

## Tom Demetrio and Barry Chafetz Discuss Illinois Supreme Court Ruling

John Flynn Rooney

*Chicago Daily Law Bulletin*

May 23, 2002

### "High Court Allows 'Future Injury' Damages"

The Illinois Supreme Court held Thursday that jurors can award damages for increased risk of future injuries, which resolves conflicting lower court decisions and reverses precedent the high court set more than 80 years ago.

The justices also found that a plaintiff now has to show an increased risk of future injuries, rather than that the injury would actually occur.

"We hold simply that a plaintiff must be permitted to recover for all demonstrated injuries," Justice Charles E. Freeman wrote for the high court, with one justice partially dissenting.

The high court added that the justices believe the decision "will provide needed stability in this matter for the bench and the bar."

Lawyers representing the plaintiff, Diane Dillon, in her medical malpractice suit, called Thursday's decision "huge."

The Dillon decision is one of the five most important rulings in tort cases during the past 25 years, said Thomas A. Demetrio, a lawyer for Dillon.

"The Supreme Court has now stated that there is an element of damages known as an increased risk of future injury for which a plaintiff may be compensated for separate and apart from other elements of damages," added Demetrio, a principal of Corboy & Demetrio, P.C. in Chicago.

#### Attorneys

- Barry R. Chafetz
- Thomas A. Demetrio

#### Related Practices

- Personal Injury & Wrongful Death

"I think that in the span of the years of my practice, this is the most important decision on the issue of damages other than [those opinions] permitting for the loss of society in wrongful death cases," said Michael T. Reagan, who argued on Dillon's behalf before the high court.

The two loss of society decisions are *Elliott v. Willis*, 92 Ill.2d 530 (1982), and *Ballard v. Barnes*, 102 Ill.2d 505 (1984), added Reagan, a name partner of Herbolzheimer, Lannon, Henson, Duncan & Reagan P.C. in Ottawa.

But Thomas H. Fegan, the appellate lawyer for the defendant, said he was pleased with Thursday's decision because it "pulled back" from the 1st District Appellate Court's ruling in the case, which placed no limit on the award that could be recovered for future injury.

The Supreme Court's decision "put limitations on [the award for future injury] that the defense bar can be happy with," added Fegan, a partner with Johnson & Bell P.C. in Chicago.

Thursday's opinion "is an extremely important decision that will have an impact in many medical malpractice cases," said Hugh C. Griffin, a Lord, Bissell & Brook partner who represents defendants in medical malpractice cases but was not involved in the Dillon case.

The high court sent the case back to the trial court for a new trial on the issue of increased risk of future harm because the jury instruction on that issue in the initial trial was inadequate.

In April 1989, Dillon was undergoing treatment for breast cancer. During a surgical procedure at Evanston Hospital, Dr. Stephen Sener inserted a catheter in Dillon's upper chest to help administer chemotherapy.

In July 1990, after Dillon finished chemotherapy, Sener removed the catheter. But the doctor failed to remove the entire catheter, with a nine-centimeter fragment remaining in Dillon.

An X-ray taken in late 1991 showed that the catheter fragment should not be removed. Dillon then requested opinions from other doctors and all but one agreed with Sener. The fragment remains lodged in the heart of Dillon, a resident of Chicago's North Side, said Barry R. Chafetz, a Corboy & Demetrio partner who represented the plaintiff at trial.

Dillon filed a medical malpractice suit against Sener, Evanston Hospital and others. The case proceeded to trial before Cook County Circuit Judge Thomas P. Quinn in 1997.

The jury awarded Dillon \$1.5 million for past pain and suffering, \$1.5 million for future pain and suffering, and \$500,000 for the increased risk of future injuries. The jury award was against Sener and the hospital. But the jury found in favor of the other defendants.

Sener and the hospital appealed to the 1st District, which affirmed the Circuit Court's judgment, with one justice dissenting on a procedural issue. The appeals court's decision was issued in an unpublished order under Illinois Supreme Court Rule 23. *Diane Dillon v. Evanston Hospital et al.*, No. 1-98-2893.

The high court then granted Sener and the hospital's request for review of the appeals court decision.

Doctors who testified at trial said Dillon's risk of infection ranged from near zero to 20 percent, the high court's opinion said.

The decision noted that the high court has historically rejected the apportionment of damages for future injuries. Those decisions were *Amann v. Chicago Consolidated Traction Co.*, 243 Ill.263 (1909), and *Stevens v. Illinois Central R.R. Co.*, 306 Ill.370 (1922).

The appeals court has issued conflicting decisions on the issue over the years, the decision added.

"We realize that our decision to recognize damages for the increased risk of future injury is at odds with our previous holdings in *Stevens* and *Amann*," the majority said. "However, we note that those cases are over 80 years old, and that scientific advances now enable the medical community to more accurately determine the probability of future injuries than in the past."

The high court cited Connecticut Civil Jury Instruction No. 2-40(c), for possible use in Illinois.

"The plaintiff is entitled to compensation to the extent that the future harm is likely to occur as measured by multiplying the total compensation to which the plaintiff would be entitled if the harm in question were certain to occur by the proven probability that the harm in question will in fact occur," the Connecticut instruction states.

Justice Thomas R. Fitzgerald took no part in the decision of the case. Chief Justice Moses W. Harrison II dissented in part. The Supreme Court case is *Diane Dillon v. Evanston Hospital et al.*, No. 91517.

"The damages instruction tendered by the plaintiff was adequate as given," Harrison wrote.\* Article Reprinted with the Permission of the *Chicago Daily Law Bulletin*.