup> The Act expressly states that if a health care provider fails to qualify under the Act, the health care provider will be subject to liability under doctrines of common law (law handed down from the prior decisions of courts examining malpractice lawsuits).<sup>xlviii</sup> While failure to qualify will exempt the plaintiff from the cap on damages, the plaintiff still faces several other limitations on his or her case. Most notable among these are the time limitations the plaintiff faces for filing his or her lawsuit.

### **Time Bars on Malpractice Claims.**

Nebraska law generally provides for a two year statute of limitations on medical malpractice lawsuits. The plaintiff has two years from the alleged act or omission that forms the basis of the lawsuit to commence an action for medical malpractice.<sup>xlix</sup> There are three exceptions to this general two year limitation.

First, if a cause of action was not discovered by the plaintiff and could not reasonably have been discovered within the two year limitation period, a plaintiff has an additional year to commence their lawsuit. In this case, the clock begins ticking either when the plaintiff discovers they have a cause of action or *upon the discovery of sufficient facts which would reasonably lead to the discovery*, whichever is earlier.<sup>1</sup> This is known as the "discovery" exception to the statute of limitations. As you can imagine, anytime the plaintiff attempts to use this exception to toll the statute of limitations, the defendant will argue that a reasonable person would have discovered the cause of action for malpractice long before the one year extension. The merit of each case for tolling the statute of limitation is a fact-specific inquiry and must be determined on a case-by-case basis.

The second exception available to plaintiffs to toll the statute of limitations is sometimes termed the “continuous treatment” exception. Under this doctrine, the statute of limitations does not begin to run until after treatment ends.<sup>li</sup> To be continuous, the treatment must be for the same or related illnesses or injuries and continue after the alleged acts of malpractice. Mere continuity of the physician-patient relationship is insufficient.<sup>lii</sup> Courts are very hesitant to allow a plaintiff to use the continuous treatment exception, and it is often the case that after an alleged act of malpractice a patient will see a different physician.

The third and final exception to the two year limitation involves claims on behalf of minors or other incapacitated persons. If, at the time the action for malpractice accrues, the person entitled to bring the action is under the age of 21, a person with a mental disorder, or imprisoned, the statute of limitations is tolled until the person reaches the age of majority, is removed from prison, or ceases to be disabled.<sup>liii</sup> This is particularly important for parents bringing actions on behalf of their minor child for malpractice in the child’s medical treatment.

Apart from those three exceptions, several other noteworthy time limitations impact malpractice litigation. First, in no event can an action for malpractice be commenced more than ten years after the date of the services or omissions forming the basis for the malpractice claim.<sup>liv</sup> This effectively limits all the exceptions discussed above to a ten year ceiling. The required timing for a malpractice claim is further complicated if the health care provider is a member of a political subdivision (such as a county hospital or clinic). The Political Subdivisions Tort Claims Act<sup>lv</sup> requires the claim be presented to the relevant governing body within one year of its accrual and filed within two years after the claim has accrued.<sup>lvi</sup> Where the defendant health care provider is a member of a political subdivision, a plaintiff must present that claim to the political subdivision before he or she can file suit in court.<sup>lvii</sup> The same is true if the defendant is an entity of the State of Nebraska, although the plaintiff then has two years to present the action to the Risk Manager.<sup>lviii</sup> After the governing body has either mailed notice to the plaintiff of its final disposition of the claim or if the plaintiff withdraws the claim due to the governing body’s inaction, the plaintiff has six months to file his or her lawsuit.<sup>lix</sup>

Although the Legislature has codified many laws having an impact on medical malpractice claims, an overview of the statutes can only provide half the picture. To fully understand the state of the Nebraska law in with respect to medical malpractice, one must also examine court decisions. The best place to start is at the top with decisions of the Nebraska Supreme Court and Nebraska Court of Appeals.

### **III. Nebraska Court Decisions Impacting Malpractice Litigation.**

Medical malpractice lawsuits historically have a very low success rate. On average, 85% to 95% of all medical malpractice claims result in a verdict for the defendant.<sup>lx</sup> These percentages make it extremely difficult not only for a plaintiff to win at trial, but also for a plaintiff to gain sufficient leverage to procure a favorable settlement from the defendant. Further, every settlement of a malpractice suit must be placed on a national register with the Department of Health and Human Services, making a dismissal at trial (which is not sent to the national registry), all the more appealing to the defendant.

