

Glimpsing the future for an amputee

CONAL DOYLE

Amputees struggle daily to live normal lives, and they face ever-growing medical costs. Give jurors a complete picture of an amputee's future to ensure that they award full and fair compensation.

Trial lawyers are always looking for simple, memorable ways to etch a case theme into the jurors' minds. A limb amputation case is no exception and should begin in the most elementary way: with a definition of amputation. For that, it would be hard to improve on one written by a 16-year-old boy who lost his leg to cancer at age 11. To him, "amputation" is "[a] word which connotes such extreme traumatic finality, the actual physical loss of a part of one's body, never again to be seen or felt, gone forever."¹

Using language like this at trial is not intended to engender sympathy but to anchor a theme. An amputation is the ultimate permanent injury, one that will never heal, a part of one's body gone forever. A fair verdict must recognize this finality and compensate accordingly.

Many amputees' stories are full of courage, hard work, and determination. Focus on what your client has accomplished and overcome. Ask the jury to give the plaintiff what he or she needs to live the most normal life possible. Usually, that means taking into full account the future cost of prosthetic care—probably the largest element of economic damages in the case and the part that will be the toughest for the defense to counter. A detailed presentation on the benefits of prosthetic care is essential to fully inform the jury of your client's needs.

The cost of prosthetic devices has soared in the past 10 years and promises to continue rising as new technology emerges. The most significant factor af-

fecting its cost is the level of amputation involved: above the knee (AKA), below the knee (BKA), or at the knee (knee disarticulation). Above-the-knee and knee disarticulation patients have to use an artificial knee joint, typically the most expensive component of a prosthetic leg. Ten years ago, a mechanical hydraulic knee was standard issue. Today, microprocessor knees are the industry standard.

While an above-the-knee prosthetic limb cost \$10,000 to \$15,000 a decade ago, an AKA leg with a microprocessor knee now costs about \$50,000. A relatively new technology, the Power Knee, manufactured by the Iceland-based company Ossur, costs about \$120,000 and should be considered by AKA patients who are candidates for it. The Power Knee, its manufacturer claims, allows for more natural movements walking up and down stairs, walking on inclines, and walking on sand or other soft surfaces.²

Below-the-knee prosthetic limbs are typically less complicated and less expensive because they do not require a knee joint. However, some are still costly: Microprocessor feet and ankles cost in the range of \$25,000.

The first microprocessor knee was the Computer Leg (C-Leg) made by Otto Bock, introduced in the United States in 1999. Other companies soon developed their own microprocessor knees.

This technology has been accepted as standard prosthetic treatment for years. Microprocessor knees have been approved by prosthetists, the FDA, the Centers for Medicare and Medicaid Services, the American Academy of Or-

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thotists and Prosthetists (AAOP), the Department of Veterans Affairs, and numerous insurance companies.

Rigorous scientific review has validated the efficacy of the C-Leg.³ Walter Reed Army Medical Center has outfitted amputee soldiers returning from the Middle East with microprocessor technology, including C-Legs and Power Knees.⁴ And microprocessor knees are not just for young, highly active people. In a deposition in a recent leg amputation case, a treating prosthetist said of the C-Leg:

When new technology is introduced in prosthetics, especially if it's expensive, it automatically gets the rap of being just for young, active amputees. The C-Leg has really changed that. It is the most stable, safe knee on the market. And so, for someone to claim it's just for young people, it's not. Because when you reach a certain age, the idea of falling takes on a whole new meaning. It means breaking hips and other injury. . . . We have some older patients who have benefited tremendously from the C-Leg. They went from falling three or four times a week to not falling in two or three years, not once. . . . It's made quite a difference.⁵

Because of the success of microprocessor devices and continuing technological advancements in the field, the cost of future prosthetic care for amputees is likely to be a crushing debt—one that needs to be accounted for in every verdict or settlement. Unfortunately, amputees cannot rely on insurance to pay for full prosthetic benefits, because individual plans consider the need for prosthetics a preexisting condition. In my experience, many plans routinely deny prosthetic benefits to their policyholders. Few will cover more than one prosthetic limb, even though most amputees need several for different purposes.

