

Law for Medical Students and Physicians: Expert Witness Wheaton B. Wood, MD, JD Athens, Ohio

I. Learning Objectives

By the end of the learning session, the student will:

- 1) Know the difference between an expert and a fact witness;
- 2) Know when an expert is needed in medical malpractice and in certain other medical cases;
- 3) Know who can testify as to the standard of care for physicians;
- 4) Know what items are privileged and cannot be discovered before trial.

II. Pre-Lecture Test Questions: True or False?

- 1) Anything that is relevant and not privileged is discoverable.
- 2) Discovery is the process of getting information from the other side in a lawsuit, before trial.
- 3) If you do not co-operate in a discovery request by your opponent, that which you hid shall be unavailable to you at trial.
- 4) Doctor – patient records are privileged without exception.
- 5) An expert witness can only testify as to what is already in evidence.
- 6) If you cannot find at least one expert witness, who is a physician in active practice at least half the time, then you cannot bring a medical malpractice case in Ohio.

III. Expert Witnesses

This lecture is the fifteenth of eighteen over two years, but is the third of four to deal with evidence. “Why is evidence so important,” you ask. One reason is, that it is evidence that you are manufacturing when you order lab tests, when you write notes in the chart, and when you do other tasks of your daily life. The other reason is, that this is how things are known in a lawsuit, and so if you understand this subject, you will understand how your work is presented in a lawsuit.

This lecture is all about expert witnesses, or people who have special knowledge who can explain something to the fact finder. The fact finder is either the jury, or the judge in a case which has no jury. Most medical malpractice cases have juries; but most workers’ compensation cases do not. Medical licensure disciplinary actions generally do not have juries. In each case the fact finder is: the jury in the malpractice case; the administrative board in the workers’ compensation or licensure cases.

Rule 601 and 602 governs witnesses in general. A fact witness is someone who has seen or experienced something, and can tell the fact finder about it. There are rules of evidence, and in Ohio (Ohio Rules of Court – Rules of Evidence www.sconet.state.oh.us) and in the federal courts, these rules are quite similar, and have numbers. In New York, they are quite different from the Ohio rules, but still are know by their numbers. New York State Consolidated Laws: Civil Practice Law and Rules Article 31 <http://caselaw.lp.findlaw.com/nycodes/c16/a28.html> .

In general, anyone who has the capacity to remember, and knows that lying is bad, can be a witness.

Ohio Evid. R. 601: “Every person is competent to be a witness except: (A) Those of unsound mind, children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly; (B) a spouse testifying against the other spouse *{with two exceptions}*”; “and two other special classifications of people in certain circumstances.

Ohio R. Evid. 602 states that a witness may not testify to something unless he has personal knowledge of the matter.

As medical malpractices cases have become a concern in Ohio, your medical association has gotten a special rule passed in this state, **Ohio R. Evid. 601 (D)**, which states that, as to the standard of care to which a physician, podiatrist, or hospital must adhere; only a physician or podiatrist in active practice at least 50% of the time may testify as to that standard. This is to prevent academics and ivory-tower Ph. D.’s from testifying to unrealistic practice standards which they wish were true, but in fact which no one adheres to. This excellent rule is unique to Ohio, as far as I know.

Rule 702 describes expert witnesses. Expert witnesses are different. They may testify to technical or scientific things, they may testify as to their opinions, and they may even testify about things they have not personally witnessed, if experts like them typically use such information in formulating their opinions.

“A witness may testify as an expert if all of the following apply: (A) The witness’ testimony either relates to matters beyond the knowledge or experience possessed by lay persons, or dispels a misconception common among laypersons; (B) the witness is qualified as an expert by specialized knowledge, skill, experience, training or education regarding the subject matter of the testimony; {and} (C) The witness’ testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable

only if all of the following apply: (1) The theory upon which the procedure , test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge , facts, or principles; (2) the design of the procedure, test, or experiment reliably implements the theory; (3) the particular procedure, test, or experiment was conducted in a way that will yield an accurate result.”

Can you have an expert come into court to say that ice cream is sweet? No, everyone knows that.

