MAXIMIZING DAMAGES IN MEDICAL MALPRACTICE CASES

By

PHILIP C. HENRY
HENRY, SPIEGEL, FRIED & MILLING, LLP
SUITE 2450
950. E. PACES FERRY ROAD
ATLANTA, GEORGIA 30326
(404) 832-8000

INTRODUCTION

In many respects, the development and proof of damages in medical malpractice cases is no different than the development and proof of damages in any other type of tort suit. On the other hand, medical malpractice cases often involve special obstacles and difficulties for identifying your client's injuries and establishing that those injuries were due to the negligence of the defendant. These special problems usually arise from the fact that in most medical malpractice cases, the injured plaintiff was treated for an injury or illness that pre-existed the plaintiff's encounter with the defendant physician or other healthcare provider. Because the plaintiff has the burden of proof, it is incumbent upon plaintiff's counsel to identify what injury is due to the defendant's negligence and prove that the plaintiff's injuries and damages flow from the defendant's negligence rather than the underlying illness or injury that pre-existed the negligence.

Let me give you a few examples that highlight these difficulties:

Example 1

A 40 year-old woman is admitted to the hospital with a severe headache and slurred speech. A CT scan demonstrates that she has suffered an intracerebral bleed. Her condition progresses to one of near coma. She gradually improves over the next two weeks but remains

impaired and disabled. She is then transferred to a rehabilitation center for inpatient rehabilitation.

While in the rehabilitation facility she undergoes a diagnostic test that causes her to suffer a second intracerebral bleed, thereby leaving her with severe disability and impairments necessitating her admission to a long term care facility for the remainder of her life. Just prior to her second intracerebral bleed, she remained unable to care for herself, was not yet capable of being discharged to her home, and the extent of her permanent impairment remained unknown. You contend that the second intracerebral bleed was due to negligence. You further contend that the second bleed was the cause of the disabling injuries that required her admission to a long term care facility.

Example 2

A 19 year-old girl sustains life-threatening multiple injuries in a severe automobile collision. The collision was so severe that the other two occupants of her car were killed as a result of injuries sustained in the accident. She undergoes emergency surgery for numerous internal injuries and is diagnosed with multiple orthopedic fractures, including several severe pelvic fractures. Her condition is stabilized, but she faces a long period of hospitalization and rehabilitation due to her internal injuries and pelvic fractures.

You contend that her pelvic fractures were inappropriately treated with traction when she in fact needed an open reduction and internal fixation. You further contend that the inappropriate treatment caused her **additional** pain and suffering beyond what she would have experienced, caused her hip and pelvis to heal in a mal-aligned position, required her to undergo a major surgical procedure to undo the mal-alignment of her pelvis, and further impacted her

physical abilities and her gait over and above how they would have been impacted from the severe multiple pelvic fractures caused by the accident itself.

Example 3

A 26 year-old man is drunk and driving at an excessive rate of speed with his two year-old son in the front seat. He has a single car collision. At the scene, EMS notes that he is not moving any of his extremities. In the emergency room, he regains complete function of his legs and some degree of function of his upper extremities. He is discharged from the emergency room and falls to the pavement as he is attempting to enter his car. You contend that he suffered an additional insult to his spinal cord as a result of the fall and that the additional insult is the primary cause of the permanent impairment of the function of his upper extremities.

Example 4

A 30 year-old woman feels a lump in her breast and goes to her physician, who refers her to a surgical oncologist. The surgical oncologist orders an ultrasound that identifies a solid mass. The surgical oncologist assures the young woman that everything is fine. Six months later, the young woman again becomes concerned about the lump in her breast and goes to a different physician. She is promptly diagnosed with breast cancer, and it is determined that the disease has already spread beyond her breast to distant sites. It is agreed by all of her treating doctors that she will die from her breast disease. You contend the six-month delay in diagnosis dramatically altered her treatment options, the amount of her pain and suffering, and her prognosis for survival.

DAMAGES AND PROXIMATE CAUSATION

As you can see from the above examples, the primary difficulty is distinguishing the injury that was caused by the negligence of the defendant from that which was inherent in the

illness or injury that led to your client's medical treatment. This issue may more appropriately be considered one of proximate cause rather than damages. The two are closely intertwined, however, and it is an issue of vital importance.

