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Grand Jury Report Censuring an Attorney Without Indictment

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FLORIDA NOTES

GRAND JURY REPORT CENSURING AN ATTORNEY WITHOUT INDICTMENT*

Facts: An attorney at law accused an assistant state's attorney of using perjured testimony and of other wrongdoings in the prosecution of a case against his client, and requested a grand jury investigation. The grand jury returned its report denying any wrongdoings and concluded that the charges made by the attorney and his client were baseless and unwarranted, constituting an attempt to cast suspicion upon the integrity of the grand jury and the office of the state's attorney. The report further suggested that the bar association conduct an investigation and provided for copies of the report to be furnished to all news media in Dade County. The attorney then moved to expunge certain portions of the report, which he alleged impugned his motives and held him up to scorn and criticism. The circuit court denied the motion to expunge. On appeal to the district court, *held*, affirmed: "We recognize that the great weight of authority and the rule followed in this state is that a grand jury has no authority to make a report criticizing individuals. We believe that where, as in this instance, the appellant was the moving party who initiated the proceedings after apparently giving his charges some publicity, a different rule applies." *Rubin v. Interim Report of Dade County Grand Jury*, 159 So.2d 918, 919 (Fla. 3d Dist. 1964).

Annotator's Comments: The majority of jurisdictions have held that it is not the function of a grand jury to single out, condemn, defame or castigate an individual by name or innuendo without the issuance of an indictment.[1] Prior to the decision in the instant case Florida had followed this majority position.[2] Thus, it has been held that the grand jury cannot by its presentments, stigmatize an individual, without allowing him the opportunity of a defense under the procedural safeguards of a trial.[3]

Nevertheless, some exceptions to this general rule have been recog-

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1. Application of United Elec. Radio & Mach. Workers, 111 F. Supp. 858 (S.D.N.Y. 1953); State v. Interim Report of Grand Jury, 93 So.2d 99 (Fla. 1957). See also *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590 (1961).

2. In State v. Clemmons, 150 So.2d 231 (Fla. 1963) the Supreme Court noted at page 234:

> The Grand Jury is not authorized to investigate the private affairs of individuals and it should not single out public officials for scurrilous condemnation without accompanying indictment.

State v. Interim Report of Grand Jury, 93 So.2d 99 (Fla. 1957); Owens v. State, 59 So.2d 254 (Fla. 1952). See also *In re* Report of Grand Jury, 152 Fla. 154, 11 So.2d 316 (Fla. 1943); *Grand Jury Presentments; Protection of the Vindicated*, 12 U. FLA. L. REV. 330 (1959).

3. Ryon v. Shaw, 77 So.2d 455, 457 (Fla. 1955).

nized.[4] The court in the instant case based its decision on one such exception, namely, that "he brought it on himself."[5] However, the facts in *Rubin* add a new ingredient to this exception, in that the attorney requested the grand jury investigation while in the process of representing a client.[6] Other jurisdictions have rejected completely the "he brought it on himself" exception.[7] When the grand jury acts beyond the scope of its authority, it is proper to order the report expunged, but it should be noted that this remedy is of little curative value since in most cases the damage already has been done.[8]

In Florida, disciplinary proceedings against attorneys are within the exclusive jurisdiction of the supreme court.[9] It has been held that the

4. Ryon v. Shaw, 77 So.2d 455 (Fla. 1955); Owens v. State, 59 So.2d 254 (Fla. 1952); *In re* Report of Grand Jury, 152 Fla. 154, 11 So.2d 316 (Fla. 1943); Hayslip v. State, 193 Tenn. 643, 249 S.W.2d 882 (1952). All jurisdictions prohibit a report which contains no more than a mere opinion. See, *e.g.*, Matter of Crosby, 126 Misc. 250, 213 N.Y. Supp. 86 (Sup. Ct. 1925).

