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PATIENT SAFETY ACT HEALTH CARE ADVISORY

In a Case of First Impression, a Connecticut Trial Court Rules That Investigation Materials Were Privileged Under the Patient Safety and Quality Improvement Act and State Laws

April 18, 2023

On March 31, a Superior Court in Connecticut issued a decision in which a Hospital's motion for a protective order was granted on the basis that documents demanded by the plaintiff who was injured at the Hospital were privileged under both the Patient Safety and Quality Improvement Act of 2005 (PSQIA) and Connecticut statutes.

I. Trial Court's Discussion and Analysis

A. Background

The plaintiff in this lawsuit was accidentally injured when resisting efforts by the Hospital's Protective Services Officers to address his threatening and aggressive behavior when attempting to remove a woman from the Emergency Room. He also was arrested by the local police department. It was later determined that the woman was his girlfriend. The lawsuit against the Hospital alleged assault and battery, negligence, negligent training and supervision and unlawful and forcible detention leading to false arrest.

During discovery, the plaintiff noticed up the deposition of the Hospital's Patient Safety Coordinator and requested that she produce "[a]ny and all records (including any written reports, videos, email communications, interoffice memos concerning said incident, etc.) … wherein [Plaintiff] was injured and subsequently arrested." In response, the Hospital filed a motion for a protective order. In the motion, the Hospital argued that the materials requested were created within its patient safety evaluation system (PSES) as part of an investigation into the incident. Moreover, the documents were reported to its contracted patient safety organization (PSO) and therefore were privileged under the PSQIA and Connecticut statutes. The plaintiff opposed the motion arguing that both statutes only applied to the peer review process in medical malpractice lawsuits and did not apply to the causes of action in his civil complaint.

B. Documents Were Privileged Under Both the PSQIA and Connecticut Statutes

In the court's rather lengthy opinion granting the Hospital's motion to compel, it relied heavily on the Illinois Appellate Court decision in *Daley v. Teruel*, 2018 IL. App (1st) 170891, 107 N.E.3d 1028, and the court's description and analysis of the scope and application of PSQIA privilege protections. In *Daley*, the Appellate Court held that incident and similar reports created within a hospital's PSES and reported to a PSO were privileged patient safety work product (PSWP) in a medical malpractice action.

Critical to the trial court's analysis were the unrebutted representations set forth in Patient Safety Coordinator's affidavit. These included the following:

- As Patient Safety Coordinator, she conducted an investigation of the incident within the hospital's PSES.
- She was one of the "designated leaders responsible for collecting, analyzing and managing [PSWP] for the purpose of submitting to a patient safety organization pursuant to the… (PSQIA)," quoting from the opinion.

- The investigation notes she prepared were reported to the PSO and were not prepared, maintained or distributed outside of its PSES.
- The Hospital contracted with a PSO, certified by AHRQ, during the time of the incident.
- The Patient Safety Coordinator participated in a safety huddle with other employees to discuss the incident and interviewed an emergency nurse who witnessed the event.
- The purpose of the huddle and interview was to obtain information to report to the PSO in order to improve the quality and safety of patient care.
- "The results of the investigation and interviews led to the creation of a subcommittee to work on an alert process designed to manage incoming aggressive behavior patients in order to better manage the care and safety of these patients," quoting from the court's opinion.
- "The affidavit … establishes that the documents were assembled and prepared by her solely for submission to [the PSO]… and were reported to the [PSO]," quoting from the court's decision.
- Based on the affidavit, the court further concluded that "the documents had the ability to improve patient safety and the quality of health care, and… were submitted to the PSO."

Quoting again extensively from the *Daley* decision, as well as the PSQIA and the Connecticut statutes, the court concluded that the hospital met its burden of establishing that the materials in dispute were privileged from discovery under both laws.

C. The Privilege Protections Under the PSQIA and Connecticut Statutes Are Not Limited to Medical Malpractice Cases

The court then addressed the plaintiff's contention that both the PSQIA and the Connecticut statutes only applied to medical malpractice cases. In doing so, it noted that the clear language in both statutes did not include such a limitation. Nor did any of the specified limitations apply in this case. It also quoted extensively from the federal district court decision in *Tinal v. Norton Healthcare, Inc.* (U.S. Dist. Ct, W.D. Kentucky, Civil Action No. 3:11-CV-596-8(July 15, 2014). In that case, the plaintiff filed a lawsuit against a hospital claiming wrongful termination under the Americans with Disabilities Act. As in this case, the plaintiff argued that the PSQIA privilege protections only apply in medical malpractice cases.

The District Court in *Tinal* rejected the plaintiff's argument concluding that: "in absence of any explicit exception to the plain language of [the PSQIA] for civil rights actions, it is clear to the Court that the privilege created for patient safety work product is intended to apply across-the-board to all other types of claims." Based on *Tinal* and its own interpretation of the PSQIA, in addition to the Connecticut principles of statutory construction, the trial court ruled that the privilege protections under both laws were not limited to medical malpractice cases. Accordingly, the trial court granted the hospital's motion for a protective order.

II. Lessons Learned and Takeaways

1. It is critical that defense attorneys in any federal or state civil or criminal proceeding or agency investigation have a clear understanding of the PSQIA and state peer review statutes when challenging discovery requests for information which is privileged under these laws.
2. When defense attorneys are not familiar with the PSQIA and the court decisions interpreting the scope of protections, providers should consider teaming up with outside attorneys experienced in this area.[1]

[1] For this case, I worked collaboratively and successfully with Brock Dubin, the Hospital's experienced defense attorney and partner in the firm of Donahue, Durham & Noonan, P.C., in Guilford, Connecticut. This included assistance in the preparation of an affidavit, the motion for protective order and the PSQIA legal arguments. I also successfully assisted Illinois defense counsel before the trial court and the Appellate Court in *Daley* and the trial court in *Proctor* both which were quoted from and/or cited by the trial court here in reaching its decision.

3. The use and introduction into evidence of a detailed affidavit(s), which include representations similar to the affidavit in this case, along with the applicable PSES policies, is a legal imperative if hoping to defend against discovery demands for privileged information.
4. The privilege protections under the PSQIA and state laws can both apply depending on the respective laws and how they are being interpreted. There are now a number of court decisions holding that these statutes are not mutually exclusive.
5. Although the trial court here concluded that it did not need to determine whether the deliberations and analysis method applied in this case, these protections probably apply to more PSWP categories of privilege information compared to information which is reported to a PSO. Your PSES policy should carefully describe in detail what information is being reported to a PSO and what information is being treated as deliberations or analysis. Functional reporting is a third method used by some PSOs and their members but is less common than the reporting and the deliberations and analysis methods.
6. If appealing an adverse discovery ruling, make sure that the record on appeal, including supporting affidavits, policies, legal arguments, etc., is included. Otherwise, they will not be considered by the appellate court. The failure to submit a full and complete trial court record and arguments has led to a number of adverse court decisions that otherwise might have upheld the PSQIA protections.

Read the full trial court opinion here. Because the case is still pending, at the client's request, the names of the parties and any other identifying information have been redacted.

CONTACT

If you have any questions regarding this or any other court decision involving the Patient Safety Act, or if you need assistance in responding to PSWP discovery demands, please feel free to contact me directly.

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