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MOLÉ v. JUTTON:

A Patient Suing a Doctor for Medical Negligence Due to Lack of Informed Consent Is Not Entitled to a Jury Instruction on Battery when the Doctor Exceeds the Scope of Consent Given**By: April M. Urban**

The Court of Appeals of Maryland held that a patient suing a doctor for medical negligence due to lack of informed consent is not entitled to a jury instruction on battery when the doctor exceeds the scope of consent given. *Molé v. Jutton*, 381 Md. 27, 846 A.2d 1035 (2004). In a case of first impression, the court concluded that a doctor must deliberately intend to deviate from the consent given by the patient in order for an action for battery to be sustained. *Id.* at 47, 846 A.2d at 1047.

Tasha Molé (“Molé”) consulted a doctor after discovering a painful lump in her breast. A sonogram revealed two cysts, one of which contained a mural nodule that required a biopsy to rule out the possibility of malignancy. On her doctor’s advice, Molé consulted a surgeon, Dr. Jutton, who attempted to aspirate the cyst; however, Dr. Jutton was unable to complete the procedure because Molé’s cyst was too tender to aspirate with a needle. As a result, Dr. Jutton recommended a surgical procedure to remove the nodule. Dr. Jutton explained the risks involved including post-operative infection.

Molé signed a consent form which explained that unknown conditions might be revealed during the procedure that could necessitate either an extension of the original procedure or a different procedure. Moreover, the consent form extended permission to Dr. Jutton to render additional treatment as necessary or advisable in the exercise of professional judgment. During the surgical procedure, Dr. Jutton removed tissue surrounding the two cysts and cut Molé’s milk ducts.

Molé filed an action in the Circuit Court for Anne Arundel County alleging medical negligence and battery. Her battery claim was premised on the doctor having exceeded the scope of consent by

cutting the milk ducts leading to Molé's left nipple. At trial, Molé requested that the court issue a jury instruction on battery, but her request was denied. The court did, however, provide instructions on medical negligence and lack of informed consent. The jury returned a verdict in favor of Molé and awarded her \$22,500.00.

Molé filed a timely appeal challenging the trial court's refusal to instruct the jury on battery. However, prior to a hearing in the intermediate appellate court, the Court of Appeals of Maryland granted *certiorari* on its own initiative to determine whether a patient suing a doctor for lack of informed consent is entitled to a jury instruction on battery when the doctor exceeds the scope of consent given.

In order to determine whether a physician's operation exceeding the scope of informed consent is battery, the court of appeals began its analysis by reiterating its previous holding in *Sard v. Hardy*, 281 Md. 432, 379 A.2d 1014 (1977). *Molé*, 381 Md. at 39, 846 A.2d at 1042. In *Sard*, the court held that a claim under the doctrine of informed consent is correctly plead as a tort of negligence, not battery or assault. *Id.* (citing *Sard*, 281 Md. at 434, 379 A.2d at 1017).

The negligence-based doctrine of informed consent requires physicians to disclose material risks and available alternatives so the patient can make an informed decision about what should be done with his or her body. *Id.* at 40, 846 A.2d at 1043. In *Sard*, the patient sued her doctor after becoming pregnant following a bilateral tubal ligation. *Id.* (citing *Sard*, 281 Md. at 435, 379 A.2d at 1017). *Sard* alleged negligent performance of the procedure and lack of informed consent for the doctor's failure to advise her that the procedure was not absolutely certain to succeed. *Id.*

The court of appeals disagreed with Molé's argument that the doctrine of informed consent, as set forth in *Sard* and subsequent decisions, does not "rise to the level of *stare decisis*." *Molé*, 381 Md. at 40, 846 A.2d at 1043. In fact, the court reaffirmed that the doctrine of informed consent as enumerated in *Sard*, was in fact a holding and not *dicta*. *Id.* However, the court agreed with Molé that no Maryland court has addressed the precise issue in the instant case—whether a doctor who exceeds the scope of consent in a medical procedure is committing battery. *Id.*

