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THE QUESTION as to who has property rights in x-ray films has been the subject of controversy between physician, attorney, patient and hospital. Although there have been few cases dealing specifically with this problem, the issue often has been raised privately among physicians and in attorney-physician debates.

X-rays have been defined as electromagnetic roentgen waves that penetrate through various thicknesses of solids. They produce, on sensitized film, an image or shadow picture of the solid which was the subject under investigation.[1]

The x-ray film has been of invaluable aid to the attorney in ascertaining whether or not his client has a cause of action; what the nature of the action is; and to a great degree, the extent of the damage. In certain malpractice cases the x-ray film almost can be *res ipsa loquitur.* To the physician involved in such a case it can mean damnation or complete absolution. With respect to the invaluable nature of x-ray film, *American Jurisprudence, Proof of Facts,* Volume 11, Introductory Comment on x-rays, p. 743, states:

> Diagnostic x-ray films often provide counsel with his best source of objective proof of his client's injuries . . . they comprise a means of dramatic persuasion often of inestimable value.

Suffice it to say that because of the valuable potential of the x-ray film in personal injury and malpractice suits, the right of control, an integral part of ownership, is a very powerful right.

The object of this article is to acquaint the attorney and physician with the main approaches to the problem of ownership of x-rays, and to supplement the various approaches with leading cases.

As the Property of the Physician

The leading and most frequently cited case dealing with the physician's property right in x-ray film is *Burton G. McGarry v. J. A. Mercier Co.*[2] The Michigan court held that, in the absence

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1 Call v. Burley, 57 Idaho 58, 62 P. 2d 101 (1936).

2 272 Mich. 501, 262 N. W. 296, 100 A. L. R. 549 (1935).

of an agreement to the contrary, x-ray negatives are the property of the doctor or surgeon who has made them incidental to treating a patient, notwithstanding that the cost thereof was charged to the patient or to the one who engaged the doctor or surgeon, as part of the professional service rendered. The rationale of the court was based on the theory that the x-ray negative is part of the physician's history of the case. The negatives, plates or films are of extraordinary value to the attending physician but are practically meaningless to the average layman. In the event of a malpractice suit, x-rays which the physician caused to have taken incident to treatment often may constitute unimpeachable evidence which would justify the treatment of the patient and totally absolve the physician, or vice versa.

The usual contract between physician and patient is for diagnosis and treatment. The practitioner's records of the diagnosis and treatment are his own property, subject to one provision: that he may not make use of the records to the injury of the patient.[3]

The above rules deal primarily with x-ray films made by the physician himself. The rule may vary where the physician sends the patient to a radiologist or x-ray technician. In such a case the relation of physician and radiologist must be scrutinized. As a general rule, the films and radiologist's report are sent to the practitioner for his personal information in treating the case. They are his property alone.[4]

The property right of the physician is far from absolute. Where the physician is a member of a hospital staff and has the patient treated and x-rayed at the hospital, the x-ray film will also be made part of the hospital record as well as part of the physician's history. The physician's property right is concurrent with a similar right of the hospital, which in turn is subject to different rules.

As Part of a Hospital Record

Where the physician treating a hospital patient engages the x-ray facilities of the hospital to make x-ray pictures of the patient, another aspect of x-ray property rights comes into perspective. Negatives or prints of x-ray films taken by the hospital are part of the hospital medical record of the patient.[5]

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[3] Gordon, Turner, Price, *Medical Jurisprudence* 82 (1953).

[4] *Ibid.*

[5] Reddy v. Zurich Genl. Acc. and Liability Ins. Co., 171 Misc. 69, 11 N. Y. S. 2d 88 (1939); Dunsmore, 8 Clev-Mar. L. Rev. 459 (1959).

Records of the hospital, including the medical record, are maintained for the use of the hospital and its medical staff in providing better patient care.[6] The medical records are the property of the hospital.[7]

Rules as to the control of hospital records are governed by state statutes. The state statutes usually provide that such records are the property of the hospital and shall not be removed except by permission of the hospital, the attending physician, by order of a court, permission of the patient, or by order of the hospital administrator.[8]

The medical record of a patient remains the property of the hospital after the patient has been discharged. It remains available for reference by the patient, those concerned with his care, or for the purposes of medical research and teaching. It is the responsibility of the hospital, as owner and custodian of the record, to safeguard its contents against loss, tampering or unauthorized use.[9]

Although it has been universally held that the medical record, including x-ray negatives and prints, are the property of the hospital, this rule has its exceptions. The attending physician has a definable legal interest in the hospital record and its contents.[10]

A number of courts have held that the patient has an interest in the medical record that cannot be denied. The patient, however, may have to protect his interest in the record through recourse to the courts.[11] A few states, by statute, give to the patient, his physician or authorized agent the right to examine and copy his medical record.[12] In the case of *Wohlgemuth v. Meyer*

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[6] Hospital Law Manual, Sections 2-1, 2-2, pp. 1-12 (1959).

