

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Harold Miterman,	:	
	:	
Plaintiff,	:	CIVIL ACTION NO. 01-5352
	:	
v.	:	
	:	
United States of America,	:	
	:	
Defendant.	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

1. On April 11, 1997, Plaintiff, Harold Miterman, underwent nasal and sinus surgery at the Veteran's Administration Hospital (VA) in Philadelphia, Pennsylvania.
2. The April 11, 1997 surgery was not the proximate cause of Plaintiff's complaints of diplopia, tearing or eye pain.
3. Daniel Grant Becker, M.D., the surgeon performing the April 11, 1997 procedure, employed the requisite degree of professional knowledge, skill, and care during this procedure.
4. Plaintiff has failed to establish by a preponderance of the evidence that the aftercare was negligently rendered. In view of the total absence of evidence of this nature, the Court

declines to conclude that the Defendant failed to provide the required post-surgical follow-up.

II. PLAINTIFF'S MEDICAL AND SURGICAL HISTORY

5. Initially, for a quarter century prior to the 1997 surgery, Plaintiff suffered from chronic sinus difficulties. Prior to the April 1997 surgery, the following surgeries were performed upon Plaintiff:
 - (i) On 3/30/73, Mr. Miterman underwent a submucous resection (a surgical procedure to reduce breathing obstructions; the sinuses beneath the eyes are accessed by way of an incision underneath the upper lip) and nasal polypectomy (a surgical procedure to remove nasal polyps) at the VA hospital. Defendant's Trial Exhibit 9.
 - (ii) On 12/10/73, Mr. Miterman had a bilateral Caldwell-Luc procedure to remove polyps from his sinuses. Entry was made into the Plaintiff's sinuses by way of the oral cavity. The sinuses were drilled and drained. Defendant's Trial Exhibit 10, Trial Notes of Testimony, December 19, 2002, p. 6-7 (hereinafter N.T. 12/19/2002).
 - (iii) On 12/13/74, Mr. Miterman had a bilateral intranasal polypectomy to remove polyps from his sinuses. Entry was made into Plaintiff's sinuses through the nasal cavity. N.T. 12/19/2002, p. 7.
 - (iv) On 5/19/75, Mr. Miterman underwent a third nasal polypectomy, carried out through a transnasal approach. N.T. 12/19/2002, p. 7, Defendant's Trial Exhibit 14.
 - (v) On 4/16/80, Dr. Hunsicker performed sinus surgery on Mr. Miterman at St. Luke's Hospital in Bethlehem, Pennsylvania. A bilateral external ethmoidectomy and a bilateral sphenoidotomy were performed, which involved entry into the sinus through the orbit, or eye, cavity. Bony partitions in the ethmoid sinus were removed to allow for more effective drainage.

During this surgical procedure, Dr. Hunsicker gained entry to the sinus cavity immediately proximate to the superior oblique muscle. The surgeon placed a clip on the left side of the anterior ethmoid artery. Defendant's Trial Exhibit 22. N.T.12/19/2002, p.7, 9. This clip was not removed at the completion of the surgical procedure. N.T.12/19/2002, p.16-18. Moreover, this clip was inserted immediately proximate to the superior oblique muscle. N.T. 12/19/2002, p. 16-17.

(vi) On 2/28/90, Mr. Miterman had endoscopic sinus surgery, bilateral nasal polypectomies, and an intranasal ethmoidectomy at the VA Hospital. The approach of this surgery was through the nose. During the 2/28/90 surgery, recurrent polyps were removed and an additional portion of the ethmoid cavities opened to permit greater drainage of the sinuses. Defendant's Exhibit 25, N.T.12/19/2002, p. 9.

6. On 4/11/97, Dr. Becker performed the sinus surgery on Mr. Miterman which is at issue in the instant matter. The maxillary sinuses and the ethmoid sinuses were reopened, and a small amount of tissue was removed from the frontal sinuses as well. Specifically, the plaintiff received the following surgical procedures: bilateral revision meatal antrostomy, bilateral revision total sphenoidectomy, bilateral frontal sinustomy and a closed rhinoplasty. The sinus surgery was performed endoscopically, which permits the surgeon to view the inside of the sinus cavities. The endoscope and the implements to remove polyps and bony partitions within the sinus cavities are inserted nasally, or through the nostrils.

