

# MEDICAL MALPRACTICE

## Bifurcation Can Reduce Costs In Malpractice Trials

PRACTICE HINDERED BY RULES GOVERNING ALTERNATE JURORS

By ERIKA L. AMARANTE, JAMES O. CRAVEN and ABIGAIL COTTERILL

As health care costs continue to rise, and the debate regarding malpractice damages caps and other methods to reduce the cost of medical malpractice insurance continues to rage, attorneys have more incentive than ever to consider alternative ways to reduce litigation costs in complex medical cases.

Bifurcation of the liability and damages phases is one method for keeping costs down. In certain types of cases, where the claimed damages are extensive and causation is hotly contested, bifurcation can be more efficient and reduce the potential for prejudice to the defendant based on sympathy or emotion related to the damages evidence. If there are multiple experts for each side on both liability and damages, and the trial is expected to last for weeks, it often makes sense for the jury to consider and decide liability before hearing any evidence of damages.

Indeed, the theory behind bifurcation is that there is little reason to expend the time and resources in trying two issues if one issue could

on the case." General Statutes § 51-243(e) (emphasis added). The *Hurley* court held that this language precluded bifurcation of the trial into stages because, by statutory mandate, "the court must discharge all the alternate jurors before the jury retires to deliberate the phase one issue, leaving no alternates for the second phase of the trial." The trial judge was concerned about the lack of alternate jurors for the damages phase, if necessary, and held that "it would be irresponsible . . . to ignore the very real risk of a mistrial by proceeding on a bifurcated basis."

The *Hurley* court's strict construction of the statute effectively renders bifurcation unavailable in all complex civil trials, including medical malpractice cases where it could potentially provide the most benefit. That result cannot be what the legislature intended. It is also inconsistent with current practice, where civil trials are often bifurcated without running afoul of the alternate juror statute. In fact, the model Civil Jury Instructions on the Judicial Branch web site contains a note at the end of Instruction 2.9-8 (Discharge of Alternate Jurors) that provides: "There are circumstances when the judge *may wish not to discharge the alternate jurors* or to



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*Murray* did not involve bifurcation, but concerned the substitution of an alternate juror after the regular jury had begun deliberations. At the time of the *Murray* decision, the criminal alternate juror statute contained the same language as the civil provision does today. In fact, until 1980, there was only one provision governing the role of alternate jurors in both civil and criminal trials. When the alternate juror provision was separated into two provisions in 1980, one for criminal trials and one for civil trials, those provisions remained identical until a 2000 amendment relevant to this issue and described below.

In 2000, in response to the issue raised in *Murray*, the legislature enacted P.A. 00-116 to amend the criminal provision governing alternate jurors and give judges the discretion to hold alternate jurors in the service of the court during the jury's deliberations in criminal trials. The civil rule was not amended at the same time.

Thus, in 2000, the civil and criminal provisions for alternate jurors became different for the first time (and they remain that way today). Unlike the civil rule, General Statutes § 54-82h (the criminal provision) now provides that, when a case is submitted to the regular jury panel, an alternate juror "may be dismissed from further service on said case or may remain in service under the direction of the court." General Statutes § 54-82h(c) (emphasis added). The criminal provision therefore gives judges the discretion to hold alternate jurors during deliberations and for another phase of trial.

There is no ready explanation for the amendment of the criminal rule for alternate jurors without a similar amendment to the civil rules. There is no policy rationale that would be furthered by disparate alternate juror rules for criminal and civil trials. The legislative history of P.A. 00-116 does not reveal any legislative in-

intention to treat alternate jurors in criminal and civil trials differently.

Most telling, the model Civil Jury Instructions found on the Judicial Branch web site assume that a Superior Court judge presiding over a civil trial has the discretion to hold alternate jurors in service during the regular panel's deliberations, particularly in the case of a bifurcated trial. Given these facts, the legislature would be wise to revisit the anomaly created by its amendment of General Statutes § 54-82h without also amending General Statutes § 51-243(e), because the unintended effect may be to render bifurcation a practical nullity in complex civil trials.

Even absent a legislative amendment, courts can and should interpret General Statutes § 51-243(e) liberally and consistently with the authority to bifurcate trials found in General Statutes § 52-205. "It is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions." *Lopa v. Brinker Int'l Inc.*, 296 Conn. 426; 994 A.2d 1265, 1269 (2010). Reading § 51-243(e) to preclude the possibility of a bifurcated trial with alternate jurors, as in *Hurley*, effectively nullifies § 52-205 whenever alternate jurors are selected – which as a practical matter happens in all complex medical malpractice trials.

Bifurcation can be an efficient way to keep litigation costs down in complex medical malpractice cases. The procedural impediment to bifurcation that *Hurley* identifies is an anomaly without justification. Whether to bifurcate, and when, should be decided based on the issues in the case and an exercise of judicial discretion. Bifurcation should not be precluded right out of the gate because of the procedural rules governing alternate jurors. Connecticut courts would be well-served by giving full effect to the legislature's grant of discretionary authority to bifurcate trials. ■

**There is no policy rationale that would be furthered by disparate alternate juror rules for criminal and civil trials.**

obviate the need for considering a second issue. See, e.g., *Barry v. Quality Steel Prods.*, 263 Conn. 424, 449 (2003).

