

# Legal-Medical-Ethical Issues

## Introduction

As medical technology advances, as our health care system expands, as government regulatory power increases and as courts contrive to confound us with its decisions, the interest in legal-medical-ethical issues grows.

How do we cope with *in-vitro* fertilization, surrogate motherhood, terminal illnesses, cloning and DNA as well as new variations of transplantation?

As law, medicine, religion, ethics, etc. focus on these problems our libraries bulge with opinions and solutions.

This subsection covers some of the critical legal-medical-ethical issues.

## Understanding the System

In order to understand the system which gives rise to the legal-medical-ethical, issues the reader must first understand the forces and doctrines which surround the issues:

- Legislative
- Judicial
- Important legal doctrines
- Ethical doctrines.

## Legislative

The state and federal governments have enacted much legislation exerting control over the manner by which medicine is practiced. The authority of this legislation rests in the federal and state constitutions. Many regulations and rulings amplify the laws. The broad area of *health laws* exist because of the government's mandate to promote the health, safety and welfare of its citizens.

## Judicial

Courts adjudicate using precedent, common law and best-effort logic. Areas of difficulty usually relate to religious freedom and freedom of choice.

## Important Legal Doctrines

Several significant legal doctrines appear repeatedly and should be understood by the reader.

**Professional Liability.** A physician is civilly liable for his actions; the law is that tort negligence by the physicians may be punishable by dollar damages. Also, the physician may be criminally liable. Physicians owe a special allegiance to their patients. The usual basis of a professional liability claim is negligence; the physician has a legal duty; when the actions of such physician did not fulfill such duty harm may result. Negligence is established by showing that without the physician's actions, or inactions, the result would not have occurred. Physicians are not held *strictly* accountable but only that they practice medicine prudently.

**Intentional Torts.** Physicians, as are all others, liable for such actions as defamation of character, infliction of mental distress, etc.

**Breach of Contract.** This circumstance would come up when the physician and patient, enter into an *arrangement* or contract (cosmetic surgery, e.g.) whereby an implied result is provided and does not occur. In this instance the physician might be sued for breach of contract.

## Ethical Doctrines

The ethical decisions are of two types:

- **Utilitarianism**  
Most good for the most people. Good is relative.
- **Deontological**  
Good is an absolute, as from good.

## Health Care Systems

### In General

Is health care an entitlement or a commodity? How do we cope with government's mandate for broad coverage (Baby Doe Regulations) and yet remain within the DRG guidelines? How do we avoid discriminating against the handicapped and yet keep health costs within manageable limits?

### Development of Modern Medicine

A number of significant factors have contributed to what we now know as modern medicine.

- Medicine as a science was accepted as opposed to medicine as a cult or art form.
- AMA became an effective lobbyist organization.
- Medical schools were standardized.
- States enacted public health measures.
- Explosion of medical and scientific research was seen.
- Federal program of Medicine became accepted.

While these advancements are noteworthy, medical practice was failing in public trust and confidence.

- Exorbitant increase in health care costs
- Medical disasters being as noteworthy as medical advances (Thalidomide, Dalkon Shield, e.g.)
- Bad press (unneeded surgery, Medicare fraud, e.g.)
- Tendency to preventive care oriented lifestyle.

## **Competitive Medicine**

A number of practices have come on the scene all of which address medicine as a commodity.

- Prospective payments (DRG)
- Medical profit motivated care
- HMO and PPO arrangements
- Walk-in emergenciers.

As emphasis is placed on for-profit care, the danger of anti-trust violations increases. More and more physicians are becoming a cog in a money machine and not a friend/advisor/confidant to the suffering patient. Dr. Welby is a thing of the past.

## **Ethical Fallout from the New Medicine**

Many major ethical problems arise as a direct result of the new philosophies and methodologies from modern medicine. These cases are well known:

- *Baby Foe*
- *Karen Ann Quinlan*
- *Barney Clark*
- *Baby Doe.*

These ethical dilemmas present themselves:

- Most of the problems relate to birth and death.
- When is animal and human experimentation acceptable?
- What advantage can be taken by modern medicine over the mentally incompetent, retarded, comatose, infants, e.g.?

