SURVEY OF RECENT DEVELOPMENTS IN NEW JERSEY LAW

In this section, the Seton Hall Law Review *presents synopses of recent New Jersey cases of interest to practitioners. In so doing, we hope to assist the legal community in keeping abreast of some of the more interesting changes in significant areas of practice.*

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On October 10, 1985, during negotiations between the Passaic Township Board of Education (Board) and the Passaic Township Education Association (Association) regarding terms of employment, the Association went on strike in order to strengthen its bargaining position. 222 N.J. Super. at 299-300, 536 A.2d at 1276. That same day, acting on the Board's complaint, the New Jersey Superior Court, Chancery Division, issued a temporary restraining order against any form of work stoppage by the Association. *Id.* at 300, 536 A.2d at 1276-77. The court ordered the employees to return to work the next day. *Id.*, 536 A.2d at 1277. Association members defied the order by failing to report to work on the following two work days.

Although the Board was able to keep schools open by the use of substitute personnel, it applied for a second restraining order on October 15, 1985. In the second order, the trial judge prohibited the continuation of the Association's strike, and ordered that employees who failed to return to work on October 16, 1985, would be fined five-hundred dollars, plus two days gross pay for every work day absence thereafter. Again, the employees refused to comply with the court order. On October 17, 1985, the Association and the Board reached a contract agreement, and employees returned to work the following Monday. *Id.* at 300 01, 536 A.2d at 1277.

In January 1986, the lower court rejected the Association's request to be relieved from paying the monetary sanctions, and instructed the Board to submit a list of itemized expenditures relating to the work stoppage and the resulting litigation. *Id.* at 301, 536 A.2d at 1277. The court subsequently entered a final order imposing monetary sanctions totaling $54,051.29, which reflected both the Board's strike-related expenses and the per diem fines against individual employees. *Id.* The Association appealed the trial court's decision. *Id.* The appellate division held that public school employees do not have the right to strike, but the imposition of fines without a formal contempt proceeding violated the New Jersey Court Rules. *Id.* at 303, 306, 536 A.2d 1278, 1280.

Judge O'Brien, writing for the court, rejected the Association's assertion that public employees have the right to strike, unless there is a clear showing that a work stoppage would create a grave and immediate threat to the public welfare. *Id.* at 301-303, 536 A.2d at 1277-78. The judge noted that the New Jersey Supreme Court had previously considered this issue. *Id.* at 302, 536 A.2d at 1277 (citing *Union Beach Bd. of Educ. v. New Jersey Educ. Ass'n*, 53 N.J. 29, 247 A.2d 867 (1968)). He stated that the supreme court, while observing that the New Jersey Constitution gives public workers the right to organize, and that nothing prohibits the state legislature from permitting public workers to strike, had held that the Legislature's enactment of the New Jersey Employer-Employee Relations Act, N.J. STAT. ANN. § 34:13A-1, did not reflect a legislative intent to permit strikes by public employees. *Id.*, 536 A.2d at 1277-78 (citing *Union Beach Bd. of Educ. v. New Jersey Educ. Ass'n*, 53 N.J. 29, 46, 48, 247 A.2d 867, 876, 877 (1968)).

Following the *Union Beach* rationale, the appellate division concluded that recent state laws mandating compulsory arbitration in contract disputes involving policemen and firemen, did not reflect a legislative intent to permit public teachers to strike. *Id.* at 302-03, 536 A.2d at 1278. Moreover, Judge O'Brien asserted that case law from foreign jurisdictions allowing public workers to strike in limited circumstances did not compel the appellate division to change New Jersey's law. *Id.* The court asserted that such a radical change could be accomplished only by the state legislature or the supreme court. *Id.* Accordingly, the court determined that the restraining orders issued by the trial court were proper since public workers do not have a right to strike. *Id.*

The court next considered the sanctions imposed for violating the restraining orders. *Id.* at 304, 536 A.2d at 1279. The court rejected the assertion that the strike was legal because strikers had offered to make up lost time and because the Board had successfully obtained substitute teachers. *Id.* at 303-04, 536 A.2d at 1278. Judge O'Brien asserted that the teachers had violated court orders and therefore could be held in contempt pursuant to New Jersey Court Rule 1:10-2. *Id.* at 304, 536 A.2d at 1278 (citing N.J. CT. R. 1:10-2).

