

April 1957

## Assault and Battery - Civil Liability - Whether or Not Fact of Actual Consent by Minor to a Surgical Operation May Be Used to Avoid Liability or Be Considered for Purpose of Mitigating Damage

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### Recommended Citation

J. E. Edmondson, *Assault and Battery - Civil Liability - Whether or Not Fact of Actual Consent by Minor to a Surgical Operation May Be Used to Avoid Liability or Be Considered for Purpose of Mitigating Damage*, 35 Chi.-Kent L. Rev. 128 (1957).

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# CHICAGO-KENT LAW REVIEW

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PUBLISHED DECEMBER, MARCH, JUNE AND SEPTEMBER BY THE STUDENTS OF  
CHICAGO-KENT COLLEGE OF LAW, 10 N. FRANKLIN ST., CHICAGO, ILLINOIS  
Subscription price, \$3.00 per year Single copies, \$1.00 Foreign subscription, \$3.50

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VOLUME 35

SPRING, 1957

NUMBER 2

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## DISCUSSION OF RECENT DECISIONS

ASSAULT AND BATTERY—CIVIL LIABILITY—WHETHER OR NOT FACT OF ACTUAL CONSENT BY MINOR TO A SURGICAL OPERATION MAY BE USED TO AVOID LIABILITY OR BE CONSIDERED FOR PURPOSE OF MITIGATING DAMAGE—A sharp division on the part of the judges of the Supreme Court of Ohio developed over the recent case of *Lacey v. Laird*<sup>1</sup> wherein the defendant

<sup>1</sup> 166 Ohio St. 12, 139 N. E. (2d) 25 (1956). An unreported decision of the Ohio Court of Appeals, which reversed a trial court judgment in favor of the plaintiff, was there upheld in a per curiam opinion. Four judges, including Taft, J., who wrote a concurring opinion in support of the syllabus prepared by the court, were of the opinion that the consent was a completely effective one. Three judges, including Hart, J., who wrote what was designated as a concurring opinion because of agreement in the reversal of the judgment, criticized the holding in relation to the attributes to be given to such consent.

surgeon had reshaped the nose of the eighteen-year old female plaintiff<sup>2</sup> by means of plastic surgery with her consent but without the consent of her parents and without making any attempt to communicate with them. After an apparently successful operation, the minor brought suit<sup>3</sup> against the surgeon charging a civil assault and battery. Upon the trial thereof, the trial judge rejected the defendant's offer of evidence to the effect that the operation was performed with the actual consent of the minor, declaring it to be the general rule that a minor, in the absence of an emergency, had no power to consent to an operation but did respond to an inquiry on the part of the jury by saying that if it found the defendant guilty of no more than a technical assault it might limit the recovery to nominal damages.<sup>4</sup> The Ohio Court of Appeals, without written opinion, reversed for error in the rejection of the testimony as to the plaintiff's consent and in charging that an eighteen-year old minor could not consent to a simple operation as well as for error in treating the case as one for technical battery and for incorrectly defining nominal damages. Plaintiff's motion to certify the record having been allowed, the Supreme Court of Ohio affirmed the holding of the Court of Appeals when a majority of the judges concluded that a minor of the age of plaintiff could effectively consent to a simple surgical operation. The dissident judges were willing to concede that evidence of such consent should have been admitted but would have limited the effect thereof to a mitigating circumstance in relation to the proper measure of damage.

The tort charged by the plaintiff, that of civil assault and battery, has long been recognized as being present in the event there is the least touching of the body of another against his will,<sup>5</sup> hence is one which may be committed by a physician or surgeon as well as by any other person. The general rule in that respect seems well established for, as Judge Cardozo

<sup>2</sup> Under Ohio Rev. Code Ann. 1954, § 3109.1, all persons of the age of twenty-one years or more, who are under no legal disability, are deemed capable of contracting and of full age for all purposes.

<sup>3</sup> According to the case of *Canterbury v. Pennsylvania Railway Co.*, 158 Ohio St. 68, 107 N. E. (2d) 115 (1952), an infant, as a procedural matter, should sue by a guardian or next friend but if the infant sues in his or her own name and no attack for lack of capacity is made, the lack of capacity is to be deemed as waived.

