



2009

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Recommended Citation

Pensyl, Heather (2009) "Recent Developments: McQuitty v. Spangler: A Claim for Breach of Duty to Obtain Informed Consent Does Not Require Evidence of a Physical Invasion," *University of Baltimore Law Forum*: Vol. 40 : No. 1 , Article 13.
Available at: <http://scholarworks.law.ubalt.edu/lf/vol40/iss1/13>

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RECENT DEVELOPMENT

MCQUITTY v. SPANGLER: A CLAIM FOR BREACH OF DUTY TO OBTAIN INFORMED CONSENT DOES NOT REQUIRE EVIDENCE OF A PHYSICAL INVASION.

By: Heather Pensyl

The Court of Appeals of Maryland held that it is not necessary to prove that a physical invasion occurred in order to bring a claim for breach of informed consent. *McQuitty v. Spangler*, 410 Md. 1, 976 A.2d 1020 (2009). Specifically, the court held that a sufficient claim for lack of informed consent arose when a physician failed to provide the patient with material information necessary to make a treatment decision, regardless of the presence of any physical invasion. *Id.* at 5, 976 A.2d at 1022.

On March 30, 1995, while twenty-eight weeks pregnant, Peggy McQuitty experienced a premature separation of the placenta from the uterus, known as a partial placental abruption. Mrs. McQuitty's attending physician, Dr. Donald Spangler, advised Mrs. McQuitty that a scheduled Cesarean Section delivery would be necessary. The timing of such posed a dilemma, however, because any further delay would increase the risk of additional separation of the placenta, and a complete abruption would cause the death of the fetus. Yet, if Dr. Spangler delivered the baby immediately, the fetus' lung immaturity also posed a risk of death. Accordingly, Dr. Spangler developed a management plan to delay the delivery, and Mrs. McQuitty consented to this plan.

About a week and a half later, a new abruption occurred, which was followed by further complications. Dr. Spangler never presented the option of delivering the baby, nor did he advise Mrs. McQuitty of the additional risks associated with the new complications. On May 8, 1995, a complete abruption occurred and Dr. Spangler conducted an emergency Cesarean Section. The complete abruption caused the child's severe cerebral palsy, which, according to testimony at trial, could have been avoided had the baby been delivered sooner.

On September 5, 2001, Mrs. McQuitty and her husband filed a complaint in the Circuit Court for Baltimore County against Dr. Spangler for malpractice and breach of the duty to obtain informed

consent. During the trial, the jury reached a verdict regarding the malpractice claim, but failed to do so regarding the informed consent claim. Two years later, at a second trial, addressing only the issue of informed consent, the jury returned a verdict in favor of the McQuittys and awarded damages of \$13,078,515. However, the judge granted Dr. Spangler's motion for judgment notwithstanding the verdict on the basis that there was no "affirmative violation of Mrs. McQuitty's physical integrity." The McQuittys appealed to the Court of Special Appeals of Maryland, which affirmed the trial court's holding. The McQuittys then petitioned the Court of Appeals of Maryland for a writ of certiorari, which the court granted.

In its analysis of the case, the Court of Appeals of Maryland addressed the following issues related to informed consent: (1) whether a physician's withholding of material information from his patient, concerning changes in medical status, would give rise to an informed consent claim by negating any prior consent given regarding treatment, and (2) whether, under Maryland law, an informed consent claim could exist in the absence of damages caused by battery. *McQuitty*, 410 Md. at 4, 976 A.2d at 1022.

First, the court noted that in order to be effective, consent must be informed. *Id.* at 19, 976 A.2d at 1031. Informed consent requires that a physician provide all information material to the patient's decision to pursue a particular line of treatment. *Id.* (citing *Sard v. Hardy*, 281 Md. 432, 444, 379 A.2d 1014, 1019-20 (1977)). Additionally, informed consent includes a duty to warn the patient of any material risks or dangers that correlate with such treatment. *Id.* at 21, 976 A.2d at 1032. This duty does not require that the physician inform the patient of all risks; the physician must only disclose those that the physician knows, or ought to know, that a reasonable patient would find important in making his or her decision. *Id.* (quoting *Sard*, 281 Md. at 444, 379 A.2d at 1022). Thus, as in Mrs. McQuitty's case, when a physician fails to inform the patient of changes in circumstances and how those changes affect the risks inherent in a course of treatment, an informed consent claim arises. *Id.* at 3, 5, 976 A.2d at 1021-22.

