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## Torts -- Doctor's Liability for "Unauthorized Operations"

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status before it will hold the carrier responsible for the duties imposed by reason of the carrier-passenger relationship.

HORACE E. STACY, JR.

### Torts—Doctor's Liability for "Unauthorized Operations"

While performing an authorized appendectomy on the plaintiff, defendant doctor punctured cysts on the plaintiff's left ovary and drained fluid therefrom. He is charged with assault and trespass for performing the unauthorized cyst punctures.<sup>1</sup> Plaintiff's testimony indicated express consent only to the removal of the appendix. Defendant's evidence did not controvert this but showed by five duly qualified medical experts that the puncture of such cysts during an appendectomy is good surgical practice performed in such situations. No emergency immediately endangering the health of the patient was shown. Plaintiff appeals from the entry of nonsuit taken after the presentation of the above evidence. The decision of the lower court was affirmed on appeal.<sup>2</sup>

"In such case the consent—in absence of proof to the contrary—will be construed as general in nature and the surgeon may extend the operation to remedy any abnormal or diseased condition in the area of the original incision whenever he, in the exercise of his sound professional judgment, determines that correct surgical procedure dictates and requires such an extension of the operation originally contemplated."<sup>3</sup>

There seems to be no disagreement among the cases that consent in some form must be present for any operation.<sup>4</sup> The form that this consent takes is generally spoken of as either express consent or implied consent.

Express consent is usually found when a very broad, general assent is given to the physician wherein he is told to remedy the situation<sup>5</sup> or to do whatever is necessary to give relief.<sup>6</sup> Consent to one operation is not, however, consent to a second.<sup>7</sup> Nor can a surgeon, during an

<sup>1</sup> *Kennedy v. Parrott*, 243 N. C. 355, 90 S. E. 2d 754 (1956). An allegation of negligence in the cutting of a blood vessel on the ovary resulting in phlebitis of the left leg was not urged on appeal although mentioned in the pleadings and in the trial below. [Record, p. 3.]

<sup>2</sup> *Kennedy v. Parrott*, 243 N. C. 355, 90 S. E. 2d 754 (1956). Cf. RESTATEMENT, TORTS § 62, illustration 5 (1934).

<sup>3</sup> *Id.* at 362, 90 S. E. 2d at 759.

<sup>4</sup> *Wells v. Van Nort*, 100 Ohio St. 101, 125 N. E. 910 (1919); *White v. Hirshfield*, 108 Okla. 263, 236 Pac. 406 (1925); *Valdey v. Percy*, 35 Cal. App. 2d 485, 96 P. 2d 142 (1939); *Wall v. Brim*, 138 F. 2d 478 (1943).

<sup>5</sup> *McClellan v. Adams*, 36 Mass. (19 Pick) 333, 31 Am. Dec. 140 (1837); *King v. Carney*, 85 Okla. 62, 204 Pac. 270 (1922); *Rothe v. Hull*, 352 Mo. 926, 180 S. W. 2d 7 (1944).

<sup>6</sup> *McClees v. Cohen*, 158 Md. 60, 148 Atl. 124 (1930).

<sup>7</sup> *Pratt v. Davis*, 224 Ill. 300, 79 N. E. 562 (1906).

authorized operation on the plaintiff's hand, take fascia lata from the thigh even though good surgery justifies such a taking.<sup>8</sup> But a doctor is authorized to reopen an incision without additional authority if he believes a needle was left within the patient's body.<sup>9</sup> The surgeon has no defense of consent, however, when the wrong person is treated even though the patient, trusting the physician, allows him to proceed without protest.<sup>10</sup> If the wrong member of the body is operated on, the surgeon cannot be excused by showing permission to operate elsewhere; as where surgeon was held liable for an unauthorized tonsillectomy, and the consent was to operate on the septum of patient's nose.<sup>11</sup> Of course an entirely different operation cannot be performed<sup>12</sup> even though benefit may be shown to have resulted.<sup>13</sup> A specific prohibition to an operating surgeon not to remove any bone or part of a bone during a foot operation cannot be disregarded by the surgeon.<sup>14</sup> Nor can the sphincter muscle be cut when doctor is told specifically not to sever it.<sup>15</sup> Even more obvious, consent to a small operation is not consent to a larger, more serious operation.<sup>16</sup> As can be seen from these few examples, the express consent decision often involves a determination of the extent of the patient's permission as reasonably deduced from the patient's conduct under the circumstances or from the actual agreement of the parties.

