RECENT DECISION ON SUFFICIENCY OF SPECIAL VERDICT FORM TO SUPPORT A BATTERY CLAIM IN A MEDICAL MALPRACTICE ACTION

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In the recent decision of Saxena v. Goffney (January 24, 2008) 07 C.D.O.S. 1180, Division Three of the Fourth Appellate District held that a special verdict form proffered by plaintiffs and accepted by the court in support of a battery cause of action against the defendant physician did not support a finding of battery. Rather, it reflected a "confluence" of battery and negligence that, in the end, only supported a finding of no informed consent, rather than a finding of no consent at all which is required to find medical battery in California.

The underlying action was one for wrongful death, medical negligence and battery against Dr. Goffney by the widow and two children of Rajesh Saxena. Dr. Goffney had undertaken to treat an open wound on Mr. Saxena's leg with a series of surgical debridements and the use of Apligraf, a synthetic skin-like material used to promote healing. At the outset of treatment, Mr. Saxena signed a consent form authorizing the procedures by Dr. Goffney. After the first several treatments, Mr. Saxena developed a fever and had difficulty breathing. When he was to see Dr. Goffney about a month after beginning treatment, he was not feeling well and his wife tried to change the appointment. At the request of a nurse in Dr. Goffney's office, Mrs. Saxena brought her husband to Dr. Goffney's office; once there Mrs. Saxena "begged and begged" to put off the procedure until her husband gained some strength. In response, Goffney said he would have to throw away and waste the $1,200 Apligraf if he did not use it that day. He went on to debride the wound and apply the Apligraf; Mr. Saxena died the next day of congestive heart failure.

The trial of the matter proceeded against Goffney only. Goffney made a motion for nonsuit on the battery claim at the close of evidence, which was denied. The court then gave two instructions to the jury on the battery claim. The first was CACI No. 530 (medical battery), the second a special instruction that made reference to a lack of "informed consent" proffered by plaintiffs and accepted by the court over Goffney's objection. The plaintiffs also proffered a special verdict form which the court accepted and gave to the jury. The jury found Dr. Goffney liable for negligent treatment or diagnosis of the patient, but also found that he performed a procedure on the patient without his "informed consent." They awarded plaintiffs $12.1 million in noneconomic damages and over $600,000 in economic damages 100% against Goffney.

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Goffney moved for JNOV on plaintiffs' battery claim, and for a new trial and to conform the judgment to MICRA. The nub of the problem in this case—which the trial court acknowledged—was that the instruction and the special verdict form proffered by plaintiffs on the battery cause of action both said "without informed consent" rather than "without consent" and thus did not require the jury to find that Goffney committed a battery. Despite this, the trial court denied Goffney's JNOV, but granted a new trial on the battery and lack of informed consent negligence cause of actions, and on damages. The trial court said the damages award could not stand because of "instructional error, the deficiencies in the special verdict form, and the jury's failure to apportion damages between the battery and negligence claims." It denied Goffney's motion for a new trial on the negligence claims and his motion to have the verdict conform to MICRA.

Goffney appealed the denial of his JNOV motion and also sought a writ to compel the trial court to grant his motion for new trial on plaintiff's negligence claim; plaintiffs cross-appealed the order partially granting a new trial. The appellate court considered the appeals and writ petition together and concluded the court should have granted Goffney's motion. It went on to reverse the JNOV and new trial orders and remanded with instructions to grant the JNOV on the battery claim, to consider Goffney's MICRA motion and to enter judgment for Goffney on the battery claim and for plaintiffs on the negligence claims. Goffney's writ petition was denied.

The appellate court began its analysis by stating that it was not going to consider two of Goffney's contentions on appeal: that the denial of the JNOV was erroneous because there was insufficient evidence that he committed battery or that he intended to harm the patient. Rather, the court focused on and agreed with Goffney's third contention, that reversal was warranted because the special verdict form prepared by plaintiffs did not contain any findings on the battery cause of action.

The court went into a detailed discussion about the fact that a battery and a lack of informed consent are two distinct and separate acts and causes of action. "A lack of informed consent which sounds in negligence arises when a doctor performs a procedure without first adequately disclosing the risks and alternatives" to the patient with respect to that that treatment or procedure. A battery is an intentional tort committed by a physician who performs a procedure with no consent from the patient to the treatment at all—"an offensive touching of a person who has not consented to the touching." The court also rejected as unmeritorious plaintiffs' contention that there is no functional difference between lack of informed consent and lack of any consent.

