EDUCATION

Surgery without consent or miscommunication? A new look at a landmark legal case

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Schloendorff v Society of New York Hospital is regarded widely as a landmark in the history of informed consent because it is thought to have established individual self-determination as the legal basis of consent and respect for patient autonomy as the ethical basis of consent. For a century, it has been understood as a laparotomy done without consent when a pelvic mass was discovered unexpectedly in an anesthetized patient after an examination. We believe it was a case of surgeons failing to communicate properly with each other and their patient. To support this reinterpretation, we present evidence from the original medical and surgical records, letters of key participants in the case, and the trial court record. We also consider the case from the perspective of the modern culture of safety in gynecologic surgery. Contrary to what is commonly assumed, Ms Schloendorff lost her legal case, and her surgery might not have been performed at all had her clinicians known, understood, communicated, documented, and reaffirmed what the patient actually wanted. This new perspective on *Schloendorff* is important for gynecologic surgeons because it vividly documents the perils of implicit consent, delegating the obtaining of consent, and miscommunication among clinicians. The *Schloendorff* case underscores the constant need for continuous quality improvement to reduce medical errors and the risk of litigation by improving communication among surgeons.

Key words: consent, miscommunication, safety, Schloendorff

The year 2014 marks the centennial of Justice Benjamin Cardozo's opinion in *Schloendorff v Society of New York Hospital*, widely regarded as a landmark legal case in the history of informed consent.[1] In response to what most believe was surgery to remove a pelvic mass that was discovered in an already anesthetized patient without her consent, Cardozo wrote: "Every human being of adult years and sound mind has the right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages… except in cases of emergency where the patient is unconscious and where it is necessary to operate before consent can be obtained."[1] This sentence appears repeatedly in the informed consent,[2] biomedical ethics,[3] and gynecologic literature[4,5] to help to establish the legal basis of consent and to help to establish respect for patient autonomy as the ethical basis of consent.

This article presents a new, contemporary perspective on *Schloendorff* that demonstrates its enduring clinical relevance for gynecologic surgeons. We will show that the *Schloendorff* case is best interpreted as a warning about the perils of implicit consent, delegating responsibility for obtaining consent, and the resulting miscommunication among physicians, surgeons, and nurses. *Schloendorff* should not be considered a landmark case solely about physician paternalism, in which gynecologic surgery was performed for a patient's benefit but without her express consent. Instead, based on the historical record, *Schloendorff* should now be appreciated as one of the earliest cases to illustrate the clinical and legal perils that result when surgeons fail to communicate effectively with their colleagues and their patient.

In reporting the *Schloendorff* case, we rely on the trial court record, which is included in the appellate court ruling in this case.[6] We also rely on the medical[7] and surgical records[8] and other contemporaneous primary source materials in the Medical Center Archives of New York Presbyterian/Weill Cornell Medical Center.

The *Schloendorff* case: a tale of implicit consent, delegating responsibility for obtaining consent, and the resulting miscommunication

Lombardo[9] recently has made a convincing case, on the basis of a scholarly legal analysis of the 1911 trial court record and of Justice Cardozo's 1914 opinion for the Court of Appeals of New York, that *Schloendorff* was not directly about consent but was about the immunity from liability of a hospital as a charitable organization from the actions of its physicians, surgeons, and nurses. It also is not recognized commonly that the 56-year-old Ms Schloendorff lost both her uterus and her case and that the damages she claimed were the result of an embolism in the brachial artery of her left arm that developed after the operation. Ms Schloendorff alleged at the trial that, although she had given consent for an "ether examination" to determine the nature of her pelvic mass, she had told the house physicians and nurses explicitly that she did not want surgery.[6] After

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her unwanted hysterectomy, she sued the hospital and not the surgeons, claiming $50,000 in damages for the loss of her fingers and her pain and suffering. Ms Schloendorff, through her attorney, alleged that she had an oral contract with the hospital to which she had paid a $7-per-week consideration that she be treated according to her direction and that this had included an explicit instruction not to be operated on. Interestingly, she did not directly accuse the hospital or its physicians of battery. It is possible that her attorney claimed there was an oral contract between her and the hospital itself because he wanted to avoid the hospital's potential defense of charitable immunity, which effectively would have prevented her from suing the hospital for the resulting negligent treatment by the physicians and surgeons. It is also notable that the damages that were claimed did not include the loss of her fibroid uterus and ovaries as a direct result of the surgery (she was already 56 years old) but rather the significant pain and suffering she underwent as a result of an infection and gangrene in her arm, which developed some weeks later and resulted in the eventual loss of distal parts of some of her fingers.

