Experts, Wrongful Death & Precautionary Probate Measures

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Good judgment comes from experience. Experience comes from bad judgment.
Mullah Nasrudin, Sufi sage, c. 1208

Genesis of this article was prior litigation of a challenging excessive force case involving an incompetent adult which became ever more onerous due to medical expert issues regarding causation, additional to the usual proof of police misconduct. When the client died after verdict and judgment but before payment of fees and costs the author was involuntarily caught within the gravitational pull of the probate court and the tender mercies of the players there.

A. Selecting And Working With Experts In Police Misconduct Litigation

Generally, an expert witness should be retained early in the police misconduct litigation process, preferably before the lawsuit is filed. In a case involving serious injury or wrongful death, particularly where the cause is disputed, *e.g.* not a shooting case with an undisputed cause of death, but a disputed use of force with an injury that may have arguably resulted from other causes, it is best to retain the person or persons with expertise to help evaluate the case before you file. This will assist in determining the viability and expense of proceeding with a lawsuit.

This article will not discuss damages experts such as those qualified to render expert opinions in economic, vocational rehabilitation, nursing home care and expense and similar areas. However, liability experts are essential to prove fault and include a variety of disciplines depending on the facts and issues of the case. These include, but are not limited to police practices experts for field activities such as use of force, police policy experts regarding municipal customs, practices and procedures, ballistics, biomechanics, pathology, serology, fingerprint analysis, crime scene analysis, communications interpretation, emergency room medicine, internal medicine, neurology, orthopedics, otolaryngology, pulmonology, toxicology and so on. The focus herein will be on key experts involving causation.

For example, cases involving deaths or serious injuries in police custody where drugs or alcohol appear to have been consumed by the decedent or victim require care to avoid the dual prejudice against adverse involvement with the police and the opprobrium attached to drug or alcohol use. Even the suggestion of drug or alcohol use will often place plaintiff at a disadvantage in proving causation. The "three dog defense" is as popular with the defense bar here as elsewhere.[1]

[1]The Three Dog Defense has three parts: 1) My dog didn't bite you (*i.e., defendant denies the subject incident*) 2) If my dog did bite you, then you weren't really injured. (*i.e. defendant denies causation and/or damages*) 3) If my dog bit you and you were injured, it was not his fault or all his fault. (*i.e. defendant seeks indemnity, contribution and/or comparative fault to reduce his damages*).

A medical or scientific expert can review available medical records, police reports, witness statements and available physical evidence and suggest not only what counsel will need to prevail, but may well accurately predict where the defense will attempt to go to defeat or deflect the claim. Early retention of a police practices expert may also be helpful in guiding the medical or scientific expert to focus and apply his or her knowledge in areas of common or provable police tactics and policy. A synergistic effect frequently arises from an interdisciplinary approach.

To locate an expert in an unfamiliar subject involving medicine or science, experienced attorneys in police practices litigation are a good starting point. Also, reports of jury trials will contain experts in various disciplines. Medical or scientific literature is frequently helpful in locating experts, particularly if cited in the specific area needed or especially if cited by the defense. If the prospective expert has experience in police practices or personal injury litigation, inquire with whom s/he has worked and request and contact references, including attorneys on both sides of the case. It is also useful to request suggestions from prospective experts contacted. Sometimes, though qualified, the expert will decline to become involved and suggest someone else. Be prepared to pay for an appointment to familiarize the prospective expert with the facts and issues of your case. A true expert will be interested in a challenging case and should be willing to make suggestions to you. Chemistry is also important: it is obviously better if you and the expert can work well together and there is a shared enthusiasm and belief in the case.

Experts can also identify areas outside of their expertise where another expert may be of value. However, you have to ask, otherwise your expert will assume that their field is the limit of your inquiry or need. True experts appreciate an opportunity to expand or demonstrate their knowledge by educating others. Given encouragement they will educate you so that you can educate the judge and/or jury. They may also identify or suggest other areas of expertise and experts with whom to consult or serve in those areas.

Regular communication as the case progresses is essential so that both you and the expert can adapt to challenges presented as new evidence comes through discovery and the defense may adapt, change or jettison an earlier theory and bring in a new one. Many attorneys make the mistake of hiring an expert on the eve of trial, hoping he will support the attorney's theory of the case and will have the time to assimilate the materials provided. This is not only unduly stressful for both attorney and expert, but is a disservice to the greater result that can be obtained for the client when there is time to absorb, reflect and communicate to adjust as discovery progresses and later as the trial unfolds. Additionally, if the case is especially compelling from a scientific or medical standpoint, the expert can assist in preparation of a settlement brief or exhibit which will prove a key point regarding causation.

