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

OPINION AND ORDER

AND NOW, this 24th day of November 1999, this Opinion and Order are entered in determination of the Preliminary Objections, filed July 6, 1999, by Defendant, The Williamsport Hospital and Medical Center, to Plaintiffs' "corrected" First Amended Complaint and the Preliminary Objections filed June 29, 1999, by Defendant Michael J. Dixon to Plaintiffs' First Amended Complaint.

I. ***Background***.

Briefly stated, this medical malpractice action concerns the death of Christian A. Wein, then age 29 and assertedly "developmentally challenged," on October 29, 1996, after a tonsillectomy and removal of adenoids procedure. The procedure was performed by Defendant Dr. Michael J. Dixon (hereinafter "Dr. Dixon") at Defendant Williamsport Hospital and Medical Center (hereinafter "Hospital") on October 25, 1996.

Plaintiffs initiated this action by Praecipe for issuance of a Writ of Summons, filed November 6, 1996. Their Complaint was filed December 22, 1998, after extensive pre-Complaint discovery. The initial Complaint set forth claims for negligence, lack of informed consent, negligent infliction of emotional distress and wrongful death and survival against Defendants, asserting that their improper medical care caused the death of Christian A. Wein. The Hospital filed Preliminary Objections which attacked the Complaint on a variety of bases, including a Motion to Strike Count V of the Complaint, which purportedly sets forth a cause of action for punitive damages against both Defendants, and a Motion to Strike Count IV, which asserts a claim against the Hospital for negligent infliction of emotional distress. On May 24, 1999, this Court issued an Opinion and Order in which, *inter alia*, the Preliminary Objection relating to the punitive damages count was sustained. The Court noted that punitive damages do not constitute a separate cause of action. Plaintiffs were given leave to amend their Complaint in this regard, and also to clarify which allegations in the Complaint related to which Defendant. With respect to Count IV of the Complaint, Plaintiffs acknowledged that no family members other than Robert Wein, father of the deceased, could assert a cause of action for negligent infliction of emotional distress. The Court therefore sustained the Preliminary Objection, but granted leave to Plaintiffs to file a more specific pleading concerning what acts of negligence were witnessed by Plaintiff Robert Wein, as well as what specific psychic injuries and resulting physical manifestations thereof, if any, were suffered by him. In both instances, the Court expressly found it could not say at that stage of pleading, as a matter of law, whether

Plaintiffs could maintain their claims for punitive damages or for negligent infliction of mental distress, if appropriately pleaded.

Dr. Dixon also filed Preliminary Objections to the initial Complaint which attacked the Complaint on a variety of bases, including a demurrer to Count III, wherein Plaintiff pleaded a claim against Dr. Dixon on grounds of lack of informed consent. In those first Preliminary Objections, Dr. Dixon asserted that Count III failed to state a claim upon which relief could be granted, because "[t]he claims set forth in Count III seem to allege a lack of informed consent for post-surgical care" and under Pennsylvania law, "[a]s of October 29, 1996, the doctrine of informed consent did not apply to medical treatment rendered outside of surgery, to include post surgical care and drug administration." Preliminary Objections of Michael J. Dixon, M.D., to Plaintiffs' Complaint, paragraphs 14, 16 (Jan. 11, 1999). Dr. Dixon also attacked the pleading because, under Pennsylvania law, claims for lack of informed consent must be based upon a battery standard, not a negligence standard. ***Id***. paragraph 15. Finally, Dr. Dixon challenged Count III on the ground that the Complaint failed to plead facts to support a claim for informed consent. Preliminary Objections, paragraph 19. Dr. Dixon sought dismissal of the entire Count, pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(2), for lack of conformity to law or rule of court, and Rule 1028(a)(4), for failure to state a claim.

This Court's Opinion and Order of May 24, 1999, denied the demurrer of Dr. Dixon to Count III. The Court did, however, grant an objection as to lack of specificity and clarity, with leave to Plaintiffs to amend Count III.

Subsequently, on June 14, 1999, Plaintiffs filed a First Amended Complaint intended to restate Plaintiffs' claims against both Defendants.[1]

The Hospital has now filed Preliminary Objections to Plaintiffs' First Amended Complaint (hereinafter referred to as "Amended Complaint"), challenging the legal sufficiency of the punitive damages and negligent infliction of emotional distress claims.

