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What's GOING ON?

Is the $4 million Arizona LASIK verdict an anomaly or not?

By C. Gregory Tiemeier, Esq.

With their signatures on a verdict form, the jurors in Tucson, Ariz., cast a dark cloud of doubt over the viability of the most popular elective surgical procedure in the United States. The LASIK surgery in question, performed by Robert W. Snyder, M.D., Ph.D., at the University Physicians, Inc. facility, was as successful as could be expected. Stephan Post, a United Airlines pilot, had 20/20 uncorrected vision. The claimed postoperative condition impaired night vision was listed on the surgical consent form he had signed, and the informed consent discussion with Dr. Snyder was well-documented. And for this recognized complication of an appropriately performed LASIK procedure, the jurors awarded $4 million.

ILLUSTRATION: AARON MCCLELLAN

What is going on here? Should we expect more verdicts of this magnitude? And are responsible surgeons risking their livelihoods by offering patients what is a safe and effective procedure?

In this article, I'll offer some answers to those questions and try to put the whole issue of LASIK lawsuits into some context by examining key facts and outcomes from current cases.

What happened in Arizona?

The Arizona verdict shocked LASIK surgeons across the country, including those who testified in the trial as expert witnesses. Jeffrey Machat, M.D., who had testified on behalf of the plaintiff, sent out a letter of explanation to fellow refractive surgeons on May 30, 2002, expressing his surprise at the size of the verdict. He found it particularly disturbing because he had testified that he could successfully retreat Mr. Post in 1 or 2 years to allow him to resume flying. In the letter, he also announced his resignation from the Clinical Advisory Group for TLC Vision Corporation.

Mr. Post alleged that there had been improper measurement of his pupils. They had in fact been measured in a dark room at 5.0 mm by a technician using a Colvard Pupillometer, and this measurement was confirmed by the optometrist. Dr. Snyder took the readings himself before operating and confirmed the previous findings. Mr. Post claimed, through his expert witnesses, that the measurements should have been performed in total darkness to simulate his flying in a cockpit at night. He also said he should have been told of increased risk of night vision problems because of his pupil size. At trial, experts testifying for the defense pointed out that pupil size is not as significant a factor as was thought in the past.

Dr. Stephen Slade, who examined the plaintiff for the defense, also expressed surprise at the verdict. He had been asked to testify regarding only the plaintiff's ophthalmic condition, and did not testify as to Dr. Snyder's standard of care. He believed that the problems Mr. Post experienced after surgery could probably be rectified with a custom ablation. He thought that the case had been well-tried by Dr. Snyder's attorneys, and felt that the jury had perhaps been taken in by emotion, rather than the evidence presented at trial.

The verdict was also a shock to me because of my involvement in a disturbingly similar case. On June 3, 2002, less than a month after the Arizona verdict, I was to open a trial in which the LASIK surgeon had performed an uncomplicated surgery resulting in 20/20 uncorrected vision. The plaintiff, an accountant/financial planner, claimed disabling night vision and lost income from impaired reading vision. He was purportedly so distressed by the vision impairment that he had spent more than a month in an

inpatient mental health facility. We suspected his 10-year history of depression and anxiety had a great deal to do with that.

But the plaintiff's lawyer was buoyed by the news of the Arizona verdict, and wasted no time in telling me about it. Convinced that the $4 million award was an anomaly, my client, co-counsel and I agreed to stick to our guns and proceed to trial. Our perseverance was rewarded by a dismissal of all claims on the eve of trial, with no indemnity payment to the plaintiff.

Recurring Issues

We may not yet know the ultimate result of the $4 million Arizona LASIK case involving Dr. Robert W. Snyder and pilot Stephan Post. At press time, Mr. Jeff Campbell, who represented Dr. Snyder, was planning to file supplemental briefs, and Sept. 18 had been set as a tentative date for hearings on a motion for a new trial and a motion for judgment notwithstanding the verdict.

According to Mr. Campbell, on Aug. 12, Dr. Jeffrey Machat, who had testified for the plaintiff in the trial, testified again at a hearing in Houston. There, he essentially recanted all of his standard-of-care criticisms. Dr. Machat said that he had assumed that the software used in the procedure would have been in multizone mode for Mr. Post's surgery, but this was an incorrect assumption. Because Mr. Post was a low myope, he had a single-zone ablation, so the treatment zone and the effective zone were the same.

Consequently, Dr. Snyder, (in Dr. Machat's opinion) did not have any heightened duty of informed consent to Mr. Post, and his disclosures were therefore appropriate and within the standard of care.

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Similar cases, different outcomes

How can this be? Two remarkably similar cases -- with two completely dissimilar outcomes. Can we reconcile these cases under the same justice system? The short answer is that we can't, and I don't think we should necessarily think we have to. The legal system is not without its anomalies. The multimillion-dollar verdict for the lapful of McDonald's java is already legend.

