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CURRENT ISSUES IN NURSING LIABILITY

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

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 law retains the present definition of a "community health care clinic" as a nonprofit organization qualified or eligible for qualification as 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.

House Bill No. 286 amended and reenacted R.S. 37:921and 929(4) and enacts R.S. 37:913(17) and 918(17). The law authorizes the Louisiana state Board of Nursing to regulate student nurses in their clinical phase of nursing education. The law does not require the licensure of student nurses during the clinical phase of their education by the board; however, it does subject them to disciplinary action. The board may deny, revoke, suspend, probate, limit, or

restrict any license to practice as a registered nurse or an advanced practice registered nurse, impose fines, and assess costs, or otherwise discipline a licensee and the board may limit, restrict, delay, or deny a student nurse from entering or continuing the clinical phase of nursing education upon proof that the individual licensee or student nurse.

House Bill No. 700 amended and reenacted R.S. 13:3714. It states copies of charts and records of various health care providers are admissible as a certified or attested copies under the following circumstances: (1) when it is signed by the administrator or the medical records librarian of the hospital in question stating it is a certified copy of the chart or record, or (2) when a copy of a bill for services rendered, medical narrative, chart, or record of any other state health care provider, as defined by R.S. 40:1299.39(A)(1) and any other health care provider as defined in R.S. 40:1299.41(A)(1), certified or attested to by the state health care provider or the health care provider, is offered in evidence in any court of competent jurisdiction, it shall be received in evidence by such court as prima facie proof of its contents, subject to cross-examination.

SENATE BILL NO. 597 provides that the screening, procurement, processing, distribution, transfusion, or medical use of human blood and blood components of any kind and the transplantation or medical use of any human organ, human tissue, or approved animal tissue by physicians, dentists, hospitals, hospital blood banks, and nonprofit community blood banks is declared to be, for all purposes whatsoever, the rendition of a medical service

by each participating therein, and not a sale. Thus, strict liability and warranties are not be applicable to the aforementioned who provide these medical services. The aforementioned provision is procedural and applies to all alleged causes of action or other acts, omission, or neglect without regard to the date when the alleged cause of action or other act, omission, or neglect occurred.

Bill No. 597 also enacted La. R.S. 9:5628.1.

La. R.S. 9:5628.1.

A. No action for damages against any healthcare provider as defined in the above section, whether based upon negligence, products liability, strict liability, tort, breach of contract, or otherwise, arising out of the use of blood or tissue as defined in this Section shall be brought unless filed in a court of competent jurisdiction within one year from the date of the alleged cause of action or other act, omission, or neglect, or within one year from the date that the alleged cause of action or other act, omission, or neglect is discovered or should have been discovered; however, except as provided in Subsection B, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the act, omission, or neglect.

B. The provisions of this Section are remedial and apply to all causes of action without regard to the date when the alleged cause of action or other act, omission, or neglect occurred. However, with respect to any cause of action or other act, omission, or neglect occurring prior to July 1, 1997, actions against

any healthcare provider as defined in this Section, must, in all events, be filed in a forum of competent jurisdiction on or before July 1, 2000. The three year period of limitation provided in Subsection A of this Section is a preemptive period within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, shall not be renounced, interrupted, or suspended.

C. Notwithstanding any other law to the contrary, in all actions brought in this state against any healthcare provider as defined in this Section, whether based on strict liability, products liability, tort, breach of contract or otherwise arising out of the use of blood or tissue as defined in this Section, the prescriptive and preemptive periods shall be governed exclusively by this Section.

D. The provisions of this Section shall apply to all persons whether or not infirm or under disability of any kind and including minors and interdicts.

E. The preemptive period provided in Subsection A of this Section shall not apply in cases of intentional fraud or willful concealment.

F. As used in this Section:

(1) "Healthcare provider" includes those individuals and entities provided for in R.S. 9:2797, Civil Code Article 2322.1, R.S. 40:1299.39 and R.S. 40:1299.41 whether or not enrolled with the Patient's Compensation Fund.

(2) "The use of blood or tissue" means the screening, procurement, processing, distribution, transfusion, or any medical use of human blood, blood product and blood components of any kind and the transplantation

or medical use of any human organ, human or approved animal tissue, tissue products or tissue components by any healthcare provider.

B. Professional Negligence Claims - Recent Case Law Review

●Coverage Under Medical Malpractice Act

Patin v. The Administrators of the Tulane Educational Fund, 770 So.2d 816 (La. 4th Cir. 2000).

