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Medical Malpractice Law in Georgia

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Research Guides

Medical Malpractice Law in Georgia

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Overview

The following is an overview of medical malpractice civil actions in Georgia and provides general resources to an individual working on this issue. It is intended to serve as a starting point for attorney's unfamiliar with medical malpractice suits or to offer additional resources for attorney's focusing on a specific aspect of malpractice. The information is specific to actions brought in the State of Georgia. Included are statutory requirements for filing and maintaining a malpractice action, critical information to defending such an action, and various reference materials for attorneys involved these cases.

Although some of the information may be relevant to actions brought in other jurisdictions, it is important to note that this guide is not intended to represent the current law in all jurisdictions and that independent research must be done in order to confirm the law in your jurisdiction. Medical malpractice actions in Georgia are heavily controlled by statute, and Georgia case law, as a result, much of this information may not translate into other jurisdictions.

About the Author

Calvin Yaeger is a law student at Georgia State University's College of Law and will graduate in May 2010. After graduation, he will be an associate at Downey & Cleveland in Marietta, Georgia. This bibliography was written in the Spring 2010 section of Nancy Johnson's Advanced Legal Research class. Send an email to njohnson@gsu.edu for more information about this bibliography.

Scope

This research guide is an introduction to medical malpractice actions in the state of Georgia. It provides useful information for both plaintiff and defense attorneys. It provides primary and secondary sources that will be valuable resources for either side of a malpractice suit in this state.

Disclaimer

This research guide is merely a starting point for a law student or attorney to research medical malpractice actions under Georgia law. As such, it is important that any researcher Shepardize or Keycite all cases and statutes before relying on them. Many of the provisions governing medical malpractice actions have been challenged as unconstitutional and may be overturned or amended. Additionally, as most of these regulations are legislative in nature, they are subject to change each year when the Georgia Assembly meets. New legislative action may affect previous case law as well as future actions. This guide should not be considered legal advice or as a legal opinion on any specific facts or circumstances. If you need further assistance in researching the topic or have a specific legal question, please contact a reference librarian in the Georgia State University College of Law library or consult an attorney.

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Primary Sources

Georgia Statutes

Georgia statutes are compiled in the Official Code of Georgia Annotated. The Code is available at any of the **University law libraries** in Georgia. You can access the Georgia Code online for free via the **Georgia General Assembly's website** or on **Lawskills**. However, these sites organize the Code by Title and are often difficult to search. The Georgia Code may also be accessed online on **Lexis** and **Westlaw**. These services offer a more user-friendly and searchable version of the Code but are only available for a fee.

Medical malpractice actions in Georgia are heavily regulated by statute. This was done in an attempt by the legislature to balance the competing need for sufficient and competent medical care with the rights of those injured by negligent care. The following is a list of some of the more common statutes used in a typical medical malpractice lawsuit. Many define basic elements of a claim and other important aspects of bringing a suit.

Filing Requirements

Pleading Requirements O.C.G.A. § 9-11-8.

This section sets forth the statutory requirements that govern filing a claim for medical malpractice in the state. First it discusses claims for relief and defines "medical malpractice." It also provides the rules in Georgia governing the form of the complaint, sanctions, defenses, affirmative defenses, the effect of a failure to deny, pleading in the alternative, and construction of the pleadings.

Affidavits O.C.G.A. § 9-11-9.1

This section requires an expert affidavit be filed contemporaneously with a wrongful death complaint.

Statue of Limitations

General Rule O.C.G.A. § 9-3-71

This section of the Georgia Code establishes the statute of limitations for medical malpractice suits in Georgia. In general, an action for medical malpractice must be brought within two years of the accrual of the cause of action. Where exceptions to this rule have been made, in no event may an action be brought more than five years after the date on which the negligent or wrongful act or omission occurred.

Definition of Malpractice O.C.G.A § 9-3-70

This section defines a medical malpractice action to include any claim for damages resulting from the death or injury of any person arising from health, medical, dental, or surgical service, diagnosis, prescription, treatment, or care rendered by a person authorized by law to perform such service or by any person acting under the supervision and control of the lawfully authorized person, or any care or service rendered by a public or private hospital, nursing home, clinic, hospital authority, facility, or institution, or by any officer, agent, or employee thereof, acting within the scope of his or her employment.

Exceptions O.C.G.A. § 9-3-73

This section lists the exceptions to the statute of limitations for medical malpractice claims.

(a) Minors and all persons who are legally incompetent because of mental retardation or mental illness are bound by the applicable periods of limitations with respect to medical malpractice, except for claims based upon foreign objects.

(b) However, any minor who is under the age of five has two years from his or her fifth birthday to bring a medical malpractice action if the cause of action arose before the minor attained the age of five years.

(c) No medical malpractice action can be brought on behalf of an incompetent more than five years after the accrual of the cause of action, and no similar action may be brought on behalf of a minor after his or her 10th birthday if the child was under five years of age at the accrual or after five years if the child was aged five or older.

Arbitration

Arbitration Orders O.C.G.A. § 9-9-62

This section is entitled **Arbitration Order.** It sets for the law pertaining to arbitration in medical malpractice cases. It states that if a judge determines that the claim is a medical malpractice claim subject to the statutory provisions governing medical malpractice arbitration, within 30 days of the filing of the petition for such order the judge must issue an order authorizing the arbitration and appointing a referee.

Referee Qualifications O.C.G.A. § 9-9-66

This Georgia statute establishes the qualifications of a referee in an arbitration proceeding. The referee must be an attorney who is an active member of the State Bar of Georgia and a

nonvoting member of the arbitration panel.

Consent

Medical Consent Law O.C.G.A. § 31-9-1

"This chapter shall be known and may be cited as the "Georgia Medical Consent Law."" These code sections refers to consent requirements in the state of Georgia.

