



Wallace PLLC Legal Update
December 2017

Medical Malpractice

Genetic Malpractice Claims Accrue on Date of Live Birth Under New York Law

Nearly forty years ago, in [*Becker v. Schwartz*](#), New York recognized a new cause of action for "wrongful birth," which allows parents to recover the extraordinary expenses of caring for a disabled child who would not have been born but for negligent genetic counseling and testing. Freighted with moral, theological, and philosophical implications, these are basically genetic negligence or malpractice claims.

Given advances in prenatal genetic testing, and its modern ubiquity, an important legal question was bound to arise: namely, how long does a plaintiff have to file a claim for wrongful birth? By statute, the time limit (or statute of limitations) applicable to medical malpractice claims in New York is 30 months, which runs from "the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure." This language would seem to suggest that the time limit applicable to a wrongful-birth claim for "extraordinary expenses" begins running on the date of the alleged malpractice, since neither the statute's "continuous treatment" nor "foreign object" exceptions applied on the facts.

The question finally reached New York's highest court in a pair of cases late last year, each involving defendants' failure to timely screen an egg donor for the Fragile X mutation or to notify plaintiffs that they did not screen for this trait. Defendants argued that the limitations period ran from the date of the alleged malpractice, which they identified as the date the embryo was implanted, meaning the cases were untimely. Plaintiffs opposed, arguing that the claim accrued on the date of birth and consequently timely.

In a landmark 5-1 decision handed down last week, with one judge not participating, the court sided with the lower courts, ruling that a cause of action for extraordinary expenses associated with a wrongful birth "accrues upon," and the limitations period runs from, "the birth of the child with a disability." See [*B.F. v. Reproductive Medicine Associates*](#) (N.Y. Dec. 14, 2017).

This result required the court had to balance "the competing policy considerations of putting to rest stale claims with ensuring 'fairness to the claimant [who] shall not unreasonably be deprived of [the] right to assert [a] claim.'" Citing the "unique features" of these cases -- the parents' inability to know whether they will bear any extraordinary expenses (i.e. a legally cognizable injury) *prior to a live birth*, and that those expenses are a consequence of the birth, not just conception -- the Court of Appeals affirmed, holding that "the cause of action accrues upon the birth of an infant with the disability," not the date of the alleged malpractice. As such, the claims were timely.

The opinion, by Chief Judge DiFiore, drew a harsh dissent from Judge Garcia, who chastised the majority for "implementing a judicially-crafted 'date of birth' accrual rule" contrary to "the plain language of the statute," which allows only two exceptions -- "continuous treatment" and "foreign object." In his view, the "arbitrary 'date of birth' accrual rule ... does not correspond to the date of the alleged injury, the date of plaintiff's capacity to sue, or the date of the injury's discovery."

###

Contact: David Wallace (david@wallacepllc.com)

About [Wallace Law PLLC](#):

Wallace Law PLLC, a sophisticated disputes practice with national reach, is focused on commercial litigation and select personal injury cases. It was formed by David Wallace, an accomplished New York trial lawyer with decades of experience trying high-value cases around the country, including many closely watched product liability trials. Formerly a partner at Herbert Smith Freehills, and at Chadbourne & Parke before that, Wallace offers clients the personal attention and efficiencies of a lawyer with large-firm expertise, without the usual trappings and pretensions.