

## **CONSIDERATIONS IN PRESENTING EXPERT TESTIMONY:**

### **The Roles Of Lawyers And Rehabilitation Professionals In Litigated Claims**

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In my practice as a personal injury trial lawyer who represents those who have suffered TBI and other serious injuries, I have met with hundreds of health care professionals from a myriad of specialties. Because the job of the personal injury lawyer is to convey to insurance adjusters, opposing counsel, judges and juries the overall effects of our clients' injuries on their lives and on the lives of their loved ones, we have to gather all information about those injuries, and then present that data in an organized, interesting manner which can be easily understood by laypersons not trained in medicine or rehabilitation. We must assimilate the entire medical record of each client, read pertinent authoritative medical publications, and meet with health care professionals who have treated the client. Sometimes, we hire consultants to help us learn pertinent subject matter, and often we retain specialists to examine the client and to review the medical records and literature in order to render expert opinions at trial.

Health care professionals working with injury victims should expect to be drawn into the forensic realm during the course of their careers. Their involvement may be limited to giving deposition testimony, or they may actually be subpoenaed to appear and give testimony at a trial or another evidentiary proceeding.

Some health care professionals perceive their roles to be limited to the evaluation and treatment of the patient. Consequently, they may be reluctant to becoming involved in the legal process. In virtually every case, parties on both sides of the litigation depend on the evaluations and opinions of the treating health care professionals to determine the appropriate measure of compensation for the patient.

The elements of damages sought in legal actions arising from personal injuries may include the following:

- the reasonable expenses of necessary medical care, treatment and services received
- the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future
- the value of lost earnings
- the value of earnings reasonably certain to be lost in the future
- disability resulting from the injuries
- disfigurement resulting from the injuries
- full or partial loss of normal life resulting from the injuries
- aggravation of any pre-existing ailment or condition by the subject injuries
- pain and suffering experienced as a result of the injuries
- pain and suffering reasonably certain to be experienced in the future as a result of the injuries
- emotional distress experienced as a result of the injuries
- emotional distress reasonably certain to be experienced in the future

Clearly, medical and rehabilitation professionals familiar with the nature and extent of the patient's injuries are critical witnesses in the chain of proof required to establish the above-stated elements of damages. In order to establish the appropriate measure of compensation, the patient's caregivers must provide detailed, analytic testimony regarding the types of treatment and services rendered, the progress of the patient during the rehabilitation process,

the prognosis for anticipated future care and improvement, and as assessment of the patient's abilities and disabilities.

The mission of the rehabilitation professional is to obtain a thorough and accurate assessment of a patient's abilities and disabilities, to provide treatment and therapies which will maximize the patient's performance in activities of daily living and to return to the patient to the fullest possible levels of independence and employability. After completing the initial assessment of a patient, it is common for most health care practitioners to establish a treatment plan and to identify rehabilitation goals.

In the forensic setting, the competence of a health care professional is often gauged by his/her ability to express opinions regarding the care provided to the patient and the bases of those opinions. Accurate, thorough and detailed records are considered a measure of professional competence. Conversely, inaccurate or incomplete records provide an attack point for lawyers seeking to discredit the work, competence or opinions of the health care professional during cross examination.

### **PROVIDING EXPERT OPINION TESTIMONY AT DEPOSITION OR TRIAL**

The term "expert witness" suggests to many people a witness who is retained by a party in litigation to provide opinion testimony which is relevant to the subject matter of the legal proceeding and whose testimony supports the position of the hiring party. However, an "expert" is not only a person who is retained for litigation purposes. An expert is any person who, because of education, training or experience, possesses knowledge of a specialized nature beyond that of the average person on a factual matter material to a claim of defense in pending litigation and who may be expected to render an opinion within his/her expertise at trial. Courts will allow expert testimony if the subject matter is outside the scope of common knowledge and if the testimony will assist the trier of fact (i.e., a jury or a judge) to understand the evidence or to determine a fact in issue.

A deposition is essentially a conference which includes attorneys for the parties, a witness, and a court reporter. After the witness is sworn under oath to tell the truth, the lawyers question the witness about the subject matter of the lawsuit. The purpose of the deposition is two-fold: First, to elicit from the witness, also called a "deponent," all facts and opinions within his/her knowledge regarding the subject matter of the litigation. Second, the attorneys generally seek to commit the witness to a version of facts or opinions in order to determine what the deponent's testimony would be if he/she were called to testify at trial.