In August of 1998, Donald Patin was hospitalized at Tulane Medical Center where he underwent cardiac catherization, received a blood transfusion and subsequently became HIV positive. The unit of blood supplied by Tulane Medical Center came from Touro Infirmary's blood bank. Mr. Patin filed suit on January 30, 1998 and Touro filed an exception of prematurity contending the plaintiff's claim was controlled by the Medical Malpractice Act and, therefore, must be submitted to a medical review panel as Touro was a qualified health care provider at all times pertinent hereto.

As with all limiting laws, the Medical Malpractice Act is strictly construed against coverage. In this instance, the Court held the transfer of blood from Touro Infirmary to Tulane did not fall within the malpractice act because there was no health care provider patient relationship between Touro Infirmary and Plaintiff. The Court rejected Touro's argument which asserted the plaintiff's claim fell within the Malpractice Act of the State of Louisiana as it had an implicit contract with Mr. Patin because Tulane sought blood from Touro on behalf of Mr. Patin. In rejecting Touro's argument, the Court stated:

> "No medical judgment is involved with fulfilling a call for a certain product. The only judgment involved in the transaction between Touro and Tulane is that of the marketplace, i.e. supply and

> demand. In this case Touro performed the function of a distributor and did nothing that required any medical expertise vis a vis Mr. Patin. Thus, there was no 'health care' provided to Mr. Patin by Touro"Id. at 819

George vs. Our Lady of Lourdes Regional Medical Center, Inc., 774 So.2d 350 (La. App. 3rd Cir. 2000).

Plaintiff fell down the steps of the mobile unit after donating blood. Plaintiff filed a complaint with the Louisiana Patient's Compensation Fund under the Louisiana Medical Malpractice Act alleging negligence on behalf of Our Lady of Lourdes Regional Medical Center. In filing an exception of prematurity, the hospital argued the claim fell within the Medical Malpractice Act. The 3rd Circuit Court of Appeal held the plaintiff's claim did not fall within the medical malpractice act stated:

> To constitute malpractice health care or professional services must be rendered to a patient. *Citations omitted*. Ms. George's sole remedy against Medical Center is based on the general law of negligence and not on the special tort of malpractice. George 774 So.2d at 356.

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.

- **EMTALA - Preemption**

Battle v. Memorial Hospital at Gulfport, 228 F.3d 544 (U.S. 5th Cir 2000)

Daniel Battle was born on September 8, 1993 healthy and normal. On December 22, 1994, he developed a fever and sores on his tongue. Ms. Battle took Daniel to his pediatrician, Dr. Reeves, who diagnosed an ear infection and tonsillitis and prescribed a course of antibiotics. Daniel's condition did not improve and shortly before midnight on December 24, 1994, Ms. Battle called and left a message with Dr. Reeves's answering service because Daniel's jaws were snapping shut. Ms. Battle then called 911 because Daniel's face began to twitch and his eyes rolled back. When Dr. Reeves called back, the paramedics had arrived and they informed him that Daniel had seizures, fever and that one hand and his face were twitching. Daniel was taken to Memorial Hospital and seen in the emergency room by Dr. Graves and Dr. Sheffield. Dr. Sheffield

performed a lumbar puncture, which Dr. Graves interpreted as normal. After x-rays and some blood work, Daniel was diagnosed with febrile seizures, pneumonia and an ear infection and was discharged with a new set of antibiotics.

In the afternoon of December 25, Ms. Battle called Dr. Reeves again and informed him that Daniel was continuing to have seizures. Dr. Reeves instructed her to take Daniel back to the Memorial Hospital emergency room where Ms. Battle put "self-pay" on the emergency room paper work. Upon arrival to the emergency room, Daniel was seen by Dr. Aust who diagnosed him with "seizure disorder" and pneumonia and administered Dilantin for the seizures. When Ms. Battle took Daniel home with a prescription for additional Dilantin, Dr. Aust instructed her to "not bring that child right back in here because Dilantin takes time to work." After the Dilantin wore off, Daniel's seizures returned and continued on and off throughout the day on December 26. That afternoon, Mrs. Battle called Dr. Reeves again. Dr. Reeves instructed her to take Daniel to Memorial Hospital and have him admitted, which she did. Drs. Aust and Reeves ordered a CT scan, without contrast, which was read as negative. They also ordered an EEG, which was not read until seven days later. When read, it was grossly abnormal.

