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Medical Malpractice—Lack of Informed Consent

[In addition], PLF claims that DFT did not provide adequate information to obtain [PNT's[1] or PFT's] informed consent for [the procedure / surgery / treatment].

To prove lack of informed consent, PLF must prove that the following [four/five] things are more likely true than not true:

0. [ONLY IF DISPUTED AS A FACTUAL MATTER:][2] DFT had a duty to give [PNT or PLF] information about the risks and benefits of the procedure;
1. An average, qualified [ex. – primary care physician/plastic surgeon/oncologist, etc.] reasonably should have known the information about [the particular material risks and benefits of the procedure],[3]
2. DFT failed to disclose to [PNT or PLF] all of the information that DFT knew or reasonably should have known was material – that is, important – to an intelligent decision by [PNT or PLF] whether to undergo [the procedure / surgery / treatment],[4]
3. If DFT had told this information to [PNT or PLF], neither s/he nor a reasonable person in similar circumstances would have had the [procedure / surgery / treatment],
4. the undisclosed material risk occurred and was a cause of [PNT or PLF]'s injury or harm,[5] and
5. the extent of the alleged injury or harm, which we call "damages."

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[1] The acronmyn PNT refers to the treated patient, if that is someone other than the PLF.

[2] Note that in most cases, a duty may be determined as a matter of law. This element is given to the jury only where there is a factual dispute (as to whether or not a duty existed) that cannot be decided as matter of law.

[3] *Roukounakis* v. *Messer,* 63 Mass. App. Ct. 482, 485–486 (2005).

[4] *Harnish* v. *Children's Hosp. Med. Ctr.,* 387 Mass. 152, 155–156 (1982).

[5] *Aceto* v. *Dougherty*, 415 Mass. 654, 661 (1993), citing *Halley v. Birbiglia,* 390 Mass. 540, 548 (1990), and *Harnish, supra at 157–158*; *Martin* v. *Lowney,* 401 Mass. 1006, 1007 (1988).

I will address each of these items now.

(a) Doctor-Patient Relationship <*Only if Disputed—Otherwise Delete*>

First, PLF must prove that a sufficiently close doctor-patient relationship existed with DFT, so that DFT had a duty to obtain [PNT's or PLF's] informed consent.[6] The following questions may help you decide whether DFT had this duty:

- which doctor explained the [procedure / surgery / treatment];
- which doctor recommended the [procedure / surgery / treatment];
- which doctor ordered it;
- which doctor was in charge of performing the procedure / surgery / treatment and which doctor was just assisting; and
- which doctor spoke to [PNT or PLF] to obtain his/her signature on a medical consent form.[7]

I offer these questions I just mentioned as examples in every case like this, but it is up to you to deterimine the importance of these questions and answers, given the particular circumstances of this case.

(b) Medical Information that DFT Should Have Known

First, [Second,] PLF must prove that DFT failed to disclose to [PNT or PLF] all of the information that DFT knew or reasonably should have known was important to an intelligent decision by [PNT or PLF] about whether to undergo [the procedure / surgery / treatment].

To decide this issue, you should proceed in two steps. First, ask what information a doctor should have known and, second, decide what information a doctor should have told a patient.

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[6] *Halley* v. *Birbiglia,* 390 Mass. 540, 547–548 (1983).

[7] *Halley*, supra at 548-549.

The information a physician reasonably should know is that information known at the time by the average qualified physician practicing in his/her field or specialty. What the physician should know involves professional expertise. The plaintiff therefore must prove this through expert medical testimony. You should remember my instructions on expert testimony when you are evaluating this testimony.

(c) Material Information that Must be Shared with the Patient

PLF must also prove that DFT failed to disclose information that DFT should have provided. A doctor must share any information about risks with a patient that the doctor should reasonably recognize is material to the patient's decision. Information is "material" to a decision, if a reasonable person in the patient's position would consider the information important in deciding whether or not to submit to the [procedure / surgery / treatment].[8]

Material information may include:

- the nature of the patient's condition,
- the nature and probability of risks involved,
- the benefits to be reasonably expected,
- the ability or inability of the physician to predict results,
- whether the treatment is reversible,
- the likely result of not having the treatment, and
- the available alternatives, including their risks and benefits.[9]

The doctor does not have to disclose all risks of a propos–ed [procedure / surgery / treatment].[10] Whether or not doctors must disclose risks depends

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[8] *Harnish* v. *Children's Hosp. Med. Ctr.,* 387 Mass. 152, 155156 (1982).

