

**OPINION
54-112**

August 30, 1954 (OPINION)

STATE HOSPITAL

RE: Professional Staff - Malpractice

This office acknowledges receipt of your letter of August 19, 1954 requesting our opinion on several questions pertaining to the operation of the State Hospital, in particular as it pertains to the work of the doctors in connection with the treatment of the patients committed to your custody.

Your questions are as follows:

1. Does the professional staff of the State Hospital have any protection from the State of North Dakota in malpractice suits?
2. Can the doctors of the State Hospital treat patients with shock therapy, insulin therapy, drug therapy and other therapy without the consent of the patient or his parents if such treatment is to the best interest of the patient?
3. Does the State Hospital have the privilege of treating these patients against their will?
4. Can the State Hospital be sued for authorizing or giving treatments that are against their will?
5. Does the medical practitioner to whom the patient has been assigned have any responsibility to the patient other than to seeing that the patient is properly detained and given proper physical care?
6. Is the patient, by law, committed for proper care and treatment or for custodial care?

In commenting upon the general situation as it pertains to the patients and the responsibility of the State Hospital and its officers towards the patients, it might be well to first refer to some of the sections in our statutes.

Section 25-0312 of the N.D.R.C. of 1943 deals with the findings of the insanity board and the warrant for commitment. This refers, of course, to the county insanity board and the warrant for commitment issued by said board. In this connection it will be noted that in subsection 1 thereof the warrant shall: 1. State the finding of the board that the patient requires treatment or observation at the State Hospital and is a fit subject therefore and for custody in the hospital; * * * * 3. Authorized the superintendent of the state hospital to receive, treat, observe, and keep such person as a patient in such hospital.

From this section it will be noted that when a patient is committed to your institution, he is committed by the local board of insanity, first for treatment or observation and also for custody. Then further he is committed for the purpose to receive such treatment as may be necessary to promote the welfare and possible cure of said patient. In this connection, when we refer to treatment, the law naturally contemplates that such treatment shall be afforded and used as is commonly used and accepted by the specialists who are in charge of the patients for such treatment. If the officers in charge of the hospital which includes yourself have determined upon a course of treatment that is recognized by the profession for the treatment of the mentally ill patients, then such treatment is legitimate and proper. The law further provides that you shall determine whether such person is sane or insane and issue a certificate to that effect to the local insanity board. If he is declared insane he has no reasoning or power to determine as to what treatment he should receive and therefore no consent is necessary. If you determine that the person is sane by a proper subject for observation and treatment, his consent should be obtained like in ordinary treatment of patients generally.

Before proceeding further, let me direct your attention to section 25-0317 of the N.D.R.C. of 1943 wherein it is provided that when a patient has been properly committed to your institution, such commitment shall protect the superintendent and other officers of the hospital from all liability, civil and criminal, on account of the reception and retention of such person therein. Such detention shall be in accordance with the laws and by-laws regulating the hospital. This section, however, does not go so far as to protect employees of your institution from deliberate negligence or carelessness in the keep and care of patients therein. No law anywhere that I am aware of protects any person in any occupation or profession from the consequences of carelessness or deliberate negligence in the performance of any of the duties assigned to him.

Now further directing your attention to section 25-0331 of the N.D.R.C. of 1943, we find that abusing insane persons is a crime and such persons shall be liable in an action for damages. This last section, of course, specifically pertains to abuse and mishandling of patients by the employees of your institution.

Coming now to answering your specific questions, we will have to state that the State of North Dakota does not, by statute, protect any employee and in particular a professional employee such as a doctor from the result of his own negligence or carelessness which is in the medical profession nominally called malpractice. Malpractice has been defined in many different ways, but in general, malpractice by a physician consists of a negligent or unskilled performance of duties which are devolved and incumbent on him on account of his relation with his patient or of a want of proper care and skill in the performance of a professional act. Another definition might be used importing the same meaning, that it is a treatment in a manner contrary to accepted rules and with injurious results; hence any professional misconduct or lack of skill or fidelity in the performance of professional or fiduciary duties, etc.

From these definitions it may be deduced that no one of your medical

staff is guilty of malpractice if he uses the method of treatment prescribed by the hospital management, such as shock therapy, insulin therapy, and many other treatments, if in the performance of such treatment the doctor in charge is following the standard practice and is using ordinary and reasonable care and skill in the performance of his assigned duties.

It is further our opinion that the State Hospital entrusted with the keep and care and treatment of mentally ill patients has the legal right to use such recognized methods of treatment as is common and ordinarily used in mental institutions. This may be done with or without the consent of the patient.

In conclusion, let us state the problem thus: First, the institution of which you are the superintendent has, by law, been entrusted with the care and treatment of these mentally ill persons. In the performance of that obligation you have a right to use such methods as are recognized by the medical profession and other professions dealing with mentally ill patients. In other words, it is your obligation and your duty not only to detain the person in your custody, but to give him such care and such treatment as it is hoped will prove beneficial to the patient and in the hope that his mental capacity may be improved and that he may be restored to sanity.

LESLIE R. BURGUM

Attorney General