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## CONSENT TO OPERATIVE PROCEDURES

By KENNETH C. PROCTOR\*

### INTRODUCTION

The objective of this article is to present the various problems involved in consent to operative procedures, and the applicable rules of law which have been announced by the courts.

The principles applicable to many legal questions differ from state to state — in some cases only in degree, in others in substance. However, the basic rules applicable to this problem, as announced by the courts throughout the country, are, generally speaking, uniform and fairly easy to state. It is the application of those principles to a given set of facts that is troublesome. This is particularly true because it is the physician who must, in the first instance and under varying circumstances, apply those rules by the exercise of his judgment.

It is rarely the routine case which creates a problem but rather the unusual or the emergency. Then the physician's judgment is subjected to its severest test — many times without an opportunity to consult with anyone.

Assume, a surgeon is visiting his patients in a hospital late in the afternoon when he is summoned to the Emergency Room by the Resident in Surgery. A ten year old boy, who obviously has been involved in a bad accident, is lying there. The surgeon's examination indicates that a blood transfusion is urgently required. His parents arrive as the examination is completed. Upon being advised of the surgeon's conclusion, the father consents. However, the mother states that she is a member of a religious sect which forbids operations of any kind and cannot consent to the transfusion. This is not a melodramatic figment of imagination. It is a case which occurred recently in Baltimore City (*Levitsky v. Levitsky*<sup>1</sup>) where, upon the father's petition, Judge Shirley Jones signed an order directing the transfusion. It might be added, *this is not a rare case.*

The phases of this subject which I propose to discuss are (1) how consent may be obtained; (2) the limitations on the authority of the physician under such consent; and (3) who may consent.

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<sup>1</sup> Circuit Court for Baltimore City, 101 A-953, A-42293, December 22, 1961.

## HOW CONSENT MAY BE OBTAINED

1. *Mandate of public authority*

First, the authority for the operation may be provided by statute or by order of court. For example, the statutes which make it the duty of the parent or guardian to have his children vaccinated.<sup>2</sup> Such a requirement was held valid by the Supreme Court of the United States in the case of *Jacobson v. Massachusetts*.<sup>3</sup>

Massachusetts had enacted a statute authorizing local Boards of Health to adopt compulsory vaccination regulations and to enforce them. Cambridge adopted such a regulation. Jacobson refused to permit the physician, acting for the board, to vaccinate him. Criminal charges were brought against him. He was tried and convicted. The Supreme Judicial Court of Massachusetts affirmed. On appeal to the Supreme Court of the United States Jacobson claimed unconstitutional invasion of his liberty guaranteed by the 14th Amendment — that compulsory vaccination constituted an assault. In a 7-2 decision the Supreme Court held the statute to be valid, saying:

“The authority of the State to enact this statute is to be referred to what is commonly called the police power \* \* \*. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”<sup>4</sup>

Another example is a compulsory sterilization statute where a patient in a state institution is afflicted with an hereditary form of insanity or imbecility. A Virginia statute making such provision was held valid by the Supreme Court of the United States in the case of *Buck v. Bell*.<sup>5</sup>

Defendant was an imbecile — daughter of an imbecile, and mother of an imbecile.

Mr. Justice Holmes said:

“It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent

<sup>2</sup> In Maryland, 4 MD. CODE (1957) Art. 43, § 73.

<sup>3</sup> 197 U.S. 11 (1905).

<sup>4</sup> *Id.*, 24-25.

<sup>5</sup> 274 U.S. 200 (1927).

those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough."<sup>6</sup>

The *Levitsky*<sup>7</sup> case, referred to above, is an example of consent effected by an order of court.

## 2. *Express consent*

The cases just discussed are, however, the exception. Generally the surgeon is faced with an operation, voluntary on the part of the patient.