Judge O'Brien noted that prosecution for contempt under New Jersey Court Rule 1:10-2 must conform to specifically enumerated procedures. *Id.* The court observed, however, that the

proceedings which resulted in the trial court's final judgment were not conducted in accordance with the procedural requirements of Rule 1:10-2 and Rule 1:10-4. *Id.* Instead, the judge noted, the lower court acted under Rule 1:10-5, which only permitted the court to order reimbursement of the Board's strike-related expenses. *Id.* The court recognized that the trial court was not precluded by statute from imposing the large fines. *Id.* at 305, 536 A.2d at 1279. The appellate court stated that the trial court was estopped, however, from imposing fines in the case at bar, because of the procedural deficiencies. *Id.* The fines were vacated by the appellate division and the matter remanded for a recalculation of Board expenses. *Id.* at 306, 536 A.2d at 1280.

The appellate court in *Passaic Township Board of Education* properly exercised judicial restraint in respecting the New Jersey common law that public employees, including teachers, may not strike. The New Jersey Constitution grants public employees the right to organize, and teachers' unions are a product of that right. These bargaining units may seek a change in the current law through the legislative process, or patiently wait for a favorable ruling from the state supreme court. Until then, taxpayers should not be expected to bear the financial burden of a work stoppage. However, by vacating the fines instead of remanding for properly conducted contempt proceedings, the court threatened the integrity of court orders. Moreover, it established poor precedent in that a court's procedural error in a contempt proceeding may bar it from remedying such errors and exacting the appropriate penalties in subsequent proceedings.

Christopher Leporati

CRIMINAL LAW—RIGHT TO GRAND JURY INDICTMENT—GRAND JURORS ARE OBLIGATED TO INFORM THEMSELVES OF ALL RELEVANT EVIDENCE TO LEGITIMATELY VOTE ON PROPOSED INDICTMENT—*State v. Ciba-Geigy Corp.*, 222 N.J. Super. 343, 536 A.2d 1299 (App. Div.), *certif. granted*, 111 N.J. 574, 546 A.2d 502 (1988).

On October 24, 1985, a thirty-five count indictment was returned against various defendants in connection with an allegedly unlawful disposal of hazardous wastes. 222 N.J. Super. at 346, 536 A.2d at 1300. The indictment followed six months of testimony regarding the defendants' activities presented to twenty-three grand jurors. *Id.* at 347, 536 A.2d at 1300. Ultimately, however, only seventeen grand jurors voted, as six jurors had been "absent" the final few months of testimony. *Id.* 536 A.2d at 1301.

During the indictment process, the grand jury had been repeatedly informed that they would vote on the matter on October 24, 1985. The Assistant Attorney General had explained that any juror who missed a session must become qualified to vote by reviewing the transcripts of the days missed, as well as transcripts of supplemental testimony which was presented to a substitute grand jury. *Id.* at 347-48, 536 A.2d at 1301. To this end, transcripts of the sessions were distributed for the jurors' review the morning of October 24, 1985. *Id.* at 348, 536 A.2d at 1301. Although some jurors had to review several thousand pages of transcript, within a few hours, the foreman informed the court that the reading had been completed and that the jury was prepared to vote. *Id.* at 348, 355 n.3, 536 A.2d at 1301, 1305 n.3. Following its "deliberation," the grand jury returned the entire thirty-five count indictment. *Id.* at 348, 536 A.2d at 1301.

Before trial, the defendants successfully motioned to dismiss the indictment primarily because fewer than the requisite twelve jurors had been sufficiently informed of the evidence on which the indictment was based. *Id.* at 346, 536 A.2d at 1300. The defense asserted that the voting jurors had not adequately reviewed the transcripts of the sessions they had missed. *Id.* at 349, 536 A.2d at 1301-02. The trial court determined that due to the limited time allotted for the jurors to review the transcripts, as well as the Assistant Attorney General's ambiguous instructions with respect to the jurors' responsibilities in that regard, there were not twelve jurors who were qualified to vote on the indictment.

Id. at 348-50, 536 A.2d at 1301-02. Thus, the judge dismissed the entire indictment. *Id.* at 350, 536 A.2d at 1302.

