

Putting something to rest

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The doctor blew it. He misdiagnosed kidney cancer by reading the film as only showing a benign cyst. Nine years later when the patient received the correct diagnosis and the cancer was finally discovered, he filed a malpractice suit against the radiologist. The statute of limitations for malpractice suits in Ohio requires plaintiffs to file suit within 1 year from the time the injury was or should have been discovered. This the plaintiff did. The defendant moved for dismissal based on Ohio's Statute of Repose that states that if any action is not filed within 4 years, it can no longer be brought forth and litigated. However, the plaintiff claimed that this was unfair in that it violated the state's equal protection clause, as he was being treated differently than say someone who discovered that a foreign body had been left inside him during an operation and couldn't possibly have found out about the injury in time to file the suit. In this instance, the statute of repose would not apply and the time to bring the action would not have started until the discovery of the foreign body. However, the appellate court ruled in favor of the defendant, holding that there was no violation of the equal protection clause, as the plaintiffs in the cited example would have been dissimilarly situated. The following appeal, *Smith v Wyandot Mem. Hospital*, Case No. 16-17-07. (Ohio Ct. App. June 25, 2018) ensued.

Ohio's statute of repose, revised code 2305.113 (C) holds that:

- (1) No action upon a medical, dental, optometric, or chiropractic claim shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim.
- (2) If an action upon a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental,

optometric, or chiropractic claim, then, any action upon that claim is barred.

Citing a prior case describing the rationale for why the Ohio legislature enacted its statute of repose, the court noted the following:

Just as a plaintiff is entitled to a meaningful time and opportunity to pursue a claim, a defendant is entitled to a reasonable time after which he or she can be assured that a defense will not have to be mounted for actions occurring years before. The statute of repose exists to give medical providers certainty with respect to the time within which a claim can be brought and a time after which they may be free from the fear of litigation. Forcing medical providers to defend against medical claims that occurred 10, 20, or 50 years before presents a host of litigation concerns, including the risk that evidence is unavailable through the death or unknown whereabouts of witnesses, the possibility that pertinent documents were not retained, the likelihood that evidence would be untrustworthy due to faded memories, the potential that technology may have changed to create a different and more stringent standard of care not applicable to the earlier time, the risk that the medical providers' financial circumstances may have changed—i.e., that practitioners have retired and no longer carry liability insurance, the possibility that a practitioner's insurer has become insolvent, and the risk that the institutional medical provider may have closed. (Cit. Omit.)

The court went on to clarify how a statute of limitations can coincide with a statute of repose by explaining that the former “establishes a time limit for suing in a civil case, based on when the claim accrued” and that this 1-year time period begins to accrue in Ohio at the time that the claimed injury was discovered or should have reasonably been discovered. In contrast, a statute of repose “bars any suit that is brought after a specified time since the defendant acted (caused the injury) even if this period ends before the plaintiff has suffered a resulting injury” (parenthesis added). The court opined that the basis of reconciliation of the 2 doctrines lies in the belief that “plaintiffs should litigate their claims as swiftly as possible and that defendants should not face potential liability

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indefinitely.” The court subsequently upheld the findings in favor of the defendant.

COMMENTARY

All states have some type of statute of limitations, and most of these time periods are between 1 and 3 years for claims involving medical malpractice. In addition, some states are discovery jurisdictions; the applicable time frame for litigation begins at the time the malpractice or injury was or reasonably should have been discovered. In contrast, other states are occurrence-based jurisdictions, in which the time period for litigation begins from the time the malpractice or injury occurred.

Most states have a statute of repose, and the time frame varies depending a lot upon the type of case in question. The bottom line is that because this is a state’s rights issue, there is no standardization of laws across the country. Therefore, it behooves each practitioner to know the laws of the state(s) in which he or she is practicing.

Yes, we are a very diverse country, and the individual states are quite proud of their heritage and are steadfast in protecting their geographic, demographic, and ideological values. Apparently, we don’t all share the same values; at least we don’t when it comes to health care or the evaluation of the care rendered. We have no cohesive agreement on what constitutes the standard of care, as evidenced by the fact that not all states have agreed to abide by a nationally recognized and accepted standard of care. Instead, many states still employ an anachronistic reliance on the locality rule that lessens the standard of care and preferentially protects the professionals within the state, all to the detriment of the citizens of that state, who should be entitled to more than what they are getting.

Statutes of limitations and repose also suffer from the inability of commonality. How courts qualify expert witnesses is another example of our diversification. Heck, we can’t even agree that teeth move the same way East and West, North and South. That’s why a doctor in one state is often found to be incompetent to

practice in another state. Yes, compared with medicine, we are truly second-class citizens. I guess I wouldn’t be as upset about this if we could all be honest and call it what it is: economic protectionism. Ah, but I digress.

Statutes of limitations are a good thing. They protect the interests of patients who may have suffered an injury because of medical malpractice by providing adequate time to secure legal representation and ensure that their case is duly investigated. In other words, adequate time is allotted for a patient to discover if they have been injured, to identify the extent and cause of that injury, and to decide if legal action should be pursued. The statute of limitations, as well as the statute of repose, also protects the doctor who cannot be expected to be held accountable for anything and everything that did or can go wrong over an indefinite period of time. At some point, the doctor should be allowed that feeling of repose. Although it is not a perfect system, it works most of the time.

The US laws and legal system are sometimes convoluted, a morass of jargon, with multitudes of exceptions, straddling fine lines, and splitting the finest of hairs. However, not all plaintiffs believe they get a fair shake; and the same sentiment can be heard coming from the medical side. I guess the take-away is that if neither side is truly happy, then one can only surmise that the system is fairly evenhanded.

Think of the issue presented here through the following analogy. You are out on the porch, dreaming of days gone by, half asleep in a rocking chair, with a dog laying at your feet, also half asleep. The chair moves back and forth as the dog’s tail wags in sync under the rail of the chair. Alas, a sudden change in the chair’s cadence results in an unexpected pain for the dog, which now must decide whether to get up, bark, and make a ruckus. If he does, he might take a nip at you. If he doesn’t, and instead lies back down to dream about buried bones and chasing cats, you are now entitled to the peacefulness of your respite in the rocker—also known as repose.