BYU Law Review

Volume 1980 | Issue 4 Article 13

11-1-1980

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Carol A. Cluff

California Supreme Court Expands the Informed Consent Doctrine; Physicians Have a Duty to Obtain an Informed Refusal: *Truman v. Thomas*

The doctrine of informed consent requires that a physician inform a patient of any significant dangers or risks connected with a proposed treatment before obtaining the patient's consent to the treatment.[1] Otherwise, the physician may be liable in tort under a theory of battery[2] or negligence[3] for harm resulting

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1. *See generally* Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972); Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960). *See also* Plante, *An Analysis of "Informed Consent,"* 36 FORDHAM L. REV. 639 (1968); Riga, *Informed Consent*, 10 LINCOLN L. REV. 159 (1977); Seidelson, *Medical Malpractice: Informed Consent Cases in "Full Disclosure" Jurisdictions*, 14 DUQ. L. REV. 309 (1976); Waltz & Scheuneman, *Informed Consent to Therapy*, 64 NW. U.L. REV. 628 (1970); Comment, *Informed Consent in Medical Malpractice*, 55 CALIF. L. REV. 1396 (1967).

2. The theory of battery has been used to impose liability where the physician performs treatment without obtaining an informed consent to the treatment. *See* Wall v. Brim, 138 F.2d 478 (5th Cir. 1943), *cert. denied*, 324 U.S. 857 (1945) (failure to inform of risks inherent in removal of cyst); Belcher v. Carter, 13 Ohio App. 2d 113, 234 N.E.2d 311 (1967) (failure to warn of radiation burns); Gray v. Grunnagle, 423 Pa. 144, 223 A.2d 663 (1966), *appeal denied*, 425 Pa. 403, 228 A.2d 735 (1967) (failure to warn patient of risk of paralysis). However, the more logical application of the battery theory is in those situations where the physician performs treatment for which the patient has not consented or where the treatment as administered deviates from the type of treatment for which consent was given. *See* Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906) (patient consented to an operation on her womb; surgery exceeded her consent when physician removed her ovaries and uterus); Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905), *rev'd on other grounds*, 98 Minn. 494, 108 N.W. 818 (1906) (physician obtained patient's consent to an operation on the right ear; surgery performed on patient's left ear); Schloendorff v. Society of N. Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914) (tumor surgically removed without patient's consent).

3. *See* Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960). *Natanson* was one of the first decisions to indicate that a physician's liability for failure to inform the patient of the risks accompanying the proposed treatment should be based on negligence. The *Natanson* court observed that "what appears to distinguish the case of the unauthorized surgery or treatment from traditional assault and battery cases is the fact that in almost all of the cases the physician is acting in relatively good faith for the benefit of the patient." *Id.* at 401-02, 350 P.2d at 1100.

The trend today is to apply the law of negligence where the consent was based on insufficient information rather than lack of consent. *See* Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972); Di Filippo v. Preston, 53 Del. 539, 173 A.2d 333 (1961); Aiken v. Clary, 396 S.W.2d 668 (Mo. 1965); Wilkinson v. Vesey, 110 R.I. 606, 295 A.2d 676 (1972).

For a general discussion of the battery and negligence theories, see W. PROSSER,

from an undisclosed risk. The Supreme Court of California in *Truman v. Thomas*[4] held that the doctrine of informed consent also requires that a physician inform a patient who refuses to submit to a diagnostic test of the risks the patient is assuming. In *Truman* the patient refused to submit to her physician's recommended diagnostic test[5] and died of the disease the diagnostic test probably would have detected. In holding that a physician could be liable in a wrongful death action, the court reasoned that a decision to refuse to submit to a diagnostic test must be based on a knowledge of the risks inherent in not having the test performed.[6]

Rena Truman died of cervical cancer in July, 1970, at the age of thirty. Respondent, Dr. Claude R. Thomas, a general practitioner, acted as primary physician for Mrs. Truman from 1963 to 1969.[7] In 1969, Mrs. Truman consulted a urologist about a urinary infection and was referred to a gynecologist.[8] The gynecologist "discovered that Mrs. Truman's cervix had been largely replaced by a cancerous tumor."[9] Dr. Thomas had not performed a Pap smear test on Mrs. Truman during the six years he had acted as her physician, but he testified that "on at least two occasions when he performed pelvic examinations of Mrs. Truman she refused him permission to perform the test, stating that she could not afford the cost."[10] Expert witnesses

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HANDBOOK OF THE LAW OF TORTS § 32, at 165-66 (4th ed. 1971); Karlson & Erwin, *Medical Malpractice: Informed Consent to the Locality Rule*, 12 IND. L. REV. 653 (1979); Riskin, *Informed Consent: Looking for the Action*, 1975 U. ILL. L.F. 580; Note, *Duty of Doctor to Inform Patient of Risks of Treatment: Battery or Negligence?*, 34 S. CAL. L. REV. 217 (1961).

