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Where Are the Health Lawyers When We Need Them

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EDITORIAL

Where Are the Health Lawyers When We Need Them?

by George J. Annas, J.D., M.P.H.

A momentous event in the field of health law occurred in April of 1978: the first national meeting of teachers of health law was held at Boston University. Of sixty individuals invited, almost all of whom teach health law as a full-time profession in various graduate schools, forty-five participated in the two-day workshop. While that response alone may have revealed the answer, the first topic on the agenda was: "Is health law a discipline?"

Professor Nathan Hershey of the University of Pittsburgh argued that, as a law school discipline, health law is like other specialized fields that deal not with specific bodies of law, but with major institutions and governmental organizations in society. He noted also that in 1957 an Institute on Hospital Law attracted only a handful of attorneys, whereas by 1978 organizations such as the American Society of Hospital Attorneys and the National Health Lawyers Association had been formed and each had approximately 1500 attorney members. Health law is, thus, not only viewed as a legitimate legal specialty by the practicing bar, it is an area that is experiencing explosive growth. Professor Hershey concluded by noting that clients are increasingly searching for "health law specialists" and that whether or not a "discipline," health law has become a recognized specialty.

Professor Kenneth Wing of the University of North Carolina said he never used the term "health law" and didn't like it because it was imprecise and its use was, therefore, dysfunctional. He explained that hospital attorneys are very different from medical law specialists, environmental specialists or public health law specialists. He argued that the so-called health lawyers primarily apply the wide body of general law to health-related problems. It is the factual context rather than the substantive law that makes the field identifiable.

This writer contributed the observation that the concept of health law shifts from one context to another. Likewise, the teacher's primary function varies depending on the type of school in which health law is being taught. Health lawyers should teach "applied law" in law schools, i.e., law from all areas applied to specific health questions. In schools of public health they should teach the fundamentals of the legal system and enough law so that graduates can do basic regulatory and legislative work, and know when to consult (and when not to consult) a lawyer in their health-related professions. In medical schools, health lawyers should teach basic concepts of human rights to acquaint medical students with the legal system and to sensitize them to the view that their patients are citizens with rights that must be recognized and supported.

The conference proceeded on to other areas, but a consistent theme was that the uniqueness of the health lawyer was not in his or her knowledge of the law, but in the types of problems that they were called upon to address. To do this effectively the health lawyer must understand the health care system and how it affects individual patients.

A recent example of the indispensability of knowledge of medical care to the health lawyer is the aftermath of the *Saikewicz** case in Massachusetts. The decision in this case caused many physicians and hospitals to consult attorneys for

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Hospital Law

Borsody RP, *Hospitals Enter Antitrust Era*, HOSPITALS 52(9): 59-63 (May 1978).

Cheifetz W, *Arizona Court OKs Malpractice Insurance Requirement for Physicians*, TRUSTEE 31(2): 6-8 (February 1978).

Friedman E, *Natural Death Laws Cause Hospitals Few Problems*, HOSPITALS 52(10): 124-130 (May 1978).

Goldsmith LS, *Hospital Hearings: Now You Can Take a Lawyer Along — Maybe*, LEGAL ASPECTS OF MEDICAL PRACTICE 6(4): 23-24 (April 1978).

Hollowell EE, *No Insurance, No Privileges*, LEGAL ASPECTS OF MEDICAL PRACTICE 6(4): 17-19 (April 1978).

Memel SL, Lemkin JW, *The Legal Status of "No Code Orders"*, THE HOSPITAL MEDICAL STAFF 7(5): 1-8 (May 1978).

Miller RW, *Hospitals and the Anti-Trust Laws*, MEDICO-LEGAL BULLETIN 27(2): 1-6 (March-April 1978).

Rees, Jr., FW, Gary JG, *Compliance with 504 Regulations Need Not Require Costly Renovations*, HOSPITALS 52(10): 78-80 (May 1978).

Medical Staff Bylaws. The Joint Commission on Accreditation of Hospitals (JCAH) has designed this new publication to assist hospitals in developing sound medical staff bylaws. Available for $6.00 from: JCAH, 875 N. Michigan Ave., Chicago, IL 60611.

Osborn v. Kelly (New York Supreme Court, Appellate Division, March 2, 1978). Relying upon *Perlmutter v. Beth David Hospital*, 123 N.E. 2d 792 (N.Y. 1954) (use of product in course of patient's professional treatment incidental to that treatment and not independent "sale" of product, thus, foreclosing claim of breach of warranty against professional), the New York court held that the physician defendant who used the product, an allegedly defective drug, cannot be held to *strict products liability* if the drug itself turned out to be the cause of injury. The court stated that the balancing of risks called for by physicians and hospital staffs suggests that such professional personnel should confront liability only for demonstrated fault in prescribing the drug.

