Professional Negligence Claims - An Update

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- **Prescription - Interruption versus Suspension**

The Louisiana Supreme Court in Diana LeBreton v. Felix O. Rabito, M.D., et al., 97-C.C. - 2221 (La. 7/8/98) has overruled the case of Hernandez v. Lafayette Bone and Joint Clinic, 467 So. 2d 113 (La. 3rd Cir. 1985) in holding:

> [T]he specific statutory provision providing for the suspension of prescription in a context of medical malpractice should have been applied alone, not complimentary to the more general codal articles which addresses interruption of prescription. Id. at 2.

After discussing the purpose behind liberative prescription, the Court contrasted the general Civil Code Articles of Prescription dealing with interruption as compared to the Medical Malpractice Act for qualified health care providers which suspends the running of prescription during the pendency of medical review panel proceedings. The Court believing that the statutes were in conflict and in order to "harmonize" the law held special rules (here the Medical Malpractice Act) will always outweigh the general rules otherwise the special legislative provisions will be canceled out by the application of general laws. In such a conflict, the Court goes on to point out the purpose behind suspension of liberative prescription, is to accord plaintiffs an equal playing field during the pendency of the Medical Review Panel Proceedings. Drawing upon Plainiol, Traite' E'lementaire De Droit Civil, No. 2698 (12th ed. 1939) reprinted in Treatise on the Civil Law at 594 (La. St. L. Trans 1959) to help explain the purpose of suspension of prescription the Court said, it "is a measure of equity, invented through regard for certain persons who are not in a position to interrupt prescription when it is running against them." In a malpractice claim, when the statutory scheme requires the fulfillment of the medical review panel proceedings prior to litigation, such a claimant may not avail himself to an interruption of prescription thereby getting equal treatment through the means of suspension. In this case the Court pointed out from the time of the request for the medical review panel, August 18, 1992, until 90 days following notification of the panel's opinion, November 12, 1996, plaintiff's claim was suspended from prescription for a period of 51 months. When suit was filed on February 3, 1997, it was therefore prescribed under the Court's ruling.

- **Multiple Recoveries under LSA - R.S. 40:1299.39**

In Conerly, et al. v. State of Louisiana, et al., 97-C-0871 (La. 7/8/98) the Louisiana Supreme Court held that wrongful death and survival actions are governed under the provisions of Medical Liability for State Services Act (MLSSA) - LSA-R.S. 40:1299.39. Because this statute reduces claimants right, any ambiguities of the statute will be strictly construed. Ruiz v. Oniate 97-C-2412, P4 (La. 5/19/98). Nevertheless, the Court will only strictly construe laws in the absence of the definite legislative intent to be accomplished by the specific statute in question. If the law is clear and unambiguous no further interpretation should be applied in the absence of absurd consequences. Reflecting on the legislative intent from the enactment and through its many revisions the Court found that the legislature was attempting to reconcile MLSSA (LSA - R.S. 40:1299.39) with the Medical Malpractice Act (LSA-R.S. 40:1299.40., et seq. - i.e. the private practitioners) the latter which only allows the recovery in the total amount of $100,000 against a doctor and a $400,000 limit from the PCF for injuries to or death of a patient. More particularly, LSA-R.S. 40:1299.39(D) which states that a party may recover under the public act to the same extent as

one may recover under the private act. Noting the purpose behind the enactment of MLSSA of insuring an adequate supply of physicians and other professionals to provide healthcare services on behalf of the state and an attempt to protect the "public fisc" by limiting the liability of the state to $500,000. In concluding the Court ruled in a claim involving malpractice against the state which causes a death of a patient a plaintiff may bring both survival action and a wrongful death claim but is only allowed to recover a maximum sum of $500,000 for all claims only once.

- **Cap Coverage - LSA - R.S. 40:1299.39**

In interpreting the MLSSA as it existed in January 1988 in the matter entitled Ruiz v. Oniate, No. 97-C-2412 (May 18, 1998) So. 2d the Louisiana Supreme Court found LSA-R.S. 40:1299.39(A)(3) to be ambiguous, thus requiring examination of the statute in view of the legislature's intent and examine the words of the statute in context of its definition and to the law as a whole. The focal point of its review was the requirement that "any" covered person at the time of the complained of malpractice under the statute, must be "acting within the course and scope of his employment, *pursuant to a contract with the state or any political subdivision thereof which contract specifically names that health care provider or his employer*."

