

Getting More Money Under The Medical Malpractice Act

Recent case law has allowed plaintiffs' attorneys to obtain recovery from the Patients Compensation Fund (the "Fund") under separate caps for separate injuries. With these new cases come additional procedural challenges for plaintiffs' attorneys which will be discussed herein.

Separate Acts Producing Single Injury

Initially, plaintiff's attorneys tried to show that, if there are multiple acts of negligence of a single health care provider, they should be entitled to more than one recovery. However, if the multiple acts of negligence result in one injury, there can be only one recovery. St. Anthony Medical Center v. Smith, 592 N.E.2d 732 (Ind. Ct. App. 1992), and Boya v. Roig, 604 N.E.2d 1 (Ind. Ct. App. 1992).

Separate Acts Producing Separate Injuries

The first case in which plaintiffs were successfully able to obtain separate recoveries under the Act was Miller v. Memorial Hospital South Bend, 679 N.E.2d 1329 (Ind. 1997). In this Supreme Court decision, the Court determined, if two different health care providers committed two separate acts of malpractice that inflicted separate and distinct prenatal and postnatal injuries of an infant, then there can be two separate recoveries. Consequently, the injured infant was entitled to two maximum statutory recoveries for the two distinct injuries caused by the two distinct acts of malpractice. However, the Court did not address the liability of each health care provider and what each owed.

This case determined that Indiana Code 34-18-14-3(a) provides that the total amount recoverable for an injury or death of a patient may not exceed the statutory cap which was then \$500,000. Since the cap refers in the singular to an

injury or death of a patient, the Court determined that multiple injuries caused by multiple acts can result in separate caps and multiple recoveries. Consequently, if a plaintiff's attorney can show that a plaintiff was injured by more than one act of malpractice which resulted in separate injuries, then the plaintiff is entitled to more than one recovery, each with its own statutory cap.

Single Act Producing Separate Injuries to Different People

The next line of cases each involved an injury to an infant and mother caused by a single act of malpractice. The first case is McCarty v. Sanders, 805 N.E.2d 894 (Ind. Ct. App. 2004) (Judges Ratliff, Riley and Sharpnack). In this case, three cases were consolidated for appeal in which a single act of medical malpractice resulted in multiple injuries to multiple patients. In Sanders, Vicky Sanders was pregnant with twins and experienced severe hemorrhage. One child died and the other child experienced damage to her brain. Vicky also suffered various injuries. The Sanderses filed their petition for excess damages with the Fund. They settled with the underlying health care provider, Terre Haute Regional Hospital, and petitioned the Fund, claiming that each one was entitled to excess damages under a separate \$750,000 statutory limit for each of them.

The Koehls involved the administration of radioactive iodine to Carla Koehl while she was pregnant with twins for treatment of a thyroid condition. The administration of radioactive iodine resulted in injuries to the thyroid glands in both infants, causing both of them to have hypothyroidism. The Koehls resolved their claim against Dr. Knight for \$100,000 and then filed two separate petitions against the Fund, one on behalf of each twin, alleging that they

were each entitled to recover damages from the Fund for their separate injuries.

Lastly, Carrie Thomas was admitted to Caylor-Nickel Medical Center for the delivery of her child. The nurse-anesthetist administered an epidural injection which caused Carrie to become non-responsive and her respirations ceased. Resuscitative measures were not effective. Carrie was immediately taken to the operating room where her son was delivered by Caesarian section. Carrie's estate filed a medical malpractice claim and settled for \$100,000. The estate and the child's father separately petitioned the Fund for excess damages alleging that the child was entitled to recovery under a separate cap. The Court denied the Commissioner's request for partial summary judgment and ruled that each injured party was allowed to seek excess damages from the Fund. The Court of Appeals affirmed the trial court's decision by looking at the statute which says that a qualified health care provider was not liable for an amount in excess of \$100,000 for an "occurrence of malpractice". Occurrence and injury were not synonymous.

The court reasoned that the malpractice carrier should not be forced to factor in additional unpredictable costs that would be incurred if the statutory cap were tied to the possible multiple injuries resulting from an occurrence of malpractice. Consequently, the health care provider who only commits one act of malpractice is only responsible for paying one threshold amount to access the Fund and each injured party can access the Fund for each party's injuries under a separate cap for each one of them. The Supreme Court has recently denied transfer in this case so it is good law.

