



Negligence Law Section

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“Immunity, Tolling, and Zoom - Oh My!”

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As 2020 draws to a close, it is difficult to describe what type of year we have had as humans, let alone as trial attorneys. For the past nine months, we have been barraged by news that has often been contradictory and politicized. We have faced fears regarding our own health, and that of our family and friends. There have been so many uncertainties this year on a day-to-day basis, and those appear likely to continue well into 2021. The impact of the pandemic has also affected innumerable aspects of our profession. I want to reflect on how this has affected us, as negligence attorneys, and how we can anticipate it may affect us going forward for the foreseeable future.

We must first recognize and thank our frontline healthcare workers who have tirelessly kept on in their profession to help all of us during these times. The hospital systems, the providers, and the suppliers have all had immense challenges to deal with to try to keep the public safe. Most states enacted numerous executive orders or public acts for the state of emergency conditions that they were facing. Here in Michigan, that included the Pandemic Health Care Immunity Act, Public Act No 240 of 2020, which took effect on October 22, 2020. The Act attempted to provide immunity from liability to healthcare providers or facilities providing healthcare services in response to the COVID-19 pandemic. The caveat to this Act was that, if any conduct arising out of these healthcare services amounted to gross negligence, willful misconduct, or intentional harm, it would not be covered. Another portion of the Act was the COVID-19 Response and Reopening Liability Assurance Act, which provided immunity from liability for tort claims arising out of alleged exposure, or potential exposure, to COVID-19, for individuals or entities that complied with all federal, state, and local laws, rules, and regulations in effect at the time. The proposed bills provided much discourse amongst the plaintiff and defense Bar. Plaintiff attorneys thought that the proposed Act was much too broad and went too far, covering things that should not be considered immune, and that might be considered medical malpractice in the “normal” non-pandemic world. Facilities and providers, on the other hand, felt that this law was desperately needed to protect them from any litigation that tried to take advantage of the dire situation facing facilities and frontline care workers. Many groups submitted their support or opposition to these proposed acts; ultimately the Act was passed.

Given the passage of these laws the question remains, what may be considered a viable medical malpractice claim in the future against healthcare providers or entities. For example, during the height of the initial surge of the pandemic in March and April, if a patient was treated in a

facility and was not able to get a test, or was discharged prematurely, and subsequently suffered injury, would this be allowed as a claim in court? If an employer had proper precautions in place, but blatantly turned a blind eye to whether or not employees and staff were following these precautions, would the claimant still be able to bring a case against his or her employer? These are all questions that have been bantered about amongst the plaintiff and defense Bar, and are certainly valid questions. As a defense attorney, I strongly believe that there should be immunity provisions in place for medical care facilities, providers, and business entities. However, I also agree that we need to make sure that there is still an opportunity and venue for those who have valid claims. It appears that we will be navigating these waters over the next couple of years to see how this plays out.

Another effect of the pandemic that we have had to grapple with are the executive orders, or lack thereof, from our Supreme Court regarding timing of statutes of limitations and filings on cases. Regarding filings and statute of limitation issues, the Michigan Supreme Court issued an executive order that allowed for “tolling” due to COVID-19. The Michigan Supreme Court, and local circuit courts, were frustrated with what to do with this new thing called a “pandemic;” questioning how long was this going to last, how severe was it going to get, and whether orders would be put in place to assist in judicial efficiency. There was some direction from the Supreme Court, and at other times no direction. This left the local circuit courts to come up with solutions for their specific venue to deal with the backlog of cases, filings, and statute issues. This, to some extent, has made sense because different counties had different needs and experiences affecting their local courts and legal system. By way of example, the needs and adaptations to Covid-19 in the Wayne County Circuit Court were very different than say the Grand Traverse County Circuit Court.

