CONSENT TO SURGICAL OPERATIONS

"A SURGEON WHO PERFORMS AN OPERATION OR PART OF AN OPERATION WITHOUT HIS PATIENT'S EXPRESS OR IMPLIED CONSENT IS GUILTY OF A TRESPASS"

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This proposition, taken from Halsbury's *Laws of England*,[1] sets out the general basis of the law relating to the practice of surgery so far as the consent of the patient is concerned. It raises, however, a number of problems which are worth further consideration especially as they arise within the context of the Malayan Penal Codes.

The first problem that arises is whether the converse proposition is also true. Granted that a surgical operation will in general constitute a trespass, that is to say an assault, if performed without the consent of the patient, is it also true to say that an operation performed with the consent of the patient will never constitute an assault?

In answering this question it is necessary to distinguish between civil and criminal liability, for it must be remembered that assault is a civil wrong as well as a criminal offence. So far as civil liability is concerned it seems to be true to say that there will be no liability provided that the patient has consented. The general principle, so far as the law of tort is concerned, is that expressed by the maxim *volenti non fit injuria*, the translation of which may be paraphrased by the words of Lord Herschell in *Smith* v. *Baker*:[2]

> One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong.

The surgeon will, therefore, be immune from an action for damages provided that the patient has consented. Thus Salmond, speaking of the maxim states:[3]

> It applies, in the first place, to intentional acts which would otherwise be tortious . . . consent to physical harm which would otherwise be an assault, as in the case of a boxing match *or a surgical operation.*

There is, however, some controversy over the question of whether the *volens* principle has an unrestricted application in this context. Winfield has suggested that:[4]

> The process game or operation to which assent is given must not be one which, quite apart from tortious liability, is banned by the law.

He adds, however, "there is no definite test for deciding what the law will ban in this connection". Furthermore there appears to be no authority to support any such limitation on the operation of the maxim and it is submitted, on principle, that no such limitation exists. Thus it is submitted that in all cases the surgeon will be protected, so far as civil liability is concerned, by the consent of his patient. As an illustration of this we may take the case of abortion.[5] It is quite clear that procuring an abortion is "banned by the law" yet it is submitted that a woman who had consented would have no action for damages against the person who procured the abortion on the ground of assault.

We turn, therefore to consider the criminal aspects of this problem. We must refer first to the relevant provisions of the Penal Codes. There are two provisions which are particularly relevant to our present problem. The first of these is section 87 which reads:

> Nothing which is not intended to cause death or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

The second provision which is relevant to our problem is section 88 which reads:

> Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or im-

> plied, to suffer that harm, or to take the risk of that harm.

Both these sections relate to exceptions to criminal liability and before discussing them in detail it will be as well to mention the offences with which a surgeon who operates with consent could conceivably be charged. On this question there is a difference between the position under the Codes and that under the common law. At common law it is not yet clear whether a surgeon who operated with the consent of his patient could nevertheless in certain cases, be charged with assault. It seems, however, to be quite clear that under the Codes he could not be charged with the offence of using criminal force (which is the offence equivalent to assault) since section 350, defines criminal force as follows:

> Whoever intentionally uses force to any person *without that person's consent,* in order to cause the committing of any offence, or intending by the use of such force illegally to cause or knowing it to be likely that by the use of such force he will illegally cause injury, fear or annoyance to that person to whom the force is used is said to use criminal force to that other.

There appear to be no exceptions to this section so that, whatever may be the position under the common law, it is quite clear that under the Codes absence of consent is an essential ingredient of the charge under section 352 of the use of criminal force, so that the charge will not lie where there has been consent. Equally consent appears always to be a defence to a charge under section 323 of voluntarily causing hurt, so that the only charge left which can conceivably be brought against a surgeon who operates with the consent of his patient is that of voluntarily causing grievous hurt under section 325[6] (apart that is from the special case of abortion).

On the basis, therefore, that the only charge with which we are here concerned is that of a charge of voluntarily causing grievous hurt we may proceed to discuss in detail the exemption under sections 87 and 88.

It is clear from a comparison of these sections that the Codes draw a clear distinction between the position whether the act is done for the benefit of the alleged victim, and the position where it is not. The first difficulty to which this distinction gives rise is that of determining how the criterion of benefit is to be applied. Some guidance is given by the explanation to section 92 which reads:

> Mere pecuniary benefit is not benefit within the meaning of sections 88, 89 and 92.

It seems reasonable to suppose, therefore, that a case such as *R.* v. *Wright*[7] would receive the same decision under the Codes as at common law. In that case a "young and lustie rogue" prevailed on a friend to cut off his left hand that he might the better be able to beg. Such an operation would presumably not be regarded as for the benefit of the patient within the meaning of section 88 and a surgeon performing such an operation would be liable despite the consent of his patient.