Separate Acts Producing Multiple Injuries to the Same Person

The Court of Appeals, Judges

Barnes, Crone and Mathias, then looked at the fact scenario wherein a physician commits multiple acts of malpractice to the same person which result in multiples injuries. In Medical Assur. of Indiana v. McCarty, 808 N.E.2d 737 (Ind.Ct.App.,2004), the insurer of Dr. Patel, Medical Assurance of Indiana, brought this action against the Fund, claiming that Dr. Patel was not responsible to pay two separate underlying amounts of \$100,000 each, the threshold amount for each act and injury to access the Fund. The Court looked at the definition of "act or occurrence". Dr. Patel committed two separate acts of malpractice. The first negligent act was ineffectively suturing Mrs. Baker's colon, and the second negligent act was leaving a hemoclip attached to her ureter. The Court, using different reasoning than that in Sanders, looked to the legislative history and determined that the legislative intent was not to completely absolve a health care provider of liability for committing multiple separate acts of malpractice that resulted in separate distinct and compensable injuries, albeit during the course of a single medical procedure, regardless of temporal proximity of those acts. When a patient suffers a compensable injury due to malpractice, the patient and the Fund reasonably should expect the health care provider to pay his or her statutory share for each separate injury caused by each separate act of malpractice regardless of the temporal proximity of those acts. In order for plaintiffs' attorneys to obtain separate recoveries under separate caps for separate injuries caused by separate acts of malpractice from the Fund, plaintiffs' attorneys must obtain the underlying threshold amount for each act of malpractice which resulted in a separate injury.

Injury to a Minor

Under the Act, a medical malpractice claim must be filed within two years of the date of the act, omission, or neglect, except that a minor less than six years of age has until the minor's eighth birthday to commence a suit. See I.C. § 34-18-7-1-1(b) However, in a recent decision, the Court of Appeals determined that the statute of limitations for a minor was unconstitutional as violative of the Privileges and Immunities Clause of the Indiana Constitution. Ledbetter v. Hunter, 810 N.E.2d 1095 (In.Ct. App.

2004).

Practical Considerations

If a plaintiff's attorney seeks to claim separate acts resulting in separate injuries, the plaintiff's attorney should file a separate complaint for each act of malpractice. However, the question arises whether there should be separate panels. Furthermore, if a plaintiff's attorney does settle the case for one underlying threshold amount to access the Fund, and only seeks one recovery from the Fund, the plaintiff's attorney should amend the Complaint to combine all acts of malpractice and allege one injury. Otherwise the Fund will look at the settlement as partial payment for each injury and argue that plaintiff has not met the threshold amount to access the Fund.

Caution should be taken when entering into a settlement agreement to ensure the plaintiff is releasing the proper party. If there is more than one defendant and the plaintiff settles with one defendant and not the other, the settlement agreement should only release the party who settled. (See Csicsko v. Hill, 808 N.E.2d 80 (Ind.Ct. App. 2004).

Another consideration is that plaintiff's attorney is still only entitled to 15% attorney fees from any amounts obtained from the Fund. Consequently, the question arises as to how to structure the fee agreement in the event that there is more than one recovery from the health care provider.

Wrongful Death Act Limits versus Medical Malpractice Act Limits

In a recent decision, the court in Chamberlain v. Walpole, 769 N.E.2d 818 (Ind. Ct. App. 2003), in a split opinion, was presented with the issue of whether recovery for the wrongful death of an adult without a spouse or dependent next of kin is limited to \$300,000 or do the caps under the Indiana Medical Malpractice Act apply. Judges Brook and Sharpnack determined that the limits of the Medical Malpractice Act would apply based upon the statutory language under Indiana Code 34-18-4-3. This statute provides that the total amount recoverable for an injury or death of a patient may not exceed \$750,000 for an act of malpractice that occurred after December 31, 1989 and before July 1, 1999.

Clearly, the statutory language con-

templates an amount recoverable for death. The statutory language is clear and unambiguous as to the damages recoverable thereunder. However, the dissent by Judge Baker was strong in that allowing an adult child to recover, for the wrongful death of a parent who does not have a spouse or dependent next of kin, more than a similarly situated adult claimant under the Wrongful Death Act violates Articles 1, 6 and 23 of the Constitution, pertaining to the Equal Privileges and Immunities Clause. This case was recently argued before the Indiana Supreme Court and the attorneys are awaiting the Court's ruling. Interestingly, Judge Sharpnack participated in this panel and he was also on the panel in the McCarty case and thus appears to be favorable to expanding recovery to injured plaintiffs.

As it stands now, although the Court of Appeals has ruled that the Medical Malpractice Act limits do apply, rather than the Wrongful Death Act limits, the Indiana Supreme Court will be rendering a final decision in this matter, hopefully in the near future.

In summary, the courts have been favorable to plaintiffs by allowing additional recoveries to escape the harsh limitations of our Medical Malpractice Act.



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The views expressed in this column are those of the author, www.brownlaw1.com.

