



Case Western Reserve Law Review

Volume 17 | Issue 3

1966

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Recommended Citation

Marian F. Ratnoff, *Hospitals--Management of Institutions--Conflict between Director's Inspection Right and Physician-Therapist Privilege* [*Hyman v. Jewish" Chronsc Disease Hosp.*, 15 N.Y.2d 317, 206 N.E.2d 338, 258 N.Y.S.2d 397 (1965)], 17 W. Res. L. Rev. 883 (1966)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol17/iss3/25>

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Recent Decisions

HOSPITALS — MANAGEMENT OF INSTITUTIONS — CONFLICT BETWEEN DIRECTOR'S INSPECTION RIGHT AND PHYSICIAN-PATIENT PRIVILEGE

Hyman v. Jewish Chronic Disease Hosp.,
15 N.Y.2d 317, 206 N.E.2d 338, 258 N.Y.S.2d 397 (1965).

In almost every medical research problem, a time comes when laboratory experiments and observations must be confirmed in human subjects. The step from the use of laboratory animals to human beings is cluttered with moral uncertainties, forcing the clinical investigator to balance the ultimate benefit to society against the risk to a few. Unfortunately, the law is of little help to the research physician. Although doctors are aware of such legal concepts as negligence, consent, malpractice, and assault, these familiar doctrines skirt crucial moral issues and are more useful in guiding the practicing physician than the clinical investigator. The doctrine which holds the doctor to the standard of practice in his community is difficult to reconcile with the need to develop new techniques and remedies. Can a clinical investigator be charged with negligence when his experiment is carefully conceived, scientifically accurate, and meticulously performed? What constitutes intelligent consent to a proposed experiment? Where can the doctor find guidance outside of his own profession?

A partial answer to these questions is contained in *Hyman v. Jewish Chronic Disease Hosp.*¹ in which the New York Court of Appeals granted leave to a member of that hospital's board of directors to examine the hospital records of certain patients to determine the alleged impropriety of experiments performed on them. The controversy in *Hyman* began when doctors of the Sloan-Kettering Institute supervised and directed the injection of living cancer cells into certain patients of the Jewish Chronic Disease Hospital.² Previously, in experiments supported by the United States Public Health Service and the American Cancer Society, doctors had injected live cancer cells into healthy volunteers at the Ohio State Penitentiary.³

¹ 15 N.Y.2d 317, 206 N.E.2d 338, 258 N.Y.S.2d 397 (1965).

² Langer, *Human Experimentation: Cancer Studies at Sloan-Kettering Stir Public Debate on Medical Ethics*, 143 SCIENCE 551 (1964).

³ *Ibid.*

They learned from these trials that healthy individuals rejected cancer cells within six to eight weeks. In contrast, rejection was much slower in cancer patients who also received the injections.⁴ Doctors could not decide if the slow rejection of the cells in cancer patients was due to their illness or to their weakened condition.⁵ Believing this determination to be critical to an understanding of the disease,⁶ they injected live cancer cells into twenty-two non-cancerous but debilitated patients at the defendant hospital.⁷

The hospital and doctors involved in the experiment allegedly obtained oral permission from the patients before the injection but "the patients were not told that the injection was of cancer cells because the doctors did not wish to stir up any unnecessary anxieties in the patients."⁸ The doctors felt there was no need to elaborate because they believed no risk was involved.⁹

The subject litigation evolved from the question of whether the patients were truly aware of the nature of the injections to which they were subjected.¹⁰ Hyman, the petitioner, a lay member of the hospital's board of directors, upon learning of the experiment from staff doctors who had resigned in protest, alleged that the patients did not comprehend the true nature of the procedure and were therefore incompetent to give their consent.¹¹ When hospital officials refused the petitioner access to the patients' medical records, citing the physician-patient privilege statute,¹² Hyman petitioned the

⁴ *Id.* at 552.

⁵ *Ibid.*

⁶ *Hyman v. Jewish Chronic Disease Hosp.*, 21 App. Div. 2d 495, 251 N.Y.S.2d 818 (1964), *rev'd*, 15 N.Y.2d 317, 206 N.E.2d 338, 258 N.Y.S.2d 397 (1965). In stating the facts of the case, the appellate division stated:

The experiments showed that the sick and debilitated non-cancer patients had the same response to foreign cancer cells as healthy volunteers, that is, there was a prompt rejection of the transplant. This in turn opened a wide possibility that, if there be such a biological mechanism as a defense against cancer, it may be possible to stimulate it either before cancer strikes or perhaps even later when the cancer has taken hold. *Id.* at 497, 251 N.Y.S.2d at 820.

