Establishing Proximate Cause in a Medical Negligence Case: More Recent Cases Seem to Limit the Reach of Seef vs. Ingalls Memorial Hospital

by Michael C. Mead & James N. Faklis

Introduction

Injuries from medical malpractice often occur as a result of concurrent negligence by multiple treatment providers, all failing in their responsibilities to the patient. For example, injuries can result from failed or missed communications between medical professionals, such as between nurse and physician, between radiologist and attending physician, or between an attending hospitalist and surgeon. However, defendant physicians may be reluctant to admit that the alleged negligence of a co-defendant affected their care or medical decision making. Co-defendants often have an incentive to provide a “unified front” and refuse to admit any deficiencies in the care and treatment so as not to open any potential window into liability.

Over 25 years ago, in a divided decision the Illinois Appellate court published Seef v. Ingalls Memorial Hospital, and provided defendants a significant weapon in seeking summary judgment or a directed verdict on the issue of proximate cause in medical negligence cases. The appellate court affirmed summary judgment for the hospital because the treating obstetrician testified that “he would have done nothing differently” even if the obstetrical nurses had notified him of the fetal monitoring strips earlier. The defense bar may rely on Seef in cases where a treating physician testifies that the negligence of nurses or other treating physicians did not affect his or her medical decision-making or the treatment provided. This issue can arise in several different contexts. Most often, it arises between doctors and nurses where nurses fail to monitor or communicate a decline in the condition of the patient to the physician. It can also arise between treating physicians, such as where a radiologist fails to properly communicate radiology findings, or between a technologist and pathologist who both fail to accurately interpret a pathology specimen in failure to diagnose cases. In these contexts, a defendant physician may attempt to provide a straight line to summary judgment for a co-defendant simply by testifying that he or she “would have done nothing differently” regardless of the negligence of other treatment providers.

The Illinois Supreme Court rejected the myopic reasoning of Seef in Snelson v. Kamm, and the appellate court provided further guidance on how to defeat a summary judgment motion on proximate cause premised on Seef in the 2013 decision Buck v. Charletta. In Snelson, the supreme court recognized that a plaintiff can create an issue of fact as to proximate cause by providing expert testimony that a reasonably careful physician would “do something differently” under the circumstances. Expert testimony can be used to discredit a treating doctor’s testimony that he or she “would have done nothing differently.” In Buck, the appellate court provided further guidance on how plaintiff can discredit the defendant doctor’s testimony by establishing factual inconsistencies and contradictions by other witnesses, in order to establish to the court that the doctor’s version of events cannot be given dispositive effect. This article provides summary and analysis of Seef, Snelson and subsequent cases, as well as analysis and practice guidance for defeating a Seef-premised defense motion.

II. Background on Seef v. Ingalls Memorial Hospital

In Seef v. Ingalls Memorial Hospital, the plaintiff filed suit against her obstetrician and the hospital for the death of her unborn baby, alleging in her complaint that the nurses of the defendant hospital, who monitored plaintiff’s mother, failed to timely notify plaintiff’s obstetrician of the child’s fetal heart monitor strip as the defendant obstetrician slept in the doctor’s lounge ten feet away from plaintiff’s room. The defendant doctor testified that even if the nurses would have told him sooner about abnormalities in the fetal heart monitor, he would not have done anything differently because, in his opinion, the earlier monitor strips would not have indicated a problem requiring immediate intervention.

Armed with that statement, the trial court granted the defendant hospital’s motion in limine and barred the plaintiff’s nursing expert from testifying about the deviations from the standard of care by the hospital nurses. The appellate court affirmed the decision of the trial court to bar plaintiff’s nursing expert from testifying regarding the standard of care, explaining even if there had been a deviation from a nursing viewpoint, plaintiff failed to show that the nurses’ deviations proximately caused the baby’s death. The court reasoned that the defendant obstetrician made an establishing proximate continued on page 40
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“inculpatory, unequivocal statement regarding his mental state at the time of the incident,” demonstrating that the nurses’ failure to notify him earlier made no difference in this case.\textsuperscript{12}

