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The Patients First Act from the Litigators' Perspective

Legislation significantly changes the way medical malpractice cases will be prosecuted and defended

In 2004, the New Jersey Legislature enacted the New Jersey Medical Care Access and Responsibility and Patients First Act, see N.J.S.A. 2A:53A-38 et seq. The statute will significantly change the prosecution and defense of malpractice cases in New Jersey. This article will explain the most significant provisions of the new statute and contains some practice pointers for both plaintiffs' and defense counsel.

The Patients First Act amends the statute of limitations, N.J.S.A. 2A:14-2, to provide that "[A]n action by or on behalf of a minor that has accrued for medical malpractice for injuries sustained at birth shall be commenced prior to the minor's 13th birthday." See N.J.S.A. 2A:14-2(a). As stated, this statute only applies to injuries sustained "at birth." As such, the change does not apply to cases involving the failure to diagnose birth defects or where the malpractice occurred not "at birth" but rather during the pregnancy. In apparent recognition of the unconstitutionality of limiting the right of minors to sue before they can file suit themselves, the Patients First Act provides that if an action on behalf of a minor is not commenced by the minor's parent or guardian prior to the minor's twelfth birthday, the "minor or designat-

ed person may petition the court for the appointment of a guardian ad litem to act on the minor's behalf." See N.J.S.A. 2A:14-2(b). However, this hardly cures the unconstitutionality of this provision.

The Patients First Act also imposes new requirements for expert witnesses. See, N.J.S.A. 2A:53A-41, "Requirements for person giving expert testimony, executing affidavit." This section may also be unconstitutional. See, e.g., *Ferreira v. Rancocas Orthopedic*, 178 N.J.144, 159-169 (2003), where Justice James Zazzali observed in his concurrence that "the conflicts between our rules and the Affidavit of Merit Statute, coupled with the fine distinctions that we have drawn to avoid the injustice that flows from the statute's strict application, suggest a possible constitutional infirmity." *Id.* at 167. Justice Zazzali suggested that the Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 et seq., appeared to be in conflict with N.J. Const. Art. VI, §2, ¶3, which states: "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts." The recently enacted changes to the Affidavit of Merit Statute and the changes in the requirements for expert testimony trespass deeply upon the exclusive obligation of our Supreme Court to make the rules governing the administration, practice and procedure of the courts.

Nevertheless, the Patients First Act provides that if the defendant is a specialist or subspecialist recognized by the American Board of Medical Specialties or the American Osteopathic Association, and the treatment involves that specialty or subspecialty, "[T]he person providing the testimony shall ... be (1) a physician credentialed by a hospital to treat patients for the medical condition, or to perform the procedure, that is the basis for the claim or action; or (2) a specialist or subspecialist recognized by the American Board of Medical Specialties or the American Osteopathic Association who is board certified in the same specialty or subspecialty." N.J.S.A. 2A:53A-41. (Emphasis added). Similarly, the Patients First Act amends The Affidavit of Merit Statute, N.J.S.A. 2A:53A-27, to require the same credentials. The statute provides that a court may waive the same specialty or subspecialty requirement if, "after the moving party has demonstrated to the satisfaction of the court that a good faith effort has been made to identify an expert in the same specialty or subspecialty, the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in, or fulltime teaching of, medicine in the applicable area of practice or a related field of medicine." See N.J.S.A. 2A:53A-41(c). Thus, the Patients First Act permits, for example, an orthopedist who has been granted

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privileges to perform spinal surgery to render the affidavit of merit and to testify against a neurosurgeon in a case involving spinal surgery. The enactment of this statute requires that the prudent lawyer check the board certification status of every potential defendant at www.njdoc-torlist.com, which lists the qualifications and board certifications of every doctor licensed to practice medicine in New Jersey.

