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Medical Malpractice in Disguise: Causes of Action and Techniques Used by the Plaintiffs' Bar to Avoid Tort Reform Limitations

Medical negligence claims often have significant value, as the damages tend to be catastrophic. Even as legislation has been enacted around the country to place limits on malpractice awards or otherwise restrict how such claims may be pursued, the plaintiffs' bar has become increasingly creative, attempting to re-classify malpractice claims as other types of torts, such as general negligence claims, merchandising practices act violations or battery, or as non-tort claims such as civil rights violations, breach of contract, warranty violations or fraud claims. Likewise, creativity in avoiding damages caps has seen the development of strategies to attempt to inflate economic damages and has created a cottage industry for life-care planners who try to broaden or expand purported long-term care needs, as well as for economists to attempt to place a dollar value on damages once thought of as non-economic in nature. This session will explore the various tricks used to dodge the limitations and laws put in place to protect against runaway malpractice awards. Presenters will examine the different strategies with which plaintiffs have had some success around the country, and they will discuss methods and arguments that can be raised by the defense bar and insurance industry to counter these actions.

1) Medical Malpractice Claims Hidden as Other actions

Despite an on-going battle with the plaintiffs' bar and other special interest groups, through individual state legislation around the country, there has been a slow, but growing, trend towards enacting business-friendly laws designed to prevent runaway jury verdicts and to otherwise bring some sense of equity to broken tort law systems. These efforts at "tort reform" are most noticeable in the changes designed to encourage healthcare providers not to abandon one particular state for the relative safety and insulation from suit that may be offered by another. While such legislation, notably related to capping certain damages, limiting causes of action or the time-frame or venue for filing claims, etc., is under constant attack on Constitutional grounds from the plaintiffs' bar, alternative techniques to avoid such restrictions or limitations created by those tort reforms have been creeping into medical malpractice litigation. One of the more common techniques is the "wolf in sheep's clothing" approach –

attempting to bring a medical malpractice suit but calling it (and pleading it as) something entirely different.

a) Merchandising Practices Act Claims

Most states have one type of "consumer protection" law or another. These may be called "Merchandising Practice Acts", "Deceptive Trade Practice Acts", "Unfair Trade Practice Acts", "Consumer Fraud Acts", etc. The common thread through these laws is that they were enacted to codify actions and conduct that may give rise to a cause of action by a consumer against a business entity for misconduct or deceptive tactics in marketing or selling goods, services or products. Clearly designed to protect consumers in the marketplace who may be victimized by the advertising or marketing of a product that does not live up to the promises made, plaintiffs' attorneys are now attempting to utilize these statutes to avoid some of the tort reform limitations otherwise applicable to medical malpractice suits. They will focus on the website statements about a physician's skill and experience, advertisements that show happy and healthy people leaving a healthcare provider's office, bold statements about the quality of care delivered, etc., to claim essentially a "deceptive" advertising or marketing practice, "undue influence" on the consumer, etc.

Challenging a claim under this type of consumer protection action is critical, since malpractice "caps" and statutes of limitations would not apply to these "consumer" laws. Likewise, these statutes often do allow for a separate award of attorney fees, which is uncommon in the normal contingent fee arrangement through which most medical malpractice plaintiff attorneys are retained. Faced with an objection that these laws product consumers against "lemon" products, Plaintiffs' attorneys will point to the generally broad language in most states which include "services" (without further definition) as one of the types of things, along with goods, merchandise, etc., covered by the act, and they will then claim, of course, that medical care is a "service" provided by the doctor, hospital or nursing home.

b) General Negligence Claims

Although more commonly seen in claims against institutional healthcare entities than individuals, plaintiffs file suits alleging that a plaintiff's injuries are the result of "garden variety" negligence. For example, in a nursing home claim, an allegation of a fall will be brought as a general liability claim instead of a failure of professional care, even in those cases where the staff may not have followed orders on restraints, did not conduct observations as directed by a physician, etc. While a fall in the parking lot or on a slippery floor of a hospital or nursing home might raise typical general negligence claims, injuries that occur while undergoing professional care of any type are more commonly within the four corners of typical medical negligence statutes. It is not uncommon to see even a clear "professional negligence" claim brought at least under an alternative theory of relief as general negligence to try to avoid tort reform limitations.

