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CURRENT ISSUES IN NURSING LIABILITY

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- **Legislative update- laws you need to know about***

1. Medical Malpractice Damages Cap

Among the bills in the recent legislative session relevant to the nursing profession are several House and Senate bills seeking to raise the cap on damages applicable to medical malpractice litigation or otherwise revise the current law which provides for a cap on damages. At the time of the submission of these materials for printing, the 1999 legislative session was approaching a close, and none of these bills appeared to be ripe for passage. However, this is an issue that is likely to be addressed again in future legislative sessions, and it would be wise for any member of the medical and allied health professions to follow any such legislation closely.

- **Limitation of Liability for Health Care Providers Rendering Gratuitous Services**

Senate Bill No. 507 provides for a limitation of liability to health care providers rendering gratuitous health care services pursuant to agreements with community health care clinics. The limitation on liability contains the expected exception for gross negligence or "willful or wanton misconduct" on the part of the protected health care provider. The proposed law also provides for the distribution or posting of notice of the limitation of liability. Furthermore, the proposed law seeks to retain the present definition of a "community health care clinic" as a nonprofit organization qualified or eligible for qualification a s a tax-exempt organization under 26 U.S.C. 501, which operates a medical clinic solely for educational or charitable purposes, whose principal function is to supply facilities, volunteer staff, and other support for the rendering of gratuitous medical or dental treatment to include an organization which may provide or arrange for services at the offices of a health care provider and includes an entity which makes arrangements for the supply of the facility. As of the time of the submission of this article, the bill passed in the House of Representatives by a vote of 34 to 4.

- Louisiana State Board of Medical Examiners

House Bill No. 1070 provides for the composition and terms of members of the Louisiana State

Board of Medical Examiners. The bill had passed both the House and the Senate at the time of the submission of this article and is set to return to the House for concurrence on amendments.

- **Burden of Proof in Medical Malpractice Actions- RN's and APRN's**

House Bill No. 2237 provides for burden of proof in malpractice actions against registered nurses and advanced practice registered nurses. The bill addresses the standard of care required of RN's and APRN's and who may testify as to those standards and seeks to amend the current statute LSA-R.S. 9:2794. The bill seeks to amend the current statute to include registered nurses and advanced nurse practitioners among the list of professionals who may testify as to standard of care for their various health care professions.

- **Hospital-based Rural Health Clinics; licensure**

House Bill No. 1184 provides that a hospital-based rural health clinic does not have to receive a separate license from a rural hospital. This bill was passed in the House and is up for a final vote on the Senate floor at the time of the submission of these materials.

- **Monitoring of Student Nurses by LSBN**

House Bill No. 286, which has been passed in both the House and Senate and is awaiting Governor Foster's signature authorizes the Louisiana State Board of Nursing to monitor student nurses in the clinical phases of their nursing educations. The proposed law does not require licensure for student nurses; however, it does subject them to disciplinary action for the same offenses which would subject licensed nurses to disciplinary action.

- **Automated External Defibrillators (AED's)**

Senate Bill 100 makes provisions relative to automated external defibrillators (AED's). The goal behind the legislation is to provide for use of AED's in communities throughout the state so that the number of deaths due to too-long response times from EMS providers in cardiac arrest cases may be reduced. In its present state, the proposed legislation would require a physician or advanced practice registered nurse (APRN) who is authorized to prescribe must be involved in the possessor's program to ensure compliance with the requirements for training with regard to the devices. The proposed law also provides for limitation of liability against the physician or APRN involved in the possessor's program. At the time these materials were compiled, the proposed legislation was on the calendar for a final House vote.

- **Proposed Regulations for Prescriptive Authority of APRN's**

The Louisiana State Board of Nursing and the Louisiana State Board of Medical Examiners intend to adopt new regulations regarding Limited Prescriptive and Distributing Authority for Advanced Practice Registered Nurses and to standardize the process and requirements for application for prescriptive privileges for nurse practitioners, certified nurse midwives, and clinical nurse specialists within the state.

The proposed regulations require that the applicant have valid and unencumbered RN and APRN licenses and provide evidence of 500 hours of clinical practice in the specialty of APRN training within the six months immediately prior to the application. Further requirements include successful completion of a minimum of 36 contact hours in advanced pharmacotherapeutics in a formal, board approved program and 12 contact hours in physiology/pathophysiology at an advanced practice level. Other requirements for the application include a collaborative practice agreement with one of

more licensed physicians, with specific provisions to be included in the collaborative practice agreement. The prescriptive authority to be granted the APRN is limited both by the proposed regulations and can be further limited by the collaborative practice agreement. The APRN may prescribe drugs as "indicated by clinical practice guidelines and the parameters of the collaborative practice agreement" with the physician. Furthermore, the APRN with limited prescriptive authority may not prescribe or distribute any drug listed as a controlled substance under federal or state law.

