STANDARDS OF CARE

WILLIAM H. LIEBBE, *Tyler*
The Liebbe Firm, PC

State Bar of Texas
26TH ANNUAL
ADVANCED MEDICAL TORTS
March 21-22, 2019
Santa Fe

CHAPTER 16

BILL LIEBBE
THE LIEBBE FIRM, P.C.
805 South Broadway
Tyler, Texas 75701
903-595-1240 telephone
903-595-1325 telecopier
bill@liebbefirm.com
www.txtrialattorneys.com

Bill Liebbe received his juris doctor degree from Southern Methodist University in 1980. He has been board certified in personal injury trial law since 1987 and has been named a Texas Super Lawyer in plaintiff's medical malpractice every year since 2005. He is a fellowship member in the Texas Trial Lawyers Association and a member of the American Association of Justice.

Mr. Liebbe has served on the faculty and as chair of the Trial Advocacy College of Texas. He is a former Trial Advocacy instructor at Southern Methodist University – Dedman's School of Law. He has written numerous papers and made numerous presentations to continuing legal education seminars sponsored by the State Bar of Texas, the Texas Trial Lawyers Association, and other organizations.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. RES IPSA LOQUITUR 1
A. Inference of negligence is rebuttable. 1
B. Res Ipsa May Not Apply to Use of the Instrument. 1
C. Chapter 74 Reports and Res Ipsa. 2
D. Causation, Res Ipsa and Expert Causation Opinions. 2

III. QUALIFICATION OF EXPERTS 3

IV. CONCLUSORY EXPERT OPINIONS 5

V. WINDRUM V. KAREH 5

VI. IF THE EXPERT TESTIMONY IS NOT CONCLUSORY, THE COURT MUST ALLOW THE TESTIMONY EVEN WHERE THE DETERMINATION IS A CLOSE CALL OR THERE IS REASONABLE DISAGREEMENT. 5

VII. NON-CONCLUSORY EXPERT OPINIONS 6
A. Experience. 6
B. Knowledge of accepted standards. 6

VIII. DEFENDANT-DOCTOR' S TESTIMONY 8

IX. EXPERT OPINION UNDER RULE 704 ADMISSIBLE ON ULTIMATE ISSUES OF MIXED LAW AND FACT 8

X. COMPARATIVE RESPONSIBILITY 9

XI. CONCLUSION 9

STANDARDS OF CARE

I. INTRODUCTION

In a medical negligence case, the standard of care is what a doctor of ordinary prudence in that particular field would or would not have done under the circumstances. *Windrum v. Kareh,* ___ S.W.3d ____ (Tex. 2019); *James v. Brown*, 637 S.W.2d 914, 918 (Tex. 1982) (per curiam); Bowles v. Bourdon, 148 Tex. 1, 219 S.W.2d 779 (1949). Texas courts have held that expert testimony is usually required to show the medical standard of care unless the medical matters and standards: (1) are a matter of common knowledge and within the experience of a layperson or (2) fall within other recognized exceptions. *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977); *Webb v. Jorns*, 488 S.W.2d 407 (Tex. 1972); *Snow v. Bond*, 438 S.W.2d 549 (Tex. 1969); *Coan v. Winters*, 646 S.W.2d 655 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).

II. RES IPSA LOQUITUR

Both former Article 4590i, § 7.01, and Civil Practice and Remedies Code § 74.201 provide**:** *The common-law doctrine of res ipsa loquitur shall only apply to health care liability claims against health care providers or physician in those cases to which it has been applied by the appellate courts of this state as of August 29, 1977.*

Res ipsa loquitur is not a cause of action separate from negligence; rather, it is a rule of evidence by which the jury may infer negligence. It applies when (1) the character of the injury is a type that would not ordinarily occur in the absence of negligence and (2) when the instrumentality causing the injury was under the defendant's management and control. The doctrine applies only when the nature of the alleged malpractice and injuries are plainly within the common knowledge of laypersons, requiring no expert testimony. The three recognized areas in which the doctrine applies to healthcare claims are negligence in the use of mechanical instruments, operating on the wrong part of the body, and leaving surgical instruments or sponges inside the body. *Kingwood Pines Hosp., LLC v. Gomez*, 362 S.W.3d 740, 751 (Tex.App.-Houston [14th Dist.] 2011, no pet; *Sullivan v. Methodist Hosps. of Dallas*, 699 S.W.2d 265, 267 (Tex. App.—Corpus Christi 1985) writ ref'd nre per curiam, 714 S.W.2d 302 (Tex. 1986); *Martin v. Petta*, 694 S.W.2d 233 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.). *Haddock v. Arnspiger,* 793 S.W.2d 948, 950 (Tex.1990)

Leaving a surgical instrument or sponge infers negligence. "Sponge cases are *sui generis*. They rarely occur, they never occur absent negligence, and when they do occur, laypeople are hard-pressed to discover the wrong." *Walters v. Cleveland Reg'l Med. Ctr.*, 307 S.W.3d 292, 298 (Tex. 2010).

In *Manax v. Ballew*, 797 S.W.2d 71 (Tex. App.—Waco 1990, writ denied), a patient brought an action against his surgeon alleging that the surgeon operated on the wrong part of the patient's back in an attempt to remove a lipoma. The Waco Court of Appeals did not require expert testimony.

