**STANDARD OF CARE**

by Mark A. Lienhoop



This article addresses four issues regarding the standard of care: 1) What it is; 2) How it can be evidenced at the medical review panel; 3) How it can evidenced at trial; and 4) How it relates to going to trial after the medical review panel opinion. This article also addresses some *Daubert* issues in medical malpractice claims.

**1. What is the Standard of Care?**

The elements of a medical malpractice claim are a health care provider's (HCP) breach of the duty to meet the standard of care owed to the patient which proximately caused a patient harm, or increased the risk and was a substantial factor in causing a patient harm. *E.g.s, Sawlani v Mills*, 830 N.E.2d 932 (Ind. Ct. App. 2005); *Brady v. Brown TP. Life Star Ambulance*, 802 N.E.2d 983 (Ind. Ct. App. 2004); *Cahoon v. Cummings*, 734 N.E.2d 535 (Ind. 2000).

The Indiana Supreme Court established the "standard of care" legal definition in *Vergara v. Doan*, 593 N.E.2d 185 (Ind. 1992) (Given dissenting). A HCP must exercise that degree of care, skill, and proficiency exercised by reasonably careful, skillful, and prudent practitioners in the same class to which the HCP belongs, acting under the same or similar circumstances. *Id*., at 187. Some factors which may be considered in determining if a HCP acted reasonably are locality, advances in the profession, availability of facilities, and if the HCP is a specialist or general practitioner. *Id.*

Note that Indiana Pattern Jury Instruction 23.01 leaves out "in the same class" to which the health care provider belongs. It provides:

> A HCP commits an act of malpractice when the HCP fails to exercise the degree of reasonable care and skill in providing health care to a patient as would a reasonably careful, skillful and prudent HCP acting under the same or similar circumstances. The malpractice may consist of doing something that the HCP should not have done under the circumstances, or the failure to do something that the HCP should have done under the circumstances.

Indiana Pattern Civil Jury Instructions, 2nd Ed., 23.01. To make this Pattern Instruction correct under *Vergara*, the language "in the same class" should be inserted before the phrase "acting under the same or similar circumstances."

The standard of care definition means HCPs need not provide perfect care. *Narducci v. Tedrow*, 736 N.E.2d 1288, 1292 (Ind. Ct. App. 2000); *Gold v. Ishak*. 720 N.E.2d 1175, 1180 (Ind. Ct. App. 1999). The law does not require that a HCP make the correct diagnosis, prescribe the correct treatment, cure the patient, or obtain a good result, so long as the standard of care is met. *Farrar v. Nelson*, 551 N.E.2d 862 (Ind. Ct. App. 1990); *Fall v. White*, 449 N.E.2d 628 (Ind. Ct. App. 1983); *C.F. Broughton, D.M.D., P.C. v. Riehle*, 512 N.E.2d 1133 (Ind. Ct. App. 1987); *Kranda v. Houser-Norborg Medical Corp.*, 419 N.E.2d 1024 (Ind. Ct. App. 1981); *Dahlberg v. Ogle*, 268 Ind. 30, 373 N.E.2d 159 (1978); *Edwards v. Uland*, 193 Ind. 376, 140 N.E.2d 546 (1923).

Health care providers are allowed to use professional judgment based on their training and experience, and given the signs and symptoms presented to them. *Fall v. White*, 449 N.E.2d 628 (Ind. Ct. App. 1983); *Kranda v. Houser-Norborg Medical Corp.*, 419 N.E.2d 1024 (Ind. Ct. App. 1981).

That a different treatment method was available, or that a different HCP would have chosen a different treatment method, does not necessarily establish a breach of the standard of

care. *Fridono v. Chuman*, 747 N.E.2d 610 (Ind. Ct. App. 2001); *Fall v. White*, 449 N.E.2d 628 (Ind. Ct. App. 1983); *Kranda v. Houser-Norborg Medical Corp.*, 419 N.E.2d 1024 (Ind. Ct. App. 1981). When there are different treatment methods available, a HCP can select any treatment method recognized within that HCP's standard of care. *Fridono v. Chuman*, 747 N.E.2d 610 (Ind. Ct. App. 2001); *Fall v. White*, 449 N.E.2d 628 (Ind. Ct. App. 1983); *Kranda v. Houser-Norborg Medical Corp.*, 419 N.E.2d 1024 (Ind. Ct. App. 1981).