Persons Authorized to Consent O.C.G.A. § 31-9-2

This section lists the persons authorized to consent to surgical or medical treatment. These include:

(1) Any adult, for himself or herself, whether by living will, advance directive for health care, or otherwise;

(1.1) Any person authorized to give such consent for the adult under an advance directive for health care or durable power of attorney for health care under Chapter 32 of Title 31;

(2) In the absence or unavailability of a living spouse, any parent, whether an adult or a minor, for his or her minor child;

(3) Any married person, whether an adult or a minor, for himself or herself and for his or her spouse;

(4) Any person temporarily standing in loco parentis, whether formally serving or not, for the minor under his or her care; and any guardian, for his or her ward;

(5) Any female, regardless of age or marital status, for herself when given in connection with pregnancy, or the prevention thereof, or childbirth; or

If an adult is unable to consent and any of the aforementioned persons are unavailable, the following persons may consent in the following order of priority:

(A) Any adult child for his or her parents;

(B) Any parent for his or her adult child;

(C) Any adult for his or her brother or sister; or

(D) Any grandparent for his or her grandchild.

Emergencies O.C.G.A. § 31-9-3

This codes section discusses consent requirements during an emergency situation and defines "Emergencies."

Mentally Ill O.C.G.A. § 31-9-4

This section makes Chapter 31-9-1 applicable to the care and treatment of mentally ill, as defined in paragraph (7) of Code Section 37-3-1.

Abortion O.C.G.A. § 31-9-5

This section states that this chapter "does not apply in any manner whatsoever to abortion and sterilization procedures, which procedures shall continue to be governed by existing law independently of the terms and provisions of this chapter."

i. General Consent O.C.G.A. § 31–9–6

This section governs general consent, and provides in part:

A consent to surgical or medical treatment which discloses in general terms the treatment or course of treatment in connection with which it is given and which is duly evidenced in writing and signed by the patient or other person or persons authorized to consent pursuant to the terms of this chapter shall be conclusively presumed to be a valid consent in the absence of fraudulent misrepresentations of material facts in obtaining the same

ii. Informed Consent O.C.G.A. § 31–9–6.1

This section provides disclosure requirements. It mandates "informed" consent to certain surgical or diagnostic procedures and disclosure of information to persons from whom consent is required. Consent must be obtained in writing, signed by the patient, and disclosed in general terms the information set forth in the statute, a rebuttable presumption as to the validity of the consent is established.

Standard of Care

Standard of Care O.C.G.A. § 51–1–27

This statute established the minimum standard of care for the practice of medicine in Georgia

"A person professing to practice surgery or the administering of medicine for compensation must bring to the exercise of his profession a reasonable degree of care and skill. Any injury resulting from a want of such care and skill shall be a tort for which a recovery may be had."

This section has been in the Georgia Code since the original Code of 1863.

Emergency Room Standard of Care, O.C.G.A. § 51-1-29.5

This provision elevates the plaintiff's burden of proof to "clear and convincing evidence" and imposes a "gross negligence" standard of liability.

Vicarious Liability

Vicarious Liability O.C.G.A. § 51-2-5.1

A new statute governs the vicarious liability of hospitals for healthcare professionals in claims arising on or after February 16, 2005. If the hospital posts a notice in prescribed form or obtains an acknowledgment from the patient or his representative that some of the healthcare professionals are independent contractors, then it is not liable unless the professional has an actual agency or employment relationship with the hospital.

If the healthcare professional has no contract with the hospital, or if the contract is unclear or ambiguous, then the relationship can only be found to be agency or employment if the hospital reserves the right to control the time, manner, or method in which the professional performs the services for which he is licensed. The statute includes a list of factors based on prior case law that can be considered in making this determination.

Miscellaneous

Offer of Judgment Rule O.C.G.A. § 9-11-68

This section allows a defendant in a tort case to 'shift' its attorney's fees to the plaintiff if the plaintiff refuses to accept an offer of settlement and ultimately fails to recover more than the amount offered.

Caps on Damages O.C.G.A. § 51-13-1

In *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt***,** 2010 WL 1004996 (Ga. 2010)

the Georgia Supreme Court found that caps on noneconomic damages were a violation of the Georgia constitutional guaranty of a right to a jury trial.

Medical Authorizations, O.C.G.A. § 9-11-9.2

This provision requires a medical malpractice plaintiff to sign a medical authorization form and file it with the complaint. The medical form authorizes the defendant's attorney to obtain and disclose the plaintiff's medical records and to discuss the plaintiff's care and treatment with the plaintiff's treating physicians.

In *Allen v. Wright*, 282 Ga. 9 (2007) the Court held that this provision is preempted by HIPPA 42 U.S.C. § 1320-7(a)(2). The Georgia law conflicted with the federal law in two respects: (1)the Georgia statute did not include a "right to revoke" the authorization as required by HIPPA, and, (2) the Georgia statute did not include a "specific and meaningful identification of information to be disclosed" as required by HIPPA.

Expressions of Sympathy, O.C.G.A. § 24-3-37.1

This provision states that "conduct, statements or activities constituting....expressions of benevolence, regret, mistake, error...[etc.] should not be considered an admission of liability."

Georgia Constitution

Ga Const. 1983, Art. III, Sec. VI, Par. IV (a)

Uniformity clause

The uniformity clause provides:

Laws of a general nature shall have uniform operation throughout this state and no local or special law shall be enacted in any case for which provision has been made by an existing general law, except that the General Assembly may by general law authorize local governments by local ordinance or resolution to exercise police powers which do not conflict with general laws.

This constitutional provision has been used to attack many of the tort reform measures included in the Georgia Assembly's final version of its tort reform bill.

Ga. Const. of 1983, Art. I, Sec. I, Par. XI (a).

Article I, Section I, Paragraph XI (a) guarantees the right to a jury trial only with respect to cases as to which there existed a right to jury trial at common law or by statute at the time of the adoption of the Georgia Constitution in 1798. This statute was used to overturn caps on noneconomic damages in medical malpractice suits.

Ga Const. 1983, Art. I, Sec. I, Par. XII.

Provides that "[n]o person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state." However, the court has determined hat Art. I, Sec. I, Par. XII was never intended to provide a right of access to the courts, but was intended to provide only a right of choice between self-representation and representation by counsel. See *Smith et. al. v. Salon Babtiste,* Case No. S09A1807 (Ga. 2010).

