

Dissecting a Medical Malpractice Trial



By Daniel J. Buba

The scope of medical malpractice victims run the gamut from factory workers, electricians, laborers, carpenters, mechanics, shipyard workers, salesmen, merchant seaman, plumbers and maintenance workers; to engineers, stay-at-home moms, doctors, attorneys, military dependents, clergy, and all the cubicle dwellers of the information technology age, and beyond.

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In the United States, a trial is thought to be the most common manner in which disputes are resolved. Contrary to what we see on television, however, very few cases actually make it to trial. The U.S. Department of Justice recently reported that only about three percent of all civil cases are resolved by a trial. The vast majority of civil lawsuits, and medical malpractice cases, are settled or dismissed before any of the litigants see a courtroom.

Trial Participants

In every civil trial, there is a plaintiff (patient) and a defendant (doctor), collectively called the parties. The plaintiff is the party with the complaint, the accuser, and the defendant is the party against whom a complaint is brought, the accused. Some cases may involve multiple plaintiffs, multiple defendants, or both. Regardless of the numbers of parties, however, there are always two sides to a lawsuit. An attorney usually represents each side, though attorney representation is not always required.

Also participating in the trial are witnesses. Each party presents its case through the use of witnesses. Witnesses serve to tell the story of the parties. The plaintiff or defendant may also be a witness. The parties may also call a special kind of witness, called an expert witness, to testify on their behalf. An expert witness is simply a witness with experience in a particular field, whose testimony will aide the lay jury in understanding certain aspects of the case.

In most medical malpractice cases, the plaintiff must present expert testimony from a health care practitioner that the defendant fell below the standard of care required and caused injury to the patient. The reason for this requirement is that laypersons do not have the expertise to make an unaided determination that a doctor did or did not do anything wrong in treating a patient.

The only time when expert medical testimony is not needed in a medical malpractice case is when the issue to be considered is within the realm of a layperson's knowledge. Leaving a surgical instrument in a patient's body, or operating on the wrong limb need no expert testimony.

The judge and jury are the final participants in a trial. The judge presides over the trial, and makes rulings regarding the law and its application to the case. The jury members are the fact finders. They listen to the evidence, and determine the facts. For example, when two parties tell different versions of the same event, the jury decides which side is true. In cases where there is no jury, the judge decides both the law and the facts.

Burden of Proof

In all civil trials, the plaintiff, as the accuser, has the burden of proving his case. Much like a criminal defendant, a civil defendant has no burden and is presumed "innocent" of any claim by the plaintiff. As a result, if the plaintiff presents no evidence, or insufficient evidence to support his claim, the defendant wins without having to present his case. The burden the plaintiff carries is that he must prove his case by what is called a preponderance of the evidence. In other words, the plaintiff must prove it is more likely than not that he should win. The best way to visualize this burden is to imagine a set of scales. If the scales are even, or tipped in favor of the defendant, then the plaintiff has not carried his burden, and loses. In order to prevail, the plaintiff must tip the scales in his favor.

To prove a case of medical malpractice, a plaintiff-patient must present evidence that the defendant-doctor was negligent, and the plaintiff does this by proving the treatment provided was below the applicable standard of care. The "standard of care" is the care and skill that a reasonably prudent practitioner would provide in treating a patient. It is established by the medical community at large, and is constantly evolving. Care that violates the standard of care today may not necessarily violate the standard of care several years ago. This distinction is an important one, since most cases take several years to get to trial. The standard of care is never based on the outcome of the case; a bad result does not necessarily mean a violation of the standard of care.

Expert medical testimony is required to establish a violation of the standard of care in virtually all medical malpractice cases. A plaintiff who fails to present the required expert medical testimony in a medical malpractice case will lose. The plaintiff must also produce expert medical testimony that the alleged negligence caused the injury.

For example, suppose that a patient's widow brings a medical malpractice case against a surgeon who admitted the patient for removal of an AO plate embedded in bone. The plaintiff-widow alleges that the surgeon should have done something to prevent a pulmonary embolism, which occurred three days after the patient was dismissed from the hospital, killing him. The patient might have an expert who would testify that she would not have removed the AO plate, but left it in place. Such testimony does not carry the burden of proving care below the standard required of the surgeon. Indeed, in most cases, the standard of care allows a practitioner to choose from a variety of treatment options within an acceptable range.

Mere testimony by an expert witness that “I would have treated this patient differently” is insufficient to establish a breach of the standard of care. The bad result also is not itself proof of any negligence. Nor is there any evidence that the doctor caused the patient’s death (i.e., that the embolism would not have occurred without the alleged negligence of the surgeon). Therefore, doctor wins on all elements.

