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# *Hondroulis v. Schuhmacher*: The Crusade Back to Canterbury

## INTRODUCTION

In the recent case of *Hondroulis v. Schuhmacher*,[1] the Louisiana Supreme Court addressed the doctrine of informed consent to medical treatment and the statutory presumption of a valid consent provided in Louisiana's Uniform Consent Law, Louisiana Revised Statutes 40:1299.40.[2] In its first ruling on *Hondroulis*,[3] the supreme court held that a written consent form which signifies the patient's consent in language that tracks the language of the statute[4] provides a rebuttable presumption of validity of informed consent to the medical procedure.

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1. 553 So. 2d 398 (La. 1989).
2. La. R.S. 40:1299.40 (1977 and Supp. 1989).
3. 531 So. 2d 450, rev'd, 553 So. 2d 398 (La. 1989) (*Hondroulis I*).
4. La. R.S. 40:1299.40 provides in part:

A. Notwithstanding any other law to the contrary, written consent to medical treatment means a consent in writing to any medical or surgical procedure or course of procedures which (a) sets forth in general terms the nature and purpose of the procedure or procedures, together with the known risks, if any, of death, brain damage, quadriplegia, paraplegia, the loss or loss of function of any organ or limb, of disfiguring scars associated with such procedure or procedures, (b) acknowledges that such disclosure of information has been made and that all questions asked about the procedure or procedures have been answered in a satisfactory manner, and (c) is signed by the patient for whom the procedure is to be performed, or if the patient for any reason lacks legal capacity to consent by a person who has legal authority to consent on behalf of such patient in such circumstances. Such consent shall be presumed to be valid and effective, in the absence of proof that execution of the consent was induced by misrepresentation of material facts.

B. Except as provided in Subsection A of this Section, no evidence shall be admissible to modify or limit the authorization for performance of the procedure or procedures set forth in such written consent.

C. Where consent to medical treatment from a patient, or from a person authorized by law to consent to medical treatment for such patient, is secured other than in accordance with Subsection A above, the explanation to the patient or to the person consenting for such patient shall include the matters set forth in Paragraph (a) of Subsection A above, and an opportunity shall be afforded for asking questions concerning the procedures to be performed which shall be answered in a satisfactory manner. Such consent shall be valid and effective and is subject to proof according to the rules of evidence in ordinary cases.

In its second ruling on *Hondroulis*,[5] the supreme court held that Louisiana Revised Statutes 40:1299.40 creates a rebuttable presumption of consent, not informed consent. In so doing, the court expressly overruled an earlier determination[6] that the statute superseded the jurisprudential rules on informed consent developed before its enactment.

## FACTS AND HOLDING OF *HONDROULIS*

Ms. Hondroulis consulted Dr. Schuhmacher because of pain in her lower back which radiated into her right hip and leg. Dr. Schuhmacher performed a second back surgery to relieve pressure on her nerves. Prior to the surgery, Ms. Hondroulis signed a consent form containing the following statement:

> I understand and acknowledge that the following risks are associated with this procedure including anesthesia; death; brain damage; disfiguring scars; paralysis; the loss or loss of function of body organs; and the loss or loss of function of any arm or leg.

After the surgery, Ms. Hondroulis continued to experience lower back pain, lost control of her sphincter and bladder, and experienced numbness in her left leg. Ms. Hondroulis filed suit against Dr. Schuhmacher alleging that he failed to obtain her informed consent to the operation. Although Ms. Hondroulis did not deny signing the form nor allege that she was induced to sign the form by misrepresentation, she testified she was given no oral information about possible risks or complications of the surgery. The trial court granted summary judgment in favor of Dr. Schuhmacher, holding that Ms. Hondroulis was bound by the consent form. The Louisiana Fourth Circuit Court of Appeal *en banc* considered the claim, and a five-judge panel affirmed.[7] It held that the court was bound by prior jurisprudence.[8] The supreme court affirmed,[9] holding that the written consent form which tracked the language of Louisiana Revised Statutes 40:1299.40 created a rebuttable presumption of valid informed consent, which Ms. Hondroulis failed to rebut.

