IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

ARTHUR TRIMBLE, Administrator of the Estate of Donna Trimble, Deceased; and ARTHUR TRIMBLE, as an individual Plaintiffs	:	
v.	:	NO. 98-01,720
WILLIAM R. BELTZ, M.D.,; WILLIAM J. TODHUNTER, M.D.; SURGICAL ASSOCIATES OF WILLIAMSPORT, DIVINE PROVIDENCE HOSPITAL, t/d/b/a BREAST HEALTH CENTER and SUSQUEHANNA HEALTH SYSTEMS, Defendants	:	

OPINION and ORDER

This opinion addresses two important issues that frequently arise–but rarely belong–in medical malpractice cases: punitive damages and negligent infliction of emotional distress. The appellate courts have floundered on both these issues, failing to provide clear direction to the trial courts and causing widespread confusion throughout the Commonwealth–not to mention inconsistencies from county to county and even from judge to judge.

In Temple v. Susquehanna Health Systems, Lycoming County No. 97-00,099, this court attempted to set forth a clear standard for punitive damages that is faithful to the policies and purposes behind imposing such damages. We now have an opportunity to apply that standard. In addition, we are given the opportunity to set forth a clear standard for negligent infliction of emotional distress. We gladly accept both invitations.

Discussion

The First Amended Complaint sets forth a cause of action in negligence against a variety of physicians during Donna Trimble's diagnosis and treatment for breast cancer. The complaint is also packed, however, with two additional goodies: claims for punitive damages and intentional infliction of emotional distress. The defendants have filed preliminary objections, asking the court to strike these claims for legal insufficiency.

Preliminary objections in the nature of a demurrer test the legal sufficiency of a complaint. The objections should be denied unless it appears certain that the plaintiff cannot recover based on the factual averments and all inferences that can be fairly deduced from them. Turner v. The Medical Center, Beaver, Pa. Inc., 686 A.2d 830 (Pa. Super. 1996).

I. Punitive Damages

In Temple v. Susquehanna Health Services, Lycoming County No. 97-00,099, we concluded that in order to recover punitive damages a plaintiff must show that the defendant knew his or her conduct created an unreasonable risk of harm to the plaintiff, and acted despite that awareness. In the opinion we explicitly stated it is not sufficient to show that a reasonable person in the defendant's position would know the conduct created an unreasonable risk. We rejected that standard because it was nothing more than a gussied up version of negligence or, at best, gross negligence.

The standard we enunciated is difficult to meet, and rightly so, for punitive damage claims do not belong in the vast majority of medical malpractice cases. Like all humans, physicians are sometimes negligent, and even grossly negligent, but it is

a rare doctor who knowingly causes a risk of harm to a patient. When such recklessness exists, it will stand out clearly, and will be distinguishable from generic malpractice cases. Plaintiffs who are the victims of such misconduct will have every right to pursue a claim for punitive damages.

Judging from the allegations in the complaint, this is not one of those cases. There is nothing whatsoever to indicate that punitive damages can be recovered from Dr. Todhunter. In the case of Dr. Beltz the issue is a bit closer, and deserves some discussion.

The plaintiffs allege that Mrs. Trimble was referred to Dr. Beltz specifically to rule out the possibility of breast cancer. He ordered a mammogram and considered performing a biopsy at that time. He did not actually perform a biopsy, however, until four months later, after Mrs. Trimble's symptoms persisted.

The plaintiff's chief argument is that because Dr. Beltz knew he was supposed to rule out breast cancer and he did not do so, punitive damages are warranted. That requires a leap this court is not prepared to make. One cannot infer from Dr. Beltz' conduct that he realized that in failing to order a biopsy he was imposing an unreasonable risk on his patient. In fact, the complaint alleges that Dr. Beltz later acknowledged he had been "a little concerned off and on" that Mrs. Trimble had breast cancer. Such a statement disproves any allegation Dr. Beltz knew that he was exposing her to an unreasonable risk of harm by not ordering a biopsy. On the contrary, it indicates that his failure to perform the test was a judgment call based on his interpretation of the results of the mammogram. Physicians rarely have the luxury of knowing for certain they are making the right

decision when treating a patient, and Dr. Beltz' doubts reflect this reality.[1]

The plaintiffs also maintain that *any* competent doctor would have performed a biopsy right away. If that is true Dr. Beltz was not only negligent–he was grossly negligent, and the plaintiffs can recover fully in negligence. 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.