#### **A. The Required Elements of a Malpractice Claim.**

A claim for medical malpractice requires that the plaintiff establish three elements. First, the plaintiff must establish the applicable standard of care. Second, the plaintiff must prove that the defendant(s) deviated from that standard of care. Finally, the plaintiff must show that this

deviation was the cause of the plaintiff's harm.<sup>lxii</sup> Each of these three elements entails different requirements for the plaintiff to make his or her case. If any element of the plaintiff's case is unsupported, the court will grant the defendant summary judgment before the case ever goes to the jury.

## 1. The Applicable Standard of Care.

All health care providers must conform their treatment of patients to a certain standard. This is known as the "standard of care" and constitutes the first element a plaintiff must establish in his or her malpractice lawsuit. Nebraska courts will instruct the jury in one of two ways regarding the applicable standard of care.

### i. The Traditional Definition of Standard of Care:

Traditionally, the standard of care was described as "what care a physician would ordinarily exercise under similar circumstances in the same or similar community while engaged in the same or a similar line of work."<sup>lxiii</sup> This definition of the standard of care contains some particularity to the relevant community in which the physician practices. The requirement that the standard of care reference the "same or similar" communities is known as the "locality rule."<sup>lxiii</sup> The locality rule has been codified in the Nebraska Hospital-Medical Liability Act and applies in malpractice suits brought pursuant to that Act. Where the circumstances are such that the traditional definition applies, the court will instruct the jury as follows:

"A (here insert words identifying the health care providers involved, words such as physician, hospital, et cetera) has the duty to possess and use *the care, skill and knowledge ordinarily possessed and used under like circumstances by other* (here insert the same words as inserted above) *engaged in a similar practice in the same or similar localities.*"<sup>lxiv</sup>

(standard of care emphasized)

But the locality rule has recently received a cool reception by Nebraska courts. A recent decision by the Nebraska Supreme Court clearly establishes that it is not always appropriate to include the locality rule in the definition of the standard of care.

### ii. The "Modern" definition of Standard of Care:

The Nebraska Supreme Court has recently abolished the use of the locality rule under certain circumstances. First, the evidence must show the local standard to be the same as the national standard.<sup>lxv</sup> The policy justification for the locality rule was originally the disparities in resources and practices between urban and rural communities and the perceived inequity of holding a physician operating with the resources of rural Nebraska to the same standard of care as a physician operating in New York City. However, "if practices within a certain specialty do not vary significantly throughout the country, there is no policy justification for the locality rule."<sup>lxvi</sup> Second, the defendant health care provider must not be a qualified provider under the Nebraska Hospital-Medical Liability Act.<sup>lxvii</sup> If the provider is qualified under the Act, the provider is given the benefit of an instruction including the locality rule.

Where both conditions are met, the phrase "in the same or similar localities" should not be included in jury instructions.<sup>lxviii</sup> Including the locality rule in jury instructions where the above

conditions are met will result in the trial court's verdict being reversed and a new trial ordered on appeal.<sup>lxi</sup> The reasoning is that including the locality rule in the instruction allows the jury to impermissibly favor or discount conflicting testimony as to the proper standard of care based on whether the testifying expert practices in a same or similar locality with the defendant. Reversal can drastically change the parties' respective bargaining positions in subsequent negotiations to settle the lawsuit – a plaintiff can demand a higher amount in settlement if the defendant faces the prospect of paying for yet another trial. Thus, a malpractice suit against a specialist, who typically follow nationalized standards, should not include an instruction of the locality rule unless the specialist is qualified under the Nebraska Hospital-Medical Liability Act.

Although the plaintiff bears the initial burden of establishing the standard of care, often times the parties will agree on the applicable standard of care. The real disagreements concern the second and third elements of a malpractice case: deviation from the standard of care and causation.

## **2. Deviation from the Standard of Care.**

Once the plaintiff has established the relevant standard of care, he or she must establish that the defendant deviated from that standard of care. This deviation can be thought of as the action that forms the basis for the plaintiff's lawsuit. The simplest way to conceptualize this element would be by juxtaposition: a reasonable health care provider would do X in these circumstances, the defendant did Y in these circumstances, therefore the defendant deviated from the standard of care and committed malpractice. However, the court has shown great deference to a health care provider's decisions.