The Saxena court observed the battery cause of action alleged in the wrongful death complaint and the plaintiffs' instructions and verdict form referred to the fact the

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defendant acted without the patient's "informed consent," not without "any" consent. While the trial court found the allegation as phrased in the complaint was sufficient to overrule a demurrer to the battery cause of action, in the context of the jury instruction and verdict form the appellate court found the language legally insufficient to support a battery claim:

> At plaintiff's request, the court instructed the jury it could find Goffney liable for battery if he performed the procedure without Saxena's informed consent. (Emphasis in original) This instruction conflated the theories of negligence and battery: It allowed the jury to find Goffney liable for battery by concluding he performed the procedure without Saxena's consent, or by concluding Saxena consented without sufficient information. Performing a medical procedure without informed consent is not the same as performing a procedure without any consent. But the verdict form read as a whole unmistakably relates to the lack of informed consent. Because it is impossible to determine how the jury would have resolved the battery issue had it been instructed properly and had it been asked to answer the question of whether Goffney performed a procedure without Saxena's consent, we will not '"speculate on the basis of the verdict."'

Instead, the court read the verdict form to mean what it says—that Goffney did not have the patient's informed consent. The court found the special verdict form "fatally defective" because it did not require the jury to "resolve every controverted issue," specifically the battery claim. Unfortunately for plaintiffs, they requested the instructions and proffered the verdict form used. They tried to argue that Goffney waived his right to challenge the special verdict form and that defense counsel lay in the weeds knowing the instructions and form were fatally defective. The court rejected both arguments of plaintiffs because there was no evidence that defense counsel was trying to "reap a technical advantage or engage in a litigious strategy." "It was plaintiffs' responsibility to tender their case to the jury. If plaintiffs chose to submit a verdict form tendering less than their full case to the jury, Goffney had no further incentive to object." The court found plaintiffs, not Goffney, had "invited the error" and are therefore bound by the defective verdict form.

As a procedural matter, the court of appeal found that while the trial court analyzed the problem with the verdict form correctly (that there was no basis for liability for battery based on the findings in the special verdict form), its solution to the problem at the conclusion of trial was incorrect. The trial court should have granted Goffney's JNOV on the battery claim rather than order a new trial because there was no

statutory basis upon which the court could grant a new trial under these circumstances and "there is no inherent power in the trial court to grant a new trial."

The court went on to address several ancillary issues on appeal that might have some interest to those who attempt to call witnesses who were not timely disclosed. Apparently, Goffney was precluded from calling witnesses he did not properly identify during discovery—he referred to the people listed in the medical records (but not by name) and then disclosed their names approximately 10 days before trial but without listing addresses or other identifying information. He was prevented from calling them at trial. The court of appeal found the error harmless, but its discussion on the duties of both the propounding and responding parties to compel or prepare adequate answers to discovery requests is fascinating and is a good primer on the benefits of diligently pursuing and updating discovery.

This is a very good result for Goffney, who went from a massive jury verdict against him on negligence and battery (it seems reasonable to infer the jury believed there was battery given the $12.1 million noneconomic verdict award) to a likely total verdict of less than $1 million after the application of MICRA and reduction of damages for negligent failure to obtain informed consent. It is also a good result for all physician defendants; the language of the court is clear that any muddling of the difference between an absence of informed consent and an absence of any consent will be resolved in the favor of a defendant, against whom a finding of "no consent" must be made to support a claim of battery.

It is worth reading Footnote 4, in which the court makes some curious comments about CACI instructions No. 530 (one of two instructions on battery the court gave the jury) and revised 530A. The court notes former CACI No. 530 made no mention of "informed" consent, but required the jury to find Goffney performed a medical procedure without any consent by the patient in order to support a claim for battery. As noted above, over Goffney's objection, the court also gave the jury an instruction on plaintiffs' battery claim that only required a finding of no "informed consent" which was consistent with the flawed special verdict form. In Footnote 4 the court observes that after the parties filed their opening briefs in this appeal for some unknown reason the Judicial Council of California issued a revised instruction pertaining to medical battery, CACI No. 530A, which now makes reference to the necessity to find a lack of "informed consent" in order to make a finding of medical battery. The court points out that the former CACI No. 530 is consistent with the law of medical battery in California while the revised instruction No. 530A "blurs the distinction between negligence and battery as described by our high court" as did the instruction and special verdict form proffered by plaintiffs in this case.