need to be disclosed as a prerequisite to obtaining the patient's informed consent. Even if a patient specifically asks the physician about her experience in performing a particular procedure, courts differ as to whether a misrepresentation on that issue by the physician would constitute a lack of informed consent.[15] As stated by the Supreme Court of Pennsylvania, "we hold that information personal to the physician, whether solicited by the patient or not, is irrelevant to the doctrine of informed consent."[16]

Aside from determining what a physician is required to disclose to satisfy the element of duty is a separate issue of how to evaluate the element of causation in a claim for lack of informed consent. In other words, how should the court determine whether the alleged failure to disclose was actually the cause of the patient's injuries? If the patient would have agreed to the procedure, even if the risks had been disclosed, any failure to disclose the risks was not the cause of the patient's injuries.

One alternative is to rely on the testimony of the injured patient, in hindsight, that she would not have undergone the medical procedure if the risks had been fully disclosed. This is referred to as the **subjective test**, because the patient is testifying about what is, or was, in her own mind. Obviously, relying on self-serving testimony by a patient in hindsight on the issue of the patient's subjective belief can lead to a great deal of abuse. Therefore, courts in most states use an **objective test** of whether a reasonable person, in the circumstances of the patient, would have consented to the medical procedure if the risks had been disclosed. In a jury trial, the jury's role is to determine what a reasonable person would have done under the circumstances.

In these ways, the law tries to accommodate the right of the patient to self-determination and the legitimate interest of the provider in avoiding unreasonable claims. In addition, the doctrine of informed consent is more than just a type of claim by an injured patient against a healthcare provider; it is the theoretical basis for a patient's right to refuse treatment, as discussed in Chapter 12. In addition, informed consent is an important part of the federal regulations on experimentation with human subjects.[17]

Subjective test
The legal standard to evaluate the element of causation in a claim for lack of informed consent on the basis of the patient's testimony in hindsight about whether he would have undergone the medical procedure if the risks had been fully disclosed.

Objective test
The legal standard to evaluate the element of causation in a claim for lack of informed consent on the basis of whether a reasonable person, in the circumstances of the patient, would have consented to the medical procedure if the risks had been disclosed.

Activity 10.1: John Parker

John Parker, age 35, was a self-employed consultant. When he moved to Littleville in 2012, he purchased health coverage for himself and his family from an MCO known as the Littleville Family Health Plan (the "Plan").

The Plan provides physician services to its enrollees through a network of independent physicians in private practice. Each of those

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participating physicians has entered into a written agreement with the Plan. The standard agreement explicitly provides that the physicians are not employees or agents of the Plan. The Plan does not provide copies of its participating physician agreements to the patients who are enrolled in the Plan.

However, at the time that he enrolled, the Plan did send Parker an 87-page brochure. On page 54, the brochure from the Plan contained the following language: "We are very happy that you have chosen the Plan to meet all of your health care needs. To obtain services under the Plan, you will need to select a primary care physician (PCP) from the enclosed list of the Plan's participating physicians. Please note that these participating physicians are not employees or agents of the Plan."

Parker did not know any doctors in the area, but he selected Dr. Susan Green as his PCP because she was on the list provided to him by the Plan. Dr. Green is a solo practitioner in private practice, and she leases office space for her practice in a shopping center in the suburbs of Littleville.

On July 15, 2013, Parker began experiencing dizzy spells. He called Dr. Green's office and made an appointment to see her the next day. On July 16, 2013, Dr. Green examined Parker in her office and made a diagnosis of Swinehausen's syndrome. The standard treatment for that medical condition is to prescribe one tablet of pentamite (10 milligrams) once a day for three weeks. In her discussion with Parker, Dr. Green explained the risks and benefits of pentamite as well as the alternative forms of treatment, and Parker consented to take the pentamite as recommended by Dr. Green.

Dr. Green had a large supply of pentamite in her office, because a sales representative for a pharmaceutical company had given her several boxes as free samples. Rather than waste time and money by sending Parker to a pharmacy, Dr. Green simply gave Parker one of the sample boxes of pentamite.

The dosage information from the manufacturer stated that the appropriate dose of pentamite was one tablet (10 milligrams), once a day for three weeks. However, Dr. Green misread the dosage information and instructed Parker, both orally and in writing, to take ten tablets of

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pentamite (10 milligrams each) once a day for three weeks. Parker did precisely as he was instructed by Dr. Green. At the end of the second week of taking the pentamite as instructed, Parker had a sudden heart attack and died.

As the personal representative of his estate, Parker's wife filed a lawsuit in state court against Dr. Green and the Plan. According to the allegations set forth in the complaint, Dr. Green was negligent in her treatment of Parker by prescribing the wrong dosage of pentamite. In addition, the complaint alleged that Dr. Green had failed to obtain his informed consent to the pentamite treatment. Although Dr. Green had informed Parker about some of the risks of taking pentamite, she failed to inform him of the risk that she might prescribe the incorrect dosage and thereby cause his death. According to the complaint, if Dr. Green had properly advised Parker of the risk of prescribing an incorrect dosage of pentamite, he would not have consented to take that medication, and he would still be alive today.

With regard to the Plan, the plaintiff alleged that it should be held liable for Dr. Green's negligence. In addition, the plaintiff claims that the Plan should be held liable for its own negligence in this case.

Please analyze each of the claims made by the plaintiff against Dr. Green and the Plan. Be sure to discuss all of the elements of each claim as well as your estimate of the likelihood of success on each claim. If you think you need any additional facts, state the facts that you think are needed, and explain how those facts would affect your analysis.

Proposals for Medical Malpractice Reform

The two purposes of the legal liability system for medical injuries are compensation and deterrence. As a society, we want to provide fair compensation to injured persons. In addition, by imposing liability on those healthcare providers that act in a negligent manner, we hope to deter negligent conduct in the future. Many believe that the current liability system does not work and does not accomplish those two policy goals. However, there are wide disagreements as to the reasons for the failure as well as the direction in which the system should be changed. This part of the chapter will evaluate the need for reform in the system of legal liability for medical injuries and then will analyze the advantages and disadvantages of various proposals for reform.