IADC COMMITTEE NEWSLETTER

TRIAL TECHNIQUES AND TACTICS

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IN THIS ISSUE

Defending personal injury claims and damage awards predicated on excessive medical treatment can be tricky. This article identifies common problems and outlines effective strategies to navigating the pitfalls inherent in these types of cases.

Plaintiff was Overtreated and Overcharged: Does the Jury Care?

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The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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Defend negligence claims for any length of time and you will inevitably encounter the plaintiff that rushed to surgery or was treated extensively, but beyond any apparent need or to no benefit. A compelling defense is constructed that the treatment was not needed, and its cost was exorbitant. Is that enough to defeat plaintiff's claims of damages? Or can the jury disregard the defense's evidence and see plaintiff as a "double victim," first of the accident and then of the doctors? In short, how does a jury process this defense? Consider these scenarios.

Scenario #1. Plaintiff undergoes a discectomy and fusion following a slip and fall accident in a restaurant. The surgery occurred three weeks after the plaintiff was first seen by the surgeon. The surgeon reviewed an MRI and based the surgical decision on the reading, but accepted the history given by plaintiff that prior conservative treatment failed without seeing any of the treatment records. The surgeon was deposed. At deposition, the surgeon acknowledged that surgery was a final option to relieve pain and restore function due to the uncertainty of success and well-recognized surgical risks (infection, paralysis, death, etc.). He testified that conservative treatment should be physical therapy three times/week for no less than three months and that pain management is also an alternative to be tried before operating.

Plaintiff received only six sessions of physical therapy provided erratically over the course of two months. A single epidural steroid injection brought 80% relief. Two more injections were recommended but never administered. The surgeon concedes at trial that the conservative treatment was inadequate. He also admits on cross-examination that he charged $150,000.00 for the fusion surgery; operates on Tuesdays and Thursday each week and does 3-5 similar procedures each day; and received 10-15 referrals each year from plaintiff's counsel, who provide him with a Letter of Protection agreeing to pay his fees from plaintiff's recovery.

The defense offers a medical expert arguing that the surgery was not needed and conservative treatments that would have been more effective had not been exhausted. An audit of the medical bills to Uniform-Customary-Reasonable ("UCR") rates charged in the surgeon's geographical areas shows typical charges 20% of the surgeon's billing.

Scenario #2. Plaintiff claims multiple disc herniations following a slip and fall accident in a store and undergoes aggressive pain management pursuant to Letters of Protection at significant costs. Enterprising defense counsel constructs a timeline showing plaintiff presenting minor complaints at the same time as she receives intensive treatments. For example:

> September 13, 2022
> Patient reports her back is feeling better since her last visit. She no longer experiences numbness in her arm and her lower back only has pain when she is performing heavy housework like moving furniture.

September 16, 2022
C7-T1 epidural steroid injection

September 23, 2022
L4-L5 epidural steroid injection

October 14, 2022
Patient reports no pain to her neck and lower back. She notes that she feels better than she felt prior to her accident.

October 21, 2022
Bilaterial L4-L5 medial branch block

October 28, 2022
Bilaterial L4-L5 medial branch block

November 4, 2022
Patient reports no issues. She reports that her neck and back only hurt after strenuous work. Overall, she reports that she is much better and thinks that residual issues are related to her Hashimoto's Disease.

November 11, 2022,
L4-L5 radiofrequency ablation.

Plaintiff testified at deposition that she is always open, honest, and accurate in her interactions with her doctors, but trusts their guidance in her treatment plan.

We asked Steven Wood, Ph.D.[1], of Courtroom Sciences, Inc. how a jury would understand these scenarios and how the defense can best use this evidence. According to Dr. Wood, the answer is, "It depends."

Jurors' life experiences lead them to hold differing attitudes and opinions regarding what is appropriate behavior for an injured plaintiff. For example, we often hear from plaintiff-leaning jurors that they do not believe that a plaintiff would go through unnecessary medical procedures for the sake of a lawsuit. For many of them, the risk, recovery time, and potential physical limitations of a surgery are not worth the additional money they may win in a lawsuit. Conversely, defense-leaning jurors are more skeptical of plaintiff's medical treatment. These jurors are often suspicious of who is "driving" the medical treatment. We have heard from these jurors that they believe the treatment is "attorney driven."

Knowing that jurors will come to differing conclusions despite hearing the same information, lends itself to a few trial recommendations:

1. Focus on the jury selection process.

During the *voir dire* process, extensive time and preparation is needed to identify jurors who will be skeptical of the plaintiff's medical treatment plan. While it is often unlikely that jurors will agree with the notion of unnecessary surgeries for secondary gain or unscrupulous medical professionals "running up bills to line their pockets," they are more likely to be

[1] Steve M. Wood, Ph.D., is a Senior Litigation Consultant at Courtroom Sciences, Inc., a full-service, national litigation consulting firm in Irving, Texas. He is a frequent conference speaker, and his work has been published in various peer-reviewed academic journals as well as scholarly magazines. He co-hosts *The Litigation Psychology Podcast*.

receptive to the idea that a plaintiff has not fully recovered from his injuries because he has not adequately followed his medical advice.

Pro-plaintiff jurors tend to attribute this lack of medical compliance to transportation issues, potential language barriers, not being properly informed about the importance of following the medical treatment plan, etc. They will attribute the plaintiff's actions to factors often outside of the plaintiff's control because these jurors have also experienced instances in their lives where they have been victims of circumstances. As a result, these types of jurors often find a way to award plaintiffs money, and they will do "mental gymnastics" with the evidence to justify their decisions. These jurors must be identified in *voir dire* and struck for cause or through peremptory challenges.

2. Present the medical information in a matter-of-fact way.

Defense counsel has the tricky job of leading jurors to the optimal conclusion that the plaintiff received unnecessary treatment or his future medical care costs are not as high as the plaintiff's experts claim. However, this is a delicate task because jurors dislike being told what to think. Moreover, defense counsel does not want to appear to be accusing the plaintiff of being a malingerer—a trap that plaintiff's counsel would be happy for defense counsel to step into. Instead, defense counsel needs to present the evidence to the jurors and allow them to come to their own conclusions about the appropriateness of the care. Despite some attorneys believing that jurors "are unintelligent," "make poor decisions," or "just don't get facts," jurors are more astute than they get credit for.

3. Provide credible alternatives.

Defense counsel often points out the egregiousness of the plaintiff's past and future medical treatment without providing a reasonable alternative. As a result, jurors are presented with alternative damages amount so low they believe the defendant is "lowballing" the plaintiff. To help diminish the likelihood of being perceived as lowballing the plaintiff, defense counsel must provide jurors with sufficient information regarding how they came to their alternative damages number. Jurors cannot be led to believe that the defendant's amount came from thin air—a perception we commonly hear. Moreover, jurors must understand that the defense's numbers are not the bare minimum; they are *reasonable and appropriate* amounts to provide the plaintiff with the necessary treatment.

In sum, a killer cross-examination of plaintiff's surgeon may not be sufficient. An argument for overtreatment needs to be approached strategically, begin with jury selection, and executed carefully. Otherwise, you can win the battle but lose the war.

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