What Is the Future of Expert Qualification in Med-Mal Cases?

Constitutional challenges and the implications of *Nicholas v. Mynster*

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The Affidavit of Merit Statute has been the subject of intense scrutiny leading up to and following the New Jersey Supreme Court's oft-cited decision in *Nicholas v. Mynster*. In the short term, this case incited a flood of applications challenging the qualifications of experts who were retained prior to the court's decision. In the long term, the *Nicholas* case clarified the requirements that all parties must adhere to when retaining liability experts. What remains uncertain is whether or not the credentialing provision of the Patients First Act passes constitutional muster. Although the Supreme Court has had several occasions to address the Patients First Act, it has never dealt with its constitutionality head-on.

In *Nicholas,* the plaintiff was operating a gas-powered cutting machine in an enclosed basement and suffered carbon-monoxide poisoning. At the hospital, the plaintiff was treated by Dr. Mynster, a board certified emergency medicine physician, and Dr. Seghal, a board certified physician family medicine practitioner. The plaintiff's expert, Dr. Weaver, was not board certified in either emergency medicine or family practice. He was board certified in internal and preventative medicine with subcertifications in critical care medicine and pulmonary disease, and had extensive experience in the treatment of carbon-monoxide poisoning.

The defendants moved to dismiss the complaint, claiming that Weaver was not qualified to offer expert testimony against either Mynster or Seghal. This motion was denied by the trial court. The Supreme Court reversed the denial, holding that Weaver was *not* qualified.

The majority opinion explained that, under the Patients First Act, when a defendant-physician is a specialist and the basis of the malpractice action involves the physician's specialty, the challenging expert must *practice* in the same specialty. If a defendant-physician practices in an American Board of Medical Specialties (ABMS) practice area and is *also* board-certified in that specialty, then the expert must have additional credentials.

If the defendant-physician specializes in an ABMS practice area and is board-certified in that ABMS practice area, and the care or treatment at issue involves that board specialty, then the expert must either be credentialed by a hospital to treat the condition at issue or be board-certified in the same specialty in the year preceding the occurrence that is the basis for the claim or action.

The Supreme Court rejected the position advanced by the plaintiff that there is an alternative to the requirements of equivalent specialty. The plaintiff contended that someone like Weaver could offer an expert opinion on the standard of care for treating carbon-monoxide poisoning because he was "credentialed by a hospital to treat" the condition of carbon-monoxide poisoning, even though he did not practice the same specialty as either defendant. Under the Patients First Act, it is not enough that an expert have knowledge of a particular field. It is now clear that the expert must *actively practice* in the same specialty.

Following this clarification by the Supreme Court, defendants in other medical malpractice cases began filing motions to bar any liability expert who did not *exactly* match the qualifications of a

defendant. On the plaintiffs' side, litigants challenged the constitutionality of the credentialing provision when opposing motions to dismiss based on affidavit of merit or expert qualification issues.

The most prevalent constitutional challenges to the Patients First Act are based on an alleged usurpation of the trial court's power to qualify experts and the Supreme Court's rule-making authority pursuant to Art. VI, §2, Para. 3 of the New Jersey Constitution, and challenges under the Evidence Act of 1960.

Art. VI of the New Jersey State Constitution mandates that: "The Supreme Court shall make rules governing the administration of all courts in the state and, subject to law, the practice and procedure in all such courts."

In *New Jersey State Bar Ass'n v. State*, the bar association and individual attorneys filed an action against the state of New Jersey for a declaratory judgment that the Patients First Act was unconstitutional under a multitude of theories. 382 N.J. Super. 284 (Ch. Div. 2005*);* aff'd by *NJSBA v. State*, 387 N.J. Super. 24 (App. Div. 2006); cert. denied by *NJSBA v. State,* 188 N.J. 491 (2006).

The court in *State Bar Ass'n* recognized that Art. VI of the New Jersey State Constitution means "the Supreme Court has exclusive and plenary power to promulgate rules governing practice and procedure in our courts, as distinguished from matters involving substantive law," which are the province of the legislature. The court recognized that, even if a statutory provision touches upon the Supreme Court's constitutional authority, the statutory provision is not necessarily unconstitutional.

