LEGAL AND PROFESSIONAL ACTIONS INVOLVING MEDICAL CONSENT AND REFUSAL IN THE NINETEENTH CENTURY

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Medical consent has a long history before the iconic cases of the early twentieth century. Medical consent and refusal were issues in many legal and professional actions during the nineteenth century. Here are descriptions of the examples that have been located to date. It is surely not a complete list. These examples are primarily from the United States and the United Kingdom. A few examples are included from other countries.

These examples were collected to demonstrate the role of medical consent in the nineteenth century and the robust consideration of medical consent issues during that period. These examples illustrate the messy way that concepts develop. There was no linear development of consent concepts. These examples illustrate lessons learned, lessons forgotten and lessons rediscovered.

These examples are presented largely chronologically, but some examples that address similar issues are gathered together out of chronological order.

Cases regarding consent to release of medical information are not included. Several other types of cases are generally not included - medical examination for evidence, impact of refusal of treatment on homicide prosecutions and civil liability cases, challenges to mandatory vaccination laws, and involuntary treatment for incapacity or mental illness or public health purposes. A few cases of some of these types are selectively included.

PENNSYLVANIA HOSPITAL - REQUIRING PATIENT CONSENT TO AMPUTATIONS (Philadelphia 1801)

At the beginning of the century at least one hospital had a practice of obtaining consent for some procedures and respecting patient choice of physician in some cases. The following statements appear in a booklet published about Pennsylvania Hospital that appears to have been part of a fund raising appeal.

> Every patient may chuse [sic] his own physician, but he must be one of the house physicians.
> Amputation is not to be performed, unless the patient consent, nor then, unless three physicians agree to it, after a consultation on the case. [1]

The statement about amputation consent was reprinted in several books and articles.[2] Evidence has not been located that the amputation consent requirement was included in formal rules during the nineteenth century.

A choice of physician provision was part of the first formal rules of the hospital in 1752. It was limited to private pay patients:

> X. That those who are taken into the Hospital at a private Expense may employ any Physicians or Surgeons they desire.[3]

An 1828 account of the hospital approved by the hospital did not mention an amputation consent requirement, but contained a patient choice of physician provision:

> At their own desire, patients may be attended, exclusively, by either of the Hospital physicians they may prefer, but in such cases it is expected that the affluent will pay the physician as though attended elsewhere.[4]

The consultation requirement was in the 1837 rules:

> 5. No important surgical operation shall be performed without a previous consultation; and, in such cases, all the surgeons shall have due notice.[5]

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[1] AN ACCOUNT OF THE RISE, PROGRESS & PRESENT STATE, OF THE PENNSYLVANIA HOSPITAL - DECEMBER 12, 1801 (Philadelphia: Robert Carr 1801). The idea that it was part of a fund raising appeal is derived from the fact that it includes instructions on how to donate or bequeath money to the hospital.

[2] *An account of the rise, progress, and present state of the Pennsylvania Hospital; the pride of Philadelphia,* MEDICAL AND PHYSICAL JOURNAL (London), 9(49):250-251 (Mar. 1, 1803); *A sketch of the Pennsylvania Hospital - Drawn up in 1801*, THE LITERARY MAGAZINE, AND AMERICAN REGISTER, 4:23, 24 (Aug. 1805); James Mease, THE PICTURE OF PHILADELPHIA (Philadelphia: B. & T. Kite 1811), *Charitable Institutions - 1. Pennsylvania Hospital*, 224, at 232; William P. C. Barton, A TREATISE CONTAINING A PLAN FOR THE INTERNAL ORGANIZATION AND GOVERNMENT OF MARINE HOSPITALS IN THE UNITED STATES (Philadelphia: Edward Parker 1814), Section XXXII, *An account of the Pennsylvania Hospital, and its internal police*, at 127; *Pennsylvania Hospital,* DAILY NATIONAL INTELLIGENCER (DC), May 31, 1817 [From the KENTUCKY GAZETTE]; *Pennsylvania Hospital – concluded,* REGISTER OF PENNSYLVANIA (Philadelphia), 2(7);97-98 (Aug. 30, 1828).

[3] *Rules Agreed To By The Managers Of The Pennsylvania Hospital For The Admission And Discharge Of Patients* (adopted Jan. 23, 1752), reprinted in PENNSYLVANIA GAZETTE (Philadelphia), Mar. 24, 1752

[4] W.G. Malin, SOME ACCOUNT OF THE ORIGIN, OBJECTS, AND PRESENT STATE OF THE PENNSYLVANIA HOSPITAL (Philadelphia: T. Kite 1828), 10-11

[5] THE CHARTER, LAWS AND RULES OF THE PENNSYLVANIA HOSPITAL (Philadelphia: Joseph & William Kite 1837), *Of the physicians, surgeons, and obstetricians*, 20

The patient consent provision does not appear in the hospital rules that have been located.

The practice of obtaining consent for operations is referred to in several articles. For example, an 1838 article by George W. Norris (a surgeon at Pennsylvania Hospital):

> The surgical division of the hospital is under the care of three practitioners, who attend in rotation each four months, and in all cases where an operation is deemed necessary, a consultation is previously held, and the full consent of the patient obtained.[6]

In 1869 PENNSYLVANIA HOSPITAL REPORTS stated: “We do not perform capital operations without consent.”[7]

An 1890 report of incident at Pennsylvania Hospital stated:

> Agnew says: "In general it may be said that amputation is proper whenever the injury of a part is such as to render it highly probable that without the operation the limb must be lost, or when the patient's life would be subject to greater risk by the adoption of any other treatment, such as resection or expectancy. That persons recover occasionally, from wounds of the most extensive and apparently hopeless character without operation is true, but such very exceptional cases are not to influence the judgment of the surgeon when deciding upon the propriety of an amputation in any given case. I remember an instance in the Pennsylvania Hospital, of a patient with a crushed ankle, who absolutely refused to have the part removed, although the indications for the operation were so clear as to admit of no doubt whatever, and yet after a long and tedious illness he finally recovered with a distorted ankle and useless foot. The result, however, was the loss of the lives of three other patients who encouraged by the obstinacy of this man declined operation, which had they been performed would in all probability have been successful."[8]

LOSS OF INSURANCE BENEFITS FOR REFUSAL OF PHYSICAL EXAMINATION (Ireland 1800)

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[6] George W. Norris, *Statistical account of the cases of amputation performed at the Pennsylvania Hospital from January 1st, 1831, to January 1st, 1838*, AMERICAN JOURNAL OF THE MEDICAL SCIENCES (Philadelphia), 22(44):356, at 357 (Aug. 1838)
[7] PENNSYLVANIA HOSPITAL REPORTS, 2:275 (1869)
[8] Christian Berry Stemen, RAILWAY SURGERY (St. Louis: J.H. Chambers & Co. 1890), 121

While consent was generally required for physical examination, there were consequences to refusal. In 1800 the rules of a Dublin sickness society barred members from collecting benefits if they refused physical examination:

> 26…. nor shall any member be entitled to relief who shall refuse to have his disorder examined by any physician, surgeon, or apothecary appointed by this society;… [9]

QUACK MEDICINES - RICHARDS V. BURNETT - LIABILITY FOR MISREPRESENTATIONS IN ADVERTISING (England 1802)

In 1802, in England, misrepresentation concerning medicines in advertising could lead to liability. In the case of *Richards v. Burnett,* a clerk sued a vendor of quack medicines who had advertised to cure every disorder and had undertook to cure his disorder. The ointments provided nearly killed him. The jury in the sheriff's court awarded the patient £400. The TIMES noted:

> The Under Sheriff expressed his surprise that causes of this nature were not more frequently the subjects of inquiry in Courts of Justice, considering how the health and lives of the public were tampered with by ignorant pretenders to medicine.[10]

The TIMES further commented on the case a few days later:

> The verdict against the Quack Doctor has thrown all the fraternity into consternation. No one of them can tell whose turn it may be next. It was certainly high time the attention of the Courts should be turned to the subject of empiricism.[11]

An American newspaper in Philadelphia reported the case early the following year.[12]

It is curious that additional cases of this type have not been located in the subsequent decade. However, quack medicine purveyors were involved in other types legal proceedings.[13]

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[9] THE FIRST NUMBER OF THE REPORTS OF THE SOCIETY IN DUBLIN FOR PROMOTING THE COMFORTS OF THE POOR (London 1800), Vol. I, 72

[10] *Quack doctors,* TIMES (London), May 31, 1802, 3. The case was also reported in *Quack doctors,* MORNING CHRONICLE (London), May 31, 1802; *Quack doctors,* BURY AND NORWICH POST (Bury Saint Edmunds), June 2, 1802; CALEDONIAN MERCURY (Edinburgh), June 3, 1802; IPSWICH JOURNAL, June 5, 1802; *Sheriff's Court. Quack Doctors - Richards against Burnett*, JACKSON'S OXFORD JOURNAL, June 5, 1802; ANNUAL REGISTER, 44:406-407 (1802). A report of the case was reprinted in the section on quack doctors in John Corry, A SATIRICAL VIEW OF LONDON: COMPREHENDING A SKETCH OF THE MANNERS OF THE AGE (1803), 131-133.

[11] TIMES (London), June 1, 1802, 2

[12] *Sheriff's Court, May 29. Richards against Burnet*, GAZETTE OF THE UNITED STATES (Philadelphia), Jan. 7, 1803.

INQUEST - JOHN SIMPSON - EMERGENCY SURGERY WITHOUT CONSENT (London 1803)

In some circumstances, emergency surgery may be performed without consent. An example occurred in 1803. An inquest was held at London Hospital into the death of John Simpson who had been wounded by a bursting musket. He was insensible when he arrived at the hospital and emergency surgery was performed. The jury returned a verdict of accidental death.[14]

LYDE V. HIGGINS - COLLECTION ACTION FOR TREATMENT OF PAUPER (England 1804)

Access to care is dependent not just on consent to treatment but also on arrangements that assure the willingness of a provider to treat. Those who are the gatekeepers to access must also approve, unless there is a provider willing to treat gratuitously.

A surgeon undertook the care of a pauper under an agreement for his father to pay the bill. When the father was unable to pay, the surgeon applied to the overseers of the poor to determine whether he should continue the treatment at their expense. They declined to give him that authority but said they would see that a reasonable bill would be paid. The surgeon sued to collect from the overseers. A jury awarded the surgeon payment. The overseers sought a new trial based in part on the not being a written undertaking. The reviewing court refused to order a new trial.[15]

CHING'S WORM LOZENGES (England 1804)

Another case involving a quack medicine arose in England in 1804. Ching's Worm Lozenges, containing mercury, was advertised as safe and

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[13] Fines were imposed for selling quack medicines without licenses. One report stated that Undertakers paid the fines. TIMES (London), Nov. 20, 1801, 3. Effective Sep. 1, 1802, the Medicine Act increased the taxes on medicines. IPSWICH JOURNAL, June 12, 1802; MEDICAL AND PHYSICAL JOURNAL, 11:474-475 (May 1, 1804); MONTHLY REVIEW, 44:423 (Aug. 1804). Fines were imposed for failing to pay the stamp duty on quack medicines. ORACLE AND DAILY ADVERTISER (London), Sep. 4, 1801, 3; TIMES (London), Dec. 21, 1801, 4; MORNING CHRONICLE, Jan. 11, 1802, 3; TIMES (London), Jan. 18, 1802, 3; *Medicine act,* TIMES (London), Oct. 20, 1802, 3; *Medicine act,* CALEDONIAN MERCURY (Edinburgh), Oct. 23, 1802. But see *Mansion-House*, MORNING CHRONICLE (London), Oct. 20, 1802 [dismissal of cases]. See letter against quackery, EXAMINER (London), Jan. 10, 1808. See petition to Parliament on stamps on medicines, MORNING CHRONICLE (London), Dec. 14, 1802, 2 [laid on table in Commons]. There was prosecution for forging stamps for quack medicines. R. v. Collicott, Rus. & Ry. 212, 168 Eng. Rep. 766 (1812); *Police - Bow-street - forged Stamps*, TIMES (London), Dec. 19, 1811, 3; OLD BAILEY PROCEEDINGS, 19th Feb. 1812

[14] TIMES (London), Nov. 9, 1803, 2

[15] *Lyde v. Higgins*, 1 Smith 305 (Apr. 20, 1804); Edward Dix Pitman, A TREATISE ON THE LAW OF PRINCIPAL AND SURETY (London: V. and R Stevens and G.S Norton 1840), 21 note

effective.[16] An inquest was held into the death of young boy who was given the medicine. Although there was no recorded express discussion of consent or of the misrepresentations, the case is included here because it shows the failure to control or punish such misrepresentations at the time.

In December 1803, Mr. Clayton administered Ching's Worm Lozenges to his three-year old son. The child became very ill and medical assistance was obtained. Despite treatment, the child died in January 1804. An inquest was held. The jury found the boy had been "poisoned by Ching's Worm lozenges." Mr. Clayton published an essay about the inquest and against advertised medicines.[17] It was favorably reviewed in several London journals.[18] It was referred to in a letter from London to a Philadelphia medical journal.[19] The coroner in the Clayton inquest took no steps against the proprietors of the medicine.[20]

CONVICTION - JOHN JOHNSON - TREATMENT CONTRARY TO DIRECTIONS OF MOTHER (New Hampshire 1805)

In 1805, in New Hampshire, John Johnson was indicted for the murder of Miss Everts for giving her opium contrary to directions from her mother. He was convicted and sentenced to 39 stripes, one hour in pillory and payment of costs.[21]

BRISTOL INFIRMARY - MARY FIDDIS - INSTITUTIONAL INVESTIGATION OF REFUSAL OF SURGERY (England 1805)

In 1805, Mary Fiddis was transferred from a local prison to the Bristol Infirmary for surgery. She refused the operation and obtained permission from

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[16] OBSERVER (London), Apr. 1, 1798, 1[Ching's Worm Destroying Lozenges]; OBSERVER (London), Apr. 21, 1799, 1[Ching's Worm Lozenges]; HULL PACKET, Jan. 7, 1800 [Ching's Worm Medicine] 17 ESSAY ON QUACKERY, AND THE DREADFUL CONSEQUENCES ARISING FROM TAKING ADVERTISED MEDICINES: ILLUSTRATED WITH REMARKS OF THEIR FATAL EFFECTS: WITH AN ACCOUNT OF A RECENT DEATH OCCASIONED BY A QUACK MEDICINE, AND OBSERVATIONS ON THE CORONER'S INQUEST TAKEN ON THE BODY: INTERSPERSED WITH ANECDOTES OF THE MOST CELEBRATED QUACKS OF THE PRESENT DAY…. (Kingston-upon-Hull: T. Clayton 1805) [hereinafter *Essay on Quackery*]

[18] BRITISH CRITIC, 25:687 (JUNE 1805); CRITICAL REVIEW, Vol. 6 (3d Series):445 (1806); MEDICAL AND PHYSICAL JOURNAL, 17(96):173-175 (Feb. 1807); MEDICAL AND PHYSICAL JOURNAL, 17(99):452-453 (May 1807) [letter disputing findings on the lozenges]

[19] PHILADELPHIA MEDICAL MUSEUM, 1:93 (1804), reprinted in ECLECTIC REVIEW (London), 1: 657 (Sept. 1805)

[20] *Essay on Quackery,* at 28

[21] *Trial of John Johnson,* POST BOY AND VERMONT AND NEW-HAMPSHIRE FEDERAL COURIER (Windsor Vt.), Mar. 19, 1805, [attributed to Rutland Herald]. All or parts of the article were reprinted in several New England newspapers, e.g., *Trial of John Johnson,* DARTMOUTH GAZETTE (Hanover NH), Mar. 29, 1805, 2; *Beware of quacks!* ALBANY CENTINEL (NY), Apr. 2, 1805, 3; CONNECTICUT HERALD (New Haven), Apr. 2, 1805, 1 [attribution: "from the Rutland (Ver.) Herald]; *Trial of John Johnson,* NEW-HAMPSHIRE SENTINEL (Keene), Apr. 6, 1805, 4; *Beware of quacks!* FARMER'S CABINET (Amherst NH), Apr. 9, 1805, 4; *Beware of quacks!* OSTEGO HERALD (Cooperstown NY), Apr. 18, 1805, 1

the jail keeper to go home. Surgeon Thomas Lee who had treated her previously, but was not on the infirmary staff, had requested to be present at the operation. This was denied in accordance with the rules of the infirmary. He published a pamphlet claiming that she would have consented if he had been permitted to be present and that her life was in imminent danger. He also alleged that she had been threatened with jail if she did not submit to the operation. The infirmary surgeons requested an inquiry by the infirmary. The surgeons were "honourably acquitted" by a special committee of forty members. Four members of the committee dissented.[22]

TAYLOR V. RAINBOW - COURT DICTA ABOUT CONSENT TO SURGERY (Virginia 1805)

In 1808, the Virginia Supreme Court addressed a case involving a gunshot wound that required amputation of a leg. Although the case was against the shooter, not the surgeon, the court used the example of a case against a surgeon to explain proper pleading. The consent of the patient was a major determinant.

> As, suppose a surgeon called in to amputate a leg, should do it in the wrong place, or so unskilfully, as to render a second amputation in another part indispensably necessary; although the cutting off the leg would, without the patient's consent, well have justified an action of trespass vi et armis, yet, being done with his consent, and in the way of his profession and undertaking, an action of trespass on the case, (founded upon his ignorance and unskilfulness in performing what he had undertaken,) would seem to be the proper remedy, and not trespass vi et armis.[23]

ACQUITTAL OF SAMUEL THOMSON - CHARGE OF MANSLAUGHTER AGAINST HERBALIST (Massachusetts 1809)

In 1809, in Massachusetts, the herbalist Samuel Thomson (sometimes spelled Thompson) was prosecuted for manslaughter for the death of Ezra Lovett, Jr.[24] Thomson was acquitted. The court ruled that consent to the type of treatment protected the practitioner from liability for manslaughter. The jury was charged:

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[22] W.B. Howie, *Complaints and complaint procedures in the eighteenth- and early nineteenth-century provincial hospitals in England,* MEDICAL HISTORY, 25:345, at 350-351 (1981); George Munro Smith, A HISTORY OF THE BRISTOL ROYAL INFIRMARY (Bristol: J.W. Arrowsmith Ltd. 1917), 158-160

[23] *Taylor v. Rainbow*, 12 Va. 423, 2 Hen. & M. 423 (May 6, 1808). For a discussion of pleading trespass, see *Monograph #3*, pages 10-12, in Robert D. Miller, SLATER V. BAKER AND STAPLETON (Madison, WI: By author 2019)

[24] Lovett died at age 21 in Beverly, Massachusetts. *Deaths*, ESSEX REGISTER (Salem MA), Jan. 14, 1809, 3

Now, there is no law which prohibits any man from prescribing for a sick person with his consent, if he honestly intends to cure him by his prescription.[25]

INQUEST - JOHN BURKE - EMETIC ADMINISTERED AFTER REFUSAL (London 1810)

In 1810, an inquest was held into the death of John Dolam Burke. He had taken arsenic. He refused an emetic offered by a surgeon. When he became insensible, the emetic was administered but it was too late. The jury found insanity.[26]

ACQUITTAL OF ISAIAH BANGS - CONSENT ISSUE IN ABORTION CASE (Massachusetts 1812)

In 1812, in Massachusetts, a practitioner Isaiah Bangs was convicted of administering an abortion potion to Lucy Holman against the patient's will. On appeal, the court found the patient had consented and overturned the conviction.[27]

PAUPERS BRIBED TO CONSENT TO VACCINATION (England 1812)

Another complex aspect of consent is the scope of the steps permitted to obtain consent. An example of the use of inducements occurred in England in 1812. In 1814, it was reported that beginning in 1812 paupers in Norwich were paid a half-crown each to consent to being vaccinated.[28]

DUNBAR V. WILLIAMS - DOCTOR REFUSED PAYMENT FOR TREATMENT OF SLAVE WITHOUT CONSENT OF SLAVEHOLDER (New York 1813)

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[25] *Commonwealth v. Thompson*, 6 Mass. 134, 5 Tyng 134 (1809); *Salem, Dec. 22*, BOSTON MIRROR, Dec. 23, 1809, 6; for the perspective of the Thomson and the Thomsonians, see Samuel Thompson, A NARRATIVE, OF THE LIFE AND MEDICAL DISCOVERIES OF SAMUEL THOMSON… (Boston: E.G. House 1822), 87-88, 95 et seq., 174-175; *Narrative of the sufferings of Dr. Thompson, who was indicted and tried for the murder of Ezra Lovett,* TELESCOPE (New York), 2(44):174 (Apr. 1, 1826). Note the ruling in this case was overturned by the Massachusetts court in 1884 in the case of *Commonwealth v. Pierce*, 138 Mass. 165 (Nov. 26, 1884)

[26] *Coroner's inquest*, TIMES (London), Nov. 2, 1810, 3. See also *Coroner's inquest*, COURIER (London), Jan. 6, 1810, 6 [forced emetic down throat of person attempting suicide]

[27] *Commonwealth v. Bangs*, 9 Mass. (Tyng) 387 (Oct. 1812)

[28] *Vaccination*, EDINBURGH MEDICAL AND SURGICAL JOURNAL, 10:120 (Jan. 1814); *Vaccination,* MEDICAL AND PHYSICAL JOURNAL, 31:136, at 137 (1814); See also *Miller v. Maxwell*, 16 Wend. 9 (N.Y. Sup. Ct. Jud. Oct. 1836) [The prior history of libel case included: "…the surgeons, proposed to reduce the dislocation, but Pierson would not consent; that Cummings proposed to bribe Pierson to give his consent by offering him some whisky, saying that he could hire him with a glass of whisky to give his consent…"]

In 1813, in New York, a doctor Dunbar sued a slaveholder Williams for payment for treatment of a slave. The court denied payment because the doctor had not obtained consent from the slaveholder for the treatment.[29]

INQUEST - CHINESE LASKAR - REFUSAL OF AMPUTATION (London 1815)

One test of the robustness of the respect for the requirement of consent is the degree of respect given to refusals.

An inquest in 1813 in London illustrates that refusal of amputation was respected, but that an attempt to leave a hospital against medical advice resulted in the patient being returned to the hospital:

> Coroner's Inquest - An inquest was taken on Wednesday on the body of a Chinese Lascar, who in the late bloody affray was severely cut in the wrist with a knife. Amputation was offered, but he refused to submit, and effected his escape from the hospital. He was taken and brought back, when amputation was again offered, but he still persisted in refusing; mortification ensued, of which he died. Verdict - Manslaughter against some person or persons unknown.[30]

PEDDA DAY V. JOHN DEXTER - MISREPRESENTATION OF KNOWLEDGE CONSTITUTED MALPRACTICE (New Hampshire 1816)

In 1816, in New Hampshire, Pedda Day sued a quack doctor, John Dexter, for malpractice based on his misrepresentation of his knowledge. The jury awarded her $400. The case was widely reported in newspapers. This may be one of the first American cases of liability for lack of informed consent, but note that it was based on affirmative misrepresentation, not on omission of information.[31]

COMPETENCY - IDIOT PERMITTED TO REFUSE SURGERY (Scotland 1817)

In 1817, the Glasgow Jury Court in Scotland heard a case challenging the capacity of Marion Johnston to have executed a deed before her death. It was alleged that she had been an idiot since birth and had been called "Daft Mary." It was stated at the hearing: "Marion had cut her throat with a knife, refused

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[29] *Dunbar v. Williams*, 10 John. 249 (N.Y. May 1813)
[30] *Coroner's inquest*, BELL'S WEEKLY MESSENGER (London), Oct. 3, 1813, 8
[31] BOSTON DAILY ADVERTISER, Oct. 22, 1816, 2; NATIONAL ADVOCATE, Oct. 24, 1816; *Keene, (N.H.), Oct. 19,* DEDHAM GAZETTE (Mass.), Oct. 25, 1816, 3; NEW YORK SPECTATOR, Oct 26, 1816, 2; DAILY NATIONAL INTELLIGENCER (DC), Nov. 2, 1816

surgical assistance, and of course she died." The jury found the deed valid.[32] It is notable that an idiot was permitted to refuse surgical assistance.

PEYTON V. RAWLENS - CHALLENGE TO AGREEMENT TO PAY PRACTITIONER WHO MISREPRESENTED HIS SKILL (Tennessee 1817)

In 1817, in Tennessee, former patient John Peyton sued practitioner John Rawlens claiming that Rawlens had caused Peyton to sign a note (an agreement to pay) to Rawlens while Rawlens was assuming the role of a skillful physician and pretending to tend to Peyton and while Peyton was delirious. Rawlens had obtained a judgment against Peyton on the note in a lower court. The court acknowledged that fraud and delirium would have been two good defenses against the note. However, because Peyton did not show why he failed to defend himself in the lower court, the court dismissed the suit with leave to amend, which would permit filing the case again. No record has been found of subsequent action on this matter.[33]

CONVICTION OF WILLIAM WOOD - CHILD DIED UNDER UNWARRANTABLE TREATMENT BY QUACK WITH CONSENT OF PARENTS (New York 1818)

In 1818, in Schenectady, New York, Edward Brown, age 10, died. He had a condition that produced contraction of his legs and stiffness of his knee joints. Regular practitioners pronounced it incurable. An unlicensed quack practitioner, William Wood, pronounced cure practicable. The parents took the child to Woods' house where he applied force to straighten the legs, exhausting the child and causing agony. He repeated this several times and the child died four hours after the last time. An inquest found the death due to the unwarrantable treatment of Wood. He was convicted of malpractice and sentenced to one year in the county jail. Although not discussed in the reports of the case, it is clear that consent of the parents did not protect him from liability.[34]

CONVICTION OF DR. EVANS - PERJURY FOR CLAIMING CURE (Massachusetts 1819)

In 1819, in Portsmouth, Massachusetts, a Dr. Evans was sentenced to two years in the state prison for perjury. He had undertaken to remove a breast tumor

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[32] *Glasgow jury court,* EDINBURGH ADVERTISER (Scotland), Oct. 10, 1817, 6
[33] *Peyton v. Rawlens*, 5 Tenn. (Hayw.) 77 (June 1817)
[34] *Miscellany,* DEDHAM GAZETTE (Mass), Sept. 18, 1818, 1; *Schenectady Circuit,* CABINET (Schenectady NY), Dec. 9, 1818; NEW-YORK GAZETTE, Dec. 14, 1818, 2; *Doct. Wood's trial*, CABINET (Schenectady NY), Dec. 16, 1818; NATIONAL INTELLIGENCER AND WASHINGTON ADVERTISER (DC), Dec. 19, 1818

on a “no cure, no pay” basis. The lady suffered from his caustic treatment and was dismissed as cured with a large open ulcer and her constitution ruined. Dr. Evans sued for his fee and swore that it was a perfect cure. This resulted in his conviction for perjury.[35]

HUPE V. PHELPS - PRACTITIONER DENIED PAYMENT DUE TO FRAUDULENT PROFESSIONS OF SKILL (England 1819)

In 1819, when a practitioner, Frederick Augustus Hube, sued Phelps in England to collect payment for medicines and attendance for his wife, the court ruled that fraudulent professions of skill could bar recovery. The jury ruled for the defendant denying payment.[36]

FALSE IMPRISONMENT IN AN ASYLUM - COERCED CONSENT (England 1819)

As mentioned earlier in the discussion of the use of inducements in 1812, a complex aspect of consent is the scope of the steps permitted to obtain consent. Coercion generally invalidates consent.

In 1819, a patient sued in England for false imprisonment for placement in asylum. The defense was consent. In the case of *Horseman v Bulmer et al.*, the court found the consent to have been coerced and, thus, invalid, imposing liability.[37]

LIMITS OF THE PROTECTIVE EFFECT OF CONSENT (North Carolina 1821)

In 1821, the limits of the protective effect of consent were addressed in a non-medical case. In a North Carolina suit for injury in a boxing match, the defendant claimed consent as a defense. The jury accepted this defense. On appeal, in the case of *Stout v Wren*, the court ruled that one cannot consent to an illegal act and ordered a new trial.[38] In 1855, in North Carolina in *Bell v. Hansley* and in 1870 in Indiana, in *Adams v Waggoner*, the courts applied a similar rule to find that a person who was injured in a consensual fight was not barred from suing, but that the agreement might reduce the damages.[39]

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[35] *Warning to cancer doctors!* CONCORD GAZETTE (NH), Mar. 13, 1819, 3; reprinted in NEW YORK COLUMBIAN, Mar. 27, 1819

[36] *Hupe v. Phelps*, 2 Stark. 423, 171 Eng. Rep. 711 (1819); *Court of King’s Bench - Quack doctors - Hube v. Phelps,* TIMES (London), Mar. 6, 1819, 3; *Law intelligence - Court of King’s Bench - Hube v Phelps*, MORNING CHRONICLE (London), Mar. 6, 1819. It is not known why the court report spells the name *Hupe.*

[37] *False imprisonment in a mad-house*, TIMES (London), April 9, 1819, 3

[38] *Stout v. Wren*, 8 N.C. 420, 1 Hawks 420 (Dec. 1821). See also *Coroner’s inquest*, ST. JAMES’S CHRONICLE AND LONDON EVENING POST, Oct. 8-10, 1812, 1 [inquest found manslaughter for death in pugilistic combat by mutual consent].

[39] *Bell v. Hansley*, 48 N.C. 131 (Dec. 1855); *Adams v. Waggoner*, 32 Ind. 531 (Nov. 1870)

LEACH V. VEITCH - LIABILITY FOR IMPROPER TREATMENT (England 1823)

In 1821, In England, a Dr. William Leach (an employee of the British Museum) was placed in a secluded cottage under the management of Dr. Veitch for the treatment of the mental disorder of delusions. In 1822, after Leach was removed to care of other doctors, his friends on his behalf sued Dr. Veitch for the actions of his agent in treating Leach with needless severity and with improper medicines that had adversely affected his health. The judge directed that Dr. Veitch was responsible for his agent. In 1823, the jury awarded the plaintiff £50.[40]

Dr. Veitch brought a criminal charge against one witness, Mr. Capper, for perjury. Mr. Capper was acquitted, he then filed suit against Veitch for malicious prosecution. By agreement of the parties, the case was then indefinitely postponed by withdrawing one juror.[41]

WILLIAM BEAUMONT and ALEXIS ST. MARTIN - MEDICAL RESEARCH WITH CONSENT (United States 1822-1833)

Although there were no related legal or professional proceedings, here is an account of the iconic case of early medical research with consent in the United States. On June 6, 1822, Alexis St. Martin (1794-1988), a French-Canadian voyager (he paddled a fur company canoe), was shot in the upper abdomen on Mackinac Island in Michigan. Dr. William Beaumont, a U.S. army surgeon, treated the wound but could not close the hole into St. Martin's stomach.

In 1824, Dr. Beaumont began inserting food in the hole to observe human digestion for the first time. He began formal experiments in 1825. These experiments ended in late 1825 when St. Martin returned to Canada, where he married and had children.

In 1828, Dr. Beaumont began serving at Fort Crawford in Prairie du Chien, Wisconsin. In 1829, St. Martin returned to Dr. Beaumont bringing his wife and children to Fort Crawford. Dr. Beaumont resumed the experiments with St. Martin. Dr. Beaumont conducted two series of experiments in Wisconsin. Other duties interpreted Dr. Beaumont's studies. The second series ended in 1831, when St. Martin returned to Canada with his family.

In late 1832, Beaumont located St. Martin and traveled with him to Washington, D.C. On October 16, 1832, St. Martin signed a one-year contract to participate in experiments. This may be the first written consent form for medical research. Pursuant to this agreement, Beaumont began a third series of experiments in Washington. These experiments continued when Beaumont moved to Plattsburgh, N.Y. In 1833, St. Martin enrolled in the U.S. Army. The army paid him and his only assigned duty was to be an experimental subject for

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[40] *Leach v. Veitch,* TIMES (London), May 14, 1823, 3; *Medical Jurisprudence*, MEDICO-CHIRURGICAL REVIEW, 5:237 (June 1824) [critique of case]

[41] *Capper v. Veitch,* TIMES (London), July 19, 1824, 3

Beaumont. On November 7, 1833, St. Martin signed a second contract for two years, but after receiving an advance payment on the contract he returned to Canada and Beaumont never experimented on St. Martin again. [42]

CONVICTION OF JONATHAN COOK - RAPE BY QUACK DOCTOR (England 1823)

In 1823, a quack doctor, Jonathan Cook, was prosecuted in England for raping Lydia Lawrence, a 12-year-old. His consent defense was unsuccessful. He was found guilty and executed.[43]

CONVICTION OF HENRY SHANNESSY - ATTEMPTED RAPE BY QUACK DOCTOR (England 1823)

Also in 1823, another quack doctor, Henry Shannessy, was prosecuted with assault and attempt to commit rape on Margaret Regan, age about 10. He assaulted her under pretense of providing medical treatment. He was found guilty and sentenced to two years at hard labor.[44]

TWYMAN V. COOK - UNTRAINED SURGEON DENIED PAYMENT - PRETENTIOUS ADVERTSING (England 1823)

In 1823, in England, an untrained surgeon Twyman sued to collect his fee from a patient Cook for treatment of Cook's leg. Twyman aggravated the condition by applying aggressive treatments in a case that regular physicians testified only required rest and slight bandaging. Twyman's pretentious advertising was reviewed in which he professed to cure many ailments. The judge observed that no honest surgeon ever promised a cure and that Twyman had not shown himself entitled to any compensation. The jury found a verdict for Cook, denying Twyman payment.[45]

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[42] William Beaumont, EXPERIMENTS AND OBSERVATIONS ON THE GASTRIC JUICE, AND THE PHYSIOLOGY OF DIGESTION (Plattesburgh: F.P. Allen 1833); J.S. Meyer, *Dr. William Beaumont*, BULLETIN OF THE SOCIETY OF MEDICAL HISTORY OF CHICAGO, 1(3):150 (Mar. 1913); I. Rutkow, *Beaumont and St. Martin: A blast from the past*, ARCHIVES OF SURGERY, 133(11):1259 (Nov. 1998); R.I. Numbers & W.J. Orr, *William Beaumont's reception at home and abroad*, ISIS, 72(4):590-612 (Dec. 1981); Susan Lederer, SUBJECTED TO SCIENCE: HUMAN EXPERIMENTATION IN AMERICA BEFORE THE SECOND WORLD WAR (Baltimore MD: Johns Hopkins University Press 1995), 115; Joseph Lovell, *ART. III. A Case of Wounded Stomach*, THE MEDICAL RECORDER, OF ORIGINAL PAPERS AND INTELLIGENCE IN MEDICINE AND SURGERY (Philadelphia), 8(1):14 (Jan. 1, 1825); William Beaumont, *ART. X. Further Experiments on the Case of Alexis San Martin, who was Wounded in the Stomach by a load of duckshot, detailed in the Recorder for Jan. 1825*, THE MEDICAL RECORDER, OF ORIGINAL PAPERS AND INTELLIGENCE IN MEDICINE AND SURGERY (Philadelphia), 9(1):94 (Jan. 1, 1826); *Singular experiment*, VERMONT CHRONICLE (Bellows Falls), Sep. 22, 1826 [reporting article from MEDICAL RECORDER]

[43] *Salisbury*, TIMES (London), July 17, 1823, 3; *Executions,* BRITISH PRESS (London), Aug. 2, 1823, 4; *Execution - Jonathan Cook*, TIMES (London), Aug. 5, 1823, 2

[44] *County Court, March 8, Rape,* TIMES (London), Mar. 18, 1823, 4

[45] *Twyman v. Cook*, TIMES (London), Oct. 24, 1823, 3

INQUEST - CHARLES COMBES - PERMITTED TO REFUSE LIFE-SAVING TREATMENT WHILE INTOXICATED (London 1823)

In 1823, in London, an inquest was held in the death of Charles Combes. On a Thursday, Combes had injured his head while intoxicated. A surgeon was called, but Combes refused to permit him to dress the wound. Combes then walked to St. Bartholomew's Hospital where he permitted the surgeons to dress the wound. He was advised it could be fatal if he did not remain in the hospital. Still intoxicated, he left the hospital and stopped in a public-house for three hours. He went home. In effect he was permitted to refuse life-saving treatment while intoxicated. He returned to the hospital on Saturday, where he died on Monday. The coroner's jury found an "accidental death through intoxication."[46]

INQUEST - EDWARD REYNOLDS - PATIENT NON-COOPERATION (London 1823)

In 1823, in London, an inquest was held in the death of Edward Reynolds. He fell while working as a laborer on a construction project. He was taken to Middlesex Hospital inebriated with a compound fracture of the left arm. Friends apparently brought him alcohol so that he remained inebriated in the hospital. Reynolds rendered the treatment offered ineffectual by continually tearing off the bandages and disturbing the splinters of bone. He was not deranged and asked to have the bandages replaced. He died in the hospital. His friends seized his body and removed it from the hospital out of fear of dissection. The jury found accidental death.[47]

REPORT OF UNAUTHORIZED SURGERY AT HOSPITAL FOR SOLDIERS WITH EYE CONDITIONS (England 1823)

In 1823, in England, it was reported that Parliament had established a hospital for the reception of ophthalmic soldiers, under the superintendence of the oculist Sir William Adams. The article reported an unauthorized surgery by Sir William Adams.

> The knighted oculist, however, exercised "an authority" in the hospital, which was new in the hospital practice of this country. — A poor blind soldier asserted that Sir William Adams, without letting him know what he was going to do, "cut open one eye and let out the humours," which he afterwards told him he did to save the other eye!! In the hospitals of this country a surgeon never performs an operation, however trifling, without previously pointing out the necessity of it, and without his full concurrence, and when the patient does not consent to it, he is discharged; To destroy one eye to save the other, is to us a new practice- One sense is often

[46] *Effects of inebriety,* TIMES (London), Sept. 4, 1823, 2
[47] *Coroner's inquest,* TIMES (London), Sept. 6, 1823, 3

improved on another being destroyed by disease or accident, but that one organ of a sense should be improved by destroying the other, is an idea in opposition to experience. Such is the sympathy that exists between the organs of vision, that it is common, in case of one eye being injured, for the other to inflame. If this is a fact, which no surgeon of experience will deny, how could Sir William expect that by destroying one eye, the disease in the other should cease.' Would not the best eye sympathize with the one on which he performed the operation? The result of the operation proved that Sir William's idea was erroneous, for the disease of the best eye, instead of being suspended, advanced, and the poor man was in a few weeks totally blind.[48]

REVEREND DR. COLLYER - ACCUSATION OF INAPPROPRIATE EXAMINATION OF MALE PATIENTS (England 1823)

The Reverend Dr. Collyer provided medical services to some patients from motives of charity. In 1823 there was a major controversy in which the Reverend Dr. Collyer was accused of inappropriate examination of the genitals of males. It was mentioned that the patients consented, but this did not resolve the matter.[49] Dr. Collyer sued the LANCET for defamation.[50] No report of a trial has been located. It is likely that Dr. Collyer dropped the suit.[51]

CONVICTION OF PETER ROSINSKI - CAUSED FEMALE PATIENT TO STRIP UNDER FALSE PRETENSES (England 1824)

In 1824, a physician, Peter Rosinski, was prosecuted in England for causing a female, Ann Gibbons, to strip under false pretenses that it was

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[48] *Inflammation of the eyes,* MONTHLY GAZETTE OF HEALTH (London), 8:749, 752-753 (Dec. 1823). For more information about William Adams, see *Ophthalmic hospital*, ST. JAMES'S CHRONICLE AND EVENING POST (London), July 23, 1822, 3

[49] *The Rev. W.B. Collyer,* TIMES (London), Aug. 25, 1823, 3; *The Rev. W.B. Collyer,* MORNING CHRONICLE (London), Aug. 25, 1823 [includes letter from Collyer] & Aug. 26, 1823; *Dr. Collyer*, MORNING CHRONICLE (London), Sep. 13, 1823 [affidavits]; *Dr. Collyer*, COBBETT'S WEEKLY POLITICAL REGISTER (London), Sep. 20, 1823; *The Reverend Dr. Collyer*, LANCET 1:46-56 (Oct. 12, 1823) [at 46, consented to examination]; TIMES (London), Oct. 16, 1823, 2; *Dr. Collyer*, LANCET 1:82 (Oct. 19, 1823); *Dr. Collyer*, LANCET 1:123-127 (Oct. 23, 1823); *Dr. Collyer*, LANCET 1:166 (Nov. 2, 1823);*Dr. Collyer and his absolvers*, EXAMINER (London), Nov. 2, 1823; *Dr. Collyer*, LANCET 1:208-209 (Nov. 9, 1823); *Dr. Collyer*, LANCET 1:243-246 (Nov. 16, 1823); *Doctor Collyer v. The Lancet*, EXAMINER (London), Nov. 30, 1823; *Dr. Collyer and his advertisement*, EXAMINER (London), Dec. 7, 1823. See also *Dr. Collyer,* THE CHRISTIAN GUARDIAN AND CHURCH OF ENGLAND REGISTER FOR MDCCCXXIV, 79-80, Feb. 1824 [exoneration by investigation of Congregational Board of Ministers]; *Rev. Collyer*, BRISTOL MERCURY, Feb. 9, 1824; *Rev. Dr. Collyer*, EXAMINER (London), Feb. 15, 1824

[50] *Dr. Collyer*, LANCET 1:314-315 (Nov. 30, 1823) [indictment for defamation by Collyer against Lancet]

[51] *Prosecution of the publisher of The Lancet, by the Rev. Bengo Collyer*, Lancet (London), 4(9):257-265 (Aug. 28, 1824)

necessary for treatment. He was convicted of common assault and sentenced to eight months.[52]

ACQUITTAL OF HENRY LEES - DEATH FROM CIRCUMCISION WITH PARENTAL CONSENT (England 1824)

In 1824, Daniel Grimshaw died during an operation for circumcision performed by Henry Lees. Daniel was 14 days old. The parents were followers of the faith healer Joanna Southcote who required circumcision of male infants. The inquest returned a verdict of manslaughter against Lees.[53] In 1825, in Lancaster, England, Lees was indicted for manslaughter for the death. He was acquitted on direction of the judge due to technicalities.[54] Mr. Justice Bayley stated:

> I desire it to be perfectly understood, that no matter whether the party acts from a religious conviction or not that they are doing what is right; they are not, therefore, warranted to practice illegal acts, more especially acts on infants, acts which may cause or lead to the death of a child. Those practices, then, are the more reprehensible, because they cannot be considered as consenting thereto. The prisoner is, therefore acquitted, from the indictment not having correctly described the cause of the child's death, and not from any doubt as to the illegality of the practice.[55]

CONSENT ISSUES RELATED TO INTRODUCTION OF STOMACH PUMP (England 1824 - 1847)

In the 1820's the stomach pump was introduced. By 1824 a new London play, *The Life of Adam*, included a humorous scene in which a stomach pump was nearly forced on someone who is pretending to be dying from excessive alcohol.[56] By 1825, there were reports of forcing the stomach pump on unwilling persons who usually had taken poison in an attempt to commit suicide.[57] By 1826, at an inquest in London into the suicide of Mrs. Margaret Mayfield by poison, a juror asked a doctor why a stomach pump was not used, and the doctor explained that it would have been useless because the poison had

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[52] *Peter Rosinski's case*, 1 Lewis 11, 168 Eng. Rep. 941 (Lancaster Sp. Assizes 1824); *Rosinski's case*, 1 Lewis 208, 168 Eng. Rep. 1015 (1824) [common assault]; *Rosinski's case*, 1 Lewis 257, 168 Eng. Rep. 1033 (Lancaster Sp. Assizes 1824) [common assault]; *R. v. Rosinski*, 1 Mood. 19, 168 Eng. Rep. 1168 (1824); *Lancaster, Thursday, March 18,* TIMES (London), Mar. 22, 1824, 3; *Northern circuit - Lancaster, Sept. 2*, MORNING POST (London), Sep. 6, 1824, 2

[53] *Extraordinary fanaticism*, TIMES (London), 4 Oct 1824, 3

[54] *Fanaticism - Charge of manslaughter, by means of the circumcision of a child of Ashton-under-Line*, LIVERPOOL MERCURY, Mar. 18, 1825, 303

[55] *Lancaster, March 14, manslaughter,* REPUBLICAN (London), 11(12):353, at 357 (Mar. 25, 1825)

[56] *Adelphi Theatre*, TIMES (London), Dec. 20, 1824, 3.

[57] *The stomach pump*, DUBLIN JOURNAL, Jan. 19, 1825, 2 [recovered]; *Philadelphia, Aug. 19 - Police Office*, DAILY NATIONAL INTELLIGENCER (D.C.), Aug. 27, 1825 [recovered]; EXAMINER (London), Sep. 3,1826, 574

already taken effect.[58] By 1827, there was a report of using a stomach pump to force feed a patient who was unable to swallow.[59] In 1832, a police superintendent threatened the use of a stomach pump to secure the consent to an emetic from a person who had attempted suicide with laudanum.[60] In 1842, there was a report of a person in Baltimore who was saved from attempted suicide by a stomach pump who was angry at being saved and threatened to hang herself.[61] In 1847, an inquest in London explored the death of a Robert Bland who died during the application of a stomach pump for a laudanum overdose. The jury found a natural death.[62]

INQUEST - DANIEL TAYLOR - LEFT AGAINST MEDICAL ADVICE - INVESTIGATION OF NURSE BY ST. GEORGE'S HOSPITAL (London 1825)

An 1825 coroner's inquest in London demonstrates that patients exercised their right to leave against medical advice. Daniel Taylor, age 27, died. A glass bottle had lacerated his hand when he was thrown from his horse. He had been admitted to St. George's Hospital, but left against medical advice. "He complained of being ill used that caused him to leave the hospital, it was not from the doctors, but the neglect and ill treatment he met with from the nurse on the ward and a patient named Allen." The jury found "accidental death by being thrown from horse." The jury further agreed that the coroner should write a letter to the Board of the hospital censuring the nurse and Allen with the belief that this would result in their dismissal. The hospital investigated and the Board of Governors found the charges against the nurse unproven.[63]

MUNN V. GODBOLD AND ANOTHER - SECRET MEDICINES

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[58] *Dreadful case of suicide*, TIMES (London), Jan. 24, 1826, 4; see critique of such cases in *The stomach pump*, BOSTON MEDICAL AND SURGICAL JOURNAL, 26(6):96-97 (Mar. 16, 1842), reprinted from Robert Druitt, THE SURGEON'S VADE MECUM (London: Henry Renshaw 1839), 318-319 ["But yet surgeons have been reprimanded by attorney-coroners, and respectable juries, for not using this instrument, even in cases in which it must have been either useless or injurious. These are the fruits of permitting the office of coroner to be filled by men who have no knowledge of the subjects that they are required to sit in judgment on."]. See also NEW TIMES (London), Jan. 31, 1827, 4 [explaining non-use of stomach pump at inquest]; Watson, *Upon the use and abuse of the stomach-pump*, LONDON MEDICAL GAZETTE, 17:412- 414 (Dec. 12, 1835)

[59] *Prevention of starvation by the use of the stomach pump*, NEW YORK SPECTATOR, Nov. 23, 1827, 1

[60] *Melancholy case of forgery and attempt at suicide*, EXAMINER (London), Aug. 5, 1832

[61] *Medical miscellany*, BOSTON MEDICAL AND SURGICAL JOURNAL, 26(26):419 (Aug. 3, 1842). See also *Attempts at suicide*, MORNING CHRONICLE (London), Sep. 14, 1842 [stomach pump forced on suicide]

[62] *Suicide in the streets from starvation*, LLOYD'S WEST LONDON NEWSPAPER, Jan. 24, 1847. See also Coroner's inquest, TIMES (London), Dec. 27, 1844, 7 [nurse exonerated for death during forced feeding]

[63] *Coroner's inquest,* TIMES (London), Aug. 23, 1825, 3; *St. George's Hospital,* TIMES (London), Aug. 25, 1825, 3; TIMES (London), Aug. 31, 1825, 3; *St. George's Hospital,* Sept. 1, 1825, 3; TIMES (London), Oct. 14, 1825, 2; *Coroner's inquest – St. George's Hospital*, MEDICO-CHIRURGICAL REVIEW, 3:583-586 (Oct. 1825)

(London 1825)

In 1825 a case was tried in London that arose out of the problem of secret quack medicines. It is included here because it touches on the information available to the sick when they choose treatment - the core issue in what is now called informed consent.

Munn sued the venders of the Vegetable Balsam for the moneys he had expended as their agent in France. The quack medicine was advertised as “an infallible remedy.” France required disclosure of ingredients and a chemical analysis by the its Medical Board. Since the venders did not comply, the medicine could not be sold in France. The jury was sympathetic to Munn and awarded him the full amount he claimed.[64]

INQUEST - MARY ALCOCK - INVESTIGATION BY ST. BARTHOLOMEW’S HOSPITAL OF OPERATION PRIOR TO DEATH - WITHOUT CONSENT OF HUSBAND (London 1826)

In 1826, in London, a coroner’s inquest was held into the death of Mary Alcock at St. Bartholomew’s Hospital. She fell into a fire and injured her head. She was eventually admitted to the hospital. Her husband claimed that students had opened her skull. The coroner concluded that she had been trepanned. The coroner’s jury exonerated the doctors. The husband also complained about the examination of the body after death. The Coroner noted that the body should not have been opened prior to death without the consent of the friends of the deceased. He advised that the husband make a complaint to the Committee.[65]

A Special General Court of the Governors and Supporters of the Institution was convened in investigate the case. They unanimously decided that every attention had been paid to the patient and referred the matter to the House Committee for further investigation. The House Committee found no violations. The testimony of the surgeon John Vincent included the following:

> The propriety of the operation is indisputable; and if he [the husband] means to assume himself the authority of forbidding those resources which surgical science can supply, to be resorted to, he must misconceive the very character of an institution like this hospital.

This suggests that no consent was sought. The circumstances in which the operation was performed suggest that it might be considered an emergency.

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[64] *Munn v Godbold and another*, MORNING CHRONICLE (London), Nov. 3, 1825. For an example of the advertising in England, see *By the King’s Riyal Patent. Godbold’s Vegetable Balsam*, NEWCASTLE COURANT (Newcastle-upon-Tyne, England), Oct. 29, 1825. Note that others sought to have Godbold declared insolvent in 1829. He disclosed that his income from the Vegetable Balsam had dropped, but he had other assets, so the petition was dismissed. *Insolvent Debtors’ Court*, TIMES (London), May 21, 1829, 3

[65] *Coroner’s inquest,* NEW TIMES (London), Mar. 16, 1826, 4

There was also testimony about following the longstanding practice of performing limited examination of bodies after death pursuant to authority given by the Governors and without consent of friends.[66]

VANDERSMITH V. WASHMEIN'S ADM'R - ADVANCE DIRECTIVE FOR MEDICAL CARE (Maryland 1826)

In 1826, the Maryland Court of Appeals decided a case that may be one of the earliest cases enforcing an advance directive for medical care. The deceased, Frederick Washmein, was taken ill at the home of Vandersmith and delivered to him $149.50. It was alleged that Washmein asked Vandersmith to send for a physician, furnish everything necessary, and apply the cash to payment of the physician and for the other expenses. When Washmein died his administrator sought recovery of the deposited monies and trial court ordered return of the monies, including the amounts spent for the physician. The appellate court reversed -

> If the money, which was placed by the intestate, *Frederick Washmein*, in the hands of the appellant, was deposited with him for safe keeping only, and for no other purpose, he then would have had no right to pay any part of it over in discharge of the physician's bill. But the evidence is, that the deceased directed the appellant to send for a physician, to furnish him with every thing that was necessary, and to apply the money placed in his hands to the payment of the physician's bill, and in discharge of any expenses that might be incurred. Now, if the meaning of the deceased was, that in the event of his death, the appellant should pay the attending physician out of the money so placed in his hands, and that formed one of the purposes for which it was lodged with him, (which would seem to have been the case, for it is difficult to suppose, that he intended, in the event of his recovery, that the appellant should be his paymaster,) then it was a special fund, only to be brought into action after the death of the intestate; and the appellant may be considered in the light of a trustee, or agent, of the physician, for whose remuneration the fund was in part created, and was warranted in paying his bill, if indeed the *amount* was such as he was entitled to receive. We think, therefore, that the court below erred in directing the jury, that the appellant was entitled to no deduction from the amount claimed in the action, on account of the physician's bill.[67]

MAGISTRATE ORDER FOR EMETIC (England 1826)

In 1826, in England, James Yelder took an overdose of laudanum in an effort to commit suicide. When he refused medical assistance, his wife applied to

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[66] *Important investigation at St. Bartholomew's Hospital*, TIMES (London), Mar. 24, 1826
[67] *Vandersmith v. Washmein's Adm'r*, 1 H. & G. 4 (Md. June 1826)

a magistrate who ordered that he be given an emetic against his will.[68] This is one of the earliest examples of an English or American judicial officer authorizing medical treatment against the will of a patient outside of treatment for mental illness. It may be that the magistrate considered the case to be a case of mental illness, but this is not discussed in the one newspaper article that has been found regarding this case.

ACQUITTAL OF JACOB EVANS - QUACK ADMINISTERED FOXGLOVE AFTER FRIENDS OF PATIENT APPLIED TO HIM FOR ADVICE (England 1826)

In 1826, in England, a boy, Camp Collins, died from foxglove given by a quack, Jacob Evans. Evans was charged with manslaughter. The court found him not guilty because friends of the deceased had applied to Evans for advice.[69]

INVESTIGATION OF DEATHS ON SHIP - CAPTAIN STRIKING CREWMAN WHO REFUSED MEDICINE (London 1827)

In 1827, a magistrate in London conducted an investigation into the deaths of a first officer and a crewmember of a ship, the *Rochester South Seaman*. Crewman Thomas Perryman became ill. The ship's doctor brought him medicine that he refused to take and "on his refusal to take it, the Captain struck him three or four severe blows on the head." Surgeon Hall testified that the blows did not accelerate the death and were given with only the intention to induce him to take the medicine. The magistrate took no further action.[70]

SEAMAN'S CHOICE OF TREATMENT (U.S. ship 1827)

In 1827, an injured mariner named Johnson who was attacked with yellow fever was given a choice of staying on ship (named *Roberts Burns*) or being admitted to a hospital ("Maison de Sante" in Port au Prince, Haiti). He chose the hospital. A Pennsylvania court ruled that the vessel and its owner were chargeable with the hospital bill and wages.[71]

INQUEST - MRS. HAMCOATES - TREATMENT OF SUPPOSED HIP DISLOCATION (England 1827)

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[68] *Attempts to commit and prevent suicide,* COURIER (London), Aug. 19, 1826, 3; *Union-hall*, TIMES (London), Aug. 19, 1826, 3; See *Marlborough-street*, MORNING CHRONICLE (London), Apr. 16, 1825 [a magistrate ordered a woman to be taken to a surgeon who gave her an emetic that ejected laudanum she had taken in a suicide attempt - there is no mention of consent or refusal]
[69] *Melancholy death* MORNING CHRONICLE (London), Oct. 30, 1826; *Manslaughter,* MORNING CHRONICLE (London), Oct. 31, 1826; *Poisoning with foxglove,* NEW YORK MEDICAL AND PHYSICAL JOURNAL, 6:144 (Jan-Mar 1827); *Poisoning with foxglove*, PHILADELPHIA JOURNAL OF THE MEDICAL AND PHYSICAL SCIENCES, 5:175 (May-Aug. 1827)
[70] *Thames police - Alleged murder on the high seas*, NEW TIMES (London), Feb. 12, 1827, 4
[71] *Johnson v. Doubty*, 1 Ashmead (Pa) 165 (1827); 6 AM. JURIST & MAG. 158 (July 1831)

Mrs. Hamcoates injured her hip when an ass fell on her. She initially refused all medical attention, but a week later she sent her husband to get a bonesetter named Walker. He treated her aggressively and during the procedure she died. At the inquest a neighbor testified that Mrs. Hamcoates did not expect to survive the operation but was anxious for it to be performed. A post mortem was performed at the request of the jury. No dislocation was found. The jury found she "died by the visitation of God," and censured the bonesetter for his conduct.[72]

ACQUITTAL OF THOMAS LAPHAM - TREATMENT WITH LOBELIA (New York 1827)

In 1827, Thomas Lapham (or Lappum) was tried for the crime of malpractice in Duchess County, N.Y., for the death of Phoebe Rogers. He was a Thomsonian doctor and he had treated her with Thomson Medicine No. 1 (lobelia and cayenne pepper) and steaming. Part of the defense was that the patient had not disclosed all for her illnesses. The jury decided that lobelia was not poisonous and found the defendant not guilty.[73]

INQUEST - HENRY LOGGINS - OPERATION IN PRIVATE HOSPITAL WITH CONSENT (England 1827)

In 1827, in England, Henry Loggins died during an operation performed in a private hospital by an assistant of Dr. Waltrop. The inquest noted full consent of the deceased to the operation. The inquest found natural death.[74]

MICHAEL O'NEIL V. GERARD BAUCKER - DEATH OF CHILD AFTER VACCINATION (New York 1827)

In 1824, in New York City, a physician, Gerard Baucker, was employed by the City Dispensary to vaccinate those assigned to him against the small pox prevailing in the city. He called upon the house of Michael O'Neil who was absent. O'Neil's child, age 2, was present in the charge of a Mrs. Baxter. She objected to vaccination on account of the absence of the father, but under threats that Baucker would complain of her, she permitted the vaccination. The first attempt was not effective, so he returned in eight days for a second attempt. The child exhibited small pox a few days later and died several months later. The father sued the doctor claiming that he had inoculated the child with small pox instead of using vaccination. Experts testified that the timing of the disease was

[72] HULL PACKET, Mar. 13, 1827
[73] *Miscellany - Medical - Report of a trial,* NEW YORK TELESCOPE, Dec. 15, 1827, 114; *Law case*, SARATOGA SENTINEL (N.Y.), Jan. 15, 1828, 2
[74] *Coroner's inquest,* TIMES (London), Dec. 14, 1827, 4

not consistent with inoculation and that the disease was contracted in the natural way. In 1827, the jury ruled for the defendant.[75]

CONVICTION OF WILLIAM WARREN - ADMINISTERED POWDERS CONTAINING ARSENIC UNDER FALSE PRETENSES (New York 1827)

In 1827, in Albany, New York, John Hogle died after taking powders given him by William Warren, a regularly trained out of state physician who did not have a New York license. Analysis discovered the powders to be arsenic. Warren initially could not be found, but was discovered in a nearby town and arrested. Warren was charged with a misdemeanor for administering the arsenic under false pretenses resulting in death. The false pretenses were that he was skilled in the art of a physician. He was convicted and sentenced to three years imprisonment.[76]

LOGAN V. AUSTIN - CONSENT TO WHIPPING NOT A DEFENSE (Alabama 1828)

In 1828, the Alabama Supreme Court decided a non-medical consent case in which Austin had consented to be whipped by Logan in exchange for Logan not prosecuting him for act of malicious mischief. Austin then sued Logan for assault and battery and the jury awarded him $500. On appeal the court ruled that while consent to a whipping was not a defense, the jury should have been permitted to consider it in mitigation of damages, so a new trial was ordered.[77]

LIBEL CASE - COOPER V. WAKLEY - WITHDRAWAL OF CONSENT (London 1828)

In London, Mr. Bransby Cooper, the nephew of the famous surgeon Mr. Astley Cooper, performed the operation of lithotomy on a patient at Guy's Hospital. The *Lancet* criticized the operation. In 1828, Mr. Cooper sued Mr. Wakley, the owner and editor of the *Lancet*, for libel. After a long and well-publicized trial, the jury found for the plaintiff and awarded £100 damages.[78]

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[75] NEW YORK SPECTATOR (Feb. 27, 1827); *Supreme Court,* NEW-ENGLAND GALAXY AND UNITED STATES LITERARY ADVISOR, 10:3 (Mar. 2, 1827)

[76] *A deed which should be investigated, if not punished*, ALBANY ARGUS (NY), Aug. 25, 1827; *Beware of quackery*, NEW YORK SPECTATOR, Sep. 28, 1827; *Beware of quackery*, DAILY NATIONAL INTELLIGENCER (DC), Oct. 1, 1827 [reprint from ALBANY DAILY ADVERTISER]; EVENING POST (NY), Oct. 5, 1827; *Albany General Sessions*, ALBANY ARGUS (NY), Dec. 28, 1827 [summary of trial]; *Albany General Sessions*, ALBANY ARGUS (NY), Jan. 1, 1828 [more details concerning trial]; *Albany general sessions,* NEW YORK SPECTATOR, Jan. 4, 1828. New York law required out of state physicians to file a copy of their diplomas with the clerk of the county and to exhibit to the county medical society regular study. N.Y. LAWS (1818), Chapter 204 (April 20, 1818)

[77] *Logan v. Austin*, 1 Stew. 476 (Ala. July 1828)

[78] *Court of King's Bench - Cooper v. Wakley,* TIMES (London), Dec. 13, 1828, 1-2; *Court of King's Bench - Cooper v. Wakley,* TIMES (London), Dec. 15, 1828, 3-4; *Court of King's Bench -Saturday - Guy's Hospital - Lancet - Libel - Cooper v. Wakley,* MORNING CHRONICLE (London), Dec. 15, 1828; see also *Mr. Wakley - surgical reform,* TIMES (London), Dec. 24, 1828, 3 [meeting of

The focus of the *Lancet* report was on (a) the time Cooper had taken, nearly an hour to perform a procedure that normally took one to seven minutes, (b) the death of the patient 29 hours after the procedure and (c) the fact that Cooper was the nephew of Astley Cooper implying nepotism.

The *Lancet* also noted; "'Oh! let it go - pray let it keep in,' was the constant cry of the poor man."[79] One witness to the operation, Mr. Holdiman Partridge, a surgeon, testified that: "During the operation the patient called out several times to the operator to desist." Other witnesses did not mention statements by the patient.[80]

However, withdrawal of consent was not an issue in the *Lancet* criticism or the trial. Everyone apparently accepted the prevailing practice of the pre-anesthesia era - after an operation started, what the patient said was ignored. Mention of the patient's statements apparently were for the purpose of demonstrating his suffering. The focus of the case was on the surgeon's judgment in the manner of the operation.

> The defense counsel noted:
> The operation was never performed on an adult till he himself felt that the pain he suffered or the apprehension of the loss of life was greater than the risk of the operation. Every man was to judge of that by his own feelings. There was something in the apparatus more terrible than in the operation itself - something that operated on the mind against being the subject of it; and it was nothing but the extreme pain, or the apprehension of loss of life, or under the hope of being relieved from it, that gave a party courage to submit to it. The jury might suppose, therefore, that no surgeon was ever called upon to operate unless under extremity, where the patient says - "I cannot live, I must die under it. The urgency is so great, that I call upon you for instant relief. All judgment is at an end. You must perform the operation, or I must die." What course was left but to perform the operation?[81]

Wakley's defendant's address included:

> The poor man repeatedly called on them and implored them to loose him - he knew the torture of his complaint, he felt the torture which he was then undergoing, still he cried to be let go.[82]

SUIT AGAINST SAMUEL McCLELLAN - JURY CHARGE REGARDING CONSENT AND EXPLANATION TO PATIENTS (New York 1829)

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supporters of Wakley and LANCET]; *Election of coroner,* TIMES (London), Sept. 11, 1830 [Wakley defeated; Cooper case mentioned]

[79] *Court of King's Bench - Cooper v. Wakley,* TIMES (London), Dec. 13, 1828, 1

[80] *Court of King's Bench - Cooper v. Wakley,* TIMES (London), Dec. 13, 1828, 2

[81] *Court of King's Bench - Cooper v. Wakley,* TIMES (London), Dec. 15, 1828, 3

[82] *Court of King's Bench - Cooper v. Wakley,* TIMES (London), Dec. 15, 1828, 4

In 1829, Dr. Samuel McClellan was sued in New York for his treatment of broken leg. The trial resulted in a verdict for the defendant. Part of the judge's charge included in substance:

> It is also a general rule that with patients of discreet minds the surgeon should explain his operation. Then in sound minds, the surgeon is not bound to use force to compel a patient to submit to an operation, even if the surgeon supposes it necessary to save life. As to children and persons not capable of deciding for themselves, the surgeon must not operate without consent of guardian or parent.[83]

PEARL V. M'DOWELL - COLLECTION SUIT - SURGERY ON LUNATIC WIFE WITH HER CONSENT AND WITHOUT CONSENT OF HUSBAND (Kentucky 1830)

In Kentucky, a surgeon performed surgery on the wife of a lunatic with her consent. The surgical partnership sued the husband for "compensation for surgical operations performed on his wife, and for medicines, care and attention furnished to her." In 1830, the court noted that:

> As a general rule, a wife cannot bind the husband by her contract. For necessaries furnished to her, he is bound, upon his implied contract, to provide them for her during cohabitation; but for nothing else. We do not intend to say, that under this rule, a husband may not be bound for medical, or surgical aid furnished to his wife, if necessary. The law is well settled, that upon a proper case made out, he would be bound for such services."

This recognizes the right of the wife in some circumstances to contract for medical services without her husband's involvement. The case dealt with the added issues arising when the husband is not competent. The husband claimed that there could be no implied contract with a lunatic. The court rejected this claim, finding that a lunatic could have an implied contract for necessaries, including medical treatment. The court noted that:

> But suppose that the committee of the lunatic should fail to procure for the wife, medical, or surgical aid, which might be indispensably necessary, or that the profits of the estate then in the hands of the committee would not justify it, shall the wife, laboring under disease, die without aid, or depend upon the charity of the world, although he may have a competent estate for the support of himself and family? Reason and humanity alike forbid it. We are aware, that there may seem to be an absurdity in supposing, that a jury would be justified to find the implied consent of the husband, whose express contracts are void, because he has no capacity to consent. We think, however, that such reasoning would be rather specious, than solid.

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[83] Senate No. 77, TRANSACTIONS OF THE MEDICAL SOCIETY OF THE STATE OF NEW YORK-TRANSMITTED TO THE LEGISLATURE FEBRUARY 9, 1857 (Albany NY: C. Van Benthuysen 1857), 65

A lunatic is not permitted to bind himself by contract, because incapable of forming an opinion, with respect to the propriety of such contract. If left to himself, he would soon be stripped of his property, by the artifice and cupidity of dishonest men, under the pretence [sic] of fair contracts. Hence the compassion, with which the law regards his infirmities, and watches over his property. But the law implies no promise, which is not reasonable and just. There is, then, no danger to be apprehended by rendering him responsible for such a demand, upon a proper case made out; although he can give no express consent, yet for necessaries furnished to him, the law presumes his consent, and he is bound.[84]

CONVICTION OF JOHN ST. JOHN LONG - MANSLAUGHTER - CANNOT CONSENT TO PUT OWN LIFE IN DANGER (England 1830)

In 1830, in England, a jury found John St. John Long guilty of manslaughter in the death of Miss Catherine Cashin. She died as a result of a lotion that had been applied on her skin by Mr. Long's servant at his direction. Mr. Long was acting in the capacity of a medical practitioner. He was sentenced to pay a fine of £ 250.

The prosecutor stated: “It might be said, that, in this case, the consent of Miss Cashin was given to all that was done; but still, no one could permit another to do that which is criminal. Persons could not give a consent to put their own lives in danger.”[85]

ACQUITTAL OF JOHN ST. JOHN LONG - MANSLAUGHTER - ONE JUDGE NOTED CONSENT DID NOT NEGATE OFFENSE AGAINST PUBLIC (England 1831)

In 1831, another jury found John St. John Long not guilty of manslaughter for the death of Colin Campbell Lloyd, wife of Edward Lloyd, who died after treatment by Mr. Long. Mrs. Lloyd had attended three days of the inquest in the Catherine Cashin case before submitting to Mr. Long's treatment. She had had a choking sensation in her throat for several years. She had been pursing self-treatment. She put herself under the care of Mr. Long when in good health. She developed redness on her breast. At Mr. Long's recommendation, they pursued treatment by rubbings. She refused continued rubbings and refused to be seen by Mr. Long. She died without being seen again. However, one of the judges noted: "With respect to what has been said about a willing mind in the patient, it must be remembered that a prosecution is for the public benefit, and the willingness of the patient cannot take away the offense against the public.”[86]

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[84] *Pearl v. M’Dowell*, 26 Ky. 658, 3 J.J. Marsh. 658 (Apr. 24, 1830)

[85] *Rex v. John St. John Long*, 4 C. & P. 398, 172 Eng. Rep. 756 (Oct. 30, 1830); *Extraordinary investigation*, TIMES (London), Aug. 23, 1830*; Adjourned inquest upon Miss Cashin*, TIMES (London), Aug. 31, 1830; *Surrender of Mr. St. John Long*, TIMES (London), Sept. 9, 1830, 1; *Trial of Mr. St. John Long*, TIMES (London), Nov. 1, 1830

[86] *Rex v. John St. John Long*, 4 C. & P. 423, 439, 172 Eng. Rep. 767 (Old Bailey Feb. 19, 1831); *Case of Mr. St. John Long*, 5 LAW MAGAZINE 121 (1831); *Coroner’s inquest on Mrs. Lloyd,* TIMES

PERSONS GIVEN EMETIC TO GET EVIDENCE (London 1832)

In 1832 in London, an emetic was given to two persons to get evidence.

In August, the *Examiner* reported that a clerk, John J. Levien, had swallowed laudanum and a suspicious check.

> The medical gentlemen warned the young man of the danger he was in, and offered him proper remedies, but he declined taking them until Mr. Thomas threatened him with force, and the stomach pump was exhibited, and then he consented to take a powerful emetic…[87]

In October, the *Times* reported:

> … on searching Russell he found something bulky in his mouth. Mr. Inspector Hornsby desired him to open it, but he refused to do so, and witness got a candle to look down his throat, and after forcing the prisoner's mouth open saw a roll of paper in it, which he supposed to be forged notes, and on attempting to get it out the prisoner swallowed it. The doctor shortly afterwards came in, when an emetic was administered to him, but it did not produce the desired effect.[88]

PRIVATE EXAMINATION OF FEMALE WITH HER CONSENT - INVESTIGATION OF DR. BAIRD AT LIVERPOOL INFIRMARY (England 1833)

In 1833 Dr. Baird, physician to the Liverpool Infirmary, performed a private examination on a 21 years old woman with her consent. She was not an infirmary patient. Her family complained of indecency in the examination. A minister then complained to the Committee of the Liverpool Infirmary. The minister and two others were appointed to inquire into the affair. They pronounced against Baird and requested his resignation. Medical officers of Manchester Royal Infirmary conducted an investigation at the request of Baird. In the absence of evidence of impure motives, they concluded “no imputation rests upon the moral character of Dr. Baird for his conduct on this occasion.” The medical committee of Manchester Royal Infirmary approved the results of this investigation. Based on this report, the trustees of the Liverpool Infirmary concluded that no action needed to be taken against Baird.[89]

(London), Nov. 12, 1830; TIMES (London), Dec. 10, 1830; *Mr. St. John Long,* TIMES (London), Jan. 8, 1831; *Trial of St. John Long for manslaughter,* TIMES (London), Feb. 21, 1831, 4

[87] *Melancholy case of forgery and attempt at suicide*, EXAMINER (London), Aug. 5, 1832

[88] *Police*, TIMES (London), Oct. 3, 1832

[89] LIVERPOOL MERCURY, Aug. 30, 1833 [ad by Dr. Baird]; Sep. 6, 1833 [Minutes of meeting of trustees of Liverpool Infirmary]; LANCET (London), ii:761-762 (Sep. 7, 1833); *The Liverpool investigation*, LONDON MEDICAL GAZETTE, 12:508-509 (July 13, 1833); 12:868-872 (Sep. 28, 1833)

Medical journal articles advised that another female should be present during examinations and critiqued the investigative process.[90] A follow-up letter to the editor in early 1834 supported the position that a female should be present.[91]

RESUSCITATION OF DROWNED PERSONS (England 1833-1841)

In 1833 to 1841, there were several reports of interference or delay in resuscitation of drowned persons, resulting in investigation or punishment. This shows the media's expectations regarding emergency services in this context. In 1833, Christopher Dalton was charged with throwing a police constable into the Regent's-canal and thus preventing the resuscitation of his wife who had drowned.[92] In 1836, the superintendent of Royal Humane Society receiving house was censured and his resignation was accepted for delay in preparing apparatus for resuscitation.[93] In 1841, after reaching its verdict, a coroner's jury discovered that no one had attempted to resuscitate a person who drowned herself. The jurors sought advice on how to pursue those who did not assist.[94] Efforts at resuscitation were apparently widespread and successful. In 1844, the Royal Humane Society reported 170 cases of recovery from drowning in prior year. However, it did not award its prize for the best essay on resuscitation because the five submitted did not contain new suggestions.[95]

STATE V. BECK - CONSENT TO WHIPPING BARRED CHARGE OF ASSAULT (South Carolina 1833)

In South Carolina, Mr. Beck took a Mr. Anderson in custody for suspected theft of leather. When Anderson was asked whether he would prefer to be whipped rather than going to jail, he consented to being whipped. Beck was charged with assault and battery of Anderson and convicted. In 1833 the South Carolina Supreme Court reversed finding that the consent barred the charge of assault. One example the court used was:

> A surgeon who for his patient's health, cuts off a limb, is not guilty of mayhem, or if one plucks a drowning man out of a river by the hair of the head, this is no assault. If, according to the prescription of the physician in

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[90] *Danger of examining females*, MEDICO-CHIRURGICAL REVIEW (London), (Oct. 1, 1833), 446-447; *Danger attending the solitary examination of female patients*, BOSTON MEDICAL AND SURGICAL JOURNAL, 9(19):307-308 (Dec. 18. 1833)
[91] *Purity of character in a physician*, BOSTON MEDICAL AND SURGICAL JOURNAL, 9(23):363-365 (Jan. 15, 1834)
[92] *Worship-street,* TIMES (London), Dec. 27, 1833, 4
[93] *Royal Humane Society,* TIMES (London), Jan. 7, 1836, 3
[94] *Police*, TIMES (London), Dec. 25, 1841, 7
[95] *Royal Humane Society*, TIMES (London), Jan. 10, 1844, 6

the Arabian Nights, a physician should beat his patient with a mallet for the bona fide purpose of restoring his health, though this might be malpractice, it would be no battery.[96]

DYMOND'S ESSAYS ON THE PRINCIPLES OF MORALITY (1834)

In 1834, Jonathon Dymond published a book, *Essays on the Principles of Morality*. In Chapter I of Essay III, point I was "Political power is rightly possessed only when it is possessed by consent of the community," he wrote:

> But the idea of being a servant of the public is quite consistent with the idea of exercising authority over them. The common language of a patient is founded upon similar grounds. He sends for a physician: —-the physician comes at his desire,—is paid for his services,—and then the patient says, I am *ordered* to adopt a regimen, I am *ordered* to Italy; and he obeys, not because he may not refuse to obey if he chooses, but because he confides in the judgment of the physician, and thinks that it is more to his benefit to be guided by the physician's judgment than by his own. But it will be said, the physician cannot *enforce* his orders upon the patient against his will: neither I answer can the governor enforce his upon the public against theirs. No doubt governors *do* sometimes so enforce them. What they do, however, and what they *rightfully* do, are separate considerations, and our business is only with the latter.[97]

HANCKE V. HOOPER - NO LIABILITY FOR INJURY DUE TO BLEEDING AT PATIENT REQUEST (England 1835)

In 1835, in England, a servant of Dr. Hooper bled Mr. Hancke at the patient's request. His arm was injured. The jury returned a verdict for defendant. The court stated:

> It does not appear that the plaintiff consulted the defendant as to the propriety of bleeding him; he took that upon himself, and only required the manual operation to be performed.[98]

CONVICTION OF JONATHAN MOCKTON FOR ASSAULT - SURGERY AGAINST THE WILL OF THE PATIENT (England 1835)

In 1835 in England, surgeon Jonathan Monckton allegedly performed surgery forcibly on James Roberts, age 15, over the opposition of the patient, his parents, and the overseer of the Brenchley workhouse where Roberts resided. Monckton was convicted, but was released on his own recognizance and

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[96] *State v. Beck*, 1 Hill. 363 (S.C. Dec. 1833)
[97] Jonathon Dymond, ESSAYS ON THE PRINCIPLES OF MORALITY (New York: Harper & Brothers 1834), 232
[98] *Hancke v. Hooper*, 7 Carrington & Payne 81, 173 E.R. 37 (C.P. Feb. 4, 1835)

otherwise not punished, except that he was later removed from his position as surgeon for the workhouse. The Justice of the Crown Court, Mr. Justice Gaselee, ruled that performing an "operation against consent was an assault." The Justice added that the surgeon had good character and that his character and honor would not suffer if he had been mistaken on the law.[99]

ASYLUM FOR BLIND LAW (Maine 1835)

In 1835 Maine passed a law appropriating money for an asylum for the blind and authorized part of the money to be used for medical and surgical treatment to restore sight:

> Provided however, That prior to the placing of any such blind persons at said Institution, the Governor shall cause them »o be examined by some skilful Surgeon or Surgeons, and if in the opinion of said Surgeon or Surgeons, such persons can he restored to sight by medical treatment or surgical operation, and <u>if they, or their parents or guardians shall be desirous that such treatment or operation should be so applied</u> and satisfactory evidence thereof be made known to the Governor and Council, they may apply a part of said sum as herein provided to defray the necessary charges for such medical treatment or surgical operations…[100]

ENGLISH OVERSEERS NOT REQUIRED TO VACCINATE (1835)

In 1835, an English court decided that overseers did not have a duty to cause paupers to be vaccinated and could not be prosecuted for failing to vaccinate the paupers who died from smallpox. It was noted “It did not appear that any of the paupers had applied to be vaccinated, or had signified their consent to the operation.” The judge noted: “I know of no law which prescribes that precautionary measures of this particular nature shall be taken by the overseer; nor, if he would take them, are the poor bound to submit to them.”[101]

DEFAMATION OF DR. JOHN MARSHALL - ACCUSATION OF DRUGGING AND ASSAULTING FEMALE PATIENT (Scotland 1835)

In 1835 a Scottish court affirmed the award of damages to Dr. John Marshall for defamation for being accused of assaulting a female patient after

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[99] *Home Circuit*, TIMES (London), Mar. 21, 1835, 7; G.G. Bird, *Forcible surgery*, LANCET, ii:27 (April 4, 1835) [LTE re: Brenchley case, refers to earlier account]; *Brenchley case*, LANCET, ii:93 (Apr. 18, 1835) [comment]; *Trial of Mr. Jonathan Monckton for forcibly performing an operation*, LANCET, ii:94-96 (April 18, 1835); for more details, see Robert D. Miller, *Medical assault: Two nineteenth century cases*, posted at https://minds.wisconsin.edu/handle/1793/80621

[100] Chapter 74, RESOLVES OF THE FIFTEENTH LEGISLATURE OF THE STATE OF MAINE (1835), 771-772 (Approved Mar. 24, 1835)

[101] *In the Matter of ____, Overseer of _____,* 3 Ad. & R. 552, 111 Eng. Rep. 524 (June 8, 1835)

rendering her insensible with a drug given under the pretense of medicating her.[102]

INQUEST - MICHAEL CUMMINGS - DELAYED CONSENT TO AMPUTATION (England 1835)

In 1835 in England, there was a coroner's inquest into the death of Michael Cummings who had broken his leg in a fall at work. A medical student testified that amputation was necessary at admission to the hospital but the deceased objected, "as well as his friends." A week later the deceased consented to amputation of the leg and the amputation was performed, but it was too late and the patient died.[103]

ACQUITTAL OF PETER DOUGLAS - MALPRACTICE FOR FALSE REPRESENTATION OF SKILL (New York 1835)

In 1835 in New York, Peter G. Douglas was indicted for malpractice for falsely representing himself to be skilled in the practice of medicine leading to Mrs. Beecher employing him to cure her daughter Mary. The jury found him not guilty.[104]

GUARDIAN APPOINTED TO CONSENT FOR MINOR (Italy 1835-1849)

In 1835-49, an Italian court appointed a guardian to consent to the amputation of minor's leg when his father refused to give consent. Here is my rough translation of the account from the Italian:

> The patient not only allows [the procedure], but wanted [it]; but the father refused to give consent because it was [performed]. In this state of affairs the dispute was submitted to higher inspection and deliberation, it was determined that consistent with the disciplines [in force], a guardian was assigned for the child, who considered the true state of things, could give the appropriate consent, and so was done. The consent was given, the operation was performed, and the child was saved.[105]

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[102] *Marshall v. Renwick and spouse*, No. 353 (Court of Session July 14, 1835), printed in Patrick Shaw et al., CASES DECIDED IN THE COURT OF SESSION FROM NOV. 12, 1834, TO SEPT. 30, 1835 (Edinburgh 1835), Vol. XIII, 1127-1129

[103] *Coroner's inquests,* TIMES (London), Sept. 23, 1835, 6

[104] *Albany General Sessions - The People versus Peter G. Douglas - Tried December term A.D. 1835*, ALBANY EVENING JOURNAL, Dec. 30, 1835, 2

[105] Pietro Betti, CONSIDERAZIONI MEDICHE SUL COLERA ASIATICO CHE CONTRISTÒ LA TOSCANA NELLI ANNI 1835-36-37-49 (Firenze: tipografia delle Murate 1856), Vol. 1, 36 [Available in Google books] [Original Italian: "Il paziente non solo vi consentiva, ma la desiderava; il padre però non voleva dare il consenso perchè essa fosse eseguita. In questo stato di cose sottoposta la vertenza alla superiore ispezione e deliberazione, venne risoluto che in coerenza delle discipline veglianti, venisse assegnato un curatore al minore, il quale considerato il vero stato delle cose, potesse dare per esso l'opportuno consenso, e così fu fatto. Il consenso fu dato; l'operazione fu eseguita, ed il minore fu salvo."]

JUDICIAL POWER TO ORDER PHYSICAL EXAM (N.Y. 1836, Vt. 1862))

In 1836, in New York, in a suit to annul the Devanbagh marriage, there was an issue of the incurability of the wife's incapacity. The court ruled that it had the power to order a surgical exam of the wife for discovery, but declined to do so.[106] In 1862, in Vermont, the court ruled that it could order a medical exam in a divorce case to determine whether the husband was impotent.[107]

LIBEL CASE - PROPOSED BRIBE TO CONSENT TO SURGERY (New York 1836)

In 1836, in a libel case by a physician, the prior history of the case stated that one of the alleged libels concerned consent:

> Besides the introductory matter above alluded to, the plaintiff also stated that previous to the publication of the libel he attended a consultation with one Dr. Cummings, in the case of a man of the name of Pierson, who had a dislocated shoulder; that they, the surgeons, proposed to reduce the dislocation, but Pierson would not consent; that Cummings proposed to bribe Pierson to give his consent by offering him some whisky, saying that he could hire him with a glass of whisky to give his consent; that the plaintiff protested against such proceeding, and left Pierson; that in about two hours afterwards he and Cummings returned, and found Pierson greatly intoxicated, whisky having been given to him in their absence; that they then reduced the dislocation, and the plaintiff proposed to give Pierson an emetic to relieve his stomach from the whisky, but Cummings objected, and they departed. On the next day the plaintiff was called upon to visit Pierson, and found him in the agonies of death, and shortly thereafter he died.[108]

M'CLALLEN V. ADAMS - COLLECTION SUIT (Massachusetts 1837)

In 1837, in Massachusetts, a surgeon sued the patient's husband for payment for a breast amputation that was performed with the consent of the patient. The husband refused to pay because he had not consented. The court ruled that express husband consent was not necessary for surgery:

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[106] *Devanbagh v. Devanbagh*, 5 Paige Ch. 554, 3 L. Ed. 827 (N.Y. Ch. 1836); see also *Greenstreet, falsely called Cumyns v. Cumyns*, 2 Phill, Ecc. 9, 161 Eng. Rep. 1062 (Consistory Court, London Feb. 2, 1812) [marriage annulled; impotency of husband; confirmed by appointed physicians and surgeons]; *T. v. M., falsely called T.,* [LR] 1 P & D 31 (Courts of Probate and Divorce Nov. 28, 1865) [discussion of physical exam in divorce proceeding]

[107] *Le Barron v. Le Barron*, 35 Vt. 365 (Nov. 1862)

[108] *Miller v. Maxwell*, 16 Wend. 9 (N.Y. Sup. Ct. Jud. Oct. 1836). See also *Paying cholera patients*, GALVESTON DAILY NEWS (TX), Oct. 9, 1884, 2 [bribing the poor in Naples to accept treatment for cholera]

The Court are of opinion, upon the facts appearing by the bill of exceptions, that the defendant, by placing his wife under the care of the plaintiff, whom he knew, at a distance from his own residence, for medical and surgical treatment, for a dangerous disease, impliedly requested him to do all such acts, and adopt such course of treatment and operations, as in his judgment would be most likely to effect her ultimate cure and recovery, with the assent of the wife, and therefore that the operation in question was within the scope of the authority given him. They are also of opinion, that the assent of the wife, to the operation, was to be presumed from the circumstances. Although it might have been an act of prudence in the plaintiff to give the defendant notice of the situation of the wife, and of his intention to perform a dangerous operation, yet we think he might safely trust to the judgment of the wife, to give her husband notice from time to time of her situation and intentions, and that it was not necessary, in point of law, for the plaintiff to give such notice, or have any new request, in order to enable him to recover a reasonable compensation for his services. If the defendant intended to show, that the operation was unnecessary or improper, under the circumstances, or that it was unskillfully or carelessly performed, the burden of proof was on him.[109]

DISMISSAL OF CHARGES AGAINST JOHN MORTRIDGE - MANSLAUGHTER CHARGE AGAINST STEAM DOCTOR FOR TREATMENT WITHOUT CONSENT (Massachusetts 1837)

In 1837 in New Bedford, Massachusetts, a steam doctor John Mortridge was charged with manslaughter in the death of Mrs. Eliza Howland. He had treated her with lobelia, other drugs and steaming without her consent. The New Bedford Police Court concluded that his ignorance of the treatments exempted him from penalties. The charges were dismissed.[110]

PROPOSED PENAL CODE FOR INDIA (1837)

In 1834, a new charter of the East India Company provided for the appointment of a commission to write a new penal code for India. In 1834, Thomas Babington Macaulay was appointed to the Supreme Council in Calcutta under the new charter. The commission was then appointed with Maccaulay as president. On October 14, 1837, the report of the commission was released. In 1860 a new India Law Commission reviewed the 1837 report and proposed enactment with some modifications. In 1860 the new penal code was enacted as Act XLV, effective May 1,1861.

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[109] *M'Clallen v. Adams*, 36 Mass. 333, 19 Pick. 333 (Sept. 1837)

[110] ALBANY EVENING JOURNAL (NY), Sept. 20, 1837, 2 [arraignment]; NATIONAL GAZETTE (Philadelphia), Sep. 28, 1837, 2; NATIONAL GAZETTE AND LITERARY REGISTER (Philadelphia), Sep. 30, 1837, 1 [trial]; SOUTHERN BOTANICAL JOURNAL, 1(19):300 (Oct. 14, 1837); DAILY NATIONAL INTELLIGENCER (DC), Dec. 6, 1837, 3; *New England Thomsonian Convention*, SOUTHERN BOTANICAL JOURNAL, 1(24):373, 379 (Dec. 23, 1837) [investigation by convention resulted in finding of no blame]

The 1837 proposal addressed in some detail the criminal responsibility of doctors for the death of patients. It makes consent a central factor.

The definition section included the following:

> 30. The words " free consent" denote a consent given to a party who has not obtained that consent by directly or indirectly putting the consenting party in fear of injury.
>
> 31. The words "intelligent consent" denote a consent given by a person who is not, from youth, mental imbecility, derangement, intoxication, or passion, unable to understand the nature and consequences of that to which he gives his consent.[111]

The section on general exceptions includes the following:

> 69. Nothing which is not intended to cause death, and which is not known by the doer to be likely to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause to any person above twelve years of age who has given a free and intelligent consent, whether express or implied, to suffer that harm, or to take the risk of that harm, such consent not having been obtained by wilful misrepresentation on the part of the person who does the thing.
>
> *Illustrations.*
>
> *(a)* A, a dentist, offers Z, a person of ripe age and sound mind, a price for Z's teeth, and, without any wilful misrepresentation, obtains Z's consent to the drawing of Z's teeth. A draws Z's teeth. Here, though A's act falls under the definition of the offence of voluntarily causing hurt, A has committed no offence.
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> ***
>
> 70. Nothing which is not intended to cause death is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause to any person for whose benefit it is done, in good faith, and who has given a free and intelligent consent, whether express or implied, to suffer that harm, or to take the risk of that harm, such consent not having been obtained by wilful misrepresentation on the part of the person who does the thing.
>
> *Illustration.*
>
> A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending in good faith Z's benefit, performs that operation on Z, by Z's free and intelligent consent, not having obtained that consent by misrepresentation. A has committed no offence.

