RATZAN LAW GROUP

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Birth Trauma: Litigating Medical Malpractice Cases in Numerous States

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Ratzan Law Group, P.A. is currently litigating birth trauma cases throughout the country. The firm's attorneys are licensed to practice law in Texas, Louisiana and Florida and are admitted pro hac vice in several others. This article addresses some of the similarities, differences, and challenges of litigating medical liability cases in various states.

Louisiana Medical Malpractice

The other 49 states in the United States use common law, but Louisiana operates under the 'Civil Law' system and does not have *stare decisis.*

Louisiana's Statute of Limitations for medical malpractice cases is one year from the date the malpractice occurred not to exceed three years from the date of the discovery of the malpractice.[1] Louisiana has a mandatory pre-suit screening process called a Medical Review Panel which commences with the filing of a request to convene a Panel with the Division of Administration of the State of Louisiana.[2] The request must briefly lay out the facts against each of the proposed defendants.[3]

The medical review panel, consists of three licensed health care providers within same sub-specialty as the proposed defendants.[4] The parties can take depositions and do discovery in preparing the submission of evidence required by both sides.[5] The medical review panel renders an opinion on whether there was a violation of the standard of care.

[1] La. Rev. Stat. Ann. § 9:5628.
[2] La. Rev. Stat. Ann. § 40:1299.47
[3] *Id.*
[4] *Id.*
[5] *Id.*

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That panel opinion is admissible at trial and either party may call any member of the panel as a witness.[6] The case then proceeds to trial in a manner consistent with other states.[7]

Louisiana has damage caps on pain and suffering in the amount of $500,000 per claim, regardless of the number of claimants and defendants. Future economic damages are paid out periodically, when consumed, or up front through a state run system, the Louisiana Patients Compensation Fund.

The Louisiana Supreme Court has held this limit on damages constitutional.[8] In particular, the *Butler*[9] decision upheld the $100,000 limit of each qualified health care provider, and makes it clear that such providers have no excess obligation after the payment of the excess up to $500,000 by the Fund. However, recent appellate court decisions have declared the caps unconstitutional.[10]

Texas Medical Malpractice

Texas pertinent law regarding Medical Liability cases is contained in Chapter 74 of the Texas Civil Practice and Remedies Code. Texas requires a detailed pre-suit procedure. Any person asserting a health care liability claim must give written notice of such claim to each prospective defendant before the filing of suit.[11] Once the pre-suit notice period has ended, the plaintiff can file an Original Petition (Complaint), proceed through to discovery and ultimately trial.

[6] *Id.*
[7] La. Code Civ. Proc. Ann. article 1632.
[8] *See Butler v. Flint Goodrich Hospital of Dillard University*, 607 So. 2d 517 (La. 1992), *cert. denied*, 508 U.S. 909 (1993) and La. Rev. Stat. Ann. § 40:1299.42
[9] *Id.*
[10] *Arrington v. ER Physicians Group, APMC*, 940 So.2d 777 (La.App. 3 Cir. 2006.)
[11] Tex. Civ. Prac. & Rem. Code §74.051

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A plaintiff must then serve expert reports within 120 days of the Original Petition to address issues of liability and causation as to each health care provider whom the Petition is directed.[12] There are stringent guidelines as to the qualifications of an Expert Witness and whether he or she can testify or not.[13]

Texas provides for limitations on noneconomic damages in the amount of $250,000 for each claimant, regardless of the number of defendant physicians or health care providers, other than institutions.[14] Noneconomic damages are limited to $250,000 for each claimant, against a single defendant health care institution.[15] In an action against more than one health care institution, the limit for noneconomic damages for each health care institution is limited to $250,000 for each claimant, and the limit for all institutions is limited to a maximum of $500,000.[16]

If future damages are at least $100,000, the court must order periodic payment of future medical costs if the defendant requests it, and the court may order periodic payment of future damages other than medical costs if requested.[17]

While rare, the Texas Supreme Court and other Texas appellate courts do recognize the theory of vicariously liability based upon actual agency or apparent/ostensible agency.[18]

[12] Tex. Civ. Prac. & Rem. Code §74.351
[13] See Tex. Civ. Prac. & Rem. Code §74.401, 74.402, and 74.403
[14] Tex. Civ. Prac. & Rem. Code §74.301
[15] *Id*.
[16] *Id*.
[17] Tex. Civ. Prac. & Rem. Code §74.503
[18] *See Baptist Memorial Hospital System v. Sampson*, 969 S.W.2d 945 (Tex. 1998); *Moreno v. Columbia Medical Center-East*, 2001 WL 522432 (Tex. App. 2001); *Garrett v. L.P. McCuistion Community Hospital*, 30 S.W.3d 653 (Tex. App. 2000); *Barragan v. Providence Memorial Hospital*, 2000 WL 1731286 (Tex. App. 2000); *McDuff v. Chambers*, 895 S.W.2d 492 (Tex. App. 1995); *Nicholson v. Memorial Hospital System*, 722 S.W.2d 746 (Tex. App. 1987); *Brownsville Medical Center v. Gracia*, 704 S.W.2d 68 (Tex. App. 1985).

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Alabama Medical Malpractice

Unlike many other states, Alabama has no pre-suit requirements in medical liability cases. Thus, a plaintiff can initiate a medical malpractice lawsuit at any time and proceed through to discovery and ultimately trial in a manner consistent with most other states.

