

Opinion No. 55-6083

January 24, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. E. E. Thompson Acting Superintendent New Mexico Industrial School,
Springer, New Mexico

This office has received your request for an opinion concerning "liability and responsibility for surgical operations" on inmates of the New Mexico Industrial School.

At the outset, it may be stated that there are two classes of individuals who may be committed to the Industrial School. First, any boy under 16 years of age who is convicted of any offense less than murder or manslaughter. § 42-4-1, N.M.S.A., 1953. Second, any boy who is adjudged to be a juvenile delinquent under the provisions of § 13-8-7, N.M.S.A., 1953. A boy upon adjudication that he is a juvenile delinquent thereupon becomes a ward of the juvenile court.

Turning now to the liability and responsibility of doctors for surgical operations performed, the general rule is:

"The relation of physician and patient is a consensual one . . . and it is the settled general rule that **in the absence of emergency or unanticipated conditions a physician or surgeon must first obtain the consent of the patient**, if he is competent to give it, or of some one legally authorized to give it for him, before treating or operating on him . . ." **41 Am. Jur., 220.** (Emphasis ours)

The cases involving consent of minor are conflicting upon the age at which a patient is competent to give his consent. I have encountered decisions which state that a person 17 years old is incapable of consenting, whereas another decision has held that a person 19 years of age is competent to consent to an operation. In view of this conflict it would seem advisable that prior to any surgical operations being performed upon inmates of the Industrial School, in the absence of an emergency, that consent from some one other than the inmates be secured. In the case of those inmates in the institution who have not been adjudged juvenile delinquents, the consent should be procured from their parents. Since those inmates in the institution who have been adjudged juvenile delinquent are wards of the juvenile courts wherein the adjudication was made, the consent prior to operation should be secured from the Judge of that court since a guardian is legally authorized to give consent. It is suggested here that as to the latter class, blanket consent from the juvenile courts be obtained for any surgical operations which may be needed while these boys are in the institution.

It is not my intention to advise you that under all circumstances are the inmates of your institution incapable of giving consent. However, since they are minors, it seems

advisable that the consent of the parents or of their guardians, the juvenile courts, be secured in advance.

It should be further stated that responsibility and liability is upon the doctor where an operation is performed without consent. The State of New Mexico, should a doctor hired by it perform an unauthorized operation, would not be responsible, under the present state of the law, to the boy or his parents since the state cannot be held responsible in tort. **Vigil et al vs. Penitentiary of New Mexico**, 52 N.M. 224.

Trusting that this answers your inquiry, I am

By

Santiago E. Campos

Assistant Attorney General