MINNESOTA LAWYER

The Class Action Cure

By: Mike Mosedale September 17, 2015 0


Peter Erlinder

Among the peculiar ironies about the intersection of medicine, public policy and the law in contemporary American life, not many are weirder than the fact that only one segment of the nation's population –and a largely reviled one, at that — enjoys a constitutionally-protected right to health care: the approximately 2.2 million people incarcerated in the nation's prisons and jails

True, "enjoys" probably isn't the best descriptor of how inmates feel about their unusual constitutional status – at least not judging by the volume of correctional health care-related lawsuits against prisons and, increasingly, their medical services contractors. Corizon – the largest of those companies and, until recently, Minnesota's provider – has been sued over 1,300 times in the past five years.

All that litigation is made possible by the U.S. Supreme Cc holding that the 8th Amendment prohibition against cruel and unusual punishment applies when inmates can establish "deliberate indifference" to a serious medical need, a standard established by the landmark 1976 U.S. Supreme Court decision, Estelle v. Gamble. In subsequent cases, the high court expanded the standard to cases involving future medical harms (second hand smoke from his five pack-a-day cellmate) and failure to take reasonable measures to abate a foreseeable risk (the rape of a pre-op transsexual by fellow inmates).

Can those principles be leveraged to force the Minnesota Department of Corrections to provide inmates with a new generation of highly effective anti-viral drugs to treat hepatitis c, a largely underdiagnosed blood borne-virus which, when left untreated, can lead to fatal cirrhosis and liver cancer?

Peter Erlinder, the former law professor at William Mitchell, thinks it's all but inevitable, thanks to two new "breakthrough" drugs –Harvoni and Viekera-Pak – approved by the Food and Drug Administration last December. With 90 percent or greater cure rate, the 12 to 24 week pill-a-day regimens of have been hailed as a major improvement over the previous option — interferon-based treatments which have a success rate between 50 to 75 percent and chemo-like side effects.

But as Erlinder strategized for a prospective class action lawsuit on behalf of Minnesota prison inmates, he also focused on another line of argument: a win for inmates would also be a major public health victory for the non-incarcerated population. The logic: The best way to fight an epidemic is take on the disease on its home turf. No one disputes that hep c thrives in prison environments, where dirty needles and unsterilized tattoo equipment are seen as contributing factors and infection rates are pegged at 10 to 20 times the rate of the general population.

Erlinder isn't the only one to consider prison-focused treatments as key to fighting the epidemic more broadly. But

he and his colleague Peter Nickitas (the counsel of record) were the first to weave the argument into a class action lawsuit, which they brought against the Minnesota DOC and the Centene Corporation, the DOC's current medical services contractor, in U.S. District Court earlier this summer. Two similar suits have since been filed in Massachusetts and Pennsylvania and, Erlinder says, more are coming.

On Monday, Minnesota Lawyer sat down with Erlinder at the St. Paul office of the International Humanitarian Law Institute, the two-person non-profit he founded and now directs. The IHLI was established to collect source material about the recent history of Rwanda, where Erlinder was held as a prisoner for three harrowing weeks back in 2010.

Despite the turmoil of recent years (including a messy and public parting with his former employer, William Mitchell), Erlinder has remained immersed in various legal crusades. The current showdown over Native American treaty rights between Minnesota's Ojibwe bands and the Department of Natural Resources is predicated largely on his scholarly work on the subject.

Now 67, Erlinder carries a whiff of professorial dishevelment. But he was energetic and engaged as he ruminated on the science, law and politics of correctional care and hepatitis– a subject he said he was drawn into by a longtime client, Ronaldo Ligons, who is nearing the end of a 40-year sentence for a second degree murder conviction Erlinder still hopes to overturn.

This interview has been edited for length and clarity.

MINNESOTA LAWYER: How and why did you become involved in this issue? When the FDA approved the new drugs?

ERLINGER: I first became aware of the science about a year ago. As you know, I've been working to get Mr. Ligons a new trial for many years. Because I respect his intelligence, I listened to what he had to say about his exposure to hepatitis c and the difficulty prisoners were having getting the new drugs. As I began to understand their effectiveness, it became clear to me that using the courts as a way to create the legal incentives could stop the HCV epidemic sooner than otherwise.

ML: How is Ligons' health these days? How about the other named plaintiff, Barry Michaelson?

ERLINDER: Neither are in extremis but both have a lot of anxiety about their infections and the effects on their other illnesses and their circulatory systems. Ron is the least well of the two. He failed the interferon treatment once and he's got some symptoms that are probably related to HCV.

ML: Do you know how he was infected?

ERLINDER: Both he and Michaelson got it in prison. Michaelson had a bunkmate who hemorrhaged blood and he had to clean up the cell. With Ron, it's less clear. He thinks he probably got it from a syringe because, under the old policies, they didn't always throw away the used syringes.

ML: How many Minnesota inmates are infected with hep c?

ERLINDER: Nationally, somewhere between 10 and 35 percent inmates are estimated to be HCV positive. In Minnesota, we're talking about between 1,000 and 3,000 inmates at a given time, 1500 to be sure.

ML: One of your more compelling arguments for requiring the DOC to screen and treat inmates is that it would benefit the public at large, not just the inmates.