⁷ Langer, *supra* note 2, at 552.

⁸ *Hyman v. Jewish Chronic Disease Hosp.*, 21 App. Div. 2d 495, 497, 251 N.Y.S.2d 818, 819 (1964), *rev'd*, 15 N.Y.2d 317, 206 N.E.2d 338, 258 N.Y.S.2d 397 (1965).

⁹ Langer, *supra* note 2, at 552.

¹⁰ *Ibid.*

¹¹ *Ibid.* "The 22 patients . . . were between 43 and 83 years old. All were sick. . . . Some of the patients were not even capable of giving consent: several were senile, some spoke only Yiddish, and one was deaf." *Ibid.*

¹² N.Y. CIV. PRAC. § 4504(a).

New York Supreme Court for the right as a corporate director to examine the pertinent hospital records and charts.¹³ The trial court refused to decide the issue of the impropriety of the experiments which the director raised, but supported his absolute right to inspect *corporate records*¹⁴ and said that the medical records must be accessible to him.¹⁵

On appeal, the appellate division denied the inspection order on the ground that it violated the physician-patient privilege, discounted petitioner's fear of personal liability for improper management and added that since written consent to experimental procedures was now required at defendant hospital as a consequence of the dispute, the director's need to inspect the records was moot.¹⁶

Rejecting the appellate division's insistence upon the supremacy of the physician-patient privilege,¹⁷ the New York Court of Appeals held that the director of a hospital corporation was entitled as a matter of law to inspect hospital records in the performance of his stewardship and that the secrecy imposed upon hospital and medical records, in the absence of a waiver by the patient, did not extend to qualified persons such as a hospital director.¹⁸ The privacy of the patient could be protected, as the trial court had pointed out, by a simple order requiring that the patient's name be concealed.¹⁹ To the hospital's argument that, in the absence of his own bad faith,

¹³ Under the provisions of N.Y. CIV. PRAC. § 1801.

¹⁴ Application of Hyman, 42 Misc. 2d 427, 248 N.Y.S.2d 245 (Sup. Ct. 1964), *aff'd sub nom.*, Hyman v. Jewish Chronic Disease Hosp., 15 N.Y.2d 317, 206 N.E.2d 338, 258 N.Y.S.2d 397 (1965).

¹⁵ Quoting HAYT & GROESCHEL, LAW OF HOSPITAL, PHYSICIAN AND PATIENT (2d ed. 1952), a well-known text written by a lawyer who filed an amicus curiae brief for the defendant hospital when the case went up on appeal. Hyman v. Jewish Chronic Disease Hosp., 21 App. Div. 2d 495, 251 N.Y.S.2d 818 (1964), *rev'd*, 15 N.Y.2d 317, 206 N.E.2d 338, 258 N.Y.S.2d 397 (1965). The trial court said that although the medical record was the hospital's property, it must be accessible to all those with a legitimate interest in it. Ruling that Hyman, as a corporate director, was one with, legitimate interest, the trial court noted that the physician-patient privilege would not be violated because the information sought would not be disclosed to outsiders or to a formal investigating committee. Hyman v. Jewish Chronic Disease Hosp., 42 Misc. 2d 427, 248 N.Y.S.2d 245, (Sup. Ct. 1964), *aff'd*, 15 N.Y.2d 317, 206 N.E.2d 338, 258 N.Y.S.2d 397 (1965).

¹⁶ Hyman v. Jewish Chronic Disease Hosp., 21 App. Div. 2d 495, 257 N.Y.S.2d 818 (1964), *rev'd*, 15 N.Y.2d 317, 206 N.E.2d 338, 258 N.Y.S.2d 397 (1965).

¹⁷ 8 WIGMORE, EVIDENCE § 2380a (McNaughton rev. 1961); 54 HARV. L. REV. 705-06 (1961); 26 CORNELL L.Q. 482 (1941).

¹⁸ Hyman v. Jewish Chronic Disease Hosp., 15 N.Y.2d 317, 206 N.E.2d 338, 258 N.Y.S.2d 397 (1965).

