Does my patient understand what I am about to do?

Canadian Physiotherapy Association

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A brief overview of the **law on informed consent**

"Had I known that this could have happened, I would have never agreed to the procedure."

Lawyers who defend health care professionals have heard this phrase from plaintiffs on countless occasions. In medico-legal actions, allegations that a plaintiff has not provided an informed consent to the procedure that ultimately caused or contributed to his/her injuries are common.

As health care providers, physiotherapists have a legal duty to insure that prior to carrying out any type of treatment for a patient, the patient has consented to that treatment. Failure to obtain consent to treatment from a patient exposes you to a potential civil claim and/or proceedings before your provincial regulator.

For consent to treatment to be considered valid, it must be an "informed" consent. The patient must have been given an adequate explanation about the nature of the proposed investigation or treatment and its anticipated outcome as well as the significant risks involved and alternatives available. The information must be such as will allow the patient to reach an informed decision.

While there are general principles that underlie the doctrine of informed consent, each provincial regulatory body has its own policy guideline and/or practice direction on informed consent . Additionally, some provinces have imposed a statutory obligation to obtain informed consent (i.e. Health Care Consent Act in Ontario or Health Care Consent and Facilities Admission Act in British Columbia). Finally, in addition to practice directions or statutory responsibility, there is a common law duty to obtain an informed consent to treatment. As a result, comments in this article are more general in nature. It is strongly recommended that you review the website of your provincial regulator should you have any specific questions about what is required in your province or territory.

There are numerous criteria that apply for patient consent to be valid in Canada:

1. The patient must have capacity to consent to treatment.

2. The patient must receive proper disclosure of information from the caregiver.

3. The authorization should be specific to the procedure to be performed.

4. The patient should have the opportunity:
   a. To ask questions
   b. To receive understandable answers

5. The authorization obtained should be free of undue influence and coercion.

6. The authorization obtained should be free of misrepresentation or material.

[1] In preparing this article, reference is made to the policy guidelines and/or practice directions from British Columbia, Alberta, Manitoba, Ontario and Nova Scotia.

[2] Rosovsky, L.E. The Canadian Law of Consent to Treatment (Markham, Butterworths) 1997

1 The patient must have capacity to consent to treatment

Consent can only be valid if the person providing it has the capacity to do so. The question of legal competency typically arises in situations where you are treating someone who is under the age of 18 or persons who may have some type of mental illness. However, these factors alone should not determine competency (i.e. someone under the age of 18 or who has a mental illness can provide a valid consent to treatment). When determining capacity, you must be confident that the person consenting to treatment has the ability to appreciate the nature and consequences of the consent discussion. If you have any doubt, seek consent from the parent, guardian, or substitute decision maker.

If there is any question as to whether the patient may not appreciate the nature and consequences of the consent discussion due to a language barrier, ensure that someone is present that can provide translation

2 The patient must receive proper disclosure of information from the caregiver

Your patient must understand the nature of the treatment and why it is being proposed. The patient must be advised of the risks associated with the treatment. The question that typically arises is to what extent you have to advise the patient of risks. In Canada, you are required to advise a patient about attendant, material and special risks. Attendant risks are those that are more common. Material risks are those that are less common, but serious should they occur. Material risks can differ between patients, so you should take into account your patient's particular health and condition when considering what risks are material. Finally, specific risks include those that are possible with respect to the specific patient.

The test in Canada as to whether the patient provided informed consent is whether the average reasonable person, in the same position as the patient, would have consented to the treatment knowing the attendant, material and special risks.

In addition to the above, the patient should be advised of the treatment's impact on lifestyle, and any economic considerations of receiving or refusing proposed treatment. The patient must be provided with any alternative treatments available and what the risks and benefits of each would provide. Finally, the patient needs to be informed as to the risks of refusing/not proceeding with treatment.

3 The authorization should be specific to the procedure to be performed

The consent that a patient provides you must relate to the specific treatment/procedure that you are proposing or recommending.

You do not have to obtain a patient's consent for every single step of a treatment plan. However, the blanket consent form that is typically signed by the patient at admission to a hospital is not sufficient. If the method of treatment that you are proposing for a patient consists of a course of treatment over a period of time, it is not necessary for you to obtain a separate consent for each stage of the treatment. However, the entire course of treatment should be discussed with the patient.

If you include other individuals in the administration of treatment to a patient (i.e. students, physiotherapist assistants etc.), then you must ensure that the patient is advised of the fact that others will be involved in providing treatment and that the patient consents to their involvement.

4 The patient should have the opportunity to ask questions and receive understandable answers

The discussion regarding consent to treatment should not be a one-way discussion. Ideally, you should have a conversation with the patient where they can ask questions and you can provide the information necessary to answer those questions.

5 The authorization obtained should be free of undue influence and coercion

It goes without saying that you must ensure that your patient does not feel pressured or obligated to proceed with the proposed treatment. Not only should you ensure that the patient does not feel pressured to proceed by another person, you must also ensure that you are not advocating the treatment plan or procedure in such a way that the patient feels they have no choice but to proceed.

6 The authorization obtained should be free of misrepresentation of material

While you are free to provide the patient with your opinion as to the best course of action, you should be as objective as possible when presenting the information to the patient. Accurate and impartial information on all treatment alternatives must be provided.

Documenting the consent discussion

Documenting the consent discussion that you have with your patient is essential. While you may have a standard practice as it relates to the discussion you have with a patient prior to undertaking treatment, this does not eliminate the requirement to document your discussion. Ideally, you would discuss the proposed treatment plan with the patient, document the discussion with the patient and then have the patient sign off on the treatment plan. However, at a minimum you must document the fact you spoke to the patient, identified the treatment plan/procedure, advised them of the risks and benefits, advised them of any alternatives, make a note of any questions that the patient had and whether the patient provided consent.

In a medico-legal action where informed consent is an issue, the patient will claim that you did not provide them with all of the necessary information to make an informed decision. If you have documented your discussion, that will be helpful in corroborating your argument that you did advise the patient of all of the information necessary to make an informed choice. The lack of documentation regarding a consent discussion increases the chances of a court or regulatory body concluding that you did not provide the patient with the information necessary to make an informed choice.

Please note that this commentary is not, nor should it be considered legal advice and should not be relied upon as such. Should you have any questions regarding informed consent as it relates to your practice, please contact your provincial association, your provincial regulator and/or the Canadian Physiotherapy Association.

The preceding was prepared and written by the legal team at Gowling Lafleur Henderson LLP (Gowlings). CPA members who participate in the Professional Liability Insurance Program are eligible for 30-minute pro bono and inclusive legal claims defence services from Gowlings, the largest and most highly-recognized legal firm in medical defence and professional liability in Canada.