TENNESSEE LEGISLATURE PASSES THREE IMPORTANT BILLS OF MAJOR INTEREST FOR HEALTH CARE PROVIDERS RELATED TO TORT REFORM, QUALITY IMPROVEMENT PROTECTIONS AND SUMMARY JUDGMENT STANDARDS

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I. The Tennessee Civil Justice Act of 2011 - Summary, Commentary and Future Issues

On May 20, 2011 the Tennessee legislature passed a major reform of civil litigation, called the Tennessee Civil Justice Act of 2011. Most of it applies to personal injury and wrongful death suits generally, while some parts apply specifically to health care. This summary highlights the major changes of interest to health care providers along with brief commentary and a discussion of future issues.

Health Care Providers, Health Care Liability Action and Health Care Services:

In derogation of the recent Tennessee Supreme Court decision in Estate of French v. Stratford House (***French II)***, the Act applies not only to certified health care practitioners in Tennessee as well as medical resident physicians, interns and fellows but the Act now applies to certified nursing assistants and other non-licensed employees of a health care provider. A **health care liability action** is defined to include claims alleging that a health care provider caused injury during or related to the provision of health care services **regardless of the theory of liability**. **Health care services** are defined to include "staffing, custodial or basic care, positioning, hydration and similar patient services." Thus, plaintiff's claims of "ordinary negligence" – i.e. unlicensed staff providing custodial care - are explicitly covered by the Act. Thus, the defense has regained the opportunity to advance Motions to Dismiss and/or for Summary Judgment limiting plaintiffs' non-medical mlapractice claims as well as the scope of discovery to medical malpractice and dismissing claims of ordinary negligence or possibly other statutory or regulatory claims.

Economic Damages:

While the Act allows for unlimited recovery for economic damages, they must be "objectively verifiable pecuniary damages" such as medical expenses, rehabilitation services, mental health treatment, custodial care, loss of earnings and earning capacity, loss of income, burial costs, repair, replacement or loss of use of property, substitute domestic services, loss of employment or of business or employment opportunities. The emphasis on objective verifiability means that courts will want solid proof of each claimed element of damages.

Non-Economic Damages:

Non-economic damages include physical and emotional pain and suffering, loss of companionship and consortium, humiliation, inconvenience, loss of enjoyment of life, and the like. The following limits apply to any personal injury or wrongful death action, not just health care liability suits.

The general cap is $750,000 per plaintiff for all injuries/occurrences regardless of whether the action is based upon a single act or omission or a series of acts or omissions causing the injuries or death.

For certain "catastrophic" injuries, the cap rises to $1 million:

*spinal cord injury resulting in paraplegia or quadriplegia;
*amputation of two hands, two feet or a hand and a foot;
*third degree burns covering over 40% of either the body or the face;
*wrongful death of a parent who is survived by a minor child.

While there may be multiple Plaintiffs in a long-term care lawsuit (surviving children), recovery is limited to $750,000 for injuries to the decedent and not multiple claims by the surviving children for loss of consortium. Loss of consortium is an element of damages based upon the pecuniary value of the decedent's life.

Comparative Fault/Apportionment:

The Act retains Tennessee's modified comparative fault system and provides that if multiple defendants are found liable under comparative fault principles, the amount of all non-economic damages (not to exceed $750,000) shall be apportioned among the defendants based upon the percentage of fault for each defendant so long as the Plaintiff's comparative fault (or in a wrongful death action, the fault of the decedent) is not equal to or greater than 50%. If Plaintiff's fault equals or exceeds 50% it acts as a total bar to recovery.

Exceptions:

These caps, however, do not apply under certain conditions:

1. if the defendant specifically intended to and did inflict serious physical injury;

2. if the defendant "materially altered, destroyed or concealed records with the purpose of avoiding or evading liability;"[1]

3. if the defendant was under the (unlawful) influence of drugs or alcohol and his/her impaired judgment caused the injury or death.