¹⁹ *Ibid.*

the corporate director was not personally liable for any impropriety in the management of the corporation,²⁰ the court countered that the *possibility* of the corporation's liability entitled the director to examine the situation and that he could act for himself in carrying out his duties without authorization from the patients whom he did not claim to represent.²¹

The subject case brings into conflict two well-established principles of law — the corporate director's inspection right and the physician-patient privilege. An examination of the pertinent legal literature fails to disclose another case in which the physician-patient privilege has been held to be secondary to the rights of a corporate director. Certainly, as the court pointed out, the inspection right of a corporate director is firmly established in New York²² and other jurisdictions.²³ Even as a common law principle, a director's right of inspection is absolute.²⁴

Modern courts require "directors and officers . . . to act carefully in the light of their actual knowledge and such knowledge as they should have gained by reasonable care and skill."²⁵ Presumably, one of the director's sources of knowledge comes by inspecting corporate records. In addition, many statutes delineate the duty of due care owed by directors to their corporation.²⁶ Whether inspection of hospital records falls within the ambit of "due care," as it has been defined in various statutes, is not clear.²⁷

²⁰ Hinkle Iron Co. v. Kohn, 229 N.Y. 179, 128 N.E. 113 (1920).

²¹ Hyman v. Jewish Chronic Disease Hosp., 15 N.Y.2d 317, 206 N.E.2d 338, 258 N.Y.S.2d 397 (1965). The dissent maintained that even though the experiment was not conducted for diagnosis and treatment of the patients' illnesses, the recorded results came within the physician-patient privilege, and in the absence of waiver by the patients, petitioner was not entitled to inspect the records, a privilege established in New York City Council v. Goldwater, 284 N.Y. 296, 31 N.E.2d 31 (1940). *Accord*, Munzer v. State, 41 N.Y.S.2d 98 (Ct. Cl. 1943); Munzer v. Blaisdell, 183 Misc. 773, 49 N.Y.S.2d 915, *aff'd*, 269 App. Div. 970, 58 N.Y.S.2d 359 (1944).

²² Because a corporate director's positive duty of due care subjects him to potential liability for corporate mismanagement, the courts of New York have given him an unqualified right to inspect corporate records to be fully informed of the affairs of the corporation. *E.g.*, Cohen v. Cocoline Prods., Inc., 309 N.Y. 119, 127 N.E.2d 906 (1955). The privilege was extended to directors of a membership corporation in Martin v. Martin Foundation, Inc., 32 Misc. 2d 873, 224 N.Y.S.2d 972 (Sup. Ct. 1962); Davids v. Sillcox, 297 N.Y. 355, 79 N.E.2d 440 (1948). This right was said to have originated in the common law. People *ex rel.* Muir v. Throop, 12 Wend. 183 (N.Y. Sup. Ct. 1834).

²³ HENN, CORPORATIONS AND OTHER BUSINESS ENTERPRISES 346 (1961).

²⁴ *Ibid.*

²⁵ *Id.* at 367.

²⁶ *Id.* at 366.

²⁷ *Ibid.*

The legal protection of *medical records as an evidentiary rule* is firmly established.²⁸ Although at common law a physician could not refuse to divulge information about his patient,²⁹ the communication of medical confidences has been specifically protected by statute in most jurisdictions.³⁰ While courts in some jurisdictions have construed these statutes strictly, as abrogations of the common law, and have confined them to testimony in a court of record,³¹ the majority have interpreted the statutes more liberally.³² The classic example of the latter view is *New York City Council v. Goldwater*.³³ There, the court refused to order the release of hospital records to a legislative committee of the municipal government investigating charges of negligence and malpractice in municipal hospitals, holding that the physician-patient privilege would not be limited to civil proceedings alone. This philosophy has been followed in New York,³⁴ and only in rare instances have the New York courts allowed any latitude as a matter of public policy.³⁵

Despite overtones of corporate law and evidentiary rules, there remain, in *Hyman*, undertones of the moral dilemma about which the court refused to speak directly. The underlying issue is the extent to which the laity can and should control human experimentation.³⁶

²⁸ 8 WIGMORE, *op. cit. supra* note 17, § 2380; 58 AM. JUR. *Witnesses* §§ 401-03 (1948).

²⁹ *Ibid.*

³⁰ *E.g.*, N.Y. CIV. PRAC. § 4504(a); OHIO REV. CODE § 2317.02. To date, thirty-four states have physician-patient privilege legislation. See O'Neill, *Ohio's Physician-Patient Privilege in Personal Injury Cases — Time for Reform*, 16 W. RES. L. REV. 334 n.7 (1965).

