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# Significant Verdicts in the Post-Covid Era

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# Agenda

Background

\$9 Million Verdict from Maryland

\$189 Million Verdict from Pennsylvania

\$25.9 Million Verdict from Pennsylvania

\$19 Million Verdict from Pennsylvania

\$30.9 Million Verdict from California

\$2.3 Million Verdict from Pennsylvania

Takeaways

# Background and Themes

# Background

- Post-Covid, the admiration for our “healthcare heroes” has subsided.
  - Heroes to villains
- Uptick nationally in large verdict nursing home negligence and medical malpractice cases.
- What are the trends that we are seeing?
  - Corporate negligence theories and narratives regarding staffing, profits, etc.;
  - Criticism regarding “stale” defenses; and
  - A need for flexibility and empathy.

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# Themes

- Healthcare generally is a person-centered industry; approach cases with a similar mindset on behalf of your client at the outset of the case.
- Be creative in formulating defenses; tell a story a jury wants to hear and will understand.
- There is a “new generation” of Plaintiff’s attorneys; make a strategy to be flexible and address avenues for relief at the outset of the case.

# \$9 Million SNF Verdict from Maryland

# Facts

- 64-year-old gentleman admitted for long-term care to a local nursing home. He was married with children and was a pastor in the community.
- He developed a pressure ulcer to his tailbone, which reportedly worsened to a Stage IV.
- His records did not show that the staff were turning and repositioning him every two hours.
- Other evidence adduced at trial showed that the resident would be left laying in his urine and feces for extended periods of time.
- Died at the age of 64, and an autopsy completed revealed the cause of death to be the pressure ulcer.

## Evidence Considered

- Experts on behalf of Plaintiff opined that defendant nursing home did not monitor and implement an appropriate care plan to prevent and treat the pressure injury.
- Defendant retained a dermatology expert, but it was noted that it had never consulted a dermatologist to treat the resident while he was still living.
- The jury also considered the fact that the resident was charged approximately \$1,000 a day, despite evidence that staff were not turning him and leaving him to lay in his own feces and urine.
- Net assets defendant (which were over \$50 million)



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## The Jury's Findings

- The jury found that resident died from the pressure injury caused by the negligence of the nursing home.
- After a seven-day trial and five hours of deliberations, the jury issued an award of over **\$9 million**.

# The Aftermath

- This case stirred discussion regarding Maryland's cap on economic damages.
- Md. Code Ann., Cts. Jud. Proc. § 3-2A-09 provides that an award or verdict for noneconomic damages for matters arising between 2005-2008 shall not exceed \$650,000. Every year thereafter, the limitation will increase by \$15,000.
  - In a wrongful death action with two or more beneficiaries, the total amount awarded for noneconomic damages shall not exceed 125% of the above-mentioned limitation.
- Therefore, the award to the Plaintiff was reduced to just over \$1 million.
- Plaintiff's Counsel: "Corporations that all too often act with careless disregard for the law and human life deserve no special treatment. Maryland law should no longer demean the suffering of victims of nursing home and health care malpractice through this discriminatory, unjust limit on human damages."
- Articles cited to a 2014 federal study which showed that 22% of nursing home residents suffer "adverse incidents."

# Takeaways

- This case highlights one of the trends we discussed at the outset: corporate negligence and the associated narratives.
- The jury took into account the fact that the company made millions in the prior calendar year, yet failed to consult a dermatologist while the plaintiff was alive, choosing instead to pay an expert \$30,000.
- The jury also took into account the cost of the Plaintiff's stay compared to the care that he received; i.e. "profits over people"

# Possible Strategies

- Combat plaintiff's "profits over people" narrative.
- Starts with the first client contact.
  - Get to know the staff. Why did they become healthcare providers? What is their story?
  - While the individual may not remember a specific patient, they will likely remember patterns and practices of treating patients with care.

# **\$182.7 Million Hospital Verdict from Pennsylvania**

## Facts

- Plaintiff sued a hospital system as well as individual physicians related to the delivery of her child
- Plaintiff claimed that due to the delayed Cesarean section, her son sustained permanent injuries, which would necessitate him needing lifetime care.
- Plaintiff's counsel adopted a "team" approach and argued that the "team" of hospital providers were collectively responsible for the harm to the Plaintiff, which relieved Plaintiff of her obligation to prove that a specific provider was negligent.
- At trial, Plaintiff dismissed the direct liability claim against the hospital, and the only surviving claim against the hospital was for vicarious liability.

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## The Jury's Findings

- The jury issued a verdict against the hospital for \$182.7 million under a theory of vicarious liability.
- No punitive damages were awarded.

