Washington Law Review

Volume 41 | Number 1

1-1-1966

Religious Freedom and Compulsory Blood Transfusion for Adult Jehovah's Witness

anon

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

 Part of the Medical Jurisprudence Commons, and the Religion Law Commons

Recommended Citation

anon, Recent Developments, *Religious Freedom and Compulsory Blood Transfusion for Adult Jehovah's Witness*, 41 Wash. L. Rev. 124 (1966).
Available at: https://digitalcommons.law.uw.edu/wlr/vol41/iss1/7

This Recent Developments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

> processes necessary to ordered society and often deprives others of remedies for harms they have suffered, courts hesitate to invoke the doctrine in novel situations unless the purpose will certainly be served. . . .[24]

This admission left the court free to grant the writ of mandamus compelling service of summons. It is submitted that this approach would have been preferable as avoiding unwarranted expansion of the doctrine of diplomatic immunity. At trial, cases such as the principal one could still be disposed of upon grounds of sovereign immunity, the appropriateness of the United States as a forum for international disputes, or forum non conveniens,[25] while simultaneously preserving substantial justice for United States litigants. As pointed out in the dissenting opinion, arguments for declining to exercise jurisdiction of United States courts to decide cases such as the principal one should not preclude service of process upon the intended defendant, since the matters of competence or jurisdiction are defenses to be raised at the option of a defendant, and therefore are inapplicable to a question of service of process.[26]

RELIGIOUS FREEDOM AND COMPULSORY BLOOD TRANSFUSION FOR ADULT JEHOVAH'S WITNESS

In two separate instances adult Jehovah's Witnesses were admitted to hospitals with severe internal bleeding. Doctors in each instance determined that blood transfusions were required to save the patient's life. Each patient refused to consent to transfusions because of his religious beliefs. In one case the patient, who had no minor children, was pronounced incompetent, a conservator to consent to transfusion was appointed by the court, and the transfusion was administered. On appeal, the Illinois Supreme Court reversed. *Held:* An adult who has no minor children cannot be compelled to take lifesaving blood transfusions against his religious objection. *In re Brooks' Estate*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965).[1] The other case involved a father of minor children who was a patient in a veterans' hospital. On the hospital's application for an order to authorize the transfusion,

[24] 345 F.2d at 980.

[25] In the principal case, both of the intended parties to the suit were foreign entities, and the alleged event occurred in foreign waters. The difficulties in procuring witnesses, enforcing judgment, and other similar problems bring forth the question of whether a U.S. court is the proper forum to decide such a dispute.

[26] 345 F.2d at 979.

[1] 34 GEO. WASH. L. REV. 159 (1965); 44 TEXAS L. REV. 190 (1965).

the patient told the judge that he would accept a transfusion only if the court assumed spiritual responsibility for the act. *Held:* Blood transfusions to save the life of an adult parent of minor children may be ordered over the patient's religious objection. *United States v. George*, 239 F. Supp. 752 (D. Conn. 1965).[2]

Limitations on the free exercise of religion are permissible only when there is involved some overriding public interest.[3] Jehovah's Witnesses regard blood transfusions as a violation of Biblical commands, and consider any attempt to compel transfusions as serious infringement on their religious freedom.[4] Courts have consistently overridden religious objection to life-preserving blood transfusions for children,[5] but only recently has litigation raised the question of whether such treatment could be ordered for adults.[6] The principal

[2] *Appeal dismissed as moot*, 2d Cir., Oct. 5, 1965 (unreported), 34 GEO. WASH. L. REV. 159 (1965). The government stated, however, in its motion to dissolve the order and withdraw the complaint:

> After timely examination of the laws of the state of Connecticut we could find no cases or statutes making it a crime to refuse to accept a blood transfusion or failing to transfuse a mentally competent adult male who has refused to consent to be transfused.

In granting the motion, the court made no mention of this statement.

