# Medical Litigation Newsletter

July 2012 Issue

## In This Issue



## Statute of Limitations for Minors in Medical Malpractice Actions

### Illinois

*By: Linnea L. Schramm*

The statue of limitations for the filing of a wrongful death action in Illinois is two years. However, if there are minor children involved in the recovery of damages based on the wrongful death of a parent, the statute is tolled in certain circumstances.

Illinois' Wrongful Death Act (Act) provides for the recovery of pecuniary damages. Pecuniary damages include the loss of society, which is defined in Illinois Pattern Jury Instruction 31.11 as: the mutual benefits that each family member receives from the other's continued existence, including affection, attention, care, comfort, companionship, guidance, love and protection.

When seeking a claim for loss of society, the limitations period is the same as the underlying cause of action for an adult. But it can be extended when the party seeking to recover damages is a minor. 735 ILCS 5/13-211. However, when the death is caused by the alleged negligence of a physician, the four-year medical malpractice statute of repose bars any action, including a wrongful death action brought by a minor for the death of a parent, after the period of repose.

For example, if a malpractice action is filed by a surviving spouse, the estate and minor children, a loss-of-society claim can be made by the minor children after the two-year statute of limitations has run as to the surviving spouse's claims, as long as the four-year statute of repose has not run. Therefore, a party not named as a defendant in the initial action may be added after the two-year statute of limitations and before the running of the statute of repose, but only as to claims made by the minor child or children.


Medical Litigation Practice Group Chair

Daniel P. Slayden
Joliet, Illinois
dslayden@hinshawlaw.com
815-726-5910

Editors

Thomas R. Mulroy, III
tmulroy@hinshawlaw.com
312-704-3748

Dawn A. Sallerson
dsallerson@hinshawlaw.com
618-277-2340

Contributors

Darrell S. Dudzik
ddudzik@hinshawlaw.com
602-337-5531

Nathan D. Hansen
nhansen@hinshawlaw.com
219-864-4523

Michael P. Russart
mrussart@hinshawlaw.com
414-225-4803

Angela M. Rust
arust@hinshawlaw.com
920-380-2079

Linnea L. Schramm
lschramm@hinshawlaw.com
312-704-3222

## Hinshaw Representative Matters

### We are pleased to report the following:

***James M. Lydon*** and ***Thomas L. O'Carroll***, Partners in Hinshaw's Chicago office, represented an emergency room physician and a hospital in a medical malpractice wrongful death case of a woman who died from an aortic dissection. The jury rejected a request by plaintiff's counsel during closing arguments for $2.1 and awarded plaintiff $100,000. Plaintiff's counsel had four experts from all over the country and expended much time and money in the case, so this was an outstanding win for defendants. The case was tried before a jury in Cook County, Illinois.

***Kelly J. Epperson***, an attorney in Hinshaw's Rockford, Illinois, office and ***Kimberly A. Jansen***, a Partner in the firm's Chicago office, represented a hospital in a medical malpractice action involving a failure to diagnose a stroke in a now 37-year old quadriplegic. The events that gave rise to the case took place in Northern Illinois, but the suit was filed in Cook County, Illinois; venue was proper as a result of a co-defendant residing in Cook County. However, the court agreed with defendant that the forum was not convenient. This success is estimated to have had a $5 to $10 million impact on damages in favor of defendants.

***Stacey L. Seneczko*** and ***Michael F. Henrick***, Partners in Hinshaw's Chicago office, represented a hospital in a medical malpractice action involving the death of a twin who was born in distress. Plaintiff alleged negligence as it related to the staffing of personnel at the delivery, as well as the resuscitative efforts that were done by the co-defendant pediatrician, who arrived approximately 7 - 11 minutes after the delivery and the neonatologist who became involved shortly thereafter. The child died approximately five hours after her birth. On the hospital's behalf, Hinshaw disputed liability and causation. Plaintiff asked for $7.1 million from the jury. After deliberating for approximately one hour, the jury returned a not guilty verdict for defendants.

