Medical Malpractice

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Second District Rejects Doctrine of
Post Hoc Ergo Propter Hoc in Medical Malpractice Cases and
Clarifies Requirement of Medical Expert’s Factual Basis in
Support of Proximate Causation Opinions

Recently, the Illinois Appellate Court, Second District, handed down a decision in which it addressed a medical malpractice issue of “first impression” in Illinois. In that decision, Hussung v. Patel, 369 Ill. App. 3d 924, 861 N.E.2d 678 (2nd Dist. 2007), the Second District stated that expert medical testimony is insufficient to defeat a motion for summary judgment to the extent that it bases the required element of causation solely upon the mere fact that an injury follows an alleged negligent action. This argument, which the court refers to in Latin as post hoc ergo propter hoc (after the fact, therefore because of the fact) is a logical fallacy. Rather, the court stated that at the summary judgment stage, a plaintiff must present “affirmative evidence” that the defendant’s negligence was arguably a proximate cause of the plaintiff’s injuries. 861 N.E.2d at 684.

In Hussung, the plaintiff filed a medical malpractice action against the defendants, Dr. Patel and Northern Illinois Physician Group, P.C. (Northern Illinois), alleging that she was injured as a result of Dr. Patel’s negligent administration of an epidural steroid injection. The plaintiff alleged that immediately upon the administration of the injection, she “experienced neurologic deficits, including drop foot of the left foot, numbness, tingling, inability to speak, and inability to walk.” Hussung, 861 N.E.2d at 679. Over the next several days, the plaintiff continued to experience symptoms of neurologic deficit, including instability when walking or standing, severe headaches, numbness, tingling, drop foot of the left foot, and confusion. Eleven days after the injection, the plaintiff was admitted to CGH Medical Center in Sterling, Illinois, “in a state of confusion and with numerous symptoms of neurologic deficit.” Id. at 680. She remained there for 5 days until she was transferred to the University of Wisconsin Hospital and Clinics, in Madison, Wisconsin, where she was diagnosed with meningoencephalitis.

In her amended complaint, the plaintiff alleged that Dr. Patel committed various negligent acts, including: improperly authorizing the epidural steroid injection, which was contra-indicated because of the plaintiff’s pre-existing conditions; failing to use fluoroscopy in the performance of the injection upon the plaintiff; failing to prevent neurologic damage; using too much steroid medication; failing to administer a test dose; failing to provide follow-up care and treatment; and failing to provide discharge instructions. The plaintiff further alleged that as a direct and proximate result of Dr. Patel’s negligence, she suffered permanent and severe injuries, past and future pain and suffering, loss of a normal life, and expenses for medical care and treatment. Id.

During discovery, the plaintiff disclosed Dr. George Mejicano and Dr. Brad Beinlich as opinion witnesses under Supreme Court Rule 213(f)(2) and Dr. Edward Brunner as a retained opinion witness under Supreme Court Rule 213(f)(3). Dr. Mejicano, an infectious-diseases specialist who treated the plaintiff at the University of Wisconsin Hospital, reviewed the plaintiff’s MRI report and the results of
her spinal fluid test, and subsequently changed her diagnosis from aseptic meningitis to herpes simplex virus type 2 (HSV-2) encephalitis or meningoencephalitis.

At his follow-up appointment with the plaintiff one month later, Dr. Mejicano made the following note: “It’s possible a steroid injection triggered a reactivation [of the HSV-2], but this is strictly speculation on my part.” *Id.* at 681. He testified at his deposition that what he thought happened to the plaintiff was that she received a steroid injection mixed with some sort of painkiller to which she had some sort of reaction almost immediately following that injection. *Id.* When questioned as to the time frame of the reaction, Dr. Mejicano stated, “So when I’m talking about the time frame piece, it seems that something had happened at the time of the injection or thereafter, although I can’t prove that.” He further stated that “It’s possible a steroid injection triggered a reactivation, but this is strictly speculation on my part.” *Id.* When asked whether the steroid itself could have caused a reactivation, Dr. Mejicano responded: “If you’re talking about a steroid injection of a lumbar spine, the answer is no to your question.” *Id.*