Bifurcation is left to the discretion and authority of the trial judge. General Statutes § 52-205; Practice Book § 15-1. Despite that discretion, however, at least one Superior Court judge has suggested that bifurcation can *never* be ordered in a civil case that involves the use of alternate jurors — which, ironically, would include all the complex medical malpractice trials in which bifurcation might make the most sense. See *Hurley v. Heart Physicians PC*, X05CV000177475S, 2007 Conn. Super. LEXIS 3143, at \*1-\*17 (Conn. Super. Ct. Nov. 8, 2007).

The decision is based on language in General Statutes § 51-243, governing the use of alternate jurors in civil cases. Subsection (e) of that statute provides that, when the case is given to the regular panel for deliberation, the alternate jurors "shall be dismissed from further service

emphasize the possibility that they may be recalled. *Those circumstances will most often occur where the case has been bifurcated* or where, because of the anticipated length of deliberation or other conditions, concern exists as to whether a regular juror might be lost during deliberation." (Emphasis added).

Although the *Hurley* court considered this language, the judge concluded that it was not binding on his decision to interpret General Statutes § 51-243(3) strictly.

### Clarification Needed

A review of the reasoning in *Hurley* reveals that a legislative clarification may be overdue. *Hurley* relied heavily on a Supreme Court decision in the criminal context, *State v. Murray*, 254 Conn. 472 (2000), that interpreted the criminal statute governing alternate jurors strictly to require dismissal of the alternates when the regular jury begins deliberations.

# A Plaintiff's Perspective On Med-Mal Voir Dire

ASKING ADVERSARY'S QUESTIONS CAN BE A BENEFICIAL TACTIC

By **SEAN K. McELIGOTT**

In a medical malpractice case, it can be challenging to find jurors who can be fair and unbiased to both plaintiff and defendant. In addition to the normal juror biases against personal injury lawsuits, there are some potential biases that are unique to medical malpractice cases.

For example, many potential jurors simply feel unqualified to pass judgment on a physician, while others are reluctant to believe that physicians commit errors. Others may have political biases, particularly after the recent federal health care debate, which exaggerated the existence and expense of so-called "defensive medicine."

Fortunately for Connecticut practitioners, the individual voir dire process allows the best opportunity for discovery of potential juror bias. But it is important not to abuse the process. Questions designed to merely condition or influence a potential juror are both improper and ultimately ineffective. A juror can tell the difference between a lawyer who is asking questions and one who is planting seeds.

Always remember that while you are picking a jury, they are picking a lawyer. Anything that could negatively affect your credibility — which is your one and only weapon as an advocate — should be scrupulously avoided.

One technique that is absolutely essential is the use of the open-ended question. Many lawyers charge through their voir dire outline content with yes or no answers while failing to get the veneer person talking. This is a

**Another benefit to asking your adversary's questions is that it limits your adversary's time with the juror and prevents him or her from gaining a feel for the potential juror.**

mistake and, incidentally, makes for a boring day of picking a jury. One good technique to get a juror talking is to state a common bias and then ask the juror to reflect upon it. For example you could ask, "There are some people who think that there are too many lawsuits against doctors; what do you think about that?"

In addition to the open-ended question, it is sometimes useful to ask a potential juror to ponder two sides of an issue. For example, you might ask: "In our country, patients have a right to sue doctors for medical care that they believe is substandard and that has led to

harm. What is good about that system? What is bad about it?"

Again, the whole idea is to get the juror talking so it is important to maintain a non-judgmental tone regardless of the answer.

Another important technique for effective individual voir dire is to ask all the questions that your adversary is likely to ask. This serves a few different purposes. First, it can help you protect a potentially good juror from being confused into saying something leading to a challenge for cause. For example, a classic question asked by the defense is whether the veneer person would want to have the plaintiff's medical bills paid even if the plaintiff did

not prove his or her case. The problem with this kind of question is that it seems perfectly reasonable to everyone but a lawyer to answer yes, because why wouldn't you want someone's medical bills paid?

## Judge's Instructions

The way to inoculate the veneer person against this type of question is to focus on the judge's instructions. You can say: "The judge will instruct you that you may not award the plaintiff compensation for medical bills unless the plaintiff proves his case. Can you follow that instruction?" Now

the veneer person understands that the judge provides instructions and the jury's job is to follow the instructions. This will help the potential juror hold up better on questioning by the defense and can be adapted to almost any line of questioning that seeks to exploit the potential juror's ignorance of the law.

Another benefit to asking your adversary's questions is that it limits your adversary's



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# Techniques For Stopping The Statute Of Limitations Clock

EVOLVING CASE LAW OFFERS INSIGHT FOR RESOURCEFUL PLAINTIFFS' LAWYERS

By CAREY REILLY

The sound that keeps every personal injury lawyer up at night is the tick-tock of the statute of limitations clock. In medical malpractice cases, the applicable statute contains both a two-year and a three-year component. The two-year "limitations" part runs from the date the plaintiff discovered or should have discovered his legal injury. The three-year "repose" section runs from the date of the defendant's negligent act. The savvy practitioner may, however, be able to extend these deadlines based on a thorough understanding of the case law.

