

SHARPENING THE FOCUS: RETHINKING THE SAFETY PRONG IN HEALTH CARE LIABILITY CLAIMS

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ABSTRACT

In Texas, health care liability claims are subject to an influx of litigation due to the lack of clarity in the Texas Medical Liability Act. The word “safety” has never been defined in the statute despite other terms in the statute being defined. As a result of leaving safety undefined, a broad category of claims have been included as medical malpractice claims under the safety standards language in a health care liability claim. Over time, the Texas Supreme Court has tried to intervene by creating a seven-factor test to interpret the word “safety” in the statute.

A judicially created seven-factor test to interpret one word in the statute contains multiple flaws. For instance, different courts emphasize different factors. This judicial bias creates confusion for practitioners who cannot predict which courts will rely on which factors to interpret a claim. Some courts do not still follow the seven-factor test and instead utilize the substantive nexus test. Therefore, a need still exists for clarity among the Texas courts and legislature. Though safety-based claims are complicated, the definition does not have to be.

This Comment seeks to address the inconsistencies that still exist in the seven-factor test to evaluate whether a claim falls under the safety prong in the Texas Medical Liability Act. It offers a legislative proposal to the current statute that includes a clear definition of the word “safety” so that claims that are not actually health care liability claims are not designated as such. As a result, claimants and lawyers can adequately prepare their case with predictability of how a court will interpret a claim.

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I. INTRODUCTION

In 2016, medical malpractice accounted for approximately 251,000 lives lost—the third leading cause of death in the United States behind cancer and heart disease.¹ When people think of medical malpractice, one classic case that often comes to mind is *Gaddis v. Smith*.² In this case, a doctor negligently left a sponge inside the patient’s body after an operation was performed.³ That is an example of a clear case of medical malpractice.⁴ In a perfect system, medical malpractice claims operate on the “negligence rule.”⁵ This rule holds physicians accountable for the injuries they negligently cause.⁶ This creates a healthy balance for physicians to evaluate the benefits of a patient receiving care, costs of not operating, and the costs of making a mistake in operation.⁷ Cases where a physician was not actually negligent and instead, a plaintiff was injured in a health care setting, do not help contribute to physicians practicing this way.⁸ Most of us do not think about a slip and fall in a hospital,⁹ a fall off an examination table,¹⁰ or even an ambulance hitting a curb on the way to the hospital as a medical malpractice claim.¹¹ Today, Texas courts have opened up the floodgates to allow all of these claims to fall under medical malpractice lawsuits as health care liability claims.¹²

To illustrate the problem within the current legal framework, imagine that your loved one was in an assisted living facility.¹³ One day, your loved one was seated on a rolling walker while an employee was pushing them along the sidewalk near a parking lot when the walker rolled over due to a

1. Ray Sipherd, *The Third-leading Cause of Death in U.S. Most Doctors Don’t Want You to Know About*, CNBC, <https://www.cnbc.com/2018/02/22/medical-errors-third-leading-cause-of-death-in-america.html> (last updated Feb. 28, 2018, 9:39 AM).

2. 417 S.W.2d 577 (Tex. 1967).

3. *Id.* at 578 (holding that a cause of action based on a surgeon leaving a sponge in a patient’s body accrues at the time the patient discovered the sponge and not the date of the actual negligent operation).

4. *See id.*

5. David J. Becker & Daniel P. Kessler, *The Effects of the U.S. Malpractice System on the Cost and Quality of Care*, in *MED. MALPRACTICE AND THE U.S. HEALTH CARE SYS.* 84 (William M. Sage & Rogan Kersh ed. 2006).

6. *Id.*

7. *Id.*

8. *Id.* (“Imperfections in markets for health care and the liability system, however, mean that the negligence rule may not provide incentives for appropriate medical care in practice.”).

9. *See Morrison v. Whispering Pines Lodge I, L.L.P.*, 428 S.W.3d 327, 329 (Tex. App.—Texarkana 2014, pet. denied).

10. *See Phillips v. Jones*, No. 05-15-00005-CV, 2016 WL 80561 (Tex. App.—Dallas Jan. 7, 2016, no pet.) (mem. op.).

11. *See City of Hous. v. Hussein*, No. 01-18-00683-CV, 2020 WL 6788079, at *15 (Tex. App.—Houston [1st Dist.] Nov. 19, 2020, pet. denied) (mem. op.).

12. *See Coming Attractions Bridal and Formal, Inc. v. Tex. Health Res.*, 595 S.W.3d 659, 665 (Tex. 2020) (holding that a hospital violated safety standards when a nurse who was infected with Ebola traveled to a bridal shop after treating an infected patient).

13. *See Collin Creek Assisted Living Ctr., Inc. v. Faber*, 671 S.W.3d 879, 884 (Tex. 2023).

crack in the sidewalk.¹⁴ Suddenly, your loved one and the employee went tumbling over and suffered injuries.¹⁵ Unfortunately, you find out one week later that your loved one has passed away.¹⁶ As a result, you want to take legal action against the assisted living facility, so you allege the theory of premises liability for the crack in the sidewalk.¹⁷ The facility disagrees with your cause of action and alleges your claims are really a health care liability claim and must be dismissed because you did not file a timely expert report.¹⁸ After your case makes it to the Texas Supreme Court, the court deems your claims do fall within the “safety” prong of a health care liability claim and therefore dismisses your claims due to the expert report not being served.¹⁹ Unfortunately, this is not an imaginary scenario for plaintiffs in Texas—this is a real life scenario.²⁰ These types of claims are why the Texas Legislature must take action.²¹

Health care liability claims have included a wide range of situations, including a nursing home resident alleging negligence in failing to eradicate spiders that resulted in a spider bite,²² to an ambulance hitting a curb while transporting a patient to the hospital,²³ or even a case where a nurse exposed to Ebola traveled to a bridal shop and inadvertently spread the virus at the bridal shop.²⁴ The reason for categorizing these claims as health care liability claims is tied to safety not having a definition in the Texas Medical Liability Act.²⁵ Therefore, safety has been interpreted as its common meaning, “secure from danger,” allowing an influx of claims that do not pertain to any kind of treatment orchestrated by a health provider.²⁶ Texas circuit courts struggled with this interpretation of safety.²⁷ Finally, in 2015, the Texas Supreme Court weighed in on the issue.²⁸ As a result, the court developed a seven-factor test

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.* at 890–91, 895.

20. *See id.*

21. *See id.*

22. *See Omaha Healthcare Ctr., LLC v. Johnson*, 344 S.W.3d 392, 396 (Tex. 2011).

23. *See City of Hous. v. Hussein*, No. 01-18-00683-CV, 2020 WL 6788079, at *15 (Tex. App.—Houston [1st Dist.] Nov. 19, 2020, pet. denied) (mem. op.).

24. *See Coming Attractions Bridal and Formal, Inc. v. Tex. Health Res.*, 595 S.W.3d 659, 661 (Tex. 2020).

25. *Id.* at 664 (“The Act does not define ‘safety,’ or a safety standard.”); *Ross v. St. Luke’s Episcopal Hosp.*, 462 S.W.3d 496, 504 (Tex. 2015) (“The TMLA does not specifically state that a safety standards-based claim falls within its provision only if the claim has some relationship to the provision of health care other than the location of the occurrence, the status of the defendant, or both.”).

26. *See TEX. CIV. PRAC. & REM. CODE ANN.* § 74.001(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.”); *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 855 (Tex. 2005).

27. *See Ross*, 462 S.W.3d at 504.

28. *Id.* at 505. (“As this case demonstrates, the line between a safety standards-based claim that is not an HCLC and one that is an HCLC may not always be clear.”).

in the pivotal case of *Ross v. St. Luke's Hospital* to evaluate the word “safety” in the statute.²⁹ While this judicially created seven-factor test aimed to provide clarity, it had the unintended consequence of broadening the scope of the term “safety” within the statute and resulted in inconsistent outcomes among the courts.³⁰

The effect of courts misconstruing a claim as a health care liability claim is that plaintiffs are bound by onerous procedural requirements to comply with obtaining an expert.³¹ Under Chapter 74 of the Texas Civil Practice and Remedies Code, a claimant must serve an expert report within 120 days of the defendant’s answer.³² If this report is not on file, the judge is required to dismiss the suit and award the defendant attorney’s fees and court costs.³³ Additionally, by allowing a blanket of claims to be “protected” as health care liability claims with damage caps, we are expanding the damage caps in Texas set at \$250,000 for noneconomic damages.³⁴ Furthermore, requiring claimants to obtain expensive expert testimony for nonsensical health care claims that do not require this standard of care analysis is a waste of legal resources.³⁵

Defining what exactly constitutes a health care liability claim in Texas has been an ongoing issue since tort reform in 2003.³⁶ Courts are still using inconsistent methods to evaluate a claim and plaintiffs are suffering.³⁷ To address this problem, the legislature should either reconstruct the health care liability claim statute to embrace the legislative intent of safety to be “directly related to healthcare” or adopt a bright-line definition to define safety instead of using the seven-factor test.³⁸ A bright-line rule either reconstructing the statute or providing a definition would create consistency when evaluating whether a claim is a health care claim in regard to departing from the acceptable standards of safety in health care situations.³⁹ The seven-factor test is subjected to judges’ interpretations and plaintiffs are having to pay

29. *Id.*

30. *See Coming Attractions*, 595 S.W.3d at 664 (using the substantive nexus test and not the seven-factor test to evaluate the safety standard in the Texas Medical Liability Act).

