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PRAESEL V. JOHNSON

BARRON: This is the epilepsy failure to warn case. As you know, the CA held that there was a duty to warn third-parties as to one of the doctors, but not as to two of the doctors. We believe that to the extent the duty was not extended to two of the doctors, that that holding was wrong, unjust, unfair and just not the law. The court in making the distinction between the doctors employed an actual knowledge test in determining foreseeability. As to the doctor who they found liable they said that his treatment was not so unrelated to epilepsy to say that there was no duty. The dissent focused on the creation of impairment test, malfeasance, misfeasance, nonfeasance distinction between the *Gooden* and the *Flynn* cases, and the consultation issue as to the scope of the treatment of the doctor who was found to have a duty had actually had.

I plan to talk about the difference between *Gooden* and *Flynn*, and the various sources of duty in this case. As you know, in the *Gooden* case, the Tyler CA held that a doctor could owe a duty to the public. In that case, the doctor had prescribed Quaaludes.

GONZALEZ: That's a no writ case?

LAWYER: Yes. In that case there was found to be a duty. In the *Flynn* case, that involved a patient who had recreationally used drugs, and showed up at the hospital and the doctor gave a drug with no known side effects to help the situation. And the majority there refused to impose a duty based on the misfeasance, malfeasance distinction. However, if you will note at the end of that opinion on rehearing, Justice Hedges has discussion about: Well I think we made the right decision, but do you need foreseeability and a special relationship, or are these two separate things? I really don't understand. That's the way I read it. And I believe that this court cleared that up in the Akin case when it said that these are two separate analysis. If you have a special relationship, you don't have to get into that multi-factored *Phillips v. Greater Transportation* type analysis. And we believe that there is a duty on all three doctors under both theories: the regular Phillips' analysis and the special relationship test.

HANKINSON: How would you define this duty that you would impose upon all these doctors to third-persons?

LAWYER: We would not actually impose this duty on all doctors to all third-persons. I believe that the unique facts of our case is that this involves an impairment that neither the physician nor the patient created. This is someone who has a physical disability.

HANKINSON: How would you have us state the duty you're asking us to recognize in this case?

LAWYER: Perhaps physicians who are treating a physically impaired person owe the public and that person, and the duty is extended to a greater group, as it was in the Akin case. We pled failure to warn.

HANKINSON: What duty?

LAWYER: You would have to look at the plaintiff's petition and what the plaintiff pleads and then determine as a court whether or not in that particular case that duty exists. In our case, we pled failure to warn the epileptic himself. A duty the doctor already has. But that that duty extended to the public.

HANKINSON: So the duty that you are asking us to impose is a duty to the public to warn physically impaired patients of their limitations, is that what you're asking us to do?

LAWYER: In this particular case, yes.

HANKINSON: So this is going to be a case-by-case determination in terms of what kind of duty is owed to third parties by physicians?

LAWYER: It's my understanding under *Greater Transport v. Phillips*, that that's the way we do this. We either engage in a multifactored analysis if the actor has created the danger, or if not, we find our duty from some other source. In this case, I believe, we have that duty under that analysis and I believe we have that duty also under the special relationship test, the physician relationship between the epileptic patient and the doctor.

HANKINSON: Are there any limitations on this duty that we're discussing with respect to a duty to the public to warn physically impaired patients of their limitations?

LAWYER: Which duty that physician already has. When you say limitation, to me it's something that already exists. So I don't really understand the question.

ABBOTT: What is your legal basis for concluding that a physician owes a duty to one of his or her patients to warn them not to drive if they are let's say an epileptic?

LAWYER: Based on the evidence in our case, we have affidavits and that was what these physicians were hired to do. They were all involved in some aspect of this fellow's treatment. And what this record shows is that he actually had a seizure ten months before the fateful accident. He received a refill of his prescription from one of the doctors, who never followed-up, the neurologist one who was supposedly primarily responsible. When he had this seizure, he told the neurosurgeon immediately when he had it. The neurosurgeon _____ get a specialist consult. He went to a family practitioner the week before the accident. He took a Dilantin level and said to the fellow:

You're levels are within normal range.

ABBOTT: What legal authority do you have to support the proposition that a doctor has to warn an epileptic not to drive? Do you have any case authority or other type of legal authority saying that such a duty exist?

