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Medical Malpractice Law: At a Glance

Defining Medical Malpractice

Lawsuits alleging that a person failed to use expertise, training or knowledge "outside the ken of the average person" are "professional negligence" cases. "Medical malpractice" cases are lawsuits alleging professional negligence against licensed healthcare providers. The patient (and/or representative) is the plaintiff and the healthcare provider is the defendant.

Affidavit Requirements

- In order to file a medical malpractice lawsuit, the plaintiff must file an affidavit signed by someone of the same profession along with a Complaint. The affidavit must set forth: (1) the qualifications of the person signing the document ("affiant"), and (2) at least one act of negligence the defendant allegedly committed (O.C.G.A. § 9-11-9.1).
- The affiant need not practice in the same specialty as the defendant. The affiant must have been providing the care at issue for three to five years prior to the alleged negligence. A physician may generally provide expert testimony against a nurse or allied health professional, but such persons may not provide expert (opinion) testimony against a physician (O.C.G.A. § 24-7-702).
- An affidavit may be filed either: (1) at the time the lawsuit is filed or (2) 45 days after the lawsuit is filed if the plaintiff's attorney files his own affidavit stating that he was retained 90 days or less before the statute of limitations expires on the claim (O.C.G.A. § 9-11-9.1).

Claim	Description
Consent	Failed to advise the patient of risks of the treatment
Battery	Treated without patient's consent
Fraud	Misled the patient into receiving treatment
Breach of Contract	Failed to achieve promised results
Intentional Act	Intended to harm patient
Failure to Supervise	Failed to provide staff qualified to treat the patient
Vicarious Liability	Liable for acts of employees and agents

Protected Information	
• Communications:	
- From patient to physician	No "privilege," HIPAA protects
- From patient in "psycotherapuetic" context	Protected without patient permission even if HIPAA permits
- From client to attorney	Privileged
- Between physician and other providers about a patient	HIPAA precludes unless actively treating
• Patient's health information	HIPAA protects

Negotiating Settlement

- An offer to resolve or settle a claim may not be used against a provider (O.C.G.A. § 24-4-408).
- An insurance company has a duty to act in good faith by giving equal consideration to both the interests of its insured and itself. In Georgia, many, but not all, standard policies require the insured's consent before the insurer may negotiate or settle the case.
- An insured may demand that its insurer settle a case within policy limits. If the insurer does not then attempt to settle within policy limits, and the verdict exceeds policy limits, the insured may have a "bad faith" claim against the insurer.

Time Limits on Lawsuits

The statutes of limitation and repose limit the time a patient has to file a lawsuit. A patient has two years from the date he learns he was injured *but* no more than five years from the date of treatment. Practically, this works out to two years from the date of treatment unless the case involves a failure to diagnose a progressive disease. In those cases, the patient has two years from the "manifestation of symptoms." Children who have claims based on treatment before they turned five have two years from their fifth birthday (O.C.G.A. § § 9-3-71 to 73).

Venue

The plaintiff must sue the defendant in the county in which the defendant resides. If there are multiple defendants, the plaintiff may bring suit in any county where at least one of the defendants resides. A corporation or medical practice "resides" in any county where it has a registered agent or conducts business.

Responding to Initial Papers

A defendant has 30 days from the date he is served with the complaint to respond to a complaint filed in state court (O.C.G.A. § 9-11-12 (a)), 20 days in federal court. Defendants must also answer questions from the plaintiff that may be served with the complaint, in the form of "Interrogatories," "Requests to Produce" or "Requests to Admit" (O.C.G.A. §§ 9-11-34 to 36). Contentions in these documents may be deemed to be "**admitted**" by a defendant who fails to timely respond.

Allocating Fault

Multiple healthcare providers can be sued in one lawsuit and the jury will consider the fault of all defendants at once. A defendant may file a "notice of nonparty fault" any time before 120 days prior to trial and identify any additional people or entities whose fault the jury should consider (O.C.G.A. § 51-12-33). The jury will receive a form that lists defendants who defended the case through trial, defendants who were named and settled and any designated "non-parties." The jury must indicate which, if any, of the people or entities listed was negligant and the portion of the plaintiff's injury each negligent party caused. Non-parties and parties who have already settled do not have to pay the plaintiff any money, even if the jury finds them all at fault. Defendants are liable to the plaintiff for their proportionate shares of the verdict. The verdict will be discounted by the amount a plaintiff's own negligence contributed to the injury. If a plaintiff was more than 50 percent responsible, the plaintiff will receive nothing (O.C.G.A. § 51-12-33(g)).

Apology v. Admission

A provider's apology is not admissable in a trial (O.C.G.A. § 24-4-416), i.e., "I am sorry [this] happened." A provider's admission is admissible in trial, i.e. "This is my fault."

Caps on Damages

The amount of money a plaintiff seeks to recover in a lawsuit is her "damages." Compensatory damages compensate the plaintiff for injuries suffered and include lost income, medical expenses and noneconomic damages. **The amount of noneconmic damages is not capped**. A plaintiff may also seek punitive damages. For a jury to award punitive damages, a plaintiff must show the defendant acted with **"conscious disregard**" for the welfare of the patient. The jury may award up to $250,000 in punitive damages. If the plaintiff shows the defendant acted with a specific intent to harm, the amount of punitive damages is not capped. (O.C.G.A. § 51-12-5.1).

Emergency Room Statute

If the plaintiff's lawsuit arises out of emergency medical care provided in a hospital emergency department or obstetrical unit or in a surgical suite immediately after the evaluation in the emergency department, the plaintiff must prove, by clear and convincing evidence, the physician or other healthcare provider was "grossly negligent," i.e. failed to exercise even slight diligence or care (O.C.G.A. § 51-1-29.5).

Prior Lawsuits

Prior malpractice lawsuits against a healthcare provider or facility are not admissible in a trial unless the healthcare provider had multiple lawsuits of the same type alleging the same injuries. The standard is "substantial similarity."

Reporting Requirements

Insurance companies must report to the Georgia Composite Medical Board payment of **any** medical malpractice judgment or settlement (O.C.G.A. § 33-3-27). A judgment is public information. A settlement becomes public when a physician is required to list them on his physician profile.

Any settlement or judgment paid on behlf of a physician is also reported to the National Practitioner Data Bank (NPDB). This information is only available to credentialing entities.

The Board will investigate any judgment or settlement of a medical malpractice claim greater than $100,000, or physicians with two or more previous malpractice judgements or settlements paid on their behalf (O.C.G.A. § 43-34-8).

Vicarious Liability

A medical employer is liable for professional negligence of any employee. Whether a healthcare provider is an employee or agent depends on the control the practice or hospital has over the time, manner or method of the provider's work. A hospital may avoid liability for the acts of providers whom the hospital identifies, by clearly posted signs or signed acknowledgement from the patient, as independent contractors.

A healthcare provider MUST obtain written informed consent if the treatment involves:

- the administration of general anesthesia, spinal anesthesia or major regional anesthesia

OR

- amniocentesis (sampling amniotic fluid using a hollow needle inserted into the uterus)

OR

- a diagnostic procedure involving the intravenous or intraductal injection of a contrast material

by disclosing: (1) the diagnosis requiring the proposed procedure; (2) the nature and purpose of the procedure; (3) the material risks of the procedure generally recognized and accepted by physicians which, if disclosed, could reasonably be expected to cause a patient to decline the procedure; (4) the liklihood of success of the procedure; (5) the practical alternatives to the procedure; and (6) the patient's prognosis if the procedure is declined.