By John P. Blumberg

Informed consent: The duty to disclose medical risks

Informed consent is the principle that a patient has the right to know about the risks and benefits of a medical procedure before making a decision whether to undergo the treatment. The corollary of this right is the duty of the physician to disclose certain information to the patient. This article discusses the variations of this cause of action which are important to both the pleading and proof of the claim, as well as the jury instructions and special verdict form.

The law of informed consent

Liability arising from medical care is based on the violation of a duty owed by the doctor to the patient. Such liability may occur in various ways. Generally speaking, medical negligence is the failure to treat a patient with that degree of skill, knowledge, and care ordinarily possessed and exercised by other physicians under similar circumstances. *Bardessono v. Michels* (1970) 3 Cal.3d 780, 788 [91 Cal.Rptr. 760]. Medical battery is the performance of a treatment that is substantially different from that for which consent was obtained. *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 635 [178 Cal.Rptr. 167].

Although the duty of informed consent is taught in medical school, the genesis of its modern application in California law was the case of *Cobbs v. Grant* (1972) 8 Cal.3d 229 [104 Cal.Rptr. 505], in which the Supreme Court employed several postulates: (1) That patients are generally unlearned in medical sciences, (2) that an adult has the right, in the exercise of control over his own body, to determine whether or not to submit to medical treatment, (3) that a patient's consent must be informed, and (4) that the patient has an abject dependence upon and trust in his physician. (*Id*. at p. 242.) The Supreme Court recognized that, although the failure to inform is a "technical battery," it is usually more appropriate to apply the law of negligence. Accordingly, the Court established that the duty of care required that a physician must explain to a patient, in lay terms, the inherent and potential dangers of a proposed medical treatment.

The plaintiff has the burden of proof whether the withheld information was *material*, that is, whether a reasonable person in the patient's position would regard the information as significant in deciding whether to undergo the procedure. *Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 345-347 [13 Cal.Rptr.2d 819]; *Parris v. Sands* (1993) 21 Cal.App.4th 187, 193 [25 Cal.Rptr.2d 800]. Although the standard is an objective one that speaks in terms of what a reasonable patient would want to know, the scope of disclosure is expanded if the physician has reason to know of a patient's unique concerns. *Truman v. Thomas* (1980) 27 Cal.3d 285, 291 [165 Cal.Rptr. 308].

A physician may be required to disclose alternative schools of thought, so long as the information is material. *Mathis v. Morrissey*, *supra*, 11 Cal.App.4th at pages 344-345. A patient must be informed about the experimental nature of treatment. *Daum v. SpineCare Medical Group, Inc*. (1997) 52 Cal.App.4th 1285, 1305 [61 Cal.Rptr.2d 260]. There is a duty of the physician to disclose any personal interest – unrelated to the patient's health – in the outcome of the treatment. *Moore v. Regents of Univ. of California* (1990) 51 Cal.3d 120, 131-132 [271 Cal.Rptr. 146]. And there is also a duty of "informed refusal" in which the physician must explain the risks of refusing to undergo an otherwise risk-free procedure. *Truman v. Thomas*, *supra*, 27 Cal.3d at page 292; *Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 738 [223 Cal.Rptr. 859].

A physician does not have to disclose relatively minor risks inherent in common procedures, so long as the particular treatment is not contraindicated in the particular patient. *Cobbs v. Grant*, *supra*, 8 Cal.3d at page 244. There is also no duty of disclosure where the patient is unable to evaluate the information, in emergencies, for example, or when the patient is a minor or incompetent. *Id*. at page 243. The physician has the discretion to withhold information if he or she reasonably believes that the information would be so upsetting that the patient would be unable to make a reasoned decision. The patient also has the right to ask not to be informed, although the physician does not have to comply with the request. *Id*. at page 246.

Expert testimony is limited

In medical malpractice cases, "the standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of the layman." *Landeros v. Flood* (1976) 17 Cal.3d 399, 408 [131 Cal.Rptr. 69]. However, if the negligence is the failure to have given informed consent, the rule is otherwise. The Supreme Court observed that "Respect for the patient's right of self- determination on particular therapy demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves. . . . Such evaluation and decision is a nonmedical judgment reserved to the patient alone." *Cobbs v. Grant*, *supra*, 8 Cal.3d at page 243.

