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Evidence of Prior Malpractice Claims – When Is It Admissible, And For What? And When Is It Deadly?

by Brenda M. Johnson

In any malpractice case, there is always the possibility that one of the professionals involved in the litigation – either an expert or a defendant – has been sued in another case, possibly involving similar facts or similar claims of negligence. If a defense expert in one of your cases has been sued for similar negligence, you of course want to use this at trial. If *your* expert, on the other hand, has been the subject of similar claims, it's something you'd like to keep out. And what if the defendant has a history of being sued for the same malpractice that is at issue in your case? You'd *love* to use this at trial. But can you? Are there any pitfalls?

As it turns out, there are times when a medical professional's litigation history is relevant, and times when it is not. Fortunately, when it comes to experts, the factors governing admissibility favor plaintiffs, since courts in Ohio and elsewhere have held that prior malpractice claims against a defense expert can be relevant to show bias, but that they have no real relevance when it comes to plaintiff's experts. When it comes to prior claims against malpractice defendants themselves, however, look out. Ohio courts have excluded such evidence, and courts in other states have treated the subject of prior lawsuits as a sort of "third rail" to which the jury should not, under any circumstances, be exposed.

Can Evidence Of Prior Malpractice Claims Be Used Against Defense Experts? Mostly Yes.

In *Oberlin v. Akron Gen. Med. Ctr.*,[1] the Ohio Supreme Court held that evidence that a defendant's expert in a medical malpractice case is himself a defendant in a case involving similar allegations of negligence is relevant to prove bias, prejudice, or motive to misrepresent, and is generally admissible.[2] The plaintiff in the underlying action alleged permanent injury to his left ulnar nerve as a result of negligence during surgery, but was precluded from cross-examining the defendant's expert about the fact that he was a defendant in another lawsuit in which similar negligence was alleged.[3] The trial court refused to allow the plaintiff to cross-examine the expert regarding the other lawsuit, holding that the danger of prejudice required its exclusion under Evid. R. 403(A).

The Supreme Court reversed the trial court, finding that the existence of an active malpractice action against the defense expert involving a similar procedure and similar injury clearly was relevant for purposes of Evid. R. 611(B), which provides that "cross-examination shall be permitted on . . . matters affecting credibility," and for impeachment purposes under Evid. R. 616(A), which provides for impeachment through evidence of bias, prejudice or "any motive to misrepresent."[4] The Court noted that similarity of procedure and injury in the two actions was sufficient to indicate bias, as it would predispose the expert to find that the defendant's conduct was within the standard of care in order to minimize the risk of his testimony later being used against him: "If [the expert] were to criticize any aspect of [the defendant's] handling of the surgery, the [other] plaintiff might seize on that testimony and use it against [the expert] in her own suit."[5] In addition, the Court noted that "an expert with

an active malpractice case against him might be hostile to malpractice claimants in general," and that his hostility could color his testimony. [6]

With respect to the potential for unfair prejudice, the Court observed that, while such evidence "might affect how a jury views testimony of an expert," this was not in itself grounds to exclude it: "Of course, evidence of an expert witness's potential bias will prejudice the case of the party for whom he is testifying. But that is the very reason for establishing the bias of a witness – to cause a jury to think critically about the testimony being offered."[7] Thus, to the extent the plaintiff sought to disclose the fact that the expert was a defendant in a pending malpractice action, the Court held the evidence was admissible. At the same time, the Court signaled there were limits to the amount of detail a plaintiff would be allowed to share regarding another action:

> The only important inquiry is whether the evidence of bias is unfairly prejudicial. Were Oberlin's counsel in this case to attempt to inflame jurors by describing the horrors of the Canadian plaintiff's injury, that might be considered unfairly prejudicial. The fact the expert is simply involved in a pending malpractice action is not.[8]

Thus, *Oberlin* establishes that evidence that a defense expert is a defendant in a pending lawsuit involving a similar medical error is admissible to prove bias, prejudice or a motive to make misrepresentations. But what about prior lawsuits? Here, the issue is slightly less clear, but still very favorable to plaintiffs.

