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The End of the Special Venue Rule in Pennsylvania Medical Malpractice Cases

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On Aug. 25, the Pennsylvania Supreme Court issued an order effectively ending the special venue rule that has applied to defendant physicians and hospitals in medical malpractice cases. For the past 20 years, Pa.R.Civ.P. 1006(a.1) provided that injured patients could only file lawsuits against health care providers in the county where the medical treatment occurred. (N.B. Until this change, for venue purposes in a medical malpractice action, the cause of action arose in the county where the negligent act or omission of failing to provide the needed care occurred. *Cohen v. Furin*, 946 A.2d 125 (Pa. Super. 2008)). The high court's Civil Procedural Rules committee will examine the impact of the rule change after two years.

While a hallmark of our legal system is that the law applies equally to everyone, medical malpractice defendants, and by extension their professional liability insurers, clearly received special treatment under this rule for which they heavily lobbied.

The rule change, which is set to go into effect on Jan. 1, 2023, will allow plaintiffs in medical malpractice cases to sue negligent healthcare providers in the counties where they regularly do business or have significant contacts. In short, medical defendants will be treated like all other defendants in the state, who do not receive the benefit of restrictive venue rules. Not surprisingly, those who have benefited from an uneven playing field decry that this equal treatment will cause malpractice insurance premiums to rise; certain specialists will not be able to secure remotely affordable coverage; doctors will leave the state; and runaway juries will return exorbitant verdicts. These same arguments were made 20 years ago when the Pennsylvania Supreme Court approved the restrictive venue rule. They were not borne out by the facts and data then, nor are they now.

This article discusses the special treatment that medical providers have received and its impact on victims of medical malpractice and Pennsylvanians at large. It addresses the false narrative that led to the venue carve-out, its political backdrop, and why that narrative is still false today. It concludes with the upshots of returning to a fairness of process, where the Rules of Civil Procedure do not tilt in one party's favor and help to shape an outcome that can only lead to less accountability in the delivery of healthcare and more medical errors.

Courtesy photo

Ezra Wohlgelernter of Feldman Shepherd Wohlgelernter Tanner Weinstock Dodig.

How We Got Here

To understand the special treatment that medical malpractice defendants have enjoyed for 20 years, it is instructive to examine the legal authority that governs venue in all other Pennsylvania lawsuits. Generally, that is:

- It is a fundamental rule of civil procedure that jurisdiction and venue are determined by the locus of the defendant's principal place of business and domicile. Pa.R.Civ.P. 1006 and 2179.
- Plaintiff's choice of forum is entitled to great deference by the trial court. [We acknowledge that a plaintiff's forum choice should be "rarely ... disturbed," is entitled to great weight, and must be given deference by the trial court. Wood v. E.I. du Pont de Nemours & Co., 829 A.2d 707, 711 (Pa.Super. 2003).]
- Venue is appropriate in the county where the individual or corporate defendant does business. Pa.R.Civ.P. 2179. To determine whether a corporation regularly conducts business in a county for the purposes of venue, the court must apply a "quality and quantity" test of business contacts. See Purcell v. Bryn Mawr Hosp., 579 A.2d 1282, 1285 (Pa. 1990). Our Supreme Court has explained:
- Quality of acts means those directly furthering, or essential to, corporate objects; they do not include incidental acts. Quantity means those acts which are so continuous and sufficient to be general or habitual. … The acts of the corporation must be distinguished: those in aid of a main purpose are collateral and incidental, while those necessary to its existence are direct.

Of course, defendants who disagree with a plaintiff's choice of venue can challenge it. But circa 2000, various special interest groups heavily lobbied for tort reform, pushing a fictive narrative of a "crisis" of medical malpractice litigation, that was threatening healthcare and raising the cost of medical malpractice insurance for physicians. That narrative was the impetus for various legislative and judicial reforms, which included the restriction on venue, as well as the requirement for a certificate of merit in medical professional liability actions.

The Truth

Contrary to the representations of special interest groups, there was no exodus of doctors from Pennsylvania prior to 2003. Data from the American Medical Association and from the Federation of State Medical Boards show an actual per capita increase in treating physicians. See Neil Vidmar, "Medical Malpractice Litigation in Pennsylvania: A Report for the Pennsylvania Bar Association," (May 2006). According to the report, while there were some fluctuations from year to year, there were 259 Pennsylvania patient care physicians per 100,000 persons in 2002 compared with 237 per 100,000 persons in 1994. In fact, Pennsylvania was substantially above the U.S. average of doctors per capita, which was 234 per 100,000 persons in 2002 and 207 per 100,000 persons in 1994.

