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OPINION NO. 82-095

Syllabus:

1. A county hospital may be held liable for the failure of an employee physician to properly obtain the informed consent of the guardian of an incompetent patient prior to treatment of the patient.

2. A county hospital may promulgate rules pursuant to R.C. 339.06 with regard to obtaining the appropriate consent prior to treating an incompetent patient.

To: Robert B. Hines, Holmes County Prosecuting Attorney, Millersburg, Ohio
By: William J. Brown, Attorney General, November 15,1982

I have before me your request for my opinion concerning the potential liability of the county hospital in Holmes County. In your request you state that there are several nursing homes in your area which care for mentally incompetent patients, many of whom do not have guardians. At times, these patients are brought to the county hospital for treatment. You state that the hospital and area physicians are concerned about their potential liability for treating those incompetent patients without guardians without the proper consent being executed. Consequently, you have inquired as to the proper procedures which would protect

the hospital from liability for claims that proper consent was not given when treating mentally incompetent patients.

As an initial point, I note that although counties enjoy sovereign immunity as a general matter, see Schaffer v. Board of Trustees, 171 Ohio St. 228, 168 N.E.2d 547 (1960); Board of Commissioners v. Mighels, 7 Ohio St. 109 (1857); see also Haas v. Hayslip, 51 Ohio St. 2d 135, 364 N.E.2d 1376 (1977) (in enacting the Court of Claims Act, the legislature did not abolish the defense of sovereign immunity with regard to political subdivisions); Mitchell v. Corrigan, 72 Ohio Op. 2d 110 (Ct. Claims 1975) (Court of Claims Act did not waive the sovereign immunity of counties), the immunity of hospitals owned or operated by counties has been waived by statute.[1] R.C. 2743.02(B) reads in part:

> The state hereby waives the immunity from liability of all hospitals owned or operated by one or more political subdivisions and consents for them to be sued, and to have their liability determined in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter.

See R.C. 2743.01(B) (defining "political subdivisions" to include counties). Thus, an examination must be made of the responsibility and corresponding liability of private hospitals[2] with regard to patient consent.

In Ohio, a physician has the duty to obtain the consent of his patient before treating the patient medically or surgically.[3] R.C. 2317.54; Lacey v. Laird, 166 Ohio St. 12, 139 N.E.2d 25 (1956); Congrove v. Holmes, 37 Ohio Misc. 95, 308 N.E.2d 765 (C.P. Ross County 1973). In the absence of an emergency situation, failure to obtain such consent prior to treatment constitutes assault and battery, regardless of whether the treatment was beneficial or harmless, and negligence. Lacey v. Laird; Siegel v. Mt. Sinai Hospital, 62 Ohio App. 2d 12, 403 N.E.2d 202 (Cuyahoga

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[1]R.C. 2743.02(C), as well as R.C. 339.06, authorizes the purchase of insurance to cover the operations, agents, employees, and members of the governing board of a county hospital. See 1978 Op. Att'y Gen. No. 78-060. R.C. 2743.02(C) also provides for the indemnification of such persons acting within the scope of their duties or acting on behalf of the hospital.

[2]It is also helpful to examine the law with regard to the liability of hospitals owned by municipalities. Even prior to the enactment of the Court of Claims Act, the defense of sovereign immunity was not available to a municipality in the operation of its hospitals, and a municipality was liable for the negligence of its hospitals' employees. Sears v. City of Cincinnati, 31 Ohio St. 2d 157, 285 N.E.2d 732 (1972).

[3]This duty devolves from an individual's right of privacy, found in the fourteenth amendment's concept of liberty and in the penumbra of the Bill of Rights, which encompasses the right of an individual to make fundamental personal decisions concerning one's own life and health. Roe v. Wade, 410 U.S. 113 (1973). See Whalen v. Roe, 429 U.S. 589 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972). See also Ohio Const. art. I, §1; Jacobs v. Benedict, 35 Ohio Misc. 92, 301 N.E.2d 723 (C.P. Hamilton County 1973), aff'd, 39 Ohio App. 2d 141, 316 N.E.2d 898 (Hamilton County 1973) (interpreting Ohio Const. art. I, §1 as establishing the principle that everyone has the right to be let alone); Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

In the area of medical treatment, every person has the right to determine what is done with his or her own body. Roe v. Wade; Siegel v. Mt. Sinai Hospital, 62 Ohio App. 2d 12, 403 N.E.2d 202 (Cuyahoga County 1978); Congrove v. Holmes, 37 Ohio Misc. 95, 308 N.E.2d 765 (C.P. Ross County 1973). The decision to obtain or reject medical treatment is both personal and fundamental, and thus is a decision protected by an individual's right of privacy. See Andrews v. Ballard, 498 F.Supp. 1038 (S.D. Texas 1980). It is this right which forms the basis of the doctrine of informed consent.

