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# Recent Developments: Tuer v. McDonald: A Change in Medical Protocol Does Not Qualify for an Exception to the General Rule Barring Admission of Evidence of Subsequent Remedial Measures

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## *Tuer v. McDonald:*

In *Tuer v. McDonald*, 347 Md. 507, 701 A.2d 1101 (1997), the Court of Appeals of Maryland held that a change in medical protocol was inadmissible under Maryland Rule 5-407 as evidence of a subsequent remedial measure. Specifically, the court denied the plaintiff's contentions that defense testimony challenged the feasibility of the new protocol or placed the testimony at issue for impeachment purposes. The court ruled that the testimony was the product of a judgment call on the advisability of the new practice. In so holding, the court narrowed the impeachment exception and strictly limited the feasibility exception in the medical malpractice context.

Eugene Tuer ("Tuer") was admitted to St. Joseph's Hospital on October 30, 1992, after complaining of chest pains. Tuer was scheduled to have coronary artery bypass graft ("CABG") surgery on November 2, 1992 at 9:00 a.m. Drs. McDonald and Brawley ("Defendants") were the scheduled surgeons for Tuer's operation. After further complaints of chest pain, Tuer's cardiologist prescribed Heparin, an anti-coagulant, to stabilize his heart condition. In accordance with hospital protocol, Tuer stopped receiving Heparin at 5:30 a.m. on the morning of the surgery.

During trial, Dr. McDonald testified that the purpose of discontinuing Heparin three to four hours before surgery was to allow the blood to coagulate. He explained that during the first stage of CABG surgery, the jugular vein is punctured and there is an inherent 5-10% risk of an inadvertent puncture of the carotid

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artery. Dr. McDonald stated that it was critical for patients not to have Heparin in their blood prior to surgery because a puncture of the carotid artery could cause a serious bleeding problem.

The surgeons delayed Tuer's surgery to attend to another patient in critical condition. They decided not to provide Heparin to Tuer during the period of delay. Tuer went into cardiac arrest at 1:00 p.m. After seven hours of surgery and other resuscitation efforts, Tuer died. Following his death, the defendants changed their procedure for discontinuing Heparin for patients with unstable angina, Tuer's condition. Under the new protocol, patients receive Heparin until they go into surgery.

At trial in the Circuit Court of Maryland for Baltimore County, Mary Tuer ("Plaintiff"), the surviving spouse of Tuer, made two efforts to introduce the defendants change in protocol into evidence through the adverse witness testimony of Dr. McDonald. First, she sought to use the new protocol to prove the feasibility of her husband surviving CABG surgery with Heparin in his blood. Defense counsel's objection to this line of questioning

was sustained by the court, but Dr. McDonald stated that he believed it would have been unsafe to restart the Heparin during the delay. Plaintiff then attempted to use the new protocol to impeach Dr. McDonald's statement. The court rejected the plaintiff's impeachment argument and entered judgment for the defendants. The Court of Special Appeals of Maryland affirmed the trial court's decision. The Court of Appeals of Maryland granted certiorari to review the trial court's exclusion of the evidence.

The court of appeals began its analysis by examining the development of Maryland law on the admissibility of subsequent remedial measures before the adoption of Maryland Rule 5-407. *Tuer*, 347 Md. at 516, 701 A.2d at 1105. Giving the common law reasoning behind the exclusion of later adopted measures, the court stated that introduction of latter taken measures places an unjust interpretation on the defendant's actions and offers an incentive for continued negligence. *Id.* at 517, 701 A.2d at 1106 (citing *Columbia v. Hawthorne*, 144 U.S. 202 (1892)). Under *Columbia*, evidence of a subsequent remedial measure was excluded as an admission of liability or proof of negligence. *Id.* at 518-21, 701 A.2d at 1106-08. Maryland courts followed the Supreme Court rule laid out in *Columbia*, but an exception to the exclusionary rule developed. *Id.* at 518, 701 A.2d at 1106.

