

**The Society of
Medicine and Law in Israel**

Journal of Medicine and Law

Volume No. 37 - December 2007

Enterprise Liability and Tort Law in Israel

Naming the Proper Target for Blaming for Medical Negligence

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During the last several decades, a change in medical tort law has been suggested in American legal circles. The call for change was the result of socio-legal ideas, combined or prompted by the reshaping of the economics and structure of the administration of medicine in the U. S. The proposition recommends the transfer of the burden of liability for negligence, from the individual physician unto the shoulders of the organization – hospital, HMO etc. – which employs the physician, provides medical services and gains financial profits by such activity. This in a nutshell is the doctrine of “Enterprise Liability”. The aim of the suggested amendment is to ensure the principal goal of tort law – the restitution of wrongs, making it more efficient, and enhancing its deterrent and preventive powers. Repeated efforts to formalize the ideas in federal law have failed. However, these ideas gain grounds in American case law.

England, Scotland and the Republic of Ireland have enacted the ideas in laws.

In Israel the principles of the novel doctrine have been realized, though most of those involved are not aware of the theoretical background. The Israeli medical malpractice insurance arrangements unknowingly implement the suggested results.

The medical system in Israel is predominantly public and based on the National Health Insurance Law, 1994. Medical care is administered predominantly by four “Sick Funds” and a public hospital system. The great majority of physicians are employed by those public non-profit organizations. All health practitioners in the public sector are insured by their respective employers, as part of the collective employment contracts between their unions and the employers.

It is important to distinguish between the “shift of the target” of medical malpractice claims as endorsed in law, and contractual arrangements, which enable to circumvent direct blaming, but depend on contract, and therefore prone to change.

Key Words: tort law, individual liability, vicarious liability, corporate liability, no-fault liability, enterprise liability, professional negligence insurance.

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Post-Traumatic Emotional Damage/Harm and Impairment Following Military Service

Avi Bleich* and Yuval Melamed**

Servicemen are exposed to perilous and stressful conditions during maneuvers and other military activities, which are highest in combat. Many soldiers are injured during military service, and compelled to cope with physical and/or emotional impairment for years to follow.

Traumatically stressful events involve real existential life-threatening risks that could cause severe persistent emotional reactions. The immediate response to a traumatic event is Acute Stress Reaction, or Combat Reaction, which is defined as short-term reaction not exceeding two days. However, when characteristic emotional symptoms persist for over a month, Posttraumatic Stress Disorder (PTSD) is diagnosed. PTSD may last for many years, even when treated, and may be accompanied by emotional distress and considerable impairment. Though combat reaction is a risk factor for the ensuing development of PTSD, the latter may emerge even unprecedentedly by combat reaction and may also be delayed for months or even years after the traumatic experience (a delayed reaction).

The recognition of mental disability may be viewed as an expression of social values, which demonstrates the ongoing tension between the attitude towards the brave combatants, worthy of admiration, as opposed to those who were injured or "mentally broken" and remained handicapped. The process of recognition is determined by law (The Law (for Compensation and Rehabilitation) of the Disabled), and its interpretation by the Israeli Court.

To be recognized, the disabled person must submit a claim to the Compensation Officer at the Ministry of Defense, which includes in detail his condition, the circumstances which brought about his/her incapacitation and an expert psychiatric opinion concerning his/her mental state.

Cases of PTSD in which the illness is manifest following military service, and the causal relationship is clear, its recognition as such is not debated. However, there are cases in which PTSD may be the result of an exacerbation of a reaction to a prior traumatic event.

The Supreme Court determined that "...as to the law for the disabled, the Court should take a generous stance towards the claimant" in order not to impede the goals of the statutory provisions, which are intended to benefit the handicapped and not to be restrictive.

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Such policy was developed with time, while gaining cumulative experience, clinical knowledge, and legal guidelines. It should be noted that the "The House of Hillel" policy (rulings which prefer the liberal view, as taken by the School (House) of Hillel in ancient times) is not an open and unrestrained policy, but rather one which maintains and develops along professional, procedural and legal principles.