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[111] A PENAL CODE PREPARED BY THE INDIAN LAW COMMISSIONERS AND PUBLISHED AT THE COMMAND OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL (Calcutta: Bengal Military Orphan Press 1837), 6

71. Nothing which is done in good faith for the benefit of a person who is under twelve years of age, or of unsound mind, by that person's lawful guardian or guardians, or by the authority of such lawful guardian or guardians, is an offence by reason of any harm which it may cause to that person:
Provided,
First, That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;
Secondly, That this exception shall not extend to the doing of any thing which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt;
Thirdly, That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or in the performance of the rite of circumcision;
Fourthly, That this exception shall not extend to rape, or to the gratification of unnatural lust, or to the attempting to commit rape or to gratify unnatural lust;
Fifthly, That this exception shall not extend to the abetment, either previous or subsequent, of any offence, to the committing of which offence it would not extend.
Illustrations.
***
(d) A, in good faith, for his child's benefit, without his child's consent, has his child cut for the stone, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A has committed no offence, inasmuch as his object was the preventing of death or grievous hurt to the child.
(e) A, in good faith, for his child's pecuniary benefit, emasculates his child. Here, inasmuch as A has caused grievous hurt to the child for a purpose other than the preventing of death or grievous hurt to the child, A is not within the exception.
***

72. Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is in such a state of mind as to be incapable of intelligent consent, and has no legal guardian to whom it is possible to apply for authority:
Provided,
First, That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;
Secondly, That this exception shall not extend to the doing of any thing which the person doing it knows to be likely to cause death, for any purpose

other than the preventing of death or grievous hurt;

Thirdly, That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt for any purpose other than the preventing of death or hurt;

Fourthly, That this exception shall not extend to rape, or to the gratification of unnatural lust, or to the attempting to commit rape or to gratify unnatural lust;

Fifthly, That this exception shall not extend to the abetment, either previous or subsequent, of any offence to the committing of which offence it would not extend.

Illustrations.

(a) Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A, not intending Z's death, but in good faith, for Z's benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence.

***

(c) A, a surgeon, sees a child suffer an accident, which is likely to prove fatal unless an operation be immediately performed. There is not time to apply to the child's legal guardians. A performs the operation, in spite of the entreaties of the child, intending in good faith the child's benefit A has committed no offence.[112]

Note B to the report is entitled *On the Chapter of General Exceptions*. It discusses some of the reasoning behind the above provisions. Here is the text of Note B:[113]

> The next point we have here to consider is how far consent ought to be a justification of the causing of death, when that causing of death is, in our nomenclature, voluntary, yet not intentional, that is to say when the person who caused the death did not mean to cause it, but knew that he was likely to cause it.
>
> In general we have made no distinction between cases in which a man causes an effect designedly, and cases in which he causes it with a knowledge that he is likely to cause it. If, for example, he sets fire to a house in town at night, with no other object than that of a facilitating theft, but being perfectly aware that he is likely to cause people to be burned in their beds, and thus causes the loss of life, we punish him as a murderer. But there is, as it appears to us, a class of class in which it is absolutely necessary to make a distinction. It is often the wisest thing that a man can do to expose his life to great hazard.it is often the greatest service that can be rendered to him to do what may very probably cause his death. He may labor under a cruel and wasting malady which is certain to shorten his life, and which renders his life, while it lasts, useless to others and a

[112] *Ibid*.14-16
[113] *Ibid*. Note B, 17-18

torment to himself. Suppose that under these circumstances he, undeceived, gives his free and intelligent consent to take the risk of an operation which in a large proportion of the cases has proved fatal, but which is the only method by which his disease can possibly be cured, and which, if it succeeds, will restore him to health an vigor. We do not conceive that it would be expedient to punish the Surgeon who should perform the operation, though by performing it he might cause death, not intending to cause death, but knowing himself to be likely the cause of it. Again, if a person attacked by a wild beast should call out to his friends to fire, though with imminent hazard to himself, and they obey the call, we do not conceive that it would be expedient to punish them, though they might by firing cause hos death, and though when they fired they knew themselves to be likely to cause death.

We propose therefore that it shall be no offense to do even what the doer knows to be likely to cause death if the sufferer being of ripe age has, undeceived, given a free and intelligent consent to stand the risk, and if the doer did not intend to cause death, but on the contrary intended in good faith the benefit of the sufferer.

We have now explained the provisions contained in Clauses 69 and 70. The cases to which the two next Clauses relate bear a close affinity to those which we have just considered.

A lunatic may be in a state which makes it proper that he should be put into a strait waistcoat. A child may meet with an accident which may render the amputation of a limb necessary. But to put a strait waistcoat on a man without his consent is, under our definition, to commit an assault. To amputate a limb is by our definition voluntarily to cause grievous hurt, and, as sharp instruments are used, is a very highly penal offense. We have therefore provided by Clause 71, that the consent of the guardian of a sufferer who is an infant or who is of unsound mind shall, to a great extent, have the effect which consent of the sufferer himself would have, if the sufferer were of ripe age and sound mind.

That there should be some provision of this sort is evidently necessary. On the other hand we feel that there is considerable danger in allowing people to assume the office of judging for others in such cases. Every man always intends in good faith his own benefit, and has a deeper interest I knowing what is for his own benefit that [sic] any body can have. That he gives free and intelligent consent to suffer pain or loss, creates a strong presumption that it is good for him on the whole to suffer that pain or loss. But we cannot safely confide to him the interest of his neighbors, in the same unreserved manner in which we confide to him his own, eve when he sincerely intends to benefits his neighbors. Even parents have been known to deliver their children up to slavery in a foreign country, to

inflict the most cruel mutilations on their male children, to sacrifice the chastity of their female children, and to do all this declaring, and perhaps with truth, that their object was something which they considered as advantageous to the children. We have therefore not thought it sufficient to require that on such occasions the guardian should act in good faith for the benefit of the ward. We have imposed additional restrictions which we conceive, carry their defence with them.

There yet remains a kindred class of cases which are by no means of rare occurrence. For example. A person falls down in an apoplectic fit. Bleeding alone can save him, and he is unable to signify his consent to be bled. The Surgeon who bleeds him commits an act falling under the definition of an offence. The Surgeon is not the patient's guardian; and has no authority from such a guardian. Yet it is evident that the Surgeon ought not to be punished. Again, a house is on fire. A person snatches up a child too young to understand the danger, and flings it from the house top, with a faint hope that it may be caught in a blanket below, but with knowledge that is highly probable that it will be dashed to pieces. Here, though the child may be killed by the fall, though the person who threw it down knew that it would probably be killed, and though he was not the child's parent or guardian, he ought not to be punished.

In these examples there is what may be called a temporary guardianship justified by the exigency of the case and by the humanity of the motive. This temporary guardianship bears a considerable analogy to that temporary magistracy which the law invests every person who is present when a great crime is committed, or when the public peace is concerned. T acts done in the exercise of this temporary guardianship, we extend Clause 72 as a protection very similar to that which is given to the acts of regular guardians.

U.S. LAW - MEDICAL SOCIETY OF THE DISTRICT OF COLUMBIA - EXEMPTION FROM LICENSING FOR UNCOMPENSATED CARE WITH CONSENT OF PATIENT (1838)

In 1838, the United States Congress passed a law addressing the Medical Society of the District of Columbia. It included:

And provided, also, That nothing in this act contained shall be so construed as to prevent any person, living within or without said district, from administering medicine, or performing any surgical operation, with the consent of the person or the attendants of the person to whom such medicine is administered, or upon whom such surgical operation is performed, without fee or reward, …[114]

[114] Chapter CCLIX – *An Act to revive with amendments, an Act to incorporate the Medical Society of the District of Columbia."* July 7, 1838. 25th Cong, Sess. II, chap. 259, 6 Stat 741

CONVICTION OF MATHEW SPILLING - DEATH IN CHILD BIRTH - QUALIFIED SURGEON (York, England 1838)

In 1838 Mathew Spilling, a lawfully qualified surgeon, was convicted at York, England, for the death of Isabella Turner. He attended her in childbirth and had previously attended her in four other births. “He then used an instrument, gave her tremendous pain, and refused to desist, though she told him he was killing her.” Testimony from the surgeons who conducted the post mortem was that she was not near her time and no instrument should have been used. The jury recommended mercy of the Court. Spilling was sentenced to six months imprisonment.[115]

DUNCAN V. COMMONWEALTH - CONSENT NO DEFENSE TO CHARGE OF AFFRAY (Kentucky 1838)

In 1838, in a non-medical case, the Court of Appeals of Kentucky addressed an affray - disturbance of the public peace by fighting with the mutual consent of the combatants. The defendant claimed that affray was the same offense as assault and battery. The court stated that assault and battery “would not be authorized unless there had been a trespass without the consent of the person injured.” Since affray required consent, the offenses were distinct.[116]

MEDICAL SOCIETY EXPELLED LUZENBERG - PAYMENT TO PATIENT TO CONSENT TO SURGERY (New Orleans 1838)

In 1838, the Physico-Medical Society of New-Orleans expelled Dr. Charles A. Luzenberg. One of the reasons was an operation for cataract on a Seminole woman that left her blind in one eye that he had widely publicized as a success. In her statement the patient said that she had received five dollars from the operator to allow him to operate.[117]

The alleged behavior may not have happened. There have been questions about the motivation for the investigation as well as the accuracy of the accusations.[118] Luzenberg was born in Italy of Austrian parents and was

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[115] *R. v. Spilling*, 2 M. & Rob. 107, 174 Eng. Rep. 230 (Mar. 9, 1838); *Mala praxis*, TIMES (London), Mar. 12, 1838, 7; *Unskilful practice of a surgeon*, LONDON OBSERVER, Mar. 19, 1838, 4; *Trial of Mathew Spilling for manslaughter*, LANCET, ii:42-48 (April 7, 1838); *Coroner’s inquest*, LANCET, ii:669-673 (Aug. 13, 1836) [coroner’s jury verdict of manslaughter against Spilling]

[116] *Duncan v. Commonwealth*, 36 Ky. 295 (Apr. 24, 1838)

[117] PROCEEDINGS OF THE PHYSICO-MEDICAL SOCIETY OF NEW-ORLEANS IN RELATION TO THE TRIAL AND EXPULSION OF CHARLES A. LUZENBERG (New Orleans 1838), 3 & 32; *Medical miscellany*, BOSTON MEDICAL AND SURGICAL JOURNAL, 18(14):227 (May 9, 1838); *Physico-Medical Society of New Orleans*, BOSTON MEDICAL AND SURGICAL JOURNAL, 18(23):370 (July 11, 1838); *Proceedings of the Physico-Medical Society of New Orleans*, BOSTON MEDICAL AND SURGICAL JOURNAL, 19:32-33 (Aug. 15, 1838)

[118] Thomas Muldrup Logan, MEMOIR OF C.A. LUZENBERG, M.D., PRESIDENT OF THE LOUISIANA MEDICO-CHIRURGICAL SOCIETY (New Orleans: J.B. Steel, 1849), 45

educated in Germany. He came to Louisiana in 1829 to study tropical diseases. He was the founder and dean of the first medical school in Louisiana that later became Tulane. He was highly respected in some circles, but he had enemies in part because of the ways he innovated some treatments.[119]

This report is included as an example of using a consent issue as an accusation in an effort to discredit a physician. Consent issues were viewed as sufficiently salient to be the basis of meaningful accusations.

CONVICTION OF JOHN RYAN - PATIENT DEATH FROM BLEEDING BY QUACK AT PATIENT REQUEST (Ireland 1838)

In 1838 at the Tipperary Assizes in Ireland, a quack doctor, John Ryan, was tried on the charge of having bled William Ryan to death. He had previously provided relief to the deceased by bleeding, so the deceased had requested this bleeding. John Ryan was convicted but due to the mitigating circumstances he was sentenced to a fortnight's imprisonment on the condition that he never again attempt to bleed anyone.[120]

INQUEST - JOHN WALKER - REFUSAL OF AMPUTATION (England 1838)

In 1838 an inquest was held in England into the death of John Walker. When shooting a gun, the barrel burst destroying part of his arm. A surgeon advised immediate amputation above the elbow, which he refused. The jury returned a verdict of accidental death.[121]

INQUEST - OSBOURN - CONSENT TO EMERGENCY OPERATION (London 1838)

In 1838 an inquest was held at Guy's Hospital in London into the death of a man named Osbourn. He had contracted lockjaw from a dog bite. The wife of the deceased testified that a few minutes before his death she was ordered away from his bedside by the surgeon Babington who was about to perform an operation. She said the deceased prayed not to do the operation, but it was done by force. The surgeon testified that the operation was to remove a tooth to provide a passage for a tube to supply nourishment. The surgeon testified that the deceased had initially opposed the removal, but when it was explained that he could not survive long without the nourishment, the deceased consented. The coroner's jury exonerated the surgeon, finding accidental death.[122]

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[119] Henry Rightor, editor, STANDARD HISTORY OF NEW ORLEANS, LOUISIANA (Chicago: Lewis Publishing 1900), 215-216; Edmund Souchon, *A biographical study*, PUBLICATIONS OF THE LOUISIANA HISTORICAL SOCIETY (New Orleans: American Printing Co. 1916), Vol. VIII, 66, at 70-71
[120] *An Irish quack doctor,* PATRIOT (London), Aug. 9, 1838, 2; *An Irish quack doctor,* EXAMINER (London), Aug. 12, 1838, p. 508
[121] *Coroners' inquests*, TIMES (London), 7 (Aug. 24, 1838)
[122] *Death from bite of a dog,* CHAMPION AND WEEKLY HERALD (London), Aug. 26, 1838

INSTITUTIONAL PLACEMENT OF CHILDREN (Pennsylvania 1839)

In 1839, in a non-medical case, based on the *parens patriae* powers of the state, the Pennsylvania Supreme Court upheld a law providing for institutional placement of children without proof of crime or any criminal proceedings. The court's decision is short and very important to the role of the state in the protection of children, so here it is in full:

> PER CURIAM.--The House of Refuge is not a prison, but a school. Where reformation, and not punishment, is the end, it may indeed be used as a prison for juvenile convicts who would else be committed to a common gaol; and in respect to these, the constitutionality of the act which incorporated it, stands clear of controversy. It is only in respect of the application of its discipline to subjects admitted on the order of the court, a magistrate or the managers of the Almshouse, that a doubt is entertained. The object of the charity is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influence of improper associates. To this end may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that of strict right, the business of education belongs to it. That parents are ordinarily intrusted with it is because it can seldom be put into better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are, at its sufferance? The right of parental control is a natural, but not an unalienable one. It is not excepted by the declaration of rights out of the subjects of ordinary legislation; and it consequently remains subject to the ordinary legislative power which, if wantonly or inconveniently used, would soon be constitutionally restricted, but the competency of which, as the government is constituted, cannot be doubted. As to abridgment of indefeasible rights by confinement of the person, it is no more than what is borne, to a greater or less extent, in every school; and we know of no natural right to exemption from restraints which conduce to an infant's welfare. Nor is there a doubt of the propriety of their application in the particular instance. The infant has been snatched from a course which must have ended in confirmed depravity; and, not only is the restraint of her person lawful, but it would be an act of extreme cruelty to release her from it.
> Remanded. [123]

[123] *Ex parte Crouse*, 4 Whart. 9 (Pa. Jan. 4, 1839)

This decision laid some of the groundwork for the later broader state interventions in the care and treatment of minors.

AQUITTAL OF SPOLASCO - MANSLAUGHTER CHARGE AGAINST CANCER-CURER (England 1839)

In 1839, in England, Susannah Thomas had had severe stomach pain for several months. She went to Baron Spolasco, a cancer-curer. Refusing to listen to her symptoms, he gave her pills that she took. She got worse. Spolasco attended her and she died. Autopsy showed that she had a perforated duodenal ulcer. The coroner's jury found him guilty of manslaughter. He was tried at the Glamorganshire Assizes and found not guilty.[124]

DEATH AT MISSIONARY HOSPITAL IN CHINA (1839)

In 1839 a Chinese female named Woo died in a medical missionary hospital in China under the care of Dr. Parker. An official, called the Namboy, was informed of the death and conducted an inquest through an interpreter. “The questions were very much to the point - such as if the operation had been made with the deceased’s full consent…”[125]

GLADWELL V. STEGGALL - MINOR CAN SUE FOR MALPRACTICE WHEN PROVIDED THE ASSENT TO TREATMENT (England 1839)

In an English case, Miss Gladwell at age 10 had employed Mr. Steggall, a medical practitioner, to treat her. Miss Gladwell sued Mr. Steggall for malpractice. Mr. Steggall sought to dismiss the case because Miss Gladwell as a minor could not contract for the services. In 1839, the court ruled that it did not make any difference who had employed the medical practitioner. "[T]here was sufficient evidence of an employment by the Plaintiff, when it was proved that the Defendant was called in, and that the Plaintiff assented to his attendance." *[Emphasis added]* The party who allows a surgical operation to be performed is

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[124] *Manslaughter by a quack, at Brigand*, LANCET, i:822-823 (Feb. 23, 1839); TIMES (London), Feb. 22, 1839, 6; FREEMAN’S JOURNAL AND DAILY COMMERCIAL ADVERTISER (Dublin), Feb. 25, 1839; *News by the London Posts*, BRISTOL MERCURY, Mar. 16, 1839; STANDARD (London), Mar. 25, 1839, 1. Later in 1839 he was charged with producing forged medicine stamps. TIMES (London), Dec. 12, 1839, 5; Mar. 11, 1840, 6. The outcome of the case has not been located.

[125] *Death of a Chinese female in the medical missionary hospital,* NEW YORK SPECTATOR, July 22, 1839, 2; *Death of a Chinese female in the medical missionary hospital,* DAILY NATIONAL INTELLIGENCER (D.C.), July 23, 1839. Note that in 1836 Dr. Parker had used a written consent in one prior successful case. *From Canton papers to the 5th April received at this office*, NEW YORK SPECTATOR, Sep. 5, 1836

presumed to have employed the surgeon for that particular purpose. The court awarded £ 10 damages.[126]

VOIDING PATIENT GIFT - VIOLATED CONFIDENTIAL RELATIONSHIP (England 1839)

In 1839, there was a challenge in an English court to the validity of a £25 gift from an aged patient to physician. The court voided the gift due to the confidential relationship between patient and physician.[127]

FORCE V. HAINES - SLAVEHOLDER NOT OBLIGATED TO PAY FOR TREATMENT OF SLAVE WITHOUT SLAVEHOLDER'S CONSENT (New Jersey 1840)

In 1840, the New Jersey Supreme Court decide a case in which Elizabeth Haines sought payment from a slave holder, Henry Force, for the care of his slave, Minna, over a period of several years. The jury awarded her part of the amount she sought. The appellate court reversed holding that in the absence of an agreement there was no obligation to pay. The court stated:

> But it is contended that this principle is subject to certain limitations; and that if the service be performed *with the knowledge* of the defendant (as in the present instance) he is liable. -- As where a physician attends a servant or slave in the family of his master, and in like cases, it has been held that he could recover, without further proof. But these cases do not depend upon the fact that the master had knowledge of the service merely, but upon the more important fact, that the service was rendered under such circumstances as unavoidably carry with them the inference that it was done with the master's *approbation and consent*. If the master could prove otherwise--if he could show that he had actually forbid the attendance of the physician, it would rebut the prima facie presumption arising from the circumstances, and repel effectually any inference of a promise to pay. In law and in reason, we are only authorized to *infer* facts in the absence of express proof. In the present case, it is proved affirmatively, that at least six years before the commencement of the suit, Mrs. Haines was expressly told by Force, that he would never again

[126] *Gladwell v. Steggall*, 5 Bingham's New Cases 733, 132 Eng. Rep. 1283 (June 19, 1839)
[127] *Dent v. Bennett*, 7 Sim. 539, 58 Eng. Rep. 944 (Dec. 1, 1835) [gift from patient to physician voided]; *Dent v. Bennett*, 4 My. & Cr. 269, 41 Eng. Rep. 105 (1839) [agreement between patient and surgeon set aside]

receive the slave, and if she should recover any thing of him, sooner than pay it, he would put his property out of his hands.[128]

COMPETENCY - EFFECT OF FEAR OF SURGERY (England 1840)

In 1840, an English court ruled that the fear of surgery did not render a person incompetent to sign a will.[129]

It is interesting to speculate whether a contrary decision would have required substituted consent for surgeries. How could a patient be competent to consent to surgery when considered incompetent to sign a will?

INQUEST - ROBERT MUDD - REFUSAL OF AMPUTATION (London 1840)

In 1840, an inquest was held into the death of Robert Mudd who was injured in workplace injury. He was removed to Guy's Hospital in London where a surgeon advised that amputation of the right foot was necessary to save Mudd's life. Mudd and his wife refused the amputation and Mudd died. The coroner's jury found accidental death.[130]

LETTER FROM GOVERNOR OF BRITISH GUIANA - PATIENT CANNOT BE COMPELLED TO TAKE MEDICINES (1840)

In 1840, Doctor MacFarlan complained to Governor Light of British Guiana that the Coolies at Vriedestien plantation refused to remain in the hospital when ordered, and to take the medicines prescribed for them. The Governor noted in a letter Lord John Russell dated June 20, 1840:

> The hospital regulations prepared by Captain Coleman, and approved by his Excellency the Governor, authorize restriction to the hospital when deemed necessary by the medical practitioner. I know of no means by which a patient can be compelled to take the medicines prescribed for him.
>
> I was at Vriedestien on the 1st of the present month, when I told the manager that in any case in which the medical practitioner would give a written certificate that it was necessary for the cure of the disease, or safety of the patient, that he should be restricted to the hospital, I would

[128] *Force v. Haines*, 17 N.J.L. 385 (Feb. 1840). The case is analyzed in detail in Hendrik Hartog, THE TROUBLE WITH MINNA: A CASE OF SLAVERY AND EMANCIPATION IN THE ANTEBELLUM NORTH (Chapel Hill: Univ. of North Carolina Press 2018)

[129] *Chambers and Yatman v. The Queen's Proctor*, 2 Curt. 415, 163 Eng. Rep. 457 (Prerogative Court May 1, 1840)

[130] TIMES (London), May 29, 1840, 5

approve of and sanction such restriction, but that I could not sanction a general confinement of patients.[131]

INQUEST - ELIZABETH MORGAN - RELIGIOUS REFUSAL OF TREATMENT (England 1841)

In 1841 in England, an inquest was held in the death of Elizabeth Morgan. She was a member of the Church of Jesus Christ and Latter-day Saints and had refused regular medical attendance based on the tenets of the church at that time. She was prayed over and a wife of an elder administered sage tea with cayenne pepper. Leeches were applied. The coroner said that the case was not strong enough for a verdict of manslaughter but he trusted that publication would caution members to the necessity of medical aid. The jury returned a verdict of natural death.[132]

VICTIM REFUSAL OF MEDICAL CARE NO DEFENSE TO PROSECUTION FOR MURDER (England 1841)

In 1841, an English court ruled that the victim of a crime could refuse potentially life-saving surgery and, if death resulted, that refusal was not a defense to a murder charge.[133] The defendant had injured the victim's finger during an assault. The surgeon advised amputation and the victim refused. A fortnight later the victim died of lockjaw.[134]

BURKE'S CASE - MANSLAUGHTER CONVICTION OF UNQUALIFIED OPERATOR (Ireland 1841)

In 1841, in Ireland, an unqualified person performed the operation of tapping upon a woman and death immediately ensued. No regular medical aid could be procured and the operation was performed at the urgent solicitation of the friends of the deceased. The operator was indicted for manslaughter. The operator claimed that the rule was that it could not be manslaughter because no other aid was accessible. The court rejected that this was a defense. The jury found the operator guilty, but imposed a fine of only 6 d because proper medical skill could not be had.[135]

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[131] PAPERS RELATIVE TO THE WEST INDIES - 1841 - BRITISH GUIANA (London: William Clowes & Sons 1841), No. 73, pages 148, 150 [Presented to both Houses of Parliament]; Parliament, ACCOUNTS AND PAPERS (1841) Vol. 16, page 150

[132] *Coroners' inquests,* TIMES (London), Nov. 4, 1841, 6; *Fanaticism versus the profession*, MEDICAL TIMES, 5(112):80 (Nov. 13, 1841)

[133] *R. v. Holland*, 2 M. & Rob. 351, 174 Eng. Rep. 313 (1841)

[134] As discussed in *Chapter 5: Causation,* posted at faculty.law.ubc.ca/ mosoff/ casebook/ubccasebook5.pdf [accessed Mar. 19, 2006]

[135] *Burke's case*, Ir. Cir. Rep. 325 (Castlebar Spring Assizes Ireland 1841)

UNNECESSARY OPERATIONS TO GRATIFY PATIENTS (England 1841)

In 1841, the PROVINCIAL MEDICAL AND SURGICAL JOURNAL editorialized against unnecessary operations performed to "gratify the wishes of the patient." Several such surgeries were described that had resulted in patient deaths. No legal proceedings are described.[136]

MANSLAUGHTER CONVICTION OF ISAAC CHAMBERLAIN (England 1841)

Mary Anne Chymist had cancer of the breast and placed herself under the care of Isaac Chambers, a butcher, who professed he could cure her. She died under his treatment expressing confidence in him to the last. The jury at the inquest found him guilty of manslaughter. He was convicted and sentenced to one year in prison. Her consent was apparently no defense.[137]

COLBY V. JACKSON - DETENTION OF MENTALLY ILL PERSONS (New Hampshire 1842)

In 1842, in the case of *Colby v. Jackson*, the highest court of New Hampshire addressed when mentally ill persons could be detained.[138] The court affirmed a jury verdict finding the overseers of the poor liable for detaining a man, but imposing only one dollar in damages. The court recognized the right of anyone to take steps to provide short-term immediate protection to the mentally ill, but ruled that court approval was necessary for long-term detention.

PARENTAL CONSENT REQUIRED FOR SALE OF DRUG TO MINOR (Kentucky 1842)

In 1842, Kentucky passed a law requiring "written consent of the parent or guardian" before a poisonous drug could be sold to a person under age 15.[139]

ASSAULT OF DOCTOR ON PATIENT (Maryland 1842)

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[136] PROVINCIAL MEDICAL AND SURGICAL JOURNAL, 2(39):255 (June 26, 1841). See also A., *Professional etiquette*, BOSTON MEDICAL AND SURGICAL JOURNAL, 29(22):440-441 (Jan. 3, 1844) [discussing yielding to expressed wishes of the patient]

[137] *Offenses - Alleged ill-treatment by a quack doctor*, EXAMINER (London), Oct. 23, 1841; Death from *alleged ill-treatment by a quack doctor,* ERA (London), Oct. 24, 1841; *Assassination by a quack doctor*, MEDICAL TIMES, 5(109):44 (Oct. 23, 1841); *A butcher surgeon*, LANCET, i:295-296 (Nov. 27, 1841); *Death from St. Vitus's dance under quack treatment*, LANCET, i:563 (May 16, 1846) [he resumed his medical practice after release and was exonerated of another patient death by a inquest in 1846]

[138] *Colby v. Jackson*, 12 N.H. 526 (Jan. 1842)

[139] Laws of Kentucky, 1842, Chapter 136 (approved Feb. 5, 1842)

In 1842, Dr. Thomas Tillott was charged in Baltimore City Court with assaulting Thomas S. Clark, a patient who had been discharged from an infirmary. The patient had been in the infirmary for twelve weeks and had a very disorderly deportment, so he was discharged for insolence. He returned after closing and resumed his quarters in the infirmary. On the following morning, Dr. Tillott ordered him to leave to which he replied that he was going to leave, so the doctor could go along. The doctor collared him and released him when he said he would leave. The patient retreated with abusive language. The doctor hurled a cane after him that struck Clark. The doctor was fined $1 and costs.[140]

VEITCH V. RUSSELL - COLLECTION SUIT - NO CONTRACT TO PAY IMPLIED FROM ATTENDANCE (England 1842)

In 1842, a court explored the complexities of when there was an obligation to pay for medical care under the English law at that time. In a collection action by a doctor, the court ruled that no contract to pay was implied from attendance. Only a promise to pay a fixed or reasonable sum could be enforced. The jury found no such promise and ruled for the defendant patient. The appellate court affirmed.[141]

EDSALL V. RUSSELL - LIBEL CASE (England 1842)

In an 1842 an apothecary Edsall sued Russell for slander. Russell was the father of a child who died after receiving medicines prepared by Edsall. The three alleged slanders were:

(1) “He killed my child; it was the saline injection that did it.”

(2) “He made up the medicines wrong through jealousy, because I would not allow him to use his own judgment.”

(3) “Mr. P told me that he (the plaintiff) had given my child too much mercury and poisoned it; otherwise it would have got well.”

The first and third were found to constitute slander and second was not. In the course of the court report it was noted that the father had given his consent and permission to make up and administer the drug. The court addressed whether administering medicines improperly might constitute and assault. One judge noted that it could not constitute assault if it did not involve personal contact.[142]

R. V. BLOOMINGTON - CONVICTION FOR FALSE PRETENSES (England 1842)

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[140] *State vs. Dr. Thomas Tillott,* SUN (Baltimore), June 6, 1842, 1

[141] *Veitch v. Russell*, 1 Carr. & M. 362, 174 Eng. Rep. 544 (Q.B. Feb. 3, 1842), *aff'd* 3 Q.B. 926, 114 Eng. Rep. 764 (Nov. 28, 1842); 28 LAW MAG. QUART, REV. JURIS. 189 (1842); *Veitch v. Russell*, TIMES (London), Feb. 5, 1842, 6

[142] *Edsall v. Russell*, 4 Man. & G. 1090, 134 Eng. Rep. 446 (Court of Common Pleas Nov. 18, 1842), also reprinted in NEW YORK LEGAL OBSERVER, 1(26):412 (Apr. 8, 1843); JURIST 6(o.s.): 996 (1843); *Edsall v. Russell*, TIMES (London), Nov. 19, 1842, 6

In 1842, an English court ruled in *R. v. Bloomington*, that a person charged with falsely pretending to be another, inducing the purchase of a substance represented to cure the eye of a child, could be convicted of false pretenses. The jury found him guilty.[143]

[143] *R. v. Bloomfield*, Car. & M. 537, 174 Eng. Rep. 624 (1842); R. v. Bloomfield, THE JURIST, 6:224 (1843) (Berkshire Lent Assizes)

WRIGHT V. BATCHELDER - MALPRACTICE SUIT INVOLVING INADEQUATE DISCLOSURE OF RISKS (New York 1843)

In 1843, an informed consent suit was tried in New York - *Wright v. Batchelder*. The parents brought a malpractice suit for the death of their child due to the excision of tonsils. They alleged that the risks had not been adequately disclosed. The Justice Court awarded $100.

> A child of the plaintiff, two and a half years old, had a tumor on the nose, about the size of a pea, and the parents of the child went with it to Utica for the purpose of having it removed by the defendant… He then examined the throat of the child, and showed the parents that the difficulty was enlarged tonsils, and suggested the propriety of having them removed. … Plaintiff inquired if it would be safe to take the child home, being about seventeen miles, as he was obliged to return home that day. The day was a very cold one - the1st of January, 1839. The doctor replied that it would be perfectly safe; that there was no danger in taking the child home after the operation the same day; said the operation was a simple one, and if not performed, the swelling would increase to such a degree as to cause the child's death; that there was no other way to cure the disease, but to have them taken out.
>
> The plaintiff finally consented, and the operation was performed and the child was taken home… It appeared that when the child arrived home it was a free perspiration; hands, feet and face warm, and no indications of having taken any cold. A few days later the child was taken unwell, and in about two or three weeks died of inflammation in the throat.
>
> The plaintiff contended that the death ensued in consequence of the operation performed by the defendant; that it was improper to perform the operation; that it was dangerous to expose the child by taking it home after the operation; and that had it not been for the advice and representation of the defendant, it would not have been done….

On further hearing in Common Pleas Court, a jury ruled for the defendant.[144]

PROMISE TO CURE NOT FALSE PRETENSES (Ireland 1843)

In 1843, man applied to Magistrate Tyndall in Dublin for advice whether he could pursue a claim of obtaining money under false pretenses against the keeper of a hydropathic establishment who had promised to cure his wife, but she got worse. The magistrate advised him that a criminal charge could not be sustained.[145]

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[144] *Excision of tonsils*, BOSTON MEDICAL AND SURGICAL JOURNAL, 28(2):29-33 (Feb. 15, 1843). For a biography of John P. Batchelder, see Samuel W. Francis, BIOGRAPHICAL SKETCHES OF DISTINGUISHED LIVING NEW YORK SURGEONS (New York: John Bradburn 1866), 117-129

[145] *Hydropathic treatment*, FREEMAN'S JOURNAL AND DAILY COMMERCIAL ADVERTISER (Dublin), Nov. 18, 1843

CAPACITY OF PERSON IN ASYLUM (England 1843)

In 1843, in a non-medical case, an English court explored the legal capacity of a person in asylum. The suit challenged a deed that had been signed by the person. The court found the person had capacity and sustained the deed.[146]

PROPOSAL TO REQUIRE CONSENT TO SURGERY IN STATE INSTITUTION (Ohio 1843)

In 1843, there was a legislative proposal in Ohio to require patient consent for surgery at the institution for the education of the blind:

> 3 o clock, P. M. Mr. Clark offered a joint resolution, authorizing the Directors of the institution for the education of the Blind to employ some skilful Oculist to examine, and, at the discretion of the Directors and with the permission of the pupil to submit to medical treatment and surgical operation such cases of blindness as may be deemed curable. Referred to the Committee on Public.[147]

RICE V. STATE - REVERSAL OF MANSLAUGHTER CONVICTION OF BOTANICAL HEALER - EFFECT OF CONSENT (Missouri 1844)

In Missouri, a botanical healer was convicted of manslaughter for the death of the patient. In 1844 in the case of *Rice v. State*, the Missouri Supreme Court reversed because the court had failed to give an instruction regarding the standard to be applied to those providing medical care.

> Among others, the court was asked to give the following instruction, which was refused, viz.: "That if the jury believe, from the evidence, that Rice, in his treatment of Mrs. Keithley, acted with good and honest intentions, they will find him not guilty." Motions for a new trial, and in arrest of judgment, were made and overruled by the court. ***
> Then, to make the defendant guilty, it must be made appear that it was unlawful for him to administer physic to the deceased with her consent. We are not aware of the existence of a law which prohibits any man from prescribing for a sick person with his consent, if he honestly intended to cure him by his prescription, however ignorant he may be of medical science.
> If a person assume to act as a physician, however ignorant of medical science, and prescribe with an honest intention of curing the patient, but through ignorance of the quality of the medicine prescribed, or of the nature of the disease, or both, the patient die in consequence of the

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[146] *Selby v. Jackson*, 6 Beav. 192, 49 Eng. Rep. 799 (1843); 1 L. REV. & Q.J. BRIT. & FOREIGN JURIS. 219-220 (1844-1845)
[147] *House of Representatives*, WEEKLY OHIO STATE JOURNAL, Dec. 20, 1843, 1

> treatment, contrary to the expectation of the person prescribing, he is not guilty of murder or manslaughter; but if the party prescribing have so much knowledge of the fatal tendency of the prescription, that it may reasonably be presumed that he administered the medicine from an obstinate willful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter, at least, though he might not have intended any bodily harm to the patient.[148]

R. V. STANTON - ACQUITTAL OF CHARGE OF SEXUAL ASSAULT ON PATIENT (England 1844)

In March 1844, Dr. Peter Stanton was found not guilty of assault with intent to commit rape of his patient Emma Brown because it was done by surprise not by force.[149]

CONVICTION OF RILEY DRAKE - MANSLAUGHTER BY THOMSONIAN PRACTITIONER - CONSENT NOT A DEFENSE (New York 1844)

In May 1844 in Binghampton, New York, Riley Drake, a Thomsonian practitioner, was convicted of manslaughter in the fourth degree for the death of Miss Frost under this treatment. Her consent was not sufficient to protect him.

> Deceased asked Drake if he could help her, and he said he could. Her father would not give his consent to have Drake. …Drake came in, and she (deceased) told him if he thought he could help her, she wished he would.[150]

INQUEST - FRANCES WILSON - FORCED FEEDING FOR VOLUNTARY STARVATION (England 1844)

In 1844, in England, an inquest was held in the death of Mrs. Frances Wilson, age 45, who had died at Byle's private lunatic asylum from "voluntary starvation," during forced feeding. She had been confined and placed in straitjacket. The nurse in attendance testified that the "deceased had a decided disposition to abstain from food… she could not be persuaded to eat proper nourishment." "What could be administered to her was generally done by some person holding her head back whilst witness put the food into her mouth." "If it was got into her mouth, she would not swallow it." While "engaged in feeding her with wine and arrow-root as the last teaspoonful was about to be poured down

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[148] *Rice v. State*, 8 Mo. 561 (Jan. 1844)
[149] R. v. Stanton, 1 Car. & K. 415, 174 Eng. Rep. 872 (Mar. 14, 1844); *Oxford Circuit - Before Mr. Justice Coleridge*, TIMES (London), Mar. 16, 1844, 8
[150] N.S. Davis, *Art. VI. - Medico-legal inquiry; or, a report of the evidence taken in the case of the People vs. Riley Drake, on an indictment for manslaughter in the fourth degree, tried at Binghampton, May, 1844,* N.Y. JOURNAL OF MEDICINE AND COLLATERAL SCIENCES, 3(9):343 (Nov. 1844)

her throat, her eyes become fixed, as if death was coming upon her. She was immediately laid down on the bed, gave a deep gasp, and immediately expired." The surgeon responsible for the asylum who was present at the death stated that she refused food because she believed it was poison. The coroner stated: "No spoon or finger was put down her throat so as to force her to swallow the liquid. There was no other way of getting her to take nourishment but by forcing her in the manner spoken of." The jury gave a verdict that "the deceased died as a consequence of abstaining from proper nourishment to sustain life."[151]

WRITTEN CONSENT - BY HUSBAND FOR SURGERY
(British Ship 1844)

In 1844, in a report of the voyages of a British ship, an early written consent was noted:

> Many of the wounded men were very carefully attended by our medical officers, to whom the greatest credit is due for their exertions in the cause of humanity. Several poor fellows submitted to amputation cheerfully, and most of them recovered. There was one poor woman accidentally wounded, who, with the written consent of her husband, underwent the operation for amputation of the leg, and for some days was cheerful, and went on well, but ultimately she died.[152]

No legal proceedings ensued.

STATE V. SMITH - HANDLING OF SMALL POX PATIENT
(New Hampshire 1845)

In 1845, the highest court of New Hampshire reversed a criminal conviction of the selectmen and overseers of the poor of the town of Exeter for their handling of the treatment of a small pox patient. The reversal was based on technicalities of pleading.

> The indictment alleges that the defendants, selectmen and overseers of the poor of Exeter, and bound to provide for sick persons, unable to provide for themselves, knowing that Eleanor Moore was infected with a contagious disease called small-pox, on a day named, with force and arms unlawfully took her from the house of Oren Head, and carried her along the "Great Road," so called, to the house of Mehitable Kelly, in Stratham, which stood near the highway, and near other houses that were inhabited, carrying her also by and near persons passing and repassing upon the Great Road, and against the consent of Mehitable Kelly, left the

[151] *Coroner's inquest*, TIMES (London), Dec. 27, 1844, 7
[152] William Dallas Bernard & William Hutcheon Hall, NARRATIVE OF THE VOYAGES AND SERVICES OF THE NEMESIS, FROM 1840 TO 1843 (H. Colburn 1844), vol. 2, 224

> woman Moore at her house, sick and destitute, by reason of which moving and abandonment she soon after died.

The history of the case stated that this had been done "against the will and consent of the said Mehitable Kelly."[153]

CIRCULAR OF POOR LAW BOARD (England 1845)

In February 1845, the Poor Law Board in England issued the following circular:

> REFUSAL OF A PATIENT TO SUBMIT TO AN OPERATION.
> 69. If any Medical Practitioner (not the Medical Officer of the Workhouse where the patient is) can certify that the pauper is not of sound mind, the Guardians would be justified in authorizing those means to be used which they are informed can alone save life; on the other hand, if the patient is of sound mind, he must be allowed to judge for himself.[154]

CONSENT ISSUES IN ABORTION PROSECUTIONS (Mass. 1845; N.J. 1848)

In 1845, Luceba Parker was prosecuted in Massachusetts for performing an abortion. The court ruled that there could be no prosecution when it is performed with the consent of a woman who was not quick.[155] In 1848, a New Jersey court similarly concluded that the consent of the mother was a defense in a prosecution of Eliakim Cooper for abortion.[156]

NEW YORK ALMS HOUSE RULES (1845)

In 1845, New York passed a June a law entitled "An Act for the re-organization of the Alms House Department, in the City and County of New York."[157] Pursuant to that law, the city repealed its 1839 ordinance governing the Alms House Department and replaced it with a new ordinance on June 16, 1845.[158] The new ordinance included:

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[153] *State v. Smith*, 20 N.H. 399 (Jan. 1845)
[154] EVIDENCE OF POOR LAW MEDICAL RELIEF TAKEN BEFORE THE SELECT COMMITTEE OF THE HOUSE OF COMMONS ON POOR RELIEF (ENGLAND) IN 1861 (Weymouth: J. Sherren 1862), 42
[155] *Commonwealth v. Parker*, 50 Mass. 263, 9 Met. 263 (Mar. 1845); see American Medical Association, TRANSACTIONS OF THE AMERICAN MEDICAL ASSOCIATION (Philadelphia 1848), Vol. 1, 99-100
[156] *State v. Cooper*, 22 N.J.L. 52 (Apr. 1849)
[157] LAWS OF THE STATE OF NEW YORK PASSED AT THE SIXTY-EIGHTH SESSION OF THE LEGISLATURE… (Albany: C. Van Benthuysen 1845), Chapter 283, *An Act for the re-organization of the Alms House Department, in the City and County of New-York* (passed May 14, 1845)
[158] BY-LAWS AND ORDINANCES OF THE MAYOR, ALDERMAN, AND COMMONALTY OF THE CITY OF NEW YORK (New York, J.S. Voorhies, 1845), Chapter LXXXI, *For the re-organization of the Alms House Department*, at 551 et seq.

> § 10. The Resident Physician shall not perform any surgical operation in the Hospitals, without the consent of the patient, nor any operation endangering life or requiring the loss of limb, until he has called in consultation at least one Surgeon, and agreed on such operation: provided, that the case shall not require an immediate operation, and in which, delay might prove of serious injury.[159]

There had been efforts as far back as 1837 to require consent for surgical operations. The following account is provided in detail to show the degree of attention that was focused on this issue. It is not clear whether any of these efforts took effect prior to the June 1845 ordinance.

On November 27, 1837 the Board of Assistant Aldermen received the report of a special committee on the reorganization of the Hospital Department of the Alms House. It included a proposed law to regulate the hospital. The section on visiting surgeons included:

> Section 6. No Surgical operation shall be performed in the Hospital without the consent of the Patient, nor any operation endangering the life or loss of a limb of the Patient, until at least two of the Surgeons have consulted and agreed upon such operation; …[160]

What action was taken on the report has not yet been located. The law was not enacted.

The city ordinance *Of the Alms House Department*, passed May 2, 1839, does not mention consent or surgery. However, it includes a requirement of vaccination:

> §4. No person shall be admitted into the house unless upon condition of submitting to vaccination.[161]

On January 30, 1843, the Board of Aldermen received a *Report of the Special Committee on the Re-organization of the Alms-House, and the Establishment of a Work-House*. It included:

> § 5. No surgical operation shall be performed in the Hospital without the consent of the patient, nor any operation endangering the life or requiring the loss of limb of a patient, until at least two Surgeons have consulted and agreed upon such operation;…[162]

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[159] *Ibid*., at 566

[160] *Document No. 108*, Board of Assistant Aldermen, Nov. 27, 1837, in JOURNAL AND DOCUMENTS OF THE BOARD OF ASSISTANTS OF THE CITY OF NEW YORK, 10:348 (1837)

[161] BY-LAWS AND ORDINANCES OF THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK (New York: W.B. Townsend 1839), Chapter XIII, *Of the Alms House Department*, Title III - Of Admission into and Discharge from the Alms House, 92 at 98

[162] DOCUMENTS OF THE BOARD OF ALDERMEN OF THE CITY OF NEW YORK …FROM JULY, 1842, TO MAY, 1843 (New York: Chas. King 1843), Volume IX, Doc. No. 73, at page 724

On February 27, 1843, the Board of Alderman met to consider the report. The NEW YORK DAILY HERALD reported a dispute about the proposed medical board to control the hospital. It arose out of accusations concerning physicians involved in writing the report. The newspaper also reported:

> Section 11th prohibits any surgical operation endangering the life or requiring the loss of a limb of a patient, unless a majority of the consulting physicians and resident physician have consented to it, except in urgent cases, but no surgical operation is to take place without the consent of the patient.[163] [

According to the official report of the meeting, the clause about consent was added pursuant to an amendment moved by Alderman Smith:

> Section 11. Alderman Smith moved to amend by adding the following thereto, "and no surgical operation shall be undertaken without the consent of the patient."
> Which was adopted, and the same then passed.[164]

On December 11, 1843, the Board of Assistant Aldermen received a report proposing reorganization of the Alms-House Department. It included:

> § 10. The Resident Physician shall not perform any surgical operation in the Hospitals without the consent of the patient, nor any operation endangering life or requiring the loss of limb, until he has called in consultation at least one surgeon, and agreed on such operation: provided, that the case shall not require an immediate operation and in which delay might prove of serious injury. [165]

At the stated meeting of the Board of Assistant Aldermen held on January 29, 1844, the Board adopted the Ordinance. There were amendments to other sections. The above section 10 was not changed.[166] This was not the final step in enacting the ordinance. Action by the Board of Alderman was also required. No record of such action has been found until the June 16, 1845 ordinance was adopted. A publication of the ordinances in effect at the beginning of 1845

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[163] N.Y. DAILY HERALD, Feb. 28, 1843, 2

[164] PROCEEDINGS OF THE BOARD OF ALDERMEN (New York: Charles King 1843) Vol. XXIV, at 634. Alderman Smith was Assistant Alderman Isaac B. Smith for the Ninth Ward. NEW YORK CITY AND CO-PARTNERSHIP DIRECTORY FOR 1843 & 1844 (New York: John Doggett, Jr. 1843), at 401. No additional information about Smith has been discovered that illuminates why he moved the amendment.

[165] JOURNAL AND DOCUMENTS OF THE BOARD OF ASSISTANTS OF THE CITY OF NEW YORK (1844), Document No. 16, *An ordinance for the re-organization of the Alms House Department*… (Dec. 11, 1843), Article X, *Of the Resident Physician*, sec. 10, 23:149, at 164

[166] JOURNAL AND DOCUMENTS OF THE BOARD OF ASSISTANTS OF THE CITY OF NEW YORK (1844), *Stated Meeting January 29th, 1844*, at page 151

includes the ordinance of 1839 as the ordinance still governing the Alms House Department.[167]

JOSIAH OAKES - STANDARDS FOR CIVIL COMMITMENT OF THOSE ALLEGED TO BE MENTALLY ILL (Massachusetts 1845)

A few days after the death of his wife,[168] Josiah Oakes, age 67, engaged to marry a young woman Sarah Jane Neal. His sons had him committed to the McLean Hospital for the Insane. In January 1845 a habeas corpus action was filed to seek his release. The highest court of Massachusetts analyzed the grounds for confinement against one's will. It concluded that he was delusional and that it was dangerous to him and others for him to be at large. The court remanded Oakes to the asylum.[169]

The U.S. District Court for the Eastern District of Wisconsin described the Oakes case as follows:

> In 1845, an inmate of a Massachusetts institution for the insane brought a habeas corpus action, alleging that his commitment was illegal. *Matter of Josiah Oake*s, 8 Law. Rep. 123 (Mass. 1845. The Massachusetts Supreme Court held that
> "the right to restrain an insane person of his liberty is found in that great law of humanity, which makes it necessary to confine those whose going at large would be dangerous to themselves or others. . . . And the necessity which creates the law, creates the limitation of the law. The questions must then arise in each particular case, whether a patient's own safety, or that of others, requires that he should be restrained for a certain time, and whether restraint is necessary for his restoration or will be conducive thereto. The restraint can continue as long as the necessity continues. This is the limitation, and the proper limitation." *Id*. at 125. Dangerousness to self thus became an additional criterion upon which commitment could be based. This criterion apparently rested on an assumption that a state could proceed as parens patriae to protect the interests of the person involved. The doctrine could be justified as a

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[167] BY-LAWS AND ORDINANCES OF THE MAYOR, ALDERMAN, AND COMMONALTY OF THE CITY OF NEW YORK (New York, J.S. Voorhies, 1845), Chapter XIII, *Of the Alms House Department*, at 117 et seq.

[168] *Deaths*, DAILY EVENING TRANSCRIPT (Boston), Oct. 17, 1844, 2 [Mrs. Charlotte Oates]

[169] *Matter of Josiah Oakes*, 8 LAW. REP. 122 (Mass. Jan. 1845), 2 AM. J. INSANITY 225 (1846); *Supreme Judicial Court*, BOSTON COURIER, Jan. 20, 1845; *Matter of Josiah Oakes*, BOSTON WEEKLY MESSENGER, Jan. 22, 1845; discussed in *Confinement of the insane*, AMERICAN LAW REVIEW, 3(2):193 (Jan. 1869); Paul S. Appelbaum and Katherine N. Kemp, *The evolution of commitment law in the nineteenth century: A reinterpretation*, LAW AND HUMAN BEHAVIOR, 6(3/4):343-354, at 346 (1982); Alan Dershowitz, *The origins of preventive confinement in Anglo-American law - Part II: The American experience*, UNIV. CINCINNATI LAW REV., 43:781 at 810-820 (1974)

derivation of an English law, under which the King was appointed the guardian of the person and goods of a lunatic.[170]

When the Oakes' attorney Hallett sought payment for his services, the guardians refused. Hallett sued and was awarded his fees.[171]

In 1850 Oakes petitioned to have his guardianship dissolved.

In March 1850, Josiah Oakes petitioned the Massachusetts legislature for legislation giving precedence to such cases.[172] No such legislation was enacted in 1850.[173]

In April 1850 a Massachusetts jury found in Oakes favor and the guardianship was revoked.[174]

ACQUITTAL OF JAMES ELLIS - DEATH UNDER HYDROPATHIC TREATMENT - CONSENT NO DEFENSE (England 1846)

In 1846, in England, Dr. James Ellis was charged with manslaughter for the death of his patient, Richard Dresser, under hydropathic treatment. The court ruled that consent of the patient was not a defense to a manslaughter charge based on the *St. John Long* case. However, the jury found him not guilty.[175]

TREATMENT OF SLAVES (Maryland 1846)

In Maryland, a slaveholder had made arrangements with a doctor to treat two young slaves with the understanding that no bill would be rendered at the time but that later the slaves would be transferred to the doctor. The doctor sued for possession of the slaves. In 1846, the appellate court in the case of *Mudd. v. Turton* affirmed, awarding the slaves to the doctor.[176]

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[170] *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. Oct. 18, 1972)

[171] *Hallett v. Oakes*, 55 Mass. 296, 1 Cush. 296 (Mar. 1848); *Benjamin F. Hallett vs. Josiah Oakes*, BOSTON DAILY ATLAS, May 3, 1848

[172] *Petition for an alteration in the proceedings of the Supreme Judicial Court,* DAILY EVENING TRANSCRIPT (Boston), Mar. 5, 1850, 4; *A venerable petitioner*, SALEM REGISTER (MA), Mar. 11, 1850, 2; *Massachusetts Legislature*, BOSTON COURIER, Mar. 21, 1850 [report on petition accepted]

[173] ACTS AND RESOLVES PASSED BY THE GENERAL COURT OF MASSACHUSETTS IN THE YEAR 1850 (Boston: Dutton and Wentworth 1850)

[174] MATTERS OF JOSIAH OAKES, SEN'R, FOUR YEARS WRONGFULLY IMPRISONED IN THE MCLEAN ASYLUM, THROUGH AN ILLEGAL GUARDIANSHIP BY MEANS OF BRIBERY AND FALSE SWEARING (Boston 1850), pp. 4-12; *Trial of a case of alleged lunacy*, NORTH AMERICAN AND UNITED STATES GAZETTE (Philadelphia), Apr. 26, 1850; *Case of Josiah Oakes*, WORCESTER PALLADIUM (MA), May 1, 1850. Oakes died in 1855. *Deaths*, BOSTON DAILY ATLAS, July 24, 1855

[175] *Regina v. James Ellis, M.D.*, 2 Carrington & Kirwan's Rep. 470, 175 Eng. Rep. 194 (June 20, 1846); *this case was abstracted in* 7 LAW MAG. QUART. REV JURIS. n.s. 41 (1847); *The water cure,* TIMES (London), June 10, 1846, 6; *Coroner's inquest. Death from the cold-water treatment: Verdict of manslaughter*, PROVINCIAL MEDICAL AND SURGICAL JOURNAL, 10(24):279-281 (Jun. 17, 1846)

[176] *Mudd v. Turton*, 4 Gill 233 (Md. Dec. 1846)

ANESTHESIA (1846-1849)

In October 1846, in Massachusetts, anesthesia was first used in surgery. In 1847 the first deaths were attributed to anesthesia. Generally an inquest was held for anesthesia deaths. It was frequently noted in the inquest that the anesthesia was used at the request or with the consent of the patient.

The first such inquest occurred in England in 1847. Ann Parkinson died in an operation to remove a tumor. Ether was used at her request. The inquest found that she had died from the ether and placed no blame on the doctors.[177]

In 1848, in England, Hannah Greener, age 15, died from chloroform administered in conjunction with an operation. She demanded chloroform and, after initial opposition, her family acquiesced. The inquest found the chloroform was administered properly and no blame should attach to the surgeon or his assistant.[178]

In 1848, Maria S. died in Desures, near Boulougne, France, from the use of chloroform for a "trifling operation." Dr. Gorre had "unwillingly consented" to use chloroform pursuant to her proposal. A judicial post mortem confirmed the death was due to chloroform due to abnormal organic condition of the heart.[179]

In 1848, in New York City, Patrick Murphy died from chloroform during an operation at the College of Physicians and Surgeons. Murphy refused to consent to the operation unless chloroform was used. The coroner's jury found death by disease of the lungs.[180]

In 1848, in London, Mrs. Sarah Bransgrove died after an operation at King's College Hospital in which chloroform was used "by her own consent." The coroner's jury returned a verdict of "natural death."[181]

In 1848, in London, W.P. Badger, son of a coroner, died under chloroform administered "at his own request" by a dentist to extract teeth. The dentist had recommended that chloroform not be used. The coroner's jury exonerated the dentist.[182]

In 1849, John Griffin, a seaman, was administered chloroform for a hemorrhoid operation at New York Hospital. He died. It was noted that the

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[177] *Fatal effects of ether*, TIMES (London), Mar. 19, 1847, 8; Mar. 30, 1847, 6; *Fatal effects of ether inhalation: inquest,* MEDICAL NEWS, May 1847, 66

[178] *Fatal application of chloroform*, TIMES (London), Feb. 3, 1848, 8; Paul R. Knight & Douglas R. Bacon, *An unexplained death: Hannah Greener and chloroform*, ANESTHESIOLOGY 96(5); 1250-53 (May 2002)

[179] *Death occurring under the influence of chloroform; air found in the veins*, LANCET, i:686-687 (1848)

[180] *Chloroform – Fatal Effects – Caution,* EVENING POST (NY), Mar. 1, 1848, 2; *Sudden death. — danger of chloroform*, WESTERN LITERARY MESSENGER, 10:95 (1848)

[181] *Coroner's inquest*, TIMES (London), Mar. 3, 1848, 7

[182] NEWCASTLE COURANT (Newcastle-upon-Tyne), July 7, 1848; *Another death from chloroform,* MANCHESTER TIMES AND GAZETTE, July 8, 1848; *W.S. Badger, Esq., of Rotherham,* LAW TIMES, 11:321 (July 8, 1848)

deceased had requested the use of the chloroform. The coroner's jury found the death due to the chloroform that was properly used and justifiable.[183]

In 1849, in England, Samuel Bennett died from chloroform for an operation to remove a toe. The inquest took evidence on consent. "Coroner: Are you sure that the deceased was aware that they were going to apply chloroform? Witness: I am quite sure, and that he made no objection." The widow testified that he had objected and stated his willingness to suffer the pain of submitting to the operation without chloroform. A medical journal account stated that he had expressed his desire to inhale chloroform. The coroner's jury found death due to chloroform properly administered.[184]

In 1849, in England, Miss Jones died during an operation to remove an eyeball. Chloroform had been administered "with her own full consent." The coroner's jury found death due to apoplexy caused by the chloroform.[185]

In 1849, in Leeds, England, Robert Mitchell died during the forcible administration of chloroform with police assistance as treatment for delirium tremens. The coroner's jury found that death had been caused by the delirium tremens with no blame attached to the surgeon.[186]

DISTRICT OF COLUMBIA ORDINANCE REQUIRING CONSENT (1847)

In 1847, Washington, D.C., adopted an ordinance requiring consent in the Washington Asylum. It stated:

> Section 5 *** no surgical operation endangering the life or loss of a limb of a patient shall be performed in the Asylum without the consent of the patient, nor then, until a consultation with one or more competent medical practitioners or surgeons, and their concurrence in the propriety of such operation shall be expressed: Provided, however, That should a case occur of an urgent nature requiring an immediate operation, and in which delay might prove fatal 'to the patient, and the physician or student should be of the opinion that the life of the patient rested on an immediate operation, a consultation may in such cases be disposed with…[187]

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[183] *Death by chloroform, while under an operation*, N.Y. HERALD, Jan. 21, 1849, 3; Gurdon Buck, *Art. IX. Death from chloroform,* N.Y. JOURNAL OF MEDICINE AND COLLATERAL SCIENCES, 2:230 (Mar. 1849)

[184] *Inquest, yesterday – death from chloroform,* DAILY NEWS (London), Feb. 21, 1849; LANCET (New York), 9(4):281-282 (Apr. 1849); AMERICAN JOURNAL OF THE MEDICAL SCIENCES, 17:524, at 525 (Apr. 1849) [reprinting the LANCET]; John Snow, *On the fatal cases of inhalation of chloroform*, EDINBURGH MEDICAL AND SURGICAL JOURNAL, 72(180):75, 84-85 (July 1, 1849)

[185] *Death from chloroform at Shrewsbury*, THE ERA (London), Dec. 6, 1849; *Death from chloroform at Shrewsbury*, LONDON MEDICAL GAZETTE, 9 (n.s.):1007 (Dec. 7, 1849)

[186] *Alleged death from chloroform at Leeds,* LONDON MEDICAL GAZETTE, 9 (n.s.):864-865 (Nov. 16, 1849); *Alleged death from the inhalation of chloroform*, PROVINCIAL MEDICAL AND SURGICAL JOURNAL, 13:668 (Nov. 28, 1849)

[187] CORPORATION LAWS OF THE CITY OF WASHINGTON (Washington DC: Robert A. Waters 1860), 282-283 - An act for the government of the Washington Asylum (Apr. 5, 1847)

BOWMAN V. WOODS - PATIENT RESPONSIBLE FOR SELECTING PRACTITIONER FROM BOTANICAL SCHOOL (Iowa 1848)

In 1848, the Iowa Supreme Court reviewed a case, *Bowman v. Woods*, claiming malpractice in how a delivery was handled. The jury had ruled for the plaintiff. The court reversed finding that the patient was responsible for the consequences of selecting a practitioner from the botanical school.[188]

DISMISSAL OF CHARGE AGAINST J.B. GALE - CLAIMED MALES SHOULD NOT ATTEND DELIVERIES (New Hampshire 1848)

In 1847, in New Hampshire, Dr. J. B. Gale attended the delivery of Mrs. L.C. Delaware at the request of the Delawares. In 1848, more than a year later, after deciding that males should not attend deliveries, the Delawares brought a criminal charge of assault and battery against Dr. Gale on the grounds that a male should not attend a delivery. The judge dismissed the case finding that no claim had been stated.[189]

INQUEST - EDITH HOLGATE - TREATMENT OF INFANT WITH PARENTAL CONSENT (England 1848)

In 1848, in England, Edith Holgate, age 14 months, died after being treated by mesmerism with her father's consent. The coroner's jury returned a verdict of death by natural causes.[190]

INQUEST - MRS. PERRY - PERSUASION TO SUBMIT TO TREATMENT WITH ASSURANCES OF CURE (England 1848)

In 1848, in England, an inquest was held in the death of Mrs. Perry. She died after treatment by an unlicensed practitioner, Young, who gave her mercury for tuberculosis. He had persuaded her to submit to the treatment with assurances of cure. The coroner's jury found that the death had been accelerated by mercury, but that there was no evidence of who gave the mercury.[191]

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[188] *Bowman v. Woods*, 1 Greene 441 (Iowa June 1848)
[189] *Trial of a physician for assault and battery,* BOSTON MEDICAL AND SURGICAL JOURNAL, 38(26):528-529 (July 26, 1848); *All sorts of paragraphs*, BOSTON POST, July 14, 1848, 2. Discussed in Ruth Faden and Tom Beauchamp, A HISTORY AND THEORY OF INFORMED CONSENT (New York: Oxford Univ. Press 1986), 82-83
[190] *Inquests, Saturday – alleged mesmerizing of a child*, DAILY NEWS (London), Oct. 9, 1848
[191] *Death accelerated by salivation in the third stage of tubercular consumption,* MEDICAL EXAMINER AND RECORD OF MEDICAL SCIENCE, 47:713-714 (Nov. 1848)

MAGISTRATE ORDERED STOMACH PUMP (New York 1848)

In 1848, a magistrate in New York ordered a stomach pump to be used on a young woman who had gone to a police station after taking arsenic in a suicide attempt.[192]

REVERSE CONVICTION OF ELIJAH FAIRLEE - DEATH ALLEGEDLY DUE TO VACCINATION (Illinois 1849)

In 1847, in Johnson County, Illinois, Dr. Elijah Fairlee vaccinated the children of Barnet Weaver at his request. Perry Herrill visited the house of the Weavers while the children were sick after the vaccination. Perry Herrill contracted small pox and died. The county Grand Jury indicted Fairlee for the murder of Herrill. A jury convicted Fairlee in 1848 and he was sentenced to four and a half years in the penitentiary. It was reported in newspapers and medical literature that Fairlee had vaccinated Herrill with small pox matter, but the appellate court report does not support this. The Illinois Supreme Court reversed the conviction because the indictment did not charge that Fairlee knew or expected Herrill to contract the disease from those he inoculated.[193]

ARREST OF DR. CROSS - DEATH AFTER TREATMENT BY STEAM DOCTOR (New York 1849)

In 1849, Stroudsburg, New York, a steam doctor Dr. Cross was arrested for manslaughter in the death of a patient, Daniel Quin. The treatment involved covering the patient with blankets and applying heat. The patient begged for air, which was almost totally denied him. The patient died shortly after the end of the treatment. The outcome of the case has not been located.[194]

ACQUITTAL OF GEORGE WINTERBOTTOM - EXPERIMENTS IN HOPELESS CASES WITH CONSENT OF THE PATIENT (England 1850)

In 1850, in England, George Winterbottom was tried for manslaughter of John Siddall who died under his quack treatment. The judge directed a verdict of not guilty.

> In a conversation with the prosecuting counsel in the course of the trial, the judge recognised the right of regular practitioners to try experiments in *hopeless* cases, with the *consent of the patient,* holding the practitioner free from blame if death ensued. The above case simply extends this immunity to the quack faculty. We do not think that this has the effect of

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[192] *Singular case of seduction and poison*, WEEKLY HERALD (New York City), Dec. 23, 1848
[193] SUN (Baltimore), Dec. 21, 1848, 1; *Manslaughter by vaccination*, MEDICAL EXAMINER (Philadelphia), 49:38 (Jan. 1849); *Elijah Fairlee v. People*, 11 Ill. 1 (1849)
[194] *Arrest of a steam doctor*, DAILY NATIONAL INTELLIGENCER (D.C.), May 9, 1849; N.Y. HERALD, May 9, 1849, 3; *Arrest of a steam doctor*, BOSTON DAILY ATLAS, May 10, 1849

giving an unlimited immunity to quacks. The case must be hopeless, and the patient's consent must be given. … Any man going to a quack in a desperate case knows that he is submitting to experiment, his hopes may be disappointed, but he cannot be said to suffer under bad faith. If an unlicensed practitioner represents his practice as experience when it is only experiment that is *mala fides,* and punishable. [195]

ASSAULT CONVICTION OF WILLIAM CASE - RAPE OF MINOR DURING MEDICAL EXAMINATION (England 1850)

In 1850, in England, Dr. William Case was prosecuted for the assault and rape of a 14-year-old girl, Mary Impett, during a medical examination. He was convicted at the Dover quarter sessions and sentenced to eighteen months in prison. On appeal the assault conviction was upheld. The court ruled that it was not consent to offer no resistance due to a bona fide belief it was medical treatment.[196]

ARREST OF SURGEON FOR DEATH IN HIGH RISK SURGERY SOUGHT BY PATIENT (Scotland 1850)

In 1850, in Scotland, Mungo Campbell sought to have an egg-sized tumor removed from his neck. Several surgeons refused to do so because it lay over the carotid artery. A young Irish surgeon performed the surgery but the patient bled to death. The doctor was apprehended by authorities "with a view to being committed for trial." The outcome has not been located.[197]

DISMISSAL OF CHARGES AGAINST CHARLES COFFRAN - DEATH FROM MEDICINES WITH CONSENT OF PATIENT (Maine 1850)

In Maine, a patient died from the administration of medicines by Dr. Charles Coffran at the request of the patient. In 1850, Dr. Charles Coffran was charged with manslaughter. The judge ruled that gross criminal negligence would need to be proven to convict, so a non pros was entered. The charges were dismissed.[198]

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[195] *Mr. Baron Alderson's decision in a case of quackery*, PEOPLE'S MEDICAL JOURNAL AND FAMILY PHYSICIAN, 1(16):123, 123-124 (Apr. 20, 1850); *Northern Circuit,* TIMES (London), Mar. 25, 1850, 7

[196] *Serious charge against an M.D.,* JACKSON'S OXFORD JOURNAL, Apr. 13, 1850; *Extraordinary charge against a physician*, HAMPSHIRE TELEGRAPH AND SUSSEX CHRONICLE (Portsmouth), Apr. 13, 1850; *Extraordinary charge against a physician*, BRISTOL MERCURY, Apr 13, 1850; *Reg. v. William Case*, 4 Cox Crim. Cas. 220 (June 1, 1850), reprinted in 2 U.S. MONTHLY L. MAG. 126 (1850) & 14 JURIST, o.s., 489-490 (1851); *Assault*, 14 JURIST o.s. 52 (1851); John J. Elwell, A MEDICO-LEGAL TREATISE ON MALPRACTICE AND MEDICAL EVIDENCE (New York: John S. Voorhies 1860), 241-242

[197] GLASGOW HERALD (Scotland), Sep. 9, 1850; MORNING CHRONICLE (London), Sep. 12, 1850, 16; MEDICAL TIMES, 22:322 (Sept. 28, 1850)

[198] PORTLAND ADVERTISER (ME), Oct. 1, 1850, 1; *The trial of a physician for manslaughter,* BOSTON HERALD, Oct. 4, 1850, 4; *Manslaughter by administering improper medicines,* LONDON

ANESTHESIA (1850-1851)

In 1850, in London, Alexander Scott died during an operation at Guy's Hospital from chloroform administered at his own insistence after being advised not to have it used. The jury found death from the effects of chloroform.[199]

In 1850, in Ireland, James Jones died when he was administered chloroform preparatory to amputation of his leg. He had "begged" that the medicine be used because he was not "a good soldier" and wanted to avoid the pain. The coroner's jury found that he had died "in the consequence of the administration of chloroform, applied at his own request, in the usual manner, without any blame being attributable to the medical gentlemen who applied it."[200]

In 1851, in England, Miss Hollis insisted on chloroform when she needed to undergo a second and third procedure to extract matter from her rectum. She had undergone the procedure the first time without anesthesia. She died during the third procedure. At the inquest, the doctor testified that he had pointed out the danger, but she persisted for the second procedure. The third time he "endeavored to prevail upon my patient not to have the chloroform: but I gave way to her earnest entreaties." The coroner's jury found that the chloroform was necessarily used and properly and judiciously applied.[201]

In 1851, in England, John Holden, an inmate, died from chloroform when he was about to under go an operation. It was noted that he had desired the relief of chloroform. The jury found the death due to chloroform used with the requisite precautions.[202]

CONANT V. MANNING - ALLEGED FRAUDULENT MISREPRESENTATIONS (Massachusetts 1851)

In December 1847, Mr. Conant suffered an injury while driving an ox-team in Lunenburg. Mass. He underwent an operation at Massachusetts General hospital. He sued Dr. Manning and was awarded damages in the first trial in April 1849. In the first trial:

> The plaintiff introduced witnesses who testified, that while he remained under the care of Dr. M., the latter told him frequently that he " was getting along well," that " all was right," etc. His counsel contended that the

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MEDICAL GAZETTE, 47:5 (1851); *Dr. Coffran's trial*, NEW ENGLAND BOTANICAL, MEDICAL AND SURGICAL JOURNAL (Worcester MA), 5(5):151 (May 1, 1851)

[199] *Death from chloroform at Guy's Hospital*, PEOPLE'S MEDICAL JOURNAL (London), 2(28):12 (July 13, 1850)

[200] *Death from chloroform,* ALBION, Oct. 26, 1850, 514; *Fatal effects from chloroform,* AMERICAN JOURNAL OF THE MEDICAL SCIENCES, 22:271-272 (July 1851)

[201] *Deaths from chloroform*, MEDICAL EXAMINER AND RECORD OF MEDICAL SCIENCE, 15: 59-60 (Jan. 1, 1852); *Death from chloroform*, AMERICAN JOURNAL OF THE MEDICAL SCIENCES, 23: 559 (Apr. 1852)

[202] *A case of death from chloroform,* HOUSEHOLD NARRATIVE OF CURRENT EVENTS, 3:89 (April 1851)

surgeon had misrepresented his condition, and that he had there by suffered damage.[203]

In Jan. 1850, a new trial was ordered on the grounds that the verdict was against the weight of evidence. In the appellate proceedings, the patient's lawyer again maintained that the doctor had made fraudulent misrepresentations to the patient; the court concluded that no damages accrued from the representations. In the second trial in April 1850, the jury award even greater damages. In October 1851, a third trial was granted on the grounds that there was no evidence supporting the verdict. The suit was then abandoned.[204]

DESERET (UTAH) INFORMED CONSENT LAW (1851)

On January 16, 1851, the legislature of the state of Deseret (renamed Utah when it became part of the United States) enacted what may be the first Anglo-American law requiring informed consent as section 7 of its Criminal Laws. In 1852, the Territory of Utah adopted the same law as part of its new criminal code. The law stated:

> If any doctor, physician, apothecary, or any other person shall give communicate or administer, of by their influence counsel, advice, persuasion, suggestion or by any means whatsoever give or cause to be given … any deadly poison, whether animal, mineral or vegetable, such as quicksilver, arsenic, antimony, or any mercurial, arsenical or antimonial preparations therefrom, or circuta, deadly nightshade, hen-bane, opium or any of the diversified preparations therefrom, or any drugs, medicines, or other preparations, such as chloroform, ether, exhilarating gas, calculated in their nature to destroy sensibility, … to any citizen of the Territory of Utah, …. <u>without first explaining fully, definitely, critically, simply and unequivocally to the patient and surrounding friends and relatives, such as father, mother, husband, wife, children, guardian or others, as the case may be, and in plain, simple English language, the specific nature, operation and design of said poison or poisonous preparation about to be or intended to be given, and procuring the unequivocal approval, approbation and consent of the patient, if of mature years and sound mind</u>, and of parents, guardians, or other friends, to the giving, administering or communicating said poison so intended, said doctor, physician, apothecary, person or persons so administering said poison, <u>without the full and free assent of said patient and friends</u>, shall be adjudged guilty of a high misdemeanor, …; and if the death of the patient

[203] *Prosecution for mal-practice*, BOSTON MEDICAL AND SURGICAL JOURNAL, 40(16):318-319 (May 23, 1849)
[204] *Trial for mal-practice*, BOSTON MEDICAL AND SURGICAL JOURNAL, 40(10):206 (Oct. 10, 1849; *Trial for mal-practice*, BOSTON MEDICAL AND SURGICAL JOURNAL, 42(4):79-80 (Feb. 27, 1850); *Prosecution for malpractice*, BOSTON MEDICAL AND SURGICAL JOURNAL, 46(9):175-176 (Apr. 1, 1852)

> or person so receiving the poison, as above specified, shall follow the taking of the same, without being made acquainted with the nature thereof, then the doctor, physician, apothecary, person or persons so giving or causing to be give in said poison, shall be adjudged guilty of manslaughter or murder, …; Provided, that the administration of poisons, as specified in the forepart of this section, and the penalties thereof shall not attach to doctors, physician and apothecaries, having their own drugs, poisons and medicines accompanying and administering to companies and individuals traveling through the Territory, the same not being citizens of the territory; but all such doctors and companies so traveling may administer to and receive of their own drugs, poisons or medicines, with good intent, on their own responsibility….[205]

The BOSTON MEDICAL AND SURGICAL JOURNAL noted this Utah law in 1871:

> Mormon physicians are forbidden, under a penalty of $1000 and not less than a year's imprisonment, to prescribe any of the more powerful agents known to the medical profession, without first explaining to the patient and his friends their medical properties, and procuring the unqualified consent of all concerned.[206]

ACQUITTAL OF SHELDON - ALLEGED ASSAULT ON PATIENT IN MEDICAL EXAMINATION (England 1851)

In 1851, surgeon Sheldon was charged with the three assaults upon Lydia Stride at Cheltenham when she underwent medical examinations at his private residence. The special jury case was tried in Court of Queen's Bench. The jury found for the defendant adding that his character was unstained.[207]

DICKSON, MALLORY & CO. V. JORDAN - SILENCE AS CONSENT (North Carolina 1851)

In 1851, in a non-medical suit for breach of contract, the North Carolina Supreme Court ruled that silence is consent in the market. The court gave the example of master's responsibility when calling a doctor for slave.[208]

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[205] LAWS AND ORDINANCES OF THE STATE OF DESERET (Salt Lake City Utah: Shepard Book Co. 1919), 26-27; ACTS, RESOLUTIONS AND MEMORIALS PASSED AT THE SEVERAL ANNUAL SESSIONS OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF UTAH (Great Salt Lake City, Utah 1866), 59-60. The law was reenacted and renumbered as section 107 in 1855.
[206] BOSTON MEDICAL AND SURGICAL JOURNAL, 84:67 (Jan. 26, 1871)
[207] *Queen v. Sheldon*, BRISTOL MERCURY, Apr. 5, 1851; REYNOLD'S NEWSPAPER (London), Apr. 13, 1851; *Charge against a Medical practitioner*, LANCET (New York), ii(1):78-79 (July 1851) [reprinted in *Charge against a medical practitioner,* WESTERN JOURNAL OF MEDICINE AND SURGERY, Aug. 1851, 165]
[208] *Dickson, Mallory & Co. v. Jordan*, 34 N.C. 79 (1851); 12 Ired. Law 79 (June 1851)

…Silence is taken for consent to give and take the market price. Neither party is allowed to take advantage from the fact that the dealing was upon this mutual understanding.

A doctor is sent for, and attends day and night upon a slave. It would be singular if the owner when sued for the services should insist "no price was agreed on," the declaration is upon a "*quantum meruit*," and I may show, in abatement of the damages, that the slave died, and so the services were of no value. If a carpenter works day after day according to instructions, and the building is of no use because of a defect in the plan, can the employer on that ground be allowed an abatement from the wages ordinarily demanded and paid to carpenters?

CHARTER OF CITY OF LOUISVILLE - CONSENT REQUIRED TO USE PATIENT IN TEACHING (Kentucky 1851)

In 1851, Kentucky adopted a law chartering the City of Louisville. The law restricted the powers of the city counsel as follows:

> But it is provided that the said council shall not have the power to allow any patient in the public wards of said hospital to be made the subject of clinical instruction, as herein provided for, without the consent of the patient. [209]

INVESTIGATION BY BIRMINGHAM GENERAL HOSPITAL - DISPUTE WHETHER PATIENT AND PARENTS HAD BEEN ADVISED OF RISKS AND CONSENTED (England 1851)

In 1851, in Birmingham, England, Dr. Gutteridge made a charge of manslaughter against Dr. Alfred Baker in a publicly distributed pamphlet. Rachel Mayou, a single woman said to be age 22, but actually age 18 to 19, had died as a result of removal of an ovarian cyst (an ovariotomy) It was alleged that she and her parents had not been advised of the risks and the procedure was done without her consent. A Birmingham General Hospital investigation by its Weekly Board, chaired by the Earl of Dartmouth, exonerated Dr. Baker and condemned Dr. Gutteridge for his pamphlet. It concluded that she had been advised of the risk and had consented.[210]

On November 1, 1851, The MEDICAL TIMES raised questions about this conclusion:

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[209] *An Act to Charter the City of Louisville* (approved Mar. 28, 1851), Article VIII, Sec. 4, from A COLLECTION OF THE STATE AND MUNICIPAL LAWS: IN FORCE, AND APPLICABLE TO THE CITY OF LOUISVILLE, KY. (Louisville: C. Settle 1857), 71

[210] *Charge against one of the surgeons of the Birmingham General Hospital*, LONDON MEDICAL GAZETTE, 48:716-719 (Oct. 21, 1851); *Investigation at the General Hospital, Birmingham,* MEDICAL TIMES, 24:460 (Nov. 1, 1851) & 24:490 (Nov. 8, 1851); LANCET, [1851]: 478 (Nov. 15, 1851); *General Hospital at Birmingham*, LONDON JOURNAL OF MEDICINE, 3(35):1055 (Nov. 1851)

Mr. Baker, with the wish to prove that his patient knew the nature of the operation which she was about to undergo, called the Rev. Thomas Rawlins, chaplain to the hospital: —

"The Rev. witness *thought* that the patient herself told him, that she was about to undergo a very serious operation; the *precise nature* formed no part of his conversation, but she *seemed* in much apprehension about it."

"Elizabeth Hodgkinson, a nurse at the hospital, stated, the mother of the patient had told her, that Mr. Baker was to open her down the stomach, and take a bag from her; but she (the mother) did not wish the daughter to be told lest it should frighten her."

The evidence of the Rev. Gentleman does not go for much. All patients, the subjects of a serious disease, are glad of consolation in their affliction, and any operation is sufficient to excite anxiety and fear; but the nurse makes a statement which was denied by the mother of the patient in the examination upon the first day, October 3.

Mr. Baker: "Did you describe to the nurse, that your daughter's belly was to be opened, and a bag taken out?" The Mother: "No, Sir, I never uttered such a word."

The evidence of Mr. Eccles is also important. Mr. Baker, it is affirmed, asked the patient, if she would like to have the disease cured? To which she replied, ″Yes, if it could be done without an operation." "Mr. Baker then, on walking away, said to a pupil, 'I shall not ask her again, but I shall do it.'"[211]

ALLEGED FORCIBLE SURGERY (New Hampshire 1852)

In 1852, in New Hampshire, a 15-year-old female consented to surgery with chloric ether. She changed her mind and ran away but was forced back. Dr. Timothy Haynes performed the surgery. She died a few minutes after the surgery. Dr. Haynes disputed this account in a letter to another medical journal. No report of any inquest or action against the surgeon has been located.[212]

ANESTHESIA (1852-1853)

In 1852, in Connecticut, Mrs. Norton died while inhaling chloroform for an operation on her teeth by a dentist, Dr. Park. There was testimony at the inquest

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[211] *Investigation at the General Hospital, Birmingham,* MEDICAL TIMES, 24:460 (Nov. 1, 1851)

[212] *Death while under the influence of chloroform,* BUFFALO MEDICAL JOURNAL, 8:176 (1852) [reprint from NEW HAMPSHIRE JOURNAL OF MEDICINE, 2:307 (July 1852)] [also printed in OHIO MEDICAL AND SURGICAL JOURNAL, 5:48 (Sep. 1852)]; *Death from chloric ether*, BOSTON MEDICAL AND SURGICAL JOURNAL, 47(2):41-42 (Aug. 11, 1852) [letter from Dr. Haynes - describes girl as “aged 12, daughter of Mrs. B”]; *A girl killed by ether in surgery*, NEW YORK OBSERVER, Jan. 13, 1853, 4 [[reprint from NEW HAMPSHIRE JOURNAL OF MEDICINE]

that it had been administered at the earnest request of the patient. The coroner's jury exculpated Dr. Park from blame.[213]

In 1852, Hollingworth underwent surgery in Manchester, England, to remove a malignant tumor. He died. At the inquest, the house surgeon said the deceased had said he wished to have chloroform. He added: "I did not give him any caution." He had not had a fatal case before. The coroner's jury found the death was due to the effects of the chloroform. A newspaper report noted that the medical staff of the hospital had decided to require a second person to scrutinize the effects on the patient while the agent was administered.[214]

In 1853, in Pennsylvania, Lewis Fritzin died when he submitted to an amputation of his injured leg. Chloroform was administered "in obedience to the wish of the sufferer." A coroner's inquest exonerated the medical personnel.[215]

HORD V. GRIMES - LIABILITY FOR SURGERY ON SLAVE WITHOUT SLAVEHOLDER CONSENT (Kentucky 1852)

In 1852, the Kentucky Supreme Court ruled that anyone was liable to a slaveholder for the death of a slave due to treatment the slaveholder did not consent to.[216]

JACKSON V. ROE - MALPRACTICE - CONSENT NOT PRESENTED AS AN ISSUE IN CASE (England 1852)

In 1852 Jackson and his wife sued Dr. Roe for malpractice in Exeter, claiming that he had mistreated her alleged uterine disease. The evidence showed that the patient had "repeatedly sent for him at all hours of the day, and of her own accord." However, this consent does not appear to have been an issue in the case. The jury found in favor of Dr. Roe. Dr. Roe published a pamphlet about the case. Jackson published a pamphlet in reply. A criminal information was filed against Jackson for libel in publishing the pamphlet. Justice Crowder refused to allow the criminal information.[217]

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[213] PUBLIC LEDGER (Philadelphia), Apr. 14, 1852; N.Y. DAILY TIMES, Apr. 15, 1852, 1; *Death from the use of chloroform*, MILWAUKEE DAILY SENTINEL, Apr. 26, 1852; *Sudden death from chloroform*, MEDICAL NEWS, 10:36 (May 1852); *Death from chloroform,* BOSTON MEDICAL AND SURGICAL JOURNAL, 46:460-462 (July 7, 1852); *Death from using chloroform,* SCIENTIFIC AMERICAN, 7(32):250 (Apr. 24, 1852)

[214] *Fatal application of chloroform*, DAILY NEWS (London), Dec. 30, 1852; *Fatal application of chloroform*, REYNOLD'S NEWSPAPER (London), Jan. 2, 1853; *Death from the administration of chloroform*, LONDON LANCET, i(1):193 (January 1853); *Fatal application of chloroform*, N.Y. DAILY TIMES, Feb. 7, 1853, 3; *Death from the administration of chloroform at the Manchester Royal Infirmary,* MEDICAL NEWS, 11:24 (Feb. 1853)

[215] N. Y. TIMES, May 28, 1853, 6

[216] *Hord v. Grimes*, 52 Ky. 188, 13 B. Mon. 188 (June 1852)

[217] *Alleged malpractice - Jackson and wife v. Roe*, LANCET, ii(6):138 (August 7, 1852); *Jackson v. Roe,* PROVINCIAL MEDICAL AND SURGICAL JOURNAL, 487 (Sept. 15, 1852); *Reviews and notices of books*, LANCET, ii:266-267 (Sep. 18, 1852) [Review of pamphlet - Edward T. Roe, A REPORT OF THE CAUSE JACKSON AND WIFE V. ROE]; *Bail court*, LANCET, ii:505 (Nov. 27, 1852); *To correspondents*, LANCET, ii:506 (Nov. 27, 1852)

ARREST OF ATTILA KELEMAN - INNOCULATION WITH SMALL POX (New Jersey 1852)

In 1852, Mr. Buhr in Newark, N.J. agreed to have Dr. Attila J. Keleman vaccinate two of his children. Instead Dr. Keleman inoculated them with small pox virus and both died from small pox. Dr. Keleman was arrested on a charge of manslaughter. The outcome of the case has not been located.[218]

ASSAULT OF FEMALE PATIENTS (England 1853)

In 1853, there were four cases in England in which medical practitioners were charged with assault by female patients. (1) James Richard Noble, was indicted in Lancashire for the rape of Eliza Kershaw. Kershaw was subject to fits. Noble, a quack doctor, violated her person under the pretense of cure. The prosecutor could not prove any resistance. The judge stated that, while it was an offense worthy of punishment, it did not constitute rape. He directed a verdict of not guilty.[219] (2) Surgeon Shorthouse was charged with raping a young female patient Anne Duff under the influence of chloroform in his office in London. The magistrates believed the charge was disproved and dismissed the summons. Miss Duff was charged with perjury and acquitted.[220] (3) Dr. Banks (a physician and magistrate) was charged with assault with intent to commit rape of a 10-year-old patient, Emma Lockwood. The grand jury threw out the charge.[221] (4) Henry Hamilton, falsely advertising as a surgeon, was tried in London for assault on a patient Elizabeth Brown during a consultation. He was convicted and sentenced to twelve months in prison.[222]

FARR V. MOORE - TWO CONSENT ASPECTS TO CASE (New Hampshire 1853)

In 1853, in New Hampshire, in the case of *Farr v. Moore*, there were two aspects involving consent. A nine-year-old boy dislocated his forearm. Dr. Moore wanted to use anesthesia to help examine the arm, but the boy refused. The ATLANTA MEDICAL AND SURGICAL JOURNAL notes “Due to the swelling and extreme

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[218] *Singular charge*, N.Y. TIMES, Aug. 14, 1852, 4; *Arrest for small-pox inoculation*, NEW YORK MEDICAL TIMES, 1(12):382 (Sep. 1852). In 1856, Dr. A.J. Keleman advertised he was directing an “Institut curative et d’hygiene” in New York City. COURRIER DES ETATS-UNIS (New York), July 4, 1856, 5

[219] *Lancashire Spring Assizes*, LIVERPOOL MERCURY, Apr. 5, 1853

[220] *Foul conspiracy and perjury against a Union workhouse surgeon*, LANCET, i(8):191 (Feb. 19, 1953); *The late unfounded charge against a medical practitioner*, LANCET, i(9):215 (Feb. 26, 1953); *The alleged perjury case at Carshalton*, LANCET, i(10):237 (Mar. 5, 1953); *Charge of rape against Mr. Shorthouse, a Union surgeon*, ASSOCIATION MEDICAL JOURNAL (London), i(21):475 (May 27, 1853)

[221] *The Speculum: Criminal charge against a physician*, ASSOCIATION MEDICAL JOURNAL, i(21):475 (May 27, 1853); *The charge against a physician for rape*, ASSOCIATION MEDICAL JOURNAL, i(31):696 (Aug. 5, 1853)

[222] *Central Criminal Court*, ASSOCIATION MEDICAL JOURNAL (London), i(44): 978 (Nov. 4, 1853)

sensitiveness of the boy, and his absolute refusal to inhale chloroform, prevented a minute examination." The doctor gave directions regarding treatment by the father and the doctor was not called again. A second doctor, Dr. Burns, was called who examined the boy with Dr. Moore and approved the treatment. Several weeks later the boy was again taken to Dr. Burns who proposed an examination under chloroform that was then agreed to. No displacement was found and current treatment was continued. The dissatisfied father applied to Dr. Dixi Crosby at Dartmouth College who advised the father there was no reasonable basis for suing Dr. Moore. At trial, Dr. Crosby was called and asked to examine the arm to enable him to testify. He declined to perform further examination unless ordered to do so, which the judge did. The jury could not agree. The plaintiffs dropped the case before it could be retried.[223]

In the same year, Dr. Crosby was the defendant in another widely publicized malpractice case, *Slack v. Crosby*, in Windsor County, Vermont. A jury awarded the patient $800 for alleged malpractice in setting a thigh-bone.[224] Dr. Crosby was granted a retrial at which the jury found in his favor.[225]

ACQUITTAL OF M. MASSON AND M. TRIQUET - PATIENT INSISTED ON CHLOROFORM (France 1853)

In 1853, in France, M. Breton requested the surgical removal of a small tumor from his face. He insisted that chloroform be used. The surgery was performed in his home by M. Masson, a medical student, and M. Triquet, an experienced physician. When the anesthetic was administered, he died. M. Masson and Triquet were prosecuted for the death. There was conflicting testimony on whether anesthesia should have been used for so simple an operation. One of the issues in the trial was the effect of the patient's insistence on the use. The following testimony was given by M. Nelaton, a professor of the medical school faculty.

> The Presiding Judge: "Is it customary to employ chloroform for light operations?"
> M. Nelaton: "Generally speaking, it is not; but the Courts must bear in mind that doctors are very frequently placed in delicate positions; they do not suggest the use of chloroform; but it is imposed on them by the patients."
> The Presiding Judge: "It is the duty of the physician to struggle against the desire of the patient."

