

# **MEDICAL MALPRACTICE**

## **CASE UPDATE**

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Achuff v. Episcopal Hospital, 38 D. & C. 4<sup>th</sup> 466 (1998 - Philadelphia Common Pleas).

### **Defendant Doctor Can Give Expert Opinions**

This is a malpractice action where the plaintiff appealed from the denial of her Post-Trial Motion following a jury verdict for the defendants. Plaintiff alleged that the court erred in allowing defendant, Dr. David Fornstein, to give opinions as a defense expert when he was called as on cross during the plaintiff's case.

Prior to trial Dr. Fornstein had been identified as an expert on his own behalf. Additionally, plaintiff had deposed Dr. Fornstein. Plaintiff objected to the doctor's testimony on the ground that he had not provided a report containing his opinions. However, a report is not required where the proposed expert is a party and has been deposed. Neal by Neal v. Lu, 365 Pa. Super. 464 530 A.2d 103 (1987).

Barnes v. Pennsylvania Hospital, et. al.  
737 A.2d 291 (Pa. Super. 1999)

### **Once Claim Brought On Behalf Of Minor, Plaintiffs Cannot Discontinue The Case Without Prejudice With A View Toward Filing A Second Action At Some Time In The Future**

In September of 1993 Plaintiff underwent an abortion procedure performed by the Defendants to terminate her three month pregnancy. Tissue sent for laboratory analysis confirmed that the pregnancy had in fact been terminated. Thereafter Plaintiff submitted to mammography to diagnose a lump on her breast and began taking birth control pills. In November it was ascertained through an ultrasound that the abortion had been ineffective and that Plaintiff was still pregnant. Plaintiff then decided to carry the pregnancy to term. Plaintiff's child was born on April 12, 1994

with a deformed left hand. Suit was commenced in August of 1995 alleging negligence by Defendants in performing the abortion so as to cause the child's deformity. Approximately two years later a petition for continuance without prejudice was filed and granted. The Trial Court entered an order discontinuing the case without prejudice. Defendants appealed the Trial Court's Order.

Defendants argued that since suit had been brought the issues should be litigated now. They further contended that when an action has already been commenced, the minority tolling statute has no application. The Court held that to allow the action to be continued without prejudice would be to prejudice Defendants unfairly by holding them hostage indefinitely to an unwarranted claim. The Court found that having once chosen to file suit Plaintiff could not then impose unreasonable burdens on the Defendants who would be compelled to remain in limbo until expiration of the Plaintiff's minority. Plaintiffs argued that there was some uncertainty as to the extent to which the deformity might develop, and thus they were not in a position to fully assess the damages. The Superior Court noted that there was nothing in the record to suggest that the minor Plaintiff was at risk for future injuries stemming from her deformed hand. Thus the argument that there might be compensable injuries in the future could not be used to suspend litigation for injuries ascertainable at the present time. The Court further observed that where the impediment to progress of the litigation is the minor Plaintiff's failure to provide discovery, the minor would, contrary to the intent of the tolling statute be allowed more opportunity than an adult to bring an action rather than the same opportunity.

The Superior Court reversed and remanded so that the Plaintiffs could withdraw their discontinuance motion and should they not do so the Trial Court was ordered to discontinue the matter with prejudice.

Bauman v. U.S. Healthcare, Inc., Nos. 98-5222, 98-5262, 98-5263 1999 U.S. App. LEXIS 22464 (3<sup>rd</sup> Cir. 9/16/99)

**Complete Preemption Does Not Apply Where Claims Relate To  
Quality Of Care Rather Than An Administrative's Decision As To  
Whether Certain Benefits Are Covered By An HMO**

In this case the Third Circuit was called upon to revisit the issue of “complete preemption” under the Employee Retirement Income Security Act “ERISA”, 29 U.S.C. §§ 1132(a). The Plaintiffs brought suit for damages arising from the death of their newborn daughter. The Complaint named as Defendants the pediatrician responsible for the treatment of the newborn daughter, the hospital where the newborn daughter was born, and the HMO in which the Plaintiffs were members.

The Plaintiff, Michelle Bauman, gave birth to Michelina Bauman at the Defendant hospital on May 16, 1995. In accordance with the health care benefits pre-certification provided by the HMO, the Defendant, Dr. Neme, an independent health care provider contracting with the HMO, discharged mother and newborn from the hospital after 24 hours. On May 18, 1995, the day after Michelina was discharged and two days after she was born, the Baumans noticed that Michelina was ill. They made numerous telephone calls to Dr. Neme, but she did not advise them to bring Michelina back to the hospital. They also contacted U.S. Healthcare and requested an in-home visit

by a pediatric nurse, but no such nurse was provided. Michelina contracted a Group B strep infection that was undiagnosed and untreated. It developed into meningitis and she died that same day.

Four Counts of the Complaint were at issue on the “complete preemption” doctrine. As to Counts One, Two and Five, the District Court ruled that they were not preempted. As to Count Six, the District Court ruled that it was preempted. Accordingly, the Sixth Count was dismissed and the case remanded to the trial court on the remaining Counts. As to Count Six the District Court held that removal was proper because it stated a claim that fit within the scope of Section 502(a) of ERISA covering claims to “recover benefits due” under the terms of a plan and therefore it had subject matter jurisdiction under the doctrine of “complete preemption.” It held, concomitantly, that Count Six was expressly preempted under Section 514(a) of ERISA and should be dismissed.

In its analysis the Court made note that there is an express preemption provision in ERISA pursuant to Section 514(a) which provides that ERISA “shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . . .”. 29 U.S.C. §§ 1144(a). State law claims that are subject to an express preemption are displaced and subject to dismissal.