The court noted that evidence became admissible to show that the defendants departed from the proper standard of care. *Id.* at 520, 701 A.2d at 1107 (citing

*Blanco v. J.C. Penny*, 251 Md. 707, 248 A.2d 645 (1968)). In *Blanco*, the plaintiff introduced evidence of the defendant placing decals on plate glass panels after the plaintiff sustained an injury by walking into the glass panel. *Id.* The evidence was admitted, not as an admission of negligence, but to show a deviation from the proper standard of care due at the time of the injury. *Id.*

Turning to an analysis of the drafting of Maryland Rule 5-407, the court offered the text of the Maryland statute and stated that the Rules Committee recommended the adoption of the substance and interpretation of the Federal Rule of Evidence 407. *Id.* at 521, 701 A.2d at 1108. In endorsing the new rule, the Committee made it clear that the standard of care exception was not part of the rule. *Id.* at 522, 701 A.2d at 1108. The two justifications for excluding the exception were: 1) that subsequent changes are equally compatible with an accidental injury or contributory negligence; and 2) the public policy of encouraging individuals to add safety measures whenever possible. *Id.* (citing Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 225-226 (1973)). The Maryland Rules Committee believed the standard of care exception would essentially become the rule and did not add it to the list of exceptions. *Id.* at 522, 701 A.2d at 1108.

Next, the court reviewed Plaintiff's arguments for admission of the change in protocol into evidence. *Id.* at 524, 701 A.2d at 1109. Plaintiff's first contention was that Dr. McDonald's testimony challenged the feasibility of the new protocol. *Id.* at 524, 701 A.2d at 1109. Maryland Rule 5-407(b)

permits evidence of a subsequent remedial measure when it is introduced to prove the feasibility of the change, but only if the defendant disputes the feasibility. *Id.* A problem arises when the defendant offers an explanation for not making a change earlier and the plaintiff asserts that the explanation is tantamount to a feasibility challenge. *Id.* at 527, 701 A.2d at 1111. The court noted that the issue was whether Dr. McDonald's judgment call controverted the feasibility of the change in protocol. *Id.* at 528, 701 A.2d at 1111.

Under normal circumstances, Dr. McDonald's statement that he believed restarting the Heparin would be unsafe, would ordinarily suffice as a challenge to the feasibility of the measure. *Id.* However, the court determined that in a medical context the standard is different. *Id.* The court characterized Dr. McDonald's testimony as the product of a balancing test between that which was medically possible and that which was advisable under the current circumstances. *Id.* at 529, 701 A.2d at 1112. Observing that "virtually anything can physically be done to the human body," the court determined that Dr. McDonald was merely stating that which was medically not advisable, but still feasible. *Id.* at 528-29, 701 A.2d at 1111-1112.

Next, the court addressed Plaintiff's effort to fit the change in protocol into the impeachment exception under Maryland Rule 5-407(b). *Id.* at 529, 701 A.2d at 1112. The prevailing view is that the impeachment exception must be read narrowly. *Id.* Proposing examples of simple defendant statements that could logically be impeached with a subsequent measure, the court asserted that

subsequent remedial measure evidence is usually not permitted to show a minor discrepancy in the defendant's testimony. *Id.* at 530, 701 A.2d 1112. Although a contradiction can always be illustrated, the issue is the nature of the contradiction. *Id.* While rejecting the plaintiff's claim, the court reasoned that the hospital's change in protocol after Tuer's death does not suggest that the defendant's believed they acted inappropriately. *Id.* at 532, 701 A.2d at 1113. The court concluded by stressing that the kind of reevaluation that occurred in this case was precisely the process that Maryland Rule 5-407 was designed to promote and protect. *Id.*

In *Tuer*, the court of appeals held that a doctor's testimony, regarding the imprudence of the use of a different medical procedure, was not a challenge to the feasibility of that procedure. Additionally, the court ruled that the doctor's testimony regarding the dangers inherent in the new procedure did not open the door to impeach the testimony. These rulings prevented the plaintiff from introducing the change in protocol as an exception to the general bar against admission of subsequent remedial measures. The court's holding created a safe haven for medical professionals in malpractice cases. Under *Tuer*, medical professionals can admit the alternate procedure was feasible, but, in their opinion not advisable. Standing on the new middle ground, medical malpractice defendants will be afforded the protection of Maryland Rule 5-407(a). Under *Tuer*, the testimony will be deemed a judgment call, not a challenge to feasibility.