As we predicted in Temple, this is not easy to do. The plaintiff will probably need to allege that the physician's own words, or perhaps the non-verbal equivalent, indicate an awareness of the risk. For instance, the physician might say to the patient or his nurse something to the effect of, "I know a biopsy is necessary, but I can't be bothered at this point," or "I'm too tired to care," or perhaps "A biopsy should be done, but I'm late for my tee time so let's wait until the next appointment." Or perhaps the nurse might see the doctor make a lewd gesture toward the patient while the patient's back is turned–a certain non-verbal indication that the physician is recklessly endangering the patient's well-being out of vindictiveness, maliciousness, or just plain orneriness. Plaintiffs who are the victims of such outrageous conduct will certainly receive a "thumbs up" from this court–and from any reasonable jury–on a punitive damages claim.

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[1] The plaintiffs urge this court to permit them to pursue their claim based on the present allegations, arguing that the defendants may file a motion for summary judgment if it appears, after discovery, that they will not be able to recover punitive damages. That is not how our system works. Before the plaintiff is entitled to explore an issue in discovery he or she must first demonstrate a right to discovery on that issue. One cannot simply make claims and hope they will later come up with evidence to support them.

We trust that physicians rarely engage in the type of conduct for which punitive damages are justified. If we are proven wrong, the public will be well advised to reject modern physicians for faith healers, witch doctors, medicine men, and others of that ilk, and the number of medical malpractice suits will decrease accordingly.

II. Negligent Infliction of Emotional Distress

Negligent infliction of emotional distress (NIED) is surely one of the most tortured torts in history. It has been tinkered with so many times, by so many courts, that its current incarnation is difficult to understand and even harder to apply. Two recent Superior Court decisions are especially exasperating in this regard. Nonetheless, with perseverence it is possible to make sense out of the morass, as we have attempted to do in the following section. Our conclusion is that two elements are necessary. First, the plaintiff must witness and recognize a discrete, identifiable, traumatic instance of negligence to a close relative at the hands of the defendant. Second, the plaintiff must witness a discrete, identifiable, traumatic instance of injury to a close relative.[2]

Prior to 1970 Pennsylvania used the "impact" rule, which permits a plaintiff to recover for NIED only if he or she was physically impacted by the negligence. Knaub v. Gotwalt, 422 Pa. 267, 220 A.2d 646 (1966). That standard was replaced by the "zone of danger" rule, which permitted a plaintiff to recover if he or she was

[2] Naturally, the plaintiff must also prove a causal, connection between the negligence and the relative's injury, as well as her own physical harm. Love, supra, at 1178-1179.

in danger of physical impact and feared such impact. Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970). A few years later that rule was abandoned for the "bystander" rule, which lives on today in a distorted and expanded form. In Sinn v. Burd, 486 Pa. 146, 170, 404 A.2d 672 (1972), the Supreme Court set forth three criteria that must be met to recover in a claim for NIED:

> (1) The plaintiff must be located near the scene of the accident,
> (2) The plaintiff's shock resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident, and
> (3) The plaintiff must be closely related to the victim.

It is the second criterion that has given courts the most trouble and it is that criterion we must address in this opinion. The essential question is, "What must the plaintiff observe?"

In Bloom v. DuBois Regional Medical Ctr., 409 Pa. Super. 83, 597 A.2d 671, 681-82 (1991), the Superior Court asked this same question and found that in the past courts had given different answers, including: "the accident," "the negligent act," "the infliction of the negligent harm," "the negligent event," and the "traumatic event." Before Bloom these inconsistencies of language did not create a problem because most of the cases involved car accidents, where the negligent act and the injury occurred almost simultaneously and the plaintiff saw both. In Bloom, however, the plaintiff saw his wife hanging from her shoestrings while in a psychological hospital, a suicide attempt allegedly due to the negligence of her physicians.

The Bloom court denied recovery, concluding,

> The gravamen of the observance requirement is clearly that the plaintiff in a negligent infliction case must have observed the traumatic infliction of injury on his or her close relative at the hands

> of the defendant. . . . To recover the plaintiff must have observed the defendant traumatically inflicting the harm on the plaintiff's relative, with no buffer of time or space to soften the blow.

Id. at 682-683.

The court pointed to Halliday v. Beltz, 356 Pa. Super. 375, 514 A.2d 906 (1986), which held that a medical malpractice plaintiff must witness the act of medical negligence itself, and the court concluded that the plaintiff must observe a negligent *omission*, as well. The Bloom plaintiff did not observe a traumatic infliction of injury, the court concluded, because "none occurred. The alleged negligence of defendants here is an omission and involved no direct and traumatic infliction of injury on Mrs. Bloom by the defendants." Id. at 683. The plaintiff observed only the aftermath of the negligence, which is not sufficient. Bloom, then, clearly establishes that the plaintiff must observe a traumatic incident of negligence that results in a relatively swift injury to a close relative.

