

Rhode Island Supreme Court Update: Oden v. Schwartz, May 16 2013

By:



JASON C. PRECIPHS, ESQ.



JAMES D. CULLEN, ESQ.

On May 16, 2013, the Rhode Island Supreme Court delivered its opinion in [Oden v. Schwartz](#), a medical malpractice case alleging misplacement of a suture during mitral valve replacement surgery. This decision is notable for the Supreme Court's rulings: (1) upholding the constitutionality of the prejudgment interest statute, R.I. Gen. Laws § 9-21-10(b); (2) its approval of the trial judge's jury instruction frankly discussing the existence of liability insurance; and (3) its ruling on the applicability of the defense of intervening and superseding cause.

Background

On January 26, 2004, Mr. Oden, underwent surgery to replace his mitral valve. Following the surgery, Mr. Oden was diagnosed with aortic insufficiency (A.I.) (i.e. a leaky aortic valve). An echocardiogram showed that the A.I. was attributable to an errant suture placed in the aortic valve during the mitral valve surgery. Mr. Oden underwent a second surgery in August, 2004 to have the valve replaced.

Mr. Oden brought suit against the surgeon, the Hospital and the echocardiologist. The case against the echocardiologist proceeded to trial. After six days of trial, including testimony from the surgeon, the echocardiologist, Mr. Oden and several experts, the jury returned a \$1.5 million-dollar verdict for Mr. Oden, finding that the echocardiologist was 25 percent responsible for Mr. Oden's injuries and the Surgeon, who was no longer a defendant (having settled), 75 percent responsible for those injuries.

The echocardiologist appealed raising five issues. His challenge to the constitutionality of the prejudgment interest statute, the trial justice's inclusion of

an instruction regarding insurance, and the Supreme Court’s decision regarding the trial justice’s refusal to instruct the jury on intervening and superseding cause merit further attention.

The constitutionality of the prejudgment interest statute

On appeal, the echocardiologist challenged the constitutionality of R.I. Gen. Laws § 9–21–10(b), which provides prejudgment interest set at a 12 percent rate. The echocardiologist argued that the 12 percent prejudgment interest statute deprives a defendant of substantive due process and infringes a party’s fundamental right to a jury trial and should therefore be subject to strict scrutiny.¹ The Rhode Island Supreme Court rejected these arguments.

The Court noted an absence of case law in support of the echocardiologist’s argument that the prejudgment interest statute should be subject to strict scrutiny. Rather, the Court’s independent review indicated that prejudgment interest statutes are treated as economic legislation and are, therefore, subject to “the most lenient rational basis” review.² The Court further held that although the echocardiologist raised concerns about the magnitude of the prejudgment interest awarded, it could not hold that this amount is not rationally related to a legitimate

¹ To satisfy strict scrutiny, the most stringent standard of judicial review, it must be shown that the law is narrowly tailored to achieve a compelling government interest and that the law is the least restrictive means of achieving the Government’s goal.

² The Court in *Oden* defined rational basis review as follows:

the statute will be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis” for the 12 percent prejudgment interest rate in medical malpractice actions.

state interest of promoting settlement as well as compensating an injured plaintiff for the loss of the use of money to which he or she is legally entitled. Further, the Court noted that the echocardiologist's arguments were undermined by the fact that he had, in fact, had a jury trial.

In light of this decision, it appears that the only avenue to reform the pre-judgment interest statute is the legislative process. The House Judiciary Committee recently held hearings on a number of bills proposing changes to the pre-judgment interest statute. However, the Senate Judiciary Committee has not scheduled hearings on similar bills. Legislative change seems unlikely in the near future.

The trial judge's instruction on insurance

In the course of instructing the jury, the trial judge, on her own initiative, included the following:

“I want to speak about one other thing, and I find it's best to directly speak about this, to discuss it openly. My experience is that jurors are often tempted to speculate about things such as medical insurance or other types of insurance or benefits. Jurors also wonder about the attorneys['] fees, who pays them, how much they will be. Jurors also wonder about what might happen to a physician's insurance premiums. I am specifically instructing you that you must not consider any of these things in deciding the case or determining what amount, if any, you will award for damages. If you were to speculate about insurance[] or attorneys['] fees, how much they might be or who will pay them, then you would be

speculating about things that are not part of the evidence, things that the law says you must not consider and things about which you could only be guessing. If you were to try to consider, compensate for, or adjust for any of these things, you would be ignoring your duties as jurors. Worse, you could very likely cause a result or outcome that you don't intend. The law and the [c]ourt have rules that govern these matters. They are not matters for jurors.”

