

2723

2009-2010 Regular Sessions

I N S E N A T E

February 27, 2009

Introduced by Sens. VOLKER, ALESI, DeFRANCISCO, O. JOHNSON, MORAHAN, PADAVAN, SEWARD -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the civil practice law and rules and the judiciary law, in relation to dental, medical and podiatric malpractice actions and to establishing a limitation on noneconomic damages in personal injury actions

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Section 3012-a of the civil practice law and rules, as  
2 amended by chapter 507 of the laws of 1987, is amended to read as  
3 follows:  
4 S 3012-a. Certificate of merit in medical, dental and podiatric malp-  
5 ractice actions AND ACTIONS AGAINST ALL OTHER PROFESSIONALS. (a) In any  
6 action for medical, dental or podiatric malpractice, OR IN ANY ACTION  
7 FOR DAMAGES, CONTRIBUTION OR INDEMNITY ARISING OUT OF ALLEGED NEGLIGENCE  
8 OF A PROFESSIONAL SUBJECT TO THE PROVISIONS OF TITLE VIII OF THE EDUCA-  
9 TION LAW, the complaint shall be accompanied by a certificate, executed  
10 by the attorney for the plaintiff, OR OTHER PARTY ASSERTING THE CAUSE  
11 OF ACTION, declaring that:  
12 (1) the attorney has reviewed the facts of the case and has consulted  
13 with at least one physician in medical malpractice actions, at least one  
14 dentist in dental malpractice actions [or], at least one podiatrist in  
15 podiatric malpractice actions, OR AT LEAST ONE PROFESSIONAL IN THE SAME  
16 PROFESSION AS THE PERSON OR PERSONS DEFENDANT IN THE SUBJECT SUIT IN  
17 OTHER PROFESSIONAL MALPRACTICE OR NEGLIGENCE ACTIONS AND who is licensed  
18 to practice in this state or any other state and who the attorney  
19 reasonably believes is knowledgeable in the relevant issues involved in  
20 the particular action, AND WHO HAS SIGNED AN AFFIDAVIT CONCLUDING THAT  
21 THERE IS A REASONABLE BASIS FOR THE COMMENCEMENT OF AN ACTION, SUCH  
22 AFFIDAVIT SHALL ACCOMPANY THE CERTIFICATE REQUIRED BY THIS SECTION, and

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD00843-01-9

1 that the attorney has concluded on the basis of such review [and],  
2 consultation AND AFFIDAVIT that there is a reasonable basis for the  
3 commencement of such action; or

4 (2) the attorney was unable to obtain the consultation AND AFFIDA-  
5 VIT required by paragraph one of this subdivision because a limitation  
6 of time, established by article two of this chapter, would bar the  
7 action and that the certificate required by paragraph one of this  
8 subdivision could not reasonably be obtained before such time expired.  
9 If a certificate is executed pursuant to this subdivision, the  
10 certificate required by this section shall be filed within ninety  
11 days after service of the complaint; or

12 (3) the attorney was unable to obtain the consultation AND AFFIDAVIT  
13 required by paragraph one of this subdivision because the attorney had  
14 made three separate good faith attempts with three separate physicians,  
15 dentists [or], podiatrists OR SUBJECT PROFESSIONALS, in accordance with  
16 the provisions of paragraph one of this subdivision to obtain such  
17 consultation AND AFFIDAVIT and none of those contacted would agree to  
18 such a consultation AND AFFIDAVIT.

19 (b) Where a certificate is required pursuant to this section, a single  
20 certificate shall be filed for each action, even if more than one  
21 defendant has been named in the complaint or is subsequently named.

22 (c) Where the attorney intends to rely solely on the doctrine of "res  
23 ipsa loquitur", this section shall be inapplicable. In such cases, the  
24 complaint shall be accompanied by a certificate, executed by the attor-  
25 ney, declaring that the attorney is solely relying on such doctrine and,  
26 for that reason, is not filing a certificate required by this section.

27 (d) If a request by the plaintiff for the records of the plaintiff's  
28 medical or dental treatment by the defendants has been made and such  
29 records have not been produced, the plaintiff shall not be required to  
30 serve the certificate required by this section until ninety days after  
31 such records have been produced.

