Improving the Louisiana Medical Malpractice Act
LSA-R.S. 40:1299.41 et seq.

Franklin D. Beahm
A. Rebecca Wilmore
Beahm & Green
New Orleans, La

Nakisha Knott
Gainsburgh, Benjamin, David, Meunier & Warshauer
New Orleans, La

Carey Wicker, III
Capitelli & Wicker
New Orleans, LA

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1. LSA-R.S.40:1299.47:

A. (1)(a) All malpractice claims against health care providers covered by this Part, other than claims validly agreed for submission to a lawfully binding arbitration procedure, shall be reviewed by a medical review panel established as hereinafter provided for in this Section. The filing of a request for review by a medical review panel as provided for in this Section shall not be reportable by any health care provider, the Louisiana Patient's Compensation Fund, or any other entity to the Louisiana State Board of Medical Examiners, to any licensing authority, committee, or board of any other state, or to any credentialing or similar agency, committee, or board of any clinic, hospital, health insurer, or managed care company.

(b) A request for review of a malpractice claim or malpractice complaint shall contain, at a minimum, all of the following:

(i) A request for the formation of a medical review panel.

(ii) The name of the patient.

(iii) The names of the claimants.

(iv) The names of defendant health care providers.

(v) The dates of the alleged malpractice.

(vi) A brief description of the alleged malpractice as to each named defendant health care provider.

(vii) A brief description of alleged injuries.

Often times, when questioned during the post-panel session, medical review panelists will advise the practitioner that certain areas of healthcare treatment were not examined/evaluated because they were "not before the panel". Typically, plaintiffs are not sophisticated experts, but the panelists, who are experts by the very nature of what they do, should be required to examine/evaluate the entire treatment provided to the patient, including, but not limited to the brief description of the alleged malpractice and/or injury.

Filing fee for panel; exceptions; expert affidavit or a pauper ruling from the court

Posting bond for panel costs when filing suit

Aggregate costs and filing fees to get through panel and into court

LSA-R.S. 40:1299.47 N - Expedited panels

District Court dismissal of a panel proceeding due to failure to comply with a discovery order

2. LSA- R.S. 40:1299.47 D(2) - Evidence to be considered by the panel may include affidavits and expert reports

Numerous materials are submitted to the medical review panel, including but not limited to x-rays, depositions, affidavits, and expert reports. It is proposed that the experts who are serving on the panels should thoroughly examine all materials submitted, even if it means re-evaluating the patient's care, that which was not alleged by the patient in his/her complaint. This may entail focusing on an area of treatment not mentioned and/or highlighted in an expert report.

Furthermore, with regard to expert reports, we look to the recent case of *Samaha v. Rau,* 977 So. 2d 880 (La. 2008). In *Samaha,* the Louisiana Supreme Court held that the medical review panel opinion served as evidence that expert testimony was available to establish defendant's *prima facie* case that he had met the applicable standard of care, thus an affidavit by the defendant was not required. This was especially so because of the plaintiff's failure to produce or obtain expert medial testimony, finding that plaintiff's answers to interrogatories were insufficient to carry its burden in an attempt to defeat defendant's motion for summary judgment.

It was recently proposed that the plaintiff be required to submit a pre-suit expert report before filing a claim, which is akin to the system that is in place in Texas. After much debate, the proposition did not advance but will likely resurface during future sessions. We propose that a pre-suit expert report is unfair, costly and potentially unconstitutional, and the current law requiring an expert to submit an affidavit and/or an expert report to support their allegations are more than sufficient.

3. Strike Process to select an attorney chair

- propose instituting a "registry for experienced attorney chairs" in order to eliminate novice chairs that are unfamiliar with the process and do not know how to move the panel process along.
- institute/incorporate guidelines for attorneys chairs across the state to ensure that uniform/consistent rules are followed by all within the state (north v. south).

4. LSA-R.S. 40:1299.41 A (8) "handling" of a patient as modified by the definition of "health care."

"Malpractice" means any unintentional tort or any breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient, including failure to render services timely and the handling of a patient, including loading and unloading of a patient, and also includes all legal responsibility of a health care provider arising from acts or omissions during the procurement of blood or blood components, in the training or supervision of health care providers, or from defects in blood, tissue, transplants, drugs, and medicines, or from defects in or failures of prosthetic devices implanted in or used on or in the person of a patient.

- the legislature routinely fights with this issue trying to determine what is "patient care and handling of a patient" relative to medical treatment.
- we propose that such services should be within the scope of service for which the provider is licensed. (negligent act or omission)
- versus some act of negligence that would be covered under the general liability policy, i.e.: patient slipping and falling in a hospital room; x-ray machine falling on a patient.

