
809.45 MEDICAL NEGLIGENCE—INFORMED CONSENT—ACTUAL AND CONSTRUCTIVE.

The (*state number*) issue reads:

"Was the plaintiff [injured] [damaged][1] by the negligence of the defendant?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things: (1) that the defendant was negligent; and (2) that such negligence was a proximate cause of the plaintiff's [injury] [damage].

As to the first thing that the plaintiff must prove, negligence refers to a person's failure to follow a duty of conduct imposed by law. Every health care provider[2] is under a duty to use professional care to inform a patient about the usual and most frequent risks and hazards inherent in the procedures and treatments that provider intends to render and to obtain the consent[3] of the [patient] [person authorized to give the patient's consent][4] to such procedures and treatments in accordance with standards of practice among other health care providers with similar training and experience situated in the same or similar communities under the same or similar circumstances at that time.[5] (This duty, however, does not exist [in cases of emergency where the patient is unconscious] [in cases where the patient is not competent to give consent].)[6]

A health care provider's violation of this duty of professional care is negligence.[7]

As to the second thing that the plaintiff must prove, the plaintiff not only has the burden of proving negligence, but also that such negligence was a proximate cause of the [injury] [damage].

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and is a cause which a reasonable and prudent health care provider could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that the defendant's negligence was the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's negligence was a proximate cause.

In this case, the plaintiff contends, and the defendant denies, that the defendant was negligent in that the defendant did not obtain the plaintiff's consent and that, had the defendant properly attempted to do so, a reasonable person, under the same or similar circumstances, would not have given consent. A health care provider fails to obtain consent by not providing information to the patient which, under the same or similar circumstances, would have given a reasonable person a general understanding of the procedures and treatments to be used, and the usual and most frequent risks and hazards inherent in them as recognized by other health care providers in the same or similar communities.[8] A health care provider also fails to obtain consent by not obtaining it in accordance with the standards of practice among other health care providers with similar training and experience situated in the same or similar communities at that time.[9] In determining the standards of

practice[10] applicable to this case, you must weigh and consider the testimony of the witnesses who purport to have knowledge of those standards of practice for obtaining consent and not your own ideas of the standards.[11]

The information that should have been communicated had the health care provider done what was necessary to obtain consent must be of such a significant nature that a reasonable person[12] under the same or similar circumstances would not have given consent after obtaining this information.

The plaintiff further contends, and the defendant denies, that the defendant's negligence was a proximate cause of the plaintiff's [injury] [damage].

I instruct you that negligence is not to be presumed from the mere fact of [injury] [damage].

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant was negligent and that such negligence was a proximate cause of the plaintiff's [injury] [damage], then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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1. In death cases, this instruction can be modified to refer to the "decedent's death."

2. A "health care provider" is defined by N.C. Gen. Stat. § 90-21.11 as, "without limitation":

> "[a] person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, or psychology"; "[a] hospital, a nursing home licensed under Chapter 131E . . ., or an adult care home licensed under Chapter 131D"; "[a]ny other person who is legally responsible for the negligence of" such person, hospital, nursing home or adult care home; "[a]ny other person acting at the direction or under the supervision of" any of the foregoing persons, hospital, nursing home, or adult care home; or "[a]ny paramedic, as defined in G.S. 131E-155(15a)".

N.C. Gen. Stat. § 90-21.11.

3. N.C. Gen. Stat. § 90-21.13 deals with the question of consent in two ways. First, it sets forth the statutory criteria for determining whether the patient *actually* gave consent. *See* N.C. Gen. Stat. § 90-21.13(a)(1) and (2). This type of consent may be called "actual consent" and it may be oral or written. If written, N.C. Gen. Stat. § 90-21.13(b) identifies it as a "valid consent." Since this special sub-categorization adds nothing to the issue before the jury, namely, the jury must find that the writing constitutes "actual consent" before it can be a "valid consent," it is not referred to in this instruction as a separate element for proof. Its use would be redundant.

The second way in which the statute deals with the issue of consent is to set up a standard for determining whether the reasonable person would have given consent under the same or similar circumstances. *See* N.C. Gen. Stat. § 90-21.13(a)(3). This standard does not ask whether the patient *actually* consented, but whether the patient would have consented. It is thus a standard of "constructive consent."

Throughout this pattern charge, the labels "actual" and "constructive" are dropped for the purposes of conciseness and avoidance of jury confusion. To the plaintiff is allocated the burden of proving that neither standard of consent is present on the facts of the case.

4. For example, the patient's spouse, parent, guardian or nearest relative. *See* N.C. Gen. Stat. § 90-21.13(a). This reference to third parties who might consent on behalf of the plaintiff or decedent is, for the sake of brevity, dropped from the remainder of this pattern charge. Where this situation exists, however, it should be added.