## **Forums for Adjudicating Dilemmas**

Several bodies are in existence which have as their goal the monitoring of certain medical activities which might become unethical.

**Research.** The Public Health Service in 1970 mandated that Institutional Review Boards be established to monitor federally funded research projects. The boards are made up of layperson, theologians, ethicists, attorneys, patients and physicians.

**Hospital Ethics Committees.** Hospitals have, by law established ethics committees to monitor potentially troublesome areas.

## **Health Care Rationing**

Health care rationing will be forthcoming soon in the U.S. It has, in fact, already begun in isolated instances. Rationing is when any person receives less than all expected care. Rationing is referred to here as due to a dearth of facilities (as opposed to lack of funds) and is a planned and strategic program. Rationing is not cost containment, though it may be such by result.

A blue ribbon panel in 1987 recommended that the following principles should be followed when restructuring our health care system:

**Principle of Universal Access.** There should be no financial barrier separating Americans in need of health care from access to available care.

**Principle of Fair Compensation.** Every provider of health services in America should be adequately compensated for services rendered to patients.

**Principle of Clinical and Economic Freedom.** To the maximum extent possible, without unduly comprising other important principles, health policy ought to restore clinical freedom in rendering health services and economic freedom in financing these services, within the contest of adequate countervailing market power from those who ultimately pay for health care in America.

**Principle of Shared Responsibility.** Financial responsibility for health care for those too poor to afford it should be shared by government, individuals, and business.

**Principle of Individual Responsibility.** To help achieve the goal of universal access to health care, the individual has a duty to have adequate health insurance coverage for him or herself and dependent children.

**Principle of Basis Benefits Guarantee.** The design of basic package of health-service benefits to which all Americans should have reliable access is ultimately a federal responsibility.

**Principle of Strong Doctor-Patient Relationship.** Any health care system should include the goal of protecting the integrity of the doctor-patient relationship.

## **Public Health and the Law**

### **In General**

State laws mandating motorcycle helmets arose when a court held the auto was at fault for injuring the unhelmeted motorcyclist. Traditionally the courts have viewed

health matters to belong to the states, basing their posture on the constitution's silence on health care.

In the 1930's the federal courts were endorsing federal intrusion into health care on the grounds of general welfare.

## **State Courts Involvement in Public Health**

Around the turn of the century states became actively involved in the health of their populace through public health activities. Courts have consistently upheld these state laws.

- In one early decision the court held that the state could infringe on one's personal liberty for the sake of the general good.
- In a famous case, the court held a person could be forced to be vaccinated against his will.
- Forced immunization of school children has been a practice for many years.
- Forced quarantines for certain communicable diseases has been upheld by the courts.
- Forced testing for venereal disease is legal.
- Forced fluoridation of drinking water is legal.
- Forced use of helmets by cyclists is legal.
- Seatbelt and child restraint laws is legal.
- Nonsmoking bans in public places is legal.

There have been numerous instances, however, where the courts have restrained the state law in going too far.

- State laws restricting use of contraceptives were held invalid.
- A woman had a fundamental right to elect to have an abortion.

## **The Law and Physicians**

Physicians are regulated and regimented beginning with medical school and extending on into matters of daily practice.

- Medical schools are structured.
- Licensing practices are regulated.
- Limits of practice (M.D. v. Chiropractors, e.g.) may be imposed.
- Credentials may be denied.
- Impaired physicians may be removed.
- Relationships with allied practices (prescription drugs, e.g.) may be monitored.
- Confidentiality rules are to be followed.
- Unique patient-physicians relationships is legally recognized.

## Areas of Particular Concern

Legal-medical-ethical issues arise in these areas:

- Reproductive choices and technologies
- Genetic screening
- Medical decisions with children
- Experimentation
- Mental health care
- Terminal illness
- Organ transplants.

