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## Supreme Court of Pennsylvania Rules on Informed Consent

The Supreme Court of Pennsylvania in *Shinal v. Toms, M.D.* published an opinion which could have far-reaching implications with respect to obtaining informed consent in Pennsylvania. The Court held that the duty to obtain informed consent is non-delegable and thus, must be obtained by the operating surgeon. The Court concluded that the trial court erred when it instructed the jury to consider information provided by the defendant's qualified staff to decide the merits of the informed consent claim.

On November 26, 2007, the plaintiff met with Dr. Steven Toms and had an initial consultation discussing the removal of a recurrent non-malignant tumor from the pituitary region of Ms. Megan Shinal's brain. According to Dr. Toms' trial testimony, the meeting included a discussion of Ms. Shinal's goals and expectations in life and the risks of different approaches to surgery, including possible damage to the nearby carotid artery and optic nerve. He further testified that he reviewed with Ms. Shinal the alternatives, risks and benefits of total vs. sub-total resection and shared with the plaintiff his opinion that although a less aggressive approach was safer in the short-term, it would increase the likelihood that the tumor would grow back.

Sometime later, Ms. Shinal had a telephone conversation with Dr. Toms' physician assistant and the plaintiff testified that she asked the physician assistant about the scarring and radiation. Ms. Shinal signed an informed consent form which acknowledged that she gave Dr. Toms permission to perform "a resection of recurrent craniopharyngioma" and identified the risks of the surgery as including pain, scarring, bleeding, infection, breathing problems, heart attack, stroke, injury and death.

During the operation, Dr. Toms perforated Ms. Shinal's carotid artery which resulted in hemorrhage, stroke, brain injury and partial blindness.

The trial court instructed the jury that in assessing whether Dr. Toms obtained Ms. Shinal's informed consent, it could consider relevant information communicated by "any qualified person acting as an assistant" to Dr. Toms. During deliberation, the jury asked for clarification and the court elaborated, "now I phrased it in that way because it is within your province to determine a recollection of the evidence you heard, who said what, who those people were that said these things and whether or not they were assistants to Dr. Toms, working under him, and I said any qualified person." After deliberations, the jury returned a defense verdict.

The Supreme Court held that the charge was in error and reversed both the trial court and Superior Court. The Supreme Court held, "For the same reasons, we hold that a physician cannot rely on a subordinate to disclose the information required to obtain informed consent. Without direct dialogue and a two-way exchange between the physician and the patient, the physician cannot be confident that the patient comprehends the risks, benefits, likelihood of success and alternatives."

**Comment:** We believe that in order to comply with this Supreme Court opinion it is likely that operating physicians all over the state will have to change their practices with regard to obtaining informed consent. As was pointed out by the dissent, according to the majority, Dr. Toms had to address personally all of Ms. Shinal's surgery-related phone calls as well as all of his other patients' surgery-related calls. The dissent added: "I fear that today's decision will have a far-reaching, negative impact on the manner in which physicians serve their patients. For fear of legal liability, physicians now must be involved with every aspect of informing their patients' consent, thus delaying seriously ill patients' access to physicians and the critical services that they provide." In fact, it is unclear, based on this opinion, whether a physician's surgeon partner would be permitted to obtain informed consent.

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