Federal Statutes

42 U.S.C. § 1320d-7 (a)(2)

The Health Information Portability and Accountability Act of 1996 (HIPAA) and the related provisions established in the Code of Federal Regulations expressly supercede any contrary provisions of [S]tate law except as provided in 42 U.S.C. § 1320d-7 (a)(2). Under the relevant exception, HIPAA and its standards do not preempt state law if the state law relates to the privacy of individually identifiable health information and is "more stringent" than HIPAA's requirements.

Code Federal Regulations

This section of the Code of Federal Regulations addresses the following HIPPA related issues:

Standards for Privacy of Individually Identifiable Health Information Regulation Text; Security Standards for the Protection of Electronic Protected Health Information; General Administrative Requirements Including, Civil Money Penalties: Procedures for Investigations, Imposition of Penalties, and Hearings

Title 45- Public Welfare

SUBCHAPTER C--ADMINISTRATIVE DATA STANDARDS AND RELATED REQUIREMENTS

45 C.F.R. 160 - General Administrative Requirements

45 C.F.R. 164 - Security and Provisions

Legislative History

The following link provides a detailed legislative history for the Tort Reform Bill,

Senate Bill 3, passed by the Georgia General Assembly in 2005.

http://www.legis.ga.gov/legis/2005_06/sum/sb3.htm

Georgia Case Law

In addition to statute, much of the law regarding medical malpractice suits in the state is established by case law. There is extensive litigation in Georgia over nearly every aspect of a medical malpractice claim in Georgia. In this guide, case law is broken up into two sections. The first deals with cases relating to the statute of limitations. This section discusses actions in which the court has barred actions based on the statute of limitations or has allowed certain exceptions or tolling of the statute based on specific circumstances.

The second seeks to set forth case law regarding the basic elements of a medical malpractice claim in the state of Georgia. This section is broken up in into cases involving the issue of whether a patient physician relationship existed, the standard of care in malpractice action and whether it had been breached, and causation. Lastly, this guide presents cases involving damages in a malpractice action, as well as constitutional challenges to the Georgia legislatures attempts at tort reform.

The cases in each topic are listed in reverse chronological order.

1. Statute of Limitation

a. General Rule:

Kane v. Shoup, 260 Ga.App. 723, 580 S.E.2d 555 (2003)

In most misdiagnosis cases, "the injury begins immediately upon the misdiagnosis due to the pain, suffering, or economic loss sustained by the patient from the time of the misdiagnosis until the medical problem is properly diagnosed and treated. The misdiagnosis itself is the injury and not the subsequent discovery of the proper diagnosis; thus, the fact that the patient did not know the medical cause of his suffering does not affect the applicability of OCGA § 9-3-71(a)." *Id.* at 724.

In this case, the Court reasoned that the evidence demonstrated only that the patient's existing condition was misdiagnosed and mistreated, and that condition was the same one that existed at the time the Plaintiff's first sought treatment. *Id.* at 725. Because the evidence did not assert that any new injury occurred, the case fell under the general rule for misdiagnosis cases. *Id.* That rule holds that "the date of injury must be considered to be the date of [the] alleged misdiagnosis." *Id.* Therefore, the trial court properly found that the Plaintiff's claims were time-barred as they were filed more than two years after the misdiagnosis.

Young v. Williams, 274 Ga. 84, 560 S.E.2d 690 (2002)

This case sets forth the standard that the statute of limitation in medical malpractice actions "begins with the occurrence of an injury, not the performance of a negligent act." *Id.* at 847.

The Court explicitly rejected the "continuous treatment" doctrine in which the statute of limitation commences from the date on which "treatment by the doctor for the particular disease or condition involved has terminated-unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery...." *Id.* at 846.

In the case, the Plaintiff filed a medical malpractice action for misdiagnosis of a foot condition. *Id.* at 845. The trial court barred the action based on OCGA § 9-3-71(a), the statute of limitation for medical malpractice actions in Georgia. *Id.* The Court of Appeals reversed holding that under the continuous treatment doctrine there was an issue of fact whether Plaintiff was treated by Defendant within two years of her filing of the lawsuit. *Id.* The Georgia Supreme Court reversed, ruling that "[t]he General Assembly has determined that medical malpractice actions must be filed within two years of the occurrence of injury or death arising from a negligent or wrongful act or omission." "The legislatively-prescribed statute of limitation does not provide for the commencement of the period of limitation upon the termination of the health-care provider's treatment of the patient, and the judicial branch is not empowered to engraft such a provision on to what the legislature has enacted." *Id.* at 848.

b. Exceptions/Discovery Rule:

Brahn v. Young, 265 Ga.App. 705, 595 S.E.2d 553 (2004)

In this case the Georgia Court of Appeals identifies a limited exception to the general rule that the statute of limitations begins running when the injury occurs. This exception, known as the "Discovery Rule" occurs "in misdiagnosis cases when an injury occurs *subsequent* to the date of medical treatment, in which case the statute of limitation commences from the date the injury is discovered." *Id.* at 708.

In this case, the plaintiff suffered an infection after having a hernia operation performed by the defendant. *Id.* The plaintiff argued that the defendant's alleged misdiagnoses during her final visits constituted separate acts of negligence that fell within the two-year limitation period for medical malpractice actions. *Id.* The Court disagreed finding that, by the subsequent dates of medical treatment alleged, the "act of alleged negligence had occurred and the injury had manifested itself through the symptoms described..." *Id.* The fact that plaintiff "did not know the medical *cause* of her suffering did not affect the application of OCGA § 9-3-71(a) when the evidence established that her injury had occurred and had physically manifested itself to her at the time of misdiagnosis." *Id.* Consequently, the plaintiff's misdiagnosis claim "[wa]s time-barred, as is any claim of improper treatment based on the misdiagnosis." *Id.*

Zechman v. Thigpen, 210 Ga. App 726, 437 S.E.2d 475 (1993)

In the case of a misdiagnosis that does not manifest any damages at the time of the act or omission, but does result in damages at a later time, the statute of limitation commences to run upon discovery of the damages. *Id.* at 729.

