



Avoid Unconscionable Verdicts

By John E. Hall, Jr. and
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Medical literature identifies three common reasons why doctors perform amputations. And three problems—**inflated damages, the reptile theory, and hindsight bias**—have strong roles in related malpractice cases.

Defending Malpractice in Amputation Cases

Amputation-related litigation is a significant—and growing—sector of medical malpractice lawsuits. In fact, it is estimated that the amputee population will more than double to 3.6 million people by the year 2050.

K. Ziegler-Graham et al., *Estimating the Prevalence of Limb Loss in the United States: 2005 to 2050*, 89(3) Arch. of Phys. Med. & Rehab. 422–29 (2008). Among minors, non-traumatic, lower-extremity amputations increased by 29 percent from 2009 to 2015. L. Geiss et al., *Resurgence of Diabetes-Related Nontraumatic Lower Extremity Amputation in the Young and Middle-Aged Adult U.S. Population*, 42(1) Diabetes Care 50–54 (2019). This growing number of amputations is inevitably leading to a surge in the number of amputation-related lawsuits. This article seeks to explore how to defend a medical malpractice lawsuit properly by explaining the most common causes of amputation, describing the problems associated with amputation-focused lawsuits, and illustrating the solutions to those problems.

Causes

There are three common reasons that a doctor may have to perform an amputation. Vascular issues are the most common conditions necessitating an amputation. Ziegler-Graham, *supra*. These issues can manifest as a result of compartment syndrome, peripheral artery disease, blood clots, or mismanagement of diabetes. K. Holland, *Symptoms and Causes of Poor Circulation*, Healthline (2016), <https://www.healthline.com>. From 1988 to 1996, amputations resulting from vascular conditions increased by 27 percent, while amputations arising from trauma or cancer decreased by 50 percent and 43 percent respectively. T.R. Dillingham et al., *Limb Amputation and Limb Deficiency: Epidemiology and Recent Trends in the United States*, 95(8) South Med. J. 875–83 (2002). Severe infection is another common cause for amputation.



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Infection may result from mistreatment of a prior injury, post-surgery complications, or necrosis of the surrounding tissue. Finally, amputation may be necessary as a result of a doctor's misdiagnosis or failure to diagnose a medical condition. A physician's failure to diagnose or delayed diagnosis of cancer, blood clots, and neurological conditions could necessitate an amputation.

Problems

These common reasons why a doctor may have to perform an amputation manifest across the board in medical malpractice cases. However, cases of amputation provide fertile soil for each of three legal problems—inflated damages, the reptile theory, and hindsight bias—to affect a case strongly.

Inflated Damages

Remote, speculative, or contingent damages should not be awarded to plaintiffs. Traditionally, the plaintiff develops his or her own estimate of the damages without the involvement of the defense attorneys. However, this lack of involvement by defense attorneys has given plaintiffs' attorneys free rein to assert obscene damages estimates.

Damages must be proven to a reasonable certainty. See *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). Yet, this is often only a small hurdle for plaintiffs' attorneys to leap. The introduction of the life-care planner has allowed plaintiffs' attorneys to overinflate damages with nothing more than a compilation of opinions. Based on costs billed to the plaintiff, the life-care planner will obtain quotes and estimates from doctors and healthcare providers regarding the expected cost to care for the injured plaintiff for the rest of the plaintiff's life. Indeed, the life-care planner will often assume the worst-case scenario to value the case as high as possible. The life-care planner will often assume that a plaintiff is "highly disabled" or "lives a sedentary lifestyle" to recommend inflated estimates for the cost of assistive, in-home care.

Plaintiffs will argue that their amputation will prevent them from any meaningful work for the rest of their lives and assert inflated damages for lost income. Second,

expect that damages for loss of consortium will be drastically exaggerated, because the plaintiff's spouse or family will argue that this injury will strip away any meaningful time with the injured plaintiff. Finally, the plaintiff generally will argue that mental issues, such as post-traumatic stress disorder, have arisen from the events leading up to the plaintiff's amputation. These forms of harm are highly speculative, and plaintiffs must be prevented from overvaluing their case.