It is elementary that whenever an operative procedure — no matter how simple — is proposed, consent of the patient or someone authorized to act on his behalf must be obtained. A condition precedent, in most cases, is an explanation by the physician, comprehensible to the patient, of the nature of the operation, why it is required, and the hazards, if any, involved. In addition to this, the person purporting to consent must be of age and must be competent.

A very recent decision of the Maryland Court of Appeals, *State v. Fishel*,<sup>8</sup> was concerned with the converse of the phase of the problem just suggested. The extent of the duty of the surgeon to impress the necessity for an operation upon a patient was involved. The Court held that the physician had fully carried out that duty to the patient; that he had sufficiently advised him of the risks involved if he did not have an operation. There the doctor had even reserved a bed for the patient who, for a few crucial days, had refused to go. The case points out, however, that there is a duty and responsibility on the part of the physician to impress upon the patient the need for an operation and the reasons therefor, provided, of course, that it is a real necessity.

The safest course is to obtain the consent of the patient in writing. This should be done not in haste, at the last moment and possibly after the patient has been subjected to sedation. The writing should be broad enough to cover not only the contemplated operation but also other procedures, in the event that any unforeseen condition arises in the course of the operation which, in the judgment of the surgeon, are required to preserve the life or limb or

<sup>6</sup> *Id.*, 207.

<sup>7</sup> *Supra*, n. 1.

<sup>8</sup> 228 Md. 189, 179 A. 2d 349 (1962).

health of the patient. It should also authorize the administration of appropriate anesthesia. It should be witnessed and there should be noted thereon a contemporaneous summary of the circumstances under which the consent was obtained, including the condition of the patient.

The suggestions which have just been made constitute an attempt to avoid the problems which arose in the case of *Stone v. Goodman*.<sup>9</sup> There the plaintiff had signed a written consent to the operation containing no limitation. He admitted his signature but contended that the consent had been signed by him immediately before the operation and while he was under sedation. Evidence offered by defendants indicated that it had been signed upon plaintiff's admission to the hospital.

Plaintiff had been injured by a fall in the course of his employment. Examination indicated an umbilical hernia and contusions of the lower right groin. Plaintiff was referred to Dr. Goodman, who was an experienced and reputable surgeon who had performed more than 1,000 hernia operations. His examination indicated a small, incomplete, indirect, oblique, inguinal hernia on the right side; direct hernia on the left side (which) permitted the introduction of the fingers directly into the peritoneal cavity — also the umbilical hernia.

Plaintiff contended that he had no pain in, and had not consented to an operation on, the left side. The hernia on the left was borne out by the operation; the hernia on the right, in the opinion of Dr. Goodman, did not require operative procedure.

In discussing the problems presented by this case, the court said:

“The rule requiring a physician and surgeon to use his best judgment does not make him liable for a mere error of judgment, provided he does what he thinks is the best after careful examination. A physician and surgeon's implied engagement with his patient does not guarantee a good result, but he promises by implication to use the skill and learning of the average physician, to exercise reasonable care, and to exert his best judgment in the effort to bring about a good result.”<sup>10</sup>

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<sup>9</sup> 241 App. Div. 290, 271 N.Y.S. 500 (1934).

<sup>10</sup> *Id.*, 507.

If there is no opportunity to obtain a written authorization, an oral consent is just as valid. Obviously it is more difficult to prove, should it be questioned at a latter date. Care should be taken, therefore, to have such a consent witnessed by someone, for example an intern or nurse. As soon as is practicable thereafter the physician and witness should note on the hospital records the authority to operate and the circumstances under which it was given. If the procedure is performed some place other than a hospital, the pertinent information should be entered on the patient's history card.

The perils involved in an oral consent are illustrated by the case of *Woodson v. Huey*.<sup>11</sup> There a chronic appendix had been diagnosed and an operation advised. The patient consented but stated that she wished a general anesthetic — not a spinal. This information was noted on her chart by her surgeon. Although the anesthetist had read the chart, he claimed that he had persuaded the patient, while on the operating table, to submit to a spinal anesthesia. This claim was denied by plaintiff. She was given a spinal anesthetic and partial paralysis resulted.