***Patrick P. Devine*** and ***Nathan D. Hansen***, attorneys in Hinshaw's Northwest Indiana office, represented a pain-management physician accused of having negligently

*— Continued on Page 3*

While minor children can recover under the loss-of-society claim for a deceased parent, they may not recover for nonfatal injuries to a parent. Siblings may also recover under the Act if the decedent is not survived by a spouse or children. Again, if the sibling or siblings are minors, they may make a claim for loss of society of another sibling, given the above circumstances, and make that claim after the running of the two-year statute of limitations for the filing of medical malpractice claims as long as the four-year statute of repose has not expired.

## Wisconsin

*By: Michael P. Russart*

Wisconsin has a unique statutory scheme governing medical negligence lawsuits. The seminal case that discusses the medical negligence statutes of limitations and statutes of repose for minors is *Aicher v. WI Patients Compensation Fund*, 2000 WI 98, 237 Wis. 2d 99, 613 N.W.2d 849. The *Aicher* Court cautioned legal practitioners about the complex interrelation between the limitations established to govern minor victims of medical malpractice and the general scheme of limitations governing medical negligence actions.

Within this unique scheme and for purposes of initiating a medical negligence action on behalf of a minor, a minor is defined as any person under the age of 18 who is not under disability by reason of insanity, developmental disability or imprisonment. This definition is important and will be discussed further below.

Bars to bringing an action for medical malpractice include statutes of limitations and statutes of repose. A statute of repose encompasses an absolute bar to a claim regardless of whether an injury has yet to occur or has yet to be discovered. Statutes of limitations can potentially be avoided if an injury is discovered after the statute of limitations has passed but before the statute of repose has expired.

In Wisconsin, the general time period under which a medical negligence action must be brought is the later of three years from the date of the injury caused by medical negligence (the three-year injury statute of limitations) or one year from the date the injury was discovered or should have been discovered by exercising reasonable diligence (the one-year-after-discovery statute of limitations). No action may be commenced more than five years from the date of the negligent act or omission (the five-year statute of repose).

The Wisconsin statutes of limitations and repose for medical malpractice actions on behalf of minors are the later of the minor's 10th birthday (the 10-year statute of repose for minors) or the time allowed under the general scheme prescribed for medical

negligence actions. The Wisconsin legislature purposefully modified the general scheme to provide further protection of the interests of very young children.

This legislatively created scheme allows a minor's claim for medical negligence to survive until the minor's 10th birthday, or beyond, depending upon the date of the act, omission, or injury. For minors, the 10th birthday serves as the moment of repose when both the injury occurred and the injury was discovered more than three years before the 10th birthday or when the negligent act or omission occurred more than five years before the minor's 10th birthday.

As mentioned, under certain circumstances, medical negligence actions that accrue before age 10 can be brought on behalf of a minor after his or her 10th birthday. One such circumstance is if an injury occurs within the three-year period immediately before the minor's 10th birthday; the applicable statute of limitations extends three years from the date of the injury. Another circumstance is if an injury from a negligent medical act or omission is first discovered after the minor's 10th birthday. In that case, an action may be commenced within one year of the discovery date, as long as: (1) no more than five years has passed from the date of the negligent act or omission, and (2) the injury should not have been discovered sooner through the exercise of reasonable diligence. Both circumstances require applying the general scheme of Wis. Stat. § 893.55(1m) because the allowed time for filing is later than the 10th birthday.

Within the medical malpractice scheme, there are two significant exceptions to the general rule of limitations and repose and the minor's statute of repose: (1) circumstances involving a health care provider's concealment of an act or omission by the provider resulting in injury to the patient; and (2) if a foreign object which has no therapeutic or diagnostic purpose or effect was left in a patient's body. Such affected patients have one year from actual discovery of the act or omission/awareness of the object or one year from when the patient should reasonably have become aware of the concealment or the object's presence if such time is longer than the general timeframe for bringing a medical negligence action.

