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What Every Doctor Should Know About Litigation

*A Primer on How to Win
Medical Malpractice Lawsuits*

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SUMMARY

This chapter explains what you should know to best look out for yourself and how you should go about doing so. Its premise is that just as patients should not leave decisions about the best course of medical treatment exclusively to medical professionals, neither should you as a doctor or health care provider leave your fate as a defendant solely in the hands of your lawyer and insurer. No one representing you will be as affected as you are by the litigation in which you are a defendant; and, although your advocates are charged with looking after your best interests, your active and intelligent participation in how they do this is absolutely necessary if they are to be effective.

Key Words: Defendant; storyteller; discovery; duty; causation; negligence; reform; MICRA.

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INTRODUCTION: PURPOSE AND SCOPE

If you are a medical professional, chances are you will be sued during your career.¹ Whether named as a principal or peripheral defendant, once served with summons you or your professional liability insurer must pay for your defense and, should you lose or settle the case, for satisfaction of your liability. Understanding the essentials of litigation enables you to eliminate or at the very least minimize your liability and get on with your life. Not knowing this information leaves you with little or no control over your own destiny, a wisp to be buffeted about by the devil's breath of litigation.

This chapter explains what you should know to best look out for yourself and how you should go about doing so. Its premise is that just as patients should not leave decisions about the best course of medical treatment exclusively to medical professionals, neither should you as a doctor or health care provider leave your fate as a defendant solely in the hands of your lawyer and insurer. No one representing you will be as affected as you are by the litigation in which you are a defendant; and, although your advocates are charged with looking after your best interests, your active and intelligent participation in how they do this is absolutely necessary if they are to be effective. Most understand that "knowledge is power." We can also appreciate that sometimes, as the cliché goes, a little knowledge may be a dangerous thing. However, the information given here can—if properly digested—make your life safer and more secure from the slings and arrows of outrageous lawsuits.

¹ "No doctor is safe from Trial Lawyers, Inc. A 2002 *Medical Economics* survey of 1800 physicians found that 58% had been the target of a lawsuit." (*Trial Lawyers Inc—A Report on the Lawsuit Industry in America 2003*, Center for Legal Policy, The Manhattan Inst., 2003, p. 12); "The first medical malpractice suit in the United States was brought in 1794. However, it was not until the 1930's that the number of claims against doctors began to significantly increase. Medical malpractice claims continued to become more common in U.S. courts until reaching a peak in the 1970's, when there were so many claims that chaos ensued. It was said that there were approximately 'five malpractice suits filed annually for every 10 doctors.'" (Jason Leo, Note: *Torts – Medical Malpractice: The Legislature's Attempt to Prevent Cases Without Merit Denies Valid Claims* (2000) 27 *Wm. Mitchell L. Rev.* 1399, 1402–1403); "Prior to 1960, only one in seven physicians had been sued in their entire career; presently claims are filed against one out of seven physicians per annum." (Rima J. Oken, Note: *Curing Healthcare Providers' Failure to Administer Opioids in the Treatment of Severe Pain* (2002) 23 *Cardozo L. Rev.* 1917, 1968, fn. 252).

Why This Chapter Can Help You

“The life of the law,” Oliver Wendell Holmes said, “has not been logic; it has been experience.”²

This chapter is derived from the litigation experiences of a seasoned practitioner. The first 3 years of my civil legal practice was in poverty law representing farm workers and senior citizens; the next 3 years in public interest law for various clients, including prisoners, senior citizen organizations, and the Black Panther Party. In the three decades since then, I have had my own civil practice representing numerous clients in various matters, including the defense of doctors and other health care providers in malpractice cases. A significant portion of this work has been in the trial courts, although most of it comes from working on appeals in California state and federal courts. Some of what is shared here also comes from consulting for the California Legislature and former Governor Jerry Brown on medical liability reform legislation, specifically the law known as the Medical Liability Reform Act (MICRA). Since MICRA’s enactment in 1975, I have continued to represent health care providers in the courts and as a legislative advocate to preserve and protect it from erosion or repeal.

Appellate practice focuses on what happens after a judgment or ruling in a lower court from which a dissatisfied party seeks reversal in a higher court. An appellate lawyer has a vantage point analogous to that of an historian: he or she must sift through the record of proceedings in the court below looking for legal or evidentiary error to determine if reversal is warranted. This quarrying gives the appellate advocate a grasp on what can and does go wrong and right in litigation and enables one to discern from these case histories what should and should not be done to win in liability disputes. Legislative advocacy complements appellate practice by adding a public policy dimension to the issues that constantly recur in medical liability disputes. It is from this trove of litigation and legislative experience that this chapter is composed. Emphasis is on California law, although reference also is made to comparable laws in other states; however, the objective is less to understand the details of the rules than the dynamic interplay between them that can and does occur when you try to navigate the rough shoals of litigation.

²O.W. Holmes, Jr. *The Mind and Faith of Justice Holmes* 51 (M. Lerner, ed. 1943).

