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MEDICAL MALPRACTICE LAW

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Supreme Court Ratifies New Judgment Charge

Justices also limit its use in *Aiello v. Muhlenberg Regional Medical Center*

The "judgment charge" in medical malpractice cases has been controversial ever since the New Jersey Supreme Court held that physicians are not liable for "an honest mistake in diagnosis or in judgment as to the course of treatment taken." See *Schueler v. Strelinger*, 43 N.J. 330, 344 (1964).

This dicta was incorporated into Model Jury Charge 5.36A in similar language: "The physician cannot be held liable if in the exercise of judgment he/she has nevertheless made a mistake." The judgment charge proved to be an insurmountable barrier for many plaintiffs in medical malpractice cases.

However, in recent years, plaintiffs have vigorously attacked the charge and often persuaded trial judges that the above-quoted sentence and the repetitive use of the phrase "exercise of judgment" in the model jury charge misled the jury.

In *Morlino v. Medical Center of Ocean County*, a unanimous state Supreme Court agreed, holding that the sentence should

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immediately be deleted and ordered the Model Civil Jury Charge Committee to revise the charge. 152 N.J. 63 (1998). In April, the committee published a revised charge.

In another unanimous opinion earlier this year, the Court ratified the new judgment charge and explained why it should only be utilized in limited circumstances. *Aiello v. Muhlenberg Regional Medical Center*, 159 N.J. 618 (1999). It is essential that any attorney handling a professional negligence case be thoroughly familiar with this case and the issues it resolves.

The Facts

In *Aiello*, the plaintiff suffered injuries to multiple blood vessels during a laparoscopic tubal ligation. The plaintiff's expert testified that the defendant deviated from the standard of care because a surgical instrument was "thrust into the abdomen at a depth far beyond the operative area." *Aiello*, 159 N.J. 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 nevertheless 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 but modified the charge to add that the "good faith exercise of judgment does not insulate

a defendant from liability if he did not adhere to the standard of care." *Id.* Additionally, the jury was instructed to decide whether the defendant had sustained the burden of proof in establishing "there were two courses of action and the doctor chose one." *Id.*

The jury found for the defendant, but the trial court granted a judgment notwithstanding the verdict and the plaintiff's motion for a new trial on damages. The trial court belatedly decided that the injury to the blood vessels could not have occurred in the absence of negligence and that it had erred in utilizing the judgment charge.

The Appellate Division, in an unreported decision, reversed and reinstated the jury verdict. The Supreme Court reversed and remanded for a new trial and, in so doing, provided guidance regarding the proper use of the judgment charge in medical malpractice cases.

The Analysis

The *Aiello* opinion began its analysis by revisiting *Schueler v. Strelinger*, in which the Court held that a physician is not liable for an "honest mistake" in diagnosis or in judgment. 43 N.J. 330, 344 (1964). The *Aiello* Court observed that this language formed the basis of the judgment charge found in Model Jury Charge 5.36A.

The justices then noted several recent Appellate Division decisions that "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." *Aiello* at 628-629; citing *Patton v. Amblo*, 314 N.J. Super. 1, 9 (App. Div. 1998); *Crego v. Carp*, 295 N.J. Super. 565, 575-576 (App. Div. 1996), certif. den. 149 N.J. 34 (1997); *Hofstrom v. Share*, 295 N.J. Super. 186, 195 (App. Div. 1996), certif. den. 148 N.J. 462 (1997); and *Adams v. Cooper Hospital*, 295 N.J. Super. 5, 8-9, 10-11 (App. Div. 1996), certif. den. 148 N.J. 463 (1997).

The Court approved the reasoning of these decisions and further explained why trial courts must be careful to 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. *Aiello* at 632.

The justices explained that the judgment charge should not have been given in a case involving the performance of surgery because it 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 testimony does not support the 'exercise of judgment' charge." *Id.* In so doing, the Court rejected the defendant's expert's testimony that performance of the procedure required the exercise of judgment.

The Court concluded by instructing that the revised Model Jury Charge 5.36A "cor-

rectly conveys the precise use of the term 'judgment' in connection with the practice of medicine." *Id.* at 633. The *Aiello* Court quoted the 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 treatment 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* at 628, n.1.

The Court explicitly held that the judgment charge is to be "avoided" in cases involving the defendant's skill in performing a surgical procedure or the failure to exercise reasonable care in rendering treatment. *Id.* at 633. The Court also approved a footnote to

the new Model Jury Charge which states:

If a case does not involve a legitimate judgment call or two schools of thought, then the Trial Judge should omit [the 'exercise of judgment'] portion of the charge. If a case involves judgment issues on some theories of liability, but not on others, the charge should be tailored to those facts. 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 involves 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. *Id.*, quoting Model Jury Charge 5.36A, fn. 4.

Aiello confirms that the reasonable judgment charge should not be utilized except in those cases where the health care professional was confronted with what the *Adams* Court called a "Hobson's choice." In other words, two or more possible courses of action that 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 *Aiello* or *Adams*, where the issues were of surgical skill or whether the nurse provided appropriate monitoring.

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, in cases where a plaintiff alleges that a defendant negligently performed a procedure or failed to monitor a patient.

To the contrary, the judgment charge must be limited to those cases where the defendant proves that there are two or more treatment plans that comply with the standard of care, and judgment was actually used in weighing the benefits and risks presented by the alternative plans. ■