Linda Fermoyle Rice
RICE & BLOOMFIELD, LLP

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2022

Issue-spotting in medical-malpractice cases

A SEASONED PRACTITIONER'S INSIGHTS INTO HOW TO EVALUATE A POTENTIAL MEDICAL-MALPRACTICE LAWSUIT IN LIGHT OF THE CHANGES COMING TO MICRA

On April 27, 2022, CAOC and attorney Nick Rowley, successfully negotiated reform of the Medical Injury Compensation Reform Act, (Act) which was signed into law by Governor Gavin Newsom on May 23, 2022. This reform will impact medical-negligence cases filed after January 1, 2023. Caps on non-economic damages to patients injured by medical malpractice will increase from $250,000 to $350,000 and will continue to increase over ten years to $750,000, with a 2% cost of living adjustment annually thereafter. The caps on wrongful-death cases will increase from $250,000 to $500,000, and will increase to $1 million over ten years. There will be annual cost of living adjustments (2%) thereafter.

Although it will impact a relatively modest number of cases, it is also possible to recover more than one cap. If one or more doctors are negligent, the plaintiff(s) can recover a single $350,000 or $500,000 cap from them. If hospital personnel also fell below the accepted standard of care, a second, separate cap is available to the plaintiff(s). If an unaffiliated health care provider, like an ambulance company or its personnel, commits a separate act of negligence, a third cap is available. However, the availability of a third cap will almost never come into play.

These changes may tempt personal-injury lawyers without experience handling medical-malpractice claims to consider doing so. There will be a steep learning curve for lawyers new to the field, first in identifying cases with merit and then litigating them. This article is intended to spotlight issues that should be considered but may not be obvious to inexperienced lawyers.

MICRA pitfalls you may not appreciate

Most lawyers are aware of the cap on non-economic damages, but the cap is just one of a number of draconian measures designed by the insurance industry and California Medical Association to deny justice to injured patients and their attorneys.

For example, many attorneys may not be aware that the statute of limitations for filing a medical negligence claim is one year, not two, but may be as long as three years. (Code Civ. Proc., § 340.5.) Suffice it to say that statute of limitations issues in malpractice actions can be exceedingly complex and implicate discrete events and continuing professional relationships. A practitioner representing patients will need to research when the statute of limitations commenced in a potential client's case.

The law requires that lawyers send a 90-day notice of claim to any health care provider against whom a lawsuit may be filed, pursuant to Code of Civil Procedure section 364. While there may be advantages to sending such a letter for the purposes of extending the statute of limitations (if served within the final 90 days before the statute otherwise would run), there are no penalties for failing to do so. For medical malpractice cases in which the statute will run on or after October 3, 2022, a notice

sent within that last 90 days will permit the case to be filed in 2023 to take advantage of the new caps.

Attorneys' contingency fees are calculated, not on the gross settlement or judgment amount as is customary in most personal-injury cases, but on the net recovery to the client, after case costs are deducted. (Bus. & Prof. Code, § 6146, subd. (c)(1).) The more the lawyer spends on the case, the less attorney's fee she recovers.

Attorneys' fees previously were also capped on a sliding scale by Business & Professions Code section 6146(a). Before the recent Act changing MICRA, a lawyer could charge only 40% of the first $50,000 net after expenses, to the client; 33-1/3% on the next $50,000; 25% on amounts between $100,000 and $600,000; and 15% on amounts in excess of $600,000. In the event the client received a net settlement of $2 million, attorneys' fees would account for only 18.58% of the total recovery, or $371,600.

For cases filed after January 1, 2023, attorney's fees will still be capped, but the cap will be diminished to 25% for cases that settle before a lawsuit is filed (a comparatively rare event in this author's experience), and 33%, net after expenses, for litigated cases. That same $2 million settlement will net the attorney $666,000 in fees, which is a substantial increase in attorneys' earned compensation, and not a windfall. If a case proceeds through trial, the attorney can petition the trial court for a higher fee, which it has discretion to grant.

Finally, if plaintiff wins future damages that exceed $250,000 (after January 1, 2023) at a trial of a medical malpractice action, defendant can elect that those damages be paid over time. (Code of Civ. Proc., § 667.7.) As a practical matter, this occurs less often than one might expect. The health care provider will not

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2022

receive Notice of Satisfaction of Judgment until the last payment is made, and most prefer not to have an outstanding judgment reflected on a credit report.

The good news about medical-malpractice cases

The law governing medical-malpractice cases is the law governing any negligence action. Plaintiff must prove liability, causation and damages, generally through expert witness testimony. (See CACI 500 series.) Unlike other special areas of expertise, like employment litigation, the law governing medical malpractice cases is static.

The bad news about handling medical malpractice cases

Although the law is straightforward, there is generally no template for handling these cases. The experienced personal-injury lawyer may be able to look at a disc bulge after a rear-end accident and conclude the settlement value of the case is $50,000. That sort of analysis simply isn't possible in medical-malpractice litigation.