While the Bloom court found no traumatic instance of negligence in that case, it acknowledged that a cause of action based on a negligent omission was possible. As an example, the court posed the scenario of a husband who takes his wife to the emergency room, where the personnel do not provide her with care and she dies in the outer office. The court explained, "The omission by the emergency room personnel in this scenario might create a sufficiently traumatic situation to be the basis for recovery for negligent infliction." Id. at 683.

The next Superior Court panel to address the issue departed from the Bloom standard in one important way: it rejected the requirement that the negligence and the injury be closely related in time, stating, "The fact that the negligence of Dr. Cramer did not take place at the time of the actual injury should not prevent

appellant from attempting to prove her claim." Love v. Cramer, 414 Pa. 231, 606 A.2d 1175, 1177 (1992). In permitting a separation between the negligence and the injury, however, the court did not abandon the requirement that the plaintiff observe a traumatic incident of negligence, nor that the plaintiff observe a traumatic injury. Therefore, we conclude that both are required.

A. Observation of the Negligence

The Love court maintained the requirement that the plaintiff witness the negligence, although the court expressed its hostility to that requirement in a footnote, stating:

> Although it seems odd that the plaintiff must actually witness the negligent act itself and not just the resulting traumatic injury to the loved one, the law as it now stands dictates such a requirement.

Id. at 1178 fn. 4. Therefore, the requirement that the plaintiff must view a traumatic infliction of injury remains unchanged. The Love plaintiff met this requirement because she observed the doctor's failure to perform tests on her mother.

Although the Love court did not explicitly state that the negligent omission must be traumatic when it occurs well before the injury, we believe that is the case. The basis for recovery under NIED has always been that the plaintiff suffered harm from the shock of a traumatic infliction of injury. For that reason, the Bloom opinion explicitly stated that the plaintiff must observe the defendant "traumatically inflicting the harm." Bloom, supra at 682. Before Love, the negligence and the injury occurred together. Now that the Superior Court has permitted them to occur separately, it only makes sense that *each* must be traumatic. Otherwise, the tort loses its essence: a shocking observation of the infliction of injury.

Observance of the negligence can only be traumatic if the plaintiff recognizes the negligence at the time. The plaintiff cannot merely *be there* when the negligence occurs, without suspecting something is wrong, for there is nothing traumatic about that. The plaintiff cannot learn later that the physician was acting negligently and *then* be shocked, for that is not a shock at all, but merely an "aftershock." In short, to be unaware of the negligence while it is occurring is to fail to witness the negligence.

This conclusion is supported by the recent case of Tiburzio-Kelly v. Montgomery, 681 A.2d 757 (Pa. Super. 1996), in which a husband made a claim for NIED based on hearing his wife's screams while she was undergoing a caesarian delivery without local anesthesia. The Superior Court denied recovery, stating that although hearing the screams could constitute a sensory observation, the husband was "not aware of its cause." Id. at 773.

Love does not indicate otherwise. In that case the plaintiff had researched her mother's symptoms and concluded they were probably caused by a coronary condition. She took her mother to the physician and clearly related her concerns to him. She specifically suggested testing or hospitalization. The physician did neither. It is reasonable to assume, from these facts, that the plaintiff knew–or at least strongly suspected–that the physician was acting negligently in failing to perform tests. Therefore, witnessing the omission would have been traumatic. Similarly, in the emergency room example provided in Bloom, the medical personnel's refusal to act while the wife languishes and dies is an obvious negligent omission, and the husband would recognize it as such. And finally, in Turner v. Medical Center, Beaver, PA, 454 Pa. Super. 645, 686 A.2d 830 (1996), the Superior

Court permitted recovery for a woman who sat at the side of her sister, and was forced to deliver her sister's dead fetus, because of hospital personnel's failure to respond to her request for assistance. In all of these instances, the plaintiff knew the omission was negligent at the time, and the experience was undoubtedly traumatic.

Naturally, lay persons are rarely aware when a physician is providing negligent care. When the negligence involves an omission, it is even more difficult to recognize. However, without simultaneous recognition of the negligence, the event would not be traumatic. In fact, because most people vest their trust and confidence in their physicians, they experience no discomfort whatsoever when the physician acts negligently.

In the vast majority of medical malpractice cases the plaintiff–even if present–will not recognize negligence when it is occurring, and will therefore experience no trauma at that time. Therefore, in the vast majority of medical malpractice cases there will be no cause of action for NIED, and that is the right and proper result. While it is true that in some ways the claim for NIED has been gradually expanded by Pennsylvania courts, it has been limited in other ways. In Armstrong v. Paoli Memorial Hospital, 430 Pa. Super. 36, 633 A.2d 605 (1993), the Superior Court adamantly refused to expand the tort beyond the situation of a close family member who actually witnesses the infliction of harm, and pointed out that the tort is being limited by courts across the country to prevent limitless liability. See also, Bloom, supra at 682. See Halliday v. Beltz, 356 Pa. Super. 375, 514 A.2d 906 (1986); Cathcart v. Keene Industrial Insulation, 324 Pa. Super. 123, 471 A.2d 493 (1984).