Also, determining if a HCP met the applicable standard of care depends on the situation at the time and not on anything known or discovered afterwards which could not, with reasonable care, have been known or discovered at the time. *Carrow v. Streeter*, 410 N.E.2d 1369 (Ind. Ct. App. 1980); *Lewis v. Davis*, 410 N.E.2d 1363 (Ind. Ct. App. 1980); *Dahlberg v. Ogle*, 268 Ind. 30, 373 N.E.2d 159 (1978).

A HCP does not have a duty to refer a patient to another HCP, unless the patient's condition is beyond the HCP's expertise or outside the HCP's specialty. *Fridono v. Chuman*, 747 N.E.2d 610 (Ind. Ct. App. 2001).

In addition, a HCP is not responsible for any result of a patient's failure to use reasonable care in following a HCP's instructions or advice. *Fall v. White*, 449 N.E.2d 628 (Ind. Ct. App. 1983).

The standard of care which applies to a claim of informed consent needs a bit more explanation. A HCP may not provide treatment to a patient without the patient's express or implied consent, unless it is an emergency. Express consent for treatment may be oral or written. The patient's consent must be based on an informed decision. A HCP has a duty to make reasonable disclosures of material facts such as the nature of a proposed treatment and the

material risks involved, so that the patient can make an informed decision regarding the patient's treatment. When a patient alleges lack of informed consent, there must be proof that the HCP failed to disclose to the patient what the applicable standard of care required that HCP to disclose. In addition, there must be proof that a reasonable person under the same or similar circumstances as the patient would not have consented to the treatment had they been properly informed of its risks or of available alternatives. Finally, the complained of act or omission must proximately cause the patient injury. *Culbertson v. Mernitz*, 602 N.E.2d 98 (Ind. 1992); *Indiana Civil Pattern Instructions*, 2d ed., 23.07; 23.08; 23.09; 23.25; 23.26; & 23.27.

The knowledge to apply the standard of care's legal definition to a particular claim is ordinarily beyond the average juror and requires expert opinion. Indiana Rule of Evidence 702; *e.g., Marquis v. Battersby*, 443 N.E.2d 1202 (Ind. Ct. App. 1982). An expert opinion is also required for lack of informed consent claims. *Culbertson v. Mernitz*, 602 N.E.2d 98 (Ind. 1992).

Breach of the standard of care is not presumed from a patient's injury or death unless the doctrine of *res ipsa loquitur* applies. *Narducci v. Tedrow*, 736 N.E.2d 1288 (Ind. Ct. App. 2000). *Res ipsa loquitur* applies only where the injuring instrumentality is under the exclusive management or control of the HCP, and the result ordinarily does not happen if the HCP meets the applicable standard of care. *E.g.s, Balfour v. Kimberly Home Health Care, Inc.*, 830 N.E.2d 145 (Ind. Ct. App. 2005); *Mullins v. Parkview Hosp., Inc.*, 830 N.E.2d 45 (Ind. Ct. App. 2005); *Syfu v. Quinn*, 826 N.E.2d 699 (Ind. Ct. App. 2005); *Ross v. Olson*, 825 N.E.2d 890 (Ind. Ct. App. 2005); *Narducci v. Tedrow*, 736 N.E.2d 1288 (Ind. Ct. App. 2000); *Slease v. Hughbanks*, 684 N.E.2d 496 (Ind. Ct. App. 1997); *Vogler v. Dominquez*, 624 N.E.2d 56 (Ind. Ct. App. 1993); *Wright v. Carter*, 622 N.E.2d 170 (Ind. 1993); *Widmeyer v. Faulk*, 612 N.E.2d 1119 (Ind. Ct.