32 (e) For purposes of this section, and subject to the provisions of  
33 section thirty-one hundred one of this chapter, an attorney who submits  
34 a certificate as required by paragraph one or two of subdivision (a) of  
35 this section and the physician, dentist [or], podiatrist OR SUBJECT  
36 PROFESSIONALS with whom the attorney consulted shall not be required to  
37 disclose the identity of the physician, dentist [or], podiatrist OR  
38 SUBJECT PROFESSIONALS consulted and the contents of such consultation  
39 AND AFFIDAVIT; provided, however, that when the attorney makes a claim  
40 under paragraph three of subdivision (a) of this section that he was  
41 unable to obtain the required consultation AND AFFIDAVIT with the physi-  
42 cian, dentist [or], podiatrist OR SUBJECT PROFESSIONALS, the court may,  
43 upon the request of a defendant made prior to compliance by the plain-  
44 tiff with the provisions of section thirty-one hundred ONE of this chap-  
45 ter, require the attorney to divulge to the court the names of physi-  
46 cians, dentists [or], podiatrists OR SUBJECT PROFESSIONALS refusing such  
47 consultation AND AFFIDAVIT.

48 (f) The provisions of this section shall not be applicable to a plain-  
49 tiff who is not represented by an attorney.

50 (g) The plaintiff may, in lieu of serving the certificate required by  
51 this section, provide the defendant or defendants with the information  
52 required by paragraph one of subdivision (d) of section thirty-one  
53 hundred one of this chapter within the period of time prescribed by this  
54 section.

55 (H) THE SUBJECT PROFESSIONAL OR PROFESSIONALS CONSULTED MAY NOT BE A  
56 PARTY TO THE LITIGATION.

1 (I) FOR PURPOSES OF THIS SECTION, A COMPLAINT SHALL INCLUDE A  
2 COMPLAINT, THIRD PARTY COMPLAINT, AN ANSWER CONTAINING A COUNTERCLAIM OR  
3 A CROSS CLAIM.

4 S 2. Paragraph 1 of subdivision (d) of section 3101 of the civil prac-  
5 tice law and rules, as amended by chapter 184 of the laws of 1988,  
6 subparagraph (ii) as amended by chapter 165 of the laws of 1991, is  
7 amended to read as follows:

8 1. Experts. (i) Upon request, each party shall identify each person  
9 whom the party expects to call as an expert witness at trial and shall  
10 disclose in reasonable detail the subject matter on which each expert is  
11 expected to testify, the substance of the facts and opinions on which  
12 each expert is expected to testify, the qualifications of each expert  
13 witness and a summary of the grounds for each expert's opinion. However,  
14 where a party for good cause shown retains an expert an insufficient  
15 period of time before the commencement of trial to give appropriate  
16 notice thereof, the party shall not thereupon be precluded from intro-  
17 ducing the expert's testimony at the trial solely on grounds of noncom-  
18 pliance with this paragraph. In that instance, upon motion of any party,  
19 made before or at trial, or on its own initiative, the court may make  
20 whatever order may be just. [In an action for medical, dental or podia-  
21 tric malpractice, a party, in responding to a request, may omit the  
22 names of medical, dental or podiatric experts but shall be required to  
23 disclose all other information concerning such experts otherwise  
24 required by this paragraph.]

25 (ii) In an action for medical, dental or podiatric malpractice, any  
26 party may, by written offer made to and served upon all other parties  
27 and filed with the court, [offer to disclose the name of, and to] make  
28 available for examination upon oral deposition, any person the party  
29 making the offer expects to call as an expert witness at trial. Within  
30 twenty days of service of the offer, a party shall accept or reject the  
31 offer by serving a written reply upon all parties and filing a copy  
32 thereof with the court. Failure to serve a reply within twenty days of  
33 service of the offer shall be deemed a rejection of the offer. If all  
34 parties accept the offer, each party shall be required to produce his or  
35 her expert witness for examination upon oral deposition upon receipt of  
36 a notice to take oral deposition in accordance with rule thirty-one  
37 hundred seven of this [chapter] ARTICLE. If any party, having made or  
38 accepted the offer, fails to make that party's expert available for oral  
39 deposition, that party shall be precluded from offering expert testimony  
40 at the trial of the action.

