TO SUE OR NOT TO SUE UNDER THE TEXAS MEDICAL LIABILITY ACT

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CHAPTER 3

Curriculum Vitae
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Education:

Southern Methodist University
Dallas, Texas
B.A. - Political Science - 1976
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Southern Methodist University
Dallas, Texas
Juris Doctor - 1980

Certifications:

Board Certified in Personal Injury Trial Law
Texas Board of Legal Specialization - 1987
Re-Certified - 1992, 1997, 2002

Licensure:

Texas - 1980
U.S. District Court - Northern District of Texas - 1981
U.S. Court of Appeals - Fifth Circuit - 1991
U.S. Court of Federal Claims - 1997

Professional Memberships:

State Bar of Texas
Association of Trial Lawyers of America - Sustaining Member
Texas Trial Lawyers Association - Fellowship Member; Director 1999-present; Associate Director 1997-1999; CLE Co-Chair 2004, 2005
Dallas Trial Lawyers Association - Director, President 2000, President-Elect 1999, Vice-President 1998, Secretary 1997, Treasurer 1996
College of the State Bar of Texas
The Million Dollar Advocates Forum

Teaching

Trial Advocacy Instructor - Trial Advocacy College of Texas -2001,2002,2003
Trial Advocacy Instructor - Southern Methodist University -Dedman School of Law - 2002, 2003

Honors and Awards:

WHO'S WHO In American Law
WHO'S WHO Among Emerging Leaders in America
Departmental Distinction in Political Science - SMU 1976
Southwestern Law Journal - 1980
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I. INTRODUCTION

Representing victims of medical malpractice has always been a challenge for the trial lawyer. Convincing a jury of medical negligence and causation in even the most egregious cases is often difficult and always expensive. As a result, the decision to sue or not to sue turns not on the "justness" of the case but the practical aspects of "winnability" and economics.

Most of us went to law school because we had a passion for justice. Justice through the tort system serves the social good. It quiets the desire for vengeance thereby maintaining peace and order. It satisfies our wish for fairness, prevents carelessness and encourages people, corporations and governments to do the right thing. Tort liability is a means of distributing losses in a socially desirable manner so the victims of carelessness and neglect do not have to bear the loss and damages alone.

Over the past two decades, special interest groups have successfully been able to paint victims of medical malpractice as menaces to society and an eminent threat to corporate and insurance profits. Through politics and lobbying these special interest groups have succeeded in closing the door of justice for many malpractice victims, especially children and the elderly. This paper will discuss the impact of House Bill 4 and Proposition 12 on civil justice and the decision of the trial lawyer to sue or not to sue under the TMLA.

II. COST AND EXPENSE

In deciding whether to sue or not, the initial question to be answered is whether the recoverable damages will make it economically feasible to pursue the case. While House Bill 4 and Proposition 12 limited the damages recoverable in medical malpractice cases, the cost and expense of pursuing these claims continue to rise.

The trial lawyer must never assume that any case is so "obvious" that the doctor and his insurance company will be willing to settle without incurring the tremendous cost and expense to prepare for trial. The trial lawyer must therefore assume that the case will have to be tried to verdict and be prepared to spend whatever is necessary in terms of time and money for a successful conclusion of the case.

Before representation is even considered, the trial lawyer must prepare a budget for the case taking into consideration:

- How many and what type of testifying and consulting experts will be needed?
- How many depositions will be needed?
- How voluminous are the records?
- What trial exhibits will be needed and how much will they cost?
- How many hours of attorney and staff time will need to be devoted to this cause?

The trial lawyer must budget a minimum of $25, 000 for the most simple medical negligence case and potentially up to $250,000 for the more serious and complicated cases. The trial lawyer must also consider the fact that medical malpractice cases rarely settle for a reasonable value until the trial is eminent. On average, it will take 1 ½ to 3 years to get the case to trial. The trial lawyer must be committed to carrying the case and its expense for at least this period of time.

III. DAMAGES

Prior to House Bill 4 and Proposition 12, every potential medical malpractice case involving serious, permanent and disabling injury or wrongful death was worthy of investigation. With the passage of House Bill 4 and Proposition 12, many of these cases are no longer viable.

A. Serious, permanent and disabling injuries

1. Senior Citizens

Senior citizens typically have no claim for loss of earning capacity and their medical care is paid for by Medicare. Non-economic damages for loss of Grandma's sight or Grandpa's paralysis is capped at $250,000. With the unpredictability of juries and jurists and the anticipated argument of the defense lawyer that Grandpa seems pretty happy in his motorized scooter, serious, permanent and disabling injuries resulting from medical malpractice on senior citizens are, for the most part, not practical if the testimony of more than one or two experts will be required.

Example: Mrs. B, a seventy-one year old retiree, was admitted through the emergency department complaining of severe abdominal pain. The surgeon decided that the abdominal pain was due to adhesions and missed the occlusion of the mesentery artery. As a result, Mrs. B lost a significant amount of bowel, spent three months in the hospital and although she remains weak she has been able to resume most of her daily activities.

