IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

DONNA L. DONMOYER, et al. Plaintiffs	: :	
v.	:	No. 98-01,189
MATTHEW C. INDECK, M.D., et al. Defendants	: :	

OPINION and ORDER

This is the third, and hopefully the final, opinion in support of our pronouncement regarding the standard for punitive damages. Due to the vigorous and untiring attempts of the plaintiffs' bar to undermine and weaken this standard, we find it necessary to once again clarify and hone our pronouncement in order to protect it from an untimely demise. Through this trilogy of opinions, we wish to make our position perfectly clear to the bench and bar.

DISCUSSION

A. The Rise of the Standard

The trilogy began with Temple v. Susquehanna Health Systems, et al., Lycoming County No. 97-00,099, in which we struggled to make sense out of the confusing appellate authority regarding when punitive damages can be awarded. Aware that all too many courts assess punitive damages by using a standard that amounts to nothing more than gross negligence, we surveyed the existing appellate opinions on punitive damages, bemoaned the lack of clear appellate authority on the matter, and attempted to forge a clear standard for punitive damages out of the muddled state of the law in Pennsylvania. We clearly distinguished between

negligence and punitive damages and concluded that in order to recover punitive damages the plaintiff must show that the defendant was aware his or her conduct created an unreasonable risk of harm to the plaintiff and acted despite that awareness. Therefore, we concluded, the complaint must allege facts from which one could conclude that the defendant knew about the risk at the time of the allegedly wrongful conduct. In one fell blow, this conclusion demolished any chance to wring out punitive damages from conduct that is merely negligent.

Undaunted, the plaintiffs in a subsequent malpractice case attempted to emasculate this standard by blurring the clear line we had drawn between punitive damages and negligence. In Trimble v. Beltz et al., Lycoming County No. 98-01,720, the plaintiffs argued that since *any competent doctor* would have realized the risk of not ordering a biopsy for a patient in the decedent's position, one could automatically infer that *this particular doctor* realized the risk. We declined to permit that inference because a "competent doctor" standard, like the reasonable man standard, states a claim for negligence. Allowing it to do double duty as a standard for both negligence and punitive damages would merge the two and plunge us back into the chaos that formerly reigned. We therefore soundly rejected that proposal and insisted the plaintiffs must plead facts from which one can infer that *the doctor being sued* realized the risk. To do this, we opined, a plaintiff may certainly use circumstantial evidence of the defendant's state of mind, but it will probably be necessary to allege facts involving the physician's own words, or the non-verbal equivalent.

Tenacious and still undaunted, the plaintiffs have tried once again to weaken this punitive damage standard. This time they argue that awareness of the risk may

be shown by evidence of circumstances where the risk was so obvious to any physician that we simply *must* infer the defendant was aware of the risk. The superficial attractiveness of this position and the skill with which it was argued make it necessary for us to once again revisit the issue and repel this attack, which strikes at the very heart of the Temple standard.

B. Quantity v. Quality

The plaintiffs have essentially asked this court to accept a "clear obviousness" standard which allows a claim for punitive damages to be based on factual averments that demonstrate an obvious risk to the objective eye, coupled with a general averment that the defendant knew about the risk. While this may sound reasonable, it must be rejected because the objective eye averment supports nothing more than a claim for gross negligence. The plaintiffs have merely raised the ante once again. First, in Trimble, they offered to substitute negligence as a standard, arguing that any doctor would have realized the risk. Now they offer *gross* negligence, arguing that the circumstances were so obviously risky that any doctor would have realized the risk. Next time, they will perhaps offer *very gross* negligence, and the next time *extremely very gross* negligence.

But no matter how many adjectives the plaintiffs pile onto a negligence allegation, it is still a negligence allegation. And we must resist the temptation to conflate the standard for punitive damages with that of negligence, for the two are different in quality–not quantity. Individuals are liable for negligent actions whether or not they realize they are being negligent at the time. Plaintiffs need only show that a reasonable person would not have acted or failed to act like the defendant.

Awareness of the danger is *imputed* to every person, because everyone has a duty to refrain from causing unreasonable risk of harm to others.

For punitive damages, however, awareness cannot be imputed. Punitive damages are warranted only when the defendant was actually aware of the risk, and acted or failed to act in spite of that risk. That is because punitive damages are meant to punish the defendant, and there is no point in punishing people for actions they were not aware were wrong. Negligence, on the other hand, yields only compensatory damages, because people should be responsible for the harm they unreasonably cause to others, whether or not they were aware of the risk at the time.

