MEDICAL MALPRACTICE

Under what circumstances may a physician be liable for medical malpractice?

Under Washington law, a physician may be liable for medical malpractice if a plaintiff proves by a preponderance of the evidence one of the following: [1]

- That injury resulted from the failure of the physician to follow the accepted standard of care.

- That the physician promised the patient or his representative that the injury suffered would not occur.

- That injury resulted from health care to which the patient or the patient's representative did not consent.

What is the standard of care?

The standard of care is that degree of care, skill, and learning expected, at the time the patient was being treated, of a reasonably prudent physician in the profession or class to which the physician belongs, in the state of Washington, acting in the same or similar circumstances.[2]

Generally, what must be proven to show that injury resulted because a physician failed to follow the accepted standard of care?

In order to prove that injury resulted from a physician's failure to follow the accepted standard of care, the plaintiff must prove that:[3]

- The physician failed to exercise that degree of care, skill, and learning expected, at the time the patient was being treated, of a reasonably prudent physician in the profession or class to which the physician belongs, in the state of Washington, acting in the same or similar circumstances.

- The physician's failure to do so was a proximate cause of the plaintiff's injury.

What must be proven to show that injury resulted from health care to which the patient did not consent?

In order to prove that an injury resulted from a physician's failure to secure the patient's informed consent, the plaintiff must prove that:[4]

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[1] RCW 7.70.030.
[2] RCW 7.70.040.
[3] *Id.*; See also: *Mohr v. Grantham*, 172 Wn.2d 844, 856 (2011).
[4] RCW 7.70.050(1).

- The physician failed to inform the patient or the patient's representative of a material fact or facts relating to the treatment.

- The patient consented to the treatment without being aware of or fully informed of such material fact or facts.

- A reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts.

- The treatment in question proximately caused injury to the patient.

A fact is considered "material" if a reasonably prudent person in the position of the patient would attach significance to it in deciding whether or not to submit to the proposed treatment.[5] Material facts include, but are not necessarily limited to:[6]

- The nature and character of the treatment proposed and administered.

- The anticipated results of the treatment proposed and administered.

- The recognized possible alternative forms of treatment.

- The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment.

See **INFORMED CONSENT**.

How is a medical malpractice lawsuit initiated against a physician?

The patient or the patient's legal representative commences a medical malpractice lawsuit against a physician by filing with the court and serving upon the defendant a summons and complaint.[7] The summons is the document which tells the physician that a lawsuit has been started, that the physician must appear and defend within a certain period of time, and that the physician's failure to do so will result in a default judgment. The complaint is the document which sets forth the factual and legal basis for the patient's claim against the physician.

The law requires mandatory mediation of malpractice claims,[8] except those claims that are subject to mandatory arbitration, or when the parties have agreed to voluntary binding arbitration.[9]

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[5] RCW 7.70.050(2).
[6] RCW 7.70.050(3).
[7] CR 3(a).
[8] RCW 7.70.100(3).
[9] RCW 7.70.100(6).

What should a physician do when the physician receives a summons and complaint?

Upon receiving a summons and/or complaint, a physician should immediately call his or her professional liability insurance company. Failure to act promptly could result in a default judgment being entered against the physician.[10]

May a physician offer an apology or express sympathy for a treatment outcome that is the basis of a malpractice action without it being admissible in evidence?

Yes. In a medical malpractice lawsuit, a statement, affirmation, gesture or conduct expressing fault, apology, sympathy, condolence or another general sense of benevolence, or a statement or affirmation regarding remedial actions that may be taken, is not admissible as evidence if the statement was conveyed by the physician to the injured person or certain family members within 30 days of the act or within 30 days of the time the act was discovered by the physician, whichever period expires later.[11]

What is the discovery phase of a medical malpractice lawsuit?

The "discovery" phase, which usually does not begin for at least 20 days after the summons and complaint are served,[12] is the phase of a lawsuit in which the parties "discover" the facts, the opinions to be expressed by experts, the existence of relevant documents, such as medical and employment records of the plaintiff, and other details. The most frequently used methods of discovery include:[13]

- Requests for production (a way to obtain documents from the other party).
- Interrogatories (written questions which must be answered under oath).
- Depositions (oral questions posed to parties and other witnesses who are under oath).
- Requests for admission (written requests for a party to admit certain statements or opinions of fact or to admit the genuineness of certain documents).
- Independent medical examinations.

