

**IN THE SUPERIOR COURT OF THE STATE OF
DELAWARE IN AND FOR NEW CASTLE COUNTY**

JOHN A. PIGNATARO,)	
)	CIVIL ACTION NUMBER
Plaintiffs,)	
)	10C-08-297-JOH
v.)	
)	
GEORGE AND LYNCH, INC. and)	
DONALD R. DIXON,)	
)	
Defendants.)	

Submitted: February 15, 2013

Decided: March 13, 2013

MEMORANDUM OPINION

Upon Defendants' Motion in Limine to Exclude Certain Testimony of Dr. Gary Crooks
DENIED

Appearances:

Brian E. Farnan, Esquire, Farnan LLP, Wilmington, Delaware; Of Counsel: Dion G. Rassias, Esquire, the Beasley Firm, Philadelphia, Pennsylvania. Attorneys for Plaintiff.

Louis J. Rizzo, Jr., Esquire, Reger Rizzo & Darnall LLP, Wilmington, Delaware. Attorney for Defendants.

HERLIHY, Judge

Defendants George & Lynch and Donald Dixon have moved to exclude the testimony of Dr. Gary Crooks, plaintiff John Pignataro's medical expert witness. Pignataro was seriously injured in a motor vehicle accident. Dr. Crooks has offered opinions about susceptibility to future medical problems due to the serious injuries he suffered in the accident. Basically stated, because Dr. Crooks was unable to assign a percentage to each increased risk, defendants argue any testimony about them must be excluded.

Since Dr. Crooks, however, did testify with reasonable medical probability that Pignataro faced these future risks, defendants' motion is DENIED.

One issue remains, however, and a hearing will be needed for the Court to determine if Dr. Crooks can offer his increased risk testimony. When he was deposed, he was not asked by anyone, especially by Pignataro's counsel, anything about his credentials, experience, or anything to establish his competency to offer his opinions. He was asked about studies or literature that would support his opinions, but cited none, or relied upon none. Defendants' challenges to his opinions, as a result, suggest to the Court a hearing is needed on the foundation for his opinions. A hearing is already scheduled on April 5th and now can be focused on his expertise and competency to offer the specific opinions he has in this case.

Facts

Pignataro's vehicle was struck by a fully loaded George & Lynch dump truck driven by Donald Dixon. Dixon went through a red light. Liability has been admitted. Among his injuries, Pignataro's spleen had to be removed, he underwent a laparotomy

and thoracotomy, and suffered a traumatic brain injury. At the time of the collision in 2008, Pignataro was twenty years old. Dr. Crooks' proffered testimony concerns three areas:

1. It is Dr. Crooks' opinion that without his spleen, [plaintiff] will be much more susceptible to infection of encapsulated bacteria. Controlling this deficiency may be possible with certain vaccines, which is an added cost to [his] medical care in addition to resolution of any future infections.

2. Dr. Crooks' also opines that [plaintiff's] repaired diaphragm will never be the same. It is likely [he] will, among other things, experience breathing problems due to the diaphragm being more susceptible to inflammation, especially with exercise and as he ages. Also, the torn diaphragm caused some intra-abdominal viscera being displaced into [his] heart causing a contusion.

3. Further, it is Dr. Crooks' opinion that the subsequent laparotomy and thoracotomy combined with internal bleeding experienced by [plaintiff] will most likely lead to the formation of scar tissue in these areas. While [he] may not feel the effects of the scar tissue at this time, it is likely the scar tissue build-up will, among other things, restrict [his] lungs and diaphragm causing breathing issues as he ages.¹

Dr. Crooks obtained his undergraduate degree from Stanford University in 1977, and a medical degree from Harvard Medical School in 1981. He is board certified in Internal Medicine. He is currently a member of the clinical excellence advisory group at the University of Pennsylvania School of Medicine. Pignataro retained Dr. Crooks as an expert witness to review the records and to offer opinions regarding the injuries, the severity of the injuries and the long term effects of the injuries.