There are many reported cases addressing whether a malpractice action is viable based upon the plaintiff's medical proof of causation. It is almost always necessary to present expert witness testimony to prevail on this issue. The following cases, while not exhaustive on the subject, should be helpful in analyzing the issue and determining the type of evidence necessary to defeat a motion for summary judgment or directed verdict: Zwiren v. Thompson, 276 Ga. 498, 578 S.E.2d 862 (2003) (instructing that expert witnesses in medical malpractice cases are required to state their opinions regarding proximate causation in terms of "reasonable medical probability" or "reasonable medical certainty" and suggesting jury instruction to that effect); Cannon v. Jeffries, 250 Ga. App. 371, 551 S.E.2d 777 (2001) (grant of summary judgment to defendants on causation affirmed where the plaintiff's expert witness could testify only to two possible conditions that may have contributed to the plaintiff's pre-term labor; expert could not state a percentage of probability that an undiagnosed Chlamydia infection caused the labor; expert further testified that the largest category of pre-term labors have no identifiable cause); Estate of Patterson v. Fulton-DeKalb Hospital Authority, 233 Ga. App. 706, 505 S.E.2d 232 (1998) (Wrongful death; summary judgment affirmed due to lack of expert testimony on causation issue. Good discussion of legal standard. Reasonable medical certainty has no greater meaning than a preponderance of the evidence, and the standard of proof is preponderance of the evidence as to medical causation); Anthony v. Chambless, 231 Ga. App. 657, 500 S.E.2d 402 (1998) (Wrongful death; summary judgment affirmed. Plaintiff's expert testified there was an 80% chance of survival **under certain circumstances**. The special circumstances required the

decedent to be in the operating room within the "golden hour." Facts showed no way patient could have been in operating room within an hour, therefore no causation); Grantham v. Amin, 221 Ga. App. 458, 471 S.E.2d 525 (1996) (Wrongful death action; motion for summary judgment granted and affirmed based on failure to show to any reasonable degree of medical certainty that the patient's death could have been avoided); Velez v. Bethune, 219 Ga. App. 679, 466 S.E.2d 627 (1995) (". . . [t]he imminence and inevitability of death for this nine day old infant go only to the quantum of damages . . ." Motion for summary judgment denied and wrongful death action allowed [Note cannot reconcile with Dowling v. Lopez below]); Roseberry v. Brooks, 218 Ga. App. 202, 461 S.E.2d 262 (1995) (Bare possibility that negligence caused injury is not sufficient; no wrongful death action allowed but claim for additional pain and suffering supported by the evidence); Dowling v. Lopez, 211 Ga. App. 578, 440 S.E.2d 205 (1993) (No action for wrongful death where patient had a terminal condition even though life could have been prolonged six to eight years if there had been no negligence. However, there may be a claim associated with loss of chance of survival, e.g., pain and suffering, loss of consortium, loss of enjoyment of life); Richmond County Hospital Authority v. Dickerson, 182 Ga. App. 601, 356 S.E.2d 548 (1987) (Proximate cause is not eliminated by proof that the decedent had less than a 50% chance of survival had the negligence not occurred. It is unlikely the principle applied in this case would be applied to allow a wrongful death action to proceed in view of the more recent cases, but would still be applicable as to a claim for other damages such as pain and suffering, etc.). See also 64 ALR 4th 1232, Recovery In Death Action For Failure To Diagnose Incurable Disease Which Caused Death.

THE IMPORTANCE OF YOUR THEORY OF LIABILITY AND THE TYPE OF DEFENDANT(S)

The development of the liability picture is an important method of maximizing damages in a medical case. We all know that the clearer the liability and the more egregious the negligence, the greater the damages. Thus, given the same injury in a case involving marginal negligence and a case involving clear-cut negligence, the amount of the damage award will typically be greater in the case involving clear-cut negligence.

The type of defendant is also important. Cases involving corporate or institutional entities, such as a hospital or HMO, generally will result in a more significant damage award than cases against an individual doctor. Identifying and developing theories of liability against an institutional defendant will almost certainly benefit the amount of a recovery received by settlement or at trial.

In cases against hospitals or other health care institutions, I believe those cases involving a "system" breakdown are better cases than ones involving bad medicine. For example, I would prefer a case where there is an abnormal test result that never finds its way into the system over a case involving a nurse who receives an abnormal laboratory result but for some reason fails to appreciate the significance of the test result. Clearly, the breakdown of a system that is designed and implemented to provide information important to the wellbeing of patients is inherently a better case than one involving human error that will be attached to a given individual.

PRESENTING DAMAGES AT TRIAL

As stated earlier, many of the principles of establishing damages in a medical malpractice case are the same as for any other tort suit. I think damages can be maximized when the following two general principles are kept in mind and your proof and argument seek to

emphasize them: (a) juries help those who help themselves (e.g., plaintiff has returned to work or attempted to return to work; plaintiff has done all physical and occupational therapy prescribed; plaintiff has a good attitude and is not bitter and defeatist); and (b) a money award will fulfill a well-defined, specific need (e.g., income replacement; future surgery; therapy; child care to allow one to return to work). Your proof of damages should demonstrate to the jury the applicability of these principles. You should also show how the jury's verdict is well deserved and can make a meaningful difference in the plaintiff's life.

The remainder of this paper will address various aspects of the presentation of damages during the different phases of trial.

Voir dire

The establishment and proof of your client's damages begins with voir dire. You should use voir dire to educate the jury about your client's injuries and damages. For example, if your client is a paraplegic, ask if anyone has any special knowledge, training or experience in the daily struggles experienced by a paraplegic. Ask a series of questions regarding any type of therapy, medical procedure or ongoing needs that your client has to find out if anyone has experience with similar problems, whether it is through education and training or through the care of a loved one.

