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Appellate Courts Question The Reasonable Judgment Charge

The most difficult obstacle for a plaintiff in a medical malpractice case is usually the "reasonable judgment charge." The essence of the charge is the instruction: "The physician cannot be held liable if in the exercise of judgment he has, nevertheless, made a mistake." Model Jury Charge 5.36(A).

The charge was adapted from *Schueler v. Strelinger*, 43 N.J. 330 (1964), and had become settled law. In three recent decisions, though, the Appellate Division re-examined the "reasonable judgment charge" and found it flawed. *Bray v. Strosberg*, A-5499-94T5 (N.J. Super. Ct. App. Div., Aug. 21, 1996), *Adams v. Cooper Hospital*, 295 N.J. Super. 5 (App. Div. 1996), and *Morlino v. Medical Center of Ocean County*, 295 N.J. Super. 113 (App. Div. 1996).

Indeed, one court has concluded that the charge is a "misstatement of the law." *Bray*, slip op. at 12. Another court, feeling compelled to express its "dissatisfaction with the Model Jury Charge" stated that the charge is "simply not the law," *Morlino*, 295 N.J. Super. at 127. On the other hand, the panel in *Crego v. Carp*, A-6144-94T5 (N.J. Super. Ct. App. Div., Dec. 10, 1996) (approved for publication), held that the charge "correctly instructed the jury as to the law." *Crego*, slip op. at 10.

Bray, *Adams*, *Morlino* and *Crego* are important because they discuss the key issue, the exercise of judgment, in not only most medical malpractice cases but in all professional negligence cases. These cases will certainly be of great significance during the charge conference in future professional negligence trials, and should therefore be carefully reviewed by all attorneys handling such litigation.

The Model Jury Charge for medical malpractice provides, in relevant part:

[W]here, according to accepted medical practice, the manner in which diagnosis and/or treatment is conducted is a matter subject to the judgment of the physician, the physician must be allowed to exercise that judgment.

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The physician cannot be held liable if in the exercise of judgment he or she has, nevertheless, made a mistake. Where judgment must be exercised, the law does not require of the doctor infallible judgment. Thus, a physician cannot be found negligent so long as he or she employs such judgment as is allowed by accepted medical practice. If, in fact, in the exercise of his/her judgment a doctor selects one of two or more courses of action, each of which in the circumstances has substantial support as proper practice by the medical profession, the doctor cannot be found negligent if the course chosen produces a poor result.

M.J.C. 5.36(A).

To understand the development of the reasonable judgment charge, one must travel back to the 1950s and 1960s, a time when plaintiffs in medical malpractice cases were often unable to obtain expert witnesses to testify on their behalf. This situation was acknowledged in *Steinginga v. Thron*, 30 N.J. Super. 423 (App. Div. 1954), where plaintiff sought an adjournment of a trial because, at the last moment, plaintiff's expert refused to testify against a "brother practitioner." *Id.* at 425. The court observed:

The circumstances of the case must be looked at in the light of — the matter is of sufficient public concern to call for plain speaking — a shocking unethical reluctance on the part of the medical profession to accept its obligations to society and its profession in an action for malpractice.

Steinginga, supra, 30 N.J. Super. at 425.

Other cases from that era acknowledged how difficult it was for plaintiffs to obtain expert testimony in malpractice cases, and spoke of a "conspiracy of silence" in the medical community. See, *Carbone v. Warburton*, 11 N.J. 418, 428 (1953); *Lewis v. Read*, 80 N.J. Super. 148, 168 (App. Div. 1968). The reluctance of most physicians to testify in malpractice cases compelled plaintiffs to rely on a few experts who testified often, such as Dr.

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David Graubard. See, e.g., *Anderson v. Somberg*, 67 N.J. 291 (1975); *Tramultola v. Bortone*, 63 N.J. 9 (1973); *Germann v. Matriss*, 55 N.J. 193 (1970); and *Schueler v. Strelinger*, 43 N.J. 330 (1964). The use of such experts was a key factor in the development of the reasonable judgment charge.