[3] Sherbert v. Verner, 374 U.S. 398 (1963). The United States Supreme Court has rarely applied the "clear and present danger" test in religious freedom cases, although it was used in *Sherbert*. See Antieau, *The Rule of Clear and Present Danger—Its Origin and Application*, 13 U. DET. L.J. 198 (1950). See also People v. Woody, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964), and cases cited therein. In *Woody*, the California Supreme Court reversed a conviction for illegal possession of narcotics by Navaho Indians who used peyote in their religious ceremonies. The court stated that free exercise questions required a two-fold test: first, how burdensome is the application of the statute upon the free exercise of defendant's religion?; second, is there some compelling state interest justifying this burden? The court distinguished Reynolds v. United States, 98 U.S. 145 (1878), which declared polygamy illegal, on the bases that polygamy was not essential to Mormon beliefs and that the degree of public danger was relatively high.

[4] WATCHTOWER BIBLE & TRACT SOCIETY OF PENNSYLVANIA, BLOOD, MEDICINE AND THE LAW OF GOD 3-8 (1961). Refusal of medical treatment on *non*-religious grounds might also be entitled to constitutional protection. Judge Cullen, concurring in People v. Pierson, 176 N.Y. 201, 212, 68 N.E. 243, 247 (Ct. App. 1903), said:

> The state as parens patriae is authorized to legislate for the protection of children. As to an adult . . . I think there is no power to prescribe what medical treatment he shall receive, and that he is entitled to follow his own election, *whether that election be dictated by religious belief or other considerations.* (Emphasis added.)

[5] *E.g.*, People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952); State v. Perricone, 37 N.J. 463, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962); Mitchell v. Davis, 205 S.W.2d 812 (Tex. Civ. App. 1947). For a discussion of these and other cases, see Cawley, *Criminal Liability in Faith Healing*, 39 MINN. L. REV. 48 (1954); 24 U. PITT. L. REV. 642 (1963); Annot., 30 A.L.R.2d 1138 (1953).

[6] *E.g.*, Application of Pres. & Directors of Georgetown College, Inc., 331 F.2d 1000, *petition for rehearing en banc denied*, 331 F.2d 1010 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964), 60 NW. U.L. REV. 399 (1965); Erickson v. Dilgard, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. 1962), 33 FORDHAM L. REV. 514 (1965). See also 10 VILL. L. REV. 140 (1964). *Erickson* was the first case involving compulsory transfusions for an adult. A hospital's request for a transfusion was denied because the court concluded that the patient was entitled to make the final decision to accept or reject a lifesaving

cases suggest that the answer may turn upon whether the patient has minor children.

In *Brooks*, in which it was held that the transfusion could not be ordered, the court distinguished cases involving snake handling in religious ceremonies,[7] refusal to accept vaccination,[8] and polygamy[9] because of the presence in each of an overriding social interest which warranted restriction upon the individual's free exercise of religion. The court also distinguished two cases in which blood transfusions had been ordered for adults, one because the transfusion was given to save an expectant mother's unborn child,[10] and the other because the patient had a minor child.[11] The court concluded that no overriding public interest existed which would justify intervention when the patient did not have minor children.[12] In *George*, in which the transfusion was ordered, the court avoided discussing religious freedom by adopting the "rationale" of *Application of Pres. & Directors of Georgetown College, Inc.*[13] In addition to the reasons given in *College*, the court in *George* considered the possibilities of a detrimental effect upon the doctor's conscience, of violation of his professional oath, and that, if the doctor honored the patient's request

---

blood transfusion. The opinion did not state that the patient was a Jehovah's Witness, but a letter from Judge Bernard S. Meyer to David Knibb, September 22, 1965, confirmed that he was. The letter stated further that it was unlikely, in view of the patient's age, that he had minor children. *Erickson* was unmentioned in any of the subsequent cases concerned with the question of transfusions to an adult, probably because it was not reported in advance sheet form until October, 1964.

[7] Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942); Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948), 2 VAND. L. REV. 694 (1949).

[8] Jacobson v. Massachusetts, 197 U.S. 11 (1905). Although there was no indication in *Jacobson* that religion was involved, public health measures have frequently been upheld against claims of religious freedom. Anderson v. State, 84 Ga. App. 259, 65 S.E.2d 848 (1951) (vaccination of child attending public school); State *ex rel.* Holcomb v. Armstrong, 39 Wn. 2d 860, 239 P.2d 545 (1952) (Christian Scientist denied admission to university for refusal to take mandatory x-ray).