In *Betterton v. Leichtling* (2002) 101 Cal.App.4th 749 [124 Cal.Rptr.2d 644] – a case involving jury instructions – the Court of Appeal addressed the question of whether the duty of a physician to give informed consent was based on the standards of the medical community, that is, a negligence standard. In answering the question in the negative, the court traced the history of the law of

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informed consent.

In Cobbs v. Grant (1972) 8 Cal.3d 229, the court rejected the rule that the scope of disclosure in informed consent cases is measured by the custom of the medical community. "Unlimited discretion in the physician is irreconcilable with the basic right of the patient to make the ultimate informed decision regarding the course of treatment to which he knowledgeably consents to be subjected." (Id. at p. 243.)

Betterton v. Leichtling (2002) 101 Cal.App.4th at page 754.

The *Betterton* court continued its analysis by discussing the subsequent Supreme Court case of *Arato v. Avedon* (1993) 5 Cal.4th 1172 [23 Cal.Rptr.2d 131]:

The *Arato* court endorsed *Cobbs*'s position that the standards of the medical community do not absolutely govern the duty of disclosure. "We underline the limited and essentially subsidiary role of expert testimony in informed consent litigation. As we cautioned in *Cobbs v. Grant*, *supra*, 8 Cal.3d 229, a rule that filters the scope of patient disclosure entirely through the standards of the medical community ' " 'arrogate[s] the decision [of what to disclose] . . . to the physician alone.' " ' (*Id.* at p. 243.) We explicitly rejected such an absolute rule as inimical to the rationale and objectives of the informed consent doctrine; we reaffirm that position." (*Arato*, *supra*, at p. 1191, brackets and ellipsis in original.) However, *Arato* also reaffirmed and applied the second part of the *Cobbs* test, which is based on the standard of professional practice. "[I]n an appropriate case, the testimony of medical experts qualified to offer an opinion regarding what, if any, disclosures-in addition to those relating to *the risk of death or serious injury and significant potential complications posed by consenting to or declining a proposed treatment*-would be made to the patient by a skilled practitioner in the relevant medical community under the circumstances, is relevant and admissible." (*Ibid.*, italics in original.)

Although no expert testimony is allowed to prove the so-called community standard on either the scope of or duty of disclosure, expert testimony is clearly necessary to establish the material risks of the procedure or treatment.

In *Mathis v. Morissey*, *supra*, 120 Cal.App.4th 332, 343, the Court of Appeal, citing *Cobbs v. Grant*, *supra*, 8 Cal.3d 229 held:

When a doctor recommends a particular procedure then he or she must disclose to the patient *all material information* necessary to the decision to undergo the procedure, including a reasonable explanation of the procedure, its likelihood of success, the risks involved in accepting or rejecting the proposed procedure, and any other information a skilled practitioner in good standing would disclose to the patient under the same or similar circumstances." (Emphasis added.)

Accordingly, experts may testify regarding the benefits and material risks of the proposed treatment and information other than serious consequences that a reasonable practitioner is required to disclose.

The doctor's duty to know about the risks

In the appropriate case, the defense might attempt to prove that certain disclosures were not necessary because some of the material risks were not known to the medical community at large and hence, the defendant was not negligent. However, in *Mathis v. Morissey*, *supra*, 120 Cal.App.4th 332, the key phrase, "all material information" which defined the scope of disclosure, was not modified by the phrase "that a reasonably skilled practitioner would recognize." And in no other case discussing lack of informed consent is there such a modifier. However, the negligence standard is based, in part, on the "knowledge, and care ordinarily possessed and exercised by other physicians under similar circumstances." *Bardessono v. Michels*, *supra*, 3 Cal.3d 780, 788.

How can these two concepts be reconciled? It might be argued that lack of informed consent is really a variant of strict liability, that is, liability is established once it is proved that there were material risks that were not disclosed to the patient, that these risks were reasonably available through consultation or research, that a reasonable person would not have consented, and that serious consequences resulted from one of the undisclosed risks. And because of the limited role of experts in informed consent cases, experts should not be allowed to testify to the contrary. The defense counter-argument, however, would be that the existing case law on expert testimony deals solely with the lack of discretion that a doctor has in disclosing material information – and that the question of whether the information should have been known is a question of fact based on the standard of care. Until an appellate court decides the issue, plaintiff's attorneys should argue that that the use of experts should be limited.