The jury believed the patient and returned a verdict in her favor as against both the surgeon and the anesthetist. On appeal this was affirmed as to the latter and reversed as to the former, the Court holding that the surgeon had done everything required of him.

When consent has been obtained the universal rule is that the surgeon may perform only the operation to which the parties have agreed except in cases of emergency, when good surgery demands some other procedure to preserve the life, limb or health of the patient and a supplemental authorization cannot be obtained. The physician cannot extend the operation merely because he is of the opinion that it is desirable or would benefit the patient.

This rule is well stated in the case of *Nolan v. Kechijian*,<sup>12</sup> where the surgeon was held to have exceeded his authority. Plaintiff complained of pains in the region of her stomach on the left side under the ribs. After examination, including x-rays, defendant advised an operation "to build up the ligaments" which supported the spleen. During the operation the spleen was removed, defendant claiming that a large hemorrhage had developed making removal necessary. Pathological examination showed a "few fibrous adhesions" on the inner surface of the spleen but that nothing else was wrong.

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<sup>11</sup> 261 P. 2d 199 (Okl. 1953).

<sup>12</sup> 75 R.I. 165, 64 A. 2d 866 (1949).

The Court stated:

"In consenting to an operation . . . an adult patient of sound mind is entitled to rely on the representations of a surgeon and . . . to limit his consent to an operation reasonably appropriate to relieve him of his condition. Although a surgeon must necessarily be allowed reasonable latitude in performing the operation within the scope of the patient's consent, we know of no rule or principle of law which extends to him free license to operate at will. In the absence of exceptional circumstances, an operation without consent or in excess of consent, express or reasonably implied, constitutes a technical assault and battery for which he is liable. . . ." <sup>13</sup>

That the same principles apply to a case where the authorization is oral is supported by the case of *McClees v. Cohen*.<sup>14</sup> Defendant was a dentist who had extracted two good teeth instead of two baby roots as requested. The Court of Appeals of Maryland affirmed a judgment for plaintiff and said:

"This is not a case wherein a emergency arose calling for immediate action in order to preserve the life or health of the patient and it was impracticable to obtain her consent, or one wherein, in the course of an operation, conditions not anticipated were discovered which, if not removed, would endanger the life or health of the patient."<sup>15</sup>

### 3. *Implied consent*

Authority to operate may also be implied from the surrounding facts and circumstances or from the actions of the patient. A man comes to a physician's office and complains of an infected finger. After examination, he is told that the infected area should be lanced. The patient sticks out his finger and the law raises an implication that he has authorized the procedure. In *McClees v. Cohen* the Court of Appeals said, (referring to removal of plaintiff's teeth by defendant) that if "the matter of their removal had been submitted to the exercise of [the dentist's] judgment, there could have been no recovery in this case."<sup>16</sup>

<sup>13</sup> *Id.*, 867-868.

<sup>14</sup> 158 Md. 60, 148 A. 124 (1930).

<sup>15</sup> *Ibid.*

<sup>16</sup> 158 Md. 60, 65, 148 A. 124 (1930).

A physician enters an accident room. A victim of an automobile accident is there. His chest is crushed and he is unconscious and in shock. There is no means of identifying him. Authority to perform such operative procedure as, in the physician's opinion, is required to preserve the man's life, limb or health is implied.

The rule just stated is equally applicable where express authority to operate has been given and in the course of the procedure the surgeon encounters an unforeseen condition, or is confronted with an emergency, immediate correction of which is imperative to preserve the patient's life, limb or health. The law implies consent to proceed.

Implied consent is the phase of the problem which presents a physician with his moments of truth. It is on such occasions that he must exercise his best judgment and pray he is right. Will a deviation from what was agreed to or anticipated preserve the life, limb or health of the patient, or is it a procedure which might merely improve his condition? Consideration of a few cases which involved implied consent may be of some help.