4. 27 Cal. 3d 285, 611 P.2d 902, 165 Cal. Rptr. 308 (1980).

5. Dr. Thomas recommended to Mrs. Truman that she undergo a Pap smear test. *Id.* at 289, 611 P.2d at 904, 165 Cal. Rptr. at 310.

A Pap smear test involves the examination of body secretions from the cervix which may be used to detect cervical cancer in women. T. STEDMAN, STEDMAN'S MEDICAL DICTIONARY 1610 (2d ed. 1966).

6. 27 Cal. 3d at 292, 611 P.2d at 906, 165 Cal. Rptr. at 312.

7. *Id.* at 288, 611 P.2d at 904, 165 Cal. Rptr. at 310.

8. *Id.* The urologist examined Mrs. Truman in April 1969; in May, after explaining to her the seriousness of her symptoms, he suggested she see a gynecologist. The urologist finally made the appointment with the gynecologist in October after Mrs. Truman had neglected to do so. Truman v. Thomas, 93 Cal. App. 3d 304, 155 Cal. Rptr. 752, 754 (1979) (Truman v. Thomas has been deleted from 93 Cal. App. 3d and hereinafter will be cited without reference to 93 Cal. App. 3d).

9. 27 Cal. 3d at 289, 611 P.2d at 904, 165 Cal. Rptr. at 310. At this advanced stage the cancer could not be surgically removed and was unsuccessfully treated. *Id.*

10. *Id.* During Mrs. Truman's first visit to Dr. Thomas she reported having had a Pap smear test within the past year. Truman v. Thomas, 155 Cal. Rptr. 752, 753 (1979).

testified that a Pap smear test probably would have detected the cancer at a stage when it could have been curable if treated.[11]

Following Mrs. Truman's death, her children brought a wrongful death malpractice action against Dr. Thomas. The Superior Court of Butte County, California, entered judgment in favor of the defendant-physician.[12] The minor children appealed,[13] arguing that the trial court erred in refusing three requested jury instructions: one dealing with strict liability[14] and two dealing with the issue of informed consent.[15] A split court of

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Dr. Thomas testified at trial:

> As I said many times with Rena, when we were doing pelvics, I would say, "Rena, you should have a pap smear now," and for various reasons she put it off. . . . [W]e already had the equipment there and [were] ready to do it and we always tried to tell girls to have one every year.

Id.

The charge at that time for a Pap smear test was six dollars. Mrs. Truman promised to come in later for a complete examination including a Pap smear test. *Id.* at 754.

11. 27 Cal. 3d at 289, 611 P.2d at 904, 165 Cal. Rptr. at 310.

12. *Id.* at 285, 611 P.2d at 902, 165 Cal. Rptr. at 308.

13. Truman v. Thomas, 155 Cal. Rptr. 752 (1979).

14. The plaintiffs requested that the jury be instructed:

> [A]s a matter of law . . . a physician *who fails to perform* a Pap smear test on a female patient over the age of 23 and to whom the patient has entrusted her general physical care is liable for injury or death proximately caused by the failure to perform the test.

Id. at 755. The plaintiffs based this argument on the Washington Supreme Court decision in Helling v. Carey, 83 Wash. 2d 514, 519 P.2d 981 (1974), which held that the defendant ophthalmologist was negligent for failing to perform a glaucoma test on the patient. The case has been severely criticized and limited to its facts. *See* Swanson v. Brigham, 18 Wash. App. 647, 571 P.2d 217 (1977); Meeks v. Marx, 15 Wash. App. 571, 550 P.2d 1158 (1976). *See also* Pearson, *The Role of Custom in Medical Malpractice Cases,* 51 IND. L.J. 528 (1976). The California Court of Appeal rejected the *Helling* holding in Barton v. Owen, 71 Cal. App. 3d 484, 498, 139 Cal. Rptr. 494, 502 (1977).

The court of appeal rejected the jury instruction, reasoning that it would give no direction to the medical profession as to a standard of care. 155 Cal. Rptr. at 756.

