MEDICAL MALPRACTICE FROM A-Z

I. LAYING THE FOUNDATION

A. CURRENT CASE LAW AND LEGISLATIVE UPDATE

In recent years, Mississippi courts have been called upon to interpret and apply the medical malpractice laws adopted by the legislature in the 2002 and 2004 special sessions. What follows is a brief overview of certain noteworthy cases in this area.

1. What Constitutes a Medical Malpractice Claim?

Miss. Code Ann. § 15-1-36 addresses the pre-suit notice requirement, statutes of limitation and the discovery rule applicable in medical malpractice cases. Differences exist in each of these areas between medical malpractice and other tort claims. Thus, an issue which commonly arises is whether the case at hand is a medical malpractice case at all. According to the Mississippi Court of Appeals, the medical malpractice statute only applies to tort claims which "arise out of the course of medical, surgical or other professional services."[1]

In *Chitty v. Terracina,* the court considered the following six factors in order to determine whether a claim is governed by Miss. Code Ann. § 15-1-36:[2]

- whether the particular wrong is "treatment related" or caused by a dereliction of profession skill;
- whether the wrong requires expert medical evidence to determine whether the appropriate standard of care was breached;
- whether the pertinent act or omission involved assessment of the patient's condition;
- whether the incident occurred in the context of a physician-patient relationship, or was within the scope of activities which a hospital is licensed to perform;
- whether the injury would have occurred if the patient had not sought treatment; and,
- whether the tort alleged was intentional.

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[1] See *Chitty v. Terracina,* 16 So.3d 774 (Miss. Ct. App. 2009).
[2] *Id.*at 778-79 (citing *Howell v. Garden Park Cmty. Hospital,* 1 So.3d 900 (Miss. Ct. App. 2008)).

2. Triggering the Discovery Rule

Miss. Code Ann. § 15-1-36 provides that professional malpractice actions brought against a licensed physician, dentist, hospital, nurse, pharmacist or chiropractor must be filed two years "from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered."[3] More plainly, the Court has explained that the two-year statute of limitations for medical malpractice actions does not begin to run until "the time the patient discovers, or should have discovered by the exercise of reasonable diligence, he has an ***actionable injury***."[4]

Under the "discovery rule," the central inquiry is:

> When the patient can reasonably be held to have knowledge of the injury itself, the cause of the injury, and the causative relationship between the injury and the conduct of the medical practitioner.[5]

While this may venture a bit away from medical malpractice, it should be noted that "[n]ot all discovery rules are created equal."[6] The Mississippi Supreme Court has recently determined that only medical malpractice claimants are entitled to a discovery rule in this state.[7] In other tort actions, the limitations period begins to run from the date of discovery of injury, not the date of discovery of any causal relationship between the injury and the wrongful conduct of the tortfeasor.[8]

3. Conflicting Statutes of Limitations for Medical Malpractice Patients Who Die While of Unsound Mind

The Mississippi Supreme Court has ruled that two subsections of the medical malpractice statute of limitations statute are in direct conflict with each other.[9] The

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[3] Weems & Weems, *Miss. Law of Torts*, § 4-2 Medical Malpractice – statute of limitations (2002) (citing, Miss. Code Ann. § 15-1-36).
[4] *Sarris v. Smith*, 782 So.2d 721, 724 (Miss. 2001).
[5] *Huss v. Gayden*, 991 So.2d 162, 165-56 (Miss. 2008).
[6] *Angle v. Koopers, Inc.*, 2010 Miss. Lexis 273, *10 (May 27, 2010) (plaintiff barred from bringimg claim against later discovered tortfeasor, because injury was discovered more than two years prior to plaintiff's discovery of cause).
[7] *Id.*
[8] *Id.*(citing *Caves v. Yarbrough*, 991 So.2d 142, 154-55 (Miss. 2008)).
[9] *Estate of Ardelua Johnson v. Graceland Care Center* and *Falkner v. Conley*, 2010 Miss. Lexis 282 (Miss. 2010) (cases consolidated on appeal).

conflicting statutes are Miss. Code Ann. §§ 15-1-36(5) and 15-1-36(6). These statutes, as well as Miss. Code Ann. § 15-1-55, are set forth below:

Miss. Code Ann. § 15-1-36(5):

> If at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person… [was] under the disability of unsoundness of mind, then such person or the person claiming through him may… *commence action on such claim at any time within (2) years* next *after the time at which the person to whom the right shall have first accrued shall have ceased to be under the disability, or shall have died*, whichever shall have first occurred.

Miss. Code Ann. § 15-1-36(6):

> When any person who shall be under the disabilities mentioned in subsections *(3), (4) and (5) of this section* at the time at which his right shall have first accrued, *shall depart this life without having ceased to be under such disability, no time shall be allowed by reason of the disability of such person to commence action on the claim of such person beyond the period prescribed under § 15-1-55*.

Miss. Code Ann. § 15-1-55:

> If a person entitled to bring any of the personal actions herein mentioned, or liable to any such action, shall die before the expiration of the time herein limited therefore, *such action may be commenced* by or against the executor or administrator of the deceased person, after the expiration of said time, and *within one year after the death of such person*.