These topics will be briefly surveyed.

### Reproductive Choices and Technologies

**Choices.** The areas of conflicts between the church and state are well known. The two primary areas of choice are birth control and voluntary abortion.

**Law.** The law has become settled in many areas.

- State bans on the use of contraceptions by married persons are not constitutional; this later extended to nonmarried persons; laws restricting sale of contraceptions later held unconstitutional.
- Compulsory sterilization is likely legal but danger of it being discriminatory is huge.
- Voluntary sterilization has been generally accepted by the courts; however court consent for sterilization of minors is often required.
- Abortion issues are in the process of evolving so are not further discussed. See several landmark cases, however.

### Genetic Screening

Some instances of genetic screening are as follows:

- Mother wishes to know the chance of her child being a hemophiliac, or having Down's syndrome, or sickle cell anemia. etc.?
- Mother wishes to know if she is a carrier for muscular dystrophy, mental disorder, etc.

Advances in medical science have been made in genetics (molecular structure of DNA, e.g.); costs of care for genetic conditions are high; use of genetic testing techniques is rapidly increasing; legal problems arising therefrom are increasing.

Some of the legal difficulties surrounding genetic screening are these:

- To what extent does the physician reveal the knowledge as regards likely genetically-predictable health results to the patient, to parents, to a court or to an employer.
- To what extent can the state or an employer require genetic screening.

A few, but by no means all, of the guides which may be followed are these:

- Physician is liable for inaccurate advice.

- Physician must act towards the patient in utmost good faith.
- Patients have rights to see at least a portion of their medical records.
- Physicians may be expected to do genetic testing if the suspected condition is likely and severe, the test is easy, the test is accurate, the test is safe and the cost of doing it is reasonable.
- Physician may not disclose to any person the results of an amniocentesis test against the wishes of the mother; physician is bound to disclose information affecting the safety of others (airline pilot with severe heart condition; homicidal patient, e.g.).
- Adoption confidentiality may be broken when genetic needs (bone marrow transplant, e.g.) arise.

Monetary settlements for genetic accidents are particularly troublesome.

- Loss of joy is not reasonable.
- Special costs may be enormous.
- Child's claim for wrongful death may be recognized.

Genetic screening has become a family generalized practice in these areas:

- Population screening (particular disease associated with a particular population)
- State-mandated tests for newborns
- Employer-required screens.

**Genetic Engineering.** Considerable controversy surrounds the medical practice of using DNA rearranging to alter nature. However, the engineering also involves saving lives or curing patients of disease.

### **Medical Decisions Involving Children**

Common law has always placed the care and custody of children with the parents; parents control also the medical care of their children. This legal right along with the rights of religious expression have created many difficult situations.

- Unmarried teenagers may now have legal abortions without parental consent. It may be required, however, that proof of *mature capability* be given before such nonconsent abortion is preformed.
- Parents may have a minor involuntarily committed to a mental institution.
- States have power to step in using their health laws and police power; e.g., forced use of diphtheria vaccinations against will of parents has been upheld.
- Parents have no right to withhold medical care on the basis of religious belief. Nor can faith healing be defended on religious grounds as a means of denying medical care normally provided a person.
- Where medical help is denied, courts may intervene and/or bring neglect charges against the parents; denial and improper treatment may be equated by the court.
- Forced care at huge expenses of seriously ill infants at insistence of the hospitals has been upheld; this decision resulted in famous *Baby Doe* regulations mandating that care be given by hospitals to such ill infants.

- In the *Baby Jane Doe* case the court held it was proper for the hospital, with parent's consent, to deny heroics to the baby; also that an intrusion by an outside person seeking custody on behalf of the baby was unwarranted. The state intruded demanding to see the records; hospital's refusal to release the records to the state (Department of HHS) was proper. The *Baby Jane Doe* resulted in a court injunction mandating that the *Baby Doe* regulations of the HHS not be implemented.
- Indiana court said an estranged husband could not prevent his wife from having an abortion.
- Where child with meningitis was denied treatment by the parents for Christian Science religious belief reasons, such parents could be criminally prosecuted by the state for manslaughter and child neglect when such child died.

