



Superior Court Holds That Root Canal Requires Informed Consent

By Jonathan D. Weiss and Jack C. Farrell

In Pennsylvania, the doctrine of informed consent has traditionally been limited to surgeons who are performing surgical procedures. The courts have generally refused to extend the doctrine to non-invasive procedures. See *e.g.* Dible v. Vagley, 612 A.2d 493 (Pa. Super. 1992), *alloc. denied*, 629 A.2d 1380 (Pa. 1993) (Superior Court held that the doctrine of informed consent was inapplicable to radiation treatment); Wu v. Spence, 605 A.2d 395 (Pa. Super. 1992), *appeal dismissed*, 632 A.2d 1294 (Pa. 1993) (Superior Court held that informed consent inapplicable to intravenous administration of antibiotics); Sinclair v. Block, 633 A.2d 1137 (Pa. 1993) (Supreme Court ruled that informal consent did not apply to the use of forceps to facilitate natural delivery); Morgan v. MacPhail, 704 A.2d 617 (Pa. 1997) (Supreme Court ruled that informed consent not required for administration of intercostal nerve blocks).

While informed consent has historically been required in the context of surgical extractions, where gum tissue and bone is excised and removed, Sauro v. Shea, 390 A.2d 259 (Pa. Super. 1978) and Bulman v. Myers, 467 A.2d 1353 (Pa. Super. 1983), no court had ever held that informed consent was necessary for basic, simple root canal therapy.

In Perkins v. Desipio, 736 A.2d 608 (Pa. Super. 1999), the Superior Court of Pennsylvania was faced with an issue of first impression: whether a dentist who performs a root canal must first obtain the patient's informed consent. The Superior Court held that informed consent was required because root canal was an invasive procedure.

In reaching its conclusion, the Superior Court began with the proposition that in Pennsylvania, a physician must disclose to the patient the "material facts, risks, complications, and alternatives to surgery," which a reasonable patient would consider significant. The court then analyzed whether, under Pennsylvania law, root canal therapy was a surgical procedure.

In Perkins, the plaintiff presented to her dentist with a toothache. Her dentist determined that she needed an immediate root canal and arranged for the procedure to be performed the next day. Following the root canal on the affected tooth, the dentist prescribed pain medication and instructed plaintiff to call him if she experienced any problems.

The plaintiff awoke the next morning with severe pain in the region where the root canal had been performed. She attempted to contact her dentist without success and then presented to the emergency room at Thomas Jefferson University Hospital, where she was prescribed antibiotics for an infection. That same evening, her dentist contacted her and arranged for a visit the following morning. At this second visit, plaintiff's dentist attempted to drain her tooth without success. He then prescribed additional antibiotics and instructed plaintiff to see her oral surgeon if her condition did not improve. The following day plaintiff met with an oral surgeon, at which time she chose to have the tooth extracted, and it was removed.

Plaintiff sued her dentist for negligence and lack of informed consent. The Philadelphia County Court of Common Pleas granted a non-suit after plaintiff presented her consent claim and dismissed plaintiff's claim for lack of consent, citing case law holding that informed consent was only required where the surgical procedure involved cutting tissue or bone.

The trial court had held that while the extraction of teeth by a dentist does require the patient's informed consent, the drilling and filling of a tooth does not. Accordingly, the trial court concluded that root canal did not involve invasive surgery because there was no cutting into or removal of any gum tissue. The Superior Court reversed.

The Superior Court explained that root canal therapy is needed when the pulp of the patient's tooth dies and then becomes infected. The cure is to clean or flush out the necrotic pulp, which runs through the center of the tooth. Root canal is a relatively simple procedure where a file is inserted down into the pulp so

the pulp chamber can be cleaned out and the diseased pulp removed. The area is then filled, typically with a substance called gutta percha, the tooth is sealed, and ultimately a crown is placed on the tooth.

In reversing the trial court, the Superior Court in Perkins concluded that the trial court misconstrued the law by focusing its attention on whether the procedure involved cutting into or removal of gum tissue or bone. The Superior Court stated that the test applied by the trial court minimized "the invasive nature of a root canal."

In what most dentists would consider to be a shockingly distorted analogy, the Superior Court stated:

Certainly no one would argue that the excision of a malignant tumor or even a benign cyst that was causing a patient discomfort is not a surgical or operative procedure. We discern no difference between the removal of diseased nerve tissue in the root of a tooth and diseased cell growth in some other part of the body.

See Perkins, supra.

Under the Superior Court's logic, which is certainly a liberal and unjustified expansion of the informed consent doctrine, the mere filling of cavities could fulfill its consent criteria. Unfortunately, the Perkins ruling is now binding upon us, and consent must be secured before root canal therapy.

In conclusion, the Superior Court's ruling will have a dramatic impact upon the practice of dentistry. While many endodontists have already been obtaining consent from patients before performing root canals, most general dentists do not. Given that thousands of root canals are probably being performed on a daily basis in our state, the potential for exposure is considerable. Under the doctrine of informal consent, a dentist is liable for a patient's complications if the procedure was performed without consent even if the surgery was properly performed.

We recommend to our clients that they secure both written and oral consent before doing any type of root canal therapy. This consent must include a detailed written and verbal explanation of:

1. The root canal procedure from beginning to its completion;
2. The risks of root canal therapy including, but not limited to, infection, nerve damage and failure, with discussion about the likelihood of their occurrence;
3. Alternatives to root canal therapy, such as doing nothing or extracting the tooth;
4. A discussion about the risks of each alternative to root canal therapy.

The above should be on a written consent form signed by the patient. The dentist should also chart that verbal consent was secured in the patient's records.

We are often asked by our dentists whether obtaining consent will cause the patient to forgo the procedure altogether. For those who need to have root canals, we think they will sign a valid informed consent release because signing the form will ultimately help relieve their pain. An explanation to the patient that consent is required by law, and must be obtained, will put the patient at ease and will allow for consent to be secured before the root canal is performed.

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