On the other hand, most of the so-called implied consent cases arise where an emergency or unforeseen situation exists and the doctor takes certain remedial action without any consent whatsoever. The very use of the term "implied consent" is erroneous here; it is ". . . a fiction, since consent does not exist, and there is no act which indicates it. It is more accurate here . . . to say that the defendant is privileged because he is reasonably entitled to assume consent, and to act as if it had been given."<sup>17</sup>

<sup>8</sup> *Franklyn v. Peabody*, 249 Mich. 363, 228 N. W. 681 (1930).

<sup>9</sup> *Higley v. Jeffrey*, 44 Wyo. 37, 8 P. 2d 96 (1932).

<sup>10</sup> *Gill v. Selling*, 125 Ore. 587, 267 Pac. 812 (1928); *Samuelson v. Taylor*, 160 Wash. 369, 295 Pac. 113 (1931). As to inferences of assent drawn from submission, see *Knowles v. Blue*, 209 Ala. 27, 95 So. 481 (1923); *Baxter v. Snow*, 78 Utah 217, 2 P. 2d 257 (1931).

<sup>11</sup> *Hively v. Higgs*, 120 Ore. 588, 253 Pac. 363 (1927). See also, *Hershey v. Peake*, 115 Kan. 562, 223 Pac. 1113 (1924); *Sullivan v. McGraw*, 118 Mich. 39, 76 N. W. 149 (1898); *Krompoltz v. Hyman*, 70 Pa. Super. Ct. 581 (1919); *Mohr v. Williams*, 95 Minn. 261, 104 N. W. 12 (1905).

<sup>12</sup> *Wells v. Van Nort*, 100 Ohio St., 125 N. E. 910 (1919); *Maercklein v. Smith*, 129 Colo. 72, 266 P. 2d 1095 (1954); see also *Markart v. Zeimer*, 67 Cal. App. 363, 227 Pac. 683 (1924). As in the cases in note 11 *supra*, the malpractice-negligence cases and the assault and battery cases are hard to distinguish at times. This is often important in connection with the running of the statute of limitations which may be different for the two causes of action.

<sup>13</sup> *Church v. Adler*, 350 Ill. App. 471, 113 N. E. 2d 327 (1953).

<sup>14</sup> *Rolater v. Strain*, 39 Okla. 572, 137 Pac. 96 (1913).

<sup>15</sup> *Luzzi v. Priester*, 295 S. W. 958 (Tex. Civ. App. 1927), a malpractice suit.

<sup>16</sup> *Paulsen v. Gundersen*, 218 Wis. 578, 260 N. W. 448 (1935). Cf. *Robinson v. Crotwell*, 175 Ala. 194, 57 So. 23 (1911); *Zoterell v. Repp*, 187 Mich. 319, 153 N. W. 692 (1915).

<sup>17</sup> PROSSER, TORTS § 18, p. 84 (2d ed. 1955). Also see RESTATEMENT, TORTS, Special Note § 62 at 116 (1934).

The emergency or unanticipated condition generally must endanger the patient's life or health in some immediate fashion; as where acute appendicitis which endangered the mother and child was discovered during a duly authorized operation for a tubal pregnancy.<sup>18</sup> With this implied consent raised by an emergency or danger to life and health and without any direct, express consent whatsoever, it has been held that a surgeon may amputate an arm which was badly injured,<sup>19</sup> that a more serious rupture on the right side of the groin could be remedied even though specific permission was only for the correction of the less serious left side rupture,<sup>20</sup> that a surgeon could operate to remove an obstruction in the urinary system which the surgeon himself had introduced thereinto,<sup>21</sup> and that a mangled and crushed foot could be amputated.<sup>22</sup> If the trier of facts denominates the situation as "emergency" this is enough to uphold defendant's verdict on appeal as to implied consent.<sup>23</sup>

In every case in the above paragraph which found that there was implied consent, the element of emergency or danger to life or health was present.