[9] *Harnish,* supra at 155-156.

[10] The duty to obtain informed consent is not limited to physically invasive treatments, but also applies to a course of treatment such as psychiatric or other medical (non-surgical) treatment. *Felder v. The Children's Hospital Corporation*, 97 Mass. App. Ct. 620 (2020).

on the severity of the potential injury and the likelihood that the injury will occur. If the probability that the injury will occur is so small as to be practically nonexistent, then the possibility of that injury occurring is not material information. Likewise, a very minor consequence would not require disclosure, even if the probability of the risk occurring is high. Between these two extremes, it is up to you to determine materiality.

In addition, doctors do not have a duty to give information the doctor reasonably believes the patient already has, such as the risks inherent in any operation, like the risk of infection.[11] You should consider materiality in view of what the physician knew or should have known to be [PNT's or PLF's] situation.

You must base your determination of the likelihood or severity of a potential risk upon expert testimony in this case.

It is up to you, however, as the jury, to decide whether the undisclosed information was material or not. This means that, once the evidence has established the probability of the risks and the likely severity of any resulting harm, you do not need expert testimony to decide whether the information was "material."

<*Additional Instruction when DFT claims the "Emergency Exception" applies*>

In this case, DFT claims that s/he was entitled to treat [PNT or PLF] without obtaining consent because this was an emergency situation. DFT has the burden to show that, more likely than not, an emergency situation excused him/her from obtaining informed consent.[12]

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[11] There may be some specific reasons that a case may go forward involving lack of informed consent concerning the risk of infection. If the case on trial is such a case, then this sentence should be modified.

[12] *Shine v. Vega*, 429 Mass. 456, 462–463 (1999).

If a patient is competent, a doctor must obtain the patient's consent before providing treatment, even if the doctor reasonably believes that, without the treatment, the patient's life is threatened.

If the doctor cannot obtain a patient's consent because the patient is unconscious or otherwise incapable of consenting, the doctor must seek the consent of a family member [IF APPLICABLE THROUGHOUT: or health care proxy or guardian], if time and circumstances permit.

The doctor may not presume that the patient, if competent, would consent to necessary emergency medical treatment unless:

- the patient is unconscious or otherwise incapable of giving consent, and
- 2) either time or circumstances made it impractical for the doctor to obtain a family member's consent.

DFT must prove, more likely than not, that both of these circumstances existed.

It is up to you, the jury, to determine whether an emergency existed and if so, whether the treating doctor took sufficient steps given all of the circumstances to attempt to obtain either the patient's informed consent, or the consent of a family member before treating the patient.[13] If you find that DFT has proved that this emergency exception applies, then DFT was not required to obtain informed consent for the necessary emergency treatment. <*end of "Emergency Exception" instruction*>

(d) Would Not Have Undergone [Procedure / surgery / treatment]

Third [Next], PLF must prove, more likely than not, that if DFT had provided him/her with the appropriate information, neither [PNT or PLF] nor a reasonable person in similar circumstances would have undergone the [procedure / surgery / treatment.]

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[13] *Shine v. Vega*, 429 Mass. at 465–467.

To meet this third [fourth] element, PLF must prove two things. First, s/he must show that s/he would not have undergone the procedure if s/he had known the undisclosed information. In other words, what would [PNT or PLF] herself/himself have done? Second, s/he must also show that a reasonable person in similar circumstances would not have chosen the treatment if s/he had known the undisclosed information. The question is how a reasonable person would have responded regardless of [PNT's or PLF's] own situation. If PLF has proven both parts of this element are probably true, then you answer "yes" to question X and otherwise, you answer no.

(e) Occurrence of Undisclosed Risk

For the fourth [fifth] element, PLF must prove two things are more likely true than not true. First, PLF must prove that s/he suffered an injury from the treatment. Second, s/he must show that the injury was one of the risks that DFT should have disclosed but failed to mention to her/him. In other words, s/he must show that the undisclosed risk in fact occurred as a result of DFT's treatment. If you find that the undisclosed risk did not occur, then the failure of the defendant doctor to disclose that risk is not grounds for a verdict in PLF's favor.

<INSERT remaining causation instructions from model negligence instructions>

(f) Damages

<INSERT damages instructions from model negligence instructions>