Revitalizing Informed Consent Law

SIIPC • June 26, 2014

Thaddeus Mason Pope, J.D., Ph.D.
Hamline University Health Law Institute

Roadmap
Do **NOT** consider patient’s “own crude opinions”
No consent at all

Mohr v. Williams (Minn. 1905)

1914
“Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . . .”

Consent

But not “informed”
Birth

1957

Salgo v. Leland Stanford (Cal.)
1960

Natanson v. Kline (Kan.)

1972
2014

Tort

Negligence
Informed consent is one type of medical malpractice.

Obstacles

Duty
Breach
Causation
Damages
Duty

What to disclose?
Not everything
Can’t send patient to med school

2 main ways to measure MD duty
Material risk
20+ states

Reasonable MD
20+ states

Material risk
• Duty measured by patient needs
• What a reasonable patient would deem significant

Odd ➔ No duty
Reasonable physician

- Duty measured by custom
- What a prudent physician would disclose

Custom to not disclose [red arrow] No duty

Breach
Focus on disclosure NOT understanding

Causation
1. PTF would have chosen differently

2. RPP would have chosen differently
3. Different choice would avoid injury

Damages
$250,000

Problems
Only 31% with advanced cancer had EOL discussions
Only 12% of clinicians discuss heart failure with patients.

EOL discussions held very late.

Mandated Disclosures
1991

Patient Self Determination Act

Duty on facilities
Upon admission
Apprise of AD rights under state law
Last 6 years at state level
“which of those individuals who do not have a [POLST] should . . . complete [one].”

Utah Admin. R. 432-31 (2011)

1996

Michigan Dignified Death Act
Mich. Comp. Laws 333.5651
“When . . . provider diagnoses . . . terminal illness, . . . comprehensive information and counseling regarding legal end-of-life options”
Prognosis with or without disease-targeted treatment

Right to accept disease-targeted treatment, with or without palliative care

Right to refuse or withdraw from life-sustaining treatment

Right to have comprehensive pain and symptom management

Meaning and availability of hospice care

Right to give individual health care instruction (POLST; AD)

2009
Patient's Bill of Rights for Palliative Care & Pain Management (Vt. Stat. tit. 18 § 1871)

Maryland S.B. 546, H.B. 30

Ariz. S.B. 1304
2010

Palliative Care Information Act
NY Pub. Health L. 2997c

Similar to CA
But better
CA: “upon the patient’s request”

NY: “shall offer to provide”

2011

Palliative Care Access Act
NY Pub. Health L. 2997d
Massachusetts Act Improving the Quality of Health Care & Reducing Costs through Increased Transparency, Efficiency & Innovation
Mandated Disclosures:
Enforcement

PENALTY
Not Only EOL

Other gaps
Other mandates

Breast reconstruction coverage
Breast density

Breast cancer (1979-1986)
Legislative Interference with the Patient–Physician Relationship

Steven E. Weinberger, M.D., Hal C. Lawrence III, M.D., Douglas E. Henley, M.D.,
Errol R. Alden, M.D., and David B. Hoyt, M.D.
Mandated CME

Continuing Medical Education Credits

The Journal of Clinical Ethics

VOLUME 11, NUMBER 1

At the Bedside

[Article Details]

Features

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Law

[Article Details]

Correspondence

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Safe Harbors

“No lengthy polysyllabic discourse”

Cobbs v. Grant (Cal. 1972)
Safe harbor for using “certified” PtDA
“Providers of state-financed health care [must] use patient decision aids”
EBM
CPG

"This is their new big carrot and stick method."
2015-2020 Reforms

PATIENTS' PREFERENCES MATTER
Stop the silent misdiagnosis

Al Mulley, Chris Trimble, Clyn Elwyn

The Kings Fund
2014

Consumer power
Transparency
Technology
Reimbursement
Fraud
Costs
2. Transparency
### Breaking Down the Payments