A leading case on the question is *Mohr v. Williams*.<sup>17</sup> There the patient complained of difficulty with her right ear. In addition to examining that ear the physician attempted to examine the left, but could not do so because of an obstruction. An operation on the right ear was advised and the patient consented. After anesthesia had been administered both ears were examined carefully and it was determined that conservative treatment would take care of the difficulty in the right ear, but that an operation should be performed upon the left ear where there was a "small perforation . . . high up in the drum membrane, hooded, and with granulated edges, and the bone of the inner wall of the middle ear was diseased and dead."<sup>18</sup> This was called to the attention of the patient's family physician, who agreed that an operation on the left ear should be performed.

The Court held: First that there was no emergency and that the operation, therefore, constituted a technical assault and battery, and, second, that the consent of the family physician did not constitute the consent of the patient. In so holding, the Court said:

"If a person should be injured to the extent of rendering him unconscious, and his injuries were of such a

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<sup>17</sup> 95 Minn. 261, 104 N.W. 12 (1905), cited with approval by the Maryland Court of Appeals.

<sup>18</sup> *Id.*, 13.

nature as to require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb, and consent on the part of the injured person would be implied. And again, if, in the course of an operation to which the patient consented the physician should discover conditions not anticipated before the operation was commenced, and which if not removed, would endanger the life or health of the patient, he would though no express consent was obtained or given, be justified in extending the operation to remove and overcome them."<sup>19</sup>

In *Wheeler v. Barker*,<sup>20</sup> examination of plaintiff indicated either an ovarian cyst or growth on the uterus. She had suffered for some time from continued vaginal bleeding. The patient signed a consent to an operation. However, there was a dispute as to when and under what circumstances it had been executed. Plaintiff contended that it had been signed just before the operation. Defendant's testimony indicated that it had been obtained by a nurse and before the administration of sedation.

The operation revealed that the ovaries were not diseased but that there was a large tumor attached to the uterus adjacent to the right ovary, and that the uterine wall was filled with multiple fibroid tumors. There was no malignancy, but the surgeon was afraid malignancy might develop. After consultation the surgeons agreed that a subtotal hysterectomy was necessary.

The jury rendered a verdict in favor of defendant, which was affirmed on appeal, the Court saying:

"When a surgeon is confronted with an emergency or an unanticipated condition and immediate action is necessary for the preservation of the life or health of the patient and it is impracticable to obtain consent to an operation which he deems to be immediately necessary, it is his duty to do what the occasion demands within the usual and customary practice among physicians and surgeons in the same or similar localities, and he is justified in extending the operation and in removing and overcoming the condition without the express consent of the patient."<sup>21</sup>

<sup>19</sup> *Id.*, 15.

<sup>20</sup> 92 Cal. App. 2d 776, 208 P. 2d 68 (1949).

<sup>21</sup> *Id.*, 71.

*Reddington v. Clayman*<sup>22</sup> is a case where it was held that the authorization from the patient was exceeded by the surgeon and that he was not justified in going beyond the consent. The infant plaintiff was operated on for T. and A. In the course of the procedure the uvula was removed. Defendant contended that he had discussed this with the parents and that they had agreed; that the reason for removal of the uvula was that plaintiff's brother had died of cancer of the throat which apparently had initiated in the uvula; that in fact it served no function. This contention was denied by the parents. The Massachusetts Court stated:

"It could not be ruled that consent to the removal of the uvula in the circumstances was necessarily implicit in the authority given. There was no medical testimony that it was usual to do this. There was no suggestion that the defendant found anything when operating which made it reasonable then forthwith to remove the uvula as a part of what was being done. On the contrary the defendant stood expressly on what he saw and learned prior to the operation."<sup>23</sup>