App. 1993); *Malooley v. McIntyre*, 597 N.E.2d 314 (Ind. Ct. App. 1992); *Ellis v. Smith*, 528 N.E.2d 826 (Ind. Ct. App. 1988); *Stumph v. Foster*, 524 N.E.2d 812 (Ind. Ct. App. 1988); *Burke v. Capello*, 520 N.E.2d 439 (Ind. 1988); *Marquis v. Battersby*, 443 N.E.2d 1202 (Ind. Ct. App. 1982).

Expert testimony of the standard of care is still required when *res ipsa loquitur* applies, unless it is a matter of common knowledge that the result ordinarily does not happen if the HCP meets the applicable standard of care. *Narducci v. Tedrow*, 736 N.E.2d 1288, 1293 (Ind. Ct. App. 2000).

**2. How Can The Standard of Care Be Evidenced at Panel?**

The standard of care can be shown at the medical review panel through affidavits or depositions of expert witnesses, through interrogatory answers of a defendant health care provider, through affidavits or depositions of a defendant health care provider, through affidavits or depositions of non-defendant prior or subsequent treaters, through statements in medical records, through statements in respected medical literature, or by common knowledge when *res ipsa loquitur* applies.

**3. How Can the Standard of Care Be Evidenced at Trial?**

The ways in which the standard of care can be shown at trial depend on the Rules of Evidence. Generally, the standard of care may be shown through expert witnesses, through interrogatory answers of a defendant health care provider, through non-defendant prior or subsequent treaters, through statements in admissible medical records, through the medical review panel opinion [*e.g.*, *Shoup v. Mladick*, 537 N.E.2d 552 (Ind. Ct. App. 1989)], or by

common knowledge when *res ipsa loquitur* applies.

A properly authenticated panel opinion provides a sufficient foundation for admissibility. *Bonnes v. Feldner*, 642 N.E.2d 217 (Ind. 1994). A properly authenticated panel opinion is absolutely admissible, even if it decided a non-expert factual question. *Dickey v. Long*, 591 N.E.2d 1010 (Ind. 1992), *affirming*, 575 N.E.2d 339 (Ind. Ct. App. 1991). The Indiana Supreme Court found in *Dickey* that the statutory provision for admissibility of the panel opinion was "unambiguous and absolute". *Id*., at 1011 (then I.C. 16-9.5-9-9, now I.C. 34-18-10-23). Even without the statutory provision, a properly authenticated panel opinion would be admissible as a public record under Indiana Rule of Evidence 803(8).

The panel opinion can be authenticated by: 1) certification from the Department of Insurance, *Bonnes v. Feldner*, 642 N.E.2d 217 (Ind. 1994), which is "self-authenticating" under Indiana Trial Rule 44, *McGee v. Bonaventura*, 605 N.E.2d 792 (Ind. Ct. App. 1993), and self-authenticating under Indiana Evidence Rule 902; 2) by the affidavit of the manager of the Medical Malpractice Division of the Department of Insurance, *Stackhouse v. Scanlon*, 576 N.E.2d 635 (Ind. Ct. App. 1991); 3) by the panel chair's affidavit declaring it a true and correct copy of the original, *Jordan v. Deery*, 609 N.E.2d 1104, 1108 (Ind. 1993); and by the affidavit of a party's attorney, *Winbush v. Memorial Health Systems, Inc.*, 581 N.E.2d 1239, 1243 (Ind. 1991).

Failure to timely contest the authentication of the panel opinion waives that objection. *E.g., McGee v. Bonaventura*, 605 N.E.2d 792, 794 fn. 1 (Ind. Ct. App. 1993).

**4. How Does The Standard of Care Relate to Going to Trial After the Panel?**

A properly authenticated panel opinion is admissible, but is not conclusive if the standard of care was met. IC 34-18-10-23. What follows is a partial list of the many other things to consider, not necessarily in order of importance.

