MEDICAL MALPRACTICE UPDATE

I. SCOPE OF THE ARTICLE

There is probably no area of personal injury law which has seen greater change and evolution in the past twenty years than medical malpractice. When the legislature passed the first significant legislation in this area in 1975, the common law of malpractice had just begun to develop. In the past decades, more appellate court and Supreme Court decisions have been handed down in this area than in the previous two hundred years.

In the 2003 Legislative Session, Texas malpractice law was radically changed. The legislature repealed Article 4590i, the governing statute for health care liability claims since 1977, and replaced it with Chapter 74 of the Civil Practices and Remedies Code. In doing so, much of the language of Article 4590i was incorporated verbatim, leading to the intended result that case law interpreting Art. 4590i will carry forward into Chapter 74 cases. The 2003 changes, with no exceptions, reduce the rights of plaintiffs, and increase the protections, defenses and immunities available to defendants.

II. THE GOVERNING STATUTES

A. CHAPTER 74

This section outlines the basic requirements of both statutes, and, where applicable, how the case law has interpreted those requirements.

1. Definitions

The class of individuals and entities covered by Chapter 74 is extremely broad.

Indisputably, the language of Chapter 74 has expanded the traditional scheme of “who is a health care provider.” It has done so by both including within the definition of “health care provider” at (12)(A) entities and individuals who were not included under 4590i and by the broad definition of “affiliate” at 74.001(a)(1). As a result of these changes, individuals who were never protected by 4590i are protected under Chapter 74. For example, a psychologist (not a listed protected provider) who provided care at the request of a gastroenterologist, was covered because he was an “employee or agent” of a health care provider. The psychologist worked for a hospital which was dismissed after Plaintiffs failed to file an expert report as to the hospital. Thus, the hospital was clearly a “healthcare institution.” Since the psychologist was a contractor to the hospital, he was covered under the act as an “employee, independent contractor, or agent of a health care provider or physician acting in the course and scope of the employment or contractual relationship” 74.001(a)(12)(B)(ii). Additionally, the psychological treatment provided constituted “health care” under 74.001(a)(10). MacPete v. Bolomey, 185 S.W.3d 580 (Tex. App. – Dallas, 2006, n.p.h.).

Further, even though individuals may not themselves constitute health care providers, the claim may still be insulated if the care is an indispensable part of health care. See “definition of a health care liability claim,” page 5, infra.

CPRC 74.001. Definitions

a) In this chapter:

   (1) "Affiliate" means a person who, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with a
specified person, including any direct or indirect parent or subsidiary.

(2) "Claimant" means a person, including a decedent's estate, seeking or who has sought recovery of damages in a health care liability claim. All persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant.

(3) "Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of the person, whether through ownership of equity or securities, by contract, or otherwise.

(4) "Court" means any federal or state court.

(5) "Disclosure panel" means the Texas Medical Disclosure Panel.

(6) "Economic damages" has the meaning assigned by Section 41.001.

(7) "Emergency medical care" means bona fide emergency services provided after the sudden onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. The term does not include medical care or treatment that occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient or that is unrelated to the original medical emergency.

(8) "Emergency medical services provider" means a licensed public or private provider to which Chapter 773, Health and Safety Code, applies.

(9) "Gross negligence" has the meaning assigned by Section 41.001.

(10) "Health care" means any act or treatment performed or furnished, or that should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.

(11) "Health care institution" includes:

(A) an ambulatory surgical center;

(B) an assisted living facility licensed under Chapter 247, Health and Safety Code;

(C) an emergency medical services provider;

(D) a health services district created under Chapter 287, Health and Safety Code;

(E) a home and community support services agency;

(F) a hospice;

(G) a hospital;

(H) a hospital system;

(I) an intermediate care facility for the mentally retarded or a home and community-based services waiver program for persons with mental retardation adopted in accordance with Section 1915(c) of the federal Social Security Act (42 U.S.C. Section 1396n), as amended;

(J) a nursing home; or

(K) an end stage renal disease facility licensed under Section 251.011, Health and Safety Code.
(12) "Health care provider" means any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health care, including:

(i) a registered nurse;
(ii) a dentist;
(iii) a podiatrist;
(iv) a pharmacist;
(v) a chiropractor;
(vi) an optometrist; or
(vii) a health care institution.

(B) The term includes:

(i) an officer, director, shareholder, member, partner, manager, owner, or affiliate of a health care provider or physician; and

(ii) an employee, independent contractor, or agent of a health care provider or physician acting in the course and scope of the employment or contractual relationship.

