Medical Malpractice Limitations for New York Infants—Time for a Change of Time

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MEDICAL MALPRACTICE LIMITATIONS FOR NEW YORK INFANTS—TIME FOR A CHANGE OF TIME?

EUGENE T. MACCARRONE† & VICTOR D. LÓPEZ††

I. INTRODUCTION

In response to the medical malpractice crisis of the 1970’s New York passed legal reforms that included Civil Practice Laws and Rules (“CPLR”) § 214-a allowing for a two and one-half year statute of limitations for instituting a claim for medical malpractice. This provision was part of New York’s effort to limit judgments for medical malpractice, and consequently curtail skyrocketing medical malpractice insurance premiums and costs, as well as allay fear of a decrease in willingness of medical practitioners to provide medical services. As an accommodation to persons with certain disabilities, including infancy, the CPLR contains a tolling provision, which provides that where the statute of limitations is less than three years as for medical malpractice

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2 See generally Governor's Mem. on L. 1975, ch. 109, 1975 NY Legis Ann. at 225 (regarding the need "to deal comprehensively with the critical threat to the health and welfare of the State by way of diminished delivery of health care services as a result of the lack of adequate medical malpractice insurance coverage at reasonable rates"); see also Jennifer M. Chow, CPLR 214-a, 208: Appellate Division, Third Department, Holds that the Statute of Limitations on an Infant's Malpractice Suit for Prenatal Injuries Begins to Run from the Time of Malpractice Even if the Malpractice Occurs Before the Child is Born, 69 ST. JOHN'S L. REV. 675 (1995).

3 N.Y. C.P.L.R. 105(j) (McKinney 2015). An “infant” is a person who has not attained the age of eighteen years. Id.
claims, the entire period of disability is the tolling period, subject however to a ten year tolling limit from the date of the accrual of the claim.\(^4\)

Thus, where an infant claims medical malpractice, a suit must be commenced within two and one-half years after the person reaches majority, but no later than ten years after accrual of the claim, even if the person is then still an infant. On its face, this appears to be a balancing of the perceived need for a short statute of limitations for bringing medical malpractice cases to help stem the malpractice crisis, and that of protecting infants, allowing them an extended time to bring their claims.\(^5\)

In certain instances this balancing succeeds in allowing the infant to pursue a medical malpractice action, either because a responsible parent or guardian timely brings an action on behalf of an infant,\(^6\) or because the infant comes of age within the limitation time (including as tolled) and is able to bring the action on his or her own behalf.\(^7\) Other times the action is precluded from going forward because no action is brought on behalf of the person still in infancy, and the statute as tolled nevertheless runs before the

\(^4\) N.Y. C.P.L.R. 208 (McKinney 2015) (“If a person entitled to commence an action is under a disability because of infancy . . . at the time the cause of action accrues, and the time otherwise limited for commencing the action is . . . less than three years, the time [for commencing an action] shall be extended by the period of disability. The time within which the action must be commenced shall not be extended by this provision beyond ten years after the cause of action accrues, except, in any action other than for medical, dental or podiatric malpractice, where the person was under a disability due to infancy.” (emphasis added)).

\(^5\) See N.Y. CLS C.P.L.R. 208 advisory committee’s note (McKinney 2015) (“The provisions for extension because of the existence of the stated disabilities [including infancy] present controversial policy questions, . . . An infant should not be penalized for the inaction of his parent or guardian . . . but, while these disabilities should continue to be recognized as grounds for extending the statutes of limitation, the extension periods should be kept to a minimum, reasonably adequate to protect the person under a disability and yet not to harass an obligor unduly.”).


\(^7\) See, e.g., Grabowski v. Kraus, 662 N.Y.S.2d 964, 965 (1997).
person reaches majority by virtue of the absolute ten year limitation.\textsuperscript{8} While it is hoped that children would be protected and that their parent/guardians would exercise responsibility to protect a child who is unable to protect him/herself, it is evident that the “balance” achieved in New York’s infancy tolling scheme for medical malpractice claims can always achieve its goal of limiting malpractice claims, but may or may not achieve its goal or protecting infants due to the ten year limit on tolling.\textsuperscript{9} Whatever success or lack thereof this balancing may have achieved in the 1970’s, recent data show that family structures have since substantially changed\textsuperscript{10} in ways that compromise the likelihood that infants will be protected during the malpractice claims tolling period. With so many children being born to young single mothers,\textsuperscript{11} it would appear that the number and competency of parents who are traditionally relied upon to guard the welfare of their children is diminished.\textsuperscript{12}

\textsuperscript{9} N.Y. C.P.L.R. 214-a (McKinney 2015). New York suits for claims of medical malpractice must generally be commenced within two years, six months from the medical “act, omission, or failure complained of.” \textit{Id.} Thus, where a medical malpractice claim accrues during infancy, the limitations toll is ten years from the time of accrual. Accordingly, an infant harmed by medical malpractice at birth would have to bring suit before turning age eleven.
\textsuperscript{11} \textit{Id.}
- 81% of new mothers aged fifteen to nineteen were not married. \textit{Id.} at 5.
- 62% of new mothers in their early twenties were not married. \textit{Id.} at 5.
If in fact the availability of infants’ access to due process to pursue medical malpractice claims has substantially diminished, is it time to update the infancy medical malpractice tolling period to allow for a full tolling of the statute of limitations beyond infancy so that the ability of infants to pursue claims on their own will be enhanced? This paper will examine the issues that relate to this question.

