Correspondence

More on *Rogers v. Okin*

Dear Editors:

The article by Mark J. Mills in the April issue of MEDICOLEGAL NEWS, *The Continuing Clinicolegal Conundrum of the Boston State Hospital Case*, is an excellent review of the troublesome case, *Rogers v. Okin*. However, Dr. Mills repeats a psychiatric cliché that does not withstand close scrutiny: "Denial [of mental illness] is one of the hallmarks of psychiatric disturbance. . . ." In considering that statement, one should recognize that denial is also a hallmark of sanity!

This is a common error of psychiatrists, social workers, alcohol treatment counselors, and the like: they tout "denial" as confirming their diagnoses, whereas in fact it is diagnostic of absolutely nothing.

Dr. Mills and his contemporaries would do themselves a favor if they would forget the trite argument about denial and get down to substance.

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Dr. Mills responds:

Although I may have overstated the case when I used the word "hallmarks," denial is a frequent manifestation of psychosis (paranoia in particular) and a sometime defense to psychologic and physical trauma. I question whether "denial" is a hallmark of sanity (but note that since my observations were clinical, and since sanity is a legal term, it is difficult to comment precisely).

Upon reconsidering my article in my new role as Commissioner of Mental Health for Massachusetts, I am increasingly troubled by the Court of Appeals opinion in *Rogers v. Okin*. What distresses me is that the court engages in policy-making without an adequate constitutional foundation, and that the judicially-promulgated policy is too rigid in its imposition on clinical decision-makers. I believe it should not stand and have thus welcomed the Commonwealth's appeal to the Supreme Court,which has granted *certiorari*.

In re Spring

Dear Editors:

I write to applaud Dr. Cranford's editorial in the February 1981 edition of MEDICOLEGAL NEWS concerning the importance of interdisciplinary dialogue, and to comment upon the Dunn/Ator article, *Vox Clamantis in Deserto: Do You Really Mean What You Say in* Spring?

Attorney Dunn's brief as amicus curiae for the Illinois Association of Hospital Attorneys in the *Spring*[1] case provided the Supreme Judicial Court of Massachusetts, in my view, a comprehensive statement of the issues and an exacting survey of the state of the law. His contribution to the discussion of these troubling issues is to be commended.

When I was appointed Guardian ad litem for Earle N. Spring, the only source of guidance available to me was the *Saikewicz* case and its substituted judgment test.[2] For example, was the Guardian ad litem an investigator for the court or an advocate within the adversary system for the ward?

During the judicial proceedings, I was concerned about whether there was sufficient evidence for the court to determine, utilizing the substituted judgment criteria of *Saikewicz*, whether it was Mr. Spring's wish to terminate this treatment. The Probate Court held that there was sufficient evidence for such a finding, and the Appeals Court, in affirming the lower court, determined that the Probate Court's review of the evidence was not clearly erroneous. The Supreme Judicial Court did not disturb that portion of the Appeals Court's opinion.

Prior to the rehearing, scheduled pursuant to Justice Quirico's order of February 4, 1980, I presented to the Probate Court a motion for the court to consider adopting a higher standard of proof than previously applied. In answering Justice Quirico's question, I suggested that the Probate Court adopt a clear and convincing test or the reasonable doubt standard. *See attached motion.*

I note that in *Eichner v. Dillon*, the New York Court of Appeals held that Brother Fox should be allowed to die since the "evidence clearly and convincingly showed that Brother Fox did not want to be maintained in a vegetative coma by use of a respirator."[3] I suggest that the John Storar decision similarly supports the argument that there must be a clear demonstration of an individual's competent desires in connection with these matters.[4]

On April 23, 1981, the Supreme Judicial Court answered the questions raised by my motion as to the appropriate standard of proof to be applied in guardianship proceedings. In the matter of the *Guardianship of Richard Roe III*,[5] the court held that the requisite standard of proof for the appointment of a guardian for an "individual unable to care for himself by reason of mental illness" is the usual preponderance of the evidence standard used in civil proceedings.

In *Roe III*, I represented the guardian who sought certain standby authority to administer psychotropic drugs to a non-institutionalized incompetent ward. In this regard, the SJC held that the likelihood of serious harm to the public must be established *beyond a reasonable doubt* for the court to authorize an order for forced medication.