Dr. Beinlich, a neurologist who treated the plaintiff at the University of Wisconsin Hospital testified that plaintiff had meningoencephalitis and HSV-2. When asked in his deposition whether he had any idea what had caused the plaintiff’s meningoencephalitis, Dr. Beinlich responded: “No, I don’t think you can tell. I think there were theories rendered at the time. I think they’re still legitimate, and I think it’s speculation as to what happened.” *Id.* at 682. He also testified that in reviewing his entries in the plaintiff’s medical chart, complication of an epidural steroid injection seemed like “the most likely cause of her problems given the temporal relationship to what had happened to her and her history that she provided that day.” *Id.* Dr. Beinlich testified that there are three possibilities that could account for the plaintiff’s condition following the injection: the injection caused a reaction that triggered a chemical meningitis that resulted in an encephalitis and polyradiculitis; the plaintiff had a partially treated bacterial infection and that she suffered complications of partially treated meningitis; or the complications were related to HSV-2, which had been cultured from the plaintiff’s cerebrospinal fluid. *Id.* As to those possibilities, Dr. Beinlich testified, “And, frankly, I can’t tell you which of those is true, and I don’t think anybody else can.” *Id.*

Dr. Beinlich was asked whether he had an opinion to a reasonable degree of medical certainty that there is a causal connection between the steroid injection and the plaintiff’s injury, to which he responded: “As I previously stated, I think it would be speculation. I think that it’s impossible to be certain. I think that the temporal relationship certainly suggests that it was a complication. I understand that herpes simplex is there. I don’t know what the cause and effect of the herpes simplex or if it’s simply reactivation of herpes simplex related to having this other process going on, and I don’t know that.” *Id.*

Dr. Brunner, a retired anesthesiologist and the plaintiff’s retained expert, testified at his deposition that it was his opinion that Dr. Patel violated the standard of care when he performed the epidural steroid injection on the plaintiff and as a result, the “plaintiff was left with serious neurologic deficits.” *Id.* at 683. He further stated “the diagnosis was meningoencephalitis that was caused by a herpes simplex virus that was activated as a result of this epidural steroid treatment.” *Id.* When asked what Dr. Patel did to activate the HSV-2, Dr. Brunner responded: “I don’t know the answer to that question. The syndrome began subsequent to his treatment. His treatment had violated the standard of care and, therefore, I feel that there’s a direct cause and effect.” *Id.* Dr. Brunner further agreed that his opinions regarding causation were “based on the timing of the problems and the fact that [Dr. Patel] violated standard of care by doing the epidural block.” *Id.*

After these depositions, the defendants moved for summary judgment, arguing that the plaintiff failed to produce expert testimony causally linking Dr. Patel’s alleged negligent acts or omissions to the plaintiff’s claimed injuries. They further argued that Brunner’s opinion that Dr. Patel’s negligence caused the plaintiff’s injuries, which was based only on the fact that the injury occurred subsequent to the injection, amounted to a post hoc ergo propter hoc (after the fact, therefore because of the fact) argument which is a “logical fallacy.” The plaintiff responded by arguing that Dr. Brunner’s causation testimony coupled with Dr. Beinlich’s and Dr. Mejicano’s testimony raised a genuine issue of material fact as to the causal relationship between Dr. Patel’s conduct and the plaintiff’s injuries.
The trial court rejected the plaintiff’s arguments and granted the defendants’ motion for summary judgment, holding that “no testimony provides any foundational support to establish that any act or omission of Dr. Patel was the proximate cause of the plaintiff’s injuries.” Id. at 684. On appeal, the plaintiff argued that there was a genuine issue of fact concerning whether Dr. Patel’s administration of an epidural steroid injection proximately caused the plaintiff’s injuries and, therefore, the trial court erred in granting the defendants summary judgment. She further argued that the timing between the administration of the injection and her injury was “so remarkable, so contemporaneous, that its causal relationship is evident and cannot be doubted.” Id. According to the plaintiff, the circumstances justify an inference of proximate cause.