# The Aftermath

- Defendant called it a “runaway jury verdict”
- Defendant is presently appealing the verdict, seeking JNOV, or in the alternative: a new trial, remittitur of the verdict, or a new trial on damages.
- The primary argument for JNOV is that because the only surviving claim against the hospital was for vicarious liability, Plaintiff was required to prove liability against any one agent or employee of the hospital, which Plaintiff did not do.
- Defendant also claimed that the causation standard on the verdict slip did not require factual causation and did not list each individual defendant.
  - The judge stated during trial that the hospital had agreed that the doctors were agents of the hospital, and therefore, when the hospital attempted to make a last-minute argument disclaiming agency, the judge noted that it was too little too late.



# Takeaways

- Some of the damages are not applicable in the senior care setting – life care plan for a minor, with increasing medical expenses a significant driver of damages
- Plaintiff's counsel is from the “new generation.”
  - Speed. Quick examinations.
    - Contrasted with complicated, technical defense
  - “All or nothing” approach on causation.

# Possible Strategies

- At the outset of the case aggressively seek to dismiss all claims against corporate parents.
  - Have conversations with Plaintiff's counsel regarding stipulations or otherwise file motions.
- Through the course of discovery, explore avenues such as MSJs to challenge and potentially dispense of unsupported claims prior to trial.
- In a case where individual physicians and the hospital are named as defendants, consider additional strategies, such as whether the doctors should be represented by separate counsel.

# **\$25.9 Million Hospital Verdict in Pennsylvania**

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# Facts

- 27-year-old man sued a hospital related to care that he received after he was kicked in the leg.
- Plaintiff claimed that the hospital did not properly or promptly treat the issues related to his leg, which lead to a below the knee amputation.
- Plaintiff was a father and a nursing assistant prior to the injury.

# The Jury's Findings

- Plaintiff, a father and healthcare worker, made for a sympathetic plaintiff.
- Defendant's defenses ultimately were less compelling than the case developed by Plaintiff.
- The jury awarded a total of \$25.9 million:
  - \$20 million for past and future non economic loss, and
  - \$5.9 million for future medical expenses

# The Aftermath and Other Considerations

- **“Right out of the gate, the jury was presented with a highly compelling story on the Plaintiff’s side and a hyper-technical medical critique from the Defendants, with no one witness from [the hospital] providing a face to the defense”**
- After the trial had concluded, a hospital spokesperson provided a statement which acknowledged:
  - The hospital cares about their patients, and recognizes that when they fall short, there must be accountability.
  - The hospital provides care to the neediest of the community, and large verdicts are concerning.

# Takeaways

- This case highlights the importance of telling a compelling story in light of the jury's rejection of a "stale" defense theory.
- The hospital did have a compelling story to tell, but they did not tell that story during trial.
- Instead, the hospital generally pointed to the actions of the plaintiff to deflect liability.

# Possible Strategies

- Highlight the “good” and begin building a compelling narrative on your client’s behalf.
- Starts with the first meetings, all the way through discovery.
  - Attempt to affirmatively elicit the “good” in depositions.
  - These stories are more compelling than a stale defense loaded with legalese.
- Through the course of discovery and trial proceedings, make clear to the jury that this was one bad day.
  - Accept responsibility when appropriate, and be empathetic



# **\$19 Million SNF Verdict in Pennsylvania**

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# Facts

- Suit was filed against the nursing home and the corporate parents.
- 70 year old resident is admitted to a nursing home with pre-existing health issues.
- Her health began to decline, and she sustained a fall with hip fracture and a Stage IV pressure ulcer.
- Plaintiffs argued that these conditions lead to her death
- Plaintiffs claimed that the ownership deliberately understaffed the center, which lead to the breach in duty to the decedent.
- It was noted that the corporate defendants never appeared for trial, fanning the flames of “profits over people.”

# Evidence Considered

- Plaintiff's Complaint alleged that the corporate entities failed to employ qualified staff, failed to provide sufficient staff, failed to have policies and procedures to address the needs of Plaintiff.
- Plaintiff also alleged the center failed to comply with a series of regulations pertaining to the management of the facility.
- Unfortunately, staff from the nursing home testified that they raised concerns regarding staffing.
- There was also an insinuation in the expert reports that staff were terminated for raising concerns.

## The Jury's Findings

- \$19 million total verdict: \$2 million for pain and suffering, \$2 million for wrongful death, and \$15 million for punitive damages.
- The Estate succeeded on its corporate negligence claims, ultimately allowing for a \$15 million punitive damages award.
- Ownership was found to be 60% liable for Plaintiff's harm. The nursing home itself was only found to be 15% liable.
- The three corporate entities were ordered to pay \$10 million of the \$15 million in damages.

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# The Aftermath

- A significant sticking point with the verdict highlighted the indifference of the corporate defendants, who failed to even show up to trial.
- This case set a precedent for the surrounding area regarding the public's attitude towards nursing homes and their ownership.
- Facts in the case were relatively typical, with an atypical award.

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# Takeaways

- This case highlights the corporate liability trend.
- The evidence at trial insinuating that employees were terminated for raising staffing concerns, coupled with the failure of corporate defendants to show up for trial, drove this high verdict.
- This case also highlights the need and importance of empathy.

