

# New York Injury Times

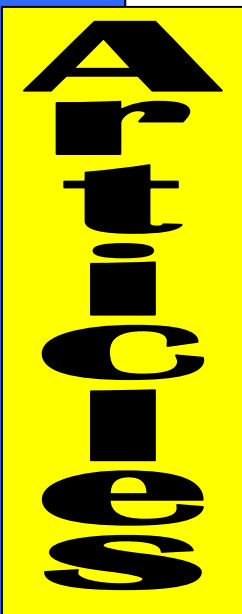
A MONTHLY NEWSLETTER PUBLISHED BY THE LAW OFFICE OF GERALD M. OGINSKI, LLC

[www.oginski-law.com](http://www.oginski-law.com)

December 05



Gerry Oginski, Trial Lawyer



## Why Shouldn't I Let My Family Lawyer Handle My New York Medical Malpractice Case?

4 Things Your New York Injury Lawyer Looks For When You Show Up In His Office

## Why You Shouldn't Rely on a Lawyer Who Tells You Your Case Is Worth Millions...

Five Reasons Why Your Malpractice Case Won't Be Accepted By A New York Malpractice Lawyer...

Slip & Fall - The 10 Most Important Things You Need To Know If You Slip and Fall in NYC

Would You Allow A Trial Judge To Sit As A Juror On Your Malpractice Case?



Learn Why Some People Need a Big City New York Law Firm for Their Malpractice Case p. 2

Why Won't You Take My Small Medical Malpractice Case? ...page 3

Recent Newsworthy Jury Verdicts and Awards...page 5

Our website  
[Oginski-law.com](http://Oginski-law.com)

Thousands of hits each month! Read our FREE special reports. Read our news section and fascinating depositions. I guarantee there's something there for you!

# In This November Edition, We Look At

## COMMON LEGAL PROBLEMS

---

### Why Shouldn't I Let My Family Lawyer Handle My New York Medical Malpractice Case?

**A: Have you ever wondered why there are so many lawyer advertisements?**

It's because lawyers think that injured victims don't know how to choose an attorney on their own. Guess what? They're right! If you've got a billboard in front of you after you've been injured that says something like "Is your car totaled? Did you break your bones? Call our law firm..." Isn't this a call to action? Sure it is. But is this the best firm for you? Let's see.

Your family lawyer is great to have general legal issues taken care of; preparing your will, maybe some business matters, parking tickets, small claims court, or maybe even some personal injury. When you've been injured by a doctor or a hospital, your family lawyer is probably the first one you're going to turn to for advice.

But, is he the right person for the job? Maybe, maybe not. Medical malpractice is a very specialized area of law. Extensive knowledge of medicine, while not required, is often helpful in prosecuting a malpractice case.

The defense lawyers who represent the doctors and hospitals are usually a sophisticated group of trial lawyers. You want your attorney to be familiar with the

defense attorneys, and you want your attorney to have experience handling, prosecuting and trying malpractice cases.

It'll do you no good if the biggest case your family lawyer has had involved a minor injury or a 'soft-tissue' case. Ask your family lawyer if he handles malpractice cases regularly. Having a few personal injury cases, does not make him an expert trial attorney in a malpractice case.

Nor should you let your family lawyer put your case into suit to try and 'squeeze' a few dollars out of the malpractice insurance company- for a quick settlement. Why? Because it doesn't work with malpractice claims. They'll quickly realize that your lawyer doesn't have the ability to take your case to trial, and your case will suffer because of it.

A law firm that has taken cases to verdict and is not afraid to try a case stands a better chance of getting a good result, than a lawyer just looking for a quick settlement.

Just remember- your family lawyer may be a great lawyer- but think long and hard whether you want him (or her) to handle your malpractice case. Ask lots of questions, and choose wisely.

### Learn Why Some People Need a Big City New York Law Firm for Their Malpractice Case

**The answer is simple.**

The reason some people seek out a big city law firm for their malpractice case is because they feel that only a New York City law

firm can handle their type of case. Or, the injured victim feels that a certain firm has a stellar reputation that other, smaller firms just don't have.