15. The first requested instruction on informed consent was taken from the CALIFORNIA JURY INSTRUCTIONS and states in part:

> It is the duty of a physician or surgeon to disclose to his patient all relevant information to enable the patient to make an informed decision regarding the proposed operation or treatment.
>
> There is no duty to discuss minor risks inherent in common procedures, when such procedures very seldom result in serious ill effects.
>
> However, when a procedure inherently involves a known risk of death or serious bodily harm, it is the physician's or surgeon's duty to disclose to his patient the possibility of such outcome and to explain in lay terms the complications that might possibly occur. The physician or surgeon must also disclose such additional information as a skilled practitioner of good standing would provide under the same or similar circumstances.
>
> . . . .
>
> Notwithstanding the patient's consent to a proposed treatment or opera-

appeal upheld the trial court's refusal of all three instructions, holding that unless a patient requests information, a physician is not under a duty to inform a patient of the dangers of failure to submit to a recommended diagnostic test.[16]

In a four to three decision, the Supreme Court of California reversed the court of appeal, holding that it was prejudicial error to have refused one of the requested jury instructions on informed consent.[17] The majority held that "if a patient indicates that he or she is going to decline the risk-free test or treatment, then the doctor has the additional duty of advising of all material risks of which a reasonable person would want to be informed before deciding not to undergo the procedure."[18] The dissent, in contrast, strongly criticized the majority for imposing on doctors the burden of having to explain diagnostic tests to

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tion, failure of the physician or surgeon to inform the patient as stated in this instruction before obtaining such consent is negligence and renders the physician or surgeon subject to liability for any injury [proximately] [legally] resulting from the [treatment] [operation] if a reasonably prudent person in the patient's position would not have consented to the [treatment] [operation] if he had been adequately informed of all the significant perils.

SUPERIOR COURT OF CALIFORNIA, CALIFORNIA JURY INSTRUCTIONS No. 6.11 (5th ed. Supp. 1975) (sometimes referred to as Book of Approved Jury Instructions; hereinafter referred to as BAJI).

The BAJI instruction presupposed that the patient had consented to treatment and, therefore, was properly rejected because Mrs. Truman refused the test rather than consented to it. 155 Cal. Rptr. at 756.

The second requested jury instruction on informed consent was a special instruction paraphrasing the BAJI No. 6.11.

It is the duty of a physician to disclose to his patient all relevant information to enable the patient to make an informed decision regarding the submission to or refusal to take a diagnostic test.

Failure of the physician to disclose to his patient all relevant information including the risks to the patient if the test is refused renders the physician liable for any injury legally resulting from the patient's refusal to take the test, if a reasonable prudent person in the patient's position would not have refused the test if she had been adequately informed of all the significant perils.

155 Cal. Rptr. at 757. This instruction was rejected. The court of appeal felt bound by the fact that no California court had ever recognized a doctrine of informed refusal. *Id.*

16. *Id.* at 760. The dissenting judge disagreed with this analysis: "When a doctor has advised a patient to undergo testing and a patient declines to do so, the doctor has an affirmative duty to insure that the patient's refusal is informed by all material facts pertinent to the decision." *Id.* at 763 (Karlton, J., dissenting).

17. 27 Cal. 3d 285, 611 P.2d 902, 165 Cal. Rptr. 308.

18. *Id.* at 292, 611 P.2d at 906, 165 Cal. Rptr. at 312. The court rejected Dr. Thomas' argument that the doctrine of informed consent did not apply to him because he had obtained no consent to treatment from Mrs. Truman and that patients who reject their physicians' advice should be responsible for inquiring further as to the consequences of their decisions. *Id.*

healthy persons.[19]

In *Truman* the Supreme Court of California, without acknowledging it as such, actually introduced a new doctrine that might be termed informed refusal. The court held that Dr. Thomas could be found liable under the auspices of the informed consent doctrine for failing to inform Mrs. Truman that her refusal to submit to a Pap smear test could result in fatal consequences. The court failed to recognize, however, that the *Truman* facts could not support a determination of liability under the informed consent doctrine. Before other courts rely on *Truman* to expand physician liability by adopting a new doctrine of informed refusal, they should carefully analyze the doctrinal aberrations and potentially adverse practical ramifications of this decision.

The following analysis will demonstrate that the doctrine of informed consent should not be broadened to include liability for a physician's failure to inform a patient of the inherent and obvious risks of refusing to submit to a recommended and common, risk-free diagnostic test. However, under certain limited circumstances a physician should be liable for failure to make information available that will enable the patient to make an informed decision whether to consent to or refuse the test or treatment.

Although the idea that a physician must obtain a patient's consent to treatment is not new to the courts,[20] it was not until the early 1950's that liability was imposed on a physician for failing to inform a patient of the risks inherent in treatment prior to obtaining consent.[21] The doctrine of informed consent has since become universally accepted in medical jurisprudence.[22] However, this doctrine has been refined over the past

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19. *Id.* at 297, 611 P.2d at 909, 165 Cal. Rptr. at 315 (Clark, J., dissenting). Justice Clark argued that "carried to its logical end, the majority decision requires physicians to explain to patients who have not had a recent general examination the intricacies of chest examinations, blood analyses, X-ray examinations . . . and innumerable other procedures." *Id.* at 298, 611 P.2d at 910, 165 Cal. Rptr. at 316.

