Expert Witness Considerations in Medical Malpractice Cases and Beyond

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Introduction

- Retention of the appropriate experts can greatly assist defense counsel with understanding the relevant issues and can be vital to obtaining an optimum claim/case resolution
- Focus of this presentation is on expert considerations based on Illinois law
- Please consult defense counsel in your particular jurisdiction as the law/protocol with regard to expert witnesses is not uniform

Who is an Expert?

- Ill. R. Evid. 702
- Rule 702.TESTIMONY BY EXPERTS
  - 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

Standard for Admissibility of Expert Opinions

- “Reasonable degree of certainty” first articulated in *Herbst v. Levy*, 279 Ill. App. 353 (Ill. App. Ct. 1935)
- Not until 1969 that the terminology was linked to admissibility determination
- There is no precise definition, but the phrase is associated with “more probably true than not”, or greater than 50% certainty
- The custom and practice is to always establish that an expert opinion is held to a reasonable degree of certainty across all practice areas

IPI 105.00-Professional Negligence

- This instruction applies not only to medical professionals, but other specialists including lawyers and accountants
- The standard is “reasonably careful”
- My custom and practice is to establish both in my clients’ written discovery answers and at deposition that they complied with the standard of care of a reasonably careful practitioner apart from eliciting this opinion from my liability expert(s)
- The standard for cases brought exclusively under the Illinois Nursing Home Care Act, 210 ILCS 45/1 *et seq*, may sound in only ordinary negligence, although intentional conduct is often claimed

IPI 105.00-Professional Negligence

- In *Sullivan v. Edward Hospital*, 209 Ill. 2d 100 (2004), the Illinois Supreme Court held that a medical malpractice defendant must be judged by an expert licensed in the same school of medicine
- There is an exception relating to communication issues
- *Sullivan* is at odds with Section 5/2-622 which requires a certificate of merit from a physician establishing that there is a reasonable and meritorious cause of action even against non-physician defendants such as nurses and physical therapists
- *Sullivan* applies at trial
- Case illustration as to how *Sullivan* can be used before trial to the defense's advantage

Additional Expert Considerations

- An expert may not be required in a medical malpractice case where the care at issue is deemed to be so grossly negligent that a layman is able to understand the conduct without the necessity of expert testimony to establish the standard of care
- Preference for local standard of care experts despite national standard of care
- An expert's opinion cannot be based upon guess, speculation or conjecture
- Barring duplicative experts on grounds their testimony is cumulative

Junk Science

- Definition of junk science - untested or unproven theories presented as scientific fact
- Junk science is often used to denigrate real science
- Example of junk science-Reliance on diffusion tensor imaging (DTI) to diagnose TBI's

Ill. R. Evid. 702 Revisited

- Rule 702 further provides that:
- Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs

Frye Test addressing the admissibility of novel scientific evidence

- *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923)
- Under *Frye*, an expert opinion is admissible only where it is generally accepted as reliable in the relevant scientific community
- *Frye* is followed in such states as Illinois, California, Minnesota, New York, Pennsylvania and Washington even though it is largely been replaced by *Daubert*

Daubert Test addressing the admissibility of novel scientific evidence

- *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)
- Under *Daubert*, courts act as “gatekeepers” and will consider additional factors including testing, peer review, known or potential rate of error, and the existence and maintenance of standards and controls
- Given *Frye’s* more singular focus, it seems more likely that a novel or questionable scientific theory would be barred under this test as opposed to *Daubert*

Is an Expert even Necessary?

- In a word, it depends - An expert is probably not necessary for example in a simple MVA or premises liability action involving minor injuries
- Considerations include whether an expert can aid defense counsel to better understand complex issues and of course aid the jury
- Experts can be helpful in assisting defense counsel in preparing for depositions
- Will retaining an expert support and facilitate defense counsel’s theme of the case?

When should an Expert be Retained?

- Pre-suit Considerations/internal consulting expert review
- Typically, experts are retained after suit is filed where defense counsel has first conducted an initial investigation and where there is no expectation that the case will be voluntarily or involuntarily dismissed early on
- In defending medical malpractice cases, my practice is to retain the appropriate experts as early as possible

Expert Sources

- There are so many and they include: the jury verdict reporter, Lexis/Nexus and Westlaw, Top Doctors lists, LinkedIn, professional associations, and authors of relevant publications
- Other sources including past experiences with the expert and word of mouth
- Expert witness services which include TASA, Seak, and Inspe Associates although I personally disfavor finding experts that advertise as this provides fertile ground for cross-examination by opposing counsel

Tips for Expert Retention

- Vetting potential experts
- Avoiding overused and retired experts
- Importance of entering into a business associate relationship with the expert in accordance with HIPAA
- Fee negotiation
- Emphasizing to the expert not to prepare a written report unless specifically requested

Consulting Expert Privilege

- Ill. Sup. Ct. R. 201 (b)(3) provides that:
- A consultant is a person who has been retained or specially employed in anticipation of litigation or preparation for trial but who is not to be called at trial. The identity, opinions, and work product of a consultant are discoverable only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject matter by other means
- A consultant is not a formal expert until such time as he/she is formally disclosed by a party

Expert Disclosure and Preparation of Experts for Trial

- Simultaneous disclosures
- My custom and practice is to prepare formal disclosures rather than requesting a report from the expert
- The disclosures should be comprehensive in the event opposing counsel does not depose the expert prior to trial
- Detailed disclosures can make a difference in the case outcome
- The importance of preparing experts for trial like our own clients even though defense counsel has less control over an expert
- If possible, experts should testify live at trial rather than via evidence depositions

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