



III. EXPERT WITNESSES

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A. BACKGROUND

Medical negligence cases, more than any other, are often "battles of the experts." With very few exceptions, you cannot present a medical negligence claim without having, and using, experts. Why you need an expert is reflected in ER 702:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

In medical negligence cases, the "may" in this rule has been interpreted as a "shall," since few lay persons have knowledge of medicine or medical standards. To prevail in a medical negligence claim, RCW 7.70.030 requires that the plaintiff must establish that "the injury resulted from the failure of a health care provider to follow the accepted standard of care," which is defined as "failing to exercise the degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the State of Washington, acting in the same or similar circumstances." RCW 7.70.040 also requires that the failure be "a proximate cause of the injury complained of."

Except in those rare cases where the negligence is observable by lay persons and describable without medical training, expert testimony is always needed to establish the standard of care and to prove causation. Morinaga v. Vue, 85 Wn.App. 822, 831-32, 935 P.2d 637 (Div. 3, 1997). In fact, it is enough in a summary judgment action for the defendant to simply point out, without the support of affidavits, that the plaintiff lacks medical evidence to make out a prima facie case of negligence, and thus to compel the plaintiff to present expert testimony. Young v. Key Pharmaceuticals, 112 Wn.2d 216, 226 (1989). "Without such expert medical testimony plaintiffs could not prove negligence and could not recover." Shoberg v. Kelly, 1 Wn.App. 673, 677 (1969), rev. den. 78 Wn.2d 902 (1970). "[E]xpert testimony will generally be necessary to establish the standard of care and most aspects of causation" Harris v. Groth, 99 Wn.2d 438, 449 (1983).

Once the plaintiff has expert witnesses in support of negligence and causation, the practical burden is shifted to the defense to counter with its own experts. Thus is created the "battle of the experts."

B. DETERMINING QUALIFICATIONS OF THE EXPERT

As a plaintiff, what are the basic qualifications needed for an expert

on standard of care? He/she should be practicing in the same area of medicine as the defendant doctor, should have knowledge of the particular procedure or disease involved, and should know what a "reasonably prudent" doctor in Washington should do with regard to the care in question. In other words, you want him/her to be able to say what the standard of care is for the defendant doctor and in what manner the standard was breached. Technically, the latter is not necessary. I had a case in which my expert simply said what the standard was, and declined to give any criticism of the defendant doctor. In fact, he didn't want to review the medical records involved. It was a matter for the trier of fact to then determine, based on the standard as enunciated by the expert, whether the facts indicated it was breached.

In most cases, however, your expert will in fact "criticize" the defendant doctor and will point out how the standard was breached. To render such an opinion, the expert will have to review the medical records involved.

The first question you face is: what kind of expert do I need? To answer that question, you need to know what issues are present in your case. If it is a hospital-based case, you need to determine which providers were negligent: e.g., a nurse, a respiratory therapist, an x-ray technician, or a doctor? If the negligence is that of a non-physician, you will probably seek an expert in



that field. A recent case holds that a physician director of an ICU who works with and supervises ICU nurses may testify as to the standard of care for ICU nurses. *Hall v. Dominican Sisters of Spokane*, 2000 WL 297748, 995 P.2d 621 (Wash. App. Div. 3, 2000). But it is rare that you will rely on the testimony of someone other than an expert in the same field.

Questions also arise as to whether a specialist may testify as to the standard of care for a generalist and whether a physician in some specialty may testify as to the standard for another specialty who performs the same procedure. Following is a brief summary of the key Washington cases that deal with these issues:

1. *McKee v. American Home Products, Corp.*, 113 Wash.2d 701, 706-7, 782 P.2d 1045 (1989). Arizona physician may not testify to the standard of care for Washington pharmacists where plaintiff alleged negligent failure of pharmacist to warn of drug dangers.

2. *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 227 et seq., 770 P.2d 182 (1989) (dissenting opinion omitted). Pharmacist may not testify to physician standard of care on proper dosage of medication.

3. *Hall v. Dominican Sisters of Spokane*, 2000 WL 297748, *3-4, 995 P.2d 621 (Wash. App. Div. 3 2000). Physician ICU director who works with and supervises ICU nurses may testify to the standard of care for ICU nurses.

