Reshaping the Boundaries of Informed Consent in Wisconsin

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Wisconsin law imposes 2 distinct legal duties on physicians—to provide non-negligent medical care, and to secure a patient's informed consent to that care. The modern informed consent obligation has evolved far beyond the traditional requirement that a physician merely obtain permission before performing a procedure on a patient. A recent Wisconsin Supreme Court case raises the question of whether this evolution has gone too far, leading to legislative efforts to overturn the court's holding.

In *Jandre v. Wis. Injured Patients and Families Compensation Fund,*[1] the Wisconsin Supreme Court affirmed a $2,011,185 jury verdict against a physician for failing to inform her patient about the existence of a diagnostic test for a condition already ruled out by an alternative diagnostic test. The precedential weight of the Court's 3-1-3 split decision is uncertain because no 4 justices agreed to the same rationale for the decision. Justice Patience Roggensack's dissent discusses why the majority's holding lacks binding weight because the concurring justice, Justice David Prosser, employed a different rationale than the other 3 justices in the majority.

As of this writing, the Wisconsin legislature is considering an amendment to Wisconsin's informed consent statute to clarify the types of information that a physician is legally obligated to disclose. The quickly evolving and uncertain state of informed consent law highlights the need for physicians to be aware of informed consent requirements and take proactive steps to manage their potential liability exposure.

This article provides an overview of the informed consent obligation, the Jandre decision, and the recently introduced legislation that proposes revisions to Wisconsin's informed consent statute, as well as a discussion of steps physicians can take to minimize the risk of an informed consent lawsuit.

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The Informed Consent Obligation

A physician's obligation to obtain informed consent is governed by state law. In Wisconsin, physicians must disclose "the availability of all alternate, viable medical modes of treatment" as well as the benefits and risks of these treatments, subject to a number of exceptions.[2] Although the language of the informed consent statute only requires information about treatment options, Wisconsin courts have interpreted the term "treatment" to encompass diagnostic testing. In determining whether a particular disclosure is required, Wisconsin courts consider what a "reasonable patient" would want to know under the circumstances.

The *Jandre* Decision

The *Jandre* case involved a physician's failure to inform her patient about the availability of a carotid ultrasound to test for a transient ischemic attack (TIA) because she had ruled out a TIA after listening to the patient's carotid arteries in an effort to detect the "whooshing sound" characteristic of a blocked artery. The physician conducted a series of additional tests to rule out a hemorrhagic stroke and a brain tumor, and then diagnosed the patient with Bell's palsy. Eleven days later, the patient suffered a stroke that left him physically and cognitively disabled.

The patient sued the physician, arguing that the physician had (1) committed malpractice by misdiagnosing his condition; and (2) breached her informed consent obligation by not informing him about the option of a carotid ultrasound to diagnose a TIA. The jury found that the physician's diagnosis of Bell's palsy, although erroneous, was not negligent. Notwithstanding its conclusion that the physician had reasonably arrived at a diagnosis of Bell's palsy, the jury held that the physician should have told her patient about the option of a carotid ultrasound, and awarded the patient $2,011,185 for the physician's informed consent breach.

The physician appealed to the Wisconsin Supreme Court, arguing that the informed consent obligation only requires disclosures related to the condition(s) the physician believes the patient has. The physician argued that, in most instances of patient care, such disclosures would actually impair decision-making by increasing the amount of largely irrelevant information before the patient. The physician also argued that requiring disclosures about excluded diagnoses would encourage the practice of defensive medicine and would dramatically increase the amount of time required to obtain informed consent.

In a sharply divided decision, the Court rejected the physician's arguments, hold-

ing that a physician must provide information about tests and treatments for conditions that are consistent with the patient's symptoms even if the physician has ruled out those conditions. Several justices wrote separate opinions expressing concern about the extreme burden this decision would impose on Wisconsin physicians. Justice Prosser called for a reevaluation of Wisconsin's informed consent statute to address the expansion of the duty of informed consent that has occurred over the past 30 years, and to resolve concerns about the profound consequences of that expansion on the practice of medicine, such as the practice of defensive medicine.

The Legislature's Response to the *Jandre* Decision

Members of the Wisconsin Legislature introduced 2013 Assembly Bill 139[3] and 2013 Senate Bill 137[4] (companion bills), which include proposed changes to clarify the scope of legally mandated disclosures.

First, the bills propose that "information about alternate medical modes of treatment for conditions that the physician does not believe the patient has at the time the physician informs the patient" be exempted from the informed consent obligation. Second, the bills propose that the scope of legally mandated disclosures include only "information that a *reasonable physician* in the same or a similar medical specialty would know and disclose under the circumstances," rather than information that a reasonable patient would want to have. Both the Legislature and the Senate will likely vote on the proposed changes before they break for the summer at the end of June.

Recommendations for Physicians

The *Jandre* case illustrates the broad scope of disclosures potentially required in any patient encounter. According to the lead opinion in *Jandre*, physicians must disclose any information that a reasonable patient would want to know about any condition consistent with his or her symptoms, even if the physician does not believe the patient has that condition.

Until the Legislature clarifies the scope of the informed consent duty, physicians should consider consulting with clinic counsel regarding the scope of information to disclose and keeping diligent records of their informed consent discussions with patients, including notes on the scope of information provided.

REFERENCES

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