

Hurricane
Sandy
Edition!

New York Medical Malpractice Attorney Gerry Oginski presents

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IF A TREE FALLS IN GREAT NECK, CAN YOU HEAR IT?

It was October 29 when a massive hurricane barreled through New York with massive winds. They called it "Hurricane Sandy," and innocuous sounding name packing a mega punch.

In case you didn't know, I grew up in the house I currently live in. The past 39 years there has been a massive tree sitting on my front lawn. A beautiful tree. An enormous tree. One that provided shade and was a beautiful sight.

For the past 20 years my wife has complained about that tree claiming that at some point it was going to topple over and destroy our house. Every few years a tree trimmer would come and prune the tree.

As if to foreshadow the events that would occur during Hurricane Sandy, a sizable tree limb fell from the tree only three weeks earlier prompting a call to the tree trimmer.

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- MED MAL-WHAT'S IN THE NEWS?
- ALL THE KINGS HORSES
- IF A TREE FALLS IN GREAT NECK
- PHOTO GALLERY
- NEW WORD SEARCH

ALL THE KINGS HORSES AND ALL THE KINGS MEN COULDN'T PUT HUMPTY...

Dumpty back together general surgeon or a colo-
again is a perfect way to rectal surgeon.
start today's story.

A woman went in for an elective hernia repair. During the course of surgery, the doctors made an inadvertent hole in her bowel. Luckily for the patient, they recognized it at that the time. Unfortunately for the patient, the doctors decided to put the bowel back together again on their own instead of calling in a general surgeon or a colo-rectal surgeon.

When a bowel injury occurs during surgery, the damaged portion of the bowel must be removed and the two remaining ends of the bowel must be connected together. This is known as an end-to-end anastomosis. Those two ends must be sealed tight to form a watertight seal.

2 days after surgery, the patient's condition worsened to the point

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Hernia Repair leads to hole in bowel & undiagnosed sepsis leading to death...

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where she needed emergency surgery with a general surgeon. What he found when he opened her abdomen was astonishing.

He found bowel contents inside her abdominal cavity, which is something that *never* should have been there. He also found that the bowel was wide open instead of being sealed tight. As a result, all of the bowel contents were freely leaking into her belly.

The abdominal contents became infected causing her a massive systemwide infection known as sepsis.

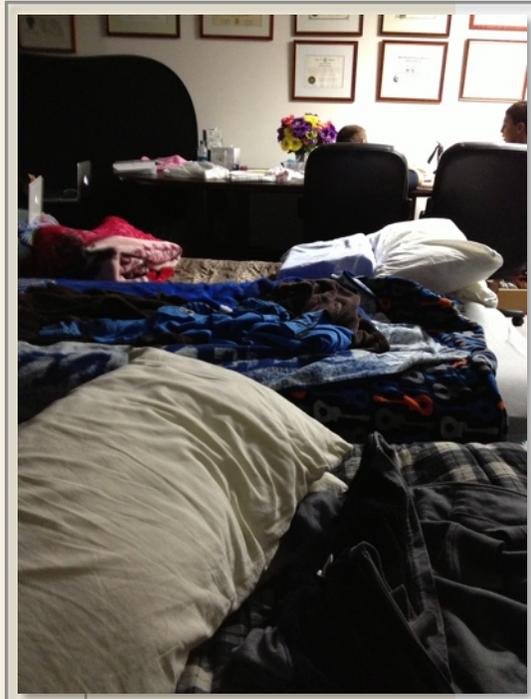
As a result of undiagnosed and untreated sepsis, this patient's kidney function deteriorated, her blood pressure dropped and she developed multi-system organ failure leading to her death hours after her emergency surgery.

What made the story so heart wrenching was that the defense continued to maintain that the GYN cancer surgeon who operated on her did nothing wrong. We argued that he never should've performed the surgery in the first place and rather should have referred the patient out to a general surgeon to have the hernia repair done.

We also argued that when the bowel injury occurred, which is a known recognized complication, he should have called in a general surgeon to repair the bowel.

After four years and four months of hard-fought litigation, I am pleased to report that I was able to successfully resolve this case during mediation to my client's satisfaction.

See today's related story on mediation.



Camping out in my office



THE BACK STORY ABOUT THESE PHOTOS...

