

**Specialty Nurses Testifying As Medical Expert Witnesses On Issues Of Causation And
Future Damages;
An Uncertain Intersection Between Law And Medicine.**

Many injury related cases seemingly come down to the proverbial “*battle of the experts.*” As a result, choosing the right medical expert witness is crucial. For years, plaintiff attorneys have typically relied upon their client’s treating health care providers to serve as medical experts at trial whereas defense attorneys have typically retained an outside expert witness, if any. This has led to plaintiff attorneys customarily being accused of commandeering their client’s care to ensure a favorable expert and defense attorneys customarily being accused of only hiring one of few known “pay-for-play” experts to ensure their client a favorable expert. But the bottom line is that attorneys want the best expert for their client on a case by case basis.

At the same time, the health care profession has continued to expand and evolve. Private health insurers, Medicare and Medicaid continue to seek to reduce costs (primarily through reducing rates of reimbursement) while health care providers seek to find more ways to be profitable without jeopardizing quality of care. In Ohio, more and more advanced care is being provided by specialty nurses, also referred to as advanced practice registered nurses (APRN), such as clinical nurse specialists, certified registered nurse anesthetists, certified nurse-midwives, and certified nurse practitioners. The increased scope of care by these specialty nurses is becoming the norm of everyday medicine. Further, the broad scope of care provided by APRNs is permitted and governed by statute.

Here lies yet another intersection between the law and medicine; namely, whether such a specialty nurse practicing with a high level of expertise as authorized by the legislature should be able to serve as an expert medical witness for purposes of causation and damages. This article touches on the subject.

Expert witnesses in general

Ohio Evidence Rule 702, *Testimony by experts*, states as follows:

A witness may testify as an expert if all of the following apply:

- (A) *The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;*
- (B) *The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;*
- (C) *The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:*
 - (1) *The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;*
 - (2) *The design of the procedure, test, or experiment reliably implements the theory;*
 - (3) *The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.*

Court as the gatekeeper for evidence

The determination of whether an individual qualifies as an expert is to be made by the court in its discretion pursuant to Evid. R. 104(A). The determination will not be reversed on appeal absent a clear abuse of discretion. See Ohio Turnpike Comm. v. Ellis (1955), 164 Ohio St. 377, 58 O.O. 179, 131 N.E. 2d 397; King v. LaKamp (1988), 50 Ohio App.3d 84, 85, 553 N.E.2d 701, 702-703; Kitchens v. McKay (1987), 38 Ohio App.3d 165, 168-169, 528 N.E.2d 603, 605-607.

Advanced practice registered nurses (APRNs), in today's practice of medicine

APRNs “provide and coordinate patient care and they may provide primary and specialty health care,” according to the Bureau of Labor Statistics. Although the exact scope of practice is defined by Ohio statute, APRNs “work in a wide variety of healthcare settings, including hospitals, physicians’ offices, nursing care facilities, schools, and clinics.” They care for patients and often serve as a liaison between the doctor and patient. Their advanced training means they have greater levels of knowledge than their RN counterparts, manifesting in greater decision-making ability and expertise in areas such as **diagnosis and assessment, planning and implementation, evaluation of healthcare and record-keeping**.

The scope of work performed by APRNs serve many functions in a clinical setting and include the following:

- Diagnosing patients as they come in
- Performing physical exams
- Performing other exam types, such as psychological, psychosocial, functional and developmental tests and diagnostics
- Ordering lab tests and interpreting results
- Developing differential diagnoses
- Maintaining patient records and ensuring patient privacy and clinic or hospital compliance
- Evaluating patient progress and responses to various treatments to modify treatment and care plans as necessary
- Providing counseling to patients and families
- Referring patients to other treatment facilities
- Providing consultations to patients who have yet to choose a course of action
- Dispensing medications to patients
- Participating in research studies

There are four main types of advanced practice nurses and in order to work in any of these positions, they must have completed an applicable training program and pass the board of certification exam for that particular type of nursing.

Certified Nurse Practitioner – CNPs work in specialty areas including cardiology, orthopedics, and family medicine, pediatrics to surgical services, pain management and oncology. While they perform a range of services to patients and may assist doctors or other medical professionals, they may conduct research and provide care independently in a range of settings, including doctors’ offices and hospitals, small clinics and other settings.

Certified Registered Nurse Anesthetist – CRNAs provide anesthesia to a wide range of patients in a variety of care settings. They are certified to provide a full spectrum of anesthesia care, including for surgical procedures, and may work with healthy to very sick individuals of all ages and all levels of acuity, including patients who cannot give consent or are in life-threatening condition.