7. Plaintiff contends that the April 11, 1997 surgery caused the following physical difficulties: left eye pain, tearing and watering of the eyes, and diplopia or double-vision.

8. Prior to the surgery at issue, Mr. Miterman articulated identical complaints:

05/24/61: Watering of eyes. Defendant's Trial Exhibit 2.

07/12/71: Severe headache and tremendous pressure in both eyes. Defendant's Trial Exhibit 6.

- 03/14/73: Tearing. Defendant's Trial Exhibit 8.
- 09/04/74: Headache, blurred vision. Defendant's Trial Exhibit 12.
- 10/28/75: Pain between and behind the eyes. Defendant's Trial Exhibit 15.
- 06/27/77: Eyes burning, tearing, spots. Defendant's Trial Exhibit 16.
- 07/14/77: Left eye pain behind the eye, floaters, flashing, streaks of light. Defendant's Trial Exhibit 17.
- 08/04/78: Conjunctivitis. Defendant's Trial Exhibit 18.
- 04/04/78: Left retro orbital pain and headache. Defendant's Trial Exhibit 19.
- 03/26/82: Conjunctivitis. Defendant's Trial Exhibit 23.
- 12/15/82: Headaches in the back of his eyes, often sees with double vision. Defendant's Trial Exhibit 24.
- 09/26/83: Double vision for one month duration. Defendant's Trial Exhibit 25.
- 10/05/88: Headaches in the back of his eyes ...appears his somatic complaints have a borderline component toward somatic delusions. Defendant's Trial Exhibit 27.
- 10/07/88: Blurring of vision, diplopia, eye pain. Defendant's Trial Exhibit 28
- 11/01/88: Complaints of halos around eyes and pain for a while when moving, tearing. Defendant's Trial Exhibit 29.
- 11/29/88: Chronic headache behind eyes. Defendant's Trial Exhibit 30.
- 06/05/89: Increased complaints of eyes watering this January - March. Defendant's Trial Exhibit 31.
- 11/01/89: Pain in left eye. Defendant's Trial Exhibit 32.
- 11/06/89: Left eye pain for months, complaints of blurred vision. Defendant's Trial Exhibit 33.
- 02/24/92: Episodes of flasher/floaters, moderate myopia. Defendant's Trial Exhibit 36.

09/16/92: Floaters, flashes, headache. Defendant's Trial Exhibit 37.

7. At the follow-up visits immediately after the April 11, 1997 surgery, Plaintiff reported his physical condition as follows:

04/11/97: At 4:15 p.m., immediately after surgery, Plaintiff did not complain of vision problems. Defendant's Trial Exhibit 40.

04/12/97: No vision problems are evident; the extraocular muscles are intact. Defendant's Trial Exhibit 41.

04/22/97: Some facial pain, maxillary sinus pain, greater in the left eye than in the right, is evident. No complaints of double vision, eye pain or tearing were made. Defendant's Trial Exhibit 42.

06/19/97: Mr. Miterman articulated numerous health concerns to his primary physician, but did not complain of diplopia, tearing or eye pain. Defendant's Trial Exhibit 43.

06/25/97: Mr. Miterman was examined in the Ophthalmology clinic. He did not complain of double vision, tearing or pain. Defendant Trial Exhibit 44.

07/14/97: Mr. Miterman was seen by his primary doctor, Dr. Margolis. No complaints of double vision, pain or tearing were made. Defendant's Trial Exhibit 45.

09/16/97: Mr. Miterman was seen in the ENT clinic. No complaints about double vision, pain or tearing were made. Defendant's Trial Exhibit 46.