Dr. Dixon has also filed Preliminary Objections to the Amended Complaint, a Demurrer and a Motion to Strike the informed consent claim. The demurrer is to paragraphs 66, 67, 68, 70, 71 and 72. Preliminary Objections of Michael J. Dixon, M.D., to Plaintiffs' First Amended Complaint, paragraphs 11 and 12 (June 29, 1999) (hereinafter "Preliminary Objections to Amended Complaint"). Those same paragraphs are also attacked as failing to have a sufficient factual basis to support a claim of lack of informed consent under Pennsylvania law. The grounds for the demurrer and motion to strike are the same as raised previously, that a negligence standard rather than a battery standard is (improperly) pleaded. *See*, Preliminary Objections to Amended Complaint, paragraphs 11, 12. Dr. Dixon also argues that the claim

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[1] On June 21, 1999, Plaintiffs apparently circulated a Corrected First Amended Complaint, which was not formally filed, to rectify typographical errors, including the erroneous naming of Divine Providence Hospital instead of the Williamsport Hospital in Count II. *See* Plaintiffs' brief, filed August 13, 1999, in response to Preliminary Objections of the Hospital, at page 3.

is based on post-surgical care, to which the doctrine of informed consent does not apply. ***Id***. at paragraphs 13 and 14.

Discussion

1. ***Preliminary Objections of Dr. Dixon Regarding the Lack of Informed Consent Allegations***.

Plaintiffs' Amended Complaint as to Count III, lack of informed consent, paragraphs 64 through 73 (and incorporating the first 63 paragraphs of the Amended Complaint) essentially allege Dr. Dixon did not explain the risks the deceased faced in undergoing this particular tonsillectomy surgery in a "same-day" procedure with follow-up care. Among other allegations, Plaintiffs assert that Christian A. Wein's legal guardians were not advised of the following: (1) a better evaluation and result would occur if he were to have remained in the hospital overnight; (2) as a developmentally-challenged individual, he would need to have certain drugs administered which posed a risk to him, particularly given his known difficulty in swallowing; (3) what the effect of post-surgery drugs would be; and (4) whether there were available alternative drug dosages or alternatives to the drugs typically administered to a patient, given the deceased's circumstances. Particularly in paragraphs 69 and 70 of the Amended Complaint, Plaintiffs claim there was a lack of discussion of alternatives as to aftercare of surgery by Dr. Dixon; further, Dr. Dixon did not explain the necessity of the continuity of care and treatment that would be required upon the surgery's completion.

The basis of Dr. Dixon's preliminary objections to these claims is that liability in operating upon an individual without giving the proper informed consent must be based on a battery standard and not upon a negligent failure to disclose risks. Dr. Dixon argues the only risks he was required to disclose in order to obtain informed consent were the risks directly associated with the surgical procedure itself and not the risk inherent in the administration of drugs or necessary surgery aftercare.

This Court finds that these preliminary objections must be denied.

Defendant generally asserts that Plaintiffs' Count III alleges negligent conduct, not battery. This simply is incorrect. The Amended Complaint taken as a whole, does not aver only that Dr. Dixon was negligent in failing to disclose these items, but rather that the consent the doctor obtained was invalid, because the matters set forth in Count III were not disclosed to the deceased' legal guardians.

Otherwise, Dr. Dixon raises essentially the same objections to the lack of informed consent count as were raised to the Count as set forth in the initial Complaint. By this Court's Order of May 24, 1999, we found that an allegation of lack of informed consent could apply to the risks involved in the aftermath of a surgical battery, inasmuch as such aftermath would not obviously be apparent or readily understood by a layperson or persons in the position of the parents of the deceased, who were his guardians at the time. This Court relied upon ***Stover v. Association of Thoracic and Cardiovascular Surgeons***, 635 A.2d 1047 (Pa. Super 1993) for the proposition that post-surgery care and treatment (including but not necessarily limited to administration of drugs) could be considered an extension of the surgical process and that an appropriate explanation of the risks involved therein was necessary in order to properly obtain consent to surgery.[2]

In this regard, the Court agrees with Plaintiffs' analysis of the issue as set forth in their Brief filed August 13, 1999:

> Plaintiffs have acknowledged that under Pennsylvania law claims for lack of informed consent are based upon a battery theory and therefore have been generally restricted to surgical treatment. At the time this incident occurred, however, in October of 1996, the courts interpreted the surgical context broadly to include post-surgical risks and complications, including the administration of drugs subsequent to surgery. *[**Stover,** supra.]*….

