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AXELROD, J., dissenting. I respectfully disagree with the result and the reasoning of the majority opinion.

The dispositive issue in this appeal is whether the plaintiffs' amended allegations of the defendants' negligence in obtaining the informed consent of the named plaintiff arise from a different set of facts than the allegations of the original complaint, and, accordingly, are time-barred because they do not relate back to the plaintiffs' informed consent allegations in the original complaint.

The relevant portions of the first count of the plaintiffs' original complaint provide in part: "3. On January 19, 1990, plaintiff [Herman Alswanger] came to [the named defendant, Douglas R. Smego's] office for an exam. During the exam, [Smego] diagnosed plaintiff's discomfort as being caused by recurrent phlebitis and discussed the operative procedure of ligation and stripping the greater saphenous vein (essentially a varicose vein repair in which the vein is tied off and excised). [Smego] recommended that the plaintiff undergo such an operation and informed the plaintiff that such an operation would be performed on a day surgery basis at The Stamford Hospital (hereinafter, 'Hospital').

"4. The plaintiff continued to treat with [Smego] in connection with his discomfort and tenderness from January, 1990 through March 19, 1990.

"5. On March 19, 1990, the plaintiff arrived at the Hospital for his surgery, which [Smego] performed under general anesthesia with the assistance of a Hospital resident, Jay Dewell, M.D. . . .

"21. The plaintiff's injuries and deficits were caused by the negligence of [Smego] in one or more of the following respects . . .

"e. in that he failed to disclose to and inform plaintiff of all material risks involved in connection with his care and treatment, including the nature and possible consequences of the operation, the prospects of success, the prognosis if the procedure was not performed, and alternative methods of treatment available . . . ."

The relevant portions of the first count of the plaintiffs' amended complaint provide in part: "3. On January 19, 1990, plaintiff came to [Smego's] office for an exam. During the exam, [Smego] diagnosed plaintiff's discomfort as being caused by recurrent phlebitis and discussed the operative procedure of ligation and stripping the greater saphenous vein (essentially a varicose vein repair in which the vein is tied off and excised). [Smego] recommended that the plaintiff undergo such an operation and informed the plaintiff that he would perform such an operation on a day surgery basis at The Stamford Hospital (hereinafter, 'Hospital'). *[Smego] did not state to plaintiff at any time that another physician would be operating on him*.

"4. The plaintiff continued treatment with [Smego] in connection with his discomfort and tenderness from January 1990 through March 1990. In particular, plaintiff agreed to have Smego perform the saphenous vein surgery, *but did not agree to have any other physician perform it*.

"5. On March 19, 1990, the surgery was performed at the Hospital under general anesthesia by [Smego] and, *without the knowledge of the plaintiff, by Hospital resident Jay Dewell, M.D.* . . .

"21. The plaintiff's injuries and deficits were caused by the negligence of [Smego] in one or more of the following respects . . .

"e. in that he failed to disclose to and inform plaintiff of all material risks involved in connection with his surgery, care and treatment, including but not limited to the nature and possible consequences of the operation, the prospects of success, the prognosis if the procedure was not performed, the alternative methods of treatment available, *and the fact that a medical resident, Jay Dewell, M.D. would participate as a co-operating surgeon*;

"f. ***in that the operation was performed without the consent of the plaintiff to the participation of Jay Dewell, M.D. as a co-operating surgeon*** . . . ." (Emphasis added.)

The relation back doctrine has been established by this court. "A cause of action is that single group of facts which is claimed to have brought about an unlawful injury to the plaintiff and which entitles the plaintiff to relief. . . . A right of action at law arises from the existence of a primary right in the plaintiff, and an invasion of that right by some delict on the part of the defendant. The facts which established the existence of that right and that delict constitutes the cause of action. . . . A change in, or an addition to, a ground of negligence or an act of negligence arising out of the single group of facts which was originally claimed to have brought about the unlawful injury to the plaintiff does not change the cause of action. . . . It is proper to amplify or expand what has already been alleged in support of a cause of action, provided the identity of the cause of action remains substantially the same, but where an entirely new and different factual situation is presented, a new and different cause of action is stated. . . . ***Our relation back doctrine provides that an amendment relates back when the original complaint has given the party fair notice that a claim is being asserted stemming from a particular transaction or occurrence, thereby serving the objectives of our statute of limitations***, namely, to protect parties from having to defend against stale claims . . . ." (Citation omitted; emphasis added; internal quotation marks omitted.) *Barrett* v. *Danbury Hospital*, 232 Conn. 242, 263–64, 654 A.2d 748 (1995).