5. The first decision to apply an exception to the censure of an individual who initiates an investigation was *Ex parte* Cook, 199 Ark. 1187, 137 S.W.2d 248 (1940). This exception was followed in Application of Knight, 28 N.Y.S.2d 353 (Sup. Ct. 1941) and Hayslip v. State, 193 Tenn. 643, 249 S.W.2d 882 (1952), in which the court noted at pages 884-85:

> Under such circumstances the movant to expunge having initiated the proceedings after publicizing them was in no position to object to the result of the investigation . . . .
>
> [I]t should become a discretionary matter for the trial court, as to whether or not the report or portions thereof . . . are expunged.

6. In *Ex parte* Cook, *supra* note 5, the petitioner had sought to be nominated for governor and as an offshoot of the election requested the investigation. In Application of Knight, *supra* note 5, an attorney requested a grand jury investigation alleging the mismanagement of an estate, but apparently he was not acting in a professional capacity while representing a client affected by such acts. In Hayslip v. State, *supra* note 5, the petitioner made public accusations concerning immoral practices at a public school, charging that the public officials permitted such acts allegedly committed by persons under the age of legal consent.

7. *Ex parte* Burns, 77 So.2d 912 (Ala. 1954); *In re* Grand Jury Report, 152 Md. 616, 137 Atl. 370 (1927); *In re* Healey, 161 Misc. 582, 293 N.Y. Supp. 584 (1937). See also the dissent of Chief Justice Neil in Hayslip v. State, 193 Tenn. 643, 249 S.W.2d 882 (1952). In *Ex parte* Faulkner, 221 Ark. 637, 251 S.W.2d 882 (1952), the court was concerned with a petition by members of a schoolboard for a grand jury investigation of school affairs. The grand jury presentment castigated Faulkner, a member of the board, because he made irresponsible statements. The court held, at page 824:

> It would seem that the weight of authority supports the proposition that it is improper for a Grand Jury to present with words of censure and reprobation a public official or other person by name without presenting him for indictment . . . .

8. Clein v. State, 52 So.2d 117 (Fla. 1950). See also People v. McCabe, 148 Misc. 330, 266 N.Y. Supp. 363, 367 (1933), where the court commented:

> A presentment is a foul blow. It wins the importance of a judicial document; yet it lacks its principal attributes—the right to answer and to appeal. No one knows upon what evidence the findings are based. An indictment may be challenged—even defeated. The presentment is immune. It is like a hit and run motorist. Before application can be made to suppress it, it is the subject of public gossip. The damage is done. The injury it may injustly inflict may never be healed.

Florida seems to follow People v. McCabe, *supra*, when attorneys are involved. See State Bar v. Nichols, 151 So.2d 257 (Fla. 1963) and State v. Interim Report of Grand Jury, 93 So.2d 99 (Fla. 1957). See also Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?* 55 COLUM. L. REV. 1102, 1112 (1955); *The Grand Jury—Its Investigatory Powers and Limitations*, 37 MINN. L. REV. 586, 604 (1953).

9. State v. Clemmons, 150 So.2d 231 (Fla. 1963); State *ex rel.* Florida Bar v. Calhoon,

Board of Governors of the Florida Bar Association and the local grievance committees are agents of the supreme court,[10] and that all disciplinary proceedings against attorneys are confidential.[11] Thus, it would appear that the mandate of the grand jury's report in the instant case "that the bar association conduct an investigation" is contrary to its later order "that copies of the report be furnished to . . . all news media in Dade County."[12]

Attorneys in Florida are sworn to observe the Canons of Ethics adopted by the supreme court of Florida. Canon 15[13] states that the lawyer "owes entire devotion to the interest of the client . . . . No fear of judicial disfavor or public unpopularity should restrain him . . . ." Canon 29[14] provides that the "counsel upon the trial of a cause in which perjury has been committed owes it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities."

