Legal Duties of Physicians

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SUMMARY

The history of the physician's legal duties has been traced from the first recorded writings of the Babylonian era to the present day. There has been a transition from the days of absolute liability to the modern idea of liability based on culpability.

The doctrine of stare decisis developed in early English law forms the very backbone of our own jurisprudence.

Broadly, if a physician renders reasonable care and skill, he is absolved from liability.

Some of the more important legal duties and proscriptions applying to physicians are discussed in particular in this presentation.

THE concept that a physician owes a legal obligation to his patient is not new.[1] Writings on medical jurisprudence go back at least 4,000 years. About 2030 B.C. the Code of Hammurabi, the Babylonian, was enacted. One of the provisions found therein states: "If the doctor has treated a gentleman for a severe wound with a lancet of bronze and has caused the gentleman to die, or has opened the abscess of the eye for a gentleman with the bronze lancet and has caused the loss of the gentleman's eye, one shall cut off his hands." However, if the patient were a mere slave, and his life was lost because of the surgeon's treatment, then the physician had but to furnish the master with another slave. The penalty imposed upon a physician bore a direct relationship to the patient's standing in the community. The physician of those days was held to be an insurer of his treatment. He practiced at his peril and paid a penalty if he failed in his trust; there existed absolute liability, and no extenuating circumstances were allowed to be pleaded by the physician in his behalf.

The first departure from these very harsh rules of the Babylonians, that a physician must practice at his peril, is found in the later rules of the Egyptians. Here, general rules were established and approved by the most learned and experienced physicians for the conduct of the physician in relations with his patient. As long as the physician followed established treatments for a disease, even if the result were unfavorable to the patient, the physician was absolved from any liability. But if he departed from the established procedure, and the patient had the misfortune to die, the physician was liable to be beheaded. Experimentation is still held in disfavor by the law today, and many a judgment has been rendered against a physician in a malpractice action based on treatment with untried drugs and methods.

Following the Egyptian era came the time of Hippocrates, whose influence dates from about 400 B.C. It is generally conceded that the practice of medicine as a science dates from this period; yet the medical writings of that day contain no references to the physician's conduct in relations with patients. As far as can be determined, the Greeks had no laws concerning malpractice. But there must have been some recognition that a physician owed a duty to his patient, for Plutarch, in his "Lives of Illustrious Men," tells the story of Glaucus, a physician of Ephesus, who left his patient to go to the theatre. In his absence the patient partook excessively of food and died; and Alexander condemned the physician to death for breach of professional duty.

During the Dark Ages (476-1000) the Church instituted a long series of edicts which were primarily aimed at malpractice by the monks.

INFLUENCE OF ROMAN LAW

In the early Roman law are records indicating that negligent conduct by the physician was used as a measure of legal liability. Smith[1] listed the following dicta which emanated from the Roman courts:

1. That a physician incurred a legal liability when he was guilty of negligence.

2. That this negligence could consist of misfeasance or nonfeasance, which arose from ignorance due to lack of adequate training, lack of skill in the particular undertaking, or failure to attend or to care for the patient after a properly performed operation.

3. That if a physician caused injury by an unauthorized operation, he could be held for battery.

4. That no responsibility for medical practice exists, without proof of fault.

The Roman law as it expanded was introduced into continental Europe about 1200 A.D. and became the basis of medical jurisprudence throughout Europe. A law for the regulation of the practice of medicine, which included drug control, was promulgated in 1240 by the Emperor Frederick II. To Germany belongs the credit of enacting the first law which provided for the examination of medical witnesses in the determination of questions in which medical knowledge could afford the only satisfying answers. This was in 1532, during the reign of Emperor Charles V, when a law was passed which provided that in every case of violent death, the opinion of medical men should be formally taken. Thus there came to be developed definite standards by which to judge the knowledge and skill of a physi-

cian. The physician came to be held responsible not only for intentional injuries but for negligence of ability which the person employing his services rightfully could presuppose him to have.

After the Norman conquest in 1066 came the development of the English common law, which to this day is the basis of our own jurisprudence. Instead of definite fixed rules, the common law, as it developed, was a flexible system which adapted itself to conditions as they arose. When a question arose for which there was no applicable custom or precedent, the judges would decide according to their ideas of right and justice. During the reign of Richard Coeur de Lion at the close of the twelfth century, it became the practice to keep an official record of the cases decided by the courts of common law. They were known as the Plea Rolls, and they have been maintained in an unbroken series down to the present. From the Plea Rolls there developed a body of recorded decisions. Such decisions were usually followed as precedents in subsequent similar cases, and there was developed the doctrine of *stare decisis*—that a decision of one of the higher courts has the force of law and is binding in all like future cases. One of the most striking features of the English common law is this adherence to precedent. These precedents control the litigated question, and if a court departs from them it is likely to have its findings set aside. When a novel question, for which there is no precedent, arises in a state court, then the court will look to the precedents of a sister state for its decision on a like question.

