Medical Malpractice

Has the First District Recognized a New Cause of Action Against Physicians?

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In December 2006, the Illinois Appellate Court, First District, delivered an opinion that some attorneys feel may have created a new cause of action against physicians in Illinois. The most notable of these attorneys is First District, Second Division Appellate Judge, Warren D. Wolfson, who wrote a scathing dissent to the majority’s decision in Mansmith v. Hameeduddin, No. 1-04-1243, 2006 WL 3490101 (1st Dist. December 4, 2006).

Background

On January 14, 1998, Delphine Mansmith died of a brain stem abscess caused by an infection that developed after receiving an epidural steroid injection for back pain. Her estate sued Mansmith’s primary care physician, Anjum Hameeduddin, M.D., and her neurosurgeon, R. Lawrence Ferguson, M.D. for medical malpractice.

Dr. Hameeduddin had treated Mansmith since early 1996 for complaints of back pain. After conservative treatment failed, Dr. Hameeduddin referred Mansmith to Dr. Ferguson in August 1996. Dr. Ferguson diagnosed her with spinal stenosis and a bulging disc at the L4-L5 vertebrae and recommended surgical removal of the bulging disc, which was performed on August 12, 1996. However, instead of operating at the L4-L5 level, he performed surgery at the L1-L3 level. Further, in the postoperative report that he sent to Dr. Hameeduddin, Dr. Ferguson mistakenly stated that he performed the surgery at the L4-L5 level.

By August 1997, Mansmith’s back pain and numbness in her lower extremities had returned and were not responding to conservative treatment. Dr. Hameeduddin ordered a second MRI, which showed that Mansmith had in fact had surgery at the L1-L3 vertebrae and that the spinal stenosis and bulging disc at the L4-L5 vertebrae remained. Dr. Hameeduddin did not inform Dr. Ferguson or Mansmith about these inconsistencies. After Mansmith indicated that she did not want to go back to Dr. Ferguson for further evaluation, Dr. Hameeduddin referred her to Dr. Miz, an orthopedic surgeon, but did not provide the report of the first MRI scan (pre-surgery) or Dr. Ferguson’s postoperative report to Dr. Miz.

Based on Dr. Miz’ review of the second MRI report, one of his recommendations was that Mansmith receive an epidural steroid injection. He did not recommend surgery because Mansmith had undergone surgery by Dr. Ferguson the previous year and he wanted to attempt conservative treatment first. In December 1997, Mansmith received an epidural steroid injection. In early January, she complained of severe headache and back pain and on January 14, 1998, Mansmith died from an acute staph infection after the epidural injection introduced bacteria into Mrs. Mansmith’s spinal canal, which caused a brain stem abscess.
Trial

At trial, Dr. Finley Brown, plaintiff’s family practice expert, opined that Dr. Hameeduddin violated the standard of care by not telling Mansmith that Dr. Ferguson operated on the wrong vertebrae, and by not coordinating her care and letting Dr. Ferguson know that he operated on the wrong level. Dr. Brown explained that when a primary care practitioner discovers an inconsistency between what a surgeon says he did and what that surgeon actually did, the practitioner must ask the surgeon to resolve the discrepancy, and inform his patient of the discrepancy. Because Mansmith did not know that Dr. Ferguson operated on the wrong level, Dr. Brown opined that she could not seek appropriate medical treatment and was exposed to an unreasonable risk associated with receiving the epidural steroid injection, thereby proximately causing her pain, suffering, and death.

Dr. Hameeduddin testified that if she became aware that a specialist had negligently treated her patient, she would have a duty to tell the patient. But when asked what her duty was when she received the second MRI report, she testified: “To render her the proper care and send her to the appropriate surgeon to have it reviewed to find out what was still causing her pain.” 2006 WL 3490101, *8. Dr. Hameeduddin also admitted that she knew there was an inconsistency between the postoperative report and the second MRI, but that she did not tell Mansmith or Dr. Ferguson about the inconsistencies.

