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# THE IMPACT OF THE TEXAS MEDICAL LIABILITY AND INSURANCE IMPROVEMENT ACT ON INFORMED CONSENT RECOVERY IN MEDICAL MALPRACTICE LITIGATION

*Frank W. Elliott\**

Subchapter F of the Medical Liability and Insurance Improvement Act (the Act)<sup>1</sup> refers to causes of action against physicians and health care providers for their failure to make reasonable disclosures of risks and hazards incident to medical care or surgical procedures. Prior to this statute, the plaintiff

had the burden to prove by expert medical evidence what a reasonable medical practitioner of the same school and same or similar community under the same or similar circumstances would have disclosed to his patient about the risks incident to a proposed diagnosis or treatment, that the physician departed from that standard, causation, and damages. The action is one of malpractice for a physician's failure to conform to medical standards in obtaining the patient's consent. Regardless of what some earlier informed consent cases suggest, such an action need not be pleaded as one for assault and battery.<sup>2</sup>

Section 6.02 of the Act provides that "the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent."<sup>3</sup> The Act does not change the proof requirements for breach, causation, and damages, but slight substantive change is made in the general duty of disclosure. However, the remainder of the subchapter makes a significant change in the method of establishing what should be disclosed.

## THE TEXAS MEDICAL DISCLOSURE PANEL

Under the Act, the Texas Medical Disclosure Panel, which consists of three attorneys and six physicians, is charged with the re-

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1. TEX. REV. CIV. STAT. ANN. art. 4590i, Subch. F (Vernon Supp. 1978-1979).
2. *Wilson v. Scott*, 412 S.W.2d 299, 302 (Tex. 1967).
3. TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.02 (Vernon Supp. 1978-1979).

sponsibility of determining which "risks or hazards" should be disclosed, and the extent of the disclosure.<sup>4</sup> The Panel has the staggering task of identifying and examining all medical treatments and surgical procedures in which physicians and health care providers may be involved.<sup>5</sup> The Panel then must determine which treatments and procedures require disclosure and those which do not.<sup>6</sup>

For those treatments and procedures on the required disclosure list, the degree of disclosure required and the form of the disclosure are to be established.<sup>7</sup> The lists with written explanations of the degree and form of the required disclosure are to be published in the Texas Register.<sup>8</sup> The lists are to be supplemented with newly developed medical treatments and surgical procedures, and by inference, the Panel may alter or modify disclosure requirements on the original lists.<sup>9</sup> These lists and explanations provide the basis for the duty of disclosure of physicians and health care providers.

#### DUTY OF PHYSICIAN OR HEALTH CARE PROVIDER

The general duty of disclosure of a physician or health care provider is found in Section 6.02 of the Act. That duty is to "disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent."<sup>10</sup> However, whether that duty was performed is to be determined by the specific duty of disclosure as it is described in Section 6.05. If the medical treatment or surgical procedure appears on the Panel's required disclosure list, then the physician or health care provider *must* disclose the risks and hazards involved. The final sentence in the section provides that "[a] physician or health care provider shall be considered to have complied with the requirements of this *section* if disclosure is made as provided in Section 6.06 of this subchapter."<sup>11</sup>

Section 6.06 provides the requirements for an effective consent to a treatment or procedure.<sup>12</sup> Considered together, Sections 6.05

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4. *Id.* § 6.03.

5. *Id.* § 6.04(a).

6. *Id.*

7. *Id.* § 6.04(b).

8. *Id.* § 6.04(c).

9. *Id.* § 6.04(d).

10. *Id.* § 6.02.

11. *Id.* § 6.05.

12. *Id.* § 6.06.

Consent to medical care that appears on the panel's list requiring disclosure shall be considered effective under this subchapter if it is given in writing, signed

and 6.06 appear to establish that the duty of the physician or health care provider is to disclose the risks and hazards of procedures on the required disclosure lists. To have an effective consent the disclosure must be written, it must be in the form and to the extent required by the Panel, and the writing must be signed by the patient or his representative and a witness. However, as will be discussed, the extent of this disclosure duty is questionable because of the language concerning presumptions in Section 6.07, and the legislative history of that language. Because of these factors, the interpretation of the statutory duty is difficult if not impossible.