**Mature Minor Situations.** The traditional legal position is that a mature minor can seek his own medical treatment without parental consent. States are increasingly recognizing the rule of the emancipated minor in this regard. The usual rule is that the physician tells the parents of the discovered medical condition if such disclosure could be in the best interest of the minor. Parents cannot force a pregnant daughter to have an abortion. A teenage boy was permitted to leave a mental institution, over his parents objections when the physician declared him to be not dangerous to himself or others. Court held minor child, not parents, could determine whether or not to have correcting operation.

**Federal Child Abuse Law.** The federal government stepped in with significant amendments to the Child Abuse and Amendment Act which affirmed the state's rule in deciding such matters as *Baby Jane Doe*. State must, however, have procedures and programs to provide for.

- Coordination between individuals and health care facilities.
- Notification to appropriate state health body of any instances of medical neglect.
- Mechanics for the state to intercede where medical neglect is involved.

The law, significantly, does permit withholding of treatment on certain instances:

- Chronically-irreversible comatose is found.
- Treatment would be futile.
- Prolonged treatment would be inhumane.

## **Matters Involving Mental Health**

Mental health law is a relatively recent specialty which has developed from two different branches:

- **Constitutional Law**  
Limits on care of mentally ill stems from such person's constitutional rights.
- **Tort Law**  
This law has developed because of the duty to protect third parties from potentially dangerous persons.

Some, but by no means all, of the significant legal issues which have been adjudicated with mental illness can include the following:

- Persons may be involuntarily committed by the state under police power authority, public health authority on the theory that the state can act as the person's guardian.
- In recent years, commitment laws and court decisions have been in considerable flux.
- Difficult decisions have been forthcoming in these areas:
  1. Mandated surgery
  2. Electroconvulsive therapy
  3. Forced medications.
- Behavior modification as a partial cure to mental illness has come into vogue in recent years. Forms of such behavioral changing programs include:
  1. Aversion techniques (punishment)
  2. Reinforcing techniques (positive approach)
  3. Verbal techniques.
- Malpractice suits are common in the medical practice of psychiatry. Opportunities for such suits will come up in these instances.
  1. *Standard* rules not followed.
  2. Side effects from anti-psychiatric drugs.
- The *holy secrets* between the patient and the therapist should be protected at all costs.

A court recently held that the state had the right to force an involuntarily committed patient to take anti-psychiatric medication.

## Human Experimentation

**Research v. Practice.** Practice is to treat with the experimentation success and involves diagnosis, preventive care or therapy. Research is to test a therapy, a medicine, a procedure, etc. with the hope of learning rather than the expectation of success.

**Review of Human Experimentation.** The history of human experimentation is chilling, reaching a low mark with the Nazi concentration camps and the Japanese Manchurian camps. The United States had its well-publicized Tuskegee Syphilis study.

**Pre-WWII Code of Ethics for Research.** A code of ethics, deemed a model, was promulgated in the 1930's. Such research had to meet these criteria:

- Costs and benefits had to be in balance.
- Where possible, there should have been animal testing.
- Disclosure to, and consent of, the patient was to be avoided except in extreme circumstances.
- Minors received special consideration.
- The needy were not to be exploited.
- Special care was given to live microorganisms.
- Full responsibility was to be accepted by research center's head physicians.
- Written documentation was mandated.

- Results publicized so as to respect patient's dignity.

**U.S. Research Codes.** The U.S. research model has several principles which must be followed:

- Any grants by National Health Institute must respect the patient's rights, must involve legitimate informed consent and have the potential for medical benefits.
- Health and Human Services Department demands that extensive research protocol be followed.
- Food and Drug Administration has promulgated regulations which set standards of research.
- Several states have enacted their own research laws.

In all of these guides the various tools and techniques of medical research are analyzed. They include:

- Control groups and randomization
- Blind and double-blind studies
- Placebos
- High risk research.

