IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

CHARLES W. COMLY, JR. and SUSAN C. COMLY, Plaintiffs	:	
v.	:	No. 98-00,922
THE WILLIAMSPORT HOSPITAL & MEDICAL CENTER, and SUSQUEHANNA HEALTH SYSTEM, and HANI J. TUFFAHA, M.D., Defendants	:	

OPINION and ORDER

This case raises the question whether an informed consent claim against a physician is a different cause of action than a medical malpractice negligence claim. The plaintiffs initially filed a complaint alleging several counts of negligence, which included allegations that Dr. Hani Tuffaha did not fully inform his patient Charles Comly of the risks and alternatives to surgery. They now wish to amend their complaint to include a separate count of informed consent. Dr. Tuffaha objects on the basis that the plaintiffs are adding a new cause of action after the statute of limitations has run.

Although legal reasoning and common sense lead this court to conclude that obtaining the informed consent of a patient is part of a physician's professional duty, our Supreme Court has not yet seen the light. Despite the national trend toward recognizing informed consent as grounded in negligence, our appellate courts have doggedly insisted that it is based on battery, an intentional tort. Until our high court changes the law on this point we are obliged to hold, against our best judgment, that it is too late for the plaintiffs to add this "new" cause of action.

Discussion

The Pennsylvania Rules of Civil Procedure provide that when a transaction or occurrence gives rise to more than one cause of action against the same person they must be joined in separate counts in the complaint. Pa.R.Civ.P. 1020(d)(1). When a plaintiff pleads more than one cause of action against a defendant, each must be stated in a separate count containing a demand for relief. Pa.R.Civ.P. 1020(a). If a plaintiff fails to do so, the cause he failed to plead is waived. Pa.R.Civ.P. 1020(d)(4). Garcia v. Community Legal Services Corp, 362 Pa. Super. 484, 524 a.2d 980, 982 (1987).

Often negligent plaintiffs can cure their error by amending the complaint. Generally, courts should liberally grant such requests. However, that policy changes after the statute of limitations has run. As the Superior Court stated in Hodgen v. Summers, 382 Pa. Super. 348, 555 A.2d 214 (1989), "[A]n amendment adding a claim which is time barred by the statute of limitations will prejudice the defendants by subjecting them to a claim which is outlawed by the lapse of time. It will do so without permitting them to raise the bar of the statute of limitations which would otherwise be available to them." Therefore, amendments adding a new cause of action are not permitted once the statute has run. Del Turco v. Peoples Home Savings Association, 329 Pa. Super. 258, 478 A.2d 456, 464 (1984). A new cause of action arises if "the amendment proposes a different theory or a different kind of negligence than the one previously raised or if the operative facts supporting the claim are changed." Junk v. East End Fire Department, 262 Pa. Super. 473, 396 A.2d 1269, 1277 (1978).

The plaintiffs have not included a separate count of informed consent in their complaint. Although they alleged that Dr. Tuffaha did not adequately inform Mr.

Comly of the risks and alternatives to surgery, these allegations were made within a negligent count. The issue therefore boils down to the question whether informed consent is a separate cause of action from professional negligence.

This court could find no appellate case precisely on point. The closest case is probably Gallegor by Gallegor v. Felder, 329 Pa. Super. 204, 478 A.2d 34, 38 (1984), where the Superior Court affirmed a trial court's refusal to permit an informed consent claim to go to the jury because allegations to support recovery on that theory had not been pled in the complaint. In the case before this court, however, the plaintiffs have made allegations to support informed consent, but they were included in a negligence count. Nonetheless, the cases cited within this opinion clearly show that under current Pennsylvania law this court has no choice but to deny the plaintiffs' request to amend their complaint.

Traditionally, informed consent in Pennsylvania has been grounded in battery, an intentional tort. Gray v. Grunnagle, 423 Pa. 144, 223 A.2d 663 (1966). The principle underlying this cause of action is that a battery occurs when a physician touches a patient without the patient's informed consent. Id. The elements to prove lack of informed consent are therefore quite different from the elements of medical negligence.

> In order for consent to be considered informed, it must be shown that:
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> > the physician disclosed all those facts, risks and alternatives that a reasonable man in the situation which the physician knew or should have known to be the plaintiff's, would deem significant in making a decision to undergo the recommended treatment . . . . The physician is bound to disclose only those risks which a reasonable man would consider material to his decision whether or not to undergo treatment.

Josza v. Hottenstein, 364 Pa. Super. 469, 473, 528 A.2d 606, 607 (1987) (citation

omitted).

In order to establish a prima facie case of medical malpractice, a plaintiff must show: (1) a duty owed by the physician to the patient; (2) a breach of that duty; (3) that the breach of duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient; and (4) damages suffered by the patient that were a direct result of that harm. Mitzelfelt v. Kamrin, 526 Pa. 54, 584 A.2d 888, 891 (1990).