A careful lawyer who wishes to offer the deponent as a witness at trial should meet with the deponent in order to prepare for the deposition. During the preparation, the lawyer should review pertinent records with the deponent. Those records may include the deponent's own records, the records of other recent or past medical providers, any reports or histories from other witnesses which may be relevant to the deponent, and authoritative publications.

When providing testimony at a deposition or during a trial, health care professionals should expect to be questioned on a broad range of matters which are related either to the evaluation or treatment of patients in general, ABI patients in particular, or to the particular patient at issue. They may also be asked to explain the administration and application of testing measures used in their specialties, and to defend or attack the reliability and validity of certain tests. In all cases, the health care professional should expect to be asked whether he/she has any opinions "with a reasonable degree of certainty" within his/her field of expertise. Note that opinions need not be stated with an absolute degree of certainty. If something is more likely true than not, i.e., with a probability in excess of 50%, the standard of a "reasonable degree of certainty" is satisfied.

In addition to being asked to state their opinions, deponents will be asked to state the bases for those opinions. In forming an opinion, the health care professional may rely on those

materials commonly relied upon by like professionals (e.g., medical records, professional literature, patient or family histories, etc.) as well as his/her own experience with the patient.

## **CAUSATION**

The role of the lawyer involved in litigation related to claims for personal injuries is to either prove or disprove the causal connection between certain events or factors and the client's injuries. The term of art used by lawyers in this regard is "proximate cause," which is defined generally as any cause which, in natural or probable sequence, produced the injury complained of. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury.

To establish or refute proximate cause, lawyers must rely on testimony from health care professionals familiar with the patient's medical condition and the specialties involved. Therefore, the health care professional should be prepared to answer questions such as "Do you have an opinion with a reasonable degree of certainty as to whether the motor vehicle collision caused or contributed to cause the patient's injuries?" If the professional offers an opinion in this regard, he/she must be prepared to articulate all bases which support that opinion.

Some health care professions do not lend themselves to the establishment of a causal link between the subject event and the patient's condition. For example, an orthopedic surgeon or a neurosurgeon likely would be considered qualified to render opinions about the causal connection between a specific traumatic event and a spinal injury. A physical therapist may not be qualified to offer opinions about that causal connection. However, the physical therapist is qualified to testify that, based on his/her training and experience in working with other spinal injury patients, this particular patient presented with similar symptoms and appeared to suffer from similar disabilities. This comparison-based approach paints a vivid image for jurors and judges and helps them to understand the full extent of the patient's injuries and the progress achieved through rehabilitation.

The question "Do you have an opinion with a reasonable degree of certainty whether the subject event caused or contributed to cause this patient's injuries?" will typically result in one of the following answers:

1. "Yes, I have an opinion: The event caused the injuries. The bases for my opinion are..."
2. "Yes, I have an opinion: The event was one factor (of a number of factors) which contributed to cause the injuries. (Bases)"
3. "Yes, I have an opinion: The event did not cause or contribute to cause the injuries. (Bases)"
4. "No, I have no opinion."

In certain cases, it may be critical to address a fine distinction in testimony regarding proximate cause. A witness may not have an opinion that an event actually did cause or contribute to cause specific injuries. However, the same witness may have an opinion that the event might or could have been a cause of the subject injuries. Therefore, the witness must be prepared to answer a question such as "Do you have an opinion with a reasonable degree of certainty as to whether the subject event might or could have caused or contributed to cause the subject injury?" The answer to this question may very well be affirmative even when the witness cannot state with reasonable certainty that the event actually did cause the injuries.

## **ESTABLISH LOGICAL PARAMETERS FOR EXPERT TESTIMONY**

In offering opinion testimony one should be cautious to limit his/her testimony to those matters within his/her field of expertise. At trial, a seasoned trial lawyer may openly criticize

and even embarrass a witness who oversteps the boundaries of his/her expertise. This attack may damage the credibility of the professional regarding even those matters within his/her specialty.

