Second Circuit Decision on Damages With Broad Ramifications

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It used to be relatively rare that medical malpractice actions in New York were brought in federal court. Only cases based upon care at a veterans (VA) hospital or the occasional instance of complete diversity between a plaintiff and the defendants would result in federal jurisdiction. That has changed with the proliferation of federally funded family health clinics under the Federally Supported Health Centers Act of 1995 (42 U.S.C. §201 et seq).

Pursuant to that law, those centers and their medical staff are deemed federal government employees for the purposes of malpractice lawsuits, and any such actions may only be brought in federal court under the Federal Tort Claims Act (FTCA), with the United States as the defendant.1 As a result, the federal courts have taken on a greater role in statewide malpractice litigation. Therefore, Second Circuit decisions in malpractice cases warrant the attention of New York medical malpractice litigators.

The U.S. Court of Appeals for the Second Circuit recently issued a particularly noteworthy opinion in Malmberg v. United States, ___ F.3d ___, 2016 WL 850859 (2d Cir. 2016), addressing damages in an action involving malpractice at a VA medical center. That decision has important ramifications for cases stemming from care rendered at VA facilities, but also has portentous implications for damages-related issues in other federal and state malpractice actions.

The plaintiff in Malmberg had been experiencing radiculopathy from his spine that resulted in weakness, numbness and tingling primarily in his left arm. This prevented him from working, but did not otherwise impair his ability to live independently or to engage in an array of activities. In November 2004, he underwent surgery at a VA hospital to remove a degenerative disc and osteophytes. After the procedure, he complained that his legs were weak, and radiologic studies of his spine revealed mild cord impingement and excessive edema.

He was subsequently diagnosed with incomplete quadriplegia. His condition deteriorated over time, and by late 2012 he had no ability to walk or stand, and only limited use of his hands. He had uncontrollable spasms in his legs on a daily basis, bowel and urinary incontinence, decubitus ulcers, constipation, diarrhea, abdominal pain, and loss of sexual function. He had daily pain that he described as 7 to 10 on a 1-10 scale, and required daily pain medication that impacted his ability to concentrate and remain alert. He lost his independence and was required to rely on others for all tasks of daily living. He also had significant psychological problems as a result of his physical disabilities, including ongoing depression.

In January 2006, the plaintiff filed an administrative claim, which the VA denied by failing to act within six months. The lawsuit was commenced in the Northern District of New York later that year. As with all FTCA lawsuits, this was a bench trial. The court found the VA liable in 2011. After a separate trial on damages in December 2012, the court awarded him $500,000 for past pain and suffering, $1.5 million for future pain and suffering, and $2.47 million in economic damages. The plaintiff appealed and the government cross-appealed. The remainder of this column will address two issues raised on the plaintiff's appeal-that the court abused its discretion

in reducing the award for future medical care based upon services that could be provided free of charge by the VA, and by awarding only $2 million for pain and suffering.

Future Medical Damages

In addressing the first issue, the Second Circuit analyzed both federal and state law. Arguing that it was entitled to this offset under federal law, the government cited Brooks v. United States, 337 U.S. 49 (1949), for the proposition that the government should not "pay twice for the same injury." In juxtaposition, the court noted that it had previously recognized that it is "particularly unseemly to force a plaintiff to receive medical services from the tortfeasor responsible for his injuries."

The court was referencing its prior decision in Ulrich v. Veterans Admin. Hosp., 853 F.2d 1078 (2d Cir. 1988), which reversed a district court's unexplained refusal to award future medical damages to a plaintiff injured by malpractice at a VA hospital, and stated that "any award for future medical expenses should not be limited on the ground that as a veteran, plaintiff is entitled to free VA medical care...." In so holding, the Ulrich court observed that the plaintiff "has a right to select a doctor or private hospital of his own choice for his future medical needs." The government in Malmberg urged the court to disregard that language as dicta.

The government also cited the court's prior decision in Morgan v. United States, 968 F.2d 200 (2d Cir. 1992), which held that an award to a plaintiff injured by malpractice at a VA facility had to be reduced by payments made under a federal statute (38 U.S.C. §1151) that requires disability payments to veterans injured by the VA. Morgan held, based on the statute's language and legislative history indicating an intent to preclude duplicate recoveries, that disability payments made under the statute had to be deducted from any subsequent award to the plaintiff, regardless of whether the award contemplated lost earnings. However, the Malmberg court distinguished Morgan because the statute requiring the government to provide medical care to all veterans (38 U.S.C. §1710) has neither language nor legislative history "prohibiting duplicative recoveries," similar to that found in the statute requiring disability payments. "It is one thing to require an offset for benefits that are meant to provide an alternative to tort damages, and another thing entirely to require an offset that would force a veteran to continue to receive medical care from his tortfeasor."

The court agreed with the U.S. Court of Appeals for the Seventh Circuit's determination in Molzof v. United States, 6 F.3d 461 (7th Cir. 1993), that "nothing under the FTCA or other provision of federal law prohibited the government from paying twice for future medical expenses," and that the issue, therefore, "is not what Congress intended, but rather whether state law...permits double payment." Quoting Ulrich, the Malmberg court found that "[f]ederal law disfavors an outcome whereby a litigant is 'obligated to seek medical care from the party whose negligence created his need for such care simply because that party offers it without charge.'"

