Dynamic Chiropractic

PERSONAL INJURY / LEGAL

Are IME and Peer-Review Doctors Accountable in the Doctor-Patient Relationship? (Part 2)

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In a West Virginia case, *Rand v Miller*,[1] a peer-review examiner was found to be responsible for reporting false information, regardless of his claim that there was no doctor-patient relationship. The Supreme Court of Appeals of West Virginia found that this could be defamatory, leading to a separate action from malpractice. Reporting false information was found to fall under this category. An erroneous diagnosis contained in the examining physician's report had caused the person examined to lose his job or some other valuable economic benefit.

The courts affirmed that a physician who reports false information is potentially subject to a defamation action that may not fall under a malpractice action, which may leave the peer-review doctor liable to defend him/herself without coverage. Regrettably, however, this particular case was dismissed as defamation, as it has a statute of limitation of one year and the patient delayed filing the claim. The court wrote, "Unfortunately, the plaintiff's defamation claim was not filed in time." *Refer to endnote #5 for the pertinent language of this ruling.*

In *Green v Walker*, a case ultimately decided by the United States 5th Circuit Court of Appeals applying Louisiana law,[2] an independent medical examiner was originally found not to be responsible for negligence in the failure to diagnose lung cancer in a patient during an annual physical. The lower courts ruled there was a lack of doctor-patient relationship and ruled in favor of the independent examining doctor. The claim against the examining doctor was for failure to diagnose and to take reasonable steps to make available in a timely fashion any findings that pose imminent danger to an employee's physical or mental well-being.

However, the appeals court ruled that a physician holds a heavy moral obligation to avoid foreseeable harm to present and future generations and that a much more effective incentive to prevent future harm will be created by placing the burden of foreseeable losses on the defendants (doctors). It also ruled that an examining doctor has the duty to conduct requested tests and diagnose results, thereby exercising a level of care consistent with a doctor's professional training and expertise. *Refer to endnote #6 for the pertinent language of this ruling.*

In *Webb v T.D.*, a case ultimately decided by the Montana Supreme Court,[3] a patient had an independent medical examination at the request of a worker's compensation insurance company. Upon reviewing a CAT scan, the IME doctor, an orthopedic surgeon, determined only a "back sprain" was evident and as a result, that the patient only had 2 percent whole-body impairment.

The patient accepted the doctor's findings and returned to her occupation, which required heavy labor. She eventually developed significant pain and dysthesia as the result of a significant herniated disc and nerve root compression. The court concluded that the orthopedic surgeon had misdiagnosed her and was not practicing within the accepted standards of his license and training. It was found that if the patient had been correctly diagnosed and had her activities limited, she would not have had these problems.

The treating doctor contended that because he had no doctor-patient relationship, there was no duty of service. However, the court found that the doctor was negligent of diagnosing the plaintiff's (patient's) condition and communicating his erroneous conclusions directly to her. As a result, the court ruled that this IME doctor had a duty of care for the patient and was liable for his opinion. *Refer to endnote #7 for the pertinent language of this ruling.*

Finally, in Maryland, *Hoover v Williamson*,[4] a lower court ruled on a company-hired, independent doctor who examined a patient employed by General Electric who worked with silica dust. The court found the doctor not responsible because an independent doctor does not have a doctor-patient relationship; therefore, there was no "duty of care."

The independent doctor took an X-ray and informed the patient that he had a little infection in his lung and nothing more. The patient went to another doctor who correctly diagnosed silicosis, which subsequently became a serious and permanent disease. The higher-court ruling says that one who undertakes a service, even gratuitously, that is necessary for another's bodily safety and leads the other in reasonable reliance without taking protective steps, is liable for the person's welfare.

In addition, since this was a case of negligence and there was no direct care for the patient through contract, the likelihood of the doctor's malpractice carrier covering this type of service is remote. Again, the IME doctor left himself exposed to giving up far more than he could possible earn in his lifetime doing IMEs. *Refer to endnote #8 for the pertinent language of this ruling.*

As rulings in lower courts can be overruled, until the case is ruled on by the highest court in your state and affirmed, it is critical that every case in which a patient is hurt be appealed. The goal is to prevent doctors nationwide from hiding behind a lack of "duty of care" by not reporting the entire truth in order to gain a desired result for personal gain. The only way this can be accomplished is by having the courts rule otherwise and in the end, protect the innocent people who still hold doctors in high regard. Should the system not change, the general public's confidence in our doctors will continue to erode at the expense of us all.

