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No More "Error in Judgment" Charge to Juries

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"Hard cases make bad law."[1] The Pennsylvania Supreme Court's February 7, 2014 decision in *Passarello v. Grumbine* may have exemplified that maxim. In *Passarello*, based on what the Court believes was a "misleading" statement of law in the instructions given by the trial judge to the jury, the Supreme Court rejected a defense verdict that had been entered in favor of a pediatrician and her practice group after a difficult jury trial in a death case.

Passarello arose from the tragic loss of a two-month old boy whose pediatrician believed was showing signs of gastrointestinal reflux and a normal reaction to immunization injections over a period of seven days back in 2001. The patient was hospitalized on the eighth day, and despite heroic, life-saving efforts, the boy died on the ninth day. The postmortem examination revealed he had a diffuse acute viral myocarditis.

The parents sued the pediatrician and her practice group. Almost eight years later, the case was tried before a jury in Altoona, Blair County. As is typical in complex malpractice cases, plaintiffs had an expert who opined that the pediatrician should have done more to properly diagnose the rare condition, and the defense team had an expert who opined that the pediatrician had complied with the standard of care because her diagnosis "fit the symptoms and made sense."

There was no dispute that the trial judge properly instructed the jury as to the plaintiffs' burden of proving professional negligence. Repeatedly throughout a lengthy charge, the trial judge duly educated the jurors by using the rote language from the Suggested Standard Jury Instructions:

- that professional negligence consists of a negligent, careless or unskilled performance by a physician of the duties imposed upon her;
- that a physician must have the same knowledge and skill and use the same care normally used in her medical specialty;
- that a physician whose conduct falls below the standard of care is negligent;
- that a physician must keep informed of the contemporary developments in her specialty;
- that a pediatrician must use current skills and knowledge, and that and if she fails to do so, she is negligent;
- that in determining whether a physician was negligent, the jury could not rely on hindsight because unexpected, unfortunate or even disastrous results are not proof of negligence;
- and that the jury must determine whether the pediatrician failed to have and exercise ordinary skill, care, and knowledge of a pediatrician under the circumstances.

Also contained within the jury instructions was one more statement – a paraphrasing from a 1963 Pennsylvania Supreme Court opinion: "physicians are permitted a broad range of judgment in their professional duties and physicians are not liable for errors of judgment unless it's proven that an error of judgment was the result of negligence."[2]

While ostensibly affirming the hornbook principle that an alleged error in a jury instruction must be viewed in the context of the complete charge, the Supreme Court majority nonetheless concluded that the plaintiff-parents were entitled to a new trial – one in which the jury would not receive an "errors of judgment" instruction. The Supreme Court ruled that an opinion filed by an *en banc* intermediate appellate bench, *Pringle v. Rapaport*,[3] had effectively "changed the law" while the *Passallo* post-trial motions were still pending, and that the "change in the law" therefore applied to the *Passarello* case.

Of the seven Justices, five formed the *Passarello* majority for several conclusions. Writing for that majority of five, Justice Seamus McCaffery approved the Superior Court's *Pringle* decision in 2009 that the "error in judgment" language emanating from the 1963 Supreme Court ruling in *Smith v. Yohe* was peripheral dictum, and that it was not intended to become part of any jury instruction. The *Passarello* majority noted that no Supreme Court had ever specifically approved use of the *Smith v. Yohe* verbiage in jury instructions. It also cited decisions from other states in which similar "error in judgment" instructions had been rejected.

The *Passarello* majority believed that notwithstanding the trial judge's detailed, proper explanation of the common law of a physician's duties, the "error in judgment" sentence undoubtedly "misled" and "confused" the jury by injecting a "a subjective element into the jury's deliberations." It concluded that the "error of judgment" charge improperly refocuses the jury's attention on the physician's state of mind – which is legally irrelevant in determining whether she deviated from the standard of care.

Five of the seven Justices established a "bright-line rule proscribing the errors-in-judgment" charge henceforth. A four-Justice majority concluded that a new trial was necessary. Two dissenting Justices believed that the "error-in-judgment" charge was not prejudicial to the plaintiffs at trial because the jury had, nonetheless, received the proper instruction with respect to the standard of care. Chief Justice Ronald Castille and Justice Michael Eakin believe that the "error in judgment" issue with which the Supreme Court dealt had not been properly raised below. They also believe that in the context of the complete jury instructions, there was no harm in the "error in judgment" sentence, which they distinguished from the more offensive "error in judgment" language used in *Pringle*.

The *Passarello* decision may be open for criticism from academics and others, but it is now a part of Pennsylvania's common law. It will likely be instructive not only in medical malpractice cases, but in any case in which professional negligence is alleged against accountants, architects, lawyers, and other professionals. Defendants will still be able to argue that the mere happening of a bad result is not proof of negligence, but they will no longer hear a trial judge explain that negligence is more than a mere "error in judgment." It seems coincidental that to some observers, the Supreme Court's renunciation of the "error of judgment" charge is, in and of itself, an "error of judgment."

For additional information on these matters, please contact William Kennedy (kennedyw@whiteandwilliams.com | 215.864.6816).

[1]Northern Securities Co. v. United States, 193 U.S. 197 (1904) (Oliver Wendell Holmes, Jr.).

[2]Smith v. Yohe, 412 Pa. 94, 194 A.2d 167, 170–71 (Pa.1963).

[3]980 A. 2d 150 (Pa. Super. 2009) (*en banc*).