Id. at 6. Plaintiffs point out that, under current Pennsylvania law, the Health Care Services Malpractice Act, … is entirely consistent with the law an enunciated in ***Stover***.

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[2] The prior Opinion perhaps did not state clearly that amendments to the Health Care Services Malpractice Act, 40 P.S. §1301.811-A, as amended, effective 1/25/97, did not apply to the facts of this case.

Subsection (b) of 1301.811-A (effective 1/25/99) states that consent is informed if the patient has been given a description of the surgery and the risks and alternatives thereof which a reasonably prudent patient would require to make an informed decision as to that procedure. 40 P.s. §1301.811-A(b). As recognized by the court in ***Stover***, however, "the doctrine of informed consent encompasses the *entire* surgical treatment and *all* of its recognized and material risks," including "[l]atent risks that are a direct result of the surgical treatment," ***Stover v. Association of Thoracic and Cardiovascular Surgeons***, *supra*, 635 A.2d 1047, 1054 (1993) (emphasis added), such as the *life-long* post-surgical administration of anti-coagulant drugs. ***Id***., at 1048 & 1052. Nothing in the language of this Section alters that conclusion….

In his prior arguments, Defendant made an attempt to distinguish ***Stover*** on its facts. The attempt was so strained, however, as to be an utter failure. Defendant argues that the reasons found for lack of adequate informed consent in ***Stover*** were directly related to the surgery and not related to post-surgical drug administration. Reply Brief in Support of

Preliminary Objections of Michael J. Dixon, M.D. to Plaintiffs' Complaint, at 4 (March 4, 1999). Defendant completely ignores the fact, however, that ***Stover*** *specifically* discussed that in order for consent to be informed the patient must be warned "…that she would need to take anti-coagulants." ***Stover***, *supra*, at 1052. To contend that Stover does not involve the post-surgical administration of drugs in light of this fact is patently absurd. Moreover, a considerable portion of the opinion reviewed the distinction between drug administration cases in which there was no surgery and therefore no battery, and those in which the administration of drugs is "in the surgical context." *See* ***Stover***, *supra*, at 1052-1054. The Court in ***Stover*** expressly stated, "…where surgical or operative procedures are involved, there must be informed consent as to injected drugs." ***Id***. at 1054 [*citation omitted*].

But more importantly, ***Stover*** stands for a larger proposition, that informed consent requires more than merely consent to the actual physical touching, but an understanding of all the material risks and *post-surgical* complications. *See* discussion in ***Stover***, *supra*, at 1052 (knowledge of

> tendency of body to produce clots after implant of heart valve and need to take anti-coagulants, not just knowledge or risks of actual surgery, necessary for informed consent). "Latent risks which are a direct result of the surgical treatment are not excluded."

Id. at 7-10.

2. ***Objections of the Hospital To Plaintiffs' Claims for Punitive Damages***

The Hospital has moved to strike Count II of Plaintiffs' Amended Complaint which seeks punitive damages on the basis that the allegations of the Hospital's wrongdoing, taken in the light most favorable to Plaintiffs, did not rise to the level which would merit an award of punitive damages against the Hospital.[3] *See* Preliminary Objections filed July 6, 1999 at paragraphs 5, 6 and 7.

The law as applies to claims of punitive damages and medical malpractice actions has been thoroughly reviewed in an Opinion of the Honorable Clinton W. Smith, P.J., dated July 21, 1999. In that Opinion, ***Temple v. Susquehanna Health Systems, et al***., No. 97-00,099, the Court at page 11 stated as follows:

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[3] The Preliminary Objections in paragraph 6 also assert that the 1996 amendments to the Health Care Services Malpractice Act, 40 P.S. §1301.812-A allow an award of punitive damages only upon proof of willful or wanton conduct, or reckless indifference to the rights of others . That amendment was effective 1/25/97 and does not apply to this case.