On appeal, the state urged that the dismissal was improper because it had complied with the supreme court's guidelines for redressing instances of absenteeism by grand jurors. *Id.* (citing *State v. Del Fino*, 100 N.J. 154, 495 A.2d 60 (1985)). The state maintained that the grand jurors, who were "experts" in the matter, were capable of reviewing the material in a short period of time by skimming over unnecessary or cumulative testimony. *Id.* at 352, 536 A.2d at 1303. Moreover, the state asserted that further inquiry into the matter was improperly delving into the mental processes of the jurors. *Id.* (citing N.J. R. EVID. 41).

The appellate division rejected the state's arguments as unpersuasive and illogical. *Id.* at 352, 536 A.2d at 1303. Writing for the court, Judge Scalera initially noted that the state constitutional guarantee of indictment by at least twelve grand jurors is an essential protection afforded citizens against wrongful or oppressive prosecutorial action. *Id.* at 351, 536 A.2d at 1303 (citing N.J. CONST. art I, para. 8). He asserted that the grand jurors "must be 'informed' of all the evidence before each may legitimately vote." *Id.* at 353-54, 536 A.2d at 1304 (citing *State v. Del Fino*, 100 N.J. 154, 495 A.2d 60 (1985)). The judge posited that once an indictment has been returned by a grand jury, a rebuttable presumption of validity attaches to it. *Id.* at 351-52, 536 A.2d at 1303.

The appellate division observed that reading transcripts is a permissible method for jurors to inform themselves. *Id.* at 353-54, 536 A.2d at 1304 (quoting *State v. Del Fino*, 100 N.J. 154, 164, 495 A.2d 60, 65 (1985)). It determined that in the case at bar the presumption of validity had been rebutted because the record demonstrated that the grand jury ignored its responsibility to adequately review missed testimonial sessions. *Id.* at 354, 536 A.2d at 1304. The court asserted that the record supported "the trial court's conclusion that not every voting juror had sufficient time in which to adequately review the transcripts and exhibits even to the extent necessary to determine which to scrutinize more closely and which to skim." *Id.* at 355, 536 A.2d at 1305. It concluded that these findings did not require improper consideration of the jurors' thought processes. *Id.*

Finally, the court asserted that rebuttal of the presumption of validity was not dispositive of the matter and did not warrant dismissal of every count in the indictment. *Id.* The court posited

that the defense must still "show a nexus between the evidence that was overlooked or not properly presented and specific counts of the indictment." *Id.* As such, it remanded the matter to the trial court with instructions to evaluate the impact of the evidence that was not properly considered as it related to each count in the indictment in light of the mandates of the grand jury process. *Id.* at 356, 536 A.2d at 1305. The court observed that should the defendants fail to show such a nexus to the individual counts in the indictment, those counts should not be dismissed. *Id.* at 355, 536 A.2d at 1305.

The *Ciba-Geigy* opinion clarifies the blurry line between the need for procedural flexibility at the indictment stage of the criminal process and the need to meet the constitutional requirement of charges founded upon probable cause. Unfortunately, the opinion failed to articulate bright-line standards to guide courts faced with attacks upon indictments in cases which are not so clear. The court failed to indicate how much time should be allocated for the grand jury to sufficiently inform itself of missed testimonial sessions, or provide a means of ensuring that the grand jury has faithfully reviewed the transcripts provided. Nonetheless, the opinion stands as a warning to prosecutors that mere lip service to the requirement of an "informed grand jury" will not suffice. Grand jurors must be *actually* informed and indictments will be dismissed where the prosecutor, or jurors themselves, fail to fulfill their constitutional obligations.

Sarah McCandless

EVIDENCE—NEWSPERSON'S PRIVILEGE—NEWSPERSON CANNOT BE COMPELLED TO TESTIFY ABOUT INFORMATION DISCLOSED IN COURSE OF HIS PROFESSIONAL ACTIVITIES ON THEORY OF WAIVER—In re *Schuman*, 114 N.J. 14, 552 A.2d 602 (1989).

Gary J. Mayron was arrested in 1986 for the kidnapping and murder of Susan Brennan. 114 N.J. at 16, 552 A.2d at 603. The *New Jersey Herald* published two articles authored by Evan Schuman containing admissions by Mayron regarding the circumstances of the crime and the method of its commission. *Id.* at 16-17, 552 A.2d at 603. The first article stated that in an interview,

Mayron had admitted killing Brennan. A second article, published two days later, contained incriminating statements by Mayron as to why he kidnapped and murdered Brennan. *Id.* at 17, 552 A.2d at 603.

