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GAMBLING WITH THE HEALTH OF OTHERS

Stephen P. Teret* & Jon S. Vernick**†

The health and wellbeing of the public is, in part, a function of the behavior of individuals. When one individual's behavior places another at a foreseeable and easily preventable risk of illness or injury, tort liability can play a valuable role in discouraging that conduct. This is true in the context of childhood immunization.

I. THE GOVERNMENT REGULATES PRIVATE CONDUCT TO PROMOTE HEALTH

In public health, what one person does has the potential to affect others. The effect may be disease related, such as when a person with a cold goes to work and passes the cold on to coworkers. The effect can also be economic, as when a motorcyclist rides helmetless, he suffers a head injury that could have been averted by the use of a helmet, and we then all share the expense of his care and rehabilitation.

Sometimes, when an individual makes a decision, he or she may think only of the personal consequences of that decision. The motorcyclist who wants to feel the wind in his hair may ignore the risk of riding without a helmet, or may calculate and then assume the risk, incorrectly thinking he is the only one involved in the possible consequences. In order to reduce the likelihood of such conduct and to control the economic costs of head injuries to motorcyclists, all states have passed mandatory helmet laws, though some states have repealed them. These laws, passed over the vocal objection of some motorcyclists, have proven to be both constitutional and effective in reducing severe head injuries and deaths.

In the field of childhood infectious diseases, the state has several interests to protect: the health of the child (under the *parens patriae* role of the state), the health of others who may come in direct or indirect contact with the child, and the economic interests of society, which will inevitably cover some or all of the costs incurred by childhood illnesses. To address infectious diseases such as diphtheria, pertussis, tetanus, mumps, measles, and others that historically have been devastating to children and others, each

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state has, through an exercise of the police power reserved to the states, passed mandatory immunization laws requiring parents to demonstrate that their children have been vaccinated in order to attend school. These laws are generally recognized as among the most successful interventions in the field of public health, having enormously reduced the incidence of morbidity and mortality that previously plagued childhood populations.

II. RISKS RESULTING FROM PHILOSOPHICAL EXEMPTIONS TO VACCINATION REQUIREMENTS

All states have included in their mandatory immunization laws a provision that if a vaccination is medically contra-indicated for an individual child, that child need not be vaccinated. The vast majority of states have also included a religious exemption within the law, so that children for whom vaccination would be a violation of a religious tenet can still attend schools without being vaccinated. But some parents of children for whom immunization is neither medically contra-indicated nor proscribed by their religion do not want to have their children vaccinated due to other, strongly held, personal reasons. These reasons include beliefs about medical responses to vaccines that are not substantiated by epidemiologic research, or beliefs based on personal moral grounds that might not fully meet the requirements of the religious exemption. The political response to the antivaccinationists has been to create a personal or philosophical exemption to mandatory immunization laws. Research, such as a 2006 study in *JAMA* by Dr. Omer and his colleagues has shown that states with such philosophical exemptions have geographic pockets of nonimmunized children attending schools—and such clusters have been related to infectious disease outbreaks involving previously controlled diseases.

Not only are these nonimmunized children exposed to the risk of acquiring these sometimes serious diseases, but so are children who have not been immunized for medical contra-indications and religious beliefs. Also, a modest percentage of children who do get vaccinated against an infectious disease are also at risk, because vaccinations are not 100% effective. Thus, the decision of a parent not to vaccinate his or her child poses serious risk to the public.

III. TORT LIABILITY AS A DETERRENT

Tort liability could encourage vaccination of children among parents who might otherwise take advantage of the easy availability of a philosophical exemption. Tort liability not only serves the purpose of compensating a damaged plaintiff, but it also serves as an incentive for preventing injury and disease. This was recognized long ago by William Prosser who wrote in his seminal treatise that with tort litigation, “there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.”

The availability of tort liability influences the behavior of potential defendants. Product manufacturers have often changed the design of their products to reduce risks, in an effort to minimize their exposure to liability. In fact, one study conducted by RAND in the early 1980s concluded that for lightly regulated manufacturers, liability was the single greatest factor influencing product design decisions. Similarly, professionals such as physicians engage in defensive practices based on the threat of liability. But the extent to which individuals acting in their personal capacity, such as parents making decisions about the health care of their children, adjust their behaviors for the purpose of avoiding liability is less well known.

Although a parent's exposure to tort liability for failure to have a child immunized might improve vaccination (and infection) rates, there are obstacles to imposing liability under existing principles of negligence. To succeed in an action for negligence, the plaintiff must generally establish by a preponderance of the evidence that (1) the defendant owed him or her a legally recognized duty; (2) the defendant breached that duty; (3) the plaintiff has legally cognizable injuries; and (4) the defendant's breach was the "but for," and also proximate, cause of those injuries. At least three of these four traditional elements of negligence might be problematic for the plaintiff in an action alleging injuries associated with a defendant parent's failure to vaccinate his or her child. Where the defendant has relied on a legislatively established philosophical exemption from vaccination, it would be difficult to argue that he or she owes the plaintiff a "duty" to be vaccinated that has been breached. In addition, establishing that an illness suffered by plaintiff's child was caused by the defendant's failure to vaccinate his or her child could be challenging.

However, these obstacles are certainly not insurmountable. For example, a state could amend its law to specifically allow for liability as a condition of claiming the philosophical exemption. The state could even require persons invoking the exemption to acknowledge, in writing, that their actions might place others at risk—with resulting potential for liability. And if the defendant's unvaccinated child were the plaintiff's only known exposure to the illness (for example, in a classroom), the finder of fact could easily enough conclude that causation has been established by a preponderance of the evidence. Even if the plaintiff had been exposed to several others with the disease, genetic sequencing of the pathogen might still allow a finder of fact to determine whether the defendant is the most likely source.

As public health professionals, our primary goal is to reduce morbidity and mortality associated with childhood illnesses. Some may argue that tort law is a blunt instrument for accomplishing that objective. As with any intervention, the availability of tort litigation carries some risk of unintended consequences—such as increasing political opposition to mandatory vaccination associated with school attendance. Others may be concerned about potential risks to the reputation or integrity of the judicial system itself. In our view, however, the potential benefits of increasing vaccination rates outweigh these concerns. The judicial system is not likely to see a substantial increase in litigation, nor will it be unable to navigate a new tort far less

complex than many it currently handles. We also note that our argument in favor of tort liability is limited to the case of a parent invoking a philosophical exemption that, unlike a religious exemption, does not directly implicate First Amendment protections.

We certainly do not argue that tort liability is the only, or even the most important, way to improve vaccination rates. However, it seems appropriate for society to discourage one parent from engaging in a behavior that places another parent's child at a foreseeable—and preventable—risk. Tort liability can do just that.