

**THE SUPREME COURT EXAMINES THE
JUDGMENT CHARGE IN *MORLINO***

**By Abbott S. Brown, Esq.
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The most difficult obstacle for the plaintiff in a medical malpractice case is often the "judgment" charge. The essence of the judgment charge is the following: "The physician cannot be held liable if, in the exercise of his judgment, he nevertheless made a mistake." This sentence, taken almost verbatim from *Schueler v. Strelinger*, 43 N.J. 330, 344 (1964), had become settled law. However, in recent years plaintiffs vigorously attacked the judgment charge, and often persuaded a trial judge that the combination of the above-quoted sentence and the repetitive use in the model charge of the phrase "exercise of judgment" confused and misled the jury. In *Morlino v. Medical Center of Ocean County*, A-36-97 (decided Feb. 26, 1998), a unanimous Supreme Court agreed, holding that the offending sentence should not be read to the jury and ordering that the Model Jury Charge be revised by the Civil Charge Committee. The *Morlino* decision should be carefully reviewed by all attorneys handling malpractice cases.

In *Morlino*, plaintiff, then eight and one-half months pregnant, presented at the defendant's emergency room complaining of a sore throat. The emergency room physician prescribed an antibiotic, Ciprofloxacin. Prior to prescribing Ciprofloxacin, the emergency room doctor reviewed the Physicians Desk Reference [PDR] which warned against the use of Ciprofloxacin by pregnant women because it caused lameness in immature dogs and because the risk to the fetus had not been ruled out. The emergency room doctor concluded that the risk to the fetus by the untreated infection outweighed the risk presented by the

Ciprofloxacin and prescribed the medication. Thereafter, plaintiff's fetus died and plaintiff sued the emergency room doctor claiming that the ingestion of the Ciprofloxacin caused her fetus' demise.

The emergency room doctor testified that he exercised reasonable judgment in prescribing Ciprofloxacin, as opposed to other antibiotics, after weighing the possible benefits and risks as well as the risk posed by the type of bacteria that he thought was causing the plaintiff's throat infection. The Supreme Court noted that the trial court's charge was "virtually identical to Model Jury Charge 5.36 (A)," which includes the following sentence which was underscored by the Court: "The physician cannot be held liable if, in the exercise of his judgment, he nevertheless made a mistake." Recognizing that "at issue in this case is the role of judgment in medical practice," the Court observed that judgment plays an essential role in the practice of medicine:

"Having made a diagnosis, the doctor must decide whether and how to treat the patient. Doctors must select treatment options from an evolving body of scientific and medical information . . . The choice may not be clear and alternatives may abound, but choose the doctor must. In selecting among alternative treatments, however, the doctor must exercise his or her judgment and select from alternatives that are objectively reasonable. The selection of an alternative that is objectively unreasonable would violate the doctor's duty of care to the patient . . . Not recognizing the role of judgment in making a diagnosis or in deciding on a course of treatment would be to deny an essential element in the practice of medicine. Accordingly, Model Charge 5.36(A) rightly recognizes that a physician may exercise judgment when choosing among acceptable treatment alternatives."

In so holding, the Supreme Court rejected the appellate division's conclusion that the use of the term "exercise of judgment" might confuse jurors. The Court distinguished out-of-state

cases rejecting similar, but not identical, jury charges which use terms such as “good faith judgment,” “bona fide judgment,” and “honest mistake,” holding that these terms:

“could lead the jury to believe that, to find the defendant negligent, the plaintiff must prove bad faith, dishonesty, or fraud. Motivation, however, plays no part in determining negligence with regard to an objective standard of care. The physician’s exercise of judgment is to be evaluated not on the basis of the physician’s good faith or honesty, but solely on whether it falls below an objective standard of care. Model Jury Charge 5.36(A) does not contain the language that the out-of-state cases found offensive, and, as a whole, correctly describes the relationship between judgment and the standard of care.”

However, the Court held that the use of the word “mistake” in the charge should be eliminated:

“One sentence in the Model Charge is problematic. The sentence reads, ‘The physician cannot be held liable if, in the exercise of his judgment, he nevertheless made a mistake’ . . . The purpose of the sentence is to advise the jury that, as between two or more courses of action, each of which accords with accepted medical practice, a doctor will not be found negligent if the course of action he or she chooses turns out to be unsuccessful. Taken out of context, the sentence could be understood to mean that a doctor who deviates from the relevant standard of care is not liable if the mistake was the result of the exercise of medical judgment. The danger is that the sentence could be construed to mean that an honest, but mistaken, exercise of judgment insulates the physician from liability for a mistake that violates a relevant standard of care. A mistake, however, connotes an instance in which the physician violates such a standard of care. Consequently, a physician who fails to abide by an objective standard of care is subject to liability even if the failure results from the exercise of judgment.”

The Court also noted that the Model Jury charge has been criticized for the repetitive use of the word “judgment” and took note of the fact that the word is used in the charge eleven times. The Court concluded that the Model Jury Charge “may benefit from review” and remanded Model Charge 5.36A to the Supreme Court Committee On Model Jury Charges. The Court instructed the committee to determine “whether fewer than eleven references” to

the word "judgment" will adequately communicate the concept to the jury and instructed that the sentence involving the non-liability for an honest mistake should be eliminated. The Court also asked the committee to make the entire charge "shorter and clearer."