In its holding addressing the conflicting statutes, the Mississippi Supreme Court stated "sections 15-1-36(5) and 15-1-36(6) directly conflict with one another. We can think of no situation in which a person of unsound mind would die without ceasing to be under the disability of unsound mind and within one year of their medical malpractice statute of limitations running – as contemplated by subsection (6) and Section 15-1-55 –

because subsection (5) grants that person a two-year limitations period after his or her death. [We] will, therefore, construe the statute so as to prevent the plaintiffs from forfeiting their rights to bring suit due to confusion created by the conflict."[10] Thus, a two-year limitations period applies to medical malpractice actions filed by an executor after the deceased patient dies while being of unsound mind.

4. Legislative Mandate Requiring the Attachment of a Certificate of Consultation is Unconstitutional

Miss. Code Ann. § 11-1-58(1)(a) requires a medical malpractice complaint to be accompanied by a certificate of consultation. The legislative penalty for the failure to attach such a certification is dismissal of the complaint.[11]

The Mississippi Supreme Court has recently determined that the dismissal requirement is unconstitutional because, under the separation of powers doctrine, only the Mississippi Supreme Court has the authority to establish procedural rules.[12] Therefore, a medical malpractice complaint, otherwise properly filed in accordance with the Mississippi Rules of Civil Procedure, cannot be dismissed and need not be amended simply because a plaintiff fails to attach a certificate of consultation.[13]

5. Medical Malpractice Noneconomic Damages Capped at $500,000 Per Wrongful Death Beneficiary

Pursuant to Miss. Code Ann. § 11-1-60(2)(a), a medical malpractice wrongful death plaintiff shall not be awarded more than $500,000 for noneconomic damages. The Mississippi Supreme Court has interpreted this statute to provide a single cap for a medical malpractice action, not multiple caps for each wrongful death beneficiary.[14]

6. Don't Forget Relevancy: Medical Experts Must Base Their Opinions on Facts, Not Speculation

Daubert requires putative expert opinion to meet two fundamental requirements: relevancy and reliability. In my experience in medical malpractice cases, experts offered

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[10] *Estate of Ardelua Johnson*, at *11 (P13).
[11] Miss. Code. Ann. § 11-1-58(1)(a).
[12] *Ellis v. Miss. Baptist Med. Ctr., Inc.*, 997 So.2d 996 (Miss. Ct. App. 2008).
[13] *Id.*
[14] *Estate of Klaus v. Vicksburg Healthcare, LLC*, 972 So.2d 555, 559 (Miss. 2007).

by the defense have adequate qualifications and experience to meet the reliability prong of this test. The relevancy requirement is where experts are sometimes vulnerable. An example of this line of attack can be found in *West v. United States.*[15]

West v. United States involves a plaintiff who sustained severely burned corneas in a routine eye procedure that caused the loss of the plaintiff's eyesight. The plaintiff claimed that his corneas were burned due to the mistaken use of a scrub solution which contained detergent instead of surgical preparatory solution indicated for use in eye procedures. The defendant's medical expert opined that the plaintiff's injuries could have arisen from exposure to several alternative agents, if the plaintiff had an underlying medical condition. There was no evidence in the record that the plaintiff had any such underlying condition, which forced the expert to admit that his opinion was premised upon speculation.[16]

Plaintiff counsel moved to exclude the defendant's expert on the basis that his opinions were premised on speculation and therefore irrelevant. Judge Lee agreed, and "indicated to the parties that while it would not bar the United States from presenting Dr. Huang's testimony at trial, the court would likely disregard any testimony or opinion he might offer as to the cause of Mr. West's injury in light of his inability to state any opinion as to the cause of Mr. West's injury to a reasonable degree of medical certainty."[17] At trial, the expert testified for the first time that "one of the numbing agents" used in surgical preparations "probably" damaged West's corneas, but offered "no explanation as to how he was previously able only to identify 'possible' causes and yet is now able to single out the 'probable' cause." Thus, the court provided the expert's testimony no weight.[18]

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[15] *West v. United States of America*, 2009 U.S. Dist. Lexis 61952 (decided July 20, 2009).
[16] *Id.* at *6-7 (during deposition, plaintiff's counsel elicited testimony from expert which confirmed that expert could not state cause of injury with a reasonable degree of medical certainty).
[17] *Id.* at 7.
[18] *Id.* at 9. The court also struck the expert's opinions due to the government's failure to disclose the new "probable" opinion prior to trial. *Id.* at 8-9.

B. UNDERSTANDING PHYSICIAN AND HOSPITAL LIABILITY

An action for medical malpractice is an action in tort for the negligent infliction of personal injury or wrongful death in the course of medical treatment by someone who professed to have a special knowledge and skill in the practice of medicine. In other words, there really is no medical malpractice tort. Instead, the tort is most typically negligence. Medical malpractice is really just a description of that negligence.

This is not to say that medical malpractice cases have no unique distinctions from other negligence actions. A physician has a duty to use his knowledge to treat his patient with such reasonable diligence, skill, competence and prudence as are practiced by ***minimally competent*** physicians in the same specialty or general field of practice throughout the United States, who have available to them the same general facilities, services, equipment and options as are available to the defendant physician.[19] A minimally competent medical professional is one whose skill and knowledge are sufficient to meet licensure or certification requirements for the profession or specialty in which he or she practices.[20]

Hospital liability raises different, but related issues to physician liability. Mississippi law allows for the imposition of vicarious liability on a private hospital[21] under this circumstance:

> Where a hospital holds itself out to the public as providing a given service … and where the hospital enters into a contractual arrangement with one or more physicians to direct and provide the service, and where the patient engages the services of the hospital without regard to the identity of a particular physician and where as a matter of fact the patient is relying upon the hospital to deliver the desired health care and treatment, the doctrine of respondeat superior applies and the hospital is vicariously liable for damages proximately resulting from the neglect, if any, of such physicians.[22]

