The “other” informed consent

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Chiropractors have received a lot of information concerning the matter of “informed consent”. In some jurisdictions, as in the case of Ontario, chiropractors are legislatively required to obtain informed consent from a patient prior to providing treatment. In all common law jurisdictions, provincial and state, the obligation has been imposed upon health care practitioners, by courts of competent jurisdiction, to obtain informed consent. The matter of the obligation to obtain informed consent has been well settled. However, there may well be another area of informed consent that is just as important but has not yet been fully acknowledged by health care practitioners.

Who a chiropractor is, and what he or she does may not be, nor may ever be, a settled issue among the profession or the public? One chiropractor may only use his or her hands, while another chiropractor may make use of modalities. One chiropractor might make use of acupuncture while another practitioner may use an activator. In addition, a chiropractor may practice alone or in a group practice with other licensed health practitioners, i.e. massage therapists, kinesiologists, naturopaths, homeopaths, etc. There are a number of variations to the type of practice which may be conducted by a chiropractor and in what environment it might be carried on. The initial limitation relating to practice may simply be the legislative authority for what type of care might be provided by the chiropractor and under what conditions, as in the case of British Columbia which restricts dual licensure by a chiropractor.

There may not be a legislative authority restricting the chiropractor from providing, as in the case in Ontario, care which is in the “public domain”. However, there may well be conditions under which “care” which is part of the public domain may be provided to a patient. From the perspective of the patient attending at a chiropractor’s office, what is expected? It is surely no different than what might be expected from attending at any other professional

office, whether it be a health care provider, accountant, lawyer or architect, that is to say, that the professional will be providing such care as is legislatively authorized within the particular jurisdiction. After all, the sign on the door may well indicate "chiropractic office". In such a case, the patient should expect to see and be treated by a chiropractor. But what if the sign indicates: "Health care office" or "Health Clinic". What should the patient expect? It is trite to indicate that this is not a case of "let the buyer beware".

It might be suggested that it is incumbent upon a practitioner to fully inform the patient of the services which will be provided by the chiropractor directly and by any other person who might be associated with the chiropractor within the same office in conjunction with treatment provided by the chiropractor. The questions are really quite simple: As a patient, am I not able to assume that the care provided to me by the chiropractor is authorized by law? Am I not able to assume that any care provided to me by the chiropractor which is not usual and customary will be explained to me in order that I might be made aware of what qualifications the practitioner has with respect to such treatment?

In the ordinary sense of the term "informed consent" the consent applies to the treatment being provided by the doctor based upon the risks and alternative treatments that may be available. While there may or may not be substantial risks associated with such treatments or techniques as "acupuncture, and the use of an activator", and radical alternative treatments such as "ear candling, or radionics" such treatments exceed the usual and customary practice of a chiropractor. The issue then becomes a matter which may be dealt with by the licensing board in terms of disciplinary action and/or in the case of an Ontario chiropractor the Chiropractic Review Committee if the practice of the practitioner has been misrepresented vis a vis a patient.

Even if the treatments being provided by the chiropractor are taught at an accredited chiropractic college, such education is not in and of itself enough to ensure that a patient has been fully informed as to the legislative authority, education, training and expertise of the chiropractor. Is the training a core subject or provided in a cursory fashion? It may well be that a patient is expected to know that a chiropractor is a primary health care practitioner; that he or she has met the requirements set out in the legislation governing chiropractors; and that he or she will perform certain examinations and request certain health care information. This is equivalent to a matter of judicial notice – i.e. ignorance of the law is not an excuse. However, as indicated previously, when a patient attends at a chiropractor's office, it is not a matter of "let the buyer beware".

In addition, while there are issues involving peripheral care within a chiropractic practice as they relate to professional conduct and academic matters, there is also a concern relating to matters of professional negligence and the defence of chiropractors. What constitutes the professional practice of a chiropractor? These are matters for the regulatory bodies to establish and, in addition, we are seeing the courts starting to show an interest in this area. This will impact chiropractic practice and may well change the way a chiropractor may want to practice or even be allowed to practice. The Canadian Chiropractic Protective Association (CCPA) will continue to protect chiropractors practising what is legal and within their scope of practice. The problem for the CCPA or for any insurer occurs when the practitioner drifts or leaps into new areas and treatments or makes statements and claims which are impossible to support. The practitioner then expects the CCPA to rescue them from their problems despite the fact that they are operating outside of the information they were taught in their chiropractic education. The sad reality is that the CCPA defends a practitioner to the best of its ability but in these situations there is not much it can do but clean up the mess the doctor will have made when he or she hits the ground. These days you can count on a crew of lawyers to be ready for you with their shovels.

