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A DOWDEN PUBLICATION SEPTEMBER 1990

How Lawyers Pick Malpractice Cases

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How Lawyers Pick Malpractice Cases

Give the devils their due: They really don't grab at every chance to bring suit. Why not? Mostly because they can't afford to.

BY GABRIELLE JONAS
Contributing Editor

Plaintiffs' attorneys. From your perspective, they're vultures eager to feast on the misfortunes of Ob/Gyns and other physicians. From their perspective, physicians and their defense lawyers definitely have the upper hand.

By some measures, they're right: According to a 1987 ACOG study, 68 percent of all Ob/Gyn negligence cases adjudicated by arbitration or jury are won by the doctor. More than 36 percent of cases taken on by the plaintiffs' attorneys are dropped or settled without payment. Why are their batting averages so low?

One reason is that in each case, they must prove three tough-to-prove things: negligence, bad outcome, and causality between the two.

Mindful of those and other major obstacles they'll have to overcome in the average 1.9 years of litigation per case, most plaintiffs' attorneys are surprisingly selective in winnowing cases. Some turn down 99 percent of all cases referred to them. Says Ken Pedersen, a Twin Falls, Idaho, plaintiffs' attorney, "That we plaintiffs' lawyers can choose our battles is our greatest weapon."

But being able to choose the battles can lead to victories that are hard on the conscience. In Mobile, Ala., doctor-turned-plaintiffs' lawyer Valentino Don Bosco Mazzia, says a firm once took on a case against his advice—and won. "It was a sympathy verdict," says Dr. Mazzia: "We had a model of a woman's pelvis up there, complete with a doll and forceps in place. The kid, with brachial plexus palsy, was sitting there. We won $500,000. We shouldn't have won. It wasn't right, but it happens."

"Country lawyer" Pedersen accepts one out of every 30 to 40 cases that come to him, primarily over the telephone. That's far less than the 5 to 15 percent acceptance rate in large cities.

Chicago attorney Louis Hilfman has become more discriminating in accepting cases ever since a 1985 Illinois ruling made an affidavit from a reviewing doctor of the same specialty mandatory in filing a malpractice suit. Without it, Hilfman says, plaintiffs' lawyers won't file. In a rare collaboration, attorneys joined doctors in lobbying for this law.

Medical malpractice makes up only 25 percent of Hilfman's overall personal injury caseload. "In medical malpractice cases," he says, "you see more people who think there's been negligence because it's difficult for them to evaluate whether it's a meritorious case. Often, they don't understand that their treatment didn't result in their bad outcome. With machinery or auto accidents, it's easier to figure out what went wrong."

Walter C. Ward, a Miami physician-turned-lawyer, says that of all the phone referrals he receives, "the vast majority provide no reason to proceed; only 10 percent are accepted for investigation after the first blush." Of those, a whopping 90 percent are dropped. So the clients who finally meet with Ward represent only 1 percent of the original callers.

An eye on the prize

Plaintiffs' attorneys don't just look at the winnability of a case. They also focus on what size settlement they might expect. But greed isn't always their guide. Unless a case has an expected settlement of at least

$40,000, it may hardly be worth the time and thousands of dollars in out-of-pocket expenses to pursue. Hence, many of the "smaller" cases are not being pursued, even when they have merit.

The out-of-pocket expenses can be prohibitive, thanks to the new aggressiveness of insurance companies. They're now defending cases, no matter how small, with unprecedented fervor. One of their new tactics: Since each side must pay the costs of deposing the other side's witnesses, the companies are summoning up to 30 witnesses per case. That infuriates plaintiffs' attorneys.

"They're fighting us tooth and nail," says plaintiffs' attorney Pedersen. "It's a deposition for every witness. All the witnesses are out of town, so you have to fly places. No money is spared in the defense of these cases—none."

In addition to deposing plaintiffs "to death," the defense may also try to draw out the case ad infinitum. About a quarter of all OBG cases take three or more years from filing to closing, according to an ACOG study.

La Jolla, Calif., attorney Merel G. Nissenberg says the way defense attorneys get paid contributes to the stretched-out time frame for some malpractice lawsuits: "You can forget any quick resolution. The longer they can draw out a case, the more money they make. They have a vested interest in keeping the litigation going."

Nissenberg adds that the defense attorneys' accomplished "milking of cases costs the insurance companies millions of dollars"—a cost that's passed along to doctors in the form of higher malpractice premiums.

Not true, protests Bob Miller, vice president of consumer affairs for the Medical Protective Company, Ft. Wayne, Ind., one of the largest doctor-owned malpractice insurers: "The time element is dictated by the plaintiffs' attorneys. They file so much paperwork that it drags things out.