Can you have an expert come into court and testify how the sugar in ice cream is perceived as sweet by the brain? Yes, that requires special knowledge beyond the ken of the average juror.

A word about jury selection:

The jury is the fact finder about whom you have the most trepidation, for it is they who will say whether you have negligently departed from the standard of care, and injured your patient by that departure. Juries are a very ancient invention of English (and Norse) law, and represent the common sense of the people. The jury is acting as the common sense of the government in a law suit; and it is they the lawyers and experts seek to convince.

It is not acceptable to discriminate in choosing a jury by race (*Batson v. Kentucky* 476 U.S. 79 (1986)) or by sex; and possibly not by excluding any protected minority.

Juries should not be biased, so that jury members with a relationship with the defendant, such as being a current patient of that defendant, must be excluded from the jury for cause¹. *McGarry v. Horlacher* (2002) 149 Ohio App. 3d 33 (2nd).

It may not be necessary to exclude jurors from a medical malpractice case just because they are a doctor or a lawyer; nor just because they were a patient in the past of one of the defendants. *Hinkle v. Cleveland Clinic Found.* 2004-Ohio-6853 (8th).

Rule 702 and rule 601 differ in certain important ways. So you see that an expert is not allowed in every case, but only where the subject matter is outside the ken of the average juror, and where an expert could help the fact finder to understand some technical matter. Also, experts must be qualified, whereas any sane adult can be a witness. Lastly, experts can give opinions and also use information which they have not seen themselves in making these opinions.

¹ Each lawyer in a case has both a limited number of peremptory strikes – to get rid of a juror for whatever reason (except race or sex) -- and an unlimited number of strikes “for cause” (if they can convince the judge).

IV. When do you Need and Expert Witness?

Medical malpractice: As you remember, a medical malpractice case is a negligence case against a physician or a podiatrist or a dentist which says that a) there was a doctor patient relationship; b) this relationship demanded a standard of care; c) the defendant doctor negligently departed from that standard of care; and d) that departure injured the plaintiff. Each of those points must be proved by an expert, with the exception that usually the doctor-patient relationship is plain and does not require expert proof.

Doctor –patient relationship. As we discussed last month, it is not always clear when a doctor-patient relationship exists. Examples of academic or teaching hospitals have said that the fact that a physician was under contract to supervise residents makes him have a doctor-patient relationship with the patient, even if the doctor has never seen the patient. *Lownsbury v. Van Buren* (2002), 94 Ohio St. 3d 231. In *Lownsbury*, an attending was waiting to be called, but had not met the patient but was deemed to be in attendance.

Standard of care and departure therefrom. It is absolutely required that a plaintiff proffer expert opinion to show what the standard of care is, and that the defendant physician departed from that. For instance, in a case in which an orthopedist put the wrong sized plate on a knee replacement, and did not put forward expert testimony to show he was not negligent, he lost the case without ever going to trial. *Vaught v. Cleveland Clinic Found.* (2003) 98 Ohio St. 3d 485. Or, on the other hand, a plaintiff claiming damages from an unnecessary colostomy lost his case before ever going to trial because he did not supply an expert witness to show that the defendant doctor departed from the relevant standard of care. *Jones v. Hartranft* (1997), 78 Ohio St. 3d 378. In one case, where a woman bore twins, and then noticed a foul vaginal odor, went back to the doctor and had a sponge removed, then sued (too late, as it turned out) for a foreign object being left inside her; the plaintiff woman lost, because she alleged she had an infection, but did not supply expert testimony that she had an infection. *Prysock v. Bahner* 2004-Ohio-3381. In another interesting case, a man had melanoma, and by traditional (histologic) staging it had not metastasized. The patient's doctor wanted him to be in a trial for PCR sentinel node staging, and so half of the nodes were sent to California for PCR. Unfortunately, the package melted and the nodes were lost, so the man never knew if he was really clean of melanoma by the PCR/sentinel node method. *Dobran v. Franciscan Medical Center* (2004) 102 Ohio St. 3d 54. The man sued for the uncertainty he suffered but the court threw his suit out of court for two reasons: 1) you cannot sue someone, even if they made a mistake, where they did no new physical harm to you; and 2) the defendant proved by expert witnesses that he had met the prevailing standard of care (standard histological evaluation of stage). Since

the plaintiff had no evidence that defendant had not met the current standard, he had no case.²

