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## Consent to Surgery

Gerald M. Smith\* and R. Joseph Olinger\*\*

THE LEGAL ASPECTS of a patient's consent to operation, or the lack of such consent, are many and varied. The general rule is that consent of the patient, or of someone authorized to act for him, is necessary in order for a physician to *legally* operate.<sup>1</sup> This rule is not altered by the fact that an unauthorized operation is slight and ordinarily is not accompanied by serious consequences.<sup>2</sup> Where no consent is present, a surgical operation upon the body is a technical battery, and in the absence of exceptional circumstances, appropriate damages may be recovered from the physician.<sup>3</sup> The question as to whether consent, either express or implied, has been given, is one of fact for the jury.<sup>4</sup>

Who may consent? A married woman, in full possession of her faculties, has the power to submit to an operation upon her person without the consent of her husband. In such a situation, if the wife's consent is obtained, the husband's consent is unnecessary, and this holds true even though the operation results in the death of the wife. If the wife voluntarily submits to the performance of the operation, her consent will be presumed in the absence of false and fraudulent misrepresentations on the part of the doctor.<sup>5</sup> Where the wife is mentally incompetent, she lacks the power of consent and her husband's consent is then necessary.<sup>6</sup>

In like respect, a surgeon who operates on the husband will not be held liable to the wife because he neglects to obtain the wife's consent, provided that the husband is mentally capable of giving his own consent.<sup>7</sup> This legal principle has been held to apply even though the husband was intoxicated at the time of the operation and said operation resulted in the husband's death.<sup>8</sup>

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<sup>1</sup> *Gregoris v. Manos*, 35 Ohio L. Abs. 279, 40 N. E. 2d 466 (Ct. App. 1941); *Hively v. Higgs*, 120 Or. 588, 253 P. 363 (1927).

<sup>2</sup> *Hively v. Higgs*, *supra*, n. 1.

<sup>3</sup> *Lacey v. Laird*, 166 Ohio St. 12, 139 N. E. 2d 25 (1956).

<sup>4</sup> *Wells v. Van Nort*, 100 Ohio St. 101, 125 N. E. 910 (1919).

<sup>5</sup> *State Use of Janney v. Housekeeper*, 70 Md. 162, 16 A. 382 (1889).

<sup>6</sup> *Pratt v. Davis*, 224 Ill. 300, 79 N. E. 562 (1906).

<sup>7</sup> *Rytkonen v. Lojacono*, 269 Mich. 270, 253 N. W. 703 (1934).

<sup>8</sup> *Barker v. Heaney*, 82 S. W. 2d 417 (Tex. Civ. App. 1935).

In regard to minors, the general rule is that the parents, one or the other, must consent to an operation upon their minor child, in the absence of an emergency, and that a minor has no power to consent to such an operation.<sup>9</sup> For failure to obtain such consent, the surgeon will be held liable.<sup>10</sup> In the *Zoski* case, a physician, without obtaining the consent of a child's parents, issued an order to a private hospital to operate on the minor who was nine and one-half years old. The operation was performed without any knowledge either on the part of the operating surgeon or on the part of the hospital authorities that such consent was lacking. The court held that the surgeon could not assume that the physician had obtained the necessary consent and stated at page 103:

In view of the child's age, the fact that neither of his parents were with him at the time of the operation or came to the hospital with him, and yet, giving all due weight to the memo from the city physician, we cannot allow consent to be implied in such situations. To do so would go far beyond the laws laid down in the authorities cited and examined.

The age and maturity of the minor seem to be important factors in determining whether the general rule in regard to minors will be strictly construed or not. In *Lacey v. Laird*<sup>11</sup> it was stated that ordinarily, where an eighteen year-old girl consents to an operation, the surgeon will not be held liable for even though the consent of the girl's parents was not obtained. The court expressed its opinion, saying:<sup>12</sup>

the term, "consent," carries with it the assumption that previous full disclosure of the implications and probable consequences of the proposed conduct to which such consent applies has been given in such terms as may be fully comprehended by the person giving the consent. It necessarily follows that consent requires a reasonable degree of maturity of mind depending upon the intricacies of the subject matter to which the consent is applicable.

