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Informed Consent Applies 'Reasonable Person' Standard; What Happens in Court Is Unreasonable

A plaintiff's passionate testimony is highly prejudicial in the eyes of a jury, yet has no probative value based on the instructions given to that jury. We need to eradicate this contradiction to ensure fairness in our judicial system.

By Eric S. Poe

Some say, "hindsight is 20/20" and there may be no better example than when we make a choice with unexpected and unfortunate results. Would we have chosen differently in retrospect? Clearly. Whether it is selecting the wrong restaurant or a less-than-ideal spouse, this is something we can all relate to, but they are choices that we have to accept every day. Such choices, while not about life or death, are often complicated by discussions with others and those who may have influenced us. Thus, our recollection, or lack thereof, of information gathered prior to making the ultimate decision can come into question.

Now, apply this to a decision that could be about life or death, and not about where one might go for dinner. Imagine a patient faced with a choice about a particular course of treatment or surgery. After the patient is provided with the pros and cons of their various options, potential side effects, and related alternatives, he or she makes a choice. Yet, despite proper care, an unfortunate outcome results. Do you think that patient (or anyone in the same situation) could accurately recall, months or even years later, all of the discussions and information gathered from the physician leading up to the decision? Could someone remain unemotional when thinking back on the choice of surgery or treatment?

In cases of medical malpractice and matters relating to informed consent, this is far more than a rhetorical question. This question is a critical part of the equation that physicians face when they are sued for medical malpractice relating to informed consent.

Asking the 'Reasonable' Question

Despite the apparent goals of fairness and justice, in the context of medical malpractice cases, it is widely accepted that the plaintiff, generally, garners more compassion from the fact-finder. The advantage usually swings toward that side of the courtroom. After all, we are all human and sympathize with someone who says they are injured.

Thankfully, to ensure balance in the courtroom in these cases, the New Jersey courts have adopted the hypothetical "reasonable person" standard, which serves to both protect plaintiffs and, equally as important, works to ensure the physician's actions at the time of the treatment are examined in a balanced manner. In the simplest terms, this means that when informed consent is at issue, a jury decides whether the information allegedly given (or not given) to the plaintiff by the medical professional was material in making his or her decision. More importantly, the question is whether this information would have altered the choice of a "reasonable person" (and not whether this information would have altered that of the actual plaintiff in the case) and avoided the unfortunate outcome.

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Despite this standard, and that the question is not about the actual plaintiff's choice but what a "reasonable person" would have done, courts allow the plaintiff to testify as to his or her own personal recollection and opinion. Adding to the confusion, just prior to deliberation, the court concludes the jury charge with the following:

Although the plaintiff's testimony may be considered on the question of whether he/she would have consented, *the issue to be resolved is not what this plaintiff would have done*. You must decide whether a reasonably prudent person would not have consented (or chosen another course of treatment), if provided with material information which you find the doctor failed to provide in this case.

Model Civil Jury Charge 5.50C (citations omitted)(emphasis added).

Why is a plaintiff allowed to testify about their own feelings or experiences about consenting to a medical procedure, especially with the benefit of having hindsight, when the standard is based upon a reasonable person, not that particular plaintiff? For that matter, if the standard is a reasonable person, but we are allowing prejudicial witnesses to simply testify, shouldn't the defense team be entitled to bring in a random person to testify? Shouldn't that person then be allowed to state their own personal beliefs in order to establish what another "reasonable person" would or wouldn't do if given such information? Common sense tells us that a plaintiff's emotional words won't be easily forgotten. Such passionate testimony is so highly prejudicial in the eyes of a jury, yet has no probative value based on the instructions to the jury. We need to eradicate this contradiction to ensure fairness in our judicial system.

Questioning the Special Treatment

Traditionally, when prejudicial testimony or evidence is elicited at a trial, the adversarial attorney shouts out, "I object." If the statement is irrelevant, or more prejudicial than probative, the court typically provides a curative instruction for the jury to disregard the statement, so long as the testimony isn't prejudicial enough to warrant a mistrial. But in reality, we all know that once the words are said aloud—once the "cat is out of the bag"—jurors have heard them and, while they may be stricken from the record, they cannot be fully forgotten.

While these instances are simply part of unpredictable trial proceedings, in this case of allowing the plaintiff to testify and then instructing the jury that "*the issue to be resolved is not what this plaintiff would have done*," as the standard is what a hypothetical reasonable person would have found to be material, we are creating a known preventable inconsistency in the courts. However, changes to Model Civil Jury Charge 5.50C on Informed Consent can right this prejudicial wrong.

As previously addressed, New Jersey law requires, in part, that a physician must disclose that which is concerning to a reasonable patient in order that the patient might make an informed decision. *Largey v. Rothman*, 110 N.J. 204, 206 (1988). A physician has a duty to disclose "such information as will enable the patient to make an evaluation of the nature of the treatment, and any attendant substantial risks, as well as of available options in the form of alternative therapies." *Id*. at 208. A physician cannot withhold necessary facts or consequences of the risks posed by a course of treatment or procedure. *Id*. at 209.

This is reiterated in the jury charge provided by courts on informed consent, which states: "the doctor must disclose the medical information and risks which a reasonably prudent patient would consider material or significant in making the decision about what course of treatment, if any, to accept." Model Civil Jury Charge 5.50C (2020). However, even with a burden on the plaintiff to prove there was not informed consent, this instruction focuses significantly on the physician's obligations and duties to "explain" to the patient what the medical options are, and to identify what will be of significance to the patient when deciding whether to consent based on the alternatives presented.

My focus here is not on the final outcome of any particular case, but to question: in light of the reasonable person standard, should plaintiffs be able to testify as to what they specifically would have done when we know it bears no weight on the standard?

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Righting the Wrong

Ironically, the true issue comes down to common sense and a conflict within a law that is very clear. If a plaintiff's testimony as to whether or not he or she would have consented, even if truthful upon recollection, it does not meet the legal "reasonable person" standard, and automatically draws objection by a defendant's attorney, why is it allowed at all?

In order to address this issue, modification to the Model Civil Jury Charge on Informed Consent is necessary to eliminate any references to plaintiffs' testimony, limiting the analysis to evidence of a "reasonable person" and thus mirroring the New Jersey standard. More importantly, in practice, courts should bar any testimony from a plaintiff as to whether they would have provided consent with the added benefit of hindsight.

Attorneys can be storytellers, and the courtroom is a playing field of gamesmanship, but when a doctor's reputation, livelihood, and life as he or she knows it is on the docket, it is very real. By righting this wrong, we may get one step closer to fairness under the law and in the game of legal chess.

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