In Alabama, a health care provider may testify as an expert witness against another health care provider only if he or she is similarly situated as defined by the statute.[19]

In 1987, the Alabama legislature passed the Medical Liability Act of 1987, which in part, limited noneconomic damages to a global sum of $400,000.[20] However, in 1991, the Alabama Supreme Court held this statute on noneconomic damages unconstitutional. [21] The statute was again recognized as unconstitutional in 2004.[22]

The Alabama legislature also passed provisions requiring periodic payments in certain circumstances where future damages are awarded.[23] However, in 2005, the Alabama Supreme Court held this statute on periodic payments unconstitutional.[24] Also, an older statutory provision provides that when a plaintiff recovers a judgment from a health care provider in excess of $100,000, the court may order that the award be paid in monthly installments.[25]

[19] *See* Ala. Code § 6-5-548.
[20] Ala. Code § 6-5-544
[21] *See Moore v. Mobile Infirmity Ass'n*, 592 So.2d 156 (Ala. 1991).
[22] *Mobile Informatory Medical Center v. Hodgen*, 884 S.W.2d 801 (Ala. 2004).
[23] Ala. Code § 6-5-543
[24] *Lloyd Noland Hospital v. Durham*, 906 So.2d 157 (Ala. 2005).
[25] Ala. Code § 6-5-486

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Alabama is one of the last remaining jurisdictions to utilize joint and several liability. Where multiple tortfeasors combine to create an indivisible injury, each tortfeasor is considered jointly and severally liable for the entire judgment.[26]

While there are no published opinions finding liability based upon apparent agency in Alabama, the courts do recognize the theory of vicarious liability based upon apparent agency should the facts of a particular case so align.[27]

Florida Medical Malpractice

Florida's Medical Malpractice statute is contained in Chapter 766 of the Florida Statutes. Before a lawsuit can be filed, Florida requires claimants to participate in a pre-suit process. A claimant must conduct an investigation to ascertain that there are reasonable grounds that a health care provider was negligent and such negligence resulted in injury.[28] The claimant must submit a verified medical opinion by a medical expert which is sent with the notice of intent to initiate litigation.[29] After completion of the investigation, the claimant must notify each prospective defendant of an intent to initiate litigation for medical negligence.[30]

[26] *See Looney v. Davis*, 721 So.2d 152 (Ala. 1998); *General Motors Corp. v. Edwards*, 482 So.2d 1176 (Ala. 1985); *Williams v. Woodman*, 424 So.2d 611 (Ala. 1982); *Buchanon v. Collier*, 555 So.2d 134 (Ala. 1989); *Matkin v. Smith*, 643 So.2d 949 (Ala. 1994); *Nelson Brothers, Inc. v. Busby*, 513 So.2d 1015 (Ala. 1987)
[27] *See Brown v. St. Vincent's Hospital*, 899 So.2d 227 (Ala. 2004); *Bengston v. Bazemore, O.D.*, 2007 WL 3496477 (M.D. Ala. 2007) (Federal case, but applying Alabama state law).
[28] Fla. Stat. § 766.203
[29] *Id.*
[30] 766.106

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No suit may be filed for 90 days after the notice is sent, during which time, the prospective defendant must conduct its own investigation into the alleged claims.[31] At or before the 90 days have elapsed, the defendant must respond to the claimant rejecting the claim, making a settlement offer, or making an offer to arbitrate.[32] A plaintiff can also offer to arbitrate.

Like many states, there are stringent guidelines as to the qualifications of an expert witness.[33]

Florida places limitations on the amount of noneconomic damages recoverable in medical liability cases. This issue is hotly contested and its constitutionality is consistently being challenged. In an action against a practitioner, noneconomic damages are limited to $500,000 per claimant.[34] However, if the injury resulted in a permanent vegetative state, catastrophic injury or death, the total noneconomic damages are limited to a total of $1 million.[35]

In an action against nonpractitioner defendants, noneconomic damages are limited to $750,000 per claimant, regardless of the number of nonpractitioner defendants.[36] However, if the injury resulted in a permanent vegetative state, catastrophic injury or death, the total noneconomic damages are limited to a total of $1.5 million.[37]

Medical liability under the concept of vicarious liability is often pled based upon theories of actual agency, apparent agency and also upon the theory of non-delegable duty.

[31] 766.106 and 766.203
[32] 766.106
[33] See 766.102
[34] 766.118
[35] *Id.*
[36] *Id.*
[37] *Id.*

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The state of the law on this topic is fluid and ultimately depends on the facts of each particular case.[38]

Should you or your firm need the services of experienced medical malpractice litigators anywhere in the United States, Ratzan Law Group, P.A. would be happy to assist you in navigating the rules, laws, and nuances associated with those cases.

[38] *See eg. Wax v. Tenet Health System Hospitals, Inc.*, 955 So.2d 1 (Fla. 4th DCA 2007); *Pope v. Winter Park Healthcare Group, Ltd.*, 939 So.2d 185 (Fla. 5th DCA 2006); *Shands Teaching Hosp. & Clinic, Inc. v. Juliana*, 863 So.2d 343 (1st DCA 2002); *Irving v. Doctors Hosp. of Lake Worth, Inc.*, 415 So.2d 55, 57-58 (Fla. 4th DCA 1982); *Cuker v. Hillsborough County Hospital Authority*, 605 So.2d 998 (Fla. 2nd DCA 1992); *Roessler v. Novak*, 858 So.2d 1158 (Fla. 2nd DCA 2003).

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