A similar conclusion was reached in *Bishop v. Shurly*,<sup>13</sup> where a surgeon was relieved from liability for the death of a nineteen year old minor when he administered a local anesthetic to said minor upon the minor's express request, even though the boy's

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<sup>9</sup> *Lacey v. Laird*, *supra*, n. 3.

<sup>10</sup> *Zoski v. Gaines*, 271 Mich. 1, 260 N. W. 99 (1935).

<sup>11</sup> *Supra*, n. 3.

<sup>12</sup> *Supra*, n. 3, at 17.

<sup>13</sup> 237 Mich. 76, 211 N. W. 75 (1926).

mother expressly stated to the physician before the operation that only a general anesthetic was to be used. It was held that the mother's consent with the surgeon could be altered by the nineteen year-old son and that "he had a legal right to contract with the defendant for the performance of the surgical operation."

When an individual, who is capable of giving consent, generally consents to an operation; *i.e.*, to do whatever is necessary to relieve his condition, such individual "will be presumed to have authorized the surgeon to perform such operation as may be required by the conditions which he finds."<sup>14</sup> And when it appears necessary to the surgeon in the course of the operation to extend the scope of said operation beyond what was originally contemplated, consent to such extension will be presumed.<sup>15</sup>

Under certain circumstances, consent need not be present in order for a surgeon to operate. This usually occurs in cases of emergency, where action on the part of the physician is necessary for the preservation of the patient's life or health and it is impracticable to obtain consent before proceeding.<sup>16</sup> This principle has been applied where the patient has consented to some form of treatment and in the course of this treatment an emergency arises which makes it necessary for the physician to act in order to preserve the patient's life or health.<sup>17</sup>

Most cases do not specify just what "degree of emergency" has to exist in order to come within this rule. They do indicate, however, that is up to the surgeon in the exercise of his best professional judgment to determine the necessity for an immediate operation without first obtaining the required consent.<sup>18</sup> One case<sup>19</sup> held that in order to come within this principle, there must be an immediate danger to the health or life of the patient and not merely some future danger. But this case dealt with the unauthorized removal of Fallopian tubes and therefore might be distinguished on the ground that courts are more stringent in requiring consent when reproductive organs are involved.

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<sup>14</sup> *Harrison v. Reed*, 21 Ohio N. P. (n. s.) 206 (Cin. Super. Ct. 1916).

<sup>15</sup> *Supra*, n. 14.

<sup>16</sup> *Luka v. Lowrie*, 171 Mich. 122, 136 N. W. 1106 (1912).

<sup>17</sup> *King v. Edwards*, 13 Ohio L. Abs. 424 (Ct. App. 1932).

<sup>18</sup> *Jackovach v. Yocom*, 212 Iowa 914, 237 N. W. 444 (1931).

<sup>19</sup> *Tabor v. Scobee*, 254 S. W. 2d 474 (Ky. Ct. App. 1953).

In *Kennedy v. Parrott*<sup>20</sup> it was held that the rule which enables a surgeon to extend an operation without the express consent of the patient is not merely confined to emergency cases. The court indicated that ordinarily the surgeon is justified in believing his patient has consented to such an operation as approved surgery demands in order to relieve the cause of the patient's affliction. The court said, in effect, that:<sup>21</sup>

In major operations, where the true condition will not be known until the operation is made, there is implied consent to extension of the operation, as the physician's good judgment dictates, if and when any diseased condition is found, if no one able to give consent is readily available.

Under the common law rule, a surgeon was required to obtain the consent of the patient before performing any other operation than that contracted for. In *Bennan v. Parsonnet*<sup>22</sup> it was said that this rule was based upon the circumstance that the patient in early times was a conscious participant in surgical operations performed upon himself, and his consent could be obtained in all instances. But surgical employment of anesthetics, which render the patient unable to consent during the operation, has been said to have swept away the entire foundation of the common law rule.

In light of these conditions effected by the use of anesthetics, the law requires someone to act for the patient, in his own interest. In other words, if the patient has not chosen such a representative, the law will recognize the surgeon himself as the one in whom the patient places confidence and on whose judgment the patient would presumably rely. However, this implication of representation was said not to give the surgeon authority to operate upon a patient against his will, or to perform an operation of a different sort from that to which he had consented or one that involved risks and results of a kind not contemplated—unless the operation was within the *general* lines of the curative treatment agreed upon between the parties.

