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Elements of Informed Consent Discussed

Generally, the editors of *Health Care Insights* do not wait three years to discuss a Connecticut Supreme Court decision, especially one deemed to be extremely important. Nevertheless, the very enlightening reasoning of the Court on August 29, 2006 demands inclusion in *Health Care Insights* even at this late date.

Dr. Julie S. Flagg was sued for medical malpractice following her delivery of the infant child of Kathleen Duffy; the infant died eight days thereafter.

The issue discussed by the Supreme Court dealt with informed consent. Ms. Duffy had asked Dr. Flagg whether "she had encountered any difficulty in 'delivering a child vaginally' after a previous Caesarean section delivery." While Dr. Flagg discussed the risks with Ms. Duffy, she did not disclose that a patient's infant "had died as a result of uterine rupture" after a Caesarean. Evidence of Dr. Flagg's experience with the above-mentioned delivery was excluded from trial at Dr. Flagg's request and then challenged on appeal.

Thus, as a matter of first impression, the Connecticut Supreme Court was asked to grapple with the thorny issue of whether a physician must disclose details of her prior professional experience to patients. Ms. Duffy argued that had she known that "an infant previously had died" under Dr. Flagg's care as a result of a vaginal birth after Caesarean section, she would not have attempted a vaginal birth, at least, not with Dr. Flagg.

Having stated in previous rulings that informed consent "require(s) something less than a full disclosure of all information which may have some bearing, however remote, upon the patient's decision," the Court refused to impose a disclosure obligation on Dr. Flagg in this case.

In a unanimous decision by Associate Justice Christine Vertefeuille, the Court stressed that Connecticut follows an objective standard. The issue, she wrote, is not what a particular patient might want to know but, rather, what a "reasonable patient" would find to be important.

No evidence was produced to show that Dr. Flagg's experience "had any bearing on the risks to the plaintiff from the procedure or that it could help the patient understand the nature of the proposed care, its risks and hazards, any alternatives or anticipated benefits." Accordingly, the Supreme Court ruled that the trial court's exclusion decision was proper.

Noting that Dr. Flagg had answered all of her patient's questions truthfully, Justice Vertefeuille rejected the claim that the Court's refusal to overturn the trial court would encourage physicians to be untruthful. "(A) physician who misleads or misinforms his or her patient about the physician's skills, qualifications or experience" will continue to be liable for misrepresentation, the Court observed.

In maintaining its adherence to the "reasonable patient" standard, the Supreme Court avoided adopting a rule which would unduly personalize malpractice claims and, indeed, encourage them.

By the same token, a physician's limited experience with a particular procedure may well be admissible if the patient can prove that such limited experience increased her risk.

Kathleen Duffy, Administratrix v. Julie S. Flagg, Connecticut Supreme Court, 279 Conn. 682 (2006)

Michael A. Kurs, who can be reached at 860.424.4331 or mkurs@pullcom.com can answer questions about this case and informed consent.

Folk Remedies Can Work

The proliferation of bottles of hand sanitizers and portable installations dispensing gallons of this scented alcohol product have become a common part of our home, work and travel landscapes. Not discussed very frequently is the fact that these products "contribute to the growing problem of antibiotic resistant bacteria" as noted by Anahad O'Connor in *The New York Times* on September 8, 2009.

There are alternatives. A recent study found that a cinnamon oil solution "killed a number of common and hospital-acquired infections, like Streptococcus and methicillin resistant Staphylococcus aureus (MRSA)."

Dr. Lawrence D. Rosen, a New Jersey pediatrician, has his own recipe, which he calls "thieves' oil," consisting of cinnamon oil, cinnamon bark, lemon oil and eucalyptus. Dr. Rosen advises that his recipe is hundreds of years old. "[I]t was used by . . . thieves who would go around stealing jewelry from dead bodies, and they never got sick," he states.

Ms. O'Connor cautions that cinnamon oil can cause an allergic reaction in some people.

