

TIPS FOR HANDLING BRAIN AND SPINE INJURY CASES FOR THE PLAINTIFF'S LAWYER

Introduction

This seminar includes presentations by several excellent experts on the medical topics of brain and spine injuries in general, spine surgery, the use of MRI and CT imaging, and life care planning, so this paper will focus on more practical tips for handling brain and spine injury cases. I would note that the medical presentations are critically important because it is impossible to competently represent a client with a brain or spinal cord injury without a thorough understanding of the medicine, including the consequences and potential complications of these catastrophic physical and emotional injuries, as well as the effective use of expert witnesses from treating physicians to therapists to life care planners. This paper will first address the significant new roles that are required of plaintiff's lawyers representing seriously injured clients and the difficult environment in which we now practice. The second portion of the paper will contain practical tips for trial preparation and trial.

The Plaintiff's Lawyer as the Ultimate Multi-Tasker in an Increasingly Suspicious World

Cases arising from brain and spinal cord injuries have always been complex. The medicine is complicated, the cases require the involvement of numerous expert witnesses on liability and damages, and the client has a lot at stake. Two relatively recent factors have made these cases even more difficult to pursue. First, the plaintiff's lawyer is now required to fulfill many more roles for the client. Second, the lawyer must accomplish those roles and advance the underlying case in an increasingly hostile environment.

Any lawyer who contemplates taking one of these cases must understand the ever-expanding role of the plaintiff's lawyer as a client advocate in cases with serious injuries and

significant expenses. The days are long gone when the plaintiff's lawyer's only task was to successfully prosecute the client's main claim. Now clients ask lawyers for assistance with numerous issues that arise from a serious injury: facilitating health care; securing health coverage; negotiating with bill collectors; getting health insurers to pay claims; filing claims for life or accidental death insurance benefits; filing for private disability benefits or Social Security disability benefits; negotiating reimbursement claims from health insurers, Medicare, or Medicaid; dealing with hospital liens; securing the appointment of guardian ad litem or guardians and/or conservators for incapacitated adults; securing the appointment of estate administrators; assisting with the duties of administrators or executors; and determining the most beneficial form of settlement (cash, structure, special needs trust) for the client.

In the context of this seminar, severe brain injury cases often require the appointment of a guardian of the person and/or conservator of assets, and spinal injuries may require immediate review of the medical options and most appropriate treatment centers. Both injuries will generally result in a claim for disability benefits. Additionally, serious injuries to the brain or spine usually involve very high medical costs resulting from emergency care, surgeries, post-surgical treatments, psychological care, physical rehabilitation, occupational training, attendant care at home, and special accommodations to homes and vehicles. These high costs raise issues of health coverage and medical care coordination, and they heighten the likelihood of reimbursement claims.

Dealing with these issues can take up an enormous amount of time. For example, in one case we obtained the appointment of a guardian and a conservator for an incapacitated adult while the patient was living, obtained the appointment of administrators when the patient passed away, assisted the clients with their duties as co-administrators of the patient's estate, prepared

an application for the appointment of a guardian for the patient's minor son, handled conversations with medical providers seeking payment, researched the existence and validity of hospital liens, and initiated conversations with a group health insurer seeking reimbursement before we even filed suit.

We remained involved in another case for two years after settlement representing the clients' interests in their request for a waiver of any repayment to Medicare. We were able to obtain a favorable result for the clients, but only after expending a substantial amount of time and resources, including an administrative hearing at the Social Security Administration. Before undertaking the representation of a seriously injured client, an attorney must be prepared to take on all of these roles.

