

Quantifying and Minimizing the Impact of Life Care Planners in Medical Malpractice Litigation

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INTRODUCTION

Life care plans create the risk of inherently speculative future medical damages awards without any corresponding requirement that plaintiffs actually apply those awards towards the plans. They also provide plaintiffs a vehicle to legitimize and quantify the largest component of economic damages in medical malpractice cases.¹ Life care plans are often attorney-driven and project costs for items unnecessary for an injured plaintiff's future well-being. They accordingly provide a seemingly legitimate basis for large jury awards, even if they sometimes bear little relationship to the care, treatment, or accommodations an injured plaintiff actually needs.²

Life care plans are widely used in medical malpractice cases, and they are effective. Between 2008 and 2016, Cook County reported 33 jury verdicts for medical malpractice plaintiffs that contained an award for future medical damages. Plaintiffs used life care planners in 33% of those cases. The cases involving life care planners produced an average total verdict award that was 437% of the average total verdict award in cases not involving life care planners. Similarly, the average future damages

¹ Mitchell, Cathlin Vinett, *Analyzing Life Care Plans*, DRI Medical Liability and Health Care Law Seminar, 149 (March 2014).

² Eceknrode, J. T. & Vernetto, D., *Fighting the Squeeze*, FOR THE DEFENSE, 68, 72 (September 2012).

award in cases involving life care planners were 937% of the average future damages award in cases not involving life care planners.³

Low evidentiary thresholds virtually guarantee even the most inflated life care plans will reach jurors, which creates a dilemma for defense attorneys in catastrophic medical malpractice cases: how do you discredit and attack bloated life care plans without simultaneously legitimizing their use in the litigation? First, this paper will discuss and analyze the structure and purpose of life care plans. Second, it will attempt to quantify their impact in medical malpractice cases in Cook County. Third, it will present solutions for defending against inflated, speculative, and attorney-driven life care plans.

THE ANATOMY OF A LIFE CARE PLAN

Life care plans are formal written documents that purport to account for an injured plaintiff's needs during their life expectancy. One informal association of nurse life care planners defines the term as:

[a] dynamic document based upon published standards of practice, comprehensive assessment, data analysis and research, which provides an organized concise plan for current and future needs, with associated costs, for individuals who have experienced catastrophic injury or have chronic health care needs.⁴

The operative word in the above definition is “need.” Life care plans are not designed to measure damages; they measure an injured plaintiff's needs. This creates an inherent disconnect in many cases because life care plans are used to maximize

³ All numbers contained in this section are based upon data compiled by the Law Bulletin Publishing Company.

⁴ See Comments, www.medlegalservices.com/lifecareplanning.

damages, but the plans themselves measure need, regardless of whether such need causally relates to the alleged negligence. Life care plans measure the lifetime needs of an injured party, but often utilize imprecise metrics to measure a catastrophically injured plaintiff's life expectancy. Most plaintiffs prove "life expectancy" through the United States Department of Labor's life tables, which contain life expectancies for "average" persons.⁵ Those "average" life expectancies, however, do not account for the actual condition at issue or any pre-existing conditions. This results in multiplication of future damages based upon a false equivalency.⁶

Additionally, the items claimed as necessities in life care plans vary greatly from case to case, and often include cost-padding, non-medical items. Claimed items range from new houses to per-annum sanitary wipe allowances.⁷ Most life care plans, including even the most conservative plans, include: physician visits, surgeries, hospitalizations, specialized transportation, specialized housing and home needs, wheelchairs, medications, and specialized attendant care and therapy. More detailed plans may include secondary medical items, including: replacement cane tips, electrode patches for TENS units, ergonomic sponges, long-handled shoehorns, jars of Vaseline, sanitary wipes, washable bed pads, exercise equipment, gym memberships, and stationary bikes. Other, more artful life care plans contain non-medical items purportedly "needed" by the plaintiff, including: oil changes, tire rotations, audio devices, hair dryer stands, folding chairs, wheel chair tote bags,

⁵ Eceknrode, & Vernetto, *supra* Note 2, at 72.