ERLINDER: I'm not the only one saying that. The Center for Disease Control understands the importance of getting HCV out of the blood pool as rapidly as possible. Making sure that people who come out of prison aren't infected is one of the best ways.

ML: So we wouldn't have an epidemic if you treated all the prisoners?

ERLINDER: There are somewhere in the neighborhood of four million people in the U.S. infected with hepatitis c. It kills more people than HIV/AIDS now. Trying to separate prisoners from the rest of the population is impossible because the prison population turns over so much, particularly when you include jails in the calculus. The question is, 'How can we most rapidly cleanse the blood pool?'

ML: Everybody complains about the price of the new drugs, which are among the most expensive ever. In a Star Tribune commentary, you pushed back against some of the cost claims of health industry professionals, including that widely quoted per patient cost figure of $90,000. Can you elaborate?

ERLINDER: We have an artificially inflated price for these drugs and the nation is being held hostage. In other

countries, the treatment is around $900. These drugs cost around a dollar a dose to produce. Ninety-thousand is the list price. That's the price you see on the sticker when you walk into car dealership. That's not the price the dealer paid. It's also true that those prices are negotiated down depending on who the customer is and how big the volume of the dealership is.

ML: Still, a lot of people in corrections look at the numbers and say, No way.

ERLINDER: We cited a study done at Stanford, and a second study published in the journal Hepatology. Both show that even at the more costly price, the drugs are costs effective overall. The savings – from the elimination of liver transplants, the elimination of other diseases, the reduction in new HCV cases, etc. — are spread over the whole economy. So it's impossible to understand that only by thinking about it terms of cost silos.

ML: But isn't that the way of institutions – to look at expenses in terms of their own balance sheets, not the cost to the whole society?

ERLINDER: That's why institutional analyses are suspect. Institutions look at data from an institutional viewpoint, even when it's necessary to look at the realities more broadly. This is only costs more money if you look at one pocket. How much money did we save by wiping out polio? Quantify that for me. Unless you can do that, don't talk to me about costs

ML: Inmate lawsuits over hepatitis c treatment have been around a while. Have the litigation dynamics changed?

Erlinder: Historically, they were worse because there was no definitive treatment but there were some successes, mainly individual cases. There have been a few attempts at class actions, one of which—it was out in Oregon in the mid-2000s — was successful. It provided a structured treatment program using the interferon protocols.

ML: What happened?

Erlinder: It was a difficult program to set up and administer because of the variability of the treatment protocols. But it was better than nothing.

ML: But that's changed by the emergence of new antivirals?

Erlinder: You and I are having a conversation that couldn't happen any other time in history except now. It's only been six weeks since this became the standard of care. Earlier, we had doctors' opinions that said exactly that. But the professional associations had not issued the standard of care until June 29. We're redrafting our complaint to address that. It changes the whole litigation strategy.

The HCV guidelines.org website is the oracle of Delphi now. We believe the standard of care has been established by the website and that the state has no alternative but to begin following it. Because once you get to the science, there's no legal argument. This is one of these unusual situations when there is an absolute medical consensus. Law has little or nothing to add.

ML: So prisons will be mandated to provide the new treatments to all inmates with chronic hep c?

ERLINDER: It's the only rational and humane thing to do given the science. When we're talking about people's lives, very often we have to roll dice. But in a few situations, we know, for sure, that we can save a life. When we consciously decide not to do it because of the bottom line, we are treating another human being with the worst of deliberate indifference.

ML: And that's the critical standard for inmates who sue.

ERLINDER: Every inmate is entitled to the medical care that's the standard of care for their particular illness. No more, no less. It's only been recently that we knew we could cure — with 95 percent certainty and without side effects – this life threating virus.

It's not a question of whether the doctors at the Minnesota Department of Corrections are going to abide by the standard, it's a question of when. Some government agencies might be able to say we don't have the funds for the treatment. Prisons and jails don't have that freedom and cost can't be the reason. It would be like saying 'We only have enough money for one meal and there are three of you, so two of you are going to starve.'

There are two other aspects to deliberate indifference worth mentioning. The Supreme Court has already held that hepatitis c is a serious illness that requires treatment. It has also said that the threat of an infection is a cause of action that can be heard in court. So this fits into an existing framework of Supreme Court cases that will requires the courts to grant relief. There's no reason for hearings and a trial. As a matter of law, I think we'll prevail.

ML: If that happens, how does it play out on the ground?

ERLINDER: If it turns out as I think it will, Minnesota — and other states — will be required to set up programs for the rapid treatment of everyone who tests positive for HCV. I think the circumstances will be vastly different in one or two years, with more manufacturers and wider distribution and lower costs. It's hard to predict exactly how it will look. But I know this is part of the process of making that happen. And the more public awareness builds for the benefit of getting the HCV out of the blood pool, the cheaper the drugs will become.

ML: Politically, it might be hard to convince the Legislature or Gov. Dayton to pour a ton of money into health care for prisoners.

ERLINDER: You're right, that's the visceral reaction. One hopes that the studies that show the overall cost savings and the fact that a lot of people have HCV in their families might blunt that a bit. I would hope that the Dayton administration sees the bigger upsides, which is curing hepatitis c. That's what this is designed to do.