In this case, the lower courts had found in favor of the plaintiff holding the individual physicians involved were protected under the statutory cap but that, Charity Hospital, though vicariously liable for the physicians, was not afforded the same limitation. The trial court awarded to Oniate, $2,000,000 for physical pain and suffering, $2,000,000 for emotional pain and suffering, $2,702,066.00 for future medical expenses, $54,432.00 for past medical expenses, and $449,821.00 for impairment of future earning capacity. The Fourth Circuit affirmed the award with a revision of the past medical expenses, which was lowered to $45,724.39. Both Courts found that Charity was unable to produce "written" contracts of the employees in question, therefore the statutory language under LSA-R.S. 40:1299.39 was not met.

The Louisiana Supreme Court in reviewing the phraseology from the above cited section which read in part "shall include but not be limited to" found no written contract was necessary in order to obtain the protection of the MLSSA damage cap. The particular provision cited calls for the inclusion of healthcare providers under the statute whether under contract or not including those who are actually employees of the State. The various amendments to the statute served as a foundation for the Court's opinion in finding the provisions calls for the inclusion of the enumerated professionals under the Act rather than exclusion. The very purpose of the MLSSA was to entice professionals to provide healthcare coverage to patients on behalf of the State through the protection against runway malpractice judgments. Such purpose, the Court reasoned, could not be obtained if coverage was being restricted to persons who only had written contracts. The Court in finding that Charity's employees, for whom it was vicariously liable, are covered persons under the Act, stated:

> It would be nonsensical to find that employees paid by the health care facility acting with the course and scope and of their employment but without a written contract are not covered "persons," and don't receive the benefit of this "insurance," but that in non-employees voluntarily providing the same services are so covered. Given that the recognized primary purpose of the MLSSA was to attract qualified professionals to provide health care services on behalf of the state by offering them primary malpractice insurance, we can see no legitimate reason for the legislature to offer this insurance to professionals who volunteer to work at state facilities and to professionals who work at these facilities pursuant to a contract between the state or political subdivision and the professional or his employer, but not also to the direct, non-contract employees of the state health care facility. Id. at P. 11.

The Court pretermitted any rulings on the Constitutionality of the cap as same was not ruled on by the lower courts due to the previous interpretation of persons covered under the MLSSA. That and the allocations of

fault and extension of said damages, have been remanded to the trial court for further proceedings.

- **Survival Action for Stillborn Fetus**

The Louisiana Supreme Court in Wartelle v. Women's and Children's Hospital, Inc., 704 So. 2d 778 (La. 1997) was confronted with the possible causes of action for damages acquired by parents of a fetus that is stillborn. The parents brought an action for wrongful death of the stillborn child under Louisiana Civil Code Article 2315.2 and a survival action on behalf of the stillborn fetus under Louisiana Civil Code Article 2315.1. Additionally the parents asserted a Lejeune action under Civil Code Article 2315.6.

In examining the Civil Code Article 2325.1, the Court focused its attention on the definition of a "person" who has been injured and whether or not a stillborn fetus is a person under the law. Under the scheme of the Civil Code, there are two kinds of persons, natural and juridical. Civil Code Article 25 defines a natural person as one that "commences from the moment of live birth and terminates at death." Noting an exception under Civil Code Article 26, which reads in part that a child born dead "shall be considered never to have existed as a person, *except for purposes of actions resulting from its wrongful death.*" The Court points out for purposes of legal interests an unborn fetus has a provisional legal personality for its legal interests which is conditioned upon subsequent live birth. Consequently, an unborn fetus may acquire a cause of action and inherent while in utero. Thus a fetus' personality can be advanced in utero with a provision that if it is born dead the "fictional personality is erased" and the Civil Code Article scheme is, the fetus never existed as a "person."

The Court, because the fetus was stillborn, held the exception to the general rule that the fetus must be born alive was not met when it said:

> A survival action is based on the victim's right to recover being transferred upon the victim's death to the beneficiary. [Citations Omitted]. The stillborn fetus cannot transmit any rights, because under the law it acquires none. Id. at 781.

