LEGAL BRIEFS

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Key words: **Informed consent, *negligence per se, res ipsa loquitur,* tort reform.**

CONFLICT FOR THE COURT

In March 2001, the New Jersey Superior Court decided the *Darwin* case (2001 W.L. 216726 (N.J. Super A.D.)), which provided some insight into the process by which an appeals court decides cases, especially cases in which important policies come into conflict. Jane Darwin (a fictitious name to protect the identity of the actual plaintiff) alleged in her complaint that she sought treatment for heroin addiction from the defendant, Dr. Lance Gooberman. Dr. Gooberman used a treatment known as "Ultra Rapid Opiate Detoxification" in which the patient is administered several drugs that compress withdrawal from heroin from about 10 days into about 4 hours. While the drugs are removing opiates from receptors in the brain, the patient is placed under a general anesthetic. The detoxification process, which would otherwise be very painful, can be performed while the patient is pain free. It is not a pleasant procedure except in comparison to the traditional alternative. It also is a controversial procedure, and the defendant was the subject of: an investigation by the New Jersey Board of Medical Examiners; a complaint filed by the New Jersey attorney general; and various newspaper articles describing the progress of these investigations.

The plaintiff's procedure had occurred on December 17, 1996. According to her complaint, she received very little information concerning the procedure. After she woke up from the anesthetic, she discovered that a pellet (which was naltrexone, a drug that blocks opiates in the bloodstream) had been implanted in her arm. She complained that no follow-up instructions were given to her. She experienced nausea and weakness. Her symptoms worsened, and the pellet failed to dissolve. Her arm became infected requiring two emergency room visits. Ultimately, the pellet had to be surgically removed, allegedly leaving a lingering infection, pain, and scarring.

She filed a complaint on December 10, 1998, just before the expiration of the statute of limitation, alleging lack of informed consent, assault and battery, breach of contract, and use of a product that was not approved by the US Food and Drug Administration.

Medical malpractice trial can be costly

The trial of a medical malpractice action can be expensive and difficult for both the plaintiff and defendant. Since juries do not understand healthcare, the parties must retain expert witnesses to study the specifics of the case and to render their expert judgment on the propriety of what was done or not done. Great effort is taken to translate complicated concepts into language the jury will understand. Because the patient's health and well being are at stake, when juries award damages, the awards can be very large. The public, and consequently state legislators, believe that the possibility of large awards can attract unscrupulous plaintiffs, and especially their lawyers, who will seek recoveries when they have suffered little or no injury, or worse, may sue in the expectation that a physician and his or her insurance company will choose to settle rather than gamble with a jury verdict.

Some states have adopted legislation that is intended to limit the availability of the courts to plaintiffs attempting to bring a medical malpractice action without satisfactory evidence that there has been malpractice. In New Jersey, the method chosen was to require that an affidavit be submitted early in the lawsuit. The affidavit had to be given by a licensed individual, having particular expertise in the general area or specialty involved in the action. The affidavit had to state that in the opinion of the licensed individual there existed a reasonable probability that the care provided fell outside acceptable standards. The object of requiring the affidavit was to get rid of nuisance suits early in the process. If a plaintiff could not get the testimony of at least 1 expert to express an opinion that there was a reasonable likelihood that there had been negligence, the plaintiff would be foreclosed from bringing the suit. The New Jersey courts would not require healthcare practitioners to pay large fees to defend themselves, hire expert witnesses, and become enmeshed in legal discovery unless an expert was willing to say at the outset that malpractice was involved.

Just as the affidavit was designed to protect healthcare practitioners from difficult and expensive lawsuits, the courts had developed relief for plaintiffs who also had to face difficult and expensive lawsuits even though at least some of them had quite legitimate claims for damage arising from substandard care. The courts had developed doctrines to protect plaintiffs who lacked the financial resources to adequately assert their rights. Because the proof of negligence was so difficult and expensive, the courts had developed "magic bullets" or shortcuts, which allowed plaintiffs to seek recovery without the expense and effort of proving negligence. One of these bullets was *res ipsa loquitur,* or "the thing speaks for itself." If the plaintiff could show 3 things: (i) that in the ordinary course of events, the injury would not have occurred if someone had not been negligent, (ii) that the injury was caused by something in the exclusive control of the defendant, and (iii) that the injury was not due to any voluntary action or contribution on the part of the plaintiff, then the plaintiff need not prove negligence. The burden of proof shifted to the defendant to show that he or she was not negligent.