Neither the Ohio Supreme Court nor the lower courts have addressed the admissibility of an expert's prior lawsuit history directly. Other state courts, however, have held that such evidence is admissible. Indeed, in *Irish v. Gimbel*,[9] the Maine Supreme Court held that it was reversible error to exclude such evidence. The plaintiff's attorney in that birth trauma case previously personally sued the defense expert for similar negligence, obtaining a settlement on behalf of his own child. On appeal, the Maine Supreme Court held that the trial court acted properly in excluding any reference to plaintiff's counsel's involvement in the prior suit, but reversed the trial court for having excluded *all* evidence that the expert had been a defendant in a similar suit. Instead, the Maine court determined that "the excluded evidence was relevant to a crucial issue, bias or interest," and that the evidence, "if admitted, could have had a controlling influence on a material aspect of the case, i.e., whether defendant deviated from the applicable standard of care."[10]

Other courts have reached similar conclusions. In *Irish*, the Maine Supreme Court relied on *Hayes v. Manchester Mem. Hosp.*,[11] in which the Connecticut Court of Appeals held that the fact that a lawsuit alleging similar medical negligence had been pending against a defense expert when he was deposed, and had been settled prior to trial, was highly relevant to an expert's motive, and plaintiff therefore should have been allowed to introduce evidence of it at trial.[12] And in *Willoughby v. Wilkins*,[13] the North Carolina Court of Appeals also held that prior lawsuits against a defense expert were relevant to bias or interest, and should be admitted at trial.

Can Evidence of Prior Malpractice Claims Be Used Against Plaintiffs' Experts? No.

Courts seem uniform in holding that litigation against defense experts is relevant to motive or bias, but not so much when it comes to lawsuits against plaintiffs' experts. While the case law on this issue is limited, the better argument is that such evidence, when offered against a *plaintiff's* expert, loses its relevance and should be excluded.

The reason for treating plaintiff's experts and defense experts differently was explained in *Willison v. Pandey*,[14] an opinion recently issued by the U.S. District Court of Maryland. In that case, the defendant argued on the basis of *Oberlin* (among other things) that such evidence was relevant to test the plaintiff's expert's bias, prejudice and credibility.[15] The district court rejected this argument, finding that the difference in alignment obviated any likelihood that a lawsuit against a plaintiff's expert would have the same probative value as litigation against a defense expert:

> In contrast to the case *sub judice*, the expert in *Oberlin* was a *defense* expert. In this case, [the expert] is the *plaintiff's* expert. The defense does not articulate any reason to explain why a plaintiff's expert, who himself has been sued for malpractice, would be biased or prejudiced against the defendant-physician in evaluating whether the defendant acted outside the standard of care. If anything having been sued himself, [the expert] arguably would be sympathetic to [the defendant], hostile to medical malpractice claims, with a motive to conclude that [the defendant] did *not* deviate from the standard of care . . . .[16]

Can Evidence Of Prior Lawsuits Be Used Against the Defendant Himself ? The Fact Of Previous Lawsuits May Not, But Any Opinion Testimony The Defendant Gave In His Own Defense Is Fair Game.

Perhaps unsurprisingly, plaintiffs have argued that *Oberlin* provides a basis for introducing evidence that a defendant doctor (as opposed to a defense expert witness) has been sued in other cases. Ohio's courts of appeals, however, have disagreed. Instead, courts in Ohio and in other jurisdictions are fairly uniform

in holding that evidence of other malpractice claims against a defendant has no bearing on any legitimate issue, and is unfairly prejudicial as well. Indeed, at least two out-of-state courts have held that the issue is prejudicial enough to require a mistrial. If a defendant doctor offers opinion testimony on his or her own behalf, however, it is still fair game to cross-examine the defendant with opinion testimony the defendant may have given in other actions brought against him.

