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Mega-Verdicts on the Rise

Rock Stars, Diversionary Tactics, and Lack of Willingness to Break from Traditional Defense Practices Sway the MPL Verdict Landscape

By John E. Hall, Jr., and E. Wayne Satterfield, Esq.

Over the past five years, the medical professional liability (MPL) arena has seen an increase in the severity of verdicts against healthcare providers. As shown in Figure 1, almost all of the common MPL categories have seen verdicts of more than $100 million.

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While several drivers play a role in verdict amounts, there are three specific factors that defense attorneys need to be aware of to avoid a mega-verdict: (1) the "rock star juror" phenomenon, (2) periphery accelerants and (3) failing to defend damages.

Jury box infiltration of 'Rockstars'

I'm going to trade this life for fortune and fame. I'd even cut my hair and change my name. 'Cause we all just wanna be big rock stars and live in hilltop houses, driving fifteen cars. –Nickelback.

Regardless of your opinion of Nickelback, their lyrics from "Rockstar" encompass the rich and lavish lifestyle that many people dream of at some point in life. However, living the lifestyle of the rich and famous used to be just that—a dream. Now, though, through real-time videos of celebrities on private jets to selfies of movie stars with million-dollar sports cars, social media allows people, especially millennials, to experience what it's like not having to worry about money.

On a daily basis, people can tune in to Facebook, Twitter, or Instagram and learn that Floyd Mayweather received $275 million for one boxing match or Taylor Swift earned $54 million in just five concerts. However, social media allows a user to go one step further and see how these celebrities spend their money or enjoy their time off. As a result, people want to be millionaires more than ever. It is no coincidence that the Mega Millions and PowerBall jackpots combined totaled an unheard of $2 billion just this past year.

The outcome has been the infiltration of the "Rockstar" mindset into the jury box. Jurors are now conditioned to seeing million-dollar jackpot winners, celebrity assets, and CEO compensation on a daily basis. Not only are they no longer offended by requests for multi-million-dollar verdicts; they have no problem awarding that amount of money if they feel negligence has occurred. Plaintiff's attorneys now understand this and are using it to their advantage in several ways.

For example, plaintiff's attorneys are now using celebrity, athlete, and executive salaries in closing arguments. By pointing to LeBron James's $153 million contract with the Los Angeles Lakers, plaintiff's attorneys are raising the minimum on what a jury might give. So even if a jury doesn't believe that an amputation is preventing a plaintiff from becoming the next LeBron James, they may believe that a third of his contract—$51 million dollars—is reasonable.

This move can be successfully countered by an aggressive defense: using motions to exclude and also presenting real-life salaries and benefits. But mostly, what's needed is recognition of the issue and a reasonable, aggressive response.