Daniel's condition continued to deteriorate. At 5:00 p.m. on December 27, Dr. Reeves's partner, Dr. Akin, saw Daniel and she diagnosed viral encephalitis, possibly the rare and dangerous herpes simplex encephalitis

("HSE"), and initiated treatment with Acyclovir, a drug that can halt the progression of HSE in some patients. She then arranged for a helicopter to transport Daniel to Tulane Medical Center where he could receive care from an infectious disease specialist. When Daniel arrived at Tulane around midnight of December 27, health care personnel immediately did a lumbar puncture which was grossly abnormal. They also performed a CT scan, with and without contrast, and an MRI. All the tests revealed abnormal results consistent with HSE.

A brain biopsy was performed and Daniel's spinal fluid, obtained from the lumbar puncture on December 27, 1994, was tested at Tulane as well as being sent to the Whitley laboratory at the University of Alabama, which specializes in HSE research. Tulane's test was negative for HSE. On January 19, 1995, Dr. Fred Lakeman in the Whitley lab obtained a positive result on the PCR test, indicating that Daniel had HSE. The plaintiff filed medical malpractice claims against Dr. Reeves, Dr. Aust, Dr. Aust's practice group, Emergency Care Specialists of Mississippi, Ltd. and Memorial Hospital on October 1, 1996, in Mississippi Circuit Court. After Plaintiffs amended their complaint to allege an EMTALA claim against Memorial Hospital, Defendants removed the case to federal court on May 1, 1997. After extensive discovery, the case was set for trial on September 14, 1998.

After the close of plaintiff’s case in chief, the magistrate judge dismissed Memorial Hospital from the EMTALA claims finding no evidence was presented

of disparate treatment or failure to stabilize the patient's condition. The 5th Circuit Court of Appeal vacated the dismissal of the EMTALA claims stating it is for the fact finder to decide if plaintiff failed to show inappropriate medical screening, failure to stabilize an unknown medical condition.

Defendant argued emergency department nursing care standards are used by nurses who have no decision authority in hospital admission. The Court however held that Defendants' explanations for Memorial Hospital's failure to follow its own published standards, while perhaps persuasive to a jury, require credibility determinations; thus the matter was returned to the district court.

The 5th Circuit Court also remanded to the district court the issue of stabilization under EMTALA. Defined by the 5th Circuit, stabilization is "treatment that medical experts agree would prevent the threatening a severe consequence of " the patient's emergency medical condition while in transit. See Burditt v. United States Department of Health, 943 F.2d 1362, 1369 (5th Cir. 1991). In the emergency room record was a physician's note that the patient suffered from a seizure disorder. Plaintiff's expert testimony defined a seizure disorder as an emergency medical condition which could deteriorate rapidly, and in fact in this case did deteriorate rapidly. Releasing the patient from the emergency room when the physicians knew the patient was suffering from seizures could be deemed a failure to stabilize under EMTALA.

Spradlin v. Acadia-St. Landry Medical Foundation, 758 So.2d 116 (La. 2000).

This case involves a claim against a private hospital for survival and wrongful death damages. The issue before the Court is whether an EMTALA claim falls under the Medical Malpractice Act necessitating a pre-litigation review by a medical review panel.

On August 24, 1995 patient presented to the emergency room of defendant hospital with complaints of vomiting, upper back pain, fever and diarrhea. The emergency room physicians diagnosed the patient with right upper lobe pneumonia and provisionally diagnosed right upper lobe cancer. After discussing the diagnosis with the patient, the doctor recommended transfer to a public hospital. The plaintiffs contend the transfer was suggested only after it was learned there was no medical insurance to cover the stay at defendant's hospital. The patient was transferred and succumbed to cardiac arrest the following day. The autopsy report stated the cause of death as pseudomonas pneumonitis. A claim was filed in district court and the hospital filed an exception of prematurity. The hospital's exception asserted the matter must be submitted to a medical review panel before being filed in district court, because when a plaintiff joins a medical malpractice claim with alternative theories of liability, the entirety of the case is subject to the medical review panel requirement. The Court of Appeal initially agreed with the district court's overruling of the exception. However, on rehearing, the Court of Appeal

reversed in part carving out that while malpractice claims must be presented to the medical review panel dumping claims under EMTALA do not. The issue was presented to the Supreme Court which held EMTALA claims must also be submitted for review to a medical review panel.

Affirming the appellate court's decision, the Louisiana Supreme Court explained although the courts have construed EMTALA as creating a federal cause of action separate and distinct from, and not duplicative of, state malpractice cause of action, medical malpractice claims and "dumping" claims often overlap. Id. at 21.

