

Wrongful Death Medical Malpractice Lawsuits: Standing, Damages, Doctor vs. Hospital Liability

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1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Evaluating Wrongful Death Medical Negligence Cases

I. Statute of Limitations - When does the statute of limitations expire?

1. Determining the statute of limitations is the first priority
2. Exceptions to the Statute of Limitations
 - Discovery rule
 - Fraudulent concealment
3. Special Notice
 - In addition to timely filing suit, may need to file notice of claim usually involving state affiliated health care providers
4. Statute of Repose
 - In some states (like Pennsylvania) in addition to the statute of limitations, you will need to consider a statute of repose usually commencing from the date of the negligent medical care

II. Damages – Are the Damages sufficient to proceed?

1. Beneficiaries
 - Is your client entitled to raise the Estate?
 - Raising the estate
 - Who is able to recover wrongful death damages?
 - Adult Children
2. The decedent's age and health
 - Decedent's age is always a factor
 - Decedent's medical condition before the negligent medical care at issue

3. Economic loss
 - Wage loss
 - Other economic losses

4. Pain and Suffering
 - Conscious pain and suffering
 - Need for expert testimony - Pathologist, Neurologist
 - Family members/friends' testimony
 - Photographs

III. Negligence – What did the healthcare provider do wrong?

1. Types of cases
 - Failure to diagnose (cancer, sepsis, pulmonary embolus)
 - Post-op infection
 - Surgical misadventures
 - OB death (mother or child)

2. Adverse event letter
 - Many states require health care facilities to advise the patient in writing when the medical care results in an adverse event

3. Red Flags
 - Consulted multiple prior attorneys
 - Not specific about what went wrong with the medical care
 - Decedent with multiple comorbidities

IV. Causation – Did the negligent medical care cause the death?

1. Increased risk of harm/lost chance vs. “but for” causation
 - Differences in the increased risk of harm standard, for example Pennsylvania vs. New Jersey standard
2. Delay of less than 6 months in cancer cases
3. This is where they will likely defend the case

V. Venue – Many times as important as liability and damages

1. Know the venue in which you would be filing the case
2. Only able to file suit in the county where negligence occurred
3. Statistics for the jurisdiction

VI. Liens- Who paid the medical expenses?

1. Need to determine lien type and the amount of the medical expenses lien early on
2. Types of liens
 - ERISA
 - Medicare
 - Medicaid
3. A large medical expense lien may make it difficult to settle the case

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EVALUATING WRONGFUL DEATH MEDICAL NEGLIGENCE CASES – PLAINTIFF’S PROSPECTIVE

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FACTORS TO CONSIDER

In evaluating whether to take on a medical negligence wrongful death case, you should consider a number of factors:

- Statute of Limitations
- Damages
- Negligence
- Causation
- Venue
- Liens



STATUTE OF LIMITATIONS

- The first issue that should be addressed when you are contacted about a wrongful death medical negligence case is the statute of limitations.



STATUTE OF LIMITATIONS

- In almost every state in order to proceed with a medical negligence case, you will need to provide, either at the time of filing the lawsuit or shortly thereafter, a certificate or affidavit of merit from an appropriately qualified medical expert setting forth that the case is meritorious. This means that you will usually need a significant amount of time to investigate the claim.



STATUTE OF LIMITATIONS

- In most states, the statute of limitations for wrongful death claims begins to run from the date of death. In some states there can be an extension of the statute of limitations based upon the discovery rule or the fraudulent concealment exceptions. However, in the vast majority of medical negligence death cases, these exceptions are not available.



STATUTE OF LIMITATIONS

- Discovery rule exception tolls the statute of limitations until the plaintiff knows she has suffered an injury and its cause (related to the medical treatment). In some states like Pennsylvania, this extension is not available in wrongful death cases.



STATUTE OF LIMITATIONS

- With the concealment exception the defendant health care provider is estopped from invoking the statute of limitations where its action, either through fraud or even unintentional concealment, causes the plaintiff to relax her vigilance or denials from her right to injury into the facts of the matter



STATUTE OF LIMITATIONS

- In addition to the statute of limitations, a number of states, including New Jersey have notice requirements for defendant health care providers affiliated with the state.



