

Virtual Mentor

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Case in Health Law

Professional Oversight of Expert Testimony

Austin v American Association of Neurological Surgeons

by Alexis Wood

Introduction

Neurosurgeon Donald Austin was suspended for 6 months by the American Association of Neurological Surgeons (AANS), a voluntary medical association. AANS gave as cause for the suspension Austin's irresponsible testimony while serving as an expert witness. Austin sued AANS for violation of his due process rights, claiming that AANS had vengefully suspended him after he testified as an expert witness on behalf of a patient in a medical malpractice suit brought against another member of AANS, Dr Q. Michael Ditmore [1].

Austin was retained to testify on behalf of a woman whose recurrent laryngeal nerve was permanently damaged in the course of an anterior cervical fusion. The result of this damage included a paralyzed vocal cord, difficulty swallowing, and shortness of breath that ultimately required her to undergo a tracheostomy. The original procedure, performed by Ditmore [2], required the surgeon to cut into the spine from the front (through the neck), being careful to retract (push aside) the tissues in front of the spine [3].

Austin testified that he believed "the majority of neurosurgeons" would agree with him that the patient would not have suffered a permanent injury to her recurrent laryngeal nerve unless Ditmore had been careless [4]. He based this conclusion on his belief that the patient had no anatomical abnormality that would cause such an injury to result without negligence on the surgeon's part [4]. Thus, Austin testified that Ditmore must have rushed the operation which resulted in a rough handling of the recurrent laryngeal nerve. No other evidence was offered of Ditmore's having rushed the operation. Expert evidence contrary to Austin's opinion was also given, and the jury returned a verdict in favor of Ditmore. Ditmore promptly complained to AANS, which, following a hearing, suspended Austin for irresponsible testimony. Austin subsequently resigned from AANS and filed a lawsuit claiming a violation of due process.

The court found that no procedural irregularities had occurred and that Austin's due process had not been violated. Austin had received prior notice and a full hearing with counsel before a panel of association members not implicated in his dispute with Ditmore. Austin's complaint alleged that AANS had acted in bad faith because it never disciplined members who testified on behalf of medical malpractice *defendants* (ie, doctors accused of malpractice), but only against those who testified on behalf of patients. Moreover, Austin argued that it was against public policy for a professional

association to discipline a member on the basis of trial testimony unless the testimony was intentionally false [5].

Dr Austin’s “expert testimony” induced the discipline.

Prior to suspending Dr Austin, AANS conducted a hearing to assess his testimony against Dr Ditmore. At that hearing, Ditmore pointed out that while Austin had performed many cervical operations, he was not as knowledgeable on anterior cervical fusion, having performed only 25 to 30 of them in 30 years of practice. Ditmore, on the other hand, had performed 700 anterior cervical fusions, with only 1 case—this one—having resulted in permanent damage to a recurrent laryngeal nerve [6].

Other information regarding Dr Austin’s testimony was discovered during the hearing, including the fact that he apparently based his testimony on only 2 articles that did not, in fact, support his testimony. Other evidence further undermined his opinion as an expert witness. For example, the recurrent laryngeal nerve is difficult to see, and often not visible during the operation, so it may be impossible for any surgeon to determine whether the particular patient’s nerve is unusually susceptible to injury [6].

Reasons for the Appellate Court’s Decision

The district court granted summary judgment in favor of AANS; that is, it ruled that no material facts were in dispute (the resolution of which is the purpose of a jury) and so decided the case based on the law. The appellate court affirmed the summary judgment, finding that Austin did not have a valid claim against AANS for several reasons.

1. Dr Austin failed to show that an “important economic interest” was at stake because membership in AANS is not a requirement for the practice of neurosurgery. Moreover, AANS is not the only association of neurosurgeons, and Austin was able to continue practicing neurosurgery notwithstanding his suspension and voluntary resignation from AANS [7]. He sought only damages and that the record of his disciplinary suspension be expunged. Despite his suspension, Austin continued to testify as an expert witness, although his income from that source fell to 35 percent of what it had been (\$222 000 per year) before the suspension.

The court looked disdainfully on Austin’s hyperbolic characterization of his financial loss from providing expert testimony, which was not his primary profession. It concluded that an action by an association must jeopardize the principal source of the professional’s livelihood [8].

2. The court found that there was no basis for Austin’s allegation that the association only considered claims against members who testified on behalf of patients in malpractice suits [8]. While all complaints up to that time had been against such members, it did not follow, the court reasoned, that AANS had acted in bad faith. It would be natural for a defendant physician to complain to AANS about testimony that he or she believed was irresponsible. It would be far less likely for a patient’s expert witness to complain to AANS because he or she would not have been accused of

negligence, harmed by loss in his or her practice, forced to stand trial, or made to face his or her liability insurer.