"Keeping costs down is in the company's best interest," Miller points out. "In a case of severe patient injury, or when the doctor's reliability is questionable, our intent is to resolve as quickly as possible. We have no incentive to build up the costs of those cases. But when the company feels the doctor is not culpable, that doctor will be defended to the death.

"We cap how much defense attorneys can bill before a case goes to trial," Miller says. "We have people in our home office who audit them. And we instruct our attorneys not to do a lot of things that attorneys would like to do." One of those instructions: Do not file nonessential interrogatory statements or depositions unless they're instigated by the plaintiff's side or they're vital to a good defense.

JACK SPRATT/THE PICTURE GROUP

Point of pride: *Chicago attorney Barry Goldberg says he's changed the way OBs practice medicine.*

A different brand of cap is affecting plain-

tiffs' attorneys' choices. Six states—Kansas, New Mexico, Indiana, Nebraska, Louisiana and California—are putting limits on how much plaintiffs can collect for pain and suffering. Hence, plaintiffs' attorneys are turning more and more toward cases with survivors—injuries bring in far larger settlements than death.

That's because there are no caps on medical expenses or loss of income. So cases involving brain-damaged infants, whose medical expenses will be accrued over a lifetime, are particularly attractive to the plaintiffs' attorney: The awards can be life-expectancy-high.

ROBERT BURROUGHS PHOTOGRAPHY

Stall tactics: *Plaintiffs' attorney Merel G. Nissenberg blames the defense attorneys and insurance companies for drawing out the time frame of lawsuits.*

Plaintiffs' attorneys say that caps have effectively frustrated their original goal as malpractice lawyers—to help the underdog. Idaho attorney Pedersen explains:

"The problem is the small case—infant death or a healed injury. Those you can't afford to take. We're turning down all sorts of smaller meritorious cases because there's no potential profit. The overwhelming reason I turn down cases is that the people aren't hurt badly enough."

With a $400,000 cap in his state on "noneconomic" loss, Pedersen says he has to train his eye not on what the plaintiff can collect for pain and suffering, but on the amount for future medical expenses or loss of income.

Considering that out-of-pocket expenses alone tend to run from $10,000 to $30,000, Pedersen says, a case doesn't become worthwhile economically unless a settlement of at least $200,000 is waiting at the finish line.

Caps make any Ob/Gyn case involving the death of a baby almost pointless to pursue, Pedersen says: "There are no lifelong medical expenses to cover in a settlement, nor is there loss of work or support."

In a trial involving a prolapsed cord and the eventual death of a 1-year-old, Pedersen spent almost $20,000 out-of-pocket, and about $50,000 in time. Based on his 40-percent contingency fee, a $200,000 settlement would have brought him a gross of $80,000—a $10,000 profit. But a $400,000 court award would have brought a gross of $160,000—$90,000 over basic costs. "Even if he gets $100,000 to $200,000, the lawyer is going to lose his ass," Pedersen says.

That's just what he did. The jury said negligence had occurred, but wasn't sure that the negligence caused the prolapse injury. The case is now on appeal, which will cost Pedersen another $5,000 to $10,000 in lawyer time.

If he wins, he'll make $50,000 to $55,000. If he loses, he kisses his $75,000 to $80,000 goodbye. But Pedersen notes that most lawyers factor into their high fees the losses

from unsuccessful cases. And sometimes he ends up with a gambler's reward: "I come out even, but I win," he says.

Medical Protective's Miller doesn't buy the lament about plaintiffs' attorneys being squeezed out of smaller cases. "The vast majority of cases," he says, "are resolved with either a very low payment, or none at all. Smaller cases make up the bulk of their caseloads, which would indicate that they're making money on these cases."

But Florida attorney Ward says he never sets arbitrary limits: "I'll take cases worth $40,000 to $50,000—even cases where plaintiffs end up with $10,000 or $20,000. That's more than they've ever seen in one place at one time in their lives. I take cases with the risk that they will not make much money."

In California, where there's a $250,000 cap on pain and suffering, attorney Nissenberg says she takes on small cases knowing that a relatively small amount may mean the difference between getting by and destitution to some clients. In a long-shot case involving a prison inmate who gave birth to a 5-month-old fetus who died four hours after birth, Nissenberg says she put the plaintiff's portion of the $15,000 settlement in a bank account, creating "a nice little nest egg" for when she comes out of prison.

Dividing the spoils

There's no question that attorneys do much better on larger cases. Cerebral palsy cases, for example, can bring in $2 million to $5 million settlements for lifelong care of the child. But even 40 percent of huge settlements and awards comes out to less than it appears. Take one of the $1 million settlements Pedersen negotiated:

Right off the bat, he turned half of his $400,000 fee over to the referring lawyer (co-counsel). The rest, minus office expenses, was split four ways between himself and his three partners. That left Pedersen with something under $50,000 for a case that took nearly three years to close. But Pedersen, of course, benefits from similar splits of his partners' cases.