Much uncertainty nevertheless remains as to the application of the criterion of distinction. We may consider the case of a person who has himself or herself sterilized on the ground that he is unable to afford any further children. Is this a case in which the operation is for the benefit of the patient so as to bring it within section 88 or is the motive sufficient to exclude it from the operation of section 88 and thus bring it within the scope of section 87? No clear answer to such a question seems possible at the moment.

We will return to the problem of the sterilization operation later. For the present it is sufficient to point out that the distinction between sections 87 and 88 is of vital significance. Under section 88 the only thing to which consent cannot be given is the intentional causing of death, whereas under section 87 consent will not avail even in cases of grievous hurt. Furthermore section 87 only applies where the person is over eighteen years of age, whereas section 88 contains no restriction as to age at all.

It seems reasonably clear that the vast majority of surgical operations would fall within the scope of section 88 as being for the benefit of the patient and therefore in the vast majority of cases the surgeon would be protected by the consent of his patient, for where the act is for the benefit of the patient the only thing to which a person cannot consent is the intentional infliction of death. There are however cases in which it cannot yet be said with any certainty that a surgical operation would be held to be for the benefit of the patient. The case of sterilization and artificial insemination spring to mind as cases in point. In the case of sterilization Lord Denning has already expressed the opinion that where this procedure is used for purely contraceptive purposes it is illegal.[8] Although in this case Lord Denning did not carry his two judicial colleagues with him (Evershed, M.R. and Hodson,

L.J.) nevertheless it is a view which doubtless would receive much support, and it cannot be said with any certainty that such cases would necessarily come within section 88.

Leaving, therefore the question of the exact scope of application of section 88 we turn to consider section 87. The point which must be observed here is that even though a case is held to be excluded from the operation of section 88 on the ground that the act was not for the benefit of the recipient it does not follow that consent cannot provide a defence, for section 87 only excludes the defence of consent where the intention is to cause death or grievous hurt and we must therefore turn to consider the meaning of the latter term. This is elaborately defined in section 320 as follows.

The following kinds of hurt only are designated as "grievous":—

Firstly. — emasculation;

Secondly. — permanent privation of the sight of either eye;

Thirdly. — permanent privation of the hearing of either ear;

Fourthly. — privation of any member or joint;

Fifthly. — destruction or permanent impairing of the powers of any member or joint;

Sixthly. — permanent disfiguration of the head or face;

Seventhly. — fracture or dislocation of a bone;

Eighthly. — any hurt which endangers life, or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

If we return now to consider the case of the sterilization operation it can be seen that it is unlikely that such an operation would come within the meaning of the term grievous hurt. Modern sterilization operations hardly amount to emasculation in the ordinary sense of the term nor would they involve the patient in twenty days severe bodily pain or prevent him for a like period from following his pursuits. The only other category of section 320 which would appear to be remotely relevant to a sterilization operation is the fifth category. Here much depends on the meaning to be attached to terms such as "impairing", "powers" and "member" but it is submitted that it would strain the meaning of these terms if a sterilization operation were included within the fifth category. It is therefore submitted that under the Penal Code the consent of a patient to a sterilization operation would be a sufficient defence to a surgeon charged with performing one. We would likewise submit that the consent of a patient to an artificial insemination procedure would be a complete defence to a surgeon charged with causing hurt or grievous hurt. To sustain the contrary view it is necessary to maintain two propositions: first, that the procedure is not for the benefit of the patient (in order to remove the exemption under section 88) and second, that the procedure involves the infliction of grievous hurt (in order to remove the exemption under section 87).

Summarising the position, therefore, we may say that where a surgeon operates with the consent of his patient the only offence (aside from particular cases such as abortion) with which he can be charged is that of inflicting grievous hurt and even that the charge can only be sustained if it can be shown first, that the operation was not for the benefit of the patient, and second, that it involved the infliction of grievous hurt within the meaning of section 320.

The second problem in connection with consent to surgical operations which we have to discuss concerns the exceptions to the general rule that where a surgeon operates without the consent of his patient he is criminally liable for using criminal force, voluntarily causing hurt, or voluntarily causing grievous hurt depending upon the nature of the operation.