41 (iii) Further disclosure concerning the expected testimony of any  
42 expert may be obtained only by court order upon a showing of special  
43 circumstances and subject to restrictions as to scope and provisions  
44 concerning fees and expenses as the court may deem appropriate. However,  
45 a party, without court order, may take the testimony of a person author-  
46 ized to practice medicine, dentistry or podiatry who is the party's  
47 treating or retained expert, as described in paragraph three of subdivi-  
48 sion (a) of this section, in which event any other party shall be enti-  
49 tled to the full disclosure authorized by this article with respect to  
50 that expert without court order.

51 S 3. Subdivisions (b) and (c) of section 5031 of the civil practice  
52 law and rules, as added by chapter 86 of the laws of 2003, are amended  
53 to read as follows:

54 (b) Awards for all past damages, all damages for future loss of  
55 services, all damages for future loss of consortium, all damages in  
56 wrongful death actions, and damages for future pain and suffering of

1 [five hundred] FIFTY thousand dollars or less shall be paid in a lump  
2 sum. In any case in which all damages are to be paid in lump sums, the  
3 judgment shall be entered on the total of the lump sums, without further  
4 regard to this section.

5 (c) As to any award of damages for future pain and suffering in excess  
6 of [five hundred] FIFTY thousand dollars, the court shall determine the  
7 greater of thirty-five percent of such damages or [five hundred] FIFTY  
8 thousand dollars and such amount shall be paid in a lump sum. The  
9 remaining amount of the award for damages for future pain and suffering  
10 shall be paid in a stream of payments over the period of time determined  
11 by the trier of fact or eight years, whichever is less. The stream of  
12 payments for future pain and suffering shall be calculated by dividing  
13 the remaining amount of damages for future pain and suffering by the  
14 number of years over which such payments shall be made to determine the  
15 first year's payment and the payment due in each succeeding year shall  
16 be computed by adding four percent to the previous year's payment. The  
17 court shall determine the present value of the stream of payments by  
18 applying a discount rate to the stream of payments.

19 S 4. Subdivisions (b) and (e) of section 5041 of the civil practice  
20 law and rules, as added by chapter 682 of the laws of 1986, are amended  
21 to read as follows:

22 (b) The court shall enter judgment in lump sum for past damages, for  
23 future damages not in excess of [two hundred] fifty thousand dollars,  
24 and for any damages, fees or costs payable in lump sum or otherwise  
25 under subdivisions (c) and (d) of this section. For the purposes of this  
26 section, any lump sum payment of a portion of future damages shall be  
27 deemed to include the elements of future damages in the same proportion  
28 as such elements comprise of the total award for future damages as  
29 determined by the trier of fact.

30 (e) With respect to awards of future damages in excess of [two  
31 hundred] fifty thousand dollars in an action to recover damages for  
32 personal injury, injury to property or wrongful death, the court shall  
33 enter judgment as follows:

34 After making any adjustment prescribed by subdivisions (b), (c) and  
35 (d) of this section, the court shall enter a judgment for the amount of  
36 the present value of an annuity contract that will provide for the  
37 payment of the remaining amounts of future damages in periodic install-  
38 ments. The present value of such contract shall be determined in accord-  
39 ance with generally accepted actuarial practices by applying the  
40 discount rate in effect at the time of the award to the full amount of  
41 the remaining future damages, as calculated pursuant to this subdivi-  
42 sion. The period of time over which such periodic payments shall be made  
43 and the period of time used to calculate the present value of the annui-  
44 ty contract shall be the period of years determined by the trier of fact  
45 in arriving at the itemized verdict; provided, however, that the period  
46 of time over which such periodic payments shall be made and the period  
47 of time used to calculate the present value for damages attributable to  
48 pain and suffering shall be ten years or the period of time determined  
49 by the trier of fact, whichever is less. The court, as part of its judg-  
50 ment, shall direct that the defendants and their insurance carriers  
51 shall be required to offer and to guarantee the purchase and payment of  
52 such an annuity contract. Such annuity contract shall provide for the  
53 payment of the annual payments of such remaining future damages over the  
54 period of time determined pursuant to this subdivision. The annual  
55 payment for the first year shall be calculated by dividing the remaining  
56 amount of future damages by the number of years over which such payments