Mastering Litigation Rules and Honing Storytelling Skills: The Keys to Winning Lawsuits

The overall approach or perspective a party to a lawsuit should have to win or best survive it is twofold: that of a game player and storyteller. The game³ played is, to be sure, a high stakes one in which you can affect the outcome to win, lose, or draw (i.e., settle). To my mind, “winning” in the context of malpractice litigation means getting out of it as early as possible with no judgment of liability against you. If you have to go to trial, even if you eventually win your case, you will pay such a heavy price that the victory will seem pyrrhic. That is because preparing for trial, let alone going through it, is a lengthy and arduous process that consumes your time and physical and emotional resources to the neglect of your present and future life. In preparing for trial, you will be forced to put much of your present life on hold while you concentrate on reliving an event that happened in the past, frequently several years in the past. Dwelling on the past in a defensive way prevents you from realizing the present and planning for the future; it is by all accounts a draining process.⁴ Therefore, your objective, and that of the team defending you, must be to rid yourself of the Damoclean lawsuit at the earliest opportunity.

The storytelling aspect of litigation requires your defense team to put a consistent “spin” or interpretation on the known and unknown facts that is a more persuasive explanation of what happened than the interpretation provided by the plaintiff. These “facts” will emerge in varying degrees of clarity from medical records and witness testi-

³Use of the term “game” is not meant to trivialize or minimize the importance of the litigation process, but rather to get the reader to better understand how to maneuver within it by “seeing” it in the sense that Wittgenstein sees what all games share: “You will not see something that is common to *all*, but similarities, relationships and a whole series of them at that.” (Ludwig Wittgenstein, *Philosophical Investigations*, 3rd Ed., 1968, § 66 [emphasis original].) Wittgenstein refers to this network of interrelatedness as “family resemblances.” (*Id.* § 67.)

⁴“According to a Harvard University study, about 20 percent of doctors who are sued for malpractice rate this event as the most significant in their life. Additionally, 40 percent undergo a major depression as a result and 60 percent state that being sued for malpractice has altered their lives and practices completely.” Richard Vinson, MD, *Blame Lawsuits*, Letter-to-the Editor, *El Paso Times*, El Paso, Texas: May 21, 2002, p. 6A.

mony, but they must be constantly placed in a context that will make sense to those deciding your case. This presupposes that although much can be learned about what happened to someone else in the course of medical treatment that is related to some injury that befalls the plaintiff, there will invariably be ambiguity about many aspects of what is learned. The longer litigation persists and the closer it gets to trial, the more facts will be known to both sides that require explanation as to why they do or do not add up to the defendant's liability. Ultimately, if one must go to trial, the audience that hears and judges what is the best or most credible story will be the court and jury or arbitrator(s).

Whatever attempts are made along the way to dispose of the case before trial will require a nonfiction narrative that is more believable than your opponent's story, that makes better sense of what is known and not known factually than a contrary explanation pointing to your liability. Stories you tell along the way to trial must be consistent with each other even if the latest spin is, as expected, more detailed than earlier versions you present. Conflicting stories or interpretations of facts will, if they are known to court or jury, hurt your credibility and increase the risk of a finding of liability against you.

With this sketch of the big litigation picture in mind, let us turn to rules of the game and then discuss what you should do from the time you are first forced to play the game.

THE IMPORTANCE OF THE RULES IN THE LITIGATION GAME

To win or avoid losing in any game other than one of pure chance, a player must be generally familiar with the rules of that game and the moves, likely and actual, of other players in it. That familiarity should not be on the detailed nuances of the rules, which is the responsibility of your lawyers, but on the importance and dynamics of the interplay between them. Rules of litigation fall into three categories: substantive, procedural, and evidentiary.

The Substantive Liability Rule of Negligence and Its Four Constituent Elements of Duty, Breach, Causation, and Compensable Injury

Substantive rules are those that define the conditions necessary to find liability. When it comes to professional liability or medical malpractice, the most common substantive rule is *negligence*. Negligence

is comprised of four essential elements, and the absence of any one element defeats liability. The first element is that a defendant must be shown to owe a *duty* to the plaintiff. This means that there must be a defined and accepted standard of care that the defendant is required to adhere to in treating the plaintiff, something the defendant should not have done that he or she did or some act that he or she did that should not have been done. Standards of care can be found in statutes, regulations, court decisions, published professional articles, and testimony by expert medical witnesses. When the standard of care is a statute, regulation, or rule of a professional organization, its violation is called *negligence per se*.

The second element that must be proved to successfully prosecute a medical malpractice case is that the defendant *breached* this standard of care, which is to say that he or she acted contrary to or in violation of it. This is usually an evidentiary matter where each side presents whatever testimony or documentary evidence that shows conduct by the defendant in conformity with or in violation of the standard of care. Where there is a conflict in the evidence about breach, the factfinder—most commonly a jury—must decide whether the evidence presented favors the plaintiff or defendant on this point.

Third, it must be proved that the defendant's breach of the duty of care owed to the plaintiff caused the plaintiff injury. Causation is of two kinds: factual and legal. Not surprisingly, factual causation is determined by the factfinder or jury, unless the case is before a judge acting by stipulation as the factfinder or by an arbitrator. The test for *factual causation*, what was once called "but for" causation, is whether the breach was a substantial factor in bringing about injury to the plaintiff. However, *legal causation*, what the law used to call proximate cause, is a policy or scope of liability determination made by the court or judge. It is an aspect of negligence liability in which courts address whether they are going to draw a "bright line," beyond which they will not impose liability as a matter of law even if the conduct at issue is deemed factually responsible for the plaintiff's injury.

Finally, as already implied, a plaintiff must prove that satisfaction of all the foregoing elements resulted in his *compensable injury*. In other words, a plaintiff must prove that his or her injuries are of a nature that may be redressed by monetary damages. Damages are of two principal kinds: economic and noneconomic. *Economic loss* is damage that can be objectively measured like lost wages and medical care, both past and future. *Noneconomic damage* is subjective and immeasurable, like pain and suffering or loss of consortium (i.e., companionship).

