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## **OVERVIEW OF MEDICAL NEGLIGENCE IN SOUTH CAROLINA**

The purpose of this booklet is to familiarize you with the law and how your case will be handled. After you have read the booklet, if you have any questions, do not hesitate to get in touch with us.

In a medical negligence case we must prove the following things:

**1. What the standard of practice was among physicians with the same education, training and experience as the defendant-doctor, based upon the facts that were known or should have been known to him at the time he was treating the patient, and that he negligently failed to follow the standard of practice.**

The law requires a doctor to take a proper history, to conduct a reasonable physical examination, and to order all tests reasonably necessary under the circumstances. If a consultation with a specialist is indicated, he must consult with a specialist himself or have the patient seen by a specialist. If there are no specialists reasonably available, the doctor's failure to consult may not be negligence.

The doctor must then make a "differential diagnosis", that is, he must consider what diseases or injuries are indicated, and he must use his best judgment to choose a course of treatment.

If he makes a wrong diagnosis, he may not be negligent if other reasonable doctors in that circumstance could also have made the wrong diagnosis.

A mere bad result following medical treatment is not evidence of negligence. The patient or his family may be compensated only when the bad result occurred because of negligence.

The law acknowledges that doctors of varying abilities exist and the law only holds the doctor to minimum standards and not the best of care. Some areas of the State have more sophisticated diagnostic equipment and treatment equipment available than other areas of the State. We must judge the doctor based upon what was reasonably available to him where he practices and not what might have been available to him in some other area, unless he should have transferred the patient to an area where more sophisticated equipment was available.

We have the burden of proving what the standard of care is and we must do this by way of an expert witness, that is, some other physician who is familiar with the applicable standards of practice. He must testify what the standards were and he must be willing to say that the defendant-doctor breached the standards of practice.

It is difficult to find doctors who are willing to testify against other doctors. We usually must go out of state to find a doctor who is willing to testify. This makes medical negligence cases expensive to pursue.

## **2. We then must prove that the breach of standards caused the injuries and damages you claim.**

Even if the doctor was negligent, he will not be required to compensate you, unless your injuries were caused by his negligence. The doctor is not responsible for injuries resulting from forces of nature or acts of God that could not be stopped by ordinary medical care.

If a doctor misdiagnoses your condition, but soon thereafter he or someone else makes the correct diagnosis and treatment began before the disease has caused further injury, the negligent doctor may not have to compensate you. Similarly, if the condition is incurable, and no matter when it was diagnosed nothing could have been done, the negligence may not result in any damages.

Many complications occur during medical treatment that may seem to be caused by negligence. However, other doctors may consider them to be "acceptable" complications. For instance, if a doctor nicks the bladder in the course of a vaginal hysterectomy, this complication may be considered acceptable, because of the difficulty in operating in such a tight space. Therefore, if you have suffered an injury that other doctors recognize as an acceptable complication, even though catastrophic results may have occurred, we may not be able to recover anything for you.

Another example would be a fatal reaction to a drug. The mere fact that the patient has a reaction is not sufficient to make a monetary recovery. However, if the patient had a reaction to the drug before and had warned the doctor or his staff about this, then there may be a compensable claim.

**3. If we prove the doctor was negligent and his negligence caused you some harm, we then must prove what damages came from his negligence and what they are worth financially.**

There are certain items of damages you are entitled to recover in most lawsuits. Some of them are as follows:

1. Past, present, and future pain and suffering;

2. Past and future loss of income and/or diminished earning capacity;
3. Out-of-pocket expenses, such as doctor's bills, and other expenses related to the injury, even if paid by insurance (you may have to pay back your insurance company if you recover);
4. Loss of consortium on behalf of the non-injured spouse; that is, loss of the services of the injured spouse in all the ways a spouse renders service to his or her mate, including housekeeping, yard work, companionship and sexual relations;
5. Loss of enjoyment of life; that is, loss of your ability to engage in recreational activities which you formerly engaged in;
6. Mental anguish; and
7. Disfigurement.

