Journal of Life Care Planning, Vol. 10, No. 4, (45-47)

Practical Matters
Possibility versus Probability

Irmo Marini, Ph.D.
Professor and Ph.D. Coordinator
Department of Rehabilitation
The University of Texas-Pan American

In being the first to test our new column on Practical Matters, I would like to begin by explaining what I and the Academy envision for this section. First, unlike the empirical manuscripts and conceptual papers that will be exclusively research-based, this column provides an opportunity for practitioners to share their professional experiences in the field in as an objective, factual manner possible. Since many of us are out there working alone, this column, with the help of member stories, could become as valuable as the empirically based manuscripts in some ways. I remember about 20 years ago in Atlanta how Roger Weed presented some of his vocational expert "war stories" in the field and then opened it up for audience participation to share their stories, and it was an enlightening session. We are hoping Practical Matters could become that type of venue for your experiences that may be beneficial to other practitioners. As such, I will hopefully set the pace here with this inaugural issue titled Possibility versus Probability.

I have been fortunate over the years to have established a great friendship with the first attorney who ever hired me in 1994, Bobby McDaniel out of Jonesboro, Arkansas. Bobby is literally one of Arkansas' top attorneys around that region (nominated so twice by his peers), and I have been referred numerous cases over the years through the domino effect attorney word-of-mouth. At any rate, over many of our social get-togethers, Bobby has mentored me regarding his world as a personal injury lawyer, and how best to withstand plaintiff/defense attorney questioning, their strategies, and general mindset.

One of the very first topics he taught me about was possibility versus probability testimony in depositions and at trial regarding the certainty of our opinions. As you know, we as experts generally need to focus on the probability (51% or greater) of something occurring rather than its possibility. So as I sometimes find myself explaining to juries that although it is possible that elephants can fly, it's not probable. This analogy vividly demonstrates to lay-person jurors the differences between the two, and although an extreme example, clearly gets the point across.

At any rate, there have been a couple instances in recent years working both plaintiff and defense cases where the attorneys I thought skillfully attempted to blur the possibility versus probability lines during trial testimony. Similarly, I have seen primarily plaintiff life care plans in which I was retained by the defense as a rebuttal expert, where similar lines have been crossed. In the case I am about to describe where I was retained as a defense rebuttal expert, an illustration of the plaintiff attorney and retained life care planner's blurring of possibility versus probability is discussed.

In recent years, I was retained as a rebuttal life care plan expert in the case of a teenage female who sustained a C8-T1 spinal cord injury. I'm sure like many of our members who have reviewed another life care planner's report and sometimes or often find the report reasonable; this wasn't the case in this particular instance is my opinion. The plaintiff life care plan projected about $9 million in future medical care compared to mine which projected just over $4.6 million over her lifetime. Both the plaintiff expert and I used Blackwell's et al. (2000) Spinal Cord Injury Desk Reference statistics coming from the national database for some estimates, and both agreed on her requiring about 10 hours per day of unskilled nursing care at present. The plaintiff life care planner additionally opined this young lady would deteriorate enough over the next 20 years to then require 16 hours per day of unskilled care, then 20 hours per day before age 60. The expert was assuming the injured teen would deteriorate functionally with time and require additional hours as generally does occur, however I argued this to be speculative with no consistent or hard empirical evidence that would suggest her needs would increase this dramatically around these particular ages. Hence, his opinion was "possible" rather than "probable" at this time with anecdotal and speculative evidence to support it.

The second area the plaintiff expert began to speculate rather than work with probabilities was with potential complications. He indicated that she would succumb to a number of secondary complications beginning immediately and therefore requiring 20 days per year of hospitalization for the next 20 years, then 30 days per year for the following 20 years, then 40 days per year until life expectancy. I was always taught in our discipline that we don't actually put a dollar value to potential complications. We make sure to cite these complications and their potential costs, but because they are speculative future problems that are not statistically probable in the literature, we as life care planners do not add in costs as actual damages as if they will occur. Unless there is some strong medical history support as well as the treating rehab specialist's backing that these complications will in all probability occur, they are regarded as only possibilities. Besides, in my opinion it's philosophically contradictory to develop a life care plan that is otherwise "preventative" or minimizes the likelihood of future secondary complications, yet essentially state that these bad things are going to happen regardless of regular doctor visits, diagnostic tests, etc.

The third area the plaintiff expert speculated where possibilities were priced out as probabilities were the actual complications. He priced out annual urinary tract infections, decubitus ulcers with and without surgery, and repetitive motion injuries among others. Again, we know from numerous studies that there is indeed an incidence of these problems occurring for persons with differing levels of SCI, but none of the empirical research suggests the probability of these occurring enough so to speculate actual damages. Although with this level of injury, this young lady had fairly good use of her hands and could transfer herself in/out of her wheelchair without much difficulty, the plaintiff life care planner had power assist wheels for her beginning immediately. I didn't disagree with this; however, the expert additionally had her receiving medical treatment for overuse syndrome beginning immediately despite her injury being less than two years old. This was in my opinion also an even more obvious case of possibility over probability, and in this instance, factually and medically impossible.

The plaintiff attorney questioning me at trial (after his expert had testified the day before), also continued blurring the lines between possibility versus probability. His line of questioning stemmed from my deposition testimony regarding my being critical of the plaintiff life care plan centering around “how sure I was that none of these secondary complications wouldn't occur?” I explained that although I wasn't sure they would not occur, of all the empirical studies I had read over the years, virtually none of them had statistically shown these potential complications to be probable occurrences. I stressed that unquestionably the secondary conditions were possible, statistically at this point in time they were not probable and therefore should not be treated as such regarding monetary costs added to the life care plan. The plaintiff attorney also stressed that if I was going to optimistically suggest she wasn't in all probability going to succumb to these problems presently and/or in the future, would that not create grave medical implications if she did not have the money to pay for all of these potential future complications? Also, because I was retained by the defense representing the company being sued, wasn't it just my job to cut the damages? It was these types of questions among others such as if she was my daughter, would I not want to consider all the potential future problems she was likely to incur, and make sure the money was there to pay for them? Excellent questions in my opinion, but ones that not only blurred the lines between possibility versus probability, but were designed to strike an emotional chord with the jury and perhaps impose guilt feelings if they awarded a nickel less than what the plaintiff life care planner had opined.

Nevertheless, I stuck to probabilities during both my deposition and at trial, and kept reiterating that although these were possible problems she may encounter, it was purely speculation at this time that she would suffer so many problems, particularly the immediate overuse syndrome despite having power assist wheels, and the 20 days of hospitalization per year. Ironically, although it may appear the plaintiff life care planner and I were miles apart on each of our own versions of her damages we in fact had agreed upon probably over 80% of the life care plan. Where I believe we began to go in different directions, was where he began to incorporate costs for things that could “possibly” happen. The case went to verdict, and the jury was indeed emotionally impacted by the injury sustained to this young teenager. In the end, they awarded her many millions more beyond what either of us life care planning experts had decided. Although I had experienced different versions of possibility versus probability being blurred in the past, in this case vividly reminded me that court trials and juries ideally try to be objective in their deliberations; however, subjectivity enters the picture in varying degrees.

We hope this column has been helpful and generates interest among our members to send in their own. Please send me your own Practical Matters stories to be considered for future issues, and/or feel free to send me your comments about this column to me at imarini@utpa.edu.