



Trials and Tribulations

The newsletter of the
Litigation Skills Committee

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Leadership Note

From the Chair

By Guy E. Hughes



Once again, we are happy to report that our annual Trial Skills and Damages Seminar in March of this year was extremely well attended and enjoyed by attendees. Practical aspects of every litigator's practice were discussed, including direct and cross-examination of experts, how to deal with damage issues with medical experts, laying the groundwork for admissibility of social media evidence as well as multiple examples of tech and demonstrative evidence that can make your case more understandable and effective. As we have mentioned before, fewer of our cases are making it to trial and it is therefore more important than ever that we make the most of each and every aspect of discovery. None of us want to settle a case, but if the odds are that we will have to, we need to make sure we are focused on putting our clients' cases in the best light possible. This will allow us to maximize our results through mediation, or in the proper case, at trial.

As we exhale, we are already looking towards 2020 and improving our seminar to meet the needs of our membership. If there are areas of litigation that you believe deserve more attention, exercises that would assist your practice, or techniques or areas that you can't find elsewhere, please let us know. We are here to provide our members what they need and want and would be happy to try and incorporate your ideas if at all possible. Please feel free to reach out to next year's program chair, Patrick Causey, pcausey@trenam.com or our program vice chair, Pamela Lee at pamela.lee@swiftcurrie.com. While they may not be able to fit all of the ideas into the program, we will do our best.

As one of the largest committees in DRI, as well as one that touches upon many other substantive committees, we have been working hard to provide our expertise and assistance throughout DRI. We have now completed several Litigation Skills Workshops and the feedback has been outstanding. We are excited about working one-on-one with members to strengthen their skills and the

workshops have provided an effective and economically sound manner to do so. We hope you will take a look at upcoming workshops and consider signing up or signing up one of your up and coming attorneys. Given the number of areas we are focusing on and the size of our committee, we are also always on the lookout for people who want to get involved in leadership positions within the committee. If you have a desire to get involved and learn more about everything we do, please email me at ghughes@cbmlaw.net and I'll be happy to discuss what we're doing and find a place for you to assist.

I also want to thank our amazing publications staff, led by Megan Pizor, Chris Turney, and Brian Rubin for their hard work and dedication. Whether it is *Trials & Tribulations*, *For The Defense*, or one of our special publications, this group hits it out of the park time after time. We all appreciate what they do, and we hope you enjoy the fruits of their labor.

Finally, if there is anything that you don't see here, or think that our committee could be doing more of, please reach out and let me know. We work hard to put together programs and materials that will make your life easier but may be missing something. If that's the case, please let me know. Otherwise, enjoy another wonderful edition of *Trials & Tribulations* and we hope to hear from and see you soon. Thanks.

Guy E. Hughes is a partner with Casey Bailey & Maines PLLC in Lexington, Kentucky, where he has a broad based litigation practice handling matters in the areas of products liability, fire loss, trucking law, premises liability as well as the defense of professional liability claims. Mr. Hughes work has also included representation of recreational product, automobile and motorcycle manufactures as well as work for a Class I Railroad with trials throughout the Commonwealth of Kentucky. Mr. Hughes is a member of DRI and currently serves as chair of the Litigation Skills Committee.

Feature Article

Untethered Damages

Dealing with Plaintiffs That Want Pain and Suffering Damages but No Medical Expenses

By Murray Flint

A car accident case comes across your desk. The facts are simple—your client was texting and driving and crossed the center lane. A driver headed the other way saw your client drift into her lane and swerved to avoid a collision. Her car left the roadway and rolled over twice. Fortunately, she was uninjured and only incurred \$2,500 in medical bills. This should be an easy case to settle. The damages are low, liability is undisputed, and your client has plenty of insurance coverage to pay a reasonable settlement.

You notice the complaint does not include a claim for medical expenses. You quickly learn plaintiff will not accept a reasonable settlement because they do not intend to present the medical bills at trial. Rather, they intend to describe your client's reprehensible conduct, the violent accident, and ask the jury to render a "fair" verdict. It becomes apparent that, if the medical expenses are excluded, this case may be worth significantly more than you thought.

