In past columns we have talked about the expense and difficulty of medical malpractice cases. Since juries do not understand healthcare, the parties must retain expert witnesses to study the specifics of the case and to render their expert judgment on the propriety of what was done or not done. Because the patient’s health and well being is at stake, when juries award damages, the damages can be very large. Moreover, there is an element of uncertainty in the litigation process based on the emotion that juries feel one way or the other. The expense and uncertainty of litigation has led to doctrines such as res ipsa loquitur and negligence per se, which make it easier for injured plaintiffs to assert their case.

There is, however, a third way in which a plaintiff can avoid the expense of litigation and maintain better control of the outcome despite the emotions and uncertainty of litigation. In fact, the same tool is available to defendants. The method is through settlement. Actually, it is the most frequently used method since the vast majority of all cases brought are settled without going to trial. Although courts do not mention it, the prospect of settlement leaves its imprint on the law.

Whether a case is going to be tried before a jury or settled, plaintiffs have to cast their nets very broadly on defendants and potential defendants. Statutes of limitations that are designed to protect defendants against the possibility that they could one day be forced to answer and defend lawsuits over incidents long forgotten and the need to create stability require that very early in the process, plaintiffs must identify all defendants and include all possible causes of action against them. Statutes of limitations discourage plaintiffs from waiting until they are certain that they can make their case before filing suit. When a lawsuit is filed it is necessary to include all of the possible defendants who could have caused the damage and to charge them with as many of the theories as possible by which they can be held liable for the damage. Rules governing pleadings (the filing of complaints and answers) permit the use of inconsistent, “alternative” pleadings.

**Summary judgment**

In physics, for every action there is an equal and opposite reaction. So, too, in the world of litigation. The countervailing tool to assist defendants who have been wrongly included is a legal process called “summary judgment.” Over the course of discovery, the plaintiff will find out which of the defendants actually caused the injury and which are innocent. After the plaintiff has been given a chance to question the possible defendants under oath and to gather evidence, defendants who can convince the court that there is no way the plaintiff can make a case against them are entitled to be dismissed through summary judgment. The defendant brings a motion and points out that even if one assumes that everything that has been stated in the pleadings, depositions and admissions on file in the case is true, no reasonable jury could hold the defendant responsible; the defendant is entitled to be dismissed from the case. The motion for summary judgment is served on the plaintiff, there is a hearing before a judge at which the plaintiff, if he or she disagrees with the defendant’s assertion, can explain what facts he or she believes are either in dispute or what facts the plaintiff believes establish a case against the defendant asking for summary judgment.

Because so many cases are settled, settlement strategy plays an important role in the litigation process even if it does not get discussed very often. Summary judgment is important because it limits the number of defendants who will be asked to contribute to a possible settlement. In an anesthetic incident, all the plaintiff will know is that the plaintiff was injured. It will be unclear whether the injury came as a result of a surgical accident, an administrative error, or an anesthetic incident. Suit will be brought against virtually everyone who was present in the operating room. After discovery the plaintiff may develop a better understanding of who was actually doing what during the course of the operation. When discovery is completed, many defendants will file motions for summary judgment. Since it is
likely that the case is going to be settled, the more defendants who are involved, the smaller each defendant’s portion of the ultimate cost of settlement will be and, theoretically, the easier it will be to settle the case or settle it for a higher amount than if the defendants are excluded. Thus, even if a defendant’s involvement in the incident is relatively minor, the plaintiff will try, as hard as the plaintiff can, to keep any defendant from getting summary judgment.

**Consortium**

Another aspect of the same consideration is for the plaintiff to increase the number of plaintiffs and the individual claims the plaintiffs assert. How do you increase the number of plaintiffs? In tort law, if a plaintiff is severely injured, not only is the plaintiff hurt, but people who depend on the plaintiff are also injured. The plaintiff’s wife (and sometimes family) may be deprived of support and companionship. This is known as loss of “consortium.” In general, consortium consists of the company, the cooperation, affection, and aid of the spouse. The settlement process also is affected by the number of ways the plaintiff may have been hurt. If a plaintiff’s arm was injured, settlements might be higher if the healthcare professionals forgot to get informed consent as well.

While you can see implications of settlement throughout the law of torts, *Bynum v Magno* (125 F.Supp. 2d 1249, 2000, Hawaii), will give us enough to talk about. In 1998, a Californian named Bynum was vacationing in Hawaii when he suffered chest pain and difficulty breathing. Through a series of mishaps during his surgery, Mr. Bynum suffered damage to his phrenic nerve that made him dependent on a ventilator and a resident of various chronic care facilities in southern California. Mr. and Mrs. Bynum sued: the cardiologist who first saw him at the hospital in Hawaii and recommended that he undergo coronary artery bypass graft surgery (which the court calls “coronary artery bypass grafting surgery”), the cardiovascular surgeon who performed the coronary artery bypass graft surgery, a pulmonologist who consulted with the cardiologist, and the hospital where all of the events took place. After discovery was completed, all of the defendants moved for summary judgment. The court faced a very confusing variety of both legal theories and defendants.

