Amending Complaints: Before, During and After Trial

by Christopher T. Hurley & Mark R. McKenna

I. The Problem

The Illinois Civil Practice Act specifically allows a plaintiff to amend a complaint at any time. The Civil Practice Act is designed "to remove barriers which prevent resolution of a case on its merits; to that end, [a] trial court's power to allow amendments should be freely exercised so that litigants may fully present [an] asserted cause of action."[1]

No complaint "is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim."[2] Further, the Illinois Supreme Court has held that "a complaint should be liberally construed" by the trial court.[2]

Some trial judges have been prohibiting the amendment of complaints just prior to or during trial, and then limiting the evidence presented at trial to the issues set out in the initial complaint. This limitation on the evidence heard by a jury is not based on any Illinois law, and denies plaintiffs the right to a resolution of the case on the merits.

Complaints are often unintentionally inaccurate and outdated by the time of trial because new evidence and facts are elicited during years of discovery all the way through trial to the close of evidence. Based on the Illinois Civil Practice Act, trial courts must permit plaintiffs to amend their complaints, and present their case to the jury, based on the evidence elicited before and during trial.

II. Complaints are Made to be Amended

The purpose of filing a complaint is to "crystallize the issues in controversy" in such a way as to adequately inform the defendant of the claims against him.[3] A plaintiff does not have to present evidence of facts at the pleadings stage of the case, as the parties will obtain evidence through the discovery process.[4] Where a complaint is based on negligence, the plaintiff must only plead facts that give rise to a duty, that the defendant breached the duty, and that the breach led to the plaintiff's injuries.[5]

Plaintiffs have a statutory right to amend the complaint at any time prior to a final judgment so long as the basis is "just and reasonable."[6] Under Illinois law a plaintiff may amend the complaint even after final judgment is entered in order to "conform the pleadings to the proofs."[7] To permit an amendment on just and reasonable grounds means that the trial court is "require[d]…to permit amendment if it will further the ends of justice."[8]

For amendment purposes, 735 ILCS 5/2-616(b) governs: "an amended pleading shall not be time-barred and shall be said to relate back to the date of the filing of the original pleading so long as (1) the original pleading was timely filed, and (2) it appears from the original and amended pleadings that the ***cause of action*** asserted grew out of the same transaction or occurrence set up in the original pleading."[9] [Emphasis supplied]

Under Illinois law trial courts must liberally construe whether the claims in an amended complaint involve "the same transaction or occurrence." In *Porter,* the Illinois Supreme Court held that "a new claim will be considered to have arisen out of the same transaction or occurrence and will relate back if the new allegations as compared with the timely filed allegations show that the events alleged were close in time and subject matter and led to the same injury."[10] "Medical malpractice plaintiffs, in particular, are afforded every reasonable opportunity to establish a case, and to this end, amendments to pleadings are liberally allowed to enable the action to be heard on the merits rather than brought to an end because of procedural technicalities."[11]

New causes of actions that arise out of an amended complaint do not have to be "identical to or substantially the same as the claim raised in the original pleading, in order for it to relate back to the original pleading for limitations purposes."[11] Where the amended complaint contains new claims related to the original injury, the amended complaint relates back to the original complaint.

For instance, in *Frigo v. Silver Cross Hospital,* the plaintiff amended the complaint well after the two-year statute of limitations, based on information obtained in discovery, to allege that the hospital was not only liable under *respondeat superior* for the actions of a co-defendant podiatrist, but also institutionally negligent in granting surgical credentials to the podiatrist. The trial court permitted the amendment, and a jury awarded the plaintiff $7.7 million on her negligent credentialing claim.