***This section was researched and compiled by Julie G. Hamner, Esq. of Beahm & Green.**

B. Professional Negligence Claims - Recent Case Law Review

- **Prescription - Interruption versus Suspension**

The Louisiana Supreme Court in Diana LeBreton v. Felix O. Rabito, M.D., et al., 97-2221 (La. 7/8/98); 714 So.2d 1226 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 would 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 of 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. Therefore, when suit was filed on February 3, 1997, it was 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., 714 So.2d 709 (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' rights, any ambiguities of the statute must be strictly construed. Ruiz v. Oniate 97-2412 (La. 5/19/98); 713 So.2d 442. Nevertheless, the Court will only strictly construe laws in the absence of 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 of 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) 97-0871 (La. 7/8/98); 714 So.2d 709 states that a party may recover under the public act to the same extent as one may recover under the private act. The Court noted the purpose behind the enactment of MLSSA was to insure an adequate supply of physicians and other professionals to provide healthcare services on behalf of the state and to make 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 a survival action and a wrongful death claim, but is only allowed to recover a maximum sum of $500,000 combined.

- **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. 97-2412 (La. 5/19/98); 713 So.2d 442, the Louisiana Supreme Court found LSA-R.S. 40:1299.39(A)(3) to be ambiguous. This required examination of the statute to determine the legislature's intent and to examine the words of the statute in the context of its definition and in comparison with the law as a whole. The focal point of the Court's review was the requirement that "any" covered person at the time of the malpractice complaint 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 that the individual physicians involved were protected under the statutory cap; However, 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 reviewed the phraseology from the above cited section which read in part "shall include but not be limited to." The Court found no written contract was necessary 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, and 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 that the provision calls for the inclusion of the enumerated professionals under the Act, rather than for 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., 97-0744 (La. 12/2/97); reh. denied (1/9/98) 704 So. 2d 778 (La. 1997), was confronted with the possible causes of action for damages acquired by parents of a stillborn fetus. 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 that for purposes of legal interest an unborn fetus has a provisional legal personality 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's personality can be advanced in utero with a provision that if it is born dead the "fictional personality is erased," and under the Civil Code scheme, 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 no Lejeune claim. A stillborn fetus is not a "person" under our law; therefore there can be no by-stander recovery under Lejeune for the death of the non-person. Rejecting plaintiff's argument for Lejeune damages, for 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.

The Court relied upon the same interpretation of the Civil Code Article 26 that a stillborn fetus is not a person. Therefore, there was no foundation for a by-stander recovery. 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 used to calculate damages in a loss of a chance in the matter entitled Graham v. Wilson Knighton Medical Center, 97-0188 (La. 3/21/97) 699 So. 2d. 365 (La. 1997), reh. denied 97-0188 (La. 10/10/97), 699 So.2d 1089. 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 that at trial, a plaintiff, 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, at the time of trial, is 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, 95-0038 (La. 6/25/96), 676 So. 2d 543 (La. 1996), rehearing denied (9/3/96), 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 because 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. 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, 29-999 (La. App. 2 Cir. 12/10/97); 705 So.2d 753 reviewed the trial court's mechanical application from Pendleton 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, there is a discussion regarding Pendelton v. Barrett, 95-2066 (La. 5/31/96), reh. denied 6/28/96; 675 So. 2d 720, wherein the Court adopted the methodology of a pre-trial hearing to establish the difference between primary and secondary harm for causation purposes. The court indicated this would be cumbersome in practice, and therefore, unworkable. Although the Supreme Court criticized its Pendleton, 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 Pendleton v. Barrett, 95-570 (La. App., 3 Cir. 12/23/97); 706 So. 2d 498, affirmed the trial court's ruling that 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., 96-0363 (La. App 4 Cir. 7/30/97); 698 So. 2d 469, the Fourth Circuit Court of Appeal correctly points out the beginning of the cases applying the loss of chance doctrine 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 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.

This means 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, 97-1654 (La. App 4 Cir. 3/4/98); 709 So. 2d 266. 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 seen professionally by Dr. Overby 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 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, 96-0361 (La. App. 4 Cir. 8/21/98); 682 So. 2d 249, 256, writ denied 96-3063 (La. 3/7/97), 689 So.2d 1372, 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 previously placed catheter and its subsequent removal, The Court found that plaintiffs failed to present evidence "to show that such examinations" of the patient's breasts were in any way related to the discovery of the fragment of the catheter. Because there was no relation between the 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, 96-2719 (La. App. 1 Cir. 2/20/98), 708 So. 2d 487, reh. denied 4/2/98; writ denied 98-1166 (La. 6/19/98), 720 so.2d 1213, 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 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, 97-841 (La. App. 3 Cir. 12/10/97); 704 So. 2d 373, 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, 97-233 (La. App. 3 Cir. 10/8/97); 702 So. 2d 765.