The Court further explained since EMTALA only preempts state law to the extent that state law "directly conflicts" with federal law, the only issue is whether imposing a mandatory pre-suit medical review panel requirement "directly conflicts" with EMTALA.

A state law may be preempted because of a direct or actual conflict with federal law in one of two ways. First, there is preemption if it is impossible to comply with both state and federal law. If dual compliance is not physically impossible there is no actual conflict. Second, state law "actually conflicts" with federal law "where state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Id. at 122.

Plaintiffs in this matter, demanded damages under EMTALA based on defendant's alleged breach of its duty to properly stabilize or to appropriately

transfer Mrs. Spradlin; if plaintiffs prove a violation of the requirements of EMTALA (which does not distinguish between intentional and unintentional conduct), they will be entitled to recover the appropriate damages.

The facts recited in plaintiffs' petition do not state a claim under EMTALA based on failure to perform a medical screening examination (or based on disparate treatment in that examination, as opposed to pay patients); therefore, whether there was any negligence in the diagnosis and treatment by the emergency room doctor prior to the decision to transfer is a matter to be addressed in the separate medical malpractice action.

Plaintiffs also alleged in this action that conduct by defendant's employees fell below the professional standard of care and constituted medical malpractice. The Court held this claim must be submitted first to a medical review panel before plaintiffs can file the claim in district court. It recognized that requiring separate suits based on related claims growing out of the same transaction or occurrence appears to be judicially inefficient and may produce inconsistent results; however, the court in the EMTALA action (which must be filed within two years) may consider whether it is appropriate under the particular facts and circumstances to grant a motion to stay that action, while urging expeditious action in the medical review panel proceeding. Thus plaintiffs were entitled to recover damages on both claims, whether in one or two trials, despite the fact that the law requires exhaustion of an administrative remedy in one action that is not applicable to the other.

- **Liability of Patient's Compensation Fund**

Ceasar v. Barry, 772 So.2d 331 (La. App. 3rd Cir. 2000)

This case is an out shoot of the bankruptcy liquidation of Physicians National Risk Retention Group. After being placed in receivership, plaintiffs and Physicians National Risk Retention Group entered into the settlement agreement for the underlying $100,000.00. The settlement was approved by the bankruptcy court. The district court approved the settlement and liability was triggered under LSA-R.S. 40:1299.44. The insurer being in liquidation however, plaintiff only received the pro rata distribution of the insurer's assets which was estimated to be approximately 30% (i.e. $30,000.00). The fund perfected this appeal arguing the liability was not triggered insofar as plaintiff's did not actually receive $100,000. Relying on the 4th Circuit Court of Appeals opinion in Morgan vs. United Medical Corporation of New Orleans, 697 So.2d 307 (La. 4th Cir. 1997), the 3rd Circuit stated:

> [P]laintiff should not be penalized by the bankruptcy of the insurer of a negligent health care provider and hold that the continuing settlement obligation to pay $100,000, rather than the actual payment of $100,000, is sufficient to trigger the statutory admission of liability under LSA R.S. 1299.44(C)(5). **Ceasar**,772 So.2d at 35.

The mere agreement by the insurer to pay $100,000 regardless of its receipt by the patient is efficient to trigger statutory liability. The Court found that the plaintiff should not bear their burden of establishing liability against the Patient's Compensation Fund because the underlying carrier is bankrupt.

Perkins v. Coastal Emergency Medical Services, 2001 La. App. 3rd Cir. Lexis 160.

In the instant medical malpractice action, the victim had experienced severe abdominal pain upon presentation at the emergency room at the hospital with vomiting and diarrhea lasting for the previous four days. The physician diagnosed gastritis and gave the patient a GI cocktail and pain medication, and discharged her. Four days later the patient was admitted to University Medical Center in Lafayette where she underwent abdominal surgery and died 10 days later. The plaintiff subsequently brought this wrongful death and survival action.

Plaintiffs received the underlying $100,000 statutory maximum triggering liability against the fund, and moved for summary judgment for the balance of $400,000 from the Patient's Compensation Fund. Summary judgment was granted by the trial court and the Patient's Compensation Fund perfected this appeal. The Court of Appeal held the malpractice victim is clearly entitled to the statutory limit of $500,000, summary judgment is appropriate to "eliminate the need for unnecessary litigation and promote judicial economy."