Human Nature

Unfortunately, juries have rendered unjust verdicts when sympathies run high in amputation litigation. Specifically, there are three ways that plaintiffs successfully achieve unjust verdicts: anchoring and adjustment, the reptile theory, and hindsight bias.

First, anchoring and adjustment will allow the plaintiff to control the purse. Anchoring and adjustment are the common human tendencies to rely too heavily on the first piece of information given (the "anchor") when making decisions. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185(4157) *Science* 1124–31. (Sept. 27, 1974). Therefore, judgments departing from the anchor require an "adjustment" in the minds of jurors. This tendency relies on the fact that jurors are laypeople with little to no experience in determining the proper award of damages. Therefore, they can be extremely reliant on—and deferential to—the first number that is presented to them. This is especially true where the anchor number seems to be backed by logic or calculations.

Second, the reptile theory will capitalize on the jury's emotions. This theory posits that humans are evolutionarily conditioned to crave both safety and survival. David Ball & Don Keenan, *Reptile: The 2009 Manual of the Plaintiff's Revolution* (2009). Plaintiffs' attorneys will leverage this conditioning by arguing that the defendant's conduct created an unsafe environment for the plaintiff. Plaintiffs' attorneys will frame their arguments to elevate the standard of care artificially by using absolute phrases (i.e., "Doctors should *always* have their patient's best interests at heart"), and by focus-

ing on the defendant's actions, or inactions, rather than the injuries themselves. By noting that the defendant remains a threat to society at large, the jury's anger will likely drive them toward large verdicts.

Finally, hindsight bias will cloud the judgement of the fact finders. Hindsight bias is the universal tendency for humans

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to perceive events that have already occurred as having been more predictable than they actually were before the events took place. Press Release, Ass'n for Psycholog. Sci., "I Knew It All Along... Didn't I?"—Understanding Hindsight Bias (Sept. 6, 2012), <https://www.psychologicalscience.org>. While scientists are aware of hindsight bias, they have never been able to negate its effects on decision-making completely. *Id.* Plaintiffs' attorneys will exploit this tendency by convincing the jury that all facts available after a lengthy discovery process were—or should have been—known to the defendant. Furthermore, plaintiffs' attorneys will frame their narrative as the only plausible set of facts at the outset, leaving the defense with an uphill battle.



Unconscionable Verdicts

Inevitably, when inflated damages estimates are comingled with human nature, unconscionable verdicts result. In the last decade, malpractice lawsuits with an amputee plaintiff have rendered verdicts of \$30 million in Texas, \$32 million in Illinois, and \$900 million in Florida, among others. See *Kirkland v. Integrated of Ama-*

While no solution is

foolproof, there are four strategies that will help level the playing field: defending damages aggressively, knowing your venue, preparing winning arguments, and removing the sympathy factor.

rillo, 2012 WL 864786 (Tex. Dist. Jan. 31, 2012); *Norals v. University of Chicago Medical Center*, 2013 WL 6988808 (Ill. Cir. Ct. Sept. 22, 2013); *Estate of Webb v. Trans Healthcare*, 2012 WL 938924 (Fla. Cir. Ct. Feb. 8, 2012). Furthermore, these types of verdicts are ever-increasing as the population of amputees in the United States continues to grow.

The Solutions

What is a defense attorney to do to overcome these seemingly insurmountable problems? While no solution is foolproof, there are four strategies that will help level the playing field: defending damages aggressively, knowing your venue, preparing winning arguments, and removing the sympathy factor.