8. Thereafter, Plaintiff's nasal, sinus and ocular muscular conditions deteriorated as follows:

(i) Mr. Miterman complained of eye pain on November 5, 1997, seven months after the operation. At that time, Plaintiff stated a sharp pain had been present in his left eye for two months at which time he developed conjunctivitis. The symptoms of conjunctivitis include tearing or discharge from the eye, pain in the eye with itching and burning. N.T. 12/18/2002, p 72; Defendant's Trial Exhibit 47. On January 3, 1998, Mr. Miterman was formally diagnosed with conjunctivitis. Defendant's Trial Exhibit 48.

- (ii) On 1/20/98, Plaintiff underwent cataract surgery on his left eye. Defendant's Trial Exhibit 49.
- (iii) On 4/15/98, Mr. Miterman advised his primary physician of pain in his left eye. Plaintiff stated his pain first appeared in August 1998, five months after surgery. He was given a prescription for new lenses for his eye glasses which did not include a prism (which would correct double vision). Defendant's Trial Exhibit 51.
- (iv) Plaintiff first reported double vision on September 24, 1998, one year and five months after the sinus surgery. The diplopia, or double vision, reported was "occasional intermittent monocular." Plaintiff also reported pain in his left eye which was caused by sinus surgery. The physician's examination failed to confirm Plaintiff's complaints. Defendant's Trial Exhibit 53.
- (v) On 3/30/99, Mr. Miterman was seen in the Ophthalmology Clinic and reported intermittent double vision and progressive blurring in left eye over recent months. The physician's examination failed to confirm Plaintiff's complaints. Defendant's Trial Exhibit 54.
- (vi) Mr. Miterman's initial reports of tearing were made on September 28, 1999, or two years and five months after the sinus surgery at issue. Defendant's Trial Exhibit 55.
- (vii) On 10/25/99, Mr. Miterman was seen by specialists in oculoplastics. His complaints of intermittent diplopia, left eye pain and excessive tearing were not substantiated by the physical examination. Defendant's Trial Exhibit 56
- (viii) On 11/22/99, Mr. Miterman was seen by the ophthalmology department. He was referred for left eye pain and tearing which occurred during and after reading. Injury to the superior oblique muscle was not evident upon examination. Defendant's Trial Exhibit 57.
- (ix) On 1/06/00, Mr. Miterman was seen by the neurophthalmology department. He complained of constant diplopia. Mr. Miterman insisted that the clip was causing pain and diplopia. He was given horizontal prisms for his eye glasses. Defendant's Trial Exhibit 58.
- (x) On 2/14/00, Mr. Miterman advised physicians that the pain in his left eye was present every day, at intermittent intervals, and this pain started after the 1997 sinus operation. Following a physical examination, plaintiff was prescribed vertical prisms, a particular type of eye glasses, for the first time. Defendant's Trial Exhibit 59.

- (xi) On 4/13/00, Mr. Miterman was seen by Dr. Volpe, a neurophthalmologist. Plaintiff's complaints included a sharp stabbing pain in his left eye, tearing and diplopia.

III. THE APRIL 11, 1997 SURGERY

- 9. Mr. Miterman's diplopia was not caused by the April 11, 1997 surgery or by damage to the superior oblique muscle. The attending physicians did not leave a surgical clip in Plaintiff's sinus cavities. The surgical clip was present in Plaintiff's sinuses prior to the 1997 surgery. N.T. 12/18/2002, p.71.
 - (i) Monocular (in one eye) diplopia is not caused by damage to the superior oblique muscle. Damage to the superior oblique muscle causes biocular (in both eyes) diplopia. N.T. 12/18/2002, p. 75-78.
 - (ii) Diplopia caused by damage to the superior oblique muscle is constant, and not intermittent as reported by Plaintiff. N.T. 12/18/2002, 75-85. The court finds the testimony of Dr. Moster to be compelling and persuasive on these issues. N.T. 12/18/2002, p. 75-78.
 - (iii) Monocular diplopia is usually associated with the development of cataracts or astigmatism, or another process which distorts visual images as they enter the eye. It simply is not caused by damage to the superior oblique muscle. N.T. 12/18/2002, p.76-77; N.T. 12/19/2002, 27.
- 10. Dr. Becker, the attending surgeon during the April 11, 1997 surgery, did not approach or damage Plaintiff's superior oblique muscle during this procedure. Dr. Becker was a credible, knowledgeable and truthful witness. Plaintiff's diplopia was not caused by the 1997 surgery.
 - (i) The April 11, 1997 surgery was unremarkable. N.T. 12/18/2002, p. 110 -143. No complications occurred. At no time was the orbit invaded or the superior oblique muscle impacted. Defendant's Trial Exhibit 39, N.T.12/19/2002, p. 10-22.