STATUTE OF LIMITATIONS

- In New Jersey, resident physicians and a number of attending physicians treating patients at “university hospitals” are affiliated with the state and timely notice has to be given to the state to allow any claims against those physicians to proceed.



STATUTE OF LIMITATIONS

- In some states like Pennsylvania in addition to the statute of limitations, you will need to consider the effects of any statute of repose, which will usually commence to run from the date of the negligent medical care.



ASSESSING DAMAGES

- Because medical negligence cases are very expensive to prosecute and difficult to win, the second question you should answer in evaluating a medical malpractice case is whether there are sufficient damages.



ASSESSING DAMAGES

- Even in medical negligence cases resulting in a patient's death, you must determine if there are significant enough damages to justify bringing suit.



ASSESSING DAMAGES

- There are a number of factors that impact damages:
 1. The decedent's age at time of injury or death
 2. Are there economic losses?
 - Wage Loss
 - Loss of services to family members



ASSESSING DAMAGES

- In Pennsylvania like most states there are two types of claims that may be brought when a negligent medical case causes the death of a person:
 - **Survival Claim**
 - **Wrongful Death Claim**



ASSESSING DAMAGES

- The beneficiaries of the two claims can be sometimes different. More importantly, you must represent the person who is entitled to bring the claim. This will vary from state to state. Further, before a wrongful death claim can be filed, you will usually need to raise the estate.



ASSESSING DAMAGES

- Another important issue in evaluating damages is whether there are any wrongful death beneficiaries. In Pennsylvania siblings are not included in those family members who may recover wrongful death damages where as in New Jersey they are.



ASSESSING DAMAGES

- Another issue is that even if the client is a designated beneficiary, was the decedent providing recoverable services? This issue comes up frequently with adult children of the decedent.



ASSESSING DAMAGES

- In most medical negligence wrongful death cases, a significant item of damages is the decedent's pain and suffering. However, it must be conscious pain and suffering.



ASSESSING DAMAGES

- If there is an issue as to whether the decedent has experienced conscious pain and suffering, consider consulting medical experts like a pathologist or neurologist.



ASSESSING DAMAGES

- Also from the outset gather information to support the pain and suffering claim by requesting such information from family members and friends of the decedent. Also, make sure that any photographic evidence related to the decedent is preserved.



NEGLIGENCE

- Failure to diagnose (cancer, sepsis, pulmonary embolus) comprises about 40% of all malpractice claims and 59% of misdiagnosis cases are related to cancer.
- Misdiagnosis/delay in diagnosing cancer are a substantial portion of medical malpractice wrongful death cases.



NEGLIGENCE

- In delay in diagnosing cancer the theory of liability is premised on the following:
 - Some cancers if detected at an early stage are readily treatable/survivable;
 - A delay in diagnosis and initiation of treatment allows the cancer to grow and spread which usually requires additional harmful treatment and worsened prognosis;
 - With some cancers early diagnosis confers a significant survival benefit and thus a delay in diagnosis causes a very significant loss of chance for a cure or survival which is the hallmark of a delay in diagnosis.



