

## RECENT TORT LIABILITY REFORMS IN OHIO & ITS EFFECTS ON LONG-TERM CARE FACILITIES

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The Ohio General Assembly generated some exciting tort liability reform for Ohio's long-term care providers during its 2002 legislative session. This article summarizes these important legislative enactments.

### Limits on Damages & Other Protections (S.B. 281)

Many people will recall the active lobbying by Ohio physicians this past year for tort reform, such as marching on the Statehouse in Columbus. These efforts were mostly taken in support of Senate Bill (S.B.) 281, which applies to "medical claims."

When S.B. 281 was first passed by the Ohio Senate, claims against long-term care facilities were not addressed in the bill. However, the Ohio Health Care Association (OHCA) worked diligently with members of the Ohio House of Representatives to ensure that the bill that Governor Taft signed into law on January 9, 2003 applies to nursing homes, residential care facilities (assisted living facilities), and facilities for the mentally retarded.

The new law applies to "medical claims" that have occurred since April 10, 2003. A "medical claim" includes any civil lawsuit arising out of the medical diagnosis, care, or treatment of any person (including claims alleging a violation of resident rights for quality of care issues), and also applies to claims based on negligent hiring, training, supervision, retention, or termination of caregivers.

### **Limits on damages**

The law limits the amount of damages that can be recovered in an action based on a medical claim. Generally, non-economic damages<sup>1</sup> may be no greater than \$350,000 per plaintiff, and no more than \$500,000 per occurrence. However, if the non-economic losses are for a loss of the use of a limb, or an injury that prevents the

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1 Non-economic damages constitute damages for pain and suffering, deformities, and loss of function or independence caused by an injury. Non-economic damages do not include funds intended to cover out-of-pocket expenses connected with the injury, past lost wages or future wages, or punitive damages that are designed to punish defendants when they acted with malice or in reckless disregard to the safety of the injured person.

claimant from living independently, the claimant may recover up to \$500,000 for each plaintiff, and \$1,000,000 for each occurrence.

Please note that these damage caps only apply to lawsuits based on “medical claims.” For example, there is no limit on the amount of damages a plaintiff may recover in a separate wrongful death action, which typically includes a claim for loss of consortium and mental anguish of the next of kin of the deceased resident. However, a claimant who brings both a wrongful death action and an action on a Medical Claim for the same injury to a decedent (i.e. the medical care rendered caused the decedent’s death) will be limited in the amount of Non-economic damages that he or she may recover with respect to their Medical Claim action to the damages caps discussed above.

### **Discouragement of frivolous lawsuits**

The law also attempts to discourage the filing of frivolous lawsuits. For example, if a resident files a medical claim against a nursing home, and the nursing home believes there is no reasonable good faith basis for the lawsuit, the home may ask the court to determine whether the plaintiff has a basis for the lawsuit. In doing so, the court must consider certain factors, such as whether the resident and their attorneys reviewed the claim and investigated its merits prior to bringing the lawsuit. If the home can show that the resident has no reasonable good faith basis for the lawsuit, then the court must dismiss the suit, and the home may ask the court to have the plaintiff pay for the home’s court costs and attorneys’ fees incurred in defending the frivolous lawsuit.

### **Potential for a payment plan if damages are awarded**

If a long-term care provider is found liable for damages, it may be able to take advantage of the periodic payment provisions in the new law. S.B. 281 provides that a court may divide a provider’s damages for a medical claim into two categories: past damages and future damages. Past damages refer to money that was awarded to the plaintiff to compensate him for damages he incurred prior to the finding of liability against the provider, such as out-of-pocket medical expenses. Future damages refer to the rest of the judgment.

If a court determines that future damages exceed \$50,000, then the provider may ask the court to order that payments for future damages be paid over several years, rather than in a single lump sum payment.

### **Limits on plaintiffs’ attorneys fees**

SB 281 also tries to stop abusive legal fee practices by plaintiffs’ attorneys. Most plaintiffs’ attorneys charge their clients no fee unless they recover from the health care provider. This fee, called a “contingency fee,” is usually in the area of 25% to 40% of the total amount recovered by a plaintiff in a lawsuit. The new law requires that if an attorney seeks to collect a total contingency fee greater than the dollar

limits set on a non-economic damages award (as discussed above), then the attorney must obtain the probate court's prior approval before collecting the fee.