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 96-2540 (La. App. 1 Cir. 11/7/97) 707 So. 2d 1267, writ granted, cause remanded by 97-3068 (La. 2/13/98)l 706 So.2d 985, reh. denied 97-3068 (La. 3/27/98); 716 So.2d 369, which stated, 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, same did not serve to suspend prescription.)

Tuazon v. Eisenhardt, 725 So.2d 553 (La. 5th Cir. 1998). The plaintiff's husband died on June 28, 1994 after being discharged from Jo Ellen Smith Hospital on June 12, 1994. The plaintiff's complaint to the Commissioner of Administration, State of Louisiana, to initiate a medical review panel proceeding was dated June 26, 1995. However, there was no indication the letter was received by or filed with the Commissioner. Correspondence dated June 29, 1995 re-routed the complaint to the Patient's Compensation Fund Oversight Board. The record reflects that the Board received the letter and filed the claim as of June 29, 1995. The panel, on August 19, 1996, found no deviation below the standard of care as to the hospital or its employees. On August 20, 1996, the patient's widow filed a second claim entitled "Supplement to Request for Review of Claim by Medical Review Panel," requesting a review of the performance of several physicians who attended to her late husband. The physicians excepted on the grounds of prescription, the exceptions were sustained and affirmed on appeal. The Fifth Circuit Court of Appeal, citing the rule of burden of proof stated:

[T]he burden of proving a suit has prescribed rest with the party pleading prescription. (Citations omitted) However, when the plaintiff's petition shows on its face that the prescriptive period has run, and the plaintiff relies on a suspension or interruption of prescription, the burden is on the plaintiff to prove the suspension or interruption.

Id at 555.

The Court Held to the long standing rule of solidary obligations interrupting prescription as to other solidary obligors finding, once prescription is accrued, it cannot be interrupted. Finding that the original complaint filed on June 29, 1995, was beyond the date of prescription, the court concluded the proceedings did not serve to suspend the tolling of the prescriptive period as same was untimely. Regardless of the fact the hospital chose to proceed through the medical review panel proceedings, its choice did not serve to suspend the running of prescription.

Apken v. Kushner, 722 So.2d 1238 (La. 5th Cir. 1998). The trial court sustained defendant's exception of prescription which was subsequently affirmed by the Fifth Circuit Court of Appeals. On April 10, 1994, decedent's husband severely bruised his leg in a fall. On April 18, he saw a Dr. Robert Murphy for the injuries to his leg. On April 19, 1994 he presented at the emergency room at West Jefferson General Hospital complaining of chest pains. Five days later, he succumbed to congestive heart failure.

While in the hospital, Mr. Apken was tended by Drs. Hallet and Kushner, both of the heart clinic of Louisiana. The plaintiff consulted an attorney regarding various succession and estate matters including insurance and potential rights against the bus company for the original injury to the leg. The attorney contacted Dr. Murphy regarding the nature of the decedent's injuries and whether same were related to his subsequent death. The attorney was informed the bruise on the leg could very well have produced blood clots leading to the congestive heart failure. Thereafter the attorney telephoned the heart clinic to speak with either Dr. Hallet or Dr. Kushner. Apparently the attorney was unable to speak with either physician and during the claim against the bus company (after taking the depositions of Drs. Hallett and Kushner in November, 1996) the attorney concluded that hospital treatment was possibly deficient. A claim was filed on February 18, 1997 against the defendant health care providers. The trial court held Ms. Apken was on notice there may have been

insufficient medical care as of early 1994 and sustained the exception and dismissed the cause of action, as the claim was prescribed on its face. The claimant has the responsibility to prove she discovered the alleged act of malpractice within a year of filing the claim. Noting that the court's record did not show "what acts, omissions or neglect on the part of the doctors was purportedly discovered by [plaintiff]," the court stated it could only conclude that she failed to show that the claim had not prescribed. 722 So.2d 1238, 1240.

Harold v. Martinez, 715 So.2d 660 (La. 2nd Cir. 1998).

In this case, the Court of Appeal points out the only necessary ingredient to begin the running of prescription is "constructive knowledge." It is not required that an attorney or another health care provider inform the possibility of a malpractice action before prescription begins to run.