Smith,[1] in his studies of the development of malpractice, stated that the precedent for all malpractice actions had its origin in the year 1615. This occurred in the case of *Everard v. Hopkins*, and the historical precedent which adheres to this date was laid down by Sir Edward Coke, "father of the common law" and at that time Chief Justice of the Court of King's Bench. This was an action against a physician for negligence, separate and apart from any contractual relation. The plaintiff's master had employed a physician to treat his servant who was injured by a cartwheel. No contract was entered into between the physician and his patient. The doctor employed "unwholesome medicine" which caused the servant to become more ill. Lord Coke said that the master, of course, could maintain an action upon the contract; the servant, however, not being a party to the agreement, could not sue thereon, but could have an action upon the case for the damage done by the treatment.

From the foregoing discussion, it can be readily appreciated that a legal obligation devolved upon the physician because of the universal demands put forward by society for its own protection. These demands have become more and more exacting with the development of medicine, and have reached their present-day status with the universal requirement that medical licensure is a condition precedent to the practice of medicine throughout the entire civilized world.

NATURE OF THE PHYSICIAN-PATIENT RELATIONSHIP

Before proceeding with the discussion of the physician's legal obligations, it would be well first to determine when a relationship comes to exist between a physician and a patient, for it is easily understandable that if a physician has no legal duty owing to a patient, he cannot be negligent toward that patient. This is best illustrated in the so-called good Samaritan situation: For instance, a physician traveling along the highway comes upon the scene of a severe automobile accident and sees several badly injured persons. The physician owes no legal duty to render aid to the injured persons, although he may have a moral duty to do so. If, because he does not give them first aid, their injuries are aggravated, the physician cannot be held liable. But once the physician does give medical aid, he then assumes a duty to the patient, and will be liable for any negligent conduct which might ensue; and it would be no defense to the physician that such services were rendered gratuitously.

Once having established a contractual relationship with the patient, the physician is duty bound to maintain his contract. Illustrative of this is the case of *Hood v. Moffet*[2] in which a husband engaged the services of an obstetrician for a stipulated fee. The patient was near term, and at the time the contract was made the physician had not as yet seen the patient. When the patient went into labor, the husband sent for the physician who refused to come because he was in attendance on another patient who was about to deliver. The court held that the plaintiff had a cause of action for breach of contract, and rejected the physician's excuse, stating that if one assumes conflicting obligations to two different persons he cannot exonerate himself from liability for breach of one of the obligations by choosing to discharge the other.

It should be noted, however, that it is becoming increasingly evident that the refusal of a physician to enter into a contractual relationship with a patient may constitute a tort. Under the statutes of the various states a physician has no right to refuse assistance to one in urgent need of medical care.[3] The ambit of legal liability of the physician is ever extending.

STANDARD OF CARE REQUIRED

When a physician undertakes the treatment of a patient, he impliedly contracts and represents not only that he possesses the reasonable degree of skill and learning possessed by others of his profession in the locality, but that he will use reasonable and ordinary care and skill in the application of such knowledge to accomplish the purpose for which he is employed; and if injury is caused by a want of such skill or care on his part, he is liable for the consequences which follow.[4]

And it also has been held that if a physician undertakes to treat the patient as a specialist in the

treatment of a certain organ, injury or disease, he is bound to bring to the aid of one so employing him, that degree of skill and knowledge which is ordinarily possessed by those in the same general locality who devote special study and attention to that particular organ, injury or disease, its diagnosis and its treatment, having regard to the state of scientific knowledge at the time.[5]

By "reasonable and ordinary care" is meant also that the physician will use all modern diagnostic aids which are available for use by the physician. Claims arising out of the non-use of x-ray examination form one of the largest and most important group of cases under malpractice actions. The trend of decisions coming from the higher courts seems to point to a growing attitude that the courts will take judicial notice, without proof, that omitting to make use of x-ray examination as a diagnostic aid in cases of fracture constitutes malpractice.

Illustrative of this is the case of *Johnston v. A. C. White Lumber Co.*[6] The Idaho statute under which action was brought requires an employer to furnish an employee with all reasonable medical and surgical care. The court in construing the statute said that reasonable care contemplates the use of all modern diagnostic aids, and held the employer liable when the company physician omitted to use x-ray examination in the diagnosis of an injury to an employee.