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[223] *Prosecution for malpractice, in case of imperfect recovery from a dislocation of the elbow,* ATLANTA MEDICAL AND SURGICAL JOURNAL, 1(4):224 (Dec. 1855)
[224] *Windsor County Court – Lorenzo Slack v. Dixi Crosby,* VERMONT CHRONICLE, June 3, 1853, 91; *Actions for mal-practice. Case of Dr. Crosby,* NEW HAMPSHIRE PATRIOT AND STATE GAZETTE (Concord), June 15, 1853, 2
[225] NEW YORK MEDICAL GAZETTE AND JOURNAL OF HEALTH, 5(11):507-508 (Nov 1854); *Dr. Crosby*, VERMONT CHRONICLE (Windsor), Jan. 30, 1855, 1

M. Nelaton: "We always do; but there are many cases where, after having stated the dangers, we are obliged to accede."

The court found the doctors guilty for proceeding when the patient was agitated, and because the room did have the ventilation. The court further ruled that:

> Whereas that if chloroform is dangerous and active agent, able directly to cause death, it should be employed only with the greatest circumspection - consequently that it should be resorted to only in the gravest operations, such as those where the force of pain is such as to overpower the physical force of the patient, and those where the immobility of the patient is an essential condition of the success of the operation: That it is established by the declarations of Triquet, that the operation to which he intended to submit Breton, was a very slight operation: That, consequently, the accused was wrong to expose Breton to case of death for an extirpation which presented neither danger nor great pain: That the use of chloroform in the aforesaid circumstances was grave imprudence, and that it is to this act the death of Breton must be attributed.

Each doctor was fined 50 francs as penalty. An appellate court reversed.[226]

McCANDLESS V. McWHA - SCOPE OF DUTY OF PATIENT TO COMPLY (Pennsylvania 1853)

In an 1853 malpractice case, *McCandless v. McWha*, the Pennsylvania Supreme Court ordered a new trial in a case where the jury had found the physician liable for his treatment of a broken leg. The majority opinion included:

> Nothing can be more clear than that it is the duty of the patient to co-operate with his professional adviser, and to conform to the necessary prescriptions; but if he will not, or under the pressure of pain cannot, his neglect is his own wrong or misfortune, for which he has no right to hold his surgeon responsible. No man may take advantage of his own wrong, or charge his misfortunes to the account of another.[227]

In a concurring opinion, a judge stated:

> A patient is bound to submit to such treatment as his surgeon prescribes, provided the treatment be such as a surgeon of ordinary skill would adopt

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[226] *Abuse of chloroform,* N.Y. TIMES, May 21, 1853, 3; *Chloroform,* DAILY ALTON TELEGRAPH (IL), June 20, 1853, 2; MEDICAL TIMES AND GAZETTE, 28:205 (Aug. 20, 1853); *Chronique*, L'ABEILLE MÈDICALE, 10:139-140 (15 Mai 1853); LA FRANCE JUDICAIRE (PARIS 1878-79), PREMIERE PARTIE, 193, at 208

[227] *McCandless v. McWha,* 22 Pa. 261, 268 (Oct. 1853); Earlier procedural decision at 20 Pa. 183 (Mar. 1853)

> or sanction. But if it be painful, injurious, and unskilful, he is not bound to peril his health, and perhaps his life, by submission to it. It follows that before the surgeon can shift the responsibility from himself to the patient, on the ground that the latter did not submit to the course recommended, it must be shown that the prescriptions were proper, and adapted to the end in view. It is incumbent on the surgeon to satisfy the jury on this point, and in doing so, he has the right to call to his aid the science and experience of his professional brethren. It will not do to cover his own want of skill by raising a mist out of the refractory disposition of the patient. *[Emphasis added]*[228]

On retrial, the physician was again found liable and this was upheld on appeal.[229]

TWOMBLY V. LEACH - SOMETIMES PERMISSIBLE TO WITHHOLD INFORMATION FROM PATIENT (Massachusetts 1853-1855)

In 1853, the highest court of Massachusetts addressed - *Twombly v. Leach* - a malpractice case arising out treatment of a thumb. At trial the jury had returned a verdict for the plaintiffs. The appellate court granted a new trial. The court noted that in some circumstances it might be appropriate to follow medical practice and withhold information from the patient:

> Upon the question whether it be good medical practice to withhold from a patient in a particular emergency, or under given or supposed circumstances, a knowledge of the extent and danger of his disease, the testimony of educated and experienced medical practitioners is material and peculiarly appropriate.[230]

The *Twombly* case is discussed in detail in § 73 of Ordronaux's THE JURISPRUDENCE OF MEDICINE, published in 1869.[231] It is discussed as a case in which a husband and wife alleged that the physician fraudulently represented to the wife that she was doing well so that she did not apply to other physicians. It was also alleged that the reason that the physician gave for opening the wife's thumb was not accurate. The physician was able though expert testimony to establish that the nature of the disease described to the plaintiff's was proper.

The *Twombly* case is also discussed in McClelland's CIVIL MALPRACTICE: A TREATISE ON SURGICAL JURISPRUDENCE, published in 1877:

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[228] *McCandless v. McWha*, 22 Pa. 261, 272(Oct. 1853)
[229] *McCandless v. McWha*, 25 Pa. 95 (1855)
[230] BOSTON POST, Jan. 22, 1852, 2; *Verdict of damages for malpractice*, DAILY NATIONAL INTELLIGENCER (DC), Jan. 27, 1852; *Twombly v. Leach*, 65 Mass. 397, 405-406, 11 Cush. 397 (Oct. 1853).
[231] John Ordronaux, THE JURISPRUDENCE OF MEDICINE (Philadelphia: T. & J.W. Johnson & Co. 1869), pp. 84-85.

> Should patients be informed of their true condition in every case, or, in other words, should they be informed as to the probable result of their illness? They should not, unless it be in exceptional cases. Such information will only end in harm, both to the patient and the medical attendant, and should therefore be withheld. [232]

LEIGHTON V. SARGENT - PATIENT RESPONSIBLE FOR EXERCISING JUDGMENT IN SELECTING PHYSICIAN (New Hampshire 1853)

In 1853, the New Hampshire Supreme Court ordered a new trial in a malpractice case - *Leighton v. Sargent* - where the jury had found the physician liable for his treatment of a dislocated ankle and foot. The court noted that the patient is responsible for the judgment exercised in the selection of the physician -

> In stipulating to exert his skill, and apply his diligence and care, the medical and other professional men contract to use their best judgment. Few cases can be supposed where but a single course of measures alone can be adopted, and many must occur, where great differences of opinion may exist as to the best course to be taken. In most cases judgment and discretion are required to be exercised. Freedom from errors of judgment is never contracted for by the attorney or the physician.
>
> Ordinary good judgment is necessarily implied in the possession of ordinary skill, and if such share of judgment is fairly exercised, any risk from mere errors and mistakes is upon the employer alone. He, too, has judgment to exercise in the selection of the physician or the lawyer whom he will employ; and if he makes a bad selection, if he fails to choose a man of the best judgment, the result is fairly to be attributed to his own mistake, and is not to be visited upon the man who has honestly done his best endeavor in his service.[233]

The case was tried again in 1854 and the jury again awarded the plaintiff damages. In 1855, the New Hampshire Supreme Court again vacated the judgment.[234]

One commentator noted an interesting fact in the case that demonstrates one approach to informing patients:

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[232] Milo Adams McClelland, CIVIL MALPRACTICE: A TREATISE ON SURGICAL JURISPRUDENCE (H.O. Houghton & Co. 1877), p. 350

[233] NEW HAMPSHIRE STATESMAN (Concord), Mar. 5, 1853 [results of first trial]; *Alleged mal-practice – another verdict against a physician,* NEW YORK MEDICAL TIMES, 2:397 (Sept. 1853); *Leighton v. Sargent*, 27 N.H. 460, 472, 7 Foster 460 (Dec. 1853); *Prosecution for mal-practice*, NEW HAMPSHIRE JOURNAL OF MEDICINE, 4(12):330-334 (Dec. 1, 1854)

[234] *A surgical case of mal-practice*, BOSTON MEDICAL AND SURGICAL JOURNAL, 51(15):289, 293 (Nov. 8, 1854); *Prosecution for mal-practice,* NEW HAMPSHIRE MEDICAL JOURNAL, 4(12):330 (Dec. 1, 1854); *Leighton v Sargent*, 31 N.H. 119, 64 Am. Dec. 323 (July 1855).

A singular circumstance occurred in the treatment of Leighton's case. Soon after the occurrence of the injury, the plaintiff wished Dr. S. to bring him some medical work on compound dislocations. He brought to him Drain's Principles of Surgery, and the patient had it with him for some weeks. This was during the time Dr. S. was making every effort to keep up the foot.[235]

ANESTHESIA (1854-1859)

Several inquests involving anesthesia deaths continued to address consent.

In 1854, in London, Mrs. Harrop died under chloroform for an operation to remove her cancerous breast. She had refused to consent to the surgery until the surgeon agreed to use chloroform. The inquest found no culpability by the medical personnel.[236]

In 1854, in London, Sandys consented to a procedure with chloroform at University College Hospital. He died. At the inquest, the surgeon testified: “We never administer chloroform without the consent of the patient.” The coroner’s jury ruled “accidental death.”[237]

In 1855, in Massachusetts, Mrs. Farley died from inhalation of chloric ether related to a tooth extraction. The ether was used at her urgent request against the wishes of the dentist. The coroner’s jury found her death due to the ether and approved of the precautionary measures adopted by the dentist.[238]

In 1856, in Massachusetts, Mrs. P.A. Morgan died when administered chloroform at her request for teeth extraction. The coroner’s jury found that she had died from chloroform “given at the urgent solicitation of the deceased and with all proper care and discretion.” It added “the jury feel compelled to caution the public against the use of chloroform…”[239]

In 1858, in Toronto, Canada, Mr. McChesney died in a dentist chair under the influence of chloroform. He refused to permit the dentist to operate unless chloroform was used. The jury exonerated the dentist because the chloroform was voluntarily inhaled and proper care was used in administering it.[240]

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[235] *A surgical case of mal-practice*, BOSTON MEDICAL AND SURGICAL JOURNAL, 51(15):289, 294 (Nov. 8, 1854)

[236] *Death from chloroform*, EMPIRE (London), Feb. 25, 1854, 7; *Case of death from chloroform*, ASSOCIATION MEDICAL JOURNAL (London), No. 66:315 (Apr. 7, 1854)

[237] *Death from chloroform,* DAILY NEWS (London), Oct. 18, 1854; *Death from chloroform,* MEDICAL TIMES AND GAZETTE, 30:390 (1854)

[238] *Death from taking ether*, DAILY NATIONAL INTELLIGENCER (DC), Mar. 3, 1855; *Death from inhalation of chloric ether*, BOSTON MEDICAL AND SURGICAL JOURNAL, 52(5):105-106 (Mar. 8, 1855); 52(6): 126-127 (Mar. 15, 1855)

[239] *Affairs about home*, BOSTON HERALD, Jan. 10, 1856, 4; *Death from chloroform*, BOSTON MEDICAL AND SURGICAL JOURNAL, 53(25):512-513 (Jan. 17, 1856); *Use of chloroform*, BOSTON DAILY ADVERTISER, Jan. 18, 1856; *Death by chloroform*, NATIONAL INTELLIGENCER (DC), Jan. 14, 1856, 3 [gave name as Miss Ida Morgan]

[240] *Death from chloroform*, MEDICAL CHRONICLE (Montreal), 5(9):125-127 (Feb. 1858); *Death in a dentist’s chair*, ADAMS SENTINEL (Gettysburg PA), Feb. 15, 1858, 2; *Death from chloroform*, PENINSULAR JOURNAL OF MEDICINE (Detroit), 5(9):500-501 (March 1858)

In 1858, in England, an inquest was conducted in the death of William Powell at the Bristol Infirmary. He needed an operation for his elbow joint. He expressed a wish to inhale chloroform. He died when the chloroform was administered. The jury placed no blame on the medical personnel.[241]

In 1858, in England, an inquest was conducted on the death of a female servant who died from chloroform for a dental procedure. Before the procedure, she "wrote an authority for the extraction of the offending tooth with the aid of chloroform." This appears to refer to a written consent. The jury found no blame on the dentist, Keeling, but recommended cautious use for trifling operations in the future.[242]

In 1858, an inquest was held in England into the death of William Rush, age 11. Rush had injured his foot. When surgeon Watkins sought to examine the foot the boy resisted due to the pain. Watkins proposed an examination under chloroform to which his mother offered no objection. Rush died under the chloroform. The jury exonerated the medical personnel.[243]

In 1859 an inquest was held into the death of Richard White who died in St. Thomas's Hospital under the influence of chloroform in preparation for a surgical operation. It was his [244]wish to have chloroform. The medical personnel were exonerated.

INQUEST - ALFRED RICHARDSON (ROYAL FREE HOSPITAL CASE) - VIOLATION OF CONDITIONS PLACED ON CONSENT BY MOTHER (London 1854)

In April 1854, Mrs. Richardson took her son, Alfred, age 3 years and 8 months, to the Royal Free Hospital in London because of urinary problems. Physicians who examined him disagreed as to whether he had urinary stones. One advised an operation. The operation was performed on April 13, 1854 and the child died April 16, 1854. The case became a scandal. The body was exhumed and the Home Secretary ordered a coroner's investigation. There were eight days of hearings between June 20 and July 17. There were questions about whether there was misdiagnosis so that the procedure was unnecessary, whether conditions on the mother's consent had been violated, whether the operation had been unnecessarily prolonged, who participated in the surgery, whether there was improper attention after the surgery, whether there were attempts at cover-up by medical and/or legal personnel, and whether there were conflicts of interests because one of the surgeons was a son of the coroner.

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[241] *Death from chloroform*, LANCET (London), i:230 (Feb. 27, 1858)); *Death from chloroform*, OHIO MEDICAL AND SURGICAL JOURNAL, 10:451-452 (May 1. 1858)

[242] *Death from chloroform*, TIMES (London), Aug. 30, 1858, 5; *Chloroform*, British JOURNAL OF DENTAL SCIENCE, 2(27):259-262 (Sep. 1858); *Another death from chloroform*, MEDICAL TIMES AND GAZETTE (London): 38:248 (Sep. 4, 1858); *Death from chloroform*, NEW YORK DENTAL JOURNAL, 2:64-65 (Dec. 1858)

[243] *Death from chloroform*, MEDICAL TIMES AND GAZETTE (London): 38:282 (Sep. 11, 1858)

[244] *Death from the administration of chloroform*, PHARMACEUTICAL JOURNAL (2d series) 1(3):195 (Sep. 1, 1859)

The allegations regarding consent were the first issue raised by counsel for the parents, even though they do not appear to have been a major feature of the ultimate deliberations. The newspaper account of the initial presentation of the attorney for the family stated:

> The mother at first refused, but ultimately consented, on the condition that no operation should be performed upon the child but in the presence of a nurse who was a friend of the mother and whom the child was accustomed to. He should show that this had not only been entirely disregarded, but the proper regimen for the child to be in before the operation had not been attended to by the medical men.

The mother and the nurse testified in support of this position. The nurse testified that a hospital nurse "said the doctors would not let me be present."

The coroner's jury concluded that the deceased had died from an operation unskillfully performed by the doctors, but did not want criminal charges. No report of a civil case has been located.[245]

FALSE PRETENSES (New Jersey 1854)

In 1854, John Frey, a German doctor, was arrested in Sussex County, New Jersey, for obtaining money under false pretenses. It was reported that he had fed gingerbread with cabalistic characters scratched on it to a sick child. He was not convicted due to insufficient evidence. He was then attacked and beaten by those he had swindled.[246]

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[245] *The mysterious case at the Royal Free Hospital: The body exhumed by order of Lord Palmerson*, DAILY NEWS (London), June 19, 1854; *Royal Free Hospital: Investigation by order of the Home Secretary,* TIMES (London), June 21, 1854, 12; *The Royal Free Hospital*, TIMES (London), June 23, 1854, 9; June 24, 1854; June 28, 1854, 12; June 30, 1854, 12; July 4, 1854, 12; July 5, 1854, 12; July 8, 1854, 12; July 10, 1854, 10; July 15, 1854, 12; July 18, 1854, 7 & 12; July 21, 1854, 6 [House of Lords]; July 25, 1854 [question in Parliament]; *A recent operation, followed by death, in the Royal Free Hospital,* DAILY NEWS (London), May 25, 1854; *Alleged death from a surgical operation,* DAILY NEWS (London), June 21, 1854; LANCET, i:672 (June 24, 1854); i:684 (June 24, 1854); ii:35 (July 15, 1854); ii:50 (July 22, 1854) [editorial]; ii:53-73 (July 22, 1854) [inquest]; ii:84 (July 29, 1854) [editorial]; ii:87-91 (July 29, 1854) [inquest]; ii:110-111 (Aug. 5, 1854); ii:132-133 (August 12. 1854); ii:177-178 (Aug. 26, 1854); ii:461 (Dec. 2, 1854); *The Royal Free Hospital and its medical officers*, DAILY NEWS (London), June 26, 1854; *The Royal Free Hospital case*, DAILY NEWS (London), June 28, 1854; June 30, 1854, 5-6; July 5, 1854; July 15, 1854; July 19, 1854; July 21, 1854; *The conspiracy against the Royal Free Hospital*, REYNOLD'S NEWSPAPER (London), July 23, 1854; *The suppressed inquest*, ASSOCIATION MEDICAL JOURNAL,2(80):614 (July 14, 1854); 2(80):630-639 (July 14, 1854); 2(81):654-658 (July 21, 1854); *Royal Free Hospital*, MEDICAL TIMES AND GAZETTE, 30:88-90 & 98-99 (July 22, 1854); MEDICAL TIMES AND GAZETTE, 30:124 (July 29, 1854); 30:174 (Aug. 12, 1854); 30:197-198 (Aug. 19, 1854); *Hospital surgeons, hospitals, and public opinion*, ASSOCIATION MEDICAL JOURNAL, 2(83):689-691 (Aug. 4, 1854); *The recent inquest, and the great responsibility of hospital governors*, MONTHLY JOURNAL, 19:189 (Aug. 1854); *Unsuccessful operation for stone in the bladder—coroner's inquest,* BOSTON MEDICAL AND SURGICAL JOURNAL, 51:126-127 (Sept. 6, 1854)

[246] ALBANY JOURNAL, Sep. 21,1854, 2

BLOCKLEY HOSPITAL RULES - PATIENT CONSENT REQUIRED FOR OPERATIONS (Philadelphia 1854)

In 1854, in Philadelphia, the Guardians of the Poor adopted rules to permit Blockley Hospital to be used for clinical instruction. One rule was:

> The Consulting Surgeons shall always be present at every capital operation, and no operation shall be performed unless advised by at least one Consulting Surgeon and the Chief Resident Physician; the consent of the patient thereto being first obtained.[247]

CONVICTION OF STEPHEN BEALE - VIOLATION OF FEMALE PATIENT WHILE UNDER ANESTHESIA (Philadelphia 1854)

Miss Narcissa E. Mudge, age 19, charged Philadelphia dentist Stephen T. Beale with having violated her person while she was under the influence of ether she had consented to. In 1854, he was convicted and sentenced to 4 ½ years. In November 1855 the Governor pardoned him based on belief in his innocence.[248]

RICE V. THORNDIKE - ALLEGED AMPUTATION WITHOUT CONSENT (Massachusetts 1855)

In 1855, in a Massachusetts malpractice case - *Rice v. Thorndike* - the patient alleged amputation without consent. The doctor alleged he had been authorized to do what in his judgment was best. The jury gave a verdict for the defendant.[249]

AUTHORITY TO ORDER REMOVAL OF TYPHUS PATIENTS (England 1856)

In 1856 Mr. Bianchi, medical officer of the St. Savior Board of Works in Southwark sought advice whether as medical officer fro the district he could order the removal of a person with typhus. Mr. A'Beckett advised him that there was no parliamentary act giving him that power: "Surely they could not remove

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[247] *Opening of the Blockley Hospital for Clinical Instruction,* MEDICAL EXAMINER, 10:628 (Oct. 1, 1854)

[248] *Conduct of dentist in Philadelphia,* DAILY ARGUS AND DEMOCRAT (Madison WI), Aug. 16, 1854, 3 [reprinted article from PHILADELPHIA LEDGER]; *The sentence of Dr. Beale,* DAILY GLOBE (Washington, D.C.), Nov. 30, 1854, 3 [reprinted from PHILADELPHIA BULLETIN]; *Pardon of Dr. Beale - and affecting scene,* WEEKLY ARGUS AND DEMOCRAT (Madison Wis.),Nov. 28, 1855, 2. See also *Medical miscellany*, BOSTON MEDICAL AND SURGICAL JOURNAL, 38:128 (Mar. 8, 1848) [French dentist convicted of abusing girls under ether]

[249] BOSTON DAILY ADVERTISER, Jan. 9, 10, 11 & 13, 1855, 1; *Another suit for mal-practice*, BOSTON MEDICAL AND SURGICAL JOURNAL, 51(25):504 (Jan. 17, 1855); *Suit for mal-practice,* AMERICAN MEDICAL MONTHLY, 3:155-156 (Feb. 1855)

persons from their dwelling without their consent; if so, the liberty of the subject would be much trampled upon by designing persons."[250]

AUTHORITY TO ISSUE QUARANTINE ORDERS (New York 1856)

In August 1856, New York City was keeping ships at anchor in quarantine for yellow fever. On August 11, it was announced that the Board of Health of the City of Castleton in Richmond County had adopted quarantine regulations. Dr. Thompson, Port of New York health officer, expressed opposition to the unilateral actions of Castleton. George W. Daly was detained in a challenge to the law and sued the Board and gatekeeper for false imprisonment. The next day captains of quarantined vessels and their followers destroyed the barricades erected by Castleton. George W. Daly, Peter W. Croft, and James Silvie were arrested for participating in the destruction of the barricades. [251]

On August 20, 1856, New York Judge Birdseye ruled on a habeas corpus petition of Peter Roff who was being detained in Richmond County jail. A justice of the peace had found that he had violated a quarantine order of the Board of Health of Castleton by passing from a quarantine enclosure to another part of town. Roff challenged the legality of the regulation of the Castleton Board of Health. The judge expressed concern with potentially conflicting local rules adopted without state authority. He concluded the town did not have authority to impose the rule and ordered Roff released.[252]

ACQUITTAL OF M. RENAULT - DEATH AFTER OPERATION TO WHICH PATIENT CONSENTED (France 1856)

In 1856, M. Renault proposed to a female patient with syphilis to cauterize a swelling with acid nitrate of mercury. He was a practitioner in Dormans (Marne), France. After considerable persuasion she consented. Two hours after the procedure she died. M. Renaut was accused at the Tribunal of Chateau-Thierry of having caused the woman's death through the operation and two Doctors of Medicine were sworn as experts.

The tribunal condemned M. Renaut to three months' imprisonment and a heavy fine. He appealed to the Imperial Court of Amiens. The Editorial Committee of the Union Medicale took on the case. The Imperial Court of Amiens reversed the judgment in the case.[253]

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[250] *Typhus patient: Power of medical officers of health to order removal*, ASSOCIATION MEDICAL JOURNAL, 4(183):577 (July 5, 1856).

[251] *The yellow fever panic,* N.Y. TIMES, Aug. 11, 1856, 1; *Sanitary condition of the city,* N.Y. TIMES, Aug. 13, 1856, 1; Aug. 14, 1856, 1; Aug. 15, 1856, 3; Aug. 16, 1856, 4; Aug. 18, 1856, 1; Aug. 21, 1856, 1; Aug. 22, 1856, 6

[252] *Our quarantine laws,* N.Y. TIMES, Aug. 23, 1856, 2 [text of decision].

[253] WESTERN LANCET, 17(10):652-654 (Oct. 1856); *Responsabilité médicale*, JOURNAL DES CONNAISSANCES MEDICO-CHIRURGICALES, 4(16):441 (15 Aout 1856)

FOWLER V. SERGEANT - PATIENT NOT OBLIGATED TO SUBMIT TO FOLLOW-UP TREATMENT (Pennsylvania 1856)

In 1850, John Sergeant was thrown from his horse and injured his hip joint. Dr. Fowler and his son examined Sergeant and did not find any fracture or dislocation. Two weeks later Dr. Fowler determined the matter was more serious and told Fowler he would have to submit to a splint or be crippled for life. Sergeant refused. Dr. Fowler terminated the relationship. Sergeant sued. The trial court ruled that there could be liability for the initial misdiagnosis and resulting unskillful treatment for two weeks. The court further ruled that the patient was not obligated to submit treatment. The jury found in favor of Sergeant. In 1856, on appeal the Pennsylvania Supreme Court affirmed the decision.[254]

AUGUSTUS VOLMUTH V. JOHN HATHAWAY - TESTIMONY RELATED TO INFORMING PATIENT AND CONSENT (Massachusetts 1856)

In 1856, in Worchester, Massachusetts, Augustus Volmuth sued Dr. John E. Hathaway for alleged malpractice in the treatment of a fracture of his arm. This was the first trial in Massachusetts after enactment of a new law permitting parties to be witnesses. Dr. Hathaway testimony included the following related to consent:

> Informed him that, if treatment did not result favorably, and Nature refused to work a cure, there was a last resort in an operation. At present, sufficient time had not elapsed, nor was his health strong enough to bear it. He assented, as if he understood my views. I had, in fact, taken pains from beginning, to explain my movements to him, in order that he might co-operate. As he went out, he asked how much my bill was. I replied, I had not made it out, but would have it ready for him at next visit. He never came again.

The case was not decided on consent issues. After the defense testimony, the plaintiff's lawyer voluntarily dropped the case, explaining to the court that he had been misinformed about the nature of the patient's injury and now believed it had been treated properly.[255]

LEGISLATIVE INVESTIGATION OF FORCIBLE SURGERY OF PRISONER SHANNON BY PROF. JOHN DAWSON (Ohio 1857)

In 1857, in Ohio, it was alleged that the prison doctor at the state penitentiary, Prof. John Dawson, had forcibly performed eye surgery on a protesting prisoner patient, Shannon, who was blinded by the operation. A legislative investigation found this to be the case.

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[254] *Fowler v. Sergeant*, 1 Grant 355 (Pa. Nov. 27, 1856)

[255] *Trial for malpractice*, BOSTON MEDICAL AND SURGICAL JOURNAL, 56(1):9-23 (Feb. 5, 1857) [excerpt from p. 18]; *Court Calendar*, BOSTON DAILY ATLAS, Jan. 16, 1857

The penitentiary had a “bye-law” which prevented surgical operations “without the consent of the prisoner, or the consent of two of the inspectors.” Dawson’s journal published an editorial against this bylaw - “The rule, therefore, is violated from the necessity of things, and should be expunged.”

The legislature passed a bill granting Shannon $500 compensation. In 1858, Ohio passed a law requiring consent to examination and surgery of prisoners.[256]

The law stated:

> Sec. 23. The hospital of the penitentiary shall, under such conditions as the directors, warden and physician may provide, be accessible to the professors and students of Starling Medical College, once a week, during the annual college terms, for clinical instruction; provided that no convict shall be subjected by such professors to any involuntary examination or surgical procedure.[257]

HABEAS CORPUS CHALLENGE TO PLACEMENT IN LUNATIC ASYLUM (New York 1857)

In the September 1857, Mr. Oliver O. Woodman, a New Orleans druggist, returned to his New York City hotel room and found his wife, Caroline Woodman, together with Mr. Gardner Furness "under decidedly suspicious circumstances." On September 12, Mr. Woodman placed Mrs. Woodman in the care of General Allan McDonald at the Sanford Hall, a private lunatic asylum in Flushing, N.Y.

Mr. Furness obtained a writ of habeas corpus on behalf of Mrs. Woodman, seeking her release. The case was tried in Common Pleas Court before Judge James I. Roosevelt. Extensive testimony was taken in court and reported in the media. The court refused to order the asylum to permit her lawyers to see her. Instead a judge agreed to go to the facility to see her. The NEW YORK TIMES editorialized against such private asylums.

The judge stated in open court that he was not inclined to permit detention of persons for mental illness who were not dangerous to themselves or others, but never had an opportunity to rule in the case. The court proceedings ended November 5, 1857, when the petition for habeas corpus was withdrawn at Mrs. Woodman's written request. She announced that she was returning to her home in Mississippi with her brother.

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[256] *Special Report of the Committee on Penitentiary*, APPENDIX TO JOURNAL OF THE HOUSE OF REPRESENTATIVES (Ohio) (1857); *The ”gross” outrage*, OHIO MEDICAL AND SURGICAL JOURNAL (Columbus), 9(4):333-334 (March 1, 1857); John Dawson, *Lenticular Cataract— Operation on both Eyes — Unsuccessful Result*, OHIO MEDICAL AND SURGICAL JOURNAL (Columbus), 9(5):406-414 (May 1, 1857); *A depressing case of physician’s malpractice,* WEEKLY WISCONSIN (Milwaukee WI), Jan. 18, 1857, 4; *Laws of Ohio,* NEWARK ADVOCATE (Ohio), July 1, 1857; *Laws of Ohio*, PROGRESSIVE AGE (Coshocton Ohio), June 9, 1858, 1

[257] *An Act providing for the appointment and more thorough system of accountability of officers of the Ohio Penitentiary, fixing their compensation, prescribing their duties, and determining the manner of working convicts*, LAWS OF OHIO, No. 53 (Apr. 12, 1858)

Mr. Woodman was later awarded divorce in a proceeding in Louisiana.[258]

RULES FOR STATE EMIGRANT AND REFUGE HOSPITAL - PATIENT CONSENT REQUIRED FOR OPERATIONS (New York 1858)

In 1858, Commissioners on Emigration in New York City adopted rules for the State Emigrant and Refuge Hospital on Ward's Island. They included:

> 2. The Chief Surgeon shall visit the Island at least every other day, prescribe for the patients under his care, and perform such operations as may be deemed necessary at the request of the patient; but no surgical operation shall be undertaken without the consent of the patient; and all capital operations, endangering the life or the limb of the patient, shall be decided on by consultations with the Chief Physician and the Superintendent. In surgical cases requiring immediate treatment, the Superintendent is required to send for the Chief Surgeon, and, when unable to obtain his services, the Superintendent is authorized to call in Doctors Valentine Mott, Willard Parker, Gurdon Buck, Alfred C. Post, John Watson, or W. H. Van Buren, any of whom may perform such surgical operations as he may deem necessary.[259]

USE OF EMETICS ON PRISONER TO OBTAIN EVIDENCE (New York 1858)

In June 1858, the New York City police used emetics to force, Frederick W. Koehler, to regurgitate a counterfeit banknote. The prisoner refused to agree to the procedure, so the police insisted.[260]

This must have been an unusual event because, on the day following the above article, the Police Headquarters had many visitors trying to see the prisoner. The N.Y. TIMES title to the follow-up story called the prisoner "the victim

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[258] *The New York Hotel scandal*, N.Y. TIMES, Oct. 31, 1857, 2; *Case of Mrs. Woodman*, N.Y. TIMES, Nov. 2, 1857, 3; *Case of Mrs. Caroline Woodman*, N.Y. TIMES, Nov. 3, 1857, 1; *The Woodman case*, N.Y. TIMES, Nov. 4, 1857, 4 (editorial); *Case of Mrs. Woodman*, N.Y. TIMES, Nov. 5, 1857, 1; *Case of Mrs. Woodman*, N.Y. TIMES, Nov. 6, 1857, 1; *The end of the Woodman case*, N.Y. TIMES, Nov. 6, 1857, 4 (editorial); *The Woodman case*, N.Y. TIMES, Nov. 6, 1857, 5 (letter to editor defending husband); *Sanford Hall,* N.Y. TIMES, Nov. 9, 1857, 6; *Letter from James T. Brady, Esq.,* N.Y. TIMES, Nov. 11, 1857, 5 (husband's attorney arguing for family rights to protect the insane); *The Woodman case* , N.Y. TIMES, Nov. 14, 1857, 1 (divorce suit); *The Woodman and Furness affair - Letter from Mr. Woodman*, N.Y. TIMES, Nov. 18, 1857, 1; *Edmund L. Hearns, Esq., and the Woodman case,* N.Y. TIMES, Nov. 20, 1857, 4 (letters defending attorney); *The Woodman case* , N.Y. TIMES, Nov. 21, 1857, 1 (letter from Furness; Woodman divorce petition); *A strange story,* TIMES (London), Nov. 27, 1857, 4; *Libel suits,* N.Y. TIMES, Dec. 2, 1857, 4 (Furness dropped libel suit against N.Y. Times); *The Woodman divorce case*, N.Y. TIMES, July 1, 1858, 2; *The Woodman divorce case*, N.Y. TIMES, July 2, 1858, 3; *Sundry items of personal scandal,* N.Y. TIMES, Aug. 4, 1858, 5 [divorce granted]

[259] Friedrich Knapp, IMMIGRATION, AND THE COMMISSIONERS OF EMIGRATION OF THE STATE OF NEW YORK (New York: Nation Press 1870), Appendix 213, 218-219 [adopted by Commissioners on Emigration June 16, 1858]

[260] *Emetics as detectives*, N.Y. TIMES, June 21, 1858, 5

of the emetic," suggesting some ambivalence about the use of this treatment for evidence gathering.[261]

In 1952, the United States Supreme Court declared the use of emetics to force regurgitation of evidence was an unconstitutional violation of due process, *Rochin v. California*, 342 U.S. 165 (1952). However, evidence obtained incidentally to medically- initiated and medically-necessary stomach pumping is generally admissible. See *State v. Green*, 32 Kan. App. 2d 789, 89 P.3d 940 (May 14, 2004).

CONVICTION FOR FALSE PRETENSES (England 1858)

In 1858, Henry de la Cuer, a "medical botanist," was prosecuted for false pretenses for having wilfully and falsely pretended to Zarah Rowlands that he was a practitioner in medicine, and also for obtaining money under false pretences. De la Cuer was fined 30s and 11s costs and immediate payment was ordered. If he did not pay, he was to be imprisoned for one month. Then, he was order to leave town. [262]

SURGERY ON BRAIN OF LUNATIC RESTORED HIS REASON - CONSENT OF WIFE (Ohio 1858)

In August 1858, newspapers reported that surgery on the brain of a lunatic by Dr. Thayer restored his reason. The articles noted that: "His wife engaged the services of Dr. Thayer, to attempt the cure of her unfortunate husband."[263]

A local Ohio paper printed more of the details. Five years earlier the man had fractured his skull on a fence stake when thrown from a wagon. He became violently deranged and was in a lunatic asylum for a long time, until discharged as incurable. He ended up in the county jail for over a year, when the wife arranged for the services of Dr. Thayer. The doctor found part of the skull depressed and decide to remove it.

> On entering the cell with is assistant for that purpose, on Friday, the man became greatly enraged, and poured out volleys of execrations on Dr. Thayer, as though unaware of the business he came on.
> At the order of the jailor Frazee, the lunatic laid down on his bed, when he was immediately confined, and copious doses of chloroform administered, until he became perfectly insensible. The depressed portion of the skull… was then taken out...
> On Saturday morning he awoke, arose form his bed and walked up and down the room perfectly rational. … He is now in a fair way of recovery.[264]

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[261] *The victim of the emetic - his splendid antecedents and brilliant prospective,* N.Y. TIMES, June 22, 1858, 8

[262] *Successful prosecution of a "medical botanist,"* LONDON LANCET, ii:150-151 (Aug. 6, 1859)

[263] *Remarkable cure of lunatic*, CLEVELAND DAILY LEADER, Aug. 10, 1858, 3; *Restoration of reason - a remarkable case,* CHICAGO TRIBUNE, Aug. 19, 1858, 3

CONVICTION FOR ABORTION - CONSENT OF FEMALE NOT A DEFENSE (Massachusetts 1858)

In 1858, the Supreme Court of Massachusetts in the case of *Commonwealth v. Wood*, affirmed the conviction of a doctor for performing an abortion. It ruled that Statutes 1845, c. 27, had changed the common law so that the consent of the female would not of itself constitute a lawful justification and it was not necessary to prove the feotus was quick.[265]

TERRENCE McQUEENEY V. W.W. JONES - EFFECT OF PATIENT REFUSAL (Ohio 1858)

Terrence McQueeney fell onto train tracks and was run over by a train fracturing both legs. He came under the care of Dr. W.W. Jones. Dr. Jones testified that he repeatedly informed McQueeney that if he succeeded in preserving the legs the left leg would remain imperfect. The patient's wife objected to the mode of treatment and aroused the neighborhood so that several men came with clubs threatening his life if he did not desist from his treatment. The patient then refused further treatment and said he would take the risk. The doctor urged the patient to consent to an operation but the patient declined. The doctor then ended his treatment. A year and half later, when the leg got much worse, the patient sued in Lucas County, Ohio, claiming malpractice. In 1858, the jury ruled for the defendant doctor.[266]

ALLEGED UNAUTHORIZED AMPUTATION (Ohio 1858)

In 1858, it was reported that a young man in Cincinnati had sued a surgeon for unnecessarily cutting off his leg while under ether in a hospital.[267] No further details of the case or its outcome have been located.

CONVICTION FOR RAPE UNDER ANESTHESIA (Montreal 1858)

In 1858 a dentist in Montreal was indicted for attempted rape while a patient was under the influence of chloroform. Although the husband was present during the whole time she was unconscious, the jury convicted the dentist.[268]

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[264] *Remarkable cure of lunatic,* MARYSVILLE TRIBUNE (Ohio), Aug. 25, 1858 [from Cleveland Herald]
[265] *Commonwealth v. Wood*, 77 Mass. 85,11 Gray 85 (Sep. 1858)
[266] *Terrence McQueeney vs. W.W. Jones*, OHIO MEDICAL AND SURGICAL JOURNAL, 12(1):22-24 (Sep. 1, 1859)
[267] *Novel suit*, SUN (Baltimore), Dec, 6, 1858, 4; WEEKLY WISCONSIN PATRIOT (Madison), Dec. 18, 1858, 3; *Current items*, NEW YORK LEDGER, Dec. 25, 1858, 4
[268] *Alleged criminal assault by a dentist*, BOSTON MEDICAL AND SURGICAL JOURNAL, 59(14):287 (Nov. 4, 1858); *The recent trial for rape in Montreal*, BOSTON MEDICAL AND SURGICAL JOURNAL,

CONVICTION FOR SYPHILIZATION (France 1858-1859)

In the 1850s in France Dr. Auzias-Turene and others advocated syphilization - the deliberate inoculation of persons with syphilis as a mode of protection from the syphilitic virus. This was controversial. Experiments were conducted at the hospital Lourcine. A Prosector of Anatomy who had submitted to the inoculation contracted the disease and it resisted medical treatment likely ruining his health. In 1854 the French Academy of Medicine condemned syphilization and the Prefect of the Seine banned it. [269] Auzias-Turenne continued to lobby with the police prefecture for permission to test his syphilization on public hospital patients. In 1859 he got his chance and he syphilized one apparently consenting patient in a Paris hospital. He was sued for this experiment, but the case never came to trial.[270]

In the 1850s there was a disagreement among physicians in France over whether persons with syphilis in its secondary phase were contagious. In 1858-1859 two experiments were conducted in which purulent matter from patients with syphilis in the secondary phase were inoculated into other patients who did not have the disease. In the winter of 1858, an intern Guyenot in Dr. Gailleton's wards at the Hopital Antiquaille in Lyon inoculated a non-syphilitic ten year old boy, Charles Bouyon, who contracted the disease. The report of this event received little attention. In 1859, Drs. Gilbert and Auzias-Turene inoculated four patients at Hopital St. Louis in Paris. All inoculated patients contracted the disease. The patients did not know what was being done to them. When this experiment was reported there was an outcry from the French medical press. The focus was on the placing of the subjects' lives in peril for science, rather than on the lack of consent. Criminal investigations were started in Paris and Lyon. The Academy of Medicine intervened in Paris and persuaded the prosecutor to drop that case. In 1859, in Lyon, there was a trial. The counsel for the state had taken the position that:

> An experiment to be lawful must come within the following restrictions:—1. The experimenter must be acquainted with the science for the further development of which he wishes to experiment, and his title must designate his fitness for the experiment he proposes or performs. 2. The cure of the patient as the only object, essential and fundamental; as, for example, the employment of a new remedy in a desperate case, when all other means have been exhausted. 3. When the experiment is for any other object than the cure of the patient, when it is merely a scientific

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59(17):346-347 (Nov. 25, 1858); Allan Hamilton, A MANUAL OF MEDICAL JURISPRUDENCE (1883), 192

[269] *Foreign correspondence*, WESTERN JOURNAL OF MEDICINE AND SURGERY, 1(6):405, 414 (June 1854); see also Joan Sherwood, *Syphilization: Human experimentation in the search for a syphilis vaccine in the nineteenth century*, JOURNAL OF THE HISTORY OF MEDICINE, 54:364 (July 1999)

[270] A. Dracobly, *Ethics and experimentation on human subjects in mid-nineteenth-century France: the story of the 1859 syphilis experiments*, BULL. HIST. MED., 77:332, 365-366 (2003)

experiment, the consent of the person to be experimented on must first be obtained. This could not be done from the infant (lad of ten years,) himself.

The judge found them both guilty of performing an experiment not in the exclusive interest of the patient, but instead with a principal goal to resolve a medical question. The principal experimenter Guyenot was fined 100 francs and Gailleton was fined 50 francs for complicity.[271]

CURRAN V. BEACH - UNNECESSARY AMPUTATION (Illinois 1859)

In 1859, Jacob Curran, a minor, by his next friend, sued Dr. W.W. Beach in Cook County Court of Common Pleas in Illinois for the alleged unnecessary amputation of his arm in 1852. The jury awarded $15,000.[272] In some cases, it is possible to review unnecessary surgery as the result of uninformed consent.

CONVICTION OF BENJAMIN COOK - PATIENT DIED AFTER BLACKSMITH TREATED HIM WITH HIS CONSENT (England 1859)

In 1859, in Winchester, England, Benjamin Crook was tried for manslaughter for the death of James Wicks. Wicks had a cancer on the lip that had been removed once and recurred. Surgeons told him it would be dangerous to operate again. Crook was a blacksmith who told Wicks he could cure the cancer. Under persuasion from his family, after hesitating several hours, Wicks consented to place himself in the hands of Crook. Crook applied oil that was later shown to be corrosive sublimate (mercury chloride). Wicks died within nine days. Crook was found guilty of manslaughter and sentenced to three months imprisonment.[273]

BUTLER V. PHIPPS - REMOVAL OF WRONG TOOTH (Maine 1859)

In 1859, in Maine, Mrs. Eliza Butler sued Dr. Phipps for removing the wrong tooth after she consented to the removal of a tooth. The defense was that the instrument slipped when the lady fainted. The magistrate ruled in favor of the defendant.[274]

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[271] A. Dracobly, *Ethics and experimentation on human subjects in mid-nineteenth-century France: the story of the 1859 syphilis experiments*, BULL. HIST. MED., 77:332-366 (2003); *Syphilitic inoculation*, PACIFIC MEDICAL AND SURGICAL JOURnal (San Francisco), 3(28):152, 153 (1860); *Tribunal correctionnel de Lyon (4t chamber),* GAZETTE MEDICALE DE LYON, No.1:12-13 (1 Jan 1860)

[272] *Court of common pleas,* CHICAGO PRESS AND TRIBUNE, Jan. 5, 1859, 1 [Curran v. Beach]; Jan. 6, 1859, 1; Jan. 7, 1859, 1; Jan. 10, 1859, 1 (verdict); Jan. 12, 1859, 1; *Malpractice*, MEDICAL AND SURGICAL REPORTER, 1(17):302 (Jan. 22, 1859); *Heavy damages for mal-practice*, JANESVILLE WEEKLY TIMES (WI), Mar. 1, 1859, 1 [gives first names of parties]

[273] *Western Circuit,* TIMES (London), Mar. 7, 1859, 11; *The week*, MEDICAL TIMES AND GAZETTE, 18:268-269 (Mar. 12, 1859); R v Crook, 1 F. & F. 520, 175 Eng. Rep. 835 (1859)

[274] *A curious suit*, NEW ALBANY DAILY TRIBUNE (Ind), June 22, 1859, 3

DISPUTE OVER AUTHORIZATION TO LEAVE HOSPITAL (New Orleans 1859)

In 1859, the CHICAGO TRIBUNE reported an article from a New Orleans newspaper that described a shootout between two physicians over the discharge of a charity patient from the New Orleans Charity Hospital.

The article described the rule of the hospital that charity cases could not leave the hospital without permission of a physician. A patient's wife had tried to get him discharged. The patient dressed and went to the gate but was not permitted to leave until a physician authorized the discharge. One physician was so upset that another physician had authorized the discharge that a shootout resulted.[275]

MEDICAL SOCIETY EXPULSION OF IGNATIUS LANGER - FOR INTIMATE EXAMINATION OF PREGNANT PATIENT WITH HER CONSENT (Iowa 1859)

In 1858, the Scott County (Iowa) Medical Society was organized. Shortly afterward Dr. Ignatius Langer was admitted as a member.[276] He had been admitted to the Iowa Medical and Surgical Society in 1853.[277]

On Oct. 25, 1859, Ignatius Langer was expelled from the Society for intimate examinations of a woman prior to labor for the purpose detecting and correcting the position of the fetus.[278]

The woman and her husband stated that they had consented to the examination and manipulation.[279] The Society took the position that he had deceived the patient by claiming the fetus was in an unnatural position, so the consent was irrelevant.[280]

The Scott County Medical Society sent notice of its actions to many publications.[281] Langer responded with a detailed justification.[282] A debate ensued in the literature.[283]

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[275] *Desperate shooting affray in New Orleans,* CHICAGO TRIBUNE, Sept. 5, 1859, 4; N. Y. TIMES, Sep. 6, 1859, 4

[276] http://www.celticcousins.net/scott/chapter17.html [accessed July 8, 2007]

[277] *Davenport, June 8, 1853*, IOWA MEDICAL AND SURGICAL SOCIETY, 2:351, 351-352 (July 1853)

[278] *Scott County Medical Society—Expulsion of a Member*, AMERICAN MEDICAL GAZETTE AND JOURNAL OF HEALTH, 11:50 (1859) [reprint from letter to the Nashville Journal of Medicine and Surgery from the Scott County Medical Society]

[279] *Dr. Langer and the Scott County (Iowa) Medical Society,* MEDICAL AND SURGICAL REPORTER, Mar. 24, 1860, 553.

[280] Charges against Dr. I. Langer, quoted in *ibid*. at 555

[281] MEDICAL AND SURGICAL REPORTER, (Philadelphia), 3(9):210 (Nov. 26, 1859); *Dr. Ignatius Langer and the Scott County (Iowa) Medical Society*, CINCINNATI LANCET & OBSERVER, 2(12):745-746 (Dec. 1859); *Scott County Medical Society—Expulsion of a Member*, AMERICAN MEDICAL GAZETTE AND JOURNAL OF HEALTH, 11(1):50-52 (Jan 1860)

[282] *Communications*, NEW YORK MEDICAL PRESS, 3(5):72 (Jan. 28, 1860). *External manipulations to remedy mal-presentation of the foetus*, NEW YORK MEDICAL PRESS, 3(5):80 (Jan. 28, 1860). Dr. Noeggerath published a defense of manipulations, see E. Noeggerath, *The operation of turning by external manipulations*, *considered from a historical and practical point of view*, NEW YORK JOURNAL OF MEDICINE, 7:329-348 (Nov. 1859)

PENAL CODE OF INDIA (1860)

In 1860 India enacted a new penal code as Act XLV, effective May 1,1861, based on the penal code proposed by the India Law Commission in 1837. The 1860 code included:

> Section 87. Act not intended and not known to be likely to cause death or grievous hurt, done by consent
> Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.
>
> Illustration
> A and Z agrees to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of

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[283] *External manipulations of foetis in utero to rectify supposed malpositions - vindication of the action of the Scott County (Iowa) Medical Society in expelling a member for alleged unprofessional conduct,* MEDICAL AND SURGICAL REPORTER, Feb. 25, 1860, 467-474, at 469 [official response by medical society]; *Scott County Medical Society v. Dr. Ignatius Langer,* MEDICAL AND SURGICAL REPORTER, Feb. 25, 1860, 487-488; *Dr. Ignatious Langer and the Scott County (Iowa) Medical Society,* OHIO MEDICAL AND SURGICAL JOURNAL, Mar. 1, 1860, 355; *Editorial,* New York Medical Press, 3(11):176 (Mar. 10, 1860); *Dr. Langer and the Scott County (Iowa) Medical Society,* MEDICAL AND SURGICAL REPORTER, Mar. 24, 1860, 553; *Dr. Langer and the Scott County (Iowa) Medical Society,* MEDICAL AND SURGICAL REPORTER, Mar. 24, 1860, 553; *The Scott County (Iowa) Medical Society and Dr. Langer,* MEDICAL AND SURGICAL REPORTER, Mar. 24, 1860, 566; *Version of foetus in utero, by external manipulation,* MEDICAL AND SURGICAL REPORTER (Philadelphia), 3(27):571 (Mar. 31, 1860); *The Scott County (Iowa) Medical Society and Dr. Noeggerath and the New York Journal of Medicine, Langer,* MEDICAL AND SURGICAL REPORTER (Philadelphia), 3(27):585 (Mar. 31, 1860); *Dr. Langer's defence*, NEW YORK MEDICAL PRESS, 3(14):210 (Mar. 31, 1860); *Editorial - Justice*, NEW YORK MEDICAL PRESS, 3(14):222 (Mar. 31, 1860); Harvey B. Wilbur, *Version of foetus in utero, by external manipulations - Dr. Langer's reply to the "Vindication of the Scott County (Iowa) Medical Society,* MEDICAL AND SURGICAL REPORTER, Apr. 7, 1860, 5; Items, NEW YORK MEDICAL PRESS, 3(15):236 (Apr. 7, 1860); *Dr. Lange on external manipulations to correct supposed malpositions of the foetus in utero,* MEDICAL AND SURGICAL REPORTER REPORTER (Philadelphia), 4(1):23 (Apr. 7, 1860); Communications, NEW YORK MEDICAL PRESS, 3(16):245-246 (Apr. 14, 1860); Ignatius Langer, *Correction of malposition of foetus in utero by external manipulations,* NEW YORK MEDICAL PRESS, 3(17):260-267 (Apr. 21, 1860); Ignatius Langer, *Correction of malposition of foetus in utero by external manipulations,* MEDICAL AND SURGICAL REPORTER, 4(4):71 (Apr. 28, 1860); CINCINNATI LANCET & OBSERVER, 3:250 (April 1860); *Dr. Ignatius Langer again*, OHIO MEDICAL AND SURGICAL JOURNAL, May 1, 1860, 442; *"The Scott Society and Dr. Langer controversy." Reply of Dr. P. Gregg, of Rock Island, to the Article of Dr. Wilbur, of Syracuse,* MEDICAL AND SURGICAL REPORTER (Philadelphia), 4(5): 96 (May 5, 1860); *External version in transverse position of the child,* MEDICAL AND SURGICAL REPORTER, 8(17):404 (July 26, 1862); J.T. Whittaker, *On rectification of fetal position by external manipulation*, AMERICAN PRACTITIONER (Louisville), i:90-96 (1870)

such fencing, may be caused without foul play ; and if A, while playing fairly, hurts Z, A commits no offence.

Section 88. Act not intended to cause death, done by consent in good faith for person's benefit
Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm

Illustration
A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending in good faith, Z's benefit performs that operation on Z, with Z's consent. A has committed no offence.

Section 89. Act done in good faith for benefit of child or insane person, by or by consent of guardian
Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person:

Provisos-Provided-
First: - That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;
Secondly: - That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;
Thirdly: - That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death of grievous hurt, or the curing of any grievous disease of infirmity ;
Fourthly:- That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustration
A, in good faith, for his child's benefit without his child's consent, has his child cut for the stone by a surgeon. Knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A is within the exception, inasmuch as his object was the cure of the child.

Section 90. Consent known to be given under fear or misconception
A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception ; or

Consent of insane person:- if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child:- unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

Section 91. Exclusion of acts which are offences independently of harm caused
The exceptions in sections 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.
Illustration
Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence "by reason of such harm"; and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

Section 92. Act done in good faith for benefit of a person without consent
Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit:

Provisos - Provided-

First-That this exception shall not extend to the intentional causing of death, or the attempting to cause death;

Secondly- That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly: -That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt;

Fourthly:-That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustrations
(a) Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A, not intending Z's death, but in good faith, for Z's benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence.

(b) Z is carried off by a tiger. A fires at the tiger knowing it to be likely that the shot may kill Z, but not intending to kill Z, and in good faith intending Z's benefit. A's ball gives Z a mortal wound. A has committed on offence.

(c) A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is not time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence.

(d) A is in a house which is on fire, with Z, a child. People below hold out a blanket. A drops the child from the housetop, knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending, in good faith, the child's benefit. Here, even if the child is killed by the fall, A has committed no offence.

Explanation-Mere pecuniary benefit is not benefit within the meaning of Sections 88, 89 and 92.

The consent provisions in the India Penal Code related to surgery were discussed in several contemporaneous writings.[284]

[284] E.g., Thomas Babington Macaulay, *Note (B). On the chapter of general exceptions*, in *Notes on the Indian Penal Code*, in Lady Trevelyan (editor), THE WORKS OF LORD MACAULAY - COMPLETE (London: Longmans. Green & Co. 1866), Vol. VII, 450-453; *Art. V, Indian and English Criminal Law*, CALCUTTA REVIEW, 43(LXXXVI):380, at 399-400 (1866)

ACQUITTAL OF KENDALL - DEATH AFTER HIGH RISK SURGERY AT PATIENT'S URGENT REQUEST (England 1860)

In 1860, in England, an inquest was held into the death of Joseph Gregg. He had an aortic aneurism that had formed a sac that appeared like a tumor or abssess under the skin. The Liverpool Infirmary informed Gregg that his case was hopeless and nothing could be done. Gregg went to a "veterinary surgeon" Kendall and begged him to lance the tumor, which Gregg did and started bleeding that could not be stopped. Gregg lingered for about a week and died. Kendall was charged with manslaughter. The defense counsel argued that

> …on this evidence it was contended by the learned counsel for the defence that the prisoner bringing fair skill, and acting only at the urgent request of the deceased, was not guilty of either gross ignorance or culpable rashness, and, although he had made a mistake in the treatment of the deceased, acting to the best of his skill and ability, he was not on that account to be convicted of manslaughter.

The summing up by the judge referred to the judge's words in the Williamson case -

> that to substantiate the charge of manslaughter the prisoner must have been guilty of criminal misconduct arising either from the grossest ignorance or the most criminal inattention. One or the other of them was necessary to make him guilty of that criminal negligence and misconduct which are essential to make out a case of manslaughter.

The judge then left the decision to the jury. The jury found Kendall not guilty.[285]

INQUEST - THOMAS HUGHES - AMPUTATION REFUSAL BY FRIENDS (New York 1860)

In 1860, Thomas Hughes, age 15, caught his arm in a circular saw and was severely injured. At Bellevue Hospital in New York City, the doctors advised amputation. Hughes' friends would "not listen to the proposition." In the absence of their consent, the amputation was not performed and Hughes died. The inquest found "accidental death."[286]

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[285] *Quackery*, LANCET, i:283-284 (Mar. 17, 1860); *Crown court*, TIMES (London), Aug. 6, 1860, 10; MEDICAL TIMES AND GAZETTE, ii:139 (Aug. 11, 1860)); *Lancing an aortic aneurism*, LANCET LONDON, ii:144 (Aug. 11, 1860)

[286] *Coroners' inquests - shocking accident to boy*, N.Y. HERALD, Sep. 28, 1860, 10

ACQUITTAL OF EVAN THOMAS - DEATH OF PATIENT UNDER CARE OF BONESETTER (England 1860)

In 1860 in England, an inquest was held into the death of a boy, Timmins, age 8, under the treatment of Evan Thomas, a bonesetter from Liverpool. The boy had had pain in his leg. The father had initially taken to the boy to a doctor who ordered a poultice. Unsatisfied the father took the boy to Thomas. Thomas treated him for a fracture that was later demonstrated not to have existed. The water bandages used by Thomas had caused abscesses. The coroner's jury gave a verdict of manslaughter. At trial, the jury found him not guilty.[287]

ANESTHESIA (1860-1862)

In 1860, in England, there was an inquest into the death of Mr. Carrell who had died at the Northampton Infirmary from chloroform for an operation to remove a tumor from his back. Carrell had "expressed a wish that chloroform be administered." The jury found the surgeons free of blame.[288]

In 1861, in England, there was an inquest into the death of Mr. Carruthers who died from the effects of chloroform during an operation. It was noted that the patient had given his "ready consent " to the chloroform. The jury found no blame on the medical officers.[289]

In 1862, in New York, there was an inquest into the death of Alice Ryan at Bellevue Hospital. She had consented to chloroform and submitting to an operation by a house surgeon for an injury to her shoulder. The jury ruled that the house surgeon was free of censure, but recommended that in the future that chloroform only be used in the presence of the attending physician or surgeon.[290]

In 1862, in England, an inquest was held into the death of Pierre Dumesil while under the influence of chloroform. The body was exhumed to conduct an autopsy. The verdict acknowledged the chloroform was administered at the request of the patient and exonerated the medical personnel.[291]

In 1862, in England, there was an inquest held at King's College Hospital into the death of Elizabeth Freed, aged 17, who died from the effects of chloroform for an operation to close a wound. She had consented to take the chloroform. The jury found the chloroform was properly administered.[292]

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[287] MEDICAL TIMES AND GAZETTE, ii: 411 (Oct. 27, 1860); MEDICAL TIMES AND GAZETTE,, ii: 585-586 (Dec. 15, 1860)
[288] *Death from chloroform*, TIMES (London), Sep. 12, 1860
[289] *Another death from chloroform*, TIMES (London), Sep. 9, 1861, 10
[290] *Coroner's inquest - death from chloroform - a victim of science*, N.Y. HERALD, Mar. 8, 1862, 8; *Death from chloroform - a victim of science*, BOSTON HERALD, Mar. 11, 1862, 1
[291] BRITISH MEDICAL JOURNAL, i:609 (June 7, 1862)
[292] *Death from chloroform*, MEDICAL TIMES AND GAZETTE, 2:186 (Aug. 16, 1862); *Death from chloroform*, LANCET, 10(2):271 (Sep. 6, 1862); *Death from chloroform,* AMERICAN MEDICAL TIMES, 5:210 (Oct. 18, 1862)

RULES FOR COMMERCIAL HOSPITAL - PATIENT CONSENT REQUIRED FOR OPERATION (Ohio 1861)

In March 1861, the Ohio legislature passed a law renaming the Commercial Hospital in Cincinnati and empowering the trustees to make rules.[293] Soon thereafter the Trustees adopted rules that included the following in the rules for the medical staff:

> 7. No surgical operation shall be performed without the consent of the patient; but if in the judgment of the surgeons, in consultation, such operation be decided absolutely necessary to the patient's safety or welfare, such patient may, by the direction of the surgeon in attendance, be discharged from the Hospital on refusal to have the operation performed.[294]

WEST V. MARTIN - EFFECT OF PATIENT NON-COOPERATION (Missouri 1861)

In 1861, in Missouri, the Supreme Court affirmed a jury verdict for a patient in a malpractice case. It discussed the consequences of patient non-cooperation.

> The defendant's fourth instruction assumed the non-liability of the defendant if the injury complained of was occasioned in whole or in part by any act of the plaintiff, or any failure on his part to submit to and observe the directions of the defendant relating to his treatment and cure, although the surgeon may have set the plaintiff's thigh unskillfully.
>
> The general principle that a party seeking legal redress must not only show his adversary to be in the wrong, but also that he himself is without fault, is subject to modification when there is mutuality in it, and both parties have contributed to produce the injury, and the instruction, we think, was erroneous. The rule in such cases seems to be, that if the plaintiff substantially contributed to the injury by his improper or negligent conduct, he can not recover; but if the injury was occasioned by the improper or negligent conduct of the defendant and the plaintiff did not substantially contribute to produce it, then the latter would be entitled to the verdict…[295]

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[293] *Tenth Annual report of the Directors of the City Infirmary and Commercial Hospital of the City of Cincinnati for the Fiscal year, from March 1st, 1861, to March 1st, 1862*, MAYOR'S ANNUAL MESSAGE AND REPORTS OF THE CITY DEPARTMENTS OF THE CITY OF CINCINNATI APRIL 14TH, 1862 (Cincinnati: Johnson, Stephens & Morgan 1861), 341, 410-411

[294] *Ibid*. 417

[295] *West v. Martin*, 31 Mo. 375 (Jan. 1861)

W V. H (FALSELY CALLED W) - DIVORCE GRANTED WHEN WIFE REFUSED SURGERY TO CORRECT CONGENITAL MALFORMATION (England 1861)

In 1861 an English court ruled on a case where a husband sought divorce on the grounds of congenital malformation of his wife that precluded intercourse. There was medical evidence that surgery might possibly remove the malformation but at great risk to life but with doubtful success. The wife was unwilling to undergo the operation, so the judge found the malformation permanent and granted divorce. The judge said:

> The report of the medical inspectors was made known to her advisors; she has not expressed any desire to undergo an operation, and the Court can hardly assume, under the circumstances of this case, the existence of any such desire. It was said that the petitioner ought to have called upon her to do so; no precedent for such a proceeding has been suggested, and I am not disposed to make one. The petitioner may with great propriety decline proposing that the respondent's life should be place in danger; she must judge for herself; and here having been no prayer for delay on her part. I think it my duty to proceed with the case on the assumption that things will remain as they are.[296]

ARMY ORDER TO VACCINATE (United States 1861)

In September 1861, the NEW YORK TIMES published an army order that all members of the New York regiment be vaccinated.[297]

CADWELL V. FARRELL - LIABILITY FOR SURGERY DIFFERENT FROM THAT CONSENTED TO (Illinois 1861 - 1862)

In October 1861, a malpractice case was tried in the Superior Court in Chicago that involved consent issues. Miss Julia Farrell, age 18, claimed that she had seen Dr. Frederick A. Cadwell, an oculist, seeking to have a white spot removed from her eye. She said that he stated that he could remove the spot. She said that she consented to the removal of the spot. Instead Dr. Cadwell removed her eye and claimed that she had asked him to remove the eye in preparation for an artificial eye. She denied such consent. She ended up blind in both eyes. Testimony was that the expert treatment performed by Dr. Cadwell was useless. The jury awarded the plaintiff $10,000. On appeal, the Illinois Supreme Court upheld the verdict.[298]

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[296] *W v H (falsely called W),* 2 Sw. & Tr. 240, at 245, 164 Eng. Rep. 987, at 989 (Mar. 2, 1861); See also, *E v. T (falsely called E),* 3 Sw. & Tr. 312, 164 Eng. Rep. 1295 (Nov. 18, 1863) [marriage nullity awarded after unsuccessful operations]

[297] N. Y. TIMES, Sep. 14, 1861, 5. For a critique of the implementation, see *Report of the Sanitary Commission*, N. Y. TIMES, Dec. 17, 1861, 4

[298] *An oculist sued for malpractice*, CHICAGO TRIBUNE, Oct. 11, 1861, 4; *The malpractice case*, CHICAGO TRIBUNE, Oct. 12, 1861, 4; *The malpractice case*, CHICAGO TRIBUNE, Oct. 15, 1861, 4;

CHARGES OF SEXUAL ASSAULT AGAINST PRACTITIONERS (England 1861-1863)

In 1861, a Southwark surgeon, David West, was charged with indecent assault of a patient, Catherine Hobbs, age 14. He was acquitted.[299]

In January 1862, a trial was held in the Liverpool Assizes in a suit brought by a father against a dentist for seducing his daughter while she was under the influence of chloroform. The jury awarded him 40s damages.[300]

In 1863, a trial was held in the Chester Assizes in a suit brought by Caroline Isabella Bromwich against Dr. Edward Waters for seducing her servant Mary Whalley. The seduction allegedly began within medical treatment. The jury found for the defendant physician.[301]

WEIR V. HODGSON - LIABILITY FOR MEDICAL EXAMINATION UNDER ILLEGAL POLICE ORDER - CONSENT UNDER THREAT NO DEFENSE (England 1861)

In 1861, in Liverpool, England, a physician was sued in the case of *Weir v. Hodgson* for assault for performing a medical exam under police order to determine whether a woman had recently given birth. The police could not give such authority to a doctor. The jury awarded her and her husband damages of £ 200. Ultimate consent of the woman under threats and intimidation was no defense.[302]

DR. BUTLER'S PRETREATMENT AGREEMENT LIMITING LIABILITY (Ohio 1862)

Before 1860, physicians became concerned about the growing number of successful malpractice cases arising out of dissatisfaction with the outcome of treatment of fractures. Some physicians insisted that patients agree to waive liability verbally or in writing before treating them. Only one case has been

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Superior Court, CHICAGO TRIBUNE, Oct. 17, 1861, 4; *Malpractice case*, CHICAGO TRIBUNE, Oct. 18, 1861, 4; *Personal*, N.Y. TIMES, Oct. 23, 1861, 4; *Mal-practice suit,* CHICAGO MEDICAL EXAMINER, Oct. 1861; *Mal-practice suit,* MEDICAL AND SURGICAL REPORTER (Philadelphia), 7:167 (Nov. 16, 1861); *Cadwell v. Farrell*, 28 Ill. 438 (Apr. 1862). Cadwell probably escaped payment of most of the judgment when he declared bankruptcy in New York in 1868. ALBANY JOURNAL (NY), 7 Jan. 1867, 3; 8 Jan, 1867, 4; ALBANY ARGUS (NY), 23 May 1867, 4; ALBANY ARGUS (NY), 7 July 1868, 3.

[299] *Serious charge against a surgeon*, MORNING CHRONICLE (London), Aug. 27, 1861; Sep. 17, 1861 [acquittal]; *Surrey Sessions - second court*, DAILY NEWS (London), Sep. 17, 1861

[300] *Case of Howarth v. White*, LANCET, i:88 (Jan. 18, 1862); Alfred Swaine Taylor, THE PRINCIPLES AND PRACTICE OF MEDICAL JURISPRUDENCE (Second Edition) (Philadelphia: Henry C. Lea 1873), Vol. 2, 459

[301] *Extraordinary charge against a physician*, LIVERPOOL MERCURY, Apr. 7, 1863

[302] *Quasi medico-legal examinations*, LANCET, ii:620 (Dec. 28, 1861); i:47 (Jan. 11, 1862); Frederick W. Lowndes*, Medico-legal responsibilities: the examinations of suspected persons*, LIVERPOOL MEDICO-CHIRURGICAL JOURNAL, 10(18):146, at 147-148 (Jan. 1890)

located in which such an agreement successfully barred liability. Dr. G.W. Butler refused to treat a case of leg fracture until the patient agreed to a special contract that obligated him only to exercise the skill he possessed. Witnesses testified that the patient verbally agreed to this contract. The leg ultimately had to be amputated and patient sued in Franklin County, Ohio in 1862. The trial judge accepted the validity of such pretreatment agreements and told the jurors that if they believed such an agreement existed that it provided the measure of responsibility. The jury ruled in favor of Dr. Butler.[303]

ACQUITTAL FOR DEATH FROM EXPERIMENTAL TREATMENT ON BLACK SERVANT WITH HER CONSENT (Michigan 1862)

In January 1862 Dr. Edwin Albert Lodge of Detroit administered gelsemium sempervirens to his black servant, Margaret Washington, to investigate its physiological reaction. He testified that this was done with her "free consent." He was a homeopathic physician and he testified that he was conducting a "proving." She died within hours. An inquest was held. It found Washington died from injudicious administration of gelsemium by Dr. Lodge. Dr. Lodge was prosecuted for manslaughter. At a trial in May, the jury found him not guilty.[304]

CONVICTION FOR FALSE PRETENSES (England 1862)

In March 1862 a peripatetic medicine vender was tried in Barnsley near Leeds, England, for false pretenses. After he misrepresented himself as a doctor's assistant, Mrs. Milner allowed him to see her sick son and gave him a half-crown for medicines. The vendor was committed for two months.[305]

SCOTT V. WAKEM - DAMAGES AWARDED FOR RESTRAINING ALCOHOLIC (England 1862)

In 1862 in England, a doctor Wakem, a surgeon in the police division, had been attending an alcoholic man named Scott. One day Scott had an attack of delirium tremens and had loaded pistols in his room. Scott's wife contacted the

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[303] John Dawson, *Suit for damages in a case of fracture of the leg, followed by mortification and amputation*, OHIO MEDICAL AND SURGICAL JOURNAL, 14:283 (July 1, 1862); *Contract between surgeon and patient,* AMERICAN MEDICAL TIMES, 5(4):50-51 (July 26, 1862); BOSTON MEDICAL AND SURGICAL JOURNAL, 66:544 (July 31, 1862)

[304] CHICAGO DAILY TRIBUNE, Jan. 21, 1862, 1; *The case of Dr. Lodge*, CHICAGO DAILY TRIBUNE, May 27, 1862, 3; *The legality of drug provings recognized*, NORTH AMERICAN JOURNAL OF HOMEOPATHY (New York), 11(42):269-292 (Nov. 1862) [report by Dr. Lodge with details of the trial]; Sydney Ringer & William Murrell, *On gelsemium sempervirens*, LANCET (London), i:892-894 (June 22, 1878); *Recent studies in therapeutics, V. Gelsemium Sempervirens*, BRITISH MEDICAL JOURNAL, i:893-894 (June 12, 1880); Emil G. Rehfuss, *Gelsemium and its reputed antidotes*, THERAPEUTIC GAZETTE (Detroit), 9(10):656, at 656-657 (Oct. 15, 1885); R.A. Withaus & T.C. Becker, MEDICAL JURISPRUDENCE, FORENSIC MEDICINE AND TOXICOLOGY (W. Wood 1911) (Second edition), Vol. 4, 893

[305] *A quack doctor in trouble*, LEEDS MERCURY, Mar. 11, 1862

police to get the pistols unloaded. Wakem came and restrained Scott for the night. Scot sued Wakem claiming trespass to his house, assault, imprisonment and restraint. There was conflicting evidence on whether the wife had called for Wakem or did not want his presence. Wakem claimed that Scott had been incapacitated and dangerous, had needed treatment for delirium tremens, and had thanked him in the morning. Scott denied this. The jury instructions made it clear that if Scott was a danger or that the wife had called Wakem for the treatment of the patient, the conduct would be justified. The jury found for the plaintiff and awarded damages of one farthing.[306]

Alfred Swaine Taylor commented on this case in his 1873 book, A MANUAL OF MEDICAL JURISPRUDENCE:

> In this case the wife denied that she had given any authority for interference, and on this point her evidence conflicted with that of the defendant, the medical man whom she had consulted. Fortunately the facts were adverse to her statement; but in future cases of this kind, it would be desirable for a medical man to have a written authority for such proceeding, bearing in mind that he does not exceed what is necessary, proper, or usual for the treatment of the person; and on this he must always exercise his own judgment, irrespective of the opinions or suggestions of others.[307]

COURT AUTHORITY TO ORDER MEDICAL EXAMINATIONS (Vermont 1862)

In November 1862, the Vermont Supreme Court ruled in the case of *Le Baron v. Le Baron* that courts had the jurisdiction to order a medical examination of a man in a divorce case when he claimed impotency.[308]

BERCKMANS V. BERCKMANS - DICTA THAT HUSBAND CONSENT IS NOT NECESSARY FOR SURGERY (New Jersey 1863)

In 1863, the Court of Chancery in New Jersey decided a case in which a husband sought divorce from the wife on the grounds of adultery with her physician. There was dicta suggesting that the court did not believe that the husband's consent was necessary for medical treatment.

> The third ground of suspicion is, examinations of, and operations upon the person of the wife, with electro magnetism and with instruments,…. The

[306] *Scott v. Wakem*, 3 F. & F. 328 (Surrey Summer Assizes 1862); *Scott v. Wakem*, TIMES (London), Aug. 13, 1862, 9-10. There is a letter to the editor critical of this outcome. *Medical responsibility*, TIMES (London), Aug. 14, 1862, 9

[307] Alfred Swaine Taylor, A MANUAL OF MEDICAL JURISPRUDENCE (Philadelphia: Henry C. Lea 1873) [Seventh American Edition], 751-752

[308] *LeBarron v. LeBarron*, 35 Vt. 365 (Nov. 1862); A note on the case appears in AMERICAN LAW REGISTER, 11:219 (1863)

> details of these operations have been introduced into the evidence for the purpose of showing that they were unnecessarily gross; being indecent liberties with the person of the defendant, and indicative of sensual feelings and purposes on the part of the physician, and that it was in fact, an attempt on the part of the defendant and the physician to procure an abortion. These operations were all conducted at the request of the husband, and in his presence. … If the doctor really wished to procure an abortion, why was it not effected? And if the wife consented, why was the husband's concurrence at all necessary?[309]

SYMM V. FRASER - SCOPE OF AUTHORITY TO RESTRAIN PERSONS IN DELIRIUM TREMENS (England 1863)

In 1863, in England, in a court decided *Symm v. Fraser*, a suit against medical personnel for allegedly unlawfully entering a house and assaulting and imprisoning the plaintiff, a Mrs. Symm. She stated she had not consented to the actions. She was inebriated and violent. The doctors who were sued had advised the action but not commanded it. The court discussed the scope of the authority to restrain persons in delirium tremens. The jury found in favor of the defendants.[310]

INHABITANTS OF BROOKFIELD V. ALLEN - HUSBAND MUST PAY FOR CARE OF COMMITTED WIFE (Massachusetts 1863)

In 1863, in Massachusetts, in the case of *Inhabitants of Brookfield v. Allen*, a husband was sued to pay for the care of his committed wife. He refused to pay because he had not consented to the commitment. The court ruled that the husband's consent was not required and he had to pay.

> And since our statutes have authorized the commitment of a wife to such hospital, without her husband's consent or knowledge, for her good and the public good, we hold him liable to pay for her support there.[311]

ANESTHESIA (1863-1864)

In 1863, in England, an inquest was held into the death of John Lawrence at King's College Hospital while under chloroform for an operation. The only comment in the report concerning consent was the statement by the surgeon that the patient "never offered any objection to the chloroform in his presence." The jury exonerated the medical personnel.[312]

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[309] *Berckmans v. Berckmans*, 16 N.J. Eq. 122 (Feb 1863)
[310] *Symm v. Fraser*, 3 F. & F. 859, 176 Eng. Rep. 391 (1863); *The case of Symm v. Fraser and another,* MEDICAL TIME AND GAZETTE, 2(701): 590 (Dec. 5, 1863); *The case of Symm v. Fraser and another,* SOLICITORS' JOURNAL AND REPORTER, 8:81 (Dec. 5, 1863)
[311] *Inhabitants of Brookfield v. Allen*, 88 Mass. 585, 6 Allen 585 (Oct. 1863)
[312] PHARMACEUTICAL JOURNAL (London) (second series), 5(2):90 (Aug. 1, 1863)

In 1863, in England, an inquest was held in the death of Ellen Smith, aged 16. Chloroform had been administered at her request. The jury concluded that no blame attached to the medical men.[313]

In July 1864, in England, an inquest was held in the death of a man at Middlesex Hospital. He had consented to chloroform for an operation to remove a tumor. The jury returned a verdict of death by misadventure.[314]

LIFE INSURANCE EXCLUSIONS FOR SURGICAL DEATHS (1864-1896)

One of the possible consequences of consenting to surgery was voiding life insurance. It was common for early life insurance policies to exclude coverage for deaths caused by any surgical operation. I have not located any cases actually litigating the applicability of the surgery exclusion, but there are several cases where the exclusionary clause is quoted.[315]

In 1864 in *Fitton v. Accidental Death Ins.* a Scottish court addressed the exclusion for deaths caused by bodily infirmity or disease. The court concluded that although the policy excluded coverage for death from hernias, it must cover a death where the hernia resulted from external violence. The insured fell with violence on the floor of his room causing an immediate rupture. He then died after a surgical operation for the resulting strangulated hernia. Thus, the insurer was ordered to make payment under the policy.[316]

In 1870, the Maryland Court of Appeals addressed a life insurance case, *Provident Life Ins. v. Martin*. Although the case did not involve surgery, the court quoted an exclusionary clause that included: "this insurance *shall not extend to* any injury caused by or arising from natural disease, or by any surgical operation rendered necessary by disease,…"[317]

In 1876, the Supreme Court of Massachusetts ruled in *Hatch v. Mutual Life Ins. Co.* that a death from voluntarily submitting to an illegal operation barred collecting on a life insurance policy.[318]

In February 1877, the United States Circuit Court for the Eastern District of New York decided the case of *Bayles v. Traveler's Insurance Company*. The deceased had an accident insurance policy that excluded coverage for "any death or disability which may have been caused in whole or in part… by any surgical operation, or medical or mechanical treatment for disease." The

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[313] *Deaths from chloroform*, MEDICAL NEWS, 21:122 (Dec. 1863)
[314] *Death through chloroform*, ERA (London), July 10, 1864
[315] E.g., *Simpson v Accidental Death Ins. Co.,* 2 C.B. (N.S.) 257, 140 E.R. 413, at 417 (1857); *Court of Exchequer, Feb. 21: Trew and Hoirns v. Railway Passengers' Assurance Co.,* TIMES (London), Feb. 24, 1862, 10; for a discussion of early insurance polices, see *Accident insurance,* 7 AM. LAW REV. 585 (1873)
[316] *Fitton v. Accidental Death Ins.,* 17 C.B. (n.s.) 122, 144 E.R. 50 (1864); *Fitton v. The Accidental Death Insurance Company,* TIMES (London), June 20, 1864, 11
[317] *Provident Life Ins. v. Martin*, 32 Md. 310 (Mar. 9, 1870)
[318] *Hatch v. Mutual Life Ins. Co.,* 120 Mass. 550 (Sep. 21, 1876)

deceased had died from an overdose of prescribed opium. The court ruled that the death was not covered by the insurance.[319]

In 1896, the United States circuit court for the Northern District of Georgia found in *Westmoreland v. Preferred Acc. Ins. Co.* that a death while under chloroform for the surgical repair of hemorrhoids was excluded from insurance coverage by the medical or surgical treatment exclusion.[320]

RELEASE OF MRS. PACKARD FROM COMMITMENT (Illinois 1863-1864)

On January 21, 1864, the CHICAGO TRIBUNE reported that the Rev. Theophilus Packard, a Presbyterian minister in Kankakee County, Illinois, had arranged for his wife, Elizabeth P.W. Packard, to be committed in 1861 to the Insane Hospital at Jacksonville, Illinois. In 1863 she was released and was held under restraint in their home by her husband. When Rev. Packard made arrangements for her to be kept at the Eastern Asylum, her friends filed for a writ of habeas corpus. Judge Starr in Kankakee empaneled a jury to determine whether she was insane. The jury ruled that Mrs. Packard was sane. Rev. Packard left the state.

On January 28, the CHICAGO TRIBUNE reprinted an article from the January 26 issue of the KANKAKEE GAZETTE. It detailed that the husband's efforts were due to religious differences.

On February 2, 1864, the CHICAGO TRIBUNE published a letter from Andrew McFarland, Superintendent of the State Hospital for the Insane in Jacksonville, defending the detention and treatment of Mrs. Packard.

On March 12, 1864, the CHICAGO TRIBUNE published a statement that both of the Packards deserved the "deepest sympathies of the public" and that Mrs. Packard exhibited a monomania and shrewdness.[321]

MISTREATMENT OF WAR PRISONERS (Georgia 1864-1865)

In 1864-1865 the largest Confederate prisoner of war camp for Union soldiers was Camp Sumter in Andersonville, Georgia. For over a year Henry Wirz commanded the camp. A military tribunal tried him for conspiracy and murder related to mistreatment of prisoners. He was found guilty. He was hung at the Old Capitol Prison that was located by the U.S. Capitol. The testimony included the following:

> I saw cases of vaccination. I saw several hundred who had been vaccinated Large sores originated from the effects of poisonous matter.

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[319] *Insurance law*, 15 ALB. L. J. 258 (1877)

[320] *Westmoreland v. Preferred Acc. Ins. Co.,* 75 F. 244 (N.D. Ga. June 5, 1896)

[321] *Excitement in Kankakee*, CHICAGO TRIBUNE, Jan. 21, 1864, 2; *Depravity of a clergyman,* CHICAGO TRIBUNE, Jan. 28, 1864, 3; *Shocking case of domestic cruelty,* BURLINGTON WEEKLY HAWK EYE (Iowa), Jan. 30, 1864, 6; *The Packard insanity case*, CHICAGO TRIBUNE, Feb. 2, 1864, 3; *Bigotry and persecution,* JANESVILLE DAILY GAZETTE (Wis), Feb. 16, 1864, 6; *Two sides to a story,* CHICAGO TRIBUNE, Feb. 21, 1864, 2; *The Packard case,* CHICAGO TRIBUNE, Mar. 12, 1864, 2

They were the size of my hand, and were on the outside of the arms, and also underneath in the arm-pits. I have seen holes eaten under the arms where I could put my fist in. These cases were in the stockade; they were not in the hospital. I never was in the hospital except for about two hours at one time. I went out to see my father, who was then in the hospital. I was vaccinated myself. I was at the south gate one morning when the operation was being performed. While I was standing there looking on, a surgeon came to me and requested me to roll up my sleeves, as he was going to perform the operation on me. I told him I could not consent to such an operation. He called for a file of guards, and I was taken to Captain Wirz's headquarters. Arriving there, one of the guards went in, and directly Captain Wirz came out of his office raging; he wanted to know where that "God-damned Yankee son of a bitch" was. I was pointed out to him as being the person. He drew his revolver and presented it within three inches of my face, and wanted to know why I refused to obey his orders. He did not state what orders. After his anger had subsided a little, I asked him to allow me to speak. He said, "God-damned quick, or I will blow your brains out." I told him, "Captain, you are aware that the matter with which I would be vaccinated is poisonous, and therefore I cannot consent to an operation which I know will prove fatal to my life." He flirted his revolver around and stated that it would serve me God-damned right, that the sooner I would die the sooner he would get rid of me. He ordered the guards to take me away and have a ball and chain put on me till I would consent to the operation. I was taken to where the chain-gang was, and a ball and chain were brought and riveted to my leg, and I was turned into the stockade to wear it until I would consent to the operation. I wore it for about two weeks, when I consented to submit to the operation. I had noticed upon several occasions that the surgeons were very careless in performing the operation; their instruments were dull, and they applied the matter in a very careless way, allowing the patients to go away us soon as they had put the matter in, and without bandaging the arms in any way. I concluded that I could wash the matter out, and, with that calculation, I consented to the operation. As soon as it was performed I went immediately to the brook and took a piece of soap and rubbed the spot and wrung it, and thereby saved myself. The vaccine matter did not work in my system. I experienced no effects from it. Up to that time none had recovered from the effects of vaccination. After that I informed several others, who saved themselves in the same manner.

By the COURT :
I consider the matter with which the men were vaccinated to have been poisonous, judging from the effects it had on others. I saw some three hundred eases. I did not understand it to be any particular poison. They called it vaccine matter. I know nothing further than that.[322]

[322] *Trial of Henry Wirz*, House of Representatives – 40th Congress, 2d Session – Ex. Doc. 23, at 156-157, in EXECUTIVE DOCUMENTS PRINTED BY ORDER OF THE HOUSE OF REPRESENTATIVES DURING

MATTER OF BAKER - VOIDING CONTRACT TO STAY IN ASYLUM (New York 1865)

In New York, a mental patient signed a contract to stay in an asylum as a voluntary patient. When he tried to leave, the asylum sued to compel him to stay pursuant to the contract. In 1865, a court denied the order finding that a person could not contract away the right to leave.[323] In 1898, the rule was applied again in New York to order a person discharged from custody of inebriate asylum.[324]

RUDDICK V. LOWE - FRADULENT MISREPRESENTATIONS OF QUALIFICATIONS (England 1865)

In 1865, in England, a patient filed a malpractice suit, *Ruddock v. Lowe*, alleging fraudulent misrepresentation of qualifications. Lowe was the proprietor of an Anatomical Museum in the Strand and had falsely held himself out as a doctor. The plaintiff was awarded £ 200.[325]

VACCINATION WITHOUT PARENTAL CONSENT (England 1865)

In 1865, in England, a public vaccinator was charged with assault for performing vaccination on a child without parental consent. The vaccinator was fined.[326]

ANESTHESIA (1865-1866)

In 1865, in Pennsylvania, Miss Malinda Caryt died under chloroform for the removal of teeth in the dentist's office of Dr. Spencer. The patient requested chloroform. The coroner's jury exonerated the dental personnel, but outside the official verdict strongly condemned the use of chloroform by dentists and called for legislation banning such use.[327]

In 1866, in England, Charles Cowdroy died under chloroform at St. Mary's Hospital. At the inquest it was alleged that the chloroform was administered without the patient's permission. The administrator of the chloroform testified he had been requested to do so by the house surgeon and understood the patient

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THE SECOND SESSION OF THE FORTIETH CONGRESS – 1867 – '68 (Washington: Government Printing Office 1868)

[323] *Matter of Baker*, 29 How. Pr. 485 (N.Y. Sup.Ct. 1865)

[324] *People ex rel. Ordway v. St. Savior's Sanitarium*, 34 A.D. 363, 56 N.Y.S. 431 (1st Dept. Nov. 1898)

[325] *Ruddock v. Lowe*, 6 F. & F. 519, 176 Eng. Rep. 672 (Croydon, Crown Court, Surrey Summer Assizes 1865) (Compton, J.)

[326] *Forcible vaccination,* BRITISH MEDICAL JOURNAL, ii:255 (Sept. 3, 1865)

[327] *Death from chloroform*, DENTAL REGISTRY OF THE WEST, 19(1):35, at 36 (Jan. 1865)

was willing, but it was not his business to question the patient. The inquest found accidental death.[328]

In 1866 an inquest was held in Philadelphia into the death of Miss Letitia Lyster in a dentist's office from chloroform administered at her request. The dentist was exonerated.[329]

QUEEN V. BABOOLUN HIJRAH AND OTHERS - EFFECT OF CONSENT TO FATAL SURGERY - CONVICTION FOR CULPABLE HOMICICE (India 1866)

In 1866, in India, a practitioner was tried for murder when an adult who submitted to emasculation died because the procedure was performed unskillfully. The court ruled that because of the adult's consent the persons concerned were guilty of culpable homicide, not murder. They were convicted and sentenced to imprisonment for two to three years.[330]

ABSOLON V. STATHAM - REMOVAL OF TEETH WITHOUT CONSENT (England 1866-1867)

In 1866, in England a trial addressed the alleged extraction of teeth of Absolon without consent while under involuntary chloroform by a dentist Stratham. Counsel for the defense admitted there was no formal consent but argued that presenting oneself for the procedure was consent. The jury could not reach a verdict.[331]

In the second trial in 1867, the patient testified she had refused to the last, she had resisted the anesthesia, and it had been forcibly administered. The acting house physician, Mr. Byers, testified that she had told him the operation was to be performed with chloroform and that she never complained to him that it was against her consent. However, he did testify that she was suffering from hysteria and struggled and screamed before the chloroform took full effect. A nurse testified that the patient acknowledged that chloroform was going to be used before lying down on the table. She also testified that the patient kicked and screamed after the operation commenced. The judge's jury summation included:

> No surgeon has a right to perform any operation against the will of the patient so long as the patient preserved consciousness and will; …

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[328] *Death from the administration of chloroform*, DAILY NEWS (London), Jan. 19, 1866; LEEDS MERCURY, Jan. 19, 1866

[329] *Death in a dental chair*, NORTH AMERICAN AND UNITED STATES GAZETTE (Philadelphia), Apr. 11, 1866; *Death from chloroform,* MEDICAL NEWS, June 1866, 98

[330] *Queen v. Baboolun Hijrah and others* (Appellate High Court Jan. 15, 1866), 5 WEEKLY REPORTER (Cr.) 7 (1866)

[331] *Absolon v. Statham*, TIMES (London), Nov. 13, 1866, 11, Nov. 14, 1866, 9; Nov. 15, 1866, 11; BRITISH MEDICAL JOURNAL, Nov. 17, 1866, 558; Nov. 24, 1866, 583

The jury ruled for the defendant.[332]

DAVIS V. MERRILL - NO LIABILTY FOR ASSISTING IN COMMITMENT (New Hampshire 1866)

In 1866, in New Hampshire, the selectmen (local officials) were sued in the case of *Davis v. Merrill* for assault and battery and false imprisonment for assisting in the commitment of an insane husband. The court ruled the wife could commit her insane husband and others could insist. The selectmen were not liable.[333]

ISAAC BAKER BROWN AND CLITORIDECTOMIES - EXPULSION FROM OBSTETRICAL SOCIETY (England 1867)

In 1867, a prominent British gynecologist, Isaac Baker Brown, was forced to resign from the Obstetrical Society of London in part for failing to obtain informed consent for performing clitoridectomies, the surgical excision of the clitoris

His book, ON SURGICAL DISEASES OF WOMEN, was the standard text in England. He was elected President of the Medical Society of London in 1865.