County 1978); Belcher v. Carter, 13 Ohio App. 2d 113, 234 N.E.2d 311 (Franklin County 1967); Congrove v. Holmes. The patient's consent will be invalid if he was not fully informed of the consequences of the medical or therapeutic procedures performed upon him. The physician has a duty to his patient to fully inform him of the procedures used on his body, including the anticipated results, the risks and dangers of the procedures, and alternatives to the therapy. See R.C. 2317.54. A breach of this duty constitutes a battery, see Belcher v. Carter, or medical negligence if the dangers actually materialize and are the proximate cause of the injury, and if the patient would have decided against the treatment if the risks had been disclosed. Siegel v. Mt. Sinai Hospital; Congrove v. Holmes.

Incompetent patients have the same right as competent patients to determine what treatment they will and will not receive. See Leach v. Akron General Medical Center, 68 Ohio Misc. 1, 426 N.E.2d 809 (P. Ct. Summit County 1981). However, this right must be exercised by a person who has legal authority to consent to treatment on behalf of the incompetent patient. R.C. 2317.54. A guardian may be appointed for an incompetent person by the probate court, either on the court's own motion, or on an application by any interested party.[4] R.C. 2111.02. See R.C. 2101.24(D) (probate court has exclusive jurisdiction to "appoint and remove guardians. . .direct and control their conduct, and settle their accounts"); R.C. 2101.24(F) (probate court has exclusive jurisdiction to "make inquests respecting persons who are unable to manage their property and affairs effectively for reasons such as mental illness, mental deficiency, or physical illness or disability, subject to guardianship"). A guardian may then exercise his ward's right to determine medical treatment.[5] See R.C. 2111.13; see also In Re Estate of Burns, 52 Ohio L. Abs. 134, 79 N.E.2d 234 (App. Darke County 1948). The failure of a physician to obtain a guardian's consent, again, could result in the imposition of liability.

Although a physician has the duty to obtain his patient's informed consent prior to treatment, R.C. 2317.54 explicitly states: "A hospital shall not be held liable for a physician's failure to obtain an informed consent from his patient prior to a surgical or medical procedure or course of procedures, unless the physician is an employee of the hospital." Consequently, a hospital may be held liable for the failure of an employee physician to obtain a patient's informed consent, although such liability will not attach for the failure of physicians who are not employed by the hospital to obtain such consent. See generally R.C. 339.06 (employment of physicians by county hospital). This distinction comports with the common law doctrine of respondeat superior, under which a hospital may be held liable for the torts of its employees and agents, but not for the torts of its independent contractors. See Cooper v. Sisters of Charity of Cincinnati, Inc., 27 Ohio St. 2d 242, 272 N.E.2d 97 (1971); Jones v. Hawkes Hospital of Mt. Carmel, 175 Ohio St. 503, 196 N.E.2d 592 (1964); Davidson v. Youngstown Hospital Association, 19 Ohio App. 2d 246, 250 N.E.2d 892 (Mahoning County 1969). See also Klema v. St. Elizabeth's

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[4] An "incompetent" for purposes of the appointment of a guardian is defined as:

> any person who by reason of advanced age, improvidence, or mental or physical disability or infirmity, chronic alcoholism, mental retardation, or mental illness, is incapable of taking proper care of himself or his property or fails to provide for his family or other persons for whom he is charged by law to provide, or any person confined to a penal institution within this state.

R.C. 2111.01(D).

[5] A guardian may petition the probate court for instructions with regard to his ward's care. See R.C. 2101.24 (the probate court has full equitable powers to fully dispose of any matter properly before it, unless otherwise limited by statute); R.C. 2111.13(D) (guardian must obey all the orders of the probate court with regard to the guardianship). In Leach v. Akron General Medical Center, the court exercised its parens patriae power to determine and exercise an incompetent patient's wishes with regard to the future course of her medical treatment through the doctrine of substituted judgment.

Hospital of Youngstown, 170 Ohio St. 519, 166 N.E.2d 765 (1960); Avellone v. St. John's Hospital, 165 Ohio St. 467, 135 N.E.2d 410 (1956). In determining the potential liability of a hospital, therefore, it is important to determine whether a physician is an employee or independent contractor of the hospital.

The primary test given for distinguishing between the relationships of employer and employee (or principal and agent) and employer and independent contractor is whether the employer has retained control, or the right of control, over the mode and manner in which the work is done. Councell v. Douglas, 163 Ohio St. 292, 126 N.E.2d 597 (1955). If the employer has retained control, the relationship is one of employer and employee; if not, the relationship is one of employer and independent contractor. Councell v. Douglas. In a hospital setting, however, it is unclear whether "control" is to be interpreted narrowly to mean control and diagnosis of patients, or to be interpreted broadly to mean control of personnel and patient care policy. Hannola v. City of Lakewood, 68 Ohio App. 2d 61, 426 N.E.2d 1187 (Cuyahoga County 1980). The court in Hannola suggests that a hospital's power to grant and revoke staff privileges indicates the hospital's right to control a physician's mode and manner of work, and thus the existence of an employer-employee relationship. The court also remarked that a hospital's establishment of policy concerning patient care indicated the hospital's control over a physician. Whether other courts will interpret "control" so broadly is unclear, see Cooper v. Sisters of Charity of Cincinnati, Inc., especially in the context of R.C. 2317.54, which specifically carves out an exception to a hospital's immunity from liability in the case of employee physicians who fail to obtain a patient's informed consent. However, even assuming that a physician is an independent contractor, if a hospital through its actions induces the belief that a doctor is in its employ, and a patient relies on that representation to his detriment, the hospital, under the doctrine of agency by estoppel, will be estopped from denying that the physician is its agent, and may be held liable for the negligence of the physician. See Lundberg v. Bay View Hospital, 175 Ohio St. 133, 191 N.E.2d 821 (1963); Councell v. Douglas; Hannola v. City of Lakewood.