The Second District, however, found that none of the plaintiff’s experts could point to any “affirmative evidence” linking the steroid injection to her injuries. Instead, the doctors “attributed any causal connection to the temporal relationship between the injection and the injury.” Id. at 685. As such, none of the doctors provided a factual basis for a conclusion that the injuries resulted from the steroid injection. According to the Second District, the failure to provide a factual basis was fatal to the plaintiff’s claim, citing Gyllin v. College Craft Enterprises, Ltd., 260 Ill. App. 3d 707, 715, 633 N.E.2d 111 (2nd Dist. 1994). [An expert’s opinion is only as valid as the basis and reasons for the opinion. When there is no factual support for an expert’s conclusions, his conclusions alone do not create a question of fact.]

The Second District found that the plaintiff was “essentially asserting a post hoc ergo propter hoc argument, which Illinois courts have rejected as “one of the classic logical fallacies.” Hussung, 861 N.E.2d at 686, citing Manias v. Peoria County Sheriff’s Department Merit Comm’n, 109 Ill. App. 3d 700, 703, 440 N.E.2d 1269 (3rd Dist. 1982) [fact that police car caught fire after officer drove it not proof of causation]. The Second District also found that while no Illinois case has said so explicitly, other jurisdictions have held that a “‘temporal association alone does not suffice to show a causal link’ because a mere temporal coincidence between two events does not necessarily entail a substantial causal relation between them.” Id, citing Lasley v. Georgetown University, 688 A.2d 1381, 1387 (D.C.App.1997), Derzavis v. Bepko, 766 A.2d 514, 521-22 (D.C.App.2000); and Hasler v. United States, 718 F.2d 202, 206 (6th Cir.1983).

Referring to the Lasley case, the Second District adopted the District of Columbia Court of Appeals’ statement that, “In a medically complicated case such as this, contemporaneity between a medical procedure and an injury is too weak a foundation upon which to infer causation. Correlation and causation are hardly synonymous.” Id., citing Lasley, 688 A.2d at 1387. The Second District found that the plaintiff’s experts never “detailed exactly how and why her injuries occurred.” Further, the court agreed that “if we were to conclude that contemporaneity could prove causation, we would inappropriately shift the burden of proof from the plaintiff to the defendant.” Id. citing Lasley, 688 A.2d at 1387. Instead of requiring the plaintiff to establish how and why the epidural steroid injection resulted in the claimed injuries, the defendant would be forced to disprove the same. Hussung, 861 N.E.2d at 686-7.

Since the Second District held that the plaintiff failed to raise a genuine issue of fact as to proximate cause, it found that the trial court properly granted the defendants summary judgment and affirmed the order of the circuit court of Lee County.

The Second District’s decision in Hussung has far-reaching implications to the defense of many medical malpractice actions. While it has long been accepted that plaintiffs must prove the element of proximate causation without resorting to speculation or surmise in order to sustain a cause of action and defeat a motion for summary judgment, the Second District has further explained the detail to which expert testimony must reach in order to satisfy that burden before trial. Many types of medical cases, such as a patient developing an infection after an operation or a patient experiencing a bleed after an invasive procedure, have an inherent temporal basis for their alleged proximate causation of injury. According to the Second District, plaintiffs’ experts will now have to go beyond the mere
temporal connection and affirmatively detail exactly how and why those injuries occurred to survive a motion for summary judgment.

ABOUT THE AUTHOR

Edward J. Aucoin, Jr. is an associate in the Chicago firm of Pretzel & Stouffer, Chartered. He has over nine years of experience in medical malpractice defense, commercial litigation, and contract litigation practice. Mr. Aucoin’s substantial client base includes private hospitals and medical practice groups, physicians and other medical professionals, and national commercial corporations. He has extensive experience in preparing complex litigation for trial, and has second-chaired medical malpractice trials in Cook County and DuPage County. Mr. Aucoin received his B.A. from Loyola University of New Orleans and his J.D. from Loyola University of New Orleans School of Law. He is also a member of the IDC.