

## Chapter 5 Summary: Informed consent: a woman's right

The concept of informed consent is a longstanding legal principle that patients may not be subjected to medical procedures without receiving full disclosure of risks and giving their consent. Though disclosure is now an ethical and legal obligation throughout most of the Western world, its application to abortion cases has been controversial. This is due in part to dispute over the risks of abortion, and in part to the difficulty of enforcing informed consent.

Both the American and Canadian Medical Associations require their members to provide patients with information concerning risks and alternatives before asking them to consent to a medical procedure. However, punishment for not doing so is unclear. Failure to inform a patient of risks or possible alternatives constitutes neither an injury in itself, nor professional misconduct. Thus, it is difficult to prosecute a physician for failing to obtain a patient's informed consent to a medical procedure, particularly abortion.

Informed consent cases generally fall under the category of negligence—the failure to provide due care to patients (rather than an intentional action that violates the patient's bodily integrity).<sup>1</sup> In order to sue successfully, the patient must demonstrate five elements of negligence: *duty* (that the physician actually had the duty to inform), *breach of duty* (that the physician did not inform), *decision-causation* (that the patient would have made a different decision had she been informed), *injury* (that the patient suffered resulting physical injury),<sup>2</sup> and *injury-causation* (that the patient suffered a risk of which she was not informed or that an undisclosed alternative would have prevented injury). Each is addressed by jurisdictional laws, such as 'Right to Know' laws that make physicians legally liable for failing to provide their abortion patients with alternatives, ultrasounds, and other information.

However, the enforcement of these laws often requires the individual to sue. Unfortunately, this route is not often pursued by individuals for reasons such as guilt surrounding the abortion, lack of knowledge of legal rights, and financial constraints. Consequently, physicians have little incentive to inform their patients of the risks of induced abortion. Lawsuits based on failure to disclose the risks of abortion are rare in both the US and Canada. Recently, however, several suits have been brought against Planned Parenthood for failing to secure informed consent before performing an abortion.

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<sup>1</sup> Morgan v. MacPhail, 550 Pa. 202, 704 A.2d 617 (1997); Reibl v. Hughes, [1980] 2 S.C.R. 880.

<sup>2</sup> Faden RR and Beauchamp TL. A History and Theory of Informed Consent. Oxford: Oxford University Press, 1986: p. 29.