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Hospital Privileges

*Bernard D. Herring**

CONDITIONS OF MODERN MEDICINE make it almost imperative that the physician have a hospital in which he may practice; on the other hand, the hospital cannot exist without its medical staff. The alleviation of human suffering and the restoration of health regardless of the patient's financial status is the common cause of both the hospital and the physician. In essence a mutual partnership is formed, in which definite obligations to the other and the community, which both are serving, are accepted.

The governing body of the hospital is the servant of the community in which the hospital operates. Probably its most important responsibility is to provide a medical staff and to make certain that it conforms to certain standards which the community has a right to expect. As a corollary of this function, the governing body has the power to appoint a qualified medical staff and to remove those who are unqualified or who fail to comply with the reasonable rules and regulations of the hospital. As one might expect, there has been a rising tide of litigation challenging the rights of the governing board.

Whatever the scope of discretion residing in the governing body, courts usually require that it affirmatively exercise such discretion and not delegate or abandon it to other parties. This applies to both private and public hospital governing boards. In the *Ware* case,[1] involving a public hospital governing board, the Supreme Court of Arkansas held it unreasonable to require membership in the county medical society as a condition to a physician's practice in the hospital, because this would constitute an unlawful delegation of powers to the county medical society.[1] The court agreed that the public hospital may adopt rules that guarantee the safety, interest and welfare of the patients and the general public, but held that its governing body cannot exclude a physician by rules that are arbitrary and capricious. The membership rule was found arbitrary because the medical

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[1] Ware v. Benedict, 225 Ark. 185, 280 S.W. 2d 234 (1955).

society could reject applications for membership for no reason at all.[2]

The *Greisman* case involved a private non-profit hospital's right to delegate responsibility respecting staff membership to a private organization.[3] A court held invalid a hospital's by-law, requiring membership in a county medical society and graduation from an approved medical school as conditions for staff membership. The plaintiff, an osteopath, had unrestricted license to practice medicine and surgery in the state of New Jersey. The hospital refused to permit him to file an application for membership on the courtesy staff. In so doing the hospital did not question the osteopath's professional or personal qualifications but based its actions solely on the fact that the osteopath did not qualify under its bylaws. Since it is a private institution, the hospital considered its staff admission policies to be discretionary. However, the court said that although the hospital is private in the sense that it is non-governmental, it is not private in other respects. The hospital is dedicated to the vital public purpose of serving the sick and injured. A great part of its funds come from public sources and through public solicitation; it is exempt from taxation because of its non-profit and public aspects. The court considered the restrictive bylaw as an arbitrary and therefore invalid exercise of the hospital's fiduciary power.

Procedural fairness in general will be determined by the hospital board's adherence or lack of adherence to its own rules and regulations.[4] When the board has the uncontrolled discretion of granting, withholding or withdrawing of privileges, the board is under no obligation to grant a hearing,[5] and if one is granted the court need not consider whether it was fair.[6] Nevertheless, when a hospital's rules and regulations provide for notice and hearing, then the courts do require the hospital to abide by

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[2] Falcone v. Middlesex County Medical Soc., 34 N. J. 582, 170 A. 2d 791 (1961). As to associational rights generally, see, Oleck, Non-Profit Corps., Orgs. & Assns., chap. 25 (2d ed., 1965, now in press).

[3] Griesman v. Newcomb Hospital, 40 N. J. 389, 192 A. 2d 817 (1963).

[4] Wyatt v. Tahoe Forest Hospital District, 174 Col. App. 2d 709, 345 P. 2d 93 (1959).

[5] Akopiantz v. Board of County Commissioners, 65 N. M. 125, 333 P. 2d 611 (1958).

[6] Dayan v. Wood River Township Hospital, 118 Ill. App. 2d 263, 152 N.E. 2d 205 (1958).

its own rules.[7] In its ruling in the *Rosner* case, the California Supreme Court established that a Board of the district hospital could not act capriciously and arbitrarily in denial of staff privileges to plaintiff because he was not "temperamentally suitable for hospital staff practice." [8] The Court ruled that the Board had exceeded its statutory authority in excluding the doctor. The trouble had resulted from disagreement as to treatment of patients, the doctor's criticism of hospital personnel and practices, and his appearance in liability suits as a witness. The Court held that the denial of staff privileges in the district would have the effect of denying the doctor the right to exercise his profession.

Procedural rights are invoked when there is a question of denial of right or privilege of caring for the physician's own patient in the hospital,[9] denial of reappointment,[10] or when an attempt is made to remove a physician from the staff.[11] Rarely are procedural rights involved in consideration of original staff appointments.

The denial of privilege to practice medicine may be considered as a restraint of trade. In the *Willis* case, a California osteopath alleged that the hospital trustees, certain osteopaths and certain doctors of medicine had combined and conspired to prevent him and other osteopaths who moved into the county in which the hospital was located from practising the profession of osteopathy. On appeal, this was found to be a cause of action.[12] The court repudiated, however, any suggestion that doctors may not join together in good faith to advance the ethics of their professions and the cause of good health, even if in the process some doctors might suffer restriction of access to hospital practices.

Recently the fundamental question, "Do hospital patients have rights?" has come up. Do adults, in full control of their mental faculties, have the right to refuse certain types of medical

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[7] Khoury v. Community Memorial Hospital, 203 Va. 236, 123 S.E. 2d 533 (1962).

[8] Rosner v. Eden Township Hospital District, 25 Cal. Rpt. 551, 375 P. 2d 431 (1962).

[9] Alpert v. Board of Governors of City Hospital, 286 App. Div. 542, 145 N.Y.S. 2d 534 (1955).

[10] *Supra* n. 6.