Certified Nurse Midwife – CNMs provide many of the same services as a gynecologist and midwife combined. CNMs help women with contraceptive control and gynecologic care as well as assisting in all stages of the pregnancy cycle. This includes initial consultations, prenatal visits and exams and postpartum care for the mother and the newborn.

Clinical Nurse Specialist – CNSs specialize in a certain area of medicine. They, like all the advanced practice nursing types, provide primary patient care to those under their scope. These areas include *setting* (a specialty may be practiced in a clinic, in critical care or in the emergency room); *population* (a specialization may be linked to a particular population of patients such as children, women or the elderly); *disease* (a specialization may focus on a specific disease or group of diseases, such as diabetes, heart disease or cancer/oncology); *health problem* (a focus on a specific issue such as pain management or wound care or stress); and *care type* (such as psychiatric or rehabilitative).

In Ohio, advanced practice nurses must remain officially under the auspices of a doctor or a medical institution. However, advanced practice nurses are authorized to receive Medicaid reimbursement.

Pertinent Statutory Language

While the types of APRNs and the scope of services provided are indicated above, the authority to actually perform all of this work is one of statutory construction. It is essentially found in RC § 4723 – Nurses. The Code states that medical diagnosis, prescription of medical measures, and the practice of medicine or surgery or any of its branches by a nurse are prohibited. RC § 4723.151 (A). That being said, RC § 4723.151(A) does not prohibit a certified registered nurse anesthetist, clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner from practicing within the nurse's scope of practice in accordance with RC § 4723.43. Nor does it prohibit a clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner who holds a certificate to prescribe issued under RC § 4723.48 from prescribing drugs and therapeutic devices in accordance with § 4723.481 of the Revised Code. (see, § 4723.151(B)). In fact, under certain circumstances, a certified nurse practitioner or clinical nurse specialist may determine and pronounce an individual's death. RC § 4723.36

Essentially, the Revised Code allows for specialty nurses to provide to individuals and groups nursing care that requires knowledge and skill obtained from advanced formal education and clinical experience so long as the specialty nursing care is done in collaboration with one or more physicians. (RC § 4723.43 and subsections). These collaboration agreements set forth what these specialty nurses are permitted to do when collaborating with a specific doctor.

In reviewing the statute, the Revised Code provides circumstances by which specialty nurses act as physician extenders. With this evolving statutory construction giving APRNs the authority to practice with a high level of autonomy and meet the goals of the providers and the payors, why would the court system not also evolve in recognizing these APRNs as being able to provide expert medical testimony in their areas of expertise the issue of causation and/or future damages?

Recent case law

"[T]he admissibility of expert testimony that an event is the proximate cause is contingent upon the expression of an opinion by the expert with respect to the causative event in terms of probability." Stinson v. England, 69 Ohio St.3d 451, 454, 1994 Ohio 35, 633 N.E.2d 532. At the same time, it has been held "the expert's opinion may be based on facts or data perceived by him or it may be drawn from knowledge gained from other experts in the field." State v. Muhleka, 2nd Dist. No. 19827, 2004 Ohio 1822, at P76. Numerous Ohio courts have held that testimony from a nurse about medical causation is inadmissible. See Robertson v. Mt. Carmel E. Hosp., 10th Dist. No. 09AP-931, 2011-Ohio-2043 (holding Ohio nursing practice law precludes nurses from testifying regarding the issue of proximate cause); Keck v. Metrohealth Med. Ctr., 8th Dist. No. 89526, 2008-Ohio-801, ¶5 (holding a certified nurse practitioner is not qualified to testify regarding proximate cause); Hager v. Fairview Gen. Hosp., 8th Dist. No. 83266, 2004-Ohio-3959, ¶10 (holding the trial court did not err in prohibiting a nurse from testifying as to the cause of the injuries); Grigsby v. Anesthesiologists of Southwestern Ohio, 1st Appellate Dist. No. C-930008, 1994 Ohio App. LEXIS 1814 (holding a certified nurse anesthetist of 22 years and familiar with the procedures at issue, was not permitted to testify on the issues of proximate cause and damages); Duchene v. Finley, 6th Appellate Dist. 2015-Ohio-397 (affirming the trial court's decision that a nurse was unable to give a medical opinion or testify regarding causation).

