1151 Claims &
Informed Consent
Requirements for an 1151 Claim

- Sec 1151 requires injury or death be proximately caused by:
  - Carelessness
  - Negligence
  - Lack of proper skill
  - Error in judgment or
  - Similar instance of fault or
  - By an event not reasonably foreseeable
  - While VA furnishing hospital care, medical treatment, surgical treatment, or exam
Requirements for an 1151 Claim

- Sec 1151 claims based on VA voc rehab or VA comp work therapy (CWT) do not require evidence of negligence, fault or accident.

- 1151 disallowed in all cases where disability or death resulted from vet’s willful misconduct.
Requirements for an 1151 Claim

- Assuming that disability/death not result of vet’s willful misconduct, entitlement hinges on showing:
  - Disability/death was caused by hospital care, med or surgical treatment, or exam and
  - Care was furnished either by a VA employee or in VA facility and
  - Proximate cause of disability/death was
    - carelessness, neg, lack of proper skill, error in judgment, or similar instance of fault on the part of VA in furnishing the hospital care, med or surgical treatment, or examination
    - or it was an event not reasonably foreseeable
Requirements for an 1151 Claim

- Most claimants will need to obtain medical opinion on question of “fault” in order to succeed
Requirements for an 1151 Claim

Most 1151 claims must meet certain causation requirements:

- Must show that VA care *actually caused* add’l disability or death, **and** either
  - 1) establish VA failed to exercise degree of care expected of reasonable health care provider, **or**
  - 2) establish VA furnished care w/o informed consent **or**
  - 3) establish injury/death resulted from event not reasonably foreseeable
Requirement of Add’l Disability or Death

- A showing of add’l disability is required in all 1151 cases except those based on vet’s death

- VA to compare vet’s functioning immediately before beginning VA care to vet’s functioning after VA care in order to determine whether there is add’l disability
Requirement of Add’l Disability or Death

- Standard of proof that applies 1151 claims: requirement of add’l disability should be characterized as whether it is as likely as not that vet has an add’l disability.

- Where 1151 claim based on vet’s death, proof of death itself satisfies this initial requirement.
Requirement that Med Care Be Furnished by a VA Employee or in a VA Facility

- 1151 only reaches Dept employee action related to furnishing medical services

- Not covered – activities of non-health care workers, such as janitors, security officers, engineers, or administrators

- Care in a VA facility may be covered regardless whether med services administered by VA employee – means that activities by non-VA contract personnel working in VA facility may be covered
Proximate Cause

- 1151 explicitly requires that VA care cause disability/death & that VA fault or accident be proximate cause of disability or death

- VA regs define proximate cause as action or event that directly caused disability or death, as distinguished from a remote contrib cause
Proximate Cause

- VA regs provide that actual causation must be shown

- That vet received VA care & now has add’l disability or has died is not sufficient to establish causation
Proximate Cause

- *Loving v. Nicholson* – vet claimed 1151 benefits for knee condition that resulted when ceiling grate fell on knee during VA exam

- Court held that VA exam coincidental to vet’s knee injury & did not *cause* it

- Court defined “caused by” as requiring existence of logical sequence of cause & effect showing that VA exam or treatment was reason for disability

- Of course, this vet may have winnable FTCA claim despite inability to obtain 1151 benefits for the knee condition
Proximate Cause

  - Vet injured b/c VA failed to properly install and maintain the equip necessary to provide him w/ med treatment

Facts

- May 2004 – vet suffering from “incomplete” quadriplegia was at a VAMC to participate in a prescribed aquatic therapy session
- Afterward, he stopped to use a restroom located at the VAMC
- While in the restroom, the grab bar he was using to lift himself into his wheelchair came loose from the wall and he fell to the ground
Proximate Case

- **Viegas** – Facts (cont’d)
  - Due to the fall, the vet sustained injuries to both his upper and lower extremities
  - Prior to his fall, the vet could sometimes walk with a walker, but since the accident he can only stand with assistance

- July 2004 – the vet filed a claim for 1151 benefits
  - He asserted that due to the fall in the VA restroom, he had incurred severe injuries resulting in the loss of use of his lower extremities and impairment of his upper extremities
Proximate Cause

- **Viega**s – Fed Cir opinion – Vet entitled to 1151 benefits

- VA cannot reasonably furnish hospital care or med treatment to vets w/o also providing access to handicapped-accessible bathrooms