The state subpoenaed Schuman to testify before a grand jury and at a pretrial suppression hearing on the articles. *Id.* at 16 n.1, 552 A.2d 603 n.1. The journalist, however, asserted the newsperson's privilege, and the state withdrew the subpoenas without prejudice. Thereafter, the state subpoenaed Schuman to testify at trial. *Id.* at 16, 552 A.2d at 603. Schuman sought to quash the subpoena, again asserting the newsperson's privilege. *Id.* at 17, 552 A.2d at 603-04.

The trial judge, relying on *Maressa v. New Jersey Monthly*, 89 N.J. 176, 187, 445 A.2d 376, 382 (1982), *cert. denied*, 549 U.S. 907 (1982), held that the New Jersey Shield Law provides for an absolute privilege against disclosure. *Schuman*, 114 N.J. at 19, 552 A.2d at 604 (citing N.J. STAT. ANN. § 2A:84A-21 (West 1976 & Supp. 1988)). The court, while noting it was not sure that the information was confidential, nevertheless decided "to err on the side of caution," and quashed the subpoena. *Id.*, 552 A.2d at 604-05. The appellate division granted leave to appeal *nunc pro tunc*, and reversed the trial judge's determination, holding that a newsperson may be subpoenaed and questioned about information, its source and the circumstances under which it was obtained when such information already has been disclosed. *Id.*, 552 A.2d at 605. The New Jersey Supreme Court granted leave to appeal. *Id.* at 20, 552 A.2d at 605.

The supreme court reversed the appellate division in a unanimous opinion authored by Justice Garibaldi. *Id.* at 32, 552 A.2d at 611. On the theory of waiver, the court held that a newsperson cannot be forced to testify about information disclosed in the course of his professional activities, including his source and the circumstances under which the information was obtained. *Id.* at 20, 552 A.2d at 605.

The supreme court noted that the Shield Law was enacted in 1933 to protect the confidential sources of media when their information was published. *Id.* at 20-21, 552 A.2d at 605-06. The court observed that the Shield Law was amended in 1960 to expand the scope of the protection of media sources. *Id.* at 21, 552 at 606. The court stated that the information itself and sources of unpublished information, however, remained unprotected. *Id.* Additionally, the court recognized that the 1960 amendments

subjected protected sources to newly enacted waiver provisions. *Id.* It added that the Shield Law was amended again in 1977, in response to judicial interpretations, to protect all sources and all information obtained in the newsgathering process, without regard to dissemination. *Id.* at 22, 522 at 606. The Shield Law was amended a third time in 1979, the justice observed, to incorporate New Jersey case law allowing criminal defendants to obtain exculpatory evidence from newspersons. *Id.* at 23-24, 552 A.2d at 607 (citing *In re Farber*, 78 N.J. 259, 394 A.2d 330 (1978), *cert. denied*, 439 U.S. 997 (1978)). Justice Garibaldi reasoned that the foregoing continuous legislative efforts to protect the media from the compulsory process, even where the information has been disclosed in an article, dictated that Schuman not be forced to testify. *Id.* at 20-21, 552 A.2d at 605.

The court stressed that the New Jersey Legislature has consistently acted to prevent the state from impeding media activities. *Id.* at 24, 552 A.2d at 607. It noted that unlike its federal counterpart, the New Jersey Wiretap Act requires the state to demonstrate "special need" to tap a newsperson's telephone. *Id.* Moreover, it recognized that the Legislature has narrowed the circumstances under which the police can search and seize data obtained in the process of newsgathering activities. *Id.*