c) Product Liability Claims

Using any medical device, medication or equipment may expose a healthcare provider to potential liability under warranty theories, as a "seller", etc., and may allow a plaintiff to get around tort reform "medical malpractice" caps or other limitations.

d) Civil Rights Claims

In the setting of correctional medicine in particular, claims that might have been brought as medical malpractice tort claims are legitimately brought instead (or in addition) as 8th amendment or Section 1983 "deliberate indifference" claims. The benefit of pursuing a cause of action under that theory is the lack of need for an expert affidavit (in those states whose medical negligence laws require a pre-suit or contemporaneous filing of an affidavit of merit in order to proceed), as well as allowing for an award of attorney fees to the "prevailing party". Most attorneys who take such cases on behalf of an incarcerated plaintiff will bring at least a two-count complaint/petition, raising both a Constitutional claim and a tort claim. By taking early depositions under the guise of pursuing the Constitutional claim, they can potentially develop enough evidence to support (or at least avoid dismissal of) their concomitant tort claim. While Section 1983 suits require action "under color of law', thereby usually limiting such claims to prison/jail litigation, don't be surprised to see plaintiff attorneys get creative in the next few years by trying to tie even private physicians to Federal law because of their receipt of Federal funds, care of veterans, etc.

e) Breach of Contract

Getting wildly creative about the causes of action they choose to bring, a more recent trend has been to allege (at least as a separate count in a multi-count suit) that a defendant healthcare provider was in "breach" of a contract with the patient. The theory is that the defendant agreed (or contracted) to provide appropriate care, and in failing to do so, is in breach. These "contracts" can be construed from a physician's standard office paperwork (some of the forms with which a patient may be presented at the office or in a hospital setting – HIPAA, releases, authorizations, etc.), which sometimes goes so far as to state that a healthcare provider will use their best efforts to care of a patient, etc. Likewise, attorneys may argue that a contract is "implied" by the actions and statements of the healthcare providers. The key benefits of being allowed to bring a claim as breach of contract claim is that no "affidavit of merit" would seem to be required, nor would any limitations on tort damages apply.

f) Fraud

Closely related to breach of contract claims and virtually akin to Merchandising Practice Act claims, are more generic common law allegations of "fraud", usually based upon a healthcare providers pronouncement about the quality of care provided as seen in the provider's advertisements, website or on-line statements, etc. Like the Merchandising Practice Act claims, plaintiffs often plead common law fraud in the alternative, and contend that they were fraudulently induced to seek treatment by the defendant provider based upon such false or fraudulent statements about quality of care, the provider's expertise or experience, etc.

2) Damage Claims Designed to Avoid Caps

As states around the country continue to enact laws that include caps on damages, the plaintiffs' bar develops strategies to try to avoid those very cap limitations. Attempting to generate damages that aren't "capped" is the main goal.

a) Punitive Damages

Punitive damages are frequently "capped" in many states, but often at some figure well in excess of the compensatory damage claim. Most plaintiff attorneys are not overly concerned about any cap on punitive damages, since making a case for such damages in a typical malpractice case is tough enough. Such damages are more likely seen in nursing home cases or other claims where a jury may be more alarmed by the fact scenario. Still, punitive damages are frequently more of a negotiating tactic, whereby plaintiff's counsel will argue vehemently at mediation about the prospect for a punitive damage award to try to enhance the case value for settlement. Since punitive damages are not generally an element of available insurance coverage, the insured, fearing a large punitive damage award, can become a silent ally of the plaintiff in negotiations.

Given the prospect for a case going to trial with a still-viable punitive damage claim, it is incumbent on the defense team to be all the more careful and thorough in evaluating the compensatory damages that might be awarded, given that those damages may serve as the foundation for (or basis for a limitation on) punitive damages. See Section 3 below.

b) Economic Damages

1) Life Care Plans

In the past decade or two, "experts" who concoct life care plans have carved out quite an active business niche. Plaintiff attorneys turn to life-care planners regularly in cases involving future losses or damages, and by putting together plans for "care", then in combination with someone who can testify to the cost of that care (a treating physician and/or an economist), plaintiffs are able to offer evidence of substantial "economic" damages that are not subject to most state caps. Extreme care should be taken to evaluate any life care plan completely. In depositions, make the life care planner explain the basis for every single type of care that he/she contends the plaintiff needs, including how they concluded that need will exist, how long it will exist, where that information came from, who provided them pricing or the cost of that need, etc. You will be surprised how often many of items of "needs" are listed rather cavalierly to pad the plan. Plaintiff attorneys love life care plans because they can sell them to the jury as some other professional's "expert" opinion of what is needed, and wash their own hands of the issue, so as to avoid looking greedy. Yet this element of damage can be devastating to the defendant(s) since there is not likely a cap on these wildly speculative and allegedly permanent needs.