(13) "Health care liability claim" means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

(14) "Home and community support services agency" means a licensed public or provider agency to which Chapter 142, Health and Safety Code, applies.

(15) "Hospice" means a hospice facility or activity to which Chapter 142, Health and Safety Code, applies.

(16) "Hospital" means a licensed public or private institution as defined in Chapter 241, Health and Safety Code, or licensed under Chapter 577, Health and Safety Code.

(17) "Hospital system" means a system of hospitals located in this state that are under the common governance or control of a corporate parent.

(18) "Intermediate care facility for the mentally retarded" means a licensed public or private institution to which Chapter 252, Health and Safety Code, applies.

(19) "Medical care" means any act defined as practicing medicine under Section 151.002, Occupations Code, performed or furnished, or which should have been performed, by one licensed to practice medicine in this state for, to, or on behalf of a patient during the patient's care, treatment, or confinement.

(20) "Noneconomic damages" has the meaning assigned by Section 41.001.

(21) "Nursing home" means a licensed public or private institution to which Chapter 242, Health and Safety Code, applies.

(22) "Pharmacist" means one licensed under Chapter 551, Occupations Code, who, for the purposes of this chapter, performs those activities limited to the dispensing of prescription medicines which result in health care liability claims and does not include any other cause of action that may exist at common law against them, including but not limited to causes of action for the sale of mishandled or defective products.
(23) "Physician" means:

(A) an individual licensed to practice medicine in this state;

(B) a professional association organized under the Texas Professional Association Act (Article 1528f, Vernon's Texas Civil Statutes) by an individual physician or group of physicians;

(C) a partnership or limited liability partnership formed by a group of physicians;

(D) a nonprofit health corporation certified under Section 162.001, Occupations Code; or

(E) a company formed by a group of physicians under the Texas Limited Liability Company Act (Article 1528n, Vernon's Texas Civil Statutes).

(24) "Professional or administrative services" means those duties or services that a physician or health care provider is required to provide as a condition of maintaining the physician's or health care provider's license, accreditation status, or certification to participate in state or federal health care programs.

(25) "Representative" means the spouse, parent, guardian, trustee, authorized attorney, or other authorized legal agent of the patient or claimant.

(b) Any legal term or word of art used in this chapter, not otherwise defined in this chapter, shall have such meaning as is consistent with the common law.

B. ARTICLE 4590i

1. Definition of “Health Care Provider”

Note the much narrower definition of a health care provider under Art. 4590i, Sec. 1.03(a)(3):

Any person, partnership, professional association, corporation, facility, or institution duly licensed or chartered by the State of Texas to provide health care as a registered nurse, hospital, dentist, podiatrist, pharmacist, or nursing home, or an officer, employee, or agent thereof acting in the course and scope of his employment.

Tex. Rev. Civ. Stat., Art. 4590i, sec. 1.03(a)(3). This seemingly straightforward definition has led to debate as to exactly what types of individuals or entities are covered. Much of this case law continues to inform the interpretation of who is a health care provider under Chapter 74.

Whether or not the definition of health care provider applies to a given defendant can affect a plaintiff’s case in a variety of ways: discovery, the statute of limitations, damages caps, 90 and 180 day bond and expert report provisions, the 120 day deadline and so on.

C. Entities Defined by the Courts as Healthcare Providers Under Chapter 74 and Article 4590i

a. “Professional Associations of Physicians”.

In Campbell v. MacGregor Medical Association, 985 S.W.2d 38 (Tex. 1998) the issue before the Court was whether a “professional association of physicians” duly licensed by the state of Texas to provide health care falls within the definition of a health care provider under Article 4590i, section 1.03(a)(3). If the association qualified as a health care provider, it would be entitled to summary judgment because the plaintiff did not file her case within the statute of limitations provided for in section 10.01. On the other hand, if the association did not meet the
Medical Malpractice in Texas, 2011

The definition of health care provider, then the plaintiff would be allowed to proceed with her lawsuit because no statute of limitations violation occurred.

The plaintiff contended that the Article 4590i language excluded the clinic from the definition of health care provider because it did not provide health care as enumerated in section 1.03(a)(3). The clinic argued that excluding it from the definition of a health care provider would frustrate the Legislature’s intent that Article 4590i cover group medical practices. The Court held that the Legislature did indeed intend to add “professional association of physicians” to the list of health care providers governed by the Act. To hold otherwise would be to hold that the statute’s protections would extend to physicians who practice as solo practitioners, but not to physicians who practice as a group. Id. at 39.

b. Dentists.