Trial Types

There are two types of trials, trial by jury and trial by judge. As noted above, in a trial by jury, the judge determines the law and the jury determines the facts. In a trial by judge—called a “bench” trial—the judge determines both the law and the facts. The U.S. Constitution guarantees a trial by jury. If a party does not request a jury trial, however, the right to a jury trial can be waived.

Most civil cases in the United States are tried by jury. Of the 3 percent of all cases that go to trial, the Department of Justice reports about two-thirds are jury trials, and one-third are bench trials.

Whether to try a case to the judge or to a jury is strictly a matter of choice by the litigants. If either party timely requests a jury trial, however, the case must be tried to a jury. Because of the constitutional implications, in most cases both parties must waive their right to a jury trial in order for the case to be tried to a judge. In a few instances, such as trials for injunctions and family law matters, a jury trial is not an option and a judge must hear the case. However, the majority of civil issues offer the litigants a choice between bench or jury trials.

So why would anyone choose to have a case heard by a judge as opposed to a jury, or vice versa? The reasons are mainly based on preconceived notions about judge and juror biases. Generally, most litigants favor a jury over a judge because the decision is put into the hands of many rather than in the hands of one. Plaintiffs usually like juries because lay individuals are believed to be more sympathetic, and a plaintiff can appeal to the emotions of a jury. Conversely, defendants usually prefer bench trials because a judge is thought to be more objective in deciding a case. Requesting a bench trial can also result in a much quicker trial date. Since court dockets in most large cities are becoming increasingly congested, the time difference between a jury trial date and a bench trial date can be literally years.

None of the perceptions about the benefits of a jury trial or a bench trial apply to all situations—every case is different. There is at least some empirical evidence that some of the commonly held conceptions about bench and jury trials are actually misconceptions. For example, while it is almost universally believed that juries tend to favor plaintiffs and award much higher monetary amounts, a recent study by the Department of Justice¹ suggests that *judges* favor plaintiffs and return higher verdicts. Still, jury trials outnumber bench trials by about two to one.

¹ See Civil Jury Cases and Verdicts in Large Counties, Civil Justice Survey of State Courts at: www.usdoj.gov/bjs/abstract/cjcavilc.htm.

Jury Selection

The selection process for a jury begins with what is called the jury pool. A number of citizens are selected as potential jurors, usually several times the number of jurors needed for a trial. From this pool of potential jurors, the jury panel is selected.

The size of the jury panel varies by state and locale. Most juries consist of about six to twelve individuals on a panel. In addition, one or more alternate jurors may also be selected. Alternate jurors sit with the jury and hear evidence just as all the other jurors. In some states, they also sit in on jury deliberations, though they are not allowed to participate. If for some reason a member of the panel is unable to continue with the trial or deliberations, the alternate juror fills in. The number of alternate jurors varies, and determining the number is usually left to the discretion of the judge. Generally, the longer the trial, the more alternate jurors.

Before any potential juror appears at the courthouse for a trial, usually a questionnaire form is mailed for the individual to complete and return to the court. Such forms request information such as name, age, occupation, educational background, participation as a party or witness in previous litigation, previous jury service, etc. Attorneys for the parties are able to obtain and review these questionnaires in advance of the trial date.

On the day of trial, when the potential jurors arrive at the courthouse, the judge typically asks some generic questions about their ability to serve. The judge may ask whether any potential juror has a problem staying for the duration of the trial, or whether the potential jurors know any of the parties or their attorneys. The purpose of these questions is for the judge to determine which, if any, of the potential jurors will be excused immediately from service.

Many juries tend to be comprised of citizens with little or no college education. One of the possible reasons for this result is that many professionals, especially medical professionals, request to be excused from jury service, citing their professional commitments as justification. Ironically, professionals are usually the first to complain when juries who lack any representatives with advanced education hear their own cases. Once the judge is finished with the preliminary screening of the jury pool, voir dire begins.

[A] Voir Dire: Questioning of the Jurors

Voir dire literally means, “to speak the truth.” It is the term used to represent the preliminary questioning of potential jurors. The purpose of voir dire is to uncover any bias in potential jurors. Plaintiffs attorneys in medical malpractice cases will try to determine if the potential jurors have any strong connection to a health care provider that might make the juror favor the defendant-doctor. Similarly, medical malpractice defense attorneys will try to uncover any bad experiences the potential jurors may have had with a healthcare practitioner, which may make the juror biased in favor of the patient. The judge, the attorneys, or both can conduct the questioning. Most jurisdictions allow the attorneys to conduct voir dire.

