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"Autonomy", "Justice" and the Legal Requirement to Accommodate the Conscience and Religious Beliefs of Professionals in Health Care

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Introduction

This is a legal and ethical response to Frank M. Archer's "Emergency Contraceptives and Professional Ethics: A Critical Review" in the May, 2000 number of the Canadian Pharmaceutical Journal.

In his CPJ column, directed to disputes about the 'morning after pill', Mr. Archer implied that there is no right to conscientious objection, and insisted that pharmacists must provide or refer patients for "recognized pharmacy services" despite moral objections.

As Iain Benson explains, pharmacists, their employers and their professional associations should be wary of Mr. Archer's erroneous legal opinions and faulty ethical analysis. Mr. Benson's article was submitted to the Canadian Pharmaceutical Journal in July, 2000, but neither his article nor another submitted by the Project Administrator were published.

Frank M. Archer's critical review, though it might seem to some people to be a legal and ethical view is, with respect, neither of these things. While it is, in its way, critical, it does not deal with the legal or ethical principles that are necessary in order to make an informed decision regarding law or ethics in relation to the practice of a profession in general or the question of "emergency contraceptives" in particular. In what follows, though I am critical of Mr. Archer's paper, I would like to point out that his paper provided the grounds for me to think through the thoughts that led to this response: for that I am grateful to Mr. Archer.

Two central principles are overlooked by Mr. Archer: first, the legal obligations of employer and employee to accommodate religious and conscience belief; and, second, the nature of the constitutional rights of citizenship themselves within a civil order. This second error, since it involved a failure to properly approach issues of justice, means that Mr. Archer's analysis fails as an ethical analysis as well. Though Mr. Archer himself notes that "justice" is one of the four key principles of contemporary ethics his article focuses almost exclusively on autonomy and nowhere

on autonomy and nowhere situates analysis of autonomy within the principles of justice in terms of the inter-personal conflict which differing beliefs present.

Mr. Archer ignores the nature of the freedom of religion and conscience and the sole legal authority he cites in support of his approach (advocating, in essence, a limited scope for the exercise of conscience and religion) does not, in fact, support it. By citing a legal authority his article could give the false impression that it gives a legally accurate statement of the law relating to religion and ethics and how they relate to "emergency contraception." Unfortunately, however, where relevant authorities exist Archer does not refer to them. Had he done so they would not have supported his conclusions as far as they went.

This response will attempt to fill in the gaps and to suggest an alternative approach to the question that accords better with appropriate constitutional tests (the law) and that gives a richer view of civil society and the competing views of citizens. While this short response is not a legal opinion on any particular fact situation it is hoped that it will provide some principles that may be of use to professionals and administrative bodies who must address conflicts of conscience in contemporary society.

The question of paternalism, however, is not relevant, or is at best but one small part of the issue of conflicting conscience or religious beliefs in society. The *Nancy B.* decision is not relevant to the question of conscience in relation to pharmaceutical or medical practice . . .

The Archer paper cites the *Nancy B. v. Hotel Dieu* decision¹ as authority for what the author terms "weak paternalism." The question of paternalism, however, is not relevant, or is at best but one small part of the issue of conflicting conscience or religious beliefs in society. The *Nancy B.* decision is not relevant to the question of conscience in relation to pharmaceutical or medical practice because the autonomous

views of one person are not what is at issue in "emergency contraception" situations where a pharmacist or physician do not wish to be involved in their prescription.

Because the autonomy of at least two people are involved, the conflict is more properly viewed as between the conscience and religious views of a professional and the expectations of a patient: this conflict cannot be settled by reference to one person's autonomy because two people's views or wishes (central to autonomy) are involved. That one of the people is the potential provider of the service sought is but one factor to take into account. To put the matter very clearly, let us look at what was and was not at issue in the *Nancy B.* decision.

Nancy B. had Guillain-Barré syndrome and was dependent upon a respirator. She wanted her respirator shut off. None of the physicians objected to what she wanted but sought the court's decision on whether such a course was legal. This is not what is relevant to the question of conscience or religious objection to "emergency contraception." Had a physician in the *Nancy B.* case refused to be involved, say, in turning off the respirator, then the issue would have been raised in a relevant form. But such a factual "issue" was not present in *Nancy B.* and that case fails to provide any light on the question of the duties that exist with respect to a pharmacist who does not wish to prescribe a particular drug or physician who does not wish to perform a particular procedure

or nurse who does not wish to assist with a particular course of treatment.