- **Spoliation**

In Bethea v. Modern Biomedical Services Inc., et al, 97-332 (La. App. 3 Cir. 11/19/97); 704 so.2d 1227, writ denied by 97-3169 (La. 2/13/98); 709 So. 2d 760, writ denied 97-3170 (La. 2/13/98); 709 so.2d 761, the Court found the plaintiff pled a viable cause of action against the defendant for spoliation. The evidence showed that defendant threw away a defective electrical plug which had shocked the plaintiff while she was plugging in an IV pump. In considering defendants argument that 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, 97-83 (La. App. 5 Cir. 10/28/97); 701 So. 2d 1062, where the Court affirmed the trial court's dismissal of a spoliation claim which is always factually oriented, stating that 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, 96-1575 (La. 10/10/97) 701 So. 2d 44, if a physician performed an invasive procedure without the consent of the patient same was determined to be a battery, and liability would flow as a result. On the 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 goes on to explain the focus of the inquiry is on the doctor's duty to provide a patient with material information needed 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 that there was a causal relationship between the failure to so disclose and any damage sustained by the patient. The Court points out, in the absence of causation, although the doctor's conduct may have been wrong, 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 indicated the effect the surgical mesh not would have prevented the subsequent herniation - no harm, no foul. In citing a person's absolute right to prevent the unauthorized intrusions of treatments in one's body, the Court awarded $5,000, an appropriate sum of money to compensate the plaintiff for general 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 to disclose material risks of a physical condition for a patient to seek appropriate treatment? In Pinnick v. Louisiana State Medical Center, et al. 30-263 (La. App. 2 Cir. 2/25/98); 707 So. 2d 1050, 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, 96-2813 (La. App. 1 Cir. 2/20/98); 708 So. 2d 797, writ denied 98-0757 (La. 5/1/98); 718 So.2d 418, where a plaintiff patient settled a personal injury suit without the knowledge of the positive 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 that his duty to make and inform a patient of his diagnosis and the required 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 that Smith's injury resulted from an automobile accident, that Dr. Walker knew State Farm was paying Dr. Walker's medical expenses, that Dr. Walker was in a business of deferring collections for treatment of accident victims, and that Dr. Walker deferred Smith's account pending settlement with State Farm.

Banks v. Wright, 721 So.2d 1063 (La. 1st Cir. 1998).

Plaintiff filed a lawsuit following a non-consensual circumcision performed during an aorta femoral bypass procedure. Seeking to avoid the medical review panel, plaintiff argued intentional tort or battery. Relying upon Lugenbuhl v. Dowling, 701 So.2d 447 (La. 1997) the court ruled the matter did fall under the medical malpractice act and had to be submitted to a medical review panel. The court affirmed the exception of prematurity previously sustained by the trial court.

- **Weight of the Evidence**

In Havard v. Children's Clinic of Southwest Louisiana, 722 So.2d 1178 (La. 3rd Cir. 1998), a thirteen

year old female suffering from juvenile diabetes, died on August 29, 1990 of diabetic ketoacidosis. The medical review panel found issues of fact existed as to whether the grandmother (the legal custodian) of the juvenile placed a telephone call to the Children's Clinic and the content of any conversation between the custodian and the nurse at Children's Clinic. The specific question of fact was whether the nurses were informed that the juvenile was a diabetic and had not been administered her insulin that morning. As a result of the telephone conversation, the juvenile was prescribed phenegran suppositories which stopped her vomiting; however, she became lethargic at 6:00 p.m. At 11:00 p.m., the juvenile was taken to the emergency room of a local hospital where she died on August 29, 1991. After a bench trial, judgment was entered in favor of plaintiffs, with the Court allocating 80% fault to the clinic and 20% fault to the grandmother. The clinic appealed on the grounds of improper application of an evidentiary rule by the trial court:

[W]here there are witnesses of equal credibility and direct contradiction occurs on a fact question, the positive or affirmative testimony will be given preponderance over that which is negative. Id. at 1180-1181.

Defendants argued the above-quoted evidentiary rule may only be applied when witnesses credibility is not at issue. The question in this case is the grandmother's version of the telephone conversation over the nurse's version of same. Arguably, the grandmother's credibility was always at issue, whereas the nurse's credibility was not issue, as she was not a defendant in these proceedings. The trial court found the grandmother's and the nurse's credibility to be equal. Third Circuit Court of Appeal found that calls are within the lower court's function and prerogative and will not be disturbed on appeal. Hence, the court's application of the foregoing evidentiary rule was proper.

