Medicolegal Aspects of Otolaryngologic, Facial Plastic, and Reconstructive Surgery

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Many operations performed by otolaryngologists, facial plastic, and reconstructive surgeons fall under the designation of elective surgery. Success in this type of surgery is primarily measured by the patiënt's satisfaction. If a surgical treatment does not satisfy the patiënt or if a complication does occur, elective surgery patients may be more likely to undertake medicolegal action than mandatory surgery patients. Indeed, Otolaryngologic, facial plastic, and reconstructive surgery does carry a high risk for litigation.[1,2]

For decades, patients were content with a paternalistic beneficence of physicians. However, this has changed considerably in the last 30 years.[3] Nowadays, optimal patient-physician relationship is an alliance with equals, characterized by honesty, trust and mutual respect (see Vuyk and Zijlker in this issue of *Facial Plastic Surgery).* Rapport between the surgeon and patiënt is essential.[4] This is stressed by the fact that lack of rapport has been documented as the major cause of medical malpractice claims.[5]

Elective surgery should be a shared decision of physician and patiënt based on mutual frank information exchange. Informing the patiënt before treatment is of crucial importance. Nowadays, it is the patiënt's right to be informed about his or her condition and possibilities for treatment, including risks and benefits. This primary patient's right together with the physician's obligation to disclose is the basis for informed consent. Furthermore, it is of importance to realize that the patient's ability to accept the surgical result may even be highly correlated with the degree to which the patiënt has been prepared. Moreover, a patiënt who is well informed before treatment will be more inclined to accept problems arising during or af ter treatment,[2] thereby reducing the chances of seeking legal redress.[6]

The goal of this article is to describe medicolegal aspects of doctor-patiënt Information conveyance in Otolaryngologic, facial plastic, and reconstructive surgery. Proper preoperative information is the basis for informed consent. The consequences of lack of consent are described. The legal importance of documentation is stressed. Medicolegal aspects of complications are discussed.

PREOPERATSVE INFORMATION

General Considerations

Because this type of surgery is elective, a complete informed discussion presented to the patiënt by the physician is mandatory. Physicians should never be evasive or withhold information. The surgeon must honestly, in understandable terms and as completely as possible, teil the patiënt of his recommendations for treatment, alternatives, and the specific risks of the surgery planned. The risks should be discussed in detail, including usual and unusual potential

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complications. The risks of surgery in general, including unpredictable events that might happen randomly, should be mentioned. The patiënt should be informed whether there are any features in his medical profile that pose a greater risk than to the average patiënt.

The patiënt must be made to understand that the goal of facial plastic surgery is to improve appearance, that perfection might not be achieved, and that there is always a chance that the functional, aesthetic, and psychologie expectations might not be fully satisfied. The patiënt should also be informed of the possibility of a secondary procedure. The patiënt should be properly instructed as to what to expect on the day of surgery. Discharge instructions should be clear, specific, and in writing. Availability during the first days is essentiaL It should be real™ ized that in spite of careful preoperative education, patients may still have an unrealistic outlook about the potential benefits and risks of facial, plastic surgery procedures.[7]

Printed Consultation

It has been shown that presenting information in a structural fashion helps the patiënt remernber more potential complications of surgery[8] Printed consultation outlines or checklists containing the required information to meet the Standard for informed consent can be useful in supplementing the memorized consultation,[9] These types of lists (Tables 1 and 2) keep the consultation focused and help prevent unintentional omissions. The surgeon can check each item, indicating the item has been presented. The printed outline becomes the permanent record of the event. A copy can be given to the patiënt to reinforce the consultation.

From a medicolegal standpoint, patiënt information brochures, describing the various procedures, inclucling benefits and risks, may become accurate records of what has been presented to the padent, in case some disagreement should occur in the future.