Having set forth the applicable principles of law, the Court was called upon to determine whether any of the claims stated in the Baumans’ Complaint were completely preempted and thus, whether they “fall within the scope of” the ERISA civil enforcement provisions.

The Court relied on Dukes v. U.S. Healthcare, Inc., 57 F.3d 350 (3d Cir. 1995), which drew the distinction between (1) state law claims directed to the quality of benefits provided, which are not completely preempted, and (2) claims “that the plans erroneously withheld benefits due” or that seek

“to enforce [plaintiffs’]” rights under their respective plans or to clarify their rights to future benefits,” which are subject to complete preemption. *Id.* at 356.

Count One challenged U.S. Healthcare’s policy of presumptively discharging newborn infants within 24 hours. The Count alleged that the HMO adopted and implemented this policy without adequate consideration for whether this policy was medically appropriate. The Count charged U.S. Healthcare with both direct negligence for the adoption and implementation of the policy and vicarious liability for the negligence of Dr. Nemeh and the hospital. As to the direct negligence claim, the Court held that the Baumans were contending that the HMO’s medical determination of the appropriate level of care was negligent and contributed to the death of their daughter. Because these claims involved the quality of care and the Plaintiffs’ attempt to hold the HMO liable as the arranger for medical treatment, they were not preempted.

Count Two was similar to Count One except that it charged the HMO with reckless indifference knowing that many infants would be at risk for life threatening disease after leaving the hospital. Thus, this Count, too, was directed toward the quality of the medical care provided.

Count Five charged the HMO with negligence in adopting hospital utilization policies that discouraged physicians from re-admitting infants to the hospital when health problems were identified subsequent to their discharge from the hospital. This Count also alleged that the HMO was negligent in the selection, supervision, training and/or monitoring of Dr. Nemeh. The Court held that both aspects of this Count pertain to the HMO’s role as a provider or arranger of medical services. On the direct negligence aspect of this Count the Baumans claimed that the HMO had adopted a policy that encouraged, pressured and/or directly or indirectly required participating

physicians to discharge newborn infants and also discouraged physicians to readmit newborn infants when the appropriate standard of care required otherwise under state law. As to the portion of the Count relating to the HMO selection, supervision, training and/or oversight of Dr. Nemeah the Court held that this did not relate to plan-administration decisions but rather to decisions that the HMO made in the course of arranging for the provision of medical services.

Thus, the Third Circuit agreed with the District Court that Counts One, Two and Five were not preempted. However, while the District Court ruled that Count Six was preempted, the Third Circuit held otherwise.

Count Six alleged that the HMO was negligent in “not providing for [an in-home] visit by a participating provider [pediatric nurse], despite assurances under its L’Il Appleseed Program that such a visit would be provided and despite a telephone call . . . from the Baumans requesting this service.” The Baumans urged the Court to interpret the Complaint as stating cause of action for violating a tort duty to provide the Bauman family adequate medical care rather than a refusal to provide benefits in violation of a contractual promise made to them under their ERISA plan. The Court held that Count Six raised an issue regarding the adequacy of the quality of care. The mere fact that the Baumans referred in their Complaint to a benefit promised by the health care plan did not automatically convert their state-law negligence claim into a claim for benefits under Section 502. Because Count Six alleged that the HMO failed to meet the standard of care required of health care providers by failing to arrange for a pediatric nurse in a timely fashion, it set forth an ordinary state-law tort claim for medical malpractice. Thus, the Court concluded that all of the claims were not completely preempted and therefore the District Court did not have subject matter jurisdiction

over the Complaint and should have remanded the entire case to state court under 28 U.S.C. §§ 1447(c), leaving to the state court to determine whether the express preemption doctrine applies to Count Six.

Behar v. Frazier, 724 A.2d 943 ( Pa. Super. 1999)

**Attorney Who Brought Malpractice Suit Against Defendant Doctor  
Found Not Liable for Wrongful Use of Civil Proceedings.**

Following dismissal of a patient’s medical malpractice action against a psychiatrist, the psychiatrist brought an action against the patient’s attorney for wrongful use of civil proceedings. Following a non-jury trial, judgment was entered in favor of the patient’s attorney. Following denial of the post trial motions, the psychiatrist appealed. The Defendant attorney had named the psychiatrist as one of eleven Defendants in a medical malpractice suit. The suit sought to hold the psychiatrist liable for medical malpractice, emotional distress and false imprisonment stemming from the patient’s psychiatric evaluation in connection with an involuntary commitment at a medical facility from November 1993 to May 1995. The Defendant attorney in the wrongful use of civil proceedings case acted as the patient’s attorney in the malpractice action. In May of 1995, the Trial Court granted the Defendant attorney leave to withdraw as counsel for the patient and subsequent counsel was substituted. Shortly thereafter, the parties reached an agreement to dismiss the psychiatrist. The claim of the psychiatrist for wrongful use of civil proceedings was based on Section 8351, 42 Pa. C.S.A. §8351 which delineates the statutory standard:

“§8351. Wrongful use of civil proceedings

(a) Elements of action.-- A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings.

(1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and

(2) The proceedings have terminated in favor of the person against whom they are brought.”

Based on a review of the record, the Court held that there was no evidence that the attorney filed suit against the psychiatrist with the intent to harass or injure him. In fact, there was no evidence that the attorney knew the psychiatrist prior to instituting suit.

