# Informed Consent

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Before engaging in any type of invasive procedure, a doctor or healthcare provider must have the patient's consent to proceed, and the consent must be "informed." Failure to follow an appropriate consent procedure may serve as a basis of liability for medical negligence.

Many courts regard the relationship between a physician and his patient as one of trust and confidence. This relationship requires the physician to exercise the utmost good faith in dealing with his or her patient. (*Hales v. Pittman*, 118 Ariz. 305, 308, 576 P.2d 493, 496 (1978).)

A civil liability claim involving informed consent arises out of a healthcare provider's breach of his or her obligation to provide appropriate information about a procedure to the patient. Physicians have to reasonably disclose all available choices and alternative treatments and also the dangers inherently and potentially involved in each of the procedures. (*Cobbs v. F.P. Grant*, 8 Cal. 3d 229, 243, 502 P.2d 1 (1972).)

If a physician properly informs the patient of the nature and probable outcomes of a procedure, and the patient consents then, absent malpractice, there can be no informed consent liability even if the patient has an unfavorable outcome from occurrence of the known risk. (*Hales*, 118 Ariz. at 309, 576 P.2d at 497.) But if the healthcare provider does not properly inform the patient about a procedure, or does not inform the patient and obtain consent for a procedure at all, then the provider can be held liable under either a negligence or intentional tort theory.

## A. Battery or Negligence?

Initially, many courts characterized a lack of consent claim under the intentional tort of battery. However, a modern trend recognizes claims involving lack of informed consent as sounding in negligence. (*e.g.*, *Saxena v. Gaffney, 159 Cal. App. 4th 316, 324 (2008); Curran v. Buser*, 711 N.W.2d 562, 568 (Neb. 2006).) Confusion over the distinction between the two types of claims has been a problem at times. (*See Duncan v. Scottsdale Medical Imaging, Ltd.*, 205 Ariz. 306, 310 ¶¶ 11-13, 70 P.3d 435, 439 (2003) (discussing inconsistent use of term "informed consent").) Most courts now understand that a battery claim arises from factual settings where a physician performs a procedure which was completely unauthorized. When a doctor obtains a patient's consent, but fails to make appropriate disclosures including risks and benefits of the procedure such that the consent was not "informed," a doctor may be found liable under a negligence theory.

In Arizona, for example, claims involving "lack of consent," that is, when a physician fails to operate within the limits of the patient's consent, may give rise to a battery action. On the other hand, true "informed consent" claims involving a physician's obligation to provide appropriate information so that the patient's consent to a procedure is "informed" are brought as a negligent action. (*Duncan*, 205 Ariz. at 310 ¶¶ 11-13, 70 P.3d at 439.)

## B. Lack of Valid Consent to a Procedure or Treatment May Constitute Battery.

A patient's valid consent is essential before a physician or healthcare provider may perform an invasive procedure. There are some exceptions to the consent requirement including cases involving a minor, emergency situations, or where a patient in mentally incompetent. However, when

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the exceptions do not apply, an action based upon battery will arise when a doctor or medical professional has unauthorized contact with a person during examination, treatment or surgery.

The Restatement (Second) of Torts ("Restatement") requires that consent, to be effective, must be "to the particular conduct, or substantially the same conduct." (Restatement § 892A (2)(b).) The circumstances of the consent discussion, the nature of the procedure to be performed, and the reasonable implications inherent in granting consent, determine the scope of the particular conduct covered by the patient's consent. (Restatement § 892A cmt. d.) What exactly the patient did and did not consent to is a fact question to be decided at trial. (*See Duncan*, 205 Ariz. at 311 ¶ 16, 70 P.3d at 440; *Cathemer v. Hunter*, 27 Ariz. App. 780, 785, 558 P.2d, 975, 980 (1976).) Holding a jury question existed as to whether a patient consented to an operation and whether the operation received was "substantially similar" to the operation to which the patient consented so as to be within the scope of the consent. If the procedure actually performed varies from what the patient consented to then the healthcare provider may be liable for battery. (*Hales*, 118 Ariz. at 310, 576 P.2d at 498.) When a patient gives a limited or conditional consent, liability for battery may arise if the healthcare provider acted with willful disregard of the consent given. (*Duncan*, 205 Ariz. at 311 ¶ 18.)

