

STATE HOSPITALS:
PHYSICIANS:
CONSENT:

At the time of entering a mental hospital a patient cannot, nor can anyone in his behalf, give permission to the hospital, to perform upon him surgical operations for an indefinite future time whenever it was decided by the hospital staff that such surgical operations were necessary.



October 14, 1953

Honorable B. E. Ragland, Director
Division of Mental Diseases
Department of Public Health and Welfare
State Office Building
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"About ten days ago, Dr. Stewart, our orthopedic surgeon, asked me whether there was not some way possible to facilitate operative surgery on fractures, his desire being to correct these fractures by operative work within a day or two after they occur. Under the present situation we promptly inform the family when a fracture occurs, and request an operative permit. This has been averaging about ten days in getting results; the family going into consultation with various doctors, or a letter having to be sent to some other place because of the family moving in the meantime, so many fractures are ten days to two weeks old before we can obtain an operative permit giving the go-ahead sign.

"I note in the Voluntary Hospitalization Application, the individual signs a statement when they enter for care and treatment, or surgery that may be necessary in promoting the recovery of said patient. I know in the past it is always considered a medical legal question regarding operative permits on just what type surgery, and how extensive it may be done, under a given permit. There is a

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definite legal question in my mind whether a general blanket surgical permit would definitely give us authority to proceed with surgery as indicated without specifically advising the people on the specific situation, as it does occur.

"I know, several years ago blanket permits for post mortem examinations were definitely ruled out as being legally technically correct. I know, at the present time, a pathologist will not do a post mortem on a permit given even before death, even if the permit is obtained during the last illness causing death. They feel, to be in the clear legally, a permit has to be obtained after death occurs. I wish, therefore, that you would check with the attorney general as to the legality of any blanket permit that might be obtained on the admission of a patient to the hospital, following, say a year or two later patient falls, sustaining a fracture, with the determination in mind to ascertain whether such a blanket permit could be used with perfect legal clearance from any responsibility. If such a permit would be considered legal, we could, naturally, improve the care to the patients when they do sustain fractures."

As we interpret the Cremer letter the question which it raises is: When a patient is admitted to a state mental hospital for treatment of a mental illness, can the patient, or someone in his behalf, give consent for the performance of surgery, the necessity for which may (or may not) arise subsequently due to some event which has not occurred or which is not directly contemplated at the time of admission and at the time when consent to such surgery is given? In other words, can consent be given for surgery of an unknown kind and degree, the necessity for which may arise at some unknown future time?

It is the opinion of this department that such a permit cannot be given. Strangely, it would seem, there do not appear to be any Missouri decisions on this matter of the consent of a patient to a surgical operation. Neither is there any statutory law on this subject. We must, therefore, turn to decisions, of which there are many, from other jurisdictions. We first call attention to the general statement of the law as found in Volume 70, Corpus Juris Secundum, page 967, Paragraph g, which states:

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"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 physician or surgeon who performs an operation without his patient's consent, express or implied, is liable in damages. In the absence of an emergency a surgeon may not perform an operation different in kind from that for which consent was given or an operation involving risks and results not contemplated. The fact that the unauthorized operation was performed with skill and care does not relieve the surgeon from liability, but, where the particular operation is not clearly unauthorized, the conduct of the operation with skill and care, and with beneficial results, may relieve the surgeon from liability.

"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. Consent to the performance of an operation is not valid if it is obtained by representations which are false to the knowledge of the surgeon. A consent given to a hospital for the benefit of the surgeon is sufficient to authorize an operation by the surgeon. If the patient is for any reason not competent to consent, the consent of someone who, under the circumstances, would be legally authorized to give it may be obtained."

