Published September 2013 in *The Hennepin Lawyer,* membership publication of the Hennepin County Bar Association. Used with permission.
612-752-6000 thl@hcba.org

Medical Malpractice: Elements, Tips, and Pitfalls

What is a Medical Malpractice Lawsuit?

A young child is brought by her concerned parents to a doctor because of a lump that has appeared. The parents are reassured by the doctor not to worry; the lump is not cancer. Eighteen months later, the child becomes sick and is diagnosed with cancer. The lump turned out to be cancer that has now spread. The child dies two years later despite extensive treatment. What, if any, recourse does the family have for the death of their beloved daughter? Sue for medical malpractice.

In a medical malpractice lawsuit, a patient alleges that he or she was injured due to the negligence of a physician or other health care provider. Medical malpractice claims typically involve complex evidence including expert testimony on the standard of care as well as the nature and extent of the patient's injuries. The costs of litigation can be high for plaintiff patients as well as for the health care providers.

Patients want to sue health care providers for many reasons, not the least of which is a lack of communication between the providers and patients. In our firm alone, we typically field 250–350 calls each month from patients who feel that they have been wronged. In a substantial percentage of those inquiries, the root cause of the patient's angst is a lack of communication between health care provider and the patient. While a lack of good bedside manner can be distressing to a patient, it is not a sufficient basis for pursuing a medical malpractice lawsuit. Nor is a bad outcome, in and of itself, sufficient grounds to pursue a medical malpractice lawsuit. Good outcomes are not guaranteed in medicine and due to the complexity of the particular case, adverse or bad outcomes are not infrequent. Oftentimes it is difficult for lay people who likely have little to no knowledge of the subject matter involved in their care to understand that their bad outcome is not a sufficient basis to successfully pursue a medical malpractice claim.

So, if lack of appropriate bedside manner, failure of communication, and a bad outcome are not enough to successfully pursue a malpractice claim, what *is* sufficient to pursue a malpractice claim?

Elements of a Claim

A mistake in medicine will amount to malpractice only when the doctor's actions or admissions constitute a departure from accepted medical standards to be expected from a practitioner similarly situated. From a legal standpoint, a doctor's actions must be viewed prospectively, not with the benefit of hindsight. To establish a claim for negligent care and treatment in a medical malpractice action, a plaintiff must typically introduce expert testimony demonstrating: 1) the standard of care applicable to the particular defendant's conduct; 2) that the defendant departed from the standard of care; and 3) that the departure from the standard of care directly caused the plaintiff's injuries.[1] The law states that negligence by a professional health care provider is the failure to use reasonable care under the circumstances. Reasonable care is care that meets an accepted standard of care a practitioner in a similar practice would use or follow under similar circumstances. The failure to provide care that meets an accepted standard of care under the circumstances

Peter Schmit
Contributing Author

Mr. Schmit is a partner at Robins, Kaplan, Miller & Ciresi, who has tried and settled numerous significant cases for consumers of health care in MN, ND, WI, IA and SD.

would be negligence. A practitioner is not negligent simply because the efforts made are unsuccessful and a failure of treatment is not negligent if the treatment was accepted based on the information the practitioner had or reasonably should have had when the choice was made. The practitioner is not negligent simply because the efforts are unsuccessful, nor is an error in diagnosis negligent if the diagnosis was an accepted diagnosis based on the information a provider had or reasonably should have had when the diagnosis was made. A practitioner must use reasonable care to get the information needed to exercise his or her professional judgment.[2]

How Does One Establish Liability?

To establish liability in a medical malpractice action, one must begin by obtaining the facts. Facts will be contained in the patient's medical records, bills, interviews with the patient and family members and other sources. A lawyer must become intimate with the facts of the case and with the environment of activity surrounding the patient's care. As the lawyer, you must familiarize yourself with the medical subjects involved such that you have a firm understanding of the disease entity, how it should be diagnosed and treated, and what is the acceptable outcome. Unless you have a medical background—and even then, to some extent—this will require you to spend many hours performing and reviewing medical research from many sources. In order to successfully handle a malpractice claim, the lawyer must be in a position to understand complex medical issues and must be able to navigate the medical environment in an effective manner. An in-depth understanding is required not only to successfully pursue a malpractice case, but also to even recognize whether one of the hundreds of calls you may receive is one worth investing your time and money in.