Since we had no heat and electricity for 13 days, we were forced to camp out in my office, which had electricity. Great idea. Except on the first night in my office, we learned quickly that the landlord shut the heat off at night. That was a brutal night. The next day, I called my landlord, explained the situation and he gladly agreed to leave the heat on at night for as long as we needed. We all slept in my office for the

BAD NEGOTIATING TACTIC DURING MEDIATION- WHY I WILL NEVER USE THIS MEDIATOR AGAIN

Jury selection was starting in two weeks. The case was in litigation for over four years. The defense refused to begin any settlement negotiations. They maintained the case was defensible.

A PHONE CALL IS MADE

I placed a phone call to defense counsel to find out what their position was. Turns out that they had just conferenced the case that week and wanted to begin negotiating. They wanted the case resolved within one day of negotiating, during a mediation. Would I agree? I agreed to mediation.

Once the date of the scheduled mediation, all parties arrived at the mediator's office. The two defense attorneys showed up with their principals and boxes full of documents to support their defenses. One defense lawyer even prepared a detailed and lengthy evaluation and analysis favoring the defense and forwarded it to the mediator prior to our mediation.

I arrived without any documents and without my client. He and I had spoken extensively prior to the mediation and he had given me authority to settle his case.

My presentation, set in a large conference room overlooking the West side of Manhattan, was a sample opening argument and lasted about 20 minutes. The defense lawyers then began picking apart our claim and raised their own defenses. This was to show the mediator and their principals that

they were not simply going to take this lying down or sitting quietly.

THE DEFENSE LAWYERS WERE VERY EXPERIENCED TRIAL ATTORNEYS

After the presentations were over, we split up and the mediator started with me.

Before mediation, I made a settlement demand of \$3 million. I conveyed that number to the defense lawyers during multiple pretrial conferences in court.

Having never worked with this mediator before, she began to explain to me, privately, what her technique and tactics were. She wanted me to give her a settlement number that she could take back to defense lawyers to tell them what **"I really want."** When I heard this, I was shocked. I was very surprised. Then I became annoyed and aggravated.

Politely, I told her that the defense knew exactly what "I really wanted" and **it was now time for them to make a good faith offer** before we begin truly negotiating.

This mediator claimed that this was how she always proceeded during mediation by starting with the attorney representing the injured victim and asking for a revised demand without ever knowing whether the defense had a single dollar to offer.

THIS TACTIC SHOCKED ME

This was stunning to me. In 24 years of practice, and settling hundreds and hundreds of lawsuits

throughout my career, I have never encountered a mediator who took this tactic. She claimed she was successful at doing so. I told her outright that's not how I operate and that's not how I will negotiate. She didn't appreciate that since she claimed to know what she was doing.

I reinforced the fact that the defense lawyers came to this negotiation knowing what **"I really wanted,"** and I would not, under any circumstances begin negotiating against myself.

"Get them to put their cards on the table and tell you how much they're offering as a first offer. Don't come to me and ask me to change my demand from \$3 million to something else before I ever hear about any money being offered."

WE GOT OFF ON THE WRONG FOOT

I found it very disturbing that before we had actually started negotiating, I was in a significant argument with the mediator about how to approach this negotiation. This was disturbing and did not bode well for future discussions on this case.

I did not let this mediator's bizarre tactic take control of the negotiation process. I advised her quite simply that I was extremely uncomfortable with this tactic and would not, under any circumstance, reduce my demand without ever learning what the defense has first offered.

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HERE'S WHAT REALLY GOOD MEDIATORS DO

I found that really good mediators will often speak with the defense lawyers **first** to get a sense of where they are and where they would like to go. This does not commit them to any particular offer but allows the mediator to get an overall gestalt about what will likely happen. From there the mediator will then come in and speak to me and give me an idea of where the defense wants to go, and maybe discuss a range of what they are comfortable in arriving at.

Instead, this mediator wanted me to bid against myself and begin negotiating with myself without ever knowing what the defense lawyers intended to do.

After our significant disagreement, which became quite heated, she reluctantly accepted my request to go get a definite offer from the defense so we could start negotiating. As expected, the defense came up with a significant first offer. It was a healthy six-figure number that got us started.

MEDIATOR DROPS THE BALL AGAIN

During the three-hour negotiation process, I learned very quickly that this mediator failed to do something critical that most other really good experienced mediators have always done.

What was it?