The second exception highlights the need for health care providers to examine closely their records retention policies and litigation hold protocols for the organizations at all levels. In many lawsuits, clinical and other records are determined to have been altered or not in possession of the organization. Under such circumstances, the defense of the lawsuit is made more challenging and the Act now increases the burden on organizations to maintain records impeccably.

Punitive Damages:

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[1] N**ote, however, that this exception does not apply to a "good faith withholding of records pursuant to privileges and other laws applicable to discovery nor to the management of records in the normal course of business or in compliance with the defendant's document retention policy or state of federal regulations."**

The Act essentially codified punitive damages law that has been in effect in Tennessee for many years. Punitive damages can only be awarded if the defendant is shown, **by clear and convincing evidence,** to have acted maliciously, intentionally, fraudulently or recklessly. Second, although juries must consider various factors in deciding the amount of punitive damages, the total is now limited to either: twice the amount of compensatory damages, or $500,000, whichever is greater.

Like the Act's exceptions for non-economic damages, however, these caps on punitive damages are excluded under certain conditions:

1. if the defendant specifically intended to and did inflict serious physical injury;

2. if the defendant "materially altered, destroyed or concealed records with the purpose of avoiding or evading liability;"[2]

3. if the defendant was under the (unlawful) influence of drugs of alcohol and his/her impaired judgment caused the injury or death.

Venue:

The Act limits "forum-shopping." That is, Plaintiffs cannot pick and choose the venue in which to sue in an effort to secure a sympathetic jury. Civil actions against a business entity must now be brought in either 1) the county where all or a substantial part of the events occurred; 2) the county where the defendant's principal office is located; or 3) if the defendant is not a Tennessee company, a county where the defendant's registered agent for service of process is located, or else the county where state statutes say the agent for service is located.

Product liability:

Product liability actions cannot be brought against sellers of a product unless the seller exercised substantial control over the particular aspect of the product that caused the harm, or unless the seller actually modified the product in a way that substantially caused the harm, or unless the seller gave an express warranty to the buyer. Second, punitive damages are restricted; they cannot be levied against those who just sell a product as opposed to designing or manufacturing it (unless the seller substantially influenced whichever aspect of the product that caused the harm). Further, punitive damages can't be levied where a product conforms to state and/or federal regulations (for example, a drug or device that is labeled and manufactured in accordance with FDA requirements).

Date, scope of effectiveness:

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[2] **Note again: this exception does not apply to a "good faith withholding of records pursuant to privileges and other laws applicable to discovery nor to the management of records in the normal course of business or in compliance with the defendant's document retention policy or state of federal regulations."**

The Act goes into effect on October 1, 2011. It covers all liability actions for injuries, deaths and losses, as covered by the Act, that accrue on or after that date. In light of the 60-day notice provision and 120- day statute of limitation extension, issues may arise regarding the accrual of the cause of action.

Other changes not highlighted above:

A number of other changes appear in the Act. The Tennessee Consumer Protection Act has been modified and restricted. The TCPA can no longer be used to pursue securities fraud, for instance, and will no longer permit class actions. Additionally, some violations of the TCPA can only be pursued by the attorney general—meaning that an individual citizen who considers the TCPA to be violated cannot sue in an individual capacity but can only ask the attorney general to act. Additionally the law reduces the amount of bond that a party must post in order to appeal a decision.

II. The Tennessee Patient Safety and Quality Improvement Act of 2011

After two Tennessee Supreme Court decisions issued in 2010 that removed long-standing "peer review" protections to health care providers, the Tennessee Legislature responded and enacted the Patient Safety and Quality Improvement Act of 2011.

State and Federal Legislation:

In Tennessee, legislation has been enacted to protect the confidentiality of QIC/QAA records. Effective April 12, 2011, the Act now protects health care organizations and providers for a broad variety of quality and safety efforts, even including cost-effectiveness and medical necessity evaluations. CFR sec. 483.75(o) (F520) is the federal regulation requiring a QAA committee and providing a confidentiality privilege.