31. *Id.* at 660–61.

32. TEX. CIV. PRAC. & REM. CODE § 74.351(a).

33. *Id.* § 74.351(b)(1), (2).

34. *See id.* § 74.301(a).

35. *See infra* Section IV.C (demonstrating the waste of legal resources by improperly classifying a claim as an HCLC).

36. *See* Brandon Beck, *Just Visiting: Health Care Liability Claims and Nonpatient Injuries in a Health Care Setting*, 56 S. TEX. L. REV. 483, 485 (2015) (explaining the changes to a plaintiff’s ability to bring health care liability claims after the 2003 tort reform).

37. *See Coming Attractions Bridal and Formal, Inc. v. Tex. Health Res.*, 595 S.W.3d 659, 663 (Tex. 2020).

38. *See* *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 197–98 (Tex. 2012) (Lehrmann, J., dissenting) (indicating in the dissent a need for a claim for safety to “arise from a breach of a health care provider’s duty to adequately ensure a patient’s safety in providing health care services”).

39. *Id.* (discussing how, if safety is kept to its common meaning, any claim against a health care provider could be interpreted as a health care liability claim).

thousands of dollars when their cases are dismissed because they did not follow procedural requirements on account of their lawyers preparing a claim for premise liability or general negligence.⁴⁰

An original bright-line definition of safety in the statute has not been put forward yet.⁴¹ Some courts have tried to piece together the statute by implying that “safety” should be coupled with the phrase “directly related to healthcare” at the end, but that idea has been rejected.⁴² While this method was originally rejected, it provides a clear path for less litigation.⁴³ Regardless of either method chosen, the legislature needs to define exactly what safety means in a health care liability claim, so that claims that are not actually health care liability claims do not get tagged as such and Texas can continue its downward trend of minimizing medical malpractice claims.⁴⁴

The goals of medical malpractice claims are “to compensate victims, deter malpractice, and punish wrongdoers.”⁴⁵ This Comment will address whether Texas is accomplishing these goals.⁴⁶ Part II of this Comment will trace the history of health care liability claims in Texas and discuss what the Texas Supreme Court has deemed the new standard to be—a subjective seven-factor test.⁴⁷ Part III will describe one suggestion for the Texas Legislature to combat the confusion among the courts.⁴⁸ Part IV will propose another solution to define the word “safety” in a health care liability claim so that frivolous litigation no longer exists as a barrier for plaintiffs to recover.⁴⁹ Finally, Part V summarizes the current legal framework in place and examines the weakness of the seven-factor test, while providing a recommendation for the best solution in order to sharpen the focus of the safety prong in health care liability claims.⁵⁰

40. See *Phillips v. Jones*, No. 05-15-00005-CV, 2016 WL 80561, at *1 (Tex. App.—Dallas Jan. 7, 2016, no pet.) (mem. op.) (noting that a plaintiff’s claim was dismissed for not having an expert report on file).

41. Jonathan D. Nowlin, *Scalpel, Please: Why the Definition of “Health Care Liability Claim” in Chapter 74 of the Civil Practice and Remedies Code Is Not as Clean-Cut as It Could Be*, 43 TEX. TECH L. REV. 1247, 1279–81 (2011) (suggesting removing the word safety from the definition, clarifying the statute by rearranging the words to make clear that “directly related to health” does not modify safety, or leaving the definition unchanged).

42. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 850 (Tex. 2005) (“The supervision and monitoring of Rubio and other nursing home residents and nursing services provided to Rubio by Diversicare’s staff were part of her health care.”).

43. Beck, *supra* note 36, at 502.

44. See *infra* Part III (illustrating a solution to decrease confusion regarding the statute).

45. Becker & Kessler, *supra* note 5, at 139.

46. See *infra* Part V (explaining how Texas can accomplish their goals for health care liability claims).

47. See *infra* Part II (detailing the extensive legislative and caselaw decisions that led to health care liability claims in 2023).

48. See *infra* Part III (stating that one solution is to amend the current statute).

49. See *infra* Part IV (providing another solution for the legislature to enact a definition for the word “safety”).

50. See *infra* Part V (concluding by summarizing the main arguments for defining “safety” in health care liability claims).

II. TRACING THE LEGACY OF HEALTH CARE LIABILITY CLAIMS IN TEXAS

In the early 1970s, medical professionals and health care providers nationwide approached state legislatures for assistance in addressing the escalating costs of medical malpractice insurance.⁵¹ In 1975, Texas health care providers who faced substantial increases in malpractice insurance premium costs urged the legislature to take action.⁵² The lobbying efforts of malpractice insurance representatives eventually persuaded the Texas Legislature, and it determined that a medical malpractice insurance crisis was well underway.⁵³ If the crisis was not dealt with, many insurance representatives and physicians believed that the soaring insurance rates would render malpractice insurance unaffordable in Texas.⁵⁴ Consequently, a number of physicians and health care providers either halted their medical practice or started practicing expensive defensive medicine thereby restricting access to health care for thousands of Texans.⁵⁵

A. The Legislature Scrambles to Develop a Cure for Insurance Crisis

Persuaded by the outcry from medical professionals in Texas, lawmakers passed the Professional Liability Insurance for Physicians, Podiatrists, and Hospitals Act (PPHA).⁵⁶ PPHA was enacted to “abolish the ‘discovery rule’ exception to the statute of limitations in medical malpractice claims only in cases where the physician, podiatrist, anesthetist or hospital was insured.”⁵⁷ The legislature designed PPHA to be short-term in nature and ultimately pave the way for a more comprehensive tort reform.⁵⁸ Therefore, PPHA created a commission—the Texas Medical Professional Liability Study Commission—to study tort law reform and offer a report with solutions for the rising costs of medical malpractice insurance to the legislature.⁵⁹ The Final Report is what we refer to today as the “Keeton Report.”⁶⁰ The Keeton Report listed six factors that could be attributed to the rising insurance costs: “(1) technological and scientific advances in medicine; (2) the changed relationship between doctors and patients; (3) the litigious nature of society; (4) substantive changes in tort law; (5) the

51. Darrell L. Keith, *The Texas Medical Liability and Insurance Improvement Act—A Survey and Analysis of Its History, Construction, and Constitutionality*, 36 BAYLOR L. REV. 265, 266–67 (1984).

52. *Id.* at 267.

53. *Id.* at 267–68.

54. *Id.* at 268–69.

55. *Id.* at 267.

56. Jamie L. Vaughan, *Ouch! The Expanding Definition of Health Care Liability Claims Under the Texas Medical Liability Act and Why Texas Took It Too Far*, 47 TEX. TECH. L. REV. ONLINE 39, 43 (2014).

57. Keith, *supra* note 51, at 267 (emphasis omitted).

58. Vaughan, *supra* note 56.

59. Keith, *supra* note 51, at 267–68.

60. TEX. MED. PRO. LIAB. STUDY COMM’N., FINAL REPORT OF THE TEXAS MEDICAL PROFESSIONAL LIABILITY STUDY COMMISSION TO THE 65TH TEXAS LEGISLATURE, (1976) (hereinafter Keeton Report).

increased number of unmeritorious claims; and (6) the possibility for excessive damages awards.”⁶¹

In 1977, after receiving the recommendations outlined in the Keeton Report, the Texas Legislature put into effect the Medical Liability and Insurance Improvement Act (MLIIA) with the intention of limiting medical malpractice litigation by stating that “the filing of legitimate health care liability claims in Texas is a contributing factor affecting professional liability rates.”⁶² The MLIIA explicitly articulated its objectives as follows: to *reduce* the occurrence and severity of health care liability claims [HCLCs], lower the costs associated with HCLCs, ensure that health care providers have access to affordable insurance rates, and enhance the accessibility of affordable health care services to Texans, all while refraining from “unduly restrict[ing] a claimant’s rights” beyond what is necessary.⁶³ This legislation introduced specific restrictions for individuals wishing to initiate such legal actions to “reduce excessive frequency and severity of health care liability claims through reasonable improvements and modifications in the Texas insurance, tort, and medical practice systems,” among other purposes.⁶⁴ The restrictions included a cap on noneconomic damages, mandate for pre-suit notices, and a reduction of the statute of limitations to two years.⁶⁵ The original definition of an HCLC as defined in the MLIIA was as follows:

[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.⁶⁶

After the enactment of the MLIIA, the Texas Supreme Court issued plaintiff-favored holdings in the years following.⁶⁷ Following these holdings, the legislature introduced an additional obstacle for potential plaintiffs by amending Article 4590i to mandate an expert report “on the . . . health care provider within 180 days of filing suit.”⁶⁸ Should this requirement for an expert report remain unfulfilled, provided the claim fell within the category

61. Vaughan, *supra* note 56.

62. Act of June 16, 1977, 65th Leg., R.S., ch. 817, § 1.02(a)(2), 1977 Tex. Gen. Laws 2039, *repealed* by Act of June 11, 2003, 78th Leg., R.S. ch. 204, 2003 Tex. Gen. Laws 864.

63. *Id.* § 1.02(b)(1).

64. Act of June 16, 1977, 65th Leg., R.S., ch. 817, § 1.02(a)(13), (b)(1), 1977 Tex. Gen. Laws 2039, 2040 (*repealed* 2003); Vaughan, *supra* note 56, at 44.

