

Professional Medical Negligence - Louisiana, a Primer

**by: Franklin D. Beahm
Beahm & Green
New Orleans, LA**

**Louisiana Judicial Council/
National Bar Association Seminar Program
June 30, 2003
Negril, Jamaica**

Professional Medical Negligence - Louisiana, a Primer

by: Franklin D. Beahm
Beahm & Green
New Orleans, LA

Created in 1975, the Louisiana Medical Malpractice Act (LSA-R.S. 40:1299.41 et seq.) created, for qualified healthcare providers, the following:

- A. Limitation on recovery of damages;
- B. Provision for future medical expenses;
- C. Pre-litigation Medical Review Panel;
- D. The Patient's Compensation Fund; and
- E. Limitation of the addendum demand.

All aspects of the Medical Malpractice Act have been declared constitutional by Louisiana Supreme Court and will be addressed in each subsection which follows.

SECTION A. LIMITATION ON RECOVERY OF DAMAGES

LSA-R.S. 40:1299.42 provides the total amount which may be recovered for injuries to or death of a patient, with the exception of future medical expenses, shall not exceed \$500,000 plus interest and cost. A qualified healthcare provider shall not be liable in excess of \$100,000 plus interest "because of injuries to or death of any one patient." The Louisiana Supreme Court in a case of Williams v. Kushner 549 So.2d 294 (La. 1989) held the \$400,000 "cap" recovery against the Patient's Compensation Fund is constitutional thus reducing the verdict of \$1,929,000 to \$500,000. This was based upon the district courts decision after a Sibley hearing¹. The district court concluded there was a medical malpractice insurance crisis and in the absence of remedial legislation (LSA-R.S. 40:1299.42) the state's legitimate interest of guaranteeing continued health care services to the citizens would be jeopardized. The appellate court did not find manifest error in the trial court's decision nor any violation of the individual dignity clause of the Louisiana Constitution. Because of the procedural presentation of the Williams case, supra, the court left for another day the question of the constitutionality of limiting the healthcare providers exposure to the maximum of \$100,000. In the matter of Butler v. Flint Goodrich Hospital 607 So.2d 517 (La. 1992) the Louisiana Supreme Court considered and found the overall recovery of \$500,000 to plaintiff per instance of malpractice was constitutional. In so ruling the Court stated the

¹ Sibley v. Board of Supervisors of Louisiana, 477 So.2d 1094 (La. 1985) The Supreme Court, in view of the malpractice act, remanded to the district court to conduct a hearing to balance the state's interest against the discriminatory restriction on malpractice awards to determine if the legislation was "arbitrary, capricious and unreasonable."

offset of benefit for the \$500,000 is the:

(1) greater likelihood that the offending physician or other healthcare provider has malpractice insurance; (2) greater assurance of collection from a solvent fund; and (3) payment of all medical care and related benefits. *Id* at 521.

Compensation and full medical care for those grossly injured by medical malpractice are legitimate social interests, and is furthered by the malpractice legislation. The discrimination in the act against those with excessive injuries (above \$500,000) is accompanied by a quid pro quo: a reasonable alternative remedy has been provided. "Since the legislature's statutory solution to the medical malpractice problem furthers the state purpose of compensating victims, it is not constitutionally." *Id* at 521. Separate independent acts of medical negligence which results in one injury is limited to one cap recovery of \$500,000. See Turner v. Massiah 656 So.2d 636 (La. 1995) when the Supreme Court stated:

If the damage, or injury, could have been divided into two parts, one part caused by one defendant and the other part caused by the other there would have been, in effect, two injuries. In that case, there having been two torts and two injuries, the question of two caps might have been present. In this case there were two torts but only one injury. *Id* at 640.

In this matter, two physicians, independent to one another failed to timely diagnosis breast cancer. Finding the failure to diagnosis breast cancer was an indivisible injury, there is only one tort and therefore only one \$500,000 recovery by the plaintiff.

SECTION B. FUTURE MEDICAL CARE AND RELATED BENEFITS

Because of the disparate treatment between seriously injured patients who could not be fully compensated under the \$500,000 limit versus patients not as seriously injured whose recovery would be sufficiently covered by the \$500,000 cap, the legislature amended the Medical Malpractice Act and added provisions for future medical care and related benefits to an injured patient.

