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Chapter 31: Food and Drug, Health, and Welfare Law

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C H A P T E R 3 1

Food and Drug, Health, and Welfare Law

WILLIAM J. CURRAN

A. FOOD AND DRUG LAW

§31.1. **Narcotics control.** The laws on control of the manufacture, sale, and use of narcotics have been comprehensively revised and rewritten.¹ The revision contains many technical drafting improvements as well as important substantive changes. New definitions have been added and all are contained in a definitions section, Section 197. The requirement of licenses for manufacturers and other processors of narcotics is continued but all requirements in this regard are gathered in two sections, Sections 198A and 198B. The penalty for violation is substantially increased. Penalties for unlawful possession of narcotics are similarly revised upward.² The provisions on filling of oral prescriptions by druggists are clarified.³ Pharmacists are authorized to sell narcotics to physicians, dentists, and veterinarians on official written orders in quantities not exceeding one ounce at any time in solutions where the narcotics do not exceed 20 percent of the complete solution.⁴ Better and more comprehensive record keeping is well recognized as a primary method of control over narcotics and the new law clarifies and strengthens the provisions in this regard.⁵

Acts of 1957, c. 449 adds narcotics users to the list of "reportable" patients for all medical practitioners and hospitals in the state. Physicians must report the name of any patient suffering from "chronic use" of narcotics within seventy-two hours of first treating him. This law, along with the strengthened reporting provisions of Acts of 1957, c. 660, should go a long way toward improving the present narcotics control program in Massachusetts.

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§31.1. ¹ Acts of 1957, c. 660, revising G.L., c. 94, §§197-217D.

² Id. §§201(4), 202(2).

³ Id. §199A.

⁴ Id. §199C.

⁵ Id. §§199D, 201, 210, 210A.

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Another new statute⁶ authorizes state food and drug inspectors to carry firearms, hand clubs, and handcuffs and gives them the authority of police officers in making arrests for violation of the narcotics laws.

B. PUBLIC HEALTH AND MEDICAL PRACTICE

§31.2. **Nursing practice: Compulsory registration.** Since 1910 Massachusetts has had a nurse registration law. However, it has been of the permissive type merely prohibiting any person from using the title "registered nurse" or "R.N." unless registered. Since 1941, there has been a similar law for licensed practical nurses. In 1957 Massachusetts became the nineteenth state to adopt a "compulsory" nursing practice act. Under the new law¹ persons practicing professional nursing or practical nursing as defined in the act must be licensed, with certain broad exceptions.

Along with the usual "grandfather clause" (for nurses now practicing who were graduated from approved schools prior to 1941) and other necessary exceptions and waivers,² there is a very comprehensive exemption in the act for "the performance of any nursing service for any patient in any institution licensed by the commonwealth or maintained by the federal government, the commonwealth or any subdivision thereof, given by any person employed in such institution."³ This exception effectively excludes all hospitals and nursing homes from the operation of the act. Even the private-duty nurse in a hospital, who is technically hired by the patient, would seem to be excluded by the language "employed in the institution." It is said in defense of the exemption, not a part of the original bill, that these institutions are already under governmental control and the government and the licensing agency can require registered nursing personnel at any time. As yet, however, the licensing agency has made no such requirement. Insertion of the exemption was probably necessary to obtain passage of the legislation. It recognizes the continued shortage of nursing personnel and the high cost of medical care. A gradual rather than an abrupt change in nursing standards is sought in its adoption. At present, home care is the only area of nursing really affected.

The law does not provide for the hiring of any investigators; the board must continue to rely on local or state police to investigate complaints it receives. Therefore the task of surveillance will fall, as it does with most of the registration acts, upon the profession itself. With home care nursing the main area affected, detection of violators will be difficult.

§31.3. **Sanitarian registration.** To the rapidly growing list of

⁶ Acts of 1957, c. 593.

§31.2. ¹ Acts of 1957, c. 595.

² Id. §§4, 5, 6(2).

³ Id. §4.

professional and trade registrations 1957 legislation adds the health department sanitarian.¹ Along with the public health nurses, the sanitarians have long been the backbone of the field staff of health departments throughout the United States. Under the new law, the Board of Registration of Sanitarians is empowered to set minimum educational and experience requirements for registration. A "grandfather's clause" provides for registration of all sanitarians who are presently serving with health departments and have been doing so for the past three years. The act is of the "permissive" type, allowing registrants to use the title "registered sanitarians" but not otherwise restricting practice.

§31.4. Other medical practice act changes. Acts of 1957, c. 655 requires for the first time that training schools for medical X-ray technicians be approved by the state. The medical school approving authority is made the state agency for this approval.

Liberalizing amendments continue to be enacted on eligibility of aliens and foreign-trained persons for practice. Under 1957 legislation aliens who have filed declarations of intention (first papers) to become citizens are eligible for registration as pharmacists¹ and veterinarians.² If they do not become citizens within five years, their registrations must be revoked.