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5. 553 So. 2d 398 (La. 1989) (*Hondroulis II*).
6. LaCaze v. Collier, 434 So. 2d 1039 (La. 1983).
7. Hondroulis v. Schuhmacher, 521 So. 2d 534 (La. App. 4th Cir.), writ granted, 522 So. 2d 571 (1988), rev'd, 553 So. 2d 398 (1989).
8. Madere v. Ochsner Found. Hosp., 505 So. 2d 146 (La. App. 4th Cir. 1987); Leiva v. Nance, 506 So. 2d 131 (La. App. 4th Cir.), writ denied, 512 So. 2d 1176 (1987); Leonhard v. New Orleans E. Orthopedic Clinic, 485 So. 2d 1008 (La. App. 4th Cir.), writ denied, 489 So. 2d 919 (1986).
9. 553 So. 2d at 398.

In its first opinion, the supreme court set forth four elements which Ms. Hondroulis needed to prove in order to rebut the presumption: (1) that the adverse consequences of the surgery were known, significant and material risks which Dr. Schuhmacher should have disclosed to her; (2) that Dr. Schuhmacher did not disclose them; (3) that she was unaware of these risks; and (4) a reasonable person with knowledge of these risks would have refused the surgery.[10]

On rehearing, the supreme court reversed its previous holding and remanded to the trial court. The court held, inter alia, that the informed consent statute was only intended to be a "modest amendment" in the informed consent doctrine, merely to establish a rebuttable presumption of consent to encounter only those risks adequately described in a consent form.[11] The court also reviewed the informed consent doctrine in Louisiana prior to the enactment of the statute. The court enumerated the elements of a cause of action for lack of informed consent, drawing language from *Canterbury v. Spence*,[12] a 1972 case from a jurisdiction that did not have an informed consent statute. In *Hondroulis II*, the supreme court reasoned that due to the generality of the language of the consent form signed by Ms. Hondroulis, her allegations raised genuine issues of material fact as to whether she exercised informed consent.

## Historical Background of the Informed Consent Doctrine

### *Lack of Consent*

The general principle from which the causes of action for lack of consent and lack of informed consent arise was first stated in *Schloendorff v. Society of New York Hospitals*[13] by Judge Cardozo: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body."[14] Various authorities[15] have interpreted this principle to be embodied in the U.S. Constitution and the right to privacy found in *Griswold v. Connecticut*.[16] In *Schloen-*

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10. Id. at 404.
11. Id. at 417-18.
12. 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064, 93 S. Ct. 560 (1972).
13. 105 N.E. 92 (N.Y. 1914).
14. Id. at 93.
15. In Re Quinlan, 70 N.J. 10, 355 A.2d 647, cert. denied, 429 U.S. 922, 97 S. Ct. 319 (1976), the court went so far as to find "the right to privacy sufficiently broad to encompass a patient's decision to decline medical therapy, even though that decision might lead to death." See also, In Re P.V.W., 424 So. 2d 1015 (La. 1982); Crain v. Allison, 443 A.2d 558 (D.C. App. 1982).
16. 381 U.S. 479, 85 S. Ct. 1678 (1965).

*dorff*, performance of a medical procedure without consent was found to be a battery.[17] A battery is usually thought of as an intentional "harmful or offensive contact,"[18] but a contact which does not cause harm may be considered a battery because there was no consent to it.[19] Thus, a medical procedure which obtains good results may be considered a battery because the patient did not consent to the procedure.

In Louisiana, the performance of a surgical procedure on a patient without the patient's consent is an "unauthorized touching" and has been repeatedly held to be a battery.[20] An unauthorized surgery having good results still constitutes a battery. Lack of consent actions also include an action for the performance of a procedure different from the one for which consent was given. In *Pizzalotto v. Wilson*,[21] Ms. Wilson consented to exploratory surgery after being diagnosed as having endometriosis.[22] During the operation, Dr. Pizzalotto found severe endometrial adhesions, which he believed had damaged the reproductive organs and had rendered Ms. Wilson sterile. Believing that this condition would result in pain, infections, and the need for a second surgery, Dr. Pizzalotto performed a total hysterectomy. The Louisiana Supreme Court found Dr. Pizzalotto liable for battery. Although the surgery may have been necessary, the supreme court found that it was not an emergency, and was therefore a battery since performed without the patient's consent.[23]

*Lack of Informed Consent*

A doctor's duty to adequately inform a patient about a medical procedure was first recognized in 1957 by the California Court of Appeals in *Salgo v. Leland Stanford Jr. University*.[24] The court in *Salgo* emphasized the need for a patient's *intelligent* consent in requiring a physician to disclose facts and known dangers of the procedure. *Canterbury v. Spence*,[25] a leading case on the informed consent doc-

