Hippocratic Oath to Include "…And I Shall Attempt To Avoid *Prosecution.*"

• HOUSTON

IN 2003, A FORT WORTH PHYSICIAN WAS INDICTED ON A MURDER CHARGE STEMMING FROM ALLEGATIONS THAT SHE SUFFOCATED A PATIENT. THE ACCUSED, DR. LYDIA GROTTI, WAS WORKING IN the intensive care unit at John Peter Smith Hospital in December 2000 when she allegedly blocked the endotracheal tube of Lettie McGhee, a 64-year-old woman who had gone into cardiac arrest while in the waiting room of the hospital.

Dr. Grotti claimed that although she regrets blocking the tube, she had pronounced McGhee dead an hour before and had obstructed the airway only in an effort to stop Agonal Respirations (i.e. breaths that occur at *death* as the brainstem deteriorates).

INTENTIONAL CONDUCT AND UNINTENTIONAL BY-PRODUCT

There is a discernible distinction between *intentional* and *unintentional* conduct that violates criminal law. Generally, intentional criminal conduct carries a stiffer punishment and, as a reciprocal effect, a greater burden on the prosecution than that of its unintentional counterpart.

For example, in order to be found guilty of a crime such as murder requires that the accused *intentionally* commit an act or omission to cause the death of another person. In contrast, an *unintentional* act that causes the death of another person as a byproduct will not satisfy the required culpable mental state to be found guilty of murder.

In the context of the patient-physician relationship in end-of-life-care, a physician may lawfully pursue a course of treatment to improve a patient's quality of life even if it hastens that patient's death. The treatment will be justified by the physician's *intent* to achieve a beneficial result for the patient even if the treatment causes patient harm as a byproduct.

Hence, if the physician does not *intend* to *cause* patient death but is merely *attempting to improve* the patient's quality of life, the unintentional byproduct (e.g. patient death) should not constitute murder under Texas law.

MURDER AS DEFINED BY TEXAS LAW

Under Texas Penal Code Section 19.02 (b)(2), a person commits murder if they *intend to cause* serious bodily injury and *commit an act* clearly dangerous to human life that causes the *death* of an individual. Arguably, Dr. Grotti may not have acted intentionally to "cause serious bodily injury" to McGhee; on the other hand, her acts may be viewed as "clearly dangerous to human life."

However, at Dr. Grotti's trial the key issue was not whether she acted *intentionally*, but whether McGhee was actually *alive* at the time that Dr. Grotti occluded her breathing tube. The standard used by the trial court was taken from Section 671.001(a) of the Texas Health and Safety Code: "A person is *dead* when, according to ordinary standards of medical practice, there is irreversible cessation of the person's spontaneous respiratory and circulatory functions."

It is an axiom of criminal law that the victim of a murder must be a *living human being* at the time that the accused commits an act or omission that causes the *death* of the victim; the accused cannot *murder* a person who is no longer alive. Thus, if Dr. Grotti (intentionally or unintentionally) blocked McGhee's endotracheal tube, but she was already dead at the time the act was committed, she cannot be successfully convicted for murder.

WRONGFUL CONVICTION
OVERTURNED

The prosecution brought a parade of witnesses including doctors and nurses to testify but only one expert, Dr. Vincent DiMaio, chief medical examiner of San Antonio, who testified unequivocally that McGhee was *alive* and had been asphyxiated. Dr. Grotti was eventually convicted and sentenced to two years in prison in August 2004 after a jury found that she had caused McGhee's death through negligence.

Dr. Grotti appealed her conviction and, based on the strong evidence contradicting Dr. DiMaio's testimony, the Fort Worth Court of Appeals reversed in 2006, holding that the evidence was factually insufficient to show that McGhee was *alive* at the time that Dr. Grotti occluded the tube (*See Grotti v. State*, 2006 WL 2627406 (Tex. App.-Fort Worth Sept. 14, 2006)). The three-justice panel concluded that the evidence presented at trial was not enough to show that Dr. Grotti killed her patient; McGhee likely was already dead when Dr. Grotti was alleged to have killed her. Thus, Dr. Grotti's guilt could not have been proven beyond a reasonable doubt, the court concluded.

EFFECT OF PROSECUTORIAL OVERREACHING

In *Grotti,* fundamental principles of criminal law were disregarded and prosecutors, in their zeal, indicted and convicted Dr. Grotti for murder in light of facts to the contrary. Should this be a pattern of prosecutorial overreaching, its effects will undoubtedly affect the *well-being* of our nation—literally. Physicians will become evermore reluctant to treat patients who have a substantial likelihood of dying while under their care for fear of being prosecuted for intentionally causing their deaths. Furthermore, elderly patients and individuals requiring emergency or frequent medical attention are the population that are most in need of a physician's care but will, unfortunately, suffer the most from this hard-lined prosecutorial approach.

While most would agree that physicians should not have unfettered discretion in treatment options that may result in patient death, their judgment need not be obfuscated by the ominous fear that they will be erroneously prosecuted at the cost of their license, livelihood, and/or reputation. • **DT**

Legal Research Provided By Bennett Law Firm Legal Clerk José R. Guerrero, Jr.

Bob Bennett *is a former prosecutor who represents doctors and other health professionals before the Texas State Board of Medical Examiners. He also helps doctors with privilege hearings, recertification, managed care exclusions, and investigations by state and federal law enforcement agencies. He can be reached at Lancaster Center, 515 Louisiana, Suite 200, Houston, Texas 77002; Phone (713) 225-6000; Fax (713) 225-6001; Website bennettlawfirm.com*

Sheryl Dacso, Dr.P.H., J.D. *is an attorney who focuses her practice on health law business transactional and regulatory compliance matters for individual, group and institutional healthcare clients. She can be reached at 1827 Norfolk, Houston, Texas 77098; Phone (713) 522-4100; Fax (713) 522-5667.*