


The Legal Duty of Physicians to Disclose Medical Errors

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A stylized silhouette of a mountain range in shades of teal, located in the bottom right corner of the slide.

The Duty to Disclose

It is now well established that if a doctor makes an error which harms (or which has the potential to harm) the patient, the doctor has a legal obligation to disclose this fact to the patient.

The Case-Law

- ◆ Stamos v. Davies (Ontario, 1985)
(punctured spleen)
- ◆ Vasdani v. Sehmi (Ontario, 1993)
(wrong operation)
- ◆ Kiley-Nikkel v. Danais (Quebec, 1993)
(pathologist's error re. biopsy)
- ◆ Pittman Estate v. Bain (Ontario, 1994)
(transfusion with HIV contaminated blood)
- ◆ Gerula v. Flores (Ontario, 1995)
(wrong operation)
- ◆ Shobridge v. Thomas (B.C., 1999)
(retained abdominal roll)

Legal Basis for the Duty to Disclose

- ◆ Informed Consent
- ◆ Breach of Fiduciary Duty
- ◆ The Ordinary Duty of Care

Legal Consequences of Non-Disclosure

- ◆ Damages for anxiety and stress
- ◆ Aggravated damages
- ◆ Punitive damages
- ◆ Fraudulent concealment

When Does the Duty Arise?

- ◆ Cases of “harm” only?

 - CMA Code of Ethics

 - CPSI Canadian Disclosure Guidelines

- ◆ Potential future harm?

“The need to disclose when there is no immediate harm but the potential for harm exists is influenced by the future likelihood of severe consequences, the severity of possible consequences and the potential to prevent, identify or mitigate future harm through clinical testing or treatment. When uncertain about whether harm has occurred, it is recommended that disclosure take place”

CPSI Canadian Disclosure Guidelines, p. 18

When Does the Duty Arise?

◆ Possible Harm?

Pittman Estate v. Bain (Ontario, 1994)

◆ No Harm?

Vasdani v. Sehmi (Ontario, 1993)

Gerula v. Flores (Ontario, 1995)

◆ The “Reasonable Patient” Test

The Timing of Disclosure

- ◆ “As soon as reasonably practicable”
Shobridge v. Thomas (B.C., 1999)
- ◆ “At the earliest practical opportunity and preferably within one to two days after discovery of the adverse event”

CPSI Canadian Disclosure Guidelines, p. 20

What Must Be Disclosed?

Facts:

not opinion

not blame

not evidence

Whose Duty?

- ◆ Is it Delegable?

- ◆ What About Others (eg. Nurses)?

Shobridge v. Thomas (B.C., 1999)

Conclusion – The Future

“It is noteworthy that Canadian courts have taken a very broad and expansive interpretation of physicians’ fiduciary obligations to their patients, as well as their duties with respect to informed consent, both of which underlie the duty to disclose medical error. This may well suggest that in the future Canadian courts will also take an equally expansive interpretation of the duty to disclose medical error to patients.”