

# CHOICES SHOULD HAVE CONSEQUENCES: FAILURE TO VACCINATE, HARM TO OTHERS, AND CIVIL LIABILITY

*Douglas S. Diekema*\* †

## INTRODUCTION

A parent's decision not to vaccinate a child may place others at risk if the child becomes infected and exposes others to the disease. Should an individual harmed by an infection transmitted from a child whose parents chose to forgo vaccination have a negligence claim against those parents? While I do not hold a legal degree and therefore cannot speak directly to issues of law, as a physician and ethicist it seems to me that the basic elements that comprise negligence claims—harm, duty, breach of duty, and causation—are met in some cases where parents forgo vaccination.

## I. THE PRACTICE OF CHILDHOOD VACCINATION

The vaccination of children has proved to be one of the most effective and important health interventions of the twentieth century. With the possible exception of improved sanitation and clean water, no other intervention in modern history has impacted children's health as significantly. Yet despite the phenomenal success of childhood vaccination, thousands of parents in the United States choose not to vaccinate their children each year. In many cases, these children can still attend public schools by taking advantage of personal belief exemptions available in many states. These parents do not represent a homogenous group: some parents may object to immunization on religious or philosophical grounds, some may object to what appears to be a painful assault on their child, and others may believe that the benefits of immunization do not justify the risks to their child. The number of parents choosing to forgo vaccination for their children appears to be increasing, in part because of the success of vaccination programs. Parents today have little or no experience with vaccine-preventable diseases like polio, haemophilus influenzae type B, or

---

\* Director of Education, Treuman Katz Center for Pediatric Bioethics; Attending Physician, Emergency Department, Seattle Children's Hospital; Professor of Pediatrics & Bioethics, University of Washington School of Medicine; Adjunct Professor of Health Services, University of Washington School of Public Health.

† Suggested citation: Douglas S. Diekema, Commentary, *Choices Should Have Consequences: Failure to Vaccinate, Harm to Others, and Civil Liability*, 107 MICH. L. REV. FIRST IMPRESSIONS 90 (2009), <http://www.michiganlawreview.org/firstimpressions/vol107/diekema.pdf>.

measles. This fading social memory makes the benefits of vaccination more difficult to appreciate.

Currently, the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention recommends that children under the age of six receive vaccination against fourteen infectious diseases: hepatitis B, hepatitis A, rotavirus, diphtheria, tetanus, pertussis, haemophilus influenzae type B, pneumococcus, poliovirus, measles, mumps, rubella, varicella (chicken pox), and influenza. Vaccination against two additional infectious diseases, meningococcus and human papillomavirus, is recommended between the ages of eleven and twelve.

With the exception of tetanus, these diseases spread only from person to person. In other words, to get a disease like measles, mumps, or influenza, you must be exposed in some way to an individual who is already infected with the disease agent. Vaccination not only provides direct protection to the individual who gets vaccinated, but also eliminates that individual as a source of infectious transmission. The latter effect is important because it provides indirect protection to unvaccinated individuals by surrounding them with vaccinated individuals—a phenomenon known as herd immunity.

Herd immunity is necessary to protect those individuals who are not yet vaccinated, those who must remain unvaccinated, and those few who remain or become susceptible to disease despite vaccination. Most vaccines cannot be given until a child is two to twelve months of age. Prior to that time, these young children remain susceptible to vaccine-preventable diseases. This age group is absolutely dependent on herd immunity to protect them from infection. Additionally, some children cannot be vaccinated against one or more diseases because of medical contraindications, past allergic reaction to a vaccine, or underlying medical conditions. Further, a small percentage of vaccinated individuals will either remain or become susceptible to disease despite vaccination. These children remain at risk despite every effort by their parents to protect them from disease acquisition through vaccination, and they depend on herd immunity for protection.

## II. VACCINE-PREVENTABLE DISEASES HAVE THE POTENTIAL TO CAUSE HARM

All of the vaccine-preventable infectious diseases have the potential to cause death or significant disability. Some of these diseases, like measles, chicken pox, and influenza, are commonly perceived as minor illnesses that result in no more harm than several days of discomfort followed by a full recovery. This may lead some parents to question the need for vaccination against such diseases.

While severe complications are rare for most of these diseases, they can be devastating in those few who experience them. Measles, for example, causes pneumonia in 1 out of every 17 cases, encephalitis in 1 out of every 2000 cases, and death in 3 out of every 1000 cases. Otherwise healthy infants die of pertussis every year in the United States; chicken pox has been associated with devastating cases of necrotizing fasciitis, or “flesh-eating bacteria”; mumps can cause infertility in males; hepatitis can cause severe liver damage; a pregnant woman who contracts rubella is at significant risk of delivering a baby with devastating birth defects; and influenza still causes

thousands of deaths each year. Every one of the vaccine-preventable diseases has the potential to cause significant harm to those who get infected.

### III. PARENTS HAVE A DUTY TO AVOID CAUSING HARM TO OTHERS

Do parents have a duty to take reasonable steps to prevent their children from spreading infectious diseases that have the potential to harm others? In *On Liberty*, John Stuart Mill seemed to recognize a duty not to cause harm to others. He argued that coercive state action could be justified where an individual's decision or action places others at risk of harm: "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."

