

Will Davidson Products Liability Litigation Conference
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Tips on Managing a Medical Malpractice/Products Liability Case

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Medical Malpractice vs. Products Liability

What's the Difference?

- **Medical Negligence: The Elements**
 - **Duty of Care**

 - **Breach of the Standard of Care**
 - **Omitting to do something that should have been done or doing something that should not have been done (Expert Evidence)**
 - "A physician is bound to exercise that degree of care and skill which could reasonably be expected of a normal and prudent practitioner of the same experience and standing, and if he hold himself out as a specialist, a higher degree of skill is required." (Crits and Crits v. Sylvester, [1956] S.C.R. 1999).
 - "The medical man must possess and use that reasonable degree of learning and skill ordinarily possessed by practitioners in similar communities in similar cases." (Crits and Crits v. Sylvester, [1956] S.C.R. 1999).
 - Expert evidence is required

 - **Causation**
 - The Plaintiff must prove on the balance of probabilities that the breach caused injury. The applicable test is "but for" i.e. the injury would not have occurred "but for" the negligence of the Defendant.

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Medical Malpractice vs. Products Liability

What's the Difference?

■ Products Liability

- Claim against a manufacturer or seller for injury that results from a defective product.
- Three main types of defects:
 - Design defect: the product is designed in a way that is flawed and makes it dangerous;
 - Warning defect: the manufacturer fails to warn about the dangers of using the product; or
 - Manufacturing defect: an error during manufacturing produces a dangerous product.
- Medical Examples: defective or dangerous equipment, prosthetic devices, hospital supplies, diagnostic equipment, surgical implants, medications etc.

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Medical Malpractice or Products Liability?

INVESTIGATE, INVESTIGATE, INVESTIGATE

- **The line between medical negligence and products liability is not necessarily clear, so you need to:**

1. Investigate in a timely manner:

- a. Detailed client interview (Did the doctor say there was a device error? Did the doctor warn about risks of taking medication? Was the medication or treatment appropriate in the circumstances?);
- b. Obtain all relevant medical records;
- c. Review and summarize records (review for comments by physicians regarding defective equipment);
- d. Inform yourself about the medical and products issues;
- e. Ask hospital to retain and preserve device, disposables and packing;
- f. Obtain: name address of manufacturer, model number, serial number, instruction manuals, training manuals, date of purchase and date of last inspection);
- g. In fatality cases, ask the Coroner to retain body parts if applicable;
- h. Retain appropriate experts.

2. Make an informed decision about pursuing:

- a. Medical malpractice action only;
- b. Products liability action only; or
- c. Medical malpractice and a products liability action.

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Medical Malpractice or Products Liability

Examples – Birth Control

- Birth control prescribed to young woman to regulate abnormal menstrual cycle.
- Birth control would not otherwise be required.
- Woman is a heavy smoker.
- Woman suffers stroke and dies.
- **Medical Malpractice or Products Liability?**

Medical Malpractice or Products Liability?

Examples – Birth Control

- **You need more information!**
 - **If the medication was prescribed at an inappropriately high dosage: potentially just a malpractice case.**
 - **If the patient was not a candidate for the drug in the first place due to an underlying health problems like hypertension: potentially just a malpractice case.**
 - **If the medication was not clinically indicated as a first line treatment (i.e. something else should have been tried first): potentially just a malpractice case.**
 - **If the medication was clinically indicated and dosed appropriately, consider a malpractice case for failure to warn and a claim against the manufacturer for failing to warn about potential and serious complications of the drug.**

Medical Malpractice or Products Liability

Examples – Surgical Cases

- **Surgical Cases – Two Common Areas**
 - **Surgical device fails during surgery causing intraoperative injury; or**
 - **Surgical implant is defective and causes injury (usually to a large number of people and the subject of a class action – metal-on-metal hip replacements, vaginal mesh etc.)**

Medical Malpractice or Products Liability

Examples – Surgical Cases

- **Intraoperative Injury:**
 - Normally the harm has been disclosed to the injured patient or the family;
 - Review the operative report very carefully for particulars of the alleged defect;
 - Liability issues to consider:
 - Did the hospital maintain the device properly?
 - Was the physician properly trained to use the device?
 - Did the physician use the device properly?
 - Was the intraoperative injury caused by the physician's negligence and not an alleged defect?

Medical Malpractice or Products Liability

Examples – Surgical Cases

- **Surgical Implant:**
 - Normally the harm has not been disclosed to the injured patient or the family.
 - Liability issues to consider:
 - Was the implant clinically indicated? If not, consider medical negligence and products liability.
 - Make sure the injury is truly from a defect and not surgical negligence – i.e. is there an overlapping injury from the device being implanted incorrectly?
 - DON'T ASSUME PRODUCTS LIABILITY CLAIM ONLY

Medical Malpractice and Products Liability

THINGS TO CONSIDER IF YOU PURSUE BOTH

- **Is there a class action?**
 - **If there is an existing class action that is applicable to your client's claim?**
 - **If there is an existing class action, you need to:**
 - **Determine whether your client's claim fits with in the class or potential class;**
 - **Determine whether the class action has been certified;**
 - **Determine whether there is time to opt out of the class action;**
 - **Consider whether it is wise to opt out of the class action;**
 - **Discuss with your client the benefits/disadvantages to being a class member;**
 - **Take instructions from your client regarding opting out of the class action if you determine that it is necessary to opt-out and pursue an individual action; and**
 - **Opt-out in time.**

Medical Malpractice and Products Liability

DON'T MAKE A LIMITATION PERIOD MISTAKE

- In the last 6 months, 6 Ontario Medical malpractice cases were dismissed 4 of the 6 cases were dismissed as a result of the Plaintiff's failure to commence an action within the 2-year limitation period provided for in the Limitations Act, 2002.
 - Liu v Wong: the Plaintiff was injured when his physician removed surgical staples. The action was commenced more than 3 years after the removal. The action was dismissed as statute barred because Mr. Liu knew there were problems with his knee as soon as the staples were removed.
 - Colin v. Tan: the Plaintiff underwent spinal surgery in 2006 and was rendered an incomplete quadriplegic. The Plaintiff attempted to add the surgeon to an existing action in 2013. The claim against the surgeon was held to be statute barred.
 - Novello v. Glick: the Plaintiff brought an action for dental negligence in May of 2014. The dental treatment occurred in March of 2012. The action was dismissed.
 - Szanati v. Melynychuk: the Plaintiff received medical treatment in 2008. The Plaintiff commenced an action against the hospital in 2010 and attempted to add the emergency physician in October 2014. The claim against the doctor was held to be statute barred.

Medical Malpractice and Products Liability

INVESTIGATE, INVESTIGATE, INVESTIGATE

The law is clear that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered by the Plaintiff by the exercise of reasonable diligence.

Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors, 2012 ONCA 851, at para 32.

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THANK YOU

Please feel free to call or email with questions.

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