

PROFESSION

Appeals court OKs payments to marrow donors

Offering scholarships in exchange for bone marrow cells extracted from blood has been ruled legal. The matter may go to the U.S. Supreme Court.

By **KEVIN B. O'REILLY**, *amednews staff*. *Posted Dec. 19, 2011.*

Offering financial incentives to encourage people to donate bone marrow cells using a method similar to regular blood donation is legal, a three-judge federal appeals court panel unanimously ruled in December.

The 9th U.S. Circuit Court of Appeals ruled that donations made using a technique called peripheral blood stem cell apheresis are not covered by the 1984 National Organ Transplant Act. The act outlaws payment or any compensation for organs such as kidneys, lungs or eyes.

In the apheresis method, which accounts for about two-thirds of marrow donations, the marrow cells are extracted from the blood after the donor takes a five-day course of medication to stimulate production of the cells.

This is in contrast to the traditional aspiration technique, in which bone marrow is extracted directly from the hip bone. The aspiration procedure was the only marrow donation method in existence when Congress wrote the law, and the method requires anesthesia and is more painful than apheresis.

"Congress could not have had an intent to address the apheresis method when it passed the statute, because the method did not exist at the time," U.S. appellate Judge Andrew J. Kleinfeld wrote in his 18-page opinion.

Paying for blood donation is legal. The court ruled that peripheral blood stem cell apheresis is a more simple blood draw than what Congress had in mind when it included bone marrow in its list of human organs for which donors could not be compensated.

The ruling is a victory for the plaintiffs, who want to encourage more people to donate bone marrow by offering up to \$3,000 in scholarships or other compensation.

"This decision is going to fundamentally change how doctors treat deadly blood diseases like leukemia," said Jeff Rows, lead counsel for the plaintiffs and senior attorney at the Arlington, Va.-based Institute for Justice, a libertarian public-interest law firm. "We will be able to experiment with the strategic use of compensation to increase the number of donors and determine if it is true in this context what's true in every other context -- that when you give people incentives to produce something valuable, you get more of it."

Rows estimates that about 3,000 people die annually waiting for a matching marrow donor, though no official figures are available.

One of the plaintiffs in the case is John Wagner, MD, director of the Division of Hematology-Oncology and Blood and Marrow Transplantation at the University of Minnesota Medical School. He said that because good marrow-donor matches to nonfamily members are so hard to come by, compensating donors is unlikely to create the kind of "marketplace" that has been seen with payment for kidney donation in India, Pakistan and other countries.

Safety concerns raised

Not everyone is pleased with the ruling, which makes marrow-donor compensation legal in California and 11 other states in the Western U.S. that are governed by the 9th U.S. Circuit Court of Appeals.

"The result of this opinion could have unexpected and disastrous consequences for patients in need of a transplant in the U.S., far beyond the jurisdiction of the 9th Circuit," said Michael Boo, chief strategy officer at the National Marrow Donor Program. "It will create an expectation of compensation, which will interfere in the clinical decision of what is best for the patient, may result in actions by donors that raise concerns about the safety and quality of each donation and will significantly increase the cost of transplantation."

The program runs a federally funded registry that includes 9 million registered donors and 145,000 umbilical cord blood units. In November, the program facilitated its 50,000th marrow transplant.

Annually, 5,000 Americans receive marrow transplants from unrelated donors to treat leukemia, lymphoma and other disorders. About 10,000 patients in the U.S. are diagnosed with these life-threatening diseases each year, according to the program.

The American Medical Association, which is not involved in the case, has policy calling for Congress to allow pilot projects to study the effectiveness and ethical consequences of paying organ donors or their families.

U.S. Attorney General Eric Holder, the defendant in the case, has until Feb. 29 to petition the Supreme Court to hear an appeal.

Chief Justice, General Eric Holder, the attorney in the case, has until Dec. 23 to petition the Supreme Court to hear an appeal. Holder also could ask for the full nine-judge 9th Circuit Court of Appeals to review the three-judge panel's decision.

ADDITIONAL INFORMATION:

Case at a glance

Is it legal to offer financial incentives to bone marrow donors?

A federal appeals court said the National Organ Transplant Act does not outlaw compensating the most popular method of marrow cell donation, called peripheral blood stem cell apheresis, which is similar to a regular blood draw. The more invasive form of donation that involves drawing bone marrow directly from the hip bone is covered by federal law and cannot be compensated, the court ruled.

Impact: Philanthropic efforts to encourage marrow donation for hard-to-match patients with life-threatening blood disorders may move forward, enabling physicians to treat more of these patients. A legal marketplace for marrow cells could emerge and lead to unsafe donation practices.

Flynn v. Holder, 9th U.S. Circuit Court of Appeals (www.ca9.uscourts.gov/datastore/opinions/2011/12/01/10-55643.pdf)

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