The supreme court rejected the state's assertion that Rule 27 of the New Jersey Rules of Evidence (Rule) 27, establishing a newspersons' privilege "to refuse to disclose . . . any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated," and Rule 37, providing that a privileged disclosure is not a wavier of the privilege, were in conflict, and therefore should be interpreted to require that the newsperson's privilege was waived when information was disseminated. The court asserted that both the plain language and legislative history of Rule 27 were not in conflict and expressly required that Schuman not be forced to testify. *Id.* at 25-26, 552 A.2d at 607-08. The court stated that assuming that these rules of evidence were inconsistent, Rule 27(b) would supersede the waiver provisions of Rule 37 because it was enacted after Rule 37. *Id.*, 552 A.2d at 608. The court further noted that the state's interpretation was flawed because it rendered the phrase "whether or not it is disseminated" in Rule 27 meaningless and because Rule 37 only applies to criminal defendants. *Id.* at 26-27, 552 A.2d at 608-09. Therefore, the court held that although a newsperson would waive the privilege pursuant to

Rule 37 by disclosing protected information to people outside the scope of his professional activities, it could not be waived by dissemination in his professional activities. *Id.*

The court concluded that policy considerations also favored quashing the subpoena. *Id.* at 28, 552 A.2d at 609. It noted that the information the state sought was available from other sources. *Id.* at 28-29, 552 A.2d at 609. It also determined that the public perception that the media is an "arm of the prosecution" might inhibit the flow of information to the public as potential sources would be hesitant to provide information if confidentiality could not be guaranteed, newspersons might destroy sensitive files, and reporters would fear that disclosure of information might constitute a waiver. *Id.* at 29, 552 at 610. Likewise, the court asserted that embroiling a small newspaper in protracted litigation over this issue could hinder its newsgathering activities. *Id.* The court stressed that these concerns were no less persuasive when the information is not confidential because it has already been disseminated. *Id.* at 30-31, 552 A.2d at 610-11.

Finally, Justice Garibaldi posited that the considerations underlying the decision to compel newspersons' testimony in grand jury proceedings support the conclusion that Schuman cannot be forced to testify at Mayron's trial. *Id.* at 31, 552 A.2d at 611. Unlike the secrecy surrounding the grand jury process, a criminal trial is public. *Id.* at 31-32, 552 A.2d at 611. Moreover, the court observed that the newsperson would be subject to probing cross-examination to elicit more specific information. *Id.*

The *Schuman* decision serves to reinforce the protections of the Shield Law. While such a determination at first glance may appear to hinder prosecutorial efforts, the unrestrained flow of information is important to law enforcement, as it often provides the authorities with crucial leads in difficult cases. Moreover, as the facts of this case highlight, rarely will a newsperson be the sole source of incriminating evidence against a particular criminal defendant. Finally, a contrary judicial result would have rendered useless the protection the Legislature sought to afford the media by enacting the Shield Law.

Loryn P. Riggiola

CRIMINAL PROCEDURE—FIFTH AMENDMENT—FOR *MIRANDA* PURPOSES, DIVISION OF YOUTH AND FAMILY SERVICES CASEWORKER DEEMED LAW ENFORCEMENT OFFICER WHEN CONDUCTING CUSTODIAL INTERVIEW—*State v. Helewa*, 223 N.J. Super. 40, 537 A.2d 1328 (App. Div. 1988).

On October 8, 1985, several Old Bridge Township police arrested George Helewa for sexually assaulting his two teenage daughters. 228 N.J. Super. at 42, 537 A.2d at 1329. At the police station, where Helewa remained for several hours before being transferred to a correctional facility, he was informed of his rights and later he signed a *Miranda* warning card. Helewa did not invoke his right to counsel, nor was he questioned by the police. The next day, a caseworker from the Division of Youth and Family Services (DYFS) interviewed Helewa for over an hour at the correctional facility where he was confined, regarding the allegations of sexual assault. The DYFS worker, aware that Helewa had been read his *Miranda* rights, did not readvise him of these rights. *Id.* at 43, 537 A.2d at 1329. She did, however, tell him that his statement would be reported to the prosecutor's office. Although initially hesitant, Helewa agreed to speak to the caseworker because he claimed he had "nothing to lose."

