

Closed Claim: What It Takes to Stay the Course



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The right to have “your day in court” is a highly cherished cornerstone of the American legal system. As a physician, defending your professional care is paramount. Whether to settle a case or defend it through trial is an important decision. Going to trial can have great consequences: losing can mean a finding of medical negligence by a jury and possible financial exposure over and above your coverage limits. Settlement (perhaps through mediation) offers the opportunity to resolve a case through a more predictable, private, and controlled process but usually results in a report to the National Practitioner Data Bank, which affects credentialing and possibly malpractice insurability. Although winning brings a sense of vindication and tremendous relief, it is a lengthy and arduous process. Some of the challenges are obvious, and some, discussed in this article, are not so obvious. “Staying the course” is a noble objective, but it may be easier said than done when faced with complex and lengthy litigation.

In this case, the patient, a woman in her 30’s, underwent a robotic total laparoscopic hysterectomy and oophorectomy. After the surgery, she was treated for a wound infection and bleeding. Approximately two months later, she presented to the emergency

department with abdominal pain and bloody diarrhea. She was diagnosed with gastroenteritis and discharged. She returned to the ED the next day and was tentatively diagnosed with C. diff. A colonoscopy showed pseudomembranous colitis for which the patient underwent a subtotal abdominal colectomy. The patient self-extubated but maintained good oxygen saturations throughout the incident. She continued to decline, however, and more surgery followed: a sigmoid colectomy and placement of a feeding tube. Post-operatively, the patient suffered a seizure and became unresponsive. About four months after her initial robotic surgery, life support was discontinued, and the patient died.

Suit was filed (in a state with a two-year statute of limitations) approximately 21 months later naming the OB/GYN who performed the hysterectomy, another OB/GYN who provided later care, the ER physician, two critical care physicians, and the hospital. More than six years later, the case finally went to trial against the critical care physicians. All the other defendants had either been dismissed or settled out of the case by the time it went to trial.

To “stay the course,” you must first “set the course.”

The defense of a case starts with a call to SVMIC during which the claims attorneys will review the lawsuit with the physician and work with him/her in the selection of defense counsel. The first things the defense attorney will do is meet with the physician to discuss the case, review the records with the physician, obtain the physician’s input, address concerns and goals, and most importantly, get to know the physician. Critically, the defense attorney will begin the investigation and analysis of the case along with a search for solid expert support. The relationship that develops between the defense attorney and the physician defendant is very important and symbiotic: each has a very different role, yet each depends on the other to get a good result. The defense attorney is an advocate but tempers his or her advocacy with objectivity and experience. The physician is the key witness who brings credibility, first-hand knowledge, and expertise. The attorney acts as a guide—leading the physician through a trying, difficult, and unknown legal landscape. As the attorney and physician develop a good working relationship, they can set a course based on a realistic view of the case.

In this case, the defense attorney and two of the insured physicians developed a commitment to see the case through all the way to trial.

Staying on course and getting to trial required persevering through delays, changes in the plaintiff's theory of fault, consideration and rejection of an inopportune settlement offer, concerns for juror sympathy, the passage of time, and logistical considerations. From the date of the initial surgery to the trial, nearly nine years passed. While this time period may seem extreme, it is important to understand that the length of time from the filing of the case to the trial is heavily dependent upon the jurisdiction in which the case is filed. Some judges set the cases pending in their jurisdiction for trial within a year or two of the filing of the suit; but other judges take a more laid back approach, and the attorneys have to be proactive in pushing for a trial date.

The case was further delayed when the trial judge abruptly continued the case one week before the scheduled trial date. This delayed the trial for approximately a year and was very costly to both sides in that a high percentage of the litigation expenses are incurred in the last few weeks before trial, including the expense and commitment to bring in expert witnesses. The stress and strain of having to prepare for trial again is also very costly in human terms, having a psychological impact on everyone involved.

In malpractice cases involving death or serious injury, a significant concern is that the jury will be so overcome with sympathy that it will not be able to hear the case fairly and impartially. The potential for jury sympathy is one of the many factors that goes into the analysis of whether to take a case to trial. To be successful, defense counsel use their skill and experience to address and mitigate jury sympathy issues in the jury selection process and during their presentation of the case to the jury. Juries are typically instructed by the trial judge to carefully consider all the evidence and to follow the law as instructed by the judge. Jurors are specifically told not to be governed by sympathy. Counsel for each party will try to determine which potential jurors may be likely to be swayed by sympathy during their questioning of them before the jury is seated. In this tragic case, the deceased patient was in her 30's and died leaving minor children behind, making the potential for jury sympathy a significant concern.

As the litigation proceeded, the plaintiff's theory of the case became a "moving target." In the earlier stages of this case, the plaintiff's theory of liability was that the patient was not properly sedated and restrained, which caused her to self-extubate on multiple occasions resulting in a hypoxic brain injury. In addition to this, the plaintiff alleged that the defendants "covered up" the fact that the self-extubations occurred, and they went so far as to argue that the defendants transferred her to a larger hospital to conceal the true cause of her death. After approximately four years, the plaintiff abandoned this theory and argued that the patient's death was caused by hyperosmolarity, hypernatremia, dehydration, and hyperglycemia which caused metabolic encephalopathy. In this case, defense counsel successfully adapted its theory of defense by obtaining additional expert support, based on the medically sound treatment rendered in this case, to counter the plaintiff's new argument.

The status of the co-defendants may change as a case is litigated. Here, some of the original defendants were dismissed while other defendants settled. In this case, an

eleventh-hour settlement offer was made to the remaining physicians. The downside with such an offer so close to trial is that it can be a distraction from the preparation efforts and focus on the upcoming trial. Moreover, engaging in such negotiations so close to trial could lead to a costly continuance of the case. The remaining physicians rejected the settlement offer and remained firm in their desire to defend their care at trial.

After an eight-day jury trial, it took the the jury less than two hours to return a defense verdict in favor of the critical care physicians. Factors that defense counsel considered to be significant in winning the case were:

- The strength, character, and medical knowledge of the physician defendants presented through their credible and sincere testimony;
- The excellent performance of the defense's expert witnesses, who were strongly supportive of the physician defendants' care and treatment of the patient; and
- The fact that some of the plaintiff's experts came across as hired guns, without much credibility, willing to change their testimony regarding the cause of the patient's death.

Although the case was tragic and the course of the litigation was long and difficult, the physician defendants and defense counsel stayed the course and worked closely together to defend their care. The sense of relief and satisfaction when the jury agreed that they had provided excellent care was very gratifying.

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