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Not warning of health risk was negligent, justices told

By Brian Mackey
Law Bulletin staff writer

SPRINGFIELD — The Illinois Supreme Court on Wednesday heard arguments on whether a hospital may face liability for failing to warn a former patient that blood she received might infect her with hepatitis C.

Diane Orlak sued Loyola University Health System in 2002 over a transfusion she received in 1989. She contends the hospital should have contacted her in the mid-1990s, when it received advisories from the federal government urging hospitals to warn past transfusion recipients about hepatitis C.

At issue is whether her complaint alleges simple negligence or, as the lower courts held, is subject to the strict four-year statute of repose that governs medical malpractice claims.

According to her brief, Orlak spent a month in the hospital in 1989 getting treatment for burns she suffered in a work-related accident. In 1996 and 1997, Orlak alleges, Loyola received notices from the Food and Drug Administration and the National Institutes of Health advising hospitals that patients who received blood transfusion before 1990 be admonished to get tested for the hepatitis C virus.

Loyola allegedly did not send a notice at that time, but did contact Orlak in 2000, when the hospital learned that the specific donor whose blood Orlak received was infected with hepatitis. Orlak then tested positive for the virus.

Orlak sued within two years of learning of the infected blood donor, but Loyola won dismissal on the ground that the medical malpractice statute of repose expired in 1993, four years after her transfusion.

That outcome was affirmed by the 1st District Appellate Court in an unpublished order.

In her appeal to the high court, Orlak contends Loyola's decision not to notify her in the mid-1990s was administrative, not medical, and therefore should not be subject to the stringent medical malpractice statute of repose. She also alleged fraudulent concealment on the part of the hospital, which she contends should have tolled any period of limitations.

At Wednesday's arguments, Orlak was represented by Richard J. Prendergast, who told the justices that earlier notice from the hospital would have prompted Orlak to get tested and treated several years earlier. The delay, he said, exacerbated her condition and put her family at risk.

"That's why this case has to get to the policy considerations, because to uphold the decision of the Appellate Court here sanctions what Loyola did in 1996 and 1997," Prendergast said. "It says, 'It's OK not to send out the notice. It's OK to leave the public at risk. It's OK to leave the patient at risk. It's OK that the patient's condition is going to deteriorate.' "

Prendergast said that if the court finds Loyola's alleged failure to notify Orlak in the mid-1990s was ordinary negligence, there is no statute of repose and the statute of limitations would not begin to run until Orlak knew or should have known about the alleged tort, when she received the letter in 2000.

"If that were the law — if the Appellate Court decision is wrong — what will Loyola do next time?" Prendergast asked. "When Loyola gets a notice like the NIH notice next time, Loyola will send out the notice."

Prendergast said Loyola was using a "but for" argument — that but for her status as a patient in 1989, there would have been no need for notice in the mid 1990s. But he identified a number of instances in which a patient might sue a hospital that have nothing to do with medical care.

"A patient is discharged improperly, slips and falls on the way out, and is injured — that doesn't arise out of the delivery of medical care ... it's ordinary negligence," Prendergast told the justices.

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He contrasted Orlak's case with a typical medical malpractice action, in which a plaintiff would need a medical affidavit and a medical expert.

He said Orlak might need expert witnesses on the hepatitis C virus and hospital records, "but what you're not going to have here is a medical expert talking about medical decisions, because this wasn't a medical decision, it was [an] administrative decision made by Loyola."

"I venture to say that if Loyola's chief of staff had been called into the meeting when they made this decision — or the head of epidemiology or the lowest intern in the hospital — and asked, 'What do you think, do you think we ought to send out this notice,' the medical decision would have been, 'Absolutely,' " Prendergast opined.

Loyola was represented by Tamar B. Kelber of Sidley, Austin LLP.

Justice Thomas R. Fitzgerald asked Kelber how Orlak's claim differed from a slip-and-fall case.

"Because the claim arises from the treatment," she replied. "I don't believe that they're arguing that Loyola has a duty to notify anyone who ever was transfused with blood, anywhere, that they should be tested for hepatitis C.

"They're arguing that because she was transfused blood at Loyola, by doctors at Loyola, Loyola has an obligation — by virtue of that care — to notify her to be tested for hepatitis C," Kelber said.

Justice Anne M. Burke asked about Orlak's contention that the hospital did contact her about a transfusion risk in the early 1990s, suggesting she be tested for HIV, the virus that causes AIDS.

"HIV and hepatitis C are very different diseases and they've been approached differently by the public health authorities," Kelber replied. HIV, by definition, is a terminal infection, she said, which has prompted the public health community to focus more attention on that disease than is does on hepatitis C.

Burke asked whether it is an administrative or medical decision to look back at who might have been infected.

"It is [an] inherently medical decision," Kelber said. "It is a decision about the likelihood of whether the person is infected, the emotional effect of being told to be tested when the risk is minimal. It is inherently wrapped up in the medical care."

With Prendergast on the briefs was Michael T. Layden. With Kelber were Eugene A. Schoon and Elizabeth C. Scott.

The case is *Diane Orlak v. Loyola University Health System, et al.,* No. 102534.