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Chapter 1 : Medical malpractice in the United States - Wikipedia

Thus, even if medical malpractice tort law allocated the burden of medical injuries perfectly, insensitivity to the true costs of care would lead physicians (and their patients) to prefer socially excessive precautions against iatrogenic injury (injury related to medical treatment).

There are a large variety of medical malpractice cases, based on the degree of negligence or recklessness, that a patient can claim in a lawsuit. Examples of Medical Malpractice Misdiagnosis - A doctor in a hospital fails to recognize cardiac tamponade in a year-old man and the lack of diagnosis or treatment leads to his death. Childbirth Injuries - An obstetrician fails to perform a C-section in a timely manner, resulting in serious injuries to the baby. Medication Errors - Negligence by a physician or nurse causes a fatal overdose of Vitamin K. Anesthesia Errors - An anesthesiologist gives the wrong amount of anesthesia to a patient, resulting in brain damage. Surgery Errors - A surgeon injures a year-old with a bone saw, causing permanent scarring and neuropathy. One of the most common recurring themes in all of these forms of medical malpractice is negligence. Negligence comes in many forms and in many different types of severity, and that level of severity will determine how much you can possibly win in compensation. Negligence Negligence is defined as the failure to act with the same amount of care that a reasonable medical professional would have acted within the same situation. This has to be the direct reason for your injury for it to be a medical malpractice case. The doctor calls him into the examination room, but is distracted and rushed from having so many patients that day. Unfazed by the depth of the wound, he says it needs just a few stitches. In doing this, he instinctively takes tools near him from a table - but unbeknownst to him, these tools had just been used to treat an infection. In addition, this decision goes against the policy to only use tools that were sterilized and in drawers. A few days after this doctor visit, your son feels pain, gets sicker, and has a clear discoloration around the cut. His laceration is now infected, requiring hospitalization and extensive treatment. The doctor denies any and all responsibility for this infection. This is a clear case of negligence from the description, but it also relates to the four elements of negligence. These are duty, breach, injury, and damages. If reasonable care and standard medical guidelines are not followed, then the duty has been breached by the doctor. The injury must cause the victim to have suffered damages, whether they are economic or non-economic. Your son required hospitalization, and the subsequent medical bills were substantial. You may have also had to miss time at work to tend to your son. Gross Negligence In addition to simple negligence, there is also gross negligence. Gross negligence takes the idea of negligence a step further - the breach of duty was much worse in these cases, where the failure to provide reasonable care goes beyond medical standards and would have been obvious to anyone. An example of this would be to imagine that you are someone who needs immediate surgery after a car accident causes severe trauma to your left arm. The surgeon, however, in his carelessness, checked your chart believing you were a different patient, one who needed their right arm amputated. The right arm gets amputated instead of the left arm receiving treatment. These examples are admittedly very clear cut. There is a lot to consider in a medical malpractice case - just because an injury occurred while under the care of a medical professional does not mean an individual has a guaranteed medical malpractice lawsuit on their hands. There are ways in which many people think they have a medical malpractice suit, but it turns out to not be the case; it is important to understand your situation. Do You Have a Case? Just because a patient suffers an injury while under the care and attention of a doctor, it does not automatically mean the individual has a medical malpractice suit against the healthcare professional. Before surgery, patients are given warnings of the risks involved in a procedure. The patient must understand the risks and authorize the surgery, meaning that those risk factors would not be grounds for a medical malpractice case. If a patient receives instructions after their surgery about what to do for follow-up care, they must follow it. If they fail to follow these instructions, and an injury occurs as a result, they will likely not have a medical malpractice suit. A week-old premature newborn endured a medication overdose in a hospital in Fort Myers, Florida. This resulted in

permanent colostomy and removing part of her liver.

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Chapter 2 : Examining Nursing Malpractice: A Defense Attorneyâ€™s Perspective

In the past 30 years, medical malpractice has become 1 of the most difficult health care issues in the United States. In addition to billions of dollars in legal fees and court costs, medical malpractice premiums in the United States total more than $5 billion annually, 1 and "defensive medicine"â€"procedures performed to protect against increasing litigationâ€"is estimated to cost more.

