MEDICAL MALPRACTICE CASE SELECTION: WHEN TO HOLD'EM AND WHEN TO FOLD'EM

The selection of a potential medical negligence case for litigation is the single most important decision that an attorney will make, and requires knowledge, experience and a large dose of common sense with a bit of intuition thrown in. The decision carries with it several years of intense legal time and effort as well as a significant expenditure of funds. It is therefore not surprising that in the usual course of things, only one in fifteen or twenty potential medical negligence cases reviewed is an acceptable candidate that warrants further analysis.

The following are some of the salient general considerations and specific factors that must necessarily go into the determination of whether or not to take a particular case of potential medical negligence:

GENERAL FACT SCENARIOS THAT ORDINARILY WARRANT CONSIDERATION IN MOST SITUATIONS

A. The negligent act or omission is something that will offend the common sensibilities of a jury. It passes the "Puke" test.

B. The patient goes into the hospital or doctor's office otherwise healthy and comes out severely injured or dead.

C. The defendant physician has changed the records, "misplaced" them, or destroyed them (a lot of explaining to do by doctor and hospital). See, *Moskovitz v. Mt. Sinai Medical Center* (1994) 69 Ohio St. 3d 638.

SPECIFIC CASE SELECTION FACTORS

I. PLAINTIFF

1. Determination

Medical malpractice litigation is a laborious and difficult process. Does your client have the "grit" to see the case through to the end? You should first make sure that your client has the determination and dedication not to ask to withdraw from the process before its conclusion. If you have invested hundreds of hours of your time to find your client is not willing to take the stand, you have waisted your time and effort. Therefore, it is important to assess the client's determination to see the case through to conclusion.

2. **Appearance and Attitude**
   The appearance of the plaintiff can often play an important role in the case selection process. Is his or her appearance consistent with the medical condition? Is his or her appearance in any way going to be inconsistent with your presentation? A plaintiff that may be ill as a result of medical malpractice, but who looks extremely healthy, may affect your ability to persuade the jury. Is the client "on the muscle", always angry or bitter?

3. **Persuasion Ability**
   Will the client make a good witness? Will the plaintiff be able to be persuasive on issues of negligence as well as damages? Can he or she express themselves well enough that a jury will understand what happened to them and make an emotional connection with them? It is often said that a jury does not enjoy giving money to someone they don't like, in short, will a jury perceive your client as "deserving".

4. **Age**
   Age should always be considered. What is your client's life expectancy purely based on the U.S, Life Expectancy Tables for his/her age. If the injured party is quite young, it may be worthwhile to withhold initiating litigation until a later time because of an unknown prognosis or other factors. If a plaintiff is quite elderly, what is the likelihood that the plaintiff may expire prior to resolution? Will the defense refrain from settlement because of the plaintiff's advanced age believing that a jury would not render a significant verdict?

5. **Prior Reviews**
   Ask the client if there have been prior reviews of his/her medical claim. Who did the prior review? What was his/her experience is handling medical negligence cases? It is important to note that some cases which have been previously reviewed and turned down have later been won by others for substantial damages. However, it may help focus your review if you have information from prior reviews.

6. **Client's Expectations**
   Does the client have a reasonable expectation about the chances of success in litigation and what may be recovered? It is often not worth your time to accept a client who will be unhappy with your services because of his or her unreasonably high expectations; you will never be able to satisfy such a client.

II. <u>DEFENDANT</u>

1. **Extent of Failure**
   What is the extent of the failure of the standard of care? Is it a clear departure with little or no arguable justification? Is it a slight deviation under extenuating circumstances that may make persuasion of the jury difficult? A review of the extent

of failure is always important. Are there aggravating circumstances that will incense a jury?

2. **Institutional**
   Is the defendant an institution? Most observers believe that jurors will follow the "more likely than not" burden of proof requirement against corporations and institutions. The "clear and convincing" rule seems to apply to individual physicians more than corporations and institutions. However, in small or very conservative counties, the "clear and convincing" or "beyond any doubt" rule may apply to a hospital as well.