Beyond trying to eliminate bias against their clients, attorneys often use the voir dire process to try to “educate” the jury in their favor. They also use voir dire to begin placing before the potential jurors the theories of the complaint and defense thereto to try to gauge their reactions. Skillful attorneys will tacitly use the questioning process of voir dire to prepare the jury to find in favor of their clients.

[B] Challenges of Jurors

When the attorneys and/or the judge have finished questioning the potential jurors, challenges may be made to remove potential jurors from serving on the jury panel. Attorneys use the challenge phase of jury selection to remove jurors who may favor the other side’s case. To remove potential jurors, two types of challenges may be made to “strike” the individual from the jury.

The first type of challenge is a challenge for cause. A “for cause” challenge is one in which the attorneys are required to state a reason for removing the potential juror. The reason given is usually that the challenged juror cannot hear the case fairly for one reason or another. For example, a juror may have stated that he or she will not abide by a judge’s instructions on the law because he or she does not think the instruction is fair. Such a situation is a clear case to have the juror removed for cause. The number of “for cause” challenges are unlimited, and the judge decides whether to excuse the challenged potential juror. Other challenges for cause may be based on a claim of juror bias. In practice, however, very few for cause challenges based on alleged bias are sustained.

The second type of challenge is a peremptory challenge (note the challenge is *peremptory*, meaning absolute, not *preemptory*). Each party is given a certain number of peremptory challenges in which to remove any potential juror from the panel. In civil trials, each side generally has two or more peremptory challenges.

No reason is needed to strike a potential juror when using a peremptory challenge, and the individual is automatically excused. The only exception is the strike must be race and gender neutral. Where a pattern of strikes suggests peremptory challenges were used to remove potential jurors because of their race or gender, the entire process must be restarted. Volumes of law journal articles have been written about race- and gender-based peremptory challenges, and an extensive discussion is beyond the scope of this chapter. Suffice to say, objecting to peremptory challenges because they are race- or gender-based is the exception rather than the rule. In most cases, the number of challenges allowed is too small to show any pattern.

[C] Jury Selection Logistics

Ordinarily, the jury box is filled with potential jury panel members by randomly selecting names from the pool of potential jurors. When a potential juror is removed by a challenge, that juror is replaced with another member of the jury pool. Each newly selected potential juror is questioned, and then, if appropriate, challenged. When each side has exhausted all of its challenges, the jury selection is complete.

The time to conduct jury selection varies. Supposedly, in the “old days,” jury questioning would take many days. In our current heavily congested court system, however, most judges limit the voir dire process to just a few hours.

[D] Preliminary Instructions to the Jury

Once the jury is selected, the judge will give the jury preliminary instructions. These instructions usually involve statements of the law and the case such as the basic allegations in the lawsuit, which side carries the burden of proof, and the presentation of evidence. The judge will also instruct the jury regarding more general issues such as note taking, limitations on discussing the case, and breaks in the trial. Of course, in a bench trial, no preliminary instructions are necessary. After the judge gives the jury preliminary instructions, the formal presentation of the case begins with opening statements.

Opening Statements

The opening statement phase of a civil trial is when the case really begins. Some lawyers very firmly believe that cases are won or lost during opening statements. In this phase, attorneys provide a road map of the trial by telling their client’s side of the story, while at the same time trying to convince the jury to find in their client’s favor.

Arguments are not allowed during opening statements. Rather, attorneys are only allowed to state what the evidence will show. Most attorneys find this to be a distinction without much of a difference. For example, the statement “Dr. Smith crippled Mrs. Jones by performing unnecessary surgery,” could be considered argument, and not allowed during opening statements. Stating “the evidence will show that Dr. Smith crippled Mrs. Jones when he performed unnecessary surgery,” however, is not considered argument because the attorney is merely stating what he believes the evidence will show.

Depending on the complexity of the case, attorneys may use exhibits during opening statements. Such exhibits are not considered evidence, but only illustrative of what each side intends to prove. Some attorneys may even use very technical computerized presentations during opening statements. Any such “props” are fair game as long as the information presented can be described fairly as “what the evidence will show.”

The time length for opening statements varies from jurisdiction to jurisdiction, and from case to case. Cases that take several weeks to try may involve half-day long or longer opening statements. Cases that take a few days to try—which is probably most cases—involve an hour or so per side for opening statements.

Presentation of Evidence

[A] Witnesses

After the attorneys finish telling the jurors what the evidence will show, the presentation of evidence begins.

