

WHAT’S THE DIFFERENCE BETWEEN INFORMED CONSENT, FAILURE TO WARN, AND FIDUCIARY DUTY?

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Introduction

The duty to obtain informed consent, the duty to warn, and fiduciary duty all relate to a physician's duty to provide patients with necessary and accurate information during all phases of a physician-patient relationship. The duty to obtain informed consent arises prior to undertaking a diagnostic or treatment procedure. One component of informed consent, the duty to disclose the known material risks of proposed procedures, could fairly be categorized as a duty to warn.

Georgia case law also requires physicians to warn patients after treatment, such as where patients have received defective medical devices and harmful drugs. The concept of fiduciary duty affirmatively requires physicians to speak truthfully rather than withhold information throughout the relationship, including while trying to obtain consent, during treatment, and when the physician has injured the patient through medical negligence.

This paper will first address the duty to obtain informed consent and conclude with a discussion of fiduciary duty and failure to warn. Before analyzing physicians' common law and statutory duty to obtain informed consent in Georgia, it is helpful to initially explain the two distinct legal principles of "consent" in the medical context.

Types of Consent In The Medical Malpractice Context

The first principle is "basic" consent, or that consent to a touching that avoids a battery. A medical "touching" without consent constitutes the intentional tort of battery for which an action will lie. Pope v. Davis, 261 Ga. App. 308, 309 (2003); Ketchup v. Howard, 247 Ga. App. 54, 55-56 (2000).

The second principle is "informed" consent, which addresses the autonomy of a competent patient to determine what medical treatment he will allow or refuse. Informed

consent involves a medical professional fully informing a patient of the risks of and alternatives to proposed diagnostic procedures or treatment so that the patient's right to decide is not diminished by a lack of relevant information. Pope, 261 Ga. App. at 310; Ketchup, 247 Ga. App. at 56.

Physicians' Common Law Duty to Obtain Informed Consent – Ketchup v. Howard

The common law doctrine of informed consent provides that physicians have a duty to inform patients of (1) the known material risks of a proposed treatment or procedure and (2) available treatment alternatives. Ketchup v. Howard, 247 Ga. App. 54, 54 (2000). Prior to the year 2000, Georgia was the only state that did not recognize this common law doctrine. A brief summary of the history of the informed consent doctrine in Georgia helps illustrate the potential consequences of the Ketchup decision.

In Young v. Yarn, 136 Ga. App. 737 (1975), the Georgia Court of Appeals found that the General Assembly had defined physicians' duty of disclosure to patients in the Georgia Medical Consent Law, now O.C.G.A. § 31-9-6 (d). This Code section provides:

A consent to surgical or medical treatment which discloses in general terms the treatment or course of treatment in connection with which it is given and which is duly evidenced in writing and signed by the patient . . . shall be conclusively presumed to be a valid consent in the absence of fraudulent misrepresentations of material facts in obtaining same.

O.C.G.A. § 31-9-6 (d). The Court determined that a duty to disclose the treatment “in general terms” does not include a duty to disclose or warn of the risks of treatment. Young, 136 Ga. App. at 738-39.

Therefore, between 1975 and 2000, Georgia did not recognize any common law duty for medical professionals to advise patients of the known material risks of a proposed procedure or the available and reasonable alternatives. In fact, evidence of a failure to reveal the risks

associated with medical treatment was not even admissible in support of a claim for professional negligence. Albany Urology Clinic, P.C. v. Cleveland, 272 Ga. 296, 298 (2000) *citing* Hyles v. Cockrill, 169 Ga. App. 132, 133 (1983); Padgett v. Ferrier, 172 Ga. App. 335 (1984) (both overruled by Ketchup v. Howard, 247 Ga. App. 54 (2000)).

In 1988, the General Assembly enacted O.C.G.A. § 31-9-6.1, a limited codification of the common law doctrine of informed consent. This statute, which is discussed fully below, imposes a duty on physicians to provide patients undergoing specified procedures with specified information. Prior to the Ketchup decision, if the procedure did not fall within the confines of O.C.G.A. § 31-9-6.1, a physician could still obtain valid consent by disclosing the general terms of treatment under O.C.G.A. § 31-9-6. Further, even if the procedure was covered by O.C.G.A. § 31-9-6.1, the physician was required only to disclose the information outlined in the statute.