In *Golden Villa Nursing Home, Inc. v. Smith*, 674 S.W.2d 343 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), a nursing home patient ran onto a highway and knocked a motorcyclist to the ground. The Houston Court of Appeals stated that "the standard of nonmedical, administrative, ministerial or routine care at a hospital need not be established by expert testimony because the jury is competent from its own experience to determine and apply such a reasonable-care standard."

In *Hilzendager v. Methodist Hosp.*, 596 S.W.2d 284 (Tex. App.—Houston [1st Dist.] 1980, no writ), a patient brought an action against a hospital for damages sustained when she fell from her bed. The court held that "whether the hospital was negligent in failing to raise the bed rails" was a *fact* issue, which could have been decided by a jury. *Hilzendager*, 596 S.W.2d at 286.

In *Harle v. Krchnak*, 422 S.W.2d 810 (Tex. Civ. App.—Houston [1st Dist.] 1967, writ ref'd n.r.e.), a patient brought an action against a physician who had to operate on the patient's body a second time to remove a sponge. The Houston Court of Appeals required no expert testimony.

A. Inference of negligence is rebuttable.

In a foreign object case, expert testimony was not necessary to prove negligence, but expert testimony and evidence of the custom of medical care was admissible and sufficient to support a finding that leaving a surgical instrument in the body was not negligence. *Kissinger v. Turner*, 727 S.W.2d 750 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.). The Fort Worth Court of Appeals distinguished the Corpus Christi Court of Appeals' holding in *Sullivan v. Methodist Hosps. of Dallas*, 699 S.W.2d 265, 267 (Tex. App.—Corpus Christi 1985) writ ref'd n.r.e. per curiam, 714 S.W.2d 302 (Tex. 1986) by noting that the operation in Sullivan was brief and uncomplicated and the sponge was left because of a faulty sponge count, while the surgery in Kissinger was difficult and the condition of the patient's internal organs contributed to the inability to account for the surgical instrument left behind.

B. Res Ipsa May Not Apply to Use of the Instrument.

Res ipsa loquitur applies only in those cases where the use of the mechanical instrument is within the common knowledge of laypeople. In *Haddock v. Arnspiger,* 793 S.W.2d 948 (Tex. 1990), Mr. Haddock sued his doctor after his colon was perforated during a

routine proctological examination. The Texas Supreme Court held that the use of a flexible colonoscope to perform a proctological examination was not within the common knowledge of laypeople.

In *Odak v. Arlington Memorial Hospital Foundation,* 934 S.W.2d 868, 873 (Tex.App.-Fort Worth 1996, writ denied), the plaintiff's newborn child suffered swelling and burns while in the defendant hospital's nursery, allegedly from an intravenous medication. The plaintiff argued that *res ipsa loquitur* applied to her case because it is commonly known that infants do not suffer chemical burns while in a hospital nursery. *Id.* The Fort Worth Court of Appeals rejected this argument, stating that the relevant inquiry was not whether an injury should occur under a given set of circumstances but instead whether the proper performance of the medical procedure is commonly known. *Id.* Because the proper use of an intravenous needle on an infant is not within the common knowledge of a layperson, expert testimony of negligence was necessary and res *ipsa loquitur* did not apply. *Id.*

In *Shelton v. Sargent,* 144 S.W.3d 113 (Tex.App.-Fort Worth 2004, pet. denied), the Shelton's argued that a layperson would understand that a biopsy should be performed when a mammogram identifies a "suspicious site" and that a physician and hospital should follow their own policies and procedures before determining that a "suspicious site" is not cancerous. Under *Odak,* however, this is not the relevant inquiry; instead, the relevant inquiry is whether the proper performance of cancer-diagnosing procedures is within the common knowledge of a layperson. Medical decisions about performing and interpreting mammograms, sonograms, biopsies, and other diagnostic procedures require professional training and are not common knowledge. Similarly, the content of hospital policies and their underlying purposes and rationale are not commonly known by the average layperson. Consequently, *res ipsa loquitur* did not apply to the Shelton's' case, and expert testimony of Dr. Sargent's' negligence was necessary to survive a no-evidence motion for summary judgment. *See id.; see also Haddock,* 793 S.W.2d at 954 (holding *res ipsa loquitur* inapplicable to medical malpractice case involving use of sophisticated medical instruments and procedures not within the common knowledge of laypersons); *Denton Reg'l Med. Ctr. v. LaCroix,* 947 S.W.2d 941, 950-51 (Tex.App.-Fort Worth 1997, writ denied) (requiring medical expert testimony of standard of care applicable to hospitals where the underlying issue involved the performance of medical procedures).

C. Chapter 74 Reports and Res Ipsa.

While Section 74.201 allows for the applicability of res ipsa loquitur, it does not create an exception to the expert report requirement under Section 74.351. Res ipsa is an evidentiary rule. Section 74.351's expert report requirement establishes a threshold over which a claimant must proceed to continue a lawsuit; it does not establish a requirement for recovery. The Legislature did not intend for Section 74.201 to eliminate the procedural requirements of an expert report at the commencement of litigation. *Garcia v. Marichalar,* 198 S.W.3d 250, 255-56 (Tex.App.-San Antonio 2006, no pet.)