If any one individual is responsible for setting the course for what cases lawyers are choosing, it has to be Chicago attorney Barry Goldberg. He's won three $6 million malpractice cases, and recently settled another for $5 million. He's a favorite of talk-shows of the Oprah Winfrey variety.

At the very least, Goldberg is partially responsible for the increase in C-sections nationwide, due to the high-profile cases he handled in the 1970's. And he's not shy about saying so: "Cesarean sections increased in frequency statistically as a result of certain settlements and verdicts on cases I handled."

Goldberg may have had the same influence on amniocentesis cases. In a high-profile 1974 suit he invoked an ACOG opinion, published in JAMA two months before

"Cesareans increased in frequency statistically as a result of certain settlements and verdicts on cases I handled."

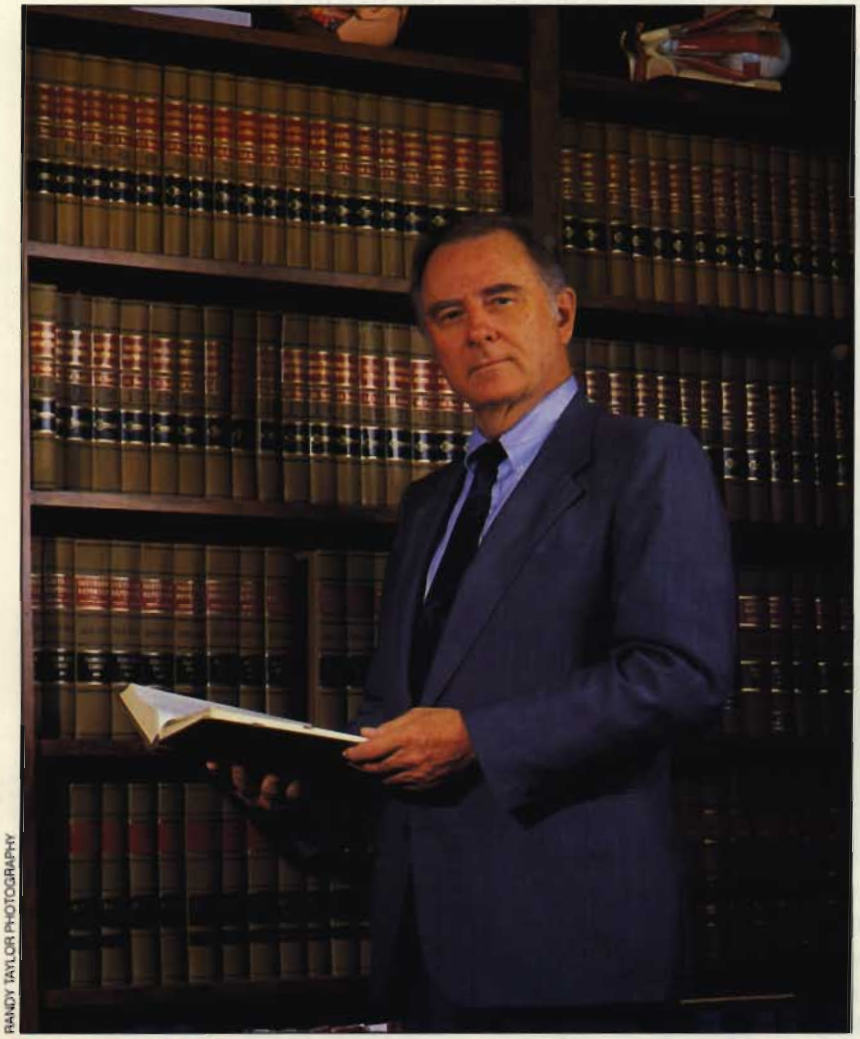
the trial, that pointed to the procedure as "highly recommended" for women 35 or over. The published opinion was essentially a description of the procedure and how to best utilize its results. It wasn't until four years later that ACOG made an "official" recommendation.

The newness of the JAMA report provided Goldberg with a highly exploitable opening. As he puts it: "When you're at the cutting edge of a new standard of care, the profession has to keep up with it. But it takes a while for the troops at large to catch up with what the standard has become."

It's pretty much the same story for electronic fetal monitoring. Many of Goldberg's suits between 1972 and 1981 focused on EFM, also a new technology at the time. "Many Ob/Gyns weren't using it frequently enough," he says. Although a recent Institute of Medicine report concluded that

there's "no demonstrated benefit of EFM," Goldberg is sticking to his guns.