In 2007, the Louisiana Supreme Court outlined six factors that will assist a court in determining whether a claim sounds in medical malpractice and therefore must first be presented to a medical review panel under the Louisiana Medical Malpractice Act and they are as follows:

(1) whether the particular wrong is "treatment related" or caused by a dereliction of professional skill;

(2) whether the wrong requires expert medical evidence to determine whether the appropriate standard of care was breached;

(3) whether the pertinent act or omission involved assessment of the patient's condition;

(4) whether an incident occurred in the context of a physician-patient relationship, or was within the scope of activities which a hospital is licensed to perform;

(5) whether the injury would have occurred if the patient had not sought treatment; and

(6) whether the tort alleged was intentional.

LaCoste v. Pendleton Methodist Hospital, L.L.C., Sup. 2007, 966, So. 2d 519, 2007-0008, 2007-0016 (La. 9/5/07), rehearing denied.

5. LSA-R.S. 40:1299.42 - Limitation of Recovery

The total amount recoverable for injuries to or death of a patient, with the exception of future medical expenses and related benefits, shall not exceed **$500,000.00** plus interest and cost. The cap applies to each claim, not to each claimant, and includes lost wages.

A qualified healthcare provider is not liable in excess of **$100,000.00** plus interest for all malpractice claims because of injuries to or the death of any one patient. Any amount due from a judgment, settlement, or arbitration award in excess of the total liability of all liable healthcare providers shall be paid from the Patient's Compensation Fund (PCF). The total amounts paid by liable healthcare providers and the PCF combined cannot exceed the $500,000.00 cap, with the exception of future medical expenses and related benefits.

Payment of $ 100,000.00 by one qualified health care provider triggers the Fund's liability for excess damages. *Stuka v. Fleming*, 561 So.2d 1371 (La. 1990) cert. denied, 498 U.S., 111 S.Ct. 513, 112 L.Ed.2d 525 (1990). The Fund cannot contest liability when there is a settlement for $ 100,000.00 by a health care provider before or after trial. *Koslowski v. Sanchez,* 576 So.2d 470 (La. 1991). The only remaining issue is the amount of damages. The Fund does not have to be made a party to litigation, nor cast in judgment in order to disburse its funds. The

Fund is a creature of the legislature designed to satisfy settlements and/or judgments against health care providers in excess of $ 100,000.00. *Remet v. Martin*, 737 So. 2d 124 (La. App. 4th Cir. 1999). Liability of multiple health care providers, to an aggregate exceeding $ 100,000.00, does not inure to the victim but reduces the excess due from the Fund. LSA-R.S. 40:1299.42(B)(3)(a). *Butler v. Flint Goodrich Hosp. of Dillard University,* 607 So. 2d 517, 519 (La. 1992).

- current cap of $500,000.00 has been in place since 1975 and should be increased in light of inflation and increased cost of living.

- healthcare providers recently proposed increasing the cap to $750,000.00 (up to one million over 5 years), but included in that proposition was a cap on non-economic damages.

Payment of $100,000.00 does not trigger liability of the PCF

6. LSA-R.S. 40:1299.43 - Future medical care and related expenses; designation of settlement funds

The only element of damage recoverable by a plaintiff above and beyond the cap is future medical expenses. Future medical expenses are defined in the MMA as including medical expenses incurred after the date of the injury *up to* the date of the settlement, judgment, or arbitration award – thus, past medical expenses – as well as medical expenses incurred *after* the settlement, judgment, or arbitration award. In all medical malpractice claims that proceed to trial, the jury receives a special interrogatory asking if the patient is in need of future medical care and if so, the amount thereof. In claims tried by the court, the court's finding must include a statement whether the patient is in need of future medical care and the amount. Future medical expenses are paid as they become due, from the Patient's Compensation Fund. The Fund may require the patient to undergo a physical examination by a physician of the Fund's choosing from time to time for the purpose of determining the patient's continued need of future medical care and related benefits, subject to certain requirements.

Designation of settlement funds as general damages (i.e., subject to the cap) or future medical expenses (not limited by the cap)

- Consider this scenario: Plaintiff settles with defendant healthcare provider, Dr. A, for $100,000.00. Plaintiff then settles with the PCF for $700,000.00. Two checks are issued by the PCF in the amounts of $300,00.00 and $400,000.00, respectively. The non-settling defendant healthcare providers, Drs. B, C, D, and E, along with the PCF, contend the $400,000.00 was intended to be for general damages, and the $300,000.00 was for future medicals; therefore the $500,000.00 cap on general damages has been met. The plaintiff argues the settlement with the PCF

was for incurred medical expenses only, and he is now entitled to proceed against other qualified healthcare provider defendants until the $500,000.00 cap on general damages is met.

- Plaintiff takes the position if the co-defendants are all released when one defendant tenders $100,000.00, defendants are given an incentive to never settle – every defendant will wait it out, hoping someone else will find the litigation too costly and settle. Plaintiff is prevented from collecting all he is entitled to, which in a case of severe injury, means he will never be fully compensated for lost wages, for example, because those are included within the general damages cap.

- Defendants argue the plaintiff is trying to get around the statutory cap. To force the other defendants to undergo trial when there can be no further recovery against them is unfair and not what the legislature intended.