At least 2 of the theories could be disposed of with regard to all defendants. The others had to be dealt with issue by issue and defendant by defendant. The plaintiffs were Mr. and Mrs. Bynum, even though only Mr. Bynum had been on the operating table. Mrs. Bynum joined the suit claiming loss of consortium and emotional distress. Consortium is a damage claim that can only be brought by a spouse. The court had little difficulty disposing of the claim because Mr. and Mrs. Bynum were divorced. Consortium, a kind of holdover concept from the early days of the law, when a husband was entitled to his wife’s earnings, could not be maintained where the couple were no longer married. Why should a divorced wife be compensated for the loss of her former husband’s company? If she had wanted his company, why had she gotten a divorce? It is the divorce that deprives her of the company, not the accident.

Actually, it turned out there was every reason why Mrs. Bynum would seek loss of consortium. Mr. and Mrs. Bynum became very concerned about the financial demands resulting from Mr. Bynum’s chronic condition. Mr. and Mrs. Bynum were divorced as a direct result of the accident. They divorced, not through any lack of affection, but so as not to endanger the family finances.

Feudal or modern, could there be any more deserving application of the remedy of loss of consortium? The court, a federal district court sitting in Hawaii, determined that loss of consortium could only be claimed by a spouse regardless of the reasons behind the divorce. I was bothered with this conclusion. On the one hand the concept of consortium was, I always thought, a kind of quaint, outdated concept and when I read that a divorced wife was applying for it, I thought it was some kind of joke. However, when I read the reasons behind the divorce, I felt that Mrs. Bynum had been badly treated. But then I thought about what the judges must have been concerned with and the effect such a ruling would have on settlements. If they allowed a divorced spouse to claim loss of consortium, even one as deserving as Mrs. Bynum, every tort case would include a loss of consortium for the divorced spouse (maybe even multiple claims for loss of consortium for several divorced spouses) because, until discovery is completed, the plaintiff will not be sure what it can and cannot prove. Because most lawsuits settle, these claims will never be tried. They will simply increase the number of plaintiffs and total damages the lawyers will be able to resolve in their settlement discussions. Although Mrs. Bynum may be deserving, many of the people who take advantage of such a change in the law will not be. If the court permits divorced wives to pursue loss of consortium actions, settlements will become more expensive, and insurance premiums will go up.
Informed consent

A second claim that was also dismissed by the court dealt with the issue of informed consent. The plaintiffs claimed that none of the defendant physicians obtained proper informed consent, and both plaintiffs (Mr. Bynum and his former wife) sued each of the doctors as well as the hospital for damages based on the failure to obtain informed consent. Again, if it was Mr. Bynum who had the operation, why does Mrs. Bynum have a claim for informed consent?

The plaintiff's attorney showed the court that there was a line of cases finding that physicians may have a duty to the patient's family to provide proper informed consent. These cases were based on the fact that the family members could be adversely affected by the failure to make proper disclosure of all of the known risks. In addition, the plaintiff also argued that guidelines published by the Agency for Healthcare Policy and Research pointed out the importance of keeping the patient's family informed of the diagnosis and treatment strategies. The plaintiff's attorney tried to use these guidelines as an indication that the standard of care required that the family be informed. Thus, failure to inform the patient was a failure to inform the family. While the factual situations in these cases were pretty specific, they opened the possibility that there was a duty to provide informed consent to the family, and the issue of the wife's right to informed consent could stay on the agenda, ultimately to be settled. Nonetheless, the court concluded that Mrs. Bynum had not shown that she was damaged by the failure of the doctors to obtain an informed consent from Mr. Bynum (assuming for purposes of the argument, that they had failed to do so), and therefore summary judgment was granted to all of the doctors on the issue of their obligation to Mrs. Bynum to obtain informed consent.

Had the physicians failed to obtain informed consent? That too was the subject of the summary judgment proceedings. There were 3 physicians involved in the patient's care: a cardiologist, a cardiovascular surgeon, and a pulmonologist who was a consultant. Of the 3, the court agreed, only the consultant physician had no obligation to obtain informed consent. Even so, the plaintiff had argued that the consulting physician was "part of the medical/surgical team" rather than a mere consultant. The plaintiff's only evidence that the pulmonologist was part of the team was a brief reference by the cardiologist in her deposition to him as part of the team. The court held this insufficient and entered summary judgment for the pulmonologist.

If the surgery was performed by the cardiovascular surgeon, on what basis could the plaintiff claim that the cardiologist had an obligation to obtain informed consent? This question underscores the tentative nature of summary judgment and why the court's refusal to dismiss a cause of action cannot be taken as equivalent to a determination that there is liability. In general, a referring physician does not have a duty to obtain informed consent where the referring physician does not perform the procedure. There are cases, however, where the referring physician retains control over the patient even during the procedure. For example, if a procedure is part of a course of treatment to be given by a referring physician, and the course of treatment requires informed consent, then the referring physician could have liability for failure to obtain informed consent. Were such issues present here? The Bynums argued that they were. Whether the coronary artery bypass graft surgery was part of a course of treatment requiring informed consent or not was a factual question. Thus, even though evidence that it was part of a course of treatment seems unlikely, it is beyond the court's purview. The court was unable to dismiss the claims against the cardiologist. There were factual issues to be resolved. Because they are factual issues, there is no way to resolve them prior to trial, and there can be no summary judgment. The only way this issue will be resolved prior to trial is through settlement.

