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/lnq

🔗 Part of the Ethics and Political Philosophy Commons, and the Medicine and Health Sciences Commons

Recommended Citation
Available at: https://epublications.marquette.edu/lnq/vol22/iss4/4
tion to inform himself of that fact, the physician is justified in maintaining silence. And if a doctor has positive reason to believe that only harm would result from the knowledge, then evasion of the issue by any legitimate means is the proper procedure.

In every case the norm should be the same, namely, the individual patient’s best interests insofar as they are humanly discernible. But the ultimate decision should not be the same in every case, since what is good in this regard for some will be bad for others, and vice versa. Hence one thing which doctors should avoid is the application of one and the same prefabricated decision to every case they encounter. Rather they should make a reasonable attempt to predetermine whether the truth about cancer will be of benefit or harm to the individual patient, and on this altruistic basis formulate an ad hoc judgment.

The moral principle involved is altogether clear: act always in the best interests of the patient. Its proper application to this problem depends upon a doctor’s correct sense of values and his prudent discernment.

* * * *

ST. PEREGRINE, THE CANCER SAINT

St. Peregrine [rhymes with terapin] was converted by St. Philip, O.S.M. He entered the Order of the Servants of Mary in 1283. Then for 62 years, Peregrine labored with the sick and did incredible, voluntary penance in religious life in preparation for a tempestuous youth. God permitted a cancerous growth to grow away at one of his legs. Amputation was deemed necessary. A miraculous cure the night before the scheduled surgery removed all trace of the malady.

His feast day is May 2 and God’s power has been manifested in sudden and miraculous cures effected through Peregrine to win him the title of official patron of cancer victims. For centuries Europeans have been loyally devoted and have confidence in this Saint.

In America the true mission is not necessarily to heal all cancer victims but rather to teach the value of pain so that their sufferings may not be wasted, with no profit to them. Discouragement should not follow if St. Peregrine does not miraculously effect a cure. Who knows? Maybe God is saving that miracle for someone whose faith is less strong... .

Further information may be had by writing to The St. Peregrine Center, 3121 W. Jackson Blvd., Chicago 12, Illinois. Booklets, statues, medals, prayer leaflets, and holy cards are available.

130 LINACRE QUARTERLY

FEWER MALPRACTICE CLAIMS—Via Our American Way

CONSENT FOR TREATMENT

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
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 foundation of our Declaration of Independence. The word, "deriving" patient consent. Every patient, including the so-called charity patient, is a person. As a person he has both the right of preserving and securing his 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 presumed 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 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 outflow 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 physician-patient relationship. 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 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 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.6

Our Government in the Nuernberg 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 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 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

A9 The Principles of Medical Ethics. A.M.A. 1949, Article III, Secs. 1 and 2.
9LINACRE QUARTERLY
1955
181-182.
9LINACRE QUARTERLY
1955
181-182.
9LINACRE QUARTERLY
1955
181-182.
9LINACRE QUARTERLY
1955
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.” 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 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-spoused 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, to life; even to secure a patient’s right to life, his consent is needed. Each man is endowed by his Creator with the inalienable right to his life, the patient’s 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

LINACRE QUARTERLY

November, 1955

135