2) Wage Loss

Wage loss claims are also not capped, so serve as a potentially significant element of damage claims. As noted in Section 3(b) below, however, care must be taken to thoroughly investigate the legitimacy of these claims, starting with the likelihood of even continued employment of the plaintiff by his/her employer, and a careful examination of the plaintiff's past performance at work, etc.

3) Medical Bills (Paid vs. Billed)

Another battleground facing litigants across the country is the issue of whether plaintiff can seek damages for "medical expenses" at the amount of the medical bill itself or is (or should be) limited to what was actually paid for the services. It is common for a medical "bill" to reflect charges that sometimes greatly exceed the amount that the healthcare provider will accept for the services. Most providers have contractual arrangements with health insurers that cause them to accept certain discounted amounts for medical services that are billed at a higher figure, and then the balance is "adjusted" (written off). Much like fungible items that have a "suggested retail value" but are sold for a lower price or even on sale, medical services are often priced at figures that will never be truly paid. In that regard, a plaintiff who has only paid (through his/her insurance carrier) a certain figure for the medical care provided is essentially seeking a windfall to request the jury award as damages the amount of a much higher bill. Recognizing that inequity, many state statutes have been enacted to limit the amount that may be claimed at trial to the amount of money actually paid (or owed) as opposed to the higher amount billed. Some states let both figures into evidence for the jury to sort out, but there still remain some areas where a plaintiff can seek that larger "billed" figure without limitation. This continues to be a source of damages inflation that defendants should carefully evaluate and challenge, in order to reduce or minimize those figures thrown in front of the jury. The true medical expenses <u>paid</u> should be the figure defendants use in any settlement discussions or mediations, having first completed thorough discovery to make sure they have the actual bills showing paid/owed amounts versus the simple "billed" figure.

4) Economic "values" placed on non-economic injuries

Not only have life care planners developed a nice cottage industry by providing a wider range of "economic" damages to plaintiff attorneys with their long-range care projections, but economists are now being utilized to put "value" on injuries that would once have been clearly considered "non-economic" in nature. For example, many plaintiff economists now calculate an actual value for the "services" provided by an injured plaintiff around the home (dishes, laundry, cleaning, yard work, etc.). While that may not totally offend traditional notions of what should be considered "economic", the more recent trend has been to put a value on the time spent (or that would have been spent) with the spouse or family of the decedent or injured plaintiff. Articles authored by plaintiff-friendly economists have served as a basis to put a dollar value on time spent doing as little as sitting and watching TV with the family, to more lively activities like helping kids with homework, being moral support for a spouse, going on vacations or attending family activities, etc. These attempts to put dollar values on traditionally "emotional" losses are designed with tort-reform limitations in mind, in an attempt to circumvent the types of awards that might be "capped".

5) Loss of Income to be generated by minor

Perhaps no type of claim is more speculative than attempting to suggest that parents have suffered some future financial loss due to the death or injury of a minor child when that child's future income and hypothetical "contribution" to his/her parents can never be known. Nevertheless, both through the use of liberal economists (see Section 2(b)(4) above) and some poorly drafted legislation in at least a few states (see Appendix A, Section 537.090 RSMo., as an example), plaintiff attorneys now can make a pitch for "money" damages as the result of death

or injury to a minor on the theory that the minor would somehow have contributed financially, at some unknown time in the future, to his/her parents.

c) Attorney Fee Awards

The strategy to seek an award of attorney fees is generally a negotiating tactic, since other than those claims in which attorney fees may be statutorily authorized, most tort claims follow the "American Rule", where parties are responsible for their own attorney fees. Nevertheless, both in civil rights claims and in some of the other alternative liability theories noted above, attorney fees may be sought by the prevailing party. Whenever a plaintiff's attorney contends in mediation as a negotiating tactic that they will seek attorney fees, defense counsel should push for details on the value of that potential claim (hours worked and documentation of same, etc.).