The questions that we are all left with are: when do you challenge this? Will it be successful? Most plaintiff attorneys that I have discussed this issue with have “not wanted to take a chance” in relying upon the tolling provision, and therefore did everything possible to file their cases within the “normal” statute of limitations. I know of several other plaintiff attorneys who had the unfortunate experience of being personally affected by COVID-19 or who had staff members become ill. This would obviously pose a completely different scenario if a defense attorney tried to challenge the timeliness of filing. Appreciating that we are all advocates for our clients, I am not sure that I would want to be the defense attorney filing a motion saying that a plaintiff attorney failed to comply with the statute of limitations, knowing that the plaintiff attorney would explain to the judge the tragic circumstances they faced, which led to their reliance on the tolling and their “late” filing.

The third biggest impact on our profession this year has been the proliferation of virtual meetings, depositions, and court hearings. I would venture to guess that prior to March 2020, the percentage of negligence section attorneys utilizing Zoom in the way we do now was less than 1%. Now, I would venture to guess that the vast majority of us utilize Zoom on at least a weekly basis. I remember going through probably what is akin to the many stages of grief in March when everything exploded. I was actually in the midst of a trial in Wayne County Circuit Court, and had only closings to complete. I recall getting an email from the judge to all parties on Saturday evening stating that the trial would have to be declared a mistrial because Wayne County was shutting down effective immediately, with no foreseeable reopening in sight. The plaintiff attorney and my co-defense counsel, both of whom I share a close working relationship and friendship with, were also shocked by this sudden closure. Many questions ran through my

head: What was “the foreseeable future”? Couldn’t we just impanel the jury for several weeks until we could reconvene? The answer was no; we figured out quickly in the coming weeks that nothing was going to be “in person” for a long time. I think everybody who may be reading this would probably agree that there was more than a physical shut down but also a mental shut down for at least several weeks, as we tried to understand what to do with ourselves, and our case docket, and not understanding that we were not going 1,000,000 miles an hour like usual. After several weeks we all began searching online or texting with colleagues about how to move forward with meetings, etc. And that beautiful word ‘Zoom’ was discovered by many of us. Not being the most technologically savvy, I recall trying to figure out how to “buy an account”, being concerned that China was going to hack into our zoom meetings, and were my clients even going to be able to figure out how to use this? Well, we all figured out how to download the app, (sometimes on several devices including the car for in transit meetings or conversations); and tried to figure out how to share screen documents to take the place of handing exhibits to witnesses, having court reporters be remote and figure out how everybody was going to agree to do it this way, and how to chat with one person or the whole group. As I write this article, I’m still figuring out many nuances within Zoom, as I am sure all of us are. The courts also came together to learn, train, and implement Zoom hearings for settlement conferences, motion hearings, or simple status conferences. I know once we all started getting the hang of this, I think we were grateful for being able to see each other rather than just talk on the phone. It provided some semblance of normalcy and reassurance.

So the question is: Will this become a mainstay for all of us? I believe Zoom will continue to be used for different meetings or events going forward because we now know how to use it. I think it will be utilized even more when a particular witness or client cannot appear in court; we now know how to “get them there” with relative ease. I believe all of us in this particular section would agree that nothing takes the place of in-person meetings or depositions. However, Zoom will be a tool in our toolbox to use going forward for efficiency reasons but more importantly, to keep the wheels moving. We have now realized that we are adaptable, and can figure out ways to work even when our normal ways of doing things are not available.

And so, this brings me back to my title of the article, which is reflective of that treasured movie, the Wizard of Oz. Recall that the premise of that movie is that Dorothy actually has a great life, but is unhappy about some trivial things. A tornado comes along, and apparently whisks her away to Oz, where she not only discovers new and beautiful things, but also goes through many trials and tribulations. In the end, she realizes that she truly was grateful for what she had, her loved ones and friends around her, and that she would not take her life for granted again. And essentially my friends and colleagues, isn’t this what has happened to us? With all of the trials and tribulations we have all endured through 2020, we have realized ways to persevere, to adapt, and to survive. Most importantly, we have learned not to take for granted, our great profession, through which we have continued to help our clients despite these unexpected challenges.

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