Finally, if a person under the age of 18 is disabled by reason of developmental disability, there are no statutes of limitations or repose that apply to such individuals injured by a health care provider. *Haferman v. St. Clare Healthcare Foundation, Inc.*, 2005 WI 171, 286 Wis. 2d 621, 707 N.W.2d 853. Plaintiff in *Haferman* was a child with cerebral palsy; the claim was that this condition resulted from an injury occurring at birth from an act or omission of a health care provider.

performed a cervical epidural steroid injection. In Indiana, a medical malpractice claim must be submitted to a medical review panel composed of three physicians before it can be filed in court. The physician prevailed before the panel, and plaintiff refiled the case in Indiana state court. The physician moved for summary judgment, based upon the favorable panel opinion. Plaintiff filed an affidavit by a New York physician, asserting that defendant physician had breached the standard of care in his procedure. Following the expert's deposition, the court struck his affidavit, finding that the affiant's deposition testimony demonstrated that his opinions were based upon inferential speculation. The court then granted summary judgment for defendant physician.

***Jerrod L. Barenbaum*** a Partner in Hinshaw's Rockford, Illinois office, represented defendant, an OB/GYN physician in a case in which plaintiff patient alleged a six-month delay in the diagnosis of her cervical cancer. The patient died of cervical cancer in April 2002. On June 23, 2000, the physician saw the patient, who complained of abdominal pain, spotting, and pain with intercourse. She also reported that she had not seen any physician in the previous 12 years. The physician noted a large, firm cervix following an exam. A Pap smear was performed and reported to him as normal. The pap spear was later found to have been misread by a cytotechnologist and pathologist; it should have been reported as "squamous cell carcinoma." The patient was instructed to return for a follow-up Pap smear in three months, but did not return to the physician. Her cancer was diagnosed at stage IIIB in December 2000 when her kidneys failed as a result of the tumor blocking her ureters. A directed verdict was granted for the physician based on the patient's expert conceding at trial that although she knew the general survival rates for the different stages of cervical cancer, and that the patient's cancer was at a lower stage in June when she saw the physician than the stage IIIB it was at diagnosis six months later, and stating that she could not opine to a reasonable degree of medical certainty as to this specific patient's survival rate at any particular point in time considering all of the variables that impact an individual's chance of survival. Daniel E. Wiesch and Brett A. Strand, attorneys in Hinshaw's Rockford office, assisted with the preparation of the successful directed verdict motion.

The *Haferman* Court based its decision upon the definition of "minor" in Wis. Stat. § 893.56, which excluded its application to persons disabled by developmental disability, and language in the statute of limitations for persons under disability (Wis. Stats. § 893.16), which excluded its application to claims against health care providers. The Court struggled with the defense position that the general medical negligence statute of limitations applied. Such a conclusion would have resulted in a shorter time period for developmentally disabled children to file medical malpractice claims than nondevelopmentally disabled medical malpractice claimants under the age of 18. Determining that the legislature would not provide a shorter limitations period for developmentally disabled children than for other medical malpractice claimants under the age of 18, the Court concluded that the legislature simply did not designate a statute of limitations or repose for developmentally disabled children with medical negligence claims. The *Haferman* majority and dissent agreed that the lack of a defined limitations period for developmentally disabled children was likely the consequence of a legislative oversight. However, no legislative action has yet filled this gap. Thus, Wisconsin currently has no statute of limitations or repose for causes of action brought on behalf of developmentally disabled children injured by health care providers.

## Arizona

*By: Darrell S. Dudzik*

In Arizona, the statute of limitation for medical malpractice actions with respect to minors is governed by Ariz. Rev. Stat. § 12-502 which provides that the period of time the person is under the age 18 shall not be deemed a portion of the period of time limited for the commencement of the action. Such a person shall have the same time or limitation after reaching the age of majority allowed to others.

A parent or guardian who seeks to recover medical expenses or damages for the personal loss sustained as a result of an injury to a child cannot claim the protection of this statute.

