Medical Malpractice Litigation in West Virginia

Application of the Medical Professional Liability Act (W.Va. Code §55-7B-1 *et seq.)*

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I. Introduction

In 1986, the West Virginia legislature passed the Medical Professional Liability Act ("MPLA") with the intent that the act would afford limited protection to the healthcare industry of West Virginia.[3] The MPLA underwent major revisions and amendments in 2001, 2003 and 2015 in order to address changes in the litigation of medical malpractice claims, as well as, numerous other limited changes since its inception.

Attorneys representing litigants in a medical malpractice lawsuit must be familiar with the MPLA. The MPLA lays out everything from the pre-suit requirements to damage caps. This article is meant to provide an overview of the MPLA and some important case law, but an attorney preparing to litigate a medical malpractice suit in West Virginia should read the MPLA in its entirety, as well as, other pertinent legal authorities.

The MPLA governs claims of medical malpractice asserted against health care providers. The statute defines health care provider as, "a person, partnership, corporation, professional limited liability company, health care facility, entity or institution licensed by, or certified in, this state or another state, to provide health care or professional care services…"[4] As such, the statute covers a wide variety of providers who render care on the public, which includes, but is not limited to, "a physician, osteopathic physician, physician assistant, advanced practice registered nurse, hospital, health care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, speech-language pathologist, audiologist, occupational therapist, psychologist, pharmacist, technician, certified nursing assistant, emergency medical service personnel, emergency medical services authority or agency, any person supervised by or acting under the direction of a licensed professional, any person taking action or providing service or treatment pursuant to or in furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment, or an officer, employee or agent of a health care provider acting in the course and scope of the officer's, employee's or agent's employment."[5]

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[3] *See* Thomas J. Hurney, Jr. & Rob J. Aliff, *Medical Professional Liability in West Virginia*, 105 W. Va. L. Rev. 369 (2003). This analysis was updated by Thomas J. Hurney, Jr. and Jennifer M. Mankins in *Medical Professional Liability Litigation in West Virginia: Part II*, 114 W. Va. L. Rev. 573 (2012) to address amendments to the MPLA following the publication of *Medical Professional Liability in West Virginia.* Although the MPLA has underwent additional amendments and changes since the publication of these articles, a familiarization of these articles would benefit any practitioners looking to litigate medical malpractice cases in West Virginia.
[4] W.Va. Code §55-7b-2(g).
[5] *Id.*

II. Background and History of the MPLA

As noted above, the MPLA was originally passed in 1986 as an attempt to balance the rising costs of medical insurance coverage with the need to assure that the citizens of West Virginia are protected in the event they suffer death or injury as a result of professional negligence.[6] With medical costs rising and the state facing a potential crisis as doctors fled the high costs of malpractice insurance, the State hoped that reform, such as the MPLA, could curb these costs, primarily through damage caps[7] for medical malpractice verdicts.[8]

In addition to the noneconomic damage cap, the MPLA implemented additional safeguards to protect against the filing of frivolous claims or defenses including the incorporation of expert witness requirements both in the pre-suit requirements and to prove liability in the case-in-chief.[9] The lack of expert review prior to filing of a medical malpractice suit was identified years before the implementation of the MPLA as a driving factor in the number of frivolous medical malpractice claims in the State, but the policing of these matters was left to the judicial system.[10]

The MPLA provided assistance to the courts by creating pre-suit requirements, as well as, outlining the procedure for litigating a medical malpractice claim. Since its passage, the MPLA has underwent a number of modifications with major changes in 2001, 2003, and 2015 with various minor adjustments made intermittently.[11] In 2015, the legislature once again heavily amended the MPLA.

III. Theories of Liability

In order to litigate a medical malpractice claim, an attorney must establish that there is in fact a claim to be litigated. The MPLA provides the elements of proof for medical malpractice claims in W.Va. Code §55-7B-3.

a. Deviation from the Standard of Care

As with other negligence based cases, medical malpractice claims require the plaintiff to prove duty, breach, and causation in order to show entitlement to damages. Under a theory of

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[6] W.Va. Code §55-7B-1 (2015).

[7] The 1986 MPLA stated, "damages for noneconomic loss shall not exceed one million dollars and the jury may be so instructed." W.Va Code §55-7B-8 (1986).

[8] *See* Franklin D. Cleckley and Govind Hatiharan, *A Free Market Analysis of the Effects of Medical Malpractice Damage Cap Statutes: Can We Afford to Live with Inefficient Doctors?*, 94 W. Va. L. Rev. 11 (1991).

[9] *Id.* at 44.

[10] *See* Michael J. Farrell, *The Law of Medical Malpractice in West Virginia*, 82 W. Va. L. R. 251, 284 (1979). Prior to the implementation of the MPLA, Michael J. Farrell conducted an extensive search of medical malpractice litigation in West Virginia in which he noted, "[t]he frequency of malpractice cases being filed without the benefit of a prelitigation expert report in support of the plaintiff's claim is appalling. Our courts have responded correctly to this situation by granting summary judgment to defendants unless the plaintiff can produce an expert witness within a reasonable time after the filing of the suit and opportunity for discovery." *Id.*

[11] In *Medical Professional Liability Litigation in West Virginia: Part II*, Thomas J. Hurney, Jr. and Jennifer M. Mankins outline "three stages" of the MPLA, and provide an overview of the 1986 enactment as MPLA I, the 2001 amendments as MPLA II, and the 2003 amendments as MPLA III. Considering the changes to the code in 2015, the 2015 amendments would likely be considered MPLA IV by those authors. A reading of this article provides an excellent background on the MPLA's history.

deviation from the standard of care, a plaintiff bringing suit under this theory of liability must show that the health care provider both deviated from the relevant standard of care and that the deviation was the proximate cause of the injury or death.[12] The plaintiff carries the burden of "proving negligence and lack of skill on the part of the physician proximately caused the injuries suffered," "… a claim of medical malpractice must be supported by expert testimony."[13] Typically, most medical malpractice claims are asserted under the deviation from the standard of care theory. W.Va. Code §55-7B-3(a) provides the following elements under this theory:

> (1) The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances; and
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> (2) Such failure was a proximate cause of the injury or death.[14]

Practicing medicine with the degree of care, skill and learning required of a reasonable, prudent health care provider does not require that a health care provider makes no mistakes or practice medicine with the highest possible degree of skill. The standard of care for medical malpractice cases is an objective standard based on how a reasonable health care provider would perform.[15] As noted in the *West Virginia Pattern Jury Instructions for Civil Cases*¸ "[t]he standard of care is a reasonable standard…[providers] are not held to the highest level of medical care, and are not required to guarantee or to achieve good results, they are required to comply with reasonable standard within the medical community."[16]In other words, a physician is not expected to be perfect.