LAWYER: The *Gooden* case says, "that a doctor owes the patient a duty in diagnoses and treatment to fulfil that duty."

ABBOTT: To fulfill which duty? Not to warn - not to drive?

LAWYER: You look at the duty the plaintiff is alleging. You analyze it under the Phillips' test: foreseeability, likelihood of injury, risk of harm verses social utility.

ABBOTT: General principles is what you are arguing. I guess what I am trying to find out is, are you aware of any specific legal authority saying that doctors owe a duty to their patients to inform them not to drive if their physical condition is such that it may impair their driving?

LAWYER: I believe that *Gooden* says that, because when you go back and look it talks about physical condition because of medication, or physical condition. But there are two cases in fact from other jurisdictions that impose that duty based on a special relationship. What they do is they take the Tarrasoff duty, which was extended to third-parties based on a patient's condition, and they expand it. They use the analogy of someone with a dangerous propensity, and that there's a relationship and that a duty is owed.

One of those cases I cited in my reply, *Duvall v. Golden,* that case involved a psychiatrist and an epileptic patient. Another case that's not cited in my reply, *Myers*, 144 Cal. App. 3d, 888, and that was a failure to warn a diabetic who didn't have the condition under control. So those two cases, I believe, are strong authority under the special relationship principle.

ENOCH: Is there a need for this duty? Would not the patient who has an automobile accident and figures that the cause of that accident was that they weren't warned not to drive when they were given some medicine? Couldn't they sue their own doctor for having failed to warn them of a side effect that caused them damage? Is there any need to create another duty on the part of the doctor to skip the patient who in fact is the one complaining of the breach of the duty?

LAWYER: No, the patient isn't complaining. We are the people who the patient killed.

GONZALEZ: You did not sue the person that caused the accident?

LAWYER: There was a settlement with the person who caused the accident. This is the

suit between the people who were injured by the epileptic patient.

ENOCH: The need for this duty, you are arguing for a duty of a doctor to people that the doctor's patient injures because of some conduct of the patient? You are arguing that the conduct of the patient, although contributing was really the result of some failure of the doctor to warn the patient about the patient's condition? If the patient believes that they were not the cause of this wreck, the patient could certainly sue their own doctor for this failure to warn, could they not?

LAWYER: Right. How does that help the person who was killed?

ENOCH: The question is, the person who is killed has their cause of action against the person that killed them. Where is the need for the person who was killed to have an additional duty against the doctor? If the driver says, "well the doctor caused it" the driver could sue their own doctor, and claim that that doctor ought to be paying for the damages that resulted from this accident. Is there any need to go further down the stream of responsibility here and have a separate cause of action by the injured person skipping the one who caused the injury? I guess I am trying to evaluate if there is a real need for this.

LAWYER: From the plaintiff's perspective in this case it wasn't the patient - it was the doctor. That's the plaintiff's perspective in this case, and that we are going directly to the person who is responsible.

ENOCH: Arguably the patient caused the accident. The question is, was the patient negligent or not negligent as a result of some condition that was contributed to a doctor?

LAWYER: We don't believe that that's true in the case of this disability. We believe that the primary responsibility is with the physician in this case. One of the things that we discussed was the waiver of the doctor/patient privilege in the area of driver's licenses, and that this _____ to us some type of concern the legislature has with people being on the road. So the duty, because of statutes surrounding the area, to us seems also to be a public duty. I guess it would be the same reason you expand and broaden the duty _____ the court did in the *Akin* case to not just the little individual boy who suffered that horrible situation, but to everyone at that church and all the parents. This person was in the zone of danger. It could have been anyone.

ENOCH: Let's take this one step further. Let's assume that there is some sort of duty that skips the patient, that the injured person goes against the patient's doctor. This is a failure to warn issue you are arguing about: Well simply the doctor that was satisfied of the duty by warning.

LAWYER: And monitoring and assessing. There is also an issue of that raised in the affidavit.

ENOCH: Well let's go further. So I have a patient that I am treating for epilepsy. It's my duty to order the patient not to drive, or is it my duty to simply warn the patient that you can have an accident if you drive, but I don't take steps to stop the patient from driving?

