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Professional Liability

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PROFESSIONAL LIABILITY

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The subject of this article, "Professional Liability," is very broad and could include not only malpractice liability, but also other liabilities of the physician and surgeon. Instead of attempting to discuss so broad a field, it will be confined to the subject of liability for malpractice and tresspass and particularly recent trends in court decisions relating to the liability of the physician and surgeon therefor.

Before discussing cases which seem to indicate a possible trend in the liability of doctors for claimed malpractice, it may be well to set out generally the basic legal principles heretofore existing in the relationship of physician and patient.

When a patient solicits the services of a physician or surgeon, and the physician or surgeon takes charge of the case, it has long been established that he impliedly represents that he possesses and will exercise the reasonable or average degree of learning and skill which is ordinarily possessed and exercised by physicians or surgeons of ordinary and average learning. In addition, if the physician or surgeon holds himself out as having special knowledge and skill in treatment or in the performance of special kinds of surgery, he is bound to exercise not merely the degree of skill possessed by general practitioners, but that special degree of skill and knowledge possessed by those who are specialists in the treatment of such ailments.

The courts are not entirely in accord in setting up the standard for determining whether the physician or surgeon has exercised the proper degree of care or skill. Some courts have restricted it to the same locality or vicinity. Other courts have tested his care and skill by that exercised by the same class of practitioners in similar localities. With the general dissemination of medical knowledge, with the publication of medical periodicals and with the meeting of medical associations, it has come to be recognized that the standard of care and skill is almost universal. As the Virginia Court expressed it: "He . . . [the physician] impliedly represents that he is keeping abreast of the literature and that he has adopted those techniques which have become standard in his line of practice."[1]

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[1] Reed v. Church, 175 Va. 284, 293, 8 S.E.2d 285, 288 (1940).

The rule has long been recognized that if a physician or surgeon employs ordinary skill and care in arriving at his diagnosis, he will not be liable in damages, even though the treatment is not proper for the condition that actually exists. The Nebraska Court supported this rule in *Van Boskirk v. Pinto*.[2]

Likewise, the law recognized that there are different schools of medicine and the treatment of the physician or surgeon is to be tested by the principles and practices of his particular school. If he follows the accepted practice of his school, he will not be guilty of negligence. But this does not necessarily exclude the testimony of physicians or surgeons of other schools, if it can be shown that the principles of the two schools concur. This provision has led to some difficulties, such as osteopaths testifying that their training and practices are the same as allopaths, thereby qualifying themselves to testify against a physician or surgeon of the regular school of medicine.

Universally, it has been held that where a physician is employed to attend a patient, the relation continues until it is ended by consent of the parties, or revoked by the dismissal of the physician, or until the services are no longer needed. The physician is required to use reasonable care to determine when to discontinue his treatment, and when he terminates his employment without notice to the patient and without affording the patient an ample opportunity to secure other medical attendance, he abandons the patient and may be liable in damages.[3] In other words, a physician or surgeon takes a patient for the "duration of the war," and while he can be discharged, he cannot discharge the patient.

Generally, also, the rule has been that a physician or surgeon may be liable for the malpractice of his partner, or for injury resulting from the negligence of assistants, agents or servants employed by him. But he is not legally liable for the negligence of nurses or interns or employees of a hospital, unless the hospital is owned or controlled by him.[4]

In connection with the performance of operations, it has been generally accepted that a surgeon performing an operation in an emergency, or with the consent of the patient or those authorized to act for him, or under circumstances whereby the consent of the patient is presumed or implied, is not liable in damages if he exercises ordinary care and skill. Voluntary submission to an

2 99 Neb. 164, 155 N.W. 889 (1915).

3 Stohlman v. Davis, 117 Neb. 178, 220 N.W. 247 (1928).

4 Broz v. Omaha Maternity & General Hospital Ass'n, 96 Neb. 648, 148 N.W. 575 (1914).

operation has always implied consent. But, an operation performed without the consent of the patient constitutes an assault for which damages may be recovered.[5]

In a malpractice suit against a physician or surgeon, the claimant must prove:

1. That the relation of patient and physician or surgeon existed. This relation may exist gratuitously and there is no distinction between "free" patients and "pay" patients. If the relationship is established, the physician or surgeon impliedly warrants that he is qualified.