Procedural and Evidentiary Rules

Procedural rules determine how and when the substantive rules do or do not come into play and how information is gathered that bears on the substantive rules. Finding information that may include or lead to admissible evidence is done through the procedural rules of discovery. The most common procedural rules of discovery include written interrogatories, requests for admission, requests to produce documents, oral depositions, and requests for designation of experts. Procedural rules that can terminate litigation or alter its focus are the subject of law and motion practice.

Evidentiary rules determine what facts get considered or precluded from consideration by the court, jury, or arbitrators to determine whether the substantive conditions of liability are satisfied. These rules determine what testimony, documents, photographs, recordings, and the like are admissible and what weight should be given to particular evidence admitted.

How Medical Malpractice Reform Changes the Conventional Rules of the Litigation Game

Numerous states faced with malpractice insurance crises over the past 30 years have made changes to their litigation rules—substantive, procedural, and evidentiary—in an attempt to cabin the number of lawsuits and the size of awards to better protect the public's access to uninterrupted health care. In 1975, California was the first state to do this in a significant way when it enacted MICRA in response to the medical malpractice insurance crisis the state was then undergoing and has since avoided repeating. MICRA exists to reduce the cost and increase the efficiency of medical malpractice litigation by revising numerous legal rules applicable to such litigation. This comprehensive reform package illustrates how changes in all three categories of litigation rules can produce stability and certainty in the determination of who gets how much, from whom, and under what circumstances when someone is injured in the course of medical treatment and seeks redress.

MICRA's success in accomplishing its stated purpose has made it a model for states experiencing problems in assuring continued access to health care stemming from an unstable litigation and liability insurance climate; it is also a model for federal legislation endorsed by the President George W. Bush and the House of Representatives but thus far blocked from enactment by a lack of support in the US Senate.

THE LIMITATIONS ON RECOVERABLE NONECONOMIC DAMAGE, PLAINTIFF LAWYER'S CONTINGENCY FEES, AND THE STATUTE OF LIMITATIONS

One change made to the substantive liability rule of negligence by MICRA was with respect to the amount recoverable in noneconomic damages by a plaintiff. That amount is capped at \$250,000.⁵ Other states have comparable limits, most restricting this category of damage somewhere between \$250,000 and \$400,000. This ceiling on a subjective, immeasurable component of recoverable damage is the heart of MICRA and the provision most vexing to personal injury lawyers who traditionally relied on these damages to cover their attorney fees.⁶ There is an impressive body of authority showing that the nonpecuniary damage ceiling has been particularly effective in arresting spiraling awards and stabilizing medical liability insurance rates.

Another reform in MICRA is the sliding contingency fee scale for plaintiff attorneys, which assures that the greater a plaintiff's injuries and damages, the larger the percentage of the total award that goes to the plaintiff, with a corresponding reduced share to the plaintiff's lawyer. As a report of an American Bar Association commission explained long ago about this kind of provision: "[In] order to relate the attorney's fee more to the amount of legal work and expense involved in handling a case and less to the fortuity of the plaintiff's economic status and degree of injury, a decreasing maximum schedule of attorney's fees, reasonably generous in the lower recovery ranges and thus unlikely to deny potential plaintiffs access to legal representation, should be set on a state-by-state basis."⁷

A third medical liability reform in MICRA and other state statutes that may be considered substantive, because it undeniably affects the outcome of many claims, is the shortening and tightening of the statute of limitations for medical malpractice claims.⁸ The *limitations period*

⁵ Ca. Civ. C. § 3333.2.

⁶ "Awards for pain and suffering serve to ease plaintiffs' discomfort and to pay for attorney fees for which plaintiffs are not otherwise compensated." *Seffert v. Los Angeles Transit Lines*, 1961 56 Cal.2d 498, 511 (dissenting opinion by Traynor, J.).

⁷ *Rep. of Com. on Medical Professional Liability* (1977) 102 ABA Annual Rep. 786, 851. See also Dept. of HEW, *Rep. of Sect's. Com. on Medical Malpractice* (1973) pp. 34-35.

⁸ Cal. Code of Civ. Proc. § 340.5.

is the time during which a suit must be filed after the injury occurs or, absent an express waiver by the defendant, it is barred. Before MICRA and analogous statutes in other states, the limitations period was practically open-ended, making stale claims common and resulting in a “long-tail” for liability that prevented accurate claims forecasting and predictable premium setting.⁹

REFORM OF THE COLLATERAL SOURCE RULE

Traditionally, when an injured plaintiff gets some compensation for the injury from a collateral source such as health, life, or disability insurance, that payment, under the collateral source doctrine, is not deducted from the damages that the plaintiff can collect from the defendant.¹⁰ The collateral source rule is “generally accepted in the United States”¹¹ and implemented by barring the factfinder from hearing any evidence about collateral source benefits. Underlying this rule is the public policy rationale that it “encourage[s] citizens to purchase and maintain insurance for personal injuries and for other eventualities . . . If we were to permit [defendants] to mitigate damages with payments from plaintiff’s insurance, plaintiff would be in a position inferior to that of having bought no insurance, because his payment of premiums would have earned no benefit. Defendant should not be able to avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to provide himself with insurance.”¹²

MICRA alters this evidentiary rule in medical malpractice cases by specifying that a medical malpractice defendant may introduce evidence of collateral source benefits received by or payable to the plaintiff. When a defendant chooses to introduce such evidence, the plaintiff may introduce evidence of the amounts he or she has paid, for example,

⁹ “More than a decade may pass before a suit is brought on an incident involving a minor. This further complicates the methods of establishing rates, and is inequitable since the vast majority of medial malpractice committed on infants is detectable within the normal statute of limitations.” California Assembly Select Committee on Medical Malpractice, *Preliminary Report* (1974), p. 10.

