

**NEW ENGLAND COLLEGE OF OCCUPATIONAL AND ENVIRONMENTAL
MEDICINE**

MEDICAL CAUSATION IN LITIGATION SETTINGS

I. Legal Forums For Medical Opinions

Medical questions arise in a variety of litigation settings. All states provide judicial and administrative forums to resolve disputes involving medical issues. State trial courts generally handle the majority of those claims based upon negligence including automobile accidents, slip and falls, and product liability. They also handle those cases based upon intentional misconduct including invasion of privacy, assault, battery, and intentional infliction of emotional distress. More recently, employment law cases involving medical issues are being presented in State courts. However, the Federal system has overlapping jurisdiction with the State courts so many of these claims could be presented in the U.S. District Court provided that these claims meet their jurisdictional requirements such as diversity of citizenship and a minimum value of \$75,000 or a federally created statute, such as FMLA, ADA, FELA, Jones Act or Longshoreman's Act, is involved.

In addition to those claims which can only be brought before a judicial tribunal as above, there are an increasing number of claims, involving medical issues, being heard in various administrative settings. Workers' compensation claims, social security disability claims and unemployment claims generally require medical findings to be made by a fact finder.

Administrative forums are designed to dispense justice in a more expeditious fashion than courts. As a result, the testing of the opinions provided by medical providers is much more limited in scope by time constraints imposed upon the parties.

II. The Litigation Process

Claims presented in a judicial setting are governed by the Rules of Civil Procedure and by the Rules of Evidence. Federal and State judicial systems operate under similar sets of these Rules. The purpose behind the Rules of Civil Procedure is to level the playing field and to prevent surprise to all participants. The Rules of Civil Procedure cover the entire litigation process from the commencement of the action, pleadings, parties, depositions and discovery including physical and mental examinations of persons under Rule 35, trials and appeals. The Rules of Evidence are designed to insure that only information which is relevant, probative and based on good and acceptable science upon which reasonable people rely and to provide some predictability in the determination as to what information can or cannot be used in a trial. “These rules shall be construed to secure fairness in administration, elimination or unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” (Rule 102, Maine Rules of Evidence). Rules of Evidence which impact the medical profession include the following:

- 409 – Evidence of furnishing or offering or promising to pay medical, hospital or similar expenses occasioned by an injury is not admissible to prove liability for the injury.
- 503 – A patient has the privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosing or treatment of the patient’s physical, mental or emotional condition... except [when the patient’s condition is an element of the claim.]
- 702 – If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

705 – The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data... The expert may in any event be required to disclose the underlying facts or data on cross-examination.

802 – Hearsay is not admissible except as provided by law or by these rules...

803 – Statements made for purposes of medical diagnosis or treatment and describing medical history or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The Rules of Civil Procedure and the Rules of Evidence apply to judicial settings regardless of whether the proceedings are before a jury or a judge acting as a jury.

Claims presented in an administrative setting are not subject to the Rules of Civil Procedure or the Rules of Evidence more often than not. A number of states, including Maine, have dispensed with adherence to these sets of rules in order to make the claims process less formal and more expeditious. For example, in Maine workers' compensation matters the hearings are governed by statute. Discovery is essentially disallowed except for answering a set of questions provided by the Workers' Compensation Board which questions are the same in all cases. Depositions of health care practitioners are not permitted unless the hearing officer finds that the testimony is sufficiently important to outweigh the delay in the proceeding. With regard to the type of evidence that can be received by the workers' compensation hearing officer, Section 309 sets forth the standard:

309 – The board...need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. The board... shall admit evidence if it is the kind of evidence on which reasonable persons are accustomed to relying in the conduct of serious affairs...

Since depositions of health care practitioners are generally not taken, Maine permits the introduction of “sworn” statements by a doctor ...so long as the other party has notice of “testimony” to be used. In other words, the parties must exchange relevant medical reports 14 days in advance of the hearing.

