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Medical Malpractice Update

Susan A. Wagener
HeplerBroom LLC, Chicago

Plaintiffs Take a Chance: The Development of Nonpattern Jury Instructions on the Loss of Chance Doctrine

In a recent decision, the Illinois Appellate Court First District held that a trial court's failure to issue a loss of chance jury instruction denied the plaintiff a fair trial, and in so doing, reversed longstanding precedent that the Illinois Pattern Jury Instruction on proximate cause properly states the law in loss of chance medical malpractice cases. *Bailey v. Mercy Hosp. & Med. Ctr.*, 2020 IL App (1st) 182702, ¶ 3. In doing so, the court found that the Illinois Pattern Jury Instruction on proximate cause does not distinctly inform the jury about loss of chance and that a jury may consider, as a proximate cause of a patient's injury, that a defendant's negligence lessened the effectiveness of treatment or increased the risk of an unfavorable outcome to a plaintiff. *Bailey,* 2020 IL App (1st) 182702, ¶ 115.

Since 1986, Illinois has recognized the Loss of Chance Doctrine. *See Northern Trust Co. v. Louis A. Weiss Memorial Hospital*, 143 Ill. App. 3d 479, 487-489 (1st Dist. 1986) (finding delay in treatment supporting evidence for proximate cause). The loss of chance doctrine in a medical malpractice action refers to two types of situations:

> "(1) where a plaintiff has been deprived of a chance to survive or recover from a health problem due to the medical provider's negligence, or (2) where the medical provider's negligence has either lessened the effectiveness of plaintiff's treatment or increased plaintiff's risk of an unfavorable outcome."

Sinclair v. Berlin, 325 Ill. App. 3d 458, 464 (1st Dist. 2001). Historically, this doctrine has not been recognized as a separate theory of recovery, but rather as a proximate cause analysis. *Sinclair*, 325 Ill. App. 3d 466.

Generally, parties have the right to instruct the jury on their theory of the case if the facts in evidence or a reasonable inference from those facts support the theory. *Bailey,* 2020 IL App (1st) 182702, ¶ 108. Illinois Pattern Jury Instructions must be used when applicable, unless the trial court determines that the instruction does not accurately state the law. *Id.* at ¶ 84. The trial court has discretion in determining what jury instructions will be presented and are not to be overturned absent an abuse of discretion such as inaccurately stating the law. *Id*.

In the absence of a specific instruction on loss of chance, plaintiffs often request the submission of nonpattern jury instructions on loss of chance, and such requests are routinely denied on the basis that the standard IPI jury instruction on proximate cause sufficiently encompasses loss of chance consideration. In *Cetera v. DiFilippo*, the plaintiffs appealed the verdict in favor of a physician for a loss of chance medical negligence action claiming that the rejection of the proposed non-IPI loss of chance instruction deprived the jury of sufficient instruction on proximate cause. *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 45 (1st Dist. 2010). The appellate court affirmed the trial court's denial of the instruction, relying on prior decisions affirming refusals of similar proffered nonstandard instructions because the proximate cause

instruction, IPI Civil (2011) No. 15.01, properly states the law in loss of chance cases, which the court finds no reason to depart from such determination. *Id.*; *see Sinclair*, 325 Ill. App. 3d at 466-467.

In *Bailey*, the appellate court reversed this long standing precedent; becoming the first court in Illinois to hold that the Illinois Pattern Jury Instruction on proximate cause is not sufficient in loss of chance cases, and that a plaintiff is entitled to a separate, loss of chance instruction. *Id.* at ¶¶ 113-117 (where plaintiff presented evidence through expert testimony that patient suffered a missed opportunity when toxic shock and sepsis were not discovered and treated earlier, thus resulting in patient's death). At trial, the plaintiff requested the following nonpattern jury instruction:

> "If you decide or if you find that plaintiff has proven that a negligent delay in the diagnosis and treatment of sepsis in Jill Milton-Hampton lessened the effectiveness of the medical services which she received, you may consider such delay one of the proximate causes of her claimed injuries or death."

Id. at ¶ 112. This request was denied by the trial court and a verdict was returned for the defendants. On appeal, the court specifically relied on the Illinois Supreme Court decision in *Holton v. Memorial Hosp.*, which grants plaintiffs the right to submit evidence and recover on a loss of chance theory. *Holton v. Memorial Hosp.*, 176 Ill. 2d. 95, 119 (1997) (where patient suffered paraplegia as a result of negligent failure to diagnose condition and admitted evidence of missed opportunity to prove proximate cause). The supreme court reasoned that "[t]o the extent a plaintiff's chance of recovery or survival is lessened by the malpractice, he or she should be able to present evidenced to a jury that the defendant's malpractice, to a reasonable degree of medical certainty, proximately caused the increased risk of harm or lost chance of recovery." *Id*. The appellate court in *Bailey* took this reasoning a step further stating:

> "When a trial court refuses a loss of chance instruction, the jury is forced to understand a plaintiff's loss of chance theory argued at trial without an instruction to guide them on the law and how it should be applied to the general proximate causation concept described in IPI Civil (2011) No. 15.01.

Bailey, 2020 Ill. App. (1st) 182702, ¶ 114.

The appellate court departed from its previous holding in *Cetera v. DiFilippo* on the basis that the function of jury instructions is to convey to the jury correct principles of law applicable to the evidence. *Id.*; *see also Dillon v. Evanston Hosp.*, 199 Ill. 2d 483, 507 (2002). The *Bailey* decision speaks to the propriety of the submission of nonpattern jury instruction on the loss doctrine, and further legitimizes the doctrine as a theory to be presented to a jury with greater guidance than previously granted.

About the Author

Susan A. Wagener is a partner in *HeplerBroom*'s Chicago office and focuses her legal practice on the defense of health care professional licensure cases, medical malpractice, nursing home litigation, and general healthcare law matters. In addition to her active trial practice, she regularly presents and publishes on topics related to malpractice risk management and the defense of disciplinary matters. Ms. Wagener is licensed to practice in Illinois and Wisconsin and is admitted to the bars of the United States Supreme Court, the Illinois Supreme Court, and the United States District Court for the Northern District of Illinois.

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