65. Vaughan, *supra* note 56, at 44.

66. Act of June 16, 1977, 65th Leg., R.S., ch. 817, § 1.03(a)(4), 1977 Tex. Gen. Laws 2039, 2040 (*repealed* 2003).

67. Vaughan, *supra* note 56, at 44–45 (noting that many plaintiffs challenged the damage cap at that time (\$500,000) and were successful in their efforts).

68. Beck, *supra* note 36. This source has an in-depth analysis of HCLCs up until 2015. *Id.*

of an HCLC, the defendant possessed the authority to pursue the dismissal of the lawsuit with prejudice and seek sanctions.⁶⁹

Finally, in 2003, the Texas Legislature passed the Texas Medical Liability Act (TMLA), which represented the centerpiece of its extensive tort reform measures.⁷⁰ This legislation introduced three key modifications that impacted a plaintiff's capacity to initiate legal action: (1) a broader definition of an HCLC; (2) a shortened expert deadline from 180 days to 120 days; (3) and a requirement that the trial judge dismiss the suit *with prejudice* and award the defendant reasonable attorney fees if a claim is an HCLC and a claimant does not have an expert report on file.⁷¹ The new definition of an HCLC under the TMLA stands 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 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.⁷²

As is evident from the text of the statute, the legislature expanded the definition of an HCLC by introducing two additional categories of claims, namely "professional or administrative services," and substituting the term "patient" with "claimant."⁷³ Collectively, these changes indicate that more claims can be included as an HCLC and the consequences of failing to provide an expert report have grown more severe.⁷⁴ Even after all of the legislative construction to define an HCLC, Texas courts have grappled with drawing the line between an HCLC and an ordinary negligence claim.⁷⁵

B. Unpacking the Surge in Health Care Claims

Over a series of cases from 2004 to 2012, the Texas Supreme Court first hinted that the decisive factor in classifying a claim as an HCLC is its "gravamen" or "underlying nature."⁷⁶ Only HCLCs are subjected to the

69. *Id.*

70. *Id.*

71. *Id.* at 486.

72. TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13).

73. Compare Act of June 16, 1977, 65th Leg., R.S., ch. 817, §1.03(a)(4), 1977 Tex. Gen. Laws 2039, 2040 (repealed 2003), with CIV. PRAC. & REM. § 74.001(a)(13) (showing how § 74 replaced the term "patient" with "claimant" in the definitions section and added "professional and administrative services" as a health care liability claim).

74. Beck, *supra* note 36, at 486.

75. *Id.*

76. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 854 (Tex. 2005) ("We do not distinguish [the claimant's] health care claims from premises liability claims 'simply because the landowner is a health care provider' but because the gravamen of [the claimant's] complaint is the alleged

expert-report requirement, so it is important to distinguish which claims trigger this statutory provision.⁷⁷ The Texas Supreme Court provided three non-conclusive factors incrementally through cases to assess the underlying nature of a claim.⁷⁸

One of the three factors examined was the need for expert testimony.⁷⁹ One of the first cases interpreting the line for an HCLC after the 2003 tort reform was *Diversicare v. Rubio*, where a mentally incapacitated resident of a nursing home suffered injuries in two separate falls during her stay at the facility.⁸⁰ In the plaintiff's amended pleading, she pleaded claims for sexual assault by another nursing home resident as well.⁸¹ In that case, the Texas Supreme Court identified "[t]he necessity of expert testimony from a medical or health care professional to prove a claim" as an important factor to consider.⁸² In *Diversicare*, the court concluded that the claims brought by the plaintiff were "not within the common knowledge of the general public to determine the ability of patients in weakened conditions to protect themselves, nor whether a potential target of an attack in a healthcare facility should be better protected and by what means," therefore requiring expert testimony to prove or refute the claim.⁸³

Another factor courts considered when evaluating the gravamen of the claim was the "nature of the acts or omissions causing claimants' injuries," illustrated in *Texas West Oaks Hospital, LP v. Williams*.⁸⁴ The examination is two-fold, involving an assessment of (1) the exact alleged negligent act or omission and (2) how it relates to health care.⁸⁵ In *Williams*, a psychiatric technician and professional caregiver was supervising a patient when a physical altercation occurred and resulted in the patient's death and injuries to the caregiver.⁸⁶ The Texas Supreme Court in *Williams* indicated that the necessity of expert testimony is a factor but not conclusive.⁸⁷ In contrast, the court held that the nature of the acts or omissions was the most important factor in evaluating the underlying nature of the claim, or the claim's

failure of [the defendant] to implement adequate policies to care for, supervise, and protect its residents who require special[] medical care."); see *Sorokolit v. Rhodes*, 889 S.W.2d 239, 242 (Tex. 1994) (looking to the underlying nature of the claim).

77. TEX. CIV. PRAC. & REM. CODE § 74.351(a).

78. See *Diversicare Gen. Partner, Inc.*, 185 S.W.3d at 848 (discussing the need for expert testimony); *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 176 (Tex. 2012) (discussing the classification of injuries. See also Beck, *supra* note 36, at 489 (discussing the element of separability).

79. *Diversicare Gen. Partner, Inc.*, 185 S.W.3d at 848.

80. *Id.* at 845.

81. *Id.* at 847.

82. *Id.* at 848 (citing *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 544 (Tex. 2004)).

83. *Id.* at 851.

84. *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 176 (Tex. 2012).

85. *Id.*

86. *Id.* at 175.

87. *Id.* at 182.

“gravamen.”⁸⁸ Therefore, this case provided that the location or identity of the defendant is not the only analysis required to determine an HCLC.⁸⁹

The next factor courts evaluated was the separability of the alleged negligent wrongful conduct from the provision of health care.⁹⁰ This principle was established in *Loaisiga v. Cerda*, in which two female patients sued a doctor for assault, claiming that he had inappropriately touched their breasts during a sinus and flu examination.⁹¹ The defendant, a doctor, contended that the alleged assault established that the patient’s claims are “interwoven with the rendition of medical care or healthcare.”⁹² There, the Texas Supreme Court held that the plaintiffs were unable to show “conclusively that the only relationship between the alleged touching of their breasts and Dr. Loaisiga’s rendition of medical services was the physical location of the examinations at the offices . . . and his status as a doctor or health care provider.”⁹³ Thus, if the only connection a plaintiff can make is that the alleged incident happened in a health care setting, that would not satisfy the requirements of the TMLA.⁹⁴

C. *The Twilley Standard Era*

Even after these early judicial interpretations, it was still not clear whether safety claims had to be directly related to health care or not.⁹⁵ The Texas Supreme Court in *Williams* tried to once and for all resolve the issue by holding that safety claims need not be “directly related” to health care to be designated as HCLCs.⁹⁶ The court adopted this view based on the “last antecedent doctrine of statutory interpretation,” indicating that the phrase “directly related to health care modifies the terms immediately before it—‘professional or administrative services’”—not safety.⁹⁷ This case was very significant at the time because there was a divide among the intermediate appellate courts over whether safety needed to be “directly related to health care.”⁹⁸ Among the courts that believed “directly related to health care” should modify “safety” were Fort Worth, Austin, Dallas, Texarkana, and Corpus Christi.⁹⁹ On the opposing side was the San Antonio Court of

88. *Id.* at 176 (“[T]he heart of these cases lies in the nature of the acts or omissions causing claimants’ injuries and whether the events are within the ambit of the legislated scope of the TMLA.”).

89. *See id.* at 176–77.

90. Beck, *supra* note 36, at 488.

91. 379 S.W.3d 248, 252 (Tex. 2012).

92. *Id.* at 258; Beck, *supra* note 36, at 489.

93. *Loaisiga*, 379 S.W.3d at 259.

94. Beck, *supra* note 36, at 489.

95. *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 176 (Tex. 2012) (discussing whether the phrase “directly related to healthcare” modifies the term safety).

96. *Id.* at 186.

97. *Id.* at 184–85.

98. Beck, *supra* note 36, at 490–91.

99. *Id.* at 491.

Appeals, which the Texas Supreme Court ultimately agreed with.¹⁰⁰ Therefore, a majority of the appellate courts believed the word “safety” in the statute was meant to translate as “safety directly related to health care.”¹⁰¹

Unfortunately, even after *Williams*, the chaos of interpreting safety in a health care liability claim was still not over.¹⁰² Texas appellate courts were left with the principle that safety claims do not have to be directly linked to health care, but if they were entirely unrelated to health care, could they still be deemed an HCLC?¹⁰³ That question is what the court in *Good Shepherd Medical Center-Linden v. Twilley* tried to solve.¹⁰⁴

In *Twilley*, an employee sustained injuries from two incidents that occurred on the hospital premises.¹⁰⁵ The employee in both of the incidents was not receiving any kind of health care.¹⁰⁶ Still, the hospital tried to rely on language from *Williams* that “the safety component of HCLCs need not be directly related to the provision of health care.”¹⁰⁷ The Texarkana Court of Appeals disagreed and held, “[W]e do not believe *Williams* encompasses safety claims that are completely untethered from health care . . . the safety claims in *Williams* were at least indirectly related to health care.”¹⁰⁸ To sum up the rule in *Twilley*, a safety-based claim must be at least indirectly related to health care, and if it is not, it cannot be an HCLC subject to the expert-report requirement.¹⁰⁹

D. The Test Results Are Back: The Texas Supreme Court’s Seven-Factor Riddle

The Texas Supreme Court finally got a chance to address the ambiguities that existed among the appellate courts in the case of *Ross v. St. Luke’s Episcopal Hospital*.¹¹⁰ In *Ross*, a friend was going to visit a patient in the hospital when she slipped and fell in the lobby where the floor was being cleaned.¹¹¹ The visitor sued on a premises liability theory.¹¹² In response, the hospital asserted that the claim was an HCLC and moved for dismissal

100. *Id.*

101. *Id.*

102. *Good Shepherd Med. Ct.-Linden, Inc. v. Twilley*, 422 S.W.3d 782, 787 (Tex. App.—Texarkana 2013, pet. denied) (“The high court did not, however, address the precise issue here—whether safety claims fall within the purview of the TMLA when they are entirely *unrelated* to health care.”).