At Dr. Crooks' deposition on December 6, 2012, he testified that, in reaching his opinions, he reviewed Pignataro's extensive medical records, and relied on over 31 years

¹ Deft.'s Mot. *in Limine*, Ex. A.

of knowledge and experience in the field of medicine.² Dr. Crooks testified that he did not review any treatises, specific studies, textbooks, reports, research, or anything on the internet in reaching his conclusions.³ Additionally, he did not examine plaintiff, nor did he ever meet him. Instead, he explained the basis for his opinions and testified that his opinions were held to a reasonable degree of medical probability.⁴

When asked about each of these three areas, Dr. Crooks testified as follows:

Q. So we begin there with a discussion of opinions. The first talks about without his spleen Tony, that Mr. Pignataro, will be much more susceptible to infection of encapsulated bacteria?

A. Correct.

Q. And I understand that statement. My follow-up question is, are you able to identify a specific percentage by which he would be more likely to be susceptible to infection of encapsulated bacteria? In other words, are you going to be able to reduce that to a specific figure?

A. No.

Q. Just that to some degree he is more susceptible given his condition?

A. Yes. The spleen is part of the immune system. And it's very important particularly for these encapsulated organisms what is well known as pneumococcal or meningococcal. And those ones they need the spleen to help fight it. You can get vaccines for some of them, but you still don't have the same sort of immune response that someone with a spleen would have, so we always worry that they are more susceptible. But I can't give you a 20 percent more or 50 percent more.⁵

* * * * *

Q. The next paragraph, and that starts on page two of Exhibit 2, references the repaired diaphragm?

A. Yes.

Q. You indicate there that he's likely to experience breathing problems due to the diaphragm being more susceptible to inflammation?

² Dr. Crooks' Dep., at p. 7.

³ *Id.*

⁴ *Id.* at p. 36.

⁵ *Id.* at pp. 11-12.

A. um-um.

Q. Yes?

A. Yes, sorry.

Q. We'll remind you, if you forget.

A. Yes.

Q. First of all, can you explain what you mean by that, "more susceptible to inflammation?"

A. So a diaphragm is like a bellows in a fire. So when your diaphragm is the bellows and you want to expand it and lowering it down, once it has been injured, and even though it has been sewn back together, it's not going to be as strong and as effective as an uninjured diaphragm. And then as he ages scar tissue is going to come in. And that can make it less effective. So if you can't expand your lungs as well, then you're more susceptible to infections in the lungs.

Q. And so by, "inflammation," that's attended to infection in the lungs?

A. Yes.

Q. I see. I'm going to ask a similar question, if you are able to identify a specific percentage by which he would be more likely to sustain - - to suffer these breathing issues as a result of the condition relating to his diaphragm?

A. No.⁶

* * * * *

Q. Would that same be true for the effects of the build-up of scar tissue; that is to say that may create - - it may result in him being more susceptible to breathing issues to some degree but you're not able to identify a precise percentage?

A. That's right. That's correct.⁷

He did, however, when asked by Pignataro's counsel, indicate he was offering his opinions with a reasonable medical probability.

Parties' Contentions

Defendants' move *in limine* to exclude certain portions of Dr. Crooks' proffered opinions. Defendants' take issue with the following opinions set forth in Dr. Crooks' expert disclosure filing:

⁶ Dr. Crooks' Dep., at pp.13-14.

⁷ *Id.* at p. 15.

- (a) . . . without his spleen, [plaintiff] will be much more susceptible to infection of encapsulated bacteria . . .
- (b) It is likely [plaintiff] will, among other things, experience breathing problems due to the diaphragm being more susceptible to inflammation.
- (c) . . . the subsequent laparotomy and thoracotomy combined with the internal bleeding experience[d] by [plaintiff] will most likely lead to the formation of scar tissue in these areas.
- (d) . . . he could experience a decrease in the absorption of nutrients.
- (e) . . . [plaintiff] could be at higher risk for esophageal cancer.⁸

Defendants allege Dr. Crooks' testimony should be excluded for two reasons. First, during the deposition, when asked about the opinions set forth in the expert disclosure, he was unable to identify a specific percentage of the above events occurring or not occurring in the future. Second, defendants argue that Dr. Crooks' opinions are not supported by proper methodology, as he does not point to any studies that support his opinions. Defendants conclude that Dr. Crooks did not provide any basis for his multiple opinions which are unreliable, speculative, and will not assist the jury in understanding the evidence.

