Post Script

a publication of Post & Post LLC

January 2017

2016 Year End Round-Up Edition

As we open the books on 2017, we look back on the state of medical malpractice and health services law in Pennsylvania.

A Review of 2016 Verdicts

An Update on 2016 HIPAA Breach Statistics

Appellate and Trial Court Cases of Interest

2016 Pennsylvania Verdicts

Lower Verdict Numbers Deserve A Closer Look

The amount of money awarded in all types of verdicts across Pennsylvania decreased by nearly $2 billion dollars in 2016. While this statement seems surprising, it deserves a closer look. At the time of this publication, statistics for medical malpractice verdicts were not yet available.

The top 50 verdicts in 2016 totaled $338 million. In 2015, the top 50 verdicts totaled $2.25 billion. In 2014, the top 50 verdicts totaled $3.33 billion. In 2013, the top 50 verdicts accounted for approximately $2 billion.

Some observers cite to the implementation of the "Fair Share Act" in 2011, as being partially responsible for the decline in total verdict dollars awarded. However, juries don't actually render verdicts based upon the Fair Share Act. Further, juries are generally not instructed on the Fair Share Act.

Other observers cite to the lack of significant "blockbuster" verdicts in 2016. Antitrust and whistle blower cases have, in past years, resulted in large verdicts. There were no large whistle blower or antitrust verdicts in 2016. By way of example, two antitrust verdicts in 2015, standing alone, accounted for $2.7 billion dollars. This would account for most of the reduction in verdict dollars seen in 2016.

For the verdicts ranking #26 through #50, the total amount awarded in 2016 was $49 million; in 2015 it was $84 million; and, in 2014 it was $104 million.

HIPAA BREACHES ON THE RISE

27,314,647 Records Breached In 2016

The 2016 HIPAA data breach statistics are in. There were 450 incidents of data breaches reported to the Department of Human Services Office of Civil Rights.

The 450 breaches involved 27,314,647 records. A surprising 9,096,515 records were breached in August alone.

During 2016, the Office of Civil Rights collected fines and payments in the amount of $22,855,300 for HIPAA breaches. The largest single fine was paid by Advocate Health Care Network in the amount of $5,550,000 involving the theft of desktop and laptop computers and improper access to data by a business associate.

Hackers accounted for 87% of the breaches, or approximately 23,695,069 records. The largest single breach involved Banner Health, in which 3,620,000 records were exposed. The frightening part is that experts estimate one in three targeted hacking attempts is successful.

Ransomware attacks on institutions have increased. Ransomware infects a

computer and encrypts its files. The system owner is then unable to access the files and data, until they purchase the encryption key from the perpetrator. In one instance, a clinic in Arizona was infected by a ransomware attack which encrypted its medical records, making them inaccessible for three months. Methodist Hospital in Henderson, KY, was also struck. In February 2016, it was reported that Hollywood Presbyterian was attacked by ransomware, and a $17,000 demand was paid by the medical center. Another attack caused the shut down of three London area hospitals for several days. In a separate attack, St. Bartholomew's Hospital, the largest hospital in British National Health System, was recently struck by ransomware.

Two particularly destructive encoding ransomware programs were noted to be "locky" and "nemucod".

Why ransomware attacks?

Invading and encrypting a system is easier than downloading files, sorting through them to locate usable information, and then finding an illicit buyer on the black market. The black market price for identification information has dropped over the past several years. Sources report that the per-medical record black market price has fallen from $60 in 2012 to $10 in 2016.

In a recent survey by the Ponemon Institute, which monitors cyber threats, 73% of respondents said they were unable to effectively identify cyber threats. 49% of respondents stated that their IT departments did not receive or review threat intelligence bulletins. 70% of the respondents indicated that they are simply overloaded by the amount of cyber threat reports, and unable to sort through them to make meaningful decisions.

2016 Court Opinions of Interest

Mcare 512(e) Expert Testimony Qualifications

Frey v. Petroski
Pennsylvania Superior Court
1161 MDA 2015

The Superior Court upheld a Luzerne County trial court's decision to allow a defense expert hematologist to testify as to the standard of care in interventional cardiology, citing to Mcare section 512(e). Mcare 512(e) allows an expert to testify outside their area of board certification when they demonstrate familiarity

the the specific area of medicine at issue.

