§ 1299.40 Consent to medical treatment; exception; Louisiana Medical Disclosure Panel; availability of lists to establish necessity and degree

A. (1) Notwithstanding any other law to the contrary, written consent to medical treatment means a handwritten consent to any medical or surgical procedure or course of procedures which: sets forth in general terms the nature and purpose of the procedure or procedures, together with the known risks, if any, of death, brain damage, quadriplegia, paraplegia, the loss or loss of function of any organ or limb, of disfiguring scars associated with such procedure or procedures; acknowledges that such disclosure of information has been made and that all questions asked about the procedure or procedures have been answered in a satisfactory manner; and is signed by the person for whom the procedure is to be performed, or if the patient for any reason lacks legal capacity to consent by a person who has legal authority to consent on behalf of such patient in such circumstances. Such consent shall be presumed to be valid and effective, in the absence of proof that execution of the consent was induced by misrepresentation of material facts.

(2) In addition to the information required to be disclosed in Paragraph (1) of this Subsection, where the medical treatment involves the surgical implantation of "Norplant" contraceptive devices, the explanation to the patient shall include the known and significant or other material risks, the known adverse results, and alternative methods of contraception.

B. Except as provided in Subsection A of this Section, no evidence shall be admissible to modify or limit the authorization for performance of the procedure or procedures set forth in such written consent.

C. Where consent to medical treatment from a patient, or from a person authorized by law to consent to medical treatment for such patient, is secured other than in accordance with Subsection A above, the explanation to the patient or to the person consenting for such patient shall include the matters set forth in Paragraph (1) of Subsection A above, and an opportunity shall be afforded for asking questions concerning the procedures to be performed which shall be answered in a satisfactory manner. Such consent shall be valid and effective and is subject to proof according to the rules of evidence in ordinary cases.

D. (1) Notwithstanding this Section or any other law to the contrary, whenever it is determined by the hospital infection control committee or equivalent body that an agent or employee of a hospital, or a physician having privileges at the hospital, has been exposed to the blood or bodily fluids of a patient, in such a manner as to create any risk that the agent, employee, or physician may become infected with the human immunodeficiency virus or other infectious agent if the patient is infected with the human immunodeficiency virus or other infectious agent, in accordance with the infectious disease exposure guidelines of the Centers for Disease Control or the infectious disease exposure standards of the health care facility where the exposure occurred, then the hospital infection control committee may, without the consent of the patient, conduct such tests on blood previously drawn or body fluids previously collected as are necessary to determine whether the patient is, in fact, infected with the virus or other agent believed to cause acquired immune deficiency syndrome or other infectious disease. If no previously drawn blood or collected bodily fluids are available or are suitable, the hospital may order, without the consent of the patient, that blood, bodily fluids, or both be drawn and collected from the patient to conduct the necessary tests.

(2) Notwithstanding this Section or any other law to the contrary, whenever it is determined by the infectious disease control officer of any law enforcement, fire service, or emergency medical service agency or organization that an agent or employee of the agency or organization has been exposed to the blood or bodily fluids of a patient while rendering emergency medical services, transporting, or treating an ill or injured patient in such a manner as to create any risk that the agent or employee may become infected with the human immunodeficiency virus or other infectious agent if the patient is infected with the human immunodeficiency virus or other infectious agent, in accordance with the infectious disease exposure guidelines of the Centers for Disease Control or the infectious disease exposure standards of the agency or organization, then the infectious disease control officer of the agency or organization may present the facts to the infection control committee of the hospital or other health care facility to which the patient has been transported. If the hospital infection control committee agrees that there has been a potential exposure to the agency or organization personnel, then the infectious disease control officer of the agency or organization may present the facts to the infection control committee or equivalent body that an agent or employee of a hospital, or a physician having privileges at the hospital, has been exposed to the blood or bodily fluids of a patient, in such a manner as to create any risk that the agent, employee, or physician may become infected with the human immunodeficiency virus or other infectious agent, in accordance with the infectious disease exposure guidelines of the Centers for Disease Control or the infectious disease exposure standards of the health care facility where the exposure occurred, then the hospital infection control committee may, without the consent of the patient, conduct such tests on blood previously drawn or body fluids previously collected as are necessary to determine whether the patient is, in fact, infected with the virus or other agent believed to cause acquired immune deficiency syndrome or other infectious disease. If no previously drawn blood or collected bodily fluids are available or are suitable, the hospital may order, without the consent of the patient, that blood, bodily fluids, or both be drawn and collected from the patient to conduct the necessary tests.

