

PUBLICATION

Duplicative Damages: Simple Negligence and Medical Malpractice

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In 2005, a jury in McMinnville, Warren County, Tennessee, rendered a verdict in favor of the plaintiffs in *Smartt v. NHC Healthcare/McMinnville, LLC*, awarding just over \$4 million in compensatory damages and well over \$29 million in punitive damages, after finding the nursing home was guilty of negligence and medical malpractice in causing injury to the resident. Interestingly, the jury did not find any of the defendants were liable for the wrongful death of the resident.

The case was appealed, and on February 24, 2009, the Court of Appeals of Tennessee at Nashville filed their opinion in *Smartt v. NHC Healthcare/McMinnville, LLC*, 2009 WL 482475 (Tenn. Ct. App).

The opinion addresses a number of issues that seem to arise in every long term care case litigated, and which cause no small amount of angst in the defense of these cases, both for the lawyers and the companies they represent. This brief article addresses just one of those issues common to most nursing home cases: whether the alleged care failures are simple negligence or amount to medical malpractice.

A central issue in the case was whether the plaintiffs' claims sounded in simple negligence or medical malpractice. The appellate court agreed with the trial court that the plaintiffs could maintain, simultaneously, both causes of action and recover damages under both theories.

Mr. Myers was 88 years old at the time of his admission to the facility on March 5, 2004. He had a lengthy list of admitting diagnoses, including extreme weakness, multiple falls with injury, episodes of unresponsiveness, peripheral vascular disease, severe chronic obstructive pulmonary disease, incontinence, poor nutritional status, muscular wasting, delusions, depression, visual hallucinations, wandering and poor vision.

Plaintiffs sued for both simple negligence and medical malpractice. Plaintiffs alleged that the facility's failure to adequately provide "custodial services," such as feeding, bathing, shaving, grooming, turning and repositioning, were matters of simple negligence. Plaintiffs also claimed that the facility was guilty of medical malpractice for failing to appropriately care for Mr. Myers' numerous medical conditions.

Tennessee courts have addressed the difficulty in distinguishing between claims for negligence and medical malpractice, stating that the test is whether the conduct "bears a substantial relationship to the rendition of medical treatment by a medical professional."¹

Why is the Distinction Between Negligence and Medical Malpractice Important?

Generally, the standard of proof for medical malpractice or medical negligence is higher than that required for simple negligence. In other words, in order to prove medical malpractice, a plaintiff will usually have to engage a qualified expert who testifies that the standard of acceptable professional practice was not met by the staff in their care and treatment of the resident. On the other hand, if an act or omission is within the knowledge of a layperson, it is a matter of simple negligence that doesn't require testimony of an expert.

A determination that an issue is one of simple negligence ultimately results in the plaintiffs' ability to offer testimony and evidence on care issues by unqualified personnel, e.g. certified nurse assistants testifying that

failure to help residents drink water results in dehydration. The problem is compounded when the plaintiffs offer proof from former and usually disgruntled staff members who testify about the general conditions of the facility who may or may not have had any direct involvement with the resident in question. The result is that the jury hears a "parade of horrors" that can be difficult for the defense to overcome.

Duplicative Damages

In the *Smartt* case, the court allowed plaintiffs to proceed on both the simple negligence and medical malpractice claims. The Court of Appeals offered only scant analysis of its determination that both claims could be pursued, stating simply that "[s]ome of [the] care [provided to Mr. Myers] included the 'custodial services' such as bathing, feeding, grooming, etc.; functions that the plaintiffs could have provided themselves." Noticeably absent from the court's analysis is a case directly on point from the Court of Appeals, Eastern Section, which held that the same type of "custodial care" complained of in the *Smartt* case fell under the ambit of medical malpractice because "evaluation of how a particular patient needs to be fed or hydrated, whether the patient is at risk for pressure sores, how often an at-risk patient needs to be turned, . . . [and] how many caregivers are needed to minister to a particular group of patients" are "decisions relating to the care . . . that necessarily involve medical knowledge." ²

The result was that the jury verdict form had line items for each element of damages available under each theory. Thus, the jury awarded the compensatory damages shown in the chart below:

	Medical malpractice	Simple negligence
Pain and suffering	\$2,000,000.00	\$450,000.00
Loss of enjoyment of life	\$700,000.00	\$275,000.00
Disfigurement	\$500,000.00	\$75,000.00
Medical expenses	\$81,839.08	\$20,459.77
TOTALS	\$3,281,839.08	\$820,459.77

The court upheld all the damages awarded except for the \$75,000 awarded for disfigurement under the simple negligence theory, which it vacated.

What Can You Do?

The lessons we can learn from this aspect of the case are more about what we can do to try to reduce the damages, rather than what we can do to reduce our exposure to legal theories. We have little control over what a trial judge or the appellate court will do. That said, you can:

1. Be proactive in addressing family concerns – address them as soon as you become aware of them, and document the meeting or the manner in which you handled the issue. Consider having a form the family signs acknowledging you dealt with the matter. You should also weigh the benefits of such documentation with the burden of having more documentation to retain and possibly produce during litigation.
2. Solicit feedback on a regular basis from the families using a standardized questionnaire regarding the level of satisfaction with the care rendered to their loved one at the facility.
3. Be vigilant in documenting pain control measures exercised by your caregivers and their result. Despite what the jury verdict suggested, Mr. Myers was prescribed only extra-strength pain reliever to be administered as needed.
4. Ensure that all your staff is properly qualified and licensed for their various positions. One argument we must continue to make is that even something as simple as feeding and hydration can amount to specialized care due to the serious medical conditions of many residents, and thus falls under the ambit of medical malpractice rather than simple negligence.

1. *Gunter v. Lab Corp. of Am.*, 121 S.W.3d 636, 641 (Tenn. 2003).

2. *French v. Stratford House*, 2009 WL 211898 at *8 (Tenn. Ct. App. 2009).