

Medical malpractice cases by their very nature require patience, honesty, truthfulness and an absolute knowledge of two difficult disciplines - medicine and law. The marriage of these two disciplines is almost immediate upon the arrival of the client in the plaintiff counsel's office. It is in fact immediate when the marriage has to be explained at the opening of trial to assist the justice or jury hearing the case of the complex nature of facts and law to come to a proper and just decision.

Starting with the client in the plaintiff counsel's office it is incumbent on the plaintiff's counsel to explain liability, standard of care, the number of experts required to support the liability decision, causation, the use of the "retrospectoscope" in proving causation and the fact that experts will have to be used to prove that aspect of the case on the balance of probabilities. Lastly the client must understand the nature of damages in broad terms and the basis upon which experts will have to be called to support those damages. Necessarily, the client will be shattered to hear of the potential cost of disbursements only, let alone fees, and they will be shocked to hear that these cases are defended vigorously by very talented defence counsel. Upon the absorption of this information, the engagement process commences. But it must be brought home loud and clear that the courtship will be a long and tedious one with the ultimate marriage occurring not for seven years.

I don't know of any plaintiff's counsel who can explain in a logically consistent fashion why a two hour time frame of negligence will take the plaintiff on a seven year odyssey towards justice - but it does - it always does.

The tremendous hurdles that have to be jumped, without ever faltering, will ultimately end up with hopefully the marriage of law and medicine meeting before a justice that can conduct the marriage in a proper, efficient, and expeditious manner. The role of the plaintiff's counsel is to ensure that the justice will have the proper materials in advance of hearing the opening of either plaintiff or defence counsel, for it will ensure that the medical jargon that the justice will be hearing throughout the trial is not only well-defined and explained by way of an aide de memo ire (a virtual dictionary of the medical terms that he/she is likely to hear during the course of the trial with the meaning of each term well understood) and agreed to by counsel on both sides.

The "marriage ceremony" (trial) is long in its own right because of the necessity of calling two or three expert witnesses per issue. It must be understood by the plaintiffs that both they and the defendant doctors or nurses or hospitals are "bit players" in the marriage ceremony. For it is the experts who will carry the day for either the plaintiffs or defence.

The marriage can come to a successful conclusion only after all the evidence is in and hopefully after the trial justice has understood all the medical issues and all the special legal issues that are unique in prosecuting these cases.

It is not the standard ceremony, you see, it is a marriage ceremony whose rules of evidence have been laid down specifically for these marriages, such as the partial reverse onus position on causation as set out in *Snell v. Farrell* and followed by numerous cases.

When it comes to these marriages it is causation which is usually the cornerstone upon which the foundation for the cases of both plaintiff and

defence will rest. It is probably the last bastion of law where causation really means "materially or substantially contributed to" the damages. In a car crash case, causation is rarely argued - one car crashes into another and people get hurt. The issue in those cases is whose fault is the car crash.

In medical malpractice there would be many more lawyers practicing if causation was not the major hurdle.

The defence in these cases can come up with many reasons (most of which are smoke and mirrors) to explain a "righteous" plaintiff's case away. This will require some thinking "out of the box", for example, by to hiring geneticists (the defence will say a genetic abnormality), infectious disease experts ("she was going to have this result anyway because she was ill you know"), or the use of what is called the "locality" rule ("you can't hold the doctor negligent because he did not have the resources at hand to do the operative procedure").

The plaintiffs, to finalize the marriage and have a happy union, must parry all of these defences on the balance of probabilities using experts to allow the trier of the fact to come to the proper conclusion. Only then, will justice be done.

So in the end, I guess medical malpractice cases are a big deal - they are hard work, they're taxing emotionally, financially, on both the plaintiff's counsel and plaintiff, and they seem to be never-ending.

On a positive note, tremendous preparation of the case leading to a proper and just verdict is probably the best ride you will have in your professional life.

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