General Statutes § 52-584 states: "No action to recover damages for injury to the

the date the petition is filed with (or granted by) the court.

According to § 52-584, the two years runs "from the date when the injury is first sustained or discovered" or should have been discovered. The word "injury" in this setting is a term of art. Our courts have long held that a cause of action will not accrue until the plaintiff discovers or should discover "not only that he has been injured but also that his injury may have been caused by the defendant's wrongful conduct." *Catz v. Rubenstein*, 201 Conn. 39 (1986).

In other words, before a medical malpractice cause of action accrues, the plaintiff must discover that he has suffered physical or mental injury, the defendant acted below

Turning to the three-year component of § 52-584, despite a plaintiff's diligent discovery of his legal injury, the repose period may pass silently and unnoticed, thereby barring a plaintiff's cause of action. This three-year period commences on the date the defendant commits malpractice. On paper, there are several tolling doctrines that may be used to stop the clock: 1) the continuing course of conduct doctrine; 2) the continuous treatment doctrine; and 3) fraudulent concealment. But, while it is possible to acquire the protection of these doctrines, it is difficult.

## Continuing Duty

The continuing course of conduct doctrine requires a plaintiff to establish an initial wrong, a continuing duty related to the initial wrong, and a continuing breach. The bane of this doctrine is establishing the continuing duty. The courts have applied a judicial gloss to this doctrine that requires a plaintiff to prove the defendant had "actual knowledge" of facts or circumstances that imposes a duty to act further. It is not enough to establish the defendant should have known. But this hurdle is not insurmountable. The last appellate case to recognize a successful application of this doctrine was *Bednarz v. Eye Physicians of Central Connecticut*, 287 Conn. 158 (2008).

The elements of the continuous treatment doctrine were newly articulated in *Grey v. Stamford Health System Inc.*, 282 Conn. 745 (2007). To establish a continuous course of treatment for purposes of tolling the statute of limitations in medical actions, the plaintiff

from Vermont to Stamford to have her yearly mammograms performed by the same group. The court's reasoning was that the nature of the defendant's diagnostic services resulted in discrete dates of treatment, not continuous care. Further, the plaintiff was unaware of any medical condition (i.e., cancer) that required ongoing treatment or monitoring.

Recently, in *Martinieli v. Fusi*, 290 Conn. 347 (2009), the court opened another avenue to toll the three-year repose section of § 52-584. In footnote 12 of the opinion, the court stated that "there may well be circumstances in which the facts of the case are so egregious that an expert would be willing to testify that no reasonable physician in the defendant's position could have lack [actual] knowledge, and, therefore, that the defendant *must have known* that the plaintiff's condition posed a serious medical risk." At least one Superior Court has employed this doctrine. *Saperstein v. Danbury Hospital*, LEXIS 197 (Jan. 27, 2010).

General Statutes § 52-595 is also available to toll the statute of limitations if a



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the accepted standard of care and the defendant's breach caused the plaintiff's harm.

Although the case law states that a plaintiff is not entitled to wait until he discovers applicable legal theories or the fullest manifestation of his harm before his cause of action is deemed to have accrued, it also states that a plaintiff has no duty to investigate a potential claim. *Taylor v. Winsted Memorial Hospital*, 262 Conn. 797 (2003). Thus, there is a natural strain between the determination of what is sufficient versus insufficient information when resolving the question of accrual.

In the arena of medical malpractice, where a plaintiff is required to prove the standard of care, breach and causation through expert testimony *and* he cannot file suit without an opinion letter from a similar health care provider, there is a very strong argument that a plaintiff's cause of action doesn't accrue until he learns from a proper expert that there has been malpractice. Practically speaking, this usually occurs after a plaintiff has contacted a lawyer and the lawyer has sent the case out for review. Case law on this subject from the lower courts appears to be evolving in the plaintiff's favor.

person...caused...by malpractice of a physician [or] hospital, shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable case should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of..."

The first and simplest way to extend both the two- and three-year periods is by petitioning the clerk of the court where the civil action will be filed for an automatic 90-day extension under General Statutes § 52-190a. In *Barrett v. Montesano*, 269 Conn. 787 (2004), the court made it crystal clear that the additional 90 days applies to the three-year repose aspect of § 52-584, as well as the two-year limitations part, despite the statutory language in § 52-190a that mentions only an "extension of the statute of limitations." The 90-day extension runs from the date the deadlines would otherwise expire under § 52-584, not

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is required to prove: 1) that he had an identified medical condition that required ongoing treatment or monitoring; 2) that the defendant provided ongoing treatment or monitoring of that medical condition after the allegedly negligent conduct, or that the plaintiff reasonably could have anticipated that the defendant would do so; and, 3) that the plaintiff brought the action within the appropriate statutory period after the date that treatment terminated.

In *Grey*, the court held that the doctrine did not apply even though the plaintiff traveled

plaintiff can prove fraudulent concealment of his cause of action. The problem with this doctrine is that the defendant's acts of concealment must be directed to the very point of causing the plaintiff to delay bringing his case and the heightened burden of clear and convincing proof applies. But it can be done. See *Puro v. Henry*, 188 Conn. 301 (1982).

