PRACTICAL TIPS FOR TRYING MEDICAL NEGLIGENCE CASES

Source: Superior court judges Richard Doughton, Ed Wilson and Catherine Eagles (handout prepared for October 2009 Superior Court Judges Conference)

I. General Overview

The most common medical negligence cases are against doctors and hospitals, but it is not unusual to see cases against dentists, nursing homes, emergency and ambulance services and emergency medical technicians, physician's assistants, nurse practitioners, nurses, and physical therapists. The legislature has set forth special proof requirements in all actions "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." G.S. 90-21.12. This paper focuses on special issues arising in the trial of these cases. Evidence issues are discussed in a separate paper, "Evidence Issues in Medical Negligence Cases," which also may be found in this Survival Guide.

In a medical negligence case, the plaintiff must prove 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." G.S. 90-21.12. "One of the essential elements of a claim for medical negligence is that the defendant breached the applicable standard of medical care owed to the plaintiff. Plaintiffs must establish the relevant standard of care through expert testimony." *Crocker v. Roethling*, 363 N.C.140 (2009) (quotations and citations omitted).

A plaintiff can also prove negligence in a medical negligence case by showing the defendant did not use his best judgment or did not using reasonable care and diligence. *Wall v. Stout*, 310 N.C. 184 (1984). While unusual, *res ipsa loquitor* can raise its head in medical negligence cases. Most of these cases will be cases where foreign objects such as sponges or surgical instruments are left within a person's body during surgery. See N.C. Pattern Jury Instruction Civil 809.05

Although a plaintiff will need an expert witness (or two) to establish the standard of care and that the defendant doctor breached that standard (thus, establishing negligence), the defendant, in most cases where contributory negligence is an issue, will NOT need an expert witness to establish contributory negligence. *McGill v. French*, 333 N.C. 209 (1993).

N.C. Pattern Jury Instruction Civil 809.00 is a clear statement of what a plaintiff in a medical negligence case must prove, and will give the presiding judge an overview of the law. The presiding judge should have a copy on the bench during the entire trial, along with Rule of Evidence 702.

II. Pre-Trial Issues

A. An Early Pre-Trial Conference Can Help.

If you are aware a medical malpractice case is on your docket in advance, and that is the usual case, it is a good practice to pre-try the case at least two weeks before the trial.

Discussion of possible settlement, the pre-trial order, motions in limine, witness problems, and scheduling are all appropriate. This can streamline the case and prevent wasted time for jurors and court personnel. These can be done by telephone if it is not possible to arrange for the appearance of all parties.

B. Discuss Scheduling With The Attorneys Early.

Some attorneys want to start late, take long lunches, and end early to accommodate the schedules of witnesses. Decide early how flexible you will be about this and then be consistent; don't hold the defendant to a different standard than you held the plaintiff.

C. Insist On A Pre-Trial Order In Which The Plaintiff Spells Out Specifically His/Her Contentions Of Negligence.

You will need this to instruct the jury and it will help you make your evidence rulings. As set forth in the pattern jury instruction, a health care provider has three duties to a patient, and understanding those duties and which duty the plaintiff contends the defendant has breached will simplify your evidentiary decisions. During the charge conference, go over this list specifically with counsel and be clear about what you will tell the jurors.

D. Ask For Advance Help On Evidence Issues.

At the beginning of the trial, ask the lawyers to give you their briefs and case authorities on likely evidence issues early so you can be prepared and not have to send the jury out while considering your ruling. If you are fortunate enough to get cases or briefs in advance, read them in advance.

