

Informed Consent: When a Signed Consent Form is Deemed Not to be Informed Consent

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*On September 12, 2005, the Court of Appeal, Second Appellate District, Division 5, filed **Quintanilla v. Dunkelman** (2005) 133 Cal.App.4th 95, a case which details instances when a signed consent form is deemed not to be informed consent.*

The evidence produced at trial demonstrated substantial evidence that the plaintiff/patient was not advised of all of the surgical procedures which would be performed. Further, there was substantial evidence that the patient had not previously met the physician who performed the surgical procedures, and that the patient was unable to read the language in which the consent form was printed.

The defendant relied, in part, on *Evidence Code* § 622. Section 622 creates a conclusive presumption that facts in a written document are true. However, the *Quintanilla* Court found this presumption was inapplicable as to the doctrine of informed consent.

The foundation for the doctrine of informed consent, as rooted in a claim for medical negligence, was set forth in *Cobbs v. Grant* (1972) 8 Cal.3d 229, and explained at length two decades later in *Arato v. Avedon* (1993) 5 Cal.4th 1172. Generally, the *Cobbs* Court found as follows: (1) The level of medical knowledge possessed by a physician, in comparison to that of a patient, is not equal; (2) a patient has the right to make a determination as to his medical treatment; (3) consent to medical treatment must be informed; and (4) a patient, by virtue of the

physician-patient relationship, is dependent upon the information provided during the decision making process. *Cobbs, supra*, 8 Cal.3d at 242-243; *Arata, supra*, 5 Cal.4th at 1182-1183.

In sum, the court in *Cobbs* explained that a physician's obligation is that of "reasonable disclosure of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each." *Cobbs, supra*, 8 Cal.3d at 243. In reaching its conclusions in *Quintanilla*, the court referenced this foundation.

It is incumbent upon a physician to ensure that a patient is completely aware of the medical treatment to be provided.

The facts in *Quintanilla*, although controverted, are generally summarized as follows. The patient spoke fluent Spanish, but was unable to read Spanish. The examining physician believed her to be able to both speak and write Spanish.¹

The patient presented with complaints of a gynecological nature to the examining physician. According to the patient, she understood that the examining physician would perform a "scraping" type procedure to address such complaints. The examining physician testified that he recommended a dilation and curettage (D&C), and also a laparoscopy.

According to the examining physician, he also referred the patient, for performance of such surgical procedures, to the treating physician. The patient claimed to never have met the treating physician. The treating physician, however, testified that on the morning of the surgical procedures, he introduced himself to the patient, asked her questions about her complaints, advised her that he would be performing the surgical procedures, and discussed with her the nature of the surgical procedures.

As for the consent form, specifically, the patient testified that she was provided with a stack of documents on the morning of the surgical procedures, which were printed in Spanish, a language she could not read. The patient further testified that she was told where to sign and initial such documents, which took approximately five minutes to complete. The consent form contained writing referencing "examination under anesthesia, [D&C], laparoscopy, possible biopsy, possible aspiration, [and] excision of vulvar lesion." The registered nurse who signed the consent form testified that she did not know if the patient understood these references.

According to the *Quintanilla* Court, the above was not sufficient to meet the foundational requirements of the doctrine of informed consent, as enunciated by the *Cobbs* Court. It found that substantial evidence was presented that the treating physician performed surgical procedures

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beyond those discussed with the examining physician (D&C, laparoscopy and removal of a lesion), the treating physician never met with the patient prior to the surgical procedures, the patient could not read the language of the consent form, and the patient was essentially told where to sign and/or initial the consent form. *Quintanilla, supra*, 133 Cal.App.4th at 115.²

With regard to *Evidence Code* § 622, the *Quintanilla* Court further found that the argument that recitals in a consent form conclusively establish informed consent was inconsistent with the rationale behind such a doctrine, considering there was substantial evidence that the patient was "rushed" through the admission process, she was unable to read the language on the

consent form and she did not understand the nature of the surgical procedures which were performed. Id. at 116-117.

Although not a departure from the proscriptions of *Cobbs*, the *Quintanilla* Court has reiterated that it is incumbent upon a physician to ensure that a patient is completely aware of the medical treatment to be provided. It is the obligation of the physician that the patient understand not only the anticipated surgical procedures, but that the patient also be able to read the language of the actual consent form. ■

¹"Examining physician" refers to the physician to whom the patient presented, but did not perform the surgical procedures at issue. "Treating physician" refers to the physician who performed such surgical procedures.

²An additional factor on appeal was that the consent form (printed in Spanish) was not translated into English at the time of trial, precluding determination as to whether the consent form satisfied the requirements of *Cobbs*.

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