Opinion No. 50-5323

November 16, 1950

BY: JOE L. MARTINEZ, Attorney General

TO: W. L. Minear, M. D. Chief Surgeon Carrie Tingley Hospital Truth or Consequences, New Mexico

*{*184}* I am writing in reply to your letter of September 1, 1950, in which you submitted a so-called "operative release" and a "publicity release" to be used by the hospital.

I would like to advise you first that the State of New Mexico does not carry mal-practice insurance on the doctors employed by the State. Such insurance, if written, would have to be paid for either by the individual doctor or by the State agency employing the doctor, if approved by the Board of Directors of the hospital.

Your second inquiry is whether there is any coverage in case hospital personnel is injured while on a hospital clinic trip? There is no coverage of medical personnel under our Workmen's Compensation Act, since such employees are not engaged in one of the "extra hazardous" occupations within the scope of the act. It follows, therefore, that any individual injured would have to pay his own hospital expenses and would be paid his usual salary only for the length of accumulated sick leave.

In the "operative release" which you have submitted there is no criticism of the first sentence The second sentence, which reads: "We further agree to relieve both the Carrie Tingley Hospital and the operating physician from any and all liability.", is too broad. Regarding the liability of the *{*185}* Carrie Tingley Hospital, it is an agency of the State and as such cannot be sued. Technically, there is no reason for including the hospital. I believe, however, that the hospital should be named in the release in order to preclude any special legislation which would attempt to confer a cause of action against the hospital for any negligence or mal-practice by individuals in the course of an operation.

The attempt to preclude suit against the operating physician by relieving him from "any and all liability" is misleading. If there were gross negligence on the part of the operating physician, or of anyone assisting in the operation, the doctor as an individual, or the assistant responsible for the gross negligence, would be liable. The mere signing of a release could not preclude such responsibility.

The liability of physicians and surgeons for injuries to patients has a long history. In order that you may see the picture clearly, I would like to state briefly some of the basic legal practices that are applicable. The relationship of physician and patient is a consensual one and it is a settled general rule that in the absence of an emergency, or unanticipated condition, a physician, or surgeon, must first obtain the consent of the patient, if the patient is competent to give it, or of someone legally authorized to give it

for him, before treating, or operating, on him. To illustrate, it has been held that where a patient consented to an operation on her right ear but after being put under an anesthetic she was found to be suffering from a more serious affliction of the left ear and the surgeon operated on the left ear, it was held that the patient was entitled to recover for the damage suffered. The fact that the unauthorized operation is slight and ordinarily not attended by serious consequences does not alter the general rule.

The foregoing general principles should be qualified by the proposition that, under certain circumstances, consent may be implied. Thus, a patient who voluntarily submits himself for treatment, relying entirely upon the surgeon's skill and judgment to decide what shall be done, gives a general consent by implication to such operation as may, in the surgeon's professional judgment, be reasonably necessary. Reasonable latitude is allowed a surgeon but the latitude does not give him an absolute license. If a minor operation is contemplated and consent is given, either specifically or implied, the surgeon is not justified in performing a major operation which involves considerably more danger to the life and well being of the patient. It must be understood that the foregoing limitations do not apply in the case of emergency or where there are unanticipated conditions demanding immediate action for the preservation of the life and health of the patient and where consent cannot first be obtained.

In view of the foregoing general practices, I would rewrite the "operative release" to read as follows:

"I/We, ___, the parents or guardian of ___ hereby consent

Name of Patient

to whatever operative care, including the administration of an anesthetic and any operation, post-operative treatment or therapeutic procedure to be performed upon ___,

Name of Patient

as may be necessary in the judgment of the operating physician.

I/We, ___, further agree to relieve the Carrie Tingley Hospital, the operating physician and his *{*186}* assistants from any liability for damages that may be suffered as a result from such operation, post-operative treatment or therapeutic procedure.

___

Name of Patient

___

Name of Parent or Guardian"

The "publicity release" which you have submitted is, in effect, a blanket authority to use any photograph and any case history for the purpose of publicity for the hospital. It should be pointed out that the relation between the physician and patient is one of highest confidence. There is no doubt but that a patient can waive these rights but it is not an unlimited license and nothing should be contained in any photograph, case history, or any other data, which would reflect on the personal integrity, character or morals of the individual involved. I realize that calling this to your attention is superfluous but I think it is well to mention it in passing. For this reason, I believe the "publicity release" as presented by you is sufficient to allow you to use either photographs or case history, subject to the restrictions I have pointed out above.

I trust that the foregoing answers your questions. If I can be of any further assistance, please let me hear from you.