103. *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 184–85 (Tex. 2012).

104. *Twilley*, 422 S.W.3d at 782.

105. *Id.* at 783.

106. *Id.* at 787.

107. *Id.* at 786 (quoting *Williams*, 371 S.W.3d at 186).

108. *Id.* at 788.

109. *See Beck*, *supra* note 36, at 492.

110. 462 S.W.3d 496 (Tex. 2015).

111. *Id.* at 499.

112. *Id.*

because there was no expert report on file.¹¹³ The trial court granted the motion to dismiss and the court of appeals affirmed, reasoning that “under *Williams* it is not necessary for any connection to exist between health care and the safety standard on which a claim is based in order for the claim to come within the TMLA.”¹¹⁴

Before the Texas Supreme Court ruled on *Ross*, the court of appeals went different ways on which standard to embrace—the current *Ross* standard or the prior *Twilley* standard.¹¹⁵ When *Ross* was on appeal, the standard the court of appeals applied was that no connection was needed—direct or indirect—to constitute a health care liability claim.¹¹⁶ Among the courts that embraced the previous *Twilley* standard that at least an indirect connection is needed included the Courts of Appeals in Fort Worth, San Antonio, Dallas, Texarkana, El Paso, Beaumont, Corpus Christi, and the First Court of Appeals in Houston.¹¹⁷ While the current *Ross* standard was initially accepted by the Tyler Court of Appeals and the Fourteenth Court of Appeals in Houston, it was evident that more courts agreed at that time there should be at least an indirect connection between the claim and the provision of health care.¹¹⁸

The Texas Supreme Court got the last say when it reversed the Fourteenth Court of Appeals in Houston’s decision.¹¹⁹ The court relied on the rule of *ejusdem generis*, which implies that “the catchall ‘other’ itself refers to standards of ‘medical care’ or ‘health care’ or ‘safety.’”¹²⁰ Therefore, for a claim to fall under the safety standard in the statute, “there must be a substantive nexus between the safety standards allegedly violated and the provision of health care.”¹²¹ The central question in a claim based on safety standards revolves around whether the standards forming the basis of the claim involve the defendant’s responsibilities as a health care provider, which encompass their duty to ensure patient safety.¹²² Here, even though the court put forth what seemed like a straightforward rule, it developed seven non-exclusive factors to analyze whether a claim is related to the defendant’s provision of medical or health care:

- (1) Did the alleged negligence of the defendant occur in the course of the defendant’s performing tasks with the purpose of protecting patients from harm;

113. *Id.*

114. *Id.*

115. Beck, *supra* note 36, at 494–95.

116. *Id.* at 494.

117. *Id.* at 494–95.

118. *See id.*

119. *Ross*, 462 S.W.3d at 498.

120. *Id.* at 504 (“[E]jusdem generis teaches that the latter must be limited to things like the former.”).

121. *Id.*

122. *Id.* at 505.

- (2) Did the injuries occur in a place where patients might be during the time they were receiving care, so that the obligation of the provider to protect persons who require special, medical care was implicated;
- (3) At the time of the injury was the claimant in the process of seeking or receiving health care;
- (4) At the time of the injury was the claimant providing or assisting in providing health care;
- (5) Is the alleged negligence based on safety standards arising from professional duties owed by the health care provider;
- (6) If an instrumentality was involved in the defendant's alleged negligence, was it a type used in providing health care; or
- (7) Did the alleged negligence occur in the course of the defendant's taking action or failing to take action necessary to comply with safety-related requirements set for health care providers by governmental or accrediting agencies?¹²³

After analyzing all of the factors, the Texas Supreme Court concluded that the answer to each question would be “no” and that the plaintiff's claim was not an HCLC.¹²⁴ Texas courts all got behind the supreme court's decision in *Ross* and attempted to adopt the seven-factor test.¹²⁵ However, adopting a judicially created seven-factor test did not provide uniform results like expected.¹²⁶

E. Defects in the Current Framework

The Texas Supreme Court in *Collin Creek* correctly identified the problem with the current legal framework, stating that “subjecting the bar, the public, and the courts over and over again to the labor-intensive effort of trying to figure out what an HCLC is resembles building a sand castle despite knowing that the tide will come.”¹²⁷ As illustrated by *City of Houston v. Hussein*, issues remain within the current framework.¹²⁸ In *Hussein*, a daughter (Hussein) and mother (Obeid) were riding in a city ambulance when it struck the concrete barrier of a toll booth.¹²⁹ Obeid and Hussein brought ordinary negligence claims against the driver of the ambulance for failing to

123. *Id.*

124. *Id.* (“Because her claim is not an HCLC, she was not required to serve an expert report to avoid dismissal of her suit.”).

125. *See infra* Section II.E (discussing cases where the Texas appellate courts attempted to adopt the seven-factor test).

126. *See infra* Section II.E (describing the inconsistencies within the seven-factor test).

127. *Collin Creek Assisted Living Ctr., Inc. v. Faber*, 671 S.W.3d 879, 897 (Tex. 2023).

128. *See City of Houston v. Hussein*, No. 01-18-00683-CV, 2020 WL 6788079, at *1 (Tex. App.—Houston [1st Dist.] Nov. 19, 2020, pet. denied) (mem. op.).

129. *Id.*

keep a proper lookout, among other acts.¹³⁰ The court examined each of the two plaintiffs' factual situations to determine if the claim involved "a substantive nexus between the safety standards allegedly violated and the provision of health care," thus deeming the claims health care liability claims.¹³¹ For Obeid, the court held that "most of the *Ross* factors favor[ed] concluding that Obeid's negligence claim against the City constitute[d] a health care liability claim," mainly because Obeid was the patient in the ambulance and was hooked up to an IV while in transit.¹³²

In its decision, the court acknowledged that not all of the *Ross* factors applied to the claims.¹³³ Conversely, Hussein's claims did not amount to a health care liability claim because most of the *Ross* factors did not weigh in favor of a health care liability claim since she was not the patient and was not receiving any health care in transit in the ambulance.¹³⁴ To confirm, the court dismissed Obeid's claim with prejudice but denied the motion to dismiss Hussein's claim.¹³⁵ How is it possible that when two plaintiffs who suffered from the same incident resulting from the same alleged negligence, only one could recover?¹³⁶ These types of decisions have devastating effects—Obeid's claim did not get its day in court, and she was subject to pay attorney fees.¹³⁷ The dissent in *Williams* expressed a fear that is now the reality in Texas for interpreting health care liability claims: "[a] whole new world [of health care liability claims], hinted by opinions of the last few years, is here."¹³⁸

Another issue with the multi-factor test is that courts have inconsistently applied the factors since the decision in *Ross*.¹³⁹ Among those inconsistencies is the emphasis on some factors over others.¹⁴⁰ The concurring justices in *Ross* emphasized the third and fifth factors as the most important to examine.¹⁴¹ These factors focus on whether the claimant was "in the process of seeking or receiving health care at the time of the injury and whether the alleged negligence was based on safety standards arising from professional

130. *Id.*

131. *Id.* at *13 (citing *Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496, 504 (Tex. 2015)).

132. *Id.* at *15–17 ("As to Obeid, although not all the *Ross* factors apply to her claim, the factors that do apply show that Obeid's negligence claim . . .").

133. *Id.* at *17.

134. *Id.* at *17–19.

135. *Id.* at *20.

136. *See id.*

137. *See id.*

138. *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 193 (Tex. 2012) (Lehrmann, J., dissenting) (citing *In re McAllen Med. Ctr., Inc.* 275 S.W.3d 458, 470 (Tex. 2008) (Wainwright, J., dissenting)).

139. *City of Alvin v. Fields*, No. 01-22-00572-CV, 2023 WL 4003522, at *8 (Tex. App.—Houston [1st Dist.] June 15, 2023, no pet.) (mem. op.) (The court in *Fields* held that several of the factors are enough, though not indicating how many must be met, stating, "[s]everal of the *Ross* factors weigh in favor of a conclusion that Field's claim is a health care liability claim.")

140. *Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496, 506 (Tex. 2015) (Lehrmann, J., concurring).

141. *Id.*

duties owed by the health care provider.”¹⁴² If these two factors are truly the most important, why then should courts struggle in applying the other five factors?