Foflygen v. Allegheny General Hospital, 723 A.2d 705 (Pa. Super. 1999)

#### **Informed Consent**

- 1) Statistics To Establish That Success Rate Of Non-Surgical Alternatives Not Admissible**
- 2) Testimony By Nursing Staff To Patient Admissible To Establish Doctor Gave Informed Consent**

In this case, the Defendant doctor performed an elective near-total gastric bypass procedure on Plaintiff due to her morbid obesity. Following surgery, Plaintiff suffered a stroke. She then filed suit against the Defendants alleging that the surgery was unnecessary, negligently performed, and performed without her informed consent. At trial, Plaintiff withdrew the negligent count having to do with unnecessary surgery and proceeded only on the lack of informed consent claims. At the close of the liability portion of the case, the Trial Court entered a non suit in favor of the hospital. Following a four-day trial, the jury returned a verdict in favor of the Defendant doctor on the informed consent claims.

The Plaintiff argued that it was error for the Court to refuse to permit rebuttal testimony to challenge the statistics given by the Defendant as to the success rates of the alternatives to surgery. This raised the question as to whether the doctrine of informed consent extends to statistics regarding the success of alternatives. In this case, the proffered rebuttal testimony was to offer different statistics as to the success of some non-surgical weight reduction alternatives. This was held to be beyond the scope of the doctrine of informed consent and therefore not relevant. The Court did state that even if such statistical information were relevant under the informed consent doctrine, it would not apply in this case because the Plaintiff had already testified that during the '70's and '80's she had tried non-surgical weight loss programs including those that were medically supervised and they did not work for her. She testified that any weight loss under those programs was subsequently regained. Therefore, Plaintiff's own evidence established that she fell outside the statistical success rate of the non-surgical alternatives regardless of the percentages of success.

The Plaintiff questioned the propriety of the Trial Court answering the question posed by the jury regarding the weight to be given testimony related to the Plaintiff by the nursing staff about informed consent. Plaintiff contended that where the surgeon admitted that he took responsibility for explaining the complex surgical risks and benefits, the jury should not have been instructed to give any weight to statements by the surgeon's nurse. This was rejected. The validity of the patient's consent is based on the scope of the information related, rather than the identity of the individual communicating the information. Thus, information from the surgeon and the nurse was relevant on the informed consent issue.

Lawler v. Stefanyszyn, 40 D. & C. 4<sup>th</sup> 34 (1998-Philadelphia Common Pleas)

**Informed Consent Provisions Of Medical Malpractice Act  
Are Substantive And Therefore Do Not Apply To Claims  
Which Arose Prior To The Effective Date Of The Act**

This case gave rise to the issue as to whether or not the defendant physician was entitled to a jury instruction regarding informed consent under the Medical Malpractice Act of 1996. The court held that this instruction was not appropriate because the statute did not apply retroactively. The events which gave rise to this claim arose prior to 1994, and obviously prior to the effective date of the Medical Malpractice Act of 1996. However, the case came to trial after the effective date of the Act.

Defendant argued that the trial court was required to instruct the jury pursuant to the new statute, 40 P.S. §§ 1301.811-A(d), which provides:

“A physician is liable for failure to obtain the informed consent only if the patient proves that receiving such information would have been a substantial factor in the patient’s decision whether to undergo a procedure set forth in subsection (a).”

The court held that this statute was substantive and imposed a new legal burden on the plaintiff which did not exist at common law, prior to the effective date of the statute. Because the amendment implicates the plaintiffs’ substantive rights, the court declined to give it retroactive effect.

**On Malpractice Settlement PIGA Not Entitled To  
Credit Against Life Insurance Proceeds**

The question before the court was whether 40 P.S. §991.1817 permits PIGA to offset amounts received by a claimant under a life insurance policy against the amount PIGA would otherwise owe the claimant. The trial court concluded the statute did not permit such an offset. The Superior Court affirmed.

In January, 1998 the parties to this malpractice action negotiated a settlement in the amount \$950,000. It was agreed that PIC was responsible for \$200,000.00 with the CAT Fund being responsible for \$750,000.00. Two days after the parties agreed to the settlement, the Commonwealth Court issued an Order of Liquidation placing PIC in liquidation. By operation of law, the plaintiffs claim against PIC became a claim against PIGA.

PIGA refused to honor the plaintiffs' claim on the ground that the decedent had a life insurance policy providing a benefit of \$584,216.84, all of which had been paid to the plaintiffs. PIGA argued under the nonduplication of recovery provision of the Act, that the \$200,000.00 claim against PIGA was entirely offset by the life insurance proceeds the plaintiffs had received. PIGA accordingly argued that it was not compelled to make any contribution toward payment of the negotiated settlement. A Petition to Enforce a Settlement was filed. The Trial Court granted the Petition.

The nonduplication of recovery section of the PIGA statute basically provides for a reduction of PIGA's liability for "any kind of insurance" payable. PIGA argued that the language must be interpreted and applied to require that the life insurance benefits paid nullify PIGA's statutory responsibility. This argument was rejected. The court held that in order for the offset to apply, the claim must be under insurance that sought to protect the insured against the same risk as was covered by the now insolvent insurer for whom PIGA was providing coverage. Further, the court held that medical malpractice insurance provided by the insolvent insurer was casualty insurance, as distinguished from life insurance. Life insurance provides a defined benefit payable upon death, whereas medical malpractice liability insurance provides coverage for amounts the insured is legally liable to pay others because of the doctor's own negligence and the harm caused. Thus, the Court held that PIGA was not entitled to offset the benefits paid under the life insurance policy. PIGA was thus found to be liable to the same extent it would have been had the plaintiffs not received any life insurance proceeds. A dissenting opinion was filed by Judge Montemuro.