⁶ *Id.*

⁷ *Id.*

elevated garden carts, and replacement tennis balls for walkers.⁸ As discussed below, even the most tangentially related “necessities” are routinely submitted to juries over evidentiary challenges.

ADMISSIBILITY OF LIFE CARE PLANS AS EVIDENCE OF FUTURE MEDICAL DAMAGES

Low evidentiary thresholds facilitate wide-spread use of life care plans. Expert witnesses draft life care plans and present them to juries. Professional life care planners exist independently of the court room, but in the litigation context they are expert witnesses used to maximize damage awards.⁹ Life care planners are typically nurses, therapists, or physicians specializing in rehabilitation. Illinois, like most states, does not possess a licensure for life care planners, and no government-endorsed or uniform certification exists. They typically base their plans upon their understanding of the injured plaintiff’s medical condition and diagnosed disabilities drawn from medical records, medical testimony, clinical interviews, and knowledge of resources available to plaintiffs, as well as costs of medical care, treatment, and equipment.¹⁰ The proliferation of this methodology allows almost any life care planner to present seven to eight figure plans to juries based upon little more than a plaintiff’s medical records and a liberal interpretation of a physician’s note concerning the plaintiff’s prognosis and the necessity of future treatment.¹¹ Plaintiffs often

⁸ *Id.*

⁹ Patterson, Rodney M., *An Irreverant Look at Life Care Planners*, Texas Tech School of Law Medical Malpractice Conference, at 4 (November 2001).

¹⁰ *See Norwest Bank, N.A. v. Kmart Corp.*, 94-cv-78RM, at 2 (N.D. Ind. 1997, Miller, J.).

¹¹ Eceknrode, & Vernetta, *supra* Note 2, at 72.

utilize multiple experts and physicians to fulfill the reasonableness and necessity foundational requirements for future medical expenses via this shotgun approach.¹²

Life care plans and corresponding expert testimony cannot be readily excluded on admissibility grounds under either the *Daubert* or *Frye* standard. In federal litigation, life care plans routinely survive *Daubert* challenges.¹³ Under the Seventh Circuit's *Daubert* analysis, life care planner expert testimony is admissible if: 1) the witness is reliable; 2) the witness's methodology is scientifically reliable; and 3) the testimony will assist the trier of fact.¹⁴ District courts typically find general life care planning experience sufficient for the reliability and methodology prongs, even when the purported expert does not possess experience planning for the needs of patients with the plaintiff's particular condition.¹⁵ As to the third factor, District courts in the Seventh Circuit routinely find that challenges to certain inflated items in life care plans properly go to the weight of the life care planner's testimony rather than its admissibility.¹⁶

¹² See *Terracina v. Castelli*, 80 Ill.App.3d 475 (1st Dist. 1979) (explaining foundational requirements for future medical expenses damages); but see *Diaz v. Legat Architects, Inc.*, 397 Ill. App. 3d 13, 45-46 (1st Dist. 2009) (barring physician testimony as to costs and need for future medical treatment as speculative where need for future surgery depended on future test results and the plaintiff's decisions on treatment).

¹³ See, e.g., *Forsythe v. Rosen Medical Group, LLC, et al.*, Civil No. 11 cv 7476, at 3-5 (N. D. Ill 2011, St. Eve, J.) (denying Defendant's motion *in limine* seeking to bar certain itemizations in life care plan under *Daubert* standard).

¹⁴ *Id.*, citing *Myers v. Ill. Cent. R.R. Co.*, 629 F.3d 639, 644 (7th Cir. 2010).

¹⁵ See, e.g., *Taylor v. Union Pac. R.R. Co.*, Civil No. 09-123-GPM, at 3, (S.D. Ill. 2010, Murphy, J.) (life care planner with general experience but no experience with patients suffering from chronic pulmonary conditions reliable under *Daubert*).

¹⁶ See *Forsythe*, *supra* Note 9, at 5-6 (challenges to items in life care plan properly attacked via cross-examination rather than *in limine*); see also *Taylor*, *supra* Note 11, at 3 (same); *Runge v. Stanley Fastening Sys., L.P.*, 09-cv-130, at 3 (S.D. Ind. 2011, Pratt, J.)(same).

