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"LOSS OF CHANCE" CLAIMS

By Patrick S. Stoneking


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With *Dickhoff v. Green,* 836 N.W.2d 321 (Minn. 2013), the Minnesota Supreme Court recognized loss of chance claims in Minnesota for the first time ever. This article provides definitions and background so that these claims can be understood.

"Loss of chance" is a term that arises most often in cases where a patient's disease went undiagnosed and untreated for some period of time. In delayed diagnosis cases, the compensable injury is rarely the disease itself. A patient presents with some existing ailment that, for whatever reason, goes undiagnosed. Most people know that when it comes to disease, earlier treatment is usually better than later treatment. Medical negligence can sometimes take away a patient's ability to get that earlier treatment. Any delay is often associated with a decreased probability of surviving the disease – a "loss of chance."

A diagnosis missed as a result of negligence creates liability on the part of a health care provider for the damage caused by that delay. So to pursue a case for malpractice, there must be expert evidence establishing the compensable harm resulting from the difference between the patient's actual health and what the patient's health would have been with a timely diagnosis. Identifying these percentages with medically supported precision is crucial to these cases, and there is inevitably a comparison between percentages of survival.

Before *Dickhoff*, to recover noneconomic damages, it was often necessary to connect the delay in treatment to the death from the underlying disease. This meant that the evidence would have to show that a patient's likelihood of survival went from above 50% to below 50%. So while a patient might have a relatively poor prognosis and a 51% chance of survival at the time a diagnosis was missed, a wrongful death claim could proceed if a delay brought that probability below 50%. In comparison, a patient with a beginning likelihood of survival below 50% would never have a valid claim for noneconomic harms, regardless of the negligence at issue.

Now with an ability to recover for loss of chance, the delay no longer has to be tied to death. In other words, crossing the bright line at 50% survival is no longer necessary to get past summary judgment. Under *Dickhoff*, a patient may have a valid claim for a drop in survival regardless of how big the drop is. While it should be remembered that size of this drop directly impacts the amount of harm that may be recovered, we should all be aware that patients who did not have a cause of action before *Dickhoff* might be able to bring a claim now.

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SELECT MEDICAL MALPRACTICE AND PERSONAL INJURY CASES AND RESULTS

PUNITIVE DAMAGES JURY VERDICT

In November 2009, an operator of an excavator hit a laborer with a 2,000 pound excavator bucket causing a pelvic injury. Philip Sieff and Brandon Vaughn represented the laborer and tried the personal injury case before a Duluth, Minnesota, jury for one week. The jury returned a verdict in favor of our client for approximately $330,000 which includes $250,000 in punitive damages. The case was closely followed and reported by the Duluth media.

$2.9 MILLION SETTLEMENT IN THIOCYANATE POISONING

Bill Maddix represented a man who suffered thiocyanate poisoning due to medical negligence. The man had a history of untreated hypertension and methamphetamine abuse and was diagnosed with a dissection of the descending aorta, acute renal failure, and hypertensive crisis. To reduce blood pressure, the doctor administered a co-infusion of sodium nitroprusside and sodium thiosulfate. This is a commonly used method to rapidly reduce blood pressure, but a byproduct of this co-infusion is thiocyanate, a neurotoxin. Patients with normal renal function can eliminate the thiocyanate, but patients with renal impairment cannot. In this case, the doctors infused the medication at too high of a rate for too long and the man suffered a catastrophic brain injury.

$1 MILLION SETTLEMENT IN INFANT DEATH

Kathleen Flynn Peterson and Brandon Thompson represented a couple who lost their first and only child when the child was just days old. The mother had an uncomplicated pregnancy and was admitted to a local hospital for delivery. During labor the baby's heart rate began to deteriorate. Inexplicably, the doctor and nurses allowed the mother to push for several hours despite clear signs that the baby was in trouble. We learned during our investigation that the doctor was called away to deliver another baby, leaving our client and her baby in distress. By the time the doctor performed an emergency C-section on our client, the baby was catastrophically brain-damaged and died several days later.

$630,000 SETTLEMENT IN COMPARTMENT SYNDROME CASE

Peter Schmit and Patrick Stoneking represented a woman who sustained serious injuries from a car accident. After transfer to a Twin Cities hospital, she underwent surgery for eight hours. During surgery, the leg not injured was placed in the hemilithotomy position and was not let down or monitored. Following surgery, she demonstrated decreased movement and pulses in the noninjured leg. She was diagnosed with compartment syndrome and taken back to surgery for a fasciotomy. Ultimately she sustained a permanent footdrop making walking on uneven ground and long distances problematic.

$475,000 SETTLEMENT IN WRONGFUL DEATH CASE

Chris Messerly and Melissa Wendland represented the family of a man who died of an acute myocardial infarction (heart attack). The man had been to the emergency room with complaints of left arm and shoulder pain after shoveling heavy snow. Although he had cardiac risk factors listed in his medical records available to the negligent physician (*e.g.*, history of high blood pressure and high cholesterol, smoker, family history of significant heart problems), the doctor did not consider cardiac causes for his symptoms. Instead, he was given Motrin and a sling and was told to go home and follow-up if he had other concerns. He died at home five days later.

