The Long Way Around: A Medical Malpractice Trial De Novo Verdict

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Author: Thomas Vertetis
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A common frustration experienced by many who practice plaintiff's medical malpractice is being unable to pursue an egregious medical error on behalf of a deserving potential client due to the reality that the economics of the case do not merit filing an expensive lawsuit.

Experienced counsel are well aware that medical negligence claims are tremendously difficult to pursue when the damages suffered are neither catastrophic nor involve a significant wage loss/impairment claim. Sheepishly explaining to a medical negligence victim that medical providers and their insurers systematically defend these cases like Gettysburg, making them too expensive to pursue, never feels good. And simply advising that a Medical Quality Assurance Commission complaint is a cost-effective alternative that may provide some measure of accountability and closure in many respects feels inadequate. Occasionally, there is an avenue to bring a medical negligence case that does not fit within the financial rubric and levels the playing field with medical care providers and their insurers: mandatory arbitration.

Civil lawsuits brought in superior court seeking damages of $50,000 or less are generally subject to mandatory arbitration. RCW 7.06.020(1).[1] The legislature implemented this statute to reduce court congestion and speed up the resolution of civil cases. *Chrisite-Lambert Van Storage Co., Inc. v. McLeod*, 30 Wn. App. 298, 302 (1984). The Mandatory Arbitration Rules (MAR) do not preclude medical malpractice claims. *See* RCW 7.06.020; MAR 1.2. To the contrary, the forum is a friendly one for plaintiffs who have suffered fairly straight-forward medical negligence claims. Discovery is limited, and relaxed evidence rules are employed that allow expert testimony to be submitted by declaration. Crucially for the plaintiffs, the proceeding can usually be completed in a single day, resulting in a minimum of expense. *See MAR 4.2; 5.2; and 5.3 (c) and (d).*

Importantly, after the issuance of an arbitration award, if the appealing party "fails to improve his or her position on the trial *de novo*," the superior court "shall assess costs and reasonable attorneys' fees against [that] party." RCW 7.06.060(1) and MAR 7.3.[2] A carefully orchestrated discovery plan coupled with the right supporting evidence (such as a declaration from a sympathetic subsequent treating medical care provider willing to provide standard of care opinions or favorable medical records that clearly outline the negligence) could make filing a medical malpractice claim under the MARs a reasonable consideration for the prospective client.

Holly Mozzone: a victim of medical negligence.

On February 5, 2011, Holly Mozzone, 39, a certified nursing assistant ("CNA") was injured on the job when her patient collapsed while Holly was assisting in toileting her. Holly's efforts to catch the falling woman caused a right shoulder injury. Holly was required to file a Labor and Industries claim and seek medical care to enable her to return to work.

On May 10, 2011, Holly came under the care of an orthopedic surgeon who diagnosed an anterior labral tear from an MRI and recommended surgery after conservative treatment failed. An arthroscopic SLAP repair and bursectomy was scheduled for July 6, 2011. By the surgeon's own admission, Holly's upcoming surgery was uncomplicated and straight-forward. During her pre-surgical consultation, he represented to her that she should be released back to work with a full recovery within three months. On the date of the surgery, the surgeon exhibited a number of unusual behaviors which seemed odd to Holly's husband, Todd Mozzone. The surgeon was given the benefit of the doubt. Unfortunately, the surgery was not successful. Holly's shoulder remained painful and she did not regain her range of motion. Holly underwent months of physical therapy and cortisone shots, and, frustrated with her

recovery, returned to the surgeon. He recommended a manipulation under anesthesia. During the recovery period, the orthopedic surgeon was evasive with Holly and his interactions with her were strained. He was coy and dismissive of her failure to improve.

The orthopedic surgeon bluntly told Holly, who was still unable to return to work, that she may fall into a small subset of patients who suffer permanent pain, loss of range of motion, and limited use of the shoulder following the surgery. The orthopedic surgeon never hinted that his surgery may have been performed improperly or caused her prolonged troubles. Holly was advised she may never return back to her vocation and to prepare to accept a life that would be drastically different than what was discussed in the pre-surgical consultation. During this time period, Holly noticed odd behavior by the surgeon, including his leaving the examination room and failing to return during one of her last visits. Fortuitously, Holly was informed that the defendant was taking a leave of absence for medical reasons and she elected to seek a second opinion from another orthopedic surgeon. It was later learned the surgeon was placed on administrative leave due to his behavior towards another medical provider. Holly's care abruptly ended with the orthopedic surgeon when he was suspended and placed on a leave of absence shortly after the manipulation under anesthesia.