One District court in Indiana, however, upheld a defendant's challenge to the admissibility of a life care planner's testimony under the *Daubert* standard. In *Norwest Bank, N.A. v. Kmart Corp.*, the plaintiff, who suffered a traumatic brain injury, disclosed Robert Voogt, a Ph.D who owned and managed a brain injury clinic, as a life care planning expert to testify to the necessity and costs of future medical care.¹⁷ The defendant sought to exclude Dr. Voogt's testimony under the *Daubert* standard. The Court granted the defendant's motion, finding that Dr. Voogt's extensive experience qualified him to state opinions of the costs of future treatments, but his lack of a medical license prohibited him from testifying to the necessity of those treatments.¹⁸ He thus failed the first prong of the *Daubert* analysis. In reaching its decision, the Court rejected the plaintiff's attempt to frame Dr. Voogt's testimony as a "forecast," rather than a "prognosis."¹⁹

The Court also found that Dr. Voogt's testimony and report failed under the second prong of the *Daubert* analysis. The Court specifically found Dr. Voogt's "forecast" unbound from any scientific principle.²⁰ Significantly, the Court rejected the plaintiff's argument that Dr. Voogt's training and experience were sufficient to find his expert opinion "scientifically reliable" in its methodology.²¹ This decision largely rested upon Dr. Voogt's lack of a medical license, which is necessary for admission of prognosis opinion testimony. Plaintiffs disclosing non-physician life care

¹⁷ *Norwest Bank, supra* Note 9, at 1.

¹⁸ *Id.* at 2.

¹⁹ *Id.*

²⁰ *Id.* at 5.

²¹ *Id.* at 5-6.

planners normally avoid such foundational challenges by liberally bootstrapping their life care planner's cost projections to a treating or expert physician's prognosis.²² The Court's finding that the planner's training and experience was not scientifically reliable, however, provides grounds for defendants in *Daubert* jurisdictions to seek exclusion of life care planner testimony where the expert solely relies on their training and experience.

Defendants in *Frye* jurisdictions such as Illinois, however, almost certainly cannot utilize similar logic or arguments concerning the scientific reliability of a life care planner's methodology. Under Illinois' *Frye* test, when the underlying basis or methods of an expert's opinion are of a type reasonably relied upon by experts in that field, the court must allow the opinion to be assessed by the factfinder—even if the opinion reaches a novel conclusion.²³ Accordingly, under this analysis, Dr. Voogt's sole reliance upon his training and experience, coupled with his testimony that he employed the standard methodology used by nearly all life care planners, would almost certainly qualify as a "generally accepted" scientific methodology sufficient to admit his testimony. Challenging the admissibility of life care planner testimony under the relaxed Illinois *Frye* standard essentially amounts to a Sisyphean task; no published opinion regarding successful exclusion exists.

²² Eceknrode, & Vernet, *supra* Note 2, at 72.

²³ See *Donaldson v. Cent. Illinois Pub. Serv. Co.*, 199 Ill. 2d 63, 77 (2002) (articulating Illinois' *Frye* "general acceptance" test).

**THE IMPACT OF LIFE CARE PLANS ON COOK COUNTY MEDICAL MALPRACTICE
VERDICTS BETWEEN 2008 AND 2016**

Life care planners significantly increased jury verdict awards in Cook County medical malpractice cases between 2008 and 2016. They also increased awards for the cost of future medical expenses in those same cases. Between 2008 and 2016, Cook County juries returned 33 verdicts containing awards for future medical damages in medical malpractices cases.²⁴ Plaintiffs presented life care plans and the testimony of life care planners in 11 of those cases. The 33 total cases produced an average total verdict award of \$8,869,884.00 and an average future medical damages award of \$3,113,781.18.²⁵ The median total verdict award was \$3,706,500.00 and the median future medical damages award was \$215,000.00. Cases involving life care plans and life care planners produced an average total verdict award of \$18,546.64.00 and an average future medical damages award of \$7,908,204.55. Conversely, cases not involving life care plans and life care planners produced an average total verdict award of \$4,241,988.74, an average future medical damages award of \$820,796.09.