Under LSA-R.S. 40:1299.43 A (1) cases which proceed to trial before a jury must include a special interrogatory to the jury asking whether the patient/plaintiff is in need of future medical care and related benefits. Absent such a special interrogatory to the jury, no award may be given for future medical. See, Merritt v. Karcioğlu 668 So.2d 469 (La. 4th Cir. 1996) wherein the court found an affirmative duty on a part of the trial court to issue a special interrogatory to the jury for future medical care. Absent same, it is the plaintiff's obligation to object in order to correct this error and preserve the right to plaintiff for future medical benefits. If the case is tried to the bench, the court has an obligation to determine any need of future medical care and related benefits. If the amount of the overall award plus future medical is less than \$500,000 then the payment

for future medical benefits is limited to the amount determined by the fact finder be a jury or judge. If the amount of award exceeds \$500,000 cap plus future medical expenses, future medical care and benefits is unlimited. The cookbook method to collect same is set forth in the statute.

SECTION C. PRE-LITIGATION MEDICAL REVIEW PANELS

The first case to challenge the constitutional scheme of the Medical Malpractice Act involved the medical review panel process. In the case of Everett v. Goldman 359 So.2d 1256 (La. 1978) the Louisiana Supreme Court stated:

A second advantage to a health care provider who has qualified under the act is that his patient must provoke a medical review panel and receive an opinion from it before he can file suit in a court of law. Although this requirement can be waived by the agreement of both parties, it is assumed that most malpractice cases against healthcare providers will be filtered through such a panel. Id at 1263.

Finding the medical review panel is designed to “weed out” frivolous claims the court relied upon multi-jurisdictional case law and numerous law review articles in stating:

In requiring pre-suit medical review panel act is not unreasonable; it has no far reaching or especially adverse effect upon the malpractice victim’s or health care provider’s rights. While the savings in overall costs are yet to be proven we cannot say that this legislative effort will not further the accomplishment of what is surely a plausible goal... we hold that the medical review panel does not exceed constitutional limits. Id at 1267.

Interestingly, in a statement by the Supreme Court in its conclusion of Everett, supra, is found on page 1270 “Courts do not rule on the social wisdom of statutes, nor on their work ability and practice. Imperfections in legislation are not in themselves grounds for judicial intervention unless those imperfections result in denial of constitutional rights or infringement or paramount statutory rights.”

1. Request for Medical Review Panel

A. Must be filed with the Division of Administration

i. La. R.S. 40:1299.47A(2)(a).

ii. Jurisprudence

a. The patient initially filed her medical malpractice claim under the "public" malpractice act, La. R.S. 40:1299.39/[research/buttonTFLink? m=d83d7bee5db9230f39829ae5f715067a& xfercit](#)

[e=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b692%20So.%202d%et seq.](#) After notification from the agency that administered the act the physician was a qualified provider under the "private" malpractice act, La. R.S. 40:1299.41 [/research/buttonTFLink? m=d83d7bee5db9230f39829ae5f715067a& xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b692%20So.%202d%et seq.,](#) she waited 16 months before filing her claim with the correct agency. The physician filed a rule to dissolve the medical review panel in district court, contending the claim had prescribed. The court held the patient would be afforded the suspension of prescription under the public act, even though the physician was a qualified provider under the private act. The patient's claim under the public act was timely. The liberative prescriptive period was suspended pursuant to La. R.S. 40:1299.39A(2)(a) [/research/buttonTFLink? m=d83d7bee5db9230f39829ae5f715067a& xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b692%20So.%202d%](#) until 60 days after the patient received notice the provider was not qualified under the public act. At that point, she had eight months to toll prescription again by filing her claim under the correct act. Her claim under the private act, filed 16 months later, was untimely. Bordelon v. Kaplan, App. 3 Cir. 1997, 692 So.2d 581.

b. As La. R.S. 40:1299.47(A)(2)(a) provides a claim is deemed filed on the date it is received by the PCF, when a medical malpractice claim is sent either to the PCF or to the Division of Administration, prescription is suspended. Patty v. Christis Health Northern Louisiana, App. 2 Cir. 2001, 794 So.2d 124 as well as Holmes v. Lee, App. 2 Cir. 2001, 795 So.2d 1232.

iii. Time Deemed Filed - La. R.S. 40:1299.47A(2)(b)

iv. Waiver of Medical Review Panel

a. La. R.S. 40:1299.47B(1)(c)

b. Barraza v. Scheppege, App. 5 Cir. 1988, 525 So.2d 1187. Health care provider who fails to file exception of prematurity prior to filing answer waives right to review of malpractice claims by medical review panel.

