The meanings of words

Laurance Jerrold, Associate Editor for Litigation and Legislation
Brooklyn, NY

This will be one of the longer articles I've ever written for this column, but hang in there, it's worth it. The case, *Duboise v Brantley*, No. S14G1192 (Sup. Ct. Ga.; July 13, 2015), revolved around what an expert witness's qualifications needed to be, particularly regarding his experience with the procedure performed. The facts are simple. The plaintiff had an umbilical hernia. The surgeon performed a laparoscopic repair. Unfortunately, the plaintiff's pancreas was punctured during the procedure upon inserting the primary trocar. As a result, he developed pancreatitis, respiratory failure, acute renal failure, and sepsis; he spent several days in a coma and was in intensive care for a month. Although he ultimately survived, he needed several additional surgeries to repair the damage. The defendant admitted that yes, he perforated the pancreas, but this was a potential known side effect of the procedure, and that doing so was not a breach of the standard of care, since this injury is a known complication of performing the procedure laparoscopically, one that the patient was made aware of.

The plaintiff's expert witness, Dr Swartz, opined that although he often performs various laparoscopic procedures, he no longer uses the technique to repair umbilical hernias because he prefers an open approach. He testified that in the last 5 years he performed only 1 laparoscopic umbilical hernia repair. Furthermore, he testified that unless the pancreas was in an unusual anatomic location, which wasn't the case, the pancreas should not be punctured by insertion of a trocar when performing any abdominal laparoscopic procedure and since the defendant did so, it was a breach of the standard of care.

The defendant's attorney objected to Dr Swartz's testimony, arguing that the plaintiff's expert was not competent to render an expert opinion since he had performed only 1 such procedure in the last 5 years. The trial court allowed the testimony. On appeal, the appellate court reversed. This appeal to the Georgia supreme court ensued.

The supreme court started its analysis by noting the following axioms regarding statutory construction and interpretation, in this case, Rule 702(c)(2)(A).

1. Any statute draws its meaning from the text as it is written.
2. The reviewing court must presume that the legislature that drafted the statute in question "meant what it said and said what it meant."
3. The statute must be read "in its most natural and reasonable way, as an ordinary speaker of the English language would."
4. Whereas the common and customary use of words is important, the context in which they are used is just as important.
5. "For context, we may look to the other provisions of the same statute, the structure and history of the whole statute, and the other law—constitutional, statutory, and common law alike—that forms the legal background of the statutory provision in question."

The statute in question governs the admissibility of expert testimony by expert witnesses in civil cases, and section 702 (b) reads as follows.

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:
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> (1) The testimony is based upon sufficient facts or data;
> (2) The testimony is the product of reliable principles and methods; and
> (3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.

In addition, Rule 702(c)(2)(A) and (B) requires that the expert:

> Have actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result having been regularly engaged in:

Division of Orthodontics and Program Director, Orthodontics and Dentofacial Orthopedics, NYU-Lutheran Medical Center, Brooklyn, NY.
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(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue.

The defendant argued that Rule 702 and all subsections stood for the proposition that the expert must actually have performed or taught the procedure in question during 3 of the last 5 years. He also argued that the procedure in question is a laparoscopic repair of an umbilical hernia. As Dr Swartz's own testimony shows, since he does not perform this procedure, his testimony should be precluded. The court then conducted a lucid session in legal reasoning. First, it noted that the statute does not define the word *procedure*. Referring to the dictionary, the court took judicial notice of the plain meaning of the word: "procedure refers to a process, method, or series of steps undertaken for the accomplishment of an end." The problem thus became the level of generality at which the procedure in question is to be defined. The court put it this way.

> Suppose that someone pointed out a dog and asked: "What sort of animal is that?" Animals can be classified at varying levels of generality, and so, you might accurately respond that the animal is a vertebrate, a mammal, of the order Carnivora, of the family Canidae, of the genus Canis, of the species Canis lupus, or of the subspecies Canis lupus familiaris.… More specific yet, you might identify the dog by its breed, gender, or some other distinguishing, immutable characteristic. Every one of these answers would amount to an accurate response to the question.
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> In the same way, a medical "procedure" can be identified at varying levels of generality. Take the procedure at issue in this case. It could be accurately characterized… as a "laparoscopic procedure to repair an umbilical hernia." Characterized in that way, the record is clear that Dr. Swartz has performed no more than one such procedure in the past five years. The procedure could, however, be characterized more generally—but just as accurately—as the surgical repair of an umbilical hernia or as an abdominal laparoscopic procedure. Under either of those characterizations, Dr. Swartz would have actual experience performing the procedure in question, inasmuch as he regularly performs surgical procedures to repair umbilical hernias, and he regularly performs abdominal laparoscopic procedures of various sorts.
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> Because not all laparoscopic procedures to repair umbilical hernias are done in exactly the same way, the procedure also could be characterized more specifically than—but just as accurately as—the way in which the Court of Appeals, Dr. Brantley, and Southeast Georgia Health characterized it. Indeed, the medical literature indicates that laparoscopic surgeons use a variety of techniques to enter into the abdominal cavity, they use different points of entry to access the abdominal cavity, and they use different numbers of trocars, as well as trocars of different sorts and sizes, to do so.… With respect to laparoscopic procedures to repair umbilical hernias specifically, the literature likewise indicates variations in techniques and tools.… And the record in this case confirms the variability of techniques and tools used in the laparoscopic repair of umbilical hernias.