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[19] Weems & Weems, *Miss. Law of Torts*, § 4-1 Medical Malpractice – in general (2002) (citing, *Hall v. Hilburn*, 466 So.2d 856 (Miss. 1985)).
[20] *Id.* (citing, *McCarty v. Mladineo*, 636 So.2d 377 (Miss. 1994)).
[21] The Court has held that the Mississippi Tort Claims Act does not allow for the imposition of *respondeat superior* liability on state hospitals when the offending medical care provider is an independent contractor. *Brown v. Delta Regional Medical Ctr.*, 997 So.2d 195 (Miss. 2008).
[22] *Hardy v. Brantley*, 471 So.2d 358, 371 (Miss. 1985); see also, *Gatlin v. Methodist Medical Center, Inc.*, 772 So.2d 1023 (Miss. 2000) (examining and following *Hardy*).

Thus, a medical malpractice case can be made against a medical professional if one can prove that the professional deviated from minimum standards of competency. A case can be made for the vicarious liability of the hospital if one can show that the patient engaged the services of a hospital, which then assigned the negligent medical provider.

In light of the chorus of tort "reform" advocates constant refrain of the unfairness of this liability scheme, one would think that the medical malpractice action is some recent concoction of the plaintiffs' bar. This is not true. Thousands of years ago, the ancient Babylonians imposed strict liability upon a surgeon. John Maxcy Zane wrote in *The Story of Law* that:

> [c]arelessness or neglect was punished and the standard of negligence seems to have approached our standard of reasonable care. [However] a surgeon was held to strict accountability. If he caused loss of life or limb he lost his hands, if a veterinary, he paid for his malpractice. It has taken long ages for doctors to achieve the comfort of burying their mistakes.[23]

This allowance of legal consequence for medical malpractice was passed to the Romans through the Institutes of Justinian[24] and ultimately into English common law.[25]

Do not let the fact that medical malpractice actions have been with us a very long time, or the fact that they are still pursued with regularity under Mississippi law, blur your understanding of the single most important thing one must understand when considering assessing physician or hospital liability: Medical malpractice cases are hard to prove and hard to win.

In 1993, Frank A. Sloan, a professor of health policy and management at Duke University, and other scholars published a detailed study of nearly two hundred claims

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[23] John Maxcy Jane, *The Story of Law*, 2nd ed. (Indianapolis: Liberty Fund, Inc., 1927, 1998) at 76.
[24] *The Institutes of Justinian*, 3rd ed., trans. By J.B. Moyle (Oxford: The Clarendon Press, 1896) at 169 ("[I]f a surgeon operates on your slave, and then neglects altogether to attend to his cure, so that the slave dies in consequence, he is liable for his carelessness. Sometimes too unskillfulness is undistinguishable [*sic*] from carelessness – as where a surgeon kills your slave by giving him wrong medicines;….")
[25] The rule that a physician is liable for medical malpractice passed into the English common law in the late Middle Ages, and the first such recorded case was heard in 1374. *See*, Stetler, *History of Reported Medical Professional Liability Cases*, 30 Temp. L.Q. 367 (1957).

for medical malpractice filed in Florida.[26] Among other things, the study found that the incidence of compensation in medical malpractice cases is low.[27] Many plaintiffs drop their suits before trial, and only one-third of plaintiffs prevail at trial.[28]

Of course, 80 to 92 percent of civil lawsuits result in a settlement.[29] Randall L. Kiser co-authored a 2008 empirical study of 2,054 civil lawsuits that went to trial between 2002 and 2005. The purpose of the study was to determine whether parties made an appropriate settlement decision before trial. Kiser concluded that "[t]he lesson for plaintiffs is, in the vast majority of cases, they are perceiving the defendant's offer to be half a loaf when in fact it is an entire loaf or more." Plaintiffs were wrong to proceed to trial 61 percent of the time. Defendants were wrong 24 percent. In 15 percent of the cases, both sides made the correct decision to try the case.

This is a great little nugget of information to consider when evaluating a medical malpractice case (or to use as a conversation starter at a cocktail party infiltrated with a bunch of lawyers), but the more important question is this: How do you know when and whether to settle? This is where experience and reputation come into play and show their true value. Sloan found that defendants offered larger settlements than they otherwise would have when the plaintiff's attorney was experienced in handling medical malpractice cases.[30]

C. THE LAW OF DAMAGES

The *Mississippi Law of Torts* provides that the "usual elements of damage for personal injury include past and future medical expenses, past and future loss of income, past and future physical and mental pain and suffering, disfigurement, and disability."[31] This is a basic principle of tort law; yet, many of us struggle with the appropriate way of explaining personal injury damages in jury instructions. Set forth below is an adopted

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[26] Frank A. Sloan, et al., *Suing for Medical Malpractice* (Chicago: Univ. of Chicago Press, 1993), 258 ppgs.
[27] *Id.* at 187.
[28] *Id.* at 12.
[29] Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, N.Y. Times, August 8, 2008.
[30] *Suing for Medical Malpractice*, at 175.
[31] *Miss. Law of Torts*, § 18-2 (2002) (citing, *Woods v. Nichols*, 416 So.2d 659, 671 (Miss. 1982); *Kinnard v. Martin*, 223 So.2d 300 (Miss. 1969); Miss. Model Jury Inst. 20.14 (1977)).