Additionally, some courts fail to analyze the entire seven-factor list and merely focus on whether there was a “substantive nexus between the safety standards allegedly violated and the provision of health care,” as stated in the *Ross* decision.¹⁴³ In a 2020 Texas Supreme Court case, *Coming Attractions Bridal and Formal, Inc. v. Texas Health Resources*, the court failed to even mention the seven-factor test.¹⁴⁴ The court instead relied on the substantive nexus test as well as the test articulated in *Williams*, stating that “if expert medical or health care testimony is necessary to prove or refute the merits of the claim against a physician or health care provider, then the claim is a health care liability claim.”¹⁴⁵ This case involved a nurse who was treating a patient infected with the Ebola virus.¹⁴⁶ The nurse subsequently traveled to a bridal shop in Ohio, and local health authorities required the shop to close to prevent the spread of the virus after learning the nurse had contracted the virus.¹⁴⁷ There, the court determined that the hospital’s departure from accepted safety standards “directly related to caring for and treating a patient with a communicable disease—caused its injury.”¹⁴⁸ Why did the Texas Supreme Court develop seven factors to determine safety if the court itself fails to use them consistently?¹⁴⁹ When should courts use the *Williams* test in addition to the *Ross* factors when evaluating whether a health care provider departed from obligatory safety standards?¹⁵⁰ As a practitioner, when can one expect the court to emphasize the seven-factor test or the substantial nexus test?¹⁵¹ These answers remain unclear and demonstrate that the Texas Legislature still has work to do in properly defining safety.¹⁵²

In *Collin Creek*, the Texas Supreme Court described the confusion left after *Ross* by stating that “it has remained unclear whether courts and litigants should analyze both whether a safety standard is directly related to health care *and* whether it has a substantive nexus to health care.”¹⁵³ The court in *Collin Creek* described factors two through four as well as six as referencing

142. *Id.*

143. *Id.* at 504; *Nw. Tex. Healthcare Sys. v. Erwin*, No. 07-22-00020-CV, 2022 WL 2916086, at *2 (Tex. App.—Amarillo July 25, 2022, pet. denied) (mem. op.); *Little v. Riverside Gen. Hosp., Inc.*, No. 14-14-00797-CV, 2016 WL 208142, at *2 (Tex. App.—Houston [14th Dist.] Jan. 14, 2016, no pet.) (mem. op.).

144. 595 S.W.3d 659 (Tex. 2020).

145. *Id.* at 667 (quoting *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 182 (Tex. 2012)).

146. *Id.* at 660.

147. *Id.*

148. *Id.* at 667.

149. *See id.*

150. *See id.*

151. *See id.*

152. *See Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 182 (Tex. 2012)).

153. *Collin Creek Assisted Living Ctr., Inc. v. Faber*, 671 S.W.3d 879, 888 (Tex. 2023).

“health care” while factors five and seven related to “safety standards.”¹⁵⁴ Even though the court has combined “medical care, or health care, or safety” as a catch-all phrase, the courts use the factor test to evaluate a departure from safety standards.¹⁵⁵ Therefore, when a claimant alleges a departure from safety standards, should they focus only on factors five and seven?¹⁵⁶ The concurrence in *Collin Creek* carefully warned the courts of the dangers of a well-intended multifactor balancing test:

[A]s so often happens with well-intended multifactor balancing tests, they instead have created a new battleground for waging costly collateral litigation of immense scope. The staggering number of cases from this Court and the lower courts, both before and after *Ross*, illustrates how many resources have been devoted to fighting over what the statutory definition of ‘health care liability claim’ means.¹⁵⁷

The Texas Supreme Court continues to express the importance of distinguishing between HCLCs and non-HCLCs, and this tension can be resolved by clearly defining safety in the statute.¹⁵⁸

III. TEXAS NEEDS A NEW AND IMPROVED TREATMENT PLAN

Given the increase of health care liability claims in Texas, the Texas Supreme Court developed the *Ross* factors in 2015, which allowed the court to determine if a plaintiff’s claim falls under the Texas Medical Liability Act as an HCLC under the safety prong of the statute.¹⁵⁹ Instead of the subjective seven-factor test—a new standard should be implemented by the legislature.¹⁶⁰ Two possible solutions exist for the legislature to consider. First, the legislature can reconstruct the statute to couple the words “directly related to health care” to safety.¹⁶¹ Second, if the courts do not wish to go reverse complicated precedent, the legislature can provide a definition for what safety really means as it pertains to health care liability so that claims unrelated to the stated purposes for health care litigation are not subject to unintended inclusion.¹⁶² A subjective seven-factor test is not a reliable means

154. *Id.* at 889.

155. *Id.* at 887 (citation omitted).

156. *See id.*

157. *Id.* at 895 (Young, J., concurring) (citation omitted).

158. *See id.*

159. *See supra* Section II.D (providing background for the *Ross* decision).

160. *See infra* Section III.A (illustrating one possible solution to define safety).

161. *See infra* Section III.A (referencing the proposed model legislation).

162. *See Ross v. St. Luke’s Episcopal Hosp.*, 462 S.W.3d 496 (Tex. 2015).

for claimants and lawyers to predict the outcome of their case.¹⁶³ As a result, claims are being dismissed, and claimants are bearing the legal costs.¹⁶⁴

A. Safety Must Be Directly Related to Health Care

One of the easier approaches to solve the safety ambiguity is to reconstruct the statute to state that the safety in a health care liability claim means “safety directly related to healthcare.”¹⁶⁵ Even the dissent in *Williams* stated, “I would hold that a claim for safety under the Health Care Liability Act must arise from a breach of a health care provider’s duty to adequately ensure a patient’s safety in providing health care services.”¹⁶⁶ As previously mentioned, the majority of the Texas appellate courts have already interpreted the statute this way by examining the legislative intent of enacting the statute in the first place.¹⁶⁷ The legislature could impose the reconstruction to appear such as:

- (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:
- (a) medical care;
 - (b) health care;
 - (c) safety directly related to health care or;
 - (d) professional or administrative services that are 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.¹⁶⁸

This statutory construction would render courts to apply each of the standards “directly related to health care.”¹⁶⁹ The purpose of including the word “safety” was to describe the safety duties arising out of the health care provider and patient’s relationship—not a departure from any safety standards in general.¹⁷⁰ The safety duties that arise as a health care provider

163. *See id.*

164. *See Phillips v. Jones*, No. 05-15-00005-CV, 2016 WL 80561, at *1 (Tex. App.—Dallas Jan. 7, 2016, no pet.) (mem. op.) (noting a plaintiff’s claim was dismissed for not having an expert report on file).

165. *See Beck*, *supra* note 36, at 492.

166. *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 198 (Tex. 2012) (Lehrmann, J., dissenting).

167. *Beck*, *supra* note 36, at 491.

168. *See TEX. CIV. PRAC. & REM. CODE* § 74.001(a)(13).

169. *See id.*

170. *See Good Shepherd Med. Ctr.—Linden, Inc. v. Twilley*, 422 S.W.3d 782, 786 (Tex. App.—Texarkana 2013, pet. denied) (criticizing the *Williams* decision, stating that “[e]ven though Williams’ safety claims were not directly related to health care, such claims were more closely connected to health care than simply arising in a health care context. They were moored to a unique medical environment

are “[d]ecisions regarding the appropriate professional supervision, monitoring, and protection of the patient population and health care providers are within the unique province of physicians and health care providers.”¹⁷¹ Therefore, a claim against the departure of safety standards “must involve a more logical, coherent nexus to health care.”¹⁷²

B. Safety Claims That Are Directly Related to Health Care Serve to Narrow the Scope of Chapter 74

Examining the legislative intent is required to justify narrowing the safety claims with the proposed legislation in the Texas Medical Liability Act.¹⁷³ In *Ross*, the Texas Supreme Court looked at the legislative intent behind the Texas Medical Liability Act and stated, “the Legislature did not intend for the expert report requirement to apply to every claim for conduct that occurs in a health care context.”¹⁷⁴ Thus, it is not likely that the legislature intended for safety claims to be “completely untethered from health care.”¹⁷⁵

The original goals of enacting this legislation, as mentioned before, were to “reduce excessive frequency and severity of health care liability claims.”¹⁷⁶ It does not follow then that the legislature would have intended claims not directly related to health care to be included in the statute.¹⁷⁷ If that were the case, “the broad meaning of ‘safety’ would afford defendant health care providers a special procedural advantage in the guise of requiring plaintiffs to file expert reports in their suits regardless of whether their cause of action implicated the provision of medical or health care.”¹⁷⁸

By establishing the connection between safety and health care clearly, the legislature would be honoring the original legislative intent behind the statute and would represent what a majority of the Texas appellate courts had already believed to be the solution.¹⁷⁹ It logically follows that by the legislature including the broad word “safety” in a health care liability claim,

involving the safety aspects of the relationship between Williams (a health care provider) and the patient he was specifically assigned to supervise.”)

171. *Id.* at 786–87 (citation omitted).

172. *Id.* at 788.

173. *See Ross v. St. Luke’s Episcopal Hosp.*, 462 S.W.3d 496, 501 (Tex. 2015). The *Ross* court aimed to “give effect to legislative intent” when reviewing the construction of the Texas Medical Liability Act. *Id.*

174. *Id.* at 502.

175. *Twilley*, 422 S.W.3d at 788.

176. Act of June 16, 1977, 65th Leg., R.S., ch. 817, § 1.02(b)(1), 1977 Tex. Gen. Laws 2039, 2040 (repealed 2003); Vaughan, *supra* note 56, at 44.

177. *See Vaughan*, *supra* note 56, at 44.

178. *Ross*, 462 S.W.3d at 504.