## Indiana

*By: Nathan D. Hansen*

According to the Indiana Medical Malpractice Act (MMA), a claim, whether in contract or tort, must be brought against a health care provider within two years after the date of the alleged act, omission or neglect. An exception in the MMA for minor children provides that a minor who is under six years of age has until his or her eighth birthday to file a medical malpractice claim. Minors who bring claims for medical malpractice that occurred after their sixth birthday must file their claim within two years.

However, prior to a plaintiff bringing a claim in court against a qualified health care provider, a proposed complaint must be filed with the Indiana Department of Insurance (IDOI) for presentation to a Medical Review Panel (Panel). In order to become a qualified health care provider and receive the protections of the MMA, the provider must file proof of financial responsibility with the IDOI commissioner and pay a surcharge required of all health care providers. Filing the proposed complaint tolls the statute of limitations until a period after the Panel renders its opinion on whether or not the health care provider complied with the standard of care. Once the plaintiff receives that opinion, he or she has 90 days, plus any time remaining on the statute of limitations when originally tolled, to file the claim in an Indiana court.

In its 2006 decision in *Ellenwine v. Fairley*, 846 N.E.2d 657, the Indiana Supreme Court defined the applicable statute of limitations when a child dies as a result of alleged medical negligence prior to his or her sixth birthday. The Indiana Child Wrongful Death Act (CWDA) provides that parents have two years from the date of the child's death to bring a claim for damages. Ind. Code 34-23-2-1. The *Ellenwine* Court indicated that the two-year statute of limitations found in the MMA applied to an action for wrongful death based on medical malpractice, reasoning that the legislative purpose behind the MMA was to foster prompt litigation of medical malpractice claims. The Court held that when a medical malpractice claim is brought for the death of a child, the MMA and CWDA operate together to require the parents to file their claim within the first to expire either of the MMA limitations period (by the child's eighth birthday) or the

CWDA limitations period (two years from the date of death). Importantly, the Court reasoned:

> . . . the wrongful death claim of a child who dies due to medical malpractice in infancy or in the first few years of life does not hang over the heads of the health care providers all the way until what would have been the child's eighth birthday. But it does continue for two years after the date of the child's death.

Regarding damages that can be recovered under the CWDA, a closer look at the statute provides that parents or a guardian can recover damages for: (1) loss of the child's services; (2) loss of the child's love and companionship; and (3) various expenses, including funeral and burial costs, medical bills, reasonable psychiatric and psychological counseling for a surviving parent or minor sibling of the deceased child, uninsured debts of the child, and administration of the child's estate, including reasonable attorney's fees. Damages are limited to whichever occurs first: (1) the date of death of the child's last surviving parent; or (2) the date the child would have reached 20 years of age, or 23 years of age if enrolled in a postsecondary educational institution or if in a technical education school or program involved with the child's career.

## Wisconsin Supreme Court Expands Scope of Informed Consent Law

In *Jandre v. Physician's Insurance Company of Wisconsin*, 2012 WI 39, 340 Wis. 2d 31, the Wisconsin Supreme Court addressed the question of whether a physician who issues a non-negligent diagnosis may nonetheless be held liable for failure to provide a patient information about available tests to diagnose other conditions originally within the physician's "differential diagnosis." The Court split in its response to this issue. Chief Justice Shirley S. Abrahamson authored the lead opinion and concluded that the law of informed consent imposes such a duty as a matter of well-established law in circumstances when a reasonable patient would require such information to make an informed decision regarding his care. Justice David Prosser, Jr. concurred, affirming a $2 million judgment against defendants. But Justice Prosser noted that he shared the concern of three dissenting justices that "the law of informed consent is being expanded beyond its original scope and purpose, with profound consequences for the practice of medicine." The dissent, authored by Justice Patience Drake Roggensack, decried the lead opinion as creating a basis for strict liability for missed diagnoses.

### Underlying Facts

The facts giving rise to *Jandre* were not in dispute. Plaintiff patient was taken to the emergency department by his co-workers after coffee began coming out his nose, the left side of his face drooped, and he began drooling and slurring his speech. His other symptoms included dizziness and weakness in his legs. Defendant physician examined the patient, forming a differential diagnosis that included Bell's palsy, Guillain-Barre, multiple sclerosis, stroke, temporary ischemic attack (TIA) and other conditions. A CT scan ruled out hemorrhagic stroke. Because of the possibility of a TIA, the physician listened to the patient's carotid arteries with a stethoscope in an effort to determine whether he had any blockages. She concluded he did not.