On a final note, medical malpractice cases against the State of Connecticut have their own statute of limitations rules, although many of the principles discussed above do apply. *Lagasse v. State*, 281 Conn. 1 (2007). ■

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## ■ From A PLAINTIFF'S ON PAGE 19

time with the juror and prevents him or her from gaining a feel for the potential juror. It is hard to develop a relationship with a juror when you have no questions to ask because they have been asked already. Also, it can be entertaining to watch your adversary try to make up questions on the spot just so he or she can at least ask some questions.

Another reason to stray onto your adversary's turf is that it shows the potential juror that you believe in your case. It shows that you are not afraid of the topics that are near and dear to the defense: that sympathy is irrelevant, that injury alone doesn't mean negligence, that the plaintiff has the burden of proof, that frivolous lawsuits exist, etc. These things are undisputedly true anyway, so they might as well be taken head on.

The famous trial lawyer Moe Levine used to tell juries that justice was the right verdict for the right reason. He would tell the jury that if they returned a plaintiff's verdict purely out of sympathy for the plaintiff's injuries, it may be the right verdict but it would be for the wrong reason and therefore unjust. Who can argue with that — the right verdict for the right reason?

You can demonstrate to a veneer person that you are interested in the right verdict for the right reason while at the same time exploring for bias. It is wrong to base a verdict on sympathy, but isn't it equally wrong to base it on the fear of ruining a physician's reputation? Get the potential juror to agree that the result should be based on the evidence only.

It is also important to explore the veneer person's positive or negative experience with the medical profession. One technique is

to ask for their best and worst experience with a physician. But do not assume that a person who has had bad experiences with a physician will be favorably inclined to the plaintiff. The juror with the least bias will likely be the one who reports no remarkable interactions with a physician one way or the other.

## Talking Politics

Political bias can be difficult to discover because such bias is typically not revealed through screening questions alone. People tend to express political viewpoints only to like-minded people in safe arenas instead of risking a conflict. Hence, the old rule of etiquette that one shouldn't talk about politics or religion at a dinner party. Again, the key is to get the person talking and to create a safe non-judgmental environment.

Remember, this is not the time to try to change someone's political viewpoint, but rather to draw it out. In the end, fears about a veneer person's politics are probably overblown. Most jurors try very hard to follow the judge's instructions and to do justice in the case before them, regardless of their general political or systemic beliefs.

One important thing to emphasize during voir dire is that the burden of proof in a civil case is not the criminal standard of beyond a reasonable doubt. The concept of beyond a reasonable doubt is so prevalent on television and in other media, and so difficult to root out, that it must be dealt with as early as possible in the jury process. It may even be worth asking a veneer person if he or she would be willing to correct a fellow juror who mistakenly used the beyond a reasonable doubt standard during deliberations. ■

# Nursing Home Falls Are Common — and Preventable

HOST OF FEDERAL, STATE LAWS GOVERN LONG-TERM CARE FACILITY SAFETY

By **BRENDEN P. LEYDON**

When the elderly fall, they usually sustain more than just a bruise or two. Many seniors end up breaking bones, fracturing hips and even sustaining head injuries due to the frail nature of their bones. According to the American Academy of Orthopaedic Surgeons, there are about 380,000 hip fracture cases annually. Surprising, many of these falls occur in nursing home facilities — places where the elderly should be monitored and carefully watched.

## Nursing Home Duties

Nursing homes are expected to provide adequate care for elderly residents living in their facilities. Federal law mandates that nursing homes ensure that their facilities are “free of accident hazards as is possible; and that each



**Brenden P. Leydon**

resident receives adequate supervision and assistance devices to prevent accidents.”

Specifically, incoming nursing home residents must be assessed by a qualified staff member. A registered nurse or physician must conduct proper and periodic

monitoring for all residents to determine their risks for falling. If residents need help walking, have a high risk of falling, or have a history of falls, then special accommodations and closer monitoring are required. The facility must also maintain close observation of seniors who experience a fall and continuously re-evaluate their condition until they recover.

A variety of state and federal laws govern such facilities, including the Connecticut Public Health Code §19-13-D8t(a)-(v) (Chronic and Convalescent Nursing Homes and Rest Homes

**In some cases, incoming nursing home residents are not properly assessed by a qualified staff member. Some facilities fail to adequately equip residents’ beds with safety devices or bed rails.**

with Nursing Supervision); Connecticut General Statutes § 19a-550 (Patient’s Bill of Rights); 42 CFR 483.1-483.75 (Requirements for Long Term Care Facilities); and various sections of the Social Security Act, 42 U.S.C §1302, §1395i-3(a)-(f), §1395x(j) and (l), §1395z, §1395hh, §1396a(a)(28), §1396d(a),(c), and (d) and §1396r(a)-(f) (Nursing Home Reform Act of 1987). Establishing a violation of one of these provisions can go a long way in proving a case.

The Connecticut legislature funded (2007-09 fiscal year) Yale University’s Connecticut Collaboration for Fall Prevention (CCFP), hoping to decrease the number of falls among older

adults statewide and to identify opportunities in which state policy could sustain changes, attitudes and knowledge of fall prevention. Other applicable standards can be located by consulting with a geriatric physician and/or nurse.

