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In Med Mal, the 'Common Knowledge Exception' Makes No Common Sense

The New Jersey Supreme Court was asked to address when, in a medical malpractice lawsuit, could the statutory requirement that an affidavit must be submitted within 60 days be waived. To this author, the short answer is never.

By Eric Poe

It may be cliché, but "a little knowledge is a dangerous thing." Today, formal training has been pushed aside as people are flooded with information—so much so that they can unofficially deem themselves as experts. This is especially true in the area of medicine with TV ads selling prescription medicine and websites overflowing with symptoms, causes and treatments, so people can literally try to diagnose themselves.

Now imagine a judge with no formal medical background trying to decide whether a claim of medical malpractice was such a clear case of negligence that they can deem unnecessary an Affidavit of Merit (the "Affidavit"), which is required by law to confirm whether a lawsuit has any merit and the accused physician deviated from the "standard of care" in the eyes of a professional peer. This is what happens when the Affidavit of Merit Act (N.J.S.A. 2A:53A-27 to -29) (the "AOM") crosses paths with the courtroom "common knowledge exception." Two very different mandates—the former being statutory law created by publicly elected legislators and signed by a governor, and the latter, common law created by judges to serve as a judicial remedy to address trial evidentiary issues.

The questionable application of the "common knowledge exception" in medical malpractice was once again thrust to the forefront in *Cowley v. Virtua Health System* (A-47-18; 081891) late last year, in which the New Jersey Supreme Court was asked to analyze its use. Essentially, the court was asked to address when in a medical malpractice lawsuit could the statutory requirement that an Affidavit must be submitted within 60 days be waived. To me, the short answer is never.

Eric S. Poe

I strongly believe any exception to the AOM is the start of a slippery slope. First, I question why the common law exception—a remedy created by judges decades ago to address when an expert witness must testify in court—should overrule a statutorily created and clear requirement on an unrelated issue. Secondly, this exception allows trial judges to subjectively determine what may be "common knowledge" and permit a case to move forward without an Affidavit. While not much is completely black-

and-white in the legal world, in this situation no grey area should exist. The statute is a yes or no. Yes Affidavit, yes continue with litigation. No Affidavit, case dismissed. End of story.

'Res Ipsa Loquitur' – The Thing Speaks for Itself

The common knowledge exception is an established common law doctrine that predates the AOM by centuries. Dating back to New Jersey caselaw in the 1800s, this evidentiary idea may be stated, quite simply, as "that fact which the ordinary person can easily understand." The entire premise behind the "common knowledge exception" finds its historical roots as the "ordinary lay man" or "ordinary layperson" legal construction. It was used by judges to excuse the requirement for an expert witness in "common knowledge" cases.

Applying the "common knowledge exception" to excuse a party from presenting expert witness testimony to a jury in a medical negligence matter first appeared in New Jersey caselaw in 1944. Even in that early case of *Hull v. Plume*, 131 N.J.L. 511, 514 (1944), the court rejected the plaintiff's argument and found that expert testimony was, in fact, required. Thus, historically,

courts erred on the side of dismissing the common knowledge exception and instead required an expert witness to explain medical issues to a jury.

Further, the common knowledge exception was a remedy to be applied in cases where the alleged act of negligence had a correlating and embedded proximate cause associated with the standard of care deviation. For example, imagine a lawsuit where the allegation against a doctor claimed he/she operated on a patient's wrong leg. This allegation, if proven, is so obvious on the basis itself, any layperson clearly would deem it an act of negligence. More importantly, in looking at these common knowledge exceptions, if a jury felt the claim was indeed true, then the act of negligence that caused the alleged injury (loss of the wrong leg) undoubtedly would be the doctor's responsibility. This should be the required application of the exception, if we recognize "common knowledge" at all.

However, over time, I believe the courts have lost sight of the very important fact pattern differences where the common knowledge exception should apply, and judges fail to recognize that in the cases which brought about this remedy, the proximate cause was inherent within the allegation of negligence.

Furthermore, and most notably, the judicially created "common knowledge exception" was established in circumstances only where there was a question of whether or not expert testimony was needed at trial. It was not established in the context of whether it could be used to bypass a clear statutory requirement of an Affidavit from a licensed peer in the early stage of a lawsuit.

Bound by the Plain Language of the Legislation

How many times has a lawyer heard that phrase when standing before a judge and jury? If it is true that judges are bound by such "plain language" of a statute, then the AOM and its broad requirement that an Affidavit be provided should stand on its own without exception.

In 1995, the legislature, with the support of the governor, established that medical professionals would be able to practice medicine without constant fear of frivolous lawsuits. This began a year earlier with a significant tort reform initiative that would preserve one's right to sue with protections against costly, lengthy nuisance suits. In striking that balance, the reformers understood that health-care malpractice claims involved issues that depended on the expertise of a medical professional.

A number of initiatives were identified during the 1994 tort reform process, including the specific recommendation that the statute requiring the Affidavit be "rewritten to withstand judicial scrutiny." News Release, Office of the Governor (June 29, 1995). What resulted, as part of a larger tort reform scheme, was the passage of bill S-766/A-263, or the AOM. This law required plaintiffs in a professional malpractice lawsuit to file the Affidavit to prove the claim is credible and could proceed to litigation. The language of the statute left no doubt that such an Affidavit be required without exception.

In the recent *Cowley* case, medical providers may have won the battle in court but New Jersey providers overall continue to lose a more subtle war. Yes, the Supreme Court held that an Affidavit was required in that case and also reiterated the difficulty in determining when the common knowledge exception should apply. However, I feel firmly that the decision by the court to continue recognizing the common law exception as a method to circumvent the statutory requirements of the AOM, remains a problem that weakens the protections created for medical professionals.

Bottom line: If an act of negligence is in fact so clear for even a layperson to understand, then attaining a sworn statement from another medical professional in their field to affirm there was in fact negligence should be easy. So it begs the question—why should this exception even be allowed to apply in the face of a plain and unambiguous statutory requirement?

Honoring the Original Intent

On behalf of the medical professionals who stand to lose under the common knowledge exception, I proposed a statutory amendment to provide greater clarification—a change that would recognize the intricacies of medical malpractice cases, disallow use of the "common knowledge exception" to circumvent the AOM in such matters, and specifically require an Affidavit in these litigations. Specifically, the proposed change states: "In the case of an action for medical malpractice, such affidavit is required without exception."

I am hopeful the legislature will adopt the proposed changes so we can reduce the number of frivolous claims that continue to haunt our doctors and other licensed professionals.

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