Orientation to law for non-lawyers Potential legal actions against health care providers There are two primary types of potential civil actions against health care providers for injuries resulting from health care: Medical treatment and malpractice laws are specific to each state. Before a health care provider delivers care, ethical and legal standards require that the patient provide informed consent. If the patient cannot provide informed consent, then, for most treatments, a legally authorized surrogate decision-maker may do so. In an emergency situation when the patient is not legally competent to give informed consent and no surrogate decision-maker is readily available, the law implies consent on behalf of the patient, assuming that the patient would consent to treatment if he or she were capable of doing so. The information must be presented in a form that the patient can comprehend i. Similarly, the legal concept of informed consent refers to a state of mind, i. Health care facilities and providers use consent forms to document the communication process. Initiatives at the federal level i. Failure to follow standard of care. The duty of care generally requires that the provider use reasonably expected knowledge and judgment in the treatment of the patient, and typically would also require the adept use of the facilities at hand and options for treatment. The standard of care emerges from a variety of sources, including professional publications, interactions of professional leaders, presentations and exchanges at professional meetings, and among networks of colleagues. Experts are hired by the litigating parties to assist the court in determining the applicable standard of care. States may also apply different standards to specialists and to general practitioners. The possibility that the parties will reach an agreement about the legal claims before or during trial, known as a settlement, means that the vast majority of initiated claims do not go through all three phases. An understanding of the litigation process and its accompanying vocabulary can be helpful in providing a fuller understanding of the intersection of law, clinical ethics, and risk management. A lawsuit will begin when the plaintiff an allegedly injured patient files a complaint claim with the court. The plaintiff is obligated to legally notify serve the defendant s e. In the complaint, the plaintiff presents the facts that are the basis for the lawsuit. The defendant is required to file an answer written response with the court, and to also provide the plaintiff with a copy within a specified period of time. After filing a lawsuit and before trial, both sides plaintiff and defendant gather information using various methods known as discovery. Discovery methods used may include interrogatories, which are written questions that the opposing side must answer under oath. Requests for production require the opposing side to provide documents to the other side. Requests for admissions require the opposing side to state that some facts are true before trial. Witnesses can be required to answer questions in person under oath, known as a deposition, and may also be required to bring documents to the deposition. Although the information collected during discovery prepares the parties for trial, it also can be used as a basis for settlement. Indeed, most civil lawsuits, including actions against health care providers, are settled and never go to trial before a judge or jury. To encourage the parties to find a resolution to a health care dispute before trial, a few states require the parties to submit to mediation.

Chapter 3 : Medical Malpractice Cases - Morgan & Morgan

4 If the medical malpractice claim is for wrongful death, and that issue already has been decided by the jury by separate issue, you may include this sentence. 5 "Where, however, the injury is subjective and of such a nature that laymen cannot.

He specializes in malpractice defense and is a frequent lecturer at continuing medical education seminars for nurses and physicians. The expanded role for critical care nurses and the increasing demands placed on them in the care and treatment of patients have led to a concomitant expansion of legal liability for malpractice. Historically, liability for treatment issues fell solely upon treating physicians as nurses were perceived largely as ministerial. However, with the responsibility of patient care assessment and planning and management being undertaken by critical care nurses, legal claims against nurses are increasing. Not all unfortunate events in medicine are caused by malpractice. Despite what may be a common societal belief, not all unexpected, unintended, or even undesired medical results can be attributed to the fault of the healthcare provider. The law recognizes that much of nursing care requires clinical judgment. Consequently, a patient must prove 4 requisite elements to establish a malpractice case. First, the patient must establish that there was a nurse-patient relationship. Rarely can it be said that a particular nurse had a duty to the patient if such a relationship cannot be shown. Once this is established, a duty is created. Second, the patient must establish the scope of the duty that was owed by the nurse; this is usually done though an expert witness testifying about the care that was required. The care need not have been the best care or even optimum care. Furthermore, when there is more than 1 recognized method of care, a nurse will not be deemed negligent if an approved method was chosen, even if that method later turns out to be the wrong choice. As long as the defendant nurse provided care that was consistent with accepted practice, the nurse will not be found negligent, regardless of outcome. This link must be established not by possibility, but by probability; thatis, it must be proved that if the nurse had not been negligent, then more likely than not, the patient would not have suffered harm. This element must also be proved by expert testimony. In November , the Institute of Medicine reported that each year medical errors are responsible for the deaths of between and 98 patients. The primary causes of litigation arising from medication errors are wrong dose given, wrong drug administered, incorrect method of administration, and failure to assess for side effects and toxicity. The need to advocate on behalf of a patient when the suitability of care is at issue is also a common allegation. However, it is well established that blindly carrying out such orders will not insulate the nurse when such orders are questionable. The Supreme Court of Ohio 5 stated the rationale for this duty in the following manner: A nurse who concludes that an attending physician has misdiagnosed a condition or has not prescribed the appropriate course of treatment may not modify the course set by the physician simply because the nurse holds a different view. To permit that conduct would allow the nurse to perform tasks of diagnosis and treatment denied to the nurse by law. However, the nurse is not prohibited from calling on or consulting with nurse supervisors or with other physicians on the hospital staff concerning those tasks when they are within the ordinary care and skill required by the relevant standard of conduct. Therefore, a nurse has an obligation to advocate on behalf of the patient when issues arise about the course of care or treatment being provided. Merely documenting in the chart that the order was discussed and confirmed with the ordering care provider is not enough. Generally speaking, a principal is responsible for the acts of its agents. In law, this is known as respondeat superior. Therefore, a hospital has vicarious liability for the negligence of its nurses, which allows a patient to bring a lawsuit against either the nurse individually, or the hospital as the employer, or both. In addition to liability arising out of respondeat superior, a hospital may also have separate institutional or corporate liability. Among its responsibilities, a hospital has a duty to the patient to ensure the competency of its nursing staff and the physicians who maintain privileges at its institution. Furthermore, the hospital is responsible for ensuring that proper drugs and equipment are available for use, and that they are not defective. The hospital also has a general duty to patients