The Patients First Act permits a defendant in a malpractice case to obtain a dismissal of a malpractice case upon the filing of an "affidavit of noninvolvement with the court." See N.J.S.A. 2A:53A-40. The affidavit of noninvolvement must state "with particularity, the facts that demonstrate that the provider was misidentified or otherwise not involved ... in the care and treatment of the claimant ... and could not have caused the alleged malpractice, either individually or through its servants or employees, in any way." N.J.S.A. 2A:53A-40(a). The plaintiff and any codefendant may challenge an affidavit of noninvolvement by filing an affidavit that contradicts the assertions of noninvolvement. N.J.S.A. 2A:53A-40(b). The statute imposes penalties upon anyone who knowingly files a false or inaccurate affidavit of noninvolvement, including the "reasonable expenses" incurred including attorney fees. The statute imposes similar sanctions on any plaintiff or plaintiff's counsel who "falsely objected to a health care provider's affidavit of noninvolvement."

The Patients First Act has also amended N.J.S.A. 17:30D-22 to prohibit any increase in the premium of any medical malpractice policy due to the filing of a case against a physician if the case was dismissed within 180 days of the filing of the physician's answer. This provision will impose pressure on defense counsel to exchange discovery promptly in order that qualified defendants may take advantage of this important provision of the new law. Defense counsel who delay may well find themselves the subject of suits by their own clients seeking reimbursement for the cost of increased malpractice premiums

imposed on defendants who should have been dismissed prior to the 180 day limit.

The Patients First Act seeks to redefine the standard of review regarding remittitur and additur. N.J.S.A. 2A:53A-42 *Procedure to evaluate award by judge following verdict*, mandates that the trial judge "consider the evidence in the light most favorable to the nonmoving party and determine whether the award is clearly inadequate or excessive in view of the nature of the medical condition or injury that is the cause of action or because of passion or prejudice by the jury." The "clearly inadequate or excessive" standard is a change from the "shock the conscience" standard previously employed.

The Patients First Act also creates an immunity in certain "Good Samaritan" situations. N.J.S.A. 2A:62A-1.3 *Immunity from civil liability for certain health care professionals, certain situations*, amends New Jersey's Good Samaritan Act, N.J.S.A. 2A:62A-1 et seq., and immunizes a health care professional who responds in a hospital or similar setting to a life-threatening emergency or a request for emergency assistance in a life-threatening emergency within a hospital or other health care facility, unless there was gross negligence, recklessness or willful misconduct. However, this section does not apply if "a provider-patient relationship existed before the emergency," if the practitioner was "on-call" and had a duty to respond to "a patient emergency situation" or if the health care professional is paid for the service rendered.

The Patients First Act also creates a provision for the payment of noneconomic losses in the form of an annuity. "Noneconomic damages" are defined as "damages for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature." The new statute provides that "Unless otherwise agreed to by the parties, in any judgment resulting from a medical malpractice action

brought by a claimant for medical malpractice in which the noneconomic damages exceed \$1,000,000, the court shall enter a judgment ordering that 50% of the noneconomic damages be paid immediately, with the costs and attorney's fees to be paid from that amount. The remaining 50% of the judgment shall be paid over 60 months in the form of a structured payment agreement." (Emphasis added). Furthermore, in the event of the plaintiff's death, any balance "shall be paid to the judgment creditor's estate." The defendant or the defendant's insurer must "post a bond or security" and the bond must be written by "a company authorized to do business in this State and is rated A-, or better, by A.M. Best Company or such other company as is approved by the Department of Banking and Insurance." The key points are that this provision only applies to the noneconomic loss portion of a judgment, and not to any portion of the award for economic losses, including lost income and the cost of medical care or a settled case.

The Patients First Act also permits malpractice policies to offer an endorsement providing the insurer with the right to settle a claim filed under the policy, without first having obtained the insured's consent. The "premium shall reflect any savings or reduced costs attributable to the endorsement." The act also permits malpractice policies to offer a deductible of at least \$5,000 and up to \$1 million per claim, but in the case of a policy with any deductible, the insurer shall be responsible for payment of the deductible and shall be reimbursed for that amount by the insured. The Patients First Act also requires that every physician who maintains a professional medical practice in this state and has responsibility for patient care maintain malpractice insurance in the minimum amount of \$1 million per occurrence and \$3 million per policy year.

As demonstrated, The Patients First Act has made significant changes in the manner in which medical malpractice cases will be prosecuted and defended. All attorneys handling such cases are well advised to carefully review this statute. ■