

A BRIEF ANATOMY OF A MICHIGAN MEDICAL MALPRACTICE CASE

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Litigation is new territory for most people, particularly with personal injury and medical malpractice claims. The following is an attempt to provide a general outline of how a case progresses, the facts and the law the attorney must weigh, and why this process is often so protracted. Also included are some, but by no means all, of the technical hurdles that must be addressed along the way.

Medical malpractice cases are civil cases. These are not criminal cases. In a civil case, the plaintiff is the patient (and possibly the spouse and minor children). If the patient is deceased, the plaintiff is the personal representative of the deceased's person's estate. The defendants are the doctors, hospitals, and other health care providers that the plaintiff claims negligently caused the injury to the patient. The damages available are monetary. This is in contrast to a criminal case, where the plaintiff is the government, and the defendant, if found guilty, can go to prison. In medical malpractice cases, if the defendant is found negligent, the defendant must pay the award the jury grants the plaintiff—the defendant will not go to jail or lose his or her medical license in the civil case. Medical malpractice cases are a special type of civil case in which the plaintiff is required to have, at the time the case is filed, significant substantiation for the allegations that are made against the defendants, including pre suit reviews by expert physicians, and signed affidavits detailing the manner in which the case is meritorious. Preparation for this substantiated filing starts at the initial interview.

Investigation Stage I – Initial Interview. Often we have a nurse perform the initial interview. It has been our experience that this is the most efficient manner to screen cases. Even with experienced attorneys, the nurses are more knowledgeable about the medicine and better able to ask the key questions at the initial client contact. In addition to the increased quality and efficiency of the initial interview when performed by a nurse, there is a practical consideration. For attorneys handling these cases, the work is very labor intensive. To prepare these cases for trial, there are pleadings that must be drafted, motions to argue in court, depositions of witnesses to be taken, experts that must be consulted, and the actual trial of cases, just to name a few of the many time-consuming tasks of working on these cases. Since we agree to investigate only about 1 in 20 cases interviewed, if the attorney were to interview all the new prospective clients, there would be little time to prepare the cases that go to court.

Investigation Stage II – Initial Evaluation. After the nurse conducts the initial interview, she prepares a detailed memo outlining the pertinent information, usually within a week after the interview. We then meet with the nurses, a paralegal, and often another attorney. At that time we discuss the merits of the potential case, medical and legal issues, and medical research that may have to be done on the issues in the case. We then make a decision whether the case has sufficient legal and medical merit to justify going to the next step, getting the medical records.

Investigation Stage III – Gathering the Medical Records. Obtaining all of the pertinent medical records is critical to evaluating such claims. While the client's recollection of events is important, the medical records are the foundation of any claim. We cannot proceed beyond this point until we have all (a complete copy) of the records for the care in question, and often, some of the subsequent treatment records. Some cases require that we get x-rays, pathology slides or other studies that are not part of what is traditionally the medical record. This can be a tedious process that can take weeks and sometimes months. Hospitals are supposed to produce these records within 30 days from the receipt of a proper HIPAA medical authorization. Realistically, this does not routinely happen. However, once we do receive the medical records, to insure that we have a complete copy, a nurse organizes and reviews what has been produced. It is not unusual, whether intentional or a clerical error, that the nurse finds critical pages missing. That requires that we request additional records, and this consumes more time. Again, this is a critical step, as an incomplete record will often result in an incomplete and faulty analysis of the case. Once we are assured that we have a complete set of the records, a nurse will review and analyze the records in an attempt to determine if the client's concerns about the care have merit. With the same people who originally met, another meeting is held. We again discuss the legal and medical merits to determine if we should go to the next step.

Investigation Stage IV – Analysis of the Medical Records and the Legal and Medical Merits of the Case. If at the second meeting we determine there is likely legal and medical merit to the case, the nurse will then be asked to prepare a chronological summary of the medical care, the issues that need to be addressed, and research any medical literature that may help in this determination. Depending on the complexity of case, this summary will vary from 5 to 30 pages. Assuming this analysis and summary still indicates the probability of legal and medical merit; a decision is then made as to which experts the records should be sent. If we go to the next step without this analysis, considerable time and money is likely to be wasted, for the client and the attorneys.