and visitors to maintain the hospital premises in a reasonably safe condition. Failure to do so may create institutional liability on the part of the hospital. After admission, the patient was noted to be intermittently disoriented. Shortly after the patient was admitted, she began getting out of bed unassisted. During rounds, the attending physician was made aware of the incidents; however, he determined that restraints were not appropriate. Within a few hours of making this assessment, the patient crawled to the foot of the bed. As she attempted to get out, she fell and fractured her right hip. In this case, according to hospital policy, each nurse in the cardiac ICU was assigned only 1 patient because of the need for close monitoring and in order to give nurses the ability to respond immediately to any problems. However, at the same time, the nurse was also required to respond to any code that occurred in the ICU. At the time the patient was crawling out of bed and fell, the nurse had been called to respond to a code. At trial, the hospital was deemed liable on the grounds of inadequate staffing. Because of the hospital directive, the nurse was required to be in 2 places at the same time. These limitations include restrictions on monetary awards. The simple answer is that they cannot be avoided. However, by utilizing the nursing process and employing critical thinking, bad outcomes that commonly lead to malpractice claims can be reduced. The steps of the nursing process are described as follows:

Chapter 4 : Law and Medical Ethics: Ethical Topic in Medicine

Evidence in Medical Malpractice Cases - 2 Haney v. Alexander, 71 N.C. App. , (): "Where the standard of care is the same across the country, an expert witness familiar with that standard may testify.

Recognizing the usefulness and effectiveness of the IME as a claim handling tool, attorneys for injured workers have increasingly targeted the IME in various ways in order to discourage the carrier from using certain physicians or to discourage physicians from performing IMEs. The former is manifested in bad faith lawsuits against insurance carriers based solely on the selection of the IME physician or in the latter case, the IME physician is sued for medical malpractice usually premised on an allegation of misdiagnosis or failure to diagnose. This article will examine legal trends regarding medical malpractice lawsuits brought against IME physicians. The majority of jurisdictions that have addressed this issue have refused to allow medical malpractice lawsuits against independent medical examiners. As noted recently by the Alaska Supreme Court, these jurisdictions have concluded that an IME performed at the behest of a third party does not give rise to a physician-patient relationship for potential medical malpractice liability. The most obvious duty imposed by these courts, and most sensible, is a duty not to injure the patient during the examination. For example, in the case of Hafner v. Beck, the Arizona Court of Appeals, Division II, refused to allow a medical malpractice lawsuit against an IME psychologist, relying on the traditional rule that there was no duty owed because there was no physician-patient relationship. In , the Arizona Supreme Court ruled that a radiologist had a duty to inform an examinee that a chest X-ray taken in the course of a pre-employment physical examination revealed abnormal findings suggestive of lung cancer. Although the physician duly noted the finding in his report and transmitted the report to the employer, the employer did not inform the examinee of the finding. Without expressly overruling Hafner, the court rejected the strict rule that a physician-patient relationship must exist in order to allow a medical malpractice lawsuit. Krasner, the injured worker Ritchie was treated by chiropractors for an injury to the spine. Ritchie did not protest the termination of his benefits. However, his condition continued to deteriorate and he eventually saw another physician who recommended immediate surgery for cervical spinal cord compression. The surgery was performed but Ritchie was left with permanent damage to his spinal cord and chronic pain. Ritchie later died of an overdose of narcotic pain medication and his survivors sued the IME physician for medical malpractice. In , an effort was made to legislatively overrule Ritchie, but after the bill passed the Arizona House of Representatives, it died in the Senate. In Hafner, the claimant never relied on or accepted the opinion of the IME psychologist who had concluded that the claimant did not require further psychological treatment and could be discharged from further treatment. The claimant immediately protested that termination of benefits but the termination of benefits was upheld by the administrative law judge. Therefore, there was reliance in the Ritchie case, to Mr. AMA ethics opinion In addition, the carrier should facilitate this process by strict compliance with state law or regulation regarding the scheduling and procedures attendant to an IME.

Chapter 5 : Medical Liability/Medical Malpractice Laws

Impact of Legal Reforms on Medical Malpractice Costs 19, orarv Problems: Medical Malpractice Can the Private Sector Find Impact of Legal.

