

**Informed consent: How performing a less
invasive procedure led to claim of battery**

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Informed consent

How performing a less invasive procedure led to claim of battery

Plaintiff Paul Christman appealed a trial court order granting a periodontist summary judgment on his claim of medical battery. The plaintiff claimed that

- material facts were disputed, and therefore summary judgment was inappropriate;
- the periodontist performed a surgical procedure for which the plaintiff had not consented, and therefore the defendant had committed a battery.¹

Mr. Christman consulted Dr. Gordon Davis, a periodontist and the defendant, to treat his gum recession and root exposure. Dr. Davis reportedly discussed with the plaintiff procedures for obtaining root coverage, including a tissue graft. The plaintiff reportedly consented to this procedure.

After administering a local anesthetic, Dr. Davis began the tissue graft and decided instead that he would perform a flap procedure. This pro-

cedure follows the same preliminary step as the graft, but after incision, the periodontist applies a protein, Emdogain (Straumann USA, Andover, Mass.), to the gum to help the gingival tissue adhere to the tooth. No graft is made. After

surgery, Mr. Christman reportedly was upset that he had not received a graft. He also was concerned to learn later that the procedure had not achieved full results, and that he would need to undergo a tissue graft procedure after all.

Mr. Christman sued Dr. Davis for dental malpractice, lack of informed consent and battery. The plaintiff later withdrew the malpractice and lack of informed consent claims and pursued only the battery claim. The defendant filed a motion for summary judgment, contending that there had been no medical battery because the flap procedure was within the bounds of the plaintiff's consent.

In opposition to the defendant's motion, the plaintiff argued that he was given no notice relating to the fact that the flap procedure was to

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be used and his specific authorization to permit the flap procedure had not been obtained. The court found that the defendant performed surgery on an area of the body to which the plaintiff consented, and choosing to perform a less invasive procedure did not constitute battery.

The plaintiff appealed his case to the Vermont Supreme Court. The court initially determined that it was important to distinguish between cases involving no consent and those involving a lack of informed consent. Generally, battery occurs only when a physician or dentist performs an operation for which there was no consent. If the patient does provide consent for the procedure used, but receives inadequate disclosures of the alternatives and foreseeable risks and benefits of the alternatives, liability must be based on lack of informed consent and a claim of medical malpractice in failing to provide the necessary disclosures.

The court found that the battery theory should be reserved for cases in which a physician or dentist performs an operation to which the patient has not consented. When the patient gives permission to perform one type of treatment and the dentist performs another, the requisite element of deliberate intent to deviate from the consent given is present.

However, when the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears. Rather, the doctor, in obtaining consent, may have failed to meet his or her due-care

duty to disclose pertinent information. In that situation, the action should be for negligence.

As noted above, the plaintiff withdrew his negligence (malpractice) claim and his lack-of-informed-consent claim, and thus the only claim before the court was the battery claim.

The court observed that, based on the facts in this case, the plaintiff's claim is that the defendant had not performed the tissue graft procedure, and that is why the procedure was

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unsuccessful. The court determined that the central issue was whether the plaintiff consented to the procedure that was performed so that he could not prove an essential element of battery.

Effective consent must be "to the particular conduct, or to substantially the same conduct."²² Accordingly, "[w]here a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained, there is a clear case of battery."²³ In determining whether the plaintiff gave adequate consent, the court enunciated the rule that it must focus on the conduct or procedure to be performed, not its consequences.

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Under the elements of battery described above, courts have denied medical battery claims when a surgeon chooses to perform a less extensive operation than the one discussed with the patient. The court stated, in this case, that there was no public policy reason to expand the law of battery to situations in which the treatment was within the bounds of the patient's consent. The court also indicated that if physicians and dentists were subject to liability for battery in these types of cases, it would deter them from freely exercising their medical judgment.

Although it held that Dr. Davis acted within the plaintiff's consent such that the plaintiff has no battery claim, the court also recognized that Mr. Christman claimed that his consent had been induced by the defendant's representation that he would perform the tissue graft procedure. Instead, Dr. Davis had performed the flap procedure without even discussing it with the defendant. To the extent that the plaintiff had an actionable claim, the court observed that it fell within the lack-of-informed-consent line of cases. However, the plaintiff had dismissed that claim in the trial court and thus that was not an issue before the court.

The court then addressed the plaintiff's claims that disputed issues of material fact should prevent it from affirming the summary judgment decision.

The court stated that it agreed that material issues of disputed fact would prevent summary judgment on whether the defendant disclosed the flap procedure as an alternative to the tissue graft procedure. Nonetheless, the court acknowledged that no disputed issues of material fact exist as to whether the plaintiff's consent covered the flap procedure in light of the plaintiff's concession that elements of the flap procedure were essential to the tissue graft procedure the plaintiff sought.

As a result, the court found that summary judgment was appropriate in favor of the periodontist.

CONCLUSION

If there are material issues of fact, a court will not grant a motion for summary judgment, as these contested facts must be determined by trial. In other words, if the plaintiff had not dismissed his claims for malpractice and lack of informed consent, the decision would likely have been to remand this case to the lower court to try those issues.

It is not likely that most plaintiffs would dismiss their malpractice and lack-of-informed-consent claims in the trial court as this plaintiff did. In reading this article, readers

should be cognizant that this is a decision centered solely on the issue of medical battery. ■

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This article is informational only and does not constitute legal advice. Dentists must consult with their private attorneys for such advice.

1. *Christman v. Davis*, ____A.2d ____ (Vt. Oct. 21, 2005).
2. Restatement § 892A(2)(b).
3. *Cobbs v. Grant*, 8 Cal. 3d 229, 239 (Cal. 1972).