The more pressing question is whether responsible practitioners are risking their personal assets by offering patients a safe, effective procedure like LASIK. Certainly there is some evidence to support this. The American Trial Lawyer's Association has a subcommittee for LASIK malpractice attorneys. Web sites like surgicaleyes.org have links to guide unhappy LASIK patients to the offices of lawyers eager to take their cases. Verdicts in Arizona, New York and California have exceeded $1 million dollars, some several times over.

On the other hand, what the incredulous citizenry doesn't hear about are the hundreds of cases in which the plaintiffs get exactly what they deserve nothing. Indeed, several LASIK cases have been successfully defended. Many have settled or resulted in awards for relatively small sums, and others have been dismissed outright. These more mundane verdicts don't sell newspapers, and they don't inspire viewers to tune in at 11. What they do is leave most nonlawyers with a stilted view of what juries do and the usual outcomes of their deliberations.

A more realistic view of the landscape

Examining the results of some other recent LASIK cases may help us define the scope and boundaries of this problem, and perhaps make it a little less intimidating:

Class action suit is of little consequence. In May 2001, *Ophthalmology Management* reported on a lawsuit brought by three sisters in Washington who had LASIK. Unhappy with their results at the Lexington Eye Center, they filed suit against Lexington, Focus Eye Care, the surgeon and the optometrist. The case was filed as a class action, and was resolved in early 2002.

The sisters, and those similarly situated, alleged violation of the Washington Consumer Protection Act (RCW 19.86 et seq.). They claimed they had been exposed to advertising that built up the LASIK surgery and that they were offered guaranties but not informed of any risks until after they had paid for the procedure. Cancellation after disclosure of risks resulted in a cancellation fee. An optometrist, not an ophthalmologist, allegedly made the decision as to candidacy for surgery.

Lexington Eye Center and Focus Eye Care are now out of business. The case was settled primarily for injunctive relief, in which the defendants agreed to refrain from certain proscribed activities in the future. Among other stipulations, the defendants agreed to not raise defenses of "governing law" and "jurisdiction" clauses contained in the consent form if the patients choose to sue in the future.

Also, the ophthalmologist was ordered to perform all 1-day postoperative examinations of patients and all follow-up examinations. The optometrist was required to clearly identify to patients whether she was an employee of the ophthalmology practice or an independent contractor, and to let patients know who was deciding on candidacy for surgery and upon whose measurements that decision was based. The plaintiffs' lawyers received $202,000 in attorney's fees.

The settlement isn't particularly earthshaking in its magnitude. The attorneys' fees, while substantial, are unlikely to inspire legions of lawyers to flock to this type of litigation. The plaintiffs apparently received no financial remuneration; at least none is reported in the Final Order and Judgment linked to the Keller Rohrback, LLP website.

The defendant companies were already out of business, so the injunctive relief is likely to have little impact on them. As for the surgeon and the optometrist, the prohibitions on their conduct were limited to what they were required to do should they renew their business relationships with the two defunct entities, Lexington and Focus. Regardless of whether the defendants' practices warranted a lawsuit, little was accomplished from the litigation, aside from keeping several lawyers busy.

However, a lesson should be learned from the lawsuit. If the allegations of the complaint were true, or even substantially based in truth, in my opinion the practices alleged to have occurred at Lexington Eye Center should have been stopped. Medical practices that have sales as their primary focus, and not patient care, are shortsighted and ultimately damaging to the profession.

I've heard similar stories of high-pressure sales techniques employed by "closers" hired by one LASIK surgery chain in Colorado. With this entrepreneurial bent, I'm not sure why these "doctors" don't get out of the eye surgery business and instead sell vacation time shares.

Plaintiff won't likely see the $30 million he's seeking. You may have heard recently of a lawsuit filed in New York seeking $10 million in compensatory damages and $20 million in punitive damages. The plaintiff, Lawrence Reif, is a lawyer who specialized in securities and corporate work, which requires a lot of reading of contracts and securities offerings. These are generally written in small print. He says he can't read them anymore, thanks to the LASIK surgery he had in January 2000, and is consequently unemployed now.

The defendants are his optometrist of many years, the eye surgeon, an optometrist who saw him for what appears to be a single postoperative visit, and The Laser Centers, Inc. From the complaint, it appears Mr. Reif had about 12 prism diopters worth of exotropia at near (or perhaps a phoria; it isn't clear from the complaint). You may be wondering now whether this alone could have something to do with his difficulty reading fine print. Perhaps the course of litigation will shed some light on this.

A postoperative examination in July 2000 by a doctor Mr. Reif did not sue allegedly revealed inadequate tear film, irregular astigmatism and striae centrally, nuclear cataracts and a
7-mm pupil diameter. While some of these vision-impairing conditions could be attributed to LASIK, they were probably disclosed in the consent form. As an expert in the review and interpretation of such documents, perhaps Mr. Reif should have spent a few moments examining it before signing. As to the cataracts, it's unlikely Mr. Reif will be able to hang that one on the defendants.

