

11-1-1955

Fewer Malpractice Claims - Via Our American Way: Consent for Treatment

T. Raber Taylor

Follow this and additional works at: <https://epublications.marquette.edu/lmq>

 Part of the [Ethics and Political Philosophy Commons](#), and the [Medicine and Health Sciences Commons](#)

Recommended Citation

Taylor, T. Raber (1955) "Fewer Malpractice Claims - Via Our American Way: Consent for Treatment," *The Linacre Quarterly*: Vol. 22 : No. 4 , Article 4.

Available at: <https://epublications.marquette.edu/lmq/vol22/iss4/4>

Fewer Malpractice Claims—Via Our American Way

Consent for Treatment

T. RABER TAYLOR, A.B., LLB.

DO YOU RECALL the front page story about the \$33,700.00 malpractice verdict for a sterilization operation? The jury believed the patient's claim that he only consented to a circumcision.¹ Did you hear of the \$100,000.00 malpractice claim for removing a woman's right breast on an indication of cancer? She claimed she consented only to a bladder and rectal operation.² You probably read of the \$250,000.00 claim for removing a woman's left ovary and other reproductive organs. She claimed she consented only to the removal of her right ovary.³

These claims, and others, prompted the request for a review of American law on patient's consent. Will this review lessen the number of malpractice claims? We all hope so. Our review of American law properly begins with the Declaration of Independence. It expresses our American philosophy of law. Its philosophy has bearing, not only on the

rights of the citizen against the state, but also and equally, on the rights of citizens between each other. It has application to questions involving the rights of patient and physician. Our American philosophy of law is expressed in these familiar words:

"We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness. That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed; * * *"

You spot the three key philosophical and ideological concepts—

First, All men are created and endowed by their Creator with inalienable Rights.

Second, Man's right to life is Creator endowed.

Third, Consent is given to Government to secure this Right to life.

These concepts indicate to doctors that physicians, like government, are instituted to make secure man's right to life. To us they also point that, like government, physicians derive their authority from man's consent. Our American law, therefore, starts with the premise of self-determination. If a physician judges a

¹The Denver Post, Friday, Oct. 31, 1952. On appeal to the Colorado Supreme Court, the case was reversed and sent back for new trial as to one of the doctors.

²Denver District Court, Civil Action A-70645. Summary judgment entered for the surgeon.

³The Denver Post, September 26, 1952. The jury rejected her claim. Denver District Court, Civil Action A-85379.

certain treatment or operation is medically indicated, does our law permit the physician to impose his judgment on the patient? No. Each man is master of his own body. He may, if he be of sound mind, expressly prohibit the performance of life sustaining treatment. All of us agree that the physician may not obtain the patient's consent to treatment by any form of double-talk, artifice, constraint, or overreaching. A distasteful example may highlight this principle for us. A surgeon told his patient that he intended to undertake minor repairs of her cervix. He planned, however, to remove her uterus and reproductive organs, but he did not disclose his plan to her. She consented to the cervical repair, but he performed the planned removal. The court sustained a verdict against the doctor because there was no consent to the operation performed.⁴

Physician respect for the Creator-given right to life is the key to obtaining, or to use the Declaration of Independence word, "deriving" patient consent. Every patient, including the so-called charity patient, is a person. As a person he has both the right and the duty to care for his health and life. When a physician treats a patient he is simply the patient's agent, exercising the patient's own right of preserving and securing his life.

Our American law, like the laws of other nations, long ago established the principle and presump-

⁴Pratt v. Davis, 224 Ill. 300, 79 N. E. 562; Griffin v. Bles, 202 App. Div. 443, 194 N. Y. S. 654.

tion that every adult of sound mind has enough intelligence to understand the meaning of a consent to treatment or operation. This principle and presumption places on the physician a twofold personal duty:

(1)—to explain to his patient the general purpose, extent, and risks, if any, of the prescribed treatment or operation; and

(2)—to be certain the patient understands, and then freely consents.

The physician's careful discharge of this duty to every patient is a basic defense against malpractice claims. When this double duty of the physician has been discharged, and when and if the patient consents, then, and only then, may the physician act. Usually this personal duty is complied with simply and without formality or written record. Sometimes a regular patient, with well-founded confidence in his physician, wants to consent to the necessary doctoring without any explanation from the doctor. His physician may act on such consent. Consent also may be reasonably presumed in cases of emergency, either where an unconscious patient is unable to give consent, or where precious seconds must be used to stop the outflowing of life.