In terms of damages, the economic losses that an injured person may recover in a tort action include expenditures for medical care and treatment, rehabilitation services, and other care, treatment, and services incurred as a result of the injury. R.C. 2315.18(A)(2)(b). As to past medical expenses, a *plaintiff* is qualified to testify as to injuries and medical treatment. Turner v. Progressive Ins. Co., 5th Dist. Holmes No. 2007CA015, 2008-Ohio-4988. It is unnecessary to have an expert testify as to the necessity of the medical expense. *Id.* An award of future damages, however, is limited to damages reasonably certain to occur from the injuries. H.J. v. Baddley, 5th Dist. Stark No. 2008CA171, 2009-Ohio-4318. "A *plaintiff's claim for future medical expenses or future physical pain must be supported by evidence that reasonably establishes the amount likely to be incurred for the future medical treatment.*" Bowers v. Next Generation Films, Inc., 5th Dist. Richland No. 08 CA 43, 2009-Ohio-1153.

Some cases do not require expert opinion concerning future damages. Ohio Courts have held "if the injury is of an objective nature (such as the loss of an arm, leg, or other member) the jury may draw their conclusions as to future pain and suffering from that fact alone. Jordan v. Elex, Inc., 82 Ohio App.3d 222, 611 N.E.2d 852 (1st Dist. Hamilton 1992); whereas there must be expert evidence as to future pain and suffering or permanency where the injury is subjective in character." Roberts v. Mut. Mfg. & Supply Co. (1984), 16 Ohio App.3d 324; see also Day v. Gulley (1963), 175 Ohio St. 83; Bowers v. Next Generation Films, Inc., 5th Dist. Richland No. 08 CA 43, 2009-Ohio-1153. A claim for future medical expenses must be supported by evidence that reasonably establishes the amount likely to be incurred for the future medical treatment. Hammerschmidt v. Mignogna (1996), 115 Ohio App.3d 276, 281-282. Thus, without expert testimony on the future course of medical treatment, a jury is not permitted to simply infer from the expense of past treatment an amount of damages for future treatment. Marzullo v. J.D. Pavement Maintenance, 8th Dist. Cuyahoga No. 96221, 2011-Ohio-6261, ¶ 40. Causal connection between an injury and a specific subsequent disability involves a scientific inquiry and must be established by the opinion of medical witnesses competent to express such opinion. Darnell v. Eastman (1970), 23 Ohio St.2d 13, 17.

Other cases have taken a different approach as to the qualifications of APRNs when providing expert testimony. In Disciplinary Counsel v. Hilburn, 135 Ohio St.3d 1, 2012-Ohio-5528, the Court analyzed RC § 4723.43(C) and upheld the competence of a licensed certified nurse practitioner specializing in mental health to give professional opinions on mental disabilities, including the ability to make diagnosis *and prognoses* with respect to mental health conditions. Further, it has been held that under Evid.R. 702(B), a nurse with sufficient knowledge, skill, experience, training, or education may qualify to give expert testimony relevant to the diagnosis of a medical condition. State v. Gibson (Sept. 24, 1997), 9th Dist. No. 96CA006527, 1997 Ohio App. LEXIS 4288, at 3, relying on Shilling v. Mobile Analytical Servs., Inc. (1992), 65 Ohio St.3d 252, 602 N.E.2d 1154, syllabus, State v. Dunn 2005-Ohio-1270. Additionally, in State v. Poling 2010-Ohio-1155, the court determined that a nurse (who was a nurse practitioner, a registered nurse with a master's degree that has extensive training in physical examination and treatment of medical conditions) was qualified to testify as an expert on the issue of whether a child was a sexual abuse victim.

Conclusion

This intersection between law and medicine may increasingly affect the determination of who to call as a medical expert witness at trial. The health care system clearly acknowledges the expertise of advanced practicing registered nurses. The Ohio legislature provides statutory construction from which these specialized nurses can practice as physician extenders in providing specialized care through independent decision making (albeit in collaboration with an available physician or physicians). With the nation's health care system and the Ohio legislature acknowledging and recognizing the expertise of specialty nurses, it would seem to reason that Ohio courts would likewise recognize APRNs as being qualified to provide expert medical opinion testimony on the very issues of causation and damages that they encounter in their everyday professional life.

From a trial lawyer's position, we want the best expert witness for our clients. In certain injury cases that best expert may be a specialty nurse with expertise and experience superior to that of medical doctor. Ultimately, the issue of qualification is one for the Court and the issue of credibility is one for the jury. The question becomes whether the Courts will (or should) catch up with the changing times of society.