# Maine Trial Lawyers Association

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Testimony of Taylor A. Asen, Esq.,
Maine Trial Lawyers Association
In Support of L.D. 549
"An Act Regarding a Discovery Rule for the Statute of Limitations for Cases of Medical Negligence"
April 6, 2023

Senator Carney, Representative Moonen, and distinguished members of the Joint Standing Committee on Judiciary:

My name is Taylor Asen. I am a partner at Gideon Asen, a law firm that specializes in medical malpractice litigation. I am here today, on behalf of the Maine Trial Lawyers Association, in support of L.D. 549.

At present in Maine, a patient has three years to initiate her malpractice lawsuit.[1] But unlike the vast majority of states, Maine has no discovery rule for medical malpractice cases: the three-year clock starts on the date of medical negligence, not on the date that a patient could reasonably be expected to know they were injured.[2]

In most medical malpractice cases, the medical error and the discovery of the injury happen at or around the same time. But in cases concerning the failure to detect a latent disease or condition, such as cancer, starting the clock at the time of the medical error is immensely unfair. In these cases, years may pass between the date of the medical error and the discovery of an injury. This is for the obvious reason that, when there is a failure to diagnosis a slow-moving disease, the disease may not be discovered until it has spread throughout the body.

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[1] 24 M.R.S.A. § 2902. By contrast, for most other personal injury claims, a plaintiff has six years to file suit. 14 M.R.S.A. § 752.

[2] There are several exceptions to Maine's three-year statute of limitations for medical malpractice claims. First, "actions for professional negligence by a minor must be commenced within 6 years after the cause of action accrues or within 3 years after the minor reaches the age of majority, whichever first occurs." § 2902. Second, for claims "based upon the leaving of foreign objects in the body," the three-year statute of limitations begins to run not when the injury occurs, but when "the plaintiff discovers or reasonably should have discovered the harm." *Id.*

Time-limits for bringing lawsuits, called statutes of limitations, are based on the idea that "[t]he law ministers to the vigilant, not to those who sleep upon perceptible rights."[3] What makes our statute of limitations for medical malpractice claims so unfair is that it punishes the vigilant and inattentive alike.

You have heard the testimony of Robyn Barnes, whose story demonstrates the unfairness of the current law. Until her father was diagnosed with metastatic bladder cancer, Ms. Barnes and her family had no reason to think that her father's doctor had done anything wrong. As currently written, the law left her and her family with no redress for the negligence that caused her father's death.

Consider another case that came into my law firm several years ago. In January 2016, the patient's primary care provider ordered a test, called a Prostate Specific Antigen ("PSA") test, which is used to screen for prostate cancer. A PSA of 4.0 or above requires further workup for prostate cancer. This patient's PSA was 12.7, which is extremely high. However, because of a systems error at his primary care provider's office, the patient was never notified of the results. Four years later, the patient had another PSA test, which was also high. He was sent to a urologist, who reviewed the patient's chart, and told him, for the first time, that he should have been evaluated for prostate cancer four years earlier. Tragically, by that time, the patient's cancer had spread beyond his prostate, which made it life-threatening. Through no fault of his own, the patient was unaware of the medical malpractice he had experienced until more than three years after the negligence occurred, thereby providing him no redress.

**The Discovery Rule in Other States**

As is noted above, most states have discovery rules that extend the statutes of limitations for some or all cases involving medical malpractice. There are many different variations of discovery rules across the country. Attached to this testimony is a spreadsheet containing information about the rules in each state. Maine is one of only five to seven states, depending on how you count, with no discovery rule for medical malpractice cases concerning misdiagnoses.[4] Maine is the only state in New England without a discovery rule for medical malpractice cases.

**The Injustice of Our Current Scheme**

If a doctor fails to diagnose a patient's case and the cancer is ultimately discovered two-and-a-half years later, the patient may have a viable malpractice case. If the cancer is discovered three years later, the statute of limitations has expired. As it currently stands, the law arbitrarily discriminates against certain malpractice victims.

The Maine Constitution protects the "right of redress for injuries."[5] The current law is contrary to the spirit of that provision, as it arbitrarily precludes victims from seeking redress for the

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[3] *Wilson v. United States Gov't*, 23 F.3d 559, 562 (1st Cir. 1987).

