

Feature Article

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Privacy vs. Honesty – The Necessity of Full Disclosure of Medical Records

Increasingly, attorneys representing personal injury plaintiffs have asserted their clients’ “privacy rights” to avoid producing medical records. Attorneys have asserted that plaintiffs should be required to produce only records relating to the “same body part” referenced in the complaint, records covering a limited number of years, or records relating to a certain illness. Courts have struggled with the appropriate manner of balancing a plaintiff’s “right of privacy” with a defendant’s right to obtain all evidence relevant to the litigation, including that relating to the issues of proximate causation of a particular injury and the nature and extent of the plaintiff’s damages. Courts have specifically grappled with two issues: (1) what medical records might be relevant or reasonably calculated to lead to admissible evidence in a particular case; and (2) who should review those records to determine which information is relevant to the litigation? An analysis of case law from Illinois and other jurisdictions reveals that decisions concerning the scope of relevancy are reasonably consistent but decisions relating to who will evaluate medical records for relevancy as dictated by the courts are not.

If courts are to properly balance a plaintiff’s interest in privacy with the defendant’s interest in full disclosure, an analysis of the scope of those interests and the methods used to promote those interests is necessary. Such an analysis reveals that the scope of relevancy can be rather broad and the effort required to distinguish relevant information from irrelevant information is complex and burdensome. Attempts to place that burden on health care providers are untenable and attempts to place that burden on trial judges is a time-consuming waste of scarce judicial resources in all but a limited number of cases.

The only fair and workable approach is to return the burden of identifying relevant information in a plaintiff’s medical records to the two parties to whom it belongs in an adversary system: counsel for the litigants. This approach has worked well in Illinois and elsewhere with very few measurable complaints. The approach relies upon licensed professionals who are trained to respect the confidentiality of others and who can suffer severe consequences for breaching confidences.

The Perceived Problem with Privacy

Common law did not recognize a physician-patient privilege. MICHAEL H. GRAHAM, CLEARY AND GRAHAM’S HANDBOOK OF ILLINOIS EVIDENCE § 503.1 (9th ed. 2009). Illinois statutes do not permit a physician or surgeon to disclose information acquired while treating a patient except in certain circumstances, including actions brought by the patient that place the patient’s physical or mental condition at issue. 735 ILCS § 5/8-802. The statutory physician-patient privilege exists to encourage free discourse between doctor and patient and to protect patients from the embarrassment and invasion of privacy that results from disclosure to an outside party. *People v. Bates*, 169 Ill. App. 3d 218, 224, 523 N.E.2d 675, 679 (5th Dist. 1988).

The Illinois Mental Health and Developmental Disabilities Confidentiality Act further provides patients a privilege against disclosure of mental health and developmental disabilities services information and records except in civil actions

...in which the recipient introduces his mental condition or any aspect of his services received for such condition as an element of his claim or defense, if and only to the extent the court in which the proceedings have been brought . . . finds, after *in camera* examination of testimony or other evidence, that it is relevant, probative, not unduly prejudicial or inflammatory, and otherwise clearly admissible; that other satisfactory evidence is demonstrably unsatisfactory as evidence of the facts sought to be established by such evidence; and that disclosure is more important to the interests of substantial justice than protection from injury to the therapist-recipient relationship or to the recipient or other whom disclosure is likely to harm. . . .

740 ILCS §110/10(a)(1).

Although the physician-patient privilege had been well-established in state practice, and several states, including Illinois, had codified the privilege, prior to the passage of the Health Insurance Portability and Accountability Act (“HIPAA”) by the United States Congress in 1996, no federal basis for a physician-patient privilege existed. *Hippocrates to HIPAA: A Foundation for a Federal Physician-Patient Privilege*, 77 TEMP. L. REV. 505, 508 (2004). Congress, however, has long been concerned with disclosure of information it believed was sensitive. Both the Veterans Health Administration (VA) and the Substance Abuse Mental Health Services Administration (SAMHA) have adopted regulations that require confidentiality of any record relating to sensitive disorders or conditions. *See, e.g.*, Substance Abuse and Mental Health Services Administration, 42 U.S.C. § 290dd-2 (1998) (mandating that records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, or treatment be held confidential); Health Administration – Organization and Functions, 38 U.S.C.A § 7332 (2006) (“Records of the identity, diagnosis, prognosis, or treatment of any patient or subject which are maintained in connection with the performance of abuse, alcoholism, or alcohol abuse, infection with human immunodeficiency virus, or sickle cell anemia which is carried out by or for the department shall be . . . kept confidential.”).

HIPAA expanded upon the VA and the SAMHA regulations, requiring all covered entities to maintain “all individually identifiable health information” held by any covered entity confidential. The information was no longer required to pertain to enumerated illnesses or conditions to receive confidential status. Instead, confidentiality applied to past, present, and future physical or mental health information. Health Insurance Portability and Accountability Act: Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462-01 (2000).

Congress passed HIPAA to provide a “baseline of health information privacy protections” for patients. *Giangiulio v. Ingalls Memorial Hosp.*, 365 Ill. App. 3d 823, 827, 850 N.E.2d 249, 264 (1st Dist. 2006). The drafters of the legislation were concerned with the hypothetical increase in privacy concerns as technology improved and access to health information increased. HIPAA’s legislative history illustrates that the drafters considered health information “relatively ‘safe’ today, not because it is secure, but because it is difficult to access.” Pub. L. No. 104-191, Health Insurance Portability and Accountability Act of 1996. H.R. Rep. No. 104-496(1), at 54 (1996). While recognizing that the privacy of individual healthcare consumers was “paramount,” the drafters also sought to encourage the development of innovative means for storing and transferring health information, including electronic exchange systems, to improve efficiency and quality in the healthcare field. *Id.* at 99-100. Congress apparently intended that the regulations promulgated under HIPAA’s Privacy Rule would protect the privacy of individual patients while also encouraging innovation that would make health information more accessible.

In the litigation context, Congress marshaled no evidence to suggest that confidential medical information concerning plaintiffs was being disclosed outside the litigation process by defense lawyers collecting such medical records. One analysis, the Health Privacy Project, included only one allegation against a lawyer in a twenty-eight page report documenting various breaches of confidence. *Health Privacy Stories*, (March 5, 2007), [http://www.cdt.org/healthprivacy/20080311_stories\[1\].pdf](http://www.cdt.org/healthprivacy/20080311_stories[1].pdf).

