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Welcome to the second issue of *Mass Appeal: A Quarterly Newsletter Addressing Appellate Issues*. This issue is devoted entirely to examining how the Connecticut Supreme and the intermediary Appellate Courts have dealt with issues of specific interest to the healthcare industry. Many of these issues are at the heart of the ongoing legal, ethical, and political debate surrounding patient rights and the obligations of healthcare providers. We have sorted through recent cases and identified emerging trends as well as specific decisions with broad implications for the healthcare industry.

To that end, we have included a discussion of the recent decision of the Appellate Court in *Pikulski v. Waterbury Hospital Health Care Center*, 77 Conn. App. 243 (2003), which addresses the issue of how trial courts must calculate collateral source payment reductions; *i.e.* the amount a plaintiff's verdict must be reduced to account for payments received by the plaintiff from other sources, such as insurance.

Note From our Contributors

The articles that follow are merely snapshots of progress in the world of medical liability defense. The areas of law discussed continue to develop and must be constantly monitored in order to obtain a clear vision of the law. The Supreme Court has provided guidance relating to expert witnesses, and also clarified that *Maloney v. Conroy*, 208 Conn. 392 (1988) is still good law (despite constant attack by the plaintiffs' bar). We have also included an overview of a recent Appellate Court case involving the

FROM THE editor

We also address two Supreme Court cases: *Gold v. Greenwich Hospital Association*, 262 Conn. 248 (2002) and *Murillo v. Seymour Ambulance Association*, 264 Conn. 474 (2003). In *Gold*, the Supreme Court defined what constituted a medical negligence action such that a plaintiff must provide expert testimony as to the standard of care when seeking relief. In *Murillo*, the Supreme Court held that a healthcare provider owes no duty to a bystander who is not under the provider's care.

We hope you find this issue of *Mass Appeal* informative and thought-provoking, and we would love to hear your thoughts, questions, and suggestions.

-- Rich Wareing

collateral source rule, a continuing reminder of the need for diligence in every aspect of trial work.

The health law practice at Pepe & Hazard is dedicated to assisting providers in navigating the ever-changing world of medical liability defense, including thorough appellate representation. For information about our health law practice, please contact Jennifer Cox at 860.241.2690.

POST-VERDICT MOTIONS AND HEARINGS:

Appellate Court provides more evidence that collateral source payment reduction is not as easy as it sounds

The trial is over. The verdict is in, but not in your favor. Having just lost the case, post-verdict motions and hearings seem extraordinarily tedious and costly. Despite every natural desire to put the case behind you, however, directing your counsel's skill and time to the task of post-verdict motions is an important step toward limiting your exposure and properly positioning your appeal. One striking example is the issue of collateral source payments; that is, the amount that the verdict should be reduced for payments received by the plaintiff from a wholly independent source (such as insurance) for the same injuries.

An astounding number of trial court judges miscalculate the collateral source payment reduction, and the error is almost always in favor of the plaintiff. To avoid such errors, it is critical that defense counsel be able to properly calculate the correct amount of collateral source payments to be deducted. A recent Connecticut Appellate Court case provides an excellent reminder that post-verdict motions are not perfunctory, and that the effort spent on such motions and hearings can avoid costly appeals.

In *Pikulski v. Waterbury Hospital Health Center*, 77 Conn. App. 243 (2003), the Appellate Court found that the trial court judge made a number of errors that would have created a substantial windfall for the plaintiff. The error that the trial court judge made repeated a long history of cases with the same outcome that could have been avoided with appropriate post-trial motions. From *Pikulski*, we reiterate the basic elements of collateral source payments that every defendant and counsel should know.

In any personal injury case, including medical liability, a plaintiff – if and when he proves his case – is entitled to two types of damages. They are “economic damages” (cost for tangible and definite losses, including future medical care or lost wages) and “non-economic damages” (intangible losses, such as pain and suffering).

Connecticut law permits the amount of economic damages awarded by a jury or judge to be reduced by the total amount already paid to the plaintiff from collateral sources, including paid medical bills. The calculation can become quite complex. One complicating element allows the plaintiff to minimize any reduction for collateral source payments by accounting for any insurance premiums paid by the plaintiff (or on his behalf).

For example, if a plaintiff was awarded \$12,000 for his injuries, but had \$10,000 in medical bills all paid by health insurance, the collateral source rule would reduce the jury award to \$2,000 (*i.e.*, \$12,000 awarded - \$10,000 paid by insurance) without accounting for premiums paid. If the plaintiff could then show that he paid \$7,500 in premiums for that health insurance, the collateral source rule would reduce the award to only \$9,500 (*i.e.*, \$12,000 awarded - \$10,000 paid by insurance + \$7,500 paid for insurance premiums). The calculation is further complicated by specific rules on contributory negligence, the timing of insurance premium payments, and the claims put into evidence.

If the collateral source payment reduction in economic damages awarded to a plaintiff is not correctly calculated, it could cost you a significant amount of money. Optimally, you want to avoid an appeal and have your defense counsel do everything reasonably possible to convince the judge of the correct calculation. Where the judge just cannot seem to reach the right mathematical conclusion, an appeal may be necessary. Ask your counsel to explain the calculation to you in detail. Understanding the elements and the process involved will make your decision-making far easier.

