

Law for Medical Students and Physicians: How a Medical Malpractice Case is Proved

Wheaton B. Wood, MD JD
Athens, Ohio

I. Learning Objectives

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

- 1) Understand how a particular case of medical malpractice goes forward to judgment.

II. Pre-lecture Questions: True or False

- 1) A lawsuit starts with the negligent act
- 2) A lawsuit starts with a written notice to the defendant
- 3) You prove a medical malpractice case using an expert witness.
- 4) Alternative medical practices are acceptable if the patient consents.

III. Lambert v. Shearer

The facts:

A forty-eight year old previously healthy man, Wayne Lambert, who owned and ran a restaurant, became ill in 1988 with a persistent cough. Mr. Lambert had long been a three pack per day cigarette smoker.

Mr. Lambert sought medical care from Karl Lee, D.O., who was also one of his customers at the restaurant, who treated empirically with antibiotics, and had a chest x-ray done on 21 January, 1988, and another on 1 February, 1988. Dr. Lee read the x-ray himself, diagnosed Legionnaires' disease, but later changed the diagnosis to acute pneumonia.

Mr. Lambert did not feel better so he left Dr. Lee's care. On the advice of a friend, Mrs. Ray, Mr. Lambert sought care from the Beechwold Medical Clinic in Columbus, where he engaged with Dr. Shearer for care. Dr. Shearer, who had cared for Mrs. Ray's husband until he died, was strongly recommended by Mrs. Ray; and also impressed Mr. Lambert very favorably during a tour of the office.

Mr. Lambert had almost never been to a doctor, until he went to Dr. Lee in January, 1988.

Apparently, Dr. Shearer told Mr. Lambert that he was a doctor of osteopathy, but he practiced homeopathy only. There was contrary evidence, however, that he did not tell Lambert that he limited his practice to alternative medical treatments. He later said he told Mr. Lambert that he did not diagnose.

Lambert's estate later said that Lambert had told Dr. Shearer that he was coughing up blood on the first visit. However, Dr. Shearer's records show the first mention of hematemesis on June 23, 1988.

Dr. Shearer treated Mr. Lambert from some time in February, 1988 until some time in November 1988, at which time Mr. Lambert became dissatisfied with Dr. Shearer's treatment and sought a third physician, who immediately diagnosed lung cancer, which ultimately killed the patient two years later, despite surgery and other more standard cancer treatments.

Dr. Shearer's treatment consisted of homeopathic medicaments, some manipulative treatments, and referral for both Reiki massage and reflexology in the Beechwood clinic; and to an Amish psychic in Indiana (but Mr. Lambert declined the referral). He also gave or sold to the plaintiff special filters to help him stop smoking. He also employed oxygen baths, diathermy, and acupuncture.

The diagnostic tests used by Dr. Shearer included dark-field microscopy; an HIV test; a special gonorrhea test which he sent to England; and a heart check on the "heartometer". Dr. Shearer did in fact make several diagnoses:

- 1) Amoebic dysentery
- 2) Pneumonia
- 3) Influenza
- 4) Paratyphoid fever
- 5) Occlusive peripheral arterial disease
- 6) Cabin fever
- 7) Inherited mild gonorrhea.

The claims:

After Mr. Lambert died, his estate sued Dr. Shearer for wrongful death and suffering of the decedent; as well as losses and suffering of the survivors.

The theory of Dr. Shearer's liability was:

- 1) There was a doctor-patient relationship between Dr. Shearer and Mr. Lambert.
- 2) Dr. Lambert had a duty of care to Mr. Lambert to either diagnose and treat his lung cancer, or to refer to someone who could treat the lung cancer.
- 3) That had the cancer been diagnosed and treated in February, 1988, Mr. Lambert would have survived; but since it was not diagnosed until November 1988, he died prematurely.
- 4) That his death and the suffering of his death, and that of his survivors, was preventable had Dr. Shearer met the minimum standard of care expected of a physician under these circumstances.

Dr. Shearer's defense was:

- 1) The doctor made clear that he limited his practice to homeopathy;
- 2) The patient assumed the risk of alternative treatment knowingly;
- 3) The doctor met the standard of care for homeopaths.

The proof:

Plaintiff:

- 1) Through an expert, plaintiff averred that defendant behaved recklessly in his treatment of Lambert; and also that defendant fell below the standard of care for a physician in this circumstance; that such recklessness and departure from the standard of care was the proximate cause of plaintiff's untimely death.
- 2) Sufficient proof to support compensatory and special damages of 3 millions dollars.

Defendant:

- 1) Averred as his own expert that he met the standard for homeopathy; and that Mr. Lambert had assumed the risk of alternative medical treatment.

The verdict:

The trial court directed a verdict in favor of the plaintiff, but left the amount of damages up to the jury. The jury awarded \$2,400,000 in a general verdict.

This verdict means that the judge at the trial thought that there was no credible evidence to support the defense position; and therefore that plaintiff automatically prevailed. Then it also means that the jury awarded punitive as well as compensatory damages (but in a technically improper form) based on the doctor's recklessness as well as negligence.