In *Delahunt v. Finton*,<sup>24</sup> during the course of an examination under anesthesia, to which plaintiff had consented, defendant passed a filiform bougie through the urethral passage into the bladder, followed by a metal sound to dilate the urethral strictures of which plaintiff complained. The bougie looped in the bladder and could not be removed. After consultation with his associates defendant operated so that the bougie could be removed. It was the contention of plaintiff that this was done without her consent. The surgeon claimed an unforeseen contingency which resulted in an emergency endangering life and health of plaintiff. The Court stated the rule applicable in such a case as follows:

"It is settled that a surgeon may lawfully perform and it is his duty to perform, such operation as good surgery demands, in cases of emergency, without the consent of the patient. In so doing he is not liable for an honest error in judgment. \* \* \* Defendant's negligence cannot be presumed, but must be affirmatively proved."<sup>25</sup>

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<sup>22</sup> 324 Mass. 244, 134 N.E. 2d 920 (1956).

<sup>23</sup> *Id.*, 922.

<sup>24</sup> 244 Mich. 226, 221 N.W. 168 (1928).

<sup>25</sup> *Id.*, 169.

On the other hand, in *Franklyn v. Peabody*,<sup>26</sup> the Michigan Court held that the following facts did not constitute implied consent under the emergency rule. Plaintiff complained of a stiff finger, and consented to an operation thereon. The finger and the palm of the hand were opened and it was found that the superficial and deep tendons had adhered together. The surgeon considered that it was necessary to sheath them in added fascia so as to separate them. He made an incision in the right thigh and obtained fascia lata therefrom. Plaintiff sustained a disability of the leg as a result of this phase of the operation.

In *Bennan v. Parsonnet*,<sup>27</sup> a previous operation to correct a hernia on patient's left side had been unsuccessful. He submitted to an operation to correct that condition. After the administration of anesthesia and further examination it was discovered that he had a hernia on the right which was much more serious, defendant being of the opinion that it might strangulate. It was determined that this was not true of the hernia on the left. The surgeon operated on the hernia on the right. Although the jury returned a verdict in favor of plaintiff, this was reversed on appeal, the court considering that this constituted an emergency which supported an implied consent.

In *Valdez v. Percy*,<sup>28</sup> examination revealed a lump the size of a small egg in right axilla. The malignancy board of the hospital ordered an exploratory operation. The lump was removed and sent to the laboratory. First report (5 or 10 minutes later) was "carcinoma of the breast."<sup>29</sup> The operation had been barely resumed (skin incised) when the second report was received informing the surgeons that there had been a mistake in the first diagnostic report, and that the true diagnosis was "lymphoma, possibly Hodgkin's disease"<sup>30</sup> — The operation proceeded and the breast was removed.

The patient had signed a blanket consent. The Court held:

"It is firmly established as the law that where a person has been subjected to an operation without his consent such a operation constitutes technical assault and battery."<sup>31</sup>

<sup>26</sup> 249 Mich. 363, 228 N.W. 681 (1930).

<sup>27</sup> 83 N.J.L. 20, 83 A. 948 (1912).

<sup>28</sup> 35 Cal. App. 2d 485, 96 P. 2d 142 (1939).

<sup>29</sup> *Id.*, 144.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Id.*, 145.

Referring to the signed consent the Court said:

“[W]e do not understand such agreement to constitute a consent to perform operations other than the one for which the operating surgeons were engaged by plaintiff to perform unless necessity therefor arose during the authorized operation. . . . And in any event, such an agreement does not absolve the operating physicians of liability for negligence, if any existed, in the performance of such operation.”<sup>32</sup>

#### 4. *Ineffective consent*

Even if a physician has obtained the patient's authorization to operate, under some circumstances such consent may be ineffective. If the physician is guilty of either fraud or misrepresentation toward the patient prior to the operation, and the patient's consent is obtained as a result of such fraud or misrepresentation, it is invalid. Misrepresentation can, of course, consist either of some positive act by the surgeon or the failure to make a sufficient disclosure to the patient.