20. *See* Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905), *rev'd on other grounds*, 98 Minn. 494, 108 N.W. 818 (1906); Schloendorff v. Society of N. Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914).

21. One of the earliest cases to examine the informed consent theory was Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (1957). *See also* Di Filippo v. Preston, 53 Del. 539, 173 A.2d 333 (1961); Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960); Aiken v. Clary, 396 S.W.2d 668 (Mo. 1965).

22. *See* Seidelson, *Medical Malpractice: Informed Consent Cases in "Full Disclosure" Jurisdictions*, 14 DUQ. L. REV. 309, 309 n.1, 310 n.2 (1976).

thirty years to impose liability only in a narrowly defined situation: where the patient consents to treatment and an undisclosed risk of that treatment causes injury to the patient.[23]

In *Truman* the California Supreme Court imposed liability under the theory of informed consent in a situation beyond what had previously been the scope of the doctrine. *Truman* is the first decision to impose liability on a physician for an act of omission where there had been no bodily intrusion; it was also the first decision to impose liability on a physician under the doctrine of informed consent where there had been neither consent nor treatment.[24]

In imposing this new liability, the court relied heavily on *Cobbs v. Grant*,[25] a recent leading case examining informed con-

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23. *See* Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972) (patient consented to laminectomy without being informed of possibility of paralysis); Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972) (patient consented to surgery without being informed of risks of subsequent complications); Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960) (patient suffered radiation burns after consenting to radiation therapy; insufficient disclosure of risks); Aiken v. Clary, 396 S.W.2d 668 (Mo. 1965) (patient consented to insulin shock therapy without being informed of risks of coma and brain damage).

24. Professor Riga outlines the elements of a cause of action under the informed consent doctrine:

1. Physician recommended a certain treatment;
2. Plaintiff consented to the treatment;
3. Physician failed to disclose a risk of the treatment that he knew would have been material to the patient's decision;
4. Physician performed the treatment;
5. Patient was injured as a result of an undisclosed risk.

Riga, *supra* note 1.

Noticeably absent from *Truman* are two of those elements: the plaintiff's consent to treatment and performance of the treatment by the physician. A cause of action should not lie when one or more elements are missing. "Thus, the autonomy and privacy of the human person is [sic] informed consent has two parts: first, that sufficient information is disclosed to comprehend the procedure and its effects upon him, and second, that the patient *actually agrees* to the procedure to be employed." *Id.* at 177 (emphasis added). Justice Clark, dissenting in *Truman*, stated: "Where no intrusion takes place, no need for consent—effective or otherwise—arises." 27 Cal. 3d at 300, 611 P.2d at 911, 165 Cal. Rptr. at 317 (Clark, J., dissenting). Footnote 1 in Justice Clark's dissenting opinion elaborates further:

> [The] authority relied on by the majority . . . is concerned with whether consent to therapy was informed and therefore effective. The cases involved situations where there has been an intrusion to the body autonomy and it is claimed the intrusion was consensual. Thus, the question of informed consent is crucial. None involves the situation where the patient has refused the intrusion and thus consent is immaterial.

Id. at 300 n.1, 611 P.2d at 911 n.1, 165 Cal. Rptr. at 317 n.1.

25. 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972). For a discussion of Cobbs v. Grant, see Comment, *New Trends in Informed Consent*, 54 NEB. L. REV. 66, 80-83

sent in California. *Truman* is factually distinguishable from *Cobbs*. In *Cobbs* the patient attempted to impose liability upon the physician for failing to inform him of the risks inherent in surgery to relieve a duodenal ulcer when an undisclosed risk of the surgery developed.[26] The facts in *Truman* were significantly different in that the patient there refused treatment (the diagnostic test), which necessarily means that the patient's illness was not a result of treatment.[27] *Cobbs* held that a physician has a "duty of reasonable disclosure of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each."[28] *Truman* expanded a physician's duty to a patient to include informing a patient of the dangers of refusing tests.[29] This extension of *Cobbs* would be justified if Dr. Thomas had obtained Mrs. Truman's consent to submit to a risky diagnostic test without first disclosing those risks. But that situation did not exist. The test was risk-free and was refused by Mrs. Truman.[30]

Had the Supreme Court of California analyzed *Truman* in the same manner that it analyzed *Cobbs*, the court would likely have concluded that important theoretical differences preclude application of the informed consent doctrine to *Truman*. The *Cobbs* court postulated four basic characteristics that typify the physician-patient relationship: (1) A patient is generally unlearned in the medical sciences; (2) An adult has the right to decide whether or not to submit to a medical treatment; (3) A patient's consent to treatment, to be effective, must be an informed consent; and (4) A patient depends on his physician for information in making his decision.[31] Applying these characteristics to the Thomas-Truman relationship reveals that the *Truman* case is fundamentally different from the *Cobbs* case.