[7] Hoyt, Hoyt and Groeschel, Law of Hospital, Physician and Patient, 652 (1952); Letourneau, Before You Disclose Information in Medical Records, 80 Hospital Manual 51 (July 1955); Ownership of and Access to Hospital Records, 166 J. A. M. A. 796 (Feb. 15, 1958); Bulletin of the Joint Commission on Accreditation of Hospitals (Nov. 10, 1955).

[8] Hospital Law Manual, *op. cit. supra* note 6.

[9] Hoyt, Hoyt and Groeschel, Law of Hospital and Nurse, 319 (1958).

[10] Hampton Clinic v. District Court of Franklin Co., 231 Iowa 65, 300 N. W. 646 (1941); McGarry v. J. A. Mercier Co., *supra* note 2; In Application of Kobes, 175 N. Y. S. 2d 83 (Sup. Ct. Chem. Co. 1958).

[11] Matter of Weiss, 208 Misc. 1010, 147 N. Y. S. 2d 455 (1955); Wallace v. University Hospital of Cleveland, 164 N. E. 2d 917, affirmed and mod. 170 N. E. 2d 261 (Ohio Ct. App. 1960), motion to dismiss granted 172 N. E. 2d 459 (1961).

[12] Conn. Gen. Statutes, Sec. 4-104, 4-105 (1958); Mass. Gen. Laws Ann., C. 111, Sec. 70 (1958); Wisc. Statutes Ann., Sec. 269.57 (Supp. 1960).

a California court held the hospital-patient relation to be fiduciary, and stated that it is incumbent on the hospital to reveal all pertinent information to the patient.[13] Other cases have held that the patient is entitled to see the hospital record notwithstanding a hospital rule requiring the physician's consent.[14]

A number of New York cases deal with the patient's right to see his medical record. The cases hold that discovery actions are pre-trial examinations and procedural remedies and do not create an absolute right in the patient to see his record at any time. The patient's right of examination must be defined by statute and will not be recognized in the absence of pending or threatened litigation.[15]

In surveying the status of the x-ray as part of the hospital medical record we see that, in addition to the property right of the physician, the hospital acquires a concurrent property right. We also find a legal interest in the record in the patient. A few cases go a step further and even consider the custodian of the hospital records. With respect to the custodian or keeper of the records the rule seems to be that, although the record is the property of the hospital, the custodian does not have the right to possess and use the information to the exclusion of the patient or those standing in his shoes. The cases seem to base this rule on the agency relation existing between hospital and custodian.[16]

As Photography

There have been cases in which attorneys have attempted to approach the problem of ownership of x-ray film and prints from the position that the film and prints are, in essence, products of photography, and that therefore they should be governed by rules pertaining to photography.

This theory argues that when a person engages a doctor, hospital, or radiologist to take a "photograph" of his person, and agrees to pay so much for the number of copies he desires, the

[13] 139 Cal. App. 2d 326, 293 P. 2d 816 (1956); Ownership and Access to Hospital Records, *op. cit. supra* note 7.

[14] Musmann v. Methodist Hospital, Unreported case No. C-2051, Superior Court, Marion Co., Indiana, June 29, 1956.

[15] Glazier v. Dept. of Hosp. of City of N. Y., 2 Misc. 2d 207, 155 N. Y. S. 2d 414 (1956); Romana v. Mt. Sinai Hosp., 150 N. Y. S. 2d 246 (Sup. Ct. Queens Co. 1956); In re Hufstutter, 220 App. Div. 587, 222 N. Y. S. 43 (1927); Jaffe v. City of N. Y., 196 Misc. 710, 94 N. Y. S. 2d 60 (1949); Petition of Cenci, 185 Misc. 479, 57 N. Y. S. 2d 231 (1945).

[16] Pyramid Life Insurance Co. v. Neason Hospital Assn. of Payne Co., 191 F. Supp. 51 (W. D. Okla. 1961); Matter of Weiss, *supra* note 11.

transaction assumes the form of a contract. As a contract it would be a breach, as well as a violation of confidence, for the "photographer" to make additional copies from the negative. The negative may belong to the "photographer," but the right to print additional copies is the exclusive right of the customer.[17] Proponents of this theory would have the property right specially in the patient, with no property rights other than those permitted by the patient, except that the "photographer" would own the negative.

