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Assault and Battery--Lack of Parental Consent to an Operation as a Basis for Liability

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judicial opposition to needed social and economic legislation.[22] Recent Supreme Court decisions such as the *Schware* case,[23] the *Jenks* case,[24] *Watkins v. United States*,[25] and *Yates v. United States*,[26] indicate a similar pendulum-like trend to reinstate and fortify personal liberty which was sorely strained during the McCarthy era of "evangelistic" insecurity.[27]

A dissection of the *Konigsberg* case reveals a pervading drive to buttress individual liberty rooted in a calmer societal approach to the ideological foes of Americanism. The ease with which either the majority position or that of the dissenting opinions can be justified shows the freedom of the judiciary to mold the law into conformity with social patterns without departing from the confines of legal precedent. Shakespeare's comment, "The devil can cite scripture for his purpose" seems equally applicable to the "law of the land."

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ASSAULT AND BATTERY — LACK OF PARENTAL CONSENT TO AN OPERATION AS A BASIS FOR LIABILITY

An eighteen year old girl called at the defendant-doctor's office to arrange for a plastic surgery operation on her nose. Arrangements were made for the operation, which was performed at a later date. After the operation suit was brought by the minor patient against the doctor for personal injuries. The basis of the claim was that the surgeon had not obtained the consent of the minor's parents before conducting the operation. The plaintiff recovered a verdict in the trial court, but suffered a reversal in the court of appeals.

The Supreme Court, in affirming the lower tribunal held that performance of a surgical operation upon an 18 year old girl with *her* con-

[22] Smith v. Allwright, 321 U.S. 649, 665 (1944) lists the 14 reversals including: Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) *overruling* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842); Williams v. North Carolina, 317 U.S. 287 (1942) *overruling* Haddock v. Haddock, 201 U.S. 562 (1906) etc.

[23] Schware v. Board of Bar Examiners, 353 U.S. 252 (1957) holding that previous membership in the Communist party is of itself insufficient grounds for exclusion from the practice of law before a state bar.

[24] Jenks v. United States, 353 U.S. 657 (1957) which made classified information available to the accused for his defense.

[25] 354 U.S. 178 (1957) questioning this activity of Congressional Investigating Committees.

[26] 354 U.S. 298 (1957) which indirectly qualifies Dennis v. United States, 341 U.S. 494 (1951).

[27] *See:* Dennis v. United States, 341 U.S. 494 (1951) which restricts the "clear and present danger" test, thereby facilitating this prosecution of Communists under the Smith Act, 54 STAT. 670 (1940).

sent will ordinarily not amount to an assault and battery, even though the consent of the girl's parents or guardian has not be obtained.[1]

As this is a case of first impression in Ohio, it is necessary to look to other jurisdictions for any expression of a general rule. It has been said that,

> . . . in the absence of an emergency an operation performed on a child without the consent of the parents or persons standing in loco parentis is a legal wrong. . . .[2]

However, there are only seventeen cases dealing directly or by dicta with this problem. In two of these cases the injured party was not a minor,[3] although both have been cited as precedent by other courts considering this point. In four cases, the issue of the necessity of parental consent was never litigated,[4] while another was not a personal injury case.[5] In the remaining ten cases which squarely faced the problem, the plaintiff won in only five.

The first important case arose in Michigan,[6] and the holding was that, under the circumstances, the consent of the minor without that of the parent was sufficient. The court did not pass on the question of whether a parent's consent is *generally* necessary. Likewise, when the problem next arose,[7] there was no definitive ruling that parental consent was an absolute condition precedent to the lawful performance of an operation on a minor. The Supreme Court of Michigan held that the operation upon the minor was not a technical assault, since an emergency existed, and any consent that *might* be necessary would be implied. This "emergency" exception has since been utilized by other courts to escape imposing liability upon a doctor.[8]

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[1] Lacey v. Laird, 166 Ohio St. 12, 139 N.E. 2d 25, (1956). The court was split 4-3 on this issue.

[2] 70 CORPUS JURIS SECUNDUM, *Physicians and Surgeons* § 48g (2) (1951).

[3] Pratt v. Davis 118 Ill. App. 161 (1905); Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905).

[4] Perry v. Hodgson, 168 Ga. 678, 148 S.E. 659 (1929); Bishop v. Shurly, 237 Mich. 76, 211 N.W. 75 (1926); Rogers v. Sells, 178 Okla. 103, 61 P. 2d 1018 (1936); Browning v. Hoffman, 90 W. Va. 568, 111 S.E. 492 (1922).

[5] *In re* Hudson, 13 Wash. 2d 673, 126 P. 2d 765, (1942). Adoption proceedings were involved in this instance.

[6] Bakker v. Welsh, 144 Mich. 632, 108 N.W. 94 (1906).

[7] Luka v. Lowrie, 171 Mich. 122, 136 N.W. 1106 (1912).

