

## **Frequently Asked Questions: Medical Malpractice Lawsuits in Wisconsin**

### **What is the definition of “medical malpractice?”**

In Wisconsin, as in most states, medical malpractice has two elements. The first question is whether your care and treatment fell below the standard of care that applied to you. The second question is whether your care and treatment caused an injury to the patient. See the Updates and Reports section for a sample of a verdict, showing typical questions that a jury is given following the trial of a medical malpractice case. The verdict includes question about informed consent, the comparison of negligence among several defendants and damages, issues that we discuss later in this document. Question 1 is the negligence question and Question 2 is the cause question.

### **How is the “standard of care” defined?**

The standard of care is defined as the care that a “reasonable” physician of your specialty would have provided in the same or similar circumstances given the state of medical knowledge at the time. Under Wisconsin law, a doctor is **not** negligent for failing to use the highest degree of care, skill and judgment or solely because there was a bad result. A jury cannot speculate or guess about the standard of care but must determine it from the doctors who testify at the trial as expert witnesses or from medical articles if an expert says that the author is recognized as an expert in the field.

The standard of care is not what an “average” physician would have done, but is a “reasonable physician” standard. It is a nationwide standard and is not determined by the personal preferences of any single physician. As a general rule, a physician is not usually allowed to even testify about his or her personal preferences, but must present testimony about what type of care is viewed as being within the nationwide standard of care. The law recognizes that often there are alternative methods of care or treatment that are recognized as being within the standard of care and that a doctor is entitled to select any of those recognized methods. The Updates and Reports section of our site contains an example of Jury Instruction 1023 that is given in a Wisconsin medical malpractice case.

## **How is it determined if a doctor “caused” an injury to a patient?**

That is a difficult issue, because in almost every case the patient presented with a pre-existing problem and because there are known complications from every treatment or procedure and because the natural progression of a pre-existing condition can be the explanation of what the patient sees as a bad outcome or injury. The main issue is whether medical negligence (if there was any) was a “substantial factor” in causing the current condition of the patient’s health. A jury is told that a doctor is not responsible for pre-existing disabilities or conditions, but is responsible if his or her care “aggravated or further impaired” the patient’s state of health. The causation instruction is contained near the end of Jury Instruction 1023.

## **What is an “informed consent” claim?**

Under Wisconsin law, a doctor generally has a duty to inform a patient about “the availability of all alternate, viable medical modes of treatment and about the benefits and risks of these treatments.” The duty to get informed consent from a patient rests with the physician, not the hospital. A physician does not have to disclose: 1) information beyond what a reasonably well-qualified physician would know; 2) detailed technical information that a patient would not understand; 3) risks that were apparent or known to the patient; 4) extremely remote possibilities that might falsely or detrimentally alarm the patient.

Courts generally analyze informed consent issues by trying to determine what “material information” a “prudent patient” would want to know. Stated another way, given the circumstances of the case, what would a reasonable person in the patient's position want to know in order to make an intelligent decision about choices that were available for treatment or diagnosis?

When an informed consent claim is raised by a plaintiff the relevant evidence usually includes 1) testimony from the patient and others who may have been with the patient about what they were told about available alternatives and their relative risks and benefits; 2) any informed consent form; 3) what the medical record says about the nature of the informed consent discussion; and 4) testimony from the doctor about his or her habit or routine practice in terms of what would have been told to the patient.

## **What is the Burden of Proof in a Medical Malpractice Case?**

The “burden of proof” is an important legal concept. In a medical malpractice case the plaintiff has the burden of proof on every jury question where the plaintiff asks for a “yes” answer and on all damage question. The jury is told that the “burden of proof” means that the plaintiff has to satisfy them by the “greater weight of the credible evidence, to a reasonable certainty,” that “yes” should be the answer to the verdict questions. Plaintiff’s lawyers usually tell the jury that this doesn’t require much, just that the evidence “ever so slightly” favors their side; and they always emphasize the difference between this burden of proof and the “beyond a reasonable doubt” standard for a criminal case. The Updates and Reports section contains the standard language for the Burden of Proof Jury Instruction, number 200. One important point in the instruction is where it says that while “absolute certainty” is not required, “a guess is not enough to meet the burden of proof.”