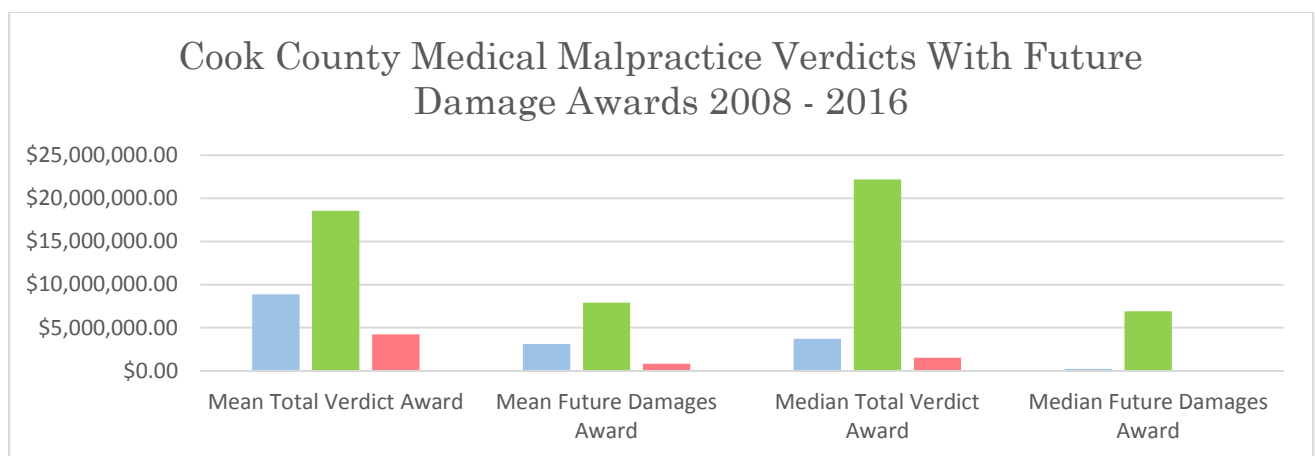
The disparity in awarded amounts between the two classes of cases is significant. The data indicate that life care planners increased total verdict awards 200% above the average, and future medical expense awards 253% above the average. The same data produced a similar median results. The median total verdict award in cases involving a life care planner was \$22,185,599.00, compared to a \$1,532,000.00 median total verdict award in cases not involving a life care planner. The median

²⁴ See *supra* Note 3.

²⁵ First Standard Deviations were \$11,695,021.43 and \$6,771,873.03, respectively.

future damages award was \$6,900,000.00 in cases involving a life care planner, compared to a \$100,000.00 median future damages award in cases not involving a life care planner. Despite a relatively small sample size, the data provide jarring evidence that life care plans significantly increase total verdicts and future medical expense damage awards in medical malpractice cases. In the table below, the blue-cell numbers represent all 33 cases, the green-cell numbers represent cases involving life care planners, and the red cells represent cases not involving life care planners.

Mean Total Verdict Award	Mean Future Damages Award	Median Total Verdict Award	Median Future Damages Award
\$8,869,844.00	\$3,113,781.18	\$3,706,500.00	\$215,000.00
\$18,546,268.64	\$7,908,204.55	\$22,185,599.00	\$6,900,000.00
\$4,241,988.74	\$820,796.09	\$1,532,000.00	\$100,000.00



MINIMIZING THE EXPOSURE CREATED BY LIFE CARE PLANS

Life care plans present strategic difficulties for defendants, and defendants facing life care plans in medical malpractice cases must make every effort to minimize their impact. As noted above, courts rarely exclude life care plans on admissibility grounds, leaving defendants to attack the weight of the plan and testimony through cross-examination. Defendants may desire to counter a plaintiff's life-care plan by presenting a more cost-effective life care plan through their own expert or economist. This approach, however, will only legitimize a plaintiff's claim for future medical damages, lend credibility to the life care planning process, and may lead a jury to split the difference between a plaintiff's hyper-inflated plan and a defendant's plan, which only benefits the plaintiff. Conversely, if a defendant does not present their own experts and figures, a plaintiff will likely argue that the figures contained in their plan are "uncontested" and must be accepted. Instead, defendants should employ a "death by a thousand papercuts" strategy to undermine the plaintiff's plan and expert. This strategy is particularly effective when a plaintiff discloses an extravagant life care plan. By attacking the plan's basis, the planner's methodology, and certain mathematical assumptions in the calculations, a defendant can effectively minimize the plan's impact on jurors.

