SCHALLER, J., dissenting. I agree with the majority that the trial court improperly viewed the complaint of the plaintiff, Susan Dimmock, as limited to allegations that expressly or implicitly concerned infection. I also agree with the majority's reasoning in discussing why de novo review is appropriate in this case. Although the majority takes no position on this issue, I believe that a de novo standard of review should be applied in this case. See *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 573 n.12, 864 A.2d 1 (2005) ("[t]he interpretation of pleadings is always a question of law for the court and . . . our interpretation of the pleadings therefore is plenary" [internal quotation marks omitted]). I further agree fully that "[i]n Connecticut, we long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties." (Internal quotation marks omitted.) *Deming* v. *Nationwide Mutual Ins. Co.*, 279 Conn. 745, 778, 905 A.2d 623 (2006). I respectfully disagree, however, with the result and the reasoning of the majority opinion.

The crucial issue in this appeal is whether the plaintiff's proposed allegations concerning the defendants'[1] negligence (paragraph 34 [j] through [n] of the proposed amended complaint) arise from an entirely different set of facts than the allegations of the operative complaint, and, accordingly, are time barred because they do not relate back to the plaintiff's allegations in the original complaint.

The majority opinion accurately traces the allegations from the two original complaints into the operative complaint. See footnote 2 and part I of the majority opinion (explaining that plaintiff originally filed two complaints through two attorneys—David W. Bush and Gary J. Greene [Greene complaint]). In essence, the plaintiff relies principally on the allegations in paragraph 34 (r) and (s) of the operative complaint as the basis for the relation back of the new allegations in the proposed amended complaint. Those subparagraphs clearly had their origin in the Greene complaint, which did not concern infection. Paragraph thirty-four of the plaintiff's proposed amended complaint proposed the following new allegations:

"j. The [d]efendant[s] failed to adequately inform [the plaintiff] of all surgical options;

"k. In that the [d]efendants failed to adequately

inform [the plaintiff] of all the surgical options in light of her history of smoking;

"*l*. In that the [d]efendant[s] failed to perform a spinal fusion with instrumentation;

"m. In that the [d]efendant[s] failed to perform a spinal fusion with instrumentation in light of the [p]laintiff's medical history;

"n. In that the [d]efendant[s] failed to adequately monitor the [p]laintiff's ongoing back condition after the initial surgery and make the necessary recommendations for additional care and treatment, including additional attempts at surgical repair."

The plaintiff argues that the new allegations relate back to paragraph 34 (r) and (s) of the operative complaint, which alleged failure "to adequately and properly care for, treat, monitor, diagnose and supervise the plaintiff for problems with her back and post operative care" and failure "to adequately and properly assess and inform the plaintiff of the risks involved in the surgery . . . ." Attempting to read these allegations "contextually," the majority concludes that the operative allegations do not support the new allegations. The majority particularly expresses concern that the new allegations of an improperly performed spinal fusion "contradict" the earlier allegation of a spinal fusion that was alleged to have been performed improperly because there was no spinal instability.

The majority affirms the trial court's rejection of the proposed amendments because they are contradictory and represent a new theory of negligence. The majority reasons that, while our case law supports the pleading of alternative theories of negligence in general, it does not support the pleading of alternative theories that contradict previously pleaded theories. I disagree with this reasoning. Whether allegations contradict earlier allegations is not the principal inquiry. It is fair to say that all revised allegations involve *some* new facts and that all new allegations alter to some extent the evidentiary requirements. The determinative factor, however, is whether the new allegations present "an entirely new and different factual situation . . . ." (Internal quotation marks omitted.) *Gurliacci* v. *Mayer*, 218 Conn. 531, 547, 590 A.2d 914 (1991), quoting *Sharp* v. *Mitchell*, 209 Conn. 59, 71–72, 546 A.2d 846 (1988). In this case, the factual situation, that is, whether a spinal fusion at L5-S1 was improperly performed, remains substantially the same for purposes of the proposed amendment.

The relation back doctrine has been explained by this court as follows: "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 establish the existence of that right and that delict constitute 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." (Citations omitted; internal quotation marks omitted.) *Gurliacci* v. *Mayer*, supra, 218 Conn. 546–47. "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 . . . .' " *Barrett* v. *Danbury Hospital*, 232 Conn. 242, 264, 654 A.2d 748 (1995), quoting *Gurliacci* v. *Mayer*, supra, 548.

In *Gurliacci*, we stated that "[w]e have previously recognized that our relation back doctrine is akin to rule 15 (c) of the Federal Rules of Civil Procedure . . . ." (Internal quotation marks omitted.) *Gurliacci* v. *Mayer*, supra, 218 Conn. 547. Rule 15 (c) (1) (B) provides in pertinent part that "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading . . . ." As we recognized in *Gurliacci*, "[t]he 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.) *Gurliacci* v. *Mayer*, supra, 547–48.

The majority opinion cites *Gurliacci* as authority for the proposition that allegations that assert an alternative basis for liability arising from the same facts can relate back to the original complaint. The reasoning of *Gurliacci* provides strong support for the plaintiff's position in this case. 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 relation back doctrine, 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.

All potential amendments to a complaint require that there be some new evidence presented. Thus, in *Gurliacci*, 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.