The provider must meet an objective, national standard of care. West Virginia adopted a national standard of care before the MPLA was enacted. The "locality rule" in medical malpractice cases was abolished in 1986 by the West Virginia Supreme Court of Appeals.[17] The abolishment of the "locality rule" comes from a belief that "doctors have substantially similar backgrounds in terms of education, training, and continuing exposure to medical information," as such, "the more uniform, or certainly comparable, availability of medical knowledge and techniques" eliminates the needs that experts be familiar with any locality's particular practices.[18] Therefore, whether a

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[12] *Dellinger v. Pediatrix Medical Group, P.C.*, 232 W.Va. 115, 123, 750 S.E.2d 668, 677 (2013).
[13] *Bellomy v. U.S.*, 888 F.Supp, 760, 764 (1995), citing to *Hicks v. Chevy*, 178 W.Va. 118, 121, 358 S.E.2d 202, 205 (1987); *Syllabus Point* 2, *Totten v. Adongay*, 175 W.Va. 634
[14] W.Va. Code §55-7B-3(a).
[15] *Pleasants v. Alliance Corp.*¸209 W.Va. 39, 49, 543 S.E.2d 320, 330 (2000).
[16] *West Virginia Pattern Jury Instructions for Civil Cases*, 2017 edition, reporters Tom Hurney, Esq. and Paul Farrell, Esq., reviewers Don Sensabaugh, Esq. and Justice Menis E. Ketchum.
[17] *Paintiff v. City of Parkersburg*, 176 W.Va. 469, 470, 345 S.E.2d 564, 565 (1986). The Supreme Court of Appeals of West Virginia clearly abolished the locality rule in West Virginia through this decision finding that the evolution of West Virginia jurisprudence had eroded the rule.
[18] *Walker v. Sharma*, 221 W.Va. 559, 565, 655 S.E.2d 775. 781 (2007) analyzing the holdings from *Paintiff v. City of Parkersburg*, 176 W.Va. 469, 470, 345 S.E.2d 564, 565 (1986).

doctor is practicing in a metropolitan large hospital or a rural health clinic, a certain baseline standard of care exists.

To establish a breach of the standard of care, the parties will need to employ expert witnesses to prove medical negligence or lack of professional skill.[19] Qualifying an expert in a medical malpractice case presents its own challenges[20], but the MPLA requires, "[t]he applicable standard of care and a defendant's failure to meet the standard of care, if at issue, shall be established…by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court."[21]

Establishing a breach of the standard of care does not prove liability, the plaintiff must also establish that the breach was the proximate cause of the alleged harm.[22] The plaintiff must show that the breach of the standard of care committed by the health care provider is "'that cause which in actual sequence, unbroken by any independent cause, produced the wrong complained of, without which the wrong would not have occurred.'"[23] Establishing the causal connection between the acts of the health care provider and the injury alleged are typically fact-based issues that become questions for the jury.[24] The plaintiff does not have to show that the health care provider's actions (or inactions) were the sole cause of the harm, only that the "'breach of a particular duty of care was a proximate cause of the plaintiff's injury, not the sole proximate cause.'"[25]

A showing that the standard of care was breached or that the actions of the health care provider were the proximate cause of the alleged injuries is insufficient. In the end, the plaintiff bears the burden of proving both negligence and that such negligence was a proximate cause of the alleged injury.[26] Proving the link is essential for success.

b. "Loss of Chance" Theory

Plaintiffs in medical malpractice claims have an alternative method to establish proximate cause in the "loss of chance" theory. Under this theory, the plaintiff contends "that the health care provider's failure to follow the accepted standard of care deprived the patient of a chance of recovery or increased the risk of harm to the patient which was a substantial factor in bringing about the ultimate injury to the patient."[27] Additionally, the plaintiff is required to "prove, to a reasonable degree of medical probability, that following the accepted standard of care would have resulted in a greater than twenty-five percent chance that the patient would have had an improved recovery or would have survived."[28]

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[19] *Roberts v. Gale*, 149 W.Va. 166, 173, 139 S.E.2d 272 (1964).
[20] *See* Section VI regarding expert witnesses herein.
[21] W.Va. Code §55-7B-7(a).
[22] W.Va. Code §55-7B-3(a)(2).
[23] *Mays v. Chang*, 213 W.Va. 220, 224, 579 S.E.2d 561, 566 (2003) quoting *Webb v. Sessler*, 135 W.Va. 341, 63 S.E.2d 65 (1950).
[24] *Id.*
[25] *Id. See also Stephens v. Rakes*, 235 W.Va. 555, 565, 775 S.E.2d 107, 117 (2015).
[26] *Dellinger v. Pediatrix Mediccal Group, P.C.*, 232 W.Va. 115, 124, 750 S.E.2d 668, 677 (2013); *see also* Syl. Pt. 4 *Short v. Appalachian OH-9, Inc.*, 203 W.Va. 246, 507 S.E.2d 124 (1998).
[27] W.Va. Code §55-7B-3(b).
[28] *Id.*

The "loss of chance" theory does not relieve the plaintiff of the use of experts to establish the standard of care, but shifts the expert's focus from injury due to breach to showing that the failure to utilize a treatment (or the utilization of a treatment) resulted in a greater than 25% chance that the outcome would have been improved.[29]

Typically, a "loss of chance" case would present itself in a failure for early diagnosis; for example, a doctor's failure to diagnose cancer results in the patient facing a significantly worse prognosis.[30] The plaintiff does not have to prove a guaranteed recovery or improved outcome, only that the preponderance of the evidence indicates the plaintiff was deprived of a 25% or greater chance of an improved outcome.[31]

IV. Statute of Limitations

A two-year statute of limitations is established for medical malpractice cases under the MPLA.[32] The two year time limit begins on the date of injury, or "within two years of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such injury, whichever last occurs: *Provided,* That in no event shall any such action be commenced more than ten years after the date of injury."[33]

a. Commencement of Statute of Limitations

As noted above, medical malpractice cases have a two year statute of limitations, which begins when the plaintiff discovers, or, with reasonable diligence, should discover the alleged injuries.[34] This is not to say that the plaintiff needs to understand the full extent or exact nature of the alleged injuries at the time counsel is sought, only that "something went wrong."[35]

For minors, any action brought by or on behalf of a minor who was under the age of ten at the time of the injury shall be commenced either within two years or prior to the minor's twelfth birthday, whichever provides the child with more time.[36] Therefore, a child who is four at the time of the injury would have until her twelfth birthday, since she would be six after two years and would have a longer period waiting until her twelfth birthday.[37]

The MPLA contains a statute of repose that cuts off actions that are not filed within ten (10) years regardless of the nature of injury.[38] In a typical medical malpractice case, a plaintiff should discover with reasonable diligence the possible injury within the two year statute of limitations; however, certain injuries may not present for an extended time or may be concealed.

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[29] *See Lambert v. United States*, Not Reported in F.Supp.3d, 2016 WL 6782748 (November 15, 2016).
[30] Thomas J. Hurney, Jr. and Jennifer M. Mankins, *Medical Professional Liability Litigation in West Virginia: Part II*, 114 W. Va. L. R. 573, 584 (2012).
[31] *See Bunner v. United States*, Not Reported in F. Supp.3d, 2016 WL 1261151 (March 30, 2016).
[32] W.Va. Code §55-7B-4(a).
[33] *Id.*
[34] *Parsons v. Herbert J. Thomas Memorial Hospital Association*, Not Reported in S.E.2d, 2017 WL 5513620 (November 17, 2017).
[35] *Id* at 4.
[36] W.Va. Code §55-7B-4(c).
[37] *Cartwirght v. McComas*, 223 W.Va. 161, 166, 672 S.E.2d 2997, 302 (2008).
[38] W.Va. Code §55-7B-4(a).

