

INSIDE THIS ISSUE

Mitigate Data Breach Liabilities	2
Misleading Answers	4
PLUS Conference	5
PLUS U	6
PLUS Closes NASDAQ	6
PLUS Foundation	9
D&O Recaps	
Talking to the Board	10
View from the Top	11
Calendar of Events	Back

HEALTHCARE FACILITY PATIENT INJURY CLAIMS: DO THEY SOUND IN GENERAL NEGLIGENCE OR PROFESSIONAL LIABILITY?

by Kristin D. McMahon and Timothy W. Kelly



Kristin D. McMahon is an attorney and Chief Claims Officer of IronHealth, Ironshore's Healthcare Liability Division, headquartered in Simsbury, CT. Kristin oversees all claims under IronHealth's managed care, healthcare, and nursing home professional liability policies. She can be reached at kristin.mcmahon@ironshore.com or 860-408-7812.

Timothy W. Kelly is an attorney with the law firm of Kerns, Frost & Pearlman, LLC in Chicago, Illinois whose diverse practice includes a wide range of commercial litigation matters with a focus on liability insurance coverage, including professional liability and general liability coverage, and reinsurance. He can be reached at tkelly@kpfplaw.com or 312-261-4579.

In deciding whether a particular claim implicates professional or general liability coverage, courts generally look to whether the claim is based on the rendering or failing to render professional services. A professional act is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor or skill and the labor or skill is predominantly mental or intellectual, rather than physical or manual.² While certain patient injury claims clearly implicate a healthcare facilities' professional liability coverage (i.e., bodily injury or death claims arising out of facility's negligent treatment of patient's decubitus ulcers, administration of excessive doses of medication), courts deem some patient injury claims as sounding in general liability rather than professional. For example, in *Lexington Ins. Co. v. Educare Community Living*, 149 Fed.Appx. 326 (5th Cir. 2005)(Texas law), an unpublished decision, Lexington, a medical professional liability insurer, sought a declaration that it had no duty to defend or indemnify the insured group home under the medical professional liability section of its policy with respect to claims that its employee sexually assaulted a resident. The Fifth Circuit Court of Appeals concluded that, under Texas law, a medical professional's liability insurance policy's coverage for "supervising, teaching, proctoring others at insured's request" did not cover training and supervision of defendant employee technicians because neither defendant had any specialized medical education or experience or was allowed to provide medical treatment.³

The Louisiana Supreme Court is one of the more recent courts to weigh in on the *professional v. general liability* debate in the context of patient injury/death at a healthcare facility in the wake of a natural disaster. On September 5, 2007, the Louisiana Supreme Court issued a sharply divided 4-3 opinion holding that certain Hurricane Katrina related claims by patients

Although more than three and a half years have passed since Hurricane Katrina's landfall on August 29, 2005 and the resulting deaths of dozens of patients at numerous Louisiana based healthcare facilities, healthcare providers continue to defend against patient bodily injury/wrongful death claims. Significantly, the insurers of these healthcare facilities and the courts have been grappling with the issue of whether these matters should be characterized as sounding in general negligence or professional liability. The answer to this question has ramifications for both the injured patient who may find his or her potential recovery limited by state medical malpractice caps and the healthcare provider's insurers who must determine whether the healthcare provider's professional or general liability coverage limits are implicated.¹

Save These Dates!

PLUS
Professional Risk Symposium:
EPL, E&O and Fiduciary

April 29 & 30, 2009
Manchester Grand Hyatt
San Diego, CA



Check out the PLUS web site
for more information:
www.plusweb.org

against healthcare providers constitute general negligence rather than medical malpractice. See, *LaCoste v. Pendleton Methodist Hospital*, 966 So.2d 519 (La. 2007). As such, the defendant provider's liability was not limited to \$100,000 (plus an additional \$400,000 payable by the Patient Compensation Fund) under the Louisiana Medical Malpractice Act ("LMMA"). Pendleton Hospital faces potential unlimited liability as the plaintiffs were permitted to pursue a negligence claim in state court.

A brief overview of the underlying facts in *LaCoste* is helpful. Althea LaCoste was admitted to the defendant hospital, Pendleton Methodist Hospital, L.L.C. ("Pendleton Methodist"), at which time she was recovering from pneumonia and required the use of a ventilator. During Hurricane Katrina and its aftermath, Pendleton Methodist Hospital lost electrical and emergency power resulting in the failure of life support systems. The plaintiffs in *LaCoste* alleged negligent and intentional misconduct by Pendleton Methodist Hospital in designing, constructing and/or maintaining a facility in such a manner that the hospital did not have sufficient emergency power to sustain life support systems and flood waters were able to enter the structure, thus endangering the safety of the patients.