<sup>4</sup> When defining nominal damages, the trial judge said the damages might be "simply damages in name" or might range from there up to the amount claimed in the prayer of the petition. See 166 Ohio St. 12 at 21, 139 N. E. (2d) 25 at 31. Hart, J., in a concurring opinion agreed that, on the basis of the holding in *First Nat. Bank of Barnesville v. Western Union Telegraph Co.*, 30 Ohio St. 555, 27 Am. Dec. 485 (1876), this was manifest error requiring reversal since nominal damages could never exceed "some small sum of money . . . as \$1," hence may have misled the jury into a verdict for plaintiff in the sum of \$3,500.00.

<sup>5</sup> *Clayton v. New Dreamland Roller Skating Rink*, 14 N. J. Super. 390, 82 A. (2d) 458 (1951).

observed in the case of *Schloendorff v. Society of New York Hospitals*,<sup>6</sup> every human being of adult years and 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 and battery for which he is liable in damages . . . This is true, except in cases of emergency where the patient is unconscious, and where it is necessary to operate before consent can be obtained."<sup>7</sup> There would seem to be no disagreement among the cases that consent in some form must be present<sup>8</sup> to authorize a physician to perform a surgical operation on the body of the patient.<sup>9</sup>

Express consent is usually given for a specific operation but consent to one operation is not consent to a second,<sup>10</sup> even one beneficial to the patient,<sup>11</sup> hence an operation on the right leg of a patient who had consented to an operation on the left leg would be an assault and battery.<sup>12</sup> Authorization for a minor operation does not ordinarily justify the performance of a major operation which involves risks of a kind not contemplated,<sup>13</sup> and consent to perform an operation is not valid if obtained by representations which are known by the surgeon to be false.<sup>14</sup> The patient's consent, therefore, must be obtained for an operation substantially the same as that which is performed.<sup>15</sup>

Consent to an operation may be found present where a very broad assent is given the physician to remedy a condition<sup>16</sup> or to do whatever is

<sup>6</sup> 211 N. Y. 125, 105 N. E. 92, Ann. Cas. 1915C 581, 52 L. R. A. (N. S.) 505 (1914).

<sup>7</sup> 211 N. Y. 125 at 129, 105 N. E. 92 at 93.

<sup>8</sup> *Wall v. Brim*, 138 F. (2d) 478 (1943); *Markart v. Zeimer*, 67 Cal. App. 363, 227 P. 683 (1924); *Pratt v. Davis*, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N. S.) 609 (1906); *Francis v. Brooks*, 24 Ohio App. 136, 156 N. E. 609 (1926); *Thorne v. Wandell*, 176 Wis. 97, 186 N. W. 146 (1922). See also annotation in 76 A. L. R. 562.

<sup>9</sup> *Mohr v. Williams*, 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N. S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303 (1905); *Rolater v. Strain*, 39 Okla. 572, 137 P. 96, 50 L. R. A. (N. S.) 880 (1913).

<sup>10</sup> *Pratt v. Davis*, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N. S.) 609, 8 Ann. Cas. 197 (1906); *Hively v. Higgs*, 120 Ore. 588, 253 P. 363, 53 A. L. R. 1052 (1927). But see *Russell v. Jackson*, 37 Wash. (2d) 66, 221 P. (2d) 516 (1950), where a surgeon testified that if a cyst is discovered on an ovary during the course of an operation it is general practice to remove it, and such removal was said not to be beyond the operation which he had been directed to perform.

<sup>11</sup> *Church v. Adler*, 350 Ill. App. 471, 113 N. E. (2d) 327 (1953).

<sup>12</sup> *Jones v. Peterson*, 44 Ore. 161, 74 P. 661 (1903).

<sup>13</sup> *Pratt v. Davis*, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N. S.) 609, 8 Ann. Cas. 197 (1906); *State for use of Janney v. Housekeeper*, 70 Md. 162, 16 A. 382, 2 L. R. A. 587, 14 Am. St. Rep. 340 (1889).

<sup>14</sup> *Birnbaum v. Siegler*, 273 App. Div. 817, 76 N. Y. S. (2d) 173 (1948).

<sup>15</sup> *Dicenzo v. Berg*, 340 Pa. 305, 16 A. (2d) 15 (1940).