B. Prematurity of Suit Prior to Medical Review Panel

i. La. R.S. 40:1299.47B(1)(a)(i)

ii. Jurisprudence - See Section C5G

2. Selection of the Medical Review Panel

- A. Attorney Chairman
 - i. Joint Selection - La. R.S. 40:1299.47C
 - ii. Strike List
 - a. La. R.S. 40:1299.47C
 - b. Kimmons v. Sherman, App. 1 Cir. 2000, 771 So.2d 665. By requesting list of attorneys' names within 90 days of receiving notice from PCF that plaintiffs were required to appoint attorney chairman for medical review panel, plaintiffs in medical malpractice action prevented dismissal of claim for failure to appoint attorney chairman.

- A. Health Care Providers
 - i. Plaintiff's Nominee - La. R.S. 40:1299.47C(3)(a)
 - ii. Defendant's Nominee - La. R.S. 40:1299.47C(3)(b)
 - iii. Third Nominee - La. R.S. 40:1299.47C(3)(d)
 - iv. Multiple Plaintiffs or Defendants - La. R.S. 40:1299.47C(3)(f)(iii)
 - v. Failure of Plaintiff or Defendant to Nominate
 - A. Warning by Attorney Chairman - La. R.S. 40:1299.47C(3)(c)
 - B. Nomination by Attorney Chairman - La. R.S. 40:1299.47C(3)(d)
 - vi. Failure of Two Healthcare Provider Panelists to Nominate Third Member - La. R.S. 40:1299.47C(3)(e)
 - vii. Qualifications of Physician Nominees - La. R.S. 40:1299.47C(3)(f)(i)

- viii. Excusing Panel Members from Service - La. R.S. 40:1299.47C(3)(f)(iv)
- ix. Who can be a panelist based on Defendants
 - a. La. R.S. 40:1299.47C(3)(f)(v)
 - b. Jurisprudence
 - a. In re Medical Review Panel for Claim of White, App. 4 Cir. 1995, 655 So.2d 803. Where there are multiple defendants who include hospital, patients may name physician from one of specialties of defendant physicians, but are not required to do so.
 - b. Francis v. Mowad, App. 5 Cir. 1988, 523 So.2d 863 Plaintiffs alleged Defendant/Podiatrist was negligent in treating her for a foot condition and a medical review proceeding was instituted. Plaintiffs nominated an orthopedic surgeon as a member of the medical review panel. The Defendant objected to the orthopedic surgeon on the grounds orthopedic surgery is not within the same class and specialty of practice as podiatry. The Court of Appeal agreed with the trial judge's decision an orthopedic surgeon is not from the same class and specialty of practice as a podiatrist, as required by La. R.S. 40:1299.47(C)(3)(f)(v).

C. Conflict of Interest by Panel Member

- i. La. R.S. 40:1299.47C(7)
- ii. Jurisprudence
 - a. Whitt v. McBride, App. 3 Cir. 1995, 651 So.2d 427. Member of medical review panel does not have to be viewed as similar to judge so any potential bias, conflict of interest, or appearance of impropriety requires removal; panel is merely body of experts assembled to evaluate and render opinion on claim, and such opinion is not binding on litigants.
 - b. Landry v. Martinez, App. 3 Cir. 1982, 415 So.2d 965. Doctor could not sit as medical review panelist where one of his

partners had served as medical consultant to the medical malpractice claimant and would probably continue to do so.

3. Duties of The Members of the Medical Review Panel

A. Attorney Chairman

i. General Duties - La. R.S. 40:1299.47 C(1)(b)(2).

ii. Specific Duties

a. Advise Panel Members on Legal Issues - La. R.S. 40:1299.47D(5)

b. Send Copy of Panel Opinion to All Parties - La. R.S. 40:1299.47J

c. Oath of Office - La. R.S. 40:1299.47C(5)

A. Nominated Members

i. Oath of Office - La. R.S. 40:1299.47C(5)

ii. Determination of Fault

B. La. R.S. 40:1299.47G

C. Maxwell v. Soileau, App. 2 Cir. 1990, 561 So.2d 1378. The sole duty of the medical review panel is to express its expert opinion, no findings made by the panel as to damages, and the findings of the panel are not binding on the litigants.

iii. Possible Panel Opinions - La. R.S. 40:1299.47G

iv. Written Opinion - McCallister v. Zeichner, App. 3 Cir. 1995, 664 So.2d 848. Under statute, medical review panel must render opinion "with written reasons," and opinion is not complete without such reasons and panel has not fulfilled its statutory duty.

4. Life of Medical Review Panel

A. One Year From Appointment of Attorney Chairman - La. R.S. 40:1299.47B(1)(b)

B. 180 Days from Appointment of Final Panel Member - La. R.S. 40:1299.47G

- C. 90 Days After Notification of All Parties of Dissolution or after Court-Ordered Extension
 - i. La. R.S. 40:1299.47B(3)
 - ii. LeBlanc v. Lakeside Hospital, App. 5 Cir. 1999, 732 So.2d 576. Medical review panel automatically dissolves upon the expiration of any court-ordered extension.