The definition of a health care provider can also have an impact on the discovery process. In Buchanan v. Mayfield, 925 S.W.2d 135 (Tex. App. – Waco 1996, mand. overruled), the plaintiff brought a medical negligence action against the defendant dentist alleging that, due to the dentist’s assistant’s negligence, the plaintiff drank out of another patient’s “spit cup”. Id. at 136. During discovery, the plaintiff sought the name of the patient from whose spit cup she drank and sent interrogatories to the defendant dentist seeking this information. Id. at 137. The dentist objected to this discovery request by asserting the physician-patient privilege. The court of appeals conditionally granted the plaintiff’s writ of mandamus stating that the dentist could not successfully assert the physician-patient relationship because he was not a physician as defined by Rule 509 of the Texas Rules of Civil Evidence. Id. at 138. In addition, the appellate court looked to the Medical Practice Act which is the statutory scheme that governs the licensing of physicians in Texas. Tex. R. Civ. Stat. Ann., Art. 4495b (Vernon Supp. 1996). Because the act confines its applicability to only physicians and because there is a separate Dental Practice Act governing the licensing of dentists in Texas, the court of appeals found that the defendant was not a “physician” for purposes of asserting the physician-patient privilege. Therefore, the plaintiff was entitled to the name of the patient.

c. Licensed Mental Health Counselor or Licensed Professional Counselor

A licensed mental health counselor is not a “health care provider” under Article 4590i. In Grace v. Colorito, 4 S.W.3d 765 (Tex. App. – Austin 1999, writ denied), the plaintiff sued her licensed counselor under the Medical Liability Act claiming that he negligently rendered psychological treatment. The licensed counselor challenged the characterization of the claim as a medical liability claim because licensed counselors are not included in the definition of a “health care provider” in Article 4590i.

The court agreed holding that licensed counselors, like psychologists and physical therapists, are not included in the Act’s definition of “health care provider” and, thus, are not health care providers under Article 4590i. Id. at 769 (see generally Lenhard v. Butler, 745 S.W.2d 101, 106 (Tex. App. – Fort Worth, 1988, writ denied) and Terry v. Barrinuevo, 961 S.W.2d 528, 530-31 (Tex. App. – Houston [1st] 1997, no writ).

See, however, MacPete v. Bolomey, supra; p.1, for instances where a psychologist might still fall under the definition of “health care provider.”

Note that under Chapter 74, licensed professional counselors are healthcare providers. Norgaard v. Pingel, 296 S.W.3d 284 (Tex. App. – Ft. Worth, 2009, n.p.h.).
d. Physical Therapists

While one court of appeals has held that a physical therapist falls within the statutory definition of a health care provider, *Flores v. Center for Spinal Evaluation and Rehab’ n*, 865 S.W.2d 261 (Tex. App. – Amarillo 1993, no writ), another court of appeals held that a physical therapist is not a “health care provider” under the statute. *Terry v. Barrinuevo*, 961 S.W.2d 528 (Tex. App. – Houston [1st] 1997, no writ).

Negligent Supervision of a Physical Therapist is a Health Care Liability Claim

Negligent supervision of a physical therapist is a health care liability claim. Although physical therapists are not protected individuals under Chapter 74, claims against health care employers, such as TIRR, are health care liability claims. Thus, claims for negligently supervising employees, even those not listed as health care providers, are health care liability claims. *Clark v. TIRR Rehabilitation Center*, 227 S.W.3d 256, (Tex. App. – Houston [1st], 2007, n.p.h.).

e. Emergency Ambulance Services


f. Veterinarians

Veterinarians are not physicians and do not fall under the limitations of Art. 4590i. *Neasbitt v. Warren, D.V.M.*, 22 S.W.3d 107 (Tex. App. – Fort Worth 2000, n.w.h.). Thus, plaintiffs in a suit for injury to their horse were not required to file a Sec.13.01 cost bond.

g. Dialysis Centers

Dialysis centers are not health care providers, *Finley v. Steenkamp*, 19 S.W.3d 533 (Tex. App. – Fort Worth, 2000, n.p.h.), and therefore “notice to one is notice to all” [see Sections II.B.6, p. 13 infra] does not apply to toll the two year statute of limitations for seventy five days as to such a facility.

h. Midwives


i. The Burden of Proof to Establish that Defendant is a Health Care Entity is on the Defendant

The burden of proof to establish that defendant is a health care entity is on the defendant. Because defendant did not establish that it was “duly licensed, certified, or registered or chartered by the State of Texas to provide health care,” it was not entitled to dismissal based on plaintiff’s failure to file expert reports. *Brown v. Villegas*, 2002 S.W.3d 803 (Tex. App. – San Antonio, 2006, n.p.h.).