As a practical matter, the courts should have little difficulty believing that the danger of lawyers disclosing confidential medical information to third parties is minimal. First, the lawyers collecting medical records are licensed professionals who could lose their license to practice law if they breached any confidentiality obligation. Second, the lawyers collecting the records are part of a profession that considers confidentiality sacrosanct. Indeed, most attorneys, when joining a firm, are warned that they cannot discuss office matters with anyone outside the office, including spouses, parents, children, and friends. Third, defense lawyers have no interest in using the information they obtain concerning a plaintiff's medical condition(s) other than to assess the value of the plaintiff's claim, and, if possible, to devalue the claim or call into question some aspect of the plaintiff's damages. Once litigation ends, lawyers typically close the files and maintains them in secure areas. After a set period of time, the files are generally shredded.

Regardless of the lack of interest defense lawyers have in disclosing a plaintiff's medical information outside of the litigation context, plaintiffs already have the ability to seek protection without limiting the defense lawyer's right to obtain relevant records. Specifically, plaintiffs may move for protective orders precluding disclosure outside of litigation.

In any event, the writers of this article are aware of no evidence adduced by any legislative body that re-disclosure of information obtained by defense lawyers and personal injury lawyers has created any problem for personal injury plaintiffs. If any such problem were ever to arise, appropriate remedies may already exist, such as the tort of invasion of privacy and disciplinary action against lawyers for unethical or unauthorized re-disclosures. Accordingly, in balancing the need for confidentiality of medical records against the need for defendants to develop defenses against claims of wage loss, permanent disability, pain and suffering, and ongoing medical treatment, there does not appear to be any significant need to preclude defense attorneys from obtaining the relevant medical records of a personal injury plaintiff to prevent the re-disclosure of the plaintiff's health information.

The Extent to which Filing a Claim Waives the Privilege

The Illinois legislature attempted to settle the issue of the scope of medical records disclosure required by personal injury plaintiffs when it passed § 2-1003 of the Code of Civil Procedure. Section 2-1003 deemed personal injury plaintiffs to have consented, by virtue of filing a personal injury action, to unlimited disclosure of all medical records of every health care provider who provided care to the plaintiff at any time. In other words, § 2-1003 sought to make explicit a defense attorney's ability to obtain the otherwise protected health information of a personal injury plaintiff by deeming a personal injury plaintiff to have waived his or her right to privacy and confidentiality with regard to medical records upon filing suit.

At the same time, however, Section 2-1003 instituted certain safeguards to prevent the disclosure of a personal injury plaintiff's health information outside the litigation context. For example, all documents and information obtained pursuant to Section 2-1003 are "confidential," and only authorized disclosure of such documents and information to "the parties to the action, their attorneys, their insurers' representatives, and witnesses and consultants whose testimony concerns medical treatment prognosis, or rehabilitation, including expert witnesses." 735 ILCS § 5/2-1003(a).

The Illinois Supreme Court, in *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997), invalidated Section 2-1003 as an unconstitutional violation of the separation of powers clause of the Illinois Constitution. *See* Ill. Const. 1970, Art. II, § 1. The Court held that evaluating the relevance of discovery requests and limiting such requests to prevent abuse or harassment are uniquely judicial functions and that § 2-1003 "impermissibly burdened and significantly infringed" upon the judiciary's constitutionally sanctioned

powers. *Best*, 179 Ill. 2d at 438-49, 689 N.E.2d at 1091-96. The Court further recognized that a patient has a privacy interest in his or her health information and medical records, but, importantly, the Court did not extend this privacy interest to a personal injury plaintiff's health information and medical records "related to the subject matter of plaintiff's lawsuit." *Best*, 179 Ill. 2d at 458, 689 N.E.2d at 1100.

The *Best* decision returned the scope of disclosure of a personal injury plaintiff's health information to the marginally narrower status quo: a personal injury plaintiff, by virtue of filing a personal injury action, waives his or her right to privacy and/or the physician-patient privilege with respect to health information and medical records related to some issue involved in the litigation. In *Kunkel v. Walton*, 179 Ill. 2d 519, 689 N.E.2d 1047 (1997), the Illinois Supreme Court, while recognizing the unconstitutionality of § 2-1003, illustrated the limitations on a personal injury plaintiff's right to privacy with respect to medical information:

The text of our constitution does not accord absolute protection against invasions of privacy. Rather, it is unreasonable invasions of privacy that are forbidden. In the context of civil discovery, reasonableness is a function of relevance. . . It is reasonable to require full disclosure of medical information that is relevant to the issues in the lawsuit.

Kunkel, 179 Ill. 2d at 538, 689 N.E.2d at 1055-56; *see also El-Amin v. Dempsey*, 329 Ill. App. 3d 800, 809, 768 N.E.2d 344, 352 (1st Dist. 2002) (mother waived the physician-patient privilege with respect to her prenatal care records during term of pregnancy by filing a medical malpractice action on behalf of infant son).

