

Jury's knowledge of potential side effects key to fair verdicts

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A patient developed Stevens-Johnson Syndrome after following a prescription regimen and sued the prescribing physician. The doctor had informed the patient about potential rare side effects, including developing a rash. Should a Pennsylvania judge have instructed a jury that it could not consider that the patient assumed the risk when agreeing to the treatment as part of the physician's defense?

A patient asked the Supreme Court of Pennsylvania to throw out two lower-court rulings that said the judge had no such limiting instruction duty, as assumption of risk had not been introduced as a defense during trial. The commonwealth's highest court in December dismissed the man's appeal, agreeing that the lower court judge had no such duty.

The Litigation Center of the American Medical Association and State Medical Societies had joined the Pennsylvania Medical Society in filing an amicus brief that urged the Supreme Court of Pennsylvania to uphold the lower court decisions in the case, *Kirksey v. Children's Hospital of Pittsburgh*.

"The assumption of the risk of jury instructions was unnecessary to the jury's understanding and application of the relevant law," the brief told the justices. "Giving undue prominence to this straw man argument ... would have been extremely prejudicial to the defendants."

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Recent Pennsylvania case law

The *Kirksey* case asked the court to revisit precedent set less than two years ago when the Supreme Court of Pennsylvania decided that the evidence of risks and complications of surgery may be admissible during trial.

In that case, *Mitchell v. Shikora*, a group of health care appellants explained that evidence of risks and complications needs to be presented so lay jurors can understand surgery risks and see that an adverse outcome isn't always caused by negligent conduct. The Supreme Court of Pennsylvania recognized that, ruling that without the testimony, where appropriate, "a jury may be deprived of information that a certain injury can occur absent negligence, and, thus, would be encouraged to infer that a physician is a guarantor of a particular outcome."

Citing arguments that the appellants and amici made during that case, the AMA Litigation Center brief told the court that "without such evidence, health care providers would face strict liability that would, in turn, wreak havoc on health care providers and their insurers, increase healthcare costs and directly undermine the quality of health care overall."

AMA: Precedent must stand

The *Kirksey* case asked the state's highest court to decide whether the superior-court decision directly conflicted with the *Mitchell* decision which the plaintiff said "instructs that when evidence of general risks and complications is admitted in a medical negligence claim to establish the applicable standard of care a limiting instruction is warranted as was requested here but was denied by the trial court and glassed over by the superior court?"

The AMA Litigation Center brief told the commonwealth's supreme court justices that there was no *Mitchell*-related question in the *Kirksey* case before them, as the plaintiff "never once mentioned *Mitchell*" at trial or in the superior court brief. In addition, the brief says, the *Mitchell* decision does not say that a limiting instruction must be issued where risks and complications evidence is introduced, nor does it say that the instruction must be provided even when instruction isn't requested.

Instead, the brief said the commonwealth's supreme court "wisely left it to the trial courts to determine whether to include such an instruction in the proper exercise of their discretion" and by doing that, "this court expressly declined to enact the bright-line rule plaintiff requests."

The brief concluded that "the trial court should be applauded, not reversed."

"Here, the trial court properly discharged its responsibility by allowing the jury to consider evidence relevant to the standard of care and by allowing the case to be presented to the jury in a meaningful and understandable way," the brief said. "There is every reason to believe that the jury properly considered the evidence and reached a just decision on the merits; there is no indication that the jury was confused."