Ketchup v. Howard, 247 Ga. App. 54 (2000), presented the Court of Appeals with an opportunity to revisit the issue of informed consent. The case dealt with a dentist's duty to disclose the risks of and alternatives to a root canal. The Court overruled Young v. Yarn, joining the other 49 states in recognizing the common law doctrine of informed consent. Ketchup, 247 Ga. App. at 54.

The Court first determined that the 1971 Georgia Medical Consent Law on which the Young court relied was intended to address only the "basic" consent that avoids a battery, not informed consent. Id. at pp. 56-58. The Court then found that Young likely would have been declared unconstitutional if considered in light of subsequent United States Supreme Court and Georgia Supreme Court decisions identifying individuals' constitutionally protected liberty interests regarding their medical treatment. Id. at 58.

For example, after Young the Georgia Supreme Court held that all legally competent persons have a liberty interest, protected by the Georgia Constitution, to make all decisions regarding their medical care. This interest includes the right to refuse medical treatment, even where necessary to save the patient's life. See Zant v. Prevatte, 248 Ga. 832 (1982); State of Ga. v. McAfee, 259 Ga. 579 (1989). See also Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990) (a competent person has a liberty interest under the Due Process Clause to refuse unwanted medical treatment). The Court correctly reasoned that this constitutionally protected liberty interest to make all decisions regarding medical treatment is rendered meaningless in the absence of the common law doctrine of informed consent. Id. at 59.

The Court also found that Young had essentially substituted the judiciary's judgment for that of the medical profession for the standard of care on the issue of informed consent. Id. By contrast, the Ketchup Court recognized that the American Medical Association's Code of Medical Ethics sets forth the medical profession's standard on informed consent. Id. at 60. The Court cited several AMA statements in support of its decision.

Section 1 of the 1998-1999 Edition, entitled Fundamental Elements of the Patient-Physician Relationship, provides "[t]he patient has the right to receive information from physicians and to discuss the benefits, risks, and costs of appropriate treatment alternatives." Id. Section 8.08 of the AMA Code of Medical Ethics, entitled Informed Consent, provides "[t]he patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice." Id.

Similarly, the 1992 Code of Medical Ethics, as prepared by the Council on Ethical and Judicial Affairs of the American Medical Association, goes further to read as follows:

The patient should make his own determination on treatment. The physician's obligation is to present the medical facts accurately to

the patient or to the individual responsible for his care and to make recommendations for management in accordance with good medical practice. The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice. Informed consent is a basic social policy for which exceptions are permitted (1) where the patient is unconscious or otherwise incapable of consenting and harm from failure to treat is imminent; or (2) when risk-disclosure poses such a serious psychological threat of detriment to the patient as to be medically contraindicated. Social policy does not accept the paternalistic view that the physician may remain silent because divulgence might prompt the patient to forego needed therapy. Rational, informed patients should not be expected to act uniformly, even under similar circumstances, in agreeing to or refusing treatment.

Id. at 60-61.

The doctrine of informed consent recognized in Ketchup requires a physician to “inform a patient of the material risks of a proposed treatment or procedure which are or should be known,” and “inform a patient of available alternatives to the proposed procedure or treatment.” Id. at 59. By adding material risks that are or should be known, the Court slightly expanded the common law doctrine as defined in the beginning of the decision.

As with O.C.G.A. § 31-9-6.1, expert testimony is required to establish that the risk either was known or should have been known, but expert testimony is not required to establish that the patient’s decision to have or reject the proposed treatment because of the risk would have been affected. Instead, the jury would, as in general tort cases, be asked to determine whether an ordinary, reasonable, and prudent person in the patient’s position would have rejected the proposed treatment or procedure using lay standards. Id. at 63.

Importantly, contrary to O.C.G.A. § 31-9-6.1, Ketchup appears to create an independent cause of action for a medical professional’s failure to obtain informed consent. The Court noted that under Young v. Yarn, a physician could induce or encourage a patient to undergo a risky yet

unnecessary surgery without making known either the attendant risks or available alternatives. Id. at 59. “This would leave the uninformed patient without a remedy, even if the procedure resulted in death or disfigurement, unless the physician negligently performed the surgery. Contrary to the holding in Young v. Yarn, the law in Georgia cannot leave such a patient with no recourse.” Id.