Since the plaintiff controls the issue of damages by plaintiff's allegations of injuries and damage, broad allegations permit broad discovery. In *State ex rel Jones v. Syler*, 936 S.W.2d 805 (Mo. 1997), a personal injury plaintiff sought a writ of prohibition against the circuit judge to prevent enforcement of an order compelling plaintiff to execute medical authorizations. In Missouri, as in Illinois, the scope of discovery is dictated by the scope of damages averred in the petition. "Once plaintiffs put the matter of their physical condition in issue under the pleadings, they waive the physician-patient privilege in so far as information from doctors or medical and hospital records bears on that issue." *Jones*, 936 S.W.2d at 807; *State ex rel McNutt v. Keet*, 432 S.W.2d 597, 601 (Mo. 1968). The court noted that the authorizations the defendants wished executed by the plaintiffs were "limitless." *Jones*, 936 S.W.2d at 807. The court further noted, however, that the scope of damages alleged in plaintiff's petition was "equally limitless." *Jones*, 936 S.W.2d at 808. The court aptly noted that "sauce for the goose is sauce for the gander" and held that plaintiff's broad averments of damages invited the overbroad authorizations. *Jones*, 936 S.W.2d at 808; *cf. Troyan v. Reyes*, 367 Ill. App. 3d 729, 739, 855 N.E.2d 967, 977 (3d Dist. 2006) (physician/patient privilege did not prohibit defendant driver from responding to motorist's requests to admit regarding motorist's medical diagnoses and cost of medical services since motorist filed the lawsuit placing his physical condition in issue and motorist had provided defendant with all of his medical records and bills); *Kunz v. South Suburban Hosp.*, 326 Ill. App. 3d 951, 956-58 761 N.E.2d 1243, 1248-49 (1st Dist. 2001) (mother waived physician-patient privilege regarding medical records of her earlier pregnancies and deliveries of her first two children when she testified in her deposition about those pregnancies and the health of her children); *see also Maxwell v. Hobart Corp.*, 216 Ill. App. 3d 108, 113-15 576 N.E.2d 268, 271-73 (1st Dist. 1991) (allowing discovery concerning food service worker's alcoholism in suit arising out of injury from waste equipment machine against machine's manufacturer on basis that worker put his condition at time of incident in issue and holding that "[p]laintiff cannot initiate litigation in which his physical condition is a critical consideration, then use the privilege to shield truth-seeking about that condition").

The Scope of Relevancy

Relevance to Elements of Damages

The scope of what medical information might be relevant or reasonably calculated to lead to the discovery of admissible information is, at least initially, determined by the adverse medical condition(s) the plaintiff claims were proximately caused by defendant's wrongful conduct and the damages allegedly resulting from the adverse condition(s). Damages generally fall within five categories:

- (a) Disfigurement (IPI 30.04 (Civil 2009));
- (b) Disability/loss of a normal life (IPI 30.04.01 (Civil 2009));
- (c) Pain and suffering (IPI 30.05 (Civil 2009));
- (d) Medical expenses (IPI 30.06 (Civil 2009)) and caretaking expenses (IPI 30.09 (Civil 2009));
- (e) Loss of earnings or profits (IPI 30.07 (Civil 2009)).

Additionally, in some cases, a plaintiff may recover damages for the emotional distress experienced and reasonably certain to be experienced in the future. IPI 30.05.01 (Civil 2009).

1. Disfigurement

The relevance of medical records relating to disfigurement may be limited to cases in which the cause of the disfigurement is in dispute. Plaintiffs typically prove disfigurement by displaying the disfigurement, or photographs of the disfigurement, to the jury. If the incident itself caused the disfigurement, such as a laceration, or in the case of a surgical procedure leaving a surgical scar, the issue concerning causation may be fairly easy to discern.

When the cause of disfigurement, such as a rash or skin sores is disputed, the need for medical records of any other condition that the ability to obtain medical, drug treatment, or psychological records may be critical. In one case, observed by this author, the plaintiff claimed that he developed pustules on his chest, arms, and legs due to an exposure to a fireproofing material. Initial reports from dermatologists indicated that the dermatologist believed that the fireproofing material, which contained materials that might be irritating to the skin, caused the plaintiff's problems. One record indicated that the plaintiff might have been aggravating his condition by picking at the pustules with a safety pin or opened paper clip. Interestingly, the plaintiff's sores were almost identical to those on a website that displayed sores caused by methamphetamine addicts digging into their skin with sharp objects to rid themselves of "meth mites" they apparently believed were under their skin when under the influence of the drug. In such instances, expert testimony might be necessary to convince a court to require the plaintiff to produce records concerning psychological and drug treatment as such records would be reasonably calculated to disclose information that might reveal the cause of the dermatological condition.

2. Disability/Loss of Normal Life

By introducing the element of damages now referred to as "loss of normal life," the question necessarily arises: "what was the plaintiff's life like preceding the accident?" Medical records frequently reveal information concerning the plaintiff's activities both before and after an accident. If a plaintiff had significant but unrelated medical maladies before the incident alleged in the complaint, the plaintiff's life may have not have been so "normal" in the first place. For example, if a plaintiff sustains a disabling shoulder injury as a result of an accident, but had Crohn's disease before the accident, which limited her activities, the jury should be permitted to consider that information in awarding damages for loss of normal life.

With respect to disability, or the inability to engage in certain activities, medical problems unrelated to the incident alleged in the complaint can disable a plaintiff from those activities, whether those problems arose before or after the incident. For example, if a plaintiff claims that she no longer water skis because of a lower

back injury, the defendant should be able to discover information concerning other medical problems which would preclude a person from such activities, such as disabling injuries to the knees, ankles, neck, or thoracic spine.

3. Pain and Suffering

That certain injuries produce significant pain frequently requires little medical testimony to establish. Most jurors understand that a patient whose ankle is crushed and suffers a trimalleolar fracture is likely to have experienced significant pain as a result of that injury. The question of whether a specific incident will cause pain and suffering in the future becomes complex when the plaintiff suffers more than one injury to the same body part or has pre-existing degenerative conditions to the same body part.

When complaints of pain appear to be disproportionate to the injury involved, a defendant will undoubtedly be interested in obtaining records concerning the plaintiff's problems with anxiety and depression before the incident or which developed after the incident for reasons unrelated to the incident. Numerous studies have linked anxiety and depression to magnified complaints of pain and inability to recover from alleged injuries. See Tamar Pincus, A. Kim Burton, Steve Vogel, & Andy Field, *A Systematic Review of Psychological Factors as Predictors of Chronicity/Disability in Prospective Cohorts of Low Back Pain*, 27 SPINE 5, 109-20 (March 2002); Francis Keefe, Meredith Rumble, Cindy Scipio, Louis Giordano, Lisa Caitlin Perri, *Psychological Aspects of Persistent Pain: Current State of the Science*, 5 THE JOURNAL OF PAIN 4, 195-211 (2004).

