Deliberations

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In *Lipinski v Krupp*, No. A-02561-5T3 (NJ Super Ct App Div, Feb 15, 2017), the plaintiff, on behalf of the deceased patient, submitted the following motion in his appeal, having lost at the trial court level. He claimed that "[T]he combined timing, language, and circumstances surrounding the issuance of the trial court's supplemental deliberations charge coerced the jury into reaching an expeditious verdict that manifested a surrender by one or more of the jurors' convictions and caused a miscarriage of justice." For the reasons stated below, the appellate court disagreed and affirmed the lower court ruling in favor of the defendant.

The facts, in a nutshell, are that the deceased was having psychological issues and was seeking therapy; she was also trying to quit smoking. The defendant prescribed Chantix for smoking cessation, which had numerous side effects attached to its use, and prescribers were advised to make sure the user was appropriately monitored. The patient thereafter committed suicide. The ensuing lawsuit claimed that because the defendants were negligent in monitoring the patient, her suicide was the fault of the defendant as had she been properly monitored, she would have been apprised of the dangers and the risks inherent in using the drug, and it was this breach of the standard of care that was the cause of the patient's death.

After a 2-week trial, and after 2 days of deliberations, the jury informed the judge that they could not come to a decision. The judge claimed that New Jersey did not have jury instructions for a deadlocked jury in a civil case, only one for criminal matters. Therefore, it fashioned one using New York's jury instructions for guidance. In the end, and after some back and forth between the judge and the attorneys for both sides, the jury was issued the following instruction.

> *I want to tell you just a couple of things. I know you're having a hard time. But, I do want to tell you that we had a [lengthy] process in selecting a jury. You all were chosen.*
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> *That means that both sides thought you were very good jurors and had a lot of confidence in you. Both sides thought you could be fair and impartial. And both sides have confidence in you as I do. There is no reason to believe that any retrial of this case would involve a jury that's more intelligent, reasonable, hard working, or fairer than you are.*
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> *I don't think so. I think we'd be lucky to get one as good. So, all I ask you is if each of you would try to view this with a fresh slate. Don't give up your own views and don't just concede for the purpose of conceding. But, do look at it with an open mind.*
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> *That's why we chose you, a lot of people we didn't choose. I saw a lot of you take notes. You all looked attentive. And, all I ask you if it's possible, look at it as hard as you can. And, finally, I appreciate that the process can be difficult.*
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> *In some respects, it wasn't intended to be easy. It's important that we have jurors and that we try to reach the best [result] possible. So, just take this in mind when you deliberate. Thank you very much.*

Fifteen minutes later, the jury returned a verdict in favor of the defendant. The plaintiff then motioned for a new trial claiming that the judge gave the wrong instruction. The plaintiff claimed that the judge had essentially coerced the jury into rendering a verdict. The judge responded that the jurors had disrupted their lives to serve on the jury; seemed to care a great deal about the case; appeared to be careful, attentive, and smart in their deliberations; and that while the jury instructions were not perfect, they were reasonable; and that the verdict reached was also reasonable.

The plaintiff also claimed that the following sentence should have been added. "Although you have a duty to reach a verdict, if that is possible, I have neither the power nor the desire to compel you to reach a verdict." Responding to all of this, the judge stated:

> *Our system [of justice] is based on the premise that, for someone to upset a jury verdict, it must be clearly and convincingly shown that there was a substantive or procedural error that would compel disregarding a jury verdict.*

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This is based on our concept that 8 jurors, 12 jurors, whatever the case may be, usually get things right. To upset a jury verdict, one may not speculate. One must prove by clear and convincing evidence that there was a miscarriage of justice. Either substantive or procedural but I don't think that hurdle can be overcome here.

Plaintiff's attorney says the jury was that divided. That kind of implies it's possible that there were four-four or even five-three and a mass of them switched in a short period of time. We'll never know and we should never know because the jury is entitled to its privacy. It's equally likely that it was six-two and one of the two switched to seven-one but we'll never know. But the important thing is that, that's really speculation.

I'm convinced on the record that we do not have any clear and convincing evidence of a miscarriage of justice. Therefore, I will deny the motion.

The case was then appealed. The appellate court reviewed the trial transcript and the jury instructions issued. In addressing the plaintiff's claim that the verdict of the trial court should be overturned and a new trial granted, the higher court stated that a jury instruction for a deadlocked jury did exist and that the following is the jury instruction that should have been given to a deadlocked jury in a civil case (New jersey Civil Jury Charge, 1.20 [2006]).

You have informed me that you have been unable as a jury to reach a verdict in this case. I do not wish to know, and I direct each of you jurors not to tell anyone, how your vote stands.

Although you have a duty to reach a verdict, if that is possible, I have neither the power nor the desire to compel you to reach a verdict.

I do want to emphasize the importance and the desirability of your reaching a verdict in this case provided that each of you can do so without surrendering or sacrificing principle or personal convictions.

You will recall that upon assuming your duties in this case each of you took an oath. That oath places upon each of you the responsibility of arriving at a true verdict based upon your own opinion and not merely by agreeing with the conclusions of the other jurors.

However, opinions can be changed by discussions in the jury room. The purpose of the jury system is to reach a verdict by comparing views and by considering the evidence with the other jurors.

During your deliberations each of you should be open-minded. You should consider the issues with proper attention to and respect for the opinions of each other. You should not hesitate to reexamine your own views in the light of your discussions.

You should consider also that this case must be decided at some time. You are selected in the same manner and from the same source from which any future jury must be selected. There is no reason to suppose that the case will ever be submitted to six persons more intelligent, more impartial or more capable of deciding it, or that additional or clearer evidence will ever be presented by one side or the other.

You may retire and take as much time as is necessary for further deliberations upon the issues submitted to you for determination.

The court concluded that the actual instructions given were not so divergent from the required one and therefore upheld the trial court's verdict in favor of the defendant.

COMMENTARY

Some cases are not that clear cut. There may be several ways to analyze any given case as much of orthodontic diagnosis and treatment planning is both objective and subjective. Some use a hard tissue paradigm; others rely more on a soft tissue evaluation. Our standards are often a little too loosey-goosey for many of us. Does anyone out there know of an established and accepted standard for how large a buccal corridor should be? Smile arcs, amounts of gingival display, and amounts of acceptable compensation for an underlying skeletal discrepancy all are inherently subjective. On top of this, we have a plethora of gizmos, widgets, and mechanical approaches to resolving whatever it is we see in an attempt to reach whatever our individualized goals are for a given case. Some would posit that there is too much art and not enough science. Oh well, such is the nature of orthodontics. It comes with being a "softer" as opposed to a "harder" clinical science.

You have 2 good attorneys making very good arguments. In the end, yes, it can sometimes be too close to call. However, in our jurisprudential system, that is exactly what a jury is asked to do. To listen, to digest, to ruminate, maybe to argue a little, and then to reevaluate and ultimately come to a decidedly overwhelming, if not unanimous, consensus. I gotta tell ya, in the end, I wouldn't want it any other way. Our system of trial by a jury of our peers is the best thing out there. It may not be perfect, but it is way ahead of whatever is in second place.

I've said this before. As a clinician, you must practice with the mindset that everything you decide about how you are going to do whatever it is you are going to do

and why you are doing it, will someday and in some way be seen, heard, or handled, and then digested, evaluated, and ultimately determined to have fallen within or outside of the standard of care. Therefore, you need to document your judgments as well as your actions. You need to be able to support and defend the whys and wherefores of your clinical decision making. If you can be certain of the relative documented correctness of your decision making, it will make it much easier for a jury to decide to arrive at the same conclusion.