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Beyond MICRA

ISSUE-SPOTTING NON-MICRA CLAIMS IN CASES AGAINST HEALTHCARE PROVIDERS

For nearly five decades medical-malpractice victims have been prevented from obtaining full or even fair compensation for their injuries due to the Medical Injury Compensation Reform Act (MICRA) of 1975. Fortunately, this law has been revised, and starting January 1, 2023, the strict $250,000 non-economic cap imposed by MICRA will increase over the next ten years. Hopefully, this change in the law will open the doors of justice to victims of medical negligence. However, this can only happen if the attorneys who choose to take on these cases understand how to properly prosecute these cases, which includes issue-spotting non-MICRA claims against healthcare providers that will help enhance the recovery potential for your clients.

MICRA 2023 and beyond

On January 1, 2023, the MICRA cap will increase non-wrongful-death general damages to $350,000 with an incremental increase to $750,000 over the next ten years (with subsequent 2% perpetual annual increases to account for inflation) and increase the wrongful death caps to $500,000 with an incremental increase to $1,000,000 over the next ten years (with subsequent perpetual annual increases to account for inflation).

Under the updated statute, these caps can apply up to three potential wrongdoers. Meaning in 2023 a wrongful death case that is capped at $500,000 (250k predeath and 250k wrongful death) can result in non-economic damages up to $2,550,000. You can get to this number when there are three wrongdoers (pre-death pain and suffering pursuant to CCP § 377.34 = $350,000 x 3 = $1,050,000; Wrongful death $500,000 x 3 = $1,500,000). This is clearly a significant increase in the value of these claims but will still be insufficient in most cases. Therefore, it is important to look for alternative theories in your cases that will increase the overall value of your client's claim.

Elder/dependent adult abuse background

When evaluating any potential claim against a hospital or skilled nursing facility you must evaluate the records to determine if the facts rise to the level of elder/dependent adult abuse pursuant to Welfare and Institutions Code section 15600. These causes of action are outside of MICRA because you must prove abuse or neglect, which are beyond medical negligence. In *Delaney v. Baker* (1999) 20 Cal.4th 32, the Supreme Court discussed the relationship between section 15657, establishing a cause of action for elder abuse, and section 15657.2, exempting causes of action for professional negligence from causes of action under section 15657.

Pursuant to the act, "neglect" of an elder or dependent adult means: The *negligent* failure of any person having the care or custody of an elder or dependent adult to exercise that degree of care a *reasonable person* in a like position would exercise. (Welf. & Inst. Code, § 15610.57, subd. (a).) Neglect within the meaning of the act includes failing to assist in personal hygiene, provide food, clothing, shelter or medical care, *protect from health and safety hazards* and prevent malnutrition or dehydration. (Welf. & Inst. Code, § 15610.57, subd. (b)(1)-(4).)

"Physical abuse" includes assault (with or without a deadly weapon), battery, unreasonable physical restraint, prolonged or continual deprivation of food or water, use of physical/chemical restraint or psychotropic medication for punishment or for any unauthorized period or purpose, sexual assault/battery, rape, incest, etc. (Welf. & Inst. Code, § 15610.63.)

Examples of neglect and abuse; "Rapey Juan"

Samantha B. v. Aurora Vista Del Mar LLC (2022) 77 Cal.App.5th 85, is the most recent case analyzing the distinction between MICRA and dependent-adult abuse claims. In *Samantha B*, three Plaintiffs were patients at a licensed psychiatric hospital, Aurora Vista Del Mar. One of the care employees, Juan Valencia (aka "Rapey Juan"), was a registered sex offender. It was alleged that both the hospital and related management company agency failed to properly vet, train, and screen Valencia, who eventually sexually assaulted the three Plaintiffs. The Plaintiffs also alleged that the Defendants had insufficient policies to protect its residents, including the Plaintiffs.

The Defendants argued these claims *sounded in negligence only* and therefore the damages should be limited by MICRA. The court disagreed and held that, under *Delaney*, when the jury finds both professional negligence and reckless neglect, plaintiffs' Elder Abuse Act claims are "not bound by the laws specifically applicable to professional negligence." Meaning there is no MICRA cap for living victims of neglect or abuse.

The court also held that Defendants' failure to train, supervise, and investigate Rapey Juan before he began working with vulnerable dependent adults like the Plaintiffs in this case could constitute reckless behavior. Therefore, the court held that the jury's decision was not limited by MICRA.

When analyzing the insufficient policies claim the court stated:

> The flaws in Aurora and Signature's policies were so obvious that the jury could conclude that they *intentionally turned a blind eye to the high probability of harm*. Even when Aurora was informed that Valencia was known as "Rapey Juan," the reaction was a shrug. There is more than ample evidence to support a finding of recklessness under the clear and convincing standard.

(*Samantha B.*, 77 Cal.App.5th at 100 [emphasis added].)

Finally, the court held that the Defendants' failure to report Rapey Juan's conduct to the California Department of Public Health was grounds for the jury to find neglect:

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> The CEO admitted that about a month after Valencia's termination she learned Valencia's conduct with the former patient at the party was sexual in nature. She also admitted that Aurora had a duty to report such an incident to the California Department of Public Health but did not do so for one year. Aurora only reported Valencia's misconduct after it became public knowledge. . .
>
> But the obvious purpose of regulations requiring such reports is to protect patient safety. Aurora's failure to make a timely report is simply evidence of a lack of concern for patient safety. It is relevant to show neglect, that is, the failure to protect patients from health and safety hazards. The trial court did not err in refusing the proposed instruction.

