IADC COMMITTEE NEWSLETTER

MEDICAL DEFENSE AND HEALTH LAW

MARCH 2019

IN THIS ISSUE

Robert G. Smith summarizes some of the significant statutes applicable to medical malpractice cases in Texas.

Summary of Statutes Applicable to Medical Malpractice Lawsuits in Texas

ABOUT THE AUTHOR

Robert G. Smith, Jr. is a shareholder of the firm Lorance Thompson, PC in Houston, Texas. Rob is a member of the Product Liability, Business Litigation, and Medical Defense & Health Law Committees of the International Association of Defense Counsel. He is on the steering committee for the ALFA International Product Liability & Complex Tort Practice Group. Rob's clients include physicians, hospitals, nursing homes, and manufacturers, among others. He has tried a wide variety of cases during his 23 years of practice. He can be reached at rgs@lorancethompson.com.

ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article contact:

Robert G. Smith, Jr.
Vice Chair of Publications
Lorance & Thompson, P.C.
rgs@lorancethompson.com

Statute of Limitations

A healthcare liability claim must be filed within two years from the occurrence of the breach or tort or from the date of the medical or health care treatment that is the subject of the claim. Tex. Civ. Prac. & Rem. Code §74.251(a).

There is a separate statute of repose that says a claimant must bring a healthcare liability claim no later than 10 years after the date of the act or omission that gives rise to the claim, meaning all claims must be brought within 10 years or they are time barred. Tex. Civ. Prac. & Rem. Code §74.251(b).

Contributory/Comparative Negligence

A claimant may not recover damages if his percentage of responsibility is greater than 50 percent. Tex. Civ. Prac. & Rem. Code §33.001.

If the claimant is not barred from recovery (*i.e.* his percentage of responsibility is not greater than 50 percent), a damage award must be reduced by a percentage equal to the claimant's percentage of responsibility. Tex. Civ. Prac. & Rem. Code §33.012(a).

If the claimant in a health care liability claim has settled with one or more persons, a damage award shall be further reduced by an amount equal to one of the following, as elected by the defendant:

(1) the sum of the dollar amounts of all settlements; or
(2) a percentage equal to each settling person's percentage of responsibility.

This election must be made by any defendant filing a written election before the issues are submitted to the trier of fact and the election is be binding on all defendants. If no defendant makes this election or if conflicting elections are made, all defendants are considered to have elected the credit of the sum of the dollar amounts of all settlements. Tex. Civ. Prac. & Rem. Code §33.012(b), (c).

A liable defendant is liable to a claimant only for the percentage of damages found equal to that defendant's percentage of responsibility for the harm at issue. Tex. Civ. Prac. & Rem. Code §33.013(a).

Joint & Several

Joint and several liability only applies if the percentage of responsibility attributed to the defendant if greater than 50 percent. Tex. Civ. Prac. & Rem. Code §33.013(b).

Damage Limitations

In an action on a health care liability claim where final judgment is rendered against a physician or health care provider other than a health care institution, noneconomic damages, inclusive of all persons and entities for which vicarious liability theories may apply, are limited to $250,000 for each

claimant, regardless of the number of defendant physicians or health care providers other than a health care institution against whom the claim is asserted or the number of separate causes of action on which the claim is based. Tex. Civ. Prac. & Rem. Code §74.301(a).

There is a separate limit of $250,000 as to noneconomic damages against a single health care institution, or $500,000 if judgment is rendered against more than one health care institution. Tex. Civ. Prac. & Rem. Code §74.301(b), (c).

Recovery of past medical or health care expenses is limited to the amount actually paid or incurred by or on behalf of the claimant. Tex. Civ. Prac. & Rem. Code §41.0105.

Exemplary damages are limited to the greater of: 1) two times the amount of economic damages plus an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or 2) $200,000. Tex. Civ. Prac. & Rem. Code §41.008.

In a wrongful death or survival action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for all damages, including exemplary damages, is limited to $500,000 for each claimant, regardless of the number of defendant physicians or health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based. Tex. Civ. Prac. & Rem. Code §74.303(a). This limit increases or decreases with the consumer price index and is currently approximately $1.8 million. Tex. Civ. Prac. & Rem. Code §74.303(b). This limit does not apply to damages awarded on a health care liability claim for past or future expenses of necessary medical, hospital, and custodial care. Tex. Civ. Prac. & Rem. Code §74.303(c).

