

Emphasize Participation in Informed Consent

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Emphasize Participation in Informed Consent

By Dr. Ken Broda-Bahm

There's a logical reaction when one hears about some of the claims that end up as the basis for a medical malpractice claim. That reaction might go something like this:

So the injury that the plaintiff complains of, that's a known complication, isn't it?

Yes, it is.

And there was an informed consent discussion, right?

Yes, there was.

So, the patient knowingly agreed to this risk, right?

Yes...but there's still a lawsuit.

It is still a lawsuit because informed consent isn't always the ace in the hole. In practice, it is one argument among many, and jurors can assign a greater or lesser degree of credibility to it. In a new article in *The Journal of Law, Medicine & Ethics* (Brodney et al., 2018) in which the use of an interactive "Patient Decision Aid," a tool used in framing and explaining the informed consent discussion and choice, led to 98 percent agreement among mock jurors that a physician met the standard of care compared to 70

percent when consent was merely charted, and just 20 percent when consent was claimed but not documented. That study involved a vaginal birth after C-section, and it replicated an earlier study focusing on screening test for prostate cancer. The studies involved relatively small simulations, but still reached very similar results and this carries an important message. The decision aids are important because they put the patient in the position of not just passively adding a signature or checking boxes, but actually making and documenting choices. The more there is participation, the more likely it is that the informed consent will matter. In this post, I will take a look at a few key ideas and tools that are useful in emphasizing that level of participation.

Participation Means Power

We have long noticed the dynamic that most legal cases — not just malpractice, but cases of all kinds — involve a primary filter that we call “Power and Choices.” Jurors will try to determine who had the greater power in the circumstances, and then support or oppose that party based on the choices they made. If a patient is passive and a doctor seems to be making all the choices, then responsibility resides with the doctor. Even if a patient has added a signature or checked off some boxes on informed consent, they don’t really have power in that situation. The more patients have choices, and the more they understand those choices, the more they’ll be seen as participating in, and at least partially owning that responsibility.

Highlight More Than One Option

It is the nature of a choice that it involves more than one option. Of course, that doesn't always apply in a medical care scenario, particularly when we are dealing with emergency medicine. But often there will be more than one choice. Even if one of the choices is "wait" or "do nothing," there is still a choice. Even if one of the choices is a bad option that a doctor would recommend against, it still helps to frame that as one of the options. In the description of informed consent, jurors should see a patient who is informed, helped, and guided in their decisions, but who is also at the end of the day making their own choices. A visual diagram showing that decision tree can also be a very useful tool in trial.

Watch Your Testimony Language

Some doctors are used to being the hub on the wheel and the focus for control over patient care. That can lead them to emphasize their own decision making: "*I decided that procedure had too much risk*" or "*I chose a course of action that would maximize the chances for recovery.*" The more the physician witness can accurately replace that "*I*" with a "*We*" during testimony, the more power and agency the patient will have.

Apply the Idea Beyond Medicine

Personal injury, products, and commercial and investment cases can have issues involving assumed risk and informed consent. In these settings, the same idea applies. The more informed consent is seen as a take it or leave it choice, or a passive exercise in box-checking, the less important and the less *real* that choice is to decision makers. And the more it is participative, the more it is a genuine choice, the more jurors will be comfortable in attaching genuine responsibility to a plaintiff's decision.

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