3. **Corporations**
   Are you reasonably certain that you can identify all necessary corporations within the original statutory time period? You cannot send a 180 day extension letter to a corporation you do not know about. Make sure that the corporation has not been sold since the occurrence of the malpractice. A 180-day letter sent to the current owner may not be effective if it was an assets only purchase. See, Red Flag cases below regarding the effect of recent Ohio Supreme Court cases

4. **Attitude and Appearance**
   What is the appearance of the defendant? Will that defendant make a poor appearance before the jury? Is he or she articulate and well kept or inarticulate and disheveled? The appearance of the defendant can be a major factor. To what extent can defense counsel "clean up" the appearance shortly before trial? Is the defendant arrogant, overbearing or a know-it-all with a "how dare you sue me, a doctor" attitude?

5. **Persuasion Ability**
   How well can the potential defendant persuade the jury? What are the surrounding circumstances which may provide a jury with the excuse to forgive him/her for a minor departure from the standard of care?

6. **Political Considerations**
   As previously mentioned, suing the only hospital in a small town may make political considerations a significant factor. You cannot leave out evaluations of the political considerations even though the jury is told to. Would a major verdict financially cripple the jury's only hospital? If that is the case, you must consider this in the review.

7. **Codefendants**
   If you file suit, what is the likelihood that there will be cross-claims or initiation of litigation against other physicians within the same suit? In what way will these codefendants help or interfere with your presentation? If you add codefendants to your suit, will they add to the complexity or add to the possibility of early conclusion? Will they affect your ability at trial with regards to challenges and persuasion? Will it be an advantage to have a court room full of defendants rather

than a single one? Will they join together in a unified defense? Depending upon each case, the possibility of codefendants must be considered in the review.

8. **Native Language**
What is the native language of the defendant? Will the defendant be able to be understood by the jury? Is miscommunication a factor in the claim? Was it a language problem that led to the injury?

III. NATURE OF INJURY

1. **Catastrophic Injury**
Is the client's injury devastating? In the case of catastrophic injury, something other than absolute liability may be acceptable under the circumstances. If there is a devastating injury but there is no liability, it makes little sense to pursue the action and the case should not be accepted.

2. **Visibility of Injury**
Some injuries are more visible than others. High visibility of an injury may assist in persuading jurors as to the significance of the loss. It is much easier to prove the impact resulting from the loss of several fingers as opposed to the loss of a kidney. One loss is quite obvious and visible. The defense may concede to a disability from loss of fingers while they may claim there is no functional difference on a day-to-day basis of a patient who still has at least one healthy kidney.

3. **Complication of Medical Issue**
If a malpractice involves an extremely complicated area of medicine, will the jury be able to follow? Will the experts be able to express their claims on causation in a clear, understandable manner?

4. **Sympathetic Nature of Injury**
An individual who has been rendered incontinent may have a very sympathetic injury even though not particularly visible to the jury. This type of injury naturally invokes sympathy from the jury. But it must never be forgotten that sympathy alone is insufficient to "prove" causation or negligence.

5. **Permanency of Injury**
While the patient may have pain and suffering and visible signs of injury from the malpractice now, will it fade and dissipate and even disappear by the time of trial? Jurors often are quite forgiving of a physician's mistakes where the patient has had a good recovery and is no longer suffering the effects of the malpractice.

IV. COST OF REVIEW

1. **Availability of Records**
Does the patient already have records to be reviewed or will you have to acquire them? If a patient has records available for review, the case may have been reviewed

several times before. Are you going to have to spend significant amounts of money to acquire the sufficient records for review? Is the hospital someplace where you can go review records and only copy what you need or do you have to order large sections of the chart for review?

2. **Availability of Medical Reviewers**
   What medical doctors or professionals do you have at your disposal to review records and make determinations, Will the meeting be done at a distance or will you b e able to visit them directly? The availability to have a two-way conversation always aids in a complete review.

3. **Number of Physicians Needed**
   How many physicians or medical professionals will it take to complete the review? Often cases need multiple reviewers because of the various aspects of medicine and causation issues involved in the case.

4. **Counsel Familiarity with the Subject Matter**
   You may be more interested in reviewing a case in an area where your medical knowledge is greater than in areas of which you have no knowledge at all. The time that it will take you to get up to speed on those issues may outweigh the desire to review the case. You may want to refer the case to someone who is extremely familiar with the subject matter of the medicine involved. Trying to become conversant in each and every area may not be possible given the nature of your time commitments and other practice requirements.

5. **Costs of Specimens, MRI's, X-rays, Mammograms, etc.**
   Do you need originals or will copies be suitable for review? How difficult will it be to obtain originals from the hospital or radiology clinic where the records presently exist? Are the records still available or are they likely to already be disposed? Will you need pathology slides or specimens and does the timing to acquire these materials fall with the available statute of limitations?