The dissenting justice in \textit{Seef} wrote a well-reasoned, logical opinion that the trial court erred in barring plaintiff’s nursing expert because the question of what the defendant obstetrician hypothetically would or would not have done was a question of fact. The expert medical opinion of plaintiff’s expert as to how the defendant obstetrician should have proceeded if properly notified created such a question of fact.\textsuperscript{13} The dissent went on to argue that a trier of fact is not required to accept a defendant doctor's hypothetical testimony as uncontroverted fact, particularly when the opposing party offers contradictory testimony,\textsuperscript{14} and proximate cause issues are typically fact specific and left for the jury to determine.\textsuperscript{15}

The dissent also cited \textit{Suttle v. Lake Forest Hospital}; a case based on similar facts and issues that was decided three months prior to \textit{Seef} in which the appellate court reached a contrary result. In \textit{Suttle}, the appellate court held there was a genuine issue of material for the jury to decide as to what the doctor would have done had he known the condition of the plaintiff.\textsuperscript{16} This contrary decision to \textit{Seef} was illogically and cavalierly dismissed by the majority in a footnote, stating, “[w]e are aware of this court’s recent opinion in \textit{Suttle v. Lake Forest Hospital}…filed September 30, 1999 and find it unpersuasive.”\textsuperscript{17}

\textbf{III. Snelson v. Kamm:} The Supreme Court discusses how to establish proximate cause and rejects the argument that plaintiff can never overcome a doctor's testimony that “he would not have acted differently.”

In \textit{Snelson}, the plaintiff underwent an arteriogram procedure at St. Mary’s Hospital of Decatur to determine the location of arterial blockages in his legs caused by arteriosclerosis, or hardening of the arteries.\textsuperscript{18} The procedure was unsuccessful and plaintiff remained in the hospital under the care of defendant general surgeon Dr. Kamm following this procedure. Plaintiff experienced severe abdominal pain, distension of the lower abdomen, bloody bowel movements and other complications in the hours after the procedure. Eventually, it was determined that plaintiff suffered an acute occlusion and infarction of the mesenteric artery from the arteriogram procedure, which resulted in the loss of 95 percent of his small intestine. Plaintiff filed suit against both the general surgeon and hospital, alleging that the general surgeon failed to diagnose and treat the occlusion, and the hospital nurses failed to adequately monitor the plaintiff and inform the surgeon of his symptoms. The supreme court found there was a breach of the standard of care by the defendant surgeon and the jury verdict of $7 million was not against the manifest weight of the evidence.\textsuperscript{19} However, the court also held that plaintiff failed to provide adequate evidence of proximate cause against the hospital nurses because there was...
no expert testimony that any standard of care deviation by the nurses was a proximate cause of plaintiff’s injury and therefore judgment notwithstanding the verdict for the hospital was proper.20

In discussing the issue of causation with respect to the hospital nurses, the supreme court explained precisely how a plaintiff can establish proximate cause in this context. The court rejected the notion that it is impossible to prove causation anytime a physician testifies that “he would not have acted differently” regardless of what information he was provided by the nurses, calling this argument a “red herring”:

“[A] plaintiff would always be free to present expert testimony as to what a reasonably qualified physician would do with the undisclosed information and whether the failure to disclose the information was a proximate cause of the plaintiff’s injury in order to discredit a doctor’s assertion that the nurse’s omission did not affect his decision making.”21

In such a case, a factual dispute as to proximate cause would be created sufficient for the jury to resolve. We do not, of course, have such a factual dispute in the present case.”22

The court explained that plaintiff can establish proximate cause with expert testimony that the alleged negligence by the nurses “increased the probability of harm” or “lessened the effectiveness of treatment.”23 The court’s holding rejected the naïve reasoning of Seef and provides the plaintiff an effective method to counter the “I would not have done anything different” testimony that in reality is the unified front defense of the defendants.

VI. Buck v. Charletta provides further guidance on how to establish proximate cause when the treating physician testifies that nothing would have changed his conduct.

