Legal Consult

Psychosurgery – Qu'est-Ce Que C'est?

Peter Martin, Esq.

Anne Vacca had been depressed for many years. She had tried various medications, psychotherapy, and electroconvulsive therapy, without relief. Her psychiatrist, Dr. Jane Erb, recommended deep brain stimulation, a treatment approved for Parkinson's disease but not for depression. Implanting a DBS device in Vacca's brain would cost about $150,000, which Vacca could not afford. Dr. Erb was the clinical director of the depression center at Brigham and Women's Hospital, and she secured the hospital's agreement to provide Vacca with free DBS treatment. Erb informed Vacca that the hospital agreed "to perform the surgery, provide the aftercare or the postoperative care, which included battery replacements, programming the device, and cover the costs as long as [Vacca] needed that." Details of Vacca's postoperative care, the type of battery to be used, and who would program the device were never specified and the parties never entered into a written agreement.

This is the point in the story at which the lawyer wags his finger and predicts doom. Sure enough, although Vacca found the initial results of the treatment to be very helpful, within three years she became concerned about the use of a standard rather than a rechargeable battery for the DBS device, the frequency with which the DBS battery required replacement, the fact that the most recent battery replacement caused her sleep problems, and the lack of a psychiatrist to program the device. She asked that her care be transferred to another hospital, and asked that her agreement with BWH be documented in writing. The hospital provided a letter agreement, but Vacca objected to this document, in part because it permitted either party to terminate upon written notice. Even after all this, BWH replaced another battery for Vacca and expressed a willingness to continue to treat her.

The story now becomes a tale of litigation. Vacca filed a complaint in Superior Court claiming BWH breached a contract, among other claims. Vacca did not bring a medical malpractice claim because she asserted the treatment was experimental and she was challenging the hospital's financial decision to not pay for elements of her care, not the medical judgment of her caregivers. At trial, evidence was presented suggesting BWH wanted to treat Vacca, in part in order to expand its psychosurgery program, and that the hospital had featured Vacca's case in promotional materials about that program. Ultimately, BWH's motion for summary judgment was allowed on all claims, with the trial judge noting that Vacca should have pleaded her claims as malpractice claims. Vacca appealed.

At this point in the story, we need to pause and ask some fundamental questions that were considered by the Appeals Court. Did the hospital and Vacca actually have an agreement here? Despite the lack of a written document, Massachusetts law recognizes oral agreements if they meet the three characteristics of offer, acceptance, and consideration. The Appeals Court considered this question in the light most favorable to Vacca, as it must in an appeal of a summary judgment where the moving party, here the hospital, would if the appeal fails to be entitled to judgment as a matter of law. That court did find that the parties had a sufficient "meeting of the minds" even though the oral agreement was indefinite in some of its terms. The court also found the required element of consideration in the fact that "BWH benefited from the arrangement because it hoped to establish a DBS program for the treatment of depression."

However, the Appeals Court found that BWH did not breach the oral agreement, crucially because BWH continued to treat Vacca at no cost until after Vacca filed her action. Vacca alleged various breaches that did not form part of the oral arrangement – use of a standard, not a rechargeable battery, BWH's refusal to pay for Vacca's care at another hospital, the hospital's failure to provide independent ethical oversight of her care, or the provision of the letter agreement. The Appeals Court found there was no "meeting of the minds" on these topics between Vacca and the hospital, and that the oral contract on other aspects of her arrangement with the hospital was not too vague as to be unenforceable. The Appeals Court affirmed the trial court's summary judgment in favor of the hospital.

Having avoided the predicted doom, the hospital would then be told by the lawyer that the lesson here is that although having a written agreement might not have avoided litigation, not having a written agreement did not prevent the creation of a contract that is legally enforceable through litigation. The lawyer might counsel the hospital that next time it engages in a private-pay or uncompensated patient arrangement involving experimental treatments or significant financial and other obligations, it would be better off manifesting that arrangement in a written document that adequately specifies all of its material terms.