(3) The results of the test shall not become a part of the patient's medical record and shall be confidential, except that the hospital may inform the exposed employee, agent, or physician, or the infectious disease control officer of the law enforcement, fire service, or emergency medical service agency of the results of the test.
In the event that the test is performed, and the results of the test are positive, the hospital shall inform the patient of the results and shall provide such follow-up testing and counseling as may be required according to the accepted standard of medical care.

The patient shall not be charged for any tests performed under this Subsection.

Nothing herein shall be construed to require the hospital to perform the test described herein.

E. (1) As used in this Subsection:

(a) "Panel" means the Louisiana Medical Disclosure Panel.

(b) "Secretary" means the secretary of the Department of Health and Hospitals.

(2)(a) In a suit against a physician or other health care provider involving a health care liability or medical malpractice claim which is based on the failure of the physician or other health care provider to disclose or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or other health care provider, 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.

(b) Consent to medical treatment may be evidenced according to the provisions of Subsections A and C of this Section or, as an alternative, a physician or other health care provider may choose to avail himself of the lists established by the Louisiana Medical Disclosure Panel pursuant to the provisions of this Subsection as another method by which to evidence a patient's consent to medical treatment.

(3)(a) The Louisiana Medical Disclosure Panel is created within the Department of Health and Hospitals to determine which risks and hazards related to medical care and surgical procedures must be disclosed by a physician or other health care provider to a patient or person authorized to consent for a patient and to establish the general form and substance of such disclosure.

(b) The panel established by this Subsection shall be comprised of eleven members, with one member licensed to practice dentistry who specializes in oral and maxillofacial surgery, and four members licensed to practice law in this state and six members licensed to practice medicine in this state. Members of the panel shall be appointed by the secretary of the Department of Health and Hospitals and submitted to the Senate for confirmation. The members of the panel licensed to practice medicine shall be selected from a list of nominees submitted to the secretary by the Louisiana State Medical Society. Of the members of the panel licensed to practice law, three shall be selected from a list of nominees submitted to the secretary by the Louisiana Trial Lawyers Association and one shall be selected from a list of nominees submitted to the secretary by the Louisiana Defense Counsel Association. The member of the panel licensed to practice dentistry who specializes in oral and maxillofacial surgery shall be selected from a list of nominees submitted to the secretary by the Louisiana Society of Oral and Maxillofacial Surgeons.

(c) The initial members of the panel shall have the following terms:

(i) The dentist who specializes in oral and maxillofacial surgery, one attorney, and two physicians shall serve a term of two years, or until a successor is appointed and qualified;

(ii) Two attorneys and two physicians shall serve a term of four years, or until a successor is appointed and qualified;

(iii) One attorney and two physicians shall serve a term of six years, or until a successor is appointed and qualified.

Thereafter, at the expiration of the term of each member of the panel, the secretary shall appoint a successor and such successor shall serve for a term of six years, or until his successor is appointed and qualified. Any member of the panel who is absent for three consecutive meetings without the consent of a majority of the panel at each such meeting may be removed by the secretary at the request of the panel present submitted in writing and signed by the chairman. Upon the death, resignation, or removal of any member, the secretary shall fill the vacancy by selection for the unexpired portion of the term.

(d) Members of the panel shall not be entitled to per diem or any other compensation for their service, but shall be entitled to reimbursement of any necessary and reasonable expense incurred in the performance of their duties on the panel, including travel expenses.

(e) Meetings of the panel shall be held at the call of the chairman or on petition of at least three members of the panel.

(f) At the first meeting of the panel each year after its members assume their positions, the panelists shall select one of the panel members to serve as chairman and one of the panel members to serve as vice chairman, and each such officer shall serve for a term of one year. The chairman shall preside at meetings of the panel, and in his absence, the vice chairman shall preside.

(g) The Department of Health and Hospitals shall provide administrative assistance to and serve as the staff for the panel.

(h) The secretary shall appoint the initial members of the panel no later than September 1, 1990, and the panel shall convene its first meeting no later than October 1, 1990.
(4)(a) To the extent feasible, the panel shall identify and make a thorough examination of all medical treatments and surgical procedures in which physicians and other health care providers may be involved in order to determine which of those treatments and procedures do and do not require disclosure of the risks and hazards to the patient or person authorized to consent for the patient. The dentist member of the panel shall only participate in the panel’s deliberation, determination, and preparation of lists of dental treatments and procedures that do and do not require disclosure. 