Dr. Steven Eisenstein, a family practitioner, an expert witness retained by Dr. Hameeduddin, testified that Dr. Hameeduddin’s duty to Mansmith after receiving the second MRI report was as follows: “[s]he was required to inform the patient that the MRI revealed abnormalities and that she felt these were significant enough that surgical consultation was necessary.” Id. at *4. Dr. Eisenstein testified that the standard of care did not require Dr. Hameeduddin to discuss the inconsistencies between the MRIs with Dr. Ferguson “[b]ecause the [second] MRI was ordered with the specific idea that this patient had pain and we were trying to get her better.” Id. Dr. Eisenstein also opined that nothing Dr. Hameeduddin did contributed to Mansmith’s death.

The plaintiff and Dr. Ferguson reached a settlement agreement before the jury reached its verdict. A jury found for the plaintiff and awarded damages in the amount of $1,198,734.94. After a setoff in the amount paid by Dr. Ferguson of $750,000, judgment was entered against Dr. Hameeduddin in the amount of $448,734.94. On appeal, Dr. Hameeduddin argued that the trial court erred when it denied her pretrial motion for summary judgment, her motions for a directed verdict at the close of the plaintiff’s case in chief and at the close of all of the evidence, and her post-trial motion for judgment notwithstanding the verdict because the plaintiff did not prove she deviated from the standard of care and did not and could not prove Dr. Hameeduddin’s actions were the proximate cause of Mansmith’s pain and suffering and ultimate death under both survival and wrongful death causes of action.

The First District’s Ruling

The First District affirmed the trial court’s denial of Dr. Hameeduddin’s motion for summary judgment. It found that the denial of the motion was not subject to review on appeal because the issues within the motion were decided at trial and therefore, any error in the denial merges into the judgment.

Dr. Hameeduddin argued the trial court erred by denying her motions for directed verdict and Judgment N.O.V. because: 1) the plaintiff failed to establish that the treatment she provided Mansmith deviated from the standard of care, and 2) the plaintiff failed to establish causation because Dr. Brown could only speculate as to what actions Mansmith would have taken had she been informed that Dr. Ferguson operated on the wrong vertebrae. The court disagreed, finding that sufficient expert testimony was presented at trial to not only establish the appropriate standard of care, but also to establish a breach thereof that proximately caused Mansmith’s injuries.
The court acknowledged Dr. Hameeduddin’s testimony that the conclusions contained in the two reports were “confusing,” making her “[u]naware of what had happened,” and stated that the jury was free to, but did not reject Dr. Brown’s testimony. *Id.* at *7. The court determined that an “inconsistency” was insufficient to trigger a duty on the part of Dr. Hameeduddin to discuss the results of the 1997 MRI and Dr. Ferguson’s postoperative findings with Mansmith. Instead, the majority found sufficient evidence in the record to support the jury’s verdict against the doctor, including: 1) Dr. Hameeduddin’s testimony during cross-examination that she would have a duty to tell the patient if she became aware that a specialist had provided negligent treatment her patient, 2) Dr. Brown’s testimony that Dr. Hameeduddin deviated from the standard of care by failing to act to correct her “confusion” and resolve the “inconsistency” between the reports, and 3) the reports from Dr. Miz and Dr. Santos post occurrence which corroborated the accuracy of the August 1997 MRI film and report, and confirmed Dr. Ferguson’s negligence during the operation.

Accordingly, “[i]t was within the jury’s prerogative to conclude that Dr. Hameeduddin had a continuing duty to discuss with Mansmith what amounted to substantial evidence of the same pathology that existed presurgery in 1996, in direct conflict with Dr. Ferguson’s claim that he performed the operation as he had intended.” *Id.* at *8. The First Circuit further reasoned that “where the record evidence reveals that Dr. Hameeduddin was the only physician that had reviewed the conflicting MRI scans (1996 and 1997) and Dr. Ferguson’s postoperative report, the burden to have passed on Dr. Ferguson’s postoperative report to the other specialists was slight. Passing on Dr. Ferguson’s report might well have provided the cover she claims here of deferring to a specialist.” *Id.* at *9.

