



Chapter 74 Update

July 24, 2013

© 2013

R. Brent Cooper

Diana L. Faust

brent.cooper@cooperscully.com

diana.faust@cooperscully.com



Issues

- Informed Consent
- Emergency Medical Care
- Statute of Repose
- Settlement Credits
- Arbitration
- Periodic Payments
- 74.35 I



Informed Consent

- *Felton v. Lovett* (Tex. 2012)
- Health care must be based on a patient's informed consent
- Health care provider may be liable for failing to disclose to a patient the risks inherent in proposed treatment
- Issue: whether the possibility that a patient, due to an undetectable physical condition, will suffer a severe, negative reaction to a procedure is a risk that is inherent in the procedure.
- Holding: It is



Informed Consent – *Felton v. Lovett*

- Treatment – neck/back pain – chiropractor
- Obtained history; x-ray cervical spine
- 2 manipulations on neck
- 3rd – more forceful
- Blurred vision, nausea, dizziness
- Vertebral artery dissection – stroke
- Doctor aware of risk



Informed Consent: *Felton v. Lovett*

- Experts: disputed whether risk inherent in procedure, SOC required disclosure, safer alternatives, manipulation caused injury
- Jury:
 - Negligence – no
 - Failed to disclose risk inherent – yes
 - Reasonable person would have refused procedure if disclosed – yes
 - Risk proximately caused injury - yes



Informed Consent: *Felton v. Lovett*

- Section 74.101:
 - *In a suit against a physician or health care provider involving a health care liability claim that is based on the failure of the physician or health care provider to disclose or adequately disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or health care provider, the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.*



Informed Consent: *Felton v. Lovett*

- Chiropractor is Not Physician
- Cannot Perform Surgery or Render Medical Care
- 74.101 Does Not Apply, but Common Law DOES Apply
- Duty to make reasonable disclosure to patient of risks incident to medical diagnosis and treatment
- Dr. Lovett: Focus on HCP rather than Patient (TMLA) is improper & renders jury findings immaterial



Informed Consent: *Felton v. Lovett*

- Court: Focus on HCP does not render findings immaterial
- Common Law & MLA Congruent
- Reasonable health care provider must disclose the risks that would influence a reasonable patient in deciding whether to undergo treatment but not those that would be unduly disturbing to an unreasonable patient



Informed Consent: *Felton v. Lovett*

- Ct App: Felton's injury would not have occurred but for physical condition—an unhealthy vertebral artery—risk could not have been inherent in Lovett's treatment
- Supremes: Ignored evidence that Felton's injury would not have occurred but for treatment, that manipulation can result in this injury, does so in significant number of cases, & dissection, stroke are known risks of chiropractic treatment that should be disclosed



Informed Consent: *Felton v. Lovett*

- Jury's "No" Answer to Negligence did not preclude liability because "Yes" answers as to MLA elements essentially same as required for common law liability
- Whether Lovett was negligent in his treatment of Felton is a distinct legal question from whether Lovett was negligent in failing to disclose the risks of treatment to Felton



Informed Consent

- *Meadows v. Tarrant County Hosp. Dist.*, (Tex. App.—Fort Worth)
- Failure-to-disclose claim is a HCLC
- Procedure performed, a right ankle arthrodesis, not procedure for which the Texas Medical Disclosure Panel has generated list of risks to be disclosed
- Expert testimony required, necessitating expert report under sections 74.101 and 74.351



Emergency Medical Care

- *Gardner v. Children's Med. Ctr. of Dallas*, (Tex. App.—Dallas June 3, 2013, no. pet. h.)
- Overruling challenge that section 74.153's heightened standard of proof in emergency medical care cases violates the Equal Protection Clause of the Texas or United States Constitutions, under a rational-basis review



Statute of Repose

- *Rivera v. Compton*, 392 S.W.3d 326, 333 (Tex. App.—El Paso 2012, pet. filed)
- Statute of repose in section 74.251(b) of the Civil Practice and Remedies Code violates the Open Courts Provision of the Texas Constitution in cases of minors injured before age eight



Settlement Credit

- *Valley Grande Manor v. Paredes*, (Tex. App.—Corpus Christi July 11, 2013, no. pet. h.) (mem. op.)
- No error in declining to apply dollar-for-dollar credit in favor of nursing home defendant, where settling defendant's liability based on wholly distinct acts and evidence at trial and the damages sought related solely to nursing home's care of the decedent during the relevant period before transfer to the settling defendant's facilities



Arbitration

- *Fredericksburg Care Co., L.P. v. Lira*, (Tex. App.—San Antonio June 26, 2013, no. pet. h.)
- 74.451 “enacted for the purpose of regulating the business of insurance,” within the meaning of the McCarran–Ferguson Act, preventing Federal Arbitration Act preemption
- Purpose of protecting and managing performance of insurance policies in the area of medical malpractice and health care liability