- **Recovery of By-Stander Damages**

In Trahan v. McManus, 728 So.2d 1273 (La. 1999), plaintiffs were the parents of a decedent attempting to recover 2315.6 damages for mental anguish and emotional distress resulting from their son's injury and death. The two issues before the Louisiana Supreme Court were whether the claim fell within the medical malpractice act and whether "by-stander damages" (also known as Lejuene damages) are recoverable when the event at issue was an act of omission by a health care provider.

Plaintiffs' 36 year old son was involved in a one-vehicle accident and was subsequently taken to a hospital emergency room where he was met by his mother. After reading the wrong hospital chart, the emergency room physician discharged Mr. Trahan, believing he was not seriously injured and simply needed bed rest. The patient Trahan's correct chart revealed entries suggestive of shock and internal bleeding. At home, Mr. Trahan complained of severe pain, and his physical condition deteriorated until he died at home several hours after discharge from the hospital.

The survival and wrongful death actions for Mr. Trahan's death were pursued by his wife, from whom he was separated at the time of death and their children. The plaintiffs in this case were his parents who sought damages under Louisiana Civil Code Article 2315.6 against the emergency room physician. The physician excepted on the grounds of no right of action, claiming plaintiffs were not within the category of persons entitled to emotional to stress under article 2315.6 since same were preempted by the surviving spouse and children of the decedent. The defendant also excepted on the grounds of no cause of action as article 2315 does not authorize recovery of by-stander damages for plaintiffs who did not witness an event which caused injury to the decedent. The trial court sustained both exceptions and dismissed the plaintiffs action. The Third Circuit Court of Appeals reviewed the lower court's decision and remanded the case for trial. The jury entered a verdict in favor of the

defendant, finding negligent conduct on behalf of the doctor but no causation between the doctor's action and the injury which would not have otherwise been incurred. Again on appeal, the court reversed the lower court's decision, noting that the injury-causing event was the doctor's discharge of the patient, which was viewed by the mother and its continuation upon the return home, which was witnessed by the father. Further, the Court of Appeal found the claim by the parents did not fall

within the medical malpractice act, as there was no patient physician relationship. On writ of certiorari, the Louisiana Supreme Court held:

The fact that damages recoverable under article 2315.6 are limited to mental anguish damages and to specifically required facts and circumstances does not serve to remove article 2315.6 claims from the applicability of the Medical Malpractice Act, as long as the mental anguish arises from the injury to or death of a patient caused by the negligence of a qualified health care provider. Id. at 1277.

The Louisiana Supreme court reiterated tort damage for medical malpractice falls under article 2315, et seq., and it is not the quality of the claimant, but the context within which the claim arises through medical care and treatment provided to a patient. The medical malpractice act does not create a cause of action for negligent medical care as same is created under article 2315, et seq. The Medical Malpractice Act only provides the procedural mechanism for the presentation of such claims. The Louisiana Supreme Court in this case states:

The requirements of Article 2315.6, when read together, suggest a need for temporal proximity between the tortious event, the victim's observable harm and the plaintiff's mental distress arising from and an awareness of the harm caused by the event. Id. at 1279.

In the case at hand, the negligent omission, which may be a concurrent cause of death, was not an injury causing event "in which the claimant was contemporaneously aware that the event had caused harm to the direct victim." 728 So.2d 1273, 1280. The discharge of a patient is not a traumatic event that can cause severe, contemporaneous mental anguish to an observer even though the ultimate consequence of the discharge is tragic. The awareness of the harm caused by the witnessed event is a critical factor for recovery under article 2315.6.

- **Trial Court Procedure**

In Smith v. Elmwood Medical Center, 720 So.2d 1222 (La. 5th Cir. 1998), defendant filed a motion for summary judgment after plaintiffs failed to answer discovery seeking the identity of expert witnesses to be presented by plaintiffs at the time of trial to establish standard of care and a violation of the standard of care on the part of the defendant. The medical review panel opinion rendered before suit was filed was in favor of the defendant. Elmwood Medical Center filed a Motion for Summary Judgment on the grounds plaintiff had no expert testimony to prove the standard of care or violation of same, and the identified medical review panelists' opinions were sufficient to defeat plaintiffs' claim under LSA-R.S. 9:2794, or, in the alternative, a motion to compel answers to interrogatories. Prior to the hearing on this motion, plaintiff answered interrogatories, identified an expert witness, and provided a curriculum vitae of the plaintiff's expert witness and a brief statement (non sworn) of the expert's opinions regarding the defendant's conduct in this matter.