The statute of repose acts as an outer limit on claims and bar the right of the plaintiff to bring the action.[39]

There is another way the two statute of limitations may be tolled. The statute of limitations are tolled if "the health care provider or its representative has committed fraud or collusion by concealing or misrepresenting material facts about the injury."[40] In the event of such misconduct, the statute of limitations is tolled for the period of misconduct.[41]

b. Discovery Rule

The discovery rule delays the start of the statute of limitations. The Supreme Court of Appeals of West Virginia has provided guidance on when the statute of limitations is delayed under the discovery rule:

> In tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that they plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury.[42]

Under the discovery rule, "the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim."[43] In the MPLA, the legislature codified the discovery rule in medical malpractice claims. Rather than include a strict two year statute of limitations, the MPLA recognizes that certain injuries may be latent and provides that the statute of limitations may not start until "…when such person discovers, or with the exercise of due diligence, should have discovered…" the potential malpractice.[44]

The discovery rule comes into play where a patient's discovery of an injury is at issue. This is ultimately a fact based investigation that becomes a question for the jury.[45] It may be reasonable for a patient to suspect an injury due to medical negligence following a procedure; however, certain injuries may present later.

Logically, the discovery rule does have an outer limit. The tolling of the statute of limits, which is available due to the discovery rule, is no longer available after the death of the plaintiff.[46] Upon death, any injuries suffered by the patient would be discovered.[47]

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[39] 51 Am. Jur. 2d *Torts* §87 (2018).
[40] W.Va. Code §55-7B-4(d).
[41] *Id.*
[42] *Gaither v. City Hosp., Inc.,* Syl. Pt. 4, 199 W.Va. 706, 487 S.E.2d 901 (1997).
[43] *Id.* at 711.
[44] W.Va. Code §55-7B-4(a).
[45] *Gaither* at Syl. Pt. 5.
[46] *Williams v. CMO Management, LLC*, 239 W.Va. 530, _, 803 S.E.2d 500, 507 (2016).
[47] *See Id.*

V. Pre-litigation Requirements

a. Notice of Claim and Screening Certificate of Merit

Before filing a medical malpractice claim, the plaintiff must comply with certain statutory requirements. Prior to serving the complaint, the plaintiff must provide the health care provider with a Notice of Claim and Screening Certificate of Merit. These requirements are not meant to limit available remedies to a plaintiff, rather the pre-litigation requirements are "(1) to prevent the making and filing of frivolous medical malpractice claims and lawsuits; and (2) to promote the pre-suit resolution of non-frivolous medical malpractice claims…"[48]

The Notice of Claim must be provided at least thirty (30) days prior to the filing of the complaint to the provider via certified mail, return receipt requested.[49] The plaintiff must provide each possible health care provider defendant with a separate Notice of Claim. The Notice of Claim must include "a statement of the theory or theories of liability upon which a cause of action may be based, and a list of all health care providers and health care facilities to whom notices of claim are being sent, together with a screening certificate of merit."[50] Additionally, a recent change to the MPLA requires, "agents, servants, employees, or officers of the health care facility…be identified by area of professional practice or role in the health care at issue…" if the claim of medical malpractice is based on "the act or failure to act of agents, servants, employees, or officers of the health care facility…"[51]

The Notice of Claim tolls the statute of limitations to allow a litigant to prepare the case. Upon mailing of the Notice of Claim,

> [A]ny statute of limitations applicable to a cause of action against a health care provider upon whom notice was served for alleged medical professional liability shall be tolled from the date of mail of a notice of claim to thirty days following receipt of a response to the notice of claim, thirty days from the date a response to the notice of claim would be due, or thirty days from the receipt by the claimant of written notice from the mediator that the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever last occurs.[52]

Litigants should remain conscious of the two-year statute of limitations, but understand that the statute does provide some leeway in allowing the tolling of the statute of limitations from the time the Notice of Claim is sent.

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[48] *Roy v. D'Amato*, 218 W.Va. 692, 697, 629 S.E.2d 751, 756 (2006) citing *Hinchman v. Gillette*, 217 W.Va. 378, 384, 618 S.E.2d 387, 393 (2005).
[49] W.Va. Code §55-7B-6(b). 2019 West Virginia Laws S.B. 510, which is effective on May 29, 2019, modified this section of the statute. The update adds the requirements that defendants be identified by area of professional practice.
[50] *Id.*
[51] W.Va. Code §55-7B-6(b).
[52] W.Va. Code §55-7B-6(i)(1).

A Screening Certificate of Merit needs to accompany the Notice of Claim provided to each defendant. As with the Notice of Claim, a separate Screening Certificate of Merit must be provided to each alleged defendant. The Screening Certificate of Merit must be executed under oath by a health care provider qualified as a an expert under the West Virginia Rules of Evidence who has no existing financial interest in the underlying claim[53], and needs to specifically state: "(A) The basis for the expert's familiarity with the applicable standard of care; (B) the expert's qualifications; (C) the expert's opinion as to how the applicable standard of care was breached; and (D) the expert's opinion as to how the breach of the applicable standard of care resulted in death; and (E) a list of all medical records and other information reviewed by the expert executing the screening certificate of merit."[54]

The Notice of Claim and Screening Certificate of Merit are meant to provide notice of the nature and extent of the claims against a health care provider, and assure that the claims are merited. However, the MPLA does provide a vehicle for a plaintiff who believes the nature of his or her claim is such that an expert certification is unnecessary. A plaintiff who "believes that no screening certificate of merit is necessary because the cause of action is based upon a well-established legal theory of liability which does not require expert testimony supporting breach of the applicable standard of care…" may file "a statement specifically setting forth the basis of the alleged liability of the health care provider in lieu of a screening certificate of merit."[55]

Actually utilizing the exception to the Screening Certificate of Merit has presented some difficulties. In *Westmoreland v. Vaidya*, 222 W.Va. 205, 664 S.E.2d 90 (2008), a family practitioner underwent a cystoscopy, in which a temporary stent was removed from his ureter. Dr. Westmoreland alleged that he withdrew his consent for the procedure, but Dr. Vaidya continued resulting in Dr. Westmoreland becoming permanently injured and disfigured. Dr. Westmoreland filed a claim against Dr. Vaidya alleging medical malpractice, civil battery, slander, and fraud. In his "notice of intent to bring suit", Dr. Westmoreland, *pro se*, stated that he intended to proceed under W.Va. Code §55-7B-6(c) stating the notice was "in lieu of [a] Certificate of Merit due to the fact that the common person would not need to have an expert verify the breech [sic] of [the] standard of care[.]"[56]

Dr. Westmoreland's case was initially dismissed by the Circuit Court for failure to comply with the statutory requirements of the MPLA.[57] On appeal, the majority found that Dr. Westmoreland should have been afforded a reasonable amount of time to fulfill the pre-suit

[53] The expert executing the Screening Certificate of Merit may be compensated for their opinions voiced in the Screening Certificate of Merit, and may participate in the matter as an expert going forward. However, they cannot have an existing interest in the underlying claim, i.e. they could not have participate in the care of the plaintiff. *See* W.Va. Code §55-7B-6(b).