Turning to the case before us, the plaintiffs have alleged that Mr. Trimble

was present when Dr. Beltz examined his wife, noticed redness around the mid portion of the areola, ordered a mammogram, and failed to perform a biopsy. He was also present at other appointments when Dr. Beltz did not perform diagnostic studies to rule out the existence of inflammatory breast carcinoma. Such allegations clearly do not meet the standard enunciated above, for they do not indicate that Mr. Trimble recognized the alleged negligent omissions when they were occurring. Unlike the Love plaintiff, there is no indication Mr. Trimble researched his wife's symptoms or had any other basis to suspect she was not receiving adequate care from Dr. Beltz. It is not enough to say that Mr. Trimble knew Dr. Beltz was supposed to rule out cancer and did not do so, for there is no indication Mr. Trimble knew Dr. Beltz was not ruling out cancer. Dr. Beltz did not throw up his arms or shrug his shoulders at Mrs. Trimble's symptoms–he examined her, ordered a mammogram, and continued to see her. Therefore, the complaint as it now stands is inadequate, for the only inference this court can gleen is that although Mr. Trimble was present at his wife's appointments, he recognized the negligence only in retrospect and therefore experienced only an "aftershock."

B. Observation of the Injury

We also find the complaint insufficient in that it fails to allege any discrete, identifiable, traumatic occurrence of injury. The Love court specifically imposed this requirement, citing to Mazzagatti v. Everingham by Everingham, 512 Pa. 266, 516 A.2d 672 (1986) and Baradi v. Johns-Manville Corp., 334 Pa. Super. 36, 482 A.2d 1067, 1071 (1984). The Love court stated, "In formulating the rule, the Supreme Court contemplated a discrete and identifiable traumatic event to trigger

recovery." (Citations omitted.).[3]

In Love, the plaintiff witnessed a heart attack. In Turner, the plaintiff witnessed her sister giving birth to a dead fetus. Here, however, there is nothing in the complaint to suggest that Mr. Trimble witnessed any discrete event of injury. At most, one could possibly infer that he witnessed his wife's deteriorating condition before she died. That is not sufficient, as demonstrated by Cathcart v. Keene Industrial Insulation, 324 Pa. Super. 123, 471 A.2d 493 (1984), where the court denied recovery to a plaintiff who allegedly experienced emotional distress in watching the slow progression of a horrible disease suffered by a close relative.

In conclusion, we hold that to recover for NIED, a plaintiff must allege that he or she observed and recognized a discrete, identifiable, traumatic incident of negligence by the defendant to a close relative and also observed a discrete, identifiable traumatic event of injury to the relative.[4]

Conclusion

Our legal system gives individuals a full and fair opportunity to sue

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[3] The Bloom court's failure to address the observation of the actual physical injury can be explained by the court's pre-occupation with the important issue in that case: the witnessing of the negligent act. The court's primary business was to define that element in the context of a negligent omission, and so the opinion focused discussion on that issue. The court never stated that the plaintiff did not also have to witness a traumatic infliction of injury. In fact, that was understood, given the court's insistence that the negligence and the injury occur close together, "with no buffer of time or space to soften the blow." Therefore, it was presumed that the plaintiff who observes the negligent act will also observe the injury.

[4] We note that this conclusion does not contradict any of the following Lycoming County opinions addressing the tort: Wein v. Wmspt. Hospital, No. 96-01,744, opinion issued 24 May 1999 by Judge Kieser; Harzinski v. Susquehanna Health System, No. 98-01,322, opinion issued 14 June 1999 by Judge Kieser; and Connelly v. Lopatofsky, No. 93-01,178, opinion issued 19 January 1994 by Judge Brown.

physicians for negligence, and the plaintiffs' bar should be well satisfied with that. It is an abuse of the system to stuff as many causes of action as possible into ordinary malpractice cases, and it is time to put a stop to these tactics. Bloated complaints demonstrate a greed that is unbecoming to their drafters and weigh down our civil system. Most importantly, such legal lard obscures the only legitimate issue in most malpractice cases: whether or not the doctor was negligent.

O R D E R

AND NOW, this _____ day of October, 1999, for the reasons stated in the foregoing opinion, the preliminary objections to the first amended complaint regarding the issues of punitive damages and negligent infliction of emotional distress are sustained. The plaintiffs are granted twenty days from the date of this opinion to amend their complaint in compliance with the opinion.

BY THE COURT,

Clinton W. Smith, P.J.

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