On February 15, 2012, Holly underwent a second consultation with a new orthopedic surgeon who reviewed her surgery and follow-up. After months of additional physical therapy and new imaging studies, the cause of Holly's persistent pain, weakness, and stiffness was identified: The prior orthopedic surgeon had placed the anchor suture directly into her shoulder joint. Subsequent imaging studies unequivocally determined that the anchor suture was located directly on the articular surface of the glenoid. Holly's current orthopedic surgeon was candid with her: the prior orthopedic surgeon was grossly negligent in placing the anchor suture directly within her shoulder joint. The improper placement of the anchor suture was the cause of her limitations and inability to return to work, as it was disrupting the smooth articulation of the humeral head within her shoulder joint. Another surgery was required to correct the mistake and additional months of physical therapy and rehabilitation would be required before Holly would be able to return to work.

Holly underwent a second shoulder surgery on September 20, 2012 and post-surgical physical therapy for a few months. In April 2013, a year and nine months after her initial surgery, Holly was cleared for employment. Unfortunately, Holly was unable to return to her prior employment as a CNA, but was fortunate enough to find employment as a flight attendant at a reduced salary. The orthopedic surgeon's flagrant surgical error and lack of candor had significantly impacted Holly and her family. Holly went through a very dark period of time, believing that she would never be able to return to gainful employment or live pain free. She had long prided herself on her work ethic and truly enjoyed her job as a CNA because of her intense desire to help people. During this time, Holly faced constant financial pressure and stress due to the reduced household income and uncertainty which surrounded her future earning capacity, further compounding her emotional burden. After considerable thought, the Mozzone family wanted to file a lawsuit seeking to hold the surgeon accountable for his actions.

Holly initially retained Mr. Ashton Dennis and the Washington Law Center to pursue a medical malpractice claim. Holly's subsequent surgeon was willing to discuss the case with counsel and clearly stated that the anchor suture had been placed incorrectly. The placement was, in his opinion, below the standard of care and was the proximate cause for her pain and shoulder dysfunction. And, significantly, Holly's pain and dysfunction decreased after the surgeon performed a debridement of the area. However, because Holly had recovered so well and was able to find a new job as a flight attendant, her damages were not extraordinary. Normally, our case evaluation rubric would not allow us to associate with counsel and pursue such a claim. Due to the egregious conduct of the surgeon, the cooperation of Holly's subsequent orthopedic surgeon and his willingness to provide a sworn declaration, as well as having the opportunity to work with Ashton, our firm decided to associate on the case and pursue it in mandatory arbitration.

Arbitration took place on July 16, 2015. We presented only one live witness, Holly Mozzone, and submitted a declaration from Holly's treating orthopedic surgeon on standard of care and causation. The

defense presented the defendant who testified live and opined on the standard of care, causation and damages. Additionally, the defense submitted a declaration from their retained liability expert, a local and well respected Virginia Mason orthopedic surgeon, Dr. David Belfie. Dr. Belfie was unequivocal in his opinion that the defendant met the standard of care. The arbitration provided us with the opportunity to cross-examine the defendant in a number of areas that had developed since his deposition.[3] The arbitration was completed in half a day.

On July 21, 2015, the arbitrator awarded Holly the full amount available: $50,000. Opposing counsel immediately notified us that his client wished to appeal the decision *de novo*. Efforts to settle the case went nowhere. The defendant's insurer, The Doctor's Company, and the defendant steadfastly maintained this was a "zero offer case." After a fair amount of post-arbitration discovery, including multiple depositions of treating providers, the plaintiff's testifying standard of care expert, and the defense expert, Dr. David Belfie, the *de novo* trial began on September 26, 2016 in Seattle before the Honorable Suzanne Parisien.

Because the collateral source rule is relaxed in medical malpractice cases, we anticipated that defense counsel would elicit testimony relating to Holly's Labor and Industries benefits. Our strategy was simple: make it clear to the jury that the State of Washington would expect—and was entitled to receive—repayment from any verdict Holly received. The nature of repayment and any "discount" Holly received was too speculative for the defense to introduce. The jury simply heard that Holly was happy to repay the State for the unnecessary medical treatment and prolonged time loss she underwent as a result of the defendant's negligence. Instead of undermining Holly's damages, we used the collateral source evidence to substantiate her damages and legitimize her injury and extensive time loss. We argued the State of Washington agreed with plaintiff's expert's future damages and wage loss calculations.

