

## NEW JERSEY MEDICAL MALPRACTICE ACTIONS AND THE TORT CLAIMS ACT

*Joseph Z. Traub, Esquire | Raynes McCarty*

New Jersey's Tort Claims Act (TCA) is a potential and probably unexpected peril of filing a medical malpractice suit in New Jersey. The TCA is New Jersey's sovereign immunity statute. It provides immunity from suit for governmental entities and employees, except under certain defined conditions.<sup>1</sup> One of the conditions is compliance with a 90 day notice requirement.<sup>2</sup> You read that right: under New Jersey's TCA, a claim may not be brought against a public entity or employee unless notice is given 90 days after the accrual of the claim. The notice must contain information prescribed by the statute, including name and address of the claimant, date, place and circumstances of the occurrence giving rise to the claim, and a description of the injuries.<sup>3</sup>

Why is the TCA pertinent to New Jersey medical malpractice claims? Because of the University of Medicine and Dentistry of New Jersey (UMDNJ). UMDNJ was a state-run health sciences school. In a series of decisions dating back almost 20 years, doctors affiliated with UMDNJ – either as professors or students – were held subject to the protections of the TCA, including the 90 day notice requirement, in suits arising from care they provided at private hospitals.<sup>4</sup> The UMDNJ was dissolved in 2013, but the schools it comprised mostly became part of Rutgers University, which is also state-run. Claims against Rutgers University have been held to be subject to the TCA's notice requirements.<sup>5</sup> Safe practice would be to assume doctors employed by and studying at Rutgers Biomedical and Health Sciences, which actually comprises nine schools, research centers and institutes around the state, could assert defenses available under the TCA.

So if the doctor or resident who provided negligent care to your client was affiliated with UMDNJ or Rutgers University, even if the treatment took place at a private hospital or other private facility, you may need to contend with the TCA's notice requirements. How often do we see clients with potential medical malpractice claims within 90 days of the alleged malpractice? What can we do under typical circumstances, where a health ordeal has prevented a potential claimant from even contemplating visiting an attorney for more than 90 days, and/or where the client has no idea whether the doctors were affiliated with UMDNJ/Rutgers?

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Fortunately, the TCA provides an avenue to relief from the 90 day notice requirement, which case law has expanded. The Act permits the filing of notice beyond 90 days after accrual of the claim if the claimant can show “sufficient reasons constituting extraordinary circumstances for his failure to file notice of claim within” 90 days.<sup>6</sup> The Act permits late filing of notice “at any time within one year after the accrual of [a] claim provided that the public entity or the public employee has not been substantially prejudiced thereby.”<sup>7</sup> According to the New Jersey Supreme Court, the TCA “does not define what circumstances are to be considered ‘extraordinary’ and necessarily leaves it for a case-by-case determination as to whether the reasons given rise to the level of ‘extraordinary’ on the facts presented.”<sup>8</sup>

New Jersey’s appellate courts have identified two categories of extraordinary circumstances that may be found to excuse late filing of notice of claim. Mercifully, the courts have recognized that people dealing with serious health challenges caused by someone else’s wrongdoing may not have the wherewithal to simultaneously take action needed to protect their legal rights. Extraordinary circumstances may be shown where the plaintiff was prevented from seeking legal counsel by the impact of the negligence. In *R.L. v. State-Operated School Dist.*,<sup>9</sup> a case involving the transmission of HIV by a public high school teacher to a student, the plaintiff waited over five months after learning of his HIV-positive status before seeking legal advice. The court found extraordinary circumstances justifying the delay based on allegations the plaintiff had “spent his time crying, preoccupied with thoughts of death and was hesitant about exposing his HIV status.”<sup>10</sup> And in *Maher v. County of Mercer*,<sup>11</sup> the court held extraordinary circumstances excusing plaintiff’s nine month delay in serving tort claim notice were shown where plaintiff was in an induced coma during her first hospitalization, and afterward was in such poor health that she was repeatedly readmitted to the hospital for further treatment.