In Buck, radiologist Dr. Charletta reviewed a MRI of plaintiff Pauline Buck’s cervical spine that was ordered by orthopedic surgeon Dr. Troy who was treating Pauline for neck pain.24 In his final radiology report, Dr. Charletta noted an abnormal finding in the patient’s right lung, which was “nonspecific” but “raises the possibility” of a malignant lung tumor.25 The report recommended that follow-up chest radiographs be taken and that a correlation with the original x-ray be performed; however no such follow-ups were done and the tumor went undiagnosed for approximately one year.26

Pauline Buck subsequently died from lung cancer and her estate brought suit against Dr. Troy and Dr. Charletta alleging that Dr. Troy never told her about the possible lung tumor in the MRI report and that Dr. Charletta was negligent in failing to make a “non-routine, real-time communication” by telephone or in person to Dr. Troy to alert him of the clinical significance of the abnormal findings in the report.27

The trial court granted summary judgment for Dr. Charletta based on establishing proximate continued on page 42
Dr. Troy’s testimony that he would not have done anything differently even if Dr. Charletta made a “real-time communication” of that report to him because he understood the clinical significance of the finding. The trial court found that Dr. Troy’s testimony broke the causal connection in proximate cause between Dr. Charletta’s actions and plaintiff’s injury. The appellate court reversed, finding that there was a factual dispute as to what might have occurred if Dr. Charletta had made a non-routine communication to Dr. Troy, based on affidavits from plaintiff’s experts, and factual inconsistencies regarding Dr. Troy’s testimony. First, the court determined that plaintiff had created an issue of fact by supplying affidavits from two radiologist experts that “Dr. Charletta’s failure to communicate the results of his MRI report directly to Dr. Troy so as to assure his receipt and understanding . . . both violated the applicable medical standard of care and resulted in a the one-year delay in Pauline’s diagnosis and treatment.”

Citing to the supreme court’s discussion in Snelson, the appellate court noted, “[i]t appears that the plaintiff in this case sub judice has taken the litigation advice offered by our supreme court . . . and offered expert witness testimony of what reasonably well-qualified physicians would have done if in the position of Dr. Troy and Dr. Charletta.”

Secondly, the court found it to be a “fundamental flaw” in the trial court’s reasoning to “effectively give dispositive effect to Dr. Troy’s testimony that he would not have done anything differently,” because there was specific evidence that Dr. Troy “did, in fact, do something different than he claimed to have done.” Specifically, Mrs. Buck testified at her evidence deposition that Dr. Troy never told her about the MRI findings whereas Dr. Troy claimed he had. Therefore a jury should have been allowed to determine whether Mrs. Buck was telling the truth or Dr. Troy was telling the truth.

If they believed Pauline Buck, the jury could reasonably conclude that a communication failure allowed the information in Dr. Charletta’s report to slip through the cracks and a non-routine, real-time communication by Dr. Charletta would have made a difference.

V. Analysis and practice application

The Snelson and Buck cases highlight several strategies for establishing proximate cause and overcoming a defense motion premised on Seef. First, plaintiff must provide expert medical testimony why the negligence of each defendant proximately caused the injury. The proximate cause testimony must come from a physician, even with respect to claims against nurses and other non-physician defendants. Although testimony about nurses’ violations of the standard of care will typically come from a plaintiff’s nurse expert, a medical doctor should normally relate the violations of the standard of care by the nurses to the injury. In such cases, it is prudent to

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have plaintiff’s medical expert review the Supreme Court Rule 213 disclosure, deposition testimony or affidavits from plaintiff’s nurse expert, so that the physician can testify about the nurses’ deviations from the standard of care and explain how the nurses’ deviations from the standard of care caused the injury and damages. Hypothetical questions may also be used in lieu of these materials.