Powsner v. St. Joseph Mercy Hospital of Detroit, Michigan Circuit Court, County of Washtenaw, No. 5279 (December 2, 1977). Plaintiff doctor, prevented from performing cardiac procedures in hospital due to an exclusive contract between a group of cardiologists and the hospital, brought an action alleging monopoly and restraint of trade. The Michigan Circuit Court found the restraint reasonable as intended to permit only those physicians most experienced and qualified to perform cardiac catheterizations, thus insuring the highest quality patient care.

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advice. Responses varied widely — and many betrayed either a lack of basic legal knowledge, a lack of understanding of the medical system, or both. For example, in at least two cases, hospitals were counseled to go to court to seek permission of a judge to discontinue "treatment" of patients who were dead under Massachusetts law relating to brain death.

Such actions are both ethically and medically inexcusable, and only a lawyer who had fundamentally misunderstood either the law or the concept of brain death (or both) could give a client such advice. Nor are these the most distressing cases. Results of faulty legal counsel have included reports of a terminally ill patient being defibrillated seventy times within a twenty-four hour period; a baby whose brain had been almost completely destroyed being kept alive by artificial ventilation, surgery, and antibiotics even though every physician and nurse involved agreed that the case was "hopeless" and the parents had asked that heroic measures not be used; continual resuscitation of a terminally ill heart attack victim with almost no brain activity for a period of more than thirty days after the doctors had concluded that the case was hopeless, and the relatives had asked that heroic measures be discontinued; and terminally ill and incurable babies with Tay Sachs or Wernig-Hoffman's disease being continually resuscitated against the wishes of their parents. All these horrors and more have been inflicted on patients and their families, according to the physicians involved, because their lawyers had advised them that they might be "breaking the law" if they did not do everything possible to keep these patients "alive."

This type of advice can only be given by someone who thinks the law requires treatment to continue into the grave, and that there is a legal requirement that one "never say die" — even when the case is hopeless and additional medical intervention will only inflict needless pain on the patient and his family. One can too easily blame physicians and nurses for treating patients in the manner described above. The point here, however, is that health lawyers — lawyers who hold themselves out as having expertise in the health care field — *must* understand the medical and health care system sufficiently to recognize the likely consequences of their advice, and must take responsibility for any needless human suffering and misery that their advice inflicts on patients. This may seem like heresy to many lawyers who view their only role as giving advice to clients on how to keep out of trouble, and who would be horrified at the notion that they had any personal moral responsibility for what the client did as a result of that advice. If you're a health lawyer that feels this way, *MEDICOLEGAL NEWS* would like to hear from you.

As a result of faulty *Saikewicz*-related advice, many hospitals and physicians in Massachusetts are asking, "where are the health lawyers when we need them?" Some will be looking for new counsel. Others will have to hire counsel to defend lawsuits brought by outraged relatives and executors who will seek damages for the unthinking, unnecessary and involuntary use of medical technology on their dying loved ones.

*This case was discussed in the last issue of *MEDICOLEGAL NEWS*: Annas, G.J., *Judges at the Bedside: The Case of Joseph Saikewicz*, 6(1): 10-13 (1978).

Hospital Safety

HOSPITAL SAFETY COMPLIANCE GUIDE: *SELF-SURVEY FORMS*. By David R. Elwing. (Interqual, 740 North Rush St., Chicago, IL 60611) (1977) 47 pp., $.50 per set (paper)

HOSPITAL SAFETY COMPLIANCE GUIDE. By David R. Elwing. (InterQual, 740 North Rush St., Chicago, IL 60611) (1977) 101 pp., $24.00 (paperback).

Human Experimentation

Standridge LW, *Experimentation on Humans in Biomedical Research: Implications for the Industry of Recent Legislation and Cases*, CASE & COMMENT 83(2): 3-13 (March-April 1978).

Psychosurgery Reports. This 1977 publication of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research contains three reports on psychosurgery. Available for $6.25 from: U.S. Government Printing Office, Washington, D.C. 20402 (S/N 052-003-00348-1).

Industrial Medicine

Schlueter DP, *et al*, *Occupational Asthma Due to Tetrachlorophthalic Anhydride*, JOURNAL OF OCCUPATIONAL MEDICINE 20(3): 183-88 (March 1978).

Warshaw LJ, *The Pregnant Worker*, JOURNAL OF OCCUPATIONAL MEDICINE 20(3): 211-12 (March 1978).

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