



## THE TRUTH ABOUT MEDICAL NEGLIGENCE CLAIMS

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Deaths and serious injuries resulting from preventable medical errors are a major problem in this country. Independent studies estimate 90,000 people die each year in hospitals alone because of such medical errors. This toll in human loss is the equivalent of 600 airplanes, with 150 passengers each, crashing every year. If only a fraction of such crashes occurred, it would be treated as a major national tragedy leading to a huge public effort to prevent such human losses in the future.

Despite this enormous human toll, the number of medical negligence cases filed each year in Washington State total only about 450. Why so few lawsuits? One reason is that only a small percentage of people even know whether a major injury or a death was caused by medical negligence. Health care providers are rarely forthcoming about telling patients and their families that an injury or death was caused by negligence.

### EXPERT TESTIMONY

A second major reason is that few attorneys are willing or able to take such a case. Medical negligence cases are notorious among attorneys for a low success rate and the huge investment needed to

prosecute the case. To prevail in a medical negligence case, the claimant and his/her attorney must prove, through expert medical testimony, that the injury or death was caused by medical negligence. Many physicians are unwilling to even review a potential claim for a patient's attorney and even fewer are willing to testify at trial that another physician was negligent. Because local physicians often know one another, or would be subject to peer pressure, it often is necessary to find out-of-state physicians willing to serve as experts. This multiplies the cost of obtaining expert testimony.

It is much easier for the health care provider and his/her attorney to find experts to support the defense. Many local physicians are happy to step in to help a fellow physician or a local hospital that has been sued. There is a common myth about "hired guns" serving as experts for the injured patient, but the opposite is more often true. Because the claimant has the burden of proof in a medical negligence case, he/she must present reputable expert testimony to even have a chance of prevailing. That means an intensive search for credible clinicians (physicians in private practice) or well-published academic physicians is often necessary.

### OBSTACLES TO BRINGING A CLAIM

Thus the obstacles to a medical negligence claim are many. To justify the high risks and expenses of bringing the case, the potential for large damages must exist. Credible and reputable health care providers must be persuaded the case is strong enough to justify testifying against a fellow health care provider. Once the case is filed, the claimant and his/her attorney will face the unlimited resources of a large insurance company defending the doctor or hospital. Finally, when the case comes to trial the decision will be made by a jury that, by and large, respects physicians and may believe that people who bring medical negligence claims and their attorneys are playing the "litigation lottery." These obstacles and juror attitudes account for the low success rate of medical negligence cases that go to trial. In Washington for the past ten years, that rate has been less than 10 percent.

Jury attitudes leading to a poor outcome may have been manipulated by insurance companies and their allies. They have convinced many people that "frivolous" lawsuits are common and have caused many physicians to give up their practices.

In fact, for the reasons outlined above, it is so difficult to bring a strong and meritorious case that no attorney with any sense would file a frivolous lawsuit. Nationally, the amount of medical negligence case payouts declined by 15.4 percent between 1998 and 2005. The number of physicians per capita practicing in Washington State increased by 2.4 percent every year between 1993 and 2003, while the population grew by only 1.7 percent per year. Rather than declining because of malpractice costs, hospitals and physician practices have been growing as more facilities are built or expanded and more physicians move to Washington State.

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