

JEHOVAH'S WITNESS: THE BLOOD QUESTION

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1. Jehovah's Witnesses and the Military.

a. Jehovah's Witnesses are members of the Watchtower Bible and Tract Society of New York, Inc. They trace their origins to a Bible study group founded in Pennsylvania in the 1870s. Organized worldwide, they count over four million members.

b. It would be unusual to find Jehovah's Witnesses in the Army, since they believe that as servants of God, it is wrong for them to serve in the military of any nation.² However, a new convert to the group who is currently serving in the military would be required by law to complete any current service obligation absent an administrative discharge for conscientious objection. More commonly, Jehovah's Witnesses are associated with the military as dependents, and as such, they are eligible for care in military treatment facilities. In addition, those military treatment facilities that accept non-DOD beneficiaries for trauma care may, on occasion, care for Jehovah's Witnesses.

2. Jehovah's Witnesses' Position on Blood Transfusion.

a. Generally, Jehovah's Witnesses seek and accept the benefits of modern health care. For those who are eligible for care in the military health care system, they seek the full use of Army medical treatment facilities much the same as other beneficiaries. There is, though, one major exception.

b. Jehovah's Witnesses hold as a tenet of their religious belief that blood transfusions, even autologous transfusions (predepositing one's own blood for one's own later use), violate God's will. Their position is based on biblical interpretation and can be summed up as follows: God is the giver of life, and it belongs to Him. Blood represents the life or soul within God's creatures. God commands mankind not to sustain life with the blood of another creature. This command covers any route of administration, oral or intravenous. Blood removed from the

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²"Religious Requirements and Practices of Certain Selected Groups, A Handbook for Chaplains," Department of the Army, Office of the Chief of Chaplains, pages 25-28.

body should be disposed of.³ The Witnesses view this prohibition as a high moral principle, not to be discarded in times of emergency, even if the consequences of obedience means death to themselves or to loved ones.

c. The prohibition against blood transfusions includes "transfusion of whole blood, packed RBCs (red blood cells), and plasma, as well as WBC (white blood cell) and platelet administration. However, Witnesses' religious understanding does not absolutely prohibit the use of components such as albumin, immune globulin, and hemophiliac preparations; each Witness must decide individually if he can accept these."⁴ In the same vein, the Witnesses as a group take no stand on the use of dialysis and heart-lung equipment (non-blood-prime), intra-operative blood salvage where the out-of-body circulation is uninterrupted, or organ transplants.⁵

3. Alternative Therapy.

a. Numerous therapeutic alternatives to blood transfusions, acceptable to Jehovah's Witnesses, are available to Army health care providers (HCP) in the treatment of their patients. These do not increase or greatly increase the risk of morbidity or mortality. For example, there are a number of non-blood plasma expanders such as saline solution, Ringer's lactate, colloids, and Haemaccel and hydroxyethyl starch solution. Other technologies used to avoid transfusions include erythropoietin, hemodilution, salvaged blood, artificial blood solutions, and hemostatic drugs.⁶

b. Where time permits prior to surgery, blood can be built up through amino acids and iron compounds. Intentionally lowering the patient's body temperature or blood pressure has been used successfully to reduce bleeding during surgery, as has sealing off all cut vessels.⁷ "In the OR [operating room], gamma-knife radiosurgery, electrocautery techniques, and laser beam coagulation allow complex surgical procedures to be

³"Jehovah's Witnesses and the Question of Blood," Brooklyn, NY, Watchtower Bible and Tract Society, 1977.

⁴Dixon & Smalley, "Jehovah's Witnesses, the Surgical/Ethical Challenge," JAMA, Nov 27, 1981, at 246:2471.

⁵Id.

⁶Bennett & Shulman, "Practical Issues When Confronting the Patient Who Refuses Blood Transfusion Therapy," Am.J.Clin.Path., April (Suppl 1) 97, at S23.