[9] Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878).

[10] Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, (per curiam), *cert. denied*, 377 U.S. 985 (1964), 33 FORDHAM L. REV. 80.

[11] Application of Pres. & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964).

[12] It was contended in oral argument in *Brooks* that freedom of religion did not permit one to endanger his own life. Judge Schaefer of the Illinois court is reported as replying, "I can just see 100,000 Christian martyrs turning over in their graves when you make that statement." Awake, Aug. 8, 1965, p. 14. *Compare* Cawley, *Criminal Liability in Faith Healing*, 39 MINN. L. REV. 48 (1954); Ford, *Refusal of Blood Transfusions by Jehovah's Witnesses*, 10 CATHOLIC LAW. 212 (1964); Comment, *The Right to Die*, 9 UTAH L. REV. 161 (1964), *with* Comment, *Unauthorized Rendition of Lifesaving Medical Treatment*, 53 CALIF. L. REV. 860 (1965); Note, 33 FORDHAM L. REV. 513 (1965). See also Address by Charles Mayo, head of the Mayo Clinic, to the National Medical Association, Cincinnati, Ohio, Seattle Post-Intelligencer, Aug. 11, 1965, p. 12, col. 1.

[13] 331 F.2d 1000 (D.C. Cir. 1964) (hereinafter cited as *College*).

by not administering a transfusion, such conduct would constitute malpractice.

College was the only case in point considered in both of the principal cases. In *College*, a single judge had issued an emergency order for a transfusion,[14] stating that the order was prompted by concern for the patient's minor child, the possibility of subsequent liability of the doctors or hospital, the transfer of spiritual responsibility from the patient to the court, and determination "to act on the side of life." The judge felt that the state was obligated to exercise its powers of *parens patriae* to protect the child from "this most ultimate of voluntary abandonments."[15] Although a petition for rehearing was denied,[16] none of the five judges who joined in opinions on that petition addressed himself to the merits.[17] The disagreement of the judges in *College* suggested to the court in *Brooks* that a majority in *College* might well have refused to order the transfusion. Nevertheless, the court in *Brooks* indicated that it might have reached the same result, and ordered a transfusion in the principal case, if minor children had been present. In holding that a transfusion could be ordered for an adult, the court in *George* noted certain similarities between that case and *College*,[18] but failed to mention those which appeared to be most relevant—both patients were parents of minor children, and both had implied that the court might assume spiritual responsibility by ordering the transfusions.

Parents have traditionally had an affirmative legal duty to support their minor children.[19] Minor children of the patients existed in both *George* and *College*. Referring to this aspect of *College*, the court in *Brooks* said, "The state might well have an overriding interest in the welfare of the mother in that situation, for if she expires, the children might become wards of the State."[20] This suggested state

[14] The order was issued under FED. R. CIV. P. 62 (g), which permits an injunction during the pendency of an appeal "to preserve the status quo." For a discussion of the procedures in *College*, see 39 N.Y.U.L. REV. 706 (1964).

[15] For an historical review of *parens patriae*, see Lippincott v. Lippincott, 97 N.J. Eq. 517, 128 Atl. 254 (Ct. Err. & App. 1925); 4 POMEROY, EQUITY JURISPRUDENCE 870 (5th ed. 1941). See also note 4 *supra*.

[16] 331 F.2d 1010.

[17] One concurring judge thought the question was moot; another, that there was no case or controversy. The dissenters considered the order void for improper procedure and lack of justiciability.

[18] The nature of the patients' ailments, the immediacy of the need for transfusions, the religious basis for refusal, and the fact that both patients were Jehovah's Witnesses.

[19] For a discussion of the various duties required of a parent, see Gill, *The Legal Nature of Neglect*, 6 NAT'L PROB. & PAROLE ASS'N J. 1 (1960). See also UNIFORM DESERTION & NONSUPPORT ACT § 1.