And, for nurses, the requirement is the same: to prove the nursing standard of care (basically, to inform the doctor timely and accurately) nurse expertise is required. *Ramage v. Central Ohio Emergency Serv., Inc.* (1992), 64 Ohio St. 3d 97. *Berdyck v. Shinde* (1993), 66 Ohio St. 3d 573. Why would someone want to sue a nurse? Answer: 1) the hospital employs the nurse, so this is a way of suing the hospital; and 2) the hospital commits ordinary negligence, not medical malpractice, and negligence has a longer statute of limitations than medical malpractice. That's why. Aren't you glad you asked?

Sometimes, there is more than one way to meet the standard of care, and the professional judgment rule states that following either method correctly meets the standard. In a case where a depressed woman went home from a psychiatric hospital and poisoned her baby, no negligence was found because the psychiatrist considered dangerousness in an acceptable manner, one of several available. *Littleton v. Good Samaritan Hospital & Health Center* (1988), 39 Ohio St. 3d 86. In another case, however, a pediatric neurologist failed to diagnose vitamin B-6 deficiency *status epilepticus* such that the infant was brain damaged when the seizures were not stopped by giving B-6. *Pesek v. Univ. Neurologists Assn., Inc.* (2000) 87 Ohio St. 3d 495. On appeal, the defendants said it wasn't fair (it was *reversible error*) not to instruct the jury on professional judgement (or, differing methods). The defendant had treated *status epilepticus* in one of several acceptable ways. No, said the appeals court, there was evidence of only one correct treatment, which was to give B-6.³

An exception to the need for an expert to show a lapse from the standard of care is where a foreign object is found in the patient after surgery. In that case, no expert is needed to show that a foreign object is not supposed to be there. *Prysock v. Bahner* 2004-Ohio-3381.

The final point in all of this is critical: if the evidence is exactly equal (plaintiff's and defendant's evidence is equally convincing) the defendant wins, because the plaintiff has the burden of proof, and must make his case to 50%, and then just a smidgeon more. *Martin v. St. Vincent's Med. Ctr.* (2001), 142 Ohio App. 3d 347

² The *Dobran* case keys off an interesting line of cases, arising out of *Heiner v. Moretuzzo* (1995) 73 Ohio St. 3d 80, where a person was, perhaps negligently, told they were HIV positive; sued for emotional distress; and were barred because the thing they feared (HIV positivity) did not exist (they weren't positive).

³ The dissent made a good point: no one knew it was B-6 deficiency; and so, since plaintiff did not prove that failure to diagnose that was negligent, but rather that the treatment of what turned out to be B-6 deficiency seizures was what was complained of, in fact the defendant was right: given what they knew as they went into the case (that the child was in *status epilepticus*) the treatment (anticonvulsants) was one of several appropriate different methods.

(6th). (Hole in trachea after cardiac vascular surgery). *Perla v. Cleveland Clinic Found.*, 2004-Ohio-2156 (8th) (hematoma after disc surgery leads to paralysis).

Causation of injury: The plaintiff must prove that the alleged departure from the standard of care actually caused the plaintiff's injury. In fact. The plaintiff (except in one circumstance) must prove that the defendant's action was 50+% likely to have caused the injury (meaning, 50% plus a smidgeon). Once again, of course, if the proofs are exactly equal (50% chance of causation and no more) defendant wins (except in one circumstance). *Perla v. Cleveland Clinic Found.*, 2004-Ohio-2156 (8th). *Martin v. St. Vincent's Med. Ctr.* (2001), 142 Ohio App. 3d 347 (6th).