form of four separate jury instructions[32] submitted by United States District Judge Glen Davidson in a personal injury action I recently tried in the Northern District of Mississippi:

> **Damages Instruction No. 1**
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> You are instructed that damages is the word which expresses in dollars and cents the injuries sustained by the plaintiff. In order to recover damages, the plaintiff must illustrate with a preponderance of the evidence that nature and cause of his damages. A plaintiff does not lose his right to recover damages because he is unable to prove with absolute certainty the mathematical value of his injury. If the cause of the injury has been illustrated with a preponderance of the evidence, you may reasonably estimate the damages, and the assessment thereof is within your discretion.[33]
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> **Damages Instruction No. 2**
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> If you determine that the defendant breached his duty of reasonable care on _____, 2010 and that said breach caused the plaintiff's injuries, then you may determine that the plaintiff is entitled to recover compensatory damages.
>
> Compensatory damages consist of two types: Economic Damages and Non-Economic Damages.
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> Economic Damages are objectively verifiable monetary amounts which arise from such things as medical expenses and medical care, rehabilitation services, custodial care, disabilities, loss of earnings and earning capacity, loss of income, loss of the fringe benefits of employment, costs of obtaining substitute domestic services, loss of employment and other objectively verifiable monetary losses.
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> Non-Economic Damages are subjectively determined monetary amounts arising from pain, suffering, inconvenience, mental anguish, worry, emotional distress, loss of society and companionship, humiliation, embarrassment, lost enjoyment of life and other similarly subjective losses.[34]

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[32] These form instructions use the generic party descriptions of "plaintiff" and "defendant". In practice, I suggest that you substitute these generic terms with actual party names.

[33] *Mississippi Model Jury Instructions*, § 11:1 (citing, *Amiker v. Brakefield*, 473 So.2d 939 (Miss. 1985); *Washburn v. Pearson*, 226 So.2d 758 (Miss. 1969)).

[34] *Mississippi Model Jury Instructions*, §§ 11:2 and 11:3.

Damages Instruction No. 3

It is your decision to determine just and fair compensation for the plaintiff. Your discretion as to the measure of compensatory damages is wide, but not unlimited, and you may not act arbitrarily. Exercise your discretion as to the amounts of compensatory damages reasonably, intelligently and in harmony with the evidence in the case and the Court's instructions. The compensatory damages for personal injury cannot be assessed by any fixed rule, and you are the sole judge as to the measure of compensatory damages in this case.

Should your verdict be for the plaintiff in this case, you may consider the following factors to determine the amount of compensatory damages to award as may be shown by a preponderance of the evidence:

1) The type of injuries suffered by the plaintiff and their duration;

2) the past, present and future physical pain and suffering of the plaintiff and its duration;

3) the past, present and future mental distress of the plaintiff and its duration;

4) all medical expenses already incurred by the plaintiff and those medical expenses which are reasonably probable to be incurred in the future, including rehabilitation services and other similar amounts which are medical in nature and consistent with the evidence;

5) all costs of custodial care and support services which are reasonably probable to be incurred in the future;

6) any future mental or physical disability or impairment that is reasonably probable to occur and/or has occurred, its duration and its effect on the plaintiff's future earnings or earning capacity. In arriving at your award for loss of future earnings or earning capacity, you should consider the plaintiff's health, physical ability, mental ability, age and earning power before his injuries and the effect of the plaintiff's injuries upon them;

7) past lost wages;

8) the past and future losses of social security matching benefits and other similar losses of the plaintiff;

9) the past and future losses of the fringe benefits of employment of the plaintiff; and,

10) any past and future losses of household domestic services.[35]

Damages Instruction No. 4

When reaching your determination of the amount of compensatory damages to award the plaintiff, you are instructed to presume that any medical, hospital or doctors' bills which have been incurred or paid in the treatment of the plaintiff's injuries were necessary and reasonable.[36]

1. ECONOMIC DAMAGES

Mississippi courts do not have a history of imposing specific requirements on the calculation of damages. The general principal is that only certain elements of damages are available but the methodology used to calculate these damages is left to the jury. These elements of damage, and certain related matters, are briefly addressed below:

a. Earning Capacity

Mississippi law provides that lost earnings should be based upon earning capacity rather than actual earnings. Additionally, the Supreme Court has held that loss of earning capacity does not have to be total to remain a recoverable element. In *Walters v. Gilbert,*[37] the Court ruled that:

> loss of earning capacity can be partial and temporary, or partial and permanent, or total and temporary, or total and permanent. It depends upon the nature and extent of the physical impairment as is well recognized in all compensation acts.

There are numerous Mississippi cases in which damages were derived from an earning capacity figure that clearly exceeded the plaintiff's earnings at the time of injury or death. For instance, in *Classic Coach, Inc. v. Johnson,*[38] the Mississippi Supreme

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[35] *Mississippi Model Jury Instructions*, § 11-5 (citing *Alpha Gulf Coast, Inc. v. Jackson*, 801 So.2d 709 (Miss. 2001); *Downtown Grill, Inc. v. Connell*, 721 So.2d 1113, 1123 (Miss. 1998); Miss. Code Ann. § 11-1-69.
[36] Miss. Code Ann. § 41-9-119; *Hubbard v. Canterbury*, 805 So.2d 545 (Miss. Ct. App. 2000).
[37] 158 So.2d 43 (Miss. 1963).
[38] 823 So.2d 517 (Miss. 2002).

