

MODIFICATION TO UTAH'S AUTO ARBITRATION LAW

Presently, an injured person can opt to arbitrate an automobile personal injury claim rather than go through the expense of a trial.

The present law limits the award an injured person can obtain through the arbitration process to \$25,000. The present law only extends to small automobile personal injury cases. Note, the jurisdiction of the small claims court was recently increased to \$10,000.

The present law allows either party to appeal the arbitration award. However, if the arbitration award is appealed and a new trial is completed in the case, the party taking the case through the appeal process faces certain hurdles. If the at-fault driver's insurance company appeals the arbitration award, the statutory ceiling of \$25,000 is increased to a potential ceiling of \$40,000. If the insurance company appeals the arbitration award, the ultimate jury award must be at least 35% less than the arbitration award, or the insurance company is responsible for paying certain costs. Similarly, if the injured party appeals the award, the verdict must be at least 35% greater than the award, or costs must be paid.

The law has now been on the books for several years. The law has worked very well in resolving the relatively small automobile personal injury case in a cost-efficient manner.

This legislative proposal does the following:

- It increases the arbitration award ceiling from \$25,000 to \$50,000.
- It can be used only as to available insurance coverage of the at-fault driver, and not against the personal assets of the at-fault driver.
- It allows the injured party to make an additional claim against the injured party's underinsured motorist coverage if the arbitration award exceeds available insurance coverage on the part of the at-fault driver.
- It increases the statutory ceiling, when an insurance company appeals the arbitration award, from \$40,000 to \$60,000.
- If either party appeals the award, the non-moving party can tell the jury the amount of the underlying arbitration award.

- If the insurance company appeals the award, the at-fault driver's assets are accessible for any verdict amount not covered by automobile insurance.
- If either party appeals the award and does not obtain a verdict at least 35% better than the arbitration award, the non-moving party's costs will be paid up to \$6,000, rather than the present ceiling of \$4,000.

The automobile arbitration law has been very successful in resolving automobile personal injury cases. The change simply will increase the number and types of cases that can be resolved through the arbitration format.

31A-22-321. Use of arbitration in third party motor vehicle accident cases.

(1) A person injured as a result of a motor vehicle accident may elect to submit all third party bodily injury claims to arbitration by filing a notice of the submission of the claim to binding arbitration in a district court if

(a) the claimant or the claimant's representative has:

(i) previously and timely filed a complaint in a district court that includes a third party bodily injury claim; and

(ii) filed a notice to submit the claim to arbitration within 14 days after the complaint has been answered; and

(b) the notice required under Subsection (1)(a)(ii) is filed while the action under Subsection (1)(a)(i) is still pending.

(2) (a) If a party submits a bodily injury claim to arbitration under Subsection (1), the party submitting the claim or the party's representative is limited to an arbitration award that does not exceed ~~\$25,000~~ \$50,000 in addition to any available personal injury protection benefits and any claim for property damage. A party who elects to proceed against a Defendant under this statute waives the right to obtain a judgment against the personal assets of the Defendant and is limited to recovery only against available insurance coverage. This section shall not prevent a party from pursuing an underinsured motorist claim as set out in Section 31A-22-305.3. Such underinsured motorist claim shall not be limited to the \$50,000 ceiling set out above.

(b) A claim for reimbursement of personal injury protection benefits is to be resolved between insurers as provided for in Subsection 3 1A-22-309(6)(a)(ii).

(c) A claim for property damage may not be made in an arbitration proceeding under Subsection (1) unless agreed upon by the parties in writing.

(3) A claim for punitive damages may not be made in an arbitration proceeding under Subsection (1) or any subsequent proceeding, even if the claim is later resolved through a trial de novo under Subsection (11).

(4) (a) A person who has elected arbitration under this section may rescind the person's election if the rescission is made within:

- (i) 90 days after the election to arbitrate; and
- (ii) no less than 30 days before any scheduled arbitration hearing.

(b) A person seeking to rescind an election to arbitrate under this Subsection (4) shall:

- (i) file a notice of the rescission of the election to arbitrate with the district court in which the matter was filed; and
- (ii) send copies of the notice of the rescission of the election to arbitrate to all counsel of record to the action.

(c) All discovery completed in anticipation of the arbitration hearing shall be available for use by the parties as allowed by the Utah Rules of Civil Procedure and Utah Rules of Evidence.