In opposition to the plaintiff's motion for summary judgment, the Fund submitted an affidavit from the physician (whose liability was upon the payment of $100,000). In the affidavit, the physician recanted his admission of liability and pointed a finger of liability at University Medical Center. By attempting to create an existence of genuine issues of material facts, the Patient's Compensation Fund attempted to resurrect the issue of liability. Rejecting the attending physician's affidavit, the Court stated:

> "The PCF cannot create an issue of material fact by introducing the affidavit of the malpracting physician recanting his admission of liability and substituting for that admission a scenario removing any causative relationship between his fault and the harm suffered."

The Court granted the plaintiff' s Motion for Summary Judgment noting plaintiff had proved damages in excess of $500,000 for the death of a wife of seventeen years and the PCF had failed to establish the existence of a genuine issue of material fact.

Judalet v. Kusalavage, 762 So.2d 1128 (La. App. 3rd Cir. 2000)

This case involves a premature rupture of a mother's amniotic sac resulting in premature birth of a child and the child's acquisition of a bacterial infection with permanent complications Dr. Kusalavage tendered $100,000 in settlement under LSA R.S. 40:1299. 41 et seq. The plaintiff moved for summary judgment for the balance of the $500.000 cap against the Patient's Compensation Fund. In opposition to the plaintiff's motion for summary

judgment, the Patient' s Compensation Fund argued through expert testimony the fetus was not born prematurely. The trial court rendered a judgment in favor of plaintiff holding that the fetus prematurity was a component part of the doctor's admission of liability.

The PCF then contended Dr. Kusalavage admitted only to the artificial rupturing of the membranes, not to the permanent infirmities resulting from her premature birth. Calling the PCF's argument "feeble," the 3rd Circuit confirmed the district court's summary judgment in favor of plaintiff stating it was extremely improbable that a physician would pay $100,000 merely for the premature birth of a fetus absent any implications. The Court also pointed out that treating physicians of the infant testified harm had resulted from the premature birth and extensive medical problems flowing therefrom included respiratory failure, Streptococcus Sepsis, intra ventricular hemorrhages, seizure disorder, ventriculus shunt surgeries, brain damage, global development delays, and life long physical and cognitive disabilities.

The Court instructed once a malpractice victim settles with a health care provider or its insurer for $ 100,000, the liability of the health care provider has been admitted or established. Settlement for a health care provider's maximum liability of $ 100,000 activates liability of the PCF and precludes it from contesting the health care provider's liability. La.R.S. 40:1299.42(B)(3). Thus, liability is admitted and settlement terminates the issue of liability in relation to the PCF as payment by one health care provider of the maximum amount of his

liability statutorily establishes that the plaintiff is a victim of that health care provider's malpractice. Once payment by one health care provider has triggered the statutory admission of liability, the Fund cannot contest that admission. The only issue between the victim and the Fund thereafter is the amount of damages sustained by the victim as a result of the admitted malpractice. The Court here found there were no genuine issues of material facts on issues of causation and damages flowing from the admitted malpractice.

- **Loss of Chance**

LeBlanc v. Barry, 2001 La. App. 3rd Cir. Lexis 383

In this case, husband brought suit against his wife's treating physician for failure to diagnose and treat her progressively worsening pulmonary fibrosis and kidney disease. The district court awarded damages for wrongful death and survival to plaintiff in the amount $500, 000 and past expenses in the amount of $519,719.35. The PCF appealed.

The Court held in order for a Plaintiff to satisfy his burden of proof in a malpractice action based on the negligence of a physician, the plaintiff must prove (1) the applicable standard of care, (2) the breach of that standard and (3) the substandard care caused and injury that the plaintiff otherwise would not have suffered. The Court explained that plaintiff need not show that the doctor's conduct was the only cause of harm, but must show by a preponderance of the evidence that she suffered injury because of the doctor's conduct. The test to determine the causal connection is whether the plaintiff proved through medical testimony that it is more probable than not that the injuries were caused by the substandard of care.

Here the patient suffered from persistent shortness of breath, fatigue, dry cough, weight loss, and diapensia on exertion. There were no notations in the attending physician's records ordering a blood test, chest x-ray, EKG or a referral to a pulmonary specialist or internist. Failing to refer the patient to

appropriate specialist hastened the patient's death according to the testimony provided by plaintiff. Plaintiff also provided expert physician testimony that an early diagnosis of fibrotic lung disease and an appropriate therapy would have enhanced the chance for survival and improvement of quality and quantity of life. Plaintiff's expert further testified if an early diagnosis had been made and appropriate treatment rendered, the decedent would have had a 90-100% chance of cure.

