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Causation on Trial: Making Sense of Causation in the Most Difficult Cases

Tips and Takeaways for Working with
Experts (Professionalism Component)

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Tips and Takeaways for Working with Experts (Professionalism Component)

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In medical negligence and complex, multi-tortfeasor cases, establishing causation can be a difficult hurdle for plaintiffs to overcome. In these cases, proof of causation invariably involves expert evidence. Working with experts requires both a deep understanding of the issues of causation and knowing how to ask the right questions of the expert. Below are some guiding tips and takeaways for working with experts.

Consider the difference between causation in a legal context and scientific proof

- In the legal context, causation is established on a balance of probabilities – meaning it is ‘more likely than not’ that the negligent act caused the outcome in issue.
- Legal counsel must retain appropriate experts (those knowledgeable in the area) to determine whether there is a causal connection between a negligent act and an outcome.
- Establishing legal causation does not require scientific evidence or scientific proof of a causal connection between the negligent act (conduct falling below the standard of care) and the outcome. Medical experts may be accustomed to pursuing a significantly greater degree of certainty or proof before making an assertion as to a causal connection between two events. It is important that counsel educate the expert on the principles of legal causation.
- Relying on inferences to establish causal connection will be insufficient if all reasonable avenues of inquiry are not explored and all possible evidence not presented.
- It is only after demonstrating the extent (or lack thereof) of the evidence available to demonstrate a causal connection between the negligent act and the outcome, that a plaintiff should be in a position to argue that the court ought to infer or draw an inference that there is a causal connection.
- In light of these principles, it is incumbent on counsel to carefully consider:
 - The type and experience of the expert. Which expert or experts could meaningfully consider the events in issue and opine on the question of causation?
 - The fact scenario to put to the expert, keeping in mind that the factual assumptions made by the expert will be the foundation for the causation opinion.
 - The question to be put to the expert. A causation expert should be asked to consider whether the outcome in issue would have been altered if the negligent act had not occurred. In a multi-tortfeasor situation, it will be important to distill this further and identify each participant involved in the situation and ask the

expert whether the outcome would have been different if the conduct of the specific tortfeasor had not occurred.

What is required from an expert opinion to meet the burden of proof?

- In establishing causation on a balance of probabilities (using the “but-for” test), plaintiffs must prove their case on the basis of ‘more likely than not’ or ‘likely to have.’
 - The material contribution test should not be relied upon. When a case involves multiple factors, parties have incorrectly relied on the material contribution test under the impression that is a lesser burden in complex situations. However, the material contribution test does not exist at law as a relaxed test for causation. To establish causation, plaintiffs need to accept the appropriate onus to make causal connections and call on expert evidence.
- If the plaintiff puts forward expert evidence which establishes a *prima facie* case for causation connecting one or more negligent acts of one or more defendants, then the court will consider the strength of that evidence. The defence does not necessarily need to assert a different theory of causation to succeed, but a defendant will need to put forward evidence to rebut the plaintiff’s causation evidence and will need to persuade the court that the causal link proposed by the plaintiffs does not meet the required threshold.
- In all but the most basic of cases, expert evidence must be provided to support the causation test. Such evidence is required in every medical malpractice case (and many other types of cases as well).

Preparing the expert and obtaining the foundation of their opinion

- Legal counsel should provide a causation expert with facts which counsel are confident can be established at trial. Basing those facts in reliable or non-controversial documents (e.g., a medical record) is an important means by which a causation expert can determine what occurred and can offer an opinion on whether a particular alleged negligent act caused the outcome.
- If there are no documents on which to rely, counsel can provide a factual summary. In this scenario, every factual element provided to the expert will need to be proven in court if not accepted by opposing counsel as true. Embellishing or adding colour to the facts when providing them to an expert is not helpful and creates a risk that the opinion could become meaningless at trial because it is founded on inaccurate information.

Questions to be asked to establish causation

- Begin with basic questions, and obtain answers based on current knowledge:
 - What happened to the plaintiff?
 - If the answer to this question is not clear, and there may be multiple explanations for what occurred then counsel needs to inquire as to whether ‘it is more likely than not’ a particular explanation best describes what happened to the plaintiff.
 - Once counsel has information as to what happened to the plaintiff and an opinion from a qualified expert that it is the ‘likely explanation’ for the

plaintiff's outcome, then one can consider with the expert whether any particular negligent act of a named defendant caused the outcome.

- If there is no link between a particular negligent act and the outcome, then there is no causation and a required element of negligence will not be proven.
- In multiple defendant cases, consider asking open-ended, clear questions that can help illuminate the role (or lack thereof) of each potential defendant in the outcome. Counsel should ask the expert to consider:
 - Why did the particular event or outcome occur?
 - How did the event or outcome occur?
 - Would the event or outcome have occurred even if the negligent conduct of the defendant(s) did not occur?
 - In other words, would the outcome have been the same regardless of the conduct of the defendant(s)?
 - How certain is the expert as to why the outcome occurred and the role, if any, of the alleged breach of the standard of care in causing the outcome?
 - Does the expert hold the opinion to the degree that it is 'more likely than not' that the event or outcome would have been avoided if the negligent conduct had not occurred?
 - Is there other information the expert requires in order to formulate an opinion?
 - Is there other input from a different type of expert that is required to understand what occurred and why it occurred?
 - If the answers are not clear and there are no other experts who could shed light on the question as to what caused the event or outcome in issue, then the expert could be asked as to what 'seems' to have occurred or what may have occurred.
- In considering all of the above, current scientific and medical knowledge and information is relevant. While a standard of care expert is bound by the standards as they existed at the time the conduct in issue occurred, a causation expert is not so bound and is free to rely upon the best and most current information and scientific literature relevant to the particular inquiry.
- Counsel should carefully consider the causation question at the outset of every case. If there is no causal link to the negligent conduct and the outcome, then there is no case.
- If it appears that a causal connection can be made, plaintiff's counsel should consider how best to present the case to the trier of fact. Counsel can consider:
 - What facts are required to be proven to establish causation?
 - How can the case be described such that a judge or jury can clearly understand what occurred and why it occurred?
 - On what a particular expert can opine to help establish with evidence the causal link between the event or outcome and the negligent act?
 - Do not ask an expert to stretch beyond his or her area of expertise. It is preferable to pursue a separate expert than to have an ill-qualified expert speak to the matters in issue.
- Universality of causation question:

- From either the plaintiff or defence perspective, the proposed causation question should be the same.
- If there is a common understanding of and common articulation of the test for causation, then it will be easier for all litigants to assess the relative strength of the case before him or her. This is important for all litigants because no one benefits when cases without merit and without a valid theory of causation are pursued.