Perceived Legal Implications of the Decision in the Schneider v. Revici Case

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The evolution of individual human rights can be seen from 1215 when Magna Carta was signed; to 1789 when the Bastille fell; to 1787 when the U.S. Constitution was signed. In this history society has evolved to afford greater and greater protection for individual human rights. However, the right of a patient to determine his choice of health care and access to non-conventional health care has yet to be firmly articulated. In light of that, *Schneider* v. *Revici* is interesting. Possibly April 30, 1987, the date of the decision on this case, may be added to the list of historic dates of individual human rights.

One would think that because of all the other human rights campaigns fought throughout history in various countries of the world, that the right to freedom of choice in health care would be automatic and without question and/or denial. Perhaps in other countries of the world that may be true, but in the United States of America the unfortunate situation exists that individuals who wish to avail themselves of health care modalities and protocols other than those sanctioned by the American Medical Association are subject to the wrath of the law, legal problems and ultimately litigation, if one wishes to exercise the right of self-determination in health care.

However, the courts have deferred to the values and assumptions of conventional medicine and have not reinforced patients' superior rights to determine treatment of their choice or to have access to health care of their choice. In light of that, *Schneider v. Revici* is significant.

The facts in this case are that Edith Schneider was a breast cancer victim who consulted five conventional physicians all of whom advised her to have her breast amputated and be treated with conventional chemotherapy and radiation. She then having rejected that advice and aware of some of the limitations of breast cancer treatment, the issues involved and the difficulties involved in breast cancer, sought out Dr. Revici. Dr. Revici advised her to have a lumpectomy and that he would treat her with his non-toxic chemotherapy. She underwent his treatments and was in his care for nearly fourteen months. Her cancer did not subside and she ultimately was prevailed upon by family members to return to conventional care which she did; had her breasts amputated and was treated with a very harsh course of chemotherapy and radiation. She then turned around and sued Dr. Revici. The unique thing about the case was that it was not simply malpractice but also fraud. Mrs. Schneider's theory was that Dr. Revici's treatment was not accepted by the medical establishment; that it was fraudulent and malpractice per se. The case went to trial and the jury acquitted Dr. Revici of any claims of fraud or lack of informed consent because it was clear that she made a knowing choice; that she had rejected conventional therapy; and that she was informed that Dr. Revici's therapy was not conventional and that she was not defrauded by him. However, the jury was directed by the judge to find malpractice if Dr. Revici's therapy was not accepted by the medical community. Dr. Revici's lawyers argued no, that in contrast to that, the jury should be instructed that Mrs. Schneider assumed the risk of non-conventional treatment precisely because she was informed and made a choice. These two issues are in conflict: 1) Dr. Revici's obligation to practice medicine established by a medicine endorsed by the establishment versus 2) the patient's right to seek out a doctor who doesn't practice medicine endorsed by the establishment. That issue was the focus of the decision before the Court of Appeals. The Court of Appeals ruled that a patient has a right to

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seek out non-conventional treatment and corresponding with that right then, is the responsibility that the patient assumes the risk in exercising that right.

Mr. Samuel Abady, Esq., attorney for Dr. Revici, in a telephone conversation with me said, "... are you aware that Victor Herbert, M.D., J.D., testified and that the nature of his testimony was simply calumny; that he called Dr. Revici 'one of the cruelest killers in the United States'. He also described his [Dr. Revici's treatment] as snake oil, and he really engaged in character assassination; and that the court of appeals found that this was absolutely outrageous behaviour. The court of appeals said the judge should never have countenanced this kind of testimony."

According to the information which I have been able to gather, the arguments presented by Dr. Revici's attorneys were based on some important historical points of view and challenged that *what is considered today as quackery is tomorrow's orthodox medicine.* The classic example which they had used was the case of Dr. Ignaz Semmelweiss.

In the argument presented by Dr. Revici's attorneys, they put forth that Dr. Ignaz Semmelweiss challenged the establishment and declared that the doctors should wash their hands before surgery. He was driven to suicide because at the time if someone washed their hands and then performed surgery and there was a problem, one could get the doctors to testify that Semmelweiss committed malpractice; whereas if today someone performs surgery and causes septicemia or infection because they failed to create a sterile field and had not washed their hands, on the basis of Semmelweiss you could sue for malpractice. So yesterday's quackery is today's orthodox medicine.

Dr. Revici's attorneys further had argued that since medicine had not established an understanding of the true cause of cancer or an effective cure for cancer, the law could not reify orthodox medicine's cancer treatments as if they were inviable and, therefore, that would be legally improper. They further argued that a doctor's freedom to practice is derived from a patient's rights to treatment. They also argued that it is the patient who decides what kind of treatment the patient seeks and desires and that *the physician and modality is the choice of the patient.*

The U.S. Court of Appeals handed down a decision which has set a precedent for non-conventional treatments and freedom of choice. The court stated:

> "In the case before us, appelles contend it is against public policy for a patient to expressly assume the risk of medical malpractice and thereby dissolve the physician's duty to treat a patient according to medical community standards . . .we see no reason why a patient should not be allowed to make an informed decision to go outside currently approved medical methods in search of an unconventional treatment. While a patient should be encouraged to exercise care for his own safety, we believe that an informed decision to avoid surgery and conventional chemotherapy is within the patient's right 'to determine what shall be done with his own body'."