First, a woman in Mrs. Truman's position would not need to

(1975); 61 CALIF. L. REV. 634 (1973).

26. 8 Cal. 3d at 234-35, 502 P.2d at 4-5, 104 Cal. Rptr. at 508-09. The California Supreme Court held that there was insufficient evidence to establish that the physician negligently performed the surgery and reversed and remanded on the issue of informed consent. *Id.* at 238-39, 502 P.2d at 7, 104 Cal. Rptr. at 510-11. To assist the trial court in deciding the case the supreme court analyzed a physician's duty to obtain the patient's informed consent prior to treatment. *Id.* at 244-45, 502 P.2d at 11, 104 Cal. Rptr. at 515.

27. 27 Cal. 3d at 292, 611 P.2d at 906, 165 Cal. Rptr. at 312.

28. 8 Cal. 3d at 243, 502 P.2d at 10, 104 Cal. Rptr. at 514.

29. 27 Cal. 3d at 292, 611 P.2d at 906, 165 Cal. Rptr. at 312.

30. *Id.*

31. 8 Cal. 3d at 242, 502 P.2d at 9, 104 Cal. Rptr. at 513.

be learned in medical science to realize that a Pap smear test was a common diagnostic test routinely administered by physicians to detect cancer and that death can result by allowing cancer to develop undetected. Secondly, Dr. Thomas obviously recognized and respected Mrs. Truman's right to decide whether or not to submit to a medical treatment. Thirdly, it does not necessarily follow that a patient's refusal of a diagnostic test must be an informed refusal to be effective. Finally, the duty imposed by *Cobbs* was directed toward protecting a patient from "abjectly" consenting to treatment without adequate knowledge of the risks involved.[32] Thus, this protection is not necessary where a patient refuses a physician's advice and consequently is not subjected to the treatment and resulting risks.

In summary, the *Truman* case does not present the fact situation to which informed consent theory has been previously applied. Furthermore, the basic postulates providing policy support for informed consent, as set forth in *Cobbs*, do not apply to the *Truman* case. However, even if it is agreed that the doctrine of informed consent does not provide the proper theoretical basis for resolution of this case, *Truman* still raises the potentially controversial question of whether physicians should be liable for failing to inform patients of the risks of refusing treatment or diagnostic tests.

The correct analytical approach to this question would be to consider the doctrine of informed refusal under traditional medical malpractice negligence theories. This approach, which focuses on the physician's duty of care to the patient and on the medical standard, suggests that in certain circumstances a physician should be found liable for failing to inform a patient of risks inherent in refusing medical tests, but that in factual situations similar to *Truman* the physician should not be found liable.

The basic elements of a cause of action for medical malpractice negligence are (1) a duty owing to the plaintiff (patient), (2) a breach of that duty by the defendant (physician), (3) an injury to the plaintiff, and (4) causation.[33] Accordingly, the initial step

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32. 155 Cal. Rptr. at 757.

33. "A *prima facie* case of medical malpractice must normally consist of evidence which establishes the applicable standard of care, demonstrates that this standard has been violated, and develops a causal relationship between the violation and the harm complained of." Kosberg v. Washington Hosp. Center, Inc., 394 F.2d 947, 949 (D.C. Cir. 1968). *See also* W. PROSSER, *supra* note 3, at § 30.

in establishing a doctrine of informed refusal is to expand the physician's duty to include an obligation to inform the patient of risks inherent in refusing to submit to recommended medical treatment or diagnostic tests.[34] This duty did not exist in California before *Truman* and logically cannot be imposed under the doctrine of informed consent. Therefore, if the duty is to be expanded, the court should fashion a new and distinct doctrine of informed refusal.

The second and third elements of a cause of action based on informed refusal would not differ from other forms of malpractice liability and are basically questions of proof. However, an informed refusal theory presents some difficulties that have been characterized as "causation" issues.[35] Theoretically, the plaintiffs in *Truman* would have the burden to prove (1) that Mrs. Truman would not have refused the test had she been informed of the risks,[36] (2) that the Pap smear test would have positively detected the presence of cervical cancer,[37] and (3) that the cancer once detected would have responded to treatment and would

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34. A central issue in *Truman* was whether Dr. Thomas had a duty to inform Mrs. Truman of the potentially fatal consequences of her decision not to submit to a Pap smear test. The court found that this duty did exist under the *Cobbs* holding, reasoning that a physician has a duty to make all material information available to a patient. 27 Cal. 3d at 292, 611 P.2d at 906, 165 Cal. Rptr. at 312.

35. *Cf.* Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1 (suggests that a duty-risk analysis is more rational and preferred over the traditional proximate cause analysis).

