

CIVIL RIGHTS ACT ANNULLED

If a citizen is deprived of his rights by persons who wear white hoods and burn crosses, the injured party can recover damages in an action at law.

If a physician is deprived of his rights by a committee of peers in a state government institution, who wear white coats, the physician has no recourse to federal court, no matter what the facts of his case may be, according to a September 26 decision of the Fifth Circuit Court in the case of *Caine v. Hardy* (see p. 3).

The *Caine* case is the most glaring example of the efforts of the federal judiciary to effectively repeal the Civil Rights Act of 1871, the "Anti-Ku Klux Klan Act."

The statute, though enacted because of the Ku Klux Klan, is expressed in very general terms:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.... (42 U.S.C.S. §1983).

The late Curtis Caine, Jr., MD, suffered the loss of a property right, his hospital staff privileges at Hinds General Hospital (a state-owned institution), in a peer review action that he alleged to be a personal vendetta in retaliation for his opposition to an exclusive anesthesia contract. As a result, Dr. Caine also lost his medical license in Mississippi and was denied licensure in numerous other states, even before the national data bank was opened. Eventually, he obtained an anesthesia fellowship that he believed might enable him to regain licensure. Near the end of what he regarded as a sentence of penal servitude, he died suddenly of a heart attack.

The actual facts of Dr. Caine's case have never been presented in a courtroom. The door of the court was slammed in his face by Judge Edith H. Jones, a frequently mentioned candidate for the US Supreme Court.

Judge Jones had to decide whether Dr. Caine's complaint, on its face, stated a cause of action under the Civil Rights Act. Instead, prejudging the facts, she wrote: "To a reasonable layman, there would be no dilemma: after a patient died while under the anesthesiologist's care, suspension pending a hearing would seem an obvious answer."

"[Dr. Caine's] assertion that he was the victim of partisan decisionmaking is of no moment....The risk of erroneous decision is ... tolerable when compared with the state's powerful interest in protecting patient safety."

These comments do not take into account the medical situation because Dr. Caine was never permitted to present it. (The patient was moribund when Dr. Caine first saw him.) Furthermore, they give "detailed credence to a patient safety issue which is not raised in the case because the

defendants never raised it and the plaintiff's pleadings refute it as a factor," as the dissenting judges point out. In effect, the Court ``converts the proceeding to a trial on the merits and without the slightest authority makes its own evaluation of the case based upon its own creation of evidence that does not exist in the pleadings."

Once a public safety issue is raised, the individual who finds the ``tolerable risk" of a misjudgment visited upon him has no cause of action, in Judge Jones' opinion, if his risk arose ``only from wanton and intentional violations of controlling state regulations." In other words, if peer reviewers in a state institution wish to assure their immunity, they seemingly must do two things: (1) establish bylaws that provide for flawless due process and (2) violate their own bylaws in a wanton and intentional fashion.

``Allegations of bias" in decision-making, she declared, even if they must be assumed to be true, ``do not render infirm otherwise constitutionally adequate procedures."

Judge Jones also dismissed Dr. Caine's First Amendment claims, stating that ``the threshold legal question in such cases is whether [Dr. Caine's] speech dealt with matters of truly public concern as opposed to matters of purely personal interest or intra-office disputes." Whether or not the awarding of a monopoly to three anesthesiologists was in the patients' best interest was deemed irrelevant because Dr. Caine also had a personal interest in the decision. The contract would have excluded him from caring for obstetrical patients at Hinds General Hospital. Therefore, speaking out on the issue was not protected free speech. Dr. Hardy and his partners could punish Dr. Caine by revoking his privileges in a public hospital, even on the basis of unproved or patently false charges.

Judge Jones' narrow interpretation of the First Amendment is radical indeed. If allowed to stand, this precedent could restrict everyone's freedom to speak on any issue in which he allegedly has any personal interest whatsoever.

The implications of the decision are far-reaching and ominous. According to the dissenters, ``this holding constitutes a license to any public agency to deprive someone of a special right by stating a ground which would constitute an emergency- with no proof thereof...This bootstrap device can be used [when] the motives for deprivation were wholly discriminatory." In other words, this decision also annuls the Fourteenth Amendment to the US Constitution.

