

1-1-1955

Chapter 20: Food and Drug, Health, and Welfare Law

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Recommended Citation

Curran, William J. and Hamlin, Robert H. M.D. (1955) "Chapter 20: Food and Drug, Health, and Welfare Law," *Annual Survey of Massachusetts Law*: Vol. 1955, Article 24.

C H A P T E R 2 0

Food and Drug, Health, and Welfare Law

WILLIAM J. CURRAN *and* ROBERT H. HAMLIN, M.D.

A. FOOD AND DRUG LAW

§20.1. **Control of illegal use of narcotics.** A number of important changes were made in 1955 in the state's laws concerning narcotics. Under Chapter 610 of the Acts of 1955, it is made a criminal offense (fine of not more than \$500 or imprisonment in jail or house of correction for not more than one year) for any person except those in the medical profession and certain associated fields to be in possession of harmful drugs except by reason of a physician's prescription lawfully and properly issued.

Chapter 718 of the Acts of 1955 makes it criminal (fine of not more than \$1000 or imprisonment in jail or house of correction for not more than one year or both) for a person to attempt to evade the laws on control of narcotics by (1) posing as a person authorized by his profession to possess harmful drugs (such as a physician, manufacturer or jobber in drugs, hospital official, or pharmacist), or (2) not being a physician, dentist, or veterinarian, making or altering a prescription for a harmful drug without authorization so to do from the prescriber.

Chapter 718 also further amends the definition of "harmful drug" as adopted in 1954.¹ The new legislation adds a new sentence to G.L., c. 94, §187A to the effect that "The term 'harmful drug' shall in particular include any derivative, active principal, preparation, compound

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§20.1. 1 Acts of 1954, c. 577; 1954 Ann. Surv. Mass. Law §23.1.

or mixture of barbituric acid, amphetamines, ergot or any hypnotic or somnifacient drug." The new amendment is intended to make it clear that these "racket drugs" used by narcotic addicts are included in the definition of harmful drugs.

§20.2. **Harmful drugs; Oral prescriptions.** In 1954 the Massachusetts legislature liberalized its laws in regard to authorizing pharmacists to fill oral prescriptions for harmful drugs.¹ In 1955 the law was further amended² to allow the filling of oral prescriptions from physicians, dentists, or veterinarians for narcotics which the Commissioner of the Federal Bureau of Narcotics "shall from time to time by rule or regulation designate to possess relatively little or no addiction liability." However, the oral prescription cannot be refilled.

§20.3. **New standards for milk.** An extensive revision of the state laws on milk standards was enacted by the 1955 legislature.¹ The legislation, to become effective December 9, 1955, establishes new quality standards for milk, milk products, and cream. The licensing provisions for milk dealers are also amended.² Milk is required to have not less than 12 percent milk solids and 3.35 percent milk fat. The legal standards for light cream, medium cream, heavy cream, and extra heavy cream are established at not less than 16, 25, 34, and 38 percent, respectively, of milk fat. Standards are also established for skimmed milk, "fortified non-fat milk," and so-called "standardized milk." A new product, so-called "half-and-half," was also recognized and a standard was set for it as "a blend of milk and cream which contains not less than ten per cent milk fat."³

The growing number and variety of flavored milk products were brought under closer regulation by the adoption of new standards for these products.⁴ In addition, the Department of Public Health is given power "to establish sanitary standards, and to establish requirements for labeling of flavored milk products."

B. PUBLIC WELFARE

§20.4. **Licensing of institutions for care of aged and infirm.** Under Chapter 662 of the Acts of 1955 very extensive changes have been made in the laws governing the licensing and inspection of nursing homes and other institutions for the aged by the State Department of Public Health. Particularly important are changes more specifically defining fire and other safety requirements. The State Fire Marshal, or fire department heads to whom the Fire Marshal may delegate the

§20.2. ¹ Acts of 1954, c. 577; 1954 Ann. Survey Mass. Law §23.1.

² Acts of 1955, c. 400.

§20.3. ¹ Acts of 1955, c. 757.

² Id. §10, amending G.L., c. 94, §9.

³ Id. §§1, 8.

