

Case Analysis:

Failure to Diagnose and Treat Acute Limb Ischemia

BY THE ENDOVASCULAR TODAY STAFF

CASE: Hardy, 170 S.W.3d 865, 2005 Tex. App. LEXIS 6546 (2005)

JURISDICTION: Court of Appeals of Texas, Sixth District, Texarkana

DISPOSITIVE LEGAL ISSUES: Failure to comply with statute that requires the expert report to provide specific allegations of negligence that are the cause of the plaintiff's injuries

FACTS

Plaintiff Hardy was a known diabetic who was admitted to the hospital on August 5, 2002, suffering from an acute myocardial infarction. A cardiologist was the attending physician who performed a catheterization and coronary angioplasty on Hardy. After the surgery, Hardy initially appeared to be doing well, but eventually developed the onset of pain and weakening in his legs, particularly on the right side. Hardy thought he had a "blood clot," and was familiar with the symptoms because he had experienced them in the past. The cardiologist dismissed Hardy from the hospital on August 9, 2002. The pain in Hardy's right leg persisted, and on August 12, 2002, he was readmitted to the hospital. A right iliofemoral thromboembolectomy was performed immediately, but 3 days later, an above-the-knee amputation of Hardy's right leg became necessary.

THE LAWSUIT

In his lawsuit, Hardy alleged that the cardiologist's negligence in failing to properly investigate Hardy's complaint and, in failing to consult a specialist, was the legal cause of the loss of Hardy's leg and the other attendant injuries and resulting damages.

In compliance with Texas malpractice law, Hardy filed an expert report. The defendant claimed that the report did not comply with the Code requirements and moved to dismiss the lawsuit with prejudice. The trial court agreed and dismissed Hardy's case with prejudice. The

trial court also denied Hardy's motion for an extension of time in which to procure the expert report.

THE EXPERT REPORT

Hardy's expert provided a summary of Hardy's symptoms and complaints and then set forth the following to support the claim of negligence:

"The defendant claimed that the report did not comply with the Code requirements and moved to dismiss the lawsuit with prejudice."

"An important consideration which would help discern procedures to be followed would be a demonstration of an adequate run-off to the vessels supplying the legs. Judicious use of aortograms and more distal arteriograms are considered important adjuncts in the precise and effective management of ischemic disease of the lower extremities.

"It is my opinion that this patient should have had a consultation with a vascular surgeon in view of his complaints before his discharge on August 9, 2002. I recognize fully the importance of his other medical problems. It is my opinion then that if this patient had had more immediate treatment that a salvage of his right leg would have

been more probable. In my opinion, [the defendant's] failure to seek such a consultation and to use such diagnostic means was not in accordance with the applicable standard of care."

APPEAL

On appeal, the plaintiff claimed that the trial court abused its discretion when it determined that the plaintiff's expert report did not constitute a good-faith effort to meet the statutory requirements of the Code.

"The court held, however, that the statements on which the plaintiff relied are not statements of a standard of care."

The appellate court held that the expert report must provide enough information within the document both to inform the defendant of the specific conduct at issue and to allow the trial court to conclude that the suit has merit. A report that merely states the expert's conclusions about the standard of care, breach, and causation does not fulfill these two purposes. "The standard of care for a doctor is what a reasonable and prudent doctor would have done under the same or similar circumstances. Identifying the standard of care is critical because whether a defendant breached his or her duty to a patient cannot be determined absent specific information about what the defendant should have done differently. It is not sufficient for an expert to simply state that he or she knows the standard of care and concludes it was or was not met."

The plaintiff claimed that various sections of the report adequately addressed the statutory requirement. The court held, however, that the statements on which the plaintiff relied are not statements of a standard of care. "The first statement refers to 'an important consideration'—not a standard of care—'which would help discern procedures to be followed.' The report then identifies that 'important consideration' as 'a demonstration of an adequate run-off to the vessels supplying the legs.' And the second sentence refers to two tests presumably used in diagnosing or treating diseases of the lower extremities. The report does not state the procedures or treatments that should have been followed when Hardy complained of leg pain; instead, it merely states the general procedures and tests used to diagnose and treat ischemic disease of the lower extremities."

The court held that the report's further statement that

the defendant's failure to seek consultation with a vascular surgeon did not put the defendant on notice of the specific conduct at issue. Nowhere did the expert report identify Hardy's specific symptoms requiring consultation with a vascular surgeon, when such consultation was required, or what treatment by such surgeon was required. Nor did the report specify what results the diagnostic tests would have been expected to reveal or what treatment would have been appropriate as a result of those tests.

The report further failed to establish a causal link. Nothing in the expert report links the claim of negligence (immediate treatment as opposed to discharge) to Hardy's injury (the amputation). The report merely states that Hardy "should have had a consultation with a vascular surgeon." It did not state what additional procedures or treatment would have been provided by the surgeon, nor did the report connect the consultation to avoidance of the amputation. The report furthermore failed to provide the medical basis for his opinion that "if this patient [Hardy] had had more immediate treatment then a salvage of his right leg would have been more probable."

RESULT

The appellate court affirmed the trial court's judgment, dismissing the case.

DISCUSSION

The plaintiff's expert report and deposition testimony must demonstrate (1) that the defendant's conduct deviated from the standard of care (defined as what a reasonable and prudent doctor would have done under the same or similar circumstances) and (2) how that deviation caused the plaintiff's injury. The trial and appellate courts in this case found that the expert report failed on both counts.

Readers of this case report residing in more "plaintiff-friendly" jurisdictions may find the outcome in this case at odds with results observed in their respective jurisdictions. The expert report here appears to provide the boilerplate language regarding "opinion" and deviation from "standard of care," yet was found insufficient. The major difference between the result in Texas and your own jurisdiction is probably not the Texas code, but the court's adherence to the letter of the law. This is largely a matter of discretion, unlikely to be overturned on appeal absent an abuse of that discretion.

Other states are now passing malpractice legislation requiring certification of malpractice by an expert before the plaintiff can even file suit. Such efforts may deter frivolous legislation provided judges are willing to enforce the law. ■