

AMERICAN JOURNAL OF LAW & MEDICINE

VOLUME 27 NUMBER 4 2001

ARTICLES

**AN eHEALTH DIPTYCH: THE IMPACT OF
PRIVACY REGULATION ON MEDICAL
ERROR AND MALPRACTICE LITIGATION**

Nicolas P. Terry

**PEGRAM'S REGRESS: A MISSED
CHANCE FOR SENSIBLE JUDICIAL
REVIEW OF MANAGED CARE DECISIONS**

Michael T. Cabill
Peter D. Jacobson

**AN ECONOMIC MODEL TO ANALYZE
THE IMPACT OF FALSE CLAIMS ACT
CASES ON ACCESS TO HEALTHCARE
FOR THE ELDERLY, DISABLED, RURAL
AND INNER-CITY POOR**

Dayna Bowen
Matthew

NOTES AND COMMENTS

**THE WTO DISPUTE SETTLEMENT
UNDERSTANDING: AN UNLIKELY WEAPON
IN THE FIGHT AGAINST AIDS**

Andrea M. Curti

PUBLISHED BY THE AMERICAN SOCIETY OF LAW, MEDICINE & ETHICS¹
AND THE BOSTON UNIVERSITY SCHOOL OF LAW

A JOURNAL OF THE AMERICAN SOCIETY OF LAW, MEDICINE & ETHICS

The AMERICAN JOURNAL OF LAW & MEDICINE (AJLM) is published by the American Society of Law, Medicine & Ethics (ASLME) and Boston University School of Law (BUSL). All decisions concerning the content of AJLM are made by a joint ASLME-BUSL editorial policy committee. Statements of fact and opinion are the sole responsibility of the authors, and are not necessarily endorsed by the editors, ASLME, or BUSL.

The editors invite the submission of manuscripts on medicolegal topics. For details, see the inside back cover. Editorial communications, including original manuscripts, should be addressed to Editor-in-Chief, AMERICAN JOURNAL OF LAW & MEDICINE, 765 Commonwealth Avenue, Suite 1672, Boston, Massachusetts 02215. Telephone: 617-353-2912.

Address subscription or membership correspondence to the Membership Director, ASLME, 765 Commonwealth Avenue, Suite 1634, Boston, Massachusetts 02215. Telephone: 617-262-4990 ext. 15. Fax: 617-437-7596. Requests for permission to reproduce AJLM material should be addressed to the Managing Editor, at the preceding address. Telephone: 617-262-4990 ext. 13. Fax: 617-437-7596.

AJLM subscriptions are \$205 per year for institutions and \$110 per year for individuals (payment for individual subscriptions must be on a personal check) who are not members of ASLME. All foreign subscribers must remit an additional \$35 per year for foreign postage fees. ASLME members receive AJLM as part of their member benefits. AJLM is published quarterly: Spring; Summer & Fall (double issue); and Winter.

Missing copies of AJLM will be sent free of charge to ASLME subscribers or members, provided that notice of such a claim is received by ASLME *within one month of receipt of the next issue published*. Requests made after this period will be billed at the regular single-issue price of \$40 (members) and \$50 (nonmembers) and the regular double-issue price of \$55 (members) and \$65 (nonmembers).

AJLM is available online, indexed or abstracted, in *LEXIS*, *Westlaw*, *Index to Legal Periodicals*, *Legal Contents*, *Index Medicus*, *MedWebPlus*, *Social Sciences Citation Index*, *Current Contents: Social and Behavioral Sciences*, *SSRN Health Law & Policy*, and *EMBASE/Excerpta Medica*.

Library of Congress Catalog No. 75-645516 (Shelf No. K1.M445). ISSN 0098-8588. U.S. postage paid at Lincoln, Nebraska, in accordance with Permit No. 264 (non-profit organization).

ADMINISTRATIVE OFFICERS OF BOSTON UNIVERSITY SCHOOL OF LAW

JON WESTLING, LL.D. (hon.), *President and Professor of Humanities*

JOHN R. SILBER, M.A., Ph.D., LL.D. (hon.), L.H.D. (hon.), *Chancellor, University Professor and Professor of Philosophy and Law*

RONALD A. CASS, J.D., *Dean and Professor of Law*

JOSEPH F. BRODLEY, LL.B., *Senior Associate Dean for Research and Professor of Law*

STEPHEN MARX, J.D., *Associate Dean for Academic Affairs and Professor of Law*

DANIEL J. FREEHLING, J.D., *Associate Dean for Administration and Professor of Law*