Provision of the Basket of Services under National Health Insurance Law: Optional or a Statutory Obligation - Oral Health as A Test Case

Tuvia Horev*

The National Health Insurance Law, 1995, is based on principles of justice, equality and social solidarity. The law adopted the basket of health services supplied by the Clalit Sick Fund (the largest in Israel) prior to 1995, and made it mandatory for all 4 sick funds. The complete basket included, in addition to the above, the services supplied directly by the Ministry of Health (MOH) until 1995. These include psychiatry, preventive services, rehabilitation appliances for the handicapped and dental services for school age children. These services were to be supplied by the Ministry of Health until transferred to the respective sick funds.

However, the task of supplying dental services to school children was transferred by the MOH to the municipal authorities. However, it was not demanded that these authorities supply the services in full, and most of them chose not to. The number of municipalities that supply services decreased during the last decade. Among those who do supply the service, variations exist in terms of content of the basket of services, and the age of recipients. Accessibility to the dental services is an additional problem in many of the municipalities. The decisions concerning remuneration for these services are also rather problematic.

The present situation, in which dental services for children are not universal and homogeneous, stands in contrast to the principle of equality and differs from other health services under the Health Insurance Law.

This article claims that dental health services for school-age children are provided in a way contradictory the National Health Insurance Law. The high cost of dental treatment in private clinics, and the lack of financial assistance for this purpose to households in need, creates wide gaps between socio-economic groups in terms of dental morbidity.

Key words: Health Policy, Health Services, National Health Insurance, Patient's rights, Oral Health.

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This article has been developed from an idea that was presented in Horev T., Mann J. Oral and Dental Health: The Responsibility of the State towards its Citizens. Taub Center for Social Policy Studies in Israel. Jerusalem. 2007.

The Human Papillomavirus Vaccine: The Appropriate Policy for Israel

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The Human Papillomavirus (HPV) vaccine is a breakthrough in the attempts to eradicate cancer and pre-cancerous lesions of the uterine cervix and in the prevention of genital warts. The vaccine is unique and considered to be the first of its kind to reduce morbidity and mortality related to the various diseases caused by HPV. Nonetheless, the route of transmission and its close association with sexual relations, the risk of infection which is limited to sexual activity, and the low incidence of viral persistency and its related diseases, raise specific ethical issues, which require careful consideration in the attempt to establish a national policy for the use of the vaccine.

This article reviews the various methods for the inclusion of the HPV vaccine in the Israeli vaccination program, i.e general authorization of its use, the incorporation of the vaccine in the Basket of Health Services, and its inclusion in the routine vaccination program. It is also necessary to decide whether to regard the vaccination as a compulsory procedure. We will also address the unique ethical issues associated with the various national policy decisions, and express our opinion regarding the appropriate national policy

Key words: Vaccine, HPV, Vaccination Policy, Compulsory Vaccination, The Basket of Health Services, Public Health, Virus, Uterine Cervix Cancer, Cost-Benefit, Epidemiology.

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Putting Ethics into the Record: Proposals for a Routine Ethical History Taking

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Tauber (in 2002 and 2006) has suggested the addition of a section termed "Ethical Concerns" to the medical record. Here the treatment team was to include psychosocial information and values of both the patient and the treatment team. This proposal has not received much attention in the literature to date. Following Tauber, Alroy (2007) suggested adding "ethical history taking" to the medical record. The present article describes the proposals of Tauber and Alroy, and discusses the reasons for the lack of interest and implementation in the suggestions. These include economic considerations of time pressure, the claim that the issues raised in the proposals have already been required specifically by law and by the existing guidelines (such as providing information to family members) and the fact that psychosocial information is anyway routinely collected ; difficulties in specifying value systems in the treatment team; defensive medicine which disinclines practitioners

to raise ethical issues in the medical record. It remains unclear as to whether adding an "ethical concerns" section to the medical record is an effective way to raise awareness of ethical issues and dilemmas. Changing the medical record should proceed by involving the treatment teams, patients and their families, in hospitals and outpatient clinics, and selecting the relevant questions in various clinical situations.

