

# HCFA and New Jersey Supreme Court Broaden Duty of Informed Consent

## HOSPITAL AND DOCTOR'S DUTY TO DISCLOSE ALTERNATIVE THERAPY OPTIONS

The federal Health Care Finance Administration (HCFA), which administers Medicare's medical programs, announced that it is now requiring hospitals and other health care providers to provide their patients with advice about pain-relief options. This would include the right to request or reject specific pain medications and the right to select alternate medication options such as acupuncture for pain control.

A letter from agency administrator Nancy-Ann De Parle to Kathryn Tucker, director of legal affairs for Compassion and Dying, an Oregon-based advocacy group, stated that pain medication is "part of the medication and treatment of disease." Michael Schroeder, vice president and general counsel of the American Acupuncture Council stated, "Hospitals who now refuse to disclose acupuncture as a potential pain control option run the risk of being disciplined by HCFA, including the risk HCFA may decertify the hospital as a Medicare provider. This would have disastrous financial consequences for most hospitals."

In a related development, the New Jersey Supreme Court has affirmed an appellate court decision that brings acupuncture and other "alternative therapies" one step closer to inclusion in patient informed consent requirements.

The case centers around plaintiff Jean Matthies, who sued her orthopedic surgeon for making her treatment decisions without giving her "informed consent," that is, without telling her about other treatment options.

The Superior Court of New Jersey heard the case. The court barred Ms. Matthies from arguing that the surgeon had acted without her informed consent. That decision was based on the historical concept of "consent" and on the fact that the surgeon had opted not to perform surgery on a nondisplaced intracapsular fracture of the neck of the femur which had impacted on her right hip.

The Matthies case went to the appellate division of the Superior Court of New Jersey. The appellate court voiced a "newly emerging concept" of informed consent, which is based on the developing "prudent patient" concept. The foundation of "prudent patient" is that it is the patient's prerogative, not the physician's, to finally determine the direction of the care. With this underpinning, the appellate court's decision overturned the lower court's findings.

The case was appealed to the state Supreme Court. After giving further clarification of the obligations of the treating physician with regard to informed consent, the justices unanimously affirmed the appellate court decision. New Jersey Supreme Court Justice Pollock wrote:

"The issues before the Court are: whether the doctrine of informed consent requires a doctor to obtain the patient's consent before implementing a nonsurgical procedure; and whether a doctor, in discussing with the patient treatment alternatives that he or

she recommends, should discuss medically reasonable alternative courses of treatment that the doctor does not recommend.

"Held: To obtain a patient's informed consent to one of several alternative courses of treatment, the physician should explain the medically reasonable invasive and noninvasive alternatives, including the risks and the likely outcomes of those alternatives, even when the chosen course is noninvasive.

"1. A patient has a duty to disclose to his or her doctor all the information necessary for the doctor to make a diagnosis and determine a course of treatment. In turn, the doctor has the duty to evaluate the relevant information and disclose all courses of treatment that are medically reasonable under the circumstances. It is for the patient to make the ultimate decision regarding treatment based on the doctor's recommendation. Informed consent applies to invasive and noninvasive procedures. (pp 10-12)

"2. Under the negligence theory of informed consent, the analysis focuses on the physician's deviation from the standard of care rather than on an unauthorized touching required under the battery theory. The decisive factor is whether the physician adequately presents the material facts so that the patient can make an informed decision. That disclosure is limited by the reasonable patient standard: the physician is obligated to disclose only that information material to a reasonable patient's informed decision. (pp. 12-14)

"3. To insure informed consent, the physician must inform patients of medically reasonable treatment alternatives and their attendant probable risks and outcomes. Physicians do not adequately discharge that duty by disclosing only treatment alternatives that they recommend. The test for measuring the materiality of the risk of a treatment is whether a reasonable patient in the patient's position would have considered the risk material. A physician should discuss the medically reasonable course of treatment, including non-treatment. (pp. 14-17)

"4. A cause of action based on the doctor's breach of the standard of care does not adequately protect the patient's right to be informed of treatment alternatives. Like the deviation from the standard of care, the doctor's failure to obtain informed consent is a form of medical negligence. Recognition of a separate duty emphasizes the doctor's obligation to inform, as well as treat, the patient. (pp. 18-20)"

After reviewing the 34-page New Jersey Supreme Court decision, Michael Schroeder, vice president of the American Acupuncture Council, commented:

"The court in *Matthies* has laid down a clear rule that the doctrine of informed consent requires that a patient not only be informed of the risks of a particular treatment, but also be informed 'as well as of available options in the form of alternative therapies.' This new requirement will leave surgeons who do not inform patient of the benefits of alternative therapies, such as acupuncture, at risk for being hauled into court by an aggressive medical malpractice attorney."

The malpractice case that Mr. Schroeder envisions has yet to be played out in the courts. Such a case would have to reach the U.S. Supreme Court, or at least the U.S. Court of Appeals, to have a national impact on informed consent law, but it seems only a matter of time.

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