Health Care Organizations, Health Care Providers and Quality Improvement Committees:

The definitions of the organizations now afforded protections are broad and include all licensed health care facilities in Tennessee, affiliates, contracted entities, patient safety organizations (PSO), per assistance programs and any entities within a health care system. The organization must have Quality Improvement Committee (QIC) with delineated functions and the statute provides a list of the functions which would support the QIC test.

The Functions of the QIC/QAA - The terms "quality improvement" and "quality assurance" are broadly defined and encompass the organization's structure, processes and procedures designed to ensure that care practices are consistently applied and the facility meets or exceeds an expected standard of quality. One of the many purposes of a QIC/QAA must be to evaluate the safety, quality processes, costs, appropriateness, and/or necessity of health care services. A few of the many examples of QIC/QAA activities include:

*determining whether the care provided met the applicable standards of care;
*establishing and enforcing guidelines to keep the costs of health care within reasonable limits;
*evaluating incident reports for purposes of safety improvement or risk management;
*assessing providers' credentials, qualifications, competence and performance;
*evaluating the quality, quantity and timeliness of healthcare services provided to patients;

*designing ongoing interdisciplinary processes to improve the delivery of services and resident outcomes;
*establishment and enforcement of guidelines designed to keep the cost of health care within reasonable bounds;
*reduction of morbidity or mortality;
*review of professional qualifications and or activities of health care providers; and
*participation in patient safety activities as defined at sec. 921 of the Patient Safety and Quality Improvement Act of 2005, P.L. 109-41, as amended.[3]

Protection and Confidentiality of Records – The Act provides a wide variety of records that are entitled to confidently privileges. The federal regulation provides confidentiality from disclosure of the QAA records "except insofar as such disclosure is related to the compliance of such committee with the requirements of this section." The protections may apply not only to the written documents that a QIC/QAA generates (such as reports, statistical analyses, minutes and memoranda), but also to statements and testimony—conversations—that occur within the committee. Protections may also include the statements and documents made, not just by people who are actually members of the committee, but also by people who just attend a meeting, for instance, to make a presentation. If a document or statement is protected, it is both confidential and privileged. It can't be subpoenaed and it can't be admitted into evidence if there is a lawsuit. If a person supplies information or makes any statements to a QIC/QAA, that person cannot be required to provide any information, either about the content of the testimony or about the opinions and conclusions developed as a result of participating in the committee's discussions. Neither the plaintiff nor the plaintiff's lawyer can obtain or review privileged documents and a judge cannot compel these documents or conversations to be revealed, so long as they are covered by the statute.

In Tennessee, If someone provides information to a QIC/QAA—and does so in good faith, without malice, and based on facts that the person knows or reasonably believes to exist—then that person cannot be held liable if someone later sues the QIC/QAA. This protection from liability would apply, for instance, to a situation in which a QIC/QAA reviews a health care provider's performance or competence and decides, e.g., that this person should no longer work for the organization. The Tennessee statute extends this liability protection to the officers, directors, trustees, healthcare providers, QIC members, or even to people who were just attending the QIC meeting at which this quality issue was discussed.

Not All Documents Are Alike – The confidentiality privilege does not protect documents or statements that are not produced specifically by the QIC/QAA for its quality review processes. There is an exception for "ordinary business records" and privileges may not apply to any information, documents or records that 1) are not produced for or used by the a QIC/QAA; 2)

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[3] Note that The Patient Safety Act and the implementing regulations at 42 CFR Part 3, provide for the disclosure of information relating to patient safety events by health care providers to entities known as "patient safety organizations" (PSOs). The statute attaches privilege and confidentiality protections to this information, termed "patient safety work product" (PSWP), to encourage providers to assemble and report this information without fear of liability, and provides for the certification and listing of PSOs, which receive this information and analyze these patient safety events so as to improve patient safety and the quality of care. The provisions of the Patient Safety Act are beyond the scope of this article.

are not produced by persons acting on behalf of a QIC/QAA; or 3) are otherwise available from original sources. These types of documents would not be protected from discovery in judicial or administrative proceedings.