Extraordinary circumstances may also be shown where the treating doctor’s status as a public employee was not apparent to the plaintiff. The New Jersey Supreme Court has noted that medical malpractice actions are “unlike most cases involving public entities and public employees,” because “the defendant doctors were performing tasks associated generally with private practice and not public service.”<sup>12</sup> The Court has repeatedly permitted the filing of late notice where the plaintiff had no reason to know his or her doctors were public employees, given the plaintiff was being treated at a private institution and the doctors did not identify themselves, either by statement or uniform, as state employees.<sup>13</sup> The Court has gone so far as to hold that the one year limit for filing late notice set forth in N.J.S.A. 59:8-9 may be tolled where the treating doctor’s status as a public employee was obscured:

We do not think that the Legislature contemplated that the one-year ban would be used to bar a plaintiff-patient from pursuing his medical malpractice claim against a physician whom he had no reason to believe was a public employee. In such unique circumstances, we find that the Legislature intended the one-year ban provided under N.J.S.A. 59:8-9 to be tolled. Accordingly, plaintiff should be entitled to file a notice of late claim.<sup>14</sup>

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The TCA provides that the only way to get relief from the 90 day notice requirement is to file a motion in court for permission to file a late notice of claim.<sup>15</sup> Practically speaking, it makes sense to send a statutorily compliant notice of claim letter to Risk Management at Rutgers Biomedical and Health Sciences as soon as you sign up a client with a potential New Jersey medical malpractice claim, even if you are past the 90 day notice window. Doing so will prompt an informative response from Rutgers (hopefully denying employment!), and will deflate any prejudice argument it might try to make later. If it turns out any of the involved care providers were Rutgers or UMDNJ employees, you will have to file a motion for permission to file a late notice of claim, supported by affidavits establishing the extraordinary circumstances that led to the delay.<sup>16</sup>

#### NOTES

<sup>1</sup> N.J.S.A. 59:3-1.

<sup>2</sup> N.J.S.A. 59:8-8.

<sup>3</sup> N.J.S.A. 59:8-4.

<sup>4</sup> *Lowe v. Zarghami*, 158 N.J. 606, 731 A.2d 14 (N.J. 1999) (finding doctor employed as clinical professor at UMDNJ subject to protections of Tort Claims Act in suit arising from treatment he provided at affiliated private hospital); *Wajner v. Newark Beth Israel Medical Center*, 689 A.2d 143 (N.J. Super., App.Div. 1997) (finding medical students acting as staff-residents at affiliated UMDNJ hospitals are employees under Tort Claims Act)

<sup>5</sup> *D.D. v. UMDNJ*, 61 A.3d 906 (N.J. 2013).

<sup>6</sup> N.J.S.A. 59:8-9.

<sup>7</sup> *Id.*

<sup>8</sup> *Lowe v. Zarghami*, 158 N.J. 606, 626, 731 A.2d 14, 25 (1999) (citation omitted).

<sup>9</sup> 387 N.J. Super. 331, 903 A.2d 1110 (App. Div. 2006).

<sup>10</sup> R.L., 387 N.J. Super. at 341, 903 A.2d at 1115.

<sup>11</sup> 384 N.J. Super. 182, 894 A.2d 100 (App. Div. 2006).

<sup>12</sup> *Lowe v. Zarghami*, 158 N.J. 606, 629, 731 A.2d 14, 27 (1999).

<sup>13</sup> *Lowe v. Zarghami*, 158 N.J. 606, 731 A.2d 14 (1999); *Eagan v. Boyarsky*, 158 N.J. 632, 731 A.2d 28 (1999).

<sup>14</sup> *Eagan*, 158 N.J. at 643, 731 A.2d at 34. See also *Ventola v. New Jersey Veteran's Memorial Home*, 164 N.J. 74, 751 A.2d 559 (2000) (excusing a more than one-year delay in filing a notice of claim on the basis that doctors employed by a N.J. state Veterans Affairs facility did not clearly identify themselves as state employees, as distinguished from U.S. Veterans Health Administration employees).

<sup>15</sup> N.J.S.A. 59:8-9.

<sup>16</sup> *Id.*



## JOSEPH Z. TRAUB

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.

### PRACTICE AREAS

- Car Accidents
- Construction Accidents
- Helicopter Crashes
- Insurance
- Medical Malpractice
- Professional Malpractice

### AFFILIATIONS

- Pennsylvania Association for Justice, Amicus Curiae Committee
- Philadelphia Bar Association
- Philadelphia Trial Lawyers Association
- Lawyers Club of Philadelphia
- American Association for Justice
- National Lawyers Guild

### EDUCATION

- Binghamton University, 1991
- Villanova University, 1994
- Temple University Beasley School of Law, 1997