(d) A party who has elected to arbitrate under this section and then rescinded the election to arbitrate under this Subsection (4) may not elect to arbitrate the claim under this section again.

(5) (a) Unless otherwise agreed to by the parties or by order of the court, an arbitration process elected under this section is subject to Rule 26, Utah Rules of Civil Procedure.

(b) Unless otherwise agreed to by the parties or ordered by the court, discovery shall be completed within 150 days after the date arbitration is elected under this section.

(6) (a) Unless otherwise agreed to in writing by the parties, a claim that is submitted to arbitration under this section shall be resolved by a single arbitrator.

(b) Unless otherwise agreed to by the parties or ordered by the court, all parties shall agree on the single arbitrator selected under Subsection (6)(a) within 90 days of the answer of the defendant.

(c) If the parties are unable to agree on a single arbitrator as required under Subsection (6)(b), the parties shall select a panel of three arbitrators.

(d) If the parties select a panel of three arbitrators under Subsection (6)(c):

- (i) each side shall select one arbitrator; and

(ii) the arbitrators appointed under Subsection (6)(d)(i) shall select one additional arbitrator to be included in the panel.

(7) Unless otherwise agreed to in writing:

(a) each party shall pay an equal share of the fees and costs of the arbitrator selected under Subsection (6)(a); and

(b) if an arbitration panel is selected under Subsection (6)(d):

(i) each party shall pay the fees and costs of the arbitrator selected by that party's side; and

(ii) each party shall pay an equal share of the fees and costs of the arbitrator selected under Subsection (6)(d)(ii).

(8) Except as otherwise provided in this section and unless otherwise agreed to in writing by the parties, an arbitration proceeding conducted under this section shall be governed by Title 78B, Chapter 11, Utah Uniform Arbitration Act.

(9) (a) Subject to the provisions of this section, the Utah Rules of Civil Procedure and Utah Rules of Evidence apply to the arbitration proceeding.

(b) The Utah Rules of Civil Procedure and Utah Rules of Evidence shall be applied liberally with the intent of concluding the claim in a timely and cost-efficient manner.

(c) Discovery shall be conducted in accordance with Rules 26 through 37 of the Utah Rules of Civil Procedure and shall be subject to the jurisdiction of the district court in which the matter is filed.

(d) Dispositive motions shall be filed, heard, and decided by the district court prior to the arbitration proceeding in accordance with the court's scheduling order.

(10) A written decision by a single arbitrator or by a majority of the arbitration panel shall constitute a final decision.

(11) An arbitration award issued under this section shall be the final resolution of all bodily injury claims between the parties and may be reduced to judgment by the court upon motion and notice unless:

(a) either party, within 20 days after service of the arbitration award:

(i) files a notice requesting a trial de novo in the district court; and

(ii) serves the nonmoving party with a copy of the notice requesting a trial de novo under Subsection (11)(a)(i); or

(b) the arbitration award has been satisfied.

(12)(a) Upon filing a notice requesting a trial de novo under Subsection (11), the claim shall proceed through litigation pursuant to the Utah Rules of Civil Procedure and Utah Rules of Evidence in the district court.

(b) In accordance with Rule 38, Utah Rules of Civil Procedure, either party may request a jury trial with a request for trial de novo filed under Subsection (11)(a)(i).

(13)(a) If the plaintiff, as the moving party in a trial de novo requested under Subsection (11), does not obtain a verdict that is at least \$5,000 and is at least 35% greater than the arbitration award, the plaintiff is responsible for all of the nonmoving party's costs.

(b) Except as provided in Subsection (13)(c), the costs under Subsection (13)(a) shall include:

(i) any costs set forth in Rule 54(d), Utah Rules of Civil Procedure; and

(ii) the costs of expert witnesses and depositions.

(c) An award of costs under this Subsection (13) may not exceed ~~\$4,000~~ \$6,000.

(14)(a) If a defendant, as the moving party in a trial de novo requested under Subsection (11), does not obtain a verdict that is at least 35% less than the arbitration award, the defendant is responsible for all of the nonmoving party's costs.

(b) Except as provided in Subsection (14)(c), the costs under Subsection (14)(a) shall include:

(i) any costs set forth in Rule 54(d), Utah Rules of Civil Procedure; and

(ii) the costs of expert witnesses and depositions.

