

Illinois court could lower proof burden in medical negligence cases

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A case before the Illinois Supreme Court threatens to effectively reduce the long-standing burden-of-proof requirements in medical negligence cases.

If that happens, it will be more difficult for juries than it already is to differentiate between adverse events and medical errors. Studies have shown that only about 27% of adverse events are caused by negligence, resulting in more than two thirds of medical negligence claims being dropped, dismissed or withdrawn with no payment.

In turn, physicians would practice more defensive medicine because they would be incentivized to order unnecessary tests or choose aggressive treatments rather than the least harmful path based on their medical judgment, the Litigation Center of the American Medical Association and State Medical Societies and Illinois State Medical Society (ISMS) tell Illinois's highest court in an amicus brief.

After a jury found that four physicians and a hospital were not negligent in their care of a woman who came into the emergency department, an appellate court said the plaintiff should be given a new trial so that the jury can be given two further instructions to consider.

The instructions at trial asked the jury to consider proximate cause, which requires a direct link between the medical negligence and patient's injuries. The trial judge, following caselaw, denied the plaintiff's request for the jury to also consider whether there was lost chance, which lets a patient ask to be compensated if a doctor's negligence diminished the chance of survival. The trial judge also denied a jury instruction on informed consent, which would have let jurors consider whether a woman was given enough information about what would happen if she went home rather than stay at the hospital.

"The practice of medicine is not an exact science. If the lower courts divert from the traditional proximate cause jury instruction and its reliance on medical standards of care, loss of chance liability in Illinois would be increasingly speculative, based on small statistical probabilities for different

courses of treatment where reasonable, experienced physicians might take different paths,” according to the brief filed in the case, *Bailey v. Mercy Hospital and Medical Center*.

Find out more about the cases in which the AMA Litigation Center is providing assistance and learn about the Litigation Center’s case-selection criteria.

Prevent liability case uncertainty

The lawsuit stems from a case where a patient, Jill M. Milton-Hampton, went to the emergency department complaining of abdominal pain, nausea, vomiting and diarrhea. Scott A. Heinrich, MD, examined her and ordered several tests and intravenous fluids. There was no definitive diagnosis, but based on symptoms and that she was feeling better after getting fluids, Dr. Heinrich believed Milton-Hampton had gastroenteritis or a stomach flu caused by a virus. She had no rash or fever.

Dr. Heinrich transferred the patient to Brett M. Jones, MD, who ordered additional tests and also believed she had viral gastroenteritis. But, he recommended she be admitted to the hospital for observation and testing. He told her the risks of leaving the hospital that evening, including that there may be something else “very, very serious” causing the symptoms.

Milton-Hampton chose to go home.

She returned to the ED the next day and was transferred to the observation unit for ongoing care. The next morning, she went into cardiopulmonary arrest and ultimately died.

Milton-Hampton’s estate believes she had a bacterial infection leading to sepsis and wants a jury to consider the loss of chance. The AMA Litigation Center and ISMS tell the court that that conflicts with settled Illinois Pattern Jury Instruction law.

“Make no mistake, providing a separate loss of chance jury instruction would create an alternative liability theory where loss of chance would become a fallback option if a plaintiff does not prove traditional proximate cause,” the brief asking the Illinois Supreme Court to overturn the appellate ruling says. “In practice, it would end up reducing the burden-of-proof requirements of a medical negligence case” and will “fundamentally alter the meaning of causation, leading to uncertainty in medical liability cases in Illinois.”

Precedent must stand

Physicians also disagree that a jury should consider informed consent regarding the information she was given before she made the choice to go home after the initial ED visit.

“Discussions about existing medical conditions and decisions a patient makes are governed by traditional medical negligence law, and the trial judge included such an instruction tailored to this question,” the brief states, noting that Dr. Jones recommended that Milton-Hampton stay at the hospital because she may have a “very, very serious” disease.

The AMA Litigation Center and ISMS tell the court “patients and physicians must be able to rely on Illinois courts to follow precedent and sound legal principles, including in difficult cases such as this one.”