

IN THE COURT OF COMMON PLEAS of PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT of PENNSYLVANIA

CIVIL TRIAL DIVISION

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| SAMANTHA KNEIPP, an incapacitated person | : | JANUARY TERM, 1997 |
| by RONALD A. CUSACK, Sr. and | : | |
| ROSEANNE M. CUSACK, her Guardians | : | |
| and | : | |
| RONALD A. CUSACK, Sr. and | : | |
| ROSEANNE M. CUSACK in their own right | : | No. 1767 |
| Plaintiffs | : | |
| v. | : | |
| | : | |
| R. BRUCE HEPPENSTALL, M.D. | : | |
| Defendant | : | |

O P I N I O N of the C O U R T

December 1, 1999

GOODHEART, J.

INTRODUCTION:

The Plaintiffs have appealed from my Order of October 1, 1999, denying their post-trial motions, and entering judgment on a jury verdict in favor of the Defendant in this medical malpractice and “informed consent” case.

The facts, for the purposes of this Opinion, are not complex. In April of 1995, Plaintiff Samantha Kneipp, a 25-year-old quadriplegic with severe brain damage¹, was taken to see Dr. Heppenstall, an orthopedic surgeon at the Hospital of the University of Pennsylvania, because the muscles in her left leg had become spastic -- uncontrollably contracted -- which made it difficult and uncomfortable for her to sit upright, and for her guardians -- her parents -- to keep her clean.

¹ The injuries that caused Ms. Kneipp’s quadriplegia and brain damage are not here at issue.

In some cases, joint pain resulting from muscle contracture can be relieved by simply cutting the tendons that operate the joint in question; in others, particularly where the joint has become dislocated, more radical surgery is often required.

When Dr. Heppenstall performed surgery on Ms. Kneipp, he found her hip joint dislocated, ruling out a simple tendon release. To relieve the pain, Dr. Heppenstall instead removed the entire ball of the hip joint – in an operation called a “girdlestone procedure”.

The Plaintiffs brought this suit, claiming that the girdlestone procedure had been performed (1) without proper “informed consent”, and (2) in a negligent manner. After a four-day trial, and a day of deliberations, a twelve-member jury returned a verdict in favor of the Defendant on both counts. Post-trial motions were filed, briefed, argued and denied; this timely appeal followed.

The Plaintiffs have pressed just two issues for review, which will be discussed below.

DISCUSSION:

I. The Plaintiffs were not Entitled to an “Irrelevant Considerations” Charge

The first basis for post-trial relief argued² by Plaintiffs’ counsel was my refusal to include an “irrelevant considerations” charge in my instructions to the jury, similar to that contained in Pennsylvania Suggested³ Standard Jury Instruction 10.07⁴.

² Plaintiffs’ counsel acknowledged at trial that he had abandoned all arguments in his brief other than those addressed here. (N.T. 9/14/99, P. 11)

³ Though under consideration for years, and cited in many published opinions, the proposed standard jury instructions have never been formally adopted by the Pennsylvania Supreme Court.

⁴ 1007 Irrelevant Consideration “A medical malpractice case is a civil action for damages and nothing more. The sole issue is whether the plaintiff has suffered injuries as the result of the defendant's negligence, and is thus entitled to monetary compensation for those injuries. The case does not involve punishment of the defendant, or even criticism of his professional abilities, beyond the facts of this matter. The claim does not involve the defendant's reputation, his medical practice, or his rights as a licensed physician. Therefore, no thought should be given to these irrelevant considerations in reaching a verdict in the case.”

A party objecting to a portion of a jury charge must show how the allegedly incorrect instructions prejudiced his case :

“When reviewing a claim of error in the trial court's jury charge, we determine whether the trial court committed clear abuse of discretion or error of law controlling the outcome of the case....A charge will be found adequate unless ‘...there is an omission in the charge which amounts to fundamental error.’ A reviewing court will not grant a new trial on the ground of inadequacy of the charge unless there is a prejudicial omission of something basic or fundamental.” Petrasovits v. Kleiner, M.D., 719 A.2d 799; 1998 Pa. Super. LEXIS 2989 (1998), quoting from, Stewart v. Motts, 539 Pa. 596, 654 A.2d 535, 540 (1995; citations omitted).

In my opinion, use of an “irrelevant considerations” charge in any but the most unusual circumstances can actually create reversible error; if a jury is given no reason at trial to speculate on how an adverse verdict might affect a Defendant physician, there is no particular reason why the matter should be brought up in the jury charge at all.