For example, in Simich v. DePhillips, the plaintiff re-called his medical expert to the stand after his nurse expert testified to violations of the standard of care by plaintiff’s treating nurses. Plaintiff’s counsel then asked his medical expert:

“Considering the nursing records and the disclosures both in her deposition and the written disclosure of [plaintiff’s nurse expert], do you have an opinion within a reasonable degree of medical certainty as to whether or not the conduct of the nurses was the proximate cause of the conditions of ill-being that developed in [plaintiff]?”37

In response plaintiff’s medical expert testified that the conduct of the nurses proximately caused plaintiff’s injury, and the appellate court relied on this opinion testimony in finding that plaintiff had established proximate cause.38

Additionally, plaintiff should specify in Rule 213(f)(3) disclosures that plaintiff’s medical expert will review the 213’s, depositions and/or affidavits of the nurse expert or may be asked hypothetical questions that these deviations proximately caused injuries and damages to the plaintiff.

Second, plaintiff should attempt to undermine the credibility of the defendant doctor by showing contradictions and factual inconsistencies regarding his or her testimony. Plaintiff should attempt to show that the defendant doctor’s version of events as to the care and treatment is contradicted by testimony from plaintiff, plaintiff’s family members or other treatment providers. Plaintiff can then argue that the doctor’s testimony is generally unreliable and in dispute, and therefore any claims by the doctor that he or she “would have done nothing differently” cannot be given dispositive effect. For example, in Buck, plaintiff showed that the doctor’s testimony was contradicted by Pauline Buck’s testimony as to whether he discussed the MRI findings with her, and therefore the doctor’s “version of events” could not be given dispositive effect over the plaintiff’s version.39

VI. Conclusion

The era of breaking the chain of causation by eliciting testimony from a co-defendant or treating physician “that they would not have done anything different” has now been squarely rejected by the supreme court. Plaintiff’s may now squarely defeat the incredible and naïve testimony that in the face of abnormalities observed by others a treating doctor would not have responded to address a patient’s needs. The Snelson court addressed this issue establishing proximate continued on page 44

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Endnotes

1 See e.g. Garley v. Columbia LaGrange Memorial Hospital, 351 Ill. App. 3d 398, 404-06 (1st Dist. 2004) (alleging nurses’ failure to notify physicians of decedent’s complaints of pain, failure to notify physicians of lack of ambulation, and failure to suggest use of anticoagulating devices caused death.

2 Seef v. Ingalls Memorial Hospital, 311 Ill.App.3d 7 (1st Dist. 1999).

3 Id. at 16.


6 Snelson v. Kamm, 204 Ill.2d 1 (2003).


8 Seef, 311 Ill. App. 3d 7, 10 (1st Dist. 1999).

9 Id. at 17.

10 Id. at 15.

11 Id. at 16.

12 Id. at 16-17.

13 Id. at 27.


15 See Holton v. Memorial Hospital, 176 Ill.2d 95 (1997).

16 Sutle v. Lake Forest Hospital, 315 Ill. App. 3d 96, 104-05 (1st Dist. 1999).

17 Seef, 311 Ill. App.3d at 29.

18 Snelson v. Kamm, 204 Ill.2d 1 (2003).

19 Id. at 35-43.

20 Id. at 49.

21 Citing to Seef v. Ingalls Memorial Hospital, 311 Ill.App.3d 7, 26-27, (O’Mara Frossard, P.J., dissenting).

22 Snelson, 204 Ill.2d at 45-46 (emphasis added).

23 Snelson, 204 Ill.2d at 47 citing Holton v. Memorial Hospital, 176 Ill.2d 95, 114 (1997) and Northern Trust Co. v. Louis A. Weiss Memorial Hospital, 143 Ill.Appp.3d 479, 486-88 (1986).


25 Id. at ¶ 10.

26 Id.

27 Id. at ¶ 4.

28 Id. at ¶ 52-54.

29 Id.

30 Id. at ¶ 73.

31 Id. at ¶ 70.

32 Id.

33 Id. at ¶ 71.

34 Id.

35 Id. at ¶73

36 In some instances, a physician may be able to testify against a nurse regarding a deviation from the standard of care that governs communications between nurses and physicians, pursuant to Wingo ex rel Wingo v. Rockford Memorial Hospital, 292 Ill. App. 3d 896, 907 (2d Dist. 1997).


38 Id. at 11

39 Buck, 2013 IL App (1st) 122144 ¶ 73.

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