Defend Damages Aggressively

Defending damages aggressively is vital to the success of your case. Because of the “anchoring” effect mentioned above, plaintiffs’ attorneys have adopted the adage

“ask, and you shall receive.” And it works. In fact, one study showed that when plaintiffs asserted a \$5 million anchor instead of a \$250,000 anchor based on the same set of facts, the case value was *eight times* greater. J. Campbell et al., *Countering the Plaintiff’s Anchor: Jury Simulations to Evaluate Damages Arguments*, 101 Iowa L. Rev. 543 (2016). Conversely, when the defense offered a counteranchor of \$50,000, the expected case value dropped by 43 percent. *Id.* By properly defending damages, the value of the case is grounded.

The first way to defend damages properly is to set the value of the case early and accurately. Do not wait for the plaintiff’s estimate of the damages to appear. Instead, use the discovery process to formulate your own estimate of the true value of the case. By propounding the right discovery, getting the right experts, and filing the right motions, the value of the case should be accurately decided.

First, discover the proper materials. All prior and present medical records, X-rays, imaging records, therapy records, and physical therapy records should be thoroughly examined to establish the plaintiff’s “baseline” status and medical condition. The plaintiff’s past and present occupational status, as well as documentation regarding the plaintiff’s loss of earnings, work time, and profits, should all be sought to deduce the plaintiff’s employment history and potential lost earnings. Finally, determine the actual costs of the plaintiff’s care, rather than looking at the costs billed by the hospital, because billed costs often drastically exceed the costs actually paid.

Second, get the right experts. Experts can help develop realistic care plans to address the needs of the plaintiff and the associated costs. The unique nature of amputation cases necessitates unique experts. The goal is to use the expert testimony to lower the expected future costs to the plaintiff.

Some experts directly dispute the plaintiff’s evidence of damages. For example, life-expectancy experts will help set the “ceiling” by countering the plaintiff’s life-care planners, who are prone to overestimating the plaintiff’s life expectancy to inflate costs. Next, treaters and medical experts will analyze the plaintiff’s comorbidities to help establish a “base-

line” for the plaintiff as well as address any other ailment that may have necessitated amputation. Finally, Affordable Care Act (ACA) experts and economists will address the disparity between billed costs and actual costs and demonstrate exaggerated future costs of care. Often, amputees have coverage through the ACA, Medicaid, Medicare, Social Security benefits, Social Security Disability applications, charitable benefits, and spousal coverage. While the collateral-source rule may hinder the presentation of this evidence at trial, evaluating the various avenues for compensation of medical costs will set the value of the case prior to negotiations with the plaintiff’s counsel.

Other experts will opine on the expected future costs of care. For example, prosthetic experts will help reduce potential future costs by discussing advances in prosthetic technology, such as durability and fewer replacements. They may also discuss reentry into the workforce by testifying to employment opportunities available to the plaintiff. Next, vocational and occupational rehabilitation experts will estimate the anticipated care necessary throughout the plaintiff’s lifetime. They may also address access to therapy and programs through school systems for minors. Finally, psychiatrists can help analyze the plaintiff’s pain and suffering, review applicable therapy records, and assess how pain and suffering should be considered when calculating damages.

The strategic use of *Daubert* motions will help control the value of the case. This motion is designed to exclude the presentation of unqualified evidence to the jury. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Often, life-care planners develop their plans by soliciting the opinions of doctors and healthcare providers. Because these statements are usually obtained out of court, they may be hearsay evidence and inadmissible. Furthermore, the life-care planner’s opinion adds nothing more than the experience of the average layperson because no special knowledge is required to solicit the opinions of others and create a life plan. Therefore, the life-care planner’s testimony may not meet the threshold required for an expert opinion. Through the use of *Daubert* motions, the testimony of the

life-care planner can be limited or totally prohibited.

