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Medical Malpractice

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First District Appellate Court Clarifies the Lost Chance Doctrine

Late last year, in the case *Foley v. Fletcher*, 361 Ill. App. 3d 39, 836 N.E.2d 667, 296 Ill. Dec. 916 (1st Dist. 2005), the Illinois Appellate Court, First District, visited the legal doctrine of "increased risk of future harm" (sometimes referred to as the "lost chance doctrine"), first recognized by the Illinois Supreme Court in *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 679 N.E.2d 1202, 223 Ill. Dec. 429 (1997). In so doing, the First District attempted to clarify some of the questions not addressed by the Illinois Supreme Court in the *Holton* decision. The court addressed two main questions: 1) what degree of proof is required to demonstrate a claim of "increased risk of harm;" and 2) what damages are recoverable under that cause of action? The First District's answers to both questions are beneficial to medical malpractice defense attorneys defending these claims.

"Lost chance" in medical malpractice actions refers to the injury sustained by a plaintiff whose medical providers are alleged to have negligently deprived the plaintiff of a chance to survive or recover from a health problem, or where the malpractice has lessened the effectiveness of treatment or increased the risk of an unfavorable outcome to the plaintiff. *Holton*, 176 Ill. 2d at 111. The case of *Northern Trust Co. v. Louis A. Weiss Memorial Hospital*, 143 Ill. App. 3d 479, 97 Ill. Dec. 524, 493 N.E.2d 6 (1986), was the first in Illinois to specifically identify and approve the loss of chance concept, in the context of deciding whether proximate causation could be established by evidence that the defendant's conduct "lessened the effectiveness" of the treatment or "increased the risk of harm" to a patient. The *Northern Trust Co*. court concluded that "the better rule is that '[e]vidence which shows to a reasonable certainty that negligent delay in diagnosis or treatment * * * lessened the effectiveness of treatment is sufficient to establish proximate cause.'" *Northern Trust Co.*, 143 Ill. App. 3d at 487.

Likewise, in *Chambers v. Rush-Presbyterian-St. Luke's Medical Center*, 155 Ill. App. 3d 458, 108 Ill. Dec. 265, 508 N.E.2d 426 (1987), the court stated that a plaintiff is not required to prove that a better result would have been obtained absent the malpractice. The court also acknowledged that the circumstances were more problematic when evidence existed that both medical malpractice and an underlying disease or injury caused the patient's death. *Chambers*, 155 Ill. App. 3d at 463. The supreme court in *Holton* concluded that *Northern Trust Co.* and *Chambers* reflect the correct application of proximate causation principles when a defendant's negligent medical care is alleged to have denied the patient a chance of survival or recovery. *Holton*, 176 Ill. 2d at 116. The court concluded, "there is nothing novel about requiring health care professionals to compensate patients who are negligently injured while in their care. To the extent a plaintiff's chance of recovery or survival is lessened by the malpractice, he or she should be able to present evidence to a jury that the

defendant's malpractice, to a reasonable degree of medical certainty, proximately caused the increased risk of harm or lost chance of recovery." *Id.* at 119.

In the recent First District case of *Foley v. Fletcher*, the plaintiffs filed their complaint, alleging the defendants were negligent in attempting a vaginal birth after caesarian section (VBAC). The plaintiffs claimed the defendants, Dr. Peggy Fletcher and Primary Healthcare Associates, S.C., knew that Mrs. Foley had two earlier caesarian deliveries, had been advised against future VBAC attempts, and that a VBAC attempt would create substantially increased and avoidable risks to Mrs. Foley and her fetus. *Foley*, 836 N.E.2d at 669. The First District addressed four issues in the appeal: whether the trial court erred in: (1) allowing plaintiffs to present undisclosed expert testimony in violation of Supreme Court Rule 213; (2) failing to inform the jury that Dr. Fletcher had multiple sclerosis (MS) and related cognitive deficits; (3) barring a videotape from being shown during voir dire, depicting a "day-in-the-life" of the minor plaintiff, Hannah, who has cerebral palsy; and (4) enabling the jury to reach a $1 million verdict for an "increased risk of future injury." For the purposes of this article, only the "increased risk of injury" portion of the court's decision will be discussed.

