MONTANA MEDICAL MALPRACTICE LIABILITY LAW

A Report to the Subcommittee on Medical Malpractice Liability Insurance

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Introduction

This report discusses Montana statutes and court cases relating to medical malpractice. The report was prepared for the SJR 32 (of the 2003 Regular Session) Subcommittee on Medical Liability Insurance.

The Montana Constitution

Article II, section 16, of the Montana Constitution, provides:

"Section 16. The administration of justice. Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state. Right and justice shall be administered without sale, denial, or delay."

This section places an important limitation of the ability of the Legislature to pass laws regulating medical malpractice cases. Under this section, the courts are open to a claim by any person that the person was injured because of medical malpractice, and a remedy must be given to the person. The person is entitled to "full legal redress".

Statutes regulating medical malpractice actions must also pass muster under the Equal Protection Clauses of the Montana and U.S. Constitutions. They must be rationally related to the Legislature's purpose in passing them.

Section 27-2-205, MCA, which is discussed below, states the time within which a medical malpractice action must be commenced. Subsection (2) provides that if the action is for death or injury of a person who was under the age of 4 on the date of the death or injury, the time for commencing the action begins to run upon the person's eighth birthday or death, whichever occurs first, and the time is tolled during any period within which the person does not reside with a parent or guardian. This limitation was upheld as rational in Estate of Dennis McCarthy, M.D. v. District Court, 1999 MT 309, 297 Mont. 212, 994 P.2d 1090, 56 St. Rep. 1241 (1999). The court said that the statute passed the rational basis test because ensuring the availability and affordability of health care services and reducing the cost of medical malpractice insurance are legitimate legislative objectives and the statute was rationally related to those objectives.

The Montana Medical Legal Panel Act, discussed below, was upheld in Linder v. Smith, 193 Mont. 20, 629 P.2d 1187, 38 St. Rep. 912 (1981). The court said that there was a rational basis for hindering access to the courts, noting that the Legislature intended the act to be a means to limit medical malpractice court claims to those that are clearly meritorious. The court also ruled that the act's mandate that a malpractice claim must be submitted to and decided by the panel before it can be filed in court does not interfere with the right to trial by jury and that submission to the panel is merely a permissible delay in the right to file a claim in court. The fact that three members of the panel that considered Linder's claim were doctors and plaintiff's claim was against a doctor was not, in the court's opinion, a denial of due process.

In Schuff v. A.T. Klemens and Son, 2000 MT 357, 303 Mont. 274, 16 P.3d 1002, 57 St. Rep. 1499 (2000), the court ruled that an offset against a judgment of a compensatory amount received through settlement or from a collateral source does not deny full compensation for a loss; it simply ensures a single recovery for a single injury. This is relevant to the statute discussed below mandating that compensation from a collateral source must be used as an offset against a judgment greater than \$50,000 for bodily injury or death.

The Montana Statutes

The Montana statutes will be discussed in the order in which they come into play, from the time that an injury allegedly occurred to the time of judgment on a claim that goes to trial.

The Montana Medical Legal Panel Act

This act, Title 27, chapter 6, MCA, was passed in 1977. It provides that a medical malpractice claim against a health care provider must be submitted to and decided by a panel of three health care providers and three attorneys before it can be filed in a court. The procedure before the panel is informal. The panel's decision is not binding and may not be introduced in evidence if the claim goes to court.

The purpose of the act, stated in section 27-6-102, MCA, is:

"to prevent where possible the filing in court of actions against health care providers and their employees for professional liability in situations where the facts do not permit at least a reasonable inference of malpractice and to make possible the fair and equitable disposition of such claims against health care providers as are or reasonably may be well founded."

The Medical Malpractice Statute of Limitations

Section 27-2-205, MCA, enacted in 1971, provides:

"27-2-205. Actions for medical malpractice. (1) Action in tort or contract for injury or death against a physician or surgeon, dentist, registered nurse, nursing home or hospital administrator,

dispensing optician, optometrist, licensed physical therapist, podiatrist, psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, pharmacist, veterinarian, a licensed hospital or long-term care facility, or licensed medical professional corporation, based upon alleged professional negligence or for rendering professional services without consent or for an act, error, or omission, must, except as provided in subsection (2), be commenced within 3 years after the date of injury or within 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs last, but in no case may an action be commenced after 5 years from the date of injury. However, this time limitation is tolled for any period during which there has been a failure to disclose any act, error, or omission upon which an action is based and that is known to the defendant or through the use of reasonable diligence subsequent to the act, error, or omission would have been known to the defendant.

