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Tort Reform Takes a Step Backwards with Recent Decision

A recent decision by an appellate court in Louisiana has struck down as unconstitutional a state law limiting damages to \$500,000 in medical malpractice cases. (See Arrington v. ER Physicians Group, 04-1235, decided 9/27/06) The law had been on the books since 1975. This ruling is hardly encouraging to those among us in favor of tort reform.

We New Yorkers, however, have such lowered expectations that reform will actually enter the consciousness of the Empire State's lawmakers that the Louisiana decision is not even a blip on our radar screen. After all, when you have already been kicked to the ground, it's hard to get any lower.

Having said that, there is still reason for hope among the state's medical providers that they can carry on robust practices while not fretting that it could be instantly taken away by a run away jury or vindictive judge. The law in New York still requires a plaintiff's attorney in almost all instances to consult with a physician and obtain an affidavit of merit before commencing a medical malpractice suit against a doctor or hospital. Such a suit, moreover, must be brought within two and a half years of the medical treatment as opposed to the full three years that all other negligence actions, including legal or architectural malpractice claims, are entitled. Lastly, attorneys' fees on medical malpractice awards and settlements are governed by statute that results in lower contingent legal fees than the typical one third slice that other negligence lawyers usually charge. All three of these present a hurdle, albeit not a pole vault, for a disgruntled patient to bring a lawsuit.

In future columns, I will raise medical malpractice issues or topics that I have experienced in the defense of medical claims over the years or come to know about anecdotally. These articles will remind you, reacquaint you or may even prompt further study or stimulate a discussion with colleagues around the water-cooler.

Here is this month's primer: *Good Samaritan Law*.

Public Health Law Section 3000-a in the State of New York states that any licensed physician who voluntarily and without the expectation of compensation renders first aid or emergency treatment at the scene of an accident or other emergency outside a hospital or doctor's office... to a person who is ill...shall not be liable for damages for injuries to such person unless...grossly negligent.

The statute begs the question: What is gross negligence? Well, gross negligence is determined on a case by case basis and almost always with the support - or lack thereof - of expert medical testimony. There are only a handful of reported cases in New York that have interpreted the Good Samaritan Law. None of those speak to gross negligence as a matter of law. We know, however, from other "ordinary" malpractice cases that gross negligence has been found where the practitioner has abandoned or assaulted the patient or exhibited other wanton or malicious conduct. In several reported licensing matters prosecuted by the Office of Professional Medical Conduct, which is responsible for investigating complaints about physicians, physician assistants and specialist assistants, gross negligence has been found where the conduct was "egregious" such as preparing the wrong leg for surgery.

So while tort reform may not be headed to New York - or Louisiana for that matter - any time soon, the Good Samaritan Law here seems to be working well to protect those altruistic doctors who would go to the aid of another without the fear of a claim or other reprisal in the event of an untoward outcome.

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