Exceptions to Informed Consent in Emergency Medicine

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The doctrine of informed consent is a legal concept that applies to all physicians in every field of medicine. This doctrine is premised on the notion that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . ."[1] The principle of bodily self-determination, even in emergency care situations, permeates through all cases involving informed consent and may only be set aside by legally recognized exceptions. These exceptions are included in both statutory and case law (ie, legislature-created and judge-created law, respectively). This article explains the informed consent doctrine and reviews the important legally recognized exceptions in the context of emergency care.

THE DOCTRINE OF INFORMED CONSENT

For a patient to be considered legally informed, the doctrine of informed consent requires a patient to have reasonable knowledge of the procedure to be performed as well as some understanding of the nature of the risks involved in the procedure.[2] To provide this level of knowledge and understanding, a physician generally has the duty to disclose to the patient the following information:[3]

- **Diagnosis,** including an understanding of any steps taken to determine the diagnosis
- **Nature of the proposed treatment,** including the potential risks of the treatment and the probability of success
- **Medically recognized alternative measures** relating to diagnosis or treatment, including measures that may be considered less desirable by the physician
- **Consequences of the patient's decision to decline or refuse treatment**

Depending on unique clinical circumstances, some jurisdictions may impose greater or lesser duties on the physician than the requirements stated here.[3,4]

Limitations to the Doctrine of Informed Consent

Limitations to the doctrine of informed consent do exist, and physicians do not have a duty to disclose every remote risk associated with a medical procedure. For example, the physician does not need to disclose the chance that a spinal anesthetic may be contaminated and may therefore cause neurologic damage if the chance of contamination is no longer considered a current risk. Nor do physicians have a duty to disclose risks that are considered common knowledge or already obvious to the patient, such as the risk of infection following a surgical operation.[4–12] However, physicians should note that "[r]isks of drug side-effects . . . are singled out for disclosure by some courts, even if the risk of side effect is small."[2,13] Fundamentally, the law only requires disclosure of risks that are defined as *material*, as judged by the seriousness or chance of occurrence.[4,5,7–12] In the case of *McKinney v Nash*, the court defined material information in the following terms:

> Material information is that which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject the recommended medical procedure. To be material, a fact must also be one which is not commonly appreciated. If the physician knows or should know of a patient's unique concerns or lack of familiarity with medical procedures, this may expand the scope of required disclosure.[11,12]

EXCEPTIONS TO THE DOCTRINE OF INFORMED CONSENT

One of the most broad and generally accepted exceptions to the informed consent rule is that a physician is

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not under a duty of disclosure in cases in which it is reasonably believed that disclosure to the patient would pose a serious threat to the patient's well being.[4,14] In the seminal case of *Canterbury v Spence,* the court articulated this exception by stating:

> It is recognized that patients occasionally become so ill or emotionally distraught on disclosure as to foreclose a rational decision, or complicate or hinder the treatment, or perhaps even pose psychological damage to the patient. Where that is so, the cases have generally held that the physician is armed with the privilege to keep the information from the patient, and we think it clear that portents of that type may justify the physician in action he deems medically warranted. The critical inquiry is whether the physician responded to a sound medical judgment that communication of the risk information would present a threat to the patient's well-being.[14]

This general rule is also applicable to emergency care circumstances.

For emergency medicine specifically, the law acknowledges that mechanistically imposing the duty of informed consent may become detrimental to the patient's health and potentially to the patient's life. Therefore, the largest number of recognized exceptions to the doctrine of informed consent comes from the challenges posed in emergency medical circumstances. The general rule is that, in certain emergency medical situations, patient consent is presumed to exist for medical treatment that addresses the emergency. For example, a typical state statute indicates that:

> A [physician] shall not be liable for civil damages for injury or death caused in an emergency situation occurring in the [physician's] office or in a hospital on account of a failure to inform a patient of the possible consequences of a medical procedure . . . [15,16]

The following three common clinical scenarios involve informed consent considerations during emergency care. These scenarios address the unconscious patient, the conscious patient with questionable competency, and the minor patient.

The Unconscious Patient

An almost universal exception to the doctrine of informed consent applies when the patient is unconscious and the probability of harm because of failure to treat is great and surpasses any threatened harm from the treatment itself.[14] The premise of this exception is that, when the patient is unconscious and in immediate need of emergency medical attention, the duties of disclosure imposed by the doctrine of informed consent are excused because irreparable harm and even death may result from the physician's hesitation to provide treatment.

