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## **MEDICAL MALPRACTICE: IOWA'S INFORMED CONSENT LAW**

**Filed by the Iowa Supreme Court**

**June 15, 2018**

**Andersen, et al. v. Khanna, et al.**

**No. 14-1682**

[www.iowacourts.gov/courtcases/1202/embed/SupremeCourtOpinion](http://www.iowacourts.gov/courtcases/1202/embed/SupremeCourtOpinion)

**Factual and Procedural Background.** In 2004, Dr. Sohit Khanna performed the surgical Bentall heart procedure on Alan Andersen without any prior experience or training in the procedure. Complications from the procedure arose which resulted in Andersen being in a coma and receiving a second heart surgery and a heart transplant. Andersen and members of his family (Andersen) brought a lawsuit against Dr. Khanna and Dr. Khanna's employers (Dr. Khanna) after he underwent the heart procedure.

Andersen sued Dr. Khanna on the basis that Dr. Khanna was negligent and that he failed to obtain informed consent in two respects: 1) he failed to properly advise Andersen of the risks and dangers of the procedure due to the presurgery condition of his heart and 2) he failed to advise Andersen that he had limited experience in performing a Bentall heart procedure.

Dr. Khanna filed a motion for partial summary judgment on the informed consent claims, alleging a physician does not have a duty to disclose physician-specific characteristics or experience in obtaining a patient's informed consent. Dr. Khanna's motion did not explicitly mention the other informed consent allegation. The district court ruled in favor of Dr. Khanna, holding that there is no duty to disclose physician-specific characteristics or experience under Iowa's informed consent law. At that point in the case, the informed consent claim based on Dr. Khanna's lack of experience was removed as an issue in the case by the district court, but the informed consent claim based on Dr. Khanna's failure to advise Andersen of the risks and dangers of the procedure remained an issue in the case.

The following year, Dr. Henri Cuenoud, a defense expert witness, during a deposition, described Andersen's heart as being in poor condition prior to the surgery and stated that he would have quoted a higher risk of a bad outcome ("25% chance of not making it") to Andersen than Dr. Khanna did. Based on those grounds, Andersen filed a motion to reconsider the ruling on the motion for partial summary judgment on informed consent, and the district court granted the motion. The ruling allowed Andersen to present evidence of Dr. Khanna's awareness of Andersen's increased mortality risk and apprising Andersen of the mortality risk. In doing so, the ruling made clear that Andersen could pursue an informed-consent claim based on the increased mortality risk due to the presurgery condition of Andersen's heart. The same ruling also ruled on a motion in limine requesting the court bar any reference to or evidence of allegations of lack of informed consent and negligent credentialing, and that Dr. Khanna was not qualified. The district court sustained the motion as to negligent credentialing, and held that Dr. Khanna's qualifications could be pursued by Andersen in the context of a general negligence claim, along with the issue of informed consent.

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The first two trials resulted in mistrials. At the pretrial conference to the third and final trial, the parties disagreed whether the issue of informed consent based on Dr. Khanna's failure to disclose a material risk due to the presurgery condition of Andersen's heart was still an issue in the case. The district court's written order following the pretrial conference did not resolve the issue. Andersen did not present evidence of such a claim in his case-in-chief, and Dr. Khanna did not move for a directed verdict at that time. The district court held a discussion outside of the presence of the jury regarding informed consent and Dr. Cuenoud's potential testimony. The district court determined the informed consent issue had been closed and would not be reopened. After Dr. Cuenoud testified, Dr. Frazier Eales, an expert witness, testified for the defense. Andersen argued that his testimony opened the door to an informed-consent argument. The district court disagreed.

The district court did not instruct the jury on informed consent. The jury concluded Dr. Khanna was not negligent in performing the Bentall heart procedure. Andersen appealed the jury's decision. The Iowa Supreme Court (Court) transferred the case to the Iowa Court of Appeals (Court of Appeals). The Court of Appeals affirmed the district court. Andersen applied for further review. The Court granted the application for further review.

**Issues.** The Court considered four issues on appeal: (1) whether the district court erred in granting partial summary judgment when it held a physician does not have a duty to disclose information about the physician's lack of experience or training; (2) whether the district court erred when it did not allow Andersen to proceed on an informed-consent claim based on Dr. Khanna's failure to disclose Andersen's material risk due the condition of his heart prior to surgery; (3) whether the jury's finding that Dr. Khanna was not negligent precludes Andersen's informed-consent claims; and (4) whether the district court erred when it denied Andersen's request to amend a jury instruction to include an additional, separate specification of negligence.

**Analysis.** The Court quoted *Pauscher v. Iowa Methodist Medical Center*, 408 N.W.2d 355, 350 (Iowa 1987), to state "Under the patient rule, 'the physician's duty to disclose is measured by the patient's need to have access to all information material to making a truly informed and intelligent decision concerning the proposed medical procedure.'" The Court stated that the element of an informed consent claim at issue in this case was the existence of a material risk or information unknown to the patient. The Court disagreed with the district court's finding as a matter of law that a physician's lack of experience or training is never material to a patient's decision to submit to a medical procedure. The Court explained there should not be a categorical exclusion of a particular type of information, such as a physician's personal characteristics, but rather a district court must apply the objective reasonable patient standard to the undisclosed information in the particular case to determine if the failure to disclose that information breached the physician's duty.

The Court rejected Dr. Khanna's "bright line" approach for several reasons. First, the Court stated the duty to disclose personal information is imposed only when it is material. Second, Iowa Code section 147.137 creates a presumption of informed consent when there is a signed writing addressing the enumerated subjects, but this informed consent statute does not preempt common law. Dr. Khanna also asserted that expanding the duty to disclose would lead to several problems. The Court stated that physicians would not be required to provide statistics of outcomes, but rather information about experience or training, just as expert witnesses do at trial. The Court rejected as unpersuasive arguments and court cases cited by Dr. Khanna that restrictively interpret the informed-consent doctrine.