II. NOT JUST A NEW YORK ISSUE

Per Professor David D. Siegel citing the New York State Court of Appeals (New York’s high court), “the Statute of Limitations was enacted to afford protection to defendants against defending stale claims after a reasonable period of time had elapsed during which a person of ordinary diligence would bring an action.” As stated, New York’s CPLR tolls New York’s usual thirty month limitation for bringing a medical malpractice action where the plaintiff is under a disability due to infancy, allowing extension by the period of disability, but limited to 10 years from the time of accrual. While such may or may not effectively protect an injured New York minor’s right to proceed, it is clear that the risk of a minor’s time running out before herself becoming “a person of ordinary diligence” to bring her own action is substantial. This risk is clearly significantly increased given the

- Overall increase of births to unwed mothers up to 36% in 2011 from 31% in 2005. Id. at 2.
- Unwed mothers more likely to have less education and lower incomes than married families. Id. at 4.
- Children of unwed mothers more likely to have developmental delays which “may be due in part to family instability.” Id. at 1.
- 40% of children likely to be in non-traditional “cohabitating” homes by age twelve, with such households being non-marital by the time the child is age fifteen. Id. at 1-2.

14 Id. at 4, 9.
Medical Malpractice Limitations

contemporary sociological marital data shown above, and expanded on herein below.

But New York is not alone in putting its infants at such risk. A survey of limitations rules for the fifty states shows that the already short statute for medical malpractice claims of most states (generally between two to three years\(^{15}\)) while generally providing some tolling accommodation for medically injured infants, most states do not provide full assurance that tolling will continue past the prospective plaintiff’s eighteenth birthday.

As shown on Table 1 below, only fourteen states—Arizona, Idaho, Illinois, Kentucky, Louisiana, Missouri, Nebraska, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, and Washington—provide such assurance. The plurality of states restrict the potential of injured infants to pursue a remedy, many substantially (e.g., Alabama, California, Colorado, and Massachusetts, etc.). Connecticut, which is home to many large insurance companies, has no special allowance for infants at all on its already very short two-year statute.

Whatever the policy motivations that prompted the shortening of medical malpractice statutes of limitations in the first place, it is clear that on their face the procedural positions of infant plaintiffs and health care professional/hospital/professional liability insurer defendants is out of balance in most of the United States. In almost every instance (other than certain special considerations such as “date of discovery” of malpractice not otherwise addressed here) the prospective defendants, virtually always “persons of ordinary diligence,” engage a defined limitations period beyond which a remedy cannot be had by the plaintiff, while New York and the plurality of the other states subordinate infants to a position of being only sometimes protected in their ability to themselves effectively pursue their claims.

Such imbalance thus appears to work fundamental procedural and substantive inequity against minors, a class of

\(^{15}\) See infra Table 1.
citizens for whom our society otherwise generally staunchly asserts need society’s protections.

<table>
<thead>
<tr>
<th>State</th>
<th>General SOL Rule</th>
<th>Minors Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>2 years from act or omission. If discovered later than 6 months after discovery.</td>
<td>4 year limit starts once the minor turns 8.</td>
</tr>
<tr>
<td>Alaska</td>
<td>2 years from act or omission.</td>
<td>2 year limit starts once the minor turns 8, or 18 if mentally disabled.</td>
</tr>
<tr>
<td>Arizona</td>
<td>2 years from act or omission.</td>
<td>2 year limit starts at age of majority.</td>
</tr>
<tr>
<td>Arkansas</td>
<td>2 years from act or omission. If discovered later than 1 year after discovery.</td>
<td>If under age 9, has until 11th birthday.</td>
</tr>
<tr>
<td>California</td>
<td>3 years from date of injury or 1 year from date that the injury is or should have been discovered through due diligence, whichever is less.</td>
<td>3 years, but if under age 6, has the greater of 3 years or until 8th birthday.</td>
</tr>
<tr>
<td>Colorado</td>
<td>2 years from act or omission. If discovered</td>
<td>If under age 6, has until 8th birthday.</td>
</tr>
</tbody>
</table>