⁴ Id. §7, amending G.L., c. 94, §84C.

responsibility, are required to inspect these institutions every three months.¹

The new law requires that no original state licenses be granted to institutions against the written disapproval of local authorities. It also sets up a Board of Review to hear appeals by aggrieved persons on a departmental refusal to issue a license under the new legislation. The Board is to be composed of the Commissioner of Public Health, the Commissioner of Public Safety, Attorney General, Director of Building Construction, and the State Fire Marshal, or their representatives. Appeals may be taken from the Board to the District Court. That court may either hear the case itself or send it before "three disinterested persons conversant with the subject matter" and the decision "shall have the same authority, force and effect as an original refusal or approval by the board." The court is given authority to *issue* the license if its action is to this effect in reversal of the decision of the Board. The latter procedure may be under some doubt constitutionally as a result of the recent *Pendergast* decision² where the Supreme Judicial Court asserted its refusal to allow the courts to "grant" a variance.

C. PUBLIC HEALTH

§20.5. **Medical professional licensing.** A new Board of Registration has been established, concerning dispensing opticians.¹ It thus becomes the nineteenth registration board and the eighth board in the medical field. A licensing agency has also been established for schools for medical laboratory technologists.²

Perhaps the most important legislation in this area, however, is Chapter 622 of the Acts of 1955. Under this legislation a new procedure is established for graduates of medical schools in foreign countries who are applicants for registration as physicians in Massachusetts. Formerly, it was very difficult for foreign-trained doctors to be licensed in Massachusetts and in many other states, because of the difficulty of proving their educational qualifications. The new legislation establishes a special review board to consider the foreign applicant's qualifications. The board is to be composed of two members of the Massachusetts Medical Society's Committee on Medical Education, one member of the Committee on Education of the Massachusetts Osteopathic Society, and the deans of the medical schools in the state. The applicant's qualifications must be found by the reviewing board to be the equivalent of graduation from an approved medical school

§20.4. ¹ Acts of 1955, c. 662, §6, amending G.L., c. 148, §4.

² *Pendergast v. Board of Appeals of Barnstable*, 331 Mass. 555, 120 N.E.2d 751 (1954); 1954 Ann. Surv. Mass. Law §14.25.

§20.5. ¹ Acts of 1955, c. 688.

² *Id.* c. 759.

in the United States or Canada. The applicant is then eligible to take the board examinations for registration as a physician in Massachusetts.

§20.6. Medical licensure; Revocation for breach of medical ethics. During the 1955 SURVEY year the Court decided the first of what may be a series of cases involving the highly publicized "conspiracy" between a lawyer, one Centracchio, and a group of practicing physicians to split fees in cases where a person receives medical service from the doctors and legal services from the lawyer for the prosecuting of damage claims involving the same injuries for which the medical services are rendered. In *Forziati v. Board of Registration in Medicine*,¹ a petition for declaratory relief, the Supreme Judicial Court upheld the jurisdiction of the Board to revoke the doctors' licenses to practice medicine in the state. The agreement between the doctors and the lawyer was to split equally the *total fee* for both types of service.

The jurisdiction of the Board was upheld under G.L., c. 112, §61, which provides that the Board may suspend or revoke the license if it appears to the Board that the holder is guilty of "deceit, malpractice, gross misconduct in the practice of his profession, or of any offense against the laws of the commonwealth relating thereto." The Court held that "gross misconduct" could be found to exist on the facts above if proved and would justify revocation of the license. The Court cited the Principles of Medical Ethics of the American Medical Association on the latter and the "strongly professional and confidential nature of the practice of medicine, as well as the necessity for the observance of high moral standards in connection with it."² The Court asserted it unnecessary to "accumulate citations for a proposition that is essentially indisputable."³

The Court was not content, however, to decide the case solely on the citation of the Principles of Medical Ethics. The reasoning behind the principle and the particular facts of this "conspiracy" were examined. The Court also noted the fact that the lawyer member of the "conspiracy" had already been disbarred.⁴ For the future, the case has its significance in the fact that the Court did, however, interpret the phrase "gross misconduct" to refer to breaches of recognized principles of medical ethics. How the Court would handle other situations of "unethical" conduct of a less flagrant type remains to be seen.⁵

§20.7. Local health regulations. Local health departments in New England have had a long history of virtual autonomy in the making

§20.6. ¹ 1955 Mass. Adv. Sh. 895, 128 N.E.2d 789.

² 1955 Mass. Adv. Sh. at 896, 128 N.E.2d at 791.

³ 1955 Mass. Adv. Sh. at 897, 128 N.E.2d at 791.

⁴ *Ibid*; Matter of Centracchio, Suffolk Law, No. 53628, Order of March 23, 1954.