- D. Extending the Life of the Medical Review Panel
 - i. La. R.S. 40:1299.47B(1)(b)
 - ii. In re Medical Review Panel ex rel. Chiasson, App. 5 Cir. 1999, 749 So.2d 796. Trial court acted within its discretion in determining that hospital did not show cause for extending life of medical review panel in medical malpractice action as no explanation for panel's delay in ruling was provided, and no hearing was requested.

- 5. Prescription Associated with Medical Review Panels
 - A. Interruption of Prescription During Panel Proceedings
 - i. Statutory Law - La. R.S. 40:1299.47A(2)(a)
 - ii. Jurisprudence
 - a. Guitreau v. Kucharchuk, 763 So.575 (La. 2000). 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, which 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.
 - b. Baum v. Nash, 97-233 (La. App. 3 Cir. 10/8/97); 702 So. 2d 765. Filing a claim for a medical review panel suspends prescription as to non-named solidary obligors "to the same extent that it is suspended for those named in the request by the panel."

- c. 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) 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.)
- A. Failure of Panel to Render a Decision and Prescription
 - i. 180 Day Rule - La. R.S. 40:1299.47 K
 - ii. Bankston v. Alexandria Neurosurgical Clinic, App. 3 Cir. 1991, 583 So.2d 1148 Medical review panel's failure to render formal opinion did not deprive district court and Court of Appeal of jurisdiction over medical malpractice claim, where panel had been dissolved without necessity of obtaining court order of dissolution upon its failure to issue written opinion within extension of time granted for rendering of opinion; once panel was dissolved, no procedural bar prevented patient from filing suit in district court, and it was incumbent upon patient to file suit to preserve her rights as dissolution of panel affected suspension of prescription with respect to defendants.
 - iii. One Year Rule Takes Precedence - Metrejean v. Long, App. 3 Cir. 1999, 732 So.2d 1240. Once 12-month period expires for medical review panel to render expert opinion, patient may file suit, even if the 180-day period for rendering opinion after selection of last panel member happens to extend beyond the one-year period.
- C. Panel Renders a Late Decision -180 Day Rule - La. R.S. 40:1299.47L
- D. Filing with Wrong State Agency - Bordelon v. Kaplan, App. 3 Cir. 1997, 692 So.2d 581. Filing of medical malpractice claim in the wrong or improper agency suspends, rather than interrupts, liberative prescriptive period, and at termination of period of suspension, prescription commences to run again.
- E. Prescription in Hepatitis C Cases

- i. 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 after 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.
 - ii. In Williams v. Jackson Parish Hospital, La. 2001, 798 So.2d 921, the Louisiana Supreme Court, apparently overruling their recent decision in Boutte, held pre-1982 claims in strict liability arising out of a defective blood transfusion are not traditional medical malpractice claims and, therefore, not governed by the Medical Malpractice Prescription Statute (La. R.S. 9:5628), but were governed by the General Tort Prescriptive Statute (La. C.C. Art. 3492.) .

- F. PCF's Right to Raise Prescription - If a qualified healthcare defendant pays less than \$100,000.00, the PCF may raise an exception of prescription, but the PCF cannot raise the issue of prescription if the defendant pays more than \$100,000.00. McGrath v. Scel Home Care, Inc., App. 5 Cir. 2002. See also, Miller v. Southern Baptist Hospital, La. 2001, 806 So.2d 10.

- G. Premature Suit DOES NOT Interrupt Prescription
 - i. The Louisiana Supreme Court in LeBreton v. Rabito, 97-C.C. - 2221 (La. 7/8/98) 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.

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 the statutes were in conflict, and in order to "harmonize" the law, held special rules (here the Medical Malpractice Act) will always outweigh the general rules otherwise the special legislative provisions will be canceled out by the application of general laws. In such a conflict, the Court goes on to point out the purpose behind suspension of liberative prescription, is to accord plaintiffs an equal playing field during the pendency of the Medical Review Panel Proceedings.