36. The requested jury instruction in *Truman* states that breach of the duty renders the physician liable for any " 'legally resulting [injury] . . . if a reasonably prudent person in the patient's position would not have refused the test if she had been adequately informed of all the significant perils.' " 27 Cal. 3d at 294, 611 P.2d at 907, 165 Cal. Rptr. at 313 (quoting BAJI, *supra* note 15, No. 6.11). "Legally resulting" was defined as, "[A] 'proximate cause of an injury . . . which, in natural and continuous sequence, produces the injury, and without which the injury would not have occurred.' " *Id.* (quoting BAJI, *supra* note 15, No. 3.75). Causation in informed consent cases usually is established by showing that the plaintiff would not have consented to treatment had the risks been disclosed.

37. Whether the Pap smear test is effective in detecting cervical cancer is currently in dispute. A recent medical journal article stated, "The Pap smear test also fails to detect the presence of cervical cancer in up to 48 percent of women under 50." Rylander, *Negative Smears in Women Developing Invasive Cervical Cancer*, 56 ACTA. OBSTET. GYNECOL. SCAND. 115, 116 (1977), *quoted in* Brief of Amicus Curiae Association of Defense Counsel in Support of Defendant and Respondent at 12. "A few critics go so far as to say that the test [Pap smear] does not save lives at all . . . . But the main criticism, . . . is that the costs of annual screening for cervical cancer are too high in comparison to the rather small number of lives saved." Mart, *The Annual Pap Smear: An Idea Whose Time Has Gone?*, 205 SCIENCE 177 (1979).

have been cured.[38] Such a hypothetical chain of "causation" presents difficult analytical problems.[39] Nevertheless, similar "causation" problems exist in informed consent cases and have been overcome by courts that have imposed a proximate causation standard.[40]

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38. The American Cancer Society claims: "If every woman had a Pap smear test with her regular health checkup, there would be virtually no deaths from cervical cancer. The overall five-year survival rate for cancer of the cervix is about 60 percent." AMERICAN CANCER SOCIETY, INC., FACTS & FIGURES 1980 17 (1979).

39. *See generally* Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause in Fact*, 46 TEX. L. REV. 423 (1968).

40. In informed consent cases the plaintiff must show that the injury was caused by a materialization of risks about which he should have been informed and that a reasonable person in the patient's position would have declined therapy had he been adequately informed. This represents the objective test of causation. *See* Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert denied*, 409 U.S. 1064 (1972). A minority of jurisdictions follow a subjective standard, requiring proof that the particular patient would not have undergone the treatment had the risks been disclosed. *See generally* Shetter v. Rochelle, 2 Ariz. App. 358, 409 P.2d 74 (1965), *modified*, 2 Ariz. App. 607, 411 P.2d 45 (1966); Di Filippo v. Preston, 53 Del. 539, 173 A.2d 333 (1961); Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960); Wilkinson v. Vesey, 110 R.I. 606, 295 A.2d 676 (1972).

Problems arise under the subjective standard when the patient has died or is too ill to testify. In Aiken v. Clary, 396 S.W.2d 668 (Mo. 1965), a case similar to *Truman* in that the patient died before trial, the court rejected the defendant's argument that the jury could not resolve the causation issue without the patient's testimony. The court stated:

> The matter of causation still must be submitted to the jury. . . . [A] jury could find from all the facts and circumstances in a particular case that had plaintiff been properly informed he would not have consented to the treatment, and this is so even though plaintiff does not specifically so testify.

Id. at 676.

Both the subjective and objective tests are an application of the "but for" rule, which comes as close to being the essence of the proximate cause theory of causation as any theory.

Cancer presents some unique causation problems. One commentator has explained the causation problem in this way:

> This proximate cause test is commonly needed in cases involving the misdiagnosis of cancer. A physician may negligently miss the diagnosis. By the time the cancer is picked up three or four months later it has spread, and the patient's life expectancy is poor. To state that the delay of several months in diagnosis and treatment was the certain or even probable cause of the spread is impossible. One can claim, however, that the delay harmed the patient by reducing his chances for a cure, which may provide a winning argument.

R. GOTS, THE TRUTH ABOUT MEDICAL MALPRACTICE 42 (1975).

One commentator has suggested an alternative to the "proximate cause" method of analysis. Under the proposed "duty-risk" analysis, the causation problems present under the proximate cause analysis could be avoided. The plaintiff would be required to show a factual connection or conduct that connects the defendant to the plaintiff's injury in some way distinct from the rest of the world. Factual connection does not denote fault or liability. Factual connection in the *Truman* case can be shown by evidence that Dr. Thomas was the only physician treating Mrs. Truman during the period in question. The analysis would then proceed much the same way as in proximate cause analy-

Eventually the question of physician liability under informed refusal is reduced to a policy decision: Should this duty to inform be imposed on the medical profession, and if so, under what circumstances? Before adopting a new duty or tort liability, the need for the liability should be balanced against the burden the duty imposes upon the physician.[41] The following factors should be considered: (1) whether the quality of medical care will be improved; (2) what the resulting costs and benefits to the patient and the physician are; and (3) the extent to which the new doctrine will be extended to other professions.

