8.03 Health Care ProVIDER Malpractice – Failure to Obtain Informed Consent

The law requires a health care provider to obtain informed consent before performing a treatment or procedure. If the health care provider fails to obtain informed consent, [he] [she] [it] may be responsible for the patient’s harm even though the treatment itself met the applicable standard of care.

The plaintiff claims that the defendant failed to obtain informed consent. In order for the plaintiff to prevail on this claim, you must find it is more likely true than not true that:

(1) the defendant failed to provide enough information about the material risks of the [insert treatment or procedure], the likelihood that the risks would occur, and the reasonable alternatives to [insert type of treatment or procedure] to allow a reasonable person in the plaintiff’s position to make an informed and intelligent decision whether or not to proceed with the [insert type of treatment or procedure];

(2) the plaintiff would have decided against the [insert type of treatment or procedure] if [he] [she] had been provided such information; and

(3) the [insert type of treatment or procedure] was a legal cause of the plaintiff’s harm.

I will now explain to you what the terms “material risk” and “legal cause” mean.

# Use Note

This instruction is to be used when the plaintiff alleges a lack of informed consent. In cases where the plaintiff alleges a complete lack of consent, Instruction 8.04 should be used. If a plaintiff raises both lack of consent, and alternatively lack of informed consent, both Instructions 8.03 and 8.04 should be given.

Instruction 2.04 (Definition of Preponderance), and Instruction 3.06 (Legal Cause), and Instruction 8.05 (Definition of Material Risk) should be given following this series of instructions.

# Comment

In Alaska the doctrine of informed consent is controlled by AS 09.55.556 which allocates the burden of proof in informed consent cases. This instruction is based primarily on the statute and Korman v. Mallin, 858 P.2d 1145 (Alaska 1993), which interprets the phrase “common risks” in the statute to mean “material risks.” The “legal cause” requirement in the instruction is not expressly set out in the statute, but is required by general tort principles. The validity of this “reasonable patient” instruction was also approved in Marsingill v. O’Malley, 58 P.3d 495 (Alaska 2002).

Two cases decided before the enactment of AS 09.55.556 illustrate the application of consent law in Alaska. See Poulin v. Zartman, 542 P.2d 251, 275 (Alaska 1975) (insufficient evidence to support finding that, had plaintiff known of an alternative procedure, he would have declined the procedure which was employed); Patrick v. Sedwick, 391 P.2d 453, 458 (Alaska 1964) (no evidence that plaintiff would have declined the operation if defendant had informed her of risk involved); see also 38 ALR 4th 900, Medical Malpractice: Liability for Failure of Physician to Inform Patient of Alternative Modes of Diagnosis or Treatment.