On appeal, the defendant hospital in *Frigo* argued that the plaintiff's negligent credentialing claim was not

timely because it was filed two years after litigation began, well beyond the two-year statute of limitations period and beyond the four year statute of repose. The appellate court in *Frigo* rejected the defendant's claim that the amended complaint was untimely, and affirmed the trial court's ruling:

> Although the first amended complaint contains more detailed allegations of negligence against Silver Cross, we find that Silver Cross had adequate notice in the original complaint because Frigo alleged that Silver Cross negligently managed the hospital.[12] (hospitals may be found liable for institutional negligence and for breaching an independent duty, which is administrative and managerial in character, to care for their patients). We find that Silver Cross was responsible for managing the hospital, had firsthand knowledge of its credentialing requirements, and knew whether Dr. Kirchner met those requirements. Therefore, we find that Silver Cross was supplied with the essential information it needed to prepare a defense to the management claim in the original complaint because similar but more specific and detailed allegations were later alleged in the first amended complaint with respect to the hospital's management—selection, retention, and credentialing of its physicians…We hold that Silver Cross was adequately apprised, before the expiration of the limitations periods (the two-year statute of limitations and four-year statute of repose), of the transaction or occurrence upon which Frigo's claims in the first amended complaint were based. [13]

Illinois courts should grant a plaintiff leave to file an amended complaint where doing so would "further the ends of justice"—in other words, if it would give the plaintiff the right to a trial on the full merits of her case[14] If the initial complaint gave the defendant enough information to understand the nature of the plaintiff's cause of action, and to form a defense, the trial court must allow the plaintiff leave to file her amended complaint, no matter the stage of the case.

Where a plaintiff's amended complaint provides more specific allegations to support the plaintiff's causes of action, a trial court will abuse its discretion in denying plaintiff leave to amend the complaint. For example, in *Schroff v. Advocate Condell Medical Center*, the trial court abused its discretion when it denied plaintiff leave to file a second amended complaint alleging vicarious liability against a medical center. The Illinois Appellate Court in *Schroff* found that the patient did not have necessary information to add claims prior to the emergency room physician's deposition about conversation with emergency room physician, which focused on patient's knee and the "patient lacked prior opportunities to add claims for institutional negligence,… and medical

amending complaints continued on page 34

amending complaints continued from page 33
center was not surprised by additional claims." This scenario exists in most medical malpractice cases, and in many tort cases in general.[15]

By now, all trial lawyers are familiar with Illinois Supreme Court Rule 213(f), which requires parties to disclose the identities and addresses of witnesses who will testify at trial, notice of the subject matter of their testimony, and, for controlled experts, their opinions and conclusions. Nowhere in this rule is the requirement that trial testimony be restricted to the facts and allegations alleged in the plaintiff's complaint.

Defendants will sometimes attempt to convince a trial judge that a plaintiff's Rule 213(f) disclosures and expert testimony must be restricted to the facts and issues identified in the complaint. That is wrong. Rule 213 is a Supreme Court Rule regarding discovery. Further, Illinois Supreme Court Rule 213(g) specifically permits any witness to testify regarding information disclosed in a discovery deposition—there is no limit imposed based on the scope of the complaint.

III. Juries Decide Cases Based on Evidence, not Pleadings

By the time a case gets to trial, after many years of discovery, there is always relevant, material evidence that a jury should consider that was not available when the plaintiff filed his complaint. Then, when the time comes for the trial court to instruct the jury on the issues they must decide, even more evidence exists—the testimony of lay and opinion witnesses, admissions, concessions obtained through vigorous cross-examination of lay and expert witnesses.

Justice demands that the issues for the jury be based on ALL of the evidence—not merely statements made in the initial pleading. However, without any support under Illinois law or the Illinois Civil Practice Act, some trial judges have prohibited plaintiffs from amending their complaints to conform to the evidence before or during trial. This is an abuse of discretion.

At the end of a trial—after the opposing parties have presented all of their evidence, "the issues instruction tells the jury what points are in controversy between the parties and thereby simplifies their task of applying the law to the facts..."[16] An issues instruction tells the jury what points are in controversy between the parties and thereby simplifies their task of applying the law to the facts.