Acts of 1957, c. 492 also liberalizes the provisions for registration of foreign-trained veterinarians. Under the new law a graduate of a foreign school will have his qualifications reviewed by a special committee³ and if the committee finds his qualifications the "equivalent of those required" for graduates of approved American and Canadian veterinary schools, he is eligible for registration.

The 1955 legislation⁴ on foreign-trained physicians, similar in content to the new veterinarian law, has been amended⁵ to require applicants to take the National Medical Board Examinations for registration in Massachusetts rather than the local examination. The special board established in 1955 for reviewing qualifications of the foreign-trained applicants has been abolished and its functions will be performed by the Board of Registration in Medicine.

§31.5. The Animal Experimentation Act. For many years medical scientists have sought a liberalizing of the laws on the use of stray dogs and other animals for scientific investigation, experimentation, and instruction. Vociferous and politically significant groups, with newspaper support, have always defeated past attempts to change the law. This year, however, a very well organized effort of the medical schools

§31.3. ¹ Acts of 1957, c. 673.

§31.4. ¹ Acts of 1957, c. 463.

² Id., c. 492.

³ The committee is composed of the Secretary of the Board of Registration and the Director of the Division of Livestock Disease Control in the State Department of Agriculture.

⁴ Acts of 1955, c. 622.

⁵ Acts of 1957, c. 329.

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and medical scientists succeeded in securing the enactment of a new "Pound Bill."¹

The act is very well drafted. It is one of the few bills with a preamble enacted in recent years. The preamble was useful in getting support for the bill since it expressed its purpose cogently and briefly. Under the bill, scientific institutions may obtain licenses from the state allowing them to receive lost or stray animals from animal pounds or public officers enforcing the dog laws in cities and towns. The impounded animals cannot be turned over to scientists for at least ten days after impounding. Also the pound cannot give to the scientists any animal given to the pound by its owner with a signed request for its immediate execution. The act contains a provision² allowing representatives of the Massachusetts Society for the Prevention of Cruelty to Animals and the Animal Rescue League of Boston to inspect any medical science institution licensed by the state to receive animals under this law. The laws on the licensing, collaring, and tagging of dogs are also strengthened under the new act³ to provide for better enforcement.

§31.6. Tissue transplants in twins: Consent. For many years medical scientists have been conducting research on the transplanting of human tissues from one person to another. The transfer of human eyes has perhaps received the greatest attention, but research has been progressing in many other areas. At the Peter Bent Brigham Hospital in Boston extensive research has been conducted in the field of kidney disease. In 1957, hospital officials and the surgeons involved went to the Supreme Judicial Court in two separate cases for declaratory decrees to allow them to transfer a kidney from a well twin to his identical twin suffering from kidney disease. Without the operation the sick twin would die. These operations had been conducted successfully before by these same surgeons but they were reluctant to proceed in these cases because of the fear of civil liability. The twins in each case were minors. Although the parents were willing to consent, the Massachusetts courts had never passed on a case of this type. There was no doubt but that the parents could consent to any procedure of benefit to each twin, but here the consent might be found to benefit only the sick twin. The healthy twin would be losing one of his two kidneys. A person can function perfectly well on one kidney, but at some time in life the fact of having only one kidney could be detrimental, as in a case where by disease or accident the remaining kidney is threatened.

In each case¹ and in very similar language the Court ruled that the hospital and the surgeons could proceed with the operation with the consent of the twins themselves and their parents. On the point of

§31.5. ¹ Acts of 1957, c. 298, inserted as G.L., c. 49A.

² Id. §8A.

³ Acts of 1957, c. 298, §3.

§31.6. ¹ *Husky v. Harrison*, S.J.C. Equity No. 68666, Aug. 30, 1957; *Masden v. Harrison*, S.J.C. Equity No. 68651, June 13, 1957.

benefit to the healthy twin, the Court found that if the operation were not allowed "grave emotional impact" might be visited on the well twin because of the loss of his brother. This emotional distress, the Court declared, "could well affect the health and well-being" of the healthy twin for the rest of his life; the operation would therefore confer a benefit on both twins. In each case, it ruled the operation "necessary" for the continued good health and well-being of the well twin.

There can be no doubt but that the Court rendered the only reasonable decision it could in these cases. To do otherwise on the face of the consent by all concerned would have been to allow the sick twins to die without justification. One might argue, however, with the Court's finding that the operation was "necessary" for the future well-being of the healthy twin. From the recital of the evidence, psychiatrists apparently testified only that the loss of the sick twin would probably cause emotional distress to the other. Was "necessity" merely a finding of fact? Is it necessary to the decision? If so, courts in future cases may be required to make such findings. They may be reluctant to do so in cases not involving life or death issues and not involving identical twins where the emotional ties between the persons may be said to be greater than in any other relationship.