Quite simply, the problem with the "clear obviousness" standard is that although the circumstances might be so extreme that any competent doctor would have realized the risk, this particular doctor might not be competent, or might have unwittingly failed to fully appreciate the circumstances because of any one of a number of reasons. We simply do not know, and we cannot impute awareness to the doctor in order to fill the gap. The plaintiffs will not be given a free ride to punitive damages on the coattails of a strong negligence claim.

In short, heaping increased amounts of negligence onto a complaint only makes the negligence greater. It can never create awareness, because awareness is qualitatively different, and cannot arise out of large amounts of negligence. A horse will never turn into an elephant–no matter how much weight it gains. Nor will a man who stuffs himself with twinkies ever turn into an Arnold Schwarzenegger. He will only become fat. Successful complaints for punitive damages must have muscle, not just flab. There is simply no escaping the requirement that in order to support a claim for punitive damages, a plaintiff must plead facts showing that *this*

defendant was aware of the risk and proceeded in spite of that awareness.

C. The Plaintiffs' Complaints

The plaintiffs have passionately argued that it is just too difficult and unreasonable to make them plead facts which demonstrate the defendant's awareness. They contend that their "clear obviousness" standard should be sufficient. In support of this argument they point to Pa.R.Civ.P. No. 1019(b), which states, "Malice, intent, knowledge, and other conditions of mind may be averred generally."

The problem with this argument is that Rule 1019(b) addresses the specificity of a pleading–not its legal sufficiency. And the appellate cases the plaintiffs cite address motions for a more specific pleading. Maleski by Traylor v. DP Realty Trust, 653 A.2d 54, 65-66 (Pa. Commw. 1994); Local No. 163, I. Union v. Watkins, 417 Pa. 120, 207 A.2d 776 (1965).

In the case before the court, however, the defendants have filed a demurrer. They are not asking the plaintiffs to plead more specific facts. They are questioning the legal sufficiency of the facts already pled. And in granting the demurrer this court is not requiring the plaintiffs to provide more details about the facts already averred. We are requiring the plaintiffs to allege *different* facts–facts that support their claim for punitive damages. Therefore, they will find no refuge under Rule 1019(b).

In the same vein, the plaintiffs complain that this court is requiring them to plead evidence, rather than just the material facts. Material facts are facts that are essential to support a claim, and which enable the defendant to prepare a defense.

Evidence, on the other hand, can include factual details that support the claim but are not essential. Again, this argument appropriately belongs in the plaintiffs' Connor arsenal, and should not be used to attack a demurrer.[1] We are not asking the plaintiffs to expand their already lengthy complaint with more details showing negligence. We are insisting that they allege facts to support their claims for punitive damages.

And finally, the plaintiffs complain that to allege such facts is too difficult at this stage in the proceedings. They essentially ask us to allow them to sue for punitive damages without facts to support that claim, in the hope they will uncover such facts during discovery. As we stated in Trimble, at 4 n. 1, that is not the way our system works. Should the plaintiffs later discover facts that support a punitive damage claim, however, they may be permitted to amend their complaint at that time, even if the statute of limitations has expired.[2]

D. Improbable, But Not Impossible

The plaintiffs seem to believe it is virtually impossible to file a medical malpractice complaint satisfying this standard. We are more optimistic. If the task is difficult, that is merely because in most cases doctors do not realize they are

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[1] And again, the plaintiffs have cited cases addressing a motion for a more specific pleading.

[2] This court would be inclined to grant such an amendment, based on the argument that it does not add a new cause of action, or that the facts underlying the claim could not have been discovered by the exercise of reasonable diligence. In fact, we note that Temple v. Susquehanna Health Systems, the first case in the punitive damage trilogy, addressed a motion to add a punitive damage claim after the statute of limitations had run. This court denied the motion not because the statute had run, but because the facts did not support a claim for punitive damages.

endangering a patient. While doctors certainly make bad judgment calls and commit dumb blunders, they rarely realize such errors at the time. We continue to believe that in the cases where punitive damages are justified, there will usually be facts to support them–facts that demonstrate the doctor knew about the risk he or she was imposing on the patient.

As we previously suggested in Trimble, such facts might take the form of a statement or a gesture. Or the doctor's awareness could possibly be inferred from non-action that amounts to a statement. For instance, suppose a physician was telephoned at home and informed of a patient's critical condition, such as heart failure, yet the doctor dilly-dallied around and arrived at the hospital much later than necessary. One could legitimately infer from those circumstances that the doctor knew he was endangering the patient by not responding immediately. His non-action was clearly not a matter of misinterpreting the symptoms, misdiagnosing them, failing to notice them, failing to appreciate their significance, or failing to properly treat them. This hypothetical doctor's conduct amounts to a shrug.