Evaluation of the QIC/QAA – In order to increase the protections and privileges afforded to the QIC/QAA, review your facilities' policies and procedures and revise them to include the variety of functions identified in state and federal regulations. Providing clear designations on documents as "QIC/QAA Records or Material" will help ensure proper confidentiality protections. Evaluate all of your committees and determine which of them may also deserve protections as a QIC (Oversight, Risk Management, Corporate Compliance, and Survey Team). If they are performing any of the functions of the QIC/QAA, designate that committee as a QIC/QAA. If the QIC/QAA contacts with an outside consultant, the QIC/QAA must specify its intent that the work is being performed pursuant to t he QIC/QAA function so there is no waiver to the privilege. By understanding the QIC/QAA protections, long-term care facilities can expand efforts to improve the quality of care and the quality of life of residents and can also reduce risk in judicial and administrative proceedings related to patient care.

With passage of the Act, defense counsel representing health care organizations now have the much needed relief from recent case law to advance objections and privilege protections to the vast amounts of discovery normally propounded during lawsuits for disclosure of QIC/QAA information including incident and accident reports, internal investigations, QAA policies and procedures.

III. Tennessee's New Statute on Summary Judgment

This year, the Tennessee legislature passed a third statute that will significantly affect medical malpractice cases and civil litigation generally. It is nearly as important as the other two but, because it involves some legal technicalities, it has received less attention. The standard for summary judgment was changed by the Tennessee Supreme Court in 2008 making it nearly impossible for defendants to obtain a summary judgment. The legislature, recognizing the increase in costs and forum shopping by Plaintiffs, overruled the 2008 ***Hannan v. Alltel*** standard thus creating the possibility of more cases being resolved prior to trial via summary judgment.

Hannan v. Alltel- Old Standard:

The Tennessee Supreme Court clarified that a Tennessee court is not to grant summary judgment merely because the Plaintiff's evidence, at the time of the filing/hearing of the Motion for Summary Judgement, is not sufficient to support one or more elements of Plaintiff's claim. In pertinent part, the Court ruled that the movant for summary judgment must instead either affirmatively negate one of those elements or demonstrate that, <u>at trial,</u> the claimant will not be able to support each element of his/her claim. The dissenting opinion took the position that the Court's opinion marked a sudden and unwarranted shift of the case law, making summary judgment even harder to gain and exposing defendants to greater risk of frivolous claims.

The Court's opinion was quite troubling for its practical effects. For example, say in a medical case that the defense deposes the plaintiff's physician expert who testifies clearly that he cannot say that the negligence in the case probably caused or contributed to the decedent's death – maybe, but no more than a possibility. The defense moves for summary judgment on the premise that the plaintiff cannot prove the element of causation and thus the plaintiff's case

crumbles to ruin. Under *Hannan*, even though the plaintiff's deficient proof would entitle the defendant to a directed verdict at trial, the defendant could not win the desired summary judgment in that posture because there remains the possibility that the plaintiff could retain another expert before trial who will give favorable testimony. Thus, under Hannan, to win summary judgment, the defendant must: a) spend the time and money to retain its own physician expert; b) then support its MSJ with its own expert's affidavit negating the element of causation (or other essential element); and c) hope that the Plaintiff will not be able to find an expert to contradict the defendant's expert. This amounted to a difficult, if not virtually impossible hurdle in many cases.

2011 Tennessee Legislation – New Standard:

On May 25, 2011, the Tennessee Legislature passed a new law defining "summary judgment." Under HB1358, which will be codified as T.C.A. 20-16-101, the party asking for summary judgment needs to do either one of two things: [1] provide the court with "affirmative evidence that negates an essential element of the nonmoving party's claim;" or [2] show the court that the other side's "evidence is insufficient to establish an essential element of [their] claim."

The second part is the one of special interest here. Under the new standard, all the defendant must do is to show that the plaintiff's evidence isn't enough to win the case—not go the additional step of proving the Plaintiff won't be able to go get enough to win, even if given the opportunity. As a result, beginning July 1, 2011, the new standard for summary judgment will put Tennessee back in line with the Federal summary judgment standard and provide the defense a procedural tool that has been unavailable since 2008.