Fraud or misrepresentation on the part of a healthcare provider may render a consent invalid. Therefore, a patient's consent which is obtained by a healthcare provider's fraud or misrepresentation will give rise to a battery action. (*See Duncan*, 205 Ariz. at 311 ¶ 20, 70 P.3d at 440.) "A patient's consent is also ineffective when he or she makes a "substantial mistake concerning the nature of the invasion of [her interest] or the extent of harm to be expected from it." (*Duncan*, 205 Ariz. at 312 ¶ 25, 70 P.3d at 441 (*citing* Restatement § 892B(2).)

*Duncan* is an example of the implementation of many of these rules governing informed consent. In *Duncan*, a patient receiving an MRI consented to a pre-imaging injection, but explicitly told the medical imaging staff that she did not want to receive fentanyl. The nurse then told the patient that orders were changed to morphine, but secretly injected the patient with fentanyl. The Arizona Supreme Court held that the medical imaging provider could be liable for battery because the patient explicitly conditioned her consent to an MRI only if morphine or Demerol were provided and that the misrepresentation by the nurse vitiated the patient's consent.

(*Id.* at 311-12 ¶¶ 15-26, 70 P.3d at 440-41. *But see Rice v. Brakel*, 233 Ariz. 140, 144 ¶ 13, 310 P.3d 16, 20 (App. 2013) (holding that battery action will not serve as an alternative cause of action when "a patient claims that a doctor failed to disclose, without specific inquiry from the patient, indeterminate factors before performing a procedure, arguably creating a mistake of fact or misrepresentation that vitiates the patient's consent.")

## C. The Standard for an Informed Consent Claim Based in Negligence.

Under a negligence theory, the plaintiff must show that but for the defendant's failure to properly inform her of the nature of the treatment, its risk and alternatives, the plaintiff would not have consented to the treatment. In general, a physician should disclose only those risks which he knows or reasonably should know are associated with the proposed treatment. Many jurisdictions recognize that a physician's duty regarding disclosure is set by prevailing practice in the community. Under the "professional" theory, expert medical testimony is required to establish the professional custom and practice. (*See, e.g., Curran*, 711 N.W.2d at 568.)

Other jurisdictions follow the "material risk" theory. (*Id.; see also Sard v. Hardy*, 281 Md. 432, 379 A.2d 1014, 1022 (1977).) The duty to disclose by the physician does not depend upon a standard set by the profession. Rather, the disclosure obligation is measured by the information which is material to what a patient needs to make an intelligent decision. (*See, e.g., Cobbs v. Grant*, 8 Cal. 3d 229, 104 Cal. Rptr. 505, 502 P.2d 1 (1972).)

A patient's informed consent is not a defense available to a physician against claims that the physician failed to comply with the applicable standard of care. (*Fiorucci v. Chinn*, 764 S.E.2d 85, 87 (Va. 2014), *see also Waller v. Aggarwal*, 116 Ohio App.3d 355, 688 N.E. 274, 275 (App. 1996). While a patient can consent to risks of surgery, a patient "does not consent to negligence." *See Wright v. Kaye*, 267 Va. 510, 529, 593 S.E.2d 307, 317 (2004).)

## D. Conclusion.

Informed consent is a fundamental principle of medical care. The informed consent process promotes dialogue and communication between a physician and patient. When obtained correctly, informed consent is conducive to patient safety and improved medical outcomes since it opens dialogue between the patient and physician and the patient knows what to expect during and after the procedure. But if informed consent is not obtained, a physician or healthcare provider can be exposed to civil liability. Performing an invasive procedure without a patient's consent is a battery, an intentional tort. And when a physician fails to inform the patient about risks of a procedure and alternative treatments, he or she may be liable for negligence should harm befall the patient.


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