FEATURE

HOW MUCH IS ENOUGH? PATIENTS' RIGHT-TO-KNOW VERSUS PRIVACY RIGHTS OF HEALTHCARE PROVIDERS

by Cynthia Heinz

Physicians and hospital administrators will no doubt find the case of *Halkyard v. Mathew*[1] of interest. This case dealt with the competing interests of a patient's right-to-know and a healthcare provider's right to privacy. In that case, a woman died following a hysterectomy performed by the defendant physician. The woman's husband sued the physician for negligence and battery and claimed that the informed consent requirements had not been met because the physician failed to disclose to the patient that he suffered from epilepsy. The physician did not suffer an epileptic seizure during the operation, nor was his ability to perform the operation impaired by the medication he was taking. Notwithstanding these facts, the plaintiff argued that lack of disclosure vitiated the patient's consent to the hysterectomy and that the consent was void for misrepresentation and fraud.

The question before the court was whether the doctrine of informed consent requires disclosure of a physician's medical condition. Based on the decision of the court, there may be a duty of care on a physician to disclose his or her medical condition if that condition poses a material risk to the physician's patients.

The hospital was also named in the lawsuit, but the claim against the hospital was resolved prior to trial. Although the court did not consider the issue of the hospital's liability, the lower court noted, as an aside, that the hospital had a duty to determine whether physicians performing surgery at the hospital were incapable of doing so. This duty suggests that there may be an onus on hospitals to make inquiries with respect to the health of their medical staff and whether they suffer from any latent medical conditions that would affect their ability to provide healthcare services.

The issues of the case as they relate specifically to the duty of physicians are discussed below.

(a) Battery v. Negligence

The Alberta Court of Queen's Bench in *Halkyard* held that nondisclosure of a physician's medical condition may not be characterized as a medical battery.[2] Both the Alberta Court of Queen's Bench and the Alberta Court of Appeal adopted the Supreme Court of Canada's restrictive interpretation of medical battery set out in *Reibl v. Hughes*.[3] In *Reibl*, the court held that battery claims may succeed only in cases where treatment or surgery was performed without the patient's consent.[4] Conversely, the tort of medical negligence involves cases where a patient consented to a particular medical treatment but not all risks of such treatment were fully disclosed.

Accordingly, failure to disclose a physician's medical condition must therefore be considered within the framework of negligence rather than battery law. The doctrine of informed consent allows a claim to be made on the basis of medical negligence where the following criteria are satisfied. First, it must be established that the physician failed in his or her duty to disclose a "material" or "special" risk. Second, it must be established that the physician's failure to disclose caused the patient's damages. This determination involves the following two steps:

- The plaintiff must establish on a "modified objective test" that, if informed of all material risks, the plaintiff would not have consented to the treatment.
- There must be a causal connection between the non-disclosed risk and the injury suffered.

(b) Nature and Extent of the Duty of Disclosure

The court in *Halkyard* considered the Supreme Court of Canada decision in *Hopp v. Lepp* in which the court authorized the disclosure necessary to obtain informed consent:

> [A] surgeon, generally, should answer any specific questions posed by the patient as to the risks involved and should, without being questioned, disclose to him the nature of the proposed operation, its gravity, *any material risks and any special or unusual risks attendant upon the performance of the operation.* However, having said that, it should be added that the scope of the duty of disclosure and whether or not it has been breached are matters which must be decided in relation to the circumstances of each particular case. [Emphasis added][5]

Materiality of a risk factor depends on both the potential severity of an injury and its probability. The Supreme Court of Canada in *Hopp* held that if a certain risk is a mere possibility which ordinarily need not be disclosed, but its occurrence carries serious consequences such as paralysis or death, it should be regarded as a material risk requiring disclosure.[6]

In considering all the evidence, the court found that the physician was not obligated to disclose his personal medical history to his patient. The evidence put forward at trial showed that the physician's condition was being controlled by medication and that there

was no epileptic seizure in the operating room at the time of surgery.[7]

