



MEDICAL MALPRACTICE TODD & WELD LLP

Winning a medical malpractice plaintiff verdict on the merits

BY JEFFREY N. CATALANO

We all know that a plaintiff's verdict in a medical malpractice comes around as frequently as a lunar eclipse. Due to the difficulty of winning such cases, malpractice filings have declined about 34 percent since 2000.¹ The tragic irony is that while malpractice lawsuits and plaintiff verdicts become increasingly rare, there remains an epidemic of medical errors that kill nearly 100,000 people per year and cost society \$29-\$38 billion *annually* to care for those injured through medical errors.² The trial system can serve a valuable role in bringing attention to and remedying these errors, while alleviating the substantial financial burdens incurred by the victims.



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Unfortunately, due to a legal environment hostile to plaintiffs, which includes lack of juror empathy, tort reform propaganda and limited *voir dire*, too many victims are left out in the cold. These impediments to

justice are not likely to change soon. So, like any threatened species, we plaintiff lawyers must adapt to the present environment in order to survive and thrive.

My partner Lisa Arrowood and I recently received permission to speak with the jury immediately after a verdict for our clients in a medical malpractice case. That unique experience reinforced many of the following concepts.

"LUCK IS THE RESIDUE OF DESIGN."

– Branch Rickey

Jurors are more informed and better educated than previous generations. Trust them with authoritative information presented in a professional way. We learned from our jury that, over five days of deliberating, they thoroughly analyzed the expert testimony *and the medical literature* to reach their verdict. Ask your expert for the most authoritative textbooks regarding the medical issues in the case (such as those used in medical school). Learned treatises may carry as much weight as expert testimony. *The New England Journal of Medicine*, in particular, carries a lot of weight around these parts. The Social Law Library is an excellent resource for articles written by the defendants or defense experts

that may contradict their anticipated testimony at trial.

Also learn about the judge's preferences in the MBA's *Guide to Judicial Practice in the Superior Court of Massachusetts*, which contains many judges' responses to more than 50 questions on such matters as *voir dire*, jury questions and admission of evidence.³

"EVERYONE HAS A PLAN UNTIL THEY GET PUNCHED IN THE FACE."

– Mike Tyson

One way to avoid a broken jaw is to draft motions *in limine* and bench memos that anticipate the left hook. Expect the unexpected and move to preclude expert testimony that's beyond the scope of the expert disclosure and/or speculative. Move to preclude the defense from using the plaintiff's presenting condition (such as high cholesterol, high blood pressure or excessive weight), and/or alleged lack of attentiveness to her health as evidence of comparative negligence. The doctor takes each patient as he finds her, and all such patients are entitled to non-negligent medical treatment and an undiminished recovery. (This is also an important jury instruction.)

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Defendants file motions to prevent us from "sending a message to the jury" during closing argument. Practice some "judo law" and file one preventing the defendant from sending a message as well, such as "Don't make it so doctors can't practice medicine" (a hard-to-believe, real-life example). Prepare to strike the doctor's self-serving testimony regarding her "custom and practice" in the absence of foundation. The doctor must testify that she had (1) a regular response, (2) to a repeated situation, (3) with a specific type of conduct in order to establish she had a routine custom and practice.⁴

"SECOND THAT EMOTION."

- Smokey Robinson and the Miracles

The case we tried involved a tragic sudden death of a fine young college student who left behind emotionally wrecked parents. Appropriately, that was not what won the

- 1) 2008 statistics recently released by the Massachusetts Administrative Office of the Trial Courts.
2) VanGeest, Jonathan B., and Deborah S. Cummins, Ph.D., National Patient Safety Foundation, An Educational Needs Assessment for Improving Patient Safety.
3) MBA "Guide to Judicial Practice in the Superior Court of Massachusetts, 3rd ed. (2008).
4) Palinkas v. Bennett, 416 Mass. 273, 277 (1993).
5) O'Connor v. Raymark Industries, Inc., 401 Mass. 586, 589 (1988).

case for us. Resist the urge to overplay the drama and stay one notch below the jury in emotions. I often say in my opening that "This is an emotional case, but we don't want you to decide it on emotions. We want you to decide it on the medicine." This gives you credibility and permission to bring out necessary emotional testimony later. We use close family members and friends at trial to testify briefly about the impact of the malpractice on the client. Jurors would rather hear it from a witness than from your client, who may seem self-pitying.

On the flip side of emotions, be careful not to demonize the doctor unless he or she deserves it. In our recent case, the defendant doctor testified during her deposition that she left her practice on "good terms." Afterward, we obtained her personnel records that revealed she was terminated following a pattern of "poor performance." At trial, my partner first gave her the opportunity to correct her deposition testimony, which she rebuffed, before crossing her heavily with the termination letter. In closing, rather than suggesting that they should find the doctor a liar, I asked the jury rhetorical questions about how they thought that impacted her credibility. I find it is often better to lead from behind than to tell jurors what to think.

"NEVER GIVE IN. NEVER GIVE IN ... NEVER GIVE IN."

- Winston Churchill

At the end of an exhausting trial,

whether you sense victory or defeat, keep Churchill's famous quote in mind. In the jury instructions, you must argue against those that are inaccurate, unfair and biased. We file a written opposition to the defendant's instructions when they include inappropriate statements such as doctors are allowed a "wide range" in their decision-making process, or a doctor is not negligent if she relies on her "best judgment." Such statements that suggest medicine is purely subjective undermine the law, which is that there are accepted standards of care to which all physicians are held.

Importantly, in your jury instructions emphasize the appropriate standard for "substantial contributing cause," i.e. "something that makes a difference in the result."⁵ I shudder to think how many cases have been lost because the jury thought "substantial" meant "very large."

CONCLUSION

Good trial attorneys are true believers in the ability of the legal process to improve lives and remedy a terribly flawed health care system. We should see the present environment as challenging us to perform at an optimal level and to refine the art of our trial advocacy. The jury, and our client, expects no less. ■

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