This practice has become common across the country in cases with low special damages and bad conduct. Since these verdicts are not based on "hard numbers," results are unpredictable and it is difficult to accurately evaluate settlement value. A few states have addressed this issue, but unfortunately they are split. To further complicate matters, many of these cases turn on the same issue: medical expenses are relevant to a plaintiff's pain and suffering claim.

On one hand, several courts have ruled past medical expenses are not relevant, and therefore inadmissible, when a plaintiff only makes a pain and suffering claim. See generally *Payne v. Wyeth Pharmaceuticals, Inc.*, 2008 U.S. Dist. LEXIS 91849 (E.D. Va. 2008); *Schieffer v. Declene*, 539 S.W.3d 798 (Mo. Ct. App. 2017); *Freeman v. Pollo Operations*, 2014 Fla. Cir. LEXIS 34427 (Fla. Cir. 2014); *Martin v. Soblotney*, 466 A.2d 1022 (Pa. 1983). In *Payne*, the Eastern District of Virginia adopted the reasoning from a Pennsylvania case:

It is immediately apparent that there is no logical or experiential correlation between the monetary value of medical

services required to treat a given injury and the quantum of pain and suffering endured as a result of that injury. First, the mere dollar amount assigned to medical services masks the difference in severity between various types of injuries. A very painful injury may be untreatable, or, on the other hand, may require simpler and less costly treatment than a less painful one. The same disparity in treatment may exist between different but equally painful injuries. Second, given identical injuries, the method or extent of treatment sought by the patient or prescribed by the physician may vary from patient to patient and from physician to physician. Third, even where injury and treatment are identical, the reasonable value of that treatment may vary considerably depending upon the medical facility and community in which care is provided and the rates of physicians and other health care personnel involved. Finally, even given identical injuries, treatment and cost, the fact remains that pain is subjective and varies from individual to individual.

Payne, 2008 U.S. Dist. LEXIS 91849 at *17-18 (quoting *Carlson v. Bubash*, 639 A.2d 458, 462 (Pa. Super. Ct. 1994)).

However, some courts disagree with this analysis, and hold that medical expenses are relevant to prove pain and suffering. *Luther v. Lander*, 373 P.3d 495 (Alaska 2016); *Barkeley v. Wallace*, 595 S.E.2d 271 (Va. 2004); *Melaver v. Garis*, 138 S.E.2d 435 (Ga. Ct. App. 1964); *Meek v. Mont. Eighth Judicial Dist. Court*, 349 P.3d 493 (Mont. 2015); *Beckner v. Palmore*, 719 S.W.2d 288 (Ky. Ct. App. 1986).

Rule 401 of the Federal Rules of Evidence says evidence is relevant if it has any tendency to make a fact of consequence more or less probable. This is an extremely broad definition. While medical expenses surely do not correlate perfectly with subjective pain and suffering, it seems disingenuous to argue they share no correlation at all. *Payne* explains some serious injuries do not require extensive treatment, and different people seek different treatment for similar injuries. However, evidence is not inadmissible simply because it does not definitively prove an issue, and both of these points can be shown through other evidence.

Of course, the defense bar's position on this issue is irrelevant when the time comes for trial. Unless you practice

in a state where medical expenses are deemed relevant to show pain and suffering, it is best to develop a backup plan before trial. The most important thing to remember is that plaintiff’s medical treatment should still be admissible evidence, even if the associated expenses are not, and a well-crafted description of superficial treatment may do the trick. Alternatively, you could try to admit medical expenses through an expert witness, who likely relied on the bills due to billing codes or to assess the scope of certain procedures. Regardless, if medical expenses are out of evidence, do not lose focus of your main trial themes or give up on your damages arguments.

There is no easy solution to this problem. Fortunately, this is fertile ground for appeal in many states and a well-supported argument on relevance in the right case could solve the problem in your area. Regardless, a proac-

tive and confident approach will stifle the plaintiff’s main goal—to create doubt and elicit higher settlement figures.

Murray S. Flint is an associate in the Swift Currie’s coverage and commercial litigation section in Birmingham, Alabama. He has experience representing businesses and individuals in the areas of insurance coverage, construction defect, premises liability, product liability, personal injury and appellate advocacy. Before joining Swift Currie, Mr. Flint practiced law with a defense firm in Birmingham, handling a wide variety of litigation matters. In this role, he tried multiple high-exposure cases to verdict and prepared successful briefs in both state and federal appellate courts.