The leading case of *Lumiere v. Robertson-Cole Distributing Corporation* held that the photographer has no property rights in the photograph, and that the negative and the right to make pictures thereafter are the exclusive property of the customer. The court went on to state that it is an implied contract, between photographer and subject, that the photographer shall not use the plates.[18] It would seem, from the holding in this case, that the rights of the photographer would be analogous to rights of the custodian of hospital medical records.

Independently of the question of contract, the law is that a private individual has a right to be protected in the representation of his "portrait," in *any* form. This is a property right as well as a personal right.[19] Applying this rule to x-ray prints, as "portraits in any form," it would again appear that the patient submitting to x-ray "photographs" would have the superior property right in the finished product. A number of cases have affirmed the preeminent property rights of the subject, stating that *all* property rights are in the person contracting therefor.[20] Neither the photographer nor stranger has a right to print or make copies without the permission of the subject.[21]

The particular question as to whether or not x-ray negatives and prints are photography has not been ruled upon. The case of *Burton G. McGarry v. J. A. Mercier Co.* held that x-ray nega-

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[17] Pollard v. Photographic Co., 40 Ch. Div. 345 (Eng.), 58 L. J. C. H. N. S. 251, 60 L. T. N. S., 5 Times L. R. 157, 37 Week Rep. 266, 24 A. L. R. 1320 (1888).

[18] 280 F. 550 (CCA 2, 1922), 24 A. L. R. 1317, cert. den. 259 U. S. 583, 42 S. Ct. 586, 66 L. Ed. 1075.

[19] Corliss v. E. W. Walker Co. (Cir. Ct. D. Mass., 11-19-1894, No. 3,152), 64 Fed. 280, 31 L. R. A. 283.

[20] Douglas v. Stokes, 149 Ky. 506, 42 L. R. A. (N. S.) 386, 149 S. W. 849, Ann. Cas. 1914 B, 374 (1912).

[21] Altman v. New Haven Union Co., 245 Fed. 113 (1918); Stedall v. Haughton, 18 Times L. R. (Eng.) 126 (1901); Moore v. Rugg, 44 Minn. 28, 9 L. R. A. 58, 20 Am. St. Rep. 539, 46 N. W. 141 (1890).

tives are technical and meaningless to the ordinary layman, but did not specifically rule that they are or are not photography. This case left unanswered the question as to whether or not the fact that x-rays are technical and meaningless to the average layman is sufficient to except x-ray negatives from the operation of the general rule as to ordinary photography.[22]

A few lower court decisions have held that x-ray films are not chattels in the sense that they can be bought and sold. In applying this rule to photography it is quite apparent that the x-ray negative possesses a characteristic not common to photographs.[23]

Viewing x-ray films and negatives from the technical point of view it appears quite incorrect to consider them as photography. X-ray pictures are not photographs, but are *radiographs*. In photography, light must be a necessary element, whereas x-ray production involves no use of light but has radiological rays as its necessary factor.[24]

Conclusion

The debate regarding the ownership of x-ray films and negatives is certainly far from being settled. With a rising number of medical malpractice suits and personal injury actions the significance of the x-ray becomes more and more important. As a natural correlative the right of control also becomes of great importance.

Although the general view regards x-ray films as merely part of the records of the hospital or physician, with the patient having only a claim for the information derived from the films, there still remain numerous problems with respect to out-of-court disclosure of these records.[25] The release of the records is a sore administrative problem of the hospital and a personal problem of the physician. Litigation-minded patients and zealous attorneys have caused physicians and hospitals to be very defensive of their records. Consequently the proper place of the x-ray in medical-legal cases has been greatly distorted.

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[22] *Supra* note 2.

[23] Hurley Hospital v. Gage (Mich., Genesee County Cir. Ct., 1931); Thocher v. Barnum and P. (Mich.-Ing. Co. Circ. Ct., 1932); Leas v. Otto (Dayton, Ohio Mun. Ct., 1932).

[24] 11 Proof of Facts 743 (1961).

[25] Louisell and Williams, Trial of Medical Malpractice Cases, Sec. 3.11, pp. 86-88 (1960).

The problem of ownership of x-rays and their proper use appears to be nearing a head, as evidenced by recent doctor-lawyer discussions. There is no one cure for the problem. Well defined state statutes with respect to medical records appears to be the answer to the hospital-patient problem. However, the doctor-patient problem appears destined to be solved only by court action.