The Court found that because the plaintiff was alleging an injury, which occurred four years after the defendant's last contact with the patient child, based on the defendant's failure to diagnose the child, the discovery rule applied. *Id.* Thus, the statute of limitations had not begin to run until the subsequent injury was discovered. *Id.*

c. Tolling

Lynch v. Waters, 256 Ga. 389, 349 S.E.2d 456 (1986)

Holding "[t]he physician-patient relationship is a confidential one and silence or failure to disclose what should be said or disclosed can amount to fraud which tolls the statute. " *Id.* at 390.

In *Lynch*, a patient brought a medical malpractice action against her obstetrician and general surgeon, alleging that defendants negligently failed to diagnose her breast cancer. Plaintiff alleged that during periodic visits to the defendant's office she was assured that everything possible was being done, no further tests were warranted, and that because of these false assurances by the physician she refrained from other medical inquiries and thereby was prevented from discovering the nature of her illness. *Id.* She further alleged the physician knew or should have known of the malignancy and that further testing or action was required, but failed to act or inform her. *Id.* The Supreme Court held that the patient's allegation was sufficient to raise a material issue of fact regarding the issue of fraud, tolling the two-year limitations period. *Id.*

Rowell v. McCue, 188 Ga.App. 528, 373 S.E.2d 243 (1988)

In a medical malpractice action for misdiagnosis, the "patient must present evidence of a *known* failure to reveal negligence in order to show fraud." *Id.* at 530.

d. Renewal after expiration:

Chandler v. Opensided MRI of Atlanta, LLC, 299 Ga.App.145, 682 S.E.2d 165 (2009)

In *Chandler*, the court held that a failure to file an expert affidavit with the complaint in medical malpractice action renders the complaint voidable, rather than void, and does not preclude plaintiff from renewing dismissed complaint after the expiration of the statute of limitations. This case overruled a plethora of prior Georgia case law, which held that a plaintiff could not renew after the expiration of the statute of limitation. See *Foskey v. Foster*, 199 Ga.App. 205 (1991); *Lyberger v. Robinson*, 207 Ga.App. 845 (1993); *Trucano v. Rosenberg*, 215 Ga.App. 153 (1994); *Grier-Baxter v. Sibley*, 247 Ga.App. 560 (2001);*Witherspoon v. Aranas*, 254 Ga.App. 60 (2002), and; *Shirley v. Hospital Auth. of Valdosta/Lowndes County*, 263 Ga.App. 408 (2003).

2. Prima Facie Case of Malpractice

***Copeland v. Houston County Hosp. Authority*,** 215 Ga. App. 207, 450 S.E.2d 235 (1994)

This case also establishes the general proposition that there are three essential elements that comprise a cause of action for medical malpractice: (1) the duty inherent in the doctor-patient relationship; (2) the breach of that duty by failing to exercise the requisite degree of skill and care; and (3) that this failure be the proximate cause of the injury sustained.

Hawkins v. Greenberg, 166 Ga.App. 574, 304 S.E.2d 922 (1983)

In this case the court discusses the elements required to show a prima facie case of medical malpractice.

"To establish liability in a medical malpractice action, a plaintiff must prove three elements: the duty inherent in the doctor-patient relationship; breach of that duty by failure to exercise the required standard of care; and that this failure is the proximate cause of the plaintiff's injury."

a. Provider-Patient Relationship

Peace v. Weisman, 186 Ga. App. 697, 368 S.E.2d 319 (1988)

This case establishes the general rule that there can be no liability for medical malpractice without a physician-patient relationship. *Id.* at 698.In this case the Plaintiff alleged that the defendant committed medical malpractice by failing to diagnose him with lung cancer in a timely manner, thereby allowing the malignancy to progress to its terminal stages. *Id.* The court held that no physician-patient relationship existed between the plaintiff and defendant because in Georgia, when a physician is retained by a third party to undertake a medical examination of an individual, he cannot be held liable to that individual for malpractice as a result of that examination, where he neither offered nor intended to treat, care for, or otherwise benefit the individual and did not injure him during the course of the examination. *Id.* In the absence of a physician-patient relationship, the defendant's only duty to plaintiff was to conduct the examination in such a manner as not to injure him. *Id.* at 699.

The relationship is a consensual one wherein the patient knowingly seeks the assistance of the physician, and the physician knowingly accepts him as a patient. Thus, in the absence of the physician's assuming some affirmative responsibility for treatment of the patient, neither an on-call arrangement nor a consulting arrangement creates the requisite physician-patient relationship. *Id.* at 698.

***Bradley Center, Inc. v. Wessner*,** 250 Ga. 199, 296 S.E.2d 693 (1982)

This case discusses an exception to the general rule that there can be no liability for medical malpractice without a physician-patient relationship when there is foreseeable injury to third parties.

The court discussed whether a physician could owe a legal duty of care to an injured party who was not his patient. *Id.* at 200. The court went on to hold that while, as a general rule, there is no duty to control the conduct of third persons to prevent them from causing physical harm to others, in this case one of the exceptions to that rule applies. Namely, that because of the special relationship which existed between appellant and appellees' father: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." *Id.* at 201.

b. Standard of Care

Pottinger v. Smith, 293 Ga. App. 626, 667 S.E.2d 659 (2008)

In this case, the trial court denied the defendant's motion for summary judgment and the Court of Appeals reversed. *Id.* at 629. In support of his contention that the record contains clear and convincing evidence proving that Pottinger's actions were grossly negligent, Smith pointed to medical records showing that Pottinger failed to recognize a serious leg fracture shown by the x-rays, and that Pottinger failed to call an orthopedic surgeon to the emergency room to consult about his leg injury. *Id.* at 628. Smith also pointed to the physician's opinion in his OCGA § 9-11-9.1 expert affidavit that these failures were below the standard of care and were grossly negligent. *Id.* at 629. Pottinger,

however, pointed to evidence that she immediately ordered x-rays on Smith's injured leg, that the x-rays were read by a radiologist, that she relied on the radiologist's finding that the x-rays did not show a serious fracture, and that, based on this finding, there was no need for an orthopedic surgeon to consult in the emergency room about Smith's leg injury. *Id.* In Pottinger's opinion, her actions met or exceeded the standard of care. Based on the record, the court found that was a plain and indisputable case. Even assuming there was evidence sufficient to create a jury issue as to whether Pottinger's actions were negligent, there was no evidence, and certainly no clear and convincing evidence, by which a jury could reasonably conclude that Pottinger failed to exercise even slight care and was therefore grossly negligent. *Id.*