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The Court concluded that a physician's experience and training can be material. First, lack of experience or training can lead to complications. Second, evidence of a physician's training and experience could be relevant because it could indicate the physician failed to disclose material information. Finally, the Court reasoned that requiring physicians to disclose their experience and training on a particular procedure will encourage physicians to gain as much training and experience with the procedure as possible.

The Court concluded that the jurisprudence which it found more persuasive was the jurisprudence that interpreted informed-consent doctrines in a broader fashion and it found those to be more in line with Iowa's informed-consent doctrine. The Court reviewed cases which cited a physician's experience and training and cases which cited other personal information about a physician. The Court agreed with other courts that whether a physician's particular characteristics are material will depend on the facts and circumstances of the case and whether those facts and circumstances create or increase a material risk to the patient. Like other courts, the Court concluded that this is usually a jury question.

The Court reasoned that Dr. Khanna's failure to disclose the risk of the surgery due to the presurgery condition of Andersen's heart was still an issue in the case during the trial at the time of Dr. Cuenoud's testimony. As such, admission of the testimony would have been relevant and not unduly prejudicial. Everyone at trial, including the judge, knew that evidence supporting this claim was to come from Dr. Cuenoud. When the district court ruled during the third and final trial that Dr. Cuenoud's testimony on that topic could not be admitted into evidence, the Court held the district court abused its discretion. The Court held that Andersen should have been allowed to rely on the cross-examination testimony of Dr. Cuenoud to support his informed consent claim that Dr. Khanna failed to disclose information about the risk of surgery due to the presurgery condition of Andersen's heart. The Court concluded the district court misapplied the prior rulings of the district court when it precluded Andersen from soliciting testimony about informed consent from Dr. Cuenoud and, in doing so, the district court abused its discretion. This ruling, the Court held, was prejudicial to Andersen.

The Court reasoned that other courts and its own case law were persuasive in holding that claims for negligence and informed consent are independent claims for relief. A physician need not violate a standard of care or otherwise be negligent in order for a patient to recover under a theory of informed consent. The Court stated that with regard to the informed-consent claim about the presurgery condition of Andersen's heart, Dr. Khanna should have disclosed the exact injury Andersen suffered, regardless of whether Dr. Khanna performed the procedure according to the applicable standard of care. The Court stated that with regard to Dr. Khanna's lack of experience, Andersen should have the opportunity to develop the theory of injury and damages before the claims are summarily dismissed.

The Court reasoned that the district court did not err when it refused to give a specific jury instruction on negligence because the district court instructed the jury to consider Dr. Khanna's training and experience when considering each specification of negligence. The jury could use Dr. Khanna's lack of training or experience to help the Court decide if he was negligent. However, even if Dr. Khanna was unqualified to perform the Bentall heart procedure, as long as he did not breach the standard of care of a qualified cardiovascular surgeon, he could not be found negligent.

**Majority Opinion by Justice Wiggins (Joined by Justices Hecht, Appel, and Zager).** The Court held that the district court erred in granting partial summary judgment when it held a physician does not have a duty to disclose information about a physician's lack of experience or training prior to performing a Bentall heart procedure on a patient because that information may be deemed to be material by

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a reasonable person. The Court held that the district court misapplied the law of the case when it prevented Andersen from putting forward evidence from Dr. Cuenoud to support his informed consent claim, and in doing so, the district court abused its discretion. The Court also held that negligence and informed consent are alternative forms of relief and as such, the finding by the jury that Dr. Khanna was not negligent did not preclude Andersen's informed consent claims. Finally, the Court held that the district court did not err when it refused to give a specific jury instruction on negligence.

**Disposition.** The Court vacated the decision of the Court of Appeals, affirmed the district court's judgment as to Andersen's specific negligence claims, reversed the district court's judgments removing Andersen's informed consent claims from the case, and remanded the case to the district court to proceed on the informed consent claims.

**Concurrence in Part and Dissent in Part by Justice Waterman (Joined by Chief Justice Cady and Justice Mansfield).** Justice Waterman dissented with regard to the part of the majority opinion that held that the jury verdict finding for Dr. Khanna that he was not negligent did not preclude Andersen's informed consent claims. Justice Waterman concluded that a jury verdict of no negligence precludes recovery for nondisclosure of Dr. Khanna's inexperience. Justice Waterman reasoned that the court cases cited by the majority and those cited by the dissent hold that the undisclosed risk must materialize into injury and it must be causally related to injury in order for there to be liability. Justice Waterman reasoned that the risk presented by Dr. Khanna's inexperience was that he might fall below the standard of care performing the surgery, but the jury held in the negligence ruling that he did not. As such, Justice Waterman reasoned that the risk never materialized which prevented an informed-consent claim.

Justice Waterman also dissented from the majority's opinion which concluded that Dr. Khanna had a duty to disclose his inexperience with a specific procedure. Justice Waterman reasoned that the legislature specified the disclosure requirements for informed consent in Iowa Code section 147.137 and stated he would not add requirements that the legislature chose to omit. Justice Waterman stated that the statute does not impose a requirement to disclose physician-specific information including success rates or the number of times a physician has performed a procedure. Justice Waterman discussed cases from across the country and concluded that most courts reject a requirement for a physician to disclose personal experience in an informed consent case. Finally, Justice Waterman reasoned that the majority's decision was flawed for multiple practical reasons and urged the legislature to overrule the decision.

*LSA Monitor:* Amber Shanahan-Fricke, Legal Services, 515.725.7354