www.surgicalneurologyint.com

ScientificScholar® Knowledge is power
Publisher of Scientific Journals

Surgical Neurology International

Editor-in-Chief: Nancy E. Epstein, MD, NYU Winthrop Hospital, Mineola, NY, USA.

SNI: General Neurosurgery

Editor
Eric Nussbaum, MD
National Brain Aneurysm and Tumor Center, Twin Cities, MN, USA

SNI® Open Access

Letter to the Editor

Customary bad practice not standard of care

Leo Clark

Department of Neurosurgery, St. Vincent Medical Center, Toledo, Ohio and St. Luke's Hospital, Maumee, Ohio, United States.

E-mail: *Leo Clark - ljpclark@bex.net

***Corresponding author:**
Leo Clark,
34 Exmoor, Ottawa Hills, Ohio, United States.

ljpclark@bex.net

Received : 21 August 19
Accepted : 21 August 19
Published : 04 October 19

DOI
10.25259/SNI_464_2019

Quick Response Code:

Dr. Epstein,

I read with interest your recent article on standards of care.

The issue of customary practice v. standard of care is of great interest in an age of excessive hardware fusion surgery. To my experience, many physicians have trouble understanding the difference between customary practice and standard of care. I hope to clarify the difference and additionally explain that what I term dangerous customary bad practice, should be abandoned as were leeches and lancets by the early 19th century.

Most states have a legal definition of the standard of care that applies a reasonableness rule: standard of care is what a reasonable physician of ordinary skill, care, and diligence would do or refrain from doing in same or similar circumstances. Each state's supreme court will fashion a definition that includes a "reasonableness" component because all negligence law is based on the reasonable man standard. A definition of negligence is failure to use reasonable care, resulting in damage or injury to another. Medical negligence is just a subset of negligence/tort law.

The customary practice argument: "it is now customary practice for a spine surgeon to perform hardware fusions on every surgical patient" – therefore, that practice is standard of care, fails when the standard of care definition includes the element of the "reasonable physician" (reasonably prudent, reasonably careful, reasonable skill, care, and diligence). The reasonable physician acts in accordance with his/her duty of care (fiduciary duty) to the patient – not self-interest. Evidence is accruing that many techniques of hardware fusion are not reasonably safe and may constitute customary bad practice, not standard of care. Standards of care change with time as medical science advances. Leeches and lancets were once standard of care.

Legal definitions of "standard of care" and "customary practice" are found in jury instructions and appellate or state supreme court cases. I cite, for example, a 2015 Ohio appellate case *Nist v. Mitchell* that addresses the differences in the Ohio legal definitions of "customary practice" and "standard of care." In my excerpt I have inserted case names, changed formatting, and omitted citations to improve ease of reading and clarity for a non-lawyer reader. Paragraph numbers from the original case citation remain.

Jury instructions are read to the jury by the trial judge at the end of the case, before deliberation by the jury, to instruct the jury on the law. In the excerpt of appellate case *Nist v. Mitchell*, the appellate court is addressing a dispute as to whether the jury instruction by the trial court on Customary Practice properly stated the law in Ohio. The law allows a jury to consider customary

This is an open-access article distributed under the terms of the Creative Commons Attribution-Non Commercial-Share Alike 4.0 License, which allows others to remix, tweak, and build upon the work non-commercially, as long as the author is credited and the new creations are licensed under the identical terms.
©2019 Published by Scientific Scholar on behalf of Surgical Neurology International

practice but complying with customary practice is not sufficient to establish that the physician has met the standard of care. That legal principle has been true for about 100 years.

Customary Practice Instruction

{¶ 32} The jury in this case [*Nist v. Mitchell* – at the lower trial court] was provided with the following instruction:

The customary or routine method of diagnosis, treatment, or procedure may be considered by you along with all of the other facts and circumstances in evidence. Although a particular method may be customary, usual or routine, this circumstance will not by itself prove that * * * method to be within the standard of care. You shall decide whether the method of diagnosis, treatment, or procedure used by Dr. Mitchell was in accordance with the required standard of care.

Appellants [the party that appealed the case from the lower trial court] argue that this instruction is not a correct statement of the law on the applicable standard of care in a medical negligence case.

[In addressing whether the instruction was a proper statement of the law the *Nist* court first noted that the instruction did mirror Ohio Jury Instructions – based primarily on case law and statutes. The *Nist* court then noted that the Ohio Jury Instruction on Customary Practice included a citation to the 1928 Ohio Supreme Court case of *Ault v. Hall*. In *Ault v. Hall* an improper jury instruction was provided.]

{¶ 34}… The *Ault* case involved a medical malpractice action against a surgeon for leaving a sponge in his patient. The surgeon argued in part that he was not liable because it was common custom and practice to rely on the "sponge nurse" to correctly account for every sponge that was used during the procedure.

The [Ohio Supreme] court recognized that with rare exception courts are quite uniform in declaring that conformity to a practice or usage is regarded as a matter proper for the consideration of the jury in determining whether or not sufficient care has been exercised in a particular case. The overwhelming weight of authority supports a general rule that customary methods of conduct do not furnish a test which is conclusive or fix a standard. Custom will not justify a negligent act or exonerate from a charge of negligence.

