

Why medical malpractice still matters.

Despite MICRA limitations, medical-negligence claims still have a crucial role in society

BY BRUCE G. FAGEL

We all know the statistics on medical-negligence cases: 80 percent of cases that go to trial result in the defense verdicts, and even if you win for the plaintiff, under MICRA, the recovery and attorney fees are limited. So why not just handle other types of personal-injury cases that do not limit recovery or attorney fees? There are three important reasons medical-negligence cases need to be filed and pursued, in necessary, through trial.

Increase in insurance liability rates

First, medical-negligence cases serve an important societal purpose, by providing financial encouragement to hospitals and doctors to improve care by learning from their errors, especially those that cause their insurance rates to increase. When hospitals pay a significant amount of their self-insured retention or when a physician's insurance carrier pays any amount that results in a higher premium on future insurance, there is an incentive to change behavior to prevent a further occurrence of the same error.

The Medical Board of California will respond to public complaints, but most of their investigations of negligent care by physicians occur as a result of a report, pursuant to Business & Professions Code section 805, following a payment of any amount in excess of \$29,999 in liability payment. These reports only occur as a result of a medical-negligence claim that results in an indemnity payment. At the same time, however, most of these investigations that are based on negligent behavior will result in probation and some type of remedial education. Actual suspensions or revocations of a medical license usually follow some type of drug abuse involvement or improper sexual behavior.

Thus, the main incentive for changing negligent behavior for physicians remains the impact of a medical-negligence claim payment on any subsequent increase in liability insurance premiums.

With regard to hospitals, the non-litigation incentive to improve behaviors of nurses remains more elusive, since there is no similar requirement that hospitals report indemnity payments as a result of nursing negligence to the Nursing Board, and the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), whose seal of approval is required for hospitals to be able to bill Medicare, does not directly require hospitals to report indemnity payments in medical-negligence cases, JCAHO does require a root-cause analysis for reports of sentinel events, which focus on the types of events that can be a basis of a medical-negligence claim, but ultimately the payment of any significant sum of money has a more powerful influence on the decision made by hospital boards, especially in the increasing for-profit hospital market.

However, while specific medical-negligence cases may result in the improvement of care in some cases, they cannot eliminate medical negligence from the health care system.

Unlike other types of human endeavors that result in episodic or occasional injuries or death due to negligence, medical negligence occurs every day in each of the nation's 6,000 hospitals, and countless times in the offices of over 500,000 physicians. With over 1.5 billion medication errors that occur annually in the U.S., every patient has a medication error every day that they are in a hospital. Luckily, most of these medication errors are minor or insignificant and rarely cause a serious injury or death, but they are errors in the delivery of medical care. Many of the most basic errors in the health care system are systemic errors due to the very complexity of the health care system, which involves multiple communications and technology interactions which cannot be easily fixed or improved. Financial demands in both public and private hospitals affect staffing in the short term and also prevent long-term improvements like electronic medical records. As a result, the number and severity of medical negligence cases is likely to increase in the future, despite the best efforts by government and the health care industry to reduce the incidence of medical errors and negligent care.

Compensation for the victims

Second, medical malpractice cases provide the only mechanism in our society to provide some level of compensation to the victims of medical malpractice. Even though MICRA limits non-economic damages to \$250,000 (which is clearly inadequate compensation for most cases) there is no limit on loss of earnings or medical expenses. Both of these economic damages have increased with inflation, which has been most dramatic with health care costs. Since juries are well aware of the costs of health care, they are far more likely to award the plaintiff's measure of economic damages in cases where they find liability. Despite the efforts of defense experts to present less-expensive alternative care, the prospect of a jury awarding an injured plaintiff the cost of future medical care (which has increased 700 percent since 1975) motivates most liability insurance carriers to settle liability cases, despite the MICRA limitation on non-economic damages.

Since a disproportionate percentage of the victims of medical negligence have either MediCal or no insurance, there is no collateral source off-set for any jury award for future medical care costs. Hospitals are also in an awkward position in arguing for less expensive care for an injured victim of medical negligence because the health care system is primarily responsible for the high cost of medical care, and most jurors understand that fact.

Money recovered from a medical-malpractice claim will often mean the difference between obtaining the necessary medical care services or relying on public benefits. Ironically, in many catastrophic-injury cases, jurors may be quite conservative in awarding damages for non-economic damages, but they will want to make sure that the plaintiff is fully compensated for the cost of all medical care required because of the injury. Although jurors cannot be told about the limit on recovery of non-economic damages under Civil Code section 3333.2, jurors will often award only a small fraction of the medical care costs as non-economic damages.

The exception occurs in wrongful death cases involving adults with young children, where the limit on non-economic damages has its greatest impact. In these cases juries will often award far more than the amount that is ultimately recoverable under section 3333.2, and jurors are often both surprised and shocked when they learn, after trial, about the limit on non-economic damages.