Thus, the question posed by the court in *State Bar Ass'n* was: Is the Affidavit of Merit Statute and the Patients First Act strictly a procedural rule (governed by the Supreme Court) or a substantive rule that defines the elements of a tort (governed by the legislature)?

To answer this question, we look to a Supreme Court case which predates *State Bar Ass'n*. In *Cornblatt v. Barow*, 153 N.J. 218 (1998), the Supreme Court held that the Affidavit of Merit statute is a *substantive rule,* which defines the elements of a tort. Article VI, §2. Para. 3 of the State Constitution does not restrict other governing powers from establishing rules governing issues of substantive law. The Chancery Division in *State Bar Ass'n* held that there is nothing in the state constitution prohibiting the legislature from enacting substantive rules that define the substantive elements of a tort.

Consequently, the failure to supply a conforming affidavit of merit is equal to a failure to state a cause of action, rather than the violation of a procedural rule. The direct issue of whether the Patient First Act violates Art. VI of the New Jersey Constitution has never been specifically decided by our Supreme Court. However, the lower court's decision in *State Bar Ass'n*, paired with the Supreme Court's earlier determination in *Cornblatt,* suggests that the law passes muster.

Another prevalent argument is that the Patients First Act runs afoul of the Evidence Act of 1960 by robbing the court of the power to determine which evidence is admissible: "The Supreme Court may adopt rules dealing with the admission or rejection of evidence, in accordance with the procedures set forth in this article." N.J.S.A. 2A:84A-33.

Under the Evidence Act, rules of evidence must be entered and discussed at a judicial conference. Then, the new evidence rule must be presented to the president of the senate, speaker of the general assembly and the governor. This procedure was enacted as a compromise between the three branches of government regarding evidence rule-making authority.

Clearly, the qualification of experts was altered solely by the legislature and, therefore, did not follow this protocol. However, the Evidence Act also delineates that any rule of evidence set by the court can be changed by statute. This argument was also raised and rejected in *State Bar Ass'n*.

There, the plaintiffs argued that N.J.R.E. 702, which governs expert testimony, had been modified by the Patients First Act without following the procedures set forth by the Evidence Act of 1960.

Indeed, the statute does have an effect on N.J.R.E. 702 in the context of medical malpractice actions. However, under the plain language of N.J.S.A. 2A:84A-37, the legislature has authority to change or cancel a rule adopted pursuant to the Evidence Act. Therefore, the court in *State Bar Ass'n* accepted that the legislature was entitled to alter the evidence rules by way of statute.

This argument has likewise never been taken head-on by the Supreme Court. However, the Evidence Act appears to allow for interplay between the judicial and legislative branches in promulgating evidence rules.

Our Supreme Court has had at least 22 opportunities to address the constitutionality of the Patients First Act. On several of those occasions, the court has taken judicial notice of possible constitutional infirmities. However, the court has never squarely addressed the issue.

Unmistakably, the Patients First Act alters the court's ability to qualify expert witnesses in medical malpractice cases. *Nicholas v. Mynster* makes clear that having extensive knowledge and expertise in a field of medical specialty may no longer be enough. This approach limits the pool of admissible experts and may work to exclude an expert who has extensive expertise in the treatment at issue, as was the case in *Nicholas*. However, it also ensures that anyone offering testimony against a doctor can speak from experience in the same specialty.

Despite the seemingly sound constitutional footing, logistical problems remain. For example, little guidance is given as to what constitutes the practice of a specialty or how to determine whether a particular treatment falls within that specialty. Moreover, given the matching specialties mandate, even relatively uncomplicated malpractice cases may require multiple experts from all parties.

As the practice of medicine grows increasingly specialized, expert credentialing is becoming more important and complex. At the same time, doctors commonly treat a myriad of conditions falling into the realm of other specialties. For example, an anesthesiologist may perform minimally invasive surgery, and a family practitioner may treat an orthopedic fracture. The requisite expert qualifications are not always clear.

From a constitutional perspective, the expert qualification provisions of the Patients First Act appear to be on solid ground. The practical implications of the legislation are not as well-settled.

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