In the vast majority of cases, however, a physician's failure to act in a particular manner after noticing certain symptoms can suggest nothing about his or her state of mind, and we cannot permit the plaintiffs to jump from negligence to punitive damages without facts to support the leap.

E. Whining About Wein

The plaintiffs have characterized our colleague, the Hon. William S. Kieser, as a convert to their "clear obviousness" theory. Plaintiffs' brief, p. 12. While it is true that in Wein v. Wmspt. Hospital et al., Lycoming County No. 96-01,744, Judge

Kieser overruled a demurrer to punitive damages, nothing in his opinion suggests that Judge Kieser was bamboozled into accepting the "clear obviousness" argument. While it is not our province to second guess Judge Kieser in assessing the sufficiency of the factual allegations in that case, we note that Judge Kieser clearly acknowledged, accepted, and attempted to follow Temple and Trimble. Furthermore, the language in his opinion demonstrates his conclusion that the allegation suggested that the hospital's inaction amounted to a shrug:

> The 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 tantamount to a *refusal* of the Hospital to perform its duty.

Wein at 9, 10 (emphasis added). The italicized words demonstrate Judge Kieser's conviction that the facts sufficiently allege that the hospital's agents were aware of the risk their non-action caused the patient. To disregard, to ignore, and to refuse all necessitate a deliberateness not present in ordinary negligence or even gross negligence.

F. The Strike Out

It only remains now for us to apply the above discussion to the complaint in the matter before us, which represents plaintiffs' third attempt to successfully state a claim for punitive damages. The case involves a patient who underwent surgery for a hernia repair and died after developing pulmonary emboli following the surgery. In the Second Amended Complaint currently before us, the plaintiffs allege that Drs. Indeck and Petty acted with reckless indifference to the interests of the patient by grossly departing from

the standards of care in virtually everything they did for him.[3] The essence of their case is that the doctors were aware of the risk of thrombosis and pulmonary emboli as post-surgical complications, and were aware of the standard medical procedures employed to prevent such complications, but nonetheless proceeded without taking any prophylactic measures. They also allege that the doctors knew about the obvious signs and symptoms of thrombosis the patient exhibited, but they did not order further testing and evaluation to determine the cause of the symptoms. Finally, they allege that the doctors were aware of the risk caused to a patient such as Mr. Donmoyer by not taking preventative measures and not responding to obvious symptoms, yet they proceeded to act in conscious disregard of that risk. But although the plaintiffs repeatedly use magic words and phrases such as "willfully, recklessly and with indifference to the interests of the decedent," and "disregarded the life threatening nature" of the test results, they fail to allege any facts which would permit one to infer that this is so. The plaintiffs state only that each doctor was aware of the risk "by virtue of his education and experience." That, of course, is simply another way of saying that any competent doctor would have known about the risk–the standard for negligence, but not punitive damages.

In short, none of the factual allegations in the complaint support the plaintiffs'

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[3] Specifically, they allege that one or both of the doctors did not order a pre-operative laboratory workup; did not order pre-operative, operative, or post-operative mini-dose heparin treatment; did not use intermittent pressure boots or anti-embolism stockings or any other preventative devices; did not give sufficient instructions to other medical professionals; did not recognize issues tending to exacerbate the changes of thrombosis; disregarded the life threatening nature of the diagnostic test results; did not identify and treat the decedent's complaints of leg pain; and did not respond to a nurse's call regarding the patient's complaints of heartburn.

claim for punitive damages, although they skillfully state a claim for negligence, and even perhaps gross negligence. If these allegations are proven at trial, the plaintiffs will recover fully for compensatory damages. The allegations do not, however, justify the imposition of punitive damages.

The plaintiffs have tried three times to sufficiently allege punitive damages. Since it appears they are unable to plead factual allegations to state a claim for punitive damages, it would do no good to permit them to amend their complaint again. The plaintiffs have struck out, and their punitive damage claims will therefore be stricken with prejudice.

O R D E R

AND NOW, this _____ day of August, 2000, for the reasons stated in the foregoing opinion, counts XII and XIII of the plaintiffs' Second Amended Complaint are stricken with prejudice.

BY THE COURT,

Clinton W. Smith, P.J.

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