Medical Malpractice in Texas

Background

Medical malpractice is a tort that was created to ensure that patients had a remedy for negligent conduct by health care providers and facilities. For a patient to succeed in a medical malpractice claim, he must prove four elements by a preponderance of the evidence: 1) that the health care provider or facility owed the patient a duty; 2) the health care provider breached that duty by failing to conform with the standard of care; 3) the provider's breach was the proximate cause of a patient's injury; and 4) the patient's injury caused economic or non-economic damages.

In 2003, the first Republican Texas Legislature since Reconstruction heeded Governor Perry's call for an overhaul of the Texas tort system with HB 4, a series of measures to reduce litigation in Texas.[1] This paper is a discussion of medical malpractice in Texas since these changes were made.

Statute of Limitations

Many claims have a statute of limitations, and medical malpractice claims are no different. A medical malpractice action must be brought within two years of the injury.[2] Sometimes, however, the actual date of the injury is impossible to ascertain. In these instances, the statute of limitations begins to toll on the last date of treatment.[3] The Supreme Court has decided that there is a different limitation standard for minor patients, however. If an injury happens before a patient's eighteenth birthday, the patient may bring a claim any time before his twentieth birthday.[4]

Health Care Providers and Health Care Institutions Defined

HB 4 broadened the definitions of health care providers and health care institutions greatly. This has the effect of expanding the class of individuals and institutions protected by the damages caps discussed below.

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[1] Joseph Nixon, *A History of Lawsuit Reform in Texas*, Texas Public Policy Foundation, May 2008
[2] Tex. Civ. Prac. & Rem. Code. § 74.251(a)
[3] *Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2001)
[4] W*einer v. Wasson*, 900 S.W.2d 316 (Tex. 1995)

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Health care providers are now defined[5] as any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, or chartered by the State of Texas to provide health care. The statute specifically includes: registered nurses, dentists, podiatrists, pharmacists, chiropractors, optometrists, and health care institutions. The statute also includes officers, directors, shareholders, members, partners, managers, owners, and affiliates of health care providers or physicians as well as employees, independent contractors, and agents of health care providers and physicians acting in the course and scope of employment or contractual relationship.

Health care institutions are now defined[6] as ambulatory surgical centers, assisted living facilities[7], emergency medical services providers, health care districts[8], home and community support services agencies, hospices, hospitals, hospital systems, intermediate care facilities for the mentally retarded or home and community-based services waiver programs for persons with mental retardation[9], nursing homes, and end-stage renal disease facilities.[10]

Liability in Medical Malpractice Cases

An injured patient has a cause of action against a health care provider for treatment, lack of treatment, or another claimed departure from accepted standards of medical care (or safety or professional or administrative services directly related to health care), which proximately results in injury to, or death of a patient.[11] This claim can be based in tort or contract law.

For tort claims generally, a plaintiff cannot recover if his "percentage of responsibility" is greater than fifty percent.[12] If his "percentage of responsibility" is fifty percent or less, a plaintiff can only recover for the percentage for which he is not responsible. [13] This is known as the doctrine of modified comparative negligence.

Vicarious liability is a doctrine that provides that one person becomes liable for the wrongdoings of another. This arises in three instances in medical malpractice claims: 1) when a health care provider is an employee of a health care institution; 2) when a health care provider is an independent contractor of a health care institution; and 3) when two health care providers are engaged in a joint venture.

There are a great number of factors considered to determine whether a worker is an employee or an independent contractor. The distinction largely hinges on the level of control a company has the right to exert over a worker and is outside the scope of this

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[5] For the definition of "Health Care Provider", *See* Tex. Civ. Prac. & Rem. Code § 74.001(a)(12)
[6] For the definition of "Health Care Institution", *See* Tex. Civ. Prac. & Rem. Code § 74.001(a)(11)
[7] For the definition of "Assisted Living Facility", *See* Tex. Health & Safety Code § 247
[8] Created under Tex. Health & Safety Code § 287
[9] So long as these facilities are adopted in accordance within §1915(c) of the Social Security Act. *See* 42 U.S.C. §1396(n).
[10] So long as licensed under Tex. Health & Safety Code § 251.011
[11] Tex. Civ. Prac. & Rem. Code § 74.001(a)(13)
[12] Tex. Civ. Prac. & Rem. Code § 33.001
[13] Tex. Civ. Prac. & Rem. Code § 33.012(a)

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paper.[14] If a health care provider is an employee of a health care institution, the institution is vicariously liable for the negligence of the provider through the tort principle of respondeat superior.

