Mercer Law Review

Volume 28
Number 1 *Annual Survey of Georgia Law*

Article 24

12-1976

Consent to Elective Surgery Valid Even If Doctor Didn't Warn of Known Risks

Richard L. Hodge

Consent to Elective Surgery Valid Even If Doctor Didn't Warn of Known Risks

In *Young v. Yarn*,[1] the Georgia Court of Appeals interpreted the Georgia Medical Consent Law[2] as not requiring a physician to warn a patient of the known risks of elective surgery for the patient's consent to be valid. The court thus decided that the doctrine of informed consent does not exist in Georgia as between patient and physician.[3]

The plaintiff, Mrs. Maxine Young, engaged the defendant, Dr. Charles P. Yarn, a specialist in plastic and reconstructive surgery, to perform a meloplasty (facelift).[4] While the defendant did render a general explanation of the procedures involved, he did not advise her of the possibility of hypertrophic scarring;[5] instead, he encouraged her to undergo the surgical process which resulted in the permanent disfigurement of her face.[6] Dr. Yarn later testified that he was aware of the risks of hypertrophic scarring associated with this type surgical procedure,[7] but the chance of such scarring occurring in this procedure was assessed by him to be about one-half of one percent.[8] Other expert testimony, however, indicated that hypertrophic scarring could be expected to occur to some degree in approximately ten percent of those cases wherein a meloplasty is performed.[9]

In her complaint before the Fulton County Superior Court, the plaintiff alleged that the physician had breached his duty to her by failing to advise her of the risks associated with this type of procedure. His breach, she said, induced her to undergo elective surgery to which she would not have consented had full disclosure of the known risks been made.[10] At the close of plaintiff's evidence, the trial judge granted defendant's motion for a directed verdict,[11] and this appeal followed.

Informed consent between patient and physician is based on the princi-

1. 136 Ga. App. 737, 222 S.E.2d 113 (1975).
2. Ga. Laws, 1971, p. 438 at 441, GA. CODE ANN. §88-2906 (1971).
3. 136 Ga. App. at 738-39, 222 S.E.2d 114.
4. Brief for Appellant at 2.
5. STEDMAN'S MEDICAL DICTIONARY, Second Unabridged Lawyers Ed. 770 (1966) defines hypertrophy as follows: "Overgrowth; general increase in bulk of a part or organ, not due to tumor formation. By some restricted to denote greater bulk through increase in size, but not in number, of the individual tissue elements; by others used to denote an increase in size in order to meet a demand for increased functional activity." (Evidently, the surgical procedure left Mrs. Young with large unsightly scars on her face at the point of the incisions.)
6. Brief for Appellant at 1-2.
7. *Id.* at 2.
8. *Id.*
9. *Id.* at 4.
10. 136 Ga. App. at 737, 222 S.E.2d at 114.
11. *Id.*, 222 S.E.2d at 114.

ple that "a consent to a treatment or diagnostic test obtained without disclosure of the hazards or dangers involved is no consent."[12] In order for the patient to give an intelligent and informed consent to an elective surgical procedure, he must be made aware of, among other things, the risks so that he may more fully comprehend the meaning of his consent.[13] As Justice Cardozo stated, "[E]very human being of adult years and sound mind has a right to determine what shall be done with his own body."[14]

Although long recognized in other states,[15] the doctrine of informed consent had received little attention in the Georgia courts before *Young*. The first Georgia case to deal with the doctrine, *Mull v. Emory University, Inc.*,[16] left unanswered the question of the applicability of this doctrine in Georgia. *Mull* merely held that where the doctrine was applicable, it applied only to those situations in which a correct and proper procedure of diagnosis or treatment was involved.[17]

In *Pierce v. Dowman*,[18] the court of appeals placed a second condition upon the applicability of the informed-consent doctrine, but still refrained from deciding whether it was the law in Georgia. In its one-page opinion in *Pierce*, the court held that if informed consent existed in Georgia, the plaintiff would be required to show by expert testimony that the hazard complained of was a known risk of the treatment.[19] The requirement estab-

12. Mull v. Emory University, Inc., 114 Ga. App. 63, 65-66, 150 S.E.2d 276, 292 (1966).

13. D. LOUISELL & H. WILLIAMS, TRIAL OF MEDICAL MALPRACTICE CASES §22.01 (1960) states that: "In the absence of any emergency that necessitates immediate medical action, and where the patient is competent and in possession of his faculties, a physician who proposes to perform a medical or surgical procedure is under an obligation to explain the procedure to the patient and to disclose the dangers incident to it, so that he may make an intelligent and informed choice as to whether to consent. When the circumstances permit, the patient should be told (1) the diagnosis, (2) the general nature of the contemplated procedure, (3) the risks involved, (4) the prospects of success, (5) the prognosis if the procedure is not performed, and (6) alternative methods of treatment, if any."

14. Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 126, 105 N.E. 92, 93 (1914).