Handling reimbursement claims from Medicaid, Medicare and private health insurers in particular has taken on a life of its own with ever changing rules. In the past year alone the United States Supreme Court decided three cases dealing with separate reimbursement issues: Sereboff v. Mid-Atlantic Medical Services, Inc., 126 S.Ct. 1869 (2006) (ERISA); Empire Healthchoice Assurance, Inc. v. McVeigh, 126 S.Ct. 2121 (2006) (Federal Employees Health Benefits Act – FEHBA); and Arkansas Dept. of Health and Human Services, et al. v. Ahlborn, 126 S.Ct. 1752 (2006)(Medicaid). Each of these cases should be required reading for any attorney with a client facing a reimbursement claim under one of these statutes. See also Popowski v. Parrott, 461 F.3d 1367 (11th Cir. 2006).

In the past, reimbursement claims were generally an afterthought following settlement. Now the Sereboff case may encourage ERISA plan fiduciaries to more actively seek reimbursement from tort settlements. In certain cases with significant medical expenses and insufficient insurance coverage, attorneys may want to evaluate reimbursement issues and

consider whether the case makes economic sense before agreeing to represent the client because a potential settlement may not be sufficient to satisfy the client's needs, attorney compensation, and the reimbursement claim.

Of even greater significance, plaintiff's lawyers find themselves taking on these expanded roles and issues in an increasingly difficult world. As a result of tort reform, defendants are able to change venue, evaluate settlement without the pressure of joint and several liability, move to exclude the plaintiff's expert witnesses based on stricter rules regarding the admissibility of expert testimony, and enjoy caps on non-economic damages in medical malpractice cases. Additionally, as a result of the media attention on tort reform and the alleged "health care crisis", many Georgia citizens are highly suspicious of tort cases and have come to expect that lawsuits are frivolous.

Perhaps comforted by these facts, we understand that some physicians and their practice groups are beginning to lower their limits of professional liability insurance coverage. We have already experienced this in one case where an OB/GYN and practice group share limits of \$1 million. The combination of more enforceable reimbursement claims, low coverage, tort reform, and suspicious juries can significantly impact the end results in these cases.

Times have changed. Any attorney representing a seriously injured client must be prepared to accept an increasingly involved role in the client's life both before and many times after litigation and be prepared for the difficulties presented by tort reform and the general negative climate towards lawsuits and trial lawyers.

Practical Tips For Trial

The tips contained in the first paragraph of this paper are worth reiterating. The attorney must understand the mechanism of the injury, the consequences of the injury, the potential long-

term complications of the injury, and the huge emotional toll that these injuries can take on the plaintiff and any spouse with a loss of consortium claim. In addition, the attorney must effectively use a wide range of expert witnesses from physicians testifying on liability issues to vocational rehabilitation specialists and economists. In addition, the plaintiff's lawyer with a brain or spinal injury case may consider the following tips.

1. Make The Jury Want to Help Your Client

Brain and spinal injury cases often result in high damage awards based on the severity of the injury and extensive amount of medical expenses and lost wages. Damages can be maximized in these cases when the following two general principles are kept in mind and your proof and argument seek to emphasize them. First, juries help those who help themselves. Juries will appreciate a plaintiff who has returned to some type of work or attempted to return to work if possible, has done all physical and occupational therapy prescribed, and who has a good attitude and is not bitter and defeatist.

Second, juries want to see that a money award will fulfill a well-defined, specific need (e.g., income replacement; future surgery; home and vehicle modification; therapy; child care to allow one to return to work). Cases involving serious brain and spine injuries are perfect situations in which to focus on these principles and show how the jury's verdict is well deserved and can make a meaningful difference in the plaintiff's life.

This can be done from the very beginning of the case to influence the jury's thoughts during the subsequent presentation of evidence. You should use voir dire to educate the jury about your client's injuries and damages. For example, if your client is a paraplegic, ask if anyone has any special knowledge, training or experience in the daily struggles experienced by a paraplegic. Ask a series of questions regarding any type of therapy, medical procedure or

ongoing needs that your client has to find out if anyone has experience with similar problems, whether it is through education and training or through the care of a loved one.

