Can Defendants in a Medical Malpractice Claim With Separate and Distinct Duties Owed to Plaintiff be Joint Tortfeasors?

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

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What is the Effect of Abolishing Solidary Obligors in Tort under Louisiana Civil Code Civ. Code Art. 2324 and the Interruption or Suspension of Prescription in a Professional Negligence Case?

A. Plaintiff must File any Claim for Medical Malpractice Timely

La. R.S. 40:1299.47(A)(2)(a) provides, in pertinent part:

> The filing of the Request for a Review of a claim shall suspend the time within which suit must be instituted, in accordance with this part, until 90 days following notification, by certified mail, as provided in Subsection J of this Section, to the claimant or his attorney of the opinion by the medical review panel, in the case of those health care providers covered by this Part, or in the case of a health of a health care provider against whom a claim has been filed under the provisions of this Part, but who has not qualified under this Part, until 60 days following notification by certified mail to the claimant or his attorney by the board that the health care provider is not covered by this Part. **The filing of a request for review of a claim shall suspend the running of prescription against all joint and solidary obligors, and all joint tortfeasors,** including but not limited to health care providers, both qualified and not qualified, to the same extent that prescription is suspended against the party or parties that are the subject of the request for review. Filing a request for review of a malpractice claim as required by this Section with any agency or entity other than the division of administration shall not suspend or interrupt the

> running of prescription. All requests for review of a malpractice claim identifying additional health care providers shall also be filed with the division of administration. (emphasis added).

It is the plaintiff's obligation to timely file an action for medical malpractice before the Patient's Compensation Fund. La. R.S. 9:5628(A) governs the timeliness of actions against physicians in Louisiana. La. R.S. 9:5628(A) provides:

> 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. (emphasis added).

In Campo v. Correa, 2001-2707(La. 6/21/02), 828 So.2d 502, the Louisiana Supreme Court explained the burden of proof resulting from a plea of prescription:

> The plea of prescription must be specifically pleaded, and may not be supplied by the court. La. Code Civ. Pro. Ann. Art. 927(B). Ordinarily, the exceptor bears the burden of proof at the trial of the peremptory exception. Spott v. Otis Elevator Co., 92-C-2522 (La. 6/18/92), 601 So.2d 136. However, if prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show that the action has not prescribed. Williams v. Sewerage & Water Bd. of New Orleans, 92-C-1688(La. 1/19/03), 611 So.2d 1383, 1386.

Not only must plaintiffs plead sufficient facts to show they filed within one year from the date of the discovery or within three years of the alleged malpractice, but they must so prove the reason why their claim has not prescribed at the time of the hearing

on this exception, or the claim is prescribed. Under La. R.S. 40:1299.47(A)(2)(a), the filing of a Request for a Review of a claim with the Patient's Compensation Fund suspends the time within which suit must be instituted, but only among joint tortfeasors.

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B. Does the Filing of a Claim against a Physician serve to Interrupt or Suspend Prescription against a Hospital, a Nurse or another Physician of a Different Specialty?

Stated another way, what is the effect of abolishing solidary obligors in tort under Louisiana Civil Code Civ. Code Art. 2324 and the Interruption or Suspension of Prescription in a Professional Negligence Case? For the purposes of this discussion, the hypothetical facts are, a claim for medical malpractice was timely filed against a physician and more than three years after the incident at issue, plaintiff adds a nurse as a named defendant. Is the claim against the nurse prescribed? Did the timely filing against the doctor serve to suspend or interrupt prescription as to the nurse? **ARE THE DOCTOR AND THE NURSE "JOINT TORTFEASORS?"**

In 1996, The Louisiana Legislature amended Louisiana Civil Code Article 2324 and abolished solidary liability (and hence, obligations)for tortfeasors in non-intentional conduct cases-i.e. negligence cases such as medical malpractice.

Louisiana Civil Code Article 2324 provides, in part:

> B. If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be joint and divisible obligation.
>
> C. Interruption of prescription against one joint tortfeasor is effective against all joint tortfeasors.

The Supreme Court in Dumas v. State of Louisiana, 02-0563 (La. 10/15/02) 828 So.2d 530, while acknowledging that solidary liability has been abolished, held the language of Article 2324(B) is equally clear:

> It provides that in non-intentional cases, liability for damages caused by two or more persons shall be a joint and divisible obligation. Each joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of that other person. This provision abolishes solidarity among non-intentional tortfeasors, and makes each non-intentional tortfeasor liable only for his own share of the fault, which must be quantified pursuant to Article 2323. Id. at 537.