2. The claimant must establish his case by a preponderance of the evidence, and must show that the physician or surgeon departed from his duty in some respect.

3. The claimant must prove that his damage proximately resulted from the negligent acts of commission or omission of the physician or surgeon.[6] Generally, it is believed that suits against physicians or surgeons are difficult, because the doctors stand together, that, like husband and wife, they fight among themselves, but when anyone attacks either of them, they join against the adversary. The converse is true. In a malpractice case, all that a claimant needs to do to prove proximate cause is to establish, by competent evidence, that any one act of the physician or surgeon, over possibly a long course of treatment, resulted in the damage.

Previously, it has always been recognized that the claimant must establish actual negligence; that a bad result is not evidence of negligence. To establish failure to use proper treatment on the part of a physician or surgeon, expert evidence of other physicians or surgeons would be required. Long ago, Mr. Chief Justice Taft, while Federal Circuit Judge, laid down this rule in *Ewing v. Goode*,[7] which became an established landmark. In that case it was claimed that there was malpractice in removing a cataract from the plaintiff's eye. Judge Taft said:

> If the maxim, "Res ipsa loquitur." were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the "ills that flesh is heir to" . . . . [I]t is

[5] See Annot., 129 A.L.R. 1370 (1942).
[6] Winters v. Rance, 125 Neb. 577, 251 N.W. 167 (1933).
[7] 78 Fed. 442 (C.C.S.D. Ohio 1897).

> not enough to show the injury, together with expert opinion that it might have occurred from negligence and many other causes. *Such evidence has no tendency to show that negligence did cause the injury.* When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither.[8] (Emphasis added.)

The Nebraska Supreme Court approved this rule in *Tady v. Warta.*[9]

The foregoing, while not constituting all the established principles governing the relationship between physicians and surgeons and patients, have long been recognized as the settled rules of the relationship. Physicians and surgeons have come to know them and have governed themselves accordingly. Insurance policies have been written with the view of affording protection to physicians and surgeons under circumstances such as might arise under such established legal principles.

In the last twenty years, malpractice suits, over the country generally, have been rather numerous. There appear to be some departures from some of these established principles. Here are some illustrations:

In a Pennsylvania case, it would seem that a new landmark was established.[10] This case had to do with the question of agency. The plaintiffs consulted the defendant, who was an obstetrician, to attend the wife during pregnancy and to deliver the child. The doctor accepted the employment. A Caesarean operation was necessary. The doctor directed that a certain intern should be his assistant and take care of the baby after delivery. Upon delivery of the child, it was turned over to the intern. The plaintiffs claimed that silver nitrate solution negligently administered by the intern destroyed one eye and permanently damaged the other. The trial court directed a verdict for the doctor, but it was reversed on appeal.

The plaintiffs did not claim that the doctor was personally

[8] Id. at 443-44. In a headnote to the decision, the requirement for the use of expert testimony was pointed out explicitly. The headnote stated:

> Upon questions involving a highly specialized art, with respect to which a layman can have no knowledge at all, the court and jury must be dependent upon expert evidence; and, when there is no such evidence to support an allegation depending upon such a question, there is nothing to justify submitting the issue to the jury.

[9] 111 Neb. 521, 196 N.W. 901 (1924).

[10] McConnell v. Williams, 361 Pa. 355, 65 A.2d 243 (1949).

guilty of negligence. The question was whether the doctor could be held, under the doctrine of respondent superior, for the negligence of the intern, an employee of the hospital. This question was held to be one for the jury. The doctor had admitted, under cross-examination, that all of the persons in the operating room were subject to his control or right of control with regard to the manner in which they performed their duties. The Pennsylvania court said:

> In determining whether the intern was defendant's servant at that time, the mere fact that he was then in the general employ of the hospital would not prevent the jury from finding that he was also at that same time the servant of defendant if he was then subject to his orders in respect to the treatment of the child's eyes with the silver nitrate solution.[11]

Two subsequent Pennsylvania cases have only somewhat limited the effect of the rule laid down in the *McConnell case*.[12] The inherent dangers of this kind of a situation remain apparent.