If a guardian or conservator has been appointed, ask if anyone has ever been appointed as a guardian or conservator by a court of law and shouldered the responsibility to provide for all financial or physical and emotional needs of a loved one. Also ask if they have ever functioned in such a role for a loved one or a friend even if they haven't been formally appointed and given that responsibility. When you ask these questions about a guardian, you will see many potential jurors turn their eyes to the guardian sitting at the table with you. They will have an immediate respect for that person and hopefully a desire to help him or her perform the responsibility that person carries on a daily basis.

2. Use Defense Witnesses to Explain The Long Term Consequences of Brain and Spinal Cord Injuries

You can often use medically trained defense witnesses to demonstrate the significance of your client's injuries and damages. One example in this context occurs when the defense calls a life care planner to defend against your damages. These professionals are very ripe for demonstrating the significance of your client's injuries.

Keep in mind that life care planners have seen first hand the devastation caused by these catastrophic injuries. Rather than trying to refute their testimony from direct examination that minimized the cost of your client's future care, use them to educate the jury about the lifelong hardships your client will endure on a daily basis. For example, have them acknowledge that catastrophic injuries have a major impact on the entire family and not just on the one that has been physically injured. Additionally, have them discuss needs for special equipment such as hand or head controlled wheelchairs, Hoyer lifts, specially controlled laptop computers, or wheelchair accessible vans.

After demonstrating the overwhelming nature of your client's injuries, ask them how much of the cost they have calculated in their life care plan covers the pain and suffering of your client and the client's family: "So, if I understand correctly, if this jury did everything you have suggested in your life care plan, there would not be an award of a single penny for the frustration, embarrassment and anger my client experiences on a daily basis because his legs are paralyzed." "The same is true for the fact that this adult man has no control of his bowel and bladder." This is particularly important in cases that are not subject to the \$350,000 cap on non-economic damages in medical malpractice actions. Just because the defendant calls a witness to address one specific area of the defense to your case doesn't mean that you can't take that person to a better place.

3. Carefully Use the Plaintiff in the Courtroom

Particularly in a case of severe disability, the plaintiff's appearance can create an uncomfortable situation for everyone, including the jury. In the past we have found that using the life care planner to actually work with the plaintiff in the courtroom while explaining his or her medical and rehabilitative needs can be an excellent way to diffuse any uncomfortable feelings. Be especially vigilant that the demonstration is tasteful and above all completely respectful of the plaintiff's physical and emotional capabilities. This is a good opportunity to show the jury first hand that the plaintiff has worked as hard as he can to help himself under the circumstances.

4. Appropriately Use Day in the Life Videos

A Day in the Life video can be very effective in showing the consequences of a brain or spinal injury. These videos generally consist of short (ten to fifteen minutes) video footage of the plaintiff, usually in his or her home environment, in the performance of the daily activities

that we all take for granted, including eating, bathing, other grooming and, if applicable, getting dressed and going to different appointments or activities. For clients with spinal injuries, the videos must effectively communicate the incredible demands of daily care. This would include everything from bowel evacuation and catheter care to range of motion exercises and transfers between a bed and wheelchair. These videos can be compelling, but it is important to make them tasteful and avoid unnecessary drama or overreaching. Prior to filming the video and certainly before trial, it can be helpful for the plaintiff's lawyer to spend 24 hours with the client and his or her family to truly understand and best explain the care that the client requires.

Conclusion

Representing someone with a severe brain or spinal cord injury can be one of the most rewarding experiences of a lawyer's career. The medicine is interesting, the possibility of a significant damage award is high, and the lawyer will have a prime opportunity to use his or her talents to maximize the result. The lawyer must be prepared to assist the plaintiff and his or her family in a variety of tasks not specifically related to the case. He or she must also be prepared to persuade expert witnesses, jurors, etc. that this plaintiff does not have a frivolous case, but rather is worthy of respect and the ultimate justice that our legal system can deliver. More than anything, these cases involve people who truly need our help in order to live the most productive life possible in the future. We can help them, even in today's litigation climate.