In *Wall v. Brim*,<sup>33</sup> the patient had developed what appeared to be a small cyst on the neck just under the back of her ear. Defendant advised her that its removal would be simple and would not require over ten minutes. The operation was performed under a local anesthetic. After the operation was commenced it was discovered that the cyst extended down between the muscles and was deeper than the surgeon had believed. After this discovery, defendant did not advise plaintiff of the problem presented and what might result. He did not obtain her consent to the much more extensive operation.

Judge Hutchinson stated the general rule on this point as follows:

“The obligation underlying this rule is not satisfied by a consent obtained under a mistaken diagnosis that the operation is simple and without danger, when a later diagnosis, while the patient is still conscious and no emergency exists, discloses that the operation is both difficult and dangerous. The rule extends no further than to hold that if a physician advises his patient to submit to a particular operation and the patient weighs the dangers and results incident to its performance and finally consents, he thereby in ef-

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<sup>32</sup> *Ibid.*

<sup>33</sup> 138 F. 2d 478 (5th Cir. 1943).

fect enters into a contract authorizing his physician to operate to the extent of the consent given but no further."<sup>34</sup>

Whether a minor can or cannot authorize an operation depends upon his maturity and comprehension of what is proposed. If he has matured sufficiently to understand the nature of the procedure and the possible consequences, then, if his parent or guardian is not available, he may legally consent even though under twenty-one. If he does not have sufficient comprehension, then he may not.

The same general rule is applicable to persons of questioned mental capacity and inebriates, their consent will be effective if, and only if, they comprehend the proposed procedure and the risks, if any, involved.

#### PERSONS GIVING CONSENT

##### 1. Married persons

Ordinarily it is sufficient if the surgeon obtains the consent of the person upon whom the operation is to be performed. In *State, use of Janney v. Housekeeper and Gifford*,<sup>35</sup> pre-operative examination indicated a lump in the breast of the wife. It was believed to be a tumor but later it was determined to be cancer. Some time after the operation the wife died and the husband sued the surgeon, claiming that he had consented to the removal of a tumor but that he did not consent to the excision of a cancer. In holding that his consent was not required, the Court of Appeals of Maryland said:

"Surely the law does not authorize the husband to say to his wife, you shall die of the cancer, you cannot be cured, and a surgical operation affording only temporary relief, will result in useless expense. The husband had no power to withhold from his wife the medical assistance which her case might require. \* \* \* The consent of the wife, not that of the husband was necessary. \* \* \* They [the physicians] could not, of course, compel her to submit to an operation, but if she voluntarily submitted to its performance, her consent will be presumed, unless she was the victim of a false and fraudulent misrepresentation, which is a material fact to be established by proof. \* \* \* If the

<sup>34</sup> *Id.*, 481.

<sup>35</sup> 70 Md. 162, 16 A. 382 (1889).

plaintiff alleges that there was no consent, he must establish his affirmation by proof. The party who allows a surgical operation to be performed is presumed to have employed the surgeon for that particular purpose."<sup>36</sup>

## 2. *Minors*

In the case of any operation upon a minor it is certainly desirable that the surgeon obtain, if possible, the consent of one or both parents. Although there is no case in Maryland that holds that where an operation on an infant is necessary consent will be implied, there is a decision to the effect that parents who refuse, without justification, to consent to an operation on their child may be subjected to punishment in the criminal court.

In *Craig v. State*,<sup>37</sup> a six-month old child had been ill for eighteen days prior to his death, during which period the parents had furnished no medical care because of their religious training. During the initial stages of the illness the child did not seem to be very ill, it being only during the two days prior to death that the child became obviously seriously ill. The parents were charged with involuntary manslaughter and, on trial, were convicted. On appeal the case was reversed, and remanded for a new trial. However, the Court referred to Article 72A, section 1,<sup>38</sup> which *inter alia*, charges parents, jointly and severally, with support, care, nurture, welfare and education of their minor children, and held that although medical care was not referred to in specific terms, it was embraced within the scope of the statute. The Court further held that failure to perform a specific legal duty which results in death, subjects such person to a charge of involuntary manslaughter. Finally, the Court held that the parents

“were, and are, at perfect liberty to believe in the religion of their selection; they may pray, anoint and call in the Elders of their Church in case of sickness of their minor children; but they, like all parents, must also obey the mandate of Article 72A, Section 1, by providing medical aid when the circumstances properly call for the same.”<sup>39</sup>

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<sup>36</sup> *Id.*, 169-171.

