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MEDICAL MALPRACTICE LAW

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In Trilogy of Cases, Court Limits Application of the Judgment Charge

The "judgment charge" in medical malpractice cases has been an insurmountable barrier for many plaintiffs. In a trilogy of recent cases, however, the New Jersey Supreme Court has strictly limited the application of the charge. *Morlino v. Medical Center of Ocean County*, 152 N.J. 563 (1998); *Aiello v. Muhlenberg Regional Medical Center*, 159 N.J. 618 (1999); and *Velazquez v. Portadin*, 163 N.J. 677 (2000). These decisions must be thoroughly understood by practitioners who handle malpractice cases.

In *Morlino*, plaintiff Angela Morlino, who was pregnant, went to an emergency room with a sore throat. The emergency room doctor prescribed an antibiotic and she suffered fetal demise the next day. The defendant doctor asserted that he exercised judgment in prescribing the

antibiotic after weighing the possible benefits and risks of the medicine as well as the risk posed by the infection, and the jury found for the defendant.

The Supreme Court observed that the trial court's jury charge included the following sentence: "The physician cannot be held liable if, in the exercise of his judgment, he nevertheless made a mistake." *Morlino*, 152 N.J. 563 at 582. Recognizing that "at issue in this case is the role of judgment in medical practice," the Court acknowledged 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. ... 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." *Id.*, at 583-84.

However, the *Morlino* Court held that the sentence with 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." ... 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. *Id.*, at 588-89.

The *Morlino* Court therefore remanded Model Charge 5.36A to the Supreme Court Committee on Model Jury Charges with instructions to eliminate the erroneous sentence and make the entire charge "shorter and clearer." The committee promptly revised Model Jury Charge 5:36A, which now states:

The law recognizes that the practice of medicine is not an exact science. Therefore, the practice of medicine according to accepted medical standards may not prevent a poor or unanticipated result. Therefore, whether the defendant doctor was negligent depends not on the outcome, but on whether he/she adhered to or departed from the applicable standard of practice and care.

A doctor may have to exercise judgment when diagnosing and treating a patient. However, alternative diagnosis/treatment choices must be in accordance with accepted standard medical practice. Therefore, your focus should be on whether standard medical practice allowed judgment to be exercised as to diagnosis and treatment alternatives and, if so, whether what the doctor actually did to diagnose or treat this patient was accepted as standard medical practice. If you determine that the standard of care for treat-

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ment or diagnosis with respect to (specify what type(s) treatment or diagnosis is involved) did not allow for the choices or judgments the defendant doctor made here, then the doctor would be negligent.

If you find that the defendant(s) has (have) complied with the accepted standard of medical care, then he/she is not liable to the plaintiff regardless of the result. On the other hand, if you find that the defendant(s) has (have) departed from the accepted medical standard, then you must determine whether such deviation or negligence was a proximate cause of any injury sustained or any loss incurred by plaintiff. Model Jury Charge 5.36A (Civil), 4-6, Medical Malpractice, Duty and Negligence (footnotes and citations omitted)(April 1999).

Aiello v. Muhlenberg Regional Medical Center

The Supreme Court soon returned to the judgment charge issue in *Aiello v. Muhlenberg Regional Medical Center*. In *Aiello*, plaintiff Laura Aiello suffered injuries to blood vessels during a laparoscopic tubal ligation. Aiello's expert testified that the defendant doctor committed malpractice by thrusting an instrument "into the abdomen at a depth far beyond the operative area." 159 N.J. 618 at 624. The defendant's expert countered that insertion of the instrument required the defendant to "exercise judgment in determining the proper angle and depth of insertion." Id.

The plaintiff requested that the trial court delete the judgment charge when instructing the jury, arguing that there was no "judgment call in this case." Id. at 625. The trial court denied the request, and the jury found for the defendant. The trial court granted a judgment notwithstanding the verdict and the plaintiff's motion for a new trial on damages, holding that the injury to the blood vessels could not have occurred in the absence of negligence. The Appellate Division, in an unreported decision, reversed and reinstated the jury verdict. The Supreme Court remanded for a new trial, and provided guidance regarding the proper use of the judgment charge in medical malpractice cases.