## **Are there any damage limits in medical malpractice cases?**

The answer to that question depends on when the medical care in question took place and what type of damages are involved. Wisconsin distinguishes between two types of damages: (1) “economic” damages, such as past or future medical expenses or past or future wage loss; and (2) “non-economic” damages, such as pain and suffering or a loss of society and companionship.

For “economic” damages, there are not, and there have never been, any limitations on damages. The jury is told that if damages are awarded for those items the amount should be whatever “reasonable” amount is needed to compensate the plaintiff.

For “non-economic” damages, the answer depends on when the medical care at issue was provided. If the care was provided before April 6, 2006, there is no limit on the amount that a jury can award for non-economic damages. That is the result of a decision by the Wisconsin Supreme Court which held that a statute which set a limit on these damages was unconstitutional. In response to that decision, the legislature passed a new law, signed by the governor on March 22, 2006, which sets a limit of \$750,000 on non-economic damages for medical malpractice that occurred on or after April 6, 2006. The Updates and Reports section contains a chronological summary of non-economic damage laws and cases in Wisconsin.

## What are the typical stages of a medical malpractice case?

Every case is different, but most malpractice lawsuits follow the same general steps. Throughout the case there will be discussion about the strengths and weaknesses of the plaintiffs' claims and about whether settlement should be pursued. Your view on that topic is very important, but your insurance company has the final say on whether a case is settled or tried. Cases can be settled through direct negotiations with the plaintiffs or through a formal mediation process. Wisconsin law requires an early mediation proceeding, but this rarely resolves disputes because it occurs so early and because the process is viewed by most plaintiffs as simply something that needs to be completed to continue with a lawsuit..

**1. Start of Case.** A lawsuit begins when a plaintiff (the patient or a representative of the patient) files a "Complaint" with a court. The complaint usually has to be filed in the county where the patient lives; but if the patient lives outside Wisconsin it is supposed to be filed in the county where the treatment was provided. The complaint must be officially "served" on each defendant. This can be done by signing a document admitting service or by personal delivery by a sheriff or other process server. Wisconsin also requires that the patient file a "request for mediation," but that can be filed before or after filing a lawsuit; so sometimes the first thing you know about a claim is when you receive the complaint. If a complaint is delivered personally to you it is essential that you immediately notify your clinic or hospital risk manager so notice can go to your insurance company.

**2. Defense Lawyer and Claims Representative.** Your insurer will hire a defense lawyer to represent you. If you would like to work with a particular defense lawyer, you can make that request. The lawyer will meet or talk with you to review the facts and medical records and prepare a formal "answer" to the complaint or response to the patient's mediation statement. It is important that you develop a good working relationship with your defense lawyer and that you do everything you can to make sure your lawyer understands your point of view in the case. Your insurance company will also assign an experienced claims representative to be your contact on the case and to work with your defense lawyer.

**3. Discovery.** There is then a fairly lengthy "discovery" process, which includes getting certified copies of all medical records, answering written questions (called "interrogatories") and answering questions under oath in a deposition. Your deposition is one of the most important parts of the case. See the separate **document** giving an overview of issues that come up in depositions.

**4. Expert Witnesses.** The judge will set a deadline for the plaintiff to identify experts who are then deposed by the defense lawyers. A later deadline is set for naming defense experts, which usually happens after the experts for the plaintiffs have been deposed. The selection of experts who are both knowledgeable in the field and able to make an effective presentation of medical information to lay people on a jury, is very important to the outcome of a case.