What is the venue? What jury results have there been in this venue with these types of cases? What is defendant's reputation in that venue? Who is the judge and what is the judge's reputation in these types of cases? Are there multiple defendants and are they blaming each other?

What are the skill levels of the attorneys involved? How well to the lawyers get along or not get along?

Do the plaintiffs or health care providers really want to go to court? Will they make good witness? How well did the patient and health care provider get along or still get along?

Do the panel members make good witnesses? Are the reasons supporting the panel decision weak or strong? Did the panel rely on incorrect information, or information discovered afterwards such as by autopsy? Did the panel apply the correct standards for breach and causation?

Has new information been discovered since the panel submissions were made that would change a panel member's decision? Is the panel decision split? Did a panel member incorrectly believe that the panel decision had to be unanimous? Did the panel incorrectly lump defendants together? Did a panel member incorrectly put the burden on your client?

Are the panel members you are counting on of the same specialty as the defendant being targeted? Has a panel member changed their opinion? Would the panel member change their opinion if the standard was a preponderance of the evidence?

Did the panel decide that there was a material issue of fact, or did the panel improperly decide a material issue of fact? Which witnesses regarding this material issue of act are more persuasive?

Did the panel find that the conduct was a factor? What is the most convincing evidence regarding causation?

Were panel members biased for or against a party? The Indiana Supreme Court has held that an attorney representing a party before the panel is not required to disclose a personal or professional relationship with a panel member, although it would be "prudent and fair" to do so. *Matter of La Cava*, 615 N.E.2d 93 (Ind. 1993). In addition, the medical malpractice act does not require the health care provider panel members to disclose their professional relationship with the patient's subsequent treater who was critical of a defendant. *Walker v. Pillion*, 748 N.E.2d 422, 426 fn. 4 (Ind. Ct. App. 2001). Were any panel members improperly contacted regarding the case before their panel meeting or after their meeting but before their written decision? *See Matter of La Cava, supra*.

Are there experts other than panel members? Are those expert witnesses more convincing than the panel members? Can the crucial witnesses be effectively impeached? Which witnesses will appear live at trial and which will appear by video-tape or by regular deposition?

Will the claim or defense make sense to a lay person? How much sympathy will there be for the plaintiff? Are the issues of liability and damages bifurcated?

How well do the plaintiff's counsel and insurer get along? What is the insurance company's experience with the attorneys involved and with the issues involved? Will the

insurance company proceed to trial regardless of the evidence?

Will a HCP consent to settlement when that consent is required? How many prior claims has the HCP had, settled, won, or lost? Is the National Practitioner Data Bank keeping the HCP from consenting? Has plaintiff made a complaint with the consumer protection division of the attorney general's office or the licensing board?

**5. How Does *Daubert* Apply in a Medical Malpractice Claim?**

*Daubert* is used here to refer generally to the United States Supreme Court case of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), and it progeny. *Daubert* held that the Federal Rules of Evidence (FRE) superseded the *Frye* test which had made "general acceptance" the basis for admitting expert scientific testimony. Under *Daubert*, a federal trial court judge has to determine if the reasoning or methodology underling offered expert testimony is scientifically valid and can properly can be applied to the facts in issue. Some factors the *Daubert* court noted to consider in determining validity were if the methodology 1) could be or had been tested; 2) had been published in peer-reviewed journals; 3) had a known rate of error; 4) or was generally accepted.

The United States Supreme Court latter applied the *Daubert* holding to all expert testimony in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

The Indiana Supreme Court has held that *Daubert* and its progeny are not binding on Indiana state courts, but that the concerns driving *Daubert* coincide with, and are helpful in applying, Indiana Rule of Evidence 702(b). *Kubsch v. State*, 784 N.E.2d 905, 920 (Ind. 2003).

Indiana Rule of Evidence 702(b) provides that "Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable."