The trial court concluded that the plaintiffs' allegations of wrongful conduct were not treatment related or caused by the dereliction of skill but related "to deficient design of the hospital including lack of emergency power, failure to implement an evacuation plan and failure to have a facility to

transfer patients." The appellate court reversed finding that the plaintiffs' claims related to the medical treatment Mrs. LaCoste received, the evaluations made of her during her stay, and her presentation to the healthcare provider which determined whether and when she should be evacuated from the hospital. As such, the appellate court concluded that plaintiffs' allegations were "all medical in nature and [fell] within the provisions and purview of the LMMA."

On September 5, 2007, the Louisiana Supreme Court reversed the decision of the appellate court and reinstated the decision of the trial court finding that the tort liability of the defendant was governed by general tort law rather than the Louisiana Medical Malpractice Act. The *LaCoste* court applied six factors to determine whether the claim sounded in medical malpractice.⁴ In analyzing the first factor, the *LaCoste* court rejected the hospital's argument that the decision to shelter in place rather than transfer patients to other hospitals as the storm approached was treatment related. Rather, the *LaCoste* court found the plaintiffs' allegations of misconduct related to deficient design of the hospital, including lack of emergency power, a failure to implement an evacuation plan, and a failure to have a facility to which a transfer of patients could be made, and not to medical treatment or the dereliction of professional medical skill.

With respect to the second factor, the *LaCoste* Court concluded that, while expert medical evidence could be necessary to establish causation with regard to the death of Mrs. LaCoste, no such expert medical evidence would be required to establish the alleged wrongful conduct on the part

of the hospital with regard to its failure to maintain adequate emergency power or its failure to protect the facility against floodwaters.

Applying the third factor, the Court stated that although Mrs. LaCoste may have been on a ventilator when the storm arrived, the pertinent acts forming the crux of plaintiffs' negligence claims involved the decisions of engineers or administrators in determining how to design or maintain the building, how much emergency power to have available, and how and when to implement an emergency evacuation. According to the *LaCoste* court, the engineers or administrators would not have needed to assess Mrs. LaCoste's medical condition to determine whether sufficient emergency power would be available or an evacuation should be implemented.

Regarding the fourth factor, the *LaCoste* court noted plaintiffs did not allege an "incident" in the context of a physician-patient relationship. Rather, the incidents cited in the petition involving lack of sufficient emergency power, the building's inadequate design and structure, and the failure to have in place a patient transfer plan allegedly caused the complete inability to transfer Mrs. LaCoste or to maintain her life-support system, and they did not involve a physician-patient relationship within the meaning of the LMMA.

Since the *LaCoste* court found that plaintiffs' allegations were neither treatment related nor the result of a dereliction of professional medical skill, whether Mrs. LaCoste would have lived had she not been admitted (i.e., the fifth factor), the Court noted that this factor did not weigh greatly in favor

continued on page 8

PLUS Digest, Case Reviews and the Class-Action Settlements and Filings Calendars Go Online!

In our efforts to make information more readily available to you, the PLUS Digest and Case Reviews will no longer be printed in the PLUS Journal after this issue.

We will instead post them on our web site under our blog.

In addition, the Class-Action Settlements and Filings Calendars will also go online under our industry library.

We hope this will provide you with more timely information, posted much more frequently online.

Check it out at www.plusweb.org.

of finding that the wrongful conduct alleged fell within the confines of the LMMA. Finally, the court noted that the sixth factor was not an issue in the case, as the plaintiffs' allegations of intentional tort did not have to be submitted to a medical review panel.


More recently, a Louisiana Court of Appeal in *Mineo v. Underwriters at Lloyd's of London* 2008 WL 4724010 (La. App. 4th Cir.) (October 22, 2008), considered the *LaCoste* factors and found that claims alleging that the nursing home was negligent in failing to provide resident adequate medical care and medication to its residents during Hurricane Katrina sounded in medical malpractice while claims alleging that the home was negligent in failing to remove the resident from the home prior to landfall of the hurricane or to provide adequate food and hydration sounded in general negligence.

CONCLUSION

While the Louisiana Supreme Court's decision in *LaCoste* is instructive on how a court may analyze whether a case sounds in medical malpractice or general liability⁵, the decision is not binding on, nor

is there a consensus among, courts outside of Louisiana on how to approach characterization of healthcare facility negligence claims. For example, in *American Economy Insurance Company v. Jackson*, 476 F.3d 620 (8th Cir. 2007), a decision issued several months prior to *LaCoste*, the United States Court of Appeals found that a Missouri based nursing home facility's failure to engage its HVAC system's air conditioning unit during an April 2001 heat wave constituted a professional service for purposes of a professional liability exclusion contained in the facility's business owner's policy. As a result of the facility's failure to switch the HVAC system from heat to central air conditioning, several residents died from complications arising from excessive heat exposure. Central to the *Jackson* court's decision to treat this matter as a professional versus general liability claim was the fact that the director of nursing relied upon her training, knowledge and experience as a nurse in making the decision not to adjust the HVAC system.⁶