The majority opinion cites *Gurliacci* v. *Mayer*, 218 Conn. 531, 590 A.2d 914 (1991), as illustrative of the court's approach to the relation back doctrine. In *Gurliacci*, the plaintiff's original complaint alleged that the defendant had acted negligently in operating his automobile while he was intoxicated. Id., 546. The proposed amendment sought to add allegations that the defendant had acted either wilfully, wantonly or maliciously, or outside the scope of his employment. Id. In allowing the amendment under the doctrine of relation back, the court stated that the "new allegations did not inject two different sets of circumstances and depend upon different facts . . . but rather amplified and expanded upon the previous allegations by setting forth alternative theories of liability. The fact that the new allegations had the potential effect of taking the claim outside the operation of the fellow employee immunity rule does not negate the identity of the cause of action. . . . ***[The defendant] had adequate notice that a claim was being asserted against him arising out of the alleged motor vehicle accident.***" (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 549.

In the present case, Smego had adequate notice that a claim was being asserted against him under the doctrine of lack of informed consent. He also had adequate notice that there was a claim that Dewell was involved in the surgery. The cause of action that originally was based on lack of informed consent and the new allegations did not negate "the identity of the cause of action." Id.

The majority holds that the focus of the original complaint was on the informed consent as it related to the surgical procedure itself, and that the amended complaint shifted the focus to consent by the patient to the participation of the individuals involved in the surgery. I respectfully disagree. The leading case in Connecticut on informed consent is *Logan* v. *Greenwich Hospital Assn.*, 191 Conn. 282, 465 A.2d 294 (1983). In that case, the court held as follows: "In some of our cases, where the claim against the physician was contractual in nature, we have recognized the importance of informing the patient of certain aspects of the contemplated treatment or surgical procedure. . . . *The failure to make a sufficient disclosure, which is ordinarily the basis for claiming lack of informed consent, has been regarded by most courts as presenting the question, not whether there was an effective consent which would preclude an action for battery, but whether the physician had fulfilled his duty of informing the patient under the appropriate standard*. . . . In a trilogy of cases decided in 1972 the traditional standard of customary medical practice in the community was abandoned by three jurisdictions as the criterion for informed consent in favor of a judicially imposed standard designed to provide a patient with information material to his decision upon a course of therapy." (Citations omitted; emphasis added.) Id., 288–91.

More recently in *Godwin* v. *Danbury Eye Physicians & Surgeons, P.C.*, 254 Conn. 131, 137 n.3, 757 A.2d 516 (2000), this court again recognized that "[t]he consent necessary to preclude a claim for assault and battery is different from the consent at issue on a claim of lack of informed consent, *where the issue is whether a sufficient disclosure was made*." (Emphasis added.) In that case, the focus of the complaint regarding informed consent did not relate to the surgical procedure itself, but rather, related to whether the physician had fulfilled his duty of making a sufficient disclosure to the patient under the appropriate standard. Id., 143.

"Unlike the traditional action of negligence, a claim for lack of informed consent focuses not on the level of skill exercised in the performance of the procedure itself but on the adequacy of the explanation given by the physician in obtaining the patient's consent." *Dingle* v. *Belin*, 358 Md. 354, 369–70, 749 A.2d 157 (2000).

In holding that the focus of the original complaint on

the informed consent related to the surgical procedure itself and that the amendment shifted the focus to consent by the patient to the participation of the individual involved in the surgery, the majority opinion states that "[f]or example, the amended complaint would have required evidence as to Dewell's actual and specific role in the surgery, his experience, whether the plaintiffs were informed of the role he would play and his experience, whether the defendants were required to provide that information to the plaintiffs, and the hospital's policy, as a teaching hospital, regarding a resident's involvement in surgery. Any discussion as to much of this evidence, however, would have been irrelevant under the original complaint, which asked whether the defendants adequately informed the plaintiffs regarding the surgical procedure."

All potential amendments to a complaint require that there be some new evidence presented. Thus, in *Gurliacci* v. *Mayer*, supra, 218 Conn. 546, the amendment to the complaint would have required new evidence as to whether the defendant was acting either wilfully, wantonly or maliciously. Further, the amendment to the complaint would have required evidence as to whether the defendant was operating the motor vehicle outside the scope of his employment. Id. The fact that new evidence would be required in *Gurliacci* was not the determining factor as to whether the amendment would relate back to the original complaint. The amendment was allowed in *Gurliacci* in part because the defendant had adequate notice that a claim was being asserted against him arising out of the alleged motor vehicle accident and the amended complaint reiterated the negligence claim based on his operation of a motor vehicle. Id., 549.