Under the same rationale there is, also, no Lejeune claim. A stillborn fetus is not a "person" under our law, there can be no bystander to a nonperson for a recovery of Lejeune damages. Rejecting plaintiff's argument for Lejeune damages, from the wrongful death of the fetus, the Court stated:

> We have held that the action results from the breach of an independent duty owed by the tortfeasor to a bystander who is closely related to the victim. Id. at 785.

Relying upon the same interpretation of the Civil Code Article 26 that a stillborn fetus is not a person does not lay a foundation for a "bystander action." The Supreme Court remanded for the revision of the damage awards of the Lejeune claim as the lower Court's award was unclear as to its distribution between the wrongful death and the Lejeune claims.

- **Loss of Chance**

The Louisiana Supreme Court revisited the methodology to calculate the damages in a loss of a chance in the matter entitled Graham v. Wilson Knighton Medical Center, 699 So. 2d. 365 (La. 1997). The plaintiff brought an action against a general surgeon and a hospital for surgical treatment of a gun shot wound to his abdomen. During the abdominal surgery to repair the gun shot wound the general surgeon ligated the external iliac artery to the right leg and then failed to immediately consult a vascular surgeon to re-establish circulation to it. The issue is time delay of the consult and the loss of chance of saving the leg from the impaired blood flow.

Specifically the Supreme Court found the plaintiff at trial, notwithstanding the $100,000 payment by the

doctor, must prove a causal relationship between the negligent act and the claimed damages in excess of the $100,000. The question being at the time of trial, the loss of a chance of saving the plaintiff's leg from amputation. Adhering to its opinion in Smith v. State Department of Health and Hospitals, 676 So. 2d 543 (La. 1996) the Court in Graham , supra at 373, stated "When the chance for survival (or, in this case saving the leg from amputation), is less than fifty percent the Court may not award full damages for the loss of life (or loss of the leg)". However, finding an exact mathematical calculation is not appropriate in loss of a chance matters as the subject is not necessarily that precise. Here the Court believed the opportunity to save the plaintiff's leg was between twenty to thirty-three percent. Accordingly, the Court mathematically recalculated the total loss of plaintiff leg to be $470,000. Therefore the Court then reduced the award by the loss of chance doctrine to $140,000 subject to the $100,000 credit from the settling physician previously paid to plaintiff.

Relying upon Graham, supra, the Second Circuit Court of Appeal in McCrery v. Willis Knighton Medical Center, 705 So. 2d 753 (La. 2nd Cir. 1997) reviewed the trial court's mechanical application of Pendelton and affirmed the trial court ruling that the loss of chance was less than fifty percent or about twenty percent and the $50,000 award was just and fair. The cause of death was pulmonary embolus and upon reviewing the court record and the expert's testimony the Second Circuit concluded the patient's chance of survival was indeed less than fifty percent contrary to plaintiff's argument. The medical testimony only suggested the possibility of survival rather than a probability of survival.

"As an aside" in Graham, supra, in Pendelton v. Barrett, 675 So. 2d 720 (La. 1996), wherein the Court adopted the methodology of a pre-trial hearing to establish the difference between primary and secondary for harm causation purposes from an act of malpractice would be cumbersome in practice and therefore nonworkable. Although the Supreme Court criticized its Pendelton, supra, decision, it did not overrule it.

In view of the Court's denouncement of the Pendelton process in Graham, supra, the Third Circuit on remand in the matter Pendelton v. Barrett, 706 So. 2d 498 (La. 3rd Cir. 1979) affirmed the trial court ruling if the death of Mrs. Pendelton was an original harm caused by the malpractice of Dr. Barrett. The Third Circuit Court of

Appeal in Pendelton, supra stated:

> While it appears the Pendelton rule has been replaced with a simple rule that the plaintiff has a burden of proving damages in excess of $100,000, we do not find this new rule applicable in this case. Instead we find the law of the case doctrine to be appropriate. Id. at 502.