Public Charity Regulatory Changes Implemented

The Connecticut Solicitation of Charitable Funds Act, signed by Governor Rell in 2008, called for regulatory changes to be put into effect by the Attorney General's Public Charities Section as of July 1, 2009.

The section announced that it will be enforcing the following registration/filing requirements for charitable organizations:

- Organizations having gross receipts in excess of $500,000 (formerly $200,000) as shown on their 990 IRS filings must include their financial statements and a CPA's audit report with their registration renewal.

- Since renewal registration forms will no longer be mailed, charitable organizations are advised to email the Attorney General at ctcharityhelp@po.state.ct.us to register an email address. The name of the organization, registration number and federal tax ID number should be furnished.

Alan S. Parker, who can be reached at 860.541.3318 or aparker@pullcom.com is familiar with the Act.

Medical Care as a Contractual Relationship?

Dr. Edward P. Monico, a member of the emergency department at Yale New Haven Hospital, offers some thought-provoking concepts in the April 2009 issue of *Connecticut Medicine*, a publication of the Connecticut State Medical Society.

Doctors typically don't think of their care giving in contractual terms, Dr. Monico notes, although negotiations between physician and patient as to why, when and how care will be delivered go on all the time.

The growth of shared decision making (SDM) Dr. Monico believes, "requires both the patient and the physician to contribute information and participate in the decision-making process . . . . by striking 'a compromise between the preservation of individual autonomy and the applicable medical standard of care' . . . ." On

occasion, the SDM process may, he contends, "trigger contractual obligations enforceable at law." How can this happen?

Dr. Monico notes that patients may enter into agreements with their care givers whereby they "commit to a set of behaviors related to the pursuit of health care goals." An example would be the achievement of weight loss.

The medical standard of care is typically enunciated under tort law principles and enforced as such in court. Dr. Monico suggests, however, that where the standard may not have been established and expectations from the treatment process must be specifically understood, the use of a contract between care-giver and patient may be appropriate. Complementary and alternative treatments are offered by the author as examples.

At the very least, *Health Care Insights* cautions against the hasty adoption of such thinking given the longer statute of limitations applicable to legal breach of contract claims.

Elliott B. Pollack, who can be reached at 860.424.4340 or ebpollack@pullcom.com can respond to questions about this area.

Ultrasounds Limited to Clinical Purposes

The Connecticut General Assembly passed and Governor Rell signed legislation preventing anyone from performing ultrasounds on pregnant women without a physician's order. Effective July 1, 2009 this legislation should close down the mall ultrasound entertainment business, an obvious misuse, in your editors' opinion, of this important imaging technology.

Ultrasound Developer is Deceased

Dr. John J. Wild died on September 18, 2009 in Edina, Minnesota at the age of 95.

While treating patients during World War II who suffered "bowel failure due to impact trauma from bomb blasts during the Blitz," Dr. Wild became aware of a "technique that used sound waves to detect cracks in the armor platings of tanks" and employed it diagnostically with certain patients.

When he immigrated to the United States, he employed this experience in collaboration with an electrical engineer to develop ultrasound as a diagnostic technique to image breast tissue.

It took a while for his inventions to be accepted; his career in the United States was marked by contention and litigation with people, as he put it, "who did not believe the evidence of their own eyes." In his obituary in the October 7, 2009 issue of *The New York Times*, it is noted that Dr. Wild and his collaborator "were the first to develop equipment specifically designed for breast scanning and (to) attempt to differentiate benign from malignant disease . . . ."

Attorney Notes

Pullman & Comley Health Care attorney Michael A. Kurs, who serves as chairman of the Connecticut Bar Association's administrative law section, is also a member of the Hartford County Bar Association's Bench Bar Committee, a group which facilitates communications between the Superior Court judges and Hartford area attorneys. In that capacity, Michael moderated a program on October 1, 2009, entitled "If You Really Want To Get My Attention: Some Advice From the Bench." The participants were six Superior Court judges.

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