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A REVIEW OF MEDICAL LIABILITY AND HEALTHCARE ISSUES

HEYL ROYSTER

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A Word From the Practice Group Chair

Samuel Clemens quoted Disraeli when he wrote this under the pen name of Mark Twain: "There are three kinds of lies: lies, damned lies, and statistics." Statistically speaking, six person juries, so far, have not changed outcomes in jurisdictions where they've been adopted. Why then was the plaintiff's bar as eager as a border collie to shepherd this legislation through our state legislature? Hopefully our future experience with six person juries will be as benign in Illinois as it has been in those jurisdictions which years ago cut back to six jurors from twelve. Time will tell and we certainly hope that the statistics haven't lied to us.

In our second article we see an example of appellate courts expanding the kinds of injuries which will be compensable under Illinois law. Prior to this case only the cost and the maternal complications of pregnancy were recoverable for a failed sterilization. Now, after *Williams v. Rosner*, parents who incur additional extraordinary expenses due to a genetic defect may recover such monies during the minority of the child. Since we're all born slightly less than perfect one has to wonder what this will ultimately lead to. What it could lead to is a decision by the Illinois Supreme Court to reassert its previous position in *Cockrum v. Baumgartner* (1983) wherein one concurring justice wrote that life no matter how imperfect is preferable to nonexistence. If one of these wrongful pregnancy cases with extraordinary damages is ultimately appealed to the Illinois Supreme Court, the law may swing like a pendulum back to where it was before this expansion of remedies. Physicians aren't the only ones who are sometimes confined to watchful waiting.

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Civil Juries Shrink in 2015

By Cheri Stuart
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The jury system began in 1189 in the first year of the reign of Henry II. Before that, they didn't have juries, but if you could find 12 people to support your case, you'd be released. Since then, it evolved from the 12 being witnesses to 12 deciding on the facts. More esoteric theorists speak of 12 signs of the zodiac giving a complete view and some prominent trial lawyers have attributed it to the number of Apostles.

Nevertheless, on 12/19/14 Illinois Governor Pat Quinn signed into law Public Act 098-1132. The new law amends the Illinois Code of Civil Procedure pertaining to jury demands. Under the amendment, the number of jurors in all civil cases will be limited to six. This is a reduction from twelve jurors in cases in which the claim for damages is at least $50,000. This amendment applies to all cases filed after June 1, 2015. In cases filed prior to June 1, the parties will still have a jury of twelve.

(continued on next page)

In this issue . . .

The amendment also states that if alternate jurors are requested, an additional fee established by the county shall be charged for each alternate juror requested. Therefore, if a party wants an alternate juror, the party will have to pay the fee. The amendment is also silent as to how many alternate jurors can be requested. However, under the section of the Illinois Code of Civil Procedure pertaining to peremptory challenges and alternate jurors, which was not amended, it states that the court may direct that one or two jurors in addition to the regular panel be impaneled to serve as alternate jurors.

It is somewhat unclear what happens if neither side makes a request for alternate jurors and then one or more jurors are unable to perform their duties. It is certainly not uncommon to lose one or even two jurors during a medical malpractice trial. Is it a mistrial if the parties are left with possibly only four jurors to reach a verdict? The argument against a mistrial would likely be that alternate jurors could have been requested.

Before the Senate voted on this bill, which was an initiative of the Illinois Trial Lawyers Association, the Illinois Association of Defense Trial Counsel (IDC) wrote a letter to the Senate in strong opposition to the bill. In the letter, the IDC wrote that reducing the number of jurors in civil cases will substantially harm the civil justice system and any cost savings achieved by having smaller jury panels will be outstripped by the increased costs associated with more unpredictable judgments caused by fundamentally changing jury deliberations through the loss of juries that accurately reflect the community.

The IDC further wrote that juries with half as many members are substantially inferior to the current jury system for three specific and common sense reasons. First, juries of six members do not have the ability to recall the evidence heard at trial as well as a jury of twelve. This failure of recall will substantially affect the result of a trial without the parties even being aware of it. Second, reducing the number of jurors creates a greater chance that one person will dominate the deliberations and that the verdict will not accurately reflect the will of the whole jury. Third, a group of only six jurors increases the possibility that the jury pool will not accurately reflect the diversity of community in which the trial is held.