The Ketchup Court adopted a purely prospective application of the duty to obtain informed consent. Id. at 64. The Court therefore held that Dr. Howard was not liable for medical malpractice based on his failure to warn of the risks of and alternatives to the root canal under the common law as it existed at the time, and affirmed the trial court’s grant of summary judgment. Id.

Several judges concurred in the judgment only. Judge Andrews, Blackburn, Ruffin and Miller joined a special concurrence contending that the majority’s recognition of common law informed consent beyond that set forth in O.C.G.A. § 31-9-6.1 invaded the province of the General Assembly and ignored contrary Supreme Court authority, primarily Albany Urology Clinic v. Cleveland, 272 Ga. 296 (2000), which is discussed below.

The Supreme Court did not review Ketchup. Certiorari was dismissed on January 19, 2001.

Physicians’ Statutory Duty to Obtain Informed Consent

In 1988 the General Assembly adopted the Informed Consent Doctrine, O.C.G.A. § 31-9-6.1, which became effective on January 1, 1989. The statute applies in a limited context and requires only limited disclosures.

The disclosure requirements apply only to physicians obtaining consent for patients undergoing the following procedures:

1. Any surgical procedure under general, spinal, or major regional anesthesia;
2. An amniocentesis diagnostic procedure; or
3. A diagnostic procedure which involves the intravenous or intraductal injection of a contrast material.

O.C.G.A. § 31-9-6.1(a).

If the procedure falls into one of these categories, the statute sets forth six categories of information that physicians must disclose “in general terms” to their patients before they undergo the specified procedures:

1. The patient’s diagnosis requiring the procedure;
2. The nature and purpose of the procedure;
3. The material risks generally recognized and accepted by reasonably prudent physicians of infection, allergic reaction, severe loss of blood, loss or loss of function of any limb or organ, paralysis or partial paralysis, paraplegia or quadriplegia, disfiguring scar, brain damage, cardiac arrest, or death associated with the procedure which, if disclosed to a reasonably prudent person in the patient’s position, could reasonably be expected to cause such prudent person to decline such proposed procedure on the basis of the material risk of injury that could result from such proposed procedure;
4. The likelihood of the procedure’s success;
5. The practical alternatives to the procedure which are generally recognized and accepted by reasonably prudent physicians; and,
6. The patient’s prognosis if the procedure is rejected.

O.C.G.A. § 31-9-6.1(a)(1)-(6). The Georgia Supreme Court has held that this statute does not impose a general requirement of disclosure on physicians, but requires physicians to disclose only the factors listed in O.C.G.A. § 31-9-6.1(a). Albany Urology Clinic v. Cleveland, 272 Ga. 296, 299 (2000).

Under O.C.G.A. § 31-9-6.1(d), failure to comply with the informed consent statute shall not constitute a separate cause of action but may give rise to an action for medical malpractice upon a showing of the following:

1. That the patient suffered an injury which was proximately caused by the surgical or diagnostic procedure;
2. That requisite information concerning the injury suffered was not disclosed; and,
3. That a reasonably prudent patient would have refused the surgical or diagnostic procedure or would have chosen a practical alternative to such proposed surgical or diagnostic procedure if such information had been disclosed.

O.C.G.A. § 31-9-6.1(d).

Physicians' Duty (or Lack Thereof) to Disclose Personal Facts Affecting Their Performance

In Albany Urology Clinic v. Cleveland, 272 Ga. 296 (2000), the Supreme Court of Georgia examined whether a physician had a duty to disclose to his patients factors of his life, namely his illegal drug use, which might adversely affect his performance of a surgical procedure in order to obtain valid consent. There was no evidence that the physician was under the influence of cocaine while treating this patient, but he was subsequently admitted to a rehabilitation facility for drug treatment. Albany Urology, 272 Ga. at 297. The Supreme Court decided this case several months prior to the Court of Appeals' recognition of the common law doctrine of informed consent.

The Court found no common law or statutory (O.C.G.A. § 31-9-6.1) duty for physicians to disclose "unspecified life factors which might subjectively be considered to adversely affect the professional's performance," but did note that physicians have a common law duty to truthfully answer a patient's questions regarding medical or procedural risks. Id. at 296-297, 298. Failure to truthfully respond may invalidate a patient's consent, leaving the physician liable

for battery. Id. at 301. Under these circumstances, however, the Court found that the unknown factor (cocaine use outside of work) that the patient claimed would have caused him to withhold consent was “too attenuated from the subject matter of the professional relationship to support a battery claim.” Id.