[54] W.Va. Code §55-7B-6(b) with updates from West Virginia Laws S.B. 510. The prior version of the statute did not require a list of the medical records and other information reviewed by the expert be provided with the Screening Certificate of Merit.

[55] W.Va. Code §55-7B-6(c).

[56] *Westmoreland v. Vaidya*, 22 W.Va. 205, 208, 664 S.E.2d 90, 93 (2008).

[57] *Id.* at 207.

certificate of merit requirement before his case was dismissed.[58] Justice Starcher wrote a separate concurrence to voice his opinions regarding the procedural barriers of the MPLA, including the screening certificate of merit, in which he stated that the pre-suit requirements of the MPLA sometimes serve as little more than "procedural humps" that "restrict, delay, or deny citizens' access to the courts."[59] As the MPLA has developed, the procedural aspects of the act have remained, but have continued to be refined and improved.

The MPLA provides a mechanism to extend the time to obtain a screening certificate of merit if a claimant finds him or herself against the statute of limitations. Under §55-7B-6(d), claimants may provider the health care provider with a statement of intent to provide the screening certificate of merit within sixty (60) days.[60]

The majority of medical malpractice cases will require a Screening Certificate of Merit. Although a mechanism exists for a medical malpractice case to proceed without a Screening Certificate of Merit, most allegations of negligence will not fall into a "cause of action…based upon a well-established legal theory of liability which does not require expert testimony supporting a breach of the applicable standard of care…"[61] In most medical malpractice cases, liability will be a contested issue and the Screening Certificate of Merit will be needed to help the defendant understand the basis for the claims in the matter.

b. *Hinchman* Response

A *Hinchman* Response affords the health care provider an early opportunity to lay out any deficiencies or concerns that may be identified in the Screening Certificate of Merit. This initial response provides the opportunity to filter out frivolous lawsuits based on the pleading requirements of the MPLA.

The Supreme Court of Appeals of West Virginia laid out the purposes of the pre-suit requirements in *Hinchman v. Gillette,* 217 W.Va 378, 618 S.E.2d 387 (2005). Syllabus Point Two of *Hinchman* states:

> Under *W.Va. Code*, 55-7B-6 (2003) the purposes of requiring a pre-suit notice of claim and screening certificate of merit are (1) to prevent the making and filing of frivolous medical malpractice claims and lawsuits; and (2) to promote the pre-suit resolution of non-frivolous medical malpractice claims. The requirement of a pre-suit notice of claim and screening certificate of merit is not intended to deny citizens' access to the courts.[62]

[58] *Id.* at 212. The Court stated that a typical amount of time in situations like this one require about 30 days to remedy the deficiency.
[59] *Id.* at 214.
[60] W.Va. Code §55-7B-6(d).
[61] W.Va. Code §55-7B-6(c).
[62] *Hinchman,* Sy. Pt. 2, 217 W.Va. 378, 618 S.E.2d 387 (2005).

Since the statute is intended to prevent frivolous claims and promote resolution of claims, the plaintiff is encouraged to obtain a Screening Certificate of Merit. Likewise, the defendants is encouraged to identify issues in the case prior to the filing of suit.[63]

One issue with pre-suit requirements is that there is no court with jurisdiction to rule on deficiencies in the pre-suit requirements.[64] As a result of this, healthcare providers who received Screening Certificates of Merit that they believed were deficient had issues challenging the sufficiency of the Screening Certificate of Merit.

In response to this issue, *Hinchman* modified Rule 12(e)'s approach on a motion for a more definite statement, so that

> …when a healthcare provider receives a pre-suit notice of claim and screening certificate of merit that the healthcare provider believes to be legally defective or insufficient, the healthcare provider may reply within thirty days of the receipt of the notice and certificate with a written request to the claimant for a more definite statement…[65]

This request needs to lay out all the insufficiencies in the Screening Certificate of Merit and Notice of Claim identified by the healthcare provider as, "the making of a request for a more definite state in response to a notice of claim and screening certificate of merit preserves a party's objections to the legal sufficiency of the notice and certificate as to all matters specifically set forth in the request…"[66]

The healthcare provider must assure that all of the insufficiencies are identified in the request as, "…all objections to the notice and certificate's legal sufficiency not specifically set forth in the request are waived."[67] The *Hinchman* Response is not meant to force the plaintiff to argue the merits of the case before filing; rather, the response is meant to assure that the healthcare provider understands the allegations and is afforded a full opportunity to evaluate those allegations.

c. Acts Outside the Realm of Medical Services

The MPLA contemplates, and governs, certain claims that a plaintiff may include related to, or resulting from, medical services. As such, many causes of action in tort against health care providers are governed by the MPLA, despite not being per se medical services. However, the MPLA does not govern all acts performed by a medical professional.

In *Boggs v. Camden-Clark Memorial Hospital Corporation,* 216 W.VA. 656, 609 S.E.2d 917 (2004), a widower brought a wrongful death action against anesthesiologist, the anesthesiologist's practice group, and hospital following the death of his wife.[68] Mr. Boggs

[63] *Id* at 387.
[64] *See Id.* at 386.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Boggs v. Camden-Clark Memorial Hospital Corporation,* 216 W.VA. 656, 609 S.E.2d 917 (2004).

alleged a variety of causes of action,[69] some of which based in medical malpractice liability and others, he claimed, were "separate and distinct from his medical malpractice claims."[70] Initially, the lower court dismissed the matter for failure to comply with the MPLA; however, on appeal, it was determined that "the lower court erred in dismissing the appellant's causes of actions in that they were only contemporaneous or related to the alleged act of medical professional liability."[71] In fact, the Court went further in saying,

> [W]e hold that the West Virginia Medical Professional Liability Act…applies only to claims resulting from the death or injury of a person for any tort or breach of contract based on health care services render, or which should have been rendered, but a health care provider or health care facility to a patient. It does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability."[72]

Chief Justice Maynard took issue with the majority's opinion in *Boggs* and filed a separate dissent. In his dissent, Justice Maynard agreed with the Circuit Court in a belief that the basis of the plaintiff's claims were based in the medical malpractice actions.[73] The dissent further illustrates the difficulty of combining medical malpractice claims with other tort claims. Without the medical malpractice in *Boggs*, the plaintiff's other claims would not have occurred. The challenge in these situations is determining what acts are intermingled with medical negligence and what acts are separate.

