Health Law I
Professor Pope
Class 7: Sept. 13, 2011

Informed Consent
Introduction

- Treatment relationship
- Duty
- Confidentiality
- Standard of care
- Fiduciary duty
- Informed consent
- Non-abandonment
- Statutes & regulations
- Foreseeability
Common law duties owed by physicians

All forms, theories of medical malpractice

Non-abandonment
Informed consent
Fiduciary duty
Standard of care

Relationship to battery
Battery

- No consent at all
- E.g. different procedure
- E.g. same procedure, different body part
- E.g. different doc

Informed Consent

- Patient did consent to the procedure
- But would not have if disclosure were appropriate

Did Dr. Spence commit a battery on Canterbury?

- What if Dr. S did something other than a laminectomy
Relationship to medical malpractice

Physician may have performed the procedure perfectly. The problem is that the physician did not make appropriate disclosures.

Duty: What to disclose
Breach: Did not disclose
Injury: Undisclosed risk happened
Causation: With disclosure, no injury
Types of information to disclose

Inherent risks of proposed treatment
- Probability
- Degree of harm

Alternatives
- Benefits & risks of each
- Doing nothing
Who will be providing treatment

Including role of residents, fellows, students, and others

Exceptions to duty

Information already known

To this particular patient

Or commonly known
Emergency

Urgent immediate need
No capacity
No opportunity for consent from patient or surrogate

Therapeutic privilege

Disclosing risk information would make the patient so upset:
That could not make a rational choice
That would materially affect medical condition

Waiver

Public Health
Disclosure duty standards

Material risk 20+  
Prof. malpr 20+  
Subjective 1?

Material Risk Standard

What would a reasonable patient consider important in making a treatment decision
Professional Malpractice Standard

What would the reasonable physician have disclosed

Subjective Standard

What would this particular patient consider material in making a treatment decision

Canterbury v. Spence
3 separate legal theories

<table>
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<th>Duty</th>
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<tr>
<td>Standard</td>
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<tr>
<td>How satisfied</td>
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Duty:
Breach: doc did not disclose information she had a duty to disclose
Injury: patient injured because of non-disclosure
Causation: had disclosure been made, a reasonable person in the patient's circumstances would not have consented
**Duty**

Of all the many risks, which did DEF have a **duty** to disclose

**Measured** by MR or RPP test

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PTF claims that physician failed to disclose information

Actionable only if physician had a **duty** to disclose that information

Duty measured, depending on jurisdiction, on 1 of 2 tests (specific variations aside)

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**Disclosure** ➔ **Waive right to sue for informed consent**

Is this assumption of the risk consistent with *Tunkl*
Disclosure duty standards

Exceptions to duty
Information already known

To this particular patient

Or commonly known

Emergency

Urgent immediate need

No capacity

No opportunity for consent from patient or surrogate

Therapeutic privilege

Disclosing risk information would make the patient so upset:

That could not make a rational choice

That would materially affect medical condition
**Waiver**

**Public Health**

**Breach**
Did DEF *actually* disclose what she had a duty to disclose?

**Injury**
Is PTF injured from type of undisclosed risk?

**Unrevealed, materialized risk**
Must have been caused by the intervention

Disclosure of the risk must have prevented its occurrence

Reasonable person in circs would not have consented
A hypothetical question

Objective standard

**Not** a subjective standard

But a little individualized

**Subjective Standard**

- Contrast with *Canterbury* -
  - NOT what the **reasonable patient** would consider material
  - Rather, what **this particular patient** would consider material in making a treatment decision

**Canterbury v. Spence**
12-00-58 Back pain
02-04-59 Myelogram
02-11-59 Laminectomy
02-12-59 Fall
02-12-59 Second operation
03-07-63 Lawsuit filed
04-00-68 Trial
12-18-69 Appellate argument
05-19-72 Appellate decision
3 separate legal theories

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<td>Standard</td>
<td>MR or PP</td>
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<td></td>
<td>Fail to disclose</td>
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<td>How satisfied</td>
<td>MRP or expert</td>
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Injury Causation

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Wilson v. Merritt

Materiality to (1) reasonable person (2) in the plaintiff’s circumstances

Plaintiff testimony is not itself sufficient to establish materiality

For materiality, argue probability and/or severity risk relative to benefit from procedure
Culbertson v. Mernitz

Merenstein case
Disclose TOO MUCH??

Arato v. Avedon

Gallbladder
Cystic duct
Bile duct from liver (hepatic duct)
Common bile duct
Pancreas
Pancreatic duct
Small intestine
Gallstones
1. Patient claims doc failed to disclose X
2. What is the duty standard in this jurisdiction?
   • If material risk (DC, CA, NJ, CT), then doc had a duty to disclose, if reasonable patient in circumstances would have considered X material
   • If prudent physician (IN, DE), then doc had a duty to disclose X if, through expert testimony, patient establishes reasonable physician would have disclosed X under the circumstances
3. Doc can argue there was **no duty**
   - On PP, she can get her own experts
   - On MR, she can explain why X would not be material
   - She can also show application of an exception

4. PTF must show breach
   - Show failure to disclose X
   - Doc can argue X was disclosed

5. PTF must show undisclosed risk, X, actually materialized (injury)
   - There are no nominal damages
   - This is not a dignitary tort

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**Canterbury**
Paralysis from laminectomy

**Culbertson**
Cervical adherence

**Rizzo**
Forceps-caused cerebral palsy
6. PTF must show causation (2 parts)

Unrevealed, materialized risk
Must have been caused by the intervention
Disclosure of the risk must have prevented its occurrence
Reasonable person in circs would not have consented

A hypothetical question
Objective standard
Like for duty in a MR state
Not a subjective standard
Only a little individualized
Subjective Standard – (Okla.)

PTF need not establish that the reasonable patient would have declined treatment after disclosure.

Rather, only that this particular patient would have declined.