

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

Sally Pruett, Individually, and on )  
Behalf of the Estate of Charles )  
Pruett, )

Plaintiffs, )

v. )

C.A. No. 08C-03-033

Ronald L. Lewis, D.O., and )  
Cardiology Consultants, )

Defendants. )

Date Submitted: March 1, 2011

Date Decided: March 10, 2011

Upon Plaintiffs' Motion in Limine as to Exclusion of  
Dr. Myerburg's Statistical Evidence: **GRANTED**

Robert J. Leoni, Esquire and Gilbert F. Shelsby, Jr., Esquire, Shelby & Leoni, 221  
Main Street, Stanton, Delaware, 19804, Attorneys for Plaintiffs

Bradley J. Goewert, Esquire and Thomas J. Marcoz, Esquire, Marshall, Dennehey,  
Warner, Coleman & Goggin, 1220 North Market Street, 5<sup>th</sup> Floor, P.O. Box 8888,  
Wilmington, Delaware, 19899-8888, Attorneys for Defendants.

Jurden, J.

## I. INTRODUCTION

Before the Court in this medical malpractice case is plaintiffs' motion in limine to exclude testimony concerning statistics from defense expert Dr. Robert J. Myerburg. The plaintiffs allege that the defendants breached the standard of care relative to medical treatment provided to Charles Pruett, the decedent, thereby causing personal injuries and death to Mr. Pruett. Defendants intend to call Robert Myerburg, M.D. as a cardiology expert at trial. Included in Dr. Myerburg's expert report is a discussion of various cardiac conditions, including Sudden Cardiac Death ("SCD"), and statistical information regarding the occurrence of those cardiac conditions in population groups in the United States.<sup>1</sup> Dr. Myerburg links these statistical probabilities to causation and standard of care issues in this case.<sup>2</sup> Dr. Myerburg's report implies that because two-thirds of patients suffer Sudden Cardiac Death without signs or symptoms, then the defendants did not breach the standard of care and cause decedent's death.

---

<sup>1</sup> See Dr. Myerburg's January 12, 2011 report at Exh. A, pp. 3-7 of Plaintiffs' Motion in Limine as to the Exclusion of Dr. Myerburg's Evidence [Trans. ID 35967875].

<sup>2</sup> See, e.g. *Id.* at p.6. ("...[A]most two-thirds of all SCD's due to coronary heart disease occur **as the first clinically recognized manifestation** of the underlying disease....") (emphasis added).

## II. DISCUSSION

Plaintiffs seek to exclude any use of statistical evidence to indicate that defendants complied with the standard of care, and argue that such use of statistical evidence runs afoul of *Timblin v. Kent General Hospital*.<sup>3</sup>

In *Timblin*, the Supreme Court reversed the trial judge's refusal to grant a new trial when Kent General's counsel emphasized to the jury that individuals often die, or suffer a neurological injury, after a cardiac arrest. Timblin entered Kent General complaining of chest pain. He was diagnosed as suffering from a heart attack and admitted to the Kent General coronary care intensive care unit. In the hours following his admission, he continued to experience an irregular heartbeat for which he was prescribed Lidocaine. Timblin had a severe reaction to the medication, and suffered a grand mal seizure during which he became unconscious and stopped breathing. Valium was administered to control the seizure and Timblin went into cardiac arrest. After doctors attempted unsuccessfully to establish an artificial airway, a nurse anesthetist was finally able to intubate Timblin. By the time that happened, Timblin had been without oxygen for approximately 25 minutes. Although Timblin was resuscitated, he suffered neurological damage due to lack of oxygen to his brain. Plaintiffs alleged that the Kent General staff was not adequately trained to intubate Timblin or resuscitate

---

<sup>3</sup> 640 A.2d 1021 (Del. 1994).

him properly, and that the failure to properly ventilate Timblin proximately caused his neurological damage.

In its defense, Kent General introduced a medical expert who testified to the following: (1) when a patient experiences a cardiopulmonary arrest, “certainly less than half – and that’s being generous – will survive;” (2) a review of two articles involving in-hospital arrests revealed that “they had a success rate, a survival rate,...of only fourteen to sixteen percent respectively. That’s only one out of seven that survives;”<sup>4</sup> (3) at least eighty percent of individuals will have some kind of brain damage because of cardiopulmonary arrest; (4) “statistically, we know less than twenty-five percent of patients whose heart [sic] goes into a systole [cessation of electrical activity] can be resuscitated. I think it’s one out of twenty. I think it was remarkable that they were able to bring his heart back under those circumstances.”<sup>5</sup>

The jury in *Timblin* returned a defense verdict. On appeal, the plaintiffs argued, *inter alia*, that the statistical evidence introduced by Kent General’s expert was irrelevant to the hospital’s treatment of Timblin and was highly prejudicial. The Supreme Court determined that the admission of the statistical evidence was erroneous because its probative value was substantially outweighed by its prejudicial effect, and reversed the trial court. The Supreme Court held that the

---

<sup>4</sup> *Id.* at 1022.