Evidence is presented primarily by calling witnesses to testify on the client's behalf. The party calling the witness first asks questions during what is called direct examination, or "direct." The opposing party then gets an opportunity to ask questions of the witness during cross examination, or "cross."

Questions on cross must be limited in scope to the questions that were asked on direct. Issues not raised during the direct examination may not be raised. Cross-examination is not required. In some instances, an opposing party may have no questions at all for tactical reasons or because the witness testified to unimportant or uncontested issues.

Following cross-examination, the party calling the witness has an opportunity to conduct redirect examination, or "redirect," and following any redirect, recross examination may take place. Each subsequent examination, however, is limited in scope by the subject matter of the previous examination. The idea is that as each round of questioning is concluded, the focus gets narrower and narrower. Consequently, for example, if no questions were asked on cross, redirect is not allowed. After recross, the process is usually concluded, although on rare occasions a judge may allow further direct and cross if circumstances so warrant.

[B] Exhibits

Exhibits are tangible pieces of evidence that are relevant to the case. Medical records, photographs, and objects are common examples of exhibits that may be used at a civil trial. Basically, any tangible object may be used as an exhibit if it will aid the finder of fact in the case.

The introduction of exhibits at trial is done primarily through witnesses. In order for an exhibit to be introduced into evidence, however, a witness must testify that the exhibit to be introduced is authentic, true, and accurate, and it must be relevant to an issue in the case. Such testimony is called foundation testimony. Before any exhibit can be introduced into evidence, a foundation must be laid.

Not all exhibits are introduced into evidence. For example, a skeletal model of the skull may be offered as an exhibit in a neurosurgery injury case because it might aid the jury in understanding the case. The skull model, however, may not be relevant to any issue in the case, and therefore cannot be introduced into evidence. Such an exhibit is called a demonstrative exhibit.

[C] Objections

During the course of witness testimony or the attempted introduction of an exhibit into evidence, an attorney may state an objection. The main purpose of an objection is to prevent the presentation of certain information to a jury. Information that is not relevant or otherwise prohibited from being presented to a jury is objectionable. It is important to know that the conduct of a trial is not a wide-open search for the truth. Rather, it is a decision-making process in which the parties present their cases according to rules of evidence and procedure.

For routine objections, the attorneys will make brief statements in open court in support of or in opposition to an objection. The judge will then issue a ruling out loud from the bench. In some situations, however, an attorney may object to potentially damaging testimony that he or she wants to keep from the jury, in which case arguing the objection in open court may reveal the damaging information. In such an instance, the attorneys may ask to approach the bench for a “sidebar.” Each attorney then approaches the judge’s bench, and will discreetly argue the objection out of the jury’s earshot. If the objection involves a major issue that requires extensive argument, the judge will excuse the jury from the courtroom so the attorneys can present their arguments out loud and on the record.

If evidence is excluded and an attorney feels the judge’s ruling was incorrect, the attorney may make what is called an offer of proof. In this instance, the excluded evidence is presented on the record, but out of the presence of the jury. In this way, the evidence is preserved if the party decides to appeal the decision. An offer of proof is rare, but effective if an appeal is contemplated.

[D] Order of Evidence Presentation

Since the plaintiff has the burden of proof, the plaintiff presents his case first. The presentation of the plaintiff’s case is called the plaintiff’s case-in-chief. The plaintiff’s case-in-chief includes what are called the essential elements of the complaint. A failure to present evidence on any one essential element produces a failure of the plaintiff to carry his burden. When the plaintiff finishes presenting his evidence, the defendant has the opportunity to make a motion for what is called a directed verdict.

When a defendant moves for a directed verdict, he is asking the judge to enter a judgment in his favor because the plaintiff failed to present evidence crucial to the plaintiff’s case. If the plaintiff has in fact failed to present evidence on a crucial aspect of his case, the judge will enter a verdict in favor of the defense. The case is over, and the defendant need not present his case.

If, however, the plaintiff has presented at least some evidence, regardless of how weak that evidence may be, then a directed verdict motion will be denied. The judge will not substitute his judgment for that of the jury in determining whether evidence is strong enough for the plaintiff to win. In that situation, the defendant will have to present his case-in-chief.

Following the defendant’s case-in-chief, the formal presentation of evidence is usually concluded, unless the plaintiff wants to present rebuttal evidence. Rebuttal evidence is evidence that may be presented to address any new issues raised by the defense that were not previously addressed by or disclosed to the plaintiff. The decision of whether to allow rebuttal evidence lies in the judge’s discretion. In some cases, surrebuttal evidence, the defendant’s “response” to rebuttal evidence, may even be allowed.