At the time of the hearing of this case, defendants argued no countervailing affidavits were produced by plaintiff and accordingly summary judgment should be entered. At the close of argument, plaintiff's counsel offered to obtain a sworn affidavit of the plaintiff's expert witness and provide

same to the court. After that the trial judge stated "Okay. I'll get back with you all. I will review the matter." 720 So.2d 1222,1223. Six days later the trial court signed a judgment granting summary judgment in favor of defendants dismissing plaintiff's complaint.

On appeal, after reviewing the foregoing, the Fifth Circuit Court of Appeal stated it is within the broad discretion of the trial court to hold the case open for the production of additional evidence. Once the record is left open for evidence, the trial court "abuses his discretion in rendering judgment a few days later without notice to the parties of his intent to do so." 720 So.2d 122, 1224. Accordingly, the case was reversed and remanded to the trial court for trial.

In Perricone v. East Jefferson General Hospital, 721 So.2d 48 (La. 5th Cir. 1998), plaintiff presented to East Jefferson Hospital complaining of shortness of breath. She subsequently underwent cardiovascular surgery and while in recovery from the surgery, fell fracturing her right hip. Defendant physicians filed a motion for summary judgment on the grounds plaintiff had no expert witness to establish the standard of care or that the defendants deviated from same. The trial court sustained the motion for summary judgment, which was affirmed by the Court of Appeal. In an effort to defeat defendant's motion, plaintiff relied upon the department procedure manual for nursing safety standards and fall prevention, claiming an issue of fact as to whether the same was adhered

to in the instant case. Rejecting this argument, the Fifth Circuit Court of Appeal stated:

While this document reflects the standard of care to be applied by nurses, plaintiff fails to present any evidence as to what was required of the doctors in assessing and implementing a fall care plan. Id. at 52.

Lastly, the court rejected plaintiff's request for additional time within which to find an expert witness in absence of cutoff dates. The court noted the case was two and one-half years old, which provided ample opportunity for plaintiff locate and present an expert witness.

- **Hospital Premises Liability**

Lopez v. State, Louisiana Health Care Authority, 721 So.2d 518 (La. 3rd Cir. 1998). In this case, plaintiff had admitted himself to the Duke Detoxification Unit at University Medical Center for Chemical Dependency. While standing in the hallway to be escorted to a smoking area, an automatic door being opened by a nurse struck the plaintiff. Plaintiff alleged premises liability, and in the alternative, medical malpractice. The court dismissed the malpractice action and reviewed the premise liability. The court set forth the burden to be shown by plaintiff as:

(1) the thing causing damage was in the custody of the defendant; (2) the thing contained a defect that created an unreasonable risk of harm to the plaintiff; and (3) the defective condition caused plaintiff's injuries. Id. at 523.

The case focused on the defectiveness of the door with plaintiff's argument that the size and location of the glass vision panel did not permit full view of the hallway outside of the detox unit before the nurse activated the automatic opener. Finding a door is in inanimate and inflexible object, fixed to a

wall and not capable of expanding, the court was confused by plaintiff's assertion that he was not standing in the direct path of the door. In finding plaintiff's position preposterous, the court stated:

The only implication that can be presented in this statement and the only inference that we can draw from it is that Mr. Lopez is asserting that the door reached out of its boundaries and struck him. We do not wish to attribute such anthropomorphic qualities to this door or to any door.

Id. at 525.

Accordingly, the court of appeal affirmed the trial court's dismissal of plaintiff's action.

- **Withdrawal of Life-Support**

Causey v. St. Francis Medical Center, 719 So.2d 1072 (2nd Cir. 1998). The decision to discontinue life support procedures on a comatose patient whose family objected to the discontinuation, is an issue that falls under the medical malpractice act, and the matter must be submitted to a medical review panel before suit may be filed. After the family refused to grant permission to withdraw life support, the physician turned to the hospital's Morals and Ethics Board which agreed with the withdrawal. The Morals and Ethics Board is covered under the Medical Malpractice Act as it is a board of the hospital.

- **Hospital/Nursing Standard of Care**

Hunter v. Bossier Medical Center, 718 So.2d 636 (La. 2nd Cir. 1998). In this case, the Court sets forth the proper standard to review a hospital in a medical malpractice action involving its nursing staff. The court stated:

A hospital is bound to exercise the requisite standard of care toward a patient that the particular patient's condition may require and to protect the patient from external circumstances peculiarly within the hospital's control. A determination of whether a hospital has breached those duties depends upon the facts and circumstances of each particular case. Id. at 640.

See Smith v. State, 523 So.2d 815 (La. 1988). Here plaintiff was a post- operative back surgery patient being walked with the assistance of two nurses aides. The patient became dizzy and leaned against one of the nurse aides who allowed the patient to slide to the floor in a gentle manner. Judgment was entered in favor of defendants.