Barnett v Bacharach. The case of *Barnett v Bacharach* illustrates this exception. In this case, the court held that, in a medical emergency in which the patient lies unconscious on the operating table, the surgeon may lawfully carry out the duties of a physician in the best interest of the patient even if these duties entail the performance of a procedure that was not originally contemplated.[17,18] In *Barnett v Bacharach,* a patient who complained of abdominal pains was diagnosed with a tubal pregnancy. The patient consented to undergo surgery only for the removal of the ectopic pregnancy**.** On incision, however, the surgeon discovered that the patient did not have an ectopic pregnancy but the symptoms were instead from acute appendicitis. The surgeon determined that, in the best interest of the patient, the appendix should be removed, and an appendectomy was performed. Following the patient's uneventful recovery, the patient refused to pay for the surgical services provided because informed consent was not first obtained and thus the procedure was unauthorized. At trial, the court found that the surgeon acted properly because of the seriousness of the patient's condition. The court stated:

> What was the surgeon to do? Should he have left her on the operating table, her abdomen exposed, and gone in search of her husband to obtain express authority to remove the appendix? Should he have closed the incision on the inflamed appendix and subjected the patient, pregnant as she was, to the danger of a general spread of the poison in her system, or to the alternative danger and shock of a second, independent operation to remove the appendix? Or should he have done what his professional judgment dictated and proceed to remove the offending organ, regarded it as a mere appendage serving no useful physiological function and causing only trouble, suffering, and ofttimes death?[17]

The court understood that to deny the existence of an emergency situation and insist on traditional informed consent would "make every surgeon litigation-conscious instead of duty-conscious as he stands, scalpel in hand, over his unconscious patient."[17]

It is essential to note that for the unconscious-patient exception to apply, the relevant emergency situation

must require immediate medical attention with insufficient time to fully inform the patient or seek consent from another authorized person.

Tabor v Scobee. In a similar case, *Tabor v Scobee*, the court found that a violation of informed consent had occurred. During the course of an authorized appendectomy on a female patient, the surgeon became aware of the patient's infected fallopian tubes and decided to remove the tubes at that point in the best interest of the patient.[19] The court held that the surgical procedure did not fall within the exception to informed consent in an emergency situation. Despite the surgeon's determination that a long-term delay (ie, 6 months) in the removal of the patient's fallopian tubes could result in serious harm or death, the patient's medical condition did not constitute an emergency because the patient would have had time to make an informed decision as to when she wished the procedure to be performed.

Blood transfusions. Medical emergencies that require blood transfusions frequently pose greater complications for physicians attempting to treat unconscious patients. This scenario is particularly difficult in cases in which the unconscious patient's family members indicate that the patient is opposed to blood transfusions for religious reasons and that the family will not provide the necessary consent. To determine if the transfusion should be performed in these cases, the majority of courts have assessed the clinical circumstances using the standard of the compelling state interest.[20–22] Under this standard, the transfusion is ordered if it is clear that the patient is incompetent to make sound medical decisions at a certain moment in time and if the patient would likely die without the blood transfusion.[20–22] The policy rationale for this abrogation of informed consent lies in the compelling state interest in the preservation of life, which outweighs the patient's religious tenets as expressed by his or her family members.

From a procedural perspective, a physician faced with an unconscious patient and family members who refuse to consent to a necessary blood transfusion should only be concerned with following the hospital's internal protocol for contacting legal counsel. Generally, the hospital's legal counsel petitions the court or notifies the office of the State Attorney to seek a court order to transfuse the patient. In some cases where time permits, legal counsel for the hospital may appear ex parte (ie, in a judicial proceeding with only one party of interest present) before a judge and receive a written order at that time.[23,24] In other cases, such as an acute emergency care setting, the court may hold an emergency hearing at the hospital within hours of the provider's request for judicial intervention. After hearing testimony from physicians and family members, the judge may sign a court order granting permission to give the necessary blood transfusion(s) on the premises.[25,26]

Courts generally favor previous judicial permission to act in emergency circumstances. However, some courts have held the position that, if a life-saving blood transfusion is needed in an acute setting and the hospital is faced with an unconscious patient and a nonconsenting family, the hospital should err on the side of saving the patient's life and simply perform the necessary procedure.[20] As one court has stated:

> When the hospital and staff are thus involuntary hosts and their interests are pitted against the belief of the patient, we think it reasonable to resolve the problem by permitting the hospital and its staff to pursue their functions according to professional standards. The solution sides with life, the conservation of which is, we think, a matter of State interest. A prior application to a court is appropriate if time permits it, although in the nature of the emergency the only question that can be explored satisfactorily is whether death will probably ensue if medical procedures are not followed.[20]

Some courts require a more elaborate set of procedures before medical intervention can occur. One Florida court has stated:

> A health care provider must comply with the wishes of a patient to refuse medical treatment unless ordered to do otherwise by a court of competent jurisdiction. A health care provider cannot act on behalf of the state to assert interests in these circumstances.[27]

The implication of this statement is that a health care provider in the state of Florida must first provide notice to the office of the State Attorney General that a situation exists that necessitates judicial intervention, at which time the State Attorney General decides whether to seek a court order.[28]

The Conscious Patient

Conscious refusal of the patient. The doctrine of informed consent and its protection of bodily self-determination guarantees that even in an emergency situation, "[a] physician must respect the refusal of treatment by a patient who is capable of providing consent."[29] *In re Quackenbush* illustrates this legal doctrine. A 72-year-old cogent patient refused to consent to amputation of both of his legs as a result of a gangrenous

condition, despite the operation being necessary to save the patient's life.[30] The treating hospital applied for a court order to compel the procedure. The court denied the hospital's application, holding that the patient's right to privacy entitled him to "decide his own future regardless of the absence of a dim prognosis."[30] However, a direct corollary to this notion of a patient's right to refuse life-saving treatment is that a physician cannot be held liable for abiding by the patient's decision to exercise that right.[28]

Medical incompetence of the patient. An informed consent situation is more difficult if the patient is conscious but incapable of accurately comprehending his or her own medical condition. In these cases, the physician must assess whether the patient is medically incompetent and thus incapable of expressly providing informed consent. If the physician determines that the patient is medically incompetent, the physician should attempt to obtain consent from a relative of the patient when feasible.[14,29] However, if no alternate source for the necessary consent is available, the physician may treat the patient without consent if the treatment is in the patient's best interest. The critical question for the physician is: under what circumstances is a patient medically incompetent of giving informed consent?

Standards for determining the medical incompetence of a patient. The generally accepted standard for determining a patient's medical competency to consent to medical treatment has focused on the patient's comprehension. The physician must assess if the patient in need of emergency medical treatment has the mental ability to reasonably understand the following information:[29]

- The nature of the patient's condition
- The nature and effect of any proposed treatment
- The risks of both pursuing any proposed treatment and not pursuing any proposed treatment

Despite this objective criteria, medical competency is a subjective evaluation of a patient's capacity to consent based on the specific factual circumstances that affect the patient.[31] Because the evaluation is subjective, courts apply individualized standards to determine a patient's competency to give informed consent.[31] As a result, the burden of the initial competency evaluation is placed on the physician (ie, the physician must assess the patient using the previously noted criteria). However, ultimately the court may be the final arbiter of whether a specific patient lacked the requisite mental state to be deemed medically competent.

For example, in *Miller v Rhode Island Hospital,* the court determined as a matter of law that a patient's intoxication may render him incapable of giving informed consent in an emergency care situation.[29,31,32] In this case, the patient was brought into the emergency room following a car accident. The patient's blood-alcohol level of 0.233 was undisputed (the patient consumed approximately 16 alcoholic beverages). When the emergency physicians asked the patient where he was injured, the patient answered that his head, eyes, back, and ribs were in pain. Also, the patient's vision was blurred because his eyes were filled with blood. Three members of the hospital's trauma team performed an evaluation on the patient. Concerned about the extent of the patient's internal injuries, the physicians informed the patient that a diagnostic peritoneal lavage was required; however, the patient refused. The trauma team determined that the patient lacked the capacity to accurately comprehend the full extent of his own injuries and therefore was medically incompetent to give his informed consent or refuse treatment. The physicians explained to the patient that in this type of situation the hospital's policy was to perform the procedure. At that point, the patient tried to get up and he started yelling. He was then physically restrained, strapped to a gurney, and given an anesthetic through a syringe. The procedure was performed. The patient left the hospital the next morning against medical advice and then sued the provider. From a finding against the defendant hospital for battery, the hospital appealed to the Supreme Court of Rhode Island.

