

Illinois Legal Update

Insights and Developments in the Law

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An Overview of Medical Malpractice

In This Issue

An Overview of Medical Malpractice 1

Bank Accounts for Children..... 2

Trust Powers Limited 2

Outlaw vs. Rule of Law 3

Victims Can Recover All of Their Medical Bills 4

A missed diagnosis. A botched operation. Amputation of the wrong limb. It seems that horror stories like these appear on the news almost every day. Although most people who are sick or injured

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recover, a report by the Institute of Medicine claims that as many as 98,000 patients die from mistakes made by their doctors every year.

Because of the need to lower costs and to process patients more efficiently, some doctors feel pressured to reduce testing and treatment in the name of cost savings. In light of this, many patients feel that the quality of medical care they receive has declined, and they

wonder if there is anything that can be done when mistakes happen. There is. A claim for “medical malpractice,” also known as a “professional negligence” claim or a “healing arts malpractice” suit, can be made.

Although only the most sensational cases tend to make the news, medical malpractice covers almost any kind of error that a doctor or other health-care provider might make in treating a patient. A doctor may give an incorrect diagnosis, order the wrong kind of treatment, order treatment to begin too early or too late, or make a blunder while treating the patient. All of these errors are considered “malpractice,” which generally means that the doctor has negligently failed to provide the patient with the same level of care as the patient expects to receive from an average doctor.

Proving It

To prove that a medical professional is guilty of malpractice in Illinois, the patient must show (1) the proper standard of care that

Continued on page four.

Bank Accounts for Children

When you establish a bank account for a minor, you can retain ownership of the money or you can pass ownership to the child. If you establish an account in which you are designated the “custodian” of the money, you have transferred ownership to the child. The money is deemed to be property transferred under the Illinois Uniform Transfers to Minors Act (the “Act”) and is owned by the donee-minor. The account is held under the child’s Social Security number.

During the child’s minority, until he or she is 21, the custodian holds, manages, and invests the money. Until the age of majority, the custodian may use the money for the child’s reasonable needs. When the child turns 21, the custodian must deliver the money and proceeds, plus accumulated interest and profit, to him or her. Unlike a trust for support or education, the proceeds of which must be used for the trust’s stated purpose, money transferred under the Act generally may be used by the custodian for the child’s support. It is, however, the custodian’s duty to use the money only for the child’s benefit.

If you establish an account “in trust” for a minor, the money in the account is not owned by the minor. Instead, such a trust account belongs to you, the trustee, during your lifetime. The long-recognized common-law trust, sometimes called a “Totten Trust,” presumes that an account established with the depositor’s money in his own name as trustee for another creates a mere tentative trust revocable at will until the depositor dies or completes the gift in his lifetime.

It is also important to remember that funds in a minor’s bank ac-

count are not completely inaccessible. An Illinois court found that the goal of protecting the financial future of a minor does not override a provision of a trust account agreement allowing the bank to set off funds from the account for a minor’s debts. In this case, the minor had made unauthorized withdrawals from another account at the bank and refused to pay the money back. The bank withdrew money from the minor’s trust account and used it to set off the unauthorized

withdrawals. As illustrated above, it is vital to review account agreements to ensure that a minor’s funds are protected as much as possible.

Sometimes, children are beneficiaries under irrevocable trust agreements. Where a trustee holds a child’s property under a written trust agreement, the trustee must abide by all of the terms of the agreement regarding the permitted

Continued on page three.

Trust Powers Limited

Court Refuses to Enforce a “Religion Clause”

Trusts are a means of separating the legal and beneficial ownership of property, which allows the beneficiary to enjoy the benefits of ownership without actually owning the asset. Trusts have been around for many years, and are common in estate planning. They allow a person to establish the terms under which someone else receives his property, and to provide for minors by putting an adult in charge of the property until the child is an adult. However, the Illinois Appellate Court recently made clear that a person’s right to control property through the provisions of a trust has its limits.

The case involved a wealthy couple who established trusts for their grandchildren. The trusts provided that if the grandchildren married someone of a different religion, they would be treated as if they had died and would receive no inheritance. The court was asked whether such a provision could be enforced.

The court found that the provision could not be enforced. Citing cases stretching back more than 100 years, the court ruled that any provision of a will or a trust that acts as a restraint on marriage was void. Such a provision was found to be against public policy, because it either restricts a person’s right to marry or encourages him or her to divorce in order to receive an inheritance. Although the Illinois Appellate Court recognized that courts in some states had reached a different result, the court determined that Illinois should follow the modern trend and refused to enforce such a provision.

Outlaw vs. Rule of Law

Recently, court documents were uncovered from a successful civil case involving some notorious nineteenth-century defendants who were better known for avoiding the legal consequences of their acts: Jesse and Frank James.

Not surprisingly, the case against the James brothers stemmed from one of their signature activities, a

bank robbery. During an attempted bank robbery by the brothers in Galatin, Missouri, in 1869, Jesse James killed a cashier.

As the brothers made their getaway, Jesse was thrown from his horse, which he left behind in favor of doubling up on Frank's horse. Soon thereafter, the brothers happened upon the unfortunate Dr. Smoote, who was also on horseback. Jesse relieved Smoote of his horse, at gunpoint, and continued the escape.

