

ROBERT A. WEIN and ELLEN HARRIS,	:	IN THE COURT OF COMMON PLEAS OF
Individually and as Co-Administrators of the	:	LYCOMING COUNTY, PENNSYLVANIA
Estate of CHRISTIAN A. WEIN, Deceased	:	
DAWN MARIE WEIN COUNTS and	:	
ERIC ALLEN WEIN,	:	
Plaintiffs	:	
	:	
vs.	:	NO. 96-01,744
	:	
THE WILLIAMSPORT HOSPITAL AND	:	CIVIL ACTION - LAW
MEDICAL CENTER; MICHAEL J.	:	PRELIMINARY OBJECTIONS OF DEFENDANT
DIXON, M.D. and CHARLES M.	:	THE WILLIAMSPORT HOSPITAL AND
BURZYNSKI, D.D.S.,	:	MEDICAL CENTER TO PLAINTIFFS'
Defendants	:	COMPLAINT

OPINION AND ORDER

I. Background.

This Opinion and Order are entered this 24th day of May 1999, in determination of the Preliminary Objections of the Defendant Michael J. Dixon, M.D., filed January 11, 1999 and Preliminary Objections filed by Williamsport Hospital and Medical Center on January 12, 1999 to the Plaintiffs' Complaint.¹ The Complaint includes allegations that Christian A. Wein, then age 29 and assertedly "developmentally challenged" while a patient at the Williamsport Hospital and Medical Center (hereinafter "Hospital") died on October 29, 1996, after a tonsillectomy and removal of adenoids procedure had been performed by Defendant Dr. Michael J. Dixon (hereinafter "Dr. Dixon") at the Hospital October 25, 1996. The Complaint further alleges that the deceased, following the surgery, exhibited obvious signs of a blocked airway passage which the Defendants failed to adequately diagnose, monitor or treat and that as a result on October 27, 1996 after 5:00 p.m. the deceased went into respiratory arrest. Plaintiffs also allege that the

¹ Argument was held on these objections and other motions March 5, 1999.

acts of medical negligence and the deceased's deterioration and respiratory arrest were witnessed in part by some of the family member Plaintiffs.

The Court will dispose of the preliminary objections by the subject matter of the issues raised by the objections of each Defendant.

II. Informed Consent.

Defendant Hospital and Defendant Dr. Dixon both object to the allegations set forth under Count 3 as to informed consent.

Plaintiffs have stipulated that they cannot maintain a cause of action against Defendant Hospital under informed consent. An appropriate order sustaining that Demur will be entered.

As to the Defendant Dr. Dixon the demur is based upon the health Care Services Malpractice Act, 40 P.s. §1301.811-A that requires informed consent to be given only when a physician performs surgery, administers anesthesia, radiation, chemotherapy, blood transfusions or experimental medication or devices or inserts a surgical device or appliance. Count 3 of Plaintiffs' Complaint alleging the lack of informed consent asserts Doctor Dixon was negligent in failing to adequately inform and advise the Plaintiff parents concerning the risks involved in the methods of care and treatment rendered to their deceased child, as a patient, as follows:

- 1) the risks the patient would incur for not following the same-day surgery discharge instructions;
- 2) failing to advise as to the choice between the surgery being conducted on an overnight-inpatient basis as opposed to choosing to undergo outpatient surgery with same day discharge;

- 3) the necessity for and consequences of the dosicity and combination of drugs given as part and parcel of the surgical procedure and follow-up thereto;
- 4) follow-up medical care, treatment and necessary equipment for use in recovery/healing process;
- 5) developmentally challenged patient's special wishes;
- 6) anxiety; and
- 7) swallowing issues.

As contended by Defendants all of Plaintiffs' claims under Count 3 as well as the rest of the Complaint against Dr. Dixon does not allege any error in the surgical procedure but rather the Plaintiffs' claims rest upon Dr. Dixon's post-operative cares, especially as to administration of drugs, monitoring and examination.

Informed consent should only apply to cases involving surgery as provided by the Health Care Services Malpractice Act. *See also, Malloy v. Shannahan*, 421 A.2d 803 (Pa. Super. 1980) and *Boyer v. Smith*, 497 A.2d 646 (Pa. Super. 1985). It is not clear to this Court at this pleading stage that the complaints of the Plaintiffs under Count 3 are not in intrinsic part of the informed decision to undergo a surgical procedure and what options as to a particular procedure should be elected by a patient. Essentially the lack of informed consent is to be treated under a battery standard and not a negligent standard, as aply contended in Defendant's brief and stated in the case of *Mour v. Rauschle*, 529 Pa. 394, 604 A.2d 1003 (Pa. Super. 1992). Thus, if one were to give the consent to suffering a battery, it would seem logical that one should be made aware of the likely aftermath of the battery if the same is not readily apparent. The aftermath of surgical battery is obviously not readily apparent to a lay person or person in the position of the parents of the deceased minor patient. Therefore, the demurrer of Dr. Dixon to Count 3 will be DENIED.

