Michigan Law Review First Impressions

Volume 107

2009

# Parents Should Not be Legally Liable for Refusing to Vaccinate their Children

Jay Gordon
*American Academy of Pediatrics*

# PARENTS SHOULD NOT BE LEGALLY LIABLE FOR REFUSING TO VACCINATE THEIR CHILDREN

*Jay Gordon** †

## INTRODUCTION

Should a parent who takes advantage of a personal belief exemption to avoid vaccinating a child be held liable if that child infects other people? No, because there are valid medical reasons for choosing this exemption and tracing direct transmission of these illnesses from an unvaccinated child to another person is virtually impossible.

I have been a pediatrician in private practice for nearly thirty years. I was conventionally trained, completed a residency in pediatrics at Children's Hospital of Los Angeles and was the Senior Fellow in Pediatric Nutrition at Memorial Sloan-Kettering Institute in New York City. Over many years, seeing thousands of children, my point of view about childhood vaccines has changed. I believe that parents have the right to decide when and how their children receive vaccinations and also have the right to decline any or all vaccines. Like many medical interventions, vaccines have risks and benefits, and parents may elect nonvaccination as the better choice for an individual child. The societal ramifications are significant and should certainly be a part of any discussion.

When children or babies who have been in contact with other children (or adults) contract most illnesses, there is no feasible way to know from whom they got the disease. Whether one is talking about a routine winter viral illness, chickenpox, or whooping cough, the contagion could have come from a child with overt disease signs and symptoms, an asymptomatic carrier, or another, perhaps mutual, contact. Vaccines are not 100% effective, so that even a fully vaccinated child can contract an illness or carry that illness and give it to another child. Blaming a specific individual—let alone suing one—because your child gets sick has no credible medical basis.

---

* Fellow, American Academy of Pediatrics.

† Suggested citation: Jay Gordon, Commentary, *Parents Should Not Be Legally Liable for Refusing to Vaccinate Their Children*, 107 MICH. L. REV. FIRST IMPRESSIONS 95 (2009), http://www.michiganlawreview.org/firstimpressions/vol107/gordon.pdf.

## I. Parents May Be Justified in Declining to Vaccinate Their Children

There are many valid reasons to support vaccination, but they *don't* support removing the right to *refuse* vaccinations. There are also situations—medical and personal—which justify waiving all or some childhood vaccines, but these are not good reasons to *abandon* vaccines altogether.

Twenty states (including Michigan) allow parents to waive any or all vaccines for personal or philosophical reasons. These children may still attend school at all levels, but the school system reserves the right to exclude these children in the event of an outbreak. This is a firm commitment on the part of the government to protect the rights of parents to participate fully in this important healthcare decision. Parents who feel that the risks of vaccinating outweigh the benefits are entitled medically and legally to waive vaccines. Section 6051 of the California Code states that "[a] pupil with a permanent medical exemption or a personal beliefs exemption to immunization shall be admitted unconditionally." Similar wording appears in most of the state laws allowing a personal belief exemption. These are not whimsical choices on the part of the legislators, the parents, or the doctors who support this right. Parents who vaccinate their children base their decisions on the advice they receive from their pediatricians and the other knowledge they have gathered. Parents who choose to waive vaccinations do so for similarly valid reasons.

Adverse outcomes can occur from both vaccination and nonvaccination. Vaccines work very well at creating immunity to illnesses, so there are very few situations that would likely lead to transmission of an illness from an unvaccinated child to a vaccinated child. The obvious exceptions would be infants too young to have received a full complement of shots and immunocompromised children. Parents must protect these two groups of children by keeping them away from too many other children. Period. Newborns and young babies are at risk any time they are in public. We can only vaccinate against a *very* small minority of contagious illnesses; it is unwise to bring your newborn into preschool when you pick up your toddler, and equally risky to attend older children's birthday parties with this baby. Further, parents of children taking high dose steroids for asthma or receiving immunosuppressive medicine for other diseases are strongly cautioned by their doctors to avoid the potential dangers I have described.

There are valid reasons for giving all the recommended vaccines, but parents' ambivalence is supported not just by instinct or alleged self-interest but also by medical literature questioning the effectiveness of immunizations. The Centers for Disease Control and Prevention ("CDC") funded a peer-reviewed article about flu shots published in the October 2008 issue of the highly respected *Archives of Pediatric and Adolescent Medicine*. It concluded:

> [S]ignificant influenza VE [vaccine effectiveness] could not be demonstrated for any season, age, or setting after adjusting for county, sex, insurance, chronic conditions recommended for influenza vaccination, and

> timing of influenza vaccination (VE estimates ranged from 7%–52% across settings and seasons for fully vaccinated 6- to 59-month-olds). . . . In 2 seasons with suboptimal antigenic match between vaccines and circulating strains, we could not demonstrate VE in preventing influenza-related inpatient/ED or outpatient visits in children younger than 5 years. Further study is needed during years with good vaccine match.

We have known for years that flu shots do not work well in older adults; newer research questions their efficacy in children, too.

Another example involves chickenpox. The Varicella Zoster virus ("VZV") causes chickenpox in children; the illness is virtually always benign and leaves the child with immunity to chickenpox. In adults, this virus also can cause "shingles," an extremely painful illness. VZV can live in the nervous system for years and then reactivate in adults whose immune systems no longer suppress it.