D. Causation, Res Ipsa and Expert Causation Opinions.

Not every medical malpractice case requires expert testimony to demonstrate causation. A trier of fact may decide the issue of causation in medical malpractice cases when (1) general experience and common sense will enable a lay person fairly to determine the causal connection, (2) expert testimony establishes a traceable chain of causation from the injuries back to the event, or (3) a probable causal connection is shown by expert testimony. *Parker v. Employers Mut. Liab. Ins. Co. of Wis.,* 440 S.W.2d 43, 46 (Tex.1969); *Cruz v. Paso Del Norte Health Found.,* 44 S.W.3d 622, 630 (Tex.App.-El Paso 2001, pet. denied); *Bradley v. Rogers,* 879 S.W.2d 947, 954 (Tex.App.-Houston [14th Dist.] 1994, writ denied); *see also Rehabilitative Care Sys. of Am. v. Davis,* 43 S.W.3d 649, 660 (Tex.App.-Texarkana 2001, pet. denied).

In *Guevara v. Ferrer,* 247 S.W.3d 662 (Tex. 2007) the Supreme Court discussed the exception to the general rule that expert testimony is needed to prove causation as to medical conditions noting the following:

In personal injury cases, trial evidence generally includes evidence of the pre-occurrence condition of the injured person, circumstances surrounding the occurrence and the course of the injured persons physical condition and progress after the occurrence. The record before us contains lay testimony about the plaintiff's pre-accident physical condition, his activities and other events leading up to the accident, the accident, an investigating police officer's report, and post-accident events including medical treatments. This type of evidence "establishing a sequence of events which provides a strong, logically traceable connection between the event and the condition" could suffice to support a causation finding between the automobile accident and basic conditions which (1) are within the common knowledge and experience of laypersons, (2) did not exist before the accident, (3) appeared after and close in time to the accident, and (4) are within the common knowledge and experience of laypersons, caused by automobile accidents.

The Court in *Guevara* explained that if the plaintiff had been pulled from a damaged automobile with overt injuries such as broken bones or lacerations, and undisputed evidence that reasonable jurors could not disbelieve showed the plaintiff did not have such injuries before the accident, then "the physical conditions and causal relationship between the accident

and the conditions would ordinarily be within the general experience and common knowledge of laypersons."

The Court made clear, however, that temporal proximity alone does not meet the standards of scientific reliability and will not support an inference of medical causation. Non-expert evidence is sufficient to support a finding of causation in limited circumstances where both the occurrence and conditions complained of are such that the general experience and common sense of laypersons are sufficient to evaluate the conditions and whether they were probably caused by the occurrence.

In *Manax v. Ballew,* 797 S.W.2d 71, 72 (Tex.App.-Waco 1990, writ denied), a jury found a physician negligent for operating on the wrong portion of the plaintiff's back to remove a lipoma. The Court of Appeals held the trial court did not err in giving a jury instruction on *res ipsa loquitur* because any lay person could look at the plaintiff's back and determine the surgery was performed in a different area than the doctor agreed to perform it. *Id.* at 73. Significantly, though acknowledging the rule that the plaintiff must still present evidence of a causal connection between the doctor's negligence and the plaintiff's injury, the court held that the fact of the resulting injury was indisputable in that case.

In *Traut v. Beaty*, 75 S.W.3d 661, 667 (Tex.App-Texarkana 2002, no pet.), a part of the wire was left in the left breast following a hook wire needle localization procedure. Traut testified the piece of wire was causing her mild discomfort, specifically when she wore "a certain type of brawl" or when she lay on her stomach. Dr. Beaty testified that piece of what are left in a breast would not cause pain, even if it moved around. He also testifies that any pain or discomfort could result from some other complication arising from the procedure. The Texarkana Court of Appeals held that this testimony demonstrated the need for expert testimony to establish the causal connection between the negligence and the pain and discomfort.

III. QUALIFICATION OF EXPERTS

Civil Practice and Remedies Code Section 74.351(r)(5)(a) defines an "expert" to mean "with respect to a person giving opinion testimony regarding whether a physician departed from accepted standards of care, an expert qualified to testify under the requirements of Section 74.401."

Section 74.401(a) provides that "[i]n a suit involving a healthcare liability claim against a physician for injury to or death of a patient, a person may qualify as an expert witness on the issue of whether the physician departed from accepted standards of medical care only if the person is a physician who:

(1) is practicing medicine at the time such testimony is given or was practicing medicine at the time the claim arose;
(2) has knowledge of accepted standards of medical care for the diagnosis, care, or treatment of the *illness, injury, or condition involved in the claim*; and
(3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care."

The definition of and qualifications of an expert witness in a suit against a physician are identical in all respects to former Article 4590i, Section 14.01(a). The test to determine whether a medical expert is qualified to render opinions is "rooted in the expert's training, experience and knowledge of the standards applicable to the *illness, injury or condition involved in the claim." Blan v. Ali*, 7 S.W.3d 741, 746 (Tex. App.–Houston [14th Dist.] 1999, no pet.) (emphasis added) (referencing Tex.Rev.Civ.Stat.Ann.art.4590(i), Section 14.01(a)).

The physician serving as the expert witness need *not* be a specialist in the particular branch of the profession for which the testimony is offered. *See Hernandez v. Altenberg,* 904 S.W.2d 734, 738 (Tex. App.–San Antonio 1995, writ denied); *Simpson v. Glenn,* 537 S.W.2d 114, 116 (Tex. Civ. App.–Amarillo 1976, writ ref'd n.r.e.).For example, an orthopedic surgeon can testify as to the standard of care for a radiologist because **the two professions work closely together, and their specialties are intertwined.** *See Silvas v. Ghiatas,* 954 S.W.2d 50, 54 (Tex. App.–San Antonio 1997, writ denied). Likewise, a general surgeon is qualified to testify regarding the standard of care for post-operative procedures performed by a gynecologist because **post-operative procedures are common to both fields.** *See Simpson,* 537 S.W.2d at 116–18.

