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Who Cares About the "Standard of Care"?

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I decided to count the number of times that my co-counsel and I used the phrase "standard of care" during a "medical malpractice" trial. I lost count after day two. "Standard of care": what does it mean? It sounds so formal, so exquisite, so ceremonial. Perhaps, it is something more than being careful. Perhaps proving a violation of the "standard of care" requires a heightened burden. Perhaps medical malpractice is not negligence, but rather a violation that is more reckless or even intentional. This is the trap that we place ourselves into when we use big words that no one understands.

The Ohio Jury Instructions (CV 417.01) give us the definition of medical negligence as follows:

> This is a medical negligence claim brought by the plaintiff to recover compensation for injuries claimed to have been caused by the defendant's negligence. The plaintiff must prove by the greater weight of the evidence that the defendant was negligent and that the defendant's negligence was a proximate cause of injury to the plaintiff. A (physician) (surgeon) is negligent if the (physician) (surgeon) fails to meet the required standard of care.

As plaintiffs' lawyers, we have selected to combine a conceptually difficult phrase from this instruction, "standard of care," and add the phrase "medical malpractice" to it. "The doctor failed to meet the accepted standard of care," or "Dr. Smith fell below the standard of care when he misread the film," or "Dr. Smith's malpractice is evident." For practitioners who have had years of training and experience in this very finite area of law, such nomenclature becomes second nature. But for jurors who are lay people that may not have had many encounters with medicine or the law, these expressions take a whole new meaning. Suddenly, by using terms such as "malpractice" and "standard of care," we posit our cases in a light more favorable to the defense. We create an unnecessarily high burden of proof that sounds more like reasonable doubt than preponderance of the evidence.

Try asking jurors during voir dire what they think medical malpractice means. You might hear the following: "it means more than negligence;" "medical malpractice is when the surgeon cuts off the wrong leg;" "malpractice is when a surgeon does something wrong, but medical negligence is when a doctor misses something." Not only do we confuse jurors by using "standard of care", we also use the phrase "medical malpractice" as if it is something more than negligence. Before the trial even begins, jurors are left with the impression that the plaintiff's burden of proof is much higher in a

medical negligence case than in any other negligence case. As we know, that simply isn't true.

Proving medical negligence cases still requires the testimony of an expert witness who will educate the jury on the standard of care and proximate cause, but as practitioners, our job is to simplify these concepts for our jurors. We are assigned with the task of making difficult concepts easy to understand so a jury may render a fair verdict. We have all experienced the unpleasant feeling of a defense verdict. A verdict, however, should not be the result of confusion, but rather the result of the jury's collective wisdom during deliberations. If the jury is confused after the presentation of evidence, as lawyers we have failed to adequately present our case. Most times in medical negligence cases, confusion results in defense verdicts.

At our last trial, my co-counsel and I decided to eliminate the phrase "standard of care" and replace it with "reasonably careful." We also decided to eliminate the phrase "medical malpractice" and, instead, use "medical negligence." In fact, we came to the realization that the Ohio Jury Instructions do not even use the phrase "medical malpractice," so why should we use it during trial? We began in voir dire by explaining to the jury that this is a "medical negligence" case. We explained that plaintiff alleges that the doctor was not "reasonably careful" in not ordering certain tests that resulted in the plaintiff's injury. During our examination of experts, and the cross of the Defendant Doctor and his experts, we used the phrase "reasonably careful." It was easier for us and our experts to explain and easier for the jury to understand.

The result was a plaintiff's verdict. By no means am I suggesting that the verdict was a result of our modified nomenclature. The trial experience, however, was much more rewarding and we felt that we had a better connection with the jury by using phrases that jurors could understand and that lawyers could easily explain. When a young lawyer tries her first few cases, she might worry about objecting at the right time, properly asking the question or making a record for appeal. Those worries eventually lessen and trial maturity opens the lawyer's eyes to the beauty of trial work that is the connection she feels with the jury when properly advocating her client's case.