Another question that could be asked at this point is: why is this a contract breach matter and not a medical malpractice action? In bringing a contract action, Vacca may have wanted to avoid certain procedural steps required for medical malpractice claims, such as the initial review of the case by a pre-trial tribunal, and the statutory $100,000 cap on malpractice damages involving a nonprofit provider. In doing so, she was obliged to find a reason other than poor clinical judgment or incompetent care for the harm she alleged, such as the hospital's desire to exploit her case for the purposes of promoting its psychosurgery program. In a footnote to the Appeals

Psychosurgery – Qu'est-Ce Que C'est? *Continued*

Court decision, the Court states: "Vacca cites no authority for the proposition that a health care provider loses the protection of the medical malpractice statutory regime if it takes financial considerations into account when making treatment decisions." The Court basically advises Vacca that "most of the alleged breaches she raised sound in medical malpractice and, as a matter of law, cannot be disguised or recast as a breach of contract claim."

The distinction between business-related claims that may found a contract action and clinically based claims that constitute grounds for medical malpractice is worth noting here. The Appeals Court in the Vacca case cited two relatively recent decisions that draw similar distinctions. One case (Morgan v. Laboratory Corporation of America (2006)) involved the late reporting by a clinical lab of "panic results" that did not involve "deliberated judgment in the particular case on the part of a physician or other skilled staff," but a decision by a non-clinical administrator. In that case, the matter would be considered under common-law negligence standards and procedures, not as a medical malpractice case.

The second case (Darviris v. Petros (2004)) involved a dispute between a patient and a physician as to the adequacy of informed consent, in which the plaintiff claimed the physician's actions violated MGL Chapter 93A, the consumer protection statute. (Chapter 93A provides the potential for both treble damages and payment for reasonable attorney's fees, neither of which is available in a medical malpractice action.) In the Darviris decision, the claim was denied because the physician's behavior was not unfair or deceptive, though the court noted in an aside that "consumer protection statutes may be applied to the entrepreneurial and business aspects of providing medical services, for example, advertising and billing."

Both cases seek to draw boundaries between medical malpractice and other types of legal actions, but the second case seems to have potential applicability to the situation of a future Anne Vacca , receiving health care not as a matter of charity, but in the normal course of a medical practice. Could the "entrepreneurial and business aspects" of promoting a new clinical service or treatment cause a physician's decision to recommend that service or treatment to a patient, with a resultant bad outcome, be considered not just negligent but unfair or deceptive? Mixing business and clinical imperatives increases the risk of expanding disgruntled patients' litigation options beyond that of the medical malpractice action, with unpredictable and potentially disastrous consequences.

At this point in the story, we may be entitled to conclude that caregivers are better off memorializing any unusual agreements they may have with patients in a carefully considered and drafted document. We may also want to emphasize that relationships with patients are best founded on and governed exclusively by clinical considerations. To do otherwise may result in bad litigation outcomes for providers and, ultimately, accounts of such cases written by lawyers, including bad puns. ✚

Peter Martin, Esq.,is a partner at Bowditch and Dewey. He concentrates his practice on health care law, representing hospitals, long-term care facilities, physicians and other facilities and providers facing complex regulatory and contractual issues throughout Massachusetts and beyond.

Society Snippets

The WDMS 29th Annual Women in Medicine Gathering September 24, 2020

SPEAKER: Dr. Lynn Eckhert

On the heels of the 100th anniversary of the Women's Suffrage Movement and the ratification of the 19th Amendment, Dr. Lynn Eckhert presented our first virtual presentation of 2020. Those who attended had the chance to win a prize for taking a short quiz to test your knowledge on the subject.

Congratulations to our winner Dr. Marjorie Saffron!

Dr. Eckhert's lecture can be viewed from our website: WDMS.org under the Events Calendar/Past Events

PHYSICIANS & SUFFRAGE QUIZ WITH RESULTS:

1. Who was the first woman to become a member of the Massachusetts Medical Society? *Emma Louise Call*
2. Who was the MMS member who advocated for women to join the MMS? *Henry Bowditch*
3. Which was the first state to offer women the right to vote? *New Jersey*
4. Which woman suffragist was a surgeon in the Civil War? *Mary Walker*
5. What mountain is associated with the struggle for woman suffrage? *Mount Rainer*
6. Name the woman physician who was President of the National American Woman Suffrage Association? *Ruth Howard Shaw*
7. Who was the first woman to become a physician who was rejected by Harvard Medical School? *Harriott Kezia Hunt*
8. Who were the Silent Sentinels of suffrage? *Protesters outside the White House*
9. Why were the Mormons important in the woman suffrage movement? *Mormon women had the right to vote*
10. Who wrote "Common Sense" Applied to Woman Suffrage? *Mary Putnam Jacobi* ✚