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17. 105 N.E. 92 (N.Y. 1914).
18. W. Prosser and W. Keeton, The Law of Torts § 9 (5th ed. 1984).
19. Id.
20. Pizzalotta v. Wilson, 437 So. 2d 859 (La. 1983); Beck v. Lovell, 361 So. 2d 245 (La. App. 1st Cir.), writ denied, 362 So. 2d 802 (1978); Coppage v. Gamble, 324 So. 2d 21 (La. App. 2d Cir. 1975), writ denied, 325 So. 2d 819 (La. 1976).
21. 437 So. 2d 859 (La. 1983).
22. Endometriosis is a disease where the lining of the uterus backs up into the uterus, fallopian tubes and ovaries rather than being discharged during the menstrual cycle. If not treated, endometriosis can cause cysts, and adhesions between the reproductive and other pelvic organs, ultimately causing sterility. Id. at 861.
23. Id. at 865.
24. 154 Cal. App. 2d 560, 317 P.2d 170 (Cal. Dist. App. 1957).
25. 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064, 93 S. Ct. 560 (1972).

trine, noted three exceptions to a doctor's duty to disclose information: (1) commonly known risks, (2) "therapeutic privilege," and (3) emergency. Under *Canterbury*, a doctor does not have to inform a patient of a risk which a person of average experience would be aware. A doctor also has no duty to inform patients of risks that would cause great anxiety which would hinder the treatment. This second exception is known as the "therapeutic privilege." The emergency exception exists when a patient is either unconscious or unable to communicate, and the harm which would result from no treatment outweighs any danger of treatment.

The court in *Canterbury* distinguished lack of informed consent from battery. Where there is a lack of informed consent, the patient is aware of the type of surgery to be performed. The surgery is authorized and is thus not a battery. The failure to inform is viewed as a negligent performance of the doctor's duty to inform. By characterizing an action for lack of informed consent as a negligence action, the court required the plaintiff to prove duty, breach and causation. The duty established in *Canterbury* required a doctor to inform a patient of all known risks that are material to the patient's decision including alternative forms of treatment. The test for disclosure was an objective one:

> [A] risk is . . . material when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk . . . in deciding whether or not to forego the proposed therapy.[26]

*Canterbury* also established an objective test for causation known as the "prudent-patient" standard.[27] Instead of relying on the plaintiff's testimony that he would have refused surgery if he had known of the risk of the injury sustained, the court in *Canterbury* looked to what an adequately informed, prudent person would have decided. Prior to the enactment of Louisiana Revised Statutes 40:1299.40, the Louisiana courts adopted the *Canterbury* objective standard for the duty of disclosure,[28] but disagreed on the adoption of a causation standard.[29]

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26. Id. at 787.

27. For a discussion of other standards, and an excellent general discussion of informed consent, see Boland, The Doctrines of Lack of Consent and Lack of Informed Consent in Medical Procedures in Louisiana, 45 La. L. Rev. 1 (1984).

28. Percle v. St. Paul Fire & Marine Ins. Co., 349 So. 2d 1289 (La. App. 1st Cir.), writ denied, 350 So. 2d 1218 (1977); Parker v. St. Paul Fire & Marine Ins. Co., 335 So. 2d 725 (La. App. 2d Cir.), writ denied, 338 So. 2d 700 (1976); Goodwin v. Aetna Cas. & Surety Co., 294 So. 2d 618 (La. App. 4th Cir.), writ denied, 299 So. 2d 788 (1974).

29. Cf. Bush v. St. Paul Fire & Marine Ins. Co., 264 So. 2d 717 (La. App. 1st Cir.), writ denied, 266 So. 2d 452 (1972); Goodwin v. Aetna Cas. & Surety Co., 294 So. 2d 618 (La. App. 4th Cir.), writ denied, 299 So. 2d 788 (1974).