[20] 205 N.E.2d at 440.

interest is based upon a potential economic burden to society. Unless this interest implies more than monetary disadvantage to the state, however, it would seem erroneous in view of the United States Supreme Court decision in *Sherbert v. Verner*[21] that a state may not inhibit the exercise of religious beliefs by a denial or conditioning of state benefits. If the cost of unemployment compensation does not afford sufficient economic justification for impingement upon the free exercise of religion by the state, a fortiori the historic function of the state as *parens patriae* of orphaned children is insufficient economic justification for such impingement.[22]

A more plausible state interest may be that of the *child's* welfare. However, the aspect of a child's welfare which would justify compulsory transfusion should be identified with greater specificity. If the state interest is based on concern for a child's material requirements or the need for a family atmosphere, no justification for intervention exists because these would probably be supplied by another Witness family. Although it is not universal, a widespread practice exists among Jehovah's Witnesses of forming inter-family agreements regarding the care and custody of children in the event of the parents' death. Witnesses refer to themselves as the "New World Family," and regard the obligation of raising chiildren within this "Family" as being so important that an orphaned child will be taken into a Witness home to prevent the child from becoming a public ward.[23]

If the law is primarily concerned with the result of a patient's refusal, *i.e., his death*[24] and consequent "voluntary abandonment" of his family, an even more basic difficulty arises. Laws directed at abandonment, neglect, and similar social problems deal with families which have *already* disintegrated. The converse is true in a Witness family, where a high degree of solidarity exists.[25] Consequently, an

[21] 374 U.S. 398 (1963).

[22] *Cf.* Katz, *Freedom of Religion and State Neutrality,* 20 U. CHI. L. REV. 426 (1953); Note, 25 U. PITT. L. REV. 711 (1964).

[23] Interview with W. Glen How, Counsel for Jehovah's Witnesses, Seattle, Washington, October 15, 1965. Reports from public welfare agencies do not reflect these practices because the records rarely include the religious affiliation of welfare recipients.

[24] Aside from religious objections, Jehovah's Witnesses believe that blood transfusions do more harm than good. "The greatest fallacy in this entire controversy is the bland, uninformed assumption that blood transfusion is necessarily a lifesaver. Nothing could be farther from the truth." How, *Religion, Medicine and the Law,* 3 CAN. B. J. 365, 374 (1960). For a survey of medical reasons used by Jehovah's Witnesses to fortify their objection to blood transfusions, see WATCHTOWER BIBLE & TRACT SOCIETY, *op. cit. supra* note 4, at 16-38.

[25] Jehovah's Witnesses believe that parental obligations are spiritual as well as legal, and place special emphasis on the religious training of their children. WATCHTOWER BIBLE & TRACT SOCIETY, *op. cit. supra* note 4, at 51-55.

analogy to abandonment is inaccurate. Before the law extends its supervision to an *intact* family, the right of that family to choose and pursue its own values should be acknowledged. State intervention under these circumstances, unlike that which is justified when a family unit has internally disintegrated, strikes at the basic structure of our self-governing, family-oriented society.

Since material needs and family environment will be supplied, only a concern for intangible benefits deriving from the natural parent-child relationship might warrant overruling a parent's religious decision to reject lifesaving medical treatment.[26] If the state interest is solely in preserving these benefits to a child, the parent's decision to reject a transfusion should be respected because the situation lacks the degree of immediacy and certainty of harm required to limit religious freedom.

When the court in *George* adopted the "rationale" of *College* in ordering a transfusion, it perpetuated the failure to consider a question of both theological and constitutional import. The patient in each case stated that, while he would refuse a transfusion, spiritual responsibility for the act would rest upon the court if it compelled the transfusion. It is difficult to ascertain whether the patient was attempting to warn the court of alleged spiritual consequences of ordering a transfusion, or attempting to compromise between his religion and his natural fear of death. The difficulty is illustrated by the reasoning in *College*, as the judge concluded that there was no abridgment of religious freedom because a patient who did not consent to a transfusion committed no sin. While Jehovah's Witnesses do not believe they will be held personally accountable for a transfusion which they were compelled to receive, it is their position that the law of God has been nonetheless violated. Thus, ordering a transfusion over the patient's objection violates his right to the free exercise of his religion, regardless of whether or not he will be charged with a sin.[27] The spiritual consequences for the person affected by state action are no test for the constitutionality of such action, since religious freedom is no less abridged because the law "accepts" spiritual responsibility for the abridgment.[28]

[26] See note 4 *supra*.