### Why go into the City when you don't have to?

This brings us back to the question of why someone would seek out a lawyer in the City. People have impressions of lawyers and doctors and professionals. There are some very good large malpractice firms in New York City. There are some excellent small malpractice firms on Long Island. Where you choose to go should **not** rest on your impression of an office at a fancy address in the City.

Rather, your decision about what lawyer or firm you choose should be based on what the lawyer can do for you.

1. What is the lawyer's experience handling your type of case?
2. Is the lawyer a solo practitioner who can give you undivided personal attention, with a track record of successfully helping his clients?
3. Is the firm you're going to a 'mill' where you're just another file number?
4. How many attorneys in a big firm will work on your case?

In all probability, even solo practitioners have the same access to electronic, online legal research that big firms do. So what's the difference? Personalized, individualized attention.

In a big firm, the lawyer who you meet with at your first meeting, most probably will not be the one who tries your case. In fact, that trial attorney may never have met

you before getting your case ready for trial.

When you call the office, how many secretaries, paralegals, associates and junior partners do you need to go through to finally reach the senior partner handling your case?

With a solo practitioner, one call does it all.

**So, to answer the question, why do some people need a big city New York malpractice firm?**

They don't. They just think they do. Wherever you choose to go, just make sure your attorney is right for you.

## **Why Won't You Take My Small Medical Malpractice Case?**

**Brenda D'Client comes into my office with many problems.**

"My doctor did my plastic surgery wrong. I can see my scar. See, look close, it's a line right below my belly. He promised me I wouldn't have any scars."

"I was given the wrong medication by the pharmacy and I have bruising all over my body."

"I had a terrible reaction to the anesthesia and now have to get follow-up treatment including a blood patch, and medications."

**Each of these scenarios involved someone who strongly believed that they were wronged by a doctor, pharmacy or hospital.**

Unfortunately for each of them, they don't meet all the requirements needed to bring a successful malpractice case in New York.

In a malpractice action, I have to prove not only that there was wrongdoing, but the wrongdoing has to have caused injury, and the

injury has to have been significant and/or permanent. If any one of those aspects is missing, there's no case. Oh yes, all of those three elements must be confirmed by a medical expert, before I can go ahead and start a lawsuit for you in the State of New York.

**So, why are these cases too small for most New York Medical Malpractice attorneys?**

In the first scenario, Brenda's injuries are minimal. It becomes financially impossible to bring a lawsuit for someone where the injuries are so small as to be virtually unnoticeable to the average person.

In the second scenario, Brenda appears to have been injured by the pharmacy's dispensing the wrong medicine. In her case the damages are minimal, and Brenda is expected to make a full recovery. Again, it becomes financially impossible to bring a malpractice lawsuit where the injuries are temporary (such as bruising).

In the third scenario, Brenda experienced a well-known side effect of anesthesia. For her, there's no malpractice here. There was no way to prevent this condition from occurring, and no alternatives to the procedure she had. Unfortunately, she had a bad outcome to a procedure, without any evidence of wrongdoing. Again, it becomes impossible to accept such a case to prosecute.

### **Conclusion**

Since a New York medical malpractice attorney takes a case on contingency (this means that he only gets paid if he is successful in obtaining money for you), he must lay out a considerable amount of money to prosecute your case.

Not only does he have to make sure you have a valid and meritorious case, but he has to determine

whether your injuries rise to the level where you will receive sufficient money after all of his expenses and legal fee are taken out. What good does it do you if most of the money is used for expenses and legal fees and you are left with a small amount of money?

It is for this reason that most New York Medical Malpractice lawyers can only accept cases that have a certain value.

## **Would You Allow A Trial Judge To Sit As A Juror On Your Malpractice Case?**

**As an attorney representing injured victims, the answer is no.**

Why then did a female trial lawyer who represented a stroke victim, in Mineola Long Island agree to accept a trial judge onto her jury panel in a medical malpractice case?

According to the New York Law Journal, this female lawyer was quoted as saying "I selected this judge because I figured he'd be able to explain the defense's shenanigans to the other jurors."

The defense attorney however was quoted as saying, "I have a different point of view. I like intelligent and smart jurors. That's why I chose this particular judge."

