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Weber Gallagher

Pennsylvania Supreme Court Rejects Per Se Rule Excluding Evidence of Informed Consent in Medical Negligence Cases

The Pennsylvania Supreme Court has overturned a Superior Court bright-line decision that evidence of informed consent is irrelevant in medical malpractice cases in a March 2015 ruling. The Superior Court had previously held that any evidence of informed consent was per se inadmissible in medical malpractice cases which did not specifically allege a lack of informed consent/medical battery. However, the Pennsylvania Supreme Court, in the decision of *Brady v. Urbas*, 2015 Pa. LEXIS 655, specifically held that evidence regarding the risks of surgical procedures, in the form of either testimony or a list of such risks as they appear on an informed consent sheet, may be relevant in establishing the standard of care.

Brady v. Urbas involved allegations that the defendant physician negligently treated the plaintiff's toe in three follow up surgeries following an initial surgery in March 2008. The plaintiff argued that the defendant physician's advice, assurances and recommendations lulled her into a false sense of security and concealed the true nature of her condition. Further, the plaintiff argued that Dr. Urbas recommended and performed procedures that were contraindicated. Notably, however, the complaint did not include a cause of action for lack of informed consent.

At various points throughout the trial (over the objections of the plaintiff's counsel) the informed consent to surgery, as well as the plaintiff's knowledge of the risks involved, was discussed. Additionally, during deliberations, the jury asked to review the consent forms at issue, stating that they needed to know what the plaintiff agreed to in treatment. The jury returned a defense verdict, specifically finding that the defendant physician was not negligent. On appeal, the Superior Court established a per se rule of exclusion, which mirrored that of Virginia, explaining that "evidence of informed consent is irrelevant in a medical malpractice case which does not contain specific allegations sounding in informed consent." The court added, in the alternative, even if such proofs had some marginal relevance to the case, they could mislead or confuse the jury by leading them to believe that the plaintiff's injuries were simply a risk of the surgeries and that the plaintiff accepted such risks, regardless of whether Dr. Urbas' negligence caused the risks to occur.

On appeal, the Supreme Court of Pennsylvania specifically declined to endorse the Superior Court's broad pronouncement that all aspects of informed consent information were irrelevant in medical malpractice cases. In doing so, the Supreme Court held that some of the information contained in an informed consent may be relevant to the question of negligence if, for example, the standard of care requires that the doctor discuss certain risks with the patient. Additionally, evidence regarding risks of surgical procedures, in the form of either testimony or a list of such risks as they appear on an informed consent sheet may also be relevant in establishing the applicable standard of care.

Comment: The Supreme Court's ruling in *Brady v. Urbas* establishes a clear framework and roadmap for the eventual admission of informed consent evidence at the time of trial. In rejecting the Superior Court's bright-line rule that no evidence of informed consent can be deemed admissible in medical negligence cases, the court provided guidance as to how to obtain admission of said evidence. Defense counsel, at the onset of litigation, must begin to establish a foundation that the purpose, nature and risks of surgery described in a signed informed consent were relevant in that they help establish the applicable standard of care. This information should be sought throughout the written discovery and deposition phase of litigation. Additionally, counsel must coordinate with medical experts to include the actual informed consent, and its contents, in expert analysis as to the applicable standard of care, which will lay a foundation that the nature and risks of the surgery are relevant to the standard of care which will eventually be discussed at the time of

trial.

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