Texas Supreme Court Trilogy on Med-Mal Causation

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Recently, the Texas Supreme Court addressed causation in a medical malpractice lawsuit for the third time in less than two years. The first of the three cases, *Bustamante v. Ponte* 529 S.W. 3d 447 (Tex. 2017), establishes that the *substantial factor* standard, rather than the more stringent *but-for causation* standard, should be applied in an appellate review of the sufficiency of the evidence relied on to support a causation finding. Using the *substantial factor* standard, the Court upheld the jury's finding that the physician's negligence was a proximate cause of harm to the patient—reversing the decision of the Dallas Court of Appeals and reinstating the trial court's judgment for the plaintiffs. The Court rejected what it viewed as an unrealistic standard for causation articulated in the by the Court of Appeals majority opinion and adopted the less stringent standard consistent with a vigorous dissenting opinion by Justice Schenck.

The second case addresses the question of what constitutes a conclusory opinion. *Baty v. Futrell* 543 S.W.3d 689 (Tex.2018). The issue before the Court was whether the trial court's determination that plaintiff's Chapter 74 expert report provided nothing more than a conclusory opinion on causation was an abuse of discretion. The expert report stated that during the administration of anesthesia before cataract surgery the nurse anesthetist should not stick the optic nerve with a retrobulbar needle. The majority, in an opinion authored by Justice Green, held that the expert report adequately addressed causation because it stated that a specific action (sticking the eye with the retrobulbar needle) was supposed to avoided by the nurse anesthetist. The Court found that this specificity was enough to save the opinion from being conclusory. In a vigorous dissent, Justice Johnson argued that the language of the expert report offered only *generalized conclusory opinions* and failed to explain how the anesthesia should have been administered to avoid injury to the patient's eye.

The most recent case addresses: 1) whether the expert testimony relied on by plaintiff at trial was conclusory, and 2) whether the physician-defendant's negligence was too remote to be a proximate cause of the patient's death. *Windrum v. Kareh*, 2019 WL 321925. Lance Windrum was suffering from hydrocephalus—a condition that causes increased intracranial pressure. A neurologist diagnosed this condition and referred Lance to a neurosurgeon to insert a shunt to relieve the intracranial pressure. The neurosurgeon performed diagnostic
testing and concluded that Lance didn't immediately need a shunt but would most likely require one in the future. About three months later, Lance died in his sleep and the family sued the neurologist and the neurosurgeon.

The jury found both the neurologist and the neurosurgeon liable and allocated 80% of the comparative responsibility to the neurosurgeon. The trial court entered judgment and the neurosurgeon appealed. The Houston Court of Appeals reversed and rendered finding that the failure to insert a shunt was not a proximate cause of Lance's death.

Writ was granted. Justice Green authored the Court’s opinion. The Court carefully examined the opinion of Dr. Parrish, the neurosurgeon who testified as an expert witness for plaintiffs and opined that the failure to insert a shunt was a proximate cause of Lance's death three months later. Dr. Parrish testified that his opinion was based on his clinical experience, coupled with his review of the medical records and the opinions of other experts who testified at trial. He did not rely on medical literature to support his causation opinion. The Court found that while medical literature is valuable in determining whether an expert's opinion is reliable, it is not always required. The test is whether the expert provides an adequate factual basis for his opinions. In the Court's view, Dr. Parish provided the jury with an adequate factual basis for his opinion that the failure to insert a shunt was a proximate cause of Lance’s death. When there is an adequate factual basis for an expert opinion it is not conclusory.

Having determined that the expert’s opinion was not conclusory, the Court turned to the question of whether the neurosurgeon’s failure to insert a shunt three months before Lance died was too remote to be a proximate cause of Lance’s death. The Court pointed out that there is no requirement that a doctor’s negligence be an immediate cause of death. The Court acknowledged that there are circumstances where the relationship between the doctor’s conduct and the plaintiff’s injury is too attenuated to be a substantial factor in bringing about the injury. The Court found that although Lance’s death occurred three months after the neurosurgeon treated him, the neurosurgeon’s failure to insert a shunt was a substantial factor in causing him to die due to elevated pressure in his brain caused by hydrocephalus.