You may not be entitled to be paid for all of your out-of-pocket expenses and intangible damages. You will only be entitled to be paid for any extra bills, lost wages, pain and suffering, etc., that were caused by the negligence. In other words, if you were going to be in the hospital anyway, and the doctor's negligence merely caused you to be in the hospital for an extra week, then you would only be able to recover for the additional week of hospitalization and any other extra expenses caused by the negligence. Sometimes it is very difficult to prove what damages were caused by the initial illness and what were caused by the doctor's negligence.

As you can see until, and unless, we know the facts surrounding your treatment, it will be impossible to give you proper advice as to the merits of your case.

In order to determine the merits of your case, it is necessary for us to take the following action.

### **THE FIRST STEP - INVESTIGATION**

Shortly after the first interview we will begin our investigation.

To be sure we have all of the facts, we would appreciate your preparing a detailed statement of all of the events that occurred which caused you to believe medical negligence was committed. Please have your family and friends that know something about what happened to you make written statements also. If you have scars or other deformities that resulted from the alleged medical negligence, please make photographs of them. Send this information along with the completed Client Questionnaire form so that we will have all available information when we review your case.

If we decide to review your case, we will ask you to get copies of pertinent medical records. When you request the records from your providers, please do not tell them you are getting the records for an attorney.

After we have received all of the requested medical records, we will conduct an in-house review of these records. If we think the case may have merit, we will request money from you to cover the cost of sending the records to an expert. We will sometimes however waive advance payment for the expert if a case appears to be meritorious. We make this determination on a case by case

basis. Obviously we cannot afford to advance these costs on every case.

We request \$300.00 upon completion of our in-house review, but otherwise we do not charge for our time in conducting the investigation. We only require the client to pay any out-of-pocket costs we incur. If we do not take your case, you do not have to pay us for our time. If we do advance costs on your behalf we will be glad to work with you to get those costs paid. You should discuss with us any financial problems you may have so that we can work out some arrangements that are acceptable to us and realistic for you.

You should not discuss the details of your case with anyone not entitled to that information. If any insurance company representative contacts you, refer them to us. Do not make any statements to them. If you have already made such statements, furnish us with a copy of the statement.

We must evaluate the facts in your case in conjunction with the rules of courtroom evidence. What may seem to be a "fact" to you may or may not be a "fact" that we can prove at trial.

For instance, you may believe that something happened because someone you trusted told you so. However, if the person who told you the information cannot testify at trial then we may not be able to get this information to the jury because of what is known as the "hearsay rule." By and large the rule is a good one, but it does prevent us from proving important facts in some cases, particularly in a death case when many facts need to be proven from the testimony of the deceased. If we cannot find an exception to the hearsay rule, important evidence may be lost because of the rules of evidence. In those situations, we may not be able to meet our burden of proof,

even though the case might have been a good case if the testimony were allowed.

Unfortunately, insurance companies for doctors do not settle many medical negligence cases unless it is clearly an open and shut case. We have to go to trial in many cases. Producing expert testimony is very expensive and some cases may not be worth the cost of trying the case. We have to decide whether your damages are enough to justify the cost and expense of trying your case. Most medical negligence cases will require expenditures of at least \$15,000.00 to \$20,000.00, and in some cases as much as \$50,000.00 to \$100,000.00. Your case must be a good one before we can afford to invest that kind of money and time.

## **THE SECOND STEP - FILING A LAWSUIT**

As a result of the medical malpractice Tort Reform Act that was passed by our Legislature and took effect July 1, 2005, all medical malpractice cases after that date must have an affidavit from an expert witness stating that they have reviewed the medical records and in their opinion the doctor(s), nurses or hospitals fell below the standard of care. The expert must be able to state in what way the provider fell below the standard of care and the basis of the expert's opinion. If the documentation and the medical records are not sufficient for an expert witness to be able to figure out what happened, then you may have difficulty in filing your lawsuit.