Experts can evaluate the expert reports of the defense to suggest whether a foundational challenge has merit. FRCP Rule 26 challenges pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), *Kumho Tire,* 526 U.S. 137 (1999) and others can be premised on an expert's advice that the defense expert opinion/report lacks scientific or medical basis. A true expert should be able to spot a phony and will be happy to do so, if given a chance. Much federal litigation concerns so-called "Junk Science" in the courtroom and plaintiff's counsel should not hesitate to

challenge unsubstantiated opinions under FRCP Rule 26 and opinions that do not meet the standards of *Daubert, Kumho Tire* and their progeny. This is a very important use of one's expert(s) and it keeps the opposition from sending in purported experts of dubious qualification or opinions without sufficient basis.

B. Issues Handling Wrongful Deaths

It is beyond the scope of this article to discuss the procedural aspects of preparing a claim and complaint for wrongful death or the federal lawsuit claims arising from police action resulting in such personal injury or death. However, it can occur that a serious injury resulting from a police action can support *both* cases in the rare, but serious situation where a lingering illness or condition caused by police contact is within the chain of causation and results in death following the original action (and judgment) for violation of Fourth Amendment rights to be free of excessive force.

More common, yet still hopefully rare, is the complication when an alleged injury caused by the police is exacerbated by a third party medical provider rendering negligent care. Because of the state law limitations on medical malpractice actions, it is the author's opinion that it is unwise to try to litigate the underlying use of force case jointly with the medical malpractice case. Apart from the separate expertise necessary to litigate the latter type of case, issues of proof, standards of care, limitations of liability that exist for medical negligence cases and the overwhelming specter of jury confusion abound.

Should medical negligence be an issue, it is wise to focus discovery on obtaining admissions from the police defendants that will narrow the focus of the case. Defendants may willingly admit that plaintiff's injury or death resulted in part from negligent medical care. If it is denied, then a motion *in limine* to preclude argument, evidence or inference thereto may be well founded on this denial. Moreover, it is hornbook law that medical negligence does not break the chain of causation for a tortfeasor or civil rights violator. The danger of unfair prejudice, confusion and undue consumption of time amply supports a motion *in limine* under Federal Rules of Evidence 403 to exclude mention of medical negligence or areas of inquiry that will remove the focus upon the police defendants.[2] Simply stated, had the alleged use of excessive force not occurred, there would be no need for plaintiff or the decedent to seek and obtain medical care – which foreseeably could be negligently provided.

From a tactical standpoint, defense counsel representing police defendants may reflexively welcome other financially well-endowed defendants to bring into the litigation. To curtail this understandable tendency, it may be helpful to remind defense counsel that bringing in the doctor and/or the hospital will hurt more than help. Since the police defendants are alleged to have caused the injury, damage or harm that got the plaintiff or decedent to the medical services provider(s), there will be an incentive for these prospective cross-defendants to push the liability back onto the police defendants. Well-endowed carriers for hospitals and doctors are likely allies for plaintiffs and

[2]Remember the 3 dog defense?

counsel as they will deny liability and attempt to shift it over to the police defendants who started the ball rolling.[3] Summarizing, defense counsel should be encouraged to visualize a battle on several fronts simultaneously with plaintiff's counsel on one front and one or more well-heeled medical malpractice defense counsel pressing hard on another. Not a pretty picture and one that can be avoided if defense counsel for the police defendants realizes that the calculus does not favor that scenario for his clients. This should prevent complicating the case with medical malpractice issues.

C. Avoiding Problems In Probate Court

A special level of hell is reserved for civil litigators who fall (or are pushed) into Probate Court. If an incompetent or conserved person or decedent is represented in a civil action for violation of rights, including wrongful death of heirs, arcane provisions of the Probate Code are implicated even if the action is filed in United States District Court. An action only for wrongful death, *i.e.*, loss to an heir, is not by itself within the jurisdiction of the Probate Court.

Approval is required of settlement of actions and payment of attorney's fees in cases involving minors, incompetents and decedent's estates. *See,* Cal. Code of Civil Procedure § 372.

At the beginning of an action when there is no money for the client or the attorney, the tendency is for the Court to encourage the attorney for the minor, incompetent or heirs of a decedent to take the case and do well. Approval of a more substantial fee is likely then to encourage production by the attorney. *After* the action is successful, human nature looks back not at the risk taken or the effort required, but that there is now an asset to be preserved for the minor, incompetent or estate (by its heirs or administrator). Unfortunately, the attorney who took the risk and obtained the result is given less credit – literally – for his or her successful efforts.