[The appellate court in *Nist v. Mitchell* then turned attention to the landmark 1976 Ohio Supreme Court case of *Bruni v. Tatsumi* that contains the modern, frequently cited, statement of "standard of care" in Ohio medical negligence cases and compared it to the "standard of care" jury instruction provided to the jury in *Nist v. Mitchell*:]

{¶ 35} The seminal case of *Bruni v. Tatsumi*, [Citation omitted.] provides that, [i]n evaluating the conduct of a physician * * * charged with malpractice, the test is whether the physician, in the performance of his service, either did some particular thing or things that physicians * * *, in that medical community, of ordinary skill, care and diligence would not have done under the same or similar circumstances, or failed or omitted to do some particular thing or things which physicians * * * of ordinary skill, care and diligence would have done under the same or similar circumstances. He is required to exercise the average degree of skill, care, and diligence exercised by members of the same medical specialty community in similar situations. [Citation omitted.] Further, "[t]he standard of care for a physician * * * of a board certified * * * specialty should be that of a reasonable specialist practicing medicine * * * in that same specialty * * *." [Citation omitted.]

{¶ 36} In the present case, [*Nist v. Mitchell*] the trial court instructed the jury on the standard of care as follows:

The existence of a physician/patient relationship places on the physician the duty to act as a physician of reasonable skill, care, and diligence would have acted under like or similar conditions or circumstances. This is known as the standard of care. The standard of care is to do those things which a reasonably careful physician would do and refrain from doing those things which a reasonably careful physician would not do. * * * The standard of care for a physician in the practice of a specialty is that of a reasonable specialist practicing medicine exercising reasonable skill, care, and diligence under like and similar circumstances * * *. A specialist in any branch has the same standard of care as all other specialists in that branch.

{¶ 37} Appellants [the party that appealed the case from the lower court] argue that *Promen v. Ward*, [Citation omitted.] supports their contention that the jury instruction, in this case, was an improper characterization of the appropriate standard of care.

Despite the fact that the surgeon in *Promen* admittedly operated on the wrong ruptured disk in the plaintiff's back, the jury returned a defense verdict…

[In *Promen* the jury instruction was in error because the trial court's instruction simply contrasted negligence with conformity to a recognized practice, without qualification, it was misleading and constituted reversible error.

The *Nist* court reasoned further that not only did the customary practice instruction mirror Ohio Jury Instructions but also there was also the separate correct standard of care instruction – uncontested by the appellants. The *Nist* court then returned to the 1928 *Ault* holding.]

{¶ 39} The holding in *Ault* indicates that, although customary or routine methods may be considered, such methods are not, in and of themselves, determinative of whether the physician complied with the standard of care…

[The *Nist* appellate court ruled against the Appellants: The Customary Practice Instruction was a correct statement of the law. And the separate accurate standard of care instruction was also provided.] *Nist v. Mitchell*, 2015-Ohio-4032, ¶¶ 31-39, 42 N.E.3d 1206, 1215–17.

In summary: customary practice is not determinative of the standard of care. The jury is permitted to consider customary practices as evidence of the standard of care, although it is not conclusive on the ultimate issue of whether the doctor was negligent. Custom will not justify a negligent act or exonerate from a charge of negligence.

A medical practice that is still customarily done but found to be risker than former standard treatment can be termed "Customary bad practice." "Customary bad practice" is not "standard of care" because bad practice (known dangerous practice) is not reasonable – not in the patient's best interest – not reasonably careful. The reasonably careful physician would not choose to treat in a riskier unsafe manner – (choose high-risk surgery when simpler less risky surgery provides the same or better result – e.g., riskier hardware fusion for lumbar stenosis rather than decompression alone).

Good medical commerce is not necessarily good medical practice – RVUs rule. More complex, risker, hardware fusion surgeries, have the advantage of generating higher RVUs/income – even when recognized as customary bad practice. For many physicians confronting customary bad practice would be biting the hand that feeds. The academics/journals/editors/societies may be compromised by the surgical hardware industry's advertising/royalties/consulting fees. In an age of propaganda, lies are preferred to inconvenient truths. (George Orwell said: useful lies were preferred to harmful truths.) However, remember in an age of propaganda telling the truth is dangerous.

Your comments regarding the AANS, "I opined that the American Association of Neurological Surgeons (AANS)' Professional Conduct Committee (PCC) policies can have the effect of deterring surgeons from testifying for the patient/plaintiff" are spot on. Deterrence is, as a probability, the intended effect.

Substitute operators without doctor-patient relationship or informed consent, risky, excessive, unnecessary, and hardware fusion surgeries, have become the norm/customary bad practice spine surgery. A generation of neurosurgeons/ortho spine surgeon is being trained in such practices, and their mentors are receiving the royalties. Perhaps the AANS ruling class are receiving royalties too and do not like you telling the truth?

You are to be congratulated. Your writing is addressing an epidemic of unnecessary and dangerous hardware spine fusion surgery. You are carefully documenting that review of the medical literature evidences that some techniques of hardware fusion surgery are not reasonably safe, may constitute customary bad practice, and should be reconsidered and possibly abandoned. Keep up the good work. "The only thing necessary for the triumph of evil is for good men to do nothing."—Edmund Burke (1770).

I continue to follow and read with interest your professional writing,

Sincerely,

Leo Clark, MD JD

Financial support and sponsorship

Nil.

Conflicts of interest

There are no conflicts of interest.

How to cite this article: Clark L. Customary bad practice not standard of care. Surg Neurol Int 2019;10:191.