As the statute was initially drafted, the language of Section 6.07(a)(1) provided that a disclosure in compliance with Section 6.06 or the failure to disclose risks of a procedure on the no-requirement list "shall be *deemed to constitute compliance as a matter of law with the requirements of [Section 6.06] of the article.*"<sup>13</sup> When the legislation was finally enacted, this language had been changed to "shall create a rebuttable presumption that the requirements of Sections 6.05 and 6.06 of this subchapter have been complied with . . . ."<sup>14</sup>

There are two problems with Section 6.07(a)(1). First, Section 6.06 provides that consent shall be effective under the subchapter if disclosure is in writing, in proper form, properly signed and witnessed. Therefore, Section 6.07(a)(1) is redundant with respect to actual disclosure, and so would have effect only with respect to the case in which the Panel says no disclosure is necessary. In addition, Section 6.07(a)(1) as originally written provided that disclosure made as required by Section 6.06 would be deemed compliance with Section 6.06. In other words, if disclosure is made in writing, in the proper form, properly signed, and witnessed, it would be deemed compliance with the requirement to make the disclosure in writing, and satisfy the duty of disclosure. Of course, if no disclosure were required, and none was made, then under the original statutory language, that also would be deemed to be compliance with the disclosure requirements. This would mean that compliance with Section 6.06 created an irrebuttable presumption that the duty of disclosure had been satisfied. In an advisory letter the Texas Attor-

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by the patient or a person authorized to give the consent and by a competent witness, and if the written consent specifically states the risks and hazards that are involved in the medical care or surgical procedure in the form and to the degree required by the panel . . . .

*Id.*

13. TEX. H.R.J. 1029 (1977) (emphasis added).

14. TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 6.05, 6.06 (Vernon Supp. 1978-1979) (emphasis added).

ney General concluded that this irrebuttable presumption violated the guarantee of trial by jury.<sup>15</sup> In response to this opinion, the language of Section 6.07(a)(1) was changed to create a rebuttable presumption of compliance rather than compliance as a matter of law. However, the language of Section 6.06 that consent "shall be considered effective" was not changed.<sup>16</sup>

Under Section 6.07(a)(1), if the physician or health care provider discloses to the patient, or person authorized to consent for the patient, the risks and hazards involved in the care or procedure that appears on the required disclosure list, then first, the fact of the disclosure and possibly the fact that the procedure or treatment is on the required disclosure list are admissible in evidence. Second, there is a rebuttable presumption that the physician or health care provider has disclosed to the patient, or person authorized to consent for the patient, the risks and hazards involved in the care or procedure that appears on the required disclosure list, and there is a presumption that the disclosure was made in writing, in the form, and to the degree required by the Panel, was properly signed, and was witnessed. Finally, the presumption shall be included in the charge to the jury.

In addition, under Section 6.07,<sup>17</sup> if the care or procedure appears on the no-requirement list and there has been no disclosure, then either fact is admissible in evidence. Again, there is a rebuttable presumption that the physician or health care provider has dis-

15. TEX. ATT'Y GEN. LA-135 (1977):

Since the utilization of the signed form would constitute consent as a matter of law, the jury would be unable to inquire into the actual validity of the consent. Presumably the form could be signed by a person who could not read or by an individual who was not competent to understand the document. Yet the statute would make such consent effective without further inquiry. What has been a fact issue would be taken from the jury's consideration and would be transformed into an irrebuttable presumption. Where the statute makes signature on the form conclusive on the issue of consent, it would be a denial of the constitutional right to have the issue determined by a jury. *Floock v. State*, 30 S.W. 794, 795-96 (Tex. Crim. App. 1895).

*Id.*

Whether or not one agrees that the precedent by way of dicta in a criminal case applies to this situation, the Attorney General has spoken.

16. TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.06 (Vernon Supp. 1978-1979).

17. TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.07(a)(1) (Vernon Supp. 1978-1979). Section 6.07(a)(1) reads:

[F]ailure to disclose based on inclusion of any medical care or surgical procedure on the panel's list for which disclosure is not required shall be admissible in evidence and shall create a rebuttable presumption that the requirements of Sections 6.05 and 6.06 of this subchapter have been complied with and this presumption shall be included in the charge to the jury.

*Id.*

closed to the patient, or person authorized to consent for the patient, the risks and hazards involved in the care or procedure should it appear on the required disclosure list, and also that the disclosure was made in writing, in the form, and to the degree required by the Panel, was properly signed, and was witnessed. The section also provides that the presumption shall be included in the charge to the jury. Although inconsistent and illogical, the failure to disclose the risks and hazards incident to procedures on the no-requirement list in effect raises a presumption that disclosure was made in the proper form.