A major and serious pitfall in the preparation of medical malpractice cases is a failure to become intimate with the environment of activity involved in the case. This mistake will cost you time and money in evaluating and pursuing meritless cases and, even worse, will allow health care providers to bamboozle you with facts and opinions not supportable by medicine nor common sense. If the practitioner does not have a firm understanding of the environment of activity, a physician witness or defense lawyer could provide an explanation that at first glance sounds reasonable but could have easily been shown to be false by a lawyer who had done his homework.

Experts

Finding well-qualified, competent and objective experts is one of the necessary elements in pursuing a medical negligence claim. It is not easy to find professionals who are willing to critique and perhaps testify that one of their brethren departed from accepted standards of medical practice. Finding and working with experts takes dedication and the utmost credibility in how you approach and handle this task. Reputations of law firms and particular lawyers can be irreparably damaged if the use of experts are not handled in an ethical and straightforward manner. The attorneys in the medical malpractice arena are a relatively small group and most of us know each other relatively well. You do not want to be known in this small community as the practitioner that uses unqualified and unscrupulous experts in an effort to pursue your claim. There are so-called experts out there who likely would be willing to testify to just about anything for the right price. Don't ever use such an expert if you want to be well-respected in the medical malpractice arena.

There are a number of sources to consider in finding an expert. Friends in the medical profession may be willing to review a case for you formally or informally and, if not, may be asked who they respect in the particular field. I always ask if I may use their name in reaching out to that individual. Many trusted reviewers are found this way. Another way is simply doing your homework and reviewing medical research and looking at the top authors in the field and contacting those individuals. As a general matter, physicians who are leading authors in their field enjoy educating people so they may well enjoy doing an objective review and educating you and perhaps a jury as to the appropriate standard of care and any violation. Be warned however that many of the leading authors in the field are incredibly busy and do not want to extend themselves even further by doing medical legal reviews. You also will run into any number of physicians who simply do not want to be viewed by other members of their profession as an expert witness.

Expert witness services should be used as a last resort because you cannot be certain of either the objectivity or the qualifications

Sliding Fee Rates for the Working Poor
Family Law and Social Security Disability Law

Emily Cooper

Cooper & Reid, LLC
ATTORNEYS AT LAW
www.cooperandreid.com
Tel: 612-353-4769
Info@CooperandReid.com
825 Nicollet Mall | Suite 950
Minneapolis, MN 55402

Tracy Reid

Accepting referrals no matter how challenging

of the doctor who reviews the case initially. Special scrutiny should be given to a service that does not charge an hourly rate but instead wants a portion of your contingency fee or of the clients proceeds in the event of substantial recovery on behalf of your client. In my career I've never utilized such a service as it is easy to envision the grueling cross-examination such a witness would endure from competent defense counsel.

Another valuable resource for experts is subsequent treating physicians. I often try to obtain the cooperation of the subsequent treating physician to at least informally discuss with me whether the care was appropriate and, if not, whether inappropriate care played a substantial part in causing harm. Be warned again, however, that often times subsequent treating physicians are unwilling or prohibited from commenting on standard of care due to the referral relationship from the potential offending provider. It is understandable that a subsequent treating physician who has a longstanding relationship with a particular referring physician or hospital or clinic would be reluctant to go on record as being critical of the source of referred business. Even in those situations, it is valuable to have an "off the record" consult because ultimately if the case proceeds, under Minnesota law the defense has the opportunity to have an informal discussion with the treating physician.[3] As plaintiff's counsel you have an opportunity to be present at such conference and at the conference, if the subsequent treating physician has opinions regarding the care provided, whether pro or con, they will be discovered. Thus, I believe it is preferable to find out what the subsequent treatment providers think before, versus after, commencing suit. You may get lucky and that subsequent treating physician will be willing to be a reviewing expert and, if supportive of the claim, a disclosed expert.

There are other professional groups consisting of lawyers who practice in the malpractice arena who share experts. Of course, part of being in that group is your responsibility to contribute to the list and if I am ever asked to do that, I obtain approval from the expert before submitting his or her name to any list.

Frequency of testifying and the impact it may have following effective cross-examination could be its own article. Suffice to say, I've seen frequency of testimony work both ways—helping the plaintiff and hurting the plaintiff. If a physician generates 50 percent or more of his or her income and spends 75 percent of their time doing forensic work, it raises questions regarding that witness's credibility to the jurors. On the other hand a physician who is utilized often must be well-qualified and thorough or else why would the witness continued to be used? I've seen that tactic effectively used by plaintiff's counsel during trial.