The Supreme Court of Rhode Island held that the determination of whether a patient's intoxication would render the patient incapable of giving informed consent depends on the specific circumstances. However, the court reiterated that medical competency was the relevant standard for physicians to judge conscious patients in these circumstances (ie, whether the patient is able to reasonably understand the medical condition and the nature of any proposed medical procedure, including the risks, benefits, and available alternatives). In this case, the court decided in favor of the defendant hospital by ordering a new trial. The court concluded that "a patient's intoxication may have the propensity to impair the patient's ability to give informed consent."[29]

Blood transfusion in the conscious patient. In emergency situations in which a conscious adult patient needs a blood transfusion to preserve life, the general rule that a medically competent individual has the right to refuse life-saving treatment still applies.[22] For example, in *Erickson v Dilgard,* a patient needed an operation to stop upper gastrointestinal bleeding.[33]

The patient consented to undergo surgery, but refused to consent to receiving any blood transfusions. The treating hospital petitioned the court for an order authorizing a blood transfusion for the patient under the theory that to undergo the necessary operation without a blood transfusion was tantamount to suicide and therefore a violation of penal law. Acknowledging that the patient was fully competent and capable of giving informed consent, the court stated that the patient had the "final say" in deciding whether to undergo a particular medical procedure and denied the hospital's petition.[22,33]

Similarly, in *St. Mary's Hospital v Ramsey,* the court upheld a patient's right to refuse a blood transfusion in which without transfusion the patient, who was suffering from renal disease, was expected to die within a few hours.[22,34] The court stated that "this competent, sick adult has the right to refuse a transfusion regardless of whether his refusal to do so arises from fear of adverse reaction, religious belief, recalcitrance or cost."[34]

Even when significant state interest is involved, a physician must still abide by a competent patient's refusal to consent to treatment.[24] In *In re Brown,* a patient suffered acute trauma resulting from a gunshot wound and was in serious need of a blood transfusion, yet refused to consent to the procedure on religious grounds.[24] Because of the need to preserve the life of the only eyewitness to the crime committed, the office of the District Attorney petitioned the court ex parte and obtained a court order authorizing the hospital to provide the necessary blood transfusion, notwithstanding the patient's religious beliefs. Following the surgery and the blood transfusion, the patient appealed to the Supreme Court of Mississippi, seeking to expunge the lower court's order authorizing the blood transfusion. The court agreed with the patient and reversed the lower court's order, noting that the need for a live eyewitness to a crime did not amount to grave and imminent public danger, and stated that "[n]o physician or hospital may subject one to medical treatment without that person's informed consent."[24]

Blood transfusion in other circumstances. However, if a patient who requires a transfusion is deemed medically incompetent and if the patient and/or the patient's family members have objected to the transfusion, most courts upon petition allow the health care provider to perform transfusions necessary to preserve the patient's life under the compelling state interest standard.[20,22] Furthermore, consideration of a patient's medical competency or right to refuse life-saving treatment may be set aside when the potential death of that patient affects the welfare of the patient's minor children.[22,35] In this scenario, the state may have a compelling interest to preserve the life of the parent by ordering the transfusion in order to protect the minor children from emotional and financial harm and abandonment.[22,35] However, not all courts have been inclined to set aside the patient's right to refuse a life-saving blood transfusion in cases in which the welfare of a child may be affected.[25] At least one court has held that the state's interest in having two parents alive to care for minor children does not supersede the individual's constitutional right to privacy and religion and thus the right to refuse life-sustaining treatment.[22,36]

The Minor Patient

For minors in an emergency care situation, the commonly accepted rule is similar to that of legal adults: physicians generally are not held liable for treating a minor without parental consent when an emergency exists and immediate injury or death could result from the delay associated with attempting to obtain parental consent.[37] However, courts are split on the issue of informed consent when a minor patient's condition is life-threatening yet does not require immediate medical attention. Some courts have held that the emergency exception does not apply and therefore parental consent or consent from another legally authorized individual must be obtained. Other courts apply the mature minor exception, which allows the minor to give informed consent if the patient has the ability to understand and comprehend the nature of the proposed treatment as well as the associated risks and potential results in view of the surrounding circumstances.[37]