⁷"Jehovah's Witnesses and the Question of Blood," Brooklyn, NY, Watchtower Bible and Tract Society, 1977, at 49-55.

performed with less blood."⁸ Army surgeons deciding upon the pros and cons of operating on Jehovah's Witnesses should be encouraged to research medical literature on bloodless surgery techniques.

4. Legal Issues.

a. General.

(1) Army regulation is clear that a non-active duty patient may not be furnished medical care without consent from the patient, a person authorized by law to consent for the patient, or by order of a court having competent jurisdiction.⁹ In regard to the courts, "There exists a wide variation among jurisdictions as to when a competent adult's decision to refuse life-saving medical treatment should be carried out."¹⁰ Courts will order intervention against the decision of a Jehovah's Witness to refuse treatment if some compelling state interest exists to override that decision. For example, compelling state interest has been found where the Witness was the sole or primary source of support of children, where the Witness was pregnant, when the patient was a minor, and when the court determined that refusal to accept treatment was tantamount to suicide.¹¹

(2) In non-emergent situations, the patient may be referred to the care of a civilian physician willing to perform the procedure without a blood transfusion. In the event that the Army HCP cannot or is unwilling to do the desired procedure without consent for a transfusion, a statement of non-availability or other arrangement under the TRICARE system may be provided to the patient. As might be expected, in communities with many Jehovah's Witnesses an informal referral network normally exists to local physicians and hospitals that accept them as patients. Moreover, today there are dozens of hospital-based programs that specialize in bloodless medicine and surgery.¹²

⁸Vernon & Pfeifer, "Are You Ready for Bloodless Surgery," AJN, Sept 97, Vol. 97, No. 9, at 40, 42.

⁹AR 40-3, para 2-19a.

¹⁰Swartz, "The Patient Who Refuses Medical Treatment," 2 J.L. & Med. (1985) at 163.

¹¹Id at 157-159.

¹²See the extensive list in the back of the Vernon & Pfeifer article at footnote 7.

(3) In the absence of preemptive Federal law, state law will prevail with regard to a minor's right to consent to (or refuse) medical treatment. Whenever a minor is able to understand the significance of the giving or withholding of a transfusion, his or her consent should be sought.¹³ Where the patient is a minor child, state law may require that the HCP report the parents' refusal to consent to life-saving treatment to the state or local government agency responsible for child neglect.¹⁴

(4) Lack of legal capacity of an adult to give informed consent will be determined by the law of the state in which the facility is located. In those cases where a judicial determination of incompetency has been accomplished, consent for medical treatment is made by the court-appointed guardian.¹⁵ Although Army regulations require spousal or next-of-kin (assuming such can be found) consent to non-emergent care of an incompetent adult,¹⁶ the wiser course is to first require the spouse or next-of-kin to institute court proceedings to obtain guardian status.

b. Tort Liability.

(1) Soldiers.

(a) A HCP who gives care to a patient without consent, expressed or implied, commits the tort of battery. Forcing a blood transfusion upon a nonconsenting patient would, therefore, constitute a battery. Whether or not the government or the HCP would be exposed to financial liability for such a battery depends on facts of each case.

(b) Although the military makes some accommodations for religious medical practices, "In emergency situations the medical treatment facility commander may order or the attending physician may take immediate steps to save a soldier's life regardless of religious practices."¹⁷ Therefore, a nonconsensual blood transfusion to a soldier in an emergency could be done within the scope of a HCP's official duties. In such a

¹³AR 40-3, subpara 2-19f(1).

¹⁴For example, 3 Vernon's Texas Code Annotated Family Code, Section 34.01 et seq.

¹⁵AR 40-3, subpara 2-19f(6).

¹⁶AR 40-3, subpara 2-19f(5).