*Louisiana Revised Statutes 40:1299.40, The Uniform Consent Law*

Beginning in 1975, state legislatures across the nation began responding to a medical malpractice crisis,[30] which was the result of an increase in insurance premiums demanded by insurance companies. Health care providers who were unable to obtain insurance at reasonable rates opted to decrease or cease rendering certain services with high potential liabilities. To avoid this obvious danger to the public welfare, state legislatures enacted substantive and procedural rules designed to decrease the liability of medical practitioners.[31] The three most common ways that legislatures attempted to decrease medical malpractice liability were (1) to limit the application of the doctrine of *res ipsa loquitur* in malpractice cases, (2) to shorten the statute of limitations for malpractice actions, and (3) to alter the presumptions and burdens of proof in informed consent cases.[32]

In 1975, the Louisiana Legislature enacted[33] the Uniform Consent Law[34] and the Medical Malpractice Act.[35] In the first case to consider the Louisiana Medical Malpractice Act,[36] Justice Calogero recognized that in passing the Act the legislature was "reacting to what it considered a crisis in the delivery of medical services to the people of this state, a crisis ostensibly prompted by prohibitive costs in connection with medical malpractice insurance. . . ."[37] While Louisiana Revised Statutes 40:1299.40 is not considered part of the Medical Malpractice Act, it is consistent with it and was also enacted in response to the medical malpractice crisis.[38]

Louisiana Revised Statutes 40:1299.40 provides in pertinent part that "written consent to medical treatment means a consent in writing to any medical . . . procedure . . . which (a) sets forth in general terms the nature and purpose of the procedure . . . together with the known risks, if any, of death, brain damage, quadriplegia, paraplegia, the loss or loss of function of any organ or limb, of disfiguring scars

30. Between 1975 and 1977 over 450 bills were introduced, and 175 statutes were enacted or amended in state legislatures, all concerning medical malpractice. Comment, An Analysis of State Legislative Responses To the Medical Malpractice Crisis, 1975 Duke L.J. 1417, and authorities cited therein.

31. Id.

32. Id. at 1425-42.

33. 1975 La. Acts No. 529 § 1, 817 § 1.

34. La. R.S. 40:1299.40 (1977 and Supp. 1989).

35. La. R.S. 40:1299.41 (1977 and Supp. 1989).

36. Everett v. Goldman, 359 So. 2d 1256 (La. 1978).

37. Id. at 1261.

38. In *Hondroulis II*, the supreme court acknowledged that the state interests served by La. R.S. 40:1299.40 were the decreasing of the number of fraudulent claims, the reducing of insurance costs and the attracting of new medical talent to the state because of these reductions. Hondroulis v. Schuhmacher 553 So. 2d 398, 416 (La. 1989).

associated with such procedure. . .," and that "[s]uch consent shall be presumed to be valid and effective, in the absence of proof that execution of the consent was induced by misrepresentation of material facts."

In *LaCaze v. Collier*,[39] the Louisiana Supreme Court addressed the significance of Louisiana Revised Statutes 40:1299.40. Ms. LaCaze consented to a hysterectomy by signing a form which tracked the language of the statute. As a result of the surgery, Ms. LaCaze suffered bladder incontinence. The supreme court found Louisiana Revised Statutes 40:1299.40 to supersede the jurisprudential forms of consent previously permitted. The court determined that subsections A and C of Louisiana Revised Statutes 40:1299.40,[40] when taken together, provided for permissible forms of both written and oral consent which were held to be "the exclusive methods for obtaining consent to treatment."[41] The court also interpreted the Uniform Consent Law to require disclosure of all known risks, whether or not material, but not to require the disclosure of alternative treatments. The court acknowledged that the risk that Ms. LaCaze's condition would result from her hysterectomy was .05% and suggested that the risk was not material. Nevertheless, the court held this risk to be "known" to Dr. Collier and therefore requiring disclosure. The court also held that the condition was a "loss of function of an organ" because "a bladder which leaks no longer performs . . . [its] function."[42] The court adopted an objective standard of causation. Ms. LaCaze was denied recovery because the court determined that, considering Ms. LaCaze's circumstances, a reasonable patient would have undergone the hysterectomy regardless of the .05% chance of incontinence.

The Louisiana Supreme Court overruled all prior jurisprudence concerning informed consent when it interpreted the Uniform Consent Law in *LaCaze v. Collier*.[43] The court stated that compliance with the statute was the only means by which to obtain consent to a medical procedure.[44] The court interpreted the statute as requiring a physician to inform a patient of *all* known risks, whether or not material. The court used an objective standard of causation. In *Hondroulis I*,[45] the supreme court states that *LaCaze* adopted an objective test for informed

39. 434 So. 2d 1039 (La. 1983).

