

Law notes

Management of severe pain

In a number of countries, including the United States, one finds that many physicians have been fearful of giving adequate analgesia to the seriously ill and dying because of the risk of incurring disciplinary or legal action for breach of the narcotics legislation. Their fear is sometimes been very understandable, but there is currently a trend to remove it.

In the case of *Hoover v. Agency for Health Care Administration*, heard in June 1996, a district court in Florida reversed a decision of the Florida Board of Medicine in just such a case [1]. The physician in question had developed her own programme for the treatment of patients suffering intractable pain resulting from non-malignant disorders. She used narcotic analgesics as necessary, but issued frequent prescriptions for small amounts, adapting her regime to the patients' response; she was able to demonstrate that her patients had by and large performed better as a result of her approach. A hearing officer had examined her practice and concurred with her views and those of an expert whom she produced; what is more, her level of prescribing did not exceed that set out in the federal guidelines for the treatment of cancer patients. However, the Board of Medicine called a series of expert witnesses, all of them physicians who did not themselves have experience in treating severe chronic pain, and who had not examined the patient records; they nevertheless testified variously that physician had prescribed a "tremendous number of pills" or acted "below the standard of care". The Board accepted their views and found that the doctor had violated the Florida Medical Practice Act; it set aside the hearing officer's reference to the federal guidelines since these were specifically designed for cancer patients, even though they were at the time the only guidelines available. A \$4,000 fine and a reprimand were imposed, the physician was placed on probation for two years and she was required to follow continuing education on the prescribing of drugs liable to abuse. Happily, the district court on appeal overruled the Board's decision since no violation of the Act had been proven, and the physician was discharged. The court remarking on the paucity of the evidence on the basis of which she had originally been convicted.

A similar course of events took place in Louisiana in 1995–1996 [2]. Here too, the physician who was involved had devoted a great deal of attention to the adequate relief of pain in chronic sufferers, keeping unusually detailed records of their treatment and response. As in the Florida case, an expert witness, relying solely on a comparison between the duration of prescribing and the text of the official product information which stressed the need for short-term use, swung the opinion of the State Board of Medical Examiners, and the physician's licence was suspended. Four years after the original charge, the Louisiana Court of Appeals overruled the Board's decision; the Board appealed and it was not until February 1996 that this appeal was denied and the physician finally cleared.

One should note that health care workers have also been held liable for providing *inadequate* pain relief. In *Estate of Henry James v. Hillhaven Corporation*, heard in North Carolina in 1990 [3],

a patient had prostate carcinoma which had metastasized to the spine and left femur, causing intractable pain. He was admitted to a nursing home and was not expected to live more than a few months; his own physician prescribed 7.5 ml oral morphine, to be given every three hours as needed. However, a nurse concluded that Mr James was addicted to morphine and she largely withdrew the opiate, giving a tranquillizer instead. Following the patient's death, his family brought a case against the nursing home, alleging "inhuman treatment" and "torture of the human flesh": for the defence, a nurse specialized in quality assurance for nursing homes testified that the staff of these institutions had an obligation to ensure the proper management of pain in their patients. The jury awarded damages of \$15 million, but parties subsequently agreed to a settlement for an undisclosed amount.

There is clearly a constant problem in balancing risk and benefit in these situations; the law is properly concerned to prevent reckless and excessive use of narcotic analgesics, yet a conscientious physician who has used these drugs thoughtfully and in his view responsibly may well find that he has transgressed the limits set for such treatment. The existence of official or professional guidelines may provide some help both in deciding on appropriate treatment or in assessing it retrospectively, but a guideline is no more than that. In the United States, where these issues have been thrown into sharp relief by litigation, a model Pain Relief Act developed by a subgroup of the American Society of Law, Medicine and Ethics promises to inspire federal legislators. A number of states have in recent years passed statutes dealing with pain relief; they provide variously for adequate medication of any type provided the patient has given written consent, application of principles of good medical practice (rather than prescribing limits set down in reference books) or complete prescribing freedom as regards analgesics except in the case of addicts [4].

Genetically transmissible disease: duty to warn

The physician has long had a professional duty, generally confirmed in statute, to provide due warning where a patient is suffering from a transmissible infectious disease, which may represent danger to others. He will need to notify the family, the patient's workplace and environment, and in certain cases the authorities. An analogous duty now seems to be emerging for the physician who encounters a case of genetically transmissible disease to inform his offspring of the fact.

The first recognition of this duty in law was provided by the case of *Safer v. Pack*, heard by the Appellate Division of the Superior Court of New Jersey in 1996 [5]. Robert Batkin was found in 1956 to be suffering from colorectal cancer, but also from multiple polyposis; the latter is a hereditary condition in which the chances of developing colorectal cancer are greatly increased. Dr Pack treated the cancer, employing extensive surgery, up to the time of Mr Batkin's death in 1964; he did not however explain to the family the hereditary nature of the underlying disorder. In 1990 the patient's daughter, Mrs Donna Safer, was found to be suffering from colonic cancer which had already extended into adjacent tissues; extensive surgery was required, followed by chemotherapy. She was also found to be suffering from polyposis.

A year later, Mrs Safer secured her father's medical records and discovered for the first time that he had suffered from multiple polyposis, which she had inherited. Dr Pack was no longer alive, but she brought an action in negligence against his estate, alleging that had she been warned in a timely manner of the hereditary risk to which she was exposed she could have undergone routine controls and her cancer would have been detected at a much earlier stage.

The trial court dismissed the claim, ruling that whereas in a contagious disease one must warn in order to enable others to avoid exposure, in the case of a genetically transmissible disease the offspring

have already been exposed. On appeal to the Superior Court, this view was overruled and a duty to warn was recognized. The Appeal Court held that in such situations “. . .the individual or group at risk is easily identified, and substantial future harm may be averted or minimized by timely and effective warning”. The Court remanded the case for trial, and at the moment of writing the outcome of the trial is awaited.

References

- [1] *Hoover v. Agency for Health Care Administration*, 676 So. 2d 1380, Fla. Dist. Ct. App., 1996.
- [2] *In the Matter of DiLeo*, 661 So. 2d 162, La. App. 1995.
- [3] *Estate of Henry James v. Hillhaven Corporation*, Super. Ct. Div. 89CVS64, Hertford County NC, Nov. 20, 1990.
- [4] *Project on Legal Constraints on Access to Effective Pain Relief*, American Society of Law, Medicine and Ethics, para 3.1, 1996.
- [5] *Safer v. Pack*, 677 A.2d 1188, NJ Super. Ct. App. Div., 1996.