

## No Hospital Informed Consent Duty to Patient

Roberta Ann Sherwood sued Danbury Hospital and her surgeon after she contracted HIV from a blood transfusion she received during surgery. The doctor was not an employee of the hospital. In her lawsuit, she claimed that the hospital had not made her aware of the risk of contracting HIV from a transfusion; that she had the option of banking her blood (autologous donation); or of the availability of a test that can detect HIV antibodies in the blood. Her claims were rejected at trial.

“ It reiterated that the duty to obtain informed consent lies exclusively with the physician who was not an employee of the hospital. ”

When the Supreme Court first dealt with this case, it held that Danbury Hospital owed Ms. Sherwood a duty to warn her of the risks of a blood transfusion. It sent her case back to the Superior Court.

The case returned to the Supreme Court after the trial court dismissed the case against the hospital and found that it owed no duty to Ms. Sherwood to warn her about the risks of a blood transfusion, *given that the surgery was performed by a non-employee physician*. Looking to its 1990 decision in *Petriello v. Kalman*, the Supreme Court held that the hospital was not liable to Ms. Sherwood for the surgeon's failure to obtain her informed medical consent. It reiterated that the duty to obtain informed consent lies exclusively with the physician who was not an

employee of the hospital and, in this case, the physician's failure to do so could not impose vicarious liability against Danbury Hospital.

*Sherwood v. Danbury Hospital*, 278 Conn. 163 (2006).

To obtain a copy of this decision, please contact Christine Collyer in our Hartford office (860-424-4329 or by email at [ccollyer@pullcom.com](mailto:ccollyer@pullcom.com)).

## New Physician Member of CMEB

Dr. Steven D. Hanks was recently appointed to fill a vacant physician membership slot on the Connecticut Medical Examining Board. Dr. Hanks is an internist; he serves as senior vice president of medical affairs and chief medical officer at New Britain General Hospital. His specialty is emergency medicine.

## Diagnostic Difficulty

“When it comes to rashes, diagnosing their cause is not a simple matter,” Dr. Howard Markel notes in the July 25, 2006, *New York Times*. This proved especially so when the rash appeared on the doctor's 5-year-old daughter.

Three hundred and twenty-five years ago, Dr. Markel notes, Dr. Thomas Sydenham, known as “the English Hippocrates,” described the typical scarlet fever rash as “branny, as if powdered by meal.”

Dr. Markel consulted with a colleague about his

daughter's symptoms and, together, they "decided to forgo a definitive throat culture (to establish a strep infection which can lead to scarlet fever) because (his daughter's ) symptoms fit Sydenham's descriptive criteria."

The antibiotics prescribed by the colleague for Dr. Markel's daughter did the job, thanks, in large measure, to the diagnostic benchmark propounded by a seventeenth-century English physician.

## Better Prevention Advocated

U.S. Surgeon General Richard Carmona recently noted that America spends 16 percent of its gross domestic product on health care and that much of these expenditures go for diseases and conditions which are preventable.

In a talk in San Antonio on June 13, 2006, the Surgeon General expressed specific concern about growing obesity in our society. The effect of obesity on increased rates of diabetes, hypertension, cancer and cardiovascular disease was stressed by Dr. Carmona who observed "(I)f we keep chasing this thing as if it were just an economic entity and fighting over who pays for health care as the disease burden continues to mount, it will become unsustainable."

## Hospital's Liability Extends Beyond Malpractice

As if caregivers did not have enough worries, a New York Supreme Court (trial) Justice recently upheld a \$2 million award to parents against The Brooklyn Hospital Center as a result of the improper disposal of the remains of their stillborn fetus.

After a difficult pregnancy, Emilian Emeagwali was admitted to the hospital on September 9, 1996; she delivered a stillborn female on September 12.

Although there was no suggestion that the hospital committed medical malpractice in any form or fashion, the hospital's conduct after the delivery became the issue. It appears that the hospital delivered the remains of the fetus to its pathology department without the parents' consent. The hospital would not or could not tell the parents what became of her remains thereafter.

Asserting that the hospital's conduct in depriving them of their right to bury their stillborn fetus violated their legal right of "sepulcher," the parents commenced a damage action which resulted in this huge jury verdict of \$2 million.

Rejecting a number of legal attacks, as well as the claim that the jury verdict was grossly excessive, the trial judge sustained the jury award which followed evidence of severe psychological injuries suffered by the mother which derived from the parents' inability to "complete the burial traditions of their culture."

*Emeagwali vs. The Brooklyn Hospital Center*, New York Supreme Court, Kings County (Feb. 28, 2006).

Should you have any questions or comments, please contact Michael A. Kurs in our Hartford office (860-424-4331 or at [mkurs@pullcom.com](mailto:mkurs@pullcom.com)).

## Antibiotic Staph Resistant Infections Discussed

The February 13, 2006, issue of *The Medical Letter* observes that these infections used to be noted primarily in hospitalized patients, and in patients who had recently received antibiotics.

The phenomenon of community associated staph resistant infections (i.e., those occurring in patients who do not meet either of the foregoing criteria) has been observed recently. Even more troubling, the strains of these infections are frequently more virulent. *The Medical Letter* suggests that infections presenting with abscesses

should be treated initially with drainage and that “culture and susceptibility testing should guide antibiotic selection” in less serious infections.

“The phenomenon of community associated staph resistant infections...has been observed recently.”

The article discussed the effectiveness of drugs such as Vancomycin, Linezolid and Daptomycin, among others.

## Retirees' Health Care Costs and Bond Market

According to the March 13, 2006, issue of *Barron's*, the undisclosed cumulative cost of keeping municipalities' and states' promises of health care benefits to their retirees amounts to as much as \$1 trillion nationally, “with the tab rising daily.” While this financial elephant in the living room looms larger every day, local officials tend to be unwilling to restructure these benefits for fear of losing reelection.

New accounting rules taking effect at the end of this year, according to *Barron's*, will penetrate the veil of secrecy surrounding these liabilities by requiring “governments to disclose what their retiree health-care costs are likely to total over the next thirty years; the numbers are sure to be eye-opening.”

When the public and, in particular, investor communities are able to come to grips with these future financial burdens, *Barron's* suggests that the bonds issued by states such as Georgia, New York and New Jersey will decline in value due to investor

fears that the financial power will not be there to cover the liabilities.

This is yet another example of the impact that America's (and Connecticut's) spiraling health care costs have outside the immediate arena of health care delivery.

## Florida Hospital Excluded from Medicare/Medicaid Participation

In 2002, South Beach Community Hospital of Miami, Florida, signed a corporate integrity agreement (CIA) with the Office of Inspector General of the Department of Health and Human Services(OIG). The Hospital had been required to sign a CIA as a result of noncompliance with various federal legal requirements. A demand by federal health care regulatory authorities to sign such an agreement is a very serious matter; hospitals must cut very square corners in dealing with regulators thereafter.

At the end of 2005, OIG notified the Hospital that it had not complied with its obligations under the CIA including, most importantly, failing to advise the government of the proposed sale of the Hospital.

As a result, this Miami health care institution was excluded from federal health care program participation by OIG for five years on March 10, 2006.

Please contact Elliott B. Pollack in our Hartford office (860-424-4340 or at [ebpollack@pullcom.com](mailto:ebpollack@pullcom.com)) for further information.

## Attorney Notes

Elliott B. Pollack's article “Credentialing Oversight Equals Hospital Negligence?” was published in the July issue of the *Connecticut Law Tribune*.