The appeal:

Not surprisingly, the defendant appealed this verdict, on the following fifteen grounds:

- 1) *Plaintiff should not have been allowed to refer to and ask for punitive damages, when they had not pled punitive damages in the initial court papers.*
- 2) The trial court should have told the jury not to award punitive damages.
- 3) The expert should not have been allowed to opine that Lambert would have survived if he had been diagnosed and treated in February, 1988
- 4) The trial court should have "undirected" the verdict when asked.

- 5) *The trial court should not have directed the verdict (that is, they should have acknowledged the defense case as averred chiefly by defendant).*
- 6) The trial court should not have allowed the plaintiff's expert to answer "inflammatory" questions.
- 7) The plaintiff's expert was not qualified to judge the standard of care in homeopathy.
- 8) *Defense should have been allowed to question the plaintiff's expert as to what his fee was for his testimony.*
- 9) The plaintiff's expert, who was not a treating physician, should not have been allowed to summarize the treatment, based only on his reading of documents in the record.
- 10) Contributory negligence should have been allowed to be considered by the jury.
- 11) Basically a reprise of ten.
- 12) *The verdict form was improper.*
- 13) The damages were not supported by adequate evidence.
- 14) *The trial court should have made the verdict be given in proper form.*
- 15) *The trial court should have listened to defendant's request for a new trial, especially because it was unopposed. [Porter v. Lima Memorial Hospital 995 F.2d 629 (6th)].*

The italicized claims of error are the one's that the appeals court agreed with, and indeed, it reversed the trial court to reconsider the case.

The reversal:

Of the fifteen points on appeal, only numbers 1), 5), 8), 12), 14), and 15) were found valid by the appeals court. Numbers 12, 14, and 15 are technical "lawyer" type "assignments of error" and , while each would have been sufficient to overrule the trial court's judgment, if that was all the case was about, I would not use it for your class, because you are medical students, not law students.

This leaves three points that we may discuss as relevant to medical students in a law course: numbers 1, 5, and 8.

Number 1: *Plaintiff should not have been allowed to refer to and ask for punitive damages, when they had not pled punitive damages in the initial court papers.*

As we have discussed in this class, punitive damages are only awarded where the behavior of the defendant "shocks the conscience" of the finder of fact (the jury and the trial court, in this case). What this case is really about is that the court does not feel that homeopathy should be practiced by a licensed physician. The basic argument, although never baldly stated, is that, because Shearer was an osteopath who practiced homeopathy, he was held to a standard of all

physicians, in that he should have referred Lambert to a physician who would diagnose and treat this deadly condition.

The net result of this is that homeopaths who are physicians would only be allowed to treat two kinds of cases: 1) cases where there is really no illness, or at least, nothing serious enough to hurt the patient; and 2) hopeless cases where no recovery would be possible.

This is similar in import to a rather famous case called *Osherhoff v. Chestnut Lodge* which essentially outlawed the use of psychoanalytic techniques for psychotic depression.

Is this really appropriate? The appeals court apparently felt not, but was too timid to say so, and so reversed, upholding argument one really on a technicality: because punitive damages were not pled in proper form, they should not have been referred to in such a manner that the jury would award them.

The real issue is, can the courts outlaw certain alternative branches of medicine, not by making them illegal, but by deeming that they are below the standard of care (and therefore always malpractice)?

Number 5: The trial court should not have directed the verdict (that is, they should have acknowledged the defense case as averred chiefly by defendant).

Here, the real issue was again, why can Dr. Shearer, as an osteopath who limits his practice to homeopathy, not be a sufficient expert witness in his own defense as to the standard of care for homeopathy? Is it really proper for an MD, from the National Cancer Institute to dictate the standard of care for an osteopath limiting his practice to homeopathy?

I submit to you that he should be; or that we should just come right out and say that the alternative medicines are outlawed if practiced by a physician.

The appeals court was not uncomfortable with the NCI academic doctor dictating the practice standards for a self-professed homeopath. Rather, they upheld the assignment of error based on a much more limited argument: since there was a question of when Dr. Shearer knew that there was hematemesis that was a question of fact for the jury.

I think that is a pretty cowardly way to handle the real question in the assignment of error.

Number 8: Defense should have been allowed to question the plaintiff's expert as to what his fee was for his testimony.

This one is actually pretty good. In this case, the academic doctor from NCI was being paid quite handsomely for his testimony. And in fact, he made a pretty good living testifying frequently against such alternative doctors, because he did not believe they should be allowed to practice. But on direct examination, he made it sound like he was coming halfway across the USA to testify against the evil Dr. Shearer because it was the right thing to do, and because he was an altruist. This was a false impression, and the appellate court said, yes, it is true that usually one may not inquire as to the amount of compensation a witness is receiving; but in this case, the witness opened himself up to such a question by falsely posing as an altruistic crusader (not a venal hired gun).