In *Gurliacci*, the court held that "[w]e have previously recognized that our relation back doctrine is akin to rule 15 (c) of the Federal Rules of Civil Procedure, which provides in pertinent part: (c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. . . . The policy behind rule 15 (c) is that a party, once notified of litigation based upon a particular transaction or occurrence, has been provided with all the notice that statutes of limitations are intended to afford. . . . Because rule 15 provides that an amendment relates back where the original complaint has given the party fair notice that a claim is being asserted stemming from a particular transaction or occurrence, the objectives of our statute of limitations, namely, to protect parties from having to defend against stale claims, is fully served." (Citations omitted; internal quotation marks omitted.) Id., 547–48.

Other courts have ruled that amendments similar to the one in the present case would relate back to the date of the original complaint. The issue of amending a complaint in a medical malpractice action to allege lack of informed consent was addressed in *Azarbal* v. *Medical Center of Delaware, Inc.*, 724 F. Sup. 279, 281–83 (D. Del. 1989), wherein the court stated: "The complaint alleges that the defendants were negligent in the performance of the amniocentesis. The complaint seeks damages for the child's injuries and for the parents' injuries resulting from the child's illness and death. On April 10, 1989, the plaintiffs filed this motion to amend the complaint. Plaintiffs seek to amend the complaint in six respects. First, the plaintiffs seek to add a claim against [the physician] for failing to obtain the informed consent of [the child's mother] prior to performing the amniocentesis . . . . The court will first address the propriety of allowing the amendment alleging lack of informed consent to the amniocentesis. [The physician] contends that this amendment would be futile because it is barred by the statute of limitations. The limitations period for bringing medical malpractice actions is two years. . . . Since the amniocentesis occurred more than two years before the motion to amend was filed, the informed consent claim would be barred were it not for Federal Rule of Civil Procedure 15 (c). . . . This court finds that the original complaint gave [the physician] adequate notice of the basis of the claim regarding lack of informed consent to the sterilization . . . . This court believes the original complaint provided adequate notice of any claims [the mother] would have arising from the amniocentesis, including a claim that [the physician] should have revealed that the procedure had caused fetal injury. The claim therefore relates back to the date of the original complaint and is not time-barred. The court will thus allow the plaintiffs to amend this claim to their complaint." (Citation omitted; internal quotation marks omitted.)

I believe, just as in *Azarbal*, that the original complaint in the present case provided adequate notice of any claims the plaintiffs would have arising from the surgery, including a claim that Smego should have revealed that Dewell would be performing the surgery. Under rule 15 (c) of the Federal Rules of Civil Procedure, an amendment to a malpractice action to allege lack of informed consent after the statute of limitations has run relates back to the original complaint. Therefore, an original complaint sounding in malpractice that includes a claim of lack of informed consent should allow an amendment to the lack of informed consent claim after the statutes of limitations has run, and that amendment should relate back to the original complaint. Several New York courts have taken the same position as the court in *Azarbal*. Thus, in *Grosse* v. *Friedman*, 118 App. Div. 2d 539, 541, 498 N.Y.S.2d 863

(1986), and in *Ecker* v. *Hopkins*, 161 App. Div. 2d 1163, 555 N.Y.S.2d 959 (1990), medical malpractice actions were allowed to be amended to add a cause of action for lack of informed consent after the statute of limitations had run. In *Ecker*, the court stated that "[the] Supreme Court erred in concluding that [the] plaintiff's proposed amendment to her medical malpractice complaint was time barred. Although [the] plaintiff sought to amend by adding a new cause of action for lack of informed consent more than two and one-half years after [the] defendants' last treatment of [the] plaintiff . . . the facts alleged in the original complaint gave adequate notice of the transactions or occurrences asserted in the proposed amended complaint, and thus, the amendment is deemed to have been interposed at the time the original claims were interposed . . . ." (Citations omitted.) Id.