One further important point in the decisions should be noted. In each the judge made a finding of fact that the healthy twin was "fully informed and understands the nature of the operation and its possible consequences." In each case the ruling of the Court allowing the operation expressly requires the consent of the healthy twin as well as that of the parents. This is an important decision in American tort law. The authorities are in disagreement on the effect of a minor's consent when he is old enough and intelligent enough to understand the full nature and consequences of what is involved. It would seem that such a minor's consent should be enough to remove at least civil liability for assault and battery. There are authorities to this effect.² However, the Ohio court very recently refused to give this effect to the consent of an eighteen-year-old.³

Too much must not be read, however, into the Court's finding concerning a minor's consent. The Court seemed to feel it necessary to go into the issues of benefit and parental consent in spite of the consent of the twins themselves. Would they have allowed the operation with only the consent of the twins themselves? Would they have allowed the twins' consent to override objections by the parents? These and other problems remain to make this field a most difficult one for

² *Bakker v. Welsh*, 144 Mich. 632, 108 N.W. 94 (1906); *Gulf & S.I.R. Co. v. Sullivan*, 155 Miss. 1, 119 So. 501 (1928); see 1 Restatement of Torts §59.

³ *Lacey v. Laird*, 166 Ohio St. 12, 139 N.E.2d 25 (1956). The court held the act of doing plastic surgery on the nose was "technical battery" when performed without parental consent, but stressed the violation of the parental rights rather than the bodily invasion of the plaintiff. The rationale is difficult to accept and the case undoubtedly deserves more extensive examination than it can be given in this chapter.

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medical and hospital practice. There is no doubt, however, that these decisions will have a definite and salutary effect on the development of the law in this field.

§31.7. **State public health hospitals.** There is a little-noticed evolution taking place in the state public health hospitals. Tuberculosis is not the major public health menace it was some twenty-five years ago and tuberculosis sanatoria are thus generally operating at less than capacity. At the same time, chronic diseases of our aging American population are on the increase. These changes in the mass disease pattern of our country are reflected in the law.

Acts of 1957, c. 458 provides for the admission of chronic disease patients to the Lakeville Sanatorium. This act and two others¹ liberalize the residency requirements for admission to this and other sanatoria, providing for admission of nonresidents of Massachusetts but giving "preference" to residents of this state.

The settlement laws (special municipal residency laws) on which patient charges have been based, always a very difficult and cumbersome system, have been modified to provide that when a sanatorium patient has no known settlement in the state, the state assumes responsibility for the charges.²

§31.8. **Sanitary code.** After a number of years of effort, the Department of Public Health has succeeded in obtaining authorization to establish a state sanitary code.¹ Though it has received little public recognition, this can prove to be the most significant legislation in the health field in 1957. Massachusetts has long been recognized as a pioneer in the field of public health, but it has always suffered in not having a comprehensive state sanitary code. The state has struggled along on piecemeal legislation and a confusion of state-local responsibility. Under the 1957 legislation the health department is authorized to set up a sanitary code "of a general as well as a specific nature to protect and improve the public health of the commonwealth." The code, adopted as regulations, will have the force and effect of law and will supersede all local regulations in the same field.

§31.9. **Treatment center for sex offenders.** In 1954 the General Court passed legislation completely revising the law on commitment of sex offenders. It was fully examined in the 1954 ANNUAL SURVEY.¹ Under that law the Department of Mental Health was authorized to establish a treatment center for such persons and until its establishment no persons could be committed under the law. In 1957 some highly publicized sex crimes called to public attention the fact that the treatment center had not been established. The result was the passage of Acts of 1957, c. 772, requiring the Department to establish the center.

§31.7. ¹ Acts of 1957, cc. 459, 460.

² *Id.*, c. 461.

§31.8. ¹ Acts of 1957, c. 678.

§31.9. ¹ 1954 Ann. Surv. Mass. Law §§15.11, 23.12.

The General Court also provided the necessary appropriation for its establishment, since the Commissioner of Mental Health had asserted that it was lack of funds which had delayed its establishment.

C. PUBLIC WELFARE

§31.10. Aid to dependent children. Eligibility requirements under the law on aid to dependent children have been broadened to cover all children under eighteen;¹ formerly, children from sixteen to eighteen were eligible only if attending school regularly. The definition of "parent" has been expanded to include first cousins, nieces, and nephews, and the definition of "money payments" has been expanded to include "medical care" in behalf of the dependent child.

§31.11. Disability assistance. 1957 legislation¹ amends the disability assistance law requirements on support of parents by their children, to make those provisions uniform with the laws on Old Age Assistance.²

§31.10. ¹ Acts of 1957, c. 430.

§31.11. ¹ Acts of 1957, c. 659.

² For a discussion of this act, see §19.8 *supra*.