The court again relied upon the substituted judgment test to determine whether this type of treatment modality was to be utilized. In doing so, in my view, the court replied to Mr. Dunn's and Ms. Ator's concerns that the court had not provided the bar and the medical profession with sufficient guidelines for future cases. The SJC's lengthy opinion now provides that guidance. Although the court repeatedly stated that its opinion was limited to an incompetent individual who is not institutionalized and who has a guardian who is seeking to administer certain psychotropic medications, I suggest that the court in *Roe III* has clarified the *Spring* case.

The guidelines, as enumerated by the court are as follows: First, the need for a court order. The court once again stated its preference for the judicial forum for such decisions, and held that the question is *not* whether the treatment is in the ward's best medical interest, but what the individual would have done if competent. In answering this question, the court must look to the intrusiveness of the proposed treatment, the possibility of side effects, the absence of an emergency, the nature and extent of prior judicial involvement, and the likelihood of conflicting interests. Second, the court delineated the relevant factors in making a substituted judgment determination — factors not expressed in the *Spring* case. They are: (1) the ward's expressed preference regarding treatment, (2) his religious beliefs, (3) the impact on the ward's family, (4) the probability of adverse side effects, (5) the consequence if treatment is refused, and (6) the prognosis with treatment. These six factors are now to be utilized in determining, as best as we are able, what the incompetent individual would have decided if he or she were competent to decide.

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§300k *et seq.* (Pub. L. 93-641), as amended by Pub. L. 96-79 [hereinafter National Health Planning Act].

2. S. Rep. 96-96, 96th Cong., 1st Sess., *reprinted in* (1979) 2 U.S. Code, Cong. & Ad. News 1306-1468, at 1310.

3. H.R. Rep. No. 190 96th Cong., 1st Sess. 51.

4. 1979 Health Planning Amendments, §103(b) adding §1502(b), 42 U.S.C. §300k-2(b)(1).

5. 42 U.S.C. §300k-2(b)(2).

6. 42 U.S.C. §300k-2(b)(3).

7. 42 U.S.C. §300*l*-1(b)(4)(A)(i) and (ii).

8. 15 U.S.C. §§1, 2.

9. 15 U.S.C. §18.

10. 15 U.S.C. §45.

11. 15 U.S.C. §15.

12. *Olin Mathieson Chemical Corp. v. Cohen*, 234 F. Supp. 80 (D.C. Pa. 1964).

13. *United States v. American Medical Ass'n*, 28 F. Supp. 752 (D.C. D.C. 1939), *rev'd on other grounds*, 110 F.2d 703, *cert. denied*, 308 U.S. 599 (1939).

14. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

15. *Id.* at 786-88.

16. 15 U.S.C. §1.

17. *Goldfarb v. Virginia State Bar, supra* note 14.

18. *Hospital Building Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976).

19. *Parker v. Brown*, 317 U.S. 341 (1943).

20. *California Retail Liquor Dealers Ass'n v. Mid-Cal Aluminum, Inc.*, 100 S.Ct. 937 (1980).

21. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

22. *City of Fairfax v. Fairfax Hosp. Ass'n*, 562 F.2d 280 (4th Cir. 1977), *cert. granted, vacated and remanded*, 435 U.S. 992 (1978).

23. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

24. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

25. McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. §1011-1015, at 1012.

26. *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979).

27. *See also Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), and *St. Bernard Hosp. v. Hospital Ass'n of New Orleans, Inc.*, 618 F.2d 1140 (5th Cir. 1980).

28. *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975).

29. For a discussion of this theory, *see* footnote 40 *infra* and accompanying text.

30. *Arizona v. Maricopa County Medical Soc'y*, 643 F.2d 553 (9th Cir. 1980), *rehearing denied*, June 12, 1980, *cert. granted*, 49 U.S.L.W. 3663 (March 10, 1981).

31. Program Policy Notice #80-21, May 23, 1980.

32. Legal Briefing Memo #6, December 2, 1980, Western Center for Health Planning.

33. Health Planning Newsletter, No. 15, November 1980, at 1.

34. *Id.* at 4.

35. *Hospital Building Co. v. Trustees of Rex Hosp.*, ____ F. Supp. ____ (E.D.N.C. 1980) (trial on remand from reversal of dismissal, 425 U.S. 738 (1976)).

36. *Huron Valley Hosp. v. City of Pontiac*, 466 F. Supp. 1301 (E.D. Mich. 1979).

37. *Id.* at 1311, 1312.

38. *Id.* at 1312-1315.