When I first saw the news bulletin about this case on the Internet, my initial impression was that the plaintiff had already received the judgment. But there's a lot of territory between the wantin' and the gittin', as they say out here in the wild West. While no one can predict the future, it's unlikely Mr. Reif will end up with $30 million from this case. The publicity that such a claim brings, however, may create an unrealistic view of LASIK litigation. Keep this in mind when you read

Recurring Issues

Some common threads run through the numerous LASIK cases that I've seen:

A Several cases have involved allegations of keratoconus, or induced ectasia (which some surgeons believe to be a manifestation of previously unrecognized keratoconus). Preoperative information regarding refractive stability, and preoperative topographies that document this, are the best ammunition for defending these claims.

A Another common issue is refractions improperly entered into the computer. Careful attention to this part of the surgery, with rechecking, can reduce this problem. The same can be said for cases in which a patient's request for monovision has been neglected.

A Curiously, pupil size is still a hot topic in many cases, seemingly as a blanket claim made in addition to others. This is something of a surprise to me, as the data coming from the numerous studies into the issue of night vision and contrast sensitivity seem to suggest that pupil size has little to

the next outrageous claim about a LASIK lawsuit.

Another case successfully defended. I recently participated in a CME telephone conference on LASIK litigation with about 250 doctors and lawyers, including an attorney from Los Angeles. The attorney, Mr. Greg Werre, described a recent lawsuit he had taken to trial. The plaintiff was amblyopic in his right eye. Pupil size was not measured preoperatively. Although the patient signed a consent to bilateral simultaneous LASIK, he did not sign the more comprehensive LASIK consent form that listed the risks of the surgery.

do with the problem. Dr. Steven Schallhorn's and Dr. Paolo Vinciguerra's research seems to be nailing this misconception down, but the lawyers and some refractive surgeons appear to be unconvinced. Certainly Dr. James Salz maintains that pupil size is a significant factor in the risk of postoperative nighttime vision problems.

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After bilateral LASIK, some folds appeared in the left cap, which was refloated with apparent success. Several months later, however, another ophthalmologist diagnosed visually significant striae. The chart did not contain a note of the immediate postoperative examination. The plaintiff alleged a slit lamp exam was required to diagnose the presence of folds in the flap before he was sent home from surgery. The patient alleged negligence, lack of informed consent, misrepresentations, and violations of the California Consumers Legal Remedies Act.

The case was successfully defended at trial. The lesson here is that the entire story of a case can't be told in a few paragraphs. Often, extenuating circumstances that come out at trial, but aren't contained in newspaper or TV blurbs, figure into a jury's decision. And certainly the whole story can't be told in a brief press release issued by the victorious attorney, which is designed primarily to make the news. Keep that in mind any time you read or hear about a verdict in a LASIK case.

The wider litigation picture

Telling anecdotal stories of litigation results is somewhat helpful, but it doesn't give us a complete understanding of what is happening with LASIK lawsuits generally. As Paul Weber, risk manger for Ophthalmic Mutual Insurance Company, has said, it's unreasonable to expect that more than a million elective procedures can be performed each year without some malpractice lawsuits from unhappy patients.

He tells us that while several LASIK settlements and verdicts have topped a million dollars, they pale in comparison to verdicts in other ophthalmology cases, such as a $15 million Texas verdict in a retinopathy of prematurity case, an $8 million New York verdict in a failure to diagnose infantile glaucoma case, and $4.5 million for a YAG laser complication in Florida. Vision loss is something that most people can relate to, and a viable claim for vision loss can easily result in a substantial verdict.

Also, there have been several defense verdicts in LASIK cases in California and New York, as well as a $2,200 verdict for the plaintiff in Virginia essentially a defense verdict. Aside from the Virginia verdict, these defense victories never made the news.

Mr. Weber gathered data from his own company's experience as a nationwide insurer of ophthalmologists. They showed 26 closed LASIK claims (dismissed, settled or tried) as of early 2002, with 55 claims still open (unresolved). Only nine of the closed claims resulted in an indemnity payment, and the average payment was a relatively small $48,000. In comparison, OMIC's average indemnity payment for cataract surgery claims was close to $100,000.

Data Mr. Weber obtained from a larger carrier showed 22 closed LASIK claims, 41 open, and 12 indemnity payments at an average of $144,000 each.

Looking at this larger collection of data, it appears that performing LASIK isn't necessarily in the same risk category as bungee jumping or free-climbing live volcanoes. In fact, it seems to be less risky than other ophthalmic procedures, which are less frequently performed. The high profile of the procedure in the popular media, however, is what can lead ophthalmologists to a different conclusion.

Prudent, not panicky

Even so, LASIK litigation is here to stay. The high profile of the procedure insures that we'll continue to hear about it, probably in a higher proportion than most other surgical malpractice cases.

Whether LASIK presents unique problems to defend continues to depend largely on the practitioner. If he or she treats LASIK as it should be as a surgical procedure to be taken seriously then the cases will probably not present unique problems at trial. On the other hand, if the procedure is treated as a product to be sold using extravagant marketing and high-pressure sales techniques, at the expense of proper informed consent, then it may well be difficult to defend at trial.

I believe that the Arizona verdict was an anomaly, but that doesn't mean that LASIK surgeons should be whistling in the dark about potential lawsuits. Be careful out there.

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