2. Definition of “Health Care Liability Claim”

a. Under Chapter 74

i. Almost Anything is Health Care

Apparently, under Chapter 74, almost anything is health care. Appellate courts have taken their cue from *Diversicare v. Rubio*, 185 S.W.3d 842 (Tex. 2005), wherein the Supreme Court held that the multiple rapes and assaults of a nursing home patient constituted health care. “The underlying nature of appellee’s claims is that
the hospital breached the standards of care and safety owed to appellees by failing to protect her from the allegedly assaultive conduct of its nursing staff.” The claim based on the assault was therefore a healthcare liability claim. Christus Spohn v. Sanchez, 299 S.W.3d 868 (Tex. App. – Corpus Christi, 2009, pet. denied).

For an opinion which elucidates the difference between assaultive conduct related to and unrelated to healthcare, see Appell v. Muguerza, __ S.W.3d ___, 2010 Tex. App. LEXIS 9299 (Tex. App. – Houston [14th], 2010, n.p.h.). Therein, defendant physician repeatedly struck his patient and her mother, and threw one of them to the ground. The court differentiated at length between those aspects of his conduct that related to Chapter 74 healthcare and those aspects of his conduct which were clearly outside the definition of healthcare, holding that a report was not required to sustain a recovery in the non-healthcare claims.

The Dallas Court of Appeals has followed suit in finding that a claim against a nursing home for hiring an unfit care provider who injured a resident by throwing scalding water on him was a healthcare liability claim, requiring an expert report. Educare Community Living Corp. v. Rice, 2008 WL 2190988 (Tex. App. – Dallas 2008, n.p.h.) (not designated for publication). Consistently, the Dallas Court has held that a claim against a hospital for failure to restrain a mental patient, who injured a non-patient visitor at the hospital, was a healthcare liability claim even though the plaintiff was not a healthcare recipient. Wilson N. Jones v. Ammons, 266 S.W.3d 51 (Tex. App. – Dallas, 2008, pet granted).

However, it is important to note that Diversicare does not preclude suit against the individual employee who sexually assaults plaintiff. In Holguin v. Laredo Regional Medical Center, 256 S.W.3d 349 (Tex. App. – San Antonio, 2008, n.p.h.), plaintiff was sexually assaulted by Laredo Regional Medical Center’s employee, a nurse by the name of Morales. While suit against Laredo Regional Medical was a healthcare liability claim, requiring an expert report, since the gravamen of the complaint had to do with patient safety, suit against Morales individually was not a healthcare liability claim, but rather a sexual assault claim, which did not require an expert report.

The Supreme Court has followed the Diversicare ruling with a procedurally tortured case, Marks v. St. Luke’s Hospital. The Court initially held at 52 Tex. Sup. Ct. J. 1184 that the Marks plaintiffs’ claim was not healthcare, as it involved a collapsing bed, which the Court reasoned involved the “maintenance team,” not healthcare providers, and that the claim was therefore one for ordinary negligence. On reahearing, the Court reversed itself (without explanation) and found that defective bed maintenance is a healthcare liability claim because a bed is “an integral and inseparable part of healthcare services.” Marks v. St. Luke’s Hospital, 319 S.W.3d 658 (Tex. 2010).

Later, a plaintiff alleged that a chiropractor rubbed her genitals during chiropractic examination. The Court, consistent with Rubio, supra, held that this constituted “healthcare,” that she was thus bringing a “healthcare liability claim,” and was thus required to produce an expert report. Vanderwerff v. Beathard, 239 S.W.3d 406 (Tex. App. – Dallas 2007 n.p.h.). Courts have held that dropping a tray full of fertilized eggs at a fertility clinic, even though the dropping of the eggs was done by an untrained technician, constituted health care. Institute for Women’s Health v. Imad, 2006 WL 334013 (Tex. App. - San Antonio 2006, no pet.) (not designated for publication). Additionally, following similar reasoning, a psychologist’s conduct was inextricably intertwined with health care and thus constituted health care even though the psychologist is not a protected individual under Chapter 74. MacPete v. Bolomey, 185 S.W.3d 580 (Tex. App. –
A cytotech who misread pap smear slides was providing health care, despite the complete absence of medical or nursing training, following similar analysis. Pro Path v. Koch, 192 S.W.3d 667 (Tex. App. - Dallas 2006, pet. denied). The Pro Path court engaged in some astonishing analysis, when it held:

“Because the definition of ‘health care provider’ does not exclude pathology laboratories, the legislature has not expressed an intent that pathology laboratories cannot fall within the protection of Chapter 74. Thus, the application of the protection of Chapter 74 to a pathology laboratory that qualifies as a ‘physician’ does not create a conflict.” Pro Path, supra at p. 22.