⁵ Cf. *Sapero v. State Board of Medical Examiners*, 90 Colo. 568, 11 P.2d 555 (1932); *Group Health Cooperative of Puget Sound v. King County Medical Society*, 39 Wash. 2d 586, 237 P.2d 737 (1951); see 70 C.J.S., Physicians and Surgeons §17.

and enforcement of local public health regulations. There are relatively few decisions of the Supreme Judicial Court outlining the scope of authority in this area, and every new decision is thus of significance. During the 1955 SURVEY year the local health regulations of the town of Canton were tested in some important aspects.

In *Cochis v. Board of Health of Canton*¹ petitioner sought a declaratory decree concerning the validity of certain of the town's health regulations concerning piggeries and garbage disposal. The Court upheld a town health regulation adopted under the "offensive trades" statute,² outlawing "piggeries" in the town. Piggeries are defined therein as the keeping of four or more pigs at any one time. A regulation was also upheld under which the Board of Health is authorized to order any person keeping one or more pigs to remove them from his premises within a reasonable time after notice that the board finds such to be a nuisance.

However, the Court affirmed the lower court's action in striking down a regulation prohibiting garbage disposal within the town. It was found invalid in spite of the fact that the town has its own municipal garbage collection. The Court did, however, validate the town's regulations under G.L., c. 111, §31A, requiring persons who collect garbage in the town or who dispose of it to procure a permit to do so and a regulation requiring those who transport garbage through the town to register to do so in order that the town be enabled to determine whether a permit as such is required.

The Court also agreed with the lower court's invalidation of the regulation providing penalties for violation of the town health regulations by a fine of not more than fifty dollars. The regulation was adopted under G.L., c. 111, §31, the general enabling act for "reasonable" local health regulations, and that statute authorizes penalties only up to twenty dollars. It was not made clear whether the regulation is invalid in toto or only to the extent of the excess penalty.³ However, since the statute itself provides the twenty dollar penalty, at least this form of enforcement may still exist after the invalidation.

In discussing the validity of the town regulations entitled "nuisances" (concerning the keeping of pigs, as noted previously), the Court alluded to the argument of the plaintiffs that these regulations were invalid because they established no clear standard which could be observed by a reasonable person. The Court agreed that a regulation must pass the usual test that it be so clearly drawn that persons need not "guess at its meaning." However, the Court quoted with approval the language of the case of *Board of Health of Wareham v. Ma-*

§20.7. 1 332 Mass. 721, 1955 Mass. Adv. Sh. 699, 127 N.E.2d 575.

² G.L., c. 111, §143.

³ It would seem that the lower court held the entire regulation invalid. (See decree, numbered finding (5), 1955 Mass. Adv. Sh. at 700-701, 127 N.E.2d at 577.) The upper court said the regulation "was correctly held to be invalid," but also asserted that "such other penalties" are invalid.

rine By-Products Co.: "Boards of Health are likely to be composed of laymen not skilled in drafting legal documents, and their orders should be read with this fact in mind. They should be so construed as to ascertain the real substance intended and without too great attention to the niceties of wording and arrangements."⁴

Just what significance this latter factor may have in a case is not at all clear. Could it "save" a local health regulation otherwise "void for vagueness"? It seems doubtful that it could. What then is its significance? It is not easy to give effect to such a statement when we realize that these regulations have the force of law. Boards of Health may have the assistance of town counsels and city solicitors or retained special counsel in these matters. Of course, as far as "nuisance" is concerned, no lawyer could help much in defining this term, one of the most elusive in American law. As far as the regulation at hand is concerned, this element is not highly significant, since the offender must receive notice that his conduct is in violation of the regulations and he is given a reasonable time to comply.

§20.8. Department of Public Health: Added powers and duties. By Acts of 1955, c. 367, the Department of Public Health is authorized to establish standards for "public medical institutions," other than hospitals, for the care of patients¹ receiving old-age assistance. The establishment of standards had formerly been the responsibility of the Department of Public Welfare. Since the Department of Public Health already has the licensing authority over hospitals, the general supervision of all institutions other than mental hospitals is now under this Department.

The Department was also authorized to establish alcoholic clinics in the cities of Lawrence² and Springfield.³ These will be added to the existing programs of out-patient clinics presently being operated by the Department's Division on Alcoholism.

By Acts of 1955, c. 335, the Department was authorized to adopt rules and regulations not inconsistent with those of the National Bureau of Standards to control the handling and disposal of radioactive materials. The regulations are to be adopted after a public hearing and after approval by the Governor and Council, and will become effective when published in a newspaper in each of the counties of the state. Violation will involve a fine of from \$100 to \$500 to the use of the Commonwealth for *each day* of violation after due notice of conduct in violation of the regulations.

⁴ 329 Mass. 174, 177, 107 N.E.2d 11, 13 (1952).