The *Aiello* Court began its analysis by noting that several recent Appellate Division decisions had "limited the application of the 'exercise of judgment' charge to medical malpractice actions concerning misdiagnosis or the selection of one of two or more generally accepted courses of treatment." Id. at 628-29; citing *Patton v. Amblo*, 314 N.J. Super. 1, 9 (App. Div. 1998); *Crego v. Carp*, 295 N.J. Super. 565, 575-76 (App. Div. 1996), cert. den., 149 N.J. 34 (1997); *Hofstrom v. Share*, 295 N.J. Super. 186, 195 (App. Div. 1996), cert. den., 148 N.J. 462 (1997); and *Adams v. Cooper Hospital*, 295 N.J. Super. 5, 8-9, 10-11 (App. Div. 1996), cert. den., 148 N.J. 463 (1997).

The Court approved these decisions and emphasized that trial courts must limit use of the judgment charge to cases that actually involve the exercise of judgment, and not the use of due care:

If the exercise of judgment rule is inappropriately or erroneously applied in a case that involves only the exercise of reasonable care, the aspect of the rule that excuses a physician for "mistakes" would enable the physician to avoid responsibility for ordinary negligence. The "mistake" that inheres in negligence, that is, the failure to exercise reasonable care, is not the kind of mistake that is excusable. If, therefore, the physician's professional conduct implicates only the exercise of reasonable care in the performance of a medical procedure and not the exercise of medical judgment in selecting among acceptable and medically reasonable courses of treatment, the medical judgment rule should not be invoked. ... In that context, it is error to instruct a jury to determine whether the defendant "exercised judgment" and may not be responsible for mistakes. 159 N.J. 618 at 632.

The *Aiello* Court then explained that the judgment charge should not have been given because the case did not involve a physician's choice between alternative courses of treatment or of different procedures. "The experts disagreed only on whether defendant performed the selected procedure in a negligent manner. This tes-

timony does not support the 'exercise of judgment' charge." Id. In so doing, the Court expressly rejected the defendant's expert's testimony that performance of the procedure required the exercise of judgment. The *Aiello* Court concluded that the revised Model Jury Charge 5.36A, quoted above, "correctly conveys the precise use of the term 'judgment' in connection with the practice of medicine." Id. at 633.

Velazquez v. Portadin

Any lingering doubts about the limited application of the judgment charge have been put to rest by the Court's May 18 decision in *Velazquez v. Portadin*. In *Velazquez*, the Court observed that "[t]his case presents another chapter in the continuing saga of the medical judgment charge." Plaintiff Diana Velazquez was admitted to the hospital in labor and was placed on an external fetal monitor. A medication, Pitocin, was given, and shortly thereafter the fetal monitor strips began to become difficult to read. The fetal monitor strips for the last 15 minutes prior to delivery were missing, and the mother claimed that she was not monitored during that time period. The plaintiffs' child had no heartbeat when born and was later diagnosed as suffering from cerebral palsy.

All of the experts agreed that the use of Pitocin was proper and that constant monitoring was necessary. The experts disagreed about "whether the strips were sufficiently readable to allow defendants to determine [the fetus'] reaction to the Pitocin induced contractions." The plaintiff's experts testified that when the strips became unreadable, the defendant should have either discontinued the Pitocin until the fetal monitor strip was reassuring or applied an internal fetal monitor to obtain an more accurate reading. The defendant's experts agreed that if the strips were unreadable, the Pitocin should have been discontinued. However, both of the defendant's experts testified that the strips were readable and that any unreadable portions were followed by readable and reassuring tracings.

Over the plaintiff's objection, the trial court gave the judgment charge, and the jury found for the defendants. The Appellate Division affirmed, only mentioning the judgment charge in passing. 321 N.J. Super. 558, 585 (App. Div.