In the instant case, the 3rd Circuit Court of Appeal referred to the analysis of the Court in Smith v. State, Dep't. of Health and Hospitals, 676 So. 2d 543 (La. 1996), that in determining that the fact finder--judge or jury–should focus on the chance of survival lost on account of malpractice as a distinct compensable injury and to value the lost chance as a lump sum award based on all the evidence in the record, as is done for any other item of general damages. The Court then explained the starting point of this analysis is to recognize that the loss of a less-than-even chance of survival is a distinct injury compensable as general damages which cannot be calculated with mathematical certainty. Here, the Court found that fact finder made this subjective determination of the value the lost, and fixed the amount of damages to adequately compensate for the cognizable loss.

- **Prescription**

Hotard v. Banuchi, 2001 La. App. 5th Cir. Lexis 53

In the instant matter, plaintiff gave birth to a child on August 24, 1992. On August 29, 1992 the child died from streptococcus infection. Suit was not filed until August 25, 1995.

When a case is prescribed on its face, the burden of proof shifts to the patient to show that prescription has been interrupted, suspended or not run. The Louisiana Supreme Court pointed out that mere notice of a wrongful act will not suffice to commence running prescription in the absence of the damages. In this instance, the wrongful act occurred on the date of birth, August 24, 1992, but the resulting damage did not occur until August 29, 1992. Plaintiff argued to the district court that the malpractice was not discovered until August 25, 1994 when the pediatrician for the plaintiff's son opined that the death of her daughter was due to a misdiagnosis of the streptococcus infection.

Plaintiff argued the August 25, 1995 filing date was timely because it is within one year from the date of discovery of the act or oral admission of malpractice and less than three years from the date of the wrongful act and resulting damages, the death of the child. In rejecting plaintiff's argument, the Court noted the one year prescriptive period commences when the injured party discovers "or should have discovered the facts upon which the cause of action is based."

The Court went on to explain constructive knowledge sufficient for prescription to commence is more than mere apprehension that something was wrong. Prescription does not run against a person who is ignorant of pertinent facts, as long as their ignorance is not willful or unreasonable. On the other hand, if a plaintiff had knowledge of facts strongly suggestive an untoward condition or result which may have resulted from improper care and treatment by health care providers and the health care providers who have not misled or covered up the information on the patient, then the facts and cause of action are reasonably knowable to the plaintiff and the plaintiff must now take action within one year. A plaintiff's failure to act in such circumstances is unreasonable. As testified upon discharge from the hospital, plaintiff knew something was not right with her child, called the defendant's office, got an appointment and was told if anything developed prior t the appointment, to return to the hospital emergency room with the child. The child was not brought to the emergency room and died prior to the office visit to the pediatrician's office.

Plaintiff also had additional notice as she had possession of the autopsy findings including the cause of death. Furthermore, plaintiffs had retained the services of an attorney to investigate another potential claim with regard to this mater. Plaintiff's counsel possessed the hospital records regarding the delivery of the female child; accordingly, the plaintiffs had a reasonable amount of facts

upon which to incite their curiosity and attention to pursue a claim for more than a year prior to filing the present claim.

Guitreau v. Kucharchuk, 763 So.575 (La. 2000).

In this matter, the Court held when the ninety-day period of suspension after the decision of the medical review panel is completed, plaintiffs in medical malpractice actions are entitled to the period of time, under LSA-R.S. 9:5628, that remains unused at the time the request for a medical review panel is filed. Once a medical malpractice claim is submitted to the medical review panel, the prescriptive period is temporarily discontinued. Prescription then commences to run again ninety days after the plaintiff has received notice of the panel's decision. Thus, when the ninety day period expires, the period of suspension terminates and prescription commences to run again; once prescription begins to run again, counting begins at the point at which the suspension period originally began.

Collum v. E.A. Conway Medical Center, 763 So.2d 808 (La. App. 2nd Cir 2000).

On January 29, 1986, plaintiff underwent a hysterectomy without complication. On August 19, 1993 because of urinary incontinence the plaintiff had surgery to repair her rectum and her vagina and also underwent bladder suspension. The Plaintiff was without complication until August 1997 when an

examination revealed that a stitch was left in her bladder during the 1993 operation. The stitch was removed on February 19, 1998; on May 11, 1998 plaintiff instituted this legal action. The claim was prescribed on its face and the Court granted an exception of prescription.

On appeal, the plaintiff argued her claim fell under the third category of *contra non valentem* because her ignorance of a potential cause of action was in some way "induced" by the defendants when they allegedly neglected to inform her of their actions. The Court rejected plaintiff's argument citing the Louisiana Supreme Court has specifically limited application of this third category to instances where a physician's conduct rose "to the level of concealment, misrepresentation, fraud or ill practices."

