Arguing Against Continuing Governmental Immunity in Medical Malpractice Actions in Pennsylvania

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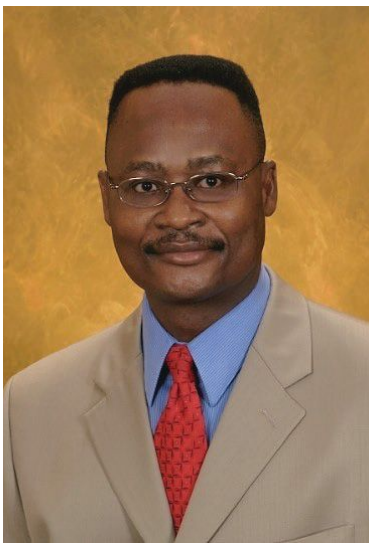
Imagine that you are unable to afford health insurance premiums—like tens of millions of other Americans—and are also unable to qualify for either Medicare or Medicaid coverage; hence, you decided five years ago to get your health care from one of the City of Philadelphia's Health Centers. Imagine also that last year, you were diagnosed with Stage 4 colon cancer with distant metastasis to the liver and brain, which carries a five-year survival of less than 15%. You are only 55 years old, with a family of four—a spouse and three teenaged children. You are understandably devastated by the diagnosis. You begin to worry about what your absence in the life of your family will mean to them, especially to your youngest child. Your life-changing diagnosis forces you to research whether or not your cancer could have been diagnosed early with a better prognosis. Your research of medical literature reveals that virtually all respected medical guidelines, including those of the American Cancer Society, the United States Preventive Services Task Force, the American College of Obstetricians and Gynecologists, the American Family Physician, and the American College of Physicians, recommends that patients at average risk for colon cancer be screened beginning at age 45 or 50, with stool-based tests, including fecal occult blood tests, and visual exam testing, including colonoscopy and flexible sigmoidoscopy. Your research also reveals that diagnosis of colon cancer at Stage 1 or 2 a is very possible with early screening, and that the five-year survival of Stage 1 or 2 colon cancer is excellent, in the range of 88–94%, respectively, instead of your grim prognosis of less than 15%.



Certainly, you think, you have a compelling case of medical malpractice against the City and its care providers, which both failed to refer you for colon cancer screening and diagnostic evaluations, including ultrasound, CT scan, and MRI of the abdomen/pelvis to rule out cancer, particularly gastrointestinal cancer, when you developed symptoms, including abdominal pain, diarrhea, vomiting, unintentional weight loss, and constipation.

You decide to retain counsel to investigate your potential case. Your plaintiff's attorney requests, obtains, and reviews your medical records from the City Health Center, which indeed confirm that throughout the five years you were under the City Health Center's care, you were never referred for colon cancer screening, despite being over 50, nor referred for diagnostic evaluation to rule out cancer, despite your documented symptoms. Your medical records further confirm that all your medical care took place within the City Health Center, except for two chest x-rays for evaluations of chest pain. Both were performed at an outside radiology practice with normal impressions for both studies. To your surprise and utter dismay, your attorney declines to proceed with your potential case on the grounds that recovery against the City and its employees would be practically impossible due to the application of the Political Subdivision Tort Claims Act—which is the local governmental immunity statute applicable to municipalities, such as the City of Philadelphia.

Prior to the seminal Pennsylvania Supreme Court case of *Ayala v. Philadelphia Board of Education*, 453 Pa. 584, 305 A.2d 877 (1973), which abolished the archaic doctrine of governmental immunity, judicially adopted in Pennsylvania in *Ford v. School District*, 121 Pa. 543, 15 A. 812(1888), municipal governments in Pennsylvania had enjoyed immunity from tort actions. In *Ayala v. Philadelphia Board of Education*, a 15-year-old child suffered amputation of his right arm in a shredding machine in the upholstery class of his school due to the alleged failure of the school's employees to properly supervise the student's use of the machine, as well as the school's placement of the machine into service in a defective condition, since it did not have a safety device, or properly warn the students of the dangers inherent in such a machine. The severely injured student's father brought suit against the Philadelphia Board of Education, which promptly filed preliminary objections asserting governmental immunity as a defense. The trial court sustained the objections, and the Superior Court affirmed. The Supreme

Court granted allocator and held that "the doctrine of governmental immunity long since devoid of any valid justification, is abolished in this Commonwealth." 453 Pa. at 586-87.

The court noted that "[t]oday we conclude that no reasons whatsoever exist for continuing to adhere to the doctrine of governmental immunity. Whatever may have been the basis for the inception of the doctrine, it is clear that no public policy considerations presently justify its retention." 453 Pa. at 592.

The court emphasized, among others, that "if the city operates or maintains injury-inducing activities or conditions, the harm thus caused should be viewed as a part of the normal and proper costs of public administration and not as a diversion of public funds. The city is a far better loss-distributing agency than the innocent and injured victim." 453 Pa. at 594-95. As to the deterrent effect of tort liability on ensuring proper conduct, the court appropriately observed that "where governmental immunity has had the effect of encouraging laxness and a disregard of potential harm, exposure of the government to liability for its torts will have the effect of increasing governmental care and concern for the welfare of those who might be injured by its actions," internal citation omitted.

