PERSONAL INJURY & MEDICAL MALPRACTICE

Expertise About the Experts

A litigator's guide to vetting scientific experts

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Made famous by films such as "The Verdict" and "My Cousin Vinny," expert witness testimony brings to mind people with advanced degrees who use esoteric industry jargon.

But experts testify to help juries understand complex issues in cases, including in personal injury law. But where one side of a case brings in an expert witness, there's an opposing attorney doing his or her own vetting to make sure the expert's testimony belongs.

Experts such as accident reconstructionists and those who testify about soft tissue injuries impossible to see, such as to the brain or spine, tend to be among the most hotly contested. In the past, courts tended to trust experts who gave opinions based on generally accepted scientific knowledge. But in recent years, the focus has turned to how rigorously experts apply the scientific method when they form opinions. Regardless of whether they represent plaintiffs or defendants, personal injury attorneys seem to agree that if an expert backs his or her opinions with a solidly grounded scientific method, their testimony will stand up to the toughest of examinations.

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>
> —Tom Metier, personal injury attorney

"Once you get that answer, there is no antidote to them," said injury and wrongful death attorney Larry Cohen during a CLE presentation last Tuesday on guidance for gathering scientific evidence in cases. "They will give you what you need."

RED FLAGS

Wheeler Trigg O'Donnell partner Craig May, who has defended personal injury cases, said a judge can make the call about whether an expert witness' testimony is really adding anything to the case in deciding whether to admit it. As an example, he said he has read about cases involving falls that have called experts to testify how a floor became slippery.

"A jury can understand a slippery floor," May said. "And they may not need an expert to explain to them" that concept. He said such situations where the testimony is not truly expertise is a red flag to look for when determining if a court should admit it.

Personal injury plaintiff attorney Tom Metier said attorneys will sometimes hire an expert because of his or her résumé, such as an Ivy League degree, to make his or her testimony sound all the more impressive, instead of focusing on the quality of the opinion they offer.

"Science doesn't live only at the Ivy League," Metier said. "What makes them a world-class expert is the quality of their work and experience." He said an attorney can look at the his or her publications and history as an expert witness, such as how they've testified in the past and the quality of their investigations, to determine how well they could serve in a case.

"If (testimony) is not based on good, defensible rigorous science and input," May said, "Garbage in, garbage out." He explained that while scrutiny of expert witnesses in the past has looked at whether they testify using generally accepted science, because courts typically do not welcome the use of unestablished theories, the 1993 U.S. Supreme Court decision in Daubert v.

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inductions (34-36 weeks) over a period of 12 years and found that the near doubling of premiums was associated with the increase in inductions, which approximately tripled.

The drug Pitocin is used to induce labor. From 1990 to 2010, the rate of induction of labor went from 9.6 to 23.8 percent. The CDC report found that heart muscle disease (cardiomyopathy), cardiovascular complications and hemorrhage were the leading causes of death in these cases. One of the most common injuries is uterine atony, a condition where the uterus has been overworked and stressed and bleeds out. Usually the uterus must be removed to stop bleeding.

If injuries sustained during labor and delivery lead to a loss of fertility, recovery might be made to cover costs associated with adoption and surrogacy. But for women with other complications or in the event of a mother's death, Woodruff says that's not usually the case.

A process called professional review makes confidential reports and findings of medical cases and patient care. The reviews are done on all sorts of cases, not just ones in which a patient has complications or dies. But especially in cases with unfortunate outcomes, Woodruff said communications and findings from those reports are crucial.

"From what we see, it is used as a tool, at least in the litigation context, to conceal facts and prevent injured people from learning about what truly happened to them and why," Woodruff said.

Colorado's professional review law defines "record" as essentially any communication between individuals in the committee and during proceedings as well as reports and assessments of the patient care under review.

The statute, which is scheduled to sunset at the end of next year, exempts from that definition communication by "any person that are otherwise available from a source outside the scope of professional review activities, including medical records and other health information." But Woodruff said that the process is often used as a shield to obscure the facts.

"I'm in a deposition asking [the hospital representative] 'What did you learn about what time the doctor was called, what were the nurses doing?' Then they say 'If you learned that during the investigation, you don't have to answer that question.' It's not documented anywhere rather than the peer review file," Woodruff said.

Woodruff said some judges are less aware of the details in the statute, and that in some cases defense attorneys will label communications confidential that shouldn't be under the law, and therefore are unable to be used to bring a claim for a patient.

"We see that judges will sometimes just sort of fall for it," Woodruff said. "We see that some judges are very meticulous and careful and they don't fall for it, and then we can kind of pierce that veil and we can get the facts themselves."

Kuhn disagrees. He believes the practice encourages open conversation among health care providers and leads to an overall improvement in patient care.

"The day that we stop protecting peer review is the day we see a screeching halt to our collective societal ability to encourage frank candid discussions among medical providers," Kuhn said.

COPIC counsel Mark Fogg said the statute clearly outlines that other information and facts outside the review are discoverable, noting that due process is important and the ultimate goal of the professional review process is improving health care.