Beach v. Lipham, 276 Ga. 302, 578 S.E.2d 402 (2003)

In this case the Court held that there is a rebuttable presumption that physicians, nurses, and other medical professionals exercise due care and skill in their treatment of patients based on their education, training, and experience, but the person claiming an injury may overcome this presumption by introducing expert testimony to the contrary. *Id.* at 303.

McDaniel v. Hendrix, 260 Ga. 857, 401 S.E.2d 260 (1991)

In this case, the Supreme Court affirmed that the general, not the local, standard of care is the appropriate one for medical malpractice cases. However, it also acknowledged that the general standard might not be articulated the same in every case. *Id.* at 859.

Wade v. John D. Archbold Memorial Hosp., 252 Ga. 118, 311 S.E.2d 836 (1984)

Justice Hardy Gregory provides an excellent analysis of the locality rule, stating that the rule should not be limited to the circumstances in any given local area, but to "what is reasonable under the same or similar circumstances" generally. *Id.* at 120.

Skinner v. Coleman–Nincic Urology Clinic, P.A., 165 Ga. App. 280, 300 S.E.2d 319 (1983)

The court held that the correct standard of care is that prevailing in the general medical community and exercised under the circumstances by other competent and similarly qualified physicians generally. *Id.* at 281.

Smith v. Hospital Authority of Terrell County, 161 Ga. App. 657, 288 S.E.2d 715 (1982)

Georgia continues to apply the "locality" rule to define the standard of care imposed on hospitals. The locality rule limits a hospital's duty to its patients to exercising ordinary care in furnishing facilities and equipment reasonably suited to the intended uses and comparable to those in general use in area hospitals or in "similar hospitals in similar communities in Georgia." *Id.* at 659.

McLendon v. Daniel, 37 Ga. App. 524, 141 S.E. 77 (1927)

The degree of care and skill required of the physician is that which, under similar conditions and like surrounding circumstances, is ordinarily employed by the profession generally. *Id.* at 528.

c. Causation

***Zwiren v. Thompson*,** 276 Ga. 498, 578 S.E.2d 862 (2003)

In this case, the Georgia Supreme Court suggested the following jury instruction on causation in medical malpractice cases:

In order for the plaintiff to show that the defendant's alleged negligence was the proximate cause of the plaintiff's injury, the plaintiff must present expert medical testimony. An expert's opinion on the issue of whether the defendant's alleged negligence caused the plaintiff's injury cannot be based on speculation or possibility. It must be based on reasonable medical probability or reasonable medical certainty. If you find that the expert's testimony regarding causation is not based on reasonable medical probability or reasonable medical certainty, then the plaintiff has not proven that the plaintiff's injury was proximately caused by the defendant's alleged negligence, and you would return a verdict for the defendant. *Id.* at 503.

Grantham v. Amin, 221 Ga. App. 458, 471 S.E.2d 525 (1996)

The third element of a medical malpractice action is that the defendant's breach of the standard of care must be the proximate cause of the injury sustained.

d. Damages / Constitutional Challenges

In 2005 the Georgia legislature attempted to institute a tort reform bill to curb the increase in healthcare premiums and malpractice insurance costs. Senate Bill 3 was passed that year seeking to end joint and several liability, cap noneconomic recovery awards, as well as a variety of other measures. Since that time, numerous provisions to that bill have been challenged as unconstitutional. The following are several of these key cases:

Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, --- S.E.2d ----, 2010 WL 1004996 (Ga. 2010)

In this recent case, the Georgia Supreme Court held that that the statutory caps on noneconomic damages in medical malpractice cases imposed by the Georgia Legislature were an unconstitutional violation of the right to trial.

Smith et. al. v. Salon Babtiste, Case No. S09A1807 (Ga. 2010)

In *Smith*, the Court upheld an offer of judgment rule (codified at O.C.G.A. 9-11-68) that allows a defendant in a tort case to 'shift' its attorneys fees to the plaintiff if the plaintiff refuses to accept an offer of settlement and ultimately fails to recover more than the amount offered. The offer of judgment rule was adopted as part of Georgia's comprehensive tort reform legislation in 2005.

Gliemmo v. Cousineau, **Case,** No. S09A1807 (Ga. 2010)

In *Gliemmo*, the Court upheld the Georgia statute's limitation of liability for emergency room doctors which limits liability only to claims resulting from "gross negligence."

For claims under prior law, a hospital may be vicariously liable for the acts of a physician who is either an actual employee or an apparent agent. See*Cooper v. Binion*, 266 Ga. App. 709 (2004). The test of whether a physician is an actual employee resembles that in the current statute. *See Id.*; *Allrid v. Emory University*, 249 Ga. 35 (1982). The test of apparent agency is whether the hospital represents that the physician is its agent and thereby causes the patient justifiably to rely upon the care or skill of such apparent agent. See *Richmond County Hospital Authority v. Brown*, 257 Ga. 507 (1987).

Tookes v. Murray, 297 Ga. App. 765, 678 S.E.2d 209 (2009)

Punitive damages may be recoverable in a medical malpractice action when the treatment at issue demonstrates such an entire want of care as would raise the presumption of a conscious indifference to consequences.

EHCA Cartersville, LLC v. Turner, 280 Ga. 333, 626 S.E.2d 482 (2006)

In this case, the Georgia Supreme Court held O.C.G.A. § 9- 10-31(c), which required the transfer of a case from the county of residence of one joint tortfeasor to the county where the tort occurred, violated Art. VI, Sec. II, Para IV of the Georgia Constitution that directly addresses venue in cases involving joint obligors.