In the case of *Wall v. Brim*, 138 F. 2d 478, at l.c. 481, the court stated:

"* * * The law is well settled that an operation cannot be performed without the patient's consent and that one performed without consent, express or implied, is a technical battery or trespass for which the operator is liable. The obligation underlying this rule is not satisfied by a consent obtained under a mistaken diagnosis that the operation is simple and without danger, when a later diagnosis, while the

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patient is still conscious and no emergency exists, discloses that the operation is both difficult and dangerous. The rule extends no further than to hold that if a physician advises his patient to submit to a particular operation and the patient weighs the dangers and results incident to its performance and finally consents, he thereby in effect enters into a contract authorizing his physician to operate to the extent to the consent given but no further. The same principle which supports the holding that a surgeon performing an operation without his patient's consent, express or implied, commits a battery or trespass for which he is liable in damages, also supports the holding that a surgeon may not perform an operation different in kind from that consented to or one involving risks and results not contemplated."

In the case of *Franklyn v. Peabody*, 228 N.W. 681, at l.c. 682, the court stated:

"The governing rule, supported by modern authority, is well stated in 48 C.J. p. 1130: '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.'"

In the case of *Gregoris v. Manos*, 40 N.E. 2d 466, at l.c. 470, the court stated:

"The courts have held that the right to control one's own body as against surgical intervention may not be disregarded. The consent of the plaintiff was necessary before the defendants could lawfully perform the operation. *Wells v. Van Nort*, 100 Ohio St. 101, 125 N.E. 910; *Cuthreil v. Protestant Hospital*, Par. 375, *Kinhead on Torts*. * * *"

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The above cases clearly establish the fact that, where no emergency exists and the patient is able to consult with the physician, the physician must obtain the consent of the patient to a surgical operation.

As to an "incompetent" the court, in the case of *In re Hudson* 126, P. 2d 765, l.c. 781, states:

"It is a well established rule that a surgical operation may not be performed on a person until the patient, if sui juris, consents thereto; or in the case of an incompetent no operation may be performed by a surgeon upon such person until the guardian of that incompetent consents to the operation; and, if an infant, no operation may be performed until consent is first obtained of the natural guardian or of one standing in loco parentis to the infant. *Pratt v. Davis*, 118 Ill. App. 161; Annotation 76 A.L.R. 562, et seq."

In all of these cases the court has made it perfectly plain that the consent to which it refers is consent to a specific surgical operation. This fact is further shown by the fact that the physician is required to acquaint the patient with the nature of the operation and the risk involved, so that the patient may decide to submit to the operation or not. In the *Brim* case, supra, it is said: "He (the patient) thereby in effect enters into a contract authorizing his physician to operate to the extent of the consent given but no further."

In view of this it seems clear that it would be wholly contrary to the law, as stated above, for a person, or for someone in his behalf, to give a general and blanket permit to a physician or to a hospital to operate upon him at any time in the future regardless of the nature of the operation or its seriousness, without obtaining permission from the patient, (or from his guardian if the patient is incompetent and has a guardian) for the patient's operation.

You have submitted to us the form entitled "Application for Voluntary Hospitalization (By Patient, Parent or Guardian) Section 202.783 RSMo Supplement 1953, Section 2 House Bill 355, 67th General Assembly."

This application is to be signed by the patient alone, or by the patient together with his parent or guardian. Paragraph 3 of this application states:

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"That by making this application, said patient and the person, if any, who makes the application in said patient's behalf, give consent to said hospital to administer such form of treatment or surgery to said patient as may be deemed necessary by the superintendent to promote said patient's recovery."

Certainly this consent is not compatible with the statement of the law regarding consent for surgery as stated above, Furthermore, the consent there given is for surgery which may be necessary and incidental for treatment of the illness for which the patient was admitted to the hospital, which is mental illness. The question which you ask is whether such consent could be made to cover a situation where at some time after admission the patient sustains a bone fracture, the proper treatment of which, necessitates surgery. The consent to surgery given in the application is, as we stated above, consent to surgery incidental and necessary to the treatment of the mental diseases for the treatment of which the patient was previously admitted to the hospital, whereas, the surgery contemplated herein is one the necessity for which arose from an entire different source.

CONCLUSION

It is the opinion of this department that at the time of entering a mental hospital a patient cannot, nor can anyone in his behalf, give permission to the hospital, to perform upon him surgical operations for an indefinite future time whenever it was decided by the hospital staff that such surgical operations were necessary.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

HPW/ld

JOHN M. DALTON
Attorney General