> …[T]his Court concludes that in order to pursue a claim for punitive damages a plaintiff must allege facts that would permit a jury to conclude the defendant was aware his or her conduct would create a high degree of risk of physical harm to another and yet deliberately acted or failed to act in conscious disregard of that risk.

In a subsequent Opinion further illuminating the law that must be applied in this case, President Judge Smith has stated:

> To recover punitive damages, however, it is not sufficient to allege that *most doctors* would have realized the risk, or that *any competent doctor* would have realized the risk. The allegations must permit us to infer that *this particular doctor* realized the risk.

Opinion and Order of October 11, 1999, ***Trimble v. Beltz, et al***, No. 98-01,720, Smith, P.J. (at p. 4).

In reaching the determination that a subjective standard applies to the necessary allegations of punitive damages in a malpractice case, President Judge Smith did not preclude the possibility that punitive damages might be imposed for reckless indifference to the rights of others. *See* ***Taylor v. Albert Einstein Medical Center***, 723 A.2d 1027 (Pa.Super. 1998). Section 500 of the Restatement (Second) of Torts defines "reckless disregard" in terms of failing to do an act which a duty imposes must be done, "knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." Regarding this section, Judge Smith stated:

> Although if read in a void the phrase "or having reason to know" could imply the objective standard, for the reasons discussed above we conclude that the phrase merely indicates that in assessing an individual's state of mind, evidence showing that he or she *has reason to know* of such facts may constitute sufficient circumstantial evidence that the individual *has actual knowledge* of such facts.

Temple, *supra*, at p. 9-10. Here, Plaintiffs argue the allegations of the Amended Complaint sufficiently plead the Hospital, through its knowledge and prior contacts with the deceased Christian A. Wein and his family, had actual knowledge of the physical and mental limitations of the deceased and was aware of the anxious state which existed concerning the deceased's coughing and swallowing. The Amended Complaint further avers the Hospital disregarded the obvious risk of swelling following the tonsillectomy operations and over the course of two days made no inspection of the deceased's throat or mouth, ignoring the patently obvious symptoms that should have led to discovery of his condition. This is asserted to be tantamount to a refusal of the Hospital to perform its duty. *See* Amended Complaint, paragraphs 26-39, 32, 35, 37, 39, 40, 43, 52.1, 52.3, 52.4, 52,8, 53.8, 58-62. *See*, *also* Plaintiffs' brief filed August 15, 1999, page 7.

This Court cannot judge whether these allegations are true, but must accept them as true for the purposes of determining these Preliminary Objections. Accordingly, the criteria enunciated in the cited rulings of Judge Smith are met. It is for either a fact finder, or a court at the summary judgment stage, to determine if Plaintiffs are entitled to punitive damages. This Court also believes that at this stage of the proceedings, the cases cited in Plaintiffs' brief relating to specific factual situations in which punitive

damages have been permitted to stand, weigh heavily against entering a dismissal of the punitive damages Count.

3. ***The Hospital's Objections to the Emotional Distress Claim***.

The Hospital also seeks to strike Count IV of Plaintiffs' complaint, which asserts a claim on behalf of Plaintiff Robert Wein, the deceased's father, for negligent infliction of emotional distress. In making this objection, the Hospital asserts that allegations that the father witnessed the injurious results of negligent care are not sufficient to meet the requirement of a contemporaneous observation of a single identified traumatic event of negligence, as set forth in ***Bloom v. DuBois General Medical Center***, 957 A.2d 671 (Pa.Super. 1991). The Hospital further argues that the father has not sufficiently alleged he suffered a physical injury as a result of witnessing the harm suffered by the deceased. The Hospital asserts the father's claim is not cognizable because he does not plead he needed psychological treatment for the emotional distress, required under the holding of ***Love v. Cramer***, 606 A.2d 1175 (Pa.Super. 1992).

