

# **Medical Malpractice Trials: Trial Judge Perspective On Law & Ethics**

**DISTRICT JUDGE NOMA D. GURICH**

**October 30, 2009**

## **INTRODUCTION**

During my 11 years of service as a District Judge of Oklahoma County, I have presided over more than 170 jury trials. Only 14 trials involved issues of medical negligence or better known as medical malpractice. <sup>1</sup> Of those 14 cases, 8 ended in verdicts for all Defendants. <sup>2</sup>

Of the remaining 6, one was settled before the jury finished their deliberations. In five cases, verdicts were returned for the Plaintiff. In three of those five, the actual damages awarded were \$500,000 or less. (In one case the defendant hospital admitted liability and tried the case on the issue punitive damages which the jury rejected.) In one case against a single physician, the jury awarded actual damages for an amount under \$1Million, but also included punitive damages based upon reckless conduct. In only one case did the jury return a multi-million dollar verdict [\$6.5 M awarded Plaintiff; \$2 M awarded Husband; with prejudgment interest verdict exceeded \$10 M]. I will discuss some pretrial ethical concerns as well as trial issues from my perspective as a trial judge.

## **PHYSICIAN/PATIENT PRIVILEGE**

There are some areas of the law that physicians and other medical professionals should be aware of when a lawsuit is filed against them. In trial preparation, the Plaintiff's attorney will take your deposition. When the plaintiff files a lawsuit against a medical

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<sup>1</sup> I have not included dental malpractice or nursing home negligence cases.

<sup>2</sup> Nine cases involved only a single physician or a business that employed the physician. Two involved only a hospital as defendant. Three involved a hospital and one or more physicians.

professional, the physician/patient privilege is waived both as to the patient's medical records and the physician's testimony. <sup>3</sup> Title 76 O.S. §19 (B) provides in part:

B. 1. In cases involving a claim for personal injury or death against any practitioner of the healing arts or a licensed hospital, or a nursing facility or nursing home licensed pursuant to Section 1-1903 of Title 63 of the Oklahoma Statutes arising out of patient care, where any person has placed the physical or mental condition of that person in issue by the commencement of any action, proceeding, or suit for damages, or where any person has placed in issue the physical or mental condition of any other person or deceased person by or through whom the person rightfully claims, that person shall be deemed to waive any privilege granted by law concerning any communication made to a physician or health care provider with reference to any physical or mental condition or any knowledge obtained by the physician or health care provider by personal examination of the patient; provided that, before any communication, medical or hospital record, or testimony is admitted in evidence in any proceeding, it must be material and relevant to an issue therein, according to existing rules of evidence. Psychological, psychiatric, mental health and substance abuse treatment records and information from psychological, psychiatric, mental health and substance abuse treatment practitioners may only be obtained provided the requirements of Section 1-109 of Title 43A of the Oklahoma Statutes are met.

HIPAA (Health Insurance Portability and Accountability Act) does not prohibit this disclosure, although disclosure of the mental or physical information and records must be relevant to the claims or defenses asserted in the medical malpractice action. <sup>4</sup>

If you are a treating physician, you may be contacted directly by counsel representing the defendant physician or hospital. Attorneys are permitted to request **ex parte** interviews with the treating physician, which means the patient's attorney will not be present. The Oklahoma Supreme Court has determined that a court order entered in a malpractice case, containing clearly permissive language that the ex parte communication is purely voluntary and cannot be compelled by any party, does not contravene HIPAA's confidentiality requirements. <sup>5</sup>

The Supreme Court has also held that there is no breach of the physician/patient privilege when a communication between a criminal defendant and his doctor is revealed by the doctor to the police and evidence against the defendant is thus obtained, although the physician does not testify at trial.<sup>6</sup> Neither can a physician be sued civilly for

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<sup>3</sup> See 12 O.S. Supp. 2004 §2503(D)(3)

<sup>4</sup> Holmes v. Nightengale, 2007 OK 15, 158 P.3d 1039.

<sup>5</sup> Holmes v. Nightengale, 2007 OK 15, 158 P.3d 1039.