After obtaining complete medical records, diagnostic imaging and any other information the expert needs to review, a conference is usually held. During the conference the attorney must explore with the physician his or her opinions regarding standard, of care, how the caregiver did not meet the standard, and whether any departure played substantial part in causing harm. Many times physicians do not understand the "more likely than not" or "preponderance of evidence" standard so I often explain the standard as part of the conference. Reasonable degree of medical certainty in the medical legal arena is quite different than the decision making basis physicians typically use in their practice, so I often find it helpful to explain that basis at the start of the conference. A physician must be aware that any conclusions he or she reaches will be strenuously vetted by defense counsel and so I challenge my experts to support any conclusions they reach by peer-reviewed literature as well as by common sense. Opinions that are relatively soft or gray can, and often do, lead counsel into trouble a year down the road during preparation time for trial.

Causation

Once you have an expert that is able to describe the standard of care and how it was violated, you must establish causation. However difficult the liability issue may be, the liability is far easier to establish than the issue of whether his or her actions, in fact, caused harm to the patient. In the cases that our office has tried, there are numerous instances where negligence was found but causation was not. While it seems logical that if the doctor was negligent it caused harm, that is often not the case in the jury's eyes and most clients do not understand this concept. I often use a very simple example to illustrate this concept to a jury. Suppose a car runs a red light, smashes into a vehicle and injures the passenger. Running the red light is the liability that caused the crash that resulted in injury. There is a direct link between running the red light and the damage. The link is causation. However, if a car ran the red light and just missed another car, thereby avoiding injury, counsel could still establish negligence, but there is no causation between that negligence and any harm. There are many other examples that can illustrate this concept to help our clients understand it better.

You often need another expert to effectively comment on causation. For example, in a delayed diagnosis of cancer case you often will need a physician to establish standard of care (what should have been done given the signs and symptoms) but you also will need an oncologist to testify regarding the effect of the delay. In Minnesota, the jury is instructed that a "direct cause" is a cause that has a substantial part in bringing about the injury.[4] The Minnesota Supreme Court has applied the "substantial factor" test to determine whether a cause is direct. Under the "substantial factor" test, negligent conduct is the direct cause of harm to another if it is a substantial factor in bringing about the harm. There may be more than one direct cause of the injury and this occurs if the effect of the negligence of two or more persons or of a person and a force of nature work at about the same time to cause the injury. If this occurs, each may be a direct cause of the injury.[5]

Under this test, it is therefore sometimes very hard to prove that negligence was a substantial factor in bringing about the injury. For example, in infection cases it is often very hard to determine the moment when intervention would have substantially improved the outcome. In failing to diagnose cancer cases, it is an ongoing battle to determine how much delay is enough to establish causation. The recent *Dickhoff* case and loss of chance analysis and how that impacts causation is in and of

itself a subject for another article.[6] Traditionally, plaintiff's counsel argued that, if a delay in diagnosis in a cancer case caused a patient to go from more likely than not surviving (>50 percent) to more likely than not dying, you have met the causation hurdle.[7] Under a loss of chance analysis, the reduction in survivability, even if not from greater than 50 percent to less than 50 percent, is compensable if caused by negligence.

Damages

Damages recoverable in a medical malpractice mirror those that are recoverable in personal injury actions. Pain and suffering, lost wages, loss of earning capacity and—in a wrongful death context—loss of aid, comfort, companionship, and society are all recoverable in a malpractice claim. As in a personal injury action, the damages cannot be based upon speculation or guess, although absolute certainty is also not required. As the Minnesota Supreme Court stated in *Pietrzak v. Eggen,* "However it is not necessary that the evidence be unequivocal or that it establish future damages to an absolute certainty. Instead, the plaintiff must prove the reasonable certainty of future damages by a fair preponderance of the evidence. In short, the plaintiff is entitled to an instruction on future damages if he or she is shown that such damage is more likely to occur than not to occur."[8]

For future medical expenses, testimony as to what care and treatment is needed and the cost of such treatment will be obtained from one or more physicians. Cooperation from a treating physician makes this task a lot easier. In cases where the treating doctor will not cooperate, an independent medical exam may be needed. For a wrongful death case due to malpractice, photographs, memorials, videotape testimonials, and other means can be used creatively to describe the relationship the decedent had with the next-of-kin. Such items are of great help in painting a picture of what was lost and how the decedent enriched the lives of his or her family, and gives the jurors a basis for awarding substantial sums. In our experience, establishing damages is the least difficult element in a malpractice action.

