

June 27, 2019: Judicial Advocacy Update

Court contemplates third party liability for physicians

The defendant, B.M.D (initials used due to confidentiality concerns), struck and killed Judith Schrope with her vehicle as Schrope was riding her bicycle on the right-hand side of a residential road. Through discovery, Vizzoni learned that B.M.D. was under the care of psychiatrist Stefan Lerner, MD at the time of the accident, being treated for "mild depression," and was prescribed at least six psychiatric medications. Discovery and testimony could not establish, however, that B.M.D. was experiencing any side effects from the medications at the time of the accident.

On May 11, 2018, the trial court granted Dr. Lerner's motion for summary judgment on the argument that he owed no duty of care to Schrope because she was not a readily identifiable victim, and that "a therapist has no duty to warn unless he or she knows or should know their patient intends to harm a readily identifiable victim." (*McIntosh v. Milano*, 168 N.J. Super. 466, 489 Law. Div. 1979). While the court affirmed the trial court's dismissal of claims against Dr. Lerner, it found the reliance on *McIntosh* to be misplaced. The court went on to say that when a practitioner prescribes either appropriate or inappropriate medication that impairs the patient, the question is not whether the practitioner has a duty to act, but rather were the consequences of the act of prescribing medication foreseeable to the practitioner. While the ruling was in favor of Dr. Lerner, the court did not preclude the establishment of a duty of care between the physician and the cyclist, but rather that there was no evidence that the physician's treatment of the patient was a proximate cause of the accident.

The Litigation Center brief argued that physician's duty of care is to the patient – and in a few rare instances to identifiable third parties – and not to protect third parties that suffer injuries as a result of the negligence of their patients. The AMA has a strong interest in ensuring that the patient-physician relationship is not improperly intruded upon such that it would undermine patient care. Physicians should "never hesitate to provide patients with treatments that have inherent risks and potential side effects because of fear of liability to the public."

Court allows evidence of a known risk in medical malpractice case

On Jan. 8, 2018 the AMA Litigation Center joined the Pennsylvania Medical Society, and various other *amici*, in submitting an *amicus* brief in the case *Mitchell v. Shikora*. On June 18, 2019 the Supreme Court of Pennsylvania ruled in favor of the Appellants, Evan Shikora, DO. This is a favorable ruling for the AMA Litigation Center and for physicians.

Dr. Evan Shikora was to perform a laparoscopic hysterectomy on Lanette Mitchell. Dr. Shikora began the operation by making an incision into Mitchell's abdomen; however, the initial incision severely cut Mitchell's colon causing Mitchell to wear an external ileostomy pouch for a short period. Mitchell filed a medical negligence action against Dr. Shikora, alleging that Dr. Shikora breached his duty of care by "failing to take reasonable precautions to prevent Mitchell from suffering complications, injuries and/or damages in connection with the surgery." Mitchell motioned to exclude evidence of her informed consent regarding the risks of the procedure, which included perforation of the colon, as well as evidence of the risks themselves, as irrelevant, unfairly prejudicial, or confusing. Relying on a Pennsylvania Supreme Court case, *Brady v. Urbas* (2015), the Court noted that "evidence about the risks of surgical procedures, in the form of either testimony or a list of such risks as they appear on an informed-consent sheet, may also be relevant in establishing the standard of care."

Ultimately, the majority opinion for the Court agreed with the Litigation Center brief in finding that simply because risk of complications is *relevant* to informed consent does not make it *irrelevant* to the standard of care. The decision supports the tenet that "injuries may occur in the absence of negligence," and that without the ability to admit evidence regarding the risks and complications of a surgical procedure, physicians would inappropriately be made strictly liable for patient harm.

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