Pignataro contends that defendants' arguments are not grounds for excluding Dr. Crooks' proffered opinions. Specifically, it is not necessary for Dr. Crooks to rely on studies to support his opinions, as this argument goes to the weight and not admissibility of his testimony. He submits that expert opinions formed based on knowledge and experience satisfy the threshold for admissibility under D.R.E. 702. He next argues that Dr. Crooks need not provide a precise statistical percentage when opining on future consequences of plaintiff's injuries. Instead, Pignataro contends that in Delaware, the

⁸ Defts.' Mot. *in Limine*, Ex. A. Pignataro has withdrawn Dr. Crooks' opinion regarding (d) and (e).

standard is reasonable medical probability and there is no requirement that the expert assign a statistical percentage to opinions. He submits that the case cited by plaintiffs, *Kern v. Alfred I. duPont Inst. of the Nemours Found.*,⁹ involved the tort doctrines of loss of chance and increased risk, which, he claims, are not applicable in this situation. Moreover, he notes that after *Kern*, the Supreme Court of Delaware held that even in the loss of chance context, expert opinions are governed by the reasonable degree of medical probability standard. Thus, as Dr. Crooks' offered his opinions to a reasonable degree of medical probability, Pignataro argues that defendants' motion to exclude Dr. Crooks' testimony should be denied.

Discussion

Delaware Rule of Evidence ("D.R.E.") 702 governs the admissibility of expert testimony. D.R.E. 702 provides:

[i]f 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 (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.¹⁰

In determining the admissibility of expert testimony, Delaware courts utilize a five-pronged test.¹¹ Before admitting expert testimony, the trial judge must determine

⁹ 2004 WL 2191036 (Del. Super. July 30, 2004).

¹⁰ D.R.E. 702.

¹¹ *Sturgis v. Bayside Health Ass'n Chartered*, 942 A.2d 579, 584 (Del. 2007).

that: (1) the witness is qualified as an expert by knowledge, skill, experience, training, or education; (2) the evidence is relevant; (3) the expert's opinion is based upon information reasonably relied upon by experts in the particular field; (4) the expert testimony will assist the trier of fact to understand the evidence or determine a material fact in issue; and (5) the expert testimony will not create unfair prejudice, confuse or mislead the jury.¹²

Therefore, for expert testimony to be admissible, it must be both relevant and reliable.¹³ The trial judge acts as a gatekeeper and determines whether the proffered evidence is relevant and reliable.¹⁴ Evidence is relevant if it advances the inquiry by making a fact of consequence more or less probable.¹⁵ Reliable evidence is “based on the methods and procedures of science, rather than subjective belief or speculation.”¹⁶ The party seeking admission of the expert testimony “bears the burden of establishing the relevance [and] reliability . . . by the preponderance of the evidence.”¹⁷ The trial judge must not “choose between competing scientific theories, nor is it empowered to determine which theory is stronger.”¹⁸ Rather, the trial judge's role is merely to

¹² *Id.* (citing *Tolson v. State*, 900 A.2d 639, 645 (Del. 2006)).

¹³ *Kapetanakis v. Baker*, 2008 WL 3824165, at *3 (Del. Super. Aug. 14, 2008) (citing *Price v. Blood Bank of Del. Inc.*, 790 A.2d 1203, 1210 (Del. 2002)).

¹⁴ *Id.* (citing *M.G. Bancorporation, Inc.*, 737 A.2d at 523).

¹⁵ D.R.E. 401.

¹⁶ *Kapetanakis*, 2008 WL 3824165, at *3 (quoting *In re TMI Litigation*, 193 F.3d 613, 669 (3d Cir. 1999)).

¹⁷ *Id.* (quoting *Quinn v. Woerner*, 2006 WL 3026199, at *3 (Del. Super. Oct. 23, 2006)).

¹⁸ *Id.* (quoting *State v. McMullen*, 900 A.2d 103, 114 (Del. Super. June 1, 2006)).

determine “whether the proponent of the evidence has demonstrated that scientific conclusions have been generated using sound and reliable approaches.”¹⁹

Pignataro indicates in his response that opinions (d) and (e) in defendants’ motion are withdrawn. Thus, the opinions regarding his absorption of nutrients and risk for esophageal cancer are moot.