CHRISTINE A. MARX, J.D., *Assistant Dean for Student Affairs*

OFFICERS OF THE AMERICAN SOCIETY OF LAW, MEDICINE & ETHICS

RUTH MICKELSEN, J.D., M.P.H., *President*

SARA ROSENBAUM, J.D., *Secretary*

KEITH GHEZZI, M.D., *Treasurer*

PHILIP REILLY, J.D., M.D., *Immediate Past President*

BENJAMIN W. MOULTON, J.D., M.P.H., *Executive Vice President*

ELLIOT L. SAGALL, M.D. (dec.), *Founder and First President*

AMERICAN JOURNAL OF LAW & MEDICINE

BOARD OF EDITORS

FACULTY EDITOR-IN-CHIEF

Frances H. Miller, J.D.
Boston University School of Law

FACULTY EDITOR-IN-CHIEF

EMERITUS AND FOUNDER
John A. Norris, J.D., M.B.A.
Harvard University

MANAGING EDITOR

Kelly A.M. McDonald, J.D.
American Society of Law, Medicine & Ethics

MEMBERSHIP DIRECTOR

Sarah Black
American Society of Law, Medicine & Ethics

EXECUTIVE VICE PRESIDENT

Benjamin W. Moulton, J.D., M.P.H.
American Society of Law, Medicine & Ethics

EDITORS

Gail B. Agrawal, J.D., M.P.H.
University of North Carolina School of Law

Michael Baram, J.D.
Boston University School of Law

Charles H. Baron, LL.B., Ph.D.
Boston College Law School

Lee J. Dunn Jr., J.D., LL.M.
Law Offices of Lee Dunn, Boston

Jay A. Gold, M.D., J.D., M.P.H.
MetaStar, Inc., Madison

Ernest M. Haddad, J.D.
Partners HealthCare System, Inc., Boston

Clark C. Havighurst, J.D.
Duke University School of Law

Nathan Hershey, LL.B.
University of Pittsburgh
Graduate School of Public Health

David A. Hyman, M.D., J.D.
University of Maryland School of Law

Sheila Jasanoff, J.D., Ph.D.
Harvard University
Kennedy School of Government

Timothy S. Jost, J.D.
Washington and Lee
University School of Law

Jay Katz, M.D.
Yale University Law School

Sylvia A. Law, J.D.
New York University School of Law

David T. Morris, J.D.
Latham & Watkins, San Francisco

Joseph P. Newhouse, Ph.D.
Harvard Medical School
Department of Health Care Policy

Irwin N. Perr, M.D., J.D.
University of Washington School of Medicine

Harvey E. Pies, J.D., M.P.H.
Blue Cross and Blue Shield of Florida

Arti K. Rai, J.D.
University of Pennsylvania Law School

Philip R. Reilly, M.D., J.D.
Interleukin Genetics, Inc., Waltham

Marc A. Rodwin, J.D., Ph.D.
Indiana University School of Public &
Environmental Affairs

Mark A. Rothstein, J.D.
University of Louisville School of Medicine
Institute for Bioethics, Health Policy and Law

E. Donald Shapiro, J.D., LL.D.
New York Law School

Sidney Shindell, M.D., LL.B.

David S. Szabo, J.D.
Nutter, McClennen & Fish, LLP, Boston

Linda V. Tiano, J.D.
Empire Blue Cross Blue Shield, Melville, NY

Sidney D. Watson, J.D.
Saint Louis University School of Law

Cyril H. Wecht, M.D., J.D.
Saint Francis Central Hospital, Pittsburgh
Corner of Allegheny County

James G. Zimmerly, M.D., J.D., M.P.H.
AEGON, Monumental Life Ins. Co., Baltimore

AMERICAN JOURNAL OF LAW & MEDICINE

INTERNATIONAL BOARD OF EDITORS

Koichi Bai
Director, Institute of Medical Humanities
Kitasato University School of Medicine
Japan

Erwin Deutsch
Faculty of Law
University of Göttingen
Germany

Bernard M. Dickens, Ph.D., LL.D.
Faculties of Law and Medicine
University of Toronto
Canada

Sev S. Fluss
World Health Organization
Switzerland

Honorable Justice Michael D. Kirby
President, Court of Appeal
Supreme Court of New South Wales
Australia

H.J.J. Leenen
Em. Prof., Social Medicine and Health Law
University of Amsterdam
The Netherlands

Christopher Newdick
Reader in Health Law
University of Reading
United Kingdom

Amos Shapira
Faculty of Law
Tel Aviv University
Israel

Peter D.G. Skegg
Faculty of Law
University of Otago
New Zealand

M.A.M. Wachter
Director, Institute of Bioethics
The Netherlands

AMERICAN JOURNAL OF LAW & MEDICINE

AMERICAN JOURNAL OF LAW & MEDICINE
STUDENT BOARD OF EDITORS
2001–2002

EDITOR-IN-CHIEF
Francine Murray

EXECUTIVE EDITOR
Ruth K. Miller

MANAGING EDITORS
Jennings Aske
Elizabeth McGinty

SYMPOSIUM EDITOR
Nicholas Vegliante

PROJECTS EDITOR
Jodie Hamill

ARTICLES EDITORS
Kerry Dunne
Laura Martin
William Mekrut
Thomas Utzinger

CASE & NOTE EDITORS
Melissa Arnold
Michele Carlucci
Cara Feldberg
Catherine Olender
Vinceetha Reddy
Angela Verrecchio