What Mr. Archer should have cited if he wished to use legal authorities to identify key issues are cases such as *Cecilia Moore v. BC*.² In the *Moore* case, a supervisor ordered a probationary social worker to issue funds for an abortion without making any attempt to accommodate the religious and conscience views of Miss Moore when she indicated that she did not wish to write the cheque due to her personal religious conviction that abortion is a sin and she did not wish to be an accessory to the commission of a sin. Note that it could have been said that a social worker is professionally required to do such a task and that the task could be described (indeed, was described by counsel for the Ministry) as related to "health." Neither the professional duty nor "health" arguments succeeded.

The relevant government authority was found liable for its failure to respect *Miss Moore's* autonomy. Her supervisor had breached the *Human Rights Act* which protects religious belief in an employment setting and had failed to give due accommodation to Miss Moore's beliefs. In this case, the supervisor ought to have found someone else to sign the cheque or signed it himself. He could not, under the guise of its being "part of the job" or "related to the health of women using social services" force Miss Moore to sign the cheque. The analogy to pharmacists is obvious. [See *Worker Fired for Refusing Payment for Illegal Abortion* and *Commentary on Cecilia Moore's Case* under "Further Reading" at the end of the article. -Administrator-]

This case stands for the proposition that a pharmacist cannot simply be ordered to comply with directions to act in a certain way if that action is in opposition to a religious or conscience view that can be accommodated, in a sense, "around" the person's refusal. The question is how is the view to be accommodated? But this is not a question Archer deals with in his paper and the relevant cases do not support the approach he takes.

The fundamental freedom of "conscience and religion" is found in the *Charter of Rights and Freedoms*, and religion has been held by the Supreme Court of Canada in the 1985 decision of *Big M Drug Mart*³ to include not only the right to hold but the right to *manifest, teach* and *disseminate* religious beliefs.⁴ Part of the freedom to hold a belief is, therefore, the ability to manifest beliefs and the most relevant definition of the term manifest is "...to make a public expression of opinion."⁵ Part of such manifestation or public expression is what might be called "the right to dissent." Religious dissent has been an important freedom and much social change has come from just this quarter. Perhaps it is why those in control fear it. But liberty demands that it be protected.

Archer appears to support a world of professional ethics where "if you don't agree with our view, clam-up or leave." A common enough argument in certain kinds of regime, to be sure, but not one that many would consider (as the *Charter* requires), "free and democratic."

Mr. Archer completely fails to analyze this "religious or conscience manifestation" component of citizenship - - the citizenship that everyone, patient or professional, has by virtue of being a citizen of a free and democratic society. Archer appears to support a world of professional ethics where "if you don't agree with our view, clam-up or leave." A common enough argument in certain kinds of regime, to be sure, but not one that many would consider (as the *Charter* requires), "free and democratic." That Frank Archer's view is emanating from an ethics advisor to a professional body is

one more reason for concern. The Pharmaceutical Association and pharmacists across Canada would do well to reconsider the approaches that are being taken to ethics if this sense of freedom and understanding of competing rights is now dominant.

What should be addressed by Mr. Archer and professional advisors, bodies and associates is the manner in which professionals of all sorts of opinions and convictions will be free to practice in an environment where technological developments bring increasingly numerous and sharp points to bear against personal convictions and beliefs. When the definitions of "health" become vague and technological developments more ethically vexed, what might be considered routine for some people may be anathema to others who function with different presuppositions. The solution cannot be to force free-thinking people with a variety of beliefs to toe the same inflexible line. When duty to work and patients comes into conflict with one's own duty to conscience or religious convictions, the answer to resolution of the conflict cannot be the simple "trumping" of belief by some general notion of "health", "patient autonomy" or "requirements of the job." That is to use a broadsword where a scalpel is required.

Yes, the patient or "client" has his or her autonomy; but so, too, does the practitioner. There is no good reason (except perhaps one grounded in an anti-religious bias) to advocate that a patient's autonomy should trump the autonomy of the professional health-care worker just because the two views conflict.

It will be a rare case that allows a job requirement to trump conscience and religion as long as those beliefs are bona fides. Most cases that one can think of in the modern world (and with due regard to the principle that "hard cases make bad law") will allow for accommodation of religious and conscience objections. The "hypothetical horrible", that Mr. Archer uses, of the "what if this is the only pharmacist in town" variety cannot be used

in a blanket way to suggest that no pharmacists can refuse to prescribe "emergency contraception" or that even in the isolated case no other arrangement could be possible.