Provision is made for approval of an attorney contingency fee contract under California statute, though it is silent on *when* approval may be sought. Probate Code § 2644 provides:

> § 2644. Contingent fee contract with attorney
>
> (a) Where it is to the advantage, benefit, and best interest of the ward or conservatee or the estate, the guardian or conservator of the estate may contract with an attorney for a contingent fee for the attorney's services in representing the ward or conservatee or the estate in connection with a matter that is of a type that is customarily the subject of a contingent fee contract, but such a contract is valid only if (1) the contract is made pursuant to an order of the court authorizing the guardian or conservator to execute the contract or (2) the contract is approved by order of the court.

[3]Do you hear those 3 dogs barking again?

> (b) To obtain an order under this section, the guardian or conservator shall file a petition with the court showing the advantage, benefit, and best interest to the ward or conservatee or the estate of the contingent fee contract. A copy of the contingent fee contract shall be attached to the petition.
>
> (c) Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.
> (d) As used in this section, "court" includes either of the following:
>
> (1) The court in which the guardianship or conservatorship proceeding is pending.
>
> (2) Where the contract is in connection with a matter in litigation, the court in which the litigation is pending.

Section 2644 controls approval of a fee agreement with counsel for a minor, estate or incompetent person in a conservatorship. For this reason, it is advisable for counsel to establish a conservatorship for a gravely disabled person. This will allow the attorney's fee contract to be submitted for approval at the outset of the litigation. Although a guardian *ad litem* petition will routinely be granted at the outset of the civil action to protect the minor or incompetent person, that does not protect counsel from *post hoc* evaluations by the court in setting what the attorney should be paid.

A petition to approve the fee agreement is most advantageously brought at the outset of the underlying case. Per § 2644, the petition may be brought in the court where the underlying action is pending. If it is done before defendants are served, there is probably no reason to serve them with the petition as they lack standing to respond and lack an identifiable interest in the fee agreement. One of the considerations for the Court is that the ward or conserved person has an interest in obtaining relief in the underlying lawsuit which is served by the current attorney. If the contract is not approved, the attorney may well refuse to proceed with the action which will be to the detriment of the ward or conserved person. The conserved person's prospective benefit may thus be jeopardized for lack of counsel (particularly as to the ward or conserved person's counsel of choice). This implicitly provides the court with an incentive to approve the contingency fee agreement, particularly when the onus is then on counsel to perform satisfactorily so that he will be paid.

Conversely, after settlement or judgment in favor of the ward or conserved person, the attorney is in a disadvantageous position. The monies soon to be obtained or having been obtained create a scenario where the court's attempt to favor the interest of the ward or conserved person shifts to an unfavorable dynamic for the attorney. Now, the Court wants to maximize the interest of the ward or conserved person not to seek monies, but to hold onto as much as possible of what has been secured.

It is for this reason that the author recommends seeking court approval of the fee agreement at or before initiation of litigation – before there is any money obtained for the minor, ward, estate or conserved person. No dollar amount is in issue at this time, merely a contingency fee percentage. The risk or gamble to be taken by counsel can be emphasized without reference to a dollar amount for fees. Judicial Monday morning quarterbacking minimizing counsel's agreed upon fee will be eliminated because *the interest is in keeping counsel rather than keeping money.* The distraction of dollars not yet obtained is eliminated at this juncture.

After litigation and upon proposed resolution of the underlying lawsuit involving a ward, estate or conserved person a different statute is applicable. Judicial approval must be secured for such resolution pursuant to Probate Code § 3600, § 3601, § 3602. Probate Code § 3601 states:

> § 3601. Order directing payment of expenses, costs, and fees
>
> (a) The court making the order or giving the judgment referred to in Section 3600, as a part thereof, shall make a further order authorizing and directing that reasonable expenses, medical or otherwise and including reimbursement to a parent, guardian, or conservator , costs, and attorney's fees, as the court shall approve and allow therein, shall be paid from the money or other property to be paid or delivered for the benefit of the minor or person with a disability.
>
> (b) The order required by subdivision (a) may be directed to the following:
>
> (1) A parent of the minor, the guardian ad litem, or the guardian of the estate of the minor or the conservator of the estate of the person with a disability.
>
> (2) The payer of any money to be paid pursuant to the compromise, covenant, or judgment for the benefit of the minor or person with a disability.

Probate Code § 3601 is clearly designed to require court approval *after* the court has approved compromise of the claim of a ward or conserved person. *See,* Probate Code § 3600. Although § 3601 gives the court the power to approve reasonable expenses, including, *inter alia,* attorney's fees, this power must be read in conjunction with a prior judicial approval, if sought and obtained by counsel for approval of the attorney's fee contract per Probate Code § 2644, discussed above.

Hopefully, the court which approved the fee agreement will be gracious and consistent in approving the disbursement of funds per the previously approved agreement – made when the risks were evident and counsel was to be encouraged – for an agreed upon fee – to take them.