2003

Procedural Provisions in Nevada Medical Malpractice Reform

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PROCEDURAL PROVISIONS IN NEVADA MEDICAL MALPRACTICE REFORM

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In late July 2002, a special session of the Nevada Legislature passed medical malpractice reform legislation.[1] The expressly-stated purpose of this statute is remedying, or at least ameliorating, the "serious threat to the health, welfare and safety of [Nevada] residents" which is posed by the state's "extreme difficulties attracting and maintaining a sufficient network of physicians to meet [residents'] needs."[2] Moreover, the measure emphasizes substantive reforms that are primarily intended to limit the potential liability of certain health care providers for negligent actions. However, the legislation encompasses numerous "procedural" provisions, which may be equally important as the substantive reforms that the legislature sought to implement. The provisos include prescriptions for statutes of limitation, joint and several liability, and judicial imposition of sanctions on attorneys who participate in inappropriate behavior when litigating cases. Most of these provisions depart from those that govern other actions. These procedural changes are significant, in part, because the modifications could apply to additional substantive areas of tort law, such as liability for vehicular collisions and for manufacturing defective products, if the alterations prove effective in the medical malpractice field. Indeed, the provisos which cover joint and several liability, as well as sanctions, amend sections of the Nevada Revised Statutes that govern all litigation. The recently-adopted procedures, therefore, warrant examination, which this essay undertakes.

The first section of the paper provides a descriptive assessment of the procedural provisions that the Nevada Legislature included in the newly-enacted statute. The second portion critically analyzes the procedural changes by evaluating their benefits and disadvantages and by comparing the modifications with analogous provisos which apply to litigation in cases that do not involve medical malpractice. The essay then proffers several recommendations for the future.

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[1] *See* A.B. 1, 18th Spec. Sess. (Nev. 2002) [hereinafter A.B. 1]. *See generally* DAN B. DOBBS, THE LAW OF TORTS 631-79 (2000).

[2] *See* A.B. 1, *supra* note 1.

I. DESCRIPTIVE ANALYSIS

The recently-passed medical malpractice legislation includes numerous substantive provisions which are principally intended to restrict the possible liability of health care providers.[3] Illustrative, and perhaps most controversial, is the imposition of a cap on noneconomic damages of $350,000, except when the defendant's conduct is "determined to constitute gross malpractice" or the "court determines, by clear and convincing evidence admitted at trial," that exceptional circumstances justify a larger award.[4] There will be time enough to analyze those substantive requirements after the statute has received comprehensive implementation, although health care providers had already called for additional reform before much effort was undertaken to effectuate the medical malpractice reform.[5]

One of the most important procedural provisions which the Nevada Legislature inserted in the recent legislation prescribes the statute of limitations for medical malpractice actions.[6] This proviso requires that "an action for injury or death against a provider of health care may not be commenced more than 3 years after the date of injury or 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury."[7] The new provision amends the Nevada Code proviso, which afforded a special statute of limitations for medical malpractice suits, while the change differs from the Nevada Code provision that prescribes the statute of limitations for other actions, which requires that they be commenced within four years after the date of injury or four years after the reasonable period for discovery.[8]

The second significant procedural provision governs the liability of health care providers for noneconomic damages in medical malpractice actions when there are multiple defendants.[9] The proviso states that "each defendant is liable for noneconomic damages severally only, and not jointly, to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to the defendant."[10] This provision modifies the Nevada Code provision that imposes joint and several liability on tortfeasors in numerous cir-

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[3] *See id. See generally* DOBBS, *supra* note 1, at 664-67.

[4] *See* A.B. 1, *supra* note 1, at § 5. *See generally* DOBBS, *supra* note 1, at 1071-74. A.B. 9 and A.B. 187, introduced in the 2003 legislature, would impose a cap on noneconomic damages of $250,000 in personal injury and wrongful death actions except when the cause of action arises from willful misconduct or an act or omission that constitutes a felony.

[5] *See Lawsuit Reform Efforts Debated*, LAS VEGAS REV. -J., Mar. 6, 2003, at 4B; Joelle Babula, *Doctors Call on Lawmakers to Revamp Liability Laws*, LAS VEGAS REV. -J., Mar. 5, 2003, at 1B.

[6] *See* A.B. 1, *supra* note 1, at § 11. *See generally* DOBBS, *supra* note 1, at 550-57.

[7] *See* A.B. 1, *supra* note 1, at § 11. This provision governs injury or death occurring after October 1, 2002. For those injuries or deaths occurring before that date, the respective limitations are 4 and 2 years. *See id.*

[8] *See* NEV. REV. STAT. § 41A.097 (affording special statute of limitations for medical malpractice actions); *id.* § 11.190 (affording general statute of limitations).

[9] *See* A.B. 1, *supra* note 1, at § 6. *See generally* DOBBS, *supra* note 1, at 1077-91.