39. *Id.* at 1312.

40. *National Gerimedical Hosp. and Gerontology Center v. Blue Cross of Kansas City*, 479 F. Supp. 1012 (W.D. Mo. 1979), *aff'd*, 628 F.2d 1050 (8th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3531 (January 27, 1981).

41. *Id.*, 479 F. Supp. at 1021.

42. *Id.* at 1016-1019, *citing Group Life & Health Insurance Co. v. Royal Drug Co., supra* note 26.

43. *National Gerimedical Hosp. and Gerontology Center v. Blue Cross of Kansas City, supra* note 40, 628 F.2d at 1054.

44. *Id.* at 1057.

45. *Id.* at 1053.

46. Legal Briefing Memo #5, September 3, 1980, Western Center for Health Planning.

47. *Today in Health Planning* 111(3): 1 (January 16, 1981). A recently reported decision of the federal District Court in Michigan is in accord with *Huron Valley* and *National Gerimedical*. In *Save Our Samaritan v. Bay Medical Center and Bay City Samaritan Hosp.*, the court dismissed claims of federal antitrust violations in connection with a planned merger of facilities which was reviewed by the HSA and given a CON by the state. The court found that Congress intended an "implied repeal" of the antitrust laws when it enacted the National Health Planning Act. In support of this proposition, the court cited language in the Act authorizing HSAs and state agencies to make appropriate allocations of inpatient and other institutional health services, because of the failure of the competitive market to allocate those services satisfactorily.

48. *Arizona v. Maricopa County Medical Soc'y, supra* note 30.

Notice to ASLM Members

On June 17, 1981, at the Copley Plaza Hotel in Boston, the Annual Business Meeting of the Society was held, and certain amendments to the Society's Constitution were adopted. The amended Constitution provides for an elected office of President-Elect, two-year terms of office, and an expanded Executive Committee — the group charged with leading the Society.

Two long-time Society members, John A. Norris and George J. Annas, were also honored for their significant contributions to the Society and to the AMERICAN JOURNAL OF LAW & MEDICINE and MEDICOLEGAL NEWS, respectively. Both Professor Annas and Mr. Norris will remain involved with their publications as Editors Emeritus.

The last order of business was the election of the Society's Board of Directors and Officers. Full details on the new and re-elected members of the Board will be published in the September issue.

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The court, however, notes the situation where an individual's right to refuse intrusive treatment may be properly subordinated to various state interests. Those state interests are: (1) the preservation of life, (2) the protection of the interests of innocent third parties, (3) the prevention of suicide, and (4) the maintenance of the ethical integrity of the medical profession.

I respectfully offer this comment to the dialogue.

Mark I. Berson, LL.B., LL.M.
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References

1. *In re Spring*, 405 N.E.2d 115 (Mass. 1980).

2. For future reference, *see* materials for the *Second Guardian ad litem Conference*, Boston College Law School, January 10, 1981, presented by Alfred L. Podolski, Chief Justice of the Probate and Family Court of the Commonwealth of Massachusetts.

3. *Eichner v. Dillon*, ____ N.E.2d ____ (N.Y. 1981).

4. *Eichner v. Dillon, id.* at ____, *reversing In re Storar*, 433 N.Y.S.2d 388 (App. Div. 1980).

5. *In re Guardianship of Roe III*, ____ N.E.2d ____ (Mass. 1981).

Motion of Guardian Ad Litem
for Pre-Trial Conference
In the Matter of Earle N. Spring

Now comes the Guardian Ad Litem and respectfully moves that this Court convene a pre-trial conference prior to April 7, 1980, in order to determine and accomplish the following:

1. Review and determine what documentary evidence shall be admitted at trial;

2. The number of physicians who shall testify before the Court;

3. To determine what standard of proof shall be applied on the issues before the Court; either

3.1. A fair preponderance of the evidence;

3.2. Evidence which is clear and convincing;

3.3. Evidence which is beyond a reasonable doubt;

4. The ordering of proof;

5. The witnesses that shall testify before the Court, other than the designated physicians.

Wherefore, the Guardian Ad Litem requests that if the Court convenes a pre-trial conference, that the Guardian Ad Litem be allowed to submit proposed pre-trial orders and that the Court issue pre-trial orders consistent with the Interlocutory Judgment entered by the Single Justice of the Supreme Judicial Court on February 4, 1980.

Respectfully submitted,
Mark I. Berson