Mulligan v. Piczon et. al. No. 672 C.D., 1999 Pa. Commonwealth. LEXIS (9/3/99)

**CAT Fund Held In Contempt For Not Abiding By Order Directing That  
Its Designee Attend Trial**

In this case, the CAT Fund appealed from an order of the Lackawanna County Court of Common Pleas that fined the CAT Fund one dollar per day for each day that a designated representative of the agency did not attend the trial in the matter of Mulligan v. Piczon, et. al. 95 Civ. 1039.

On January 15, 1999 the Trial Court issued an Order and compelled the CAT Fund to name its designee for attachment to the trial scheduled March 15, 1999 to May 7, 1999, within 10 days or by January 25, 1999. On February 22, 1999 the CAT Fund sent the Trial Court a letter and advised the Trial Court that it would not be attending the trial in the Mulligan case. On February 25, 1999 the Trial Court issued a rule to show cause why the CAT Fund should not be held in contempt for ignoring the Trial Court's Order of January 15, 1999. The CAT Fund filed preliminary objections on the ground that the Trial Court had no authority to issue the order, the Trial Court had no authority to hold either the CAT Fund or its designee in contempt, and that the Rules of Civil Procedure and Lackawanna County local rules do not give the Trial Court jurisdiction over the CAT Fund. On March 12, 1999 the Court ordered that the rule be made absolute and held the CAT Fund in technical de minimis contempt and certified that the interlocutory order involved controlling questions of law and that immediate appeal would materially advance the determination of the matter. 42 Pa. S. 42 Pa. C.S. §§ 702 (b).

The Commonwealth Court affirmed the Order of contempt and relied on In re LaMarre 494 Fed.2d 753 (6<sup>th</sup> Cir. 1974) where the claims manager of INA, Charles LaMarre (LaMarre), was ordered to attend a settlement conference because of his refusal to accept the settlement recommendation of counsel. LaMarre refused to follow the District Judge's Order and was held in contempt.

The Commonwealth Court further held that the Trial Court had authority to invoke personal jurisdiction over the CAT Fund and its representative because the CAT Fund carries on “. . . a continuous and systematic part of its general business within this Commonwealth, . . .” 42 Pa. C.S. §§ 5301 (a) (iii), and is mandated to do so by 40 P.S. §§ 1301.701 - 1301.702, as a “. . . statutorily mandated fund which serves as a secondary insurer in medical malpractice cases.” King Boettcher

537 Pa. 574 578-79, 645 A.2d 219, 221-22 (1994). The Court also relied on Lackawanna County Rule of Civil Procedure 212 which states, "If an attorney does not have complete settlement authority, the party or a person with full settlement authority shall accompany the attorney to the pretrial conference or shall be available by telephone during the pretrial conference." Thus, the Court held that the Trial Court had authority to hold the CAT Fund in contempt of Court. Further, even a misguided Court Order must be obeyed until rescinded or reversed. The CAT Fund unilaterally chose to ignore the Trial Court's Order. The Order of the Lackawanna County Court was affirmed. Panea v. Isdaner 39 D. & C. 4<sup>th</sup> 129 (1999 - Philadelphia Common Pleas)

**On Malpractice Settlement PIGA And Insured Entitled  
To Credit Against Health Insurance Benefits**

Plaintiffs filed a medical malpractice action in November, 1995 against the defendant physician who was insured by PIC. In December, 1997, the parties reached a settlement in the amount of \$75,000.00, and plaintiffs forwarded a release and an order to settle, discontinue and end.

In January, 1998 before the settlement funds were paid, PIC was declared insolvent. Plaintiffs subsequently requested payment from PIGA, which tendered \$50,000.00 to plaintiffs, claiming that it was entitled to a credit of \$25,000.00 under the nonduplication of recovery provision of the statute governing PIGA. The \$25,000.00 reflected the payment by plaintiffs' health insurer. Plaintiffs filed a petition to force a settlement claiming that PIGA or the defendant was liable for the additional \$25,000.00.

PIGA, the court held, is entitled to a credit for any kind of other insurance payment, including payments by a health insurer. The statute unambiguously precludes plaintiffs from recovering from PIGA the sum paid by their health insurer.

The court further held that since the plaintiffs were barred from recovering against PIGA the \$25,000.00, they were likewise barred from recovering that amount against the insured tortfeasor.

Pappas v. Asbel 724 A.2d 889, 555 Pa. 342 (1999)

**Malpractice Claim Not Preempted by ERISA**

The issue before the Court was whether ERISA preempts the state law claims brought against U.S. Healthcare. The Court held that ERISA did not preempt these claims.

On May 21, 1999 Basil Pappas (“Pappas”) was admitted to Haverford Community Hospital (“Haverford”) through its emergency room complaining of paralysis and numbness in his extremities. At the time of his admission Pappas was an insured of HMO - Pa. Health Maintenance Organization operated by U.S. Healthcare. The doctors who consulted concluded that Pappas’ condition constituted a neurological emergency and that it was in his best interest to receive treatment at a university hospital. Arrangements were made to transfer Pappas to Jefferson University Hospital. The doctor who arranged the transfer was alerted to the fact that U.S. Healthcare was denying authorization for treatment at Jefferson. The ambulance was ready to take Pappas to Jefferson at 12:40 p.m. Ten minutes later the transferring doctor contacted U.S. Healthcare to obtain authorization to transfer to Jefferson. At 1:15 p.m. U.S. Healthcare responded to the transferring doctor’s inquiry and advised that authorization for treatment at Jefferson was still being denied but that Pappas could be transferred either to Hahneman University, Temple University or the Medical College in Pennsylvania. Because of additional delays, Pappas was not transported to Hahneman until 3:30 p.m.