<sup>5</sup> *Id.* at 1022-23.

statistical probability of death or brain damage following a cardiac arrest cannot be used to show that a doctor acted in conformity with the applicable standard of care.<sup>6</sup> As noted by the Supreme Court in *Timblin*:

It is settled law that the standard of care in a medical malpractice action is established by evidence of the degree of care and competence ordinarily exercised by physicians on the same or similar community. **A defendant may not use evidence that a patient's treatment ended with an expected result to infer the patient received proper care. If it is a fact that 80% of cardiac arrest victims die or suffer brain damage, that fact is not relevant to the issue of whether Kent General deviated from the applicable standard of care in trying to resuscitate Mr. Timblin.**<sup>7</sup>

In *Timblin*, there was no dispute that Timblin's neurological damage was caused by the approximate 25-minute period he was deprived of oxygen, and that he was deprived of oxygen because an airway could not be established for approximately 25 minutes. The only issue was whether Kent General's alleged negligence proximately caused the delay in establishing the airway. If Kent General was unable to ventilate Timblin even though it complied with the applicable standard of care, then Timblin's brain damage was not caused by Kent General's conduct.<sup>8</sup> The Supreme Court reiterated that statistical probability evidence "creates a significant risk of jury confusion and unfair prejudice" because it might cause the jury to decide the case based on what happens normally instead

---

<sup>6</sup> *Id.* at 1024.

<sup>7</sup> *Id.* (Citations omitted) (Emphasis added).

<sup>8</sup> *Id.* at 1024-25.

of what happened in the case before it.<sup>9</sup> As the Supreme Court noted, the causation issue in *Timblin* was whether the inability to create an airway was caused by Kent General's alleged negligence, not whether Timblin's brain damage was an inevitable result of the cardiac arrest. Consequently, "the statistical evidence had little, if any, relevance to the issue of causation...."<sup>10</sup> The Supreme Court determined that the statistics introduced in *Timblin* invited an inference that because the majority of patients who suffer a cardiac arrest die or suffer brain damage, Timblin was expected to suffer brain damage. "Because [s]uch an inference is not based upon the facts of the case at hand, but rather an impermissible speculation based on inapplicable statistics,<sup>11</sup> the potential for misleading the jury was quite substantial."<sup>12</sup>

The plaintiffs in this case argue that Dr. Myerburg's statistical evidence is barred under Delaware Rule of Evidence 403 because, like the statistical evidence offered in *Timblin*, its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury. According to the plaintiffs here, the statistics offered by Dr. Myerburg "tend to mislead the jury into believing that

---

<sup>9</sup> *Id.* See also *Frey v. Goshow-Harris*, \*3 2009 WL24637889, (Del. Super.) ("Just as it was improper for Kent General to argue [in *Timblin*] that it was not negligent because most people suffer brain damage or die during a cardiac arrest, it was also improper to argue that because most gynecologists miss a ureter injury during surgery...[the defendant doctor's] actions were not negligent."

<sup>10</sup> *Id.* at 1025.

<sup>11</sup> *Id.* at 1026. The Supreme Court noted that unless a "special nexus" is shown between the evidence of common behavior and the facts of the case, the use of such common behavior evidence is highly prejudicial.

<sup>12</sup> *Id.*

Decedent's injuries were unavoidable and not attributable to Defendant's conduct given the occurrence of Sudden Cardiac Death in the general population."<sup>13</sup> The court agrees. The fact, if it is a fact, that almost two thirds of all Sudden Cardiac Deaths due to coronary artery disease occur as the first clinically recognized manifestation of the underlying disease enlightens the jury to infer that the decedent's death was inevitable and unpreventable because in the majority of people with coronary artery disease the first clinically recognized manifestation of the disease is sudden cardiac death. Dr. Myerburg's statistical evidence also invites the jury to infer that this fact, if it is a fact, means that because the symptoms of coronary artery disease were not clinically apparent by routine exam or by the nature of emergent symptoms, the defendant's did not deviate from the applicable standard of care. The statistical evidence sought to be introduced through Dr. Myerburg by the defendants also invites the jury to infer that because statistically two thirds of patients suffer sudden cardiac death without signs or symptoms, the defendant's complied with the standard of care. Just as it is improper to use an unusual outcome to create an inference that the proper standard of care was not exercised, it is improper to infer that the patient received proper care simply because his treatment ended with the result that occurs in two thirds of patients with underlying

---

<sup>13</sup> See Plaintiff's Motion in Limine at 2-3 [Trans. ID 35967875].

coronary artery disease.<sup>14</sup> Delaware Courts have held that unless a “special nexus” is established between the evidence of common behavior and the facts of the case, the use of such common behavior evidence is highly prejudicial. The Court finds no such special nexus here. The danger of unfair prejudice, confusion of the issues, and misleading the jury substantially outweighs the probative value of the ??? statistics. Moreover the evidence of statistical probability creates a significant risk of juror confusion and unfair prejudice because such evidence might lead the jury to decide the case “based on what happens normally instead of what happened in the case before it.”<sup>15</sup> At issue is whether the defendants complied with the applicable standard of care and, if not, whether their breach proximately caused the decedent’s death. The statistical probabilities contained in Dr. Myerburg’s report are not relevant to whether the defendants in this case exhibited the degree of care and competence ordinarily exercised by physicians in the same or similar community in their treatment of the decedent. Just as in inference of negligent medical treatment is not warranted simply because the treatment ends with the highly unusual result, the inference of medical treatment complying with the standard of care is not warranted simply because the treatment of a patient ends with a statistically probable result.<sup>16</sup>

---

<sup>14</sup> See *Frey v. Goshow-Harris*, \*2 2009 WL24637889, (Del. Super.).

<sup>15</sup> *Timblin* at 1025.

<sup>16</sup> *Id.* at 1024.



### **III. CONCLUSION**

Because the Court finds that the relevance of the statistical information sought to be introduced by the defendants in this case is substantially outweighed by the danger of unfair prejudice, confusion and misleading the jury,<sup>17</sup> and further because the Court does not find a special nexus between the statistical evidence and the facts of the case, the Court **GRANTS** the plaintiffs' motion in limine excluding the statistical evidence.

**IT IS SO ORDERED.**

---

Jan R. Jurden, Judge

cc: Prothonotary – Original

---

<sup>17</sup> Delaware Rule of Evidence 403,