Section 6.07(a)(2)<sup>18</sup> is rather straightforward in comparison to Section 6.07(a)(1). Under Section 6.07(a)(2) the failure to disclose risks and hazards incident to any medical care on the required disclosure list is admissible in evidence. However, it is again unclear whether the fact that the procedure was on the required disclosure list is also admissible. Further, this section creates a rebuttable presumption that the failure to disclose was negligent. Finally, the presumption of negligence shall be included in the charge to the jury. The statutory proviso that "failure to disclose may be found not to be negligent if there was an emergency or if for some other reason it was not medically feasible to make a disclosure of the kind that would otherwise have been negligence"<sup>19</sup> is unclear. The failure to disclose may not be negligence in the case of an emergency treatment. However, the failure to disclose may also not be negligence if there is some reason why it was not medically feasible to make a disclosure that otherwise would have been required. This excusable nondisclosure must depend in each case on the physician's judgment that the disclosure would generate stress and be detrimental to the patient's health.

In summary, the subchapter applies to suits against physicians or health care providers for liability claims based on the failure adequately to disclose the risks and hazards incident to medical care rendered by the physician or health care provider. Negligence is the only theory of recovery, and there is liability for the failure to disclose risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.<sup>20</sup> Whether the medical care requires a disclosure of risks and hazards is to be decided by a panel.<sup>21</sup>

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18. *Id.* § 6.07(a)(2).

19. *Id.*

20. *Id.* § 6.02.

21. *Id.* §§ 6.03, 6.04.

If the care or procedure is on the required disclosure list, the physician or health care provider has a duty to disclose risks and hazards prior to obtaining the patient's consent.<sup>22</sup> The written disclosure must state specifically the risks and hazards involved, and the patient's signed consent must be witnessed.<sup>23</sup> A written instrument conforming to those requirements is admissible in evidence, and it creates a rebuttable presumption that the duty of disclosure has been performed. Evidence of forgery, incompetency, or illiteracy of the patient, or other evidence relevant to invalidity of the consent, would rebut the presumption of adequate disclosure.<sup>24</sup>

If the care or procedure is on the required disclosure list and the statutory disclosure requirements are not met, the fact that disclosure is required is admissible in evidence and creates a rebuttable presumption of negligence. The presumption may be rebutted by evidence of an emergency or medical reason for nondisclosure.<sup>25</sup> However, if the care or procedure is on the no-requirement list, then there is no duty to disclose any risks or hazards.<sup>26</sup> Finally, if the care or procedure is not found on either list, then the statute does not apply, and the common law rules apply.<sup>27</sup>

#### PRESUMPTION

It is important to examine the effect of the "presumptions" created by this subchapter. Texas cases have established that the use of presumptions is only a device for placing the burden of producing evidence.<sup>28</sup> In the most common form of presumption, once the party in whose favor the presumption is to operate has established the basic fact that gives rise to presumed facts, then the burden of producing evidence to disprove the presumed facts is upon the other party. If no rebuttal evidence is produced, the presumed fact is established. If evidence disproving the presumed fact is produced, then the presumption vanishes, and the original party must prove the presumed fact by evidence as though the presumption had never existed. The evidence that established the basic fact may also tend to prove the presumed fact. However, if it does not,

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22. *Id.* § 6.05.

23. *Id.* § 6.06.

24. *Id.* § 6.07(a)(1).

25. *Id.* § 6.07(a)(2).

26. *Id.* §§ 6.05, 6.07(a)(1).

27. *Id.* § 6.07(b).

28. See *Robertson Tank Lines, Inc. v. Van Cleave*, 468 S.W.2d 354 (Tex. 1971); ELLIOTT, *Annual Survey of Texas Law: Evidence*, 26 Sw. L.J. 185, 187 (1972).

and no further evidence is introduced tending to prove the presumed fact, then there is "no evidence" of the presumed fact, and no issues would be submitted.

Similar to the presumption is the *res ipsa loquitur* inference. In *res ipsa loquitur*, the initial facts, when established, give rise to an inference of negligence. Regardless of the evidence introduced to rebut negligence, the initial facts are sufficient for *res ipsa* to be submitted to the jury. The jury may infer negligence from the existence of the initial facts.<sup>29</sup> The "presumptions" that appear in Section 6.07 do not fit into either the form of the general presumption or *res ipsa loquitur* inference. The jury is told of the presumption of disclosure. However, in some situations the presumption appears to do more than place the burden of producing evidence. Even if considered as analogous to a *res ipsa* inference, there is some effect on the burden of persuasion.