- ii. In Schulingcamp v. Ochsner Clinic, App. 5 Cir. 2002, the plaintiff filed suit, then entered a consent judgment dismissing one of the defendants without prejudice because the claim was premature, but keeping other defendants in the suit. A medical review panel was not filed against the dismissed defendant until 8 years later. The plaintiff argued the pending suit against the other defendants interrupted prescription against the dismissed defendant. Citing Lebreton v. Rabito for the proposition it was inappropriate to apply La. C.C. Art. 3463 (which interrupts prescription as long as the suit remained against the remaining obligors), the Court held the claim against the dismissed defendant was prescribed. The Court noted the later, more specific statute, the Medical Malpractice Act, applies and, because the plaintiff did not file the malpractice claim within one year, the claim was prescribed.
- iii. In Wesco v. Columbia Lakeland Medical Center, App. 4 Cir., 801 So.2d 1187, the plaintiff filed a premature suit and a Medical Review Panel Claim which was dismissed after two years for failure of the plaintiff to select an attorney chairman. The defendant then had the suit dismissed as premature. When the plaintiff filed a second PFC claim within one year of the dismissal of the suit, but not within one year of the first PCF claim, the defendant filed an Exception of Prescription. The Court held the premature suit did not suspend prescription and the plaintiff's claim was prescribed.

H. Wrongful Death Claim and Suspension of Prescription - Brown v. Our Lady of the Lake, App. 1 Cir., 803 So.2d 1135. A mother and son filed a Medical Review Panel Complaint alleging treatment the mother received was negligent, but the mother died during the pendency of the Medical Review Panel and the complaint was not amended to allege the mother's death. Within ninety days of the Panel Opinion, but more than one year after the mother's death, the son filed a wrongful death and survival action. The Court held the wrongful death claim was prescribed as it was not filed within one year of the death and the Medical Review Panel proceeding did not suspend prescription on the wrongful death claim because no notice of the death was given.

- 6. Submission of Evidence to Medical Review Panel
 - A. Written Evidence - La. R.S. 40:1299.47D(1)
 - B. Other Attachments to Submission of Evidence - La. R.S. 40:1299.47D(2)
 - C. Requirements of Claims for a Medical Review Panel - La. R.S. 40:1299.39 E(2)
- 7. Miscellaneous
 - X. Convening of Panel - La. R.S. 40:1299.47E
 - Y. Additional Information Requested by Panel - La. R.S. 40:1299.47F.
 - Z. Costs of the Medical Review Panel
 - i. Attorney Chairman - La. R.S. 40:1299.47I(1)(b)
 - ii. Physician Members - La. R.S. 40:1299.47I(1)(a)
 - iii. Who pays for the Panel
 - B. If the Defendant Wins - La. R.S. 40:1299.47I(2)(a)
 - C. If the Claimant Wins - La. R.S. 40:1299.47I(2)(b)
 - D. If There is a Material Issue of Fact - La. R.S. 40:1299.47I(3)
 - AA. Admission of Panel Opinion in Subsequent Lawsuit - La. R.S. 40:1299.47H
 - BB. Accrual of Legal Interest - La. R.S. 40:1299.47M

SECTION D. PATIENT'S COMPENSATION FUND

The Louisiana Patient's Compensation Fund is essentially a nonentity when it comes to its presence in a court of law. Under the first Prince Williams' case of Williams v. Kushner 449 So.2d 455 (La. 1984), the court found an action for amount of money in excess of the \$100,000 paid by the settling physician in a continuation action "against the health care provider." Consequently, the settling defendant is retained as a nominal

defendant through which the plaintiff's claim for in an amount in excess of \$100,000 to continue against the Patient's Compensation Fund. In so finding, the court in Williams, supra page 458, stated "Hence, the only party defendant contemplated by the medical malpractice act is the health care provider."

1. Liability of the Patient's Compensation Fund

a. Bankruptcy of Defendant's Insurance Company

Cesar 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 v. 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 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). Cesar, 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 the plaintiff should not bear their burden of establishing liability against the Patient's Compensation Fund because the underlying carrier is bankrupt.

b. PCF Cannot Create an Issue of Fact

Perkins v. Coastal Emergency Medical Services, 2001 La. App. 3rd Cir. Lexis 160. In the instant medical malpractice 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." The Court stated:

"The PCF cannot create an issue of material fact by introducing the affidavit of the malpracticing 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.

c. Settlement Terminates Issue of Liability as to the PCF

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 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 a physician would pay \$100,000 merely for the premature birth of a fetus absent any implications. The Court also pointed out 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 the plaintiff is a victim of the health care provider's malpractice. Once payment by one health care provider has triggered the statutory admission of liability, the Fund cannot contest the 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.