Therefore, the focus of this inquiry is whether or not defendants added to an ongoing claim of professional negligence subsequent to the time of prescription has lapsed are joint tortfeasors with the timely named defendants? To resolve this inquiry one must look to the Louisiana Civil Code dealing with obligations.

The tripartite classification of obligations involving multiple persons is provided in La. Civ. Code Art. 1786 through Art. 1788. La Civ. Code Art. 1786 provides:

> When an obligation binds more than one obligor to one obligee, or bonds one obligor to more than one obligee, or binds more than one obligor to more than one obligee, the obligation may be several, joint, or solidary.

La. Civ. Code Art. 1787 provides:

> When each of different obligors owes a separate performance to one obligee, the obligation is several for the obligors. When one obligor owes a separate performance to each of different obligees, the obligation is several for the obligees. A several obligation produces the same effects as a separate obligation owed to each obligee by an obligor or by each obligor to an obligee.

La. Civ. Code Art. 1788 provides:

> When different obligors owe together just one performance to one obligee, but neither is bound for the whole, the obligation is joint for the obligors. When one obligor owes just one performance intended for the common benefit of different obligees, neither of whom is entitled to the whole performance, the obligation is joint for the obligees.

Did the doctor and the nurse, as obligors, owe one performance to the patient now plaintiff? If the doctor and the nurse owed separate and distinct obligations to the patient then their duties and obligations to him are several. What are the duties each owed to the patient?

The obligations or legal duties of a physician to his/her patients, are set forth in LSA-R.S. Art. 37:1262 (1), which provides:

> The practice of medicine, whether allopathic or osteopathic, means the holding out of one's self to the public as being engaged in the business of, or the actual engagement in, the diagnosing, treating, curing, or relieving of any bodily or mental disease, condition, infirmity, deformity, defect, ailment, or injury in any human being, other than himself, whether by the use of any drug, instrument or force, whether physical or psychic, or of what other nature, or any other agency or means; or the examining, either gratuitously or for compensation, of any person or material from any person for such purpose whether such drug, instrument, force, or other agency or means is applied to or used by the patient or by another person; or the attending of a woman in childbirth without the aid of a licensed physician or midwife.

In contrast, the obligations of a nurse (hospitals through its employees) are set forth in LSA-R.S. Art. 37:913 (13) and (14):

> "Practice of nursing" means the performance, with or without compensation, by an individual licensed by the board as a registered nurse, of functions requiring specialized knowledge and skills derived from the biological, physical, and behavioral sciences. **The practice of nursing or registered nursing shall not be deemed to include acts of medical diagnosis or medical prescriptions of therapeutic or corrective nature.**
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> "Registered nursing" means the practice of the scope of nursing which is appropriate to the individual's educational level, knowledge, skills, and

> abilities, including...[i]mplementing nursing care through such services as case finding, health instruction, health counseling, providing care supportive to or restorative of life and well-being, and **executing health care regimens as prescribed by licensed physicians,** dentists, optometrists, or other authorized prescribers (emphasis added).

The above statutory authority clearly provides the practice of nursing does not allow or include acts of medical diagnosis or medical prescription. **Only physicians may diagnose, treat, and/or give prescriptions or medical regimes to be carried out by other health care providers, such as the nursing staff of a hospital.**

The different duties and responsibilities between physicians and nurses are discussed in Hinson, et al v. The Glen Oak Retirement System, 03-37550, 861 So 2d. 572 (La. App. 2nd Cir. 9/2/03). In Hinson, the plaintiffs alleged the diagnosis of their mother's colon cancer was delayed due to improper care by the nursing home staff. The trial court ruled in favor of the plaintiffs' claim for medical malpractice, but the Second Circuit reversed the verdict in favor of Glen Oaks Retirement System. The Second Circuit held that since the plaintiffs attempted to show the nursing staff improperly diagnosed their mother, they could not prevail. Diagnosis of the plaintiff's injury was not a duty of the nursing staff, and thus, any misdiagnosis was not a breach of the nursing standard of care. It is the physician's obligation to the patient to diagnose the plaintiffs' maladies, not the nursing staff's. The Second Circuit held:

> [P]revalent through the testimony of all of the expert witnesses in this case is the primary distinction between the roles of physician and nurse. The responsibility for diagnosis, including the decision to further investigate through lab work and other tests, is unmistakably that of the treating physician, not a nursing home or its nursing staff. On the other hand, it is the duty of the nurses involved in the daily care of nursing home residents to communicate details of the residents' conditions to their doctors, which is primarily done through entries and documentation in the residents' charts." Id. at 737-738.

