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Outside Counsel

The Loss of Chance: Missed Diagnosis and Delayed Treatment

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When a doctor ignores the complaints or symptoms of a patient, resulting in a delay in the diagnosis and treatment of the underlying condition, leading to an increased likelihood of premature death or worsening of the condition, the proximate cause of the aggravated condition or death is established. This is generally referred to as the loss of a chance.

The first case to discuss this issue was *Kallenberg v. Beth Israel Hospital*, where the court affirmed a jury verdict in favor of the plaintiff based on expert testimony that opined that if properly treated, energetically and adequately, the patient still (would have had) a 20, say 30, maybe 40 percent chance of survival if surgery had been undertaken; and that surgery could have been performed if the proper drugs had been administered. He also testified that if the proper drugs had been administered, even without surgery, she had a 2 percent chance of survival.[1]

Some attorneys initially interpreted the Kallenberg holding to mean that where there was even a 2 percent loss of a chance, without further proof, a recovery was permitted. Subsequent to Kallenberg, an appellate court held that there must be proof that there was a substantial possibility that there would have been a recovery but for the malpractice.[2]

Mortensen

Thereafter, in *Mortensen v. Memorial Hosp.*, the court clarified its Kallenberg holding and pointed out that proximate cause is a legal concept which cannot be dissected and measured in terms of percentages.[3] The court noted that in requiring that a defendant's negligent act or omission be a substantial factor in bringing about the plaintiff's injury, a plaintiff is not required to eliminate every other possible cause of injury.

That another possible cause concurs with defendant's negligent act or omission to produce an injury does not relieve a defendant from liability if the plaintiff shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred.[4] Thus, the trial court properly charged the jury that the defendant's negligence had to be a substantial factor in bringing about the loss of plaintiff's leg.[5]

Indeed, it is well-settled law that in order for a plaintiff to recover damages, a defendant's negligence need not be the sole cause of the injury; it need only have been a substantial factor in bringing the injury, and that a court should so instruct a jury.[6] Where a court erroneously uses the phrase the proximate cause instead of a proximate cause in instructing a jury, a new trial may be required.

In order to establish a prima facie case in a medical malpractice action, where causation is almost always a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant.[7]

A doctor may be held liable for the injuries proximately caused by his or her departures from good and accepted medical practices where the plaintiff's injuries would have been less severe than they were but for said negligence.[8] A physician may similarly be held liable for the damages that result from a delay in treatment.[9] Thus, an 11-hour delay in surgery that consequently reduced the decedent's chances of survival was actionable and there was legally sufficient evidence of causation.[10]

Jump

The law with respect to the loss of a chance was recently and clearly stated by the Appellate Division, Second Department, in *Jump v. Facelle*.

In cases of this nature, the plaintiff's expert need not quantify the exact extent to which a particular act or omission decreased a patient's chances of survival or cure, as long as the jury can infer that it was probable that some diminution in the chance of survival had occurred, the court said.

A court may commit reversible error in denying a request for a jury instruction that a deprivation of a substantial chance for a cure can constitute a proximate cause of a decedent's injuries and/or death.[11]

An example of an application of these principles is seen in *Stewart v. NYCH & HC*, where the plaintiff proved that it was more likely than not that she lost a substantial opportunity to have a natural child birth. The chance that she lost, in order to be substantial, did not have to be more likely than not, and did not have to be more than 50 percent, but it had to be more than slight.

Thus, the plaintiff merely had to prove that defendant's negligence was the proximate cause of the loss of her right fallopian tube and that such negligence deprived her of a substantial possibility of conceiving and bearing children naturally. If the jury found that she lost even a 5 percent to 10 percent chance of having a successful pregnancy as a result of sexual intercourse and that this chance was substantial, a verdict in her favor would be justified.[12]

Cancer

While the loss of a chance theory can

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apply to many scenarios involving medical malpractice, it is commonly encountered in cases where a delay in diagnosing the plaintiff's cancer has occurred.[13]

