



# Healthcare Liability Smorgasbord Poses Challenge

## Connecticut courts restrict options once claim selected

By **JEFFREY R. BABBIN**

**H**ealth care providers often face three related, yet distinct, claims in court: medical malpractice, informed consent, and battery. Lawyers and their clients, whether plaintiffs or defendants, must consider the differences among these causes of action at every stage of a case, from complaint to trial.

A health care provider commits malpractice by deviating from the standard of care set by the medical profession, which a plaintiff must prove by expert testimony. In a malpractice case, the plaintiff also must prove by expert testimony that, more likely



than not, the claimed damages were proximately caused by the deviation from the standard of care.

In contrast, a physician can fail to

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obtain a patient's informed consent to a medical procedure even if the procedure is skillfully performed. The informed consent doctrine requires the physician to make a sufficient disclosure of the risks of or alternatives to a medical procedure—and the disclosure must cover what a reasonable patient would want to know, and not what the medical profession thinks the patient should know.

A plaintiff claiming lack of informed

Supreme Court explained in *Logan v. Greenwich Hospital Ass'n*, the legal issue is whether there has been “an effective consent which would preclude an action for battery.” Battery should not be confused with informed consent, as Logan instructs: “The failure to make a sufficient disclosure... is ordinarily the basis for claiming lack of informed consent.”

An informed consent claim presupposes consent, albeit an ill-informed one.

**Choosing the wrong theory of liability, or too many, can be fatal to recovery by the plaintiff, and defense counsel would be wise to understand and exploit those errors.**

consent can recover damages simply by having undergone the procedure, if the jury finds that a reasonable person would not have agreed to the procedure if the omitted information had been disclosed.

On the other hand, a physician's failure to obtain any consent is a medical battery. In other words, as the Connecticut

Therefore, a physician's conscious decision not to disclose certain risks of or alternatives to a procedure, which results in consent, is still a matter of informed consent and not of battery.

This distinction is important because, unlike the failure to obtain informed consent (which is considered negligence),



an intentional battery can expose a physician to paying punitive damages (limited to attorneys' fees in Connecticut), which might not be covered by insurance.

### Important Distinction

Also, on the issue of liability, if a plaintiff presses for verdicts on both informed consent and battery, astute defense counsel will look for an inconsistent verdict and ask for a new trial. A jury should not find both uninformed consent and battery, unless the battery occurred after the patient initially gave consent and later withdrew it, or the physician performs an additional procedure without consent.

Even if a jury chooses only one theory of liability, the court can set aside the verdict and even enter judgment for the physician (with no new trial) if the evidence reasonably supported only the other theory of liability—making it potentially risky for a plaintiff to give a jury a smorgasbord of choices.

The theory of liability also affects who can be sued. All health care providers, whether physician, nurse or hospital, can commit malpractice when deviating from a professional standard. But hospitals (and typically nurses) have no duty to obtain a patient's informed consent—that is the treating physician's duty alone.

The Connecticut Supreme Court explained in *Petriello v. Kalman* that a hospital can voluntarily undertake programs to educate physicians about procedures, and take steps to ensure that physicians obtain informed consent, without assuming any duty to the patient

if the physician fails to get that consent. Of course, if the hospital employs that physician, it can be sued for the physician's failures under a theory of respondeat superior, but the hospital undertakes no duty of its own.

### Framing The Case

How a plaintiff initially frames the complaint can therefore make or break a case. Take the plaintiff who initially sues for professional malpractice. After pretrial discovery, the plaintiff finds he cannot establish either a deviation from the standard of care or causation. But maybe an expert testified during a deposition that the injured plaintiff was not instructed about the risks of treatment or alternative therapies.

Defense counsel can now move for summary judgment on the malpractice claim, and although the plaintiff might try to salvage the case by recasting it as an informed consent claim, it may be too late to change horses. If the defendant is a hospital, the new claim fails under *Petriello*. If the defendant is a physician, the informed consent theory may now be barred by the statute of limitations: the Connecticut Supreme Court held in *Alswanger v. Smego* and *Keenan v. Yale-New Haven Hospital* that a new theory of liability based on informed consent raised new facts and required the gathering of different evidence and, therefore, did not relate back to the start of the lawsuit.

With that in mind, some plaintiffs have sought to characterize newly-developed theories of liability as just another species of professional

malpractice to avoid these problems. But in two recent decisions, Connecticut courts have rejected those attempts.

In *Pekera v. Purpora*, the Appellate Court held that the complaint's allegation of failing "to properly manage" the patient's condition was one of a deviation from the standard of care and was not sufficiently elastic to encompass the newfound informed consent theory. Because the plaintiff's expert evidence addressed only informed consent, the court affirmed summary judgment for the defendant physician on the pleaded malpractice claim.

In *Sherwood v. Danbury Hospital*, the Supreme Court held that the alleged failure to assist the patient to avoid elective surgery until the blood supply was safer was, in fact, an informed consent claim and not a negligent failure to adhere to a professional standard of medical care. The Supreme Court, reaffirming *Petriello*, mandated judgment in favor of the hospital.

It is important for counsel to understand the different categories of claims against health care providers. Choosing the wrong theory of liability, or too many, can be fatal to recovery by the plaintiff, and defense counsel would be wise to understand and exploit those errors. ■

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