

A man suffered from a serious, though not immediately life-threatening, impairment of his circulatory system. The man's cardiologist recommended a cardiac bypass operation and referred the man to a cardiothoracic surgeon. The surgeon did not inform the man of the 2% risk of death associated with this operation. The surgeon defended this decision based on his best personal judgment that "the man was a worrier and it would have significantly lessened his chances of survival to be worried about the nonsurvival rate."

After obtaining the patient's consent, the surgeon successfully performed the bypass operation and the man made a good recovery. However, when the man learned of the 2% risk of death associated with the operation, he was furious that the surgeon had failed to disclose this information to him. The man would have refused the operation had he been informed of the risk.

If the man asserts a claim against the surgeon based on negligence, will the man prevail?

- A. No, because the operation was successful, and the man suffered no harm.
- B. No, because the surgeon used his best personal judgment in shielding the man from the risk statistic.
- C. Yes, because a patient must be told the risk factor associated with a surgical procedure to give an informed consent.
- D. Yes, because the man would have refused the operation had he been informed of the risk.

## Explanation:

**Physicians** have a **duty to disclose** the **risks of a medical treatment** or procedure to a patient so that the patient can give informed consent to the treatment or procedure. In most jurisdictions, the required level of disclosure of risks is governed by custom among physicians.\* **Failure to make the required disclosure** subjects the physician to **negligence liability\*\*** when:

the failure to disclose **caused the patient to consent** to the treatment or procedure (ie, the patient would not have done so had the risk been disclosed) *and*

the **undisclosed risk materialized** and caused the plaintiff **physical harm**.

Here, the surgeon failed to inform the man of the 2% risk of death associated with the operation before performing it. The man likely needed to be told of this risk to give informed consent, and he would have refused the operation had he been so informed. But since the surgery was successful and the man suffered no harm, he will not prevail in a negligence suit against the surgeon (**Choices C & D**).

\*A significant minority holds that the physician must disclose "material risks." A material risk is one that a reasonable person in the patient's position would consider when deciding whether to undergo the treatment or procedure.

\*\*In contrast, failure to obtain the patient's consent to a treatment or procedure may subject the physician to **battery** liability.

**(Choice B)** A physician has no duty to disclose a risk when the physician reasonably believes that disclosure would threaten a patient's well-being. However, that belief must be based on the physician's sound medical judgment—not the physician's best personal judgment (as seen here).

## Educational objective:

Under the informed-consent doctrine, a physician who fails to disclose the risks of a medical treatment or procedure to a patient is liable for negligence if (1) the failure to disclose caused the patient to consent and (2) the undisclosed risk materialized and resulted in physical harm.

## References

Canterbury v. Spence, 464 F.2d 772, 790 (D.C. Cir. 1972) (establishing that negligence based on informed-consent doctrine requires that the patient suffer physical harm).

61 Am. Jur. 2d Physicians, Surgeons, and Other Healers § 167 (2020) (discussing the informed-consent doctrine).

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## Tort liability under informed-consent doctrine