In *Johnson* v. *Kokemoor*, 199 Wis. 2d 615, 620, 545 N.W.2d 495 (1996), a patient brought an action against a surgeon alleging failure to obtain her informed consent to surgery. The court stated: "In this case information regarding a physician's experience in performing a particular procedure, a physician's risk statistics as compared with those of other physicians who perform that procedure, and the availability of other centers and physicians better able to perform that procedure would have facilitated the plaintiff's awareness of 'all of the viable alternatives' available to her and thereby aided her exercise of informed consent." Id., 623. "We reject the defendant's proposed bright line rule that it is error as a matter of law to admit evidence in an informed consent case that the physician failed to inform the patient regarding the physician's experience with the surgery or treatment at issue." Id., 639. "When different physicians have substantially different success rates, ***whether surgery is performed by one rather than another represents a choice between 'alternate, viable medical modes of treatment'*** . . . ." (Emphasis added.) Id., 645.

In *Barriocanal* v. *Gibbs*, 697 A.2d 1169, 1170 (1997), an action was brought against a surgeon claiming lack of informed consent and negligence in performing the surgery. In reversing the trial court's exclusion of the plaintiff's proffered expert testimony that the surgeon had breached the applicable standard of care required to obtain informed consent by failing to inform the patient of the surgeon's lack of recent aneurysm surgery, the court stated: "Next, we must determine whether the exclusion of the proffered testimony constituted 'significant prejudice so as to have denied the appellant a fair trial.' By statute in Delaware, a health care provider is required to disclose 'the ***risks and alternatives*** to treatment or diagnosis which a reasonable patient would consider material to the decision whether or not to undergo the treatment or diagnosis.' " (Emphasis added). Id., 1173.

In *Dingle* v. *Belin*, supra, 358 Md. 357, the plaintiff retained a surgeon to remove her gallbladder. The surgeon was assisted by a medical student and a resident, who was just beginning her fourth year of residency training. Id., 358. The resident dissected the gallbladder and removed it. Id. The plaintiff filed a battery count that was dismissed. She also filed a breach of contract claim and counts for negligence arising from the lack of informed consent. Id., 359. The thrust of the lack of informed consent count was that without the plaintiff's knowledge or consent, the resident played a very active role in the surgery and did the cutting, clamping and stapling, which should have been performed by the surgeon retained by the plaintiff. Id. The claim was that by failing to inform the plaintiff of the scope of responsibilities that would be performed by the resident, the surgeon and the resident " 'breached their duty to secure the fully informed consent of [the plaintiff] prior to commencing operating upon her.' " Id. The court stated that the "[r]isks, benefits, collateral effects, and alternatives normally must be disclosed routinely, but other considerations, at least if raised by the patient, may also need to be discussed and resolved. See Aaron D. Twerski & Neil B. Cohen, 'The Second Revolution in Informed Consent: Comparing Physicians to Each Other,' 94 Nw. U. L. Rev. 1 (1999); *Johnson* v. *Kokemoor*, [supra, 199 Wis. 2d 615]. One of those considerations, in an expanding era of more complex medical procedures, group practices, and collaborative efforts among health care providers, may be who, precisely, will be conducting or superintending the procedure or therapy. This may be especially important with respect to surgical procedures, which usually involve collaboration between the chosen surgeon and other medical professionals who may be unknown to the patient. The physician, as [the surgeon] indicated was the case here, may be unwilling to accept limitations on the actual performance of the surgery, ***but, if the identity of the persons who will be performing aspects of the surgery is important to the patient, the matter must be discussed and resolved***." (Emphasis added.) *Dingle* v. *Belin*, supra, 370.

The original complaint in the present case alleged lack of informed consent for failure to inform the plaintiffs of material risks involved and alternative methods of treatment available. The proposed amendments amplified and expanded upon those previous allegations by setting forth the claim that the failure to inform the plaintiffs that Dewell would be a co-operating surgeon failed to disclose to the plaintiffs the risks and alternatives to the treatment. Under the amendment, the identity of the cause of action remains substantially the same. The actionable occurrence in the original complaint and in the amendment is lack of informed consent. Smego had fair notice of the claim of lack of informed consent in the original complaint, and the

amendment amplified and expanded on that claim.

I would hold that informed consent does involve a patient's right to know the identity and qualifications of the surgeons involved in the patient's procedure. I would not reach, at this time, the issue of a hospital's policy, such as a teaching hospital, regarding a resident's involvement in surgery and whether that involvement has to be unmasked to the patient.

Accordingly, I would find that the trial court improperly granted Smego's motion for summary judgment, and I would remand the case for a new trial limited to the issue of lack of informed consent against Smego and the issue of damages.