Many of the CCPA members ask the question – why should the chiropractic profession as a whole be responsible for chiropractic care which is not customarily part of a chiropractic practice? As stated, the CCPA covers a practitioner for what is legal and permitted by regulation. It is not for the CCPA to endorse other procedures. However this is an issue that will not easily go away and the profession will have to come to a decision as to what it wants in this regard.

It should be noted that with respect to acupuncture, there is a specific rider offered by CCPA which provides coverage for chiropractors providing acupuncture care in their office.

It can be just as distressing to a chiropractor involved in a dispute with a patient when an educational institution is called upon by authorities, whether this involves the criminal courts, civil courts or licensing boards to provide clarification as to what is taught at chiropractic colleges. Inevitably, the request for attendance at the hearings arises because of a claim that a practitioner is practising a technique or in a manner which is considered to be beyond what constitutes the customary and usual practice of chiropractic. There have been situations when the President of the Canadian Memorial Chiropractic College has been either requested or subpoenaed to attend at a hearing to explain within the context of the education of chiropractors whether a particular practitioner is practising chiropractic using methods taught at an accredited chiropractic college.

While the education of a chiropractor continues throughout his or her professional career, such continuing education should be exercised with care having regard to what use such education will play within the practitioner's office. The chiropractic profession has, for years, argued that a medical doctor taking a weekend course in manipulation cannot be considered to have the same expertise as a chiropractor. Why should the standard be any different for chiropractors? There must be recognized criteria for adopting a new technique or method of practice within a practitioner's office. Has the technique been tested? Has research been conducted on the technique? Are there circumstances in which the technique is contraindicated? Is the technique rated as experimental by the licensing board? If this is the case, the chiropractor may be bound by regulation to inform the patient of such.

Should circumstances arise when a doctor's method of practice comes under scrutiny, part of the investigation involves whether the techniques used by the chiropractor have been taught at chiropractic college. This is not a guideline set by the profession. It has long been established by the courts.

As indicated, the patient should be advised of any issue which is not otherwise usual and customary in a chiropractor's office. This is not merely a matter of choice to the patient but can be the subject matter of a professional complaint if the patient feels that he or she attended at the doctor's office for chiropractic care and was mislead into believing that a procedure is part of a chiropractor's usual and customary practice. It is not enough that a chiropractor provided care which caused no injury, the test may well be "would a reasonable patient have reasonably understood what treatment the chiropractor was to provide to the patient, and the chiropractor's education, training and authority for providing the care". The more extreme the procedure is from usual and customary practice, the more information that must be given to the patient.

Health care at the end of the 20th Century was entrenched solidly in the principal that a patient is in control of the services which are to be provided by a health care practitioner. Patients have become integral players within the health care system. It is a foregone conclusion that the 21st Century will be a time in which patients become even better informed as to the options available to them. This is even more evident when a survey in the United States, indicates that 42% of the population use complementary and alternative medical therapies. An estimated $27 billion, a majority of which was paid directly by the patient, was spent on more than 600 million office visits for such therapies in 1997.[1]

Patients are, and will continue to be entitled to receive disclosure concerning any care being provided to them. The chiropractor will continue to be obligated to ensure that the patient knows what is usual and customary and what falls outside of the boundaries of the norm. The issue becomes from a professional, civil and criminal basis, how do you deal with or defend reasonable people doing unreasonable things? The issue becomes important in dealing with matters of civil damages, professional conduct, integrity and professionalism. It is all a matter of the "other informed consent".

Reference

1 Eisenberg et al. Trends in alternative medicine use in the United States, 1900–1997, results of a follow-up national survey. JAMA 1998; 280:1569-1575.