40. Subsection A provides for a written consent form and subsection C provides for consent "secured other than in accordance with Subsection A. . . ."

41. 434 So. 2d at 1046.

42. Id. at 1047.

43. Id. at 1039.

44. Id. at 1046.

45. 553 So. 2d 398 (La. 1989).

consent.[46] *LaCaze* did adopt an objective standard for causation, but not an objective standard of disclosure. *LaCaze* stated that all risks must be disclosed regardless of materiality. It is the definition of a material risk that makes a disclosure requirement objective. If all known risks have to be disclosed, then the disclosure requirement cannot be an objective one because it ignores the materiality of the risks. Nevertheless, the court in *Hondroulis I* reinstated the objective disclosure requirement.[47] The court granted summary judgment in favor of the doctor because the consent form signed by Ms. Hondroulis created a presumption of informed consent that Ms. Hondroulis was unable to overcome. In *Hondroulis II*, the court narrowed the presumption created by a statutory consent form. Unlike *Hondroulis I*, the court in *Hondroulis II* decided that the consent form did not create a presumption of informed consent. Instead, the consent form created a presumption of consent only to those "risks adequately described in the consent form in layman's terms."[48] The court also overruled its previous holding in *LaCaze* to the extent that it had stated that the Uniform Consent Law provides the sole means of obtaining consent to medical treatment.[49] Instead, the court in *Hondroulis II* viewed the Uniform Consent Law as a "modest amendment" to the doctrine of informed consent.[50] According to the court, the jurisprudence effective prior to the enactment of the Uniform Consent Law is still applicable to informed consent cases.

## ANALYSIS

On rehearing,[51] the Louisiana Supreme Court reversed its previous holding in *Hondroulis I*[52] that a written consent form which tracks the language of the Uniform Consent Law[53] gives rise to a presumption of valid informed consent. The supreme court reached three intermediate conclusions which led to the reinterpretation of Louisiana Revised Statutes 40:1299.40: (1) the right to privacy contained in the Louisiana Constitution includes the right to decide whether to undergo medical treatment;[54] (2) the legislative intent behind Louisiana Revised Statutes 40:1299.40 was to establish a rebuttable presumption of consent

46. Id. at 402.
47. Id.
48. Id. at 417.
49. Id.
50. Id. at 418.
51. 553 So. 2d 398 (La. 1989).
52. Id.
53. La. R.S. 40:1299.40 (1977 and Supp. 1989).
54. 553 So. 2d at 415.

to encounter risks adequately described in the consent form;[55] and (3) the legislature did not intend to make substantive changes to the doctrine of informed consent by enacting Louisiana Revised Statutes 40:1299.40.[56] While the ultimate conclusion to deny Dr. Schuhmacher summary judgment was correct, the preliminary conclusions require close examination.

### THE RIGHT TO PRIVACY

The Louisiana Supreme Court, correctly concluded that the right to privacy protected by the Louisiana Constitution includes "the right to decide whether to obtain or reject medical treatment."[57] The court observed that the decision to undergo medical treatment, like decisions concerning marriage,[58] contraception,[59] and family relations,[60] "clearly" should be one of those personal decisions constitutionally protected by the right to privacy.[61]

The court's conclusion is consistent with the intended meaning of Article I, Section 5 of the Louisiana Constitution. The doctrine of informed consent is founded upon the right of self-determination.[62] Article I, Section 5 of the 1974 Louisiana Constitution expressly provides protection to individuals against unreasonable "invasions of privacy." This protection was intended to "accelerate the tentative steps"[63] of *Griswold v. Connecticut*[64] and to provide an express right to privacy which encompasses the right of self determination.[65]

### REBUTTABLE PRESUMPTION

The Uniform Consent Law affects the right to decide whether to obtain or reject medical treatment. Because this right is now protected under the Louisiana Constitution, Louisiana Revised Statutes 40:1299.40