3. Next, the court found that there was no basis for Dr Austin's claim that public policy did not allow professional associations to sanction members for giving expert testimony. Austin argued that allowing professional associations to sanction members for irresponsible testimony would deter members from giving such testimony, and this would interfere with the civil justice system. Hence, Austin claimed, as a matter of public policy, professional associations should not be allowed to sanction members for their testimony. But the court reasoned differently. It said that, rather than deter the willingness of members to testify, AANS membership bolstered members' credentials, boosting their credibility as expert witnesses and even deflecting close scrutiny [8]. The court said that professional associations help the justice system screen experts, and it called for greater policing of expert testimony, pointing out the difficulty courts have in refuting esoteric and technical medical testimony [9]. While the *Daubert* rule [10] requires judges to screen proposed expert witnesses carefully to ensure that their testimony is responsible, such a rule is not applicable in every court nor is it unassailable.

Despite ruling against Austin, the court did acknowledge that professional self-regulation is not entirely trustworthy. It reasoned that most members of AANS would likely be hostile to malpractice litigation, thereby imparting a subtle bias to its evaluation of members' complaints. But the court found nothing in the hearing transcript to justify such an inference in the Austin case.

4. Finally, the court discussed the strong national interest in identifying and sanctioning poor physician performance, reasoning that doing so improved the quality of health care [11]. Since Austin's testimony reflected the quality of his judgment, his clinical judgment was in question also. Thus, reasoned the court, the discipline by AANS served an important public policy function.

Commentary

Most physicians who offer expert testimony in court help society. By serving as an expert witness, a physician informs the legal community of the standard of care for a particular medical issue. This clarification can reinforce the standard and, by facilitating the identification of those who are not complying with these norms, can help protect patients from harmful practitioners.

But the practice of serving as expert witnesses is not without ethical conflict for physicians. Physician witnesses are well compensated for their testimony, and winning verdicts increase the expert's marketability as a witness. While compensation will not buy bad faith testimony from most physicians, having a financial interest in the outcome of the case can conflict with a physician's obligation to put the well-being of patients foremost at all times.

This conflict does not automatically mean it would be better to bar physicians from acting as expert witnesses or from receiving payment for their testimony. Expert

witnesses are needed to explain the intricacies of medical procedures and treatment in layperson's terms and they should be paid for their expertise. It would be inefficient for the justice system to rely on the availability of volunteers each time a case that demanded expert testimony came before the court.

The implications of physicians' general hostility towards medical malpractice litigation must also be examined. While it is possible that some physician witnesses will harbor hostility towards malpractice litigation and favor their defendant colleagues, most are loathe to have the safety of patients and the reputation of the profession put at risk by physicians who are incompetent or have erred consistently and with serious consequences.

Besides the potential biases on the part of individual physicians, ethical conflicts exist for the professional association caught in circumstances similar to those of AANS. On the one hand, the association's principal concern is the competence of physicians and safety of patients. On the other hand, such organizations are advocates for their members and interested in protecting them from unfounded malpractice claims. In the long run, though, the best way to minimize litigation is to maintain high standards of care. Achieving that goal will reduce the number of malpractice suits and improve the reputation of the group. Therefore, it is in the interest of the association to help the courts expose physicians who are not practicing within the standard of care. By the same token, these associations have good reason to discipline physicians who testify negligently or recklessly, whether those physicians are appearing on behalf of patients or on behalf of defendant doctors. As the Austin court said, society depends upon medical associations to monitor physicians because they are the parties best suited for the task.

The American Medical Association (AMA) has defined the criteria for physician participation as medical expert witnesses. Agreeing that, as professionals with special training and experience, physicians "have an ethical obligation to assist in the administration of justice," the AMA's *Code of Medical Ethics*, requires that those who testify as medical experts "have recent and substantive experience in the area in which they testify and should limit testimony to their sphere of medical expertise" [12]. The opinion goes on to state that the medical witness "should not become an advocate or partisan in the legal proceeding" [12].

In encouraging physicians to provide expert testimony, professional associations satisfy the obligation of the profession to self-regulate in at least 2 ways. First, they help the judicial system comprehend standards of care and discipline those physicians who do not consistently perform up to standard. This sometimes painful self-regulation protects patients at large and sees to it that individual patients who have been harmed by incompetent physicians are recompensed. Secondly, by then monitoring the testimony of physicians who testify as experts and, if necessary, sanctioning those who testify negligently, recklessly, or in bad faith, the association ensures that the reputation of the profession is upheld.

References

1. *Austin v American Association of Neurological Surgeons*, 253 F3d 967, 968 (7th Cir 2001).
2. *Austin*, 253 F3d at 969.
3. *Austin*, 253 F3d at 969-70.
4. *Austin*, 253 F3d at 970.
5. *Austin*, 253 F3d at 969.
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8. *Austin* at 972.
9. *Austin* at 973.
10. *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993).
11. *Austin*, 253 F3d at 974.
12. American Medical Association, Opinion 9.07 Medical Testimony. *American Medical Association Code of Medical Ethics*. Available at http://www.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=policyfiles/HnE/E-9.07.HTM&&s_t=&st_p=&nth=1&prev_pol=policyfiles/HnE/E-8.21.HTM&nxt_pol=policyfiles/HnE/E-9.01.HTM&. Accessed March 24, 2005.

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