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HEALTH Surgical and Medical Treatment: Provide for Informed Consent

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HEALTH

Surgical and Medical Treatment: Provide for Informed Consent

CODE SECTION:	O.C.G.A. § 31-9-6.1 (new)
BILL NUMBER:	SB 367
ACT NUMBER:	1365
SUMMARY:	The Act provides for informed consent of the material risks of: (1) any surgical procedure performed under general anesthesia, spinal anesthesia, or major regional anesthesia; (2) an amniocentesis diagnostic procedure; and, (3) a diagnostic procedure which involves the intravenous injection of a contrast material.
EFFECTIVE DATE:	January 1, 1989

History

Prior to the passage of SB 367, Georgia was the only state without an informed consent law.[1] The bill was introduced to fill what many lawyers considered a void in Georgia law.[2] Complaints from constituents who stated they would not have consented to surgery had the physician informed them of the risk were another catalyst for SB 367.[3]

In the past, Georgia legislators have attempted to pass informed consent legislation. In 1985, SB 128 was introduced and, faced with strong opposition, was never reported from the Senate Committee on Judiciary.[4] Like SB 367, SB 128 promoted patient participation in the decision-making process and required doctors to inform patients of material risks and treatment alternatives.[5]

SB 367, introduced in the 1987 session,[6] also met strong opposition.[7]

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1. Smith, *Georgia's Medical Consent Law*, 21 Ga. St. B.J. 138, 138—39 (1985).
2. *See id.* at 141. The bill was sponsored by Senators Donn Peevy, Senate District No. 48; Thomas Allgood, Senate District No. 22; and Lawrence Stumbaugh, Senate District No. 55.
3. Telephone interview with Senator Donn Peevy, Senate District No. 48 (Mar. 31, 1988) [hereinafter Peevy Interview].
4. Final Composite Status Sheet, Mar. 7, 1986.
5. *Compare* SB 128, as introduced, 1985 Ga. Gen. Assem. *with* O.C.G.A. § 31-9-6.1 (Supp. 1988).
6. Final Composite Status Sheet, Mar. 12, 1987.
7. Telephone interview with Aubrey T. Villines, Jr., Georgia Trial Lawyers Association (Apr. 5, 1988) [hereinafter Villines Interview].

However, the death of Senator Jim Tolleson, a proponent of the bill who died following a diagnostic dye test, impelled serious efforts to pass an informed consent law.[8] After numerous revisions, the bill passed on the last day of the session.[9] The final version of SB 367 reflects the interests of several lobbying groups: the Medical Association of Georgia (MAG), the Georgia Trial Lawyers Association (GTLA), and the Georgia Hospital Association.[10]

SB 367

The Act adds a new Code section[11] to the chapter regarding consent for surgical or medical treatment.[12] Prior to the addition of Code section 31-9-6.1, a patient's consent to surgery was considered valid if the physician disclosed "in general terms the treatment or course of treatment,"[13] rather than the risks of treatment. The courts did not interpret this provision as an informed consent law.[14] Rather, physicians had no affirmative duty to disclose the risks involved in treatment,[15] because the doctrine of informed consent was not a viable principle of law in Georgia.[16] SB 367, as introduced, was broad in scope and sought to incorporate all surgical procedures.[17] As enacted, the bill was specifically limited to amniocentesis, "intravenous injection of a contrast material," and surgical procedures involving general, or spinal, or major regional anesthesia.[18]

The GTLA and MAG each significantly influenced the development of SB 367. The GTLA wanted the bill to cover all types of medical treatment and to require disclosure of all risks;[19] in contrast, MAG strived to limit physician liability.[20] The resulting legislation reflects a compromise

8. *See House Passes Bill Requiring Doctors to Tell of Test Risks*, Atlanta J., Mar. 4, 1988, at 1D, col. 5; *Senate Approves Bill Requiring Patients Be Informed of Risks*, Atlanta J., Jan. 30, 1988, at 7B, col. 1.

9. Final Composite Status Sheet, Mar. 7, 1988.

10. Peevy Interview, *supra* note 3.

11. O.C.G.A. § 31-9-6.1 (Supp. 1988).

12. O.C.G.A. §§ 31-9-1 to -7 (1985 & Supp. 1988).

13. O.C.G.A. § 31-9-6(d) (1985).

14. *See, e.g.*, Spikes v. Heath, 175 Ga. App. 187, 332 S.E.2d 889 (1985) (summary judgment reversed on ground that plaintiff may have not validly consented to insertion of I.U.D. which perforated her uterus).

15. *See, e.g.*, Sikorski v. Bell, 167 Ga. App. 803, 805, 307 S.E.2d 701, 703 (1983); Blount v. Moore, 159 Ga. App. 80, 84, 282 S.E.2d 720, 723 (1981) (physician's duty only to inform patient of general terms of treatment, not to disclose risks).