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55. Id. at 417.
56. Id. at 418.
57. Id. at 415.
58. Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817 (1967).
59. Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029 (1972).
60. Price v. Massachusetts, 321 U.S. 158, 64 S. Ct. 438 (1944).
61. Hondroulis v. Schuhmacher, 553 So. 2d 398, 414 (La. 1989). In discussing the fundamental nature of the right to decide one's own medical treatment, the court likened that right to the right to decide to continue or terminate a pregnancy. Although beyond the scope of this paper, *Hondroulis II* has great implications on the right to choose an abortion as protected by the Louisiana Constitution.
62. Schloendorff v. Society of New York Hosp., 105 N.E. 92, 93 (N.Y. 1914).
63. Hargrave, Declaration of Rights of the Louisiana Constitution of 1974, 35 La. L. Rev. 1, 20 (1974).
64. 381 U.S. 479, 85 S. Ct. 1678 (1965).
65. Hargrave, supra note 63, at 21.

must be examined carefully. Louisiana Revised Statutes 40:1299.40 reads:

> A. Notwithstanding any other law to the contrary, written consent to medical treatment means a consent in writing to any medical or surgical procedure or course of procedures which (a) sets forth in general terms the nature and purpose of the procedure or procedures, together with the known risks, if any, of death, brain damage, quadriplegia, paraplegia, the loss or loss of function of any organ or limb, of disfiguring scars associated with such procedure or procedures, (b) acknowledges that such disclosure of information has been made and that all questions asked about the procedure or procedures have been answered in a satisfactory manner, and (c) is signed by the patient for whom the procedure is to be performed, or if the patient for any reason lacks legal capacity to consent by a person who has legal authority to consent on behalf of such patient in such circumstances. Such consent shall be presumed to be valid and effective, in the absence of proof that execution of the consent was induced by misrepresentation of material facts.
> B. Except as provided in Subsection A of this Section, no evidence shall be admissible to modify or limit the authorization for performance of the procedure or procedures set forth in such written consent.
> C. Where consent to medical treatment from a patient, or from a person authorized by law to consent to medical treatment for such patient, is secured other than in accordance with Subsection A above, the explanation to the patient or to the person consenting for such patient shall include the matters set forth in Paragraph (a) of Subsection A above, and an opportunity shall be afforded for asking questions concerning the procedures to be performed which shall be answered in a satisfactory manner. Such consent shall be valid and effective and is subject to proof according to the rules of evidence in ordinary cases.

The fourth circuit interpreted this statute to provide a presumption of valid and informed consent to the medical procedure described which was only rebuttable by proof that the consent was induced by misrepresentation of material facts. The fourth circuit also construed Louisiana Revised Statutes 40:1299.40(B) to preclude the admission of any evidence not concerning misrepresentation to rebut the presumption in subsection A.[66] This construction, by allowing only the validity and

66. 521 So. 2d 534, 536 (La. App. 4th Cir. 1988).

not the content of the consent form to be rebutted, in effect created an irrebuttable presumption of consent under the statute, which gave enormous protection to physicians. A general consent form that tracked the language of the statute would, as a matter of law,[67] constitute valid consent to medical treatment. Although a physician has a duty to inform patients of material risks associated with medical procedures, liability for breach of this duty could be avoided by obtaining the patient's "consent" on a form that tracks the language of the statute. By providing such an easy avoidance of liability, the statute as interpreted by the fourth circuit would encourage physicians to gain a patient's consent by signature of a general consent form, rather than by adequately disclosing the material risks of the proposed procedure. The amount of information disclosed to patients would decrease. Without specific information about the procedure and material risks involved, patients would be unable to make an intelligent decision concerning medical treatment.

The supreme court declared the fourth circuit's interpretation of Louisiana Revised Statutes 40:1299.40 to be unconstitutional because "the practical effect" of the statute would be to burden the patient's right to decide whether to undergo medical treatment by "substantially limiting" access to material information without the justification of a compelling state interest.[68] To avoid declaring the statute itself unconstitutional, the supreme court reinterpreted it more narrowly to regulate the proof of informed consent.

The court concluded that the statute established a rebuttable presumption of consent to encounter only those risks adequately described in the consent form. The court justified this conclusion on three grounds.[69] First, to interpret the statute as providing an irrebuttable presumption would render it unconstitutional. Second, the term "presumption" should be interpreted as being rebuttable unless the statute expressly states that the presumption is conclusive. Third, the presumption of "consent" does not mean "informed consent."