While the Court recognizes differences in language between Chapter 74 and Chapter 4590i’s “inclusive” list of health care providers, it nevertheless stands the stated legislative purpose of Chapter 74 on its head to allow within the protection of a statute wide ranging entities that are not included within its terms. Particularly when a statute by design takes away citizens’ constitutional rights, traditional statutory construction is for narrow, rather than expansive, reading of such legislation.


Supplying Oxygen is healthcare. Company supplying an oxygen tank and ventilator is a healthcare defendant, even if it provides no healthcare whatsoever. Turtle Healthcare Group v. Linan, ___ S.W.3d ___, 2011 WL 1661524 (Tex. 2011) (per curiam).

Consulting on safety at a waterpark is healthcare. Yamada v. Friend, 335 S.W.3d 192 (Tex. 2010). A party cannot escape the Chapter 74 expert report deadline by not
amending a claim against a healthcare provider to allege common law slip and fall causes of action based on the same facts as the healthcare liability claim, and consulting on safety at a water park constitutes health care under Chapter 74. *Medical Center of Lewisville v. Slayton*, ___ S.W.3d ___, 2011 Tex. App. LEXIS 393 (Tex. App. – Fort Worth, 2011, n.p.h.).

**Proper Floor Mopping.** A patient who slips and falls on a wet bathroom floor and files suit has filed a healthcare liability claim, as proper floor mopping is “directly related” to healthcare. *Harris Methodist v. Ollie*, ___ S.W.3d ___, 2011 WL 1820880 (Tex. 2011).


i. Re-Casting Claims is Impermissible - DTPA


ii. Recasting as Contract Also Impermissible

Plaintiff sought to obtain reimbursement from a nursing home for inadequate services provided by the nursing home to her mother. She did not file an expert report because she was seeking contractual damages for costs of the services not provided only. The Dallas Court dismisses saying “[plaintiff’s] argument that she could avoid triggering Chapter 74 by omitting any allegation of injury or death and by praying only for contract damages was merely another variation of the artful-pleading tactic that Texas courts have frequently condemned. The legislature did not intend for plaintiffs to be able to avoid the requirements of Chapter 74 so easily.” *Victoria Gardens of Frisco v. Walrath*, 257 S.W.3d 284 (Tex. App. – Dallas, 2008, pet. denied).

In another example of a plaintiff attempting to bring suit against a health care provider on a breach of contract claim, rather than as a negligence claim governed by Chapter 74, plaintiff was dismissed for failing to meet the requirements of Chapter 74. Plaintiff complained that defendant Ramchandani agreed to perform surgery, but instead permitted another surgeon who was incompetent to perform the surgery, with bad results. Plaintiff sued defendant Ramchandani for breach of contract alleging that, since Dr. Ramchandani had agreed to perform the surgery, he was contractually bound to do so, and his failure to perform the surgery himself was a breach of contract which could support litigation against him. The Court held that “Doctor Ramchandani’s alleged failure to perform the surgery as agreed and his alleged designation of another doctor to perform the surgery are necessarily part of the rendition of health care services.” Accordingly, Chapter 74’s requirements apply. *Ramchandani v. Jimenez*, 314 S.W.3d 148 (Tex. App. – Houston [14th], 2010, n.p.h.).
iii. A Few Exceptions

A few recent exceptions to the foregoing trend are noteworthy: **use of a treadmill** at a hospital-owned facility is not healthcare since it is not “directly related to health care” or “an inseparable part of the rendition of health care services.” *Valley Baptist Medical Center v. Stradley*, 210 S.W.3d 770 (Tex. App. – Corpus Christi, 2006, pet denied).

In a situation in which consent to perform an **autopsy** was not obtained, defendant alleged that plaintiff’s case must be dismissed because plaintiffs failed to file a Chapter 74 expert report. Plaintiff claimed that the allegations were not a healthcare liability claim. The Fort Worth Court says that in order for Chapter 74 to apply, a “patient” must be involved. “This clearly implies that a person must be alive in order to be a ‘patient’. This court has previously held that a body was not a patient, nor was an autopsy a form of medical treatment. See *Putthoff v. Ancrum*, 934 S.W.2d 164 (Tex. App. – Fort Worth, 1996, writ denied). We agree with such a holding as the idea that a cadaver can be ‘patient’ is, on its face, illogical. As such, we hold that a dead body is not a patient and conclude that a body does not receive ‘medical care, treatment or confinement’ after death. Therefore, we hold that the claim brought by Graham is not a healthcare liability claim. As such, no expert opinion was required to be filed. . .” *Hare v. Graham*, 2007 WL 3037708 (Tex. App. – Fort Worth 2007, pet. denied) (**not designated for publication**).