For example, the Centers for Disease Control and Prevention currently says that 75, patients die annually, in hospitals alone, from infections alone - just one cause of harm in just one kind of care setting. James, PhD [5] that estimates , unnecessary deaths annually in hospitals alone. Using these numbers, medical malpractice is the third leading cause of death in the United States, only behind heart disease and cancer. Less than one quarter of care takes place in hospitals. Across all care settings the numbers are higher. Another study notes that about 1. The defendant is the health care provider. Relying on vicarious liability or direct corporate negligence, claims may also be brought against hospitals, clinics, managed care organizations or medical corporations for the mistakes of their employees and contractors. Furthermore, the study found that the most common result of this negligence was death of the patient. Elements of the case[edit] A plaintiff must establish all five elements of the tort of negligence for a successful medical malpractice claim. A duty was breached: The breach caused an injury: The breach of duty was a direct cause and the proximate cause of the injury. Deviation from the accepted standard: Further establishment of conditions of intention or malice where applicable. Without damage losses which may be pecuniary or emotional , there is no basis for a claim, regardless of whether the medical provider was negligent. Likewise, damage can occur without negligence, for example, when someone dies from a fatal disease. In cases involving suicide, physicians and particularly psychiatrists may be to a different standard than other defendants in a tort claim. In most tort cases, suicide is legally viewed as an act which terminates a chain of causality. An exception is made for physicians who are found to have committed malpractice that results in a suicide, with damages assessed based on losses that are proved likely to accrue after the act of suicide. Such information includes interrogatories, requests for documents and deposition. If both parties agree, the case may be settled pre-trial on negotiated terms. If the parties cannot agree, the case will proceed to trial. The plaintiff has the burden of proof to prove all the elements by a preponderance of evidence. At trial, both parties will usually present experts to testify as to the standard of care required, and other technical issues. The fact-finder judge or jury must then weigh all the evidence and determine which side is the most credible. The fact-finder will render a verdict for the prevailing party. The verdict is then reduced to the judgment of the court. The losing party may move for a new trial. In a few jurisdictions, a plaintiff who is dissatisfied by a small judgment may move for additur. In most jurisdictions, a defendant who is dissatisfied with a large judgment may move for remittitur. Either side may take an appeal from the judgment. Expert testimony[edit] Expert witnesses must be qualified by the Court, based on the prospective experts qualifications and the standards set from legal precedent. To be qualified as an expert in a medical malpractice case, a person must have a sufficient knowledge, education, training, or experience regarding the specific issue before the court to qualify the expert to give a reliable opinion on a relevant issue. Expert testimony is not qualified "just because somebody with a diploma says it is so" United States v. In addition to appropriate qualifications of the expert, the proposed testimony must meet certain criteria for reliability. In the United States, two models for evaluating the proposed testimony are used: Merrell Dow Pharmaceuticals U. Before the trial, a Daubert hearing [15] will take place before the judge without the jury. The Daubert hearing considers 4 questions about the testimony the prospective expert proposes: Whether a "theory or technique. Some state courts still use the Frye test that relies on scientific consensus to assess the admissibility of novel scientific evidence. In view of Daubert and Kuhmo, the pre trial preparation of expert witnesses is critical. The judge may expand the limits contained in the "school of thought" precedent. Papers that are self-published may be admiited as the basis for expert testimony. Non-peer reviewed journals may also be admitted in similar fashion. The only criterion is the opinion of a single judge who, in all likelihood, has no relevant scientific or medical training. Economic damages include financial

losses such as lost wages sometimes called lost earning capacity , medical expenses and life care expenses. Non-economic damages are assessed for the injury itself: Punitive damages are not available in all states and, when allowed, are usually only awarded in the event of wanton and reckless conduct. Statute of limitations[edit] Main article: Statute of Limitations There is only a limited time during which a medical malpractice lawsuit can be filed. In the United States, these time limits are set by statute. In civil law systems, similar provisions are usually part of the civil code or criminal code and are often known collectively as "periods of prescription" or "prescriptive periods. Therefore, each state has different time limits set. Most states have special provisions for minors that may potentially extend the statute of limitations for a minor who has been injured as the result of medical malpractice. However, the authors also noted that the vast majority of malpractice claims did not lead to any indemnity payments. The overhead costs of malpractice litigation are exorbitant. For every dollar spent on compensation, 54 cents went to administrative expenses including lawyers, experts, and courts. Claims involving errors accounted for 78 percent of administrative costs. No single medical condition was associated with more than five percent of all negligence claims, and one-third of all claims were the result of misdiagnosis. They claim that the cost of medical malpractice litigation in the United States has steadily increased at almost 12 percent annually since However, more recent research from the U. In , data pooled from the industry by the publication Medical Liability Monitor indicated that medical malpractice insurance rates had declined for four straight years. The decrease was seen in both states that had enacted tort reform and in states that had not, leading actuaries familiar with the data to suggest that patient safety and risk management campaigns had had a more significant effect.

Chapter 6 : Virginia Medical Malpractice Law: An Overview

Section (2) requires notice to all prospective defendants of the claimant's intent to initiate litigation for medical malpractice; section (3) provides that the suit may not be filed for ninety days after this notice is mailed to the prospective defendants; and section (4) tolls the statute of limitations during this ninety.