- *Remet v. Martin*, 737 So. 2d 124 (La. App. 4th Cir. 1999) held the MMA does not provide for the dismissal of other health care providers on the basis of a plaintiff's settlement with the first health care provider for its maximum liability. In *Remet*, the doctor-defendant settled with the plaintiff for $100,000.00, and the court disagreed with the co-defendant social worker's assertion she was entitled to automatic dismissal. The court stated the plaintiff was entitled to seek a determination of the remaining health care providers.

- But if parties agree the settlement funds are specifically for general damages, and the total amount is up to the cap of $500,000.00, then arguably the remaining defendants should be dismissed because the plaintiff has in fact recovered the maximum amount allowed under the cap.

- The legislature should incorporate a provision requiring the designation of settlement funds as general damages and/or future medicals in all settlement agreements. All parties to the settlement must understand exactly what is being paid, and the settlement documents should clearly state this in order to avoid confusion. This would help to facilitate settlement and prevent litigation regarding the intent of the settling parties.

7. LSA-R.S. 40:1299.47 2(a) – Prescription; Reconciliation of Louisiana Civil Code Article 2324 and the MMA

The fountainhead of tort liability is Louisiana Civil Code Art. 2315, which provides in

part that every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The Medical Malpractice Act constitutes a special legislative provision in derogation of the general rights available to tort victims and therefore must be strictly construed. *Galloway v. Baton Rouge General Hosp.*, 602 So. 2d 1003, 1005 (La. 1992).

In1996, the Louisiana Legislature amended Louisiana Civil Code Article 2324 and abolished solidary liability (and therefore, obligations) for tortfeasors in non-intentional conduct cases (i.e. negligence cases such as medical malpractice).

Louisiana Civil Code Article 2324 provides:

A. He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.

B. If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. A 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 such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, immunity by statute or otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable.

C. **Interruption of prescription against one joint tortfeasor is effective against all joint tortfeasors**. (Emphasis added.)

LSA-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).

Also, LSA-R.S. 40:1299.41(G) provides the running of prescription against a health care provider who is answerable **in solido** with a qualified health care provider against whom a claim has been filed for review under this Part shall be **suspended** in accordance with the provisions of R.S. 40:1299.47(A)(2)(a). (Emphasis added.)

- The legislature amended La Civ Code Art. 2324, but not the MMA.
- MMA, as special legislation, as an exception to La Civ Code Art. 2324. See, *LeBreton v. Rabito*, 714 So. 2d 1226 (La. 1998): Where two statutes deal with the same subject matter, they should be harmonized if possible; however, if there is a conflict, the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character.

- *Borel v. Young*, 07-0419 (La. 7/1/08) 2008 La. LEXIS 1529: Louisiana Supreme Court held the more specific provisions of the Medical Malpractice Act regarding suspension of prescription against joint tortfeasors apply to the exclusion of the general code article on interruption of prescription against joint tortfeasors, LSA-C.C. art. 2324(C). By including special provisions regarding suspension of prescription in the medical malpractice statutes, the legislature excluded the applicability of interruption of prescription.

- Further, under *Borel*, both the one-year and three-year periods set forth in LSA-R.S. 9:5628 are **prescriptive**, with the qualification that the contra non valentem type exception to prescription embodied in the discovery rule is expressly made inapplicable after three years from the act, omission, or neglect. (Originally, the Court had held the plaintiff's suit was extinguished by *preemption*; *Borel v. Young*, 07-0419 (La. 11/27/07) 2007 La. LEXIS 2596. On rehearing, the Court found the plaintiff's suit had prescribed because, as stated above, the one-year and three-year periods in LSA-R.S. 9:5628 are prescriptive, not preemptive.)

- Initial request for a medical review panel suspended prescription as to the health care providers alleged to be joint tortfeasors and/or solidary obligors with the named health care providers; however, pursuant to LSA-R.S. 40:1299.41(G) and LSA-R.S. 40:1299.47(A)(2)(a), prescription was suspended for only 90 days following notification, by certified mail, of the issuance of the medical review panel's opinion. *Richard v. Tenet Health Systems, Inc.*, 03-1933(La.App. 4 Cir. 4/14/04), 871 So.2d 671, writ denied, 04-1521 (La. 10/29/04), 885 So.2d 587

- But if La Civ Code Art. 2315, the foundation of all tort liability, is abolished, then can you even have an action for medical malpractice under the MMA?

8. Ex Parte Conferences

- Propose provision be added to the MMA that provides no ex parte conferences between defense counsel and plaintiff's treating physicians be allowed. There are HIPAA laws available, but currently there is no private remedy for the plaintiff. A doctor may be reported to the federal government, but there has been no enforcement under the Bush Administration and hence, no remedy.

- Propose preventing the doctor from testifying about liability and/or causation. He/she would be allowed to testify regarding facts and treatment, however.

- If these ex parte conferences were to continue and go unpunished, it would in effect allow the patient to be harmed yet again.

9. <u>Samaha v. Rau</u> 977 So2d 880 (La.2008)