

Medical Malpractice: Time limits and Statutes of Limitations*

Most people are surprised to learn that there are strict relatively short time limits that apply to medical malpractice claims dependent upon the nature of the claim, the age of the victim, the potential defendants and whether municipalities or State or Federal governmental entities are involved. Unlike many other time limits in civil practice, Notice of Claim and Statute of Limitations time limits are strictly construed and the failure to comply may fatally bar prosecution of your claim. Unfortunately, many potential clients wait until it's too late to take action. Therefore, if you believe you have suffered injury due to medical error or substandard care do not wait until it's too late. Call our office now for a free initial consultation and learn how to protect your rights.

So, let's take as example a common medical malpractice claim of failure to timely diagnose appendicitis causing a ruptured appendix with infection requiring corrective abdominal surgery. During this surgery a sponge is inadvertently left in the patient and not discovered until 2 years later requiring another abdominal surgical procedure leaving you with permanent injuries.

Assume, you the patient are 47 years old, visiting a neighbor and present to Plainview Hospital ER on 3/3/2018 with complaints of abdominal pain. You are treated with fluids and discharged with an incorrect diagnosis of stomach virus. Then 5 days later 3/8/2018 you are at home experiencing severe right lower abdominal pain with fever and malaise and are rushed by ambulance to Nassau University Medical Center (NUMC), the closest hospital where you are operated upon for a perforated appendix with extensive abdominal infection. Unbeknownst to you a sponge, a foreign object, is inadvertently left behind and

not diagnosed for over 2 years requiring yet another corrective abdominal surgery on July 3, 2020 requiring a colostomy leaving you with a prolonged recovery and permanent injury.

You present to our office March 3, 2021 and wish to sue Plainview Hospital, NUMC and the individual doctors involved. You waited not knowing the time limits involved and assuming that your serious Injuries would allow you to bring claims against all responsible parties. Unfortunately, your delay has resulted in the expiration of the statute of limitations against Plainview Hospital and severely prejudiced your claims against NUMC. Here's why this presents a complicated mix of questions to answer.

The general medical malpractice statute of limitations is calculated to run 2 and ½ years from the time of the alleged malpractice. This time may be extended if there is a continuous course of care and treatment by the same health care provider for the same illness, injury or condition which gives rise to the malpractice. In this instance the Statute of limitations does not begin to run until the termination of the care and treatment. This is known as the continuous treatment doctrine which in itself may be complicated to apply and has been the subject of much case law. In our example, the statute of limitations has expired against Plainview Hospital as more than 2 and ½ years has expired from the time of the malpractice and there was no continuous care and treatment by this hospital which would extend the time to file suit. However, if the injured party was under 18 years of age, he or she would be considered a minor under the law which tolls the running of the statute of limitations during the period of infancy for a maximum of ten years. Therefore, for example, if your child was age

5 at the time of the malpractice then the child's malpractice claims for personal injuries would be viable for a maximum ten years up to age 15. This is known as the infancy toll which does not apply to the parent's derivative claim for loss of services which still would have expired under the general medical malpractice statute of limitations. Is your head spinning yet?

Now let's discuss your claims against NUMC which is akin to a municipal hospital in which the general time limits and statute of limitations is completely different and much shorter. To start with the General Municipal law requires that a Notice of Claim be served upon the Municipality within 90 days from the date of the medical malpractice or last date of continuous care and treatment as described above. Otherwise, a motion will have to be filed with the court for permission to serve a late Notice of Claim. Then a lawsuit must be commenced within one year and 90 days from the date of the negligent act or omission or from the last date of continuous treatment. Otherwise, your claim will be barred. The motion for permission for late filing must also be made before expiration of the one year and 90 days.

In the event of death due to malpractice the Statute of Limitations for a wrongful death claim runs 2 years from the date of death provided a Notice of Claim is timely served within 90 days from appointment of an administrator of the Estate. Confused by now? You're not the only one as lawyers and Judges grapple with these issues regularly. If a minor is involved the Statute of Limitations will be extended as set forth above but a timely Notice of Claim must still be served. If permission is necessary to serve a late Notice of Claim the courts will consider the age of the child as a factor whether to allow a late filing.

Now let's apply the law to the facts and your claims against NUMC.

In our example the negligent act of leaving a sponge in your body occurred during the surgery of March 8, 2018 but not discovered by you until after the corrective surgery occurred on July 3, 2020. A Notice of Claim was not timely filed within 90 days as you did not know about the foreign object left behind in your body nor was court permission sought within one year and 90 days from the initial occurrence as the sponge was not discovered by you until July 3, 2020 after it was surgically removed. Is your claim against NUMC forever barred? The answer is maybe yes or maybe no. Why? The law allows a foreign object extension to the statute of limitations which generally provides you with an additional 1 year from the date of discovery of the foreign object to commence a lawsuit. However, since a Notice of Claim was not filed within 90 days from the date of discovery of the foreign object you must first seek court permission to file a late Notice of Claim before filing the lawsuit. In weighing various factors, the court will exercise its discretion in determining whether to grant permission for a late filing. Unfortunately, most people don't understand that ignorance of the law does not constitute an excuse for late filing.

Now let's say that instead of Plainview Hospital you initially presented to Stony Brook Hospital, a NY State operated facility and wished to prosecute a malpractice claim. The Court of Claims act requires that a Notice of Claim be filed or Notice of Intention to file a Claim be served within 90 days from the occurrence. If only a Notice of Intention is served, then a Notice of Claim must still be filed within 2 years from the date of the malpractice or wrongful death. Otherwise, a motion to the Court of Claims for permission to file a late

Notice of Claim or Intention to file a claim must be made before the expiration of the 2-year Statute of Limitations. Once again if a minor is involved the Court will consider the age of the victim as a factor in deciding whether to grant the motion.

Now let's say that when you obtained your medical records from Plainview Hospital a few months before visiting our office you were shocked to learn that a routine Radiology Chest x-ray report states there is a 3cm lung lesion which is suspicious for a malignant cancer. You immediately consult your PCP who refers you for a lung biopsy which proves positive for lung cancer. Do you have a timely claim against Plainview Hospital and their ER doctors for failing to advise you of this suspicious finding? The answer is yes. Under New York Law, in claims involving negligent acts or omissions causing delayed diagnose of cancer or malignancy the 2 and ½ year Statute of Limitations runs from the date you knew or reasonable should have known of the negligent act or omission and that it caused injury whichever is earlier. There is overall a 7-year cap on this provision that runs from the date of the negligent act or omission.

So, what does this all mean to you the victim of medical malpractice who has suffered serious personal injuries? The lesson is clear. If you believe you have a case you should consult an experienced attorney as soon as possible to understand and protect your rights. My colleagues and I at Duffy & Duffy are very experienced and highly respected attorneys handling complex medical malpractice cases involving serious personal injuries. We welcome your calls and there is no charge for initial consultations. In fact, if we accept your case, we work solely on a contingency fee basis and you will not be charged any fee unless we recover money damages for you. The fees are set by law and we also advance all

expenses necessary to successfully prosecute your case to a successful conclusion. While we cannot guarantee a result our proven track record of success speaks for itself. Just ask around as we enjoy an excellent reputation within our professional Community.

Please don't wait until it may be too late. Pick up the phone and give us a call now at **516- 394-4200** or you prefer e-mail awc@awclaw.com.(**Insert Duffy address**

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