III. Medical – Legal Causation

Medical opinions are an absolute necessity in establishing causation of a medical condition to an event which gives rise to a claim for legal damages. Did the automobile accident which was caused by the negligence of another cause the plaintiff to develop a new medical condition or aggravate a pre-existing condition? Did the work injury cause the employee’s disability? Does the claimant have a medical condition which prevents employment? Those are the types of medical questions which the legal community must provide answers to in the various legal settings deciding the pending claim. Not only must the lawyers know and understand the legal requirements necessary when dealing with medical opinions, but for a physician to be fair to his patient or process, he/she too must understand how and why challenges are made to those opinions. Physicians, by their nature, want to help their patients or the process by providing honest and fair written or oral testimony. However, their efforts are often thwarted by a lack of understanding as to how their opinion is perceived by those who ultimately decide the claim.

The legal and medical professions have always had some degree of cynicism toward the other. Those in the medical profession point to the fact that their profession is based on

science and, therefore, their expressed opinions are owed some degree of acceptance. On the other hand, the legal profession looks at their medical counterparts are being too focused on the science aspect of their profession and not the human element which is the source for much of the information relied upon to form a medical opinion. Herein lies the conflict which would be lessened if the physician has a better understanding as to the rules imposed by the courts on their opinions. The following legal terms are present and evaluated by fact finders in every litigated claim.

Burden of Proof

The burden of proof is a duty upon the petitioning party to prove all of the essential elements (facts) of their claim. For example in negligence cases, the essential elements are duty, breach of duty, causation (harm) and damages. The moving party (Plaintiff) is responsible for presenting competent and probative evidence on each element in order to justify a verdict. In a workers' compensation claim, the moving party (Employee) must prove by offering competent and probative evidence that he/she was an employee who sustained an injury arising out of and in the course of his/her employment and that notice of the same was provided within the prescribed time period.

Standard of Proof

The standard of proof relates to the quality and quantity of evidence produced by the moving party in order to satisfy his/her burden of proof. In civil matters heard before judicial tribunals, the standard of proof is most often referred to as the "preponderance of the evidence." When questions are posed to medical practitioners asking for an opinion, usually

the terms “to a reasonable degree of medical certainty or probability” are included to suggest that the opinion meets this standard of proof. Preponderance of the evidence is often explained by the use of the 51% analogy. The preponderance of the evidence standard generally applies to administrative claims as well. Maine has increased the standard of proof for mental injuries by suggesting a “clear and convincing” standard which is often explained by the use of the 75% analogy. By way of comparison, the criminal standard of “proof beyond a reasonable doubt” is often explained by the use of the 99.9% analogy.

Medical Causation

It is necessary in all injury cases being litigated that the moving party offer medical evidence supporting the claim that the event (automobile accident, slip and fall, work accident), in fact, caused the injury. Those claims presented in the judicial settings are generally more straight forward than in workers’ compensation settings. The lawyers are free to argue that the event was insufficient to cause the injury; that the plaintiff had a pre-existing condition subject to an apportionment offset; or any other defense which cast doubt upon the medical opinion.

Legal Causation

In Maine, and at least 7 other states, legal causation must also be addressed in conjunction with medical causation in workers’ compensation claims. Unfortunately, most physicians believe that any injury which occurs while an employee is working is “caused” by the work and therefore compensable. However, the Maine Supreme Judicial Court has made it clear that “it was not intended that compensation should issue for every disability resulting from an injury sustained *while* the employee was at work, but only for a disability as to which the

precipitating injury was additional sustained *because* of the employee's work." See Bryant v. Masters Machine Co, 444 A.2d 329 (Me, 1982). In those cases where an employee has some type of pre-existing condition and, hence, bears some personal element of risk because of that pre-existing condition, the employee must show that the employment contributed some substantial element to increase the risk, thus offsetting the personal risk which the employee brings to the work environment. In Barrett v. Herbert Engineering, Inc, 371 A.2d 633 (Me. 1977), the employee had a long standing chronic back condition. While walking a work in his normal manner, his symptoms increase. On appeal, the Law Court upheld a denial of benefits because the employment did not increase the employee's exposure to disability beyond the risk encountered in everyday life. The analysis requires that the workers' compensation Hearing Officer determine first whether legal causation exists and if so then whether medical causation exists.