³¹ *E.g.*, *Southwest Metals Co. v. Gomez*, 4 F.2d 215 (9th Cir. 1925); *William Laurie Co. v. McCullough*, 174 Ind. 477, 90 N.E. 1014 (1910).

³² See 17 Am. St. Rep. 566 (1899); 58 AM. JUR. *Witnesses* § 403 (1948); Annot., 133 A.L.R. 732 (1941); 8 WIGMORE, *op. cit. supra* note 17, § 2380.

³³ 284 N.Y. 296, 31 N.E.2d 31 (1940).

³⁴ *Munzer v. State*, 41 N.Y.S.2d 98 (Ct. Cl. 1943); *Munzer v. Blaisdell*, 183 Misc. 773, 49 N.Y.S.2d 915 (Sup. Ct. 1944), *aff'd*, 269 App. Div. 970, 58 N.Y.S.2d 359 (1945) allowed damages against the director of a state mental hospital for releasing plaintiff's record at that hospital to a member of the board of visitors. The court indicated that the principal functions of a board of visitors were visitation and inspection, but only as to the general welfare and business administration of the hospital. Maintenance of secrecy was required to prevent the patient from suffering humiliation and possible damage from disclosures of matters intensely personal to him.

³⁵ *Thomas v. Morris*, 286 N.Y. 266, 36 N.E.2d 141 (1941). The liberal interpretation and extension of the doctor-patient privilege has been sharply criticized by Wigmore and others as an impediment to the ascertainment of the truth. See 8 WIGMORE, *op. cit. supra* note 17; 54 HARV. L. REV. 705-06 (1941); O'Neill, *supra* note 30.

³⁶ *Hyman* presents two dramatic departures from the way doctors tend to look at the problem. Doctors often seek prior approval of their proposed studies. They are

If *Hyman* gives the lay director the right to examine hospital records, to what extent is he expected to comprehend what he reads in the chart? How is he to determine whether the experiments are essential to the advancement of medical knowledge? Must he possess special knowledge to determine the risk to the proposed subject? If *Hyman* means that the director can be held personally liable for his bad faith in failing to examine hospital records, will he be held liable simply because his own knowledge is not competent to make a judgment? The New York court offers no answers.

The implications of the present decision extend, unexpectedly, in another direction. Professional practice in hospitals is usually under the aegis of a professional board or committee. The lay board concerns itself with matters of broad policy and financial support of the institution. The intermediate court in the present litigation clearly felt that the proper function of visiting boards is visitation.³⁷ Has the New York Court of Appeals, in rejecting this limited view of the director's function, opened the door to the review of other aspects of professional care which might be encompassed within the corporate director's inspection right?

Since the court based its decision on corporate law, it might have added that reasonable reliance by a corporate director on expert opinion has been allowed by some courts.³⁸ The decision might have pointed the way out of the enigma posed by human experimentation by suggesting the possibility that the corporate director be informed of proposed experimentation and that he seek the expert opinion of doctors who have a disinterested view of the proposed work. *Hyman* could have been the impetus for the establishment

advised to look to the department heads in medical schools and hospitals, to the specialized societies to which they belong, and to the editors of medical and scientific journals for guidance before proceeding. Many medical schools have committees which review projected work involving human subjects. See, e.g., Editorial, 2 BRITISH MEDICAL J. 179 (1954); Welt, *Reflections on the Problem of Human Experimentation*, 25 CONN. MEDICINE 75, 77 (1961); HARVARD MEDICAL SCHOOL, RULES GOVERNING PARTICIPATION OF MEDICAL STUDENTS AS EXPERIMENTAL SUBJECTS, Jan. 1, 1958. None of the declarations and pronouncements of medical bodies about human experimentation speak to the pre-experimental control by any group other than doctors.

Hyman, in contrast to the medical approach to the problem, allows a lay person to be made a party to the review process. *Hyman* seems to indicate that that review can be *post facto*. The case does not suggest another possible alternative — that the decision to do human experiments receive the *prior* approval of a lay board of directors.

³⁷ *Hyman v. Jewish Chronic Disease Hosp.*, 21 App. Div.2d 495, 251 N.Y.S.2d 818 (1964), *rev'd*, 15 N.Y.2d 317, 206 N.E.2d 338, 259 N.Y.S.2d 397 (1965).

³⁸ HENN, *op. cit. supra* note 23, at 367.