

A SURGEON'S BIAS LEADS TO A FAILURE TO CONSENT

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The recent case of *Jambrovic v Day* spells a warning to health providers to ensure that all relevant treatment alternatives are explored in the consenting process.

The plaintiff was diagnosed with a brain tumour in March 2011 and his treating neurosurgeon counselled him on the course of treatment open to him. It was decided that the plaintiff would undergo an excision of the tumour endoscopically through the nasal passage.

Following the surgery the plaintiff suffered a brain haemorrhage and the aftermath of this led to catastrophic disability.

The allegation that the surgery itself was negligently performed was withdrawn prior to trial. It was accepted that the surgery was not negligent and that the plaintiff had suffered a recognised complication.

It was, however, alleged that the plaintiff was not properly consented for surgery, and that the neurosurgeon was not properly experienced to carry out the surgery.

The Decision

During cross examination, the following telling exchange was had between the plaintiff's representative and the neurosurgeon:

Q: *'You would agree, wouldn't you, that in the conversation you had with Mr Jambrovic, that you intended to convey what you felt; namely, that he would be better off with a surgical as opposed to conservative treatment. That's right, isn't it'*

A: *'Yes'*

The court found on the evidence that Dr Day could not have thoroughly advised the plaintiff of the alternative to surgery, being conservative treatment (which the experts agreed would have been preferable) versus the attendant risks of surgery, or the plaintiff would not have agreed to it. Evidence also emerged that the patient literature given to the plaintiff during the consenting process was on craniotomy and not laparoscopic tumour removal. The court concluded that the plaintiff had not provided informed consent.

The court also considered expert evidence that the neurosurgeon was 'probably' not experienced to carry out the procedure, noting that he had not received training in this type of surgery or even ever witnessed it being performed. It was held that if the surgeon's inexperience had been disclosed the plaintiff would have sought out a more experienced surgeon, under whom the rate of recognised complication would have been lower.

Implications for you

Although this has been billed as a consent case, the negligence arose from the neurosurgeon's lack of judgment in 3 respects: firstly, he did not consider that conservative treatment was preferable to surgery thereby dealing with the consent process in a perfunctory way. Similarly he lacked judgment in not telling the patient that he had not performed the surgery previously. Finally, his judgment was lacking in undertaking surgery he was not trained to perform.

The case highlights the need for a healthcare provider to carefully consider treatment options and not allow his or her own treatment bias to unduly influence patient choice.

Health providers should also be aware of their scope of practice and not exceed this. This could easily have been a serious disciplinary matter for the neurosurgeon.

Jambrovic v Day; Jambrovic v Day [2017] NSWSC 1468 (27 October 2017)

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