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Surgical Operation on Minor without Consent of Parent

Harry B. Hutchins
University of Michigan Law School

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SURGICAL OPERATION ON MINOR WITHOUT CONSENT OF PARENT.—The case of *Bakker* v. *Welsh et al.*, 108 N. W. Rep. 94, recently decided by the Supreme Court of Michigan, is of interest, as it involves a question of special importance to the surgical practitioner and one upon which there seems to be a great dearth of authority. The son of the plaintiff, a youth of seventeen years, consulted defendant Welsh, a surgical specialist, in regard to a tumor upon his left ear, and was told that the character of the growth could only be determined with certainty by a microscopic examination. Such examination having been made by a specialist in microscopy and the result reported to the surgeon, the latter advised the young man that it would be best to have the tumor removed by a surgical operation. At the time of young Bakker's first visit to the office of defendant Welsh, he was accompanied by an aunt and two adult sisters, and at least one of the sisters accompanied him upon the second visit when the operation was advised. There was some conflict in the testimony as to what took place upon the occasion of the second visit, the sister testifying that her brother, having objected to taking an anaesthetic, was informed by Doctor Welsh that there was no danger, while the testimony of the doctor was to the effect that he told the patient that, while there was always some danger attending the taking of an anaesthetic, he advised the operation. A few days later, the young man accompanied by his aunt and at least one sister went again to the office of Doctor Welsh, and from there he was sent by the doctor to a hospital where, as all understood, an operation would be performed the following day. Before the administration of the anaesthetic, the doctors took the usual precautions, making a careful examination of the heart and lungs of the young man, both of which appeared to be normal. With the usual appliances for a successful operation at hand, Doctor Apted, an expert in the administration of anaesthetics, who had been engaged by Doctor Welsh, began to administer chloroform by means of the mask and drop method. He had administered about one-third of an ounce, taking from seven to ten minutes in which to do it, when, just as Doctor Welsh was about to commence the operation, the heart of the patient suddenly ceased to beat. Every means known to the profession to meet such an emergency was used but without effect.

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The young man lived with his father upon a farm, but the father was not informed of the visits to Doctor Welsh or that an operation was to be performed. No attempt was made by anyone to get the consent of the father to an operation. The father having been appointed administrator of the estate of his deceased son, brought the suit, claiming a right of action under what is commonly known as the "Death Act," and alleging that a liability arose because of the failure of defendant Welsh to inform the father and get his consent before entering upon the operation, the doctor knowing that the son was a minor, and further because of the improper administration of the anaesthetic. The trial judge directed a verdict in favor of the defendants, and the judgment below was affirmed by the Supreme Court. The claim that the anaesthetic was improperly administered was found by this court to be without merit, the court suggesting that the record, instead of disclosing a want of skill, "shows quite the contrary." In regard to the question of the liability of the defendants because of failure to notify the father of the intended operation, the court was obliged to reach a conclusion without the aid of authority. It was argued in behalf of the plaintiff that "as the father is the natural guardian of the child and is entitled to his custody and his services, he cannot be deprived of them without his consent; * * * that it is wrong in every sense, except in case of emergency, for a physician and surgeon to enter upon a dangerous operation, or, as in this case, the administration of an anæsthetic, conceded to be always accompanied with danger that death may result, without the knowledge and consent of the parent or guardian;" that " it is against public policy and the sacred rights we have in our children that surgeons should take them in charge without our knowledge and send to us a corpse as the first notice or intimation of their relation to the case." But in view of the maturity of the son and the fact that he was with adult relatives who understood the entire situation and knew that an operation was to be performed, and the further fact that there was nothing in the record to indicate that if the consent of the father had been asked, it would not have been freely given, the court held that the consent of the father to the operation was not necessary. "We think," said the court, "it would be altogether too harsh a rule to say that under the circumstances disclosed by this record, in a suit under the statute declared upon, the defendants should be held liable because they did not obtain the consent of the father to the administration of the anaesthetic."

The conclusion of the court in this case is in line with a suggestion made in a recent number of this REVIEW. In a note upon the general subject of consent to surgical operations, in which the cases then decided are collected and reviewed, the following language appears: "While the consent of the parents before operating upon a minor child should ordinarily be secured by the surgeon, it is probable that the consent of the child to a necessary operation, if of such age and understanding as to appreciate the situation and the nature of the operation, would protect the surgeon, although so far as the writer has observed, this question has not as yet been passed upon by a court of last resort." See 4 MICHIGAN LAW REVIEW (No. 1), pp. 49-51.

H. B. H.

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