It is extremely important for a physician who is sued in a medical malpractice case to work closely with his or her attorney in responding to discovery requests.

What is a deposition?

A deposition is oral testimony given under oath before a court reporter. A deposition of a party to the lawsuit or of a witness who is unavailable at the time of trial can be read to the jury

[10] CR 5(d)(2).
[11] RCW 5.64.010.
[12] CR 4(a)(2).
[13] CR 26(a).

at trial as if it were live testimony. A deposition also can be used to "impeach" a witness if the witness' testimony at trial differs from the witness' deposition testimony.

Because depositions can be used against a physician at trial, it is extremely important for a physician to be well prepared for his or her deposition.

When is the trial phase of lawsuit?

It usually takes a year or more from the filing of the lawsuit until a medical malpractice case actually goes to trial.

Only a small percentage of medical malpractice cases actually go to trial. Many cases are disposed of by way of a compromise settlement. Some are voluntarily dismissed. Some are dismissed on summary judgment motions.

The medical malpractice cases that do go to trial usually are tried to a jury, but occasionally are tried to a judge. In a jury trial case, the jury determines whether there was malpractice, whether the malpractice caused the injury, and how much money, if any, should be awarded to the plaintiff.

Malpractice trials usually last anywhere from one to three weeks, but can take longer. Except for emergencies, it is extremely important that the defendant physician be in attendance for the entire trial.

When a physician is sued in a medical malpractice action, should the physician discuss the details or merits of the case with anyone other than representatives of the physician's insurance carrier, employer or attorney?

No. A physician should not discuss the lawsuit with anyone except representatives of the physician's professional liability insurance company, the employer or attorney without first obtaining approval from his or her attorney. In particular, a defendant physician should not discuss the details and merits of the case with colleagues or with persons who potentially may be witnesses in the case.

Must the patient's attorney certify that the filing of a malpractice claim is not frivolous?

Yes. When a malpractice claim is filed, the patient's attorney must certify that the claim is not frivolous, that it is grounded in fact, is warranted by existing laws or a good faith extension, modification, or reversal of an existing law, and that the claim is not filed for the purpose of harassment. If the court finds that the attorney has violated these rules, the court may impose sanctions, including legal fees and the physician's attorney's fees.[14]

[14] RCW 7.70.160; *See also*: CR 11.

May a physician who is sued for malpractice make a counterclaim against a plaintiff for malicious prosecution?

In rare cases, a physician who is sued for malpractice may have a valid basis for asserting a counterclaim for malicious prosecution against the plaintiff. The physician's burden of proof in a malicious prosecution counterclaim is very high. The physician must prove that the plaintiff initiated the medical malpractice action against the physician with knowledge that the claim was false, unfounded, malicious, and without probable cause. The success rate on malicious prosecution counterclaims is very low.

If the court finds that the malicious prosecution counterclaim was frivolous and advanced without reasonable cause, the physician may be liable for the plaintiff's reasonable expenses, including attorneys' fees, incurred in defending against the counterclaim.

A physician's attorneys' fees incurred in pursuing a malicious prosecution counterclaim are generally not covered by insurance.

Are there requirements for health care liability risk management training?

Yes. Washington law requires that once every 3 years physicians must complete a health care liability risk management training program provided by the physician's professional liability insurance carrier. The risk management training provides information related to avoiding adverse health outcomes resulting from substandard practice and minimizing damages associated with the adverse health outcomes that do occur. Completion of such a training program is mandatory for renewal of a physician's professional liability insurance.[15]

Must an insurer report payments in connection with the settlement or judgment of a malpractice insurance claim to the Medical Quality Assurance Commission or the National Practitioner Data Bank?

Under state law, a professional liability insurer is required to report to the MQAC all malpractice payments in excess of $20,000, and the payment of three or more malpractice claims during a five-year period, made on behalf of a physician.[16] Under federal law, any entity which makes any payment under a policy of insurance, self-insurance, or otherwise in settlement, partial settlement, or satisfaction of a judgment in a medical malpractice action or claim on behalf of a physician, must report the payment to the National Practitioner Data Bank and the MQAC.[17] See **NATIONAL PRACTITIONER DATA BANK.**

[15] RCW 48.22.080.
[16] RCW 18.71.350.
[17] 42 U.S.C. §§ 11131, 11134.