Usually a medical expert must opine that it is 50% + likely that the defendant doctor's mistake caused the plaintiff's injury. This is called "reasonable medical certainty". If it is only 50% and no more likely, then defendant would win on failure to prove causation. An excellent case on causation is *Hinkle v. Cleveland Clinic Found.*, 2004-Ohio-6853 (8th) . In fact, the legal point of that case is otherwise, and it is cited below, but the fact pattern is a good example of complex causation issues. In that case, a young mother of two had a cerebral vascular accident, lost consciousness, was taken first to one hospital, then to another, where she had neurosurgery, and her life was saved; but vasospasm set, and despite use of hypertension/anticoagulation/hypervolemia the brain swelled, and despite hemi-craniectomy, the patient died. The plaintiff argued that the therapy to prevent the vasospasm was not done right, and that is why patient died. No one argued that the CVA could have been prevented, no one argued about the transfer from the secondary to the tertiary care center; no one argued that the surgery was negligent. So you see, the causation argument becomes exceedingly focused, and complicated, just as medicine really is. In that case, the jury felt the post-operative care met the standard, and the plaintiff lost the case.

A non-clinical physician or a non-physician scientist may be called to prove causation of the injury, whereas in Ohio under Evid. R. 601 (D), only a physician in active practice 50% of the time or more may testify as to the standard of care. *Shilling v. Mobile Analytical Services, Inc.* (1992), 65 Ohio St. 3d 252. In that case, a neurotoxicologist testified as to the likelihood of gasoline in the water supply causing brain damage. However, the Ohio courts are gatekeepers, to evaluate the expert and his proposed science before trial, as under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) as codified in Ohio in Evidence Rule 702 (C).

Sometimes, no one can figure out what caused the injury, but somebody must have done something wrong, or the patient would not be injured. This type of case uses a "trick" or shortcut of evidence called *res ipsa loquitur*, whereby the argument goes: "something bad happened; this type of bad thing does not

happen unless someone was at fault; it happened while the patient (or the property) was under the defendant's control; therefore the defendant is liable." An interesting case in which *res ipsa* was not pleaded but probably should have been, is *Martin v. St. Vincent's Med. Ctr.* (2001), 142 Ohio App. 3d 347 (6th). In that case, a man had coronary artery bypass surgery, and went into the operating room with an intact trachea, but came out of it with a hole in his trachea. Unfortunately, this hole became infected, the patient became septic from the infection, and he died. The evidence was inconclusive as to how the hole got there: the defendants met each of the plaintiff's assertions of how the hole happened, and defeated them. In this case, therefore, the plaintiff lost.

The exception to the 50% rule is when someone is already sick, and something the doctor does negligently reduces his chance of survival. This is the "loss of chance" doctrine as enunciated in *Roberts v. Ohio Permanente Med. Group, Inc* (1996), 76 Ohio St. 3d 483. In that case, it was determined that a late diagnosis of cancer reduced the plaintiff's chance of survival from 28% to 15%, and the doctor who made the late diagnosis was liable for the total value of the patient's loss due to the cancer, times (0.28 – 0.15). But you can see that in fact the theory is still the same: the doctor's negligence was said to be more likely than not to have caused the drop in plaintiff's chance of survival (not the fact that he had a fatal disease).

Economic expert: A big part of negligence cases is proving the value of the injury which the plaintiff is said to have caused. The jury sometimes awards too low damages amount and is reversed on appeal (*Pena* case cited last month) or the reverse; but in general an economic expert is needed to prove the value of a case. An interesting case wherein an economic expert was barred from testifying in a *Daubert* hearing before trial is *McGarry v. Horlacher* (2002) 149 Ohio App. 3d 33 (2nd). In that case the field of "hedonic losses" was held to be too speculative for presentation, and the exclusion was upheld on appeal.

Informed consent: In an informed consent case, under the elements as elucidated in *Nickell v. Gonzalez*, people were not sure if an expert was required to show the standard of care, that is what should have been disclosed. You remember from September's lecture that to show a prima facie case in negligent failure to obtain informed consent, the plaintiff must prove: a) the doctor did not inform a patient of a certain risk; b) the standard of care was such that the doctor should have informed the patient of this risk; c) this risk eventuated; and d) an ordinary patient in the plaintiff's situation would have elected not to have the treatment had they known of this risk.