The Court then goes on to outline the provisions of the law of the case doctrine by citing the matter entitled In Petition of Sewage & Water Board of New Orleans, 278 So. 2d 81 (La. 1973). Under the law of the case doctrine, the Court of Appeal did not disturb the district court's findings from the Pendelton hearing.

In Boudoin v. Nicholson, Baehr, Calhoun and Lanassa, et al., 698 So. 2d 469 (La. 4th Cir. 1997) the Fourth Circuit Court of Appeal correctly points out the beginning of the cases applying the loss of chance was Hastings v. Baton Rouge General Hospital, 498 So. 2d 713 (La. 1986). Its progeny includes Smith v. State Department of Health and Human Resources, 523 So. 2d 815 (La. 1988), where the Supreme Court held though plaintiffs need not prove the patient would have survived but for the physician's conduct when it stated:

> However, they must establish by the preponderance of the evidence that he had a chance for survival and this chance was lost due to the defendant's negligence. Id. at 473.

Meaning that the plaintiff still has a burden of proving it is more probable than not the plaintiff lost a chance

of survival and not that plaintiff merely lost a "chance".

- **Prescription**

A continuing tort serves to prevent the commencement of the running of prescription. The question of whether a continuing professional relationship between a patient and physician qualifies to prevent the commencement of prescription under the continuing tort doctrine was addressed by the Fourth Circuit in Romaguera v. Overby, 709 So. 2d 266 (La. 4th Cir. 1998). Here, Dr. Overby had a long standing professional relationship with the patient for treatment of breast cancer. As part of the therapy, a "port-A-cath" was surgically implanted by Dr. Overby to facilitate continuing access for chemotherapy treatment. After the conclusion of chemotherapy treatment, the "port-A-cath" was surgically removed by Dr. Overby on June 28, 1991. Until March 30, 1995, the patient was see by, Dr. Overby, professionally every six months for breast examination.

On May 19, 1995 in preparation for breast reconstructive surgery a pre-surgical chest x-ray revealed the presence of a foreign body which later turned out to be a fragment of the catheter which Dr. Overby had failed to remove. Plaintiff initiated suit and was met with an exception of prescription. Affirming the trial court's maintenance of the exception of prescription, the Fourth Circuit quoting its holding in Short v. Giffin, 682 So. 2d 249, 256 (La. 4th Cir. 1996), said, "In order to create a continuing tort, there must be continuing acts of fault coupled with continuing damage." Noting that Dr. Overby's continued treatment of the plaintiff was unrelated to the previous placed catheter and its removal, plaintiff's failed to present evidence "to show that such examinations" of the patient's breasts was in anyway related to the discovery of a part from the fractured catheter. Because there was no relation between catheter removal and the breast examinations, the conduct causing the damage abated on June 28, 1991, at which time prescription began to run. As suit was not filed until April 17, 1996, same was clearly prescribed on its face and the Court affirmed the lower Court's dismissal.

Likewise in Wang v. Broussard, 708 So. 2d 487 (La. 1st Cir. 1998) when called upon to decide the issue of a continuous tort the Court relied upon whether there was a "continuous representation" of such a nature it would likely hinder a patient's inclination to sue. In affirming the exception of prescription, the First Circuit Court, stated:

> [T]hat the continuous representation rule should apply only 'where the professional's involvement at the alleged malpractice is for the
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> performance of the same or related services and not merely continuity of a general professional relationship Id. at 492.

Though the continuous representation rule was borrowed by the Court from the line of cases for interruption of prescription for legal malpractice the Court found it synonymous to medical malpractice and the result is the same.

See, Parker v. Dr. X, 704 So. 2d 373 (La. 3rd Cir. 1997), wherein the Court points out that the burden of proof on an exception of prescription is placed upon plaintiff when pleadings contained in the record on their face show the claim is prescribed.

Filing a claim for a medical review panel suspends prescription as to nonnamed solidary obligors "to the same extent that it is suspended for those named in the request by the panel." Baum v. Nash, 702 So. 2d 765, 768 (La. 3rd Cir.1997).