If a defendant in a malpractice case files an affidavit stating that they are familiar with the standard of care and that the standard of care was met, Nebraska courts hold this to be a prima facie case of lack of negligence.<sup>lxx</sup> Establishing a deviation from the standard of care often requires the use of expert testimony (see section "C. The Court's View on the Role of Expert Witnesses" below). The plaintiff's witness must show more than that he or she would have pursued the plaintiff's treatment differently than the defendant. A disagreement among doctors of equal skill and learning as to what the proper treatment should have been does not establish negligence. Where a mere difference of opinion is involved, the court must enter a directed verdict for the defendant.<sup>lxxi</sup> The element of deviation from the standard of care often becomes a battle of the experts, and so long as the plaintiff's expert will testify that the defendant's conduct deviated from the standard of care, a genuine issue of fact remains for the jury. But even if the defendant is found to have deviated from the standard of care, that deviation alone will not support a claim for malpractice. The defendant's deviation must have been the cause of the plaintiff's injuries.

## **3. Proximate Causation.**

The element of proximate causation requires the plaintiff to prove that the defendant's deviation of the standard of care caused or contributed to the plaintiff's injury.<sup>lxxii</sup> Proximate causation is measured using the familiar "but for" test. The defendant's conduct is the proximate cause of the plaintiff's injuries if the injuries would not have occurred "but for" the defendant's conduct.<sup>lxxiii</sup> Proving that the defendant's deviation from the standard of care caused the plaintiff's harm often involves a complex medical analysis and thus requires, almost

by default, that the plaintiff obtain expert testimony almost by default. There are exceptions. (see section “C. The Court’s View on the Role of Expert Witnesses” below).

If the plaintiff attempts to establish causation by an expert opinion, the opinion must state that it was “more likely than not” that the plaintiff would have had a better outcome had the defendant not deviated from the standard of care.<sup>lxxiv</sup> As one recent decision stated, “While a 49-percent chance of a better recover may be medically significant, it does not meet the legal requirements for proof of causation.”<sup>lxxv</sup> There must be a level of certainty to the expert’s opinion; the terms “chance” and “prognosis” are, by definition, too uncertain to establish causation.<sup>lxxvi</sup>

Numerous other issues arise when examining the element of proximate causation. A patient may have been him- or herself negligent in failing to follow the doctor’s instructions. More likely, this failure may be deemed to be the sole cause of the plaintiff’s injury.

## **B. The Court’s View on the Role of the Expert Witness**

### **1. Admissibility of Expert Testimony**

Nebraska’s Rules of Evidence allow expert witness to testify if the expert possess scientific, technical, or other special knowledge which will assist the jury’s understanding of the evidence or determine a fact in issue.<sup>lxxvii</sup> The proponent of the witness must show that the witness is qualified by knowledge, skill, experience, training, or education.<sup>lxxviii</sup> On cross examination, the expert must disclose the underlying facts or data upon which he or she basis their opinion testimony.<sup>lxxix</sup>

It is generally easy for parties to meet the requirements for the admission of expert testimony in medical malpractice cases. The proponent of an expert witness must establish three conditions for the expert’s opinion to be admitted. First, the expert must be qualified as such. Second, the expert’s opinion must assist the jury. Third, the expert must disclose the basis of his or her opinion on cross-examination.<sup>lxxx</sup> Meeting these requirements is not often difficult with proper preparation before the witness’ testimony. Most important is that the witness be prepped and that he or she have prepared for the opposing counsel’s cross examination.

### **2. When is Expert Testimony Necessary to Establish an Element of the Malpractice Claim?**

Perhaps the most unresolved issue involving expert testimony in medical malpractice lawsuits is determining under what conditions the plaintiff need not produce expert testimony to support his or her lawsuit. Although experts are expensive, plaintiffs will rarely be able to establish a prima facie case of malpractice without their testimony. A prima facie case of medical malpractice may be proven either by expert testimony or by showing that the negligence of the professional was clearly within the comprehension of laymen.<sup>lxxxi</sup> The alternative to expert testimony is known as the “common-knowledge” exception.<sup>lxxxii</sup>

The common knowledge exception must be analyzed with respect to each individual element of the plaintiff’s prima facie case. For an element to be successfully established by common knowledge, the conduct in question must be extreme and obvious. Examples include failure to remove a surgical instrument from the patient’s body or the amputation of the incorrect limb.<sup>lxxxiii</sup> The Nebraska Supreme Court’s most recent decision involving the application of the

common-knowledge exception decided that the plaintiff could apply the exception to meet the elements of both the standard of care and the deviation from the standard of care, but not the element of proximate causation.<sup>lxxxiv</sup> So close...yet so far away. The plaintiffs were one element away from surviving the health provider's motion from surviving the defendant's motion for summary judgment, but their reliance on the common-knowledge exception fell short when they attempted to apply it to causation.