In fact, the reasonable judgment charge became a matter of settled doctrine in *Schueler*, supra, a case in which Dr. David Graubard was the plaintiff's expert. In *Schueler*, plaintiff's decedent consulted the defendant for various abdominal complaints, and the defendant recommended an operation. The patient bled profusely after the operation, resulting in complications and ultimately her demise. Before surgery, the defendant, a surgeon, had ordered a prothrombin test to determine the rate at which the patient's blood coagulated. Dr. Graubard testified that the prothrombin test revealed a deficient blood-clotting rate and, absent an emergency, that it was malpractice to perform the operation before the coagulation rate had returned to normal. The jury found for the plaintiff and awarded \$10,000.

In reversing, the Supreme Court noted that Dr. Graubard's testimony regarding the deficient prothrombin rate was contradicted by the testimony of all of the other doctors who were involved in the plaintiff's care, including plaintiff's hematologist who testified that the prothrombin rate was "borderline and could be within normal limits." *Schueler*, supra, at 342.

The Court therefore disregarded Dr. Graubard's opinion and concluded "plaintiff's medical proof was insufficient to raise a factual issue as to whether decedent's blood-coagulation rate was deficient or abnormal prior to the first operation. Under the circumstances it was error to allow the jury to determine whether Dr. Strelinger departed from standard medical practice in failing to have the second test made." *Schueler*, supra, at 344. The Court added:

The fact that a good result may occur with poor treatment, and that good treatment will not necessarily prevent a poor result must be recognized. So, if the doctor has brought the requisite degree of care and skill to his patient, he is not liable simply because of failure to cure or for bad results that may follow. *Nor in such case is he liable for an honest mistake in diagnosis or in judgment as to the course of treatment taken.* A physician must be allowed a wide range in the reasonable exercise of judgement. He is not guilty of malpractice so long as he employs such judgement, and that judgement does not represent a departure from the requirements of accepted

medical practice.

Schueler, supra, 43 N.J. at 344-45 [emphasis added].

This language was the basis of the Model Jury Charge.

Other cases from the same era reached similar conclusions. In *Clark v. Wichman*, 72 N.J. Super. 486 (App. Div. 1962), the plaintiff alleged that the defendant negligently delayed operating on a fracture resulting in a non-union. The defendant contended that he exercised reasonable judgment in delaying the operation because he thought the plaintiff was going to achieve a union without surgery. The defendant argued that as a matter of law it

was not malpractice to defer surgery since the decision not to operate was a matter of judgment. The Appellate Division agreed, holding that a physician "is not liable for honest mistakes of judgment. Evidence of mere mistake or error is insufficient to sustain an action for negligence." *Clark*, 72 N.J. Super. at 495. This holding has long been the settled law in malpractice litigation.

Unsettling the Law

However, the law became unsettled during the last half of 1996. In *Bray*, supra, the plaintiff sustained nerve damage when the defendant dentist extracted a tooth. The plaintiff did not claim that the dentist negligently extracted the tooth, but rather that the dentist failed to provide appropriate follow-up care after she reported post-operative numbness. Both plaintiff's and defendant's

experts agreed that the plaintiff needed to be followed "carefully" after such an injury. The trial court instructed the jury in accordance with the Model Jury Charge and *Schueler*, supra, including a sentence which was underscored by the Appellate Division: "The dentist cannot be held liable if in the exercise of judgment he or she has nevertheless made a mistake." *Bray*, slip op. at 11. The jury found for the defendant and the plaintiff appealed. The Appellate Division, in a per curiam opinion issued by Judges Virginia Long, Murry Brochin and Marilyn Loftus, reversed, stating:

The purpose of the "error of judgment" language is to advise the jury that, as between two or more courses of action, each of which accords with accepted dental practice, a dentist will not be found negligent even if the course of action he or she chooses turns out to be unsuccessful [emphasis in original]. In those circumstances, the choice of one course of action over another is not a "mistake." On the contrary, a "mistake" connotes an

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instance in which a dentist does something outside of accepted dental norms. *Therefore, technically speaking, the language providing that "a dentist cannot be held liable if in the exercise of judgment he or she has nevertheless made a mistake" is a misstatement of the law.*

Bray, slip op. at 12 [emphasis added].