(b) The panel shall prepare separate lists of those medical treatments and surgical procedures that do and do not require disclosure and for those treatments and procedures that do require disclosure shall establish the degree of disclosure required and the form in which the disclosure will be made. 

(c) Lists prepared under Subparagraph 4(b) of this Subsection together with written explanations of the degree and form of disclosure shall be promulgated according to the Administrative Procedure Act. The form of the disclosure and manner in which such disclosure shall be made shall be subject to legislative oversight by the House and Senate Health and Welfare Committees. The initial lists of the panel shall be published on or before January 1, 1991, or at such time as soon after that date as the panel determines to be feasible, but, in no event, shall the initial lists be published later than March 1, 1991. The lists compiled and published and rules promulgated relative to the form and manner of disclosure according to the provisions of this Subsection and evidence of such disclosures or failure to disclose by a physician or other health care provider as provided in Paragraphs (5) and (6) of this Subsection, shall be admissible in a health care liability suit or medical malpractice claim involving medical care rendered or a surgical procedure performed on or after March 1, 1991. 

(d) At least annually, or at such other period as the panel may determine, the panel shall identify and examine any new medical treatments and surgical procedures that have been developed since its last determinations, shall assign them to the proper list, and shall establish the degree of disclosure required and the form in which the disclosure shall be made. The panel shall also review and examine such treatments and procedures for the purpose of revising lists previously published. These determinations shall be published in the same manner as described in Subparagraph 4(c) of this Subsection.

(5) Before a patient or a person authorized to consent for a patient gives consent to any medical or surgical procedure that appears on the panel's list requiring disclosure, the physician or other health care provider shall disclose to the patient, or person authorized to consent for the patient, the risks and hazards involved in that kind of care or procedure. A physician or other health care provider may choose to utilize the lists prepared by the panel and shall be considered to have complied with the requirements of this Subsection if disclosure is made as provided in Paragraph (6) of this Subsection. 

(6) Consent to medical care that appears on the panel's list requiring disclosure shall be considered effective under this Subsection, if it is given in writing, signed by the patient or a person authorized to give the consent and by a competent witness, and if the written consent specifically states, in such terms and language that a layman would be expected to understand, 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 under Paragraph (4) of this Subsection.

(7)(a) In a suit against a physician or other health care provider involving a health care liability or medical malpractice claim which is based on the negligent failure of the physician or other health care provider to disclose or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or other health care provider:

(i) Both the disclosure made as provided in Paragraph (5) of this Subsection and the failure 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 Paragraphs (5) and (6) of this Subsection have been complied with and this presumption shall be included in the charge to the jury; and

(ii) The failure to disclose the risks and hazards involved in any medical care or surgical procedure required to be disclosed under Paragraphs (5) and (6) of this Subsection shall be admissible in evidence and shall create a rebuttable presumption of a negligent failure to conform to the duty of disclosure set forth in Paragraphs (5) and (6) of this Subsection, and this presumption shall be included in the charge to the jury; but failure to disclose may be found not to be negligent, if there was an emergency as defined in R.S., 40:2113.6(C) or, if for some other reason, it was not medically feasible to make a disclosure of the kind that would otherwise have been negligence.

(b) If medical care is rendered or a surgical procedure performed with respect to which the panel has not made a determination regarding a duty of disclosure, the physician or other health care provider is under the general duty to disclose otherwise imposed by this Section.

(c) In order to be covered by the provisions of this Subsection, the physician or other health care provider who will actually perform the contemplated medical or surgical procedure shall:

(i) Disclose the risks and hazards in the form and to the degree required by the panel;

(ii) Disclose additional risks, if any, particular to a patient because of a complicating medical condition, either told to the physician or other health care provider by the patient or his representative in a medical history of the patient or reasonably discoverable by such physician or other health care provider;

(iii) Disclose reasonable therapeutic alternatives and risks associated with such alternatives;
(iv) Relate that he is obtaining a consent to medical treatment pursuant to the lists formulated by the Louisiana Medical Disclosure Panel; and

(v) Provide an opportunity to ask any questions about the contemplated medical or surgical procedure, risks, or alternatives and acknowledge in writing that he answered such questions, to the patient or other person authorized to give consent to medical treatment, receipt of which shall be acknowledged in writing.

F. Notwithstanding the provisions of Subsection E of this Section, consent for dental treatment rendered by dentists not performing oral and maxillofacial surgery in a hospital setting shall be governed exclusively by the provisions of R.S. 40:1299.131.