Obviously it is advisable for a physician to learn what some of the legal obligations are which he assumes. In a subject so vast it would be almost impossible to list all the legal duties of the physician in the limited scope of this presentation, and the reader is referred to the treatise of Regan[7] for a most complete discussion of this question. An attempt will be made to list and discuss some of the more important duties, and to illustrate them with actual cases.

DUTY TO KEEP ABREAST OF ADVANCES OF MEDICAL SCIENCE

A physician is legally obligated to keep abreast of the advances made by his profession.

In *Vigneault v. Dr. Hewson Dental Co.*, the defendant dentist in preparation for the extraction of teeth used multiple injections of a local anesthetic agent. Following the extraction osteomyelitis of the jaw developed. Evidence was permitted to be introduced that the block method of injection was then being currently used, and that the possibility of osteomyelitis was much less by this "advanced method." The defendant was held to be negligent in not keeping abreast of the developments in his profession.[8]

In *Ferrell v. Ellis*, the defendant physician attempted to disclaim liability for negligence on the ground that all country physicians know no better. The court held that the standard of care is based on present conditions of medical knowledge and not on past conditions acquiesced in by country folk.[9]

DUTY NOT TO REVEAL CONFIDENTIAL INFORMATION

A physician is under legal obligation not to reveal any confidential information imparted to him under the physician-patient relationship. In fact, many of the states have made such a violation a statutory offense. The New York statute reads: "A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."

If a physician, under a mistaken diagnosis, publicizes that a patient of his has a venereal disease, such an act is slander *per se*, and the patient need not offer any proof of special damage since the law presumes that one suffered damages simply by the publication of such a diagnosis.[10]

DUTY TO OBTAIN CONSENT FOR SURGICAL OPERATION

A physician has a legal duty to obtain the consent of the patient before attempting surgical treatment, and in the case of a minor the parents' consent must first be obtained.

In *Hivey v. Higgs*, the patient consulted the defendant physician, who advised the plaintiff that it was necessary for her to have an operation performed upon the septum of her nose, and the plaintiff then and there employed the doctor to perform the operation. While the patient was under anesthetic the physician, instead of operating upon the septum of the plaintiff's nose, removed the patient's tonsils. The court held that the physician had no such authority to operate, and that his wrongful act constituted assault and battery, although the physician in his defense contended that he merely committed a breach of contract, and therefore the plaintiff should recover only nominal damages.[11]

In *Mohr v. Williams*, the patient consented to an operation upon his right ear, and the surgeon, finding a similar condition in the other ear, operated upon that one too. The court said, in finding for the patient, that where one consents to an operation on the right ear, the physician has no privilege to operate on the left ear, regardless of the necessity of such operation, unless such operation is necessary to save the life of the patient.[12]

It has even been held that the performance of an unauthorized autopsy is an interference with one's property rights.[13] The common law has always been that a corpse is personal property belonging to the decedent's family, and that any interference by one person with another's personal property is a tort.

DUTY TO EXERCISE THE UTMOST OF GOOD FAITH AT ALL TIMES

The physician-patient relationship is in the nature of a trust, the patient being the beneficiary and the physician the trustee. The courts have always zealously guarded the rights of the beneficiary and have demanded that the trustee discharge his duties with the utmost of good faith. The law demands that the physician act in the same capacity and will not

tolerate the practice of fraud and deceit on the patient.

In *Moses v. Miller*, the defendant physician undertook to remove the plaintiff's gallbladder. During the course of operation, the physician for some reason abandoned the operation. The physician, however, informed the patient that he did remove her gallbladder. The fraud was discovered during a subsequent abdominal operation some years later. The patient was allowed to recover damages for this fraudulent concealment by the physician that he had not removed the gallbladder.[14]

In another action involving the practice of fraud on the rights of the health of the patient, the plaintiff was allowed recovery. Here the defendant physician knew that his treatment could be of no benefit, and yet he induced the patient to continue with the treatment and thus to incur a large bill by assurances that the treatment was well suited to effecting a cure.[15]

In *Tompkins v. Board of Regents* of University of New York, the physician prescribed narcotic drugs for addicts without proper medical basis, solely to satisfy the addiction. This was held to constitute "fraud and deceit" in the practice of medicine and to justify suspension of the physician's license under the New York statute. The court of appeals, in affirming the lower court, said that issuing a prescription for narcotic drugs to an addict tends to deceive those concerned in enforcing narcotic drug laws.[16] Thus, by statute, the physician owes a duty to the public, and the violation of a statute affecting the public welfare constitutes a crime, a much more serious offense than a tort, which is concerned only with the violation of a private right.