(c) An award of costs under this Subsection (14) may not exceed \$4,000.

(15) For purposes of determining whether a party's verdict is greater or less than the arbitration award under Subsections (13) and (14), a court may not consider any recovery or other relief granted on a claim for damages if the claim for damages:

(a) was not fully disclosed in writing prior to the arbitration proceeding; or

(b) was not disclosed in response to discovery contrary to the Utah Rules of Civil Procedure.

(16) If a district court determines, upon a motion of the nonmoving party, that the moving party's use of the trial de novo process was filed in bad faith as defined in Section 78B-5-825, the district court may award reasonable attorney fees to the nonmoving party.

(17) Nothing in this section is intended to affect or prevent any first party claim from later being brought under any first party insurance policy under which the injured person is a covered person.

(18) (a) If a defendant requests a trial de novo under Subsection (11), the verdict at trial may not exceed ~~\$40,000~~ \$60,000.

(b) When either party requests a trial de novo, the non-moving party can advise the jury of the amount of the underlying arbitration award.

(c) The personal assets of the defendant will be accessible for any amount of the judgment not covered by automobile insurance.

~~(b)~~(d) If a plaintiff requests a trial de novo under Subsection (11), the verdict at trial may not exceed \$25,000 \$50,000.

(19) All arbitration awards issued under this section shall bear post judgment interest pursuant to Section 15-1-4.

**EXISTING Utah Medical Malpractice
Statutes Protecting Health Care Providers**

1. Caps on Noneconomic Damages §78B-3-410
2. Caps on Attorney Fees §78B-3-411
3. Caps on Damages for Loss of Consortium §30-2-11(7)
4. Caps on Governmental Immunity Act total damages in most circumstances §63G-7-604
5. Statute of Repose (claims expire even if patient unaware of injury such as undiagnosed cancer) §78B-3-404
6. Short Statute of Limitations §78B-3-404
7. Prelitigation Screening Mandatory Before Lawsuit §78B-3-416
8. Abrogation of Collateral Source Rule (negligent care provider gets the benefit of insurance that the patient paid for or that taxpayers provide) §78B-3-405
9. Periodic Payment of Future Damages Delaying by Years or Decades the Patient's Receipt of an Award §78B-3-414
10. Arbitration Agreements Enforced §78B-3-421
11. Restriction on Informed Consent Claims §78B-3-406
12. Restriction on Warranty, Guaranty and Contract Claims §78B-3-408
13. Limits on Use of Admissions of Fault §78B-3-422
14. Governmental Immunity Act Time Limits for Claims against the University, residents and other trainees

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15. Increased Burden of Proof for victims for all Emergency Department Care §58-13-2.5 et seq.
 16. Notice of Intent Required Before Lawsuit §78B-3-412
 17. Federal Tort Claims Act limits on Claims Against the VA Hospital
 18. Prohibition on Access to and Use of Peer Review, Incident and Credentialing Materials §26-25-1
 19. Limitation on Therapist's Duty to Warn §78B-3-604
 20. Good Samaritan Act §78-4-501
 21. Immunity and Extension of Good Samaritan Act and Health Care Providers Immunity from Liability Act to nurse practitioners §58-31b-701
 22. Immunity for 911 Calls §69-2-6
 23. Immunity for Emergency Medical Assistance (including paid services) provided by governmental employees §63G-7-302(5)(s)
 24. Immunity for care provider who renders care at scene of emergency without duty to respond §58-13-2
 25. Immunity (except for gross negligence or willful misconduct) for uncompensated care §58-13-3
 26. Immunity for certain care providers during emergency declarations §26-49-501
 27. Immunity to retired health care provider volunteers if care is uncompensated §58-81-104(5)

SUMMARY OF UTAH MEDICAL MALPRACTICE LAWS

October 13, 2009

Introduction:

Utah is rather progressive in its protections for health care providers from medical liability lawsuits. The following outlines Utah's statutory protections for health care providers.

Utah Constitutional Provisions.

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party. Utah Const. Article I, § 11.

Utah Statutory Protections.