The Court upheld the trial judge's instructions. Although the Supreme Court noted that neither party had raised the issue of insurance, it held that, because liability insurance is a concept that pervades daily life and features prominently in the national debate regarding medical insurance and medical liability, the trial judge's introduction “simply addressed the reality that jurors often wonder about liability coverage,” and, as such, was proper.

Consequently where, prior to this ruling, raising the existence of malpractice coverage would trigger a mistrial, Oden endorses open discussions of malpractice insurance immediately prior to jury deliberations. Knowing that a trial judge is free to discuss the effects of a verdict on a defendant doctor's malpractice insurance premiums, our team at Roberts, Carroll has formulated plans to treat the issue to pre-empt and blunt the impact of the Court's jury charge.

Intervening and Superseding Cause

Although the echocardiologist had been permitted to amend his complaint to include intervening and superseding cause as a defense, the trial judge declined

to instruct the jury on the defense. The echocardiologist appealed this decision arguing, in essence, that any alleged negligence in his performance and analysis of the echocardiogram was not a legal cause of the patient's damages because his care was superseded by the surgeon's negligent failure to follow up on his report of A.I.³

The Supreme Court noted that under Rhode Island law, an intervening and superseding cause exists where an original tortfeasor's negligence can no longer be considered to be the proximate legal cause of the plaintiff's injuries. For the defense of intervening superseding cause to be presented to the jury, a defendant must demonstrate that a separate and unforeseeable secondary act of negligence took place such that the second negligent act is the sole cause of the plaintiff's injuries. The Court also held that an instruction on intervening and superseding cause should not be given in every case where harm is caused by two negligent tortfeasors. Rather, the Supreme Court noted that the trial justice has discretion to instruct the jury on intervening and superseding cause where he/she has determined that, as a matter of law, the alleged negligence of the second tortfeasor was independent of that of the first.

In this case, the Supreme Court held that the trial judge was correct when she decided not to instruct the jury on intervening and superseding cause. The Supreme Court agreed with the trial judge's conclusion that:

Since both the echocardiologist and the surgeon were operating

³ An echocardiogram is required in the course of mitral valve surgery to ensure that the replacement valve has been properly placed and to identify any complications or problems with heart function. There was conflicting testimony as to whether the echocardiographer identified A.I., and alerted the surgeon to the A.I.

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as part of a surgical team, their “roles and responsibilities were inextricably intertwined ... attempt[ing] to reduce an open heart surgery and the roles of the [doctors] to a question of who performed the last act ... makes no sense.

The Court also approved the trial judge’s holding that, because the echocardiologist and the surgeon were part of the same surgical team, although they each owed an independent duty to Mr. Oden, these duties “ran parallel” such that their duties included “guarding against the mistakes of another, even if those mistakes may be the result of negligence.”

How the Supreme Court’s application of the intervening and superseding cause concept in Oden will play out in future cases is unclear. The decision has a number of potentially important implications. Most clearly, Oden is a case about timing. The temporal proximity of the allegedly negligent acts played a central role in the viability of the intervening superseding cause defense. Since the echocardiologist’s actions and the surgeon’s actions occurred in the course of the same procedure it was almost impossible to truly segregate each act. The decision in Oden thus undermines the ability of defendants to raise intervening and superseding cause as a defense where negligence is alleged during the course of the same medical procedure. Additionally, the Supreme Court’s decision reinforces the idea that all physicians, and by extension all medical practitioners, have a duty to guard against the negligence of another physician or medical practitioner. While the full scope of this duty is not yet clear, one would hope that this duty would be limited to contexts like surgery and other situations where simultaneous care is being rendered.