Mill's justification for interfering with the freedom of an individual has become known as the "harm principle." Vaccination laws rely on the harm principle for their justification. State immunization programs and school mandates exist not simply because they provide a direct health benefit to the vaccinated individual, but because they protect other individuals in the community—those who must remain unimmunized for medical reasons and those who remain nonimmune despite vaccination. The existence of these "school mandate laws" would suggest that there is, in fact, a civic duty to vaccinate one's children in the interest of protecting those in the population who remain susceptible.

Courts have repeatedly upheld compulsory vaccination laws in the United States as a reasonable exercise of the state's police power—even in the absence of a disease outbreak. Such laws survive constitutional challenge even in cases where they conflict with the religious beliefs of individuals. In the first such case, *Jacobson v. Massachusetts*, the Supreme Court held that:

the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.

While both the harm principle and *Jacobson* are primarily concerned with justifying coercive state action, one could argue that laws requiring vaccination of citizens exist to enforce a duty that each citizen has to every other member of the community. These laws suggest that a duty exists, even though most states provide the opportunity to opt out of vaccination on the basis of personal beliefs. The existence of the duty to avoid harming others does not cease to exist simply because one objects to the mechanism (in this case vaccination) by which states ensure that protection.

In fact, parents who choose not to vaccinate their children illustrate the "free-rider" problem—they take advantage of the benefit created by the participation of others in the vaccination program while refusing to participate and share equitably in the risks and obligations of the program. These individuals act unfairly to others in the community by pursuing self-interest ahead of civic responsibility. Even if the community refuses to

coerce or punish these free riders, they remain morally culpable in an important way.

Finally, the expectation that parents vaccinate their children to prevent harm to others is a reasonable one for several reasons. First, vaccination offers direct, demonstrated benefit to the child. Second, the safety of childhood vaccines is well established and the risk of serious side effects or complications is exceedingly rare. Finally, existing data clearly support the conclusion that the risks to a child of remaining unvaccinated, even in the United States, exceed any risks that might be attributable to vaccines themselves. Given this, placing a duty on parents to vaccinate their children is reasonable and represents prudent public policy.

#### IV. FAILURE TO VACCINATE ONE'S CHILDREN CONSTITUTES A BREACH OF DUTY

If parents have a duty to vaccinate their children, then it would follow that most situations in which a parent fails to do so would constitute a breach of that duty. There may be at least three notable exceptions to this rule. First, a parent's duty to vaccinate a child requires vaccination of the child *at the recommended time*, and not before then. Second, the duty to vaccinate does not exist for those children who have specific and recognized contraindications or those who have previously experienced side effects that medical professionals agree preclude further vaccination against that agent. Finally, the duty to protect others by taking reasonable steps to keep one's child from spreading disease is discharged when a parent has made a good faith effort to get their child vaccinated. In the event of vaccine failure—where an individual child, despite vaccination, contracts and spreads disease to another—the parents can still be said to have fulfilled their duty. Likewise, inability to pay for vaccinations may also excuse a parent from this duty. Vaccination is a public good, but not all states assure that citizens can obtain vaccination at no cost. In those states, it may be unreasonable to expect parents to fulfill this duty without assistance.

#### V. THE QUESTION OF CAUSATION

The question of causation turns on whether a parent whose child has suffered serious harm from a vaccine-preventable disease can claim that the harm is the result of another parent's decision to forgo vaccination of their own child. In considering that question, several factors are important. First, there is little question that the harm in this case results from transmission of an infectious agent from one person to another. While it may not always be possible, when the specific person who spread disease to a harmed person can be reliably identified, establishing causation is a fairly easy task.

While the direct cause of the harm is the infectious agent, the vector—in this case, a child—is an essential link in the chain of causation between infectious agent and a serious consequence of infection. A reasonably foreseeable consequence of failure to vaccinate a child is the possibility that the child will contract the disease and spread it to others. In this situation, were it not for the failure to vaccinate that child, the spread of disease would almost certainly not have occurred. This case for causation may be

weakened if the person who has been harmed is also unvaccinated by choice. In that case, there is an intervening and more direct cause of the harm—the fact that the harmed person had forgone the opportunity to gain direct protection through vaccination. While this would not break the chain of causation, it might allow the defendant to claim contributory or comparative negligence, thus reducing or eliminating any damages.

#### CONCLUSION

I have argued that vaccine-preventable diseases can cause significant harm to infected individuals, that parents have a duty to take reasonable steps to avoid having their children spread infectious diseases to others, that failure to vaccinate an eligible child constitutes a breach of that duty, and that failure to vaccinate a child can be a proximate cause of harm to another. I recognize that negligence law may introduce important nuances into my analysis, but I would also argue that justice might demand that a tort remedy be available in this situation.

If an ethical basis for tort liability exists, it resides in providing a mechanism by which someone who is made worse off by the careless or self-serving actions of another can claim recompense for that harm. Negligence law recognizes that persons should be accountable for their decisions and actions when those decisions and actions unreasonably place others in harm's way. A parent whose child suffers brain damage, death, or disability as a result of contact with another child whose parents chose to forgo vaccination has been harmed unfairly. While the current system in the United States has a publicly funded mechanism for compensating those injured as a result of vaccine side effects, there is no corresponding public mechanism to guarantee that a child harmed by an unvaccinated child will receive the medical care, services, and support necessary. The best mechanism for justice in this situation may be the tort system. It would be unreasonable for those who have made good-faith efforts to participate in the vaccination program to suffer harm at the hands of those who have not, without some mechanism for recompense.