A similar division of claims occurred in *Gray v. Mena,* 218 W.Va. 564, 625 S.E.2d 326 (2005), in which a patient brought a civil action against a physician and other healthcare providers based on assault and battery after the patient alleged Dr. Mena inserted his non-gloved finger in her vagina.[74] The plaintiff characterized her claim as a civil action for assault and battery and did not comply with the MPLA.[75] The trial court dismissed the action for failure to comply with the MPLA, which caused the plaintiff to appeal under the theory that her claim was not a medical malpractice action.[76]

On appeal, the Supreme Court of Appeals of West Virginia found that the plaintiff had properly framed the case as an assault and battery civil action, rather than a medical malpractice case.[77] The defendants were permitted to request that the plaintiff comply with the MPLA

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[69] Plaintiff in *Boggs* alleged failure to adhere to the standard of care in anesthetizing his wife, as well as, negligent hiring and retention, and vicarious liability in medical malpractice; and additional claims in fraud, destruction of records, tort of outrage, and spoliation of evidence, which he asserted were outside of his medical malpractice claims.
[70] *Id.* at 659.
[71] *Id.* at 663.
[72] *Id.*
[73] *Id.* at 665.
[74] *Gray v. Mena*, 218 W.Va. 564, 625 S.E.2d 326 (2005).
[75] *Id.* at 567.
[76] *Id.*
[77] *Id.* at 570.

requirements, and the court thereafter could examine the issues raised.[78] The Court took the opportunity to remind litigants that if any doubt exists complying with the requirements of the MPLA is a safer course of action.[79]

Separating medical malpractice claims from other tort claims will often prove difficult. A case similar to *Gray* was decided in Florida, in which a plaintiff alleged sexual assault against a health care provider, but did not comply with the statutory notice and pre-suit screening requirements.[80] In *Burke v. Snyder*, 899 So.2d 336, 30 Fla. L. Weekly D586 (2005), the plaintiff alleged her doctor forced his hand into her genitals during her medical examination.[81] Plaintiff failed to follow the statutory pre-suit requirements and filed outside the two-year statute of limitations; however, the appellate court found, "the claim of sexual misconduct in this case is not a claim arising out of negligent medical treatment (malpractice)…"[82] The Florida court found that the plaintiff's claim could proceed despite the failure to comply with the statute's requirements.

Not all tort claims against a health care provider will be governed by the MPLA; however, litigants filing tort claims against health care providers would be prudent to comply with the requirements of the MPLA, including the pre-suit requirements, when possible. As illustrated in these cases, other tort claims against healthcare providers often have some relation to the medical care provided; as such, it is good practice to comply with the MPLA requirements.

d Nursing Homes, Assisted Living Facilities, and Related Entities

Litigation against nursing homes, assisted living facilities, or related entities, operates on a shorter statute of litigation than other action under the MPLA. Under W.Va. Code §55-7B-4(b), a civil action against these entities "must be commenced within one year of the date of such injury, or within one year of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such injury, whichever occurs last…"[83]

These claims are subject to a statute of repose limiting the discovery rule, which provides "[t]hat in no event shall any such action be commenced more than ten years after the date of injury."[84]

Under W.Va. Code §55-7B-6(e), in actions against nursing homes, assisted living facilities, or related entities, a claimant without sufficient time to obtain a screening certificate of merit before the expiration of the statute of limitations may provide the health care provider with a state of intent to provide a screening certificate of merit within one-hundred and eighty days from the Notice of Claim.[85]

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[78] *Id.*
[79] *Id.* at 571.
[80] *Burke v. Snyder*, 899 So.2d 336, 30 Fla. L. Weekly D586 (2005).
[81] *Id.* at 338.
[82] *Id* at 341.
[83] W.Va. Code §55-7B-4(b).
[84] *Id.*
[85] W.Va. Code §55-7B-6(e).

The statute of limitations can still be tolled when filing a claim against nursing homes, assisted living facilities, or related entities just as against other medical professionals. Much like W.Va. Code §55-7B-6(i)(1), the statute of limitations is tolled once a Notice of Claim is served upon the facility under W.Va. Code §55-7B-6(i)(2).[86] The statute of limitations may be tolled,

> [O]ne hundred and eighty days from the date of mail of a notice of claim to thirty days following receipt of a response to the notice of claim, thirty days from the date a response to the notice of claim would be due, or thirty days from the receipt by the claimant of written notice from the mediator that the medication has not resulted in a settlement of the alleged claims and that mediation is concluded, which last occurs.[87]

Actions against nursing homes, assisted living facilities, and related entities still require a Notice of Claim and Screening Certificate of Merit; however, litigants with their backs against the statute of limitations can be afforded additional time when bringing suit through these mechanisms.

e. Prelitigation Mediation

Under the MPLA, a health care provider in receipt of a Screening Certificate of Merit is entitled to "prelitigation mediation before a qualified mediator upon written demand to the claimant."[88] A health care desiring prelitigation mediation must be afforded the same within forty-five days from the date of the written demand.[89] The entitlement to prelitigation mediation is the reason why the plaintiff must wait thirty days from the receipt of the Notice of Claim before filing the complaint.[90]

Plaintiffs who fail to comply with the timing requirements of the MPLA regarding prelitigation mediation run the risk of having to restart the pleading process; however, "this pre-litigation mediation option is very rarely requested by health care providers because there is often very little or no benefit to a healthcare provider for doing so."[91] If the parties do elect to mediate the case before the start of litigation, the results of the mediation are not admissible as evidence in any proceedings.[92]

VI. Retaining Experts

Expert witnesses are often the key to succeeding or failing in a medical malpractice claim. Given the complicated nature of many of the claims, and the relative lack of medical knowledge held by the general public, a good expert builds the foundation of a medical malpractice case.

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[86] W.Va. Code §55-7B-6(i)(2).
[87] *Id.*
[88] W.Va. Code §55-7B-6(g).
[89] W.Va. Code §55-7B-6(h)
[90] *State ex rel. Miller v. Stone*, 216 W.Va. 379, 384, 607 S.E.2d 485, 490 (2004).
[91] Anders W. Lindberg, *Medical Malpractice Litigation in West Virginia: Applicability of the Medical Professional Liability Act, West Virginia Code §55-7B-1 et seq.* (October 10, 2018), https://wvyounglawyers.com/practice-handbook/medical-malpractice/
[92] W.Va. Code §55-7B-6(j).

a. Qualified Experts

Selecting and retaining the right expert takes considerable time and care. Counsel must determine how a potential expert will withstand intense scrutiny from opposing counsel at trial or deposition. There are a number of factors to consider when evaluating potential expert witnesses including their education, experience, training, location, and cost.

There is no particular set of skills or training that guarantees an expert will be qualified to testify. Any potential expert witness must meet the standard requirements of West Virginia Rule of Evidence 702(a) by qualifying as an expert witness through his or her "knowledge, skill, experience, training, or education."[93] The determination of whether a witnesses qualifies as an expert will ultimately fall on the circuit court; however, the Supreme Court of West Virginia has provided guidance.