### Equitable Division of Damages Among Defendants (S.B. 120)

S.B. 120 provides for a more equitable way to attribute damages between multiple defendants in lawsuits based on non-intentional torts, i.e., lawsuits not based on allegations of assault, battery, or other intentional wrongdoing. It became effective for actions that have occurred since April 9, 2003.

Under the new law, if a court or jury finds that two or more defendants caused the same injury to the plaintiff, then it must consider whether one defendant is more responsible than the others in causing the injury. If it determines that one defendant is more than 50% responsible for the injury, then that defendant is jointly and severally liable for all compensatory damages that represent economic losses to the plaintiff. For those defendants determined to be less than 50% responsible for the plaintiff's injury, the court or jury is required to determine the specific percentage of responsibility for each defendant, and they will only be liable for that portion of the award for economic damages.

For example, suppose that a resident sues his attending physician, his physical therapist, and a nursing home for medical malpractice and negligence arising out of injuries to the resident for which all three were involved. Assume that the case goes to trial, and that the jury finds for the plaintiff and awards \$100,000 in economic damages to cover the economic losses associated with the injury. Under prior law, each defendant in the example would have been considered jointly and severally liable for the whole damages award. This meant that the plaintiff could recover the entire amount of the judgment from any of the parties. This was generally a bad result for long-term care facilities that frequently had deeper pockets than individual care providers.

However, under the S.B. 120, in the exact same scenario, the court would require the jury to return a finding as to the degree of culpability of each defendant. Assume the jury returned a finding that the plaintiff's attending physician is 40% to blame for the resident's injuries, and the physical therapist and nursing home are each 30% to blame. Under the new law, each party would only be responsible for its respective portion of the damage award. So the physician would have to pay \$40,000 and the physical therapist and nursing home would each pay \$30,000.

Remember, however, that this equitable division of the award is only effective as long as one of the parties is not found to be more than 50% responsible. Thus, in the above example, if the jury had determined that the nursing home was 60% responsible, and the physician and physical therapist were each 20% responsible, then the result would be much different. The nursing home would be jointly and severally liable for the entire damage amount of \$100,000, while the physician and physical therapist would only be liable for \$20,000 each. If the physical therapist

and the physician each pay their share of the liability, then the nursing home would be liable for \$60,000 of the award. However, if the physical therapist or the physician fail to make good on the judgment, then the nursing home is liable to the plaintiff for any amounts left unpaid, up to \$100,000.

### Protection for Quality Assurance Material (S.B. 179)

S.B. 179 expands the civil immunity provided for the actions and documents generated by quality assurance committees to new providers, and establishes new protections for “incident reports” and “risk management reports.” It became effective on April 9, 2003.

#### **MR/DD providers now covered**

Under prior law, only hospitals, nursing homes, and residential care facilities (assisting living facilities) were provided with protection for quality assurance and peer review documents and proceedings. The new statute greatly expands that coverage to any “health care entity,” which is defined to include any government entity, for-profit or not-for-profit entity that conducts quality assurance review or credentialing of health care professionals and entities. Thus, the new law provides for the first time quality assurance and peer review privileges to residential facilities licensed by the Ohio Department of Mental Retardation and Developmental Disabilities as well as any other long-term care provider that carries on quality assurance activities as a part of its operations.

#### **QA committee records protected**

The new law restates and clarifies several points from previous quality assurance protection laws, such as:

- The proceedings, records, and contents of meetings of a peer review or quality assurance committee are to be held in confidence and are restricted from discovery in civil actions against a health care entity arising out of matters subject to the evaluation and review of the committee.
- The privilege provided to quality assurance information cannot be used to withhold “original source” information, such as medical records.
- The conduct of the quality assurance or peer review committees and its members are immune from lawsuits for the acts, omissions, or decisions made in the course of its quality assurance or peer review activities.

#### **Incident reports receive special protection**

For the first time, the new law applies special rules regarding the discoverability of “incident reports” or “risk management reports” generated by a peer review or quality assurance committee in certain actions. These reports are defined as reports of an incident that involve injury or potential injury to a patient as a result of

patient care by a health care entity, prepared exclusively for use by, and within the scope of, the quality assurance or peer review committee. These reports are not subject to discovery or admission in a tort action. The law provides that anyone with knowledge of the contents of such a report is prohibited from testifying in a tort action concerning their contents in court, further protecting the contents of these reports from disclosure in a lawsuit.