NEGLIGENCE

Table 7. Trends in 5-year Relative Survival Rates* (%) by Race, US, 1975-2013

	All races			White			Black		
	1975-77	1987-89	2007-13	1975-77	1987-89	2007-13	1975-77	1987-89	2007-13
All sites	49	55	69	50	57	70	39	43	63
Brain & other nervous system	23	29	35	22	28	33	25	32	42
Breast (female)	75	84	91	76	85	92	62	71	83
Colon & rectum	50	60	66	50	60	67	45	52	59
Colon	51	60	65	51	61	67	45	52	56
Rectum	48	58	69	48	59	69	44	52	66
Esophagus	5	9	21	6	11	22	4	7	12
Hodgkin lymphoma	72	79	88	72	80	89	70	72	85
Kidney & renal pelvis	50	57	75	50	57	75	49	55	76
Larynx	66	66	63	67	67	65	58	56	50
Leukemia	34	43	64	35	44	65	33	35	58
Liver & intrahepatic bile duct	3	5	19	3	6	18	2	3	14
Lung & bronchus	12	13	20	12	13	20	11	11	17
Melanoma of the skin	82	88	94	82	88	94	57†	79†	69
Myeloma	25	27	51	24	27	51	29	30	52
Non-Hodgkin lymphoma	47	51	73	47	51	74	49	46	67
Oral cavity & pharynx	53	54	68	54	56	69	36	34	49
Ovary	36	38	47	35	38	46	41	34	39
Pancreas	3	4	9	3	3	9	2	6	8
Prostate	68	83	99	69	84	>99	61	71	97
Stomach	15	20	31	14	18	30	16	19	31
Testis	83	95	97	83	96	97	73††	88†	92
Thyroid	92	94	98	92	94	98	90	92	97
Urinary bladder	72	79	78	73	80	79	50	63	65
Uterine cervix	69	70	69	70	73	71	65	57	58
Uterine corpus	87	82	83	88	84	85	60	57	65

*Rates are adjusted for normal life expectancy and are based on cases diagnosed in the SEER 9 areas from 1975 to 77, 1987 to 89, and 2007 to 2013, all followed through 2014. †The standard error is between 5 and 10 percentage points. ‡Survival rate is for cases diagnosed from 1978 to 1980.

NOTE: This table provides historical trends based on the 9 oldest SEER registries. Contemporary survival rates presented throughout this report and in Table 8 (page 21) may differ because they are based on more complete population coverage.

Source: Howlader N, Noone AM, Krapcho M, et al. (eds). SEER Cancer Statistics Review, 1975-2014, National Cancer Institute, Bethesda, MD, www.seer.cancer.gov/csr/1975_2014/, based on November 2016 SEER data submission, posted to the SEER website April 2017.



NEGLIGENCE

Table 8. Five-year Relative Survival Rates* (%) by Stage at Diagnosis, US, 2007-2013

	All stages	Local	Regional	Distant		All stages	Local	Regional	Distant
Breast (female)	90	99	85	27	Oral cavity & pharynx	65	84	64	39
Colon & rectum	65	90	71	14	Ovary	47	93	73	29
Colon	64	91	72	14	Pancreas	8	32	12	3
Rectum	67	88	70	15	Prostate	99	>99	>99	30
Esophagus	19	43	23	5	Stomach	31	67	31	5
Kidney†	74	93	67	12	Testis	95	99	96	73
Larynx	61	77	45	34	Thyroid	98	>99	98	56
Liver‡	18	31	11	3	Urinary bladder§	77	70	35	5
Lung & bronchus	18	56	29	5	Uterine cervix	67	92	57	17
Melanoma of the skin	92	99	63	20	Uterine corpus	81	95	69	16

*Rates are adjusted for normal life expectancy and are based on cases diagnosed in the SEER 18 areas from 2007-2013, all followed through 2014. †Includes renal pelvis. ‡Includes intrahepatic bile duct. §Rate for in situ cases is 96%.

Local: an invasive malignant cancer confined entirely to the organ of origin. **Regional:** a malignant cancer that 1) has extended beyond the limits of the organ of origin directly into surrounding organs or tissues; 2) involves regional lymph nodes; or 3) has both regional extension and involvement of regional lymph nodes. **Distant:** a malignant cancer that has spread to parts of the body remote from the primary tumor either by direct extension or by discontinuous metastasis to distant organs, tissues, or via the lymphatic system to distant lymph nodes.

Source: Howlader N, Noone AM, Krapcho M, et al. (eds). SEER Cancer Statistics Review, 1975-2014, National Cancer Institute, Bethesda, MD, http://seer.cancer.gov/csr/1975_2014/, based on November 2016 SEER data submission, posted to the SEER website April 2017.