## Falls Remain Frequent

Yet, despite the nursing home regulations currently in place, many seniors still experience falls. But why? Experts point to a number of reasons. In some cases, incoming nursing home residents are not properly assessed by a qualified staff member or they are simply left unattended. Some facilities fail to adequately equip residents’

beds with safety devices or bed rails. Sometimes the nursing home may erect the beds too high.

Other nursing homes may fail to install proper alarm systems or overlook the need for crash mats if slippery floors are present.

Along with bruises, broken bones and fractures, a fall can easily result in head injuries, paralysis, and even death. Some injuries result in prolonged pain and suffering and depleted quality of

life. The American Academy of Orthopaedic Surgeons estimates that around 30 percent of people over 65 will fall each year. This equates to about 433,000 hospitalizations annually. Many of these falls could and should have been prevented if reasonable care was employed as required to prevent against them.

Given the catastrophic effects that flow from falls by the elderly, the level of care that should be deemed “reasonable” is obviously quite high. Cases involving such falls are worth investigating and pursuing, given the preventable nature of many of them. ■



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# Initiating Medical Malpractice Cases In Federal Court

PRACTITIONERS RISK CLAIMS BEING DENIED IF PROPER STEPS AREN'T TAKEN

By JACK WURGAFT

The first concern for all practitioners handling medical malpractice cases in federal court is the initial processing of the claim. Once it is determined that the health care provider is a federal employee, or the health clinic qualifies as a federally funded health center under 42 U.S.C. 233 (g) — (n), a “claim for damage, injury or death” (Standard Form 95) must be filed within two years of the accrual of the cause of action. The Department of Health and Hu-

man Services oversees programs for federally supported health care centers and is the proper agency for presentation of the claim.

man Services oversees programs for federally supported health care centers and is the proper agency for presentation of the claim. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2401(b), 2671–2680, is the exclusive remedy for claims against federal employees and qualified health centers. Under the provisions of the FTCA, an action may not be instituted upon a claim against the United States for money damages caused by the negligent act of any federal employee acting within the scope of his employment, unless the claimant first presents the claim to the appropriate

federal agency and the claim is finally denied by the agency in writing and sent by certified or registered mail. If the agency fails to make a final disposition of the claim within six months after it is filed, the claimant may deem the claim denied.

Therefore, the claimant must first exhaust his administrative remedies as a prerequisite to the commencement of a civil action in tort. This jurisdictional prerequisite cannot be waived. In order for a claim to be valid, damages must be stated in an exact dollar amount. It is imperative

disability, if any, the prognosis and the period of hospitalization or incapacitation. Copies of itemized bills for medical, hospital or burial expenses actually incurred must be attached to the claim. A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Assuming you have filed the claim in proper form and with the proper agency, you will receive a letter from that agency stating: “therefore, your client’s administrative tort claim has been properly filed with this Department for the named health center and its involved employee(s).” Receipt of this letter is essential in the proper processing of the claim. Be certain that the agency has responded to the claim and has acknowledged that it was properly submitted.

As previously stated, once the claim is acknowledged to have been properly filed, should the agency fail to make a final disposition within six months of the filing, you may consider the claim denied and start suit. If, however, the claim is denied at any time after it is submitted, you *must* file suit within six months of the denial or your claim will be forever barred.

As an example, suppose your client received treatment at a community health care center or clinic. While your initial thought may be that the FTCA is inapplicable, the fact is that many such clinics are a qualified health center requiring notice.

Certain officers and employees of federally qualified health centers are also entitled to the procedures and protections afforded to federal employees under the FTCA. Specifically, under 42 U.S.C. 233(g)(1)(A), “any officer, governing

center will be deemed a federal employee.

If so, the government will file a “certification of scope of employment” in which the government concedes that the individual was acting within the scope of federal employment on the dates and times in question. With the filing of this certification, the lawsuit should name only the United States of America as the defendant, not the health care center and not the individual employee.

## State Lawsuits

There may be a situation in which a lawsuit against a health center not known to be a qualified health center, and/or an employee of that health center, is filed in state court since the claimant believes that the federal government is in no way involved in the business of the health care providers.

Subsequently, and after the two-year statute of limitations as to the notice provision, it may be discovered, for the first time, that, in fact, the defendants do qualify under the federal statutes. What is the claimant to do under these circumstances? The 1st Circuit Court of Appeals has held that a claim accrues under the FTCA “when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the factual basis for the cause of action.” Furthermore, “[t]he test for whether a plaintiff should have discovered necessary facts is an objective one.”

A determination as to when a cause of action accrues under this “discovery rule” involves a two-step inquiry. *Patterson v. United States*, 372 F. Supp. 2d 195, 200 (D. Mass. 2005). First, the court must determine “whether sufficient facts were available to provoke a reasonable person in the plaintiff’s circumstances to inquire or investigate further” with respect to the factual basis for the cause of action. Once this duty to investigate is established, the plaintiff is deemed to have knowledge of what she would have discovered through a reasonably diligent investigation.