The Indiana Supreme Court has held that the intent in adopting IRE 702(b) was to liberalize, not constrict, admission of scientific evidence. *Sears v. Manilov*, 742 N.E.2d 453 (Ind. 2001)(testimony of post-concussion syndrome from hitting head). The *Sears* court noted that IRE 702(b) permits expert testimony even though it is not generally accepted. It would then be most improbable that generally accepted scientific principle would be too unreliable to be admitted. *Id*.

The Court in *Sears* explained that the trial court is to consider the underlying reliability of the general principles involved in the testimony. *Id*. But IRE 702(b) does not require the trial court to re-evaluate each subsidiary element of an expert's testimony within a subject. *Id*. Once a trial court is satisfied that the expert's testimony will assist the trial of fact and that the expert's general methodology is based on reliable scientific principles, then the accuracy, consistency, and credibility of the expert's opinions are properly left to vigorous cross examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact. *Id*.

IRE 702(b) does not apply at the medical review panel stage to preclude what the panel may consider. Preliminary determinations of law are generally limited to affirmative defenses under Trial Rule 8, issues of law or fact under Trial Rule 12(D), and compelling discovery under Trial Rules 26-37. *Griffith v. Jones*, 602 N.E.2d 107 (Ind. 1992). A trial court cannot define terms and phrases, determine what evidence the panel may consider, nor the form or substance of its opinion. *Id*. Neither the panel chair nor a trial court may determine what material the medical

review panel can consider; only the panel can make that determination. *Chen v. Kirpatrick*, 738 N.E.2d 727 (Ind. Ct. App. 2000). Thus, any argument against an expert's opinion based on IRE 702(b) would be left to the weight the panel members should give the opinion.

IRE 702(b) also does not apply to the medical review panel opinion, nor to the testimony of a medical review panel HCP. A properly authenticated panel opinion is absolutely admissible, even if it decided a non-expert factual question. *Dickey v. Long*, 591 N.E.2d 1010 (Ind. 1992), *affirming*, 575 N.E.2d 339 (Ind. Ct. App. 1991). By statute, any party may call a member of the medical review panel as a witness who "shall appear and testify." IC 34-18-10-23.

Finally, IRE 702(b) does not apply to summary judgment proceedings. *Doe v. Shults-Lewis Child and Family Service, Inc.*, 718 N.E.2d 738 (Ind. 1999). The *Schults Lewis* Court held that when asserting repressed memory at the summary judgment stage as a justification for filing a claim beyond the statute of limitations, a plaintiff need only present information supporting the scientific validity of the methodologies & processes used to form the expert opinion. *Id*., at 750. The affidavit must assert admissible facts on which the opinion is based and state the reasoning or methodologies on which the opinion is based. *Id*. However, the reliability of scientific principles need not be established as long as the trial court is provided enough information to proceed with a reasonable amount of confidence that the principles used to form the opinion are reliable. *Id*., at 750-751.

This writer does not know of any reported Indiana medical malpractice cases which applied IRE 702 at trial to the standard of care. However, cases decided before the IREs were adopted in 1994 may give some guidance how trial courts might apply IRE 702 to the standard of care. For example, the Court of Appeals had previously held that a chiropractor was not

qualified to give an opinion that specialists in internal medicine and pulmonary disease had breached the standard of care. *Stackhouse v. Scanlon*, 576 N.E.2d 635 (Ind. Ct. App. 1991).

The Court of Appeals was able to avoid deciding if a neuropsychologist may render an expert opinion on medical causation in the medical malpractice claim of *Clark v. Sporre*, 777 N.E.2d 1166 (Ind. Ct. App. 2002). The *Clark* Court held the opinion was speculative because it assumed a hypoxic event when there was no evidence of such. *Id*. The *Clark* Court noted that an expert's causation opinion must be based on application of particular scientific facts to particular data about the instant case. *Id*.