Photographs and Computer S maging

Photographs can be useful to inform, providing they are representative of the spectrum of results that can reasonably be expected. Photographs may educate the patiënt as to possible postoperative asymmetries, irregularities, and scars of the proposed procedure. Description or diagrams of scars, expected after facial plastic and reconstructive surgery may not adequately convey the true character of scars inherent in these procedures. Indeed, photographs are acceptable adjuncts for establishing informed consent if the photographs pro vide information that enables the patiënt to understand better risks and complications of the proposed procedure. Photographs showing only good results may create a warranty and possibly unrealistic patiënt expectations. Such photographs, used as a promotional item, may be characterized in court as implied or expressed guarantees.

Computer imaging can be used advantageously as a communication tooi in facial plastic and reconstructive surgery, By enhancing communication and understanding, the patient-physiciaii relationship may be irnproved.[10] The key to successful use of computer imaging *is* to be honest and ethical in what you produce on the screen, It must be stressed to the patiënt that it is only an estimate of an out-come for a particular procedure. A similar strategy is of importance when. drawing on the patiënt's photographs. Enhancement of the patiënt's ability to visualize proposed changes in facial features may allow improved, truly informed preoperative consent.

At the time of introduction of computer imaging in facial plastic surgery, medicolegal consequences of these realis tic predktion tracings were not clear. However, there has been no reported incideince of legal problems due to breach of implied warranty resulting from inappropriate or inaccurate imaging.[11]

Disclosure of Lïmitatsons of Expertise

The physician must have that degree of skill ordinarily possessed by physicians of his professional status in similar circumstances. He is expected to exercise that skill in the care of the patiënt.[12] The patiënt has the right to presume that a physician is competent in the proposed course of medical care.[13] Medical ethics dictate the physician's duty to act in. the best interest of the patiënt. This implies that if the doctor is not competent,, his or her obligation is to refer the patiënt to someone who is.[13] If the patiënt is injured because the physician failed to refer the patiënt to a more qualifieci physician, then the physician may be found negligent. [12>14,15] To protect against this charge, it is wise for otolaryngologic and facial plastic surgeons to be sure that their training is adequate. Ultimately, however, individual physicians must judge whether they are properly trained to perform a procedure before adding it to their armamentarium.[14]

DOCUMENTATION

The surgical report is of primary importance in professional liability and may offer the best defense

Table 1. Outline for Rhinoplasty Consultation

Patiënt name . Date:.

General
Realistic expectations—key to success
Why you are here __ Change nasal shape __ Improve nasal breathing
Examination
___ Face—asymmetry
___ Nose—asymmetry
___ Irregularity
___ Skin thickness
___ Sears
___ Nose
___ Septum

Problem
___ 1. Shape of nasal skeleton (bone, cartilage) is changed. The skin has to adapt itself to this new shape.

Goals
. Establish normal proportion, symmetry, and harmony ofthe nose and face
. Improvement rather than perfection ,
Improving shape rather than overall size
Reestablish (apparent) midline position
Improve nasal function

Limitations
___ Facial asymmetry/dïsharmony
___ Magnitude of change limited
___ Skin thickness (thick, thin)
___ Previous surgery
___ Goals may only be partially met

Alternatives
___ No treatment (any adverse consequences?)
___ Surgical correction

Surgical technique
___ Anesthesia
___ Operating room
___ Incisions
___ Biomaterials
___ Donor site
___ Sutures
___ Dressings
___ Postoperative hospitalization
___ Restrictions
___ Return to normal activity

Trade-offs Te m po r a ry
__ Discomfort (pain/sensitivity)
__ Discoloration
__ Numbness
___ Nasal blocking
__ Restricted activity
___ Swelling (up to 1 year, extremely rarely longer) Permanent
___ Sears
___ Numbness Special risks Implants
___ Infection
___ Removal
___ Extrusion

Risks/complications Nose
___ B l eed i n g/b lood collection*
___ Infection
___ Sensory change
___ Asymmetry
___ Imperfection
___ Nasal function (unimproved/deteriorated)
___ Skin redness
___ Skin damage/wound separation Auricular donor site
___ B l eed i n g/b lood collection*
___ Infection
___ Sensory change
___ Scar
___ Change in position
___ Shape

Even though the risk and complications cited above occur infre-quently, there are the ones that are peculiar to the operation or are of greatest concern. Other complications and risks can occur but are even more uncommon.