4. *White v. Kent Medical Center*, 61 Wash. App. 163, 169 et seq., 810 P.2d 4 (Wash. App. Div. 1 1991). Specialists may testify to the standard of care for generalists.

5. *Miller v. Peterson*, 42 Wash.App. 822, 831 et seq., 714 P.2d 695, review denied, 106 Wash.2d 1006 (1986). Orthopedic surgeon may testify to standard of care of podiatrist where (1) methods of treatment in different schools are the same, (2) where methods of treatment should be the same, or (3) the expert's knowledge is based on the defendant's school.

As established in these cases, there are situations where you can use an expert in another specialty to establish standard of care for a defendant. But why make things difficult for yourself? In the vast majority of cases it will make sense to find an expert whose credentials and background match those of the defendant.

We have been talking primarily about standard of care, but experts are often needed to prove causation, to establish other "peripheral" issues involved in a case, and to establish damages. In an obstetrical negligence case involving hypoxia-induced encephalopathy resulting from a delay in delivering a child by cesarian-section, you might use the following experts:

- *Obstetrician*
- *Anesthesiologist*
- *Labor and Delivery Nurse*
- *Perinatologist*
- *Neonatologist*
- *Neonatal Nurse*
- *Pediatrician*
- *Developmental Pediatrician*
- *Pediatric Neurologist*
- *Genetics Specialist*
- *Neuroradiologist*
- *Physical Therapist*
- *Psychologist*

- *Speech Specialist*
- *Hearing Specialist*
- *Occupational Therapist*
- *Psychologist*
- *Ophthalmologist*
- *Prosthetist*
- *Educational Consultant*
- *Vocational Consultant*
- *Life-care Planner*
- *Economist*

In the above case, you may need the obstetrician, anesthesiologist, and labor and delivery nurse to establish negligence. You may need the perinatologist, pediatric neurologist, genetics specialist, and neuroradiologist to rebut issues of causation, i.e., was there a pre-existing genetic problem or did the child's problems occur in utero during the pregnancy? The neonatologist, neonatal nurse, and pediatrician might also help in determining causation if there are issues of whether injury occurred after birth. The developmental pediatrician would likely work with a team consisting of a physical and occupational therapist, speech and hearing specialists, psychologist, and ophthalmologist in determining the child's deficits and needs in the future. In many instances, the developmental pediatrician will also help to establish life expectancy, a key issue in most cases involving birth trauma. The prosthetist can talk about prosthetic help that may be needed, the educational specialist can deal with special educational needs, and the vocational consultant will discuss future income loss. Finally, the life-care planner summarizes all of the special needs and the costs of meeting them, and the economist reduces it all, including the income loss, to present cash value.

The obstetrical case is one of the most complex and requires more experts than almost any other kind of case. Obviously, there are much simpler cases where the experts needed are fewer in number. For example, in a case involving the failure of a vascular surgeon to respond to a compartment syndrome that caused a neuropathy or a foot drop, it is possible that you will only need a vascular surgeon and a neurologist to establish negligence and causation/damages. But even in the simpler cases, there are often peripheral issues that will require expert testimony, such as nurses, vocational consultants, or economists.

As a further example of the kinds of experts that may be used in a case, attached as an exhibit to this section is a disclosure of experts in a case involving anesthesiology negligence that resulted in cardiac arrest and hypoxic brain damage. Note that there are a number of anesthesiology experts identified. At trial, it is likely we would have had only two testify as experts, but there were uncertainties over scheduling and ability of the experts to testify at trial. This case settled at mediation approximately three months before trial. We did not need as many damages experts because of the client's residency at Centre for Neuro Skills in Bakersfield, California. The staff of that facility, although technically treating health care providers, would have provided much of the testimony needed to establish the damages.

When you are looking for experts, should you look for them in academic medicine or in private practice? There is no clear answer for every case. Academicians will often have greater expertise and longer curriculum vitae.

But if the expert comes over as an "ivory tower" expert or as someone with little understanding of what goes on in a medical clinic or office, the expert may not be the right one. In a typical case in our office, we often try to have one of each: one from academic medicine and one who is "in the trenches" doing the same thing as the defendant doctor. Thus, in the anesthesiology case for which the experts are listed in the appendix, we were likely to use at trial both the local anesthesiologist and either the Stanford or Harvard faculty members.