If we do find an expert that is willing to give us an affidavit, then we must file a Notice of Intent to File Suit. The Notice of Intent to File Suit is filed with the court and then served on the defendant(s). The potential defendant(s) then contacts their insurance company and the insurance company will hire an attorney for the defendant(s). Once we find out who the attorney is, we have to have a pre-suit

mediation before we can actually file your lawsuit. Usually the pre-suit mediation is nothing more than a telephone call between the attorneys and the mediator, because at that stage no one knows what all of the evidence will be. However, sometimes the case is so clear that we are able to settle a case at that level, but those cases are few and far between.

If a pre-suit mediation does not result in a settlement, then we will file a Notice to the court that the mediation failed and that will authorize us to go ahead and file an actual lawsuit.

Once we file the actual Summons and Complaint, the defendant(s) has thirty days to answer the Complaint unless we give them additional time which is usually done as a matter of courtesy. Usually the defendant(s) will deny responsibility or claim that you are not injured to the extent described in the Complaint. Or they may claim that you contributed to your own injuries and you were contributorily negligent because you failed to follow the defendant's advice or for some other reason. If the jury finds you are contributorily negligent and that your negligence is more than 50% then you would be barred from any recovery. If the jury finds that your negligence is less than 50% they can give you a portion of your losses.

After the doctor has answered our complaint, we will send the doctor written questions, known as interrogatories, which he must answer under oath. The defendant will also send us written questions which you must answer under oath. My office staff will contact you when the defendant serves interrogatories on us. Your timely response is absolutely necessary because we only have a certain period of time in which to answer the questions.

All known witnesses who are deemed important will be deposed. Each witness is placed under oath by a court reporter and both sides ask questions about the events that are the subject of the lawsuit. Before your deposition is taken, we will meet with you and make sure that you are thoroughly prepared.

After all depositions are taken, the law requires us to have another mediation since everyone at that point knows all of the evidence. A mediator will be chosen and agreed upon by all the parties. We will then have a chance to present our case to the insurance adjuster and the defense attorneys and the mediator will attempt to settle the case. Because we are careful in what cases we choose, most of our cases do get settled before trial at mediation. If we cannot agree on the value of the case, or if the defendant does not feel he wants to settle, then we will have to go to trial.

We ask for your understanding if things do not move as fast as you would like. Unfortunately, we have to conduct discovery at a time that is convenient for all of the attorneys. Often depositions are scheduled and must be canceled because one of the attorneys is in trial. We apologize for any inconvenience these delays cause, but they are beyond our control.

### **WHAT IS MY CASE WORTH?**

We will do our best to make an intelligent estimate of the value of your lawsuit. Many times a negligent doctor has such a good reputation in his area that it is impossible to win a case against him. Sometimes factors in the client's background may make it less likely that we can win. A case may be so complicated that it is impossible for a jury to understand, in spite of all we do to simplify matters. If the jury gets too confused, the easy thing for them to do is to give a verdict to the doctor. The luck of the draw when the

jury is chosen is the greatest factor which affects the value of your case. The judge may also make a difference. We will do our best but in spite of our best efforts, good cases are sometimes lost for reasons over which we have no control.

We will discuss with you all of the ramifications of the case and give you the best advice we can about what your case is worth. Naturally, a person who has received serious, crippling injuries is entitled to recover more money than an individual who had only minor injuries. However, if the evidence of negligence is weak, a person who has a very serious injury may have to settle his case for a fairly small sum of money because the chance of winning may be low. A person who has a small injury, but good evidence of negligence, may sometimes be able to settle his case for more money than one with more serious injuries. In every instance, the amount of damages must be weighed against the chances of winning. Each case must be judged on its own merits.

We will not settle your claim without your permission. When we know all the factors concerning the value, or lack of value of your case, we will then discuss them with you so you can make an informed decision concerning settlement. You can always count on us being brutally honest with you in our evaluation of your case.

### **SOME HELPFUL HINTS**

If you are under a doctor's care please remember that your present doctor may be a friend of the defendant and anything you say to him may end up going back to the defendant doctor. Unless you have cleared it with this office first, do not mention to your present doctor that you are investigating a medical negligence case against another doctor. Sometimes we will ask you to inquire of your

present physician whether he might be willing to assist you in a medical negligence case. Do not do this on your own.