The two presumptions created by Section 6.07 have different applications. The first presumption is that created under Section 6.07(a)(1). The basic fact necessary for this presumption is the existence of the written consent required by Section 6.06. When that consent is in evidence, the presumption is raised that the duty of disclosure has been performed, or that there was no negligence. Because the plaintiff has the burden of producing evidence of the defendant's negligent nondisclosure, it is unusual that the burden of producing the basic evidence to raise the presumption of disclosure should be on the defendant. Perhaps this results from the fact that disclosure and consent were at one time affirmative defenses to actions for assault and battery, the original theories used in medical malpractice cases.

In any event, it appears that evidence that could rebut the presumption of disclosure under Section 6.07(a)(1) is evidence that would attack the validity of the consent. If the plaintiff fails to rebut the presumed validity of the written consent, then there is no issue raised for submission to the jury, and a directed verdict for the defendant should be entered. However, the plaintiff may rebut this presumption by submitting evidence of the incompetency of the signing patient or witness, by showing that the consent form was not read, by showing that there was no opportunity to read the paper, or by submitting some other evidence that tends to show a lack of the disclosure intended under Section 6.07.

In Texas, the introduction of rebuttal evidence would cause the

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29. See *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245 (Tex. 1974).



presumption to disappear. However, because the plaintiff has the burden of persuasion on the issue of negligence, he still must prove that no informed consent was given or that the defendant failed to disclose the risks and hazards involved. This creates a problem of how to include the presumption of disclosure in the charge to the jury. Perhaps the only way this can be done is by an instruction to the jury on the weight of the evidence.<sup>30</sup>

The second presumption to be considered is found in Section 6.07(a)(2). The basic facts of this presumption are that the prescribed care or procedure is found on the required disclosure list and that the required disclosure was not made. When those facts are established by the plaintiff, the presumption is raised that the defendant was negligent in failing to disclose. To rebut this presumption the defendant must produce evidence of an emergency, or of circumstances indicating the medical infeasibility of disclosure, or of the inadvisability of disclosure because of the patient's condition. If no rebuttal evidence is produced, there is no negligence issue for submission to the jury, and negligence is established as a matter of law. However, if there is rebuttal evidence, the method of submission of the negligence issue is unclear. In this instance, the issue is not, as it was under Section 6.07(a)(1), whether there was a failure to disclose; rather the issue is whether the admitted failure to disclose was negligent.<sup>31</sup>

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30. The issue to be presented to the jury in this instance would be whether the defendant failed to disclose the risks and hazards involved. The jury instruction would be: You are instructed that because there is evidence that the disclosure of the risks and hazards of the procedure was made in writing, in the form and to the degree established by the Medical Disclosure Panel, and because there is evidence that consent to the care or procedure was given in the same writing, signed by the patient [or one authorized to sign for the patient], and by a witness, you must find that the defendant did disclose the risks and hazards involved unless the plaintiff has established a failure properly to disclose by a preponderance of the evidence.

31. The special issue could be framed thus: Do you find from a preponderance of the evidence that the failure to disclose the risks and hazards involved was negligence?

The term "NEGLIGENCE," as used in this issue, means the failure to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.

You are instructed that the risks and hazards involved were required to be disclosed by the Medical Disclosure Panel. Therefore, you may find that the failure to disclose was negligent. However, the failure to disclose may be found not to be negligent if the defendant were confronted by an emergency which arose suddenly, unexpectedly and not proximately caused by negligence on the part of the defendant, and which to a reasonable physician required immediate action without time for explanation. [or] However the failure to disclose may be found not to be negligent if because of [state some other reason] it was not medically feasible to make a disclosure of the proper kind.

## CONCLUSION

The Texas Medical Liability and Insurance Improvement Act<sup>32</sup> provides the mechanism for a Panel determination of informed consent standards. The only exceptions to these statutory standards will be in instances in which there is an emergency, medical reason for nondisclosure, or procedures for which the Panel has not determined the informed consent standards. Although it would appear that both the medical and legal professions would benefit from a standardization of informed consent requirements, it should also be noted that there is a corresponding restriction in the application of a medical malpractice cause of action based on the lack of informed consent. In addition, the presumptions of adequate disclosure that arise from statutory compliance need further clarification if the Act is to effectuate the legislative intent.

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32. TEX. REV. CIV. STAT. ANN. art. 4590i, Subch. F (Vernon Supp. 1978-1979).