In the instant case, the attorney, during the course of his representation of a client, charged the prosecution with using perjured testimony. Thus, by stating his belief that there has been perjured testimony pursuant to the standards prescribed by the canons, the Florida attorney risks having his professional reputation injured by a possible criticism from the grand jury if it finds the evidence insufficient to warrant an indictment.[15]

If the supreme court grants certiorari in the instant case it will have to choose between two alternatives: (1) following the district court's decision, or (2) reaffirming *State ex rel. Brautigam v. Interim Report of*

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102 So.2d 604 (Fla. 1958), in which the court noted that the lawyer is an essential component of the administration of justice; State *ex rel.* Florida Bar v. Evans, 94 So.2d 730 (Fla. 1957); Application of Harper, 84 So.2d 700 (Fla. 1956); INTEGRATION R. FLA. BAR, art. XI.

10. State *ex rel.* Florida Bar v. Rubin, 142 So.2d 65 (Fla. 1962).

11. INTEGRATION R. FLA. BAR, art. XI, § 5(h). See also Murrell v. Florida Bar, 122 So.2d 169 (Fla. 1960); Dade County Bar Ass'n President's & State Attorney's Special Comm., 116 So.2d 1, 4 (Fla. 1959), where the court commented:

> Moreover, traditional concepts of due process and fair play, so important in our scheme of government clearly comprehend a full and complete investigation before charges are preferred against an officer of the court. In the profession of law, a good reputation is the practitioner's most valuable asset.

12. Rubin v. Interim Report of Grand Jury, 159 So.2d 918, 919 (Fla. 3d Dist. 1964).

13. CODE OF ETHICS—RULE B, § I.

14. *Ibid.*

15. In Hayslip v. State, 193 Tenn. 643, 249 S.W.2d 882, 885 (1952) Chief Justice Neil noted in his dissenting opinion:

> Every citizen who now voluntarily goes before the Grand Jury and undertakes to give it any information relating to criminal misconduct does so at the peril of being defamed, in an official report, when the evidence is not deemed sufficient upon which to have an indictment.

If the above statement is true as applied to an individual, it is even more on point when applied to an attorney in Florida, who is sworn to follow Canons 15 and 29 as well as the additional CODE OF ETHICS—RULE B, § II, which states that no person admitted to practice law in Florida should "fail to offer to exclude, or omit to disavow, disclaim, and seek the elimination, from the case of any false or forged evidence or testimony, promptly upon learning that it is false or forged."

Grand Jury,[16] which, in discussing the effect of a report on an attorney, *held*: "It is stated that the report does not charge the principals with a crime . . . . But it at least convicted them . . . inevitably blackening their reputations and destroying them in their profession."[17]

It is submitted that grand jury reports which criticize the conduct of attorneys should be carefully scrutinized before their release to the public, since the duty of an attorney to his client might well be misconstrued by the ordinary layman sitting on a grand jury. In all cases, the Bar Association should be an active participant prior to any public release of findings by the grand jury. In any event, the following disturbing questions remain unanswered:

(1) Should the grand jury have authority to file reports criticizing individuals without indictment, by virtue of its function to protect the public interest? And, should not such authority emanate from the legislature?

(2) In the event that Florida follows the "he brought on himself" exception, should the report be automatically expunged if the Florida Bar Association exonerates the attorney?

(3) Since the publication of a grand jury report criticizing an attorney is tantamount, in effect, to a public reprimand, should not this disciplinary measure be within the exclusive jurisdiction of the Florida Bar Association as an arm of the supreme court?

WILLS—POWER TO DESIGNATE CHARITIES GIVEN TO EXECUTORS MAY BE EXERCISED BY ADMINISTRATOR C.T.A.

Facts: The testatrix provided for a bequest of four thousand dollars to a home for boys and an equal sum to a home for crippled children. The homes were to be selected and designated by the executors of the estate, who were appointed in another clause of the will. The county judge's court found that one of the executors had died and the other was ineligible to serve, and appointed an administrator c.t.a. The court also appointed a guardian ad litem who was to represent the unknown charities. The residuary beneficiaries contested the authority of the administrator c.t.a. to select charities, alleging that the power granted in the will was personal. The court found that the power was given to the executors *virtute officii*. On appeal the district court, *held*, affirmed: "The testatrix has evinced a general charitable intent. There is nothing in the will to

16. 93 So.2d 99 (Fla. 1957).
17. *Id.* at 102.

indicate that the testatrix intended that only the two persons named should make the selection and designation of the particular homes to benefit from the will." *In re Serrill's Estate*, 159 So.2d 246, 249 (Fla. 2d Dist. 1964).