Pappas claimed that the delay caused permanent quadriplegia resulting from compression of his spine by an abscess. Pappas filed suit against his primary care physician at Haverford. Haverford then filed a third party complaint against U.S. Healthcare joining it as a party defendant for its refusal

to authorize the transfer of Pappas to a hospital selected by the Haverford physicians. U.S. Healthcare filed a motion for summary judgment on the third party claims.

Following a careful review of the law in this area, the Court concluded that the negligence claims against the health maintenance organization did not “relate to” an ERISA plan. The Court further held that Congress did not intend to preempt state laws which govern the provision of safe medical care. Claims that an HMO was negligent when it provided contractually - guaranteed medical benefits in such a dilatory fashion that the patient was injured indisputably are intertwined with the provision of safe medical care. The Court held that it believed it would be highly questionable to find that these claims were preempted when the United States Supreme Court has stated that there was no intent on the part of Congress to preempt state laws concerning the regulation of the provision of safe medical care.

Perkins v. Desipio, 736 A.2d 608 (Pa. Super. 1999)

### **Dentist Performing Root Canal Must Give Informed Consent**

This was an appeal from a judgment in favor of the Defendant in a dental malpractice action. On appeal the Plaintiffs challenged the Trial Court's refusal to submit their informed consent cause of action to the jury. While vacationing, Mrs. Perkins developed a tooth ache in an upper front tooth. She saw the Defendant, Dr. Desipio, who subsequently took an X-ray of the affected area. He determined that Tooth No. 10 was in need of immediate root canal. He performed the root canal procedure on the affected tooth. On the following day, the Plaintiff was awakened due to severe pain in the region where the root canal was performed. She could not reach the Defendant doctor. She then presented herself to the Emergency Room at Thomas Jefferson Hospital. She was prescribed antibiotics and pain killers and was discharged from the hospital. She subsequently saw the Defendant doctor who attempted to drain the tooth without success. He prescribed additional antibiotics and instructed Mrs. Perkins to see an oral surgeon if her condition did not improve. The following day, the Plaintiff consulted with her oral surgeon and chose to have the tooth extracted.

Plaintiff filed suit against the doctor, alleging claims of negligence and a lack of informed consent. She complained that he did not inform her of the risk of an infection developing following the root canal. She attempted to introduce an expert on the issue of informed consent. The Trial Court ruled that root canal is not subject to informed consent and precluded the expert from testifying.

The Trial Court based its conclusion on its belief that a root canal is not surgery and that there was no cutting into or removal of any gum tissue. The Superior Court held that the Trial Court's

conclusion was erroneous, as it minimized the invasive nature of a root canal. In the field of dentistry, the Superior Court has determined that the extraction of teeth requires informed consent. Neither the Pennsylvania Legislature nor the Courts have defined surgical or operative procedure. Plaintiffs argued that a root canal was an invasive procedure involving the use of surgical instruments and the “incision or excision” upon the body of the patient “to restore health” is contemplated by the Supreme Court’s definition of “surgery” or “operation”. Morgan v. MacPhall, 550 Pa. 202, 704 A.2d 617 (1997).

Plaintiff’s expert during the expert colloquy distinguished root canal from the filling of a cavity. The expert testified that he would obtain informed consent on a root canal but not to fill a cavity. In a root canal, the expert explained a dentist invades the soft tissue and the pulp of the tooth which is the nerve and blood supply that is infected and necrotic. Frequently, there is a lot of infection that has already eaten away at the bone of the apex. In a normal filling, every effort is made to stay away from the nerve. Thus, the Court concluded that regardless of whether the dentist cut through the gum or the top of the tooth, there was an invasion of the body involving the use of a surgical instrument to make an excision in order to relieve discomfort or restore the patient’s health. Petrasovits v. Kleiner, 719 A.2d 799 (Pa. Super. 1998)

**1) Two Schools Of Thought Does Not Exonerate Defendant Doctor**  
**2) Defendant Unable To Impeach Expert Based On Suspension From Medical Association Not Resulting In Conviction**

In this malpractice case, the Plaintiff suffered a work-related back injury while employed as an orderly at a hospital. After sixteen months of physical therapy and rehabilitative treatment, the Plaintiff consulted with the Defendant doctor and neurosurgeon. The Defendant recommended and performed back surgery on the Plaintiff who claimed that the condition worsened as a result of the surgery. Plaintiff’s medical malpractice suit based liability on three theories: (1) negligent performance of surgery; (2) lack of informed consent; and (3) negligence in recommending surgery.

The Trial Court granted a non suit on the theory of negligent performance, and the jury rejected the lack of informed consent theory. The jury, however, found Defendant liable of malpractice for recommending back surgery to Plaintiff. The jury awarded Plaintiff \$908,000.

On appeal, the Defendant argued that the Plaintiff's own expert had acknowledged that the Defendant doctor's decision to recommend back surgery was supported by a considerable number of respected neurosurgeons who would have found the Plaintiff a suitable candidate for surgery. Thus, the Defendant doctor contended that the two schools of thought doctrine was a defense to the medical malpractice case and judgment n.o.v. should be granted. The Court found that Plaintiff's medical expert had testified that the two schools of thought doctrine did not apply.

The Defendant attempted to cross examine the Plaintiff's expert regarding his suspension from the American Association of Neurological Surgeons for giving improper testimony in another case. The Defendant argued that this was relevant and admissible to impeach the credibility of Plaintiff's liability expert, Dr. Austin. The Court rejected this testimony. The Court held that the Defendant wished to impeach Dr. Austin's credibility by using a specific instance of conduct that had not resulted in a conviction. This was an improper method of impeachment. Thus, introduction of this evidence was properly excluded.