Court allowed the average salary of a college graduate to be used as base earning capacity even though the decedents had not yet graduated from college. In fact, only one of the decedents was enrolled at the time of the accident and the other had temporarily left the university to earn money to finance his education. *Choctaw Maid Farms, Inc. v. Hailey* [39]and *Woods v. Nichols*[40] provide other examples of lost earnings that are based upon earning capacity figures which total higher than the plaintiff's actual earnings.

Not only has the Court allowed recovery of earning capacity figures which exceeded actual earnings, the Court has even allowed recovery of earning capacity figures when the plaintiff's post-injury earnings were higher than his pre-injury earnings. In *Jesco v. Shannon,*[41] a foreman injured in a factory explosion returned to work as a janitor with earnings higher than his pre-injury earnings. The Mississippi Supreme Court found that "the fact that the employer had been generous to date of trial does not negate [sic] impairment in earning capacity."

The Mississippi Supreme Court has also allowed unemployed individuals or individuals who were not part of the labor force to recover damages based on earning capacity. In *Miss. Cent. R. Co. v. Smith,*[42] a former nurse who had been out of the workforce for several years was awarded damages based upon her earning capacity. Similarly, an elderly unemployed man was declared to have some earning capacity in *Walters v. Gilbert,*[43] and the Court declared as follows concerning the level of proof necessary to establish earning capacity:

> Appellant seems to confuse earning capacity with actual monetary benefits earned. It is not essential that wages, income tax returns, or deposit slips be shown to establish earning capacity, though such evidence would be strong and conclusive of the actual earning capacity. But any person who is not a hopeless cripple or permanently helpless has some earning capacity. He could be a night watchman, parking lot attendant, baby sitter, or hold some similar job…. In the case at bar, though appellee's earning capacity was insufficient to require the filing of an income tax return and though he failed to prove any payment of wages

[39] 822 So.2d 911 (Miss. 2002).
[40] 416 So.2d 659 (Miss. 1982).
[41] 451 So.2d 694 (Miss. 1984).
[42] 168 So. 604 (Miss. 1936).
[43] 158 So.2d 43 (Miss. 1963).

> paid to him, this does not preclude the jury from determining what, if any, his earning capacity, little as it may be, was.

In a case involving the wrongful death of a child, the Court ruled that there is a rebuttable presumption that the projected future income of an injured party be based on the national average.

However,

> Either party may rebut this presumption by presenting relevant credible evidence to the finder of fact, such as testimony regarding the child's age, life expectancy, precocity, mental and physical health, intellectual development, and relevant family circumstances.

Projected future earnings should not be based on the average income of the community or the parents' income.

> Both methods result in potentially disparate recoveries for children from affluent communities or with affluent parents, as opposed to children from less affluent areas or with less affluent parents.

Economists will commonly prepare several scenarios regarding education attainment when calculating earnings for an individual who has not yet entered the workforce. In my experience, it is not unusual and is in fact desirable to prepare separate scenarios for a high school graduate, community college graduate and college graduate. Presenting the issue in this manner empowers the jury and allows the savvy plaintiff's attorney to argue for the highest award.

A final issue associated with earning capacity is the use of age-earnings profiles. Some economists use age-earnings profiles based on Current Population Survey data; whereas, others simply use the average of annual lifetime earnings for all future work years. This latter approach essentially overstates earning capacity in the early years and understates it in later years.

b. Worklife Expectancy

Once the earning capacity of the plaintiff has been determined, it is the job of the plaintiff's expert economist to determine the worklife expectancy of the plaintiff. Many experts utilize Bulletin 2254[44] to calculate worklife, while others use Skoog and Ciecka.[45]

c. Taxes

In *Smith v. Industrial Contructors*,[46] the Fifth Circuit, considering a case under Mississippi law, upheld the lower court's decision to allow lost future earnings to be reduced by income taxes. This decision was based upon

> the Mississippi goal of awarding the beneficiaries the amount, but only the amount, that the decedent reasonably would have and could have contributed to the them.

Most economists routinely make a deduction from projected earnings to account for state and federal income taxes. Some also adjust the discount rate to account for income taxes on the interest to be earned or use a discount rate based on tax exempt bonds.

d. Fringe Benefits

Fringe benefits are a recoverable element of economic loss in a personal injury action. In *Flight Line, Inc. v. Tanksley*,[47] the Supreme Court ruled that expert testimony placing fringe benefits at 31.7% of earnings was admissible. This percentage figure was based on data from the *United States Statistical Abstract* and supported by a telephone conversation with the plaintiff's employer who stated that benefits were about 30%. In a previous trial in this same case, the same economist had valued fringe benefits at 11% of earnings, referencing only "legally required" benefits. The court ruled that controversy over benefits and the appropriate percentage was "fine fodder for cross-examination" but held that the testimony was admissible.

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[44] *Worklife Estimates: Effects of Race and Education*, Bureau of Labor Statistics, Bulletin 2254 (February 1986).
[45] Skoog, Gary R. and James E. Ciecka, *The Markov (Increment-Decrement) Model of Labor Force Activity*, Journal of Legal Economics, 2001, 11(1).
[46] 783 F.3d 1249 (5th Cir. 1986).
[47] 608 So.2d 1149 (Miss. 1992).