See also, Stover v. Association of Thoracic and Cardiovascular Surgeons, 635 a.2d 1047 (Pa. Super. 1993).

However, inasmuch as Plaintiffs' brief acknowledges that paragraphs 67 and 68 and the other allegations as to lack of informed consent could have been more specifically and clearly set forth an amended complaint as to these allegations should be filed.

I. Punitive Damages.

Both Defendants object to the 5th Count of Plaintiffs' Complaint, which asserts claims for punitive damages. Defendants accurately argue a punitive damage claim is not a separate cause of action but is to be pleaded as part of the count alleging negligence against a particular individual defendant. In addition, the Defendants correctly argue that punitive damages are not recoverable for acts constituting ordinary negligence but are awarded under Pennsylvania law only when the acts of inappropriate conduct amounts to being outrageous, such as being performed with a bad motive or being performed with a reckless indifference to the interest of others. Plaintiffs acknowledge bad motive is not alleged in any part of the Complaint. The issue then is whether or not the acts complained of are of reckless indifference. Reckless indifference may be shown where acts of an unreasonable character are intentionally done in disregard of risk known to the actor or otherwise so obvious that the actor must have been aware of the situation which was so great as to make it highly probable that harm would follow. *See Smith v. Brown*, 423 a.2d 743 (Pa. Super. 1980). The Plaintiffs' Complaint alleges that the deceased minor patient was known to both Defendants to be physically and mentally challenged and was in a known and obvious risk situation following his tonsil/adenoids surgery procedure when he displayed obvious warning signs of airway obstruction. These warning signs are said to be “. . .unwillingness to swallow or take anything orally,

extreme nervousness and agitation, unwillingness to go to sleep and unwillingness to lie down. . . .” Paragraph 74.2 of Complaint. Plaintiffs allege that despite these known risks and obvious dangers the Defendants failed to take any action to treat the airway blockage over a period of two days or to alleviate the condition even though they knew through vital signs, urine output and hydration signs the patient was deteriorating and his life was at peril. Plaintiffs also assert that inappropriate drug therapy was administered at the same time patient was deteriorating and that the drug therapy was administered in violation or contrary to known protocols and known medical authority. The Plaintiffs also contend that the Hospital failed or refused to have appropriate equipment available to treat the life-threatening condition of the minor patient. All these things Plaintiffs assert amount to reckless indifference to the interests of the deceased minor patient.

The Court cannot say as a matter of law that such contentions on the part of the Plaintiffs would not sustain a claim for punitive damages if appropriately pleaded in the complaint, identifying which allegations of reckless indifference are being alleged against which Defendant and proven at trial. The preliminary objection of each Defendant will be GRANTED; however, Plaintiffs may re-plead an appropriate claim for punitive damages as to each Defendant. If Plaintiffs can allege sufficient facts to sustain a claim for punitive damages against either Defendant such facts should not be set forth as a separate count.

II. Emotional Distress.

Defendants also both demur to the claims set forth in Count 4 of all Plaintiffs against both Defendants for the negligent infliction of emotional distress. Plaintiffs readily acknowledge that the emotional distress claim cannot be maintained on behalf of any Plaintiffs except perhaps Robert A. Wein, the Plaintiff

Father of the deceased who witnessed the events of October 27, 1996, when the code was initiated together with the administration of CPR, intubation and subsequently physical condition and actions of his son.² If so, given the obvious close relationship of father and son under the standards enunciated by *Love v. Cramer* a claim for emotional distress may exist in favor of the Plaintiff Father. Defendants contend that the Father cannot maintain such an action either since there was no particular treatment or event, which he observed which caused distress to his child, the deceased patient, nor did he witness his son's death. Plaintiffs on the other hand contended at argument that under the case of *Love v. Cramer*, 606 A.2d 1175 (Pa. Super. 1992) the Father Plaintiff's witnessing of his son's deteriorating condition during several days of hospitalization due to Defendant's failure to provide sufficient medical care and ultimately witnessing his son ceasing breathing, becoming cyanotic and a code procedure being initiated by the Hospital is sufficient factual basis from which a jury may determine that the Father was with the son during the occurrence of medical care and suffered a shock resulting from direct emotional impact upon him as he sensed and contemporaneously observed the acts of negligent medical care. In this case there is no question that the Plaintiff Father alleged improper medical treatment and sensed and contemporaneously observed his son's rapid deterioration and lack of care and increasing non-response to treatment which lasted over several days.