16. *See, e.g.*, Hyles v. Cockrill, 169 Ga. App. 132, 133, 312 S.E.2d 124, 127 (1983); Simpson v. Dickson, 167 Ga. App. 344, 347, 306 S.E.2d 404, 406 (1983); Parr v. Palmyra Park Hosp., Inc., 139 Ga. App. 457, 459, 228 S.E.2d 596, 598 (1976).

17. SB 367, as introduced, 1987 Ga. Gen. Assem.

18. O.C.G.A. § 31-9-6.1(a) (Supp. 1988).

19. Villines Interview, *supra* note 7.

20. Telephone interview with Richard Greene, General Counsel for the Medical Association of Georgia (Apr. 5, 1988) [hereinafter Greene Interview].

between these two groups and other constituents. Although GTLA complains that the scope of the bill is too limited, sponsors of the bill are satisfied now that Georgia has a medical informed consent law.[21]

Under the Act, informed consent is required for surgical procedures performed under general, spinal, or major regional anesthesia; diagnostic procedures involving the intravenous injection of contrast material; and amniocentesis.[22] Amniocentesis was included by the conference committee to expand the scope of the bill.[23] Sponsors of the bill predict that amniocentesis will be the first procedure to give rise to lawsuits based on the failure to give informed consent.[24] However, MAG states that physicians routinely inform patients of the risks of amniocentesis and provide patients with counseling when the procedure is considered.[25]

Disclosure of treatment risks can be made by several means. The responsible physician[26] may disclose the pertinent information through the use of audiotapes, videotapes, pamphlets, or booklets.[27] The physician may delegate this duty to "nurses, physician's assistants, trained counselors," or patient educators who may disseminate the information under the direction, and as an agent, of the responsible physician.[28] The first Senate floor amendment permitted hospital employee participation in the informed consent procedure only if those employees were approved to participate by the hospital.[29] This approval requirement was deleted from the final bill; the treating physician remains responsible for insuring that the patient has been advised of the material risks and alternative treatments.[30]

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21. Peevy Interview, *supra* note 3.
22. O.C.G.A. § 31-9-6.1(a) (Supp. 1988).
23. Villines Interview, *supra* note 7. *See* SB 367 (CCS), 1988 Ga. Gen. Assem.
24. Villines Interview, *supra* note 7.
25. Greene Interview, *supra* note 20.
26. A "responsible physician" is the "physician who performs the procedure or the physician under whose direct orders the procedure is performed by a nonphysician." O.C.G.A. § 31-9-6.1(h) (Supp. 1988).
27. O.C.G.A. § 31-9-6.1(c) (Supp. 1988). A concern is that information conveyed through these other means may avoid the patient-physician relationship which is so crucial. There may be instances in which the public is best served by these methods, such as videotapes, but giving an illiterate person a pamphlet is unlikely to be effective disclosure. Villines Interview, *supra* note 7.
28. O.C.G.A. § 31-9-6.1(c) (Supp. 1988).
29. The floor amendment stated:

> The information provided for in this Code section may be disclosed through the use of video tapes, audio tapes, pamphlets, booklets, or other means of communication or through conversations with nurses, physician's assistants, trained counselors, patient educators, or other similar persons whom reasonably prudent physicians believe to be capable of communicating such information; provided, however, if such persons are hospital employees, their participation must be approved by the hospital.

SB 367 (CSFA), 1988 Ga. Gen. Assem.
30. O.C.G.A. § 31-9-6.1(c) (Supp. 1988).

The Act is intended to impose the duty to inform on the physician, not the hospital or hospital personnel.[31] When a doctor uses hospital personnel to educate the patient, the hospital is liable for the failure to inform only if the responsible physician is an employee of the hospital.[32]

In addition to limiting the kinds of surgical procedures for which informed consent is required, the Act defines "material risks" narrowly.[33] In drafting the bill, the legislators used the phrase "material risk of" rather than "material risks including."[34] In this context, the following conditions are intended to comprise rather than to illustrate "material risks": infection, allergic reaction, disfigurement, severe loss of blood, organ loss, paralysis, brain damage, cardiac arrest, or death.[35] Further, the Act provides a two-part test. First, the material risks are those generally recognized and accepted by the reasonably prudent physician. Second, material risks are those which, if disclosed to a reasonably prudent person in the patient's position, could reasonably be expected to cause that person to decline treatment upon disclosure.[36]

For a valid malpractice cause of action, the patient must prove: (1) nondisclosure of risks by the physician, (2) that a patient who is reasonably prudent would have refused treatment, and (3) that "the patient suffered an injury which was proximately caused by the surgical or diagnostic procedure."[37] As in all medical malpractice actions, an expert affidavit must accompany a complaint alleging that the injury was a material risk and was caused by the procedure.[38]

Whether failure to inform a patient of material risks is itself a separate cause of action is debatable. According to MAG, failure to inform does not constitute a separate cause of action for medical malpractice under Georgia law.[39] In contrast, GTLA contends that failure to inform constitutes medical malpractice under the new law.[40] GTLA analogizes a lack of informed consent to a lack of "meeting of the minds" under contract

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31. Peevy Interview, *supra* note 3.