Explain the client's needs

As in any case involving medical and economic issues, the selection of expert witnesses is critical. You will need testimony from two experts: a prosthetist and an economist.

The prosthetist is likely to be your most important expert, the one who will explain to the jury in detail the devices

that your client will need to live a full and productive life. A prosthetist is not a medical doctor but a trained, certified professional who constructs and fits prosthetic limbs. The AAOP is the governing body that regulates this field.

Rather than retaining a prosthetist as a paid expert witness, use your client's treating prosthetist if possible. Prosthetists rarely have significant forensic experience or derive much, if any, in-

made with an "athletic foot" that provides energy return but that cannot be used with a microprocessor knee or ankle. The running leg can also serve as a backup leg if the everyday leg needs repair.

The notion that an amputee should try to get through life with only one prosthetic leg reminds me of the Kevin Costner movie *Tin Cup*, in which Costner's character tries to play a round of

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come from forensic work. As a result, they make credible witnesses who are difficult to impeach.

Moreover, in my experience, most prosthetists (unlike some doctors) are accessible, easy to deal with, and willing to help their patients who are in litigation. So before spending unnecessary money on a retained expert who will be perceived as having a pro-plaintiff bias, develop a rapport with your client's treating prosthetist to see if he or she can provide the evidentiary basis for your economic expert's projections.

The prosthetist will need to address three main questions.

What type of prosthetic devices does the amputee require? Most lower-limb amputees need three prosthetic limbs: an everyday walking leg, a "water" leg, and a running/activity/backup leg. Highly active amputees who compete in sports may require several more.

The "everyday leg" typically has a microprocessor knee for an AKA and a microprocessor foot or ankle for a BKA. A C-Leg provides safety and stability for everyday activities, improves gait, and lowers energy expenditure.⁶ Unfortunately, it is not waterproof and not adequate for high-impact athletic activity.

A "water leg" is essential for use in the shower or bath, which is where amputees routinely suffer slip-and-fall injuries. A waterproof leg is also necessary for water sports or going to the beach.

Finally, a "running leg" is typically

golf with only one club, the 7-iron. Although theoretically possible, doing so is extremely difficult, and it seems pointless for a golfer not to use all the tools available to play the game well. Similarly, no amputee should be further disadvantaged by insufficient or limiting technology.

How often will the amputee have to replace the prosthetic limbs? After establishing the types of devices appropriate for the amputee, the prosthetist should explain the replacement cycle for each. Most limbs require a socket replacement every one to two years; sometimes more frequent replacements are needed for amputees who experience growth spurts or weight changes. On average, prosthetic limbs (including the knee and ankle hardware) should be replaced every two to four years, although that time frame can vary depending on the amputee's activity level. When a socket on one prosthetic limb needs replacement, the same parts on all three legs should be replaced so that each fits comfortably.

One caveat about using your client's prosthetist as an expert witness: As in every profession, there are "old-timers" who have not embraced the newest technology and may not be serving your

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Area of need	Two-year replacement cycle		Four-year replacement cycle	
	Minimum	Maximum	Minimum	Maximum
Power Knee	\$ 3,133,788	\$ 3,133,788	\$ 1,554,557	\$ 1,554,557
Sockets	\$ 0	\$ 188,027	\$ 94,011	\$ 282,038
Total	\$ 3,133,788	\$ 3,321,815	\$ 1,648,568	\$ 1,836,595

client's best interests. They also may not have taken the classes to become "certified" in fitting a C-Leg or Power Knee. In that circumstance, your client may need to get a second opinion, and you may need to find a reputable prosthetist familiar with the most recent technology to testify.

What are the current and future costs of prosthetic devices? The prosthetist can provide an evidentiary basis for your economic expert to testify about future costs. In one of my recent leg amputation cases, the treating prosthetist commented on the soaring cost of prosthetics:

Q: In terms of these devices, do they tend to increase [in price] over time like everything else? Or if it's a new device, it's expensive at first and drops in price some after that?

A: Never drops.

Q: Never drops?

A: But they do go up. I mean, prior to the C-Leg and that technology, it was probably some sort of pattern. But I think the C-Leg and that technology has really changed that. It skewed any kind of pattern that we had.