Nor was there a crisis of runaway juries doling out large payouts to anyone who sued. Data compiled by the Pennsylvania Supreme Court for January 2000 to July 2003 shows that of 1,144 medical malpractice cases tried to jury verdict, 835 (73%) were in favor of the defense. So why were medical malpractice insurers raising their premiums? The truth lies with market forces and bad business decisions. As reported by Steve Esack, "Politics, money and fears in Pennsylvania medical malpractice fight," The Morning Call (Feb. 10, 2019), malpractice insurance companies had for years set their premiums artificially low to gain customers. That practice caused three major malpractice insurers to become insolvent in the 1990s and early 2000s. In a double punch, insurance companies also lost money on the premium dollars they invested when the stock market plunged in 2001. They raised their rates to offset their investment losses. For a full discussion of how poor economic conditions and other factors, beyond payouts, impact medical malpractice insurance rates, see Joseph B. Treaster and Joel Brinkley, "Behind Those Medical Malpractice Rates," New York Times (Feb. 22, 2005).

The Impact of the Special Venue Rule

While the special venue rule solved no medical malpractice "crisis," it—in conjunction with other tort reforms from that time—opened a medical Pandora's Box for citizens of the commonwealth. Problems include:

Diminished Patient Safety: Data from the Pennsylvania Supreme Court shows that after these reforms went into effect, the number of medical malpractice filings dropped by 42.7% from an average of 2,733 in 2000-2002 to 1,565 in 2019. Against this backdrop, the Patient Safety Authority, which is an independent state agency that collects reports of patient safety events from Pennsylvania healthcare facilities, reported that there were 8,553 "serious events" in 2019. A serious event is one that "results in death or compromises patient safety and results in an unanticipated injury requiring the delivery of additional healthcare services to the patient." A study published in 2016 by researchers at Johns Hopkins University School of Medicine found that preventable medical error is the third leading cause of death in the United States. See Martin A. Makary and Daniel Michael, "Medical error—the third leading cause of death in the US," 353 BMJ 2139 (2016).

To claim that we are alleviating a burden on the health care system by reducing the number of medical malpractice lawsuits ignores the crucial role lawsuits play in identifying and rectifying safety issues. For instance, in the mid-1990s, insurance companies decided mothers and newborn babies only required—and they would only pay for—a 24-hour hospital stay. Many neonatal problems do not manifest until three to fivedays of life, and during the era of post-delivery two-week follow-up pediatrician appointments infants were falling through the cracks and developing kernicterus, often resulting in catastrophic brain injury. Pennsylvania enacted legislation requiring insurers to pay for at least 48-hour hospital stays for newborns when the issue came to light, in part, through lawsuits brought by our firm and others.

Increased Financial Burden Upon Taxpayers: Victims of medical negligence do not slink away when they are denied their day in court. Without compensation from lawsuits for their medical bills, future medical care and lost wages, many will turn to the commonwealth and its taxpayers for government assistance.

Juror Bias: When malpractice victims must file exclusively in the county where their treatment occurred, there is a significant possibility that the largest employer in that county will be the hospital, thus increasing the risk of juror bias. According to data from Pennsylvania's Department of Labor and Industry, in Q1 of 2022, hospitals were the number one employer in 18 out of Pennsylvania's 67 counties. As large health systems continue to take control of how healthcare is delivered throughout Pennsylvania, it would be patently unfair if they could not be sued in venues where they regularly do business or have significant contacts, like all other defendants.

Conclusion

It was George Orwell who wrote in "Animal Farm": "All animals are equal, but some animals are more equal than others." Perhaps Orwell's allegorical commentary is applicable to the past 20 years of medical malpractice litigation in Pennsylvania.

Most citizens do not get to choose their doctor or tortfeasor. But they can, in accordance with the rules of our legal system, choose the county/jurisdiction to hear their case. Medical malpractice defendants should not be "more equal" than others.

I submit that the political capital expended tinkering with the venue rule and other tort reforms that undermine equitable treatment in our legal system would be far better utilized in measures designed to reduce medical errors.

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