Problems with jury instructions

BAJI 6.11 (Reality of Consent – Physician's Duty of Disclosure) spoke in terms of a physician's duty and that the failure of the physician to inform the patient before obtaining consent is negligence that renders the physician subject to liability. The instruction spoke clearly in terms of negligence. The CACI replacement for BAJI 6.11 is CACI 532, which eliminated all reference to duty and negligence. One of the problems facing practitioners, however, is the wording of CACI 533 (Failure to Obtain Consent – Essential Factual Elements). The first phrase of CACI 533 says "Plaintiff claims that Defendant was negligent because he . . . ." However, nothing in the prior instruction, CACI 532, defines the failure to obtain informed consent in terms of negligence, and CACI 533 lists no element of negligence. To deal with this problem, attorneys handling lack of informed consent cases should attempt to remove the reference to negligence.

An additional problem arises in this context because CACI 501 says, "When you are deciding whether the physician was negligent, you must base your decision only on the testimony of the expert witnesses who have testified in this case." As explained above, if there was a failure to disclose material information concerning the risk of death, injury or serious consequences, expert testimony is not

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permitted. Accordingly, if lack of informed consent is the only cause of action, CACI 501 should not be given. In cases in which there are theories of both negligence and lack of informed consent, the jury must be instructed that it is not to rely on expert testimony on the informed consent issue. Failure to do so has been described as "invited error." *Jamison v. Lindsay* (1980) 108 Cal.App.3d 223, 232 [166 Cal.Rptr. 443]; *Arato v. Avedon*, *supra*, 5 Cal.4th at page 1192, fn. 12.

Strategic considerations

Because of juror skepticism, attorneys specializing in medical malpractice recognize that it is the rare case in which lack of informed consent will be the sole theory of liability. More frequently, plaintiff's counsel will argue that (1) the patient was not informed of the risks of the procedure, and (2) the procedure should not have been recommended in the first place. This approach gives the jury the option of finding in favor of the plaintiff on the informed consent issue, even while finding that the doctor was not negligent in making the recommendation.

In a recent trial, involving theories of both negligence and lack of informed consent, the defense attorney attempted to persuade the court that the special verdict for negligence should be used instead of a combined special verdict. In rejecting the request, the trial judge held that the two theories – negligence and lack of informed consent – cannot be lumped together in a Special Verdict form under the theory of negligence because they have different elements. The CACI verdict forms treat negligence and informed consent separately. (See VF-500 and VF-501 and the Directions for Use, which state that the forms can be combined.)

The verdict form

The special verdict form to be crafted in a combined negligence and lack of informed consent case presents numerous challenges. For example, if there is a finding that there was a lack of informed consent, but no negligence, the jury must still address the damages issues. One way to deal with the challenge is to give the jury three special verdict forms: One for informed consent, one for negligence, and one on damages. For a combined Special Verdict, the following form is suggested.

We, the jury, answer the questions submitted to us as follows:

Question No. 1: Did plaintiff give his informed consent for the proposed treatment?

Answer yes or no.

If you answered Question No. 1 "no," answer Question No. 2. Otherwise, skip Question No. 2 and Question No. 3 and answer Question No. 4.

Question No. 2: Would a reasonable person in plaintiff's position have consented to the treatment if he had been fully informed of the possible results and risks of and alternatives to such treatment?

Answer yes or no.

If you answered Question No. 2 "yes," skip Question No. 3 and answer Question No. 4. If you answered Question No. 2 "no," answer Question No. 3.

Question No. 3: Was plaintiff's harm a result of a risk that defendant should have explained before the procedure was performed?

Answer yes or no.

Question No. 4: Was the defendant negligent in the medical care and treatment of plaintiff?

Answer yes or no.

If you answered Question No. 1 "yes," or Question No. 2 "yes" or Question No. 3 "no" or Question No. 4 "no," sign and return this verdict. Otherwise, answer Question No. 5.

Question No. 5: Was the negligence of defendant a cause of injury to plaintiff?

Answer yes or no.

If you answered Question No. 1 "yes" or Question No. 2 "yes" or Question No. 3 "no," and thereafter answered Question no. 4 "yes," but then answered Question no. 5 "no," sign and return this verdict. If not, then answer all of the remaining questions [regarding damages.]

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