In 1907 at Society of New York Hospital (SNYH), the medical and surgical services were separate in several dimensions. The 2 services were physically separate and had different professional staff. The medical and surgical records at SNYH, which were written in long hand on paper, appear to have been kept in different places as well. Crucially for the *Schloendorff* case, there were at least 3 physicians responsible for her care on the medical service and at least 3 surgeons when she was transferred to the surgery service. There is no documentation in the medical or surgical records that the patient agreed to an ether examination but refused any surgery. There is also no documentation that an ether examination was ever performed, although Ms Schloendorff did admit at trial that that was what she believed she had agreed to and what she was told would happen, at least by Dr Bartlett, who was the chief physician on the medical service. There is documentation in the medical record that indicates that at least one provider, Dr Martin, a house physician under Dr Bartlett, believed that the patient had in fact consented to surgery for what was preoperatively diagnosed as a likely fibroid uterus: "Wished operation for mass, which is just above the symphysis, size of orange, and rounded. Vaginal examination shows it to be connected to the uterus."[7] Although the physicians requested and received a surgical consult on their patient, there is conflicting testimony as to what the conclusion and advice given during that consult consisted of beyond the record of an examination in the chart on Jan. 26, 1907, five days before she was transferred to the surgery service. There is no documentation of physician-to-surgeon communication during or after the transfer on Jan. 31, 1907.

The patient's past medical and social history

At the time of admission on January 10, 1907, according to the trial court record, the patient was known as Mary Gamble, a 56-year-old "teacher of physical training, voice culture of reduction and development"[6] or voice coach. She had been living in San Francisco at the time of the 1906 earthquake, 9 months earlier, but had moved to New York to join her son because she was frightened by this experience during which she lost 2 sisters. She was admitted to the medical service of SNYH complaining of stomach pain and severe weight loss, which she attributed to anxiety resulting from the earthquake.

The patient's medical admission

During her medical admission, she testified in the trial court proceeding that she was treated conservatively with stomach washings and diet of "a little bit of raw egg and a little bit of milk and that is all."[6] The medical record documents that she received different diets, bismuth, gastric lavage, and enemas and that she had gained 11 pounds over the course of her 3-week admission to the medical service. At the end of her medical admission she was declared "cured of stomach pain" that had been caused by "acidity."[7]

Dr Bartlett was her attending hospital physician for her medical admission; his physical examination revealed the incidental finding of an abdominal mass, which she testified that she had been aware for some time. Dr Bartlett recommended a surgical evaluation of the lump. She was seen by Dr Stimson, the chief surgeon, and Dr Cottle, a house surgeon who was Dr Stimson's assistant. According to her testimony, Dr Stimson was not able to detect the lump because she was "too nervous, too rigid," and he said to some other doctors who were on rounds with him that he would have to do an "ether examination."[6] Dr Stimson did not explain what an ether examination was, and Ms Schloendorff testified that she "did not say anything to him."[6] The next time she saw Dr Bartlett she asked him what was meant by an ether examination and told Dr Bartlett explicitly that she did not want an operation. Dr Bartlett assured her that there would be no operation that the ether examination "would be very simple"[6] and would help to determine the nature of the lump. She testified that Dr Bartlett advised her that she could have surgery at another time. She packed and was ready to leave the next day. Both her landlord and her son testified that Ms Schloendorff had expected to be discharged in a few days; the landlord even produced a letter that was used as evidence of the patient's intention.

Dr Stimson testified that he saw Ms Gamble on the medical service on Jan. 26, 1907. He testified that he was able to perform a physical examination with one hand on her abdomen and the fingers of his other hand "in the lower bowel and vagina and got it between the two hands."[6] He testified that his diagnosis was a "multiple fibroid tumor."[6] He also testified that there was no need for an ether examination; his diagnosis had precluded the need for such an examination. An unsigned note in the medical record dated January 26 would support this testimony. Dr Stimson claimed that he said to Ms Gamble that he would perform surgery "if she wanted it removed." He added: "She did not say she was opposed to an operation."[6] Dr Bartlett, whose deposition testimony