Share18 Shares 1K Doctors have often been seen as some of the smartest members of society, and with good reason. It takes years of training, constant retraining, and a lot more than just book smarts to be a good doctor. But they are still human, and humans are fallible. Mistakes are made every day, and while some of them can be insignificant, others can completely change lives. Suing doctors for less-than-perfect practice is becoming more and more common, the morality of which is debatable. In many cases on the other hand, it is clear if a patient suffered because somebody was careless. Below are ten examples of some of the most cringe-inducing medical malpractices of recent years. Three times in one year. The first incident was the result of a third-year resident failing to mark which side of the brain was to be operated on. The doctor and nurse in this operation claimed they were not trained in how to use a checklist, although one must ask how many people would allow their heads to be cut open by someone who has clearly never received professional training in the fine art of grocery shopping. The patient in this case died a few weeks later. In the third case, the chief resident neurosurgeon and a nurse both clarified which side of the brain was to be operated on beforehand, and then proceeded to operate on the other side. Mexico and a runner-up Mr. Being a bodybuilder, he is, unsurprisingly, concerned with his physique, and in he decided he wanted to get pec implants. When he awoke from his surgery, he discovered that while he had been given implants, he was actually given breast implants C-cups , and not pec implants. Police in Florida began a search for Reinaldo Silvestre, a man who had posed as a doctor and had no legitimate medical credentials. Silvestre had forged documents and had also operated on at least two women in Florida, using kitchen utensils. In , Silvestre was found in working in Belize, where he is believed to have treated hundreds of patients over at least a one year period. The surgery was five and a half hours long, and for about two of those hours, Carol was awake. She explained that anesthesia is made up of two different elements, one to paralyze the patient, and one to put them to sleep. Unfortunately, only the paralyzing agent worked fully in her case, and halfway through the operation, she woke up but could not move at all. Carol was awake for the exact moment they removed the eye. She was so traumatized by the ordeal that she has slept in a reclining chair since, too afraid to lie down. Cases like these are known as Anesthesia Awareness, and it is estimated that up to 42, people in the US alone experience it every year. But perhaps it should be. In Janice McCall, 65, died six days after she caught fire during surgery. While the cause of the fire was not released in this case, there are a number of other examples to that can explain possible causes to igniting in surgery: In , Enrique Ruiz suffered second-degree burns after an electronic scalpel caused his oxygen supply to explode, which the hospital then tried to cover up. In another case, Catherine Reuter, 74, suffered second and third-degree burns after a cauterizing tool caused the alcohol based disinfectant on her face to catch fire. The incident led to strong infections, kidney failure, and long-term sedation. Reuter never fully recovered, and died in hospital two years later. It is estimated that surgical fires affect up to patients a year. There are about 1, such reports every year in the US. While uncommon, such an occurrence can be extremely painful, and can lead to other complications such as infection or internal bleeding. What sets Daryoush Mazarei out from other examples is not the fact that the item left behind inside his chest, a retractor, was 10 inches long, nor that it could physically be seen poking out. It is that when he went back to the University of Pittsburgh Medical Centre, he was told he should seek psychiatric care. After a month of agonizing pain, multiple complaints, and repeatedly being told the problem was in his head, Marazei was finally given a CT scan, and the item was removed. He has begun legal proceedings against the hospital. Undoubtedly, this was a major operation and any number of things could have gone wrong. While her body did reject the organs, it was not simply a case of bad luck. The hospital hid the mistake for 11 days, and then

went public looking for another donor. She received a second transplant two weeks after the first one, but was declared brain dead and taken off life support. Her mother believes that she was weaned off her medication so she would seemingly pass away naturally. In , 70 year old Graham Reeves of Wales died after not one, but two surgeons removed the wrong kidney. This sort of error is not an isolated incident, nor is it confined to any one body part. After undergoing further examinations, she was told she had months to live. The doctors told her she could possibly get an extra three months if they removed the left side of her chin, right up to her ear, and replaced it with her fibula. Desperate to spend more time with her 10 and 12 year old sons, she underwent the procedure. The lump was removed, and although slightly disfigured, Tutt was grateful to have extra time with her sons. Three months later, she was called to the doctors office, who gave her the good news that she was cancer free. The bad news was that she had in fact never had cancer at all. There had been a mix up in the lab, and Kim Tutt had gone through five surgeries and been left disfigured for nothing. Other cards were more sexual, and more notes were found that appeared to be erotica featuring Lozano and his doctor. It was also reported that they did in fact have sexual relations. After about five years, he committed suicide. Depending on who and what you believe, it can be argued that both of these are present in the case of Bryan Mejia, but what sets it apart from the others is the ethical debate that it sparked. Bryan was born with only one leg, and no arms. The deformity is obviously not the fault of the medical staff at Palm Beaches, but parents Ana Mejia and Rodolfo Santana have accused the staff of negligence for not properly detecting this through ultrasounds, saying they would have aborted their son if they had known he would only have one limb. Most people would expect that a doctor would be able to alert the parents-to-be of such a disability, but Dr. Morel, the defendant, argued that he is not to blame. The couple, who feared the child may be born with down-syndrome, opted not to undergo amniocentesis after they were told there was a This test would have detected the missing limbs, but there was a 1 in chance that it could result in a miscarriage, and Morel argued that it was their decision, and he cannot be blamed. But according to the lawyer representing the couple, the second ultrasound given to them shows all four limbs intact , suggesting they were given false evidence. But many people see this as the couple suing the hospital because they had a disabled child. This, the fact that the couple say they would have aborted their son, and the accusations of malpractice, all caused widespread outrage and debate.

