Reasonable Medical Opinions

The question as to the degree of certainty to which a doctor must testify in a medical malpractice case seems to be a never-ending inquiry. As my Dad would say, there are more opinions on this than "Carter has little liver pills." Remember Carter's Little Liver Pills? Well, don't worry, neither do I. It was an old time saying, however.

The case of *Mazzie vs. Lehigh Valley Hosp.*, 2021 Pa. Super. LEXIS 214, 2021 WL 1439637 (April 16, 2021) (Nichols, J.) is illustrative. This case addressed not only the never-ending inquiry over what an adequate medical opinion sounds like, but also the circumstances in which new trials should be granted because of the damage award.

Appellants allege that the trial court erred in: (1) granting a new trial limited to damage; (2) substituting its judgment for the jury and usurping the jury's verdict with respect to non-economic damages; (3) disregarding the jury's role in assessing the testimony presented at trial; and (4) denying its request for judgment notwithstanding the verdict (JNOV) and its cross-motion. The Superior Court affirmed.

On September 8, 2014, Mrs. Mazzie underwent laparoscopic surgery to repair an incisional hernia, related to a prior hysterectomy, and an umbilical hernia. Dr. Garcia performed the surgery at LVHM. Following the laparoscopic surgery, Mrs. Mazzie was discharged from LVHM and transported to Manor Care Easton on September 12, 2014. A few days later, however, she returned to LVHM with septic shock and was rushed to the operating room. As a result of the infection, Mrs. Mazzie was put into a medically induced coma, and underwent numerous additional surgical procedures necessary to save her life.

The patient alleged that she suffered post-operative complications because Dr. Garcia negligently pierced her bowel during surgery.

Appellants first complain that the trial court should have granted their motion for JNOV because plaintiff's medical expert failed to render his opinion to a reasonable degree of medical certainty. However, the court's review of the record confirmed that Dr. Mowschenson testified, to a reasonable degree of medical certainty, that Dr. Garcia deviated from acceptable medical standards when he used a Veress needle to repair Ms. Mazzie's incisional and umbilical hernias. Although Dr. Mowschenson did not use the exact phrase, "reasonable degree of medical certainty," his opinions were rendered to that degree of certainty. *Id*., at *11, relying on *Vicari vs. Spiegel*, 2007 PA Super 316, 936 A.2d 503, 509 (Pa. Super. 2007)(holding testimony sufficient even where exact phrase was not used). Throughout his testimony, Dr. Mowschenson was steadfast in his opinion that Dr. Garcia negligently performed Ms. Mazzie's lower abdominal surgery and that his negligence was a factual cause of her post-operative injuries. While Appellants emphasize that Dr. Mowschenson used the phrase "more likely that not" on cross-examination in response to questions about Dr. Garcia's alleged negligence, the totality of Dr. Mowschenson's testimony revealed that his opinions were rendered to the requisite degree of certainty. *See Carrozza vs. Greenbaum*, 866 A.2d 369, 379 (Pa. Super. 2004) ("That an expert may have used less definite language does not render their entire opinion

speculative if at some point during his testimony he expressed his opinion with reasonable certainty.")((citation omitted)). Moreover, because the testimony, considered in its entirety, was sufficient to send this case to the jury, it would have been improper for the trial court to grant Appellants' motion for non-suit. *See Vicari*, *supra*, 936 A.2d at 512 (nonsuit improper where totality of testimony met requisite degree of certainty).

Many experts are confused by the difference in language required by state courts. Most courts do not require the Pennsylvania standard of "reasonable degree of medical certainty," but rather a degree of likelihood, sometimes expressed as "more likely than not." The confusion over this phraseology has been looked at not only by many state and federal courts, but also by the auspicious Institute of Medicine and the American Law Institute when the latter adopted the phraseology "factual cause," also utilized now by the Pennsylvania Standard Jury Instruction Committee.

Pennsylvania has been moving closer to the concept that if a doctor uses the term "more probable than not" or "more likely than not," they are in essence saying reasonable degree of medical certainty. After all, the emphasis is not on "certainty" but on "reasonableness." When a doctor in Pennsylvania testifies to a reasonable degree of medical certainty, the doctor is effectively saying that the opinion given is based upon a high degree of likelihood.

Appellants also asserted that the trial court erred in granting a new trial on damages. The trial court granted a new trial because of the jury's failure to award Ms. Mazzie damages for pain and suffering.

Once it reviewed the record, the appellate court agreed with the l court below that Ms. Mazzie suffered serious post-operative injuries and underwent subsequent surgical procedures as a direct result of these injuries. Ms. Mazzie developed abdominal pain, abdominal distension, and a fever following her September 8, 2014, surgery.

Although Ms. Mazzie suffered from various pre-existing conditions, even Appellants' medical expert, Dr. Matthew Finnegan, M.D., concluded that Ms. Mazzie suffered serious post-operative injuries. In particular, Dr. Finnegan testified that Ms. Mazzie developed peritonitis – a severe infection in the abdomen – as a result of the bowel perforation.

Accordingly, the record supported the jury's finding that Dr. Garcia negligently performed Ms. Mazzie's lower abdominal surgery and that his negligence was a factual cause of her post-operative injuries.

Appellants further argued that the jury's award of medical expenses only was a compromised verdict which should not be disturbed. The Superior Court agreed with the trial court that the jury's verdict did not meet the definition of a compromise verdict. The jury did not find that Ms. Mazzie was contributorily negligent. Nor did the jury return a verdict in a lesser amount than the stipulated medical expenses. Rather, the jury, as stated above, assigned full liability to Dr. Garcia.

The Superior Court found that the record supports the trial court's ruling that it was unreasonable for the jury to believe that Ms. Mazzie did not endure compensable pain and suffering.

The takeaway bullet points are as follows:

- Doctor testified to a reasonable degree of medical certainty even though he used the term "more likely than not."
- The totality of the testimony revealed that the doctor's opinions were rendered to the requisite degree of certainty.
- The fact that the expert may have used less definite language at some point does not render the entire opinion speculative.
- The trial judge did not err in granting a new trial because of the failure to award damages for pain and suffering.
- Even defendant's doctor conceded that there were post-operative injuries and subsequent surgical procedures.
- This was not a compromise verdict. The jury did not find any contributory negligence.

This opinion represents a recognition that experts need not use any magic formula in terms of giving opinion, and that Pennsylvania is moving more towards the majority rule than its own quirkish formulation. The opinion also recognized that the issue was not merely whether a damage award was inadequate. Granting a new trial based upon a substitution of the judge's opinion regarding the amount of damages warranted for that of the jury's would be unfair to the verdict winner. Rather this was a case where the jury failed to award an element of damages that was clearly supported by the evidence. Therefore, remand was necessary for retrial on that issue.

Clifford A. Rieders, Esquire
Rieders, Travis, Humphrey,
Waters & Dohrmann
161 West Third Street
Williamsport, PA 17701
(570) 323-8711 (telephone)
(570) 323-4192 (facsimile)

Cliff Rieders is a Board-Certified Trial Advocate in Williamsport, is Past President of the Pennsylvania Trial Lawyers Association and a past member of the Pennsylvania Patient Safety Authority. None of the opinions expressed necessarily represent the views of these organizations.