Investigation Stage V – Experts' Reviews. Medical malpractice cases are expert dependent. One cannot pursue such cases without the appropriate experts. If one does not have expert testimony to support the claims, the court is required to dismiss the case. After April 1994, and the so-called Tort Reform changes to the law, the experts that may testify in support of a case have been

strictly limited. If the defendant is a specialist, the expert must also specialize in the same area. If the defendant specialist is board certified in the specialty, the expert must likewise be board certified in the same specialty. This requires extensive background checks on the potential defendants and the experts to whom we send the case. If there is more than one potential defendant in a case, and of different specialties, an expert must be obtained for each. By way of example, a doctor in internal medicine usually cannot testify against a nurse, an OB/GYN cannot testify against a nurse midwife, nor can a general surgeon testify against an orthopedic surgeon. The more potential defendants, the more experts that will be required. In many cases, we also need experts to discuss complications a patient suffered, other medical problems a patient has that may impact on the issues, or the feasibility of alternative treatments.

Expert witnesses are very expensive. The vast majority of litigation cost in a medical malpractice case is for experts. Physician experts charge us hundreds of dollars per hour for their time, similar to their customary charges when practicing medicine. In a medical malpractice case, we must compensate our experts for their time when initially reviewing the records, for preparing for depositions, and for preparing and appearing at trial. For this reason, the potential recovery (the damages in the case) must be balanced against the cost of pursuing the case. It makes no sense for the client or the attorney to pursue a case if the costs will approach or exceed the anticipated settlement value or jury verdict. In addition, there are no guaranteed successful medical malpractice cases. For many reasons, the best of cases can be lost. The risk of losing, or the probability of winning, must be balanced against the cost of the litigation and the potential recovery. Unfortunately, given that there have been caps on noneconomic damages in Michigan since 1994, many attorneys have concluded that attempting to pursue even a good case, which has a potential value of less than \$400,000, cannot be justified.

Assuming the case reaches this point, the records are then sent to an expert. We attempt to send the records to the most critical experts first. In most cases, we will minimally need 3 or 4 experts. We do not send the records to all the experts at one time, but to the pivotal experts first. We have found that this saves considerable time, as well as money. If the pivotal expert cannot support the case, it makes little sense to go to the secondary experts. For example only, in a birth injury case, the defendants may include the OB/GYN, a nurse, a neonatologist, a resident physician, and an anesthesiologist. The OB/GYN's actions are often the key to the care. If the expert finds nothing deficient in that care, the rest of the case is likely to fail and, therefore, a waste of time and money to send to the other experts.

The experts we consult are actively practicing in their area of specialization, as they are required to do to serve as an expert witness. However, because they have full-time employment, the review of the medical records is often done at night or on the weekends. Although we try to only work with those who are reasonably prompt, this review process is seldom accomplished in less than 3 to

4 weeks. Some clients anticipate a response within days after the records are sent; this seldom happens.

The time it takes to investigate each case will differ. Some cases can take 6 months to review, others can take as long as 2 years, depending on the complexity of the case, whether we can get the records promptly, availability of experts, and a multitude of other legal and medical issues.

Legal Considerations. Some clients feel that because they have had a bad or unexpected outcome, the doctors and health care providers should be responsible. That is not the law. When a patient files a lawsuit, they have a heavy burden of proof at the time of trial. The defendant has no obligation to prove they acted appropriately; the patient-plaintiff has the burden of proving the merits of the case. The plaintiff's burden of proof has 3 elements, and all 3 must be proven to the jury's satisfaction to win. If the patient-plaintiff fails to prove any 1 of the 3, the plaintiff's case will be dismissed. This burden of proof includes the following elements:

- (1) That the defendant doctors, nurses or hospital were negligent, or that they failed to act in accordance with the acceptable standard of care. The standard of care in Michigan is defined as doing what the "average" physician or nurse would have done under the same or similar circumstance. As mentioned, the only way this can be done is by expert testimony. The jury is not permitted to speculate whether the care was appropriate; they must listen to the expert's testimony. If the plaintiff's expert testifies that the care was contrary to the standard of acceptable care, and the defendant's experts testify it was acceptable, then the jury must decide which expert's explanation is more believable.
- (2) The plaintiff must prove that the defendant's negligence was the proximate cause of the injury suffered. The definition of "proximate cause is that which, in a natural and continuous sequence, unbroken by new and independent causes, produces the injury." Proximate cause is often hotly disputed in medical cases. Unlike an auto case where the driver was healthy when rear-ended, then had a broken arm, and the causal connection is obvious, in medical cases many patients come to the hospital because they already have a medical problem. Secondly, most medical procedures have known complications that happen when everything is done appropriately. Therefore, many medical cases are defended on proximate cause, even when the negligence, or violation of the standard of care, is reasonably clear.

An example of this is a case I defended when I represented hospitals earlier in my career. With a fractured hip on a patient who had been in an auto accident, the doctors put the wrong leg in traction – it was 2 weeks before they discovered their mistake. Our defense was the

immobilization of the opposite hip actually immobilized the fractured hip, the fracture healed properly and, luckily, in proper alignment. There was clearly negligence, but there was no proximate cause or injury due to the negligence. The plaintiff lost.

There is also a quantitative element to proximate cause. The plaintiff must show that, but for the defendant's negligence, there was a greater than 50% probability that the injury would not have happened. If a patient is seen in the ER with chest pain, is not properly treated, and the patient dies, the family must show that with proper treatment the prognosis for survival, if treated in the ER, was greater than 50%. If the experts testify that the chance of survival was only 49% with proper treatment, the plaintiff's case fails on this element. Saying the results would "possibly" been different with better care is not enough.

This greater than 50% threshold has been vigorously debated in our courts for the last few years. It is most problematic in cases of misdiagnosis. When there is a misdiagnosis (and failure to treat), the patient must prove that the change in prognosis from the time of the misdiagnosis to the diagnosis and treatment changed more than 50%. The case that caused all the controversy in 2002 was a breast cancer case. There was a failure to diagnose a breast lesion. At the time, with proper treatment, the prognosis was about 85% for a good outcome. By the time the diagnosis was made, the prognosis had fallen to about 65%. Even if the 20% lost chance resulted in death, the court held this was insufficient change to meet the greater than 50% test.

- (3) The plaintiff must also prove all elements of damages. If you cannot work, need medical care, or have incurred, or will incur medical bills in the future, that must be proven through expert testimony. In the absence of an expert testimony, the jury will not be permitted to speculate as to what damages were suffered, past or future.

There are caps on noneconomic damages (pain, suffering, loss of enjoyment of life, etc.) No longer are there huge verdicts because of pain and suffering. Caps on noneconomic damages are not only serious limitations on your ability to be compensated for your injuries, but can cause serious problems at trial if the jury decides that they will allocate most of your award to noneconomic injuries, and do not give the economic losses their due consideration. The jury is not told that there are caps on their award, but after a verdict, the judge makes a determination which cap applies and reduces the award if it exceeds the present applicable level. The jury may decide that they do not want to spend the time and effort to calculate the anticipated yearly economic damages for medical expenses and lost wages, and will instead simply fill in a large amount for "pain and suffering" with the anticipation that this will compensate for the future medical bills and lost income. Unfortunately, the judge will have to reduce the

non-economic (pain and suffering) award to the cap level, leaving the plaintiff with little or no recovery for their economic losses.

We give you these explanation to demonstrate that there is far more involved in getting to a satisfactory recovery than just proving the case.