15. *See* Annot. *Malpractice: Physician's Duty to Inform Patient of Nature and Hazards of Disease or Treatment*, 78 A.L.R. 2d 1028 (1961) and cases cited therein. It should be noted, however, that even those states which apply the doctrine of informed consent do not impose a duty to inform of minor risks. For example, in Cobbs v. Grant, 8 Cal. 229, 502 P.2d 1 (1972), the California court stated that there is no duty to disclose minor risks, risks of very low incident, or commonly known risks.

16. 114 Ga. App. at 63, 150 S.E.2d at 276.

17. The court stated: "Whether or not the 'informed consent' rule is applicable in this state, such rule, if applicable, applies only to the duty to warn of the hazards of a correct and proper procedure of diagnosis or treatment, and has no relation to the failure to inform of the hazards of an improper procedure." 114 Ga. App. at 66, 150 S.E.2d at 292. This statement was also quoted by the court in Irwin v. Arrendale, 117 Ga. App. 1, 7, 159 S.E.2d 719, 725 (1967). However, since *Irwin* involved injuries allegedly sustained when a prisoner at the prison hospital received x-rays to which he did not consent, it may be distinguished from the purely elective situation which existed in *Young*.

18. 135 Ga. App. 783, 219 S.E.2d 8 (1975).

19. The court stated: "The informed consent rule, if applicable in this state, requires that

lished in *Pierce* was clearly met, however, in *Young* where expert testimony established that hypertrophic scarring was a known hazard of meloplasty.[20]

These decisions appear to be the only cases prior to *Young* which discuss the doctrine of informed consent in Georgia. A case after *Young* dealing with informed consent is *Kenney v. Piedmont Hospital*,[21] which was handed down by the same division of the court that decided *Young*. In *Kenney*, however, the physician disclosed to his patient the risks, including a numerical statistic of the chances of death occurring.[22] Therefore, the *Kenney* case, which merely cites *Young* for the proposition that there is no duty of the physician to disclose the risks involved,[23] was not a proper case in which to allege the doctrine of informed consent.

In *Young*, the court put to rest the question whether informed consent exists in Georgia.[24] In reaching this decision, the court construed the Georgia Medical Consent Law[25] to be dispositive of the informed-consent question.[26] The court first noted that Georgia's medical-consent statute was not controlling, since the consent form in *Young* did not disclose the general terms of treatment as required by the statute.[27] Nevertheless, the court held that the statute was an indication of legislative intent concerning the duty of a physician to disclose known risks in order to validate the consent obtained from the patient.[28] The wording of the statute, "discloses in general terms the treatment or course of treatment,"[29] was held not to require disclosure to the patient of the known risks of elective surgery.[30] In reaching that conclusion, the court adopted the definition of "treatment" in BLACK'S LAW DICTIONARY:[31] "A broad term covering all steps taken to effect a cure of an injury or disease; the word including examination and diagnosis as well as application of remedies."[32] The court concluded that disclosure of

---

the plaintiff establish by expert testimony that the hazard is a known complication of the procedure involved." *Id.*, 219 S.E.2d at 9.

20. Brief for Appellant at 2 and 4.

21. 136 Ga. App. 660, 667, 222 S.E.2d 162 168 (1975). *See also* McMullen v. Vaughn, 138 Ga. App. 718, 721, ___ S.E.2d ___, ___ (1976) which reiterates that the doctrine of informed consent is not a viable principle of law in Georgia.

22. *Id.* at 660, 222 S.E.2d 162 at 164.

23. *Id.* at 667, 222 S.E.2d at 168.

24. 136 Ga. App. at 738-39, 222 S.E.2d at 114.

25. This statute, codified at GA. CODE ANN. §88-2906 (1971), states in pertinent part: "A consent to medical and surgical treatment which discloses in general terms the treatment or course of treatment in connection with which it is given and which is duly evidenced in writing and signed by the patient or other person or persons authorized to consent pursurant to the terms hereof, shall be conclusively presumed to be a valid consent in the absence of fraudulent misrepresentations of material facts in obtaining the same."

26. 136 Ga. App. at 738, 222 S.E.2d at 114.

27. GA. CODE ANN. §88-2906 (1971).

28. 136 Ga. App. at 738, 222 S.E.2d at 114.

29. GA. CODE ANN. §88-2906 (1971).

30. 136 Ga. App. at 738, 222 S.E.2d at 114.