V. CAUSES OF ACTION

1. **Abandonment**
   Abandonment should never be forgotten as a cause of action. Physicians who refuse to follow-up their surgery or make call backs may have abandoned the care of their patient. Juries are usually sensitive o the issues of abandonment.

2. **Informed Consent**
   Did the defendant advise the plaintiff of the material risk of the proposed procedure? Did he or she also advise of the alternatives and the material risks to the alternative? Is it likely that a reasonable person would have refused the proposed procedure for an alternative if it had been offered? Would the patient have refused the procedure altogether if the risks were known? Did the material risks not advised of actually

occur? See, *Nickell v. Gonzalez* (1985) 17 Ohio St. 3d 136; *White v. Leimbach*, 131 Ohio St. 3d 21, 2011-Ohio-6238; ORC §2317.54.

3. **Negligence**
   Did the defendant fall below the standard of care in one area or in several? If there are multiple aspects of the failure, will the jury be incensed about the poor quality of care delivered? Is it a close question which could be decided either way? The issues of negligence are always at the foundation of a review.

4. **Record Changing**
   The Supreme Court in *Moskovitz v. Mt. Sinai Med. Ctr.* (1994) 69 Ohio St 3d 638 authorized punitive damages against a defendant who altered records in an attempt to avoid liability. The requirements of that case and your client's situation must be reviewed to determine if such a claim exists.

VI. CAUSATION AND NEGLIGENCE ISSUES

1. **Supervening Cause**
   While preparing a review, you must look for supervening causes. Will additional defendants have to be added? Do those defendants create jurisdictional or venue problems? Has the statute expired against one or more possible intervening or supervening actors? Did supervening or intervening defendants create a break in the events relieving the physician under review of liability?

2. **Intervening Cause**
   Did an act occur that intervenes in the causation link between the physician under review and other medical providers?

3. **Multiple Claims**
   Are there any multiple claims that will cause confusion with the jury? Are there multiple claims against various parties? Do they create causation problems as to which claim caused which injury? Can the cases be separated or must they be tried together?

4. **Multiple Causes**
   Was the plaintiff's condition the result of a single cause? Could the injury have been caused by another person, therapy, or procedure? What is the patient's situation with regards to previous medical history that may provide the defendant with a theory of alternative cause? Does the alternative cause theory meet the requirements of *Stinson v. England* (1994), 69 Ohio St. 3d 451.

5. **Anger Factors**
   Are there factors in the case that would anger a juror against the physician because of the type of negligence and conduct involved? Anger factors may help the jury reach the level of clear and convincing required by their own emotions.

6. **Admissions**
   Are there admissions available on the issue of negligence or causation? Do not rely on the patient for these admissions as many physician to patient admissions are never repeated a second time. Often patients misunderstand a statement as an admission.

7. **CYAs**
   Review of the records should always include obvious CYAs made at the time of or shortly after the event. CYAs in records not only include alterations but statements of their defense on justification which may be helpful in establishing causation or negligence.

VII. INSURER

1. **Settlement Stances**
   You need to know your insurance companies and how they tend to proceed. Some companies will never offer anything until the very day of trial. If so, does the case have the staying power to make it worthwhile to move to that point? Will they refuse to settle if you have never won a case against them?

2. **Trial Tactics**
   Each insurer seems to have various trial tactics that are unique. Some companies follow a particular course of litigation because it establishes a standard.

3. **Consent Requirements**
   Does the insurance policy require consent of the physician to settle a case? If so, will the consent requirement prevent any settlement from ever being accomplished? If consent is a feature in the case, can the case be maintained through to the end of litigation assuming consent will not be given?

VIII. THE THEOBALD TRAP

In *Theobald v. University of Cincinnati*, 111 Ohio St. 3d 541, 2006-Ohio-6208, the Ohio Supreme Court decided that if a physician, who is involved in the education of a medical student, resident or fellow of a designated state institution as part of his duties while treating a patient who later sues him/her for medical malpractice, may claim immunity as a state employee. The consequence of this immunity is that the case against that physician must be filed in the Ohio Court of Claims where the case will be tried to one of a group of politically selected judges without a jury.

The trap: If you sue the teaching, non-employee physician in state court but do not file a separation action in the Court of Claims and the statue of limitations expires,

you should contact your professional liability insurance carrier because you no longer have a defendant physician for whom you can recover.