In *Mayle v. Pennsylvania Dept. of Highways*, 479 Pa. 384, 388 A.2d 709(Pa. 1978), the Supreme Court followed suit with the abolition of the doctrine of sovereign immunity, initially judicially expressly adopted in *O'Connor v. Pittsburgh*, 18 Pa. 187 (1851), which protected the Commonwealth and its agencies from tort liability. The doctrine of sovereign immunity was a relic from the English crown to the effect that the sovereign could not be sued without its consent.

In *Mayle v. Pennsylvania Dept. of Highways*, the plaintiff sued the Commonwealth alleging that he was injured due to the Commonwealth's negligent maintenance of a public highway. The Commonwealth Court dismissed the plaintiff's action premised on the Commonwealth's defense that sovereign immunity "prohibited any court in the Commonwealth from hearing the suit." 479 Pa. at 386. The issue before the Supreme Court was "whether the Commonwealth is immune from tort liability except where a legislative act expressly or implicitly authorizes suit." *Id*.

The Court, in reversing the Commonwealth Court, held "[w]e today abrogate this doctrine of 'sovereign immunity.' We conclude that the doctrine is unfair and unsuited to the times and that this Court has power to abolish the doctrine. Whatever justification ever existed that the Commonwealth is immune from liability for tortious conduct unless the Legislature has consented to suit, the doctrine's day has long since passed. Under the doctrine, plaintiff's opportunity for justice depends, irrationally, not upon the nature of his injury or of the act which caused it, but upon the identity or status of the wrongdoer." *Id*. at 386.

Rejecting the myriad reasons adduced by the Commonwealth for upholding sovereign immunity, including clogging of the courts and destabilization of government finances, the court emphasized, among others, that "…because negligence involves the reasonableness of the actor's conduct, unreasonably expensive protective measures will not be required of governments any more than they are required of private parties. Welfare economic analysis suggests that government, if suable in tort, may become more efficient, although this improvement may not appear on its balance sheets as added assets or reduced liabilities." *Id*. at 395. The court continued "[t]he financial burden argument is no longer compelling now than it was in 1790, and no more so in the context of State government than in the context of local governments or charities. We continue to reject it." *Id*. at 396.

Ironically, however, despite its forceful rejection of the antiquated, and clearly unjust, sovereign immunity

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doctrine, which by its own pronouncement ensures that "plaintiff's opportunity for justice depends, irrationally, not upon the nature of his injury or of the act which caused it, but upon the identity or status of the wrongdoer," the court emphasized that based on its reading of Article I, Section II of the state constitution, "[t]he Constitution is…neutral it neither requires nor prohibits sovereign immunity." *Id*. at 400. The court continued "[t]he history of the adoption of this section [of the Constitution] indicates that the Framers of 1790 intended to allow the Legislature, if it desired, to choose cases in which the Commonwealth should be immune, but did not grant constitutional immunity to the Commonwealth." *Id*. at 400.

Apparently seizing on the language in *Mayle v. Pennsylvania Dept. of Highways* that the legislature, if it desired, may "choose cases in which the Commonwealth should be immune," from liability, the Pennsylvania legislature in 1980 enacted the Sovereign Immunity, 42 Pa. C.S. 8522, providing that "[t]he following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:

"(1) Vehicle liability …. (2) *Medical-professional liability* …. (3) Care, custody or control of personal property …. (4) Commonwealth real estate, highways and sidewalks …. (5) Potholes and other dangerous conditions …. (6) *Care, custody or control of animals* …. (7) Liquor store sales …. (8) National Guard activities. Acts of a member of the Pennsylvania military forces, (9) Toxoids and vaccines…" (emphasis added).

The legislature in 1980 also enacted the governmental Immunity Act, aka, the Political Subdivision Tort Claims Act, 42 Pa. C.S. 8542, which allows suit against a local agency if the alleged action falls within any of the eight exceptions set forth in the Act, which provides: "(b) Acts which may impose liability: The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency: "(1) Vehicle liability …. (2) Care, custody or control of personal property …. (3) Real property …. (4) Trees, traffic controls and street lighting …. (5) Utility service facilities …. (6) Streets …. (7) Sidewalks …. and (8) Care, custody or control of animals…."(emphasis added) (also, see my article, Differences Between the Pennsylvania Sovereign Immunity and Political Subdivision Tort Claims Acts, 69 Pa. Bar. Ass'n Q. 16(Pennsylvania Bar Association Quarterly) (January 1998).