(2) Notwithstanding the provisions of 27-2-401, in an action for death or injury of a minor who was under the age of 4 on the date of the minor's injury, the period of limitations in subsection (1) begins to run when the minor reaches the minor's eighth birthday or dies, whichever occurs first, and the time for commencement of the action is tolled during any period during which the minor does not reside with a parent or guardian."

Subsection (2) of the statute was inserted in 1987.

The Good Samaritan Law

The good samaritan law was enacted in 1963 and provides:

"27-1-714. Limits on liability for emergency care rendered at scene of accident or emergency. (1) Any person licensed as a physician and surgeon under the laws of the state of Montana, any volunteer firefighter or officer of any nonprofit volunteer fire company, or any other person who in good faith renders emergency care or assistance without compensation except as

provided in subsection (2) at the scene of an emergency or accident is not liable for any civil damages for acts or omissions other than damages occasioned by gross negligence or by willful or wanton acts or omissions by such person in rendering such emergency care or assistance.

(2) Subsection (1) includes a person properly trained under the laws of this state who operates an ambulance to and from the scene of an emergency or renders emergency medical treatment on a volunteer basis so long as the total reimbursement received for such volunteer services does not exceed 25% of his gross annual income or \$3,000 a calendar year, whichever is greater.

(3) If a nonprofit subscription fire company refuses to fight a fire on nonsubscriber property, such refusal does not constitute gross negligence or a willful or wanton act or omission."

In McCain v. Batson, 233 Mont. 288, 760 P.2d 725, 45 St. Rep. 1495 (1988), the court stated that the central reason for good samaritan legislation in Montana is the need to encourage physicians to render emergency medical care when they otherwise might not.

A related law enacted in 1989 provides:

"27-1-734. Limits on liability of health care provider in emergency situations. A physician licensed under Title 37, chapter 3, a nurse licensed under Title 37, chapter 8, or a hospital licensed under Title 50, chapter 5, rendering care or assistance in good faith to a patient of a direct-entry midwife in an emergency situation is liable for civil damages for acts or omissions committed in providing such emergency obstetrical care or assistance only to the extent that those damages are caused by gross negligence or by willful or wanton acts or omissions."

Montana Rules of Evidence, Rule 702

This rule provides:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

As is obvious from words of the rule, the rule is not limited to medical malpractice cases.

In most medical malpractice cases, the plaintiff will have to put an expert medical witness on the stand to establish the standard of care that applied to the defendant physician and a departure from the standard. Falcon v. Cheung, 257 Mont. 296, 848 P.2d 1050, 50 St. Rep. 276 (1993); Dalton v. Kalispell Regional Hospital, 256 Mont. 243, 846 P.2d 960, 50 St. Rep. 54 (1993). However, this was not necessary when the defendant physician's own testimony established the standard of care and his departure from the standard. Hill v. Squibb and Sons, 181 Mont. 199, 592 P.2d 1383, 36 St. Rep. 651 (1979). Nor was it necessary in Rudeck v. Wright, 218 Mont. 41, 709 P.2d 621, 42 St. Rep. 1380 (1985), in which the court held that if it is found that a foreign object was mistakenly left in a patient's body, no expert medical testimony is required to establish that the surgeon was negligent.

The Collateral Source Rule

If a case ends with a total award against one or more physicians in excess of \$50,000 and the plaintiff will be fully compensated for his damages (except court costs and attorney fees), the plaintiff's recovery under the award must be reduced by any amount paid or payable from a source other than the defendant or defendants that does not have a subrogation right. This rule, which also applies to cases other than medical malpractice cases, was enacted in 1987 and is contained in the following section of the Montana Code Annotated:

27-1-308. Collateral source reductions in actions arising from bodily injury or death -- subrogation rights. (1) In an action arising from bodily injury or death when the total award against all

defendants is in excess of \$50,000 and the plaintiff will be fully compensated for his damages, exclusive of court costs and attorney fees, a plaintiff's recovery must be reduced by any amount paid or payable from a collateral source that does not have a subrogation right.