[4] Georgia and Missouri have "quasi" discovery rules, as is explained in the attached chart.

[5] Article 2 § 19.

failure to diagnose latent diseases. A person who learns two years after the negligence that she has metastatic cancer may seek redress, while a person whose cancer becomes evident three years after the medical negligence cannot.

Indeed, the Supreme Courts of several other states, such as New Hampshire, Arizona and Indiana, have held that the absence of a discovery rule in medical malpractice claims runs afoul of their state constitutions, as it irrationally discriminates against injured persons who have no ability to comprehend the nature of their injuries before the statute of limitations runs.[6]

**The State of Medical Malpractice Claims in Maine**

Whenever changes are proposed to the medical malpractice laws that would increase access to the civil justice system, the response from opponents is invariably the same: the proposed change—whatever it is—will "open the floodgates" of "frivolous lawsuits," which "will drive doctors from our state."

It is important for this Committee to appreciate that, in Maine, there is hardly a problem with frivolous medical malpractice suits.

In 2022, there were 52 medical malpractice claims filed in Maine—that includes claims against not only hospitals and doctors, but also nursing homes and pharmacies; there were 11 the first 10 weeks of 2023. By way of reference, there are approximately 5,000 active physicians in Maine, as well as thousands of mid-level providers (physician assistants, nurse practitioners, etc.).

This is not because of a lack of medical errors. Medical errors kill an estimated 98,000 Americans every year, and Maine has its fair share of medical negligence.

Rather, the lack of medical malpractice cases stems from the difficulty of proving these cases, as well as the high cost associated with litigation. In order to succeed in a medical malpractice case, a plaintiff must prove not only that the defendant provider was negligent, but also that the negligence caused an injury. In the context of a case concerning the failure to diagnose cancer, a case will typically be viable only if the plaintiff can prove that, but for the negligence, the patient would have survived. This is often impossible to do, due to the difficulty of proving how advanced the cancer would have been had it been caught at an earlier stage.

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[6] *Carson v. Maurer,* 424 A.2d 825, 834 (N.H. 1980) (holding New Hampshire law "invalid insofar as it makes the discovery rule unavailable to all medical malpractice plaintiffs except those whose actions are based upon the discovery of a foreign object in the injured person's body"); *Kenyon v. Hammer*, 688 P.2d 961 (Ariz. 1984) ("The act under consideration abolishes the discovery rule for many types of claims against health care providers, no matter how meritorious the claim. It is difficult to find a compelling or even legitimate interest in this."); *Martin v. Richey*, 711 N.E.2d 1273, 1285 (Ind. 1999) (medical malpractice statute of limitations without discovery rule "would impose an impossible condition on her access to the courts and pursuit of a tort remedy").

L.D. 549 will not alter the burden of proof placed on plaintiffs. In other words, it will only affect those cases wherein the plaintiff can prove that earlier intervention would more likely than not have changed the patient's outcome.

Another reason medical malpractice cases are so rare in Maine is that they are extremely expensive to pursue. In Maine, medical malpractice cases must be tried twice—first to the prelitigation screening panel, and then to a jury. Accordingly, it is not uncommon for medical malpractice cases to in Maine to cost well in excess of $100,000 to litigate. Because personal injury lawyers only recover these costs and get paid if the case succeeds, we are exceedingly selective about the cases we take on.

To give you a sense of how selective we are, consider my law firm, Gideon Asen, which has been open for about two-and-a-half years. In that time, we have filed, or committed to file, less than one percent of the potential medical malpractice cases we have seen.

Again, nothing in this bill will fundamentally alter the structure of Maine's medical malpractice system, and there is no reason to believe that, if passed into law, L.D. 549 will noticeably increase the number of medical malpractice suits filed in Maine each year.

L.D. 549 will, however, allow lawyers to consider misdiagnosis and delayed diagnosis cases on their merits, rather than rejecting them solely on the basis that the malpractice was not discoverable before the statute of limitations passed.

**L.D. 549 Is Narrowly Tailored**

Another claim we often hear from opponents to expanding access to justice—and that we expect to hear today—is that the proposed change to the law is too expansive.

On the contrary, the bill, as currently written, implements a "narrow" discovery rule: that is, the three-year statute of limitations begins to run "when the plaintiff discovers or reasonably should have discovered the harm."