(c) Causation

Where it is shown that a physician has failed in his or her duty of disclosure, the circumstances of each case must further be examined in order to satisfy the two-staged causation test of negligence. First, courts employ the "modified objective test" set out in *Reibl*, and affirmed in *Arndt v. Smith*,[8] which asks whether a reasonable person in the circumstances of the plaintiff would have consented to the proposed treatment if all the risks had been disclosed.[9] This test is referred to as a modified objective test because it employs a reasonable or prudent patient standard, but also requires the particular fears or concerns of such a patient to be taken into consideration. A patient's fears, however, must themselves be reasonably based and further:

> …fears which are not related to the material risks which should have been but were not disclosed would not be causative factors… In short, although account must be taken of a patient's particular position, a position which will vary with the patient, it must be objectively assessed in terms of reasonableness.[10]

Once the first stage of causation has been satisfied, the second stage requires that the potential harm not disclosed by a physician actually materializes and injures the patient. Basic principles of negligence law require a breach of duty that proximately causes a legally recognized injury.

The causation requirements outlined above raise some uncertainty as to whether conditions personal to the physician will be captured under this doctrine. As noted above, the Supreme Court of Canada stated that causative factors do not include "fears which are not related to the material risks." However, the Alberta Court of Appeal in *Halkyard* suggested that a physician's own medical risk factors may be considered as material facts:

> …we do not accept that the law in Canada imposes any liability in negligence on a doctor who fails to disclose his personal medical problems in a case where those medical problems cause no harm to the patient. *When harm is caused by the lack of disclosure, liability in negligence may arise.* [Emphasis added][11]

… failure to disclose a physician's medical condition must therefore be considered within the framework of negligence rather than battery law. The doctrine of informed consent allows a claim to be made on the basis of medical negligence …

Given that no harm was caused to the patient from the failure to disclose, the Alberta Court of Appeal did not decide the issue of whether a physician was obligated to disclose his or her medical condition. The Alberta Court of Appeal held as follows:

> Even assuming (without deciding) that a duty of care exists which requires disclosure of the personal medical condition of the physician, it is clear from both *Reibl* and *Arndt*, as well as the general law of negligence, that there is no liability unless the loss is caused by the failure to disclose or inform.[12]

Accordingly, it is clear from Halkyard that there is currently no duty on a physician to disclose his or her medical condition where such medical condition does not pose a material risk to the treatment being provided by the physician. A duty may be imposed and liability in negligence may arise where there is a causal connection between the medical condition of the physician and the harm caused to the patient.

Some commentators have emphasized the policy consequences of imposing a duty on physicians to disclose their personal medical conditions prior to obtaining consent to treatment. The trial court in *Halkyard* paid particular attention to the article written by Barry Furrow, an excerpt of which follows:

> A better way to frame the risks for the courts is to think of such status risks as better regulated by threshold screening of providers for staff privileges, by institutional policies to promote safer healthcare delivery, and by use of tort law to set a standard of unreasonable risk creation. Methods of achieving such threshold screenings to protect patients against high-risk providers include staff privilege limitations, the threat of a negligence suit against a provider who is truly a "typhoid surgeon", and professional self-restraint by physicians who become aware that they are high-risk providers.
>
> Informed consent law embodies the social policy that unqualified practitioners present socially impermissible risks. If unqualified, handicapped, alcoholic, or HIV infected healthcare professionals create an unacceptable level of risk to patients, they should be barred from practice. But disclosure of their "wounds" makes no sense. This is a distortion of the purpose of the informed consent doctrine, destroying provider privacy while improperly relieving state authorities and hospitals of their burden to monitor their physicians and set proper and reasonable standards for practice. Informed consent doctrine is ill suited to carry such additional baggage- it is unfair to providers, moves doctrine into an area of risk with no clear stopping point or bright line, and is simply not justified by a risk analysis.[13]