Some insurance policies affording both professional and general liability coverage to healthcare facilities are silent with respect to whether patient tort claims fall within the professional or general liability

sections of the policy. The answer will depend on whether the underlying claim is deemed to involve medical treatment thus implicating the professional liability insuring agreement or the insured's general business activity thereby implicating the general liability insuring agreement. In response to the uncertainty regarding characterization of a patient tort claim, some insurers expressly preclude from the general liability coverage of their policies any claim involving a patient. These carriers are drawing a bright line in the sand for their insured healthcare facilities and their brokers alerting them to the fact that the limits afforded under the professional liability section of their policy will respond to patient injury claims while the limits afforded under the general liability section will respond to tort claims caused by the insured's business activities. Other insurers' policies are silent on whether the general liability insuring agreement may be implicated by a healthcare facility patient tort claim. Insurance brokers and their healthcare facility clients should carefully consider general and professional liability claim characterization when reporting claims and its impact on deductible amounts and erosion of the applicable insuring agreement's policy limits. 

FOOTNOTES

- 1 Commercial general liability policies serve a purpose distinct from professional liability policies. *American Motorists Ins. Co. v. Southern Security Life Ins. Co.*, 80 F.Supp.2d 1285, 1288 n.3 (M.D.Ala. 2000). A general liability policy provides comprehensive coverage to the insured and covers certain types of general business activity, while a professional liability insures members of a profession from liability arising out of a special risk associated with practicing a particular profession. *Id.* Coverage is normally excluded in general liability policies for rendering and failing to render professional services.
- 2 See, *Hampton Medical Group, P.A. v. Princeton Ins. Co.*, 840 A.2d 915, 921 (N.J.App. 2004) (quoting 7A.Appleman, Insurance Law and Practice §4504.3). An act should not be deemed a professional service merely because it is performed by a professional. *Id.* Rather, it must be necessary for the professional to use his specialized knowledge or training. *Id.* The relevant consideration is not the title or character of the party performing the act, but the act itself; *Hampton Medical Group*, 840 A.2d at 924; *Visiting Nurses Association of Greater Philadelphia v. St. Paul*

Fire & Marine Insurance Company, 65 F.3d 1097, 1101 (1995).

- 3 See, *Williamson v. Hospital Service District*, No. 1 of Jefferson, 888 So.2d 782 (La. 2004) (Louisiana Supreme Court held hospital's failure to repair a wheelchair resulting in injury to its patient did not sound in malpractice); *Romero v. Wills-Knighton Medical Center*, 870 So.2d 474 (La.App. 2004) (Court concluded that a patient who was injured while walking on a treadmill while undergoing physical therapy at a medical center did not have to submit a claim to a medical review panel under the Louisiana Medical Malpractice Act prior to filing suit).
- 4 The six factors included: (1) whether the particular wrong is "treatment related" or caused by a dereliction of professional skill; (2) whether the wrong requires expert medical evidence to determine whether the appropriate standard of care was breached; (3) whether the pertinent act or omission involved assessment of the patient's condition; (4) whether an incident occurred in the context of a physician-patient relationship, or was within the scope of activities which a hospital is licensed to perform; (5) whether the injury would have occurred if the patient had not sought treatment; and (6) whether the tort alleged was intentional.

- 5 See, *Leonard v. Department of Health and Hospital Ruston Developmental Center*, 2008 WL 239669 (La.App.2 Cir.) (January 30, 2008) (Court of Appeal held that wrongful death claim by parents of a client of a group home who died after ingestion of an unknown quantity of medication after one of the residents gained unauthorized access to the medication room was a general negligence case and not a medical malpractice case which had to be presented to a medical review panel because the incident did not occur in the context of a doctor patient relationship).
- 6 See also, *Fridell v. CommonBond Communities*, 2008 WL 434616 (Minn.App.) (not reported in N.W.2d) (Court of Appeals in Minnesota held that wrongful death claim filed on behalf of 90 year old resident of assisted living facility who died of complications of thermal burns after she was found unconscious on the floor of her shower with her head and torso under hot water is a professional negligence claim against a healthcare provider and not a premises liability claim stemming from the landlord's negligent provision of scalding hot water to the decedent's unit because the assisted living care facility owed specific duties (i.e., supervision in bathing activities) to its residents that landlords do not owe to their tenants).



Calling All Authors

Have you authored an article or thought about writing an article on a professional liability topic? Do you want to share it with the PLUS membership? Then send it to us and we'll look at publishing it in the *Journal* and/or archive it in our resource library on our web site.

It's easy! You can either provide your article online through our web site article submission area or e-mail it to Kim Holland at kholland@plusweb.org.