The court was correct to conclude that Louisiana Revised Statutes 40:1299.40 must be interpreted to provide a rebuttable and not a conclusive presumption. Yet the court took an unnecessary step of stating that the presumption which arises is of mere consent and not informed consent. The actual presumption does not need to be changed. A written general consent form which provides a presumption of valid informed consent would not be unconstitutional if the presumption

67. An irrebuttable presumption is no presumption at all, but is a rule of law. 553 So. 2d 398, 417 (La. 1989).

68. Id. at 419.

69. Id. at 417.

was rebuttable. A consent form which creates a rebuttable presumption of informed consent would still not be absolute protection from liability for the physician, and the unreasonable burden on a patient's access to information would not be present. Furthermore, the supreme court's current interpretation of the statute renders section A(b) useless. In that section, the patient "acknowledges that such disclosure of information has been made. . . ." If the only risks presumed to be disclosed are those already contained in the consent form, there would be no need for a patient to acknowledge the disclosure of that information. Also, there is more than one way to disclose information. Disclosure can be written or oral. Considering that subsection (b) which contains the "acknowledgment of disclosure" also acknowledges that questions have been answered satisfactorily, it is reasonable to conclude that this acknowledgment is of information communicated but not evidenced in the consent form.[70] The supreme court reinterpreted the statute to provide a presumption of valid consent to encounter only those risks adequately disclosed in the consent form.[71] It is possible to reinterpret the statute without re-writing it. The supreme court should have interpreted Louisiana Revised Statutes 40:1299.40 to provide a rebuttable presumption of valid informed consent to all material risks of the described medical treatment when a written form which complies with subsections (a), (b), and (c) is produced. Although material information may not be disclosed on the written form, subsection (b) contains an acknowledgment that such information has been disclosed. If this presumption of informed consent is rebuttable, a plaintiff could rebut the presumption by proving that no disclosure beyond the written form was made.

The type of communication desired between a doctor and a patient should also be considered in determining the extent of the presumption. The supreme court's interpretation of the statute would cause a doctor to disclose all material risks in a written consent form to gain the benefit of the presumption. Having disclosed all material risks in the form, a physician would have little incentive to discuss with the patient the proposed treatment and alternative treatments and their respective material risks. The majority, if not all, of the information communicated to the patient would be through the written consent form.

Under the interpretation which leaves intact the presumption of valid and informed consent to all material risks by use of the statutory

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70. See Bolland, Recent Developments in Patient Consents in Medical Procedures in Louisiana, 32 La. B.J. 23, 27 n.9. The author comments that "[t]he informed consent must be conveyed to the patient so that he fully comprehends or understands the information given to him and the 'acknowledgment' and 'answering the questions of the patient' requirements in the statute are consistent with this interpretation."

71. 553 So. 2d at 417.

language, a general consent form could be used to gain the benefit of the presumption. If that general consent form did not adequately disclose a material risk, the doctor would lose the benefit of the presumption if the plaintiff showed that no other communications outside of the written form disclosed the material risk. Under this interpretation, the doctor would be encouraged to discuss the procedure with the patient. This discussion would provide an opportunity for the patient to ask questions, and a second opportunity for the doctor to explain things that the patient did not understand or found troublesome. The second interpretation provides a greater opportunity for the patient to receive adequate information through a meaningful communication than that provided by the first interpretation.

## EFFECT OF LOUISIANA REVISED STATUTES 40:1299.40 UPON THE DOCTRINE OFINFORMED CONSENT

In 1983, the Louisiana Supreme Court declared in *LaCaze v. Collier*,[72] that Louisiana Revised Statutes 40:1299.40 superseded the jurisprudential rules defining informed consent. In *Hondroulis II*,[73] the supreme court overruled this holding. The court chose instead to view the statute as "a modest amendment to the informed consent doctrine."[74] The court went on to conclude that the legislature did not intend to make substantive changes to the doctrine of informed consent by enacting Louisiana Revised Statutes 40:1299.40.[75] The Louisiana statute is similar to other statutes that have generally been interpreted to affect the presumptions and burdens of proof in the informed consent doctrine.[76] If this statute did not supersede prior jurisprudence, then the jurisprudential rules in existence before the enactment of the statute[77] are still in effect. What those jurisprudential rules are is not very clear. *LaCaze v. Collier* was recognized for ending the confusion about the doctrine of informed consent in Louisiana.[78] The circuit courts were in disagreement over the use of a subjective or objective