- (ii) The area in which the surgery was performed was not proximate to the superior oblique muscle. N.T. 12/19/2002, p. 117-124.
- (iii) No injury to the orbit was inflicted during this surgery. Had injury occurred, the distinctive, and deeply yellow fat of the orbit would have protruded into the sinus cavity and bleeding would have increased. No evidence exists in the medical records of the April 11, 1997 surgery that the orbit, or the periorbita, was invaded in any way. N.T. 12/19/2002, p. 13-15. N.T. 12/19/2002, p. 15.
- (iv) The superior oblique and the medial rectus muscles, two of the several muscles which move the eyes, were not damaged during Plaintiff's April 11, 1997 surgery. N.T. 12/19/2002, p.15. Had assault to the superior oblique and medial rectus muscles been inflicted, blood and pain would have been immediately present. They were not. N.T. 12/19/2002, p.19.

Moreover, had such injury occurred, difficulty in vision, and occasional double vision, would have been evident to the patient immediately upon gaining consciousness. N.T. 12/19/2002, p. 19-20. Tearing would have occurred shortly after surgery. N.T. 12/19/2002, p. 20. None of these symptoms developed in temporal proximity to the surgery¹.

11. Plaintiff's tearing was not caused by his sinus surgery of April 11, 1997. N.T. 12/18/2002, p. 90-91.

- (i) Damage inflicted during surgery would not initially appear more than two years after the surgery.
- (ii) In addition, the note of Nov. 22, 1999 (Defendant's Trial Exhibit 57) identifies the absence of nasal lacrimal duct obstruction. N.T. 12/19/2002, p. 20-22,29). A surgical cause of Mr. Miterman's tearing is medically unlikely without concurrent nasal lacrimal duct obstruction.
- (iii) Finally, the nature of tearing reported by Plaintiff is inconsistent with damage to the nasal lacrimal duct: injury to this duct results in persistent, not intermittent, tearing. N.T.12/19/2003, p.30.

¹ The numerous eye examinations conducted prior to October 25, 1999 which record Plaintiff's extraocular motility, or eye movement, as normal demonstrate that the function of the superior oblique muscle was not damaged during the operation. N.T. 12/18/2002. p. 78, 80-81; N.T. 12/19/2002, p. 23-26, 28-29. Defendant's Trial Exhibits 53,54.

12. Plaintiff's eye pain was not caused by the sinus surgery of April 11, 1997. Pain which develops months after the surgery is not related to the surgery. N.T. 12/18/2002, p.95; N.T. 12/19/2002, p.32.
13. Plaintiff failed to introduce expert testimony tending to establish that aftercare was negligently provided.
14. Dr. Volpe's initial opinion, in which the subtle misalignment observed in Mr. Miterman's eyes was attributed to the surgery, was incorrect. This opinion was based on a medical history as reported by Mr. Miterman, and upon the review of medical reports, CT scans or medical records.

When apprised of Plaintiff's full medical history, Dr. Volpe retracted this opinion, recognizing that it was based upon insufficient facts, and concluded that the 1997 surgery "absolutely [did] not" cause Mr. Miterman's diplopia. Deposition of Dr. Volpe, 12/17, 2002, p. 7-19.

This court finds Dr. Volpe's ultimate opinion that the surgery did not cause the diplopia credible and accurate.

15. The testimony of the eminently qualified expert and otolarayngologist, Dr. James Ian Blaugrund, stating that the surgery was performed in satisfaction of existing professional standards of care was truthful, accurate and persuasive.
16. The testimony of Dr. Mark Leslie Moster, an expert in neurophthalmology, was truthful, accurate and instructive. The April 11, 1997 surgery did not cause the Plaintiff's diplopia, eye watering or eye pain.