[8] Wells v. McGhee, 39 S. 2d 196 (La. App. 1949); and Sullivan v. Montgomery, 155 Misc. 448, 279 N.Y. Supp. 575, (City Ct. N.Y. 1935). In the former case the court classified treatment of a fracured arm as an emergency, while in the latter working on a twisted ankle was similarly classified. Both holdings are based upon specious reasoning and obviously designed to avoid undesired results.

The year 1913 saw the issue next arise.[9] The court held, as a matter of law, that the consent of a parent was a necessity and that an operation without consent could not be performed on a minor without constituting at least a technical assault and battery. Unfortunately no independent analysis of the problem was made by this court.

The Michigan Court was again faced with this problem some years later, and held, as a matter of law, that, ordinarily, consent of a parent must be obtained before an operation may be performed upon a minor.[10] However, the court once again failed to reanalyze the problem and instead relied upon their own dogma as a rule of law.

The above-mentioned cases are the foundation for the decisions or dicta in the other eleven.[11] Thus, it appears that the "well-settled" rule is based on a very meager precedent and is unsupported by any rational analysis of the problem by any court of record.

The instant case is truly the first in which the rule and its reasoning are considered analytically. The minority opinion accords with the orthodox rule that a parent's consent to an operation on a minor is a necessity. The rule thus expressed is not based upon the legal capacity of a minor to consent. It is based upon a right belonging to the parents whose liability for support and maintenance of their child may be greatly increased by an operation which does not turn out well. This statement is one of the first expressions of a rationale for the rule to be found, and has some merit.

On the other hand, the majority points out that the doctrine of "volenti non fit injuria" has been held to apply to minors in Ohio.[12] The basic principle behind this doctrine is consent, both actual and implied. Thus, if a minor cannot recover for a personal injury because of his implied consent, then consent voluntarily and intelligently given

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[9] Rishworth v. Moss, 159 S.W. 122 (Tex. Civ. App. 1913). The fallacy of this case is that the only basis for the decision is the holding in the two prior Michigan cases where no such rule had been promulgated and one other case in which no minor was involved.

[10] Zoski v. Gaines, 271 Mich. 1, 260 N.W. 99 (1935). The decision was supported by three prior cases, two of which were not in point, and one of which was the *Rishworth* case, *supra*, note 9.

[11] Bonner v. Moran, 126 F. 2d 121 (D.C. Cir. 1941); Tabor v. Scobee, 254 S.W. 2d 474 (Ky. App. 1951); Wells v. McGehee, 39 S. 2d 196 (La. App. 1949); Bishop v. Shurly, 237 Mich. 76, 211 N.W. 75 (1926); Gulf & S.I.R. Co. v. Sullivan, 155 Miss. 1, 119 So. 501 (1929); Sulivan v. Montgomery, 155 Misc. 448, 279 N.Y. Supp. 575 (City Ct. N.Y. 1935); Rogers v. Sells, 178 Okla. 103, 61 P. 2d 1018 (1936); Zaman v. Schultz, 19 Pa. D. & C. 309 (Pa. App. 1932); Browning v. Hoffman, 90 W. Va. 568, 111 S.E. 492 (1922); and *In re* Hudson, 13 Wash. 2d 673, 126 P. 2d 765 (1942).

[12] Centrello v. Basky, 164 Ohio St. 41, 128 N.E. 2d 80 (1955); Porter v. Toledo Terminal Rd. Co., 152 Ohio St. 463, 90 N.E. 2d 142 (1950).

should be valid as a defense in an action of the nature present in the instant case. It is further stated that in this state, if a girl over the age of sixteen consents to sexual intercourse, no rape will have been committed. The majority also considers a bulk of the cases in point, and distinguishes them on the basis of the age of the children involved therein, indicating that the maturity of the plaintiff is a major factor. This accords with the view that:

> If a person whose interest is invaded is at the time by reason of his youth or defective mental condition, whether permanent or temporary, incapable of understanding or appreciating the consequences of the invasion, the assent of such person is not effective as a consent thereto.[18]

Conversely, it then follows that if a person can understand the consequences of the invasion, an assent should be effective.

As a result of this decision, it appears that the law in Ohio now is that the consent of a minor may be a defense. However, it is dependent on whether the minor has the capacity to understand and appreciate the nature of the act to which he consented.

The decision in the instant case is in line with modern life and experience, where so many "minors" approaching "maturity" have been given greater freedom of action and decision by their parents and have a greater awareness of personal responsibility in their daily affairs. This is not only a social phenomenon, but also a legal one. Other examples of the law's recognizing maturity in children before the age of twenty-one can be found in driver's license statutes, the draft and enlistment laws and the marriage laws in some states.

This decision, moving away from strict liability to the more reasonable ground of liability based on fault is a desirable one. Hopefully it may find acceptance in other jurisdictions.

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[18] RESTATEMENT, TORTS, § 59 (1934)