Unless the duty to inform patients of the risks of refusing tests or treatment would significantly improve the quality of medical care, the patient would not benefit from imposing the new duty upon the physician because the patients would bear the increased cost of medical services. In addition, if the duty to inform could not satisfactorily be shifted to medical support staff, the time required for a physician to educate patients would detract from his primary obligation to treat patients and would also clog the access of other patients to medical services. On the other hand, if patients in fact are refusing diagnostic tests and treatment because they are unaware of their underlying purposes, then the quality of medical care would be improved by requiring physicians to make this information available to them. Failure to do so should result in physician liability.

Whenever a new duty is to be imposed in negligence liability, its potential impact on other professions should be analyzed. Traditionally, the doctrine of informed consent only allowed recovery in medical malpractice cases where there was an intrusion to the body autonomy.[42] However, liability for informed refusal could arguably be imposed whenever a patient refuses to follow a physician's advice. This raises troubling questions, not only for the medical profession, but also for other professions to which similar malpractice liability might be extended. For instance, could dentists who fail to inform patients of the risks

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sis—determining a duty owing to the plaintiff and a breach of that duty. The duty-risk analysis only tries to eliminate the strained finding of molecular or proximate causation. *See* Thode, *supra* note 35; Thode, *supra* note 39.

41. 27 Cal. 3d at 298, 611 P.2d at 909, 165 Cal. Rptr. at 315 (Clark, J., dissenting); Coulter v. Superior Court, 21 Cal. 3d 144, 153, 577 P.2d 669, 674, 145 Cal. Rptr. 534, 538 (1978); Rowland v. Christian, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968).

42. *See, e.g.*, Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960).

associated with not brushing their teeth or not having regular checkups be held liable for the consequences of dental disease. Similarly, informed refusal liability could adversely affect attorneys who fail to adequately inform clients of the legal reasons behind their advice and the legal ramifications of refusing to follow that advice. Clearly, the extension of such a duty to other professions would inflict them with the same onerous and costly burden. However, once the duty to obtain an informed refusal is imposed on physicians, it would inevitably be extended to dentists, lawyers and other professionals.

These policy considerations make clear that an expanded duty for physicians under a doctrine of informed refusal should be limited and clearly defined. The physicians should be able to determine when the duty has been met; those attempting to impose liability should know what constitutes a breach of that duty. A major criticism of the informed consent doctrine is that it has failed to establish workable guidelines for physicians. Doctors generally have been unable to ascertain to what extent they are required to educate their patients of the risks of proposed treatment.[43]

Courts, however, frequently refrain from establishing guidelines, reasoning that to do so would infringe on legislative functions.[44] Nonetheless, if courts elect to create new duties, they

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43. One commentator has expresed this criticism of the informed consent doctrine:

> The application of the existing informed consent doctrine to the day-to-day practice of medicine is fraught with inconsistency. Legal requirements imposed on the physician are ill-defined and diffuse . . . . The result has been a litany of lawsuits by outraged patients, creating uncertainty and confusion within the medical community.
>
> Clearly, the existing doctrine of informed consent must undergo major reconsideration by state legislatures and the legal community if it is to: (1) guarantee a meaningful choice to the medical consumer; (2) lend substance to the medical consumer's heretofore illusory right to self-determination; (3) afford substantial certitude to the medical community; and (4) encourage judicial consistency.

Maldonado, *Strict Liability and Informed Consent: "Don't Say I Didn't Tell You So!"*, 9 AKRON L. REV. 609, 609-10 (1976).

In a study published by the Department of Health, Education and Welfare, the Secretary's Commission on Medical Malpractice found that "[t]he doctrine of informed consent is subject to abuse when it imposes an unreasonable responsibility upon the physician." U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, REPORT ON THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 29 (1973).

See also Mills, *Whither Informed Consent?*, 229 J.A.M.A. 305 (1974).

44. Some states have passed laws outlining a physician's duty to inform the patient of inherent risks of treatment prior to obtaining consent to treatment. *See, e.g.*, IOWA CODE ANN. § 147.137 (West Supp. 1980); GA. CODE ANN. §§ 88-2901 to -2907 (1979).

should do so with certainty.

