A Medical Literature Primer

by Kenneth T. Lumb

Introduction

Medical literature is used in virtually every medical negligence trial. Plaintiffs' experts rely on authoritative, reliable books and articles, while defendants' experts, of course, rely on defensive articles planted in the literature to help defend lawsuits. Both sides cross-examine the other sides' experts relentlessly using texts and journal articles.

Watch an attorney cross-examine a defense expert or a treating physician called by the defense in a motor vehicle or slip-and-fall case, however, and you'll rarely see a reference to medical literature. This is a shame, for a few well-chosen phrases uttered by a treating physician on direct and revealed to the jury as medical "truth" from the authoritative literature while cross-examining the defendant's expert, can make all the difference in convincing the jury how a mild traumatic brain injury can happen or that so-called "soft-tissue" injuries are real and painful.

Hearsay

Medical literature – or "learned treatise" if you prefer Wigmorese – is hearsay. Any article or text not authored by the witness is an out-of-court statement by a declarant unavailable for cross-examination, and it is almost always offered to prove the truth of the matter asserted. It can be used with varying degrees of detail, however, in two main ways: as a basis of an expert's opinion on direct examination and to impeach an opponent's expert on cross-examination. It is almost never admitted as substantive evidence.

Use on Direct

We all know by rote that an expert can rely on facts or data not in evidence if they are of a type reasonably relied upon by experts in the relevant field in forming opinions on that subject.[1] One of the otherwise inadmissible sets of facts or data experts may rely upon is medical literature.[2] An expert can thus base his opinions on medical literature in general or on specific articles or texts. He cannot, however, summarize his notes regarding the contents of medical articles.[3]

In *Mielke v. Condell Memorial Hospital*, the plaintiff asked her expert on direct examination to review the literature regarding gentamicin and Lasix.[4] In answering the question, the expert began to read from notes he had taken during his review of the literature. A defendant objected, arguing that the contents of the articles were hearsay, and, if allowed, the testimony would allow the jury to hear evidence that could not be challenged on cross examination.[5] The trial court barred the witness from reading his summaries of the medical articles upon which he had based his opinions.[6] The Second District of the Illinois Appellate Court affirmed, holding that the proposed testimony was hearsay.[7] The court noted that the testimony regarding the results of tests described in the articles could not be effectively challenged on cross examination because the witness did not conduct the tests and could not testify regarding the test methods and procedures.[8]

In *Schuchman v. Stackable*, the Fifth District relied on *Mielke* in holding that an expert may not read directly from or paraphrase medical articles on direct examination.[9] If an expert may not summarize articles, the court reasoned, it logically follows that he or she may not read to the jury passages from those articles.[10]

The Illinois Supreme court specifically approved the following general formulation, in *Lawson v. G.D. Searle & Co.*:

> I base my opinion on my experience and making such evaluations, a detailed study of all the clinical studies that have been published in the literature relative to the incidence of thromboembolic disease in patients receiving oral contraceptives and in patients not receiving oral contraceptives.[11]

A trial court may also allow an expert to recite the names of the specific articles or authorities he has relied upon.[12]

Use on Cross

In *Darling v. Charleston Community Memorial Hospital*, the Illinois Supreme Court held that an expert could be cross-examined using "the views of recognized authorities in their fields" even if the expert had not relied upon them.[13] In so holding, the court noted that a person becomes an expert by studying and absorbing a body of knowledge.[14] To

prevent cross-examination upon this relevant body of knowledge would only serve to protect the ignorant or unscrupulous expert.[15]

Whether used on direct or cross, however, medical literature is generally not admissible as substantive evidence. Medical treatises are not generally admissible to prove an issue of fact.[16] Treatises also do not constitute independent evidence of the standard of care. If a proposition from the literature is important to your proof, make sure an expert testifies to it. Even though a jury may accept its truth based upon your cross-examination of your opponent's expert, it will not be available to respond to a directed verdict motion or to support a plaintiff's verdict or contest a defense verdict on appeal.

Several potential exceptions to the prohibition on substantive admission exist. The appellate court has stated in *Fornoff* and several other cases that articles may be admissible substantively where necessary to prevent plaintiff from suffering a serious hardship, as where plaintiff makes a positive showing that securing an expert is impossible.[17] This statement is *dicta*, however, and no reported decision has allowed this exception.

