

When something bad causes something good

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D*opson-Troutt et al vs Novartis Pharmaceuticals Corporation*, Case No. 8:06-CV-1708-T-24-EAJ (US Dist. Ct.; Middle Dist. Fla., Tampa Div.; 2013) begs an interesting legal question. Suppose you render negligent treatment causing a compensable injury of some type, but at the same time, the patient receives an unexpected benefit from the treatment. Should that benefit be allowed to offset the injury suffered to whatever degree?

In *Dopson-Troutt*, the plaintiff was diagnosed with breast cancer that had metastasized to her hip and pelvis. Her oncologist prescribed Aredia and Zometa, types of bisphosphonates that were manufactured and sold by the defendant (Novartis Pharmaceuticals Corporation). After a dental extraction, the plaintiff developed osteonecrosis of the jaw. The drugs were prescribed to reduce the plaintiff's risk of a skeletal-related event associated with the spread of her cancer, but, lo and behold, they wound up extending her life. The plaintiff filed a lawsuit against the defendant claiming, among other things, that the osteonecrosis of the jaw injuries she sustained were due in part to a lack of warning concerning this known possibility.

Several pretrial motions were filed, the first of which was that the plaintiff wanted to have any evidence of the benefits of the drug excluded because she was taking the drugs to prevent a skeletal-related event, not to fight her cancer. The court denied this motion. The next motion sought to prohibit the defendant from producing evidence that the drugs do not cause osteonecrosis of the jaw. This issue had already been litigated in other cases and decided in the defendant's favor, so the motion was denied. Finally, the plaintiff sought to exclude evidence or argument that any damages she suffered should be offset by any benefits she received from taking the drugs.

The defendant sought to apply Section 920 of the Restatement (Second) of Torts (1979), which states:

Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

Before proceeding further, it is important to understand what the Restatement is. In our legal system, as far as the judiciary branch (as opposed to the legislative branch) is concerned, cases decided at the trial level, although binding on the parties, generally do not carry much precedential value insofar as future cases based on similar claims or legal theories are concerned. However, this changes as cases make their way through the Appellate Courts, and these cases are now sometimes cited as precedents for lower courts to follow, or at least be guided by in their decision making. The legal holdings derived from Appellate decisions are what is often referred to as the Black Letter Law. The American Law Institute, founded in 1923, is an organization of legal scholars, judges, and noted practitioners who represent the legal community and whose purpose is to restate not only what the law is but also what it should become. They take the common law principles as they exist and reframe them into statements or idealized rules to be followed. Although these rules and opinions are not binding, because of the drafter's stature in the legal community, they are highly regarded and are very often followed and applied by courts at all levels. Restatements cover many areas of the law such as Torts, Contracts, Agency, etc.

The Restatement of Torts is a fascinating tome that is chock full of examples to clarify the rules. The one that it states concerning Section 920, and which applies to the case at hand, is as follows:

A, a surgeon, without B's consent, operates upon B's eye, causing B to lose the sight in that eye. In an action of battery, it may be shown in mitigation of damages for the loss of the eye that had A not operated, the sight of the other eye would have been lost.

The defendants argued, using the following corollary, that the plaintiff would have suffered greater harm had she not taken the drugs, which the plaintiff claimed she would not have taken had she been informed of the possibility for osteonecrosis of the jaw. Therefore, the benefit received, the extended life span, should be used to mitigate the damages claimed to result from the osteonecrosis of the jaw. The court agreed with the defendant, thus permitting them to argue the unexpected benefit as mitigation.

The remaining motions were not germane to this discussion.

COMMENTARY

Think about it; the rule sort of makes sense. We have all seen cases of really high, mesioangularly impacted canines. The deciduous canines were over-retained, so space was there. You discuss the risks associated with the exposure, the possible gingival architecture defects that might occur posttreatment, the extended treatment time required, not to mention the fact that the surgeon said the prognosis was iffy at best. However, a canine is a canine, so you “educate” the patient that it’s worth the shot. Everyone was prepared for failure. Well, guess what? The patient suffers severe anterior root resorption, but, lo and behold, you can bring the canines in and to top it all off, they’re perfect. You didn’t discuss the chance of root resorption to the anterior teeth because you honestly didn’t see your mechanics causing this potential injury. Can the unexpected benefit obtained be used to mitigate the damages suffered?

Your patient is a peripubescent female with a significant skeletal mandibular retrognathism in addition to her maxillary and mandibular anterior crowding. You recommend an orthognathic consultation, and everyone agrees that an ideal approach would include a mandibular advancement when her dentofacial growth and development has ceased. The patient’s parents indicate that the patient is being teased at school because of her anterior crowding and “fangs” and ask if there is anything that can be done now. You respond that 4 premolars can be taken out now, the teeth aligned, but that the patient will still have an overjet at the end of treatment that will require orthognathic surgery when she is finished growing. You engage in your usual informed consent discussion, and everyone moves forward.

Well, as things progress, you realize that the anterior imbrication was actually a functional interference, and as you align the anterior maxillary teeth, the mandible starts to posture forward. You make a clinical decision based on the patient’s physiological response to initiate Class II mechanics, and son of a gun, the overjet disappears. This completely unexpected result, coupled with the fact that surgery is no longer in this child’s future is fabulous news. However, it wouldn’t be a story without the downside. The patient experienced some temporomandibular disorder symptomology coupled with internal derangement issues related to juvenile idiopathic arthritis, which the patient claims was exacerbated because of the orthodontic treatment rendered. Strictly for the sake of argument, assume the orthodontic treatment was determined to cause or contribute to the patient’s injury; should any financial award the patient may be entitled to be offset by the unexpected benefit of having corrected the mandibular retrognathia?

When my daughter was younger, she used to ask me all the time what I was doing. One time, I told her I was studying for 1 of my law school exams. As children do, she wanted to know more. I happened to be reading the Restatement of Torts. I figured I would have a little fun, so I read her something like the following, which I am now paraphrasing:

Students A and B are fooling around in the school hallway. A pushes B who bumps into student C, causing C to fall to the ground and break her arm. Is B responsible for C’s injury? Is A responsible? Are A and B both responsible? Was it just an accident, and is no one responsible because nobody intended anyone to get hurt?

She loved our discussions so much that it became our bedtime story stuff. Yes, she is now an attorney and has more letters after her name than I do, but I digress. The point is that life sometimes forces us to consider primary and secondary causes of events, considerations regarding determining the amount of any compensatory damages someone may be entitled to based on the outcome of those events, who should be responsible for paying the damages, and whether there are any mitigating factors that should or could be used to offset these determinations.

Offsets. And you thought they were only forms of first-order bends.