

Why Are Medical Malpractice Cases So Difficult in Alabama?©

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In Alabama medical malpractice cases are one the most difficult type of tort cases to successfully prosecute.¹ From 2004 through 2008 health care providers won almost 80% of the medical malpractice cases tried by juries in Alabama. Besides being difficult to win at trial, many medical malpractice cases are dismissed by the Court before a jury even gets a chance to hear or decide the case.² From 2004 through 2008 171 medical malpractice cases were dismissed in favor of the health care providers by Summary Judgment. The reason these cases are so difficult for victims is because Alabama evidentiary and procedural laws favor health care providers and make it difficult for a malpractice victim to succeed in a civil lawsuit. Yes, you hear doctors and the medical community raise concerns over the high cost of their malpractice premiums and they blame Plaintiff lawyers and lawsuits for these high premiums. But the truth is their gripe should be with the insurance companies who continue to claim “frivolous” lawsuits are the reason for these high premiums. As you will see from the information below, Alabama laws make it almost impossible for a frivolous medical malpractice case to even get through the Court house doors. These difficulties also explain why some attorneys in Alabama often just summarily dismiss calls from people who believe they have been the victim of malpractice without offering any meaningful explanation as to why no viable case exists.

Often times people will call an attorneys office simply wanting them to just to write a letter to the doctor’s insurance company to obtain a settlement for their harm without filing a lawsuit. But the insurance companies who provide malpractice insurance to doctors and hospitals know how difficult these type claims or cases are to prove under Alabama law. That is why they rarely offer compensation to people who believe they have been the victim of malpractice without full and complete litigation. Simply put, they know medical malpractice cases are very expensive and costly to prove and therefore they are not willing to settle until extensive and expensive litigation has been undertaken. But why are these cases so expensive and difficult?

Why are Medical Malpractice cases so expensive?

Medical malpractice is the failure of a health care provider to follow the **appropriate standard of care** (breach of a duty) which **causes** a harm or death.³ This sounds simple enough until you look at what is required to meet this definition. The victim must “prove by expert testimony” the standard of care which was breached and that the failure to follow that standard of care probably caused the injury or harm.⁴ This means no matter how straight forward the alleged malpractice may seem, expert testimony is needed to support the malpractice claim. Furthermore expert testimony is needed to establish the causation of the injury or harm. Experts must be equally or similarly qualified as the healthcare provider in

question.⁵ Basically very few if any local doctors are willing to testify against another local doctor. This means victims must usually secure the services of an expert from outside the local area and these experts can be very expensive. A preliminary retainer for a basic medical record review can easily cost \$10,000.00. These preliminary expert reviews usually are done for the basic purpose of establishing if a potential malpractice case can move to the next level of investigation and warrant further review by experts in a specific area or related to a specific issue.

Further adding to the expense and cost of a medical malpractice case is Ala Code § 6-5-551. This statutory law requires that a medical malpractice lawsuit include in the Complaint “a detailed specification and factual description of each act and omission alleged by plaintiff [victim] to render the health care provider liable to plaintiff and shall include when feasible and ascertainable the date, time and place of the act or acts.” In practical application this means victims of alleged malpractice must have a detailed expert opinion before drafting and filing a medical malpractice lawsuit. Given the complexities of medicine and medical care, it is often necessary to have two or three experts in order to comply with this statute. Again, more expenses. The statute further states that a Complaint which does not comply with these requirements “shall be subject to dismissal for failure to state a claim upon which relief may be granted.”

What all of this means is that Alabama law basically requires victims and their attorneys to undertake very expensive investigation procedures before ever trying to bring a medical malpractice case into Court. Most attorneys in Alabama who handle personal injury matters, including medical malpractice cases, do so on a contingency fee agreement (a percentage of the recovery) and they advance expenses for clients related to the prosecution of that case.⁶ These costs include expert fees. But the cold hard reality is the case must warrant the risk of these expenses. It does not make economical sense to advance \$50,000 to \$100,000 in litigation expenses if the probable recovery in the case is not significant or is not even going to cover the expenses of prosecuting the case. Medical malpractice insurance companies know this and that is the main reason victims get the cold shoulder from them. This is also the reason they pay little heed to victims who say “I’m going to get a lawyer and sue the doctor!”