Plaintiff also argued the three year prescriptive period should be interrupted because the alleged malpractice falls under the "continuing tort" doctrine. The Court of Appeal rejected plaintiff's argument in citing that prescription runs on a continuing tort from the "cessation of the wrongful conduct that causes of damages where the cause of injury is a continuous one given rise to the successive damages," Collum So.2d at 815 In Crump v. Sabine River Authority, 737 So.2d 720 (La. 1999). The Court clarified stating a continual tort is occasioned by unlawful acts, not "the continuation of the ill effects of an original, wrongful act." Id at 728. In this instance, the Court found that plaintiff was merely suffering the continuation ill effects of the original act same is not a continuing tort.

Ginn v. Woman's Hospital Foundation, Inc., 770 So.2d 428 (LA. 2000)

This is a Hepatitis C case following a blood transfusion in February of 1976. The blood transfusion occurred prior to the amendment to the Medical Malpractice Act which specifically included defects in blood which occurred on August 5, 1976. Therefore, at the time the plaintiff's injury occurred, she acquired a cause of action in strict tort liability under Civil Code Article 2315, which is a vested property right protected by the guarantee of due process. Therefore, the Court held legislation enacted afer the acquisition of such a vested property right cannot be retroactively applied so as to divest plaintiff of her cause of action in this matter.

Boutte v. Jefferson Parish Hospital Service District No. 1, 759 So.2d 45 (La. 2000.

This case involves blood transfusions received the plaintiff at defendant hospital in December 1981 and January 1982. Fourteen years later plaintiff was diagnosed with hepatitis C virus. Within a year of diagnosis, plaintiff filed suit against the hospital; the hospital filed an exception of prescription relying on La. R.S. 9:5628.

Plaintiff argued that the malpractice prescriptive statute LSA-R.S. 9:5628 was not applicable to his claim because his claim was based on strict liability. The Court in this matter ruled a claim in the nature of the medical malpractice act regardless of the underlying legal theory (here strict liability) used to support

the claim is governed by the prescriptive period for Medical malpractice claims set out in La. R.S. 9:5628.

Plaintiff also challenged the constitutionality of La. R.S. 9:5628 and/or the Medical Malpractice Act. Although Plaintiff raised this argument (and others regarding the unconstitutionality of the statutes) in their memorandum in opposition to the exception of prescription filed in the trial court and again in assignments of error in the court of appeal; they did not plead the unconstitutionality of the statutes with specificity in any pleading in the trial court, nor did they serve the Attorney General as required by law so that the State's interests could be represented. Therefore, the Court declined to address these claims.

Halle v. Our Lady of the Lake Hospital, Inc., 2000 La. App. 1st Cir. Lexis 3577

This is a hepatitis C infection case from a blood transfusion in 1978 at Our Lady of the Lake Hospital. Plaintiff initiated suit in March, 1995. The trial court relied upon the case of Boutte v. Jefferson Parish Hospital Service District No. 1, 759 So.2d 45 (La. 2000) the Court held any claim for defective blood falls within the Louisiana Medical Malpractice Act and therefore, the medical malpractice prescriptive statute of LSA-R.S. 9:5628. The Court went on to state:

> "Moreover, giving the existence of a 3 year peremptory statutory period, the, the contra non valentum exception is inapplicable.

> The instant causes of action, both in negligence and strict liability are therefore subject to the peremptory statute of a period of three years from the date of the last act, omission or neglect. Id. at 5.

Liner v. Daughters of Charity of St. Vincent DePaul, Inc., 753 So.2d 336 (La. App. 4th Cir. 2000)

In this instant mater, plaintiff's Hepatitis C did not manifest until eighteen years after the alleged incident. The Court held the claim had prescribed although plaintiff had filed it within one year from the date she was diagnosed with Hepatitis C.

In granting the defendant's exception of prescription, the Court cited Hebert v. Doctors Memorial Hospital, 486 So.2d 717 (La. 1986), wherein, the Supreme Court explained that the three year prescriptive period is a "separate and independent feature" of the statute and was intended to establish a "maximum prescriptive period for medical malpractice claims." Hebert, 486 So. 2d at 723-24. The Supreme Court has also recognized that "by enacting La. R.S. 9:5628, the legislature has in a limited manner legislatively overruled the fourth exception of the judicially created doctrine of *contra non valentem* as it applies to actions for medical malpractice filed more than three years from the date of the act, omission or neglect.

