

Opinion No. 57-169

July 12, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Jr.,
Assistant Attorney General

TO: Mr. Leo P. Schwartz, Administrator, Carrie Tingley Hospital, Truth or
Consequences, New Mexico

QUESTION

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1. Will operative release signed by parents or guardians of minor patients exempt physicians and surgeons of the Carrie Tingley Hospital from the possibility of liability for their negligence or malpractice?
2. Should the Hospital buy insurance covering the resident-doctors whose pay is so low that it is almost impossible for them to carry their own insurance?

CONCLUSIONS

1. Probably not.
2. See opinion.

OPINION

ANALYSIS

In September of 1955 an Attorney General Opinion was rendered in which it was properly stated that the State is immune from suit for acts of negligence or malpractice committed by the staff members and resident physicians at the Carrie Tingley Hospital. Upon receipt of the above Opinion, the Hospital dropped its malpractice and liability insurance. In order to protect its resident doctors from the possibility of liability, an operative release has been submitted for approval, which is stated as follows:

I[We, ____, THE PARENTS OR GUARDIAN

OF ____, give our consent that whatever operative care, including the administration of anesthetics and any operation or therapeutic procedure necessary, may be performed by the physician in charge. We further agree to relieve both the Carrie Tingley Hospital and the operating physician from any and all liability.

____ (Name of Parent or Guardian)

___ (Name of Parent or Guardian)

The Board has inquired as to whether the above release will protect resident doctors and other personnel. We are of the opinion that such an agreement would probably not absolve personnel from liability resulting from their negligent acts. In **12 am. Jur.**, p. 683, the text states:

"Undoubtedly, agreements exempting persons from liability for negligence induce a want of care, for the highest incentive to the exercise of due care rests in a consciousness that a failure in this respect will fix liability to make full compensation for any injury resulting from the cause. It has therefore been declared to be a good doctrine that no person may contract against his own negligence. However, statements to the effect that any agreement by any person which assumes to place another party at the mercy of his own faulty conduct is void as against public policy have been said to be too general and sweeping to receive judicial sanction. Nevertheless, there is no doubt that the rule which forbids a person to protect himself by agreement against damages resulting from his own negligence applies where the agreement protects him against the consequences of a breach of some duty imposed by law. It is, of course, clear that a person cannot by agreement relieve himself from a duty which he owes to the public independent of the agreement. Whether he can relieve himself from the duties to the other contracting party attaching as a matter of law to the relation created by the agreement is more difficult to determine. An analysis of the decisions indicates that even under the view that a person may, under some circumstances, contract against the performance of such duties, he cannot do so where the interest of the public requires the performance thereof or where, because the parties do not stand on a footing of equality, the weaker party is compelled to submit to the stipulation."

In this particular case it cannot be said that minor patients hospitalized are on an equal footing with the physician, and certainly they would be compelled to submit to the stipulation should they care to obtain treatment. It is our opinion that the public interest is directly affected, and that the operative release would be of little or no value.

Turning to the second question, we are of the opinion that the purchase of insurance is a policy decision to be acted upon by the Directors of the Hospital. As previously stated, we feel that the Institution and its Directors are immune from suit for the negligent acts of its employees. This office has always strongly recommended insurance coverage for the staff employees in similar instances, but as indicated above the decision to purchase malpractice insurance rests with the Board.