Illinois law for over a century has dictated that juries must decide cases based on the material facts adduced at trial—not based on the legalese set forth in the pleadings:

> The general rule often declared is that instructions must in a clear, concise, and comprehensive manner inform the jury as to what material facts must be found to recover or to defeat a recovery.[17] The rule adopted by nearly all courts is that the court must define the issues to the jury without referring them to the pleadings to ascertain what they are. Judge Thompson, in his work on Trials (sections 1027, 2314, 2582), lays

down that rule, and says that it is error to leave the jury to construe and determine the effect of the pleadings, which are often drawn in technical language and which might not be correctly understood by persons unlearned in the law.[18]

The role of the trial court must be to ensure that juries decide cases based on the evidence at trial—not statements made many years earlier in a pleading. In situations where discovery and trial have revealed new truths—and new claims—Illinois law offers us the ability to amend our complaint at any time, to conform the pleading to the proofs. By following the law, trial courts will fulfil their role of ensuring juries decide cases based on their merits.

Endnotes

[1] *Scala/O'Brien Porsche Audi, Inc. v. Volkswagen of Am., Inc.,* 87 Ill. App. 3d 757, 762, 410 N.E.2d 205, 208 (1st Dist. 1980).

[2] *First Nat. Bank in DeKalb v. City of Aurora*, 71 Ill. 2d 1, 8–9 (1978).

[3] *Gold Realty Group Corp. v. Kismet Café, Inc.*, 358 Ill.App.3d 675, 679, 295 Ill. Dec. 252, (1st Dist. 2005).

[4] *Ingram v. Little Co. of Mary Hosp.,* 108 Ill. App. 3d 456, 459, 438 N.E.2d 1194, 1196 (1st Dist. 1982).

[5] *Borushek v. Kincaid*, 78 Ill. App. 3d 295, 296, 397 N.E.2d 172, 174 (1st Dist. 1979).

[6] *Keefe-Shea Joint Venture v. City of Evanston*, 346 Ill. App.3d 48 (1st Dist. 2005).

[7] *Mandel v. Hernandez,* App 1 Dist. 2010, 344 Ill. Dec. 322, Ill. App.3d 701.

[8] *Seibert v. Continental Oil Co.* (1987), 161 Ill.App.3d 891, 895, 113 Ill.Dec. 743, 515 N.E.2d 728. *Loyola Acad. v. S & S Roof Maint., Inc.*, 146 Ill. 2d 263, 272–73, 586 N.E.2d 1211, 1215 (1992).

[9] *Grove v. Carle Foundation Hospital*, 364 Ill.App.3d 412, 418, 301 Ill.Dec. 191, 846 N.E.2d 153 (2006).

[10] *Porter v. Decatur Mem'l Hosp.*, 227 Ill. 2d 343, 360, 882 N.E.2d 583, 593 (2008).

[11] *Bellucci*, 338 Ill.App.3d at 391, 273 Ill.Dec. 610, 789 N.E.2d 784.

[12] *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill.2d 278, 291, 246 Ill.Dec. 654, 730 N.E.2d 1119 (2000).

[13] *Frigo v. Silver Cross Hosp. & Med. Ctr.*, 377 Ill. App. 3d 43, 63–64, 876 N.E.2d 697, 716 (1st Dist. 2007), as modified (Sept. 20, 2007).

[14] *Arroyo v. Chicago Transit Authority*, App. 1 Dist. 1994, 205 Ill. Dec. 715, 268 Ill. App.3d 317.

[15] *Schroff v. Advocate Condell Med. Ctr.*, 2015 IL App (2d) 141132-U.

[16] Illinois Pattern Instruction (Civil) 20.00 (Introduction).

[17] *Moshier v. Kitchell & Arnold*, 87 Ill. 18.

[18] *Krieger v. Aurora, E. & C.R. Co.*, 242 Ill. 544, 548, 90 N.E. 266, 268 (1909).

Christopher T. Hurley *is the founding partner of Hurley McKenna & Mertz in Chicago. He concentrates his practice on personal injury, wrongful death and professional negligence cases. He is a former President of the Illinois Trial Lawyers Association. Mr. Hurley is a Fellow of the American College of Trial Lawyers and the International Academy of Trial Lawyers. Mr. Hurley is a frequent speaker and published author regarding trial practice.*

Mark R. McKenna *is a partner at Hurley McKenna & Mertz in Chicago. He concentrates his practice on personal injury, wrongful death and professional negligence cases. He is a member of the Illinois Trial Lawyers Association's Board of Managers.*