31. BLACK'S LAW DICTIONARY 1673 (4th ed. 1957).

32. *Id.*, *citing* Hester v. Ford, 221 Ala. 592, 130 So. 203 (1930).

the general terms of treatment did not include disclosure of the known risks of treatment.[33] Consequently, since the appellant could not sustain her action alleging that the physician had breached his duty to inform her of known risks, her consent was not rendered invalid.[34]

Additionally, the court upheld a directed verdict for the defendant on the allegation that the surgical procedure had been negligently performed.[35] In so doing, the court relied upon the principle established in *Pilgram v. Landham*[36] to the effect that the presumption of care, skill and diligence of surgeons may be overcome only by expert testimony.[37] Finally, rejecting the plaintiff's contention that the defendant breached an implied warranty to her,[38] the court cited *Bryan v. Grace*[39] for the principle that a physician or surgeon "is not an insurer or warrantor that the exercise of his professional judgement will effect a cure of the patient."[40]

The method employed by the Court of Appeals of Georgia to find that the informed-consent doctrine does not exist in this state is, to say the least, perplexing. The court's reliance on BLACK'S LAW DICTIONARY for the definition of "treatment" used in deciding *Young* is equally unfathomable.[41] If BLACK'S is to be used as authoritative source material for our appellate courts in Georgia, it would seem that the definitions of "disclose" and "consent" would be equally binding upon the courts in their interpretation of Georgia's medical-consent law.[42] "Disclose" is defined as meaning "to bring into view by uncovering, to lay bare, to reveal to knowledge, to free from secrecy or ignorance, or to make known."[43] Obviously, this raises the question whether disclosure has occurred when the physician has failed to reveal to the patient the known risks that would enable a patient to carefully consider all pertinent facts and then give a truly voluntary and informed consent. "Consent" is defined as meaning "a concurrence of wills; voluntarily yielding the will to the proposition of another; acquiescense or compliance therewith; agreement; the act of coming into harmony or accord."[44] This definition gives rise to the question how one may volun-

33. 136 Ga. App. at 738, 222 S.E.2d at 114.

34. *Id.* at 739, 222 S.E.2d at 114.

35. *Id.*, 222 S.E.2d at 115.

36. 63 Ga. App. 451, 11 S.E.2d 420 (1940).

37. *Id.* at 454, 11 S.E.2d at 423. In *Young* it was shown by expert testimony that cutting away too much skin or underlying tissue could cause the complained of hypertrophic scarring. However, there was no expert testimony in Mrs. Young's case that Dr. Yarn negligently cut away too much skin or tissue. 136 Ga. App. at 739, 222 S.E.2d at 115.

38. 136 Ga. App. at 739-40, 222 S.E.2d at 115.

39. 63 Ga. App. 373, 11 S.E.2d 241 (1940).

40. *Id.* at 379, 11 S.E.2d at 244.

41. 136 Ga. App. at 738, 222 S.E.2d at 114.

42. GA. CODE ANN. §88-2906 (1971).

43. BLACK'S LAW DICTIONARY 551 (4th ed., 1957), *citing* State v. Krokston, 187 Mo. App. 67, 172 S.W. 1156, 1157 (1915).

44. *Id.* at 378, *citing* Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 371 (D.C. Minn. 1939).

tarily yield his will to the proposition of another when it is not known what is contained in the proposition. It seems axiomatic that one has not voluntarily aligned his will with the proposition of another when all factors of the proposition have not been made known. How may one consent to that of which he is not aware? In short, "a consent to a treatment or diagnostic test obtained without disclosure of the hazards or dangers involved, is no consent."[45]

It is likely that had the analysis made by the court of appeals turned on the definition of either "consent" or "disclose" in determining the meaning of Georgia's medical consent law, the court would have recognized the existence of the informed-consent doctrine in Georgia. The holding in *Young* appears to have been the result of merely choosing to note the definition of one word to the exclusion of an arguably more applicable word and basing the decision on that definition.

The manner in which the decision was reached in *Young* leaves the impression that perhaps the Court of Appeals has heard the cries of "malpractice crisis" raised by physicians and their insurors and has heeded those cries by judicially denouncing the informed-consent doctrine in Georgia. The holding in *Young* that a physician has no duty to warn his patients of the known risks of an elective surgical process creates an extremely unjust situation for poorly informed patients who, in most instances, would not have rendered their consent for the elective surgery if the risks had been made known to them. One cannot consent to that of which he is not aware; it follows then that the patients cannot be held to have consented to the risks of surgery if they are not informed of these risks. Not only does the decision in *Young* allow a physician to perform elective surgery upon patients with, at best, only questionable consent, but it may also be viewed as the abridgement of the plaintiff's rights in a suit against a physician. As the law presently stands, a physician may induce or encourage a patient to undergo risky yet unnecessary surgery without making known the attendant risks. The uninformed patient is left without remedy if the procedure results in death or disfigurement, unless the physician is negligent in performing the surgery.

Informed consent has its roots in the right to control what happens to one's own body. In *Young*, the court took this right from the patient and inappropriately placed it in his physician; it leaves the patient with no satisfactory remedy when he is damaged or disfigured by elective surgery, the risks of which were not fully disclosed to him before obtaining his consent. The court or the legislature should correct this error quickly.

RICHARD L. HODGE

45. 114 Ga. App. at 65-66, 150 S.E.2d at 292.