1 shall be made and the payment due in each succeeding year shall be  
2 computed by adding four percent to the previous year's payment. THE  
3 ADDITION OF FOUR PERCENT TO EACH OF THE PREVIOUS YEAR'S PAYMENT SHALL BE  
4 THE EXCLUSIVE MEASURE OF INTEREST, INFLATION, FOREGONE INVESTMENT OPPOR-  
5 TUNITY AND ANY OTHER MEASURE OF DAMAGE. Where payment of a portion of  
6 the future damages terminates in accordance with the provisions of this  
7 article, the four percent added payment shall be based only upon that  
8 portion of the damages that remains subject to continued payment.  
9 Unless otherwise agreed, the annual sum so arrived at shall be paid in  
10 equal monthly installments and in advance.

11 S 5. The civil practice law and rules is amended by adding a new arti-  
12 cle 50-C to read as follows:

13 ARTICLE 50-C

14 LIMITATION ON NONECONOMIC DAMAGES

15 5051. DEFINITIONS.

16 5052. DAMAGE AWARDS.

17 S 5051. DEFINITIONS. AS USED IN THIS ARTICLE:

18 1. "NONECONOMIC DAMAGES" MEANS SUBJECTIVE, NONPECUNIARY DAMAGES ARIS-  
19 ING FROM PAIN, SUFFERING, INCONVENIENCE, PHYSICAL IMPAIRMENT OR DISFIG-  
20 UREMENT, MENTAL ANGUISH, EMOTIONAL DISTRESS, LOSS OF SOCIETY AND COMPAN-  
21 IONSHIP, LOSS OF CONSORTIUM, INJURY TO REPUTATION, HUMILIATION AND OTHER  
22 NONPECUNIARY DAMAGES.

23 2. "ACTUAL ECONOMIC DAMAGES" MEANS OBJECTIVELY VERIFIABLE PECUNIARY  
24 DAMAGES ARISING FROM MEDICAL EXPENSES AND MEDICAL CARE, LOSS OF EARNINGS  
25 AND EARNING CAPACITY, BURIAL COSTS, LOSS OF USE OF PROPERTY, COSTS OF  
26 REPAIR OR REPLACEMENT OF PROPERTY, COSTS OF OBTAINING SUBSTITUTE DOMES-  
27 TIC SERVICES, LOSS OF EMPLOYMENT, LOSS OF BUSINESS OR EMPLOYMENT OPPOR-  
28 TUNITIES, REHABILITATION SERVICES, CUSTODIAL CARE AND OTHER PECUNIARY  
29 DAMAGES.

30 3. "PERSONAL INJURY ACTION" MEANS ANY ACTION, INCLUDING BUT IN NO  
31 MANNER LIMITED TO MEDICAL, DENTAL AND PODIATRIC MALPRACTICE ACTIONS,  
32 WHETHER IN TORT, CONTRACT, OR OTHERWISE, IN WHICH THE PLAINTIFF SEEKS  
33 DAMAGES FOR INJURY TO THE PERSON OR WRONGFUL DEATH.

34 4. "COMPENSATION" MEANS MONETARY AWARDS.

35 S 5052. DAMAGE AWARDS. IN ANY PERSONAL INJURY ACTION, THE PREVAILING  
36 PLAINTIFF MAY BE AWARDED:

37 1. COMPENSATION FOR ACTUAL ECONOMIC DAMAGES SUFFERED BY THE INJURED  
38 PLAINTIFF; AND

39 2. COMPENSATION FOR NONECONOMIC DAMAGES SUFFERED BY THE INJURED PLAIN-  
40 TIFF, NOT TO EXCEED TWO HUNDRED FIFTY THOUSAND DOLLARS.