When faced with determining who qualifies as an expert, the circuit court is to perform a two-step inquiry:

> First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify.[94]

The determination of whether a witness is qualified to testify as an expert, and thus to the ultimate issue in the matter, is within the sound discretion of the circuit court.[95] Although the court acts as a "gatekeeper" in determining whether an individual is qualified as an expert, there is no "best expert" rule and the court are directed to err on the side of admissibility.[96]

As noted above, West Virginia does not follow the "locality rule."[97] Therefore, a physician does not have to be familiar with the customs or practices common among physicians or medical practitioners in the area. Likewise, a medical provider does not have to employ a specific technique or procedure in order to be qualified as an expert, rather use of a specific technique or procedure should be used to give weight to the testimony and not to the admissibility.[98]

Most cases require plaintiffs to obtain a Screening Certificate of Merit, which needs to be provided by an expert. Although the expert executing the Screening Certificate of Merit does not have to go through any scrutiny prior to executing the document, the Screening Certificate of Merit does require references to the expert's familiarity with the standard of care and qualifications as an expert accompany the Screening Certificate of Merit.[99] As such, it is prudent to assure that the

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[93] W.Va. R. E. Rule 702(a).
[94] *Gentry v. Mangum*, Syl. Pt. 5, 195 W.Va. 512, 466 S.E.2d 171 (1995).
[95] *Id.* at 524-525.
[96] *Id* at 525.
[97] *See Paintiff v. City of Parkersburg*, 176 W.Va. 469, 345 S.E.2d 564 (1986), abolishing the locality rule in West Virginia following a series of decisions that eroded the rule.
[98] *Walker v. Sharma*, 221 W.VA. 559, 567, 655 S.E.2d 775, 783 (2007).
[99] W.Va. Code §55-7B-6.

expert executing the Screening Certificate of Merit be able to withstand the same scrutiny as a testifying expert. Since the MPLA requires that a qualified expert provide the Screening Certificate of Merit, plaintiff counsel will often opt to continue with the same expert throughout the case and have the author of the Screening Certificate of Merit serve as the standard of care or causation expert for the case-in-chief.

In most cases, standard of care is established through competent expert testimony. In order for an individual to provide expert testimony in a medical malpractice case, the proper foundation must be laid by establishing the following:

> (1) The opinion is actually held by the expert witness; (2) the opinion can be testified to with reasonable medical probability; (3) the expert witness possesses professional knowledge and expertise coupled with knowledge of applicable standard of care to which his or her expert opinion testimony is addressed; (4) the expert witness's opinion is grounded on scientifically valid peer-reviewed studies if available; (5) the expert witness maintains a current license to practice medicine with the appropriate licensing authority of any state of the United States: *Provided*, That the expert witness's license has not been revoked or suspended in the past year in any state; and (6) the expert witness is engaged or qualified in a medical field in which the practitioner has experience and/or training in diagnosing or treating injuries or conditions similar to those of the patient.[100]

If the proposed expert meets these standards and is actively practicing medicine, "at the time of the medical injury, sixty percent of his or her professional time annually to the active clinical practice in his or her medical field or specialty, or to teaching in his or her medical field or specialty in an accredited university…" the party offering the expert is afforded a rebuttable presumption that the witness is a qualified expert.[101]

b. Standard of Care and Proximate Cause

Typically, expert testimony is required to establish a breach of the standard of care and that the breach was the proximate cause of the plaintiff's injuries. In West Virginia, there is a "general rule that in medical malpractice cases negligence or want of professional skill can be proved only by expert witnesses."[102]

The parties may disagree as to whether a case falls under the "common knowledge" exception, as such, the trial court would have to make a determination that expert testimony is necessary.[103] If the trial court is asked to exercise its discretion in requiring experts be retained, the parties must be afforded "a reasonable period of time must be provided for retention of an expert witness."[104] In order to resolve any potential expert issue upfront, the parties may consider having an order entered by the court requiring that experts be retained by both parties to prove

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[100] W.Va. Code §55-7B-7(a).
[101] *Id.*
[102] *Roberts v. Gale*, Syl. Pt. 2, 149 W.Va. 166, 139 S.E.2d 272 (1964).
[103] *McGraw v. St. Joseph's Hosp.*, Syl. Pt. 8, 200 W.Va. 114, 488 S.E.2d 389 (1997).
[104] *Daniel v. Charleston Area Med. Center, Inc.*, Syl. Pt. 4, 209 W.Va. 203, 544 S.E.2d 905 (2001).

standard of care and proximate cause. Regardless of whether a plaintiff has to retain an expert for the Screening Certificate of Merit or is able to progress under the "common knowledge" exception, at some point all plaintiffs have to retain an expert to establish standard of care.

The defendant's deviation from the standard of care will often be the primary issue in a medical malpractice case. Establishing the standard of care is accomplished through the testimony of "one or more knowledgeable, competent expert witnesses."[105] In the event the parties agree on the standard of care, the court may not require expert testimony on standard of care.

Typically, the plaintiff must establish that medical negligence occurred, as well as, "that such negligence was the proximate cause of the injury."[106] The Supreme Court of West Virginia provided a through overview of how the element of proximate cause fits into medical malpractice claims in *Mays v. Chang*, 213 W.Va. 220, 579 S.E.2d 561 (2003).[107]

In *Mays*, the estate of a patient who died of colorectal cancer brought a suit against the decedent's doctor for negligence in failing to discover the colorectal cancer, which they alleged decreased the chances of survival for the decedent.[108] The circuit court applied the proximate cause analysis and determined that it was not foreseeable for a physician, using ordinary care, to determine that the decedent was suffering from colorectal cancer and prohibited the plaintiff from introducing evidence regarding the defendants' failure to perform CBC or hemoglobin a/la tests.[109]

The *Mays* court noted that, "the phrase 'proximate cause' in *W.Va. Code*, 55-7B-3 'must be understood to be that cause which in actual sequence, unbroken by any independent cause, produced the wrong complained of, without which the injury would not have occurred.'"[110] "'The proximate cause of an injury is the last negligent act contributing to the injury and without which the injury would not have occurred.'"[111]

The issue in *Mays* is a common issue in medical malpractice suits. The plaintiff must show a causal relation between the harm alleged and the defendant's duty of care; in other words, "a plaintiff's burden of proof is to show that a defendant's breach of a particular duty of care was *a* proximate cause of the plaintiff's injury, not the *sole* proximate cause."[112] Defining proximate cause can be difficult, as proximate cause can be an "elastic and mystical term that is meaningless unless is it applied to the facts of a particular case."[113] Without the parameters of the case and the background of relevant facts, proximate cause is a term difficult to define.

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[105] W.Va. Code §55-7B-7.
[106] *Short v. Appalachian OH-9, Inc.*, Syl. Pt. 4, 203 W.Va. 246, 507 S.E.2d 124 (1998).
[107] *Mays v. Chang*, 213 W.Va. 220, 579 S.E.2d 561 (2003).
[108] The decedent suffered from multiple chronic conditions, including insulin dependent diabetes and high blood pressure, which required him to be under the supervision of a physician and submit to certain blood tests although not those required to detect colorectal cancer. *Id* at 223.
[109] *Id.* at 223-224.
[110] *Id* at 224, citing Syl. Pt. 3, *Webb v. Sessler*, 135 W.Va. 341, 63 S.E.2d 65 (1950).
[111] *Id.* citing Syl. Pt. 5, *Hartley v. Crede*, 140 W.Va. 133, 82 S.E.2d 672 (1954), *overruled on other grounds* by *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983).
[112] *Id.*
[113] *Id.* citing *Smith v. Penn Line Service, Inc.*, 145 W.Va. 1, 33, 113 S.E.2d 505, 522-23 (1960)(Browning, P. dissenting).