The court concluded that even if the frequency of follow-up care was a matter of judgment:

[T]he jury needed to determine whether defendant's exercise of judgment conformed with the standard of care agreed upon by both experts and defendant, himself. In short, it had to decide whether he followed her "carefully." In giving his instruction, including the dental judgment charge, the trial judge failed to explain this critical point to the jury. It may be, as plaintiff contends, that the jury was ... left with the mistaken impression that if it accepted [the defendant's expert's] opinion that the frequency of follow-up visits was within defendant's judgment, defendant could not be held liable. It was the trial judge's responsibility to disabuse the jury of this notion and to ensure that the jury understood how the exercise of judgment charge applied to this aspect of the case. He did not do so. As a result, we have no confidence that the jury verdict resulted from a proper application of the law to the facts.

Bray, slip op. at 14.

The court therefore reversed and remanded the case for a new trial.

A similar conclusion was reached by Judge Robert Muir Jr., and joined by Judges Steven Kleiner and Lawrence Bilder, in *Adams*, supra. Adams 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 30 minutes and that:

During that time, plaintiff began to choke on mucus 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 mucus. Plaintiff sustained a comminuted fracture of his left hip and a head trauma as a result of the fall.

Adams, supra, 295 N.J. Super. at 10.

The trial court refused to instruct the jury that the defendant nurse had a right "to exercise her medical judgment in the treatment of a patient." *Id.* at 8. The jury determined that the nurse was negligent and awarded plaintiffs \$1,660,000. In affirming, the Appellate Division noted:

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." ... 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, supra, 295 N.J. Super. at 9 [emphasis added].

The court affirmed the verdict, explaining that "[t]he medical judgment rule does not apply to all medical malpractice actions." *Id.* at 8.

More Criticism

The *Morlino* court also found fault in the Model Jury Charge. *Morlino* suffered fetal demise after ingesting an antibiotic while in her eighth month of pregnancy. Plaintiff had a sore throat and previously had been prescribed amoxicillin without improvement. After examining the plaintiff, the defendant, an emergency room physician, suspecting a bacterial infection, administered a single 500 mg pill of ciprofloxacin. The plaintiff's baby died the next day.

Plaintiff's expert testified that the defendant committed malpractice by administering ciprofloxacin, which caused the fetal demise. However, the defendant's expert, using language borrowed directly from the Model Jury Charge, opined that "it was appropriate for a physician to use his medical judgment and prescribe a stronger antibiotic" after the first antibiotic was ineffective. *Morlino*, 295 N.J. Super. at 119. The jury returned a verdict in favor of the defendant and the plaintiff appealed.

In affirming, Judge James Havey, joined by Judges Murry Brochin and Naomi Eichen, nevertheless felt compelled to write:

[W]e cannot pass the issue without expressing our dissatisfaction with the Model Jury Charge.

The most powerful sentence in the charge is as follows: "the physician cannot be held liable if, in the exercise of his judgment, he nevertheless made a mistake." *Without some reference to the relevant standard of care, this sentence alone is simply not the law.* A physician exercises "judgment" every time he treats a patient. We sense a danger that the sentence is a signal to the untrained juror that an honest, good-faith exercise of judgment alone insulates the physician from liability ... [W]e cannot help but note that the term "exercise of judgment" in one form or another is used eleven times during the instruction. *Repetitive use of the term has, in our view, a clear capacity to muddle the jury's understanding of the central question; in the specific circumstances before the physician, did he or she exercise the same degree of skill*

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and diligence ordinarily possessed and exercised in similar situations by the average member of the profession practicing in his or her field.

Morlino, 295 N.J. Super. at 127 [emphasis added].