Here are some non-medical malpractice cases involving IRE 702(b) and expert medical opinion on causation. *Willis v. Westerfield*, 839 N.E.2d 1179 (Ind. 2006)(expert testimony needed on failure to mitigate because cause or extent beyond layman's knowledge); *Topp v. Leffers*, 838 N.E.2d 1027 (Ind. Ct. App. 2005)(defendant's directed verdict affirmed where no expert testimony of sufficient certainty that pre-existing condition aggravated by accident, complaints subjective, no complaints immediately after accident, & causation not within lay person's understanding); *Norfolk Southern Ry. v. Estate of Wagers*, 833 N.E.2d 93 (Ind. Ct. App. 2005)(Expert opinion in FELA action that decedent's general workplace exposure to diesel fumes & asbestos played significant role in cancer but could not estimate what % was sufficient to survive summary judgment. Where expert's testimony based on expert's skill or experience rather than scientific principles, proponent must only show subject matter related to some field beyond knowledge of lay persons & witness has sufficient skill, knowledge, or experience in field to assist trier of fact to understand evidence or determine fact in issue.); *Sikora v. Fromm*, 782 N.E.2d 355 (Ind. Ct. App. 2002) *trans. den.* (chiropractors opinions that bulging disc caused

by auto accident sufficient); *Kristoff v. Glasson*, 778 N.E.2d 465 (Ind. Ct. App. 2002)(No error to strike deposition of treater regarding history of anxiety and depression since testified could not cause diagnosis of post-concussion syndrome); *Clark v. Sporre*, 777 N.E.2d 1166 (Ind. Ct. App. 2002)(opinion on medical causation speculative as not based on facts in evidence); *Armstrong v. Cerestar USA, Inc.*, 775 N.E.2d 360 (Ind. Ct. App. 2002)(summary judgment for defendant proper because certified safety professional's testimony that plaintiff was exposed to hazardous concentration of hydrogen sulfide gas and as result became disoriented and fell was speculative, as not based on specific data nor medical training); *Muncie Indiana Transit Authority v. Smith*, 743 N.E.2d 1214 (Ind. Ct. App. 2001)(causation of carpal tunnel syndrome required expert testimony where plaintiff had previous history of hand numbness); *Brannos v. Wilson*, 733 N.E.2d 1000 (Ind. Ct. App. 2000)(Dr's opinion accident 16 months before possibly caused death not enough); *Creasy v. Rusk*, 730 N.E.2d 659 (Ind. 2000)(affidavit of LPN that patient unable to appreciate consequences of actions could be considered in summary judgment); *Indiana Michigan Power Co. v. Runge*, 717 N.E.2d 216 (Ind. Ct. App. 1999)(expert opinion of more than possibility needed on medical causation when injuries claimed from electrical-magnetic fields of power lines, not based on facts in evidence, "years of experience" not sufficient); *Long v. Methodist Hospital of Indiana, Inc.*, 699 N.E.2d 1164 (Ind. Ct. App. 1998) (nurse not qualified to offer expert opinion as to medical cause or as to increased risk of harm); *Schloot v. Guinevere Real Estate Corp.*, 697 N.E.2d 1273 (Ind. Ct. App. 1998)(expert medical opinion needed to determine which injuries & bills related to fall and which not); *Roberson v. Hicks*, 694 N.E.2d 1161 (Ind. Ct. App. 1998)(no expert on causation needed where plaintiff felt new pain after car accident, different from his multiple sclerosis); *City of East Chicago v. Litera*, 692 N.E.2d 898

(Ind. Ct. App. 1998)(expert medical testimony insufficient to connect subsequent medical treatment to fall); *Ford Motor Co. v. Reed*, 689 N.E.2d 751 (Ind. Ct. App. 1997)(expert not needed for injury caused by smoke from fire where plaintiff testified symptoms began immediately and were not like any had before); *Hottinger v. Trugreen Corp*., 665 N.E.2d 593 (Ind. Ct. App. 1996)(allowed opinion injuries caused by herbicide exposure).

**Conclusion**

Although the standard of care is based on a legal definition, it is ultimately what an expert is allowed to state it is. IRE 702, and the cases interpreting it, do not apply at the panel stage but control when such expert opinion is needed and admissible at trial.

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