Keywords: medical record, ethical history taking , values

Genetic Cloning in View of Huxley's "Brave New World"

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The ability to create a human being by artificial means is on one hand very appealing and very appalling and frightening on the other. Since 1996 when Dolly was cloned, the issue of genetic cloning evoked public debate. The current article examines the role of Aldous Huxley's classical novel "A Brave New World" published on 1932, in the general public's view on cloning. This book still plays a central role in the defining public, political and civil attitudes around the issue of cloning and eugenics.

The present article starts with a review of the history of cloning and, the public attitude towards it in Israel and other countries. Then, several issues of public interest with regard to cloning are examined in the light of Huxley's work. We conclude with the presentation of the author's predictions in light of the realities of the present and of the possible applications of genetic cloning.

Huxley's legacy is still prevalent today and unconsciously guides even those who did not read the book. In the modern world, **Huxley's** ideas represent a radical view within the cloning debate. Even if we do not follow blindly his predictions, it is important that his book will remain as part of the public discourse on this issue.

It is suggested that the political establishment will take special care as to setting the guidelines for the "do and don't do" in the matter of cloning. At the same time, it seems advisable to go beyond the boundaries of a single country and try create a world-wide convention, combining professional, intellectual and political ideas and views, in which the limits of the permissible and the prohibited may be defined and agreed upon. Such boundaries will be subject to changes according to future developing circumstances. **Huxley's** predictions best be left within the pages of literature - of fiction.

Key words: Cloning, genetic engineering, brain-cells

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The Effect of Attitudes of Nursing Students towards Cheating during their Studies on their View of Ethical Behavior in General, and Ethical Behavior in Nursing in Particular

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The phenomenon of behavior associated with cheating among students in general, and among students of health professions in particular, is worrisome. This is daunting in particular with regard to the nursing profession, since flawed academic integrity during nursing studies, may damage the professional standards and integrity of the academic nursing community. It also may affect the quality of the health services. Studies indicate that there is a variety of causes for plagiarizing, and that many factors which affect such behavior. It also serves as an indicator of the underlying factors in the ethical approach of the student with regard to plagiarizing.

The Aims of the Research: To examine the attitudes of nursing students towards fraudulent behavior, and the impact of the phenomenon on the development of ethical attitudes in nursing.

Method: Population and Sample – a convenience sample of 350 subjects: students in the B.S.N. program; registered nurses studying towards a BA degree; students studying towards an MA degree in nursing; students in academic retraining programs towards the RN degree; practical nursing students taking courses towards RN qualification.

85% of the population consisted of women; 50% single; 53% did not serve in the IDF.

The Research Procedure – Contact was made through the Directors of the schools affiliated with Tel Aviv University. Questionnaires were anonymous and answered independently by the subjects. 350 questionnaires were distributed, 235 were returned, of which 228 were filled out in full. The rate of response was 65.2%.

Research Methods –

- a. A questionnaire to assess the degree of moral behavior associated with academic and professional integrity (869.=α);
- b. A questionnaire on attitudes towards plagiarizing (758.=α);

Key words: Nursing student, cheating behavior, copying, moral judgment, integrity, honor code, theoretical studies, clinical studies.

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- c. A questionnaire on the students' feelings on the attitude of the university and the school towards them (683.=α);
- d. Questions on opinions or attitudes towards fraudulent behavior – with dichotomous responses;
- e. Socio-demographic details about the subjects.

Results: There is a relationship between the student's personal characteristics and his/ her attitude towards cheating. The more religious the student considers him/ herself, the more negative the attitude expressed towards cheating; students who served in the IDF have a more negative attitude towards cheating than those who did not. There is a relationship between the attitude towards cheating during studies and ethical professional behavior. In addition, the present study supports the argument that there may be a disparity between the way students view fraudulent behavior during their studies, regarded as normative, and their personal stance which regard such behavior as unethical.

Promotion of Academic and Professional Integrity through the Construction of an Ethical Code for Academic Integrity at the Shoenbron Academic School of Nursing, Tel Aviv

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Eighteen students in their 1st through 3rd years of study towards a degree in Nursing at Tel Aviv University were brought before a disciplinary hearing in 2003, for copying and/or purchasing of academic papers. They were suspended for a period of one year. Although these cases constituted only 2.25% of the total students' body in the program, the opinion of the teaching staff of the Department of Nursing and the affiliated schools was that these students were only the tip of an iceberg.