**5. Trial.** After discovery has been completed both sides usually have a pretty good idea about the medical and legal issues, so the case is either voluntarily dismissed by the plaintiff, settled or proceeds to trial. The timing of a trial varies from county to county, but a trial generally occurs 1 1/2 to 2 years after a case is filed. The length of the trial depends on the number of witnesses, and it can vary from a few days to 3 weeks and sometimes longer. Most medical malpractice cases are tried to a jury of 12, but a case can also be tried just to a judge without a jury. That is an issue you should discuss with your defense lawyer. If either side wants a jury, and pays the fairly minor jury fee, the case will be tried to a jury. While there can be exceptions, most defense lawyers believe it is important for you to attend every day of the trial, starting with the jury selection and continuing until a verdict is announced.

The trial begins with jury selection, a process that takes several hours and sometimes a half to a full day. Forty or so residents of the county, usually selected from drivers license records, are required to appear. A group of twenty or so is randomly selected for the initial panel. They are asked questions by the judge and all lawyers to see if there is any reason why they would not be able to judge the case fairly and impartially. If there is a concern about their fairness, the judge will consider excluding a person “for cause.” After that process has been completed both sides are entitled to remove (“strike”) 3 or 4 jurors for no reason. These are called “peremptory strikes.” For that reason it is important for you to attend the jury selection and to pay close attention to the process; your opinions about who to remove with a peremptory strike are very important to your defense lawyer.

The trial will probably begin with 14 jurors, including 2 extra (called “alternates”) in case a juror becomes ill or is for some reason unable to attend every day of the trial. If more than 12 remain in the jury at the end of the case jurors are removed by random draw to get down to the 12 who will deliberate and decide the case. For performing this very important civic duty, jurors are usually paid only \$15.00 per day and usually have to pay for their own lunches. Meals are required to be provided by the county only when the jury is deliberating at the end of the trial.

The case begins with opening statements, first from the plaintiff and then from the defense lawyers. This is considered a very important part of the trial because it is generally thought that many jurors make up their minds, or develop quite strong inclinations, based on the opening statements. The plaintiff then calls witnesses for their case and they are cross-examined by your lawyer. The plaintiff's lawyer can call you as an "adverse" witness in the plaintiff's part of the trial. This just means that the plaintiff's lawyer can cross-examine you early on. Be sure to discuss this prospect with your lawyer; because how well you do in handling cross-examination, whether done in a "adverse" examination or during the defense part of the case, is very important.

Jurors are usually allowed to take notes during the trial, but not during the opening statements or closing arguments. Some judges allow jurors to ask questions of witnesses. When that is done the questions are written out by the jurors and reviewed by the judge and all lawyers before any question is asked. Allowing jurors to ask questions seems to have gone out of fashion, because it can take a lot of extra time.

At the end of the plaintiffs case your lawyer has an opportunity to make a motion to dismiss if no evidence was presented on a required element of the case. This type of motion is not often granted, but it can be effective in some cases.

The defense case then begins, usually with you as the first witness, followed by other fact witnesses and the defense experts. Your lawyer will have to respond to the damage issues raised by the plaintiff because in Wisconsin all issues are tried at the same time. Federal courts, and courts in some states, have what are called "bifurcated" trials where the jury first decides if the defendant was negligent before hearing any evidence on damages. But that is not the procedure in Wisconsin, so you will hear lots of damage evidence during the plaintiff's part of the case and your lawyer will probably have experts if the case involves future economic damages, like wages and future medical or care costs.

At the end of the trial your lawyer can again make a motion to dismiss or to direct a verdict in your favor. While this type of motion is sometimes granted, many judges, even if they think the motion has merit, tend to want the jury to make a decision.

At the end of the trial the lawyers make their closing arguments, first the plaintiff, then the defense and then a rebuttal argument by the plaintiff. The plaintiff is allowed to go last, and to make a rebuttal argument, because the plaintiff has the

burden of proof. The judge then reads the jury instructions to the jury; this can happen either before or after the closing arguments by the lawyers.

