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This article traces the development of a patient’s right to medical self-determination. It demonstrates that although this right has been boldly proclaimed in court rhetoric, it has been carefully constrained in court decisionmaking. In delineating the duty on physicians disclose information essential for their patients to make their own decisions, courts have responded more to physician resistance than to patient need. To date, the tort doctrine of informed consent has proven inadequate to achieve true patient autonomy. The article explains why managed care constraints on insurance-covered treatment options and on physician disclosure of noncovered options warrants a reconsideration and expansion of the disclosure duty. Guiding principles are proposed to assure that patients are informed of medically appropriate treatment options even if their insurance will not pay for them.

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In the last decade, “evidence-based medicine” (EBM) has become all the rage. Just as the Supreme Court instructed the federal judiciary to take a more critical approach to the assessment of expert testimony, proponents of EBM call on health care professionals to apply the best available evidence when making treatment decisions. Instead of relying on what they may remember from medical school or have learned from their personal experiences (or from drug company sales-persons), EBM insists that physicians consult the biomedical literature for

the latest clinical research findings. The fact that the medical profession views such an idea as novel—even radical—offers a startling picture of traditional (“opinion-based”) medical practice, one quite different from that imagined by courts and regulatory agencies when they blithely assume that physicians can effectively assimilate tremendous quantities of complex information. EBM may, however, embody some naïve assumptions about the character of the available scientific evidence, failing to appreciate shortcomings such as the extent to which conflicts of interest have affected the biomedical literature. Nevertheless, the debate surrounding evidence-based medicine offers important insights for various decisionmakers when they address health care quality issues. In turn, legal institutions may help to facilitate EBM by addressing conflicts of interest in biomedical research and by encouraging physicians to rely on rigorous research rather than largely anecdotal information when treating their patients.

Notes

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