Experts in Mississippi regularly utilize a percentage for fringe benefit earnings based on Bureau of Labor Statistics or Chamber of Commerce data. Courts have expressed no preference for one source or another.

e. Household Services

In *Gulf Transport Co. v. Allen*,[48] the Mississippi Supreme Court ruled that the value of lost household services is an appropriate element of economic damage. Economists regularly rely on Bryant, Zick and Kim[49] or the works cited in Douglass, Kenny and Miller[50] to determine average hours devoted to household services; however, a party is allowed to present evidence to support or attack the use of this average wage. These services are normally valued at a minimum wage rate.

f. Present Value

The Supreme Court clearly requires that future earnings be reduced to their present value, and that a jury instruction to that effect be granted if requested by the defendant.[51] The discount rate most commonly utilized by economists is based on the rate for United States Treasuries.

g. Inflation

The Mississippi Supreme Court has long recognized the impact that inflationary conditions have on the purchasing power of money, and consequently allows jurors to hear evidence of this impact. In *Flight Line, Inc. v. Tanksley*,[52] the Court allowed an economist to project a 6.7% rate of inflation for future earnings based on the average for the previous 15 years.

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[48] 46 So.2d 436 (Miss. 1950).
[49] Bryant. W. Keith, Cathleen D. Zick, Hyoshin Kim, *Household Work: What's it Worth and Why?*, 1992, Information Bulletin 322 IB228, Cornell University.
[50] Douglass, John B., Genevieve M. Kenney and Ted R. Miller, *Which Estimates of Household Production are Best?*, Journal of Forensic Economics, Winter 1990, 25-45.
[51] See, *Young v. Robinson*, 538 So.2d 781 (Miss. 1989).
[52] 608 So.2d 1149 (Miss. 1992).

h. Medical Expenses

Mississippi law allows for the recovery of past and future medical expenses, so long as the future medical expenses are established "in terms of reasonable probability in accordance with the jury instructions."[53]

2. NON-ECONOMIC DAMAGES

Pain and suffering may be recovered as an ordinary element of damages in a personal injury action, and the jury has broad discretion in determining the amount of the award for such damages. The only standard of damages for pain and suffering is what the jurors as reasonable persons would consider just.[54]

Emotional distress damages are recoverable under two standards: First, emotional distress damages are recoverable where the defendant's conduct is malicious, intentional, willful, wanton, grossly negligent, indifferent or reckless.[55] Under this intentional infliction of emotional distress standard, no injury is required to recover for the mental anguish experienced by the plaintiff.[56]

The second standard for recovery applies for negligently inflicted emotional distress. Under this scenario, the plaintiff must prove some demonstrable harm which was reasonably foreseeable by the defendant.[57]

In 2002, the legislature enacted a $500,000.00 cap on non-economic damages in medical malpractice cases. As defined in the statute:

> "Noneconomic damages" means subjective, nonpecuniary damages arising from death, pain, suffering, inconvenience, mental anguish, worry, emotional distress, loss of society and companionship, loss of consortium, bystander injury, physical impairment, disfigurement, injury to reputation, humiliation, embarrassment, loss of the enjoyment of life, hedonic damages, other nonpecuniary damages, and any other theory of damages

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[53] *Eiland v. Westinghouse*, 58 F.3d 176 (5th Cir. 1995).
[54] *Mississippi Law of Damages 3d*, §35:3 (2003) (citing, *Biedenharn Candy Co. v. Moore*, 184 Miss. 721, 186 So. 628 (1939); *Kinnard v. Martin*, 223 So.2d 300 (Miss. 1969); *First Nat. Bank v. Langley*, 314 So.2d 324, 77 A.L.R.3d 570 (Miss. 1975).
[55] *Leaf River Forest Products, Inc. v. Ferguson*, 662 So.2d 648 (Miss. 1995).
[56] *Id.*
[57] *Morrison v. Means*, 680 So.2d 803 (Miss. 1996), clarified and modified, 744 So.2d 736 (Miss. 1999).

> such as fear of loss, illness or injury. The term "noneconomic damages" shall not include punitive or exemplary damages.[58]

This non-economic damage cap has proven to be a significant limitation upon recovery in those medical malpractice cases involving catastrophic injury. In a Veterans' Administration medical malpractice case I tried last year against the United States, Judge Tom Lee expressed frustration at his inability to award more than the $500,000 non-economic cap, stating that "but for the statutory cap, the court, taking into account future noneconomic damages, would have been included to award more than $500,000."[59]

In light of this judicial frustration, I urge any of you to notify the Mississippi Association of Justice ("MAJ") if you have a case which you believe the cap can and should be challenged. The MAJ, in conjunction with other entities, will assist you with friend of the court briefing, as well as your own, in preparing constitutional and other legal attacks of these grossly unfair and arbitrary limitations of a plaintiff's rights to obtain full redress.

