

PA Supreme Court Confirms Risk/Complication Evidence Is Admissible for Standard of Care and Causation in Med Mal Cases

By: Andrew F. Susko and Kim Kocher

Healthcare Alert

6.19.19

In a win for healthcare providers, the Pennsylvania Supreme Court confirmed in *Mitchell v. Shikora* that evidence of the risks and complications of a surgical procedure may be admissible in a medical negligence case that does not involve a claim for lack of informed consent. The Court clarified that the evidence may be relevant not only to the standard of care, but also causation in a medical negligence case.

Prior to *Mitchell*, in *Brady v. Urbas*, the Supreme Court held that, where informed consent is not at issue, “[e]vidence 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 . . . be relevant in establishing the standard of care.” In *Mitchell*, the Superior Court acknowledged that risks and complications may be relevant in establishing the standard of care, but then effectively established a bright-line exclusionary rule in direct conflict with *Brady*. The Superior Court reasoned that, because a defense expert acknowledged that the occurrence of a known complication can neither prove nor disprove negligence, evidence of known risks and complications is irrelevant.

The Supreme Court reversed the Superior Court’s decision and reinstated the trial court’s order allowing the evidence. The Court reasoned that the Superior Court blurred the distinction between evidence of informed consent, *i.e.*, a patient’s affirmative consent to surgery, and evidence regarding the risks and complications of a medical procedure. The Supreme Court explained that evidence that the plaintiff’s injury is a known risk or complication of the medical procedure does not definitively prove or disprove negligence. Rather, the evidence of known risks, even if the surgery is performed with due care, is essential to inform the jury that injury can occur absent negligence. Because risks and complications evidence may assist the jury in determining whether the injury was the result of negligence, it helps the jury determine whether the physician violated the standard of care. Preclusion of the evidence may encourage the jury to conclude that a physician is a guarantor of a particular outcome. In other words, without risk/complication evidence, the jury would not know that the particular injury suffered by the plaintiff is known to be a risk/complication that may happen even with the best of care. The Supreme Court’s ruling, thus, permits a jury to determine whether the plaintiff’s injury occurred due to non-negligent causes.

In reaching its decision, the Court acknowledged that the admission of risks and complications evidence could lead a jury to mistakenly conclude that the injury was merely an assumed risk or complication, but instructed trial courts to ensure, through instruction and comment, that the jury is aware of the proper role of the evidence. In a Concurring Opinion, Mr. Justice Wecht also suggested review of the current Proposed Standard Jury Instructions to ensure that the jury does not misuse the evidence as consent to negligence. In a Concurring/Dissenting Opinion, Madame Justice Donohue agreed that the evidence may be admissible, but was not in the case of *Mitchell*.

The White and Williams team of Andy Susko (suskoa@whiteandwilliams.com; 215.864.6228) and Dan Ferhat (ferhatd@whiteandwilliams.com; 215.864.6297) submitted an amicus brief on behalf of the Philadelphia Association of Defense Counsel and the Pennsylvania Defense Institute in support of reversal.

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.