Annotator's Comments: In each decision involving the legal effect of a testamentary clause granting to the executor some choice as to distribution, there are two steps in the process of analysis. The court will first classify the clause as creating or attempting to create either a trust, power, or gift.[1] Having chosen the class which applies, the court will then proceed to give effect to the testamentary disposition solely in terms of the law governing that class. A bequest or devise of property to an executor is presumed to be made to him in his official capacity in the form of a power, or in trust.[2]

There is no doubt that the use of the trust permits the executor to select the ultimate takers, but if the devise were interpreted as lacking a definite beneficiary it would be invalid[3] and the property would pass to the residuary legatees.[4] On the other hand, the creation of a discretionary power of appointment does not impose the requirement that the beneficiaries be definite, and thus clearly could be employed to carry out the testator's intent;[5] but this renders discretionary the exercise of the power, and thereby fails to impose upon the executor the obligation to make a selection.[6] If the power is coupled with a *duty* to exercise it, a power in trust is created, and consequently is subject to the definite beneficiary requirement.[7] In order to carry out fully the testator's wishes, the executor must be obligated to exercise the power of selection, yet as a trust or a power in trust (which are the only vehicles for imposing the obligation), the devise may be totally void for want of a definite beneficiary. In such cases, the devise may be valid only if interpreted as a power, in which case the applicable law does not require that the executor

1. Scott, *Trusts for Charitable and Benevolent Purposes*, 58 HARV. L. REV. 548 (1945); *Devise to Executor for Further Distribution—Application of Trust and Power Doctrines*, 56 MICH. L. REV. 1167 (1958).

2. Thomas v. Anderson, 245 Fed. 642 (8th Cir. 1917); Tunis v. Dale, 97 N.H. 420, 89 A.2d 760 (1952); *In re* Brown's Estate, 122 N.Y.S.2d 640 (1953); RESTATEMENT, PROPERTY § 323, comment *e* (1940). Cases on this point are collected in 104 A.L.R. 114 (1936), and in 151 A.L.R. 1438 (1944).

3. Hazard v. Bacon, 42 R.I. 415, 108 Atl. 499 (1920); Markhom v. Tibbets, 79 F. Supp. 47 (S.D.N.Y. 1947)

4. RESTATEMENT, PROPERTY § 323, comment *e* (1940).

5. Watt's Estate, 202 Pa. 85, 51 Atl. 588 (1902); *In re* Rowland's Estate, 73 Ariz. 337, 241 P.2d 781 (1952).

6. Clark v. Campbell, 82 N.H. 281, 133 Atl. 166 (1926); *In re* Rowland's Estate, 73 Ariz. 337, 241 P.2d 781 (1952).

7. The trust will be valid only if the testator has met the requirements imposed in the case of Morice v. The Bishop of Durham, 10 Ves. 522, 32 Eng. Rep. 947 (1805), that is, by designating a definite trust beneficiary. Failure in this respect totally invalidates the devise, and the executor is said to hold the corpus on a resulting trust for the heirs or next of kin of the testator. See Tunis v. Dole, 97 N.H. 420, 89 A.2d 760 (1952).

exercise his discretion. This is the interpretation adopted by the court in the instant case.[8]

It should be noted that the approved revision of the Restatement of Trusts allows the trustee to carry out the terms of a trust made unenforceable, either because it is for an indefinite class of beneficiaries or because it is for an indefinite purpose, provided that (1) the trustee is directed or authorized by the terms of the trust to select the ultimate takers from the class or the purpose, and (2) the class or the purpose are not entirely indefinite.[9] Some courts have allowed the executor to select the trust beneficiaries, when the devise gave sufficient directions so that the court could determine whether a given selectee came within the named purposes.[10] However, the majority of jurisdictions have failed to accept the Restatement view.