The first soft-spot in life care plans is the basis of the plan. Defendants must precisely determine what the life care planner actually did to formulate their opinions. Did the life care planner interview the plaintiff or family members? What medical information, records, testimony, and opinions form the basis of the

projections? Did the life care planner consult with any of the plaintiff's experts or treating physicians before drafting the plan? Did the life care planner use software to produce the plan?

The answers to these questions can create fertile ground for cross-examination to expose the plan's shortcomings and speculative nature. If the life care planner made an independent prognosis based upon an artful extrapolation from another doctor's records or opinion, a defendant may be able to show that the original doctor does not support the life care planner's prognosis. If a life care planner failed to consider pre-existing conditions, or failed to review the medical evidence concerning pre-existing conditions, a plan including costs for treatment of pre-existing conditions will appear extravagant. If a life care planner did not interview a plaintiff's family members, their testimony may undercut the planner's projections. Testimony reflecting a plaintiff's capabilities at the time of trial from people that are with the plaintiff often severely undermines inconsistent future projections made by an expert that has only seen the plaintiff once.²⁶ By the same logic, a plaintiff's therapy, treatment, counseling, and living condition at the time of trial may expose a life care planner as failing to consider a plaintiff's actual situation and needs. Life care plans should not place an injured plaintiff in a better position than she was in before any complained-of occurrence.²⁷ Additionally, if the plaintiff is not receiving the "bells and whistles" care and treatment often contained in a life care plan, defendants can

²⁶ *Id.*

²⁷ Cannon, H., *What's in the Numbers? Effective Use and Cross-Examination of Life Care Planners and Vocational Economic Experts in Product Liability Litigation*, DRI Products Liability Seminar (2006); see also *Clark v. Children's Mem. Hosp.*, 2011 IL 108656, ¶ 29.

demonstrate that those items are not reasonable or necessary. Evidence that the life care planner created the report using software will reveal a cookie cutter approach that is not tailored to the plaintiff's actual needs or condition.

Assumptions used to calculate the total cost of future care should be exposed. As noted above, plaintiffs typically utilize "average" life expectancy to calculate a life care plan's duration. The "average" person's life expectancy does not precisely account for catastrophic medical conditions or pre-existing conditions. Defendants should thus obtain and present a physician's prognosis for a catastrophically injured plaintiff in order to cut down any inflated life expectancy multipliers. The same logic applies to speculative costs and required equipment contained in life care plans. It is critical to know how a life care planner came up with the pricing data and how they applied those data to the plan. Most life care planners utilize inflationary rates, and do not consider long term pricing contracts.²⁸ Additionally, most life care plans include costs for goods and services that are available, and will continue to be available, to the plaintiff for free.²⁹ The collateral source rule may prevent cross-examination on this point, but it is worth pursuing when the free services in question have been available to similarly situated plaintiffs for years or decades. Defendants can also focus on a few "absurd" items contained in the life care plan to expose overreach.

CONCLUSION

Life care plans are ubiquitous in catastrophic medical malpractice cases, and their use has proven effective in Cook County. Lack of uniform credentialing or

²⁸ Miller, S & Hurney, T., *Defending Against Life Care Plans*, IADC Midyear Meeting, at 6 (2016).

²⁹ *Id.*

industry standards produce a range life care planner methodologies and items included in plans as necessities. Although most life care plans and life care planner testimony readily survive admissibility challenges, most life care plans can be effectively attacked. Effective cross-examination of a life care planner requires thorough analysis of the planner's opinion basis, methodology, assumptions, and knowledge of the plaintiff's medical condition, physician testimony, and family member testimony.