Fortunately, continued occasional exposure to children with chickenpox usually keeps the antibody level against the virus high enough so that shingles is not terribly common. That is the state of medical care in most of Europe where governments and the medical establishment have refused to officially recommend universal vaccination against chickenpox. Among many studies supporting this refusal is a report in the prestigious medical journal *Vaccine* written by researchers at Britain's Public Health Laboratory Service, who found that "eliminating chickenpox in a country the size of the United States would prevent 186 million cases of the disease and 5,000 deaths over 50 years. However . . . *they said it could also result in 21 million more cases of shingles and 5,000 deaths.*"

Of course, we have been quite successful in reducing certain childhood diseases to almost insignificant numbers in the United States, Western Europe, and many other places. (Somalia experienced its first polio-free year in 2008.) And widespread vaccination directly led to this success.

In March 2005, Julie Gerberding, Director of the CDC, held a press conference to announce that "[t]he elimination of rubella in the United States is a tremendous step in protecting the health and well being of pregnant women and infants." A viral illness feared by pregnant women "is no longer considered to be a major public health threat in the United States."

Another success story involves measles. The United States averages about 60 cases of this viral illness each year. In 2008, the country is on course to have about 160 cases among 300 million Americans. However, the media have managed to turn these extra 100 cases into a cause célèbre for vilifying parents who question the currently recommended schedule of twenty-five or more separate injections over the first two years of life.

In 1960, if a parent were presented with a dilemma about the polio vaccine and hypothetical side effects, the decision would not have been too difficult given the prevalence of polio during that time period. In 2008 or 2009, the illness is rare worldwide: we are on target for about 1700 cases on the entire planet in 2008 with all but 100 of the cases being in India, Nigeria, Pakistan, Angola, or Afghanistan. The benefits, both personal and

societal, of the polio vaccine were so clear thirty or forty years ago that parents and doctors easily agreed on universal vaccination.

"Childhood vaccines save 33,000 lives each year in the United States." This statement has been made so often that no one seems to question the absence of logical thinking behind it. The numbers are based on medical care in the early to mid-1900s. There is no way to estimate how many lives vaccines are saving, and a similar estimate of harm from vaccines is difficult to calculate. As a result, a parent's decision not to vaccinate a child is being unfairly vilified.

## II. Parents Should Not Be Liable for Placing Their Children's Best Interests Above Universal Vaccination Policies

In the absence of facts, doctors and others are trying to frighten people into vaccinating or not vaccinating. That fear includes the notions that unvaccinated children pose a great threat to others and that parents of these children are not being responsible. In fact, these parents are choosing what they consider to be the safest course of action for their children and pose very little, if any, danger to other children and adults.

Some medical interventions are not controversial, and some prompt only mild controversy. For example, if a child has acute lymphocytic leukemia, the cure rate with conventional medical care approaches ninety percent, and very few doctors or parents will argue against the standard treatments offered in spite of their known complications and adverse reactions. But vaccines are presently controversial, and purported truths about safety and efficacy are challenged daily by lay people and physicians.

Very few medical actions are risk free. Prior to surgery or when medication is prescribed, your doctor explains the risks and benefits. For surgery, the consent form is often many pages long with dire warnings about what can go wrong. Childhood vaccines are shipped to my office with a long thin package insert detailing how the shots are manufactured, what they contain, and what can and has gone wrong. The last lines in many of these inserts sound ominous: "This vaccine has not been evaluated in animals for its carcinogenic or mutagenic potentials or for impairment of fertility." I seriously doubt that vaccines are a large source of cancer, genetic mutation, or impaired fertility. However, any time I inject a vaccine into a child there is potential for adverse outcome. I respect parents' questions and objections to our current vaccine schedule. Parents have the absolute right to participate in these medical discussions, and not giving them the information they need to make informed decisions is inadequate medical care. Not seeking out this information is an abrogation of parental responsibilities.

The list of side effects from adverse reactions to vaccines, in a *Physicians' Desk Reference* "warning" section, given *out of context*, would probably frighten many parents out of vaccinating at all. There are thirty or more items on that list. Similarly, the list of symptoms and complications of the illnesses against which we vaccinate could scare parents into giving every shot available as soon as possible.

Pediatricians and other physicians use the latter option on a daily basis. I share my colleagues' disdain for scare tactics from the "antivaccine" camp, but I object equally to doctors using fear and misinformation to try to convince parents (and legislators) that vaccines are risk free. Both sides are distorting the truth for their own purposes. Childhood illnesses are part of the first decade of life; immunity is acquired, and the consequences are almost always minor.

Modern medical care has completely changed the morbidity and mortality rates associated with virtually every single infectious disease. Yet, the "33,000" number is used in the media as if we actually know how many children would succumb to these illnesses in the absence of vaccines in the twenty-first century. We do not really have any idea what this number would actually be with twenty-first century medications and care. And unvaccinable diseases are far, far more common and, realistically, a greater concern for parents: toddlers get eight to ten or more colds each year. To restate a very important point, even vaccinated children can carry diseases like pertussis and mumps. There are no completely reliable medical or laboratory tests showing who infected whom.

## Conclusion

Vaccines work. They carry some risk but are a viable method of preventing contagious diseases. Parents who choose not to vaccinate their children accept responsibility for their actions, do not endanger others, and must retain this right. There is no medical basis for holding them liable.