Chapter 7 : Florida Bar Journal â€“ Florida Medical Malpractice and the Statute of Limitations â€“ The Flori

By Christopher R. Heil. The Family and Medical Leave Act[i] (AFMLA) became effective on August 5, , for most employers, and is a powerful tool to protect the injured worker if the law applies.

Osherow Page 38 A full understanding of statute of limitations issues is essential to both case selection and analysis and the formal prosecution of each meritorious medical negligence claim. As a practical matter, the practitioner is well advised to select the earliest possible date for computation of the two-year statute of limitations which will control in most cases, i. Unfortunately, meritorious cases, for many reasons, at least on occasion, will not be presented to counsel until after two years from the date of the actions giving rise to the case, or under circumstances where, viewing the case in the most cautious light, the statute runs the risk of running shortly. This article will consider the benefits and risks of immediate action to preserve claims while counsel, suspicious that the case has merit, requires additional time for consideration and investigation. A clear understanding of these issues can enable counsel to take on difficult cases occasionally meritorious ones with a large upside that numerous other attorneys have rejected , without substantial risk other than that generally in contingent cases. Counsel should promptly reject those where the risk is clearly outweighed by the reward, or where the chance of obtaining the required corroborating medical affidavit1 is unlikely to be accomplished within the limitations period. In these circumstances, the case should be formally rejected, in writing, at the earliest opportunity. Often, the analysis that has lead to the conclusion should be explained to the client personally. These meetings, while time consuming, can save counsel from considerable annoyance later. Where the limitations period is approaching rapidly, a face-to-face discussion with the client is highly advisable both to preserve the relationship and to discuss options. If the upside potential is enormous and the risk worth your time, you must be fully prepared to proceed immediately, and have a prospective expert lined up to review the case. Do not consider these difficult liability or damages cases unless your calender is free and you are prepared to devote the time necessary on an immediate basis. Even then, unless there are clear overriding reasons to proceed, cases like this must be viewed with extreme caution. On occasion, counsel may find that a very promising matter has crossed his or her deskâ€”but usually you will just be the last of many counsel who have rejected the case. Avoid this precarious position. While beyond the scope of this article, finding an esteemed medical provider to prepare the necessary corroborating medical affidavit or the opinion necessary to properly reject the case for lack of merit as to liability or damages, or both, may, as well, be close at hand. Pivotal as to whether the act applies is whether the case is even one of medical malpractice, thus warranting the stricter procedural rules. Investigation and Notice The first step for counsel facing a potential medical malpractice claim is to conduct a presuit investigation. The day period is also intended to encourage settlement prior to initiating litigation if possible. A copy of all relevant medical records must be provided to either party requesting such documents or their respective attorney at a reasonable charge within 10 business days. The notice of intent letter was sent to the defendant on November 13, seven days before the expiration of the limitations period. This began the day presuit investigation phase by law and was set to expire on February 11, , but was extended by mutual agreement to April 30, Both cases involved an alleged conflict between F. While the court in Boyd found the conflict to be whether the day period starts from the date notice was mailed or received, the rule was immediately amended to comport with the statutory language that the period begins upon receipt. Once negotiations have proven to be unsuccessful, parties should be allowed to file suit as soon as possible following the day tolling period and once the claim has been rejected, there is no reason to toll the limitations period any longer. In Mason, the court stated that Rule 1. Suit must be filed within 60 days or within the remainder of the statute of limitations after the notice of intent to initiate litigation is mailed, whichever is longer, upon the earliest of two events: The court in Hankey covered many aspects of the medical malpractice act and statute of limitations issues. In that case, the limitations period began to run on December 6, , and was scheduled to end on December 6, The notice of intent was filed on March 19, , and suspended the