His book, ON THE CURABILITY OF CERTAIN FORMS OF INSANITY, EPILEPSY, CATALEPSY, AND HYSTERIA IN FEMALES (1865), advocated that these conditions could be cured by clitoridectomy. The BRITISH MEDICAL JOURNAL published a scathing review of the book, questioning the procedure and its necessity. In 1867 a substantial portion of the medical profession questioned the efficacy of the procedure and his alleged failure to inform patients of the nature of the procedure when obtaining their consent.

After a hearing by the Obstetrical Society in 1867, there was a vote of 194 for removal from the Society, 38 against removal and 5 nonvoters.[334] Brown was permitted to resign.

It appears from the secondary sources available at this time, that in all cases the patients submitted or consented to the procedure and there is no mention that it was performed by force against the will of the patient. However, there was substantial dispute over what the patient knew about the procedure to which she was submitting.

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[332] TIMES (London), Nov. 29, 1867, 9; *Letter to the editor*, TIMES (London), Dec. 2, 1867, 11; BRITISH MEDICAL JOURNAL, Nov. 30, 1867, 509; Dec. 7, 1867, 531. Over **£** 320 was raised from his professional brethren for his defense. *Statham Defence Fund*, BRITISH MEDICAL JOURNAL, i:486 (May 16, 1868)

[333] *Davis v. Merrill,* 47 N.H. 208 (Dec. 1866)

[334] *The Obstetrical Society and Mr. Baker Brown,* MEDICAL TIMES AND GAZETTE, i:356-359 (Apr. 6, 1867) [charges]; *The Obstetrical Society's charges and Mr. Baker Brown's replies,* LANCET, i:427-428 (Apr. 6, 1867).*Obstetrical Society of London,* MEDICAL TIMES AND GAZETTE, i:366-378 (Apr. 6, 1867) [transcript of hearing and vote tabulation]; *Obstetrical Society of London,* LANCET, i:429-441 (Apr. 6, 1867) [transcript]; *Mr. Baker Brown and the Obstetrical Society of London,* MEDICAL PRESS AND CIRCULAR, 3:344-355 (April 10, 1867); *Clitoridectomy and medical ethics,* MEDICAL TIMES AND GAZETTE, i:391-392 (Apr. 13, 1867); BOSTON DAILY JOURNAL, Apr. 20, 1867, 4

> Such “purity of speech apparently extended to an explanation of the operation in the patient herself. In the Obstetrical Society’s inquiry into the practice of clitoridectomy, it became evident from the testimony that many women who had the procedure performed had been told merely that they were going to have a “slight operation on the external parts.” (*British Medical Journal*, 1867:397). ***
> A Harley Street physician, Dr. Greenhalgh, wrote of “the censures of the indignant profession and the verdict of the outraged public…. My contention also is that women have unwittingly been made the victims of operations of the nature of which they were wholly ignorant.” (Greenhalgh 1867:42).***
> Brown denied vehemently that he had … performed the operation without explaining to the patient some approximation of what he intended to do. Another surgeon in the room pointed out that few operations of any kind were explained to the patient, lest he or she refuse to undergo them…. (*British Medical Journal* 1867:388).[335]

A medical journal stated that medical ethics required disclosure of the nature of the operation -

> “It is an offence against Medical ethics, also, to obtain the woman's consent, nominally, while she is left in ignorance of the real scope and nature of the mutilation, and of the moral imputations which it involves. Consent to a thing whose nature is not known, is like the consent of an infant or lunatic—null and void. Equally do we repudiate, as an offence against Medical ethics, the performance of such an operation, even with the consent, nominal or real, of the patient, but without the full knowledge and consent of the persons on whom she is dependent, as wife or daughter. As the woman's character affects theirs, they have a right to decide whether a female relative should undergo this operation, with the disgrace it involves, or whether relief shall be sought from other means.
> …Dr. Routh argued that all the details of every operation cannot be described to patients. But it is not the details—it is the moral questions involved in clitoridectomy, which ought not to be kept secret. Dr. Routh argued, also, that there are cases in which a Practitioner is bound to keep a patient's secrets from her husband; but in cases before us, it is not secrets imparted by the patient, but dishonourable surmises and filthy imputations generated in the mind of the Practitioner—the nature of the mutilation and its disgrace—that are kept secret.[336]

It is interesting to note that Baker Brown was practicing in December 1867 and was being more careful in his disclosure to patients. The BOSTON MEDICAL

[335] *Victorian clitoridectomy: Isaac Baker Brown and his harmless operative procedure*, MEDICAL ANTHROPOLOGY NEWSLETTER, 12(4): 9-15 (Aug. 1981)
[336] *Clitoridectomy and medical ethics,* MEDICAL TIMES AND GAZETTE, i:391, 92 (Apr. 13, 1867)

AND SURGICAL JOURNAL reprinted an article from LANCET that reported Baker Brown being called in on consultation on December 28, 1867, in a case that resulted in a caesarean operation.

> On finding this abnormal condition, I called on Mr. Baker Brown, who immediately visited her at two P.M., and confirmed my diagnosis; and was of the opinion that nothing but a Caesarean operation could save either mother or child. Having explained the circumstances to the patient and her husband, and by their full concurrence, I at once removed her to the "London Surgical Home," where Mr. Brown, assisted by Drs. Holt Dunn, Hubbard, Watts, Mr. Strange and myself (all of whom examined the patient under chloroform previous to the operation, and confirmed the opinion as to the state of the pelvis, and as to the absolute necessity o the operation), at once operated, quickly removing a healthy female child…[337]

In 1869, Baker Brown became a bankrupt.[338]

There was one case of clitoridectomy by Baker Brown that came to light in a divorce proceeding seeking to establish the insanity of the wife. In the case of *Hancock v. Peaty*, a relative of Mrs. Peaty sought a declaration of nullity of her marriage to Mr. Peaty on the grounds she was insane at the time of the marriage. Mr. Peaty eventually dropped his opposition to the divorce and it was granted. Prior to the divorce proceeding, Mrs. Peaty was an inmate of Baker Brown's Surgical Home for a time where he performed a clitoridectomy on Mrs. Peaty with her consent (likely uninformed) and the consent of her sister, but without her husband's knowledge. Baker Brown claimed to have not known of her insanity although insanity was his one of his usual reasons for performing the procedure. No legal proceedings were brought against Baker Brown on behalf of Mrs. Peaty. The treatment of Mrs. Peaty was one of the examples used in the Obstetrical Society proceedings that resulted in his expulsion.[339]

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[337] *A case of caesarean operation successful to mother and child*, BOSTON MEDICAL AND SURGICAL JOURNAL, 78(18) [ns. 1]: 289-290 (June 4, 1868)

[338] *Mr. Baker Brown*, MEDICAL PRESS AND CIRCULAR, 36 (Jan. 13, 1869)

[339] *Hancock (falsely called Peaty) v. Peaty*, [L R] 1 P&D 335 (Courts of Probate and Divorce Mar. 19, 1867); *The surgical home,* LANCET, i:156-157 (Feb. 2, 1867); *The case of Hancock v. Peaty,* MEDICAL PRESS AND CIRCULAR, 3:128 (Feb. 6, 1867); *Law Report – Court of Probate and Divorce, Mar. 19 – Hancock v. Peaty – Judgment,* TIMES (London), Mar. 20, 1867, 12; *The Obstetrical Society's charges and Mr. Baker Brown's replies,* LANCET, i:427-428 (Apr. 6, 1867) [see charges 12 and 13]; *Obstetrical Society of London,* MEDICAL TIMES AND GAZETTE, i:366-378 (Apr. 6, 1867) [response to Baker Brown's replies to 12 and 13]; *Mr. Baker Brown and the Obstetrical Society of London,* MEDICAL PRESS AND CIRCULAR, 3:344-355 (April 10, 1867) [further responses by Baker Brown]; *Hancock v. Peaty,* TIMES (London), Apr. 17, 1867, 11 [order to Mr. Peaty to show cause]; *Hancock v. Peaty,* TIMES (London), Apr. 25, 1867, 9 [Decree of nullity pronounced];*Hancock v. Peaty,* MEDICAL PRESS AND CIRCULAR, 3:423 (May 1, 1867) [noting that conclusion of case so that "the case altogether continues in the same obscurity as before"]

ANESTHESIA (1867)

In 1867, an inquest was held in New York into the death of Ann McGlennan at Bellevue Hospital during an operation under chloroform. The jury found that the operation was performed with her consent and concluded that there was no blame.[340]

In 1867, in England, an inquest was held in the death of Ernest Morrell who died from chloroform in St. Mary's Hospital applied to help in the reduction of a dislocated thumb. "…the wife of the deceased, who was with him, said he repeatedly and emphatically said he could not take chloroform, he could not bear it, and she implied in her statement to the jury that he had been compelled to take it against his will. After her interview with him the surgeons and the chief nurse state, deceased consented to take chloroform." The jury gave a verdict of accidental death. [341]

KANSAS STATE PENITENTIARY RULES (1867)

In 1867 the Kansas State Penitentiary adopted rules that included:

> 2. … no surgical operation shall be performed upon any prisoner without his consent, or the consent of two of the Inspectors.[342]

CONSENT BY FRAUD UNDER PRETENSE OF TREATMENT RENDERED INTERCOURSE NOT RAPE (New York 1867)

In New York, a physician Walter was convicted of rape for having intercourse with a woman of infirm mind under the pretense that it was treatment. In 1867, an appellate court quashed the conviction, ruling that consent obtained by fraud made it not rape.[343]

UNAUTHORIZED TOOTH REMOVAL (England 1867)

In 1867, in England, a case of unauthorized tooth removal, *Brown v. Eskell*, was settled with a payment to the patient.[344]

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[340] *Death from chloroform,* N.Y. TIMES, Feb. 7, 1867, 2; *Death from inhaling chloroform*, N.Y. DAILY TRIBUNE, Feb. 7, 1867, 2

[341] *Death from chloroform,* MEDICAL PRESS AND CIRCULAR, 3:262-263 (Mar. 13, 1867)

[342] *By-Laws, Rules and Regulations for the discipline and government, established by the Directors, August 1, 1867*, ANNUAL REPORT OF THE DIRECTORS AND OFFICERS OF THE KANSAS STATE PENITENTIARY TO THE SECRETARY OF THE STATE OF KANSAS, 1867 (Leavenworth Kansas 1867), 39

[343] *Walter v. People*, 50 Barb. 144 (N.Y. App. Div. 1867); AMERICAN LAW REGISTER, 15(12):746-751 (Oct. 1867)

[344] *Legal proceedings against a dentist,* MEDICAL TIMES AND GAZETTE, i:158 (Feb. 9, 1867); *Extraction of teeth without leave unlawful,* DENTAL COSMOS, 8:505-506 (1867); JACKSON'S OXFORD JOURNAL, Mar. 16, 1867 [Eskell disclaimed lack of consent]

PLAYFORD V. THE UNITED KINGDOM ELECTRONIC TELEGRAPH CO. - DICTA ABOUT CONSENT TO SURGERY (England 1867)

In an 1867 court decision in England concerning a mistake in a telegram, the court noted in dicta that consent to allow an operation was consideration for surgery.[345]

HOARD V. PECK - LIABILITY FOR SELLING LAUDANUM TO WIFE WITHOUT HUSBAND'S KNOWLEDGE (New York 1867)

In 1867, in New York, a husband sued a druggist who had sold laudanum to his wife without his knowledge. The plaintiff was awarded $500. On appeal, a new trial was denied. The opinion stated:

> I think the rule is general, 'that he who knowingly assists the wife in the violation of her duty, as such, is guilty of a wrong for which an action will lie, where injury is thereby inflicted upon the husband.'[346]

LONDON MIDWIVES (1868)

Consent was mentioned in passing in the controversy over the training and role of midwives in London in the 1860's. Midwives sought more access to training and more independence from male physicians. A Female Medical Society was founded in London in 1864.[347] Through its efforts, in 1864 a Ladies Medical College was opened in London. An alliance was formed between the Female Medical Society and the British Lying-in Hospital.[348] In 1868 there was controversy concerning the treatment of a patient at the Lying-in Hospital. Usually only physicians used forceps. When a physician was not available during a difficult delivery, an experienced midwife Miss Maria Firth used one blade of forceps with the consent of the patient and her friends. When her efforts were not successful, she ceased. [349] When Dr. Henry Eastlake arrived, he had to resort to craniotomy to save the mother. Dr. Eastlake blamed Miss Firth for using the forceps and the loss of the infant. The investigation by the Lying-in Hospital

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[345] *Playford v. The United Kingdom Electronic Telegraph Co.,* 16 W.R. 219 (Q.B. Nov. 19, 1867), 4 CAN. L. J. n.s. 47 (Feb. 1868)

[346] *Hoard v. Peck*, 56 Barb. 202 (N.Y. Onondaga Gen T. 1867)

[347] LIVERPOOL MERCURY, Oct. 5, 1864; Oct. 7, 1864; Oct. 9, 1864. It was in existence two year earlier, but was reorganized in 1864. REPORT OF THE FOURTH ANNUAL MEETING OF THE FEMALE MEDICAL SOCIETY (pamphlet 1868), 1

[348] REPORT OF THE FOURTH ANNUAL MEETING OF THE FEMALE MEDICAL SOCIETY (pamphlet 1868), 4

[349] MEDICAL TIMES AND GAZETTE, 1:222 (Feb. 22, 1868) [Letter from Maria Firth]; *The British Lying-In Hospital*, MEDICAL TIMES AND GAZETTE, 1:250 (Feb. 29, 1868) [response by Dr. Eastlake]. See also, PUBLIC OPINION, 13:244 (Mar. 7, 1868) [Maria Firth's critique of handling her response]. Maria Firth (1831-1882) later formed the London Association of Nurses, was its superintendent, and died holding that position. Sarah A, Southall Tooley, THE HISTORY OF NURSING IN THE BRITISH EMPIRE (1906), 271-274; LONDON GAZETTE, Apr. 7, 1882. In the 1881 census, she is listed as assistant superintendent of nurses at a hospital.

resulted in the forced resignation of Dr. Eastlake.[350] He published a long letter to the editor in two medical journals on Feb. 1, 1868 criticizing Miss Firth and the hospital. [351] Dr. James Edmunds who was a member of the board of the Lying-In Hospital and a lecturer at the Ladies Medical College defended Miss Firth and the Lying-in Hospital.[352] The British Medical Association investigated Dr. Eastland's resignation and Dr. Edmunds conduct in the affair.[353] Dr. Eastlake sued Dr. Edmunds for libel.[354] Miss Firth sued Dr. Eastlake for libel.[355] Neither case went to trial. The disposition of the cases has not yet been located, but it is likely that they were dismissed when Dr. Eastlake died in 1869.[356]

Dr. Edmunds had previously been embroiled in other medical controversies.[357] For example, in 1865, Dr. Edmunds reported that statistics of mortality rates in childbirth demonstrated that deliveries with midwives resulted in fewer deaths.[358] When the LANCET reported this in a negative light,[359] Dr. Edmunds filed a libel suit against the editor of the LANCET, Mr. Wakley.[360] The LANCET published an apology,[361] settling the case.[362]

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[350] *The special general meeting at the British Lying-In Hospital*, MEDICAL TIMES AND GAZETTE, 1:222 (Feb. 22, 1868) [letter from Richard Dickson]

[351] *The British Lying-In Hospital And The Ladies' Medical College*, THE BRITISH MEDICAL JOURNAL, i:108-109 (Feb. 1, 1868) [letter from Dr. Eastlake]; MEDICAL TIMES AND GAZETTE, 1:131-132 (Feb. 1, 1868) [letter from Dr. Eastlake]

[352] *The British Lying-In Hospital And The Ladies' Medical College*, THE BRITISH MEDICAL JOURNAL, i:131-133 (Feb. 8, 1868) [letter from Dr. Edmunds with response by Dr. Eastlake]; MEDICAL TIMES AND GAZETTE, 1:165-167 (Feb. 8, 1868)) [letter from Dr. Edmunds with response by Dr. Eastlake]; MEDICAL PRESS AND CIRCULAR, 194-195 (Feb. 26, 1868) [letter from Dr. Edmunds followed by editorial comment]

[353] MEDICAL TIMES AND GAZETTE, 1:290 & 305 (Mar. 14, 1868) [committee appointed]; *Metropolitan Counties Branch. Special general meeting*, BRITISH MEDICAL JOURNAL, i:570 (June 6, 1868) [report acquitting the editor of the British Medical Journal; strongly disapproving Dr. Edmunds' charges; and recommending no further action on Dr. Eastlake's dismissal]; *British Medical Association. Metropolitan Counties Branch. Special general meeting*, MEDICAL TIMES AND GAZETTE, 1:620-621 (June 6, 1868) [report]

[354] PALL MALL GAZETTE (London), June 24, 1868 [trial postponed]; *Law intelligence - Eastlake v Edmunds*, LONDON EXPRESS, June 24, 1868, 3; *Court of Exchequer - June 24 - Eastlake v. Edmunds*, DAILY NEWS (London), June 25, 1868, 2; MORNING POST (London), June 25, 1868, 7; LANCET, i:832 (June 27, 1868); *Law notices*, TIMES (London), June 23, 1869, 11 [*Eastlake v. Edmunds* scheduled for Court of Exchequer]; BRITISH MEDICAL JOURNAL, i:594 (June 26, 1869) [case again postponed]

[355] PALL MALL GAZETTE (London), June 24, 1868 [trial postponed until after case of *Eastlake v. Edmunds*]; *Firth v. Eastlake*, TIMES (London), June 29, 1868, 11 [judge reaffirmed postponement]

[356] PALL MALL GAZETTE (London), Nov. 29, 1869 [death of Eastlake in Paris]; *The late Dr. Eastlake*, MEDICAL PRESS & CIRCULAR, 451-452 (Dec. 1, 1869)

[357] *Meeting of medical practitioners in the east of London*, BRITISH MEDICAL JOURNAL, i:156-157 (Feb. 11, 1865) [medical testimony in coroner's cases]; *Dr. Edmunds and coroners' inquests*, BRITISH MEDICAL JOURNAL, i:236 (Mar. 4, 1865)

[358] *Mortality in childbirth*, TIMES (London), Oct. 10, 1865, 10

[359] *The Female Medical College*, LANCET, ii:435 (Oct. 14, 1865). See also critique in *Obstetrical statistics*, MEDICAL TIMES AND GAZETTE, ii:421 (Oct. 14, 1865)

[360] *Dr. Edmunds and the statistics of death after childbirth*, LANCET, i:580 (May 26, 1866)

[361] *Dr. Edmunds and the statistics of death after childbirth*, LANCET, i:580 (May 26, 1866); *Female doctors*, LLOYD'S WEEKLY NEWSPAPER, June 10, 1866

[362] *Dr. Edmunds and the Ladies' Medical College*, LANCET, i:613-614 (June 2, 1866) [Letter of acceptance from Edmunds]

ANESTHESIA (1868)

In 1868, Mrs. Hannah Lowe of Winona, Minnesota, died from chloroform administered for a dental procedure in the office of dentist T. B. Welch. She took the chloroform at her own request. An inquest found that the death was due to impure chloroform. The dentist was not censured, but the dental literature criticized the handling of the chloroform.[363]

In 1868, in Louisville, Kentucky, Eliza O'Bryan, age 12, died in an amphitheater at Louisville City Hospital under chloroform for an operation for ulcerated ankle by Dr. George W. Bayless. The chloroform was administered with the consent of the patient - who voluntarily skipped breakfast and dinner so she could "be ready for doctors" knowing that she needed an empty stomach for chloroform. The patient consented to go before the class for her operation. Her mother was dead and her father was absent. Note that consent by a minor was accepted. An inquest found that no blame attached to the surgeon or his assistants.[364]

SOUTH CAROLINA STATE PENITENTIARY RULES (1868)

In 1868 the Duties of the Physician in the Rules and Regulations of the South Carolina Penitentiary included:

> 3. He shall see that all proper medicine is administered to those who are sick, and perform all surgical operations that may be necessary, and discharge all other duties that properly pertain to his profession, and, if necessity require it, to pay extra visits; but no surgical operation shall be performed upon any prisoner without his consent, or the consent of the Governor, or two of the Commissioners of the Penitentiary.[365]

It is ambiguous whether the "his consent" referred to consent of the physician or the consent of the patient.

PECULIAR PEOPLE - WAGSTAFFE - MANSLAUGHTER CHARGE FOR RELIGIOUS REFUSAL BY PARENTS (England 1868)

In 1868, in London in the Central Criminal Court Thomas and Mary Ann Wagstaffe were charged with manslaughter for the death of their daughter, Lois Wagstaffe, age 14-months. They had not sought medical care for the child who

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[363] *Death from chloroform,* DENTAL REGISTER, 22(1):46-49 (Jan 1868)
[364] Richard O. Cowling, *Death from chloroform,* MEDICAL AND SURGICAL REPORTER (Philadelphia), 18:113 (Feb. 8, 1868)
[365] *Report of Superintendent of Penitentiary* (January 14, 1868), 78, at 86, Document G in MESSAGE NO.1 OF HIS EXCELLENCY GOV. J.L. ORR WITH ACCOMPANYING DOCUMENTS (Columbia S.C.: Phoenix Book and Job Power Press 1868)

had inflammation of the lungs, but instead had anointed her with oil and prayed for her. They were members of a religious group, the Peculiar People, who were opposed to medical attention. At the trial, the surgeon who performed the post mortem testified that the child would in all probability have been saved if medical advice had been obtained. He also testified that the symptoms must have been urgent and apparent to ordinary persons. The judge instructed the jury that it must determine whether the child came to its death by the gross and culpable negligence of the parents. The judge indicated that there was latitude in deciding what medical treatment was to be applied in a particular case. The judge thought that was a case where affectionate parents had done the best for the child. The jury returned a verdict of not guilty, but also stated that both parents were liable to censure for not calling medical advice.[366]

In 1879, when the United States Supreme Court ruled that a law banning polygamy did not violate the constitutional protection of freedom of religion, the court discussed the *Wagstaffe* case, in its discussion of the limits of religious freedom. The court stated:

> In Regina v. Wagstaff (10 Cox Crim. Cases, 531), the parents of a sick child, who omitted to call in medical attendance because of their religious belief that what they did for its cure would be effective, were held not to be guilty of manslaughter, while it was said the contrary would have been the result if the child had actually been starved to death by the parents, under the notion that it was their religious duty to abstain from giving it food. But when the offence consists of a positive act which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made. No case, we believe, can be found that has gone so far. [367]

ILLEGAL DETENTION OF LUNATIC (England 1868)

In 1868, a surgeon Shaw was tried at the Hereford Assizes for the crime of taking charge of a lunatic woman without the required orders and certificates. He was convicted, imprisoned and fined.[368]

IMPLIED AUTHORITY TO CONSENT FOR MINOR (Kentucky 1868)

In 1868, in Kentucky, the Court of Appeals decided that when a guardian permits his ward to reside with the ward's mother, he has given the mother implied authority to arrange for medical care for the ward and has given an

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[366] *Reg. v. Wagstaffe*, 10 Cox. C. C. 530 (1868); *Central Criminal Court,* TIMES (London), Jan. 28, 1868, 9*; Central Criminal Court,* TIMES (London), Jan. 30, 1868, 11
[367] *Reynolds v. United States*, 98 U.S. 145 at 167, 25 L. Ed. 244 at 250-51 (Jan. 6, 1879)
[368] *Law and crime*, ILLUSTRATED TIMES (London), Mar. 7, 1868, 159

implied promise to pay the value of such medical services out of the ward's property, since the guardian had not arranged for other care.[369]

SEXUAL ASSAULT CHARGES AGAINST PRACTITIONERS (1868-1869)

In 1868, dentist L.E. Edmonson was arrested in Galveston, Texas, on a charge of having taken indecent liberties with a patient, Mrs. F.L. Baker, while she was under the influence of chloroform that she had consent to for a dental procedure. He was found not guilty.[370]

In 1869, Cecilia Jones accused Mr. Berry, a surgeon of Wimbleton, with criminal assault. The magistrate dismissed the charges. Mr. Berry sued Miss Jones for perjury and she was acquitted on the grounds of insanity.[371]

In 1869 in Queenstown (now Cobh), Ireland, Ellen Kearns, age 13, accused Dr. William Bennett Forde of felonious assault. Her story did not remain consistent, so the judge concluded that it was imagined and directed acquittal. The MEDICAL TIMES AND GAZETTE noted:

> …this trial, as well as many others which have taken place, inculcate the necessity of extreme caution on the part of our brethren Consultations of a delicate kind should never take place except in the presence of a third party. The reputation of a Medical Practitioner is like that of the wife of Caesar it must be "above suspicion."[372]

WALSH V. SAYRE - COURT ORDER MANDATING PHYSICAL EXAMINATION (New York 1868)

In 1868, a New York court in the case of *Walsh v. Sayre* issued one of the first American court orders mandating inspection of a living person's body for purposes of discovery in a personal injury case. When the defendant first petitioned for the order, the court denied it, requiring the defendant to refile the petition in equity court. The equity court issued the order and the examination occurred.[373]

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[369] *Walker & Green v. Browne*, 66 Ky. 686 (App. Sep. 19, 1868)
[370] *Serious charge,* GALVESTON DAILY NEWS (Tex), Aug. 16, 1868, 3; *Criminal court,* GALVESTON DAILY NEWS (Tex), Oct. 9, 1868, 6
[371] *Charges of assault against medical practitioners*, LANCET, i:688 (May 15, 1869); MEDICAL TIMES AND GAZETTE, i:633 (June 12, 1869); *The late charges against Mr. Berry*, LANCET, ii:732 (Nov. 27,1869)
[372] *Serious charge against a medical practitioner*, MEDICAL TIMES AND GAZETTE, ii:150-151 (July 31, 1869), reprinted in BOSTON MEDICAL AND SURGICAL JOURNAL, 81(5):90 (Sep. 2, 1869)
[373] *Walsh v. Sayre*, 52 How. Prac. 334 (1868); *Alleged malpractice- motion for personal inspection &c.,* N.Y. TIMES, Oct. 2, 1868, 2; THE ALLEGED MALPRACTICE SUIT OF WALSH VS. SAYRE (New York: Geo. H. Shaw 1870)

JOYNER V. YOUNG AND SHILLITOE - LIABILITY FOR UNAUTHORIZED PHYSICAL EXAMINATION (England 1869)

In November 1868, a newborn infant was abandoned at the doorway of the infirmary in Hitchin in Hertfordshire, England. Suspicion fell on a woman or her daughter as possibly being the mother. A police inspector took a doctor to their house and he examined them finding no evidence of recent childbirth. The women sued the inspector and doctor for trespass and assault. The case of *Joyner v. Young and Shillitoe* was tried in May 1869. The plaintiffs claimed that the defendants had placed undue pressure on the women to induce them to submit to the examination. The defendants maintained the women had given full and free consent to the examination and that no improper persuasion had been employed. The jury found the defendants liable assessing each £ 20 damages.

The LANCET commented:

> …we cannot acquit Mr. Shillitoe of indiscretion. He went to two women who had just best startled by a disgraceful accusation; and, on the ground of a consent which at best was given hastily, and in a condition of great excitement and distress, he subjected them to a medical examination. It is quite certain, not only that Mr. Shillitoe should have waited for a more deliberate consent, but that he should also have obtained the consent of the husband and father, who, on returning home in the course of the day, heard for the first time of the indignity to which his wife and daughter had been subjected. It is probable that most men would urge upon the women of their households submission to an examination that would vindicate their innocence; but no man would feel otherwise than deeply aggrieved on learning that such an examination had been made without his knowledge and consent. We think, moreover, that it is very undesirable that medical men should in any way lend themselves to police requirement.[374]

On August 2, a question was asked in the House of Commons about Inspector Young. Home Secretary Bruce confirmed that local authorities had reinstated Inspector Young.[375]

A public meeting was held in Bodmin (over two hundred miles from Hitchin) in August to express indignation at the police and medical actions in this case.[376]

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[374] *Important action against a medical man,* LANCET, i:510 (Apr. 10, 1869)*;* LANCET, i:752 (May 29, 1869); *Extraordinary charges against a medical practitioner and a police superintendent*, EDINBURGH EVENING COURANT, May 20, 1869, 5; PALL MALL GAZETTE (London), May 21, 1869; *Extraordinary case*, MANCHESTER TIMES, May 22, 1869; *Extraordinary case of assault*, REYNOLD'S NEWSPAPER (London), May 23, 1869; LANCET, i:752 (May 29, 1869)

[375] *House of Commons, Monday, August 2*, TIMES (London), Aug. 3, 1869, 5

[376] *The police and public,* LANCET, ii:222 (August 7, 1869)

SCOPE OF AUTHORITY TO ORDER PHYSICAL EXAMINATION (1869-1887)

In 1869, a coroner in Melbourne, Australia, attempted to order a medical examination of two women. An Australian medical journal obtained a barrister's opinion that the coroner did not have the authority to enforce such an order. [377]

In 1871, in Leominster, England, a coroner ordered an examination of a woman who was suspected of infanticide. She refused to see the physicians and later committed suicide. The LANCET noted that the order was beyond the authority of the coroner.[378]

In 1887 a constable in New South Wales, Australia, ordered a medical examination of a woman suspected on infanticide. The surgeon refused. The woman could not be found. A coroner opined that if she had been found the surgeon would have had to conduct the examination. The surgeon wrote a letter to the editor of the AUSTRALIAN MEDICAL GAZETTE who opined that the surgeon was correct and consent must be obtained from the person to be examined.[379]

CRAIG V. STEPHENS - ACCEDING TO WISHES OF PATIENT (Quebec 1869)

In 1869, in the Superior Court at Sweetsburgh in Quebec, Canada, the court tried the malpractice case of *Craig v. Stephens*. Craig's wife had a fracture of the right thighbone. One of the reasons that the judge dismissed the case was that the outcome was due to the "treatment rendered necessary by the condition of the health of the Plaintiffs wife and adopted at her own request." The CANADA MEDICAL JOURNAL noted:

> …it certainly appears that if any injury had arisen to the limb, from the mitigated treatment having been adopted instead of the severe course that would have been followed in the case of a stronger patient, such mitigation of treatment was acceded to by the Defendant only in consequence of the heart-rending appeals of the patient herself, " for God's sake to save her life, and not mind her limb."…
> she not only implored the doctor to mitigate the necessarily severe treatment of such a case, and save her life at the expense of a more perfect cure of leg, but that she and her husband also have distinctly approved and praised the care and treatment bestowed by the Defendant.

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[377] *Medical examination of women,* AUSTRALIAN MEDICAL GAZETTE, 3:235 (Dec. 1871)

[378] *A question of medico-legal responsibility*, LANCET, ii:333 (Sep. 2, 1871); LANCET, ii:414-415 (Sep. 2, 1871) [letter to the editor in defense]; LANCET, ii:477 (Sep. 30, 1871) [reiteration of editorial position that actions were not justified]; Frederick W. Lowndes*, Medico-legal responsibilities: the examinations of suspected persons*, LIVERPOOL MEDICO-CHIRURGICAL JOURNAL, 10(18):146, at 149-150 (Jan. 1890)

[379] *The medical examination of persons arrested on suspicion*, AUSTRALIAN MEDICAL GAZETTE, 6:107 (Jan. 1887), citing TAYLOR'S MEDICAL JURISPRUDENCE. See Alfred Swaine Taylor, A MANUAL OF MEDICAL JURISPRUDENCE (10th Edition) (London: J & A Churchill 1879), 592-593

> I do not here examine elaborately the question whether under all or any conceivable circumstances, a Surgeon is justified in listening and acceding [sic] to the wishes of his patient — it is sufficient for the present case to observe that there is no evidence of the want of ordinary and reasonable care and skill such as the circumstances would permit; and though those circumstances do not seem to me to require a resort to the defence that the treatment adopted was at the request of the patient, I cannot shut my eyes to the fact, that such a request, and made in the most earnest manner is clearly proved; and I do not see in such a case how the operation of the maxim *volenti non fit injuria* is to be avoided.[380]

CONVICTION OF ALBERT SHANNON - FORCED ABORTION (Michigan 1869)

In 1869, Dr. Albert F. Shannon was arrested in Michigan for manslaughter in the death of a woman during an abortion. It was alleged that her husband and the doctor had forced her into the doctor's office against her will. Her husband absconded. Dr. Shannon was convicted and sent to prison. The Governor pardoned Shannon in 1871 due to fatal illness and he died two months later.[381]

ANESTHESIA - INCLUDING WRITTEN CONSENT IN VERNER CASE (1869)

In 1869, a British actor, Charles Verner, died from chloroform administered preparatory to surgery at Charing-cross Hospital. At the inquest, the surgeon "handed in a paper to the coroner, which he stated was in the handwriting of the deceased, on which was written: 'I, Charles Verner, give my free consent to the operation upon me being performed by Mr. Canton, and will bear all the risks.'" The coroner's jury found death due to chloroform properly administered.[382] This is one of the earliest legal proceedings involving a written consent form.

In 1869, in Oxford, England, an inquest was held on the death of Herbert Hildyard Clarke, age 19, who died from chloroform for an operation. Clarke had received chloroform before and had consented to this use. The jury found that it had been administered with due care and skill. No question was raised about the capacity of this minor to consent. It was noted that his father was in India.[383]

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[380] *The action against Dr. Stephen for malpractice,* CANADA MEDICAL JOURNAL, 5(11): 518 (May 1869)
[381] *Alleged malpractice - Dr. A.F. Shannon arrested - particulars of the case,* CHICAGO TRIBUNE, Aug. 12, 1869, 2; JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF MICHIGAN - 1873 (Lansing Mich.: W.S. George & Co. 1873), 95 [Governor explanation of pardons]
[382] *Death of an actor from chloroform,* TIMES (London), Oct. 16, 1869, 7. Note that this was the same surgeon who was involved in the Skelton case in 1871, *infra*
[383] *Death from chloroform,* TIMES (London), Nov. 11, 1869, 10

In 1869, an inquest was held in England in the death of a chemist, William Godley, who had chloroform administered at his own request for an operation. The jury assigned no blame to the doctors.[384]

BOYDSTON V. GILTNER - NOT REQUIRED TO INFORM PATIENT (Oregon 1869)

In 1869, in Oregon, a court ruled in a malpractice case, *Boydston v Giltner*, concerning treatment of a fractured arm. The jury instructions included the following:

> If you should find that Dr. Giltner, the defendant, refractured the arm, it does not follow from that fact alone that he was guilty of bad surgery. Nor does it follow from the fact that the plaintiff was not informed what the surgeon was doing or about to do.

The jury found for the defendant.[385]

WELSH FASTING GIRL (1869)

In 1869, it was reported that Miss Sarah Jacob, age 12, in Wales had not eaten for 17 months. There was suspicion of deception, so in March a team of doctors was organized to watch her to assure that she was not eating. In September, the TIMES published a critique from the LANCET questioning the approach and asking why there had been no intervention to treat the child. In December, Guy's Hospital agreed to participate in a project involving observation of the girl at all times to assure that she was not eating. The project was approved by the girl's parents and a town meeting. The father "signed an agreement" promising to assist in the test.

In mid-December, the girl died in the presence of four nurses from Guy's Hospital. Her parents had refused to offer her any food. The TIMES printed a report of the nurses who had watched her. The report was made to the committee that over saw the project.

An inquest was held. On December 22, the TIMES published letters critical of those who observed her to prevent eating. On December 24, the Times editorialized:

> The girl undoubtedly was starved to death, and the question arose who was responsible for her starvation? If she wilfully refused food, having due facilities for obtaining it, and being master of her actions, she committed suicide. But if other persons either consented to this refusal or encouraged it, would they not become accessories to an act of self-murder? If, on the other hand, the girl was afflicted with hysterical delusions, might not those

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[384] *Death from chloroform,* MEDICAL TIMES AND GAZETTE, i:235 (Feb. 27, 1869); *Death from chloroform,* CHEMIST AND DRUGGIST, 10:287 (Apr. 15, 1869)
[385] *Boydston v. Giltner*, 3 Ore. 118 (Cir. Ct. Nov. 1869)

> who allowed them to be carried to such a fatal issue become liable to a still more serious charge? If the girl was deliberately subjected to treatment which would actually tend to augment her delusions, and if this treatment was maintained to the last at all risks, how would such conduct fall short of downright murder?

The coroner instructed the jury the physicians and nurses could not be responsible; the responsibility rested with the father. The inquest found that the neglect of the father failing to provide food resulted in manslaughter. He gave bail and was released. The TIMES published a letter to the editor on December 24 questioning whether the physicians at Guy's Hospital had sanctioned the project. On December 25, letters from Guy's hospital were published indicating that one official, Thomas Turner, had authorized hospital nurses to be used in the project; the governors and medical staff had not approved the project. A "senior physician to Guy's Hospital" wrote:

> Had the girl been in Guy's Hospital she would have been fed had she desired it or not, and no veto on the part of the parent would have prevented our taking measures to preserve her life.

In February 1870 it was reported that the public was not satisfied with the coroner's inquest decision in favor of the physicians involved in the project. It was announced that there be a magisterial inquiry. The magisterial inquiry was conducted in March 1870.

Concurrently on March 10, 1870, the Assizes against the father were commenced, but quickly adjourned until the completion of the magisterial investigation.

At the conclusion of the inquiry, the father and mother were committed for manslaughter. The magistrate refused to charge any of the medical people or others involved in the project.

The father was sentenced to twelve months hard labor and the mother was sentenced to six months hard labor.[386]

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[386] *The "strange story from Carmarthhenshire,"* TIMES (London), Mar. 25, 1869, 5; *The Welsh fasting girl,* TIMES (London), Sept. 17, 1869, 10; *The Welsh fasting girl,* TIMES (London), Dec. 3, 1869, 9; *Death of the Welsh fasting girl,* TIMES (London), Dec. 18, 1869, 3; TIMES (London), Dec. 18, 1869, 7 [editorial]; *The "Welsh fasting girl",* TIMES (London), Dec. 20 1869, 12; *The Welsh fasting girl,* TIMES (London), Dec. 22, 1869, 4 [inquest]; TIMES (London), Dec. 24, 1869, 7 [editorial]; *The Welsh fasting girl,* TIMES (London), Dec. 24, 1869, 10 [inquest; including father's testimony]; *The Welsh fasting girl,* TIMES (London), Dec. 25, 1869, 4 [letters]; *The Welsh fasting girl,* TIMES (London), Dec. 28, 1869, 4 [letter defending Welsh doctors]; *The Welsh fasting girl,* N.Y. TIMES, Jan. 10, 1870, 1; *The Welsh fasting girl,* TIMES (London), Feb. 1, 1870, 9; *The Welsh fasting girl,* TIMES (London), Feb. 12, 1870, 12; *The Welsh fasting-girl prosecution,* TIMES (London), Mar. 7, 1870, 6; *The Welsh fasting-girl case,* TIMES (London), Mar. 9, 1870, 5; *The Welsh fasting-girl case,* TIMES (London), Mar. 11, 1870, 10 [magisterial inquiry & Assizes]; *The Welsh fasting girl,* TIMES (London), Mar. 15, 1870, 12 [inquiry]; *The Welsh fasting girl,* TIMES (London), Mar. 16, 1870, 12 [inquiry]; *The Welsh fasting girl affair,* GALVESTON DAILY NEWS (Tex), Mar. 26, 1870, 3; http://www.gtj.org.uk/en/item6/15829 [12/08/05]; William A. Hammond, M.D., SPIRITUALISM AND ALLIED CAUSES AND CONDITIONS OF NERVOUS DERANGEMENT (G.P. Putnam"

TEFFT V. WILCOX - DECISION LEFT TO SURGEON (Kansas 1870)

A patient in Kansas sued the physician for the manner of resetting a dislocated shoulder. In the November Term, 1866, of the Shawnee District Court, the jury found for the plaintiff and awarded $2,900. In 1870, The Kansas Supreme Court reversed and ordered a new trial. The court stated:

> It is plain to the most casual observer that there is great room for difference of opinion in the exercise of the arts of surgery and medicine; and as a result, there are usually more ways than one of accomplishing the same thing, and each having its advocates as being equally efficient or even better than any other. "Good judgments may differ;" and such being the case, as just remarked, the practitioner must use his judgment, and follow its dictates in all cases of doubt, or where they may be a foundation for such difference of opinion, and if he thus exercises such judgment in an enlightened and reasonable manner, he will not be responsible for errors.

Thus, the decision was left to the surgeon.[387]

EXAMINATION OF SUSPECTED HOMOSEXUALS (London 1870)

In April 1870, two men, Boulton and Park, were arrested for dressing as women, which was a misdemeanor of public indecency. At the request of the police superintendent, a doctor, James Paul, examined them and extended the examination to a determination of whether they had had homosexual relations. Based on the doctor's evidence, the charge was increased to buggery, a crime that was punishable with ten years to life in prison. After over a year of trials and other legal proceedings, Boulton and Park were acquitted of all charges except outraging public decency.[388]

Chief Justice Cockburn rebuked the police surgeon for examining the accused without his consent. He also chided the government for relying on evidence obtained in this manner.[389]

Sons: N.Y. 1876), Chapter XIV: "Fasting Girls" [http://www.hutch. demon.co.uk/fasting_girl.htm [accessed Dec. 8, 2005]]; Charles Meymott Tidy, LEGAL MEDICINE (London: Smith, Elder &Co. 1882), Part I, at 593 (Case 1)

[387] *Tefft v. Wilcox*, 6 Kan. 46 (Jan. 1870)

[388] TIMES (London), Apr. 30, May 7,14,16,21,23,0, 31, June 6,7,9.10.13.29, July 5,7,11,12, Dec. 7, 1870, May 10,11,12,13,15.16, June 6, 1871; William A. Cohen, SEX SCANDAL: THE PRIVATE PARTS OF VICTORIAN FICTION (Duke Univ. Press 1996), 77-80; Neil McKenna, FANNY AND STELLA: THE YOUNG MEN WHO SHOCKED VICTORIAN ENGLAND (Faber & Faber 2013)

[389] Frederick W. Lowndes*, Medico-legal responsibilities: the examinations of suspected persons*, LIVERPOOL MEDICO-CHIRURGICAL JOURNAL, 10(18):146, at 157 (Jan. 1890); William A. Cohen, SEX SCANDAL: THE PRIVATE PARTS OF VICTORIAN FICTION (Duke Univ. Press 1996), 77-80 [in note 8 on page 79 the statement by the Chief Justice is quoted]

PARENTAL REFUSAL OF VACCINATION (England 1870-1872)

Beginning in 1870, there were many cases in England arising out of the refusal of parents to have their children vaccinated

In 1870, three persons, Thomas Bartlett, Caleb Harris, and James Stuck were charged with violating the Vaccination Act by neglecting to have their children vaccinated. They all objected to vaccination. Bartlett and Struck were find and, when they refused to pay, were committed to prison for 14 days. The wife of Harris agreed to have the child vaccinated, so the case against Harris was dismissed.[390] Mr. Stuck was charged again in 1872. He claimed his child was unfit for examination and produced a medical certificate. A police surgeon and another medical man appointed by the guardians both testified under oath that they found the child fit. The magistrate refused to accept the certificate against such testimony and fined Mr. Stuck.[391]

In 1871, John Huff was charged for a second time for refusing to have his child vaccinated. It was decide that he could be fined again.[392] Mr. de Tzeinowitz was charged, fined and had the fine paid. The officer noted that he could no longer bring multiple charges due to the decision on appeal in *Pilcher v. Stafford*.[393] Henry Regell was also charged. He presented a certificate that the child was unfit for vaccination. The vaccination officer imposed no fine and ordered him to obtain a new certificate every two months until the child was vaccinated.[394] Walter Blake was charged and claimed the child was unfit, but produced no certificate. He was fined.[395] Aaaron Emery, an activist in the anti-vaccine campaign, was charged. The officer ordered vaccination of the child. When he failed to comply, he was fined.[396] John Ontons was charged. He had had his other children vaccinated and claimed the one that was not was unfit, but they could not afford to obtain a certificate. The officer said that the public vaccinator could have given the certificate. A fine was imposed that would be remitted if the child was vaccinated in a week.[397]

In 1872, the MEDICAL TIMES AND GAZETTE noted: “In Northampton, last week, the borough magistrates held a special session, and heard 120 charges of noncompliance with the Compulsory Vaccination Act. Heavy fines were inflicted in many cases.”[398] George Sawyers was charged and fined.[399]

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[390] *Police,* TIMES (London), Apr. 22, 1870, 11
[391] *Police,* TIMES (London), Nov. 19, 1872, 9
[392] *Police,* TIMES (London), Jan. 26, 1871, 11
[393] *Police,* TIMES (London), Sept. 8, 1871, 9; *Pilcher v. Stafford*, 4 B. & B. 775, 122 Eng. Rep. 651, 10 Jurist 651 (Queen’s Bench Jan. 27, 1864)
[394] *Police,* TIMES (London), Nov. 23, 1871, 11
[395] *Police,* TIMES (London), Nov. 23, 1871, 11
[396] *Police,* TIMES (London), Dec. 25, 1871, 11; *Police*, TIMES (London), Jan. 26, 1872, 10
[397] *Police,* TIMES (London), Dec. 29, 1871, 9
[398] *Smallpox jottings,* MEDICAL TIMES AND GAZETTE, i:76 (Jan. 20, 1872)
[399] *Police*, TIMES (London), Apr. 15, 1872, 13

In 1872, the Queens Bench court ruled that a person could be convicted more than once for refusing to have a child vaccinated.[400]

In 1872, George H. Foster, a member of the Peculiar People that opposed medical treatment, was summoned for not having his child vaccinated. He agreed to have the child vaccinated so only a small penalty was imposed. [401] He was indicted a second time for his refusal and was again fined.[402]

In 1872, William Alexander Rhind was charged and the magistrate refused to accept the evidence presented and adjourned the case.[403] Author Gilbert and George Ward were ordered to pay costs for failure to deliver the certificate of vaccination to the officer.[404] Mr. Paxton was fined repeatedly for refusing to have his children vaccinated. He believed vaccination to be dangerous. He believed that his wife had died from complications of vaccination.[405] Anthony Would was charged and fined.[406]

PROSTITUTE CONSENT TO MEDICAL EXAMINATION (England 1870)

In 1870, in England, prostitutes signed consent to report for medical examination under the Contagious Diseases Act. When they failed to do so, they were committed to prison. The MEDICAL TIMES AND GAZETTE reported:

> A young woman, residing at Plumstead, has been committed to prison for fourteen days, with hard labour, for neglecting to report herself for Medical examination after having signed a consent to do so under the Contagious Diseases Act (Women).[407]
>
> The Contagious Diseases Acts (Women).— Several women were summoned at the Canterbury Police-court on Monday last. In the first case the woman was charged with being a common prostitute, and not submitting herself for examination: the Inspector of Police admitted in cross-examination that he had never seen the defendant solicit men, and had never known her to visit a bad house; but it was urged on the part of the prosecution that the oath of the Inspector " that he had good cause to believe the woman to be a prostitute " was sufficient, in which view the magistrates appeared to concur, for they made an order for her to appear periodically for examination daring the next twelve months. In the next case the woman had signed a consent to submit herself for Medical examination under the Acts, and had been examined accordingly; she now complained that she had then been locked up, with others, in a room from half-past twelve till six, and then removed to Shorncliffe, arriving

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[400] *Fines for neglect of vaccination,* MEDICAL TIMES AND GAZETTE, i:519 (May 4, 1872)
[401] *Police*, TIMES (London), May 31, 1872, 11
[402] *The martyr to the vaccination laws,* BOSTON MEDICAL AND SURGICAL JOURNAL, 88:512 (1873)
[403] *Police,* TIMES (London), June 15, 1872, 11
[404] *Police,* TIMES (London), Sept. 23, 1872, 9
[405] F.B. Smith, THE PEOPLE'S HEALTH - 1830-1910 (New York: Holms & Meier Publishers, Inc. 1979), 167, *citing* LANCET, Nov. 2, 1872, 659.
[406] *Police,* TIMES (London), Dec. 21, 1872, 11
[407] MEDICAL TIMES AND GAZETTE, i:275 (March 5, 1870)

there at half-past eight, had no food given to her all that time, and had suffered great pain; notwithstanding which, the Bench sentenced her to seven days' imprisonment in Maidstone gaol; but upon promising to submit to future examination, the sentence was withdrawn. In the next case the woman also complained of harsh treatment and consequent pain, and said she would rather "do" twelve months than be examined again; she was sentenced to seven days' imprisonment in Maidstone Gaol. The last case was not gone into, the defendant being (as was stated) drunk.[408]

29th Victoria Cap 35, sec 17:

17. Any Woman, in any Place to which this Act applies, may voluntarily, by a Submission in Writing signed by her in the Presence of and attested by the Superintendent of Police, subject herself to a periodical Medical Examination under this Act for any Period not exceeding One Year.

(H) *Voluntary Submission to Examination*.
THE CONTAGIOUS DISEASES ACT, 1866

I A.B. of _____, in pursuance of the above-mentioned Act, by this Submission, voluntarily subject myself to a periodical Medical Examination by the Visiting Surgeon for [*Portsmouth, or as the case may be*] for ____ Calendar Months from the Date hereof.

Dated this ___ Day of _____ 18__.

(Signed) A.B.

Witness,
X.Y., Superintendent of Police for _____ [*or as the case may be*].

ANESTHESIA (Japan & England 1870)

In 1870, in Yokohama, Japan, British Captain Gilfillan died under chloroform during an operation for a dislocated shoulder. The chloroform was administered at the insistence of the patient and friends. A British coroner's jury found that the chloroform was administered without proper degree of care, in effect a verdict of manslaughter against the surgeon, Dr. Dalliston. He was released on bail and there is no evidence of trial. He was still practicing at the hospital in 1872.[409]

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[408] *The Contagious Diseases Acts (Women),* MEDICAL TIMES AND GAZETTE, i:485 (April 30, 1870); for additional information about registration and treatment of prostitutes in England and France, see Appendix - Statutes 29 & 30 Victoria, THE IRISH JURIST, 18:10 et seq. (1866); and *Compulsory medication of prostitutes by the state*, WESTMINSTER REVIEW, 106:137-188 (July 1876). For statistics on submission to examination, see *The working of the Contagious Disease Act*, BRITISH MEDICAL JOURNAL, ii:257 (Aug. 22, 1874);*The Contagious Diseases Act*, BRITISH MEDICAL JOURNAL, ii:658 (Nov. 21, 1874)

[409] *Coroner's inquest*, JAPAN WEEKLY MAIL, 1:328-329 (July 15, 1870); *Death from chloroform in Japan,* MEDICAL TIMES AND GAZETTE, ii:430 (Oct. 8, 1870); JAPAN DAILY MAIL, Apr. 8, 1872, 190

PECULIAR PEOPLE - SAVILLE - MANSLAUGHTER CHARGE FOR RELIGIOUS REFUSAL BY PARENTS (England 1870)

On September 19, 1870, a grand jury in the Central Criminal Court in London was presented with the case of Thomas and Elizabeth Saville who were charged with manslaughter for causing the death of their three-month-old child by neglecting to provide proper medical advice for a dangerous illness of diarrhea. They were members of the Peculiar People. They were tried in Central Criminal Court before Commissioner Kerr. The physician who performed the post mortem testified that the disease might have been checked by medical attention, but that he could not express an opinion on whether the child would have survived with medical attention. The defendants were acquitted.[410]

CRAWFORD V. BECKWITH - EFFECT OF PATIENT REFUSAL (Ohio 1870)

In 1870, in Ohio, Dr. Beckwith was sued for alleged negligence in treatment of a fracture and dislocation of the leg of Crawford. The jury found for the plaintiff in the first two trials and on a third retrial found for the defendant. The jury charge in the third trial included:

> In regard to the amputation of the leg, if at a time and under the circumstances rendering amputation proper and necessary the defendant advised and proposed, and offered to amputate it, and the patient refused to have it done, the defendant is in no way responsible for the consequences of its not being amputated at the time.[411]

UNNECESSARY OPERATION (New York 1870)

There are some cases in which it was alleged that operations were unnecessary without discussing the consent process. It is not always clear whether (1) the lack of necessity should have been known and disclosed prior to the operation so that there is an implicit consent question or (2) the practitioner did not know the lack of necessity prior to the operation. An example is an 1870 case in New York. Mrs. Lena Fuller, age 17, died from a Cesarean operation in which the womb was unnecessarily removed. Dr. Marcus Berg performed the operation. The patient's father witnessed the operation. The coroner's inquest gave a verdict of gross malpractice. Dr. Berg was indicted for manslaughter.[412] It appears that the case was never tried.[413]

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[410] *Central Criminal Court,* TIMES (London), Sept. 20, 1870, 9; *Central Criminal Court,* TIMES (London), Sept. 23, 1870, 11

[411] *The courts – Court of Common Pleas*, DAILY CLEVELAND HERALD (Ohio), Nov. 21, 1870

[412] *The case of Dr. Berg,* N.Y. HERALD, Aug. 16, 1870, 8; *Five prisoners arraigned for murder, and one for manslaughter,* N.Y. TIMES, Sept. 27, 1870, 2

[413] No newspaper report of any further action in the case has been located. The case is included in *Exhibit No. 1. Names of the persons against whom indictments are found, the disposition of*

EMERGENCY EXCEPTION TO CONSENT REQUIREMENT (Missouri 1870)

There are some reports of persons being forced to have treatment in cases that appear to fall within the now-recognized emergency exception to need for consent. For example, in 1870, in St. Louis, a hydrophobic patient was forced to the hospital in an ambulance with police assistance. No legal action has been located.[414]

CARPENTER V. BLAKE - EFFECT OF FALSE REPRESENTATIONS (New York 1871-1878)

In 1866, Levantia S. Carpenter was thrown from her horse and her elbow was dislocated. Dr. Zara H. Blake was called to set her arm. Ms. Carpenter sued Dr. Blake for malpractice when the joint became stiff and useless. The jury ruled in favor of the patient and awarded $2,000. The physician appealed. The appellate court upheld the verdict in 1871. Dr. Blake had not used a sling. There were accusations of abandonment. The court discussed the scope of duty to inform about post-operative behavior:

> I agree with the defendant's counsel, that it was the right of the defendant to give up the care of the limb at any time, especially with the plaintiff's assent; but if the defendant insists upon that consent as a shield from liability for any negligence of which he may have been guilty, or for any malpractice committed, it was competent for the plaintiff to show, if she could, that her consent was obtained by representations that were false…. I have already expressed the opinion that the consent of the plaintiff, if obtained by false representations, was no protection to the defendant against liability for damages that had occurred before the consent was given.

In 1872, the highest court of New York reversed on other grounds and ordered a new trial. The court ruled that it was an error for the trial court to charge the jury that was immaterial that the defendant was reputed to be a skillful surgeon.

The jury at the second trial again ruled in favor of the patient. In 1877, the appellate court upheld the decision and, in 1878, the highest court of New York affirmed, stating:

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which is it noted on the register kept at the office of the district attorney, REPORT OF THE COMMITTEE ON THE JUDICIARY AS TO THE EXAMINATION INTO THE AFFAIRS OF THE OFFICE OF THE DISTRICT ATTORNEY OF THE CITY AND COUNTY OF NEW YORK, REPORT NO. 183 IN ASSEMBLY (MAY 7, 1872), 11, at 16. Marcus Berg is listed as a physician in CURTIN'S WESTCHESTER COUNTY DIRECTORY, 1873-74, and in the BROOKLYN, NEW YORK, CITY DIRECTORY for 1874 and again in 1876.

[414] *Another case of hydrophobia,* N.Y. TIMES, Aug. 26, 1870, 1.

The judge properly charged if the defendant was dismissed with the assent of the plaintiff, he was not responsible for subsequent results, yet if he deceived and misled her and the arm was not in good condition he was responsible unless the injury occurred after that time.[415]

ALLEGED UNAUTHORIZED AMPUTATION (England 1871)

In 1871, in London, a lawyer, Mr. Mayo, inquired of a magistrate as to how proceedings might be brought against a surgeon concerning an alleged unauthorized amputation of an arm at St. Thomas's Hospital. The woman, Atkins, had allegedly refused the amputation. One surgeon asked if she would abide by his judgment and she agreed thinking it meant operating on the tumor. Under chloroform her arm was amputated. He was advised that no criminal action could be brought and that a civil action would be the only remedy but would be useless. The patient stated she had not authorized the lawyer to act on her behalf, so no suit was brought. A few days later the steward of St. Thomas's Hospital appeared before the presiding magistrate to deny the allegations, claiming she was fully informed by the surgeon of the probable necessity of amputation and it was carried out with her full knowledge an assent. At the time of discharge, in accordance with hospital regulations, she was asked if she had any complaint and she made no complaint. Mr. Mayo admitted that he had written the newspaper report of the alleged unauthorized amputation.[416]

ANESTHESIA (1871)

In 1871, in Denver, Colorado, a man named Jeremiah Murphy died from chloroform administered at his request for a surgical operation. The coroner's jury acquitted the physician of all blame.[417]

In 1871, in London, an inquest was held into the death of David Skelton under the influence of methylene for an operation to remove a severely injured finger. The methylene had been administered at the request of the patient. The doctor testified that he never allowed methylene to be administered unless with the patient's full consent after due deliberation. The jury found the methylene had been properly administered.[418]

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[415] *Carpenter v. Blake*, 60 Barb 488 (N.Y. Sup. Ct. 4th Dept. May 1, 1871), *rev'd on other grounds*, 50 N.Y. 696 (Dec. 24, 1872); 10 Hun. 358 (N.Y. Sup. Ct. 4th Dept. April 1877), *aff'd*, 75 N.Y. 12 (Nov. 12, 1878)

[416] *Lambeth,* MORNING POST (London), Jan. 23, 1871, 7; *Lambeth,* MORNING POST (London), Jan. 31, 1871, 7; *Amputations at hospitals,* SHEFFIELD AND ROTHERHAM INDEPENDENT, Feb. 1, 1871, 3; *A question of consent,* LANCET, i:129-130 (Jan 28, 1871); *Attempted legal proceedings*, MEDICAL TIMES AND GAZETTE, 1:110-111 (Jan. 28, 1871)

[417] DAILY CENTRAL CITY REGISTER (CO), March 4, 1871; ST. JOSEPH HERALD (Mich), Mar. 11, 1871, 2; *Death from chloroform*, NEW YORK MEDICAL JOURNAL, 13:600, at 601 (1871)

[418] *Death from mytheline*, DAILY NEWS (London), Apr. 22, 1871; *Death from mytheline*, STANDARD (London), Apr. 22, 1871, 6; *Death under the influence of methylene,* BRITISH MEDICAL JOURNAL, i:456 (Apr. 29, 1871); *Death under the influence of methylene,* MEDICAL AND SURGICAL REPORTER, 24(21):443-444 (May 27, 1871); *Death under mytheline,* BOSTON MEDICAL AND SURGICAL JOURNAL, 84:390-391 (June 8, 1871); Robert H. Collyer, MYSTERIES OF THE VITAL ELEMENT (London: Henry

Also, in 1871, an inquest was held in London into the death of Mrs. Hale during an amputation under chloroform that she had consented to. The jury found the death was due to chloroform.[419]

RULES OF NEBRASKA STATE PENITENTIARY (1871)

The rules and regulations of the Nebraska State Penitentiary stated in the duties of the physician:

> 3. He shall… perform all surgical operations that may be necessary… but no surgical operation shall be performed upon any prisoner without his consent, or the consent of two of the Inspectors.[420]

CHAMBERLIN V. MORGAN - NO OBLIGATION TO CONSENT TO PROCEDURE UNDER ANESTHESIA TO MITIGATE DAMAGES (Pennsylvania 1871)

In 1868, Hattie Morgan, age 16, dislocated her arm. Dr. Abraham Chamberlin attempted to reduce the dislocation. He then proposed to put her under anesthesia to again attempt reduction. Her father declined to consent. The jury awarded her $300. The doctor appealed, claiming that she had a duty to submit to mitigate damages. The court called the proposal an experiment. The court ruled there was no duty to submit and affirmed the judgment.[421]

FORCIBLE REMOVAL FOR SMALL POX (New York 1871)

In April 1871, an officer of the Brooklyn Health Board entered the residence of Adam Schneider and determined that three children had small pox. When the officer sought to remove the children to the hospital, the father called two other men and forced the officer to retreat. The Sanitary Inspector returned with police, forcibly entered the residence, and took the children to hospital. The father and two friends were arrested.[422]

REANY V. REANY - GUARDIANSHIP OF INEBRIATE (Ohio 1871)

In 1871, in Ohio, a wife petitioned to be appointed guardian of her inebriate husband. The court ruled that it was necessary to prove that he was

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Renshaw 1871) (Second Edition). Note that this is the same surgeon who was involved in the Verner case in 1869, *supra*

[419] *Deaths from chloroform*, BRITISH MEDICAL JOURNAL, i:538 (May 20, 1871)

[420] *First annual report of the Board of Instructors of the Nebraska State Penitentiary, for 1870*, in the HOUSE JOURNAL OF THE LEGISLATURE OF THE STATE OF NEBRASKA (Jan. 30, 1871), at page 158

[421] *Chamberlin v. Morgan*, 68 Pa. 168 (Mar. 23, 1871)

[422] *Brooklyn*, N. Y. TIMES, Apr. 3, 1871, 8; *The small pox in Brooklyn*, N. Y. HERALD, April 3, 1871, 5

incapable of taking care of his property. Squandering his assets was insufficient proof so the petition was dismissed.[423]

LOOK V. DEAN - STANDARD FOR DETENTION OF THE INSANE (Massachusetts 1871)

In August 1869, David Dean engaged in loud and boisterous religious talk in the vicinity of Methodist camp meeting on Martha's Vineyard. James Look, a deputy constable, took him into custody. Mr. Dean sued claiming false arrest and imprisonment. Constable Look sought to justify his actions on the grounds that Mr. Dean was insane. The jury ruled in favor of Mr. Dean. On appeal, in 1871, the court upheld the verdict finding that insanity was a basis for detention only when the person was dangerous to himself or others. Mental illness alone was not sufficient.[424]

INQUEST - ELIZABETH WILLIAMS DEATH FROM SURGERY WITH CONSENT (England 1871)

In 1871, an inquest was held into the death Elizabeth Williams who died from lockjaw caused by a surgical operation to correct a long-standing deformity in her right hand. She was an inmate in Walton gaol. The son of a gaol surgeon performed the operation. She had consented to the surgery and is reported to have been anxious to have it done quickly. The jury exonerated the surgeon, but questioned whether the gaol should permit operations that were not imminently necessary for long-standing deformities.[425]

REFUSAL TO PERMIT LYMPH TO BE TAKE FROM CHILD (England 1872)

In 1872, in England, John Charles Howes, was charged with refusing to permit lymph to be taken from his child who had been successfully vaccinated. He was assessed a nominal fine of 1 s.[426]

PECULIAR PEOPLE - HURRY - PARENTAL RELIGIOUS REFUSAL OF MEDICAL ASSISTANCE (England 1872)

George Hurry and his wife were charged for the smallpox death of their seven-year-old daughter Cecilia. They sought no medical assistance. He was an elder of the Peculiar People and his wife also belonged to the sect. After he was taken into custody, a second child died of smallpox. He was released on bail. A grand jury indicted Mr. Hurry for manslaughter and neglect in failing to provide

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[423] *When the court can appoint a guardian for a drunken husband,* CINCINNATI DAILY GAZETTE (Ohio), July 10, 1871, 4
[424] *Look v. Dean*, 108 Mass. 116 (Oct. 1871)
[425] *Death from lockjaw in Walton gaol*, LIVERPOOL MERCURY, Dec. 1, 1871
[426] *Police*, TIMES (London), Jan. 26, 1872, 10

medical assistance. He surrendered. The prosecutor withdrew the charge of manslaughter. In 1872, he was tried in Central Criminal Court and a jury found him guilty of neglecting to procure medical advice. The defendant stated in court that the sect was willing to abide by the law. The defendant was then discharged on his own recognizance.[427]

MORAN V. PEOPLE - CONVICTED OF RAPE OF PATIENT (Michigan 1872)

In 1872, Dr. Santiago Don Moran was convicted of raping a 16-year-old patient. The Michigan Supreme Court affirmed:

> Considering the way, and the purpose for which, the girl had been placed by her father under the care and treatment of the defendant as her physician, the evidence had a tendency to show, and the jury might properly have found, that the girl was induced by the defendant to submit to the sexual intercourse with him, from the fear and under the apprehension, falsely and fraudulently inspired by the defendant for the purpose of overcoming her opposition, that, if she did not yield to such intercourse, he intended to, and would, use instruments "for the purpose of enlarging her parts," and that such operation with instruments would be likely to kill her. And if the jury should so find--with or without the other facts submitted to them by the charge given--and that she would not otherwise have yielded, it would be their duty to find the defendant guilty of the crime charged.[428]

DISMISSAL OF ASSAULT CHARGE FOR MEDICAL EXAMINATION (England 1872)

In August 1872, in Evesham (England), Charlotte Perkins charged surgeon Anthony Herbert Martin with assault. She was a servant girl who was suspected to be pregnant, so her employer arranged for Dr. Martin to examine her. He did so in the presence of the employer. She admitted that she consented, but later objected to the extent of the examination. She did not resist the examination, but cried. She complained 19 days later. The magistrates dismissed the case.[429]

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[427] *Reg. v. Hurry*, 76 C.C.C. Sessions Paper 63 (1872); *Popular ignorance*, TIMES (London), Apr. 19, 1872, 12; *The Peculiar People*, TIMES (London), Apr. 25, 1872, 12; *Central Criminal Court*, TIMES (London), May 4, 1872, 11; *Central Criminal Court*, TIMES (London), May 7, 1872, 11; *Central Criminal Court*, TIMES (London), May 9, 1872, 11; *The Peculiar People*, BRITISH MEDICAL JOURNAL, i:533 (May 18, 1872)

[428] *Moran v. People*, 25 Mich. 356 (July 13, 1872)

[429] *Extraordinary charge against a surgeon at Evesham*, BIRMINGHAM DAILY POST, Aug. 21, 1872, 5

R. V. LOCK - DIFFERENCE BETWEEN SUBMISSION AND CONSENT (England 1872)

In 1872, in a non-medical case in England, the court discussed the difference between submission and positive consent in an indecent assault case, *R. v. Lock*. James Lock was accused of indecent assault of two boys and he defended on the basis that the acts were not against their will. The trial court stated:

> The boys were not asked by the counsel on either side if it was done against their will or with their consent, but they stated that they did not know what the defendant was going to do to them when he took them into the field and placed them on his lap and laid them on the ground.
>
> On these facts it was contended by the counsel for the defendant that there was no case for the jury inasmuch as the filthy acts were not done against the will of the boys. Having determined that it was a question for the jury, in summing up I stated to them that the law recognised a distinction between mere submission and positive consent. A person may submit to an act done to him from ignorance, or his consent may be obtained by fraud, and in neither case would it be such a consent as the law contemplates. Consent means an active will in the mind of the patient to permit the doing of the act complained of; and knowledge of what is to be done, or of the nature of the act that is being done, is essential to a consent to the act….
>
> The jury found the defendant Guilty, stating that they did so, being of opinion that the boys merely submitted to the act of the defendant not knowing the nature of such act.

On appeal, Kelly, C.B., stated:

> The question before us arises upon an indictment for an indecent assault, and it is whether mere submission to an indecent act without consent, the circumstances being such that the person assaulted was unable to exercise his will either one way or the other, relieves the other party from criminal liability; and whether the facts proved in this case, although done without fraud towards the patient, do not make out the charge of indecent assault, the patient being unable to exercise his will. There being no actual consent, and on the other hand no actual fraud to induce consent, I think that where a child submits to an act of this kind in ignorance, the offence is similar to that perpetrated by a man who has connection with a woman while asleep.

Grove, J. stated:

> I am of the same opinion. I do not think that an exercise of an actual dissenting will is necessary to constitute an assault in a case like this. The

> acts done must be in some sense against the will of the patient. Dissent may be either positive or negative. If positive dissent is necessary, the direction to the jury was wrong; if an active dissent is not necessary, the direction was right. I think that negative dissent is enough, and that mere submission in ignorance of the nature of the act done does not differ from negative dissent.

The other judges agreed, so the conviction was affirmed.[430]

ALLEGED INDECENT ASSAULT OF PATIENT (Channel Islands 1872)

In 1872, in Jersey (Channel Islands), dentist, James T. Grant was charged with the indecent assault of Caroline Pope while under the influence of anesthesia to extract a tooth. A jury found him not guilty. Professional journals recommended having a witness present during anesthesia.[431]

DEFOE V. PEOPLE - CHARGE OF INTENT TO RAPE PATIENT (Michigan 1872)

In Michigan, Dr. Defoe was charged with intent to commit rape on a female patient. In 1872, his conviction was overturned on appeal due to errors in the jury instructions.[432]

ANESTHESIA (1872)

In 1872, an inquest was held into the death of Harriet Sophia White, age 16, who had died during an eye operation under the influence of chloroform at London Ophthalmic Hospital. Friends contended she had not consented to chloroform. She had undergone a prior similar operation with chloroform and had consented to the surgery. The surgeons contended she was aware that chloroform would be used. There was evidence that hospital authorities "generally assumed to carry out operations under chloroform without asking the consent of the parents." The jury found that she had died while under the influence of chloroform.[433]

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[430] *Reg. v. Lock*, LAW TIMES REPORTS, 27:661-663 (Jan. 11, 1873); a consistent but differently worded account appears in *R. v. Lock* (Nov. 23, 1872), 21 WEEKLY REPORTER 144 (Dec. 21, 1872)

[431] *The charge of criminal assault by a dentist in Jersey*, BRITISH JOURNAL OF DENTAL SCIENCE (London), 15(198):558 (Dec. 1872); *A witness necessary in the administering of anaesthetics,* MEDICAL RECORD, 8:47 (Jan. 15, 1873)

[432] *Defoe v. People*, 22 Mich. 224 (1872)

[433] *Death of a young lady under chloroform*, ILLUSTRATED POLICE NEWS (London), Sep. 21, 1872; *Death of a young lady under chloroform*, LLOYD'S WEEKLY NEWSPAPER (London), Sep. 21, 1872; *Death from chloroform*, BRITISH MEDICAL JOURNAL, ii:357 (Sep. 28, 1872); *The public health*, TIMES (London), Sep. 26, 1872, 11

REFUSING VACCINATION OF CHILDREN (England 1873)

In 1873, William Young was summoned and presented a certificate of unfitness from Dr. W.J. Collins who was shown to believe vaccination to be improper in any case. Young stated nothing would induce him to permit vaccination. He was fined.[434] William Clarkson was fined with costs for refusing vaccination of his children. It was reported that he had paid more than 30 pounds in fines and costs to date.[435]

Repeated cases of this nature continued to occur.[436]

RESULT OF FORCIBLE EXAMINATION INADMISSIBLE AS EVIDENCE (New York 1873)

A New York coroner ordered the forcible examination of a female prisoner to obtain evidence that she had recently delivered a child. In 1873 a New York court ruled that the report of the examination was inadmissible as evidence because the constitution declared that "no person shall be compelled, in any criminal case, to be a witness against himself."[437]

POWELL V. WESTMORELAND - UNSPECIFIED ASSAULT AND BATTERY (Georgia 1873)

In Georgia, Powell was award $4,447.18 against Dr. Westmoreland for unspecified assault and battery. In 1873, the state supreme court affirmed the granting of a new trial based on the non-attendance at the trial of the doctor due

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[434] *Police,* TIMES (London), Jan. 7, 1873, 9

[435] *Refusal to vaccinate,* BRITISH MEDICAL JOURNAL, i:94 (Jan. 25, 1873)

[436] *Police,* TIMES (London), Sept. 4, 1874, 9; *Police*, TIMES (London), Nov. 21, 1874, 10; *Vaccination prosecution,* BRITISH MEDICAL JOURNAL, i:452 (Apr. 3, 1875)*; Prosecution under the vaccination act,* BRITISH MEDICAL JOURNAL, ii:55 (July 10, 1875); *The compulsory vaccination act,* BRITISH MEDICAL JOURNAL, ii:647 (Nov. 20, 1875); *The vaccination act,* BRITISH MEDICAL JOURNAL, ii:681 (Nov. 27, 1875); *The vaccination act,* BRITISH MEDICAL JOURNAL, i:21 (Jan. 1, 1876); *Police,* TIMES (London), Oct. 19, 1876, 11; *Police,* TIMES (London), Jan. 23, 1877, 11; *Police,* TIMES (London), Feb. 10, 1877, 11; *Police,* TIMES (London), June 19, 1877, 12; *Police,* TIMES (London), July 26, 1877, 12; BRITISH MEDICAL JOURNAL, ii:415 & 424 (Sept. 22, 1877); *Evasions of the vaccination act* BRITISH MEDICAL JOURNAL, ii:450 (Sept. 29, 1877); *Police,* TIMES (London), Oct. 19, 1877, 12; *Vaccination certificates and sham vaccination,* SANITARY RECORD, 7:332 (Nov. 23, 1877); *Police,* TIMES (London), Dec. 5, 1877, 12; *Police,* TIMES (London), Dec. 22, 1877, 11; *Neglect of vaccination,* BRITISH MEDICAL JOURNAL, i:497 (Apr. 6, 1878) [father censored by coroner's jury]; *Anti-vaccination,* BRITISH MEDICAL JOURNAL, ii:671, Nov. 2, 1878*; Police*, TIMES (London), Dec. 13, 1878, 12; *Police,* TIMES (London), May 31, 1879, 13; *Refusal to vaccinate,* BRITISH MEDICAL JOURNAL, i:63 (Jan. 10, 1880); *A martyr: anti-vaccination*, MEDICAL TIMES AND GAZETTE, i:141 (Jan. 31, 1880); Ann Clark, *Compliance with infant smallpox vaccination legislation in nineteenth-century rural England: Hollingbourne, 1876-88*, SOC. HIST. MED., 17(2):175-198 (2004)

[437] *People v. McCoy*, 45 Howard 216 (N.Y. Sup. Ct. May 1873)

to attending another patient. More details concerning the nature of the assault have not been located, so it is not known whether there was a consent issue.[438]

MANSLAUGHTER CHARGE FOR VACCINATION (Massachusetts 1873)

In 1873, in Spencer, Massachusetts, a charge of manslaughter against Dr. Fontaine was presented to the grand jury. He was accused of causing the death of child by inoculating with smallpox virus that he represented to be vaccine. No report of an indictment has been found.[439]

ANESTHESIA (1873)

In 1873, in Ireland, Mrs. Lamb sued Drs. Barton and Bennett when her husband died from chloroform during amputation of part of his foot. Mr. Lamb had assented to the amputation and chloroform. The issue before the jury was whether there was negligence in the administration of the chloroform. The jury found for the defendants.[440]

In 1873, in Boston, Mrs. Homan died during an operation to remove an ovarian tumor. It was alleged she was given ether against her express instructions. The defendants claimed tacit consent. The coroner's jury exonerated the doctors.[441]

VACCINATION OF CHILD WITHOUT CONSENT (New York 1873)

In 1873, in New York City, Holliwell, who was opposed to vaccination, sued the city for vaccinating his daughter without consent during a small pox outbreak in the city. When small pox was prevalent in New York, one of the agents of the Board of Health called at the house of plaintiff in the absence of Holliwell and his wife, and vaccinated his little girl without her consent and against the protest of an older sister, who informed the agent that her father would not permit the act. The judge dismissed the case on the technical grounds that the city was not responsible for acts of the independent Board of Health and, even if it were, it would not be liable for acts of the vaccinator contrary to instructions only to vaccinate those desiring it.[442]

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[438] *Powell v. Westmoreland*, 49 Ga. 341 (July 1873)
[439] *By mail and telegraph,* N.Y. TIMES, July 8, 1873, 1; ANNUAL REPORT OF THE STATE BOARD OF HEALTH OF MASSACHUSETTS, vol. 5, 542 (1874)
[440] *Action arising out of a death from chloroform*, BRITISH MEDICAL JOURNAL, ii:92-94 (July 26, 1873); ii:123 (Aug. 2, 1873); *The Irish assizes,* TIMES (London), Jul. 25, 1873, 7.
[441] BOSTON DAILY ADVERTISER, Dec. 6, 11, 16, & 19, 1873; BOSTON DAILY GLOBE, Dec. 8, 16 & 19, 1873; WISCONSIN STATE JOURNAL (Madison), Dec. 12, 1873, 2; BOSTON MEDICAL AND SURGICAL JOURNAL, 89:644-645 (Dec. 25, 1873)
[442] *Involuntary vaccination,* MEDICAL AND SURGICAL REPORTER, 29:359-360 (Nov. 15, 1873); *Damages for vaccination,* MEDICAL RECORD, 8:566 (Nov. 15, 1873)

PHILLIPS V. WOLF - CONSENT TO ABORTION NO DEFENSE (New York 1873)

In New York, a husband sued for death of his wife due to an abortion. In 1873, in the case of *Phillips v. Wolf*, the appellate court reversed dismissal of the case, finding that consent of the wife would not excuse negligent or ignorant treatment.[443]

LINTON'S APPEAL - WILL CONTEST - COMPETENCE BEFORE SURGERY (Pennsylvania 1874)

In an 1874 will contest in Pennsylvania, *Linton's Appeal*, it was alleged that the testator lacked capacity when the will was signed because she "was laboring under great nervous excitement, caused by her misgivings as to the result of the operation, to which she was about to submit." The court concluded that she had capacity:

> It thus appears that just before signing the paper, which according to the testimony must have been previously prepared, the testatrix participated in the conversation that took place in regard to the proposed operation, exercised her own judgment as to its propriety, and in view of the opinions expressed by her chosen medical advisers, and notwithstanding her own serious apprehensions of a fatal result, consented to have it performed. The learned professional gentlemen, to whose judgment she thus deferred, must have considered her competent to decide for herself, whether she would submit to the treatment they proposed, or not. The circumstances detailed by the witnesses referred to clearly indicate an intelligent exercise of judgment coupled with unusually strong will power.[444]

TULTE V. MURPHY - ALLEGED AMPUTATION WITHOUT CONSENT (California 1874)

In an 1874 California case, Dr. Murphy had amputated Mr. Tulte's leg. Mr. Tulte testified that his consent to the operation was not informed. He did not agree to the amputation. However, this issue was not pled so the court could not consider it. The judge granted a non-suit on the pled issue of performing the surgery negligently.[445]

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[443] *General Term abstract, Supreme Court - First Department,* ALBANY LAW JOURNAL, 8:346 (Nov. 29, 1873)
[444] *Linton's Appeal*, 104 Pa. 228 (Jan. 7, 1874)
[445] *Surgery*, DAILY EVENING BULLETIN (San Francisco), Mar. 5, 1874; *Interesting case of surgery*, DAILY EVENING BULLETIN (San Francisco), Mar. 9, 1874; *Interesting surgery case*, DAILY EVENING BULLETIN (San Francisco), Mar. 10, 1874

UNSATISFACTORY ARTIFICIAL EAR (England 1874)

In 1872, plaintiff who had lost most of an ear asked defendant to make him an artificial ear. Plaintiff claimed defendant had agreed it would be durable, flesh colored and comfortable to wear. The completed ear caused pain and discolored in the sun. Plaintiff claimed defendant promised to make a second ear but did not do so. Plaintiff sued to recover the $200 he had spent on the first ear. Defendant claimed that he had told plaintiff that it would be difficult and that the plaintiff would be unlikely to be satisfied, but the plaintiff was anxious and willing to pay to experiment. The jury awarded the plaintiff $100.[446]

PECULIAR PEOPLE - HINES - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (England 1874)

In 1874, in England, a coroner's jury charged Thomas Hines with a misdemeanor for the death of his two-year-old son, who died under the care of George Hurry of the Peculiar People. At trial, Baron Pigott found there was no case for the jury because there was no statute that imposed a duty to call a physician. Baron Pigott stated that the evidence showed an honest, ignorant mistake, not intentional or culpable omission of duty.[447]

STEVENSON V. UNDERHILL - DOCTOR FORBIDDEN TO SEE PATIENT (Ohio 1874)

In 1874, in Ohio, William Stevenson sued Dr. George C. Underhill for malpractice in treating an injury to his arm. Underhill had briefly seen the patient and left to see another patient. Stevenson's wife told Underhill not to return if the other patient had small pox. When Underhill reported the other patient probably had small pox, Stevenson's wife banned him from the house. So he did see Stevenson again. The jury found for the defendant, concluding that there could not be neglect when the doctor was forbidden to see the patient.[448]

ANESTHESIA (1874)

In 1874, in Cleveland, Ohio, Mrs. Bridget Gleason died from the effects of chloroform administered Dr. W.F. Biggar's office. The patient needed to have a needle removed from her thigh. The doctor recommended no chloroform and the patient insisted on chloroform. The coroner's jury found the death due to her heart condition and the use of chloroform to be "injudicious."[449]

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[446] *An action for an artificial ear,* BRITISH MEDICAL JOURNAL, I:720 (May 30, 1874)
[447] *Reg. v. Hines*, 80 C.C.C. Sessions Paper 309 (1874); *Is a physician necessary?* 10 ALBANY LAW JOURNAL 178 (1874-75); *Central Criminal Court*, TIMES (London), June 8, 1875, 11 [discussion of Baron Pigott's position]
[448] *Court matters*, ELYRIA INDEPENDENT DEMOCRAT (Ohio), June 10, 1874, 3
[449] *Death from chloroform,* CLEVELAND DAILY HERALD (Ohio), July 20, 1874, 4

In 1874, in Boston, Charles Linscott died from the effects of chloroform given for a tooth extraction. The patient consented to the chloroform. The coroner's jury found the death due to chloroform and recommended legislative action to prevent the use of chloroform.[450]

INQUEST - JAMES CULLIHAN - DELAY OF SURGERY DUE TO HOSPITAL RULE CONCERNING CONSULTATION (Philadelphia 1874)

In 1874, an inquest was held in Philadelphia into the death of James Cullihan who had died at the Homeopathic Hospital after surgery. He had suffered a complex fracture in a fall and it was determined that amputation of part of his thigh was necessary. The patient was advised of the risk of death with and without the amputation and he expressed his willingness to proceed. The resident physician delayed surgery because the hospital had a rule that he had to consult with the chief surgeon before a capital operation and the chief surgeon was out of town. By telegraph the chief surgeon advised waiting until his return. The condition deteriorated and in consult with another physician, the resident physician proceeded. The coroner's jury censored the surgeons for the delay in the surgery. This illustrates the potential adverse effects of rules that are designed for protection, but do not address foreseeable contingencies.[451]

ALLEGED ASSAULT OF FEMALE PATIENT (England 1874)

In 1874 in England, Dr. Edmund Pope was accused of criminally assaulting a female patient Field while she was visiting him as a patient. The magistrate concluded there was insufficient evidence to convict and dismissed the charges.[452]

GEISELMAN V. SCOTT - EFECT OF INFORMATION GIVEN TO PATIENT (Ohio 1874)

In the 1874 malpractice case, *Geiselman v. Scott*, the Ohio Supreme Court commented on the effect of information given to the patient:

> It is undoubtedly true, that the information which a surgeon may give to a patient concerning the nature of his malady, is a circumstance that should be considered by the jury in determining the question whether the patient, in disobeying the instructions of the surgeon, was guilty of contributory negligence or not.[453]

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[450] *Inquests*, BOSTON POST, Oct. 3, 1874, 3
[451] *The inquests yesterday,* PHILADELPHIA INQUIRER, Aug. 20, 1874, 2; *Editorial notes*, HAHNEMANNIAN MONTHLY, 10:92-93 (Sept. 1874).
[452] *The perils of practice,* BRITISH MEDICAL JOURNAL, ii:311 (Sept. 5, 1874)
[453] *Geiselman v. Scott*, 25 Ohio St. 86, 88-89 (Dec. 1874)

SHELTON V. JACKSON - COLLECTION SUIT - ACCEPTANCE OF SERVICES IMPLIES OBLIGATION TO PAY (Iowa 1874)

In 1874, in Iowa, in the case of *Shelton v. Jackson*, a doctor who had been called in consultation by another physician sued the patient to be paid. The patient said his arrangement with the original physician was that the consultant would be paid by the original physician. The court ruled that "When a party, knowingly and without objection, permits another to render services for him of any kind whatever, the law implies a promise to pay what the same is reasonable worth." The patient had a duty to make any different arrangement known to the consultant before accepting the services. [454]

DISCUSSION OF MEDICAL CONSENT BY PARLIAMENTARY SELECT COMMITTEE (England 1874)

In 1874 in England a parliamentary select committee on the law related to homicide considered the difficulty of surgeons operating without consent." The discussion of the medical issues was reprinted in British medical journals. No conclusions were reached.[455]

ROGERS V. TURNER - COLLECTION SUIT - SCOPE OF PARENTAL RESPONSIBILITY TO PAY FOR SERVICES NOT CONSENTED TO (Missouri 1875)

In 1875, in Missouri, the courts addressed a case in which a doctor sought payment from parents for services to their minor child. The appellate court affirmed the trial court decision against the doctor:

> This action was by a physician to recover a bill of $ 25 against defendant, for medical services to his son, in treating and curing the son of a disreputable disease.
>
> The evidence clearly showed that the son was a minor living with the father, and consulted and employed the plaintiff without the knowledge of the father, who had a family physician. Neither the son or [sic] the plaintiff advised the father of the fact until eighteen months after the services were rendered.
>
> The court gave all the instructions asked by the plaintiff; but rendered a verdict and judgment against him, and we think the judgment is right. Medical services of the character might be considered as necessaries; but the father never having refused to supply the son with any medical attention that might be necessary, was under no obligation to

[454] *Shelton v. Johnson*, 40 Iowa 84 (Dec. 1874)
[455] *The law of homicide*, MEDICAL TIMES & GAZETTE, 2:605-606 (Nov. 28, 1874); John Charles Bucknill*, The law of murder in its medical aspects,* BRITISH MEDICAL JOURNAL, ii:667, 670 (Nov. 28, 1874)

pay for services rendered without his knowledge or consent.[456]

STRONG V. FOOTE - COLLECTION SUIT - GUARDIAN ORDERED TO PAY FOR SERVICES WARD CONSENTED TO (Connecticut 1875)

In 1875, in Connecticut, in the case of *Strong v. Foote*, a dentist sued the guardian of a 15-year-old patient to collect the charges for the services. The guardian challenged on the ground that the minor patient could not enter a valid contract. The court ruled that such dental services were included in the necessaries that a minor could contract for. Friends of the orphan patient had taken the patient to the dentist twice previously and the guardian had paid the bill out of the minor's property without objection. The guardian was ordered to pay the bill.[457]

PECULIAR PEOPLE - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (England 1875-76)

In 1875, in England, John Robert Downes, a member of the Peculiar People who rejected medicine on religious grounds, was indicted for the manslaughter of his child, Charles Downes, age 2, by neglecting to provide proper necessaries and medical attention. He was tried in Central Criminal Court on June 9, 1875, before Mr. Justice Blackburn. George Hurry who had been released in 1872 after stating he would abide by the law testified that he was one of the elders of the Peculiar People called to pray for Charles. Mr. Hurry testified that the sect called in medical aid in cases of smallpox or any other contagious disease in conformity with the ruling of Mr. Justice Byles. Mr. Justice Blackburn instructed the jury that they should find the defendant guilty of manslaughter if he neglected to procure medical aid for the helpless infant when it was reasonable to do so and he had the ability and the death was caused by such neglect. The jury found him guilty. The judge asked the jury to also decide whether the defendant had a bona fide belief that medical advice was not required and that he believed that it was wrong to call medical aid. The jury answered these two questions in the affirmative. The judge deferred the sentence of the defendant and released him on bail, while the appellate court reviewed the case.[458]

On November 13, 1875, the Court for the Consideration of Crown Cases Reserved reviewed the conviction because of the conflicting decisions of Mr. Justice Byles and Mr. Justice Blackburn and Baron Pigott. The Court affirmed the conviction based on a recent statute that made it an offense for a parent to

[456] *Rogers v. Turner*, 59 Mo. 116 (Feb. 1875)
[457] *Strong v. Foote*, 42 Conn. 203 (Apr. 1875)
[458] *Central Criminal Court*, TIMES (London), June 8, 1875, 11; *Central Criminal Court*, TIMES (London), June 10, 1875, 11; TIMES (London), June 11, 1875, 9 [commentary arguing in favor of upholding conviction]

willfully neglect to provide medical aid to a child under age 14 whereby the health of the child is seriously injured.[459]

On September 21, 1876, Mr. Downes was tried in Central Criminal Court before Mr. Justice Field for the death of his 13-month-old daughter due to failure to provide medical care. The physician who performed the post mortem testified that the child had died form scarlet fever and disease of the kidneys and that these conditions would have been amenable to medical treatment. It was noted that Mr. Downes had promised the judge at the prior trial that he would abide by the law. The jury convicted him. The judge sentenced him to three months imprisonment without hard labor.[460]

In 1875 in England, there was another prosecution of a member of the Peculiar People for refusal to provide medical care to his children. Isaiah Payne was charged with neglect for not calling in medical aid for two children with fever, one of whom died. He was released on bond of £ 5 to come up for judgment when called by the magistrates. No report has been found of being called. [461]

In 1876, Frederick Watts, another member of the Peculiar People, was indicted for manslaughter for the death of his child Emily by neglecting to provide necessary medical attendance. The jury acquitted Watts.[462]

ANESTHESIA (1875-1877)

In 1875, in Cambridge, England, an inquest was held in the death of Mrs. Ann Shaw during surgery to remove an eye. She had asked or chloroform and died under its influence. The coroner's jury found that the chloroform had been administered carefully and properly.[463]

In 1875 in England, an inquest was held into a death from chloroform administered to permit reducing a dislocated arm. The deceased had consented to the chloroform. The jury exonerated the doctors.[464]

In 1875 an inquest was held into a death from use of chloroform in conjunction with reduction of a dislocated shoulder joint. "The patient took chloroform at his own request."[465]

In 1875 in Greenwich, England, an inquest was held into the death of Robert Summers at the Seaman's Hospital. He died from chloroform administered with his consent for an operation to remove dead bone form his leg. The jury exonerated the doctors.[466]

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[459] *Queen v Downes*, 1 Q.B.D. 25, 13 Cox. C.C. 111, 33 L.T.R. 675 (1875) [conviction for manslaughter sustained]; *Court for the Consideration of Crown Cases Reserved*, TIMES (London), Nov. 15, 1875, 11

[460] *Central Criminal Court,* TIMES (London), Sept. 22, 1876, 11

[461] *Peculiar people,* BRITISH MEDICAL JOURNAL, ii:437 (Oct. 2, 1875)

[462] *The peculiar people again,* BRITISH MEDICAL JOURNAL, i:173 (Feb. 5, 1876); STAFFORDSHIRE SENTINEL, Mar. 25, 1876

[463] TIMES (London), July 20, 1875, 5

[464] *Death from chloroform,* MEDICAL TIMES AND GAZETTE, ii:428 (Oct. 9, 1875)

[465] *Another death from chloroform*, MEDICAL PRESS AND CIRCULAR, 305 (Oct. 13, 1875)

[466] *The Week,* MEDICAL TIMES AND GAZETTE, ii:447, 448 (Oct.16, 1875)

In 1876 in St. Louis, Missouri, an inquest was held into the death of John McCormack who died at the City Hospital under the influence of chloroform. McCormack had insisted on chloroform. The jury exonerated the doctors.[467]

In 1877 in England, an inquest was held into the death of George Morley Harrison which occurred when he was given laughing gas at is request in preparation for extraction of teeth by a dentist. The jury exonerated the dentist.[468]

PARENTAL REFUSAL OF AMPUTATION (Ireland 1875)

In 1875, a child, William Ormond, died at the Jervis Street Hospital in Dublin, Ireland, after the father refused to permit an amputation. The doctor had consulted with a magistrate seeking authority to amputate. The magistrate said that he could not overrule the father. Other operations were performed with the consent of the father. The coroner's jury found the death due to the fall that had caused the injury and added that he had been treated with skill and care.[469]

INQUEST - DUNN - DISPUTE OVER WHETHER PARENTS CONSENTED TO FATAL PROCEDURE (Ohio 1875)

In 1875, in Cincinnati, Ohio, Dr. C.S. Muscroft was accused of having performed a lithotomy on John Dunn's son without parental consent that resulted in his death. Sister Edmonda of the hospital testified that the mother told her that she and her husband consented. The body was exhumed for an autopsy. The coroner's jury exonerated the doctor of all blame.[470]

HOENER V. KOCH & BEEBE (Illinois 1875)

In 1875 in Illinois, Peter Hoener sued Drs. Koch and Beebe for alleged malpractice. Dr. Koch advised an operation for hernia and told Hoener there was danger. Dr. Koch declined to perform the surgery. He advised that Dr. Zimmerman perform the operation. The patient refused. Dr. Hoener then suggested Dr. Beebe from Chicago and was authorized to send for him. Dr. Beebe performed the operation. Hoener was initially satisfied and returned to work contrary to instructions not to do so. Beebe did not defend the case. The jury ruled in favor of Koch. In 1877 on appeal the judgment was reversed based

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[467] *Deadly chloroform,* ST. LOUIS GLOBE-DEMOCRAT, Mar. 24, 1876, 4; *Deadly chloroform,* ST. LOUIS GLOBE-DEMOCRAT, Mar. 25, 1876, 8

[468] *Inquests,* TIMES (London), March 30, 1877, 3; MEDICAL AND SURGICAL REPORTER, 36:387 (Apr. 28, 1877)

[469] *Charge against Jervis-Street Hospital, Dublin,* MEDICAL TIMES AND GAZETTE, ii:473-474 (Oct. 23, 1875); *Charge against hospital officials*, FREEMAN'S JOURNAL AND DAILY COMMERCIAL ADVERTISER (London), Oct. 15, 1875, 7

[470] CINCINNATI DAILY GAZETTE (Ohio), Oct. 30, 1875, 4; *Alleged malpractice,* CINCINNATI DAILY GAZETTE (Ohio), Oct. 30, 1875, 2; *End of John Dunn Inquest – Dr. Muscroft exonerated,* CINCINNATI DAILY GAZETTE, Nov. 1, 1875, 3

on various evidentiary errors in the trial.[471] No indication of a follow-up trial has been found.