17 ALA. CODE § 6-5-482 (2005).  
23 Id.  
24 CAL. CIV. PROC. CODE § 340.5 (Deering 2016).  
25 Id.
<table>
<thead>
<tr>
<th>State</th>
<th>Limitation</th>
<th>Special Allowances</th>
</tr>
</thead>
<tbody>
<tr>
<td>Connecticut</td>
<td>2 years from injury or discovery, but no later than 3 years from act or omission, if discovered later than 1 year after discovery.</td>
<td>No special allowances.</td>
</tr>
<tr>
<td>Delaware</td>
<td>2 years from act or omission of treatment, if discovered later than 1 year after discovery.</td>
<td>If under age 6, has until 6th birthday or 2 years, whichever is longer.</td>
</tr>
<tr>
<td>Florida</td>
<td>2 years from injury or discovery, but no later than 4 years from act or omission.</td>
<td>Until 8th birthday, or normal statute, whichever is longer.</td>
</tr>
<tr>
<td>Georgia</td>
<td>2 years from injury or discovery, but no later than 5 years from act or omission. If foreign object left in body, then 1 year from discovery.</td>
<td>If under 5, has until 7th birthday generally, but may be extended up to 10th birthday E.g., if the injury was not reasonably ascertainable by age 7 and occurred prior to age 5.</td>
</tr>
<tr>
<td>Hawaii</td>
<td>2 years from injury or discovery, but no later than 6 years from act or omission.</td>
<td>If under age 6, has until 10th birthday or 6 years to file, whichever is longer.</td>
</tr>
</tbody>
</table>

27 Id.
28 CONN. GEN. STAT. § 52-584 (2015).
29 Id.
31 Id.
32 FLA. STAT. § 95.11 (2015).
33 Id.
34 GA. CODE ANN. § 9-3-71(a)-(b) (2015).
37 Id.
<table>
<thead>
<tr>
<th>State</th>
<th>Time Limitation</th>
<th>Exception</th>
</tr>
</thead>
<tbody>
<tr>
<td>Idaho</td>
<td>2 years from act or omission. 1 year from discovery of a foreign object.</td>
<td>Statute tolled while minor but no more than 6 years from act or omission.</td>
</tr>
<tr>
<td>Illinois</td>
<td>2 years from injury or discovery, but no later than 4 years from act or omission.</td>
<td>If under age of 18, has 8 years, or until 22 birthday.</td>
</tr>
<tr>
<td>Indiana</td>
<td>2 years from act or omission.</td>
<td>If under age of 6, has until 8th birthday.</td>
</tr>
<tr>
<td>Iowa</td>
<td>2 years from injury or discovery, but no later than 6 years from act or omission.</td>
<td>If under age of 8, has until 10th birthday.</td>
</tr>
<tr>
<td>Kansas</td>
<td>2 years from occurrence, or up to 4 years if the injury is not reasonably ascertainable until sometime after the initial act.</td>
<td>1 year after turning 18, but not more than 8 years from injury.</td>
</tr>
<tr>
<td>Kentucky</td>
<td>1 year from occurrence or discovery, but no later than 5 years after date of injury.</td>
<td>1 year after turning 18, or are married.</td>
</tr>
</tbody>
</table>

41  *Id.*
45  *Id.*
<table>
<thead>
<tr>
<th>State</th>
<th>Laws</th>
<th>Exclusions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Louisiana</td>
<td>1 year from occurrence or discovery, but no longer than 3 years after date of injury.</td>
<td>No special allowances.</td>
</tr>
<tr>
<td>Maine</td>
<td>3 years from act or omission. If foreign object left in body then 3 years from discovery.</td>
<td>3 years after 18th birthday, or 6 years from negligence, whichever comes first.</td>
</tr>
<tr>
<td>Maryland</td>
<td>3 years from injury or discovery, but no later than 5 years from act or omission.</td>
<td>Minors have until 11th birthday, or normal statute, whichever is longer.</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>3 years from injury or discovery, but no later than 7 years from act or omission.</td>
<td>If under age 6, has until 9th birthday, or 7 years from act or omission, whichever comes first.</td>
</tr>
<tr>
<td>Michigan</td>
<td>2 years from occurrence, or 6 months from discovery.</td>
<td>If under age of 8, has until 10th birthday or 2 years, whichever is longer. For reproductive injuries under age 13, has until 15th birthday, or 2 years, whichever is longer. Under age 18 has 1 year after 18th birthday, but no more than 2 years after injury.</td>
</tr>
</tbody>
</table>

51 Id.
52 ME. REV. STAT. tit. 24 § 2902 (2015).
53 Id.
54 MD. CODE ANN., CTS. & JUD. PROC. § 5-109 (West 2015).
55 Id.
57 MASS. GEN. LAWS ch. 231, § 60D (2015).
58 MICH. COMP. LAWS § 600.5805 (2015).
59 MICH. COMP. LAWS § 600.5851 (2015).
<table>
<thead>
<tr>
<th>State</th>
<th>Time Limit Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minnesota</td>
<td>4 years from negligence.(^{60}) 1 year after their 18th birthday, but not more than 7 years after occurrence.(^{61})</td>
</tr>
<tr>
<td>Mississippi</td>
<td>2 years from occurrence or discovery, but no longer than 7 years after date of injury.(^{62}) If under age of 6, has 2 years following 6th birthday.(^{63})</td>
</tr>
<tr>
<td>Missouri</td>
<td>2 years from occurrence or discovery, whichever occurs first.(^{64}) If under age of 18, has until 20th birthday, or 10 years from the date of discovery, whichever is later.(^{65})</td>
</tr>
<tr>
<td>Montana</td>
<td>3 years from discovery, but no longer than 5 years after date of injury.(^{66}) If under age of 4, the 3 years begin on their 8th birthday.(^{67})</td>
</tr>
<tr>
<td>Nebraska</td>
<td>2 years from occurrence or 1 year from time of discovery, but no more than 10 years after date of injury.(^{68}) Statute is tolled until 21st birthday.(^{69})</td>
</tr>
<tr>
<td>Nevada</td>
<td>3 years from occurrence or 1 year from date of discovery.(^{70}) 3 year statute, unless brain damage or birth defects then family has until 10th birthday. If child becomes sterile then must file 2 years from date the injury is discovered.(^{71})</td>
</tr>
</tbody>
</table>