Why are Medical Malpractice cases so difficult?

Medical care is a complex blend of sciences. Biology, chemistry, anatomy and physiology all factor into the healing arts. These complexities often make issues of causation complicated to prove. Add to this that the standard of care of what should or should not be done in a particular medical situation is not always as clear as we would like it to be and you can see why medical malpractice cases can be difficult to prove. The mere fact that another doctor would have done something different or opted for another treatment protocol or procedure in and of itself is not evidence of malpractice. The treatment or procedure in question must be a deviation from the applicable standard of care, i.e., no reasonable health care provider would have done it that way and the harm would not have occurred if there had

been no breach or deviation from the acceptable standard of care. What follows is a brief summary of Alabama laws that apply to medical malpractice cases.

Higher burden of proof: Unlike most civil lawsuits in Alabama which simply require proof to the jury's reasonable satisfaction, medical malpractice cases require proof by substantial evidence.⁷

Alternative methods of treatment: The mere fact that an alternative method of treatment would have brought about a better result is not evidence of malpractice if the method of treatment in issue was within the reasonable standard of care.⁸

Bad result or outcome: A bad result or outcome from a medical procedure is not malpractice or evidence of malpractice if the health care provider followed the standard of care.⁹

Informed consent to a known material risk of the procedure: If the alleged harm is the result of a known material risk of the procedure and the patient consented to the procedure and the health care provider followed the appropriate standard of care, then there is no malpractice.¹⁰ Even if consent to the procedure is not obtained, Alabama law recognizes implied consent to treatment if the patient knew about the material risks of the treatment.¹¹

Limitation on time for commencement of action. All actions against physicians, surgeons, dentists, medical institutions, or other health care providers for liability, error, mistake, or failure to cure, whether based on contract or tort, must be commenced within two years next after the act, or omission, or failure giving rise to the claim, and not afterwards; provided, that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; provided further, that in no event may the action be commenced more than four years after such act; except, that an error, mistake, act, omission, or failure to cure giving rise to a claim which occurred before September 23, 1975, shall not in any event be barred until the expiration of one year from such date.¹²

In summary.

Alabama laws and the complexity of medical care make medical malpractice cases difficult to win in our State. It is often discouraging for people who believe they have been the victim of medical malpractice to get attorneys to take the time to explain why medical malpractice cases are so difficult to pursue in Alabama. Also, sometimes victims don't understand all the hurdles that have to be cleared by a lawyer before he or she can say whether or not a viable medical malpractice claim exists. It is our hope this article has helped provide a better understanding of these issues.

ENDNOTES

1. According to statistics from the Alabama Administrative Office of Courts (AOC) only 22 of the 106 medical malpractice cases tried to a jury in Alabama courts from 2004 - 2008 resulted in verdicts in favor of the victim.
2. According to AOC from 2004 through 2008 171 medical practice cases were dismissed via Summary Judgement. In a summary judgement motion, the Defendant in a civil lawsuit is asking the Court to dismiss the victim's lawsuit because there is no legal basis for the lawsuit to continue.
3. Alabama Pattern Jury Instruction 25.00 - Medical Malpractice; Elements of Proof.
4. Alabama Pattern Jury Instruction 25.04 - Proof of Standard of Care.
5. Ala Code §6- 4- 442(2). [In 1987 the Alabama legislature enacted the Alabama medical Liability Act of 1987.]
6. Note: Some States prohibit attorneys from advancing court costs and litigation costs for clients.
7. Alabama Pattern Jury Instruction APJI 25.05 defines substantial evidence as follows:
Substantial evidence is that character of evidence that would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.
8. Alabama Pattern Jury Instruction 25.07.
9. Alabama Pattern Jury Instruction 25.08.
10. Alabama Pattern Jury Instruction 25.10.
11. Alabama Pattern Jury Instruction 25.12.
12. Alabama Code § 6-5-482.

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