§20.8. ¹ Mental patients and tuberculosis patients are excluded since neither of these are eligible for old-age assistance benefits.

² Acts of 1955, c. 424.

³ *Id.*, c. 428.

D. MENTAL HEALTH

§20.9. Reforms in commitment laws. As a result of recommendations made by the Special Commission on Commitment, Care and Treatment of Mental Hospital Patients,¹ extensive revisions² were enacted in the state's commitment laws, G.L., c. 123. The reforms are designed to meet the principal objections voiced concerning the commitment laws, to afford greater protection of the rights of mental patients.³

In the major commitment procedure, that for prolonged judicial commitment in G.L., c. 123, §51, the previous law did not provide that notice of the proceedings in court be given the person to be committed. Also, the probate judge making the commitment was not required to see the person if he gave reasons in his order indicating why he did not. The effect in practice has been that no person committed under Section 51 has been seen by the committing court in recent years. The new legislation requires that notice of the proceedings be given to the person concerned, and he may request a hearing in court if he so desires. If he does not request it, the commitment may be made on the psychiatrists' certification required under Sections 51 and 53.

In accordance with former law, mental patients under voluntary and temporary care could be transferred to involuntary prolonged commitment status without notice to the patients of such a change. Chapter 637 adds a notice requirement and an opportunity to request a hearing in such cases.

The statutes⁴ providing for a jury trial on the issue of insanity in commitment cases have been repealed. Jury trials in such cases have been uniformly criticized by both legal and medical commentators,⁵ and no jury trial has been accorded or requested in a commitment case in Massachusetts in recent times, even though the statutes were still on the books.

The new legislation also makes a start toward improving the nomenclature in Chapter 123. The terms "insanity" and "feeble minded" are replaced by "mentally ill" and "mentally deficient," respectively, and definitions⁶ are provided for the new terms. The definitions are intentionally broad, since they are given actual substance only by the psychiatrist's certification of the condition for the purposes of any of

§20.9. ¹ Senate No. 735 (1955), created by Resolves of 1954, c. 108.

² Acts of 1955, c. 637.

³ Senate No. 735, p. 9 (1955).

⁴ G.L., c. 123, §§57-61.

⁵ See, e.g., Weihofen and Overholser, *Commitment of the Mentally Ill*, 24 *Texas L. Rev.* 307, 340 (1946); Williams, *Public Law Adjudications of Mental Unsoundness in Texas: Jury Trial Policy*, 1 *Baylor L. Rev.* 248 (1949); Dewey, *The Jury Law for Commitment of the Insane in Illinois*, 69 *Am. J. Insanity* 571 (1913).

⁶ Acts of 1955, c. 637, §1, amending G.L., c. 123, §1.

the commitment procedures. Of most significance to lawyers perhaps is the fact that in the definition of mental illness it is asserted that a finding of mental illness for the purpose of commitment to a mental institution "shall not per se import a finding of civil incompetency or of criminal irresponsibility."

§20.10. Transfer of patients between institutions. A new procedure for the transfer of patients between institutions in the Department of Mental Health was also enacted.¹ The Department must now give notice of a transfer to the patient's nearest relative or guardian at least forty-eight hours before making the transfer except in emergency cases where notice must be given to the same persons within twenty-four hours after the transfer. The Department is also authorized to transfer a patient to the mental hospital at Bridgewater when the patient has made two or more attempts to escape from another state hospital, or where the patient is found to be dangerous to other persons. Notice of such intent to transfer must be given to the patient and to his nearest relative or guardian not less than three days before the transfer. The patient or nearest relative or guardian may request a hearing on the transfer, with the hearing to be conducted in accord with G.L., c. 123, §51, the procedure for an original commitment.

§20.11. Out-patient clinics. The report of the Special Commission on Commitment, Care and Treatment of Mental Hospital Patients¹ also recommended expansion of the state's preventive mental health programs, and its community out-patient clinics, and its boarding-out programs. This accords with the recommendations of the Governor's Committee to Study State Hospitals, appointed in March, 1953.² Thus, Chapter 637 of the Acts of 1955 also authorizes the Department of Mental Health to establish out-patient mental health clinics in collaboration with public and private schools and other agencies providing cooperative or complementary facilities to the state clinics.

§20.10. ¹ Acts of 1955, c. 637, §5, amending G.L., c. 123, §20.

§20.11. ¹ Senate No. 735, p. 15 (1955).

² Report of the Governor's Committee to Study State Hospitals 9 (1954); see 1954 Ann. Surv. Mass. Law §23.4.