Any and all of the risks and complications can result in: ___ Additional surgery __ Hospitalization __ Time off work ___ Expense to you

On occasion, surgical revisions may be indicated following the original surgery. If planned or performed within 1 year after the original surgery, there will be no charge by the surgeon, butafacility fee will be chargecl by the hospital for use of the operating or treatment room.

No guarantee. The practice of medicine and surgery is not an exact science; although good results are expected, there cannot be any guarantee, nor warranty, expressed or implied, by anyone as to the results that may be obtained.

Comments:

Date _____ Surgeon: _____

Copy of consultation to to be given to patiënt. Copied and provided to patiënt by:

*Must be off all aspirin-containing product for 2 weeks before surgery. Check all medications with us; some other medications may also affect clotting.

for the surgeon in case of litigation.[16] The surgeon has to be sure the record of the patiënt's history is complete and adequate. Courts in the United States have maintained that the written record is superior to human memory.[17] In case of a dispute over facts between the patiënt and the physician, juries are more apt to believe the written account and will always regard the medical record as having greater validity than the patiënt's undocumented testimony pertaining to events that occurred months or even years previously. All decisions between doctor and patiënt that contribute to informed consent must be recorded in writing, which is an important protection against later dispute. It is important not to criticize the work of other physicians in the medical record, unless the writer is prepared to defend such imputations in court.[14] In that sense humorous or derogatory remarks may have potential legal implications.

The surgery should be described in adequate detail and should include Information about all anatomie areas treated. Information should be recorded

Table 2. Outline for Otoplasty Consultation

Patiënt name. Date:.

General
Realistic expectations—key to success
Why you are here: change shape and position of external ear
Examination ___ Face ___ Shape ___ Wiclth __ Ear
___ Relative height ___ Specific shape/position , Asymmetrie protrusion
Goals
. Establish norrnal contours and symmetry
Reestabiish normal position . Improvement rather than perfection . incomplete correction rather than overcorrection

Trade-offs Te m po ra ry
___ Discomfort (pain/sensitivity) ___ Discoloration/swelling ___ Numbness ___ Head band ___ Restricted activity ___ Permanent ___ Scar ___ Sensitivity ___ Numbness Risks/complications ___ B l eed i n g/b lood collection* ___ Infection ___ Sensory change ___ Suture extrusion ___ Asymmetry ___ Ree u r ren ce
Even though the risk and comptications cited above occur infre-quently, there are the ones that are peculiar to the operation or are of greatest concern. Other complications and risks can occur but are even more uncommon.
Any and all of the risks and compfications can result in __.

LimitatJons
__. A!! humans are asymmetrie: ___ Symmetry may not be achievecl ___ Goals may only be partialiy met Surgica! lechm'que __, Anesthesia __.. Operating room ___ Incisions
___ Unabsorbable deep sutures
___ Cartifage scoring __ Ca rt i lage shave __ Absorbable skin sutures
___ Dressings ___ "Day-care" __ Supporting head band ___ Resl'rictions ___ Return to normal activity

No guaranlee. The practice of medicine and surgery is not an exact science; although good results are expected, there cannot be any guarantee, nor vvarranty, expressecl or implied, by anyone. as to the results that may be obtained.
Insurance usually covers oioplasty, preauthorization will be obtained before proceeding with surgery,
Co m men ts:
Date _____ Surgeon: _____

Copy of consultation to be given to patiënt.

Copied and provided to patiënt by:

Additional surgery ___ Hospitalization ___ Time off work ___ Expense to you
On occasion, surgical revfsions may be indicatecl following the original surgery, If planned or performed within l year a f ter the original surgery, there will be no charge by the surgeon, but a facility fee will be charged by the hospita! for use of the operating or treatment room.