¹⁰ See 1 Dobbs, *Law of Remedies*, 2nd Ed., 1993, § 3.8(1), pp. 372–373.

¹¹ *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1; see also *Rest.2d Torts*, §§ 920, 920A.

¹² *Helfend*, *supra*, 2 Cal.3d at 10 .

in insurance premiums,— to secure the benefits. Although this modification of the collateral source rule does not specify how the jury should use such evidence, the underlying legislative presumption and the practical effect is that in most cases, the jury sets plaintiff damages at a lower level because of its awareness of plaintiff net collateral source benefits. Other states have altered their collateral source for medical negligence cases to explicitly mandate a deduction of the amount of the collateral sources from the plaintiff's award.¹³

Courts repelling constitutional challenges to MICRA like collateral source reforms recognize that alteration of this conventional evidentiary bar leads to lower malpractice awards and directly relates to the objective of reducing the costs incurred by malpractice defendants and their insurers. Reputable studies confirm the correctness of this conclusion.¹⁴ As the California Supreme Court remarked, "The Legislature could reasonably have determined that the reduction of such costs would serve the public interest by preserving the availability of medical care throughout the state and by helping to assure that patients who were injured by medical malpractice in the future would have a source of medical liability insurance to cover their losses."¹⁵ Indeed, in analyzing the collateral source rule, the Court acknowledged that most legal commentators had severely criticized it for affording a plaintiff a double recovery for losses not really sustained and noted that "many jurisdictions had either restricted or repealed it."¹⁶

ALTERATION OF THE "LUMP SUM" JUDGMENT RULE

At common law, a plaintiff who suffers bodily injury at the hands of a tortfeasor has traditionally been compensated for both past and

¹³ See Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis* *Duke L.J.* 1975;1417:1447–1450.

¹⁴ See Patricia M. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence, Law & Contemp. Probs.*, Spring 1986, at 57, 72 (collateral source offset associated with 14% decrease in claim frequency); *id.* at 77 (collateral source offset associated with decrease in amount of awards by 11 to 18%).

¹⁵ *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 166.

¹⁶ *Helfend v. Southern Cal. Rapid Transit District*, *supra*, 2 Cal.3d at 13.

future damages through a “lump sum” judgment, payable at the conclusion of the trial.¹⁷ However, increasingly in the past half century, tort scholars have recognized that lump sum awards often are dissipated by improvident expenditures or investments before the injured person actually incurs the future medical expenses or earning losses. Accordingly, they have advocated legislative adoption of a “periodic payment” procedure as a reform measure that would, in these commentators’ view, benefit both plaintiffs and defendants.¹⁸ Many states have responded with statutes authorizing the periodic payment of damages in various tort fields,¹⁹ especially medical malpractice. These statutory reforms are classic procedural laws.

¹⁷ 2 Harper & James, *The Law of Torts* (1956) § 25.2, p. 1303.

¹⁸ See *id.*, at pp. 1303–1304; Keeton & O’Connell, *Basic Protection for the Traffic Victim—A Blueprint for Reforming Automobile Insurance* (1965) pp. 351–358; Henderson, *Periodic Payments of Bodily Injury Awards* (1980) 66 *A.B.A.J.* 734.

¹⁹ See, for example, Ala. Code § 6-11-3(3) (future damages of more than \$150,000 to be paid periodically); Alaska Stat. § 09.17.040(d) (periodic payment judgment mandated if requested by injured party); Cal. Code of Civ. P. § 667.7 (periodic payment judgment mandated if requested by any party to a medical malpractice action and the award for future damages is at least \$50,000); Fla. Stat. § 766.209(4)(a) (periodic payment judgment mandated if requested by medical malpractice defendant whose offer of binding arbitration was refused by the claimant), § 768.78(1) (periodic payment judgment permitted if requested by any party); Kan. Stat. Ann. § 603407(c)(3) (judgment in medical malpractice action in the form of an annuity to be entered for future economic damages if noneconomic and accrued economic damages award do not exceed overall cap); Md. Code Ann., Cts. & Jud. Proc. § 11-109(c)(1) (periodic payments listed as a permitted alternative form for future economic damages in medical malpractice actions); N.H. Rev. Stat. Ann. § 507-C:7 IV (in action for “medical injury” periodic payment of future damages permitted if amount greater than \$50,000 and any party so requests); N.M. Stat. Ann. § 41-5-7(D) (future medical and related care damages from medical malpractice to be paid as expenses incurred); S.D. Codified Laws Ann. § 21-3A-2 (periodic payment judgment permitted if requested by any party to a medical malpractice action); Utah Code Ann. § 78-14-9.5 (periodic payment of future damages required if requested by any party); Wash. Rev. Code § 4.56.260 (at a party’s request, any award for future economic damages of at least \$100,000 to be entered as a periodic payment judgment).