72. 434 So. 2d 1039 (La. 1983).
73. 553 So. 2d at 418.
74. Id.
75. Id.
76. Fla. Stat. Ann. § 766.103(4) (Supp. 1990); Idaho Code § 39-4305 (1975); N.C. Gen. Stat. § 90-21.13 (1985); Ohio Rev. Code Ann. § 2317.54(86); Utah Code Ann. § 78-14-5(2)(e) (1976). These statutes differ as to whether the presumptions are rebuttable or not, but all concern presumptions.
77. 1975 La. Acts No. 529 § 1.
78. Boland, Doctrines of Lack of Consent and Lack of Informed Consent in Louisiana, 45 La. L. Rev. 1 (1984).

test for causation.[79] Regardless of what the prior jurisprudence was, the supreme court clarified the jurisprudential rules by adopting the cause of action first developed in *Canterbury v. Spence*.[80] The court sets out the doctrine of informed consent in *Hondroulis II* to consist of a doctor's duty to disclose material information[81] with the exceptions of emergency, therapeutic privilege and unknown or immaterial risks,[82] and an objective, or "prudent-patient" standard for causation.[83]

### DENIAL OF SUMMARY JUDGMENT

The supreme court denied Dr. Schuhmacher's motion for summary judgment. Dr. Schuhmacher moved for summary judgment on the grounds that the general consent form signed by Ms. Hondroulis created an irrebuttable presumption of informed consent.[84] The supreme court held that this form created a rebuttable presumption that Ms. Hondroulis consented to "whatever risks a reasonable person, in what the doctor knew or should have known to be the patient's position, would have apprehended from the written consent form."[85] Ms. Hondroulis averred that the risk of loss of control of her bladder was a known, material risk and that a reasonable person would have foregone treatment if adequately informed of this risk. Due to the supreme court's construction of Louisiana Revised Statutes 40:1299.40, the issue at motion for summary judgment was whether the language "loss of function of a bodily organ" would inform a reasonable person of the risk of loss of control of the bladder. Dr. Schuhmacher did not carry his burden of showing that there was no issue of material fact concerning Ms. Hondroulis's consent, therefore, the motion was denied.

If Louisiana Revised Statutes 40:1299.40 had been interpreted to provide a rebuttable presumption of valid and informed consent to a medical procedure as evidenced by a statutory consent form, the motion

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79. Percle v. St. Paul Fire & Marine Ins. Co., 349 So. 2d 1289 (La. App. 1st Cir.), writ denied, 350 So. 2d 1218 (1977); Goodwin v. Aetna Cas. & Surety Co., 294 So. 2d 618 (La. App. 4th Cir.), writ denied, 299 So. 2d 788 (1974).

80. 464 F.2d 772 (D.C. Cir. 1972), cert. denied, 409 U.S. 1064, 93 S. Ct. 560 (1972).

81. 553 So. 2d 398, 411-12 (La. 1989).

82. Id. at 412-13.

83. This cause of action is identical to *Canterbury*. Although the supreme court does not expressly adopt *Canterbury*, Justice Dennis cites it eight times in his dissent to the first ruling on *Hondroulis* and cites it thirteen times in the majority opinion of the present case.

84. In Douget v. Touro Infirmary, 537 So. 2d 251 (La. App. 4th Cir. 1988), a defendant successfully used a motion in limine to exclude evidence challenging the validity of a consent form. A motion in limine could also be used to exclude a consent form from the view of the jury.

85. 553 So. 2d at 419.

for summary judgment would still have been denied. The consent form would have been given a presumption of validity because of the acknowledgment of disclosure as required by subsection (b). By alleging that no communications beyond the consent form occurred, Ms. Hondroulis could have rebutted the presumption of valid consent and raised a genuine issue of material fact. The motion for summary judgment could have been denied under this reasoning.

## Conclusion

By reinterpreting the Uniform Consent Law to provide a rebuttable presumption of consent only to risks disclosed in the consent form, the supreme court has taken a valuable protection away from physicians. The Uniform Consent Law was enacted because of the medical malpractice crisis. While the reinterpreting of the statute to provide only a rebuttable presumption was necessary to avoid having an unconstitutional statute, the limiting of the presumption was not. The limiting of the presumption is not consistent with the legislative intent of the statute. It is also a questionable policy choice considering the rising price of medical costs and the threat of another medical malpractice crisis.

*Cindy Matherne*