What should have been disclosed: In *Badger v. McGregor*, 2004-Ohio-4036 (10th) this issue may have been resolved. A patient had a car accident in West Virginia, and ended up in Columbus with both a brachial plexus injury, and a spinal infection. The neurosurgeon consulted with an expert in infectious disease, and order gentamycin, but in a higher dose than the consultant

suggested, and kept it going longer than the consultant suggested. Predictably, the patient ended up with a vestibular syndrome, and sued for negligent failure of informed consent. Two interesting points emerged from that case. First, the attending has a duty to see that informed consent is obtained for each medicine or procedure, even where multiple consultants are used in the case. (What about multiple consultants who write orders on the case?). Second, an expert is required to prove the standard of care, that is, what risks should have been revealed and discussed.

Workers' compensation: For almost 100 years now, states and the federal government have encouraged a sort of compromise in workplace injuries: if the employer will buy workers' compensation insurance, then the only remedy for the injured worker will be through the board that administers that insurance (eliminating multiple costly private lawsuits). Social Security disability determination is a kind of general compensation insurance offered by the federal government to people who are disabled (whether in a work context or not). You will be signing many social security, Ohio Jobs and Family Services, and private insurance disability forms in your career, and will be acting as an expert witness each time you sign one of these, giving your opinion as to whether the patient is disabled. IN fact, a sick excuse from work is a type of disability form, and has the evidentiary weight of the above cited evidence.

As you are pressured by patients to sign these, you must be sure that everything which you allege is something you would be comfortable testifying about, as an expert, in open court. You must not be swayed by the patient's or employer's pressure, because you are responsible for what you certify. An example of an expert certifying non-disability after an inadequate examination is found in *Willitzer v. McCloud* (1983), 6 Ohio St. 3d 447. Just think to yourself, before you certify: "would I be comfortable testifying to what I am about to certify in open court, with my most respected attending as an expert disagreeing with me? "

Most often, the defendant must pay the fee of the plaintiff's expert, (*Moore v. General Motors Corp.* (1985) ,18 Ohio St. 3d 259) and so this type of testimony can pay well. But it must be truthful, and you must be prepared to defend what you have said.

The board or hearing officer hearing a disability or workers' compensation case is not required to believe your expert: they make their own determination, and weigh your proffered expert as they see fit. This evaluation is not subject to reversal unless done in a manner abusive of discretion. *State ex rel. Thomas v. Pub. Emp. Retirement Sys. Of Ohio, 2004-Ohio-1403 (10th)*. .

Board of Medicine disciplinary actions: If you should be charged in a board of medicine investigation, you should retain an attorney. However, it is clear that the board may disregard any expert you retain to prove that you are blameless, and that indeed the board can act as its own expert *Pons v. Ohio State Medical*

Board (1993) 66 Ohio St. 3d 619. Some states, such as New York, hire an expert in the field of the accused physician to advise them ; in Ohio, this appears not to be required.

V. How is an Expert Witness Proffered?

Before trial: Most of the work in a lawsuit occurs before the trial and much of that work is something called discovery. The modern idea in discovery is that everything should be found out freely, then sifted through, then parts of that discovery (those parts which constitute proper evidence) should be presented to the fact finder, who will decide what really happened. In Ohio you must tell your opponent who your expert will be and each point that the expert will be used to prove. Both sides must do this at a certain date before the trial, or they will not be allowed to use their expert. And remember, for a medical malpractice or informed consent case, no expert means You Lose!

Name and qualifications of expert and expert report. The name of your expert, his qualifications, and his report as to what he shall be testifying about are required. *Jones v. Hartranft* (1997), 78 Ohio St. 3d 378. In New York, the name may not be disclosed, and only certain qualifications need be stated; and a report is not required. CPLR 3101 (D). In Federal Court, the situation is closely approximated to that in Ohio.