<sup>6</sup> Bryson v. State, 1985 OK CR 107, 711 P.2d 932.

negligence in furnishing information obtained in treating a plaintiff to law enforcement authorities that led to his arrest and conviction.<sup>7</sup>

## **EXPERT WITNESS AT TRIAL**

If you are appearing as an expert witness on behalf of another physician, your relationship with PLICO may be the subject of cross-examination and impeachment. In Mills v. Grotheer, 198 OK 33, 957 P.2d 540, the Oklahoma Supreme Court adopted the “connections” test by which a trial court must determine when an expert’s connection to a defendant’s insurer is substantial and goes beyond that of a mere policyholder. The Court will consider such things as whether the expert is a paid member of PLICO’s board of directors, or served on PLICO’s loss prevention committee. The higher the degree of connection of the expert with PLICO, the more probable that expert could be biased toward the insurer.

Here is some practical advice. Look pleasant when you are being videoed. Use plain language and explain the medical terms in simple terms. Do not talk down to the jury. Do not try to be too professorial. Do not be 100% in agreement with the physician you are defending. Jurors find expert testimony to be boring (especially videos) and often confusing and not helpful. In one case, several jurors were so upset by the testimony of the expert witness for the defendant doctor that they expressed happiness that the expert no longer practiced in Oklahoma.

## **DEFENDANT AT TRIAL**

***Practice humility.*** Think of this as bed side manner. Be sincere and honest. Make eye contact with the jury and do not be afraid to look at the plaintiff. The best thing that can happen at trial is for the plaintiff’s counsel to “oversell” his case or look greedy.

Be careful that you do not ask for something that is not in your best interest. Recently, a plaintiff’s attorney in a personal injury trial told the jury in closing argument that his client was not concerned about the money, but only the principle. The jury found the plaintiff and defendant each 50/50 negligent but gave zero damages.

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<sup>7</sup> Bryson v. Tillinghast, 1988 OK 6, 749 P.2d 110

Don't expect the trial judge to "throw out the plaintiff's case" as frivolous. The law does not allow judges to substitute their judgment for that of a jury when a material fact is in dispute. In the case of Robinson v. Oklahoma Nephrology Associates, Inc., 2007 OK 2, 154 P.3d 1250, two physicians were sued in connection with separate treatment rendered to the Plaintiff. One was a family physician and the other a specialist. Defense counsel for the individual family physician asked the trial court to sustain a demurrer to the evidence after the plaintiff presented its case. The trial judge sustained the demurrer believing that the Plaintiff's experts' testimony did not meet the burden of proof as to the family physician. The jury returned a substantial verdict against the specialist. The plaintiff appealed only the part of the case involving the family practitioner. In reversing the decision of the trial judge, the Supreme Court said:

The trial court granted [defendant's] demurrer because no expert used the phrase "reasonable medical probability" to describe the degree to which Dr. [E]'s negligence caused Mrs. Robinson's injury. That basis is too narrowly focused. Our case law requiring a medical malpractice plaintiff to produce evidence that her injuries were caused by a particular physician's negligence has never required that she produce experts who will utter a particular magic phrase but has focused instead on the particulars of each case. While the plaintiff must present evidence to remove the cause of her injuries from the realm of guesswork, she need not establish causation to a specifically high level of probability merely to withstand a demurrer to the evidence. *Citation omitted.* "Absolute certainty is not required." *Citation omitted.*<sup>8</sup>

The Robinsons produced evidence that Dr. [E]'s conduct contributed to cause Mrs. Robinson's injury even if it was not sufficient by itself to cause the injury.... Whether two causes are concurrent or whether one cause merely creates a condition for the second cause presents a question of fact. Unless the facts are undisputed and point inexorably to one conclusion, that determination is not properly made by the trial court on a demurrer to the evidence.<sup>9</sup>

Jurors in Oklahoma County are generally conservative. Most people have great respect for physicians and would not question their qualifications or diagnosis. Take the advice of your attorney. He or she has had many years of experience trying cases to juries.

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<sup>8</sup> Robinson v. Oklahoma Nephrology Associates, Inc., 2007 OK 2, 154 P.3d 1250

<sup>9</sup> Robinson, supra.