Where a serious matter such as forcing a person to act against her most fundamental beliefs and convictions is concerned, a heavy burden should be required before such a direction is given or sanction for breach applied. The onus must be on those demanding a service or access to a procedure to show why someone else should be forced against their conscience and/or religion to provide that service or access *once the objection has been clearly and frankly stated and rooted in a religious or conscience ground.*

Decades of labour and employment law cases have shown that the test for religious conviction objections is *subjective* not objective, so all Mr. Archer's arguments about his views of foetal development in relation to personhood are simply beside the point and do nothing but show his own personal views of the matter. Mr. Archer's beliefs about the non-personal status of the foetus and its religious *insignificance* are simply irrelevant to the person who views an unborn human being as a sacred entity worthy of being considered as a rights bearer. Mr. Archer's argument on this point (viewing an unborn human as a non-person) is a "faith commitment" of his - - *he cannot prove lack of personhood scientifically* any more than a religious person can prove personhood scientifically. So why then should the faith commitments of those fellow adherents of Archer's faith dominate those of

other faiths?⁶

A reviewing court or tribunal will look at whether the views are held *subjectively*, not whether Frank Archer or some other person agrees with them objectively. The same error, rooted in lack of tolerance and respect for competing views, appears in Mr. Archer's article with respect to his use of the principle of "autonomy." Focusing only on *patient* autonomy in a conflict of beliefs/aims case is like focusing on a passing airplane while swinging at a golf-ball. With respect, Frank Archer appears to see the plane but misses the ball.

In medicine where two people are involved, autonomy is always a two-way street. Yes, the patient or "client"⁷ has his or her autonomy,⁸ but so, too, does the practitioner. There is no good reason (except perhaps one grounded in an anti-religious bias) to advocate that a patient's autonomy should trump the autonomy of the professional health-care worker just because the two views conflict. What is needed, and Mr. Archer's approach does not assist us at all in this task, is an examination of how to accommodate conscience and religious views within the contemporary technocratic and often implicitly anti-religious paradigm of certain aspects of modern medicine. In case anyone has missed it, the question of whether anything is "given" with respect to human persons is going to be, in many cases, *the* issue in coming decades as various issues in human genetics begins to unroll their discoveries and possibilities into the various areas of society (medicine, ethics and law included). An analytical framework of some sophistication is necessary to ensure maximal respect for and accommodation of differing views in society.

The approach to ethics recommended by Frank Archer, in light of human rights decisions and the *Charter of Rights* has little to recommend it.

The real issue, where there is a conflict of views between people regarding involvement with a procedure or drug, is not settled by reference to one person's "autonomy" but by reference to another principle, that of "justice" (defined as "rendering a person their due..."). For it is there, in the order of justice, that competing claims must be reconciled in a manner that accords with the rule of law (including professional ethics and respect for professional disagreement), the provision of health-care and the developed understanding of a civil society.

Unfortunately, Frank Archer's article does not help us on these important questions and its slight reference to law and principle might lead some people to consider it as a guide in these areas when it is nothing of the sort. The approach to ethics recommended by Frank Archer, in light of human rights decisions and the *Charter of Rights* has little to recommend it. Apart from channeling large sums of money into the hands of lawyers (a benefit to some people), this approach will be expensive for professional bodies that follow it as they are called upon to pay lawyers, legal damages and court costs or to settle out of court (as with the Markham, Ontario nurses) to "keep matters quiet." Medical ethics, including those of pharmacists, need to adjust to the new legal realities which require robust accommodation of conscience and religious beliefs.



Iain T. Benson is a lawyer, lecturer and writer who travels and lectures widely in North America and overseas on topics related to law and culture (including medical ethics - - he served for a time on the ethics committee of a large Vancouver hospital). He has appeared on a variety of issues before

House and Senate Committees and Royal Commissions and is invited frequently to be a guest on leading radio and television programs and in recent years has been heard on CBC Radio's "Ideas", "Tapestry", "Commentary", "Cross-country Check-up" and on T.V. on the Learning Network and other programs across Canada. His writing has appeared in academic journals and major newspapers such as *The Globe and Mail*, *The National Post*, *The Calgary Herald* and *The Ottawa Citizen*. As Executive Director of the Ottawa based think-tank, The Centre for Cultural Renewal, Benson has established an International Research Council that numbers amongst its members leading thinkers at such institutions as Oxford and Cambridge in England, Princeton in the United States and Toronto and Queens in Canada.

Centre for Cultural Renewal: an independent, not-for-profit, charitable organization that helps Canadians and their leaders shape a vision of civil society. To this end, its focus is on the important and often complex connections between public policy, culture, moral discourse and religious belief, and produce discussion papers, forums and lectures on key issues affecting Canadian society, public policy and culture.