3) Defense Strategies

a) Motions to Dismiss or Strike

Injury or death claims brought by plaintiffs that should be couched in terms of medical malpractice but are not (to avoid the various statutory restrictions applicable to such claims) should be attacked early. For example, in states that suggest by statute or case law that claims against healthcare providers shall be brought only pursuant to that state's medical negligence statutes, any attempt to articulate a claim against the defendant healthcare provider as "general negligence", "merchandising practices", "breach of contract", etc., should be stricken. In courts where the motion judge may not issue a detailed written ruling explaining his/her decision, defense counsel should consider asking that any oral argument on the motions (where allowed) be on the record. Preserving the court's failure to strike a non-medical claim for appeal is critical, especially if the damage award at trial substantially exceeds what a judgment limitation might have been under a state's medical negligence law.

b) Discovery Techniques to Limit Damage Claims

1) Interrogatories

Although the Federal courts and some states limit the number of interrogatories that can be posed, carefully crafted questions can tie down damage claims to the exact dollar. More importantly, although all parties are under a duty to seasonably supplement discovery responses, regular follow-up interrogatories that simple request the plaintiff to "update all prior responses" may be helpful if at trial the plaintiff tries to admit evidence of damages or expense figures that were not fully described or listed in interrogatories. It is not unusual for a plaintiff to indicate that they had "forgotten" to list something, and the courts seemingly allow them leeway to "supplement" at trial. If counsel can demonstrate on-going efforts to get thorough and complete damage information during discovery, a reasonable court will not allow plaintiff to expand those claims at trial.

2) Deposition Approach

Defense counsel should never be afraid to ask detailed questions about damage claims in deposition, and in fact, should very meticulously and thoroughly explore whatever claims the plaintiff may make. The failure to tie them down to the otherwise vague descriptions of injury that they might give will allow plaintiff to expand broadly on his damages at trial. It is better to get as much detail as possible in deposition, so that whatever the claims may be, whether for economic losses or some type of "pain and suffering" damages, they find themselves unable to craft a broader damage claim at trial. Tightly explored damage claims help the carrier assess the case value, plan for maximum exposure at trial, calculate potential punitive damage limits (in states where punitive damages are tied to compensatory damages), and assist in mediation planning.

Every plaintiff who claims to have lost wages, promotional opportunities or future earnings capacity should be thoroughly questioned about the duration and quality of their history with that employer, the names of not only his/her supervisor, but the heads of other departments (including personnel) who can "vouch" for them, etc. Thereafter, depositions of those individuals should also be taken, as often you will find that plaintiff's "expectations" for the future don't match reality. Likewise, in deposing the plaintiff, ask about his/her retirement plans. While they may say they planned to work until 70 if not for the injury, if you don't ask at deposition, you can certainly expect at trial that every plaintiff witness will have been coached to say that they plaintiff had no plans to retire, and wanted to work as long as physically able, if not for this injury.

The bottom line for discovery depositions is that you should leave the deposition knowing exactly what you face at trial in the event of an adverse verdict, so that you can report that potential damage range to the carrier, who can then appropriately set a reserve, consider settlement value, and evaluate the merits of defending through trial or potential ADR.

APPENDIX A

Missouri Statutes, Section 537.090 RSMo.

537.090. Damages to be determined by jury — factors to be considered. — In every action brought under section 537.080, the trier of the facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death and without limiting such damages to those which would be sustained prior to attaining the age of majority by the deceased or by the person suffering any such loss. In addition, the trier of the facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued. The mitigating or aggravating circumstances attending the death may be considered by the trier of the facts, but damages for grief and bereavement by reason of the death shall not be recoverable. If the deceased was not employed full time and was at least fifty percent responsible for the care of one or more minors or disabled persons, or persons over sixty-five years of age, there shall be a rebuttable presumption that the value of the care provided, regardless of the number of persons cared for, is equal to one hundred and ten percent of the state average weekly wage, as computed under section 287.250. If the deceased is under the age of eighteen, there shall be a rebuttable presumption that the annual pecuniary losses suffered by reason of the death shall be calculated based on the annual income of the deceased's parents, provided that if the deceased has only one parent earning income, then the calculation shall be based on such income, but if the deceased had two parents earning income, then the calculation shall be based on the average of the two incomes.

(RSMo 1939 § 3654, A.L. 1945 p. 846, A.L. 1955 p. 778 § 537.080, A.L. 1967 p. 663, A.L. 1973 H.B. 173, A.L. 1979 S.B. 368, A.L. 2005 H.B. 393)

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