In deciding this issue of first impression, the court looked to the United States District Court for the District of Maryland. Specifically, the court in *Robinson v. Cutchin*, 140 F. Supp.2d 488 (D. Md. 2001), addressed the same issue presented in the instant case. *Molé*, 381 Md. at 44, 846 A.2d at 1045. Although not mandatory authority, the court of appeals found *Robinson* persuasive and chose to adopt the analysis and rationale from that case, rather than *Sard*. *Id.* at 46, 846 A.2d at 1046. In essence, the court aligned itself with the majority of courts that have addressed the issue in the instant case. *Id.*

In *Robinson*, a doctor performed a bilateral tubal ligation during an emergency caesarean section without informed consent. *Id.* at 44-45, 846 A.2d at 1045 (citing *Robinson*, 140 F.Supp.2d at 490). *Robinson* sued her doctor, alleging lack of informed consent and battery. *Molé*, 381 Md. at 45, 846 A.2d at 1045. The district court held that the “touching” of *Robinson* by her doctor was not battery because no proof existed that the doctor acted by “intending to cause a harmful or offensive contact.” *Id.* (quoting *Robinson*, 140 F.Supp.2d at 490). In fact, *Robinson* consented to the initial touching during the emergency operation, which was not harmful because it did not cause any additional physical pain, injury, or illness more than the pain attributed to the original procedure. *Molé*, 381 Md. at 46, 846 A.2d at 1046. Most importantly, *Robinson* testified that she was not aware that the procedure occurred until twenty one months after it transpired. *Id.* Additionally, the court reasoned that the procedure did not offend *Robinson*’s reasonable sense of dignity because she had previously given birth to six children. *Id.* (citing *Robinson*, 140 F.Supp.2d at 493).

Furthermore, the court of appeals found significant the case of *Cobbs v. Grant*, 502 P.2d 1 (1972). *Molé*, 381 Md. at 46, 846 A.2d at 1046. In *Cobbs*, the court held that the intentional tort of battery is reserved for instances where either no consent is obtained, or the patient consents to one treatment but a substantially different one is performed. *Id.* at 47, 846 A.2d at 1046-47 (citing *Cobbs*, 502 P.2d at 8). Moreover, the intent to deviate from the consent given must be deliberate, as opposed to merely failing to meet the duty of care to disclose pertinent information. *Molé*, 381 Md. at 47, 846 A.2d at 1047 (citing *Cobbs*, 502 P.2d at 8). In the latter case, the action should be pleaded in negligence. *Molé*, 381 Md. at 47, 846 A.2d at 1047.

Applying the findings in the previously mentioned cases to the instant case, the court of appeals concluded that Dr. Jutton inadequately disclosed the potential risks associated with the procedure, namely, that the required incision may result in the cutting of milk ducts. *Molé*, 381 Md. at 47, 846 A.2d at 1047. However, Molé consented to the procedure that was performed and to any necessary extension that the doctor deemed medically necessary. *Id.* Accordingly, the court of appeals reasoned that the cutting of the milk ducts was a necessary part of the expected procedure, thus it was not unrelated or independent from the consent given. *Id.* Consequently, the case was one of lack of informed consent, not battery. *Id.* As a result, the court of appeals affirmed the trial court's ruling holding that the denial of Molé's request for a jury instruction on battery was proper and created no reversible error. *Id.*

The court's holding in *Molé v. Jutton* distinguishes between a situation in which the patient alleges that there was no consent for the touching, and one in which consent was not informed. In so holding, the court's distinction ensures that patients are able to make informed decisions about what happens to their bodies while protecting doctors from rising insurance rates resulting from lawsuits. In particular, unlike an informed consent case where the patient must show that the injury involved a material risk that was not explained, an action for battery does not require such expert testimony and is much easier to prove. Thus, the court's distinction protects doctors and patients alike from rising costs associated with medical malpractice litigation, and also results in decreased medical fees for patients.