This case is included here as an example of the patient's role in selection of the surgeon

HAVERTY V. BASS - WHEN MUNICIPALITY CAN TAKE CUSTODY OF CHILD OVER PARENTAL OBJECTION WITHOUT WARRANT (Maine 1876)

On April 15, 1873, a police officer and city physician took custody of a child who was believed to be sick with small pox in order to take the child to a city hospital. They did this at the direction of the mayor and aldermen of Bangor, Maine. After a reasonable demand for entrance, they broke and entered the husband's house (which was fastened against the officers,) and took the child away from the mother. Since they did not have a warrant, the mother sued claiming trespass in that she was assaulted in taking the child from her arms. In 1876, the highest court of Maine ruled in *Haverty v. Bass* that the municipality could take the action without a warrant.[472]

GUARDIANSHIP FOR ABUSED CHILD (California 1876)

In 1876, the Society for the Prevention of Cruelty to Children in San Francisco, California, investigated case of cruelty to children by Mrs. Margaret O'Connell. Mrs. O'Connell was arrested for drunkenness and using vulgar language in Police Court. The Policeman took a child into custody and, since he was sick he was taken to a hospital, where he was diagnosed with typhoid fever. It was announced that a guardian would be appointed for the boy.[473]

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[471] *Heroic treatment of a desperate case*, GOSHEN TIMES (Ind), Oct. 15, 1874, 4 [favorable report of case); "*A Remarkable operation*," QUINCY DAILY HERALD (IL), Oct. 25, 1874, 2 [letter to the editor labeled "[Advertisement]" from Dr. William Byrd critiquing operation]; *That "remarkable operation" - Its results, &c.,* QUINCY DAILY HERALD (IL), Nov. 11, 1874, 4 [describing consent process; opinion of Dr. Byrd and others that first operation was unnecessary]; *Malpractice trial*, QUINCY DAILY WHIG, Oct. 30,1875, 4 [description of trial]; *Peter Hoener v John W Koch et al*, 84 Ill. 408 (June 1877)

[472] *Haverty v. Bass*, 66 Me. 71 (Apr. 18, 1876); *Notes of cases,* ALBANY LAW JOURNAL, 16:290-291 (Oct. 27, 1877)

[473] *A case of alleged cruelty to children,* DAILY EVENING BULLETIN (San Francisco, Cal), July 27, 1876; see also *Cruelty to children*, DAILY EVENING BULLETIN (San Francisco, Cal), May 3, 1880, 3; *Protection of children,* EVENING BULLETIN (San Francisco CA), Feb. 3, 1881, 1; *Protection of cruelty to children,* EVENING BULLETIN (San Francisco CA), Nov. 2, 1882, 2; *Children's protectors,* EVENING BULLETIN (San Francisco CA), Jan. 13, 1886, 3

MCDONALD V. MASSACHUSETTS GENERAL HOSPITAL - TREATMENT BY STUDENT OVER PATIENT OBJECTION (Massachusetts 1876)

In 1876, the highest court of Massachusetts ruled that a charitable hospital generally could not be held accountable for the acts of house surgeons and house pupils. The court ruled:

> If they had made suitable regulations, had selected proper persons to fill the position of surgeons, then, whether those persons neglected to perform their duty, or whether another person, as the house pupil, not selected for the office of surgeon, assumed without authority to act as such, and injury has thus resulted, the plaintiff has no remedy against the corporation.

The plaintiff had alleged that he had objected to having the house pupil treat his fractured leg, but that the pupil had proceeded to do so. The court did not reach this issue because it found charitable immunity.[474]

HATCH V. MUTUAL LIFE INS. CO - VOLUNTARY SUBMISSION TO ABORTION BARRED LIFE INSURANCE PAYMENT FOR RESULTING DEATH (Massachusetts 1876)

In 1876, the Supreme Court of Massachusetts ruled that a clause in a life insurance policy barring recovery for deaths in the consequences of unlawful acts barred payment when the insured had voluntarily submitted herself to an illegal operation for an abortion without justifiable medical reason.[475]

MELBOURNE HOSPITAL RULES - PATIENT CONSENT REQUIRED FOR IMPORTANT OPERATION (Australia 1876)

In 1876 there was an inquest in Melbourne, Australia, into the death of Robert Berth at Melbourne Hospital related to a lithotomy performed by Dr. Beaney. It was noted that Rule No. 7 of Melbourne Hospital was:

> No important operation in surgery shall be performed without the previous consent of the patient (if in a position to give it), nor unless sanctioned on a consultation, by two at least of the surgeons, except in cases or [sic] emergency….[476]

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[474] *McDonald v. Massachusetts General Hospital*, 120 Mass. 432 (June 26, 1876). For a nineteenth century analysis of charitable immunity, see *Respondeat superior in the case of charitable corporations*, HARVARD LAW REVIEW, 9:541- 543 (1896)

[475] *Hatch v. Mutual Life Ins. Co.,* 120 Mass. 550 (Sep. 21, 1876)

[476] LITHOTOMY: ITS SUCCESSES AND ITS DANGERS BEING A VERBATIM REPORT FROM SHORTHAND NOTES, OF AN INQUEST HELD BEFORE THE CITY CORONER (Melbourne: F.F. Balliere 1876), 64 [hereinafter *Lithotomy 1876*]. The State Library of NSW is reported to have a copy of the Melbourne Hospital

A witness discussed this rule:

> Your attention has been called to a rule of the Hospital. Now let us see what that rule really says. It states that
>
> "No important operation in surgery"—
>
> Dr. Barker says this was not an important operation—that he can do it in three minutes on an average—
>
> "shall be performed without the previous consent of the patient, if in a position to give it"—
>
> Well, this man was sent to the Hospital for the very purpose of being operated upon for stone—
>
> "nor unless sanctioned, on a consultation, by two at least of the surgeons"—
>
> How on earth was that sanction to be obtained in this case? —
>
> "except in cases of emergency."
>
> Why the man was sent to Melbourne to be operated upon for stone. He was crawling about the Hospital grounds, bent double with the awful pain which he was suffering, passing bloody matter through the penis, and unable to void urine except in small gushes. It was stopped by this enormous mass of stone in his bladder. Was this no case of emergency? The poor wretch was suffering from retention of the urine, and his kidneys and other delicate parts were effected. Surely it was a case of emergency to relieve a man from such a state of suffering as this. But suppose that Dr. Beaney did not hold a consultation. Suppose that he broke this rule. I believe that nearly all the rules of the Hospital are only observed in the breaking of them, as a general thing. If you look at the proceedings of the Hospital Committee, you will see that every week new rules are being proposed, observations are made on the breaking of rules, cases are brought before the committee of young gentlemen at the Hospital not keeping the prescribed hours and so forth, and censures innumerable are passed. Admitting, however, for the sake of argument, that Dr. Beaney did break the rule as to consultations, is that a reason why you should find him guilty of manslaughter? The thing is preposterous. It may be a proper subject for investigation by the Committee, or for censure by them; but it is ridiculous that it should be made a reason for the holding of this inquest.[477]

QUEEN V. FLATTERY - CONVICTION FOR RAPE OF PATIENT (England 1876)

In 1876, Lavinia Thompson, age 19, went to John Flattery for medical treatment. He told her she needed a surgical operation. She submitted believing

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bye laws and rules (1876). The case is also reported in *Inquest upon the body of Robert Berth*, AGE (Melbourne), Dec. 31, 1875, 3

[477] *Lithotomy 1876*, at 90-91

he was medically treating her. Instead he had intercourse with her. He was convicted of rape. In 1877, the appellate court upheld the conviction.

> I think this conviction ought to be affirmed. Mr. Lockwood has ably argued that there was consent on the part of the prosecutrix, and therefore no rape. But, on the case as stated, it is plain that the girl only submitted to the plaintiff's touching her person in consequence of the fraud and false pretences of the prisoner, and that the only thing she consented to was the performance of a surgical operation. Up to the time when she and the prisoner went into the room alone, it is clearly found on the case that the only thing contemplated either by the girl or her mother was the operation which had been advised; sexual connection was never thought of by either of them. And after she was in the room alone with the prisoner, what the case expressly states is that the girl made but feeble resistance, believing that she was being treated medically, and that what was taking place was a surgical operation.[478]

EXAMINATION OF FEMALES WITHOUT CONSENT (England 1877-1878)

In 1877-1878, there were three cases involving examination of female inmates and prisoners without consent. Advocacy groups pursued each of these cases.

In 1877, in England, a physician, Dr. Jobson, was sued for examining a female prisoner, Anne Agnew, pursuant to a magistrate's order. The court ruled that a magistrate had no right to order examination of the person of a prisoner. In the absence of prisoner consent, it was an assault for a physician, pursuant to such an order, to examine a female prisoner charged with concealing birth of an illegitimate child. The jury found no consent and awarded damages of £ 50. The award was upheld on review. The case was pursued by the Association for the Defence of Personal Rights of Women and Children.[479]

In 1878, in England, Bridget Ward, inmate of the Bolton Union Workhouse, sued Edward Sergeant, house surgeon for the Bolton Infirmary, for allegedly examining her without her consent. The doctor claimed tacit consent. He also testified:

> In cross-examination Mr. Sergeant said he was aware that it was illegal to examine a woman against her will. On being then asked what precautions

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[478] *Queen v. Flattery*, 2 QB D 410 (Feb. 3, 1877); *Crown Court,* TIMES (London), Dec. 25, 1876, 9 [*abstracted in* 16 ALB. L.J.152 (1877-78)]; Charles Meymott Tidy, LEGAL MEDICINE (London: Smith, Elder &Co. 1883), Part II, at 192 (citing BRIT. MED. JOUR., Feb. 10. 1877, p.181; Sir J. Stephens, DIG. CRIM. LAW, p. 171, note 1)

[479] *The case of Anne Agnew. The personal rights of women,* NORTHERN ECHO (Darlington), Feb. 24, 1877; *Agnew v. Jobson and others*, BRITISH MEDICAL JOURNAL, 1:336-337 (March 17, 1877); *Agnew v. Jobson*, 13 Cox 625 (Ct. Cm. Pleas June 26, 1877); Frederick W. Lowndes*, Medico-legal responsibilities: the examinations of suspected persons*, LIVERPOOL MEDICO-CHIRURGICAL JOURNAL, 10(18):146, at 151-153 (Jan. 1890)

> he had taken to let the woman know that she need not give consent unless she liked, he said he had not taken any beyond explaining that an examination was necessary.

The jury ruled in favor of the defendant. The Vigilance Society for the Protection of Women and Children (or the Vigilance Society for Protecting the Personal Rights of Women) pursued the suit.[480]

In 1878, in Leeds, England, Mary Harrison, a domestic servant, sued a police surgeon, George Heald, for assault for examining her against her will in a police cell to determine whether she had given birth. The jury awarded her £ 25. The Vigilance Association for the Defence of Personal Rights pursued the case.[481]

ACQUITTAL FOR ASSAULT OF PATIENT (England 1877)

In 1877 in Birmingham, England, George Howard, surgeon's assistant, was charged with felonious assault on a patient, Fanny Harriet Child, while under the effect of chloroform. He was denied bail. Two months later at trial he was acquitted.[482]

GRAMM V. BOENER - PATIENT CANNOT COMPLAIN ABOUT OPERATION THAT SURGEON ADVISES AGAINST AND PATIENT INSISTS ON (Indiana 1877)

In 1877, in the malpractice case of *Gramm v. Boener*, the Indiana Supreme Court stated:

> It seems to us to be the duty of a surgeon, when called upon to perform some surgical operation, to advise against it, if, in his opinion, it is unnecessary, unreasonable, or will result injuriously to the patient. The patient is entitled to the benefit of his judgment, whether asked for or not. If the surgeon, when called upon, should proceed to the performance of the operation, without expressing any opinion as to its necessity or propriety, the patient would have a right to presume, that, in the opinion of the surgeon, the operation was proper.
> But if a surgeon, when thus called upon, advises the patient, who is of mature years and of sound mind, that the operation is unnecessary and improper, in short advises against the performance, and the patient still insists upon the performance of the operation, in compliance with which the surgeon performs it, we do not see upon what principle the surgeon

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[480] *Extraordinary action against a medical officer*, MANCHESTER TIMES, Jan. 26, 1878; *Manchester,* MEDICAL TIMES AND GAZETTE, i:100-101 (Jan. 26, 1878)
[481] *Action for assault against a Leeds police surgeon – damages £ 25*, LEEDS MERCURY, May 7, 1878; *Illegal surgical examinations*, BRITISH MEDICAL JOURNAL, 1:561-562 (Apr. 12, 1879)
[482] *Charge of assault against a surgeon's assistant,* BRITISH MEDICAL JOURNAL, ii:429-430 (Sept. 22, 1877); *London letter,* PHILADELPHIA MEDICAL TIMES, 8(6):136 (Dec. 22, 1877); Allan Hamilton, A MANUAL OF MEDICAL JURISPRUDENCE (1883), 192

can be held responsible to the patient for damages, on the ground that the operation was improper and injurious. In such case, the patient relies upon his own judgment, and not upon that of the surgeon, as to the propriety of the operation; and he can not [sic] complain of an operation performed at his own instance and upon his own judgment, and not upon that of the surgeon.[483]

INQUEST - WALTER WILLIAMS - FAILURE TO INFORM OF RISKS OF DONATING BLOOD (England 1877)

In 1877, in England, Walter Williams died a few days after some of his blood was transfused to another with his consent. The coroner's jury returned a verdict of "death by misadventure," and they added the physician had made insufficient inquiry as to the deceased's habits and condition, and that Williams "did not receive sufficient caution as to the risk he was running."[484]

RAOUL V. NEWMAN - COLLECTION SUIT - RESPONSIBILITY FOR COST OF EMERGENCY SERVICES (Georgia 1877)

Kit Rutland, age 13 or 14, was severely injured on the track of a railroad warehouse in Macon, Georgia. William Raoul was the station agent. He called for a physician to treat the boy. Dr. E. M. Newman responded and provided services. When the railroad company refused to pay his bill, Dr. Newman sued Mr. Raoul for the $425 bill. The jury ruled in favor of the doctor. In 1877, on appeal, the Georgia Supreme Court reversed and ordered a new trial because the jury had not been properly instructed. The court noted that the station agent might have been acting for the father, so that the father would be liable for the cost. The court stated:

> If, in the presence of a great and overwhelming calamity to a human being, the defendant was merely acting for the absent father, and the plaintiff so understood it, the father would be liable for any necessary services rendered by the physician, and the defendant would not be liable for anything done by the physician after he became enlightened as to the true situation. [485]

PECULIAR PEOPLE - DOWSETT - PARENTAL REFUSAL OF MEDICAL TREATMENT (England 1877)

In September 1877, an inquest was held in Plaistow by Mr. C.C. Lewis concerning the death of George Dowsett, the son of parents who were members of the Peculiar People. The parents had not called medical assistance for his

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[483] *Gramm v. Boener*, 56 Ind. 497, 502 (May 1877)
[484] *Death from blood-transfusion*, BRITISH MEDICAL JOURNAL, 658 (May 26, 1877); *An operation which resulted in death*, N. Y. TIMES, June 10, 1877, 5
[485] *Raoul v. Newman*, 59 Ga. 408 (Aug. 1877)

diarrhea and congestion of the brain. The jury returned a verdict of death by natural causes.[486]

ST. LOUIS HOSPITAL ORDINANCES - PATIENT CONSENT REQUIRED FOR SURGICAL OPERATIONS (Missouri 1877)

In 1877, the Board of Heath of St. Louis adopted an ordinance providing for the governance of the city hospitals. It included in the rules for the City Hospital:

> Sec. 9. No patient shall be discharged for refusing to accept any operation not decided upon by the Superintendent; and no surgical operation shall be undertaken without the consent of the patient, if he be sane and responsible or able to go away; but if, in the judgment of the Superintendent, or — in capital operations — in his judgment and that of a Consulting Physician or medical member of the Board of Health, such operation be absolutely necessary to the patient's safety and welfare, or reasonably speedy recovery, or removal from the Hospital, such patient may be discharged from the Hospital, by the Superintendent, on refusal to have the operation performed; and it may be performed, if he be not sane, responsible, or able to go away. No patient shall be removed from the Hospital for any clinical purpose.

A similar rule was included in the patient rules for the City Female Hospital:

> SEC. 10. No patient shall be discharged for refusing to accept any operation not decided upon by the Superintendent; and no surgical operation shall be undertaken without the consent of the patient, if she be sane and responsible or able to get away; but if, in the judgment of the Superintendent, or in capital operations, in his judgment, and that of a Consulting Physician or Medical member of the Board of Health, such operation be decided absolutely necessary to the patient's safety and welfare, or reasonably speedy recovery or removal from the Hospital, such patient may be discharged from the Hospital by the Superintendent, on refusal to have the operation performed, and it may be performed, if she be not sane responsible or able to get away, No patient shall be removed from the Hospital for any clinical purpose.[487]

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[486] *Inquests*, TIMES (London), Sept. 7, 1877, 8; *Peculiar people,* BRITISH MEDICAL JOURNAL, ii:387 (Sept. 15, 1877)

[487] LAWS, ORDINANCES, RULES AND REGULATIONS FOR THE GOVERNANCE OF THE HEALTH DEPARTMENT OF THE CITY OF ST. LOUIS 1878 (St. Louis, MO.: Max Olshausen 1878), *No. 10,366 – An Ordinance providing for the Government and Management of the Hospitals and Morgue*, 64, at 133

RULES OF COLUMBIA HOSPITAL FOR WOMEN AND LYING-IN ASYLUM (Washington, D.C. 1877)

In 1866 Congress created the Columbia Hospital for Woman and Lying-in Asylum. By-laws and Regulations, as reported in 1877, included:

Article XI – Patients.

5. No patient shall, against her will, or without her consent, be taken to the lecture-room as a subject for clinical instruction.[488]

DISCHARGE FOR REFUSING TO PERMIT STUDENT TO PERFORM SURGERY (St. Louis 1877)

In 1877, Charles Clayton was admitted to City Hospital in St. Louis with heart disease contracted from yellow fever while serving in the marines in Florida. He was advised that he needed surgery. He consented on the condition that the surgery was performed by one of the professors advising surgery. Although thus was agreed to, he discovered that a student doctor was going to perform the surgery. When the patient objected, he was directed to leave the hospital.[489]

PECULIAR PEOPLE - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (England 1878)

In January 1878, Coroner Wybrants of Somerset held an inquest into the death of a child named Heathman due the failure to obtain medical attendance. The jury returned a verdict of death from natural causes.[490]

In January 1878, Coroner C.C. Lewis held an inquest in South Essex into the death of a child of parents who were members of the Peculiar People. The child had developed inflammation of the lungs but no medical attendance had been called. The jury expressed hope that the father would be prosecuted.[491]

FARRELL V. MCLAREN - COLLECTION SUIT - IMPLIED PROMISE TO PAY WHEN PERSON WITH MEANS ASSENTS TO OPERATION (Nova Scotia, Canada 1878)

In Nova Scotia, Canada, surgeon Farrell performed an operation upon Mr. McLaren. Dr. Farrell sued to collect payment for his services from the patient's

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[488] *Report of the Secretary of the Interior*, House of Representatives, 45th Cong, 2d Sess., Ex. Doc 1, Part 5, 877 (1877)
[489] *A doctor's decision*, ST. LOUIS GLOBE DEMOCRAT, Oct. 16, 1877, 8
[490] *Inquests,* TIMES (London), Jan. 11, 1878, 11
[491] *Inquests,* TIMES (London), Jan. 11, 1878, 11; *The "Peculiar People" again,* MEDICAL PRESS AND CIRCULAR (London), 75(2023):79 (Jan. 23, 1878)

estate. The administratrix of McLaren's estate claimed the surgery in the eleemosynary City Hospital should be for free. In 1878, the court ruled that there was an implied promise to pay since the patient had assented to have the operation performed by Dr. Farrell and had the means to pay.[492]

DISCUSSION OF CONSENT AT STATE LEGISLATIVE HEARING ON MAINE GENERAL HOSPITAL (1878)

In February 1878 the Finance Committee of the Maine Legislature held a hearing concerning Maine General Hospital. It is curious that one of the issues was consent. The BOSTON DAILY GLOBE reported:

> [Dr. Brickett] had heard that a man had his leg cut off without his knowledge; that another had had his bladder cut open for stone, when none was there, and had died in consequence of it; … To this it was replied that the man who had his leg cut off had a compound fracture, but never complained that the operation was *performed without his knowledge*; that the operation on the man who had his bladder cut open was for chronic inflammation, and not for stone. Other explanations were made, tending to exonerate the surgical and medical staff from blame.[493]

ANESTHESIA (1878)

In 1878, in Philadelphia, Mrs. Neely died in the dentist's chair of H.G. Winslow. She had consented to use of chloroform. The coroner's jury found that the dentist was guilty of criminal ignorance for using the chloroform without having made an examination of the patient. The coroner censured the dentist and committed him to prison to await the grand jury. The grand jury did not indict.[494]

In 1878 an inquest was held into the death of Michael Hannigan at Sheffield Infirmary from chloroform. Hannigan had consented to the chloroform. The medical men were exonerated from blame.[495]

HERGARTY V. SHINE - INFECTION WITH VENEREAL DISEASE - ALLEGED FRAUDULENT CONCEALMENT DURING CONSENSUAL SEXUAL RELATIONS (Ireland 1878)

In 1878, in Ireland, a woman sued the man she had been living with because he had concealed that he had venereal disease and during consensual

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[492] *Farrell v. McLaren*, 3 Russell & Chesley 75, 12 Nova Scotia 75 (Jan 1878)
[493] *New England - The investigation of the Maine General Hospital*, BOSTON DAILY GLOBE, Feb. 11, 1878, 2
[494] *A fatal anaesthetic,* PHILADELPHIA INQUIRER, Mar. 23, 1878, 2; *The use of chloroform,* NORTH AMERICAN (Philadelphia), Apr. 3, 1878, 1; *Death from chloroform,* MILWAUKEE SENTINEL, Apr. 4, 1878, 2; Lawrence Turnbull, THE ADVANTAGES AND ACCIDENTS OF ARTIFICIAL ANAESTHESIA (1879), 98-101
[495] LONDON EAST END NEWS, Oct. 12, 1878, 2

sexual relations he had infected her with the disease. She claimed fraudulent concealment. The jury awarded her £450 finding her consent was no defense because he had concealed the fact of his being diseased. The High Court of Justice, Queen's Bench Division, reversed. Finding that, since the whole case arose out of an immoral consideration, no suit could be brought. It further noted that the fact of concealment of the disease did not render the sexual intercourse an assault. The Irish Court of Appeal agreed the action was not sustainable.[496]

PECULIAR PEOPLE - MISELBROOK - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (England 1878)

In June 1878, an inquest was held into the death of George Miselbrook, aged three-months and three-weeks, the child of Charles and Jane Miselbrook. They were members of the Peculiar People and had not sought medical attention for the child. The child had died of whooping cough. The coroner's jury returned a verdict of manslaughter. Mr. Miselbrook was tried at the Central Criminal Court. When the medical testimony was that medical aid might not have saved the child, the judge stopped the case and the jury acquitted the defendant. The judge warned the defendant against the peculiar notions of the sect.[497]

UNAUTHORIZED TAKING OF SKIN FOR GRAFT (Scotland 1878)

In 1878 it was reported:

> A nurse in a Glasgow hospital has had to pay £5 damages and costs for taking, without consent of the boy's parents, some healthy flesh from the arm of a juvenile patient, in order to graft it upon the body of another.[498]

The *Pall Mall Gazette* commented:

> The process of grafting flesh is no doubt interesting, and often useful; but there can hardly be two opinions that an operation of this nature should not be performed without the full consent of the person from whose body the flesh is to be taken. The same rule holds good as regards transfusion of blood.[499]

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[496] *Hergarty v. Shine*, 14 Cox 124 (Q.B. June 1878), appeal dismissed, (Ct. App. Dec. 1878); *Actions arising ex turpi causa - constructive assault*, CENTRAL LAW JOURNAL, 7:291-295 (1878); *Constructive assault – action for infecting with venereal disease*, CENTRAL LAW JOURNAL, 8(6):111-115 (Feb. 7, 1879).

[497] *Inquests,* TIMES (London), June 10, 1878, 11; *Inquests,* TIMES (London), June 13, 1878, 5; *Central Criminal Court,* TIMES (London), June 28, 1878, 12

[498] MEDICAL AND SURGICAL REPORTER, 39:306 (Oct. 5, 1878); AMERICAN MEDICAL BI-WEEKLY (Louisville KY), 9(8):179 (Oct. 12, 1878); *A barbarous "operation*," SYDNEY MORNING HERALD (Australia), Dec. 20, 1878, 5

[499] PALL MALL GAZETTE (London), Sep. 7, 1878, 4

PARENTAL REFUSAL OF MEDICAL TREATMENT - SOCIETY FOR PREVENTION OF CRUELTY TO CHILDREN (Massachusetts 1878)

In 1878, in Boston, parents refused to permit an operation on their sick daughter, age 3. She needed to have her chest tapped to relieve water on the chest. The doctor contacted the president of the state board of health. The combined efforts of these two and the Society for Prevention of Cruelty to Children, two sisters of charity, and the parish priest were unsuccessful, until the agent of the SPCC explained to the parents that when the child died the parents would be penalized for their neglect. The parents then yielded and the operation was performed and her full recovery was expected. [500] Out-of-state newspapers reported that the SPCC took forcible possession of the child.[501] However, it was not until the following year that the SPCC was granted statutory powers.

> Section 1. It shall be lawful for the probate court of any county, when it appears that any minor resident therein under the age of fourteen years is without a legally appointed guardian, and that such minor is entirely abandoned, or treated with gross and habitual cruelty, by the parent or other person having the care or custody of such minor, or that such minor is illegally deprived of liberty, to appoint as guardian of such minor "The Massachusetts Society for the Prevention of Cruelty to Children" for such period as seems fit to the court; and the society shall thereupon become entitled to the custody of such minor child to the exclusion of any other person, but shall not be entitled to the minor's goods and chattels. Said court may at any time, for good cause, revoke their decree. [502]

VAN DEUSEN V. NEWCOMER - FALSE IMPRISONMENT IN ASYLUM (Michigan 1879)

In 1879, the Michigan Supreme Court addressed a suit by a patient, Mrs. Newcomer, against the superintendent of an insane asylum, Edwin Van Deusen, for false imprisonment. The court stated:

> There was an abundance of testimony introduced on the trial tending to show that previous to, at the time she was taken to the asylum, and while there, she was insane, but was not by any one considered dangerous, either to herself or third persons. There was also abundant testimony introduced tending to show that she was taken to the asylum at the request of her friends, and that she remained there with their full knowledge, consent and approval until discharged as convalescent and taken home by them. There was also testimony in the case tending to show that at the time she was taken there she was not and had not been

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[500] *Cruelty to children,* BOSTON DAILY ADVERTISER, Nov. 4, 1878

[501] ST. LOUIS GLOBE-DEMOCRAT, Nov. 12, 1878, 2

[502] ACTS AND RESOLVES PASSED BY THE GENERAL COURT OF MASSACHUSETTS (1879), *Chapter 179 - An Act Concerning The Care Of Abandoned And Abused Children* (Approved Apr. 1, 1879)

> insane; that her friends "thought she was in a weak, poor state, and very nervous;" that they supposed she would have that rest and quiet there which she so much needed; that there was a department at the asylum where such patients had all sorts of recreation and amusements, and would receive medical treatment, and that under such a belief they consented that she be taken there….
>
> It seems quite clear to me that these several provisions recognize the right of the friends and relatives of an insane person to request his reception at and treatment in the asylum, and that no other, farther or different process is required, nor is there anything indicating that only the dangerously insane can be so received….
>
> It may be of the utmost importance, in many cases, that speedy aid should be afforded, even although no dangerous symptoms are manifested, and where delays would but aggravate and render more slow and difficult a recovery. In a very large majority of the cases the natural love and affection of the friends and relatives of the person so afflicted, and their watchful and jealous care of all unnecessary restraint, will prove a sufficient protection against abuse. There may be cases where no such love, affection or watchful care will exist, and where for sordid or other unworthy motives, parties may be deprived of their liberty under a pretense of insanity. This may be so, but whether where relatives thus act upon their own responsibility they do not act at their peril may be a question of very great importance, but which does not arise, and therefore will not be passed upon in this case….

The jury had found the superintendent liable. The court, after discussing the limited liability of the superintendent, reversed and ordered a new trial. [503]

REMOVAL TO SMALL POX HOSPITAL - SUIT AGAINST CITY (New York 1871-1879)

In May 1871, Bridget Tormey was forcibly removed from her home by Board of Health officers and placed in the Small-Pox Hospital. The officers alleged she had smallpox, but it was maintained that they had not examined her prior to removal and that they had refused to permit her examination by a private physician prior to removal. She actually had only measles. She sued the city. The city's first attempt to have the case dismissed was argued in April 1874. One of the grounds on which the City tried to avoid liability was by claiming the removal was the responsibility of the Board of Health and, thus, a responsibility of the state. The court rejected this defense. The city appealed. In January 1878 a New York appellate court ruled that the City shared responsibility and could be sued. In March 1879, the trial started, but the judge dismissed the case on the ground the suit should have been brought against the Board of Health. It is not clear how

[503] *Van Deusen v. Newcomer*, 40 Mich. 90 (Jan. 14, 1879)

the trial court was apparently able to disregard the appellate court ruling. No record of further appeal has been found.[504]

ANESTHESIA (1879)

In 1879 an inquest was held into the death of Mary Jane Edgington at Guy's Hospital under the influence of chloroform. A London newspaper reported that Edgington's husband testified that she had an aversion to chloroform and that it had been administered against her will. The jury exonerated the medical personnel.[505] The *British Medical Journal* report of the case added:

> With reference to the statement which, according to the *Times*, the patient made to her husband, that chloroform had been given to her against her will, it should be remembered that, on admission, and on the morning after she readily assented to the administration of anaesthetics, and also that she was delirious for some time before her death.[506]

LABRIE V. MANCHESTER - COLLECTION SUIT (New Hampshire 1879)

In 1879, the New Hampshire Supreme Court decided the case of *Labrie v. Manchester*. The health officers employed Labrie to take care of members of her father's family who had been confined in the pest house by order of the health officers without their own or their father's consent. Labrie sued to be paid for her services. The court ordered that she be paid.[507]

RUTHS V. REULING - ALLEGED OPERATION WITHOUT CONSENT (Maryland 1879)

In 1879, in Maryland, Mrs. Ruths sued Dr. Reuling for operating on both her eyes for cataract without her consent and with a bad result. The court ruled in the defendant's favor.[508]

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[504] *Small-pox patients: The city's liability for errors of the Board of Health - a curious case,* N.Y. TIMES, Apr. 18, 1874, 4; *Mistaken for a small-pox patient*, N.Y. TIMES, Oct. 17, 1877, 2; *Tormey v The Mayor*, 19 Hun 542 (N.Y. Sup. Ct. 1st Dept. Jan. 1878); *Where the city is liable,* N.Y. TIMES, Jan. 5, 1878, 3; *Mrs. Tormey's suit against the city*, N.Y. TIMES, Mar. 18, 1879, 5; *New-York,* N.Y. TIMES, Mar. 19, 1879, 10.

[505] ILLUSTRATED POLICE NEWS (London), Mar. 29, 1879.

[506] BRITISH MEDICAL JOURNAL, i:562, at 563 (April 12, 1879)

[507] *Labrie v. Manchester*, 59 N.H. 120 (June 1879)

[508] *Report of the proceedings in the case of Ruths vs. Reuling*, MEDICAL RECORD, 18:187 (Aug. 14, 1880); *The Reuling versus Chisolm Trial*, VIRGINIA MEDICAL MONTHLY, 7(4):346-347 (July 1880)

PROCTOR V. MANHATTAN EYE AND EAR HOSPITAL - OPERATION EXCEEDED SCOPE OF CONSENT - CHARITABLE IMMUNITY (New York 1879)

In New York City, Mrs. Mary Ann Proctor consented to surgery on her right eye and directed the left eye not be touched. Surgeons at the Manhattan Eye & Ear Hospital operated on both eyes leaving her blind. In 1879 she sued the hospital. The hospital claimed that she had consented. The issue was not reached because the case was dismissed based on the charitable immunity of the hospital.[509]

ASSAULT CHARGE BY JENNIE RIGNEY (New York 1879)

Not all complaints of assault are truthful. In September 1879, Miss Jennie Rigney filed two complaints against dentist, George W. Weld, alleging that he had sexually assaulted her while under anesthesia for a dental procedure and had then procured "criminal malpractice" (an abortion) on her. Miss Rigney and Dr. Weld lived in the same boarding house and Dr. Weld's office was on the first floor of the house. Miss Rigney also charged Dr. Ernest D. Pape with performing the criminal malpractice. The initial newspaper article stated that she "impressed all who heard her with the truthfulness of her story." The physicians were arrested. Dr. Pape was released on bail the next day.

A few days later, the employer of Miss Rigney, Mrs. Tabitha L. Stephenson, testified that she had entered the dental office after the dental procedure was completed. The window blinds were open and the door was unlocked. Miss Rigney did not complain then or later that she had been assaulted. Miss Rigney's sickness at her house had been due to a fall from a stepladder, not criminal malpractice. Mrs. Stephenson had fired Miss Rigney for stealing. She believed Miss Rigney to be untruthful and not to be trusted. Dr. Weld was released on bail. In October 1879, the grand jury dismissed the complaint against both physicians.

In November 1880, Miss Rigney was sentenced to three and a half years in the penitentiary for larceny from her employer. She pled guilty to the larceny in exchange for the dropping of the charge that she had administered morphine to her employer during her illness. In a bizarre follow-up of identity theft, in 1882 and 1883, while Miss Rigney was still in prison, her name was used by another girl who was involved in numerous thefts.[510]

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[509] *Suing for loss of sight,* N.Y. TIMES, May 9, 1879, 3; *Dismissing a suit for damages,* N.Y. TIMES, May 15, 1879, 2; *New York Supreme Court,* MEDICAL RECORD, 15:599-600 (June 21, 1879); *Liabilities of hospitals*, BRITISH MEDICAL JOURNAL, i:409 (Mar. 13, 1880)

[510] *Jennie Rigney's blasted life*, N.Y. TIMES, Sept. 14, 1879, 12; *Miss Jennie Rigney's charges,* N.Y. TIMES, Sept. 15, 1879, 8; *Jennie Rigney's complaint,* N.Y. TIMES, Sept. 18, 1879, 3; *Dr. Weld released on bail,* N.Y. TIMES, Sept. 20, 1879, 3; *City and suburban news.* N.Y. TIMES, Oct. 25, 1879, 8; *Jennie Rigney sentenced,* N.Y. TIMES, Nov. 11, 5, 1880, 8; *A female thief's any crimes,* N.Y. TIMES, Nov. 6, 1882, 8; *Story of a girl thief,* NEWARK DAILY ADVOCATE (Ohio), Nov. 30, 1883, 1

POTTER V. WARNER - NONCOMPLIANCE AS CONTRIBUTORY NEGLIGENCE (Pennsylvania 1879)

In 1872, John Warner, age 8, was run over by a coal car when he was playing by the track of a coal company. His leg was broken. Dr. J.D. Potter was called to attend to the injury. A malpractice suit was brought against Dr. Potter for his treatment. The jury gave a verdict of $500 for the plaintiff. In 1879, the Pennsylvania Supreme Court reversed and ordered a new trial.

The court noted:

> It is, however, the duty of the patient to submit to the treatment prescribed, and to follow the directions given, provided they be such as a physician of ordinary skill would adopt or sanction. ***
>
> If they find the parents of the boy were in charge of and nursed him during his sickness, and that they did not obey the directions of the plaintiff in error in regard to the treatment and care of their son during such time, but disregarded the same and thereby contributed to the several injuries of which he complains, he cannot recover therefor.

Thus, the jury should have been instructed that the physician could not be liable for injuries that resulted from the contributory negligence of the patient or his parents.[511]

BADER V. GORDON - COLLECTION ACTION - DEFENSE OF LACK OF CONSENT - JURY FOR DOCTOR BUT NOTED INSUFFICIENT EXPLANATION BEFORE SURGERY (England 1879)

In 1879, in England, Charles Bader, an ophthalmic surgeon from Guy's Hospital, sued Mr. Alexander Gordon, a barrister, for his fee for an eye operation - an iridectomy. The defense and counter-claim was that the operation was performed "unnecessarily and without his consent" and negligently. More specifically he claimed that the needling was performed to conceal the negligence in the iridectomy. He further claimed that the surgeon had "fraudulently fabricated an entry in his case-book."

Bader testified that he explained the two ways that the cataract could be treated - namely total extraction or needling - and Gordon elected needling and consented to iridectomy as a preliminary to the needling. The initial procedures were performed in June 1875 and Gordon was supposed to return for additional needling, but did not do so until March 1878.

The jury awarded the oculist his full fee, but added a rider that Bader did not sufficiently explain the operation to the patient before performing it.[512]

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[511] *Potter v. Warner*, 91 Pa. 362 (Nov. 10, 1879)

[512] *Bader v. Gordon*, TIMES (London), Dec. 9, 1879, 4; *Bader v Gordon*, DAILY NEWS (London), Dec. 9, 1879; *Summary of the morning's news*, PALL MALL GAZETTE (London), Dec. 9, 1879; *Bader v Gordon*, REYNOLD'S NEWSPAPER (London), Dec. 14, 1879. For more information about

The *British Medical Journal* commented:

> Mr. Bader of Guy's Hospital has recovered by action at law fees for an operation, which his patient, a barrister, contested on the ground of want of skill and want of adequate preliminary information as to the risks of the operation. The jury added a rider regretting that Mr. Bader did not more accurately inform the patient on this head. In this the judge concurred; and we must confess to entertaining a similar opinion.[513]

Mr. Bader sent a note to the journal:

> In June 1875, Mr. Gordon, age 25, a barrister, consulted me for cataract in the left eye…. I therefore explained to him that, to improve sight, the cataract would have to be removed. Mr. Gordon expressly wished not to be detained from business; he had the treatment by extraction, and that by absorption, explained to him; he selected the latter, on my assurance that he would not be confined in his bed. He clearly understood that, to render absorption more safe, there should be two operations; first, iridectomy; then the needle-operation. The appointments for these operations were made beforehand with Mr. Gordon. Why I should explain to the patient the mechanical details of an iridectomy, especially if he is to have an anaesthetic, I cannot see, in spite of the rider of the jury. Is it kind or wise to depress the patient's mind by such descriptions, and then to give an anaesthetic?[514]

The journal appended the following at the end of Mr. Bader's note:

> We have to add, after reading the note, that our observation expressed agreement with the rider of the jury and the observation of the judge; and we are still of the opinion that, before operating on a case where binocular vision still exists, the patient should be amply warned of the risks of the operation…[515]

Bader responded:

> On December 27th, page 1033 of the Journal, you state" "Where binocular vision still exists, the patient should be amply warned", etc. My case-book clearly shows that Mr. Gordon had all the attributes of binocular vision, except the power of reading, and that this was the very reason why the treatment of the cataract was advised. Mr. Gordon did not go home alone;

Bader, see *Eyes through Bader's eyes (Charles Bader 1825-1899),* BR. J. OPHTHALMOLOGY, 9(11):1363-64 (Nov. 2012)

[513] BRITISH MEDICAL JOURNAL, ii(989):944 (Dec. 13, 1879)

[514] *The case of Bader versus Gordon*, BRITISH MEDICAL JOURNAL, ii(991):1033 (Dec. 27, 1879)

[515] *Ibid*.

> what are your motives for stating that he undertook a journey the next day? Do you wish to assist a member of the Association?[516]

In response to this unsubtle attempt to invoke the old boy network, the Journal added:

> Our "motives" are, of course, to further the discussion, on public and professional grounds, of questions of no small therapeutic importance raised by an action at law reported in the public papers. The question of "membership of the Association" is foreign to that subject.[517]

The other medical journals of the day also published entries about the case. They mentioned the jury rider, but did not express an opinion about the rider.[518]

DENIED COMMITMENT OF HABITUAL DRUNKARD (England 1880)

In January 1880, a licensed victualler applied to the Marylebone Police Court to have his wife placed in a home or retreat as a habitual drunkard. Mr. De Rutzen denied the application ruling that under the Habitual Drunkards, Act of 1879, section 10, her consent must be obtained.[519]

BROCK V. O'SULLIVAN - COLLECTION SUIT AFTER PATIENT DIED - DENIED PAYMENT DUE TO HOLDING OUT HOPE OF CURE (Missouri 1880)

In Missouri, Mr. O'Sullivan consulted a physician about his daughter's ovarian tumor. That physician advised no surgery because there was little hope of cure. The father consulted a second physician, Dr. Brock, who proposed to remove the tumor. Dr. Brock expressed confidence in his ability to perform a cure. The father consented and the patient died. In 1880, Dr. Brock sued for his fee. The jury ruled in favor of O'Sullivan because the Dr. Brock had held out the hope that he could save the patient's life.[520]

INQUEST - PARENTAL REFUSAL OF MEDICAL TREATMENT - DEATH UNDER CARE OF HERBALIST FATHER (England 1880)

In 1880, an inquest was held in Smethwick, England, into the death of Oliver Franklyn Russell, age nine months, who died of pneumonia, when his

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[516] *Bader v. Gordon,* BRITISH MEDICAL JOURNAL, Jan. 3, 1880, i:27
[517] *Ibid*.
[518] *Bader v. Gordon,* LANCET, ii:885-886 (Dec. 13, 1879); *Bader v. Gordon*, MEDICAL TIMES AND GAZETTE, 672 (Dec. 18, 1879); *Bader v. Gordon,* LANCET, ii:924 (Dec. 20, 1879) [letter from George Critchett defending his testimony at trial]; *Bader v. Gordon,* LANCET, i:31 (Jan. 3, 1880) [Bader letter responding to the Critchett letter]
[519] *The habitual drunkards' act*, BRITISH MEDICAL JOURNAL, i:141-142 (Jan. 24, 1880)
[520] *A surgeon's fee,* ST. LOUIS GLOBE DEMOCRAT, Jan. 13, 1880, 10

herbalist father did not seek medical aid due to his disbelief in doctors. The coroner's jury returned a verdict of manslaughter.[521] The outcome at the assizes has not been located.

ANESTHESIA (Manitoba 1880)

In 1880, it was reported that in Manitoba, Canada, Jimmy Gallagher dislocated his shoulder. When Gallagher was "refractory," two doctors "had to chloroform him before he would submit to the operation.[522]

BALES V. MCCHESNEYS - EXCEED SCOPE OF CONSENT - (Chicago 1880)

In 1880 in Chicago, Miss Ida Bales sued William B., Alexander C. and James H. McChesney, dentists. She had sought to have five teeth extracted. While under anesthesia, they extracted all the teeth in her upper jaw - 15 teeth. At the first trial the jury could not agree. The CHICAGO TRIBUNE criticized the outcome:

> The disagreement of the jury in the case of Miss Bales against McChesney Brothers' dentists, looks very much like an outrage… The McChesney Brothers claimed that they pulled out the other teeth because they were unsound, while the plaintiff claimed that they were healthy, though she could not prove it, because the dentists had the teeth in their possession, and did not care to produce them. … It is to be presumed Miss Bales owned her teeth and was competent to say what should be done with them, though the McChesney Brothers seem to imagine that the moment a patient gets into their operating-chair and is under the influence of laughing gas he surrenders all control over his jaw. Having ordered them to pull five teeth, it was their business to pull five and not fifteen, and it is none of their business whether they are decayed or not.

In 1881, at the second trial, the jury again could not agree.[523]

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[521] *Alleged manslaughter at Smethwick*, BIRMINGHAM DAILY POST, Jan. 14, 1880; PALL MALL GAZETTE, Jan. 15, 1880; REYNOLD'S NEWSPAPER (London), Jan. 18, 1880; *A "disbeliever " in scientific medicine,* MEDICAL TIMES AND GAZETTE, i:111 (Jan. 24, 1880)

[522] MANITOBA DAILY FREE PRESS (Winnipeg), July 28, 1880, 1

[523] *State courts,* CHICAGO TRIBUNE, Apr. 2, 1880, 3; *Pulling too many teeth*, DAILY INTER OCEAN (Chicago), May 5, 1880, 6; *Extracting teeth by wholesale,* DAILY INTER OCEAN (Chicago), Mar. 24, 1881, 6; *The tooth-doctor's case*, CHICAGO TRIBUNE, Mar. 25, 1881; *Pulling teeth,* CHICAGO TRIBUNE, Mar. 27, 1881, 4; *Extracting teeth without the consent of the patient,* MEDICAL RECORD (New York City), 19:503 (Apr. 30, 1881); *Boles v. M'Chesney*, CHICAGO TRIBUNE, Oct. 13, 1881, 11; *Dental malpractice*, CHICAGO TRIBUNE, Oct. 15, 1881, 16; *Superior,* DAILY INTER OCEAN (Chicago), Oct. 15, 1881, 13

PECULIAR PEOPLE - CATLIN - SPOUSAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (England 1880)

In 1880, an inquest was held into the death of Hannah Catlin. Her husband, Martin Richard Catlin, was a member of the Peculiar People and had refused to call medical aid for his wife. The coroner's jury found the father guilty of manslaughter. The magistrates committed him to trial for culpable negligence. At trial, he was found not guilty.[524]

INVESTIGATION BY CORK FEVER HOSPITAL OF ALLEGED EXPERIMENT WITHOUT CONSENT (Ireland 1880)

In 1880, in Ireland, Dr. McNaughton Jones was accused of administering a novel and dangerous drug without consent or consultation, resulting in a boy's death. A hospital committee of inquiry in the Cork Fever Hospital exonerated the doctor. Excerpt from committee report:

> Third charge — 'That he so performed that operation without any proper explanation to Mr. Crawford of its nature or effect, and without getting his sanction.' The answer of the Committee to that is — We do not think it was necessary that Dr. Jones should have given any explanation to Mr. Crawford, nor was it necessary to get his consent.[525]

The father subsequently brought a libel action against a newspaper and medical journal for their reporting of the case. The jury could not agree. The case was then dropped.[526]

HEINEMANN'S APPEAL - PARENTAL REFUSAL OF MEDICAL TREATMENT - APPOINTMENT OF GUARDIAN (Pennsylvania 1880)

In January 1879, Charles Heinemann had a wife and five children. During December, his wife and one child died of diphtheria. In 1880, two more children died of diphtheria. Heinemann refused to call a physician to attend his first child to die. He called physicians in the other cases, but too late to assist. Heinemann was not a physician. Without medical assistance, Heinemann treated his family with the Bannscheidt system that involved pricking the skin and rubbing oil in the skin.

The maternal grandmother of the remaining children, ages 5 and 8, petitioned for the appointment of a guardian. The Orphans Court of Allegheny

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[524] *Central Criminal Court, Aug. 4*, TIMES (London), Aug. 5, 1880, 4; *Peculiar people,* BRITISH MEDICAL JOURNAL, ii:279 (Aug. 14, 1880)

[525] *Medical inquiry,* TIMES (London), Sep. 16, 1880, 7; Sep. 20, 1880, 6; *Extraordinary charge against a physician,* MEDICAL TIMES AND GAZETTE, 2:354 (Sep. 18, 1880); 2:377-378 (Sep. 26, 1880)

[526] *Action for libel*, MEDICAL PRESS & CIRCULAR, 122 (Feb. 9, 1881); 319-320 (Apr. 13, 1881); 369 (Apr. 27, 1881); 562 (Dec. 28, 1881); *Crawford v. British Medical Association*, IRISH LAW TIMES REP., 16:86-90 (Q.B. Div. 1881)

County appointed a guardian. The father appealed. The Pennsylvania Supreme Court affirmed. It ruled that Heinemann did not have to seek treatment for his family in accordance with allopathic medicine, but that he had to seek assistance from a practicing physician, even if the physician practiced the Bannscheidt system. Self-treatment of very ill family members was not sufficient. His unwillingness to seek timely outside treatment for his other children indicated neglect justifying the change of custody.[527]

HOWELL V. WEST AND JONES - ALLEGED BREACH OF CONTRACT (England 1880)

In 1880, in England, a son of Dr. Howell was a boarder at Dr. West's house. The son got scarlet fever and was removed to the school infirmary where he died. The father claimed breach of an express contract not to remove the child from the house. The father admitted that he did not say that in no case was the boy to be sent to the infirmary; that in making the agreement with Dr. West he was thinking of the old infirmary, which was in the school buildings; and that he did not say anything about the new isolated infirmary, though he knew of the building of it. The jury found no breach of contract and no negligence, ruling for the defendants. Appeals were denied.[528]

INVESTIGATION BY CAMBERWELL BOARD OF GUARDIANS - ALLEGED UNCONSENTED OPERATION (England 1880)

In 1880 in England, an inmate of the Gordon-road Workhouse accused the infirmary doctor of performing an operation on his eye without his consent. The Camberwell Board of Guardians appointed a sub-committee to investigate. No further report has been located.[529]

CLAIM INSANE WHEN CONSENTED TO TEETH REMOVAL (California 1880)

It was reported in 1880 that San Francisco man requested that a dentist remove all his teeth. When the dentist advised against it, the man insisted and the dentist performed the requested service. He later claimed that he was temporarily insane at the time and sued the dentist for malpractice for removing his teeth.[530] The outcome of the case has not been located.

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[527] *Heinemann's Appeal*, 96 Pa. 112, 15 Norris 112, 42 Am. Rep. 532 (Nov. 15, 1880); *Notes on cases,* ALBANY LAW JOURNAL, 23(3):42-43 (Jan. 15, 1881). Note that in 1881 a Schultz was prosecuted in Iowa for a death resulting from his practicing a Baunscheidtist. His conviction was reversed. *State v. Schulz*, 55 Iowa 628, 8 N.W. 469 (June 1881)

[528] *Howell v. West and Jones,* THE GRAPHIC (London), Apr. 17, 1880; *The Epsom College Case,* BRITISH MEDICAL JOURNAL, i:630 (Apr. 24, 1880); *Howell v. West and Jones,* MEDICAL TIMES AND GAZETTE, i:454-455 (April 24, 1880); i:529 (May 15, 1880)

[529] *Alleged improper medical treatment*, MEDICAL TIMES AND GAZETTE, i:469 (Apr. 24, 1880)

[530] INDIANA WEEKLY MESSENGER (Pa), June 2, 1880, 2; DEFIANCE DEMOCRAT (Ohio), July 1, 1880, 1

INQUEST - MARY O'KEEFE - HUSBAND VETOED AMPUTATION (Ireland 1880)

In 1880, a married woman, Mary O'Keefe, was admitted to Mercer's Hospital, Dublin, after being burned in an epileptic fit. The surgeons advised amputation of her arm. She gave qualified consent but her husband, David, vetoed the operation. The police reported that he refused because if she had lived she would have been a burden on him. She died a few days later. An inquest was held. The jury found accidental death and appended:

> " We are of opinion that had an operation been performed after the consultation on the 3rd inst., her life would have been saved, and that there is no evidence that her husband interfered, and we exonerate him from any blame. At the same time we consider it was a proper case for an investigation."[531]

REMOVAL OF CHILDREN WITH SMALL POX (New York 1880)

In September 1880, Dr. J.B. Taylor, the Chief of the Vaccinating Bureau in New York City, sought to remove two children with small-pox from a tenement house. Although the parents had indicated their willingness to allow this to occur, when the ambulance arrived, the father, Mr. Hennon refused to permit anyone to touch Mary, age 4, or Anna, age 14, both of whom had smallpox. He threatened to use force to resist. He also reported that he had taken "legal advice" and "was prepared to exhaust every legal means in his power to resist the proposed action." Quarantine was maintained on the house. It was reported a few days later that the children had been removed to the Riverside Hospital.[532]

PECULIAR PEOPLE - SEARS - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (England 1880)

In late September 1880, an inquest was held in the Sittingbourne district of Kent into the death of Arthur William Sears, infant son of John Sears, a member of the Peculiar People. No medical attention had been called; the parents had relied on anointing and prayer. The medical testimony was that the child had died of inflammation of the mucous membrane of the bowels that would have been amendable to medical treatment. The coroner's jury returned a verdict of manslaughter. The magistrates of Sittingham committed Mr. Sears for trial and permitted his release on bail. On January 22, 1881, he was tried at the Assizes of

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[531] *Death by Fire - Serious Charge against a husband*, FREEMAN'S JOURNAL AND DAILY COMMERCIAL ADVERTISER (Dublin), June 10, 1880, 7; *An extraordinary charge,* FREEMAN'S JOURNAL AND DAILY COMMERCIAL ADVERTISER (Dublin), June 10, 1880, 7; *The responsibility of operating surgeons*, MEDICAL TIMES AND GAZETTE, i:668-669 (June 19, 1880)

[532] *Harlem's small-pox cases*, N.Y. TIMES, Sept. 18, 1880, 6; *Defying the Health Board*, N.Y. TIMES, Sept. 19, 1880, 5; *City and suburban news,* N.Y. TIMES, Sept. 21, 1880, 8; *The Harlem small-pox cases,* N.Y. TIMES, Sept. 23, 1880, 2

the South-Eastern Circuit, Maidstone. The judge noted that a guilty verdict would not have moral disgrace for this defendant due to his religious convictions, but that it was important for these people to be taught that they could not willfully disobey the law. The jury returned a verdict of guilty, but indicated that it would be satisfied with the defendant entering his recognizance to come up for judgment when called for. This was similar to release on probation.[533]

ANESTHESIA (1880)

In 1880, an inquest was held into the death of James Edward Gelleff who had died at West London Hospital under chloroform administered for an operation. It was noted that the chloroform had been given with the patient's consent. The jury exonerated the doctors.[534]

LONDON HOSPITAL CONSENT PRACTICES (England 1880)

In 1880, the *Pall Mall Gazette* reported that in the London Hospital - "An operation is never undertaken unless the full consent of patient and friends has been previously obtained. All risks are explained. The surgeons often give the family a long time to think over the matter." No hospital regulation has yet been located, so this may refer to a practice, rather than a rule.[535]

TUCKER V. NOYES - SILENCE AS CONSENT (New York 1880-1881)

In New York, the patient Tucker and his parents gave consent to operate on only one eye. A few days before the surgery, Dr. Noyes changed the plan and informed the patient and his friends of the decision to operate on both eyes. There was no dissent at that time from the patient or friends. Dr. Noyes claimed that silence was consent. The patient presented himself for surgery and on the operating table reiterated that only one eye was to be operated on. Dr. Noyes operated on both eyes. This suit was brought to test the right the surgeon to alter his plan without consulting the patient.

The judge instructed the jury that the plaintiff had the burden of proof to show that the physician was negligent in not obeying instructions and that under the excitement of the impending operation the patient lacked capacity to revoke his prior consent. The jury voted 10 to 2 for defendant. Dr. Noyes stated that in the future he would seek "positive expressed permission."[536]

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[533] *Inquests,* TIMES (London), Oct. 1, 1880, 4; *Charge of manslaughter,* TIMES (London), Oct. 2, 1880, 9; *The Assizes*, TIMES (London), Jan. 24, 1881, 11

[534] *Death from chloroform*, BRITISH MEDICAL JOURNAL, ii:559 (Oct. 2, 1880)

[535] *The hospital of the million – II*, PALL MALL GAZETTE (London), June 30, 1880

[536] *Suit for the loss of a eye,* N.Y. TIMES, Dec. 18, 1880, 3; *The patient's consent to an operation and the surgeon's discretion*, MEDICAL RECORD, 18:714-715 (Dec. 25, 1880); *Tucker versus Noyes,* MEDICAL RECORD, 19(1):25 -26 (Jan. 1, 1881) [Letter to the editor from Dr. Noyes,];

LATTER V. BRADDELL - UNAUTHORIZED EXAMINATION OF FEMALE SERVANT (England 1880-1881)

In England, Miss Leonora Latter was in the domestic service of Captain and Mrs. Braddell. Mrs. Braddell came suspicious that Miss Latter was pregnant so she arranged for Dr. Sutton to examine Miss Latter. The doctor did so using force. Miss Latter expressed her dislike of being examined but offered no resistance and did what the doctor told her. She later sued the Braddells and Dr. Sutton for assault. In 1880, the judge ruled in favor of the Braddells and submitted the case against Dr. Sutton to the jury. The jury at the Manchester Assizes found in favor of the doctor. Two judges of the common pleas division heard an appeal. The two judges had opposing opinions, so the jury verdict was sustained.[537]

One judge stated:

> I dare say the woman thought that her master and mistress had a right to have her examined. But what she did was to submit under the influence of other considerations. The truth is that it is impossible to say the jury was wrong in finding that she submitted, not in consideration of violence, but for some other reason. It is not unlike the case of the boy holding out his hand to be struck, for the boy knows that if he does not submit he will be compelled to submit to something worse."

The other judge stated:

> "If there was no threat, and she submitted, there was no assault."[538]

The British Medical Association commented:

Should a patient be consulted by his medical attendant? COLLEGE AND CLINICAL RECORD, 2(1):13 (Jan. 15, 1881) [printed for Jefferson Medical College, Philadelphia]

[537] *Latter v. Braddell*, LAW JOURNAL REPORTS C.P., 50:166-170 (Nov. 26-27, 1880); *Latter v Braddell*, LAW TIMES (N.S.) 43:605 (C.P. Div Jan. 15, 1881); *Civil Court - Latter v. Braddell and others,* TIMES (London), Apr. 14, 1880, 13; *Civil Court - Latter v. Braddell and others,* TIMES (London), July 13, 1880, 12; *Common Pleas Division - Latter v. Braddell and wife and Sutcliffe*, TIMES (London), Dec. 4, 1880, 4; *Court of Appeal - Latter v. Braddell and wife and another*, TIMES (London), Feb. 25, 1881, 3; *Personal rights and medical examinations*, BRITISH MEDICAL JOURNAL, ii:940 (Dec. 11, 1880); *Master and Servant - Assault - Submission*, LEGAL NEWS, IV(16):128 (Apr. 16, 1881); ALBANY LAW JOURNAL, 23:123 (Feb. 12, 1881); *Latter v. Braddell and Wife and Sutcliffe,* MEDICAL TIMES AND GAZETTE, i:267 (Mar. 5, 1881); *Assault - force necessary - reluctant submission by domestic servant to command of mistress,* ALBANY LAW JOURNAL, 24:57 (July 16, 1881); Frederick W. Lowndes*, Medico-legal responsibilities: the examinations of suspected persons*, LIVERPOOL MEDICO-CHIRURGICAL JOURNAL, 10(18):146, at 153-156 (Jan. 1890) [Author's conclusion: "Never examine any female, under any circumstances, without having first obtained her consent in the presence of one or more reliable females, and, if possible, in conjunction with some other practitioner."]

[538] *Latter v. Braddel*, LAW JOURNAL REPORTS Q.B. 50:448-449 (Feb. 23-24, 1881)

> The issue of this case is thus satisfactory; but medical men cannot be too strongly cautioned never to undertake any examination of the kind except with the full consent of the individual before witnesses. Neither the direction of a mistress nor a police order will suffice; the subject must assent of her own free will.[539]

The *Hampshire Telegraph & Sussex Chronicle* reprinted a criticism of the outcome from the *Pall Mall Gazette*:

> The case of Latter v. Braddell, in the Court of Appeal, throws doubt on the venerable maxim of English law that "there is no wrong without a remedy." The plaintiff, a servant-girl, had been subjected to a medical examination by order of her mistress, who had brought a cruel and totally unfounded charge against her. The action for assault against the mistress and the medical man was twice tried before a Manchester jury, and on the second trial the judge directed a verdict for the mistress, leaving the case against the doctor to the jury, who found in his favour. On motion for a new trial the court in banco, consisting of two judges, one of whom had tried the case at assizes, were equally divided in opinion. The Court of Appeal has now held that the decision o f the judge and verdict of the jury were right - the whole case turning on the fact that the girl had offered no resistance beyond crying. Technically the judges of the Court of Appeal were bound to decide that there had been no assault, but they fully admitted the gross moral wrong that had been done. Lord Justice Brett expressing his "abhorrence of the conduct pursued toward this unhappy girl from beginning to end."[540]

HARTFORD HOSPITAL RULES (Connecticut 1881)

In 1890 the Executive Committee of Hartford Hospital reported the rules it had adopted for the hospital. They included:

> No operation shall be performed without the consent of the patient; but if consent cannot be obtained after all the surgeons in consultation have decided that the patient's safety demands it, the visiting surgeon shall advise the discharge of the patient from the Hospital.[541]

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[539] *Medical examinations*, BRITISH MEDICAL JOURNAL, ii:214 (Aug. 7, 1880)
[540] HAMPSHIRE TELEGRAPH & SUSSEX CHRONICLE, Mar. 2, 1881
[541] *Rules of the Hartford Hospital*, TWENTY-SIXTH ANNUAL REPORT OF THE EXECUTIVE COMMITTEE OF THE HARTFORD HOSPITAL PRESENTED TO THE CORPORATION AT THEIR ANNUAL MEETING, DECEMBER 14, 1881 (Hartford Conn: Case, Lockwood & Brainard 1882), 35-36

ADMINISTRATION OF MORPHINE WITHOUT CONSENT (U.S. 1881)

In January 1881 a San Francisco newspaper reported on the practice of some physicians to administer morphine without consent. It included this account:

> Some time ago, a writer in this city, while suffering from a slight congestion of the brain, to which men engaged in his profession are so subject, applied to a physician for relief. The disciple of Aesculapius, without his patient's consent, at once administered hypodermically a three-groan dose of morphine. Its immediate effects were delightful, but its after consequences - who shall describe them? Hell hath no torments compared with the suffering of a recovery under such circumstances.[542]

COLLECTION ACTION - AGREEMENT WITH PATIENT NOT VALID (France 1881)

In 1876, in France, doctor M. Guerin treated M. Hardouin, for a wounded foot. He cured the wound. After the patient's death, he sent his bill to the family. The family offered him half the amount billed. He sued and lost in the trial court. On appeal the court agreed. In 1881, the court declared that there could be no valid agreement between the patient and his doctor, for the patient struggling for his life is no longer master of his will, and if he makes any agreement, it is only necessity and fear that guide his pen.[543]

DE MAY V. ROBERTS - DECEIT VITIATES CONSENT - NONDISCLOSURE CAN CONSTITUTE DECEIT (Michigan 1881)

Having no need of an assistant, Dr. De May took an unprofessional unmarried man Alfred Scattergood, to attend the confinement of Mrs. Roberts. She and her husband submitted to his presence believing him to be a medical man. Upon discovering his actual status, they sued De May and Scattergood for intrusion. The trial court ruled in their favor. The Michigan Supreme Court affirmed:

> We are of opinion that the plaintiff and her husband had a right to presume that a practicing physician would not, upon an occasion of that character, take with him and introduce into the house, a young man in no way, either by education or otherwise, connected with the medical profession; and that something more clear and certain as to his non-professional character would be required to put the plaintiff and her husband upon their guard, or

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[542] *A shameful practice*, SAN FRANCISCO EXAMINER, Jan. 25, 1881, 2

[543] *Honoraires médicaux; décision importante pouvant former jurisprudence*, LYON MEDICAL, Tome xxxvi (No. 8): 289 (20 Fevrier 1881); *A patient's agreement to pay repudiated by the law*, MEDICAL TIMES AND GAZETTE, i:275 (Mar. 5, 1881)

remove such presumption, than the remark made by De May that he had brought a friend along to help carry his things.
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To the plaintiff the occasion was a most sacred one and no one had a right to intrude unless invited or because of some real and pressing necessity which it is not pretended existed in this case. The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation. The fact that at the time, she consented to the presence of Scattergood supposing him to be a physician, does not preclude her from maintaining an action and recovering substantial damages upon afterwards ascertaining his true character. In obtaining admission at such a time and under such circumstances without fully disclosing his true character, both parties were guilty of deceit,…[544]

INQUEST - JOHN GETCHY - DEATH FROM TREATMENT BY QUACK CONSENTED TO BY VICTIM (New Jersey 1881)

In about 1862, John Getchy, a saloonkeeper from Hoboken, New Jersey, was shot in the leg. In about 1878, he came under the treatment of Henry Bremer. Mr. Getchy consented to five operations by Mr. Bremer using an instrument called a Blaumchiedtismus. Mr. Getchy died in 1881 after the fifth operation. An inquest was held because the physician who was called in when the patient neared death refused to sign a death certificate.[545] It was announced that an officer went from New York to Cincinnati in an attempt to capture Henry Bremer, a cigar manufacturer, charged with causing death by malpractice.[546] No further report has been located

ANESTHESIA (1881)

In 1881, an inquest was held into the death of Barbara Siska who died in St. Louis as chloroform was administered for an operation on tumors on her neck. It was reported that she was very desirous of having the operation. The coroner ruled that it was accidental asphyxiation.[547]

In 1881, an inquest was held into the death of Bridget Doyle, age 11, from the effects of chloroform administered during an operation that Bridget and her mother had consented to. The jury returned a verdict of death from misadventure.[548]

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[544] *De May and Scattergood v. Roberts*, 46 Mich. 160, 163, 165-166, 9 N.W. 146, 147, 149 (June 8, 1881)
[545] *The Getchy inquest at Hoboken,* N.Y. TIMES, Aug. 4, 1881, 8; *Did it with his Blaumchiedtismus*, WHEELING REGISTER (WVa), Aug. 4, 1881
[546] *After a professed surgeon,* FORT WAYNE DAILY GAZETTE (Ind.), Aug. 4, 1881, 1; *Death from malpractice*, ST. LOUIS GLOBE-DEMOCRAT, Aug. 4, 1881, 2
[547] *Chloroformed to death*, ST. LOUIS GLOBE DEMOCRAT, June 16, 1881
[548] *Death from inhaling chloroform*, MANCHESTER TIMES, Nov. 26, 1881

In 1881, an inquest was held into the death of Edgar H. Tapper who died at a Chicago dental office while being administered chloroform. Tapper had insisted on the chloroform. The jury stated that they "deprecate the use of chloroform in such cases." The jury suggested "dentists should be compelled to keep all appliances for resuscitating patients using anesthetics in their offices."[549]

ANESTHESIA (1882)

In 1882, an inquest was held into the death of John B. Kelley, a speculator on the Board of Trade of Chicago. He had paralysis of the larynx. At his request chloroform was administered for an operation to insert a breathing tube. He died from the effects of the chloroform. The coroner's jury in Chicago found he had died a natural death from the effects of the chloroform, exonerating the physicians.[550]

GERMAN ARMY REGULATION CONCERNING CONSENT TO AMPUTATION (1882)

In 1882, it was reported in a newspaper "…no amputation is allowed in the German army without the consent of the patient…" The referenced army regulation has not been located.[551]

PECULIAR PEOPLE - MORBY - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (England 1882)

In 1882, an inquest was held in Kent, England, into the death of Abraham Morby, age 8. He had died of smallpox with no medical attention. His parents, Rachel and John Morby, were members of the Peculiar People. The elder who had been called to assist was Thomas Hines. Medical testimony was that medical attendance would have increased the probability of recovery. The coroner's jury reached a verdict of manslaughter against the father and he was released on bail.

Mr. Morby was convicted of manslaughter. In the absence of medical testimony that death was accelerated by the neglect, the appellate court held in 1882 that the conviction could not be sustained.[552]

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[549] *Killed by chloroform*, DAILY INTER OCEAN (Chicago), Dec. 29, 1881, 6

[550] *A social skeleton*, CHICAGO DAILY TRIBUNE, July 11, 1882, 12 [the scandal was that his wife lived separately and he was living with another woman]; *Coroner's inquest: A strange disclosure*, DAILY INTER OCEAN (Chicago), July 11, 1882, 3

[551] *German army doctors*, BELFAST NEWS LETTER, Dec. 14, 1882. An 1867 handbook on war surgery noted that consent was not required in the Prussian army but was generally obtained. J. Neudörfer, HANDBUCH DER KRIEGSCHIRURGIE (Leipzig: F.C.W. Vogel 1867), 204

[552] *Queen v. Morby*, 8 Q.B.D. 571 (1882), 30 W.R. 613 (1882); *The Peculiar People*, TIMES (London), Jan. 13, 1882, 6; *Court for the Consideration of Crown Cases reserved,* TIMES (London), Mar. 27, 1882, 4; 46 L.T. REP. N.S. 288 (1882); ALBANY LAW JOURNAL, 26:79 (1882-83); ALBANY LAW JOURNAL, 26:219 (1882-83); LEGAL NEWS, V(31):241 (Aug. 5, 1882)

DEATHS AFTER VACCINATION OF INFANTS (England 1883)

On January 12, 1883, the TIMES of London reported an inquest in Central Middlesex into the death of a one-month old, Lillian Ada Williams, after a vaccination. The 17-year-old mother reported that her baby had been taken away from her and vaccinated and that she felt it was not her place to protest. Despite careful medical attention the baby died of complications of the vaccination. Expert testimony was that the vaccination of this premature baby should have been postponed. The coroner's jury found death was due to "suppurative meningitis, following ulceration of vaccine vesicles on the arm" and that "it would have been well to postpone vaccination in the present case."[553]

The following month, Mr. Walter M'Indoe Dunlop, the medical officer for the workhouse where the child had been vaccinated, was charged with feloniously killing the child. Mr. Corrie Grant, barrister, the attorney for the prosecution was instructed on behalf of the Anti-Vaccination Society. He contended that

> …the defendant had no authority to vaccinate the child without the consent of the mother. He was appointed by the Poor Law authorities, of course, but their rules gave him no authority to act as he had done. In a circular issued by the Poor Law Commissioners it was laid down that when there was a danger of smallpox the guardians could instruct the medical officer to vaccinate the child without the consent of the parents. But there was no danger and no instruction had been given by the guardians and the Vaccination Act gave the defendant, as parish medical officer, to vaccinate a child in the workhouse without applying for the parents' consent. He would prove the mother's consent was not asked in this instance. If he proved that fact he should submit that the defendant had acted illegally, and in doing what he did has committed an assault upon the child.

The deputy midwife at the workhouse testified that the mother had been advised that the doctor was coming to vaccinate the children. Another witness pointed out the mother had been vaccinated on the same day. The magistrate stated his opinion that the evidence failed to show that the doctor had done anything wrong and dismissed the case.[554]

Two letters to the editor over the next few days sought to use the case as a basis for challenging and defending mandatory vaccination.[555]

On May 26, 1883, there was an inquest into the death of another infant, Herbert Walsh, at St. Pancras after vaccination. The mother had been

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[553] *Inquest,* TIMES (London), Jan. 12, 1883, 4
[554] *Police*, TIMES (London), Feb. 7, 1883, 4 [summons issued]; The *vaccination case at St. Pancras,* TIMES (London), Feb. 15, 1883, 11; *Police,* TIMES (London), Mar. 1, 1883, 4
[555] *The St. Pancras vaccination case,* TIMES (London), Mar. 9, 1883, 4; *The St. Pancras vaccination case,* TIMES (London), Mar. 14, 1883, 6

revaccinated and her breast milk had stopped. The jury concluded that the death of the infant was due to wasting caused by the absence of the mother's milk and condemned the revaccination of the mother so soon after birth. [556] Questions were asked in parliament about vaccinations at St. Pancras.[557]

DISMISSAL OF INDECENT ASSAULT CHARGE (Ireland 1883)

In 1883 in Kells, Ireland, a dispensary patient, Kate Murphy, charged Dr. Sparrow, medical officer, with indecent assault. He had refused to give an emmenagogue medicine (which she urged him to do) until satisfied she was not pregnant. With her full consent, he examined her and confirmed she was pregnant. The magistrates held a hearing. There were six witnesses who were within earshot at the time of the alleged assault and heard no outcry. The magistrates dismissed the case.[558]

Emmenagogue herbs are used to stimulate blood flow in the pelvic area and uterus to stimulate menstruation or cause an abortion.

PECULIAR PEOPLE - COUSINS - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (England 1883)

In January 1883, Coroner W.J. Payne of Southwark held an inquest in the death of Robert Percy Clemence Cousins, age 3 years. His parents were members of the Peculiar People and had not sought medical attendance. The physician who performed the post mortem concluded that he had died from "mischief in the lungs." He further testified that early in the illness medical attention would have prolonged his life, but later in the illness medical attention would not have helped. The coroner's jury voted 12 to 1 in favor of a verdict of manslaughter against the father. The grand jury threw out the bill and jury found the father not guilty.[559]

VACCINATION REFUSAL (Maryland 1883)

In 1882, Baltimore adopted an ordinance requiring vaccination and imposing a fine for refusal. George W. Watts refused vaccination and refused to pay the fine. He was jailed where the rules required all prisoners to be vaccinated, which occurred. He sued the city and its officials. In 1883, a court

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[556] *Inquests,* TIMES (London), May. 28, 1883, 6

[557] *E.g., House of Commons,* TIMES (London), July 14, 1883, 8; Aug. 3, 1883, 6

[558] *Unfounded charge against an Irish doctor,* PALL MALL GAZETTE (London), Jan. 16, 1883; *Unfounded charge against a medical man,* BRITISH MEDICAL JOURNAL, i:175 (Jan. 27, 1883); *The risks of medical practice,* MEDICAL PRESS, 86 (Jan. 24, 1883); *Kells,* SUPPLEMENT TO THE MEDICAL PRESS AND CIRCULAR, 6 (Jan. 24, 1883); MIDLAND MEDICAL MISCELLANY AND PROVINCIAL MEDICAL JOURNAL, ii:58 (Feb. 1883); MEDICAL AGE, 1:36 (Feb. 10, 1883); *Perils of medical practice,* AMERICAN OBSERVER, 58 (May 1883)

[559] *Inquests,* TIMES (London), Jan. 24, 1883, 10; TIMES (London), Jan. 25, 1883, 4; *Peculiar people: It is not a crime to refuse to call a doctor,* CHICAGO DAILY TRIBUNE, May 16, 1883, 5

gave jury instructions in favor of the law. The jury gave a verdict for the defendants.[560]

PARENTAL UPSET AT CONSENSUAL PHYSICAL EXAM (Nebraska 1883)

In 1883, the Nebraska Supreme Court addressed a case in which an irregular practitioner had made an intimate examination of a teenage girl for the purpose of treatment, in the presence of her mother with the consent of the girl and her father. The father became upset with the examination and threatened to send the practitioner to the penitentiary for the examination. Under this threat, the father obtained a note and mortgage from the practitioner. The court enjoined the note and mortgage because they had been obtained under duress and fraud.[561]

CONSEQUENCES OF REFUSAL OF TREATMENT BY U.S SOLDIER (U.S. 1883)

On September 1, 1883, Circular No. 3 of the Army included a standard general order concerning willful aggravation of disability. By implication it recognized that surgery could be refused.

> (1) When it is known that the disease or injury causing the death or discharge of an officer or soldier has been aggravated by his willful and persistent refusal to submit to such reasonable restrictions, methods of treatment, or surgical operations as would, in the opinion of the medical officer, conduce either to the patient's cure or to the lessening of the disability, the fact will be noted on the register…
> (2) Such information will also be placed upon the certificate of disability, in order that the Commissioner of Pensions may have before him all facts necessary to his guidance in the adjustment of any claim against the Government that the officer or soldier may subsequently make.[562]

FALSE PRETENSES - FALSELY CLAIMING TO BE QUALIFIED MEDICAL PRACTITIONERS (England 1883)

In 1883 Henry George (aka Du Berry) and Thomas Hancock were charged with obtaining money by false pretenses from Robert Kay Pemberton by falsely claiming to be qualified medical practitioners. The jury found them not guilty of obtaining the money, but guilty of attempting to obtain it. Sentence was postponed and they provided bail.[563]

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[560] *Compulsory vaccination pronounced legal by the courts*, MARYLAND MEDICAL JOURNAL, 10:175 (July 7, 1883)
[561] *Hullhorst v. Scharner*, 15 Neb. 57, 17 N.W. 259 (July 1883)
[562] Charles R. Greenleaf, A DIGEST OF CURRENT ORDERS AND DECISIONS WITH EXTRACTS FROM ARMY REGULATIONS RELATING TO THE MEDICAL CORPS OF THE U.S. ARMY (Washington DC: Govt. Print. Off. 1890), 22
[563] *Central Criminal Court, Aug. 3*, TIMES (London), Aug. 4, 1883, 4

Evan Hallett (aka Du Barry) charged a solicitor, Thomas Boardman, and his clerk with conspiring to defraud by taking money for “squaring” the prosecuting counsel in the charges against Hallett.[564] The Police Court concluded that there were no charges to submit to a jury.[565]

Hallet and Hancock charged Pemberton with perjury.[566] The charge was dismissed.[567]

When George failed to appear on the false pretenses charge, he forfeited his bail and was sentenced to nine months hard labor.[568] He had used the time to liquidate his assets and was thought to be on his way to Australia.[569]

He had sold his “Medical Hall” to Thomas Hancock (alias Clifford). Hancock continued the business contrary to his undertaking with the court that the business would cease. Under the prior conviction, Clifford was sentenced to nine month’s imprisonment.[570]

PECULIAR PEOPLE - SOUTH - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (England 1883)

In November 1883, an inquest was held into the death of Henry Edwin South, age 14 months, by Coroner William Carter of East Surrey. His parents were members of the Peculiar People and had not sought medical attention. The physician who performed the post mortem concluded that he had died from intense bronchitis, but he could not say whether the life could have been saved by medical attention. The jury returned a verdict of death from bronchitis, but expressed the opinion the death was accelerated by the parents' gross neglect. The coroner admonished the father.[571]

SUBMISSION BY INCOMPETENT NOT CONSENT (Indiana 1883)

In 1883, the Indiana Supreme Court in the case of *Pomeroy v. State* affirmed the conviction of a physician for raping a mentally incompetent patient while pretending to examine her. Her submission did not constitute consent.[572]

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[564] *Serious charge against a solicitor*, REYNOLD’S NEWSPAPER (London), Sept. 2, 1883; *Charge of fraud*, TIMES (London), Sept. 14, 1883, 5; *Gleanings*, BIRMINGHAM POST, Sep. 15, 1883

[565] *The alleged conspiracy and fraud*, DAILY NEWS (London), Sep. 15, 1883; *Proceedings affecting solicitors*, LAW TIMES, 75:355-356 (Sep. 22, 1883)

[566] *The singular charge of perjury*, LLOYD’S WEEKLY NEWSPAPER (London), Oct. 14, 1883

[567] *The quack doctor prosecutions*, ILLUSTRATED POLICE NEWS (London), Dec. 1, 1883

[568] *Central Criminal Court, Oct. 19*, TIMES (London), Oct. 20, 1883, 12; *Central Criminal Court, Nov. 24*, TIMES (London), Nov. 26, 1883, 12. See also *Conviction of quack doctor*, ILLUSTRATED POLICE NEWS (London), Mar. 17, 1883) [Hamilton Jacob convicted of violating Medical Act by representing himself as a doctor]

[569] *The quack doctor prosecutions*, ILLUSTRATED POLICE NEWS (London), Dec. 1, 1883

[570] *Ibid*.

[571] *Inquests,* TIMES (London), Nov. 20, 1883, 10

[572] *Pomeroy v State*, 94 Ind. 96 (Dec. 20, 1883); ALBANY LAW JOURNAL, 30:283-284 (1884)

ANESTHESIA (1883)

In 1883 inquest was held into the death of Francis Harrison who died under the influence of chloroform during a surgical operation at St. Thomas's Hospital in London. It was noted that he consented to the operation. The doctors were exonerated.[573]

DEATH DURING CONSENSUAL MEDICAL PROCEDURE (India 1884)

In February 1884 an inquest was held in India into the death of Arisia Allison, aged 28, at the European General Hospital during a medical procedure to which she had consented. The medical personnel were exonerated.[574]

FAITH CURE - BLANCHETT - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (New York 1884)

In 1884, the Rev. Clement T. Blanchett, an Episcopal minister in New York, insisted on using the faith cure on his six-year-old daughter, Annie Van Ness Blanchett, who had fractured her left arm. He and his wife (who had recently been cured by the faith cure) refused to summon a physician. Assistant Bishop Potter wrote him a letter on behalf of the bishop asking him to reconsider and seek medical assistance. The Society for the Prevention of Cruelty to Children notified him that it would intervene if he did not heed the bishop's advice. Rev. Blanchett summoned a physician, but before he could arrive Rev. Blanchett was served with a summons from the Yorkville Court. The doctors arrived and reset the bones. The father appeared in court with a certificate of medical attendance and the case was dismissed.[575]

RELEASE OF DRUNKARD FROM ASYLUM (New York 1884)

A wealthy woman, Henrietta Wylie, was addicted to alcohol after she separated from her second husband. Upon petition of family members, a jury found her to be a habitual drunkard and Alfred S. Brown was appointed the committee of her person and estate.[576] He placed her in a private lunatic asylum, Sanford Hall. Through secret communications, she begged friends to seek her release. Neither friends nor counsel were allowed to talk with her.

In August 1884, a good friend, Mrs. Eaton, obtained a writ of habeas corpus thru attorney H.M. Leonard to review her detention, especially challenging placement in a lunatic asylum. The judge ordered that attorney Leonard be allowed to talk to Mrs. Wylie. The judge refused to order her release, indicating that the only way to get her released was to have her declared sane and have

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[573] REYNOLD'S NEWSPAPER (London), Nov. 4, 1883; TIMES (London), Nov. 9, 1883, 10
[574] *Death whilst undergoing an operation*, TIMES OF INDIA, Feb. 20, 1884, 3
[575] *The faith cure in court,* N.Y. TIMES, June 6, 1884, 8
[576] *Mrs. Wiley's responsibility*, N. Y. TIMES, Mar. 9, 1883, 2; *Kissing the court*, N. Y. HERALD, Mar. 18, 1883, 18

the committee set aside. Upon petition of Leonard, Brown was ordered to show cause why she should not be discharged.[577]

The judge ordered Mrs. Wylie to be released from the asylum, but did not give her control of her property until she could demonstrate that she was no longer a drunkard. She was given a say in where she would live.[578]

Lawyer Brown, who remained her committee, refused to pay Leonard or to pay for the boarding house where Mrs. Wylie lived, claiming that she should still be in the asylum. In December 1884, Brown was ordered to give an accounting.[579] No further newspaper reports have been located.

