

Pathological evidence in malpractice trials

Russell G. Thornton, JD

In the evaluation, prosecution, and defense of health care liability claims, the value of any pathological evidence should not be underestimated. Most often, this evidence consists of the surgical pathology report for removed tissues and/or the results of an autopsy. As with other medical evidence, however, the value of pathological evidence may only be as good as the abilities, knowledge, and effort of the pathologists involved.

A detailed evaluation of a case's pathological evidence includes not only review of the pathology report itself but also consideration of the significance of what is and is not found. Frequently, through a thoughtful review of this evidence, key information is obtained for use in the evaluation and handling of these claims.

TISSUE SPECIMENS

The most frequent type of pathological evidence encountered in health care liability claims is evaluation of tissues or organs removed during biopsies or surgical procedures. Such evidence frequently provides a definitive diagnosis of a clinical situation that may be nonspecific or equivocal.

In failure-to-diagnose claims, such as a failure to make a timely cancer diagnosis, pathological evaluation of the tumor might reveal whether a causation defense can be used. Close evaluation of the pathological nature of the tissue or tumor may show that the underlying process is more or less aggressive than may appear from a quick review of the report alone. If the tumor is more aggressive, there may be reasonable grounds to argue that earlier diagnosis and treatment would not have changed the outcome. In addition, in some cases, further evaluation of the tissue, making use of more recent knowledge about tumor subtypes and pathology, may be helpful. For example, immunohistochemical testing may provide important information about the biological nature of the tumor and its expected response to intervention. It goes without saying that if the pathological evidence from the case establishes that earlier intervention would or would not have made a difference in the outcome, that is a key piece of evidence.

One case involved a 9-month delay in diagnosis of kidney cancer. A superficial review of the pathology report revealed only that the tumor was malignant and was contained within the kidney capsule at the time of diagnosis and removal. Further evaluation of the exact type and nature of the tumor, however,

revealed that it had never been known to metastasize and/or recur. This additional information was key in convincing the court to dismiss the claim on summary judgment.

Similarly, in an obstetrical malpractice claim, pathological examination of the mother's placenta revealed that the likely cause of the child's developmental problems was in utero and not birth-related. This evidence allowed plaintiffs' counsel to be convinced early on to resolve the matter on a "costs of court" basis. Conversely, in a number of matters, placental evaluations excluded a similar defense.

Surgical pathological results can also play a key role in determining whether or not a surgical procedure was indicated or justified and may establish a reasonable basis for the clinician's failure to diagnose a particular condition. In one claim that involved a failure to diagnose uterine cancer, the key issue was evaluation of the patient's uterine bleeding. The clinician believed that the bleeding was due to a noncancerous process and treated the condition as such. While the patient was ultimately determined to have uterine cancer, pathological evaluation of the patient's uterus also revealed the existence of a condition that may have been a nonmalignant cause of the bleeding and provided the clinician with a strong defense.

Pathological evaluations may help determine whether the underlying disease process was acute or chronic. In a claim alleging an unnecessary hysterectomy based on a contention that the underlying condition was acute and, therefore, should have been treated in a more conservative, nonsurgical manner, uterine pathology was similarly valuable. Pathological evaluation of the uterus revealed chronic changes, thereby supporting the clinician's decision to perform a hysterectomy.

AUTOPSIES

In legal cases that involve the death of a patient, the autopsy can be of paramount importance. In these situations, the autopsy report may be the linchpin on which cases succeed or fail.

Autopsy results can support the fact that death was the result of a risk inherent in the procedure and, therefore, was

From Stinnett Thiebaud & Remington LLP, Dallas, Texas.

Corresponding author: Russell G. Thornton, JD, Stinnett Thiebaud & Remington LLP, 2500 Fountain Place, 1445 Ross Avenue, Dallas, Texas 75202 (e-mail: rthornton@strlaw.net).

not necessarily the result of substandard conduct. For example, claims related to postcatheterization retroperitoneal hematomas are often based on vascular injury found on autopsy at the catheterization access site. While this injury is certainly damaging evidence to the defense, since the pathologist will probably opine that it caused the underlying bleeding, the defense might be able to get some beneficial evidence from this fact. In one such matter, the pathologist admitted on cross-examination that he had seen similar “injuries” in other individuals who had undergone catheterization and that such vascular injuries are not unusual and are a risk associated with the procedure. This evidence, coupled with the fact that the consent form listed vascular injury as a potential risk associated with the procedure, was used by the defense to diffuse negligence claims against the interventionalist.