¹⁷AR 600-20, subparas 5-4b.(1) and 5-6h.(3)(g).

situation, there would be no liability for the HCP or the government.¹⁸

(c) If the situation is not emergent, a nonconsensual blood transfusion on a soldier/Jehovah's Witness may give rise to personal liability on the part of the HCP.¹⁹ This area is admittedly gray. No Army regulation requires the consent of a military member to treatment in nonemergency situations. Such cases should be directed to a medical board.²⁰ Whether directing or giving a nonconsensual transfusion in a non-emergent situation would be considered outside the scope of official duties of a HCP is unknown. Assuming, arguendo, that it was decided that such treatment was outside the scope of duty, then the HCP might find himself the defendant in a malpractice action without government provided counsel or reimbursement.²¹

¹⁸The Gonzalez Act, 10 U.S.C. 1089 (1982), and the Federal Employees Liability and Tort Compensation Act of 1988, 28 U.S.C. 2679(b)(1), provide that an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2672 et seq., is the exclusive remedy for personal injuries caused by the negligent or wrongful acts or omission of military health care providers while acting within the scope of their duties or employment. Section 2681(h) of the FTCA excludes from coverage tort claims based upon battery unless such acts are committed by investigative or law enforcement officers. However, section 1089(e) of the Gonzalez Act states that section 2680(h) of the FTCA does not apply to "any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions. . . ." As the Feres doctrine currently bars relief under the FTCA to soldiers for service-connected injuries—including injuries arising from negligent health care provided within military treatment facilities—effectively there can be no tort recovery.

¹⁹ As noted in footnote 10, the Feres doctrine bars a soldier from recovering against the government under the FTCA for service-connected injuries. Therefore, a soldier who seeks compensation for the intentional battery of a nonconsensual blood transfusion would probably seek redress in a state court against the responsible HCP.

²⁰AR 600-20, subpara 5-4c(3) and 5-6(3). The scenario of having a HCP refer a case to a medical board solely for refusal to accept a blood transfusion is probably not realistic. Within a short period the soldier/patient would either recover sufficiently to where the blood was not needed or progress to the state where the need for blood was deemed emergent and could be transfused against his or her will.

²¹AR 27-40, Chapter 4 provides the procedures to be used by military personnel or civilian employees who are sued in their personal capacity for acts performed in the performance of official duties. The Department of Justice (DOJ) is responsible for the defense of such actions. If DOJ determines that the defendant was acting outside the scope of his employment at the time of the occurrence, it could decline representation, leaving the defendant to fend for himself. That's the bad news. The good news is that the courts have consistently held that there is absolute immunity to military personnel from common law tort claims by other service members for injuries suffered in the course of duty. *Mollnow v. Clarlton*, 716 F.2d 627, 628 (9th Cir. 1983),

(2) Civilians.

(a) In the absence of a court order, there might well be a viable claim for lack of informed consent for a nonconsensual blood transfusion on a non-active duty patient, whether the action was taken in an emergent or non-emergent situation. Probably the most difficult issue for claims personnel or the trier of fact would be to determine damages and compensation where a life-saving blood transfusion was forced on the claimant/plaintiff.

(b) In the current climate of professional liability, a HCP may feel that he or she is better off forcing a blood transfusion on an unwilling patient rather than permitting the patient to die. However, recent case law supports the right of competent adults to refuse life-saving treatment on religious grounds.²² Therefore, concern about tort liability for allowing such a patient to go without a transfusion may seem unwarranted.

5. Recommendations.

Hospital judge advocates are urged to establish an office SOP for obtaining a court order for emergency medical treatment of non-consenting civilian patients. Court appointment of a guardian should be considered whenever the lack of consent to treat life-threatening conditions involves a minor. The state or local government agency responsible for reporting of child neglect should be consulted regarding prior cases with Jehovah's Witnesses refusing to consent to blood transfusion for their children.

Cert. Denied, 465 U.S. 1100 (1984), Reh. Den., 466 U.S. 954; *Trerice v. Pederson*, 769 F.2d 1398, 1403-1404 (1985).

²²*In re Melton*, 505 N.E. 2d 255 (Ohio 1987); *In re Melides*, 390 N.Y.S. 2d 523 (1976): see, also, Paris, "Compulsory Medical Treatment and Religious Freedom: Whose Law shall Prevail?", *Univ. of San Francisco Law Review* 1975, at 10:1-35.