Clearly, under Pennsylvania law informed consent and medical malpractice are two separate causes of action, as illustrated by numerous appellate cases. A patient may prevail on an informed consent claim even in the absence of any negligence by the physician. Moure v. Raeuchle, 529 Pa. 394, 604 A.2d 1003 (1992); Gallegor, supra. An informed consent plaintiff need not show a causal link between the failure to inform and the harm suffered. Gouse v. Cassel, 532 Pa. 197, 615 A.2d 331 (1992). In fact, a patient need not even show that had he been properly informed, he would not have chosen to undergo the surgery. Boutte v. Seitchik, 719 A.2d 319 (Pa. Super. 1998). The justification advanced for these rules is that a physician commits the tort simply by performing an authorized procedure. Moure, supra.

On the other hand, an informed consent plaintiff must establish elements that a negligence plaintiff does not have to prove. For instance, the plaintiff must show there has been a surgical operation or procedure. Wu v. Spence, 413 Pa. Super. 352, 605 A.2d 395 (1992). Therefore, a patient may not sue the physician for lack of informed consent when the physician prescribes therapeutic drugs without disclosing the material risks–whether the drugs are injected into the patient's body or taken orally. Id. The patient must also show that the physician failed to disclose a material

risk. Nogowski v. Alemo-Hammad, 456 Pa. Super. 750, 691 A.2d 950 (1997), *appeal denied*, 550 Pa. 684, 704 A.2d 638. Thus the Superior Court held that a plaintiff could not prevail on an informed consent claim even though the physician had left a sponge in his body, because the risk was highly unlikely and not one a physician normally discusses with a patient. Id.

Pennsylvania appellate courts have obstinately refused to recognize informed consent claims within a negligence theory. Moure, supra; Foflygen v. R. Zemel, M.D., 420 Pa. Super. 18, 615 A.2d 1345 (1992), *appeal denied*, 535 Pa. 619, 629 A.2d 1380; Wu, supra; Boyer v. Smith, 345 Pa. Super. 66, 497 A.2d 646 (1985); Malloy v. Shanahan, 280 Pa. Super. 440, 421 A.2d 803 (1980). Other jurisdictions, however, have been more open-minded. In a dissent in Malloy, supra at 445, Superior Court Judge Hoffman hailed the overwhelming trend among courts in other jurisdictions to recognize informed consent as grounded in negligence rather than battery. The long list of citations from other states demonstrates that Pennsylvania is clearly out of step in this increasingly important area of the law. Id.

This court joins Judge Hoffman in calling for a change. Negligence is a far more appropriate context for an informed consent claim. After all, the doctrine is based upon the principle that an individual has the right to determine what is done to his or her body; therefore, informing a patient of the material risks should be a fundamental aspect of the professional duty of every physician, whether or not there is surgery or physical touching involved. The fiduciary quality of the physician/patient relationship and the medical ignorance of most individuals makes this duty all the stronger. Judge Hoffman's thoughtful dissent contains many additional reasons why negligence is a more appropriate theory than an intentional tort. For instance, a

physician's omission rarely results from a willful intent to injure the patient, and the culpable conduct itself–the failure to inform–does not involve a touching. He also points out a more practical reason for grounding informed consent in negligence: a doctor could be held liable for punitive damages under a battery count and if battery is considered an intentional tort, the physician might not be covered by malpractice insurance.

One relatively recent Superior Court panel has expressed solidarity with Judge Hoffman on this point, although it declined to buck Supreme Court precedent. Wu, supra at 397. Another panel of judges hinted they were clinging to the battery theory only because they were bound to do so. See Foflygen, supra.

Unfortunately, it will take a decision by our Supreme Court to change the law. As the Superior Court stated in Foflygen, supra at 1353, "[W]e are compelled to analyze informed consent cases under a battery theory until and unless our Supreme Court decides to recognize an informed consent cause of action grounded in negligence."[1] This court can only hope such a change will be forthcoming.

O R D E R

AND NOW, this _____ day of June,1999, for the reasons stated in the

[1] The court also acknowledges that other trial courts have reached the same regretful conclusion. Holmes v. Milton S. Hershey Medical Center, Dauphin County No. 4295 S1982 (1984) (Dowling, J.), affirmed by the Superior Court in a memorandum opinion No. 00501 Harrisburg 1984; Fetzer v. Mikesell, Centre County No. 90-2736 (1991) (Grimes, J.); Hull v. Ibanez, McKean County, No. 809 C.D. 1987 (1991).

accompanying opinion, the plaintiffs' Request for Leave to Amend Plaintiffs' Third Amended Complaint is denied.

BY THE COURT,

Clinton W. Smith, P.J.

cc: Dana Stuchell, Esq., Law Clerk
Hon. Clinton W. Smith
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