limitations period for 90 days as of the date it was received by the defendants. Prior to a response by the defendants, the parties agreed to a day extension, which continued to suspend the limitations period for another 30 days or until the defendants responded to the notice of intent. By July 18, , all the potential defendants had responded to the notice of intent, running the limitations period again. As of March 19, , the date the notice of intent was served more than 60 days remained until the expiration date of the original limitations period December 6, Careful attention should be placed on the various extension provisions and how they may affect tolling of the statute of limitations. At issue was a dispute whether the day tolling provision granted upon petition to the clerk and pursuant to F. The court was called upon to decide whether the prior extension provision is provided in addition to other tolling provisions, under all circumstances, or whether the extension provision is the remainder of the statute of limitations period or 60 days, whichever is greater, in which to file suit. This is regardless of whether the extension of 60 days is considered a tolling or extension provision. Thus, the court determined that the day purchased extension may be added to the allowed 60 days following the completion of the presuit investigation, in order to construe the statutes in a manner that favors access to the courts. The seminal case is Nardone v. Subsequent cases reaffirmed the Nardone principle with harsh results as a consequence in some cases. Defendants could pick the earlier of the two alternatives to begin the running of the limitation period and bar causes of action that may have been meritorious while placing a super-knowledge burden on prospective plaintiffs. The effect of this rule can be seen as counterproductive and resulting in an actual increase in litigation, for it encourages people who may have any suspicion that their injury was caused by medical malpractice to run out and hire a lawyer or be barred from bringing any action at all. It also put patients in the precarious position of having to decipher what is and what is not medical negligence. This hindsight knowledge of injury approach took a change of direction to a more logical and workable rule, when the Florida Supreme Court announced in Tanner v. In other words, the nature of the injury alone may in some cases communicate that it was caused by medical malpractice, but in cases where the injury may have likely been caused by natural causes, the limitations period does not begin to run until there is reason to believe it was caused by medical malpractice. The plaintiffs in Tanner, parents of a stillborn child, sued the delivering health care providers from a birth that took place on April 1, Their complaint alleged the doctors had examined the mother on March 31, , and sent her to the hospital for testing the morning prior to birth of the stillborn infant. They alleged negligence on the part of the defendants and that the negligence was not known by the plaintiffs until December 29, The notice of intent to initiate litigation was filed February 12, , and suit was filed August 1, The defendants moved for dismissal of the action as time barred and the trial court granted that motion which was affirmed by the appellate court, after finding that the period of limitations expired as of April 1, , two years from the actual stillbirth. Of particular concern were cases where natural causes may be a likely cause making the Nardone rule counterintuitive to notions of fairness. Even the Second District, which rendered Nardone, later took issue with the results that case had on other medical malpractice cases. The Tanner court admitted that the new rule may make determining when the limitations period begins to run more difficult, but reasoned that the new rule was justified given the four-year statute of repose absent fraudulent concealment announced in Kush v. Exactly when a claimant knew or was on notice of an invasion of legal rights in the medical malpractice scenario can present a fact question that precludes a granting of summary judgment against the claimant. For purposes of determining if a claimant had discovered medical negligence so as to begin the running of the limitations period, a misdiagnosis constitutes evidence that the claimant did not have the requisite knowledge that an injury was caused by medical negligence until that claimant received a correct diagnosis. Take, for instance, the claimant who lapses into coma shortly after admission and treatment. This was the case in Stone v. Although the claimant challenging the summary judgment entered against him relied on Tanner to argue that his injury was not the type that standing alone would indicate that medical malpractice had possibly occurred, the court citing to Tanner,53 reiterated the proposition that the nature of the injury in some cases is sufficient to support the knowledge requirement and thus start the running of the limitations period notwithstanding the case in which the injury

may have been a result of natural causes. This issue is necessarily fact specific and dependent on the individual circumstances of a given case. It also suggests that the Nardone rule that the statute of limitations commences when the plaintiff has notice of the negligent act giving rise to a cause of action or when the plaintiff has notice of the physical injury caused by the negligent act is still alive in some form. Note also that for purposes of constructive notice, when a health care provider is subject to statutory requirements designed to ensure that each patient is counseled about an adverse diagnostic test result for a condition that may not become symptomatic for years, the tested patient is not on constructive notice of the undisclosed test result merely because it has been filed in his medical records. Although that case did not involve medical malpractice, in discussing this doctrine the court noted that it was not a novel principle of law and had been discussed in previous cases involving medical negligence. Determining whether a cause of action is time-barred upon expiration of the statute of limitations may include an inquiry into both issues: Finally, the delayed discovery doctrine provides that a cause of action does not accrue until the plaintiff either knows or reasonably should know of the tortious act giving rise to the cause of action. This last principle sounds strikingly akin to Nardone and a transgression from Tanner in which knowledge of the injury must also be accompanied by knowledge of a reasonable possibility that the injury was caused by medical malpractice. Either way, Tanner is still good law but it can be seen that its holding is not as broad as some may believe. Conclusion The medical malpractice act in Florida is both complex and evolving. Counsel handling a potential medical malpractice case must be familiar with the presuit requirements affecting the viability and strength of each case whether representing the claimant or health care provider. It is hoped that the above analysis demonstrates the need for careful attention to detail and how procedure can affect the substance of a cause or right of action in medical malpractice litigation. At first impression the statute of limitations may seem like a simple calculation. However, it can be seen how in many cases it can become determinative of a given medical malpractice case. A full understanding of the statute of limitations and its relationship to other aspects of the Medical Malpractice Reform Act will enable counsel to handle these cases with confidence. Indian River Memorial Hosp. Groth , So. They named several defendants but had not included one physician. Two days later, the plaintiffs filed and were granted the day extension of the statute of limitations regarding all the previously named defendants. As an affirmative defense, it was alleged that the amended complaint was filed after the statute of limitations period had expired and the lower court granted summary judgment for the defendant. On reversal, the Fourth DCA found the plaintiff to have been aware of her injury since February of thus a strict reading of the statute of limitations would bar an action after February 20, The court construed the statutory language narrowly and refused to read into the language a requirement that a defendant must be specifically named in the petition for the day extension where it is not specifically provided for otherwise. As Kagan illustrates, the day presuit investigation period reflects a balancing for both sides and in favor of allowing a prospective plaintiff access to the court. This holding is also consistent with promoting a curtailment of frivolous claims. However, an independent special hospital district with taxing authority owning two or more hospitals has 20 days. Regarding the day period, the statute provides that the plaintiff has 60 days or the remainder of the statute of limitations, whichever is longer, in which to respond to the notice of rejection. In this case, the original limitations period had only seven days left and thus the 60 days applied, in which case the 90 days and 30 days tacked on pushed the period to April 25, , and adding 60 days pushed the limit in which to respond to June 24, Note the court rejected 60 days from April 30, , in which to file suit, ruling that the earlier receipt of the rejection of the claim on April 25, , by the claimant began the 60 days in which to file suit. Thus, suit had to be filed on or before June 24, and the filing on June 27, , was therefore untimely. Suit would have been timely had an automatic extension of the statute of limitations been obtained since there would have been 97 rather than seven days left until the statue of limitations ran at the time the notice of intent was received. Note that although the statute is tolled as of the date the notice of intent is mailed, the tolling period is measured from the date the notice is received by the prospective defendant. Winter Haven Hospital, So. Hillsborough County Hospital Authority, So. The Tanners claimed that the statute