The plaintiff also contended La. R.S. 9:5628 was unconstitutional, because it unfairly distinguished between blood cases brought against private hospitals, and similar cases brought against public hospitals. The Court refused

to address this issue however, because it had not been properly raised as nothing in the original petition or any other pleading had previously mentioned it and Louisiana courts have long recognized that the unconstitutionality of a statute must be specially pleaded.

Williams v. Jackson Parish Hospital, 768 So.2d 866 (La. App. 2nd Cir. 2000)

In this matter, plaintiff appealed a district court ruling denying her constitutional challenge of La. R.S. 9:5628. Plaintiff contended La. R.S.9:5628 violated LSA-Const. art. 1, §§ 3, 22, on the basis that its application deprived her of due process of law and access to the courts, and unfairly discriminated against her on the basis of physical condition. The Court pointed out that the Louisiana Supreme Court has previously considered and upheld the constitutionality of LSA-R.S. 9:5628 when challenged on these grounds in Crier v. Whitecloud, on rehearing, 496 So. 2d 305 (La. 1986); furthermore, in Whitnell v. Silverman, 686 So. 2d 23, (La. 11996), the Court declined to overrule its earlier decision in Crier. Compelled to follow the dictates of the supreme court, the Court held that the trial court properly dismissed the plaintiff's contentions of unconstitutionality on the above-stated grounds.

The 4th Circuit also held the district court erred in considering the plaintiff's challenge of the constitutionality of the statute based on its application to Hepatitis C, a disease with a latency period of greater than three years, because plaintiff had not properly filed pleadings challenging the constitutionality of the statute on said grounds. The Court then expounded as to the jurisprudential requirements to properly challenge a statute's constitutionality: (1) the plea of unconstitutionality must first be made in the trial court; (2) the plea of unconstitutionality must be specifically pleaded; and (3) the

grounds outlining the basis of unconstitutionality must be particularized. Id. at 868.

- **Proximate Cause**

Williams v. Dauterive Hospital, 771 So.2d 763 (La. 3rd Cir. 2000)

In Williams a patient was taken to the hospital after he fell off the back of pick up truck and hit his head on the concrete pavement. The patient arrived in the emergency room at Dauterive Hospital at 3:16 a.m. At 5:00 p.m. that day, skull x-rays and C.T. scans revealed a brain injury for which the plaintiff needed specialized care. The patient was transferred to Lafayette General Medical Center in the early morning hours of the following day and died that afternoon.

The jury returned a verdict in favor of defendants, dismissing the plaintiff's case. The jury found the patient was 100% at fault for causing his severe injury and subsequent death having found the attending emergency room physician's actions did not cause or contribute to the patient's death. In reviewing the trial record, the Court concluded the jury committed manifest error in failing to find the emergency room physician did not breach the standard of care. After further review, however, the Court also held that the emergency room physician's breach of the standard of care was not the proximate cause or result of the patient's injury and subsequent death, thereby affirming the jury's assessment of no liability on the part of the emergency room physician. The appellate court concluded the ER physician's failure to timely intervene would

not have effected the management or the outcome of the patient's situation as no operation was going to save the patient's life because his fate was sealed the moment his head hit the concrete in the Wal-Mart parking lot.

- **Potpourri**

Adams v. Home Health Care of Louisiana, 2000 La. Lexis 3382

The supreme court deemed a summary judgment motion is improper to determine the factual issue of causation between the claimed negligence and the claimed injury, here an amputation of patient's foot. Defendant admitted negligence but defended on the basis of expert evidence that Plaintiff's foot would have to have been amputated irrespective of its negligence. Defendant also stated plaintiff's nurse experts were not qualified to testify regarding the causal relationship between a claimed negligence and loss of a foot. The Court, however, held that the admitted negligence clearly caused some damages even if it was merely the hastening of the amputation.

Bussell v. West Calcasieu Cameron Hospital, 774 So.2d 83 (La. 2000)

Plaintiff through his employer was referred to West Calcasieu Cameron Hospital to be tested for carpal tunnel syndrome. The nerve sensation screening test involved touching the plaintiff's arm with a safety pin. According to plaintiff, his skin was pierced with the safety pin during the nerve sensation test.

Subsequently he filed a claim for potential HIV exposure and emotional anxiety resulting from same vis a vis HIV. Rejecting the plaintiff's claim, the Louisiana Supreme Court in affirming the district court found plaintiff's claim lacked an essential element in his claim for HIV risk exposure as no other person prior to plaintiff had been penetrated beneath the skin with that needle; thus, there was no factual support basis of plaintiff being exposed to the pathogen.