179. *See Beck*, *supra* note 36, at 491.

they intended for safety claims to be directly related to health care in order to fall under the Texas Medical Liability Act.¹⁸⁰

C. A Majority of the Texas Appellate Courts Agreed That Safety Involves Health Care

A potential disadvantage of following this approach is that the courts did exhibit a disagreement among interpreting the statute this way at one point.¹⁸¹ Even though a majority would have been willing to adopt this approach, there was at least one appellate court that did not agree.¹⁸² Additionally, the Texas Supreme Court in *Ross* could have just adopted this rule when they were given the opportunity to clarify between the two standards at the time, and they did not.¹⁸³ Therefore, this approach may not be completely unambiguous.¹⁸⁴

However, the extensive litigation arguing between the two standards—indirectly related to health care or not—provides indication that the legislature needs to take action to clarify.¹⁸⁵ If the courts eventually adopted the *Ross* standard that there needed to be a substantive nexus between the safety standards violated and health care, then it is possible all Texas courts would follow suit and now understand how safety claims need to be directly related to health care.¹⁸⁶

D. Clarifying the Statute Would Clear Up Inconsistencies

Since there has been extensive litigation over this particular part of the statute, the Texas Legislature has an opportunity to clear up the confusing and complex legal precedent that exists.¹⁸⁷ It is important to note that while the phrase “or safety or professional or administrative services directly related to health care” has “or” separating the two, it does not have commas separating the phrases like it does after “medical care” and “health care.”¹⁸⁸ Once again, this indicates that the legislature did not intend for safety to stand on its own.¹⁸⁹ If the legislature is looking for a quick, effective fix to clarify

180. *Ross*, 462 S.W.3d at 504 (“[W]e conclude that the safety standards referred to in the definition are those that have a substantive relationship with the providing of medical or health care.”).

181. Beck, *supra* note 36, at 495.

182. *Id.*

183. *See Ross*, 462 S.W.3d at 504.

184. *See Beck*, *supra* note 36, at 495.

185. *See supra* Section II.D (discussing the different tests used by the appellate courts and the factor test created by the Texas Supreme Court).

186. *See Ross*, 462 S.W.3d at 504.

187. Beck, *supra* note 36, at 486 (“[D]espite the legislature’s broader definition of HCLC in the TMLA, trial and appellate courts continue to be confronted with locating the line that separates HCLCs from claims involving only ordinary negligence.”).

188. *Id.* at 501 (quoting TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13)).

189. *See id.*

the cases on safety claims in a health care liability claim, it should revert back to the legislative intent and the plain meaning of the statute and finally construct the statute to state what most Texas courts have interpreted the statute to mean—which is that safety claims must be directly related to health care.¹⁹⁰

One benefit of this method is that the majority of Texas courts have interpreted the statute this way already.¹⁹¹ Therefore, the time and effort that the legislature would spend on reconstructing the statute would be relatively minimal.¹⁹² However, while most of the appellate courts agreed with this interpretation, one did not.¹⁹³ Further, the Texas Supreme Court held that there must be a substantive nexus between health care and safety as opposed to a direct relation.¹⁹⁴ Accordingly, the court would be operating contrary to its own precedent if it were to adopt this approach, which could create additional confusion in the case law regarding safety claims in an HCLC.¹⁹⁵ Consequently, this solution must be weighed against other solutions to develop the most consistent approach for the legislature to adopt.¹⁹⁶

IV. SEEKING A SECOND OPINION—DEFINE SAFETY

If the legislature resolves to maintain prior precedent and not pursue the process of amending the statute, a second option is to provide a clear definition for the word safety in a health care liability claim.¹⁹⁷ The legislature has already done this for other words in the statute that have been heavily litigated.¹⁹⁸ As previously mentioned, the legislature did not intend for safety to be used as a catchall phrase; it is intended to answer the question of “whether the safety standard[] implicated the defendant’s duties as a health care provider.”¹⁹⁹

As the court stated, “[f]oundational to the rule of law itself is the principle that citizens should know what law governs them [u]nless answering the antecedent HCLC-status question is relatively simple, courts cannot work efficiently and the parties’ limited resources must be expended on matters collateral to their merits dispute.”²⁰⁰ The court warned of several

190. *See id.*

191. Nowlin, *supra* note 41, at 1278.

192. *Id.*

193. *Id.*; *see* Emeritus Corp. v. Highsmith, 211 S.W.3d 321, 327 (Tex. App.—San Antonio 2006, pet. denied).

194. *See* Ross v. St. Luke’s Episcopal Hosp., 462 S.W.3d 496, 504–05 (Tex. 2015).

195. *See infra* Section IV.A (listing the proposed definition).

196. *See* Beck, *supra* note 36, at 491–501 (discussing the different approaches courts have taken).

197. *See supra* Section II.B (providing caselaw history).

198. *See supra* Section II.A (demonstrating the legislative change from “patient” to “claimant” and providing a definition for “claimant”).

199. City of Hous. v. Hous., 608 S.W.3d 519, 527 (Tex. App.—Houston [1st Dist.] 2020, no pet.).

200. Collin Creek Assisted Living Ctr., Inc. v. Faber, 671 S.W.3d 879, 895–96 (Tex. 2023) (Young, J., concurring).

possible scenarios if the current legal framework is not resolved.²⁰¹ These scenarios include plaintiffs assuming that any claim that remotely attaches to health care is an HCLC and incurring substantial costs to adhere to procedural requirements.²⁰² Second, the legislature could provide clarity by amending the definition and creating a bright-line rule resulting in fewer claims.²⁰³ Thirdly, the court could resolve the vague and unpredictable multifactor test and create rules and subrules instead of weighing factors.²⁰⁴ This Comment recommends a combination of the second and third solution—provide a bright-line definition for the word “safety” and remove the unpredictable multifactor test when analyzing a safety claim under the Texas Medical Liability Act.²⁰⁵

A. Hand Me the Scalpel: Provide a Definition for Safety

The Texas Legislature left practitioners and plaintiffs in the dust when they failed to define the word “safety” in the phrase “safety or professional or administrative services directly related to health care.”²⁰⁶ As Justice Lehrmann stated in *Ross*, “my concern that a statute intended to address the insurance crisis stemming from the volume of frivolous medical-malpractice lawsuits has become a nebulous barrier to what were once ordinary negligence suits brought by plaintiffs alleging no breach of any professional duty of care.”²⁰⁷ This led to many lawsuits and the creation of the subjective, seven-factor test developed by the courts to merely cure one word in the statute.²⁰⁸ The Texas Supreme Court should not have been asked to develop a cure in the first place.²⁰⁹ The role of the judicial branch is to interpret the law and apply it to facts—not to create factors in place of legislation that applies to any set of facts.²¹⁰ The seven-factor test created by the Texas Supreme Court contains many flaws.²¹¹

201. *Id.* at 896.

202. *Id.*

203. *Id.*

204. *Id.* at 897.

205. *See infra* Section IV.A (discussing a better definition for safety and the issues with the factor test).

206. TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13).

207. *Ross v. St. Luke’s Episcopal Hosp.*, 462 S.W.3d 496, 506 (Tex. 2015) (Lehrmann, J., concurring).

208. *See id.* at 505.

209. *See* *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 193 (Tex. 2012) (“The [c]ourt’s strained reading of the statute runs counter to express statutory language, the Legislature’s stated purposes in enacting the current version of chapter 74, and common sense.”).

210. *Baldwin v. United States*, 140 S. Ct. 690, 695 (2020) (Thomas, J., dissenting) (“[T]he Judicial Department has imposed upon it, by the Constitution, the solemn duty to interpret the laws”) (quoting *United States v. Dickson*, 40 U.S. 141, 162 (1841)).

211. *Collin Creek Assisted Living Ctr., Inc. v. Faber*, 671 S.W.3d 879, 888 (Tex. 2023) (noting one of the flaws the court stated: “[i]n the wake of *Ross*, it has remained unclear whether courts and litigants

First, as with any judicially-created factor test, there is the risk of judicial bias when applying the test.²¹² After all, it was the Texas Supreme Court that created this test and now it will be binding on all fourteen courts of appeals.²¹³ Will the decision of eight justices on the supreme court be interpreted the same way for all eighty justices on the courts of appeals?²¹⁴ Second, a factor test does not provide clear legal precedent for future cases when there is a lack of consistency on which factors to apply.²¹⁵ The lack of predictability can create room for manipulation if one party focuses on certain factors and downplays the other ones to achieve a certain result in their favor.²¹⁶ Additionally, the factor test makes it difficult for lawyers who are evaluating their client's claims without knowing how much value the trial court will place on certain factors to be able to provide their client with the best legal advice.²¹⁷ Overall, a seven-factor judicially-created test produces inconsistent rulings as different judges weigh certain factors over the others, which can ultimately lead to unfair decisions.²¹⁸

A clear definition would clear up these inconsistent rulings and provide clarity and predictability.²¹⁹ Parties could better predict the outcomes of their cases if they are aware of the legal standard that the court is going to use.²²⁰ The predictability of a bright-line definition could speed up the legal process of filing an HCLC because a claimant would have better guidance on whether an expert report would be required and could circumvent the procedural penalties of not having a report on file if the claim is deemed an HCLC.²²¹ Ultimately, a claimant may incur lower legal costs if they do not have to go through the procedural process of paying an expert to review records and provide an expert report, or having a trial court dismiss their claim and then having to refile or appeal the decision just to be heard in court.²²²

should analyze both whether a safety standard is directly related to health care *and* whether it has a substantive nexus to health care”).

