What is my Medical Malpractice Case Worth?

When a prospective client first calls to discuss whether he has a medical malpractice case I have to make a preliminary decision about the potential value of the case. Obviously, questions about the value of a malpractice case also come up at the tail end of a litigation, when we reach the resolution phase of a matter and begin negotiating. At the outset, when I estimate the potential value of a case I am simply guestimating whether a successful outcome will likely justify the time and expense investments required to prosecute the file. When estimating the value of the case at the end of a litigation for clients, I am trying to come to a reasoned assessment about a case's true value. I have the benefit of much more information at the end of a litigation than I do when a client first calls me on the telephone, so I am in a better position to reach conclusions and give clients more guidance about the value of a case at that point. Nevertheless, at best case valuation is a process that involves judgment and reasonable minds can differ about issues involving judgment. Also, different clients have different objectives, money means different things to different people and individuals differ in their tolerance for risk. All of these things have to be taken into consideration when discussing how best to resolve a malpractice case.

Questions of value that come up when a malpractice case is screened.

The question of value comes up when attorneys screen medical malpractice cases because before a lawyer decides to meet with a prospective client and open a file he must make an initial determination that the case is financially viable. Click here for an article that discusses financial viability as it relates to the issue of case screening in more detail.

In the majority of cases that I screen over the telephone, it appears that a prospective client has been the victim of negligent care, but the injuries sustained do not justify the time and expense of a medical malpractice lawsuit. Medical malpractice claims rarely settle without a lawsuit and malpractice litigations only settle if it is clear to all parties that proceeding to trial will create a substantial risk of a verdict against a defendant physician. Most of the time a case has to go through almost all of the discovery portion of a litigation for a defense attorney to be in a position to estimate the risk of loss and exposure the insurance company and defendant physician will face at trial. This is because in medical malpractice cases, issues of liability, proximate cause and damages are all the subject of expert opinions. Before experts formulate their opinions, parties to the lawsuit must engage in discovery to uncover evidence experts will base their opinions on. After factual discovery is complete, experts write reports setting forth their opinions. Experts are then deposed so that their opinions can be vetted and challenged in additional discovery proceedings. For all of these reasons, malpractice cases almost always involve very significant out of pocket expenses and a large commitment of attorney time to a law firm. To stay

afloat, law firms who represent medical malpractice plaintiffs must screen cases that take these business realities into consideration. Almost always, a firm can only litigate a medical malpractice case if the negligence of the defendant physician caused a permanent injury that will have a significant impact on a patient's life.

Questions of value that come up at the end of a malpractice litigation.

After a case goes through discovery, the question of value comes up again during the resolution phase of a lawsuit. Damages in medical malpractice cases are usually broken down into economic and non-economic loss. Economic loss includes financial losses resulting from the negligence of the defendant and typically include past and future lost wages, medical expenses, costs incurred related to obtaining replacement services previously provided by a disabled malpractice victim and costs related to services, equipment and materials used to mitigate the consequences of malpractice. Non-economic loss includes damages awarded by the jury for disability, pain and suffering and loss of enjoyment of life.

The significant difference between economic and non-economic loss is that an attorney is entitled to ask a jury for a specific dollar value on claims of non-economic loss. Thus, if a malpractice patient suffers $1.5 million in lost wages and $200,000 in medical expenses, those numbers go "on the board" before the jury and the argument on summation will be that the jury should start their damages calculations at $1.7 million. Lawyers are not permitted to ask for a specific dollar value when it comes to damages for pain, suffering and loss of enjoyment of life. Jurors are simply instructed to use their everyday experience and judgment when coming to a sum to compensate a plaintiff for non-economic losses. This is an odd anomaly in the law because the fact of the matter is that most people have absolutely no experience valuing the impact of injury and disability.

Economic loss

Lost Wages.