IV. Why Medical Opinions Are Not Always Accepted

Physicians are trained to provide answers to complex questions. Their opinions are predicated on a thorough review of the available information including medical records, patient history, physical examination, diagnostic studies and reports from specialists. Unfortunately, in a legal setting the physician's best medical judgment is not always accepted and for reasons which have absolutely nothing to do with medicine. Lawyers are trained to cast doubt upon any expert testimony provided by individuals not hired by them. The method used to attack a physician's medical opinion varies depending upon who is the ultimate fact finder and decision maker. Where lay juries are involved, the cross examination strategy will most likely be to attack the

physician's credibility by showing that he or she is biased in some manner or lacks training in injury management. Does the physician earn most of his income by examining claimants for insurance companies, employers or defense attorneys? Does the physician even treat individuals? Has the treating physician done fellowships in specialized areas of medicine involved in the claim. Lawyers try to avoid talking anatomy to lay juries because they often lack the capacity to understand the science of it. Hence, the focus is primarily on other non-scientific areas of cross-examination.

When the fact finder is either a judge acting without a jury or an administrative law judge or hearing officer, lawyers recognize that these types of non-scientific examinations are not as persuasive. Many of these physicians have appeared before these fact finders on numerous occasions. They are familiar to the fact finders who tend not to accept the bias or training arguments seriously. They are more interested in the anatomy and learning why a diagnosis is more or less probable.

How does the law treat these "dueling" experts? It does not impose any requirements on the fact finder to accept the opinion of the "best and the brightest." Rather, it is clear that the law permits the fact finder, whether it is a jury or judge/hearing officer, to weigh conflicting medical opinions and decide which of these opinions is the most persuasive. The fact finder has complete discretion in accepting one doctor over another and can accept the opinion of a family physician over a world renowned specialist. The fact finder may accept the opinion of one

physician even if numerous other physicians of note disagree. The law notes that the fact finder is “uniquely situated to weigh conflicting medical and testimonial evidence.” Harvey v. HCI Corp. WCC App Div, 88-059 (Me. 1988). Fact finders are even permitted to accept part of a physician’s opinion and accept other parts and to accept opinions based upon earlier examinations rather than current examinations. Even uncontradicted medical opinion need not be accepted by the fact finder if speculative or diminished by other facts in evidence.

What types of “facts” are evaluated by fact finders to determine which medical opinion is most persuasive? The following represents the most common areas of cross examination not based on science or anatomy.

Issues involving the Claimant – Is the Claimant credible

If the Claimant is not credible, then the law permits the fact finder to disregard medical opinion based upon information provided by an incredible claimant. Claimants become less credible to fact finders (perhaps not to physicians however) if they overstate or exaggerate their complaints; if the complaints are subjective in nature with no objective findings being discernable; if the mechanism of injury does not seemingly fit the condition diagnosed; if the claimant gets worse during treatment and after most physical activity has ended; if the physical examination and diagnostic studies are normal and the physician still bases his opinion only upon the statements of the claimant

Issues involving the Physician – Is the Physician thorough

Lawyers oftentimes have better medical records than the physician. A medical opinion is weakened if the physician has to admit to not seeing all of the available medical records even if those records might seem unimportant. By not having all of the prior records, physicians open themselves up to claims that they misunderstood the nature of a prior surgery or type of treatment if the information comes directly from the claimant. Medical opinions are weakened if not supported by a medical analysis. Medical opinions are weakened if that opinion is guarded by the physician's use of terms like "plausible, possible, could have, might have, or is consistent with." Medical opinions can be made to appear weak if the physician has seen the claimant infrequently. Physicians are considered to be intelligent. However, sloppily written reports where gender or body parts are confused or which contain misspellings or poorly written sentences or paragraphs add to the lessening of the medical opinion.

The law justifies the fact finders ability to select whatever medical judgment they deem appropriate for that case. Different fact finders could reach different conclusions on the same set of facts. However, the fact finders are the only participant in the legal process who have the opportunity and ability to see "all parts of the puzzle." As such, the law permits them to decide a case on the "totality of the evidence."

