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When a Medical Malpractice Case Can Be Settled Even If the Defense Experts Do Not Think That the Case Has Merit

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[PHOTO NOT SHOWN] caption: Bruce Fagel has law offices in Beverly Hills, specializing in medical malpractice. Dr. Fagel practiced emergency medicine for 10 years before becoming an attorney, and was recently included in the *National Law Journal* list of "The 10 Best Trial Attorneys in the Nation."
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Some juries and many judges incorrectly believe that in a medical malpractice case, when experts disagree on the liability of a health care provider, the defense wins because the plaintiff has the burden of proof. Defense attorneys will always characterize the case as a "battle of the experts," usually because the defense can always get a "qualified" medical expert who will dispute plaintiff's theory of negligence or causation. Yet the reality of medical malpractice cases is that defendant doctors, hospitals, and their insurance carriers settle a substantial number of cases even when they have expert testimony to defend the case.

There are multiple reasons why the defense in medical malpractice cases will decide to settle a case prior to trial, and understanding these factors will allow you to successfully pursue some medical malpractice cases even when the case might otherwise involve a traditional battle of experts. The key is knowing when to settle and how to place a realistic value on the case.

Jury Appeal of Plaintiff vs. Defendant

In its simplest form, any medical malpractice case is a tort claim between individuals. Even the jury instructions require the jury to consider a hospital or a corporate defendant as any other individual. Defense attorneys will always report to their carrier on the jury appeal of the plaintiff or plaintiffs. An injured child is almost always a sympathetic plaintiff, and some are more sympathetic than others.

On the imaginary scale that is used to give value to a case to determine if it settles or goes to a jury, a sympathetic plaintiff is worth several points. At the same time, and by the same measurements, an unsympathetic defendant is a significant factor considered by the defense. This is more true with physicians than with nurses. Many nurses will often make nervous or ill-informed witnesses with little recall of any facts beyond what is written in the medical records. However, in reality, many jurors will overlook such problems in nursing witnesses, and many hospitals do not consider such nursing witnesses as a liability in their case.

Unsympathetic physicians often have a much bigger problem with jurors. If a physician was trained in a foreign country and/or has a difficult-to-understand accent, and if the physician comes across as uncaring or otherwise unsympathetic to a jury, their insurance carrier will consider such a factor as important, or more important, than the jury appeal of the plaintiff.

These factors can never be known at the outset of any case, and require at least depositions of the involved physicians and nurses to determine how well each would play to a jury.

Another equally important aspect of this analysis is the relationship between the defense attorney and the defendant physician. Some defense attorneys will bond with their clients, which is usually manifested by their constant reference to the defendant by their first name, and the attorney will view their defense as a crusade. In other situations, the defense attorney may admit that the physician is not their best client. Unlike plaintiff attorneys who can reject the case of an unsympathetic client, defense attorneys work for insurance companies and they cannot turn down a case just because the physician is not very likable. But in a case where the defense attorney shares the view that the physician is not a very sympathetic witness, that attorney will try to settle the case before the physician has to testify before a jury.

Conversely, a well-spoken, intelligent, caring physician may be a more difficult obstacle to a plaintiff in a medical malpractice case than a good causation defense. Since most physicians who are involved in medical malpractice cases do not have an extensive background of prior lawsuits, and many who have been sued before have a record of cases dropped or defense verdicts, it is often not possible to assess the personality of a physician before taking their deposition.

Clear Evidence of Negligence Even If Causation Is Less Certain

Negligence is always easier for a jury to understand than is causation. But medical experts often look at causation first, and if they find insufficient or inconclusive evidence of causation, they will allow that conclusion to overshadow their view of negligence. However, some medical malpractice cases present as fairly clear violations of the standard of care, especially in situations where there are actually published standards from either medical organizations or speciality societies on a specific subject. When there is evidence of a violation of such a clear standard, even if the causal connection to the damages is less clear, the defense must consider whether a jury will go from a finding of negligence to damages, as long as there is some evidence of causation.

A more common scenario exists when there are two potential causes of an injury and one is not related to any medical negligence and the other cause is more likely a result of medical negligence. In such a situation, the defense experts and possibly even plaintiff's experts will focus on the non-negligent cause of the injury and ignore the negligent cause. While such a case would represent a gamble at trial for the plaintiff, it would represent a similar gamble for the defense, and that is sometimes all that is needed for resolution prior to trial, even if, again it is for less than full or even a reasonable value on the case.

Severity of Plaintiff's Injuries and Need for Future Care

While the law directs juries to determine negligence and causation before going to damages, the reality of jury trials is that a jury will tend to blend their evaluation of all issues. This presents a danger for both plaintiff and the defense and can therefore be a basis of a settlement prior to trial. The danger of this approach, however, is that without sufficient evidence of liability (both negligence and causation) many juries will find for the defense, despite evidence of major damages. Thus, from the outset of the case, you must avoid the idea that a big damages case will settle itself. Unfortunately, unlike almost any other type of personal injury case, many potential

medical malpractice cases will have big damages, with the need for costly long-term care and/or loss of earnings, but without sufficient evidence on either negligence or causation. However, where there are big damages with a plausible theory on liability, you should explore all avenues of settlement before plunging into the risks of trial.

Assistance of a Good Mediator

Most mediators who have experience with medical malpractice cases will agree that any settlement that is reasonable under the facts and circumstances of the case is better than the risks at trial. It is interesting that the best and most successful mediators, in terms of actually being able to settle medical malpractice cases, are former plaintiff attorneys who now do full-time mediation. Defense attorneys and their carriers will often agree to such mediators because of their experience in understanding how a settlement beats the risks of trial, but also because such individuals have a much better experience in being able to value a case for settlement than retired judges, whose experience in medical malpractice cases is often limited to defense verdicts at trial. Most retired judges will admit that they have rarely seen a medical malpractice case that has merit, because such cases always settle before they see them in trial.

When the Plaintiff Makes a Reasonable Demand

This is the most important factor to consider in handling any medical malpractice case. You must be willing to re-evaluate your case after discovery produces evidence that changes the initial impression about the case. This requires honest communication with the client about the value of the case, and at the earliest reasonable opportunity, you must be willing to either walk away from or substantially reduce the client's expectation about the potential recovery in a case. Defense attorneys and their insurance companies will always consider the value of any case as being less than the plaintiff's perspective, but when they are presented with a reasonable demand that is based on the actual realities of the case rather than what the client wants to receive, the defense cannot ignore the opportunity to resolve a case prior to trial.

These factors do not guarantee that any specific medical malpractice case will be settled, and they certainly do not allow a plaintiff attorney to necessarily settle any medical malpractice case for what otherwise would be considered as reasonable damages. But even a settlement for less than reasonable value would be better for the client than losing the case at trial. The critical decision that must be made in any medical malpractice case is not at the start of the case, before any reasonable discovery has been undertaken, but at a later point after at least a few depositions of the plaintiff and defendants where the non-medical aspects of the case can be determined. If the case does not resolve at that point, then the attorney and the client must decide if the next step—proceeding through expert discovery and depositions—is economically viable.

The major problem in pursuing medical malpractice cases occurs when plaintiff attorneys and their clients focus too much on the potential damages in the case and lose track of the fact that the liability in the case may be too thin to win a "battle of the experts." Unfortunately, some plaintiff attorneys, out of necessity to get the client, will oversell the value of the case, and then, after discovery, when it turns out that the case's value is considerably less, they fail to reevaluate the case realistically. At this point in the case, the plaintiff attorney must be honest with the client and present the facts of the case with appropriate advice for the client so that a reasonable position for settlement can be taken.