32. Telephone interview with Paul Bolster, Director of Governmental Relations for the Georgia Hospital Association (Apr. 5, 1988). *See* O.C.G.A. § 31-9-6.1(d) (Supp. 1988). Senator Peevy considers this provision the worst part of the bill. Peevy Interview, *supra* note 3. *But see* Roberson v. Menorah Medical Center, 588 S.W.2d 134 (Mo. Ct. App. 1979) (hospitals have no duty to see that informed consent is properly obtained); Garcia v. Presbyterian Hosp. Center, 92 N.M. 658, 661, 593 P.2d 487, 490 (N.M. Ct. App. 1979) (court called a hospital's failure to inform properly a "fraudulent concealment").

33. Greene Interview, *supra* note 20. *See* O.C.G.A. § 31-9-6.1(a)(3) (Supp. 1988).

34. Greene Interview, *supra* note 20.

35. O.C.G.A. § 31-9-6.1(a)(3) (Supp. 1988).

36. *Id.*

37. O.C.G.A. § 31-9-6.1(d)(1)—(3) (Supp. 1988).

38. O.C.G.A. § 31-9-6.1(d) (Supp. 1988); *see* O.C.G.A. § 9-11-9.1 (Supp. 1988).

39. Greene Interview, *supra* note 20.

40. Villines Interview, *supra* note 7.

law.[41] According to GTLA, unless the patient understands the risks and alternatives to treatment, the physician is not authorized to perform the procedure.[42] Even if the physician performs the procedure perfectly, he has acted negligently by not obtaining the necessary consent.[43] As interpreted by MAG, however, the statute requires medical injury before a cause of action arises.[44]

The Act allows five exceptions for which disclosure of information and informed consent are not required: (1) medical emergency as defined by Code section 31-9-3; (2) absence of material risks involved with the procedure; (3) patient consent in writing to nondisclosure; (4) prior consent obtained within ten days of the procedure or thirty days "from the date of admission or for the period of time the person is confined in the hospital for that purpose, whichever is greater;" and (5) prior consent for unforeseen "surgical or diagnostic procedure."[45]

SB 367 originally provided exceptions only for routine or emergency treatment.[46] Exceptions (2), (3), and (4) were added by a Senate Special Judiciary substitute at the request of MAG.[47] The Senate further amended the bill to include unforeseen surgical or diagnostic procedures.[48] The amendment's drafters envisioned a situation in which a patient, already under anesthesia, needed additional surgery. The practical aspect of medicine may necessitate the additional operation without reviving the patient to obtain consent.[49] The Act provides that in such circumstances "the patient has consented to allow the responsible physician to make the decision concerning such procedure."[50]

Prior consent, if given within certain time limitations, is also valid.[51] The House included the provision for prior consent if given within ten days for outpatient treatment.[52] The conference committee included the provision for prior consent if given within thirty days for inpatient treatment.[53]

The Composite State Board of Medical Examiners must now promulgate rules and regulations to implement the law.[54] Such rules shall include standards relating to the discipline of physicians who violate this

41. *Id.*
42. *Id.*
43. *Id.*
44. Greene Interview, *supra* note 20.
45. O.C.G.A. § 31-9-6.1(e) (Supp. 1988).
46. SB 367, as introduced, 1987 Ga. Gen. Assem.
47. Greene Interview, *supra* note 20. *See* SB 367 (SCS), 1988 Ga. Gen. Assem.
48. SB 367 (CSFA), 1988 Ga. Gen. Assem.
49. Peevy Interview, *supra* note 3.
50. O.C.G.A. § 31-9-6.1(e)(5) (Supp. 1988).
51. O.C.G.A. § 31-9-6.1(e)(4) (Supp. 1988).
52. *Id.*; *see* SB 367 (HCSFA), 1988 Ga. Gen. Assem.
53. O.C.G.A. § 31-9-6.1(e)(4) (Supp. 1988); *see* SB 367 (CCS), 1988 Ga. Gen. Assem.
54. O.C.G.A. § 31-9-6.1(g) (Supp. 1988).

Code section.[55] In addition, the Board must inform all licensed physicians of the adoption of the Act.[56]

Supporters of SB 367 have had mixed reactions to the Act. The bill's sponsors are satisfied that Georgia has an informed consent statute, though limited in scope.[57] MAG is satisfied that it effectively lobbied to limit the scope of the bill to specific surgical or diagnostic procedures.[58] However, an advocate for the GTLA wonders, "Does another Senator or Representative have to die before we decide to broaden the scope of this bill?"[59]

S. Bawtinhimer

55. *Id.*
56. 1988 Ga. Laws 1443, § 2. This section was not codified.
57. Peevy Interview, *supra* note 3.
58. Greene Interview, *supra* note 20.
59. Villines Interview, *supra* note 7.