<sup>16</sup> *McClallen v. Adams*, 36 Mass. (19 Pick.) 333, 31 Am. Dec. 140 (1837); *Rothe v. Hull*, 352 Mo. 926, 180 S. W. (2d) 7 (1944); *King v. Carney*, 85 Okla. 62, 204 P. 270 (1922).

necessary to give relief.<sup>17</sup> Thus a patient who consults a surgeon and voluntarily submits himself for treatment relying entirely on the surgeon's skill and care to decide for him what ought to be done gives a general consent, by implication at least, to such an operation as may, in the surgeon's skill and professional judgment, be deemed reasonably necessary.<sup>18</sup>

The generality of the rule mentioned also recognizes that it may not always be possible to secure the express consent of the patient hence, under proper circumstances, the consent of the patient may be implied or presumed.<sup>19</sup> In an emergency and where the patient is unconscious, it may be necessary to operate before consent can be obtained<sup>20</sup> so, confronted with an immediate need for the preservation of the life or the health of the patient and it being clearly impracticable to obtain a consent to an operation which the surgeon deems immediately necessary, the latter must do what the occasion demands within the usual and customary practice among physicians and surgeons in the same or similar localities. While so acting, he may be justified in extending an operation and removing or overcoming conditions without express consent.<sup>21</sup> Thus, in major internal operations where both patient and surgeon know that the exact condition of the patient cannot be finally and definitely diagnosed until after the patient is completely anaesthetized and the incision has been made, in the absence of proof to the contrary, the consent will be construed as being one of general 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 sound professional judgment, determines that correct surgical procedure dictates and requires such extension.<sup>22</sup>

Turning particularly to the matter of performing surgical and similar operations on children, most of the cases declare that the consent of at least one of the parents is necessary<sup>23</sup> but there is some indication that, in an emergency, a surgeon may operate on a child without waiting for authority

<sup>17</sup> *McClees v. Cohen*, 158 Md. 60, 148 A. 124 (1930).

<sup>18</sup> *Pratt v. Davis*, 224 Ill. 300, 79 N. E. 562 (1906); *Hively v. Higgs*, 120 Ore. 588, 253 P. 363, 53 A. L. R. 1052 (1927); *Nolan v. Kechijian*, 75 R. I. 165, 64 A. (2d) 866 (1949).

<sup>19</sup> *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30, Ann. Cas. 1916C 1097 (1915). In *Mohr v. Williams*, 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N. S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303 (1905), the court recognized but refused to apply the rule.

<sup>20</sup> *Tabor v. Scobee*,—Ky.—, 254 S. W. (2d) 474 (1951), noted in 32 CHICAGO-KENT LAW REVIEW 152.

<sup>21</sup> *Wheeler v. Barker*, 92 Cal. App. (2d) 776, 208 P. (2d) 68 (1949).

<sup>22</sup> *Kennedy v. Parrot*, 243 N. C. 355, 90 S. E. (2d) 754 (1956). See also Restatement, Torts, § 62, illustration 5, and note in 34 N. Car. L. Rev. 581.

<sup>23</sup> *Zosky v. Gaines*, 271 Mich. 1, 260 N. W. 99 (1935); *In re Vasko*, 238 App. Div. 128, 263 N. Y. S. 552 (1933); *Moss v. Rishworth*, 222 S. W. 225 (Tex. Civ. App., 1920); *Browning v. Hoffman*, 90 W. Va. 568, 111 S. E. 492 (1922).

from the parents or from a person standing *in loco parentis* when it appears (1) to be impracticable to secure consent, (2) the operation on the child appears to be necessary to the surgeon without prolonged delay, and (3) reasonable and diligent effort on the part of the surgeon to find the parents of the child and to advise them of the situation has been made.<sup>24</sup>

If the surgeon purports to rely on an express consent from the minor he might be protected by the fact that the minor has been expressly emancipated<sup>25</sup> or is married<sup>26</sup> but, prior to the instant holding, only two Michigan cases had held that the consent of the unemancipated minor would be sufficient to permit a surgeon to operate without incurring liability.<sup>27</sup> By contrast, a majority of the courts dealing with the problem have held that a minor may not consent to a surgical operation in such a manner as to relieve the surgeon of the consequences of at least a technical assault and battery,<sup>28</sup> particularly so where the operation was not one for the benefit of the minor but in favor of a third person, even though a close relative.<sup>29</sup>

<sup>24</sup> *Jackovach v. Yocom*, 212 Iowa 914, 237 N. W. 444, 16 A. L. R. 551 (1931); *Luke v. Lowrie*, 171 Mich. 122, 136 N. W. 1106 (1912); *Tabor v. Scobee*,—Ky.—, 254 S. W. (2d) 474 (1951).