Serious Illness or Surgery

Where a serious illness is being treated, or surgery is prescribed, physician candidness is required by our laws⁵ as well as by our

⁵Malpractice and the Physician, Louis J. Regan, M.D., LL.B., 147 J.A.M.A., pp. 54-59 (Sept. 1, 1951).

medical ethics⁶. The permit of a patient, without the physician's disclosure of the material facts due him, may prove in fact to be no consent. The physician-patient relationship is a personal and intimate one. It involves an element of trust and confidence. An obligation of utmost good faith exists and requires the physician to make the fullest possible disclosure about the risks of any prescribed treatment. To illustrate, a man went to his doctor complaining of a swelling in the palm of his right hand. The doctor diagnosed it as a Dupuytren's contracture and recommended corrective surgery. His doctor did not, however, disclose the considerable risk that the operation might fail and leave the patient's hand worse than before. The patient consented to the operation which, according to the evidence, he would not have done had he known the odds of failure. The operation was skillfully performed, but failed to achieve the expected result. The patient was left with greater disability than he had originally. A jury verdict against the doctor was affirmed. The skillful performance of the operation did not, ruled the Supreme Court, excuse the doctor who had breached his duty to make a full disclosure of the surgical risk to the patient as an incident to gaining his enlightened consent.⁷

Our Government in the Nuern-

⁶The Principles of Medical Ethics, A.M.A. 1949, Article III, Secs. 1 and 2.

⁷Schaendorff v. The Society of the New York Hospital, 211 N. Y. 125, 105 N.E. 92; Kinney v. Lockwood Clinic, Ltds., 4 D.L.R. 906 (1931). See Bailey v. Harmon, 74 Colo. 390, 222 Pac 393 (1923).

berg Medical Trials has given implicit declaration that man's Creator-endowed rights to life are inalienable. It has also made express application of the principle that the physician's authority to treat is derived from the patient's consent. Although the following noteworthy statement of law was applied to experiments on humans it reflected a consensus of our American decisions in cases not involving experimentation. Because it was adopted by the Tribunal for all participating nations, it is a landmark decision in international law. In part, it reads:

"The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.

"The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs, or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity."⁸

⁸II Trials of War Criminals Before the Nuernburg Military Tribunals, U. S. Government Printing Office, "The Medical Case," pp. 181-182.

When the physician has been candid and the patient comprehends and consents to the prescribed serious treatment or surgery, then a witnessed memorandum of the consent should be made. The law requires comprehending consent of the patient. The law does not **require** that it be in writing. "The business of getting signed authorization on a formal instrument is but a rule of professional custom, laudable in every respect, but it is not required by any law."⁹ The written form is obtained for the physician's protection. A form will be good protection only insofar as it is a memorandum reflecting what the doctor explained, the patient knew, and to which the patient consented. Emphasis on the **form**—the consent paper—has detracted from the **substance**—a complete comprehending clear consent. If exploration, or an incidental operation is contemplated, the patient should understand and consent.

"Blanket" Forms Are Not Enough

The best memorandum reflects the oral explanation of the physician, the consent of the patient, and the patient's witnessed signature. A permit that specifies neither the kind of treatment or surgery, nor who is to do it, leaves the consent ambiguous. This ambiguity may create misunderstanding. Naturally, the nature of the treatment or operation need not, and should not, be described in

⁹Maercklein and Postma v. Smith, 129 Colo. _____, Colorado Bar Association Advance Sheet, Vol. 6, No. 9, page 188 at 191; 266 Pac. (2d) 1095.

technical terminology. Again, if exploration, or an incidental operation is contemplated, the consent should say so and permit it. If a blanket form of consent is to be used, it should at least name the doctor and authorize him to give the treatment or perform the operation that, in his judgment, he deems necessary. A consent form signed by a patient who does not know what he is signing is of doubtful value. Blanket, or "blunderbuss" consent forms, claiming, to authorize any and all procedures by any and all staff members and agents, are undesirable. They are a weak defense against the patient's statement that different treatment was received than he agreed to. Further, such forms violate the doctor-espoused principle of giving every person his free choice of physician. Less reliable, if at all reliable, are the small print consent forms obtained at the admission desk. No explanation is given to the patient. Often there is not a true opportunity for the patient either to read or to understand what is being signed.

Should all routine and blanket consent forms be discontinued as useless? No, but it is hoped that our review will stimulate an improvement in the procedure for obtaining consent. It is also hoped the review will heighten the physician's awareness of his personal obligation to explain the treatment, its extent, and the risks, if any, at the time he gets the patient's consent.

By way of conclusion, let us each bear in mind the paramount

concept of our American law. Each man is endowed by his Creator with the inalienable right to life; even to secure a patient's right to life, his consent is needed by his physician.

[Mr. Taylor gave this as the Postgraduate Lecture, Mennonite Hospital and Sanitarium, La Junta, Colorado, Feb. 21, 1955. It was first printed in *The Rocky Mountain Medical Journal*, May, 1955. We acknowledge kind permission to republish in LINACRE QUARTERLY.]

The Doctors' Guild

St. Luke unto the doctors on a Christmas day decreed:

"The doctors shall be gentle and the Master's words shall heed,
'The works which I do they give testimony of Me.'

Let the world see in your diligence, the glory of Calvary,

And guided be your hands, let their sacredness reveal;

They are worthy to be clasped in His, in His love to heal.

For holy is your trust, blessed your mind in thought applied,

You serve the sick and suffering, for these He died.

And all your lives be faithful to the least of all mankind,

That to you His promise: 'Blessed of My Father!' in eternity will bind."

G. K. CHESTERTON