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Secondary Sources

Books and Treatises

- Medical Torts in Georgia: A Handbook on State and Federal Law by C. Ashley Royal, Preyesh K. Maniklal, Gary C. Christy, and Jennifer Roberts
  ISBN: 9780314903969This title is designed to help Georgia attorneys who handle medical malpractice cases better serve their clients. In addition to complete coverage of relevant Georgia law, this publication offers an overview of key federal issues that often arise in medical malpractice cases. It is organized and presented in a fashion that renders the book equally useful as a desk/research reference and as a resource for quick reference at trial. Analysis is supported by footnotes and citations to hundreds of cases. It is written by practitioners for practitioners, it is designed to be practical, useful and reliable.
- Georgia Law of Torts, 2009-2010 ed. by Charles R. Adams III
  ISBN: 9780314920379This title provides a comprehensive treatise on Georgia torts. It is intended both for the general practitioner who necessarily encounters a broad range of torts issues, as well as for the specialist who needs a basic familiarity with an area of tort law tangential to his field of expertise. The seasoned torts practitioner may also find this book to be a helpful ready reference work for location of pertinent statutory or case authority. It should be used in addition to the above referenced title to develop a more complete overview of a tort claim in Georgia.
- Georgia Law of Torts—Trial Preparation and Practice, 2010 ed. by Kenneth L. ShigleyThis title covers the strategic and procedural aspects of preparing for trial of a tort action, including conducting the initial client interview; investigating the case; evaluating jurisdiction and venue; filing pleadings, discovery, and trial motions; jury psychology; trial themes; and more.

Legal Encyclopedias

Lisa A. Zakolski, J.D., ***Civil Procedure: Considerations in Initiating Suit, Including Jurisdiction, Pleadings, and Parties,*** **Georgia Jurisprudence, 2 Ga. Proc. Considerations**

in Initiating Suit § 2:18 (2010).

This article gives detailed analysis regarding medical malpractice claims in Georgia. It is a great place to start for anyone unfamiliar with Medical malpractice lawsuits. It includes relevant code sections and contains a cumulative supplement with numerous Georgia cases on a variety of issues.

Jane E. Lehman, *Professional Malpractice*, Georgia Jurisprudence, 14 Ga. Jur. Personal Injury and Torts § 36:92 (2010).

This article focuses on the statute of limitation in medical malpractice cases. It analyzes exceptions to the general rule, provides Georgia statutes governing the statute of limitation, and discusses case law relating the the issue.

American Law Reports

American Law Reports offer citations to relevant cases by jurisdiction regarding narrow point of law. They also provide in depth explanations of these points of law.

George L. Blum, *Medical malpractice: who are "health care providers," or the like, whose actions fall within statutes specifically governing actions and damages for medical malpractice*, 12 A.L.R.5th 1 (1993).

Medical malpractice: who are "health care providers," or the like, whose actions fall within statutes specifically governing actions and damages for medical malpractice. This article seeks to clarify what entities or persons are "health care providers" whose actions fall within statutes enacted to govern medical malpractice claims.

Robin Miller, *Effect of Fraudulent or Negligent Concealment of Patient's Cause of Action on Timeliness of Action Under Medical Malpractice Statute of Repose*, 19 A.L.R.6th 475 (2006).

This annotation collects and analyzes all the state cases, and the federal cases arising under diversity jurisdiction, discussing the effect, on the timeliness of an action under a state medical malpractice statute of repose, of a medical practitioner's or facility's alleged concealment of a cause of action for medical malpractice by a patient or the patient's family.

Newsletters

Email Alerts

BNA provides over 100 different email alerts to Georgia State University College of Law faculty, students, and staff. To sign up for BNA's email alerts, go to the **BNA registration page**. If you are accessing this page from off campus, you will need to be authenticated by the Law Library's proxy server before going to BNA's registration sit

The BNA has email alerts for topic relating to Medical Malpractice such as "Health Law and Business Library," "Medical Research Law & Policy Report," and "Medical Devices Law and Policy Report."

Law Reviews and Legal Journal Articles

Ellwood F. Oakley, III, *The Next Generation of Medical Malpractice Dispute Resolution: Alternatives to Litigation*, 21 Ga. St. U. L. Rev. 993 (2005).

This article concentrates on litigation alternatives in medical malpractice cases. In particular, it focuses on binding arbitration and the use of medical screening panels. The article suggests the possible increased use of alternative dispute resolution (ADR) mechanisms. Also, it considers the medical malpractice legal environment of Georgia.

Patrick D. Blake, *Redefining Physicians' Duties: An Argument for Eliminating the Physician-Patient Relationship Requirement in Actions for Medical Malpractice*, 40 Ga. L. Rev. 573 (2006).

This article conducts an in-depth analysis of the legal status of individuals who, despite the fact that they are interacting with a physician in some medical context, fall into the non-patient category. It surveys the various contexts that courts have determined constitute a physician-patient relationship, as well as the contract-based rules that these courts employed in their analyses. It presents cases in which courts abandoned the traditional physician-patient requirement for medical malpractice lawsuits, focusing first on the decisions which employed a direct contact test and then on those that used a multifactor balancing test.

Kate S. Cook, Alan J. Hamilton, Brandon L. Peak and John C. Morrison III, *Trial Practice and Procedure*, 59 Mercer L. Rev. 423 (2007).

This is an excellent survey of the impact of the Tort Reform Act of 2005 on trial practice and procedure in Georgia. It addresses legislation and case law imperative to litigation in Georgia courts. Although the Georgia General Assembly enacted less legislation related to trial practice and procedure during this survey period than in recent years, it discusses the few laws passed that are noteworthy.

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Computerized Research

Online Research Systems

The two major online legal research systems, LexisNexis and Westlaw, require a user ID and password to access. Law students may be able to obtain this information for free, but there is often a charge for practicing attorneys. Many firms purchase a contract with either, or both, that allow associates to perform research.