LAWYER: I guess the duty is if the patient shows up in your officer a week before they have a horrible accident and they've recently had a seizure and you take a blood level, while you're taking the blood level to say: By the way, have you had any seizures since you visited me last year ago? We have affidavit testimony attached to our response to the summary judgment to that effect. In fact, one of the defendant doctors in his deposition, part of which is attached to one of our responses, there's a dispute about whether he warned, he claims he did and he claimed it was his duty like any other doctors to do so). This is out of the mouths of their own.

ENOCH: So the doctor would have a duty to keep an epileptic from driving?

LAWYER: No, not to control, to warn.

ABBOTT: If a doctor does give a warning to an epileptic not to drive, the doctor has at that point in time a discharge to his or her duty, and if the epileptic goes out and has an accident, then the doctor arguably would be entitled to summary judgment on the basis that he or she fulfilled their duty?

LAWYER: I think if there's a duty, we go back and we have a trial on that issue, and if the jury determines that the doctor fulfilled the duty, they will tell the plaintiff to go home.

ABBOTT: And the fulfillment of the duty would be merely informing the epileptic not to drive?

LAWYER: Yes, a duty that already exists.

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RESPONDENT

McCULLOUGH: I represent Dr. Johnson a family physician, Dr. Waller a neurologist, and Sadler Clinic where the physicians practiced.

Under the facts surrounding this accident caused by Ronald Peterson, does this court want to recognize the duty _____ argue for against these doctors? The court is exactly right, what is the duty? If you look at the briefing, you find that it's a duty to warn, a duty to inquire, a duty to document. If the patient says “yes”, do we then have a duty to take the car keys away? What are the parameters of this duty?

ABBOTT: Let's assume that the parameter of the duty is merely one to warn an epileptic not to drive. Is that an onerous burden to place upon a physician?

McCULLOUGH: It would not be an onerous burden to place on a physician if the facts indicated that that was what was required. The facts of this case do not indicated that. The undisputed facts are that we have a life-long epileptic, Peterson, who had a lengthy relationship with Dr. Johnson and Dr. Waller, who had informed both physicians on previous occasions of his seizure activity, who had sought treatment for his seizure activity, who had been compliant with his medication therapy, had called for refills for his prescription, who was stable with his seizures, whose current dilantin levels just 7 days before the accident were within the therapeutic range, and who had had no seizures to this doctor's knowledge on the date of the accident within 4 years. The other doctor had not seen the patient for over 18 months. At that point, he had been seizure free for over 3 years. There were no indications, no facts to say, "warn", unless you want to impose a duty every time a physician seeing a patient with a medical condition to warn and document that you've warned so that the duty is fulfilled.

If negligence rest primarily on the existence of a reason to anticipate injury and the failure to perform the duty arising out of that anticipation on the facts here, we do not believe that a duty exist. It was not foreseeable that Peterson seeking treatment for the flu, who had sought treatment for epilepsy in the past would not also tell the doctor that he had recent seizure activity. Commonsense tells you whether the record is clear or not, whether the record is documented that he asked or didn't ask, when the patient is presented with symptoms, the questions would have been asked: How are you doing? The very fact that he pulled the serum dilantan level indicates the seizures must have been discussed or the condition must have been discussed because we are documenting the anticonvulsant drugs in the man's system.

Did he act reasonably under those facts? We believe that he did. There is no reason to create a duty. We believe that the CA acted appropriately and affirmed the summary judgment. We ask that the court do that also.

HANKINSON: Are there any circumstances under which a physician owes a duty to third parties arising out of his treatment of a patient?

McCULLOUGH: If he treated him negligently. If he created the condition, which led to the third party's injury, then perhaps that duty would be there. In this instance, however, he did not create the treatment that they were using was successful.

HANKINSON: So you would recognize a duty under some circumstances?

McCULLOUGH: There could be a duty under some circumstances. There are some cases that say that where you have created the duty, this misfeasance, or where you have done something that

actively creates the issue or the problem. In this instance, that did not happen. The duty was not there, summary judgment was appropriate and the CA appropriately affirmed.

ABBOTT: If I understand you correctly, you're saying that because the last time this doctor knew about any type of epileptic problem was 18 months ago. The doctor should not be held to a duty to inform the patient not to drive?