NOTES:

Effect of Amendment of 2001


8. La. Rev. Stat. Ann. § 40:1299.40 establishes a presumption of valid consent when a written consent is signed by a patient, but the presumption may be rebutted if the plaintiff establishes the existence of a material risk the physician failed to disclose, that the material risk was realized, and there was a causal connection between the failure to inform the patient of the risk and realization of the risk. Larche v. Rodriguez, La. App. 2000-0881, 765 So. 2d 388, 2000 La. App. LEXIS 1442 (La.App. 4 Cir. May 17 2000).


10. Only theory under La. Rev. Stat. § 40:1299.40(E) under which recovery against a physician is allowed for failure to disclose or adequately disclose a risk or hazard to a patient is that of negligence, and such claims fall within the purview of the Medical Malpractice Act; thus, a trial court did not err by dismissing a mother's medical battery claim against a physician for his unauthorized circumcision of her son because her only theory of recovery against the physician was in the nature of a medical malpractice claim. Wilson ex rel. Wilson v. Landry, La. App. 98-2385, 748 So. 2d 655, 1999 La. App. LEXIS 3754 (La.App. 1 Cir. Doc. 28 1999).


12. A doctor's motion for summary judgment under La. Code Civ. Proc. Ann. art. 967, accompanied by a surgical patient's signed written consent, was improperly granted where the supporting evidence offered by the doctor did not refute the patient's allegation that the doctor misrepresented the extent of scarring or disfigurement that might result from the surgical removal of tattoos; under La. Rev. Stat. Ann. § 40:1299.40, consent to a medical procedure was invalid if it was induced by a doctor's misrepresentations. Williams v. Fields, 570 So. 2d 20, 1990 La. App. LEXIS 2171 (La.App. 3 Cir. 1990).

13. Where nerve root damage was not a known complication of a vertebral needle biopsy, the physician's failure to advise the patient of this complication did not invalidate the patient's informed consent. Leonard v. New Orleans East Orthopedic Clinic, 485 So. 2d 1008, 1986 La. App. LEXIS 6360 (La.App. 4 Cir. 1986).

14. Finding in favor of the patient and spouse in their medical malpractice informed consent action against the doctor and his insurer was proper, where the video tape supplied by the doctor was not sufficient to inform the patient of the potential risks associated with the procedure, La. Rev. Stat. Ann. §§ 40:1299(C), 40:1299.40(C); the patient was not suffering from a life-threatening condition and she would have refused treatment had she been made aware of the possibility of major, long-term scarring to her legs. Mannina v. Borland, La. App. 03-1165, 2004 La. App. LEXIS 883 (La.App. 3 Cir. Mar. 31 2004).

15. In a medical malpractice suit arising from a patient's death during a fluorescein angiogram performed on her eye, the court found for the doctor on the issue of informed consent; while the written consent form signed by the patient did not satisfy the requirements of La. Rev. Stat. Ann. § 40:1299.40(A) as it failed to identify death as a risk, the patient was adequately informed under La. Rev. Stat. Ann. § 40:1299.40(C) because the doctor supplemented the written consent form with verbal warnings describing the risk of death. Soileau v. Med-Express Ambulance Serv., La. App. 03-0351, 856 So. 2d 92, 2003 La. App. LEXIS 2632 (La.App. 3 Cir. Oct. 1 2003).

16. In a malpractice case, the question was whether the patient raised genuine issues of material facts as to whether the physician's failure to tell the patient the odds of success of bone grafts to the hips were 20 percent or less (as asserted by the patient's expert), which would deprive the patient the opportunity to make an informed decision; based on the evidence, the bone grafts were an effort to postpone the inevitable, where total hip replacement was highly undesirable for a 29 year-old patient, and the informed consent requirements of La. Rev. Stat. Ann. § 40:1299.40 were met. Rovira v. Byram, La. App. 2002-1115, 841 So. 2d 1009, 2003 La. App. LEXIS 472 (La.App. 5 Cir. Feb. 25 2003).

17. La. Rev. Stat. Ann. § 40:1299.40 establishes a presumption of valid consent when a written consent is signed by a patient, but the presumption may be rebutted if the plaintiff establishes the existence of a material risk the physician failed to disclose, that the material risk was realized, and there was a causal connection between the failure to inform the patient of the risk and realization of the risk. Larche v. Rodriguez, La. App. 2000-0881, 765 So. 2d 388, 2000 La. App. LEXIS 1442 (La.App. 4 Cir. May 17 2000).