² The Complaint is ambiguous as to what observations were made by the Plaintiff Father and the impact of those observations upon him. For example, paragraphs 35 and 36 state the Father was with his son at 8:30 a.m. and throughout the day of October 27, 1996 and paragraph 42 states Father was present at 5:30 p.m. The Complaint does not say what the Father observed between these times nor what events transpired after 5:30 p.m. the Plaintiff Father observed nor their impact upon him. Paragraphs 70 through 73, Count IV, are broad allegations only which assert all the decedent's family members witnessed the events leading to his demise and were emotionally impacted by those acts.

It is clear that emotional distress is not recoverable for the death. What is recoverable under a claim for emotional distress is the shock and physical injuries resulting from a direct emotional impact upon the observance of the negligent acts being inflicted upon the son. This Court does not believe that the actual death of the son needs to be witnessed in order for such emotional shock to occur. Plaintiffs' Complaint, however, does not specifically set forth what acts the Father actually observed. It may be that there is no dispute to such facts nevertheless, they must be specifically pleaded. In addition, the Complaint, as acknowledged by the Plaintiffs' counsel at argument, does not allege any specific physical injury resulting in any physical injury to Plaintiff Father. The Court, therefore, will sustain the demurrer but will permit Plaintiffs to file an amended complaint asserting specific facts to support a claim for emotional distress as to the Plaintiff Father.³

IV. Motion to Strike/Lack of Specificity.

Defendant Dr. Dixon also raises in the way of a motion to strike or a motion for specific pleading objections to paragraphs 53.11 and 53.13 of the Plaintiffs' Complaint which asserts negligence against the Doctor. As discussed by the Court at argument the allegations are overly broad and non-specific. The preliminary objections of the Defendant to those paragraphs are to be SUSTAINED.

V. Wrongful Death.

Both Defendants also object by way of Motion to Strike and Demurrer to Count 6 of Plaintiffs' Complaint which alleges a claim on behalf of all Plaintiffs against both Defendants for wrongful death. Plaintiffs have acknowledged that this Count may not be maintained to the extent that it seeks a loss

³ The Court has not attempted to decide whether the limitations upon claims for emotional distress under *Bloom v. Dubois General Medical*, 957 A.2d 671 (Pa. Super. 1991) operate as a bar to Plaintiff-Father's claims in this case. A more specific pleading is required before such an analysis can be made

of consortium and punitive damages. Plaintiffs also agree the brothers and sisters of the decedent are not proper claimants under the Wrongful Death Act. Accordingly, the demurrer to Count 6 as originally pleaded will be sustained. Plaintiffs may file an appropriate amended complaint as to their claim for wrongful death.

Based upon the foregoing the following Order is entered.

ORDER

AND NOW, this 24th day of May 1999:

1. As to Count 3 of Plaintiffs' Complaint as to lack of confirmed consent against the Defendant Williamsport Hospital and Medical Center, the demurrer is SUSTAINED and such claims should not be asserted against said Defendant. As to the Defendant Dr. Dixon the Motion to Strike and Demur is DENIED; however, a preliminary objection as to a lack of specificity and clarity is GRANTED. Plaintiffs may file an amended complaint as to Count 3 as to Defendant Dr. Dixon.
2. As to Count 5 Punitive Damages, the Motion to Strike and/or Demur as to each of the Defendants is GRANTED. Plaintiffs may file an amended complaint as to punitive damages in accordance with the foregoing Opinion.
3. As to Count 4 of Plaintiffs' Complaint, negligent infliction of emotional distress the Motion to Strike of both Defendants is GRANTED. Plaintiffs may file an amended complaint as to those allegations.

and/or such analysis may be an appropriate issue for summary judgment disposition.

4. Paragraphs 53.11 and 53.13 of Plaintiffs' Complaint are STRICKEN. Plaintiffs may file an amended complaint as to those allegations.
5. As to Count 6, Wrongful Death, the Motion to Strike and/or Demur of each Defendant is GRANTED. Plaintiffs may file an amended complaint as to that count in accordance with the foregoing Opinion.
6. Any amended complaint to be filed in this matter shall be filed by the Plaintiffs within twenty days of the date of the filing of this Opinion. Such complaint shall conform to any rulings made in the foregoing Opinion.

BY THE COURT,

William S. Kieser, Judge

cc: Eileen A. Grimes, CST
Clifford A. Reiders, Esquire
David R. Bahl, Esquire
C. Edward S. Mitchell, Esquire
Robert A. Seiferth, Esquire
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire

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