Ideally, you would locate an expert who has knowledge of the unique aspects of your case. If you are bringing a claim against a family practice doctor who does obstetrics in Port Angeles, you would not want the nationally-known obstetrician with a 50-page c.v., even though the obstetrician can testify about standards for a family practice doctor holding herself out as having expertise in obstetrics. But if the case involves cardiothoracic surgery at the University of Washington, you will undoubtedly need a comparable university-based surgeon as your expert.

The same doesn't hold true for causation experts, however, since greater expertise and a specialization in that area of medicine may be a plus for your expert. In some cases, where the causation relates to a rare condition or disease, you may find that there are only a half-dozen people in the country who have the requisite knowledge to testify. Thus, in rare cancer cases you may have to go to Sloan-Kettering or the M.D. Anderson cancer centers to find someone who has seen enough patients with that cancer to express any opinion on causation. In

a recent case we had involving a rare metabolic disorder (there had been only three in Washington, as far as we could determine), we ended up with experts in England and Australia, and conducted telephone depositions at odd hours given the time difference.

B. SAVVY WAYS TO FIND THE EXPERT YOU NEED

Once you have determined what kind of expert you need, how do you find the expert? In general, there are four ways of locating experts: review of medical literature, referrals by or through other attorneys, referrals by other experts, and "expert services." I won't comment on the latter, who advertise in ATLA Trial magazine and other legal publications, because I have no experience in working with them.

1. Medical Literature

If you are looking for a top expert in any field, you may want to find the physicians who have published in that field. Thus, if you need an expert in carotid endarterectomies, you can either find current articles on that subject or check who authored the chapter on endarterectomies in a vascular surgery text. (See the section on using the internet for ideas on locating the literature). Be aware, however, that the top experts in a field are often busy academicians or researchers, and may not want to, or be able to, participate as an expert witness.

Once you have names, how do you contact the experts? I have a partner who prefers calling them and giving them enough details to make them think it is an "interesting" case they may want to review. I find it uncomfortable to make a "cold call" like that, so I more



often write a letter to the expert giving a brief description of the case. Increasingly, academic experts use e-mail, and if you can get their e-mail address a short note to them usually gets a very prompt response. Letters, I have found, often sit in in-baskets or get put aside to answer later. Using my letter approach, I have sometimes sent out as many as a dozen letters to experts, and received responses from only four or five. And sometimes the responses have all been “thanks, but no thanks.”

2. Referrals by and through other attorneys

This is really the best means of locating good experts. If you know someone who has handled a similar case, or can find reference to such a case in the medical malpractice publications, then call and ask the plaintiff’s attorney who he or she would recommend. There are publications that report on medical negligence cases, and they can be a source of information on experts. Medical Malpractice Verdicts, Settlements, and Experts is published by attorney Lewis Laska, and includes in each month’s report as many as 200 cases nationally. Attached as an Exhibit is information on that publication. They also will do an “expert search” or a “similar case search” through their database for a modest cost. Another publication is Medical Liability Reporter, which reports on selected cases (usually appellate cases) and has brief articles on each (publication information is an Exhibit).

WSTLA’s Trial News has articles on occasion about a medical negligence case, and contact with the plaintiff’s

attorney could elicit information about the experts used in that case. Finally, Northwest Personal Injury Litigation Reports (formerly Jury Verdicts Northwest) will publish reports of medical negligence cases and will include identities of experts used by each side. A caveat is in order: when this publication lists “medical experts” it often includes treating physicians who testified only about the care they provided, and were not expert witnesses as such.

The advantage of culling the names of potential experts from these sources is that you can also call the attorney who handled the case and ask whether the expert was effective in deposition or at trial. An expert who appears qualified on paper may turn out to be a dud when it comes to testimony.

A new means of locating experts is the ATLA medical malpractice list-serve, open only to plaintiff’s attorneys who belong to the medical malpractice section of ATLA. Like many list-serves, you get a lot of “garbage” stuff that doesn’t interest you. In fact, the limit of 60 messages a day is often reached, and it includes such items as queries about a good orthopedist in Omaha or “what is the statute of limitations in Iowa?” But if you put out a query asking for an expert in a particular field, you will often receive dozens of responses from attorneys who have handled similar cases and can recommend an effective witness. Since joining the list-serve about a year ago, I have used it at least once a week and, even when I don’t use it, I gather the names of potential experts every week from responses made to other attorneys who ask about experts.