20. Where the doctor perforated three of the patient’s internal organs during surgery and punctured the patient’s large intestine while trying to remedy the perforations, the doctor had obtained adequate consent from the patient before performing surgery; the patient signed two consent forms that listed the risks of the procedure as required by statute, and the doctor had discussed the procedure with the patient. **Fusilier v. Dauterive, La. App. 99-692, 759 So. 2d 821, 1999 La. App. LEXIS 3688** (La.App. 3 Cir. Dec. 22 1999).

21. Where a patient suffered injuries after her doctor accidentally sutured her catheter in place while performing bladder suspension surgery, summary judgment was properly granted in favor of the doctor in the patient’s malpractice action; the risk of suturing the catheter in place was a recognized risk but not a material risk and a reasonable prudent person in the patient’s position would have consented to the procedure had the risk of suturing the catheter been disclosed. **Fluck v. Coffman, La. App. 32100, 742 So. 2d 79, 1999 La. App. LEXIS 2478** (La.App. 2 Cir. Sept. 22 1999).

22. Doctor’s failure to obtain informed consent of a decedent, as required by La. Rev. Stat. Ann. § 49:1299.40, for procedures that the decedent was to undergo, was legally inconsequential because the spouse and children of the decedent were unable to establish a causal relation between that failure and the decedent’s death. **Capel v. Langford, La. App. 98-1517, 734 So. 2d 835, 1999 La. App. LEXIS 1218** (La.App. 3 Cir. Apr. 28 1999).


25. La. Rev. Stat. Ann. § 40:1299.40(E)(7)(c) places on the physician, or other health care provider who will actually perform the contemplated medical or surgical procedure, the duty of disclosing risks and hazards to the patient, disclosing to the patient reasonable alternatives and the risks associated with such alternatives, answering the patient’s questions regarding the procedure, risks and alternatives, and obtaining the patient’s consent to the procedure. **Harris v. Landry, La. App. 97-0525, 734 So. 2d 1, 1998 La. App. LEXIS 3959** (La.App. 1 Cir. Apr. 8 1998).

26. Neither the hospital that employed the technician who performed the ultrasound, nor the radiologist responsible for confirming that the ultrasound was done properly, had a duty to inform the patient under La. Rev. Stat. Ann. § 40:1299.40 of the unreliability of the ultrasound as an estimate of fetal weight for purposes of determining whether vaginal delivery was appropriate; rather, the statute placed such duty on the physician who actually delivered the baby, as he was the health care provider who actually performed the contemplated procedure. **Harris v. Landry, La. App. 97-0525, 734 So. 2d 1, 1998 La. App. LEXIS 3959** (La.App. 1 Cir. Apr. 8 1998).

27. In determining whether doctors obtained the informed consent of a patient in her action for medical malpractice arising from misdiagnosed cancer, the trial judge applied the proper objective standard of the average reasonable patient; the patient was required to prove that a fully informed, reasonable person in her condition would have refused the operation. **Boudoin v. Crawford & Marshall, Ltd., La. App. 97-224, 709 So. 2d 798, 1998 La. App. LEXIS 72** (La.App. 5 Cir. Jan. 14 1998).


29. Hospital where a surgery was performed had no duty to ensure that a patient’s consent to surgery was informed and valid because risk of paraplegia was on consent form that he explained and patient signed and patient did not show consent was induced by misrepresentation of material fact; the consent form, pursuant to La. Rev. Stat. Ann. § 40:1299.40, was therefore presumed valid in the absence of proof that its execution was induced by misrepresentation of material facts. **Leger v. La. Med. Mut. Ins. Co., La. App. 98-1098, 732 So. 2d 654, 1999 La. App. LEXIS 868** (La.App. 3 Cir. Mar. 31 1999).

30. Where a patient suffered injuries after her doctor accidentally sutured her catheter in place while performing bladder suspension surgery, summary judgment was properly granted in favor of the doctor in the patient’s malpractice action; the risk of suturing the catheter in place was a recognized risk but not a material risk and a reasonable prudent person in the patient’s position would have consented to the procedure had the risk of suturing the catheter been disclosed. **Fluck v. Coffman, La. App. 32100, 742 So. 2d 79, 1999 La. App. LEXIS 2478** (La.App. 2 Cir. Sept. 22 1999).