Albany Urology contains several statements that support the special concurrences in Ketchup. The Supreme Court noted that prior to the informed consent statute, physicians were under no common law duty to disclose procedural risks to patients. Id. at 298. The Court went on to state that this common law rule could only be changed by legislative act, which occurred with the limited informed consent law in O.C.G.A. § 31-9-6.1. Id. Being in derogation of common law (as it existed at the time), O.C.G.A. § 31-9-6.1 must be strictly construed. Id. at 299. Therefore, “in situations not covered by the statute’s language, the common law rule must still govern, as courts are without authority to impose disclosure requirements upon physicians in addition to those requirements already set forth by the General Assembly.” Id.

The Ketchup court fully acknowledged Albany Urology, rationalizing that the Supreme Court’s mention of the common law doctrine of informed consent was dicta, and that it had the right to correct its error in Young v. Yarn and its progeny. Ketchup, 247 Ga. App. at 64-65.

The issue in Albany Urology was whether the failure to make such a disclosure constitutes fraud or vitiates basic consent or consent to avoid a battery. It remains to be seen whether the doctrine of informed consent recognized in Ketchup would require the disclosure of such personal information to obtain valid informed consent. As noted by Justice Carley in her dissent, which was joined by Justices Huntstein and Thompson:

The concept of valid consent to undergo a medical procedure encompasses more than the procedure itself, and includes the qualifications or lack thereof of the one who is proposing himself as the professional who will perform that procedure. . . . Certainly,

the qualifications of the particular physician, no less than the general and inherent risks of the suggested medical procedure, are of concern to the patient whose authorization is being sought.

Albany Urology, 272 Ga. at 304.

Fiduciary Duty

A physician's fiduciary duty to accurately and truthfully inform his patient arises out of the trust and confidence of the physician-patient relationship. Where a person sustains toward another a relation of trust and confidence, his silence when he should speak or his failure to disclose what he ought to disclose is as much a fraud in law as an actual affirmative false representation. See Price v. Currie, 260 Ga. App. 526, 528 (2003); Kodadek v. Lieberman, 247 Ga. App. 606, 609 (2001).

Most of the breach of fiduciary duty cases we found in the medical malpractice context dealt with a physician's fiduciary duty to inform a patient of an injury or negligent mistreatment. See, e.g., Kane v. Shoup, 260 Ga. App. 723, 726 (2003); Miller v. Kitchens, 251 Ga. App. 225, 226 (2001). This issue usually arises when a patient claims that a physician's fraud deterred him from bringing a medical malpractice action, thereby tolling the statute of limitation until the patient's discovery of the fraud.

Fraud sufficient to toll the statute of limitation under these circumstances requires (1) actual fraud involving moral turpitude on the part of the defendant; (2) the fraud must conceal the cause of action from the plaintiff, thereby debarring or deterring the knowing of the cause of action; and (3) the plaintiff must have exercised reasonable diligence to discover the cause of action, notwithstanding the failure to discover within the statute of limitation. Miller v. Kitchens, 251 Ga. App. at 226.

Further, while a physician has a fiduciary duty to inform his patient of any injury or negligent mistreatment, to establish fraud a plaintiff must present evidence that the physician knew that the plaintiff was injured in the ways the plaintiff contends; that the physician knew that his violations of the standard of care caused such injuries; and that he intentionally concealed such fact. Miller, 251 Ga. App. at 226-27. Proof of these elements is obviously difficult. A plaintiff must show not just a misdiagnosis, but a “known failure to reveal negligence in order to show fraud.” Price, 260 Ga. App. at 529.

Georgia case law does address physicians’ fiduciary duties in other contexts. For example, in Breyne v. Potter, 258 Ga. App. 728, 732 (2002), the Court of Appeals held that the trial court erred in granting summary judgment to a physician on a breach of fiduciary duty claim. The physician, a maternal-fetal medicine specialist, misread the results of genetic tests and provided inaccurate information to his patient regarding her baby, after which the patient had an abortion. The physician here admitted that he owed a fiduciary duty to the patient, but unsuccessfully contended that the patient’s decision to abort the pregnancy severed the causal link between breach and damages as a matter of law. Breyne, 258 Ga. App. at 731.