If one needed to rank the elements in terms of the necessity of expert witness testimony, establishing the element of proximate causation would rank number one. Expert testimony is almost always required to prove proximate causation.<sup>lxxxv</sup> It is rarely the case that a jury of laypersons will be competent to decide which, if any, of a plaintiff's injuries were proximately caused by the health care provider without the aid of expert testimony.<sup>lxxxvi</sup> In a close second is the establishment of the standard of care. In extreme cases, it may be obvious even to the lay person that, whatever the standard of care was, it was clearly violated. Take the woman left dead on the waiting floor in New York, for example. In cases like these, where the misconduct is so extreme and obvious, the elements of standard of care and deviation are often lumped together; no matter what the standard of care was, this conduct clearly violated it. For that reason, deviation from the standard of care has to be lowest on the hierarchy. Even the Nebraska Supreme Court has noted that establishing this element "has the potential to be much more straightforward."<sup>lxxxvii</sup> Of course, the consequence of failing to provide expert testimony necessary to establish one element of a prima facie case of malpractice, summary judgment, begs the question why a prudent litigator would not use the expert to establish all three elements and thereby bolster his client's case.

## END NOTES

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- <sup>i</sup> Neb. Rev. Stat. §§ 44-2801 - 44-2855.
- <sup>ii</sup> Neb. Rev. Stat. § 44-2801.
- <sup>iii</sup> *Gourley v. Nebraska Methodist Health Sys., Inc.*, 265 Neb. 918, 936, 663 N.W.2d 43, 64 (2003).
- <sup>iv</sup> Neb. Rev. Stat. § 44-2811.
- <sup>v</sup> Neb. Rev. Stat. § 44-2803.
- <sup>vi</sup> Neb. Rev. Stat. § 71-101, as amended by 2007 Neb. Laws. L.B. 463.
- <sup>vii</sup> Neb. Rev. Stat. § 44-2804.
- <sup>viii</sup> Neb. Rev. Stat. § 44-2805.
- <sup>ix</sup> Neb. Rev. Stat. §§ 71-401 - 71-459.
- <sup>x</sup> Neb. Rev. Stat. § 44-2806.
- <sup>xi</sup> Neb. Rev. Stat. § 44-2810.
- <sup>xii</sup> Neb. Rev. Stat. § 44-2813.
- <sup>xiii</sup> Neb. Rev. Stat. § 44-2816.
- <sup>xiv</sup> Neb. Rev. Stat. § 44-2824(1)(a).
- <sup>xv</sup> Neb. Rev. Stat. § 44-2827.
- <sup>xvi</sup> *Id.*
- <sup>xvii</sup> Neb. Rev. Stat. § 44-2827.01
- <sup>xviii</sup> Neb. Rev. Stat. § 44-2824(1)(b).
- <sup>xix</sup> Neb. Rev. Stat. § 44-2829(2)
- <sup>xx</sup> Nebraska Department of Insurance Website, <http://www.doi.ne.gov/notices/notc2007/notice11.pdf>, accessed August 1, 2008.
- <sup>xxi</sup> Neb. Rev. Stat. 44-2829(3).
- <sup>xxii</sup> Neb. Rev. Stat. 44-2831.
- <sup>xxiii</sup> Neb. Rev. Stat. § 44-2821(2).
- <sup>xxiv</sup> *Id.*
- <sup>xxv</sup> *Id.*
- <sup>xxvi</sup> Neb. Rev. Stat. § 44-2821(4).
- <sup>xxvii</sup> Neb. Rev. Stat. § 44-2821(3).
- <sup>xxviii</sup> Neb. Rev. Stat. § 44-2836(3).
- <sup>xxix</sup> Neb. Rev. Stat. § 44-2825(1).
- <sup>xxx</sup> Neb. Rev. Stat. § 44-2825(2).
- <sup>xxxi</sup> Neb. Rev. Stat. § 44-2825(3).
- <sup>xxxii</sup> Neb. Rev. Stat. § 44-2830.
- <sup>xxxiii</sup> *Id.*
- <sup>xxxiv</sup> Neb. Rev. Stat. § 44-2832.
- <sup>xxxv</sup> Neb. Rev. Stat. § 44-2833.
- <sup>xxxvi</sup> *Id.*
- <sup>xxxvii</sup> *Id.*
- <sup>xxxviii</sup> *Id.*
- <sup>xxxix</sup> Neb. Rev. Stat. § 44-2840.
- <sup>xl</sup> Neb. Rev. Stat. § 44-2840(4).
- <sup>xli</sup> Neb. Rev. Stat. § 44-2841(1).
- <sup>xlii</sup> *Id.*
- <sup>xliii</sup> *Id.*
- <sup>xliv</sup> Neb. Rev. Stat. § 44-2843(3).
- <sup>xlv</sup> Neb. Rev. Stat. § 44-2844(2).
- <sup>xlvi</sup> Neb. Rev. Stat. § 44-2821(1).
- <sup>xlvii</sup> *Id.*
- <sup>xlviii</sup> *Id.*
- <sup>xlix</sup> Neb. Rev. Stat. §§ 25-222, 44-2828.
- <sup>l</sup> Neb. Rev. Stat. § 25-222.
- <sup>li</sup> *Lincoln Grain, Inc. v. Coopers & Lybrand*, 215 Neb. 289, 294, 338 N.W.2d 594, 598 (1983).