31. Doctor’s failure to obtain informed consent of a decedent, as required by La. Rev. Stat. Ann. § 49:1299.40, for procedures that the decedent was to undergo, was legally inconsequential because the spouse and children of the decedent were unable to establish a causal relation between that failure and the decedent’s death. **Capel v. Langford, La. App. 98-1517, 734 So. 2d 835, 1999 La. App. LEXIS 1218** (La.App. 3 Cir. Apr. 28 1999).
32. Doctor failed to obtain informed consent for an arteriogram performed on a patient, as required under La. Rev. Stat. Ann. § 40:1299.40, when the doctor explained the procedure and its risks to the patient whom he knew was extremely hard of hearing, when the patient's daughter urged the patient to refuse the procedure, and when the doctor heard the patient respond "okay" both when asked for authorization for the procedure and when urged by his daughter to refuse consent for the procedure. Yahn v. Folse, La. App. 25176, 639 So. 2d 261, 1993 La. App. LEXIS 3284 (La.App. 2 Cir. Oct. 27 1993).

33. Doctor was not liable when a child contracted polio and paralysis from a live oral polio vaccine he administered without advising her parent of its risks; the injuries were not causally related to his breach of the duty to inform the parents because a reasonable person knowing the risks associated with the vaccine would have consented to the vaccination. Boyd v. La. Med. Mut. Ins. Co., 593 So. 2d 427, 1991 La. App. LEXIS 3637 (La.App. 1 Cir. 1991).

34. Where a written consent form did not comply with La. Rev. Stat. Ann. § 40:1299.40(A) in that it did not set forth the nature, purpose, or known risks of the patient's surgery, the court had to consider whether consent was otherwise given, in accordance with La. Rev. Stat. Ann. § 40:1299.40(C), and because the decision of the jury that a doctor had verbally warned the patient of the nature, purpose, and risks of the surgery was not manifestly erroneous, it was affirmed. LeBlanc v. Krupkin, 555 So. 2d 600, 1989 La. App. LEXIS 2766 (La.App. 1 Cir. 1989).

35. Doctor was not entitled to summary judgment on a patient's informed consent claim where there were remaining factual issues regarding whether the patient had any independent knowledge of the specific risks of her surgery that was superior to that of an ordinary lay person, pursuant to La. Rev. Stat. Ann. § 40:1299.40. Hondroulis v. Schuhmacher, 546 So. 2d 466, 1989 La. App. LEXIS 1486 (La. 1989).

36. Where consent to medical treatment from a patient that had come into the emergency room with facial disfigurement from an accident included an explanation to the patient or to the person consenting for such patient and afforded an opportunity for asking questions concerning the procedures to be performed which were answered in a satisfactory manner, the consent given was to be held valid and effective and subject to proof according to the rules of evidence in ordinary cases. Distefano v. Bell, 544 So. 2d 567, 1989 La. App. LEXIS 941 (La.App. 1 Cir. 1989).

37. Summary judgment was granted where the uniform consent law, La. Rev. Stat. Ann. § 40:1299.40, established a presumption of informed consent, and the patient could not rebut that presumption by evidence that her condition was a material known risk. Hondroulis v. Schuhmacher, 531 So. 2d 450, 1988 La. LEXIS 1596 (La. 1988).


40. Where the possibility of vascular injury was not included in the written consent form that a patient signed, the trial court did not err in dismissing the patient's claim; the patient failed to show that a reasonable person in a similar position would have withheld consent if the physician had advised of the possibility of vascular injury. Jones v. Levy, 520 So. 2d 457, 1988 La. App. LEXIS 251 (La.App. 5 Cir. 1988).


42. In a patient's medical malpractice action, a directed verdict in favor of a doctor and a hospital was affirmed where the court rejected the patient's contention that the trial court erred in its finding that the evidence did not overcome the statutory presumption of the validity of a consent form; under La. Rev. Stat. Ann. § 40:1299.40, when written consent to medical treatment was given by a patient as provided by Louisiana's Uniform Consent Law, no evidence was admissible to modify or limit the consent except a showing of inducement by misrepresentation. Madere v. Ochsner Found. Hosp., 505 So. 2d 146, 1987 La. App. LEXIS 8865 (La.App. 4 Cir. 1987).

43. Where nerve root damage was not a known complication of a vertebral needle biopsy, the physician's failure to advise the patient of this complication did not invalidate the patient's informed consent. Leonhard v. New Orleans East Orthopedic Clinic, 485 So. 2d 1008, 1986 La. App. LEXIS 6360 (La.App. 4 Cir. 1986).

44. Patient who agreed and gave written consent to a limited conservative operation calculated to save her reproductive organs but was instead subjected to a hysterectomy by which the organs were irrevocably removed was the victim of a battery by the surgeon who operated on her where there was no emergency that required removal of her reproductive organs to save her life and no consent had been given to perform such an operation. Karl J. Pizzalotto, M.D., Ltd. v. Wilson, 437 So. 2d 859, 1983 La. LEXIS 11389 (La. 1983).