As for proximate cause, the court found opposing doctrines were offered to assist it in analyzing the issues therein. Dr. Hameeduddin contended that the case should be analyzed under the “loss of chance” theory, citing *Scardina v. Nam*, 333 Ill. App. 3d 260, 775 N.E.2d 16 (2002), and *Aguilera v. Mt. Sinai Hospital Medical Center*, 293 Ill. App. 3d 967, 691 N.E.2d 1 (1997). Hameeduddin contended that *Aguilera* and *Scardina* were instructive on the speculative nature of the claimed causal connection in this case. However, the court, without much reasoning, found the circumstances present were not comparable to those in *Aguilera* or *Scardina*.

Mansmith cited to an “informed consent” case, *Coryell v. Smith*, 274 Ill. App. 3d 543, 653 N.E.2d 1317 (1995). However, the court found that the case, “given its unique facts, does not fall neatly within either doctrine” forwarded by the parties, but instead, it found “support from cases involving each doctrine in addressing the issue before us.” *Id.* In support of its reasoning, the court recited the testimony from almost all the medical experts that the surgical operation that Mansmith agreed to undergo in 1996 was the correct surgical operation for her in 1997 and that Mansmith was counterindicated for an epidural steroid, which put her at a greater risk of infection. *Mansmith*, 2006 WL 3490101 at *10-11. The Court further concluded that “it is also clear on the record that, had a laminectomy been properly performed in either 1996 or prior to December 1997, Mrs. Mansmith would never have underwent the epidural steroid injection, which resulted in the acute staph infection that killed her.” *Id.* at *11.

However, as Judge Wolfson pointed out in his dissent, Dr. Wiz had access to Mansmith’s medical records and recommended the epidural injection instead of the surgery “because Mrs. Mansmith had increased risk factors for surgery and had suffered previous postsurgical problems.” *Id.* at *18. Dr. Miz was not asked if he would have recommended surgery instead of the epidural injection if he had been told that Dr. Ferguson may have operated at the wrong level, and as such, “[w]e are left with no credible evidence that the defendant’s failure to inform Mrs. Mansmith had substantial impact on Dr. Wiz’s decision to use the epidural injection.” *Id.*

The majority found that the plaintiff’s focus was never on Dr. Miz, or what he should or should not have done. Instead, the court stated that the plaintiff’s case against Dr. Hameeduddin centered on what
Dr. Hameeduddin knew and did not disclose, and what Dr. Ferguson would have done had Dr. Hameeduddin complied with the standard of care owed to Mansmith. The court further rejected Dr. Hameeduddin’s contention that it is pure speculation that Dr. Ferguson would have done anything differently had Dr. Hameeduddin informed him that he performed the laminectomy on the wrong level, finding Dr. Ferguson’s testimony “clearly supports the contrary.”

But, as Judge Wolfson correctly points out in the dissent, Mansmith’s cause is “not aided by the fact that the defendant failed to inform Dr. Ferguson he might have operated on the wrong part of Mrs. Mansmith’s back. The Mansmiths had decided not to return to Dr. Ferguson even before they learned about his misplaced surgery. For what conceivable reason would they return to him after learning about his gross negligence?” Id.

The court also rejected Dr. Hameeduddin’s argument that “[w]ithout any direct testimony from the decedent, plaintiff cannot sustain his burden as to causation,” finding no direct evidence was needed. Instead, the court found that the circumstantial evidence was sufficient to make the causal connection between Dr. Hameeduddin’s professional negligence and the ultimate injuries suffered by Mansmith a question for the jury to determine. Specifically, the First District found there was objective medical evidence, without providing that evidence in its opinion, that Mansmith would have acted as she acted in 1996 by undergoing a second laminectomy had she been informed that the laminectomy she underwent in 1996 was incorrectly performed. This, according to the court, was because “[p]resumably, and consistent with Dr. Hameeduddin’s standard of care, she discussed the available options with Mrs. Mansmith in light of Dr. Ferguson’s recommendation.” Id. at *12. A reasonable inference could be drawn by the jury, according to the court, that Mansmith agreed to undergo the epidural injections, with attendant risks, because she had the misimpression that the first surgery was performed properly and did not provide any relief. In addition to the aforementioned medical evidence on the issue of proximate causation, the court stated that the “case, to a certain extent, also involves Mrs. Mansmith being deprived of the medical evidence to determine for herself what surgical procedure to undergo.” Id. at *14.

