New York Law Journal

CPLR 5501(c) Review of Excessive Future Medical Expenses Awards

We recommend that defense attorneys advocate more aggressively for CPLR 5501(c) comparative case analysis review of future medical awards.

By **Timothy R. Capowski and John F. Watkins** | July 12, 2019

Defense litigators familiar with personal injury actions are all well-acquainted with the oft-seen practice of seeking a CPLR 5501(c) comparable case analysis to determine whether a given award for pain and suffering "deviates materially from what would be reasonable compensation"—in practice, whether it deviates materially from awards sustained by other courts for similar injuries. Less often seen is the use of the same statutory provision to seek a comparable case review for awards for future medical expenses. And yet not only does

such a review further the policy goals of CPLR 5501(c), but it has been successfully used to reduce outlandish future medical expense awards. We recommend, therefore, that defense attorneys advocate more aggressively for CPLR 5501(c) comparative case analysis review of future medical awards.

Historical Development. Hard as it may be to imagine, New York, not so very long ago, once seemed poised to adopt a hard cap on pain and suffering damages. The subject had been fiercely debated in the 1980s, when the Jones Commission actually proposed such a cap, and while that debate ended in a compromise—the adoption of CPLR 5501(c)'s "deviates materially" standard, at the urging of then-Governor Mario Cuomo—a new surge of enthusiasm for tort reform followed in the 1990s.

The Republican Party swept into its first Congressional majority in 40 years, leveraging nationwide support for tort reform in the form of the "Common Sense Legal Reform Act", a plank in the "Contract with America" platform. While President Clinton vetoed the "Common Sense Legal Reform Act" that followed, the issue went beyond partisan politics. In particular, the cresting asbestos litigation wave presented a crisis acknowledged by all observers. See, e.g., *Georgine v. Amchem Prods.*, 83 F.3d 610, 618-19 (3d Cir. 1996). In the decade that followed, a dozen states would adopt comprehensive tort reform packages; another dozen would adopt such reforms strictly in the medical malpractice context. Even in liberal New York, the specter of the Jones Commission damages cap remained, a looming shadow over the plaintiffs' bar. Alive to this threat, the New York plaintiffs' bar prudently began to focus its efforts on the previously-ignored component of future medical expenses.

When tort reform ultimately failed to gain further purchase in New York, plaintiffs' successful pivot to future medical expenses, combined with cost-cutting in the insurance defense industry and understandable anxiety and uncertainty over increases in health care costs caused awards for future medicals to begin to rise. Indeed, future medical damages seemed limited solely by the scope of an attorney's imagination and an expert's ability to sell. As such, a new cottage industry arose, one of paid life care planners whose purpose is to provide evidentiary support for "kitchen sink" future medical expenses: housekeepers, home health aides, wildly expensive designer pain creams, and other tack-ons such as lifelong physical therapy. In response, a separate cottage industry of surveillance professionals has sprung into existence, to counter the representations of life-care planners.

In short, we have seen a surge in the amount of claimed damages for future medicals, accompanied by an increase in secondary litigation costs occasioned by the trial-within-a-trial over the size and scope of such claims. Because defense attorneys rarely seek the apples-to-apples comparative case review that is common in the context of pain and suffering, the resulting awards may depart sharply upward from past verdict awards, even for garden variety injuries. For example, back injury claims involving surgical intervention that tend to command future medical expenses awards of low-to-mid-six figures are now accompanied by elaborate multi-million-dollar life care plans that are multiples of the highest sustained awards. These projections encroach well into the range of sustained future medical expenses awards for catastrophic injuries. This phenomenon occurs with even more drastic ramifications in catastrophic brain damage and paralysis claims, where life care planner and economist projections in the tens of millions and even over one hundred million are becoming more frequent and well beyond any figures ever sustained by the Appellate Division.

Post-Trial and Appellate Review of Future Medical Expenses Awards: A Dual Evidentiary and CPLR 5501(c) Analysis. As the focus on, and size of, future medical expenses verdicts has increased, the all-too-frequent response of the defense bar has been to challenge (and thus have the court review) them on a purely evidentiary basis. Defendants argue that the various treatment components proposed in plaintiff's life care plan are unsupported by the evidence, are inconsistent with the plaintiff's actual treatment history, or that the source of the treatment components (frequently a life care planner or non-treating expert referred by plaintiff's counsel) is incompetent to testify to these future care needs.

This method can lead to success on occasion. See, e.g., *Hernandez v. Consolidated Edison Co. of N.Y.*, 144 A.D.3d 501 (1st Dep't 2016). However, arguments limited to a purely evidentiary basis are subject to challenge, and made more so by the defense bar's historic reluctance to offer its own life care plan via an expert. This reluctance is founded on the fear that by offering such an expert, they appear to concede liability (in unified trials) and/or set a "floor" on damages, thereby inviting a "compromise" at the mid-point between the figures advanced by their expert and plaintiff's. In the absence of a defense expert, however, defendants expose themselves to the risk that the court will overlook the rule that unfounded or speculative assertions are not evidence, and wrongly think itself constrained to affirm in the absence of affirmative countervailing expert proof of a lower figure.