During trial, the plaintiffs presented the testimony of Dr. Lisa Thornton and Dr. David Townsend, over the defendants' objections, to show that Hannah had an increased future risk of scoliosis and hip dislocation. Dr. Townsend said he could not quantify the risk as slight, moderate or significant or predict whether the risk would materialize in Hannah's case. At the conclusion of the evidence, the trial court instructed the jury, over the defendants' objection, on damages for risk of future injury in the following manner:

> The plaintiff Hannah Foley claims that she has suffered an increased risk of scoliosis and hip dislocation as a result of the defendant's negligence. Hannah Foley is entitled to recover damages for physical harm resulting from a failure to exercise reasonable care. If the failure to exercise reasonable care increases the risk that such harm will occur in the future, Hannah Foley is entitled to compensation for that increased risk. In order to award this element of damage, you must find a breach of duty that was a substantial factor in causing a present injury which has resulted in an increased risk of future harm. The increased risk must have a basis in the evidence. Your verdict must not be based on speculation. The plaintiff is entitled to compensation to the extent that the future harm is likely to occur as measured by multiplying the total compensation to which the plaintiff would be entitled if the harm in question were certain to occur by the proven probability that the harm in question will in fact occur. *Foley*, 836 N.E.2d at 672-3.

The jury awarded the plaintiffs $1 million for Hannah's increased risk of future injury and the defendants appealed the verdict. The First District vacated that portion of the award, finding that the testimony of Drs. Thornton and Townsend did not specify the level of increased risk Hannah faces or the probability of injuries and therefore the "degree of risk" was not proven within a reasonable degree of certainty. The court found that the award could not be upheld under *Dillon v. Evanston Hospital,* 199 Ill. 2d 483, 494, 264 Ill. Dec. 653, 771 N.E.2d 357 (2002). In *Dillon*, the Illinois Supreme Court ruled that damages for increased risk of future injury are compensable, but "[t]he burden is on the plaintiff to prove that the defendant's negligence increased the plaintiff's risk of future injuries. A plaintiff can obtain compensation for a future injury that is not reasonably certain to occur, but the compensation would reflect the low probability of occurrence." *Dillon*, 199 Ill. 2d at 504, 264 Ill. Dec. 653, 771 N.E.2d 357. But "the increased risk must be based on evidence[,] not speculation, and, more importantly, the size of the award must reflect the probability of occurrence." *Dillon*, 199 Ill. 2d at 506. Therefore, the *Foley* court found that the award of $1 million for increased risk of future injury could have been based only on speculation since no tangible evidence was before it. *Foley*, 836 N.E.2d at 677-8.

The decision in *Foley* demonstrates that there is no presumption of a risk increased or chance lost in medical malpractice cases. Rather, a plaintiff must present expert testimony that specifies or quantifies the increased risk. That quantification will necessarily vary according to the injury at issue. In *Foley*, the court stated that the increased future risk of scoliosis and hip dislocation needed to be quantified as slight, moderate or significant. An increased risk of blindness or future myocardial infarction may lead to different quantifications by the plaintiff's expert witness. It can also be assumed from the decision in *Foley* that expert testimony offered by the defendants to refute the alleged increased risk must be based on the evidence, or that testimony also would be considered speculation and not admissible.

Plaintiffs have long argued that once a theory of increased risk of future injury is presented, they are able to recover damages for the entire injury. The *Foley* court refuted this argument by its citation to the following language in *Dillon*: "the increased risk must be based on evidence[,] not speculation, and, more importantly, the size of the award must reflect the probability of occurrence." *Dillon*, 199 Ill. 2d at 506. Therefore, once the jury determines the total amount of damages for increased risk of future harm, it must next determine the likelihood that the future harm will occur based on the evidence admitted at trial. Then, the jury would multiply the total damages by the likelihood to arrive at the net damages for risk of future harm. This formulation is reflected in verdict form 30.04.04, entitled *Increased Risk of Harm – Calculation*, drafted by the Supreme Court Committee on Jury Instructions in Civil Cases and available on its website. This verdict form lists the "likelihood" portion of the equation in terms of percentage.

Thus, can an argument be made that plaintiffs must offer expert testimony on likelihood of increased risk of future harm in terms of percentages or thus be barred at trial? What is the minimal level of evidential quantification that is required to meet the standard set in *Dillon* and reaffirmed in *Foley*? Should one defer addressing an opposing expert's increased risk disclosure that does not contain quantification and likelihood aspects in hopes to bar them at trial, or challenge them on cross examination in a deposition in hopes that they will be unable to clarify the position? These answers will most likely be on a case-by-case basis, but all medical malpractice defense attorneys should at least be aware of the issues and the ability to challenge the theory of increased risk when they are confronted with it.

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