By contrast, other states, including New Hampshire, have a "broad" discover rule. Under New Hampshire law, the three-year statute of limitations accrues when "the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury **and its causal relationship to the act or omission complained of.**"[7] Under New Hampshire law, then, an action does not begin to accrue when a patient discovers that she has injury, but when she discovers, or should have discovered, that her injury was the result of the defendant's negligence. This proposed change is far narrower than New Hampshire and simply seeks to begin the three years upon discovery of the injury.

**Conclusion**

In its opinion striking down their law discarding the discovery rule in medical malpractice claims, the Supreme Court of Indiana noted that, without a discovery rule, some patients

[7] N.H. Rev. Stat. Ann. §508:4.

would be required "to bring a claim for medical malpractice before becoming aware of her injury and damages . . . and this indeed would be boarding the bus to topsy-turvy land."[8]

We ask you, for the sake of future victims of medical malpractice, to take our medical malpractice laws out of topsy-turvy land.

Thank you for your time.

[8] *Martin v. Richey*, 711 N.E.2d 1273, 1284 (Ind. 1999).

| State | Discovery Rule in Medical Malpractice Cases? | Description | Cite |
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| Alabama | Yes | Six months from discovery, but no more than four years from the date of injury. | Ala. Code §6.5.482 |
| Alaska | Yes | Two years from discovery of injury. | *Pedersen v. Zielski*, 822 P.2d 903 (Alaska 1991)) |
| Arizona | Yes | Two years from discovery. | P.2d 961 (Ariz. 1984) (striking down abolition of discovery rule in medical malpractice cases on equal protection grounds) |
| Arkansas | No | | Ark. Stat. Ann. §16-114-203 |
| California | Yes | One year from discovery of injury and cause, but no more than three years from the date of injury (unless an enumerated exception applies). | Cal. Civil Procedure Code §340.5 |
| Colorado | Yes | Two years from discovery, but no more than three years from the date of injury (unless an enumerated exception applies). | Colo. Rev. Stat. §13-80-102.5 |
| Connecticut | Yes | Two years from discovery, but no more than three years from the date of injury | Conn. Gen. Stat. §52-584 |
| Delaware | Yes | An additional year tacked onto statute of limitations for discovery rule. | Del. Code Ann. tit. 18, §6856 |
| Florida | Yes | Two years from discovery, but no more than four years from injury. | Fla. Stat. §95.11 |
| Georgia | Quasi ("New injury" rule) | In the case of a misdiagnosis, two years from each "new injury"; in no event longer than five years from act or death. | Ga. Code §9-3-70 *et seq*. |
| Hawaii | Yes | Two years from discovery, not to exceed six years from act. | Hawaii Rev. Stat. §657-7.3 |
| Idaho | No | No | |
| Illinois | Yes | Two years from discovery but not more than four years from act. | Ill. Rev. Stat. ch. 735, §5/13-212 and §5/13-215 |
| Indiana | Yes | Two year statute of limitations accrues when malpractice discovered | *Martin v. Richey*, 711 N.E.2d 1273, 1284 (Ind. 1999) ( medical malpractice statute of limitations without discovery rule is unconstitutional). |