212. Almara Sepanian, *Cleaning House with Rule 41(B): An Empirical Study of the Multi-factor Tests for Involuntary Dismissals*, 44 SW. L. REV. 411, 421 (2015) (stating multi-factor tests' purposes are “diminished if judges rely on just a few of the factors instead of conducting a comprehensive multi-factor analysis.”).

213. See *Collin Creek*, 671 S.W.3d at 888 (analyzing the *Ross* factors to determine whether a substantive nexus exists between safety standards and the provision of health care).

214. See *About Texas Courts*, TEX. JUD. BRANCH, <https://www.txcourts.gov/about-texas-courts/courts-of-appeals/> (last visited Oct. 4, 2024).

215. Janel A. DeCurtis, *The Federal Arbitration Act's Section 1 Exemption and Last-Mile Delivery Drivers of the Gig Economy: Why a New Approach Is Necessary*, 54 SUFFOLK U. L. REV. 521, 545 (2021) (“Attempts at judicially-created tests have thus far offered inconsistent results.”).

216. See *Collin Creek*, 671 S.W.3d at 888 (using the substantive nexus test instead of the seven-factor test).

217. See Sepanian, *supra* note 212, at 420–21.

218. See *id.*

219. See Paula Sweeney, *Definitions Under Chapter 74*, 51 TEX. TECH L. REV. 745, 764 (2019).

220. See *id.*

221. TEX. CIV. PRAC. & REM. CODE § 74.351.

222. See Ann E. Harwood, *Medical Experts*, 50 U.S. ATTY'S BULL. 1 (2002). This is a great overview of the process of hiring an expert in a medical malpractice case. *Id.*

Additionally, a bright-line proposal would create uniformity among the Texas courts.²²³ The courts would interpret and consistently apply the rule on the same standard, which would minimize the potential for judicial bias.²²⁴ Lastly, adopting a bright-line rule would give the power to create laws back to the legislative branch.²²⁵ The Texas Legislature created this statute, and they should be the ones to clean it up.²²⁶ As the legislature has done with other terms in the statute, it is time it defines the word “safety” as well.²²⁷

One proposed definition of “safety” is as follows:

Texas Civil Practice and Remedies Code § 74.001(a)(26): “Safety” means an act or omission arising from the professional duties owed by a health care provider to maintain the physician’s or health care provider’s license that occurred during the process of seeking or receiving health care.²²⁸

This definition encompasses the most important factors that courts routinely analyze.²²⁹ It illustrates that safety needs to be evaluated during the process of seeking or receiving health care, not safety as it stands on its own.²³⁰ Also, it provides narrower situations in which a safety claim can arise, which could minimize litigation in this area.²³¹ The words “arising from the professional duties owed by . . . a health care provider” implicate a defendant’s duty in their role as a health care provider, not the role of an ordinary person, thus limiting the scope of negligence claims that can be brought against them.²³² The professional duties language was adopted from the “professional or administrative services” definition already defined in the statute.²³³ It is important that we properly define safety because “[d]efinitions seldom make a case, but can often kill a case.”²³⁴ The inability to define safety and apply it to a case leads to case dismissal and time consuming and expensive procedural repercussions.²³⁵ The current framework creates inconsistency, subjectivity, judicial activism, limited guidance, and

223. See *supra* Section IV.A (explaining the inconsistencies among Texas courts in applying the *Ross* factors).

224. Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. OF POL. SCI. 241, 242 (2019) (indicating that “judicial decision-making is highly variable.”).

225. See Beck, *supra* note 36.

226. *Id.*

227. See TEX. CIV. PRAC. & REM. CODE § 74.001.

228. See generally TEX. CIV. PRAC. & REM. CODE § 74.001 (proposing a new safety definition).

229. See *Ross v. St. Luke’s Episcopal Hosp.*, 462 S.W.3d 496, 506 (Tex. 2015) (Lehrmann, J., concurring).

230. See *infra* Section IV.B (discussing the advantages and disadvantages of a bright-line definition).

231. See *infra* Section IV.B (explaining how the clarity of a bright-line definition would minimize litigation).

232. *Ross*, 462 S.W.3d at 504; see *supra* Section II.A (describing how the statute lists the definition for “professional or administrative services”).

233. See *supra* Section II.A (discussing the broader definition of HCLCs).

234. Sweeney, *supra* note 219.

235. *Id.*

complexity for non-legal professions—creating barriers to justice.²³⁶ A bright-line proposal would clear up the inconsistencies and make it easier for plaintiffs and practitioners to prepare a case.²³⁷

B. Experts Will Argue Against a Bright-Line Proposal

The counterargument to a bright-line proposal is that the legislature carefully crafted the statute to insert “or” to separate the word “safety” from the phrase “directly related to healthcare.”²³⁸ Additionally, because the legislature did not use the Oxford comma, it could be reasoned that the legislature did not intend safety to be included with “professional or administrative services directly related to health care.”²³⁹ However, when interpreting a statute, courts look to give effect to the legislature’s intent.²⁴⁰ Usually, courts can determine the legislature’s intent by looking at the plain meaning of the text unless the meaning “leads to absurd or nonsensical results.”²⁴¹ Overall, the courts look at the “statute [] as a whole rather than [an] isolated” portion, such as the word safety alone.²⁴²

Here as mentioned, the legislative intent behind passing the Chapter 74 of the Texas Civil Practice & Remedies Code was essentially to minimize medical malpractice claims.²⁴³ At the time, Texas was suffering from a medical malpractice crisis and insurance rates skyrocketed.²⁴⁴ Therefore, if the ultimate goal of the legislature was to minimize medical malpractice claims in Texas, it would not logically make sense that the legislature intended to make safety so broad to encompass an influx of new claims that would not traditionally fall under a medical malpractice claim.²⁴⁵ As stated in *Ross*, “the broad meaning of ‘safety’ would afford defendant health care providers a special procedural advantage in the guise of requiring plaintiffs to file expert reports in their suits regardless of whether their cause of action implicated the provision of medical or health care.”²⁴⁶ Part of the enactment of Chapter 74 was to impose expert report requirements “to identify frivolous

236. See *Watson v. Good Shepherd Med. Ctr.*, 456 S.W.3d 585, 587 (Tex. App.—Texarkana Jan. 15, 2015, pet. denied) (“Once again, we find ourselves on the difficult terrain of trying to determine when, under the Texas Medical Liability Act . . . a safety claim is a health care liability claim . . . for which an expert report must be served on the health care provider defendant.”).

237. See *id.*

238. See *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 176 (Tex. 2012) (quoting TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13)).

239. Beck, *supra* note 36, at 501–02.

240. *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012).

241. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011).

242. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

243. Act of June 16, 1977, 65th Leg., R.S., ch. 817, § 1.02(b)(1), 1977 Tex. Gen. Laws 2039, 2040 (repealed 2003).

244. *Id.* § 1.02(a)(4).

245. See *id.* § 1.02(b)(1).

246. *Ross v. St. Luke’s Episcopal Hosp.*, 462 S.W.3d 496, 504 (Tex. 2015).

claims and reduce the expense and time to dispose of any that are filed.”²⁴⁷ In *Watson v. Good Shepherd*, the court examined the legislative intent behind creating the expert report requirement and found that “[t]he legislative intent underlying the expert-report requirement is not advanced by requiring an expert report in simple slip-and-fall cases occurring on hospital premises.”²⁴⁸ Once again, this restated that the intent of the statute was not to expand the reach of HCLCs by including slip-and-falls or other safety-related claims.²⁴⁹

Courts can be reluctant to adopt a bright-line rule because not all claims may follow a one-rule approach.²⁵⁰ A bright-line rule can be too rigid and may not apply to all situations.²⁵¹ However, it is clear that the legislature wanted a narrow approach like a bright-line rule to reduce HCLC claims in Texas.²⁵² Secondly, courts routinely emphasize different factors.²⁵³ Chapter 74.001 has definitions for almost every other word in the statute—even the phrase “professional or administrative services” that directly follows “safety.”²⁵⁴ Therefore, it would be a simple fix to create a definition that includes language from the more emphasized factors—the third and fifth—and include it with Chapter 74.001 definitions.²⁵⁵ Words in the statute that have been heavily litigated such as “claimant” have their own definition in the statute now.²⁵⁶ Thus, the legislature has the opportunity to clear up this interpretation issue to align with the intent behind the statute with the stroke of a pen.²⁵⁷

C. Wasting Legal Resources

HCLCs are subject to extensive procedural requirements—different than your average negligence claim.²⁵⁸ The procedural requirements include providing an expert report which is both expensive and time-consuming.²⁵⁹ The expert report addresses the alleged departure from the standard of care and how the departure caused damages to the plaintiff.²⁶⁰ Acquiring an expert report can be difficult to obtain because of a physician’s unwillingness to get

247. *Loaisiga v. Cerda*, 379 S.W.3d 248, 258 (Tex. 2012).

248. 456 S.W.3d 585, 593 (Tex. App.—Texarkana 2015, pet. denied).

249. *See id.*

250. *Id.* at 593 (Mosely, J., concurring) (pointing out the difficulties in establishing a bright-line rule for HCLCs).

251. *Id.*

252. *See id.* at 592–93.

253. *Ross v. St. Luke’s Episcopal Hosp.*, 462 S.W.3d 496, 506 (Tex. 2015) (Lehrmann, J., concurring).

254. TEX. CIV. PRAC. & REM. CODE § 74.001(a)(24).

255. *See id.*; *Ross*, 462 S.W.3d at 506 (Lehrmann, J., concurring).