The position of the IDC is supported by research. Research has been performed for many years to investigate whether there is a difference between six and twelve member juries. This research was performed following the Supreme Court's decision that Florida's use of a six member jury in criminal cases does not violate a defendant's Sixth Amendment right to a jury trial. *See Williams v. Florida*, 399 U.S. 78 (1970). In a 1997 meta-analysis, Michael Saks, PhD, MSL and Mollie Marti, PhD, JD identified several key findings from the studies. Smaller juries are more likely to contain no members of minority groups. Twelve member juries spend more time in deliberation. Twelve member juries deadlock somewhat more often. On the strength of at least two studies, twelve member juries accurately recall more trial testimony. Significantly, the research did not show that there is difference in verdicts (guilty versus not guilty) when there is a reduction in jury size.

The combined wisdom of twelve jurors often astounds trial lawyers when they ask jurors post verdict how they resolved the issues in the case. They tend to be much more creative and, yes, more logical than most lawyers in analyzing the issues. If there was cosmic significance in the number 12 we may be in for a disappointment. The amendment raises questions and concerns. We, and the IDC certainly have concerns. Time will tell.

Cheri Stuart practices in the areas of medical malpractice litigation, hospital liability defense, and long term care facility defense. The scope of her practice also includes representation of health care professionals in proceedings before the Illinois Department of Financial and Professional Regulation. Cheri has extensive trial experience, including recently obtaining a defense verdict in a $5 million medical malpractice wrongful death claim.

Illinois Appellate Court Allows Recovery of Extraordinary Expenses in Wrongful Pregnancy Action

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Plaintiffs may plead an action for "wrongful pregnancy" if a pregnancy occurs despite the performance of a surgical procedure for sterilization such as a tubal ligation. When a plaintiff establishes the defendant's liability under a wrongful pregnancy theory, monetary damages are typically limited to only general expenses. However, the Illinois First District Appellate Court recently held that a plaintiff may also recover extraordinary expenses in a wrongful pregnancy claim, which includes monetary damages for medical, institutional and educational expenses necessary to manage and treat the child's congenital or genetic disorder. As a result, it is now more likely that plaintiffs will seek such damages in a wrongful pregnancy action.

They sought extraordinary expenses that they expected to incur by caring for Kennadi until the age of majority in addition to the general damages resulting from Cynthia's pregnancy.

Background

In *Williams v. Rosner,* 2014 IL App (1st) 120378, plaintiffs Cynthia Williams ("Cynthia") and Kenneth Williams were both carriers of the trait that causes sickle cell disease. The Williams' first child developed sickle cell disease shortly after birth, and thereafter Cynthia sought obstetrics and gynecology services from the defendant, Dr. Rosner at Reproductive Health Associates, S.C. ("Reproductive Health"). Cynthia discussed her concerns with Dr. Rosner, including her fear of birthing another child who would inevitably develop sickle cell disease. Accordingly, she elected to undergo a tubal ligation in an effort to achieve permanent sterility, but the procedure was canceled due to anesthesia complications. Shortly thereafter, Dr. Rosner recommended that Cynthia undergo a mini-laparotomy in addition to the originally agreed upon tubal ligation procedure. On December 30, 2008, Dr. Rosner performed the mini-laparotomy and tubal ligation on Cynthia. However, Dr. Rosner only removed one of her fallopian tubes and one of her ovaries, and left the remaining fallopian tube and ovary intact. Less than a year later, Cynthia became pregnant with her second child. It was at this time that Cynthia learned that her left fallopian tube and ovary had not been removed during the December 2008 procedure. On February 1, 2010, she gave birth to a daughter, Kennadi, who was subsequently diagnosed with sickle cell disease.

The Williams filed a complaint against Dr. Rosner and Reproductive Health for medical negligence and wrongful pregnancy and alleged that the defendants proximately caused Cynthia to have undesired fertility which resulted in the birth of a diseased child. They sought extraordinary expenses that they expected to incur by caring for Kennadi until the age of majority in addition to the general damages resulting from Cynthia's pregnancy.

Discussion

Wrongful pregnancy is an action brought by parents of a child who is born following a negligently performed sterilization procedure. In such a case, plaintiffs were traditionally limited to only general damages, "including costs associated with the 'unsuccessful operation, the pain and suffering involved, any medical complications caused by the pregnancy, the cost of delivery, lost wages, and loss of consortium.'"