Each medical-malpractice case is unique. Each involves a different bodily system and a different mechanism of injury. In each case, by the time expert witnesses are deposed, the lawyer must understand the medicine as well as the experts. While this sounds daunting, and it is, the attorney only has to learn about that one discrete area of medicine involved in his client's claim. But, where to start?

The most basic way to begin this educational process is to obtain the patient's medical records and retain the services of a reputable expert practitioner to review them. Generally, you want an expert in the same field as the defendant health care provider or someone who can see the "big picture." It is good practice to require that the potential client bear these initial costs, with the understanding that, if the review is favorable, the lawyer will thereafter advance the costs of litigation.

In selecting an expert, a lawyer new to the field would be wise to consult with an experienced medical-malpractice lawyer. An experienced lawyer will often know whom to consult by subject and expertise in the field. A great expert is someone who is not only reputable and, perhaps, widely respected by defense lawyers, but also someone who can tell the story of what happened to your client in terms the lawyer and a jury can easily understand. If the lawyer can't understand what happened after reviewing the records with the expert, it is unlikely a jury will be able to do so. Moreover, a great expert can also advise the lawyer why she should *not* take the case, if proving liability is likely to be difficult or impossible, thus saving thousands of dollars and hundreds of hours of preparation.

This, of course, is in stark contrast to how defense attorneys operate. As one reputable medical expert who testifies regularly for both plaintiffs and defendants told me, "I prefer working with plaintiff's lawyers. If I tell a plaintiff's lawyer that he doesn't have a case, that case never gets filed. If I tell a defense lawyer that he doesn't have a defense, he will just shop the case to another expert until he finds one willing to tell him what he wants to hear." Unfortunately, too often this is successful, regardless of the merits of the defense.

Educating the lawyer

While the lawyer contemplating a medical-malpractice case will likely rely on the expert to explain the medicine in terms that can be readily understood, it is highly recommended that the attorney review the medical records herself (or engage the services of a seasoned med mal lawyer to do so). It is good practice to have some understanding of the medical aspects of the potential case to begin the issue-spotting process.

When encountering a medical term, procedure, test or medication that is unfamiliar, the internet is an invaluable resource and the greatest gift ever to medical malpractice attorneys. (No more trekking to the UCLA biomedical library for a day of research.)

In reviewing the records, the lawyer should be asking, "Do they make sense?" If a patient's CBC shows her white blood cell count is high, or other signs of infection, what are the implications and did someone act on it to rule out infection or prescribe antibiotics? If a patient fell in the hospital, what, if anything, was done to rule out potential consequential injury? If a routine chest X-ray or any imaging was interpreted as abnormal, did someone follow-up?

Most lawyers will have to review the medical records several times to prepare for an intelligent meeting with the expert. This is for the benefit of counsel and the expert as she prepares to depose and cross-examine the treating providers and opposing experts. Each time the lawyer reviews the records, she should understand more about their significance and find additional details which may be helpful (or harmful) to the client's case.

What kind of a case is it?

While there is no "template" for evaluating medical-malpractice cases, there are general categories of cases. Understanding what kind of case it is will be an important step in its handling and deciding which experts will be needed to prove it. The following are categories of pure (e.g., not mixed with products liability) medical-malpractice cases:

Failure to timely diagnose a condition, which often involves the failure to thoroughly examine the patient, and/or the failure to order appropriate diagnostic testing.

Failure to provide timely and appropriate treatment for a diagnosed or diagnosable medical condition.

Failure to address a known complication in a timely manner. For example, a surgical complication, which may not be the result of medical negligence and, thus, not actionable, can become a viable medical-malpractice case if the surgeon (or hospitalist) doesn't recognize and address it during or after the surgery.

Negligence in the technical performance of a procedure or surgery.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2022

Failure to provide appropriate follow-up.

The prescription and/or administration of the wrong medication or medication in an inappropriate dosage.

Failure to supervise, usually in a hospital setting, resulting in injury, for example, from a fall.

How many experts are required?

Identifying the number of experts likely to be necessary to prove all aspects of the case before agreeing to take it on is important because there is a direct correlation between the number of plaintiff's experts needed and the likely cost of the litigation. As a rule of thumb used by the author, for every expert needed, the lawyer can expect to spend between $15,000 and $25,000 before trial and that much again at trial. This is not based on a scientific analysis of any kind, but has proved a useful tool for estimating the likely cost of handling a given case.

Are there any issues regarding causation?

A strong liability case is less than worthless (i.e., a large liability) if legal causation cannot be established. This is most frequently a problem in failure-to-diagnose cases and must be addressed with the expert pre-litigation. For example, it may be clear from the records that a gynecologist never read the suspicious mammogram of a patient later diagnosed with breast cancer. This may be a great case if the delay in diagnosis was eighteen months; it may be an impossible case if the delay was six weeks.

What are the damages?