5. *Starnes v. Taylor*, 272 N.C. 386, 392–93, 158 S.E.2d 339, 334 (1967); *Sharpe v. Pugh*, 270 N.C. 598, 604, 155 S.E.2d 108, 112 (1967); *Watson v. Clutts*, 262 N.C. 153, 159–

60, 136 S.E.2d 617, 621 (1964); *Hunt v. Bradshaw*, 242 N.C. 517, 521, 88 S.E.2d 762, 766 (1955).

6. This pattern charge does *not* address certain issues in rebuttal to the defendant's showing of actual or valid consent (or to the plaintiff's failure to show lack of consent). For example, the evidence may tend to show facts which satisfy the issue of actual or valid consent in defendant's favor. Yet, such actual or valid consent might have been obtained under circumstances of fraud, deception or misrepresentation, or from a person not mentally or physically competent to give it. *See* N.C. Gen. Stat. § 90-21.13(b) and (c). These issues would tend to show no actual or valid consent and, when present, should be addressed to the jury by way of special supplementary instructions. Where these special issues arise, therefore, a separate issue on fraud, deception, misrepresentation or mental or physical competence should be given prior to the submission of this issue on consent. (These special issues will not be needed in conjunction with the constructive consent issue since that question is independent of the means by which the actual or valid consent is attempted to be obtained.)

7. N.C. Gen. Stat. § 90-21.13 governs informed consent claims. Note that, unlike the 2011 amendment to N.C. Gen. Stat. § 90-21.12 (2011), N.C. Gen. Stat. § 90-21.13 was not amended to include the "under the same or similar circumstances" language. Rather, N.C. Gen. Stat. § 90-21.13(a) specifies that the relevant standard is "in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities."

8. N.C. Gen. Stat. § 90-21.13(a)(2). In the case of *Osburn v. Danek Med., Inc.*, 135 N.C. App. 234, 520 S.E.2d 88 (1999), *aff'd*, 352 N.C. 143, 530 S.E.2d 54 (2000) (*per curiam*), the Court of Appeals upheld the trial court's refusal to give instructions requested by the plaintiff to the effect that the applicable duty of care required physicians to inform their patients if the proposed procedure or a device used in the procedure was experimental in nature. 135 N.C. at 237, 520 S.E.2d at 91. The Court of Appeals stressed that the applicable standard was statutory, N.C. Gen. Stat. § 90-21.13(a)(2), and that the statute required only such disclosure of information as would lead to a "general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities." *Id*. at 239, 520 S.E.2d at 92. Thus, if it were in keeping with this standard for a health care provider to disclose that the procedure or device was experimental, then failure to make that disclosure would be a breach of the duty of care. In instructing a jury on informed consent, therefore, the trial court should not deviate from the statutory standard, but, as was done in *Osburn*, may properly give the physician's failure to inform the patient of the experimental nature of the procedure or device as a contention of negligence. *See* 135 N.C. App. at 240, 520 S.E.2d at 92.

9. N.C. Gen. Stat. § 90-21.13(a)(1).

10. For cases filed on or after 1 October 2011, Rule 702(a) of the *North Carolina Rules of Evidence* requires that before an expert can testify "in the form of an opinion, or otherwise": (1) the testimony must be "based on sufficient facts or data"; (2) the testimony must be the product of "reliable principles and methods"; and (3) the "witness has applied the principles and method reliably to the facts of the case." N.C. R. Evid. 702(a) (2011). *See also* N.C. R. Evid. 702(b)–(f) (setting forth the specific qualifications required of an expert witness testifying on the appropriate standard of health care). In proper cases, lay opinion testimony may be used. *See* N.C. R. Evid. 701 and *Schaffner v. Cumberland Cnty. Hosp. Sys.*, 77 N.C. App. 689, 692, 336 S.E.2d 116, 118 (1985) (stating that expert testimony is not invariably required in all cases).

11. *Jackson v. Sanitarium*, 234 N.C. 222, 226, 67 S.E.2d 57, 61-62 (1951); *Vassey v. Burch*, 45 N.C. App. 222, 225, 262 S.E.2d 865, 867, *rev'd on other grounds*, 301 N.C. 58, 269 S.E.2d 137 (1980); *Whitehurst v. Boehm*, 41 N.C. App. 670, 677, 255 S.E.2d 761 (1979). "There are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise." *Gray v. Weinstein*, 227 N.C. 463, 465, 42 S.E.2d 616, 617 (1947), quoted in *Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118. *See also* other cases cited in *Schaffner*.

12. It should be emphasized here that the question is not whether a particular plaintiff would have given consent if advised in accordance with the applicable standards of practice, but whether the *reasonable person* would have consented. Thus, it is improper for the plaintiff to testify from hindsight as to whether he or she would have consented. *Watson v. Clutts*, 262 N.C. 153, 160, 136 S.E.2d 617, 622 (1963). (The court excluded such testimony "which presented a case of looking backwards.")