A **nursing home resident bitten by a spider** could bring a premises liability claim. Getting rid of spiders is no different in a nursing home than any other facility, and did not require a medical expert. *Omaha Healthcare Center v. Johnson*, 246 S.W.3d 278 (Tex. App. – Texarkana 2008, pet. filed).


**Tripping Over Wires.** Tripping over wires in a hospital room is not a healthcare liability claim. The test is whether the injury results from actions that are in some way “an inseparable part of the rendition of medical services and the standards of safety within the health care industry.” Warning about the presence of wires on the floor cannot, as a matter of law, be held to be an inseparable part of the medical standards of care or health care services, neither is medical testimony required to determine whether such wires should run across the floor. *Dallas Homes for Jewish Aged v. Leeds*, 2010 WL 1463439 (Tex. App. - Dallas, 2010, n.p.h.) **not designated for publication**.

**Improper Sexual Relationship.**

A claim against a therapist for initiating an improper sexual relationship with a patient after the termination of the patient’s hospital stay is not healthcare. There is not a “substantial and direct relationship” between the defendant’s actions and the patient’s care and treatment. Further, the sexual relationship “certainly did not constitute an inseparable or integral part” of the healthcare. As to the entity that retained the therapist, plaintiff complained that the entity, Nexus, that retained the therapist, failed to properly inquire about her background. The Court holds that this is not healthcare because it does not concern any “act or treatment performed or furnished or that should have been performed or furnished by [Nexus] for, to, or on behalf of [plaintiff] during [plaintiff’s] medical care, treatment, or confinement. Although the failure to inquire may be “related” to plaintiff’s care and treatment, they did not constitute or implicate an “inseparable or integral part” of that care and treatment, as required in the Supreme Court’s ruling in

Importantly, the Court holds that part of the basis for this opinion is that no expert testimony is required in order to determine that the therapist defendant violated statutory prohibitions against sexual relationships with patients. A lay individual, according to the Court, can determine that the statute was violated. The Court also permits plaintiff’s claim against Nexus for failing to act to stop the abuse once it knew or had reason to know that the exploitation was in progress. The Court again concludes that this is not healthcare. The Court differentiates sexual abuse that takes place on defendant’s premises and during a hospitalization versus improper sexual relationship after the fact. Nexus v. Mathis, ___ S.W.3d ___, 2011 WL 454504 (Tex. App. – Dallas, 2011, n.p.h.).

Assault with Nail Polish. Appellant, an employee of D hospital, was admitted for a tonsillectomy. While he was anesthetized, two nurses painted his fingernails and toenails with pink nail polish, wrapped his thumb with tape and wrote "Barb was here" and "Kris was here" on the bottoms of his feet. He sued but did not file reports, arguing the claims were not for health care liability. The trial court dismissed and the Court of Appeals reverses, ruling in favor of the Plaintiff that such conduct is, indeed, not health care. Drewery v. Adventist Health System/Texas Inc. ___ S. W. 3d ___, 2011 WL 1991763 (Tex. App. – Austin, 2011, n.p.h.).

Note that in other states, courts have taken a more real-world approach. The Louisiana Supreme Court has held that accusations that hospitals lacked evacuation plans, resulting in tragedy as a result of Hurricane Katrina, were not medical malpractice claims. Therefore, special provisions for malpractice suits did not apply, neither did damage caps in malpractice claims. LaCoste v. Pendleton Methodist Hospital, 966 So. 2d 519 (La. 2007)  Claims that the hospital failed to design, construct, and/or maintain their facility to provide emergency power to sustain life support systems during and in the aftermath of a major hurricane, to implement adequate evacuation plans, and to have facilities available for transfer of patients in the event of an emergency or mandatory evacuation, sounded in general negligence and not in medical malpractice within the scope of the Louisiana Medical Malpractice Act, and thus, representative of the patient’s estate and patient’s survivors did not have to present their claims to the medical review panel as a prerequisite to initiating suit against the hospital. The particular wrongs asserted were not “treatment-related” or caused by a dereliction of medical professional’s skill, in that the death of the patient who was on life support was caused when the life support systems failed due to loss of electrical power, and by the hospital’s alleged failure to transfer the patient to another facility. The claims did not require medical expert evidence on the applicable standard of care and alleged breach, and the claims did not involve an assessment of the patient’s condition. The claims did not involve the physician-patient relationship or involve activities that the hospital was licensed to perform. Accordingly, the strictures of the Louisiana malpractice act did not apply.

