

2000

Lea R. Ficklin and Margaret Ficklin v. J. Ralph Macfarlane and J. R. Rees : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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**IN THE SUPREME COURT
OF THE
STATE OF UTAH**

LEA R. FICKLIN and MARGARET
FICKLIN, his wife,

Plaintiffs-Appellants,

-vs-

J. RALPH MACFARLANE, M.D. and
J. R. REES, M.D.,

Defendants-Respondents.

Case No.
14271

BRIEF OF APPELLANTS

Appeal from Judgment against Appellants in the Second
Judicial District Court of Weber County, State of Utah,
the Honorable Ronald O. Hyde presiding.

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEA R. FICKLIN and MARGARET
FICKLIN, his wife,

Plaintiffs-Appellants,

vs.

J. RALPH MACFARLANE, M.D. and
J. R. REES, M.D.,

Defendants-Respondents.: :

Case No. 14271

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from an adverse decision by the Second District Court of Weber County, State of Utah. Plaintiffs-appellants brought suit against defendants-respondents alleging medical malpractice because of their failure to adequately warn or inform plaintiffs-appellants of the material risks or dangers of the surgery they performed on defendant LEA R. FICKLIN. Upon defendants-respondents' motion to dismiss for failure to state a prima facie case made at the conclusion of the presentation of plaintiffs-appellants' evidence, judgment was entered in favor of defendants-respondents by the Honorable Ronald O. Hyde in the District Court of Weber County, State of Utah. Appeal is brought from that judgment.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the lower court's judgment of dismissal of plaintiffs' two count complaint and an order requiring the District Court to submit the case to a jury for determination of whether the defendants breached their duty to plaintiffs by failing to inform them of the material risks involved in the operation and the material fact that the defendants'

surgical team had never performed this surgical procedure on a human being.

STATEMENT OF THE FACTS

Plaintiff LEA R. FICKLIN was suffering from a heart condition known as angina pectoris and was under the care of David P. Jahsman, M.D., an internal medicine specialist, who determined that it may be salutary for plaintiff to undergo a cardiopulmonary bypass procedure to relieve the symptoms of the angina condition. Plaintiff LEA R. FICKLIN was subsequently referred to the defendants for their consideration of performance of this operation on Mr. Ficklin. The defendants failed to inform the plaintiffs that this was the first operation of this kind that they had performed as a team on a human being and of the material risks that the plaintiffs were assuming by undergoing this procedure. Subsequent to the operation, plaintiff LEA R. FICKLIN sustained extreme central nervous system deficits including partial paralysis, legal blindness, loss of memory and impairment of his other mental facilities. As a consequence of these impairments, plaintiff MARGARET R. FICKLIN, was required to permanently terminate her gainful employment to provide care for her husband, plaintiff LEA R. FICKLIN.

ARGUMENT

POINT I.

THE DEFENDANT SURGEONS HAD A LEGAL DUTY TO FULLY INFORM THE PLAINTIFFS OF ALL THE MATERIAL RISKS INVOLVED IN THIS SURGICAL PROCEDURE.

Although plaintiffs consented to an operation for the implantation of a vein from the leg and between the aorta and the arteries of the heart (tr. 37) they would not have consented to the procedure had the doctors informed them of the material risks that they were assuming by consenting to this operation (tr. 14, 15, 46, 47, 48).

The legal duty of a physician to disclose all material risks is well established. In Salgo v. Stanford, 154 Cal. App. 2d. at 578, the

California Court stated:

"A physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment. Likewise, the physician may not minimize the known dangers of a procedure or operation in order to induce his patient to consent."

When alleging a lack of informed consent, the patient need not show that the operation per se was the proximate cause of any injury that developed, for the issue is not that the procedure was performed unsatisfactorily, but that it was performed at all. Therefore, the plaintiff need only show that he would not have submitted to the operation or treatment if he had been fully advised of the risk which resulted in the injury.

This problem is closely allied with whether the plaintiff will have to establish through expert testimony whether or not it was standard medical practice in his community for a physician to disclose more about the nature and effects of a proposed operation or treatment than was disclosed to him. Many courts have held that such expert testimony is required, but some recent widely cited cases disagree. Canterbury v. Spence, 464 F. 2d. 722; Cobbs v. Grant, 502 P. 2d. 1; Fogal v. Genesee Hospital, 344 N.Y.S. 2d. 552.

Since Canterbury v. Spence, supra, is the first major significant departure from this rule and expands the scope of tort liability for failure to get informed consent, a close scrutiny of this case is required. The case concerned a laminectomy in the thoracic spine. A myelograph showed a filling defect at the fourth thoracic vertebra. The surgeon advised an operation for a suspected ruptured disc. When asked about the danger, he said the operation was not more dangerous "than any other operation."