The above principles are set forth in the case of *Bennan v. Parsonnet*,<sup>23</sup> in which a surgeon, having undertaken to operate

<sup>20</sup> 243 N. C. 355, 90 S. E. 2d 754 (1956).

<sup>21</sup> *Id.* at 755. See, Wasmuth, Consent to Surgical Procedures, 6 Clev-Mar. L. R. 235 (1957).

<sup>22</sup> 83 N. J. L. 20, 83 A. 948 (1912).

<sup>23</sup> *Ibid.*

to correct a hernia in the patient's left groin and, having placed him under an anesthetic, discovered a more dangerous hernia in the right groin and proceeded to operate on that. The court, holding that the surgeon was not liable, based its decision on the ground that the surgeon was the patient's representative to act in his behalf because the patient was under an anesthetic. It was also said that rupture is simply a protrusion of the intestine; and, whether it occurs on the right side or on the left, the intestine is the same; the muscular wall is the same; the operation is the same; and its dangers and risks are the same. The court concluded that "Under these circumstances, the operation that was performed was not in any true sense against the will of the patient or in any legal sense an operation of a different sort from that which the plaintiff had consented to undergo."<sup>24</sup>

It was held in *Re Johnson's Estate*<sup>25</sup> that the surgeon was justified in operating upon an organ other than that which it was originally contemplated would be treated. The surgeon, engaged by the patient's regular doctor to remove a uterine tumor which he had diagnosed, made his own examination and instead removed the patient's diseased appendix without having informed either her or her regular physician of his intention to do so. The court said that while there was no evidence that the plaintiff had consented to the removal of her appendix, the evidence of her medical witness was that, upon finding the condition of the appendix as he did, the defendant surgeon should have removed it; and there was no evidence that the removal caused any of the damage for which the plaintiff sought recovery. Thus, it was held error to give an instruction authorizing a verdict for the plaintiff if the jury found that the appendix had been removed without her consent and that she suffered damage as a result of this act. It would seem that the Nebraska court felt that the plaintiff's authorization was broad enough to cover whatever trouble was causing her discomfort, and that the surgeon was justified in operating upon an organ different from that originally contemplated.

The rule is different in cases where consent is given to remove a certain organ, and reproductive organs are removed or operated on instead. Courts have held that where there is no express consent to such an operation, there shall be no implied

<sup>24</sup> *Id.* at 951.

<sup>25</sup> 145 Neb. 333, 16 N. W. 2d 504 (1944).

consent. In *Tabor v. Scobee*<sup>26</sup> the plaintiff, a minor, was operated on for appendicitis. During the operation, finding that the patient's Fallopian tubes were full of pus, swollen, and sealed at both ends, the defendant removed them without the consent of the plaintiff or her stepmother who was in the hospital. The plaintiff was sterilized. The court ruled that there was no implied consent present. Evidence indicated that removal of the tubes would have been necessary soon, and that their remaining in the body in their swollen and infected condition was dangerous; but evidence did not establish that their removal was an emergency in the sense that death would likely ensue immediately if the tubes were not removed. Although delay in their removal might have been harmful or fatal, there was still time to give the patient and the parent an opportunity to decide the fateful question. The court said that had the plaintiff been operated upon originally for the removal of her Fallopian tubes, and had her appendix been removed without her consent, then consent to the removal of her appendix would be implied, on the ground that the appendix is considered by scientists generally to be of no utility and a danger or a potential danger.

Where reproductive organs are involved, the courts are reluctant to say that a surgeon had implied consent to operate thereon, if no consent to do so was present. Thus, liability has been upheld where the plaintiff submitted to a simple appendectomy but during the course of the operation the physician performed a hysterectomy.<sup>27</sup>

It has been held that where the factor of mistake is present, a surgeon is liable, at least where the mistake is the result of his own fault or negligence. This is especially true if a surgeon engaged to operate on a particular organ performs the operation on another and sound part of the body by mistake.<sup>28</sup>

Authorization of a minor operation does not ordinarily justify the performance of a major operation which involves risks or results of a kind not contemplated.<sup>29</sup> It has been recognized that where a patient consents only to minor surgery, the doctor who proceeds to perform major surgery may be held for a technical battery. This is true at least in the absence of a showing that in

<sup>26</sup> *Supra*, n. 19.