The Unnecessary Epidemic

AIDS: The Unnecessary Epidemic by Stanley Monteith, MD, Covenant House Books, 1991, \$14.95

Dr. Monteith has provided a stimulating, revealing, and personal insight into a side of the AIDS epidemic that has had little exposure. He is an orthopedic surgeon who sought to apply the same medical and public health measures to the human immunodeficiency virus (HIV) that have been applied to other infectious diseases, but found that higher powers were determined to ``politically protect" HIV carriers and expose large numbers of Americans to unnecessary risk.

The strength of the book is Dr. Monteith's personal encounter with the California Medical Association (CMA) and politically appointed committees. Time after time, he brought resolutions before the House of Delegates and various committees, only to have other resolutions substituted and decisions made behind closed doors (often in violation of CMA's own rules). Sometimes, he was not even allowed to use his delegate's microphone!

Dr. Monteith calls us all to action "to change the political, moral, and spiritual climate of our nation." I agree almost entirely with his conservative positions on AIDS and other issues. I differ with him on the degree of threat that AIDS constitutes to society in general, its spread among heterosexuals, and the extent of HIV testing needed. All in all, however, I heartily recommend this book for its poignant, first-hand narrative of medical and political leaders who have failed to honor their office and limit the spread of this epidemic.

Edward Payne, MD
Medical College of Georgia, Augusta

Volume Performance Standards

Physicians feel pressured to diagnose ailments curable by a procedure currently falling short of plan fulfillment (rather than one that has been "overutilized"). The authorities investigate a hospital if deaths per year exceed the quota. Terminally ill patients are excluded from hospital care as doctors compel families to take them home to die. Medical staffs spend an inordinate amount of time on paperwork. They must coordinate each procedure and diagnosis with numbers specified in the plan (Paul Craig Roberts and Karen LaFollette, *Meltdown Inside the Soviet Economy*, Cato Institute, 1990).

We have seen the future and how it works....

Letter to the Editor

[This letter was also sent to James Todd, Executive Vice President of the AMA and to AM News.]

I am writing this open letter concerning the AMA's attitude to...the RBRVS....It seems as though the AMA has focused on the 16% cut in the conversion factor as its main challenge....In the past we were hoodwinked by the bureaucracy into accepting an Alice-in-Wonderland Medicare system. Now we are to suffer its offspring, "physician payment reform." Regulations for 1992...are an abomination...It is time that we stop pussyfooting with the government. We must become resolute and like Albert Finney in the movie *Network* we should state, "We have had enough and we're not going to take it anymore!" The AMA should stand on its own two feet, support its constituents, and proclaim for all to hear that we denounce the RBRVS...and will be

no party to this madness. I do not believe that our bureaucrats can run roughshod over a united, organized medical profession.

Ian D. Samson, MD, Lakewood, NJ

Balance Billing Ban Upheld

The US Circuit Court of Appeals for the Third Circuit found that a Pennsylvania law banning balance billing is not unconstitutional and is not preempted by federal Medicare legislation. The Court stated that the regulation of public health and therefore medical care costs was well within the state's police powers.

The Pennsylvania Medical Society argued that the tremendous size of the Medicare program and the extensiveness of its regulations, especially regarding fees, "left no room" for state legislation. The Court noted that Congress knew that at least four states had, and 18 states were considering, restrictions on balance billing when it enacted its own rules. Thus, in remaining silent on the preemption issue Congress "failed to evince the requisite clear and manifest purpose to supersede those state laws."

The medical society's argument that balance billing bans would affect access and quality were called "speculative" (BNA's Medicare Report 9/6/91).

Will Medicare Cost Curbs Become Universal?

In the past eight years, Congress and the White House have quietly created a pervasive system of government controls over the price of medical care. The essential feature is a flat fee for each service, regardless of the cost to the provider or the worth to the patient.

A commercial insurer might not have gotten away with such measures, "but an 80,000-pound gorilla like the federal government can."

Experts say the controls can easily be extended to all medical care. House Ways and Means Committee Chairman Dan Rostenkowski (D-IL) has proposed the Medicare system as the basis for cost controls in his national health insurance proposal (Spencer Rich, Washington Post 8/20/91).