Physicians' Insurance Company v. Pistone, 726 A.2d 339, 555 Pa. 616 (1999)

**Medical Malpractice Carrier Not Obligated To Cover  
Doctor In Suit Involving Negligence In Commission Of Perverted Acts**

In this case a professional liability insurer sought a declaratory judgment that the policy provided no coverage for the physician's acts of exposing himself to a patient, fondling her breasts, and masturbating during examination. Justice Neuman held that the physician's acts were not "professional health care services" and, therefore, were outside coverage of the policy. The Plaintiff in this case was admitted to the hospital complaining of abdominal pain. The Defendant doctor treated her for gallstones. He subsequently entered Plaintiff's semi-private room to perform an examination and closed the privacy curtain around the bed. No other patient was in the room. He then fondled her breasts, exposed his genitals and masturbated in front of her. He was charged with indecent assault and indecent exposure. Plaintiff and her husband subsequently brought a lawsuit against the Defendant doctor, claiming that he was negligent in exposing his patient to his sexual perversion, that his employer was negligent in hiring him and that the hospital was negligent in granting him staff privileges.

The Defendant doctor and the employer requested that PIC defend them in the action. PIC informed the doctor that it was denying coverage under its policy and that it would neither defend nor indemnify him with respect to the Plaintiff's claim. PIC filed an action seeking declaratory judgment that it not be required to defend or indemnify the Defendant doctor or his employer. Plaintiff argued that the Court should hold that when a patient is receiving legitimate medical treatment and is then sexually assaulted by her physician, the sexual assault should be deemed as

arising from the rendering of professional healthcare services, and therefore covered under the liability policy.

The Court noted that other jurisdictions have held that when a medically negligent procedure is so inextricably intertwined and inseparable from the intentional conduct that serves as a basis for the separate claim of sexual assault, that the professional liability policy coverage must apply. The Court rejected the argument that because the examination began as a rendering of professional healthcare services, that all of the doctor's acts during the examination should be considered professional healthcare services. The Court rejected the "intertwined and inseparable from" test. The Court held that the standard against which the coverage issue is to be judged requires an examination of whether the act which caused the alleged harm is a medical skill associated with specialized training. The Defendant doctor's acts clearly failed to meet this test, and the Trial Court properly granted summary judgment.

Rubino v. Weiss, 39 D. & C. 4<sup>th</sup> 293 (1998-Philadelphia Common Pleas)

**Statute Of Limitations Does Not Begin To Run Until  
Termination Of Doctor-Patient Relationship**

In 1985 the plaintiff consulted the defendant, Dr. Weiss, complaining of pain in his left toe. An implant was inserted in July of 1985. In April of 1989 Dr. Weiss performed another surgery and inserted another implant. In December of 1992 the second implant was removed. Plaintiff remained under the care of Dr. Weiss until January, 1994. A complaint was filed on April 14, 1994 alleging malpractice with respect to the 1985, 1989 and 1992 surgeries.

Defendant moved for partial summary judgment with regard to the 1985 and 1989 surgeries.

The court held that where there is a continuing relationship between doctor and patient the statute of limitations does not begin to run until the plaintiff's relationship with the defendant doctor is terminated. The Motion for Partial Summary Judgment was denied.

Shannon v. McNulty, 718 A.2d 828 (Pa. Super. 1998)

**HMO Conduct Subject To Scrutiny Where It Provides  
Health Care Services Rather Than Money To Pay For Services**

This case concerned the Plaintiffs' claims of vicarious and corporate liability against HealthAmerica stemming from the premature delivery and subsequent death of their son.

Ms. Shannon testified that she was a subscriber to the HealthAmerica HMO when her child was conceived. Toward the end of her pregnancy she made several calls to HealthAmerica's emergency phone line concerning her severe irregular abdominal pain, back pain and about the fact that she was unable to get in touch with her doctor, Dr. McNulty. She was advised by the triage nurse to continue her efforts to contact Dr. McNulty. She finally spoke to HealthAmerica's in-house orthopaedic physician who directed her to go to a hospital to get her back examined. She followed the doctor's advise to go to West Penn Hospital, passing three hospitals on the way. At West Penn she was processed as having a back complaint because those were HealthAmerica's instructions. She delivered a 1-1/2 lb. baby that night. The baby survived two days and then died due to severe prematurity.

The Shannons' expert testified that he had experience in a setting where patients would call triage nurses. He opined that HealthAmerica, through its triage nurses, deviated from the standard of

care following the phone calls to the triage line on October 10, 11 and 12, 1992, by not immediately referring Mrs. Shannon to a physician or hospital for a cervical exam and fetal stress test. In addressing whether an HMO could be corporately liable, the court held under Thompson v. Nason Hospital, 527 Pa. 330, 591 A.2d 703 (Pa. 1991) that liability could be imposed on the basis that the HMO had a “A duty to oversee all persons who practice medicine within its walls as to patient care.”

The court observed that a great deal of today’s health care is channeled through HMO’s with the subscriber being given little or no say so in the stewardship of their care. While these providers do not practice medicine, they do involve themselves in decisions affecting their subscriber’s medical care. These decisions may, among others, limit the length of hospital stays, restrict the use of specialists, prohibit or limit post-hospital care, restrict access to therapy or prevent rendering of emergency room care. All of these efforts are for the laudatory purpose of containing health care costs. However, where decisions are made to limit a subscriber’s access to treatment, that decision must pass the test of medical reasonableness.

