DATE**:** 03-11-91

CITATION**:** VAOPGCPREC 16-91
Vet. Aff. Op. Gen. Couns. Prec. 16-91

TEXT:

SUBJECT: Parental Consent for Surgery on a Minor Veteran.

(This opinion, previously issued as Opinion of the General Counsel 3-70, dated August 19, 1970, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

To: Chief Medical Director

QUESTION: Consideration of the necessity for parental consent for surgery on a minor veteran and the applicability of State laws on this matter.

COMMENTS: Problems stemming from the relationship between the Federal Government and the State Governments have continued to arise from time to time since the earliest days of our country. These complexities have been the subject of much intensive study and many Supreme Court rulings. The Federal Government's constitutional immunity from direct State interference with the carrying out of Federal functions, however, has been clearly established. Hunt v. United States, 278 US 96 (1928) and Ohio v. Thomas, 173 US 276 (1899). Under the "necessary and proper clause," Article 1, Section 8, Clause 18 of the Constitution, the Federal Government has the authority to carry out the functions assigned to it by the Constitution in whatever manner is deemed reasonable and proper. And this is so without regard to whether the functions are carried out on land owned by the United States or by others and without regard to the jurisdictional status of the land upon which the Federal functions are performed.

We have considered the problem presented only as it relates to discharged veterans since an individual's legal status is changed while in the military service and a minor member of the Armed Forces is considered emancipated for certain purposes, United States v. Williams, 302 US 46 (1937). It is reasonably clear, however, that the disability of minority is generally regarded as being reimposed upon discharge. This is evidenced by the fact that more than 40 states have enacted legislation enabling minor veterans to contract for the purchase of homes under the GI Bill or successor statutes- legislation which would not have been necessary if the emancipation were considered as continuing.

Although there are strong arguments for contending that State laws relative to medical care are, or could be, an interference with a Federal function and are therefore not binding, it is apparent that VA has consistently required consent of a parent or guardian before operating on a minor veteran, as determined by State law. This policy, currently stated in M-2, Part XIV, Par. 1.02, is based on sound principles of law, affording maximum protection to the practitioner as well as to the individual rights of the patient. In 87 Op Sol 185, July 16, 1946, we quoted the rule regarding consent, as stated in 76 A.L.R. 562, as follows:

"The general rule seems to have become well established that, before a physician or surgeon may perform an operation upon a patient, he must obtain the consent either of the patient, if competent to give it, or of someone legally authorized to give it for him, unless immediate operation is necessary to save the patient's life or health, although under exceptional circumstances the consent may be regarded as having been impliedly given."

We concluded therein that it was inadvisable to lessen the safeguards against an unauthorized operation or spinal puncture as embodied in existing regulations.

We feel there are strong practical reasons for this policy. VA medical personnel are members in good standing of their profession, as well as VA employees. They practice their profession in accordance with generally recognized and accepted practices, standards, and ethics, and this is how VA expects them to perform. It might reasonably be assumed that any radical departure from the norm, such as the performance of an operation without proper consent, which is not essential to the performance of the Federal function, could be criticized by the profession as a whole, and could lead to unwarranted confusion and resentment.

The legal implications of the Federal Tort Claims Act (28 U.S.C. s 1346) must also be considered in determining whether to perform surgery on a minor without parental consent. Whether the Act would impose legal liability on the Government or whether the circumstances considered would fall within one of its expressed exceptions (discretionary function, assault, battery or false imprisonment) cannot be stated unequivocally. The law does state, however, that liability is determined in accordance with the law of the place where the alleged negligent act or omission occurred. In other words, the applicable standards of care against which the conduct of Government doctors and nurses and hospitals are measured are those which are applicable to non-Government doctors, nurses, and hospitals of the same community in which the negligent act or omission occurred. Hicks v. United States, 368 F2d 626 (4th Cir.1966). Therefore, it would appear that local law or practice is crucial in determining substantive liability.

In light of the above, the question of what is a negligent or wrongful act may

hinge upon a local statute or practice, and if that statute or practice requires parental consent for an operation on a minor child, a VA physician to avoid a violation of "local law" or practice should follow that criteria. Moreover, the fact that the accident occurs on Federal property will not require departure from the rule that State law is determinative of liability. United States v.Marshall, 391 F2d 880 (1st Cir.1968). However, since the states often differ with regard to what constitutes tortious conduct, it is not improbable that the Government may escape liability in one state and yet be liable for the same type of conduct in another. United States v. Hambleton, 185 F2d 564 (9th Cir.1950).

HELD:

In summary, there are many actions which could be done by VA personnel in exercising the inherent power of the Federal Government which, as a matter of policy, are not done. The consent for surgery on a minor veteran is one such area. By complying with State law, the VA tends to avoid or minimize criticism and law suits. We think the present policy is wise and should be continued.

We are attaching hereto a brief summary of the VA position with respect to the broader question of compliance with State law in other areas of your concern.

VA COMPLIANCE WITH STATE LAWS

I. State laws which interefere with Federal function are not applied.

A. Licensing of Hospitals. 18 OpGC 477, February 2, 1922, held:

"Generally speaking, the term 'license' implies a grant by the State to one, permitting him to do that which without the grant would be unlawful. Indeed your very question implies that it might be unlawful for the Government to operate one of its hospitals in a State without its permission.