Closing Arguments

When each side has concluded its case, closing arguments begin. As with opening statements, the time length allowed varies from case to case and court to court. Unlike opening statements, however, just about anything goes during closing arguments. The parties are free to summarize and—as the name indicates—argue their case during closing in virtually whatever manner they see fit. All exhibits introduced into evidence are free game.

The only limitation during closing arguments is that the attorneys are supposed to confine their arguments to matters that are supported by the evidence. An objection that an attorney is misstating the evidence, or arguing an issue not supported by the evidence, however, usually gets the following reply from the judge: “The jury heard the evidence, and knows what it is.” In other words, the jury, as the official fact finder, knows whether a closing argument is or is not supported by the evidence. The parties are therefore given great latitude in presenting their closing arguments.

Final Instructions

Following closing arguments, the judge usually excuses the jury so that the attorneys can argue over final instructions. Final instructions are the instructions on the law the judge gives to the jury to guide them in reaching a decision. Only instructions of law that are supported by evidence in the case are given, and that is what the attorneys argue about. Each side will try to persuade the judge to read an instruction to the jury that is favorable to its case.

As noted above, the jury, as the fact finders, will determine what they believe to be the true version of the facts presented at the trial. The jury will then apply those facts to the law as provided in the final instructions. For example, a final instruction may read as follows:

In order for the plaintiff to prevail, the plaintiff must prove that A, B, and C occurred. If you find the plaintiff has proven each of these elements, your verdict must be for the plaintiff. If you find the plaintiff patient has failed to prove even one of these elements, your verdict must be for the defendant doctor.

As with preliminary instructions, final instructions are omitted in a bench trial.

When the judge has decided which final instructions he or she is going to give, the jury is brought back into the courtroom and the final instructions are read. The judge also instructs the jury on the logistics of reaching a decision, such as choosing a foreman and taking breaks. The jury then retires to the jury room to deliberate.

Jury Deliberations

During jury deliberations, the jury is allowed to discuss the case amongst themselves. If the jury members have followed the judge's preliminary instructions, this will be the first time they discuss the case. Jury research shows that the process of reaching a decision varies widely from jury to jury, as does the time to reach a decision. Like many aspects of the trial process, a lot of conceptions exist about jury deliberations. If the jury deliberates for a relatively short period of time, it is believed they will return a verdict in favor of the defense. This conception comes from the belief that even if the jury quickly decided in favor of the plaintiff, it usually takes a long time to calculate damages. This conception, however, has proven to be a misconception in many cases.

While the jury is deliberating, the parties and their attorneys usually leave the courthouse and wait at a more comfortable location (usually a nearby restaurant, because, for some reason, most jury trials conclude at the end of the day). When the jury returns with a verdict, the parties are contacted to return to the courtroom.

If the jury is unable to reach a verdict, then the jury is hung. The remedy in the case of a hung jury is a new trial. Because most judges (and parties and attorneys) would rather crawl across a room full of broken glass than re-try a case, judges will pressure the jury to keep deliberating until they are able to reach a decision. If that fails, the judge declares a mistrial, and a new case is eventually scheduled.

The Verdict

When the jury returns to the courtroom to announce its verdict, the collective hearts of the parties and their attorneys can probably generate a registration on a Richter scale. It is the moment of truth, the climax of the entire trial process. After the verdict is read, either party may poll the jury to "verify" that each juror supports the decision, though a polling of the jury is always done, if at all, by the losing party.

Once the jury is polled, the losing party can also ask the judge to overturn the jury decision, called a motion for judgment notwithstanding the verdict, or JNOV (judgment *non obstante veredicto*). A motion for JNOV is only granted if the judge, in hindsight, believes the case should not have been submitted to a jury because there was no evidence that a reasonable person would have credited on an essential element of the plaintiff's case. The judge has the discretion to enter a JNOV, but such discretion is rarely invoked. In most situations, judges are very hesitant to substitute their own judgment for that of the jurors. Once the judge enters a verdict, the trial is over.

A medical malpractice trial is nearly always a roller coaster ride of emotions. When the opposing side is putting on its case, you can feel as though you are being pummeled over the head with a baseball bat, and defeat is inevitable. Moments later, your attorney can perform a stunning cross-examination, and victory seems certain. Such is life in our adversarial system, where two parties present the case in a punch, counter-punch format. When the verdict is finally entered, regardless of the outcome, most parties are relieved that it is over. All have a more thorough understanding as to why 97 percent of civil cases never make it this far.

THE END