In our experience, establishing damages is the least difficult element in a malpractice action.

Expert Affidavits

No other aspect of medical malpractice litigation has generated more motions, briefs, and orders than the law that requires expert affidavits. In order to comply with the requirements of Minn. Stat. §145.682, a plaintiff must serve an affidavit identifying each person who will be called as a "witness to testify with respect to issues of malpractice or causation," and disclosing "the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion."[9] It has been observed that the legislature's intent with this statute was to limit "meritless" or "frivolous" lawsuits.[10]

The Minnesota Supreme Court has provided further guidance as to the required content of a Minn. Stat. §145.682 affidavit. Plaintiffs are "expected to set forth…specific details concerning their experts' expected testimony, including the applicable standard of care, the acts or omissions that plaintiffs allege violated the standard of care and an outline of the chain of causation that allegedly resulted in damage to them."[11] "[B]road and conclusory statements as to causation and empty conclusions are insufficient."[12] A trial court's determination as to the sufficiency of the 145.682 affidavit is generally reviewed for an abuse of discretion.[13]

Despite having several opportunities to do so, the Minnesota Supreme Court has never once required that the expert who signs the Minn. Stat. §145.682 affidavit must have a precise overlap with the defendant physician in terms of education and training. A medical expert is competent to testify as an expert when that witness has both sufficient scientific knowledge of and practical experience with the subject matter of the offered testimony.[14]

Discussing adequacy of §145.682 affidavits and what they should include is another topic that could be the subject of its own article. Suffice it to say, it is the most important legal document in a medical malpractice action. A well-written, thorough, and reasoned expert affidavit is a work of art and many hours are often spent in creating that work of art. Medical illustrations and literature should be incorporated into the affidavit and practitioners should not spare any effort in creating a detailed document that sets out the standard of care, how the defendant violated that standard, and how the violation played a substantial part in causing harm. In order to do so, the attorney often need to include a detailed description of the medicine involved so that the court can understand your expert's position and can see how your expert's position is supported by medicine. More cases are dismissed for insufficient affidavits than for any other reason, and the failure to adequately comply with this provision is one of the major pitfalls in the malpractice arena.

Frequency of Claims

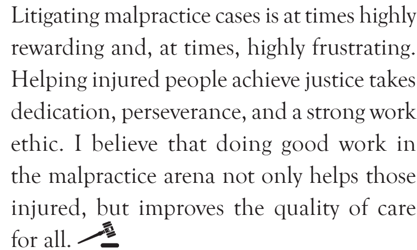
Special interest groups have been decrying a "litigation explosion" for decades. However, when one actually drills down and examines the statistics, there is no explosion in Minnesota, nor in the nation, when it comes to malpractice actions. According to the Minnesota State Court Administration database, from 2002 through 2011 there have been 1,221 malpractice cases filed with a high of 143 in 2005 and a low of 101 in 2010. Malpractice cases pale in comparison to contract actions that have totaled 81,579 over that same period. Nationally the story is the same. According to the national Center for State Courts, all tort filings declined by 25 percent between 1999 and 2008, and the number of medical malpractice cases filed in state court decreased 23 percent between 2001 and 2010. Depending upon the state, medical malpractice cases accounted for

0.2 percent to 2 percent of civil caseloads in 2010.[15]

The relative rarity of malpractice claims filed is at odds with the Institute of Medicine's 1999 report that indicated that preventable medical errors in hospitals killed between 44 and 98,000 Americans each year, more than motor vehicle accidents, breast cancer, or AIDS (*www.justice.org/rde/justice*). The complexity of and difficulty in establishing the elements necessary for malpractice claim along with the costs associated with pursuing such claims, is one answer for why there are not more malpractice claims filed. Another reason may be that at trial, medical malpractice plaintiffs are less likely to prevail than other tort plaintiffs. According to the 2005 Civil Justice Survey of State Courts, there were an estimated 2,449 medical malpractice trials nationwide. The plaintiff win rate for medical malpractice was 23 percent, less than half the plaintiff win rate for other personal injury cases.[16] While plaintiff win rates in Minnesota are not made public, from my experience, I would say it is less than the national rate. Of course, the defense has a lot to say about which cases are tried. Our win rate is directly attributable to the time and effort spent on screening, working with experts, developing theories that resonate with jurors, and representing good solid people.