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NOTES

1. The citation for this decision, not given by Archer, is: *Nancy B. v. Hotel-Dieu de Quebec* (1992) 86 D.L.R. (4th) 385 (Que. Superior Ct.).
2. *Moore v. British Columbia (Ministry of Social Services)*, Canadian Human Rights Reporter, Vol. 17, Decision 24, Pages D426-D434 (29 June, 1992). The Ministry was ordered to pay many thousands of dollars in damage and costs for this failure to respect Cecilia Moore's religious beliefs. Many of the same arguments made by Frank Archer failed to impress the human rights adjudicator.
3. *R. v. Big M Drug Mart* (1985) , 18 D.L.R. (4th) 321 (S.C.C.).
4. As stated by Chief Justice Dickson at DLR pp. 353 - 354: The essence of the concept of freedom of religion is the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination....Freedom can primarily be characterized as the absence of coercion or constraint....
5. *Shorter Oxford English Dictionary*, 3rd ed., Vol. 1, p. 1272.
6. Shortly after this article was submitted to the *Canadian Pharmaceutical Journal* a unanimous three justice panel of the British Columbia Court of Appeal (the highest level of court in British Columbia) overturned a trial decision that had taken the same sort of view of the "secular" as that which is implicit in Frank Archer's analysis: viewing, as he does, "religion" and religious beliefs as divided from the "secular" by some sort of "bright line." This sort of thinking is antiquated and

reflects a "secularistic" mentality and has no place in either courts or medical ethics. The judges determined that the term "secular principles" necessarily *includes* full exercise of conscience that is influenced completely or in part by religious parents' convictions. The elected school trustees decided to refuse approval to certain books that showed "same-sex parents" and based this refusal in part on the religious beliefs of the trustees and took into account the views of parents, some of which were also religiously based. According to the judges, this religious aspect did not breach the requirement of the *School Act* that schools be run in accordance with "strictly secular principles." The decision of the trustee's to refuse approval of the books was upheld. For a detailed review of this decision see the website of the Centre for Cultural Renewal: (<http://www.centreforrenewal.ca/lex-40.html>) where the decision, *Chamberlain v. Surrey School District No. 36*, British Columbia Court of Appeal, 2000 BCCA 519 (September 20, 2000) is analyzed and described. The decision was not appealed and remains, therefore, the binding law on this point in British Columbia.

7. An interesting point for further reflection, relates to the now ubiquitous use of the term "values" (instead of "virtues", principles or morals) and how that term, found everywhere in contemporary "ethics", like another newcomer on the scene, the term "client" (both now prevalent in medicine and education) show that "marketplace thinking" and a certain "commodification of the person" have come to dominate the therapeutic and traditional relationship between patient and physician. This "marketplace" mentality has also affected the traditional educational relationship of teacher and student. Both points, however, are beyond the scope of this response, though it should cause us concern about the direction the professions are going. On the bankruptcy of "values" language for morals and ethics see: Edward G. Andrew, *The Geneology of Values* (Boston: Rowman and Littlefield, 1995). The Canadian philosopher George Grant (1918 – 1998) once said, in a Canadian Broadcasting Corporation interview that values language is "...an obscuring language for morality used when the idea of purpose has been destroyed...and that is why it is so wide-spread in North America" G. Grant, Transcript "The Moving Image of Eternity" *Ideas* (Toronto: CBC, 1986). Elsewhere I have discussed the corrosive effects of "values" language and misuse of the term "secular" on culture: see, *Notes Towards a (Re) Definition of the "Secular"* (2000) 33 UBC Law Rev. 519 – 549. [See also, Mr. Benson's popular summary of some of the main points in the Law Review article - Administrator-]

8. The *Nancy B.* case showed the valid place of a focus on autonomy when the court allowed her physicians to turn her respirator off so that her wishes could be followed and "nature could take its course." There was, as said earlier, no competing autonomy/belief/conscience claims in the case.

Further Reading

Benson, Iain T., "There are No Secular 'Unbelievers'". *Centrepoints* #7, Spring 2000
<http://www.consciencelaws.org/Examining-Conscience-Issues/Ethical/Articles/Ethical10.html>

Murphy, Sean, *In Defence of the New Heretics:- A Response to Frank Archer.*
<http://www.consciencelaws.org/Conscience-Archive/Conscience-Project-Documents/New-Heretics-Conscience.html>

- *Insubordination* (Worker fired for refusing payment for illegal abortion)
<http://www.consciencelaws.org/Repression-Conscience/Conscience-Repression-10.html>

- *Commentary on Cecilia Moore's Case.*

<http://www.consciencelaws.org/Examining-Conscience-Issues/Legal/Articles/Legal03.html>

- *Establishment Bioethics.*

<http://www.consciencelaws.org/Examining-Conscience-Issues/Ethical/Articles/Ethical16.html>
1

Protection of Conscience Project, *Report 2001-01: Re: College of Pharmacists of British Columbia-
Conduct of the Ethics Advisory Committee* (26 March, 2001)

<http://www.consciencelaws.org/Conscience-Archive/Conscience-Project-Reports/Report-2001-01.html>