THE MCARE ACT'S STATUTE OF REPOSE: HARSH CONSEQUENCES

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The recent dismissal of claims in four Philadelphia County medical malpractice actions is a reminder of the harsh consequences of the Medical Care Availability and Reduction of Error (MCARE) Act's Statute of Repose. According to the opinions accompanying the orders of dismissal, the Statute of Repose goes beyond eliminating medical negligence claims; it eliminates any claim whatsoever, even against a doctor who knowingly operated on his patients unnecessarily, and against the institution that delayed in disclosing the misconduct.

Sometime in early 2012, Penn Medicine found one of its doctors had been performing unnecessary cardiac procedures for almost ten years. For example, the doctor had surgically implanted stents in dozens of patients who did not have vascular blockages or need stents. Penn Medicine informed the doctor's patients and the public generally about the misconduct on April 2, 2013, though it had discovered the misconduct over a year earlier. Approximately twenty lawsuits were filed in Philadelphia in the ensuing months making a variety of claims stemming from the unnecessary procedures. The suits named both the individual doctor and Penn Medicine as defendants. In some instances, the procedures had taken place more than seven years earlier, in 2004, 2005 and 2006.

Arguing preclusion under the MCARE Act's Statute of Repose, the defendants filed motions to dismiss all claims relating to procedures performed more than 7 years before suit was filed, including these four cases where plaintiffs had undergone unnecessary procedures. In her opinions in all four cases, issued on October 22, 2015, the Honorable Frederica Massiah-Jackson held she was "constrained to agree" that the claims were barred. [1]

Reprinted From PTLA's Verdict, Volume 2015-2016 – Issue 6

The Statute of Repose provides that "no cause of action asserting a medical professional liability claim may be commenced after seven years from the date of the alleged tort or breach of contract," with exceptions only for foreign objects unintentionally left in the body and for minors' claims. [2]

Plaintiffs argued the statute of repose did not impact their claims because they had commenced suit within seven years of when the cause of action arose – which was the date they were informed by Penn Medicine that they had been operated on unnecessarily. It was on this date that what they had understood to be a necessary medical procedure became an injury giving rise to liability. But the Statue of Repose mooted arguments about when the cause of action arose. Under *Abrams v. Pneumo Abex Corp.*, 981 A.2d 198 (Pa. 2009), the court noted, a statute of repose "bars a plaintiff's suit before it happens; completely abolishes and eliminates the cause of action."

Plaintiffs also questioned the Statute of Repose's applicability to many of their claims. The defendant doctor had profited from deceiving them in order to cut open their bodies and insert foreign objects. The MCARE Act addresses medical negligence. Why should the MCARE Act's Statute of Repose have any bearing on their claims of battery, fraud, misrepresentation and unjust enrichment? Even those claims were barred, the court held, because the MCARE Act applies to "medical professional liability claims," which it defines broadly as "any claim seeking the recovery of damages or loss from a health care provider arising out of any tort or breach of contract causing injury or death resulting from the furnishing of health care services which were or should have been provided." [3]

Plaintiffs further argued that neither the doctor nor Penn Medicine should be able to benefit from the extended delay in informing them of the doctor's malfeasance. What good could possibly come from allowing someone to avoid liability for actionable claims by intentionally hiding them? The court rejected this "compelling argument" too, holding that the Statute of Repose abolished plaintiffs' causes of action, rendering equitable considerations such as the discovery rule impertinent and erroneous.

The MCARE Act's Statute of Repose comes into play only rarely, which was part of the calculus involved in the process of drafting the Act. Model legislation drafted by the American Medical Association served as the basis for the debate in Pennsylvania over what came to be the MCARE Act. The AMA's model contained a statute of repose that was meant to drive an actuarially calculated savings on malpractice insurance premiums, provided it applied to *all* claims, including minors' claims. The fact that the MCARE Act's Statute of Repose *does not* apply to minors' claims was a significant victory for plaintiffs' rights. It also gutted the actuarial savings on premiums.

These recent opinions are a reminder that when it does come into play, the Statute of Repose has harsh consequences, arbitrarily barring claims under circumstances more egregious than its drafters likely imagined. They also provide an impetus to recall how much more harsh the Statute of Repose might have been.

NOTES

[1] *Mathai v. Banka, et al.,* Phila. CCP N o. 131102814; *Deni v. Banka, et al.,* Phila. CCP No. 13 1200327; *Gallagher v. Banka, et al.,* Phila. CCP No. 1 31203573; *Wolfberg v. Banka, et al.*, Phila. CCP No. 131203574.

[2] 40 P.S. § 1303.513.

[3] 40 P.S. § 1303.103.

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It was in law school that Joseph Traub was first inspired to work on behalf of catastrophically injured laborers, helping represent them in claims against the manufacturers of the defective industrial machines that caused their injuries. Since graduating, cum laude, from Temple University Beasley School of Law, his professional work has expanded to representing people catastrophically injured by defective industrial and consumer products, unsafe construction practices, dangerous driving and serious medical errors. For example, he has represented a man thrown from a scissor lift with poor lateral stability, a woman whose arm was pulled into a commercial ironing roller, a family struck by a drunk driver, and a man whose throat cancer was missed by a pathologist. His work has helped provide financial relief, as well as a sense of justice and resolution, to victims and their families while also encouraging safer products and medical practices.

Mr. Traub has lectured and published articles on various topics relevant to the practice of personal injury litigation, including principles of legal ethics, strategies in construction litigation and federal preemption. As a member of the Amicus Curiae Committee of the Pennsylvania Association for Justice, Mr. Traub advocates for the rights of injured persons in the appellate courts of Pennsylvania. His appellate advocacy on behalf of his own clients has resulted in several positive developments in the law, including ensuring funds are available to compensate malpractice victims where a doctor's insurance carrier goes bankrupt (Heim v. Medical Care Availability and Reduction of Error Fund, 23 A.3d 506 (Pa. 2011)), and allowing medical experts to testify where they are familiar with the care at issue even if they do not practice in the same specialty as the defendant (Vicari v. Spiegel, 989 A.2d 1277 (Pa. 2010)). He is also on the Board of Directors of the National Lawyers Guild Philadelphia Chapter, an association of lawyers and legal workers doing primarily civil rights and public interest advocacy. In his free time he enjoys distance running and playing drums in a band.

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