

5.50C INFORMED CONSENT (Competent Adult and No Emergency)^{1, 2}
(Approved 10/00; revised 3/02)

A doctor must obtain the patient's informed consent before the doctor may treat or operate on the patient.³ The doctor has a duty to explain, in terms understandable to the patient, what the doctor intends to do before subjecting the patient to a course of treatment or an operation. The purpose of this legal requirement is to protect each person's right to self-determination in matters of medical treatment⁴.

A doctor has a duty to evaluate the relevant information and disclose all courses of treatment that are medically reasonable under the circumstances.⁵ In order to obtain the patient's informed consent, the doctor must tell the patient not only about the alternatives that the doctor recommends, but also about all medically reasonable alternatives that the doctor does not recommend. A doctor does not comply with the duty of informed consent by disclosing only the treatment alternatives that the doctor

¹ *Matthies v. Mastromonaco*, 160 N.J. 26, 34 (1999).

² This charge does not cover an emergency situation or the development of an unforeseeable condition during surgery. *Samoilov v. Raz*, 222 N.J. Super. 108 (App. Div. 1987).

³ *Largey v. Rothman*, 110 N.J. 204 (1988); *see also, Niemiera v. Schnieder*, 114 N.J. 550 (1989). If the patient is an infant, a parent's consent may not be required. *See, e.g., Youngs v. St. Francis Hosp.*, 205 Kan. 292, 469 P.2d 330 (Sup. Ct. 1970).

⁴ *Matter of Farrell*, 108 N.J. 335, 347 (1987).

⁵ "Physicians have a duty to evaluate the relevant information and disclose all courses of treatment that are medically reasonable under the circumstances." *Matthies*, 160 N.J. at 34.

recommends.⁶ Accordingly, the doctor must discuss all medically reasonable courses of treatment, including non-treatment, and the probable risks and outcomes of each alternative.⁷ By not discussing these alternatives, the doctor breaches the patient's right to make an informed choice and effectively makes the choice for the patient.⁸ The doctor has a duty to explain, in words the patient can understand, all material medical information and risks. Medical information or a risk of a medical procedure is material when a reasonable patient in the plaintiff's position would be likely to attach significance to it in deciding whether or not to submit to the treatment.⁹

A doctor is responsible for any injuries suffered by the patient, if the doctor did not adequately explain all medically reasonable courses of treatment, including non-treatment, in what the doctor knows or should know to be the patient's medical position or condition. The doctor is not required to disclose to the patient all the details of a proposed operation or treatment or all the possible risks, no matter how

⁶ "Physicians do not adequately discharge their responsibility by disclosing only the treatment alternatives that they recommend." *Matthies*, 160 *N.J.* at 37.

⁷ "For consent to be informed, the patient must know not only of alternatives that the physician recommends, but of all medically reasonable alternatives that the physician does not recommend. Otherwise, the physician, by not discussing these alternatives, effectively makes the choice for the patient. Accordingly, the physician should discuss the medically reasonable courses of treatment, including non-treatment and their attendant probable risks and outcomes." *Matthies*, 160 *N.J.* at 38.

⁸ "By not telling the patient of all medically reasonable alternatives, the physician breaches the patient's right to make an informed choice." *Matthies*, 160 *N.J.* at 39.

⁹ *Matthies*, 160 *N.J.* at 37-39.

small or remote.¹⁰ The doctor is not required to communicate those dangers known to the average person or those dangers the patient has already discovered. Taking into account what the doctor knows or should know to be the patient's need for information, the doctor must disclose the medical information and risks which a reasonably prudent patient would consider material or significant in making the decision about what course of treatment, if any, to accept. Such information would generally include a description of the patient's physical condition, the purposes and advantages of the proposed surgery or treatment, the material risks of the proposed treatment and the material risks if such surgery or treatment is not provided, as well as the available options or alternatives that are medically reasonable under the circumstances and the advantages and risks of each alternative.¹¹

The plaintiff must prove all of the following elements: (1) the defendant doctor failed to give the plaintiff all of the information that a reasonable person in the plaintiff's position would expect a doctor to disclose so that the plaintiff might make an informed decision about the course of treatment; (2) the undisclosed risk (of the

¹⁰ Although under *Largey* expert testimony cannot be used to establish the applicable standard as to what information must be disclosed (with perhaps the one exception noted in footnote 3) such testimony may be required or, at least, admissible on the question of the degree to which a risk was or was not remote or small. *Largey v. Rothman, supra*, 110 *N.J.* at 213-214.

¹¹ *Matthies*, 160 *N.J.* at 34.

treatment)/(of non-treatment) occurred;¹² (3) a reasonable person under the circumstances of this case would not have consented to (or would have chosen to undergo) the treatment or operation had he/she been so informed;¹³ and (4) the course of treatment or operation (or failure to operate or treat) was a proximate cause in producing plaintiff's injuries or conditions.¹⁴

Although the plaintiff's testimony may be considered on the question as to whether he/she would have consented, the issue to be resolved is not what this plaintiff would have done. You must decide whether a reasonably prudent person would not have consented (or chosen another course of treatment),¹⁵ if provided with material information which you find the doctor failed to provide in this case.¹⁶

If, however, you find that the defendant doctor gave all the information which a reasonable patient in the plaintiff's position would expect to receive at the time the consent was given, or that the undisclosed risk did not occur, or that the information

¹² As appropriate.

¹³ As appropriate.

¹⁴ As appropriate.

¹⁵ As appropriate.

¹⁶ *Largey v. Rothman, supra*, 110 N.J. at 215-226. This paragraph covers the issue of proximate cause regarding liability. *See also, Grasser v. Kitzis*, 230 N.J. Super. 216 (App. Div. 1988). Plaintiff must also show that the injuries for which compensation is sought proximately resulted from the defendant's conduct. *Garcia v. Meiselman*, 220 N.J. Super. 317 (Law Div. 1987), suggests a balancing test which has not yet been approved or discussed by our appellate courts.

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which was omitted or not disclosed would not have caused a reasonably prudent patient to refuse consent to the procedure or operation, or that the course of treatment or operation, or failure to operate or treat, was not a proximate cause in producing the plaintiff's injuries or conditions, then your verdict should be for the defendant on this issue.