4. Medical Expenses

Whether bills are causally connected to treatment of an injury becomes more complicated when a plaintiff suffers from multiple problems or had similar problems preceding an accident. A patient who had knee surgery and multiple debridements for infection after that surgery might have needed a total knee replacement before a fall that resulted in a torn anterior cruciate ligament. Similarly, a plaintiff with long-standing and progressive degenerative disc disease might have needed a fusion or prosthetic disc replacement long before an injury which resulted in a back strain. In cases involving multiple traumas to the same area of the body, information concerning the symptoms from each traumatic event is necessary to determine what event might have contributed to what portion of the patient's need for treatment.

5. Wage Loss and Loss of Earning Capacity

As with disability, the inability to work can be caused by any number of physical or mental problems, especially for those plaintiffs who work in jobs requiring heavy lifting or significant concentration. Medical records relating to any condition causing long-term or permanent limitations would be reasonably calculated to lead to the discovery of admissible evidence relating to a claim of wage loss or diminished earning capacity.

6. Mental Anguish/Emotional Distress

The allegation of mental anguish or emotional distress by a plaintiff necessarily triggers a desire by defendant for a broad range of medical and mental health records relating to that plaintiff's health. Mental anguish, depression, and anxiety can be caused by a wide variety of problems in addition to intractable pain, such as:

- (a) Family problems, such as the death of a child, divorce, and serious illness of a loved-one or close relative;
- (b) Stress at work;
- (c) Childhood abuse;
- (d) Substance abuse;

- (e) Other health problems;
- (f) Financial problems.

Indeed, psychiatrists and psychologists frequently list all of the “stressors” a patient is suffering before developing an appropriate treatment plan. That mental anguish and emotional distress can arise from multiple stimuli is beyond question. Accordingly, information of all potential causes of mental anguish and emotional distress is necessary to properly defend such a claim.

Relevance to Other Issues

1. Proximate Cause

In personal injury cases, a jury is asked to “fix the amount of money which will reasonably and fairly compensate [a plaintiff] for the elements of damages proved by the evidence to have resulted from the negligence or wrongful conduct of the defendant.” IPI 30.01 (Civil 2009). That medical records, both before and after an incident, are necessary to determine whether a particular incident might have caused a particular injury is beyond question. If a plaintiff claims a back injury resulted from a motor vehicle accident, the accident arguably could not have caused a problem if the plaintiff had identical complaints and test results before and after the accident. The immediate onset of new symptoms following an accident suggests that the accident proximately caused an injury, while a significant delay in the onset of symptoms, or a delay in treatment of alleged symptoms, tends to suggest the opposite.

The absence of pre-existing complaints or symptoms relating to a particular condition can be important to the issue of proximate cause to both the plaintiff and defendant in a case involving personal injuries. In a case involving a herniated disc producing right-sided radiculopathy, collecting a plaintiff’s medical records before the incident alleged in the complaint and determining that the plaintiff treated with the same physicians for years for various ailments such as colds, flues, and gastroesophageal reflux disease (GERD), but never voiced any complaints of low back pain or pain radiating from the low back into the right lower extremity, would tend to establish that the condition was either not present or not producing symptoms before the alleged incident. Conversely, a failure to mention any complaints of low back pain or pain radiating into the right lower extremity to a family physician for three months after the date of the accident would tend to indicate that the condition did not arise at the time of the accident but rather at some later time. A plaintiff complaining of low back pain to a chiropractor, which the plaintiff rates as an 8 on a scale of 1 – 10, might lose credibility when records from the plaintiff’s primary care physician from the same time period establish that the plaintiff did not complain of back problems to the primary care physician.

Counsel for plaintiff will undoubtedly seek to use the testimony of the primary care physician concerning the absence of prior complaints relating to a certain condition to establish that the condition did not pre-exist the date of the loss. In all fairness, both sides should have equal access to the records to evaluate the plaintiff’s condition before the incident irrespective of whether that information favors the plaintiff or the defendant’s position at trial.

2. Psychological Information

An often over-looked issue is the importance of psychological records in determining whether a plaintiff has suffered any injury at all. Both counsel for plaintiff and counsel for defendant in personal injury cases are familiar with the plaintiff that presents a set of symptoms which are difficult to believe and suggest a psychological component might underlay the severity of symptoms. In one case, tried in the Southern District of Illinois, the plaintiff claimed permanent injuries to her neck although none of her physicians could find a physiological basis for her complaints or objective findings which correlated to the patient’s significant complaints of pain and disability. A review of all her medical records dating back thirty years by a physician board-certified in neurology and psychology revealed that she previously had complaints related to digestive

problems and underwent an exploratory laparotomy which revealed no basis for the plaintiff's symptoms and reproductive problems that resulted in a surgical procedure which likewise revealed no physiological basis for the plaintiff's subjective complaints. The physician determined that the plaintiff had a condition specifically recognized in the Diagnostic and Statistic Manual IV (DSM IV) which lawyers colloquially (and inaccurately) refer to as Munchausen's Syndrome. That condition could never have been discovered without full access to the plaintiff's medical records. Incidentally, discovery of the condition permitted treatment for the plaintiff's numerous symptom sets involving various systems in her body and saved her from unnecessary and dangerous surgeries.

Many psychological conditions can be pertinent to a plaintiff's claim for personal injuries:

- (a) Numerous studies have linked anxiety and depression to magnified complaints of pain and inability to recover from alleged injuries;
- (b) Many psychological tests administered at the request of psychiatrists contain validity and/or malingering scales which would certainly be relevant to the nature and extent of a plaintiff's damages in a personal injury case;
- (c) Psychological conditions can be disabling in and of themselves if sufficiently severe and not properly treated. A plaintiff may not be engaging in activities because of bouts of depression or anxiety rather than some physical limitation, or a combination of both. Certainly, whether one condition, the other, or both is a proximate cause of an alleged disability and whether either condition is treatable is relevant to a claim of permanent disability or wage loss.

The plaintiff's claim for damages will determine the extent to which psychological and psychiatric records might lead to the discovery of admissible evidence, but claims of permanent disability, loss of normal life, and future wage loss will likely increase the defendant's desire to obtain such records. *See Cerveny v. American Family Ins. Co.*, 255 Ill. App. 3d 399, 410-11, 626 N.E.2d 1214, 1222 (1st Dist. 1993) (in driver's personal injury action, questions asked by underinsured motorist insurance carrier during cross-examination of driver's daughter concerning daughter's chronic affliction with lupus before, during, and after accident were relevant, since insurance carrier's theory of case was that many of driver's claimed physical maladies were not caused by accident, but were psychosomatic manifestations of extreme pressure she was under at time of accident, including overwhelming concern for her daughter).