With that caveat in mind, in my experience, some health care professionals who are not medical doctors unduly restrict themselves from offering opinions that they may not typically offer during the course of treatment but which they may hold as a result of their training and experience. Here is one example: A nurse testifies that in her opinion with a reasonable degree of nursing certainty, a patient with symptoms of cardiac ischemia should receive sublingual nitroglycerine; that the reason for administering nitroglycerine is to allow for increased oxygenation to the heart; that a failure to administer nitroglycerine under such circumstances can cause cardiac arrest and death. After giving such testimony, it would be illogical for the nurse to then testify that because she is not a medical doctor she has no opinion whether the failure to administer nitroglycerine might or could have been a proximate cause of the cardiac arrest and death of the patient. Indeed, if the nurse understands the reasons for the administration of the drug and the potential adverse consequences of a failure to give that drug, it logically follows that she would believe with a reasonable degree of certainty that the failure to give the drug might or could have contributed to cause the cardiac arrest and death of the patient.

The point of the above example is this: When offering testimony, the expert should not impose artificial restrictions on himself/herself because of a perceived notion of what the limits of the testimony should be. These concerns can be addressed during preparation for deposition or trial testimony, during which the health care professional and lawyer should explore all proper topics for testimony and the reasonable and logical boundaries of the professional's expertise.

One additional point should be made. Witnesses sometimes think that lawyers are trying to put words into their mouths. However, experienced trial lawyers know that the content of the testimony of a truthful witness must be in the words of the witness himself/herself. Memorized or "coached" testimony is much more likely to break down, and the witness' credibility may be irreparably damaged. However, during the preparation for testimony, the lawyer should challenge the expert to establish the limits for the anticipated opinion testimony and the ferret out all possible grounds for attack during cross-examination. Remember always that the skilled trial lawyer strives to establish and maintain the credibility of our clients, our witnesses, and ourselves. We do not want to put words into the mouths of our expert witnesses; we just want to know the full limits of their testimony and all logical deductions and inferences to be drawn therefrom.

## **STANDARDS FOR ADMISSIBILITY OF OPINION TESTIMONY**

Before a judge will allow an expert witness to offer opinion testimony into evidence, the court will determine whether the anticipated testimony satisfies the applicable standard for admissibility. In most state courts, the applicable standard remains that test established in Frye v. U.S., a 1923 federal court decision. Under the "Frye test," expert testimony is admissible only if the basis for the evidence has gained general acceptance in the relevant scientific community. If the preferred testimony does not meet the Frye "general acceptance" standard, the trial judge should not admit the testimony into evidence.

In 1993, the U.S. Supreme Court replaced the Frye test with Daubert v. Merrell Dow Pharmaceuticals ( a decision which was clarified by the Court in its 1999 opinion in Kuhmo Tire Company Ltd. v. Carmichael.) The "Daubert test" is now the standard for the admissibility of opinion testimony in federal courts. The criteria applied under Daubert and subsequent cases decided by lower federal courts include the following:

1. Has the theory or technique relied upon by the expert been tested?
2. Has the theory or technique been subjected to peer review and publication?

3. What is the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation?
4. What is the degree to which the theory is generally accepted in the scientific community?
5. Has the expert witness done research independent from litigation, or was the opinion developed solely for the case?
6. Did the expert witness form an opinion and then look for supporting evidence to validate the opinion, or did research and/or evaluation lead to the opinion?

When preparing to present opinion testimony in a deposition or at trial, the expert and the trial lawyer should remain mindful of the admissibility standards applicable to the case at hand. Although most state courts continue to apply the Frye test, they are increasingly called upon to reassess the standards of admissibility and to consider Daubert factors along with the Frye test. Therefore, in order to maximize the prospect of having the proposed opinion testimony admitted into evidence, it is advisable to attempt to satisfy both the Frye test and as many of the Daubert criteria as possible.

## **CONCLUSION**

In the legal system, an experienced, competent health care professional is considered an expert in his/her field. Successful presentation of expert testimony depends on the quality of care rendered to the patient, careful documentation of the services provided, and thorough preparation prior to the deposition or trial. The expert who understands and accepts his/her role in the process of fair compensation through litigation furthers the rehabilitation process in ways that can be both satisfying and rewarding.