- (2) Before an insurance policy payment is used to reduce an award under subsection (1), the following amounts must be deducted from the amount of the insurance policy payment:
 - (a) the amount the plaintiff paid for the 5 years prior to the date of injury;
 - (b) the amount the plaintiff paid from date of injury to date of judgment; and
- (c) the present value of the amount the plaintiff is thereafter obligated to pay to keep the policy in force for the period for which any reduction of an award is made pursuant to subsection (3).
- (3) The jury shall determine its award without consideration of any collateral sources. After the jury determines its award, reduction of the award must be made by the trial judge at a hearing and upon a separate submission of evidence relevant to the existence and amount of collateral sources. Evidence is admissible at the hearing to show that the plaintiff has been or may be reimbursed from a collateral source that does not have a subrogation right. If the trial judge finds that, at the time of hearing, it is not reasonably determinable whether or in what amount a benefit from such a collateral source will be payable, he shall:
- (a) order any person against whom an award was rendered and who claims a deduction under this section to make a deposit into court of the disputed amount, at interest; and
- (b) reduce the award by the amount deposited. The amount deposited and any interest thereon are subject to the further order of the court, pursuant to the requirements of this section.
- (4) Except for subrogation rights specifically granted by state or federal law, there is no right to subrogation for any amount paid or payable to a plaintiff from a collateral source if an award is reduced by that amount under subsection (1).

Note that under subsection (1), it is the plaintiff's "recovery", not the plaintiff's award, that is reduced by the collateral source payment. The plaintiff may not in fact be able to recover the full award from the defendant or defendants. If the full award is not recovered, a collateral source reduction will not be

allowed, because the plaintiff will not, in the words of subsection (1), be "fully compensated for his damages" if the plaintiff does not recover the full amount awarded. Shilhanek v. D-2 Trucking, Inc., 2000 MT 16, 298 Mont. 101, 994 P.2d 1105, 57 St. Rep. 89 (2000).

Limitation on Noneconomic Damages

Section 25-9-411, MCA, enacted in 1995, provides:

"25-9-411. Medical malpractice noneconomic damages limitation. (1) (a) In a malpractice claim or claims against one or more health care providers based on a single incident of malpractice, an award for past and future damages for noneconomic loss may not exceed \$250,000. All claims for noneconomic loss deriving from injuries to a patient are subject to an award not to exceed \$250,000. This limitation applies whether:

- (i) based on the same act or a series of acts that allegedly caused the injury, injuries, death, or deaths on which the action or actions are based; or
 - (ii) the act or series of acts were by one or more health care providers.
- (b) If a single incident of malpractice injures multiple, unrelated patients, the limitation on awards contained in subsection (1)(a) applies to each patient and all claims deriving from injuries to that patient.
- (2) (a) For purposes of the limitation on awards contained in subsection (1), a claimant has the burden of proving separate injuries, each arising from a different act or series of acts. An award or combination of awards in excess of \$250,000 must be reduced to \$250,000, after which the court shall make other reductions that are required by law. If a combination of awards for past and future noneconomic loss is reduced in the same action, future noneconomic loss must be reduced first and, if necessary to reach the \$250,000 limit, past noneconomic loss must then be reduced. If a combination of awards is reduced to \$250,000, a claimant's share of the \$250,000 must be the same percentage as the claimant's share of the combined awards before reduction.

- (b) For each claimant, further reductions must be made in the following order:
- (i) first, reductions under 27-1-702;
- (ii) second, reductions under 27-1-703; and
- (iii) third, setoffs and credits to which a defendant is entitled.
- (3) An award of future damages for noneconomic loss may not be discounted to present value.
- (4) The \$250,000 limit provided for in subsection (1) may not be disclosed to a jury.
- (5) As used in this section, the following definitions apply:
- (a) "Claimant" includes but is not limited to:
- (i) a person suffering bodily injury;
- (ii) a person making a claim as a result of bodily injury to or the death of another;
- (iii) a person making a claim on behalf of someone who suffered bodily injury or death;
- (iv) the representative of the estate of a person who suffered bodily injury or death; or
- (v) a person bringing a wrongful death action.
- (b) "Health care provider" means a physician, dentist, podiatrist, optometrist, chiropractor, physical therapist, or nurse licensed under Title 37 or a health care facility licensed under Title 50, chapter 5.
- (c) "Malpractice claim" means a claim based on a negligent act or omission by a health care provider in the rendering of professional services that is the proximate cause of a personal injury or wrongful death.
 - (d) "Noneconomic loss" means subjective, nonmonetary loss, including but not limited to:
 - (i) physical and mental pain or suffering;
 - (ii) emotional distress;
 - (iii) inconvenience;
 - (iv) subjective, nonmonetary loss arising from physical impairment or disfigurement;
 - (v) loss of society, companionship, and consortium, other than household services;
 - (vi) injury to reputation; and
 - (vii) humiliation.