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| Iowa | Yes | Two years from reasonable discovery but not more than six years from injury. | Iowa Code §614.1 |
| Kansas | Yes | Two years from act, but up to four years after reasonable discovery. | Kan. Stat. Ann. §60-513(b) |
| Kentucky | Yes | One year from date of discovery, but not more than five years after act. | Ky. Rev. Stat. §413.140 and §413.170 |
| Louisiana | Yes | One year from date of discovery, but no later than three years from date of injury. | La. Rev. Stat. Ann. §9:5628 |
| Maine | No | | |
| Maryland | Yes | Three years from discovery, but no more than five years from injury. | Md. Courts & Judicial Proceedings Code Ann. §5-109 |
| Massachusetts | Yes | Within three years of discovery, but no later than seven years after injury. | Mass. Gen. Laws Ann. ch. 260, §4; Joslyn v. Chang, 837 N.E.2d 1107 (Mass. 2005) |
| Michigan | Yes | Six months from when the plaintiff should have discovered the existence of a medical malpractice claim. No more than six years from injury. | Mich. Comp. Laws §600.5805, §600.5838a and §600.5851 |
| Minnesota | Yes | Four years from the date the cause of action accrues. The action accrues not when the patient is misdiagnosed, but when the patient is damaged. | Minn. Stat. §541.076 and §541.15; MacRae v. Group Health Plan, Inc., 753 N.W.2d 711, 719 (Minn. 2008) |
| Mississippi | Yes | Two years from act or reasonable discovery, no more than seven years. | Miss. Code Ann. §15-1-36 |
| Missouri | Quasi (discovery ruke for negligent failure to inform) | Two years from discovery of failure to inform. | Mo. Rev. Stat. §516.105 |
| Montana | Yes | Two years from discovery, no more than five years from act. | Mont. Code Ann. §27-2-205 |
| Nebraska | Yes | One year from reasonable discovery, no more than 10 years from injury. | Neb. Rev. Stat. §44-2828 and §25-213 |
| Nevada | Yes | Three years from injury or one year from reasonable discovery. | Nev. Rev. Stat. §41A.097 and §11.250 |
| New Hampshire | Yes | Within three years of discovery of the injury and the "causal relationship to the act or omission complained of." | N.H. Rev. Stat. Ann. §508:4 |
| New Jersey | Yes | Within two years of the discovery that injury is due to the fault of another. | N.J. Rev. Stat. §2A:14-2; *Caravaggio v. D'Agostini,* 166 N.J. 237, 249 (2001) |
| New Mexico | Yes (for certain prov | Within three years of the date of discovery for "non-qualified" providers | *Romero v. Lovelace Health Sys .,* 455 P.3d 851, 855 (N.M 2019). |

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| New York | Yes | Where the action is based on negligence failure to diagnose a malignant tumor, two years and six months from discovery of negligence but no more than seven years from injury; or where there is continuous treatment, two years and six months from the last treatment. | CPRL 214-A |
| North Carolina | Yes | Three years from act or one year from reasonable discovery, whichever is later, but not more than four years after injury. | N.C. Gen. Stat. § 1-15 |
| North Dakota | Yes | Within two years of discovery but not more than six years after act unless concealed by fraud. | N.D. Cent. Code §28-01-22.1 |
| Ohio | Yes | No more than four years from discovery. | Ohio Rev. Code Ann. §2305.113. |
| Oklahoma | Yes | Two years from reasonable discovery. | Okla. Stat. tit. 76, §18 |
| Oregon | Yes | Two years from reasonable discovery, but within five years from the date of the act or omission | Or. Rev. Stat. §12.110 and §12.160 |
| Pennsylvania | Yes | Two years from the date of disovery, but within seven years of date of injury. | Pa. Stat. tit. 40, §1303.513; 42 Pa.C.S. § 5524 |
| Rhode Island | Yes | Three years from when act of malpractice should have been discovered. | R.I. Gen. Laws §9-1-14.1 |
| South Carolina | Yes | Three years from discovery, but no more than six years from injury. | S.C. Code Ann. §15-3-545 |
| South Dakota | No | | S.D. Codified Laws Ann. §15-2-14.1 |
| Tennessee | Yes | One year discovery, no more than three years from act except where there is fraudulent concealment. | Tenn. Code Ann. §29-26-116 |
| Texas | No | | Tex. Civil Practice and Remedies Code Ann. §74.251 |
| Utah | Yes | Two years from discovery the injury, but not more than four years from act. | Utah Code Ann. §78B-3-404 |
| Vermont | Yes | Three years from incident or two years from reasonable discovery, whichever occurs later, but not later than seven years after incident. | Vt. Stat. Ann. tit. 12, §521 |
| Virginia | Yes | Two years from occurrence, no more than 10 years unless under disability. In a claim for the negligent failure to diagnose a malignant tumor or cancer, for a period of one year from the date the diagnosis of a malignant tumor or cancer is communicated to the patient. | Va. Code §8.01-243(C)(3) |

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| Washington | Yes | Three years from injury or one year from reasonable discovery, whichever is later. No more than eight years after act. | Wash. Rev. Code §4.16.350 |
| West Virginia | Yes | Two years from discovery, no longer than 10 years after injury. | W. Va. Code §55-7B-4 |
| Wisconsin | Yes | Three years from injury or one year from reasonable discovery, not more than five years from act. | Wis. Stat. §893.55 |
| Wyoming | Yes | Two years from discovery. | Wyo. Stat. §1-3-107 |