Helewa was indicted in April 1986, for two counts of child endangerment and aggravated sexual assault. *Id.*, 537 A.2d at 1330 (citing N.J. STAT. ANN. § 2C:24-4(a) (West 1979); N.J. STAT. ANN. § 2C:14-2(a) (West 1979)). Helewa pleaded not guilty and challenged the admissibility of his statement to the DYFS worker on the grounds that he was not advised of his *Miranda* rights prior to the interview. *Id.* at 43-44, 537 A.2d at 1330. The trial court denied Helewa's motion, reasoning that the DYFS caseworker was not a law enforcement official for purposes of *Miranda*, and that the defendant was aware of his rights when he voluntarily waived them. *Id.* at 44, 537 A.2d at 1330. The appellate division granted leave to appeal and affirmed. The court held that a DYFS worker was a law enforcement agent for *Miranda* purposes, but asserted that the defendant had knowingly waived his *Miranda* rights. *Id.* at 52-53, 537 A.2d at 1334-35. The court also asserted that *Miranda* warnings need not be repeated at each custodial interview. *Id.* at 52, 537 A.2d at 1335.

Judge Michels, writing for the panel, began his analysis by observing that under certain circumstances a person is considered to be a law enforcement official for *Miranda* purposes when

conducting a custodial interview. *Id.* at 45-50, 537 A.2d at 1330-33. The judge noted that the critical inquiry is not whether the interview was conducted at the direction of law enforcement officials, but whether the custodial interview "is likely to lead to a criminal prosecution." *Id.* at 51, 537 A.2d at 1334. The court concluded that if such questioning leads to subsequent prosecution and *Miranda* warnings were not given, the state will be barred from using the defendant's statement in its case-in-chief. *See id.* at 45, 50-51, 537 A.2d at 1330, 1333-34.

The appellate division held that due to the "close working relationship" between DYFS and the prosecutor's office, a caseworker conducting a custodial interrogation must be considered a law enforcement official for *Miranda* purposes. *Id.* at 51-52, 537 A.2d at 1334. The judge noted the "close working relationship" between law enforcement agencies and DYFS in child abuse cases. *Id.* at 47-48, 537 A.2d at 1332. He also noted that "[a]lthough the DYFS caseworker's ultimate purpose in obtaining information from the alleged perpetrator is to ensure the protection and welfare of the child, the likelihood of such information being used against the perpetrator in a criminal prosecution changes the status of the 'social worker' to one of a 'law enforcement officer' in the context of *Miranda*." *Id.* at 48, 537 A.2d at 1332.

The court next addressed the necessity of repeating *Miranda* warnings at subsequent custodial interviews. *See id.* at 52-53, 537 A.2d at 1334-35. The court recognized the importance of protecting the fifth amendment rights of criminal defendants, but stated that *Miranda* requirements need only be complied with at the commencement of questioning. *Id.* at 52, 537 A.2d at 1335 (quoting *State v. Magee*, 52 N.J. 352, 374, 245 A.2d 339, 350 (1968), *cert. denied*, 393 U.S. 1097 (1969)). The court reasoned that while "the DYFS interview may constitute a different species of custodial interrogation than that conducted by a traditional law enforcement officer, . . . [it did not require] additional warnings where the police would not be under a concomitant duty." *Id.* at 52-53, 537 A.2d at 1335. Accordingly, the court determined that Helewa was properly advised of his rights and knowingly waived them. *Id.* at 52, 537 A.2d at 1334.

Judge Shebell, in a separate opinion, concurring in part and dissenting in result, agreed with the majority's conclusion that because of the relationship between law enforcement agencies and DYFS, *Miranda* warnings are required prior to a DYFS

worker's custodial interrogation if the resulting statements are to be admissible in a criminal proceeding. *Id.* at 53-54, 537 A.2d at 1335 (Shebell, J., concurring in part and dissenting in part). The judge noted, however, that the purpose of the *Miranda* doctrine is to afford a defendant "the full opportunity to exercise his rights and . . . to combat the inherently compelling pressures of custodial interrogation." *Id.* at 54, 537 A.2d at 1335-36 (citing *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)) (Shebell, J., concurring in part and dissenting in result). Therefore, Judge Shebell concluded that in order to protect an individual's fifth amendment and other related rights, the repetition of *Miranda* warnings by a DYFS worker should be required. *Id.* at 55, 537 A.2d at 1336 (Shebell, J., concurring in part and dissenting in result).

The *Helewa* court acknowledged that social workers are regarded as law enforcement officers when conducting custodial interviews and as such they trigger the mandatory safeguards of *Miranda*. The court, while recognizing the critical need to protect the constitutional rights of defendants, failed to require that additional *Miranda* warnings be given prior to such interviews. This decision indicates the court's unwillingness to impose seemingly unnecessary administrative burdens on state agents, so long as defendants have been previously advised of their rights. The court's reluctance in this regard may result in effectively eliminating the protection afforded by *Miranda* to those defendants who are unaware of the possible repercussions of their statements to state agents in subsequent interrogations.