Recalling the decision of Judge Taft in *Ewing v. Goode*, which established the general rule that the doctrine of res ipsa loquitur is not applicable in malpractice cases, attention is now directed to some exceptions to that rule. Through the years, there have been some departures, such as in the case of x-ray burns, where the machine is entirely under control of the physician or a technician. In a California case, plaintiff was being operated upon for appendicitis. He came out of the operation, so he claimed, with an injury to his right shoulder and an apparent paralysis of the right arm. The plaintiff's medical experts and an independent expert appointed by the court, all testified that in their opinion the injury was traumatic. Defendant's experts were of the opinion that the condition was a systemic product of some infection. All of the doctors and nurses present at the operation gave evidence that nothing occurred during the operation which could possibly produce the injury. In fact, nothing occurred at all, except the operation. The court held that as it appeared that an injury to a healthy part of the body had been incurred during the operation the facts were sufficient to make a prima facie case

[11] Id. at 366, 65 A.2d at 248.

[12] Sacchi v. Montgomery, 365 Pa. 377, 75 A.2d 535 (1950), stated in dictum that negligent post operative care of an intern and nurse would not be imputed to the surgeon. Shull v. Schwartz, 374 Pa. 554, 73 A.2d 402 (1950) held a surgeon was not liable for the failure of an intern to remove two stitches from an incision following an operation where the intern had been directed to remove the stitches by the surgeon.

against the defendants, under the rule of res ipsa loquitur.[13] Upon a second appeal of the case, a judgment for the plaintiff was affirmed.[14]

In a subsequent California case, the doctrine of res ipsa loquitur was applied where the physician intended to remove a wart from the plaintiff's nose. The doctor testified that he planned to remove the wart first, and that for this part of the operation the plaintiff was given an anesthetic with nitrous oxide and oxygen. He then intended to remove the tonsils, after giving the plaintiff an ether anesthetic. Containers of both gases were in the operating room. The doctor testified that he removed the wart with an electric needle which gets rather hot and that after he had finished removing the wart and was cauterizing the wound with the electric needle, there was a "flash" and a "pop" about six inches above the plaintiff's face. As a result of this accident, the plaintiff suffered contusions and bled profusely from the nose and mouth. The jury in the trial court returned a verdict for the defendants, but on appeal it was held that plaintiff was entitled to a new trial. The reason for the reversal was that there were four possible explanations for the explosion and the defendants had produced evidence as to their due care on only two of these possible explanations. The court said that as the doctrine of res ipsa loquitur applied, the defendants had not produced evidence on all points necessary to enable a jury to find in their favor.[15]

The effect of departures from the rule that the doctrine of res ipsa loquitur does not apply is to permit a bad result or an unusual happening to require a physician or surgeon to explain the cause. In other words, a prima facie case may be established for the claimant and the burden of proof shifted to the physician or surgeon.

It has been pointed out previously that the general rule has been that a physician is not liable for a mistake in judgment in making a diagnosis where he uses ordinary and reasonable care and skill, even though his diagnosis, honestly made, may be wrong. Both Nebraska and Georgia have stated that malpractice may consist in a lack of skill or care in diagnosis as well as in

[13] Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258 (1944). 25 B.U.L. Rev. 25 (1945); 33 Calif. L. Rev. 331 (1945); 40 Ill. L. Rev. 421 (1946); 18 So. Calif. L. Rev. 310 (1945); 9 U. Det. L.J. 51 (1945).

[14] Ybarra v. Spangard, 19 Cal. App.2d 43, 208 P.2d 445 (1949).

[15] Dierman v. Providence Hospital, 31 Cal.2d 290, 188 P.2d 12 (1947).

treatment.[16] In the Georgia case, it was held that the jury could find that the defendant optometrist had not exercised reasonable care and skill in his examination where it appeared from the evidence that as a result of wearing the glasses prescribed the patient suffered headaches and nausea and was backward in his school work. The only expert testimony for the plaintiff was given by an ophthalmalogist, not an optometrist.[17]

In a Massachusetts case, the physician, it was claimed, negligently diagnosed the diseased condition as a throat ailment and ordered the patient taken to a hospital sixty miles away. It was claimed that the patient was, at the time, suffering with pneumonia. The court held that the evidence was sufficient to support a finding that the defendant should have known that the intestate was suffering from pneumonia, even if the throat ailment from which he was also suffering, displayed some symptoms that were characteristic of pneumonia.[18]