LEPROSY EXPERIMENT ON CONDEMNED PRISONER WITH WRITTEN CONSENT (Hawaii 1884)

In September 1884, in the Hawaiian Islands, Dr. Edward Arning conducted an experiment of inoculating a condemned criminal, Keanu, with leprosy. The Privy Council gave permission and agreed that, if Keanu consented to the experiment, they would commute his sentence to life. Keanu gave written consent to the experiment. Bacilli were found in the sore on his arm until March 1885 and, in March 1887, he began to show signs of constitutional infection. This was believed to demonstrate the infectiousness of leprosy, but questions were raised after his death when it was discovered that other family members had leprosy. The LANCET questioned whether the experiment should have been conducted.[580]

COMMONWEALTH V. PIERCE - CONSENT NO DEFENSE TO HOMICIDE BY PHYSICIAN (Massachusetts 1884)

In 1884, in Massachusetts, Dr. Franklin Pierce was tried for the death of Mrs. Mary A. Bemis. He had treated her with “kerosene bath.” She died four days later from the skin damage caused by the treatment. After twenty minutes deliberation the jury found him guilty. The highest court of Massachusetts upheld the conviction finding that the patient’s consent was no defense to a homicide prosecution for a death resulting from treatment with flannel soaked in kerosene. In 1885, he was sentenced to two years in prison.[581]

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[577] *A rich woman in an insane asylum*, N. Y. TRIBUNE, Aug. 27, 1884, 3; *Back to Sanford Hall,* N. Y. TIMES, Aug. 29, 1884, 8; *Trying to release Mrs. Wylie*, N. Y. TIMES, Sep. 2, 1884, 8

[578] *To be given a chance*, N. Y. TIMES, Sep, 5, 1884, 8; *Mrs. Wylie has something to say*, N. Y. HERALD, Sep. 5, 1884, 3

[579] *Released from an asylum*, N. Y. TIMES, Dec. 28, 1884, 3; *Mrs. Wylie still in court*, N. Y. HERALD, Dec. 28, 1884, 6

[580] *The inoculation of a condemned criminal,* MEDICAL RECORD, 29:449 (Apr. 17, 1886); *Inoculation with leprosy performed,* TIMES, Nov. 19, 1888, 13 (letter from THE OFFICE OF THE BOARD OF HEALTH, HONOLULU, H.I.); *Inoculation with leprosy,* LANCET, ii:1036-1037 (Nov. 24, 1888) (questioning experiment); F.R. Day, *The inoculability of leprosy*, MEDICAL ERA, 7:5 (Jan. 1889); R.H.L. Bibb, *The nature and treatment of leprosy,* AMERICAN JOURNAL OF THE MEDICAL SCIENCES, Nov. 1894, 539 (family members)

[581] *Commonwealth v. Pierce*, 138 Mass. 165 (Nov. 26, 1884); *A queer case*, FITCHBURG SENTINEL (MA), Jan. 31, 1883, 2 [arraignment]; *On trial for manslaughter,* N.Y. TIMES, May 27, 1884, 5;

ANESTHESIA (1884)

In 1884 in England, an inquest was held into the death of William Cottrell in the infirmary of the Manchester Workhouse, Crumsall, during surgery under chloroform. It was noted that the patient had consented to the operation. The coroner's jury found death from misadventure, exonerating the doctors.[582]

CHANGE IN CONSENT RULES AT WORCESTER INFIRMARY (England 1884)

In 1884 a local newspaper reported in detail on the deliberations regarding a rule change in the Worcester Infirmary. It provides some insight into the nature of the debate when such rules were adopted:

> On the proposition to add a new rule: "That no serious operation on a child be performed without the consent of parents or guardians having been first obtained."
> Dr. Strange said it had been suggested that there was no need for the rule, for what it provided was already the law of the land.
> The Rev. W.R. Case remarked that, supposing it was the law of the land, it was right that the rule should be adopted. Many laws of the land were disregarded.
> After some discussion the rule was adopted as follows: - "That no serious operations on a child shall be performed without the consent of its parents or guardians, except in case of urgency, to be decided on by the physicians and surgeons of the case."[583]

CONVICTION - ATTEMPTED RAPE OF PATIENT (England 1884)

In 1884, surgeon Peter Bradley was charged in Chesterfield County Police Court with the attempted rape of Eliza Swetmore in his office. In November 1884 he was found guilty at the Leicester Assizes. He was sentenced two years hard labor. The conviction was criticized in the medical press. After an extensive effort by the medical profession, Bradley was released in July 1885.[584]

"Dr." Pierce convicted, FITCHBURG SENTINEL (Mass), May 28, 1884, 3; *Guilty of manslaughter,* N.Y. TIMES, May 29, 1884, 1; *The accountability of medical men*, BOSTON MEDICAL AND SURGICAL JOURNAL, 111:545 (Dec. 4. 1884); *Notes of cases,* ALBANY LAW JOURNAL, 30(24):462 (Dec. 13, 1884); *The kerosene case,* FITCHBURG SENTINEL (Mass), Jan. 27, 1885, 2; *Light punishment for malpractice,* N.Y. TIMES, Jan. 27, 1885, 1; SCIENCE, 8:358 (Oct. 22, 1886)

[582] *Death under chloroform,* BRITISH MEDICAL JOURNAL, ii:105 (Dec. 6, 1884)

[583] *Worcester Infirmary*, BERROW'S WORCESTER JOURNAL, June 21, 1884, 7

[584] *Serious charge against surgeon*, DERBY MERCURY, Aug. 13, 1884; *Attempted rape by a surgeon*, DERBY MERCURY, Nov. 5, 1884; *The case of Dr. Bradley*, LANCET, i:165-166 (Jan. 24, 1885); *The imprisonment of Dr. Bradley*, MEDICAL PRESS AND CIRCULAR, 90:101-102 (Feb. 4, 1885); *The case of Dr. Bradley*, BRITISH MEDICAL JOURNAL, I:488 (Feb. 28, 1885); *Shall Dr. Bradley be liberated?* LANCET, ii:27 (July 4, 1885); *Imperial parliament - The case of Dr. Bradley*, DAILY NEWS (London), July 22, 1885; *Dr. Bradley's release*, LANCET, ii:169-170 (July 25, 1885);

DEATH UNDER FAITH TREATMENT AT FAITH HOME (St. Louis 1885)

In January 1885, a child, Joseph B. Durham, died at the Faith Home, 1510 Poplar Street, St. Louis, Missouri. Faith Home was an institution where children were treated by faith and not by medicine. The child's mother, Ella Augers, reported the death to authorities. A coroner's investigation was conducted. The coroner rendered a verdict of death by infantile convulsions. The coroner concluded the child had not suffered from lack of medical attention. By the end of the month, the Faith Home stopped accepting sick babies.[585]

M. BOUYER V. DR. TRELAT (France 1885)

In 1885, in Paris, France, M. Bouyer sued Dr. Trelat, Professor at the Ecole de Medicine in Paris, and another doctor, M. Delens, for allegedly performing medical procedures on him without his consent. The defendant responded that the patient expressed gratitude for the care taken of him, and never opposed any part of the treatment, otherwise his wishes would have been considered.

Dr. Trelat also defended by saying:

> We cannot expect our patients to compel us to exact a duly-certified deed from them before they consent to have their pulses felt, or even a written and signed consent or certificate of their willingness to submit to a lancet-thrust.

The court found for the defendants ordering the plaintiff to pay on the counter-claim.[586]

STOGDALE V. BAKER - WRITTEN CONSENT NOT DETERMINATIVE (Massachusetts 1885-1887)

In Boston, Annie Stogdale sued Dr. William Baker and the Free Hospital for Women in Boston for performing an operation, an ovariotomy, on her against her will. The defendants claimed consent.

In the first trial in 1885, the judge ordered a verdict for the hospital and the jury could not agree regarding the doctor [10 for plaintiff and 2 for defendant], resulting in a verdict for the doctor.

The British Medical Association, TIMES (London), Jul 31, 1885, 8; *The case of Dr. Bradley: presentation by the medical profession*, LANCET, II:1162 (Dec. 19, 1885); F.R. Bronson, *False accusations of rape*, AMERICAN JOURNAL OF UROLOGY AND SEXOLOGY, 15(3):101, at 107-108 (Mar. 1919).

[585] ST. LOUIS GLOBE-DEMOCRAT, Jan. 21 & 22, 1885; *Coroner's cases,* ST. LOUIS GLOBE-DEMOCRAT, 17, Feb. 1, 1885

[586] *Special correspondence,* BRITISH MEDICAL JOURNAL, i:300, 301, Feb. 7, 1885; *Notes from special correspondents,* PHILADELPHIA MEDICAL TIMES AND REGISTER, 15(13):466-471 (Mar. 21, 1885); *Un ingrat malade*, JOURNAL DE MÉDECINE DE PARIS, 8(7):255-259 (14 Feb. 1885)

In the second and third trials in 1886, the jury again could not agree. In the second trial, 3 jurors were for plaintiff and 9 for defendant.

In the fourth trial in 1887, the jury gave a verdict for the defendant. Stogdale was required to pay costs of the suits.[587]

Stogdale had signed a written consent, but the court did not find it determinative. An opinion piece in the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION discussed the limited effect of the written consent:

> After a careful explanation of the condition and reasons, she was admitted into a charity hospital, and before the operation signed an agreement assenting thereto and holding the doctor harmless of the results…. It was held by the court that the written agreement, entered upon prior to the operation was not in itself sufficient; the plaintiff claiming that she did not have the proper understanding of the character of the operation, and its possible attendant dangers and results. Although such an agreement is considered by many as a proper precautionary measure, it may, perhaps be questioned, if in some instances at least, it might not raise doubt and distrust in the mind of the patient, reasoning that the doctor himself was not quite clear in the premises, and thus sought to throw the burden of responsibility of doubt upon the sufferer, which he himself should justly bear. This construction at least might be placed upon it by the average juryman, enforced, as it is sure to be, by the sympathetic plea of the eloquent attorney.[588]

CITY INVESTIGATION OF EXAMINATION OF PREGNANT PATIENTS (California 1885)

In 1885, the Board of Health of San Francisco, chaired by the mayor, investigated charges concerning examination of pregnant patients by Dr. Rosenthal at the City and County Hospital. Five women left the hospital because they objected to the examinations. The report acquitted Dr. Rosenthal but emphasized that women should not be dismissed from the hospital for refusal to submit to examinations. A newspaper report stated:

> He [Dr. Perry] also visited the women at the Hospital who were examined by Rosenthal and found that, according to their own statements, none of them were subjected to unusual treatment or treatment calculated to humiliate them. He did not think, however, that refusal to submit to these examinations should be cause for dismissal from the hospital, but that the

[587] BOSTON DAILY GLOBE, Mar. 20, 1885, 6; Nov. 6, 1885, 5; Nov. 7, 1885, 8; Nov. 12, 1885, 9; June 22, 1886, 13; Dec. 11, 1886, 3; Dec. 15, 1886, 6; Dec. 25, 1886, 8; Nov. 30, 1887, 8; Dec. 1, 1887, 6; Dec. 13, 1887, 6; BOSTON DAILY JOURNAL, July 1, 1886, 1; *A malpractice suit*, PHILADELPHIA MEDICAL TIMES, 16(7):252 (Dec. 26, 1885); *Stogdale vs. Baker,* BOSTON MEDICAL AND SURGICAL JOURNAL, 117(25):610-611 (Dec. 22, 1887)

[588] Henry O. Marcy, *Some special reasons why the laparotomist should consider the medico-legal aspects of abdominal surgery*, JAMA, 15:174, 176 (2 Aug. 1890)

Visiting Physician should humor the inmates and exercise great discretion in treating them.

Dr. Shorb also thought the punishment of dismissal was too severe for refusal to submit to the examinations. Whenever patients objected to an examination for clinical purposes he thought they might be sure of being sustained by the Board of Health. He did not believe in taking advantage of the poverty of patients to annoy them with unnecessary examinations.[589]

INQUEST - ZUBY WELLS (Illinois 1885)

In 1885, in Rockford, Illinois, an inquest was held into the death of Miss Zuby Wells. The coroner's jury concluded that the death was caused by blood poisoning as the result of an unsuccessful and unnecessary operation performed by Miss Dr. Huntley of Rockford. Witnesses testified that the girl was well and strong, and that Dr. Huntley hugged and caressed her until she consented to the operation; that she was kept under the influence of ether for hours; and nearly died on the operating table before counsel was called and the operation was stopped. The family said it was going to bring the matter before the grand jury. No further report has been located. [590]

ROBERTS V. WILLIAMS, AYRES & SATTLER - MALPRACTICE SUIT AFTER REFUSAL OF CONSENT TO RECOMMENDED TREATMENT (Ohio 1885)

In 1885 in Cincinnati, Ohio, Edward Roberts sued Drs, Williams, Ayres and Sattler, oculists, for malpractice. Roberts was a machinist who had gotten a piece of iron in his left eye. He went to them to treat an eye injury. They testified that they had advised that the eye needed to be removed to avoid losing the sight of both eyes, but he and his mother would not consent. He and his mother testified that they advised leaving the eye alone. He went from doctor to doctor for nearly two years. On the advice of the last doctor, she finally agreed to the operation, which was performed, but it was too late. He lost sight in both eyes and sued the original doctors. The judge instructed that if other oculists had advised removal and offered to remove the eye and Roberts refused to consent, he could not recover. The jury could not reach agreement. Eight were for the plaintiff and four for the defendants, so the plaintiff did not prevail. It was believed there would be a second trial, but no report of it has been located.[591]

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[589] *Board of Health - relating to examinations at the City and County Hospital by Dr. Rosenthal*, EVENING BULLETIN (San Francisco), Apr. 7, 1885

[590] *Illinois items,* CHICAGO TRIBUNE, April 10, 1885, 9

[591] *Court matters - Hearing of a malpractice suit against Drs. Williams & Ayers*, COMMERCIAL GAZETTE (Cincinnati), Apr. 21, 1885, 6; *Court matters - Testimony of oculists in Roberts malpractice case,* COMMERCIAL GAZETTE (Cincinnati), Apr. 22, 1885, 5; *Court matters - The malpractice case goes to the jury*, COMMERCIAL GAZETTE (Cincinnati), Apr. 23, 1885, 6; *Other court matters - Failure of the malpractice jury to agree*, COMMERCIAL GAZETTE (Cincinnati), Apr. 24, 1885, 5; *Court matters,* COMMERCIAL GAZETTE (Cincinnati), Apr. 25, 1885, 5; *The Buckeye*

FIRST CASE OF MUSCLE GRAFTING (New York 1885)

In 1885, Annie Finnell, age 23, suffered a work place injury when her hand was caught in the rollers of a clothes mangle at the laundry where she was employed. The first case of muscle grafting in America was performed on her at Bellevue Hospital. Her "consent" was obtained without telling her the nature of the procedure. "The young woman was told that she would have to submit to an operation, but she was not told, and is not now aware, of its exact nature."[592] No legal or professional action was initiated.

COLLECTION ACTION AGAINST HUSBAND FOR FATAL OPERATON HE DID NOT CONSENT TO (France 1885)

In 1881, M. Labbé performed an ovariotomy on a lady and she did not survive the operation. Labbé held the husband and nephews of the deceased (her residuary legatees) responsible for the debt. They refused to pay, claiming no responsibility. The husband had been opposed to the operation. In 1885, it was reported that the tribunal decided in favor of the doctor.[593]

MONTREAL VACCINATION RIOTS (Canada 1885)

In September 1885, when a provincial rule mandating vaccinating was published, there were riots among the French Canadians protesting the law. Within a week, matters had calmed down.[594] By October, an American newspaper was reporting that Montreal priests were recommending vaccination.[595] In 1885, during the smallpox epidemic, police in Montreal forcibly took sick children from the Gagnon family to a hospital.[596]

CHARGES OF RAPE AND ASSAULT OF PATIENTS (England 1885)

In 1885, in England, Dr. Trestrail was charged with rape of a pregnant patient. The jury found Trestrail not guilty.[597]

Metropolis, GALVESTON DAILY NEWS (TX), Apr. 29, 1885, 5; *Roberts vs. Williams, Ayres and Sattler*, CINCINNATI LANCET AND CLINIC, May 9, 1885, 567-575; *A recent malpractice suit*, MEDICAL NEWS, 46(22):603 (May 30, 1885)

[592] *A novel operation*, N.Y. TIMES, Apr. 30, 1885, 2

[593] *Paris,* BRITISH MEDICAL JOURNAL, ii:413-414 (Aug. 29, 1885)

[594] *French against English,* N.Y. TIMES, Sept. 29, 1885, 1; *All quiet in Montreal,* N.Y. TIMES, Oct. 6, 1885, 1

[595] WELLSBORO AGITATOR (PA), Oct. 20, 1885, 2

[596] *The smallpox epidemic,* N.Y. TIMES, Nov. 5, 1885, 5; see *The smallpox in Canada*, N.Y. TIMES, Nov. 6, 1885, 1, for another case of resistance the next day, see *Health officers defied,* N.Y. TIMES, Oct. 26, 1885, 1

[597] *Western Circuit*, TIMES (London), Nov. 12, 1885, 5; *Successful disposal of false charge,* BRITISH MEDICAL JOURNAL, ii:924 (Nov. 14, 1885); *Criminal charges against medical men*, MEDICAL PRESS AND CIRCULAR, 91:496-497 (Nov. 25, 1885)

In 1885, in Leeds, England, police surgeon George Henry Heald was charged with indecent assault of Ada Jane Hodgson during a medical examination. The jury found Heald not guilty.[598] Note that this the same George Heald who was fined for examining Mary Harrison against her will in 1878.[599]

BROWN V. PURDY - REMOVAL TO SMALL POX HOSPITAL (New York 1885)

On November 19, 1879, Angelina M. Brown was removed to a smallpox hospital in New York based on a complaint to the Board of Health by Dr. A.E.M. Purdy. When officials arrived for her removal, she objected but was told that force would be used if she resisted, so she went along quietly. It was determined that she did not have smallpox and she was authorized to leave, but since she was ill she accepted the invitation to stay for several more days. Mrs. Brown had operated a successful store, but her customers refused to deal with her after she was removed. Mrs. Brown sued Dr. Purdy. The trial occurred in November 1885. The jury awarded her damages. The Superior Court ruled that the case should have been dismissed because she sued the wrong men. The physician she sued had a duty to report. The decision to remove her to the hospital was made by another official.[600]

ATTEMPT TO NEGATE WRITTEN CONSENT TO AUTOPSY (Massachusetts 1885)

Although this chronology is focused on consent and refusal of treatment of living persons and does not address the handling of dead bodies, this case is included as an early example of an attempt to negate a written consent.

In 1885, Frances Rooney sued George Rowe and Dr. Samuel Delano in Boston municipal court in part for performing an autopsy on the body of her father without her consent. She had signed consent to the autopsy, but she said the paper was misrepresented. The defendants stated they had informed her the purpose of the paper. The judge found that she had consented.[601]

HOLLYWOOD V. REED - COLLECTION ACTION - NO CURE, NO FEE - (Michigan 1885)

Dr. James Hollywood sued Alfred Reed to collect the amount claimed to be due for services. The patient claimed that there was a contract that there would be no fee unless there was a cure and there was no cure. The jury

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[598] *The Assizes,* TIMES (London), Dec. 1, 1885, 9

[599] See Examination of females without consent (England 1877-1878), supra at page 140

[600] *In a small pox hospital,* N.Y. TIMES, Dec. 9, 1879, 1; *The case of Miss Brown,* N.Y. TIMES, Dec. 10, 1879, 8; *In the pesthouse by mistake,* N.Y. TIMES, Nov. 18, 1885, 8; *In and about the city,* N.Y. TIMES, Nov. 19, 1885, 2; *Sued the wrong men,* N.Y. TIMES, Dec. 31, 1886, 8

[601] *A peculiar suit*, WORCESTER DAILY SPY (Mass), June 4, 1885, 4; SPRINGFIELD DAILY REPUBLICAN (Mass), June 5, 1885, 7; WORCESTER DAILY SPY (Mass), June 5, 1885, 1

reached a verdict in favor of the defendant. In 1885, the Michigan Supreme Court upheld the verdict.[602]

REVOCATION OF MEDICAL LICENSE FOR FALSE ADVERTISING (Minnesota 1885)

In 1885, the Supreme Court of Minnesota, addressed a case in which a physician sough to prohibit the state medical licensing board from revoking his medical license for false advertising. The trial court granted the Writ of Prohibition and the Supreme Court quashed the writ.

> The complaint sets out, in full, the advertisement in which relator, among other things, asserts to the public his ability to speedily cure *all chronic*, nervous, blood, and skin diseases of both sexes, also *all* diseases of the eye and ear, without injurious drugs or hindrance from business; *all* old, lingering constitutional diseases, where the blood is impure, causing ulcers, blotches, sore throat and mouth, pains in the head and bones, *cured for life*, etc. The complaint further charges that relator published this advertisement for the purpose of soliciting and procuring, wrongfully and fraudulently, patients to submit themselves to medical treatment by him; and that the statements therein contained are *false*, and that relator *well knew* them to be false when he made them, and that it was intended thereby to deceive the public and impose on the credulous and ignorant. The gist of this charge is, not that he advertised his business, nor merely that the statements contained in the advertisement were false, but also that relator *knew them to be false*, and made them *with intent to deceive and impose on the public*. If true, this is unprofessional and dishonorable conduct of the grossest kind.[603]

INVOLUNTARY OPERATIONS ON MILITARY PERSONNEL (1885)

In 1886, a medical journal reported that a law had been passed related to the Serbo-Bulgarian war authorizing involuntary operations on military personnel in some circumstances.

> When operating commenced it was found that the patients would as often as not refuse permission to the surgeon to amputate, whereon the surgeons went to the council for help. A law was passed to suit the case, which said that if three medical men agreed that it was necessary for a patient to undergo a capital operation, and refused his consent, that the operation might be done without or rather against his consent.[604]

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[602] *Hollywood v. Reed*, 57. Mich. 234, 23 N.W. 792 (June 10, 1885)
[603] *State ex rel. Feller v. State Board of Medical Examiners*, 34 Minn. 391, 26 N.W. 125 (24 Dec. 1885)
[604] R. Lake, *The Servo-Bulgarian war from a surgical point of view*, ANNALS OF SURGERY, 4:381, 384 (1886)

The law has not been located. Hostilities ended in late November 1885, when the Red Cross arrived, so any law would likely have been enacted in Serbia or Bulgaria in December 1885.

TIEDMAN'S OPINION ON COMPULSORY SURGICAL AND MEDICAL TREATMENT (1886)

In 1886, Christopher G. Tiedman published *A TREATISE ON THE OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM A CIVIL AND CRIMINAL STANDPOINT*, Section 15 of Volume 1 was *Compulsory submission to surgical and medical treatment*. He opined that medical and surgical treatment could not be forced on sane adults except when they had conditions that were a danger to the public.[605]

CAVE V. TORRE - FALSE IMRISONMENT IN ASYLUM (England 1886)

In 1886, in England, in the case of *Cave v. Torre*, the plaintiff claimed false imprisonment in a lunatic asylum. A lower court ordered the defendant to give the grounds for determining madness. This was reversed on appeal.[606]

PECULIAR PEOPLE - RELIGIOUS REFUSAL OF MEDICAL TREATMENT - (England 1886)

In February 1886, an inquest was held in Royston, England, into the death of Martha Theobald, from pneumonia. Her father was a farm bailiff named William James Theobald (called Leader in early newspaper reports) and a member of the Peculiar People. He declined to obtain medical aid. The coroner's jury returned a verdict of manslaughter.[607]

In May 1886, before Mr. Baron Pollock, William James Theobald was indicted for the manslaughter. On May 16, he was tried. There was medical testimony that the life of child would have been prolonged by medical attendance. The jury convicted Mr. Theobald and he was sentenced to seven days imprisonment without hard labor.[608]

In February 1886, another inquest was held in Essex into the death another child, Rosie Annie Crosby, who died from pneumonia. Her father was a member of the Peculiar People and refused to call in medical assistance. The

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[605] Christopher G. Tiedman, A TREATISE ON THE OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM A CIVIL AND CRIMINAL Standpoint (St. Louis: F.H. Thomas 1886)

[606] *Cave v. Torre*, 54 L.T. (N.S.) 87 (Q.B. Div. Feb. 24, 1886), rev'd 54 L.T. (N.S.) 515 (Ct. of App. Mar. 12, 1886); *Notes of cases,* ALBANY LAW JOURNAL, Apr. 10, 1886, 282; *Bill of particulars - libel,* ALBANY LAW JOURNAL, July 10, 1886, 31

[607] BIRMINGHAM DAILY POST, Feb. 5, 1886; *The Peculiar People,* LLOYD'S WEEKLY NEWSPAPER (London), Feb. 7, 1886; *The Peculiar People,* LANCET, i:283 (Feb. 6, 1886)

[608] *The Assizes,* TIMES (London), May 17, 1886, 7; *The Peculiar People,* LLOYD'S WEEKLY NEWSPAPER (London), May 16, 1886; *The Peculiar People,* EVENING NEWS (London), May 15, 1886, 1

jury recommended that proceedings be brought against the father for willful neglect.[609] No evidence of further proceedings has been located.

In July 1886, Coroner Langham held an inquest in Southwark on the death of Mary Brooks, age 4. Her parents were members of the Peculiar People and had not sought medical attendance. A physician testified that the child had died form meningitis and that there was no cure. The father was acquitted and warned by the judge.[610]

In September 1886, an inquest was held into the death of Elizabeth Hughes who was a member of the Peculiar People and refused medical attendance. A doctor who testified could not be certain she would have lived with medical attendance. The jury found natural death and censured the husband and the elder George Brooks.[611]

ANESTHESIA (1886)

In 1886, Thomas E. Roche died from the administration of chloroform in the German Hospital in New York City. A coroner's jury found no hospital or physician liability. The report stated: "Inasmuch as the chloroform was of good quality and administered by a competent physician in a proper manner and with the consent of the patient, no blame can be attached to the hospital authorities or physicians in charge."[612]

In 1886 Jonathon Evans died under the effects of chloroform administered with his assent before surgery at the Manchester Workhouse infirmary. The jury exonerated the medical personnel.[613]

GRING V. LERCH - REFUSAL TO HAVE SURGERY NEGATED PROMISE TO MARRY (Pennsylvania 1886)

A woman sued a man for breach of promise to marry. He defended on the grounds that she had disclosed that she needed surgery in order to engage in intercourse and she promised to undergo such surgery, but she had not done so. The trial court ruled in favor of the woman. In 1886, the Pennsylvania Supreme Court reversed. "We are of opinion that the plaintiff's failure to perform her promise to have the operation performed absolved the defendant from his contract."[614]

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[609] *The peculiar people and the doctors,* ECHO (London), Feb. 16, 1886, 4; *Essex - The peculiar people and the doctors*, LLOYD'S WEEKLY NEWSPAPER (London), Feb 21, 1886
[610] *Inquests,* TIMES (London), July 23, 1886, 7; GUARDIAN (London), July 28, 1886, 6
[611] *Inquests*, STANDARD (London), Sep. 17, 1886, 6
[612] *The physician blameless,* N.Y. TIMES, Feb. 27, 1886, 8
[613] *Death under chloroform*, MANCHESTER TIMES, Nov. 13, 1886.
[614] *Gring v. Lerch*, 112 Pa. 244, 3 A. 841 (Apr. 12, 1886); *Judgment reversed,* DAILY ERA (Bradford PA), Apr. 14, 1886, 1

There was no attempt to compel the surgery. She had the right to refuse the surgery, but there were consequences.

MEDICAL SERVICES ARE NECESSARIES (Michigan 1886)

In 1886, the Michigan Supreme Court ruled that medical services were necessaries, like food and clothing, so a married woman who had been deserted by her husband could contract for medical services. “That the medical services rendered were in a proper sense necessaries cannot be questioned.” “It is not to be expected that physicians and surgeons will always feel bound to render gratuitous treatment to injured persons, and when the occasion is pressing it would be unreasonable to delay until an absent husband is communicated with to learn whether he consents or refuses to assume her contracts. Time will not allow minute inquiries, and humanity will not prompt them.” Thus, he was responsible for the bill. The case was a collection action by a physician for treatment of a fractured leg.[615]

INVESTIGATION AT NORTH STAFFORDSHIRE INFIRMARY OF ALLEGED FORCED OPERATIONS (England 1886)

In 1886, Rev. Tovey was dismissed from the chaplaincy of the North Staffordshire Infirmary and made charges in the press against the staff. The Infirmary appointed a committee to investigate. The Birmingham Daily Post reported: “Modest women, it is alleged, have been forced to submit to a totally unnecessary operation at the will of the nurse. The committee find this is simply untrue.”[616]

CASEY V. IMLACH - ALLEGED OPERATION WITHOUT CONSENT - DUTY TO INFORM OF THE NATURE OF THE OPERATION AND ITS POSSIBLE RESULTS (England 1886)

In 1886, in England, Mr. and Mrs. Casey sued a surgeon, Dr. Francis Imlach, for an operation in 1884 when he removed Mrs. Casey's ovaries and Fallopian tubes without her consent. Dr. Imlach testified that before the operation that he was convinced that she understood the nature of the operation. Mrs. White, a hospital nurse, testified that she prepared the patient for the operation and remembered telling Mrs. Casey what the consequences of the operation would be. The jury returned a verdict for the defendant in 1886.

An Inquiry Committee at the Liverpool Medical Institution issued a report in late 1886. It stated:

> The principal subject of inquiry was whether the patients were duly and fully informed of the nature and probable consequences of the operations proposed. The lady superintendent and the nurses stated that they were

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615 *Carstens v. Hanselman*, 61 Mich. 426, 28 N.W. 159 (May 12, 1886)

616 BIRMINGHAM DAILY POST, Aug. 20, 1886

always most completely informed upon *every* point. The deputation, however, reported to the Inquiry Committee that the impression which they had received from their interview was that, whatever might have been the intention of the nursing staff, they had not in reality conveyed to the patients such information as to the character and results of the operations as could alone be considered sufficient.
Previous information to the patients. - The Committee are also of opinion that the medical staff should use more care fully to apprise the patients of the nature of the operations about to be performed, and their possible results. The patients examined by the Committee very generally denied that sufficient information—or, indeed, any information at all - was given to them as to what was proposed to be done to them.

Dr. Imlach was removed from the staff of the hospital in 1887.[617]

In reaction to the *Casey v. Imlach* case, Franz Hoeffner threatened to assault Dr. John Earp Burton, an honorary surgeon at the same hospital. Dr. Burton had performed an operation on his wife with "her full consent." he wrote a letter to the doctor in which he challenged him to a duel. He stated:

> By your instructions my wife has told me a lie concerning her state of health after operation. … You are condemned by the laws of this realm to the gallows for perpetuating such hellish outrages on women without even hinting to their husbands of what you are going to do to them or even to acquaint the unfortunate Woman herself of the consequences.[618]

Mr. Hoeffner was charged with threatening to assault the doctor. After trial he was bound over to keep the peace with two sureties of £50 each.[619]

CONSENT OF MINOR TO BE SKIN DONOR (Georgia 1886)

In 1886, in Georgia, Dr. Henry Wile obtained the consent of a 13-year-old boy to remove skin grafts from his arm to place on the ulcerated head of his 9-year-old cousin who had been burned in a fire. The boy's father criminally charged Dr. Wile with assault and battery. The judge ruled that the boy had

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[617] *Extraordinary action against a Liverpool doctor*, LIVERPOOL MERCURY, August 7, 1886; *Action against a medical man*, DAILY NEWS (London), August 7, 1886; *The Assizes,* TIMES (London), Aug. 9, 1886, 7; *Action against a Liverpool doctor: Casey v. Imlach*, LANCET, ii, 298-303 (Aug. 14, 1886); *Hospital for Women Liverpool*, BRITISH MEDICAL JOURNAL, 1195-1196 (Dec. 11, 1886) (report of inquiry committee); *Report of the inquiry committee appointed by the Liverpool medical institution,* LANCET, ii:1147-1149 (Dec. 11, 1886); *The election at the Liverpool Hospital for Women*, MEDICAL PRESS AND CIRCULAR, 94:123 (Feb. 9, 1887)
[618] *Challenge to a duel,* TIMES (London), Aug.16, 1886, 6
[619] *Challenge to a duel,* TIMES (London), Aug.16, 1886, 6; *The challenge to a duel,* TIMES (London), Aug.23, 1886, 6

more than ordinary intelligence and discretion and had the right to consent, so no crime had been committed. The case was dismissed.[620]

CONSENT TO OPERATION REQUIRED IN CHARITABLE HOSPITAL (India 1886)

In November 1886, in India, a pauper patient sued for loss of sight due to an unskillful and unauthorized operation. The trial judge ruled that the surgeon attending a patient in a charitable hospital could operate without consent and then dismissed the case due to lack of evidence of unskillfulness. On appeal the court ruled that the trial court had erred on the consent issue and was correct on the evidentiary issue. The appeal was dismissed despite the error.[621]

GARREY V. STADLER - COLLECTION ACTION - IMPLIED DUTY TO PAY FOR SERVICES (Wisconsin 1886)

In December 1886, the Wisconsin Supreme Court decided the case of *Garrey v. Stadler*. Dr. Garrey had been called in as a consulting surgeon by the attending surgeon Dr. Fleischer and assisted in the operation with the knowledge and assent of the patient, Stadler. Dr. Garrey sued the patient for payment of the value of his services on the implied promise to pay. Dr. Fleischer had a contract with Stadler that Fleischer would pay for any assistants or consultants called in. Dr. Garrey was not aware of this contract. The trial court had ruled for the patient and the supreme court reversed and ordered a new trial.

> Whatever may have been the belief or understanding of the defendant on the subject, such belief could not release him from liability to the plaintiff for the services performed, in the absence of any evidence tending to show that the plaintiff had knowledge of the contract between him and Dr. Fleischer….
>
> As the law in such case implies a promise to pay what the service is reasonably worth on the part of the person for whom such service is performed, such implied promise must be overcome by evidence showing that the person performing the service knew that there was a different arrangement for the payment of such service, to which he expressly or impliedly assented.[622]

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[620] *Medico-legal aspects of skin-grafting,* ATLANTA MEDICAL AND SURGICAL JOURNAL, 4(1):52-53 (Mar. 1887); *The medico-legal aspects of skin-grafting*, BOSTON MEDICAL AND SURGICAL JOURNAL, 116(13):317 (Mar. 31, 1887); *Of general interest*, DECATUR WEEKLY REPUBLICAN (Ill), Nov. 18, 1886, 4; *Prosecuted for skin grafting,* MEDICAL RECORD, 31:332 (Mar. 19, 1887)

[621] *The suit for damages for loss of sight – Eduljee Sorabjee Mistry v. Framjer Dorabjee Divecha*, TIMES OF INDIA, Nov. 24, 1886, 3

[622] *Garrey v. Stadler*, 67 Wis. 512; 30 N.W. 787 (Dec. 14, 1886)

JONAS V. KING - COLLECTION ACTION - EXTENT OF DUTY TO SUBMIT TO FURTHER TREATMENT (Alabama 1886)

A practitioner King sued a patient Jonas to collect his fee for treating hemorrhoids on a no cure, no pay contract. The practitioner claimed that the patient had breached the contract by refusing to submit to further treatment. The patient sought the identity of the treatment to prove it was worthless. The practitioner claimed it was a secret and the trial court did not order disclosure. The jury awarded the practitioner $100. The Supreme Court of Alabama reversed and ordered a new trial, finding errors including failure to require disclosure of the treatment.[623]

STATUTE REGARDING CONSENT TO OPERATIONS (Cape of Good Hope 1886)

In 1886, the Cape of Good Hope adopted a statute protecting surgeons from criminal penalties death from operations in certain circumstances.

> *Surgical Operations.*
> 73. Every one is protected from criminal responsibility for performing with reasonable care and skill any surgical operation upon any person for his benefit, with such person's consent, if in a fit state to give such consent, or, in the case of a minor, with the consent of the parents or guardians of such minor: Provided that performing the operation was reasonable, having regard to the patient's state at the time, and to all the circumstances of the case.
> *Act done in good faith for the benefit of a Person without consent.*
> 74. Nothing is an offense by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit.[624]

SHAW V. GRAVES - COLLECTION ACTION - SCOPE OF DUTY OF OTHERS TO PAY (Maine 1887)

In February 1887, the Maine Supreme Judicial Court decided a case in which a doctor tried to collect his fee for services rendered to a woman living with the defendants. The trial court had ordered payment and the appellate court reversed.

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[623] *Jonas v. King*, 81 Ala. 285, 1 So. 591 (Dec. 1886)
[624] NATIVE TERRITORIES' PENAL CODE, No. 24 (July 9, 1886)

A physician was called to visit a Mrs. Cofren who lived with the defendants. She had the bond of her sons that they would support her, and the sons had the obligation of the defendants to render the support. In rendering this support they might have to make contracts with physicians or other persons, but the person to be supported could not make contracts in their name without their consent. The plaintiff, a physician, performed medical services for Mrs. Cofren and made the charges to her therefor. An action for those services cannot be maintained against the defendants on an implied promise. Such an implication does not arise from the situation of the parties. *Moody v. Moody*, 14 Me. 307.

No express promise was made by either of the defendants (husband and wife), nor can any promise be fairly inferred from the circumstances. The most that can be pretended, to fix any liability on the wife, is, that she knew that the plaintiff had been sent for, not directly by her, but without any objection on her part. But the case shows that, when the plaintiff first came to the house, he was met by the husband, who forbade him rendering any services on their account.

The utmost claim that could have been in any view possibly recoverable, would be for so much of the first visit of the plaintiff as consisted in going to the house, before he was met by the husband in a hostile attitude, almost at the door. But this the plaintiff cannot recover, if for no other reason, because at that interview, he elected not to divide the charge, rendering the services on the credit of Mrs. Cofren, against whom he charged all subsequent visits, and against whom and whose estate he has since endeavored, until this suit was brought for the same services, to make a collection of his bill. The verdict is unsupported by the evidence.[625]

ANESTHESIA (1887)

In March 1887 an inquest was held into the death of a laboring man at St. Thomas's Hospital in London under the influence of chloroform administered with the patient's consent. The jury found no blame attached to the hospital authorities.[626]

INQUEST - TREATMENT OF SUICIDE AGAINST WILL (California 1887)

In April 1887, an inquest on a death in Los Angeles reported that a physician had been called to attend the deceased shortly before his death because he had taken a half-ounce bottle of laudanum with intent to kill himself. The physician reported using emetics and other remedies "much against the will and efforts of the deceased." Although the deceased appeared to rally, he died that night. The inquest concluded that the death was due to suicide.[627]

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[625] *Shaw v. Graves*, 79 Me. 166, 8 A. 884 (Feb. 24, 1887)
[626] *Death from chloroform*, BRITISH MEDICAL JOURNAL, i:686 (Mar 26, 1887)
[627] *Cold poison*, LOS ANGELES TIMES, Apr. 29, 1887, 2

SUKAROO KOBIRAJ V. THE EMPRESS - ACCEPTANCE OF RISK UNDER THE INDIA PENAL CODE (India 1887)

Sukaroo, a kobiraj uneducated in matters of surgery, operated on an old and feeble man, Manai, for internal piles with an ordinary knife. The man died from hemorrhage. The kobiraj was charged under the India Penal Code s. 304A with causing death by a rash and negligent act. He asserted that he was entitled to the defense of s. 88 because he acted in good faith, without intention of causing death and for the benefit of a patient who had accepted the risk. The appellate court concluded that since he was uneducated in surgery he was not acting in good faith. It also concluded that he had not demonstrated the patient knew of the risk when he consented to the operation, so he could not be said to have accepted the risk. The court wrote:

> A patient can hardly be said to accept a risk of which he is not aware. We think it was for the defence pleading the exception to show that the patient in the present case did accept the risk, and that consequently he was aware of it. But no attempt was made to show that the patient did know what risk he was undertaking. The evidence is only to the extent that he consented to the operation with great unwillingness, and that the only information communicated to him by the prisoner on the subject was that if he submitted to the operation he would be cured. Upon that understanding he did submit; and died. It seems, therefore, quite impossible to say that he accepted the risk of the prisoner's act.

The conviction was upheld, but the original sentence of one year's rigorous imprisonment was reduced to a fine of a hundred rupees because "similar sets of acts by really professional men have been visited in this country with much less punishment."[628]

REMOVAL OF BIRTHMARK TO INTERFERE WITH IDENTIFICATION OF CHILD (Illinois 1887)

In 1887, during the pendency of a habeas corpus proceeding to determine the custody of a child, age 4, named Emile de Beukelaer or Eddie Andrews, the woman who had secured possession, Emma de Benkelaer, arranged for a physician, William H. Burt, to remove a birthmark from the boy to make it more difficult to determine his identity. The trial court found the woman and the doctor in contempt of court for this action. The trial court had ordered thirty days in jail

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[628] *Sukaroo Kobiraj v. The Empress*, INDIAN LAW REPORTS (Calcutta Series), 14:566 (Apr. 30, 1887). See also *Imperatix v. Jamaludin Walad Jamal Saheb and others*, NORTH INDIAN NOTES AND QUERIES, 3(12):202-203 (Mar. 1894) [Bombay High Court upheld murder conviction of three for death during exorcism of evil spirit to treat back pain with consent of deceased and her father - "We find no evidence showing that she consented to such great violence as was used."]

and a $500 fine. In October 1887, the Illinois Court of Appeal found the actions of the woman and the physician to be interference with justice and contempt of court but reversed their conviction on the grounds that the punishment was too harsh.[629] Custody of the child was eventually awarded to his birth mother, Carrie Andrews.[630]

COURT MARTIAL OF MARINE WHO REFUSED MEDICATIONS (U.S. military court 1887)

In October 1887, private marine Coleman was sentenced by court-martial to ten days of solitary confinement for "disrespectful language" in refusing to take pills prescribed by the naval physician.[631]

GERMAN PHYSICIAN SLAPPED CHILD (Berlin 1888)

In 1888, a physician in Berlin, Germany, slapped the buttocks of a four-year-old who was screaming and kicking. The mother obtained a summons against the doctor. The court decided that his object was to do good for the child and dismissed the case.[632]

INQUEST - BENEDICT - PRACTICE WITHOUT LICENSE (Chicago 1888)

In February 1888, Mr. F. Benedict died in Chicago under the Koreshan Science treatment of C.R. Teed. The coroner's jury found that he had practiced medicine without a license. The determination of the grand jury has not been located.[633]

BARTLETT V. SPARKMAN - COLLECTION ACTION - SCOPE OF DUTY OF OTHERS TO PAY (Missouri 1888)

In April 1888, the Missouri Supreme Court addressed a case concerning when the actions of others could obligate payment for medical services. The defendant, Sparkman, authorized his brother to procure Dr. McGowen for his sick wife. Dr. Mc Gowan was not available so the brother secured a different doctor,

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[629] *de Beukelaer v. People*, 25 Ill. App. 460 (Oct. 1887 decided; Mar. 28, 1888 opinion filed); *Punished for contempt*, CHICAGO DAILY TRIBUNE, July 9, 1887, 7; *A charge of conspiracy*, CHICAGO DAILY TRIBUNE, July 13, 1887, 7; *In the domain of justice,* CHICAGO DAILY TRIBUNE, July 21, 1887, 10; *Mrs. de Beukeiner [sic] gets another chance,* CHICAGO DAILY TRIBUNE, Mar. 29, 1888, 10; *The Eddie Adams contempt,* DAILY INTER OCEAN (Chicago), Mar. 29, 1888, 10.
[630] *Miss Andrews keeps her baby,* CHICAGO DAILY TRIBUNE, July 24, 1887, 7
[631] *In jail for not taking pills,* NEWARK DAILY ADVOCATE (Ohio), Oct. 25, 1887, 1; *Condensed telegrams,* DECATUR DAILY REVIEW, Oct. 25, 1887, 2
[632] *Punishing patients for their own good*, CANADA LANCET, 20:220 (Mar. 1888)
[633] *A "Koreshan" fatality*, CHICAGO TRIBUNE, Feb. 22, 1888, 1; *Held to the grand jury,* CHICAGO TRIBUNE, Feb. 23, 1888, 12

Dr. Bartlett. The trial court found this outside the scope of the agency of the brother, so Sparkman was not liable. The appellate court noted that in new and unexpected emergencies and necessities an agent can be justified in assuming extraordinary powers. The court reversed and ordered a new trial.[634]

AQUITTAL OF CHINESE DOCTOR WHEN PATIENT DIED UNDER TREATMENT FRIENDS HAD CONSENTED TO (Australia 1888)

In 1888, in Ararat, Victoria, Australia, friends of Frederick Lewin called in a Chinese doctor named Ah Wah to treat him for diphtheria. A few days later Lewin was taken to a hospital where he was found to have diphtheria and pneumonia. He died. The Chinese doctor was criminally charged in the death. The judge pointed out that he had contributed to the death by failing to apply fitting treatment; he had not actively injured the man; although ignorant, he had done his best; and he had acted at the request of the deceased friends who had brought the trouble on themselves. The jury acquitted Ah Wah.[635]

COOK COUNTY HOSPITAL SURGICAL CONSENT RULE (Chicago 1888)

In April 1888 the Public Service Committee of the County Board in Chicago adopted new rules for the conduct of the County Hospital. The newspaper report of the action included:

> It is further provided that all operations shall be performed by the attending staff, but none shall be performed without the consent of the patient.[636]

BENNISON V. WALBANK - UNNECESSARY SURGERY (Minnesota 1888)

Drs. Walbank and Collins treated George Bennison after he was accidently caught in the gearing of a mill. They amputated his arm. There is no indication this was done without his consent. Bennison sued claiming that the amputation was not necessary. At the first trial the jury could not agree.[637] At the second trial the jury awarded Bennison $3000.[638] In 1888, the Minnesota Supreme Court upheld the verdict.[639]

CHRISTIAN SCIENCE - CORNER - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (Massachusetts 1888)

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[634] *Bartlett v. Sparkman*, 95 Mo. 136, 8 S.W. 406 (Apr. 1888)
[635] *Charge of manslaughter against a Chinese doctor*, AUSTRALIAN MEDICAL GAZETTE, 7:175 (Apr. 1888)
[636] *County building notes*, INTER OCEAN (Chicago), Apr. 25, 1888, 9
[637] *Alleged malpractice*, ST. PAUL DAILY GLOBE (MN), Apr. 28, 1887, 5; *The jury disagreed*, ST. PAUL DAILY GLOBE (MN), Apr. 29, 1887, 1
[638] *Judgment for malpractice*, BISMARCK DAILY TRIBUNE (ND), May 10, 1887
[639] *Bennison v. Walbank*, 38 Minn. 313, 37 N.W. 447 (Apr. 25, 1888)

In May 1888, a Christian Scientist, Mrs. Abbie Corner, was charged in Massachusetts with manslaughter for the death of her daughter, Mrs. Lottie James, by failing to provide a physician for her in childbirth. The first judge who reviewed the evidence concluded that she should be held to answer before the Superior Court. She furnished bonds and was released. A grand jury reviewed the matter and refused to indict, exonerating Mrs. Corner.[640]

INQUEST - EMERGENCY AMPUTATION WITHOUT PARENTAL CONSENT (England 1888)

In July 1888 in England, the LANCET medical journal reported an inquest into a death of a minor Elizabeth Boxall from an amputation without parental consent. The emergency circumstances were found to justify proceeding without parental consent.

> … inquest recently held on a patient who had formerly been in the London Hospital, where amputation of the leg was performed. The verdict returned by the jury was "Death from shock " *{sic).* … The father made a complaint that the operation had been done without his consent; but until the inquest the hospital authorities had heard nothing of any resentment on his part with regard to this. It would appear that the patient was placed under an anaesthetic, as permission had been obtained to examine into the nature of an unusual swelling, which had developed after a contusion of the thigh, and that this was found to be an extensive sarcomatous growth. There being no question as to the necessity for amputation, and as the child would have run grave risk if the condition had been left as it then was, and operation postponed, amputation was performed at once. The consent of parents to any operation is obtained as a matter of course in all cases, but at times the surgeon has to act on his own responsibility, and stand *in loco parentis. …*[641]

INQUEST - VACCINATION IN ST. PANCRAS WORKHOUSE (England 1888)

In November 1888, inquest was held in England concerning the deaths of two children at St. Pancras Workhouse after vaccination by the medical officer.

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[640] *A faith curist in trouble,* N.Y. TIMES, May 6, 1888, 1; *Christian Science killed her,* N.Y. TIMES, May 19, 1888, 8; *The Christian Scientist held,* N.Y. TIMES, May 27, 1888, 5; *The Christian Scientist not indicted,* N.Y. TIMES, June 10, 1888, 6; *Mrs. Corner held for trial*, FITCHBURG SENTINEL (MA), May 26, 1888, 5; *The Christian Science case,* ATLANTA CONSTITUTION (GA), June 10, 1888; BOSTON MEDICAL AND SURGICAL JOURNAL, 118:662 (June 28, 1888)

[641] *Operating without permission,* LANCEt, ii:82 (July 14, 1888); *Charge against a hospital,* REYNOLD'S NEWSPAPER (London), July 1, 1888. See *The memorial plaque to Elizabeth Boxall*, Posted by London Walking Tours at https://www.london-walking-tours.co.uk/postmans-park/elizabeth-boxall.htm - the plaque states: "Elizabeth Boxall, Aged 17, Of Bethnal Green...Died Of Injuries Received In Trying To Save A Child From A Runaway Horse, June 20 1888."

The coroners' jury decided the death had been accelerated by vaccination, and added a rider that children in workhouses should not be vaccinated before or while in quarantine without the consent of the parents, when that can be obtained.[642]

NELSON V. HARRINGTON - CONTRACT MIGHT LIMIT PRACTITITONER LIABILITY (Wisconsin 1888)

In November 1888, the Wisconsin Supreme Court decided the case of *Nelson v. Harrington*. In 1885, Tollef A. Nelson made arrangements with Dr. Harrington to treat his 15-year-old son, Thomas Nelson, who had problems with his hip. Dr. Harrington was a spiritualist and clairvoyant physician. Thomas ended up crippled and sued Dr. Harrington for malpractice. Dr. Harrington had not properly diagnosed the condition or treated the condition. Dr. Harrington defended that he had properly followed his "school" of medicine and that Mr. Nelson had picked him knowing his school. The jury found in favor of the Nelsons. The Supreme Court of Wisconsin affirmed, rejecting that clairvoyant medicine should be recognized as a school of medicine. Thus, a clairvoyant physician can be held to the standard of regular physicians. The court noted that it might be possible to establish a different standard by special contract, but that there was no special contract in this case. The court said:

> Perhaps a medical practitioner may protect himself from liability for unskillfulness by a special contract with his patient that he shall not be so liable; but in the absence of such a contract the practitioner must be held to his common-law liability. This rule was applied to a common carrier in *Conkey v. M. & St. P. R. Co.* 31 Wis. 619. DIXON, C. J., there said: "I think, in the absence of special contract or agreement to the contrary, the true policy of the law, now as much as ever and even more, is to adhere to the strict rules of liability on the part of common carriers established by the common law." Page 633. The reasons which there prevailed for adhering to that rule, and thus vindicating a sound public policy, are much more cogent in the case of the physician who deals with health and life instead of property.[643]

R. V. CLARENCE - ACQUITTAL OF DEFENDANT FOR GIVING VENEREAL DISEASE TO WIFE (England 1888)

In England in a non-medical case, *R. v. Clarence*, the defendant was convicted for assault for giving venereal disease to his wife. In November 1888, the appellate court reversed:

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[642] *Death after vaccination,* LANCET, ii:1033 (Nov. 24, 1888)

[643] *Nelson v. Harrington*, 72 Wis. 591, 605, 40 N.W. 228, 234 (Nov. 8, 1888); *Wisconsin news*, MILWAUKEE DAILY JOURNAL, Dec. 3, 1887; *A verdict for malpractice*, MILWAUKEE SENTINEL, Nov. 9, 1888, 5; *Malpractice - clairvoyants - degree of care and skill*, ALBANY LAW JOURNAL, 38:490 (Dec. 22, 1888)

First, was he guilty of an assault P In support of a conviction it is urged that even a married woman is under no obligation to consent to intercourse with a diseased husband, that had the wife known that her husband was diseased she would not have consented, that the husband was guilty of a fraud in concealing the fact of his illness, that her consent was therefore obtained by fraud and was therefore no consent at all, and, as the act of coition would imply an assault if done without consent, he can be convicted.

This reasoning seems to me eminently unsatisfactory. That consent obtained by fraud is no consent at all, is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent. In respect of a contract fraud does not destroy the consent. It only makes it revocable. Money or goods obtained by false pretences still become the property of the fraudulent obtainer unless and until the contract is revoked by the person defrauded, and it has never been held that, as far as regards the application of the criminal law, the repudiation of the contract had a retrospective effect, or there would have been no distinction between obtaining money under false pretences and theft.

A second and far more effective way of stating the argument, however, is that connection with a diseased man and connection with a sound man are things so essentially different that the wife's submission without knowledge of the facts is no consent at all. It is said that such a case rests upon the same footing with the consent to a supposed surgical operation or to connection with a man erroneously supposed to be the woman's husband. In the latter case there has been great difference of judicial opinion as to whether it did or did not amount to the crime of rape, but as it certainly would now be rape by virtue of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 4, I treat it as so settled.

A third way of putting the case is that, inasmuch as the act done amounts to legal cruelty according to the doctrines formerly of the Ecclesiastical Courts and now of the Divorce Court, it cannot be said to be within the consent implied by the marital relation.

These different ways of putting the argument in favour of a conviction have some important differences. According to each the consent of the marital relation does not apply to the thing done, a fact as to which there does not seem to be room for doubt, and according to each the want of it makes the transaction an assault. According to the first it is the fraudulent suppression of the truth which destroys the consent de facto given, a proposition involving as a necessary element in the offence the knowledge of his condition on the part of the offender. According to the second it is the difference between the thing supposed to be done and the thing actually done that negatives the idea of consent at all, and in that view it

must be immaterial whether the offender knew that he was ill or not. According to the third, his knowledge is material, not on the ground of fraudulent misrepresentation, but because it is an element in legal cruelty as that term is understood in the Divorce Court….
We are thus introduced, as it seems to me, to a set of very subtle metaphysical questions. If we are invited to apply the analogy of the cases in which a man has procured intercourse by personating a husband, or by representing that he was performing a surgical operation, we have to ask ourselves whether the procurement of intercourse by suppressing the fact that the man is diseased is more nearly allied to the procurement of intercourse by misrepresentation as to who the man is or as to what is being done, or to misrepresentations of a thousand kinds in respect of which it has never yet occurred to anyone to suggest that intercourse so procured was an assault or a rape. There are plenty of such instances in which the knowledge of the truth would have made the victim as ready accept the embraces of a man stricken with smallpox or leprosy…
Of course, if by legislation such cases should be brought within the criminal law, all we shall have to do will be to face the difficulties and do our best to administer the law. It seems to me, however, that such an extension of the criminal law to a vast class of cases with which it has never yet professed to deal is a matter for the Legislature and the Legislature only.

ACQUITTAL FOR ALLEGED ASSAULT BY IMPROPER MEDICAL EXAMINATION (England 1888)

In 1888 in England, Alice Ann Adam sued doctor Robert James Cooke, alleging that he had committed an assault by an improper examination. The jury concluded Dr. Cooke had made a justifiable examination.[644]

SULLIVAN V. TIOGA RAILROAD CO. - EFFECT OF REFUSAL OF AMPUTATION (New York 1889)

A railroad company employed Sullivan as an ashman. His leg was broken in an employment incident. He refused amputation advised by physician and died a few days later. His administratrix sued and the jury ruled in her favor. The highest court of New York upheld the verdict rejecting that railroad's assertion that the refusal of amputation should bar the claim:

> It is next argued by the learned counsel for the appellant that the plaintiff should be deprived of her recovery, because the injured man at first rejected the advice of his physician and refused to submit his leg to amputation. If the refusal was fatal to the patient, the defendant has no cause to complain, for death limits a verdict to a less sum than a jury might think proper to award to a living but crippled man. But the physician,

[644] *Alleged improper examination,* LANCET, ii:1033 (Nov. 24, 1888)

> in fact, gave no assurance that an operation would change the apprehended result. "It would," he testifies, "have improved the chances," but he also said that within his own experience there had been cases where against advice, and in the face of such objection, amputation had been omitted and the limb saved. It appears, therefore, that surgery is not an exact science, and even in its present advanced stage there is defective anatomy and misjudgment. It certainly cannot be said, as matter of law, that a patient may not, without imputation of negligence, trust to natural results, without the complications of scientific experiments. But this question was also properly submitted to the jury and answered by their verdict in favor of the plaintiff.[645]

FORCIBLE VACCINATION (Massachusetts 1889)

In 1889, Michael Tarpey, a steerage passenger on a Cunard ship from Ireland to Boston, was forcibly vaccinated after he refused to submit. He got boils and abscesses on the vaccinated arm. He sued claiming that the Boston Board of Health could not mandate vaccination on the high seas, so the action was unauthorized. The case was settled for an undisclosed “liberal sum.”[646]

GRAVES V. SANTWAY - UNNECESSARY SURGERY (New York 1889)

In New York, Dr. Frederick L. Santway performed gynecological surgery on Flora E. Graves for the purpose of removing her sterility. The patient "submitted" to the surgery, but claimed that she was "relying upon his assurances, declarations, and advice," the surgery was actually unnecessary and the surgery was performed negligently. She sued and the jury awarded her $500. In 1889 and 1891, New York appellate courts upheld the verdict.[647]

JANNEY V. HOUSEKEEPER - CONSENT OF HUSBAND TO SURGERY NOT NECESSARY (Maryland 1889)

In Maryland, Mrs. Matilda C. Janney had a lump in her breast. Dr. Housekeeper recommended removal of the tumor. She and her husband agreed to this operation. When Drs. Housekeeper and Gifford performed the surgery under anesthesia, they removed her breast. Six months later she died. Mr. Janney and his daughters sued the doctors. The jury ruled in favor of the defendants and the appellate court affirmed. In January 1889, the court affirmed that the decision concerning the surgery was for the patient, not her husband. The court wrote:

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[645] *Sullivan v. Tioga Railroad Co*., 112 N.Y. 643, 20 N.E. 569 (Mar. 5, 1889)
[646] *Exceed its authority,* BOSTON DAILY ADVERTISER, Aug. 2, 1889, 6; *Objected to vaccination*, BOSTON DAILY GLOBE, Aug. 2, 1889, 10
[647] *Graves v. Santway*, 6 N.Y.S. 892 (4th Dept. Apr. 1889), *aff'd* 127 N.Y. 677, 28 N.E. 256 (June 25, 1891)

When the doctors came to the house she had already prepared herself to undergo the operation. If she consented to the operation the doctors were justified in performing it, if after consultation they deemed it necessary for the preservation and prolongation of the patient's life. Surely the law does not authorize the husband to say to his wife, you shall die of the cancer; you cannot be cured, and a surgical operation affording only temporary relief, will result in useless expense. The husband had no power to withhold from his wife the medical assistance which her case might require….

The consent of the wife, not that of the husband, was necessary. The professional men whom she had called in and consulted, being possessed of skill and scientific knowledge, were the proper persons to determine what ought to be done. They could not, of course, compel her to submit to an operation, but if she voluntarily submitted to its performance, her consent will be presumed, unless she was the victim of a false and fraudulent misrepresentation, which is a material fact to be established by proof. … If the plaintiff alleges that there was no consent, he must establish his affirmation by proof. The party who allows a surgical operation to be performed is presumed to have employed the surgeon for that particular purpose….[648]

JENNINGS V. SNOW - LIBEL CONCERNING TREATMENT OF PATIENT (England 1889)

In 1889, in England, Dr. Jennings sued Dr. Snow for libel for a letter Dr. Snow wrote to the chairman of the weekly board of the Brompton Cancer Hospital concerning Dr. Jennings conduct with a patient Mary Clark. Jennings was accused of performing an operation without required consultations and unnecessarily and with trying to coerce Miss Clark into allowing him to amputate her arm. The amputation did not occur. The letter would be privileged, unless written with malice. It was claimed that for some time Snow had been trying to get Jennings removed from the staff. The jury returned a verdict in favor of the plaintiff and awarded £10 in damages. Although the case discusses consent and coercion issues, these were not presented in the instructions to the jury.[649]

FATAL FAST OF PRISONER (Georgia 1889)

In 1889 in Georgia, a prisoner, John Adams, died after a fatal fast. On March 15, 1889, the ATLANTA CONSTITUTION reported that there was widespread local discussion and published statements from several officers, physician and prominent citizens concerning what they would have done had they been in

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[648] *State ex rel. Janney v. Housekeeper***,** 70 Md. 162, 16 A. 382 (Jan. 10, 1889); SUN (Baltimore), Jan. 11, 1889, 2; *Where a wife's will is supreme,* N.Y. HERALD, Mar. 3, 1889, 12; *The rights of married women*, MILWAUKEE JOURNAL, Mar. 6, 1889, 2; CENTRAL LAW JOURNAL, 28:183-184 (1889)
[649] *Jennings v. Snow*, TIMES (London), Feb. 5, 1889, 3; Feb. 6, 1889, 3; Feb. 7, 1889, 3; Feb. 8, 1889, 3-4

charge. Some said they would have force fed him through a stomach tube and others said they would have tried persuasion and abided his decision.[650]

DEATH FROM UNNECESSARY OPERATION (Pennsylvania 1889)

In 1889, in Pennsylvania, Dr. Fickle and others performed an operation for obstruction of the bowels that caused the death of Miss Alice Thumma. A post-mortem showed there was no obstruction so the operation was unnecessary. Suit was filed in March 1889. The outcome has not been located.[651]

SANDERSON V. HOLLAND - PATIENT NON-COOPERATION (Missouri 1889)

In April 1889, Missouri addressed the impact of patient non-cooperation on a malpractice suit. It ruled:

> We regard the conduct of the parents in this case, however, as that of the plaintiff. While then it is a good defense, in an action for negligence, that the negligence of the plaintiff, *at the time of the injury*, contributed to produce the injury, yet "it is no answer to an action, that the injured party, subsequent to the injury, was guilty of negligence which aggravated it. The negligence that will constitute a defense must have concurred in *producing* the injury." Cooley on Torts, p. 683. If then the defendant, Dr. Holland, carelessly and unskilfully set, bandaged and dressed plaintiff's arm, and she was injured thereby, then the action will not be *defeated* by showing that subsequently her parents added to the extent of such injuries by their carelessness and negligence in nursing. This showing would not *defeat* plaintiff's case, but merely go to *mitigate* the damages as against the defendant….[652]

PENSION CLAIM OF CHARLES T. CALDWELL (D.C. 1889)

In 1888 a civil war soldier, Charles T. Caldwell, was denied a pension. In 1864, while in a military hospital for a fever, a operation had been performed on his hand for a preexisting injury. As a result a finger was amputated and his arm was partially paralyzed. The denial was on the basis that it was a preexisting condition. The decision was reviewed and reversed in 1889.

> 2. It was not improper for the surgeon, as indicated by the evidence in the accompanying papers, to suggest or propose that, in addition to treating claimant for the disabilities on account of which he was put in the hospital,

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[650] *What would you do,* ATLANTA CONSTITUTION (Ga), Mar. 15, 1889, 4
[651] *Sued for malpractice,* PHILADELPHIA INQUIRER, Mar. 25, 1889, 6; *Alleged unskillful surgery*, DAILY INTER OCEAN (Chicago), Mar. 24, 1889, 1; *Not afraid of a jury,* PHILADELPHIA INQUIRER, Apr. 4, 1889, 2
[652] *Sanderson v. Holland*, 39 Mo. App. 233 (Apr. 13, 1889)

he should perform the operation, which he did, upon the distorted hand of claimant, whether said operation was deemed by claimant to be a necessary one or not. The operation was plainly designed to benefit the soldier, and, in the performance of it, the surgeon was acting as strictly in the line of duty as when engaged in treating the diseases on account of which the soldier had been sent to the hospital. The discretion of the surgeon in the exercise of his authority in the treatment of his hospital patients was not limited, but free from restraint, except by his own judgment as to what was best to be done for each patient's benefit; his responsibility, also, was co-extensive with his discretion in the premises; and, therefore, the soldier's consent to the aforesaid operation could not lessen in any degree the surgeon's official responsibility in the matter.
3. It is not denied, but is admitted to be true, that the aforesaid surgical operation—however unnecessary it may have been—did increase, instead of remove, the distortion of the soldier's injured hand, and that the increased disability, resulting in injury of hand and partial paralysis of left arm, was both permanent in character and pensionable in degree…. the claimant's present disability is directly due to the line of duty in the service, the Government being responsible for the injurious consequences of the surgeon's apparent malpractice in the case.[653]

CANNOT COMPEL DEFENDANT TO SUBMIT TO ANESTHESIA TO DETERMINE WHETHER HE IS LYING (France 1889)

In 1889, a judge in Paris decided that the defendant could not compel the plaintiff to be put under chloroform without his consent to test whether he was lying. A falling stone had injured the plaintiff's arm. The defendant claimed the injury was a sham.[654]

SHEPARD - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (California 1889)

In 1889, a child, Howard Shepard, about age 3, of Rev. Mr. Shepherd, a minister in the Holiness Church, died in the Los Angeles area. When application was made for a burial permit without a physician's certificate, it was discovered the child had died of diphtheria without medical attention while the parents pursued divine healing. The father denied being a Christian Scientist; he believed in divine healing by Jesus. An inquest was held, and the jury found death from natural causes, but condemned the actions of those in charge of the child. As there was no law to cover the case, they could go not further.[655] The death

[653] United States Department of the Interior, DECISIONS OF THE DEPARTMENT OF THE INTERIOR IN APPEALED PENSION AND RETIREMENT CLAIMS (Washington DC: U.S. Government Printing Office, 1890), 37, at 39-40
[654] N.Y. HERALD, June 16, 1889, 19
[655] *"Divine healing,"* L.A. TIMES, July 6, 1889, 2; *Divine humbug,* L.A. TIMES, July 7, 1889, 3

occurred at the house of John Bayer. He was fined $5 for not reporting the existence of contagious disease on the premises.[656]

COOK COUNTY HOSPITAL RULE CONCERNING PHOTOGRAPHING PATIENTS (Illinois 1889)

In 1889 Board of Commissioners of Cook County (Illinois) adopted a requirement that no photographs be taken in Cook County Hospital without the written consent of the patient.[657]

CHILDREN CAN CONSENT TO BE SKIN DONORS (California 1890)

In December 1889 the 12-year-old son of Mr. Lanning responded to a newspaper ad of Dr. Stevens calling for eight to ten healthy children. Dr. Stevens removed skin from the children for skin-grafting without consent from the parents. The son returned home with ten cuts. He had been paid 5 cents each cut. A few days later Lanning swore out a complaint against Dr. Stevens for cruelty to children. Dr. Stevens paid $25 cash bail and was released. [658]

In Jan. 1890, Judge Owens issued a lengthy decision in Dr. Stevens favor. He concluded the children could give valid consent:

> I am aware that the statute arbitrarily fixes the ages of children for certain purposes - but this is not one of them - nor is it so under the provisions of the common law, which make it a matter of intelligence between the ages of 7 and 14. The maxim, “He who consents cannot receive an injury,’ applies in this case.
> Again, does this case come within the letter of the statute? I think not. This case is a trifling operation, voluntarily and intelligently entered into in the interests of suffering humanity, and in a skillful effort to save a valuable human life, cannot be properly considered as … “inflicting unjustifiable physical pain or mental suffering.” If any thing was committed it was a private wrong, for which the parent has a civil remedy. I find the defendant not guilty.[659]

FAITH CURIST - JANSEN - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT - REMOVAL OF CHILD TO HOSPITAL (New York 1889)

John Jansen called a physician to see his wife and her child, but refused to fill the physician’s prescriptions. Mr. Jansen was a member of a faith-cure

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[656] *A faith cure,* L.A. TIMES, July 11, 1889, 2
[657] OFFICIAL PROCEEDINGS OF THE BOARD OF COMMISSIONERS OF COOK COUNTY, ILLINOIS (1889), 346
[658] *Skin grafting*, L.A. TIMES, Dec. 3, 1889, 2; *Dr. Stevens arrested*, L.A. TIMES, Dec. 8, 1889, 6; *Dr. Stevens silent*, L.A. TIMES, Dec. 9, 1889, 6; L.A. TIMES, Dec. 25, 1889, 8 [hearing before Judge Owens].
[659] *Dr. Stevens discharged*, L.A. TIMES, Jan. 8, 1890, 3

society and called the doctor so that he could get a death certificate if his wife or her child died. The child had scarlet fever and the wife was ill. The Health Commission ordered removal of the mother and child to a hospital and an arrest warrant was issued for the husband. In December 1889, Mr. Jansen was convicted and fined $200. It was announced that he would serve one day in prison for each dollar.[660]

FAITH CURIST - LARSEN - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT - HUMANE SOCIETY TOOK CUSTODY (New York 1889)

In December 1889, it was reported that a child with diphtheria in Brooklyn had been taken from his faith curist father, Ole Larsen, who was refusing all medicines. The humane society had taken charge of the child and the father was arrested for failing to provide medicines to his sick child.[661]

MOTHER'S CONSENT SUFFICIENT FOR SURGERY (Belgium 1890)

In Belgium, Dr. Deschamps of Liege operated on a child for curvature of the tibia with consent of the mother. Resulting gangrene led to amputation of the leg. Over two years later, the father sued because his consent had not been obtained. In 1890, a Belgian court awarded 10,000 francs. The judgment was reversed on appeal.[662]

FAITH CURIST - HANS - EXONERATION FROM ALLEGATION OF PARENTAL REFUSAL OF MEDICAL TREATMENT (California 1890)

In January 1890 in Los Angeles, Miss Addie Hans, age 19, died of consumption. It was initially reported that she had died when her mother refused to let her take medicine due to her belief in the faith cure. Investigation by Health Officer McAllister discovered that she had received medical treatment and had been declared incurable by her attending physician.[663]

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[660] *More faith-cure recklessness*, N.Y. TIMES, Dec. 8, 1889, 13; *Faith-cure fanatics punished*, N.Y. TIMES, Dec. 20, 1889, 9; *They lived by faith,* STANDARD (Ogden Utah), Dec. 10, 1889, 5 [arrest of John Jansen, Maria Petersen and Annie Jensen for leaving house with contagious disease without public health precautions]

[661] *Faith curist idiocy,* L.A. TIMES, Dec. 15, 1889, 6; *Faith curist convicted*, SALEM DAILY NEWS (Ohio), Dec. 17, 1889, 3

[662] *Permission to operate,* LANCET, i:40 (Jan. 4, 1890) ["Indeed, it would seem that a written permission to operate may have to be insisted on in all cases in that country."] ; *An action for malpraxis in Belgium,* BRITISH MEDICAL JOURNAL, i:112 (Jan. 11, 1890) ; *Embarrassing suit for malpractice*, MEDICAL AND SURGICAL REPORTER (Philadelphia), 62(2):330 (Mar. 15, 1890); *Responsibility of an operator,* MEDICAL RECORD, 38:330 (Sept. 20, 1890); LE BELGIQUE JUDICAIRE, 48(30):471-476 (Apr. 13, 1890); Fernand Merlin, DE LA RESPONSABILITE MEDICALE (Saint Etienne 1892), 54-55

[663] *The Christian Science fiend again at work,* L.A. TIMES, Jan. 23, 1890, 7; *Refused medical aid,* OAKLAND TRIBUNE (Cal), Jan. 23, 1890, 1

A few days later the L.A. TIMES republished the following January 24 article from the SAN FRANCISCO POST that probably relates to the same case:

> A young woman of 19, whose parents are Christian Scientists, died a day or two ago at Pasadena, and it is said that her parents refused her medical treatment. There should be an inquest in this case and all facts should be made known. If the parents did refuse to permit the use of ordinary and approved remedies and treatment they ought to be indicted for manslaughter.[664]

It is curious that there is no acknowledgement that several days earlier the L.A. TIMES had reported exoneration of the parents.

PORTER V. POWELL - COLLECTION ACTION - WHEN MINOR EMANCIPATED (Iowa 1890)

In January 1890, the Iowa Supreme Court addressed a case in which a physician sued a father to pay for services to his minor daughter (age 14) for typhoid fever. She was living away from home. The services were provided with the consent of the patient and without the consent of the father. The court explored what constituted emancipation of a minor child and the scope of parental responsibility for the needs of children. The court found her only partially emancipated and affirmed liability of the father.

> Without further citation of authorities, we announce as our conclusions that it is the legal as well as moral duty of parents to furnish necessary support to their children during minority; that a parent cannot be charged for necessaries furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same; and that such promise may be inferred on the grounds of the legal duty imposed…. There was no such as emancipation as exempted the father from liability for actual necessaries furnished to his daughter.[665]

> No question was raised about the validity of her consent to the services. It could have been justified by partial emancipation or by being a necessary. This and other cases concerning emancipation are important to an understanding of the scope of the rights of minors to make economic and medical decisions.[666]

CHRISTIAN SCIENCE - PETTERSON AND OLSEN -PARENTAL REFUSAL OF MEDICAL TREATMENT (New York 1890)

In 1890, Peter Petterson, the six-year-old son of John Petterson, died in Brooklyn of diphtheria when his Christian Scientist father refused to call for a

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[664] *They ought to be indicted for manslaughter*, L.A. TIMES, Jan. 28, 1890, 5
[665] *Porter v. Powell*, 79 Iowa 151, 44 N.W. 295 (Jan. 29, 1890)
[666] *Obligation of parent to support infant child,* LAWYERS' ANNOTATED REPORTS, 7:176-177 (1890)

physician. The father was arrested and charged with manslaughter. The outcome of the case has not been located.[667]

In March 1890, a nine month old died from bronchitis in Brooklyn when his faith curist father, Gatthorn Olsen, refused to call a physician. The arrest of the father was ordered. He was indicted by a Kings County Grand Jury for manslaughter. The outcome of the case has not been located.[668]

INQUEST - EMERGENCY OPERATION PERFORMED ON CHILD WITHOUT PARENTAL CONSENT (England 1890)

A mother took her child to Shadwell Children's Hospital because he had a fit of coughing. The mother refused to consent when the doctor said an operation was necessary. When she returned to the hospital after consulting with her husband, she discovered that the operation had been performed because the child had got worse. The child died shortly afterwards from asphyxia. The doctor testified that the operation was the only chance of saving the child's life and he believed failure to operate would have been gravley neglecting his duty. The coroner stated that he believed some juries would have returned a verdict of manslaughter against the doctor if he neglected to perform the operation due to lack of parental consent. The jury exonerated the doctor.[669]

WELLS V. WORLD'S DISPENSARY MEDICAL ASSOCIATION - ALLEGED CONSENT BY FRAUDULENT INDUCEMENT (New York 1890)

In New York, Elizabeth Wells sued the World's Dispensary Medical Association claiming fraudulent inducement to undergo surgery by a misrepresentation that she had a uterine tumor. A small tumor had been removed, so she did not prevail on her fraud claim. There was testimony that the surgery was unnecessary. Based on this, the jury ruled in her favor. The defendants claimed that she could not win on the basis of a claim outside the scope of her complaint. In 1890, the New York Supreme Court affirmed the verdict for the patient since the issue of necessity had been tried in the court without objection from the defendants.[670]

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[667] *A faith-cure apostle arrested,* N.Y. TIMES, Mar. 1, 1890, 8; *A faith curist permits his child to die without medical attendance,* CHICAGO DAILY TRIBUNE, Mar. 1, 1890, 5; *City and suburban news,* N.Y. TIMES, Mar. 2, 1890, 6

[668] NEW OXFORD ITEM (PA), Mar. 14, 1890, 8; *A faith curist indicted,* L.A. TIMES, Mar. 23, 1890, 1

[669] *The right to perform operations in hospitals*, BRITISH MEDICAL JOURNAL, i:496-497 (Mar. 1, 1890)

[670] *Wells v World's Dispensary Medical Ass'n,* 120 N.Y. 630, 24 N.E. 276 (Apr. 15, 1890)

CHRISTIAN SCIENCE - BARROWS - INQUEST INTO DEATH UNDER CHRISTIAN SCIENCE CARE (New York 1890)

In May 1890, an inquest was held into the death of Mrs. Barrows in Jamestown. N.Y. She had died under the care of two Christian Scientists. The coroner's jury rendered the verdict:

> Mrs. Barrows came to her death from cancer of the breast on the 8th of May. We believe that contributory to this death was the culpable negligence of Mrs. M. J. Smith and Mrs. E. G. Lovejoy, who were advised of the nature of the fatal malady with which deceased was suffering, and failed to resort to or advise treatment by any of the methods known to medical science. We further believe that W. A. Barrows was also negligent of his duty in not securing medical treatment for his wife when there was reason for believing that she was in need of such treatment.[671]

Smith and Lovejoy were arrested pending action by the grand jury. The outcome of the grand jury has not been located.[672]

FAITH CURE - FENN - DEATH UNDER FAITH CURE (Nebraska 1890)

In July 1890, Mrs. W.W. Leman died in Omaha, Nebraska, during childbirth. Mrs. Jennie Fenn applied the faith cure. The coroner's jury found Mrs. Fenn guilty of criminal negligence. An order was issued for her arrest. In June 1891 she pled guilty and paid a fine of $20.[673]

ANESTHESIA (England 1890)

In August 1890 an inquest was held into the death of Ellen Borrows while under chloroform at the Cottage Hospital in St. Helens, Lancashire. The consent of the patient and her husband were discussed at the inquest. The medical personnel were exonerated.[674]

STEELE V. TAYLOR - LIABILITY FOR MEDICAL EXPERIMENT NOTWITHSTANDING CONSENT (Ohio 1890)

In 1890, in Cincinnati, Ohio, a suit was brought alleging that the Cornelius S. Steele had been injured in experiments of Dr. George K. Taylor with the elixir of youth. The plaintiff was an old man who had consented to the experiments

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[671] *A check to Christian Science,* MEDICAL RECORD, 37:620, May 31, 1890
[672] *News in this vicinity*, OLEAN DEMOCRAT (NY), June 12, 1890, 9; Sep. 18, 1890, 10
[673] *Treated only by her mind,* OMAHA WORLD HERALD, July 10, 1890, 8; *Pleaded guilty,* OMAHA WORLD HERALD, June 5, 1891, 8.
[674] *Death under chloroform at St. Helens*, LIVERPOOL MERCURY, Aug. 19, 1890

that resulted in an abscess on his leg. In the case of *Steele v. Taylor*, the jury found for the plaintiff awarding $75 in damages.[675]

CHRISTIAN SCIENCE - STEWART - DEATH UNDER CHRISTIAN SCIENCE TREATMENT (Canada 1890)

In 1890, John Kent submitted himself to treatment by a Christian Scientist, Mrs. Stewart, in Toronto, Canada. He soon died. A coroner's jury returned a verdict of manslaughter against Mrs. Stewart. She was arrested and held to bail until trial. The outcome of the case has not been located.[676]

CHRISTIAN SCIENCE - MANLOVE - DEATH UNDER CHRISTIAN SCIENCE TREATMENT (California 1890)

In 1890, Mrs. E.E. Manlove died in Los Angeles of cancer. She had gone to a doctor who recommended an operation. She refused to have the operation and decided to rely on Christian Scientist treatment. A coroner's inquest was held and concluded that she died due to her refusal of medical treatment and reliance on Christian Science.[677]

FAITH HEALERS - REFUSAL OF MEDICAL TREATMENT BY FAITH HEALING MISSIONARIES (Sierra Leone 1890)

In 1890, a group of nine American missionaries that believed in faith healing went to Sierra Leone. They contracted fever. Three died. Most refused medical attention. Physicians saw three missionaries. One consented only after being told the group would be sent back to America if he did not submit.[678]

DISCUSSION OF EMERGENCY TREATMENT OF CHILD (England 1890)

In October 1890 the *British Medical Journal* discussed the consent issues related to a case in which a tracheotomy was performed on a baby at East London Children's Hospital. The surgeon advised the operation and the mother declined to consent until she could consult with her husband. While she was away, the situation became acute and the surgeon proceeded without consent.

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[675] *The responsibility of the physician for experiments upon patients, even with the latter's consent,* MEDICAL RECORD, 38:235 (Aug. 30, 1890); CAMBRIDGE JEFFERSONIAN (Ohio), Sep. 26, 1889, 2.
[676] *Her treatment caused his death,* CHICAGO DAILY TRIBUNE, Sept. 10, 1890, 2; see *Another C.S. trial,* CHRISTIAN SCIENCE JOURNAL (Boston), 13(11):469-472 (Feb. 1896), which is a letter from Mrs. Stewart in Toronto indicating that she was not incarcerated at that time.
[677] *A coroner's inquest,* L.A. TIMES, Sept. 19, 1890, 7
[678] *Victims of the faith-cure belief,* CHICAGO DAILY TRIBUNE, Oct. 16, 1890, 2

Although it gave temporary relief, the child died within an hour and a half.[679] No legal proceeding has been located.

CHRISTIAN SCIENCE - HAMILTON - DEATH UNDER CHRISTIAN SCIENCE TREATMENT (Missouri 1890)

In December 1890 in Marshall, Missouri, an inquest was held into the death of Isaac Hamilton from typhoid fever. When he got sick physicians were called, but after a few visits, his wife instructed them not to return. His wife and daughter were Christian Scientists and arranged for him to be attended by Christian Scientists, Mr. and Mrs. F.M. Hudson, during the last three weeks of his life. Although he was not a Christian Scientist, he is reported to have consented to try Christian Science. The coroner's jury found that his death was due to criminal neglect of those who had in him charge. It was announced that the grand jury was beginning to investigate in March 1891. The outcome of the case has not been located.[680]

SETTLEMENT OF CHALLENGE TO REMOVAL TO PEST HOUSE (California 1890)

In 1890, Dr. Hagan, the public health officer for Los Angeles, was sued for the death of a child who he had removed to a pest house because the child had smallpox. The city settled the case for $2,750.[681]

DISMISSAL OF SUIT ALLEGING UNNECESSARY AMPUTATION WITHOUT CONSENT (Russia 1890)

In 1890, a suit was filed in Libau, Russia, against a Dr. Johannsen for amputating a gangrenous foot unnecessarily and without consent of the patient or his parents. The court found consent and necessity and dismissed the case.[682]

CHRISTIAN SCIENCE - PROTZMAN - DEATH UNDER CHRISTIAN SCIENCE TREATMENT (Iowa 1891)

In February 1891, an inquest was held in Des Moines, Iowa, into the death of William Protzman, who had died of typhoid fever, while under the attendance of Christian Scientists. His wife kept his parents and other relatives away by force and threats. The coroner's jury concluded that he had died due to "the practicing upon him of the teaching of an association called themselves Christian

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[679] *Urgent dyspnoea in an Infant, aged 12 months, occurring suddenly, and terminating fatally within an hour and a half, due to a caseous gland which had ulcerated its way into the trachea*, BRITISH MEDICAL JOURNAL, ii:899 (Oct. 18, 1890)
[680] *Result of "Christian Science" treatment,* N.Y. TRIBUNE, Dec. 4, 1890, 7; *A victim of Christian Science,* KANSAS CITY TIMES (Mo), Mar. 24, 1891, 1
[681] Henry Harris, CALIFORNIA'S MEDICAL STORY (Grabhorn Press: San Francisco 1932), 262-263, citing State Board of Health, REPORTS, 1890, p. 59
[682] *Malpractice in Russia,* CINCINNATI LANCET-CLINIC, 64(15):455 (Oct. 11, 1890)

Scientists." The outcome of the subsequent grand jury investigation has not been located.[683]

PRESCOTT V. STICKNEY - REFUSAL TO PERMIT FOLLOW-UP TREATMENT (Massachusetts 1891)

An 1891 case in Massachusetts illustrates the consequence of deciding not to consent. Mrs. Prescott sued Dr. Stickney for the outcome of his treatment of her wrist injury. He defended on the grounds that she would not consent to necessary treatment. She had then gone to a bonesetter and a homeopathic physician who broke the adhesions. The jury returned a verdict for the defendant.[684]

CUSTODY OF A CHILD AFTER SIBLING DIED UNDER CHRISTIAN SCIENCE TREATMENT (New York 1891)

When the Traffords separated, one daughter went with the mother and the other went with the paternal grandparents. The daughter in the mother's custody died when the mother resorted to Christian Science prayer instead of medical treatment. The mother seized the other daughter from the grandparents. In 1890, the father brought a habeas corpus action and the court awarded custody to the paternal grandparents.[685] On June 12, 1891, the mother with the assistance of two men seized the child from the grandmother on a public street. The police recovered the child.[686]

EXPERIMENTS INSERTING CANCER TUMOR INTO HEALTHY TISSUE (France 1891)

In June 1891, Professor Cornil presented a paper to the French Academy in Paris stating that he had removed a breast with a tumor and had then, without the patient's consent, inserted a piece of the tumor under the skin of the remaining healthy breast. A tumor grew in that breast which Cornil then removed. The French Academy expressed stern disapprobation of the methods and refused to discuss the paper. Medical journals and the public press also expressed indignation. No legal action was taken against Cornil.[687]

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[683] *Another victim of Christian Science*, ST. PAUL DAILY NEWS (MN), Feb. 18, 1891, 3; CEDAR RAPIDS GAZETTE (Iowa), Feb. 23, 1891, 1; *The state of Iowa*, CHARITON HERALD (Iowa), Mar. 12, 1891, 3

[684] C.W. Stickney, *A surgico-legal case*, BOSTON MEDICAL AND SURGICAL JOURNAL, 124(9):207-208 (Feb. 26, 1891)

[685] *People ex rel. Trafford v. Trafford,* 12 N.Y.S. 43 (Sup. Ct. Nov. 3, 1890)

[686] *Abducted by her mother,* N.Y. TIMES, June 14, 1891, 8

[687] LANCET, ii:80 (July 11, 1891); *Grafting cancer in the human subject*, TIMES AND REGISTER, Sept. 12, 1891, 212

Professors Hahn and Von Bergmann, in Berlin, were charged with having inoculated cancer in a healthy human being. The outcome has not yet been located.[688]

BOTSFORD V. UNION PACIFIC RAILWAY CO. - COURT CANNOT ORDER SURGICAL EXAMINATION OF PLAINTIFF (U.S. 1891)

Clara L. Botsford sued the Union Pacific Railway Company for injuries that resulted from an upper berth in a sleeping car falling on her head. The defendant asked the trial court to issue a discovery order requiring Ms. Botsford to submit to a surgical examination to diagnose her condition. The trial court refused ruling that it did not have such authority. The jury awarded $10,000. On appeal, in 1891, the United States Supreme Court affirmed. The court stated:

> The single question presented by this record is whether, in a civil action for an injury to the person, the court, on application of the defendant, and in advance of the trial, may order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injury sued for. We concur with the Circuit Court in holding that it had no legal right or power to make and enforce such an order.
>
> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone." Cooley on Torts, 29….
>
> The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country….
>
> So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history.[689]

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[688] *Special correspondence*, BRITISH MEDICAL JOURNAL, ii:214 (July 25, 1891); *Grafting cancer in the human subject,* TIMES AND REGISTER, Sept. 12, 1891, 212; *Grafting cancer in the human subject*, JAMA, 17:233-234 (Aug. 8, 1891)

[689] *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 11 S. Ct. 1000, 35 L. Ed. 734 (May 25, 1891)

The federal rules were changed in 1937 to add Rule 35 that authorizes federal courts to order physical examinations of parties. In 1941, the United States Supreme Court ruled that Rule 35 was within the power granted the court by 28 U.S.C. 2072. In 1964, the United States Supreme Court ruled that Rule 35 did not violate the right of privacy.[690]

Botsford addressed only federal courts. State courts had ordered and continued to order plaintiffs to undergo physical examination as a condition of proceeding with law suits for damages for alleged injuries.

ADELAIDE HOSPITAL RULES (Australia 1891 & 1899)

In 1891, Adelaide Hospital in Australia adopted a rule that the new Koch lymph for tuberculosis be injected only with consent -

> The Government has approved the report of the Koch Lymph Board… The lymph has been forwarded to the Adelaide Hospital. The Board recommends that the injection of tuberculin be considered an extraordinary operation which, under the regulations of the hospital must be conducted in the presence of three of four members of the medical staff, and in all cases only after the patient's consent is obtained.[691]

In 1899, Adelaide Hospital rules were adopted that included:

> 12. No important operation shall be performed without the previous consent of the patient or friends….[692]

ALLEGED FATAL EXPERIMENT AT A NEW YORK HOSPITAL (1891)

In 1891, Mrs. John Freeman was admitted to the German Hospital in New York City. The next day her husband found her dead at Bellevue Hospital. It was reported that young doctors at German Hospital had experimented on her by performing a surgical procedure on the woman called correting. They blundered and then transferred her to Bellevue to die.[693]

GAMMAGE SUITS - ALLEGED FORCIBLE CHLORFORM AND SURGERY (Michigan 1891)

In 1891, A. E. Gammage asserted that after he decided not to have surgery, doctors at St. Mark's Hospital had forcibly chloroformed him and

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[690] *Sibbach v. Wilson & Co*., 312 U.S. 1, 85 L Ed 479, 61 S. Ct. 422 (1941), *rehearing denied*, 312 U.S. 713, 85 L. Ed. 1144 (1941); *Schlagenhauf v. Holder*, 379 U.S. 104, 13 L. Ed. 2d 152, 85 S. Ct. 234 (1964)

[691] *South Australia*, BRITISH MEDICAL JOURNAL, i:1203 (May 30, 1891)

[692] Honorary Physicians and Surgeons, 12, *Regulations for the Adelaide Hospital Staff*, Document No. 61, PROCEEDINGS OF THE PARLIAMENT OF SOUTH AUSTRALIA (Adelaide 1900), Vol. 2, 161 (effective August 1899)

[693] *Hurried to Bellevue to die,* N.Y. TIMES, June 24, 1891, 8

performed surgery against his will.[694] Gammage first sued Dr. Reuben Peterson, physician in principal charge of the hospital.[695] Peterson was arrested and released on bail.[696] Gammage also sued his personal physician, Dr. T. Thatcher Graves who was also arrested and released on bail.[697] The hospital discharged two nurses. The hospital claimed the discharge was not related to the fact they made written statements in the Gammage case.[698] Peterson and Graves filed a claim of perjury against Gammage and he was arrested and released on bail.[699] After several days of hearings, the court found no willful perjury.[700] The outcomes of Gammage's suits have not been located.