IS IT MALPRACTICE OR JUST PLAIN NEGLIGENCE?

You are a healthcare provider. You are also, unfortunately, a defendant in a case approaching its court date and the plaintiff has not yet named any experts who will testify at trial. Does it matter? It does if the claim alleges professional malpractice instead of just plain negligence. In a professional malpractice case, expert testimony will be required, and the plaintiff's failure to name any expert is fatal to her case. No expert, no trial.

So, how do you know whether a claim is for professional negligence or just plain negligence? The Connecticut Supreme Court has decided that it does not matter what the plaintiff chooses to call it. Rather, courts must closely review the circumstances under which the alleged negligence occurred to decide the question. Specifically,

the relevant considerations in determining whether a claim sounds in medical malpractice are whether: (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment.

Gold v. Greenwich Hospital Association, 262 Conn. 248, 254 (2002).

In *Gold*, the plaintiff sued the hospital and one of its emergency room physicians for injuries she sustained when she was attacked by a woman that she brought to the hospital earlier that night for an allergic reaction. The plaintiff claimed that the hospital and the physician should have known that the woman posed a danger to others when discharged. During the litigation, the plaintiff's only named expert conceded at his deposition that he did not have enough information to form an opinion, to a reasonable degree of medical probability,

that the defendants deviated from the standard of care. Based upon this concession, the defendants moved to dismiss the case for lack of expert testimony, and the trial court granted the motion.

On appeal, the plaintiff argued that expert testimony was not required because her claim was for ordinary negligence, not medical malpractice. The Supreme Court disagreed, concluding that, regardless of what term the plaintiff used, the claim was for medical malpractice because:

- (1) the defendants were sued as medical professionals;
- (2) the alleged negligence arose out of the defendants' treatment of the woman; and
- (3) the alleged negligence substantially related to a medical diagnosis and involved the exercise of medical judgment.

The claim implicated the defendants' medical judgment because the plaintiff alleged that she was injured as a result of the woman's discharge, and that the defendants negligently discharged the woman without ascertaining whether she posed a danger to others.

When bringing negligence claims against professionals, plaintiffs seeking to avoid the costly burden of offering expert testimony must now pass the *Gold* test. Whether a plaintiff describes the negligence as "ordinary" is not controlling. If anything, *Gold* creates a presumption that expert testimony is necessary in any case against a healthcare professional that alleges negligence in the care and treatment of a patient, even if it is not the patient who is suing. Under *Gold*, in any case where a plaintiff lacks expert testimony – either because he has not named an expert, or because the named expert cannot testify that the provider or facility deviated from the standard of care – consideration should be given to asking the court to dismiss the case prior to trial.

NO DUTY TO PATIENT'S COMPANION

The Connecticut Supreme Court has decided that a healthcare provider does not owe a duty of care to a patient's companion who suffers injuries from observing medical procedures, even if the companion's injuries were reasonably foreseeable. Relying on public policy considerations, the Court in *Murillo v. Seymour Ambulance Association*, 264 Conn. 474 (2003), refused to extend a healthcare provider's duty of care to bystanders outside of the physician-patient relationship.

In *Murillo*, the plaintiff accompanied her sister to the hospital where the sister was to have emergency surgery. The plaintiff watched while an emergency medical technician attempted, unsuccessfully, to insert an intravenous line in her sister's arm. Eventually, a registered nurse was able to find the vein and insert the IV. While the plaintiff watched the attempts and the actual insertion, she began to feel faint and expressed her feelings to both the EMT and the nurse. The patient also told them her sister felt faint. Neither the EMT nor the nurse aided the plaintiff. Not surprisingly, the plaintiff fainted and fell to the floor. As a result of the fall, the plaintiff suffered a broken jaw, broken and chipped teeth, and facial lacerations. The plaintiff sued the EMT, the nurse, and their employers for her injuries.

Even though the plaintiff's injuries from fainting were foreseeable, the Court refused to hold the healthcare providers responsible. In Connecticut, the foreseeability

of an injury is not enough to impose liability if public policy does not justify imposing a duty. In *Murillo*, the Court declared that society expects, and public policy demands, that medical providers focus their efforts on their patients and not be distracted by bystanders who might be affected by observing a medical procedure. Finding support in cases from Pennsylvania, Illinois and Kansas that reached similar results, the Connecticut Supreme Court also concluded that creating such a duty would be contrary to the public policy against increased litigation, as it would otherwise encourage the filing of additional lawsuits by witnesses to medical procedures.

The *Murillo* decision is significant for another reason; that is, the Connecticut Supreme Court cited to, and effectively reinforced the correctness of, its prior decision in *Maloney v. Conroy*, 208 Conn. 392 (1988), which held that there is no cause of action for bystander emotional distress as a result of witnessing medical malpractice. The Supreme Court's reliance on *Maloney* is significant because plaintiffs' lawyers have been asserting (and some trial courts have agreed) that *Maloney* was no longer good law because of the Supreme Court's 1996 decision in *Clohessy v. Bachelor*, 237 Conn. 31 (1996), which – while not arising from a medical negligence claim – recognized a general cause of action for bystander emotional distress. *Murillo* makes it clear that *Maloney* remains good law, and that bystander emotional distress claims have no place in medical malpractice cases.

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