Q: You mean in the other devices?

A: It's just so different than other devices that were on the market prior to it. The cost is substantially more expensive.⁷

You may need to retain an additional prosthetist when your client requires a technologically advanced and more expensive device, such as the Power Knee. Even amputees who are not currently using a Power Knee, perhaps because of cost, may do so in the future. So you may want to retain someone who is certified to fit the Power Knee to carefully explain its benefits and costs.

Project future costs

An economist is the other important witness you'll need. Although some attorneys may want to use a life-care planner to summarize the plaintiff's future care needs, you don't need one to de-

termine the cost of future prosthetic care. A good economist can take the prosthetist's opinions about the type and number of devices and their replacement cycles and make a projection.

You must find an economist who is willing to consider the effect of the microprocessor chip on future costs. Even the most conservative economist has to agree that the future cost of prosthetic care will grow at a rate higher than current interest rates. As a result, in determining settlement amounts, there should never be a reduction to present value for this cost.

For example, the Consumer Price Index from the Bureau of Labor Statistics can provide a conservative economist with the percentage increase in future medical care.⁸ Although this number constantly varies, comparing it with a relevant interest marker, like the Treasury Bill, should result in roughly a one-point *increase* in value from present value, rather than the one- or two-point reduction to present value typical to future-wage-loss claims.⁹

I used the chart on this page as evidence in a case where a 31-year-old man lost his leg at the knee and would require over 40 years of future prosthetic care. The treating prosthetist said the patient would benefit from the Power Knee, which would need to be replaced every two to four years and would need a new socket every two years.

In this case, the plaintiff's future prosthetic cost for his everyday leg (with a Power Knee) was between \$1,648,568 and \$3,321,815, for an average of about \$2,485,000. Including the plaintiff's water leg and running leg, the total cost of future care ranged from \$2,349,162 to \$4,338,664, for an average of about \$3,344,000.

Actually, these numbers are probably too conservative: The defendants retained neither a prosthetist nor an econ-

omist to rebut this testimony and candidly admitted that these projections were "conservative hard numbers."

The Bureau of Labor Statistics does not have a special category for prosthetics, and looking back over the past 30 years to predict, say, the next 30 years will probably not provide an accurate cost picture. Technological changes are likely to continue revolutionizing the field, and unlike flat-screen TVs, this technology never gets cheaper.

Some lawyers may be more comfortable with a conservative economic approach, based on the facts of their individual case. But the most accurate presentation of future damages will rely on the change in the cost of prosthetic care over the past 10 years, rather than projecting expenses based on the increase in the cost of medical care in general.

Focus on everyday life

What about noneconomic damages? There can be no reasonable debate that the physical, emotional, and psychological impact of losing a limb is catastrophic and devastating. Take an understated approach that lets the jury draw its own conclusions about your client's noneconomic losses.

During a recent mock trial/focus group in one of my cases, several mock jurors commented that they believed my client's leg amputation must have caused him significant psychological and emotional distress, but they appreciated that I did not talk about it much. A sympathetic case is a sympathetic case. Talking too much about why the jury should sympathize with your client can do more harm than good.

Rather than speaking in emotional terms, give jurors specific, factual evidence about the everyday struggles that an amputee endures, preferably through memorable stories from witnesses other than the plaintiff. Jurors can cite this evidence later, in deliberations, to justify a substantial noneconomic verdict.

For example, consider this excerpt from a closing argument in a case where the plaintiff made a good recovery and returned to work as a chiropractor:

Despite this success, [the plaintiff] will struggle for the rest of his life with everyday activities that an able-bodied person takes for granted. He will have to wear a prosthetic leg for the rest of his life. What that means is that a part of his body, his stump, is encased in an unventilated hard socket for most of his waking hours.

His stump shrinks as the day goes on, and it creates different pressure points within his socket. You have heard that this ranges from causing annoying discomfort all the way to debilitating pain that effectively prevents him from walking. He cannot walk up stairs step-over-step. He struggles going down steps safely. He struggles with lateral or backward movements. He cannot smoothly progress from a walk to a run to save a child from running in front of a moving car. You have heard his wife testify that he stays up at night worrying about whether he will be able to save his son from running out into traffic.

