

# **SOUTH DAKOTA MEDICAL MALPRACTICE LAW SUMMARY**

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## **Statutes of Limitation**

SDCL 5-2-14.1 contains the medical malpractice statute of limitations. It allows suit on or before "two years after the alleged malpractice ... " The statute can be tolled by SDCL 15-2-22 or SDCL 15-2-20. These toll the running during absence of the defendant from the state, during the mental illness of the plaintiff, and most significantly it is tolled until one year after a juvenile plaintiff reaches majority.

## **Contributory or Comparative Negligence**

SDCL 20-9-2 contains South Dakota's version of comparative negligence. It bars a Plaintiff's claim if the contributory negligence of the plaintiff is more than slight in comparison with the defendant's(s'). If it is slight it reduces the plaintiff's recovery by the amount of contributory negligence found.

## **Joint and Several Liability**

South Dakota has adopted a version of the Uniform Contribution Among Joint Tortfeasors Act, SDCL 15-8-11 to 15-8-22. The right to contribution is preserved. By interpretation, if a party is sued, it is a "joint tortfeasor." Unless proportionate fault is litigated by crossclaims, each party is presumed to have equal fault. In addition, South Dakota has joint and several liability, but no tortfeasor can be forced to satisfy more than twice its proportionate liability.

## **Contribution**

See, Joint and Several Liability. SDCL 15-8-12 specifically preserves the right to contribution from joint tortfeasors.

## **Vicarious Liability**

A principal is liable for the negligence of its actual or ostensible agents. SDCL, Title 59.

## **Expert Testimony**

In malpractice cases, Plaintiff must produce expert testimony on standard of care and causation. In an informed consent case, South Dakota has adopted the reasonable patient standard and so expert testimony is not required, but may be required on questions of what are risks and how often do they occur.

## **Damage Caps**

Damages in medical malpractice cases are capped at \$500,000.00 in general damages, but unlimited specials. SDCL 21-3-11.

## **Statutory Cap on Attorney's Fees**

None.

## **Periodic Payments**

South Dakota does have a procedure for statutory periodic payments. SDCL 21-3A-1 to 21-3A-13. It requires that it be elected within 120 days of service. It is seldom, if ever, used in South Dakota.

### **Collateral Source Rule**

South Dakota follows the collateral source rule. However, by statute, a limited exception exists. If payments are made by insurance not paid for by the plaintiff or a government program, not subject to subrogation, the defense has a right to introduce the existence of the payment(s). SDCL 21-3-12.

### **Prejudgment Interest**

Anyone who suffers a loss is entitled to interest from the date the loss occurred at the Category B Rate (currently 10%). SDCL 21-1-13.1. Excluded from prejudgment interest are intangibles like pain and suffering, emotional distress, loss of consortium or loss of enjoyment of life.

### **Patient Compensation Funds**

Not applicable.

### **Immunities**

The immunity most often involved in medical malpractice cases is public entity immunity of hospitals created by public entities. SDCL 3-21-1. Unless the entity has been given proper notice of the claim within 180 days of the injury, the entity is immune from suit. See, *Hanson v. Brookings Hospital*, 469 NW2d 826 (SD 1991).

### **Arbitration**

South Dakota has no compelled arbitration in medical malpractice cases.