Utilizing Alternative Theories of Medical Malpractice

By Mark McGrath

You are sitting in your star expert's deposition. Despite five hours of wood-shedding, your expert has just testified that a national standard of care governs the removal of gangrenous limbs. "If the left leg is gangrenous, you remove the left leg," he explains testily. "I don't care if you are in New York or New Bern. In that scenario, removing the good leg is going to be negligent regardless of where you are performing the procedure." Defense counsel grins in a rather mean way. The trap is tripped.

Our unfortunate plaintiff's lawyer need not despair so quickly. What is often forgotten is that the same or similar communities standard codified at N.C. Gen. Stat. Sect. 90-21.12 is only one of four malpractice standards that are available to plaintiffs under North Carolina law. Given the perils and uncertainty that attend use of the statutory standard, attorney representing patients would be well-advised to hold the common law standards in reserve.

The Statutory Standard of Care

Prior to 1970, North Carolina abided by the locality rule in malpractice cases. Under the locality rule juries assessed the performance of physicians against the standards existing in the community where the malpractice occurred. As a corollary to the rule, only physicians who had personal familiarity with that community were permitted to testify as experts in the case.

In Wiggins v. Piver, the North Carolina supreme court rejected the locality rule, and held that experts were competent to testify on standard of care issues as long as they were familiar with the standard of practice in similar localities.1 Following Wiggins, the North Carolina General Assembly enacted N.C. Gen. Stat. Sect. 90-21.12 in 1975, thus codifying the "same or similar communities" standard that presently governs North Carolina malpractice cases.

This statute provides as follows:

In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

Of course, the "same or similar communities" language has proven anything but simple in its application and interpretation. Indeed, after years of systematic mauling by the North Carolina appellate courts, we are left with a standard of care that trivializes the entire concept of medical negligence by reducing complex medical litigation to the intellectual level of a trivia contest. How curious that the statute which steered North Carolina clear of the locality rule and provided us with a momentary glimpse of the mainstream now claims as its primary achievement the elevation of coarse maneuvering over medical substance, and the routine exclusion of qualified experts!

Other Common Law Standards

As articulated by Justice Higgins in the seminal case of Hunt v. Bradshaw, a physician who undertakes to provide professional services to a patient must meet three requirements:

1. She must possesses the degree of professional learning, skill and ability which others similarly situated ordinarily possess;

2. She must exercise reasonable care and diligence in the application of her knowledge and skill to the patient's case; and

3. She must use her best judgment in the treatment and care of her patient.

As the Hunt case makes clear, a breach of any one of these standards of care renders the practitioner liable.

The argument could be made that the enactment of N.C. Gen. Stat. Sect. 90-21.2 superseded and had the effect of abrogating the three common law standards enunciated in Hunt. The only problem with such an argument would be the fact that it was raised and rejected more than 20 years ago. In Wall v. Stout, the supreme court held that statutory same or similar communities standard codified in Sect. 90-21.2 did not abrogate, but supplemented, the three common law standards identified by the Hunt court.

Consistent with the decision in Wall, the current version of the Pattern Jury Instruction 809.00, Medical Negligence, provides as follows:

Negligence refers to a person's failure to follow a duty of conduct imposed by law. Every health care provider is under a duty to use his best judgment in the treatment and care of his patient; use reasonable care and diligence in the application of his knowledge and skill to his patient's care; [and] provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time the health care is rendered. A health care provider's violation of any one or more of these duties of care is negligence.

Footnote 3 to the instruction makes clear that in recognizing these independent standards of care, the instruction is invoking the bases of liability articulated by Justice Higgins in Hunt.

Conclusion

These common laws standards of practice offer hope to plaintiff's attorneys whose experts flunk the Cackalacky demographics test prior to trial. Properly interpreted, Hunt provides that the same or similar communities standard is only one of four standards that are available to plaintiffs. Because the same or similar communities standard is distinct from the three common law standards identified in Hunt, an expert should be permitted to testify regarding a physician's failure to meet the common law standards without so much as mentioning the same or similar communities standard. This argument is supported by the pattern jury instructions, which recognize that the same or similar communities standard is only one among several applicable medical negligence standards. As the pattern instructions make clear, the breach of any one of these standards constitutes medical negligence.

In practice, it would be wise for attorneys to elicit opinions from their own experts at deposition applying the common law standards. For example, have your expert testify that Dr. Doom failed to use her best judgment in the treatment and care of your client. This will provide your client with a measure of additional security against having his case dismissed for want of expert witnesses. And in the courtrooms of this generation, goodness knows we need it.