Brown v. Southern Baptist Hospital, 715 So.2d 423 (La. 4th Cir. 1998). In this case, a jury returned a verdict in favor of plaintiff and against the hospital finding that the nursing care was substandard when a patient received Bunnell's irrigation solution for an infected finger causing the finder to burn. The Bunnell solution was improperly confected by the pharmacist and the patient voiced complaints of a burning pain after surgical debridment. Plaintiff testified he repeatedly told the nurse of the burning sensation on his hand and requested that the nurse check the hand, which was not done. The nurses testified they responded to Mr. Brown's complaints; however, this was unsatisfactory to plaintiff's expert who testified that the Bunnell solution should be soothing and not

cause a burning sensation. The burning sensation post-operatively was unusual and the fact that plaintiff failed to receive relief from Demerol and Percocet should have alerted the attending nurses to inform the physician.

King v. State DHH, 728 So.2d 1027 (La. 2nd Cir. 1999). On May 26, 1987 King was admitted into LSUMC Shreveport for cardiac work-up secondary to chest pains. Ms. King was advised of the need for quadruple bypass and, against medical advice discharged herself. Ms. King, an insulin dependent diabetic was readmitted into LSUMC on May 30th 1987, where she underwent successful quadruple coronary arterial bypass. After an uneventful recovery, Ms. King was discharged to home in Winnsboro, Louisiana.

After discharge, Ms. King developed a sternum surgical wound infection which was attended to by physicians on an outpatient basis. When she developed a temperature of 100 she telephoned the medical center and spoke to a nurse. The nurse reviewed the culture report for Ms. King and advised Ms. King to return to LSUMC that day for follow up examination and evaluation. Refusing to travel from Winnsboro to Shreveport, Mrs. King requested a prescription of antibiotics. The nurse refused and again admonished Ms. King to return to LSUMC that day for follow up evaluation and examination. After Ms. King again refused the nurse's request, the nurse advised Ms. King to contact her local physician.

After significant convalescence, the surgical wound healed but Ms. King suffered from shortness of breath and shoulder pain allegedly due to the surgical wound infection. After the medical review panel's opinion was rendered in favor of all health care providers, plaintiff presented a suit in district court which led to a defense verdict dismissing plaintiff's complaint.

The issue on appeal surrounded the standard of care to be practiced by the nurse to whom Ms. King spoke to on June 26, 1987. Plaintiff complained that physicians should not be allowed to offer expert testimony on the standard of care of nurses. The Second Circuit stated:

Physicians frequently testify about nursing standards because nurses who perform medical services are subject to the same standards of care and liability as are physicians. Id. at 1030.

Relying upon Cangelosi v. Lady of the Lake Regional Medical Center, 564 So.2d 654 (La. 1989) the court correctly points out:

A nurse who practices her profession in a particular specialty owes to her patients the duty possessing the degree of knowledge or skill ordinarily possessed by members of her profession actively practicing in such, a specialty under similar circumstances. It is the nurses duty to exercise the degree of skill ordinarily employed, under similar circumstances, by member of the nursing profession in good standing who practice their profession in the same specialty and to use reasonable care and diligence, along with his/her best judgment, in the application of his/her skill to the case. Nurses who perform medical services are subject to the same standards of care and liability as are physicians.

Id. at 1030.

The defense presented expert testimony indicating the nurse's standard of care required: (1) Instruction to Ms. King to return to LSUMC; or (2) To seek alternative medical attention elsewhere. The plaintiff's contention, which was rejected by the trial court, was that the standard required the nurse to (1) Inform Ms. King of the "urgency" of situation; (2) Advise Ms. King Ms. King to see a physician within 24 hours; (3) Determine if a physician, hospital or emergency room was locally available to Ms. King and provide for transportation; (4) Obtained an agreement that Ms. King would get medical treatment within 24 hours; (5) Document the conversation in the medical record and (6) Follow up on Ms. King's status after 24 hours had passed when LSUMC Shreveport had not been contacted by another physician or emergency room regarding Ms. King.

The trial court accepted the defendant's experts over the plaintiff's and affirmed the trial court's defense verdict.

Landry v. Clement, 711 So.2d 829 (La. 3rd Cir. 1998). Violation of hospital policies and procedures may serve as a basis for finding negligent conduct by the nursing staff of a hospital. This OB case focused on the interpretation of the fetal heart monitor and reporting of same to the attending doctor. The policy of the hospital was that a competency test was to be administered to all OB nurses after fetal heart monitor training sessions. The evidence at trial showed none of the OB nurses ever received any fetal heart monitor training or testing.

- **Nursing Board Jurisdiction**

Hemphill v. Louisiana State Bd. Of Nursing, 713 So.2d 1265.