Where an HMO is providing health care services rather than merely providing money to pay for services, its conduct should be subject to scrutiny. When a benefits provider, be it an insurer or a managed care organization, interjects itself into the rendering of medical decisions affecting a subscriber’s care it must do so in a medically reasonable manner. Here HealthAmerica provided a full service for emergent care staffed by triage nurses. It was under a duty to oversee that the dispensing of advise by those nurses would be performed in a medically reasonable manner.

The Trial Court’s entry of a nonsuit on corporate liability and vicarious liability was found to be in error and the case was remanded for trial.

Siegal v. Stefanyszyn, 718 A.2d 1274 (Pa. Super. 1998)

### **Outrageous Conduct Of Defense Counsel Warrants New Trial**

In this malpractice action, the Plaintiffs contended that the Defendant Doctor removed too much bone from the Plaintiff's left orbit causing her left eye to sink into her maxillary sinus cavity. Plaintiffs also argued that a second operation was performed to correct the Doctor's initial mistake. Finally, Plaintiffs argued that the Defendant Doctor never informed the Plaintiffs that she intended to remove bone from the orbit. After a seventeen-day trial, a verdict was rendered for the Defendants.

Defense counsel had consulted with a treating physician, Dr. Shore, regarding the propriety of the Defendant doctor's treatment of the Plaintiff. Dr. Shore had advised Defendant's counsel that the Defendant doctor's treatment fell below the applicable standard of care. At trial, Plaintiffs sought to introduce Dr. Shore as a witness. However, prior to Dr. Shore testifying, defense counsel made a motion to specifically preclude him from giving any opinion testimony. The motion was granted. Despite the fact that defense counsel knew that Dr. Shore considered the Defendant doctor's treatment to be below the applicable standard of care, and despite the fact that Dr. Shore was precluded from testifying because of defense counsel's motion, defense counsel made the following improper and outrageous argument during closing argument to the jury:

“But you know; if Mary Stefanyszyn—They really felt that Mary Stefanyszyn had committed malpractice or did not get informed consent, you would have heard that from our friend Dr. Shore. He [Dr. Shore] was the operating surgeon. . . He came down here. And they limited him to CAT scans, for which he's not an expert. Came down to testify to CAT scans.

\* \* \* \*

Do you think if John Shore really felt that Mary Stefanyszyn had done something wrong that Richard Siegal would let him walk out of this courtroom without saying so? The answer is no.”

718 A.2d at 1272.

Plaintiffs objected, and the Court gave a curative instruction to the effect that the jury may not draw any adverse inference against the Plaintiffs because Dr. Shore did not testify on the standard of care when called as a witness.

Nevertheless, the Superior Court held that there are certain instances where the comments of counsel are so offensive or egregious that no curative instruction can adequately obliterate the prejudice. The Court concluded that defense counsel’s reference to the absence of opinion testimony of Plaintiffs’ witness was improper and outrageous and so polluted the jury that the effect could not be cured by the curative instruction that was given. A new trial was awarded.

Taylor v. Albert Einstein Medical Center 723 A.2d 1027 (Pa. Super. 1998)

**Lack Of Consent May Give Rise To Tort Of Battery And Intentional  
Infliction Of Emotional Distress**

The case involved cross appeals having been taken from a judgment in the amount of \$674,565.07. The case involved a sixteen year old student who was diagnosed with a viral infection. Her condition worsened. She was admitted to Einstein Hospital. Her condition continued to deteriorate. A chest x-ray revealed that the endotracheal tube had been misplaced into the student’s right main stem bronchus. It was subsequently repositioned but had been there for three hours. One of the Defendant doctors determined that the Plaintiff needed to undergo an invasive diagnostic procedure known as a Swan Ganz catheterization. Dr. Trinkaus consulted a cardiologist, Dr.

Wertheimer, who concurred in the decision to do the catheterization. Dr. Trinkaus then sought to obtain authorization for the procedure from the parents of the student. The mother testified that she extended her consent to perform the procedure only to Dr. Wertheimer, based on his experience and Dr. Trinkaus' admitted lack of experience. Plaintiff sought to establish at trial that Dr. Trinkaus was desirous of obtaining experience performing such procedures despite having assured the Plaintiffs that Dr. Wertheimer would perform the procedure, and knowingly undertook to perform insertion of the catheter and sheath while Dr. Wertheimer stood nearby and read the waveforms produced by the catheter.

The parties agreed that the student died during the procedure, while the Defendants contended that the death was wholly unrelated to the catheterization. There was expert testimony that "the inadvertent placement of the catheter in an arterial vessel and an attempt to pass it was a direct initiating factor in the events that occurred, mainly, her cardiac arrest and subsequent death."

The trial judge granted the motion of the Defendant for a directed verdict on the informed consent claim at the close of the evidence, ruling that the identity of the surgeon who was to perform the procedure was irrelevant to the issue of informed consent. The judge also granted a directed verdict as to the misrepresentation and negligent infliction of the emotional distress claims, and removed the issue of punitive damages from the consideration of the jury.