Where the plaintiff offers proof that the defendant departed from accepted standards of follow-up care, which allowed a period to pass when the plaintiff's decedent could have been successfully treated and thereby caused the metastasis that ultimately developed, a prima facie case of medical malpractice has been established.[14] Delays in the diagnosis and treatment of cancer as short as a few weeks can result in a physician being liable for a diminished chance of survival.[15]

It is well established that a physician is responsible for damages caused to the plaintiff where there is testimony adduced that would allow the jury to conclude that the defendant's failure to take more rigorous measures to ascertain the cause of the plaintiff's complaints constituted a departure from accepted standards of medical practice, and that the delay in diagnosing the metastasis of plaintiff's breast cancer to her bones was a proximate cause of her injuries.[16]

Where the plaintiff's expert opines that had her breast cancer been diagnosed earlier, the tumor would have been much smaller and she would not have suffered metastasis to an axillary lymph node, and a timely diagnosis would have increased her chances of long term survival, proximate cause has been established and liability for the physician's negligence may ensue.[17]

The failure to perform a timely biopsy and establish a plan for timely follow-up examinations to rule out an evolving malignancy were significant departures that resulted in an approximate 9 month delay in the diagnosis of plaintiff's breast cancer. The failure to advise a patient of the results of her mammogram, allowing her breast cancer to progress and go untreated over the course of 20 months is similarly actionable.[18]

The failure to investigate a lump in a women's breast, particularly when mammograms are known to give false negative responses, may constitute a departure from accepted medical practices and substantially contribute to the metastasis of the cancer to the plaintiff's lymph nodes, resulting in the physician being liable for these injuries.[19]

Where plaintiff's expert witness opined that the defendant departed from good and accepted medical standards based on his failure to perform follow-up examinations or order a timely mammogram, and that the mass that existed at the time of the earlier examination was a stage one cancer with an 80 percent cure rate, and that by the time the cancer was diagnosed, almost a year later, it had progressed to stage four cancer with an extremely poor prognosis, the defendant was properly held liable for his negligence in depriving the plaintiff a chance for recovery.[20]

A question of fact was presented where the plaintiff's expert averred that the defendants' failure to order a CAT scan to ascertain the nature of a density constituted a departure from accepted medical practices, and had such a test been performed, plaintiff's tumor would have been diagnosed when it was only 12 millimeters in size and when the cure rate was 60 percent to 70 percent, and the tumor was finally found when it was 3 centimeters to 4 centimeters in size and there was only a cure rate of less than 5 percent.[21]

Similarly, where a rational view of the evidence would permit the jury to find that defendants' negligence was a proximate cause of plaintiff's cancerous disease progressing from one stage to another, and thus, not only necessitating more extensive surgery but drastically reducing his chance of survival, recovery for the plaintiff is permissible. The failure of a physician to properly follow-up with a patient, resulting in a lack of a correct diagnosis of cancer and an ensuing metastatic spread, may provide a basis for imposing liability even where the patient is partially responsible for the delay in diagnosis.[22]

Conclusion

Even a short delay in the proper diagnosis and treatment of a medical condition can cause tragic results. The courts are cognizant of this and have sustained significant awards for the damages caused by a plaintiff being deprived of a chance to survive a condition as a result of the negligence of a physician, particularly in cases involving cancer.[23]

1. 45 A.D.2d 177, 179-180, 357 N.Y.S.2d 508, 510 (1st Dept. 1974), aff'd, 37 N.Y.2d 719, 374 N.Y.S.2d 615 (1975).

2. *Kimball v. Scors*, 59 A.D.2d 984, 399 N.Y.S.2d 350 (3rd Dept. 1977).

3. 105 A.D.2d 151, 157, 483 N.Y.S.2d 264, 269 (1st Dept. 1984).

4. 105 A.D.2d 151, 158, 483 N.Y.S.2d 264, 270 (1st Dept. 1984). See also, *Cavlin v. New York Medical Group, P.C.*, 286 A.D.2d 469, 470, 730 N.Y.S.2d 337, 338 (2nd Dept. 2001).

5. 105 A.D.2d 151, 159-160, 483 N.Y.S.2d 264, 271 (1st Dept. 1984).