If expert is defendant physician, report may not be necessary: Sometimes, either because the defendant is a good expert, or because what the defendant did is so obviously wrong that he can't get another expert, the defendant acts as an expert in his own defense. If you expect to be an expert in your own case in Ohio, some courts do not require a report before hand, reasoning that the medical record itself is your report. You should not rely on this, however. As *Vaught v. Cleveland Clinic Found.* (2003) 98 Ohio St. 3d 485 tells us, the failure to disclose the defendant's expected role as an expert can lead to his preclusion. IN that case, a surgeon put the wrong sized plate on a patient's knee; they had pain; he did another surgery (leaving the plate); they still had pain; another surgeon put in the right size plate, and all the pain went away except the pain from the second surgery by the first doctor. No one seemed to want to testify for doctor number one, so he was his own expert; but his attorney did not announce this in discovery. He lost the case before ever going to trial. **Question:** Might this result in a legal malpractice case?

If treating physician who is not a defendant is to be called: Sometimes, a treating physician but who is not a party is called as a witness. In *Fidelholtz v. Peller* (1998) 81 Ohio St. 3d 197, a woman came to her doctor with a mass on her leg. The doctor biopsied the mass, and sent the sample to pathologist #1.

Pathologist #1 saw rare mitotic figures on slide #4; asked for recuts, and sent the recuts to pathologist #2. Pathologist # 2 said the mass was benign. It was not, and the lady had to have her leg removed two years later. Plaintiff claimed and proved that, had the malignancy been diagnosed earlier, the leg would probably have stayed on. Pathologist #2 settled for \$125,000, and then joined plaintiff's side to secure a plaintiff's award for 250,000 (which could not be discounted for the 125,000 settlement see below). On the one hand, this case kind of stinks; but on the other, pathologist # 2 would have to be qualified as an expert and would not be allowed to testify to any treatment impressions she had which from her treatment of the patient but which were not in the record (i.e., notes to herself, saying, "gee, hard case! Check such and such out.") *Moore v. Grandview Hospital* (1986), 25 Ohio St. 3d 194.

Privileges from discovery. Some things cannot be discovered. Last year I told you that **incident reports** could not be discovered unless there was no mention of the incident in the medical record. That case (*Cooper v. Sisters of Charity*) has been overruled by *De Paul v. St. Elizabeth Health Ctr.* 2004-Ohio-4992 (7th), such that incident reports are absolutely privileged.⁴

Medical records: general: Privileged unless the plaintiff puts them in issue. Psychiatric records are privileged unless specifically put in issue. In Ohio there is a psychotherapist-patient privilege (ORC 4732.19) which would protect psychotherapy communications from discovery, unless the psychiatric condition was put in issue (following *Jaffee, Special Administrator for Allen, Deceased v. Redmond* ___ U.S. ___ (1996); but if such psychological evaluation is court ordered, the records are not privileged for purposes of the cases in which the evaluation was ordered *In re Jones* (2003) 99 Ohio St. 3d 203.

Lawyer work product: The notes and theories of the lawyer as he prepares for trial are privileged unless he shows them to you for help in preparing your expert deposition or testimony.

What if you don't co-operate with discovery? The basic penalty for failure to freely give non-privileged information requested by the other side is that you can't use that information or expert at trial yourself. For instance, in *Nakoff v. Fairview Gen. Hosp.* (1996) 75 Ohio St. 3d 254, a surgeon who failed to comply with discovery lost his expert and suffered a 2.5 million dollar verdict as a result. But the penalty may be greater. An orthopedic surgeon who gained about 40% of his income from being an expert witness intentionally destroyed his records after one year to thwart discovery by his opponents. This resulted in criminal contempt charges, which resulted in an investigation into and action against his medical license. *State ex rel. Corn v. Russo* (2001) 90 Ohio St. 3d 551.

Immune from liability: This point is a little astray of the main point of this chapter but is worth repeating at this time. Remember, that if you have a

⁴ See *Ware* where attorney client privilege was also an issue.

statutory duty to report something (like suspected child abuse *Criswell v. Brentwood Hospital* (1989) 49 Ohio App. 3d 163; or the risk that a psychiatric patient will harm someone ORC 2305.51 (Duty to warn)) then you are immune from suit if you reveal such medical information in compliance with the statute.

