

PHYSICIANS: Must not operate on adults without consent ~~on~~ on minors without obtaining consent of parents, on inmates at Intermediate Reformatory.

March 28th, 1939.

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Dr. John W. McHaney,
Institutional Physician,
Intermediate Reformatory,
Jefferson City, Missouri.

Dear Doctor McHaney:

We wish to acknowledge your letter of March 21st, as follows:

"I would appreciate an opinion regarding any liability which might occur to myself or the state from the performance of corrective operations upon inmates of Alcoa Reformatory.

"Such operations being hemorrhoidectomies, herniotomies, circumcisions, and tonsillectomies.

"These would be done only upon the request of the inmate.

"The fact that a large percentage of the inmates are under legal age - would this require written consent of the parents for such operations.

"I would appreciate your opinion on the above questions."

48 C. J. Section 120,
page 1130, discusses the subject of operations
by physicians and surgeons with and without
consent:

"Where a patient is in possession of his faculties and in such physical health as to be able to consult about his condition, and no emergency exists making it impracticable to confer with him, his consent is a prerequisite to a surgical operation by his physician; and a surgeon who performs an operation without his patient's consent, express or implied, commits an assault for which he is liable in damages. The patient's consent may be implied from circumstances; thus, if he voluntarily submits to an operation, his consent will be presumed, unless he was the victim of false and fraudulent misrepresentations. If the patient is for any reason not competent to consent, the consent of some one who, under the circumstances, would be legally authorized to give it may be obtained. Where an emergency arises calling for immediate action for the preservation of the life or health of the patient, and it is impracticable to obtain his consent or the consent of anyone authorized to speak for him, it is the duty of the physician to perform such operation as good surgery demands, without such consent. And if, in the course of an operation to which the patient consented, the physician discovers conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life of the patient, he will,

although no express consent be obtained or given, be justified in extending the operation to remove and overcome them. But the removal of a bone during the course of an operation, contrary to the understanding between the surgeon and the patient, renders the surgeon liable in damages. The implied appointment of the surgeon as the legal representative, during the period of unconsciousness, of a patient who has appointed no other person, does not give the surgeon a license to operate on the patient against his will or by subterfuge, or to perform a different operation than that consented to, or one involving risks and results not contemplated."

In the case of *Fausette v. Grim*, 186 S. W. (Mo. App.), 1177, l. c. 1181, the court on a motion for rehearing in pointing out that a patient's consent to an operation was an essential prerequisite to the surgeon's right to perform an operation, said:

"No doubt a patient's consent to an operation is an essential prerequisite to the surgeon's right to perform an operation, if the patient is in possession of his faculties or is in such condition that consent can be obtained. *Pratt v. Davis*, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N.S.) 609, 8 Ann. Cas. 197; *Mohr v. Williams*, 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N.S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303. And if a surgeon should obtain the patient's consent by a false and fraudulent representation, the surgeon might be liable upon that cause of action. *Pratt v. Davis*, supra. In such case he

would perhaps be liable to an action for deceit. 2 Am. & Eng. Ency. of Law (2d Ed.) 803; 30 Cyc. 1579."

In the case of Schloendorff v. The Society of the New York Hospital, 211 N. Y. 125, 105 N. E. 92, 1. c. 93, the court in holding that where the operation is performed by the surgeon without obtaining the patient's consent, the surgeon is guilty of assault for which he is liable in damages, said:

"Every human being of adult years and sound mind has the right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages, except in cases of emergency where the patient is unconscious, and where it is necessary to operate before consent can be obtained."

As to the necessity of a physician or surgeon obtaining the consent of parents before operations on minors, we find the following statement in 48 C. J. Section 121, page 1181:

"* * * * * it has been held that in case of an emergency a surgeon may operate on a child without waiting for authority from the parents, where it appears impracticable to get it. But in the absence of an emergency an operation performed on a child without

the consent of the parents is a legal wrong; and adult sisters of the child, who are its temporary custodians, have no authority to give consent under such circumstances. Only a reasonable and diligent effort on the part of the physician to find the parents and advise them of the situation has been required."

In the case of *Moss v. Rishworth*, 222 S. W. 225, a parent sued a physician for performing an operation on his 11 year old daughter without his consent, alleging that the operation resulted in the death of the child.

The child, who had been living with its parents, was placed by the father in the immediate care and custody of her older sister, Clara, who had 3 years experience in training to become a graduate nurse. She took the child to a doctor to ascertain whether an operation was needed for removal of adenoids. An examination disclosed badly diseased tonsils and the appearance of adenoids. The doctor advised the sister that a real necessity existed for an operation to remove the diseased tonsils and adenoids.

Having agreed upon a date for the operation, the child returned with her sister Clara and another sister, Nellie, who had two years training as a nurse, and after an examination the operation was performed, but before coming from under the influence of the anesthetic the child died.

The court in holding that before an operation may be performed, a physician must obtain the consent of his patient, if competent to give it, said:

"The authorities are unanimous in holding that a surgeon is liable for operating upon a patient, unless he obtains the consent of the patient, if competent to give such consent, or, if not, of some one who, under the circumstances, would be legally authorized to give the requisite consent. If a person should be injured to the extent that he is unconscious, and his injuries of such nature as to require prompt surgical attention, a physician called to attend would be justified in applying such treatment as might reasonably be necessary for the preservation of his life or limb, and consent on the part of the injured person would be implied upon the ground of an existing emergency.