Caveat: These cases predate the Supreme Court’s self-reversal in Marks v. St. Luke’s Hospital, 319 S.W.3d 658 (Tex. 2010), in which it held that bed maintenance was an inseparable part of healthcare and that therefore a claim for injuries due to a collapsing bed was a Chapter 74 healthcare liability claim.

iv. It May Not Even Be Necessary to Be a Patient to Fall Under Chapter 74

It may not even be necessary to be a patient to fall under Chapter 74. A plaintiff sued two nursing homes, at which she had never been a patient, for negligently retaining and inadequately investigating the background
of an employee at those facilities who was later terminated from both and came to work at the third facility, at which she was a patient, and in which the employee sexually assaulted her. She argued that Chapter 74 did not apply to her claims against the first two nursing homes because she had never been a patient at either one. The Court’s reasoning is that the two nursing homes had an administrative duty, created by statute, to report any abuse or neglect by employee, which duty to report also “implicates” their duty as health care providers, and further reasons that, because this duty to report cannot be separated from the two nursing homes’ responsibility to ensure resident safety, then the statutory duty to report abuse or neglect by a terminated employee was an inseparable part of the rendition of health care services. Based on thus argument, even though plaintiff was NEVER a patient at either nursing home, Chapter 74 still applied. Dunn v. Clairmont Tyler, 271 S.W.3d 867 (Tex. App. – Tyler, 2008, n.p.h).

B. Under 4590i

Section 1.03(a)(4) defines a health care liability claim as:

A cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient, whether the patient’s claim or cause of action sounds in tort or contract.

Tex. Rev. Civ. Stat., Art. 4590i, Section 1.03(a)(4). This definition has had an impact on certain cases and this case law is included as it continues to inform Chapter 74 to the extent that the rationale is still applicable.

(i) Fraud in the Health Care Context

A former psychiatric hospital patient brought an action alleging that through fraudulent acts, the physicians at the in-patient facility induced him to lengthen his stay. Shannon v. Law-Yone, 950 S.W.2d 429 (Tex. App. – Fort Worth 1997, writ denied). Plaintiff’s claim was not a “health care liability claim” as defined under the MLIIA, but rather, a cause of action for common law fraud to which a four-year statute of limitations applied.

An unnecessary hysterectomy case which was grounded in fraud was, however, dismissed. The plaintiff in Gomez v. Matey, 55 S.W.3d 732 (Tex. App. – Corpus Christi, 2001, n.w.h.) sued for having been fraudulently induced to have an unnecessary hysterectomy. Plaintiff’s proof of fraud would have been exclusively medical: whether or not the hysterectomy was necessary, what the symptomatology was, etc. Therefore, since all the proof of the fraud claim was medical, the case was a medical or health care liability claim, and the Plaintiff was required to comply with the requirements of Article 4590i, including Section 13.01.

(ii) Non-Medical Negligence by a Health care Provider

Does a suit that involves acts of ordinary negligence automatically fall within the definition of a health care liability claim simply because the act of negligence was committed by a health care professional? The Corpus Christi Court of Appeals held that it did not. Rogers v. Crossroads Nursing Services, Inc., 13 S.W.3d 417 (Tex. App. – Corpus Christi, 1999, n.p.h.). In Rogers, the plaintiff was recovering at home from back surgery when a home nursing agency employee negligently placed a heavy supply bag on a table. The bag fell on the plaintiff re-injuring his back. Id. “Because the question of how to place a heavy supply bag in a patient’s home so as not to injure the patient is not governed by an accepted standard of safety within the health care
industry, but rather is governed by the standard of ordinary care, we find that [the plaintiff’s] cause of action for negligence is not a health care liability claim but is one for common law negligence.”

(iii) Duty to Maintain Safe Premises

“In enforcing the Act, however, we must be equally careful not to extend the Act’s reach beyond its stated bounds. Clearly, not every action taken by a health care provider or every injury suffered by a patient falls within the ambit of the Act.” Bush v. Green Oaks Operator, Inc., 39 S.W.3d 669 (Tex. App. - Dallas, 2001, n.p.h.). Plaintiff was injured while a patient at Defendant medical facility by another patient, this one violently dangerous. In holding that 4590i did not apply to Plaintiff’s cause of action, the Court stated “the duty that Bush alleged Green Oaks owed to her was the duty to provide her with a reasonably safe environment or to warn her of a known danger. This duty is owed by a premises owner to an invitee; it is not a duty owed by a health care provider to a patient. Green, at 674.

