Damages in medical-malpractice cases under MICRA

Evaluating the case as to the class of damages is critical to the decision of whether to take the case

By Bruce G. Fagel

The evaluation of damages in a medical-malpractice case starts with the initial evaluation and decision to accept the case. MICRA has created two classes of plaintiffs in medical-malpractice cases. One class includes those plaintiffs who have a claim for only non-economic damages. These include wrongful-death claims involving children or the elderly, where the heirs have no claim for loss of income from the decedent, and those whose injuries are self-limited without any significant loss of earnings or medical expenses.

The other class includes those wrongful-death claims of an adult where the heirs (spouse and/or children) can show a significant loss of financial support over time between the death and the expected work-life of the decedent, and those cases where the plaintiff has a long-term or permanent injury that impacts loss of earnings and future medical care costs. The first step in the evaluation of any medical-malpractice claim requires a careful and objective determination about which class of damages are involved.

Cases with only non-economic damages

These are the most challenging cases to evaluate because of the limited recovery regardless of the facts or circumstances of liability. Data from the insurance and defense industry has shown that the filing of medical-malpractice cases is down in the last few years, and most of that reduction has been in these types of non-economic-damages-only cases. Many attorneys have chosen to not accept any such cases leaving the plaintiffs without any remedy. But this is not good for the profession and is certainly a disservice to the public. These cases should not be routinely rejected, but with careful evaluation, prosecution and settlement, these cases can provide at least some reasonable level of compensation for the injured victims of medical negligence and their families.

The key to these cases is deciding which cases can be resolved without incurring costs beyond the proportion of the limited recovery. At the same time, one needs to understand that these cases are what defense attorneys love to defend. Since most doctors and hospitals have liability-insurance policies with separate duties to defend and indemnify, defense attorneys have broad discretion to defend the case since even if they lose at trial, the indemnity payment is limited, and far less than the limit of the insurance. In such cases, doctors may be reluctant to give their consent to settle before trial. Also, hospital insurance policies usually have a large self-insured deductible that is often more than $250,000 so any settlement must come from their own funds.

Cases that involve multiple, separate defendants with separate attorneys can easily become very unwieldy and difficult to resolve short of trial. Also, wrongful-death cases involving multiple heirs, including some who are reluctant or even unwilling to participate, need to be viewed as potentially too complicated to pursue. However, cases involving a single or at most two defendants (doctor and hospital) with limited plaintiffs and clear liability can usually be resolved in a way that makes economic sense for both the plaintiff and their attorney. Ultimately, the plaintiffs in such a case need to understand from the beginning that since the case has a maximum recoverable limit of $250,000 after trial, settlement prior to trial may require some discount to be of economic value to both sides.

Cases with more than non-economic damages

Just because there are economic losses in the form of loss of earnings and/or household services or future medical care costs does not automatically mean that such a case is any more likely to be successfully prosecuted than a case with only non-economic damages. A jury will never get to damages, and an insurance carrier will never make a reasonable offer to settle without sufficient evidence of liability. But assuming that there is adequate clarity to the liability facts and issues in the case, the limitation on non-economic damages in medical-malpractice cases makes it more important to understand how to obtain maximum economic damages.

Wrongful-death claims

The economic loss to the heirs in a wrongful-death claim takes any medical-malpractice case into a different category than a non-economic damages claim only since MICRA does not restrict or limit recovery of economic damages. The issues of negligence and causation often predominate wrongful-death claims since defense experts will often exaggerate any pre-existing condition or co-morbidities, especially in cases involving failure to earlier diagnose and treat cancer. Once liability can be shown, the damages will depend on the projected life expectancy of the decedent had there not been negligence causing the death. In such case, the prognosis for the type of cancer when earlier diagnosed or the decedent's other

medical conditions need to be taken into account in proving economic damages.

Loss of earnings

In any wrongful-death claim, the loss of financial benefits to the heirs is subject to proof of actual earnings by the decedent, the work-life expectancy of the decedent, less self-consumption and less any off-sets from any social security payments, pursuant to Civil Code section 3333.1, which is part of the MICRA laws. Proof of actual earnings can be based on W-2 statements for at least 5 to 10 years, if such documentation is available. However, depending on the occupation of the decedent, proof of loss of earnings from the date of death until the end of a future projected work-life expectancy may be more difficult to prove and it will be subject to the opinions of the defense economist who will want to minimize such damages. Individuals who are self-employed or whose work history is not consistent may have more difficulty in establishing this element of damages. Since self-consumption is an accepted offset in any wrongful-death claim, an economist is required to give opinion evidence about the appropriate percentage for self-consumption of the decedent. The "studies" on self-consumption are highly interpretable, since it varies both by income level and number of heirs in the household.

Loss of household services

One important element of economic damages in any wrongful-death claim which is often forgotten or overlooked in many medical-malpractice cases is the element of household services, which are legally recognized as having economic value, regardless of whether or not the heirs have actually been able to attempt to "replace" the household services of the decedent. In some cases where the actual earnings of the decedent are not substantial, the value of household services may, in fact, be a larger amount, especially if the decedent is a mother with small children, who earned little outside the home. Also, household services continue beyond the work-life expectancy of the decedent, to the end of the life expectancy of the spouse, unless the decedent would have pre-deceased the spouse, but for the negligence of the defendant. There are two ways to measure household services. One is a statistical analysis based on the age, gender, and other measurable factors of the decedent. But in some specific cases, the decedent's household services may be of greater value than the statistical average, and the surviving spouse needs to provide specific information to an economist to make calculations for a specific case.