The Court views defendants’ motion as raising two issues. First, is Dr. Crooks’ inability to assign percentage to the risks he has identified by itself mean his opinions must be excluded? Second, since he cited no studies or literature, has he offered a competent basis on which to opine? As noted earlier, there is a hearing scheduled on April 5th, and the Court is deferring until that time consideration of that issue.

In support of this first argument, defendants rely on *Kern v. A.I. duPont*,²⁰ a medical negligence case in which plaintiff alleged the “increased risk doctrine.” The increased risk doctrine is applicable to cases where plaintiff may recover damages if the person’s risk of suffering a negative medical condition is increased because of the negligence.²¹ In *Kern*, plaintiff’s experts did not state “with reasonable probability and precision what the chances were that the surgery would have worked, much less offer any opinion as to the percentage by which [d]efendant’s alleged negligence reduced the

¹⁹ *Id.* (quoting *McMullen*, 900 A.2d at 114).

²⁰ 2004 WL 2191036 (Del. Super. July 30, 2004).

²¹ *United States v. Cumberbatch*, 647 A.2d 1098 (Del. 1994).

chance of success.”²² In that context, this Court held that, because the percentages form the basis for the damages calculation by the jury, they are vital and must be stated.²³

Pignataro takes the position that the increased risk doctrine is not applicable to this case. Yet he cites to *Kardos v. Harrison*, which stands for the proposition that a plaintiff is not required to “present evidence of the precise statistical percentage of the lost chance of survival.”²⁴ Pignataro submits that even in this context, the expert’s opinions are governed by the reasonable medical probability standard. The Court finds his position on the non-applicability of increased risk to this case as to be contrary to what Dr. Crooks opines.

The factor which distinguishes *Kern* and these other cases on increased risk is that the medical expert in that case did not state his opinion with reasonable medical probability. Factually, therefore, *Kern* is an outlier. Dr. Crooks’ three opinions on Pignataro’s increased risks were offered with reasonable medical probability.

In *United States v. Anderson*, the Delaware Supreme Court recognized increased risk as an element of damages indicating a plaintiff must show that it was more probable than not that he or she will suffer an increased risk.²⁵ More to the point, in a wrongful death medical negligence case, the Supreme Court said, when speaking of *Anderson*, “[w]e did not hold that a plaintiff must present evidence of the precise statistical

²² 2004 WL 2191036, at *4.

²³ *Id.*

²⁴ 980 A.2d 1014, 1017 (Del. 2009).

²⁵ 669 A.2d 73, 77 (Del. 1995).

percentage of the lost chance of survival.”²⁶ The expert, when plaintiffs questioned him, was unable to testify with reasonable medical probability whether earlier diagnosis would have improved the chance of a better outcome. About that, the Supreme Court said:

The Superior Court did not dismiss this case because the plaintiff failed to present expert testimony establishing the precise percentage of the Decedent’s loss of chance. The Superior Court dismissed the case because the plaintiff’s only evidence on causation was, by her own expert’s admission, speculative. Consequently, the plaintiff failed to make a *prima facie* case on the issue of causation.²⁷

It was in *Kardos* that the expert’s inability to offer a last chance survival opinion with reasonable medical probability, which was fatal.²⁸ That is not the case here. Dr. Crooks stated his three opinions with reasonable medical probability. He did not, and does not, have to ascribe specific percentages to each.

Defendants’ next argument that Dr. Crooks’ opinions should be excluded because he does not reference any studies is also without merit. Defendants attempt to narrow the standard under D.R.E. 702 and *Daubert*. There is no requirement under any Delaware standard that a proffered opinion will be excluded *unless* the expert relies on literature or treatises in formulating an opinion.²⁹

²⁶ *Kardos*, 980 A.2d at 1017.

²⁷ *Id.* at 1019.

²⁸ *Id.*

²⁹ *See Pavey v. Kalish*, 3 A.3d 1098, 2010 WL 3294301 (Del. Aug. 23, 2010) (TABLE) (emphasis added).

Absent any sworn testimony, the use of *curriculum vitae* and argument do not suffice. The Court cannot fully appreciate Dr. Crooks' basis for forming his opinions. Again, that will be the primary focus of the April hearing.

IT IS SO ORDERED.

J.