EMORY HEALTHCARE RISK SUMMARY

Office of Quality and Risk
404-686-2470

II. MEDICAL MALPRACTICE IN GEORGIA

A. What is Professional Negligence and How Does it Apply to Medical Professionals in Georgia?

As with other professions, the theories of negligence for healthcare providers arise from their professional standing and licensure. Georgia law defines ordinary *diligence* as the care that a prudent person takes of his own property while ordinary *negligence* is the lack of ordinary diligence:[4]

Georgia authorizes this standard to apply to healthcare providers by requiring that medical professionals practice with the expected reasonable care and skill:[5]

> A person professing to practice surgery or the administering of medicine for compensation must bring to the exercise of his profession a reasonable degree of care and skill. Any injury resulting from a want of such care and skill shall be a tort for which a recovery may be had.

B. When Might a Patient have a Medical Malpractice Claim?

Someone may have an action for medical malpractice when they have any claim for damages resulting from the death of, or injury to, any person arising out of: [6]

(1) Health, medical, dental, or surgical service, diagnosis, prescription, treatment, or care rendered by a person authorized by law to perform such service or by any person acting under the supervision and control of the lawfully authorized person;

(2) Care or service rendered by any public or private hospital, nursing home, clinic, hospital authority, facility, or institution, or by any officer, agent, or employee thereof acting within the scope of his employment.

When determining whether an action is one for medical malpractice, the court looks at whether the act of concern **involves medical knowledge** and judgment that is outside the knowledge of the ordinary person. In a medical malpractice case, the person bringing the suit ("Plaintiff") will have to show that there is **a set of rules and standards** that others in the same medical field have to obey. In order to establish what those rules and standards are, the Plaintiff is required to present a person who qualifies as an **expert** in that particular field and can testify about the standards. In cases of injuries that do not result from a lack of medical judgment, such as a patient who is dropped by a medical provider, a Plaintiff would *not* need evidence of a specific standard for the medical professional.

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[4] O.C.G.A. § 51-1-2.
[5] O.C.G.A. § 51-1-27.
[6] O.C.G.A. § 9-3-70.

C. What are the Elements of a Medical Malpractice Claim?

A Plaintiff and the Defendant both submit evidence in court, but the Plaintiff must prove to the jury that by a preponderance of the evidence (that which is more convincing than other testimony against it) the following four elements of negligence are all present:[7]

(1) ***Duty***

The Defendant owed or had a duty to the Plaintiff to perform or not to perform a professional service in a certain manner (e.g., a doctor-patient relationship existed);

(2) ***Breach of duty***

The Defendant failed in that duty (breached the "**standard of care**");

(3) ***Proximate cause***

The Defendant's breach caused harm to the Plaintiff; and

(4) ***Damages***

The Plaintiff experienced physical, mental, or financial damages as a result of the Defendant's action.

Each of these four elements must be proven in order to find the Defendant negligent. If the Plaintiff cannot prove a duty existed and was breached, even if negligence has been proven, there can be no finding of liability. Similarly, if no damages can be proven, there can be no finding of negligence. The jury decides the facts based on the evidence submitted at trial and renders a verdict. The jury also decides the monetary damages, if any, to be paid to the Plaintiff.

D. What is the "Minimum Standard of Care?"

While other professions can also have actions brought against them for malpractice, Georgia has a standard specifically for the medical profession that establishes the minimum standard of care:[8]

> A person professing to practice surgery or the administering of medicine for compensation must bring to the exercise of his profession a reasonable degree of care and skill. Any injury resulting from a want of such care and skill shall be a tort for which a recovery may be had.

This "standard of care" is the second element critical to a medical malpractice claim, as discussed above. A Plaintiff will argue that they were injured because the healthcare provider failed to meet the minimum standard of care.

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[7] Roberts v. Aderhold, 273 Ga. App. 642 (2005).

[8] Official Code of Georgia Annotated (O.C.G.A.) § 51-1-27.

III. PROCEDURE TO FOLLOW SHOULD A SERIOUS EVENT OCCUR

If a serious event that may give rise to litigation occurs, actions taken after the fact can be just as important as the event itself:

- Calmly handle the immediate clinical situation;
- **Should a change need to be made to a note or the chart**, make the change as immediately as possible and clearly distinguish as a change or addition to the original.
- Communicate with the patient and family;
- **Notify Risk Management; and**
- Participate in disclosure of outcomes and maintain good relations with the patient and family.