Assessing the value of the case is important from the outset. Non-economic damages are not capped by MICRA. A case involving a 36-year-old surgeon earning $600,000 per year, who is disabled by his injuries, is a much different case than the same injury occurring to a child or retiree, where the bulk of the damages will be non-economic and, thus, capped. Birth injuries, if they result from medical negligence, are tragic, extremely complex and costly, but attractive cases because the cost of future medical care can be astronomical and is recoverable in full.

Can a credible claim of elder or dependent adult abuse be made on the facts?

Under certain facts it may be possible to take the case out of MICRA by pleading an elder abuse cause of action (See the article on this topic in this issue of Advocate, October 2022). Doing so will always invite demurrer. Unfortunately, many judges do not have a good grasp of the distinction between medical negligence and elder abuse, so the chances of a demurrer being sustained are distressingly good.

Depending on the facts, if the case is compelling on the issue of elder abuse, it may be good practice not to plead medical malpractice at all in the initial complaint, so the focus is exclusively on the facts that support the Elder-Abuse claim. Invariably the focus for elder or dependent adult abuse is the quality of custodial care and/or decisions that effectively denied necessary care or services. The defense will still argue that the case should be one of simple medical negligence, but a judge may be less inclined to sustain the demurrer and should not do so without giving counsel leave to amend. The complaint can always be amended at a later date to add a simple negligence cause of action.

Did the defendant's misconduct amount to an intentional tort?

If a surgeon did the right procedure on the wrong patient, the doctor committed a medical battery, an intentional tort. There are other circumstances, though rare, where it may be possible to claim the conduct of the health care provider amounted to fraud, oppression or malice. If the facts justify a claim to punitive damages, beware! Punitive damages may not be pleaded against a health care provider in the original complaint. (Code of Civ. Proc., § 425.13.)

The law requires that a motion to amend the complaint to add punitive damages be made and sets a tight timeline for when that can be done. A motion to amend under section 425.13 must be made within two years of the date the complaint is filed or nine months before the matter is first set for trial, whichever is earlier. It is good practice to obtain the discovery necessary to support the claim for punitive damages at the outset of the case so a motion can be made shortly after the initial trial-setting conference.

What about pre-death pain and suffering?

Under Code of Civil Procedure section 337.34, subdivision (b), pre-death pain and suffering may support the recovery of up to another $350,000, but counsel should be careful to evaluate the wisdom of making such a claim if it will trigger a right to reimbursement on behalf of Medicare or Medi-Cal against the estate of the decedent.

Is the potential client and his or her story compelling to you?

On initial intake, which should be conducted in person (or via Zoom), the lawyer should listen carefully to what the potential client has to say about what happened. If the client and her story is compelling to you, it is likely to be compelling to a jury. However, what the potential client tells you is based on lay perceptions or mixed sources that may or may not be supported by the medical records. The injured patient or family of a decedent sees events through a different lens than the expert will. It is important to recognize this and remain clinically engaged and not get swept up in an emotional response to the client's story.

Beware the client who assures you that the doctor admitted his mistake and will want to settle the case without a lawsuit. Most medical-malpractice claims are settled late in the litigation process, usually after expert discovery is

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2022

concluded on the eve of trial. Pre-litigation settlements are rare. Furthermore, the defendant doctor will virtually never admit to a deviation from the standard of care. If your client testifies that the doctor admitted his mistake, it becomes a "he said/she said" case, and generally, a doctor is more likely to be believed than your client.

Beware the client who knows too much about MICRA or the medical issues in his case. It is likely that he has spoken to a number of lawyers who decided against taking it. And, of course, there are those who have done extensive internet research and rely on fringe studies that are not generally accepted or recognized as authoritative for why their case is sound.

Be cautious about the client who tells you that another doctor agreed to be an expert. Trust, but verify. Will the subsequent treater talk to you about the patient's situation? Surprisingly, doctors will sometimes respond to a respectful letter from a lawyer who stresses that she is in the process of gathering information to advise a potential client. Ask for a 15-minute in-person meeting and tell the doctor you will send a check in advance for their time.

If the meeting goes well and the subsequent treating physician is supportive (whether or not he is willing to be an expert), send a letter to the doctor thanking him for the time, stating, "Based on our conversation, I have advised [the client] that I am willing to represent her in a lawsuit." This letter likely will be among the records produced to the defense at an early point in the litigation and strongly suggests the treater was critical of the defendant's care, which tends to make defense lawyers nervous.

Are you the right lawyer to handle the case?

While a personal-injury trial lawyer may be capable of handling a medical-malpractice case, it may not be the best choice for the lawyer or the client. If your expertise is handling employment claims or motorcycle-injury cases or trucking accidents, consider referring the client to or teaming up with a practitioner with proven experience and expertise in the field. They may be easier to find with the upcoming changes to MICRA.

Linda Fermoyle Rice has 43 years' experience handling medical malpractice lawsuits. She currently serves as an Emeritus Member of the CAALA Board of Governors, which awarded her its Ted Horn Award for her contribution to the legal profession in 2012. She and Todd Bloomfield were business partners for 20 years before she began the [long] process of retiring in June 2021.