Negligence per se

Another shortcut was *negligence per se.* If there is a statute or regulation that addresses the standard of care and the standard is for the protection of the public, then violation of the standard is deemed to be negligence, and it is not necessary that actual negligence be proven. In 1985, the Georgia Supreme Court decided the *Worthy* case. Anesthesia was being administered in a hospital by a student nurse anesthetist supervised by a physician's assistant. The Georgia statute, which has since been changed, allowed a CRNA to administer anesthesia only "under the direction and responsibility of a duly licensed physician with training or experience in anesthesia." Whether or not it is good practice to have a student nurse anesthetist supervised by a physician assistant, it is clear that the physician assistant was not "a duly licensed physician with training or experience in anesthesia." Since the hospital had violated a statute designed for the safety and protection of citizens, the Georgia Supreme Court ruled that this was *negligence per se.* The fact that the hospital was violating a statute that creates a standard of conduct is sufficient, by itself, to establish negligence.

The *Darwin* case is the legal equivalent of the philosophic question of what happens when an unstoppable force meets an immovable object. Legal bullets, which had evolved to protect plaintiffs, denied the protection of the courts because of the expense and complexity of litigation came into direct conflict with a legal shield designed to protect defendants from being preyed upon by people hoping the defendants would agree to a quick settlement rather than face the expense and complexity of litigation. (A solution that might have made both plaintiffs and defendants happy would be to do something about the expense and complexity of litigation — but that is a subject for some future column.)

So which policy will prevail? Ultimately, the issue was decided not so much by the better principle, but by who was supporting the policy. The court's decision first described the dilemma in which it found itself. The legislature, attempting to eliminate frivolous lawsuits, required that an affidavit be introduced that there was a likelihood of malpractice or negligence "in any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence." But what effect should that requirement have on cases, such as *res ipsa loquitur* and *negligence per se,* when the courts have said that because of special circumstances, the plaintiff does not have to prove negligence? While Darwin had not filed the affidavit, she was hoping to rely on the doctrine of *res ipsa loquitur* that unless there is negligence, the insertion of a pellet should not result in a lingering infection and 2 emergency room procedures to remove it. In addition, she was also hoping to rely on *negligence per se* that the state was investigating Dr. Gooberman for performing the very same procedures he had performed on her.

Res ipsa loquitur

Under the doctrine of *res ipsa loquitur,* the plaintiff is basically admitting she was not sure what happened. What kind of affidavit can a plaintiff provide that the care, skill, or knowledge of the physician fell outside acceptable professional or occupational standards when the plaintiff was anesthetized and had no idea what the physician did? It turned out that the dilemma had already been faced by the New Jersey courts, and the *Darwin* court followed the case of *Hubbard v Reed,* (331 N.J. Super 283 (App. Div.)) The court had held that the statute requiring an affidavit was applicable to *res ipsa loquitur* cases. Its decision was based on its recognition that in determining policy, the courts must defer to the legislature. Its reasoning was that the language of the statute was quite clear that the requirement of an affidavit applied in *all* malpractice cases

"regardless of the method of proving the claim." The statute did not permit *any* exceptions, and the court decided it did not have the power to create an exception where the legislature had not.

Now that we know what the court decided, does the decision make sense? Was this the best approach to this problem? In a case of *res ipsa loquitur,* what the plaintiff must prove is not that the defendant was negligent but that the accident would not have happened in the absence of negligence. What is the point in forcing the plaintiff to get an affidavit that the defendant's conduct fell outside the standard of care when there will not even be any testimony about what the defendant did. Nor does the decision seem to advance the policy of reducing frivolous lawsuits. How frequently are there frivolous lawsuits in which the defendant meets the requirement of *res ipsa loquitur* — the defendant was in exclusive control and, in the ordinary course of events, the injury would not have occurred if someone had not been negligent. Was this a case where the legislature wanted to get rid of *res ipsa loquitur* or one where it merely overlooked it? By applying the requirement of the affidavit to cases in which *res ipsa loquitur* applies, the court got a chance to demonstrate its subordinate role to the legislature but failed to come up with a solution that met the policy implications of either statute.