<sup>25</sup> *Mark v. McElroy*, 67 Miss. 545, 7 So. 408 (1890).

<sup>26</sup> *Grayson v. Lofland*, 21 Tex. Civ. App. 503, 52 S. W. 121 (1899).

<sup>27</sup> See the cases of *Bakker v. Welsh*, 144 Mich. 632, 108 N. W. 94, 7 L. R. A. (N. S.) 612 (1906), where a boy seventeen years of age, accompanied by his parents, who were not asked to consent, submitted to the administration of an anaesthetic prior to a minor operation and died and where there was no indication or evidence that consent would not have been given if asked, and *Bishop v. Shurly*, 237 Mich. 76, 211 N. W. 75 (1926), where a nineteen-year old infant was said to be able to give a valid consent to a surgical operation on his person on the theory the operation fell into the category of "necessaries," for which the minor could become bound. Restatement, Torts, § 59, note 1, supports this view, indicating that if the child is capable of appreciating the nature, extent and consequences of the invasion, his assent prevents liability even though the assent of the parent is not obtained or is expressly refused.

<sup>28</sup> *Pratt v. Davis*, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N. S.) 609, 8 Ann. Cas. 197 (1906); *Tabor v. Scobee*,—Ky.—, 254 S. W. (2d) 474 (1951); *Mohr v. Williams*, 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N. S.) 439 (1905); *Browning v. Hoffman*, 90 W. Va. 568, 111 S. E. 492 (1922). For other cases involving infants much younger than the eighteen-year old plaintiff in the instant case, see *Zoski v. Gaines*, 271 Mich. 1, 260 N. W. 99 (1935), where the child was only 9 years and 6 months old; *Roger v. Sells*, 178 Okla. 103, 61 P. (2d) 1018 (1936), child was 14; *Moss v. Rishworth*, 222 S. W. 225 (Tex. Civ. App., 1920), the child involved was 11; and *In re Hudson*, 13 Wash. (2d) 673, 126 P. (2d) 765 (1942), where the child was 12.

<sup>29</sup> In *Bonner v. Moran*, 126 F. (2d) 121 (1942), noted in 20 CHICAGO-KENT LAW REVIEW 357 and 30 Geo. L. Journ. 477, a fifteen-year old minor, in the absence of his parents, consented to a skin grafting operation to aid a near relative. *Time Magazine*, Vol. 69, No. 25, p. 80, reports an instance wherein one twin brother, aged 19, was asked to participate in a kidney transplant operation to aid his dying twin brother. The surgeons, fearful that not even the surviving parent could give legal consent thereto, caused a suit to be conducted against themselves as defendants on behalf of the two boys as plaintiffs to secure a court ruling on the point. The judge is reported as saying that the healthy twin's future well-being would be more benefited than not by thus helping his brother, so he allowed the doctors to

The reasoning offered by the majority of the judges of the Supreme Court of Ohio, at the time of upholding the validity of the consent actually given by the minor, proceeded along the line that capacity to consent was not the equivalent of capacity to contract, a matter usually regulated by statute, but more nearly equated with such things as capacity to commit a tort or a crime,<sup>30</sup> to assume a risk,<sup>31</sup> or to give permission to the doing of an act which, without such permission, would have amounted to a criminal offense against the minor.<sup>32</sup> Except where these analogies rest upon a statutory foundation, however, there is reason to doubt the validity of the underlying premise for the problem then becomes one of fact open to differing conclusions under differing circumstances. Simplicity in law is, to say the least, enhanced by a uniform rule such as the one which makes the age of the child the controlling factor.

An entirely different argument was offered by the minority judges. They deemed it to be a matter for parental judgment on the premise that the rule is not one with respect to the minor's capacity to consent but springs from the parental liability for support and maintenance which may be greatly increased by an unfavorable result stemming from a surgical operation. Since the parents would be responsible for the nurture and training of the minor, they were said to be entitled to a corresponding supervision and control with which strangers should not be permitted to interfere. Nevertheless, to avoid a possible harsh result, the minority was willing to consider the purported consent as having a bearing on the matter of damages believing, with Lord Mansfield, that an infant's privilege is "given as a shield and not as a sword."<sup>33</sup> That view tends to coincide with the thought that in a case where a minor has falsified his or her age when entering into a contract such fact may be considered either as ground

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proceed "without incurring any civil liability." For a case in which only the minor's interest was at stake and the parents had refused to give consent, see *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N. E. (2d) 769 (1952). The court there acted to appoint a guardian who, following appointment, gave the desired consent on behalf of the ward.