E. Ruling On Admissibility Of Expert Testimony In Advance.

In some cases, the parties will ask you to decide via a motion in limine whether testimony of one or more expert witnesses — usually on behalf of the plaintiff — is admissible. If there are serious questions under Rule of Evidence 702, you may want to do this. If you exclude the evidence, the plaintiff may take a voluntary dismissal without the time or expense of empanelling a jury. If you admit the evidence, it may assist settlement negotiations. On the other hand, it can take a long time and can result in having to listen to the same evidence twice. The Supreme Court in *Crocker v. Roethling*, 363 N.C.140 (2009), discusses when such a hearing is required in the context of a summary judgment motion. For a discussion about whether a ruling on a motion in limine preserves an issue for appellate review, see *Kor Xiong v. Marks*, __N.C. App. ___, ___, 668 S.E. 2d 594, 597 (2008).

F. Motions To Continue Made On The Day Of Trial.

Most medical negligence cases have had Discovery Scheduling Orders in place for some time, and there have often been substantial steps taken by court staff to get these cases tried, such as summonsing extra jurors and obtaining a special session of court. Motions to Continue made at the last minute should be granted only when there is a serious compelling reason for doing so. Compare *Green v. Maness,* 69 N.C.App. 292 (1984)(disclosure of expert witness ten days before trial required continuance) and *Campbell v. Pitt Memorial Hospital*, 84 NCApp 314 (1987)(no error in refusing to continue trial where plaintiff disclosed 20 experts a month before trial) *aff'd in part and disc. review improvidently allowed in part*,

(1987), *overruled on other grounds* by *Johnson v. Ruark Obstetrics & Gynecology Assoc.*, 327 N.C. 283 (1990).

III. Jury Management Issues

A. Jury Selection: Do the jurors have any privacy interests? Be prepared for questions on voir dire inquiring into a juror's health history in some detail. Decide in advance how far you will allow counsel to go and discuss this at the pretrial conference.

B. Be Mindful Of The Jury's Time: Try to handle offers of proof at the end of the day and to hear long arguments at the lunch break or other times when the jury is not waiting. At the end of each day, inquire of the parties about which witnesses will be testifying the next day, which will assist the lawyers in planning and being ready. Be prompt after recesses and breaks so that you are not contributing to delays.

Excuse the Jury when you know you won't need them for awhile. There is no reason the jury should sit in the jury room for two hours if you know you will be busy with the lawyers on a legal question. Let them take a long lunch or go home early. These cases are rarely tried without a few long conferences with the lawyers outside the jury's presence, and it can remove a stress factor for you and make the jury happier if they don't sit around a lot.

C. Managing Bench Conferences: The lawyers may want to approach the bench or be heard outside the jury's presence all the time. There will be a number of evidence issues which will require this, but many are ordinary objections that don't require a hearing. Get the lawyers in the habit of stating their objections concisely without having to excuse the jury. The trial will run more smoothly and the jury will feel more a part of things.

D. Taking Notes: Letting jurors take notes in a long trial can be helpful to jurors in a number of ways. It helps them stay focused and interested and, during deliberations, can help them remember the evidence. Offer the jurors notepads at the beginning of trial and be sure to give a cautionary instruction along the lines of N.C. Pattern Jury Instruction Civil 100.70.

IV. Trying The Case.

A. Don't Micromanage: Take your time and let both sides have an adequate opportunity to present their respective cases. Usually the lawyers in these cases are skilled advocates, and the best approach is usually to let the lawyers try their case. Generally, they know their bounds. Treat each side as equally as you can.

B. Video Depositions: Ask the lawyers to allow video depositions to be played in their entirety. If that is not possible, release the jury early one day and resolve the objections in advance.

C. Directed Verdict Motions: You may be called upon to revisit expert testimony issues here; defendants may again challenge the admissibility and sufficiency of an expert's testimony. Note that if you deny or reserve ruling on a motion for a directed verdict and if the defense presents evidence, then "any subsequent ruling by the trial judge upon defendant's motion for directed verdict must be upon a renewal of the motion by the defendant at the close of all the evidence, and the judge's ruling must be based upon the evidence of both plaintiff and defendant." *Cox v. Steffes*, 161 N.C. App. 237 (2003)(citations and quotations omitted).