Both websites contain a variety of primary and secondary sources in an easily searchable database covering countless areas of law for numerous jurisdictions. Both websites also provide free research assistance through toll-free hotlines, where research attorneys will assist an attorney in finding a variety of legal data quickly and efficiently.

i. Westlaw

Westlaw is a very useful database of primary and secondary research materials for state and federal law. This service is free for law students and at a cost to all others. It can be accessed at **http://www.westlaw.com**.

When reading a case, the researcher can determine whether that particular case is currently good law by checking "Citing References," which contains links to any other cases, which have cited that particular case. This feature organizes the cases by relevance and indicates whether these cases cited, quoted, agreed or disagreed with that particular case. In addition "Citing References" also provides links to secondary material that has cited the case.

Additionally, Westlaw includes the West Key Digest System in which West editors assign key numbers to a particular topic within a case. Researchers can click on this key number and search other cases that contain that same topic and key number.

For statutory research, Westlaw uses the West annotated versions of the Georgia Code. Therefore, the researcher can read the text of a statute and then see useful case annotations referring to that statute along with references and links to pertinent secondary material

Westlaw has a “Medical Litigator” tab under the Directory link at the top of its site. This function is extremely useful for medical malpractice researchers and attorneys. Available are medical guides and summaries, medical journals, healthcare and expert witness information, as well as a host of other useful information.

a. Practice Materials

The following is a compilation of helpful practice materials available on Westlaw. They refer to some of the more common motions and pleadings that are utilized in medical malpractice actions:

Answer—Defense of statute of limitations in medical malpractice action (Legally incompetent plaintiff—Statute of repose). Alley, Jr., Georgia Pleading, Practice & Legal Forms Annotated § 9-3- 73 Form 2 (2d ed.).

Answer—Defense of statute of limitations in medical malpractice action (Minor plaintiff—Statute of limitations). Alley, Jr., Georgia Pleading, Practice & Legal Forms Annotated § 9-3- 73 Form 1 (2d ed.).

Am. Jur. Pleading and Practice Forms, Arbitration and Award § 36 (Notice of motion—For order directing arbitration to proceed according to provisions of contract)

ii. LexisNexis

LexisNexis is also a helpful database of primary and secondary research for Georgia law. Like Westlaw, it is free for law students on the **LexisNexis Law School web site** and available at a charge for attorneys. This site can be found at www.lexis.com.

On Lexis, the Shepardize function allows the researcher to view the treatment of a case to determine whether a case is still good law. It also allows the researcher to see other cases that have cited that particular case. In Lexis, cases are organized by jurisdiction. Statutes also contain useful case annotations and links to relevant secondary material. Similar to West’s key number system, Lexis organizes topics in cases by Head note. The researcher can then click on a head note to find other cases dealing with that same topic. For statutes, Lexis also has annotations to pertinent case law and secondary material related to that particular statute.

On the Lexis research homepage, there is a link under the “Legal” tab entitled “Area of Law-by Topic.” If the researcher clicks on this link, a “medical malpractice” category is available. This option provides an enormous number of resources for researching medical malpractice issues.

a. Practice Materials

***5C-104 Bender's Forms of Discovery: Medical Malpractice,* FORM NO. 104:6 PLAINTIFF'S INTERROGATORIES To Defendant-Action for Malpractice**

***5C-104 Bender's Forms of Discovery: Medical Malpractice, FORM NO. 104:5*DEFENDANT'S INTERROGATORIES To Plaintiff--Action for Malpractice--Another Form**

***7A-147 Bender's Forms of Discovery: Medical Malpractice,* § 147.syn Synopsis to Chapter 147: PHYSICIANS AND OTHER MEDICAL PERSONNEL**

Web Articles

The following link is to an excellent article on how to do medical research online, which was written by Janabeth Evans, R.N., R.N.C., a nurse consultant who specializes in finding medical information for lawyers: http://www.attorneys-medserv.com/medinf.html

Free and Low Cost Websites

Lexisone law.lexisnexis.com/webcenters/lexisone/ (last visited April 13, 2010)

Lexisone is maintained by Lexis as a cheaper alternative. It includes cases from the past five years but is much more limited in its search capabilities than LexisNexis or Westlaw.

Casemaker http://www.gabar.org/casemaker/ (last visited April 13, 2010)

Casemaker is a search engine for state and federal materials. It includes access to Georgia case law, statutes, state and federal court rules, administrative codes, and Attorney General opinions. Access to Casemaker is free with a State Bar of Georgia number. Because it is a free service, its research capabilities are much more limited than Westlaw or LexisNexis.

FindLaw http://www.findlaw.com/ (last visited April 13, 2010)

FindLaw is a free source that contains a searchable database of many cases. Like Casemaker, it limited in its research capabilities compared to Westlaw or LexisNexis. It has links to Federal and state constitutions, codes, rules and regulations, and local ordinances. FindLaw also includes Federal cases, but it does not have Georgia cases.

Loislaw http://www.loislaw.com/ (last visited April 13, 2010)

This low-cost research tool allows searches of statutes and cases by keyword. Use the "currency" feature to view the dates of coverage for each source of information. If a user needs to view a list of cases, there is a "Find Multiple Citations" link. Loislaw.

Georgia Supreme Court http://www.gasupreme.us/ (last visited April 13, 2010)

Georgia maintains this site with links to its recent opinions and decisions for the few years. There is also a search function for searching the docket by case number, attorney last name, or by entering a part of the style of the case. Georgia Supreme Court.

Google Scholar www.scholar.google.com (last visited April 13, 2010)

Google Scholar is a useful resource to find scholarly articles in a variety of fields of law and other areas. These articles may be useful in understanding all aspects of medical malpractice. However, it should be noted that often these articles have little weight in the legal community and many times require a subscription or a flat fee to access them. The helpful articles can be found by searching "Medical Malpractice" or other similar terms. Google Scholar.

Online Medical Research

Medical information on the Internet is growing and diversifying on a daily basis. Information is continuously added and it becomes very challenging to sift through the numerous sites to find specific content. Traditional search engines do not focus on medical sites, and therefore some very valuable sites are overlooked or not updated into the index.