Susan Wortmann

TORTS—ASSAULT AND BATTERY—JURY INSTRUCTION ON ASSAULT AND BATTERY IN MEDICAL MALPRACTICE CASE IS ONLY APPROPRIATE IF PHYSICIAN PERFORMS OPERATION SIGNIFICANTLY DIFFERENT FROM THAT AUTHORIZED BY THE PATIENT—*Samoilov v. Raz*, 222 N.J. Super. 108, 536 A.2d 275 (App. Div. 1987).

In 1983, Dr. Sharir Raz surgically removed a benign tumor located beneath the left ear of Sergey Samoilov. *See* 222 N.J. Super. at 110-12, 536 A.2d at 276-77. The left side of Samoilov's face is now paralyzed as a result of facial nerve damage sustained during the surgery. *Id.* at 112, 536 A.2d at 277. Samoilov brought a malpractice suit against Raz to recover damages. *Id.* at 109, 536 A.2d at 275.

At trial, Samoilov and Raz offered conflicting testimony concerning their discussions regarding the possible risks attendant to the surgery. *Id.* at 110, 536 A.2d at 276. Samoilov claimed that Raz had told him serious damage to the facial nerve was not likely if the tumor was benign. *See id.* Raz, however, asserted that he had emphasized the possibility of facial nerve damage, regardless of whether the tumor was malignant or benign. *Id.* at 111, 536 A.2d at 276. The trial judge refused to instruct the jury on assault and battery, and instead instructed the jury on traditional principles of negligence. *Id.* at 112, 536 A.2d at 277. The jury returned a verdict in favor of the defendant. *Id.* at 113, 536 A.2d at 277. The plaintiff appealed alleging, among other things, that the trial judge erred in failing to charge the jury on the theory of assault and battery. *Id.* at 109, 113, 536 A.2d at 275, 277.

The appellate division affirmed the trial court's decision. *Id.* at 121, 536 A.2d at 282. Judge Baime, writing for the court, noted the common law rule that deviation in a surgical procedure, however slight, without first having obtained a patient's consent, constitutes a battery. *Id.* at 116, 536 A.2d at 279 (citing *Kennedy v. Parrott*, 243 N.C. 355, 360-61, 90 S.E.2d 754, 758 (1956)). The court explained, however, that as the use of anesthesia in modern surgery makes it impossible for patients to consent to changes due to unforeseen complications during an operation, strict adherence to the common law rule is no longer appropriate. *Id.* at 116-18, 536 A.2d at 279-80. Instead, the court adopted the "prevailing view" that when deviation from the contemplated surgical procedure is necessitated because of unexpected complications, a physician's conduct should be

judged according to the negligence theory of informed consent. *Id.* at 118-19, 536 A.2d at 280-81. The court further determined that jury instruction on battery should be limited to instances where a patient consents to a surgical procedure and the physician performs a "substantially different" procedure without the patient's authorization. *Id.* at 119, 536 A.2d at 280-81.

The appellate division noted that for policy reasons "absent proof to the contrary, the consent given, express or implied, should be construed to authorize the physician to employ surgical procedures, which in his professional judgment, are reasonably necessary to remedy his patient's condition." *Id.* at 120, 536 A.2d at 281. Applying this standard, the court posited that there was no basis for a jury charge on assault and battery. *Id.* The court concluded that the jury instruction was proper, dismissed the plaintiff's other claims as to the necessity of a limited instruction regarding the consent form's probative effect, and held that the jury verdict was against the weight of the evidence as being without merit. *Id.* at 121, 536 A.2d at 281-82.

The *Samoilov* court determined that a jury instruction regarding battery is proper in a medical malpractice action only when the evidence indicates that a physician has performed an operation significantly different from the one consented to by a plaintiff. Absent such evidence, a physician's conduct will be measured against the traditional negligence standard. The court's decision permits liability based on the theory of battery to attach only in very limited circumstances. The court should be commended for properly restricting the applicability of a theory, based on outdated principles, to only egregious situations.

Jean-Marc Zimmerman