Endnotes

Endnote #5 – West Virginia: *Rand v Miller:* The physician in this case was "hired by an employer to evaluate the medical records of prospective employees." As a result of an inaccurate medical opinion, the prospective employee was denied the position and sued for defamation and medical malpractice. The Supreme Court of Appeals held that "a physician who undertakes to evaluate a prospective employee's medical records for the employer lacks a sufficient professional relationship with the employee to support a malpractice action. If the physician reports false information, a defamation action may be brought."

Endnote #6 – Louisiana: *Green v Walker*: At issue here was an examination that a Dr. Walker conducted of Sidney Green pursuant to a contract with Mr. Green's employer, and as a result of the employer's policy requiring employees to undergo an annual physical examination as a condition of continued employment. The court ultimately cited that the physician who conducts medical examination of employees has a duty to conduct requested tests and diagnose results, therefore exercising a level of care consistent with the doctor's professional training and expertise.

The issue presented by the prosecution was whether "Louisiana jurisprudence supports an extension of the traditional physician-patient relationship to admit of a legal relationship between examining physician and examinee, thus imposing the physician's duty of due care in that situation." The court concluded that the Civil Code "permits the articulation of a duty of care that would protect physical examinees, if they are to be deemed other than 'patients,'" quoting the

following from an earlier decision in *Pitre v Opelousas* General Hosp., 530 So.2d 1151 (La. 1988):

"The persons at whose disposal society has placed the potent implements of technology owe a heavy moral obligation to use them carefully and to avoid foreseeable harm to present or future generations. In the field of medicine, as in that of manufacturing, the need for compensation of innocent victims of defective products and negligently delivered services is a powerful factor influencing tort law. Typically in these areas also the defendants' capacity to bear and distribute the losses is far superior to that of consumers. Additionally these defendants are in a much better position than the victims to analyze the risks involved in the defendants' activities and to either take precautions to avoid them or to insure against them. Consequently, a much stronger and more effective incentive to prevent the occurrence of future harm will be created by placing the burden of foreseeable losses on the defendants than upon the disorganized, uninformed victims."

The court continued: "From this linchpin the Pitre court held that when a physician knows or should know that there is an unreasonable risk that a child will be born with a foreseeable birth defect, he owes a duty, not only to that child's parents, but to the not as yet conceived child, to exercise reasonable care to warn the potential parents and assist them to avoid conception of the foreseeably deformed child. If article 2315 supports such a duty we cannot but conclude that it also supports a duty between an examining physician and the person present and consenting to the examination, notwithstanding the claim that the examination is being conducted ostensibly for the benefit of another."

Endnote #7 – Montana: *Webb v T.D.*: "Based on § 27–1–701, MCA, we likewise conclude that it is consistent with statutory law in Montana to impose a duty on physicians who perform examinations of an employee, insured, or other person at the request of a third party to exercise the level of care required by the examiner's professional training and experience and to make information regarding the results of that examination available to the examinee if the physician's findings disclose an imminent danger to the examinee's physical or mental well-being.

"For these reasons, we conclude that the District Court erred when it held that the defendant, Robert K. Snider, M.D., had no duty to the plaintiff, Diana L. Webb, to exercise ordinary care under the circumstances alleged in this case. We reverse the order and judgment of the District Court and remand to the District Court for further proceedings consistent with this opinion."

Endnote #8 – Maryland: *Hoover v Williamson:* "The Appellee is right in his contention that ordinarily, recovery for malpractice or negligence against a doctor is allowed only where there is a relationship of doctor and patient as a result of a contract, express or implied, that the doctor will treat the patient with proper professional skill and the patient will pay for such treatment, and there has been a breach of professional duty to the patient. Thus, it has been held that there is not a doctor-patient relationship between: (a) a prospective or actual insured and the physician who examines him for the insurance company; or (b) a prospective or actual employee and the doctor who examines him for the employer.

"There is, however, a broader, a more fundamental rule of long standing under which a physician may incur a tort obligation which is nonconsensual and independent of contract. This is the general rule that one who assumes to act even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all. Restatement, Torts, Sec. 325, says the law is that one who gratuitously undertakes to render services which he should recognize as necessary to another's bodily safety, and leads the other in reasonable reliance on the services to refrain from taking other protective steps, or to enter on a dangerous course of conduct … is subject to liability to the other for bodily harm resulting from the actor's failure to exercise reasonable care to carry out his undertaking."

References

1. Rand v. Miller, 185 W. Va. 705 (1991).
2. Green v. Walker 910 F.2d 291 (5th Cir., 1990).
3. Webb v. T.D., 287 Mont. 68 (Mont., 1997).
4. Hoover v. Williamson, 236 Md. 250 (1964).

Part 1 of this article appears in the July 1 issue and outlines several other state judicial decisions involving the doctor-patient responsibility of IME / peer-review doctors.

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