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- lii *Id.*, 215 Neb. at 294 (citing *Borgia v. City of New York*, 187 N.E.2d 777 (N.Y. 1962)).
- liii Neb. Rev. Stat. § 25-213.
- liiv Neb. Rev. Stat. § 48-2828. Absolute bars such as this are known as statutes of repose.
- liv Neb. Rev. Stat. §§ 13-901 – 13-927.
- lvi Neb. Rev. Stat. § 13-919(1).
- lvii *Id.*
- lviii State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 – 81-8,235.
- lix Neb. Rev. Stat. §§ 81-8,227, 13-919(1).
- lx Stoehr, Jeffrey L., Esq., *Assessment and Evaluation of the Medical Malpractice Case (Plaintiff's Perspective)* in SUCCESSFUL MEDICAL MALPRACTICE SUITS, 15 (National Business Institute 2007).
- lxi *Thone v. Regional West Medical Center*, 275 Neb. 238, 243, 745 N.W.2d 898, 903 (2008).
- lxii *Hoffart v. Hodge*, 9 Neb.App. 161, 171, 609 N.W.2d 397, 406 (2000).
- lxiii *Mahnke v. State*, 276 Neb. 57, 58-9 751 N.W.2d 635, 638 (2008).
- lxiv Nebraska Jury Instructions, Second Edition, NJI2d Civ. 12.01(The Nebraska Jury Instructions are prepared by the Nebraska Supreme Court Committee on Practice and Procedure).
- lxv *Fales v. Books*, 253 Neb. 491, 497, 570 N.W.2d 841, 844 (1997).
- lxvi *Id.*, quoting *Wentling v. Jenny*, 206 Neb. 335, 338, 293 N.W.2d 76, 78-79 (1980).
- lxvii *Id.*
- lxviii *Id.*
- lxix *Fales*, 253 Neb. at 497-98, 570 N.W.2d at 844-45.
- lxx *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005).
- lxxi *Kortus v. Jensen*, 195 Neb. 261, 270, 237 N.W.2d 845, 851 (1976). *Jensen* was distinguished two years later in *Greenberg v. Bishop Clarkson Memorial Hospital*, 201 Neb. 215, 266 N.W.2d 902 (1978). However, the Supreme Court recently cited *Jensen* favorably in *Wolski v. Wandel*, 275 Neb. 266, 275, 746 N.W.2d 143, 151 (2008) for the exact proposition as quoted above. According to the Court in *Wolski*, “if the expert believed there had been a deviation from the standard of care, it would have been a simple matter...to have said exactly that.” *Wolski*, 275 Neb. at 274, 746 N.W.2d at 151 (quoting *Jensen*).
- lxxii *Thone*, 275 Neb. at 250, 745 N.W.2d at 900.
- lxxiii *Worth v. Kolbeck*, 273 Neb. 163, 170, 728 N.W.2d 282, 290 (2007).
- lxxiv *Rankin v. Stetson*, 275 Neb. 775, 786-87, 749 N.W.2d 460, 468-69 (2008).
- lxxv *Id.*
- lxxvi *Id.*
- lxxvii Neb. Rev. Stat. § 27-702.
- lxxviii *Id.*
- lxxix Neb. Rev. Stat. § 27-705.
- lxxx *Rankin*, 275 Neb. at 781, 749 N.W.2d
- lxxxi *White v. Lovgren*, 222 Neb. 771, 773, 387 N.W.2d 483, 485 (1986).
- lxxxii *Thone v. Reg. West Medical Center*, 275 Neb. 238, 745 N.W.2d 898 (2008).
- lxxxiii *Thone*, 275 Neb. at 244, 745 N.W.2d at 904.
- lxxxiv *Thone*, supra.
- lxxxv *Thone*, 275 Neb. at 250, 745 N.W.2d at 908.
- lxxxvi *Id.*
- lxxxvii *Thone*, 275 Neb. at 249, 745 N.W.2d at 907.