Does My Patient Understand What I Am About to Do? A Brief Overview of the Law on Informed Consent

This article was prepared and written by the BMS Group Healthcare Professionals Insurance Alliance legal team at Gowling WLG (Canada) LLP (Gowlings). CAO members who participate in the professional liability insurance program are eligible for 30 minutes of pro bono and inclusive professional liability claims defence services from Gowlings, one of Canada's largest and most highly recognized legal firms in the areas of medical defence and professional liability.

"Had I known this could have happened, I would never have agreed to the procedure."

Lawyers who defend healthcare professionals have heard this phrase from plaintiffs on countless occasions. In medico-legal actions, allegations that a plaintiff did not provide their informed consent to a procedure that ultimately caused or contributed to his/her injuries are common.

As healthcare providers, optometrists have a legal duty to obtain consent from their patients prior to any treatment. Failure to obtain consent to treatment from a patient exposes you to a potential civil claim and/or proceedings before your provincial regulator.

For consent to treatment to be considered valid, it must be "informed" consent. The patient must have been given an adequate explanation regarding the nature of the proposed investigation or treatment and its anticipated outcome, as well as the significant risks involved and any available alternatives. The information provided must be sufficient to enable the patient to reach an informed decision.

While there are general principles that underlie the doctrine of informed consent, each provincial regulatory body has its own policy guidelines and/or practice directions on informed consent. Additionally, some provinces have imposed a statutory obligation to obtain informed consent (e.g., the Health Care Consent Act in Ontario, and the Health Care Consent and Facilities Admission Act in British Columbia). Finally, in addition to any practice directions or statutory responsibilities, there is a common law duty to obtain informed consent to treatment. As a result, the information in this article is rather general in nature. It is strongly recommended that you contact your provincial regulator if you have any specific questions about the requirements in the jurisdiction where your practice is located.

In Canada, for patient consent to be valid, the following criteria must be satisfied:

1. The patient must have the capacity to consent to treatment.
2. The patient must receive a proper disclosure of information from the caregiver.
3. The authorization should be specific to the procedure to be performed.
4. The patient should have the opportunity to
   a. ask questions, and
   b. receive understandable answers.
5. The authorization obtained should be free of undue influence and coercion.
6. The authorization obtained should be free of any misrepresentation of material information.

1. The patient must have the capacity to consent to treatment

Consent can only be valid if the person providing it has the capacity to do so. The question of legal competency typically arises in situations where the patient is under the age of 18 or may have some type of mental illness. However, these factors alone should not determine competency (i.e., someone under the age of 18 or who has a cognitive deficit can provide valid consent to treatment).

When determining capacity, you must be confident that the person consenting to treatment can appreciate the nature and consequences of the consent discussion. If you have any doubt, seek consent from the parent, guardian, or substitute decision-maker. If there is any question as to whether the patient may not appreciate the nature and consequences of the consent discussion due to a language barrier, ensure that someone who can provide translation is present.

2. The patient must receive a proper disclosure of information from the caregiver

Your patient must understand the nature of the treatment and why it is being proposed. The patient must be advised of the risks associated with the treatment. A question typically arises regarding the extent to which you have to advise the patient of risks. In Canada, you are required to advise a patient about attendant, material and special risks. Attendant risks are those that are more common. Material risks are those that are less common, but serious should they occur. Material risks can differ between patients, so you should take into account your patient's particular health and condition when considering what risks are material. Finally, specific risks include those that are possible with respect to the specific patient.

In Canada, the test for determining whether the patient provided their informed consent is whether an average reasonable person, in the same position as the patient, would have consented to the treatment knowing the attendant, material and special risks.

In addition to the above disclosure, the patient should be advised of the treatment's potential impact on their lifestyle, and any economic considerations associated with receiving or refusing the proposed treatment. The patient must be provided information regarding any alternative treatments available and the risks and benefits of each. Finally, the patient needs to be informed as to the risks of refusing treatment.

3. The authorization should be specific to the procedure to be performed

The consent that a patient provides must relate to the specific treatment/procedure that you are proposing or recommending.

You do not have to obtain a patient's consent for every single step of a treatment plan. However, a blanket consent form, such as that typically signed by the patient at admission to a clinic or private practice, is not sufficient. If the method of treatment that you are proposing for a patient consists of a course of treatment over a period of time, it is not necessary for you to obtain a separate consent for each stage of the treatment. However, the entire course of treatment should be discussed with the patient.

If other individuals will be helping to treat the patient (i.e., students, optometric assistants, etc.), then you must ensure that the patient is advised of the fact that others will be involved in providing treatment and that the patient's consent authorizes their involvement.

4. The patient should have the opportunity to ask questions and receive understandable answers

The discussion regarding consent to treatment should not be a one-way monologue. Ideally, you should have a conversation with the patient during which they can ask questions and you can provide the information necessary to answer those questions.

5. The authorization obtained should be free of undue influence and coercion

You must ensure that your patient does not feel pressured or obligated to proceed with the proposed treatment. Not only should you ensure that the patient does not feel pressured to proceed by a third party, you must also ensure that you as the caregiver are not advocating the treatment plan or procedure in such a way that the patient feels they have no choice but to proceed.

6. The authorization obtained should be free of any misrepresentation of material information

While you are free to provide the patient with your opinion as to the best course of action, you should be as objec-

tive as possible when presenting the information to the patient. You must provide accurate and impartial information on all treatment alternatives.

DOCUMENTING THE CONSENT DISCUSSION

It is essential that you document the consent discussion that you have with your patient. While you may have a standard practice regarding the discussion you have with a patient prior to undertaking treatment, this does not eliminate the requirement to document your discussion. Ideally, you would discuss the proposed treatment plan with the patient, document the discussion, and then have the patient sign-off on the treatment plan. However, at a minimum, you must document the fact that you spoke to the patient, identified the treatment plan/procedure, advised them of the risks and benefits, and informed them of any alternatives. You should also note any questions that the patient had and whether the patient provided their consent.

In a medico-legal action where informed consent is an issue, the patient may claim that you did not provide them with all of the necessary information to make an informed decision. If you have documented your discussion, it should help to support your argument that you did provide all of the necessary information. A lack of documentation regarding a consent discussion increases the chances that a court or regulatory body will conclude that you did not provide the patient with the necessary information.

In conclusion, by incorporating a comprehensive informed consent policy into the standard procedures for your practice, you can reduce your exposure to liability and provide your patients with the information to which they are both legally and ethically entitled.

Please note that this commentary is not legal advice, and should not be relied upon as such. If you have any questions regarding informed consent as it relates to your practice, please contact the Canadian Association of Optometrists (CAO) and/or your provincial regulator. ●