In *McGarry v. Horlacher,*[17] which was decided by the Second District, the plaintiff-appellant argued, based on *Oberlin*, that she should have been allowed to introduce evidence that the defendant had previously been sued for similar malpractice.[18] At trial, the court had permitted plaintiff to cross-examine the defendant about the opinions he had offered on his own behalf in the prior trial, but barred plaintiffs from disclosing the existence of the prior case, the facts of the case, or its result.[19] In affirming the trial court, the Second District drew a distinction between cross-examining a defense expert about his litigation history, which the Ohio Supreme Court held was permissible in *Oberlin*, and disclosing to the jury that the *defendant* himself had been sued before:

> In *Oberlin*, the supreme court held that "evidence that an expert witness is a defendant in a pending malpractice action alleging a medical error similar to the one at issue is probative and is admissible to prove bias, prejudice, or motive to misrepresent." In that case, the facts of the case in which the doctor was testifying as an expert were very similar to the facts in a pending malpractice case against the expert doctor. No previous medical malpractice claims against the defendant doctor were at issue. The court noted that the fact that the evidence presented "no * * * danger of an evidentiary ricochet," i.e., it revealed information relevant to the expert but not to the defendant, weighed in favor of its admission. The court concluded that such evidence, although prejudicial, was not unfairly prejudicial. The court did comment, however, that attempts to inflame jurors by describing the "horrors" of another plaintiff's injuries might be considered unfairly prejudicial. **Furthermore, while we recognize that a doctor often testifies as an expert in a medical malpractice suit against him, *Oberlin* did not specifically address whether a defendant doctor's own statements in another medical malpractice case could be used against him. Obviously, the fact that a defendant doctor has been involved in other medical malpractice cases has a greater risk of being unfairly prejudicial than such evidence related to an expert witness.**[20]

Based on this distinction, the Second District held that "[t]he trial court properly forbade this type of questioning,

and *Oberlin* does not support its admission."[21]

Plaintiffs have also attempted to argue that such evidence, while perhaps not relevant to bias or motive, may be relevant to show notice of a dangerous condition or that the doctor lacked competence to perform the procedure; however, these theories have been rejected as well. In *Lumpkin v. Wayne Hospital*,[22] for instance, the Second District rejected the argument that other lawsuits were relevant to show notice of a dangerous condition, and affirmed exclusion under Evid. R. 403.[23] And in other states, the rejection of such evidence has been vehement.

In *Persichini v. William Beaumont Hosp.*,[24] the Michigan Court of Appeals upheld a trial court's decision to declare a mistrial when plaintiff's counsel asked the defendant doctor if it was true that he had been sued six or eight times.[25] And in *Lai v. Sagle*,[26] Maryland's highest court reversed a trial court for failing to grant a mistrial when plaintiff's counsel referred in opening statement to the fact that the defendant doctor had been a defendant in prior medical malpractice actions. In so doing, that court established a brightline rule precluding the introduction of such evidence: "Courts often are reluctant to declare brightline rules or standards. There are good reasons for this usually. In this case, we overcome that reluctance."[27]

The reasons for the court's categorical reaction were as follows: First, the Court observed that evidence of prior negligent acts is substantially prejudicial in nature, and normally may only be admitted for extremely limited purposes similar to those set forth in Evid. R. 404(B), but that these purposes rarely present themselves in malpractice cases.[28] Motive or intent, for instance, are not relevant to proving negligence, and prior accidents cannot be used to show a predisposition to negligence.[29] Indeed, the court compared it to admitting evidence of prior arrests in criminal trials, and noted it would not even be proper for purposes of impeachment unless the defendant volunteered that he had never been sued for malpractice.[30] For these reasons, the Maryland court concluded that, absent some unusual circumstance, "we can conceive of no instance where making a jury aware in a malpractice trial, whether in statements of counsel or through proffered evidence, of prior malpractice litigation against a defendant doctor would be permissible."[31]

Other courts have perhaps been less vehement than Maryland's, but have come to similar conclusions regarding the admissibility and potential relevance of evidence of prior malpractice. In *Armstrong v. Hrabal*,[32] for instance, the Wyoming Supreme Court upheld the exclusion of evidence that the defendant doctor had been sued before for negligence on similar facts for reasons that parallel those articulated in *Lai*.[33] Among other things, the court upheld exclusion because lack of relevancy was a legitimate basis for doing so, and also because of the danger of a "trial within a trial" posed by commenting on the prior litigation.[34] Likewise, in *Laughridge v. Moss*,[35] a Georgia Court of Appeals held that evidence of previous medical negligence by the defendant was not admissible to show negligence on a different occasion, nor was it admissible for impeachment.