R.C. 339.06 states in part: "The board [of county hospital trustees] shall have the entire management and control of the hospital, and shall establish such rules for its government and the admission of persons as are expedient." Pursuant to this provision, and in light of the hospital's potential liability for battery and negligence due to the failure of its employee physicians to obtain a patient's informed consent, as outlined above, it is within the hospital board's power to pass regulations governing the admission and treatment of incompetent patients. If a patient already has a guardian upon admittance to the hospital, the regulations should, of course, provide for obtaining the consent of the guardian. If, however, a patient who does not have a guardian is brought to the hospital, and it reasonably appears that the patient is incompetent, hospital regulations should provide a procedure for the appointment of a guardian as well as the obtainment of his consent prior to the commencement of treatment, assuming there is no emergency.[6] Considering the doubt that Hannola raises as to a hospital's liability

[6]If a patient were brought to the hospital, and his consent obtained as if he were competent, and it was later contended that the patient was in fact, incompetent, and thus unable to consent to treatment, the hospital may be held secondarily liable for battery or negligence, as discussed above. The plaintiff in such a case would first have to rebut the legal presumption that every person is competent, see Reiser v. Bernhard, 112 Ohio App. 221, 169 N.E.2d 496 (Franklin County 1959), and would bear the burden of proving the patient was incompetent. See Annot., 25 A.L.R. 3d 1439 (1969). If the plaintiff could prove that the patient was incompetent, thus vitiating any consent the patient may have given, the hospital and its employee physician would be liable in a battery action, even though the treatment was harmless or beneficial. See Lacey v. Laird; Belcher v. Carter. See also Annot., 25 A.L.R. 3d 1439 (1969). However, only nominal damages could be recovered in such an action. Lacey v. Laird. In a negligence action, in which actual damages for resulting harm could be recovered, the plaintiff would, again, have to overcome the presumption of competency, and prove the patient was incompetent, and then show inter alia, that the physician was negligent in not recognizing his patient's incompetence. See Annot., 25 A.L.R. 3d 1439 (1969).

for its independent contractors, I see no reason why a hospital's regulations concerning the informed consent of incompetent patients need be limited to the patients of employee physicians.

I also note that, in addition to the derivative liability which may be imposed upon a hospital through the theories of respondeat superior or agency by estoppel, a hospital has certain independent duties, the breach of which will constitute negligence. There is authority to the effect that a hospital is responsible for maintaining the customary standards of medical care, and upgrading those standards, as necessary. Khan v. Suburban Community Hospital, 45 Ohio St. 2d 39, 340 N.E.2d 398 (1976); Davidson v. Youngstown Hospital Association. A hospital can be held responsible for monitoring the treatment procedures and medical care rendered to patients, and for supervising the work of physicians and staff in order to insure proper standards of care are being upheld. Hannola v. City of Lakewood; Davidson v. Youngstown Hospital Association. In order to carry out these responsibilities, a hospital governing board has the authority to promulgate regulations concerning the training and experience of the hospital staff, the conditions under which particular services are performed, and other rules which protect patients and insure that proper health care standards are being maintained. Burks v. Christ Hospital, 19 Ohio St. 2d 128, 249 N.E.2d 829 (1969); Davidson v. Youngstown Hospital Association.

In your letter of request, you question whether the procedures outlined in R.C. 5122.271 are sufficient to protect the hospital from liability. As you note, R.C. 5122.271, which addresses the consent of patients in hospitals for the mentally ill, is not directly applicable. However, the procedures outlined therein seem quite adequate with regard to protecting an incompetent's rights. I note only that the treatment procedures listed in R.C. 5122.271 are drastic or very intrusive in nature. Informed consent must be obtained for any surgical or medical treatment, even though it may be "minor" or relatively risk-free.

In conclusion, it is my opinion, and you are advised, that:

1. A county hospital may be held liable for the failure of an employee physician to properly obtain the informed consent of the guardian of an incompetent patient prior to treatment of the patient.

2. A county hospital may promulgate rules pursuant to R.C. 339.06 with regard to obtaining the appropriate consent prior to treating an incompetent patient.