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PERSPECTIVE

## A mediator's perspective on standard of care

By Gary N. Stern

The phrase “standard of care” is most commonly used in the context of a health care professional negligence case. After 44 years of being a litigator, primarily in injury and health care cases, I came to understand that among my first duties when considering a new case was to open the book of approved jury instructions and see what those instructions say about the type of case I am considering. Forty-four years later I discovered as a mediator that looking to the approved standard jury instructions is an essential step in my practice from the moment the parties retain me to mediate their case. But my perspective as a mediator regarding what the words of the instructions mean and how they will impact the mediation session is very different from the perspective I brought to the table as an advocate.

“Standard of Care” starts its journey in California’s civil jury instructions with CACI 401:

“Negligence is the failure to use reasonable care to prevent harm to oneself or to others.

A person can be negligent by acting or by failing to act. A person is negligent if that person does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation. You must decide how a reasonably careful person would have acted in [Defendant’s] situation.”



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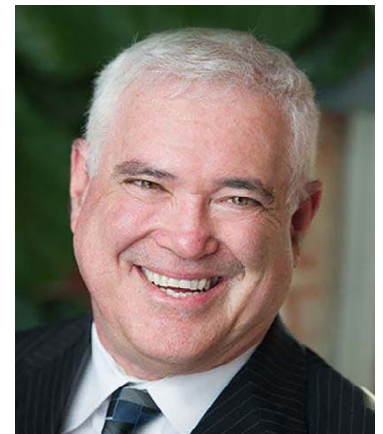
In the CACI instructions that follow concerning the law of negligence, we learn that different people, in different circumstances (e.g., a minor, or a disabled person) will have different standards of care.

We also learn an important lesson about care standards. As to everyday affairs of life, care standards are a matter of law. “The formulation of the standard of care is a question of law for the court. Once the court has formulated the standard, its application to the facts of the case is a task for the trier of fact if reasonable minds might differ as to whether a party’s conduct has conformed to the standard.” *Ramirez v. Plough, Inc* (1993) 6 Cal.4th 539, 546 (internal citations omitted.) But our Supreme Court goes on to say that “in most cases, courts

have fixed no standard of care for tort liability more precise than that of a reasonably prudent person under like circumstances.” *Id.* Over the years, general standards of care have been established by statute or by judicial decision.

In the health care negligence setting, I rarely see a knock-down, drag out fight over “what” the standard of care is in a given health care setting. Why? Because in the health care setting, our system of civil justice has determined that it needs help to determine the threshold question of what is “the standard of care” regarding a particular health care procedure or evaluation. That help comes from experts and in the vast majority of cases I have seen, both as a litigator and as a mediator, there is

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consensus as to the health “standard of care.” The battle in almost every case is whether the standard was breached and especially, whether any such breach made a difference in the patient’s outcome.

CACI 501 says it all; I quote it here without the brackets that will vary in the particular case. An important caveat is that even in the health care setting, there may be variations as to what “standard of care” is and the source for its determination. But in the vast majority of cases, the following is the law:

“A doctor is negligent if she fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful doctors would use in the same or similar circumstances. This level of skill, knowledge, and care is sometimes referred to as ‘the standard of care.’ You must determine the level of skill, knowledge, and care that other reasonably careful doctors would use in the same or similar circumstances, based only on

the testimony of the expert witnesses who have testified in this case.”

The words of CACI 501 could easily be adapted to driving a car. “A driver is negligent if she fails to use the level of skill, knowledge and care in driving a car that other reasonably careful drivers would use in the same or similar circumstances.” The difference is that there is a universality of experience in the world of motor vehicles that is not present in the delivery of health care. As a society, we have reasonably decided that the determination of “standard of care” cannot be left to lay judges or lay jurors. We ask experts in the field to bring us that insight.

And yet, I cannot recall the last time, either as a mediator or as an advocate, when there was a good faith dispute as to “what” the standard of care was in the case. As a mediator, my first task is to find the areas of common ground and then build those areas to help the parties see where the case might go if resolution short of trial is not

achieved. In a health care negligence case, I immediately look to a foundation for common understanding that starts with agreement as to standard of care.

At that point in the process, I turn to the views of the experts. Now I should also emphasize that in the usual medical negligence mediation, I have one overriding initial task and that is to make sure the defendant doctor (in cases where the defendant is an individual and not an institution) has given settlement consent. Unique in this area of law is the right of the party doctor to withhold consent for settlement. Usually, we are only engaged in private mediation at the point where defense counsel has secured consent from her client. So assuming consent, I diligently seek common ground as to an agreed “standard of care”; common ground that I find is aided by the views of the experts.

As a mediator, I am focused on the experts. Who are they? What

is their background? What is their experience in legal cases? Are they doctors first and medical-legal participants second?

And finally, I offer the following perspective. In the vast majority of health care negligence cases, where there are superb lawyers on both sides who have retained the finest doctors in the field, I ask the parties and counsel to step into the jury room. Do they believe that one expert, over the other, will carry the day? Or, is there room for the possibility that something else, some other fact or belief, will decide the outcome of the case? As a mediator, I do not have the luxury of drawing easy conclusions about how lay folks will think about the medicine that has been presented to them. I do not have the luxury of believing that jury instructions about “standard of care” will be the decisive factor in how a case will be perceived. As a mediator in a health care negligence case, “standard of care” is just the beginning.