Of the 3 physicians, clearly the cardiovascular surgeon had an obligation to obtain the informed consent. The cardiovascular surgeon proposed 2 reasons why the claim against him for lack of informed consent should be dismissed. The first is that it was his normal practice to properly inform patients. Why is this a defense? Over centuries, the law has developed very complex rules as to what type of evidence will be admitted at trial. It is not sufficient that one party be allowed to testify that he or she did or did not do something while the other party says the negative. The advantage of following procedures and proper charting in the healthcare area is extremely important because even if memory is not sufficient (can a cardiovascular surgeon really remember the details of a conversation about informed consent held years earlier?), the fact that it is common practice or that a person "always" does something in a certain way, is a reliable indication to a court and jury that it was done that way in the instant case even if no one can remember. Thus, here the cardiovascular surgeon's "normal prac-
tice” to provide informed consent was evidence that informed consent was provided. Nonetheless, the plaintiff claimed that no relevant information was provided about the risk to the phrenic nerve.

The cardiovascular surgeon admitted that he did not inform the plaintiff about other alternatives. But that was only because he felt so strongly that coronary artery bypass graft surgery was the proper solution. The cardiovascular surgeon’s admission that he failed to provide information on alternatives looks pretty damaging, unless you realize that he proposed to rely on a provision of Hawaii law that a plaintiff cannot make a claim for failure to give informed consent if a reasonable person would have consented to the surgery had all the risks and alternatives been disclosed. The Hawaii statute was part of an effort at tort reform to reduce the number of lawsuits based on technical violations of healthcare procedures. You might think the plaintiff would be disappointed, but whether a reasonable person would have agreed to the surgery or not is a factual question. That is, it can only be decided by a jury. Therefore, there could be no summary judgment, and one huge issue was left on the table of the parties’ settlement conference.

This situation again underscores the common-sense approach to informed consent. Why bother to get informed consent in Hawaii if Hawaiian law says that you cannot base a case on it if a reasonable person would have consented to the operation had the facts been known? The answer: do not forget settlement! In the Bynum case, the lack of consent leads to an inability to terminate the case at an early level. Very few patients will be unreasonable and refuse surgery if all the facts are told. By failing to provide information about alternatives, an opening was left for the plaintiff to take this point to a jury. This is a pretty heavy price to pay for the failure to spend an extra 5 minutes with the patient and answer questions about the risks of surgery and the benefits of other alternatives.

One aspect of the case that I thought was interesting was the court’s reliance on legal precedent for what is basically an interpretation of factual data. As part of his broad net, the plaintiff had sued the pulmonologist for failure to obtain informed consent. The court held that the pulmonologist was in a category of physician called “consulting physician,” and it cited a case in which a consulting physician was not required to obtain informed consent. The court’s reasoning appears to follow the rules of logic. (“Consulting physicians do not have to obtain informed consent. Dr. Callan is a consulting physician. Therefore, Dr. Callan did not have to obtain informed consent.”) Although the court’s reasoning looks logical, it is not because it assumes its conclusion. In a prior case, a consulting physician was held not to be responsible for informed consent. The question of whether the pulmonologist was a consulting physician depends on whether he is required to obtain informed consent. If he was not, he is a consulting physician and entitled to summary judgment. Whether the pulmonologist was required to obtain informed consent was what the court was trying to figure out in the first place.

The last issue that the court had to resolve was whether the hospital was a proper party to the lawsuit. The plaintiff’s claims against the hospital were that it had liability for the negligent acts of doctors working at the hospital. Because hospitals do not directly employ physicians, hospitals tend not to be liable for the negligence of the physicians. The plaintiff, however, pointed out that there are exceptions. The exceptions have to do with whether the hospital has done something that would lead a reasonable person to believe that the physician is a hospital employee. Realistically, is there much chance the hospital will be found to have misled the public to believe that the physicians were hospital employees? The court ruled that Hawaii will follow a doctrine found in Texas and Connecticut, that the plaintiff must actually establish that he or she had a reasonable belief that the physician was an agent or employee of the hospital, the belief was generated by some affirmative act of the hospital or the physician, and the patient justifiably relied on the representation of authority. That looks like a pretty heavy burden, except that it is a factual burden, and as we know, summary judgments are not available where there are factual disputes. Actually, because the factual test was uncertain before the court’s decision, the hospital’s liability could be decided by further proceedings.

Conclusion
Understanding the way lawyers work and think is important to those governed by the legal system. Because of the expense and uncertainty of litigation, lawyers often expect settlements. The prospect of settlement affects the way lawyers handle cases.