41 S 6. Section 474-a of the judiciary law, as amended by chapter 485 of  
42 the laws of 1986, is amended to read as follows:

43 S 474-a. Contingent fees for attorneys in claims or actions for  
44 medical, dental or podiatric malpractice, OR IN ANY CLAIM OR ACTION FOR  
45 PROPERTY DAMAGE OR PERSONAL INJURY, INCLUDING DEATH. 1. For the purpose  
46 of this section, the term "contingent fee" shall mean any attorney's fee  
47 in any claim or action for medical, dental or podiatric malpractice, OR  
48 IN ANY CLAIM OR ACTION FOR PROPERTY DAMAGE OR PERSONAL INJURY, INCLUDING  
49 DEATH, whether determined by judgment or settlement, which is dependent  
50 in whole or in part upon the success of the prosecution by the attorney  
51 of such claim or action, or which is to consist of a percentage of any  
52 recovery, or a sum equal to a percentage of any recovery, in such claim  
53 or action.

54 2. Notwithstanding any inconsistent judicial rule, a contingent fee in  
55 a medical, dental or podiatric malpractice action, OR IN ANY CLAIM OR  
56 ACTION FOR PROPERTY DAMAGE OR PERSONAL INJURY, INCLUDING DEATH, shall

1 not exceed the amount of compensation provided for in the following  
2 schedule:

- 3 [30] 25 percent of the first \$250,000 of the sum recovered;
- 4 [25] 20 percent of the next \$250,000 of the sum recovered;
- 5 [20] 15 percent of the next \$500,000 of the sum recovered;
- 6 [15] 10 percent of the next \$250,000 of the sum recovered;
- 7 [10] 5 percent of any amount over \$1,250,000 of the sum recovered.

8 3. Such percentages shall be computed on the net sum recovered after  
9 deducting from the amount recovered expenses and disbursements for  
10 expert testimony and investigative or other services properly chargeable  
11 to the enforcement of the claim or prosecution of the action. In comput-  
12 ing the fee, the costs as taxed, including interest upon a judgment,  
13 shall be deemed part of the amount recovered. For the following or simi-  
14 lar items there shall be no deduction in computing such percentages:  
15 liens, assignments or claims in favor of hospitals, for medical care,  
16 dental care, podiatric care and treatment by doctors and nurses, or of  
17 self-insurers or insurance carriers.

18 4. In the event that claimant's or plaintiff's attorney believes in  
19 good faith that the fee schedule set forth in subdivision two of this  
20 section, because of extraordinary circumstances, will not give him  
21 adequate compensation, application for greater compensation may be made  
22 upon affidavit with written notice and an opportunity to be heard to the  
23 claimant or plaintiff and other persons holding liens or assignments on  
24 the recovery. Such application shall be made to the justice of the trial  
25 part to which the action had been sent for trial; or, if it had not been  
26 sent to a part for trial, then to the justice presiding at the trial  
27 term calendar part of the court in which the action had been instituted;  
28 or, if no action had been instituted, then to the justice presiding at  
29 the trial term calendar part of the Supreme Court for the county in the  
30 judicial department in which the attorney has an office. Upon such  
31 application, the justice, in his discretion, if extraordinary circum-  
32 stances are found to be present, and without regard to the claimant's or  
33 plaintiff's consent, may fix as reasonable compensation for legal  
34 services rendered an amount greater than that specified in the schedule  
35 set forth in subdivision two of this section, provided, however, that  
36 such greater amount shall not exceed the fee fixed pursuant to the  
37 contractual arrangement, if any, between the claimant or plaintiff and  
38 the attorney. If the application is granted, the justice shall make a  
39 written order accordingly, briefly stating the reasons for granting the  
40 greater compensation; and a copy of such order shall be served on all  
41 persons entitled to receive notice of the application.

42 5. Any contingent fee in a claim or action for medical, dental or  
43 podiatric malpractice, OR IN ANY CLAIM OR ACTION FOR PROPERTY DAMAGE OR  
44 PERSONAL INJURY, INCLUDING DEATH, brought on behalf of an infant shall  
45 continue to be subject to the provisions of section four hundred seven-  
46 ty-four of this [chapter] ARTICLE.

47 S 7. This act shall take effect immediately, provided, however, that:

48 (a) The amendments effected by the provisions of sections one and five  
49 of this act shall apply to subject actions commenced on and after such  
50 date; and

51 (b) The amendments effected by the provisions of section six of this  
52 act shall apply to retainer agreements executed on or after such date.