Conclusion

Litigating malpractice cases is at times highly rewarding and, at times, highly frustrating. Helping injured people achieve justice takes dedication, perseverance, and a strong work ethic. I believe that doing good work in the malpractice arena not only helps those injured, but improves the quality of care for all.



---

1 Bigay vs. Garvey 575 N.W.2d, 107 (Minn. 1998); quoting Plutshack vs. University of Minnesota Hospitals, 360 N.W.2d, 1, (Minn. 1982).

2 Minn. Civ. Jig. 80.10.

3 Minn. Stat. § 595.02(s).

4 Minn. Civ. JIG 27-10.

5 Minn. Civ. JIG 27-15.

6 Dickhoff v. Green, ___ N.W.2d ___ (Minn., May 31, 2013).

7 Cornfeldt v. Tongen, 295 N.W.2d, 638, 740 (Minn. 1980) ("We have stated that to avoid a directed verdict a plaintiff must introduce expert medical testimony that it was more probable than not that the death resulted from the doctor's negligence.")

8 295 N.W.3d 504, 507 (Minn. 1980).

9 Minn. Stat. §145.682 requires the service of two affidavits. Minn. Stat. §145.682, subd. 2. The first affidavit is served with the Summons and Complaint and must state, among other things, that the plaintiff's attorney has reviewed the matter with an expert. Minn. Stat. §145.682, subd. 3(a). The second affidavit requirement is for the service of a different, more detailed affidavit identifying experts within 180 days of the commencement of suit. Minn. Stat. §145.682, subd. 4.

10 Broehm v. Mayo Clinic Rochester, 690 N.W.2d 721, 725 (Minn. 2005); Sorenson v. St. Paul Ramsey Med. Ctr., 457 N.W.2d 188, 191 (Minn. 1990).

11 Sorenson, 457 N.W.2d at 193.

12 Broehm, 690 N.W.2d at 726, citing Anderson v. Rengachary, 608 N.W.2d 843, 847-8 (Minn. 2000); Lindberg v. Health Partners, Inc., 599 N.W.2d 572, 577-8 (Minn. 1999); Stroud v. Hennepin County Med. Ctr., 556 N.W.2d 552, 556 (Minn. 1996).

13 Broehm, 690 N.W.2d at 725.

14 Cornfeldt, 262 N.W.2d at 692.

15 Medical Malpractice – A Small Portion of Civil Caseloads, Court Statistics Project, National Center for State Courts.

16 2005 Civil Justice Survey of State Courts as reported at www.courtstatistics.org.

PROFESSIONAL LIABILITY INSURANCE PROGRAMS

Do you sometimes feel you're an afterthought for companies that would rather focus on big law firms?

Put your firm's priorities first with the professional liability program that specializes in taking care of solo and small-firm attorneys—The Marsh Professional Liability Insurance Program.

According to statistics, **78 percent of attorneys are in a solo practice or a firm with just two to five lawyers**.* Yet many malpractice insurance companies and professional liability insurance brokers would rather focus on bigger firms with dozens or hundreds of attorneys.

Where does that leave smaller firms? Too often, firms find themselves with one-size-fits-all plans—paying more than they should, or lacking crucial coverage because they didn't get expert advice to help them tailor coverage and premiums to the needs of a solo or small-firm practice.

Today you have a better option: The Professional Liability Insurance Program, administered by Marsh U.S. Consumer, a service of Seabury & Smith, Inc., provides a comprehensive policy with Liberty Insurance Underwriters Inc., a member company of Liberty Mutual Insurance Group.

Because this plan focuses on attorneys in solo and small firms, you'll lock in a reliable package of professional liability protection—***customized to the real-world risks facing firms of your size.***

To Learn More, Contact
John Collentine, Senior Vice President
Marsh U.S. Consumer
333 South Seventh Street, Suite 1600
Minneapolis, MN 55402
(800) 328-4671, ext. 7655
john.t.collentine@marshpm.com

FIND OUT MORE
About The Best Malpractice Value For Solo Practices And Small-Firm Practices:

Call **1-800-328-4671, ext. 7655**
or visit **www.proliability.com/lawyer**

MARSH

AR Ins. Lic. #245544 CA Ins. Lic. #0633005
d/b/a in CA Seabury & Smith Insurance Program Management

* *"What Percent of the U.S. Population Do Lawyers Comprise?,"* Wisegeek, www.wisegeek.com, viewed 9/19/12.
Administered by: Marsh U.S. Consumer, a service of Seabury & Smith, Inc.

62758, 62756, 62757 ©Seabury & Smith, Inc. 2013