New Jersey Law Journal
Medical Malpractice Litigation
MAY 18, 2015 An ALM Publication

Overcoming Damage-Reduction Defenses in Med-Mal Cases

Should plaintiff's diminished worklife or actual-life expectancy, unrelated to defendant's negligence, be considered?

By Dennis M. Donnelly

Who better than doctors and medical-malpractice carriers to create alternative medical excuses for avoiding 100 percent responsibility? The stronger the patient's liability and causation case, the greater the temptation for defense attorneys to aggressively assert damage-reduction defenses. That way, even when traditional first-line defenses to deviation and causation are defeated, they can snatch some measure of discount damage victory from the jaws of defeat. This article will examine a relatively new third-line damage-reduction fallback position: the diminished work life and/or total life expectancy defense.

Case law has sharply limited and circumscribed the traditional secondline damage-reduction defense strategy of alleging comparative negligence by the patient. *Ostrowski v Azzara*, 111 N.J. 429 (1988). Decisional law has also made doctors, not patients, shoulder the burden of proving what, if any, percentage causation from a preexisting disease can be deducted from their otherwise 100-percent damage share. See *Flood v Alluri*, 431 N.J. Super. 365 (App. Div. 2013) (and the veritable flood of cases it reviews.)

Even so, or perhaps because of that, defendants in malpractice cases still pursue third-line damage reduction strategies. They argue in wrongful death cases, for example, that the patient whose death they indisputably caused had a diminished life expectancy from other causes unrelated to their bad care, and that requires a damage discount. This article will explore the two main forms these defenses take and explore legal precedent and practice points to defeat, dilute or diminish decreased work-life and diminished general life expectancy defenses in medical negligence cases. The examples provided are all drawn from real medical malpractice cases I have handled. While honestly reproducing these defense damage-reduction theories, I will also be exploring just where and how their theoretical parsing of reality tends to break down, and becomes legally and logically suspect. For similar, related reasons, I will suggest that such defenses are a "bad" strategy for defending liability and can even increase rather than decrease damage verdicts.

©iStockphoto.com

First, the two main forms such defenses take are explained below:

- *Alternative, contemporaneous damages, which we did not cause, when our negligence caused our patient's death.* Even if we were negligent and did cause the patient's death and he had no preexisting contributing cause we can prove, the patient also suffered an unrelated complication of the treatment or surgery at issue through no fault of ours, and that complication, such as a stroke, would have diminished his ability to return to work anyway. So, it is argued we must get a discount from full damages for the amount of diminished work life and resulting financial losses the decedent and his or her survivors would have suffered in any event.
- *General health issues would have diminished the decedent's life expectancy even without our negligence abruptly ending his or her life instead.* The argument here is that unrelated to our negligent care, the decedent had specific risk factors, such as obesity, a smoking or drug habit, high blood pressure or the need for recurring replacement of body parts, such as heart valves, hips, or knees, which decreased his or her life expectancy beyond that reflected in generalized actuarial life tables for the entire population, and so we want a discount for that as well.

Now that we have outlined these two alternative third-line damage defenses,let's consider the following procedural and substantive issues:

1. Who has the burden of proof, and in what order should these issues be permitted at trial?
2. What type of expert testimony is truly needed to carry that burden?
3. What are the jury-specific costs in asserting such defenses?

Defendant should bear the burden of proof.

Although no New Jersey case has reviewed this exact issue, both existing case law in New Jersey by analogy and specific holdings from other jurisdictions make defendants who sponsor life expectancy diminishment defenses shoulder the burden of proof. See Mod. Civ. Jury Charge 8.11- Duty to Mitigate Damages, which makes it crystal clear that defendants have the burden of proof for that analogous defense. See also the Scafidi line of cases, which gives medical

Continued on Page 2

Overcoming Damage-Reduction Defenses in Med-Mal Cases

Continued from Page 1

malpractice defendants the burden of either proving that a percentage of causation can be attributable to a preexisting cause, or be responsible for 100 percent of the damages in the event they are found liable. *Scafidi v. Seiler*, 119 N.J. 93 (1990).