In Petzelt v. Tewes, 260 Ga. App. 802 (2003), a patient sued an anesthesiologist for, among other things, breach of fiduciary duty based in part on his allegation that the anesthesiologist fraudulently obtained his consent to perform medical procedures by assuring him that his referring physician was aware and approved of her treatment plans. The trial court granted summary judgment on this claim based on the anesthesiologist’s argument that there was no evidence she made false statements or intentionally misled or deceived the patient to obtain consent.

The Court of Appeals reversed, noting that in cases of fraud a patient's consent may be vitiated if a physician fails to respond truthfully to the patient's questions about a diagnosis or treatment. Pezelt, 260 Ga. App. at 804-05. The Court found evidence on which a jury could infer that the anesthesiologist recklessly misrepresented that the referring physician acquiesced to her treatment plan, and that the anesthesiologist intended to deceive the patient. Id. at 805-06.

Failure to Warn

Other than the general failure to warn of the risks of proposed procedures associated with informed consent, most of the cases alleging failure to warn in the medical context deal with the failure to warn patients of dangers associated with medical devices and drugs. See Allen v. Belifante, 217 Ga. App. 754 (1995) (failure to warn of dangers associated with interpositional implants to correct temporomandibular joint dysfunction [TMJ]); Screven v. Drs. Gruskin & Lucas, P.C., 227 Ga. App. 756 (1997) (also failure to warn of problems with a TMJ device).

Additionally, the learned intermediary doctrine is similar to a physician's basic duty to obtain informed consent. Under this doctrine, the manufacturer of a prescription drug or medical device does not have a duty to warn the patient of dangers involved with a product, but instead has a duty to warn the patient's doctor, who acts as a learned intermediary between the patient and the manufacturer. Williams v. American Medical Systems, 248 Ga. App. 682, 685 (2001). The rationale for the doctrine is that the treating physician is in a better position to warn the patient than the manufacturer, in that the decision to employ prescription medication or medical devices involves a professional assessment of medical risks in light of the physician's knowledge of a patient's particular need and susceptibilities. McCombs v. Synthes, 587 S.E.2d 594 (Ga.) (2003).

One other interesting area of failure to warn cases involves a mental health professional's duty to warn third parties of a threat of serious bodily harm. At least two Georgia cases touch on this issue.

In Bradley Center v. Wessner, 250 Ga. 199 (1982), the Supreme Court recognized a duty to control a hospitalized patient in order to prevent harm to third parties. The Court approved the Court of Appeals' description of this duty as follows: "[w]here the course of treatment of a mental patient involves an exercise of 'control' over him by a physician who knows or should know that the patient is likely to cause bodily harm to others, an independent duty arises from that relationship and falls upon the physician to exercise that control with such reasonable care as to prevent harm to others at the hands of the patient." Bradley Center, 250 Ga. at 201 *citing* Bradley Center, 161 Ga. App. at 581. This duty arises out of the general duty that one owes to all the world not to subject them to an unreasonable risk of harm, not a physician-patient relationship. *Id.* at 201. Bradley Center was a duty to control, not a duty to warn, case.

The Court of Appeals was next presented with an opportunity to define a duty to warn in Jacobs v. Taylor, 190 Ga. App. 520 (1989), but somewhat dodged the issue. In Jacobs, a released mental patient killed his former wife, against whom he had made specific threats, and two others, who were strangers. The children of the victims sued the patient's former psychiatrists.

As to the former wife, the Court found that even if the physicians had a duty to warn her about the danger her former husband posed, the wife's subsequently acquired knowledge of that precise danger absolved them of any liability in their failure to warn. Jacobs, 190 Ga. App. at 527. The evidence showed that the former wife was fully aware of the danger and had instituted

criminal proceedings against the patient for terroristic threats. Id. There was therefore no duty to warn her of the obvious, or what she knew or should have known. Id.

As to the strangers, there was no evidence that they were foreseeable or readily identifiable targets of the patient's unspecified threats. Id. The Court declined to impose blanket liability on doctors for failing to warn members of the general public of the risk posed by a patient with a history of violence who made generalized threats. Id.