Charities are given different treatment.[11] When a clear intention is expressed that a fund or other property shall be given to charity, it is held to be immaterial that the objects are not defined. The principle is that the court treats charity as the substance, while the particular disposition is considered the mode of the gift. A distinction is drawn between the general charitable intention, which must be clear, and the mode of executing it, which, though vague and indefinite, does not affect the validity of the gift.[12] A power to determine the particular object to be benefitted may be delegated; thus a bequest to a definite class of charitable objects, coupled with the appointment of a person to select the objects, is not void for uncertainty.[13]

The Florida courts do recognize the *cy pres* doctrine. However, there was no necessity to refer to it in the instant case. According to the *cy pres* doctrine, when a testator manifests in his will a general charitable intention as well as a specific charitable purpose which cannot be executed in

8. *In re* Serrill's Estate, 159 So.2d 246, 248 (Fla. 2d Dist. 1964). But see Ames, *The Failure of the Tilden Trust*, 5 HARV. L. REV. 389, 395 (1892) in which the author commented that an unenforceable trust might nevertheless be given limited legal effect. Ames' doctrine is intended to apply only to the case where the class is partially definite; in such event, the executor is permitted to appoint solely persons whom the court determines to fall definitely within the class. See also Dulle's Estate, 218 Pa. 162, 67 Atl. 49 (1907); *In re* Gestetner Settlement, 1 ch. 672 (1953).

9. RESTATEMENT SECOND, TRUSTS §§ 1 122, 123 (1957).

10. Cochran v. McLaughlin, 128 Conn. 638, 24 A.2d 836 (1942); Feinberg v. Feinberg, 131 A.2d 658 (Del. Ch. 1957); Dulle's Estate, 218 Pa. 162, 67 Atl. 49 (1907). But see Dormer Estate, 348 Pa. 356, 35 A.2d 299 (1944) in which two executors were found to have a power which was general, except that they could not appoint to themselves. Unfortunately, the court held that upon the death of one executor the power was destroyed.

11. Where the power of selection of the beneficiaries is attached to the office rather than to individuals selected by the testator as his executors, the power may be carried out by anyone who acts as executor. 10 AM. JUR. *Charities* § 31 (1937). See also RESTATEMENT, PROPERTY § 318, comment *k* (1940), and RESTATEMENT, TRUSTS § 396 (2d ed. 1959).

12. WILLIAMS, THE LAW RELATING TO WILLS 651 (2d ed. 1961).

13. *Id.* at 658 ("Delegation of Power to Determine Objects").

accordance with the exact terms prescribed in the will, the courts will apply the trust to carry out the testator's intent as nearly as possible, consistent with the specific charitable purpose.[14] In essence, the doctrine as applied to charitable gifts is one of approximation and liberal interpretation, designed to save the gift for charity and at the same time to carry out the charitable intent of the donor.[15]

In the instant case, the court was not called upon to deal with the problems of the uncertain beneficiary, since the ultimate recipient was a charitable institution exempt from the requirement of definiteness. Therefore, the annotator's above comments on related matters serve chiefly to illustrate the ancillary questions which might arise in future cases in Florida.

In the instant case, the court found that the power to designate charities was given to the executors *virtute officii*; the power was not personal and could be exercised by the person holding the office, *i.e.*, the administrator c.t.a.[16] As a general rule, where a power is conferred on two or more persons, the power is given as an expression of special confidence in their combined judgments. Therefore, the concurrence of all is necessary for a valid exercise of the power, unless the power is specifically granted to the donees jointly or severally. However, when a power is granted to persons *virtute officii*, and not as individuals, it may, on the death of one or some of them, be exercised by the survivor or survivors. It has been held that when the power is impersonal, or where the testator has not specifically provided that it shall be exercised solely by a named executor, it is exercisable by any person succeeding to the office to which the power is attached;[17] however, the use of the word *executors* does not per se raise the presumption that the power of appointment is impersonal.[18] In the instant case, however, the court concluded that "there is nothing in the will to indicate that the testatrix intended that only the two persons named should make the selection."[19]

The following questions should be noted as requiring further clarication:

> (1) Should not the concepts of power and trust be employed, not as ends in themselves, but as means of effectuating the desires of the testator, thus forcing the executor or the administrator c.t.a. to make a selection?