The alternates are then excused and the jury begins its deliberations. A final verdict requires agreement by 5/6 of the jury, meaning that with a 12-person jury there has to be agreement by 10 people. The questions on the **verdict** deal first with negligence, causation, informed consent (if that is an issue), comparative negligence (if that is an issue), and damages. The jury is specifically told that if it answers “no” to the negligence question, or to the cause question, then they do not have to deal with the damage questions.

Most Wisconsin judges do not send any exhibits to the jury unless they ask for them and not until the request has been considered with all lawyers. The deliberations will continue as long as necessary, unless the jury is completely and irrevocably deadlocked at something less than 10 votes for either side. That rarely happens, but it is possible. You should talk with your lawyer about what to do while waiting for the jury’s verdict. Usually everyone stays close to the courthouse in case the jury has questions or asks to see some exhibits. At a minimum your lawyer needs to know how to quickly reach you so you can be present when the verdict is announced.

### **What happens after a verdict?**

After a verdict is given by the jury, the side that lost has 20 days to file motions with the trial judge if they think errors were made or that there is some reason why the verdict should be changed or a new trial held. It is very difficult, but not impossible, to overcome a jury verdict with this type of motion.

The side that won the case is able to “tax costs,” which means that the losing side will have a judgment for some of the expenses of the winning side. The allowed items are limited by state law, but in major cases with lots of depositions the amount can be tens of thousands of dollars and sometimes much more. When the defense wins, there is often discussion about waiving the taxation of costs if the plaintiff will agree to not pursue motions after verdict or an appeal. This is something you can discuss with your defense lawyer and insurance claims representative.

There is then a time period for appeal to the Wisconsin Court of Appeals. This is an automatic right if the losing side wants to pursue an appeal. It must be filed either 45 or 90 days after the final judgment has been issued by the trial court, the difference depends on whether a written notice of the final judgment is given to the losing side by a deadline set in the statutes. An appeal usually takes another year or so

to complete. When a decision is made, the losing side can ask the state Supreme Court to review the case, but that is not an automatic right, and for many appeals the decision by the Court of Appeals is final.

### **What is the effect of a verdict for the plaintiff?**

If the verdict is for the plaintiff, there are potential financial and reporting consequences for you. There will not be any immediate financial consequences so long as you have the required amount of primary coverage (now \$1 million) and have paid your assessments to the Wisconsin Injured Patients and Families Compensation Fund (the “Fund”) and the claims against you are all within the definition of medical malpractice claims covered by Ch. 655 of the Wisconsin Statutes. In general, your primary insurance pays for the defense of the case and up to the first \$1 million of damages and the Fund pays all damages over \$1 million. Punitive damages are not recoverable in a medical malpractice case, and your personal assets are not in jeopardy so long as you have the required primary insurance and are a Fund participant.

If a payment is made as a result of a medical malpractice claim against you, the fact of the payment has to be reported to the National Practitioner’s Databank. Under Wisconsin law, the clerk of court is required to make a report to the State Medical Examining Board of any finding by a judge or jury of negligence against a doctor. For medical examining board purposes, a finding of negligence is “conclusive evidence” of unprofessional conduct, which can lead to disciplinary action by the board. These are important issues to discuss with your lawyer.

### **What happens if more than one defendant is found negligent?**

This question raises the issue of “comparative negligence.” If the plaintiff claims that more than one person was negligent, the jury is asked the negligence and cause questions for each; and then for any defendants who are found causally negligent, the jury is asked to assign a percentage, based on “how much and to what extent each party is to blame” for the injury and “whether the conduct of one made a larger, equal, or smaller contribution than the other.”

The answer to this question can have a big effect on the allocation of damages. If a jury concludes that a defendant is 51% or more responsible for the injuries, then the plaintiff can recover all of the damages from that defendant; but if the defendant is 50% or less responsible, then the defendant is liable for only his or her percent of the damages.