45. Where a patient signed two consent forms for a hysterectomy surgery to be performed on her and also had been afforded an opportunity to have all of her questions concerning the procedure satisfactorily answered by her physician, the consent was still valid and effective, even if oral, if the disclosures listed in subsection A about the nature and purpose of the procedure were answered orally and not in writing. LaCaze v. Collier, 434 So. 2d 1039, 1983 La. LEXIS 11156 (La. 1983).
46. "Settlement" as contemplated by La. Rev. Stat. Ann. § 40:1299.44(C)(5) must be with the Louisiana Patient's Compensation Fund (Fund) rather than with an insurer; because as the rest of § 40:1299.44(C)(5) provides, the insurer must have already paid its policy limits in order for liability to be deemed admitted; when the Fund has not agreed to a settlement, the trial court has no settlement to approve. A Koslowski v. Sanchez, 563 So. 2d 937, 1990 La. App. LEXIS 1524 (La. App. 1 Cir. 1990).

Torts > Intentional Torts > Defenses > Consent

47. Even though the patient signed a consent form pursuant to La. Rev. Stat. § 40:1299.40, the consent was not informed because the wife’s testimony established that the doctor did not identify the loss of bowel and bladder function as a specific risk of surgery. Hidding v. Williams, 578 So. 2d 1192, 1991 La. App. LEXIS 999 (La. App. 5 Cir. 1991).

Torts > Malpractice Liability > Healthcare Providers

48. Finding in favor of the patient and spouse in their medical malpractice informed consent action against the doctor and his insurer was proper, where the video tape supplied by the doctor was not sufficient to inform the patient of the potential risks associated with the procedure, La. Rev. Stat. Ann. §§ 40:1299(C), 40:1299.40(C); the patient was not suffering from a life-threatening condition and she would have refused treatment had she been made aware of the possibility of major, long-term scarring to her legs. Mannina v. Borland, La. App. 03-1165, 2004 La. App. LEXIS 683 (La. App. 3 Cir. Mar. 31 2004).

49. In a malpractice case, the question was whether the patient raised genuine issues of material facts as to whether the physician’s failure to tell the patient the odds of success of bone grafts to the hips were 20 percent or less (as asserted by the patient’s expert), which would deprive the patient the opportunity to make an informed decision; based on the evidence, the bone grafts were an effort to postpone the inevitable, where total hip replacement was highly undesirable for a 29-year-old patient, and the informed consent requirements of La. Rev. Stat. Ann. § 40:1299.40 were met. Rovira v. Byram, La. App. 2002-1115, 841 So. 2d 1009, 2003 La. App. LEXIS 472 (La. App. 3 Cir. Feb. 25 2003).

50. Louisiana statutory directives on informed consent to medical treatment are contained in the Uniform Consent Law, La. Rev. Stat. § 40:1299.40; a plaintiff in an informed consent case bears the burden of proof to show: (1) the existence of a material risk which the physician must disclose; (2) the failure of the physician to inform the patient of a material risk; (3) the realization of the material risk; and (4) a causal connection between the failure to inform the patient of the risk and realization of the risk. Parker v. Harper, La. App. 01-0548, 803 So. 2d 76, 2001 La. App. LEXIS 2432 (La.App. 3 Cir. Oct. 31 2001).


52. Disputed facts as to causation, whether or not a doctor disclosed the risks of treatment of a child, and whether or not the material risk was realized precluded the grant of summary judgment in favor of a doctor in the medical malpractice informed consent case, which was brought under the Uniform Consent Law, La. Rev. Stat. § 40:1299.40. Parker v. Harper, La. App. 01-0548, 803 So. 2d 76, 2001 La. App. LEXIS 2432 (La.App. 3 Cir. Oct. 31 2001).


54. Only theory under La. Rev. Stat. § 40:1299.40(E) under which recovery against a physician is allowed for failure to disclose or adequately disclose a risk or hazard to a patient is that of negligence, and such claims fall within the purview of the Medical Malpractice Act; thus, a trial court’s factual findings concerning whether the plaintiffs rebutted the presumption under La. Rev. Stat. Ann. § 40:1299.40; a plaintiff in an informed consent case bears the burden of proof to show: (1) the existence of a material risk which the physician must disclose; (2) the failure of the physician to inform the patient of a material risk; (3) the realization of the material risk; and (4) a causal connection between the failure to inform the patient of the risk and realization of the risk. Wilson v. Landry, La. App. 98-2365, 748 So. 2d 655, 1999 La. App. LEXIS 3754 (La.App. 1 Cir. Dec. 28 1999).