Congress Punishes Honesty

Thirty-seven states have found a way to transfer \$3 billion of their Medicaid burden onto the federal government, using federal taxes paid in other states (such as Iowa) that have not

participated in the scam. The 37 states raised the Medicaid payment rates, then levied a special tax or "donation" on the Medicaid providers. These revenues (at least half of which came from federal taxes) are used to "match" more federal funds. A HCFA rule prohibiting federal matching payments on taxes linked to increased Medicaid payments is scheduled to take effect in January, 1992. (The rule was proposed in February, 1990, but a Congressional moratorium has delayed implementation.) The rule is strongly opposed by the National Governors' Association and the American Hospital Association (Des Moines Iowa Register 9/30/91 and BNA).

Fifth Circuit Court Ignores Clearly Established Law, Says State Can Do No Wrong in Hospital Peer Review

On September 26, 1991, twelve judges of the US Court of Appeals for the Fifth Circuit, sitting en banc, ruled that officials at a public hospital can ignore procedures set forth in medical staff bylaws and revoke a physician's hospital privileges as a personal vendetta, without running afoul of the Due Process Clause of the Fourteenth Amendment to the US Constitution. The decision in *Caine v. Hardy* overrules volumes of case law protecting citizens from abuse by government officials. The majority opinion, authored by Bush appointee Edith H. Jones, ignores both the pronouncements of the US Supreme Court on due process and basic concepts under the Federal Rules of Civil Procedure.

Shortly after Curtis Caine, Jr., MD, an anesthesiologist, successfully objected to the granting of an exclusive anesthesia contract by Hinds General Hospital, and lost an election for chairmanship by one vote, the anesthesiologists who had sought the contract initiated an investigation into Dr. Caine's practice. The result was a summary suspension of Dr. Caine's medical staff privileges, which were later revoked by the Executive Committee, and finally terminated by the hospital's Board of Trustees. (For further detail, see AAPS News, Oct and Nov 1990 and p. 1 of this issue.)

Dr. Caine filed suit against M.D. Hardy, MD, and his partners, as well as the public hospital itself. Specifically, he alleged that he was denied his notice and hearing rights under the hospital's bylaws and that he was not given access to medical records that were necessary to his defense against the charges leveled by Dr. Hardy and his partners. The suit was filed under the Civil Rights Act of 1871, 42 U.S.C. 1983.

The US District Court dismissed the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and the US Court of Appeals affirmed.

Writing for the majority, Circuit Judge Edith Jones held that Dr. Caine's 50-page complaint did not state a cause of action under 42 U.S.C. 1983. Ignoring the well-established strictures of Rule 12(b)(6) of the Federal Rules of Civil Procedure, she concluded, without any sworn evidence in the record, that the public hospital's and prosecuting physicians' actions were motivated by patient safety concerns rather than ill will, and that the hospital was not required to give Dr. Caine proper notice before terminating his privileges. Moreover, Judge Jones, again without the benefit of any sworn evidence, assumed that any speech of Dr. Caine regarding operations of the hospital was not entitled to First Amendment privileges.

As the dissent in the case correctly points out, these assumptions on the part of the majority go against the basic principles of civil procedure. Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, when a defendant files a motion to dismiss a complaint, the facts as stated in the complaint must be taken as true. Dr. Caine explicitly stated in his complaint that there was no "emergency" justifying his summary suspension, that he was denied procedural due process both before and after his suspension, and that the

actions of the defendants violated his right to free speech. It is apparent that his complaint, if taken as true, stated a valid claim for the violation of his constitutional rights. The majority nevertheless believed the hospital's side of the story, despite the lack of any evidence (such as affidavits or depositions) to support that story.

The most shocking aspect of the majority opinion is its analysis of the procedural due process issue. Dr. Caine alleged numerous violations of the hospital's bylaws, which were put in place in order to comply with due process. The majority reasoned that the failure of the defendants to follow the bylaws was not a due process violation because the actions of the defendants (who were agents of the state) were "random and unauthorized" by the state: "It cannot be said that the decisionmakers in this case were 'authorized' either to misuse the regulations or to discipline Dr. Caine for improper purposes" [i.e. to violate the law], wrote Judge Jones.

In effect, the majority argued that (1) a state acts only through its statutes, not through its agents, and (2) if a state law is violated by agents of the state (say by violating the hospital bylaws), there is no federal cause of action, as long as the injured party can file an action in state court. The judges ignored the question of whether or not the state remedy was adequate. (A chance to appeal within 30 days to a chancery court for administrative review only is manifestly inadequate.) They also ignored the whole procedure of filing pendant state claims, a standard legal practice in federal cases.