Legislatures that have enacted periodic payment laws for future damages concluded that this will further the fundamental goal of matching losses with compensation by helping to ensure that money paid to an injured plaintiff will, in fact, be available when the plaintiff incurs the anticipated expenses or losses in the future. In addition, they determined that the public interest is served by limiting a defendant's obligation to those future damages that a plaintiff actually incurs, eliminating windfalls obtained by a plaintiff's heirs when they inherit a portion of a lump sum judgment that was intended to compensate the injured person for losses he never sustained. As the California Supreme Court stated when, against constitutional attack, it upheld that state's periodic payment provision:²⁰

One of the factors which contributed to the high cost of malpractice insurance was the need for insurance companies to retain large reserves to pay out sizeable lump sum awards. The adoption of a periodic payment procedure permits insurers to retain fewer liquid reserves and to increase investments, thereby reducing the costs to insurers and, in turn, to insureds. In addition, the portion of [the periodic payment statute] which provides for the termination of a significant portion of the remaining future damage payments in the event of the plaintiff's death is obviously related to the goal of reducing insurance costs.

HOW THE VARIOUS RULES "FIT" WITHIN THE LEGAL HIERARCHY

Notice that most of the rules discussed so far are state *statutes* or judge-made by courts where the liability disputes arise. Court- or judge-made rules (they are synonymous) are known as *common law* rules. They are derived from particular factual disputes and, after articulation of them by the court as a guiding principle for future cases, have the force of *stare decisis* or precedent. Precedent is to be followed by future courts unless it has outlived its usefulness or no longer makes sense. That decision is made by an intermediate appellate court or the highest court in that state or by the legislature. When the defendant in a professional liability case is the federal government or its employees, or arises under particularly defined circumstances that implicate federal law,

²⁰*American Bank & Trust Co. v. Superior Court* 36 Cal.3d 1984;359, 372,373.

then federal courts decide the dispute according to federal statutes and federal common law.

All statutes—federal and state—must be interpreted or applied by courts to particular facts. This naturally gives courts some leeway to clarify the application of the statute and, by so doing, put an additional gloss on its plain language. If a statute is itself a statement of the common law, there is authority that a court can just amend it by interpreting it in light of changing circumstances and conditions. When statutes are amended in ways a legislature does not like, it can “correct” the court’s interpretation by restating or further amending the statute. In interpreting statutes courts must look to pertinent constitutional provisions, the *purpose* of the statute, how it relates to other statutes that also apply to the dispute, and to *canons of statutory interpretation* or aids in reading the text and ascertaining whether the enacting body “said what it meant, and meant what it said.”

Sometimes a statute is challenged for its validity, either on its face or as applied, by reference to the federal and applicable state *constitutions*. A federal statute cannot be invalidated on constitutional grounds except by reference to the US Constitution. A state statute, however, must comply with *both* the federal and state constitutions as well as with federal statutory law that preempts the field. Although generally a statute found in compliance with the US Constitution also satisfies its corresponding state constitutional cognate, this is not always so. State constitutions sometimes provide *greater* protection to their citizens than analogous provisions of the federal constitution.

The interplay between the hierarchy of courts and related statutes and constitutional provisions is an important dynamic to keep in mind when playing the litigation game. For example, from 1872 to 1975, California personal injury cases were governed by the rule of contributory negligence, a rule that by popular consensus was embodied in a statute unchanged in wording from when originally enacted.²¹ *Contributory negligence* means that if a defendant could show that the plaintiff’s own negligence contributed to his or her injury, even to a small degree, then the plaintiff is completely barred from any recovery

²¹ “Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, *except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.*” (Cal. Civ. C. § 1714; italics added.)

against the defendant. Yet when that statute was challenged as unfair in *Li v. Yellow Cab Co.*,²² California's supreme court agreed and interpreted it as suddenly providing, *mutatis mutandis*, for *comparative negligence*: This means that the assessment of liability in California and the majority of states that have since adopted comparative fault in place of contributory fault is based on the plaintiff's proportionate share of fault to the total universe of negligence; so that a plaintiff 25% negligent for his or her own injuries should only have damages reduced by that percent of the total loss incurred, not be barred entirely from recovery.

Another illustration of how the dynamic interplay between the rules of procedure, evidence and substantive liability can dispose of a malpractice case short of trial is *Martinez v. Ha, M.D.*²³ An orthopedic surgeon performed a complete knee replacement on the plaintiff, who developed a serious infection shortly afterward that necessitated a knee fusion. The plaintiff sued claiming that the doctor had not washed his hands and caused the infection. The doctor moved to summarily dispose of the case, presenting expert written testimony that there was no evidence he had caused the infection in plaintiff's knee. Plaintiff opposed the motion, but did not submit any expert testimony contradicting the doctor; so the court ruled for the doctor. On appeal judgment was affirmed, the appellate court stating that the lower "court was presented with uncontroverted evidence that [plaintiff] could not prove at least one element [i.e., causation] of his claim."²⁴

What *Li* and *Martinez* underscore is that a successful litigator must always be aware of the dynamic interplay of the rules and of new interpretations of them that can yield different results from the old readings.

The Importance of the Players in the Litigation Game and of Storytelling

The players include the parties, their attorneys, witnesses, and the court and jury (or in some cases, arbitrators). The players who are parties to the litigation (i.e., plaintiffs and defendants) can voluntarily agree to end the game at any time, which is the outcome of most litigation; however, this only occurs when they have assessed that the consequences

²² (1975) 13 C.3d 804.

²³ 12 P.3d 1159 (2000 Alas.).