He will have a permanent limp no matter what type of prosthetic leg he can afford.

Like most amputees, [the plaintiff] gets rashes and blisters on his stump, which rub painfully against his prosthetic limb when he is walking, sitting, or standing. This condition is prevalent in a hot, humid climate, like a southern summer. He has told you what it feels like when he gets a painful blister on the bottom of his foot that he cannot relieve by taking weight off it.

You have heard from medical experts that a knee disarticulation amputee like [the plaintiff] exerts 50 percent more energy walking than an able-bodied person. So, after 8 hours of work on his feet, it feels like he has been working 12 hours. You have heard his wife say that the first thing he does when he comes home is to take off his leg and sit on the couch. This will be his reality every day for the rest of his life.

I have watched jurors debate these issues in different mock trials and focus groups over the years. Each was moved

by different aspects of an amputee's life. Some ascribed great value to the emotional distress that a parent feels about not being able to prevent his or her child from being struck by a moving car. Others thought about having to wear a hard, inanimate object strapped to their body every day. Facts like these are more powerful than emotional appeals.

In a tort "reform" environment, your best approach is to focus on what the jury can do to make a difference in the amputee's future. Let jurors understand the importance of prosthetics in the amputee's everyday life and know that these are hard costs that will be with your client

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forever. If jurors appreciate this, they will be more likely to fully and fairly compensate your client for the cost of future prosthetic care, allowing him or her to return to the most normal life possible. ■

Notes

1. Amputee Coalition of Am., *Ctrs. for Medicare & Medicaid Servs., Negotiated Rulemaking Committee Meeting* (Apr. 7, 2003) (public statement by Paddy Rossbach, Pres. & CEO), www.amputee-coalition.org/aca_rossbach_3-7-03.html.

2. See www.ossur.com/bionictchnology/powerknee; <http://bionics.ossur.com/pages/306>.

3. See e.g. www.ottobock.com/cps/rde/xbcr/ob_com_en/im_646b33_c-leg_studies.pdf.

4. Sandra Basu, *Prosthetics Technology Evolution Helps Patients Adjust at Walter Reed*, U.S. Med-

icine (June 2006), www.usmedicine.com/article.cfm?articleID=804&issueID=88; see also Bio-Medicine, *Ossur's Power Knee Widely Available in September* (Aug. 3, 2006), <http://news.bio-medicine.org/biology-news-3/Ossurs-POWER-KNEE-widely-available-in-September-5674-1>.

5. Depo. Steven Schulte, *Pierce v. Catholic Health E.*, No. 2005CV106321 (Ga., Fulton Co. Super. filed Sept. 19, 2005) (copy on file with author).

6. A bibliography of studies that support the efficacy of the microprocessor technology is available from the author; contact him at conal@willoughbydoyle.com. See also www.ottobock.com/cps/rde/xbcr/ob_com_en/im_646b33_c-leg_studies.pdf.

7. A March 2008 jury verdict vividly illustrates the importance of emphasizing future prosthetic costs in medical malpractice cases subject to tort

"reform" caps. Although the trial skills of the plaintiff lawyer, Adam Malone, were clearly the predominant factor in the outcome, the plaintiff's future prosthetic care presentation was in large part based on the model set forth in this article. In fact, the plaintiff's treating prosthetist was Stephen Schulte, whose testimony is cited here (albeit from another case). The significant general damages award was subject to Georgia's legislative cap on noneconomic damages, which has yet to be addressed by the Georgia Supreme Court. *Harris v. Sumter Regl. Hosp.*, No. 06CV2533-1 (Ga., Dougherty Co. Super., Mar. 10, 2008).

8. See U.S. Dept. Labor, Bureau Labor Stats., *The Consumer Price Indexes (CPI)*, www.bls.gov/cpi.

9. This has been my experience with past cases. With the constant fluctuation in interest rates, particularly in today's economy, precise citations to previous cases would not be helpful. You should rely on your economic expert to provide precise figures based on today's rates.