The defendant argued that "procedure" should be interpreted at an "intermediate" level of generality without stating a foundation for why. The supreme court was not persuaded and flatly told the defendant that he was wrong. Turning to the next issue, the court noted that an expert, as per the statute, must have "actual and professional knowledge and experience in the area of practice or specialty in which the opinion is to be given"; that his knowledge and experience is derived from the fact that the expert was "regularly engaged in the active practice of such area of specialty for three of the last five years or in teaching… as an employed member of the faculty of an educational institution…"; and that the expert has done so with "sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure or teaching others how to perform the procedure."

The court noted that, ideally, an expert can demonstrate his appropriate level of knowledge by proving that he has actually done the procedure in question; without such "proof," he could indeed be found lacking. However, according to the statute that is not really the issue, the real question is whether the expert has the "appropriate level of knowledge in performing the procedure or teaching others how to perform the procedure, not whether the expert himself has actually performed or taught it." But if the statute calls for an expert to have this level of knowledge and that it is suitable or fitting

for a particular purpose, the next question to be asked would be, what is the purpose? The conclusion was that the purpose was to be able to provide the expert testimony itself. The bottom line noted by the court was that Rule 702 "is designed to ensure that an expert genuinely knows of that of which he speaks."

The court noted that the gatekeeper role of the trial court judge requires that a flexible inquiry be made that is tailored specifically to what an expert witness proposes to testify to and to what extent those opinions have a basis in sound scientific principles and methodologies. Likewise, the judge must be convinced that the expert has the "appropriate level of knowledge" required by Rule 702(c)(2)(A) and (B). The court noted that as far as it was concerned, such is the case when the expert exhibits a "sufficient knowledge about the performance of the procedure—however generally or specifically it is characterized, so long as it is the procedure that the defendant is alleged to have performed negligently—to reliably give the opinions about the performance of the procedure that the expert proposes to give."

The court offered another analogy to illustrate the proper application of these principles by stating the following.

> Consider a cardiovascular surgeon, who is offered as an expert on the standard of care with respect to a particular sort of heart surgery. The surgeon has not performed any surgeries of that particular sort, but she has performed many other heart surgeries. Whether her experience has given the surgeon an "appropriate level of knowledge in performing the procedure" depends upon exactly what opinions the surgeon is expected to share in her testimony. If she proposes to testify about an aspect of the surgery in question that is unique and materially unlike the heart surgeries with which she has experience, her limited experience likely will be a problem for the admissibility of her testimony. But if she proposes only to testify about an aspect of the surgery that is—as shown by the record—not different in any material way from the surgeries with which she has experience, she might well be found to have an "appropriate level of knowledge" by virtue of her practical experience. Whether the experience of a particular expert witness is enough to establish that the expert has an "appropriate level of knowledge" is a question committed to the discretion of the trial court.

In other words, it's not whether the expert has ever performed precisely the same surgery and how many times. It is, rather, whether the expert has performed surgeries like the one in question, whether he has obtained informed consent for similar types of procedures, and whether he has performed procedures that carry the same risks as the procedure performed by the defendant. The court reversed the appellate court's ruling and found the expert competent to testify.

COMMENTARY

You're not a cardiovascular surgeon, but you are an orthodontist. You have decided to be an expert in a malpractice case involving the claimed misuse of a "propulsionator" to correct a Class II malocclusion. The injuries claimed are whatever you can conjure up. You can be the expert for whichever side you choose. The point is that you have never used a "propulsionator" to advance the mandible. You have used all sorts of widgets and gizmos in your practice to advance a patient's mandible but not a "propulsionator."

What is a propulsionator? It's a simple removable plastic and wire thingamabob that changes mandibular posture. It's a piston-and-rod type of device. It's elastomerics or springs and wires. It can be anything you can dream up. Does it really matter?

You know the anatomy. You know the physiology. You know the concepts of occlusion. You know how to take bite registrations. You know the physics involved. You've got this, you've done it, just not with this appliance. So, the question now is, are you competent to testify that someone did or did not breach the standard of care based on the facts and the testimony of how something was used? The same reasoning applies to other clinical interventions. Aren't the questions and considerations the same as they might relate to the newest temporary anchorage devices or miniplates, the newest accelerated tooth movers, the newest brackets; the list goes on. You should be able to see the arguments both ways. Which side of the line do you fall on? The easy way to solve this dilemma is not to become an expert witness. But hey, what's the fun in that?

Because of the nature of what we do, there will always be "advances" in appliances, techniques, and ministrations. The key is that they all have a foundation in the basic art and science of the practice of orthodontics. As long as we are well grounded in those basics, we should be able to interpret whatever comes along and thus understand and use pretty much any intervention, instrument (sure, maybe we may need to practice with it or adjust to a learning curve), theory, or mechanotherapy that is placed before us. Once we have analyzed it, we are free to adopt it or discard it. After all, we are individualists, not automatons. There is only 1 caveat. At the end of the day, after all the smoke clears, we must remember that there is a patient at the end of everything

we do. The patients are the recipients of our best intended ministrations; they are the ones who must walk around with the hardware we insert into their oral cavities; and they must pay us for doing so.

Over the last quarter century plus some, I have seen us make the simple more complicated, often in the name of technologic advancement. I'm not saying it's wrong, I'm not saying it's right, I'm just saying that it is. The reasons for the changes are driven by us, our vendors, and our patients. In my humble opinion, some of these reasons are good, but some others are not so good. In the end though, as a profession, we ought to think long and hard about where we are going and how we are getting there. The price to pay for not doing so is that we might just end up in a place we don't want to be.