Further, these are numerous categories of medical research.

- Vaccines
- Cost-effectiveness
- Special grouping (children, infants, dying, etc.)
- Fetuses and abortions
- Dead or near-dead subjects.

## **Animal Experimentation**

While noncontroversial for many years, medical experimentation using animals have become the focus recently of considerable debate. There are four main issues in the debate:

- Number of lives consumed
- Species of animals used
- Pain and suffering to which they are subjected
- Scientific reasons for their use.

Most of these issues are ethical in nature.

**Laboratory Animal Welfare Act.** This federal law requires the Secretary of Agriculture to promulgate and enforce rules for the use of animals for medical experimentation.

## **Death and Dying**

Death has ceased to be a private struggle but has rather become a public affair involving teams of physicians, nurses machines, etc.-in brief, a major, highly visible and expensive high tech process. Some would say we need a better definition of what death actually is.

**Death at Time of Coma.** Can legally one become dead when such coma occurs—that is, brain death where there is no response, no movement or breathing and no reflexes? Some say, yes. This leaves unanswered this issue of being in an irreversible coma but with *some* responses and reflexes. This was the circumstances with *Karen Quinlan*. The logic with the Quinlan case was that a person's right to have an abortion surely should extend to such person's right to terminate their own life—and vice versa.

**Substitute Judgment Test.** A person, severely mentally retarded who had been institutionalized for over 50 years was terminally ill with leukemia. Question—should chemotherapy be used. No family members could assist in the decision. The court put itself in the person's position and acted as it believed such person would act. The court reasoned that the person would elect to *not* have chemotherapy.

**Best Interest of the Person Rule.** Courts will sometimes rule in difficult circumstances as though it were acting in the best interest of the patient. Courts will often intrude in this circumstance where the patient's family wants the *heroics* stopped but the hospital wishes them to be continued.

**Refusal by Competent Patients.** The usual rule which courts will follow is this: competent patients may reject medical care over the objections of the physicians and the hospital. Recent court decisions appear to support the contention that family wishes to terminate treatment will not be honored by the providers. As it stands, the state courts are woefully at odds on the issue. A physician may refuse to honor the family's request to terminate treatment, living will notwithstanding *but* must be agreeable to the transfer of the patient to another physician who will honor the family's request and the living will.

**Courts and the Living Will.** State law mandate that the wish to deny *heroic medicine* made by a person while competent, must be honored when such person becomes incompetent. Courts have generally honored these laws and the compliance therewith. Courts will also permit oral testimony which establish that the patient wished there to be no heroics.

**Power of Attorney.** An increasing number of states are allowing a person to assign to another person the right to select the medical care by a transfer of power called a durable power of attorney.

**Competent Person-Terminally Ill-Refuses Treatment.** Person suffers from MS, e.g. and wishes to end the suffering; person refuses care; hospital forces the care claiming to do otherwise is to participate in a suicide. Courts have held that forced care is not appropriate; the person may deny care and die.

**Euthanasia.** Pathologist found not guilty in death by strangling of his terminally ill spouse. Euthanasia is not legal but debate on its pros and cons is growing.

**Resuscitation Medicine.** This circumstance arises when the patient is unable to give informed consent and there is no family to give consent or guidance. Clinical research resuscitation is then declared appropriate when the other conditions exist:

- Immediate lifesaving measures are needed.
- No significant difference between conventional and experimental treatment or regards death.
- Expected outcome is better with experimental than with the conventional as regards outcome or improvement.

- Clear contrast of medical results of the experiment as opposed to the conventional is possible.

In such instances hospital ethics or prognosis committees are helpful.

**Medical Position or Care.** The American Academy of Neurology has promulgated a position on certain aspects of the care and management of patients who are in a persistent vegetative state.

## Organ Transplants

An organ transplant is a technical innovation which creates both legal and moral as well as financial challenges for us.

