

# What is Informed Consent for a Surgical Procedure and was it Obtained?

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In *Miller v. Markowitz, Dalecki and Memorial Hospital For Cancer & Allied Disease 1*, one issue in the case was whether or not the patient's informed consent for a esophagogastroduodenoscopy ("EGD") was obtained. The patient consulted with Dr. Markowitz, a gastroenterologist because of epigastric burning, dyspepsia, and abdominal pain. At that time, she also had an "Endoscopy Nursing Patient Assessment".<sup>2</sup> The patient denied any history of high blood pressure, high cholesterol, vascular disease, fainting, chest pains or shortness of breath. Although seen by a cardiologist several years prior to this assessment, no diagnoses of any cardiac diseases were made and her medical records revealed none.

The patient decided to undergo the recommended EGD and was seen by the hospital anesthesiologist and a GI fellow who went over the procedure with the patient. They discussed the procedure and its risks and the risks and benefits of anesthesia respectively. The patient's cardiac status was also reviewed.<sup>3</sup>

While waiting in the pre-anesthesia area, the patient vomited, but the procedure went forward. A nurse anesthetist sedated the patient with general anesthesia at about 4:08 p.m. and the patient was intubated about sixty seconds later. The surgery began at 4:11 p.m. and was completed at 4:19 p.m. After assessing that the patient was spontaneously "ventilating and arousable, the nurse anesthetist extubated the patient in the OR at roughly 4:30 p.m. and then moved the patient to the PACU.

Unfortunately, in the PACU, the patient's heart rate slowed and she appeared pale. A code was called at 4:33 p.m. but resuscitation efforts were not successful and the patient died at 5:00 p.m. An autopsy indicated that the patient had atherosclerotic cardiovascular disease.

The patient's executor filed a suit against the physicians and the hospital alleging that the defendants had failed to obtain approval from her cardiologist that she was a candidate for anesthesia; had failed to obtain informed consent; had failed to timely "resuscitate and oxygenate" the patient during resuscitation; and had failed to take a proper medical history prior to the surgical procedure.<sup>4</sup>

Dr. Markowitz was dropped from the case after it was filed and only Dr. Daleki and the hospital remained as defendants.

The defendants filed several motions, the important one for this Bulletin being a summary judgment on the allegation of failure to obtain informed consent. The Court explained that when moving for a

summary judgment in New York, the defendants must show that the plaintiff was “indisputably informed of the foreseeable risks, benefits, and alternatives of the treatment rendered,” and “that a reasonably prudent patient would not have declined to undergo the [procedure] if he or she had been informed of the potential complications”. 5

Three physician expert witnesses testified that the review of the patient’s medical record revealed that her consent was properly obtained; that absent a history of cardiac problems, not obtaining a cardiac consult was within the standard of care for the surgeon; and that nothing in the patient’s medical records indicated she had any cardiac disease or condition. Rather, the one expert who was board certified in internal medicine with a subspecialty certification in cardiovascular disease stated that the patient died of an “unexpected, unpredictable, and unavoidable” cardiac arrhythmia. 6

Relying on the expert testimony of three physicians, the Court held that the hospital and Dr. Daleki presented evidence that they were entitled to a summary judgment (no need to go to a trial for judgment as no liability existed) as to the lack of informed consent count. It opined that the experts’ testimony supported the patient was sufficiently advised of the risks and benefits of general anesthesia and the procedure.

As noted above, the executor also alleged that the defendants were professionally negligent in their care of the patient. This aspect of the case will be discussed in the next Bulletin, with a focus on the care provided by the nurse anesthetist.

## **FOOTNOTES**

1. 2011 NY Slip Op 30417 (N.Y. Sup. Ct. 2011).
2. Id. at 1
3. Id. at 2.
4. Id. at 3.
5. Id. at 3, 4.
6. Id. at 5.

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