Second, the court must determine “whether the plaintiff, if armed with the results of that investigation, would know enough to permit a reason-

**The claimant should submit a written report by the attending physician, showing the extent of injury, the nature of treatment, and the degree of permanent disability.**

able person to believe that she had been injured and that there is a causal connection between the government and her injury.” (Emphasis added.)

If a reasonable person would not believe that she had been injured and that there was a causal connection between the government and her injury, the plaintiff’s claim has not accrued under the FTCA. Obviously, these are fact-sensitive issues, and each case will be decided on its own merits. Therefore, it is even more important for the practitioner to be vigilant in its investigation and use the websites previously cited to determine the status of the health care provider.

The practitioner must be meticulous in processing any claim under the FTCA. Those involving medical malpractice with the added issue of identifying the health care provider as a federal employee can be tricky. Use care in determining the eligibility of the health care provider, and then prepare and file the processing documents to comply with the applicable rules. From that point on, the process is substantially the same as a state court case. ■

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## MEDICAL MALPRACTICE

man Services oversees programs for federally supported health care centers and is the proper agency for presentation of the claim.

The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2401(b), 2671–2680, is the exclusive remedy for claims against federal employees and qualified health centers. Under the provisions of the FTCA, an action may not be instituted upon a claim against the United States for money damages caused by the negligent act of any federal employee acting within the scope of his employment, unless the claimant first presents the claim to the appropriate

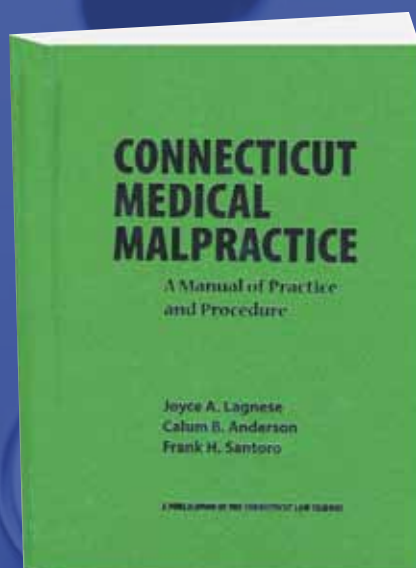
that the claim form be completed in as much detail as possible and include all medical documentation in support of the claim. The claim may be signed either by the claimant or a by duly authorized agent or legal representative, provided that satisfactory evidence is submitted with the claim, establishing an expressed authority to act on behalf of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his authority to present the claim.

In support of a claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent

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# Experts' Opinions Must Be Based On Facts

UNLIKE HUMPTY DUMPTY, WITNESSES CAN'T MAKE UNPROVED ASSERTION

By **PATRICK J. FILAN**

"I don't know what you mean by 'Glory,'" Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't – till I tell you. I meant there's a nice knock-down argument for you!" "But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean – neither more nor less."

—Lewis Carroll,  
"Alice's Adventures in Wonderland"

Were Humpty Dumpty an expert who offered such an opinion in a courtroom his opinion would likely be inadmissible "ipse dixit." *Ipse dixit* means "an assertion made but not proved." See *Klein v. Norwalk Hospital*, 299 Conn. 241 (2010), citing "General Electric Co. v.



Patrick J. Filan

Joiner, 522 U.S. 136, 137, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). "Nothing . . . requires a . . . court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."

In *Klein*, the defendant's expert offered an opinion that the plaintiff's injuries were not caused by the negligence alleged against the defendant. The opinion was based on a review of the plaintiff's medical records. The admissibility of the opinion was challenged unsuccessfully at a Porter hearing. The case was tried to a defense verdict and appealed.

The Connecticut Supreme Court reversed, noting that the defendant did not make the required showing under Porter that his methodology, a review of medical records, had been subjected to peer review or had a known rate of error for his chosen methodology, two of the Porter requirements. The Court went on to state that the absence of such evidence was "determinative of the inadequacy of the defendant's proof of the methodology's reliability."

Without evidence that a records review constituted a reliable methodology, the expert's opinion was nothing more than his *ipse dixit*, or an opinion like Humpty Dumpty's: "It means just what I choose it to mean — neither more nor less."

A factual basis for an expert's opinion has long been required. See *Wallace v. Saint Francis Hospital and Medical Center*, 44 Conn.App. 257 688 A.2d 352, (1997). In the same case, the court stated that the facts upon which an expert's opinion is based are an important consideration in determining the admissibility of his opinion. "Just because someone has a medical degree or is board-certified . . . that does not authorize him to testify about a theory that is not based on a solid foundation." *Clarke v. Schofield*, 632 F. Supp. 2d 1350, 1355 (2009). Facts assumed in a hypothetical question must have their basis in the evidence on the record. *Wallace, supra*.

Patrick J. Filan has offices in Fairfield, Connecticut and White Plains, N.Y. His practice focuses on personal injury cases, including wrongful death, medical malpractice, car and truck accidents, and products liability. You can learn more about him at [www.filan-law.com](http://www.filan-law.com).

An *ipse dixit* opinion even from a well-credentialed may also be inadmissible because it is not helpful to a jury in rendering a verdict. Connecticut Code of Evidence section 7-2 provides that a witness "qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion . . . if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue."

