

Birth-Related Medical Malpractice

by Attorney Coulter Boeschen

Learn about birth-related injuries to babies and mothers -- who can sue, and what damages may be recovered.

Birth-related medical malpractice occurs when a doctor, hospital, or other medical staff acts negligently (fails to use reasonable care) and causes one of the following:

- injury to the mother or child during pregnancy or delivery
- wrongful birth -- when the parents would have ended or avoided a pregnancy if they had known about birth defects, or
- wrongful pregnancy -- when the parents' attempt to avoid or end a pregnancy fails.

Each of these claims comes with its own rules for who can sue and what damages can be recovered. (To learn about the requirements for a medical malpractice claim, including common types of claims, read Nolo's article [Medical Malpractice Basics](#).)

Birth Injuries to the Mother or Infant

Although rare, sometimes a doctor's medical malpractice causes either the mother or infant, or both, to be injured prior to or during the birth of the baby. Some examples of malpractice that can cause birth-related injuries include:

- negligently failing to control excessive maternal blood loss post-delivery, and
- negligently failing to monitor the baby's oxygen intake pre-and-post-delivery.

Injury to infant. If an infant is injured, the parents must bring the lawsuit, acting as guardians for the infant. On behalf of the infant, the parents may ask for both general and special damages. General damages include the cost of suffering, such as mental and physical pain and suffering, and loss of enjoyment of life. (To learn more about damages in medical malpractice cases, read Nolo's article [Damages in Medical Malpractice Cases](#).)

Example: A doctor doesn't use reasonable care and erroneously decides to deliver a baby prematurely. As a result, the baby suffers brain damage. The parents may sue to recover medical expenses incurred to pay for ongoing rehabilitation and developmental needs, as well as pain and suffering since the baby will experience the ongoing trauma of physical and mental disability.

Injury to mother. The mother can bring a claim for medical malpractice if the doctor's carelessness caused her injury prior to or during birth. For example, if the doctor fails to note the mother's high blood pressure prior to delivery, a sign of a condition known as preeclampsia, and the mother has a seizure during delivery (which preeclampsia often

leads to), the mother may have a claim for medical malpractice to recover for injuries caused by the seizure.

Emotional injury to parents. The parents may also be to sue for the emotional pain and suffering they experience because of their baby's injury.

Wrongful Birth

In a wrongful birth action, the parents claim that the doctor should have warned them about their child's impending birth defects and that if they had known, they would have either avoided the pregnancy or ended the pregnancy.

Usually, the claim is based on:

- negligent genetic testing before the child was conceived, or
- negligent failure to detect mental or physical impairments in the early stages of pregnancy.

The damages available for a wrongful birth case typically include the costs arising out of the child's disorder, such as medical expenses and educational therapy. The parents may also be able to recover for the emotional pain and suffering associated with the birth and raising the child.

Most states allow parents to bring wrongful birth claims. A few states have laws that limit recovery of damages. But the vast majority of states do not allow *the child* to sue for "wrongful birth" (when the child sues, it is sometimes called "wrongful life").

Wrongful Pregnancy

Parents may sue for wrongful pregnancy if they tried to avoid pregnancy -- either through sterilization, pregnancy testing, or abortion -- but those methods failed due to the negligence of the doctor or medical staff.

In a wrongful pregnancy action, the child is born healthy, but the parents sue for the harm caused by the unwanted pregnancy and birth. The types of damages that may be recovered depends on the state. Though most states allow the parents to sue for costs like medical expenses and lost wages, only some states allow damages for the parents' pain and suffering caused by an unwanted pregnancy. A few states allow recovery of the costs of raising a healthy but unwanted child, but most do not.

Getting Help

Because birth-related injuries and medical malpractice law can involve complex medical and legal issues, it is often essential to get advice or representation from a lawyer.

For help on choosing a good medical malpractice attorney, read Nolo's article [Finding a Personal Injury Lawyer](#).

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How Much Is Your Personal Injury Claim Worth?

Here's how insurance companies determine the value of your personal injury claim.

Figuring out how much your accident injuries are worth is a critical aspect of any personal injury claim, and it's the part of a claim that is most difficult to determine; the amount varies depending on your very particular circumstances. Here is an overview of how insurance companies determine the value of a claim.

What an Insurance Company Must Compensate

To determine what your claim is worth, you must first know the types of damages for which you may be compensated. Usually, a person who is liable for an accident -- and therefore his or her liability insurance company -- must pay an injured person for:

- medical care and related expenses
- income lost because of the accident, because of time spent unable to work or undergoing treatment for injuries
- permanent physical disability or disfigurement
- loss of family, social, and educational experiences, including missed school or training, vacation or recreation, or a special event
- emotional damages, such as stress, embarrassment, depression, or strains on family relationships -- for example, the inability to take care of children, anxiety over the effects of an accident on an unborn child, or interference with sexual relations, and
- damaged property.

The Insurance Company's Damages Formula

When determining compensation, it is usually simple to add up the money spent and money lost, but there is no precise way to put a dollar figure on pain and suffering or on

missed experiences and lost opportunities. That's where an insurance company's damages formula comes in.

At the beginning of claim negotiations, an insurance adjuster adds up the total medical expenses related to the injury. These expenses are referred to as "medical special damages" or simply "specials." That's the base figure the adjuster uses to figure out how much to pay the injured person for pain, suffering, and other nonmonetary losses, which are called "general" damages.

When the injuries are relatively minor, the adjuster multiplies the amount of special damages by 1.5 or 2. When the injuries are particularly painful, serious, or long-lasting, the adjuster multiplies the amount of special damages by up to 5. (The multiplier may be as great as 10 in extreme cases. For information on exactly how an adjuster determines the multiplier, see *How to Win Your Personal Injury Claim*, by attorney Joseph L. Matthews (Nolo).)

The adjuster then adds on any income lost as a result of the injuries.

That's all there is to the formula. However, this figure -- medical specials multiplied by a number between 1.5 and 5, then added to lost income -- is not a final compensation amount but only the number from which negotiations begin.

Percentage of Fault

The extent each person is at fault is the most important factor affecting how much the insurance company is likely to pay. The damages formula gives you a range of how much your injuries might be worth, but only after you figure in the question of fault do you know the actual compensation value of your claim -- that is, how much an insurance company will pay you.

Determining fault for an accident is not an exact science, but in most claims both you and the insurance adjuster will at least have a good idea whether the insured person was entirely at fault, or if you were a little at fault, or if you were a lot at fault. Whatever that rough percentage of your comparative fault might be -- 10%, 50%, 75% -- is the amount by which the damages formula total will be reduced to arrive at a final figure.

For an extensive discussion of determining the value of your claim -- along with many examples -- see *How to Win Your Personal Injury Claim*, by attorney Joseph L. Matthews (Nolo).