It is well known that in many cases a surgeon will have to operate in cases of emergency without the consent of his patient, and this contingency is provided for by section 92 which reads:

> Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit: Provided —
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> *Firstly.* — that this exception shall not extend to the intentional causing of death, or the attempting to cause death;
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> *Secondly.* — that this exception shall not extend to the doing of anything which the

person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly. — that this exception shall not extend to the voluntary causing of hurt, or the attempting to cause hurt for any purpose other than the preventing of death or hurt;

Fourthly. — that this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

This section makes it quite clear that a surgeon is justified in operating without consent in any case in which the operation is necessary to prevent death or grievous hurt and in which it is impossible to obtain the consent of the patient.

One point which does emerge from this section is that there seems to be no justification for the practice of obtaining consent in such cases from either a spouse or next of kin. If the patient is unable to give consent and the circumstances are such as to bring the case within the term of section 92 then the surgeon is, under the terms of the section, justified in operating without seeking any consent from any other person. Even at common law it has always been difficult to see the justification for the practice of seeking consent from persons other than the patient. Thus it seems clear that consent from the spouse or other next of kin will not protect the surgeon if his patient on recovery decides to institute proceedings. This seems to be implied in the Canadian decision in *Murray* v. *McMurchy*.[9] In this case the surgeon, during performance of a Caesarian section, found numerous fibroids in the uterus, and on the ground that any other pregnancy would be dangerous he sterilized the lady by tying off both tubes. The surgeon consulted the lady's husband and was told to do whatever he thought was best. This could clearly be construed as consent on the part of the husband, it was held, however, that it did not affect the lady's right to recover damages when she recovered, on the ground that there was insufficient emergency to justify the surgeon proceeding without the lady's consent. The implied consent given by the husband was not regarded as having any effect whatsoever on the position.

The situation, therefore appears to be simply that if there is a sufficient emergency to bring the case within the terms of section 92 then a surgeon is justified in operating without the consent of the patient, and he is not obliged to seek the consent of anyone else. If however there is no sufficient emergency then there is no substitute for the consent of the patient.

We turn therefore to consider the case of persons who are incapable of giving a consent in any case on the ground of infancy or insanity. The situation here is governed by section 89 of the Penal Code which reads:

> Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause to that person: Provided —
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> *Firstly.* — that this exception shall not extend to the intentional causing of death, or the attempting to cause death;
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> *Secondly.* — that this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;
>
> *Thirdly.* — that this exception shall not extend to the causing of grievous hurt, of the attempting to cause grievous hurt unless it be for the purpose of preventing death, or grievous hurt, or the curing of any grievous disease or infirmity;
>
> *Fourthly.* — that this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

So far as infants under the age of twelve and persons of unsound mind are concerned, therefore, consent may be given by their guardian or other person who has lawful charge of them. Furthermore by the provisions of section 90 any apparent consent given by such a person is of no avail. Thus if a surgeon operated on a child under twelve years of age with the consent of that child but without the consent of the child's guardian he would remain liable to a criminal prosecution.

A slight difficulty arises, however, in the case of children. Under section 92 the consent of the guardian is required to protect the surgeon. Under section 87, however, a person must be over the age of eighteen before he can consent to the infliction upon himself of grievous hurt.

What, therefore is the position of children between the ages of 12 and 18. Let us suppose the case of a seventeen year old boy who wishes to have an operation upon his knee cap so as to enable him better to be able to take part in athletic activities. The boy consents to the operation, but his parents refuse. Would the surgeon be justified in undertaking the operation? If we assume that the operation does amount to the infliction of grievous hurt then the case does not come within the scope of section 87, on the other hand since the boy is over 12 years of age he does not come within the scope of application of section 89. It is submitted that the answer to this problem lies in the realization that the exception of both sections 87 and 88 are not worded in such a way as to be exclusive. Section 87 admittedly is limited to cases where the consent is given by a person over the age of 18 but this does not necessarily imply that no consent, even to grievous hurt, will be effective if given by a person under the age of eighteen. Thus even if it were held that the operation were not for the benefit of the infant, so as to bring it within the exception in section 88 (which lays down no age requirement) nevertheless it does not follow that consent to grievous hurt cannot be given by a person under 18 merely because section 87 is so limited in its application.

No clear solution appears yet to have been reached in the case of persons between the ages of 12 and 18. Where the operation is for the benefit of the patient then there is no difficulty since the consent of the patient appears to be sufficient under section 88. The only difficulty arises in connection with those operations which were held to be not for the benefit of the patient.

The final problem which needs examination here concerns the nature of the consent which will be sufficient to protect the surgeon from proceedings either civil or criminal. The situation here is covered by the provisions of section 90 which reads:

> A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or if the consent is given by a person who from unsoundness of mind or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

Consent may be express or implied and most difficulties arise in those cases in which the surgeon claims that the patient gave tacit consent. This problem may be illustrated by the decision in *Beatty* v. *Cullingworth*[10] in which a surgeon had performed a bilateral ovariectomy. The evidence was to the effect that, prior to the operation, the woman, who was engaged to be married, informed the surgeon that if he found both ovaries diseased he was to remove neither. The surgeon testified that he had replied "You must leave that to me" which remark the plaintiff denied having heard. It was held that the surgeon was not liable for assault on the ground that the plaintiff had given tacit consent.