Commencement of the medical review panel proceedings will serve to suspend prescription. However, a

written inquiry as to the status of a health care provider under the PCF even if it includes allegations and conclusions of malpractice by the healthcare provider for whom the qualification information is being sought will not, in and of itself, serve to suspend prescription. See In re Medical Review Panel Leday 707 So. 2d 1267 (La. 1st Cir. 1997) and 704 So. 2d 284 (La. 1st Cir. 1997), because the letter did not "request for review of a claim" under LSA-R.S. 40:1299.39.1 or LSA-R.S. 40:1299.47 and same did not serve to suspend prescription.

- **Spoilation**

In Bethea v. Modern Biomedical Services Inc., et al, 704 So. 2d 1227 (3rd Cir. 1997) the Court found the plaintiff pled a viable cause of action against the defendant for spoilation when the evidence showed the defendant threw away a defective electrical plug which had shocked the plaintiff while she was plugging in an IV pump. In considering defendants argument of no statutory duty required it to preserve the electrical plug, the Court held:

> Although there is no statutory duty imposed on the defendants in this case to preserve the evidence and avoid hindering plaintiffs' claim, we find a duty exists under La. Civ. Code art. 2315. The absence of a statutory duty is not tantamount to no duty. The parameters of what constitutes fault in Louisiana reach far and wide in order to hold people accountable for their harmful actions regardless of whether or not their actions are covered by statutory provision. Intentionally hindering a plaintiff's civil claim when there is no statutory duty to prevent this action is just as violative of our civilian notion for justice and fair play as when a statutory duty is imposed. Id. at 1233.

Also, see Nicoll v. LoCoco, 701 So. 2d 1062 (La. 5th Cir. 1997) where the Court affirmed the trial court's dismissal of a spoilation claim which is always factually oriented and the credibility determination of the trier of fact in district court will not be overturned unless clearly wrong.

- **Consent and Informed Consent**

Louisiana Supreme Court has reoriented the causes of action for lack of consent versus lack of informed consent. Prior to Lugenbuhl v. Dowling, 701 So. 2d 447 (La. 1997) if a physician performed an invasive procedure without the consent of the patient same was determined to be battery and liability would flow as a result. Contrary, if there was consent given by the patient but it was not "informed" due to the failure to list one of the material risks or complications of the procedure then same was analyzed under negligence doctrine. The Court in Lugenbuhl, supra, held:

> We therefore reject battery-based liability in lack of informed consent cases (which include no-consent cases) in favor of liability based on the breach of the doctor's duty to provide the patient with material information concerning the medical procedure. Id. at 453.

The Court then goes on to explain the focus of the inquiries is on the duty for the doctor to provide material information to a patient to make an informed decision for the particular case at hand. Additionally, the plaintiff has the burden of proving that the lack of informed consent occurred through the failure to disclose material information and there was a causal relationship between the failure to so disclose and any damage sustained by the patient. In the absence of causation, the Court points out although the doctor's conduct may be wrong, but it is not consequential and therefore not actionable.

In Lugenbuhl, the patient objected to the surgeon's failure to use a surgical mesh to repair an incisional hernia. The patient subsequently suffered from an additional hernia; however, all of the testimony was to the effect the surgical mesh not would have prevented the subsequent herniation - no harm, no foul. In citing a

persons absolute right to prevent the unauthorized intrusions of treatments in ones body, the Court awarded $5,000 which was an appropriate sum of money to compensate the plaintiff for general compensatory damages caused by the doctor's breach of duty even in the absence of actual physical harm. "In this type of case, damages for deprivation of self-determination, insult to personal integrity, invasion of privacy, anxiety, worry and mental distress are actual and compensatory." Lugenbuhl at 455.

In addition to warning a patient of a material risk of a particular procedure, is there a duty on the part of a doctor for failing to disclose material risks of a physical condition for a patient to seek appropriate treatment? In Pinnick v. Louisiana State Medical Center, et al. 707 So. 2d 1050 (La. 2nd Cir. 1998) the Court addresses this very issue under the same analysis it would when a patient develops a complication following a particular procedure. In this case the Court found that the patient was appropriately informed.