Interestingly, the day after this article appeared in the New York Law Journal, I was participating in a continuing legal education program, judging a national law student mock trial competition. The judge assigned to our courtroom was the one who sat on the recent malpractice case that resulted in...(can you guess?), a defense verdict.

I learned that this judge was a conservative republican judge assigned to a criminal trial part. My

only thought was, "What was the plaintiff's attorney thinking?"

Now- that doesn't mean that even if this person was not on that jury, and someone else was, that the outcome of that malpractice case would be different. But the purpose of selecting a jury is to try and select the best possible jury for your client's case. In my opinion, putting a republican judge on a jury in a malpractice case against a doctor and a hospital in conservative Nassau County is not a good choice.

**In New York, lawyers, doctors, judges and other professionals must serve jury duty.** That doesn't mean that you have to select them!

### **3 Things To Know When You Cross-Examine a Doctor at Trial**

Your client has accused a prominent doctor of malpractice. Her case goes to trial, and your first witness is the well-respected doctor. How do you cross-examine him?

#### **1. Learn as much medicine as possible that's involved in the case.**

You have to be a mini-expert on the medicine before ever getting up in Court to question the doctor. Read medical textbooks, medical literature, and use other physicians as experts to teach you the medicine.

#### **2. Ask only leading direct questions.**

You must keep a tight leash on any witness whom you cross-examine. If you ask an open-ended question ("Tell us why the patient bled to death Doctor...") you will suffer the dire consequences of a 10 minute lecture to the jury by this medical witness. Big mistake. You don't

want the jury to see how educated and wonderful this physician is. You want them to see how he answers YOUR questions.

"You operated on Mrs. Jones 1 year ago?"

"You perforated her aorta while examining her nose?"

"The patient bled to death as a result of that puncture, correct?"

"Good medical practice dictates that when doing this procedure you should stay away from the aorta, correct?"

"The aorta is not in the surgical field, right?"

Do not ask "So how is it that you ruptured the aorta while doing this procedure?" (That's an open ended question.) Instead ask "Did you expect to puncture the aorta during this procedure?" "What steps did you take to make sure the puncture did not occur?" ...and on it goes.

#### **3. Do not ask a question when you don't know the answer!**

During the course of a lawsuit you will have plenty of opportunity to learn everything about what happened. In New York, this is called the discovery phase of the lawsuit. If you are at trial, and do not know the answer to a specific question, I strongly suggest you NOT ask the question, unless the answer will absolutely not harm you or your case. Remember, you never know what will come out of the witness' mouth.

Here's a great example. A dispute arose between two men in a park. It's twilight. A scream is heard, and a witness to the scream turns and sees two men standing near each other. One man's nose is gone and his face is bleeding profusely. The other man is just standing there.

On the witness stand, the defense lawyer asks the witness whether he

actually saw his client bite the man's nose off. The witness replies "No. I didn't."

"Then you're not sure my client was the one who bit his nose off?"

"Oh, I'm sure alright. It was definitely your client."

"Really? How can you be so sure?" asks the defense attorney.

"Because I saw your client spit out the man's nose from his mouth!"

Cross-examination of a doctor is not easy. Experience is the key and learning all the medicine possible helps frame your questions.

### **4 Things Your New York Injury Lawyer Looks For When You Show Up In His Office**

When you need to find an injury lawyer, you need to ask lots of questions. You might meet with more than one attorney before you feel comfortable with your choice of lawyer.

When you arrive in his (or her) office, you look around, look at the diplomas on the wall, look at how the office is run, and look at the furnishings. What does this tell you? Does a messy office reveal a lawyer who can handle your case? Does a clean office mean your lawyer has no other clients? You don't know from the looks of it. Use your gut instinct to tell yourself whether you can put your trust and your case in his or her hands.

At the same time you are deciding whether this lawyer is the right one for you, the lawyer is also looking at you to see if you are the right client for him. Here's what a lawyer, practicing in New York will look for in a client.

#### **1. Honesty.**

The client must be straightforward and honest about what happened to them. They must let the attorney decide what facts and information are important. We don't want a client who is selective about what they say. We also need to know a client's past history; were there any skeletons in the closet? Any convictions? Any prior lawsuits? We need to know in order to better help you.