55. Where the risk of a cranial spinal fluid leak following surgery was material, defendants were liable for failing to obtain the patient’s informed consent prior to surgery; the physician is required to disclose all risks which are "material" pursuant to La. Rev. Stat. Ann. 40:1299.40 Coscino v. Wolley, La. App. 96-0702, 696 So. 2d 257, 1997 La. App. LEXIS 1550 (La.App. 4 Cir. June 4 1997).


58. Trial court properly dismissed the patient’s malpractice action against the physician who performed surgery on his ear and injured
the patient's facial nerve during the procedure, on the ground that the patient failed to prove that he did not give an informed consent to the surgery under La. Rev. Stat. Ann. § 40:1299.40, and the physician discussed the patient's condition, the treatment, and its risks, and had no duty to warn the patient of the remote risk of facial nerve damage. Cherry v. Herques, 623 So. 2d 131, 1993 La. App. LEXIS 2603 (La.App. 1 Cir. 1993).

59. The presumption created by La. Rev. Stat. Ann. § 40:1299.40, which was based on the fact that a patient had signed a doctor’s consent form prior to the doctor’s performance of a lumbar laminectomy, was rebutted because the doctor’s disclosure of the attendant risks was made while the patient was heavily sedated. Hondroulis v. Schumacher, 612 So. 2d 859, 1992 La. App. LEXIS 4134 (La.App. 4 Cir. 1992).

60. "Settlement" as contemplated by La. Rev. Stat. Ann. § 40:1299.44(C)(5) must be with the Louisiana Patient's Compensation Fund (Fund) rather than with an insurer; because as the rest of § 40:1299.44(C)(5) provides, the insurer must have already paid its policy limits in order for liability to be deemed admitted; when the Fund has not agreed to a settlement, the trial court has no settlement to approve. Koslowski v. Sanchez, 563 So. 2d 937, 1990 La. App. LEXIS 1524 (La.App. 1 Cir. 1990).

61. In a medical malpractice action against defendants, a plastic surgeon and a nurse, by appellant, the bankruptcy trustee of a patient and her husband, the patient was found to have made informed consent under the Uniform Consent Law, specifically La. Rev. Stat. Ann. § 40:1299.40, because medical experts testified that the possibility of permanent anesthesia was not a known risk at the time of the operation and that the possibility of anesthesia was so remote that disclosure was unnecessary. Harris v. Bell, 543 So. 2d 1137, 1989 La. App. LEXIS 974 (La.App. 1 Cir. 1989).

62. Patient who complained that her consent to a stomach stapling was obtained by misrepresentations failed to prove any misrepresentation and was bound by the Uniform Consent Law, La. Rev. Stat. Ann. § 40:1299.40, because medical experts testified that the possibility of permanent anesthesia was not a known risk at the time of the operation and that the possibility of anesthesia was so remote that disclosure was unnecessary. Hutton v. Craighead, 530 So. 2d 101, 1988 La. App. LEXIS 1707 (La.App. 4 Cir. 1988).

63. Patient who agreed and gave written consent to a limited conservative operation calculated to save her reproductive organs but was instead subjected to a hysterectomy by which the organs were irrevocably removed was the victim of a battery by the surgeon who operated on her where there was no emergency that required removal of her reproductive organs to save her life and no consent had been given to perform such an operation. Karl J. Pizzalotto, M.D., Ltd. v. Wilson, 437 So. 2d 859, 1983 La. LEXIS 11389 (La. 1983).

64. Prior to a hysterectomy, it was not required as part of obtaining informed consent to tell the patient of the risk of vesico-vaginal fistula where the risk was 2 or 3 per every 1,000 hysterectomies. La Caze v. Collier, 416 So. 2d 619, 1982 La. App. LEXIS 7551 (La.App. 2 Cir. 1982).

Torts > Negligence > Proof of Negligence > Breach of Statute

TREATISES AND ANALYTICAL MATERIALS
1. Louisiana Tort Law § 21-3, CHAPTER 21. NEGLIGENCE: PROVISON OF SERVICES (MALPRACTICE), § 21-3 Health Care Providers--An Overview, LOUISIANA TORT LAW.


LAW REVIEWS


13. 50 Tul. L. Rev. 655, COMMENT: Recent Medical Malpractice Legislation--A First Checkup, Kandy G. Webb, March, 1976, Copyright (c) 1976 Tulane University, Tulane Law Review

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