²⁴ *Id.* at 1163.

of continuing it are likely riskier in terms of their self-interest than capping it. That assessment is an ongoing one based on the progress of the game and how application of the rules and the moves by the players stack up at any given time.

The Lawyers

Lawyers are indispensable to lawsuits. Indeed, they are so essential that a popular saw holds that “any town that won’t support one lawyer, will always support two.” They are the legal representatives of their clients, which means they speak for them to the universe concerned about your dispute. If the lawyer makes a bad impression on others in that universe it hurts the client. It is largely through lawyers that the court and jury will assess you and your adversary, and determine who to favor in various decisions. Lawyers are, in essence, the main strategists and tellers of their clients’ stories. Your lawyer is also your guide through the legal labyrinth you must traverse; it is by and through your lawyer that, if you ask the right questions, you will learn the options available to win your case. You need and deserve the best lawyer you can get for your case.

Defendants in medical malpractice cases typically turn to their liability insurance company for a lawyer. Usually the carriers can be counted on to provide those they insure with well-qualified attorneys because they share with them the objective of winning. When the carrier informs you about the lawyer or law firm they have in mind to defend you, ask for a resume of the lawyer. Pick up the telephone if the lawyer has not contacted you first, and have a frank discussion about the attorney’s qualifications and experience. How long has the lawyer been in practice? How many medical malpractice cases has he litigated? What have been the results? Does he know the plaintiff’s attorney? Has he ever been on the opposite side of a case against the plaintiff’s attorney and, if so, what happened? Check standard news sources, jury verdicts, and databases of appellate cases to see what you can learn about the attorney.

Occasionally, the chemistry between a client and counsel is not good. If that should happen to you, if you don’t have a comfortable or confident feeling about your prospective or assigned attorney after conferring with him or her, be honest. A good lawyer understands the importance of a positive attorney–client relationship, as does you malpractice insurer. Trust and confidence are the cornerstones to this, every bit as much as they are essential to the physician–patient relationship.

Regrettably, people who would not hesitate to grill a contractor for a prospective home remodel about past projects and references, become

shy when it comes to selecting counsel for representation that could affect their careers. Don't make that mistake; it is much more difficult to switch lawyers in the middle of litigation because of a bad initial selection than it is to take the time to be as reasonably sure as you can be that you have chosen the best person to represent you. Martindale-Hubbell is a quick source of basic biographical information about lawyers. Newspaper articles and electronic databases of information mentioning the lawyers involved in published opinions and jury verdicts are other sources of useful information.

You are not required to accept whatever attorney is recommended to you, no more than your carrier is required to accept and pay for any attorney you may like but who knows little or nothing about medical malpractice. You and your professional liability insurer should, because you have the same interest in achieving the most favorable outcome for you, be able to agree on a good attorney, one with the education and experience best suited for your needs.

“Here Comes the Judge!”

Judges are the principal representatives of the court; they interpret and apply the law and, when a jury is involved, instruct it on the applicable legal rules. Although a jury is usually involved in a medical malpractice case, courts can, by agreement of the parties, sit as both the “finder” of facts and law. An arbitrator or panel of arbitrators, of course, act as determiners of both the law and facts. Judges and arbitrators also rule on motions that can dispose of or shape the course of the litigation and rule on what evidence is admissible. Obviously, who one gets for a judge can be critical to the case, so it's important to know as much as one can about the judge or arbitrator who will hear the case. The best source of information about judges and arbitrators is, not surprisingly, other lawyers who have tried cases before them. Because most defense attorneys practice primarily where they live, they will know about the judge or at least know someone else who has tried cases before, or knows the judge. Certain public information is also available about judges, including information about cases on which they have decided or ruled. From these varied sources, one can usually discover whether a judge has a reputation for fairness, knowledge of the law, is intellectually bright or slow, and has a quick or even temper.

Many, if not all, states permit one peremptory challenge to a judge and all allow a challenge based on bias. It is common in larger urban areas to assign a different judge for pretrial motions from the judge drawn for settlement discussion and trial, so research on the universe of

judges one is likely to draw for each of these stages of litigation is advisable.

The Jury

Jurors decide factual disputes, which means that they determine the ultimate “facts” of your case. Their judgment as to what the “facts” are, including the fact and size of damages should they decide to award them, cannot be disturbed on appeal unless it can be shown that there is no substantial evidence to support those findings. When a judge or arbitrator also acts as the “fact finder,” this same restrained standard of review—“substantial evidence”—also applies.

Selection of jurors naturally comes just before the case is to be tried, which means that the parties will have gathered all their evidence and should be ready for trial. Each party, through counsel, will have some opportunity to question or submit questions to the judge to ask of each juror. The law refers to this as the *voir dire* of prospective jurors. Usually, each party has a limited number of peremptory challenges and may also challenge a juror for “good cause” or bias, on which the judge will rule.

Some lawyers are fond of employing, for big cases, jury consultants, professional “jury experts” who read body language and pay particular attention to the responses jurors make to the *voir dire* questions. Other lawyers trust their own instincts when it comes to accepting or challenging certain jurors; and some even feel that it doesn’t matter in the end which jurors are selected; they take any panel that meets with the judge’s approval. If your case looks like it is going to trial and you feel you have a good sense of people, your lawyer should be willing to listen to you in the jury selection process.

