

# Med-mal questions

## Emergency consent, fraud issues raised in case headed to high court

By Robert G. Seidenstein

How much should doctors tell patients' families — both before an emergency procedure and after things go wrong?

Expect the New Jersey Supreme Court to provide some answers in a case that has potentially far-reaching impact for doctors, as well as lawyers handling medical malpractice cases.

The justices have agreed to review the major case that centers on the amount of information family members are given — or not — by doctors.

Among other issues, *Liguori v. Elmann* asks whether a medical emergency, without exception, eliminates the doctor's duty to obtain informed consent before starting treatment.

It also asks whether there is a cause of action for fraud based on a doctor's misrepresentations regarding a patient's medical condition.

The facts in the case are compelling.

Geraldine Liguori, 71, who initially did well after quadruple heart-bypass surgery at Hackensack University Medical Center, developed complications requiring the doctor who assisted in the surgery to insert a tube into her chest for a collapsed lung on an emergency basis. At the time, the primary doctor was operating on another patient.

The assisting doctor, James P. Hunter — who was not yet board certified because he had not completed his general surgery residency — acted without consent of the patient's children, one of whom is a doctor.

The insertion went awry.

The primary doctor, Elie Elmann, asked a third doctor to see the patient. That doctor repaired a hole in her heart related to the tube insertion.

Later, Elmann, in speaking to the family, allegedly failed to disclose what had happened.

He said he assumed the patient's daughter knew of the events after the bypass.

Liguori eventually died.

Elmann and Hunter won the lawsuit brought by her family.

On appeal, the family said serious mistakes by the trial judge led to that result.

The Appellate Division affirmed in a 94-page decision that featured a dissent on another issue also before the court. The dissenter said Hunter should have been held to the high standard of a specialist, not a general practitioner, because he acted as a specialist, even if he did not hold himself out to the public that way.

### Informed consent

That issue ties in with the one of informed consent for the tube insertion.

In papers seeking high court review, Adam M. Slater of Nagel Rice & Mazie in Roseland, who represents the family, noted the woman's doctor son, John Liguori, would never have permitted Hunter to insert the chest tube and would have demanded an attending surgeon perform the procedure.

John and his sister, Patricia, were either close by or reachable by telephone when Hunter performed the insertion, Slater said.

The patient was unconscious at the time.

Slater said the judge was wrong in dismissing the informed-consent and battery claims against Hunter on the grounds that informed consent isn't required in the face of a

medical emergency. The Roseland attorney said there was sufficient time for Hunter to talk to the family.

But Hunter's attorney, Judith A. Wahrenberger of Wahrenberger, Pietro & Sherman in Springfield, said it was undisputed the patient required the tube insertion on an emergency basis. She said it was never suggested that "all situations described as emergencies obviate the need for informed consent," and the issue is specific to the facts of the case.

The Appellate Division's *per curiam* decision said, "All of the witnesses testified that decedent's condition was a life-threatening emergency. Furthermore, the model jury charge ... limits the informed-consent charge to non-emergencies. And emergencies have traditionally been recognized as exceptions to the informed-consent doctrine."

In the case against Elmann, the family's claim for fraudulent misrepresentation was converted to a claim for lack of informed consent.

The appeals court said that generally "concealment by a physician or failure to disclose his or her own malpractice does not give rise to a cause of action in fraud separate from a customary malpractice action."

The judges said the harm alleged to have resulted from the misrepresentation was "the same as that alleged to have resulted from the malpractice itself."

Scott T. Heller of Gibling & Combs in Morristown, representing Elmann, said that was the correct legal analysis.

#### **Fraud claim**

He also said that in *Howard v. University of Medicine and Dentistry of New Jersey*, the New Jersey Supreme Court in 2002 stated it was "unwilling to extend the common law to allow a new fraud or deceit-based cause of action, which would permit punitive damages and avoid the required proof of causation and damages in the traditional informed-consent setting."

Slater said the appeals court missed the point.

Converting the fraud claim to an informed-consent claim was incorrect, he said. "Since Dr. Elmann did not ask for consent to any treatment when he failed to disclose the medical information, the informed-consent charge simply did not fit the facts or claims that were being advanced. Therefore, the jury had to find in favor of Dr. Elmann since he never sought consent to any treatment plan and simply misrepresented the decedent's condition."

The family was harmed, Slater said, because it was deprived of the option of seeking medical care elsewhere after the mother's treatment was botched.

"The fact that Dr. Hunter's conduct set the damages in motion does not mean that Dr. Elmann's conduct, which prevented the plaintiffs from attempting to halt the cascade of injuries, did not also cause injury. For example, the jury could find both were at fault but find that Dr. Elmann's misconduct caused the death. In fact, the jury could have found only against Dr. Elmann, and awarded damages only against Dr. Elmann," he said.

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