



Doctor liable for not providing sign language interpreter

■ A column analyzing the impact of recent court decisions on physicians

By Amy Lynn Sorrel — covered legal, antitrust, fraud and liability issues from 2005 to 2010, and has also written the "In the Courts" column. Posted Jan. 5, 2009.

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In the Courts

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A punitive damages verdict is enough to catch anyone's attention. But a verdict for punitive damages in a disability discrimination case can be a double whammy for physicians.

Since such claims are not covered under traditional medical liability insurance, any judgments would come out of doctors' own pockets.

That is exactly what befell New Jersey rheumatologist Robert A. Fogari, MD, when a Hudson County jury in October 2008 unanimously handed down a \$400,000 award against him for allegedly refusing to pay for a sign language interpreter for a patient who is deaf. Half of the award was for punitive damages.

The verdict is believed by some legal experts to be among the largest of its kind, and has many physicians fearing it will set a dangerous precedent and prompt similar litigation.

Dr. Fogari had treated Irma Gerena for lupus for about a year and a half, beginning in May 2004. Over the course of about 20 office visits, Gerena claimed in court documents that she repeatedly asked Dr. Fogari to provide a sign language interpreter, but was rebuffed.

The Jersey City rheumatologist argued that, as a solo physician, he could not afford the cost, which was estimated at \$150 to \$200 per visit. The expense was overly burdensome given that Medicare reimbursed only \$49 per visit, according to Dr. Fogari's attorney. Instead of hiring an interpreter, Dr. Fogari exchanged written notes with Gerena, with the help of family members. After her diagnosis, Gerena's treatment largely involved monthly check-ups to monitor her medication, with no major complications, the doctor's attorney said.

Gerena made no allegations of medical negligence. But because Dr. Fogari denied her an interpreter, she claimed she never had "any real understanding" of her diagnosis, treatment or prognosis, and was deprived of an equal opportunity to fully participate in her medical care, according to the complaint. Dr. Fogari treated Gerena's condition with steroids, but she alleged the doctor never fully explained the risks and benefits.

Gerena transferred to another doctor. She then sued Dr. Fogari, alleging he violated the federal Americans with Disabilities Act and the Rehabilitation Act, as well as New Jersey's anti-discrimination law. The jury agreed, finding Dr. Fogari discriminated against Gerena when he failed to provide a sign language interpreter to make sure he was effectively communicating with his patient. Dr. Fogari is appealing the verdict.

Effective communication

State and federal law generally prohibit discrimination on the basis of disability and require physicians and other private, covered entities to provide reasonable public accommodations to ensure "effective communication" with patients who have disabilities such as blindness or hearing impairment, and with their family members.

But those accommodations include a range of so-called auxiliary aids that doctors can use, including note-takers or video or computer-based transcription devices, which can be less expensive than an interpreter service, said Lawrence Downs, general counsel to the Medical Society of New Jersey. The physician organization is considering getting involved in the case on appeal.

"We need to make sure those remain viable options for physicians. And the courts have been careful in saying, if [doctors] can communicate effectively and patients can participate in their treatment, physicians have pretty wide latitude in how to effectuate that communication," Downs said.

A qualified interpreter may be required for complex diagnoses or treatment decisions, such as a high-risk surgery, but not necessarily for routine or maintenance care, he said.

"No one disagrees there should be effective communication. ... The question is, how does public policy justify physicians bearing the cost [of a more expensive interpreter service] when reimbursement doesn't come close to covering it?" Downs asked.

Gerena had argued to the jury that the annual cost of a sign language interpreter amounted to less than a quarter of a percent of Dr. Fogari's yearly income.

The expense may seem negligible for a single patient, said Antranig Aslanian Jr., the rheumatologist's attorney. "But what if you had 40 or 50 patients?"

State and federal disability and antidiscrimination laws contemplated the impact that such accommodations would have on a smaller versus a larger practice, he said.

The courts also should consider whether medical negligence was a factor, Aslanian said. Gerena was not required to show that anything went wrong with her care in order to bring her disability discrimination claim. At the same time, Dr. Fogari was prevented from raising that defense.

Meanwhile, because disability discrimination claims typically are not covered by medical liability insurance, physicians are left personally liable for any judgments. That, on top of the interpreter costs, puts additional strain on doctors and ultimately strains access to care, Aslanian said. He added that in this case, the punitive damages -- typically rendered for intentional conduct -- were unwarranted.

"There was no question in this case regarding any malpractice or misdiagnosis. So if a patient is properly treated, there had to be some reasonable, effective communication," he said, noting that Dr. Fogari and Gerena mutually agreed to communicate using written notes.

"The patient wasn't treated differently than anyone else, so how is that discriminating?"

American Medical Association policy opposes any discrimination based on an individual's disability. The AMA also supports legislative efforts to clarify requirements in the Americans with Disabilities Act regarding the provision of qualified interpreters for patients with hearing impairment. Organized medicine continues to monitor enforcement of the ADA provisions to assure that physician offices are not subjected to undue burdens in their efforts to assure effective communication with patients who are hearing impaired.

A patient's perspective

Whether effective communication exists, however, rests in the view of the patient, not the doctor, said Clara R. Smit, Gerena's attorney.

She pointed to a 2001 New Jersey appeals court decision in *Borngesser v. Jersey Shore Medical Center* that has served as a state and national precedent, and was among the first to define effective communication.

Judges ruled that effective communication was essential during "critical" points of the patient's treatment -- aspects that involve significant procedures, consent, diagnoses or treatment options -- and that the efficacy of the communication method chosen had to be viewed from the patient's perspective. In that case, the patient was hospitalized after complications arose from an abnormally rapid heartbeat, during which time the hospital declined her requests for a sign language interpreter. There were no allegations of inadequate care. The hospital was found liable for disability discrimination.

"We as a society have determined we want to have equal access for all patients with disabilities," said Smit, of East Brunswick, N.J. "But even if a doctor thinks he can communicate, that doesn't mean patients can ask questions when they want to and understand enough to really make the decisions they need to make about their medical treatment."

Smit said the punitive damages award in Gerena's case sends a strong message to doctors that they cannot ignore legal obligations to accommodate patients with disabilities. In addition to her requests, Gerena had a sign language interpreter service call Dr. Fogari to offer its services and inform him of the law and Gerena's need, according to court documents.

The U.S. Dept. of Justice also can enforce the Americans with Disabilities Act. A West Virginia primary care practice in December 2008 settled a complaint that a patient filed with the government, saying the group failed to provide a sign language interpreter or other auxiliary aids to its patients. The group agreed to pay \$5,000 in damages and civil penalties, establish nondiscriminatory policies for providing effective communication, and train staff and post notices on the policies.

Physicians can argue that providing such services may pose a hardship on their practices, but rarely are such defenses successful, according to legal experts.

Courts generally will consider a doctor's overall resources, financial or otherwise, said Paula Pearlman, executive director of the Disability Rights Legal Center in Los Angeles. For example, courts will look at a doctor's income tax returns. "And in every community there are services available," through advocacy or other organizations to accommodate patients with disabilities, Pearlman said. Doctors also can receive tax credits for providing such services.

"It is an added requirement," Pearlman said. "But you want to give your patient the best possible care, and it's just the cost of doing business."

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