The Morlino decision must be considered in context with *Adams v. Cooper Hospital*, 295 N.J. Super. 5 (App. Div. 1996), certif. den. 148 N.J. 463 (1997), where plaintiff had been hospitalized after a motor vehicle accident, and had a tracheal tube in his throat. The defendant, a nurse, was ordered to monitor the plaintiff and suction the mucus from the plaintiff's throat. The court noted that the nurse left plaintiff unattended for thirty minutes and that:

"During that time, plaintiff began to choke on mucous accumulated at the trache tube. Unable to speak, he attempted to use a bedside call button designed to summon a nurse. His effort to do so led to his falling out of bed. The defendant and the trauma doctor found plaintiff lying on the floor surrounded by his urine and fecal matter. Subsequent suctioning of plaintiff's throat, according to the trauma doctor, brought out a 'copious' amount of mucous. Plaintiff sustained a comminuted fracture of his left hip and a head trauma as the result of the fall." *Adams*, at 10.

The trial court refused to instruct the jury that defendant nurse had a right to exercise judgment as to how frequently to suction the patient's throat, and "refused defendants' request to instruct that a medical professional must be allowed a wide range in the reasonable exercise of judgment as to the course of treatment taken." *Adams*, at 8. The jury determined that the nurse was negligent and awarded plaintiffs \$1,660,000.00. In affirming, the Appellate Division noted:

"The medical judgment rule does not apply to all medical malpractice actions. *Schueler* set its parameters. '[W]hen a surgeon selects one of two courses, . . . either one of which has substantial support as proper practice by the medical profession, a claim of malpractice cannot be predicated solely on the

course pursued.' *Id.* at 346, 204 A.2d 577. The *Schueler* Court emphasized that, when a matter exists 'about which there are differing schools of medical opinion . . . the plain inference is that the matter must be left to the good faith judgment of the experienced attending surgeon.' *Ibid.* The Court relied on this principle to absolve the defendant doctor of liability because he chose between two medically confirmed alternatives. Those alternatives were to operate quickly and risk the patient's bleeding to death because of a blood-clotting problem or to take additional time to improve the blood's clotting and risk the spread of her possible cancer. These Hobson's choice circumstances induced the Court's reversal of a judgment against the doctor.

Here, no such choicelessness existed. The issue before the jury was whether [the defendant nurse] had the duty to constantly monitor her patient, the plaintiff, during the time she was in charge of his care." *Adams*, at 8-9.

The court therefore affirmed the verdict.

The recent cases involving the reasonable judgment charge suggest that the exercise of judgment instruction should not be given except in circumstances where the health care professional was confronted with a "Hobson's choice," *i.e.*, two or more possible courses of action which comply with the standard of care, each with benefits and risks. See, *Adams*, *supra*, 295 N.J. Super. at 9. For example, in *Morlino* the physician was faced with the choice of various medications, all of which provided potential benefits, but all of which posed certain risks. In contrast, there was no 'Hobson's choice' in *Adams*, where the issue was whether the nurse provided appropriate monitoring, and therefore the reasonable judgment/honest mistake charge was deemed inappropriate. It logically follows that the reasonable judgment charge has no application in cases involving surgical mishaps or other scenarios where judgment is not involved, for example, where a plaintiff alleges that a defendant lost control of a surgical instrument or failed to perform an inexpensive test which would have disclosed the possibility of the presence of a tumor. To the contrary, the judgment charge should be limited to those cases where there are two or more treatment plans

which comply with the standard of care and require a true exercise of judgment in weighing the benefits and risks presented by the alternative treatment plans.

Furthermore, the former "honest mistake" language is no longer viable and should not be given, even in modified form, in any circumstances. Since it is not a "mistake" to choose one of several treatment plans that are in accord with the generally accepted standard of care, a doctor who does make a "mistake" has not complied with the standard of care. The use of the word "mistake" in the jury charge is inherently confusing and should be eliminated.

Finally, it should be remembered that whenever a defendant requests a "judgment" charge, it would clearly follow that the case also requires an informed consent analysis and charge, because it is the patient who is entitled to make the ultimate decision as to the course of treatment. The Supreme Court's commitment to the concept of the fully informed patient was emphasized in *In Re Conroy*, 98 N.J. 321 (1985), where the Court noted that "Under this doctrine, no medical procedure may be performed without a patient's consent, obtained after explanation of the nature of the treatment, substantial risks, and alternative therapies." *Conroy*, at 346. See also, *Largey v. Rothman*, 110 N.J. 204 (1988). The *Conroy* Court added "it is the doctor's role to provide the necessary medical facts and the patient's role to make the subjective treatment decision based on his understanding of those facts." *Conroy*, at 347. Thus, when a physician asserts that there were two or more courses of action which complied with the generally accepted standard of care, and that each treatment plan presented potential benefits and risks, even if the exercise of judgment compels the physician to recommend one course of action, it is the patient, not the doctor, who must decide what will be done.