3. WRONGFUL DEATH and SURVIVAL CLAIMS

The wrongful death statute simply provides that a wrongful death beneficiary is entitled to recover "such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit."[60] Given the vagueness and breadth of this language, the Mississippi Supreme Court has taken it upon itself to specify that the following wrongful death damages are available: 1) the present net cash value of the life expectancy of the deceased, 2) the loss of the companionship and society of the decedent, 3) the pain and suffering of the decedent between the time of injury and death, 4) funeral and burial expenses, and 5) expenses of the decedent's last illness.[61] We will briefly address a couple of these elements of wrongful death damages:

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[58] Miss. Code Ann. § 11-1-60. In 2004, the Legislature included "disfigurement" within the definition of non-economic damages. Accordingly, plaintiffs can no longer obtain separate compensation outside the cap for disfigurement from injuries such as burns.
[59] *West v. USA*, 2009 LEXIS 61592, *23 fn. 5 (S.D.MS. July 20, 2009).
[60] Miss. Code Ann. § 11-7-13.
[61] See, eg., *Jones v. Shaffer*, 573 So.2d 740, 743 (Miss. 1990); *McGowan v. Estate of Wright*, 524 So.2d 308 (Miss. 1988)(citing several cases).

a. Present Net Cash Value of the Life Expectancy of the Deceased

The present net cash value of the decedent's life is determined by multiplying the projected annual future income of the deceased by his work life expectancy, discounting it to present cash value, and deducting a percentage for the deceased's personal living expenses.[62] Since the Supreme Court declared the necessity of a personal consumption factor, experts have debated the expenses to include and percentages to employ. For example, one expert has argued that personal consumption should only include basic living expenses of the decedent,[63] whereas other experts have employed personal consumption factors for three and four person households when the decedent is single.[64] The courts have allowed the parties to argue the merits of each approach and have left the determination within the province of the finder of fact.

An extremely important matter of which Mississippi practitioners should be mindful is that our courts is a "loss to estate" jurisdiction. Most jurisdictions utilize a "loss to dependents" measure of damages, which awards damages to dependents to replace the financial benefits they would have obtained from the decedent.[65] Mississippi courts, however, do not require a wrongful death beneficiary to establish that he was receiving, or was likely to receive, financial support from the deceased to recover the net cash value of the decedent's life.[66]

b. Loss of Companionship and Society of the Decedent

It is important to recall who may recovery wrongful death benefits. If the decedent has a surviving spouse, that spouse is entitled to recover loss of society, companionship and services. If a decedent has children, they are entitled to recover for loss of training and guidance until the age of majority. The children are also entitled to loss of society and companionship from the date of the death of the parent for the balance

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[62] *Sheffield v. Sheffield*, 405 So.2d 1314, 1318 (Miss. 1981); see also, *Jones v. Shaffer*, 573 So.2d 740, 742 (Miss. 1990)("In computing a person's lost net cash value, a personal consumption factor must be taken into account.").

[63] *Classic Coach, Inc. v. Johnson*, 823 So.2d 517 (Miss. 2002).

[64] *Greyhound Lines v. Sutton*, 765 So.2d 1269 (Miss. 2000); *Classic Coach, Inc. v. Johnson*, 823 So.2d 517 (Miss. 2002); *Jones v. Shaffer*, 573 So.2d 740, 743 (Miss. 1990).

[65] Weems & Weems, *Miss. Law of Torts*, § 14-4(a) (citing, Dobbs, *The Law of Torts*, § 296 (2000); *Freeman v. Davidson*, 768 P.2d 885 (Nev. 1989)).

[66] *Jones v. Shaffer*, 573 So.2d 740, 744 (Miss. 1990); *Sheffield v. Sheffield*, 405 So.2d 1314 (Miss. 1981).

of the child's life. As under intestate distribution, the children and surviving spouse share damages equally and to the exclusion of other relatives.[67] In the event that the decedent leaves no surviving spouse or children, the wrongful death statute allows those occupying the next most preferred class under intestate distribution to recover their losses of society, companionship and services and to the exclusion of those relatives in the less preferred classes.

II. EFFECTIVE NEW CLIENT SCREENING AND INTAKE

A. INITIAL CLIENT INTERVIEW

B. WHICH CASES TO AVOID – ASSESS THE VALIDITY OF THE CASE

C. UTILIZE MEDICAL EXPERT CONSULTATION BEFORE AGREEING TO TAKE THE CASE

This portion of the materials is devoted client intake, case assessment and the use of experts prior to pursuing a case. Instead of separating these categories into three sections, I have opted to group them all together, largely because they all occur in conjunction with one another in a dynamic fashion.

1. Who is the Plaintiff?

Screening and selection of a new case cannot be adequately performed without conducting an in-depth interview of the potential plaintiff and family members and others who are crucial to a successful resolution. The following are some issues which should be covered:

a. History of Prior Lawsuits

You must inquire in your intake interview whether your potential client has been a plaintiff in prior lawsuits, and investigate the facts and circumstances surrounding each prior lawsuit in order to determine whether some or all of the injuries suffered by your client were the subject of previous claims. It is often the case that allegations made as to prior claims were so general as to potentially encompass some of the same injuries your potential client contends arose from the current incident.

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[67] Miss. Code Ann. § 11-7-13; *Partyka v. Yazoo Development Corp*., 376 So.2d 646, 648 (Miss. 1979).

b. Detailed Health History

Obtaining medical records can be extremely costly. I recommend dealing with this issue on a cost/benefit analysis. If I am considering a case and gain information that the client has alleged the same or similar injuries in previous litigation, I always have *the client* obtain those records. I do not usually have the client obtain records concerning health problems not related to the injuries at issue in the potential litigation, except:

- If the potential client was partially or totally disabled prior to the incident in question, I ask the client to obtain the medical records associated with the claimed disability, including workers' compensation documents, social security disability records and any depositions or other sworn testimony.
- If the potential client had an underlying medical condition prior to the incident I am evaluating which arguably limited his or her work and/or life expectancy, it is important to obtain these records in order to evaluate whether the damages you can claim as a result of this limitation justifies bringing the action.
- If the potential case you are evaluating involves a decedent, I like to obtain a summary of the health history of the survivors who will recover if the lawsuit is successful. This issue is particularly important when representing the elderly in situations where the surviving spouse may not be in good health and unavailable for trial, which can have a substantial impact on damages.

c. Family Support

Rarely do I accept a case without interviewing key family members who would likely be potential witnesses. I want to know whether there are family members or friends who can verify the recollection of the potential client. If what occurred at a medical appointment is crucial to the success of the case, then I recommend that you absolutely interview all persons who accompanied the potential plaintiff to the visit, including those with whom the potential plaintiff may have spoke shortly after the visit.

d. Why are you here?