of limitations was tolled for 90 days and that they thereafter had 60 days to file suit. Accordingly, the Tanners argued the statute of limitations did not run until August 29, days from April 1, so that suit was properly filed on August 1, However, the court found that the time remaining on the statute of limitations must be calculated from the date the notice of intent was filed, rather than simply adding on the extra time at the end of the original limitations period. Accordingly, from the date the notice of intent is filed, the plaintiff has 90 days the tolling period during presuit plus either 60 days or the remainder of the statute of limitations calculated as the amount remaining at the time the notice of intent was sent , whichever is greater. Based on this calculation, the court concluded suit was not timely filed on August 1, , since suit would have had to be filed within days of February 12, , or by July 12, Guerra, WL Fla. Actions for wrongful death resulting from medical malpractice are subject to the medical malpractice statute of limitations rather than the two year statute of limitations for wrongful death actions. Leesburg Regional Medical Center, So. Where a plaintiff in a tort action based on childhood sexual abuse alleges that she suffered from traumatic amnesia caused by the abuse, does the delayed discovery doctrine postpone the accrual of the cause of action?

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medical malpractice action: either an action could be commenced on behalf of the child within three years of the injuryâ€"or reasonable discovery of the injuryâ€"or the injured minor could bring suit on his or her own behalf within three years of attaining the age of majority.

Patient Compensation or Injury Fund None provided. An additional five percent of any recovery after institution of any appellate proceeding is filed or post-judgment relief or action is required for recovery on the judgment. In any action for damages based on personal injury or wrongful death arising out of medical malpractice, whether in tort or contract, in which the trier of fact makes an award to compensate the claimant for future economic losses, payment of amounts intended to compensate the claimant for these losses shall be made by one of the following means: The defendant may make a lump-sum payment for all damages so assessed, with future economic losses and expenses reduced to present value; or 2. Limits on Attorney Fees No limitations. Any exemplary damages awarded to a client in a tort suit based on health care or professional services shall be placed in a special fund that may be expended at the discretion of the administrator, Guam Memorial Hospital, for the improvement of medical services within the territory of Guam. Proceedings and records of peer review committees and quality assurance committees. All judgments payable by periodic payments, as provided in this section, shall constitute a property right of the judgment creditor entitled to receive the payments, shall survive the death, disability or incapacity of the judgment creditor, and shall be inheritable, devisable, assignable and otherwise subject to disposition by the judgment creditor as any other form of intangible personal property; provided that nothing contained herein is intended to amend, modify or in any way alter any federal, state or local laws pertaining to taxes which may or may not be assessed against all or any portion of the judgment. Punitive damages not recoverable in medical malpractice cases. A party to the action must elect not less than 60 days before commencement of a trial involving issues of future damages unless leave of court is obtained. Notwithstanding IC , the commissioner may: However, the amount provided by the commissioner may not exceed 80 percent of the total amount expended for the agreement. Any party may petition the court for a determination of the appropriate payment method of such judgment or award. If so petitioned the court may order that the payment method for all or part of the judgment or award be by structured, periodic, or other nonlump-sum payments. However, the court shall not order a structured, periodic, or other nonlump-sum payment method if it finds that any of the following are true: The payment method would be inequitable. The payment method provides insufficient guarantees of future collectibility of the judgment or award. No award of exemplary or punitive shall exceed the lesser of: Compensation for reasonable attorney fees to be paid by each litigant in the action shall be approved by the judge after an evidentiary hearing and prior to final disposition of the case by the district court. Compensation for reasonable attorney fees for services performed in an appeal of a judgment in any such action to the court of appeals shall be approved after an evidentiary hearing by the chief judge or by the presiding judge of the panel hearing the case. Compensation for reasonable attorney fees for services performed in an appeal of a judgment in any such action to the supreme court shall be approved after an evidentiary hearing by the departmental justice for the department in which the appeal originated. The court may include in such judgment a requirement that the damages awarded be paid in whole or in part by installment or periodic payments, and any installment or periodic payment upon becoming due and payable under the terms of any such judgment shall constitute a separate judgment upon which execution may issue. The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property. Limits on Attorney Fees.