The upside of a bench trial in a medical malpractice case

Unless you're hoping for the instant gratification of a jury verdict, relying upon the judge's decision may increase your odds of prevailing at trial

By Brian Graziani

In mid-July of 2021, I was set for trial in Napa County, representing husband and wife Plaintiffs in a medical malpractice case. The case involved an elective plastic surgery performed on the wife, which went poorly. I represented the husband for his claim of loss of consortium.

Less than one week before trial, we received notice from the Court that since nobody had posted jury fees, our right to a jury was waived, and the trial would be a bench trial. For the record, I was not the attorney that originally filed the case, and I did not personally have an opportunity to timely post fees. Surprisingly, the defendants never posted fees either (inadvertently). When I got the news that the case would be a bench trial, I was relieved. It was my opinion that this case was better suited for a bench trial. And I was right.

The last offer from the Defendants was for "waiver of costs, and a subsequent malicious prosecution action." The final Decision from the bench totaled $448,835 (not reducible per MICRA), in addition to costs to the Plaintiffs as the prevailing parties. This was an excellent result.

Upon reflection, I re-confirmed my belief that there are many ways that this medical malpractice case, and many like it, are perhaps better suited for a bench trial, rather than a jury trial. Below are some of my thoughts.

Non-economic damages cap

Medical malpractice cases are very tough, due in part to the existence of MICRA as well as much of the case law surrounding medical malpractice. All the associated laws heavily favor the Defendants. Moreover, the jury never gets to know about them. Probably the most notable example of this is that a Plaintiff in a medical malpractice case may not receive more than $250,000 in non-economic damages. Further, there is strong law in favor of precluding a plaintiff attorney from informing the jury of this limit, and I have never won that battle during motions in limine.

Without the jury knowing about the limit, there is the danger that they will over-compensate on non-economic damages, and under-compensate on economic damages. This is because economic damages often have a greater deal of complexity involved. As a result, it is entirely possible that during deliberation, a jury may get frustrated by an economic damages award, give up on it, and just over-compensate on the general damages instead. Clearly, this creates a risk that you do not get the economic damages that are warranted, and whatever sum is awarded for general damages will only get reduced to $250,000 after judgment is entered. This is not a concern when the judge sits as the trier of fact.

Insurance coverage

A jury never gets to know that the verdict will get paid out by insurance. While it is possible that some jurors are savvy enough to know this, it is also possible that none of them do. This could lead to the danger that a sympathetic jury would feel that it is unfair to impose a substantial verdict on a defendant who would then have to pay out of pocket. This is not a concern with a judge who sits as a trier of fact, who will know about the existence of insurance, and likely even the policy limit.

This concern is somewhat amplified in a medical malpractice case. This is because many jurors are sympathetic to doctors and other healthcare providers. This is because jurors often perceive doctors and healthcare providers as heroes (which, generally speaking, they are). Despite any lawyer's best attempts to mitigate this risk through the voire dire process, the pro-doctor bias may still make its way into the deliberations room. It is my opinion that judges, on the other hand, do not carry that same pro-doctor bias, and as a result, are better able to hear the case more objectively.

Prevailing knowledge is that a jury is more likely to return a defense verdict than an arbitrator. I would think the same would hold true for judges sitting as triers of fact in bench trials.

Complex medical issues

Judges are smart. Medical malpractice cases often involve a substantial amount of complex medical and economic issues, which require intelligence and endurance to understand and process. If your case is dependent on the trier of fact attentively and closely following very complex medical issues, your case may be better served by having an attentive judge sitting as a trier of fact. Don't get me wrong, I do believe that twelve jurors are generally very smart. However, when you have twelve of them deliberating over

complicated medical or economic issues, there is more room for things to go awry.

Procedural ease

There are many ways in which a bench trial is less cumbersome than a jury trial. First, judges are always very mindful of the jury's time. As a result, they become task masters about scheduling and the calendar. If you have a case that has several experts (especially doctors), this gets burdensome. If there is no jury, however, the judge will allow for much more calendar flexibility.

Second, with no jury, there is no need to compile jury instructions, no argument over jury instructions, and there is no voir dire. This all saves a lot of time.

No instant gratification from the jury verdict

One drawback of the bench trial is that after all the evidence is in, and arguments made, you do not get the instant gratification of a jury verdict. In fact, my recent case involved a somewhat protracted process on the back-end.

Our bench trial involved post-trial written closing arguments, followed by in-person closing arguments. This spanned a couple of months. The Court's Proposed Decision was issued a couple of weeks after that. Either party then had fifteen days to object to the Proposed Decision. After objections were reviewed, the Court then issued its final Decision. The Decision gets reduced to a judgment. At that time, the prevailing party may file a memorandum of costs.

My case started in mid-July, and final judgment was only recently entered. Furthermore, the written briefing was labor intensive. My closing brief was about forty pages and attached hundreds of pages of trial transcripts as exhibits.

On the other hand, unless there is some error in the application of law, the threat of a motion for a new trial in a bench trial is relatively toothless. Along those same lines, so is the threat of appeal. By contrast, a jury, and jury instructions, are fertile grounds for defendants to dig up reasons to threaten appeal. In the absence of the jury, and when the judge is sitting as the trier of fact, the threat of appeal is minimal. This almost completely eviscerates the burden of post-trial law and motion, post-trial appeal, and post-trial settlement negotiations, including the weighing of settlement offers against the merits of the threatened appeal.

It is important to comment on the complete scrutiny of the trial transcripts. In the bench trial context, both sides are combing through the trial transcripts to support their final written briefing and closing arguments in the case. This is a double-edged sword, because if you missed any element of a cause of action, there will be definitive proof of it. On the other hand, if you have diligently submitted all required evidence in your case, you have definitive proof of that. Therefore, and just for the fun of stating the obvious, in the context of the bench trial, you must be sure to get in all of your evidence as to all of your causes of action. Once you have done that, however, your post-trial resolution should be relatively seamless.

Therefore, even though there is some additional work on the back-end of a bench trial (most notably the "Closing Brief"), once you do get to the end, you are in a much better position to have expedient and complete finality in the resolution of your case. Here again, in the balance, the bench trial is more favorable.

Conclusion

Depending on such factors as the jury appeal of your case, the county in which you are case will be tried, and who your judge will be, it may be a better approach to take your medical malpractice case into a bench trial instead of a jury trial. If you are sure that your medical malpractice case is better suited to a bench trial, ask opposing counsel to stipulate to it. Good luck!

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