Nursing students are exposed to the professional ethical behavior required of a nurse since the initial stages of their training, as part of both the theoretical and clinical study programs. The students are made well aware of how the teaching and clinical training staffs regard dishonest performance in presenting papers or during examinations, as a

Key words: Academic integrity; cheating behavior, copying, honor code, ethical code for academic integrity, nursing students.

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breach of the ethical conduct required and expected of nurses. Therefore, the staff was surprised by the claims made by those students that their unethical conduct as students would not be reflected in their professional behavior.

The students' arguments combined with the wish to identify the motives and factors that motivate cheating among students of nursing, prompted Balik et al. (2005) to study the effect of the attitudes of the nursing students towards academic cheating, their perception of ethical professional behavior in general and in nursing in particular. Based on Balik's findings and on those in the relevant professional literature, an ethical code for academic integrity was constructed for the Shoenbron Academic School of Nursing, affiliated to Tel Aviv University.

The purpose of this paper is to present the theoretical background which led to the construction of the ethical code and the process by which it was introduced at the School of Nursing.

Primary Appointment of a Medical Expert by the Court

Avraham Sahar*

The Israeli Regulations of Civil Procedure require that an action in tort, which involves a medical problem, be accompanied by a Medical Expert Opinion presented by the plaintiff. The regulations allow for exceptions, left at the discretion of the Court. The Court may exempt the appellant and appoint a primarily independent Medical Expert. Such exemption and appointment of a Medical Experts was allowed only in a limited number of cases. This status is distinct from that of Court Appointed Expert, after and in addition to the Experts for the parties had presented their Opinions. It is also different from that of an Expert appointed by the Court after the parties had been denied their right to present their respective Experts. In most cases the exemption was granted on financial grounds – the high expenditures involved in the engagement of the Expert. Only in one Case this argument was found as sufficient – 'poverty should not block the way to justice'. In most cases a supplementary argument was required, a procedural one, or a recommendation by a previous Expert.

The appellant for such a Court appointment, waives her/his right to present her/his own evidence, and is left to that presented by the other party's and the Court's Experts.

Key Words: expert opinion; medical expert; court appointed expert; right to present evidence; expedition of procedure;

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This paper was prompted by a recent ruling (App. Req. 1777/07 (District Ct. Haifa) in which the District Court approved the granted appeal for the appointment of an Expert by a lower Court. The paper follows and discusses the Court's comments on the various aspects and categories of Court Appointed Experts, and the various interests involved in the Court's considerations, such as the party's right to present evidence and the attempt to expedite the legal process, when deciding on such appointments, and influence the Court's attitude towards such evidence.

Why a Conviction Should Not Be Solely Based on a Drug Test

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This paper deals with the ruling in the **Lubertovski**¹ case, in which the Supreme Court adjudicated that the sole finding of a drug by urinalysis is sufficient proof of the actus reus of drug abuse. We examined this ruling using the Bayesian analysis, commonly employed in the assessment of methods of medical testing and diagnosis. We conclude that even when the accuracy of a given test is very high, when it is applied in a group (or population) with low frequency of drug usage, there is a high risk that most positive results are false positives.

We address the legal significance of the probabilities which arise by the application of Bayes' Theorem, and argue that the reliance on prior probability of drug use by a specific defendant, as indicated by the prevalence of drug use within the population to which that defendant belongs, is inappropriate in criminal law and its required standard of proof.

We suggest that a positive result of a drug test should not be used as sole evidence in the criminal justice system. We further suggest that the law stipulate that, for the establishment of the defendant's guilt, further valid evidence is introduced, indicating the defendant's use of the drug.

A review of American case law and legal/scientific literature, concerning possible sources of error in drug tests, shows that false positive results indeed do occur.

Considering a positive result of a single drug test as definitive evidence may lead to many wrongful convictions.

Key words: drug test, GC/MS, Lubertovski ruling, medical testing and diagnosis, Bayes' theorem, false positive, sole evidence, prosecutor's fallacy, miscarriages of justice, convicting the innocent.

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¹ SUPR. CT. JUST. 27/86 LUBERTOVSKI V. THE MILITARY COURT OF APPEAL P.D. 40 (3) 757, PP 758-759.