- Restroom grab bars, and other equip specifically designed to assist the disabled, are a necessary component of the health care services the VA provides b/c w/o such equip many vets would be unable to avail themselves of VA med care
Proximate Cause

- **Viegos** – Fed Cir opinion – Vet entitled to 1151 benefits
  
  - Current case status - VA still has time to appeal decision –
    - By requesting panel reconsideration or en banc review, or
    - By filing petition for cert. with U.S. Supreme Court.
Proximate Cause

1151 claim may be based on VA’s failure to timely diagnose or properly treat a condition, which allows continuance or natural progress of a disease or injury.

However, add’l disability/death resulting from vet failing to follow med instructions is not considered to be caused by VA

Advocates--keep in mind that to establish proximate cause in 1151 claims, claimant need only show that positive & negative evidence is in approx. balance
Alleging that VA is the Proximate Cause of Add’l Disability or Death

- VA regs provide many ways to establish that VA med care, treatment, or exam proximately caused disability or death

- Claimant can show:
  - VA failed to exercise degree of care that would be expected of a reasonable health care provider; or
  - VA furnished care w/o vet’s or surrogate’s informed consent; or
  - Event was not reasonably foreseeable based on what a reasonable health care provider would have foreseen
Alleging that VA is the Proximate Cause of Add’l Disability or Death

- VA regs also provide that for disability/death resulting from VA training, rehab services, or CWT, claimant need only show vet participated in essential activity or function of trainings, services, or CWT program that was proximate of death or injury

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Advocacy Advice: Lack of Reasonable Degree of Care

- Advocates can meet the req that VA care proximately caused disability/death if they can establish that it is ALAN that VA failed to exercise deg of care expected of a reasonable health care provider

- This is standard generally used in civil malpractice cases
Advocacy Advice: Lack of Reasonable Degree of Care

- This is a question about standard med practices, so . . .

- It would be most helpful to secure expert medical testimony that reasonable health care provider would not have provided care in the manner administered by the VA
Advocacy Advice: Lack of Informed Consent

- Advocates can show that it is ALAN that VA furnished care w/o vet’s or surrogate’s informed consent

- Informed consent is defined as freely given consent that follows a careful explanation by practitioner to patient or patient’s surrogate, of proposed diagnostic/therapeutic procedure or course of treatment
Advocacy Advice: Lack of Informed Consent

- Practitioner must explain treatment in understandable language & discuss expected bens, reasonably foreseeable assoc risks, complications or side effects, reasonable and available alts, and anticipated results if no action taken.
Advocacy Advice: Lack of Informed Consent

- There must be opportunity
  - To ask questions
  - To indicate comprehension of info &
  - To grant permission freely w/o coercion

- VA Manual indicates that “express consent” is consent that has been clearly stated either orally or in writing
Advocacy Advice: Lack of Informed Consent

Under 38 C.F.R. 17.32(b), consent may be implied rather than express

Consent implied when:
- Immediate med care necessary:
- To preserve life or
- Prevent serious impairment of health of patient or others and
- Patient unable to consent and
- Practitioner determines there is no surrogate or waiting for consent from surrogate would increase hazard to life or health of patient or others
Advocacy Advice: Lack of Informed Consent

- Practitioner defined as
  - Physician, dentist, or health care prof who has been granted specific clinical privileges to perform treatment or procedure
  - Includes medical & dental residents & other approp trained health care professionals designated by VA regardless whether they have been granted clinical privileges
Advocacy Advice: Event Not Reasonably Foreseeable

- VA determines whether event was not reasonably foreseeable based on what a reasonable health care prov would have foreseen

- Event does not need to be completely unforeseeable or unimaginable, but must be one that reasonable health care provider would not consider an ordinary treatment risk
Advocacy Advice: Event Not Reasonably Foreseeable

- Relevant factor:
  - Whether event was type that a reasonable health care provider would have disclosed in connection with informed consent procedures

- Therefore, when informed consent docs fail to mention event that resulted in the disability or death they provide support that event was not reasonably foreseeable
Advocacy Advice: Event Not Reasonably foreseeable

- **Halcomb v. Shinseki (Oct 2009)**
  - Generic written consent form may be enough to establish vet consented even if form neglects to specify potential complications from procedure

- After undergoing left eye surgery, vet developed endophthalmitis, which a VA med examiner characterized as a “rare, but not unheard of complication”
Advocacy Advice: Event Not Reasonably Foreseeable

- The vet argued that endophthalmitis & retinal tears, events the Board determined were reasonably foreseeable, should have been specifically addressed in the VA’s written consent form for eye operation.