6. *Galioto v. Lakeside Hosp.*, 123 A.D.2d 421, 422, 506 N.Y.S.2d 725, 726 (2nd Dept. 1986).

7. *Hughes v. New York Hospital-Cornell Medical Center*, 195 A.D.2d 442, 443-444, 600 N.Y.S.2d 145, 147 (2nd Dept. 1993).

8. *Minelli v. Good Samaritan Hosp.*, 213 A.D.2d 705, 706-707, 624 N.Y.S.2d 452, 453 (2nd Dept. 1995).

9. *Scariati v. St. John's Queens Hosp.*, 172 A.D.2d 817, 819, 569 N.Y.S.2d 189, 190 (2nd Dept. 1991).

10. *Jump v. Facelle*, 275 A.D.2d 345, 346, 712 N.Y.S.2d 162, 163 (2nd Dept. 2000), lv. to app. dis., 95 N.Y.2d 931, 721 N.Y.S.2d 607 (2000), lv. to app. den., 98 N.Y.2d 612, 749 N.Y.S.2d 3 (2002).

11. *Gagliardo v. Jamaica Hosp.*, 288 A.D.2d 179, 180, 732 N.Y.S.2d 353, 354 (2nd Dept. 2001).

12. *Stewart v. NYCH & HC*, 207 A.D.2d 703, 616 N.Y.S.2d 499 (1st Dept. 1994). See also, *Cannizzo v. Wijeyasekaran*, 259 A.D.2d 960, 689 N.Y.S.2d 315 (4th Dept. 1999) (negligence of defendants deprived plaintiff of a substantial possibility of having a functioning kidney).

13. Gagliardo, at note 11.

14. *Connolly v. Pastore*, 203 A.D.2d 412, 413, 610 N.Y.S.2d 560, 561 (2nd Dept. 1994).

15. Hughes, at note 7 (two-week delay); Cavlin, at note 4, (13-day delay); *Galandauer v. Brookdale Hospital Medical Center*, 274 A.D.2d 448, 710 N.Y.S.2d 396 (2nd Dept. 2000) (six-week delay).

16. *Schneider v. Memorial Hospital for Cancer and Allied Diseases*, 100 A.D.2d 583, 437 N.Y.S.2d 524 (2nd Dept. 1984).

17. *Provost v. Hassam*, 256 A.D.2d 875, 681 N.Y.S.2d 820 (3rd Dept. 1998).

18. *Lopez v. Bautista*, 287 A.D.2d 601, 732 N.Y.S.2d 172 (2nd Dept. 2001).

19. *Simmons v. East Nassau Medical Group, P.C.*, 260 A.D.2d 463, 688 N.Y.S.2d 209 (2nd Dept. 1999).

20. *Nussbaum v. Gibstein*, 138 A.D.2d 193, 531 N.Y.S.2d 276 (2nd Dept. 1988), rev'd on other grounds, 73 N.Y.2d 912, 539 N.Y.S.2d 289 (1989).

21. *Forrester v. Zwanger-Pesiri Radiology Group*, 274 A.D.2d 374, 375, 710 N.Y.S.2d 620, 621 (2nd Dept. 2000).

22. *Windisch v. Weiman*, 161 A.D.2d 433, 437-438, 555 N.Y.S.2d 731, 734 (1st Dept. 1990). See also, *Flowers v. Southampton Hospital*, 215 A.D.2d 723, 627 N.Y.S.2d 81 (2nd Dept. 1995) (cancer progressed from stage one to stage two).

23. See, *Charell v. Gonzalez*, 251 A.D.2d 72, 673 N.Y.S.2d 685 (1st Dept. 1998), lv. to app. den., 92 N.Y.2d 816, 684 N.Y.S.2d 187 (1998) ($4,700,000.00); *Pipitone v. Zweig*, 186 A.D.2d 73, 588 N.Y.S.2d 16 (1st Dept. 1992) (settlement for $2.8 million and trial on apportioning damages between the defendants); Lopez, at note 18 ($1.1 million).