Witnesses, Especially “Experts”

All witnesses are important, especially you. This means witnesses should be well prepared. A prepared witness is not a “coached” witness; a “prepared” witness is one who understands the purpose for which his or her testimony is sought, and has some understanding of the questions likely to be asked. This requires a witness to think about the best and most honest way to respond to these questions. Your attorney will be able to and should prepare your witnesses. As for adversarial witnesses, pretrial discovery will reveal who they are and what they are likely to say and not say. Knowing this information will enable you and your attorney to fashion questions that show whether a witness is credible or, if credible, why mistaken about some key fact.

As a practical matter, in medical malpractice cases the most frequent source for defining the standard of care, as well as for determining the presence of other elements in the negligence calculus, is the *expert* witness. Who qualifies as an “expert” is defined by the law of the jurisdiction where the case is litigated. California, for example, which is typical of many jurisdictions, defines an expert as one who has “special knowledge, skill, experience, training or education” about the subject to which the testimony will relate.²⁵ Whether expert testimony is *admissible* (i.e., can be considered by the “fact finder”) also depends on where the case is tried. Federal law, for instance, makes judges the “gate-keepers” for ensuring that scientific evidence is admitted *only* if it is both *relevant* and *reliable*.²⁶ Most significantly, the court must determine if the expert testimony offered has an adequate foundation, which means a judge has an independent duty to screen evidence and assure that it has a *rationaly reliable basis*. In determining this, a court can consider whether the expert used the scientific method, whether the theory or technique relied upon has been subjected to peer review and publication, whether a particular scientific technique has a significant rate of error, and whether the methodology used is generally accepted in the relevant scientific community.

Medical malpractice cases are “expert driven.” Experts are, as a general matter, best retained early to obtain their input on discovery and to aid in pretrial motions that can terminate or pare down issues in the case. Usually your attorney will want to retain a prospective expert in a given field as a “consultant” to the attorney; that way it will not be necessary to disclose your “expert’s” identity and opinion on a matter should you decide not to use him or her as an “expert.” The opinion would then be protected under the “work product” privilege of your attorney. If you or your adversary decide to go ahead with certain experts at trial, however, their identities must be disclosed by a certain time in the litigation framework to give each of you an opportunity to question the expert on his or her opinion before trial.

Although it used to be that the standard of care pertinent to medical negligence was a *local* one, the standard of care for sometime now has been a *national* one, which opens the door for both sides obtaining the “best” experts in the country. Moreover, because medicine is a dynamic and fast-changing profession, what was good medical practice yester-

²⁵ Cal. Evid. C. § 720(a); *Brown v. Colm* (1974) 11 Cal.3d 639.

²⁶ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993).

day may no longer be the case now; and an “expert” must be up on current medical advances and standards of care. The personal injury bar used to complain of a “conspiracy of silence,” a tacit agreement amongst or common reluctance by doctors not to testify against their colleagues in medical negligence cases. Whatever truth there may have been to this accusation, a quick glance of the copious advertisements for “forensic medical experts” in the pages of magazines published by and for the personal injury bar shows that this is no longer true.

WHY IT IS CRITICALLY IMPORTANT TO “SEIZE THE TIME” WHEN SUED

Time can be critical to the outcome of litigation, a fact underscored by the often used legal phrase that “time is of the essence.” The law provides that from the moment you are served with summons, the clock starts running on when you must respond to it and what devices will be available to you for that response. Usually, the period for filing an answer or other response is 30 days, a window by which, if your attorney acts promptly and intelligently, can give you a decided advantage over your adversary. If you waste or allow any of this time to pass in the belief (indisputably true) that you don’t have to respond until the end of that 30 days, or that your attorney can probably get an extension of time by which to respond (almost always true), you could lose valuable opportunities to seize important advantages.

The Importance of Time in the Discovery Process

To illustrate the importance of time in litigation, consider the procedural device of discovery, the means by which parties are to find out from each other what evidence is known to that party or others in support or derogation of the lawsuit. One of these discovery mechanisms is the right to compel a party to appear and answer relevant questions under oath from your lawyer. This is called an *oral deposition*. The answers given to these questions often reveal facts that will determine whether the plaintiff has a viable claim against you or whether you have a defense against liability. Absent a showing to the court of “good cause,” a plaintiff must normally wait 20 days after serving summons before noticing the defendant’s deposition; however, the defendant need not wait any period of time after being served to notice the plaintiff’s deposition.²⁷

²⁷ Cal. Code of Civ. Proc. § 2025(b)(2).

A defendant has no waiting time other than the notice that must be given the plaintiff to appear for the deposition, usually 10 days, unless there is an order from the court shortening this time. Hence, it is possible for a defendant to get the jump on the plaintiff and smoke out his or her case early regarding the extent of damage suffered and why the plaintiff believes the defendant is responsible for it.

The longer you wait to take the plaintiff's deposition, the greater the likelihood that "facts" will be revealed or become "known" to the plaintiff that strengthen his or her case. For this reason, some defense lawyers prefer to wait to take the plaintiff's deposition until later in the lawsuit, especially because you usually only get one opportunity to take the plaintiff's deposition, unless there are unusual circumstances involved. However, if you have reason to believe the plaintiff has not put together a case by the time you are served, then it may be possible to get rid of the case early by showing that it is missing one or more elements critical to the liability equation.