*Must be off all aspirin-containing product for 2 weeks before surgery„ Check all medications with us; some other medications may also affect dotting.

about the type of artesthesia used. The use of a suitable standard operation report is convenient and is especially useful to ensure that all appropriate parts of the record are included, The operation report must be redacted immediately after the procedure and should. contain the indication for the surgery the surgical procedure, and the type of anesthesia, the sequence of surgical steps, and all problems encountered. A schedule of postoperative care should be written down.

Preoperative and postoperative photographs are a mandatory, objective form of documentation for otolaryngologic, facial plastic, and reconstructive surgery. Photographs should be taken of the patiënt in a standard pose. Obtaining photographs in standard pose may well be a proof of the doctor's best intentions and should avoid any postoperative suspicion of "doctoring" or falsification of photographs. Photographs should be in the chart prior to surgery Details, such as preexistent asymmetries, irregularities, and scars, deserve additional objective standardized photographic documentation.

Finally, records should not be released to individuals other than the patiënt without proper written authorization of the patiënt, If records are properly released, only copies should be allo wed to leave the office and the original should be maintained.

INFORMED CONSENT

The primary aspect of informed consent is the duty to disclose.[3] Informed consent is based on shared decision from physician and patiënt, with the physician understanding the relevant values of the patiënt and the patiënt understanding the nature of disease and intervention, including risks and benefits.[18] All details should be explained, so that a reasonable person could understand the procedure and could then refuse the surgery based on the potential problems. The most common problems should be included within the consent. The patiënt needs all Information necessary to enable him to make an intelligent decision as to whether to submit to a

proposed treatment and to make the consent valid. The only alternatives that need to be discussed are those that involve the same or a similar risk level and benefits as those found in the proposed form of care.

The consent is valid if the patiënt has: (1) substantial understanding of the disease and the nature of the intervention, including both the benefits and the risk; (2) the ability (capacity or competence) to provide authorization to the physician to proceed; and (3) substantial freedom from control by others.[18] It is both a legal and moral responsibility of the surgeon that patiënt consent is obtained before the procedure is performed.[19]

Informed consent is not to be confused with a *consent form.* The purpose of a written consent form is to document that a process of informed consent has taken place to protect the physician if the process is later disputed.[18] There is no legal obligation to obtain a signed consent prior to surgery.[3,19] The consent form does suggest that the surgeon has spent time with the patiënt explaining the operation, including risks and benefits to him. Such form is little more than a formal acknowledgement of the patiënt education process.[12]

Apart from the consent form, the surgeon still has to enter in the chart what has been told to the patiënt.

LACK OF CONSENT

The surgeon should understand that consent does not extend to procedures that are not part of the treatment consented to. Under common la w, any unauthorized touching of a patiënt constitutes a battery. The touching that takes place in a clinical situation is not a battery if the patiënt gives consent. Thus, a surgical procedure done without consent, whether expressed or implied, is a battery and the surgeon can become liable.

The standard of disclosure is not to be measured by what a reasonable doctor would have told the patiënt, but what a prudent patiënt would be expected to know.[20] To prove lack of informed consent, the patiënt would have to show: (1) a physician's failure to disclose; (2) breach of that duty; (3) injury to the patiënt.[20,21]

COMPL1CATIONS

Complications are an inescapable consequence of any surgical procedure. Because a large part of otolaryngologic, facial plastic, and reconstructive surgery falls under the designation of elective surgery, postoperative complications are particularly distressing to both physician and patiënt.[1] If the standard of care for developing informed consent was met, the patiënt has been provided with information regarding risks and complications.[8] From jurisdiction of European Courts, it may be concluded that complications with an incidence of more than 1% have to be mentioned to the patiënt, especially if a risk is about 1% and is so obviously vital to an informed choice that no reasonably prudent surgeon would fail to explain.[15]

The information about complications should be in the context of the surgeon's experience, not that of a world class surgeon who publishes low complications rates due to his experience and competence.[1] Physicians have the obligation not only to warn patients of the complications, but also to make the patiënt understand what this complication means.