"The important thing is, from everybody's standpoint, the patient and the physician, you want an objective, thorough and where appropriate, critical review. You don't want it motivated by anything other than quality of care," he said.

Fogg said professional review allows for an individual to come forward with allegations without concerns of retaliation. It also provides other options for education or restriction rather than severe punishment, depending on the case.

A 2009 American Medical Association survey found that more than 30 percent of OBGYNs said their fear of lawsuits led them to perform more Cesarian sections.

In 2013, the U.S. rate of C-sections was 32.7 percent, double the 10-15 percent rate that the World Health Organization set as medically necessary. Fennemore Craig director Barbara Glogiewicz represents physicians and has handled many obstetric malpractice cases. She said claims in OBGYN cases are particularly concerning because of large awards.

Doctors are covered by at least $1 to 2 million in insurance, and premiums have risen for obstetricians.

Though Glogiewicz said most of her clients try not to let a potential malpractice claim influence their decisions, many have seen colleagues go through harrowing lawsuits.

"I think the reality is that when I talk to clients, they say 'I try to do what's in the best interest of my patients,'" she said. "There's always a focus to not practice defensive medicine, but in reality, some practitioners are more liable to recommend a C-section because of risks associated with malpractice claims."

And though the cap on non-economic damages is low, Glogiewicz believes it's an important limitation to have in place to balance out the soft cap on economic damages, especially because emotion and sympathy can sway a jury.

"The problem is that's a train that when it leaves station, nobody knows where it's going to end up," she said. "The doctor in court is the one who feels the worst of all. They didn't go to medical school to hurt people. Reining in emotion is necessary for doctors to get a fair shake." •

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Merrell Dow Pharmaceuticals put focus on whether experts apply a rigorous methodology to their opinions and that judges should be able to assess that methodology and the facts.

"What if [an opinion is] generally accepted, but based on bad science?" May said. "Well, then that shouldn't come in."

A TOOLKIT FOR EXAMINATION

During his presentation, Cohen laid out a framework of questions for attorneys to ask when examining an expert witness who is giving any kind of scientific opinion to help decide whether his or her testimony should be admitted.

Validity: Does the analytical instrument an expert used to help form his opinion measure what it purports to?

Cohen used the example of a bathroom scale. "Someone says a bathroom scale works because I can stand on it and it tells me my weight," he said. "How do you know? Somewhere in time, somebody had to do some research to figure out how the bathroom scale works, such that it could tell us weight, and make the determination that it works."

Reliability: Does the instrument measure consistently?

Cohen explained reliability in this context differs from legal reliability for admitting scientific evidence. He said a person can examine reliability by looking at how an instrument was developed and its claims about the extent of its validity.

"You aren't going to find things out there that are valid and reliable 100 percent," he said. "The difference between the reality that's out there that we're trying to identify and the conclusion that we can draw using these instruments is referred to as a rate of error."

Sensitivity: How correctly can the instrument identify people with the condition it measures?

"If it's valid and reliable but not sensitive, we're back to the question of what usefulness this has in supporting an opinion," Cohen said. "If (the expert) says 'I don't know,' what's the next step? A motion in limine to eliminate that opinion, because they can't support it."

Specificity: Can the instrument identify the absence of the condition, and rule out other explanations?

Cohen used the example of a person who appears to have a short-term memory problem but an alternate explanation might be an attention issue that prevents him or her absorbing information.

"The instrument that you want to say detects short-term memory, is it specific to that, or is it also picking up attention?" he said.

"These are questions you can always ask, and they will always lead you to things that you can use on direct and cross-examination." •

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ing helmets do not provide protection against CTE.

Although Cohen said medical negligence for failure to identify the condition might be a lucrative legal argument to explore, the difficulty of diagnosing CTE while a person is alive presents a challenge for making it.

Cohen continued to say increasing knowledge of CTE has furthered understanding of the part trauma plays in brain damage because repeated trauma can also overwhelm the body's usual healing process.

"Plasticity allows the brain, where the injury is very modest, to overcome the fact of injury organically and to avoid the symptoms that are characteristic of a traumatic brain injury," he said. "But if the injury is more pervasive ... you see a presentation and a continuation of symptoms." Cohen said while genetics are thought of as a strong factor for susceptibility to CTE, there is not yet a clear answer, and science is likely a long way from providing one.

"We absolutely need to remain humble, because the field of brain function is truly in the infancy stage."

— Larry Cohen, injury and wrongful death attorney

"We absolutely need to remain humble, because the field of brain function is truly in the infancy stage," he said, adding that he has heard the sentiment that the area of knowledge has progressed from infancy to toddlerhood.

Cohen reiterated the need for lawyers to come up with a framework of thinking to account for different outcomes in people who suffer the same trauma besides simply dismissing those who do suffer brain damage as malingerers.

"That's the window that I believe CTE is going to provide to understand why we see the differences we do in mild traumatic brain injury," Cohen said. "It's going to do a whole lot more, but if it did only that, it would be a tremendous advancement over where we are." •

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