17. Dr. Moster and Dr. Blaugrund correctly and accurately applied existing medical knowledge associated with the physical conditions from which plaintiff suffers.
18. The expert testimony of Plaintiff's expert, Dr. Bogdasarian, that the April 11, 1997 surgery fell below the requisite medical standard of care in that the orbit must have been invaded, which, in turn, caused Plaintiff's current eye complaints, is not supported by medical evidence. It is unpersuasive. It is rejected.
- (i) In reaching this opinion, Dr. Bogdasarian relied only medical records covering the years 1997 to 2000. He failed to review all of Mr. Miterman's CT scans and post operative reports before reaching his conclusions. Deposition of Dr. Bogdasarian, December 9, 2002, p.28-30.
 - (ii) Dr. Bogdasarian's was factually inaccurate in his assertion that Mr. Miterman did not have complaints of eye pain, tearing or diplopia prior to the 1997 surgery. Dr. Bogdasarian's testimony that Mr. Miterman's complaints began shortly after the 1997 surgery are based solely on Mr. Miterman's deposition testimony. Deposition of Dr. Bogdasarian, 12/9/2002, p. 44-64. The medical records conclusively demonstrate the inaccuracy of this premise essential to Dr. Bogdasarian's ultimate opinion on the skill exercised during the April 11, 1997 surgery.
 - (iii) Even Dr. Bogdasarian ultimately admits that his conclusion that Mr. Miterman's left orbit was invaded during the sinus surgery in 1997 is unsupported by the medical records, the CT scans and the CT scan reports. Deposition of Dr. Bogdasarian, 12/9/2002, p. 64.
 - (iv) Dr. Bogdasarian's opinion that Mr. Miterman's superior oblique muscle was impacted or damaged during the surgery, causing his double vision, is not supported by the numerous eye examinations conducted after April 11, 1997 which show the superior oblique muscle as intact.
18. Dr. Bogdasarian's factual basis for his expert opinion was derived from review of two sources: Mr. Miterman's deposition and limited medical records enumerating plaintiff's complaints to certain treating physicians. Deposition of Dr. Bogdasarian, 12/9/2002, p. 36, 46, 47, 49,54, 60.

In actual fact, Mr. Miterman is a diagnosed paranoid schizophrenic, N.T. 12/18, 2002, p.69, who has “many bizarre and ill defined somatic symptoms which were suggestive or somatic delusions.” Deposition of Dr. Bogdasarian, 12/9/2002, p.30; Defendant Trial Exhibit 20. A “somatic delusion” is defined as a “delusion or incorrect self-appraisal related to some physical complaint.” Deposition of Dr. Bogdasarian, 12/9/2002, p. 31. Indeed, the medical records chronicle plaintiff’s long history of somatic complaints. Defendant Trial Exhibits 3, 4, 5, 11, 12, 20, 21, 24, 27.

19. Having observed Plaintiff, the Court finds that he is not an accurate historian of his medical condition and symptoms.

IV. CONCLUSIONS OF LAW

1. This is a claim filed under the Federal Tort Claims Act against the United States of America. Title 28 U.S.C. § 1346(b) provides that claims may be filed against the United States,

... for money damages ... for personal injury or death caused by the negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred..”

2. The law of Pennsylvania is applicable when a veteran was treated in a hospital in Pennsylvania and alleges the negligent act occurred in Pennsylvania. 28 U.S.C. § 1346(b).

3. As a general matter in Pennsylvania, to establish a cause of action in negligence, a plaintiff must demonstrated that the defendant owed a duty of care to the plaintiff, the defendant breached that duty, the breach resulted in injury to the plaintiff, and the

plaintiff suffered an actual loss or damage. Negligence is the absence of ordinary care that a reasonably prudent person would exercise in the same or similar circumstances. Martin v. Evans, 441 Pa. 497, 711 A.2d 458 (1998).