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14. Sheldon v. Powell, 99 Fla. 782, 128 So. 258 (1930); Lewis v. Gaillard, 61 Fla. 819, 56 So. 281 (1911). See 57 AM. JUR. *Wills* § 1146 (1947).

15. Christian Herald Ass'n v. First Nat'l Bank, 40 So.2d 563 (Fla. 1949); Lewis v. Gaillard, 61 Fla. 819, 56 So. 281 (1911).

16. 72 C.J.S. *Powers* § 35 (1951).

17. Bratton v. Trust Co., 191 Ga. 49, 56, 11 S.E.2d 204, 208 (1940).

18. *Id.* at 210.

19. *In re* Serrill's Estate, 159 So.2d 246, 249 (Fla. 2d Dist. 1964).

(2) Would the testator's intent have been construed in this same manner, if the ultimate recipients were non-charitable institutions, or was the *virtute officii* conclusion indirectly influenced by the favored treatment given to charities in Florida?

PHYSICIANS AND SURGEONS—PHYSICIAN'S DUTY TO WARN OF POSSIBLE ADVERSE RESULTS OF PROPOSED SURGERY IS A QUESTION FOR THE JURY TO DETERMINE

Facts: Plaintiff, a nine-year-old boy, was suffering from dizzy spells. The boy's mother, upon recommendation, took the boy to a neurosurgeon, who suggested the necessity of the boy's undertaking an arteriogram, a dangerous exploratory operation in which three per cent of the cases are known to result in death or serious injury. The subsequent operation resulted in the partial paralysis of the boy. The circuit court entered a directed verdict for the neurologist. On appeal, the district court, *held*, reversed and remanded: "Here there was evidence the parents were not informed by [the defendant physician] of the dangers incident to an operation, and there was testimony by neurosurgeons it was customary to inform those who would make such a decision that the operation was a dangerous procedure." *Bowers v. Talmage*, 159 So.2d 888, 889 (Fla. 3d Dist. 1963).

Annotator's Comments: There have been numerous treatises dealing with the question of a patient's consent to medical procedures.[1] In the past, malpractice cases in which the absence of consent was the major issue were decided on the theory of a battery,[2] but the recent practice has been to decide the question on the basis of the required standard of conduct of a reasonable and prudent doctor of the same school as the defendant doctor, acting under similar circumstances.[3] Courts have recognized three forms of consent: express,[4] implied-in-fact,[5] and implied-

1. Kelly, *The Physician, The Patient and The Consent*, 8 KAN. L. REV. 405 (1960), is a review of malpractice cases dealing with consent of the patient; Lund, *The Doctor, The Patient, and the Truth*, 19 TENN. L. REV. 344 (1946); McCoid, *A Reappraisal of Liability for Unauthorized Medical Treatment*, 41 MINN. L. REV. 381 (1957); Powell, *Consent to Operative Procedures*, 21 MD. L. REV. 189 (1961); Annot., 79 A.L.R.2d 1028 (1961).

2. Zaretsky v. Jacobson, 99 So.2d 730 (Fla. 3d Dist. 1958); Chambers v. Nottebaum, 96 So.2d 716 (Fla. 3d Dist. 1957); Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906); Williams v. Menehan, 191 Kan. 6, 379 P.2d 292 (1963); Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905); Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914); Rolater v. Strain, 39 Okla. 572, 137 Pac. 96 (1913).

3. Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960); McCoid, *A Reappraisal of Liability for Unauthorized Medical Treatment*, 41 MINN. L. REV. 381 (1957).