VI. How is an Expert Witness Attacked?

Exclusion of expert from case: You want to keep the other side from even putting their experts on because, in medical malpractice or informed consent cases, that will sink their ship before it ever leaves port. There are four main ways to do that:

- a) **Procedural: non-compliance with discovery requirements:**
- b) **Daubert hearing (scientific incompetence).**
- c) **No Clinical Competence (601 (D))**
- d) **Wrong expert (not relevant under 401).**

Exclusion of expert from courtroom during trial while other witnesses testify: Under rule 615 (A) one witness cannot sit in the court room and listen to the other witnesses. If they could, can you imagine how similar the story each told would be? There would be little chance to trip up witnesses who lied. However, under 615 (B) there is an exception: in general an expert witness may hear the other witnesses, and also an expert who is necessary to the trying of the case (which must be approved beforehand by the judge) may sit throughout the case in the court room. *Hinkle v. Cleveland Clinic Found*, 2004-Ohio-6853 (8th).

Some topics are deemed irrelevant, either by statute or before the trial, and you are not allowed to talk about them. The classic topic deemed irrelevant by statute is the existence of insurance coverage for liability due to negligence of an issue in the case. If the insurance is brought up, it is felt, the jury will be less careful with their awards. This is codified by Evid. R 411.

Under the collateral source rule (*Pryor v. Webber* (1970), 23 Ohio St. 2d 104), some money, that the patient gets because they were injured, but which they paid for, such as social security, workers' compensation (*Savage v. Correlated Health Services Ltd.* (1992), 64 Ohio St. 3d 42), privately purchased disability insurance, and settlements from someone not deemed liable in tort (*Fidelholtz v. Peller* (1998) 81 Ohio St. 3d 197) cannot be mentioned; these sources of money cannot even be offset against the verdict of the plaintiff, to reduce it. Is this fair?

Attack credibility: Finally, this is what you need to do once the expert is in the trial. You must make them look bad or silly or dumb. We shall devote a whole session next month to the actual techniques of questioning experts, so you become more comfortable with this procedure. For now, there are a few rules which you should know.

Bias: If you can show that the expert is biased, you may be able to use otherwise forbidden information to attack that expert for his bias. The hottest area in Ohio tort law seems to be getting malpractice insurance into evidence in order to attack the bias of an expert. In *Ede v. Atrium S. OB-GYN, Inc.* (1994) , 71 Ohio St. 3d 124, a gynecological malpractice case, the defendant's expert was insured by the same medical malpractice insurance company as the defendant; the plaintiff was allowed to bring up the fact of this insurance, since the unity of insurance coverage was said to bias the expert. In *Davis v. Immediate Medical Serv.* (1997) 80 Ohio St. 3d 10 the defendant's expert and the co-defendants had the same medical malpractice insurance, and the judge allowed plaintiff to discuss the fact of this insurance under the bias argument.

Impeach with prior statements or learned treatises: It would be nice if you could quote previous testimony of the opposing expert which contradicts his testimony in this case. You may do this, if you find previous articles which he wrote; but if the defendant writes articles, you may not impeach him with them, unless you show he is relying on them in this case. *Stinson v. England* (1994) 69 Ohio St. 3d 451. No "magic words" are needed to show that the expert relied on a treatise (*Freshwater v. Scheidt* (1999) 86 Ohio St. 3d 260) such as that he finds it "authoritative" or that he "relied" on it; this can be shown from the testimony, in Ohio. It appears that, once your expert has been impeached (by seeming to have contradicted some treatise which he has found authoritative) you probably can rehabilitate that expert with the same learned treatise. *Oberlin v. Akron General Med. Ctr.* (2001) 91 Ohio St. 3d 169. {Note that *Toth v. Oberlin Clinic, Inc.* 02-LW-1800 *Unreported* 2002 (9th) says you may not so rehabilitate).

You may show that an expert is involved in a similar malpractice action in another state or another country and that this would bias his opinion; but you may not show that the defendant is or has been involved in other malpractice actions. *Toth v. Oberlin Clinic, Inc.* 02-LW-1800 *Unreported* 2002 (9th). You may inquire whether the expert is being compensated for his time, but you may not inquire as to the amount. *Ohio Dept. of Mental Health v. Milligan* (1988), 39 Ohio App. 3d 178.