In sum, evidence of prior similar malpractice can be used against defense experts, but cannot be used against plaintiff's experts or against defendants themselves – although, to the extent malpractice defendants offer opinion testimony in their own defense, opinion testimony given by them in other cases may be used in cross-examination as long as the jury is not informed of the prior malpractice claim. ■

End Notes

1. 91 Ohio St.3d 169, 2001 Ohio 248.
2. *Id.* at 171.
3. *Id.* at 170-171 (describing testimony).
4. 91 Ohio St.3d at 171 (citing Evid. R. 611(B) and Evid. R. 616(A)).
5. *Id.* at 171.
6. *Id.* at 172.
7. *Id.* at 173.
8. *Id.* at 173.
9. 691 A.2d 664, 1997 ME 50.
10. *Id.* at ¶ 50.
11. 661 A.2d 123 (Conn. App. 1995). That opinion addressed a situation in which a lawsuit was pending against the expert when his deposition was taken, but had been settled by the time the expert testified at trial.
12. *Id.* at 125.
13. 310 S.E.2d 90 (N.C. App. 1983)
14. No. CCB-09-01687, 2011 U.S. Dist. LEXIS 118386 (D. Md. Oct. 13, 2011).
15. *Willison* at *16.
16. *Id.* at *17-*18 (emphasis in original). The defendant in that action also cited *Navarro de Cosme v. Hospital Pavia*, 922 F.2d 926 (1st Cir. 1991), in which the First Circuit rejected the argument that the trial court erred in allowing such evidence to be admitted. In *Navarro,* however, evidence that the plaintiff's expert had been subject to three prior malpractice suits had been admitted in conjunction with evidence of other improprieties, including the submission of inflated bills for expert fees and the suspension of his notary license for failure to file required reports. *See Willison* at *18-19 (summarizing *Navarro*). As the court in *Willison* observed, the First Circuit had held that the admission of such evidence *as a whole* arguably did not exceed the trial court's discretion under Fed. R. Evid. 608(b) (allowing crossexamination as to specific instances of conduct to attack witness' character for truthfulness). *Willison* at *19. At the same time, the *Willison* court distinguished *Navarro* on those grounds as well.
17. 149 Ohio App.3d 33, 2012 Ohio 3161 (2d Dist.).
18. *Id.* at ¶¶ 41-43.
19. *Id.* at ¶ 43.
20. *McGarry* at ¶ 42 (emphasis added; citations omitted).
21. *Id.* at ¶ 43.
22. 2004 Ohio 264 (2d Dist.).
23. *Lumpkin* at ¶ 16.
24. 607 N.W.2d 100 (Mich. App. 1999).
25. *Id.* at 104.
26. 818 A.2d 237 (Md. 2003).
27. *Id.* at 239.

28. *Lai* at 245. Rule 404(B) provides that evidence of other wrongs or acts is inadmissible to prove character "in order to show action in conformity therewith," but that such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid. R. 404(B).

29. *Lai* at 246.

30. *Id.* at 246-47.

31. *Id.* at 248.

32. 2004 WY 39, 87 P.3d 1226 (Wy. 2004).

33. The defendants in *Hrabal* had argued that the doctor's "fund of knowledge" (i.e., training and past experience) was irrelevant because the issue was not what the doctor knew or what her qualifications were, but whether she breached the standard of care at a particular time. *Id.* at ¶ 46. This, in turn, apparently was the grounds for the trial court's exclusion of the evidence. *See id.* at ¶ 47 (quoting record).

34. *Id.* at ¶ 48.

35. 294 S.E.2d 672 (Ga. App. 1982).

Save the Date

The Cleveland Academy of Trial Attorneys' Annual Installation & Awards Dinner will be held on

Friday, June 7, 2013
Reception: 5:30-6:30 p.m.
Dinner: 6:30 p.m.
Program: 7:30 p.m.

Keynote speaker: To be Announced

Location: The Club at Key Center
127 Public Square
Cleveland, Ohio 44114

President-Elect George E. Loucas will be sending out invitations shortly
Please join us for an evening of fun and collegiality!