In pulmonary embolism cases, autopsy evidence plays a substantial role in the outcome. In such claims, the frequent contention is that some embolization was present before the fatal event that the clinician failed to appropriately diagnose and that timely diagnosis and evaluation would have prevented the patient’s death from a subsequent fatal embolization. In these cases, the pathologist can frequently determine whether or not antemortem emboli were present and, if so, when they occurred. In two instances, this evidence was instrumental to favorable outcomes for the defense. In one matter the absence of antemortem emboli led to an early dismissal of the claim; in another matter, it was essential to a defense verdict at trial. Conversely, in one matter in which the defense exhumed the decedent’s body to look into this issue, it was determined that the plaintiffs’ contentions were valid. With this information, there was an early disposition of the claim, favorable to all.

The value of an autopsy was also shown in a claim that a patient was improperly intubated. In that matter, the allegation was that “lacerations” noted in the patient’s throat on autopsy indicated that the endotracheal tube had been pushed through the esophagus and that oxygen went into the patient’s mediastinum, as opposed to his lungs. While the report looked dire on its surface, deposition of the pathologist revealed that the contentions by the decedent’s family were without merit. The pathologist testified that the “lacerations” mentioned on autopsy were of the type seen routinely in patients who had been intubated and that there was no through-and-through perforation of the esophagus. This testimony was essential in an eventual dismissal of the case.

Autopsies are also valuable because they may reveal a cause of death wholly unknown and/or unsuspected by the decedent’s health care providers. An example was a claim that a patient’s transfusion-related acute lung injury (TRALI) was not diagnosed or treated in a timely manner. Based on the clinical timing and nature of the event, TRALI was the most logical cause of the patient’s demise. Autopsy revealed an entirely different, unrelated infectious process that displayed none of the features associated with TRALI.

Who performs the autopsy in death cases often becomes an issue. Under Texas law, the medical examiner has jurisdiction

when an individual dies within 24 hours of hospital admission (1). When the medical examiner performs the autopsy, the results can be very decisive, since jury members will presume that the pathologist was impartial.

Complications arise when the medical examiner does not elect to “take” the case and a “private” autopsy is performed, either by the hospital pathologist or by a pathologist selected by the patient’s family or legal counsel. Except in cases in which the cause of death is obvious, the key is to ensure that qualified and impartial individuals are involved. Otherwise, the results of the autopsy will be viewed with skepticism since one “side” has “selected” the pathologist. In these situations, the more transparent the process, the better.

It can be beneficial to have more than one experienced staff pathologist perform autopsies in non-medical examiner cases. A number of facilities assign autopsies to experienced pathologists on staff on a rotating basis. This practice is beneficial because it dampens the ability for one side to criticize the pathologist performing the autopsy as being partial to the other side.

Another way to make the autopsy process transparent is to involve pathologists who specialize in a particular area of pathology when indicated. For example, in many cardiac cases, the key question is the existence, extent, and nature of any preexisting cardiac damage the patient suffered. In a number of instances, we have been able to defend cases on the basis that pathological evaluation of the heart showed extensive damage that preexisted the terminal event. This type of evidence provided the basis on which to obtain a dismissal of a case or at least provided the defense team with strong evidence to use at trial. This same tenet holds true in situations that involve key findings in other organs, such as the lungs, liver, or kidneys, or in situations that involve malignancies.

If such beneficial evidence exists, it is best for it to be based on, and come from, an evaluation by the pathologist with the most experience and knowledge in the applicable area, as opposed to a more general pathologist. Otherwise, opinions are open to cross-examination on the basis that the pathologist rendering these opinions was not even the most experienced and knowledgeable pathologist on staff in these areas. If specialists are available and willing to participate, there is no good reason to leave them out of the process; further, a failure to take advantage of such knowledge and experience can be used to attack the validity of the process and/or results. By including specialists in the autopsy, it can be credibly argued to all involved, including the family, lawyers, and juries, that the process was open, aimed at finding the truth.

Since pathological evidence can be extremely important to the complete evaluation and assessment of a claim, the pathologists involved should take all reasonable steps to ensure the validity and credibility of any pathological examinations. Those involved in subsequent health care liability claims should take advantage of this specialized and important knowledge. The information can have a significant impact on any case.

1. *Tex. Code of Crim. Proc. Ann.*, Art. 49.25, section 6 (Vernon’s Supp. 2005).