Another exception involves using medical literature for a purpose that removes it from within the ambit of hearsay; to prove notice, for instance. In *Kochan v. Owens Corning Fiberglass Corporation*, plaintiff's expert was allowed to summarize, in detail, various medical and industrial articles regarding the effects of asbestos.[18] The plaintiffs offered the testimony to show what the defendant knew or should have known regarding the effects of asbestos.[19] The plaintiffs were attempting to show that it was generally known in the industry and by the defendant before 1955 that asbestos caused asbestosis and cancer. The defendant objected, citing *Schuchman*'s prohibition on reading medical literature on direct examination.

The appellate court held that *Schuchman* was distinguishable. In *Schuchman*, the literature was used to support the expert's opinion and to show there were other experts who agreed with him. In *Kochan*, however, the literature was truly the factual basis of one of the expert's opinions; not the opinion that asbestos causes cancer (the truth of the matter asserted in the articles), but rather that the defendant knew or should have known before 1955 that asbestos was dangerous.[20] Thus, because the articles constituted the facts underlying the opinion, they could be summarized on direct examination.

The *Kochan* court went on, however, and held that the testimony was also admissible because it was relevant to notice.[21] Documents offered to prove the recipient had notice of the

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contents and not to prove the truth of the contents are admissible as an exception to the hearsay rule.[22] Technically speaking, evidence offered to prove notice does not need a hearsay exception because it is not hearsay but either justification allows the result sought.

The third exception includes certain types of "literature" that rise not only to the level of substantive evidence but also constitute independent evidence of the standard of care. Hospital policies, procedures and bylaws, state licensing regulations and standards published by accreditation organizations are all substantive and independent evidence of the standard of care.[23] Manufacturer's instructions or package inserts are also independent and substantive evidence of the information they contain.[24] Thus, the Physician's Desk Reference (PDR) and medical device instructions (or package inserts) are admissible even without expert testimony.

Disclosure

This latter exception is particularly useful because one can argue that literature used to cross-examine an opponent's opinion witness no longer needs to be disclosed. In *Maffet v. Bliss*, the Fourth District Appellate Court held that none of Supreme Court Rule 213's disclosure requirements apply to cross examination.[25] The court distinguished *Iser v. Copley Memorial Hospital* because that case involved the disclosure of an opinion on direct examination that an article was authoritative.[26] Thus, if one can extract a concession of reliability from an opponent's witness, one can potentially use any literature to cross-examine that witness. If using the PDR, JCAHO standards or other *Darling*-approved materials, a lawyer does not even need a concession from the witness.

Defensive Literature

Of course, what is good for the goose is good for the gander and defense counsel will attempt to use literature favorable to his or her case against your witnesses. Under some circumstances, one can block that effort. For example, a lawyer can argue that his or her opponent's literature is not reliable because it was not written for professional colleagues. Medical literature possesses an aura of reliability because it is generally written for professional colleagues for the purpose of advancing medical science. More than a few articles and text chapters, however, have been written more to advance the defense of medical negligence and personal injury claims than to advance medical knowledge. In *People v. Behnke*, a prosecutor used a manual entitled *Basic Training Program for Forensic Drug Chemists* to cross-examine a defense witness.[27] Even though a state witness testified that it was authoritative, the appellate court held that it should not have been admitted. It was published by the forerunner of the Drug Enforcement Agency, an arm of the Justice Department and its purpose was to "train personnel in the shortest time possible" with a view toward testifying in litigation. It was not written for, nor reviewed by professional colleagues, and it was difficult to identify the specific authors. For these reasons, it could not be considered authoritative.[28]

Another approach is to argue that defendant's literature does not correlate to the plaintiff's clinical condition and is thus not relevant. In *Boatmen's National Bank v. Martin*, the appellate court affirmed the trial court's refusal to allow the defendant's experts from referring to or basing opinions on statistical literature that the defendant did not show was clinically correlated to the plaintiff's condition. [29]

Foundation

Every law student that has taken a basic trial advocacy course knows that the proponent of a piece of medical literature must show that it is "authoritative" before he or she can use it to cross-examine an expert. There are several methods to establish the "authoritativeness" of a given article or test: The trial court can take judicial notice; the witness can concede its authority; or another expert can testify that it is authoritative.[30] Of course, if an expert relies upon a particular article or text in forming his opinion, it is fair game in cross-examination.[31]