MASS TORT LITIGATION AND INVESTIGATIONS

DEFECTIVE HIP LITIGATION UPDATE

In 2013, the FDA provided additional warnings about the unique risks of Metal-on-Metal hip implants. When two hip components each made from metal alloy repeatedly connect, the release of metal particles may cause tissue or bone damage leading to pain, implant loosening, device failure, and revision surgery.[1] The FDA proposed that manufacturers of certain Metal-on-Metal hip implants submit valid scientific evidence to demonstrate a reasonable assurance of safety and effectiveness, a very unusual move for devices that have been on the market for some time.[2] In the wake of this announcement, some manufacturers opted to cease sales of their Metal-on-Metal products, including DePuy with its Pinnacle Ultamet metal liner.[3]

We are actively litigating cases involving the alleged premature failures of several different Metal-on-Metal and other types of hips, including: **DePuy ASR**, **DePuy Pinnacle**, **Biomet M2a**, **Zimmer Durom Cup, Wright Conserve, Wright Profemur, and Stryker Rejuvenate, and ABG II**. In the ASR litigation, two trials have occurred in 2013, with one defense and one plaintiff verdict. Five more ASR trials are scheduled to start in state and federal courts before the end of the year. Trial is scheduled in the DePuy Pinnacle litigation in late 2014, and discovery is ongoing in the Biomet and Wright litigations. In the 15 months since Stryker Corporation's recall of **Stryker Rejuvenate and ABG II** modular hip stems, hundreds of cases have been filed in state and federal courts. Robins, Kaplan, Miller & Ciresi L.L.P. Partner Tara Sutton has been appointed to serve on the Plaintiffs' Steering Committee in the New Jersey state court litigation, where an early bellwether mediation process is underway. In federal court, the Stryker multi-district litigation (MDL) was recently assigned to Judge Donovan Frank in the District of Minnesota.

GRANUFLO/NATURALYTE LITIGATION: DIALYSIS PRODUCTS LINKED WITH INCREASED RISK OF DEATH

The FDA recalled Fresenius Medical Care's dialysis products GranuFlo and NaturaLyte in March 2012.[4] These products have been linked to a six-fold increased risk of cardiopulmonary arrest and sudden cardiac death.[5] Some patients who received these dialysis products were injured after receiving too much bicarbonate, which can result in metabolic alkalosis, which in turn can cause major cardiac events and death.[6] Our firm is representing patients injured by these products and actively litigating these cases.

LARIAM INVESTIGATION: ANTIMALARIAL DRUG LINKED TO NEUROPSYCHOLOGICAL SIDE EFFECTS

On July 29, 2013, the FDA issued a safety alert warning about permanent psychiatric side effects associated with the anti-malarial drug mefloquine hydrochloride (brand name Lariam), and advised that a Black Box warning be added to the drug's label.[7] Commonly used by international travelers, Larium has been linked to adverse reports including suicide, aggression, psychosis, paranoia, hallucinations, panic, and depression.[8] The drug is manufactured by Hoffman La Roche, Boehringer Ingelheim (Roxane Laboratories), Sandoz Inc., and Teva Pharmaceuticals. Our firm is investigating this case.

ABILIFY INVESTIGATION: DRUG LINKED WITH COMPULSIVE BEHAVIOR

We are also investigating the link between the drug aripiprazole (brand name: Abilify) and compulsive gambling and other compulsive behavior such as compulsive eating, excessive shopping, and hypersexuality.[9] Abilify is an atypical anti-psychotic medicine prescribed to treat a variety of disorders including schizophrenia, bipolar disorder, depression, irritability, agitation, and mania.[10] Abilify is manufactured by Otsuka America Pharmaceuticals Inc. and Bristol-Myers Squibb Co.

– See footnotes on Page 4.

RECOGNITION

SUPER LAWYERS AND RISING STARS

Recently attorneys in our Medical Malpractice, Personal Injury and Mass Tort practices were honored as 2013 Super Lawyers and Rising Stars. We couldn't attain these rankings without you and we want to acknowledge and thank you for your support of our practice. We appreciate it.

2013 Minnesota Super Lawyers

Michael V. Ciresi
John F. Eisberg
Chris Messerly
Vincent J. Moccio
Kathleen Flynn Peterson
Peter A. Schmit
Philip Sieff
Tara D. Sutton
Brandon E. Thompson
Terry L. Wade

2013 Minnesota Rising Stars

Kate E. Jaycox
Troy F. Tatting
Brandon E. Vaughn

Mass Tort Investigations Footnotes:

1. www.fda.gov/MedicalDevices/Safety/AlertsandNotices/ucm335775.htm.
2. www.federalregister.gov/articles/2013/01/18/2013-01006/effective-date-of-requirement-for-premarket-approval-for-two-class-iii-preamendments-devices.
3. www.depuy.com/about-depuy/news-and-press/detail?tid=&year=&page=2.
4. www.fda.gov/medicaldevices/safety/listofrecalls/ucm309990.htm.
5. *See* FMC Internal Memo to Medical Directors & Attending Physicians, November 4, 2011, available at www.nytimes.com/2012/06/15/health/fda-investigates-fresenius-for-failure-to-warn-of-risk.html?_r=0.
6. *Id.*
7. www.fda.gov/drugs/drugsafety/ucm362227.htm.
8. *Id.*; www.cbsnews.com/2100-500164_162-538144.html.
9. *See e.g.,* MG Roxanas, Pathological gambling and compulsive eating associated with aripiprazole; Aust N Z J Psychiatry, 2010 Mar,44(3),291; M Kodama, T Hamamura. Aripiprazole-induced behavioural disturbance related to impulse control in a clinical setting, Int J.
10. Highlights of Prescribing Information, available at www.addabilify.com.

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