One point which should be stressed is that before a person can be held to have consented to something they must be aware of all the relevant facts. There is indeed a duty, the exact extent of which has not been determined, on a surgeon to disclose the facts to his patient. Within limits, however, the surgeon has discretion. Thus in the Canadian case of *Kenny* v. *Lockwood Clinic Ltd.*, Fisher, J. A. stated:[11]

> To fasten on a physician or surgeon the obligation to discuss with his patient the possibilities and probabilities of an operation (without any request by the patient) in order that the patient might make an election as to whether the operation shall take place, simply because of the fiduciary or confidential relationship existing between a patient and her surgeon or physician is to my mind unwarranted.

It is, of course normal practice for a signed consent form to be used before the performance of an operation. The wording of this form becomes important since the courts seem less inclined to imply consent in respect of matters not covered by the form where an express consent is given. It is important, therefore, that the form used should cover all matters regarding which the surgeon may need protection.

This point may be illustrated by the fairly recent unreported case of *Mitchell* v. *Molesworth*.[12] The plaintiff was a patient upon whom a successful operation had been performed. He nevertheless sued the surgeon on the ground that the latter had orally agreed to operate personally, whereas he had in fact allowed his house-surgeon to operate. As this was not something to which the patient had consented,

the surgeon was guilty of procuring a trespass to the plaintiff's person. The plaintiff recovered nominal damages.

As a result of this decision the Medical Defence Union published a revised consent form designed to meet the difficulty created by this case, the final clause of which read:

> I understand an assurance has not been given that the operation will be performed by a particular surgeon.

Another matter upon which the wording of the form becomes important concerns subsequent treatment. If more than one operation is to be performed does the original consent apply to the subsequent operation. The Medical Defence Union's recommended form contains the clause:

> I also consent to such further or alternative operative measures as may be found to be necessary during the course of such operation and to the administration of a local or other anaesthetic for any of the foregoing purposes.

This is, with respect, not a happily worded clause since it does not make clear whether the consent extends only to further or alternative treatment found necessary and actually carried out at the time of the original operation, or whether it extends to treatment carried out at some subsequent period. On balance it is submitted that the words only cover the first interpretation and that if, therefore, the operation reveals that further operations are necessary which are carried out at some subsequent date a further consent form should be obtained with respect to these operations — unless of course their performance becomes a matter of necessity and the patient is in no condition to consent thereto. In such a case the surgeon will be justified in proceeding without consent under section 92.

A point which should be stressed is that the consent given to further or alternative treatment is confined to that which is found to be necessary. It does not, therefore, justify the practice of casually performing an appendicectomy whenever the abdomen is opened for any other purpose, on the ground that its excision will remove the possibility of another operation at some future date. Its removal under such circumstances would only be justified if it was immediately necessary. This point may be illustrated by the Canadian decision in *Murray* v. *McMurchy* which was cited earlier. The sterilization in that case was not justified — however convenient it may have been — because there was no immediate necessity.

It may be doubted however whether such a clause really adds very much. A surgeon is justified in proceeding without consent where what he does is necessary to save life, and it is by no means clear that the use of such a clause really extends in any way that which the surgeon is entitled to proceed.

In conclusion we may say that although in the vast majority of cases the position of a surgeon is quite clear there are many marginal cases in which doubt remains as to the effect of the patient's consent. Since surgeons are not usually given to abusing their position and since the vast majority of patients are not quick to institute proceedings against their medical advisers it is likely that many of these marginal cases will remain unresolved for some considerable time.

REFERENCES

1. (Halsbury).
2. [1891] A.C. 325 at p. 360.
3. Law of Torts 12th ed. (1957) at p. 38-9 italics added.
4. Law of Torts 6th ed. (1954) at p. 29.
5. See section 312.
6. We have deliberately excluded from consideration in this paper questions which arise if the patient dies as a result of the operation. See on this, in addition to the section quoted in this paper. Section 300 Exception 5.
7. East P.C. i. 396; Hale P.C. i. 412.
8. Bravery v. Bravery [1954] 3 All E.R. 59.
9. [1949] 2 D.L.R. 442.
10. (1896) B.M.J. 1546.
11. [1932] 1 D.L.R. 507.
12. (1950) B.M.J. July 15.