THIRD-YEAR EDITORS

Randi Burnstine
Nicole Castagna
Andrea Curti
Edward F. Dombroski, Jr.
Taruna Garg
Aviva Halpern

John Hofmann
Brian Holohan
Sabre Kaszynski
Danielle Krause
Ian Prior
Kathleen Romanow

Tal Sapeika
Sarah Smegal
Amy Stewart
Mary Katherine Welti
Brian Winner
Mary Zendran

STAFF MEMBERS

Bruce Anderson
Catherine Bailly
Sara Beliveau
Neil Bloomfield
Carol Botros
Carrie Buchanan
Jacqueline Ceurvels
Judith Donovan
Kristofor Erickson
Christine Flood
Jodie Friedman
Katherine Gehring

Rebecca Greenfield
C. Murray Harris
Amanda N. Hill
Elizabeth Hokanson-Russo
Kristin Jenkins
Judith Joseph
Robert Kanapka
Caren H. Kang
Sandhya Kawatra
Stacy E. Kern
Rajpreet Kochhar
Peter Mello

Richard Montgomery
Laura Nicholson
Jennifer Norton
Allison Pearsall
Anna Piazza
John Quick
Rachel Regenold
Andrew Saxon
Jeremy Shure
Charlotte Spears
Yaroslava Tyler
Christine Vargas

AMERICAN JOURNAL OF LAW & MEDICINE

VOLUME 27 NUMBER 4 2001

ARTICLES

- AN eHEALTH DIPTYCH: THE IMPACT OF PRIVACY REGULATION ON MEDICAL ERROR AND MALPRACTICE LITIGATION 361 Nicolas P. Terry
- PEGRAM'S REGRESS: A MISSED CHANCE FOR SENSIBLE JUDICIAL REVIEW OF MANAGED CARE DECISIONS 421 Michael T. Cahill
Peter D. Jacobson
- AN ECONOMIC MODEL TO ANALYZE THE IMPACT OF FALSE CLAIMS ACT CASES ON ACCESS TO HEALTHCARE FOR THE ELDERLY, DISABLED, RURAL AND INNER-CITY POOR 439 Dayna Bowen Matthew

NOTES AND COMMENTS

- THE WTO DISPUTE SETTLEMENT UNDERSTANDING: AN UNLIKELY WEAPON IN THE FIGHT AGAINST AIDS 469 Andrea M. Curti

RECENT DEVELOPMENTS IN HEALTH LAW

- SELECT RECENT COURT DECISIONS 486
- IN MEMORIAM: RICHARD F. GIBBS 495
- INDEX TO VOLUME 27 497
- ASLME CONFERENCE CALENDAR 498

© 2001 American Society of Law, Medicine & Ethics, Inc., and Boston University School of Law. All rights reserved. For permission to photocopy articles or other materials appearing in the AMERICAN JOURNAL OF LAW & MEDICINE, contact Copyright Clearance Center, 222 Rosewood Dr., Danvers, Massachusetts 01923; tel. 978-750-8400; fax 978-750-4470; or contact the Managing Editor, American Society of Law, Medicine & Ethics, 765 Commonwealth Ave., Ste. 1634, Boston, Massachusetts 02215; tel. 617-262-4990 ext. 13; fax 617-437-7596; email kmcdonald@aslme.org.

“To err is human; to forgive, divine.”

Alexander Pope, ESSAY ON CRITICISM

Due to a printing error, the last issue of the AMERICAN JOURNAL OF LAW & MEDICINE (volume 27, numbers 2 and 3) failed to contain the final version of David M. Studdert and Troyen A. Brennan’s article, *Toward a Workable Model of ‘No-Fault’ Compensation for Medical Injury in the United States*. Any subscriber wishing a complimentary copy of the correct version should contact Joe Christensen, Inc., at (800) 228-5030 or, by email, at order.desk@christensen.com.

Also in the last issue, footnote 113 in Michael Baram’s article, *Making Clinical Trials Safer for Human Subject*, failed to reference the authors of the cited work. It should have read as follows:

113 See Mark Barnes & Sara Krauss, *Conflicts of Interests in Human Research: Risks and Pitfalls of “Easy Money” in Research Funding*, 9 HEALTH L. REP. (BNA) 1378 (Aug. 31, 2000) (noting that the regulations require disclosure of certain financial arrangements but do not impose limits or other similar restrictions) [hereinafter *Conflicts of Interest in Human Research*].