If a health care provider is an independent contractor of a health care institution, a claimant must prove three elements to impute the provider's liability to the institution under the principle of ostensible agency: 1) the claimant had reasonable belief that the provider was an agent or employee of the institution; 2) this belief was generated by the hospitals affirmative actions or knowingly permitting a provider to hold himself out as such; and 3) the claimant relied on this representation justifiably.[15]

Furthermore, if two health care providers: 1) agree to a common purpose, 2) have a community of financial interest, and 3) both possess an equal amount of control over a venture; they are engaged in a joint enterprise[16] in Texas and may be liable for each other's torts.

Special Discovery Considerations

Within 120 days of filing a health care liability suit, a plaintiff must provide expert reports discussing the liability and causation for each health care provider or institution against whom the plaintiff has asserted a claim. The Legislature laid out the factors that courts may consider in determining whether or not a witness is an expert.[17] If no such report is provided, the Court must grant a defendant's motion to dismiss with prejudice and award attorneys' fees.[18] These reports are required even in the rare medical malpractice claims that do not require expert testimony.[19] The expert report requirement has vastly increased the cost to the plaintiffs in medical malpractice causes of action.

Damages

There are three statutory schemes covering damages in Texas medical malpractice causes of action. The most controversial aspect of the 2003 Texas medical malpractice reform was the cap on non-economic damages.[20] In all medical malpractice causes of action against health care providers filed after September 1, 2003, non-economic damages are limited to a total of $250,000 for each claimant.[21] In causes of action that include health care institutions, non-economic damages are capped at $250,000 per institution with a $500,000 total cap.[22] The Texas Constitution was amended with the specific purpose to authorize non-economic damage cap provisions in September 2003.[23]

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[14] The IRS and Texas Workforce Commission both have entire publications dedicated to this subject.
[15] Baptist Memorial Hospital System v. Sampson, 946 S.W.2d 945, 949 (Tex. 1998)
[16] *St. Joseph Hospital v. Wolff*, 94 S.W.3d 513 (Tex. 2002)
[17] Tex. Civ. Prac. & Rem. Code. §§ 74.401-74.403
[18] Tex. Civ. Prac. & Rem. Code. § 74.351
[19] *Murphy v. Russell*, 167 S.W.3d 835 (Tex. 2005)
[20] For the definitions of "Economic Damages", "Noneconomic Damages", and "Exemplary Damages", *See* Tex. Civ. Prac. & Rem. Code § 41.001
[21] Tex. Civ. Prac. & Rem. Code. § 74.301(a)
[22] Tex. Civ. Prac. & Rem. Code. § 74.301(b-c)
[23] Tex. Const. art. III, § 66.

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The damage provisions for medical malpractice causes of action for wrongful death are slightly different. In these cases, all damages (including economic, non-economic, and exemplary damages) are capped at $500,000 where final judgment is rendered against a health care provider.[24] The $500,000 cap is in 1977 dollars, and is subject to the consumer price index published the Bureau of Labor Statistics of the United States Department of Labor.[25] In 2011, the adjusted cap is $ $1,862,392.74.[26]

The Legislature has capped exemplary damages for all causes of action. Exemplary damages are capped at two times the amount of economic damages plus noneconomic damages up to $750,000.[27]

Texas has adopted the collateral source rule.[28] The collateral source rule bars the admissibility of evidence at trial to show that a plaintiff' has been compensated from other sources, such as a health insurance provider or worker's compensation.[29] The collateral source rule is one of the few procedural advantages retained by the plaintiff's bar. The American Tort Reform Association has cited Texas as a major leader, and success story, on tort reform.[30] It is noteworthy that Texas is not one of the thirty-eight states to reform its adoption of the collateral source rule.[31]

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[24] Tex. Civ. Prac. & Rem. Code. § 74.303(a). This cap does not include "expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury." (Tex. Civ. Prac. & Rem. Code. § 74.303(c)).

[25] Tex. Civ. Prac. & Rem. Code. § 74.303(b). Although this provision became effective in 2003, the cap is adjusted to inflation using 1977 dollars because of a preceding statute. *See Rose v. Doctors Hospital*, 801 S.W.2d 841 (Tex. 1990) for a discussion of the predecessor statute.

[26] CPI Inflation Calculator (http://146.142.4.24/cgi-bin/cpicalc.pl?cost1=500,000&year1=1977&year2=2011)

[27] Tex. Civ. Prac. & Rem. Code. § 41.008(b)

[28] *Brown v. American Transfer & Storage Co.*, 601 S.W. 2d 931 (Tex. 1980).

[29] American Tort Reform Association (http://www.atra.org/issues/index.php?issue=7344)

[30] American Tort Reform Association (http://www.atra.org/wrap/files.cgi/7964_howworks.html)

[31] American Tort Reform Association (http://www.atra.org/issues/index.php?issue=7344)

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