Future Custodial Care in Periodic Payments

- *St. Joseph Reg'l Health Ctr. v. Hopkins*, 393 S.W.3d 885, 886 (Tex. App.—Waco 2012, pet. filed)
- TC required to render judgment on jury verdict awarding plaintiff damages in sum of \$411,936 for future custodial care expense
- P died before judgment



Future Custodial Care in Periodic Payments: *St. Joseph's v. Hopkins*

- Defendant initially requested periodic payments of future custodial care expenses, which would have then terminated upon plaintiff's death
- But D withdrew its request for periodic payments, and therefore, statutory option, terminating periodic payments for custodial care services on plaintiff's death, no longer applied



74.351 – Many Issues

- Theories of Liability
- Non-Suit & Tolling
- Equitable Tolling
- Health Care Liability Claim
- Attorney's Fees
- Legislative Change



Each Theory of Liability

- *Certified EMS, Inc. v. Potts* (Tex. 2012)
- Direct & Vicarious Liab arising out of sexual assault
- Report Addressed Vicarious, but Deficient as to Direct
- Ct App: No requirement to address each theory of liability
- Supremes: Report need not cover every alleged theory of liability to make D aware of conduct at issue



Each Theory of Liability

- *TTHR Ltd. Partnership v. Moreno* (Tex. 2013)
 - Alleged Hospital Vicariously Liable for Conduct of Physicians, Nurses, and Directly Liable for its Own Conduct
 - Report Sufficient as to Physicians
 - Report Insufficient as to Nurses, Hosp.
 - All Claims Could Proceed
 - Did Not Address Multiple Cure Periods Issue



Non-Suit & Tolling

- *CHCA Woman's Hosp. v. Lidji* (June 21, 2013)
 - Non-suit: 116th day; re-filed 2 years later
 - Deadline tolled during period of non-suit
 - Protects right to non-suit and ensures full 120-days to serve report, consistent with Chapter 74's overall structure
 - Recognized TMLA neither recognizes nor prohibits tolling



Equitable Tolling

- *Carpinteyro v. Gomez* (Tex. App.—San Antonio 2013, pet. filed)
 - Deadline for Service on Saturday
 - Served on Monday, Per TRCP 4, 311.014 of Tex. Gov't Code
 - Rule 4 (Computation of Time) Moves Saturday Deadline to Monday
 - 311.014 – Same
 - No Conflict with Chapter 74 Because Silent
 - Report Served Timely



HCLC

- *Texas West Oaks Hosp. v. Williams*, 371 S.W.3d 171 (Tex. 2012)
 - Interpreting whether employee's claim for on-the-job-injury constituted "health care liability claim"
 - Held: employee was a "claimant" under the Texas Medical Liability Act ("claimant" need not be a patient)
 - Held: Claim based on departures from accepted standards of safety need not be directly related to health care



HCLC: *West Oaks*

- Employee health care provider injured while attempting to restrain patient at private mental health hospital
- Ee alleged injuries arising out of inadequate training, supervision, risk-mitigation, and safety and urged claims as ordinary negligence against nonsubscriber to workers' compensation scheme
- TMLA intended to be broad



HCLC: *West Oaks*

- Ee was “claimant” under definition:
- “a person, including a decedent’s estate, seeking or who has sought recovery of damages in a health care liability claim. All persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant.”
- Character of Claim was HCLC because concerned departure from standards of health care and safety
- Required expert testimony
- Safety does not have to be directly related to health care



HCLC

- *Loaisiga v. Cerda* (Tex. 2012)
 - Whether claims by patient against physician for misconduct during medical examination constitute HCLC under TMLA
 - Held: Court recognizes rebuttable presumption that claim is HCLC
 - Explains that “broad language of TMLA evidences legislative intent for statute to have expansive application”



HCLC: Laser Hair Removal

- *Bio-Derm v. Sok* (Sept. 8, 2013 oral argument)
 - Whether Laser Hair Removal is HCLC



Attorney's Fees

- *Mastin v. Jelinek* (13th-Edinburg, March 31, 2013) (mem. op.)
 - No Error in Failing to Award Total Amount of Attorney's Fees Requested
 - D Attorney Testimony
 - P Attorney Testimony About Costs Not Reasonable or Necessary, Arising from Obstructionist Tactics, Unnecessary and Harassing Multiple Motions to Prolong, Delay, and Cause Additional Costs



74.351 (a): Effective 9/1/13

- (a) In a health care liability claim, a claimant shall, ***not later than the 120th day after the date each defendant's original answer is filed***, serve on that party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report ***not later than the later of the 21st day after the date the report is served or the 21st day after the date the defendant's answer is filed***, failing which all objections are waived.
- Effective for claims filed on or after 9/1/13



Service After Suit Before Process

- Person Not a Party Until After Service of Process
 - *Dingler v. Tucker* (Fort Worth)
 - *Carroll v. Humsi* (Austin)
 - *Carreras v. Zamora* (Corpus Christi)
- Party is One Named in Pleadings Regardless of Whether Served with Process
 - *Zanchi v. Lane* (Texarkana, pet. granted)



THE END

Thank you!