

CHIROPRACTIC LITIGATION

“THE EXPERT WITNESS”

PART II

As I had mentioned in part I, in the January Issue, when scientific, technical or specialized knowledge is required, it is most often presented by recognized experts in their fields. Under Fed.R.Evid.702, decisions to admit or to exclude an expert witness's testimony lies within the court's discretion. In part II, we will look at how the trial court deals with scientific testimony in medical litigation.

In medical litigation (negligence), six elements must be proven, which include: (1) an act or actionable omission by the defendant (2) Duty of due care (3) Breach of duty (lack of due care) (4) Actual causes (5) Proximal causes and (6) Damages. The first three define the negligence portion and the last three define the liability portion. All six elements must be proven to establish liability. Physicians that practice must exercise a degree duty to meet the standard of care existing in the “same or similar” communities by member of their profession. In the pre-suit investigation experts are needed to review records, both from a plaintiff and defendant standpoint in order to establish negligence. Due to the complexity of medical litigation other types of experts may also be needed.

Under Daubert, scientific evidence must meet the trier of facts. In addition the judge should admit the evidence and allow the jury to weigh the credibility of the expert and the evidence presented. A lot of times this will not happen and the Daubert standard motion may be applied to challenge the expert witness as it applies to Daubert rule 702. One such challenge deals with the reasoning and methodology of the evidence as to its reliability and scientific weight, also the question of the evidence and its relevancy to the facts of the case. Like many HMO's, which require a “gatekeeper”, the judge as the gatekeeper may exclude evidence that is unscientific, unreliable or the expert does not have sufficient knowledge or training in the field he or she claims to be giving expert testimony in. Most courts will allow the expert the opportunity to defend the admissibility of his or her testimony before making a ruling.

The question is how to determine whether evidence is scientific in medical litigation cases. The expert can have very good credentials in his or her field, but lack the scientific basis for his or her opinion. An expert can qualify by:

1. Having competence in his or her field by training and knowledge.
2. Supporting or documenting the method by which he or she reaches a conclusion and that conclusion is reliable under Daubert.
3. That the testimony given by the expert assists the facts of the case
4. That the evidence/testimony is scientific, technical or special knowledge.

When the courts in a gatekeeper role, it must determine the reliability of the evidence under Daubert 702 by:

1. Can the evidence/opinion be tested
2. Is the evidence subject to peer review and publication
3. Is the error rate, plus or minus in the technique used to reach a conclusion by the expert.
4. Is the theory used to reach a conclusion generally accepted in the scientific community.

5. Is the evidence reliable, relevant and scientific in the case.

You as a Chiropractor can testify based upon your qualifications and knowledge, but the evidence must be scientific in base and defined by clinical criteria and or objective tests to reach your diagnosis. In the use of expert testimony, the use of theories, hypotheses, or observations in reaching your conclusions without clinical or objective findings may make you suspect to the methodology you used to form your opinion.

Most laws in medical negligence, requires the plaintiff to prove a preponderance of evidence, with a reasonable degree of medical probability, that the action or omission by the defendant was the cause of the plaintiff's injuries. The question is whether the expert has proven to a reasonable medical probability with scientifically reliable evidence that the defendant was the cause of the plaintiff's injuries. In addition did the expert rule out other possibilities that could of caused the plaintiff's injuries.

The gatekeeper, under Daubert as described earlier is to ensure that the testimony by the expert is reliable and relevant. The expert must follow, in the litigation process the same level of intelligence that recognizes him or her in their respective fields of expertise.

Medical litigation is becoming more complex and the role of the expert will increase.

Expect more challenges of the experts as explained in part I and II. Under Rule 702 (Daubert), may be used to define trial issues, but also to exclude the expert from giving testimony. The expert should be well trained in his or her respective fields of expertise and have the knowledge to withstand challenges. Look at all cases in a logical manner and base your testimony on scientific, technical or special knowledge and training.