<sup>30</sup> As to an infant's liability for tort, see *Horton v. Wylie*, 115 Wis. 505, 92 N. W. 245, 95 Am. St. Rep. 953 (1902). For a general statement of a minor's capacity to commit a crime, see 27 Am. Jur., *Infants*, § 97 et seq.

<sup>31</sup> In *Centrello v. Basky*, 164 Ohio St. 41, 128 N. E. (2d) 80 (1955), the court held that the question as to whether or not a ten-year old plaintiff had assumed the risk of tortious injury was one which should be left to the jury.

<sup>32</sup> The court cited Ohio Rev. Code Ann. 1954, § 12414, as an illustration of the familiar fact that a female child, over the statutory age, can prevent the taking of sexual liberties with her person from being rape merely by consenting thereto.

<sup>33</sup> *Zouch ex dem. Abbot v. Parsons*, 3 Burr. 1794 at 1802, 97 Eng. Rep. 1103 at 1107, 1765). See also *Harris v. Collins*, 75 Ga. 97 (1885), to the effect that the law places persons *non sui juris* under disabilities to protect their rights, not to enable them to invade or assail the rights of others.

for denying rescission<sup>34</sup> or as subjecting the minor to a countersuit for damages arising from the deceit.<sup>35</sup>

After all factors are considered, therefore, it would seem to be the better view that a surgeon should be allowed to introduce evidence as to an actual consent by a minor, particularly one approaching maturity and the age of discretion, if not as an absolute defense then at least for the purpose of providing a mitigating factor to be considered by the jury when awarding damages. To do otherwise would be to allow a minor to make a profit from participating in the very tort itself.

J. E. EDMONDSON

AUTOMOBILES—INJURIES FROM OPERATION OR USE OF HIGHWAY—WHETHER IT IS POSSIBLE TO OBTAIN SUBSTITUTED SERVICE UPON THE PERSONAL REPRESENTATIVE OF A DECEASED NON-RESIDENT AUTOMOBILE OWNER UNDER A STATUTE PROVIDING FOR SUCH SERVICE UPON A NON-RESIDENT OWNER OR OPERATOR—The extent to which substituted service may be utilized in automobile accident cases was put in issue in the recent Ohio case of *In Re Wilcox' Estate*.<sup>1</sup> Therein, a resident of Colorado had been involved in an automobile accident in Ohio after which he returned home and died shortly thereafter. The present claimants sought an adjudication of this matter before an Ohio tribunal and, for this purpose, they attempted to obtain jurisdiction over the personal representative of the deceased under the so-called substituted service statute.<sup>2</sup> The Court of Appeals of Ohio, in reversing the trial court, held that a statute providing for substituted service upon a non-resident owner or operator of an automobile by serving process upon the Secretary of State did not authorize such service upon the personal representative of one who was subject to this statute.

Since the adoption in 1908 of the first statute subjecting non-resident

<sup>34</sup> *Young v. Daniel*, 201 Ky. 65, 255 S. W. 854 (1923), noted in 72 U. of Pa. L. Rev. 450.

<sup>35</sup> *Berryman v. Highway Trailer Co.*, 307 Ill. App. 480, 30 N. E. (2d) 761 (1940), noted in 19 CHICAGO-KENT LAW REVIEW 302.

<sup>1</sup>—Ohio App.—, 137 N. E. (2d) 301 (1955).

<sup>2</sup> Ohio Rev. Code, 1953, § 2703.20, which provides: "Any non-resident of this state, being the operator or owner of any motor vehicle who accepts the privilege extended by the laws of this state to non-resident operators and owners, of operating a motor vehicle or of having the same operated within this state . . . by such acceptance or licensure and by the operation of such motor vehicle within this state makes the secretary of state of the state of Ohio his agent for the service of process in any civil suit or proceeding instituted in the courts of this state against such operator or owner of such motor vehicle, arising out of any accident or collision occurring within this state in which such motor vehicle is involved."