4. The mere occurrence of accident or injury does not establish negligence. In order to recover, the plaintiff must prove, by a preponderance of the evidence, that the defendant's conduct deviated from the standard of care expected under the circumstances, and that the deviation was the proximate cause of the actual harm. Hamil v. Bashline, 481 Pa. 256, 392 A.2d 1280 (1998).
5. Under Pennsylvania law, a cause of action for medical malpractice exists when the plaintiff establishes a duty owed by the physician to the plaintiff, a breach of that duty by the physician, that the breach was the proximate cause of the harm suffered, and that the damages were the direct result of the harm. Schneider v. Fried, No. 01-3786, (3d Cir., February 18, 2003); Hightower-Warren v. Silk, 548 Pa. 459, 698 A.2d 52 (1997); Mitzelfelt v. Karmin, 526 Pa. 54, 62, 584 A.2d 888, 891 (1990).
6. A medical specialist "... 'is expected to exercise that degree of skill, learning and care normally possessed and exercised by the average physician in the medical community who devotes special attention' to the diagnosis and treatment of diseases within that specialty." Schneider, supra, at 17 (citing McPhee v. Reichel, 461 F.2d 947, 951 (3d Cir. 1972).)
7. Unless the matter is so simple or the lack of skill or care is so obvious as to be within the range of experience and comprehension of even non-professional persons, the plaintiff must provide a medical expert to establish to a reasonable degree of medical certainty that the defendant's acts deviated from an accepted medical standard and that deviation was the cause of the harm suffered. Welsh v. Bulger, 698 A.2d 581, 585 (Pa. 1997); Hightower-Warren, supra, at 463.

8. The mere occurrence of injury does not prove negligence. Rather, after plaintiff establishes that the defendant breached some duty of care owed the plaintiff, the plaintiff must also establish that the breach of the duty of care is the proximate cause of the plaintiff's injury. Hamill v. Bashline, 481 Pa. 256, 392 A2d 1280 (1978); Incollingo v. Ewing, 444 Pa. 263, 282 A2d 206 (Pa. 1971).
9. Plaintiff has failed to satisfy his burden of establishing, by a preponderance of the evidence, that the April 11, 1997 surgery was negligently performed, or fell below the appropriate standard of care. Welsh v. Bulger, 548 Pa. 504, 698 A.2d 581 (1997); Brannan v. Lankenau Hospital, 490 Pa. 588 (1980), Chandler v. Cook, 438 Pa. 477 (1970).
10. Dr. Becker possessed and exercised the care, judgment, skill and knowledge of a professionally competent ortholaryngologist and surgeon in performing the April 11, 1997 procedure.
11. The April 11, 1997 surgery was not the proximate cause of Plaintiff's tearing, eye pain or diplopia. This surgery was not a substantial factor in bringing about Plaintiff' injuries. Under most circumstances, the element of causation is a question of fact reserved for the fact-finder; the question is removed from the fact-finder's consideration only where it is clear that reasonable minds could not differ on the issue. Hamil v. Bashline, 481 Pa. 256, 392 A.2d 1280 (1978).
12. As Plaintiff's injuries were not caused by the April 11, 1997 surgery, no damages insue as a consequence of that surgery.
13. Plaintiff has failed to demonstrate, by a preponderance of the evidence, that the aftercare for his April 11, 1997 surgery was negligently rendered.

14. Judgment is entered in favor of the Defendant, the United States of America, and against the Plaintiff, Harold Miterman. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Harold Miterman,	:	
	:	
Plaintiff,	:	CIVIL ACTION NO. 01-5352
	:	
v.	:	
	:	
United States of America,	:	
	:	
	:	
Defendant.	:	

AND NOW, this day of March, 2003, following a bench trial conducted on December 18 and 19, 2002, and upon consideration of the argument and exhibits submitted by both parties, it is hereby ORDERED that judgment is entered in favor of the defendant, the United States of America, and against the plaintiff, Harold Miterman.

This is a final judgment. The Clerk of Court is directed to statistically close this matter.

BY THE COURT,

Legrome D. Davis