The liability of any insurer under the common law theory of recovery commonly known in Texas as the "Stowers Doctrine" (bad faith related to unreasonably failing to resolve a claim in response to a demand within the limits of the available insurance) shall not exceed the liability of the insured. Tex. Civ. Prac. & Rem. Code §74.303(d).

Collateral Source Rule

Under Texas law, evidence of coverage provided, or collateral payments made to a claimant by any other source, including Medicare, Medicaid, insurance, or Social Security, etc. is generally not admissible. However, as noted above, recoverable medical expenses in Texas are limited to those "paid or incurred" (Tex. Civ. Prac. & Rem. Code §41.0105), which excludes expenses written off by a medical provider, reductions due to contractual agreements, adjustments required by Medicare or Medicaid, etc.

Defendants should argue that because medical bill reductions and write-offs are not recoverable, unreduced bills are irrelevant

and should not be admitted into evidence at trial.

Agency/Vicarious Liability/ Doctrine of Respondeat Superior

The $250,000 limits on noneconomic damages as discussed above are inclusive of all persons and entities for which vicarious liability theories may apply.

A hospital is not liable for an independent contractor's medical malpractice based on ostensible agency, unless a claimant shows (1) he had a reasonable belief that the physician was the agent or employee of the hospital, (2) such belief was caused by the hospital affirmatively holding out the physician as its agent or employee or knowingly permitting the physician to hold himself out as its agent or employee, and (3) he justifiably relied on the representation. *Baptist Memorial Hospital System v. Sampson*, 969 S.W.2d 945 (Tex. 1998).

Contracts/Hold Harmless Agreements

Locum tenens physicians are generally Independent contractors and must have their own professional liability insurance unless contract terms require that coverage be provided by a third party, such as the medical staffing company that placed the *locum tenens* physician or the health care facility where they are placed. *Locum tenens* physicians should also be aware of contract terms that may require them to defend and indemnify any third parties, and make sure they have professional liability insurance that covers such situations.

No physician or other health care provider shall request a patient or prospective patient to sign an agreement to arbitrate a health care liability claim unless the agreement includes a written notice in 10-point bold type stating:

> UNDER TEXAS LAW, THIS AGREEMENT IS INVALID AND OF NO LEGAL EFFECT UNLESS IT IS ALSO SIGNED BY AN ATTORNEY OF YOUR OWN CHOOSING. THIS AGREEMENT CONTAINS A WAIVER OF IMPORTANT LEGAL RIGHTS, INCLUDING YOUR RIGHT TO A JURY. YOU SHOULD NOT SIGN THIS AGREEMENT WITHOUT FIRST CONSULTING WITH AN ATTORNEY.

Tex. Civ. Prac. & Rem. Code §74.451.

Unfair Claims

The Texas Deceptive Trade Practices Consumer Protection Act does not apply to physicians or health care providers with respect to claims for damages for personal injury or death alleged to have resulted from negligence related to the standard of care on the part of any physician or health care provider. Tex. Civ. Prac. & Rem. Code §74.004.

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

DECEMBER 2018
Illinois Supreme Court Holds Hospital Not Liable Under the Doctrine of Apparent Agency
Mark D. Hansen and Richard K. Hunsaker

NOVEMBER 2018
Challenging the Plaintiff's Economic Expert
Erik W. Legg and Stephanie M. Rippee

OCTOBER 2018
Ex Parte Communications with Treating Physicians: Leveling the Playing Field
Joseph D. Piorkowski, Jr.

SEPTEMBER 2018
Illinois Appellate Court Considers Scope of Privilege Established by Patient Safety Act
Mark D. Hansen and Emily J. Perkins

JULY 2018
Illinois Appellate Court Issues Opinion Limiting Expert Testimony Regarding Proximate Cause and on Plaintiff's Use of Voluntary Dismissal to Avoid Directed Verdict and Retain Additional Experts
Mark D. Hansen and J. Matthew Thompson

JUNE 2018
Hospital's Reimbursement Rates Found to be Relevant to Determine Whether the Hospital's Charges are Reasonable
Robert G. Smith, Jr.

MAY 2018
Special Interrogatories: Be Careful What You Ask For
Mark D. Hansen and Tyler J. Pratt

APRIL 2018
Discovery of Electronic Medical Records, Audit Trails, and Metadata
David L. Brown, Jr. and Emily Slay Walters

MARCH 2018
$347 Million FCA Judgment Set Aside Under Escobar's Materiality Standard
Megan Hargraves

FEBRUARY 2018
Illinois Appellate Court Addresses Ex Parte Communications between Hospital Counsel and Formerly Employed Nurse
Mark D. Hansen and J. Matthew Thompson