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MED-MAL MATTERS

Defendants in medical negligence trials occasionally attempt to show the jury informed consent forms even where the plaintiff has not pleaded or argued a lack of informed consent. Though the lack of relevance seems obvious, there is a paucity of legal authority on the subject. A very recent New Jersey case, however, provides some very persuasive guidance.

In *Ehrlich v. Sorokin*, 2017 N.J. Super. LEXIS 114 (2017), the plaintiff sued her gastroenterologist, Jeffery Sorokin, after a colonoscopy and polypectomy went wrong. The plaintiff, Norma Ehrlich, underwent five procedures between 2004 and 2011 for recurrent polyps, all performed by the defendant. Sorokin used several different techniques, including a "saline lift" technique. This involves injecting saline into the colon to lift the polyp from the colon wall, making it easier and safer to remove with a hot or cold snare.

For the last procedure, Sorokin used argon plasma coagulation, or APC, in which, the physician passes a small catheter through a channel and then introduces conductive argon gas around the polyp and through the channel. He then applies an electrical charge to vaporize the polyp. Unlike the snare technique, no part of the instruments in APC make contact with the polyp.

The night after the last procedure, the plaintiff woke to severe pain and went to the hospital via ambulance where she underwent emergency surgery for a perforated colon and peritonitis. Surgeons performed a hemicolectomy, ileostomy and mucous fistula.

In her complaint, Ehrlich alleged that Sorokin was negligent in performing the APC without injecting the polyp and surrounding colon with saline to create a "cushion" beneath the polyp. Her expert opined that Sorokin burned the plaintiff's colon because he failed to perform the saline lift injection technique prior to performing the APC. The expert said a flat, broad polyp in the area of the colon that's thinnest and most susceptible to injury required the defendant create a saline cushion around the polyp to protect the colon.

Before the trial started, Ehrlich moved to bar any evidence of her consent to any of her five colonoscopy procedures, arguing that consent and the informed consent process were irrelevant where the plaintiff does not plead a lack of informed consent. The trial judge denied the motion, holding that the forms and information provided to the plaintiff "... were part of the standard of care and therefore relevant."

After the trial court denied a motion to reconsider, Ehrlich fronted the issue and testified on direct examination about the various consent forms she signed before each of the procedures Sorokin performed. On cross-examination, Ehrlich conceded that the forms stated that "passage of the instrument may result in an injury," but she pointed out that none of the forms mentioned that her colon could be burned.

Over Ehrlich's objection, the trial court allowed



NEGLIGENCE WITH CONSENT?

A New Jersey case gives guidance on informed consent

By **THOMAS A. DEMETRIO** and **KENNETH T. LUMB**

the jury to review the informed consent documents during deliberations. After a defense verdict, Ehrlich appealed, arguing primarily that the trial court erred in admitting evidence of consent because she did not plead, or attempt to prove, a lack of informed consent.

The appellate court noted that, under New Jersey law, informed consent is generally unrelated to the standard of care. An informed consent case involves a failure to provide a patient with adequate information regarding the risks, benefits or alternatives to a treatment. A "deviation from the applicable standard of care" case involves an error in diagnosis or treatment.

Though each theory is a subgroup of "medical negligence," they have different theoretical underpinnings and represent two distinct duties.

Turning to the facts before it, which presented an issue of first impression in New Jersey, the appellate court held that the admission of consent evidence was reversible error because the only issue at trial was whether performing APC without saline lift deviated from the standard of care. Whether Ehrlich had been told of the risk of perforation "had no bearing on this determination."

After swatting away Sorokin's argument that Ehrlich opened the door by fronting the issue after the trial court had twice denied her motion to bar, the court ultimately held that consent and risk evidence in noninformed consent cases is inad-

missible because it invites the jury to reason that consent to the procedure implies consent to the resultant injury.

Though no Illinois opinion has squarely addressed this issue, the result should be exactly the same here. In *Taylor v. County of Cook*, 2011 IL App (1st) 093085, the court was presented with a situation converse to that in *Ehrlich*. In *Taylor*, the plaintiff alleged that the defendant negligently treated her polymyositis. At trial, she attempted to testify about what she would have done if the defendant had informed her of alternative treatment methods. Though the plaintiff had not pleaded an informed consent cause of action, she argued that the failure to inform her of treatment options "was negligence and not a lack of informed consent." *Id.* at ¶18.

The Illinois Appellate Court was not impressed, holding that the question related only to an informed consent case and was therefore irrelevant. *Id.* at ¶19-24. [CL](#)

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