Also, see Smith v. Walker, 708 So. 2d 797 (La. 1st Cir. 1998), where a plaintiff patient settled a personal injury suit without the knowledge of the positivie findings of a herniated disc at L4-5 pursuant to CT Scan. Following the CT Scan the physician, Dr. Walker, did not advise the patient of the injury. Subsequently, Mr. Smith settled his personal injury claim with State Farm Insurance for the amount of $2,000 plus specials of $1,804.70. Upon learning of the ruptured disc, the patient then sued Dr. Walker. Dr. Walker maintained his duty to diagnose and inform a patient of the diagnosis and treatment did not extend as far as the risk of whether a patient will settle a personal injury lawsuit. The Court found Dr. Walker's duty did extend to inform his patient of the serious diagnosis of the herniated disc particularly in view of Dr. Walker's knowledge of Smith's injury resulted from an automobile accident, Dr. Walker knew State Farm was paying Dr. Walker's medical expenses, Dr. Walker was in a business of deferring collections for treatment of accident victims and Dr. Walker deferred Smith's account pending settlement with State Farm.

- **Jury Charges**

Some of the following jury charges are recapitulations of existing case law. However, this will update some citations and clarify some of the jargon previously used by the Courts.

- A physician is not required to exercise the highest degree of care possible. Rather, his duty is to exercise the degree of skill ordinarily employed by his professional peers under similar circumstances. The law does not require absolute precision from a physician. A physician's conduct and professional judgment must be evaluated in terms of the reasonableness under the existing circumstances and should not be viewed in hindsight and in terms of results or in light of subsequent events. Ferrell v. Minden Family Care Center, 704 So. 2d 969, 972 (La. 2nd Cir. 1997).

- When the subject at issue concerns the particular field of the specialist's expertise, the testimony of the specialist is entitled to greater weight than that provided by other medical experts. Haynes v. Calcasieu Medical Transportation 702 So. 2d 1024, 1031 (La. 3rd Cir. 1997), writ denied (La. Mar 27, 1998) (No. 98-C00355).

- The law does not require perfection in medical diagnosis and treatment. On the contrary, a doctor's professional judgment and conduct must be evaluated in terms of reasonableness under the then existing circumstances, not in terms of results or in light of subsequent events. .Nicoll v. LaCoco, 701 So. 2d 1062, 1065 (La. 5th Cir. 1997)

- Also, see Descant v. Administrators of Tulane Educational Fund 706 So. 2d 618, 631 (La. 4th Cir. 1998) writ denied (La. Apr 03, 1998) (No. 98-C-0467) wherein the Court in reciting verbatim the jury charges provided by Judge McGee and found it to be an

accurate statement of law on informed consent.

- **Potpourri**

Prior to his death, a physician was insured through a commercial carrier and was a qualified member of the Patient's Compensation Fund. Upon his death, as was the usual procedure, a portion of the underlying carrier's premium and the PFC surcharge was refunded to the estate of the decedent. Plaintiff then contended the deceased physician was no longer a qualified health care provided and was not accorded the protections of LSA-R.S. 40:1299.41 et seq. The First Circuit Court of Appeal in Dunn v. Bryant, 701 So. 2d 696 (La. 1st Cir. 1997) found that the decedent, Dr. Bryant and his estate were protected by the Patient's Compensation Fund under LSA-R.S. 40:1299.41 et. seq.

In Pugh v. Mayeaux, 702 So. 2d 988 (La. 3rd Cir. 1997), the Court properly excluded articles from the medical literature which were published two years after the complained of incident which served as a basis for the foundation of the plaintiff's malpractice complaint.

The Fourth Circuit in Taylor v. Tulane University of Louisiana, 699 So. 2d 1117 (La. 4th Cir. 1997) held the payment of $75,000 to plaintiff in settlement with a judicial admission of liability was not sufficient to trigger liability of the Patient's Compensation Fund under the Medical Malpractice Act.

In Stewart v. St. Francis Cabrini Hospital, 698 So.2d 1 (La. 3rd Cir. 1997), the Court found that the wife of a hospital employee who was stuck with a dirty needle did not set forth a cause of action for HIV phobia. With no allegations in the petition for a "channel" for infection between husband and wife there is no compensable action, only speculation.

See, Dardeau v. Ardoin, 703 So. 2d 695 (La. 3rd Cir. 1997), wherein the Court held the decedent doctor's office chart is admissible under Louisiana Code of Evidence Article 803(4).

Legislation