Informed consent

However, applying the statute to the case meant only that Darwin's negligence claims could not be pursued. It did not end the case. The plaintiff had brought suit claiming several grounds as the basis for her complaint. Because the plaintiff had failed to file the required affidavit, any of the grounds that related to negligence had to be dismissed. But the plaintiff could still proceed against the defendant on the non-negligence grounds including breach of contract and product liability claims. These were not claims for breach of professional responsibility or those that involved a physician's deviation from standard of care. But what about the plaintiff's claim concerning the lack of informed consent?

In previous articles we have noted that the basis for informed consent was the avoidance of charges of assault and battery. To perform surgery, you must touch the patient. Therefore, any surgery without consent constitutes an assault and battery. But courts came to the conclusion that the avoidance of battery only explained the "consent" part of "informed consent." How did the "informed" part come in? As we know, the legal profession tends to defer to healthcare professionals on matters relating to the practice of healthcare. How do the courts determine whether a physician has provided enough information for a consent to be informed? Courts began to see informed consent as being based not only on the avoidance of battery but on a theory of negligence as well. Since all physicians had to obtain the patient's consent, a physician's conduct in obtaining the consent could be weighed against a standard of care: the standard of what other physicians in his or her position disclosed to obtain informed consent from their patients.

What information had to be disclosed to a patient for the consent to be "informed?" The answer, at least initially, was: the same information that other physicians in the same position customarily told their patients in order to obtain consent. The process of weighing a physician's conduct against the conduct of other physicians is a "negligence" standard. Failure to obtain informed consent was seen not just as the basis for a battery but also as a breach of the physician's professional responsibility to the patient. In more recent years, the courts have said that the standard for informed consent is providing information that a reasonable patient would want to know. Nonetheless, a case where a physician's conduct is compared to a standard is a "malpractice or negligence" case.

Why was it so important to decide if obtaining informed consent was negligent or not? After all, you still have to get informed consent whether it is to avoid battery or to avoid being negligent. The New Jersey statute requiring an affidavit of merit applies to actions "resulting from alleged act of malpractice or negligence." The New Jersey court had to look very carefully at the facts of the *Darwin* case to see if she was arguing a negligence theory or a battery theory. It concluded that to the extent the plaintiff was claiming that the defendant had failed to provide her with all of the information that she needed to decide to consent to the procedure, she was claiming a negligence action, which could no longer be pursued because she had not filed the affidavit. On the other hand, if the plaintiff was claiming that the physician had provided so little information that the physician had not technically obtained her consent *at all,* then her injuries did not result from negligence but from an assault and battery, which could be pursued even in the absence of the affidavit.

Thus, the conclusion of the trial court dismissing all charges against the physician was affirmed

in part and overruled in part, and the case was sent back to the trial court for further proceedings. Those claims of the plaintiff that were based on negligence, on the failure of the physician to meet a standard of care, were excluded by the plaintiff's failure to file the affidavit of merit. Those claims that were not based on negligence were not dismissed and could be pursued.

Lack of respect for patient

One of the other elements of this case that is not discussed is the emotional basis that underlies the plaintiff's claim against the physician. When one looks at the charges that were made by the plaintiff, it is clear that the real wrong that was done, at least in the plaintiff's eyes, is that the plaintiff was not treated with respect. The plaintiff's story is that she went into a physician's office, but no one seemed interested in her. She was told nothing. The procedure was performed on her even though she did not know what to expect. After the procedure was performed, things did not go well. She was unprepared for the possible adversities and she suffered damage and inconvenience. What she seems to be complaining about is that she was abandoned.

Let me acknowledge that we have no way of knowing exactly how the plaintiff was treated. None of us were there to see the interaction between the patient and the physician. Perhaps she was treated poorly; perhaps she was treated well and just remembers it as being treated poorly. However, there is an association between malpractice charges, a lack of communication, and the plaintiff's feeling that the healthcare provider did not care about her. Even if its policy is flawed, we can take a lesson from the *Darwin* case and appreciate the role that informed consent can play in a process of communication, which patients deserve and the law requires. The *Darwin* case interests us for its insights into the causes of litigation and because it highlights the process that courts go through to resolve conflicts between worthwhile policies.