As is evident from the two acts, while the Sovereign Immunity Act waived immunity to liability for medical malpractice actions against Commonwealth parties, such waiver is not listed in the Political Subdivision Tort Claims Act. Accordingly, in *Weissman v. City of Philadelphia*, 99 Pa. Commonwealth. Ct. 403, 513 A.2d 571 (1986), and its progeny, including *Matteo v. Katz*, 97 Pa. Commonwealth Ct. 512, 509 A.2d 1387(1986), and Glim v. City of Philadelphia, 149 Pa. Commonwealth. Ct. 491, 613 A.2d 613 (1992), the Commonwealth Court, as observed in *Glim v. City of Philadelphia*, "held that governmental immunity bars medical malpractice suits against the City and against health care workers employed by the City because negligence involving medical treatment does not fall within any of the governmental immunity exceptions at 42 Pa. C.S. Sec. 8542 (b)."

The Pennsylvania legislature's initial and ongoing failure to waive immunity to liability for medical malpractice actions against municipalities and their employees is unjust, inhuman, unfair, shameful, unconscionable, and profoundly short-sighted. As the Supreme Court appropriately emphasized in Ayala, "…no reasons whatsoever exist for continuing to adhere to the doctrine of governmental immunity. Whatever may have been the basis for the inception of the doctrine, it is clear that no public policy considerations presently justify its retention." As that court also emphasized, "[i]f the city operates or maintains injury-inducing activities or conditions, the harm thus caused should be viewed as a part of the normal and proper costs of public administration and not as a diversion of public funds. The city is a far better loss-distributing agency than the innocent and injured victim."

Allowing suits against municipalities and their employees for negligent conduct against animals (the eighth exception under the governmental immunity act), while disallowing suits for humans in the provision of medical care, is not only immoral and repugnant to any notions of justice and fairness but is actually economically unwise. Ultimately, the taxpayers will continue to foot the medical bills of patients improperly treated by municipal facilities and their employees in the form of Medicare and Medicaid payments, which many times, cost hundreds of thousands of dollars for each patient untimely diagnosed with terminal cancer. The reason being, among others, that once diagnosed with terminal cancer, patients previously ineligible for either Medicare or Medicaid, usually qualify for one, or both, depending on their age at diagnosis.

Also, continuing to prohibit medical malpractice recovery against municipal governments and their employees negates necessary incentives for municipal employee health care providers to provide better, efficient, and quality care to patients, as poignantly noted by the Ayala court to the effect that "where governmental immunity has had the effect of encouraging laxness and a disregard of potential harm, exposure of the government to liability for its torts will have the effect of increasing governmental care and concern for the welfare of those who might be injured by its actions."

In this day and age, when some respected studies estimate that between 250,000 to more than 400,000 patients die each year in the United States due to medical mistakes, it is way overdue for the Pennsylvania legislature to allow medical malpractice suits against municipal governments and their employees in order to, among other things, improve patient safety and reduce governmental spending that goes into treating patients injured by the medical malpractice of municipal governments and their employees.

Common sense, economic reasons, and simple decency weighs very heavily in favor of waiving immunity to liability for medical malpractice actions against municipalities and their employees. For example, in the scenario presented in the beginning of this editorial, had the City and its employees complied with the prevailing medical standard of care and timely screened and diagnosed the patient's colon cancer when it was Stage 1 or 2a, or even earlier before the progression to malignancy of any polyps present, the cost of treatment and restoration to health of the patient would have been a mere fraction of the typical cost of treating a patient with Stage 4 colon cancer. The high costs of treating advanced cancers are ultimately paid by

continued on page 8

From the Editor

continued from page 6

taxpayers when such patients neither have, nor could afford private health insurance. In addition, early diagnosis with a better prognosis inures to the benefit of both the patient, who could continue working and providing for his or her family, and to society, since a working patient contributes to the tax base and saves the public the costs of welfare and disability payments, which invariably become necessary for poor/less financially well-off patients with advanced cancers. ■

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Letter Regarding the Summer 2019 "Race and the Law" Issue's "Complicity" Feature

RE: "Complicity," by M. Kelly Tillery, *The Philadelphia Lawyer, Special Issue: Race And The Law*, Vol. 82, No. 3, Summer 2019

"Mr. Tillery, thank you very much for sending this. It's right on! Our profession needs to be subjected to a great deal of excoriation. It's too smug. It operates on myths, camouflage, plausibility. I'm going to send you four articles I've written that touch on a lot of this by mail. I'm a print person. But if you could produce a 8-900 word piece for the Harvard Law Record, the nation's oldest law school newspaper, and is online as well and seen around the country, I'd really appreciate it. If you want to do that and summarize this article and whatever else you want to add in 8-900 words.

Thank you for writing this. As you know there's a lot more that can be written about what lawyers have done during, before and after slavery. Whole books can be written on this. This is a profession that represents raw cruel power over the rule of law. Almost every abuse you read about in the paper, from the Wall Street crimes to the opiates, to the Boeing 737 Max, and much more, lurking behind it and enabling it and helping to cover it up is a corporate lawyer. Look what they've done to the law of contracts. They've weakened the law of torts and destroyed the law of contracts by one-sided standard form contracts and then prohibit people from going to court under compulsory arbitration, unilateral modification. You got a great opening here, thank you!" ■

Ralph Nader
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