Recoverable damages:

- Non-economic losses - at most $250, 000.
- Medical care - fifteen percent of whatever Medicare paid.
- Budgeted cost and expense - $35-50,000.

It is simply not prudent to risk two years of litigation and over $35,000 hoping that a jury might award $250,000 for Mrs. B's pain and suffering and mental anguish. Medical care costs are reimbursed to Medicare.

2. Infants and Children

Serious, permanent and disabling injuries to infants and children are likewise not practical to pursue in many cases unless a convincing argument can be made that the injury will have a serious impact on future earning capacity. Loss of limb, loss of bowel and bladder function and similar injuries may not justify the cost and expense of pursuing the case if multiple expert witnesses will be required.

3. Middle-aged Wage Earners

Serious, permanent and disabling injuries resulting from medical malpractice that result in significant losses of future earning capacity to wage earners remain practical to pursue.

B. Death Cases

1. Senior citizens, infants and children.

Before the landmark decision of *Sanchez v. Schindler,* 651 S.W. 2d 249(Tex 1983) the killing of infants, children, and senior citizens was in reality an economic benefit for the survivors. After all, it is widely known that the economic cost of rearing a child far exceeds the economic benefit derived from the child's performance of household chores such as washing the dishes, cleaning the garage and mowing the lawn. An enlightened Texas Supreme Court recognized that the pecuniary loss rule was based on an antiquated concept of the child as an economic asset and revised its interpretation of the Texas Wrongful Death Statute in light of social realities and expanded recovery beyond the antiquated and inequitable pecuniary loss rule. If the pecuniary loss rule were followed, the average child and senior citizen has a negative value.

We know now that the value of the life of an infant, child or retired person is $250,000 if the victim is killed by a negligent doctor. This $250,000 must be divided amongst all of the wrongful death beneficiaries. As a result, medical malpractice cases involving the wrongful death of infants, children and retired people are not practical if more than one or two experts will be required.

Example:

Mr. Jones and his wife recently retired to Golden Acres Retirement Community and Golf Resort. His physician ignored the signs and symptoms of colon cancer for 2 ½ years. He is survived by his wife of fifty years and four adult children. The trial lawyer advises the bereaved family that the net anticipated recovery after deductions for cost, expenses, attorney's fees and Medicare reimbursement will be approximately

$100,000 divided five ways. They are further advised

that each of their depositions will be taken by an insurance defense lawyer who will do everything he or she can to imply that he was not a good husband and father. The survivors decide that it is not worth $20,000 each to have the memory of their husband and father attacked and tarnished.

2. Middle-aged Wage Earners

Since the legislature has now defined the worth of a human being to be directly proportional to his or her capacity to make money, cases involving the death of wage earners remain practical unless they earn at or near minimum wage and their personal consumption significantly reduces the pecuniary loss to the survivors of the working poor.

IV. EMERGENCY CARE

The emergency care provisions of Chapter 74 will have very little impact on decisions to sue or not to sue. Virtually all emergency care cases involve either delays in treatment that result in the patient becoming unstable or the patient is discharged with a benign diagnosis when in reality they had a life threatening condition that was missed. Under these circumstances, "emergency care" must be pleaded and argued as an affirmative defense.

Civil Practice and Remedies Code §74.151(a) provides that a person who in good faith administers emergency care..... "is not liable in civil damages" for an act performed during the emergency unless the act is willfully and wantonly negligent.

In other words, a physician defendant is *immune from liability* in an emergency care situation unless he or she is willfully or wantonly negligent. Immunity from liability is an affirmative defense that must be pleaded or else it is waived. *Kinnear v. Texas Comm. On Human Rights,* 14 S.W. 3d 299 (Tex. 2000). See also Texas Pattern Jury Charge 51.19 (comment B).

V. EXPERT REPORT REQUIREMENTS

In some cases, the medical record alone simply does not provide sufficient information from which an adequate expert report can be prepared. If oral depositions of the negligent healthcare providers can not be taken and the records are incomplete, inaccurate or do not provide enough information to prepare an adequate expert report, the case can not be filed. In enacting House Bill 4, the Texas Legislature recognized this undeniable obstruction of justice.

- In the early House versions of HB4, the Texas Legislature contemplated prohibiting Rule 202 depositions in medical malpractice cases. Exceptions to the prohibition would have included situations where the records were incomplete, inaccurate or illegible or where it could not be reasonably determined from the record what sequence of events occurred. Engrossed Version of House Bill 4 filed March 31, 2003 §10.03.
- The Senate Committee Report Version of HB4 filed May 14, 2003 contained the following provision in §74.351(u): "The court may allow additional deposition discovery on a showing by a plaintiff that *additional information is needed for the completion of an expert report that cannot otherwise practicably be obtained in a timely manner under this subsection and Subsection (s).*"
- The prohibitions and restrictions on Rule 202 were eliminated from the final bill and the provision that would have allowed more than two oral depositions of any witness in addition to the discovery allowed by §74.351(s) to prepare expert reports was removed.