Medicare disclosed payments of $77 billion in 2012 to more than 180,000 doctors and other medical providers for services and equipment. The breakdown for the top 15 medical specialties ranked by average paid to individual billers:

<table>
<thead>
<tr>
<th>Provider type</th>
<th>Number of providers</th>
<th>Total paid in millions</th>
<th>Average amount paid per provider</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hematology/ oncology</td>
<td>7,774</td>
<td>$356,677</td>
<td>$46,000</td>
</tr>
<tr>
<td>Radiation oncology</td>
<td>4,135</td>
<td>1,499.6</td>
<td>352,600</td>
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<tr>
<td>Ophthalmology</td>
<td>17,067</td>
<td>5,985.0</td>
<td>327,229</td>
</tr>
<tr>
<td>Medical oncology</td>
<td>2,612</td>
<td>894.6</td>
<td>339,723</td>
</tr>
<tr>
<td>Portable X-ray</td>
<td>7</td>
<td>2.0</td>
<td>259,030</td>
</tr>
<tr>
<td>Rheumatology</td>
<td>4,093</td>
<td>1,044.5</td>
<td>257,701</td>
</tr>
<tr>
<td>Nephrology</td>
<td>7,003</td>
<td>1,685.6</td>
<td>241,657</td>
</tr>
<tr>
<td>Cardiology</td>
<td>22,041</td>
<td>4,166.3</td>
<td>193,209</td>
</tr>
<tr>
<td>Dermatology</td>
<td>10,507</td>
<td>2,385.3</td>
<td>222,745</td>
</tr>
<tr>
<td>Interventional pain management</td>
<td>1,856</td>
<td>366.1</td>
<td>200,044</td>
</tr>
<tr>
<td>Periphera! vascular disease</td>
<td>74</td>
<td>14.3</td>
<td>193,778</td>
</tr>
<tr>
<td>Hematology</td>
<td>662</td>
<td>127.6</td>
<td>182,640</td>
</tr>
<tr>
<td>Cardiac electrophysiology</td>
<td>111</td>
<td>204.0</td>
<td>180,010</td>
</tr>
<tr>
<td>Vascular surgery</td>
<td>2,696</td>
<td>485.3</td>
<td>184,099</td>
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<tr>
<td>Urology</td>
<td>8,791</td>
<td>1,389.4</td>
<td>187,369</td>
</tr>
</tbody>
</table>

Source: Centers for Medicare and Medicaid Services; The Wall Street Journal
3. Reimbursement

**Hospital Penalties Year 2**
Medicare Readmissions Reduction Program

2,225 hospitals will be penalized
1,154 hospitals won’t be fined
1,371 will get lower penalty than in Year 1;
1,074 will get higher penalty

0.38% The average penalty, down from the 0.42% average penalty in FY2013

Source: KHN analysis of data from the Centers for Medicare & Medicaid Services
Manage wellness

Treat the sick
4. Technology
Usually for MEDICAL diagnosis, now PREFERENCE diagnosis too.

BlueButton
Download my data

OpenNotes
Ask questions, identify inaccuracies.
Compliance

[Diagram showing compliance rates for different categories over time]

Cross Industry Data: HC Innovate Health

the reminder contains all the necessary info, such as appointment time, date, doctor name, and patient name, as well as a unique patient ID that can be used to confirm or check in for a specific appointment.

IC is not a one-time event, ongoing
5. Fraud
Unnecessary
Ineffective
Unwanted

6. Costs

YOU'RE SAYING I CAN HAVE MY CAKE
AND EAT IT TOO?!?!?!?
Conclusion

Consumer power
Transparency
Technology
Reimbursement
Fraud
Costs
Questions

Thaddeus Mason Pope
Director, Health Law Institute
Hamline University School of Law
1536 Hewitt Avenue
Saint Paul, Minnesota 55104
T 651-523-2519
F 901-202-7549
E Tpope01@hamline.edu
W www.thaddeus pope.com
B medicalfutility.blogspot.com

Selected References