Because the determination of an expert's qualifications under both Rule 702 and section 14.01(a) is based on knowledge, training, or experience, it is incumbent upon the plaintiff in a medical malpractice case to present expert testimony of a medical doctor with knowledge of the specific issue which would qualify him or her to give an opinion on that subject. *See Broders v. Heise,* 924 S.W.2d 148, 152 (Tex.1996).

The courts have held that a medical witness who is not of the same school or practice may be qualified to testify if **he or she has practical knowledge of what is usually and customarily done** by other practitioners under circumstances similar to those that confronted the defendant charged with malpractice. *See Marling v. Maillard,* 826 S.W.2d 735, 740 (Tex. App.–Houston [14th Dist.] 1992, no writ) (citing *Bilderback v. Priestley,* 709 S.W.2d 736, 740 (Tex. App.–San Antonio 1986, writ ref'd n.r.e.) The Texas Supreme Court has

made it clear that if **a subject of inquiry is substantially developed in more than one field**, a qualified expert in *any* of those fields may testify. *See Broders,* 924 S.W.2d at 152. Likewise, the courts have held that if **the subject matter is common to and equally recognized and developed in all fields of practice**, any physician familiar with the subject may testify as to the standard of care. *See Garza v. Keillor,* 623 S.W.2d 669, 671 (Tex. Civ. App.–Houston [14th Dist.] 1981, writ ref'd n.r.e.) (infection process); *Hersh,* 626 S.W.2d at 154 (taking a medical history, discharging a patient); *Sears v. Cooper,* 574 S.W.2d 612, 615 (Tex. Civ. App.–Houston [14th Dist.] 1978, writ ref'd n.r.e.) (use of a diuretic).

In *Estorque v. Schafer* 302 S.W.3d 19 (Tex. App.-Fort Worth 2009, no pet.) the plaintiffs' expert report was challenged on the basis that the expert, a family practitioner, did not have sufficient qualifications in the specialties of nephrology, urology and gynecology to render opinions on the standard of care and the causal relationship between the physician's failure to refer and the resulting kidney disorders and gynecological cysts. The Fort Worth Court of Appeals found the expert qualified.

In his report, Dr. Miller stated that he **acquired** his "education, knowledge, training and experience" on the condition involved in the claim through:

A. **Attending classes** that taught the evaluation, treatment, diagnosis and care of patients with the same or similar conditions as the plaintiff;
B. **Acquired knowledge** about the plaintiff's condition **through practical experience**, medical conferences, technical works published in textbooks and journals, consultations with other physicians, communications with hospital nurses, staff and residence, lectures personally given;
C. **Lectures** personally given in conferences, participation in hospitals committees; and
D. **Observation** of nurses and supervising residents that care for and treat patients with the same or similar medical conditions as plaintiff.

In *Leland v. Brandal*, 217 S.W.3d 60 (Tex. App.-San Antonio 2006), *aff'd* 257 S.W.3d 204 (Tex. 2008) the San Antonio Court of Appeals determined that Dr. Gray, an anesthesiologist, was not qualified to provide expert testimony on the causal relationship between the cessation of Plavix and aspirin and Brandal's ischemic stroke. Following remand, the trial court granted a 30-day extension during which the Brandal's served Dr. Gray's supplemental expert report.

Following denial of his second motion to dismiss based on the supplemental report, the San Antonio Court of Appeals found Dr. Gray qualified. *Leland v. Brandal*, No. 04-09-00027-CV (Tex. App.-San Antonio 2009, no pet. h.). In his supplemental report, **Dr. Gray detailed how he had "acquired knowledge of the causal relationship between cessation of Plavix and aspirin and ischemic stroke**, specifically from seminar training in the areas of hematology, pharmacology and physiology. Dr. Gray noted that:

A. He had **attended many seminars** since entering the practice of medicine that focused specifically on how anticoagulant therapies like Plavix and aspirin are processed by the body, how they affect the body immediately before, during and after surgery and how the body responds when those drugs are discontinued.
B. Dr. Gray noted that he "stays abreast of developments in the field **by reading a number of medical journals** that involve the field of anesthesiology and reads "articles describing how anticoagulant therapies like Plavix and aspirin are processed by the body and how they affect the body immediately before, during and after surgery and how the body responds when the drugs are discontinued."
C. Dr. Gray stated that as a clinical professor of anesthesiology, **he is responsible for teaching residents** "about the effects of anticoagulant and antithrombotic therapies of Plavix and aspirin on blood before, during and after surgery."
D. Dr. Gray explained that in his **"consultation with these patients, their surgeons and their primary care physicians**, he has learned about how Plavix and aspirin work, and how the body and specifically, the blood, reacts when these drugs are discontinued."

The Court of Appeals held that Dr. Gray's statements in his supplemental report regarding his knowledge, skill, experience, training and education were sufficient to enable the trial court to conclude that he was qualified to offer an opinion on causation. The Court of Appeals specifically pointed to statements by Dr. Gray that he had "acquired knowledge about the effects of Plavix and aspirin" through practical experience, attending classes, through technical works published in journal, consultations with other physicians and by teaching medical residents about the risks associated with discontinuing Plavix/aspirin therapy prior to surgery. The court concluded that Dr. Gray's supplemental report demonstrated his qualifications to opine on the specific issue before the trial court and provided a fair summary of his opinion on the issue of causation. The trial court therefore did not abuse its discretion when it denied Leland's motion to dismiss.