[27] An analogy is drawn between a patient forced to take the transfusion and a rape victim. While the latter is not considered as having committed adultery, the rights of the individual have nonetheless been violated. Interview with W. Glen How, Counsel for Jehovah's Witnesses, Seattle, Washington, Oct. 15, 1965.

[28] It could hardly be argued that no abridgment would occur if the state prohibited worship services on the basis that would-be worshippers would be absolved from religious sanction because of their inability to worship. 9 UTAH L. REV. 161, n. 47 (1964).

The suggestion made in *George*, that the conscience of the doctor and the possibility of malpractice might be factors in the balancing process, is of doubtful validity. While members of the medical profession are in sharp disagreement on the ethics of acceding to the wishes of Jehovah's Witnesses,[29] no state interest is represented by the doctor's conscience[30] and no legal duty could rest upon the doctor to provide treatment in violation of the patient's directions.[31] Absent a court order,[32] it would be malpractice for a physician to administer a transfusion over the objection of the patient.[33] By suggesting that it would be malpractice *not* to give the transfusion, the court failed to recognize that the logical development of its suggestion would be to have liability for malpractice arise from a failure to commit malpractice.

RESIDENCY REQUIREMENT FOR PUBLIC EMPLOYMENT —DENIAL OF DUE PROCESS AND EQUAL PROTECTION

Plaintiffs, a labor union and two of its members, sought a declaratory judgment on the constitutionality of a city ordinance requiring all private contractors performing work for the city to employ only residents of the county in which defendant municipality was situated.[1] On

[29] A panel discussion among physicians of the University of Pennsylvania School of Medicine, reprinted in Fitts & Orloff, *Blood Transfusion and Jehovah's Witnesses*, 108 SURGERY, GYNECOLOGY & OBSTETRICS 502 (1959), illustrates this disagreement.

[30] The Hippocratic Oath contains no clear answer for a physician. It has been interpreted to mean that the doctor must be a physician of the soul no less than of the body, and must consider the moral implications of his treatment. EDELSTEIN, THE HIPPOCRATIC OATH—TEXT, TRANSLATION AND INTERPRETATION 24 (1943).

[31] It was suggested in *College* that the doctors might have an obligation to operate to avoid criminal liability. In spite of a statement in SHARTEL & PLANT, THE LAW OF MEDICAL PRACTICE 371 (1959), suggesting the contrary, there is no duty to provide treatment against the patient's request. Otherwise, the physician would be under a legal duty to commit assault and battery. See McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 553 (1959).

[32] For a discussion of the applicability of the doctrine of implied consent to transfusion cases, see Comment, 9 UTAH L. REV. 161 at 164 (1964). *But see* 60 NW. U.L. REV. 399 (1965). See generally PROSSER, TORTS 104 (3d ed. 1964). The patient in *George* had executed a civil release in the form approved by the Board of Trustees of the American Hospital Association. See also Hospitals, Journal of the Amer. Hosp. Ass'n, Feb. 1, 1959, p. 46.

[33] This is commonly considered assault and battery. PROSSER, TORTS 104 (3d ed. 1964). Assault and battery is incorporated with negligence into the larger classification of malpractice. See Physicians' & Dentists' Business Bureau v. Dray, 8 Wn. 2d 38, 111 P.2d 568 (1941); Kelly, *The Physician, The Patient, and The Consent*, 8 KAN. L. REV. 405 (1960); Steincipher, *Survey of Medical Professional Liability in Washington*, 39 WASH. L. REV. 704 (1964).

[1] The court does not quote the ordinance, but states, Construction Union v. City of St. Paul, 134 N.W.2d 26, 28 (Minn. 1965):

The ordinance involved compels all contractors who are performing work for the