

California Medical Malpractice - the Plaintiff's Perspective

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What Is Medical Malpractice?

(1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise;

(2) a breach of the duty;

(3) a proximate causal connection between the negligent conduct and the injury; and

(4) resulting loss or damage.”

(*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968 [191 Cal.Rptr.3d 766].)

CALIFORNIA CIVIL JURY INSTRUCTIONS (CACI)

501- Standard of Care for Health Care Professionals

A [medical practitioner] is negligent if [he/she] fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [medical practitioners] would use in the same or similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the standard of care.”

CACI 501 Continued . . .

You must determine the level of skill, knowledge, and care that other reasonably careful [medical practitioners] would use in the same or similar circumstances, **based only on the testimony of the expert witnesses** [including defendant] who have testified in this case.



**EXPERT REVIEW AND
CONSULTATION**

California law is designed to discourage the plaintiff's lawyer from pursuing a medical malpractice claim.



MICRA - Medical Injury Compensation Reform Act of 1975

- Reduces Plaintiff's Available Damages**
- Limits the Plaintiff Lawyer's Fees**
- Allows Evidence Otherwise Not Available to the Jury**
- Shortens the Time Available to Sue**
- Required 90 Days Notice Prior to Filing Lawsuit**

CIVIL CODE SECTION 3333.2(b)

In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars (\$250,000).

Business and Professions Code Section 6146.

- (1) Forty percent of the first fifty thousand dollars (\$50,000) recovered.
- (2) Thirty-three and one-third percent of the next fifty thousand dollars (\$50,000) recovered.
- (3) Twenty-five percent of the next five hundred thousand dollars (\$500,000) recovered.
- (4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars (\$600,000).

Civil Code Section 3333.1

Exception to the Collateral Source Rule

Civil Code Section 3333.1

DEFENDANT CAN introduce evidence of payments to Plaintiff from . . . any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services

Code of Civil Procedure Section 340.5

Statute of Limitations - Adults

...[T]he time for the commencement of action shall be **three years** after the date of **injury** or **one year** after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the **injury**, whichever occurs first.

Code of Civil Procedure Section 340.5

Statute of Limitations - Minors

Three years from the date of the alleged wrongful act except that actions by a minor under the full age of six years shall be commenced **within three years or prior to his eighth birthday** whichever provides a longer period

WHY???



To Be Sued Less, Consider Listening More

- The overwhelming number of people who suffer an injury due to the negligence of a doctor never file a malpractice suit at all. Patients don't file lawsuits because they've been harmed by shoddy medical care. Patients file lawsuits because they've been harmed by shoddy medical care – and something else happens to them.
 - Carolyn Thomas, *Why Doctors Get Sued*, Oct. 15, 2010, The Ethical Nag, Marketing Ethics for the Easily Swayed, Quoting from Malcolm Gladwell, *Blink*.

- The doctors who had never been sued spent more than three minutes longer with each patient than those who had been sued did
- They were more likely to make “orienting” comments, such as “First I’ll examine you, and then we will talk the problem over” or “I will leave time for your questions.”
- They were more likely to engage in active listening, saying things such as “go on, tell me more about that.”
- They were far more likely to laugh and be funny during the visit.
- The difference was entirely in how they talked to their patients.

Can I Say “I’m Sorry”

- Overall, the London researchers found that the decision to take legal action was determined not only by the original injury, but also by **insensitive handling and poor communication** after the original incident.
- Their conclusions warn that doctors should not view litigation solely as a legal and financial problem. In addition, failure to provide information, an explanation, **and an apology** actually **increases the risk of litigation** and erodes the patient-doctor relationship.
 - Lancet. 1994 Jun 25;343(8913):1609-13. Why do people sue doctors? A study of patients and relatives taking legal action. Vincent C, Young M, Phillips A.

YES!

California Evidence Code Section 1160

Benevolent Gestures Inadmissible

...[E]xpressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person **shall be inadmissible as evidence of an admission of liability in a civil action**. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section.

Be Careful, But Don't Worry Too Much

Cobbs v. Grant (1972) 8 Cal.3d 229 (California Supreme Court)

Even alleged statement of fault by physician who patient stated that **he blamed himself** for having to go back in for second surgery was **not admissible as proof of a breach in the standard of care.**

Don't go overboard. It can backfire!

- **Q. Doctor, you stayed at the hospital on September 17, until [the patient] woke up; is that correct?**
- A. She was awake in recovery.
- **Q. And did you have a conversation with her at bedside when she woke up?**
- A. I told her I had injured the artery in her left leg.

- **Q. At any point during that admission, did you tell [the patient] that you had committed a, quote-unquote, unforgiveable mistake?**
- A. I told her I made a mistake. I don't recall exactly what I told her.

- **Q. My clients have told me that you specifically told them that it was a, quote-unquote, “unforgiveable mistake.” Would you agree that you said that?**
- A. I don't know – I don't recall saying exactly that. I apologized profusely to both the husband and [the patient]. When you take anyone in to operate on them and you injure something that you don't intend to injure, you're – very sorry. And you tell them that. You don't – it's not a mistake that I've ever made. So, you know, I'm devastated. I'm devastated what I've done to her. But I don't recall my exact wording of what I said to her. I talked to her in recovery as she was waking up.

- **Q. Would you disagree if she testified at trial that she – you said “unforgivable mistake,” would you disagree with that statement?**
- A. I don't remember what I said. I told her – I apologized that it was an injury that **I have caused**. It was a mistake in the operating room. But I don't recall a specific language I used that long ago.

- **Q. Would you disagree with her if she said “unforgiveable mistake,” that you used that – that term specifically?**
- A. I can't argue either way. I don't – I doubt – I mean, that doesn't – I don't recall that. But I – I apologized to her multiple times, and I don't remember what I said each time. I apologized to her there, daily in the hospital.