1979 WL 42764 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
January 16, 1979

***1** Honorable Donald V. Myers
Solicitor
Eleventh Judicial Circuit
County Courthouse
Lexington, South Carolina 29072

Dear Solicitor:
You have requested an opinion from this Office with respect to the following questions:
(1) with respect to a public hospital, such as Lexington County Hospital, should, or must, a hospital or its employees extract blood samples for blood alcohol analysis from a non-consenting defendant at the request of law enforcement officers or the coroner;

(2) with respect to a public hospital, such as Lexington County Hospital, would the hospital or an employee of the hospital be civilly liable for the non-negligent extraction of a blood alcohol sample from a patient without his consent, if this were done at the request of a law enforcement officer or the coroner.

This Office had a previous request for an opinion dealing with the almost identical questions. The request was submitted by a private attorney and this office declined to issue an opinion on that basis.

Our research discloses no authority which would directly deal with the question of a hospital's or its employees' liability under such circumstances. In Hospital Law Manual, Volume II, (Consents, Section 6-3), it is said:
There are no reported decisions on the question of the extent of hospital liability for obtaining blood from a person who has not given consent where the sample has been requested by a law enforcement officer.

Accordingly, no definitive answer to your question is possible at this time. Nevertheless, a number of factors, in our opinion, would most likely be considered by the courts upon future review.

Generally, the taking of a blood test without one's consent is considered a technical battery. The court in Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80, 90 (1940) stated that:
To subject a person against his will to a blood test is an assault and battery, and clearly an invasion of his personal privacy.

However, in Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the United States Supreme Court held that a state officer may require a blood test without a search warrant to be performed upon an accused without his consent following his arrest for driving under the influence of intoxicating liquors. See 1970 Op. A.G., No. 3019, p. 307; 1973 Op. A.G., No. 3441, p. 11. Implicit in the court's decision is that for Constitutional requirements to be fulfilled, the test must be performed by trained personnel in a proper medical environment. Accordingly, in order for the officer to obtain the blood sample in accordance with Schmerber, the procedure must be performed by medical personnel.

It has been generally stated that an agent is not relieved of liability from tortious conduct merely because he acted at the request or even the command of the principal, 'unless he is exercising a privilege of the principal to commit the act. If the agent is acting within his authority and pursuant to the direction of his principal, he is entitled to the protection of such immunities the principal would enjoy in the same circumstances . . ..' 3 Am.Jur.2d, Agency, Section 300, p. 660. Also see A.M. Collins and Co. v. Panama R. Co., 197 F.2d 650 (7th Cir. 1952); Harding v. Ohio Casualty Ins. Co., 230 Minn. 327, 41 N.W.2d 818 (1950).

***2** The police officer's right to obtain a blood sample without a warrant is based upon the theory that it is a search incident to a lawful arrest. Schmerber makes clear that the defendant must be under arrest. Your question ultimately concerns the extent to which the hospital, or its employees, can be held liable for the non-consentual taking of the blood sample.

It is possible that the hospital or its employees would have avilable the common law defense of good faith in any civil action as would the police officer. The Court in Hill v. Rowland, 474 F.2d 1374 (4th Cir. 1973), stated that the 'defense of good faith and probable cause are available to federal agents, and state and local police officers in civil suits against them for damages for unconstitutional arrest or search.' (See Pierson v. Ray, 386 U.S. 547; Bivens v. Six Unknown Agents of Federal Bureau, 456 F.2d 1339 (2nd Cir. 1972).) It is therefore possible that the hospital and its employees would also be able to rely on the good faith defense for the non-neglient extraction of a blood sample based upon the officer's representation of a lawful arrest. At the present time, however, it is simply not possible for this Office to give an opinion to the effect that the hospital or its employees would not be civilly liable for such action. It would simply not be appropriate for this Office to render such an opinion. I feel sure that the hospital has attorneys who can give them guidance in this area.

Our research has been unable to locate any authority for the proposition that a hospital or its employees must comply with an officer's request for assistance by giving a blood test. As you point out in your letter, these cases frequently involve such fundamental concerns of public health and safety, that the cooperation of the medical community is proper and indispensable.

The decision in Schmerber makes clear in my opinion the proposition that a county might require the county physician, upon the request of a law enforcement officer, to conduct the blood test.

As to your question concerning the authority of coroner's to require a blood test from living persons, it should be recognized that although the office of coroner is an ancient one and its functions are such that it is closely related to law enforcement, there is no authority for a coroner to order or forceably take a blood test from the survivor of an automobile accident or killing. 1957-58 Ops. Att'y Gen. dated September 17, 1957, page 73. However, Section 17-7-80 of the 1976 Code clearly does state the coroner's duty 'to take or cause to have taken by a qualified person such blood or other fluids of the victim as are necessary to a determination of the presence and presentage of alcohol or drugs.' (Emphasis added). Accordingly, appropriate test may be required of medical personnel by the coroner but only as to the victim.

This question has caused a great deal of concern. It is my understanding that it is a recurring problem. Some resolution of this matter should be attempted and it would certainly be an appropriate matter for the legislature to consider. It is my understanding that in addition to the question of liability, the hospitals and their employees are also concerned about the necessity for their personnel to make so many court appearances that it would deprive those hospitals of much needed personnel. I am satisfied that some sort of legislative solution to this problem can be found. In discussing this matter with the attorneys for the Hospital Association, I have found that they are willing to participate in working out some legislative solution which would protect them as well as allow the hospitals to assist law enforcement in this vital area.

***3** In conclusion then it is our opinion that there is no authority which would require a hospital or its employees to comply with an officer's request that a blood test be involuntary conducted on a defendant. The answer to the question of whether the hospital and its employees would be civilly liable is simply too uncertain for this Office to issue an opinion stating that they need not fear any liability. Such an opinion would not protect the hospital or its employees from liability in the event a court should disagree with our interpretation of the law. The hospital and its employees should follow the advice of their attorneys.

Very truly yours,

Emmet H. Clair
Deputy Attorney General

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