"The governments of various States have not the power by taxation or otherwise to interfere with or impede the National Government in the exercise of its powers ..."

"In view of the above I am of the opinion that it is not necessary for the Government hospital for the care of mental cases to secure a State license before it can operate."

B. Licensing of Doctors. 94 Op Sol 732 (Serial 953-47) concluded:

"... physicians and dentists in the employ of the VA are not required to obtain Tennessee registration ..."

C. Drawing blood for release to State officials to determine alcoholic content. On February 25, 1959, we stated in an opinion:

"This office has previously taken the position that the provisions of paragraph 1J.29 of VA Manual M-1, Part I, prohibit a VA physician, while acting in that capacity, from withdrawing blood from the body of a deceased veteran-patient as well as from a living patient, for the purpose of releasing it to local civil authorities for determinations as to its alcoholic content ..." "The foregoing manual provisions represent something more than agency policy. They are based on a legal determination that the VA does not have the authority to provide the requested service to local civil authorities, with or without the veteran's consent ..."

D. Sterilization of Incompetents. In an opinion of January 17, 1962, we stated:

"The VA position in respect to sterilization is clear. The former Solicitor has held that there is no authority for the VA to perform an operation for the sole purpose of rendering a veteran sterile .. Although sterilization performed pursuant to the South Dakota statute may be a reasonable and proper exercise of the police power of the state (40 A.L.R. 515) and conceding that such an operation so performed is not 'a matter of choice' of the veteran, it must be recognized that it is usually not medically necessary for the treatment of a 'disability'."

E. Inspection laws. In 29 Op Sol 551 of December 23, 1936, it was stated:

"The power of the State to license and inspect a hospital owned and operated by the Federal Government, if it exists, amounts in effect to the power to control."
* *

"Since this function is within the scope of Federal authority and since the Congress has legislated, it naturally follows that the authority of the agencies designated to carry out these functions is superior to any State authority and that such agencies of the Federal Government are not subject to State supervision."

II. Some areas are controlled solely by State law-such as marriage, divorce, adoption, and commitment. Illustrative of the rationale is the following quotation from 24 Op GC 1931, June 12, 1923, wherein it was stated:

"The holding of persons against their will in hospitals or elesewhere is a restraint of personal liberty and illegal, except where sanctioned by due process of law. Due process of law means in such case a regular commitment by a court of competent jurisdiction. Under our government control of the insane and the incompetent within the States is vested exclusively in the State Courts. It is not possible, even for the United States, lawfully to hold persons against their will within the States except upon commitment by the State Courts."

Since there is no Federal law relating to commitment, we must look to State law for guidance in this area. There is some question as to whether the VA is bound by a State statute which provides that a patient must be released from a hospital, upon his demand, within a prescribed number of days or commitment action initiated. This question becomes further complicated by the fact that different periods of time are prescribed by different states. In a letter to the Director, United States Veterans Bureau, dated May 25, 1929, the Attorney General of the United States said inter alia:

"Where a person alleged to be insane is detained in a government hospital without legal commitment, the officer in charge is not required to immediately release the insane patient but may hold the patient for such reasonable length of time as is necessary to call the attention of the proper authorities to the fact that such a person, in fact insane, is held in restraint, in order to give such proper authorities time in which to institute proper proceedings in accordance with the law of the place where the patient is held, to have him adjudged insane and lawfully committed. See King v. McLean, 64 Fed. 331; Denny v. Tyler, 3 Allen 225, Maxwell v. Maxwell, 189 Iowa 7, in re Allen, 82 Vt. 365."

While there may be a presumption that the period of time prescribed by State law for detaining a patient without commitment is a "reasonable length of time," that does not mean that a few days beyond such prescribed period is not reasonable. As a matter of practice, however, an attempt should be made to act in conformity with State law as long as such action is not in conflict with applicable Federal statutes and regulations, and conformance is administratively feasible.

III. Indicative of the intricacies of the inherent problems involved in State and Federal relationships is that of consent for autopsy. On July 8, 1954, we held that telephonic or telegraphic authorization for post-mortem examination could be accepted in Connecticut, even though there was a Connecticut statute which required written authorization. The United States (VA) had exclusive jurisdiction over the lands on which our Connecticut hospitals were located. In West Virginia, however, where a similar statute had been enacted but where the Government had only concurrent jurisdiction, we held to the contrary on December 11, 1963, saying:

"However, it cannot be stated unequivocally that the securing of consent in writing to perform an autopsy at the VA Hospitals and Center in West Virginia amounts to an interference with a federal function."

On March 31, 1970, we reaffirmed the legal conclusion reached in the Connecticut opinion when the same question arose in the context of Ohio law. DM & S has since decided, however, that compliance with the State requirements will not interfere with our Federal functions and, in furtherance of

the spirit of cooperation and comity within the medical community together with the advantages which flow from uniformity, it will be in the best interest of VA to adopt a policy of compliance with State law in this regard. We understand that changes to reflect this attitude will be made to the appropriate directives as soon as practicable.

VETERANS ADMINISTRATION GENERAL COUNSEL
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