Smoote was not the first or the last victim of the James brothers, but he was unusual in then bringing, and winning, a lawsuit against them for the full value of the horse, saddle, and bridle that they had stolen.

One might expect the outlaws to have ignored the lawsuit altogether, but the brothers answered the lawsuit by arguing that they were not personally served with notice of it. Although a sheriff testified that he

had delivered the papers to the James family farm (pity the process server charged with serving a summons on Jesse James!), the case was dismissed on that technicality. That might have been the end of the litigation, were it not for Jesse's decision to publish a letter in a newspaper declaring himself innocent of the holdup and murder.

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Correctly pegging Jesse James as a newspaper reader, Smoote's attorney cleverly won the court's approval to file a notice of service in the classified section of a local newspaper, thus

giving Dr. Smoote another bite at the apple. Again, through their attorney, the James brothers initially fought the lawsuit, but soon they withdrew from the suit and allowed a judgment to be entered against them for \$223. The judgment was satisfied when Smoote took possession of the horse which Jesse had left behind at the robbery.

Yes, Dr. Smoote had to endure the dreaded prospect of one day staring down the barrel of Jesse James's weapon, but in dollars and cents he fared well. The horse he now had, which Jesse had bought with cash gained from some of his successful robberies, was believed to have been from Kentucky racing stock and was valued at \$500 (a considerable sum for the time).

Bank Accounts

Continued from page two.

uses of the trust property. Trust money invested in accordance with a trust agreement is maintained in a trust account held under an employer identification number (EIN) issued by the IRS.

Personal Injury Proceeds

Parents may find themselves managing bank accounts that are established for the investment of personal injury proceeds for their children. Personal injury proceeds payable to minors are governed by court orders. While a lawsuit brought on behalf of a child is at first controlled by the child's parent or guardian, the court holds ultimate authority over whether a settlement is in a child's best interest. The court also has control over money paid in a settlement or after a verdict. Typically, court orders specify where parents may invest a child's money and what use, if any, can be made of the money during the child's minority. Parents must seek the court's approval before withdrawing any funds from the account during the child's minority.

Whether you invest for your children on your own initiative or in connection with an established trust or court order, be sure the accounts are properly structured. As to your own investing for your children, consider whether you or your child should be the owner of the money and be sure to take into account the tax consequences of ownership.

Resolution of legal issues depends upon many factors, including variations of facts and interpretations of Illinois law. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

Medical Malpractice

Continued from page one.

should govern the conduct of the medical professional, (2) that the medical professional negligently breached the applicable standard of care, and (3) that the resulting injury to the patient was caused by the breach.

However, unlike most other kinds of lawsuits, a malpractice lawsuit cannot even be filed in Illinois until after a qualified health professional—a professional who has either practiced or taught in the same area of health care for at least the previous six years and who knows what standard of care was owed to the patient—signs a written report stating that the injured patient has “reasonable and meritorious” reasons for filing the lawsuit.

This special requirement that the patient provide an expert report before he or she can even go to court is intended to weed out claims lacking in merit. However, the fact that many doctors are reluctant to acknowledge that a colleague has made a mistake means that the expert report requirement often makes it more difficult to pursue a claim, even in a clear case of malpractice.

Time Limit

Suits for medical malpractice must be brought within two years of the date the patient knew or should have known that he or she was the victim of malpractice. Although the law does allow some additional time if the patient did not know the doctor committed malpractice until well after the treatment is over, in most cases a lawsuit must be filed within four years

of the date that the malpractice occurred. If it takes a while for a patient to realize that he or she was the victim of an act of malpractice, this unique requirement can make it more difficult for the patient to bring a malpractice claim.

Once a malpractice case actually makes it into court, it is a very complicated case to win. Proving malpractice requires presenting testi-

mony from qualified experts, and the scientific and medical issues presented in even the simplest malpractice cases are very complex.

Medical malpractice suits require both an experienced lawyer and top-notch legal work. If you feel that you or a loved one was the victim of negligent medical care, make sure to consult with a qualified attorney.

Victims Can Recover All of Their Medical Bills

In a recent decision, the Illinois Supreme Court held that Illinois would follow the “reasonable value” rule in deciding how much an injured person could recover for medical care received.

The case involved an elderly man who was badly injured in a car accident. His doctors billed him for more than \$80,000 for treatment. However, those bills were settled for just \$19,000, because his treatment was paid for by Medicaid and Medicare. At trial, the jury awarded the man \$80,000 for his medical bills, but the trial court reduced his recovery to \$19,000, the amount actually paid. The court of appeals affirmed this result, but the supreme court reversed.

Looking at cases from around the country, the court found that most states follow the reasonable value rule, which allows injured persons to recover the reasonable value of the medical care they receive, regardless of what is actually paid for the care. Reducing recovery to the amount actually paid would give a negligent defendant the benefit of contracts entered into by others, such as when a doctor agrees to accept less from Medicare than from a private patient. The court ruled that defendants should not be allowed to benefit by such arrangements, whether they be the plaintiff’s own insurance or government-provided coverage like Medicaid and Medicare.

This case, which clarified Illinois law on this point, allows the injured to be fully compensated for their losses, and prevents defendants from receiving a “windfall” if the person they injure happens to be insured.