The plaintiff died following a cardiac catheterization procedure. The question arose as to whether the administration of anticoagulants by the interventional cardiologist and the failure to measure clotting time with an ACT test prior to beginning a cardiac catheterization met with the standard of care.

The defense hematology expert and the defense cardiology expert both testified that the standard of care was met. The plaintiff's objection to the hematologist offering standard of care testimony in interventional cardiology was overruled.

A defense verdict was rendered and the plaintiff appealed citing the allowance of the hematologist's testimony as error in violation of section 512 of the Mcare Act.

The trial court noted that the fields of hematology and cardiology, under the facts of this case, were "substantially similar." During expert voir dire at trial, the hematologist noted that he frequently consults on interventional cardiology cases. The plaintiff's cardiology expert testified that the failure to perform an ACT test to measure the patient's clotting time prior to the cardiac catheterization was a deviation from the standard of care. The defense hematologist disagreed, and noted that, while no ACT test was performed, the lack of any clot on the wires or devices, strongly suggested that the patient's ACT level was within appropriate parameters and he was fully anticoagulated for the procedure.

The Superior Court upheld the trial court's decision. The Superior Court also cited to the fact that other experts in the case had rendered similar testimony, thereby rendering any error harmless.

The Superior Court cited to Mcare section 512(e) noting that an exception to the general rule permits an expert to testify when he is substantially familiar with the medical issue under examination. The Superior Court found the hematologist, based upon his training and experience, to be "eminently qualified."

Dragonetti Verdict Upheld Against Hospital

Jury Finds Improper Purpose, But Awards Zero Dollars

Miller v. St. Luke's

Pennsylvania Superior Court
1193 EDA 2015

The Superior Court upheld a Dragonetti jury verdict against St. Luke's Hospital. The jury found that St. Luke's acted "without probable cause and for an improper purpose," but also found that, "plaintiffs suffered no damages as a result of said defendant's conduct."

Plaintiffs filed suit against St. Luke's and a nurse following the nurse's confession that he had intentionally harmed patients with diverted medications. After discovery, St. Luke's filed a motion for summary judgment based upon a lack of expert testimony sufficient to establish a *prima facie* case. The trial court granted summary judgment for St. Luke's.

Following the grant of summary judgment, St. Luke's filed a Dragonetti action against the plaintiffs, plaintiffs' counsel, and their certificate of merit expert. St. Luke's later voluntarily dismissed the actual plaintiffs based upon testimony that they had relied upon the advice of their counsel.

The plaintiff counsel responded by filing a Dragonetti action against St. Luke's, claiming that the St. Luke's suit was motivated by improper purpose, and intended to intimidate counsel, undermine counsel's work, and to stop potential future plaintiffs from suing St. Luke's.

The two Dragonetti cases were tried together. The jury found that St. Luke's lacked probable cause to continue its Dragonetti suit, and that the suit was filed for an improper purpose. The jury also found that the plaintiff attorneys and their expert had not suffered any damages.

The plaintiff attorneys appealed, stating that Dragonetti damages are "presumed," and need not be proven with specificity. The plaintiffs cited Standard Jury Instruction 17.90B which notes, "You may presume that the plaintiff suffered both injury to his reputation and emotional distress, mental anguish, and humiliation that would normally result from conduct such as the defendant's. ..."

The trial court had ruled that Standard Jury Instruction 17.90B was inapplicable to this action, because the Dragonetti Act itself, at Sections 8353 and 8354, requires a plaintiff to prove damages.

The Superior Court upheld the trial court's ruling, and cited to Section 8354 of the Dragonetti Act noting, "the plaintiff has the burden of proving ... [t]he plaintiff has suffered damages as set forth in Section 8353." The Superior Court noted that allowing "presumed damages" would render Section 8354 a nullity, and

there was no indication that the legislature intended Section 8354 to be a nullity.