IV. CONCLUSORY EXPERT OPINIONS

A conclusory statement asserts a conclusion with no basis or explanation. *See City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex. 2009).; *see also Bustamante v. Ponte*, 529 S.W.3d 447, 462 (Tex. 2017). (explaining that "[a]n expert's testimony is conclusory if the witness simply states a conclusion without an explanation or factual substantiation"). Bare or baseless opinions cannot support a judgment, even if there was no objection over their admission into evidence. *See Pollock*, 284 S.W.3d at 816. An "expert must explain the basis of his statements to link his conclusions to the facts." *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999); *see also Jelinek v. Casas*, 328 S.W.3d 526, 563 (Tex. 2010) ("It is not enough for an expert simply to opine that the defendant's negligence caused the plaintiff's injury. The expert must also, to a reasonable degree of medical probability, explain how and why the negligence caused the injury.").

"[I]t is the basis of the [expert] witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law . . . ." *Pollock*, 284 S.W.3d at 816 (citations omitted); *see also Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 876 (Tex. 2001 (noting that "Texas courts have long recognized the necessity of expert testimony in medical-malpractice cases"). Mere evidence of injury coupled with an expert's opinion that the injury might have occurred from the doctor's negligence has no tendency to show that the doctor's negligence caused the injury. *See Jelinek*, 328 S.W.3d at 536 (quoting *Hart v. Van Zandt*, 399 S.W.2d 791, 792 (Tex. 1965)). And the mere *ipse dixit* of the expert—that is, asking the jury to take the expert's word for it—will not suffice. *See Pollock*, 284 S.W.3d at 816; *see also Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 806 (Tex. 2006) (explaining that testimony is fundamentally unsupported when "the only basis for the link between the [expert's] observations and his conclusions was his own say-so" (citing *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 912-13 (Tex. 2004) (Hecht, J., concurring))). An expert cannot provide the jury with unexplained conclusions or ask the jury to "take his word for it" because of his status as an expert. *See Arkoma Basin Expl. Co., Inc. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 389 (Tex. 2008).

V. WINDRUM V. KAREH

In *Kareh v. Windrum*, 518 S.W.3d 496, (Tex. App.—Houston [1st] 2017) *reversed Widrum v. Kareh*, ___ S.W.3d ____ (Tex. 2019) the Court of Appeals reversed the judgment of the trial court and rendered a take nothing judgment concluding that the testimony of Plaintiff's expert Dr. Parrish that Defendant Kareh breached the standard of care in failing to place a shunt was conclusory in part because his opinion on the standard of care was not supported by literature and although he had experience placing shunts in patients, he identified nothing in that experience to support the conclusion that every failure to place a shunt in those circumstances constitutes a breach of the standard of care by omission. In a vigorous dissent by Justice Harvey Brown, a well-regarded author in the area of expert qualification, identified two "possible misinterpretations."

"The first possible misinterpretation is that the panel is suggesting that an expert's negligence opinion cannot be based on experience. It can. It is just that when an expert relies on experience as the basis for an opinion, the expert must explain the experience so the jurors can meaningfully review it. The second is that the panel is suggesting that an expert's negligence opinion is conclusory if the expert does not identify any supporting literature. That is not necessarily true. Whether an expert's opinion is conclusory does not turn on whether an expert can identify supporting literature: instead, it turns on whether an expert who relies on literature as the basis for an opinion has adequately explained the literature's applicability so jurors can meaningfully review the opinion." *Kareh dissenting opinion* 518 S.W.3d at 515.

In reversing the Court of Appeals, the Texas Supreme Court noted that ***experience alone may provide a sufficient basis for an expert opinion*** *and that* ***medical literature is not necessary to support an expert opinion***, although it tends to strengthen the basis for the opinion and therefore is preferred. *Citing Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998). Here, Dr. Parrish based his conclusion on his own experience treating patients with hydrocephalus and intracranial pressure, the experience of other doctors in the field, medical records and test results, autopsy report and the testimony of the forensic pathologist. ***Dr. Parrish explained how and why*** all these bases led him to conclude that a shunt was required. Although Dr. Parrish failed to cite any literature in support of his ultimate conclusion that the standard of care required insertion of a shunt, Dr. Parrish provided his resume and describing his experience, Dr. Parrish provided enough reasons for his opinion. In other words, he provided a basis for his opinion which is more than mere *ipse dixit.*

VI. IF THE EXPERT TESTIMONY IS NOT CONCLUSORY, THE COURT MUST ALLOW THE TESTIMONY EVEN WHERE THE DETERMINATION IS A CLOSE CALL OR THERE IS REASONABLE DISAGREEMENT.

Justice Terry Jennings dissented the Court of Appeals denial of en banc reconsideration because the panel substituted its judgment for that of the jury on credibility issues and disregarded substantial evidence and well-settled legal sufficiency principles. *Kareh*

dissenting opinion 518 S.W.3d at 520.In *Windrum*, the Texas Supreme Court observed that the line determining whether an expert opinion is conclusory is difficult to draw, and "[c]lose calls must go to the trial court." *Citing Larson v. Downing*, 197 S.W.3d 303, 304 (Tex. 2006) (per curiam). "But when the evidence falls within the zone of reasonable disagreement, the court may not substitute its judgment for that of the fact finder." *Citing City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005); *see also Jackson*, 116 S.W.3d at 761 (stating that "a court must not merely substitute its judgment for that of the jury," and "the jury is the sole judge of the credibility of witnesses and the weight to be given to their testimony").