Other cases have used the term implied consent in a slightly different way; as where a mother's consent to an operation on her child was considered as implying consent of the child.<sup>24</sup> But, in the usual use of the term the consent arises from the presence of emergency or possible dire results. Most of the cases listed which denied an implied consent did so expressly because there was no emergency. It seems in one case that Justice Cardozo lists "emergency" as the only direct exception to the express consent rule.<sup>25</sup> A recent Kentucky case states directly that a mere endangering of the patient's life or health some time in the future is not such an emergency as would imply consent presently.<sup>26</sup> It will be noted that in the principal case, the testimony of the expert witnesses was that the cysts were certainly not immediately dangerous. The defendant himself testified:

"I say they [the cysts] were dangerous. I can't say how long it would have been before she would have had to have an operation; it possibly could have been two or three months before it would have been necessary for her to have had an operation. It is pos-

<sup>18</sup> *Barnett v. Bachrach*, 34 A. 2d 626 (D. C. Mun. App. 1943); see also *Sullivan v. Montgomery*, 155 Misc. 448, 279 N. Y. Supp. 575 (1935).

<sup>19</sup> *Jackovach v. Yocum*, 212 Iowa 914, 237 N. W. 444 (1931).

<sup>20</sup> *Bennan v. Parsonnett*, 83 N. J. L. 20, 83 Atl. 948 (1912).

<sup>21</sup> *Delahunt v. Finton*, 244 Mich. 226, 221 N. W. 168 (1928).

<sup>22</sup> *Luka v. Lowrie*, 171 Mich. 122, 136 N. W. 1106 (1912).

<sup>23</sup> *Barnett v. Bachrach*, 34 A. 2d 626 (D. C. Mun. App. 1943).

<sup>24</sup> *Barfield v. South Highlands Infirmary*, 191 Ala. 553, 68 So. 30 (1915).

<sup>25</sup> *Schloendorff v. N. Y. Hospital*, 211 N. Y. 125, 105 N. E. 92 (1914).

<sup>26</sup> *Tabor v. Scobee*, 254 S. W. 2d 474 (Ky. 1951).

sible if I had not done anything to this ovary or ovaries, that she might never have had to have an operation."<sup>27</sup>

The expert witnesses testified to the effect that "[i]t is the accepted theory to puncture them *whether they are dangerous or not.*"<sup>28</sup> (Emphasis added.) The customary and usual practice of surgeons was established; that surgeons usually remedy such conditions is adequately shown.<sup>29</sup> But no emergency or immediate danger was shown. It is submitted that the principal case goes further in "implying" consent<sup>30</sup> in a non-emergency, non-danger situation than any previous case.<sup>31</sup>

The basis of the North Carolina court's decision, then, would not seem to be any "emergency" theory. The court, rather, believes that modern medical practice with its use of anaesthesia and isolated operating rooms demands that some change be made in the former strict consent rules. It quotes extensively from *Benman v. Parsonnet*,<sup>32</sup> a New Jersey case, to show the historic development of modern surgery and the need for a change in the law. The rule as quoted in the first paragraph above is then stated with a citation to three cases.<sup>33</sup> It is interesting to note that two of the three cases and the *Benman* case were "emergency" or "danger to life and health" types of cases; the other case was a "voluntary submission" case.<sup>34</sup>

The consent raised from this non-emergency, modern medicine doctrine allows the surgeons themselves to establish the limits as to what a given operation should cover once the surgeon sees the exact internal condition after incision. Some latitude is necessary, certainly. The facts of the principal case as presented by the five experts seem to make a case for such freedom. The limits of this type of consent still have to be drawn. How far afield may the surgeon go in remedying non-emergency situations? The limiting line in emergency cases is not im-

<sup>27</sup> *Kennedy v. Parrott*, 243 N. C. 355, 90 S. E. 2d 754 (1956), [Record, p. 30.]

<sup>28</sup> *Kennedy v. Parrott*, 243 N. C. 355, 90 S. E. 2d 754 (1956), [Record, p. 48; also pp. 34, 38, 42 and 51.]

<sup>29</sup> See *Russell v. Jackson*, 37 Wash. 2d 66, 221 P. 2d 516 (1950), where physicians testified that if a cyst on an ovary is discovered during an operation it is common practice to remove it.

