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The “Loss of Chance” Doctrine in Medical Malpractice Cases

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On May 31, 2013, the Minnesota Supreme Court issued an opinion that may have a significant impact on medical malpractice cases, and the insurers that issue coverage to health care providers. In *Dickhoff v. Green*, No. A-11-0402, the Court held that Minnesota law permits a claim for loss of chance of recovery or survival. The 3-2 decision represents a shift in Minnesota malpractice law, and makes Minnesota the latest to join a growing majority of jurisdictions in permitting such a claim.

Under a traditional tort analysis of a medical malpractice case, in order to succeed, a plaintiff has to establish that it is “more probable than not” that their injury resulted from the doctor’s negligence rather than from their pre-existing condition. This “all or nothing” approach to causation provides a significant defense to medical professionals, particularly those treating patients with significant injuries or serious diseases with poor prognoses. Critics have argued for the application of a “loss of chance” approach – allowing a plaintiff, or her survivors, to recover for a doctor’s negligence that reduces the chance of recovery or survival, regardless of whether the patient’s chance of survival was above or below 50% at the time of the doctor’s alleged negligence.

A number of jurisdictions have recognized such a doctrine, which, proponents say, recognizes that a patient’s chance of survival has value, and that the defendant should be liable for the value of the chance that was lost. These include Arizona, the District of Columbia, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Missouri, Montana, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, South Dakota, Virginia, Washington, West Virginia, Wisconsin and Wyoming. Only eight states have considered and clearly rejected the doctrine: Florida, Idaho, Maryland, Mississippi, New Hampshire, Tennessee, Texas, South Carolina and Vermont.

As of May 31, 2013, Minnesota can be added to the list of jurisdictions recognizing the last clear chance doctrine in the context of medical malpractice claims. In *Dickhoff v. Green*, No. A-11-0402, the Minnesota Supreme Court, in a 3-2 decision, overruled longstanding precedent and held that Minnesota state law permits a claim for loss of chance of recovery or survival. The Court framed its holding not as “recognizing a new injury” but, rather, “recognizing that an injury that has always existed is now capable of being proven to a reasonable degree of certainty.” In this regard, the Court indicated its belief that medical science has progressed to a point where a doctor can gauge a patient’s chances of survival to a reasonable degree of medical certainty. The Court stated that these advances make it possible to prove causation in a loss of chance case.

This is the latest opinion in a fundamental shift in the nature of medical malpractice cases, providing additional avenues of recovery for plaintiffs and limiting one of the defenses typically available to the medical professional. Whether this will cause an increase in the number of claims, the cost of defending those cases or the exposure to

medical professions is yet to be fully analyzed. However, it is a trend that should be watched.

Given the significance of the ruling, and the 3-2 nature of the decision, it is anticipated that the defense will seek rehearing *en banc* of the decision in *Dickhoff*.

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