## **2. Presentation.**

How does the client present themselves when they talk to you? Are they quiet? Are they loud? Are they well dressed? Do they look at you when they respond? Are they comfortable telling what happened?

This is very important, because your lawyer is looking to see what type of witness you will make if your case has merit and ultimately goes to trial.

## **3. A Desire To Seek Help- Not Vengeance**

There are some clients who come into a lawyer's office so outraged that they were harmed by someone else that all they want is revenge. That's a normal, healthy feeling. There are other clients who come to us asking for help because they can't pay their medical bills or their mortgage because their injuries prevent them from working.

A client who seeks revenge is volatile and unpredictable on the witness stand. That doesn't mean they don't have a valid case. It simply means that it's going to be tougher to help this type of client, because no matter what the lawyer does, it probably will never be enough.

A client who genuinely seeks help and compensation to right a wrong is the perfect type of client a lawyer seeks.

## **4. A Desire To Get Better, and Improve Themselves.**

There are some clients who want to 'milk the system'. They're waiting for their payday and will simply sit home and wait until their settlement comes. For those folks, they live for their lawsuit.

For many others, the lawsuit is a means of support to pay their expenses, to be able to afford surgery to correct their problem, and as compensation for their suffering. The client, who is doing everything possible to get their life back to normal is the ideal type of client. Some people want to return to work, even if they're in pain. Others are content to stay at home and watch TV while recuperating.

As with all types of cases, each one is different, and each case has its ups and downs. Next time you're deciding upon what lawyer to use, keep in mind that your lawyer is deciding whether he'll choose you too.

## **Five Reasons Why Your Malpractice Case Won't Be Accepted By A New York Malpractice Lawyer**

### **1. We can't prove the doctor did anything wrong.**

What do I mean? In order to prove a malpractice case in New York, your lawyer must prove that your doctor or hospital departed from good medical care. Well, how do you prove that? By having a medical expert review your records and determine that there were departures from good care.

### **2. We can't prove that the wrongdoing caused injury.**

In New York, we must show not only that there was wrongdoing (departures from good care) but also that the wrongdoing caused injury. Again, this must be proven by a medical expert who has reviewed all of your medical records. If this element is missing, we cannot successfully prove your

case.

### **3. We can't prove that you suffered significant and permanent injury as a result of wrongdoing by a doctor or hospital.**

What constitutes significant and permanent injury? An injury that disables you from doing your daily activities. Something that is permanent and is expected to last for a long time, like a scar. A fracture is considered significant. There are many other significant injuries and obviously injuries affect different people different ways. Your lawyer needs to see how your injuries have affected you and what the future holds for you.

### **4. You have lied about important facts in your case or your past.**

If you lie to your attorney, and he finds out about it, in all likelihood, he will not accept your case. Honesty is the utmost of importance. If you feel you have certain information you don't want to disclose to him that's one thing. But to actively lie about past lawsuits or events that happened is a big no-no. Your attorney is obligated to keep your information confidential. Hold him to that obligation.

### **5. You insist on running the show and tying the attorney's hands by insisting what he can and cannot do.**

This is the 'kiss of death' for a case. Where the client believes they know more than the attorney and knows best how to develop strategy in their case. In a lawsuit, your attorney is your legal advisor. He provides you with the best legal options available to you, and together you should be able to make the best choices for your case.

There are instances where the client

will demand that the attorney do things that either are not proper, or unfounded, that if done would ruin your case. Remember, you must have faith and trust in your attorney. If not, then you might want to look for another lawyer to represent you.

**These are five of the main reasons why your malpractice case will be rejected by a New York Medical Malpractice Attorney.**

## **Why You Shouldn't Rely on a Lawyer Who Tells You Your Case Is Worth Millions**

"I went to two other lawyers before coming to you. Each of them told me my case was worth millions. Why aren't you telling me the same thing?"

Simple. What those lawyers did was tell you something they could never guarantee.

There is no way for them to know how much money they could obtain for you before any case is started on your behalf. Even if I were to give you a number that I believe you are entitled to, it would be absolutely wrong. I could give you a wildly outrageous number or a very small number. Both would be wrong.