There are 2 different levels of caps. The lower cap is presently \$411,300.00; the higher is \$735,500.00.¹ The higher cap only applies if the plaintiff is hemiplegic (paralysis of one half of the body) paraplegic (paralysis of both legs) or quadriplegic (paralysis of all four limbs) resulting in a total permanent functional loss of 1 or more limbs caused by injury to the brain or the spinal cord. If read carefully, this last sentence would make amputation of the wrong leg a lower cap case – neither the brain or spinal could would be involved. This definition has not been directly tested by an appellate court decision since its enactment in 1994, but given our present court's strict, literal interpretation of statutes, total and permanent are likely to mean just that. What is more problematic is what "functional loss" means. If one can move one's legs, but not walk without assistance, is that a functional loss? We would argue that it is, but we have a very conservative Supreme Court. The higher cap also applies if the plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living. Note that death is not an exception to the lower cap. This means that even if a patient dies as the result of medical malpractice, the noneconomic damages may be limited to the lower cap, depending on the specific circumstances related to the patient's condition prior to death. Lastly, the higher cap applies when there has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

It is also important to note that the cap applies to all plaintiffs against all defendants—it is not a per person cap, nor can we obtain additional noneconomic damages by adding additional defendants. One cap per case is the rule.

Statute of Limitations. There is a time limit when cases must be filed; this called the statute of limitations. There are multiple exceptions, but the general rule is the case should be filed 2 years from the date of the alleged negligence.

If the claim involves a wrongful death, the time may be longer, or 2 years from the issuing of the LOA (Letters of Authority) from the Probate Court appointing the Personal Representative, but never longer than 5 years from the negligent act.

Minors under the age of 8 years of age at the time of the malpractice have until their 10th birthday to start their case.

¹ Revised January 24, 2011 per MCL 600.1483.

There is also an exception for cases where it would be difficult for the patient to know there was medical negligence. This exception is called the "discovery rule". The patient has 6 months from the date "the claim was or should have been discovered" but never more than 6 years from the date of negligence.

A claim not filed within the statute of limitations time period is forever barred.

Notice of Intent to File a Claim (NOI). In 1994, part of the medical legislation included another hurdle before one can file a case. Now, one is required to file what is called a NOI (Notice of Intent to File a Claim). This is very similar to the complaint that is filed to start the case. We must send this NOI (a detailed explanation of the allegations of negligence, what each health care provider did that was negligent, specifically how that caused the injury and the damages that resulted) to every party that may be later named in the case. We often name everyone that looks as though they may be involved as they cannot be named as parties later if they are not in the NOI. Therefore, you may see names in the NOI that are unfamiliar or people that we did not originally discuss as defendants.

The court's interpretation of this statute has required that we be very specific in our statements of the claim. For that reason, unless there is insufficient time, we try to do this after we have had the case reviewed by our experts. Often this NOI can be 15 to 30 pages. The original purpose of the NOI was to see if the case could be settled without the cost and time of litigation. While the intentions may have been good, this seldom happens. There are too many disputed issues that can only be sorted out with cross-examination and experts testifying, and this only happens once the case is filed.

What the NOI does, however, is further delay the filing of the case. The NOI must be sent before a case can be filed. After the NOI is sent, one must wait 182 days (6 months) before we can file suit. If the NOI is filed within 6 months before the 2-year time period for filing the complaint, the NOI tolls (stops) the running of this time period (6 months) then it starts running again after the 6-month waiting period expires. This often results in cases not being filed until 2 ½ years or more after the alleged negligent care. If the NOI can be prepared and sent 18 months before the 2-year statute of limitations, then the waiting period can expire before the 2 years and the case can be filed earlier. If this sounds confusing, you are in good company and is another example of how the law in this area has made these cases a logistical nightmare.

Affidavits of Merit (AOM). Although the above NOI period may initially sound like a waste of time, there are a number of important details being finalized in preparation for filing the lawsuit at the end of the 6 month wait. One of these is what is referred to as the Affidavit of Merit (AOM).

Another aspect of the 1994 medical malpractice legislation was the AOM. Every case filed in Michigan must be accompanied by an affidavit signed by a physician who qualifies as an expert, who has reviewed all of the pertinent medical records,

who attests that the defendant violated the standard of care, and that substandard conduct caused a particular injury. These are the 3 elements for which the patient has the burden of proof as described above under Legal Considerations.