4. Farver v. Olkon, 40 Cal. 2d 503, 254 P.2d 520 (1953).

5. McGuire v. Rix, 118 Neb. 434, 225 N.W. 120 (1929).

in-law.[6] Recently the courts have become increasingly aware of the requirement that the consent be based upon adequate information as to possible consequences.[7]

In *Bong v. Charles T. Miller Hospital*,[8] the supreme court of Minnesota recognized that a patient was entitled to know the probable facts and results of the contemplated surgery when no immediate emergency existed. In *Mitchell v. Robinson*[9] a patient was given insulin treatment for emotional illness; the court commented that convulsions were frequent consequences of this treatment and could result in fractures. The court subsequently held that the doctors owed their patient, who was in possession of his faculties, the duty to inform him generally of any serious collateral hazards.[10]

The case that best illustrates the development of the "informed consent" theory of recovery is *Natanson v. Kline*.[11] In that case the plaintiff, suffering from cancer of the breast, had a left mastectomy[12] performed. Thereafter the plaintiff was given radiation therapy and sustained injuries from radiation alleged to have been given in an excessive amount. The plaintiff claimed that the nature and consequences of the risks of the therapy were not properly explained to her. The court held that the physician's duty to disclose to a patient the risks of a proposed treatment depends upon the circumstances, and the general practice followed in such cases by the medical profession in the locality. In substance, the decision holds that a doctor may be liable on the theory of *negligence*, even though the patient voluntarily submitted to the treatment and even though the treatment was properly administered.[13]

The cases discussed above are the first to impose a concrete and specific duty upon a physician to disclose a proposed treatment's inherent risks.[14] *Mitchell* places a general duty upon physicians to inform patients of possible serious collateral hazards. Whether this duty has been fulfilled is a question of fact for the jury to decide without the aid of expert testi-

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6. Luka v. Lowrie, 171 Mich. 122, 136 N.W. 1106 (1912).

7. DiFilippo v. Preston, 173 A.2d 333 (Del. 1961); Natanson v. Kline, 186 Kan. 393, 350 P.2d 1096 (1960); Mitchell v. Robinson, 334 S.W.2d 11 (Mo. 1961).

8. 251 Minn. 427, 88 N.W.2d 186 (1958).

9. 334 S.W.2d 11 (Mo. 1960); Annot., 79 A.L.R.2d 1017 (1961).

10. Mitchell v. Robinson, 334 S.W.2d 11, 19 (Mo. 1960).

11. 186 Kan. 393, 350 P.2d 1093, *opinion clarified*, 187 Kan. 186, 354 P.2d 670 (1960). See also Salgo v. Leland Stanford, Jr., Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (1957); Williams v. Menehan, 191 Kan. 6, 379 P.2d 292 (1963). *Contra*, Hunt v. Bradshaw, 242 N.C. 517, 88 S.E.2d 762 (1955).

12. Amputation of the breast. See STEDMAN, MEDICAL DICTIONARY, 1961.

13. On the state of the record Dr. Kline failed in his legal duty to make a reasonable disclosure to the appellant, who was his patient. Natanson v. Kline, 354 P.2d 670, 673 (Kan. 1960). For a result which differs because of the facts in the case, see Roberts v. Wood, 206 F. Supp. 579 (S.D. Ala. 1962).

14. It is likely that the high degrees of risk present in each of the treatments motivated the courts in their holdings. The *Mitchell* rule is in fact limited to high risk situations.

mony. *Natanson* limits the duty to a diclosure of those facts necessary to form the basis of an intelligent consent by the patient. The sufficiency of the information disclosed is a question for the jury, but the Kansas court has ordered that expert medical testimony must be utilized to determine whether a particular disclosure comports with reasonable professional practice. However, the language in *Natanson* seems to indicate that the complete failure to disclose establishes a prima facie breach of duty by the physician to his patient.[15]

In *DiFilippo v. Preston*,[16] the plaintiff was recommended to the defendant for thyroid[17] surgery. The surgeon failed to warn the patient about the possible paralysis of the vocal cords, which would result in the patient's loss of voice. Undisputed testimony proved that injuries of this type occur about two per cent of the time, but the supreme court affirmed a directed verdict for the defendant on the ground that the custom of the medical profession to warn must be established by expert medical testimony. The court found that all the experts who testified were in agreement that it was not the practice of the surgeons in the area to warn in similar cases.