<sup>27</sup> *Rogers v. Lumbermens Mut. Cas. Co.*, 119 S. 2d 649 (La. App. 1960).

<sup>28</sup> *Moos v. United States*, 225 F. 2d 705 (8th Cir. 1955).

<sup>29</sup> *Supra*, n. 6.

the course of the operation he was confronted with an emergency justifying the implication that the patient would have consented to the extension of the treatment.

In *Wall v. Brim*<sup>30</sup> a doctor, believing that a cyst lay immediately beneath the skin, told the patient that its removal would involve only a minor operation taking about ten minutes. But when the incision was made, the surgeon found that the cyst involved the lower tissue. He did not inform her of the condition but proceeded with the removal, unavoidably injuring adjacent nerves. A question for the jury was raised as to whether the surgeon was guilty of an actionable tort. The court noted medical testimony that the patient should have been advised of the condition before the operation was proceeded with, and furthermore stated that consent obtained under a mistaken diagnosis of a simple operation did not authorize a more difficult and dangerous operation when a later diagnosis, while the patient was still conscious and no emergency existed, disclosed the true condition.

In Ohio there is authority to the effect that physicians employed to perform a minor operation who, without the knowledge or consent of an unconscious patient, agreed among themselves to perform a major operation, are, as a matter of law, liable in damages unless there existed a life and death emergency.<sup>31</sup> But in *Harrison v. Reed*<sup>32</sup> the court seemed to rule otherwise. A doctor, engaged to correct a condition from which the plaintiff was suffering, undertook to perform an operation upon her lower abdomen. After the lower incision was made, the doctor felt that it was necessary to make an incision on the upper abdomen in order to remedy the disorder. The court stated that under the circumstances of this case he had implied authority to do so; and furthermore, that the law implied the consent of the patient to do all things necessary to alleviate her condition. It was held that evidence of an admission by the defendant surgeon that he had made the upper incision only to examine conditions left by a previous operation did not justify any inference of wrongdoing on his part, for it was necessary that he make this incision in order to locate the source of the trouble.

Where there is evidence that a physician has been authorized only to perform more or less minor surgery, but has proceeded

<sup>30</sup> 138 F. 2d 478 (5th Cir. 1943).

<sup>31</sup> *Supra*, n. 17.

<sup>32</sup> *Supra*, n. 14.

to perform a more serious operation involving the removal or amputation of various organs, a verdict for the plaintiff is said to be justified.<sup>33</sup>

The practice of having patients execute forms of general consent to whatever treatment may be found necessary has been adopted by some hospitals and physicians. The execution of such a form has been recognized in some of the cases as at least evidence which may be considered on the issue whether the extension of the operation was authorized. In *Wheeler v. Barker*<sup>34</sup> evidence that the plaintiff signed a consent upon her admission to the hospital to whatever operation might be deemed necessary or advisable was held to have been properly submitted to the jury, in spite of plaintiff's contention that she was under opiates at the time she signed and did not realize what she was doing.

The consent to an operation has usually been held to include authorization for the surgeon to take necessary additional steps to correct or repair conditions caused by the surgery, at least where the condition in question was not the result of the physician's negligence. In some cases it has been held that where an incision is reopened to remove an object left therein, the reopening is not a separate and independent operation but incidental to and a part of the main one and so authorized. Thus, it was said in *Higley v. Jeffrey*<sup>35</sup> that the surgeon was not liable for performing an unauthorized operation when he reopened the incision.

In conclusion, it may be observed that many inroads have been made upon the general rule stated at the outset—that consent of the patient is necessary for the performance of a legal operation. In almost every instance, these have depended upon and have been the result of the specific and peculiar factual situations under which the cases have arisen.

<sup>33</sup> *Markart v. Zeimer*, 67 Cal. App. 363, 227 P. 683 (1924); *Hundley v. St. Francis Hospital*, 161 Cal. App. 2d 800, 327 P. 2d 131 (1958).

<sup>34</sup> 92 Cal. App. 2d 766, 208 P. 2d 68 (1949).

<sup>35</sup> 44 Wyo. 37, 8 P. 2d 96 (1932).