Why New York Needs Medical Malpractice Date-of-Discovery Law

By Marea L. Wachsman, Esq.

The New York State legislature will launch a new legislative session in January. Currently, many members of both the Assembly and Senate strongly support a bill that would provide a discovery- of-injury rule allowing the two-and-a-half year statute of limitation for medical malpractice actions to start to run from the date on which one discovered or should have discovered that one's injury was caused by malpractice. This is intended to temper the patent injustice of the current rule, which leaves many New Yorkers with an expired statute of limitations before they ever have reason to know that they have a case, and incentivizes wrongdoers to keep patients in the dark concerning mistakes that have been committed.

There are times when it is not reasonably possible for a person to discover the cause of an injury, or even to know that an injury has been sustained, because some injuries do not manifest themselves at the time of the negligent act. Presently, CPLR 214-a provides that an action for medical, dental or podiatric malpractice must be commenced within two years and six months of the alleged negligent act, even if the patient is unaware that a negligent act occurred. The statute provides two exceptions to this rule: (a) continuous treatment wherein the statute of limitations starts to run from the last date of treatment; and (b) the statute of limitation starts to run when a foreign object is discovered inside a patient following a surgery. These exceptions are limited in scope and have been narrowly construed by the courts. In all other cases, the statute of limitations begins to run on the date of the malpractice regardless of whether or not the patient knows they have been injured or is aware that they were a victim of malpractice.

The injustice of New York's current lack of a date-of-discovery rule manifests itself primarily in cancer cases where mammograms, x-rays and laboratory tests are misread and patients are wrongly advised that they are fine. When patients are thus misdiagnosed, it is bad enough that not only are their chances of survival diminished by the delay, but currently they are also time-barred from commencing a medical malpractice action. In these situations, the State of New York punishes the victims of malpractice when the delay in the discovery of the malpractice is through no fault of their own, thus, making these patients victims not once, but twice.

In *Casale v. Hena*, 270 A.D.2d 680 (3d Dep't 2000), a physician told his 35 year old patient that there were two spots on her mammogram, but it was nothing to worry about and to have a repeat mammogram in five years. The doctor failed to tell the patient that the radiologist recommended a repeat mammogram in six months for comparison. The patient died at 40 years of age. The Appellate Division held that the action was time barred because the law did not provide for tolling of the statute. Lavern Wilkinson, (for which Lavern's Law was named) was a woman who died at age 41 in 2013 from a curable form of lung cancer after doctors failed to diagnose a small suspicious mass on one of her lungs in 2010. Ms. Wilkinson, a single parent of an autistic child, did not knowingly sit on her rights, she did not know, and she did not have any reason to know, that there was a mass on her 2010 x-ray. Ms. Wilkinson was unaware that the doctors at the hospital had failed to notice and report a cancerous nodule on one of her lungs. The x-ray was under someone else's control and she had an absolute right to rely on the person reading and interpreting the x-ray. That reliance caused her the most severe and irreparable injury of all, death. By the time Ms. Wilkinson learned that she had been a victim of malpractice, the statute of limitations had run. While proper compensation cannot correct the wrong, it would have allayed Ms. Wilkinson's main concern, which was ensuring that her disabled daughter was cared for.

A woman living in the State of New York should have the same legal rights and remedies as a woman who resides in any of the of 44 states that currently have a date of discovery statute with respect to instituting a

lawsuit for the failure to detect cancer or a precancerous lesion on a mammogram or other medical tests. In short, in New York, CPLR 214-a states that a patient only has two and one half years from the date the film was read to institute a lawsuit for the failure to diagnose cancer on the film, even if the fact that such a failure was not discovered until three years after the film was read. Such a result is simply not fair nor is it in accord with 44 other states. It is beyond time for New York to correct the miscarriage of justice that has been corrected in every state except Maine, Minnesota, Idaho, South Dakota and Arkansas. Simply put, the failure of having a date of discovery statute creates a loophole for laboratories, radiologists and hospitals that keeps them from being responsible for their actions and/or omissions and fails to promote patient safety. Indeed, current law actually provides an advantage to those who are able to conceal mistakes from patients long enough to leave the victims without recourse. The current statute fails to protect the approximately 19 million people that reside in this state, of which 51% are females and are at a higher risk for being a victim of a mistake because women 40 years of age and over undergo yearly mammograms.

Biography

Marea L. Wachsman has been practicing law since 2001 upon her graduation from New York Law School in 2000. Ms. Wachsman is a partner in the firm of Schreier & Wachsman, LLP and specializes in complex medical malpractice and general negligence cases. Ms. Wachsman is on the Executive Board of NYSTLA and is Co-Chair of the Bar Liaison Committee. In addition, she is the President of the Women Trial Lawyers Caucus, Inc. and a Vice President of the Brooklyn Women's Bar Association.