The physician prescribed the patient medication for Bell's Palsy and sent him home with instructions to follow up with a neurologist. She did not tell the patient that some of his symptoms (such as dizziness, difficulty swallowing, and weakness in his legs) were atypical of Bell's palsy, or that an ultrasound could definitively rule out TIA, which is often a precursor to a full stroke. The patient followed up with his primary care physician, who noted that he appeared to be recovering from Bell's palsy. Eleven days after his visit to the emergency department, the patient suffered an ischemic stroke that resulted in physical and cognitive impairments. An ultrasound at that time showed 95 percent blockage of a carotid artery. Had the blockage been detected sooner, the stroke might have been prevented.

### The Jury's Findings

At trial, the jury was instructed on both negligence and informed consent. Although the physician testified at trial that listening to the carotid arteries is a "very, very poor screening test," and a more reliable and noninvasive carotid ultrasound was available, the jury concluded that the physician was not negligent for

failing to order the ultrasound, and not negligent in her final diagnosis of Bell's palsy. Nonetheless, the jury found that the physician should have informed the patient of the availability of an ultrasound of the caratoid artery to rule out TIA, and that the failure to give the patient this information was a cause of his injuries. Approximately $2 million was awarded the patient and his wife, and the court of appeals affirmed.

## The Wisconsin Supreme Court's Ruling

Wisconsin's informed consent statute, Wis. Stat. § 448.30, states that, "[a]ny physician who treats a patient shall inform the patient about the availability of all alternate, viable medical modes of treatment and about the benefits and risks of those treatments." This obligation is subject to certain exceptions. For example, there is no obligation to disclose "detailed technical information that in all probability a patient would not understand," or "extremely remote possibilities that might falsely or detrimentally alarm the patient." The Court had previously held, in *Martin v. Richards*, 192 Wis. 2d 156, 176, 531 N.W.2d 70 (1995), that the applicable informed consent standard asked "what would a reasonable person in the patient's position want to know in order to make an intelligent decision with respect to the choices of treatment or diagnosis?"

In *Jandre*, the lead opinion of the Wisconsin Supreme Court reasoned that even if a physician is not negligent in using one of multiple alternative, non-negligent techniques of diagnosis, a reasonable patient may still want information about alternative diagnostic techniques. Further, these three Justices held, "it is [t]he patient's condition (i.e., the patient's symptoms), not the diagnosis, [that] drives the duty to disclose."

Justice Prosser concurred because he found sufficient evidence to support the jury's verdict, but expressed concern over the multiple public policy concerns at issue, calling for a "blue ribbon committee" to review the informed consent statute and case law, "so that physicians are given clear guidance as to their obligations." The dissent argued that the rationale of the lead opinion attempted "to hold [the physician] strictly liable for a missed diagnosis by requiring that she obtain [the patient's] informed consent to forgo a carotid ultrasound, whose only relevance was to show that [the physician's] diagnosis of Bell's palsy was not correct." The dissenting justices noted that the lead opinion would require doctors not just to disclose the risks and benefits of recommended procedures, but to also obtain informed consent to forgo procedures that the doctor does not recommend, including procedures that are inconsistent with the diagnosis the doctor has made.

In a joint statement, the Wisconsin Hospital Association, the Wisconsin Medical Society and the Wisconsin Chapter of the American College of Emergency Physicians lamented that the decision "leaves physicians in the difficult position of not knowing how much information a physician should provide to a patient about tests for diagnoses already ruled out by the physician." These groups have already taken up Justice Prosser's call for policy review and begun efforts to revisit and revise Wisconsin's informed consent statute, vowing to pursue legislative changes.

For further information, please contact **Angela Rust** or your regular Hinshaw attorney.