Overview of Tort Law as Applied to the Issue of Lack of Informed Consent

Lack of informed consent, like medical malpractice, is governed by Tort law. A Tort is any civil wrong for which the law provides a remedy. Two caveats of this definition are that the legal system doesn’t provide a remedy for all civil wrongs, only select infringements on another person’s rights, such as malpractice. The second caveat is that this area of law does not address things like contracts or criminal law, so the only sanction available in the realm is monetary damages.

Lack of Informed Consent is an unintentional tort arising under negligence. The original basis for a claim that there was inadequate informed consent was the tort action of battery. Battery is an intentional tort, meaning someone intended to cause harm. The basic battery claim was changed to a negligence claim because insurance will cover unintentional torts and not intentional torts. This was a public policy decision trying to create a fair remedy for injured patients, but also not putting physicians in financial danger due to unintentional infringements. The tort is unintentional because even when informed consent is not adequate it is usually due to unintentional mistakes and not malicious behavior.

There are 4 elements to a claim of lack of informed consent (just like a medical malpractice claim):

1. Duty
2. Breach
3. Causation
4. Damages.

Duty is the issue of whether a physician has a duty to a patient and what that duty is. An example of this, not related to informed consent, is whether a doctor has responsibility for the outcome of a patient in the ED waiting room that the physician has never seen.

Breach means that a duty existed and the duty was breached because proper care was not provided. The plaintiff (patient) must show that there is a standard of care and that the defendant (physician) did not provide care that met the standard of care. The standard of care is defined as what a reasonable physicians, of similar training and experience, would do in that situation. The standard is not an average physician, because that would indicate that half of practicing physicians are providing care below the standard of care. The standard of care is proven by expert testimony. Each side calls an expert who testifies to what they think is reasonable standard care. Who to believe is up to the jury.

Causation means that the breach of duty actually caused the harm complained of. If I provide substandard care by ordering a medication that the patient is allergic to, I have no liability if the patient doesn’t have an allergic reaction. The patient must actually have an adverse response, otherwise the fact of providing substandard care does mean the physician will be held liable.

Damages mean that there can be a monetary value assigned to the injury. The first requirement is physical injury. A patient cannot recover damages for anxiety or mental suffering unless they suffered a physical injury, even if the physical injury is trivial. Once a patient can show that they have suffered some injury then they may also recover for pain and suffering. Actual damages are those cost associated with the injury itself- lost wages, cost of medical care, cost of future medical care. Non-economic damages are monetary compensation for pain and suffering. The pain and suffering damages are those subject to liability caps (such as the one in Colorado). Actual damages cannot be capped because the patient has a right to be compensated for their own lost expenses.
An informed consent claim is a specific type of negligence claim. The plaintiff (patient) must allege that they were not properly informed, meaning that the physician did not disclose information that a reasonable physician would disclose (see discussion of Gorab v. Zook below). However, once the plaintiff has established breach of duty they must further show that if they had been properly informed they would have refused to undergo the procedure. The standard is prospective from the time the consent was obtained, not looking back at the bad outcome that actually occurred. Thus a patient cannot say “if I had known this rare complication would happen to me, I would not have had the procedure done.” They must show that they would have refused the procedure if given complete and accurate information.

Important Concepts for Gorab v. Zook

Prima facie case- a plaintiff hoping to recover from a physician must at least allege that each element of a tort claim occurred. The plaintiff has to claim that substandard care was provided and that care directly caused the injury. In Gorab v. Zook, it is a crucial issue that the plaintiff does not offer expert testimony as to what the standard of care is. Thus, there is no allegation of breach of duty. Since the plaintiff does not offer evidence on the issue, there is an assumption that the physician’s expert is correct, and the standard of care was met.

Shifting burdens- initially the plaintiff must give evidence that each element of a medical malpractice claim. The plaintiff therefore has the burden of establishing a case. Once the plaintiff has established a case the defendant then has the burden of refuting at least one element. In a case like Gorab v. Zook, if the plaintiff had offered evidence that the defendant did not meet the standard of care, then the defendant would have to offer evidence that he did meet the standard of care. If the plaintiff has an expert that testifies to a given standard the defendant must show that the standard of care was met, otherwise the plaintiff’s expert is presumed to be correct. Once both sides have met their burden the case is decided by a jury. The jury weighs the facts and decides who they believe.

In Colorado the standard of care for informed consent is the “reasonable physician” standard. The standard of care is what a reasonable physician (of similar training and experience) would disclose. This is contrast to the “reasonable patient” standard which requires a physician to disclose everything a “reasonable patient” would want to know. However, these standards are functionally linked because a reasonable physician should disclose all the things a reasonable patient would want to know. However, the physician can enter testimony that no other physicians in the area disclose a particular risk, and that infers that the physician acted reasonably because they acted as their peers act. Patients can offer evidence that physicians other places disclose a certain risk, and the jury can decide whether a reasonable physician should disclose those things that the other physicians in the community would disclose, or if they should disclose.

Finally, to recover damages for improper informed consent that patient must show that if they had been informed of a particular risk that ultimately caused their injury, they would not have consented. They cannot say “knowing what I know now,” namely that a particular risk affected them, they would have refused the procedure. They have to prove that if the risk was disclosed, they would have refused to consent at the time that the consent was sought. This is very difficult to prove.

One of the important take home messages of this case is that liability for failure to obtain proper informed consent is hard to prove. Patients may have a hard time finding evidence that a reasonable physician would have acted differently. More difficult is showing that the patient themselves would have refused to consent is a given risk was disclosed. Most of the failures we see daily (or hopefully less often) breach ethical standards but do not rise to the level of breaching legal standards. This is important to remember as you think about how you will go about obtaining consent. This session is to help you understand how to comply with the higher ethical standard of informed consent, not merely the lower legal standard of acceptable behavior.