The laminectomy showed a swollen cord that couldn't pulsate, an accumulation of large, tortuous and dilated veins and a complete absence

of epidural fat. On the first postoperative day, the patient's condition was good. That night he fell from his bed as he was trying to void, unassisted by hospital personnel. Shortly afterwards, paralysis set in. The surgeon performed a reoperation and created a gusset to give the cord more space to pulsate.

At the trial, the physician testified, when called as a witness for the plaintiff, that no one knew what caused the paralysis but that trauma could cause it, and he further stated that the risk of such paralysis was but one percent, i.e., a very slight possibility, and to disclose it to a patient would be bad medical practice as it might deter him from undergoing needed surgery and could provoke adverse psychological reactions which could preclude the success of the operation. He was the only medical expert called and, at the close of the entire case, the trial court dismissed the plaintiff's cause of action. The Circuit Court of Appeals for the District of Columbia granted a new trial and in a lengthy opinion, set forth the following standards relevant to the instant case, to-wit:

"The physician had a duty to disclose the risk even if only a one percent chance of paralysis existed.

It is a root premise of American jurisprudence that every human being has a right to determine what shall be done with his own body.

The very dependence of a patient upon the physician requires a disclosure of all foreseeable potential dangers.

What must be disclosed is not to be gauged by medical standards but rather by standards set by law which must be imposed by the courts upon physicians.

No expert testimony is needed as to what the physician should have informed the patient of.

The scope of disclosure is measured by the patient's need to know. Therefore, all risks material to an intelligent decision must be known.

The law must set a standard for adequate disclosure; the physician's duty to disclose must be determined by foresight, not hindsight; the fact-finder must find, in order to impose liability, that the physician's communication to the patient was "unreasonably inadequate."

An objective standard is established, i.e., a risk is deemed material, when a reasonable person with due regard for the patient's position would be likely to attach significance to the risk in deciding whether to accept or to forego therapy. Thus, even a very small chance of death, or of a disability which would dramatically outweigh the potential benefit of therapy, requires disclosure.

Whether the patient would have consented or not is an objective test to be decided by the reasonably prudent man standard, so that physicians are not victimized by the patient's hindsight.

No expert testimony is required to show the materiality of a risk or to show the effect of disclosure or nondisclosure."

In a 1974 Oregon Supreme Court decision the Court stated:

"For purposes of the requirement that the physician must inform patient of all material risks involved in certain courses of treatment, a risk is material when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risks or cluster of risks in deciding whether or not to undergo the proposed therapy."

Holland v. Sisters of St. Joseph of Peace, 522 P. 2d. 208 (Ore. 1974).

The duty of a physician to inform the patient is a fiduciary duty.

The relationship between the physician and his patient is one of trust calling for a recognition by the physician of the ignorance and helplessness of the patient regarding the patient's own physical condition.

A patient is entitled to rely upon his physician to tell the patient what he needs to know about the condition of his own body, and physician must supply the patient with material facts that the patient will need in order to intelligently chart his destiny with dignity.

The elements of the cause of action based upon the "informed consent doctrine" include the existence of the material risk unknown to the patient, the failure to disclose it, assuring that the patient would have chosen a different course if the risk had been disclosed, and resulting injury.

The physician has a duty to disclose to the patient the material risks of a medical procedure as a matter of law (emphasis added), and testimony

of medical experts is not necessary to establish the duty to disclose that which the law requires.

When a reasonable person in the position of a patient probably would attach significance to a special risk in deciding on course of treatment, such a risk is material and must be disclosed to patient by the physician. Miller v. Kennedy, 522 P. 2d. 852 (Wash. App. 1974).

The plaintiff need not show that the operation per se was the proximate cause of any injury that developed, for the issue is not that the procedure was performed unsatisfactorily, but that it was performed at all. Therefore, the plaintiff need only show that he would not have submitted to the operation or treatment if he had been fully advised of the risk which resulted in the injury. Salgo v. Stanford, supra.

The Washington Court in the case of ZeBarth v. Swedish Hospital Medical Center, 499 P. 2d. 1, 81 Wash. 2d. 12, 52 A.L.R. 3d. 1067 defines "informed consent" as follows:

"The name for a general principle of law that a physician has a duty to disclose what a reasonably prudent physician in the medical community in the exercise of reasonable care would disclose to his patient as to whatever grave risks of injury might be incurred from a proposed course of treatment, so that a patient, exercising ordinary care for his own welfare, and faced with a choice of undergoing the proposed treatment, or alternative treatment, or none at all, may intelligently exercise his judgment by reasonably balancing the probable risks against the probable benefits."

Also see Annotation A.L.R. 3rd. 1067.

The Oklahoma Supreme Court defines "informed consent" as "a principle that every person has a right to determine what shall be done with his own body and therefore, in situations where medical treatment involves grave risks of collateral injury even if performed in a nonnegligent manner, law imposes a duty upon physicians to inform the patient of options avail-

able and risks attendant upon each so patient can make an informed exercise of choice.