With those words, *the Court affirmed the patient's rights as having priority over and superior to medical establishment's rights,* and that a patient can obtain non-conventional or unorthodox treatment for cancer in this case which did not include conventional surgery and chemotherapy. This then was a dramatic and resounding decision, in my opinion, in favour of several issues:

> A patient's right to choose treatment for health care regardless of the protocol, i.e., conventional or non-conventional; the ability of the physician to offer non-conventional treatments as a protocol with the patient knowing that such a treatment is not the standard orthodox procedure; and, acknowledges the position in a legal forum for *non-conventional treatment and/or therapies to be addressed as non-fraudulent practices.* The last item being the most important, in my view.

Previously the courts have established the individual's right to determination in health care.

> *Andrews* v. *Ballard* was a classic decision in which the alternate health care modality of acupuncture was the subject of legal action with the individual's right to choice of practitioner. In that case, the court ruled that an individual who was trained in

traditional acupuncture was qualified to render the treatment. In that case Judge McDonald stated:

> "And it is the individual making the decision, and no one else, who if he or she survives, must live with the result of that decision. One's health is a uniquely personal possession. The decision of how to treat that possession is of no less personal nature."

The uniqueness about the decision rendered in the *Schneider v. Revici* case, in my opinion, is the ability of a non-traditional or complementary health care treatment to withstand the rigors of the law and so to speak, land on all four feet. The judges did not refer to the non-traditional cancer therapy treatment as quackery, which is the usual tendency for medical orthodox circles and those in opposition to non-conventional treatments to do. This is a highly significant indicator, in my opinion. This speaks to me from a perspective that the courts are now not only entertaining, but listening very carefully to the issues surrounding health care freedoms and choices since previous case law has decided the individual's right to privacy and to take care of their body as they see fit. The uniqueness of the *Schneider* v. *Revici* case for me is that a precedent has been set in American case law which could have health care/legal ramifications. This case should become the legal keystone around which complementary health care can test the legal waters in great depths. I believe the *Schneider v. Revici* case has set precedents, not only for patient, physician and health care, but for ethics in medicine and law also. I see this case challenging to both plaintiff and defendant arguments. The debating skills of attorneys will be greatly taxed if they choose this case as their citation to illustrate a point of law, in my opinion. I feel this case has a uniqueness about it which can help the complementary/alternate health care treatment and modality protocols in a fashion which no case law heretofore has been able to do.

There has been no Constitutional decision saying that the right of privacy protects an individual at seeking out non-conventional care. That is precisely why *Schneider v. Revici is* an important decision. Although it is not on a Constitutional ground, it at least foreshadows the legal basis under the 1914 decision of *Schloendorf v. New York Hospital* and why perhaps it ought to have Constitutional dimensions.

The United States Court of Appeals for the Tenth Circuit in *Rutherford v. the United States* found the right of privacy protecting individual's choice of non-conventional care; the Supreme Court reversed, but not addressing that issue. The California Court of Appeals in *People* v. *Privitera,* which was a criminal case, the Court of Appeals reversed. Then the Court of Appeals found that the right of privacy protected the patient's rights to determine health care, and the California Supreme Court reversed, and said it didn't. *Schneider* v. *Revici* stands in contrast to Privitera and Rutherford. In both Privitera and Rutherford the mid-level courts of appeals, one a state court and one a federal court, found privacy protected in a cancer patient's right to choice and the Supreme Court of California and the Supreme Court of the United States said no, it didn't. *Schneider v. Revici* says it does!, but in a different context, as a matter of law generally and not in a Constitutional theory. (And that's why our coalition (CANAH) is seeking a Health Care Rights Amendment to the U.S. Constitution.)

For those of you interested in the legal citation for *Schneider* v. *Revici,* it is *817 F.2d 987 (2nd Cir. 1987).* The attorneys for Dr. Emanuel Revici are Samuel Abady and Rick Jaffe of the New York law firm of Abady and Jaffe.

I should like to acknowledge and to thank Mr. Samuel Abady for his telephone interview, legal/technical help to me in writing this article and for the splendid legal job he did in arguing this case.

In this article I have presented my personal opinions and viewpoints from my experience as a Legislative Advocate working for the legalization of alternate health care in the United States of America and as a lobbyist in Washington, D.C. working for that cause in representing the Coalition for Alternative in Nutrition and Health Care, Inc. (CANAH).

See also Book Review p. 33 The Great Medical Monopoly Wars.