VII. NON-CONCLUSORY EXPERT OPINIONS

A. Experience.

The expert witness, in stating the standard of care, should discuss his or her training and experience with the diagnoses, care, or treatment of the medical condition relevant to the claim. In doing so, the expert witness <u>should explain how and why</u> the standard of care is what a doctor of ordinary prudence would do under the circumstances.

Section 74.401 (a) sets out three criteria for the qualification of an expert witness on the issue of whether the physician departed from accepted standards of medical care. The third qualifying criteria under Section 74.401 (a) is that the physician is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of care. 74.401 (c) provides: "In determining whether a witness is qualified on the basis of training or experience, the court shall consider whether, at the time the claim arose or at the time the testimony is given, the witness: (1) is board certified or has other substantial training or experience in an area of medical practice *relevant to the claim;* and (2) is actively practicing medicine in rendering medical care services *relevant to the claim."* (emphasis supplied).

In *Widrum v. Kareh*, ___ S.W.3d ____ (Tex. 2019), the Texas Supreme Court, although not referencing Section 74.401, found the opinion of Dr. Parrish on standard of care was not conclusory because he based his conclusions on his own experience, as well as medical records, experience of other doctors in the field and the testimony of the forensic pathologist. While experience alone may provide a sufficient basis for an expert opinion (*See Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998)) an "expert must explain the basis of his statements to link his conclusions to the facts." *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999); *see also Jelinek v. Casas*, 328 S.W.3d 526, 563 (Tex. 2010) ("It is not enough for an expert simply to opine that the defendant's negligence caused the plaintiff's injury. The expert must also, to a reasonable degree of medical probability, explain how and why the negligence caused the injury."). The standard of care opinions of Dr. Parrish were not conclusory because "he based this conclusion on his own experience treating patients with hydrocephalus and intracranial pressure, the experience of other doctors in the field, Lance's own medical records and test results, Lance's autopsy report, and the testimony of Dr. Dragovic, the forensic pathologist. Dr. Parrish explained *how and why* all of these bases led him to conclude that Lance required a shunt." Page 12.

B. Knowledge of accepted standards.

The expert witness should explain that the standard of care is not simply based upon his or her own experience but has been generally accepted as valid in the relevant medical community.

The second qualifying criteria under section 74.401 (a) is that the physician "has knowledge of accepted standards of medical care, for the diagnoses, care, or treatment of the illness, injury, or condition involved in the claim." In addition to testimony establishing the standard of care based on the expert's training or experience, the expert witness should explain how he or she knows the stated standard of care has been generally accepted as valid in the medical community. (See *E.I. du Pont de Nemours & Co., Inc. v. Robinson,* 923 S.W.2d 549 (Tex. 1995) where one of the six nonexclusive factors the court should consider in determining whether an expert's opinion is reliable is whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community). The source of the expert's knowledge that the standard of care has been generally been accepted as valid can come from a variety of nonexclusive sources:

Knowledge of what other doctors do under the same or similar circumstances.

The medical expert may have gained knowledge of what other doctors do under the same or similar circumstances from speaking with colleagues in his practice or in the same medical community, participation in hospital committees, observation of other healthcare providers that care for and treat patients with the same or similar medical conditions, consultation with other physicians, continuing medical education courses, lectures and seminars.

Medical literature and textbooks.

Texas Rules of Evidence 803(18) allows learned treatises to be read into evidence, but not received as exhibits, if established as reliable authority by the witness or other expert testimony or by judicial notice. Also Rule 803 (18) permits cross-examination of an expert with treatises established as reliable authorities in the same manner.

Some types of medical literature may not only be introduced as direct evidence but may also establish the appropriate standard of care. *See Davis v. Marshall*, 603 S.W.2d 359 (Tex. Civ. App.—Houston [14th Dist.]

1980, writ ref'd n.r.e.) (package insert established proper standard of care for application of a case). Additionally, the fact that a learned treatise is published after the incident in question does not disqualify that treatise, at least where the treatise discusses principles in effect or similar to the ones in question at the time of the incident. See, e.g., *King v. Bauer*, 767 S.W.2d 197 (Tex. App.—Corpus Christi 1989, writ denied).

If a medical expert seeks to support his opinion with medical literature, he must base his opinion on a "broad reading of the medical literature." *Minn. Min. & Mfg. Co. v. Atterbury,* 978 S.W.2d 183, 193 (Tex.App.- Texarkana 1998, pet. denied). "Broad reading of medical literature" means that the expert must "point to specific passages in varied and different sources that are generally accepted as support for his conclusion." *Id.*

UpToDate.com is an evidence-based clinical resource available via the Internet and off-line on personal computers or mobile devices. It is written by over 5700 physician authors, editors and peer reviewers. All articles reference peer-reviewed medical literature. For a more complete listing of sources of standards, I recommend Colleen Carboy, RN, JD, "*Standards of Care and Where They Can Be Found"* State Bar of Texas 24th Annual Advanced Medical Torts, March 9 – 10, 2017, San Antonio, Chapter 2.

Clinical practice guidelines and professional standards.