This legislative intent was not considered by the Beaumont Court of Appeals in *In Re Miller*, 133 S.W. 3d 816 (Tex. App. - Beaumont 2005, *orig. proceeding*) and the Houston Court of Appeals in *In Re Huag*, 175 S.W. 3d 449 (Tex App - Houston [1st Dist.] *orig. proceeding*).

It is foolish and absurd to construe House Bill 4 as prohibiting Rule 202 depositions when one considers that one of the stated purposes of allowing Rule 202 depositions is to perpetuate a person's own testimony. TRCP 202.1(a). If a dying patient retains a trial lawyer with only a month or two to live, it would be foolish and absurd to say that the patient's videotaped deposition could not be taken to preserve the victim's testimony pursuant to Rule 202. While some might argue that House Bill 4 was a purposeful attack on victims of medical malpractice and designed to reduce premiums by eliminating the right to sue, it is doubtful that the Texas Legislature and Governor Perry intended to silence the voice of victims by forcing the plaintiff to wait months before a dying victim's testimony could be videotaped for use at trial after he or she died. The courts should not construe a statute in a manner that will lead to a "foolish or absurd result" when another alternative is available. *University of Texas Southwestern Medical Center at Dallas v. Loutzenhiser*, 140 S.W. 3d 351, 367 n20 (Tex 2004).

Nonetheless, until a correct interpretation of House Bill 4 is made by the courts, many trial lawyers will be reluctant to sue in a medical malpractice case if the records do not provide sufficient information upon which an adequate expert report can be prepared.

VI. CASES THAT ARE SLAM DUNK AND CAPPED

House Bill 4 and Proposition 12 created a few "slam dunk and capped" wrongful death cases. These cases must meet the following criteria:

- Liability is clear, convincing and obvious.
- The budget for the case does not exceed $25,000.
- The verdict will exceed the non-economic damage cap.

Example 1: Emergency Room Malpractice

A twenty-seven year old single female presents to the emergency room with severe abdominal pain. The emergency room physician fails to order appropriate tests to rule out small bowel obstruction and discharges her with a diagnosis of pelvic inflammatory disease. The young woman dies at her parent's home. The autopsy proves that she had small bowel obstruction.

Example 2: Obstetrical Malpractice

The labor and delivery nurse brought to the obstetrician's attention the non-reassuring tracings on the fetal heart monitor. The obstetrician elected to allow the labor to continue for three hours. The newborn baby dies nineteen minutes after vaginal delivery from anoxia.

In each of these cases, the liability insurance carrier settled for slightly less than the non-economic damages cap shortly after suit was filed and the expert reports were served, resulting in considerable "defense costs" savings to the carrier. In the first example, only the emergency room physician was deposed. In the second example, no depositions were taken.

VII. WINNERS AND LOSERS

From the foregoing analysis, it is fairly easy to determine who the "winners and losers" are under House Bill 4 and Proposition 12.

A. **Losers** - Infants, Children and Retired People
B. **Losers** - Texas Families of the working poor.
C. **Losers** - Medicare and Medicaid. Since most cases involving injury to the poor and retirees are no longer practical, there will be fewer lawsuits filed on behalf of medical malpractice victims who are on Medicare or Medicaid. As a consequence, there will be no reimbursement to Medicare or Medicaid for the millions of tax dollars spent to provide care and treatment for the injuries suffered by the poor and elderly due to substandard medical care.
D. **Losers** - Healthcare Providers. When The Medical Protective Company sought a nineteen percent rate increase in October 2003, they explained to the

Texas Insurance Commissioner that "capping non-economic damages will show a loss savings of 1.0%" Predictably, malpractice insurance premiums will continue to increase for Texas doctors after Proposition 12 just as they did in California after MICRA.[1]

E. **Losers** - Medical Malpractice Insurance Defense Lawyers. The reasons are obvious.

F. **Winners** - Special interest groups and the legislators they support.

VIII. CONCLUSION

"Equal Justice Under Law" is merely a fading stone inscription on the side of the United States Supreme Court Building. Chances are, if you are a victim of medical malpractice, House Bill 4 and Proposition 12 have closed the doors to justice because the decision to sue or not to sue under the TMLA has nothing to do with the Trial Lawyers' passion for Equal Justice Under Law.

[1] In the first thirteen years after the enactment of MICRA malpractice caps, California doctor's premiums increased by 450%. MICRA's California's insurance reform initiative (Proposition 103) was responsible for stabilizing medical malpractice premiums, not damages caps. www.consumerwatchdog.org/malpractice/rp/1008.pdf