Do not document that you notified Legal or Risk Management and do not document that something was discussed at a peer review or quality assurance meeting.

IV. ANATOMY OF A MEDICAL MALPRACTICE LAWSUIT

In Georgia, cases involving hospital and healthcare provider negligence are first heard by a State or Superior Court, and then either party may appeal to the Court of Appeals of Georgia. Regardless of which court hears the case and whether the Defendant is the hospital, a doctor, nurse, or other healthcare provider, the process described below is identical.

A. The Summons and Complaint

Most Plaintiffs/claimants retain an attorney to represent them, except on the less frequent occasions when a Plaintiff represents himself ("pro se"). A lawsuit begins when the Plaintiff files a Summons and Complaint, which is done through his attorney and may be served (delivered), upon the named party in a lawsuit by an officer of law, other process server, or through registered mail. The Summons tells the individual that there is a lawsuit against him (the "Defendant") and states that the attached Complaint must be answered within a prescribed period of time - 30 days in State court, 20 days in Federal court. The Complaint must also have an accompanying affidavit from a professional in the same field who has reviewed the relevant medical records, and which sets forth at least one negligent act or standard of care violation committed by the professional sued.[17]

If you are served with a Summons and Complaint regarding a professional liability lawsuit, immediately contact Emory's Office of Quality and Risk for processing. If after hours, please page the Risk Manager on call using PIC 50316. Otherwise a default judgment could be entered against you as an individual, without

[17] O.C.G.A. § 9-11-9.1 Affidavit Requirement

having a chance to defend yourself. If the Complaint goes unanswered, then the court assumes that the Defendant is negligent and did cause the injuries, which results in a default judgment against the Defendant. Once negligence and causation are assumed, then the only question remaining for the court is how much the Plaintiff can recover for damages, which includes injuries and costs incurred by the Plaintiff.

Under the terms and conditions of the Emory Liability Insurance Program, all Emory employees involved in the patient's care that is being investigated, whether named as Defendants or not, are required to fully cooperate and assist with all aspects of the investigation. Failure to cooperate may result in the withholding of insurance protection under the program. Similarly, non-treating providers asked to review a file or otherwise assist with the investigation of an Emory event, are expected to do so; Emory's corporate citizenship encourages its healthcare providers to assist and support each other in reviewing cases with the goal of improving the overall quality of care Emory delivers to its patients.

B. Meet with the Attorney and Risk Management

Shortly after the Summons and Complaint is received by the Defendant and delivered to Risk Management, meetings take place between Risk Management, the Defendant, and the attorney selected to defend the case. The defense attorney and Defendant are provided with information regarding the processes and claims management philosophy of Emory. The attorney assigned to the case will discuss the general issues of the case with the Defendant and with Risk Management. Finally, the attorney gathers facts about the care and treatment of the patient and the medical or surgical issues, which includes obtaining information from the healthcare providers who are familiar with the medical issues.

The Defendant and other medical providers knowledgeable about the case must obtain and thoroughly review the medical record prior to meeting with the attorney. The attorney will have a general knowledge of the issues and the medical/legal course he or she believes they will follow, but it is incumbent upon the healthcare provider to prepare for the meeting and contribute to this general understanding. The initial meeting may be followed by additional meetings with the attorney and Risk Management staff.

The communications between the healthcare providers, the defense attorneys, and Risk Management, are **entirely confidential** under Georgia law.[18] Communications between the healthcare providers and Risk Management are made for the purpose of seeking advice, which is "privileged" information under Georgia law - that means no one else can inquire about the communications. **All healthcare providers are cautioned not to discuss cases with co-workers or friends without seeking the advice of Risk Management or the defense attorney assigned to the case.** Conversations, emails and texts with co-workers, friends, and family are not protected and can be revealed in litigation and may also violate health privacy laws. Please advise Risk Management or defense counsel if you possess any e-mails, texts, photos, etc., that may be germane to the case under investigation.

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[18] O.C.G.A. § 24-9-21 Confidentiality of Certain Communications.

VIII. CONCLUSION

Emory's Office of Quality and Risk works to prevent against and manage claims so that our healthcare providers can continue to focus on providing excellent patient care. Litigation can be a source of distraction and stress – at work and at home. Resources such as Emory's Faculty Staff Assistance Program and Pastoral Care are available to support and assist you. Should you have any questions or concerns, please contact the Office of Quality and Risk at: 404-686-2470 or use the 24/7 On-Call PIC# 50316.

January 23, 2015