**Organ Donation.** If there is to be a transplant there must be a donor.

- The federal government encourages organ donation by means of the National Organ Transplant Act. A task force created by this act was to study the moral, ethical, legal issues of transplantation as well as to encourage organ donation.
- All of the states have adopted the Uniform Anatomical Gift Act which has its purpose the encouragement of organ donation.
- Courts have generally held that the next of kin does not have the property rights of the deceased as regards the deceased's body parts. That is, the wife cannot donate her husband's organs without his prior written approval.
- There are religious prohibitions to organ donation.
- Some workable system to increase the volume of available organs on a national level is needed.
- Prior consent on the part of the donor is needed.
- Commercial trafficking on organs has been banned by many states and the federal transplant law; proposals for tax credits as an inducement to donation have been considered but not adopted.
- Success with cadaver transplants may in the near future eliminate the need for live organ transplants.
- While dialysis as an artificial organ has been successful, the experience with the artificial heart has been discouraging.
- Animal organ transplantation has been done. These are generally viewed only as *last resort* treatments.

**Funds for Organ Transplantation.** Organs are scarce, facilities few, medical talent is limited and costs are extremely high. Most private plans will pay for organ transplants; Medicare will pay for end-stage renal in some circumstances. Many people view the huge costs of transplantation are more properly that of society than of the employer.

**Candidate Organ Transplants.** The list of organ transplants is as follows:

- Kidney
- Heart
- Lung
- Heart-lung
- Liver

- Pancreas
- Cornea
- Bone marrow
- Fetal tissue.

A frightening prospect with fetal tissue transplants is the creation of fetuses obtained by abortion as a commercial venture.

## Regulation of Health Care

### In General

Health is the *absence of disease, disability and discomfort*. Government interest in health is great because of its mandate to promote the population's welfare. Regulations usually are grouped as to access, quality and cost.

### Access to Health Care

Modern governments view access to health care as a right. Government's obligation to see that its citizens have health care may be limited to the needy as a subgroup-viewing the *not needy* as a group to whom it has no obligation.

- Physician's elect to practice freely and may not be forced to practice. Hospitals traditionally have been relieved to actions of the physician's practicing in the hospital.
- Hospitals, however, may be forced to provide care if they hold themselves out in such capacity, in the same way as an inn or common carrier.
- Religious hospitals may not withhold care in treatment to achieve their religious goals. Hospitals must provide care even if they are not paid for such services.
- No care can be refused because patient refuses to agree to anything which would infringe on his constitutional rights. States may not infringe on patient's right to seek medical care with which he is comfortable-even if it is incorrect or unprofessional.
- State can force a hospital to provide care for its citizens but also refuse to pay for it

### Private Health Insurance

While government views health care as a right, they expect the citizenry to finance such care by itself. The majority of American workers are covered by private plans-indemnity (fully insured or self-funded), Blue Cross-Blue Shield and HMO's are the three mechanisms.

### Government Health Insurance and Regulation

Federal and state governments are involved in health insurance or its regulation in these ways:

**Medicare.** This is federal health insurance plan for persons over age 65.

**Medicaid.** This is a joint state-federal plan for providing health care to the medically indigent.

**HCFE.** This federal agency, Health Care Financing Administration is a part of the federal Social Security Administration and has the responsibility for administering Medicare and Medicaid programs.

**Hill-Burton Program.** This federal program provides funds for hospital building and expansion.

**Federal Cost Containment.** Congress became aware of the need for federal legislation and regulations in the early 1970's; since that time significant legislation and regulation has been enacted with cost containment as its goal.

- Direct price control
- Restraints on what the federal government will allow providers to get for care to Medicare and Medicaid recipients (DRG rules, e.g.)
- Subsidization of HMO's
- Funding health manpower training
- PSRO reviews of provider utilization
- Federal health planning legislation
- Certificate of Need Program.

**Federal Antitrust Laws.** Physicians have been admonished by the Justice Department to avoid price fixing. Several grand jury investigations are ongoing and vigorous prosecution of miscreant physicians may be expected.