3. Plaintiff's Activities

Medical records frequently contain references to the plaintiff's extracurricular activities. Patients often discuss vacations, sports and other activities with their medical providers. The activities may affect the patient's health. *See Betts v. Manville Personal Injury Settlement Trust*, 225 Ill. App. 3d 882, 929, 588 N.E.2d 1193, 1223 (4th Dist. 1992) (allowing evidence of cigarette smoking as evidence of negligence on the part of plaintiffs in action for asbestos exposure). Those activities are also at issue in any case in which a plaintiff claims that a condition is permanently disabling, especially if the plaintiff claims that he or she can no longer engage in a particular activity because of the injury that caused the condition. Because a plaintiff's medical records frequently contain such information, those records are likely to lead to the discovery of admissible evidence.

4. Future Damages

When a plaintiff is claiming permanent damages, the plaintiff's longevity necessarily becomes an issue. The first instruction on damages, Illinois Pattern Jury Instruction number 30.01, instructs the jury to consider the "duration" of the injury. Illinois Patter Jury Instruction number 34.01 instructs the jury that if it finds that the plaintiff is entitled to damages arising in the future, it may consider "how long the plaintiff is likely to

live.” IPI 34.01 (Civil 2009). The jury may be given a mortality table but it is also instructed that the figure in the mortality table is not conclusive because:

It is the average life expectancy of persons who have reached [that age]. It may considered by you in connection with other evidence relating to the probable life expectancy of the plaintiff in this case, including evidence of his occupation, health, habits, and other activities, bearing in mind that some persons live longer and some persons less than the average.

IPI 34.04 (Civil 2009).

When a plaintiff asserts permanent wage loss or diminished earnings, permanent medical or caretaking expenses, or permanent pain and suffering or disability, the plaintiff’s longevity is at issue. If the plaintiff has a terminal disease and the plaintiff’s physicians believe that he or she will live only five years, the jury needs to know that aspect of the plaintiff’s health to properly assess damages. Medical records containing information concerning potentially terminal or life-shortening diseases or conditions should be discoverable in such cases. *Agosto v. Trusswal Systems Corp.*, 142 F.R.D. 118, 119-20 (E.D. Pa. 1992) (medical records and history of a plaintiff who tested positive for HIV are relevant to life expectancy and damages in products liability suit with claims for future pain and suffering and lost earning capacity); *Stevens v. Bangor and Aroostook R. Co.*, 97 F.3d 594, 599 (1st Cir. 1996) (holding that if post-accident health problems impact the plaintiff’s ability to work or on his or her life expectancy and arise independently of the accident, the defendant is entitled to adduce evidence of such problems to try to reduce the potential damages award); *see also Elliott v. Koch*, 200 Ill. App. 3d 1, 14, 558 N.E.2d 493, 503 (3rd Dist. 1990) (evidence of prior injury or condition is relevant to the extent of the plaintiff’s claimed damages).

In *Doe v. G.J. Adams Plumbing, Inc.*, 8 Misc. 3d 610, 794 N.Y. S. 2d 636, (Oneida Sup. Ct. 2005), the court addressed the issue of whether the fact that the plaintiff had been HIV positive for the previous ten years was discoverable in an action in which the plaintiff alleged that the plaintiff suffered a serious injury which “may include injuries which will persist for some time into the future and/or are permanent.” *Doe*, 8 Misc. 3d at 611, 794, N.Y.S. 2d at 637. The court recognized the general rule that a plaintiff who commences a personal injury action waives the physician-patient privilege to the extent that his physical or mental condition is placed in controversy, noted that New York law provides special protection regarding confidentiality regarding an individual’s HIV status, and then carefully crafted an order balancing the interests of the plaintiff and defendant. *Id.* at 611, 794, N.Y.S. 2d at 637. The court required the plaintiff to submit a particularized statement of the injuries sustained, including the alleged duration and magnitude of future injuries together with expert disclosures. The court permitted defendant to retain a physician to conduct a physical examination of the plaintiff with “all records, unredacted” to permit that doctor to determine whether the plaintiff had conditions that would theoretically shorten the plaintiff’s life, and then decided that it would hold a hearing which might include a determination of evidence relevant to the plaintiff’s life expectancy, including a *Frye-Daubert* hearing “to ascertain whether the science claimed to be in clash is sufficiently adequately founded to be admissible.” *Id.* at 614, 794 N.Y.S. 2d at 639-40.

Interestingly, the court, in discussing the need to balance the rights of the parties in view of the legislature’s clear intent that HIV status remain privileged and its disclosure be severely restricted, noted that a trial primarily focused on orthopedic injuries could be diverted into one relating to the impact of HIV status on life expectancy and current and foreseeable future treatment modalities. The court, after reviewing the history of the legislation, noted that it did not mention the legislative intent to restrict the traditionally expansive access which defendants have to a plaintiff’s medical records in personal injury cases, but expressed hope that the procedure it fashioned would demonstrate that no real medical dispute concerning life expectancy existed and offered the possibility of a “stipulation” regarding life expectancy to eliminate the diversions that the plaintiff’s HIV status might create in the trial. *Doe*, 8 Misc. 3d at 614, 794 N.Y.S. 2d at 639-40; *cf. Wehmeier v. UNR Industries, Inc.*, 213 Ill. App. 3d 6, 34-35, 572 N.E.2d 320, 339-40 (4th Dist. 1991) (holding evidence

of plaintiff's smoking habit in personal injury action for asbestos exposure is relevant to plaintiff's reduced life expectancy, causation of alleged respiratory disease, and extent of plaintiff's claimed damages).

Arbitrary Limits to Disclosure

Defense counsel have encountered attempts by the plaintiff's bar to place arbitrary limits on the discoverability of medical records. The two most frequently requested limitations involve the so-called "same body part" limitation and an arbitrary time limitation.