From other jurisdictions, see *Harlow v. Chin*, 405 Mass. 697, 714 (1989), "When the opposing side believes that the person in question, because of poor health, has a lower life expectancy than that reflected in the mortality tables, the usual remedy is to offer evidence to that effect and argue the point to the jury." Therefore, this one area where both the common law and common sense agree: life expectancy tables meet the prima facie burden of proving life expectancy, and if a defendant wants to assert that work life or general life expectancy is diminished beyond what life expectancy tables already include, then they have the burden of proving that.

Although it is also undecided in precedent, both judicial economy and fundamental fairness would support only allowing such a defense on defendant's case and saving any response to rebuttal. That would avoid two drawbacks to such defenses, which are even more acutely dangerous in our age of scarce judicial and jury resources:

- Otherwise improvable or prejudicial side-tracking issues that would never be established by the defense would both confuse the issues in the case and require correcting charges or, in the worst case scenario, reversal and retrial of large complex cases. See *Monahan v. Obici Med. Mgmt. Servs.*, 271 Va. 621 (2006) (where an unsubstantiated defense that the patient's damages should be decreased because he went to one hospital rather than another was allowed at trial, a completely new trial on damages was required); and
- Cases often settle midstream, and allowing these issues to all come out indiscriminately would front load the plaintiff's case with what is truly rebuttal evidence and might waste days of trial on an issue that would never have otherwise been reached because the case settled before any defendant resorted to such a third-line defense.

Without expert actuarial testimony, these defenses might be improper.

Unless the defense has an extremely well-qualified actuarial expert, the usual medical doctor proponent for decreased life expectancy defenses has no true expertise in what I would call subtracting from the subtraction he makes for the plaintiff's particular, specific health problems. There are two unfair fallacies inherent in such defenses.

Cherry-picking aggravating health factors and making a 100-percent deduction for them from average life expectancy overlooks the fact that average life expectancy figures already include thousands of people with the same aggravating health factors, and so an actuarial deduction for that condition, e.g., obesity, high blood pressure, etc., has already been made. Without truly precise and rarified actuarial expertise, a defense expert might, say, subtract five years off work life or general life, but have no clue or no real legal basis to show whether that condition had already taken 2.5 years off everyone's average life expectancy.

Worse yet, the average life expectancy cohorts contain thousands of people with worse life-shortening conditions, such as cancer or the whole host of genetic or environmental factors that reduce life expectancy much more markedly, and which this plaintiff patient does not have. So, will the defense expert subtract those from his subtraction or give life-extending credit for Hamlet's "thousand natural shocks that flesh [and life expectancy tables] is heir to," but which this plaintiff fortunately dodged?

Mud wrestlers can hardly complain when their cases get soiled.

As Oscar Wilde reminds us, "a cynic is a man who knows the price of everything and the value of nothing." Although defense counsel and carriers are entitled to be cynical about many things in plaintiffs' cases, it does not come without a hidden value-added tax. Producing death-discounting experts is no different from producing defense economists or life care planners. It comes with a powerful odor, not of mendacity perhaps, if the expert is any good, but at the very least with the not-so-hidden jury message that "well now that they decided they are liable, they are just seeking a discount." It can often be, in other words, penny-wise and pound-foolish. Secondly, and no less profoundly, wise plaintiffs counsel will answer any attempt to deduct years from the patient's life with a highly relevant poison-pill antidote. This patient's character, family support system and or prior life show that he or she is way above average in overcoming adversity or illness.

All in all, diminished life expectancy defenses, like many attractive abstractions, don't hold up well when exposed to real life and real trial conditions. I respectfully submit, therefore, the following warning label, "Caution: Use at your own and your client's peril. May cause loss of liability, greater not lesser than expected damages and just generalized malaise."

Think about it: would a driver who ran a red light and killed the occupant of another car open the door at the accident site and say, "Well, it's true I killed you, but you were overweight [or had diabetes or whatever] and so you didn't have a full life expectancy." Is a physician whose negligence leads to a patient's death really on any higher ground than that driver? And if not, don't doctors who run medical red lights, just like car drivers who run red lights, equally deserve righteous indignation that such a defense would even be made? ■

All in all, diminished life expectancy defenses, like many attractive abstractions, don't hold up well when exposed to real life and real trial conditions.

Donnelly is a partner at Blume Donnelly Fried Forte Zerres & Molinari in Chatham. He is the immediate past president of the New Jersey chapter of the American Board of Trial Advocates (ABOTA) and the current president of the Inner Circle of Advocates, an organization of the nation's best plaintiff trial attorneys.