Plaintiff Torpedoes Her Own Case With Facebook Post

Plaintiff's 2010 Facebook Post Established That She Knew of Her Injury Years Earlier

Nicolaou v. Martin, M.D.
Pennsylvania Superior Court
1286 EDA 2014

The plaintiffs filed suit alleging a delay in diagnosis of Lyme disease.

After the completion of discovery, the defense filed a motion for summary judgment, citing the statute of limitations, and a 2010 Facebook post.

The lawsuit was commenced on February 10, 2012, but the complaints related to 2006-2007 testing for Lyme disease. Testing in 2006-2007 had been negative. It was not until February 2010 that the plaintiff received a positive Lyme test.

Key to the motion for summary judgment, was a Facebook posting made by the plaintiff on February 13, 2010. In that post, the plaintiff stated that she had just received her positive Lyme test results. The plaintiff went on to state:

"I had been telling everyone for years I thought it was Lyme and the doctors ignore me, thank you god, you have answered my prayers !!!!!!!"

The plaintiff's helpful Facebook friends then posted comments confirming that the plaintiff had, for several years, been telling friends that she had Lyme disease.

The trial court granted summary judgment.

The plaintiffs appealed, but did so as *pro se* litigants. Their initial brief did not address the issues on appeal, and the Superior Court counselled the plaintiffs to

file a supplemental brief addressing the issues. When the plaintiffs' second brief failed to address the issues, the Superior Court entered an order striking the plaintiffs' briefs.

Summary judgment was affirmed.

The Superior Court rejected plaintiffs' argument that *an actual positive test* was necessary to trigger the statute of limitations. The court noted that in years prior to the positive test, at least one practitioner directly advised the plaintiff-patient that, despite negative tests, he believed she actually had Lyme disease. The court also pointed out that plaintiff, despite negative tests, had received treatment for Lyme disease several years earlier. The plaintiff-patient had experienced significant improvement in her condition from the early Lyme treatments. The Superior Court found that the Facebook post established the plaintiff-patient's level of prior knowledge.

Physician Defendants Compelled To Give Expert Opinions

Lakawanna County Trial Court Holds Deposition Instruction Not To Answer Improper

Karmin v. Reedy
Lackawanna County 11 CV 4598
Judge Thomas Nealon

Judge Nealon granted a motion to compel and ruled that a defendant physician was required to answer deposition questions regarding the standard of care, and could not decline to do so by stating that they would not offer expert opinions at trial. Judge Nealon also set aside defense claims that a doctor could not be required to give retrospective testimony in reviewing fetal monitor strips.

At deposition, defense counsel instructed the doctor not to answer questions and cited to Penna. Co. for Insurances of Lives & Granting Annuities v. City of Phila., 262 Pa. 439, 105 A.2d 630 (1918). Defense counsel advocated that a defendant physician cannot be required to give an expert opinion during the course of his discovery deposition in a professional liability case. Defense counsel also cited to Jistarri v. Nappi, 378 Pa.Super. 583, 549 A.2d 210 (1988) arguing that one

defendant physician cannot be compelled to render an opinion against a co-defendant.

Judge Nealon held that the plaintiff was entitled to question the defendants on expert opinions, even if those opinions concerned the negligence of the defendant themselves or the negligence of a co-defendant. Judge Nealon also opined that the defendant can be required to answer questions based upon retrospective analysis of (in this case) fetal monitoring strips.

Judge Nealon found that nothing contained in Pa.R.C.P.4003.1 or the Neal or Jistarri opinions precluded discovery of expert opinions and/or retrospective expert opinions. Judge Nealon also rejected the position that a defendant could avoid answering expert opinion questions if his counsel stipulated that the defendant would not offer any such opinions at trial.

Judge Nealon also considered what might happen if a defendant refused to answer expert opinion or standard of care questions in a deposition and/or at a trial. Judge Nealon indicated that one would normally expect a doctor to have knowledge of the standard of care and an opinion as to whether his care and treatment met the standard of care. Judge Nealon indicated that a doctor refusing to testify as to his opinions and the standard of care at trial might result in the court issuing an adverse inference jury charge.

Featured Photo

New Years' Eve Fireworks Over Philadelphia

Questions or Comments ?
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