At the beginning of your case, there is so much information to obtain about your injuries, your medical records and how your injuries have affected you that it is impossible to accurately tell you what your case is really worth.

It's true that there are similar cases that we may know the value of, but remember, each case is different, and each case has different facts that can make it difficult to compare with yours.

The job of a good lawyer is to

gather ALL of your information, and then formulate the chances and likelihood of success of your case. A lawyer who does that stands a much better chance of explaining to a client the approximate value of their case.

I'll let you in on a little secret. I suspect that those other attorneys who told you your case was worth millions did so primarily to have you sign up with them as opposed to going to another attorney.

No matter what any lawyer says, it is impossible to guarantee such a result. If you don't believe me, just ask the lawyer to put that promise in WRITING. See how quickly they backtrack when you ask them to do that!

## **Slip & Fall - The 10 Most Important Things You Need To Know If You Slip and Fall in NYC**

Q: What are the top 10 most important things you need to know if I slip and fall?

1. What was the weather like?
  2. What type of shoes were you wearing?
  3. Do you wear eyeglasses?
  4. Do you have a history of dizziness or falling?
  5. Are you taking any medications that make you dizzy?
  6. What did you slip or trip on?
  7. After you fell, did you see what it was that you fell on?
  8. Were there any witnesses to your fall?
  9. Did you file an accident report with the owner of the property, or with the police?
  10. How long do you think the dangerous condition existed before you fell?
- 

# **Jury Awards**

## **\$3.4 million awarded to blind woman fired by state blind agency**

HARRISBURG, Pa. - A federal jury awarded \$3.4 million Tuesday to a blind woman who was fired as head of Pennsylvania's state agency for the blind and visually impaired, ruling that she was discriminated against because of her disability.

The six-woman, two-man jury awarded her \$180,000 in "front pay" - future wages she lost because she was fired - but her lawyer said he will instead ask the judge to reinstate her to her old position.

Of the total, Schmerin was assessed \$1.74 million and Nasuti \$1.62 million. The jury decided that Boone had proven that the two men made false, defamatory and stigmatizing public statements about her firing that called into question her good name, reputation and professional qualifications.

"The jury misunderstood all kinds of things," said Golden, who argued that Boone was fired because of her shortcomings as a manager, not because of her disability.

The jury determined that Boone's firing was either motivated by "an evil motive or intent" or the two men acted with "reckless or

callous indifference" to her rights.

### **N.Y. Court Upholds \$21 Million Vicarious Liability Award**

The New York State Supreme Court, Appellate Division, First Department, has awarded \$21 million to an accident victim, setting what is believed to be a record \$8 million for future pain and suffering.

The case involved a 25-year-old pedestrian who was rendered a paraplegic when struck down in Manhattan in an accident caused by a Budget Rent A Car in November 2000.

The Court upheld \$20.3 million of a \$24.5 million December 2003 jury verdict, one of the highest such verdicts ever returned and affirmed in New York State.

"This may be the last of the vicarious liability cases holding rental car companies responsible for the negligence of their operators, as the law of vicarious liability was revoked in August by the Federal Government's passage of the Graves Amendment to the Federal Transportation Funding bill," noted Cook.

### **Westchester County Jury awarded \$6.65 million dollars for an Erb's Palsy injury suffered at birth.**

The infant, Kaquon Burch, was born on October 13, 1994 at New Rochelle

Hospital.

The child's family claimed that the delivery was complicated by a shoulder dystocia. During the delivery, the infant's head delivered but his body did not immediately follow. Rather, his shoulder was stuck behind the mother's pubic bone. They claimed the obstetrician failed to use accepted obstetrical maneuvers to relieve the impaction before completing the delivery, and instead used excessive traction (or pulling) on the infant's head in an effort to remove the infant from the mother's birth canal. As a result, nerves controlling the infant's brachial plexus were torn, resulting in a permanent right arm palsy.

The obstetrician denied that this was a complicated delivery, and denied the existence of a Shoulder Dystocia or that excessive traction was needed to effectuate this delivery. The doctor did not deny the existence of the brachial plexus palsy injury, but argued that the injury must have occurred in utero. The doctor's expert pediatric neurologist contended that the injury was a mild Erb's Palsy resulting in no appreciable limitation.