If one of the doctors calls you to inquire about why we are requesting your records, just acknowledge that we are your attorneys and do not give out any information. These calls are designed to intimidate you. If the doctor is insistent, refer him to this office.

Do not talk about your lawsuit at work, at parties or in public places. Do not discuss your case with anyone except close family members or close friends. Never brag about what you are going to get out of your lawsuit. Never count on the outcome of your lawsuit being favorable until the money is in your hands.

We expect you to be responsive when we need something from you. We must work together to get justice for you.

### **CHECKLIST OF THINGS FOR YOU TO DO**

Below is a list of things you can do to help us. This information is of great importance in the preparation of your case. We can do our best only when we know all of the facts, so it is essential for you to provide the information requested.

1. Completely and accurately answer the questions on the Client Questionnaire form and return it to us as soon as possible.
2. Please keep a daily diary of your activities with emphasis on restriction of your activities caused by your injuries, specific pains and the frequency of them, frequency of medication taken, etc. A

diary will help you remember a lot of things you otherwise may forget.

3. If we request you to, please forward to our office itemized receipts of:
  - a. Hospital bills;
  - b. Doctor's bills;
  - c. Ambulance bills;
  - d. Nursing bills;
  - e. Drug (medicine) bills; and
  - f. All other expenses you incurred as a result of the accident, including:
    - 1) Travel to and from the doctors' offices and hospitals. (Keep a notebook record of these expenses.)
    - 2) Additional help around home and/or business (including baby sitters, or other caretakers, if applicable, and domestic or yard help). Keep a notebook record of these expenses and keep all of your receipts.
4. Ask your druggist to provide separate receipts for drugs so we can be certain that the bills include only medicines which are related to the accident. Should they inadvertently include some other medicine or other household items such as toothpaste, this will be used by the defendant to embarrass you at trial to make it appear that you are seeking something to which you are not entitled. If you are using non-prescription drugs, such as aspirin, please save the containers as proof of the quantity of such drugs you have taken for pain relief, etc.

5. List the names, addresses, and telephone numbers of any neighbors, friends, fellow employees or relatives who know how the negligence has affected your life and who will be willing to testify for you. Tell them that someone from this office may contact them.
6. Furnish us with statements from your employer concerning time lost from work because of your injuries and what loss of wages you have incurred as a result.
7. List any other expenses you have incurred as a result of your injuries which are not included above.
8. Sign the medical authorization forms we send to you and return them to us as soon as possible.
9. If you are a Medicare patient, you may want to contact Carolinas Center for Medical Excellence at (800) 922-3089 to see if they would do an investigation into the incident. (Do not tell them you have consulted with an attorney as they will not do a review then.)

## **CONCLUSION**

We want to be of service to you and to get the best result we can for you. However, because we have a very active trial practice the attorneys cannot always be available. We are out of the office for several weeks at a time trying cases all over the state. When we are not in court we may be taking depositions or preparing for the next trial. We are not office attorneys -- we are courtroom attorneys. For that reason we have employed highly skilled legal nurse consultants, paralegals and legal secretaries to deal with

most of the problems that occur when we are not in the office. They are the ones you will have the most contact with, as they will be calling you periodically to get information from you. They will make detailed memos for us of the conversations they have with you. Most questions that you have can be answered by the paralegal or legal secretary assigned to your case. If they cannot answer your questions, they will find out the answer from one of the attorneys assigned to your case and will relay the answer to you or one of the attorneys will contact you. Please do not get angry if the attorney is not immediately available or if they do not return your calls promptly. When we are trying cases or getting ready for a big trial we must concentrate on that case and other cases take a back seat at that point. When your case comes up for trial it will get the same concentrated attention from the attorneys.

Your understanding and cooperation will be appreciated. Lawsuits move slowly but we will do all we can to expedite your case. We try to keep our clients informed periodically about the status of their case, but if you should get concerned about what is happening, please feel free to call and discuss your concern with us.

We look forward to assisting you and we hope that you will be pleased with our services.

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