An expert who expresses an *ipse dixit*-type opinion is not offering testimony that will assist a jury or fact finder in understanding the evidence or rendering a decision. All that jury is hearing is an unsubstantiated opinion that has no factual basis in the record and is devoid

of a reliable method by which the opinion was reached. Expert testimony "will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments." See *Clarke v. Schofield*, 632 F. Supp. 2d 1350, 1355 (2009).

Expert opinions are admissible and helpful to a jury when there is a factual basis in the record for the opinion and where the methodology by which the opinion was reached is reliable and passes muster under Porter. The *ipse dixit* of a credentialed witness is not helpful to the jury and is not based on a reliable methodology.

In challenging an expert's seemingly conclusory *ipse dixit* opinion at a Porter hearing and on

- cross-examination some things to look for are:
- Is the opinion based upon a solid evidentiary and factual foundation?
  - Does the opinion ignore important facts in the record?
  - Are facts that are not helpful to the expert's opinion explained away in some coherent, scientific fashion?
  - If unhelpful facts are not addressed and dealt with coherently, the opinion becomes more and more inadmissible *ipse dixit*.
  - Has the expert articulated and explained the method by which he arrived at his opinion?

■ Continued on **PAGE 24**

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# Proposed Laws: Deceptive In Appeal, Destructive In Effect

BILLS THAT WOULD LIMIT MALPRACTICE AWARDS RUN AFOUL OF CONSTITUTION

By PAUL EDWARDS

Currently in Washington, D.C., both houses of Congress are considering bills that seek to destroy the fundamental constitutional concepts of federalism and right to a trial by jury. All in the name of allegedly saving a few bucks.

Senate Bill 197, the Medical Care Access Protection Act of 2011 (MCAP), and House Resolution 5, the Help Efficient, Accessible, Low-cost, Timely Healthcare Act of 2011 (HEALTH), both seek to severely restrict compensation for non-economic damages and the payment of attorney contingency fees. Both bills should be rejected. Neither bill does a single thing to protect patients or reduce the unacceptably high number of deaths or maiming due to medical error each year. Neither bill will serve its stated purpose of providing "improved medical care by reducing the excessive burden the liability system places on the health care delivery system."



Perhaps most importantly, however, both bills strike at the very fundamental principles of federalism and the protections and sanctity of civil liberty for which our forefathers fought with their lives.

Senate Bill 197 proposes to limit compensation for all non-economic harms and losses to \$250,000 from any one health care provider, but no more than \$500,000 from multiple health care institutions or providers. House Resolution 5 would limit compensation for all non-economic harms and losses at \$250,000. Both bills also seek to restrict the payment of attorney contingency fees (the typical fee structure utilized by medical malpractice victims who otherwise lack the financial resources to pursue compensation through the civil justice system), essentially limiting the contingency fee to 15 percent for any recovery over \$600,000.

Neither bill, on the other hand, imposes any limits on the amount of money that a health care provider or its insurer can pay its attorneys to protect their financial interests.

At the same time these legislative proposals attempt to destroy the right and ability of medical malpractice victims to be fully compensated for their injuries and losses, the bills do *nothing* to prevent or reduce the shockingly high incidence rate of death and maiming due to preventable medical errors. The Institute of Medicine's leading study on preventable medical errors has estimated that as many as 98,000 people die every year as a consequence of preventable medical errors. If the Centers for Disease Control were to include preventable medical errors as a category, the Institute of Medicine's findings would make preventable medical errors the sixth leading cause of death in America.

As noted legal scholar Tom Baker, from the University of Pennsylvania Law School, has pronounced in his 2005 book "The Medical

Malpractice Myth:" "We have an epidemic of medical malpractice, not of malpractice lawsuits." Whose interests are the proponents of these bills really protecting? The interests of all Americans to receive safe medical care, or the interests of others, including insurers and their lobbyists, to maximize profits?

Neither bill will improve the health care delivery system by decreasing costs. In 2004, the Congressional Budget Office calculated that malpractice costs amounted to "less than 2 percent of overall health care spending." Thus, according to the CBO, "even a reduction of 25 percent to 30 percent in malpractice costs would lower health care costs by only about 0.4 to 0.5 percent, and the likely effect on health insurance premiums would be comparably small."

## 'Defensive Medicine'

Proponents of the bills in question would argue that the 2004 CBO numbers did not take into account the indirect costs of medical mal-

practice litigation attributable to extra tests ordered by physicians to avoid legal liability, also known as "defensive medicine." When the CBO re-visited this issue in 2009 and attempted to account for indirect costs, it again concluded that tort reform including damage caps and restrictions on attorney contingency fees would only save 0.5 percent of all health costs. The CBO has also concluded that "savings from reducing defensive medicine would be very small."

Moreover, the proponents of these bills fail to acknowledge that the GAO identified "revenue-enhancing motives" as one of the real reasons behind the utilization of extra diagnostic tests and procedures. Finally, just last month the Cato Institute published the results of a study by Shirley Svorny, an adjunct professor at the Cato Institute and a professor of economics at California State University — Northridge. Ms. Svorny's research on this topic produced the following conclusion: "Reducing physician liability for negligent care by capping court awards, all else equal, will reduce the resources allocated to medical professional liability underwriting and oversight and make many patients worse off. Legislators who see mandatory liability caps as a cost-containment tool should look elsewhere."