NEGLIGENCE

- In considering whether to proceed with a cancer death case, the above leads to the following general guidelines:
 - **The best cancer cases involve cancers, like colon and breast, which provide the best chance for survival if detected at an early stage but have a later stage cure rate that is poor;**
 - **Stay clear of cancers which have a poor early stage prognosis – for example small cell lung cancer cases.**



NEGLIGENCE

- Some cancers (like primary brain cancer and pancreatic cancer) have a poor prognosis even with early detection and good medical care;
- Be careful of cancer cases where a genetic variation (triple negative breast cancer) causes a poor prognosis even if diagnosed early;
- Be wary of taking cases involving rare cancers



NEGLIGENCE

- Many states including Pennsylvania and New Jersey mandate that health care facilities (hospitals, rehab facilities and nursing homes) notify in writing a patient or his/her family if an adverse event occurs while in the facility.



NEGLIGENCE

- An adverse event is typically defined as “an event that results in unintended harm to the patient by an act of commission or omission rather than by the underlying disease or condition of the patient.”



NEGLIGENCE

- Always ask if the decedent or her family has received an adverse event letter. This signifies that the health care facility has acknowledged that the decedent has been injured due to medical care.



February 3, 2016

Dear Mr. C,

We at _____ Medical Center commit to provide quality medical care to our patients and the communities we serve. As you know, during your original surgery you experienced bleeding complications that required additional surgery.

The staff of _____ Medical Center commits to respect the rights of patients and their families to be informed about the occurrence of such events. Our Patient Safety Committee is conducting a review of the circumstances surrounding your care, in keeping with our commitment to quality and safe health care. Our goal is to continually evaluate our processes of care to improve the quality of service to our community.

You have my best wishes for your continued recovery. If you have any questions or would like an update related to our efforts, kindly contact me at (717) _____.

Sincerely,

Chief Medical Officer



NEGLIGENCE

Red Flags

- Consulted multiple prior attorneys;
- Not specific about what went wrong with the medical care;
- Decedent with multiple comorbidities.



CAUSATION

- Most states including Pennsylvania and New Jersey have adopted increased risk of harm or lost chance causation for medical negligence cases. However, there are variations in “relaxed” causation standards and it is important to know the differences.



CAUSATION

- For example under New Jersey's formulation, the plaintiff can only recover that percentage of her damages attributable to the loss of a chance (i.e. if lost chance was 40% the plaintiff is only able to recover 40% of the jury's award). In Pennsylvania, there is no reduction of the plaintiff's recovery damages if the jury accepts plaintiff's expert's opinion on causation.



CAUSATION

- In the vast majority of the delay in diagnosis of cancer death cases, in order for there to be significant change in the plaintiff's chance of survival, the delay in diagnosis has to exceed six (6) months.



CAUSATION

- In most delay in diagnosis cases, including cancer cases, the main defense will be that the delay did not alter the outcome, so you will need to carefully assess causation.



VENUE

- The venue for a medical negligence wrongful death case is almost as important in evaluating a case as are liability and damages. The venue for the case should be considered as to whether to pursue a medical negligence wrongful death case.



VENUE

- In some states like Pennsylvania, the legislature has mandated the venue (county) for filing of a medical negligence case. The ability to file in a major metropolitan area like Philadelphia will greatly increase plaintiff's chance of success. Also some counties have adopted case management systems which will allow the case to come to trial sooner than in other venues.



LIENS

- In many medical negligence wrongful death cases, there will be a substantial medical expense lien. It is vital that the amount and type of the lien be ascertained as early as possible.



LIENS

- In most states including Pennsylvania and New Jersey, medical expenses are not recoverable in medical negligence wrongful death cases unless they are paid by a self-funded ERISA health plan, Medicare or Medicaid.



LIENS

- In medical negligence cases, particularly involving elderly decedents, a substantial medical expenses lien that has to be repaid from any award or settlement can make settlement problematic.



UNIQUE TO THE CASE

- In addition to all of the above, each case will usually have some unique situation or fact that will be an important consideration in your assessment of whether to undertake representation. For example:

Decedent's past;

Family dynamics;

Immigration status;