Permanent injury claims

The limitation on recovery of non-economic damages in cases with a severe and permanent injury increases the focus on obtaining maximum economic damages for loss of future earnings and future medical expenses. Since obtaining economic damages is not artificially limited and dependent solely on the testimony of experts who are able to testify that such losses are "reasonably certain" to occur in the future, the defense in such cases will contest each and every element of such economic losses, including life expectancy. In many states where there is no limit on non-economic damages, the requirement and need for details and multiple experts on economic damages is less important.

Loss of earnings

In any catastrophic-injury claim that impacts the plaintiff's ability to earn income in the future, the analysis and proof is similar to that of a wrongful- death claim, with one very significant difference. Since the plaintiff is the injured party rather than the heirs of the decedent, there is no offset for self-consumption. Also, if the plaintiff's injury impacts their life expectancy to a level below their work-life expectancy, the provisions of Code of Civil Procedure section 667.7 that require periodic payment of all future damages, including future loss of earnings, do not apply. The plaintiff is entitled to the present cash value of any such future "lost years" loss of earnings. In cases where the plaintiff is injured before they have had the opportunity to finish their education and enter the work force, the analysis of future loss-of-earnings capacity becomes more of a statistical average based on assumptions about what educational level the plaintiff would have achieved, and what the statistical averages are for such educational levels.

Since the data collected by the U.S. Dept. of Labor provides information on average income by educational level and gender, two adjustments need to be made by plaintiff's economist to such data. First, the educational level of the average American has been increasing. It is currently approximately one year post high-school, but will likely reach two years post high-school over the next 10-15 years. Also, the wage gap between men and women, though currently substantial, is slowly closing, and the average wages for a female in the next 10-15 years would be expected to be closer to the average male. Both of these "trends" need to be taken into consideration when calculating the earnings loss for someone who would not be expected to enter the work force for another 10-15 years.

Future medical-care costs

Determining the present cash value of future medical-care costs requires multiple experts, including at least one physician who can provide an opinion on the plaintiff's prognosis and life expectancy, a life-care planner who can provide cost numbers for each element of plaintiff's future medical care needs, and an economist who can calculate the present cash value of plaintiff's life-care plan based on the projected life expectancy. In addition, a rehabilitation physician is often required to provide specific input on plaintiff's therapy and attendant care needs. Under section 667.7, any defendant in a medical-malpractice case can request that all future payments for medical-care costs

be made under a periodic payment judgment where the court sets the monthly or yearly payment schedule for a specific number of years (based on a jury finding or evidence of plaintiff's life expectancy) and the payments stop upon death or the end of the projected life expectancy, whichever occurs first. Typically, in catastrophic- injury cases, the court will require a life annuity to protect the plaintiff and ensure payments for as long as the plaintiff lives. Prior to 2008, the cost of such an annuity would always be less than the medical evidence or jury finding on plaintiff's life expectancy, and thus the defense could always save money after any jury verdict involving a catastrophic, permanent injury to plaintiff. However, since 2008, the insurance companies that are in the annuity business are no longer willing to take the kind of financial risks that they did before 2008, and thus the cost of one or more annuities that would fund any periodic payment judgment is more, and sometimes much more than the present cash value of such future payments.

Offsets and MediCare set aside trusts

Civil Code section 3333.1 allows the defendant in any medical malpractice case to introduce evidence to the jury of payments by health insurance or other public benefits such as social security payments. For past economic losses involving earnings or medical costs, actual payments with documentation allows a jury, or a defendant's insurance carrier, to calculate such an offset. With regard to future loss of earnings, payments from a disability policy or social security payments are usually considered as reasonably certain as an offset. However, with regard to future medical-care costs, even with a policy of private health insurance, it is far less certain that specific items that are part of plaintiff's life-care plan will be considered as covered expenses under a specific health-insurance plan, and plaintiff should insist on the defendant having the burden of proving that such items will in fact be paid for by any specific health-insurance policy.

Since the Affordable Care Act now removes lifetime caps and prevents health-insurance companies from denying coverage for a pre-existing injury, it will be easier for the defense to argue that much of plaintiff's life-care plan will be paid for by private health insurance, but it is reasonably certain that attendant care in the home, which is often the largest part of a life-care plan for a catastrophic injury, will never be paid for by any private health insurance. Also, any plaintiff who has MediCal as their primary health insurance is required to repay MediCal for any benefits paid, and thus MediCal is an exception to section 3333.1, and the defense cannot claim any off-set for MediCal benefits, either in the past or in the future.

All insurance carriers now require language in all settlement releases that makes the plaintiff's attorney personally liable and responsible for any MediCare lien, including MediCare future interests. MediCare has proposed regulations for the creation of MediCare Set Aside Trusts, which require that a separate trust be established to pay for future medical care that would otherwise be paid for by MediCare, and the failure to establish such a trust could result in the plaintiff losing their MediCare benefits. There are no specific terms or requirements for such MediCare set aside trusts and MediCare specifically does not want to or can not review such trusts to determine if they meet their requirements, unlike MediCal which does review and approve Special Needs Trusts. Even if the plaintiff is not on MediCare at the time of the injury, if the disability is permanent which would qualify the plaintiff for MediCare benefits after two years, then the issue of a MediCare set aside trust must be addressed as part of any settlement.


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