If a jury concludes that a care provider's negligence caused a patient to become disabled, the patient may recover for past and future lost wages. In a simple case, expert economic testimony may not be required, although expert medical testimony must always establish that a plaintiff is physically disabled. If an economist is not hired, evidence of a plaintiff's past earnings will be placed before the jury (usually in the form of W-2 forms etc.), and the jury will be asked to project the loss of earnings that a plaintiff will suffer due to disability until his work-life expectancy is reached. Sometimes malpractice does not render a patient completely disabled, but injuries cause limitations that result in decreased income. In those circumstances, the measure of lost wages is the difference in earning capacity before and after the injury.

In many medical malpractice cases, an economist will be hired when there is a future lost wage claim. There are many reasons for this, including the fact that people usually receive benefits above and beyond wages when they

are employed, including medical insurance coverage and pension benefits. These kinds of damages are not usually capable of simple proofs, and hiring an economist to evaluate the nuances of these losses is often well worth the cost involved. Additionally, under the law in New Jersey, the dependents of an individual injured by malpractice have a right to recover for the lost value of services previously provided by a malpractice victim (counsel and guidance, household chores etc.) which can no longer be performed as a result of disability. Hiring an economist makes it possible to quantify the value of such services so that they can be placed before the jury as a dollar value. Another benefit to hiring an economist is that they can explain and distill complex concepts like "present day value" and provide net numbers after taxes so that jurors are relieved of some of the burden of conducting these kinds of calculations on their own.

Future lost wage claims are always contested because they can wind up being a substantial sum in any jury award. Defendants will argue that (a) a plaintiff's injuries were not significant enough to result in any disability, or (b) that a plaintiff who is disabled is capable of some other form of employment that would lessen or mitigate the consequences of his lost wages. Defendants will offer medical expert testimony about the nature and extent of a plaintiff's disability. Frequently defendants hire employability and vocational experts who offer opinions about the kind of work a plaintiff is still qualified to perform and the kinds of opportunities that are available in the workforce. Click here to review Model Jury Charge 8.11(c) Loss of Earnings. The Model Jury Charges are the actual instructions given by judges in civil jury trials in New Jersey. These instructions explain the law that is to be applied to the facts by juries, and jurors are told to follow these instructions when deciding cases.

Medical Expenses

A plaintiff may recover payment for medical expenses which were reasonably required for the examination, treatment and care of injuries proximately caused by a defendant physician's negligence. Claims for medical expenses must be supported by expert testimony that establishes that (a) the care was medically necessary, and (b) the charges were reasonable. If expert testimony establishes that the plaintiff will incur future medical expenses, a claim for those expenses can be made as well.

The collateral source rule prevents plaintiffs from recovering medical expenses that were already paid by insurance coverage. Nevertheless, most health insurance policies grant an insurance company subrogation rights to seek reimbursement for medical expenses paid for injuries caused by someone else's negligence. The law allows for similar subrogation rights relative Worker's Compensation payments, Medicare and Medicaid. As a result, in most cases all of these bills will go before the jury, but the judge will either mold the verdict after it is returned if the third-party payor does not have a right to reimbursement or the verdict will stand and the money will be forwarded to the insurance carrier or government agency if a subrogation right exists. Click here for Model Jury Charge 8.11(a) Medical Expenses.

Other economic losses related to mitigating the impact of an injury due to medical negligence.

Families may suffer other kinds of economic loss as a result of a physician's negligence. Patients who suffer catastrophic injuries frequently need to have modifications made on their homes or automobiles to continue functioning. Also, services can sometimes be provided to allow a patient to maintain some level of independence he would otherwise forfeit if he had to go to a long term care facility. In cases like this, lawyers will often hire a life care planner. Life care planners are experts (frequently nurses) who evaluate a patient's disabilities and provide testimony about the kinds of equipment and services that can help patients cope with their disabilities and the costs of such services.

In cases involving patients who suffer less serious injuries, proofs about ancillary services necessitated by injuries can often be something as simple as a receipt. For example, if a patient normally painted his own home prior to being injured by malpractice, but since has had to hire someone to perform this chore, the costs of the service could be placed before the jury with a receipt, cancelled check or simple testimony.