- Vet did not allege that informed consent discussion was defective, only that generic consent form should have been considered negligence per se.
Advocacy Advice: Event Not Reasonably Foreseeable

- Court:
  - Disagreed w/ vet
  - Found that VA regs & handbook do not require detailed recitation of all info conveyed in securing informed consent
  - It cannot be presumed that vet’s complications were not discussed simply b/c not recorded

- Again, standard of proof for this element of 1151 claim is whether it is ALAN that event was not reasonably foreseeable
Recent CAVC Case on Informed Consent

- *McNair v. Shinseki* (Nov. 2011)

- Court:
  - Presumption of regularity does not apply to scope of info provided to a patient by a doc re: risks of treatment/surgery
Recent CAVC Case on Informed Consent

Court:

- But failure to give info to patient about potential adverse effect does not defeat finding of informed consent – If a reasonable person faced w/ similar circumstances would have proceeded w/ treatment
Recent CAVC Case on Informed Consent

- May 1995 – vet discharged
- June 1998 – bilateral reduction mammoplasty at VA hospital
- Vet & physician signed auth for med procedures form reflecting she was advised of nature of surgery, attendant risks & expected results
- Form was general & did not state specific risks discussed

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Recent CAVC Case on Informed Consent

- Nov 1998 – Vet filed 1151 claim for continual neuralgia from surgery
  - Neuralgia is pain along the course of 1 or more nerves
- RO denied claim b/c evid showed pain from nerve regeneration was expected consequence
- Jan 2009 – BVA denied 1151 claim, finding:
  - neuralgia was foreseeable risk but
  - Vet not entitled to 1151 b/c no evid of VA negligence
  - & vet gave informed consent
Recent CAVC Case on Informed Consent

- Vet argued that:
  - Specific risk of neuralgia was not disclosed
  - Reference to “minor & immaterial deviations” only included minor mistakes in documenting consent

- VA argued that:
  - Vet signed consent form
  - Failure to disclose risk would not have deterred a reasonable person from surgery
Recent CAVC Case on Informed Consent

Court:

- “Presumption of regularity” does not apply to scope of advice & info given by doc in generic consent form, if contested by claimant

Court:

- Diversity of patients, procedures & circumstances counsels against recognizing a presumption that a doc fully informed particular patient about a particular consequence of a particular med procedure just because form filled out properly
Recent CAVC Case on Informed Consent

- VA must weigh vet’s contentions, signed consent form, and all relevant evid in record to determine whether certain info provided to vet

- Minor deviations does incl substantive as well as technical and procedural errors
Recent CAVC Case on Informed Consent

Court:
- BVA conclusion that “a reasonable person could assume that surgeon's detailed discussion addressing possible residual scarring included neuralgic pain” to be inadequate b/c no rational was provided for concluding what a reasonable person could assume

Court:
- BVA failed to provide rational for determination that any failure to document neuralgia was minor deviation that was immaterial under circumstances of case
Recent CAVC Case on Informed Consent

- However, failure to inform re: a reasonable foreseeable consequence of treatment is minor, nonmaterial deviation if a reasonable person under circumstance would have consented anyway.

- Court to VA: look not only to likelihood of undiscl. risk materializing, but recog that some foreseeable risks may be minor compared to foreseeable consequences of continuing w/o treatment.
Recent CAVC Case on Informed Consent

BVA provided no discussion re: whether reasonable person in vet’s situation would have proceeded w/surgery if advised of risk of neuralgia

BVA did not discuss consequences of proceeding w/ surgery vs. foregoing surgery

- These are primary factors to eval whether reasonable person would have proceeded w/ surgery
Recent CAVC Case on Informed Consent

- CAVC sent case back to BVA for development of facts related to scope of info provided to vet re:
  - Foreseeable risks of her treatment
  - Foreseeable consequences of failing to undergo treatment
  - Whether a reasonable person would have proceeded w/ surgery even if advised of risk of neuralgia
Questions