Beyond the flawed premises underlying these bills, they also raise compelling issues of constitutional dimension. Proponents of these tort reform efforts trash the concept of federalism embodied in the 10<sup>th</sup> Amendment to the U.S. Constitution. James Madison, known as the Father of the Constitution, explained the concept of federalism as follows: "The powers delegated to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, [such] as war, peace, negotiation, and foreign commerce. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people."

This principle was embodied in the 10<sup>th</sup> Amendment, which provides: "The powers not

delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

These concepts explain why the proponents of the federal tort reform bills torture the Commerce Clause in a shameless effort to establish a constitutional authority for what is otherwise an undeniable slap in the face to states and the principles of federalism that Madison and his peers deemed so critically important.

This is precisely why Virginia Attorney General Ken Cuccinelli has promised to immediately file suit to block federal tort reform legislation if it were ever enacted into law. Cuccinelli struck at the heart of the hypocrisy of the conservative Republican sponsors of these bills when he recently stated in a *Washington Post* Op-Ed piece:

"Senate Bill 197 takes an approach that implies 'Washington knows best' while trampling states' authority and the 10th Amendment. The legislation is breathtakingly broad in its assumptions about federal power, particularly the same power to regulate commerce that lies at the heart of all the lawsuits (including Virginia's) against the individual mandate of the 2010 federal health-care law. I have little doubt that the senators who brought us S. 197 oppose the use of the commerce clause to compel individuals to buy health insurance. Yet they have no qualms about dictating to state court judges how they are to conduct trials in state lawsuits. How does this sort of constitutional disconnect happen?"

## Slap At Juries

In addition to Cuccinelli's 10<sup>th</sup> Amendment concerns, however, is the utter disregard for the 7<sup>th</sup> Amendment also embodied in these proposed bills. The 7<sup>th</sup> Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Justice Hugo Black once observed: "The founders of our government thought that trial by civil jury was an essential bulwark of civil liberty."

## From EXPERTS' on PAGE 23

- Is the expert's methodology reliable under the *Porter* criteria? That is, has the methodology been tested; subjected to peer review; does it have a known or potential rate of error? Has it garnered general acceptance in the relevant scientific community?
- Are there flaws in the expert's reasoning that make reliance on the opinion unreasonable and render the conclusions of doubtful validity?
- Is there an "analytical gap" between the data relied on and the opinion offered?

## Conclusion

The subjective opinion of even a well-credentialed expert who is unable to present and explain the evidence he relies on and



Paul Edwards

As I write this piece, a jury is hearing evidence in the death penalty phase of a notorious criminal trial in the courthouse around the block. It is incredible, in the true meaning of the word, to consider that we will trust a jury of our peers to decide the fate of the life of one of our citizens in the heat of the passion and sympathy necessarily evoked by the most heinous of crimes, yet the proponents of these bills would have us believe that juries of men and women from our local communities are intellectually and emotionally incapable of making a fair, reasoned and evidence-based decision about the amount of money necessary to compensate the victim of medical malpractice for all of the resulting losses proven in court.

It is the ability of individual citizens to hold fully accountable those who are negligent for all losses and harms caused that is the motivational driving force for safety, caution and prudence in the way we conduct our daily affairs, even in the health care setting.

It isn't enough that the health care profession has a national databank of information about negligent doctors that is not shared with the public so that we can protect the doctors and not the patients? It isn't enough that the health care profession has the "peer review privilege" that prevents discovery of internal root cause analyses or the results of internal investigations of medical errors that might provide frank and honest assessments of medical conduct?

It isn't enough that simply to be granted permission to sue a health care provider in this state an injured malpractice victim must pay several thousand dollars to a physician just to get a report that serves as a functional equivalent of the key to the courthouse's locked front door (a lock that does not apply to other negligence injury victims), and then has to pay tens of thousands more to physician experts just to prove his/her case in court?

It isn't enough that we require medical malpractice victims to prove their claims via the testimony of physicians in the same medical specialty while at the same time we permit the professional boards of those medical specialties to threaten, harass, intimidate and sanction those among its ranks who would dare to speak out against a colleague?

Has anyone ever stopped to consider that perhaps all of these privileges and protections already afforded to the health care industry are primary reasons for the alarming 98,000 annual deaths and untold number of maimings that result from preventable medical errors? Let's stop legislating more protections for the health care industry and start doing something constructive about reducing the number of deaths and maimings due to preventable medical errors. ■

cannot point to a reliable methodology he utilized in reaching his opinion is expressing an *ipse dixit* opinion that should not be admissible.

When confronted with *ipse dixit* expert opinions, lawyers should be like Alice, who challenged Humpty Dumpty, "The question is whether you can make words mean many different things." The *ipse dixit* expert would have it as Humpty Dumpty, who replied, "The question is which is to be master — that is all." The rules of evidence do not permit unsubstantiated conclusory opinions even from well-credentialed experts. Expert opinions must be based on the evidence and a reliable methodology by which the opinion was reached. Unsupported conclusions which ignore the evidence and resemble a closing argument should not be admitted. ■