The connection between a breach of the standard of care and the alleged injury is typically a question for the jury, as it depends on the facts of the case. "Questions of negligence, due care, proximate cause and concurrent negligence present issue of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusion from them."[114] As such, summary judgment on proximate cause rarely occurs.

Retaining an expert who can establish standard of care is essential for parties both prosecuting and defending medical malpractice claims. Success in a medical malpractice claims depends on using expert testimony to connect a breach in the standard of care to the proximate cause of the alleged injuries. Therefore, it is worthwhile for a litigant to spend time and effort in retaining the perfect expert.

VII. Pleading

As a civil action, a medical malpractice generally follows the pleadings outlined in the West Virginia Rules of Civil Procedure with "a complaint, answer, a reply to counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served."[115]

a. The Complaint

Since medical malpractice actions are civil cases, the complaint in a medical malpractice claim follows West Virginia Rule of Civil Procedure 3 and commences the civil action with the court.[116] However, unlike in many other civil actions, in a medical malpractice action, "no specific dollar amount or figure may be included in the complaint, but the complaint may include a statement reciting that the minimum jurisdictional amount established for filing the action is satisfied."[117] Including a specific dollar amount in the complaint is a direct violation of the statute; however, the court has alternative measures to cure the defect short of dismissing the case if it elects to strike the paragraphs that include the specific dollar amounts.[118]

Although the MPLA prohibits a plaintiff from pleading a specific amount of damages in the complaint, any defendant in a medical malpractice action may make a written request for a statement of damages setting forth the nature and amount of damages alleged in the proceeding at any point.[119] The plaintiff is required to provide a response to the request for damages within thirty days; otherwise, the defendant making the request can petition the court and demand the plaintiff serve a response.[120]

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[114] *Id.* citing Syl. Pt. 5, *Hatten v. Mason Realty Co.*, 148 W.Va. 380, 135 S.E.2d 236 (1964).
[115] W.Va. R. Civ. P. 7(a).
[116] W.Va. R. Civ. P. 3(a).
[117] W.Va. Code §55-7B-5(a).
[118] *Moore v. Ferguson*, Not Reported in F.Supp.3d, 2015 WL 3999596 (July
[119] *Id.*
[120] *Id.*

b. Answer and Exchange of Medical Records

As with a typical civil action, the answer in a medical malpractice case is governed by West Virginia Rule of Civil Procedure 12, which provides that the answer shall be served within twenty days, unless certain exceptions apply.[121] If the defendant receives the complaint and provides a notice of bona fide defense, the defendant is afforded an additional 10 days to respond, which makes service of the answer due within thirty days after the defendant is served with the complaint.[122] The defendant is automatically provided thirty days to respond whenever the complaint is served on the defendant "through or by an agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of such defendant or upon a defendant in the manner provided in Rule 4(e) or (f)."[123]

In order to build a proper defense, a defendant will need to closely examine the medical records and review the care provided, as such, obtaining the medical records as quickly as possible is important. The MPLA provides that, "[w]ithin thirty days of the filing of an answer by a defendant in a medical professional liability action or, if there are multiple defendants, within thirty days following the filing of the last answer, the plaintiff shall provide each defendant and each defendant shall provide the plaintiff with access, as if a request had been made for production of documents pursuant to rule 34 of the rules of civil procedure, to all medical records pertaining to the alleged act or acts of medical professional liability which: (1) Are reasonably related to the plaintiff's claim; and (2) are in the party's control."[124] If the plaintiff knows of relevant medical records not in his or her possession, the plaintiff is to provide a release to the defendant(s) allowing for the collection of those records.[125]

The MPLA encourages the parties to freely exchange pertinent medical information regarding the alleged claims, which encourages the efficient resolution of matters. As the parties request and exchange medical records, there may be information that's relevancy is contested. If the relevancy is contested by a party, the party challenging the relevancy of the request is to provide "written notice to the requesting party of the existence of such records and schedule a hearing before the court to determine whether access should be provided."[126] Likewise, a party believing that medical records exist that have not been provided, "shall give written notice thereof to the party upon whom the request is made, and if said records are not received within fourteen days of the written notice, obtain a hearing on the matter before the court."[127] The court has the ability to

[121] W.Va. R. Civ. P. 12(a)(1).
[122] *Id.*
[123] *Id.* Rule 4(e) provides for constructive service, which includes service by publication and service by mailing. Rule 4(f) provides for personal service outside the state of West Virginia.
[124] W.Va. Code §55-7B-6a(a).
[125] *Id.*
[126] W.Va. Code §55-7B-6a(c).
[127] W.Va. Code §55-7B-6a(d).

assess costs related to enforcing these requests after "a finding as to the reasonableness of the parties' request for or refusal to provide records…"[128]

VIII. Damages

a. Establishing Damages

Economic damages come in comprehensive and punitive damages. Compensatory damages will include realized damages, such as medical bills, as well as, future damages, such as ongoing therapy or lost earning potential. Punitive damages are meant to punish the behavior of the health care provider and are limited under the MPLA.[129]

Parties may need to retain damage experts to show or refute the extent of injuries or the plaintiff's ability to earn future wages through vocational rehabilitation experts. Vocational rehabilitation experts can help establish the plaintiff's potential for work and help establish future damages.

If the plaintiff is not able to work or care for his or herself, a life care planner can help establish future damages by estimating the costs associated with caring for the individual. A life care plan integrates data and assessments of the individual to determine the current and future needs of an individual who experienced a catastrophic injury or chronic health needs.[130] The testimony of a life car planner may be presented to assist the jury in determining damages and the extent of the plaintiff's injury.[131]

Specific damage amounts can be established through the testimony of an expert economist. Typically, one or both sides will retain an economist to calculate the future damages in a case.[132] An economic expert will use the economic evidence in the case, such as past earnings, and the plaintiff's injuries to create various life scenarios with possible future damages, which are reduced to present value.[133]

Ultimately, the decision of whether to award damages, and the amount of damages, is ultimately a question for the trier of fact, be that the jury or the judge. The trial court does have the ability to vacate a jury verdict and award a new trial under Rule 59 of the West Virginia Rules of Civil Procedure.[134] However, despite the court's broad discretion to award a new trial, the court should not grant one, "unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done…"[135]

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[128] W.Va. Code §55-7B-6a(e).
[129] W.Va. Code §55-7B-8.
[130] J. Stanley McQuade, *Medical Information System for Lawyers,* §3B:10.50. Life Care Plans (2d*)* (August 2018 update).
[131] *See Neely v. Belk, Inc.*, 222 W.Va. 560, 668 S.E.2d 189 (2008).
[132] *See* Jacob A. Stein, *Stein on Personal Injury Damages,* §6:18 (3d ed.)(October 2018 Update).
[133] *See Andrews v. Reynolds Memorial Hosp., Inc.*
[134] W.Va. R. Civ. P. 59.
[135] *In re State Public Bldg. Asbestos Litigation*, 193 W.Va. 119, 124, 454 S.E.2d 413, 418 (1994) quoting 11 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* §2801 at 27 (1973).

b. Statutory Limits on Damages

The 2003 amendments to the MPLA added statutory limitations on the noneconomic damages a plaintiff could recover in a medical malpractice case. Under the current MPLA, "the maximum amount recoverable as compensatory damages for noneconomic loss mat not exceed $250,000 for each occurrence, regardless of the number of plaintiffs or the number of defendants or, in the case of wrongful death, regardless of the number of distributes…"[136]

If the noneconomic damages are the result of "(1) wrongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3) permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life-sustaining activities…", the noneconomic cap is raised to $500,000 for each occurrence, regardless of the number of plaintiffs or defendants.[137]

Health care providers are not afforded the benefit of statutory limits under the MPLA, if the provider "does not have medical professional liability insurance in the aggregate amount of at least $1 million for each occurrence covering the medical injury which is the subject of the action."[138] This statute, therefore, has the effect of placing a medical malpractice insurance requirement on health care provider; because, without such insurance, the provider may be personally responsible for the damages.

