



## WHICH DEFENDANTS DO YOU NAME IN A MEDICAL NEGLIGENCE CASE?

By Eugene M. Moen, J.D.

In most medical negligence cases there are a number of providers involved in the care that resulted in injury to the patient. In a hospital setting, that may include nurses, the attending physician, radiologists, pathologists, and consulting specialists. Even in an office setting, there may be arguable claims against entities other than the treating physician, including outside consultants and prior treating physicians.

Deciding which providers to name as defendants can be a difficult question, and many less-experienced attorneys err on the side of using a shot-gun approach and including all possible defendants for whom they can find an expert willing to express criticism. The rationale may be a desire to have more potential entities to participate in a settlement, a hope that defendant “finger-pointing” will help make the case, or, more commonly, a concern that leaving someone out will create an “empty chair” under RCW 4.22.070.

This article will state the proposition that, for a variety of reasons, “less is better” when it comes to litigating medical negligence cases. Having more defendants does not necessarily help your case. For every case in which one defendant tries to shift blame to another, and thus helps prove your negligence claim, there will be numerous cases in which the defendants end up working together to disprove key elements of your case, such as causation. Settlement is often more difficult, and sometimes

impossible, because the defendants’ different carriers can’t decide on allocation of responsibility and payment of a settlement. With multiple defendants, you will have a sharing of defense strategies and costs, and more defense attorneys questioning key witnesses at depositions. Scheduling can be a nightmare with multiple defendants and defense counsel. If the case goes to trial, you may face more preemptory challenges for the defense, multiple opening statements, cross-examinations, and closing arguments, and more expert witnesses on key issues.

In larger damage cases, a major reason for limiting the number of defendants, and ideally ending up with one culpable defendant, is to put pressure on the provider and his/her carrier to settle. A typical provider in an office setting will have limited insurance coverage, often \$1,000,000. If you have a claim that may be larger than the limits, but for which you would accept that amount or somewhat less in settlement, you will want to make a policy limits demand. Keep in mind that most medical liability policies have a “consent to settle” clause which requires the doctor to consent before any settlement offers can be made. Many physicians respond in very personal ways to a lawsuit and want to defend it to the hilt. Part of that may be professional pride or a genuine conviction that they were not negligent, but part of it is concern over the

requirement that any settlement be reported to the federal national practitioner data bank, and any settlement over \$20,000 to the state Medical Quality Assurance Board. To achieve a settlement, you have to overcome those obstacles.

The best means of inducing a defendant doctor to authorize settlement, and an insurance company to pay the policy limits, is to set up a bad faith claim. Once your claim exceeds the policy limits, the carrier has to advise its insured of the potential for an excess judgment. Often, the physician will be advised by the carrier-retained attorney to hire independent counsel. If the doctor still refuses to consent to settle, the carrier is off the hook on a bad faith claim. But if the doctor realizes that his personal assets and income are at risk and consents to settle, that shifts the burden to the insurance carrier. Often, the doctor will not only consent to settle, he/she will even put pressure on the carrier, through her/his independent counsel, to settle within the limits. You may have created an unwitting ally in your efforts to convince the insurance company that they have substantial exposure on your claim.

With consent to settle by the insured provider the burden shifts to the insurance company, which faces a difficult situation. It can tough out the claim and defend it, but doing so exposes its insured to an excess judgment



and exposes itself to a bad faith claim that may, in effect, multiply the coverage for which they actually received premiums. If the doctor wants to avoid the risk of an excess judgment and the hassles of litigation, she/he may become upset with a carrier that refuses to act in the insured's best interests. Professional liability insurance is often a competitive business, and having angry insureds doesn't help in selling policies.

This scenario usually works effectively only when there is a single defendant. Once other defendants are named the pressure is off any one provider, since liability and trial exposure is spread over more entities. The most culpable provider won't feel the pressure to consent to settle based on a potential excess judgment, and the defendants collectively may feel they can present a stronger defense as well as share the costs and risks of litigation.

A typical setting in which this situation will arise is a hospital-based claim in which a physician was negligent. There may also be a plausible case against the hospital, based on what information a nurse gave to the doctor, or against another provider, such as a radiologist or pathologist. Indeed, the attending physician may vigorously argue that the medical error would not have occurred but for the negligence of someone else. Assuming adequate liability coverage for the physician, and a willingness by the plaintiff to settle within those limits, it may still behoove the plaintiff's attorney to name only the doctor as a defendant. With the inclusion of other defendants, the doctor may not be motivated to consent to settle and his/her carrier may not be willing to settle at or near the policy limits. The result may be an inability to

settle the claim and an expensive and risky trip to the courthouse for trial, or at the least a protracted effort to sort out, through discovery, the relative exposure of each of the defendants and their carriers.

What about the "empty chair" defense? In the scenario set out above, won't the doctor assert an affirmative defense that the nurse or other provider was at fault, and you run the risk of losing some percentage of your judgment at trial? The answer is: not necessarily. In the medical setting, it is often difficult for a provider to shift blame to another provider. In the hospital setting, the doctor may not be willing to blame the nurses, because he has to work in that setting on a daily basis. A hospital defendant may not want to blame a doctor, because hospitals are competitive about seeking patients and it is the doctors who admit patients to the hospital.

After all, to successfully assert the empty chair defense under RCW 4.22.070 the defendant has to name the entity that is at fault, and provide expert testimony as to negligence. It is an uncomfortable situation for a provider or his/her carrier to act like a plaintiff and try to prove negligence of another provider. Juries often react negatively to such finger-pointing. In some cases, also, the entities are insured by the same carrier, and it is awkward for the defendant's attorney to shift blame to another entity insured by the same company.

In any medical negligence case, careful thought should be given to whether to name only one defendant. In addition to the reasons set out above, there should be a professional

consideration: being named as a defendant in a negligence case is traumatic and stressful, and you shouldn't sue a provider unless it is really necessary to protect your client's interests. With more defendants, you can also usually count on more costs in litigating the claim. Naming multiple defendants may also make it easier for the jury to conclude that no one person is to blame. If you name successive physicians who missed a diagnosis, you may help establish the defense position that the standard of care was met since more than one physician made the same error.

If your lawsuit is brought early enough, you may be able to start with the most culpable defendant and have time to conduct discovery to see if it makes sense to bring in another provider as a defendant. The one thing you don't want to do is simply start out naming everyone whose name appears in the medical records under the theory the defendants will sort out who is at fault and you can dismiss some defendants later. That approach may violate ethical standards, and it certainly will be costly to you and your client and make settlement difficult or impossible.

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