

Medical Malpractice: A Year in Review

Presented by:

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Roadmap

Standard of Care & Causation:
Shaw Estate v. Handler

Duty of Expert to Court:
Forget et al. v. Gibb et al.

Opinions in Clinical Notes:
Gumbley v. Vasiliou



Standard of Care & Causation: Basics

- 2 Elements to Prove:
 - Liability
 - Damages
- Liability
 - Breach of the Standard of Care
 - Causation
- Need Both



Standard of Care & Causation: Breach of the Standard of Care

- Not:
 - Error in clinical judgement
 - Determined w/ hindsight
 - Judged to standard of perfection
- Is:
 - Failure to exercise skill *reasonably* expected of prudent practitioner w/ same experience



Standard of Care & Causation: Causation

- “But for” Test
 - Breach of SOC must be *necessary* cause of outcome
- 2-Step Analysis:
 - What likely *happened*
 - What likely *would have happened* but for breach



Standard of Care & Causation:

Shaw Estate v. Handler: Facts

- Nov. 16 – PM:
 - P presented to ER w/ 10/10 abdo pain
 - ER doc (“D”) ordered CT abdo → **normal**
- Nov. 17 – AM:
 - D **d/c** P home
 - W/in 1 hr → CT **abnormal**
- Nov. 18
 - Morn: P return to ER
 - Aft: Surgical consult
 - Eve: Surgery → ischemic bowel → not repairable

Standard of Care & Causation: *cont. Shaw Estate* – Decision

- **Trial**
 - Findings of Facts
 - A/o d/c, P still in significant pain
 - Over Nov. 17th, ischemic bowel became progressively worse
 - Standard of Care
 - No breach to d/c → CT reassuring
 - **Breach** not to recall → CT abnormal
 - Causation
 - But for failure to recall on Nov. 17th AM, P would have lived
- **Appeal** dismissed

Standard of Care & Causation: *cont. Shaw Estate* – Take-Aways

- **Standard of Care**
 - Consider new information
- **Causation**
 - Not all cases will require specific “window of opportunity”



Duty of Expert to Court

Codified & Common Law Duty

- **Rule 4.4.01 of RCP**
 - Fair, objective, non-partisan
 - Related only to matters w/in expertise
 - Provide additional assistance as Court may require
 - *Duty to Court prevails*
- **Common Law**
 - *Mohan* test
 - “Acid test” for bias



“I know nothing about the subject,
but I’m happy to give you my expert opinion.”

Duty of Expert to Court

Importance of Compliance

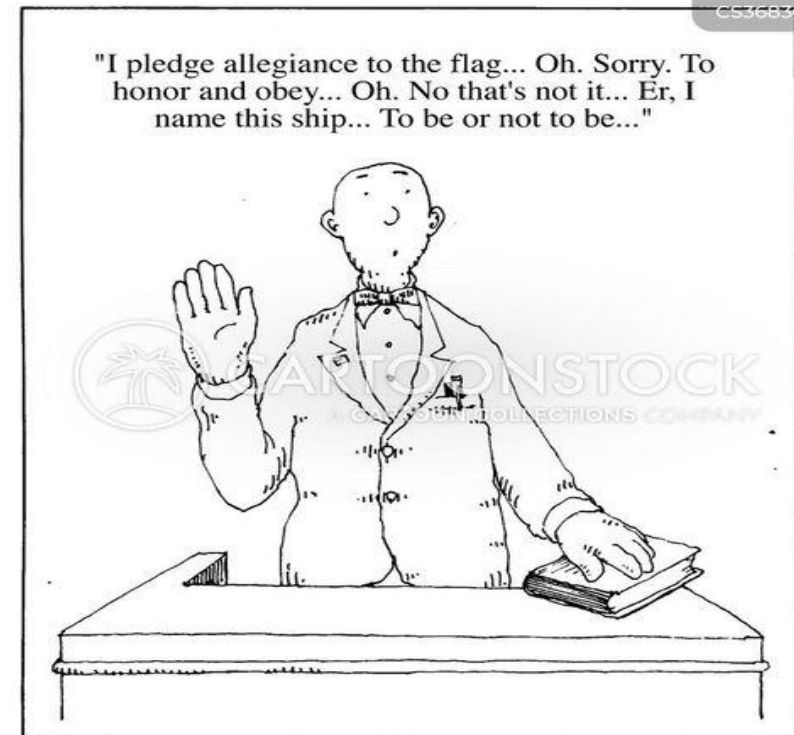
- Evidence to be Admissible
- Evidence to be Preferred
- Protect Reputations!



Duty of Expert to Court

Forget et al. v. Gibb et. Al. - Facts

- Case against gen surgeon re: 2 abdo surgeries on P
- D expert *clearly* preferred (D won)



Duty of Expert to Court

cont. *Forget* – “Bad” Expert

- Failed to Understand Concept of Standard of Care
 - Results-oriented opinion
 - Fundamentally misunderstood concept of a “standard”
- Failed to Comply with Duty as Expert
 - *Always* favoured evidence of P
 - Failed to take role/duty seriously



Duty of Expert to Court

cont. *Forget* – “Good” Expert

- Unbiased
 - Prior retainers split 50/50 (P vs. D)
 - Straight-forward, non-combative, and responsive
 - Focused on facts instead of assumptions
 - Did not prefer one witness' testimony over the other
- Took Process Seriously
 - Properly prepared by reviewing all records
 - Thoughtful & considered answers (i.e. fulsome explanations)
 - No hindsight bias



Opinions in Clinical Notes

Introduction to Hearsay

- Significance of CNRs
 - Opinion = evidence at trial (w/out knowledge/testimony)
- Legal Problem: Hearsay
 - Out-of-Court statement tendered as proof of *truth* of statement
 - Some exceptions



Opinions in Clinical Notes

Gumbley v. Vasiliou - Synopsis

- Facts
 - Oct. 9: P admitted under D's care w/ acute asthmatic attack → worsened → intubated
 - Oct. 10: Intensivist took over from D as MRP
 - Oct. 16: Signs of neurologic injury
 - Sub-issues: When & how did brain injury occur
- Trial – D liable
 - D failed to intubate & consult w/ intensivist at appropriate time (by 10:30 p.m.)
 - But for breach, brain injury wouldn't have occurred

Opinions in Clinical Notes

cont. *Gumbley* – Hearsay Synopsis

- Oct. 10th note from intensivist to D

“...Around **midnight**, she required intubation **because of severe** respiratory **acidosis and hypoxemia**...**You called me** at home to provide advice **about what to do next**....”

- Trial Judge's Use

- *Inferred* source of opinion/info was D
- Relied on note (in part) for findings of fact relevant to SOC & causation:
 - Brain injury occurred btw. **10:30 p.m. - midnight**
 - **Cause** of brain injury = **hypoxemia/acidosis**

Opinions in Clinical Notes

cont. *Gumbley* – Appeal re: Hearsay

- Statement was hearsay re:
 - *Timing* of intubation
 - *Reason* for intubation
- Exceptions Applied
 - Statement against interest
 - Business records

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