The cutting and vigorous dissent of Judge Jerre S. Williams castigates the majority for its reasoning. Judge Williams observed:

Dr. Caine's representatives should be granted the chance to develop their claim that the defendants violated Dr. Caine's constitutional procedural rights under *Zinermon* and the critical free speech right of advocacy as to a matter of obvious public concern [quality of patient care in a public hospital]. Yet these critical assertions of constitutional default are treated as trivia by the en banc court, so much so that no denial or explanation or even answer is permitted. In what appears to be an overwhelming desire in the Court to hold against Dr. Caine, even before the facts are developed, the Court simply ignores the firmly established law which governs this case. There is no doubt about the controlling law of Federal Rules of Civil Procedure 12(b)(6) and 15(a). So the Court in its wholly inappropriate ad hoc drive to deny whatever rights Dr. Caine claimed and might establish simply ignores the law and the procedural posture of the case. "Such result-oriented decision making can only erode respect for the federal judiciary." (Citation omitted.)

Undoubtedly, if allowed to stand, the Caine decision will erode the fundamental rights of all

citizens who are subjected to harassment and abuse at the hands of government officials.

Shall this precedent be allowed to stand, unchallenged?

The American Health Legal Foundation intends to support a petition for writ of certiorari in the US Supreme Court.

Contributions to the Foundation, 1601 N. Tucson Blvd. Suite 9, Tucson, AZ 85716, are tax deductible.

New Members

AAPS welcomes Drs. Jerome C. Arnett, Jr. of Elkins, WV; William Bilnoski of Auburn, WA; Edwin Charnock of DeSoto, TX; Alfredo N. Lopez Del Castillo of Staten Island, NY; Waldo E. Floyd, III of Macon, GA; Jorge H. Galindo of Renton, WA; David Hudson of Murfreesboro, TN; Richard Lande of Houston, TX; Richard W. Lomas of Renton, WA; Melvin Morse of Renton, WA; Randall Pearson of Oak Ridge, TN; Fred Reeb of Renton, WA; Stanley P. Rogers of Margate, NJ; Ian D. Samson of Lakewood, NJ; Harold Schultz of Norwalk, OH, and Karl L. Singer of Auburn, WA.

The Fairfield County (Ohio) Medical Society is cordially welcomed as a corporate member.

New medical student members are: Mayra I. Alfonso of Ponce, PR; James S. Doll of Beavercreek, OH; Daniel Elshoff of Fairborn, OH; Scott Hubbard of Dayton, OH; Jeffrey Kleinman of Dayton, OH; Scott Logan of Dayton, OH; George Miller of Dayton, OH; Robyn L. O'Brien of Cincinnati, OH; Michael J. Page of Fairborn, OH; Laura Praeger of Kettering, OH; Eric Simmons of Kettering, OH; Linda D. Winston of Trotwood, OH. Welcome!

In Memoriam: Lewis Urling, MD

Lewis Urling, MD, a life member of AAPS and former director, died suddenly on September 14.

Dr. Urling practiced obstetrics and gynecology, delivering more than 3,000 babies in the course of his career. He was also very active in local government, serving as President of the City Council of Lancaster, OH. Many local physicians and lawyers attended his course on the US Constitution.

Dr. Urling is survived by his wife Patricia.

On Euthanasia

The Final Exit by Derek Humphrey, executive director of the Hemlock Society is #1 on the best-seller list.

In the Netherlands, where an activist judiciary has rendered a statute against euthanasia meaningless, perhaps 10,000 to 12,000 persons per year are put to death by their physicians, some without their consent. Up to 81% of Dutch family physicians have engaged in euthanasia.

Margaret Mead said of the significance of the Hippocratic Oath: "For the first time in our tradition there was a complete separation between killing and curing....The followers of Asclepius were...dedicated completely to life under all circumstances, regardless of rank, age, or intellect."

She felt that this was a "priceless possession which we cannot afford to tarnish, but society always is attempting to make the physician into a killer" (Michael Fumento, "The Dying Dutchman: Coming Soon to a Nursing Home Near You," The American Spectator, Oct 1991).