To avoid paying fees and costs under MAR 7.3, the defendant needed to improve his position subsequent to filing for trial *de novo* by either winning a defense verdict or limiting the plaintiff's damages to less than $50,000. Instead, on October 5, 2016, after seven days of trial, the jury returned a verdict in Holly's favor for $188,000: $83,000 in past economic damages, $45,000 in future economic damages, and $60,000 in non-economic damages. Our client was overjoyed, crying as the verdict was read. The jury had awarded her more than three times her arbitration award.

The jury disregarded the defendant's liability and causation defense and found in a 10-2 verdict that the defendant was negligent and proximately caused Holly damages. Importantly, we made a reasonable and conservative damages request in our closing argument, knowing that MAR 7.3 would provide additional compensation. The jury appreciated the conservative request and returned a verdict within the range of damages we had requested.

Per the jury, the defendant's own testimony, as well as the testimony of his expert, Dr. David Belfie, convinced them of the defendant's negligence.

Dr. Belfie had essentially testified that the defendant could place the anchor wherever he wanted, and relied heavily on surgical discretion. Importantly, Dr. Belfie testified that while he would not have placed the anchor on the articular surface, it was still within the standard of care. The defendant had refused to concede that the anchor was placed on the articular surface, and stated that he had placed it correctly on the glenoid rim. However, Dr. Belfie clearly testified that the anchor had been placed within the joint itself, rather than on the glenoid rim. Due to scheduling issues, the defendant's direct testimony had been interrupted by Dr. Belfie's testimony. He stated to the jury that he did not agree with Dr. Belfie, placing him at odds with every single medical expert, plaintiff and defense, who had testified during the course of the trial. The defendant capped that statement off by claiming that he was the best surgeon in his practice group and that he could "operate circles around" his colleagues. As this jury seemed to affirm, sometimes hubris carries a hefty cost.

Following trial, we successfully negotiated our attorney's fees and costs with opposing counsel, resulting in a net verdict of $338,000. Due to repeated conversations with our client regarding the nature of arbitration and the lack of a guarantee of receiving fees and costs, our client was extremely excited about our victory.

Final Thoughts

This particular strategy of pursing important medical malpractice claims through mandatory arbitration can be applied successfully, but we recommend that you carefully pursue cases where you can effectively manage costs in the initial arbitration and where the theory of liability is not unduly complicated. Here, only one expert witness—the subsequent treating physician—was necessary to offer standard of care and causation opinions at the arbitration. In cases where multiple disciplines are required, the case will mostly likely become too expensive to pursue, draining any potential recovery to the client in the event that the defendant does not de novo the judgment.

Once the arbitration award was appealed by the defendant, a decision was made by Ashton and myself to retain a testifying expert and invest a significant amount of time and money into further developing our liability and damages themes for trial. The infrequency of this strategy in medical malpractice cases clearly impacted the defendant's insurer. From our perspective as the case neared trial there was a deliberate effort to streamline the trial presentation and a mindfulness that a plaintiff's verdict would necessarily require the insurer to be paying both parties expenses and attorney's fees.

In the end, providing Holly with a sense justice and accountability made the risk and effort well worth it. Personally, it was tremendously enjoyable to team up with Ashton and try this case. He and his paralegal, Jennifer Cott, brought an energy and tenacity that made a big difference in bringing the verdict home for Holly.

As we strive to promote justice and accountability for injured members of our community, it is worthwhile to consider this unorthodox approach for select medical malpractice claims. You may be able to pursue a worthwhile matter on behalf of a truly wronged, damaged and deserving victim.

Tom Vertetis, *EAGLE member, is a partner at Pfau Cochran Vertetis Amala, primarily representing injured victims in complex personal injury, wrongful death, medical malpractice, school liability, and civil rights claims.*

1 Last biennium, SHB 1248, a bill to expand Civil Arbitration passed the House and the Senate Law & Justice Committee and was nearly signed into law. The bill highlights included: raising the civil arbitration limits to $75,000; requiring the aggrieved party to sign a declaration of intent; and increase filing fees from $220 to $250. Due to the growing support for alternatives that will relieve case volume within the courts, it is likely tha the MAR limits will be raised in the near future.

2 RCW 7.06.060(2) provides the prevailing party can recover typical statutory costs, reasonable attorneys' fees, and expert fees after the date of the de novo.

3 It is recommended that you retain a court reporter to transcribe the defendant's arbitration testimony if you anticipate the matter being appealed.