There were conflicting reports on whether treatment was actually forced. The *Medical Standard* [10:28 (1891)] reported the following:

> Dr. Peterson, of Grand Rapids, has been sued for malpractice under the following circumstances. The patient was placed in the lithotomy position on the operating table and everything was ready, when his nerve failed him and he refused the operation. Dr. Peterson insisted upon going ahead with it. and endeavored to administer chloroform. The patient resisted. Two policemen passing by were called in, and upon the representation being made that the patient was insane, assisted the physicians and attendants in putting him to sleep. The operation was then successfully performed. When the patient revived it was found that his left arm was broken in two places, the injuries having been sustained in his struggles against the anaesthetic.[701]

The *Medical Age* wrote a very different account:

> When he recovered from the effects of the anaesthetic, Gammage, while pretending in Dr. Graves' presence to be anxious for him to do the operation contemplated, later during the Doctor's absence, grossly

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[694] *Broke his arm twice*, TIMES-HERALD (Grand Rapids MI), May 14, 1891, 1
[695] *Heavy damages paid*, DAILY CHRONICLE (Marshall MI), May 26, 1891, 1; *Damages for malpractice*, KANSAS CITY TIMES (MO), May 28, 1891, 8; *Criminal violence by a physician*, DAILY PICAYUNE (New Orleans), May 30, 1891, 4; *A sensational suit for damages in Grand Rapids*, HILLSDALE STANDARD (MI), June 2, 1891, 6
[696] *Dr. Peterson arrested,* TIMES-HERALD (Grand Rapids MI), May 26, 1891, 1
[697] *Dr. Graves arrested*, TIMES-HERALD (Grand Rapids MI), May 28, 1891, 1
[698] *Discharge of nurses*, TIMES-HERALD (Grand Rapids MI), May 27, 1891, 4
[699] *In police court,* TIMES-HERALD (Grand Rapids MI), June 17, 1891, 1; a few days later Gammage was ordered to give security for costs, *Must give security*, TIMES-HERALD (Grand Rapids MI), June 23, 1891, 7.
[700] *Did he swear falsely?* TIMES-HERALD (Grand Rapids MI), July 11, 1891, 1; *Evidence chawed out*, TELEGRAM-HERALD (Grand Rapids MI), Aug. 18, 1891, 1; *Gammage case still on*, TELEGRAM-HERALD (Grand Rapids MI), Aug. 19, 1891, 1; *Gammage's case resumed*, TELEGRAM-HERALD (Grand Rapids MI), Sep. 5, 1891, 1; *Albert Ross the novelist*, TELEGRAM-HERALD (Grand Rapids MI), Sep. 22, 1891, 6; *Produced the missing chart*, TELEGRAM-HERALD (Grand Rapids MI), Sep. 23, 1891, 6; *End of the evidence*, TELEGRAM-HERALD (Grand Rapids MI), Oct. 14, 1891, 6; *Gammage did not lie*, TELEGRAM-HERALD (Grand Rapids MI), Oct. 27, 1891, 6
[701] *Michigan*, MEDICAL STANDARD (Chicago), 10(1):28 (July 1891)

misrepresented the Doctor to others, telling the most willful lies concerning him, to the effect that the operation was forced upon him. Learning this, Dr. Graves refused to again attempt to operate.

As a result of this refusal, Gammage made affidavits as to maltreatment, which led to Dr. Graves' arrest. Inasmuch as Gammage's affidavits were not substantiated by facts, a suit against him for perjury was at once instituted. Gammage being informed of this suit, mysteriously disappeared for several days, but having the temerity to return to Grand Rapids, was arrested, and subsequently bailed *by the aid of a homoeopathic physician,* who gave bonds for his appearance.[702]

Peterson and Graves filed a claim of perjury against Gammage and he was arrested and released on bail. After several days of hearings, the court found no willful perjury.

PECULIAR PEOPLE - GOOBEY - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (England 1891)

In August 1891, Coroner Wynne E. Baxter of East London held at inquest on the death of Emily Goobey, age 5 months. The parents were members of the Peculiar People and no medical attention had been called. The mother had had 14 children and only 5 were still alive. An inquest into the death of one child in 1888 had reached a verdict of death by natural causes. Medical testimony was that Emily had died form exhaustion from consumption of the bowels and that the child probably could have been saved if proper medical attention had been obtained. The coroner said that it was necessary to prove the life could have been saved by medical attention and there was insufficient evidence of this. The jury returned a verdict of natural death.[703]

HUSBAND FORCIBLY RESISTED REMOVAL OF WIFE TO HOSPITAL (Illinois 1891)

In August 1891, Mrs. Kern was reported as a needy case to the county agent because she had been bedridden with consumption for over a year and her home was squalid. The County Agent sent an ambulance to take Mrs. Kern to the County Hospital. When an ambulance arrived to take her to the hospital, her husband, a former police officer, refused to let her be taken and attacked the ambulance driver with a knife. The ambulance driver was forced to leave without the patient. The County Agent announced plans to use force if necessary to take her to the hospital. No further articles about this matter have been located.[704]

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[702] *An interesting case with a moral for doctors,* MEDICAL AGE (Detroit), 9(12):366 (June 25, 1891)
[703] *Inquests,* TIMES (London), Aug. 17, 1891, 5
[704] *Would not let her go,* CHICAGO DAILY TRIBUNE, Aug. 4, 1891, 3

ANESTHESIA (1891)

In August 1891, an inquest was held in Liverpool, England, into the death at Southern Hospital of Patrick Hoey under chloroform. The chloroform was administered with his consent. The surgeons were exonerated.[705]

O'BRIEN V. CUNARD STEAMSHIP CO. - IMPLIED CONSENT TO VACCINATION (Massachusetts 1891)

In Massachusetts, Mary O'Brien sued Cunard Steamship Company for assault claiming that its physician had vaccinated her without her consent. The trial court ruled against her.[706] In September 1891. The highest court of Massachusetts upheld the verdict, concluding that she had given implied consent to the vaccination. The court stated:

> If the plaintiff's behavior was such as to indicate consent on her part, he was justified in his act, whatever her unexpressed feelings may have been. In determining whether she consented, he could be guided only by her overt acts and the manifestations of he feelings.[707]

The court went on to describe the posted notices in various languages that informed passengers of the vaccinations.[708]

STATE V. NASH - ACQUITTAL FOR ALLEGED ASSAULT OF PATIENT (North Carolina 1891)

In September 1891, the North Carolina Supreme Court decide the case of *State v. Nash*, in which a physician was charged with assault of 17-year-old female patient. His conviction was reversed.

> If it be conceded that where a physician induces a female to submit to an examination of her person, by the false and fraudulent representation that he is putting his hands upon her in good faith, for the purpose of diagnosing and treating a disease, when in fact his object is only to gratify a licentious desire, he is equally guilty, in contemplation of law, with one who takes the same liberties against her consent, and the avowed intention of gratifying his lusts, it is none the less a sound proposition of law, that whether the person charged with the assault be a physician or not, he may successfully meet such charge by showing to the

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[705] *Death under chloroform*, LIVERPOOL MERCURY, Aug. 22, 1891, 7
[706] *Improper vaccination vs. Cunard Steamship Company,* BOSTON MEDICAL AND SURGICAL JOURNAL, 122(18):434-435 (May 1, 1890)
[707] *O'Brien v. Cunard Steamship Co.,* 154 Mass. 272, 28 N.E. 266 (Sept. 1, 1891); *A suit from compulsory vaccination*, PHILADELPHIA INQUIRER, Apr. 25, 1890, 1; *Vaccination unpunished*, BOSTON DAILY GLOBE, Sep. 2, 1891, 8; *A legal decision concerning ships' surgeons*, BOSTON MEDICAL AND SURGICAL Journal, 125:362-363 (Oct. 1, 1891)
[708] *O'Brien v. Cunard Steamship Co.,* 154 Mass. 272, 28 N.E. 266 (Sept. 1, 1891)

satisfaction of the jury that, without resorting to falsehood or deception, he had the consent of a girl seventeen years old to put his hand upon her person as he did. Whether his intention was to desist after fondling her or to have carnal intercourse with her, if she should continue to yield to him, he was not guilty if her consent was gained otherwise than by using his professional character to practice a fraud.

There was serious conflict in the testimony of the prosecutrix and the defendant as to what the latter actually did and said at her bedside. The charge of the learned judge seems to have been founded upon the idea that the jury, in passing upon the facts, were so restricted that they must adopt either the theory of the State or that arising out of the defendant's testimony, and were not at liberty to take into consideration the whole of the evidence and predicate their finding upon an hypothesis not entirely consistent with the theory advanced or the testimony offered in support of it by either the prosecution or the defense. Counsel may have contended before the jury that another witness corroborated the testimony of the plaintiff to the extent of showing that the mother of the prosecutrix had expressed apprehension as to the consequence to her daughter of over-exertion on the previous afternoon. The jury may have concluded that, under the honest belief that the prosecutrix was suffering, and with the *bona fide* purpose of relieving her, the defendant first entered her room, but that, subsequently, on discovering a willingness on her part to submit to liberties, that, as she must have known, constituted no part of a legitimate medical or surgical examination, he determined to go further and did so with her assent plainly indicated. It appeared that two men, sleeping in the loft just above her, heard no outcry nor loud remonstrance, and the prosecutrix did not say that she called for any one; yet, though she told the defendant that she was not sick, needed no attention and pushed his hand away, she submitted, without objection made in a tone sufficiently loud to be heard in the loft, to liberties, accompanied by expressions of endearment and solicitations to go with him into the adjacent room, that counsel may have argued were inconsistent with the idea that she yielded only because he was conducting an examination as a physician authorized by her mother. The jury might have been influenced, too, by the fact that the father of the prosecutrix appeared, according to her testimony, at the door and saw the defendant going out of the room twice; that he subsequently neither asked nor received a full explanation from his daughter for nearly two days after, though he ordered her to dress and go to his son's house on that night. The rule laid down by Wharton (Cr. Law, sec. 1156) is, that proof of the assent of the woman, given in ignorance of the fraud that was being practiced by the medical man, where the physician, under pretense of examination, has sexual intercourse, will not constitute a defense to the charge of assault. The principle was first established in the cases of *Rex v. Stanton,* 1 Car. & K. 415, and *Rex v. Case,* 4 Cox C. C. 220. In the latter case the instruction given by the recorder and approved by the Court, was that "the girl *was of*

age to consent, and if they thought she had consented to what the prisoner had done, they ought to acquit the prisoner, but if they were of opinion that she was *ignorant* of the nature of the prisoner's act and made no resistance, solely from the belief that she was submitting to medical treatment, they ought to find him guilty." In that case the physician actually had carnal intercourse with a girl of fourteen, who had been placed under his care by her parents for medical treatment.

We think that the questions whether the prosecutrix consented after being kissed and told that she was a sweet girl (even conceding the truth of her own statement) to the still greater liberties with her person, which she testifies that the defendant took, and whether, if she did consent, she was influenced to yield solely because she thought the defendant was making a medical examination of her person at the request of a parent, should have been fairly submitted to the jury; as, in *Rex v. Case,* the judge ought to have told the jury that, in one view of the evidence, the defendant was not guilty, as well as that in the other view, he was guilty of an assault. In *Rex. v. Case* it seemed to have been conceded, or not seriously disputed, that the girl of fourteen was innocent, and did not understand what the physician was doing. In the case at bar there was evidence tending to show that the prosecutrix was not of good character, and it was admitted that she was in her eighteenth year. The defendant had a right to demand that the attention of the jury should be directed to the question whether she understood the manifest purpose of one who kissed and fondled her, and knew that his conduct was not that of a physician making a medical examination in good faith, but still submitted quietly until her father appeared upon the scene. But in response to the requests of the defendant, the judge embodied his instruction upon this point in two or three propositions, culminating in the sentence: "If he acted in good faith as a physician, and did what he did as such, he is not guilty; *otherwise, he is guilty."* So that the jury were not left at liberty to reach the belief, from the evidence, that though the defendant was not in good faith examining the prosecutrix as a physician, still that she understood and assented to what he did, or that she understood that he was putting his hands upon her with the purpose of gratifying his lusts, and made no objection because she was indifferent or ready to submit to what he did, if not to still greater liberties.[709]

CHRISTIAN SCIENCE - BENNETT - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (Indiana 1891)

In November 1891, an inquest was held in Anderson, Indiana, into the death of the three-year-old daughter of Mr. and Mrs. John Bennett who had died of diphtheria under the care of Christian Science. The coroner’s jury decided that she had died of neglect. Warrants were issued for the arrest of the parents and

[709] *State v. Nash*, 109 N.C. 824, 13 S.E. 874 (Sep. 1891)

the Christian Science practitioner. The outcome of the case has not been located.[710]

CITY OF SANDWICH V. DOLAN - NEGATIVE INFERENCE PERMITED FROM REFUSAL TO SUBMIT TO TEST (Illinois 1891)

In December 1891, the Illinois Court of Appeals ruled in *City of Sandwich v. Dolan* that a negative inference could be drawn from a plaintiff's refusal to submit to a harmless test.

> He further stated that he wanted to examine the muscles with a battery, but that she objected to it. He gave as a reason for wanting to make such a test, that the battery would show the amount of electricity required to produce contraction of a muscle and would show, apart from any statement of the patient, indications of health or disease. …
> In the present case appellee introduced her evidence of the nature and extent of her injuries. If appellant claimed that she exaggerated or feigned the symptoms which she manifested and related, it was important and substantial matter of defense. If she had refused to submit to an examination which would disclose the truth it would tend to show that the symptoms were exaggerated or feigned. [711]

DUBOIS V. DECKER - SCOPE OF DUTY TO SUBMIT TO ADDITIONAL TREATMENT (New York 1891)

In a New York malpractice case, the defendant physician sought a jury instruction that the plaintiff would be barred from suing if he had disobeyed physician orders. The trial court refused the instruction. The patient prevailed in the case. The highest state court affirmed:

> In submitting the case to the jury, the defendant asked the court to charge that "if the plaintiff did not obey the defendant's instructions and this contributed to an aggravation of the injury, the plaintiff cannot recover." The court declined to charge in the form in which the request was put, and an exception was taken by the defendant.
>
> It appears from the testimony of the defendant that after the second amputation he dressed the stump and put the plaintiff in position by elevating the limb so as to prevent hemorrhage and too much pressure upon the arteries; that the plaintiff did not keep in the position in which he was placed and got his leg to bleeding, and that he presumed that this bleeding interfered with the healing of the limb. It also appears that sometime after the second amputation the plaintiff refused and neglected

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[710] *"Died from sin and fear,"* N.Y. TIMES, Nov. 13, 1891, 9; *A "Christian Science" murder,* N.Y. TIMES, Nov. 17, 1891, 26

[711] *City of Sandwich v. Dolan*, 42 Ill. App. 53 (2d Dist. Dec. 7, 1891)

to take the medicine that was left for him by the defendant, and that subsequently, after the defendant had ordered him to be removed to another room so as to avoid liability of contracting erysipelas from a patient that had been brought to the alms-house afflicted with that disease, he left and went away.

Whilst the removing of the limb from the position in which it was placed may have produced the bleeding and thus to some extent impeded the healing, and his going away at the time that he did may also have further aggravated the difficulty, these facts would only tend to mitigate the damages and would not relieve the defendant from the consequence of previous neglect or unskillful treatment. As to the prescription we are not told what it was or what it was for, and the jury was, therefore, unable to determine whether or not the condition of the patient would have been materially changed by its use.

The request to charge, as we have seen, was to the effect that if the plaintiff did not obey the instructions, and this contributed in aggravation of the injury, the plaintiff cannot recover. This was too broad if the jury found that the defendant was guilty of malpractice prior to the disobedience complained of.[712]

CHRISTIAN SCIENCE - LORD - DEATH UNDER CHRISTIAN SCIENCE TREATMENT (California 1891)

In 1891, George Lord, Jr., a mail carrier in San Bernardino, California, became ill. A physician was called, diagnosed meningitis, prescribed treatment, and calmed the patient down. A Christian Science practitioner convinced Mrs. Lord to dismiss the physician and rely on Christian Science. The practitioner took complete control over the case. The patient died under the treatment. The coroner' jury found criminal neglect by Mrs. George Ward, who had been employed as a nurse and Christian Science healer, and censured the practices of Christian Scientists. It was first announced that the District Attorney would be filing a criminal complaint and arresting Ward for manslaughter. The next day it was announced that the matter would be turned over to the grand jury for investigation.[713]

The grand jury indicted for manslaughter. In February 1892, Mrs. Eliza Ward came to trial for manslaughter on the charge of causing the death of Lord by preventing proper medical attention. After a well-publicized trial, Mrs. Ward was acquitted.[714]

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[712] *DuBois v. Decker*, 130 N.Y. 325, 330-331, 29 N.E. 313, 314 (Dec. 15, 1891)
[713] *Another victim of the Christian Science craze*, L.A. TIMES, Dec. 16, 1891, 7; *San Bernardino County*, L.A. TIMES, Dec. 17, 1891, 7; *San Bernardino County*, L.A. TIMES, Dec. 25, 1891, 7
[714] *San Bernardino County*, L.A. TIMES, Feb. 2, 1892, 7; *San Bernardino County*, L.A. TIMES, Feb. 4, 1892, 7; *Christian Science,* L.A. TIMES, Feb. 6, 1892, 8; *San Bernardino County*, L.A. TIMES, Feb. 7, 1892, 7 [acquittal]; *San Bernardino County*, L.A. TIMES, Feb. 8, 1892, 7

CHRISTIAN SCIENCE - LAY - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (Iowa 1891)

In December 1891, Clarence Lay, age 7, died in Burlington, Iowa, while attended by a Christian scientist, Ida Vandewater. An inquest was held and the jury censured the parents and directed that Vandewater be prosecuted for practicing medicine without a license.[715]

BELSEY V. MCLELLAND - FORCIBLE TREATMENT (England 1892)

In 1892, in Birmingham, England, a probationer nurse Miss Harret Belsey at the Worchester Infirmary had an ulcerated throat. She claimed the matron, Miss Mary Jane McLelland, forced her to submit to having her throat painted in spite of her protestations and said bad things about her. Miss Belsey sued for assault and libel. There was testimony that she had offered no resistance. Her attorney focused on the libel claim. The judge instructed the jury that probationers should not be bullied, but matrons should not be harassed for properly doing their duty. The jury ruled for the defendant.[716]

The decision was criticized in nursing literature:

> …considerable surprise has been expressed at the verdict. If it be not an ”assault” in an aggravated form to force a brush down another person’s throat against her will, it is very difficult to understand the meaning of the word. As another Nurse was employed to hold Miss Belsey, it is clear that considerable restraint of her freedom was also used.[717]

CHRISTIAN SCIENCE - NICHOLS - DEATH UNDER CHRISTIAN SCIENCE TREATMENT (Illinois 1892)

In March 1892, Mrs. Jennie L. Nichols, a 41-year-old widow, died in a Chicago boarding house while voluntarily under Christian Science treatment. A coroner's jury ordered that the Christian Science healer, Mrs. R. L. Stebbins, be held to await grand jury action. Mrs. Stebbins was released on bail. On May 13, a grand jury returned no bill. It was reported that this was based on the conclusion that "if a person wanted to submit to the faith cure or Christian Science it was nobody's business but his own."[718]

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[715] *The coroner’s verdict*, BURLINGTON HAWK-EYE, Jan. 1, 1892, 9

[716] *Birmingham County Court,* THE NURSING RECORD, Sep. 1, 1892, 725-726; Sep. 8, 1892, 730-731 & 736

[717] THE NURSING RECORD, 736 (Sep. 8, 1892)

[718] *Without a doctor,* CHICAGO DAILY TRIBUNE, Apr. 3, 1892, 1; *Mrs. Stebbins does not despond,* CHICAGO DAILY TRIBUNE, Apr. 4, 1892, 3; *Victim of a faith cure,* DAVENPORT DAILY LEADER (Iowa), Apr. 4, 1892, 3; *Mrs. Stebbins released,* CHICAGO DAILY TRIBUNE, Apr. 5, 1892, 3; *Christian Science murder,* L.A. TIMES, Apr. 11, 1892, 4; *It was her own business,* CHICAGO DAILY TRIBUNE, May 14, 1892, 3

RESISTANCE TO REMOVAL OF SON WITH SMALL POX (New York 1892)

In April 1892, George Humphrey of New York City was arraigned for shooting at physicians who tried to take his son from his home when his son had smallpox. The outcome of the case has not been located.[719]

SURGERY ON CHILD PURSUANT TO MAGISTRATE'S ADVICE (Manchester England 1892)

An English newspaper reported in 1892:

> A man named Wilson, a grocer, was charged at Manchester, on Saturday, with assaulting, his wife. … Mrs. Wilson told the magistrates that her little boy's leg was so badly injured that the doctors said amputation was absolutely necessary. Nothing could be done unless the husband gave his consent, and this he refused to do. … The magistrates advised Mrs. Wilson to take the boy to the infirmary, where the operation would be performed without the father's consent.[720]

CANADIAN LAW ON SURGICAL OPERATIONS (1892)

In 1892, Canada enacted a statute protecting surgeons from criminal liability for surgical deaths in certain circumstances and prohibiting consent to death -

> Surgical Operations.
> 57. Every one is protected from *criminal* responsibility for performing with reasonable care and skill any surgical operation upon any person for his benefit, provided that performing the operation was reasonable, having regard to the patient's state at the time, and to all the circumstances of the case.
>
> Consent To Death Not Lawful.
> 59. No one has a right to consent to the infliction of death upon himself; and if such consent is given, it shall have no effect upon the *criminal responsibility* of any person by whom such death may be caused.[721]

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[719] *Sufferers from smallpox*, N.Y. TIMES, Apr. 12, 1892, 8
[720] *An inhuman father*, HUDDERSFIELD CHRONICLE AND WEST YORKSHIRE ADVERTISER (Huddersfield), Apr. 18, 1892, 3
[721] *An Act respecting the Criminal Law*, 55-56 Victoria, ch. 29 (effective July 1, 1893) [A similar law was enacted in New Zealand – 57 Vict., No. 56 (1893)]

ANESTHESIA (1892)

In July 1892, Mary Grace O'Brien, age 7, died in Chicago from the effect of chloroform administered while setting her arm. At the inquest, there was testimony by an aunt that she had protested the use of the chloroform. There had been a dispute between doctors over use of chloroform. As a matter of professional etiquette, chloroform was used in deference to the family physician. The coroner's jury found the death due to chloroform and exonerated the doctors.[722]

CHRISTIAN SCIENCE - RAWSON - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (New York 1892)

In August 1892, in Albany, N.Y., a truck ran over Edith Rawson, age 5. Police called a physician, but her Christian Science parents refused medical attention. The child died of fractured rib and internal injuries. The Hudson Rover Humane Society made a complaint against the father, upon which the magistrate issues an arrest warrant. No further articles have been located.[723]

FAITH CURE - CLARK - DEATH UNDER FAITH CURE (California 1892)

In December 1892, Mrs. Mary B. Clark died in South Pasadena, California, of consumption after refusing medical attention and relying on faith. Coroner Weldon investigated and concluded that those around her had done all they reasonably could to encourage and offer her medical attention, but she had courteously but firmly refused. He concluded that there was no point to an inquest, since it would be impossible to place the responsibility for the death on anyone other than Mrs. Clark.[724]

LEGAL OPINION ON PERFORMING OOPHORECTOMY ON INSANE WOMEN (Pennsylvania 1893)

In 1893, Thomas Barlow furnished on opinion to the Committee on Lunacy of the Board of Public Charities that it was illegal to perform oophorectomy upon insane women unless necessary to save life. It was illegal and "in view of its experimental character is brutal and inhuman and not excusable on any reasonable ground." "A lunatic cannot give a legal consent to the performance of an experimental operation, nor can her relatives legally give such a consent on

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[722] *Dies in their arms*, CHICAGO DAILY TRIBUNE, July 25, 1892, 1; *The city in brief*, DAILY INTER OCEAN (Chicago), July 27, 1892, 8
[723] *Christian Science did not cure*, N.Y. TIMES, Aug. 6, 1892, 5; MIDDLEBURY INDEPENDENT (Ind), Aug. 25, 1892, 6
[724] *Pasadena,* L.A. TIMES, Dec. 21, 1892, 7

her behalf…" The Board approved the opinion and forwarded it to the Board of trustees of the Norristown Hospital for the Insane.[725]

R. V. INSTAN - MANSLAUGHTER - FAILURE TO SUPPLY MEDICINE TO RELATIVE (England 1893)

In February 1893, an English appellate court upheld the manslaughter conviction of a woman, Miss Instan, for the death of her aunt, Ann Hunt, who she lived with. The aunt became sick and unable to obtain food and medical attendance. Miss Instan had a duty to supply food and medicine or to inform others able and willing to provide assistance. She failed to do this.[726]

EMETIC ORDERED TO RECOVER EVIDENCE (Pennsylvania 1893)

In May 1893, in Pennsylvania, a judge ordered that a person be given an emetic in an attempt to recover a document he had swallowed in court. A newspaper reported:

> It is not an uncommon thing to make a man eat his own words, or to cram them down his throat, but it is rather an unusual proceeding for a prisoner to eat the evidence of his guilt, and do it right in open court in the bargain! Whaley, the Buffelonian, raised a money order, and when arraigned in court picked up the order and ate it. The judge ordered him to suspend digestion at once and take an emetic, but the plan failed to work.[727]

ANESTHESIA (1893)

In September 1893 in Castlemaine, Victoria, Australia, Jane Root charged Dr. J.R. Hutton for unlawful assault at Castlemaine Hospital for allegedly administering chloroform against her will. She had objected but offered no resistance. The Police Magistrate said the evidence showed no force or violence so that it did prove unlawful assault. He dismissed the case and assessed costs against Root. She also claimed damages but the Police Magistrate contended he did not have jurisdiction on that claim.[728]

In December 1893, an inquest was held in Birmingham, England, into the death of Leonard Alfred Barker, age 11, while under the effects of anesthesia for dental surgery. The father was a commercial traveller and sent his written consent to the operation. The coroner's jury found death from syncope caused by chloroform with no blame to anyone.[729]

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[725] *Protecting the insane*, PHILADELPHIA INQUIRER, Jan. 9, 1893, 5
[726] *R. v. Instan* (Cr. Cas. Res. Feb. 4, 1893), Edward Cox, REPORTS OF CASES IN CRIMINAL LAW, 602 (Feb. 4, 1893); LAW TIMES, 68(n.s.):420 (Mar. 27, 1893)
[727] MCKEAN DEMOCRAT (Smithport Pa), May 19, 1893, 4
[728] AUSTRALASIAN MEDICAL GAZETTE, 12:355 (Oct. 15, 1893)
[729] BIRMINGHAM DAILY POST, Dec. 23, 1893

SURGERY ON PERSONS IN ASYLUMS (Minnesota 1893)

In October 1893, the Minnesota Attorney General issued an opinion spelling out the extent of the authority to perform surgical operations upon patients committed to insane asylums.[730]

BROMWICH V. FERRABY - VACCINATION WITHOUT CONSENT (England 1893)

In 1893, in Birmingham, England, a suit, *Bromwich v. Ferraby*, was brought seeking damages from a medical officer for the vaccination of a 14-year-old in a workhouse without the consent of the boy or his parents. The judge ruled that the guardians of the workhouse stood in loco parentis and could authorize treatment, so there was no assault. On appeal, a retrial was ordered. The retrial 1894 again exonerated the medical officer finding that the boy had consented, but the jury added a suggestion that in the future it should be made clear that a person has the option of refusing treatment.[731]

SURGERY WITHOUT PARENTAL CONSENT (Germany 1894)

In 1894, in Hamburg, Germany, Klein charged Dr. Waitz with performing surgery on his daughter without his consent. On appeal the doctor was found to have violated the law. The case is described in more detail in the *Occidental Medical Times*:

> An interesting legal controversy arose the other day in connection with one of the Hamburg hospitals. A child had been admitted suffering from tuberculous osteo-myelitis of the foot, for which, after several other remedies had proved ineffectual, resection appeared necessary. The father of the child, however, after much wavering, said that he would rather remove her from the hospital. As he let several days go by without doing so, and had not seemed in reality so much opposed to the operation, the surgeon in charge, Dr. Waitz, determined to operate, hoping to obtain the necessary acquiescence afterwards. On the day of the operation the father returned, but as the child was already anesthetised, he was told it was too late now. At first he made no objections, but several months later when the child was in excellent health, after a secondary amputation performed at the same hospital and with his complete consent, he suddenly entered proceedings against Dr. Waitz, on the plea of injuries

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[730] *Report of the Attorney General* (Minnesota), 150 (1895)

[731] *Vaccination law,* BRITISH MEDICAL JOURNAL, i:1283 (June 17, 1893); *Compulsory revaccination in a workhouse by order of board of guardians does not constitute an assault*, PUBLIC HEALTH (London), 5(64):350 (Aug. 1893); *Alleged illegal revaccination*, BRITISH MEDICAL JOURNAL,, ii:1082 (Nov. 11, 1893); *The Birmingham vaccination case,* LONDON MEDICAL PRESS AND CIRCULAR, 108:183 (Feb. 14, 1894); *Claim for damages for revaccination,* BRITISH MEDICAL JOURNAL, i:383 (Feb. 17, 1894)

and mutilation of the limb having been done to the child. In the first court he was unsuccessful, but on appeal he obtained a decision in his favor. A great deal of discussion has naturally arisen on the subject. The weak point for the lawyers in this case is that the decision bases on a paragraph regarding injuries wilfully inflicted by means of instruments, especially knives, etc. Now, it is quite obvious that it is utterly absurd to class a surgical operation as a corporeal injury, especially when, as in this case, the result has been a positive gain to the patient, but no surgeon has the right to cure any one against his will, or against the will of his legal guardian. Evidently German law is somewhat defective in this point, and in any case it behooves surgeons not to let themselves be carried away by any *furor chirurgicus.*[732]

RIGHT TO POSSESSION OF REMOVED TOOTH (Germany 1894)

In 1894 in Gera, Germany, a patient consented to have his tooth removed by a dentist. This was done skillfully and successfully. The tooth was very large so the dentist desired to keep it, claiming the right to do so by right of possession. The patient sued to recover the tooth. The outcome has not been located.[733]

M.L. V. GOELET & DELPHEY - ANESTHESIA - DISPUTE OVER CONSENT (New York 1894)

In 1894, in New York, in the case of *M.L. v. Goelet & Delphey*, a wife sued after her husband died during an operation to remove a gangrenous finger. She claimed that chloroform was administered against the express directions of the patient and family. The doctor testified that the patient did not object on the day of surgery when told that chloroform would be used. The lawyers tried to block the testimony based on confidentiality but were overruled. The defense attorney stated:

> What will a verdict for the plaintiff mean? Let me tell you in a few words. As this is an action for damages in tort, it can be followed by an execution to be issued against the person of these defendants to incarcerate them behind prison bars. It will be remembered by every surgeon in this land, and no surgeon will dare give an anesthetic agent until an iron-bound contract has been signed by the patient, holding the surgeon blameless for all consequences. Think of it, gentlemen; a verdict for the plaintiff! One of you, who may render such a verdict in this case, may be injured in a few days. You may be seriously injured; amputation may be necessary to

[732] *Germany,* OCCIDENTAL MEDICAL TIMES (Sacramento CA), 8:697, 699-700 (Nov. 1894); J. Grassi, *Zur verantwortlichkeit des arztes*, FRIEDREICH'S BLATTER FUR GERICHTLICHE MEDICIN UND SANTITATSPOLIZEI (Nurnberg), 25(6):443, 444-445 (1894)
[733] *Germany,* OCCIDENTAL MEDICAL TIMES (Sacramento CA), 8:697, 700 (Nov. 1894); *In interessanter process*, DEUTSCHE MONATSSCHRIFT FUER ZAHNHEILKUNDE, 12:63-64 (1894)

> save your life. You are in great pain, and suffering severely; and the injured member, be it a foot, a hand, or a finger, must be amputated to save your life. Your life's blood is slowly but surely dropping away. You exclaim: "Doctor, I can't stand it any longer! Hurry and give me something to relieve the pain, and amputate!" All is ready for the operation, but your physician suddenly remembers the case of L. against Drs. Goelet and Delphey, in which the jury decided against the defendants. Then your physician tells you, "Not yet; you must wait until I can see my lawyer, and have a contract prepared for yon to sign, to protect me in case of an accident of any kind." In the mean time, you lie suffering, perhaps dying. Think, gentlemen, carefully, what results a verdict for the plaintiff in this action will bring.

The judge's charge included -

> an objection made by Mrs. L, or by the daughter, is not an objection that the defendants in this action were bound to give heed to… if you come to the conclusion that the defendant did, in fact, say, "Don't give me chloroform, Doctor, I leave to you to determine whether that was meant as a command, or whether it was an expression of a wish on his part…

The jury ruled for the defendants.[734]

STATE V. GILE - MANSLAUGHTER - CONSENT NOT DEFENSE TO DEATH AFTER OPERATION (Washington 1894)

In the state of Washington, Dr. Gile was charged with manslaughter for performing hip surgery on a patient who died two weeks later. He claimed that the consent of the patient should be a defense. The trial court rejected this defense. The physician was convicted. In 1894, the Washington Supreme Court affirmed. The court stated:

> But this instruction is also wrong, for the reason that it assumes that consent to a surgical operation in dangerous cases is a good defense, though the effect be fatal, irrespective of the manner in which it may be performed, which cannot, in our judgment, be the law. Consent is only a good defense, in such cases, where the operation is performed with due care and skill.[735]

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[734] Eden V. Delphey, *A case of anesthesia with death, and attempted extortion successfully resisted,* MEDICAL AND SURGICAL REPORTER, 72: 455 (Mar. 30, 1895); *Death under chloroform and suit for malpractice*, TIMES AND REGISTER (Philadelphia), 27(20):321 (May 19, 1894); *Another malpractice suit comes to naught*, MEDICAL RECORD, 45:793 (June 23, 1894); *New York State Medical Association,* MEDICAL NEWS, 65:474 (Oct. 27, 1894)

[735] *State v. Gile*, 8 Wash. 12, 35 P. 417 (Jan. 9, 1894); *Consent as a defense to dangerous operations,* JAMA, 22:360 (Mar. 10, 1894)

CHALLENGE TO CONSENT TO REMOVAL TO FEVER HOSPITAL (Scotland 1894)

In January 1894 in Leith, Scotland, a smallpox patient who had consented to removal to a fever hospital sued the Medical Office of Health in Leith claiming that her consent had been induced by threats. By the time the case was heard, she had been taken back to her home. The sheriff dismissed the case finding that she had consented and the threats were not sufficiently proved.[736]

HERSHEY V. FOX - SURGERY BEYOND SCOPE OF CONSENT (Pennsylvania 1894)

In Pennsylvania, Mr. Hershey consulted Dr. Fox. He alleged that Dr. Fox stated that he would part the cataract in his left eye to restore sight and instead he attempted to entirely remove the cataract, whereby causing loss of sight in the left eye. Hershey sued and in 1894 the judge granted a non-suit, finding base ingratitude and no malpractice. One report in a medical journal noted that an important point brought out in the trial was "It is not absolutely necessary for the physician to inform or explain to the patient the character of the operation to be performed."[737]

BURBANK HOSPITAL RULES (Massachusetts 1894)

On March 19, 1894, the Trustees of the Burbank Hospital of the City of Fitchburg, Massachusetts, adopted bylaws, rules and regulations that included the following:

> 8. No surgical operation shall be performed without consent of the patients or those in authority over them, when such consent can be obtained. In cases in which such consent cannot be obtained, a record of the reasons shall be kept; and in all operations of a grave character information shall be given of the nature of the operation and the danger attending it….[738]

APPENDECTOMY FAD (1890s)

In the 1890s, there was a fad of appendectomy operations. In 1894, an article in *Look* magazine proposed to restrict the use of the operation. -

> … human life would be safer in New York if the operation was forbidden except by order of a court…[739]

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[736] *The powers of Medical Officers of Health*, MEDICAL PRESS AND CIRCULAR, 108:127 (Jan. 31, 1894)
[737] *Dr. Fox vindicated,* PHILADELPHIA INQUIRER, Feb. 16, 1894, 7; *Hershey and his eyesight,* NORTH AMERICAN (Philadelphia), Feb. 16, 1894, 7; *Dr. Fox vindicated*, TIMES AND REGISTER, Feb. 24, 1894, 126; *"Base ingratitude,"* MEDICAL AND SURGICAL REPORTER, 70:615 (Apr. 28, 1894)
[738] *The Burbank Hospital*, FITCHBURG SENTINEL (Mass), Mar. 20, 1894. 1 & 6
[739] LIFE, Mar. 8, 1894, 148

IN RE SMITH - CHALLENGE TO SMALLPOX QUARANTINE (New York 1894)

In 1894, the New York Court of Appeals addressed a habeas corpus action, *In re Smith*, challenging a smallpox quarantine order. The persons quarantined were engaged in an express delivery service. When they refused to be vaccinated, the commissioner ordered then to be quarantined because of the risk them contracting and spreading the disease. The court concluded that only persons who were diseased or had been exposed to the disease could be quarantined, so it ordered them to be released form quarantine. Smith then sued the Health Commissioner for damages. A jury in Kings County, found in favor of the plaintiff in 1895 awarding $489. In 1896 the appellate court reversed on the grounds that some evidence had been erroneously excluded and ordered a new trial. [740]

UNAUTHORIZED REMOVAL OF SKIN FOR TRANSPLANT (California 1894)

In March 1894, at the City and County Hospital in San Francisco seven strips of skin were removed from the thigh of Michael McGowan without his consent and were transplanted into Jean Forrest. The removal occurred while McGowan was under anesthesia for an operation on the ulcer for which he had been admitted to the hospital. McGowan, an Irishman, was especially upset that his skin had been transplanted onto a French person. McGowan sued the City and County of San Francisco. The outcome of the suit has not been located.[741]

MILWAUKEE SMALLPOX RIOTS (Wisconsin 1894)

In 1894, public health authorities sought to prevent the spread of smallpox in Milwaukee. Wisconsin. They forcibly removed patients, especially children, from their homes. There were several violent uprisings against department inspectors and their police escorts.[742]

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[740] *In re Smith*, 146 N.Y. 68, 40 N.E. 497 (May 3, 1895), *reversing* 84 App. Div. 465, 32 N.Y. Supp. 317 (2d Dept. Feb. 11, 1895); ALBANY LAW JOURNAL, 49(19):315-316 (May 12, 1894); *Compulsory vaccination*, BOSTON MEDICAL AND SURGICAL JOURNAL, 130:524 (May 24, 1894); *Wants $10,000 for being quarantined*, N.Y. TIMES, June 16, 1894, 9; SANITARIAN (New York), 36:75 (Jan. 1896); *Smith v. Emery*, 11 App. Div. 10, 42 N.Y. Supp. 258 (2d Dept. Dec. 15, 1896); for documents in habeas corpus case, see ANNUAL REPORT OF THE DEPARTMENT OF HEALTH OF THE CITY OF BROOKLYN FOR THE YEAR 1895 (Brooklyn 1897), 325 et seq.

[741] *Wants damages for stolen skin*, HOMOEOPATHIC NEWS, 23(10):365-367 (Oct. 1894); *Stolen grafts*, TIMES AND REGISTER, 28:285 (Nov. 3, 1894)

[742] Judith Walzer Leavitt, THE HEALTHIEST CITY: MILWAUKEE AND THE POLITICS OF HEALTH REFORM (Princeton: Princeton University Press, 1982); *Fear another riot,* CHICAGO TRIBUNE, Aug. 9, 1894, 7; *Stones the police,* DAILY NORTHWESTERN (Oshkosh Wis), Aug. 10, 1894, 1; *Distrustful of physicians,* CHICAGO TRIBUNE, Aug. 11, 1894, 4; *Attack on health officers,* CHICAGO TRIBUNE, Aug. 21, 1; *Women fight police,* CHICAGO TRIBUNE, Aug. 29, 1894, 3:94, 7; *Smallpox riots in Milwaukee,* CHICAGO TRIBUNE, Aug. 28, 1894, 5; *Mob of women rules,* CHICAGO TRIBUNE, Aug. 30, 1894, 3; *Health officers ask the law's aid,* CHICAGO TRIBUNE, Sept. 3, 1894, 3; *Milwaukee's unfortunate*

DEATH OF BLOOD DONOR (France 1894)

In June 1894, a French court (tribune civil de la Seine) addressed a case in which a M. Lefevre had had anemia requiring a blood transfusion and his gardener, M. Meunier, volunteered to provide the blood. Lefevre recovered. Later Meunier became ill and attributed his condition to the blood donation. He sued Lefevre. By the time the case came to trial, Meunier had died and autopsy showed he had died from stomach cancer, which was not affected by the blood donation. The court dismissed the case.[743]

COURT ORDERED RELEASE FROM SUICIDE HOLD (New York 1894)

On September 16, 1894, Bridget Sugar was acting in a way that her neighbors thought would injure herself. They called police. When a policeman approached her, she jumped out of a window, injuring herself. She was taken to Bellevue Hospital and was charged with attempted suicide. The NEW YORK TIMES reported that meant that she could not be discharged without a court order. In January 1895, the policeman who had taken her into custody petitioned the court for an order to release her. She was so crippled that she was taken to the court in an ambulance and the judge went out to the street to see her. The judge then ordered her release.[744]

UNAUTHORIZED SURGERY (Illinois 1894)

In September 1894, Mrs. Emilie Ponevaire sued Drs. Barker and Kerch and Cook County for allegedly oophorectomizing her without her consent. The outcome of the suit has not been located.[745]

ANESTHESIA (1894)

In 1894 inquest was held in London into the death at St. Bartholomew's Hospital of Thomas White during a tracheotomy under the effect of chloroform. He had consented to the chloroform. The coroner's jury found death by misadventure.[746]

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notoriety, JAMA, 23:400 (Sept. 8, 1894); *Renewal of the smallpox riots,* DAILY GAZETTE (Janesville Wis), Oct. 18, 1894, 1; *"Impeaching" a health commissioner,* JAMA, 23:730 (Nov. 10, 1894); *Use bogus vaccine,* CHICAGO TRIBUNE, Nov. 27, 1894, 1

[743] *Two interesting law cases,* MEDICAL PRESS AND CIRCULAR, 108:671 (June 27, 1894); *Le sujet qui fournit le sang dans une transfusion ne peut réclamer des dommages-intérêts*, REVUE DE MÉDECINE LÉGALE ET DE JURISPRUDENCE MÉDICALE, Vol. 1(8):457-58 (1894)

[744] *Ordered her released,* N.Y. TIMES, Jan. 18, 1895, 11

[745] CHICAGO DAILY TRIBUNE, Sep. 13, 1894, 4; *State items*, MEDICAL STANDARD, 16(4):125 (Oct 1894)

[746] *Persons, places, and things*, CHARITY RECORD (London), Dec. 6, 1894, 16

EXPERIMENT - JACKSON V. BURNHAM (Colorado 1895)

In 1890, Jesse R. Jackson sought treatment from Dr. N.G. Burnham for "*phimosis*, or an adherence of the prepuce or foreskin of the *penis* to the head thereof, and a consequent swelling thereof." Standard treatment at the time was slitting the foreskin. Instead, Dr. Burnham treated him with a flaxseed meal poultice. By the time other physicians became involved in the care, gangrene had set in and through three operations his penis was amputated. A jury award Mr. Jackson $5,000. In 1891, a Colorado appellate court reversed, but in January 1895 the Colorado Supreme Court reinstated the judgment. The courts struggled with the issue of whether the jury instructions would prohibit any advances in medical practice. Before quoting *Carpenter v. Blake*, The Colorado Supreme Court stated:

> In this connection, although out of its order, we notice instruction number 16, as it embodies somewhat the same principle, in the following language:
> "That, if writers on the treatment of phimosis, or practical surgeons prescribe a mode of treatment, it is incumbent on surgeons called on to treat such an ailment to conform to the system of treatment thus established, and if they depart from it they do so at their peril."
> The learned writer of the opinion of the court of appeals condemns this instruction because it contravenes the rule that the criterion by which to judge of the correctness of a particular mode of treatment must be one universally adopted by the profession, and that the language used in the instruction may be construed to mean that a treatment prescribed by *some* writers or *some* surgeons may not be departed from without peril; and for the further reason that, if sustained, the rule announced will prohibit further progress in surgery.
> We do not think the language used should be construed, or that the jury could have understood it to mean, that a treatment laid down by *some* writers or practiced by *some* surgeons should control, but that it clearly conveys the idea that the mode of treatment meant is one which writers and the profession universally commend.
> There must be some criterion by which to test the proper mode of treatment in a given case, and when a particular mode of treatment is upheld by a consensus of opinion among the members of the profession, it should be followed by the ordinary practitioner; and if a physician sees fit to experiment with some other mode, he should do so at his peril. In other words, he must be able, in the case of deleterious results, to satisfy the jury that he had reason for the faith that was in him, and justify his experiment by some reasonable theory. [747]

[747] *Jackson v. Burnham,* 20 Colo. 532, 39 P. 577 (Jan. 1895), *rev'g, Burnham v. Jackson*,1 Colo. App. 237, 28 P. 250 (Sept. 1891)

FAITH HEALER - JOHN ALEXANDER DOWIE (Chicago IL)

John Alexander Dowie was a faith healer in Chicago. The following summarizes the reported deaths of this followers and actions taken by public authorities through 1900. Dowie (1847-1907) was the founder of the Christian Catholic Church in 1895 and the International Divine Healing Association. He also founded a large religious community in Illinois called the City of Zion.[748]

It is reported in one source that in 1895, the faith healer John Alexander Dowie was charged in Chicago with manslaughter and neglect for the death of one of his followers who was denied medical attention. The jury convicted him, but the conviction was overturned. The age of the victim has not been located. This has not been confirmed in the Chicago newspaper reports that have been located.

Chicago newspapers reported the following:

In June 1894, Professor Julius F. Kellogg died at John Alexander Dowie's faith cure establishment in Chicago. Dr. Kellogg had fallen and suffered a concussion. He then went to Dowie's establishment. At the inquest there was a verdict of accidental death.[749]

In December 1894, Mrs. Charles Walker, a Moody Institute student, attended a Dowie service and experienced an apparent apoplectic fit. Persons at the Dowie establishment were unable to restore her consciousness, so a Mr. Letcher called a police ambulance. Mrs. Walker died in the ambulance.[750]

In February 1895, May Van Houten, age 7, died of measles that converted to croup while being treated pursuant to Dowie's teachings. Her father, a Dowie follower, refused medical attention.[751]

In July 1895, Mrs. Magdaline Burke from Canada died of heart disease in a Dowie facility. At the coroner's inquest, the Dowie physician, Dr. John G. Speicher, who signed the death certificate testified that he had not provided medical treatment to Mrs. Burke. The coroner report recommended revocation of Dr. Speicher's medical license, but this did not occur.[752]

In May 1896, Alice M. King, age 35, died of consumption in a Dowie hospital.[753]

In October 1896, Miss Rebman, age 5, was in a Dowie facility with her mother. The mother had tuberculosis. When the daughter developed a throat disease, her mother took her to the County Hospital. A County Hospital physician diagnosed diphtheria and wanted to admit her to the contagious disease ward. When the mother learned that she could not accompany her daughter, she

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[748] *John Alexander Dowie,* http://www.solcon.nl/apgeelhoed/ htmldoc/nb-dowie.htm [accessed Oct. 7, 2004]; *John Alexander Dowie,* THE COLUMBIA ENCYCLOPEDIA, Sixth Edition (2001); http://www.dowie.org/john_alexander_dowie.htm [accessed Oct. 8, 2004]

[749] *He dies at Dowie's,* CHICAGO DAILY TRIBUNE, June 24, 1894, 11

[750] *Was it faith cure?* CHICAGO DAILY TRIBUNE, Dec. 24, 1894, 8

[751] *Victim of a faith,* CHICAGO DAILY TRIBUNE, Feb. 27, 1895, 12

[752] *Dies in Dowie's den,* CHICAGO DAILY TRIBUNE, July 2, 1895, 1; *Drugs of no use now* CHICAGO DAILY TRIBUNE, July. 3, 1895, 12

[753] *She though Dowie could cure her* CHICAGO DAILY TRIBUNE, May 27, 1895, 7

refused and returned to the Dowie facility with her daughter. Dowie was threatened with quarantine if the diagnosis was confirmed.[754]

In April 1899, Mary Moses, age 10, died of dropsy complicated by pneumonia. Her father was a Dowie-follower and had not sought medical attendance. A coroner's jury found the father responsible for the death and censured him.[755]

In April 1899, Miss Addie E. Smith age 45, died under the care of Dowie-followers, but not in a Dowie home. The coroner decided no inquest was required.[756]

In January 1895, Chicago officials conducted inspections of Dowie's Divine Healing Homes to determine whether they were illegal hospitals. Officials asserted that the homes were hospitals. A city ordinance required hospitals to obtain a city permit that could be issued only with the permission of nearby property owners. Violators could be fined or closed as nuisances. Dowie was fined $100 for the unsanitary condition of one establishment. The city council passed a new ordinance strengthening the regulation of all hospitals. In June 1895, Dowie was arrested twice for violating the hospital ordinance. After a trial of three consolidated cases, a jury found him guilty and fined him $50, plus $124 in costs. Dowie was arrested again the next day on the complaint of a neighbor. In June, Dowie sought to enjoin further arrests and prosecutions, but the injunction was denied. By June 24, 46 warrants had been issued. The cases tended to result in hung juries. In July, a jury found against Dowie in one case and he was fined $100. He was then arrested on additional warrants. Later in July another jury found in favor of Dowie in a civil action to collect a previously assessed $100 fine, determining that Divine Healing Home No. 2 was not a hospital. A few days later another jury found Divine Healing Home No. 3 to be a hospital in violation of the ordinance and fined Dowie $50 and costs. In early August another jury found another home to be a hospital in violation of the ordinance and fined Dowie $50 and costs. On August 9 the Chicago Daily Tribune published an editorial entitled "What is a hospital?" In mid-August Dowie sought through a petition for habeas corpus to challenge the basis for his repeated arrests. The judge upheld the city ordinance and denied the writ. However, on the same day, another jury found Dowie not guilt of violation of the hospital ordinance. In November, on appeal two juries affirmed two of the fines for operating hospitals.[757]

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[754] *Dowie in trouble again* CHICAGO DAILY TRIBUNE, Oct. 4, 1896, 7

[755] *Censured for child's death,* CHICAGO DAILY TRIBUNE, Apr. 1, 1899, 14

[756] *Dowie devotee found dead,* CHICAGO DAILY TRIBUNE, Apr. 22, 1899, 5

[757] *Visit Dowie's homes,* CHICAGO DAILY TRIBUNE, Jan. 8, 1895, 12; *Dowie's race is nearly run,* CHICAGO DAILY TRIBUNE, Jan. 9, 1895, 8; *Neighbors ask a postponement*, CHICAGO DAILY TRIBUNE, Jan. 10 1895, 8; *To protect the sick,* CHICAGO DAILY TRIBUNE, Jan. 13, 1895, 10 [text of ordinance]; *City takes a hand*, SUNDAY INTER OCEAN (Chicago), Jan. 13, 1895, 1; *"Divine healer" Dowie fined $100,* CHICAGO DAILY TRIBUNE, Feb. 3, 1895, 6; *Dowie in the toils,* CHICAGO DAILY TRIBUNE, June 14, 1895, 1; *Arrested Dr. Dowie*, DAILY INTER OCEAN, June 14, 1895, 1; *Dowie in durance once more,* CHICAGO DAILY TRIBUNE, June 15, 1895, 6; *To keep issuing warrants for Dowie,* CHICAGO DAILY TRIBUNE, June 16, 1895, 1; *He vents his spleen,* CHICAGO DAILY TRIBUNE, June 17, 1895, 8; *"Dr." Dowie and his troubles,* CHICAGO DAILY TRIBUNE, June 18, 1895, 2; *"Dr." Dowie again under arrest, ,* CHICAGO DAILY TRIBUNE, June 19, 1895, 7; *Bad day for Dowie,*

In January 1895, Dowie was tried for practicing medicine without a license. After several days of testimony, the judge reserved judgment, but I have been unable to find the final ruling.[758]

In July 1895, a court denied a petition to enjoin Dowie from permitting afflicted persons to enter his homes. The court refused to rule on whether Dowie healed by prayer because it was a religious issue outside the jurisdiction of the court. The court concluded that there was insufficient evidence for finding the homes were a civil nuisance. The court advised that failure to control contagious disease could form a basis for an injunction.[759]

In June 1899, the Chicago mayor appointed a committee to investigate into the methods at Dowie's institute.[760]

In late July 1899, Mrs. Annetia Flanders died of blood poisoning in St. Luke's Hospital in Chicago. She had been under the care of Dowie followers prior to admission to St. Luke's. She refused to allow her husband to call a physician. He finally did so against her wishes. Her attending physicians believed her life could have been saved of she had been admitted sooner, so they notified the State Board of Health, which ordered an investigation. Suit was brought against a healer, Henrikka Bratz, for practicing medicine without a license and proceeding were started to revoke the medical license of Dr. Speicher. Dowie followers claimed that the death was caused at St. Luke's. The coroner's inquest found

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CHICAGO DAILY TRIBUNE, June 20, 1895, 8; *Local snap shots,* CHICAGO DAILY TRIBUNE, June 21, 1895, 6; *Dowie faces "warrant" music,* CHICAGO DAILY TRIBUNE, June 23, 1895, 2; *Dowie's injunction refused*, CHICAGO DAILY TRIBUNE, June 23, 1895, 6; *Dowie roasts his persecutors,* CHICAGO DAILY TRIBUNE, June 24, 1895, 3; *Dowie jury reports disagreement,* CHICAGO DAILY TRIBUNE, June 26, 1895, 8 [trial of one case]; *Dowie's jury is under suspension,* CHICAGO DAILY TRIBUNE, June 27, 1895, 8; *Dowie has a friend on t e jury,* CHICAGO DAILY TRIBUNE, July 10, 1895, 6; *Dowie invites contagious disease,* CHICAGO DAILY TRIBUNE, July 12, 1895, 8; *Dowie says he is not a nuisance* CHICAGO DAILY TRIBUNE, July 13, 1895, 13; *One hundred dollar fine for Dowie,* CHICAGO DAILY TRIBUNE, July 19, 1895, 1; *Dowie's adherents make threats,* CHICAGO DAILY TRIBUNE, July 21, 1895, 3; *More woe for Dowie,* CHICAGO DAILY TRIBUNE, July 22, 1895, 1; *Dowie gets a favorable verdict* CHICAGO DAILY TRIBUNE, July 24, 1895, 7; *Dowie is found guilty and fined,* CHICAGO DAILY TRIBUNE, July 26, 1895, 5; *Another jury finds Dowie guilty* CHICAGO DAILY TRIBUNE Aug. 3, 1895, 4; *What is a hospital* CHICAGO DAILY TRIBUNE, Aug. 9, 1895, 6; *Four more warrants for Dowie,* CHICAGO DAILY TRIBUNE, Aug. 13, 1895, 2; *"Dr." Dowie out on habeas corpus,* CHICAGO DAILY TRIBUNE, Aug. 15, 1895, 7; *"Dr." Dowie's busy day in court*, CHICAGO DAILY TRIBUNE, Aug. 17, 1895, 5; CHICAGO DAILY TRIBUNE, Aug. 18, 1895, 6 [rearrest]; *"Dr." Dowie is still in court*, CHICAGO DAILY TRIBUNE, Aug. 22, 1895, 7; *Dowie pays the costs of a jury,* CHICAGO DAILY TRIBUNE, Aug. 23, 1895, 1; *Uses it as a lever,* CHICAGO DAILY TRIBUNE, Aug. 25, 1895, 30; *Six warranes for Dr." Dowie,* CHICAGO DAILY TRIBUNE, Sept. 25, 1895, 1; *Notes,* CHICAGO DAILY TRIBUNE, Oct. 8, 1895, 7 [warrants served]; *Dr. Dowie's appeal case heard,* CHICAGO DAILY TRIBUNE, Nov. 8, 1895, 2; *"Dr." Dowie found guilty,* CHICAGO DAILY TRIBUNE, Nov. 9, 1895, 5; *No verdict in Dowie case,* CHICAGO DAILY TRIBUNE, Nov. 15, 1895, 3 [four jurymen had attended Dowie's service the night before]; *Jury finds Dowie guilty,* CHICAGO DAILY TRIBUNE, Nov. 16, 1895, 3

[758] *The city in brief*, DAILY INTER OCEAN (Chicago), Jan. 6, 1895, 8; *Dowie's case comes before a court,* CHICAGO DAILY TRIBUNE, Jan. 12, 1895, 6; *John Alexander Dowie on trial*, DAILY INTER OCEAN (Chicago), Jan. 12, 1895, 7; *"D." Dowie's case again*, CHICAGO DAILY TRIBUNE, Jan. 16, 1895, 8; *Dowie on the stand for himself,* CHICAGO DAILY TRIBUNE, Jan. 23, 1895, 9; *Dowie heard in his own defense*, DAILY INTER OCEAN (Chicago), Jan. 23, 1895, 3

[759] *Divine healer Dowie scores one,* CHICAGO DAILY TRIBUNE, July 17, 1895, 3

[760] *To inquire into Dowie place,* CHICAGO DAILY TRIBUNE, June 13, 1899, 5

Mrs. Bratz and another elder, D.C. Holmes, Criminally responsible for the death and turned the matter over to the grand jury. They were arrested and released on bond. Mrs. Bratz was convicted of practicing medicine without a license and fined $100. The grand jury refused to issue bills concerning the deaths.[761]

In August 1899, Mrs. Augusta Schlater died in her home within 24 hours of leaving a Dowie institution. She had spent two weeks in the institution. It was reported that Dr. Speicher ordered her out of the Dowie institution when it appeared that she could not live. The coroner's inquest determined the death was due to tuberculosis.[762]

In August 1899, Anna Reid from Bellevue, Iowa, died of tuberculosis under Dowie treatment. She had been in Chicago three days. She died in a boarding house.[763]

In October 1899, a Chicago man called for prayer healers when his wife was in child birth. The baby died and the wife was in critical condition.[764]

In October 1899, coroner's verdicts in Indiana found deaths of two children to be due to the neglect of their parents and Dowie followers. They refused to summon medical attention.[765]

In November 1899, Dowie was mobbed in Hammond, Indiana, by persons who were upset that a little girl had died of scarlet fever while under Dowie treatment.[766]

In December 1899, Lillian Becker, age 3, died while under Dowie treatment. Dr. Speicher signed a death certificate reporting the cause as tuberculosis. The coroner's office determined that she had actually died of diphtheria.[767]

In December 1899, Emma Gawell, age 19, died of heart trouble while under Dowie treatment.[768]

In January 1900, it was reported that Dowie required all deaths to be handled through one undertaker. He refused to deliver bodies to other firms.[769]

In January 1900, Esther H. Hocking, age 2, died while under Dowie treatment. A coroner's post-mortem determined she had died of measles. [770]

In February 1900, W.F. Green died in a Dowie institution.[771]

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[761] *She has faith but dies,* CHICAGO DAILY TRIBUNE, July 29, 1899, 1; *Prayer did not save her,* CHICAGO DAILY TRIBUNE, July 30, 1899, 32; *Move in Flanders case,* CHICAGO DAILY TRIBUNE, July 30, 1899, 5; *To sift "divine healing* CHICAGO DAILY TRIBUNE, July 31, 1899, 12; *Dowie may be prosecuted,* CHICAGO DAILY TRIBUNE, Aug. 1, 1899, 5; *Dowie people use placards,* CHICAGO DAILY TRIBUNE, Aug. 8, 1899, 12; *Jail for faith healers,* CHICAGO DAILY TRIBUNE, Aug. 9, 1899, 12; *Blow for "Zion" cure*, CHICAGO DAILY TRIBUNE, Aug. 17, 1899, 12; *D.C. Holmes and Mrs. Bratsch free,* CHICAGO DAILY TRIBUNE, Sept. 26, 1899, 12

[762] *Third Dowie patient dies,* CHICAGO DAILY TRIBUNE, Aug. 20, 1899, 10

[763] *Dies under Dowie treatment,* CHICAGO DAILY TRIBUNE, Aug. 23, 1899, 7

[764] *Another victim of Dowie's teachings,* CHICAGO DAILY TRIBUNE, Oct. 7, 1899, 12

[765] *Coroners blame Dowie plan,* CHICAGO DAILY TRIBUNE, Oct. 20, 1899, 1

[766] *Dowie mobbed in Indiana,* N.Y. TIMES, Oct. 29, 1899, 12

[767] *Dies during Zion cure,* CHICAGO DAILY TRIBUNE, Dec. 26, 1899, 1; *Contradicts a Dowie doctor,* CHICAGO DAILY TRIBUNE, Dec. 28, 1899, 2

[768] *Young Dowie disciple dies,* CHICAGO DAILY TRIBUNE, Dec. 26, 1899, 1

[769] *But on undertaker to Zion,* CHICAGO DAILY TRIBUNE, Jan. 5, 1900, 8

[770] *Faith cure patient dies,* CHICAGO DAILY TRIBUNE, Jan. 17, 1900, 2

In March 1900, the 18 month-old daughter of Edward S. Chleter died of convulsions while under Dowie treatment. Seven months before his wife had died while under Dowie treatment.[772]

In March 1900, Henry Martin died at a Dowie institution.[773]

In April 1900, George Segerstedt died at his home. For six months, he had been under the care of Dowie followers refusing medical to call a physician.[774]

In May 1900, Margaret Putnam died while under the care of Dowie. The coroner determined she had died from typhoid fever.[775]

In May 1900, Peter Jesterden died in a Dowie institution. The coroner determined the death was due to pneumonia.[776]

In May 1900 Mrs. George Tucker died from fever while under the care of Dowie followers. She had not been a Dowie follower but after she was ill for three weeks, she was persuaded to dismiss her physician and consent to try divine healing. As she became worse she proposed to abandon divine healing and recall her physician, but the Dowie deacons insisted she was getting well. She dies after a week of Dowie treatment. The State Board of Health investigated the deacons for potential malpractice. [777]

In May 1900 Millie Logan was ruled insane by Judge Dewitt L. Jones and committed to the state asylum in Kankakee. Dowie followers convinced her mother to take her to a Dowie institution where Dowie attempted to cast out devils. Dowie and eight of his healers were charged with contempt of court for interfering with the commitment order. The Protective Agency for Women and Children also pursued litigation against them. The State Board of Public Charities and the state asylum joined in the prosecution.[778]

In June 1900, Walter Streets, age 11, a member of the Dowie church, died of diphtheria after fifteen days of Dowie treatment. He lived with his grandmother who was also a Dowie member.[779]

In September 1900, Ollie Kendall, age 17 and a Dowie follower, refused medicine and died under Dowie treatment. His father advised calling a physician

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[771] *Dies in Dowie institution,* CHICAGO DAILY TRIBUNE, Feb. 19, 1900, 1

[772] *Die despite Dowie prayers,* CHICAGO DAILY TRIBUNE, Mar. 23, 1900, 1; *Autopsy on a Dowie patient,* CHICAGO DAILY TRIBUNE, Mar. 24, 1900, 7

[773] *Henry Martin dies at Dowie's Zion,* CHICAGO DAILY TRIBUNE, Mar. 30, 1900, 5

[774] *Follower of "Dr." Dowie dies,* CHICAGO DAILY TRIBUNE, Apr. 29, 1900, 4

[775] *Autopsy of a Dowie patient,* CHICAGO DAILY TRIBUNE, May 5, 1900, 7

[776] *Death of a Dowie patient,* CHICAGO DAILY TRIBUNE, May 15, 1900, 9

[777] *After two Dowie men,* CHICAGO DAILY TRIBUNE, May 16, 1900, 7

[778] *Bound at a Dowie home,* CHICAGO DAILY TRIBUNE, May 24, 1900, 1; *Aims to indict Dowieties,* CHICAGO DAILY TRIBUNE, May 25, 1900, 1; *Turn law on Dowieites,* CHICAGO DAILY TRIBUNE, May 26, 1900, 5; *Dowie to face charge,* CHICAGO DAILY TRIBUNE, May 29, 1900, 5; *Dowie case is planned* CHICAGO DAILY TRIBUNE, June 2, 1900, 16; *Followers hit at Dowie* CHICAGO DAILY TRIBUNE, June 3, 1900, 3; *At work on Dowie case* CHICAGO DAILY TRIBUNE, June 4, 1900, 8; *Dowie "healers" to be prosecuted by state officials,* CHICAGO DAILY TRIBUNE, June 5, 1900, 4; *Logan girl may testify,* CHICAGO DAILY TRIBUNE, June 6, 1900, 10; *Dowie evidence is ready,* CHICAGO DAILY TRIBUNE, June 7, 1900, 5; *Funds to fight Dowie,* CHICAGO DAILY TRIBUNE, June 8, 1900, 10; *State beards Dowie in Zion,* CHICAGO DAILY TRIBUNE, June 9, 1900, 9; *To fight Dowie on all sides,* CHICAGO DAILY TRIBUNE, June 10, 1900, 6

[779] *Boy clings to belief in divine healing and death results,* CHICAGO DAILY TRIBUNE, June 24, 1900, 8

which he refused to permit. His father arranged for a physician to examine him while he was asleep. The physician advised treatment, but Ollie continued to refuse.[780]

In October 1900, Mrs. Louisa Russell died while under Dowie treatment. Friends had urged her to call a physician but she refused.[781]

In October 1900, at a Dowie facility, Annie Knudson, age 15, died of typhoid fever.[782]

In November 1900 at sea on her way home from Europe, Dowie's sister, Mrs. Samuel Stevenson, died of pneumonia. She had refused medical attention.[783]

In December 1900, the 5-year-old son of Mr. and Mrs. Hauck was the first death in Dowie's new Zion City in Waukegan. He died of enlargement of the brain with new medical attendance. After an initial disagreement, the coroner permitted the body to be shipped.[784]

REMOVAL OF SKIN FROM IDIOT CHILD WITHOUT PARENTAL CONSENT (Knox County IL 1895)

In 1895 skin was removed from the idiot son of John D. Moore. The son lived in the almshouse. The skin was grafted onto the arm of another patient with the permission of the superintendent of the almshouse. His relatives asserted that they had not been consulted and that the boy could not consent. The father sued John Cook, superintendent of the almshouse, Dr. Schwartz, the almshouse physician, and supervisors J.S. Simpson and John Robson of the almshouse committee. The trial started December 6 in Galesburg, Illinois. The outcome of the trial has not been located.[785]

OPPOSITION TO ANTI-TOXIN TREATMENT WITHOUT PARENTAL CONSENT (England 1895)

1895, there was a dispute in England over whether the new anti-toxic treatment for diphtheria could be administered without parental consent. Here are a few articles by the opponents of the treatment,

> The *Islington Gazette* of February 8th reports that at a meeting of the Holborn Guardians the Clerk read a letter from the Guardians of Hackney asking Holborn to join them in a protest against the Metropolitan Asylums Board using the anti-toxic treatment of diphtheria without the consent of the patients. Mr. Bade moved that the Board consent, adding that at the

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780 *Ollie Kendall prefers dying in Dowie church to living by medicines,* CHICAGO DAILY TRIBUNE, Sept. 16, 1900, 1

781 *Another Dowie patient dies,* CHICAGO DAILY TRIBUNE, Oct. 4, 1900, 3

782 *Girl dies in Dowie Zion,* CHICAGO DAILY TRIBUNE, Oct. 26, 1900, 1

783 *Dowie's sister is dead,* CHICAGO DAILY TRIBUNE, Nov. 28, 1900, 9

784 *First death in Zion City,* CHICAGO DAILY TRIBUNE, Dec. 1, 1900, 9

785 HENRY REPUBLICAN (IL), Feb. 14, 1895,1; *Sues for $5,000 damages*, ALTON EVENING TELEGRAPH, Dec. 6, 1895, 1; *A peculiar lawsuit*, DECATUR WEEKLY REPUBLICAN, Dec. 12, 1895, 6

Asylums Board he opposed it on the ground that they had no right to experimentalise with new remedies upon the poor. Mr. Kelly seconded. If the Asylums Board wanted to experimentalise, let them do it on some of the West End people. Miss Baker said the attitude of the Board was to allow the medical staff to provide the best that was possible for the patients, and not to interfere with their treatment. Mr. Garrity had every admiration for the medical fraternity; but in this regard he thought they might have experimentalised upon some of the majority at the Asylums Board. (Laughter). Miss Baker: I would not object if I had diphtheria. The motion was adopted by nine votes to five. Miss Baker: It won't do you any good. It is done.[786]

The *Islington Gazette* also reports a discussion at the meeting of the Islington Guardians. The Clerk read a communication from the Hackney Union, enclosing a copy of the following resolution, passed at their meeting of 9th January: That a letter be addressed to the Local Government Board, asking them to withhold their sanction to the proposal of the managers of the Metropolitan Asylums Board to provide an anti-toxic establishment until the question has been decided as to whether patients who are removed to the hospitals of the managers suffering from diphtheria shall be required to submit to the anti-toxic treatment without their consent being given thereto, and in the case of children, the written consent of their parents." Mr. Hollyman said it would be injudicious to take any action in the matter. No action was taken.[787]

At the meeting, on March 29th, of the Lambeth (London) Board of Guardians, Mrs. Despard moved that the Local Government Board be requested to issue an order that no diphtheria patient entering a rate-supported institution should be subjected to the anti-toxin treatment unless the consent of the patient had been previously obtained, and in the case of children the consent of the parents or guardians. She considered that the great diversity of opinion on the question existing amongst medical men justified the board taking such a course. Mrs. Stroud spoke warmly in favour of the resolution, which was carried unanimously.[788]

BURGGRAFF V. EMERY AND BOYDEN - DEATH FROM VACCINATION (New York 1895)

In 1895, a jury in Brooklyn failed to agree in a suit by Peter Burggraff against Health Commissioner Emery and vaccinator Dr. Frank E. Boyden for the death of Burggroff's daughter, Julia, from lockjaw allegedly the result of vaccination at school by Boyden. The jury was 10 to 2 in favor of defendant.[789]

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[786] *Holborn guardians and the treatment*, ZOOPHILIST, 14:145 (Mar. 1, 1895)
[787] *Islington guardians and the treatment*, ZOOPHILIST, 14:145 (Mar. 1, 1895)
[788] *Patients or parents to consent to inoculation,* ZOOPHILIST, 14:178 (May 1, 1895)
[789] James Colgrove, *Between persuasion and compulsion: Smallpox control in Brooklyn and New York, 1894-1902*, BULL. HIST. MED. 78:349, 365-71 (2004); *Vaccine suits in Brooklyn*, N.Y. TIMES, Jan. 10, 1896, 9; *Lockjaw germs abound*, N.Y. TIMES, Jan. 11, 1896, 14; *Dr. Emery's mind probed*, N.Y. TIMES, Jan. 15, 1896, 10; MEDICAL NEWS, 68(4):110-111 (Jan. 25, 1896)

SCHAEFER V. SCHELLING - FORCIBLE VACCINATION (New York 1895)

In 1895, Emil Schaefer sued Dr. Schelling of the Brooklyn Board of Health for forcibly vaccinating him. The jury awarded him $1,500. In 1894, the doctor was also charged criminally with the assault. Dr. Schelling was found guilty and was given a suspended sentence.[790]

UNAUTHORIZED REMOVAL OF UTERUS (Belgium 1895)

In Belgium, a lady who suffered from uterine hemorrhage and her husband consented to allow her uterus to be curetted. When the operation was begun it was discovered that there was cancer of the uterus, and the operator and the family physician decided to remove the whole organ, the result being that the patient died from hemorrhage. As neither the patient nor the husband was consulted about the hysterectomy, it was held by the court in 1895 to be unjustifiable. On review, the damages were reduced to £200. The court ultimately acquitted the doctor.[791]

UNAUTHORIZED AMPUTATION - RAILWAY NOT LIABLE FOR SURGEON EMPLOYEE (Indiana 1895)

In April 1895, the Indiana Supreme Court reversed a jury award of $4,500 to William Sullivan for the unauthorized amputation of his arm. The defendant was his railway company employer. The amputation was by the company surgeon. The court ruled that a railway company was not liable for the malpractice of its employee surgeon where the patient had the privilege of rejecting the surgeon.[792]

WRITTEN CONSENT TO TREAT DRUNKARD (Wisconsin 1895)

In April 1895, a law was adopted in Wisconsin requiring written consent to institutional treatment for drunkenness. A judge entered an order authorizing the Keeley treatment for drunkenness for two men at county expense pursuant to the new Wisconsin state law, Ch. 203. The article stated that "The written consent of the drunkard must also be presented, with his agreement to take the treatment

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[790] *$1500 for forced vaccination*, N. Y. TIMES, Nov. 16, 1895, 1; *A suit for damages for vaccination,* BOSTON MEDICAL AND SURGICAL JOURNAL, 133:528 (Nov. 21, 1895); *Guilty of assault for vaccinating a sick man,* MEDICAL RECORD, 45:725 (June 9, 1894)

[791] *Risk of operating without consent*, MEDICAL RECORD, 48:412 (Sep. 21, 1895); *Responsabilité chirurgicale*, ANNALES D'HYGIENE PUBLIQUE ET DE MEDICINE LEGALE, 34:384 (July 1895); *A hard case*, LANCET, i:501 (Feb. 22, 1896)

[792] *Pittsburgh, Cincinnati, Chicago and St. Louis Railway Co. v. Sullivan*, 141 Ind. 83, 40 N.E. 138 (Apr. 9, 1895); *The case reversed,* LOGANSPORT REPORTER (Ind), Apr. 10, 1895, 8; *Sullivan's arm*, LOGANSPORT DAILY REPORTER (Ind), May 9, 1893, 3; *$4,500 damages*, PHAROS TRIBUNE (Logansport Ind), May 11, 1893, 4

and obey the rules of the institution." Section 2, of Ch. 203, concerning the petition for treatment for being a habitual drunkard stated:

> The written consent of such habitual drunkard to the granting of the prayer of the petition, and his agreement to take the treatment and obey the rules of the institution, shall be annexed thereto, or produced in court and filed therewith.[793]

STATE V. PEERY - ALLEGED RAPE UNDER CHLOROFORM (West Virginia 1895)

In July 1895 in West Virginia, Dr. William E. Peery was convicted of rape of Rosa J. Johnston while under the influence of a mixture of chloroform and ether. IN March 1896 the highest court of West Virginia reversed the conviction and ordered a new trial because the trial court had erred in not giving an instruction to the jury that the charge may be due to a hallucination caused by the chloroform and ether.[794]

SCOPE OF SOLDIER CONTROL OVER HERNIA OPERATION (U.S. 1895)

In August 1895, the Acting Secretary of War of the United States issued a decision that

> Operations for the radical cure of hernia will be performed, with the consent of the soldier, by medical officers specially designated to the Surgeon-General of the Army…. If the case is considered unsuitable for operation, or if an operation is declined by the soldier, the fact will be noted upon the certificate of disability. [795]

PECULIAR PEOPLE - CABLE - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (England 1895)

In August 1895, William Cable appeared before the Southend Petty Sessions chaired by Mr. E.A. Wedd and a full bench of magistrates. He was a member of the Peculiar People. He was answering a summons issued at the instance of the Royal Society for the Prevention of Cruelty to Children. He was charged with cruelty to four children by refusing to call medical aid when they were suffering from diphtheria. All four children - age one-year and ten months to age 10 - were dead. This was a test case whether parents were required to

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[793] *At county expense,* WAUKESHA FREEMAN (Wis), May 9, 1895, 1; LAWS OF WISCONSIN (1895), ch. 203, sec. 2 (approved Apr. 15, 1895)
[794] *State v. Perry*, 41 W.Va. 641, 24 S.E. 634 (Mar. 18, 1896)
[795] *Decision Actg. Sec. War Aug. 14, 1895 - 19166 A.G.O. '85*, reprinted in the ADJUTANT-GENERAL OF THE ARMY'S CIRCULAR (No 9) dated Headquarters of the Army, A. G. O., Washington, September 9, 1895

call medical aid. The Bench committed the defendant for trial and bail was allowed. In November 1895, he was acquitted at trial.[796]

HEDIN V. MINNEAPOLIS MEDICAL AND SURGICAL INSTITUTE - DECEIT (Minnesota 1895)

In August 1895, the Minnesota Supreme Court decided a case, *Hedin v. Minneapolis Medical and Surgical Institute*. Hedin sued for deceit. He paid the institute $500 when its personnel claimed his condition was curable and that they could cure it. A jury found deceit and awarded him $500 with interest. The court found no errors and refused to order a new trial.[797]

CHANGE IN RULES OF WESTERN MARYLAND HOSPITAL (1895)

In October 1895, the medical and surgical staff of Western Maryland Hospital weakened the rule concerning consent. Article 5, Section 13 was changed from:

> No capital operation shall be performed without the consent of the patient, if an adult, or the parents or guardian, if a minor, nor without the approval of a majority of the visiting staff, unless such operation be demanded immediately to save life.

To -

> No capital operation shall be performed, *in charity cases*, without the consent of the patient, if an adult, or the parents or guardian, if a minor, *if practicable*, nor without the approval of a majority of the visiting staff, unless such operation be demanded immediately to save life.[798]

REED V. CRISSEY - SCOPE OF DUTY OF HUSBAND TO PAY FOR CARE (Missouri 1895)

In November 1895, the Missouri Court of Appeals decided a case, *Reed v. Crissey*, in which the plaintiff, Reed, had advanced money to the wife of Dr. Robeson to pay for medical and surgical care in Chicago. Reed sued Dr. Robeson's estate for reimbursement. The trial court ordered payment and the appellate court affirmed.

> A husband is liable for necessaries furnished his wife. Necessaries, it is said, consist of food, drink, clothing, washing, physic, medical attention, instruction and a suitable place of residence….

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[796] *The Peculiar People,* TIMES (London), Aug. 22, 1895, 9; *The Peculiar People and their tenets*, LANCET, 2:1308-1309 (Nov. 23. 1895)
[797] *Hedin v. Minneapolis Medical and Surgical Institute,* 62 Minn. 146; 64 N.W. 158 (Aug. 5, 1895)
[798] *Change in rules and regulations*, EVENING TIMES (Cumberland MD), Oct. 26, 1895, 4

A wife, in purchasing necessaries, is by operation of law the agent of her husband in that transaction and is a competent witness against him in a suit for such necessaries…. And whatever may be the rule of the common law, equity allows one who has lent money to a distressed wife, with which to procure necessaries, to stand in the stead of the persons supplying the same, and to recover of the husband the amount actually paid by the wife out of the money so lent her. The lender is only bound in such case to see that the loan is properly applied….

As has been seen, it is, in effect, admitted by the defendant's answer that the wife of the testator was afflicted with an ovarian tumor, and that no relief was possible, except in the surgical operation of *laparotomy*. The defense relied on was, first, that the plaintiff did not lend the testator's wife the amount claimed, or any amount, and, second, that the testator provided and offered to provide for her at their home, all necessary medical and surgical treatment, etc. …

And as to the second defense, it appears that it is in effect conceded, both in the answer and the testimony, that Mrs. Robeson was in actual need of the medical and surgical attention which she received, and but for which she would have died. But it is insisted that the testator offered his wife competent medical and surgical assistance at home, and that this she declined to accept and therefore there was no liability.

The only testimony adduced which has any tendency to establish this defense is that of Dr. Cutler. He testified to certain conversations with the wife; and also that he made a physical examination of her. But his testimony in this respect is contradicted by both the testimony of the wife and that of Mrs. Tesson, who is admitted to have been present when the conversation and examination testified to took place. It did not appear that Dr. Cutler had ever performed the operation of laparotomy, or that he had any special skill or experience in the performance of such delicate and dangerous surgical operations. Dr. Hedges, who had been the testator's family physician for the previous twelve years, advised the wife not to think of having the required operation performed at her home, but to go to the place where she had the operation performed. Other physicians also advised that the operation could not be safely performed at her home. The greater weight of the testimony was to the effect that the operation could not be safely performed, except at some such place as that at which it was performed. The evidence is quite convincing that the testator did not provide, or offer to provide for his wife, at their home, the medical and surgical attention of which the latter stood in so much need. We can not think that this defense was proven.[799]

[799] *Reed v. Crissey*, 63 Mo. App. 184 (Nov. 4, 1895)

CHRISTIAN SCIENCE - BEER - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (Canada 1895)

In December 1895, a Canadian court ruled that neither the father of a child nor a Christian Science practitioner, Mary Ellen Beer, could be indicted for the failure to provide medical aid to the child, Percy Robert Beck, age 6, who died from diphtheria.[800]

BEATTY V. CULLINGWORTH - ALLEGED SURGERY EXCEEDED SCOPE OF CONSENT (England 1892-1897)

In 1892, Charles James Cullingworth, a prominent London surgeon, removed both ovaries of Alice Jane Beatty, a Scottish hospital nurse. She claimed that she had expressly directed him not to remove more than one. He claimed that he refused to operate under such a restriction, demanding that she agree that he could do what was necessary, and that she had assented. He claimed that it had been necessary to remove both in order to save her life. She sued in 1892 but dropped the suit when her solicitors advised her that she could not win.

She was unable to work, became destitute, and pursued numerous avenues of complaint, including through the professional society that Dr. Cullingworth later headed. In 1894, she went to the doctor's house and, when she refused to leave, he had the police remove her. The police arrested her, but the magistrate dropped the charges. She sued the doctor for battery and false arrest. The court dismissed the case.

She again sued the doctor. Consent was a question for the jury. After three days of testimony, the jury found for the doctor. In 1897, an application for appeal was denied.[801]

An American legal periodical, The Green Bag, concluded its 1897 summary of the case with the following: "If that case had arisen in this country the result would certainly have been to the contrary. The English Courts are tenderer toward dogs, but less considerate of women than the American courts."[802]

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[800] *Reg. v. Beer*, CAN. L.J., 32:416 (Toronto Assizes Dec. 5, 1895)

[801] *Beatty v. Cullingworth,* TIMES (London) , Apr. 11, 1894, 3; Aug. 11, 1896, 12-13; Nov. 17, 1896, 14; Nov, 18, 1896, 13; Jan. 14, 1897, 3; BRITISH MEDICAL JOURNAL, i:829 (Apr. 14, 1894); ii:423-424 (Aug. 15, 1896); ii:1525 & 1546-1548 (Nov. 21, 1896); i:178 (Jan.16, 1897) *Beatty v. Cullingworth,* THE NURSING RECORD & HOSPITAL WORLD, Apr. 14, 1894, 242; Aug. 15, 1896, 135; Nov. 21, 1896, 422; Nov. 28, 1896, 447; Jan. 23, 1897, 80; Nov. 5, 1898, 374; *Legal responsibility of a surgeon for pursuing an operation beyond the limits fixed by the express directions of his patient,* INTERNATIONAL MEDICAL JOURNAL, 6(3):229-235 (Apr. 1897)

[802] *Surgical discretion,* GREEN BAG, 9:136 (1897)

A Society for the Protection of Hospital Patients was formed as a result of the case. Miss Beatty was its secretary. Miss Beatty became an activist in nursing circles.[803]

In 1899, when Miss Beatty became ill and applied for services at the West London Hospital, she was denied services. She was informed that "the Committee had placed a minute in their books, stating that, should occasion at any time arise whereby Miss Beatty should at any time require medical attendance, she should not get any treatment whatsoever from the institution." A special meeting of delegates from the temperance, friendly, and trade union societies was held to consider this. The Demonstration Committee gave her a letter of recommendation, but she was again refused services. A delegation met with the superintendent of the hospital who explained that she might be likely to be a litigious person. The journal of British nurses editorialized their hope that the hospital "will speedily rescind this very injudicious resolution."[804]

In 1900, Miss Beatty sued Messrs. Simkin, Marshall, and Co., of Stationers'-hall-court, London; and Messrs. Oliver and Boyd, of Edinburgh, printers and publishers; and Dr. Joseph Bell, M.D., Edinburgh for libel. Dr. Bell had written a book "Notes on Surgery for Nurses." He included the following paragraph:

> Another nurse raises an action against a most distinguished surgeon because in operating on her without fee or reward he had, so she fancied, removed more of her precious person than she had expected he meant to remove. Truly a strange action to be raised by any ungrateful patient unless a lunatic - how much worse by a nurse against a doctor.

When the case appeared in court, Mr. Justice Phillimore asked for a private meeting with both sides that resulted in a settlement. Counsel for the defendants then publicly apologized to Miss Beatty. The book was withdrawn from publication, with only 164 copies having been sold, and reissued without the paragraph. An agreed verdict of 50 guineas and costs was entered.[805]

In April 1900, Miss Beatty presented herself to another hospital seeking services. Notwithstanding a letter from Sir Richard Webster, she was refused admission based on an entry in the minute book that she was not to be admitted as a patient. When she refused to leave the building, a police constable was called to remove her. When she refused to leave, she was taken into custody and released to be on good behavior for six months. It is reported that later in the day she attended a meeting of the Metropolitan Radical Federation and

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[803] THE NURSING RECORD & HOSPITAL WORLD, Jan. 23, 1897, 80; June 5, 1897, 465; REYNOLD'S NEWSPAPER (London), Jan. 17, 1897 ["…no operation is justifiable without the full consent of the patient, if possible first obtained."]; *The Prince of Wales and the Hospitals*, BRITISH MEDICAL JOURNAL, i:598 (Mar. 6, 1897); *Society for the Protection of Patients,* CANADIAN JOURNAL OF MEDICINE AND SURGERY, i(3):132 (Mar. 1897) ["It will soon come to pass that the physician will have to call his patient into consultation, and follow the patient's superior wisdom and knowledge in administering treatment."]