(*Samantha B.*, 77 Cal.App.5th at 94-95, 103.)

This is a critically important case to read, review, and use when pleading an elder/dependent adult abuse claim against a healthcare provider. Using the examples from this case in your pleadings and discovery will help you obtain the critical evidence you need to prove your case.

Medical battery

A battery cause of action is an intentional tort, and therefore, not covered by MICRA. Battery is an offensive and intentional touching of the victim without the victim's consent. (*Kaplan v. Mamelak* (2008) 162 Cal.App.4th 637, 645.) To state a cause of action for medical battery, the following elements must be pled:

1. Defendant performed a medical procedure without plaintiff's consent; [or] That plaintiff gave consent to one medical procedure, but defendant performed a substantially different medical procedure;
2. That plaintiff was harmed; and
3. That defendant's conduct was a substantial factor in causing plaintiff's harm.

(See CACI 503A - Medical Battery.)

The Court in *Conte v. Girard Orthopaedic Surgeons Medical Group, Inc.*, (2003) 107 Cal.App.4th 1260 at 1267, stated:

> A typical medical battery case is where a patient has consented to a particular treatment, but the doctor performs a treatment that goes beyond the consent. "When an action is based upon the theory of surgery beyond consent, the gist of such action is the unwarranted exceeding of the consent. This is a theory of technical battery." (*Pedesky v. Bleiberg* (1967) 251 Cal.App.2d 119, 123.) For example, the patient consents to an electromyogram, a relatively uncomplicated procedure, but the doctor performs a myelogram, which involves a spinal puncture.

(*Berkey v. Anderson*, (1969) 1 Cal.App.3d 790.)

The first element for a "substantially different procedure" is illustrated in the case of *Cobbs v. Grant* (Cal. 1972) 8 Cal.3d 229. In that case, the California Supreme Court stated, "[w]here a doctor performs a substantially different treatment for which consent was not obtained, there is a clear case of battery." (*Id.* at p. 239.) The Court in *Cobbs* offers several examples of cases in which a physician's performance of a substantially different procedure constituted clear battery.

However, the examples in *Cobbs* do not seem to lend themselves to any overarching test or specificity for deciding the limits or margins of where a medical procedure is 'substantially different' from the authorized procedure. "*Cobbs*'s description of the representative procedures offers little guidance." (*Kaplan*, *supra*, 162 Cal.App.4th at 646.) Consequently, additional analysis is required on a case-by-case basis.

For that purpose, *Kaplan*, *supra*, is instructive. In *Kaplan*, the plaintiff sought treatment for his spine from the neurosurgeon defendant. (*Id.* at p. 639.) The plaintiff agreed to allow the defendant to operate on the eighth and ninth thoracic vertebrae, but the defendant mistakenly operated on the wrong discs. (*Id.* at p. 640.) The plaintiff sued for medical battery and the defendant demurred. (*Id.* at p. 645.)

The appellate court explained that *a patient may limit his consent when agreeing to undergo a medical procedure and the physician is obligated to honor those limitations.* The plaintiff's signed consent form gave defendant authority to operate on only the eighth and ninth thoracic vertebrae, and "[i]n absence of any definitive case law establishing whether operating on the wrong disk within inches of the correct disk is a substantially different procedure," the *Kaplan* court concluded that the matter was a factual question to be decided by the jury.

Issues of medical battery often present themselves in your medical negligence cases and being familiar with this body of law will help transform your MICRA-capped case into a more valuable uncapped case.

Corporate negligence

Corporate negligence is another consideration that attorneys must not overlook when pursuing medical malpractice cases. Often, a hospital will grant privileges to physicians who have a history of malpractice. Normally, the hospital can avoid liability of the physicians by arguing they are independent contractors. However, you can bring in the hospital under *Elam v. College Park Hosp.* (1982) 132 Cal.App.3d 221. In *Elam* the court concluded that a hospital can be held accountable for negligently screening the competency of its medical staff to ensure the adequacy of medical care rendered to patients. In short, the hospital owes a duty to ensure the competency of its medical staff and to evaluate the quality of medical treatment rendered on its premises.

This is a powerful tool in a big economic case to hold the hospital liable to ensure adequate coverage to pay your claim. It could also be a powerful tool to get outside of MICRA if the evidence suggests that the hospital had actual knowledge of the health-and-safety hazard of the physician and failed to protect

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
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the patients from a known health-and-safety hazard. In either case, knowing this caselaw will help increase the overall value of your cases.

Conclusion

There is nothing better than helping a victim of medical negligence achieve justice for their injuries. But these cases are very difficult to prove and you must use every tool available to you to create the best results for your clients. When suing healthcare providers, attorneys should be very cautious in case selection and only take meritorious cases that have been reviewed by a medical expert and can stand up to scrutiny. Failing to do so gives our opponents ammunition to persuade public opinion at the ballots and in the courtrooms. If we as consumer attorneys can hold wrongdoers accountable with meritorious and effectively litigated cases, we will not only help our clients, but we will make our healthcare institutions safer for our communities.

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