[10] *See* A.B. 1, *supra* note 1, at § 6.

cumstances – including, most importantly, vehicular operation – which do not involve medical malpractice.[11]

The third important procedural provision governs the imposition of sanctions upon attorneys.[12] The provision states that, if a court finds that a lawyer has "filed, maintained or defended a civil action . . . in this state and such action or defense is not well-grounded in fact or is not warranted by existing law or by an argument for changing the existing law that is made in good faith; or unreasonably or vexatiously extended a civil action . . . the court shall require the attorney personally to pay the additional costs, expenses and attorney's fees reasonably incurred because of such conduct."[13] This provision amends the Nevada Code provision, which previously made sanctions' imposition discretionary, while it differs from Nevada Rule of Civil Procedure 11, which makes sanctions' imposition mandatory for violations of rather similar behavioral requirements but leaves the type of sanctions imposed to judicial discretion.[14]

II. CRITICAL ANALYSIS

The provision which imposes a special shortened statute of limitations that governs medical malpractice actions offers several benefits.[15] The provision affords the general advantages of all statutes of limitation: promoting the presentation of fresh, and limiting the presentation of stale, evidence.[16] The provision will also decrease the period in which health care professionals can be exposed to potential liability and, therefore, may increase certainty in the medical malpractice area and facilitate reductions in insurance premiums.

However, the special statute of limitations for medical malpractice actions may impose certain disadvantages. For example, the provision will mean that some potential plaintiffs who are injured by medical negligence will be barred from recovery because they did not pursue legal actions promptly enough or institute efforts to discover the negligence in sufficient time. In situations when liability would otherwise be imposed, this restriction may have especially detrimental consequences because damages attributable to medical negligence can often be substantial.

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[11] *See* NEV. REV. STAT. § 17.225 et seq.; *see also id.* § 41.141 (stating that comparative negligence statute does not affect joint and several liability in certain situations).

[12] *See* A.B. 1, *supra* note 1, at § 16. *See generally* GEORGENE VAIRO, Rule 11 Sanctions (2d ed. 1992).

[13] *See* A.B. 1, *supra* note 1, at § 16.

[14] *See* NEV. REV. STAT. § 7.085; NEV. R. CIV. P. 11. The new statute includes other, arguably less important, procedural provisions. For example, A.B. 1 § 7 prescribes dismissal of actions not brought to trial within three years of filing, in contrast with NEV. R. CIV. P. 41(e) that includes a five-year proviso. Section seven also directs the district courts to adopt "court rules to expedite the resolution" of medical malpractice actions. A.B. 9 and S.B. 97, introduced in 2003, would impose limitations on contingency fees. For discussion on the efficacy of such efforts, see generally Hebert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943 (2002).

[15] *See supra* notes 5-7 and accompanying text.

[16] *See* DOBBS, *supra* note 1, at 550-57.

The special provision which restricts joint and several liability for non-economic damages in medical malpractice cases offers certain benefits.[17] The provision reduces unfairness that can arise when a defendant who is responsible for a small percentage of the awarded judgment must pay a substantially greater percentage of the judgment because other defendants are judgment proof.[18]

The special provision which limits joint and several liability can correspondingly impose disadvantages. The provision could prevent plaintiffs who have suffered serious injuries and can prove that damages were attributable to medical negligence from recovering a substantial portion of their damages. It seems fairer to impose that loss on the negligent defendant, who typically has insurance coverage, than on the plaintiff who often has no coverage and comparatively few resources.

The special provision which makes mandatory judicial imposition of sanctions on attorneys who violate certain responsibilities affords several benefits.[19] The proviso implements the ideas of deterrence and punishment generally and as to the specific lawyers who engaged in the prohibited behavior, while the provision enables the party who is injured by the inappropriate conduct to recover compensation for that harm.[20]

The special sanctioning provision could also impose some disadvantages, however. First, experience with a rather analogous sanctioning requirement in the federal system led the United States Supreme Court to amend the rule a decade after the stricture's promulgation.[21] The 1983 revision of Federal Rule 11 engendered substantial satellite litigation and the amendment's invocation for strategic purposes, while it had chilling effects on certain types of cases, most notably civil rights lawsuits.[22] The mandatory nature of sanctions also provided judges insufficient flexibility when considering sanctions motions, although the 1983 federal revision at least accorded judges discretion in selecting appropriate sanctions. The new Nevada provision deprives the judge of discretion in choosing a sanction and requires lawyers to pay costs, expenses, and attorney's fees, which can be substantial, while the proviso would purportedly impose this stricture in all cases before its application to medical malpractice suits demonstrates the concept's efficacy. Prescription of multiple sanctioning provisions can also complicate civil practice by requiring that counsel and parties discover, master, and satisfy two discrete and disparate sanctioning commands: the provision in the Nevada Code and Nevada Rule of Civil Procedure 11.

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[17] *See supra* notes 8-10 and accompanying text.

[18] *See* DOBBS, *supra* note 1, at 1077-91.

[19] *See supra* notes 11-13 and accompanying text.

[20] *See, e.g.*, William Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFFALO L. REV. 485 (1988-89).

[21] *See* Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401 (1993); *see also* Carl Tobias, *Improving the 1998 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1606-11 (1994). *See generally* Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475 (1991).

[22] *See* Amendments to Federal Rules of Civil Procedure, 461 U.S. 1095 (1983). *See generally* sources cited *supra* notes 19-20.

III. Suggestions For The Future

The review of the benefits and disadvantages of the procedural provisions that the Nevada Legislature included in the new medical malpractice statute suggests that the detriments outweigh the advantages. The 2003 legislative session, therefore, may want to reconsider these special provisos and perhaps abolish or amend the provisions. If the Nevada Legislature decides to leave the measures intact, it should provide for rigorous analysis of their application and possible future reconsideration in light of what this evaluation shows.