To date, there is no all-inclusive engine for searching medical sites. Moreover, there is not a single engine that adequately and thoroughly indexes just the most reputable sites. The following are a sampling of sites that will search for and retrieve up-to-date, applicable and current postings from peer-reviewed sources.

a. National Library of Medicine - http://www.nlm.nih.gov

b. Medline (accessible from various sites)

MEDLINE is the NLM's premier bibliographic database covering the fields of medicine, nursing, dentistry, veterinary medicine, the health care system, and the preclinical sciences. MEDLINE contains bibliographic citations and author abstracts from more than 4,300 biomedical journals published in the United States and 70 other countries.

The file contains over 11 million citations dating back to the mid-1960's. Coverage is worldwide, but most records are from English-language sources or have English abstracts. Medline is free, and is accessible from various sites, such as Medscape, Pubmed, and Healthgate.

c. Pubmed - http://www.ncbi.nlm.nih.gov/PubMed/

The PubMed database was developed in conjunction with publishers of biomedical literature as a search tool for accessing literature citations and linking to full-text journal articles at web sites of participating publishers.

Publishers participating in PubMed electronically supply NLM with their citations prior to or at the time of publication. If the publisher has a web site that offers full-text of its journals, PubMed provides links to that site, as well as sites to other biological data, sequence centers, etc.

User registration, a subscription fee, or some other type of fee may be required to access the full-text of articles in some journals.

d. Medscape - http://www.medscape.com

Medscape is a multi-specialty Web service for clinician and consumers that combines information from journals, medical news providers, medical education programs, and materials created for Medscape. Here you will find a combination of peer-reviewed publications, a free version of drug information via the "First Data Bank File" and free Medline. At the present time there is no fee to set up a user account which gives access to full text articles.

e. Healthfinder - http://www.healthfinder.gov

Healthfinder is a free gateway to reliable consumer health and human services information developed by the U.S. Department of Health and Human Services.

Healthfinder can lead you to selected online publications, clearinghouses, databases, web sites, support and self-help groups, as well as the government agencies and not-for-profit organizations that produce reliable information for the public.

Blogs

Legal blogs are websites, which offer a series of annotations on a specific topic. Individual attorneys or law school professors maintain them. There is no charge to access these websites, and none of the blogs require user ID's to access the articles. They generally offer opinions from practitioners on issues affecting a particular legal field or discuss recent decisions that affect that area of law.

Atlanta Injury and Civil Litigation Blog http://www.atlantainjurylawblog.com/cat-medical-malpractice.html.

This blog is maintained by a law firm and is dedicated to injury related news and issue in Georgia. There are many topics to read up on in addition to medical malpractice law.

Georgia Personal Injury Lawyer Blog http://www.georgiainjurylawyerblog.com/medical_malpractice/

This is also a law firm maintained blog regarding current issues in medical malpractice law. It offers in depth discussion on topics affect this area of law

Georgia Insurance Defense Law Blog http://www.georgiainsurancedefenselawyer.com/medical_malpractice_defense/

This blog is very similar to the others mentioned. However, it tends to look at many of the same issues from the perspective of a defense attorney, and focuses on defense of medical malpractice claims.

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Interest Groups and Associations

Georgia

Georgia Bar Association Health Law Section

The Health Law Section deals with a wide variety of health care law issues relevant to attorneys for hospitals, physicians, insurers, employers, patients and government agencies. These issues include Medicare/Medicaid and private insurance reimbursement issues; medical malpractice; certificates of need and state licensure; health care finance, taxation and antitrust; managed care (HMO and PPO); and hospital staff issues and peer review. The Section publishes a newsletter for its members and conducts educational seminars during the year. The Section also sponsors health law projects among the various Georgia law schools, such as the Georgia Advocate's Guide to Health Care, prepared by Mercer University School of Law with funding from the Section. The Section co-sponsors with ICLE an annual Health Care Fraud Institute.

Dues: $20/yr

Section Year: Sept. to Sept. (one year term)

Website: http://www.gabar.org/sections/section_web_pages/health_law/

National

i. American Bar Association Civil Defense Lawyers Section

The Tort Trial and Insurance Practice helps attorneys stay at the forefront of emerging issues and technologies in tort and insurance law. This resource allows plaintiffs, defense, corporate, and in-house counsel to gain a comprehensive view of issues in areas like animal law, products liability, medical malpractice, and all areas of insurance.

This section publishes the following periodicals: *The Brief* (4x per year); *Tort Trial & Insurance Law Journal* (4x per year); *TortSource* (4x per year)

Their website is http://www.abanet.org/tips/.

ii. American Bar Association Health Law Section

The Health Law Section is one of the 27 Sections, Divisions and Forum of the ABA. This section attempts to provide a simple and efficient platform to assist in healthcare practice. It provides easy access to the services, publications, CLE, and other benefits available through the Section.

The Section has three main activities – CLE programs, publications and government submissions – and almost all of our activities are driven by our twelve substantive Interest Groups.

Each Interest Group maintains its own web page where you can find information on specific issues related to your practice. The Interest Groups are:

- Business & Transactions
- eHealth, Privacy & Security
- Employee Benefits & Executive Compensation
- Healthcare Facility Operations
- Healthcare Fraud & Compliance
- Healthcare Litigation & Risk Management
- Managed Care & Insurance
- Medical Research, Biotechnology & Clinical Ethical Issues
- Payment & Reimbursement
- Physician Issues
- Public Health & Policy
- Tax & Accounting

iii.. American Bar Association Committee on Health Care Liability http://www.abanet.org/dch/committee.cfm?com=SC129400

As a part of the 'Health Care Priority' federal preemption of state medical liability laws is an ABA Legislative and Governmental Priority issue. It is also a priority of many state and local bar associations.

The Standing Committee participated in the public debate on medical professional liability and on the interrelationship between the legal system and health care and has been instrumental in making the ABA a part of that debate over the years. Congressional testimony and letters can be found here.

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