In an Ohio case, the physician incorrectly diagnosed a patient's pregnancy as gall bladder trouble and treated the patient for that ailment. The court held that the question as to whether the physician had used due care and diligence in making the diagnosis was one of fact for the jury where there is more than a scintilla of evidence tending to indicate the absence of such care and diligence. The court further held that as the physician knew that other medical men had diagnosed the symptons differently there was a scintilla of evidence to support the jury's verdict.[19]

In a United States Court of Appeals case, a patient sustained a fractured skull and was unconscious for several days. The physicians treated the patient for the fractured skull but failed to discover a fractured hip. It was held that the plaintiff had established a prima facie case of negligence, which put the burden upon the physicians of proving that the condition of the plantiff's head was such that examination and treatment of the hip would have endangered her life.[20]

In another class of cases, those dealing with consent to surgery, the Nebraska Supreme Court has defined a restriction of the consent doctrine in cases where the surgeon relies upon the

[16] See Mangiamel v. Ariano, 126 Neb. 629, 253 N.W. 871 (1934); Cook v. Moats, 121 Neb. 769, 238 N.W. 529, 79 A.L.R. 694 (1931).

[17] Kahn v. Shaw, 65 Ga. 563, 16 S.E.2d 99 (1941).

[18] Coburn v. Moore. 320 Mass. 116, 68 N.E.2d 5 (1946).

[19] Paulson v. Stocker, 53 Ohio App. 229, 4 N.E.2d 609 (1935).

[20] Weintraub v. Rosen, 93 F.2d 544 (7th Cir. 1937).

diagnosis of another physician.[21] In this case, a physician sent the patient to a surgeon with a diagnosis of a pelvic tumor. The surgeon operated, found no tumor, made a diagnosis of pregnancy, and in connection with the operation, removed the plaintiff's appendix. The court said:

> Where, under the above conditions of employment, the surgeon, relying wholly upon the physician's diagnosis, operates, and during the course thereof discovers facts or conditions which suggest a reasonable basis for a different conclusion from that arrived at by the physician which, if true, would make the proposed operation inadvisable or unnecessary, and there exists no emergency requiring him to proceed, the surgeon is not negligent if he refrains from completing the operation until a further proper diagnosis based upon the newly discovered facts or condition is made, and a proper course of action based thereon is determined.
>
> Likewise, where, under the above conditions of employment, and before performing the operation, the surgeon discovers facts or conditions which appear to contradict the physican's diagnosis, or which cause the surgeon to question the correctness of the physician's diagnosis or to reach a different diagnosis, with the result that a different or no operative treatment is indicated, and there is no emergency, and the surgeon operates without making an additional and proper diagnosis to determine the questions presented and the action to be taken, the surgeon is negligent and liable to respond in damages for such injury and detriment to the patient as proximately follows.[22]

The members of the medical profession may find the following suggestions helpful.

1. Do not guarantee results or a cure, as a suit could then be grounded on a breach of an express contract and not upon an implied contract. In such a case, expert medical testimony, in all probability, would not be required to be produced by the plaintiff.

2. Be careful in diagnosis, irrespective of whether the patient is a pay or a charity patient, and if the case is one where the services of a specialist should be secured, then the specialist should be called in for consultation or the patient referred to the specialist.

3. Keep abreast of the great progress being made in medicine, for today the physician and surgeon are most likely to be charged with knowledge of such progress. The North Dakota court expressed it in these words:

[21] In re Johnson's Estate, 145 Neb. 333, 16 N.W.2d 504 (1944).
[22] Id. at 344, 16 N.W.2d at 511.

The duty of a doctor to his patient is measured by conditions as they exist, and not by what they have been in the past or may be in the future. Today, with the rapid methods of transportation and easy means of communication, the horizons have been widened, and the duty of a doctor is not fulfilled merely by utilizing the means at hand in the particular village where he is practicing. So far as medical treatment is concerned, the borders of the locality and community have, in effect, been extended so as to include those centers readily accessible where appropriate treatment may be had which the local physician, because of limited facilities or training, is unable to give.[23]

[23] Tvedt v. Haugen, 70 N.D. 338, 344, 294 N.W. 183, 188 (1940).