3. Referrals by Other Experts

This is also a good means of introduction to potential experts. If you can call “Dr. Smith” and say that “Dr. Brown” suggested you call him, you have an automatic entre and there is a good chance Dr. Smith will at least listen to your request before hanging up the phone. We work a lot with experts from certain medical schools, especially the University of California at San Francisco, Stanford University, and the University of California at San Diego. When we need an expert for which we don’t have a source, we will often contact the experts we have worked with at those schools and ask them if they could suggest someone at their institution. They can often steer us to the top people in their departments or those who have a special interest or expertise in our area of medicine. In the section on use of the internet, I will discuss how to find medical schools and names of potential experts.

C. USING THE EXPERT TO WIN YOUR CASE – PLAINTIFF PERSPECTIVE

1. Using experts for settlement

If you try your medical negligence case, your odds of winning are not very good. Roughly 85% of medical negligence cases going to trial in Washington are defense verdicts. So it’s imperative that you use your experts effectively before trial to settle your case.

A good settlement presentation will emphasize the expertise and credentials of the experts who support your case. If they have been deposed, then the defense will know whether they are effective or not. If they haven’t



been deposed, should you get written statements from the experts for settlement purposes? Opinions vary on that. Some good plaintiff's attorneys will elicit short statements from their experts, or will write to the expert summarizing what they will say and ask them to review, make changes, and sign the statement. Others have the view that you never want to have your expert pinned down to a specific opinion, which can then be used to prepare for deposition. If you have credibility with the defense, you can tell them what the expert will say and it may be given weight. From experience, they know that what you tell them is pretty close to what the expert will testify to at deposition.

2. Using Experts at Trial

If your case goes to trial, it means that liability is disputed and the other side has experts that contradict your experts. Your trial experts on liability will often be the key factors in your case. If they are persuasive, you at least have a chance of winning (keeping in mind that bleak 85% statistic). If they are not, you've already lost the case.

Think carefully about the key elements of your case and how to present them. If causation is the major issue in the case, try to lead with your causation expert. Primacy and recency mean a lot in trials, and since you usually can't end the case with your expert, you can't have recency. The one exception is when you can use a true rebuttal expert and that person can summarize key elements of your case at the very end of the trial. Rebuttal experts in medical negligence cases are rare, however, because the issues are extensively explored and closely defined through

discovery of the experts before trial. Sometimes the defense will open the door a crack by having their expert say something that is different from what was testified to at the deposition or otherwise developed through discovery, and you can then bring back your expert to rebut the new testimony.

Unfortunately, scheduling experts for trial is a major hassle. If you're flying in someone from San Diego, you want a specific date for the testimony and trial schedules and delays often won't give you that. The reality is that you often plug your expert in whenever he or she is available, and all your plans at building your case through your experts is wistful thinking. You won't be able to bring back the expert even if the defense changes its story at trial (and, of course, the trial judge will almost never strike the testimony). But sometimes you can arrange to have your expert available to testify by telephone, and some judges will allow rebuttal testimony by that means.

If negligence is your strong suit at trial, lead with that expert. Strong negligence will drag causation with it, and strong causation will often carry negligence on its back.

In using your expert at trial, let the literature work for you and buttress the expert's testimony. The introduction of "learned treatises" is covered by ER 803(a)(18):

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony

or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

What this means is that if your expert testifies that any particular text or treatise is authoritative, then portions of that text can be read into evidence by the expert. More importantly, if the text has been validated by your expert, it can then be used to cross-examine the defense expert. Where key aspects of a case have been summarized neatly in leading texts (i.e., "A solid breast mass should always be biopsied"), you can blow up the statements and use them during closing argument to show that the defense expert's opinion (that it was acceptable to not biopsy the mass) is not accepted by leading experts in the medical community. The treatise thus becomes your "silent expert" in the courtroom who buttresses your expert and rebuts the defense expert.

Following is a list "standard" texts in various areas of medicine. If a publication is deemed to be a "reliable authority" because professionals in the field regard the text as trustworthy or is of a type reasonably relied upon by experts in the field, then these are all "reliable."