Denial by patients of the possibility of postoperative complications is a very troublesome problem.[7] Many patients seem totally unaware that, however remote, complications are indissolubly connected with surgery and might indeed happen to them. Regardless of the reason of denial, a potential complication may pose a medicolegal problem. The inhibition of the patiënt's ability to hear and to comprehend stresses the importance of documenting informed consent.

Having prepared the patiënt in the appropriate way does make an enormous difference in handling of a postoperative complication. Many patients who feel that the surgeon made every effort to inform and feit that the surgeon was honest, consciëntieus, concerned, and thorough will be less inclined to file claims, even in the presence of unsatisfactory results or untoward complications.[22] Patients who are adequately informed are more likely to regard a complication as a known risk and a complication may be more readily accepted regardless of the cause. However, if a complication occurs without forewarning, a discussion of the complication will be easily perceived by the patiënt as excuses. Doubts about the surgeon's honesty, conscientiousness, concern, and competence will severely tax the patiënt-doctor relationship. No matter how thorough the consultation or how complete the information provided on the risks and complications, the surgeon will still be held liable if the complication resulted from negligence.

Adequate handling of a complication even in a forewarned patiënt is in the best interest of patiënt and doctor. Hear the patiënt out and give adequate medical as well as emotional support and respect. Good medical ethics dictate that complications must be discussed openly and in clear terms with the patiënt and should never be denied. Providing information to maintain informed consent is a continuous process and not just a moment in time. Modification in treatment and care must be made to

reflect changing conditions and circumstances and the Information provided during the initial consultation must be continuously updated.[8] Try to deal with facts. Teil the patients what can be done and what cannot be done. If possible, never take hope away. Document the problem carefully with chart entries and, if possible, photographs. Be available. Inform nursing personnel that the patiënt should have easy access to you.

Any time the patiënt questions the physician's competence in handling the complication, it is best to obtain a second opinion. It is recommended that this be done by the physician by telephoning the consultant in front of the patiënt, so that the patiënt understands your concerns and what has been said and what you are asking the consultant to do. Friendly consultation is not meant to minimize the complication. The patiënt must be helped by showing concern and recognition of the problem. All. ef-forts should be made to soothe unpleasant feelings. Inflammatory statements should be prevented.

In case of malpractice action, obtain legal advice. The way physicians react in case of litigation is often emotional: either strong resistance with aggression and anger with respect o the plaintiff or a sense of guilt. However, do not give way to one's feeling too easily Stïll try to work on improving the patiënt-doctor relationship, if possible. Good documeiitation in. case of malpractice action is imperative. This also means that changes should never be made in the patiënt's record. The fact that the records have been changed may be explained in court as follows: the doctor made changes because hè feit hè was negligent

The doctor must defend the rights and dignity of the patiënt[23] and this is hopefully ack.nowledged and recognized. by the patiënt. The doctor must never for a. moment or in the least degree resigri his conscience to the litigator. The previ.ou.sly mentioned conditions would make lawsuits unnecessary. It is our feeling that from the psychosocial perspective of the patiënt and the doctor lawsuits are better prevented. During the lawsuits, the patients are emotionally confronted with their problem and have to relive an unhappy situation. Sometimes only after years of litigation does the patiënt get recognition of the problem. The economie compensation may only be the second goal. This statement is not meant to imply that all lawsuits against doctors are unjustified. Many patients are encountered who undoubtedly have a firm basis for action.

FINAL COMMENT

Foor communication, rather than poor results, is the most important denominator of litigation between patiënt and physician in otolaryngologic, facial plastic, and reconstructive surgery. Adequate preoperative counseling is the key to patiënt satisfaction and prevention of legal action. Informed consent may well be considered the legal counterpart of good medical ethics. Dissatisfaction is often a result of improper patiënt information and a failure to establish or maintain rapport between patiënt and surgeon.

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