Several factors need to be considered in setting the scope of a new duty of informed refusal. Liability more readily should be imposed when the patient has made an uninformed refusal of treatment as opposed to an uninformed refusal of a diagnostic test. In recommending a proposed course of treatment, the physician is already aware of the medical problems, whereas in recommending certain diagnostic tests the physician is merely following accepted preventive measures. Diagnostic tests are the physician's tools of discovery. Many times the physician does not even suspect that there is a medical problem until the tests are made. In recommending treatment, however, the physician knows what the problem is and what the consequences most likely are if treatment is refused.

Furthermore, certain diagnostic tests are recommended to all patients regardless of present or past ailments and are routinely administered to patients as a class. These tests and their accompanying purposes are usually familiar to, and understood by, the majority of patients. Examples of these types of tests include blood pressure tests, blood tests, chest X-rays, breast examinations, and Pap smear tests.[45] Some are specific to the disease they are designed to detect; others are general in nature and could detect any of a number of diseases.[46] There are, however, diagnostic tests that are unfamiliar to the average patient, and the physician should be required to provide additional in-

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California has no such statute.

45. Because of the effective nationwide effort on the part of cancer prevention groups to encourage women to have Pap smear tests regularly, this test should be classified in the group of familiar tests. A survey of cervical cancer rates found: "Almost all women regardless of age, ethnic group, or income had heard of the Pap smear test . . . ." Stern, Misczynski, Greenland, Damus & Coulson, *"Pap" Testing and Hysterectomy Prevalence: A Survey of Communities with High and Low Cervical Cancer Rates*, 106 AM. J. EPIDEMIOLOGY 296, 298 (1977). The survey also found that 86-90% of the women 35-44 years old had had a Pap smear test within the last two years. *Id.* at 299.

Also, a vast majority of women in this country understand that death can result when cancer is allowed to develop untreated. *Id.* The American Cancer Society has made a nationwide effort to educate people on cancer detection and prevention. Numerous pamphlets distributed by the American Cancer Society encourage people to have routine checkups for cancer and to see a physician at the earliest sign of cancer. *See, e.g.*, AMERICAN CANCER SOCIETY, INC., FACTS ON UTERINE CANCER (1978); AMERICAN CANCER SOCIETY, INC., WHY CHECKUPS SHOULD BE A PART OF EVERY WOMAN'S LIFE, ALL HER LIFE. . . (1978); AMERICAN CANCER SOCIETY, INC., CANCER FACTS FOR WOMEN (1977); AMERICAN CANCER SOCIETY, INC., STAY HEALTHY, LEARN ABOUT UTERINE CANCER (1973).

46. A simple blood test, for example, could detect diabetes, anemia, cancer, and numerous other serious and often fatal diseases. It could also detect common and easily treatable diseases as well as the presence of infection.

formation to the patient who refuses such a test.

Although it has been argued that the scope of a physician's duty under informed refusal should not be very broad, there are concededly certain limited circumstances in which a physician who fails to adequately inform the patient of the risks inherent in refusing recommended treatment or tests should be held liable. Such liability could justifiably be imposed on a physician in the following circumstances: First, the physician recommends medical treatment for a specific complaint but fails to inform the patient of the risks and consequences of refusing treatment. The patient refuses the treatment, and injury results from the development of an undisclosed risk. Secondly, the patient specifically requests to be informed of the risks inherent in not undergoing the proposed treatment or diagnostic test, but the physician fails to adequately inform the patient, and injury results from the development of an undisclosed risk. Finally, the physician recommends a diagnostic test not understood by a reasonable patient and also fails to inform the patient of the risks in refusing the test, and injury results from the development of an undisclosed risk.[47]

The first circumstance does not apply to the *Truman* case because Dr. Thomas was not treating Mrs. Truman for symptoms related to the cervical cancer. Because Mrs. Truman refused the Pap smear test and did not request information regarding it, the second circumstance is also inapplicable. Finally, a Pap smear test is understood by women to detect cervical cancer, and women understand that cancer can cause death; accordingly, the third circumstance does not apply. Therefore, had the Supreme Court of California decided the *Truman* case under this approach, based on a reasonable and justifiable duty of informed refusal, it would have found Dr. Thomas not negligent in failing to inform Mrs. Truman that death could result from allowing cancer to develop undetected when she refused the recommended Pap smear test.

Truman v. Thomas represents an unwarranted expansion of the doctrine of informed consent to include liability for a physician's failure to disclose the risks of refusing to submit to a routine diagnostic test. Liability for failure to inform patients who

47. In all circumstances the physician is only required to disclose those risks that would have been known to the reasonable physician. Expert testimony would be allowed to show what risks were known or should have been known to the physician.

refuse tests or treatment may be justifiable if the claim were brought in the traditional negligence format. However, to provide justice to both patient and physician the scope of this new duty should be strictly limited. In the instant case the liability imposed on Dr. Thomas was beyond the reasonable scope of a physician's duty.

Carol A. Cluff