On the issue of the tort of battery, the Court held that the Plaintiff need not establish that the surgery was performed in a negligent manner. Rather, the Court held that surgery could have been done perfectly and could even have had a beneficial effect on the patient, yet a cause of action could still exist, for it is the fact of the unauthorized procedure which constitutes the tort. The Court noted

that unlike an informed consent case where it must be shown that as a result of the recommended treatment the patient actually suffers an injury the risk of which was undisclosed, or the patient actually suffers an injury that would not have occurred if the patient opted for one of the undisclosed methods of treatment, it was not necessary for Plaintiff to prove these elements under a theory of battery. Therefore, while expert medical testimony is necessary in an informed consent case it is not where the case involves battery. The Court held that the record contained substantial credible evidence to support the battery claim based on the lack of consent for Dr. Trinkaus to perform the surgery, and therefore the case must be remanded for a new trial. For the same reasons the claim for misrepresentation should not have been removed from the consideration of the jury. The Court further held that the conduct which the mother Plaintiff contended Dr. Trinkaus engaged in was precisely the type of conduct which punitive damages are intended to prevent and for which punitive damages may be recovered.

There is a dissenting opinion by Judge Beck with respect to the ruling on the issue of the intentional infliction of emotional distress. Judge Beck noted that the mother was not present in the room when the catheterization took place, she was not a witness to Dr. Trinkaus' conduct and that this element has always been cited as a required element in cases involving family members seeking recovery under Restatement (2d) Torts §46(2). The rationale for the requirement of presence has been explained in cases discussing the tort of negligent infliction of emotional distress. In those cases, the Courts have held that the relative who contemporaneously observes the tortious conduct has no time to brace his or her emotional system. The negligent tortfeasor inflicts upon this bystander an injury to the victim. Hence, the critical element for establishing such liability is the

contemporaneous observance of the injury to the close relative. Because the element was lacking, Judge Beck held that judgment n.o.v. should have been granted on this claim.

**TABLE OF CASES**

Page

Achuff v. Episcopal Hospital, 38 D. & C. 4th 466  
(1998 - Philadelphia Common Pleas)

**Defendant Doctor Can Give Expert Opinions** ..... 1

Barnes v. Pennsylvania Hospital, et al.  
737 A.2d 291 (Pa. Super. 1999)

**Once Claim Brought On Behalf Of Minor, Plaintiffs Cannot  
Discontinue The Case Without Prejudice With A View Toward  
Filing A Second Action At Some Time In The Future** ..... 1

Bauman v. U.S. Healthcare, Inc., Nos. 98-5222, 98-5262, 98-5263 1999 U.S. App. LEXIS 224

**Complete Preemption Does Not Apply Where Claims Relate To Quality  
Of Care Rather than An Administrative’s Decision As To Whether Certain  
Benefits Are Covered By An HMO** ..... 3

Behar v. Frazier,  
724 A.2d 943 (Pa. Super. 1999)

**Attorney Who Brought Malpractice Suite Against Defendant Doctor  
Found Not Liable For Wrongful Use Of Civil Proceedings**..... 7

Foflygen v. Allegheny General Hospital,  
723 A.2d 705 (Pa. Super. 1999)

**Informed Consent**  
**1) Statistics To Establish That Success Rate of Non-Surgical  
Alternatives Not Admissible**  
**2.) Testimony By Nursing Staff To Patient Admissible To Establish  
Doctor Gave Informed Consent** ..... 8

Lawler v. Stefanyszyn, 40 D. & C. 4th 34 (1998-Philadelphia Common Pleas)

**Informed Consent Provisions of Medical Malpractice Act Are  
Substantive And Therefore Do Not Apply To Claims Which Arose  
Prior To The Effective Date Of The Act** ..... 10

Page

McCarthy v. Bainbridge, No. 3261, Pa. Super. LEXIS 2882 (9/24/99)

**On Malpractice Settlement PIGA Not Entitled To Credit Against Life Insurance Proceeds**..... 11

Mulligan v. Piczon, et. al. No. 672 C.D.,1999 Pa. Commw. LEXIS 707 (9/3/99)

**CAT Fund Held In Contempt For Not Abiding By Order Directing That Its Designee Attend Trial**..... 12

Panea v. Isdaner 39 D. & C. 4th 129 (1999-Philadelphia Common Pleas)

**On Malpractice Settlement PIGA And Insured Entitled To Credit Against Health Insurance Benefits** ..... 14

Pappas v. Asbel,  
724 A.2d 889, 555 Pa. 342 (1998)

**Malpractice Claim Not Preempted By ERISA** ..... 15

Perkins v. Desipio,  
736 A.2d 608 (Pa. Super. 1999)

**Dentist Performing Root Canal Must Give Informed Consent**..... 17

Petrasovits v. Kleiner,  
719 A.2d 799 (Pa. Super. 1998)

**1) Two Schools of Thought Does Not Exonerate Defendant Doctor  
2) Defendant Unable To Impeach Expert Base On Suspension From Medical Association Not Resulting In Conviction** ..... 18

Physicians' Insurance Company v. Pistone,  
726 A.2d 339, 555 Pa. 616 (1999)

**Medial Malpractice Carrier Not Obligated To Cover Doctor In Suit Involving Negligence In Commission Of Perverted Acts** ..... 20

Rubino v. Weiss, 39 D. & C. 4th 293 (1998-Philadelphia Common Pleas)

**Statute Of Limitations Does Not Begin To Run Until Termination  
Of Doctor-Patient Relationship** ..... 21

Shannon v. McNulty,  
718 A.2d 828 (Pa. Super. 1998)

**HMO Conduct Subject To Scrutiny Where It Provides Health Care  
Services Rather Than Money To Pay For Services** ..... 22

Siegal v. Stefanyszyn,  
718 A.2d 1274 (Pa. Super. 1998)

**Outrageous Conduct Of Defense Counsel Warrants New Trial** ..... 24

Taylor v. Albert Einstein Medical Center,  
723 A.2d 1027 (Pa. Super. 1998)

**Lack Of Consent May Give Rise To Tort Of Battery And Intentional  
Infliction Of Emotional Distress** ..... 25