The court observed that "a growing number of courts have rejected similar exercise of judgment instructions because they confuse jurors into focusing on the health care provider's *subjective* intentions and judgments rather than the real issue of whether the health care provider's *conduct* conformed to an *objective* standard of care." *Id.* at 128 [citing nine out-of-state cases]. The court concluded that "what is demanded is not good-faith exercise of judgment, but the exercise of due care. In our view, the Model Jury Charge does not convey that message in a clear manner." *Id.* at 129 [emphasis in original].

Nevertheless, the court did not reverse because it concluded that, in the circumstances of the case before it, "any shortcomings in the charge" did not "cause substantial prejudice to the plaintiff." *Id.* The court based this conclusion on the "compelling evidence" that the defendant carefully weighed the benefits and risks inherent in the use of ciprofloxacin and that his conduct in administering the drug "conformed to prevailing medical standards." *Id.*

Support for the Charge

However, in *Crego*, *supra*, the Court upheld the validity of the model jury charge. In *Crego*, *supra*, plaintiff alleged that the defendants, a family practitioner and an orthopedic surgeon, were negligent in failing to diagnose a ruptured Achilles' tendon and that she lost the chance for a surgical repair of the tendon due to the delay in diagnosis. The jury found that the family practitioner was not negligent, and that, although the orthopedic surgeon was negligent, his negligence was not a substantial factor in causing the plaintiff's ultimate injuries.

On appeal, the plaintiff argued, among other things, that the reasonable judgment charge contained in the Model Jury Charge was an incorrect statement of the law. In rejecting this argument, the *Crego* court held that the Model Jury Charge, "when read in its entirety, correctly instructed the jury as to the applicable law of New Jersey dealing with medical malpractice cases, including the duty that a physician owes to his or her patient in a case of this kind." *Crego*, slip op. at 10.

The court based this conclusion on the fact that the trial court followed Model Jury Charge Section 5.36(A) which is consistent with *Schueler*, *supra*. The court held that the portion of the charge which states that "A doctor who departs from standard medical practice where no judgment is permitted cannot excuse himself from the consequences by saying that it was an exercise of his judgment" cured the charge of any deficiencies. *Id.* at 11.

It is difficult to reconcile *Bray*, *Adams*, and *Morlino* with *Crego*. Perhaps the answer is found in the fact that the *Crego* court noted that plaintiff's expert's testimony could reasonably be interpreted to suggest, and the jury could have reasonably determined, that the family practitioner was not negligent. *Id.* at 18. However, since there was no risk involved in testing for a ruptured Achilles'

tendon, the better reasoning is found in the *Bray/Adams/Morlino* analysis that the reasonable judgment charge can confuse the jury into focusing on the doctor's "*subjective* intentions and judgments rather than the real issue of whether the health care provider's *conduct* conformed to an *objective* standard of care." *Morlino*, 295 N.J. Super. at 128.

The recent series of cases involving the reasonable judgment charge suggest that the exercise of judgment instruction should not be given except in circumstances where the professional was confronted with a "Hobson's choice" — that is, two or more possible courses of action which comply with the standard of care, each with benefits and risks. 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 *Bray*, where the issue was whether the defendant provided appropriate follow-up care, or *Adams*, where the issue was whether the nurse provided appropriate monitoring, and therefore the reasonable judgment/honest mistake charge was 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. Furthermore, the "reasonable judgment charge" should be limited to those cases where there are two or more treatment plans that 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. Finally, it is clear that the present "honest mistake" language is no longer viable and should not be given, even in modified form, in any circumstances.

Additionally, where the defendant requests a "reasonable judgment" charge, it would clearly follow that the case requires an informed consent analysis and charge, because it is the patient who is entitled to make the ultimate judgment as to the course of treatment. A discussion of informed consent is beyond the scope of this article, but has been discussed previously. See, Brown and Gold, "Informed Consent in Medical Malpractice Litigation," 142 N.J.L.J. 937 (Dec. 11, 1995). However, 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 "[u]nder 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*, *supra*, 98 N.J. at 346. The Court added "it is the doctor's role to provide the necessary medical facts and the patient's role to make the subjective decision." *Conroy*, *supra*, 98 N.J. 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. ■