<sup>30</sup> It is realized that the term "implied consent" is specifically—and correctly—avoided by the North Carolina court as a "fetish," *Kennedy v. Parrott*, 243 N. C. 355, 361; 90 S. E. 2d 754, 758, but for uniformity's sake the term is used throughout this note.

<sup>31</sup> Cf. *McGuire v. Rix*, 118 Neb. 434, 225 N. W. 120 (1929) and *Boydston v. Giltner*, 3 Ore. 118 (1869). Although stating rather liberal rules to absolve the physician, both cases differ in their holdings from the principal case. See RESTATEMENT, TORTS §§ 54 and 62 (1934).

<sup>32</sup> 83 N. J. L. 20, 83 Atl. 948 (1912).

<sup>33</sup> *King v. Carney*, 85 Okla. 62, 204 Pac. 270 (1922); *Baxter v. Snow*, 78 Utah 217, 2 P. 2d 257 (1931); *Jackovach v. Yocum*, 212 Iowa 914, 237 N. W. 444 (1931).

<sup>34</sup> *Baxter v. Snow* stated, *inter alia*, that voluntary submission to a physician for diagnosis and treatment would raise a presumption of consent absent contrary evidence. See note 10 *supra*.

possible to draw since it will extend only to the affected area, but where this emergency boundary is not present some difficulty will be encountered. It remains to be seen how the court will handle an extension which is not so universally conceded by the medical experts to be the "usual practice of surgeons."

The general rule still subsists that "every human being of adult years and a sound mind has a 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."<sup>35</sup> To this the North Carolina court quickly would add, however, that once the general permission is given, the doctor may operate as good surgery demands, correcting also certain other situations even if no dire emergency is present. The limiting boundaries are still to be delineated.

WILLIAM P. SKINNER, JR.

### Trial Practice—Hearings for a New Trial—Right of Trial Court to Take Testimony Outside the Record and to Deny the Right of Cross Examination

In North Carolina,<sup>1</sup> as in many other jurisdictions,<sup>2</sup> the trial court has the inherent power to set aside a verdict and order a new trial.<sup>3</sup> Where there is no question of law or legal inference involved in a motion for a new trial, it is addressed to the sound discretion of the trial judge whose ruling, in the absence of abuse, is not reviewable on appeal.<sup>4</sup> This power is considered essential for the orderly administration of justice since the judge is in a position to observe the trial objectively and protect the proceedings from unfair influences which may never appear in the record.<sup>5</sup> Since the judge may exercise his discretion and give no reasons

<sup>35</sup> *Schloendorff v. N. Y. Hospital*, 211 N. Y. 125, 129; 105 N. E. 92, 93 (1914) (a much quoted phrase of Justice Cardozo).

<sup>1</sup> *Bird v. Bradburn*, 131 N. C. 488, 42 S. E. 936 (1902).

<sup>2</sup> Common law authority of a trial court to set aside a verdict and order a new trial is inherent in all courts of common law in the United States. 39 AM. JUR., *New Trial* § 4 (1942).

<sup>3</sup> This common law power has been partially codified in N. C. GEN. STAT. §1-207 which specifically sets out the trial courts' right to set aside a verdict and grant a new trial upon exceptions, insufficient evidence, or for excessive damages.

<sup>4</sup> *Muse v. Muse*, 234 N. C. 205, 66 S. E. 2d 689 (1951); *Pruitt v. Ray*, 230 N. C. 322, 52 S. E. 2d 876 (1949).

<sup>5</sup> Speaking of the judge's duty to set the verdict aside when he perceives that justice has not been done, the court said: "His discretion to do so is not limited to cases in which there has been a miscarriage of justice by reason of the verdict having been against the weight of the evidence (in which, of course, he will be reluctant to set his opinion against that of twelve), but he may perceive that there has been prejudice in the community which has affected the jurors, possibly unknown to themselves, but perceptible to the judge—who is usually a stranger—or a very able lawyer has procured an advantage over an inferior one, an advantage legitimate enough in him, but which has brought about a result which the judge sees is contrary to justice. In such, and many other instances which would not