After quoting extensively in its judgement from Furrow's article, the trial court in *Halkyard* stated:

> I am satisfied on the basis of the evidence I have heard and the cases and articles I have read that Dr. Mathew was not obligated to disclose to Mrs. Halkyard his personal medical history. According to Dr. Mathew and his own doctors, by reason of the letters put in evidence, the medication he was on kept his epilepsy under control. There was no epileptic seizure in the operating room at the time of the surgery he performed on Mrs. Halkyard. *It is the duty of Dr. Mathew's personal physician to determine whether Dr. Mathew can continue doing surgery. It is also the duty of the hospital to determine whether Dr. Mathew or any other doctor performing surgery in its hospital can continue his or her practice in that hospital if the doctor, for whatever reason, is not capable of performing surgery. It is also the duty of any doctor to determine if he or she can continue their medical responsibilities when a physical or mental incapacity exists.* [Emphasis added][14]

Another commentator argues: "[t]he privacy rights of the physician about his or her own health must also be considered along with the potential for discrimination against persons with illnesses or disabilities that do not, in reality, pose a risk to the patients' health.[15] She proposes that

> [t]he most satisfactory resolution is to continue to require disclosure of "material" and "special risks" that are referable to the treatment itself. A patient is entitled to assume his or her physician is competent and skilled and will perform to the standards of the profession. Only if a physician's personal factors actually intervene in the treatment and cause injury to the patient, is an action in negligence an appropriate avenue for addressing liability.[16]

… there is currently no duty on a physician to disclose his or her medical condition where such medical condition does not pose a material risk to the treatment being provided by the physician. A duty may be imposed and liability in negligence may arise where there is a causal connection between the medical condition of the physician and the harm caused to the patient.

It appears that a proper application of basic negligence principles dictates the same results favoured by the policy commentators above. Negligence requires a duty, a breach of that duty and a causal link between the breach and the ensuing harm. If these criteria are applied to informed consent cases involving medical risk factors of healthcare providers, then there will be a basis for liability only where the risk of harm is objectively reasonable and where that risk materializes into actual harm. This approach appears to satisfy policy considerations by providing an appropriate balance between the privacy rights of healthcare providers and the patients' right-to-know.

Notes

1 *Halkyard v. Mathew* (1998), 231 AR 281 (QB), aff'd (2001), 277 AR 373 (CA) [hereinafter *Halkyard*].

2 *Ibid.*, at para. 9.

3 *Reibl v. Hughes*, [1980] 2 SCR 880 at 890 [hereinafter *Reibl*].

4 *Ibid.*

5 *Hopp v. Lepp*, [1980] 2 SCR 192 at 210 [hereinafter *Hopp*].

6 *Ibid.*

7 *Halkyard*, *supra* note 1, at para 18.

8 *Arndt v. Smith*, [1997] 2 SCR 539 [hereinafter *Arndt*].

9 *Ibid.*, at 554.

10 *Reibl*, *supra* note 3, at 900; as affirmed in *Arndt*, *ibid.*, at 547.

11 *Halkyard*, *supra* note 1, at para. 11.

12 *Halkyard*, *supra* note 1, at para. 9.

13 Barry R. Furrow, "Must Physicians Review Their Wounds" (1996), 5 *Cambridge Quarterly of Health Care Ethics*, at p. 211.

14 *Halkyard*, *supra* note 1, at para. 18.

15 Brenda Johnson, "Recent Decisions: Must Doctors Disclose Their Own Personal Risk Factors: Halkyard v. Matthew" (2001), 10 *Health L. Rev.* No. 1, at para. 16.

16 *Ibid*., at para 18.

With permission.

Cynthia Heinz is in the Health Law Group of Fasken Martineau DuMoulin LLP. She can be reached at (416) 366-8381 or **cheinz@tor.fasken.com**. Former Fasken Martineau articling student **Sara Wells** assisted with this article.