Virtually every medical specialty organization has published clinical practice guidelines and professional standards. Clinical practice guidelines seek to guide medical decision-making and provide clinicians with recommendations for diagnosis, management, and treatment in specific areas of healthcare. Since they are not intended to be construed or to serve as a standard of medical care, standing alone they are not conclusive of the standard of care but can be used to either support the expert's opinion on standard of care or to impeach an opposing expert .For example, compliance with blood transfusion standards of the American Association of Blood Banks and the Food and Drug Administration is evidence on the ultimate issue of negligence, but is not conclusive and will not support a summary judgment where controverting proof is raised. *Hernandez v. Nueces Cnty. Med. Soc'y Cmty. Blood Bank*, 779 S.W.2d 867 (Tex. App.—Corpus Christi 1989, no writ) (hepatitis contracted from blood transfusion).

Rules and regulations of state licensing boards.

The Texas Medical Board (TMB) has been given authorization to make rules to regulate the practice of medicine. TEX. OCC. CODE § 153.001. The TMB's purpose is to protect the public's safety and welfare through the regulation of the practice of medicine. 22 TEX. ADMIN. CODE § 161.2(a). The TMB regulates physicians, physician assistants and acupuncturists. Title 22 Part 9 of the Texas Administrative Code contains multiple chapters covering a multitude of areas including rules for office-based anesthesia. Since compliance with the TMB rules is mandatory for licensure, and because the rules were created to protect the public, they constitute credible evidence of the standard of care applicable to a physician in Texas.

Texas has recognized that a professional's standards may be some evidence of the standard of care. *Lunsford v. Bd. of Nurse Examiners*, 648 S.W.2d 391 (Tex. App.—Austin 1983, no writ) (standards of the Board of Nurse Examiners); *Valdez v. Lyman-Roberts Hosp., Inc.*, 638 S.W.2d 111 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) (standards of the Board of Nurse Examiners). Further, the conduct of a nursing home may be evaluated from the regulations of the Texas Department of Health, which establish a "minimum duty" owed by the nursing home to its patients. *Golden Villa Nursing Home, Inc. v. Smith*, 674 S.W.2d 343 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

The Joint Commission, Never Events and National Patient Safety Goals.

The Joint Commission Accreditation manuals and the National Patient Safety Goals address expected elements of hospital policies and procedures, medical bylaws, rules, regulations and policies. The Agency for Healthcare Research and Quality publishes a list of "never events" covering a variety of topics including surgical events, device events, patient protection events and care management events. These may be considered in establishing a standard of care. *Denton Reg'l Med. Ctr. v. LaCroix*, 947 S.W.2d 941 (Tex. App.—Fort Worth 1997, writ denied).

Policies and Procedures/Training Procedures.

In *Denton Reg'l Med. Ctr. v. LaCroix*, 947 S.W.2d 941 (Tex. App.—Fort Worth 1997, writ denied), the Fort Worth Court of Appeals held "in determining the standard of care, we may also look to the hospital's internal policies and bylaws, as well as the standards of the Joint Commission on Accreditation of Health Care Organizations (JCAHO). However, these factors alone do not determine the governing standard of care. See Hicks v. Canessa, 825 S.W.2d 542, 544 (Tex.App.--El Paso 1992, no writ); Hilzendager, 596 S.W.2d at 286; see also Foley v. Bishop Clarkson Mem. Hosp., 185 Neb. 89, 173 N.W.2d 881, 884 (1970); Darling v. Charleston Community Mem. Hosp., 33 Ill.2d 326, 211 N.E.2d 253, 257 (1965), cert. denied, 383 U.S. 946, 86 S.Ct. 1204, 16 L.Ed.2d 209 (1966). See generally 2 GRIFFITH, TEXAS HOSPITAL LAW § 3.0332, at 67."

Evidence of Medical Custom-Admissible but Not Conclusive

In 1977, the Texas Supreme Court rejected custom as controlling in medical malpractice cases. *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977) states the Texas rule that "a physician who undertakes a mode or form of treatment which a reasonable or prudent member of the

medical profession would undertake under the same or similar circumstances" shall not be subject to liability for rejecting alternative standards that center around what a given number of physicians might do. Hence, the Court favored a standard based on good medical practice over a standard based on a practice that is customary.

Medical custom and practice are admissible not only to establish the medical standard of care, but also to show the defendant's departure from the customary practice as some evidence of negligence. *King v. Bauer*, 767 S.W.2d 197 (Tex. App.—Corpus Christi 1989, writ denied). Texas courts have also held that compliance with a medical custom is not a conclusive absolute test of freedom from medical negligence because the custom itself may be negligent. *Kissinger v. Turner*, 727 S.W.2d 750 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.); *Golden Villa Nursing Home, Inc. v. Smith*, 674 S.W.2d 343 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). *See also Brown v. Lundell*, 344 S.W.2d 863, 867 (Tex. 1961).

In a case involving a suit against a nursing home, the defendant argued that it had exercised the degree of care, skill and diligence exercised by such homes in similar communities, thus precluding a finding of negligence. The Houston Court of Appeals rejected the nursing home's contention that conformity with custom precludes a finding of negligence. *Golden Villa Nursing Home, Inc. v. Smith*, 674 S.W.2d 343 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

VIII. DEFENDANT-DOCTOR' S TESTIMONY.

It is well-settled in Texas that the medical standard of care in a medical malpractice action may be established with the defendant-physician's own testimony as to the applicable medical standard of care involved. *See Williams v. Bennett*, 610 S.W.2d 144 (Tex. 1980); *Wilson v. Scott*, 412 S.W.2d 299 (Tex. 1967); *Hersh v. Hendley*, 626 S.W.2d 151 (Tex. App.—Fort Worth 1981, no writ).

