

# Battery Claim Left Standing Against Doctor

BY MARTIN FOX

A STATE JUDGE has left standing a battery claim against a physician who allegedly performed a surgical procedure without the plaintiff's specific authorization.

Manhattan Supreme Court Justice Stanley L. Sklar noted the plaintiff agreed to a colonoscopy provided it was performed at Lenox Hill Hospital by his private physician. The surgery, which allegedly perforated his bowel, was performed by a resident physician at the hospital.

**The decision will be published Monday.**

Justice Sklar did dismiss a separate claim for assault directed at Dr. Eric Morgenstern — part of an action for malpractice arising from lack of informed consent — which maintained the unauthorized surgery was an "intent to harm."

"Plaintiff's claim for assault is dismissed," Justice Sklar wrote in *Tom v. Lenox Hill Hospital*, filed last week. "An assault is the intentional placing of another in apprehension of imminent harmful or offensive conduct' . . . Here, where it is claimed that the plaintiff was unconscious, he could not have been in apprehension of imminent harmful or offensive contact."

But the court denied the defense motion to dismiss the cause of action for battery, ruling that discovery was required to resolve key issues.

The plaintiff's attorney, Harry I. Katz of Queens, said the battery claim was significant because it was a "punitive tort" which would render the individual physician personally liable since it is not covered by malpractice insurance. He said this approach can have "tactical advanta-

ges" through use as "leverage" in settlement negotiations.

The defendant, in moving to dismiss the battery claim, maintained that the consent form signed by the plaintiff, Kwok Tung Tom, not only authorized surgery by his private physician, Dr. Michael Krumholz, but "whomever he may designate as his associate or assistants."

Moreover, the decision observed, the defense also argued "that it is well known that Lenox Hill is a teaching hospital and that residents and fellows routinely assist the attending physician." Consequently, "by seeking treatment at Lenox Hill Hospital, plaintiff consented to having residents and assistants assist in the procedure."

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## Excerpt From the Decision

"[The defense] failed to submit any competent evidence that there was [a practice of using residents to perform surgery] at the hospital. Similarly, the defendants' claim that the battery claim should be dismissed because the plaintiff actually consented to [the resident's] performance of the procedure by signing [a] consent was also raised for the first time in defendants' reply."

Justice Stanley L. Sklar