

Important Issues in Vermont Medical Malpractice Law



Van Dorn & Curtiss, 2008

Claims of Medical Malpractice

Generally, claims of medical malpractice may fall into the following categories:

- 1) Failure to diagnose – Failure to diagnose can also be inclusive of a delayed diagnosis. A failure by a physician to properly diagnose a condition can cause the ailment or disease to progress into stages that are irreparable. For example, the failure to diagnosis types of cancer in a timely manner can mean the difference between life and death.
- 2) Failure to gain patient consent – When a medical provider fails to gain their patient's consent prior to performing a procedure, it is considered a form of battery, and a type of medical malpractice. However, if consent by or on behalf of the patient is not reasonably possible, there may be no medical malpractice.
- 3) Lack of informed consent – When a medical provider fails to disclose to the patient the reasonably foreseeable risks and benefits of the procedure, or alternative treatments to a procedure, that would allow the patient to make an informed decision. There can be no claim for lack of informed consent in cases of emergency. For a jury to find lack of informed consent, it must be shown that a reasonable patient would not have consented to the procedures if they had known the risks involved.
- 4) Surgical errors – Most medical procedures involve some measure of risk. However, medical negligence, or malpractice, can involve a medical provider's failure to exercise the standard skill, care, and prudence necessary during a surgical operation. This can include a medical provider creating new medical problems, or not curing the problem for which the procedure was intended. Surgical errors can be the most devastating of all medical mistakes. Surgical errors can take place during pre-operative planning, during the surgery itself, or during the post-operative phase.
- 5) Prescription errors – Some of the most common medical malpractice claims are prescription errors. Prescription error claims can arise when a medical professional gives the wrong dose or the wrong medication to a patient, when the medical professional provides a prescription that has an adverse reaction to a prescription or drug the patient is currently taking, or when a patient has an allergic reaction to a prescribed drug.

Statute of Limitations

In Vermont, actions to recover damages based on claims of medical malpractice must be brought within three (3) years of the date of the injury causing event, or two (2) years from the date the injury is discovered or a reasonable person would have discovered, whichever is later, but no later than seven (7) from the date of the injury causing event. There is no statute of limitations on claims of medical malpractice where fraudulent concealment has prevented the plaintiff from discovering the negligence.

Causation

In medical malpractice, the plaintiff must prove that, as a result of the defendant's conduct, the injuries would not otherwise have been incurred, and therefore, an act or omission of the defendant cannot be considered a cause of the plaintiff's injury if the injury would probably have occurred without it. *Smith v. Parrott*, 833 A.2d 843, (Vt. 2003).

Expert Testimony

Except where the alleged violation of the standard of care is so apparent that it can be understood by a layperson without the aid of medical experts, the burden of proof in medical malpractice actions requires expert testimony. *Provost v. Fletcher Allen Health Care, Inc.*, 890 A.2d 97 (Vt. 2005).

Presumptions

In an action against a physician for medical malpractice, there is no presumption of the physician's negligence and the burden of showing negligence is on the plaintiff. *Sheldon v. Wright*, 67 A.2d 807 (Vt. 1907).

Expression of Regret or Apologies

Any oral expression of regret or apology, including a good faith explanation of how a medical error occurred, made by or on behalf of a medical provider that is made within 30 days of when the provider knew or should have known the error occurred, is inadmissible in any civil proceeding as evidence of the medical provider's liability.

Damage Caps

Vermont does not cap the amount of damages a plaintiff may recover in a medical malpractice action.

Arbitration

Arbitration is a process whereby the parties litigate their claims to a neutral third party without the use of a jury. The arbiter then makes a ruling on the claim. Medical malpractice claims in Vermont may be brought to arbitration prior to the commencement of trial, but not after.