\(^{63}\) Id.  
\(^{65}\) Id.  
\(^{67}\) Id.  
\(^{71}\) Id.
<table>
<thead>
<tr>
<th>State</th>
<th>Limitations</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Hampshire</td>
<td>3 years from occurrence or discovery. If under age 18, has until 20th birthday.</td>
</tr>
<tr>
<td>New Jersey</td>
<td>2 years from occurrence or discovery. Birth injuries must be filed by 13th birthday.</td>
</tr>
<tr>
<td>New Mexico</td>
<td>3 years. 1 year after reaching the age of majority.</td>
</tr>
<tr>
<td>New York</td>
<td>30 months from occurrence, or 1 year from time of discovery of a foreign object. 30 months from 18th birthday, but must be within 10 years.</td>
</tr>
<tr>
<td>North Carolina</td>
<td>3 years from injury or death, or 2 years from discovery to file suit up to 4 years. 1 year from discovery of a foreign object but not more than 10 years after the procedure. 1 year from 18th birthday, if given consent order by court. Has until 10th birthday otherwise, and regular rules apply.</td>
</tr>
</tbody>
</table>

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73 Id.  
75 Id.  
77 N.M. STAT. ANN. § 37-1-10 (2015).  
79 N.Y.C.P.L.R. 208 (McKinney 2015). A claim for medical malpractice, which has a statute of limitations of 30 months under N.Y. C.P.L.R. 214-a, can be brought at any time until the minor reaches his/her 18th birthday, but the tolling period cannot exceed 10 years. Id.  
81 N.C. GEN. STAT. § 1-17 (2015).
<table>
<thead>
<tr>
<th>State</th>
<th>Requirement</th>
<th>Exception</th>
</tr>
</thead>
</table>
| North Dakota        | 2 years from when injury should have been noticed; if late discovery, then the limit is 6 years.  
|                     | No limitations extended more than 12 years.                                  |                                                                           |
| Ohio                | 1 year from the act or lack of care. Must be filed 180 days after notice is given, or 1 year from discovery of a foreign object, but cannot exceed 4 year statute.  
|                     | Statute tolled until the age of majority is reached.                          |                                                                           |
| Oklahoma            | 2 years.                                                                    | If under age 12, has 7 years to file claim, if over the age of 12, has 1 year after 18th birthday. |
| Oregon              | 2 year from time of injury or discovery, but no more than 5 years.           | 5 years from malpractice, or 1 year after 18th birthday, whichever is earlier. |
| Pennsylvania        | 2 years from time of act or lack of proper care.                             | 2 years from 18th birthday. If emancipated minor then he/she has only 2 years. |
| Rhode Island        | 3 years from action or lack of proper care.                                 | If under age of 18, has until 3 year of reaching that age to file.          |

84 OHIO REV. CODE ANN. § 2305.113 (LexisNexis 2015).
85 OHIO REV. CODE ANN. § 2305.16 (LexisNexis 2015).
87 OKLA STAT. tit. 12, § 96 (2015).
90 40 PA. CONS. STAT. § 1301.605 (2015).
<table>
<thead>
<tr>
<th>State</th>
<th>Limitation Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Carolina</td>
<td>3 years from occurrence, or 2 years from discovery of foreign object. 7 years from malpractice, or 1 year after 18th birthday, whichever is less.</td>
</tr>
<tr>
<td>South Dakota</td>
<td>2 years. 1 year from 18th birthday.</td>
</tr>
<tr>
<td>Tennessee</td>
<td>1 year from time of malpractice; if foreign object is left in body then one year from the time discovered, or should have been found. All causes of action other than for the recovery of real property are tolled during minority.</td>
</tr>
<tr>
<td>Texas</td>
<td>2 years from act or lack of treatment. Cannot be taken after 10 years. If under age 12, must take action by child's 14th birthday (this section has been held to violate the Texas Constitution).</td>
</tr>
<tr>
<td>Utah</td>
<td>2 years after the injury is discovered, or through the use of reasonable diligence should have discovered, but not to exceed 4 years after the date of the alleged act, omission, neglect, or occurrence, or 1 year from</td>
</tr>
</tbody>
</table>