Same body part limitation

Counsel for plaintiffs frequently argue that if plaintiff is seeking damages relating to a particular body part, the defendant should only be permitted to obtain records concerning treatment of or complaints related to that same body part. The problem with this limitation is that the logic supporting the argument only applies in the simplest personal injury cases which involve no claims of long-standing or permanent injuries.

The "same body part" limitation is unfair in cases involving claims of disability, future lost wages or diminished earning capacity. For example, although approved interrogatories in Missouri's Twenty-Second Judicial Circuit (St. Louis City) apply the "same body part" limitation (and, in one case, an arbitrary time limit of ten years) to requests regarding "other illnesses, impairment, or injuries," they also implicitly recognize the need to expand the scope of discovery in more complex personal injury cases involving claims for disability. See Twenty-Second Judicial Circuit Court-Approved Interrogatories for "auto accident," "medical malpractice," and "slip and fall" cases available at <http://stlcitycircuitcourt.com/forms.html>. For example, the court's approved instructions for "slip and fall" claims includes a request for information involving the plaintiff's application for disability benefits from "any entity (governmental, insurance, employer, etc.)," including the nature of the injury causing the claimed disability regardless of whether the injury was to the same body part(s) alleged to have been injured in the underlying case. *Id.*, Defendant's Approved Slip and Fall Interrogatories to Plaintiff, no. 17, p. 10.

It is easy to find examples of personal injury cases in which the "same body part" limitation is unduly restrictive. A plaintiff who suffers a back injury and claims that the injury prevented her from engaging in downhill skiing could suffer from any number of ailments to other body parts that might prevent similar activities. An iron worker who claims that he can no longer work on beams because of a knee injury might be unable to do that task because of a separate head injury that caused vertigo or problems with balance. In one case, a plaintiff claimed that he was unable to operate a restaurant due to neck and back problems allegedly arising out of an incident. Medical records revealed, however, that he suffered from multiple heart attacks and a stroke and that his doctors had recommended that he apply for disability before the incident involved in the litigation.

The "same body part" limitation also ignores the manner in which loss of normal life or disability is determined by juries. Whether a person has suffered a diminution in the enjoyment of his or her life or a disability from a particular activity depends, at least in part, upon the plaintiff's overall physical condition before the incident. For example, if a plaintiff claims a low back injury with the resulting disability that he can no longer bow hunt, any permanent injury to his hands, wrists, arms, neck, and possibly legs would be relevant to determining whether he was already precluded from engaging in that activity. Similarly, in the case of a plaintiff claiming permanent wage loss due to a wrist injury allegedly resulting in reflex sympathetic dystrophy (RSD), whether that plaintiff had subsequently filed a claim for permanent disability with the Social Security Administration claiming permanent disability resulting from depression, diabetes, and Crohn's disease, as well as the treatment records for each of those conditions, would be relevant to the issue of what injury/condition proximately caused the alleged wage loss.

With respect to alleged expenses for medications, the "same body part" rule is unfair to defendants. For example, in one case, plaintiff claimed that she was permanently required to take Oxycodone due to pain

caused by complex regional pain syndrome. Her medical records revealed, however, that she was already taking the medicine for temporomandibular joint (TMJ) dysfunction. Since pain medications are not targeted to specific body parts, the defendant should be permitted to conduct discovery to determine whether the plaintiff's TMJ dysfunction was permanent, whether the plaintiff was required to take Oxycodone permanently for the pain caused by her TMJ, or whether the plaintiff would need to take a greater amount of the same medication to treat her CRPS pain.

Time Limitations

Counsel for plaintiffs frequently seek an arbitrary time limit for the discoverability of medical records, and use certain cases to support this argument. For example, in *State ex rel Brown v. Dickerson*, 136 S.W. 3d 539 (Mo. App. W.D. 2004), the appellate court for Illinois' sister state held that the trial court did not abuse its discretion in ordering the plaintiff to answer an interrogatory requesting a disclosure of drugs or medicine prescribed for the plaintiff in the five years immediately before the occurrence in a premises liability case involving a fall that resulted in a fractured skull and intracranial hemorrhage, loss of consciousness, subdural hematoma, and neck injury. The court expressed concern with "overly broad medical authorizations" and "open-ended interrogatories," and noted that discovery and medical authorizations must be limited in time and tailored to the physical conditions at issue under the pleadings on a case-by-case basis. *Brown*, 136 S.W. 3d at 545.

Similarly, in *State ex rel Stecher v. Dowd*, 912 S.W.2d 462, 465 (Mo. 1995), the court, in a medical malpractice suit based on the alleged failure of the doctors to obtain informed consent before using an experimental drug in a "double blind" study, held that, although a plaintiff puts his or her physical condition at issue in a personal injury action, defendants are not automatically entitled to obtain every medical record of a plaintiff "from birth." The court noted that the authorizations tendered by the defendant did not contain "any time limits," seeking records from any provider "who has ever treated (plaintiff) for any reason from his birth to the present day." *Stecher*, 912 S.W.2d at 465.

In *State ex rel Jones v. Syler*, 936 S.W.2d 805 (Mo. 1997), the court noted that "*Stecher* also emphasized the importance of time limits" on medical authorizations because time limits "tie the authorizations to the particular case and the injuries pleaded." *Jones*, 936 S. W. 2d at 808. Judge Edward D. Robertson, Jr., dissenting, complained that, among other things, the addition of time limitations "breeds uncertainty and provides an excuse for the protracted litigation over discovery that the majority counsels against." *Jones*, 936 S. W. 2d at 809. Judge Robertson reasoned:

I do not agree that the time and provider limitations . . . are consistent with a discovery process designed to ferret out previous injuries or complaints of injuries to the body parts or systems that plaintiff claims a defendant's negligence caused. The opposite is true. And this is particularly so where the defendant seeks to learn whether a plaintiff suffered or claimed an injury of sufficient magnitude to require medical treatment to those same body parts or systems prior to the event that led the plaintiff to file suit against these defendants. Such information is highly relevant to defendant's case – if not on the issue of negligence then certainly on the question of the extent of the defendant's contribution to the plaintiff's other damages. That a fifty-year-old plaintiff had neonatal surgery for a congenital defect of the spine, or fall from a bicycle on her tenth birthday and broke her arm, or had a tattoo removed from her upper chest by a dermatologist, or frequently visited a chiropractor for treatment of an aching back for a decade that ended ten years before the accident at issue occurred, or consulted a psychiatrist for constant pain at some point in her past are all highly relevant facts that a defendant is entitled to discover when a plaintiff puts arm and back injuries or chest-scarring or severe pain of the mind at issue in a law suit.