The more prudent approach that we recommend is to complement the foregoing with the review available pursuant to CPLR 5501(c) and its 'analogous case comparison' analysis. This is the exact same dual analysis routinely performed in evaluating pain and suffering awards (*Donlon v. City of New York*, 284 A.D.2d 13, 18 (1st Dep't 2001)) and punitive damages awards (*Cardoza v. City of N.Y.*, 139 A.D.3d 151, 166 (1st Dep't 2016)).

This approach has succeeded when raised. For example, in a case where a jury awarded $2,872,400 for future medical expenses in a below-the-knee amputation case, our office argued to the Appellate Division for a significant remittitur pursuant to CPLR 5501(c) based on prior sustained six-figure awards for medical expenses in other leg amputation cases, albeit to older plaintiffs. The Appellate Division agreed with us and ordered a remittitur to $1.5 million to the 23-year-old plaintiff based on "the decisions of this Court regarding reasonable compensation values for future medical expenses in similar cases." *Firmes v. Chase Manhattan Automotive Fin.*, 50 A.D.3d 18, 29 (2d Dep't 2008).

Even more recently, we were successful in arguing the dual analysis in a back injury case involving spinal fusion surgery. The Kings County jury awarded a verdict including $1.6 million in future medical expenses. We demonstrated on the post-trial motion that, inter alia, appellate-evaluated awards for future medical expenses have not exceeded the six-figure range. (Indeed, even the biggest outlier decision affirming the highest-ever pain and suffering award in a spinal fusion case, *Stewart v. New York City Tr. Auth.*, 82 A.D.3d 438 (1st Dep't 2011), involves a remitted future medical expenses award of $660,000.) Confronted with these precedents, the Supreme Court ordered a conditional remittitur of the $1.6 million future medical expenses verdict, pursuant to CPLR 5501(c), to $750,000, and the matter settled before defendants' appeal seeking a further remittitur could be perfected. See *Dias v. Blue Sea Construction*, Sup. Ct., Kings Cnty. Index No. 505822/2015 (Dec. 4, 2018, Rivera, J.).

Other cases have seen similar results. See, e.g., *Rappold v. Snorac*, 289 A.D.2d 1044, 1046 (4th Dep't 2001) (citing CPLR 5501(c) and "deviates materially" standard to reduce future medical expenses award "[u]pon our review of comparable cases"); *Nevarez v. New York City Health and Hospitals*, 248 A.D.2d 307, 309 (1st Dep't 1998) (reducing $4,796,483 verdict for future custodial care to $2.5 million on basis that it "deviates materially from what is reasonable compensation under the circumstances and is excessive to the extent indicated above") (citing numerous analogous cases).

We have seen this strategy succeed on dozens of occasions over the past decade, most especially in the area of back injury cases involving spinal fusion surgery. Plaintiffs consistently submit multi-million dollar projected future medical expenses claims, and juries sometimes return multi-million dollar verdicts for this component, even though the sustainable range remains in the six-figures. When we make this demonstration, plaintiffs tend to argue that future medical expenses should be reviewed on a purely evidentiary basis. However, after we provide them with the above-cited case law confirming that the courts do, in fact, review future medical expenses awards under CPLR 5501(c)'s "deviates materially" standard, they also typically settle based on tacit recognition of CPLR 5501(c)'s applicability.

We recommend affirmatively raising the CPLR 5501(c) argument. Courts are unlikely to accord defendants remittitur based on CPLR 5501(c) sua sponte, and may feel constrained to affirm patently excessive and unprecedented awards simply because they are technically supported by evidence or by assertion mistaken as evidence. See *Barnhard v. Cybex Int'l*, 89 A.D.3d 1554 (4th Dep't 2011) (affirming largest future medical expense award ever for adult catastrophic injury of $28.6 million on evidentiary sufficiency basis [CPLR 5501(c) was never raised as a basis for reduction] despite that no appellate court had ever previously approved a future medical expenses award of even $20 million prior to that to any adult plaintiff).

In contrast, where defendants press the CPLR 5501(c) argument, they both protect their clients' interest and provide the courts a further chance to advance the public policy rationale underpinning CPLR 5501(c)—that is, to prevent an upward spiral of awards and to provide similarly-situated litigants with fairness, transparency and predictability. This, in turn, benefits both the overburdened court system and New York as a whole, because a world of transparent and predictable litigation is a world where more claims settle for proper value. Defendants should not hesitate to underscore these benefits to the courts and advocate fiercely for future medical expenses awards in keeping with past sustained awards.

Timothy R. Capowski *and* **John F. Watkins** *are appellate partners at Shaub, Ahmuty, Citrin & Spratt.*