256. CIV. PRAC. & REM. § 74.001(a)(2).

257. *See Beck*, *supra* note 36.

258. CIV. PRAC. & REM. § 74.351.

259. *See id.*; *Sweeney*, *supra* note 219.

260. CIV. PRAC. & REM. § 74.351(f)(5)(a).

involved in a legal claim, their busy schedule, and the time it takes to diligently review a case and provide a report.²⁶¹ In some situations, a lawyer may need to obtain multiple experts for a single claim.²⁶² Even after retaining an expert, medical records and documentation must be provided to the expert which can take months depending on the volume of records.²⁶³ Then, before trial, a lawyer will depose the expert, which comes out of a plaintiff's pocket as well.²⁶⁴ Therefore, the process as a whole can add months to acquire all of the necessary information to comply with procedural barriers.²⁶⁵

For a plaintiff to endure all of those legal costs, it is important that the claim is properly deemed an HCLC that would benefit from expert testimony.²⁶⁶ Otherwise, the time and expenses a plaintiff would incur filing suit would not be justified.²⁶⁷ Additionally, if a plaintiff's claim gets dismissed because they did not obtain an expert report, then this rigorous process creates delays that can result in opportunity costs for plaintiffs to actually get compensated for their injuries.²⁶⁸ In Texas, a defendant can wait 120 days from the date of their answer, plus an additional twenty-one days to file a motion to dismiss for a failure to serve an expert report, and then await a hearing to determine if an expert report is required.²⁶⁹ Ultimately, the consequences of dismissing a claim for not classifying it as an HCLC are: filing fees, attorney's fees, expert witness fees, court costs such as document filing, court appearances, and lost time and effort.²⁷⁰ These costs should not fall on a plaintiff for a lack of conciseness in the statute.²⁷¹ Plaintiffs and their lawyers should be able to prepare adequately for the type of lawsuit that the claim falls under and not be subjected to excessive legal costs in order to recover.²⁷²

261. See generally Harwood, *supra* note 222 (explaining the process of obtaining a medical expert).

262. *Id.* (explaining that the purpose of retaining an expert is to testify on “what a reasonable health care provider would do under the same or similar circumstances”—some claims call for multiple experts on the matter).

263. *Id.* at 5 (emphasizing the importance of providing the expert with all medical records).

264. See CIV. PRAC. & REM. § 74.351(s)(2).

265. Harwood, *supra* note 222 (giving an example of a plaintiff's counsel working with experts for years).

266. See *id.*

267. See *id.*

268. See CIV. PRAC. & REM. § 74.351(b)(2).

269. *Id.* § 74.351(a).

270. See *id.* § 74.351(b)(1).

271. See Nowlin, *supra* note 41, at 1256–57.

272. See *Watson v. Good Shepherd Med. Ctr.*, 456 S.W.3d 585, 594 (Tex. App.—Texarkana Jan. 15, 2015, pet. denied) (“There is a need for a ‘bright red line’ for the public and the profession to employ.”).

D. Insurance Residents Continue to Take Advantage of the Weak Legal Framework

A bright-line definition or a statutory reconstruction of the statute to make safety directly related to health care prevents further abuse from insurance companies in this area of the law.²⁷³ Insurance companies take advantage of the poor legal framework in place and remain advantageous in many areas.²⁷⁴ It is clear that consumers bear the cost and repercussions of the current medical malpractice climate.²⁷⁵ These advantages include caps on non-economic damages and strict standards for establishing liability.²⁷⁶ Insurance companies have greater leverage in settlement negotiations and have access to specialized medical malpractice defense teams.²⁷⁷ Effective claim management can help insurance companies avoid large payouts and maintain profitability.²⁷⁸ Insurance premiums continue to increase for doctors to protect themselves from medical liability.²⁷⁹ Therefore, the “harm to patients of medical negligence may be far greater than the monetary costs of the liability system would suggest.”²⁸⁰

The price that physicians pay for medical malpractice insurance has increased over the years.²⁸¹ These costs “increased from 2020 to 2021, and 5% of those premiums increased by 10% or more.”²⁸² So the insurance companies continue to profit off medical malpractice claims even after tort reform.²⁸³ Overall, when a claim is against a hospital or health care provider, it is advantageous to classify the claim as an HCLC because there is less risk involved for an insurance company.²⁸⁴ This practice has led to frivolous pleadings and meritless claims that have nothing to do with the health care provided to a patient.²⁸⁵ This solution lessens the risk of meritless claims benefiting insurance companies because adopting a definition for the word

273. Nowlin, *supra* note 41, at 1273.

274. *Id.*

275. Becker & Kessler, *supra* note 5.

276. TEX. CIV. PRAC. & REM. CODE § 74.301.

277. See *Malpractice Insurance: What You Need to Know*, 3 J. ONCOLOGY PRAC. 274, 276 (September 2007). This is a good overview of malpractice insurance for a physician’s benefit. *Id.*

278. See *id.*

279. See *id.* at 274–75.

280. Becker & Kessler, *supra* note 5, at 85.

281. *Preserve Medical Liability Protections*, TEX. MED. ASS’N, (last visited Oct. 4, 2024) https://www.texmed.org/uploadedFiles/Current/2016_Advocacy/Texas_Legislature/312095_Medical_Liability_Protections.pdf.

282. *Id.*

283. *Id.*

284. Nowlin, *supra* note 41, at 1273 (describing the effect of medical malpractice insurance covering ordinary negligence claims).

285. See *Loaisiga v. Cerda*, 379 S.W.3d 248, 258 (Tex. 2012).

“safety” will not only narrow these types of claims; it will also better serve the legislative intent of reducing medical malpractice claims.²⁸⁶

V. CONCLUSION

The ambiguous interpretation of the word “safety” in the TMLA can be resolved by either reconstruction of the statute to expand to include “safety directly related to health care” or providing a clear definition for safety in the statute.²⁸⁷ Safety should not be interpreted under its common meaning as it is included in an HCLC because it was intended to relate to safety in health care scenarios.²⁸⁸ The legislature intended to reduce the frequency of HCLCs in Texas due to rising medical malpractice insurance costs.²⁸⁹ Therefore, the legislature must take action to make this connection clear once and for all.²⁹⁰ Plaintiffs are having their claims dismissed as a direct result of the inability to predict how courts will interpret the current subjective seven-factor test established in *Ross*.²⁹¹ The judicially-created multi-factor test has left practitioners, plaintiffs, and courts in an unpredictable legal landscape.²⁹² One solution of combining the phrases “safety” and “directly related to health care” allows for an easy statutory fix.²⁹³ Under this solution, the legislature would not need to come up with a new definition that could also be subject to legislation.²⁹⁴ However, as discussed above, the courts have remained in disagreement over this phrase, so it is not likely that Texas courts will willingly embrace the reversal of precedent.²⁹⁵

Conversely, a second solution would provide a clear definition for the courts to interpret.²⁹⁶ This method aligns with the steps the legislature has

286. *Ross v. St. Luke’s Episcopal Hosp.*, 462 S.W.3d 496, 506–07 (Tex. 2015) (Lehrmann, J., concurring).

287. *See supra* Parts III & IV (discussing the need for statutory revisions in Texas); Beck, *supra* note 36, at 490–91.

288. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 855 (Tex. 2005) (using safety’s common meaning as “‘untouched by danger; not exposed to danger; secure from danger, harm or loss.’” (quoting BLACK’S LAW DICTIONARY (6th ed. 1990))).

289. *See* Act of June 16, 1977, 65th Leg., R.S., ch. 817, § 1.02(b), 1977 Tex. Gen. Laws 2039, 2040 (repealed 2003).

290. *See* Beck, *supra* note 36.

291. *Ross v. St. Luke’s Episcopal Hosp.*, 462 S.W.3d 496, 505 (Tex. 2015); *see* *City of Hous. v. Hous.*, 608 S.W.3d 519, 531 (Tex. App.—Houston [1st Dist.] 2020, no pet.) (“As a result, because Houston’s claim constitutes a health care liability claim and Houston failed to serve the City with a statutorily-required expert report, we hold that the trial court erred in denying the City’s motion to dismiss.”).

292. *See* *Watson v. Good Shepherd Med. Ctr.*, 456 S.W.3d 585, 587 (Tex. App.—Texarkana Jan. 15, 2015, pet. denied) (emphasizing the difficulty of identifying a health care liability claim).

293. *See supra* Section III.A (explaining why safety must directly relate to health care).

294. *See supra* Section III.A (discussing the simplest way to amend the definition of “health care liability claim”).

295. *See supra* Section III.A (noting the variety of ways different Texas appellate courts have interpreted the statute).

296. *See supra* Section IV.A (providing a definition for safety).

taken in the past to clear up inconsistencies in the statute by providing a definition.²⁹⁷ If every other word is defined in the statute, the legislature should take swift steps to define this, a heavily litigated term, that has stumped the courts for many years.²⁹⁸ In sum, either solution will be a step forward that serves to resolve the unsettling precedent regarding the precise meaning of safety in a health care liability claim.²⁹⁹

297. *See supra* Section IV.A (explaining how a new definition of safety could fall in line with past legislative intent).

298. *See supra* Section IV.A (noting the failure to properly define “safety”).

299. *Collin Creek Assisted Living Ctr., Inc. v. Faber*, 671 S.W.3d 879, 888 (Tex. 2023) (demonstrating the need to clear up the safety prong in the statute after *Ross*).