If your client has catastrophic injuries and a guardian has been appointed, ask if anyone has ever been appointed as a guardian by a court of law and shouldered the responsibility to provide for all financial, physical and emotional needs of a loved one. Also ask if they have ever functioned in that role for a loved one or a friend even if they haven't been formally appointed and given that responsibility. When you ask these questions about a guardian, you will see many potential jurors turn their eyes to the guardian sitting at the table with you. They will have an

immediate respect for that person and hopefully a desire to help him/her perform the responsibility that person carries on a daily basis.

If your client had injuries, illnesses or limitations prior to the events at issue, ask the potential jurors how a person with limitations should be treated by a medical professional and whether that treatment should be any different than the treatment afforded an able bodied person. Ask how that same person should be treated in a court of law and whether that person should be viewed in a court of law any differently than an able bodied person. Ask open-ended questions, not leading questions that call for a yes or no answer. Try to have the potential jurors open up and discuss with you and among themselves how they feel about issues of importance to your client's case.

Opening statement

If you have a difficult question of proximate cause, acknowledge that in opening statement. Tell the jury that while the evidence will establish that the defendant's negligence in all probability caused your client's injury, the proof will not establish causation to a 100% medical certainty. Tell them that if they require that degree of proof, you are acknowledging right then and there it will not be forthcoming.

Witnesses

It is no surprise that the effective use of lay witnesses, such as family members, co-workers, friends, etc. can be a very powerful method to demonstrate your client's injuries. In a medical malpractice case the defendants are medically trained, and there will be many other witnesses involved with the plaintiff who also have medical training. You can often use the defendants and other medically trained defense witnesses to demonstrate the significance of your client's injuries and damages. The beauty of this is that you can take a defense witness who has

the ability to undermine the liability aspect of your case and make him or her appear to be a plaintiff's witness when it comes to acknowledging the type and seriousness of your client's injuries. If you have a client who has clearly suffered significant injuries and the defense witness resists acknowledging the severity of those injuries, you will probably be able to portray that defense witness as a heartless soul.

A couple of examples of using medically trained defense witnesses to your advantage come to mind. A young girl who has developed Stevens Johnson Syndrome as a result of the inappropriate prescription of a sulfur-based antibiotic has painful and disfiguring blisters on her body, the inside of her mouth and down her throat. The suffering caused by these blisters is the equivalent of someone suffering with a significant burn. In fact, the patient is placed on a burn unit for management of her condition. The patient is placed on a PCA pump to self-administer morphine for pain control. A review of the nurses' notes reveals that the patient was not administering morphine to herself, not because she was not suffering pain, but because the simple pressing of the pump with her finger caused unbearable pain in and of itself. The medical records of your client are always a potential great source for documented pain and suffering, both mental and physical.

Another example is when the defendant calls a Life Care Planner to defend against your damages. These professionals are very ripe for demonstrating the significance of your client's injuries. Keep in mind that these professionals have seen first hand the devastation caused by catastrophic injuries such as those experienced by your client. Rather than focusing on refuting their testimony minimizing the cost of your client's future care, use them to educate the jury about the lifelong hardships your client must endure daily. Have them acknowledge and agree that catastrophic injuries have a major impact on the entire family and not just on the one that has

been physically injured. After demonstrating the overwhelming nature of your client's injuries, ask them how much of the cost they have calculated in their life care plan covers the pain and suffering of your client and the client's family. "So, if I understand correctly, if this jury did everything you have suggested in your life care plan, there would not be an award of a single penny for the frustration, embarrassment and anger my client experiences on a daily basis because his legs are paralyzed." "The same is true for the fact that this adult man has no control of his bowel and bladder." Just because the defense calls a witness to address one specific area of the defense to your case doesn't mean that you can't take that person to a better place.

Closing Argument

In the presentation of your damages case, you should always show respect towards your client. After all, that is exactly what you're asking the jury to do with their verdict, that is, let their verdict demonstrate their respect for your client's injuries. When it comes to translating that respect and appreciation into money damages, it is a very personal decision as to how you argue for an award for damages. More often than not, I do not ask for a specific monetary amount. Rather, I speak with the jury more about general concepts such as respect, truth and fairness and tell them that I leave it to their discretion, which discretion we will accept without question, when they return with their verdict.

I like to show the jury a copy of the verdict form and familiarize them with it and walk them through the form and the procedure for completing the form. I would like to think that by being their guiding hand in the courtroom, they might be looking to me as their guiding hand in the jury room. Be sure you educate the jury about the law. The law does not require that the defendant's negligence be the sole proximate cause of your client's injury in order for your client

to recover. Instead, it is only necessary that the defendant's negligence be a contributing proximate cause to the injuries sustained.

CONCLUSION

The same principles that apply to the proof of damages in other tort cases also apply to medical malpractice cases. However, the proof of damages in medical malpractice cases presents special problems because every plaintiff has an underlying illness or injury that confuses the damages picture. It is vitally important to meticulously develop expert witness testimony to establish proximate cause and that injury of a different and lesser nature would have occurred in the absence of negligence by the defendant.