[11] Johnson v. City of Ripon, 259 Wis. 84, 47 N.W. 2d 328 (1951).

[12] Willis v. Santa Anna Community Hospital, 58 Cal. 2d 592, 375 P. 2d 431 (1962).

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treatment which doctors recommend? In particular does this issue arise in connection with Jehovah's Witnesses.

One case involved a twenty-five year old married woman who was treated by a Georgetown Hospital for a ruptured ulcer.[13] The attending doctors determined that she would die if she did not receive blood transfusions, but would have a 50 per cent chance of living if she did. Since both the patient and her husband were Jehovah's Witnesses, neither would consent to transfusion, which is contrary to their religious beliefs (Genesis 9:4, Leviticus 7:26, 17:14, Acts 15:20, 29). After a federal district court refused to issue an order authorizing blood transfusion to an adult patient without her or her husband's consent, a judge of the United States Court of Appeals went to the hospital and talked to the patient, her husband and physicians. He then issued a temporary order, authorizing the administration of such transfusions as physicians deemed necessary to save the patient's life. The transfusions were administered. Later the patient petitioned for rehearing of the application for the order. On Feb. 3, 1964, the Court of Appeals, by a majority judgment, with four of the nine judges dissenting, dismissed the petition on the grounds that the patient's recovery deprived the dispute of any practical consequences. The dissenting judges were most outspoken in their disagreement. Judge Miller pointed out that no single judge of the Court of Appeals had the power to act alone. Judge Burger, in a separate dissenting opinion, submitted that while courts have a proper function in their allotted area, they are not entitled to manage peoples' private affairs.

A recent Illinois case involved a 39 year old female patient with a bleeding peptic ulcer. When she became unconscious from loss of blood, her physician, who had been treating her for two years and was fully aware of her religious beliefs, decided that a transfusion was imperative. He testified that the patient would die within 24 hours if she did not receive the transfusion. The trial court appointed a "conservator," who authorized the blood transfusions in behalf of the patient. Following her release from the hospital the patient and her husband sought to have the court order voided as a matter of principle. Patient urged that she had been denied the right to freedom of religion, discrimi-

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[13] Application of the President and Directors of Georgetown College, 331 F. 2d 1000 (D.C., Cir., 1964).

nated against and placed in the position of a "second class citizen" who was not allowed the right of free exercise of religion, enjoyed by all others and, on the basis of her physician's contrary opinions, deprived of her right to be "let alone." She pointed out that she had signed a release freeing both the physician and the hospital from liability for any consequences that might result from her refusal to submit to blood transfusion. The probate court dismissed the petition of the patient and her husband on the ground that the proceedings were moot.

However, when the case came to the state supreme court on appeal, the tribunal decided otherwise.[14] It held that "even though we might consider (the patient's) beliefs unwise, foolish or ridiculous, in the absence of overriding danger to society we may not interfere." Thus there appears to be growing awareness by the judiciary of individual rights of patients and their right to reject an accepted form of therapy. Recently a 21 year old married woman delivered a healthy baby but subsequently developed massive uterine bleeding, necessitating an emergency hysterectomy. The hemoglobin was checked several times at 1.5 Gms. and hematocrit 5.5%. Patient and her husband were advised of her extremely precarious condition. Though semicomatose and cyanotic she adamantly refused blood transfusion, because of religious convictions. This patient survived without blood transfusion and is enjoying good health today. To some this kind of religious conviction is foolhardy and unwise. However, persons with faith and integrity have often been misunderstood, chided and persecuted, sometimes even by legal authorities. Do our staff privileges, which are so sacred to us, grant us the right to deny to individuals their religious rights when they clash with accepted medical therapy? Indeed, there are judicial decisions to the effect that we do not have the right or privilege (on the basis of our medical knowledge) to deny a competent adult the right to follow his religious convictions, even though death may be imminent.

Finally, racial discrimination has been linked with staff privileges or the lack of them. In the *Simkins* case the plaintiffs were Negro physicians, dentists and patients seeking an injunction to restrain the Moses H. Cone Hospital from continuing to

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[14] Brooks, Estate v. Brooks, 32 Ill. 2d 361, 205 N.E. 2d 435 (1965).

deny to Negro physicians and dentists the use of staff privileges and from continuing to deny admission of patients on the basis of race.[15] Too, plaintiff asked that, portions of the Hill-Burton Act, permitting separate but equal facilities, be declared unconstitutional.

In the District Court the issue revolved around whether or not the defendants were instrumentalities of the government. The court concluded that the separate but equal clause in the Hill-Burton Act was not in issue because the hospital did not claim the right to discriminate, and held that the Fourteenth Amendment did not require it to grant staff privileges. This decision was appealed.

The United States Court of Appeals propounded the legal question in a different manner—whether state or federal government or both had become so involved in the conduct of these hospitals that their activities are also the activities of these governments, without the hospitals necessarily becoming their instrumentality in a strict sense. On Nov. 1, 1963, the Circuit Court ordered the District Court to grant the requested injunction in the *Simkins* case, and held that those provisions in the Hill-Burton Act undertaking to authorize segregation by state connected institutions were unconstitutional. Under the Hill-Burton Act the Long Hospital had received almost $2 million in public monies and the Cone Hospital about $1 million for construction purposes.

Almost daily, judicial decisions are handed down, affecting the practice of medicine. As a consequence the rights and responsibilities of physicians are in a state of flux. We must remain vigilant and view these changes critically but objectively, realizing that there will be a constant need for evaluation of these changing legal concepts, especially as they relate to staff privileges, for such privileges are in no small way associated with such highly volatile subjects as procedural fairness, restraint of trade, religious freedom, and racial discrimination.

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[15] Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 959 (4th Cir., 1963).