I always try to ask the potential client why he or she is considering hiring an attorney. The answer may be obvious in some situations, but in others the answer is less

obvious. You may learn that the client was told by a subsequent medical provider that the former provider committed malpractice. You may learn that family members in the medical field have an opinion with respect to medical care provided. The potential information you may gain from this question is wide and varied, and in many cases may not otherwise come to light until much later in the case.

e. Provide Informed Consent

Most potential clients have never filed a lawsuit and have little to no exposure the legal system beyond what they have seen on television and read in the newspapers. How many of us have heard this phrase uttered from a potential client: "I'm not the suing type of person, but …."

I find that if you take the time to explain to the client the time parameters of a lawsuit (can take 18 months to 2 years even in federal cases) and provide a rough outline of the life of a lawsuit (complaint, answer, discovery, motion practice and time delays associated with each), you can go a long way toward insulating yourself from unfair criticism down the road.

f. How much is my case worth?

The question that most clients seem to think is easily answered is many times the most difficult to answer. Most clients ask this question; and when a potential client does not ask this question, I bring the issue up and use the opportunity to explain all of the factors and unknowns that come into play. I discuss the elements of damage, issues of credibility, non-economic damage caps (and the likelihood at that time that the case is a "cap case") and medical issues that seem apparent at the time.

g. Avoid Overestimating/Underestimating the Injury

It is extremely important for the potential client to understand that the jury's evaluation of the level of injury is normally influenced by the degree to which the potential client has recovered from his injuries. In fact, in many cases, the level of injury is normally influenced by the degree to which the potential client *appears to have recovered* from his injury. The latter is particularly important to consider and address in

traumatic brain injury cases, and other cases in which the injuries are not readily apparent.

When addressing this issue, I find that two pieces of advice are extremely important:

1. Always follow the advice of your doctors. If they say you should attempt a return to work, then attempt a return to work. The client should know that you are rooting for them to get better far more than you are rooting for increased medical expense recovery in their suit.
2. Do not do anything that may make you appear less injured than you are. For example, if a potential client is claiming psychological damage, he or she should avoid going to bars or parties which could give the impression that they are not being honest. Also, an absolute line I have learned to draw in the sand is this: Stay away from Facebook, MySpace and other social media. If they have an account, preserve its present contents and delete the account.

2. What are the Facts?

The famous value investor, Warren Buffett, once said that "writing a check separates a commitment from a conversation." In a certain way, those of us who work on a contingency fee basis are value investors just like Buffett. We invest significant sums of money and amounts of time into this thing; and, we leverage our assessment of a case and our ability as trial lawyers to obtain a significant return on our money. Who among would ever undertake such an investment without obtaining as much information as we can about our investment? Who would invest in a stock or a bond or a piece of real estate without doing the same? There is no substitute for investigating the facts.

In the age of tort reform, the one advantage that remains in our favor as plaintiff attorneys is that we can know and build our case thoroughly in advance of litigation. In many, but not all instances, we can interview witnesses and obtain signed statements, explore theories of liability, consult experts and plot a litigation strategy all in advance of filing suit. This is an opportunity we should not squander.

a. Personal Interview of Witnesses

In many cases we consider, the initial documentation we obtain includes a police report or private investigator narrative from potential witnesses. Do not make the mistake of relying solely on the narratives of others. Credibility is often the turning point in litigation; and, if I am investing my money, I want to be the one who makes the final call on a witness' credibility. Moreover, the relationship you may forge with the potential witnesses by personal interviews may pay significant dividends down the road.

b. Consult an Expert

Consulting an expert in early stages of case evaluation, in my experience, is not only important in medical malpractice actions, it is required. Miss. Code Ann. § 11-1-58 requires that a certificate accompany a medical malpractice complaint in which the attorney for the plaintiff declares that he or she "has reviewed the facts of the case and has consulted with at least one" expert "who is qualified to give expert testimony as to the standard of care or negligence and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action."

I firmly believe that it is much better to spend money on an expert early and learn that you have no case, than to wait until you have spent much more down the road. Of course, there is an assumption built into this concept that many of us have learned the hard way: Sometimes a client comes to see you so close to the running of the statute of limitations that you do not have time to obtain a full and complete expert review. Section 11-1-58 does allow an exception for this circumstance, in that the statute grants the attorney 60 days after service of the suit to consult with an expert.

3. Venue

Serious consideration of the appropriate venue to file suit, when options exist, must be at the forefront of the mind of every plaintiff's attorney. Issues such as jury venire, how quickly a trial can be had, the potential judges and magistrates and simple home-town politics must be given strong consideration. Do not always believe that state

court is the best venue. Many times the speediness of a federal case and other factors can dictate that federal court is a better option, despite (and in some cases because of) the necessity of a unanimous verdict.