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95 Id.
100 TEX. CIV. PRAC. & REM. CODE ANN. § 74.251(a) (West 2015).
101 Id.; see Adams v. Gottwald, 179 S.W.3d 101 (Tex. App. 2005) (holding this section unconstitutional under TEX. CONST. art. I, § 13 as applied to minors); see also Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983) (discussed infra at Section III).
<table>
<thead>
<tr>
<th>State</th>
<th>Discovery Rule</th>
<th>Statute Begins</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vermont</td>
<td>3 years for most cases, 2 years from time of injury or injury should have been reasonably discovered.</td>
<td>Statute begins on 18th birthday, but no action taken if more than 7 years.</td>
</tr>
<tr>
<td>Virginia</td>
<td>2 years from occurrence or 1 year from discovery of foreign object, but no more than 10 years.</td>
<td>If under age of 8, has until 10th birthday.</td>
</tr>
<tr>
<td>Washington</td>
<td>3 years or 1 year from time of injury should have been discovered, but no longer than 8 years.</td>
<td>3 years from 18th birthday.</td>
</tr>
<tr>
<td>West Virginia</td>
<td>2 years from time injury is discovered, or time of wrongful death.</td>
<td>Until the age of 12, or 2 years from the time of injury.</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>3 years from time of malpractice or 1 year from the discovery of the injury, whichever comes first.</td>
<td>Until 10th birthday, or within 3 years, whichever is later.</td>
</tr>
<tr>
<td>Wyoming</td>
<td>2 years from action or omission of care, or 2 years from reasonable revelation of the injury.</td>
<td>Prior to 8th birthday, or within 2 year of occurrence, whichever is later.</td>
</tr>
</tbody>
</table>

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102 UTAH CODE ANN. § 78B-3-404 (LexisNexis 2015).
110 Id.
111 Id.
113 WIS. STAT. § 893.56 (2015).
114 WYO. STAT. ANN. § 1-3-107 (2015).
115 Id.
III. EQUAL PROTECTION/DUE PROCESS ISSUES

The apparent disparity in access to justice for infants in the medical malpractice arena prompts the question of whether the disparate treatment is unconstitutional under federal and/or state equal protection and due process principles. Although the U.S. Supreme Court has not ruled on the matter, it has generally been held under both federal and state court rulings that the legal treatment for short statutes of limitations for claiming medical malpractice is constitutional.

Although the clear trend has been that these statutes are a permissible exercise of state police powers and violate neither the United States Constitution nor State Constitutions generally, there is some significant precedent to the contrary.

116 U.S. CONST. amend. XIV, § 1.
117 See, e.g., Douglas v. Hugh A. Stallings, M.D., Inc., 870 F.2d 1242 (7th Cir. 1989) (holding that economic or social legislation which does not involve suspect classifications or infringe on a fundamental interest is presumed constitutional and will be upheld if it is rationally related to a legitimate state interest); see also Helgans v. Plurad, 680 N.Y.S.2d 648 (1998) (holding that New York’s statute of limitations did not violate due process or equal protection guarantees).
118 See e.g., Raley v. Wagner, 57 S.W.3d 683 (Ark. 2001) (holding two-year statute of limitations for minors' claims did not violate the equal protection and due process clauses of the federal or state Constitutions); Crowe v. Humana Hosp., 439 S.E.2d 654 (Ga. 1994) (holding that statute of limitations on minor’s medical malpractice claims does not violate equal protection); Ledbetter v. Hunter, 842 N.E.2d 810 (Ind. 2006) (holding statute of limitations on minors under Medical Malpractice Act did not violate Privileges and Immunities Clause); Plummer v. Gillieson, 692 N.E.2d 528 (Mass. App. Ct. 1998) (holding malpractice statute of repose for medical malpractice claims brought on behalf of minors is constitutional); Harlfinger v. Martin, 754 N.E.2d 63 (Mass. 2001) (holding statute of repose for medical malpractice actions on behalf of minors satisfied due process and equal protection); Batek v. Curators of Univ. of Mo., 920 S.W.2d 895(Mo. 1996) (holding statute of limitations applicable to medical malpractice does not create special law for limitation of civil actions in violation
Washington State’s Supreme Court recently addressed the issue in *Schroeder v. Weighall*, where plaintiff filed a medical malpractice claim one day before his 19th birthday involving the misreading of a magnetic resonance imaging (MRI) scan taken when he was nine years old. The Superior Court dismissed the complaint as barred by Washington State’s statute of limitations on minors’ malpractice claims that require such claims to be filed within three years of the act or omission or one year from the date that the act or omission was or should have reasonably been discovered. The omission was discovered in 2009 while plaintiff was a minor, but an action was not commenced until the day prior to the plaintiff’s 19th birthday. The case was dismissed as time barred, but the Washington State Supreme Court reversed on grounds that requiring minors to institute claims during their minority for medical malpractice while other statutes of limitations for minors’ claims are generally tolled until they reach the age of consent violates the Washington State Constitution’s prohibitions on special privileges and immunities.

of State Constitution); Estate of McCarthy v. Mont. Second Judicial Dist. Court, Silverbow County 994 P.2d 1090 (Mont. 1999) (holding malpractice limitations period for a minor’s claims did not violate equal protection); Willis v. Mullett, 561 S.E.2d 705 (Va. 2002) (holding medical malpractice statute of limitations for minors was constitutional); Aicher ex rel. LaBarge v. Wisc. Patients Compensation Fund, 613 N.W.2d 849 (Wisc. 2000) (holding malpractice statutes of repose on malpractice actions of minors do not violate State Constitution’s right-to-remedy clause).