# Possible Strategies

- Simply put: if parent companies or corporate entities are named, a representative should be present for trial.
- However, at the outset of the case, it is important to pursue avenues to dismiss these entities.
- Witness management starts at the first meeting:
  - Here, former employee testimony was damning.
  - Create a rapport with both former and current employees.
  - Ensure that they know that you are there to support and defend the care he or she provided.
- With witnesses of the corporate entities, also important to manage witnesses
  - Importance of establishing their role, if any at the center, and be consistent with messaging.

# **\$30.9 Million Verdict in California**



# Facts

- 87-year-old admitted for short term rehabilitation after hospitalization for hip surgery.
- He was admitted with compromised skin to his bilateral heels and was noted to be high risk for skin breakdown.
- Plaintiffs' alleged that he developed pressure ulcers to his bilateral heels, despite not being discovered during his admission
- Ulcers advanced to Stage IV, and Plaintiffs' claim this lead to his death.
- Family sued the center and its corporate parents alleging elder abuse and neglect, constructive fraud, violation of patient's rights and wrongful death.
- Plaintiffs' claimed facility was understaffed to increase profits; staff was not properly trained or supervised.

# Evidence Considered

- Plaintiffs argued the resident should have been repositioned every two hours to prevent skin breakdown.
  - The records indicated he was only repositioned once.
- Plaintiffs argued the center failed to initiate care plan interventions to prevent skin breakdown on his heels, to include floating the heels, specialty mattress, and regular skin checks.
- Plaintiffs also claimed that the center was regularly understaffed to increase profits.
- Defense argued that the resident was admitted with compromised heels
- Defense also argued that the wounds were not present at the center and were discovered two days after discharge; argued his family failed to offload his heels and properly reposition him.

# The Jury's Findings

- Verdict totaled \$30.9 million:
  - \$5.9 million in compensatory damages
  - \$25 million in punitive damages
- The jury found the corporate defendants directly liable for the full amount of the verdict as well as under theories of aider and abettor and co-conspirator liability.

# The Aftermath

- Plaintiffs filed a post-trial motion for attorney's fees pursuant to California's Elder Abuse Act that was granted, with a total award of \$4.6 million in attorneys fees.
- Defendants filed post-trial motions to conform the verdict to the appropriate statutory limitations and to the evidence.
- The judge denied these motions, stating:
  - “Substantial evidence supported a pattern and practice, supported by management supervision and policy directives, to drive profits and reduce services. Substantial direct and circumstantial evidence presented a nexus between such policies and practices and patient neglect and harm. The jury was presented with substantial evidence of a willful, and knowing disregard of the rights and safety of the vulnerable elderly clients entrusted to Defendants' care.” The Order also stated, “Plaintiff here presented substantial evidence that Defendants' conduct was repeated, and the product of a policy to maintain understaffing, increase patient acuity, and drive cost-cutting, despite the awareness of probable consequences. The jury heard substantial direct and circumstantial evidence, including real-time emails, establishing a link between private equity investors' short - term quest for maximizing profits, and a reckless disregard for patient care.”

# Takeaways

- Given the jury found the corporate defendants directly liable for the entirety of the verdict, this case demonstrates the ongoing corporate negligence trend.
- In post-trial motion practice, the judge soundly declined any of defendants' theories that the punitive damages verdict was unconstitutional in light of the evidence presented.
  - The judge specifically mentioned email exchanges

# Possible Strategies

- Recognize the risk early.
  - Sophisticated counsel
  - Honest assessment of your own facts
- As previously discussed, pursue all avenues to dismiss corporate entities.
- If these entities remain in the case, begin witness development at the very first meeting.
- Throughout fact development, determine whether damaging emails about staffing exist, and develop a strategy for how to combat these findings.
  - Consider whether to develop your client's testimony regarding these issues, should they exist.

# **\$2.3 Million SNF Verdict in Pennsylvania**

# Facts

- 92-year-old resident
- She sustained a fall in the shower and broke her hip. After the fall, staff attempted to move her in a way that, Plaintiff alleges, further aggravated her injury.
- DOH cited the facility for failing to keep the facility free of accident hazards and the failure to supervise.
- Plaintiff's family also filed a complaint with the DA, alleging elder abuse, though no criminal charges appear to have been brought
- The state Department of Health cited Green Ridge Care Center for failing to keep its facility free of accident hazards and for failing to supervise, according to the lawsuit.



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## The Jury's Findings

- Jurors found the center acted with “reckless indifference” to resident’s rights
- The jury also found that the center knew the conduct of an employee amounted to reckless indifference.
- The jury handed down a verdict of \$300,000

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# The Aftermath

- The judge ordered another trial to assess punitive damages.
- While the reasoning is not yet known, a \$2 million verdict for punitive damages was issued.

# Takeaways

- Be vigilant regarding corporate entities named in complaint. Attack the pleadings.
- Defense has to tell a story
  - Empathy, compassion
- Quick and simple defense themes
  - Avoid stale and overly complex narratives

# Thank you

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