Cobb v. Dallas-Fort Worth Medical Center-Grand Prairie, 48 S.W.3d 820 (Tex. App. – Waco, 2001, n.p.h.) Holds that when hospital’s central supply delivers an incomplete set of screws to surgery, the issue is “non-medical, administrative, ministerial, or routine care at a hospital,” and is thus general negligence and not a health care liability claim.

In order for Plaintiff to couch a claim for injury in a health care facility as a premises liability claim, Plaintiff must provide evidence of an unreasonably dangerous condition on the premises. Simply recasting a malpractice claim as a premises claim will not allow the Plaintiff to evade the dictates of either Article 4590i or Chapter 74. Herse v. Jimenez, 2003 WL 22656754 (Tex. App. - San Antonio 2003 n.p.h.) (not designated for publication).

(iv) Credentialing as a Health Care Liability Claim


(v) Hospital Failure To Arrange For Services

Columbia Medical Center of Las Colinas v. Hogue, 132 S.W.3d 671 (Tex. App. – Dallas, 2004), affirmed in [pertinent] part, reversed in part, Columbia Medical Center v. Hogue, 271 S.W.3d 238 (Tex., 2008) holds that the Plaintiffs were making a health care liability claim when they alleged that the hospital was negligent in not having emergency echocardiogram services, that it was negligent in failing to provide effective on-call coverage by physicians, and that the hospital failed to communicate its limitations to the community at large. Thus, Article 4590i applied, and Plaintiff’s allegations in Hogue brought them within the definition of “health care liability claim”.

(vi) Assault by a Health care Provider

When a neurologist, during the course of the neurological exam, placed his penis in patient’s hand as part of her neurological work up, he was “acting in his own prurient interest and ceased to be acting for his employer”. Thus, his conduct did not arise out of the course and scope of his employment, and his employer was not liable. However, in an astonishing juxtaposition of concepts, the Houston 14th Court went on to hold that the physician’s conduct did constitute violations of the standard of care (i.e.: medical practice), and thus were covered under Article 4590i. Buck v. Blum, 130 S.W.3d 285 (Tex. App. - Houston [14th Dist.], 2004, n.p.h.).
3. **Definition of “Physician”**

Section 1.03(a)(8) defines a physician as:

A person licensed to practice medicine in this state.

Tex. Rev. Civ. Stat., Art. 4590i, sec. 1.03(a)(8). This definition, read in conjunction with subchapter N regarding expert witnesses, resulted briefly in an argument that all expert testimony must be provided by a physician who is licensed to practice medicine in the state of Texas. This contorted reading of the statute was later vitiated, with the legislature amending Article 4590i to provide that the medical licensure of an expert physician need not be from Texas. See Section I.2., Infra, p. 31.

4. **Chapter 74 Conflict with Other Law**

An entirely new section has been added providing the dominance of Chapter 74 over other statutory authority.

**Section 74.002. Conflict With Other Law and Rules of Civil Procedure**

(i) In the event of a conflict between this chapter and another law, including a rule of procedure or evidence or court rule, this chapter controls to the extent of the conflict.

(ii) Notwithstanding Subsection (a), in the event of a conflict between this chapter and Section 101.023, 102.003, or 108.002, those sections of this code control to the extent of the conflict.

(iii) The district courts and statutory county courts in a county may not adopt local rules in conflict with this chapter.

C. **Chapter 74 and Sovereign Immunity**

An entirely new section has been added providing that sovereign immunity is not waived by Chapter 74.

§ 74.003. **Sovereign Immunity Not Waived**

This chapter does not waive sovereign immunity from suit or from liability.

D. **Chapter 74 - The Deceptive Trade Practices Statute**

An entirely new section has been added providing that the Deceptive Trade Practices Act (DTPA) does not apply to Chapter 74 claims.

§ 74.004. **Exception From Certain Laws**

(i) Notwithstanding any other law, Sections 17.41-17.63, Business & Commerce Code, do not apply to physicians or health care providers with respect to claims for damages for personal injury or death resulting, or alleged to have resulted, from negligence on the part of any physician or health care provider.

(ii) This section does not apply to pharmacists.

E. **Section 4.01 and Notice of Claim**

(i) Chapter 74.051 and 74.052

The legislature carried forward 4590i’s notice requirement virtually intact, with the important addition of Sec. 74.052, which now requires potential claimants to submit, with their notice letter, a medical authorization as drafted in the statute.

§ 74.051. **Notice**

(a) Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care