Contrary to popular belief, there are no magic words necessary to establish the authority of an author or a particular work. Indeed, the word "authority" or "authoritative" need not even be uttered. In *People v. Johnson*, the defendant was convicted of murder after a bench trial.[32] During the trial, defense counsel attempted to cross-examine Dr. Shaku Teas, an assistant medical examiner for Cook County, using a textbook named *Pathology of Homicides*.[33] Dr. Teas admitted that she was familiar with the textbook, and used it for reference.[34] She could not say, however, that it was "one of the most commonly used sources on forensic pathology" or whether it was authoritative.[35] The trial court sustained the state's objection to use of the text based upon the fact that Dr. Teas had not relied upon it in forming her opinions.[36] The First District of the Illinois Appellate Court disagreed and held that the defendant had adequately established the book's authority:

> We believe the record in the instant case reveals an adequate concession by Teas that she considered the text-

> book ... authoritative for purposes of satisfying the Supreme Court's concern, in *Darling*, regarding the effectiveness of expert testimony. Teas stated that, although she did not rely on the textbook she related she was familiar with it and had used it in the past as a reference.[37]

Thus, a trial lawyer need not be stymied by defense (and some plaintiffs') experts' affected ignorance of the definition of "authoritative" or their belief that "nothing is authoritative" because that magic word is not necessary. Ask instead what texts they own, what texts they advise their medical students, residents or fellows to memorize, read, scan or refer to. Ask them what texts are on the shelves in their offices, at home or in the library or conference room of their clinic or hospital department. Pay attention when taking their depositions, and note the texts on their shelves. One can almost always get them to concede enough to establish authoritativeness: Is it generally useful and reliable in day-to-day practice? Is it a standard reference? Do you use (or have you used) it as a reference? Do you know Dr. Welby (an editor or chapter author)? Agree he is an authority on telemedicine? Do you agree he is one of many authorities?

Conclusion

Medical literature is a powerful weapon in the trial lawyer's arsenal. A thorough understanding of the literature itself and the rules regarding its use are essential to the success of any medical negligence trial. Medical texts and articles are needed whenever medical facts and opinions are at issue. A lawyer should never depose or cross-examine a defense medical expert without a full understanding of the relevant literature, no matter the type of case.

Endnotes

[1] *Wilson v. Clark*, 84 Ill.2d 186 (1986).
[2] *Piano v. Davison*, 157 Ill.App.3d 649 (1st Dist. 1987).
[3] *Mielke v. Condell Mem. Hosp.*, 124 Ill.App.3d 42 (2d Dist. 1984).
[4] *Id.* at 51-2.
[5] *Id.* at 52.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 55.
[9] *Schuchman v. Stackable*, 198 Ill.App.3d 209 (5th Dist. 1990).
[10] *Id.* at 230.
[11] *Lawson v. G.D. Serle & Co.*, 64 Ill.2d 543, 557 (1976).
[12] *Mielke v. Condell Mem. Hosp.*, 124 Ill.App.3d 42 (2d Dist. 1984).
[13] *Darling v. Charleston Com. Mem. Hosp.*, 33 Ill.2d 326 (1965).
[14] *Id.*
[15] *Id.*
[16] *Fornoff v. Parke Davis & Co.*, 105 Ill.App.3d 681 (4th Dist. 1982).
[17] *Id.*
[18] *Kochan v. Owens Corning Fiberglass Corporation*, 242 Ill.App.3d 781 (5th Dist. 1993).
[19] *Id* at 803.
[20] *Id* at 804.
[21] *Id* at 806.
[22] *Id.*
[23] *Darling v. Charleston Com. Mem. Hosp.*, 33 Ill.2d 326 (1965).
[24] *Ohligschlager v.Procter Comm. Hosp.*, 55 Ill.2d 411 (1973).
[25] *Maffet v. Bliss*, 329 Ill.App.3d 562 (4th Dist. 2002).
[26] *Id.*
[27] *People v. Behnke*, 41 Ill.App.3d 276 (5th Dist. 1976).
[28] *Id.*
[29] *Boatmen's National Bank v. Martin*, 223 Ill.App.3d 740 (5th Dist. 1992).
[30] *Id.*
[31] *Piano v. Davison*, 157 Ill.App.3d 649 (1st Dist. 1987).
[32] *People v. Johnson*, 206 Ill.App.3d 875 (1st Dist. 1990).
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*

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