In Florida, prior to the case of *Atkins v. Humes*,[18] the judicial mind considered medical knowledge far beyond the comprehension of the average person.[19] The court in *Atkins* held that in many instances jurors are capable of determining without the aid of expert testimony that the negligence of a doctor was the proximate cause of the injury. As a result of this decision it is enough to prove that, more likely than not, the doctor was negligent.

Chambers v. Nottebaum[20] was an action by a patient against a physician for trespass to the person. The plaintiff sought damages for the permanent partial paralysis of one leg allegedly caused by the use of a spinal anesthetic administered against the patient's express instructions. The court affirmed a judgment for the plaintiff and found that the jury was correctly charged to the effect that a doctor may operate only with permission and within the limits of the express instructions given by the patient as to the type and manner of the operation, except when emergency situations require a deviation from this general rule.

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15. See Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520 (1962); Govin v. Hunter, 374 P.2d 421 (Wyo. 1962).

16. 53 Del. 539, 173 A.2d 333 (1961).

17. Denoting a gland and a cartilage of the larynx—STEDMAN, MEDICAL DICTIONARY, 1961.

18. 110 So.2d 663 (Fla. 1959). Prior to this decision only three Florida cases considered a doctor analogous to any other type of expert: Gulf Life Ins. Co. v. Shelton, 155 Fla. 586, 21 So.2d 39 (1945); Woolin & Son, Inc. v. McKain, 110 So.2d 92 (Fla. 3d Dist. 1959); and Kovacs v. Venetian Sedan Serv., Inc., 108 So.2d 611 (Fla. 3d Dist. 1959).

19. Foster v. Thornton, 113 Fla. 600, 152 So. 667 (1933).

20. 96 So.2d 716 (Fla. 3d Dist. 1957) and see cases cited therein.

Much closer to the instant case is *Zaretsky v. Jacobson*.[21] In that case, the plaintiff, suffering from a paralysis of the lower part of his body, alleged that he had agreed to submit to a hernia operation. Instead, an aortagram was performed, which the plaintiff also claimed had been negligently conducted. The court reversed a summary judgment for the defendant on the ground that the issue of whether the plaintiff had consented to the diagnostic procedure was a question of fact which precluded the rendition of a summary judgment.

The instant case was brought as an action for trespass to the person, on the theory of a lack of *informed consent* to an operation. A condition precedent to the granting of relief is the determination of whether the injury which the plaintiff suffered was a result of a collateral hazard of the operation, of which he was not aware and the existence of which the doctor was under a duty to reveal. There are two views on this question. Some courts follow *Mitchell v. Robinson*,[22] holding that the doctor has the duty to reveal to his patient all foreseeable collateral effects. Others follow *Natanson v. Kline*,[23] and hold that the doctor has only a duty to advise when good medical practice—defined by the custom of the locality where the operation or treatment is to take place—so requires. This latter view requires the presentation of medical testimony to determine the standard of conduct of the local physician. The instant case falls within both views, but leaves unanswered the following questions which the courts probably will be called upon to resolve:

(1) Is it within the purview of the *Atkins* decision that the jury may determine, without the aid of medical testimony, not only the question of proximate causation, but also the standard of care required of a physician?

(2) Should not the plaintiff's burden of proof in informed consent cases be limited to proving that the resulting injury was a medically foreseeable hazard, and that such hazard was serious in nature?

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21. 99 So.2d 730 (Fla. 3d Dist. 1958).
22. *Supra* note 9.
23. 186 Kan. 393, 350 P.2d 1093, *opinion clarified*, 187 Kan. 186, 354 P.2d 670 (1960).