Remember when I said that good experienced mediators get a gestalt

from the defense about where they're going and where they would like to be? Well, that concept was totally missing here. Instead I would get comments from the mediator when she returned from talking to defense lawyers that **"I have no idea where they are going or where they want to be."**

That revealed a critical flaw in this mediator's tactics and ability to understand how to proceed forward and make recommendations.

Here's the way I looked at it.

If the mediator has absolutely no idea where the defense wants to go or where they expect to be the end of this negotiation, how then can she make recommendations to me about altering my demand and making counteroffers? The answer is that she would be unable to. That puts me at a significant disadvantage. Instead of being a trusted mediator, she is merely acting as a conduit **and is not in control of the mediation process.**

A MEDIATOR IS NOT SIMPLY A CONDUIT TO TRANSMIT MESSAGES

A mediator is not simply a passageway within which to transmit messages from one side to the other. I don't need a mediator to do that. Instead, I have no problem having face-to-face discussions with defense counsel. In fact, many lawsuits are resolved where the attorneys simply negotiate directly after having obtained settlement authority.

To recap, here was a mediator who started off on the very wrong foot with **a very poor negotiation**

tactic. I refused to proceed forward using this tactic. Then, during the lengthy negotiation process she was unable to obtain useful information that would have assisted her and myself with key information that would have made the negotiation process smoother and much quicker.

CASE IS SUCCESSFULLY SETTLED DESPITE THIS MEDIATOR'S TACTICS

Despite these difficulties with this mediator I'm pleased to say that we successfully settled this case after three hard-fought hours.

The benefit of agreeing to mediation was that it would save all sides tremendous amounts of money in trial costs and if we agreed on a certain settlement amount, this would be a guaranteed outcome. When you go to trial, no matter what type of case you believe you have, there is never a guaranteed outcome.

What's the moral of the story here?

1. Never let a mediator push you around and dictate the terms on which you are about to negotiate.
2. Use all available information to formulate strategies about where you think the defense is going and where you think they're ultimately going to wind up based upon feedback from the mediator.

A FINAL THOUGHT HERE...

I can tell you this. Despite obtaining a favorable result for my client, I will not be using this mediator ever again.

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My mother-in-law, my 10-year-old son and my wife were sitting in the den. Only 30 minutes earlier I had been standing in my living room looking out the window watching that massive tree. What I saw was shocking.

Normally, when the wind blows, trees will sway at the top. In this case, **the base of the tree was swaying.** This was an ominous sign. 30 minutes later my mother-in-law screamed along with my son. Then we heard a loud boom that rocked the entire house.

This massive tree that had been a bedrock of stability in front of my home for so many years and likely was about 75-100 years old had toppled over onto our garage, crushing it. It destroyed our roof, blew out windows, damaged both of our cars and now came to rest across our entire front yard.

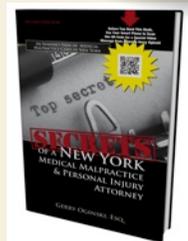
It's one thing to hear about it after it happens, it's another to actually watch it fall causing its devastating destruction.

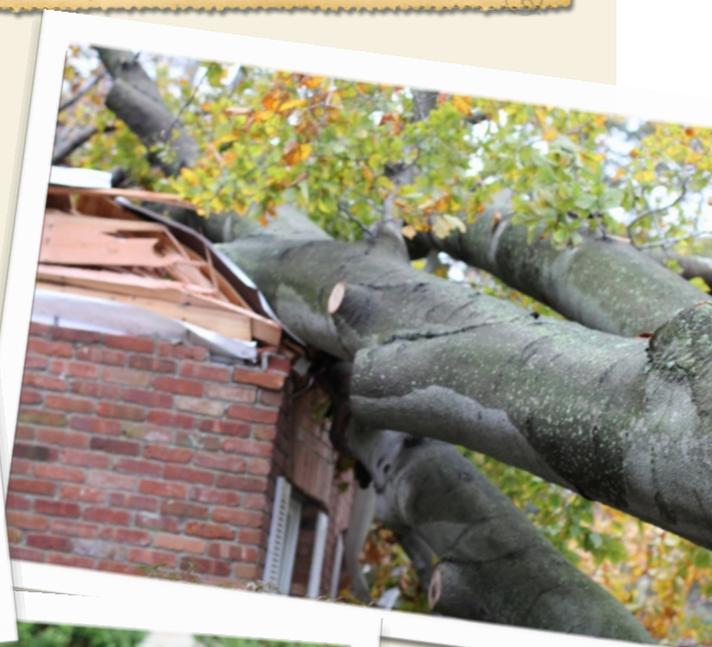
We remained without power for the next 13 days as temperatures continued to decrease into the low 40s. This made it impossible to continue living in the house without heat or electricity. We had no choice but to move into my office for the last four days that we were without power. Daytime activities were doable. Once the sun went down it became extremely challenging and frustrating.

