

Winter, 2018

AEI CLAIMS LAW QUIZ

DOES INFORMED CONSENT NEGATE A SURGEON'S DUTY OF CARE?

[Ref. Medical Malpractice, Para 3.06]

FACTS: The plaintiff, Alexandra Granovsky, was scheduled to have her gall bladder removed by a minimally invasive procedure known as a laparoscopic cholecystectomy. It requires cutting the cystic duct to free the gallbladder from the liver. Prior to the procedure Granovsky's surgeon, Dr. Chagares, explained the risks involved, including damage to the common bile duct, and she signed a consent form. By signing the form she gave permission for the procedure despite its potential complications and risks. During the procedure, the surgeon mistakenly cut the common bile duct causing Granovsky to suffer serious injury.

Granovsky sued Dr. Chagares asserting medical malpractice for the surgeon's negligence in performing the procedure. The plaintiff did not claim that the defendant failed to fully inform her of the risks of the procedure, only that he negligently performed it.

The plaintiff, having anticipated that the defendant would attempt to introduce evidence that the consent form she signed informed her of the risk of injury to the common bile duct, sought to exclude all evidence of informed consent. According to the plaintiff there was no claim made regarding informed consent and any evidence about it was irrelevant and had the potential to confuse the jury. The defendant argued that evidence of informed consent was relevant to show that the plaintiff's injury was a recognized complication of the surgery and, therefore, not negligence. The defense conceded that the surgeon inadvertently cut the common bile duct, but argued that he was not liable for the plaintiff's injury because it was a recognized complication of the surgery, of which he fully informed the plaintiff and, therefore, he did not deviate from the standard of care. The trial judge allowed the informed consent evidence. The jury returned a defense verdict and the plaintiff appealed.

QUESTION: Is evidence of informed consent admissible to prove that a patient assumed the risk of injury when a medical malpractice claim is based solely on a surgeon's failure to exercise the required degree of care in performing the surgery?

ANSWER: No, according to a New Jersey appellate court in *Granovsky v. Chagares*, 2017 N.J. Super. Unpub. LEXIS 2074 (N.J. App. 2017).

Lack of informed consent and medical negligence are separate and distinct causes of action.

Lack of informed consent involves a patient's right to be informed of risks and complications attendant to a physician's recommended course of treatment. A cause of action based on lack of informed consent requires proof that a reasonable patient would have avoided the risk of injury by refusing to undergo the procedure if she had been fully informed of the risk. Medical negligence, on the other hand, involves a physician's failure to meet the duty to perform competently at all times. To prove a prima facie case of medical negligence, a plaintiff must present expert testimony to establish the standard of care, the physician's breach of that standard, and a causal connection between the breach and the plaintiff's injuries.

Dr. Drew, the plaintiff's expert, testified that the defendant deviated from the standard of care by using an outdated surgical technique and failing to obtain a critical view of both the cystic duct and the cystic artery before cutting. The trial judge allowed cross-examination of Dr. Drew about his consent form and what he tells his patients about the risks of the procedure.

Defendant's experts, Dr. Koehler and Dr. Fischer, testified that cutting the common bile duct was a recognized complication of the procedure and not a deviation from the standard of care. The trial judge allowed these doctors to testify about their consent forms, what they tell their own patients about the risks of this procedure, and whether Granovsky had been informed prior to the surgery (she had been) about the risk of injury to the common bile duct.

Dr. Chagares testified about his informed consent discussion with Granovsky prior to surgery.

In addition to the informed consent testimony elicited from the treating doctor, the experts, and the defendant, the defendant's counsel highlighted the testimony by repeating much of it in his closing argument to the jury. Over the plaintiff's objection, the trial judge admitted all of the informed consent evidence despite the fact that the plaintiff's only cause of action was for medical negligence. The plaintiff never alleged lack of informed consent.

The appellate court concluded that evidence of informed consent, when lack of informed consent is not an issue, has the capacity to confuse the jury. The court did acknowledge that recognized, unavoidable complications of a medical procedure may be relevant to prove the standard of care applicable to the physician performing the procedure. Although a physician may argue that a recognized complication of a medical procedure may occur even in the absence of negligence, that must be proved through the testimony of medical experts. Expert testimony, however, need not and should not include any reference to what patients are usually told about the risks of the procedure or what the plaintiff was told about those risks. The court concluded its analysis by stating:

Although defendant undoubtedly has the right to defend himself against the complaint made against him, he does not have the right to set up a straw man argument against the complaint he would rather defend, diverting the jury's attention from the negligent treatment claim plaintiff brought, and improperly suggesting to the jury that having been advised of the possibility of bile duct injury and having consented to the surgery, plaintiff assumed the risk.

The court held that the admission of informed consent evidence when the plaintiff asserted only a claim of negligent treatment was reversible error and remanded the case for a new trial.

CONCLUSION

The court's holding in *Granovsky* is consistent with the view taken by most state courts that have considered the issue. Although a patient may consent to undergo a medical procedure that presents

certain recognized complications, in doing so the patient does not consent to the negligent performance of that procedure. Evidence of informed consent, including the patient's signed consent form, is irrelevant and unduly prejudicial in medical malpractice cases based only on the physician's alleged breach of the applicable standard of care.

Courts that have reached the same conclusion as the court in *Granovsky* include:

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| Connecticut | <i>Hayes v. Camel</i> , 927 A2d 880 (Conn. 2007) Without a lack of informed consent claim, the trial court abused its discretion when it admitted evidence about the patient's informed consent in a medical malpractice case. Such evidence could create jury confusion. |
| Delaware | <i>Baird v. Owczarek</i> , 93 A3d 1222 (Del. 2014) Evidence of the patient's informed consent was neither material nor probative on the issue of whether the physician deviated from the standard of care in performing the procedure. |
| Pennsylvania | <i>Brady v. Urbas</i> , 111 A3d 1155 (Pa. 2015) In medical malpractice cases based on a physician's alleged breach of the standard of care in performing a procedure, evidence that a patient gave informed consent is inadmissible. |
| Virginia | <i>Wright v. Kaye</i> , 593 SE2d 307 (Va. 2004) A patient's informed consent is not a defense to a claim that a physician deviated from the standard of care in performing a procedure. |