Moreover, the medical record entries and post-treatment statements of the defendant-physician have been held to be admissible evidence to establish the medical standard of care and admissions of departure from that medical standard. *Bronwell v. Williams*, 597 S.W.2d 542 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.).

In *Williams v. Bennett*, 610 S.W.2d 144 (Tex. 1980), the Texas Supreme Court held "that there is some evidence to support the jury finding that [the defendant-physician] violated the medical standards set by his own testimony." *Williams*, 610 S.W.2d at 146. The defendant-physician had testified that, to discharge a patient with a severe infection, would be inappropriate medical practice. The plaintiff need not introduce independent expert testimony when the defendant has testified to the appropriate principles and practices.

The San Antonio Court of Appeals has held that a supervising surgeon's deviation from the standard of care established by his testimony was a question for the jury. *Baker v. Story*, 621 S.W.2d 639 (Tex. App.—San Antonio 1981, writ ref'd n.r.e.). The defendant-physician testified "that it would be a deviation from standard medical practice for a surgeon, intending to cut a nerve ganglion, to cut a normal appearing ureter instead." *Id.* at 643.

In *Hersh v. Hendley*, 626 S.W.2d 151 (Tex. App.—Fort Worth 1981, no writ), a medical malpractice case was brought against a non-medical podiatrist for alleged negligence in surgery, which caused the plaintiff's pulmonary embolism and foot pain. The Fort Worth Court of Appeals held that the defendant physician's testimony sufficiently "established a standard of care in regard to acceptable medical practice in the school of podiatry." There was no independent expert testimony needed.

In *Wynn v. Mid-Cities Clinic*, 628 S.W.2d 809 (Tex. Civ. App.—Texarkana 1981, writ ref'd n.r.e), the defendant physician's testimony established the standard of care for the amount of x-ray radiation needed to kill cancerous cells. The plaintiff supplied the expert testimony concerning the proper use of radiation therapy. The Texarkana Court of Appeals held that the expert witness's testimony was adequate to raise a fact issue to be decided by the jury where testimony between the defendant's and the plaintiff's expert witnesses conflicted on a fact issue.

IX. EXPERT OPINION UNDER RULE 704 ADMISSIBLE ON ULTIMATE ISSUES OF MIXED LAW AND FACT

Rule 704 of the Texas Rules of Evidence states: Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

In the significant case of *Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987), the Texas Supreme Court held that medical expert testimony on a mixed question of law and fact is admissible under Rule 704 in medical malpractice actions. Specifically, the Court ruled that medical expert testimony that the defendant hospital's conduct constituted "negligence," "gross negligence," and "heedless and reckless conduct," and that certain acts were "proximate causes" of the minor plaintiff's injury was admissible under Rule 704. The Court opined succinctly:

> Fairness and efficiency dictate that an expert may state an opinion as a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts.

Birchfield 747 S.W.2d at 365. Importantly, the Supreme Court's ruling in Birchfield interprets Rule 704

as abolishing the "ultimate issue" rule, which excluded expert testimony on ultimate issues of medical negligence and proximate causation in malpractice cases. In so doing, *Birchfield* effectively overrules prior Texas court decisions prohibiting medical expert testimony concerning "negligence," "malpractice," and "proximate causation" in medical malpractice actions. *See Snow v. Bond*, 438 S.W.2d 549 (Tex. 1969); *Coan v. Winters*, 646 S.W.2d 655 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).

Moreover, the decision in Birchfield is consistent with a modern trend favoring a liberalized approach to Rule 704 by allowing expert opinion couched in terms of a legal standard with appropriate definitions and instructions by the court. *See* 3 J. WEINSTEIN & M. BURGER, WEINSTEIN'S EVIDENCE SEC. 704 (1987).

Texas courts have held that the terms "medical negligence," "malpractice," "gross negligence," and "proximate cause" are mixed questions of law and fact. Thus, legally-correct definitions and instructions concerning these terms are required by the court for a fair and proper trial. *See Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361 (Tex. 1987); *DeLeon v. Louder*, 743 S.W.2d 357 (Tex. App.—Amarillo 1987, writ denied) (partial definition of proximate cause did not fulfill the requirement that an opinion be based upon proper legal concept as required in *Birchfield*); *E-Z Mart Stores v. Terry*, 794 S.W.2d 63 (Tex. App.—Texarkana 1990, writ denied).

X. COMPARATIVE RESPONSIBILITY

A medical expert may also testify as to the comparative responsibility of defendants. *Harvey v. Stanley*, 803 S.W.2d 721 (Tex. App.—Fort Worth 1990, writ denied).

XI. CONCLUSION

Winning medical negligence cases turns in large part on whose expert witness the jury will believe. Having your expert explain in detail his or her experience, how that experience caused him or her to identify the standard of care, and how he or she knows that this is the standard of care accepted by others in the medical community is a good start, but the expert should also explain "why this is the standard of care." The "why" should be anchored to the values and beliefs of the jury. For example: Question- "Why did the standard of care require testing to rule out heart attack, when the most likely cause of the patient's complaint was indigestion?" Answer-"You must always rule out the worst possible diagnosis first because if you don't, the patient could die." By explaining the "how and why" your expert witness not only will be more persuasive but reviewing courts will not find the testimony conclusory.