It is the distinct obligation of a physician to diagnose the patient's condition and to order treatment for same. The nurse's obligation to the patient consists of charting and

informing the physician of the patient's condition, and implementing the physician's orders, which includes administering medications and preparing the patient for testing and lab work. Thus, the nurse's duties and obligations are separate and distinct from the physician's duties and obligations to the patient as a matter of law.

As a further example of the separate duties and obligations of doctors and nurses, it is well settled jurisprudence only a physician can testify as to the standard of care of another physician. A nurse cannot testify regarding the physician standard of care since they have completely different training requirements and duties as to patient care. In Taplin v. Lupin, et al., 97-1058 (La. App. 4th Cir. 10/1/97),700 So.2d 1160, the Fourth Circuit discussed this distinction. In Taplin, the plaintiff's mother went to the emergency room of St. Charles General Hospital. She was attended to and discharged by the doctor's associate, Dr. Arnold Lupin. Later, she went to another hospital, was admitted, and subsequently died. The plaintiff could not find a doctor or expert to testify the defendants breached the standard of care owed to plaintiff's mother, but instead chose to rely on the testimony of a registered nurse. In granting the writ and reversing the trial court's decision, the Fourth Circuit held that a registered nurse was not an expert when it came to the standard of care a doctor owed a patient and was not competent to opine as to whether the standard was breached or whether the breach caused the patient's injuries. The applicable standards of knowledge, skill and care are determined from testimony of expert witnesses who are members of the pertinent specialty and who are qualified to testify on the specific subject at issue. Id. *citing* Bradford v. O'Neill, 95-2449 (La. App. 4th Cir. 11/20/95), 88 So.2d 33, 35-36.

As the above authority dictates, when it comes to patient care, physicians and nurses (which means hospital too) have separate and distinct duties and obligations

toward patients. Therefore, physicians and nurses are not joint tortfeasors, as a matter of law.

C. Do Physicians from different Specialties Owe the Same Duty to a Patient and thus are Joint tortfeasors?

Physicians engage in various specialties within the practice of medicine. Each specialty requires its own degree of credentialing and lends itself to its own realm of expertise. Each medical specialty owes a separate duty to a patient. A cardiologist's duty is to care for and make decisions relative to the heart and its functions. A pulmonologist's duty is to care for and make decisions relative to the lungs and their function. It is for this reason that where an alleged act of negligence raises issues peculiar to the particular specialty involved, then only physicians in that specialty may offer evidence of the applicable standard of care. La. Rev. Stat. 9:2794 A(1); McDaniel v. Reed, 00-2529 (La. App. 4Cir. 10/3/01), 798 So.2d 1121, 1123. Therefore, an orthopedist, for example, cannot testify as to the standard of care of an internist**.** This is because each specialist has the requisite knowledge of that specialty, hence the consult of the orthopedist by the Internist. For the same reasons, do not both orthopedists and internists owe different duties to a patient?

D. Conclusion

As the obligations and duties of a physician and a nurse are distinct, there is no suspension of prescription as between them pursuant to La. R.S. 40:1299.47(A)(2)(a) and La. Code Civ. Art. 2324. Suspension of prescription can only occur between joint tortfeasors.

See, Sylvia Davis v. Lakeland Medical Center, L.L.C.
No reported opinion in the 4th Circuit.
No. 2005-C-1342, (La. App. 4th Cir. 2006).

Writ denied Davis v. Lakeland Medical Center, L.L.C., et al,
944 So. 2d 1277 (La. 2006).

Byron K. Perrilliat v. Meadowcrest Hospital,
No reported opinion in the 4th Circuit,
2006-C-0294 (La. 4th Cir. 2006).

Writ denied, Perrilliat v. Dr. Daniel Bouchette, et al,
936 So. 2d 207 (La. 2006).