The AOM has been the focus of many Appellate Court decisions in the last few years. The requirements for this pleading are specific and unforgiving. There must be an affidavit for each defendant named. If a defendant is a specialist, the affidavit must be signed by a specialist. If the defendant is certified by a nationally recognized board of specialist, the expert must have the same certification. Even if the expert and defendant have identical qualifications, there are other factors that must be checked, such as does the expert perform the same procedure, treat the same condition, or use the same medical device as was involved in the case at issue. In a case with multiple defendants, this process can consume much of the 6 months after the NOI is sent. This AOM must be filed with the complaint when commencing the formal action.

Filing of the Complaint to Trial: Pre-Trial Discover Period. Medical malpractice cases, with rare exceptions, must be filed in the county where the medical care was provided. Although this may seem logical and even convenient for the patient, it is also an advantage for the defendants as the case will be heard by a judge and jury who will likely know or be familiar with doctors and hospital.

The period of time after the case is filed, and before trial, is called the period for "discovery". This means literally that each party is permitted, within the bounds permitted by MCR (Michigan Court Rules) to discover what documents the other party may have, what witnesses the other side may call, to take the depositions² of each others' potential witnesses, and to basically prepare the case for trial. Each Court is monitored by the Michigan Supreme Court to insure that cases move in a timely fashion. Years ago, this discovery period may have taken 3 to 4 years. Presently, courts attempt to have the parties ready for trial within 18 months after the filing of the complaint. This time may vary, depending on the court's schedule and special circumstances that each case may present, but 18 months is a good rule of thumb.

During this 18-month preparation time, usually after the doctors, nurses and experts have had their depositions taken, the court will likely order that the parties meet with an independent facilitator to see if the case can be settled. This is called medication or facilitative mediation. All the parties and their attorneys are present. The facilitator will then meet individually with each of the parties to

² A deposition is simply a statement made under oath. In the pre-trial period, this is done in an informal setting, usually in the office of one of the attorneys. Each attorney will be present, along with a court reporter. The witness is sworn to tell the truth as if they were in court. All the attorneys will then ask questions about the witnesses' knowledge of the facts of the case. In a medical malpractice case, many of the questions will involve the elements the plaintiff is required to prove – negligence, proximate cause and the damages.

see if there is a figure at which the case can be resolved without trial. This process is usually per the agreement of the parties, but is sometime ordered by the court.

In addition to facilitation, every civil case in Michigan must go through a process called case evaluation. This is usually scheduled from 3 to 6 months before trial. The court appoints 3 case evaluators. One is an attorney who customarily represents defendants, one who customarily represents plaintiffs and one who is described as a neutral, or who does not do personal injury or medical malpractice litigation. Before the case evaluation date, each party submits a detailed summary of the facts, the testimony, and attaches all the pertinent documents. No witnesses are present. Although all parties are entitled to be present, they seldom attend as only the attorneys can speak. Each argues the merits of their case after which the case evaluators meet for 5 to 15 minutes to decide the value of the case. They put a number on the case based on the presentation, the arguments and their experience as to what the case is worth. This is another attempt to settle the case.

After the case evaluation, the parties have 28 days to accept or reject the case evaluation figure. If both parties accept, the case is settled. If one party rejects the figure, the case goes forward to trial. However, if a party rejects the award, there are consequences if they go to trial and the award as to them is not better by at least 10 percent of the award. The consequences are they will have to pay the other side attorneys fees and costs incurred by the other side from the date of the rejection. Because the cost and time to prepare and try a case can be substantial, the risk is considerable, particularly to the patient who is unlikely wealthy enough to personally afford the cost of litigation. In medical malpractice cases, the costs awarded and accessed against the patient will often be from \$100,000 to as high as \$250,000, and sometimes higher.

For all of the above reasons, the most important decision an attorney makes in a medical malpractice case is whether to take the case, or recommend that the client file a lawsuit. Contrary to the media spin, promoted by the insurance lobby, this is not a "lottery" but a serious business decision.

Trial. In Michigan, the case is presented to 6 jurors (although 7 or 8 may be impaneled in the event someone has to leave due to illness or a family emergency). The plaintiff (patient) presents their case first after which the defendant presents their witnesses and experts as to why they did nothing wrong, or if they did, their actions did not cause the patient's injury. Unlike a criminal case, where the verdict must be unanimous, when 5 of the 6 jurors agree on a verdict, the case is over.