1999). The Supreme Court reversed and focused on the judgment charge in its opinion, stating "Plaintiff's main argument on appeal is that the improperly tailored instruction on the medical judgment charge constituted error. ... We agree with plaintiffs that the trial court's failure to untangle the facts in relation to the medical judgment charge left the jury free to excuse defendants based on the evidence of judgment in areas where no judgment was exercised. Because that error was not harmless, a new trial is necessary."

The Supreme Court began its analysis by taking note of the difficulty in the application of the judgment charge. "[O]ur courts have often struggled in determining whether the facts of a particular case call for the application of the judgment charge. We have generally limited the application of the judgment charge to medical malpractice actions concerning misdiagnosis or the selection of one of two or more generally accepted courses of treatment." [Citing *Aiello, Patton and Adams*].

The *Velazquez* Court then re-emphasized that the judgment charge should be "limited to cases in which the physician exercised judgment in selecting among acceptable courses of action." The Court instructed that "[A] trial court must not only administer the exercise of judgment charge solely in cases where the charge is appropriate, but it must also separate out those aspects of the medical care that involved judgment and those that did not. ... The failure to do so constitutes reversible error where the jury outcome might have been different had the jury been instructed correctly."

This determination is essential because the inappropriate or erroneous application of the judgment charge might "enable the physician to avoid responsibility for ordinary negligence."

The *Velazquez* Court further observed that "the point is driven home in a footnote to the most recent Model Charge" which it quoted:

If a case does not involve a legitimate judgment call or two schools of thought, then the Trial Judge should omit this portion of the charge. See *Adams v. Cooper Hospital*, 295 N.J. Super. 5, 8 (App. Div. 1996). If a case involves judgment issues on some theories of liability, but not on others, the charge should be tailored to those facts. *Patton v. Amblo*, 314 N.J. Super. 1 (App. Div. 1998), (trial judge committed reversible error when he failed to separate out what aspects of care involved judgment and which did not) and see *Campos v. Firestone Tire and Rubber Company*, 98 N.J. 198, 210 (1984). Medical malpractice practitioners should assist the court in framing tailored, objective statements of those issues which do involve legitimate dispute issues of judgment or two schools of thought. To give one example among many, if a distinct issue in a case involved a doctor who ordered a test and never received the result, the jury would appropriately be charged that there was no exercise of judgment or two schools of thought defense to that claim. In contrast, what steps to take in response to a test result might involve one or more issues of judgment. M.J.C 5.36A, n. 4 (April 1999).

The Court therefore reversed, explaining that the trial court "failed to tailor the charge to the theories and facts presented."

The Supreme Court explained that since all experts agreed that monitoring was required, that failure to do so was a deviation from the standard of care. The Court noted that whether the fetal monitor strips were readable did not involve medical judgment and that the judgment charge was thus inapplicable to that allegation of negligence. The Court further held that if the strips were readable "[T]he

issue was whether they revealed fetal distress. If there was no fetal distress, no action was required. If fetal distress was evident, the issue was whether continuing the Pitocin without remedying that distress comported with the standard of care. Again, no judgment was required." In concluding, the Court explained:

[T]he bulk of this case implicated the question of deviation from the standard of care, not judgment. The able defense lawyers, knowing the power of the judgment charge, took every opportunity to lead the court and jury into thinking that the entire case revolved around the exercise of judgment. It did not. Although one or possibly a few judgment issues may have been implicated, the heart of the case was about whether there was a deviation from the standard of care. The undifferentiated instruction on medical judgment misled the jury and thus improperly insulated the defendants from liability. ... Because the judgment charge was not tailored to the facts of this case, its coverage was overbroad and had the potential to improperly insulate defendants from liability. Accordingly, a new trial is required. 163 N.J. 677, 690-91.

Velazquez is an extremely significant case. Trial courts must no longer tolerate vague allegations of the exercise of medical judgment. In fact, the Supreme Court instructed that the trial courts and counsel must analyze the testimony and theories "on the record" to determine whether the reasonable judgment charge is applicable and if so to which issues. Thus, it is now clear that the defendants must specify which decisions constituted the exercise of medical judgment and support — with expert testimony — the contention that there were two generally accepted schools of medical thought about each decision. ■