(e) "Patient" means a person who receives services from a health care provider."

Periodic payment of future damages

Section 25-9-412, MCA, enacted in 1995, provides:

"25-9-412. Periodic payment of future damages in medical malpractice cases. (1) A party to an action for a malpractice claim, as defined in 25-9-411, in which \$50,000 or more of future damages is awarded may, prior to the entry of judgment, request the court to enter a judgment ordering future damages to be paid in whole or in part by periodic payments rather than by a lump-sum payment. Upon a request, the court shall enter an order for periodic payment of future damages. The total dollar amount of the ordered periodic payments must equal the total dollar amount of the future damages without a reduction to present value.

- (2) A court ordering the payment of future damages by periodic payments shall make specific findings as to the dollar amount of periodic payments needed to compensate the judgment creditor for future damages.
- (3) The judgment order must specify the recipient or recipients of periodic payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments must be made.
- (4) The court shall order that periodic payment of future damages be made, during the life of the judgment creditor or during the continuance of the compensable injury or disability of the judgment creditor, through the purchase of an inflation-indexed annuity approved by the court. The annuity must be in the form of an inflation-indexed annuity contract purchased from a qualified insurer that, in the most recent edition of A.M. Best, has an "A" (excellent) or higher rating and is in a class 7 or higher classification. The annuity also serves as any required supersedeas bond. Upon purchase of a court-approved annuity, the court shall order that the judgment is satisfied and that the judgment debtor

is discharged. If the judgment creditor dies before all periodic payments have been made, the remaining payments become the property of the creditor's estate."

As used in that section, "future damages" means damages for future medical treatment, care, custody, loss of future earnings, and future pain and suffering of the person who obtained the judgment award. (Section 25-9-401, MCA.)

Montana Case Law Issues Unrelated to the Statutes Contained in This Report

The Standard of Care Applicable to a Physician

In the usual medical malpractice case, negligence is claimed. This requires the plaintiff to prove that the defendant was subject to a standard of care and violated the standard. In Montana, the standard of care rule imposes on a physician who is in general practice the standard of care of a reasonably competent general practitioner acting in the same or a similar community in the United States in the same or similar circumstances. However, if the physician is a board-certified specialist or a board-certified general practitioner or family practitioner, the standard of care is that the physician has the duty to possess and exercise the reasonable and ordinary degree of learning, skill, and care possessed and exercised by physicians of good standing in the same school of practice in the same or a similar locality in Montana. A similar locality is one of similar geographical location, size, and character. Chapel v. Allison, 241 Mont. 83, 785 P.2d 204, 47 St. Rep. 101 (1990).

Issues Not Limited to Medical Malpractice Cases

In a given medical malpractice case, there are innumerable procedural, evidentiary, and substantive issues that can arise but that are not limited to medical malpractice cases and can arise in other types of cases. A medical malpractice case is a negligence case. As with any other type of negligence case, it raises such questions as: did the defendant have a duty of care toward the plaintiff, what was that duty, did the defendant breach the duty, did the breach result in an injury, what was the nature and extent of the injury, was the plaintiff contributorily negligent, and what damages should be awarded? It is the purpose of this report to set forth the statutory and case law that is unique to medical malpractice cases, not the law governing every conceivable issue that can arise in a medical malpractice case but that can also arise in other types of cases.

An example of such an issue is whether a doctor was an "ostensible agent" of a hospital within the meaning of section 28-10-103, MCA, which provides that:

"An agency is either actual or ostensible. An agency is actual when the agent is really employed by the principal. An agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent who is not really employed by him."

There are two medical malpractice cases known to have reached the Montana Supreme Court in which one of the issues was whether a doctor was an "ostensible agent" of a hospital. However, this ostensible agency rule applies anytime A intentionally or negligently leads B to believe that C is A's agent, no matter who A and C are.

If a principle of law is not unique to medical malpractice cases, it is up to anyone who thinks that application of the principle of law to medical malpractice cases creates a problem that calls for a change in that law as it relates to medical malpractice cases and only medical malpractice cases to convince the Legislature or the courts that change is necessary.

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