<sup>37</sup> 220 Md. 590, 155 A. 684 (1959).

<sup>38</sup> 6 Md. CODE (1957) Art. 72A, § 1.

<sup>39</sup> 220 Md. 590, 600-601, 155 A. 684 (1959).

(c) *Incompetents*

If a person is mentally incompetent then his or her consent to operative procedure may be given by the husband or wife or parent or guardian. That a physician cannot be too careful in ascertaining that the patient is mentally incompetent before acting under such consent is illustrated by the recent case of *Maben v. Rankin*.<sup>40</sup>

Defendant caused plaintiff to be taken to the psychiatric ward of St. John's Hospital to be detained there while he gave her electroshock treatments. Plaintiff's examination had been at request of her husband. There was evidence that plaintiff's husband had consented to her confinement and treatment. However, she had not consented. Plaintiff claimed she was not mentally ill. She had expert testimony to support her contention. Defendant testified that, based upon his observations and the information which he had received from plaintiff's husband and other doctors, she was mentally ill and needed hospital care and electroshock treatments.

Defendant had failed to complete and file the certificate required by statute.

Plaintiff sued for false imprisonment and assault and battery and recovered a judgment of \$78,000. On appeal the judgment was reversed and a new trial granted, although the Court indicated judgment should be for plaintiff. The Court said:

"In this connection the jury was instructed that the burden was on defendants to prove that the husband consented in good faith on plaintiff's behalf and for her benefit to the restraint and treatment. This placed an excessive burden of proof on defendants with respect to the husband's good faith. A doctor is not required to investigate whether the consenting husband has an ulterior motive in the absence of circumstances which put him on notice that the husband is acting in bad faith. The burden of proving that the doctor was put on notice is on the plaintiff. Good faith is presumed.

"\* \* \* The involuntary hospitalization of a person in a mental institution in violation of the statute constitutes false imprisonment. Insofar as force is used to accomplish the unlawful detention, there is also liability for assault and battery. However, the use of

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<sup>40</sup> 55 Cal. 2d 139, 10 Cal. Rptr. 353, 358 P. 2d 681 (1961).

force in the treatment of the patient so hospitalized may not constitute assault and battery in all circumstances."<sup>41</sup>

#### SUMMARY

By way of summary my advice to physicians is as follows:

(1) When one has an opportunity to obtain express consent be sure the patient is competent to authorize the necessary operative procedure.

(2) Explain to the patient in lay language the nature of the operation, why it is necessary and the risks, if any, which are involved.

(3) Obtain the consent of the patient, or someone authorized to act on his behalf, in writing in the broad form suggested above, and have the execution of the document witnessed by someone cognizant of the background.

(4) If written authorization is not practicable, if possible, obtain the oral consent of the patient or someone authorized to act on his behalf.

(5) Whether the consent is written or oral a summary of the surrounding circumstances, duly witnessed, should be noted on the patient's hospital chart or office history card. This should include a concise statement of his physical and mental condition at the time of such execution.

(6) In cases where the patient's express consent cannot, for one reason or another, be obtained and someone authorized to act on his behalf cannot be contacted, then the guide is, "will the proposed operative procedure preserve the patient's life, limb or health?" — not "will he be better off with this operation?" In such an emergency a physician has to rely on experience and judgment. Many times it will have to be a calculated risk. On such occasions I am sure that the Hippocratic oath will be of greater help and have more significance than decisions of any court to which attention can be directed.

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<sup>41</sup> *Id.*, 682, 683-684.