VII. When will you be an Expert (Witness)?

Every working day, you are an expert. Each time you make a judgment or a decision, you are acting upon special knowledge, gained by training, study, and experience. Every time you act as a doctor, you are acting with expertise.

You will be an expert witness in the following situations: I would almost guarantee that someday you will be in a court or administrative hearing, giving expert opinion on something. Below are a few common examples.

- a) **workers compensation claims:** You will have to either attest in court or write that a patient is disabled, and whether that disability is permanent or temporary, and how completely disabled the patient is.
- b) **Insurance company reviews:** you will be asked what the likely prognosis of your treatment is, and whether your treatment is medically necessary. You will attest to the truth of your statements by signing them.
- c) **Commitment and competency hearings:** You may be required to testify that a certain patient is dangerous to himself or others by virtue of a mental illness, and requires to be confined for psychiatric treatment for his or others' safety.
- d) **Quality improvement activities:** You will give opinions in incident report and other quality assurance reviews at your hospital, and your testimony, while privileged unless you are a defendant, will be a form of expert testimony regarding medical procedures and practices.

You may be an expert in more dramatic situations:

- a) **Medical malpractice cases:** No medical malpractice case can be brought without three types of expertise: economic (not your field); and the standard of care and whether or not it was breached; and whether the breach caused the plaintiff's injuries to a substantial degree of medical certainty (50% plus a smidgeon).
 - a. **for plaintiff:** Even if you are not a world renowned expert, a friend or colleague may ask you to testify for him or her in their defense.
 - b. **for defendant:** If you have trouble paying off your school loans, or that new Rolls Royce, you may want to be hired as an expert for a plaintiff; or, you may be forced into testifying for plaintiff as a non-defendant treating physician.
- b) **Disciplinary actions by employer or board:** You may be asked either by the medical board or by your employing hospital or other institution to give evidence for or against a colleague (or yourself) charged with misfeasance or negligence.
- c) **Informed consent cases.** You may be asked to be an expert as to what should be disclosed to a patient.

Remember the story of the hare and the hound. There was a hound. He went hunting after hares; the hare got away; and when the hound returned to his kennel, his friends teased him with not running fast enough. He said, "It is true the hare outran me; but after all, I was running for my supper, and he was running for his life". Also recall: the expert witness is the hood ornament on the car that the attorney drives into the court room. Keep it truthful—keep it simple – keep it humble.

VIII. Case Example: *Lambert v. Shearer*.
(Was discussed in the following month's class)

We went through various permutations and distortions of *Lambert v. Shearer* (1992) 84 Ohio App. 3d 266, to help the class understand expert testimony and how it is done.

A 40-something year old 3-pack per day restaurant owner had a cough, and sought consultation from one of his customers. This physician gave him some antibiotics, but the cough did not get better, and the first physician referred the man to a second physician, licensed to practice medicine in Ohio, but who practiced only homeopathy. After two years of homeopathic treatment, the restaurant owner was worse; and saw a third physician, who, that day, diagnosed advanced lung cancer. Despite removal of one lung, the restaurant owner died in agony two years after seeing the third doctor.

IX. Post-lecture Questions: True or False?

- 1) In a medical malpractice case, a non-physician may be used to prove causation of the harm.
- 2) In a medical malpractice case, a non-physician, or a non-clinical physician, may testify as to the proper standard of care.
- 3) Medical textbooks may not be used as evidence.
- 4) An expert witness may be impeached and rehabilitated using textbooks read to the jury.
- 5) The purpose of an expert witness is to make understandable to the fact finder something which is difficult to understand.
- 6) The doctor being sued may be his own expert.

X. Cases, Statutes, and Treatises Cited

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Tracy v. Merrell Dow Pharmaceuticals, Inc (1991), 58 Ohio St. 3d 147
Vaught v. Cleveland Clinic Found. (2003) 98 Ohio St. 3d 485
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 ORC 2317.02 (Physician- or dentist-patient privilege)
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