

LEGAL CAPSULES
by
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20 December 2001

The dispensing of controlled substances to patients needing pain management can many times cause problems for certain pharmacy personnel. It appears that if a patient presents a prescription for 360 tablets of Percocet®, or another narcotic analgesic, immediately the red flags go up, the patient is presumed to be a drug abuser, the assumption is made that there is no way the patient needs that many tablets, and by God, we've been charged with protecting the nation's narcotic supplies so there is no way the patient is getting that prescription filled here! I want to share with you a case from August of 2001 where a jury wrestled with the question of adequate pain management for a patient. This is a case I touched on at the Combined Forces Pharmacy Seminar back in October, but I thought it worth going into a little more detail. The case is *Bergman v. Chin* from the Alameda Superior Court in California, and even though it specifically addresses a physician's responsibility, I don't think it is too far a leap to apply the precepts to pharmacy.

In February of 1998, 85-year old William Bergman was found at his home unable to move and in severe pain. The daughter who found him took him to the hospital where he was admitted with a diagnosis of multiple compression fractures and possible lung cancer. The attending physician, Dr. Chin, prescribed Demerol® on an as needed basis and never changed the pain medication order for Mr. Bergman's 5-day hospital stay despite Bergman's continued complaints of severe pain. Mr. Bergman was discharged home under the care of a hospice nurse and Dr. Chin prescribed Vicodin® for pain management even though Mr. Bergman had trouble swallowing. Bergman's daughter, seeing her father in severe pain, contacted Dr. Chin to prescribe something stronger, and he prescribed a shot of Demerol® and a Duragesic® patch. Two days after arriving home, the hospice nurse noted Mr. Bergman's severe pain and tried to contact Dr. Chin, however he never returned her call. The nurse then contacted another physician who prescribed liquid morphine and two more Duragesic® patches. Mr. Bergman's pain was then alleviated, but he died the next day.

Mr. Bergman's daughter brought a negligence suit against Dr. Chin based on a theory of inadequate pain management as well as a separate cause of intentional infliction of emotional distress. A word about the intentional infliction of emotional distress. This tort is founded on the principle that if one commits an act that is so shocking that besides any physical harm that may be done, emotional trauma is sure to result also, then the actor can be held liable for the intentional infliction of emotional distress. For example, if someone shoots another person, besides being charged with attempted murder, assault with a deadly weapon, or whatever, a civil suit can be brought for the intentional infliction of emotional distress since the act of shooting someone is almost sure to bring some type of emotional trauma. That being said, let's get on with this case. At trial, the plaintiff's expert witnesses testified that the standard of care for intractable pain is round-the-clock pain management along with as needed meds for breakthrough pain. Plaintiff's experts stated that Dr. Chin's care did not meet that standard. Dr. Chin's experts testified that his care did meet appropriate standards, so it was up to the jury to decide the case. The jury found, by clear and convincing evidence, that Dr. Chin's care of Mr. Bergman did not meet standards and, in fact, amounted to elder abuse. On the intentional

inflectional of emotional distress issue, the jury could not reach a verdict, but awarded Mr. Bergman's estate \$1.5 million based on Mr. Bergman's pain and suffering.

So what does all this mean? First, keep in mind this was a lower court ruling so it does not yet have the level of a precedent-setting ruling that must be followed by other courts in California. Second however, it should make providers, pharmacists, patients, and yes, lawyers more aware of the legal and ethical implications of pain treatment. Some may feel this will make health care providers more cognizant of their duties and responsibilities associated with pain management of a patient while others feel it will open the door to an overabundance of pain medication prescribing due to the fear of being sued. Thirdly, from a Joint Commission on Accreditation of Healthcare Organizations view, pain management is a big issue right now. We must be able to show that we are taking care of a patient's pain in a proper manner so the patient doesn't suffer. In essence, the belief is that with today's medications, no one should have to be in pain. Lastly, from a pharmacy standpoint, I think this case *may* represent a departure from the time-honored principle that it's my right to refuse to fill any prescription I want to. My reasoning is this. It may require us to show cause for refusing to fill a prescription. Instead of just not wanting to fill it because of, say, the large quantity of controlled substance written for, we may need to have a good reason why we are unwilling to fill it such as no DEA number, an absolute contraindication with the patient's current drug profile, or the like. If we don't have a good reason and the patient experiences pain and suffering because drug treatment was delayed, I believe we are setting ourselves up to be included in any future lawsuit the patient may bring for negligence/pain and suffering. It will be interesting to see how this develops in the courts.

In closing I leave you with this. When you get prescriptions for controlled substances, especially for narcotic analgesics in large quantities, don't immediately assume they are not legitimate or the patient is trying to take advantage of you. There are many people who need chronic pain management and with pain being such a subjective affliction, many of them will need potent analgesics. Also, as this case points out, doctors may write for more narcotic analgesics to ensure a patient's pain is controlled rather than run the risk of being sued down the road. Yes, we need to exercise proper care regarding the safeguarding and proper dispensing of controlled substances, but we should not be so miserly that a patient suffers because of our overzealous attitude toward these medications. That wraps it up until next time. As always, practice safely and have fun.