Despite the massive property damage we suffered, I consider ourselves to be extremely lucky. Not so many people were as fortunate as us and despite many people who didn't suffer any damage, ours is only property damage. I'm thankful for electricity and heat and for the fact that this tree did not turn five or 10° toward our house which would have destroyed it.



Only 10 days after hurricane Sandy hit, NY was blasted with a nasty Nor'Easter dumping 6" of fresh snow. Having gone for a total of 13 days without electricity and heat, here I am making lemon ices out of lemons. Actually, I'm putting my time to good use by creating educational video to help my ideal clients understand key concepts they need to know. The topic on the right was about slip and fall cases involving snow and ice!





Despite all the property damage, we were actually very lucky. Lots of people in NY lost their homes & lives.



Gerry's Trivia Game

New Word Search!

TEST YOUR KNOWLEDGE OF NY LAW

FIND ALL WORDS AND WIN A GIFT CARD!

TRUE OR FALSE?

1. A mediator is an impartial judge who helps settle a case prior to trial.
2. Your initial settlement demand is the final number you expect the defense to pay.
3. Governor Cuomo eliminated the 'hurricane deductible' for property owners.
4. Every lawyer in NY is required to take 24 credits of continuing legal education every 2 years.
5. A 'failure to diagnose' a known complication often rises to the level of medical malpractice.
6. Before starting a medical malpractice lawsuit in NY, an attorney is obligated to have a medical expert confirm there's a valid case.
7. A '50-H' hearing refers to gambling at the racetrack.
8. A 'charge conference' is where the trial judge wants to know what credit card you'll be using to pay the judgment.
9. Because of Hurricane Sandy, Governor Cuomo temporarily suspended the time limits to file medical malpractice & accident cases in NY.
10. A 'judgment call' by a doctor is when the doctor calls you to render his judgment of your medical condition.

M	E	D	I	A	T	O	R	H	C	S	H	D	T	M
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R	O	O	J	N	P	U	O	W	T	M	E	K	R	
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N	M	O	P	G	S	A	H	G	S	H	T	G	S	S

- FIND THESE 15 WORDS:**
- | | |
|--------------|------------|
| COMPENSATE | MEDIATION |
| COUNTEROFFER | MEDIATOR |
| COURT | MILLIONS |
| COURTROOM | NEGOTIATE |
| DAMAGES | OFFER |
| DEMAND | SANDY |
| HURRICANE | SETTLEMENT |
| | TESTIFY |

Word search challenge: Find all 15 words correctly, and fax it in with your name & address filled out for a \$10 gift card to Dunkin Donuts. ONLY 15 GIFT CARDS AVAILABLE...so fax it in quickly!

NAME: _____
 ADDRESS: _____
 CITY: _____ STATE: _____
 ZIP: _____
 EMAIL: _____
 PHONE: _____
FAX TO: 516-487-8472



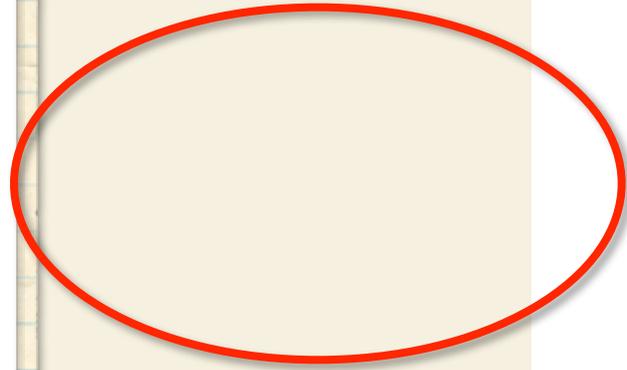
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NOVEMBER 2012

Give this newsletter to your best friend.
They'll thank you for it, and so will I.

----- *Answers to Trivia Game* -----

1. True, 2. False, 3. True, 4. True, 5. True, 6. True, 7. False, 8. False, 9. True, 10. False

**Call me right now with any legal questions about injuries from any accident or medical care.
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