

CALCULATION COMPENSATION FOR NEGLIGENCE

Changing Landscape of Medical Malpractice Case Valuation

BY SHIRLEY BLAZICH, ESQ.

In the past 20 years, the Nevada State Legislature and Nevada courts have sought to create a balance between the rights of injured patients and the rights of healthcare providers serving Nevada communities. In 2004, legislation created limits on the potential recovery that injured plaintiffs in medical malpractice cases could recover, striving to keep doctors from leaving the state due to allegedly increasing professional liability insurance premiums. In 2023, the pendulum swung back and gave more rights back to the injured patients.¹ Nevada courts have also created and clarified laws applicable to medical malpractice cases. As a result of these changes, a sort of sliding scale has been inadvertently created that determines the potential monetary “value” that each medical malpractice case has.

An understanding of how to determine the monetary value of a medical malpractice case is crucial for practicing attorneys. Unlike other areas of law, NRS 41A.081 *requires* the parties in a medical malpractice action, including their counsel and insurers, to attend a settlement conference.² This requirement can be satisfied through a judicial settlement conference or through private mediation. The failure to attend, or participate in good faith, is sanctionable. So how can litigants get better at this valuation analysis to better advise their clients, meaningfully prepare for and participate in required settlement conferences, and get the most benefit from the settlement conference or private mediation?

Whether parties litigate or mediate, they must have their eye on the prize, meaning the likely *end result* at trial. “End result” in this situation does not refer to how a jury might decide a case or what monetary award a jury might give. Instead, the “end result” means what the law allows a medical malpractice plaintiff to *keep* after a jury verdict. Parties often litigate, or come to mediation, without a clear understanding of what the law allows the plaintiff in their case to recover and what will

be reduced by the court in post-trial motions. Realistically determining case value, in addition to liability risk and exposure, will help litigants have productive negotiations that are more likely to result in a settlement. Nevada law will affect the ultimate “value” of a medical malpractice case regardless of whether resolution is achieved through settlement or trial.

Increasing Limits on Non-Economic Damages

Nevada Revised Statute (NRS) 41A.035, enacted in 2004, placed a “cap” on non-economic damages at \$350,000 per case, regardless of the number of plaintiffs or defendants. However, in 2023, the Nevada Legislature increased the cap by \$80,000, to \$430,000, effective January 1, 2024.³ The amount of the cap will continue to increase by an additional \$80,000 each subsequent year on January 1 until the cap reaches \$750,000. After that the statute provides for an annual cost of living increase of 2.1 percent annually. For the first time in 20 years in Nevada, the potential “value” of a case changes every calendar year. As such, depending on what side you represent, there is either an advantage, or a disadvantage, to waiting to

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resolve a medical malpractice case until the next annual increase takes effect. Parties may find that during settlement negotiations, especially if they occur near the end of the calendar year, there is a debate as to amount of the applicable cap that should be paid.

No Limit to Limitations

NRS 41.503 further serves to cap recovery to \$50,000 for negligence stemming from certain emergency hospital care necessitated by traumatic injury and requiring immediate medical attention. In addition, NRS 41.035 limits claims against state-run medical facilities to \$200,000, an increased amount that went into effect as a result of legislative changes in 2019. However, these limitations only apply in certain very specific situations.

Larger Awards for Attorney's Fees and Costs

In medical malpractice cases, a jury verdict is likely to be followed by a request for attorney's fees and costs. This is especially true if an Offer of Judgment was rejected and then that party fails to secure a better result at trial.⁴ In deciding whether to award attorney's fees following an Offer of Judgment made under NRCP 68, the district court must consider the factors set forth in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983): (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith, in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.⁵

The Nevada Supreme Court supports district court awards of attorney's fees and costs. In the recent Supreme Court decision in *Murray v. Centennial 140 Nev. Adv. Op. 14 (2024)*, the court stated that it would uphold awards of attorney's fees and costs that are supported by substantial evidence and would only disturb such awards upon a showing of abuse of discretion. An abuse of discretion is unlikely to be found if the lower court properly analyzed the factors in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) when making its award of attorney's fees and costs. The *Brunzell* factors require the court to analyze: (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived. *Id.*⁶ In *Murray*, the Supreme Court upheld the lower court's award of more than \$700,000 in attorney's fees and costs. According to *Murray*, the district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence.⁷

In 2023, further legislative changes were enacted to increase the contingency fees that plaintiff's lawyers could charge in medical malpractice case to 35 percent of the amount recovered, and to increase recoverable expert costs under NRS 18.005(5) from \$1,500 to \$15,000 per expert.⁸ Medical malpractice cases often require the use of multiple experts, making this a big-ticket item in any request for costs.