In determining whether extraordinary damages should be awarded in this case, the Court took special note of *Cockrum v. Baumgartner,* 95 Ill. 2d 193, 196 (1983). In that case, the Illinois Supreme Court declined to extend the scope of damages permitted in a wrongful pregnancy action to include the costs of raising a

healthy, but unexpected child who was born as the result of a negligently performed sterilization procedure. The Illinois Supreme Court awarded only general damages and expressed an "unwillingness to hold that the birth of a normal healthy child can be judged to be an injury to the parents" because that concept "offends fundamental values attached to human life."

The Court also assessed the rationale utilized in *Williams v. University of Chicago Hospitals,* 179 Ill. 2d 80, 84 (1997). In that case, the plaintiffs alleged the defendant doctor negligently performed a tubal ligation procedure which resulted in the birth of a child with attention deficit hyperactivity disorder ("ADHD"). Plaintiffs argued that the doctor was aware that their first child had a disability, and therefore sought extraordinary expenses for the child's psychological treatment and special education. The court held the plaintiffs could not establish proximate cause without an established link between the defendants' negligence and the birth of a disabled child. The court rejected the plaintiffs' argument that the doctor's knowledge regarding their first child was enough to make the birth of another child with the same disability a foreseeable consequence of medical negligence. The court noted that the plaintiffs could not prove that the doctor caused the condition or that the defendant knew of the possibility that a child with a particular defect could be born as a result of a failed operation. More importantly, the plaintiffs could not prove that the parents were seeking to avoid a specific risk of which the defendant was aware. Therefore, no extraordinary expenses were awarded.

In the case at issue, the defendants heavily relied on the *Williams* case for support. The defendants contended that the plaintiffs could not satisfy the requisite proximate cause element and therefore, it was not necessary to expand the scope of damages to include extraordinary expenses. Defendants further argued that Dr. Rosner's knowledge that plaintiffs' first child had sickle cell disease did not necessarily suggest that it was foreseeable that the birth of another child with sickle cell disease would result after a negligent tubal ligation procedure. The defendants maintained that even if the plaintiffs could establish foreseeability, they could not establish Dr. Rosner's negligence proximately caused Kennadi's sickle cell disease. The defendants also argued that the expansion of damages in this case would be contrary to established public policy because "virtually everyone is born with some condition, characteristic, or trait that might be construed as rendering the person other than healthy and normal."

The court disagreed and held that the birth of a child with sickle cell disease was a foreseeable consequence of a negligently performed sterilization procedure. The court distinguished the *Williams* case and concluded that the requisite link between Dr. Rosner's negligence and Kennadi's condition was established. Since the plaintiffs communicated the need to avoid conception of additional children to Dr. Rosner, the birth of a second diseased child was of such a character that "an ordinarily prudent person would have foreseen it to be a likely consequence of a negligently performed tubal ligation procedure." The court explained that a plaintiff must provide evidence that a specific genetic abnormality was a foreseeable consequence of the defendant's negligence. Therefore, the court held that a parent may be awarded extraordinary damages if the unwanted pregnancy was a foreseeable consequence of a negligently performed sterilization procedure and the parent communicated their desire to avoid the resulting injury to the physician.

The defendants maintained that even if the plaintiffs could establish foreseeability, they could not establish Dr. Rosner's negligence proximately caused Kennadi's sickle cell disease.

Conclusion

The court created an exception to the general rule that only general damages can be awarded in a wrongful pregnancy action. Plaintiffs in Illinois may now request extraordinary damages when the birth of a child with a congenital or genetic disorder is a foreseeable result of a negligently performed sterilization procedure. In the future, plaintiffs will likely continue to seek expansion of recoverable damages in wrongful pregnancy actions, and it will be interesting to see whether any other appellate courts follow the lead of the court in *Williams v. Rosner.*

Mark Hansen has extensive experience in complex injury litigation, with an emphasis in medical malpractice, professional liability, and product liability. Mark regularly defends medical providers in professional liability actions involving significant injury or death.

Emily Perkins focuses her practice in the area of civil litigation, including medical malpractice and professional liability.

Firm Moves Into New Chicago Office

On December 22, Heyl Royster moved into a new Chicago office located on the seventh floor of 33 N. Dearborn Street. The newly renovated office space helps us to better serve our clients in the Chicago-area. Convenient to both the state and federal courthouses, the new office offers features large state-of-the art conference rooms, as well as an open collaboration space that can accommodate larger meeting groups.

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