In Stuka v. Flemming 561 So.2d 1371 (La. 1990) and Graham v. Willis-Knighton Medical Center 699 So.2d 368, the Supreme Court found specifically the only issue to be determined once the healthcare provider has paid \$100,000 is the amount of damages sustained by the plaintiff "as a result of the admitted 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. We recognize that this literal interpretation of the statute affords less rights to the Fund when claims against multiple health care providers are settled than when such claims are tried. In the case of a trial the Fund has the opportunity for reduced exposure when more than one health care provider is determined to be liable. But in the case of a settlement with one health care provider for \$100,000 the Fund does not have this opportunity in the subsequent litigation with the victim. However, the Legislature chose in cases of settlement simply to declare the admission of liability by the \$100,000 payment of one health care provider and did not provide for the Fund's affirmative right to litigate liability on the part of any other named or unnamed health care providers. Id at 1374.

See, Bridges v. Southwest Louisiana Hospital Association 746 So.2d 731 (La. 3rd Cir. 1999). But see, Conner v. Stelly, 807 So.2d 817 (La. 2002) where the Louisiana Supreme Court completely ignored Stuka, supra in a per curiam opinion stated:

Although payment of \$100,000 in settlement establishes proof of liability for the malpractice and for damages of at least \$100,000 resulting from the malpractice, at the trial against the Fund, the plaintiff has the burden of proving that the admitted malpractice caused damages in excess of \$100,000. Graham v. Willis-Knighton Med. Ctr., 97-0188 (La. 9/9/97), 699 So.2d 365. Accordingly, that portion of the trial court's judgment prohibiting the PCF from arguing or presenting evidence before the jury that victim or third-party fault caused any of the damages in this case is reversed. *Id* at 827

The Court made no mention of Stuka, supra, not even a statement that Stuka case was now overruled. The plaintiff in Conner, supra, settled with one health care provider before trial and dismissed the other defendant and proceeded to trial against the PCF, just as was done in Stuka.

SECTION E. ADDENDUM CLAUSE

In the original act adopted in 1975, LSA-R.S. 40:1299.41(E) stated a specific dollar amount cannot be pled in the petition once a case advanced to suit. Instead, the prayer for relief shall be "for such damages as are reasonable in the premises." This was declared constitutional by Louisiana Supreme Court in Everett v. Goldman 359 So.2d 1256 (La. 1978). It is of little consequence in today's world in view of the amendment to Louisiana Code of Civil Procedure Article 893 which states no specific monetary amount shall be included in the allegations of the petition but that the prayer for relief shall be "for such damages as are reasonable in the premises."

SECTION F. BURDEN OF PROOF - LSA-R.S. 9:2794

§2794. Physicians, dentists, optometrists, and chiropractic physicians; malpractice; burden of proof; jury charge

A. In a malpractice action based on the negligence of a physician licensed under R.S. 37:1261 et seq., a dentist licensed under R.S. 37:751 et seq., an optometrist licensed under R.S. 37:1041 et seq., or a chiropractic physician licensed under R.S. 37:2801 et seq., the plaintiff shall have the burden of proving:

(1) The degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians, dentists, optometrists, or chiropractic physicians licensed to practice in the state of Louisiana and actively practicing in a similar community or locale and under similar circumstances; and where the defendant practices in a particular specialty and where the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved, then the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians, dentists, optometrists, or chiropractic physicians within the involved medical specialty.

(2) That the defendant either lacked this degree of knowledge or skill or failed to use reasonable care and diligence, along with his best judgment in the application of that skill.

(3) That as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred.

B. Any party to an action shall have the right to subpoena any physician, dentist, optometrist, or chiropractor for a deposition or testimony for trial, or both, to establish the degree of knowledge or skill possessed or degree of care ordinarily exercised as described in Subsection A of this Section without obtaining the consent of the physician, dentist, optometrist, or chiropractor who is going to be subpoenaed only if that physician, dentist, optometrist, or chiropractor has or possesses special knowledge or experience in the specific medical procedure or process that forms the basis of the action. The fee of the physician, dentist, optometrist, or chiropractor called for deposition or testimony, or both, under this Subsection shall be set by the court.

C. In medical malpractice actions the jury shall be instructed that the plaintiff has the burden of proving, by a preponderance of the evidence, the negligence of the physician, dentist, optometrist, or chiropractic physician. The jury shall be further instructed that injury alone does not raise a presumption of the physician's, dentist's, optometrist's, or chiropractic physician's negligence. The provisions of this Section shall not apply to situations where the doctrine of *res ipsa loquitur* is found by the court to be applicable.

1. Need for an Expert Witness

Fortenberry v. Berthier, 503 So.2d 596, 598 (La. App. 4th Cir. 1987)

“[P]laintiff could produce no expert testimony to support the malpractice suit in accordance with R.S. 9:2794.”