He says anti-EFM studies are defense-driven and sponsored, with an eye toward dismantling one of the sure-fire weapons that plaintiffs' lawyers have in their medical malpractice armamentarium. "If they can destroy the efficacy of EFM and say it's not worthwhile, they can revert to flying blind," Goldberg says. "When the vehicle of the information... is considered to be worthless, you can't persuade a jury with it."



RANDY TAYLOR PHOTOGRAPHY

Sympathy verdict: *"Staying objective isn't always easy," says doctor-cum-lawyer Walter C. Ward.*

Goldberg appears to want Ob/Gyns to abandon their critical diagnostic skills in favor of technology: "There's no question that electronic fetal monitoring is better than flying by the seat of your pants. Without it, diagnosis would revert back to the judgment of the doctor. Then he has to use just his experience and background. It's like saying we should go back to the Dark Ages and eliminate all scientific data."

What cases will lawyers be choosing in the future? Goldberg predicts breast cancer—radical mastectomy vs. partial mastectomy vs. lumpectomy. Another area will be questions on hysterectomies: Are there too many? Are they the new appendectomies?

Although lawyers are primarily guided by economic concerns in choosing cases, sheer outrage sometimes outweighs everything else. Dr. Ward calls one such case his "surprise package." It involved a physician who delivered a baby, sutured the episiotomy and—surprise— another baby. The twin suffered asphyxiation. Says Ward: "These people were already poor. Having a brain-damaged baby on their hands is absolutely devastating." But why the suit? "Instead of doing a cesarean, the doctor fiddled around for two hours."

One attorney, who asked not to be identified, took a small case because the doctor's behavior made him livid. The Ob/Gyn had turned his back on a woman in labor to "kid around with the nurse. The patient grunted and huffed and puffed; out comes the baby and lands on his head on the floor, resulting in a subdural hematoma and umbilical cord damage."

The baby recovered, says the lawyer, but "that type of thing makes you angry. The case was settled for a $35,000 annuity for the child's college education. I risked $7,000 to bring the case to trial, but I felt pretty good about it."

Sometimes instinct guides the lawyer in choosing a case—especially when the attorney is also a physician. Dr. Ward, who left his practice as a GP to ply medical malpractice law, went against the advice of experts to pursue a case involving a 30-hour labor and a newborn with a collapsed lung. "The baby's head had been banging against the pelvic floor all that time," he says.

All the experts, including his own, said

that the child had only minimal brain damage and urged him to accept a $50,000 settlement. But Ward "just knew something was wrong with the child" and sat on the case for six years after filing, waiting to see how the child would develop.

At intervals during those years, Ward filmed the girl side-by-side with her healthy playmate. But no one realized the extent of the child's damage until they saw the film. Did he use the film in court? "Didn't have to," says Ward. "They settled for $3 million when they saw it."

"Was there sufficient damage?"

Most cases aren't selected and pursued on instinct, but on the points of law. "Attorneys first try to determine if there is negligence," says Ward. "And then: Was there sufficient damage to justify the expenditure of time and money necessary to bring the lawsuit? But staying objective isn't always easy. You meet these damaged kids—sometimes you get blinded you get so intent. These things can happen without negligence. You have to sort out which is which."

Says California attorney Nissenberg, "Sometimes there's negligence but not an untoward result. And sometimes there's negligence and a really bad result, but you can't tie them together."

Lawyers who have armed themselves with the medical facts enjoy a distinct advantage in the case-selection process. Nissenberg, for example, owns a "very expansive" medical library and attends medical conferences regularly nationwide.

She takes classes at UCLA medical school, where she also attends seminars in different specialties. "I've had doctors ask me where I got my medical training, which to me is a super compliment," she says. Chicago attorney Goldberg also attends medical conferences and claims to have read "anything ever written" on the medical topics that fall within his legal purview.

For some attorneys, idealism is also a factor in choosing cases. Ward says he's lost thousands of dollars on cases he knew in advance would carry low settlements. Why did he take them? "Because I felt they should be investigated; the people deserved to find out what happened. Often, after spending thousands of dollars I find that there was no case."

Dr. Ward says "This business of lawyers taking frivolous cases is basically nonsense, because anyone who takes frivolous cases is a fool; he's going to lose money."

Most of the plaintiffs' attorneys interviewed say they admire most doctors. "I'm a physician first," says Ward. "I really went into medicine to help people, and I'm still doing that." But admiration for his former colleagues seems shot through with caustic cynicism: "I still have my medical license. I could go and malpractice tomorrow if I wanted to." ■

"Wow! It's David and Lisa, my hamsters!"