[804] THE NURSING RECORD & HOSPITAL WORLD, Feb. 24, 1900, 155-156

[805] *Queens Bench Division - Beatty v. Simpkin, Marshall, and Co. and Others,* TIMES (London), Mar. 3, 1900, 15; *Nurse and doctor,* THE NURSING RECORD & HOSPITAL WORLD, Mar. 17, 1900, 215-216

announced her intent to appeal for public support. It was decided to request that Mr. Pickergill, M.P. ask a question on the subject in the House of Commons.[806]

The STANDARD reported on the question asked:

> Mr. Pickersgill asked the Home Secretary whether his attention had been drawn to the case of Miss A.J. Beatty, who on Saturday, 21st April, being duly provided with a letter, applied for medical treatment at King's College Hospital, when she was refused admission, and on insisting upon he right was arrested by police, taken to Bow-street Police-station, and placed in a cell, permission to communicate with her friends being denied to her; and whether he would inquire into the circumstances of this case and the conduct of the police in the matter.
> Mr. Collings (who answered the question) said - Miss Beatty was arrested at 1:30 p.m. for creating a disturbance in Portugal-street, Lincoln's-inn-fields, and taken to Bow-street Police-station previous to being brought before the Magistrate. During the time she was in custody she made no request to be allowed to communicate with anybody, and her case was disposed of by the Magistrate at 3:40 p.m. The Secretary of State finds no reason to take exception to the conduct of the police in any particular.[807]

Mr. Pickergill posed an additional question on 10 May to which the Attorney General responded:

> Mr. Pickersgill (Bethal-green, SW) asked the Attorney-General whether his attention had been called to the fact that on Saturday, April 21, Miss A. J. Beatty, upon her application for medical treatment at King's College Hospital, was refused admission; and whether the authorities of this public institution are bound to afford relief to suitable applicants for medical treatment without discrimination.
>
> The Attorney General (Sir R. Finley), who, on rising, was received with cheers from all parts of the House, in reply to Mr. Pickersgill, said - It is, I believe, the fact that Miss Beatty was refused admission at King's College Hospital. As far as I know, there is no legal obligation on such Institutions to admit any particular individual.[808]

On August 1, 1911, the House of Commons debated the National Insurance Bill. Mr. George Greenwood moved to insert ""(e) No such rule shall prescribe any penalty, nor shall any insured person be subject to any penalty, whether by suspension of benefit or otherwise, on account of the refusal by any

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[806] THE NURSING RECORD & HOSPITAL WORLD, Apr. 28, 1900, 342-343
[807] STANDARD (London), 8 May 1900, 2.
[808] TIMES (London), May 11, 1900, 6; STANDARD (London), May 11, 1900, 2; LANCET, i:1477 (May 19, 1900); *The irrepressible Miss Beatty*, MEDICAL PRESS AND CIRCULAR (London), 120:511 (May 16, 1900)

such person to submit to a surgical operation, or vaccination, or inoculation of any kind." Mr. Forster asked “Is it lawful to save a man's life against his will? [HON. MEMBERS: ‘No.’]”[809] The proposed insertion was adopted after being further amended by adding “Unless such refusal in the case of a surgical operation of a minor character is considered by the society, or on appeal the insurance commissioners, unreasonable.”[810]

In October 1911, Stephen Paget gave an address on the “use of our authority” at Medical Society of King’s College Hospital.[811] He critiqued the House of Commons for its position on saving life against the will of the patient. He advocated surgery without consent to save lives. Stephen Coleridge responded in a letter to the editor of THE SATURDAY REVIEW OF POLITICS, LITERATURE, SCIENCE AND ART under the heading *Personal liberty and the medicine man.*[812] Charles Walker then defended Paget’s position.[813] In December 1911 Miss Beatty wrote a letter in “defence of our right to personal bodily freedom.”[814] There were a series of letters to the editor in response to these letters.[815] Miss Beatty responded.[816]

GOLDNAMER V. O’BRIEN - CONSENT TO ABORTION (Kentucky 1896)

In Kentucky, Sallie O'Brien sued several defendants for inducing her to submit to an attempted abortion by a physician procured by them and judgment was rendered for $ 1,700. In January 1896, the Kentucky Court of Appeals reversed the judgment, stating: “at least the party consenting to the injury can not profit by his wrongful act.”[817]

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[809] HANSARD, 1 August 1911, 330

[810] British National Insurance Act, 1911, section 15 (2)(e)

[811] Stephen Paget, *An address on the use of our authority*, BRITISH MEDICAL JOURNAL, II:1241-1243 (Nov. 11, 1911) [Delivered at the opening meeting of the Medical Society of King's College Hospital, on October 13th, 1911]; see also James C. Hoyle, *The use of our authority*, BRITISH MEDICAL JOURNAL, II:1392 (Nov. 18, 1911)

[812] Stephen Coleridge, *Personal liberty and the medicine man*, SATURDAY REVIEW OF POLITICS, LITERATURE, SCIENCE AND ART, 112:734-735 (Dec. 9, 1911) [hereinafter *Saturday Review*], reprinted in ZOOPHILIST AND ANIMALS’ DEFENDER, 31(9): 142 (Jan. 1912) and reprinted in MEDICAL FREEDOM (New York), 1(9):4-5 (May 1912)

[813] Charles Walker, *Personal liberty and the medicine man*, SATURDAY REVIEW, 112:797 (Dec. 23, 1911

[814] Nurse A.J. Beatty, *Personal liberty and the medicine man*, SATURDAY REVIEW, 112:830 (Dec. 30, 1911)

[815] Charles Walker, *Personal liberty and the medicine man*, SATURDAY REVIEW, 113:17-18 (Jan. 6, 1912); Stephen Coleridge, *Personal liberty and the medicine man*, SATURDAY REVIEW, 113:50 (Jan. 13, 1912); Charles Walker, *Personal liberty and the medicine man*, SATURDAY REVIEW, 113:80 (Jan. 20, 1912)

[816] Nurse A.J. Beatty, *Personal liberty and the medicine man*, SATURDAY REVIEW, 113:112 (Jan. 27, 1912)

[817] *Goldnamer v. O’Brien*, 98 Ky. 569, 33 S.W. 831(Jan. 16, 1896); *Torts - assault - right of action in party consenting to an abortion*, HARVARD LAW REVIEW, 9(8):550 (Mar. 25, 1896)

ANESTHESIA (1896)

In March 1896 an inquest was held into the death of Andrew Thompson, a convict in the North Dakota penitentiary, who died under the influence of chloroform given in preparation for an operation. Thompson had consented to the operation and the chloroform. The jury found the administration of the anesthetic to be necessary and proper.[818]

In April 1896 an inquest was held into the death of a fifteen-year-old girl who died under the influence of chloroform administered by Joseph Priestly an unregistered dentist. She had consented to the use of chloroform. The coroner stated that there was no evidence the girl knew she was submitting to a dangerous operation. The jury returned a verdict of manslaughter because among other aspects of the case Priestly did not have assistant.[819]

HOLLEMAN V. HARVARD - LAUDANUM SOLD TO WIFE AGAINST DIRECTIONS OF HUSBAND (North Carolina 1896)

In 1896, in the case of *Holleman v. Harvard*, the North Carolina Supreme Court ruled that a husband could recover damages from a druggist who sold laudanum to his wife against the husband's orders, where she became an addict. The druggist was found to have wilfully assisted the wife in depriving the husband of her services and companionship.[820]

REMOVAL OF PLASTER WITHOUT CONSENT (South Dakota 1896)

In August 1896 Henry Wilkieson of Jefferson, S.D., sued a physician for allegedly removing a plaster and the underlying skin without his consent. Wilkieson sued the physician for suffering and for telling the tale to his friends holding him up to ridicule and contempt. The newspaper report of the suit was widely published.[821] The outcome of the suit has not been located.

MILLER V. BAYER - CONSENT TO ABORTION NOT BAR TO SUIT FOR DAMAGES (Wisconsin 1896)

A Wisconsin woman sued an abortionist and the two men who had allegedly raped her and arranged for the abortion. The trial court rejected the suit on technical legal grounds. In October 1896, The Wisconsin Supreme Court reversed and ordered a trial. The Court observed:

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[818] *Death at the pen*, BISMARCK DAILY TRIBUNE, March 4, 1896, 3; *Was unavoidable*, BISMARCK DAILY TRIBUNE, March 5, 1896, 3.
[819] *Death from chloroform*, BRITISH MEDICAL JOURNAL, i:1070 (Apr. 25, 1896)
[820] *Holleman v. Harvard*, 119 N.C. 150, 25 S.E. 972 (1896); *Damages - sale of opium to wife - right of actin by husband*, CENTRAL LAW JOURNAL, 44:53-55 (1897)
[821] *Sues the physician*, CEDAR RAPIDS EVENING GAZETTE (IA), Aug. 31, 1896, 3; *Mr. Wilkieson and his faithful plaster*, NEWARK DAILY ADVOCATE (Ohio), Sep. 10, 1896, 7

It is further contended that plaintiff cannot recover, because she submitted to the operation performed upon her. Such is not the law. Consent by one person to allow another to perform an unlawful act upon such person does not constitute a defense to an action to recover the actual damages which such person thereby received.[822]

COLLECTION ACTION - DEATH AFTER DANGEROUS SURGERY PATIENT CONSENTED TO (Oregon 1896)

In November 1896, in Oregon Dr. Andrew C. Smith sued the estate of Catherine B. Verdler to collect a fee of $1000 for his medical services including a surgical operation. After being informed the operation was dangerous, Mrs. Verdier had consented. She lived for several days after the operation. The focus of the suit was on the sliding scale of fees of the doctor. He charged on ability to pay. The estate sought to pay $250. The jury agreed that he should be paid the $1000.[823]

DASHIELL V. GRIFFITH - ABANDONMENT OF PATIENT (Maryland 1896)

In 1896, in the malpractice case of *Dashiell v. Griffith*, the plaintiffs' alleged that the defendant doctor had abandoned the patient. The Court of Appeals of Maryland stated:

> It is contended by the defendant that, *under the pleadings,* he could be held liable only for improperly treating the finger of the plaintiff on the days upon which he had seen her at his office, which were February the 17th, 18th, 19th, 20th and 22d, the plaintiff being an office patient and seen by the defendant only at his office on the days named. In consequence of the illness and death of defendant's father he was continuously absent from his office, and did not again see plaintiff until after the finger had on March 2d been amputated. If the defendant had in his treatment of the finger, prior to the 24th of February, exercised reasonable care, skill and diligence, and then, because of the illness of his father, had turned the plaintiff over to Doctor Cockrell, a competent physician, for the further treatment of her finger, and the plaintiff refused to go to Doctor Cockrell for treatment, then the liability of the defendant ceased, and the plaintiff assumed to herself the consequence of any injury resulting from the neglect of her finger, for it cannot be said that the defendant, under any and all circumstances, was required to continue the treatment of the plaintiff. If he provides for the further treatment of the patient in such manner as the defendant did in the case under consideration here, he has complied with every reasonable demand upon him.

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[822] *Miller v. Bayer*, 94 Wis. 123, 68 N.W. 869 (Oct. 13, 1896)
[823] *A doctor and his fee*, THE MORNING OREGONIAN (Portland), Nov. 18, 1896, 8

However, the court declined to rule on this proposition and instead ruled in favor of the doctor based on technical issues of pleading.[824]

ERIE COUNTY HOSPITAL RULES (New York 1896)

In 1896 the Board of Supervisors of Eire County, N.Y., received and filed Rules and Regulations for the Government of Eire County Hospital. They included:

> No surgical operation shall be undertaken without the consent of the patient: but if in the judgment of the surgeons in consultation, such operation shall be decided absolutely necessary to the patient's safety, such case shall be referred to the Superintendent for his decision.[825]

The referenced source does not disclose if and when the rules took effect.

PAYMENT TO EXPERIMENTAL SUBJECT TO CONSENT (New York 1896-1900)

In 1896, a successful New York City merchant Charles Rouss went totally blind. He offered $1 million to anyone who could restore his sight. He hired a blind man, James J. Martin, who consented to undergo likely cures. Martin underwent several likely cures. None of which were successful. In 1900 Rouss withdrew his offer and he died in 1902.[826]

ANESTHESIA (1897)

In February 1897, in Iowa, Alice Grimes alleged that, when she went to Dr. Burchell to have a tooth extracted, he injected something into her gums without her consent. He denied injecting her with anything other than the usual anesthetic. After hearing the evidence, the judge directed the jury to find for the defendant.[827]

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[824] *Dashiell v. Griffith*, 84 Md. 363, 35 A. 1094 (Dec. 3, 1896)
[825] PROCEEDINGS OF THE BOARD OF SUPERVISORS OF EIRE COUNTY N.Y. FOR THE YEAR 1896 (Buffalo NY: James D. Warren's Sons 1897), 523 - Chapter 2 - Medical Staff, Article 7.
[826] *Christopher Gray, Broadway: his middle name*, N.Y. TIMES, Aug. 11, 1996; *Sight fast failing*, ATLANTA CONSTITUTION (GA), Mar. 3, 1896, 2; *Way down in Dixie's land*, N.Y. TIMES, Apr. 4, 1896, 9; *A million for sight*, DAVENPORT DAILY LEADER (IA), July 13, 1896, 1; *Chicago man after the rich prize*, CHICAGO DAILY TRIBUNE, July 31, 1896, 1 [Felt's cure]; *He may get Rouss' million*, GALVESTON DAILY NEWS (TX), Sep. 6, 1896, 19 [Felt's cure]; *Rouss will try the X rays*, CHICAGO DAILY TRIBUNE, Nov. 23, 1896, 2 [Edison's cure]; *Wants eyesight restored*, DUBUQUE DAILY HERALD (IA), Dec. 4, 1896, 3 [Edison's cure]; *May cure blindness,* ARIZONA REPUBLICAN (Pheonix), Jan. 10, 1897, 7 [Edison's cure]; *Rouss may yet see*, MIDDLETOWN DAILY ARGUS (NY), Oct. 16, 1897, 1 [Guelph Norman cure]; *A cure for blindness*, N.Y. TIMES, July 12, 1898, 10 [Cassidy's cure]; *Charles B. Rouss still hopes*, N.Y. TIMES, Aug. 12, 1898, 12 [Cassidy's cure]; *Mr. Rouss withdraws offer*, N.Y. TIMES, Oct. 7, 1900, 15; *Charles B. Rouss dead*, N.Y. TIMES, Mar. 4, 1902, 9
[827] *The session,* CEDAR RAPIDS EVENING GAZETTE (Iowa), Feb. 3, 1897, 6; Feb. 4, 1897, 2

In May 1897, an inquest was held in England into the death of Frederick Joseph Ward, age 17 months. He died while under chloroform for an operation that his mother had consented to. The jury exonerated the medical personnel.[828]

FAITH CURIST - BENJAMIN - PARENTAL RELIGIOUS FAILURE TO PROVIDE MEDICAL ATTENTION (Iowa 1897)

In February 1897, Lena Benjamin, age 15, died of pneumonia in her home. The coroner ordered an inquest when he discovered she had received no medical attention and she may have been attended by Mrs. Stevens, who some said was a faith curist, although she denied it. The coroner's jury found natural death and censored no one.[829]

NEW YORK LAW ON POSSESSION OF ANESTHETICS (1897)

In 1897 New York enacted a law concerning possession of narcotic and anaesthetic substances that has a peculiar provision regarding consent:

> A person (other than a duly licensed physician or surgeon engaged in the lawful practice of his profession) who has in his possession any narcotic or anaesthetic substance, compound or preparation, capable of producing stupor or unconsciousness, with intent to administer the same or cause the same to be administered to another, without the latter's consent, unless by direction of a duly licensed physician, is guilty of a felony, punishable by imprisonment in the state prison for not more than ten years.[830]

The legislature recognized the relevance of consent, but only to a limited extent, because the consent requirement did not apply to licensed physicians and surgeons.

STATE V. NOAKES - FAILURE TO PROVIDE SOMEONE TO ATTEND BIRTH (Vermont 1897)

When Emma Jones, a house servant of Martin and Sarah Noakes, became pregnant, the Noakes permitted her to stay in their house for the delivery. The baby was born alive and died from a skull injury. The Noakes were charged with manslaughter in part because they did not arrange for some one to attend the birth. They were convicted. In May 1897, the Vermont Supreme Court reversed and ordered a new trial. The court stated:

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[828] *A child's death under chloroform*, DERBY MERCURY, May 26, 1897
[829] *Lena Benjamin's death*, N.Y. TIMES, Feb. 7, 1897, 1; *Lena Benjamin a victim* N.Y. TIMES, Feb. 9, 1897, 3; *Helena Benjamin's death,* N.Y. TIMES, Mar. 4, 1897, 10
[830] Chapter 42, Laws of New York (1897), Vol. 1, p. 21

> To render criminal the neglect of parents and others, having charge of children or other dependents, there must be capacity, means and ability to provide support and care, or to prevent the threatened harm, as well as the legal duty to provide and act. If there is not capacity, means and ability to perform the legal duty, the omission to perform it is not criminal. ….
> It is incumbent upon the State in a criminal prosecution, to prove such capacity, means and ability, as well as the legal duty to provide or act, on the part of the accused.
> To create a criminal liability for neglect by nonfeasance, the neglect must also be of a personal, legal duty, the natural and ordinary consequences of neglecting which would be dangerous to life….
> From the language of the charge excepted to, taken in connection with the instruction on the subject of criminal carelessness and neglect, the jury must have understood that they might rightly find from the fact that the respondents permitted the child to be born in their house, that it was criminal negligence on their part not to have procured some one to be present at the birth of the child, to assist the respondent, Sarah Noakes, without regard to the means and ability of the respondents to procure such assistance, and without regard to whether the situation and attendant circumstances of the confinement of its mother were such that a careful, prudent person ought to have foreseen that the omission to procure such assistance was likely to cause the death of the child, as a natural and ordinary result. This is clearly erroneous, even though it were conceded that the respondents were under a legal duty to care and provide for the child, but which is not conceded. …..This exception must be sustained.
> We do not pass upon the question of the duty, if any, imposed by the law, upon the defendants under the facts disclosed by the record, other than as expressly stated in this opinion.[831]

WILSON V. JOHNS HOPKINS HOSPITAL - SCOPE OF DUTY TO DISCUSS ALTERNATIVES (Maryland 1897)

In 1897, in Maryland, Mr. Wilson sued Johns Hopkins Hospital and Drs. E.D. Clark and Joseph C. Bloodgood in federal court alleging an operation performed on him that destroyed his virility was unnecessary. The judge directed verdicts for the defendants finding insufficient proof to create a question for the jury. In May 1897, the court discussed the scope of the duty to discuss alternative remedies.[832] The newspaper report of the case stated:

> The court also said that it would be very dangerous to leave to the jury the question whether want of consideration was shown in not suggesting the other operation to Mr. Wilson and giving him the option of choosing either operation. ‘I don’t think a physician,” continued the judge, “is in the habit of

[831] *State v. Noakes*, 70 Vt. 247, 40 A. 249 (May 1897)
[832] *Mr. Wilson’s suit,* SUN (Baltimore), May 8, 1897, 6; *Mr. Wilson loses his case*, SUN (Baltimore), May 18, 1897, 10

stating to a patient all the alternative remedies in a case. His ultimate duty is to advise that which he thinks is best. The only point to be considered is whether, in view of the mutilation, it was the duty of the surgeon to state that there was another less desirable operation. Exercising the discretion imposed on the court as a duty, I must say to the jury that there is no evidence to warrant a verdict against Dr. Bloodgood. As to Dr. Clark, he was merely an assistant, and had no responsibility. The matter is one of professional judgment, which the jury ought not to be allowed to pass on.[833]

WHIDDEN V. CHEEVER - QUARANTINE (New Hampshire 1897)

In New Hampshire, Mr. Widden challenged the use of his house for quarantine and his confinement in it when he did not have the disease. In June 1897, the court ruled that the health officer was not liable. The court stated:

> The plaintiff seeks to recover damages of the defendant, who was the physician member of the board of health of the city of Portsmouth, for using his dwelling-house and buildings for small-pox patients, and for confining him to the premises against his will and exposing him to contagion from March 24 to May 14, 1894….
> The plaintiff, who was not ill, protested against his confinement to the buildings and the use made of his premises, and requested the defendant to remove the patients to a pest-house. He was confined by the defendant until the quarantine was raised, and was then released….
> Statutes enacted for the preservation of the public health are to receive a liberal construction. The powers conferred upon local boards of health are quite extensive when the public health or comfort demands it….
> There was no taking of property for public use without compensation. It was merely the exercise of a reasonable health regulation under the police power of the state, within the limitations of the statute.
> Such regulations as are reasonably calculated to preserve the public health are valid, though they may abridge individual liberty and rights of property….
> There is nothing in the case to show that the defendant did anything he was not authorized to do, or that he did not act in good faith within the limits of his statutory duty, as he understood it.[834]

GOVERNOR ORDERED SURGERY ON PRISONER (Missouri 1897)

In August 1897, the Governor of Missouri ordered surgery on condemned prisoner Charles Dreher so that he could be rendered sane and could be hanged. The surgery was reported to be successful, but the prisoner died of

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[833] *Mr. Wilson's damage suit,* SUN (Baltimore), May 17, 1897, 7
[834] *Whidden v. Cheever*, 69 N.H. 142, 44 A. 908 (June 1897)

typhoid before he could be hanged. This is the only case of an American executive official ordering surgery that has been located.[835]

FINE FOR LEAVING HOSPITAL WITHOUT PERMISSION (England 1897)

In August 1897, a patient was fined for leaving a British fever hospital without permission while suffering from typhoid fever.[836]

INQUEST - PERCIVAL ZALKIN GERMIANS - ALLEGED SURGERY WITHOUT CONSENT (England 1897)

In October 1897, in London, Coroner Walter Schroder held an inquest on the death of Percival Zalkin Germains, age 16, who had died at St. Thomas Hospital. The boy's father claimed that neither he nor his son had agreed to the surgery that had resulted in his son's death. The medical personal claimed consent had been obtained. A post mortem was conducted and there was no evidence of consent from the father for the post mortem. The medical personnel testified that they did not seek consent for post mortems. The jury concluded that death was due to heart failure following tuberculosis and that the hospital was justified in performing the operation and that the father had given consent. The jury suggested that relatives and friends of deceased persons should be given an opportunity to object to post-mortem examinations. The Coroner agreed to forward the suggestions to the hospital.[837]

CAHN V. CAHN - COURT CAN ORDER SURGICAL EXAMINATION (New York 1897)

In October 1897, in the case of *Cahn v. Cahn*, a New York court ruled that it could order a surgical examination in a divorce case that sought annulment on the ground of physical disability.[838]

PECULIAR PEOPLE - SENIOR - PARENTAL RELIGIOUS FAILURE TO SECURE MEDICAL AID (England 1897)

On September 27, 1897, an inquest was held into the death of James Senior, aged 4 years and 11 months. His father, George Senior, a member of the Peculiar People and had not sought medical attention. The jury concluded the child’s life would have been prolonged if medical attendance had been sought,

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[835] *Cured him to kill him,* EVENING NEWS (Lincoln Neb), Aug. 17, 1897, 3
[836] *A patient fined for leaving a hospital*, LANCET, ii:553 (August 28, 1897); *Control of hospital patients*, MEDICAL AND SURGICAL REPORTER, 77:781 (Dec. 18, 1897)
[837] *Inquests,* TIMES (London), Oct. 6, 1897, 9
[838] *Cahn v. Cahn*, 48 N.Y.S. 173, 21 Misc. 506 (Sup. Ct. New York Co. Oct. 1897)

The next day George Senior was charged in police court with felonious killing.. Mr. Senior was committed to trial and bail was allowed.[839]

On about October 5, an inquest was held in the death of Amos Senior, age 14 months. Again his father, George Senior, not sought medical attention. Amos was the sixth child the seniors had lost without medical attention. The medical expert could not say that medical assistance would have prolonged the child's life. The coroner's jury returned a verdict that the child had died of pneumonia.[840]

On October 28, 1897, Mr. Senior was tried for the death of James in Central Criminal Court before Mr. Justice Ridley. James had contracted a cold and by neglect the cold had developed into congestion of the lungs. Medical evidence was that medical assistance would have prolonged the child's life and probably saved the life. The judge stated that it was no excuse for the manslaughter of a child that the parent's actions had been based on their religious opinion. The jury found Mr. Senior guilty.

On October 28, 1897, immediately after the Senior trial, George Vince was tried for the death of his son, Arthur Vince, age four months, who contracted bronchitis that developed into pneumonia. Mr. Vincent was also a member of the Peculiar People and did not provide medical aid for his son. The jury found the prisoner guilty.

The judge asked each prisoner to give a pledge that he would abide by the law, and call medical aid if any of their children became ill in the future. Both prisoners declined to do so. The judge postponed judgment and he let both out on their own recognizance.[841]

On October 29, 1897, Mr. Senior and Mr. Vince appeared in the Central Criminal Court for sentencing for the guilty verdict for manslaughter. The judge released both on their own recognizances of £ 20.[842]

On October 28, 1898, Mr. Senior was charged with causing the death of his son, Tansley, age eight months. He had again withheld medical aid. Medical testimony was that that there was no reason why the child's life should not have been saved with medical assistance. He was released on bail of fifty pounds.[843]

On October 29, 1898, Mr. Senior appeared in the Central Criminal Court for sentencing for the guilty verdicts for the manslaughter of his children, James. The judge released Mr. Senior on his own recognizance. On November 23, Mr. Senior was tried and convicted. He was released on bail while the case was reviewed. [844]

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[839] *A "peculiar parent" in the dock*, MID SURREY TIMES AND GENERAL ADVERTISER (London), Oct. 2, 1898, 3 [inquest into death of James Senior - father Thomas George Senior charged in police court with killing James by not providing medical attendance]; TIMES (London), Oct. 15, 1897, 13 [committed for trial on death of James]

[840] TIMES (London), Oct. 6, 1897, 9 [Amos Senior inquest]

[841] *Central Criminal Court*, TIMES (London), Oct. 29, 1897, 12 [Senior and Vince found guilty]

[842] *Central Criminal* Court, TIMES (London), Oct. 30, 1897, 15

[843] *Police*, TIMES (London), Oct. 29, 1898, 15; Nov. 5,1898, 5

[844] *Central Criminal Court*, TIMES (London), Oct. 30, 1898, 15; *Central Criminal Court*, TIMES (London), Nov. 25, 1898, 13

On December 10, 1898, the Court for Consideration of Crown Cases Reserved affirmed the conviction.[845]

FAITH CURIST - SMITH - PARENTAL RELIGIOUS FAILURE TO SECURE MEDICAL AID (Indiana 1897)

In November 1897, Elder Smith, a faith curist, was fined $5 and costs and sentenced to 17 and one-half days in jail for failing to secure medical aide for his dying daughter.[846]

DOCTOR FINED FOR VACCINATION BY ASSAULT (Alabama 1897)

In December 1897, in Alabama, Dr. Bryan Dozier was arrested on a charge of assault and battery by vaccination of the infant child of Lucy Boykin over her objection Ms. Boykin was charged with resisting an officer and violating the vaccination law. The court dismissed the charges against Ms. Boykin and fined the doctor $10 for assault and $50 for carrying a concealed weapon.[847]

HOAX TO SECURE MORPHINE (Illinois 1898)

In January 1898, it was reported that Joseph Schrader had submitted to two operations at the Evanston Emergency Hospital the prior year in order to get morphine. The article described an attempt by Mr. Schrader under the alias R.S. Miller to repeat the deception by claiming to have peritonitis. Doctors reported that he seemed to be dying until he got morphine. He was then identified. He had also previously committed a hoax on the hospital by informing it he was making a large bequest but he proved to be penniless.[848]

PEOPLE V. ABBOTT - ROLE OF CONSENT IN ABORTION PROSECUTION (Michigan 1898)

In March 1898, in Michigan, the court ruled in the case of *People v Abbott*, that the consent of the patient was immaterial in a prosecution for manslaughter from an unlawful attempt to perform an abortion.[849]

EXCESSIVE AMOUNT OF SKIN TAKEN FROM DONOR (New Zealand 1898)

In April 1898, a woman in New Zealand agreed to donate skin to treat a burn patient. The doctor removed 52 square inches of skin. She sued for the

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[845] *Reg. v. Senior*, [1899] 1 Q.B. 283, 68 L.J.Q.B. 175, [1895-1899] All ER Rep. 511 (Dec. 10, 1898); *Police,* THE LAW JOURNAL, Dec. 17, 1898; ALBANY LAW JOURNAL, 59:3 (1899); L.Q. Rev., 15:105 (1899); 47 Am. L. Reg. 324 (1899)
[846] *Fifteen years ago,* FORT WAYNE NEWS (Ind), Nov. 9, 1912, 9.
[847] AGE HERALD (Birmingham Ala), Dec. 8, 1897, 5; Dec. 14, 1897, 5
[848] *Schrader turns up again,* CHICAGO DAILY TRIBUNE, Jan. 26, 1898, 12
[849] *People v Abbott,* 116 Mich. 263, 74 N.W. 529 (Mar. 15, 1898)

excessive amount of skin removed. The jury found that she was a consenting party, exonerating the doctor. On appeal, in 1898, she was awarded $3000 in damages because more skin was taken than necessary.[850]

LOGAN V. FIELD - COLLECTION ACTION - SCOPE OF DUTY TO DISCLOSE (Missouri 1898)

In Missouri, Dr. Logan sued the defendant, Field, seeking payment of his fee. The trial court ruled for the doctor. In May 1898, the appellate court ruled that the doctor had a duty to advise the patient if the treatment would probably not be of any substantial benefit. It ordered a new trial where a jury would determine if this duty had been breached. The court wrote:

> If defendant's testimony is to be believed his application for treatment was on condition that a cure would be effected. He requested of plaintiff that he tell him whether he could be cured; that he must know this, otherwise he would not take treatment since he had no money to throw away. The plaintiff in answer to this stated that he could not then tell whether or not he could effect the desired cure. At each of the subsequent treatments, extending through a period of nearly ten months, the plaintiff gave the defendant assurance that his ailment was yielding to such treatment, thereby encouraging the defendant to continue taking the same. This was the second time the defendant had taken plaintiff's treatment. It was for the jury to decide whether or not, when the defendant applied the second time for treatment on the condition alone that he could be cured, the plaintiff then knew or ought to have known that the former's ailment was incurable, or that it would not yield to the usual treatment or that such treatment would be of no substantial benefit.
>
> It was the duty of the plaintiff to act in the utmost good faith toward the defendant. If he knew that he could not accomplish a cure, or that the treatment adopted would not probably be of any substantial benefit, it was his duty to so advise defendant and a failure to do so was a breach of duty.[851]

WENDELL V. WENDELL - DIVORCE (New York 1898)

In 1898, in the divorce case of *Wendel v. Wendel*, the court denied divorce. The woman, a widow, had her ovaries removed in a surgical operation at the time of the birth of her child by her first husband. The second husband claimed not to have known the nature of the operation prior to the wedding. One of the grounds for seeking divorce was her inability to have children.

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[850] *A peculiar claim,* THE ADVERTISER (Adelaide), Mar. 4, 1898, 5; *Skin-grafting extraordinary*, BOSTON MEDICAL AND SURGICAL JOURNAL, 138:335-336 (Apr. 7, 1898) [erroneously reported as being in Australia]; *She got $3,000 for her skin*, DAILY MALL AND EMPIRE (Apr. 8, 1898); CANADIAN PRACTITIONER, 23:254 (1898)

[851] *Logan v. Field,* 75 Mo. App. 594 (May 16, 1898)

It seems to us clear, therefore, that it cannot be held, as a matter of law, that the possession of the organs necessary to conception are essential to entrance to the marriage state, so long as there is no impediment to the indulgence of the passions incident to this state.[852]

PRITCHARD V. MOORE - NONCOMPLIANCE (Illinois 1898)

In May 1898, in the case of *Prichard v. Moore*, an Illinois appellate court wrote:

The main contested questions of fact are, first, whether Dr. Pritchard gave defendant proper and skillful treatment, and second, whether on January 22d he discharged his patient as cured, when in fact the latter needed further treatment, as plaintiff claims, or whether the plaintiff threw off all restraint, refused to obey all orders of his physician, refused to submit to a necessary examination, and in effect discharged the doctor, as defendant claims….

The probabilities supported the testimony of Drs. Prichard and Norton. …We think the only reasonable conclusion to be drawn from the evidence in this record is that Dr. Prichard treated the patient with proper skill and care, and that plaintiff became impatient of the necessary and tedious restraint, removed the necessary appliances the doctor had placed upon him, refused to permit further examination and to receive further treatment, and virtually discharged the doctor, and thereby exonerated him from further responsibility.[853]

INQUEST - ADA CORNELIUS - DEATH FROM ALLEGED UNNECESSARY OPERATION (New York 1898)

In June 1898, a coroner's inquest was held in King's County, N.Y., into the death of Ada Cornelius, age 16. She died at her home after an allegedly unnecessary operation to which she objected. Dr. Frank J. Vose and Dr. Joseph C. Thomas were arrested pending the inquest. The coroner's jury found the death to be due to "culpable professional incompetence." The coroner adjourned the arraignment of the physicians.[854] The coroner then discharged the physicians. The case was sent to the Grand Jury.[855] No report of action by the Grand Jury has been located.

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[852] *Wendel v. Wendel*, 30 A.D. 447 52 N.Y.S. 72 (2d Dept. 1898), **rev'g** 22 Misc. 152, 49 N.Y.S. 375 (Sup. Ct. Spec. T. Dec. 1897)
[853] *Prichard v. Moore*, 75 Ill. App. 553 (2d Dist. May 23, 1898)
[854] *Death of Ada Cornelius,* N.Y. TIMES, June 25, 1898, 14; *Death of Miss Cornelius,* N.Y. TIMES, July 9, 1898, 4
[855] *Accused doctors go free*, BROOKLYN DAILY EAGLE, July 19, 1898, 28.

PECULIAR PEOPLE - MARSH - PARENTAL RELIGIOUS FAILURE TO SEEK MEDICAL AID (England 1898)

On June 2, 1898, Henry James Arthur Marsh was charged with killing his daughter, Hilda Ruth Marsh (age 13 months). He was a member of the Peculiar People and did not provide medical assistance for his daughter. At the inquest on the prior day, the coroner's jury concluded that the child had died from pneumonia and that the father's failure to seek medical aid had accelerated the death. He was released on bail. On June 13, 1898, on remand, he was charged with causing the death. The post mortem indicated the child had died from pneumonia. Medical testimony was that if medical assistant had been obtained at the commencement of the complaint the child life would have possibly been saved and would certainly have been prolonged. He was released on bail.

On June 22, 1898, he was tried at the Central Criminal Court before Mr. Justice Darling. The jury found him guilty. The judge refused to make him a martyr and released him on his own recognizance of ten pounds.[856]

ANESTHESIA (1898)

In June 1898, an inquest was held in Manchester, England, into the death of William Corlett, age 15, who had died at the Royal Infirmary while chloroform was being administered for an operation. There was a misunderstanding about whether the consent of the parents had been obtained beforehand. The verdict was accidental death. The coroner advised that the infirmary authorities should obtain consent in writing in all such cases.[857]

SULLIVAN V. MCGRAW - OPERATION ON WRONG LEG (Michigan 1898)

In Michigan, James P. Sullivan entered a hospital so that his surgeon Theodore A. McGraw could perform an operation on his right leg. The nurse shaved the right leg. When the surgeon arrived, he believed the operation was planned for the left leg. The patient was under the influence of chloroform. The surgeon asked the patient's brother who said he would need to telephone their family before answering. The patient's father arrived, although having been told by the patient not to come. The father said that he thought the left leg was to be operated on. The surgeon proceeded to operate on the left leg without waiting for the brother to return. The patient sued and trial court directed a verdict for the surgeon. In July 1898, the state supreme court reversed and ordered a trial. The court wrote:

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[856] *Police*, TIMES (London), June 3, 1898, 12; *Police,* TIMES (London), June 14, 1898, 14; *Central Criminal Court,* TIMES (London), June 23, 1898, 13

[857] *Death under chloroform at the Manchester Infirmary*, MANCHESTER TIMES, June 10, 1898; *Death under chloroform at the Royal Infirmary*, BRITISH MEDICAL JOURNAL, i:1557 (June 11, 1898)

When in the operating room, the defendant himself disputed the fact that the leg so prepared was the one to be operated upon. He asked the brother, who says he got confused, and was unable to state, but asked time to make the inquiry by telephone, and started to do so; but the defendant, instead of waiting, operated before the brother returned. The only excuse given, so far as this record shows, is that the father came in at that moment, and directed the left leg to be operated upon. The father was not there at the plaintiff's request; on the contrary, he was told to remain at home. It may be true that the doctor might be excused for the operation upon the wrong leg if he had waited until the brother returned, and had been advised that the family said that it was the left leg to be operated upon.

Perhaps that, in connection with what the father said, might show that he was in the exercise of due care, if there were no other testimony which had a tendency to show the want of such care as he should have exercised. But there is some testimony tending to show that the left leg was not discolored or inflamed, while the right leg was. In addition to this, the plaintiff testifies that, at the time the doctor advised him to go to the hospital, it was for the purpose of an operation upon the right leg, and not upon the left. The case should have been submitted to the jury for their determination whether the defendant exercised that degree of care which, under the circumstances, he was bound to exercise. [858]

SOMMERVILLE HOSPITAL INVESTIGATION - ALLEGED ATTEMPT BY NURSE TO CONVINCE PATIENT TO CONSENT TO AMPUTATION (Massachusetts 1898)

In 1898 Dr. A.H. Carvell published a statement explaining why he resigned form the hospital. Among other reasons, he charged Miss Hartwell, matron of Sommerville Hospital, with threatening a patient with discharge if he did not consent to have his foot amputated. The foot was not amputated. Miss Hartwell requested an investigation by the hospital. A committee of the hospital held hearings over several days investigating the accusation. The report of the committee concluded the matter was due to misunderstandings, that the matron was not disqualified from her job, that her character as a woman was not impeached, that she was temperamental and her efficiency would be enhanced by more tactfulness, that Dr. Carvell and his homeopathic associates might be justified in feeling aggrieved, that mutual forbearance is suggested, and other conclusions.[859]

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[858] *Sullivan v. McGraw*, 118 Mich. 39, 76 N.W. 149 (July 18, 1898); *McGraw of Detroit sued for malpractice*, MEDICAL NEWS, Mar. 5, 1898, 311

[859] *Sommerville's hospital*, BOSTON GLOBE, June 10, 1898, 2; "*Injured the hospital*," BOSTON JOURNAL, July 1, 1898; *Praise Miss Hartwell*, BOSTON JOURNAL, July 8, 1898; *Nearing Close*, BOSTON JOURNAL, July 9, 1898; *Matron testifies*, BOSTON JOURNAL, July 15, 1898; *Evidence all in*, BOSTON JOURNAL, July 22, 1898; *Queer report*, BOSTON JOURNAL, Aug. 19, 1898, 2 [text of some of the report]; *Report not satisfactory*, BOSTON DAILY ADVERTISER, Aug. 20, 1898, 4; *Boquets plenty*, BOSTON JOURNAL, Aug. 20, 1898, 4

A few days later Miss Hartwell sued Dr. Carvill based on the statements claimed to have been made before the investigation.[860] The outcome of the suit has not been found. In October, the hospital increased matron Hartwell's salary.[861]

THOMPSON V. MYERS AND FRAUNTFELTER - UNAUTHORIZED OPERATION (Ohio 1898)

In 1898, Annie Thompson sued Elmer G. Myers and James Frauntfelter in Canton, Ohio, alleging an unnecessary and unauthorized operation on her deformed right foot leaving her crippled. She underwent surgery under anesthesia on August 26, 1897 at Aultman Hospital and claimed the surgery performed was different from what she had authorized. At trial, the plaintiff elected to proceed solely on the claim of lack of consent. In March 1899, the jury ruled in favor of the defendant.[862]

POTTER - PARENTAL RELIGIOUS FAILURE TO SEEK MEDICAL AID (New York 1898)

In August 1898, 13-year old Faith Potter had typhoid fever. Her parents disregarded orders of Health Officer to isolate the child and seek medical attendance. They did this because of their belief in prayer. The mother called a physician near the end of Faith's life after she was told that she would be prosecuted if her daughter died. Faith died at home. The father, a sea captain, was away during the illness. There is no report of prosecution.[863]

PECULIAR PEOPLE - COOK - PARENTAL RELIGIOUS FAILURE TO SEEK MEDICAL AID (England 1898)

On August 23, 1898, an inquest was held before Deputy Coroner W. Schroder on the death of Ethel Grace Cook, age 20 months. Her parents, James and Grace Cook, were members of the Peculiar People and had not sought medical treatment. The post mortem exam indicated that the child had died from asphyxia supervening upon bronchial pneumonia. Medical testimony was the child would have lived with proper medical attention. The Coroner advised the jury to find the parents guilty of manslaughter. The coroner's jury found

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[860] *Dr. Carvill sued*, BOSTON JOURNAL, Aug. 23, 1898, 2; *The Hartwell-Carvill suit*, BOSTON JOURNAL, Aug. 24, 1898, 5

[861] *Salary increased*, BOSTON JOURNAL, Oct. 6, 1898, 7

[862] *A surgical operation,* MASSILLON INDEPENDENT (Ohio), Aug. 29, 1898, 1; *The damage case decided in favor of the defendant - Court notes,* MASSILLON INDEPENDENT (Ohio), Mar. 20, 1899; *Motion for new trial,* MASSILLON INDEPENDENT (Ohio), Mar. 13, 1899, 3; *The damage case decide in favor of defendant - court news,* MASSILLON INDEPENDENT (Ohio), Mar. 20, 1899, 4

[863] *A dying child neglected*, N.Y. TIMES, Aug. 11, 1898, 4; *Prayers and drugs both fail,* N.Y. TIMES, Aug. 18, 1898, 10; *Personal*, N.Y. TIMES, Aug. 18, 1898, 6

unanimously that the parents were guilty of criminal neglect. The Coroner released the parents on bail.

On August 24, the parents were committed for trial and released on bail.

On September 16, the parents were tried in Central Criminal Court before Mr. Justice Darling. The jury foreman announced that the defendants were not guilty. When the foreman started to say "But the jury think--," another jury member interrupted him and said that there was no agreement on that. The judge directed the jury to consider the verdict. The jury announced that they agreed there was gross neglect, but could not agree whether it had accelerated death. The judge announced that they would not be tried in this session and released them on bail until the next session.

On October 26, the parents were tried in Central Criminal Court before Mr. Justice Bigham. The jury found them guilty. The judge stated he respected their earnest conviction and discharged them on their own recognizance. The judge stated that he did not want his action to be misinterpreted. He would impose punishment the next time this occurred.[864]

In September 1898, Robert Felton and Mary Ann Felton were indicted for the manslaughter for the death of their eight-week-old child, Ruby Gladys Felton. The parents had not called medical attendance even though she could not eat. Elders of their religious sect, the Peculiar People, prayed and anointed her with oil. Medical testimony was that the child would have lived with medical aid. In November 1898, they were tried in the Assizes of the South-Eastern Circuit before Sir Henry Hawkins. The jury acquitted the defendants.[865]

MADISON V. MANGAN - PATIENT CAN CONTRACT TO SUBMIT TO TREATMENT (Illinois 1898)

In September 1898, in the case of *Madison v. Mangan*, an Illinois Court of Appeals ruled that a patient could contract to submit to treatment. It reversed a judgment against a physician for failure to cure piles because the patient had violated the contract to submit to further treatment.[866]

INSTRUCTIONS ON DUTY TO SUBMIT TO SURGERY TO MITIGATE DAMAGES (Pennsylvania 1898)

There is a general rule in cases where plaintiffs seek damages that the plaintiff cannot collect for the amount of damages due to the failure to take reasonable steps to mitigate (reduce) the damages. Defendants sometimes claimed that plaintiffs should have a duty to undergo surgery to mitigate

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[864] *Reg. v. Cook*, 62 J.P. 712 (1898); *Inquests,* TIMES (London), August 24, 1898, 5; *Police*, TIMES (London), August 25, 1898, 2; *Central Criminal Court*, TIMES (London), Sept. 17, 1898, 12; *Central Criminal Court*, TIMES (London), Oct. 27, 1898, 13; ALBANY LAW JOURNAL, 58:232 (1898-99)

[865] *The Assizes*, TIMES (London), Nov. 15, 1898, 7; LAW JOURNAL, Nov. 19, 1898; *Criminal negligence,* HARVARD LAW REVIEW, 12(6):428-429 (Jan. 25, 1899)

[866] *Madison v. Mangan*, 77 Ill. App. 651 (2d Dist. Sept. 26, 1898)

damages. In one such case in 1898 the Pennsylvania Supreme Court approved the following jury instructions:

> (1) If they "believe that the surgical operation, necessary to relieve or cure the plaintiff was a serious or critical operation necessarily attended with some risk of failure, then the plaintiff was not bound in law to undergo a serious and critical surgical operation which would necessarily be attended with some risk of failure."
> (2) If they "believe that such operation was dangerous and critical and attended with risk of failure she was privileged to exercise the liberty of choice, under such circumstances, as to whether suffering and [*486] feebleness resulting from the injury would be endured or whether the surgeon's knife should be used."[867]

CHRISTIAN SCIENCE - FREDERICK - PROSECUTION FOR DEATH UNDER CHRISTIAN SCIENCE TREATMENT (England 1898)

In 1898, Harold Frederick, a newspaper correspondent and author, died at his home in London while under Christian Science attention, called the “absent treatment,” after dismissing his doctors. His friends had summoned the doctors to return, but he refused to follow their directions. He died of heart disease. There was an inquest on the death.[868] A coroner's jury returned a verdict of manslaughter against two Christian Scientists. Miss Lyon was held responsible as the guardian of the deceased for failing to secure medical aide. Mrs. Mills was held responsible for undertaking treatment. They were sent to jail awaiting trial. At trial, they were discharged because the prosecution offered no evidence.[869]

CONSCIENTIOUS OBJECTION TO COMPULSORY VACCINATION (England 1898)

In 1898, the British law on compulsory vaccination was amended to permit conscientious objection. Some areas of the country that opposed vaccination readily approved objector status. For example, in 1898, at a court sitting in Keighley, 660 parents with 1670 children won appeals recognizing their objector status.[870]

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[867] *Laurence Kehoe, in right of Mary J. Kehoe v. The Allentown & Lehigh Valley Traction Company*, 187 Pa. 474, 485; 41 A. 310, 313 (Oct. 17, 1898); see also, *Blate v. The Third Avenue Railroad Co.*, 44 A.D. 163, 60 N.Y.S. 732 (1st Dept. Nov. 1899) [plaintiff not required to submit to operation]
[868] *Relied on Christian Science,* CHICAGO DAILY TRIBUNE, Oct. 22, 1898, 5
[869] *Verdict against scientists,* N.Y. TIMES, Nov. 9, 1898, 7; *Manslaughter by Christian Scientist,* DAILY KENNEBEC JOURNAL (Me.), Nov. 12, 1898, 1; *The death of Mr. Frederic*, GLEANER (Kingston, Jamaica), Nov. 30, 1898, 4; *Correspondence*, MEDICAL RECORD, 55:31 (Jan. 7, 1899)
[870] F.B. Smith, THE PEOPLE'S HEALTH - 1830-1910 (New York: Holms & Meier Publishers, Inc. 1979), 168 - 169, *citing* LANCET, Oct. 8, 1898, 960

DOUGLAS HOSPITAL CONSENT RULE (Nebraska 1898)

In November 1898, it was reported that the county commissioners had adopted a rule requiring written consent of the patient before a serious operation could be performed at the Douglas County hospital in Nebraska.[871]

CONSENT OF SOLDIER REQUIRED FOR RADICAL CURE OF HERNIA (Austria-Hungary 1899)

In 1899, a medical journal reported that in the Austria-Hungarian army operations for the radical cure of hernia required the consent of the soldier.[872]

DETWILER V. BOWERS - COLLECTION ACTION - SCOPE OF FATHER RESPONSIBILITY WHEN HE DID NOT CONSENT (Pennsylvania 1893-1899)

In 1893, a Pennsylvania surgeon, Dr. Bowers, operated on a girl, age 5, to remove a cancerous growth on her neck. Her mother had given consent. The father, Thomas C. Detwiler, had not consented and refused to pay the surgeon, so he sued for his fee. The trial court ruled in favor of the surgeon. The father paid the judgment. In 1894, the surgeon again operated to remove a growth in the child's armpit and, knowing the father's objection to the prior operation, acted with only the mother's consent. The father refused to pay and the trial court again ruled in favor of the surgeon. By the time of the appellate decision, the child had died of cancer.

In February 1899, the appellate court reversed finding that the father was not liable. The father had previously arranged for the child to be examined by "five resident surgeons of good repute, each and all of whom diagnosed the disease as recurrent sarcoma or cancer, and had refused to remove the tumor for the reason that it would certainly return in a short time in a more dangerous form, or in a more vital part of the body, and that an operation would be likely to hasten the death of the child." The court noted "very respectable authority is adduced by the defendant to show that these heroic operations were injudicious experiments if not mistakes." "The plaintiff describes it as a difficult and dangerous operation which was to afford temporary relief in an incurable case. A surgical operation of such doubtful advantage is not a necessary for which a nonassenting father is liable."[873]

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[871] W.F. Milroy, *Intracranial hemorrhage: A clinical report*, WESTERN MEDICAL REVIEW, 3 3:396, 397 (Nov. 15, 1898)
[872] William C. Braisted, *A service view of inguinal hernia*, MEDICAL RECORD, 55:116 (Jan. 28, 1899)
[873] *Detwiler v. Bowers*, 9 Pa. Super. 473 (Feb. 17, 1899), LANCASTER LAW REVIEW, 16(27):209 (May 22, 1899); *Principal and agent,* AM. L. REG., 47:313 (1899)

PARNELL & SPRINGLE - EXCEEDING SCOPE OF CONSENT (Montreal 1899)

In Montreal, Canada, a patient consented to a minor operation to address tubo-ovarian symptoms. During surgery, the surgeon found abscesses and with agreement to the necessity from other surgeons present removed the tubes and ovaries. The patient sued based on the unauthorized removal. In January 1899, the judge ruled for the defendant deciding the operating surgeon was within his rights. The court wrote:

> Considering, that the three regular practising surgeons present, including Defendant agreed, that under the circumstances it was absolutely necessary for the preservation of Plaintiff's life, that her ovaries should be removed at once.
>
> Considering, that it was impossible to obtain Plaintiff's consent to such operation at the time, as she was then unconscious.
>
> Considering, that the surgeons performing an operation, is in duty-bound, to do everything, necessary for the preservation of the life of his patient, according to the circumstances of the case, as they may arise.
>
> Considering, that under the proof made in this cause, Defendant is shown to have acted legally, and with prudence and every necessary precaution, so that he is entirely blameless of the charges set forth against him by Plaintiff.[874]

FORCED VACCINATION (Illinois 1899)

In 1899 in Chicago, Health Department physicians used police to force the public to submit to vaccination.[875]

MCLEAN V. KANSAS CITY (Missouri 1899)

In May 1899, Missouri decided a case that illustrates the complex interaction of consent to medical services and responsibility for payment. A wife, Ella McLean, was injured falling on a sidewalk. She sued the city. Medical expenses were part of the damages claimed. The court of appeals ruled that only her husband could recover for the medical expenses, so she was denied payment. The court ruled:

> …the wife may recover for medicines and medical attention where the charge therefor is made against her…
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> …she would be presumed to be acting within her implied authority as agent for her husband and her act would bind her husband for the liability for the reasonable value of the service subsequently rendered her

[874] *Parnell & Springle,* 5 R.J. 74 (Superior Ct. District of Montreal Jan 20, 1899) [Le revue de jurisprudence du recueil des decisions de Quebec]; *Suit against a surgeon*, BOSTON MEDICAL AND SURGICAL JOURNAL, 140:343 (Apr. 6, 1899)
[875] *Continue vaccination crusade,* CHICAGO DAILY TRIBUNE, Mar. 9, 1899, 2

by the physician so called…. Nothing appears in the record to rebut the presumption of the liability of the plaintiff's husband for the amount of the medical services rendered plaintiff, so that we are constrained to hold the instruction which authorized a recovery by her for such services was wrong.[876]

FAITH CURIST - KRANTZ - PARENTAL RELIGIOUS REFUSAL OF MEDICAL TREATMENT (New York 1899)

In May 1899, Lizzie Krantz, age 12, was attended by a faith curist, Mrs. Maria Miller. A physician had seen Lizzie and had advised amputation of toes that had gangrene. Instead her mother called upon Mrs. Miller. After Mrs. Miller had applied a paste and incantations, the mother admitted her daughter a hospital. It was reported that Lizzie was dying of gangrene in the hospital. It was announced that the Superintendent of the Sanitary Bureau was applying for a warrant to arrest Mrs. Miller.[877] A few days later Mrs. Miller was arrested and arraigned before Magistrate Brenner for practicing medicine without a license.[878]

ALLEGED REMOVAL OF SKIN FROM BOY WITHOUT CONSENT (England 1899)

In 1899 the St. Austell Board of Guardians received a letter alleging that skin had been removed without consent from a boy age eight or nine in the workhouse and the skin had been put on the leg of a woman in the workhouse. It was further alleged that the Board knew of the incident and hushed it up. It was determined that the Visiting Committee had received a report of the incident and had concluded it was a trifling affair that did not need to be reported to the Guardians. The Guardians apparently agreed, focusing their attention on refuting that they had previously known of the incident.[879] No further action regarding the matter has been located.

FAITH CURIST KEPT PHYSICIANS AWAY (Ohio 1899)

In May 1899, Frank Sell of Canaan, Wayne County, Ohio, was treated by a faith curist, who ordered all non-believers away. It is reported that as he got worse he requested that a physician be called and that neighbors insisted that he be heeded, but the faith curist refused. The prosecuting attorney was contacted and he sent a letter to the faith curist demanding that she leave town, which she did. The doctor was called, but it was too late and the patient died.[880]

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[876] *McLean v. Kansas City*, 81 Mo. App. 72 (May 29, 1899)
[877] *Seeks Mrs. Miller's arrest,* N.Y. TIMES, May 9, 1899, 5
[878] *Magic healer arrested*, MIDDLETON DAILY ARGUS (N.Y.), May 11, 1899, 2
[879] *St. Austell Board of Guardians - Remarkable allegations*, THE ROYAL CORNWALL GAZETTE, FALMOUTH PACKET, AND GENERAL ADVERTISER (Truro), May 25, 1899, 3
[880] *Faith curist ordered away,* NEWARK DAILY ADVOCATE (Ohio), May 26, 1899, 1

THOMPSON V. DEVON - ALLEGED ASSAULT IN VACCINATION (Scotland 1899)

In 1899, in Scotland, James Lamb Thompson sued James Devon, medical officer for the Duke Street Prison, for alleged assault by vaccinating him while he was a prisoner. The judge found that the vaccination had been administered to the prisoner without objection pursuant to the established practice of such vaccinations on prisoners who did not object. The judge found no misrepresentation and no negligence. The judge ruled in favor of the medical officer. On appeal the decision was upheld.[881]

COLLECTION ACTION - OPERATION EXCEEDING SCOPE OF CONSENT (Germany 1899)

In Dresden, Germany, a patient consented to surgery. The surgeon, Dr. Ihle, found a more extensive malady during the operation and proceeded to perform a more extensive operation, removing the ovaries and fallopian tubes, with success. When the bill was presented, the patient protested claiming lack of consent. When the surgeon sued to collect his bill, the Supreme Provisional Court at Dresden ruled that the operation should not have been performed without consent and constituted "illegal bodily injury." The surgeon was denied his fee and the public prosecutor announced his intention to start criminal proceedings. However, ultimately, no prosecution was initiated.[882]

PECULIAR PEOPLE - NORMAN - PARENTAL FAILURE TO SECURE MEDICAL AID (England 1899)

Frederick and Eleanor Norman were indicted for the manslaughter of their daughter. They were members of the Peculiar People and had not called for medical attendance. On July 26, 1899, they were tried in Central Criminal Court before Mr. Justice Ridley on the charge of manslaughter. When medical experts could not say the child would have lived with medical attendance, the jury found the defendants not guilty. However, they had been charged in a second indictment with neglecting a child. They were released on bail for the second indictment.[883]

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[881] *Vaccination of Glasgow prisoners*, GLASGOW HERALD (Scotland), Jan. 26, 1899; *Vaccination case*, GLASGOW HERALD (Scotland), May 17, 1899; *Alleged vaccination assault*, BRITISH MEDICAL JOURNAL, i:1314 (May 27, 1899)

[882] *Current topics,* ALBANY LAW JOURNAL, 59:443 (June 3, 1899); Joseph Heimberger, STRAFRECHT UND MEDIZIN (Munchen: C.H. Beck'sche Verlagsbuchhandlung 1899), § 1. Einleitung, 2-5

[883] *Central Criminal Court*, TIMES (London), July 27, 1899, 11

INTERFERENCE WITH TAKING CHILD FROM FAITH CURIST (New York 1899)

In August 1899, Rev. Cyrus B. Fockler, a Christian minister, was arrested and jailed when he interfered with an officer who was ordered to take a child from the faith curists for medical treatment. He was charged with cruelty to a child and interfering with an officer. He was released on bond.[884]

CHRISTIAN SCIENCE - PARENTAL FAILURE TO SEEK MEDICAL AID (Illinois 1899)

In 1899, a Chicago paper reported that an 8-year-old child had died of typhoid fever in Douglas County, Illinois, when his Christian Science parents did not seek medical attendance until it was too late. The State's Attorney for Douglas County asked the Attorney General for an opinion whether any criminal law had been broken. The Attorney General responded that no criminal law had been broken. The criminal law against willfully permitting a child to be placed in a situation where its life or health may be endangered applied only when there was willfulness. When the parents honestly believed in the efficacy of the approach they adopted there could be no willfulness. The Chicago Daily Tribune editorialized against this position.[885]

CHRISTIAN SCIENCE HEALER CENSURED (Iowa 1899)

In October 1899, Frank Koepp, age 16, died in Clinton, Iowa, of typhoid fever while under the care of Christian Scientists. The city health officer initially barred the issuing of a burial certificate until a regular physician had examined the body.[886] A coroner's jury censured the Christian Science healer for not providing proper food and care.[887]

CONSENT RULE FOR NEW YORK DISPENSARIES (New York 1899)

In October 1899, the New York State Board of Charities adopted rules and regulations for dispensaries that included the following:

> VI.—*Instructions in Dispensaries.* Managers may make needful rules and regulations for clinical, secular and religious instruction in their respective Dispensaries, but in no instance r hull any applicant be required to attend such instruction as a condition on which he or she can receive medical or surgical relief at the Dispensary, No applicant shall be required to submit to an examination, oral or physical, for other purposes than his

[884] *Faith curist aggressive,* N.Y. TIMES, Aug. 11, 1899, 5
[885] *Children the victims,* CHICAGO DAILY TRIBUNE, Sept. 10, 1899, 32
[886] *Burial permit refused*, DAVENPORT REPUBLICAN (IA), Oct. 13, 1899, 3
[887] DAVENPORT REPUBLICAN (IA), Oct. 14, 1899, 4

or her proper medical or surgical treatment without his or her full and free consent; in the case of an infant, the consent of the father, mother, or guardians, must be obtained for the purpose above mentioned.[888]

GUARDIAN APPOINTED FOR CHILD OF CHRISTIAN SCIENTISTS (Ohio 1899)

In November 1899, in Orrville, Ohio, Charles Linberger who had typhoid fever was denied medical care because his father and sister who were Christian Scientists would not permit a physician to be called. This was called to the attention of a probate judge who appointed a guardian with instructions to procure a nurse and physician and see to that prescribed medicine was administered. [889]

ALLEGED OPERATION WITHOUT CONSENT (New Zealand 1899)

In 1899, In New Zealand, a patient sued Dr. de Renzi for allegedly removing her coccyx without her consent. The jury ruled for the defendant, finding that there was consent.[890]

DISRIMINATION IN PUBLIC HEALTH MEASURES - BUBONIC PLAGUE SCARE OF 1900 (San Francisco 1900)

One exception to the requirement of consent to medical treatment is the police power to take action to protect the public health. However, the action must be necessary and appropriate and not administered discriminatorily. One case that illustrates the response of the law when this power is used in an improper fashion is the bubonic plague scare in San Francisco in 1900.[891]

In April 1900 it was suspected that the bubonic plague had reached San Francisco.[892] Quarantine was imposed that excluded Chinese and Japanese persons from leaving San Francisco unless they were inoculated. There was widespread opposition to inoculation.[893] Chinese “highbinders” threatened to assassinate any Chinese person who submitted. The Chinese consul-general to

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[888] *State of New York State Board of Charities, Rules and Regulations*, POST-GRADUATE, 14(11): 936, 938 (Nov. 1899)
[889] *Faith healers outwitted,* N.Y. TIMES, Nov. 24, 1899, 3; *Faith-healers outwitted,* MEDICAL NEWS, Dec. 2, 1899, 721
[890] *A New Zealand action for malpraxis*, BRITISH MEDICAL JOURNAL, ii: 1455 (Nov. 18, 1899)
[891] For more information about this event, see Charles McClain, *Of medicine, race, and American law: The bubonic plague outbreak of 1900*, LAW & SOC. INQUIRY, 13:447 (1988); Marilyn Chase, THE BARBARY PLAGUE: THE BLACK DEATH IN VICTORIAN SAN FRANCISCO (Random House 2003); Nayan Shah, CONTAGIOUS DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO’S CHINATOWN (U. Cal. Press 2001); Charles McClain, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY (Univ. of Cal. Press 1996)
[892] *Echoes and news - plague situation in San Francisco,* MEDICAL NEWS, Apr. 6, 1900, 545, at 548-549
[893] *That 'Frisco plague,* L.A. TIMES, May 21, 1900, I2

the city said the Chinese would not submit to inoculation, reporting that many of those who had submitted were deathly sick.[894] The San Francisco Board of Health announced that it would not forcibly compel inoculation.[895] The Chinese minister in Washington secured the agreement of the Surgeon General that only those leaving the Chinese quarter would need to be treated.[896] In the name of Wong Wai the Chinese Six Companies applied for an injunction against the Board of Health requiring inoculation before leaving the city. Three judges of the United States Circuit Court heard the case.[897] The injunction was issued, in part because the Board of Health was not empowered to issue such an order. The city Board of Health considered additional steps but received legal advice that they were precluded by the injunction.[898] However, the Board of Supervisors of San Francisco then met and passed a resolution empowering the Board of Health to impose quarantine.[899] The Secretary of State wrote to the California Governor Gage asking for a report so that he could respond to the Chinese minister who complained the injunction was being ignored.[900] In the name of Jew Ho the Chinese Six companies filed for another injunction.[901] A temporary restraining order was issued.[902] The Chinese Six Companies filed a writ of habeas corpus seeking the release of Chun Ah Sing who had been arrested under the quarantine.[903] Governor Gage sent a communication to the Secretary of State finding that there had never been a case of plague in California.[904] The Board of Health removed the quarantine order on the same day that the federal court ruled on the Jew Ho case and dissolved the quarantine.[905] The United States quarantine officer for the port of San Francisco then issued an order to all common carriers not to transport any person out of San Francisco to other states without a certificate from the United States marine Hospital officers.[906] The order was revoked pursuant to direction from Washington.[907] The quarantine officer was accused of contempt of court but this was later purged of contempt and released.[908]

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[894] *Clash with Chinese,* L.A. TIMES, May 22, 1900, I4
[895] *Plague stamped out*, L.A. TIMES, May 23, 1900, I3
[896] *Chinese minister's views,* N.Y. TIMES, May 25, 1900, 2
[897] *An Oriental kick,* L.A. TIMES, May 26, 1900, I3
[898] *Health board loses,* L.A. TIMES, May 29, 1900, I3; *Wong Wai v. Williamson*, 103 F. 1 (C.C. N.D. Cal. May 28, 1900)
[899] *Chinese roped in,* L.A. TIMES, May 30, 1900, I3; *Starving the Chinamen*, WATERLOO DAILY REPORTER (Iowa), June 2, 1900, 2; *Lines tightened up,* L.A. TIMES, June 5, 1900, I3
[900] *Gage to investigate*, L.A. TIMES, June 5, 1900, I3
[901] *Fight quarantine,* L.A. TIMES, June 6, 1900, I5
[902] *Victory for Chinese - Health board restrained*, L.A. TIMES, June 7, 1900, I4
[903] *Hot time in China,* L.A. TIMES, June 10, 1900, I4
[904] *Gage on the plague,* L.A. TIMES, June 14, 1900, I4
[905] *Quarantine lifted,* L.A. TIMES, June 16, 1900, I5; *Jew Ho v. Williamson*, 103 F. 10 (C.C. N.D. Cal. June 15, 1900)
[906] *Latest plague turn,* L.A. TIMES, June 17, 1900, I3
[907] *Quarantine is off,* L.A. TIMES, June 19, 1900, I5
[908] PHILADELPHIA MEDICAL JOURNAL, 6:53 (July 14, 1900); *Wong Wai v. Williamson*, 103 F. 384 (C.C. N.D. Cal. July 3, 1900)

Note that there had been an outbreak of the plague in January 1900 in the Hawaiian islands. Chinatown in Honolulu was condemned and burned down. Honolulu was quarantined. A house-to-house inspection was conducted. Restrictions were placed on shipping.[909]

ETHEL YATES - DIVINE HEALING DEATH (Iowa 1900)

On January 5, 1900, Ethel Yates died of appendicitis in Council Bluffs, Iowa. A coroner's jury in Council Bluffs found that her death was due to neglect and referred the matter to the grand jury.[910] The Pottawattamie County grand jury charged S.P. James, a divine healer, and Mrs. P.B. Yates, the mother of Ethel, with being responsible for the death. At the recommendation of James, Yates had discharged the physician who had been caring for her daughter. Ethel Yates was buried in Tabor, Iowa.[911]

It was reported that Ethel Yates had begged the owner of the house she was in and her mother to call a physician, but they refused.[912]

Mrs. Yates was arrested in Iowa, but Mr. James escaped to Nebraska.[913]

Governor Poynter of Nebraska refused the extradition request from Iowa for Silas J. James on the basis that the crime charged did not constitute a crime under the laws of Nebraska. Mr. James was the pastor of the Church of Christ in South Omaha.[914]

Mrs. Yates was released on bail.[915] The indictment against her was later dismissed.

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[909] *More plague in the Hawaiian Islands*, L.A. TIMES, Jan. 9, 1900, I3; *Fighting plague in the Hawaiian Islands*, L.A. TIMES, Jan. 16, 1900, I5; *Hawaii and the plague*, L.A. TIMES, Jan. 20, 1900, I4; *Big fire in Honolulu's Chinatown*, L.A. TIMES, Feb. 1, 1900, I5; *Bubonic plague has about run its course*, L.A. TIMES, Feb. 10, 1900, I8; Plague at Honolulu, L.A. TIMES, Feb. 16, 1900, I4; *Dread plague spreads to other islands*, L.A. TIMES, Feb. 23, 1900, I2; *Fresh outbreak of dread bubonic plague*, L.A. TIMES, Feb. 28, 1900, I4; *Plague situation better than for a month*, L.A. TIMES, Mar. 14, 1900, I4; *More plague in the island paradise*, L.A. TIMES, Mar. 28, 1900, I5; *No plague to worry Honolulu people*, L.A. TIMES, Apr. 2, 1900, I2; *Almost clean of dread bubonic plague*, L.A. TIMES, Apr. 18, 1900, I8; *Affairs in Hawaii*, L.A. TIMES, June 6, 1900, I2.

[910] *Faith healer blamed*, COSHOCTON AGE (Ohio), Jan. 12, 1900, 18.

[911] *Neglect,* LINCOLN EVENING NEWS (Neb), Jan. 9, 1900, 2 [quotes from inquest]; *Faith healer blamed*, DAILY HERALD (Delphos Ohio), Jan. 9, 1900, 1; *Blamed for death,* DAILY REVIEW (Decatur Ill), Jan. 9, 1900, 1; *A faith cure victim,* OXFORD MIRROR (Oxford Junction Iowa), Jan. 18, 1900, 6; *Faith curist indicted,* N.Y. TIMES, Jan. 19, 1900, 3; *Christian Scientists indicted*, DAVENPORT DALY REPUBLICAN (Iowa), Jan. 19, 1900, 1; *Faith curist indicted,* N.Y. TIMES, Jan. 19, 1900, 3; *Faith healers indicted,* EVENING DEMOCRAT (Warren PA), Jan. 19, 1900, 2; *Indicts a Nebraska healer,* NEW ERA (Humestan IA), Jan. 24, 1900, 4; *Brevities,* CHIEF REPORTER (Perry Iowa), Jan. 25, 1900, 6; iagenweb.org/fremont/obits/tabor1900.htm [accessed 08/27/05] [burial in Tabor, Iowa]

[912] *If true, tis' awful*, DAVENPORT REPUBLICAN (Iowa), Jan. 10, 1900, 4

[913] *Mrs. P.B. Yates arrested,* CHICAGO DAILY TRIBUNE, Jan. 19, 1900, 2; *Divine healer arrested,* NEWS (Frederick MD), Jan. 19, 1900, 1; *Mrs. Yates now in jail,* DAVENPORT DAILY REPUBLICAN (Iowa), Jan. 20, 1900, 1 [comments by James' lawyers]; *Divine healers,* IDAHO DAILY STATESMAN (Boise Ida.), Jan. 19, 1900 [Mr. Yates efforts to secure bond for bail]

[914] *Divine healer goes free,* NEBRASKA STATE JOURNAL, Feb. 1, 1900, 5; *Didn"t get him,* LINCOLN EVENING NEWS (Neb), Feb. 1, 1900, 6; *Refuses to honor requisition,* CHICAGO DAILY TRIBUNE, Feb. 1, 1900, 2; *Cut to the core,* NEWARK DAILY ADVOCATE (Ohio), Feb. 1, 1900, 2

[915] *Iowa news,* OXFORD MIRROR (Oxford Junction Iowa), Feb. 8, 1900

MARTSOLF CHILDREN - CHRISTIAN SCIENCE DEATH AND CHILD CUSTODY (Pennsylvania 1900)

In December 1899 and January 1900, the family of Frank Martsolf in Pittsburgh, Pennsylvania experienced diphtheria in their home. The parents were Christian Scientists. Two children died and the third child and father were ill. Health authorities forced a physician into house. The father refused to take medicines. The health officials took the family into charge.[916]

EFFORTS TO REMOVE WILLIAM GAGE TO A HOSPITAL (Ohio 1900)

One newspaper reported the following, but no follow-up information has yet been located:

> Efforts were made to remove William W. Gage, a cousin of Lyman J. Gage, secretary of the treasury, to an infirmary hospital, but the patient refused absolutely to go, insisting that he could not survive a removal. He says that his cousin would assist him if he should make an appeal, but this also he declines to do. He may be taken to a charity hospital upon order of the probate court.[917]

CIVIL ASSAULT CHARGE AGAINST VACCINATON OFFICERS (North Carolina 1900)

J. L. Jackson sued Chief of Police W.S. Orr and Officers Shields, Sikes and Black charging them with assault on his daughter and another girl in enforcing the compulsory vaccination order. The defendants reported that the girls had consented. The girls testified that no violence was used and that they were treated kindly. The magistrate dismissed the case.[918]

EXCLUSION FROM SCHOOL FOR REFUSING MEDICAL EXAMINATION (Chicago 1900)

In October 1899, the Committee on School Management of the Board of Education of Chicago recommended approval of medical inspection of public school pupils and announced that fifty physicians would be hired to minimize the spread of disease in the schools. There was an outbreak of scarlet fever at the time. Mr. Barnes, attorney for the State Board of Health, announced that it would prosecute Dowie supporters and others who did not cooperate. The Board of

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916 *Faith cure vs. diphtheria,* N.Y. TIMES, Jan. 8, 1900, 1; *Diphtheria a winner,* L.A. TIMES, Jan. 8, 1900, I7; *Obstinate Christian Scientists,* NEWS (Frederick MD), Jan. 8, 1900, 1; *Diphtheria as victor,* MANSFIELD NEWS (Ohio), Jan. 8, 1900, 6; *Diphtheria as victor,* NEWARK DAILY ADVOCATE (Ohio), Jan. 8, 1900, 2; *Diphtheria winner,* L.A. TIMES, Jan. 8, 1900, 17; *Science treatment failed,* NEBRASKA STATE JOURNAL, Jan. 9, 1900, 2

917 *Refused to go to infirmary*, NEWARK DAILY ADVOCATE (Ohio), Jan. 12, 1900, 2

918 *No case against police,* CHARLOTTE OBSERVER (NC), Mar. 2, 1900, 6

Education delayed final approval, but the inspection started in early January 1900.[919]

In March 1900, Paul Wright filed a suit challenging the exclusion from school of his daughter, Mary, age 10, for refusal to submit to the examination. Later in the month, the court upheld the requirement by denying a writ of mandamus.[920]

FRANCIS TRUTH - MAIL FRAUD (Boston 1900)

Ads for Francis Truth appeared in newspapers in 1899.[921]

In 1900, Francis Truth of the Divine Healing Association was placed under federal arrest in Boston for mail fraud. A grand jury indicted him on twenty counts. He conducted a business of "absent treatment" though over twenty typists who answered mail sending him $5 per treatment, reportedly generating $30,000 per week. Francis Truth's real name was E.B. Bemis or Will Bemis.[922]

In July 1900, Francis Truth pled guilty to seven counts of mail fraud. He was fined $2,500.[923]

Later in July 1900, the U.S Post Office issued a fraud order stopping all mail to Truth and his organization. Some 32,000 letters were returned to their senders.[924]

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[919] *To inspect the pupils,* CHICAGO DAILY TRIBUNE, Oct. 27, 1899, 2; *Delay plan to isolate*, CHICAGO DAILY TRIBUNE, Nov. 2, 1899, 8; *Talk of Hummel case*, CHICAGO DAILY TRIBUNE, Nov. 19, 1899, 8; *Andrews and Harris clash,* CHICAGO DAILY TRIBUNE, Jan. 10, 1900, 9

[920] *Fight on school rule,* CHICAGO DAILY TRIBUNE, March 4, 1900, 6; *To take school census,* CHICAGO DAILY TRIBUNE, March 7, 1900, 7 [principals to report refusals]; *For school of farming,* CHICAGO DAILY TRIBUNE, March 14, 1900, 9 [answer filed]; *To examine pupils' health,* CHICAGO DAILY TRIBUNE, March 27, 1900, 9 [writ denied]

[921] *E.g.,* BANGOR WHIG AND COURIER (Me), Nov. 15, 1899, 5

[922] *"Divine healer" arrested*, N.Y. TIMES, Mar. 16, 1900, 7; *Boston's alleged divine healer, now under arrest,* DAILY KENNEBEC JOURNAL (Me.), Mar. 16, 1900, 3; *Healer arrested for fraud,* DAILY GAZETTE (Janesville Wis), Mar. 16, 1900, 1; *Now in jail,* MANSFIELD NEWS (Ohio), Mar. 16, 1900, 6; *Divine healer arrested,* NAUGATUCK DAILY NEWS (Conn), Mar. 16, 1900, 1; *Lot of money,* NEWARK DAILY ADVOCATE (Ohio), Mar. 16, 1900, 1; *Divine healer arrested,* NEBRASKA STATE JOURNAL (Lincoln), Mar. 16, 1900, 2; *Fine detective work,* NORTH ADAMS EVENING TRANSCRIPT (Mass), Mar. 16, 1900, 2; *Divine healer is charged with fraud,* POST STANDARD (Syracuse NY), Mar. 16, 1900, 1; *Thirty thousand a week,* TIMES DEMOCRAT (Lima Ohio), Mar. 16, 1900, 1; *Protecting the people,* NORTH ADAMS TRANSCRIPT, Mar.19, 1900, 4 [editorial]; *Money orders for "divine healer" held,* N.Y. TIMES, Mar. 25, 1900, 26; CONSHOCTON AGE (Ohio), Apr. 6, 1900, 2; *Divine healer on trial,* POST STANDARD (Syracuse NY), Apr. 14, 1900, 2 [arraignment]; "*Divine healer's mail held,"* N.Y. TIMES, Apr. 21, 1900, 9; *"Healer's" mail seized,* TIMES DEMOCRAT (Lima Ohio), Apr. 21, 1900, 1; *"Healer's" mail seized,* MANSFIELD NEWS (Ohio), Apr. 21, 1900, 1; *"Healer's" mail,* Naugatuck Daily News (Conn), Apr. 21, 1900, 2; *"Healer's" mail seized,* NEWARK DAILY ADVOCATE (Ohio), Apr. 21,1900, 1; *"Healer's" mail seized,* CONSHOCTON AGE (Ohio), Apr. 24, 1900, 7 ; *Divine healer Truth indicted on all of twenty counts*, NORTH ADAMS TRANSCRIPT (MA), May 18, 1900, 1; *Boston healer is indicted,* CHICAGO TRIBUNE, May 19, 1900, 3

[923] *"Divine healer" guilty,* N.Y. TIMES, July 11, 1900, 1; *"Divine healer" fined $2,500*, FORT WAYNE NEWS (Ind), July 11, 1900, 5; *Francis Truth pays fine of $2,500,* POST STANDARD (Syracuse NY), July 12, 1900, 12

[924] *Faith curist's mail stopped,* N.Y. TIMES, July 29, 1900, 6; "*Divine healer" got 32,000 letters,* N.Y. TIMES, Aug. 11, 1900, 3; DAILY GAZETTE AND BULLETIN (Williamsport Pa), July 30, 1900, 1; *Francis Truth's mail stopped,* NAUGATUCK DAILY NEWS (Conn), July 30, 1900, 1

In July 1901, Francis Truth was arrested in Denver, Colorado, for obtaining money under false pretenses and practicing medicine without a license.[925]

In November 1901, Francis Truth filed for bankruptcy in New Hampshire.[926]

In March 1902, Francis Truth advertised a temple in New York City.[927]

Francis Truth's methods of advertising are discussed in an October 1902 New York Times article.[928]

In 1912, Francis Truth was located in a house in Oakland, California.[929]

In 1922, a Texas newspaper included a Francis Truth ad with a Nassau, Bahamas, address.[930]

In 1937, Francis Truth was arrested in San Francisco for violation of the medical practice act.[931]

MULLEN V. FLANDERS - OPERATION WITHOUT CONSENT (Vermont 1900)

Bridget Mullen sued Dr. Flanders for malpractice. She agreed to an operation for club feet. She claimed that one foot had to be amputated due to his negligence and that he had operated on the other foot contrary to her consent. A jury awarded her $6833.33.[932]

COLLECTION ACTION BY PHYSICIANS WITH COUNTER-CLAIM OF LACK OF CONSENT (England 1900)

In 1900, Dr. William M.A. Anderson and Dr. Robert Fenner sued Mr. Charles Moeller to collect medical fees. He counterclaimed on various grounds including an allegation that "the so called operation of June 16 was done against his will and wish." The case was tried before the Lord Chief Justice in May 1900. In its account of his summing up, the TIMES of London noted:

> The defendant's complaint was that he only consented to the operation if Sir Lauder Brunton was present, and it was suggested that Dr. Fenner had been endeavoring to avoid making appointments with Sir Lauder Brunton. … There was also evidence that the defendant did consent to the

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925 *Claims kisses will cure,* SIOUX VALLEY NEWS (Correctionville Iowa), July 25, 1901, 3

926 *"Divine healer" a bankrupt,* N.Y. TIMES, Nov. 12, 1901, 6; NEWS-DEMOCRAT (Uhrichsville Ohio), Nov. 22, 1901

927 *Temple of Truth,* N.Y. TIMES, Mar.15, 1902, 10; DAVENPORT DAILY REPUBLICAN (Iowa), Mar. 23, 1902, 12; *Opposition for Mrs. Mary Eddy,* KANSAS CITY STAR, Mar. 23, 1902

928 *Honest methods in advertising,* N.Y. TIMES, Oct. 12, 1902, 27

929 *Wipe away those tears,* OAKLAND TRIBUNE (Cal), Feb. 4, 1912, 23

930 PORT ARTHUR DAILY NEWS (Tex), Mar.19, 1922, 15

931 *Self-styled healer to face S.F. court,* OAKLAND TRIBUNE (Cal), May 18, 1900, 1

932 *Made woman a cripple*, ST. ALBANS MESSENGER (VT), Apr. 20, 1900, 8; *Verdict against Flanders*, ST. ALBANS MESSENGER (VT), Apr. 23, 1900, 9; *Vermont news items,* ARGUS AND PATRIOT (Montpelier VT), Apr. 25, 1900, 1

> operation's taking place, and the most that could be said with regard to this incident was… that it was done against his wish. Was that so? It only rested on the evidence of the defendant himself, whose conduct in the matter had been childish.

The jury ruled in favor of the physicians on both the collection action and the counter-claim.[933]

VACCINATION OF ALL ON SHIP (Returning from Manila - 1900)

In mid-1900, several cases of small pox were found on the naval ship Meade returning from Manila. General Otis and all others on board were required to submit to vaccination. The ship was kept in quarantine for five days.[934]

MEDICAL EXAMINATION FOR AUTOMOBILE DRIVER'S LICENSES (CHICAGO 1900)

One Massachusetts newspaper reported in 1900 that Chicago was requiring automobile drivers to submit to a medical exam to determine their nerves were in good condition.[935]

On February 18, 1900, the CHICAGO DAILY TRIBUNE that Chicago had issued its first drivers licenses to nine persons who had passed the first examination. The test included a health test, bodily and mentally, a test of common sense and practical knowledge of things mechanical, and technical questions by the city electrician.[936]

On July 28, 1900, the first license revocation occurred. It was due to a collision with a patrol wagon carrying a patient to the hospital.[937]

In April 1902, a ten-year-old was granted a license.[938]

In June 1903, a judge granted a default injunction restraining the city from arresting chauffeurs who did not have a license.[939]

In October 1905, the mayor of Chicago issued new rules of the road for chauffeurs.[940]

In 1908, the state licensing law in Illinois was found not to require any test for the issuance of a license. Anyone filing an application was issued a license. A grand jury report recommended a new law with requirements.[941]

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[933] *Anderson and another v. Moeller*, TIMES (London), May 10, 1900, 16; *A troublesome patient*, MEDICAL PRESS AND CIRCULAR, 120:513 (May 16, 1900)
[934] *Otis,* TIMES DEMOCRAT (Lima Ohio), June 5, 1900, 1
[935] *Evidence of experience,* NORTH ADAMS TRANSCRIPT (MA), Aug. 22, 1900, 5
[936] *Fit to drive autocabs,* CHICAGO DAILY TRIBUNE, Feb. 18, 1900, 6
[937] *Revokes the license of Walter D. Glenn to operate automobile,* CHICAGO DAILY TRIBUNE, July 29, 1900, 12
[938] *Youngest chauffer in city,* CHICAGO DAILY TRIBUNE, Apr. 5, 1902, 7
[939] *Two run down by autos,* CHICAGO DAILY TRIBUNE, June 10, 1903, 1
[940] *Major issues auto rules,* CHICAGO DAILY TRIBUNE, Oct. 19, 1905, 1
[941] *Think auto law defective*, CHICAGO DAILY TRIBUNE, May 15, 1908, 5; *Would halt auto slaughter*, CHICAGO DAILY TRIBUNE, May 22, 1908, 1

VACCINATOR CHARGED WITH ASSAULT AND ACQUITTED (Massachusetts 1900)

In September 1900 a prominent Massachusetts doctor, Dr. J. P. St. Germain, was charged criminally with assault and battery for allegedly vaccinating an infant against the mother's wishes. He was acquitted because there was evidence the mother bared the infant's arm and reluctantly consented to the vaccination.[942]

MONTANA SMALLPOX EPIDEMIC - THE COMPLEXITIES OF TAKING ACTION (1900)

On September 22, 1900, the *Anaconda Standard* published a list of the names of the eighteen smallpox cases in the county pest house under a headline of "Danger of an epidemic." It described how Dr. O'Leary who was looking after smallpox cases for the county had handled several cases, including the cases of a nineteenth person, Harrington, who refused to go to the pest house, so he was quarantined in his residence. In another case, a local complained that health authorities had left one person unattended so that he wandered off exposing her children and herself to smallpox. The mayor explained that the lack of a detention hospital made it difficult to provide complete protection. The newspaper opined that the people of Butte were being exposed due to dispute between city and county authorities over financial and official responsibility. The city council was expected to approve a detention hospital the following Monday, so a site was being cleared. Debate concerning the expense of quarantining lodging houses was starting. One physician advocated compulsory vaccination.[943]

On October 1, County Attorney Breen issued a 20-page opinion that the board of health and school board did not have the authority to compel anyone to be vaccinated or to exclude a child from school for not being vaccinated. He felt it unfair to put the opposing parents to the expense of challenging such a rule in the courts. If the board desired to pursue the matter, he recommended that the board incur the expense of pursuing a court decision establishing the legality of such a rule.[944]

On October 8, the newspaper article was headed: "Smallpox epidemic has grown to very dangerous proportions" with a subhead line of "Apparently the officials are utterly unable to rise to the occasion and suppress the disease - There is a general demand that more stringent measures be used - Meanwhile

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[942] *Vaccination an assault?* NEW HAVEN REGISTER (Conn), Sep. 1, 1900, 2; *Massachusetts,* JAMA, 35:696 (Sep. 15, 1900); *A vaccinator charged with assault,* MEDICAL RECORD, 58:540 (1900); *Vaccination and malpractice,* MEDICAL NEWS, 77:467 (Sep. 22, 1900) [acquittal].

[943] *Danger of an epidemic,* ANACONDA STANDARD (Mont), Sept. 22, 1900, 5

[944] *Can't suspend pupils,* ANACONDA STANDARD (Mont), Oct. 2, 1900, 6

citizens should see that their families are vaccinated." There were forty known cases in the city. The article stated that City Health Officer Alexander had recommended compulsory vaccination to the council. "The aldermen did not want to go that far - they shirked the responsibility of ordering compulsory vaccination." The article noted further: "The health officer had the authority to order compulsory vaccination but apparently he also was reluctant to assume the responsibility…" A local citizen was quoted that compulsory vaccination was necessary to avoid the cost to taxpayers of taking care of the sick.[945]

When Dr. Alexander decided to invoke compulsory vaccination, the newspaper abandoned its crusade for vaccination and turned on him.[946]

At least one person was arrested for refusing vaccination, confirming that compulsory vaccination meant punishment for failure to be vaccinated, not vaccination by force.[947]

On December 28, the city health board voted to suspend compulsory vaccination and discharged the three special health officers.[948]

In January 1901, the newspaper reported that the former special policemen were being abused and beaten.[949]

On March 9, 1901, the newspaper announced: "Smallpox is finally stamped out." The contagion hospital which had been maintained for 16 months was to be closed the following week. Dr. T.J. Sullivan, who had been in charge of the hospital, was praised. There were only two deaths among the 174 patients treated during 1900 and only three deaths among the 250 patients during 1901. Dr. Sullivan commented on the success of the compulsory vaccination program.[950]

In September and October 1901, the state Attorney General issued opinions to Missoula and Great Falls authorities that the no school board or board of health could exclude students from school for failure to be vaccinated. However, the Cascade County Attorney had issued an opinion that the order was lawful, so it was anticipated that Great Falls would continue its order until the attorney general or objecting mother obtained a court order to the contrary.[951]

HAERING V. SPICER - DUTIES OF PATIENT (Illinois 1900)

In 1900, the Illinois Court of Appeal ruled in the case of *Haering v. Spicer* that a physician could not be held liable for failure to completely diagnose a patient when the physician had proposed surgery under aesthesia to complete the diagnosis, required an assistant to provide the anesthesia, and the patient's husband declined to obtain the assistant. The court ruled that:

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945 *Smallpox epidemic has grown to very dangerous proportions*, ANACONDA STANDARD (Mont), Oct. 8, 1900, 7
946 *With lance and virus,* ANACONDA STANDARD (Mont), Nov. 13, 1900, 5
947 *Sent to pesthouse,* ANACONDA STANDARD (Mont), Nov. 24 1900, 2
948 *Let out the policemen*, ANACONDA STANDARD (Mont), Dec. 29 1900, 8
949 *Notations and observations,* ANACONDA STANDARD (Mont), Jan. 7, 1901, 4
950 *Smallpox is finally stamped out,* ANACONDA STANDARD (Mont), Mar. 9, 1901, 8
951 *Authorities at outs,* ANACONDA STANDARD (Mont), Oct. 10, 1901, 10

It is the duty of a person who has called a surgeon to treat him for an injury to follow all reasonable advice prescribed, and if the surgeon requests needed assistance and the patient refuses or neglects to procure it, the surgeon can not be held liable in damages for a permanent injury when the employment of assistance would have rendered the injury only temporary.[952]

KELLEN V. DRS. MANGES AND ROSENBERG - ALLEGED OPERATION WITHOUT CONSENT (New York 1900)

In 1900 Miss Lucy Kellen sued Drs. Morris Manges and Julius Rosenberg for allegedly administering chloroform and performing an unnecessary curettage on her against her will. The physicians alleged necessity and consent. [953] The jury could not agree at the first trial with nine for the physicians and three for the patient.[954] The jury gave a verdict for the physicians in the second trial.[955] An appeal was dismissed.[956]

ALLEGED UNNECESSARY OPERATION WITHOUT CONSENT (New York 1900)

In August 1900, Beckie Goldman made a charge to a New York City coroner that authorities at Mount Sinai Hospital had performed an unnecessary operation on her brother Michael, age 6, without consent of relatives. He died in the hospital. The newspapers of the day stated at the inquest that hospital authorities would be called upon to explain the operation without consent.[957] No report of the inquest has yet been located.

JORDEN V. JORDEN - DIVORCE ON GROUNDS OF REMOVED OVARIES DENIED (Illinois 1900)

In 1898 a husband sought to divorce his wife on the grounds that she was impotent because her ovaries had been surgically removed prior to the marriage. In 1900, the Illinois Court of Appeals affirmed the trial courts dismissal of the case. The wife claimed that the husband had consented to the operation and denied that the couple was unable to consummate the marriage. The appellate court ruled that (1) the husband knew of the nature of the operation and the

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952 *Haering v. Spicer*, 92 Ill. App. 449, 1900 Ill. App. LEXIS 806 (Dec. 7, 1900).
953 *Suit against two physicians,* N.Y. TIMES, Nov. 21, 1900, 32; JAMA, 35(22):1418 (Dec. 1, 1900)
954 *A suit against physicians,* MEDICAL RECORD (New York), 58(23):899 (Dec. 8, 1900)
955 *Physicians held guiltless of malpractice,* NEW YORK MEDICAL JOURNAL, 73:1094 (June 22, 1901); *Echos and news*, MEDICAL NEWS (New York), 79(2):68 (July 13, 1901)
956 N.Y. TIMES, Nov. 9, 1901, 11; *Kellen v. Manges et al*.. 65 App. Div. 616, 73 N.Y. Supp. 1138 (1st Dept. Nov. 8, 1901) [without a written opinion]
957 *To investigate boy's death*, N.Y. DAILY TRIBUNE, Aug. 5, 1900, 12; *Complain of the surgeons*, SUN (NY), Aug. 5, 1900, 13; *Operated without consent*, DAILY PEOPLE (NY), Aug. 5, 1900, 1

effect that it would have and (2) inability to bear children while capable of coition did not legally constitute impotence.[958]

WATSON V. WILLIAMSON - UNNECESSARY OPERATION (Iowa 1900)

Mamie Watson sued Dr. Josiah Williamson in Des Moines, Iowa, for performing an unnecessary life-threatening operation on her. The nature of the operation is not disclosed in the reporting. The defendant failed to make an appearance at the trial so judgment was taken by default. She was awarded $2,500.[959]

[958] *Jorden v. Jorden*, 93 Ill. App. 633 (2d Dist. Apr. 1900)
[959] *Verdict by default*, IOWA STATE BYSTANDER (Des Moines), Apr. 13, 1900, 2; *Big judgment for malpractice*, CEDAR FALLS SEMI WEEKLY GAZETTE (IA), Apr. 17, 1900, 3