D. Charge Conference And Closing Argument: Based on the pre-trial order, you can have a very good draft of your instructions before the charge conference. Still, allow plenty of time for the charge conference. Depending on the time when all parties rest their cases, send the jury home for the day, or tell them to come in late the next day so that the jury isn't kept cooling their heels in the jury room while the lawyers wrangle. The ideal is for all arguments to be made on the same day.

E. Long Trials Are Hard. It is okay to stop at 12:30 on Friday in a multi-week case so that everyone has time to go to the bank, check in at work, and otherwise clear their heads. This is true for the judge, the lawyers, and the jurors. Try to get some exercise every day and don't overeat at lunch.

V. Settlements During Trial

If a case settles during trial, be sure to get the terms on the record. If the settlement does not cover all relevant issues, it may fall apart during the drafting of the release and have to be tried again. See *Chappell v. Roth*, 353 N.C. 690 (2001).

If there is more than one defendant and the plaintiff and one defendant settle during the trial, what do you say to the jury? The less said the better, usually, so something like, "You no doubt noticed that counsel for Defendant B is no longer here. The issues that relate to Defendant B have been removed from this trial and you do not need to concern yourself with those claims any longer." See *Campbell v. Pitt Memorial Hospital*, 84 N.C. App. 314 (1987)(proper to prohibit any references to the fact that a treating physician witness had been a defendant who settled with plaintiff before trial) *aff'd in part and disc. review improvidently allowed in part*, 321 N.C. 260 (1987), *overruled on other grounds by Johnson v. Ruark Obstetrics & Gynecology Assoc.*, 327 N.C. 283 (1990).

The other defendant may want to know the terms of the plaintiff's settlement with the settling defendant. There does not appear to be any case law on this, so it would seem to be in your discretion. However, North Carolina law prohibits confidential settlements with public agencies, including public hospitals and ambulance services. *See* G.S. 143-318.10 (b) (defining "public hospital"); G.S. 132-1.3 (prohibition against confidential settlements with public agencies); *News and Observer Publishing Co. vs. Wake County Hosp. Sys*., 55 N.C. App. 1 (1981).

VI. Post-Trial Motions For Costs

Read and be familiar with G.S. 7A-305 (d), G.S. 6-20 and G.S. 7A-314 pertaining to costs. There will almost always be a request for expert witness fees by one side or the other, and these can be very substantial. Experts must be subpoenaed. They can only be paid for their time testifying.

Unless an expert witness is subpoenaed, the witness fees are not generally recognized as costs. *Wade v. Wade,* 72 N.C. App. 372 (1985); *Miller v. Forsyth Memorial Hospital, Inc*; 173 N.C. App. 385 (2005). G.S. 7A-314(e) states: "If more than two witnesses are subpoenaed, bound over, or recognized, to prove a single material fact, the expense of the additional witnesses shall be borne by the party issuing or requesting the subpoena."

VII. Miscellaneous

A. Is There A Provider/Patient Relationship? "A physician-patient relationship between defendant Cain and plaintiff must be shown before any duty of care may be imputed to defendant Cain." *Willoughby v. Wilkins*, 65 N.C. App. 626 (1983); see *Easter v. Lexington Memorial Hospital*, 303 N.C. 303 (1981).

B. Agency Issues Can Arise In Medical Negligence Cases: *Smock v. Brantley*, 76 N.C. App. 73 ()(as a matter of law, doctor was not agent of hospital on facts shown); *Willoughby v. Wilkins*, 65 N.C. App. 626 (1983)(evidence sufficient to go to the jury on question of whether ER physician was employee of hospital or independent contractor).

C. Informed Consent: These cases are almost always against doctors; efforts by the plaintiffs' bar to expand that duty to hospitals and nurses have met with little success. *See Daniels v. Durham County Hospital Corporation*, 171 N.C. App. 535 (2005)