Perhaps most concerning about the court’s determination on this particular issue is its finding that the jury could speculate as to proximate causation, as it had “more than sufficient evidence to make a reasonable and objective determination as to what Mrs. Mansmith likely would have done based on the evidence that was presented.” Id. As Judge Wolfson states:

“The factual chain from the defendant’s lack of candor to the acute staph infection that killed Mrs. Mansmith has been stretched beyond the breaking point. The evidence invites the jury to guess and speculate. Dr. Brown’s testimony engraved the invitation. From the simple fact that at one point the Manssmiths expressed a desire to go to the University of Chicago Medical Center for a second opinion Dr. Brown concluded she would have sought a neurosurgical reevaluation and had a second operation. That is unsupported speculation. The Manssmiths did not seek a referral to the University of Chicago until after Mrs. Mansmith received the injection. On several occasions, the trial court sustained objections when Dr. Brown attempted to testify to what, in his opinion, Mrs. Manssmith would have done if the defendant had told her about the discrepancy between Dr. Ferguson’s operative report and the second MRI. The grounds for the objection were that the witness was being asked to speculate. The trial court rulings were correct. But then the jury was allowed to engage in that same speculation.” Id. at *18.

The majority states that because the trial court instructed the jury to answer a special interrogatory which asked whether the epidural steroid injection performed by Dr. Carobene was the sole proximate cause of the death of Mansmith, it “guarded against [speculation] by the use of appropriate instruction
to the jury”. Id. at *14. Yet the court does not explain how answering that special interrogatory in the negative prevented the jury from speculating as to how Mansmith would have acted in this matter.

Judge Wolfson’s dissent correctly finds that “[p]laintiff has pursued a theory, successfully so far, that never has been approved by any reported decision in this State.” Id. at *17. Mansmith v. Hameeduddin is not an informed consent or “loss of chance” case. Rather, the majority agreed with the plaintiff, who referred to it as a “failure to inform case,” without “any support for the proposition that such a theory exists in this State.” Id. If anything, Dr. Hameeduddin created a condition that made the injury possible in this matter. Her actions were not, “standing alone, enough to establish proximate cause.” Unger v. Eichleay Corp., 244 Ill. App. 3d 445, 451 (1993). Id.

What does the majority’s holding mean to the provision of care to medical providers?

Many questions necessarily arise from the Mansmith v. Hameeduddin decision. First, the majority intimates that Dr. Hameeduddin could have provided “cover” to herself by passing on the MRI reports and post-operative reports to the conferring specialists. If so, would those conferring specialists also have a duty to inform the patient of the negligence by Dr. Ferguson? Where would this chain of duty stop? Does this mean that exclusive knowledge of the information is not a factor in imposing liability?

Second, what degree of “confusion” or “inconsistency” needs to be present before this proposed “duty to inform” becomes applicable. Do we now require physicians to inform on each other for any supposed breach of the standard of care to the patient, regardless of whether it has caused injury? Would this duty to inform cause a negative situation where physicians would not accept referrals from a referring physician known to have informed on another physician in the past, and is that in the best interest of the patients?

Finally, are there any limits to the application of the “duty to inform” cause of action proposed by the majority? Exactly what information does the physician have a duty to inform the patient of during the provision of treatment? Does this duty survive the patient’s death and apply to the estate?

Certainly, the Mansmith v. Hameeduddin decision creates more questions than answers. As such, defense counsel can hope that the decision is an anomaly in the jurisprudence rather than the development of a new cause of action. Either way, we need to start answering the questions.

ABOUT THE AUTHOR
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