LEGAL DUTY TO RENDER SERVICE

After the physician-patient relation has been established, unless otherwise limited in the contract of employment, it cannot be terminated at the mere will of the physician, but must last until the treatment is no longer required, or until it is dissolved by the mutual assent of the parties, or until reasonable notice is given in order that the patient may have an opportunity to engage the services of another physician.[17]

In *Tadlock v. Lloyd* the plaintiff employed the physician to attend his sick child. The physician examined the patient and diagnosed the illness as scarlet fever. The following day the physician was requested to call and see the child again, and he did not do so, making the statement that the disease must run its course. Subsequently several other requests were made to the doctor to call on the patient. Finally, in response to an urgent appeal, he did visit the patient. The child died shortly after his arrival. The action here was not founded upon active malpractice but upon negligence of proper care and attention. The omission of the physician's legal duty was the proximate cause of the death of the child. The court said that when a physician makes no effort to inform himself of the condition of his patient, or of the progress of the malady, if damage results therefrom, the physician is liable.[18]

DUTY NOT TO EXPERIMENT

It is a physician's legal duty to follow the accepted methods of practice prescribed by his profession.

In *Owens v. McCleary* the evidence showed that the defendant physician treated the patient for hemorrhoids, and that in doing so he did not use any of the methods of treatment approved by his profession, but on the contrary, employed one distinctly disapproved by the profession, thereby inflicting serious injury on the patient. The court said that not to employ the methods followed or approved by a physician's school of practice, evidences either ignorance or experimentation on his part. If the physician wishes to avoid civil liability, he must employ, in the treatment of patients, methods which are recognized and approved by his profession as most likely to produce favorable results.[19]

In *Graham v. Dr. Pratt Institute*, the patient went to the defendant physician in response to a newspaper advertisement that smallpox pittings could be successfully removed. The results of the treatment were unsatisfactory, and the patient brought action on grounds of malpractice. Evidence was introduced to show that there is no known treatment in medical science for the cure or removal of smallpox pits. The court said that if a physician applies a treatment not sanctioned by medical society, and which the physician is bound to know is not sanctioned, the law imputes malicious intent in the physician's conduct.[20]

DUTY TO REFER TO ANOTHER PHYSICIAN

If a physician is consulted by a patient with regard to a disease which he has not the skill and knowledge to treat, it is his legal duty to so inform the patient and to suggest the services of another physician.

In *Mernin v. Cory*, the defendant dentist failed to extract an entire tooth. On subsequent visits he attempted to remove the remaining fragment but without success. As a result of excessive manipulations, infection developed in the patient's jaw. The patient repeatedly asked the dentist if it would not be proper for her to consult a physician and surgeon, and the dentist advised her that this was unnecessary. Relying on such advice, she postponed consulting a physician for a long time, and afterwards when she did, it was too late for her to receive benefit from any treatment. The court found that the dentist violated a legal duty in not referring the patient to a physician when he found that he could not handle the situation.[21]

DUTY TO GIVE INSTRUCTIONS TO THE PATIENT

It is the legal duty of a physician, in dealing with a case, to give the patient all necessary instructions applicable to the diagnosis, so that the patient may have a better understanding of the ailment and thus

cooperate more intelligently with the physician in carrying out the proper treatment.

In *Everts v. Worrel,* it appeared that the physician told the patient that his skin condition was acne. The fact was that the physician actually believed the patient had syphilis and treated him on this basis. The court said that by keeping the patient in ignorance of his true state, he would not know or appreciate the consequences that might follow certain acts or omissions on his part.[22]

In *Newman v. Anderson,* the physician was found to be negligent in omitting to give the patient proper instructions as to the application and removal of an ointment used for the treatment of a burn.[23]

OTHER LEGAL DUTIES OF THE PHYSICIAN

No attempt has been made herein to mention all the legal duties of the physician, but for the sake of completion it should be noted that a physician has been held to have a duty to an unborn child;[24] that he must respect the right of privacy of his patient;[25] and, that he cannot interfere with the personal freedom of the patient.[26]

In addition to the duties owed to his patient, there are many statutory duties imposed upon the physician by the state, the violation of which constitutes negligence. Some of these include the reporting of communicable diseases to the health authorities, the instillation of silver nitrate into the eyes of the newborn, and the recently enacted statute in California forbidding the physician to participate in rebates.

And to round out the subject of the physician's liability, it is necessary to state that besides the legal duties owed to the patient and the state, a physician still owes a duty to third persons who come within the sphere of his activities. Thus a husband can maintain an action against the physician for the loss of his wife's services; a third person who becomes infected from a negligently treated carrier has a cause of action against the physician; and, finally, a physician can be liable to a person through the negligent acts of his employees.

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