Noneconomic loss

Noneconomic loss consists of damages awarded for disability, impairment, pain and suffering and loss of enjoyment of life. Again, in New Jersey, plaintiffs may not ask for a specific monetary amount for noneconomic loss damages, and the jury is asked to use its common sense and everyday experience when coming to calculations about these damages. Click here for Model Jury Charge 8.11(e), which thoroughly explains the nuances of these kinds of damages.

Although attorneys may not specify a sum to the jury for damages related to disability, impairment, pain and suffering and loss of enjoyment of life, they are permitted to use a time unit argument in summation to help a jury come to a reasoned conclusion about how to compensate a plaintiff in a medical malpractice case. A lawyer will pick a unit if time, for example — a single day, and ask a jury to calculate damages for a patient based on what reasonable compensation would be for one day of pain disability and loss of enjoyment experienced by a plaintiff on a given day. The jury is then provided with the amount of days left in a plaintiff's life (through life expectancy tables or expert testimony) and they are asked to multiply a day's compensation by that number. The utility of this process is that it allows a jury a framework for coming to a decision about a subject that is otherwise very abstract and hard to contend with.

In addition to the damages sustained by a patient, if the patient is married his/her spouse will have a claim for damages related to a per quod claim. The spouse of an individual is entitled to the services of his/her spouse in attending to things like household maintenance, and to companionship and comfort. To the extent medical malpractice interferes with these things, the spouse of a malpractice victim has a claim for damages. Although this claim is a derivative one, when medical malpractice results in a substantial injury, per quod claims can be a substantial part of the case. Click here for Model Jury Charge 8.30(b) Loss of Spouse's Services, Society and Consortium.

Defenses to Damages

Every case has a liability defense and if a patient/plaintiff does not meet his burden of proof and convince a jury that a doctor was negligent then they will recover nothing. Click here for Model Charge 5.50(a) Duty and Negligence, which sets forth a patient's burden of proof on the issue of negligence in a medical malpractice case. Similarly, in every case a plaintiff must prove that a defendant physician's negligence proximately caused his injuries. This is a very esoteric subject in medical malpractice cases that involves different nuances depending on the facts involved in the particular case. The subject is beyond the scope of this article, but the essence of the issue is that to prove proximate cause a patient must demonstrate that the mistake made by the medial provider was sufficiently connected to the injury claimed. Click here for Model Charge 6.10 Proximate Cause – General Charge to be Given in all Cases for an introduction to the concept.

Sometimes medical malpractice cases involve an allegation on the part of a medical provider that a patient failed to follow instructions, and this is what actually caused the injuries and damages involved in the case. When this occurs, the defense being raised is comparative negligence. If a jury determines that a plaintiff is partially responsible for the damages he suffered as a result of failing to follow instructions, they are instructed to reduce the damages that are awarded by the percentage they believe the plaintiff is responsible for the outcome. If the jury concludes that the plaintiff is more than 50% responsible for the damages, the plaintiff patient is awarded nothing. Click here for Model Jury Charge 7.31 Comparative Negligence: Ultimate Outcome which explains how a defense of comparative negligence can reduce a jury award.

How I Approach the Subject of Case Value with Clients

Usually after all expert reports are served and discovery is complete we begin to address the potential value of a given medical malpractice case with a client. We start be calculating the amount of economic loss a plaintiff has and will sustain, and we then attempt to determine the range of damages that can be expected for noneconomic loss. Typically, I will do a verdict/settlement search in cases involving similar malpractice damages to get an overview of the recoveries that have occurred in various jurisdictions in similar claims. I then provide the client with this data and an analysis of where I think their case falls in the spectrum of claims. We then discuss negotiating strategies and get a clear definition of what a client's "bottom line" is.

While I provide clients with data and my analysis, the decision about whether to settle a case is always the client's. Attorneys have an ethical obligation under RPC 1.4 to advise their client of any settlement offer that has been made by the defense.

I have yet to disagree with a client about the value of a case. I believe this is because I work on medical malpractice cases on a contingency basis and so I have a common interest with each client to maximize the potential recovery

in any given matter. Also, because we educate our clients about the valuation process and provide them with the data that we use to come to conclusions about these subjects, it is easy to stay on the same page at the end of a litigation.