I. Standard of Proof

In a medical malpractice action, a plaintiff must allege negligence, i.e. the failure to follow a standard of care, and that an injury occurred therefrom. The allegation is proved or disproved by a preponderance of evidence, as opposed to proof by the higher evidentiary standards of clear and convincing evidence or beyond a reasonable doubt. *Hansen v. Hansen*, 958 P.2d, 931, 934 (Utah Ct. App. 1999); *Nelson v. Pioneer Valley Hosp.*, 830 P.2d 270, 272 (Utah 1992).

An allegation of negligence or failure to follow a standard of care for emergency room care must now be proved by clear and convincing evidence. Utah Code Section 58-13-2.5 (2009 G.S.)

II. Statute of Limitations.

A medical malpractice action must be commenced within 2 years after the plaintiff discovers or should have discovered the injury, with a maximum limit of 4 years after the alleged act. An action alleging a foreign object being wrongfully left in the patient's body must be commenced within one year after the plaintiff discovers or should have discovered the existence of the foreign object. An action alleging fraudulent concealment of the misconduct must be commenced within one year after the plaintiff discovers or should have discovered the concealment. Utah Code Ann. § 78B-3-404.

For a medical malpractice action regarding a minor victim, the statute of limitations does not begin to run until the minor reaches 18 years of age. Utah Code Ann. § 78B-2-108.

III. Informed Consent.

It is presumed that a patient gave express or implied consent. To overcome that presumption, the plaintiff must prove: (1) a provider-patient relationship, (2) that health care was rendered, (3) that personal injuries resulted, (4) that the health care had a substantial and significant risk of serious harm, (5) that the patient was not informed of the risk, (6) that a reasonable, prudent person would not have consented, and (7) that the care was the proximate cause of the injuries. Utah Code Ann. § 78B-3-406.

The provider may provide as defenses: (1) that the risk was relatively minor, (2) that the risk is common knowledge to the public, (3) that the patient said that s/he would accept the health care regardless of risk or that s/he did not want to know the risks, etc., (4) that the provider used reasonable discretion as to the manner of disclosure if the provider reasonably believed that more disclosure could be expected to have a substantial and adverse effect on the patient's condition, or (5) that written consent was given. Utah Code

Ann. § 78B-3-406.

A provider is not liable for consequences resulting from a guardian's refusal to give consent for treatment of a child if: (1) the provider recommends the treatment, (2) the guardian has sufficient information to make an informed decision, and (3) consent for the treatment is required by law to be given before treatment. Utah Code Ann. § 78B-3-407.

IV. Liability for a breach of guarantee, warranty, contract or assurance of result.

A provider cannot breach a guarantee, warranty, contract or assurance of result unless it was in writing. Utah Code Ann. § 78B-3-408.

V. Damages and Fees

A. Prayer of a Complaint.

No dollar amount may be specified in the prayer of a complaint. Utah Code Ann. § 78B-3-409.

B. Collateral Sources.

The award is reduced by however much money the plaintiff has received from collateral sources, with the exception of sources that have subrogation rights. Utah Code Ann. § 78B-3-405.

C. Cap on Noneconomic Damages.

A plaintiff may recover noneconomic losses with a cap of \$400,000 plus any adjustment for inflation, since July 1, 2002, as determined by the state treasurer. Utah Code Ann. § 78B-3-410.

D. Punitive Damages.

Punitive damages may be awarded only if: (1) compensatory damages are awarded, (2) it is established by clear and convincing evidence, (3) that the acts/omissions are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and disregard of, the rights of others.

Evidence of a party's wealth is admissible only after a finding of liability for punitive damages has been made.

After an allowable deduction for the payment of attorneys' fees and costs, 50% of punitive damages in excess of \$20,000 is remitted to the state treasurer for deposit into the General Fund. Utah Code Ann. § 78B-8-201.

E. Periodic payment of future damages.

For future damages of \$100,000 or more, the court shall order that they be paid by periodic payments rather than in one lump sum. Utah Code Ann. § 78B-3-414.

F. Cap on Attorneys' Fees.

An attorney may not collect more than one third of the award. Utah Code Ann. § 78B-3-411.

VI. Comparative Negligence/Proportional Liability.

Defendants are proportionally liable for the damages awarded according to the percentage of their fault. Utah Code Ann. § 78B-5-819.