119 Schroeder v. Weighall, 316 P.3d 482 (Wash. 2014).

120 WASH REV. CODE ANN.§ 4.16.190 reads as follows:

1. Unless otherwise provided in this section, if a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be at the time the cause of action accrued either under the age of eighteen years, or incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 Wash Rev. Code Ann., or imprisoned on a criminal charge prior to sentencing, the time of such disability shall not be a part of the time limited for the commencement of action.
Ohio’s Supreme Court addressed the issue in *Schwan v. Riverside Methodist Hospital* in 1983 in which a minor patient sued a hospital to recover for allegedly negligent treatment by hospital employees. The trial court granted the hospital’s motion for summary judgment. The Court of Appeals for Franklin County reversed, and the case came before the Ohio Supreme Court on the allowance of a motion to certify the record. The Ohio Supreme Court affirmed in a 4-1 ruling that held the medical malpractice limitations statute, which requires a minor of ten years of age or older to file a medical malpractice action within one year, to be “unconstitutional because it violates the right of medical malpractice litigants who are minors to ‘equal protection.’”

Writing for the majority, Justice Locher noted:

> Our review of the language of R.C. 2305.11(B) leads us to conclude that the statute creates a distinction without reasonable grounds between medical malpractice litigants who are younger than ten years of age and those who are older than ten but still minors. For example, under R.C. 2305.11(B) a child whose cause of action

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(2) Subsection (1) of this section with respect to a person under the age of eighteen years does not apply to the time limited for the commencement of an action under WASH REV. CODE ANN. § 4.16.350, the section that imposes a statute of limitations for medical malpractice generally.

121 See WASH, CONST. art. I, § 12 (West, Westlaw through 2015 Regular Session) (providing that “[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations”); see also Schroeder, 316 P.3d at 482 (holding that limiting a minor’s right to toll medical malpractice claims until he/she reaches the age of majority grants an immunity to the defendant and burdens the minor plaintiff’s privilege to bring a negligence claim and that to do so requires the state to meet a more exacting test than a rational basis review).


123 Id. at 301 (citing OHIO CONST. art. I, § 2).
accrues on the day before his tenth birthday may file an action any time until his fourteenth birthday. Yet, if the same cause of action accrued on the day after the child’s tenth birthday, the one year (plus notice) provision of R.C. 2305.11(A) apparently controls.

We recognize that the General Assembly often must draw lines in legislation. Yet, it is the age of majority which establishes the only rational distinction.124

In addition, the Ohio Supreme Court again weighed in on the issue of the constitutionality of medical malpractice statutes in a series of four cases appealing dismissals at trial of minors’ medical malpractice claims barred by statutes of limitations which required minors to bring medical malpractice actions within one year from the date the cause of action accrued, or four years from date that the alleged malpractice occurred, whichever came first.125 The Court struck down the medical malpractice statute as applied to minors on grounds that it violated sections 1 and 16 of article I of the Ohio Constitution.126

In New Mexico, the Court of Appeals in Jaramillo v. Heaton127 held that a statute of limitations requiring minors injured

124 Id. at 302.
126 Id. at 723. The relevant Ohio Constitution sections read as follows: “All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.” OHIO CONST. art. I, § 1.
   All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

OHIO CONST. art. I, § 16.
through medical malpractice before the age of six to bring a claim by their ninth birthday violates minors’ due process rights because it is unreasonable to expect a child to bring a claim on his or her own behalf at the age of nine.\textsuperscript{128} 

A Texas statute that required minors who reached the age of six to begin medical malpractice claims within two years was found to be in violation of the due process provisions in article I, section 13 of the Texas Constitution in Sax v. Votteler.\textsuperscript{129} The case involved a minor who had one of her fallopian tubes removed in error instead of her appendix. In reversing the lower court’s granting of the physician’s motion for summary judgment of the malpractice action brought by the child’s parents when she was 11 years old, the Texas Supreme Court noted:

If the parents, guardians, or next friends of the child negligently fail to take action in the child’s behalf within the time provided by article 5.82, the child is precluded from asserting his cause of action under that statute. Furthermore, the child is precluded from suing his parents on account of their negligence, due to the doctrine of parent-child immunity. The child, therefore, is effectively barred from any remedy if his parents fail to timely file suit. Respondents argue that parents will adequately protect the rights of their children. This Court, however, cannot assume that parents will act in such a manner. It is neither reasonable nor realistic to rely upon parents, who may themselves be minors, or who may be ignorant, lethargic, or lack concern, to bring a malpractice lawsuit action within the time provided by article 5.82.\textsuperscript{130}

\textsuperscript{128} \textit{Id.} at 503.
\textsuperscript{129} Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983); \textit{see also} Adams v. Gottwald, 179 S.W.3d 101 (Tex. App. 2005); \textit{supra} note 101.
\textsuperscript{130} Sax, 648 S.W.2d at 667 (citation omitted).
Utah’s Supreme Court struck down a statute that imposed a two-year and four-year statute of limitations on the medical malpractice claims of minors in *Lee v. Gaufin*, holding these to be unconstitutional under article I, section 24 of the Utah Constitution (providing that “[a]ll laws of a general nature shall have uniform operation”). In language similar to that of the Texas Supreme Court in *Sax v. Votteler*, the Utah Supreme Court noted:

Although lawsuits asserting a violation of a minor’s rights may be brought by parents, general guardians, or next friends as guardians ad litem, such persons have no legal duty to assert or otherwise protect a minor’s legal claims. If parents and guardians fail to assert a minor’s claim because they are neglectful, unavailable, or disinterested, or because they have a conflict of interest in filing a lawsuit for the minor, the minor’s legal claim can never be asserted when a statute of limitations bars the cause of action before the minor reaches majority. Accordingly, the general rule for over 360 years has been that statutes of limitations are tolled for minors.