Time and Summary Judgment or Summary Adjudication

Another procedural mechanism that can be combined with the prompt taking of the plaintiff's deposition is a *motion for summary judgment* or *partial summary adjudication*. This motion is a way for the court to look behind the pleadings and determine if the opposing party's pleadings lack evidentiary support that warrants limiting or terminating the lawsuit.²⁸ This is a particularly effective device for getting rid of a lawsuit where one of the essential elements of the substantive rules of liability is lacking; however, a defendant cannot invoke it earlier than 60 days after the complaint is filed, must give the plaintiff 75 days notice before it can be heard, and cannot have it heard later than 30 days before the date set for trial.²⁹ As a practical matter, these time requirements impose on defense counsel a burden to conduct sufficient discovery and investigation to put together the motion and file and serve it on the plaintiff 3.5 months before the date set for trial. A defendant who does not pay close attention to the passage of time could, through inadvertence, lose the right to invoke summary judgment and end up having to go to trial (perhaps unnecessarily).

²⁸ *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.

²⁹ Cal. Code of Civ. Procedure § 437c(a); *McMahon v. Superior Court (American Equity Ins. Co.)* (2003) 106 Cal.App.4th 112, 116.

Therefore, when served with summons, you should immediately notify your medical liability insurer and get a copy of the summons and complaint to the appropriate representative. While doing this, you should also request your insurer to inform you right away of the lawyer who will be defending you. Do not wait for the lawyer to contact you. Once you know the identity of your counsel, contact him or her and ask to meet and confer about your case, preferably in person; however, if that cannot be done right away, then make contact by telephone.

WHY YOU SHOULD MEET WITH YOUR LAWYER RIGHT AWAY AND WHAT YOU SHOULD SEEK TO ACCOMPLISH

The Importance of a Litigation Strategy and Discovery Plan

To ensure that the meeting with your lawyer is as productive as possible, you should first read the complaint and try to discern from it what you are accused of having done or not done that supposedly makes you liable. If the complaint is what is known as a form complaint, this generally will be more difficult than if it is written by the plaintiff's counsel and sets forth some specific facts. However, in reading the complaint, you will at least be able to learn the identity of the plaintiff and when the event that allegedly resulted in injury occurred, even if it is a general form. Check your own records to see what they reveal about the plaintiff and to help refresh your memory. Make copies of these records so that you can review them without getting marks on your originals that could be misconstrued as attempts to alter the records. You will want to have reviewed whatever information you can quickly assemble before you meet with your attorney so that you can share all you recall about your role in treating the plaintiff. If there were others involved in the incident of treatment about which plaintiff complains, make some notes as to who they were, what role they played in that treatment, and how you know that they were involved or witnessed the treatment.

Ask your counsel for a facial evaluation of the complaint. What legal theories, other than negligence, is the plaintiff relying on? What are the necessary elements to those theories and how does your lawyer think the plaintiff will try to satisfy them? Are the theories asserted in the complaint's various causes of action supported in law? If not, should they be excised before trial by an appropriate motion?

Now, there are two things any good malpractice defense attorney will do to best represent a client: put together a *discovery plan* and a

litigation strategy. The two go hand-in-hand, and although not all attorneys put them in writing, you will want a commitment from your attorney to do so for you. These are privileged documents, so your opponent will not be able to force you to disclose them. To be sure, both the initial discovery plan and litigation strategy will change as new information is learned and as there are rulings on motions filed by the parties that affect the course of the litigation. That is understandable, but it is important for you to have each revised plan because it will keep you informed as to how your defense is progressing, what needs to be done, by when, and whether the case is likely to be resolved without the necessity of trial. Your attorney will also likely work a little harder and maybe smarter for a client who shows interest in his or her own defense.

As already mentioned, your objective is to get rid of the case against you at the earliest opportunity, certainly before trial. Ask your attorney to explain his litigation strategy for accomplishing that goal. Is the complaint subject to a demurrer or motion to strike? If so, will these be filed or not; and if filed, when? Is the plaintiff asserting any claims that are outside the MICRA defenses available to you? Can those claims be disposed of by legal motions or are you stuck with defending hybrid claims? What evidence must be assembled to file a motion for summary judgment or summary adjudication? Does the discovery plan track with the litigation strategy so as to avoid time barriers that might otherwise preclude those motions from being filed?

Once you have a sense of the theories the plaintiff is relying on in suing you, it will be important to find out what evidence the plaintiff has, or must get, to tie you into each theory. Your attorney will develop a discovery plan that seeks to find out what you don't know and confirm what you do know. That discovery plan should set forth the facts essential to prove the elements of any theory of liability asserted and of any defense you will assert. Your attorney should seek a stipulation with opposing counsel as to material facts that you believe will not be disputed and put that stipulation in writing. The discovery plan should indicate the discovery device(s) that will be used to prove or disprove the existence of each element of all claims and defenses and the source of proof for each fact pertinent to those elements. The extent of claimed damages is something that you will want to nail the plaintiff down on.

What experts will your attorney need for your case? Will any of the treating physicians be treated as expert witnesses? How soon will these experts be retained? Do the local court rules limit the number of experts and, if so, does this hurt your defense? What experts has

plaintiff's counsel used in the past for medical malpractice cases? (This information often can be ascertained through various computer database searches and by asking other counsel who may be familiar with or have litigated against the plaintiff's counsel in the past.)

CONCLUSION

John Wooden, the coach for UCLA's most successful winning basketball team, stated that "failing to prepare is preparing to fail." You and your defense team can best prepare to win by developing a well-thought-out and regularly revised plan for discovery and litigation strategy. In doing this, your sense of how the rules and players interact and can affect the outcome of the litigation game will make you a more valuable contributor in preparing to win.



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