Reaching the jury

Third, the same statistics that show 80 percent of medical malpractice cases that go to trial result in a defense verdict, also show that over 25 percent of all cases are settled prior to trial. It is the ubiquitous nature of medical negligence that most concerns the liability insurance carriers and hospital risk managers, because properly presented, most medical negligence cases will appeal to the “reptile” in each juror.

While few jurors who have direct experiences with medical negligence will withstand a proper challenge for cause or the peremptory challenge by the defense, most jurors understand that at some point in the future either they or their family will need hospital care and safety is an issue that will resonate with almost any juror. Hospitals are naturally concerned that in today’s system of competition and marketing, a public concern about safety can have a larger impact on the financial statement than a settlement or increase in insurance premiums.

The most important factor in evaluating any medical-malpractice claim is to determine whether the nature of the claim is something that a jury would accept as showing medical negligence. Unlike many other types of tort claims, medical-negligence cases cannot be based solely on the severity of damages, with later discovery to find evidence of negligence. Medical negligence cases must be evaluated early in the case to confirm that the facts fit the type of pattern that has the greatest chance of successful resolution, either by settlement or trial. Case selection at the outset thus becomes the most important decision that any attorney needs to make in pursuing a medical-negligence claim.

There have been many articles written about what kinds of fact patterns do not lead to successful outcomes, but little about the kinds of cases that are worth pursuing. The most significant factor in analyzing any medical-negligence case is whether the facts suggest some type of system error that puts patients’ health at risk, beyond the specific injury or death in an individual case. Unfortunately, many attorneys focus on the severity of the injury, rather than the process that resulted in the injury or death. Many medical experts, when asked to review a case to determine if there is care below an acceptable standard of care, will either assume that care is only negligent if it is the direct cause of an injury or death or they will only focus on their specialty and assume that the negligent care was due to a practitioner in another specialty. While such medical experts may be sufficient to get a case to a jury, they cannot explain to a jury why such negligent care should matter to the jury. Under such circumstances, it is easy to understand why over 80 percent of such cases that do not settle before trial end in a defense verdict.

Hospital risk managers and their insurance carriers have a far better understanding about the value of any medical negligence claim when it is presented to them in the proper terms. Since non-economic damages are limited to \$250,000 many insurance claims reps incorrectly assume

that any medical negligence case is worth a maximum of \$250,000 plus some limited economic damages. That is why despite the effect of inflation on loss of earnings and especially on future medical care costs, most physicians in California still have the same \$1 million limit of liability insurance that they had in 1975. But even in wrongful death cases of an adult with little or no actual provable income, there is an economic value to home services, which can often be more than the limit on non-economic damages.

The initial review of the facts of any medical-malpractice case must focus on whether the injury or death is the result of a medical error or negligent care. There is a significant difference which escapes many attorneys, but which forms the basis for the defense of most cases, and ultimately is the reason many medical-negligence cases result in defense verdicts. Medical errors are endemic in hospitals, but not all errors fit into the legal category of negligence, and even those that do represent negligence may not be accepted as such by a jury. However, with the increasing number of medical interactions with patients, and the increasing complexities of health care, the number of valid medical-negligence claims will likely continue to increase in California and throughout the U.S. Attorneys who are committed to providing a service to consumers must be willing and able to accept medical negligence cases and pursue them to a successful resolution for their clients.

Many attorneys and most Californians do not remember that before MICRA was enacted by the Legislature in 1975, the California Medical Association and the California Hospital Association conducted a study to determine if it would be less expensive for doctors and hospitals in California for the Legislature to adopt a no-fault type of system similar to Workers' Compensation, where an injured plaintiff would be able to collect a specified amount of damages for any injury that occurred in a hospital. Obviously the amount of payment would be low to offset the number of claims which would not require any proof of actual negligence. However, what the CMA and CHA discovered was that less than three percent of all acts of negligence causing injury in a hospital ever resulted in a medical-negligence claim, and thus even with significant liability payments, it was far cheaper to keep the current system requiring proof of liability. Subsequent studies in other states in the 1980s also showed that fewer than 10 percent of all potential cases of negligent care causing injury or death ever resulted in a medical negligence claim. Even if only half of those "missing cases" reach an attorney, there is a need for many more attorneys to pursue these cases on behalf of the victims of medical negligence.

While we can all agree that MICRA and its effects on compensation for the injured victims of medical negligence is grossly unfair, attorneys who refuse to take medical-negligence cases because of the limitation on non-economic damages do not help either those victims or society in general. Attorneys who refuse to take medical-negligence cases because of the limitation on attorney fees make the legal profession look even worse in the eyes of the public.

While efforts are on-going in both the courts and the Legislature to change the draconian effects of Civil Code section 3333.2, the increase in the number of victims of medical negligence and the increasing severity of long-term injuries require that all attorneys be able to correctly identify those cases that have merit. If those cases are correctly pursued, such victims of medical negligence will at least be provided some measure of compensation for their injuries and long-term suffering.

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