

Legal Brief

Medical Malpractice

This Legal Brief was drafted for general informational purposes only. It is not meant to be a comprehensive guide, nor should it be construed as legal advice. The information in this brief is current as of July 1, 2015; readers should consult the most recent versions of referenced statutes, regulations, and cases to ensure there have been no material changes.

Summary

The failure to possess and exercise the same degree of care as other physicians in the same line of practice and in the same or a similar location may constitute malpractice and submit the physician to a claim for damages. This standard of care includes a requirement that the physician obtain the informed consent of the patient before commencing treatment.

South Dakota law includes certain procedural and substantive limitations on damage awards in malpractice actions.

Physicians and their malpractice insurers are required to make reports of malpractice claims.

Discussion

The Standard of Care

Generally speaking, physicians are held to certain standards of care in their treatment of patients, and when their treatment of a patient falls below this standard of care, they may be held responsible for damages for medical malpractice. Under this standard of care, the physician is required to possess and use the same degree of care and skill ordinarily possessed and exercised under similar circumstances by other physicians in good standing engaged in the same line of practice in the same or similar locality. The physician is also required to be diligent in their effort to accomplish the purpose for which he or she is employed.

A physician is not necessarily negligent because he or she commits an error in judgment or because treatment proves unsuccessful. Negligence only occurs if the error in judgment or lack of success is due to a failure to perform any of the duties associated with the care and skill ordinarily exercised under similar circumstances by similarly situated physicians.

A physician also has the duty to disclose to the patient the nature of a proposed procedure, the material benefits of the procedure, the material risks associated with the procedure, the likelihood those risks will occur, and the consequences of remaining untreated. If an alternative procedure is reasonably appropriate, the physician has a duty to disclose the material risks and benefits associated with the alternative procedure as well. It is generally held that the failure of a physician to obtain an informed consent from his or her patient constitutes a departure from the usual standard of care applicable to physicians, thus constituting malpractice.

Investigational Treatments

Effective July 1, 2015, subject to applicable requirements of federal law, South Dakota law authorizes “investigational treatment” for certain eligible patients and under certain conditions. A treating physician who is in compliance with the requirements of the law may not be subject to arrest or prosecution, penalty under state law, nor may their state-issued license be canceled, suspended, revoked or non-renewed due solely to the physician’s participation in a course of investigational treatment. The term “investigational treatment” means treatment with a drug, biological product, or device that has successfully completed phase 1 of a clinical trial but has not yet been approved for general use by the U.S. Food and Drug Administration (“FDA”) and which remains under investigation through an FDA-approved clinical trial.

The law does not explicitly provide for immunity from suit for a physician recommending or participating in a course of investigational treatment, but it does state that the law itself does not create a state-law based cause of action as long as the provider acts in good faith compliance with the law and exercises ordinary care. Unless and until a Court rules otherwise, physicians should assume there is no state law immunity from suit. In any event, state common law still requires the physician to exercise the same care and skill that is the existing standard of care and there is the potential for causes of action arising under federal law.

As noted above, federal law must also be complied with in connection with a proposed course of investigational treatment; the physician is at risk of federally-imposed sanctions and penalties if those requirements are not met. Generally speaking, the base qualifications for investigational treatment as established by federal law are (1) the patient must have a serious or immediately life-threatening disease or condition; (2) there is no comparable or satisfactory alternative therapy available; (3) the potential benefit to the patient outweighs the risks and the risks are not unreasonable given the circumstances; (4) use of the treatment will not interfere with proposed or ongoing clinical investigations and approval processes; and (5) FDA approval. 21 CFR 312.300, et. seq.

See also **Investigational Treatments** legal brief

Limitations on Damages

In any action for damages for personal injury or death alleging malpractice against a physician, or against the practitioner's corporate, limited liability partnership, or limited liability company employer based upon the acts or omissions of the practitioner, the total general damages which may be awarded may not exceed the sum of Five Hundred Thousand Dollars (\$500,000). However, there is no limitation on the amount of special damages which may be awarded. “General damages” are damages for things like pain and suffering, loss of consortium, and loss of enjoyment of life. “Special damages” are more specifically-quantifiable items, such as past and future medical expenses, prostheses, and wheel chairs.

To lessen the harassment value of discovery concerning punitive damage claims in medical malpractice and other actions, the legislature has provided that discovery may not commence until after the court has found that there is reasonable basis to believe that willful, wanton, or malicious conduct has occurred. SDCL 21-1-4.1.

In some circumstances, including compliance with certain notice requirements and if the damages are Two Hundred Thousand Dollars (\$200,000) or more, awards for future damages may be payable in periodic payments over a term of years. SDCL 21-3A.

Reporting Claims of Malpractice

A physician applicant for initial licensure or renewal must disclose whether the applicant has ever been the subject of a judgment in a civil action involving medical malpractice or the practice of medicine or whether the applicant has ever settled any such claim. ARSD 20:47:03:03(16). All insurers writing medical malpractice insurance in the state must file reports with the Division of Insurance setting forth data on the disposition of all medical malpractice claims handled by

the insurer in the state. The Division of Insurance is required to forward relevant data concerning any such reported claims to the Board of Medical and Osteopathic Examiners. SDCL Ch. 58-23A

See also **Limitation of Actions** legal brief

Conclusion

A physician is expected to possess and exercise the same degree of care as other physicians practicing in the same field and locality. The failure to do so may constitute malpractice and subject the physician to a claim for damages. South Dakota law imposes certain limitations on damages that may be awarded in a malpractice action. The law also requires both physicians and their malpractice insurers to make reports on malpractice claims.



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