The rule I prefer is admittedly harsh. But it has limits. Its limits are those that plaintiff places on the defendant by the pleadings filed. I would hold that the waiver of the patient/physician is complete

as to the parts and systems of the body for which injury is claimed. I would no longer recognize any limitation as to time or provider as to those injuries the plaintiff puts at issue.

Jones, 936 S. W. 2d at 810.

The mischief of an arbitrary time limit, such as five years preceding the incident alleged in the complaint, should be obvious. A claim of permanent disability as a result of lower back problems asserted ten years before an accident is far more relevant to a personal injury claim alleging damage to the inter-vertebral discs and related nervous system than a back strain two years preceding the accident. Likewise, that a physician diagnosed a herniated disc at the L4-5 level of the lumbar spine twelve years before the incident is highly relevant to a plaintiff who claims that she herniated her disc at L4-5 as a result of a motor vehicle accident.

Who Should Review the Records?

Perhaps the most problematic issue concerning balancing privacy rights with the defendant's legitimate right to defend itself is the question of who should review the records to determine which records are relevant and which records are not. Medical records are not neatly compartmentalized by medical condition and are frequently voluminous, making the task of reviewing the records for "relevant" information daunting. Only three choices have been mentioned by the courts:

- (1) The health care providers;
- (2) The courts; and
- (3) Counsel for the parties.

Health Care Providers

The courts should not require or permit physicians to determine what records are relevant to a particular case. Multiple reasons exist for such an approach. First, and most important, attorneys and judges should determine relevance, not doctors or their records keepers who are not before the court and lack legal training. Second, placing the duty on physicians or their office employees to determine relevance creates an unfair burden. Third, requiring physicians to determine relevance is impractical since the physicians themselves may not have other records which would lead to a determination that something is relevant, such as the records of other treating physicians with whom they have had no contact.

A recent case handled by our firm uniquely highlighted the problems with requiring health care providers to determine which records are relevant. The case involved a motor vehicle accident and allegations of soft-tissue injuries. After a protracted dispute with the plaintiff's counsel over whether the plaintiff was required to disclose his medical records pre-dating the date of the subject accident, we agreed, for the sake of conserving time and additional costs required to resolve the discovery dispute, to limit the medical records authorization provided by the plaintiff to those body parts allegedly injured in the accident.

Upon receipt of the limited authorization, we forwarded it to a clinic that had treated the plaintiff. Several weeks later, we received a letter from the clinic's Health Information Department advising:

The Clinic is in receipt of your letter and authorization requesting copies of medical records for the above referenced patient. The authorization enclosed permits the Clinic to produce copies of all medical records relating to certain body part(s).

We will not undertake to provide the records for the body parts for a number of reasons. The information sought involves a form or format that is not readily producible, and the Clinic therefore does not agree pursuant to 45 CFR Sec 164.524(c)(2)(i). Our medical record clerks do not have the expertise to decipher the records for medical information related to diagnosis, systems, organs, anatomy, etc. There may not be immunity from liability for conducting such a task.

We would be willing to produce records based on dates of service with a new authorization specifying the dates needed. Another alternative is for the patient or an authorized person to inspect the file in the Health Information Department and flag which records needed to be copied. This would require a new authorization for all records.

Please contact me at the number above if you have any questions or comments.

The clinic's Health Information Department put into context the practical problems associated with limiting authorizations to certain body parts are requiring the health care providers to determine which records are relevant to a given case. In many cases, the personnel tasked with producing the plaintiff's records are not qualified to decipher and analyze the plaintiff's health information to determine which records deal with certain body parts. It is even more precarious to demand that such health care providers, who generally have no legal training or expertise, analyze such health information for its legal relevance to the multitude of issues arising in personal injury litigation. Moreover, health care providers, already dealing with numerous and voluminous health information requests, should not be further burdened with the intricate analysis required by such authorizations or forced into a position where they are deemed accountable, or even liable, for analysis they are not qualified or capable of performing competently. As the Illinois Supreme Court held in *Best*, the responsibility of evaluating the relevance of discovery requests is a uniquely judicial function.

In another case, we requested a plaintiff's prescription records from a national pharmacy chain. To appease the concerns of plaintiff's counsel, we agreed to limit the request to those medications related to the treatment of the medical condition at issue. The national pharmacy chain refused to produce records pursuant to the limited request, noting that its employees that handled record requests had neither the expertise nor the time to determine which records to produce.

It should be noted that counsel for plaintiff are not always comfortable with the prospect of a physician determining what records are relevant to a certain injury or condition. In *Andreatta v. Hunley*, 714 N.E.2d 1154, 1161 (Ind. App. 1999), the dissenting opinion noted that "at oral argument before this court, the [plaintiffs'] counsel recounted previous occasions when a health care provider mistakenly included the medical records of others, including family members, in the materials sent in response to a civil defendant's discovery request." Attorneys representing injured plaintiffs have good reason to question a decision that places the determination of relevance in the hands of employees in the records departments of health care providers.

The Courts

A trial court will have the last word at the trial level as to whether any information is relevant, reasonably calculated to lead to the discovery of admissible evidence, or admissible. The precise question that the court should address is whether the court should be burdened with reviewing medical records in every case involving claims for personal injuries.