A similar result was reached by the Missouri Supreme Court in *Strahler v. St. Luke’s Hosp.*. In this case, a minor’s medical malpractice claim arising from negligent treatment of a 15 year old was dismissed at trial for exceeding the two-year statute of limitation when the minor filed the malpractice claim at the age of 19. The Court held (in a 4-3 decision) the statute of limitations violated article I, section 14 of the Missouri

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133 *Sax*, 648 S.W.2d at 666.
134 *Lee*, 867 P.2d at 578 (citations omitted).
Constitution “which guarantees to every Missouri citizen ‘that the courts of justice shall be open to every person, and certain remedy afforded for every injury to person.’”136

In New York, the court in *Helgans v. Plurad*137 held that “[a] statute comports with due process if the Legislature, in enacting it, was ‘acting in pursuit of permissible State objectives and . . . the means adopted [were] reasonably related to the accomplishment of those objectives.’”138 The court went on to cite part of the legislative rationale for the short limitations periods:

The medical malpractice Statute of Limitations was shortened from three years to two years and six months by the 1975 enactment of CPLR 214-a in response to the “critical threat to the health and welfare of the State by way of diminished delivery of health care services as a result of the lack of adequate medical malpractice insurance coverage at reasonable rates.”139

The court stated that “[C]learly, the objective of preserving the quality of health care services for residents of the State is a legitimate governmental objective.”140

Regarding equal protection, the *Helgans* court further stated that “[A] Statute of Limitations is not deemed arbitrary or unreasonable solely on the basis of its harsh effect in a particular case.”141

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136 Id. at 8-9 (quoting MO. CONST. art. I, § 14); see also MO. CONST. art. I, § 14 (providing “[t]hat the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay”).
138 *Id.* (quoting Montgomery v. Daniels, 38 N.Y.2d 41, 54 (1975)).
139 *Id.* at 650 (citing Governor's Mem. on L. 1975, ch. 109, 1975 NY Legis. Ann., at 1739-40).
140 *Id.* at 650 (citing Treyball v. Clark, 65 N.Y.2d 589, 590 (1985)).
141 *Id.* at 650.
While the allegedly injured plaintiff in _Helgans_ was not a minor and so was subject to New York’s normal two and one-half year statute of limitations, the strict manner in which due process and equal protection are interpreted in that and similar cases serves to magnify the legal effect on minors.

Exacerbating this problem for all and especially for infants are extremely stringent “notice of claim” rules that may exist in certain jurisdictions. These notice rules serve as a prerequisite for bringing claims against governmental units.

In New York, for example, to bring a tort action against a municipality, including against a municipal hospital for medical malpractice, a notice of claim against the municipality must be filed within ninety days after the occurrence of the claim.\(^\text{142}\) Inasmuch as this rule is not subject to tolling for infants (although on motion the court may consider infancy in deciding whether to permit a late filing),\(^\text{143}\) it would appear that the potential consequences on minors suffering medical malpractice injury at a municipal institution can be extremely harsh indeed.

From both legal and practical points of view, it is necessary to address the question: if competent adults, as in _Helgans_, are sometimes unable to meet the short statutory and very short time requirements for bringing suit, how can society expect that minors, especially those at greater risk due to poverty, uneducated parents, and/or lack of a responsible adult who cares, will always be so able?

**IV. FURTHER COMPLICATIONS**

Traditionally, American society relied on the nuclear family to provide the most local of governance and protection of children. Coincident with the time beginning with the 1970’s through the present, the same time frame thus far addressed by the


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statutes of limitations rules addressing the medical malpractice crisis, a dramatic shift has taken place in American family structure. As discussed earlier, this trend, as regards the continuing increase in the percentage of young mothers who are unwed, can have serious deleterious effects on the care of children born in such situations. While many families continue to be look out for the affairs of their minor children, is not necessarily the case across the board.

From a medical care perspective, data show that the need to protect our children in our contemporary climate is critical. Per National Center for Health Statistics ("NCHS") Data Brief Number 18 (published on May 2009), “[n]onmarital births are at higher risk of having adverse birth outcomes such as low birthweight, preterm birth, and infant mortality than are children born to married women. Children born to single mothers typically have more limited social and financial resources.”144 While teenage births are down steeply (50% in 1970 to 23% as of 2007145), 86% of teenage births in 2007 were nonmarital (and do continue to decline146).147

General evidence showing a direct relationship between birth rates and years of education attained by women, with the highest birth rates among mothers with the least education148 has persisted for some time.149 For example, in 1994 unmarried women aged 18 to 24 having zero to eight years of total education had a birth rate of 300 per thousand compared with less than 25 per

145 Id. at 4-5.
146 Id. at 1.
147 Id.
149 Id. at 5.
thousand with sixteen years or more of education. This pattern was constant for all age groups over eighteen. Further, this relationship of educational attainment for unmarried women was directly opposite that for married women as it is now.