Again, the underlying issue is whether academic and government doctors, who have the time to fly about the country supplementing their salaries by expert testimony, should be allowed to dictate the practice standards for everyone. This of course is what evidence rule 601 (D) is addressing when it limits standard of care testimony to doctors in active clinical practice at least 50% of the time (at the time of the alleged negligent act, as later construed). But of course, Dr. Weiss, the hired gun gilding an otherwise lower government salary, would have met that standard?

Underlying this issue is the older issue, of whether a national standard is indeed appropriate for all standards of care for all doctors; and if so, which national standard?

IV. Post Lecture Questions: True or False?

- 1) In cases of deceptive practices (fraud) punitive damages may be awarded.
- 2) A patient cannot give informed consent to alternative medical practices if the patient does not know or understand his diagnosis, and therefore the risks of non-treatment of his illness.
- 3) State law prohibits unauthorized negligent release of medical records, even by an "uncovered" entity.
- 4) "Loss of chance" means whatever chance of recovery you would have had, minus whatever chance you have left, times the total damages.

V. Cases and Materials Cited

Cases

Lambert v. Shearer (1992) 84 Ohio App. 3d 266
Porter v. Lima Memorial Hospital 995 F.2d 629 (6th)

Treatises

Horan J, Maltz A, Roth A *et al.* "HIPAA Electronic Transaction, Security and Privacy Regulations" chapter 16 in Abrams and Moy *Legal Manual for New York Physicians* NYSBA 2003.

Senska, R "Mitigating the "HIPAA Scare" : a Closer Look at Provider Disclosures to Patient Representatives ... under ...HIPAA" 10 NYSBA Health Law Journal 38 (2005).

Ohio Cases Cited by *Lambert v. Shearer*

Alexander v. Mt. Carmel Medical Center (1978), 56 Ohio St.2d 155
Berlinger v. Mt. Sinai Medical Ctr. (1990), 68 Ohio App.3d 830
Bird v. Pritchard (1973), 33 Ohio App.2d 31
Blakeman v. Condorodis (1991), 75 Ohio App.3d 393
Brookridge Party Center, Inc. v. Fisher Foods, Inc. (1983), 12 Ohio App.3d 130
Bruni v. Tatsumi (1976), 46 Ohio St.2d 127
Calderon v. Sharkey (1982), 70 Ohio St.2d 218
Calmes v. Goodyear Tire & Rubber Co. (1991), 61 Ohio St.3d 470
Cincinnati Art Galleries v. Fatzie (1990), 70 Ohio App.3d 696
Columbus Finance v. Howard (1975), 42 Ohio St.2d 178
Cooper v. Sisters of Charity (1971), 27 Ohio St.2d 242
Frank v. Vulcan Materials Co. (1988), 55 Ohio App.3d 153
King v. LaKamp (1988), 50 Ohio App.3d 84
Kitchens v. McKay (1987), 38 Ohio App.3d 165
Mayhorn v. Pavey (1982), 8 Ohio App.3d 189
McKoy v. Furlong (1990), 69 Ohio App.3d 62
McQueen v. Goldey (1984), 20 Ohio App.3d 41
Mers v. Dispatch Printing Co. (1988), 39 Ohio App.3d 99
Miller v. Marrocco (1989), 63 Ohio App.3d 293
O'Day v. Webb (1972), 29 Ohio St.2d 215
Ohio Dept. of Mental Health v. Milligan (1988), 39 Ohio App.3d 178
Preston v. Murty (1987), 32 Ohio St.3d 334
Ramage v. Central Ohio Emergency Serv., Inc. (1992), 64 Ohio St.3d 97
Schellhouse v. Norfolk & Western Ry. Co. (1991), 61 Ohio St.3d 520
Seley v. G. D. Searle & Co. (1981), 67 Ohio St.2d 192
Sorina v. Armstrong (1990), 68 Ohio App.3d 800
State v. Bradley (1989), 42 Ohio St.3d 136

Steinbeck v. Philip Stenger Sons (1975), 46 Ohio App.2d 22
Studier v. Taliak (1991), 74 Ohio App.3d 512
Taylor v. C. Lawrence Decker, M.D., Inc. (1986), 33 Ohio App.3d 118
Wagenheim v. Alexander Grant Co. (1983), 19 Ohio App.3d 7
White v. Moody (1988), 51 Ohio App.3d 16
Willet v. Rowekamp (1938), 134 Ohio St. 285
Williams v. Grant (1979), 65 Ohio App.2d 225

Ohio Cases Citing *Lambert v. Shearer*

Cupp v. Kudla, 158 Ohio App.3d 728, 2004-Ohio-5528
Cupp v. Kudla, 2004-Ohio-5528
Douglass v. Salem Community Hosp., 153 Ohio App.3d 350, 2003-Ohio-4006
Frederick v. Vinton Cty. Bd. of Edn., 2004-Ohio-550
Furr v. State Farm. Mut. Auto. Ins. Co. (1998), 128 Ohio App.3d 607
Nevins v. Ohio Dept. of Transp. (1998), 132 Ohio App.3d 6
Schlachet v. Cleveland Clinic Found. (1995), 104 Ohio App.3d 160
Young v. Univ. of Akron, 2004-Ohio-6720