McCULLOUGH: At that point, he had released Peterson to go back to work and to drive, because he had been seizure-free three years before. So under the facts of this case, he had not been driving. So, the accident in 1991 to be imputed back to the negligence or to the doctor's conduct in 1989, I think that's a bit of a stretch.

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SNELLING: I represent Dr. Wendenburg, and we are all here today to discuss the topic whether a tort feasor's doctor should be perfect, because we are going to skip the auto policy and go to the doctor's malpractice policy. And that's what this case is about. So you've been absolutely right in that line of questioning.

I could name a line of cases to this court that has shown this court's reluctance to expand a duty to third persons. In the recent years, we've seen the *Seagram's* case, that says alcohol manufacturers don't have a duty to warn of the obvious problems associated with alcohol. We had the Watson case where a third party does not have the standing to sue a tort feasor's auto insurer.

OWEN:: Is it your position there's no duty at all or just no duty under the facts of this case?

SNELLING: I think we get down the slippery slope when we start trying to have a court fashion what is a duty and what is the standard of care in medical malpractice world that we are going to fashion a test to give a remedy for third parties. Remember we've got 4590i here, which the legislature found that there was a problem and a health care crisis that they came up with this reform to provide a mechanism for relief for patients of doctors who had committed malpractice, but at the same time put some safety mechanisms in there, like a review panel.

OWEN: What would the duty be - the two third parities- is there any at all and if so what is it?

SNELLING: I can't say that there would never be a duty, because I think *Terasol* would probably be a good starting point. This court has had a couple of encounters with *Terasol* rule, and we know that that says that when there is a psychiatrist, who's obviously a physician, has got an

uncontrollable patient on their hand, and that patient has expressed the comments that they want to kill or hurt a readily identifiable victim, then obviously there's a duty to control that person or to warn that readily identifiable victim's family. You see the problem here. We don't have a readily identifiable victim if you go past *Terasol.*

OWEN: Let's assume the facts are, the patient had been told not to drive and was in fact not driving, and the doctor was negligent in releasing them to drive. Would you owe a duty to third parties under those circumstances?

SNELLING: That's the problem I have with trying to get this duty to drive or not to drive and releasing him.

OWEN: The patient is relying on the physician and says, doctor I haven't been driving and I won't drive if you tell me not to drive. If you tell me I'm okay to drive, I will. And the doctor negligently diagnoses...

SNELLING: Then the patient obviously has a lawsuit against the doctor under 4590i.

OWEN: What about the third party?

SNELLING: I haven't seen anything that would indicate that we should go beyond *Terasol* at a minimum.

OWEN: How does that distinguish *Terasol*?

SNELLING: Because you have a patient who for one thing...let's go straight to the duty. What are the problems with defining the parameters: You shouldn't drive? Is it you shouldn't drive or you can't drive? Because you know what's happened to Dr. Wendenburg in this case? There was absolutely no controversion that Dr. Wendenburg said: I warned you not to drive. In his deposition he said: I told them they shouldn't drive. Do you know what their controverting affidavit say: I was told I could not drive. So now we're getting into semantics. Is it should not drive or could not drive? The CA said that Dr. Wendenburg there was a fact issue, because he never told them they should not drive. That is not true. That was never controverted. That's game, set and match.

OWEN: Back to the duty. Distinguish *Terasol* if you can?

SNELLING: *Terasol,* readily identifiable victim. The *Thompson* case which later came down after *Terasol* had to do with a psychiatrist who was trying to be held accountable by the plaintiffs for a child who was attacked in a neighborhood. They said, no, it's not enough that your patient said he was going to attack some child in some neighborhood - that's too broad. We're not going to expand the duty that far. If you take the reasoning of the *Thompson* and the *Terasol* cases,

what you've got here is you're imposing a generalized duty on a doctor to protect the driving public at large. I don't think Texas is ready to go that far yet.

ABBOTT: What if you have a situation where the doctor is seeing someone who is undergoing an epileptic seizure and the doctor says: "Here, take two aspirins and go home." The patient says: "I'm driving." The doctor says: "Well drive carefully." And so it's fairly deducible that that epileptic is going to have a car wreck on the way home? Is the court supposed to turn a blind eye to that type of conduct, or are we to establish a duty in that situation?

McCULLOUGH: You know this court has said that it's more than foreseeability. It's also the opportunity to control. That's what the *Gooden v. Tipps* case was about.