The reality of the situation is that recovery of awards for fees and costs is more easily achieved against defendants, most of whom are covered by insurance, than against individual plaintiffs. As such, the law pertaining to awards of fees and costs tends to favor plaintiffs. Increasing and more common awards of attorney's fees and costs play a significant role in evaluating the ultimate monetary value of a medical malpractice case.

Different Treatment of Past and Future Damages

Pre-judgment interest is only available to a plaintiff for past damages, not future damages.⁹ A verdict form needs to clearly differentiate between the two types of damages. Otherwise, if they are grouped together, a plaintiff may not be entitled to pre-judgment interest on any portion of the damages award. The Supreme Court has stated that it is erroneous to award prejudgment interest for the entire verdict when it cannot be determined what part of the verdict represents past damages. *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 428, 132 P.3d 1022, 1035 (2006).¹⁰ See also *Valley Health Sys., LLC v. Murray*, 140 Nev., Adv. Op. 14 (2024). In those cases where the past damages are minimal, but the future damages extensive, pre-judgment interest may be minor or non-existent and therefore would not be a significant factor in a case value evaluation.

According to NRS 42.021, awards for future damages that exceed \$50,000, either party may request that the court issue an order that the judgment be paid in periodic payments. Such payments are subject to modification in the event of the death of the judgment creditor. Meaning that, for fragile and catastrophically injured plaintiffs, they may not be able to collect upon the full value of an award of future damages if they die before the final periodic payment is made.

Collateral Source Rule Loopholes

Unlike other areas of law, evidence of collateral source payments is not excluded from evidence at trial. Under NRS 42.021, a defendant "may" introduce evidence of certain collateral source benefits paid to, or on behalf of, the plaintiff. If the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to any insurance benefits. The jury, however, is not actually required to reduce the plaintiff's award based upon the collateral source benefits the plaintiff received. Ultimately, the jury has the right to award the full amount of any medical special damages without regard to the plaintiff's receipt of collateral benefits. Furthermore, the fact that collateral benefits were introduced into evidence at trial means that a source of collateral benefits (except for federal sources) may not recover, or seek subrogation from, the plaintiff for any of the benefits it paid. This serves to prevent an inadvertent double reduction against a plaintiff in a medical malpractice case. Debate about whether the reduced numbers, or full value of the medical expenses, should be considered as part of a case valuation often neglects to factor in the power of the jury in making the ultimate decision.

Pro-Rata Share of Liability Only is Recoverable

In 2004, NRS 41A.045 abrogated joint and several liability amongst tortfeasors and replaced it with several liability only for defendants based upon the percentage of negligence attributable to that defendant only.¹¹ The Supreme Court went on in the years that followed to clarify that settled defendants, and even non-parties, can be placed on a verdict form and the jury allowed to apportion liability.¹² The monetary value of a medical malpractice case will turn on which defendants the plaintiff can recover against, and which lines on the verdict form will serve to lower a defendant's overall liability. In the majority of cases, only the pro-rata share of liability awarded against a defendant is recoverable.

All in all, these legislative and common law changes have altered the landscape of medical malpractice litigation and how cases are valued over time. Determinations of whether participation in required settlement conferences, and decisions on whether to accept or reject Offers of Judgment, were made in good faith or satisfy the *Beattie* factors, will necessarily include an analysis of case monetary value under the applicable law. Parties exchanging Offers of Judgment, or attending required settlement conferences, with the best chances of reaching a mutually agreeable settlement, will need to understand how recent changes in the law affect case value. Parties proceeding to trial will need to understand how post-trial rulings will affect their recovery or exposure. Changing laws means that litigants must also change how they view and analyze the monetary value of medical malpractice cases moving forward. Past results are not indicative of future success and the path that has been paved leads us to a brave new world of medical malpractice litigation full of pitfalls for litigants that are unsavvy or unwilling to change outdated views about case values.



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ENDNOTES:

1. Nevada Assembly Bill 404 (2023).
2. Nev. Rev. Stat. 41A.081 (2015)
3. Nev. Rev. Stat. 41A.035 (2023)
4. Nev. R. Civ. P. 68 (2019)
5. *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).
6. *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).
7. *Valley Health Sys., LLC v. Murray*, 140 Nev., Adv. Op. 14 (2024).
8. Nevada Assembly Bill 76 (2023)
9. NRS 17.130(2) (Am. 1987)
10. *Albios v. Horizon Cmty's., Inc.*, 122 Nev. 409, 428, 132 P.3d 1022, 1035 (2006).
11. NRS 41A.045 (Am. 2004)
12. *Piroozi v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 100, 363 P.3d 1168, 1171 (2015).

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