Pfiffner v. Correa, 643 So.2d 1228, 1234 (La. 1994)

“We hold that expert testimony is not always necessary in order for a plaintiff to meet his burden of proof in establishing a medical malpractice claim. Though in most cases, because of the complex medical and factual issues involved, a plaintiff will likely fail to sustain his burden of proving his claim under LSA-R.S. 9:2794's requirements without medical experts, there are instances in which the medical and factual issues are such that a lay jury can perceive negligence in the charged physician's conduct as well as any expert can, or in which the defendant/physician testifies as to the standard of care and there is objective evidence, including the testimony of the defendant/demonstrates a breach thereof. Even so, the plaintiff must also demonstrate by a preponderance of the evidence a causal nexus between the defendant's fault and the injury alleged.”

2. Res Ipsa Loquitur Doctrine

Cangelosi v. Our Lady of the Lake Regional Medical Center, 564 So.2d 654, 665 (La. 1990)

“In order to utilize the doctrine of res ipsa loquitur the plaintiff must establish a foundation of facts on which the doctrine may be applied. The injury must be of the type which does not ordinarily occur in the absence of negligence”.

“The plaintiff does not have to eliminate all other possible causes or inferences, but must present evidence which indicates at least a probability that the injury would not have occurred without negligence”.

“The facts established by plaintiff must also reasonably permit the jury to discount other possible causes and to conclude it was more likely than not that the defendant's negligence caused the injury. Again, the plaintiff does not have to eliminate completely all other possible causes, but should sufficiently exclude the inference of his own responsibility or the responsibility of others besides the defendant in causing the accident. The inference of negligence points to the defendant when the conduct of others is eliminated as a more probable cause. The plaintiff must show not only that an accident occurred or that the accident was caused by the negligence of someone, but also that the circumstances warrant an inference of defendant's negligence”.

“The plaintiff must also establish that the defendant’s negligence indicated by the evidence falls within the scope of his duty to the plaintiff. This is often, but not necessarily, proved by a showing that the defendant was in exclusive control of the injury-causing instrumentality”.

“Use of the doctrine of res ipsa loquitur in a negligence case, as in any case involving circumstantial evidence, does not relieve the plaintiff of the ultimate burden of proving by a preponderance of the evidence all of the elements necessary for recovery”.

SECTION G. LOUISIANA MEDICAL CONSENT LAW (LSA-R.S. 40:1299.50 ET SEQ.) AND INFORMED CONSENT (LA. R.S. 40:1299.40).

§§1299.53. Persons who may consent to surgical or medical treatment

A. In addition to such other persons as may be authorized and empowered, any one of the following persons in the following order of priority, if there is no person in a prior class who is reasonably available, willing, and competent to act, is authorized and empowered to consent, either orally or otherwise, to any surgical or medical treatment or procedures including autopsy not prohibited by law which may be suggested, recommended, prescribed, or directed by a duly licensed physician:

- (1) Any adult, for himself.
- (2) The judicially appointed tutor or curator of the patient, if one has been appointed.
- (3) An agent acting pursuant to a valid mandate, specifically authorizing the agent to make health care decisions.
- (4) The patient's spouse not judicially separated.
- (5) An adult child of the patient.
- (6) Any parent, whether adult or minor, for his minor child.
- (7) The patient's sibling.
- (8) The patient's other ascendants or descendants.
- (9) Any person temporarily standing in loco parentis, whether formally serving or not, for the minor under his care and any guardian for his ward.

B. If there is more than one person within the above named class in Paragraphs (A)(1) through (9), the consent for surgical or medical treatment shall be given by a majority of those members of the class available for consultation.

§§1299.54. Emergencies

A. In addition to any other instances in which a consent is excused or implied at law, a

consent to surgical or medical treatment or procedures suggested, recommended, prescribed, or directed by a duly licensed physician will be implied where an emergency exists. For the purposes hereof, an emergency is defined as a situation wherein: (1) in competent medical judgment, the proposed surgical or medical treatment or procedures are reasonably necessary; and (2) a person authorized to consent under Section 1299.53 is not readily available, and any delay in treatment could reasonably be expected to jeopardize the life or health of the person affected, or could reasonably result in disfigurement or impair faculties.

B. For purposes of this Section, an emergency is also defined as a situation wherein: (1) a person transported to a hospital from a licensed health care facility is not in a condition to give consent; (2) a person authorized to give consent under 1299.53 is not readily available; and (3) any delay would be injurious to the health and well being of such person.

Hondroulis v. Schuhmacher, 553 So.2d 398 (La. 1988)

Brought the disclosure panel informed consent forms

SECTION H. PRESCRIPTION - LSA-R.S. 9:5628

§5628. Actions for medical malpractice

A. No action for damages for injury or death against any physician, chiropractor, nurse, licensed midwife practitioner, dentist, psychologist, optometrist, hospital or nursing home duly licensed under the laws of this state, or community blood center or tissue bank as defined in R.S. 40:1299.41(A), whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.