ABBOTT: I disagree that a doctor has the right to control whether or not someone walks out of the doctor's office...

McCULLOUGH: You're absolutely right.

ABBOTT: And so you're saying since the doctor doesn't have the right to control the patient walking out of the office, a doctor who knows in likelihood that someone is going to have a seizure while they are driving home has no duty to either that party or to the world at-large knowing that that person is about to get in a car wreck?

McCULLOUGH: I think that you're changing the factual scenario a little bit. I don't know if the grand mal seizure is imminent what that man is about to walk out the door, I don't know within those perimeters how long it takes a controlling medication that could control the possibility of that grand mal seizure from occurring. But if you're saying just on that set of facts that it's going to happen when he walks out that door, I would say let's address that for another day. That's certainly a good question, but it's not evident in this case.

PHILLIPS: Do you think the *Gooden* case is wrong?

McCULLOUGH: No, I can't say that *Gooden v. Tipps* is wrong. I can't say that it applies in this case.

PHILLIPS: You're making an argument about never any duty to third persons.

McCULLOUGH: I would concede that if there were a duty under *Gooden v. Tipps* if you give a patient a mind altering drug, and you send him on the road, and it has changed their functioning and impaired their functioning, something that you've given them, you've controlled the _____, then yes, you could be subject to liability. But on the converse we've got a gentleman who is 42 years old. We would have to go back in time to his very first physician when he was diagnosed at

9 to see if that doctor warned him that when he gets to driving age that he better watch it and not drive if he has a seizure to all the subsequent doctors, to Drs. Johnson and Waller and to Dr. Wendenburg, who is a neurosurgeon who operated only on his back and we've imposed a duty on him now to treat an epileptic man and make him responsible for the epileptic's diagnoses and treatment. The *Lopez* case cited in my brief sets out that just because an epileptic patient tells a back doctor when they are about to go into surgery that, "By the way, I'm an epileptic," and that's considered, that is not a diagnosis. And that's what happened here. He told Dr. Wendenburg in April 1990, months and months and months before Jan. 1991, the date of the wreck.

The other thing that's not been mentioned here is it's undisputed that Ronald Peterson the driver was being treated for many years by Drs Johnson and Waller for his epilepsy. And at the time that he told Dr. Wendenburg, Dr. Wendenburg was his back doctor, Dr. Wendenburg said, You need to see your treating physicians about this.

It's a mess.

ABBOTT: Wasn't it Dr. Wendenburg who provided the affidavit that said that he thought that there was a duty to inform the patient not to drive?

McCULLOUGH: No, Dr. Wendenburg said that he asked all of his patients to tell him if they have a debilitating seizures, which is epilepsy, and that is his recommendation to tell them that. And that's not been disputed.

ABBOTT: And did he say that was the reasonable standard of care?

McCULLOUGH: That was his opinion. I don't think anyone asked him if that was a reasonable standard of care across the board, or if that was the reasonable standard of care for treating physicians who are treating an epilepsy patient. I think his affidavit was in a standard of care as a neurosurgeon who performed back surgery and established a friendly patient/doctor relationship with his patient.

We've got a problem if you wanted to go that far to expand the duty beyond Terasol to the public at large, is the warning enough to say, "You should not drive," or do you say, "You cannot drive?" Does it have to be oral? Does it have to be written? The CA seems to suggest that if it's not in the medical records, then it's no good. You've got to have a "cannot drive," "should not drive" in writing. Do you have to have witnesses? What if the tort feasor later says, "Well I didn't appreciate what they were telling me, the significance of it." I mean we could just have all kinds of battles.