RED FLAG CASES: "BUYER BEWARE"

1. The client comes to your office one week before the statute of limitations is about to run – The recent decisions of the Ohio Supreme Court in *Wuerth, Comer* and *Irwin* make this an impossible case to consider except in the very rarest of situations and even then extreme caution must be taken. *Nat'l Union Fire Co. of Pittsburgh, Pa. v. Wuerth*, 122 Ohio St. 3d 594, 2009-Ohio-3601; *Comer v. Risko*, 106 Ohio St. 3d 185, 2005-Ohio-4559; *Erwin v. Bryan*, 125 Ohio St. 3d 519, 2010-Ohio-2202.

2. The non-compliant patient. The client did not follow the doctor's advice, missed several appointments, or did not take the prescribed medication—death knell of a good case.

3. The client is being sued by the doctor for not paying the bill and wants to counterclaim for "all he is worth."

4. Damages are insignificant. With the April, 2003 passage of the medical negligence tort reform legislation in Ohio with it arbitrary damage caps, this consideration is all the more critical since (a) the preparation and trial for plaintiffs routinely costs $50, 000 to $100,000 and significantly more in catastrophic cases and (b) almost 85% of all medical malpractice cases tried result in verdicts for the doctor or hospital.

5. There is an equally plausible explanation for patient's injury besides the doctor's negligence. (i.e. difficult to prove proximate cause, etc.)

6. The client has been turned down by other lawyers and wants a third or fourth opinion – because all the other lawyers were "crooked" or were "bought off by the doctors".

7. The client tries to tell you which doctors to sue and which not to sue – bad omen – allows defendants to point at the empty chair.

8. The client wants revenge and hates all doctors because the results were bad.

9. The client is a chronic complainer (particularly over a non-catastrophic injury, or says "I'd liked to died", but didn't).

10. The client was seriously ill and got a little sicker. (e.g., an extended hospital stay.)

11. The client was the victim of medical negligence, had an injury, but is fine now (or will be at the time of trial).

12. The patient says, "I would never have allowed the doctor to do the procedure if he would have told me the risks" – beware of the lack of informed consent case.

13. The patient had elective cosmetic surgery and does not like the results.

14. The defendant doctor is a nice, kind considerate man who will come across like "Marcus Welby." (These cases are real trouble because the defendant is so likeable and the jury will probably forgive his/her negligence and not want to hurt him/her. If you must sue him/her, take care in *voir dire* to point out that the doctor will not lose his/her license, will not go to jail, and will not lose his/her privileges.)

15. Doctor's records do <u>not</u> verify the client's story (in fact they contradict it!) Exception – if you have several lay witnesses who say patient is correct and heard patient tell the doctor about the lump.

In the end, the best and strongest cases are those based on clear, simple facts with clients that a jury will believe to be "deserving" of their verdict. If your client, due to one or more of the factors referenced above, is not the type of person that a jury will feel is worth their time and effort, the result will be a defense verdict if liability is at issue or at the very least, a low verdict amount.

COMMUNICATION WITH THE OPPOSITION: DEALING WITH THE DEVIL

I. NAMING PARTIES TO THE COMPLAINT

Pre-suit communication with the risk manager, insurance company adjuster or defense counsel of a hospital can avoid the unnecessary joinder of nurses, residents or fellows as named parties in a lawsuit simply to satisfy the impractical and illogical Ohio Supreme Court decisions in *Wuerth*, *Comer* and *Irwin.* Consider working out a pre-suit stipulation or immediate post-filing (if the statute of limitations has not expired) stipulation regarding the employment status of hospital healthcare providers. This is a win-win situation for both sides.

Likewise, pre-suit communication with risk management/defense counsel regarding potential immunity issues pertaining to hospital employees as well as teaching, non-employee physicians is simply good litigation practice. Again consider the stipulation route to resolve employment status/immunity issues without jeopardizing potential claims or defenses.

II. MEDIATION/SETTLEMENT NEGOTIATIONS

It is not a sign of weakness by either side to suggest mediating a case if the circumstances warrant it as long as both sides come to the table in good faith and with the aim of trying to work out a reasonable resolution on of the case. It is essential to select a mediator who both sides respect, who knows his job and who gets cases resolved.

Settlement negotiations should always be conducted in a respectful and reasonable manner. Braggadocio and "trash" talk are the hallmarks of the amateur and never get a case resolved.

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