The R.N. State Nursing Board does not have statutory authority to discipline student nurses have not applied for or already obtained a license. In reversing and nullifying the board's final order denying a student nurse approval to enter or progress to the next clinical level, the First Circuit Court of Appeal held:

[U]nder the plain language of § 929(D) of Part I of the Nurses Act, the disciplining of a student nurse by the Board when that student has not applied for licensure and/or has not already obtained a license is outside the scope of the authority granted to it by the legislature. Id. at 1268.

Under the plain dictates of the Nurses Act, only licensed nurses may be disciplined by the State Board. Note that this case may be legislatively overruled.

- **Potpourri**
    - **A signed consent form is presumed to be valid and effective. Hezeau v. Pendleton Methodist Memorial Hospital, 715 So.2d 756 (La. 4th Cir. 1998).**
    - **Venue against the health care provider is proper in the parish where the wrongful conduct occurs, not where the physician may have been located at the point in time when he should have been physically present in another parish to treat a patient.**

Richmond v. Dow, 712 So.2d 149 (La. 4th Cir. 1998).

- **The trial court is given great discretion on the acceptance of an expert witness. The refusal of the court to accept a plastic surgeon in the field of general surgery will not be disturbed on**

appeal.

Stanley v. Corcoran, 712 So.2d 1063 (La. 5th Cir. 1998).

- **A cause of action for patient dumping under EMTALA 42 USC 1395 (dd) and LSA-R.S. 40:2113 et seq. is not covered by the medical malpractice act and therefore need not be presented to pre-litigation screening panel (medical review panel) prior to suit being filed in a court of law. In so holding, the court found that issues under EMTALA are not medically related but is rooted in economics.**

Spradlin v. Acadia-St. Landry Medical Foundation 711 So.2d 699 (La. 3rd Cir. 1998).

- **The patient's Compensation Fund is statutorily required to forward all malpractice complaints it receives from the Commissioner of Insurance to the clerk of the Louisiana Supreme Court within 15 days of receipt. Plaintiff sought and obtained a Writ of Mandamus to compel the board to forward said complaints from the date that the original judgment was entered by the trial court.**

Sanders v. Wooldridge, 729 So. 715 (La. 1st Cir. 1999).

- **In upholding the trial court's decision in favor of the plaintiffs for a shoulder dystocia injury to their child, the court stated "the use of fundal pressure and/or a request to the mother to push during delivery, when the condition of shoulder dystocia is present, deviated from the acceptable standard of care." 725 So.2d 539, 543. Drawing upon its case Skorliach v. East Jefferson General Hospital, 478 So.2d 916 (La. 5th Cir. 1985), the Fifth Circuit held, "A physician owes a duty to a father and mother not to negligently injure the child during the birth process." 725 So.2d 539, 544.**

Young v. LAMMICO, 725 So.2d 539 (La. 5th Cir. 1998)

- **Plaintiff's counsel filed a request for medical review panel within one year of the complained of event. However, in the complaint, the wrong date was set forth as to when the offending event occurred. More than a year after the event in question, plaintiff's counsel amended the original complaint and the hospital filed an exception of prescription which was denied by the trial court. The trial court and the Fifth Circuit Court of appeal relied upon Louisiana Civil Code of Procedure Article 1153 found adequate and timely notice to the named defendants of the event in question and the amending petition related back to the original filing of the complaint for medical review panel proceedings. Accordingly, the court affirmed the denial of the exception of prescription.**

In Re: Medical Review Panel of David Wempren, 726 So.2d 477 (La. 5th Cir. 1999).

h. The court held under LSA-R.S. 40:1299. 47, the Patient's Compensation Fund improperly dismissed the medical review panel proceedings and the court issued a writ of mandamus to re-open plaintiff's claim before the medical review panel proceedings. The 90 day letter notice forwarded by the Patient's Compensation Fund in this case occurred before the expiration of two years from the time of the initial filing within which to secure the attorney chairman. The 90 day grace period can only begin to run after the expiration of two years from the date of request for the medical malpractice action.

Bossier Medical Center v. Prudhomme, 718 So.2d 627 (La. 2nd Cir. 1998)

- **After the jury awarded past medical expenses to plaintiff with no corresponding amount for general damages, the plaintiff appealed to the Fourth Circuit Court of Appeal. Realizing the general rule where the trier of fact awards medical expenses but no general damages, the court refused to alter the jury determination finding a mixture of factual and medical issues in the record led the jury to conclude no objective injuries were sustained by plaintiff.**

Gauthreaux v. Frank, 718 So.2d 985 (La. 4th Cir. 1998).