

AND THE TRUSTEES OF THE :
UNIVERSITY OF PENNSYLVANIA :

APPEAL OF: MAHEEP GOYAL, M.D., :
THE UNIVERSITY OF PENNSYLVANIA :
D/B/A THE UNIVERSITY OF :
PENNSYLVANIA HEALTH SYSTEM :
A/K/A THE CLINICAL PRACTICES OF :
THE UNIVERSITY OF PENNSYLVANIA :
A/K/A HOSPITAL OF THE UNIVERSITY :
OF PENNSYLVANIA, AND THE :
TRUSTEES OF THE UNIVERSITY OF :
PENNSYLVANIA :

OPINION IN SUPPORT OF REVERSAL

MR. JUSTICE SAYLOR

DECIDED: December 22, 2011

Elsewhere, I have set down my thoughts concerning the analysis which should be undertaken in considering procedural changes in the medical professional liability litigation arena. See Freed v. Geisinger Med. Ctr., 607 Pa. 225, 245-52, 5 A.3d 212, 225-29 (2010) (Saylor, J., dissenting) (discussing various social phenomena impacting health care providers and their patients in Pennsylvania in terms of risk, cost, access, and quality of care). I reached the conclusion that, in light of the important conflicting interests involved, “it is very clear that the necessary regulation of the medical malpractice litigation arena requires difficult social policy judgments appropriate to the legislative branch.” Id. at 250-51, 5 A.3d at 228.

I find such commentary to be all the more pertinent to the present circumstances, in which the Court assumes a common-law policymaking role to address the breadth of health-care providers’ substantive liabilities, an arena far better suited to the province of our General Assembly. Cf. Official Comm. of Unsecured Creditors of Allegheny Health

Educ. & Research Found. v. PriceWaterhouseCoopers, LLP, 605 Pa. 269, 301 & n.27, 989 A.2d 313, 332-33 & n.27 (2010) (referencing the Legislature’s superior policymaking resources and commenting that responsible decision-making in areas of public impact requires consideration of broader potential social effects). From my perspective, experience with such judicial policymaking ventures sharply demonstrates the need for deep reflection and judicial self-restraint. See, e.g., Bugosh v. I.U. N. Am., Inc., 601 Pa. 277, 279-98, 971 A.2d 1228, 1229-40 (2010) (Saylor, J., dissenting, joined by Castille, C.J.) (commenting on the impaired state of common-law strict products liability jurisprudence in Pennsylvania). See generally Cafazzo v. Cent. Med. Health Servs., Inc., 542 Pa. 526, 537, 668 A.2d 521, 527 (1995) (“[B]efore a change in the law is made, a court, if it is to act responsibly must be able to see with reasonable clarity the results of its decision and to say with reasonable certainty that the change will serve the best interests of society.” (quoting Hoven v. Kelble, 256 N.W.2d 379, 391 (Wis. 1977))).¹

¹ In the realm of healthcare provider liability, referencing a “robust” legislative presence, one commentator explained as follows:

At the very least, legislative presence provides an important judicial source and anchor to common-law jurisprudence This judicial source is not limited to express statutory enactments directly on point but can include legislative policy evident in related enactments, as well as the fundamental role of the legislature to make policy decisions -- especially those with far-reaching social consequences. The longstanding legislative presence in the regulation of physicians, the institutional limitations of the courts, and the social ramifications of enlarging significantly physician liability all form a proper boundary to common-law tort liability expansion upon physicians.

Tory A. Weigand, Lost Chances, Felt Necessities, and the Tale of Two Cities, 43 SUFFOLK U. L. REV. 327, 345-46 (2010) (footnotes omitted); accord Smith v. Parrott, 833 A.2d 843, 848 (Vt. 2003) (“[T]he decision to expand . . . potential liability of the medical (continued . . .)

I acknowledge the very difficult circumstances facing Appellee and her son, and the strong potential that she might have been better prepared for what was to come had she learned earlier of her son's physical impairments than at his birth. Assuming a wrong was inflicted on Appellee related to this inability to prepare, all Justices agree that our present law does not afford redress for this type of injury. See Opinion Announcing the Judgment of the Court, slip op. at 10 n.8, 24. See generally Schmidt v. Boardman Co., 608 Pa. 327, 366-68, 11 A.3d 924, 948-49 (2011) (opinion in support of reversal, in relevant part) (Saylor, J., joined by Castille, C.J., and Eakin, J.) (discussing the genesis of the theory of negligent infliction of emotional distress and the associated concept of physical impact). Moreover, the judicial system is subject to inherent limits, and there are substantial -- sometimes momentous -- cost-benefit tradeoffs inherent in decisions to offer new forms of redress. In light of the limitations of modern compensation law, there simply are some wrongs which are not, and should not be made, actionable in courts of law. See generally PROSSER ON TORTS §1 (4th ed. 1971), cited in Armstrong v. Paoli Mem. Hosp., 430 Pa. Super. 36, 42, 633 A.2d 605, 608 (1993).

I find the present circumstances to be within this category, particular where the Court has not been presented with the kind of empirical information necessary to make an informed decision expanding healthcare provider liability beyond current boundaries.

In terms of the practicalities, I also note that the opinion in support of affirmance does not detail how damages are to be assessed relative to the new cause of action it sanctions. It is evident that Appellee would have experienced emotional suffering upon and after her son's birth, regardless of any and all amounts of preparation. Presumably,

(continued . . .)

profession in Vermont 'involves significant and far-reaching policy concerns' more properly left to the Legislature, where hearings may be held, data collected, and competing interests heard before a wise decision is reached." (citations omitted)).

in assessing damages, a jury would be required to separate such suffering from the additional distress caused by the unpreparedness. Such division is akin to one required in automobile crashworthiness cases between the hypothetical injury which would have ensued had the defendant-manufacturer taken adequate safety measures and the actual harm suffered on account of the associated defect. See Harsh v. Petroll, 584 Pa. 606, 609-10 n.1, 887 A.2d 209, 211 n.1 (2005) (discussing crashworthiness doctrine). The difficulties with such an abstract analysis obviously are magnified when dealing with injuries deriving from emotional suffering as opposed to physical injury. Cf. Brief for Appellants Chester County Hosp., et al. at 46 (“[I]f the theory is the defendant’s conduct merely prevented an opportunity to anticipate the shock, there is absolutely no evidence or precedence to permit the conclusion that medical science now is capable of identifying what amount of the inevitable shock might have been avoided by the opportunity to anticipate it.”). In this regard, I have serious reservations about the practical consequences of introducing what is essentially “emotional crashworthiness” liability into the healthcare arena.

In summary, on this record -- and in light of the already complex and risk-laden environment in which those who practice medicine must operate, as well as the undeniable social utility of their collective efforts -- I differ with the lead Justices’ conclusion that the present expansion of their liability exposure is justified.

Mr. Justice Eakin joins this Opinion in Support of Reversal.