This court in *SmithKline* had a case that they dealt with very similar to this. *SmithKline* was a lab that did urine testings for perspective job candidate, that job candidate didn't

get the job because *SmithKline* determined that there were opium traces. It turned out she ate poppy seeds on a muffin, and she sued *SmithKline* for failure to warn. They should have warned her that there have been other kinds of possibilities to cause false readings. And this court said, "no, not going to do it, because there would be too many possibilities of all kinds of things that could cause false results. Putting that duty would be too broad on *SmithKline,* the lab testing people." And here we've got a back doctor who's being held to the standard of the treating physician and he's being told to provide the duty to warn is it written, is it oral, is it should have, is it can't do? Don't know. And then the court next said that it wasn't going to extend the duty on *SmithKline* to warn when that could be done with a perspective and candidate and the employer, the employer could tell them these possibilities. It also had the impact of impinging on other professionals who are rendering services - part of that _____ in the treating process. Well if you take that to its logical extreme, we could get the pharmacist in here for filling the prescription if it was the friendly Eckerds' neighborhood store who knew Mr. Peterson. We could get the lab testing technicians. How far do we take the duty? How far do we take it to *Terasol*? Mr. Peterson went back to his treating physicians, one-week before the accident. And there was no proximate cause in refilling that prescription because Mr. Peterson's blood levels were fine. So what has my client done? Absolutely nothing. This is not the case to expand the duty, and it certainly isn't one to expand the duty to protect third parties against a patient in this instance, Dr. Wendenburg.

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REBUTTAL

LAWYER: I would like to start out by asking you to please read those *Myers* and *Duval* cases, that I cited to you. They will say more to you than I can in this short 5 minutes. In terms of Ms. Snelling's point about a readily identifiable patient, the reason you need that in that situation where you are warning a third party is obviously you can't tell a psychotic patient, "By the way don't kill your wife." That's the reason you need a readily identifiable person and that's the distinction in our case. That is discussed in one of those two cases that I cited to you.

This case is perhaps one of the most important because we're dealing with what I call a time bomb patient. Contrary to this being obvious, we have someone who has a disability, who thinks it's under control, and the only way he can find out about this situation is from the very professionals who claim that they have absolutely no responsibility. This cannot be. When I was sitting at counsel table, I thought I was in a trial court. This is a summary judgment case, and by the way, the facts really are hotly controverted. Obviously I peeked your interest enough for you to have us come here, but you know you read these things over and over again, and I noticed even more controverted facts. In 1983, the patient went to see the family practitioner and reported history of seizures and that the practitioner decided he would be on medication indefinitely. In 1985 and 1986, he showed up again in May 1985, with a seizure he had had the day before. At that point, he was referred to the neurologist, Waller. They couldn't get it under control.

SPECTOR: There was some mention in the briefs about a driving license. Did Mr. Peterson have a driver's license?

LAWYER: That's not in the record.

SPECTOR; Is there some way that a driver receives a driver's license if they are impaired in some way? Is that made known to the State that they are only to drive with glasses or when they are taking their medicine? How does that work?

LAWYER: That is not an issue in this case. My understanding briefly, is that the doctor can voluntarily give that information and not be subject to a suit from the patient for breach of privilege or the patient can volunteer that information when he renews, if he renews.

SPECTOR: There is no form that you fill out?

LAWYER: I don't believe that's in the record. There were two seizures: One in May 1986, and one in June of 1986. Yet you read these doctors' affidavits and they say the seizure in June of 1986 was the first seizure. Look at one of the exhibits attached to Peterson's affidavit. It wasn't the first seizure. The first seizure was the month before. I believe it's Johnson's answers to interrogatories. There were two seizures that happened in 1986. Waller tried to get the seizures under control, the medication under control - could not do it. In 1989, patient stopped seeing both of them. But Waller refills the seizure medication in May 1990, and one month later, Peterson has a seizure and Waller doesn't know about it. He's a neurosurgeon. He's specialist. Why doesn't he know about it? Waller says he had told Peterson to tell his doctor if he had a seizure. In fact, Peterson did tell Dr. Wendenburg who he was going to. Dr. Wendenburg knowing Peterson had had a seizure refilled the prescription without consulting a specialist who he claimed was responsible. And if you have the deposition testimony before you, which is not in the record, it wasn't part of the summary judgment evidence, you would see that the doctor knew. He claimed that they were responsible and that he got his instructions on how to refill it from the patient.

ENOCH: Is your claim an assertion that the doctors' committed medical malpractice?

LAWYER: No.

ENOCH: It's your claim there was some sort of product defect because they failed to warn?

LAWYER: We're claiming that there was a foreseeable harm, that they had a responsibility and that they breached that responsibility both to the patient, but in this case we're not representing the patient, we are representing the person who was injured. My mere purpose in trying to go through these facts is to show you that there are some very hotly controverted issues.