B. 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.

C. The provisions of this Section shall apply to all healthcare providers listed herein or defined in R.S. 40:1299.41 regardless of whether the healthcare provider avails itself of the protections and provisions of R.S. 40:1299.41 et seq., by fulfilling the requirements necessary to qualify as listed in R.S. 40:1299.42 and 1299.44.

Crier v. Whitecloud, 496 So.2d 305 (La. 1986)

Suit filed more than three years after the implantation of a Harrington Rod was deemed prescribed under LSA - R.S. 9:5628. This was the decision even though the rod did not fail until after the passage of three years after it's placement. This was the court's decision on rehearing. After it's original opinion, the Court found against prescription "because the onset of injury marked the first point in time that the courts could take cognizance of plaintiff's claim... the commencement of prescription... from the initial act or omission was suspended until the injury actually occurred."

Campo v. Correa

Burden of Proof Regarding Prescription

In Campo v. Correa, 2001-2707 (La. 6/21/02), the Louisiana Supreme Court held a medical malpractice petition should not be found to be prescribed on its face if: it is brought within one year of the date of discovery; the facts alleged with particularity in the petition show the patient was unaware of malpractice prior to the alleged date of discovery; and the delay in filing suit was not due to willful, negligent, or unreasonable action of the patient. Therefore, as long as the plaintiff asserts the malpractice was not discovered until less than one year prior to filing the petition, the defendant retains the burden of showing the claim is prescribed.

Participating in Medical Review Panel of a Prescribed Action

In Tuazon v. Eisenhardt, 725 So.2d 553 (La. 5th Cir. 1998), 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 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.

Constructive Knowledge

In Harold v. Martinez, 715 So.2d 660 (La. 2nd Cir. 1998), the Court of Appeal indicated the only necessary ingredient to begin the running of prescription is "constructive knowledge." It is not required an attorney or another health care provider inform the possibility of a malpractice action before prescription begins to run.

Amending Date of Alleged Malpractice and Prescription

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

Contra Non Valentum

Collum v. E.A. Conway Medical Center, 763 So.2d 808 (La. App. 2nd Cir 2000). 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 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 plaintiff was merely suffering the continuation ill effects of the original act same is not a continuing tort.

SECTION I. SOLIDARITY OBLIGATION V. JOINT TORT FEASOR INTERRUPTION OF PRESCRIPTION DOCTORS V. HOSPITALS

SECTION J. MISCELLANEOUS

Professional vendor - Shortess v. Touro, 520 So.2d 389, 391 (La. 1988)

Selling blood to plaintiff placed strict liability in tort upon the hospital. “The responsibility of a professional vendor or distributor is the same as that of a manufacturer.”

Loss of chance - Hasting v. Baton Rouge General, 496 So.2d 713, 720 (La. 1986)

“It is not necessary to prove that a patient would have survived if proper treatment had been given but, only that there would have been a chance of survival. Defendants conduct must increase the risk of a patient’s harm to the extent of being a substantial factor in causing the result, but not be the only cause.”

Also, see Martin v. East Jefferson General Hospital, 582 So.2d 1272 (La. 1991)

Per se negligence -

Unsuccessful course of treatment - Magos v. Feerick, 690 So.2d 812, 817 (La. 3rd Cir. 1996)

“An unsuccessful course of treatment is not a per se indication of malpractice.”

Retained lap sponge - Johnston v. Southwest Louisiana Association, 693 So.2d 1195 (La. 3rd Cir. 1997)

[T]he surgeon had exclusive control of the sponge from the time he physically placed it inside his patient until he removed it,” and “the nurse’s count is a remedial measure that cannot relieve the surgeon of his non-delegable duty to remove the sponge in the first instance.”

Diagnostic error - Tillman v. Lawson, 417 So.2d 111, 114 (La. 3rd Cir. 1982)

“As to the diagnostic duties required of a dentist or a physician, an error of diagnosis is not malpractice per se. A physician or dentist is not obligated to always be correct in making a diagnosis. A diagnosis is an act of professional judgment and, in case of a misdiagnosis, malpractice exists

only if it results from a failure by a physician or dentist to exercise the standard or degree of care in diagnosing which would have been exercised by a member of his profession in good standing in his locality, under similar circumstances. Whether a physician was negligent in making a diagnosis must be determined in light of conditions existing and facts known at the time thereof, and not in the light of knowledge gained through subsequent developments.”