The court then addressed whether a physical invasion requirement exists under the doctrine of informed consent. *McQuitty*, 410 Md. at 17, 976 A.2d at 1029. Dr. Spangler argued that the duty to obtain informed consent arises only when a physician proposes a treatment involving an "affirmative violation of the patient's physical integrity." *Id.* at 18, 976 A.2d at 1030 (quoting *Land v. Zorn*, 389 Md. 206, 230, 884 A.2d 142, 156 (2005); *Reed v. Compagnolo*, 332

Md. 226, 242, 630 A.2d 1145, 1153 (1993)). In rejecting Dr. Spangler's argument, the court relied on the historical common law basis for an informed consent claim. *Id.* at 26, 976 A.2d at 1035. As early as 1767, an informed consent claim could be pled on the case. *Id.* at 26, 976 A.2d at 1035 (citing *Slater v. Baker & Stapleton*, 95 Eng. Rep. 860 (K.B. 1767)). This cause of action was a precursor to negligence, rather than an action in battery. *Id.* (citing *Slater*, 95 Eng. Rep. 860). Thus, traditionally, the gravamen of a claim for lack of informed consent rested in the physician's duty to obtain consent to treatment. *Id.* at 28, 976 A.2d at 1036. Subsequent courts have interpreted this as a duty to provide the patient with all material information relevant to the patient's decision to pursue treatment. *McQuitty*, 410 Md. at 31, 976 A.2d at 1038 (citing *Sard*, 281 Md. at 444, 372 A.2d at 1022).

Next, the court analyzed *Reed v. Campagnolo*, wherein it held that a physician's failure to offer diagnostic tests should be analyzed under the professional standard of care, not the doctrine of informed consent. *Id.* at 25, 976 A.2d at 1034-35 (citing *Reed v. Campagnolo*, 332 Md. 226, 242-43, 630 A.2d 1143, 1152-53 (1993)). Additionally, the court in *Reed* held that the duty to obtain informed consent only arose when a physician failed to obtain consent to some treatment. *Id.* at 23, 976 A.2d at 1033 (citing *Reed*, 332 Md. at 241, 630 A.2d at 1152). In an attempt to distinguish the situation under which the doctrine of informed consent applied from a medical malpractice claim, the *Reed* court referenced *Karlsons v. Guerinot*, which held that an informed consent claim could not exist without "an affirmative violation of the patient's physical integrity." *Id.* at 22, 976 A.2d at 1032-33 (quoting *Karlsons v. Guerinot*, 57 A.D.2d 73, 82, 394 N.Y.S.2d 933, 939 (N.Y. App. Div. 1977)). This reference to *Karlsons* departed from the common law basis for an informed consent claim, and resulted in the view that an informed consent claim necessitated the additional element of a physical invasion. *Id.* at 26, 976 A.2d at 1035.

The court in *McQuitty* clarified this uncertainty and delineated the correct approach: a claim for lack of informed consent rests in negligence, rather than battery. *Id.* at 29, 976 A.2d at 1036-37. The court indicated that to require a physical invasion would contradict the underlying basis for the informed consent doctrine, which is to promote the patient's choice and personal autonomy. *McQuitty*, 410 Md. at 31, 976 A.2d at 1038. Accordingly, the court held that there exists no requirement of a physical invasion in the informed consent doctrine. *Id.* at 33, 976 A.2d at 1039.

By clarifying contradictory precedent, the court in *McQuitty* reconnected the informed consent doctrine with its common law origins in the law of negligence. The court reaffirmed the informed consent doctrine's strength with regard to ensuring the patient's right to make informed decisions about procedures and treatments that personally affect the patient. Requiring a patient to show evidence of battery in order to sustain an informed consent claim would have severely limited the doctrine's power. Thus, without the requirement of a physical invasion, a lower threshold exists for patients to bring claims for lack of informed consent, allowing legal practitioners to assert the patients' rights more readily. As a result of this decision, the amount of successful informed consent cases may increase.