The jury, made up of four women and two men, unanimously determined that the doctor had departed from good and accepted medical practice during this delivery. The jury awarded the infant Kaquon Burch, Six Hundred

and Fifty Thousand Dollars (\$650,000.00) in past pain and suffering and Six Million Dollars (\$6,000,000.00) in future pain and suffering.

### **Brooklyn patient wins \$400,000 for sponge left in body**

A livery driver in Brooklyn, N.Y., won a \$400,000 jury award because a surgeon had left a sponge in his body after an appendectomy.

Youcef Saou's malpractice suit was against the Lutheran Medical Center and the surgeon, the New York Post reported. The jury found both the hospital and the surgeon to have been negligent, the report said.

It took a CAT-scan to find out that an 18-inch surgical sponge -- rolled into a 2-inch ball -- was the reason for the patient's severe abdominal pain.

### **Largest Personal Injury Verdict in San Francisco History**

The parents of a 4-year-old killed in a Municipal Railway accident in San Francisco in February 2003 have been awarded the largest personal injury verdict from the city of San Francisco in the city's history.

Elizabeth Dominguez was killed when a Muni maintenance truck jumped the sidewalk near 24th Street and Potrero Avenue, pinning Dominguez to the wall of a pizza restaurant.

In September, a San Francisco Superior Court jury offered a total verdict of \$24.7 million to the four plaintiffs, which include Dominguez' parents, as well as Monica Valencia, a classmate of Elizabeth's, and Monica's grandmother Candelaria Valencia, who both witnessed the accident.

The San Francisco Superior Court released a court order that offers the Dominguez parents a sum of \$15.5 million in damages, \$5 million less than they were awarded in the jury trial. Alternatively, the court order states that the parents could opt to have a new trial solely on the matter of damages.

If it stands, the amended verdict of \$22.5 million, which includes \$3.1 million in damages for Candelaria Valencia and \$3.5 million in damages for Monica Valencia, would be the largest personal injury verdict owed by the city of San Francisco.

**Ford ordered to pay \$30.4 million to family of dead 16 year old girl**

---

A Texas jury ordered Ford Motor Co. Monday to pay the family of a 16-year-old girl \$30.4 million to compensate for a fatal 2004 rollover crash in which a pickup truck's roof collapsed.

The attorneys for Jessica Garcia argued that the F-150's roof crushed, and the girl was ejected when her seat belt failed to keep her inside the vehicle when the pickup rolled over. They said Ford's design wasn't safe.

"Ford should treat its customers like prized possessions; instead, it treats them like lab rats," said Mikal Watts, the Garcia family attorney.

The Brownsville, Texas, verdict follows a similar case decided last month -- also argued by Watts -- where another Texas jury awarded a family \$42 million following the death of a 10-year-old boy killed in an Expedition SUV.

The jury in Brownsville awarded the family \$20.4 million in actual damages and \$10 million in punitive damages.

Ford said it would appeal the verdict. The company argued that the evidence showed Garcia was not wearing a seat belt, and the crash was caused by a negligent driver striking her vehicle at highway speeds.

"This is another tragic reminder that seat belts can help save lives only when they are worn," said Ford spokeswoman Kathleen Vokes.

---

## News Flash!

### RECEIVE YOUR NEWSLETTER BY EMAIL!

If you'd prefer to receive your monthly newsletter by email, simply email me at lawmed1@optonline.net, or call my secretary Frances to give her your email address.

---

This newsletter is published by THE LAW OFFICE OF GERALD M. OGINSKI, LLC and is © Copyright protected. It is published for informational purposes only, and no legal advice is intended. We only practice law in the State of New York. Each case is different and you are invited to discuss any legal questions with Mr. Oginski, at no cost or obligation.

The Law Office of Gerald M. Oginski, LLC  
150 Great Neck Road, Ste. 304  
Great Neck, NY 11021

**Call me personally,  
*anytime.*  
516-487-8207**

Send to

PRSRD STD  
U.S. POSTAGE PAID  
GREAT NECK, NY  
PERMIT No.21