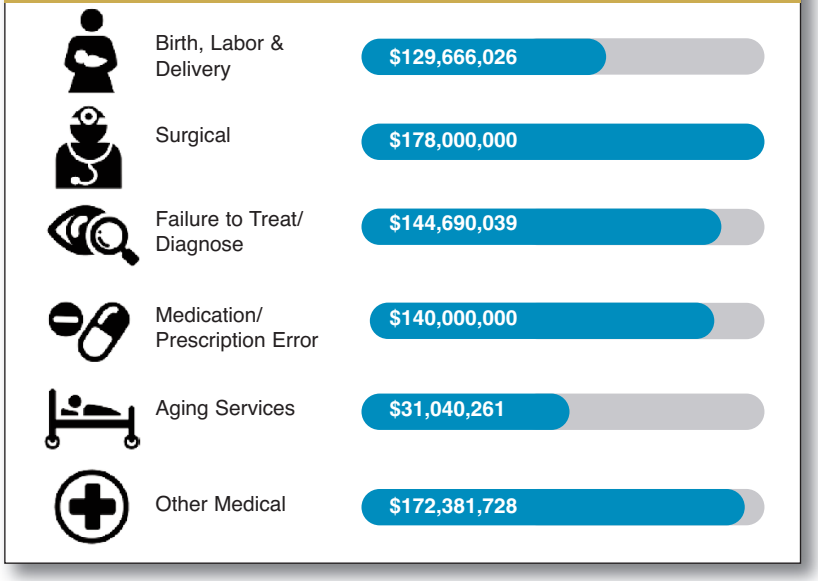
Periphery accelerants

A common driver in mega-verdicts is the "periphery accelerant" used by plaintiff's attorneys to cast the defense in a negative light. Periphery accelerants are minor facts that can transform into the linchpin of the case, despite playing no role in the medical care. The most common accelerant is the missing or altered medical record. Others are former employees who've skipped town and money-focused policies and procedure. In most cases, the missing medical record or former employee plays little to no role in the care provided to a patient. However, plaintiff's attorneys have begun using these accelerants as the themes for their cases, to take the focus away from the medicine.

Plaintiff's attorneys will use the changed or missing medical record as evidence of spoliation. Most states have spoliation sanctions that can range from jury charges that allow juries to make every negative inference from the missing evidence to the striking of defenses from the record. Some states even have a separate cause of action for spoliation. A finding of spoliation increases the likelihood of a mega-verdict and will be the theme of the plaintiff's case.

Another strategy is to paint the missing medical records as the consequence of a corporate cover-up. With MPL cases involving hundreds of medical records, most medical providers involved won't be able to offer a reason for why a particular medical record is missing, nor do they understand its potential for swaying a jury. Knowing this, plaintiff's

Figure 1. The Largest MPL Verdicts Based on Medical Specialty Area/Cause of Loss



attorneys will question each and every medical provider about the contents of the record and its whereabouts. Plaintiff's attorneys then use inconsistent answers about the record from each provider to show that its absence must be the result of wrongdoing by someone with a monetary interest in the case—the corporation.

Similarly, a company's policies and procedures are used to dehumanize the physicians and place the blame on the "executives" making them. By using video depositions of CEOs discussing the decision-making process behind policies and procedures, plaintiff's attorneys shift the focus of blame away from physicians, whom jurors naturally like, to the "greedy" corporation.

But regardless of their specific form, accelerants need to be recognized and honestly dealt with. Millennials and others need us to show why this issue does not matter when it comes to care. Being unprepared for them can result in a mega-verdict.

Failing to defend damages

Lastly, mega-verdicts tend to come about in instances where the defense counsel fails to defend the damages the plaintiff has incurred. Defense attorneys often believe that if they acknowledge damages and suggest a value to award that they believe is reasonable, or counter a plaintiff's life care planner with one of their own, they are conceding liability. However, jury studies show that when defendants have offered no testimony contesting the plaintiff's damage estimate, jurors feel they have no choice but to rely on the plaintiff's damage evidence, which is often inflated.

Traditionally, it's the plaintiff who develops an itemization of the damages, and the defense is not involved in the early stages of development, because the focus is on challenging liability. However, defense attorneys need to begin defending damages at the outset of the case, by propounding the right discovery, obtaining the right experts, and identifying the right areas where value will be challenged. It is crucial that the defense aggressively establish its own number, as opposed to relying on plaintiff's calculations, early in the litigation, regardless of liability.

Specifically, defense attorneys should be obtaining all medical bills early in discovery, to identify the special damages that the plaintiff will claim. In addition, they should research collateral-source rules that may allow them to argue for the offset of certain damages. Regarding experts, investigation into the plaintiff's life care planner's education and past testimony can often reveal bogus credentials or boilerplate life care plans. Moreover, the depositions of treating physicians should be considered; oftentimes, they may disagree with what a life care planner deems necessary for future care.

Overall, defending damages is crucial to eliminating the possibility of a mega-verdict. Defense attorneys should focus as much on damages as they do on liability, right at the outset of a case. Doing so allows the defense to establish its own value, and this number can be used as leverage in settlement negotiations, in addition to countering plaintiff's request to the jury during the trial. MPL

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