It also quoted extensively from the U.S. Court of Appeals for the Third Circuit's opinion in Feeley v. United States, 337 F.2d 924 (3d Cir. 1964), as follows:

A victim of another's tort is entitled, we think, to choose, within reasonable limits, his own doctor and place of confinement, if such care is necessary. To force a plaintiff to choose between accepting public aid or bearing the expense of rehabilitation himself is an unreasonable choice. The plaintiff may not be satisfied with the public facilities; he may feel that a particular private physician is superior; in the future because of over-crowded conditions he may not even be able to receive timely care. These are only a few of many considerations with which an individual

may be faced in selecting treatment. The plaintiff's past use of the government facilities does not ensure his future use of them. He will now have the funds available to him to enable him to seek private care. He should not be denied this opportunity.
The Second Circuit thus concluded in Malmberg "that federal law does not require an offset against a veteran's damages award for future medical care that could be provided at a VA facility."

Collateral Source Offsets

But the analysis did not end there. Since damages under the FTCA are determined by the law of the state in which the tort occurred, the court addressed whether the offset sought by the government was required as a collateral source under CPLR 4545. It noted that the statute, which must be strictly construed because it is in derogation of the common law, is silent on whether there may be an offset based on services a plaintiff is entitled to receive from a responsible tortfeasor.
It found, however, that the plain language of the statute "suggests that a tortfeasor's offer to provide a plaintiff with free medical services at the tortfeasor's facility does not warrant an offset against the damages award." The court pointed to the language of CPLR 4545 that a reduction of an award based on a collateral source requires a finding that the cost or expense "will, with reasonable certainty, be replaced or indemnified from any collateral source." Applied to the circumstances in Malmberg, the court observed:
If the plaintiff seeks medical care from a non-VA provider-which, as discussed, is his prerogative-the costs of that medical care cannot be regarded as "replaced or indemnified" merely because the plaintiff elected not to accept the opportunity to receive free medical care from the VA. Indeed, the government has not demonstrated that, under these circumstances, plaintiff's future medical care costs "will, with reasonable certainty, be replaced or indemnified from any collateral source."
It then cited several state court decisions that rejected collateral source offsets that "would deprive plaintiffs of the ability to choose their own medical services caregiver." Among them were Andrialis v. Snyder, 159 Misc.2d 419 (Sup. Ct., New York Co. 1993, Gammerman, J.), which held that therapies available for free through the school district could not offset a jury award for therapies to an infant plaintiff because "the parents could not select the therapist," and Giventer v. Rementeria, 184 Misc.2d 744 (Sup. Ct., Richmond Co. 2000, Maltese, J.), which made the same finding, and further found that "an HMO would not replace" a jury's award that permits an infant plaintiff's parents "to obtain the care that they choose, from the doctors and nurses of their choice, without any limitations such as pre-approval or being on a list...."2
The Malmberg court quoted a portion of Andrialis that rhetorically asked whether a plaintiff's entitlement to VA benefits should preclude an award for future medical care, to emphasize the distinction between sources that pay for medical services by providers selected by the patient and ones that render services through providers selected by the government-the latter not qualifying as collateral sources under CPLR 4545.
The Second Circuit also embraced the Second Department's opinion in Kihl v. Pfeffer, 47 AD3d 154 (2d Dept. 2007), that the reasonable certainty standard was not satisfied by a plaintiff's health insurance coverage that flowed through her husband's employer because her continued receipt of benefits was beyond her control and dependent upon her husband's continued employment. Quoting from Kihl, the Second Circuit observed that "[w]hile Section 4545 aimed

to prevent 'double recoveries,' it was 'not meant to enslave a health care beneficiary to a particular employer or insurance provider.' "

Against this backdrop, the court vacated the district court's offset of the Malmberg plaintiff's award for future medical care that could be provided for free by the VA, expressly noting the "difference between insurance policies that allow patients to select their own providers and reimburse payments for those services, and programs that allow government agencies to select medical providers for the patients." It concluded the subject with the observation that "there is some risk of a double recovery to the extent [Charles] Malmberg elects to continue receiving services from the VA, but any such concern is for Congress and not this court."

The court's specific holding that the free medical care available to all veterans cannot serve as an offset to damages awards for plaintiffs injured by VA malpractice is obviously of huge importance in all such cases. However, the court's opinion-particularly the portions recognizing the rights of plaintiffs to choose their health care providers without encumbrances or sacrifices under both federal and state law-also has great significance for all cases in which defendants seek offsets for awards based upon governmental programs. The Second Circuit made clear that such offsets are not available under federal law, or as a collateral source under CPLR 4545.