VII. Government Immunity.

Provisions of the Utah Health Care Malpractice Act, Title 78B, Chapter 3, Part 4 apply to malpractice

actions against entities which are brought under the Utah Governmental Immunity Act, i.e. "each office, department, division, agency, authority, commission, board, institution, hospital, college, university, Children's Justice Center, or other instrumentality of the state." Utah Code Ann. § 63-30d-102. But the provisions of Title 78B do not affect the requirements for filing notices of claims, times for commencing actions, and limitations on amounts recoverable (\$583,900 and \$0 for punitive damages) under the Utah Governmental Immunity Act. Utah Code Ann. § 78B-3-415.

VIII. Good Samaritan and Other Emergency Service Immunity.

A licensed health care professional who, under no legal duty to respond, gratuitously and in good faith renders emergency care at the scene of an emergency is immune from civil damages. Likewise, such a licensee is immune from civil damages for acts or omissions in rendering care for the implementation of measures to control the causes of epidemic and communicable diseases as described in the Local Health Department Act. Utah Code Ann. § 58-13-2.

A person who, in good faith, assists government agencies, in providing emergency care as a result of a natural disaster, bioterrorism, a pandemic, etc., is immune from civil damages unless s/he is grossly negligent, caused the emergency, or has engaged in criminal conduct. Utah Code Ann. § 58-13-2.6.

A health care professional who provides health care at a charitable health care facility is not liable in a medical malpractice action if s/he provides the care gratuitously, within the scope of his/her license, with proper disclosure to the patient of immunity, and is not grossly negligent or willful and wanton. Utah Code Ann. § 58-13-3.

IX. Insurance Coverage.

If insurance is not readily available to a region, and public interest requires it, the commissioner of insurance may implement plans to provide it. Utah Code Ann. § 78B-3-413.

X. Notice of intent to commence action.

Plaintiff must give prospective defendants at least 90 days notice of intent to commence an action. If notice is served less than 90 days prior to the running of the statute of limitations, the statute is extended to 120 days from the date of service of notice. Utah Code Ann. § 78B-3-412.

XI. Prelitigation Panel Review.

For all medical liability suits, a prelitigation panel review is a condition precedent to commencing litigation. Utah Code Ann. § 78B-3-416.

A. Organization.

The Division of Occupational and Professional Licensing provides a hearing panel in alleged medical liability cases except cases with a dentist as defendant. The division establishes procedures and rules for the panel. Utah Code Ann. § 78B-3-416.

B. Time Limitations.

The party commencing the action must file a request for prelitigation panel review within 60 days after service of notice of intent to commence action. Utah Code Ann. § 78B-3-416.

C. Proceedings.

Proceedings are informal, nonbinding, and are not subject to judicial review, but are compulsory as a condition precedent to commencing litigation. Utah Code Ann. § 78B-3-417.

D. Decisions.

The panel renders its opinion in writing based on the evidence as to whether each claim

has merit or no merit. If determined to have merit, the panel indicates whether the conduct complained of resulted in harm to the claimant. Utah Code Ann. § 78B-3-418.

XII. Arbitration.

Unless the parties agree to a single arbitrator, arbitration is before a panel of three arbitrators chosen in the following manner: (1) one selected by the plaintiff, (2) one selected by the health care provider, and (3) one jointly selected by all, or, if the parties cannot agree, the first two arbitrators select the third from a list of individuals approved by the state or federal courts. Utah Code Ann. § 78B-3-421.

When in arbitration, all parties waive the requirement to appear before a prelitigation panel. Utah Code Ann. § 78B-3-421.

The patient has the right to rescind an arbitration agreement within 10 days of signing the agreement. The patient may not be denied health care solely because s/he refuses to enter into a binding arbitration agreement. Utah Code Ann. § 78B-3-421.

A signed arbitration agreement is not binding if the plaintiff: (a) proves that the signer lacked capacity to sign, or (b) shows by clear and convincing evidence that the agreement was induced by the provider's fraudulent acts. Utah Code Ann. § 78B-3-421.

XIII. Statements of apology, sympathy, etc.

Any unsworn statement, affirmation, gesture, or conduct by the defendant that expresses apology, sympathy, commiseration, condolence, compassion, a general sense of benevolence or that describes the sequence of events or the significance of events is not admissible as evidence of an admission of liability. Utah Code Ann. § 78B-3-422.