Know Your Venue

Adjust your strategy based on the location of the trial. Certain states are notorious for handing down large verdicts, and it is important to know that from day one. For example, since 2012, Florida has rendered jury verdicts in amputation cases of \$15.9 million, \$109 million, and \$900 million. See *Hollingsworth v. Holy Cross Hosp., Inc.*, 2018 WL 1617051 (Fla. Cir. Ct. Mar. 8, 2018); *Carter v. Board of Trustees of the University of South Florida*, No. 12-CA-9942 (Fla. Cir. Ct. 2018); *Estate of Webb v. Trans Healthcare*, 2012 WL 938924 (Fla. Cir. Ct. Feb. 8, 2012). It is crucial that defense attorneys assess their venue at the outset; the venue may have a large effect on whether going to trial is the best for the client. Furthermore, it may be worth removing a case to federal court if your client has been sued in a high-dollar venue and all removal requirements are met.

Prepare Winning Arguments

Based on our survey of amputation cases in the last ten years, the pool of arguments that consistently led to defense verdicts was surprisingly small. The arguments that won the majority of defense verdict fell into two categories. The first type of argument is that the amputation was a rare and unforeseeable result of the proper treatment to the patient. This argument sways juries in a number of ways. First, it negates the reptile theory by demonstrating to the jury that the doctor was not responsible for creating the environment that led to the plaintiff's harm. Instead, it reinforces that the doctor was doing his or her job correctly and was simply the victim of circumstances that he or she couldn't control. Second, it demonstrates that the doctor did not breach his or her duty to care properly for the patient, since the doctor could not foresee the harm.

The second type of argument that won defense verdicts was that the amputation was the result of a preexisting condition. Co-morbidities that may have created the necessity to amputate are only growing more common. For example, nearly 85 percent of lower-extremity amputations are preceded by a foot ulcer resulting from

diabetes. P.W. Moxey et al., *Lower Extremity Amputations—a Review of Global Variability in Incidence*, 28(10) *Diabet. Med.* 1144–53 (2011). Furthermore, in the United States, 60 percent of nontraumatic amputations are performed on people with diabetes. W.F. Todd et al., *Evaluation and Treatment of the Infected Foot in a Community Teaching Hospital*, 86(9) *J. Am. Podiatr. Med. Assoc.* 421–26 (1996). All told, this amounts to over 73,000 amputations on diabetics per year. Ctrs. for Disease Control & Prevention, *National Diabetes Statistics Report: Estimates of Diabetes and Its Burden in the United States, 2014* (US Dep't of Health & Hum. Servs. 2014), <http://www.cdc.gov>.

Other important factors to note are whether the plaintiff has had several procedures performed on the amputated area or whether the defendant is not the first doctor to observe the amputated area, both of which often can provide an alternative explanation for the amputation. Finally, the necessity to amputate may not arise until after-the-fact. If the plaintiff argues that the doctor's failure to diagnose led to the amputation, it will be important to assess whether the necessity to amputate arose from a complication outside of the doctor's control.

The goal with these arguments is to negate hindsight bias and the reptile theory. To do so, the jury must be forced to consider the defendant's point of view. Studies have shown that the best way to negate hindsight bias is to encourage the jury to consider and discuss alternative explanations of the events that occurred. Press Release, Ass'n for Psycholog. Sci., *supra*. By encouraging the jurors to question the inferences that they made about how the harm occurred, they are more likely to render a fair verdict. These arguments serve to do just that by introducing new facts to the jury that will break the plaintiff's narrative of the events and ground the case in reality.

Remove the Sympathy Factor

Sympathy for the plaintiff is inevitable when dealing with an amputation case. However, sympathy should never be the controlling factor in a case. The plaintiff should be compensated for the amount of harm caused by the defending party's neg-

ligence, not for how much sympathy he or she can garner from the jury. To avoid paying a sympathy-verdict, the defense must make sure that the case stays grounded in facts and that it does not wander into emotional appeals.

Conclusion

- Anchor your case early on in order to challenge plaintiff's value of the case;
- obtain relevant medical records;
- determine validity of lost wages claims;
- determine the actual cost of care and compare costs billed to costs paid;
- get the necessary experts to opine on the standard of care and causation;
- be conscious of your venue;
- refute the plaintiff's attempts to inflate damages;
- prevent the plaintiff from using the reptile theory;
- eliminate hindsight bias; and
- fight sympathy.

