Informed Consent: What Every Pennsylvania Physician Needs to Know

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Informed consent is an important part of the patient-physician relationship and has implications for other theories of medical malpractice.

The principle of "informed consent" has been a component of Pennsylvania's common law since the 1930s and has been evolving ever since. Pennsylvania first considered the concept in 1932 in *Moscicki v. Shor*, 163 A. 341 (Pa. Super. 1932), a dental surgery case in which the Superior Court determined that, absent an emergency, a patient has the right to consult with his physician concerning treatment decisions and that consent is required as a prerequisite to care. Thirty years later, in *Smith v. Yohe*, 194 A.2d 167 (Pa. 1963), the Pennsylvania Supreme Court formally adopted the concepts articulated in *Moscicki*, and since that time, Pennsylvania's courts and legislature have continued to refine the law of informed consent.

What is the basis of a claim for lack of informed consent?

Unlike every other jurisdiction in the United States, Pennsylvania continues to treat a claim for informed consent as one sounding in battery – that is, as an intentional tort – and it is because of this distinction that certain procedural and evidentiary rules have developed and remain in place. Despite rumblings over the years from Pennsylvania's lower courts urging recognition of a negligence-based claim for lack of informed consent, our Supreme Court has declined to do so.

When is informed consent required?

Informed consent was initially deemed necessary only in cases involving surgical procedures. The doctrine was then expanded in 1997 with the enactment of the Health Care Services Malpractice Act (HCSMA), 40 Pa. Cons. Stat. § 1301.811-A, which expanded the traditional concept of informed consent to include the related administration of anesthesia during surgery; the administration of radiation, chemotherapy, blood transfusions, and experimental medications of devices; and the insertion of a surgical device or appliance. The provisions of the HCSMA concerning informed consent, which codify common law concepts, were the precursor to those found in Section 504 of the Medical Care Availability and Reduction of Error (MCARE) Act, 40 P.S. §1303.501 *et seq.*, enacted in 2002. Thus, at present, informed consent is not required for procedures such as clamping a wound, inserting a drain following surgery, the use of forceps during natural childbirth, the non-surgical administration of medication, chiropractic manipulation, angiogram, intravenous administration of antibiotics or other non-experimental prescription medication, or the oral administration of prescription drugs.

Who must obtain informed consent?

Informed consent must be obtained by the physician who actually performs the procedure, although in determining whether adequate information was supplied, a jury may consider the dissemination of information to the patient by others on the physician's staff. *Foflygen v. Zemel*, 615 A.2d 1345 (Pa. Super. Ct. 1992). Only the physician who conducted the procedure may

be liable for failure to obtain informed consent, and a hospital cannot be found liable in this regard under a theory of vicarious liability. *Valles v. Albert Einstein Medical Center*, 569 Pa. 542, 805 A.2d 1232 (2002).

What information must be disclosed?

Both common law and the MCARE Act have adopted the "reasonable patient standard," pursuant to which a doctor is required to disclose "all those facts, risks and alternatives" that a reasonable patient in the same or similar situation would want to know before deciding whether to proceed with the proposed treatment." *Cooper v. Roberts*, 286 A.2d 647, 649 (Pa. Super. Ct. 1971). Thus, while doctors are not required to disclose "all known information," they are required to "advise the patient of those material facts, risks, complications and alternatives to surgery that a reasonable person in the patient's situation would consider significant in deciding whether to have the operation." *Gouse v. Cassel*, 532 Pa. 197, 615 A.2d 331, 334 (1992).

What must a plaintiff in an informed consent case prove?

A plaintiff asserting a claim for lack of informed consent must:

- Obtain a certificate of merit under Pa.R.C.P. 1042.3. *Pollock v. Feinstein,* 917 A.2d 875 (Pa. Super. 2007).
- Establish that proper informed consent was not provided.
- Demonstrate that receiving such information would have been a substantial factor in the patient's decision whether to undergo the procedure.
- Present expert testimony to establish the existence of risks in a specific medical procedure, the existence of alternative methods of treatment and the existence of risks attendant with such alternatives. *Festa v. Greenberg*, 354 Pa. Super. 346, 511 A.2d 1371 (1986).

A plaintiff is *not* required to establish causation between the lack of informed consent and any alleged injuries, nor must the plaintiff actually have sustained injury, because the tort of informed consent is based upon battery, or unwanted "touching."

When is a patient's informed consent admissible in a medical negligence case?

A new twist to the doctrine of informed consent was announced by the Pennsylvania Supreme Court in November 2014 in the case of *Brady v. Urbas*, 111 A.3d 1155 (Pa. 2015), in which the defendant physician sought to introduce evidence of a plaintiff's consent to podiatric surgical treatment to establish the applicable standard of care. The Court was asked to decide whether a doctor sued for medical negligence could introduce evidence that the patient was informed of and acknowledged various risks of surgery, even if the complaint does not assert a cause of action based on a lack of informed consent and ultimately found that while evidence of informed consent was not admissible to establish whether there was a deviation in standard of care that caused injury, it could be considered under certain circumstances to establish the applicable standard of care. However, the Court found that a patient's actual, affirmative consent was irrelevant to the question of negligence because the "assent to treatment does not amount to consent to negligence, regardless of the enumerated risks and complications of which the patient was made aware."

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