Mohr v. Williams, 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N.S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303; Pratt v. Davis, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N.S.) 609, 8 Ann. Cas. 197; Rolater v. Strain, 39 Okl. 572, 137 Pac. 96, 50 L. R. A. (N.S.) 880; Schloendorff v. Society of New York Hospital, 211 N. Y. 125, 105 N. E. 92, 52 L. R. A. (N.S.) 505, Ann. Cas. 1915C 581."

And in holding that the temporary custody of the sister did not give her authority to give consent to the operation, but that only the father could give consent, said:

"The evidence shows that there was an absolute necessity for a prompt operation, but not emergent in the sense that death would likely result immediately upon failure to perform it. In fact, it is not contended that any real danger would have resulted to the child had time been taken to consult the parent with reference to the operation. Therefore the operation was not justified upon the ground that an emergency existed.

"The physicians, acting in good faith, in assuming the sisters had authority to give consent, undertook to perform the operation, and, although the operation was skillfully performed and without negligence, death ensued, either as the result of the operation or of administering the anesthetic, or both. The sisters were but the temporary custodians of the child, and as such temporary custodians had no authority to give consent to perform the operation in the absence of an emergency. The parent was the only one who could legally give consent to perform it, and, if not given, the physicians' act in performing it was a legal wrong. If performed without the consent of the parent, it would amount to a technical assault for which the child could have recovered had she survived the operation, and it follows that, under article 4695, the cause of action would survive to the defendant in error, not dependent, however, upon the extent of the injuries to the minor child.

"It is insisted that the paramount interest of the child alone must be considered in determining whether such an operation shall be performed, and that if her health demanded an operation, and that, if skillfully performed, no cause of action would arise, even though it resulted disastrously. The law wisely reposes in the parent the care and custody of the minor child, and neither a physician nor those in temporary custody of the child will be permitted, in a case of this character, to determine those matters touching its welfare."

In the case of *Browning v. Hoffman*, 90 W. Va. 568, 111 S. E. 492, it was shown that when the necessity of an amputation of the leg of the patient, a young boy, became known at 2:30 o'clock p.m. of the second day, efforts were made to apprise the parents, and obtain their consent. The father was absent, and the mother, who was not found for several hours thereafter, when notified protested against the operation without the assent of the husband, who didn't return until 9:00 o'clock p.m., and then refused to permit the assistant physician to perform the operation. The court in holding that it was error to instruct the jury unqualifiedly that it was the duty of the assistant physician promptly to notify the parents or grandparents of such necessity, the grandmother, who was at the hospital, not being shown to have had authority to assent to the amputation, and it not being known to the physician that the boy resided with the grandparents, said:

"An instruction which, in view of all these facts and circumstances, imposed absolute duty from the physician promptly to inform parents or grandparents of the necessity of amputation, is clearly misleading and prejudicial. It ignores the evi-

dence of negligence of the parents and futility of notice to them, if it had been given. Except in very extreme cases, a surgeon has no legal right to operate upon a patient without his consent, nor upon a child without the consent of its parent or guardian. *Rishworth v. Ross*, 191 S. W. 843; *Mohr v. Williams*, 1 L.R.A. (U.S.) 439; *Relater v. Strain*, 51 L. R. A. (U.S.) 880; 30 Cyc. 1577; 21 R. C. L. 392."

We must next determine whether the legal principles as above outlined are also applicable to inmates in prisons or reformatories. Although we have been unable to find any cases in point, we fail to see why there should be a different rule for inmates, both adult and minor, as it applies to the obtaining of consent by the physician before the performance of an operation, or on what grounds a different rule would be justified.

50 C. J. Section 27, page 339, in pointing out the duties of a jailer or warden states that:

"Among other duties imposed are the duty to receive and keep prisoners; the duty to preserve the health of the prisoners, and a *fortiori* to preserve their lives; the duty to supply food and board to the prisoners; and the duty to keep the jail clean and sanitary."

50 C. J. Section 28, page 339, states that:

"For a breach of the duty of the jailer or warden to keep the jail sanitary and warm, or to furnish food, he is liable for injury proximately resulting therefrom to a prisoner."

We merely cite the above duties of jailers and wardens to point out that an inmate does not lose all his rights as a human being, by reason of his having committed a crime. If a jailer or warden may become liable to a prisoner for injuries proximately resulting from failure to keep the jail sanitary and warm, or to furnish food, such personal and natural rights which may involve the inmate's chance of living deserves, of course, the greatest of respect and protection.

Section 8495, Revised Statutes of Missouri, 1929, provides that among other duties of the physician of the Intermediate Reformatory, he shall:

"First, attend at all times to the necessities of the sick convicts, whether they are in the hospital, in cells or elsewhere, and bestow on them all necessary medical services; *
****"

From the foregoing we are of the opinion that the physician of the Intermediate Reformatory for Young Men may perform, without personal liability, corrective operations upon an inmate at said Reformatory, where the inmate requests it and gives his consent, and may also perform corrective operations upon minors, provided the legal consent of the parents of said minor is obtained.

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With respect to the state's liability, we find the following statement in 59 C. J. Section 337, page 194:

"A state is not liable for the torts of its officers or agents in the discharge of their official duties unless it has voluntarily assumed such liability and consented to be so liable, the only relief the aggrieved person has in such case being an appeal to the legislature;*

* * * *

From the foregoing we are of the opinion that should the physician of the Intermediate Reformatory perform corrective operations upon inmates without their consent, or in the case of minors, without the consent of their parents, the state would not be liable for the tortious acts of the physicians.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

(Acting) Attorney General

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