The emergent and immediate case. *Jackovach v Yocom* illustrates a case in which a clear emergency for a minor abrogates the need for parental informed consent. In this case, a 17-year-old boy was severely injured when he jumped from a moving train and was caught and dragged 80 ft by an iron step protruding from behind the train car.[38] The boy suffered a crushed elbow joint and a 2-to-3-in scalp laceration from which he was bleeding profusely. The boy was subsequently brought to the operating room and anesthetized so that the physicians could stop the bleeding from the scalp wound. While the boy was under anesthesia, the physicians determined that the boy's arm needed to be amputated because of the immediate danger it posed to his life. After the arm was amputated, the boy and his parents brought suit against the physicians based on the theory that the procedure was performed without their informed consent. In holding for the defendant physicians, the court noted that the physicians were faced with the

decision of bringing the patient out from under anesthesia only to obtain consent from the patient and his parents for the amputation. Returning the patient to consciousness for this time would have subjected the patient to greater risk of shock because of a necessary second anesthesia induction. The court held that in the face of this life-threatening emergency, the physicians acted with skilled judgment by deciding to amputate the arm; thus:

> [I]f a surgeon is confronted with an emergency which endangers the life or health of the patient, it is his duty to do that which the occasion demands within the usual and customary practice among physicians and surgeons in the same or similar localities, without the consent of the patient.[38]

The emergent but not immediate case. In contrast, in *Rogers v Sells*, the court found that a defendant physician was liable for not obtaining parental informed consent before amputating a 14-year-old boy's foot following a car accident.[39] In this case, the defendant physician examined the boy and found that the boy's right leg was "crushed and mangled; that the muscles, blood vessels, and nerves were torn and some of the nerves severed, and that the foot had no circulation."[39] After the patient was brought to the hospital, the defendant physician amputated the boy's foot without the permission of his parents. The boy's parents then sued the physician based on the theory of lack of informed consent. The issue for the court was whether emergency necessitating the immediate amputation of the boy's foot existed, which would obviate the need for informed consent. Although the court recognized an emergency exception to the doctrine of informed consent, testimony indicated that the leg was neither swollen, turning black, nor bleeding profusely, and the boy's own testimony indicated that he was able to both wiggle and feel his toes on the way to and while he was at the hospital. Therefore, the court held that the situation was not an emergency with the danger of immediate harm and that the physician had an obligation to obtain informed consent.[39]

Mature minor exception. *Younts v St. Francis Hospital* is an example of the mature minor exception. In this case, a 17-year-old minor was at the hospital visiting her mother, who had undergone major surgery and was in a semiconscious state. During her visit, the minor severed a portion of her finger in the hinge of a closing door.[2] The minor patient was taken to the emergency room at which time she consented to surgical treatment, including a pinch graft taken from her forearm. The procedure was successfully completed. However, the patient's mother brought suit against the hospital based on a lack of informed consent for performing the surgical procedure. The patient's mother indicated that if she had been consulted for the purposes of informed consent, she would not have given her consent and instead would have first sought the opinion of her family physician. However, the court noted that if the treating physician waited for the patient's mother to completely regain consciousness following surgery to obtain consent for the daughter's treatment, the patient would have needlessly endured a painful injury. Furthermore, the patient's father lived 200 miles away (as the patient's parents were divorced) and his address was unknown, so it was not possible to obtain his consent for the patient's treatment. Finally, the court used a contract standard to assess whether the patient could provide informed consent, despite being a minor. In this case, the court concluded that on the basis of the patient's age and her apparent ability to comprehend the intricacies of the situation, the patient was mature enough to understand the nature and consequences of the procedure (ie, similar to entering into a contract) and thus was mature enough to "knowingly consent to the beneficial surgical procedure made necessary by the accident."[2] Although the patient's condition did not constitute a life-threatening emergency, the court indicated that the consent given by the minor was valid under the mature minor exception.[37]

Blood transfusion in a minor patient. Finally, if a minor is in need of a life-saving blood transfusion, the majority of courts are much less hesitant to intervene because of the compelling state interest in preserving the life of a child. Even when both the patient and the patient's parents have adamantly expressed their refusal to consent to a life-saving blood transfusion (generally because of religious beliefs), upon petition to the court, the state is likely to intervene to preserve the life of the minor.[26] One court has effectively expressed the state's compelling interest in preserving the life of a minor by stating, "[n]ot even a parent has unbridled discretion to exercise their [sic] religious belief's [sic] when the state's interest in preserving the health of the children within its borders weighs in the balance."[26]

CONCLUSION

Informed consent is an important legal doctrine for all physicians. Emergency care situations, however, pose special concerns. By following basic procedures of medical assessment, understanding the legal rights of the patient, and understanding the exceptions to the informed consent rule, the physician can act in the patient's best interest without incurring legal liability. **HP**

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