It is noteworthy that the New York State Court of Appeals was presented with a similar issue in Foote v. Albany Medical Center Hosp., 16 N.Y.3d 211 (2011),3 a wrongful birth action in which the defendants sought to dismiss on the ground that the plaintiffs had no injury because all medical and educational services were being provided by Medicaid and the schools. In holding that those government programs did not, as a matter of law, eliminate the plaintiff-parents' obligation for their child's extraordinary care expenses, the court cited the opinion of the plaintiffs' expert that those programs provided only a minimum level of services, and that optimal care required greater services for which the plaintiffs would be required to pay out-of-pocket.

It concluded that a factual issue was presented as to "whether there is a difference between the resources provided by government programs and the extraordinary medical and other treatment or services necessary for the child during minority." The court in Foote stated that it did not reach, and expressed no opinion on, whether the government programs can qualify as a collateral source under CPLR 4545. The Second Circuit's opinion in Malmberg indicates that they cannot.

Pain and Suffering Awards

In addressing the pain and suffering awards, the court observed that neither party challenged the district court's factual findings with regard to the plaintiff's injuries (described at the outset of this column), and that its review of the nature and measure of awards under the FTCA are guided by state law. In endeavoring to conduct that review, the court quoted the district court's analysis as follows:

As evidenced above, the significant changes to Plaintiff's life are severe and real. They are not, in any sense, mere speculation. Unequivocally, Plaintiff's injuries are permanent, devastating, and catastrophic. The range in New York is normally between $500,000 and $1,500,000 dollars for a pain and suffering award. Therefore, the court will award Plaintiff $500,000 for past pain and suffering and $1,500,000 for future pain and suffering.

Describing that analysis as "sparse" and providing "little on which we may base our review," the court held that it "fails as a matter of law." It found that the district court did not provide a sufficient rationale for the award, since it failed to cite any cases to support its conclusion that

the range for permanent and catastrophic injuries in New York is $500,000 to $1.5 million. In fact, the court noted, the only quadriplegia cases cited by the district court in a footnote provided far greater recovery. Since the district court's analysis was insufficient for a fair determination of the adequacy of its award, the court vacated the award and remanded for the district court to set the damages and explain its rationale.

The quadriplegia cases noted by the district court, as referenced by the circuit court, were Saladino v. Stewart & Stevenson Servs., No. 01 Civ. 7644(SLT), 2011 WL 284476 (EDNY Jan. 26, 2011), aff'd, 500 Fed.Appx. 69 (2d Cir. 2012) ($15 million), McMillan v. City of New York, Nos. 03-CV-6049, 08-CV-2887, 2008 WL 4287573 (EDNY Sept. 19, 2008) ($4 million past, $7.5 million future), and Barnhard v. Cybex Int'l, 55 A.D.3d 1348 (4th Dept. 2008) ($3 million past, $9 million future).

Further, numerous Appellate Division decisions established that by 2014 (the year of the district court's damages decision in Malmberg) the range of pain and suffering awards for permanent, devastating, and catastrophic injuries in New York greatly exceeded $500,000 to $1.5 million.4

Conclusion

The Second Circuit's decision in Malmberg is important for several reasons. First, it should eventually result in Malmberg receiving fair compensation for his pain and suffering and medical care. Second, it establishes important precedent under both federal and state law relative to efforts to reduce damages awards for future care based upon services that are available to plaintiffs free of charge via governmental programs. Last, it requires federal district courts to identify and support the evidentiary and precedential bases for pain and suffering awards. Thus, this case has significant implications on damages in federal and state malpractice actions.

Endnotes:

1. See Moore and Gaier, "Federally Funded Clinics, Medical Malpractice," NYLJ, April 1, 2008, p. 3; Moore and Gaier, Recent Decision on Federally Funded Centers, Medical Malpractice, NYLJ, Oct. 4, 2011, p. 3.
2. The authors represented the plaintiffs in each of those cases.
3. For discussion, see Moore and Gaier, "Determining Recovery for Wrongful Birth," Medical Malpractice, NYLJ, Aug. 2, 2011, p. 3.
4. See Peat v. Fordham Hill Owners Corp., 110 A.D.3d 643 (1st Dept. 2013) ($16 million-severe second- and third-degree burns); Aguilar v. New York City Transit Auth., 81 A.D.3d 509 (1st Dept. 2011) ($10 million-above-the-knee amputation of left leg, and right leg rendered essentially useless); Bissell v. Town of Amherst, 56 A.D.3d 1144 (4th Dept. 2008) ($10 million-paralysis and total dependency); Miraglia v. H&L Holding Corp., 36 A.D.3d 456 (1st Dept. 2007) ($10 million-paraplegia); Ruby v. Budget Rent A Car Corp., 23 A.D.3d 257 (1st Dept. 2005), lv. denied, 6 N.Y.3d 712 (2006) ($10 million paraplegia from spinal cord injury); Bondi v. Bambrick, 308 A.D.2d 330 (1st Dept. 2003) ($9.75 million-loss part of leg and pervasive scarring); Sanders v. New York City Transit Auth., 83 A.D.3d 811 (2d Dept. 2011) ($8.55 million-right leg, below-knee amputation and other traumatic injuries); Dockery v. Sprecher, 68 A.D.3d 1043 (2d Dept. 2009) ($7.95 million-brain damage).