The “irrelevant considerations” charge sets forth no legal principle necessary for the resolution of this case, and the refusal of a trial court to give a requested jury instruction – even if the requested instruction accurately states the law – is not a *per se* basis for post-trial relief, which is available only if the omission also meets the Petrasovits test quoted above. Butler v. Kiwi, 412 Pa. Super 591; 604 A.2d 270 (1992).

The language in 10.07 requested by Plaintiff in the exact language that appeared in the drafters’ revision of March, 1978 which predates the establishment of the National Data Bank by more than a decade. It would therefore be inaccurate and would constitute error by the Court if I were to so change.

II. The Jury Was Properly Instructed on “Informed Consent”

During the charge to the jury, I instructed the panel on the law of informed consent as follows :

“Before performing surgery, a physician is obligated and responsible under the law to inform that physician’s patient of all the material risks that this surgical procedure could encounter. It is not every single risk.

“For example – again, it is an absurd example – you don’t have to say that maybe some terrorist is going to cut off the electrical supply to the hospital and, therefore, in the middle of surgery, he can’t complete the surgery and the patient might die because all the equipment breaks down. That is so far out and that is an obvious situation, it may be a risk in this crazy world in which we live. It might be a risk that one might tell a patient if some surgical procedure is performed at, say, an abortion center, because we have so many bombings, maybe that is a risk. I don’t know, and we are not faced with that in this case.

“So it must be all the risks that a reasonable patient would be expected to know. And that’s the decision that you are going to have to make, what a reasonable patient would be expected to know, what the risks are as well as the alternatives of the procedure. In other words, you determine what alternatives were available, and the patient has a right to choose between the alternatives given by the physician....”

“[T]he doctor is responsible to discuss the various procedures, including that procedure, as well as other alternatives, and to let the patient know fully what they encounter and what is suggested so that the patient can make an intelligent, informed decision.”
(N.T. 3/18/99, Pp. 4.32-4.34)

Later, in response to a question from the jury during deliberations, I gave the following additional explanation :

“A patient’s consent to a procedure ... is valid only if the patient has been informed of all those risks that a reasonable person in that situation would consider important to his or her decision of whether to undergo the surgery.

“The physician must inform the patient of all of the recognized and

material risks of the surgery. The physician is also required to inform the patient of alternatives to the proposed surgery and the risks and chances of success of those alternatives.

“If the patient consents to the procedure proposed by the physician without that information, the consent is not ‘informed’, and not legally valid. Here, the informed consent of one of the parents of Samantha Kneipp was required....

“Number one, the physician must deliver the information that is required. If you determine that it has been delivered to the parents or parent, then if the parent doesn’t understand, they are obligated to say, ‘Doctor, I don’t understand what you are saying; explain it to me in more detail.’

“But you can’t expect the doctor to go into the person’s mind and decide, ‘does this person understand me or doesn’t this person understand me?’. This is a very subjective thing. So, under certain circumstances, one would expect the person to respond by saying, ‘Explain it again’, or ‘I don’t understand this or understand that,’ or ‘how about this?’ or ‘how about that?’.

“But then again, use common sense. You are the physician – not you are the physician; a physician, a specialist. If you determine under the circumstances of this case that these parents could not comprehend what was going on, then there is an additional duty on the part of that physician to make this very clear, perhaps be able to read into the[ir] reactions that maybe they don’t understand.

“And considering that you can take into account the history in this case, the fact that the parents were involved since Day 1 from the time she sustained her brain injury, they were there with her for her at all times, at home as well as in treatment. And all these things you can consider in determining whether they understood or should have understood what he said, if he said the proper things.”
(N.T., 3/18/99, Pp. 4.76 - 4.78).

I also re-emphasized to the jury, in response to a further question, that an effective informed consent may be given orally, or in writing. (N.T. 3/18/99, P4.80).

It should be clear from a review of the above that I fully, completely and accurately explained the law of informed consent to this jury, and that the Plaintiffs' objection – which is largely based upon my refusal to read Standard Jury Instruction 10.06 *verbatim* – is without merit⁵.

CONCLUSION:

The Plaintiffs have put forth no basis on which post-trial relief should have been granted. Accordingly, my decision to deny it should be affirmed.

BY THE COURT:

GOODHEART, J.

⁵ Much of the discussion in the Plaintiffs' brief on this point actually centers upon the jury's interpretation of the evidence presented at trial to show informed consent, an issue not raised in the Plaintiffs' post-trial motion, and in any event, a jury's evaluation of evidence presented, if supported -- as in this case -- by competent evidence, cannot be disturbed by the court post-trial.

