

MEDICAL NEGLIGENCE

a practical approach

By Gerard Mullins

There is rarely a medical negligence case that doesn't require some expert evidence to establish liability. What is often ignored is that the expert evidence must be founded upon a solid factual foundation. Establishing the factual foundation requires a methodical yet harmonious approach to case analysis in the development of proof.

Jan Woodward Fox and Angeline Vacharis, of Fox, Rainey & Buttram in Houston, Texas, delivered a paper to the American Association for Justice Convention in San Francisco in 2003 on a practical approach to establishing proof in medical negligence cases. They suggested the following nine steps in case analysis and proof development.

STEP 1: GENERATE A HYPOTHESIS

- Focus on the conclusion that the injury demands.
- Work backwards to what, logically, must have happened.
- Capture the hypothesis in one sentence.

STEP 2: USE INDUCTIVE REASONING TO GET AT THE FACTS

- Consider the principles of cause and effect – things do not 'just happen'.
- Consider what you know about patterns of human behaviour and how certain situations generate predictable consequences.
- Look for opportunities to confirm your hypothesis by examining the defendant's conduct:
 - assess after-the-fact conduct;
 - find a resonance between the operative facts and the defendant's subsequent behaviour; and
 - search for ways in which the defendant's subsequent behaviour is admissible.
- Frame discovery and investigative efforts around likely patterns of behaviour and their consequences.

STEP 3: USE DEDUCTIVE REASONING TO ORGANISE AND USE KNOWN FACTS

- Trace the events before and after the injury.
- Make a chronology and update it as additional facts emerge.
- Study the chronology for relationships between the events and for gaps in the story.
- Test the hypothesis against both 'good' and 'bad' facts to determine case integrity.
- Look for consistency, credibility and completeness.

STEP 4: DETERMINE HOW YOU WILL DEAL WITH THE BAD FACTS

- Turn them to your advantage as much as possible.
- Attack facts that are against your hypothesis of the case by making use of:
 - factors that undermine the credibility of sources; for example, motives to fabricate, or a witness's inability to observe events;
 - internal inconsistencies in the defendant's version of the facts; and
 - contradictory and more credible evidence.
- Minimise the importance of any bad facts left standing.

STEP 5: DETERMINE HOW YOU WILL DEAL WITH THE GOOD FACTS

- Corroborate them.
- Emphasise them.
- Repeat them.

STEP 6: CATEGORISE FACTS, NOT ISSUES

- Categorise facts around one important concept or operative fact.
- Tie categories to conclusions you wish to achieve.
- Use one-word descriptors.

STEP 7: DEAL WITH ANY PROBLEMS CAUSED BY CLAIMING AGAINST MULTIPLE DEFENDANTS

- Consider internal consistency in the plaintiff's case;
- Consider how the plaintiff's story will be told;
- Consider how the development of facts against one defendant will aid another.

STEP 8: DEVELOP THE ORDER AND TYPE OF PROOF

- Keep the judge's task in mind:
 - locate the key or central action in the case;
 - construct the most credible inferences between the elements of information that make up competing stories; and
 - at each stage:
 - decide how to interpret each story element;
 - decide what connections are to be set up among the elements; and
 - decide what frame of reference to apply.

STEP 9: USE EVIDENCE TO TAKE ADVANTAGE OF PRIMACY AND REGENCY

- Consider the importance of first impressions and the impact of emotional evidence.
- Consider saving operative factual evidence until the judge has a frame of reference and a context in which to make the inferences and logical deductions you seek.
- Consider keeping 'wrap-up' evidence for the conclusion.
- Make use of the power of the implicit statement.
- Structure to enhance continuity in the story.
- Consider the associative value of simultaneous proof.

It is critical to keep the big picture in mind. Think simply and informally and keep the storyline in mind at all times. Interestingly, the authors urge you not to get distracted by the 'bad facts'. Identify and acknowledge them, but do not allow them to distract you from your case preparation. ■

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