Courts frequently review medical records during *in camera* inspections to determine which documents are discoverable. See *Anderson v. Rush-Copley Medical Center, Inc.*, 385 Ill. App. 3d 167, 174, 894 N.E.2d 827, 835 (2d Dist. 2008) (burden of establishing a privilege under the Medical Studies Act may be met by submitting the materials alleged to be privileged for an *in camera* inspection); *Youle v. Ryan*, 349 Ill. App. 3d 377, 381-82, 811 N.E.2d 1281, 1284-85 (4th Dist. 2004) (holding that trial court abused its discretion in failing to conduct an *in camera* inspection of physician's database contents prior to ordering production of the information in patient's medical malpractice action against physician and hospital); see also *Nester v. Lima Memorial Hospital*, 139 Ohio App. 3d 883, 745 N.E.2d 1153 (3rd Dist. 2000) (case remanded for *in camera* inspection); *State ex rel Stecher v. Dowd*, 912 S.W. 2d 462 (Mo. 1995) (*in camera* inspection does not exclude counsel for defendant); *Barker v. Barker*, 909 So. 2d 333, 30 Fla. L. Weekly D 1655 (Fla. App. 2nd Dist. 2005) (case remanded for *in camera* inspection to safe guard privacy interests); *Zappi v. Pedigree Ski Shops*,

Inc., 244 A.D. 2d 331, 664 N.Y.S.2d 57 (2nd Dept. 1997) (case remanded for *in camera* inspection by trial court to determine what records were “material and necessary to the defense of this case.”).

In *Nester*, the dissenting justice commented on the pragmatic concern regarding *in camera* inspections:

The appellant in this case has alleged a myriad of physical and mental ailments, which he claims all stem from the 1997 laparoscopic surgery. These problems include chronic pain, adult respiratory distress syndrome, depression, joint stiffness, back aches, numbness, and loss of sexual desire. This extensive range of allegations essentially places the appellant’s entire medical history at issue. Therefore, I believe that the trial court did not abuse its discretion by ordering the discovery of all medical records from 1973 to the present. Furthermore, I cannot agree with the majority’s decision to remand for an *in camera* inspection since I fail to see how a trial judge is supposed to determine whether a previous medical problem is relevant to the underlying action when such a variety of disorders have been interjected into the law suit.

Nester, 139 Ohio App. 3rd at 890, 745 N.E. 2d at 1158 (Judge Walters, dissenting).

In our adversary system, the trial judge must decide questions of relevance and, in the case of discovery disputes, whether production of certain materials are likely to be reasonably calculated to lead to the discovery of admissible evidence. The trial court, when determining such issues, will be briefed by two or more competent adversaries who will make their best arguments, supported by appropriate medical or scientific experts and research.

In the case of review of thousands of pages of medical records, it is difficult to envision a judge reviewing the records to determine which portion should be redacted to ensure the privacy of the plaintiff. The trial judge might not have had any experience in personal injury cases before coming to the bench. Even if the trial judge had experience with personal injury cases before coming to the bench, those cases may not have involved the type of injury or illness involved in the case. Moreover, since medical science is constantly evolving, a trial judge, even with substantial experience in personal injury litigation and the specific disease process or injury involved in the case, would need to stay abreast of recent developments in the field involved.

Aside from issues of expertise, the appellate court should consider time that would be required of trial judges if it fell upon them to perform *in camera* inspections of medical records in every personal injury case to determine what portions of the records should be redacted to protect the plaintiff’s privacy rights.

Finally, requiring trial judges to review all medical records would do a disservice to the adversary system. In personal injury cases, plaintiffs frequently retain counsel known for their expertise in personal injury matters, including their experience and knowledge of medical treatment, diagnoses, prognoses, and the need for future medical care. Defendants select counsel based on their concentration in specific areas and their experience and knowledge relating to medicine. Counsel for plaintiffs and defendants frequently engage in extensive research and consultation with pertinent medical experts to understand the medical issues in a case. A trial court would have none of these advantages available to it before reviewing extensive medical records and could deprive a defendant of critical information necessary to defend a claim simply because the court simply did not understand why particular records might be relevant to a particular case.

Counsel for the parties

For the reasons discussed in the previous paragraph, the attorneys representing the parties are in the best position to determine what information contained in thousands of pages of medical records might be relevant to the case. More importantly, both counsel for plaintiff and counsel for defendant have a direct financial and professional motivation to scour thousands of pages of records to find the “smoking gun” in a medical malpractice case where the “*pièce de résistance*” will establish or destroy a particular claim for damages. For example, in a recent pharmacy malpractice case, one sentence in the nurse’s notes among thousands of pages of records provided the information necessary to convince counsel for plaintiff to voluntarily dismiss the case

based on the alleged mis-filling of plaintiff's prescription. The nurse recorded that the plaintiff's spouse admitted that the plaintiff had switched his medicine with hers.

Presumably, most plaintiffs are not concerned with disclosure of treatment of routine illnesses. For example, that defense counsel might read in the plaintiff's records that the plaintiff was treated for earaches, the flu, or a skin rash at some point preceding the accident which is the subject matter of the litigation. Defense counsel have no interest in treatment for such conditions as that treatment did not advance any theory of defense counsel might wish to assert.

Counsel for plaintiffs are in a unique position, however, to locate and redact information about which his or her client may be particularly sensitive. For example, if a plaintiff has suffered a severe injury to his knee and wishes to keep private the fact that he is impotent, the attorney representing him can explain that he should not assert claims of diminished sex life or mental anguish or depression as a result of the knee injury to avoid disclosure. The attorney can then be proactive in taking steps to redact any reference to the impotence before disclosure to defense counsel. No additional burden would be placed on plaintiff's counsel since plaintiff's counsel should be reviewing the plaintiff's records to prepare the case for both discovery and trial. Moreover, counsel for plaintiff will have the best motivation to ensure that all references to impotence are redacted from the records.

The discussion returns to the basic issue of whether a plaintiff seeking damages for personal injuries or mental anguish has his or her privacy rights diminished in any significant way when a defense attorney and the attorney's consulting or testifying experts are aware of a particular medical condition or problem. The only threat of re-disclosure to the "public" would occur at trial or in pleadings filed with the court. In such instances, counsel for plaintiff and counsel for defendant can agree to appropriate steps to prevent third party disclosure just as they do in cases involving trade secrets and proprietary business information.

The question is whether the purpose of protecting patient-physician communications will be adversely affected by allowing defense counsel full access to medical records to determine what portions of the records arguably relate to the damages and proximate cause issues asserted in the case. In the absence of compelling evidence to the contrary, and in the absence of specific governing statutory direction (such as in the case of patients who are HIV positive), counsel for defendants should be permitted to collect and review all arguably pertinent medical records except in that limited number of cases in which counsel for plaintiff and plaintiff are concerned with revelations concerning a specific privacy concern.

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