

PROFESSIONAL ISSUES

Informed consent at heart of New York lawsuit

In the Courts. By [Bonnie Booth](#), AMNews contributor. March 10, 2008.

When the *New York Times* "City Blog" carried an item earlier this year about a lawsuit filed against New York-Presbyterian Hospital by a Brooklyn construction worker alleging he was subject to a rectal exam that he vehemently opposed, the blogosphere took notice.

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The thought of being subject to such an invasive procedure with little or no regard for one's wishes struck many blog readers as scary enough. The idea of being sedated and held down so physicians could perform it, as the lawsuit alleges, seemed a terrifying scenario, indeed.

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But under the facts as alleged in this lawsuit, was it medical malpractice? Barring a last minute settlement, that's the question a jury will take up this month in the New York State Supreme Court in Manhattan.

According to court documents, Brian Persaud was hit in the head and knocked to the ground by a wooden beam in May 2003, while working at a construction site. He was transported to New York-Presbyterian Hospital by ambulance and was fully conscious and alert when he arrived.

He was seen by an on-duty emergency department physician who told him he would be receiving a rectal examination to determine whether his spinal cord was injured. Persaud refused the procedure. He became agitated and struck a hospital employee. He was then restrained, sedated and temporarily intubated while doctors performed the procedure, according to court documents.

Following the procedure, when Persaud still didn't settle down, the hospital called the city police department. When officers arrived, Persaud was handcuffed to a bed, arrested and held for 24 hours.

A misdemeanor assault charge against him was eventually dismissed and the record sealed.

Persaud filed his lawsuit against the hospital, a physician and five others in April 2004, claiming assault and battery, unlawful confinement, negligence and lack of informed consent. He is asking compensatory and punitive damages.

His attorney told the *New York Times* blog that Persaud developed posttraumatic stress syndrome, has been unable to work, and shows no trust in either the medical system or police. The hospital has refused to comment on the case.

These sensationalized allegations have brought media attention to the issue of informed

consent. However, the idea and the issues surrounding it are not new -- nor are they strangers to the courtroom.

In 1914, a New York court noted that "every human being of adult years and sound mind has the right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault for which he is held liable in damages." The decision continued, however, with a caveat similar to one that is likely to be at issue in the present case. "This is true except in cases of emergency where the patient is unconscious and where it is necessary to operate before consent can be obtained."

The medical world today is a lot more complicated than it was in 1914. Studies have shown that informed consent is rarely truly "informed," and researchers from both law and medicine have spent a good deal of time and energy studying informed consent procedures and trying to create a consent form that steers away from legalese and medical terminology that confuses the average patient.

According to AMA policy, physicians must honor the basic policy of informed consent "unless a patient is unconscious or otherwise incapable of consenting, and harm from failure to treat is imminent."

The issue of whether a patient who signed such a form was actually informed is very common in medical malpractice lawsuits. The fact that, in some states, the definition of informed consent is now set by statute, rather than common law, has done little to change that.

Emergency exception at issue

The law gets even murkier when the issue isn't whether a patient understood the nonemergency procedure they consented to, but whether consent was even required.

The law has created the "emergency exception" -- a legal principle under which "consent to treatment in a dire situation is inferred when neither the patient nor a responsible party can consent, but a reasonable person would do so."

Perhaps the language of the exception seems crystal clear to some. But in reality, the law is rarely black-and-white, resting instead somewhere in the gray between . When a patient arrives at an emergency department with a head trauma, an emergency physician may be forced to make a quick assessment to determine whether the patient is capable of making an informed decision.

Courts have ruled that there are situations in which a physician may overrule a patient's refusal of a medical procedure if the physician determines the patient isn't capable of making the decision, and no family member is available to give consent.

Did Persaud's traumatic head injury cloud his judgment when he refused the rectal exam to check for a spinal cord injury? At trial, the plaintiff's expert is expected to say no, and the hospital's expert will likely say yes. It will be up to the jury to decide whom to believe.

Booth, a former *Professional Issues* editor, is now studying law. To comment on this column contact *Professional Issues* Editor Tanya Albert Henry (tanya.albert.henry@ama-assn.org), 312-464-5748.

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