Finally, recent emigration into the U.S., both documented and not, has resulted in many new residents not acquainted with American law, culture, and the English language. As a practical matter, many of this new population are at an obvious disadvantage in navigating the American judicial systems, and this is particularly acute in any efforts at protecting their children. Under American Constitutional Law, any child born in the U.S. is a United States citizen, so even where immigrant parents are in the U.S. illegally, children born to them are not. The ability of new immigrant parents, and particularly those in the U.S. illegally, to protect in favor of the medical needs of their children, including guarding against and pursuing legal claims for medical malpractice, are significantly compromised.

Synthesis of this data supports the following conclusions:

- The majority of contemporary births in the U.S. continue to be to married couples.
- A substantial number of contemporary births are to unmarried mothers, including young and very young mothers, and a substantial number of additional children will live in broken families.
- Nonmarital born children have higher medical and mortality risks than do children born to married couples.

150 Id. at 6.
151 Id.
152 Id. at 13.
153 Id. at 5.
154 U.S. CONST. amend. IV, § 1.
155 See Vilensky & Podolsky, supra note 142; Schwan v. Riverside Methodist Hosp., 452 N.E.2d 1337 (Ohio 1983) (discussing America’s new immigrant population and for a discussion regarding malpractice cost impacts of the related tort reform measures).
Nonmarital born children are more likely to have more limited social and financial resources than children born to married couples.

Uneducated unmarried women have substantially more nonmarital children than educated unmarried women, with a plurality of teenage mothers (thus having limited education) being unwed.

There is a special need to protect children of new immigrants.

Consideration of and access to the American legal system generally require attributes and resources atypical of the profile that continues to emerge for an increasing segment of American children. Those attributes and resources include:

- A family structure that provides greater assurance that the child’s needs are diligently attended to; in this regard, “two parents are (generally) better than one”;
- Access to competent pre-natal and childhood medical care, including the knowledge and financial resources, including insurance, that facilitate such access, so as to minimize both the risk of illness as well as the potential consequence of medical malpractice to the child;
- Knowledge on the part of a parent or guardian as to when legal resort on behalf of the child is warranted; when and how to pursue same; and how to make necessary financial arrangements to do so; and
- Familiarity with American systems of justice and reasonable access thereto, including sensible rules that do not preclude reasonable opportunity to redress medical injuries of children.

Conversely, the profile of prospective defendants in medical malpractice claims, doctors, hospitals, and their
professional liability insurance carriers includes the following attributes:

- They are a highly educated, knowledgeable and sophisticated group of persons;
- Substantial political influence, as indicated, for example, by the aforesaid curtailed statute of limitations rules of the 1970’s;
- Access to a high quality medical malpractice defense bar;
- Significant financial resources with which to defend and settle malpractice claims; and
- A substantial imbalance as to the certainty with which the statute of limitations rules apply to them, as compared with the uncertainty with which they can apply to minor plaintiffs.

While the medical profession and its insurers admittedly grapple with issues that are arguably unfair to them (for example, their argument for capping the dollar amount of court awards to prevailing plaintiffs), it is clear that the statute of limitations issue at hand regarding minors represents a substantial due process imbalance between these parties in favor of the medical profession, despite the success of the “rationally related to a legitimate state interest” argument under which such has been found constitutional. In a society that professes to “put children first”, the imbalance is striking, even in the face of the concerns of the medical profession that prompted the very limited statute of limitations for infants.

V. CONCLUSION

It is clear that it is not the 1970s anymore, and that American society and social needs have changed substantially since then. Whatever considerations prompted the need for medical malpractice tort reform then need to be revisited in light of the very

\[156 \text{ See supra note 117.}\]
clear practical disparity that has emerged between how the contemporary American legal system treats children-plaintiffs vis a vis medical defendants. The gap is wide and unfair, the traditional technical equal protection and due process rules notwithstanding.

It is worthy of note that there is no clear evidence to support the thesis that severely limiting minors’ time for commencing medical malpractice actions effects a meaningful reduction of malpractice costs, which savings were a fundamental premise of the legislative changes shortening the limitations periods in the 1970s.

Of further note is that traditional evidentiary problems that militated in favor of shorter statutes of limitations are minimized in the contemporary medical environment via electronic record keeping and back-up systems that allow for comprehensive medical record keeping, retention, and long-term storage.

Legal rules must keep up with the times if they are to be relevant and fair. The times have changed and the rules should change with them. Certainly a medical malpractice statute of limitations rule that would provide infants until the age of majority plus a reasonable time thereafter to commence a claim against any applicable person, private or municipal, would go far in providing greater equity in our legal system for our children.