Duty imposed upon physician to inform patient as to risks of a course of treatment extends to inherent and potential hazards of treatment, alternatives, and results likely if patient remains untreated but has no application to hazards of improper procedure." Martin v. Stratton, 515 P. 2d. 1366 (Okla. 1973).

Applying the sister state's definitions of informed consent and in view of the testimony given by these plaintiffs at the trial, it is evident that a question of fact that should have been considered by the jury was improperly withheld from the trier of fact by the trial judge.

Even if the risk of this result occurring was as small as one percent (tr. 85) the defendants still had a duty to disclose it to the plaintiffs. In the case of Coopers v. Roberts, 286 A. 2d. 647 (Pa. 1971) the plaintiff signed a blanket consent form for performance of a gastroscopic examination (diagnostic procedure). The doctor assured the patient that the procedure was a simple one and that there should not be any trouble. The physician had done the procedure 250 times with no mishap. The possibility of injury was only .0004%. Nevertheless, the Pennsylvania court found for the patient holding that the medical community practice bears no relationship to the standard to measure the amount of knowledge a patient needs to make an informed consent. The Cooper court further held that "as the patient must bear the expense, pain, and suffering of any injury from medical treatment, his right to know all material facts pertaining to the proposed treatment cannot be dependent upon self-imposed standards of the medical profession."

The doctor owes a duty to his patient to make reasonable disclosure of all significant facts. Mitchell v. Robinson, 334 S.W. 2d. 11,

14 (Mo. 1960). Some courts have held that the fiducial qualities of the (physicians-patient) relationship imposes a duty to reveal to the patient that which is in his best interest that he should know. Emmett v. Eastern Dispensory and Casualty Hospital, 396 F. 2d. 931 (D.C. App. 1967), Mason v. Ellsworth, 474 P. 2d. 909 (Wash. 1970). Every man has a right " to forgo treatment or even cure if it entails what for him are intolerable consequences or risks, however warped or perverted his sense of values may be in the eyes of the medical profession, or even the community, so long as any distortion falls short of what the law regards as incompetency." Note Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship, 79 Yale L. J. 1533, 1565 (1970). See also Salgo v. Leland Stanford, Jr. University Board of Trustees, 317 P. 2d. 170 (Cal. 1957). The scope of the physician's communication to the patient must be measured by the patient's need and that need is the information material to the decision. Canterbury v. Spence, *supra*, at 786-87. The result was foreseeable (tr. 67, 68) and the plaintiffs had a right to know it. In Wilkinson v. Vesey, 295 A. 2d. 676 (R.I. 1972) the court stated that "informed consent" imposes a duty upon a doctor which is completely separate and distinct from his responsibility to skillfully diagnose and treat the patient's ills. The patient's right to make up his own mind should not be delegated to a local medical group many of whom have no idea as to his (the patient) informational needs.

In view of the foregoing, it is evident that the trial court should have allowed the issues of fact as to whether or not the defendant doctors had failed to adequately inform their patient regarding the material risk of permanent injury and that they breached their duty to the plaintiffs in failing to inform them that they had never previously performed this operation as a team upon a human being. The law must safeguard the undisputed right of

the patient to receive information which will enable him to make a choice either to take his chances with the treatment, by whom rendered, or to risk living without it.

POINT II.

THE STANDARD FOR DETERMINING WHAT IS A MATERIAL RISK IS A LEGAL, NOT A MEDICAL QUESTION, TO BE DETERMINED BY AN OBJECTIVE TEST.

What the doctor must disclose to his patient is not to be gauged by medical standards but rather by standards set by law which must be imposed by the courts upon physicians. No expert testimony is needed as to what the physician should have informed the plaintiffs of. Whether the patient would have consented or not is an objective test to be decided by the reasonably prudent man standard. Canterbury v. Spence, supra. Furthermore, the physician has a duty to disclose to the patient the material risks of a medical procedure as a matter of law, and testimony of medical experts is not necessary to establish the duty to disclose that which the law requires. When a reasonable person in the position of a patient probably would attach significance to a special risk in deciding on course of treatment, such a risk is material and must be disclosed to patient by physician. Miller v. Kennedy, supra.

CONCLUSION

It is respectfully submitted that the trial court erred in failing to allow the jury as the trier of fact to determine whether or not the defendant surgeons had complied with the legal standard of disclosure to the plaintiffs in divulging sufficient information to them to enable them to exercise their discretion to give an "informed consent" or pursue other alternatives which were reasonably available to them. These factual questions were properly considerable in light of the circumstances of the case by the jury that was empaneled for this purpose.

Therefore, this honorable Court should reverse the judgment of the District Court and remand the case to it for further proceedings.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Glenn J. Mecham", written over a horizontal line.

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