The *Gurliacci* court correctly focused on the factual situation rather than on the potentially contradictory nature of the original and new allegations. The new allegations, in fact, could have been viewed as inconsistent or even contradictory, had the nature of the allegations been the appropriate focus of the court's attention. The original allegations involved negligence *within the scope of employment*. Id., 542. The new allegations involved a claim of actions that were wilful, wanton or malicious actions, or were *outside the scope of employment*. Id., 546. Clearly, the new allegations would present a different evidentiary situation from the original one. The court in *Gurliacci*, however, correctly concluded that "the new allegations did not inject two different sets of circumstances and depend on different facts . . . ." (Internal quotation marks omitted.) Id., 549. The court rejected the defendant's argument based on *Sharp* v. *Mitchell*, supra, 209 Conn. 73,[2] that "the change of focus from actions within the scope of employment to actions outside the scope of employment is of such a magnitude as to preclude a relation back for statute of limitations purposes." (Internal quotation marks omitted.) *Gurliacci* v. *Mayer*, supra, 218 Conn. 548.

In the present case, the defendants had adequate notice that a claim was being asserted against them based on a claim of negligence in the performance of medical services culminating in a spinal fusion at L5-S1. They also had adequate notice that the claim concerned the condition of spinal stability following the surgery. While the new allegations did present a different configuration of the factual situation, they did not negate "the identity of the cause of action." (Internal quotation marks omitted.) Id., 549. The defendants had fair notice that the plaintiff's claim of negligence concerned the decision to undertake, manner of performance and results of the spinal fusion at L5-S1.

The majority cites to numerous cases of this court involving the issue of whether new allegations relate back to the original complaint. My reading of those cases indicates that the analysis and outcomes were consistent with the reasoning of this dissenting opinion.[3] In *Sharp*, for example, the original allegations presented a theory of negligent supervision while the amended allegations presented a claim of negligent design and construction of the underground storage area, a claim that presented an entirely different factual situation. *Sharp* v. *Mitchell*, supra, 209 Conn. 73; see also footnote 2 of this dissenting opinion.

The plaintiff in this case relied on *Wagner* v. *Clark Equipment Co.*, 259 Conn. 114, 788 A.2d 83 (2002), which, in my view, offers persuasive support for the plaintiff's position. The majority dismisses the importance of *Wagner*, however, on the ground that the original and the new allegations presented theories that were consistent. In fact, the court in that case readily could have noted an inconsistency between the old and new theories. Nevertheless, because consistency is not the key to understanding the relation back doctrine, the court looked, instead, to whether the factual situation presented by the amendments was new and entirely different from the original one. Id., 130. On this score, the focus of our determination in *Wagner* was properly on the factual situation. We concluded that "[t]he allegations found in [the] proposed [complaint], which pertain to the issue of design defect with respect to the back-up alarm, arise out of the same set of facts set forth in the [original] complaint, namely, an injury caused by a defective forklift. Consequently, the [proposed complaint] contain[s] allegations that arise from the same cause of action stated in the [original] complaint, and, thus . . . are not barred by the statute of limitations." Id. Similarly, in the present case, both the operative and the new allegations involve an injury caused by an improper spinal fusion at L5-S1.

For the foregoing reasons, I conclude that the trial court improperly determined that the amended complaint presented claims that did not relate back to those in the operative complaint and, therefore, was time

barred. I would reverse the summary judgment rendered by the trial court. Accordingly, I would reverse the judgment as to the other two issues raised on appeal and remand the case to the trial court for further proceedings, including an order granting the motion to amend the complaint. This disposition would represent a broad and realistic interpretation of the pleadings that would promote substantial justice in this case.

[1] The defendants in this case are Patrick F. Doherty and Frank M. Maletz, and the medical practice groups to which they respectively belong, Neurological Group, P.C. and Thames River Orthopedic Group, LLC. Although Lawrence and Memorial Hospital, Inc., also was named as a defendant, the plaintiff withdrew her claim against the hospital, and references to the defendants do not include the hospital.

[2] In *Sharp*, we concluded that the statute of limitations barred the defendant's amended complaint alleging wrongful death based on negligent design and construction because it did not relate back to the defendant's original complaint alleging wrongful death based on negligent supervision because "[t]hese complaints involve two different sets of circumstances and depend on different facts to prove or disprove the allegations of a different basis of liability." *Sharp* v. *Mitchell*, supra, 209 Conn. 73.

[3] The majority cites *Alswanger* v. *Smego*, 257 Conn. 58, 61, 776 A.2d 444 (2001), and *Keenan* v. *Yale New Haven Hospital*, 167 Conn. 284, 285–86, 355 A.2d 253 (1974), to support the statement: "we are unaware of any case in which this court has held that new allegations that replace and *directly contradict* those in the operative complaint have been deemed to amplify, and hence relate back, to those in the operative complaint." (Emphasis in original.) A close reading of *Alswanger* and *Keenan*, however, indicates that we examine the *factual underpinning* of the proposed cause of action in order to determine whether the proposed cause of action relates back to the original cause of action.

Indeed, in *Alswanger*, we concluded: "[i]n the present case, we are faced with an amended complaint, filed after the statute of limitations had expired, alleging an act of negligence based on a different set of facts from that alleged in the original complaint." *Alswanger* v. *Smego*, supra, 257 Conn. 66. In *Keenan*, we concluded: "[a]cts amounting to negligence and acts amounting to assault and battery, not related to lack of due care, do not constitute a single group of facts. They are separate and distinct. It is clear that the count alleging an assault, as made more specific, raises a cause of action separate and distinct from the negligence originally pleaded." *Keenan* v. *Yale New Haven Hospital*, supra, 167 Conn. 286. These cases, as well as *Gurliacci* v. *Mayer*, supra, 218 Conn. 531, *Wagner* v. *Clark Equipment Co.*, 259 Conn. 114, 788 A.2d 83 (2002), and *Sharp* v. *Mitchell*, supra, 209 Conn. 59, which I discuss in the text of this dissenting opinion, indicate that whether the new cause of action *contradicts* the original cause of action is not relevant to the determination of whether the new cause of action relates back to the original cause of action.