In this Court's prior Opinion and Order granting the Preliminary Objections to the emotional distress claims set forth in the initial Complaint, we held that the averments in the Complaint were not sufficiently specific to allow a determination to be made as to whether such a claim existed in this case. We recognized, however, that under ***Love v. Cramer,*** *supra,* allegations that the father witnessed his son's deteriorating condition during several days of hospitalization post-surgery (including observation of a code procedure performed on his son when he stopped breathing and became cyanotic), while also witnessing

the Hospital's failure or refusal to provide sufficient medical care, formed a sufficient factual basis to support an emotional distress claim. A jury may determine from those facts, if proven, that the father was in the presence of his son during the rendering of medical care (and/or lack thereof) and suffered a direct and adverse emotional impact as he sensed and contemporaneously observed the events.

In our prior decision, this Court acknowledged a deficiency existed in the initial Complaint as the father did not allege he had suffered any specific psychic injury, resulting in any physical injury, from the emotional distress. Plaintiffs assert the physical injury resulting from the emotional distress, occasioned by witnessing the decedent's medical mistreatment, is pleaded through the allegations of paragraph 76 of the Amended Complaint, which state as follows:

> 76. Plaintiff has suffered loss of sleep, depression, physical aches, pains, and physical reactions, bowel difficulties, and has had to deal with the continuing nightmare of watching Chris Wein be mistreated and die as a result thereof.

Allegations of physical manifestations of an emotional distress injury which are transitory or occur at the scene are insufficient to allow recovery under the doctrine enunciated by ***Love v. Cramer,*** *supra*. *See* ***Kelly v. Resource Housing of America, Inc.***, 614 A.2d 423, 426-428 (Pa.Super. 1992). However, averments of severe depression, acute nervous condition, flashbacks and nightmares, or inability to sleep, which were or could have been of a serious and permanent nature, were deemed sufficient allegations of physical manifestation of emotional distress in ***Krysmalski v. Tarasovich***, 622 A.2d 298, 317-18 (Pa.Super. 1993).

Plaintiff argues these physical manifestations are essentially similar to those alleged in the Amended Complaint. Plaintiff also argues that physical manifestations of emotional injury recognized prior to ***Love*** in ***Crivellaro v. Pennsylvania Power and Light***, 491 A.2d 207 (Pa.Super. 1985), namely depression, nightmares, nervousness, insomnia and hysteria, are analogous to allegations of paragraph 76 of the Amended Complaint.

This Court must agree that the types of injuries set forth by Plaintiffs, at a bare minimum, assert the type of physical injuries recognized in ***Crivellaro, Love and Kelly***. What is missing from the Amended Complaint, however, is an allegation as to the seriousness or permanency of these physical manifestations. Accordingly, the Motion to Strike Count IV must be granted. However, this Court will once again permit the Plaintiffs to attempt to plead a sufficient claim of emotional distress.

Concerning repleading of this allegation, this Court makes two further observations. First, the contention of the Hospital that some type of psychological treatment must result from the emotional distress in order for an injured party to recover for a claim for negligent infliction of emotional distress has not been supported by any cases cited to this Court.

Second, we do not believe our ruling concerning the emotional distress issue is in any way in conflict with the Opinion of the Honorable Clinton W. Smith, P.J., in ***Trimble v. Beltz***, No. 98-01,720, *supra*. Under the facts of this case, it is this Court simply stating that under the allegations of Plaintiffs'

Complaint, the jury who must decide what the father witness and, under the law, whether it was sufficient to trigger emotional distress resulting in physical manifestations that were more than transitory.

Accordingly, the following Order is entered.

O R D E R

AND NOW, this 24th day of November 1999, Preliminary Objections of Defendant Michael J. Dixon to Plaintiff's First Amended Complaint in the nature of a motion to strike/demurrer to Count III are DENIED.

The Preliminary Objections of the Defendant Williamsport Hospital in the nature of a motion to strike Count II of Plaintiffs' Amended Complaint as to punitive damages is DENIED. The Preliminary Objection of Defendant Williamsport in the nature of a motion to strike Count IV to Plaintiffs' Amended Complaint as would relate to negligent infliction of emotional distress is GRANTED.

To the extent that Defendant Dixon has joined in the preliminary objections to the punitive damages allegations and the emotional distress allegations, those objections are DENIED.

It is further ORDERED and DIRECTED that a further amended complaint as would relate to the emotional distress allegations, in accordance with the provisions of this Order, within a period of twenty from the date of the filing of this Order.

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