PA Court Keeps Doctor on the Hook for Delegating Informed Consent Duty

There's no question that if a surgical procedure is to occur, the patient must first grant informed consent — a statement acknowledging that the individual was made aware of the risks and success rates of the surgery, alternatives to surgery, and that in light of all that information, s/he still wants to proceed with surgical intervention. What was thrown into question recently was *to whom* that informed consent must be granted.

And a Pennsylvania Supreme Court ruling should serve as an immediate warning to doctors practicing in the state, but ultimately, physicians everywhere: while there may be much they can delegate, they must receive that informed consent firsthand.

Doctor sued for malpractice after delegating informed consent duties to PA

Shinal v. Toms background:

Plaintiff Megan Shinal, a patient of Dr. Steven A. Toms, had a benign brain tumor affecting her pituitary gland. The decision to excise the tumor was not made at Shinal's first visit to Toms' office. The patient subsequently spoke to one of the doctor's assistants over the phone, and the two discussed the procedure. A few weeks after the call, Shinal met with that same physician's assistant in person and signed an informed consent form for the operation (a total resection of the tumor).

The surgery resulted in a perforation in Shinal's carotid artery, which led to partial blindness, hemorrhaging, stroke, and brain injury. Shinal brought a malpractice action against Toms, alleging that the physician did not explain the risks involved with surgery, did not suggest a less risky treatment option (for instance, radiation therapy), and did not obtain informed consent.

In its deliberation of whether informed consent was indeed obtained, the jury considered the information the physician's assistant had shared with the plaintiff. That consideration rested on the trial court's permission to allow it. The jury's verdict was entered in favor of the physician defendant, and the Superior Court affirmed the judgment.

However, the delegation buck stopped at the Pennsylvania Supreme Court last month; a 4-3 decision overturned the Superior Court's order and determined that, when asking if informed consent was obtained, the jury had no business in considering information supplied to the patient by anyone other than Dr. Toms himself.

“Direct dialogue” a must…and the physician must be part of the dialogue

The thrust of the plaintiff’s appeal was that the jury’s verdict was at odds with the Medical Care Availability and Reduction of Error Act (Mcare), and that it conflicted with *Valles v. Albert Einstein Med. Ctr.*, a case in which the Court ruled that a hospital could not be held liable for a doctor failing to obtain informed consent from the patient prior to surgery. (The Mcare Act was signed into law in Pennsylvania in 2002; among its goals: “Reforming the law on medical professional liability; providing for patient safety and reporting; […] providing for medical professional liability informed consent…”)

The Court concurred with both points of the appeal, stating: “Without direct dialogue and a two-way exchange between the physician and patient, the physician cannot be confident that the patient comprehends the risks, benefits, likelihood of success, and alternatives.”

Therefore, the Pennsylvania Supreme Court determined that obtaining informed consent from patients is a non-delegable duty tied to the surgeon. The Superior Court’s affirmation has been reversed, and the Supreme Court has since remanded for a new trial.

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