The legislature knew that inflation would eventually make these damage caps seem low; therefore, a provision was included to assure that the caps would remain consistent. "On January 1, 2004, and in each year thereafter, the limitation for compensatory damages contained in subsections (a) and (b) of this section shall increase to account for inflation by an amount equal to the Consumer Price Index published by the United States Department of Labor, not to exceed one hundred fifty percent of the amounts specified in said subsections."[139] As such the current values are $347,329.39 for each occurrence and $694,658.78 for permanent injuries or death.[140] Although the MPLA accounts for an annual increase based on inflation, the statute also limits the maximum amount the statutory limits may be increased based on inflation. The statutory caps can "not exceed one hundred fifty percent of the amounts specified…"[141] As such, the current statutory caps, accounting for inflation, have nearly reached the maximum cap allowed.

The constitutionality of the 2003 version MPLA was confirmed by the Supreme Court of Appeals for West Virginia. In Syl. Pt. 6 *MacDonald v. City Hosp., Inc.*, 227 W.Va. 707, 715 S.E.2d 405 (2011), the Court found that both the $250,000 cap per occurrence and the $500,000 cap for cases involving permanent injuries or death were constitutional.[142] Since the implication

[136] W.Va. Code §55-7B-8(a).
[137] W.Va. Code §55-7B-8(b).
[138] W.Va. Code §55-7B-8(d).
[139] W.Va. Code §55-7B-8(c).
[140] United State Department of Labor, Bureau of Labor Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm (visited on October 15, 2018). Values as of September, 2018.
[141] W.Va. Code §55-7B-8(c).
[142] Syl. Pt. 6 *MacDonald v. City Hosp., Inc.*, 227 W.Va. 707, 715 S.E.2d 405 (2011).

of the 2015 amendments, which did not substantially effect this section, there have been no challenges to the constitutionality of the caps.

c. West Virginia Patient Injury Compensation Fund

In order to help assure that claimants were able to recover economic damages awarded to them, the West Virginia legislature created the West Virginia Patient Injury Compensation Fund, "for the purpose of providing fair and reasonable compensation to claimants in medical malpractice actions for any portion of economic damages awarded that is uncollectable as a result of limitations on economic damage awards for trauma care, or as a result of the operation of the joint and several liability principles and standards…"[143]

Initially, the funding for the West Virginia Injury Compensation Fund was provided by the state from funds that would have otherwise been transferred to the tobacco fund.[144] In 2005, 2006, and 2007, an amount of $2,200,000 was placed into the fund to provide the initial funding for the program.[145] Once the fund was established with this initial funding, the intent of the legislature was that the fund would continue through other funding sources. The additional funding sources included: (1) annual assessments on licensed physicians; (2) assessments on trauma centers; and (3) assessments on claims filed under the MPLA.[146]

The Board of Medicine and the Board of Osteopathic Medicine assess a biennial assessment in the amount of $125 from every physician in the state for the privilege of practicing medicine.[147] Likewise, the Board of Risk and Insurance Management shall levy a $25 assessment for each trauma patient on the state's trauma centers.[148]

Parties in a medical malpractice action need to be aware of the West Virginia Patient Injury Compensation Fund, because settlements and judgments may be subject to an assessment of one percent of the gross amount.[149] A "qualifying claim" is subject to the assessment, which is "any claim for which a screening certificate of merit is required, or for which a statement setting forth the basis of the alleged liability of the health care provider is allowed in lieu of the screening certificate of merit" as defined in the MPLA.[150] When a medical malpractice case is settled, or a judgement rendered, the plaintiff is tasked with providing payment of one percent of the gross proceedings to the clerk of court, who will then remit the assessment to the State Treasury for deposit in the fund.[151] If the parties resolve the claim prior to filing of an action, the claimant is

[143] W.Va. Code §29-12D-1(a).
[144] W.Va. Code §29-12D-1(b).
[145] *Id.*
[146] W.Va. Code §29-12D-1a.
[147] W.Va. Code §29-12D-1a. Resident physicians who are participating an accredited full-time program of post-graduate medical education in the state; physicians on active duty in the armed forces of the United States, who will not be reimbursed by the armed forces for the assessment; physician practicing solely under a special volunteer medical license; physicians holding an inactive license; or physicians practicing under 40 hours per year may be exempt from the assessment.
[148] *Id.*
[149] W.Va. Code §29-12D-1a(c).
[150] W.Va. Code §29-12D-1a(c)(1).
[151] W.Va. Code §29-12D-1a(c)(3).

to remit the payment to the Board of Risk and Insurance Management within 60 days of the settlement agreement.[152]

A check should be made payable to and provided to the Circuit Clerk. The Circuit Clerk will need to be provided some basic information about the case, such as: 1) the case style and number; 2) the amount of the settlement; 3) date of the settlement; 4) name of entity (insurer) issuing the payment; 5) name of person who sought treatment giving rise to the claim; 6) dates of treatment giving rise to the claim; 7) all defendant healthcare providers; 8) all attorneys involved in the case and their client; and 9) information on any action filed as a result of this claim, including court approval of the settlement, including venue, civil action number, parties, and judge.[153]

IX. Conclusion

The MPLA was created in order to assure that the citizens of West Virginia receive the best possible medical care in light of the rising cost of medical liability insurance causing many health care providers leaving the state.[154] The MPLA works to find a balance between the public's right "to adequate and reasonable compensation" when they suffer from an act of medical malpractice and the health care providers' ability to "obtain the protection of reasonably priced and extensive liability coverage…"[155]

Through its revisions and amendments, the MPLA has continued to seek a balance between these two concepts. Throughout the life of the MPLA, the correct balance between the concepts has been an issue. Plaintiffs will always desire no caps on damages or, in the alternative, the highest possible caps. On the other side, defendant health care providers will always advocate that damage caps allow them to practice without fear of defending meritless claims. The MPLA will continue to evolve as the needs of the citizens of West Virginia change and as the legislature continues to attempt to balance these dual concerns.

[152] *Id.*
[153] The 29th Judicial Circuit requests that attorneys, at a minimum, provide these numbered items. Most circuits will require at least this information.
[154] W.Va. Code §55-7B-1.
[155] *Id.*