THE LEGAL RELATIONS OF OBSTETRICS.[1]

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In a state of society assuming to be highly civilized, there is scarcely a department of human life that is not recognized by the law and made subject to its control. However complicated or novel men may make their relations one with another, the law, as it finds expression either in the statute books or in the great body of precedents and decisions which we call the common law, refuses to be surprised or outwitted. It says plainly to every one, "You shall make redress to any person who is injured through your negligence; and if your negligence is wilful and transcends certain limits, you shall be held accountable also to the State, and shall pay the penalty which attaches to crime." To this comprehensive principle, no exception is made in favor of our profession of medicine, a profession instituted and practised for the relief of human suffering; and from very early times the law has undertaken to say what the physician, in the act of rendering service, owes to his patient, and has seemed not to care much for that which the patient owes to the physician for the service rendered. The subject is an interesting one, and it has been thought that a concise statement of the rules which the law recognizes at the present time as applicable to the practice of obstetrics, might not prove unprofitable.

Let us suppose, now, that the midnight messenger has brought word to one of us medical men that a woman, a mile or more away, is in labor and wants a doctor's help. The ready response, "I'll come at once," and the rapid transit to the lying-in room establish a relation full of responsibility, sometimes full also of unexpected peril. What does the law say to the obstetrician as he enters on this relationship? It says:

"You need not have responded to the summons which called you to this bedside. This suffering woman had no lawful claim upon you for your services. However strongly selfish interest, expedieney, prudence, humanity may have urged you hither, you had the right to decline the call and to remain at home in comfort, if you so desired. But having accepted this position, having undertaken the care of this case, you have assumed certain obligations which the law fully recognizes, and which you cannot avoid, except at the risk of losing both money and reputation.

"Your obligation is that of an implied contract which, though less formal and specific than an express contract executed in writing, is not less binding in its nature.

"You must continue in attendance here, and may not abandon the case or desert the patient without reasonable cause or without allowing sufficient time for the procurement of other attendance.

"In undertaking the care of this woman through her labor and the puerperal period following it, you shall attend upon her with reasonable diligence and skill, and you will be answerable to her for any want of ordinary care, diligence and skill which results in her injury.

"Under the obligations of the implied contract, in accordance with which you are employed, you do not warrant or insure that all the results of your attendance upon this woman shall be satisfactory to her, that she shall have a perfect recovery, or that your treatment shall effectually stand in the way of accident and harm. Your judgment relative to the application of certain remedies or modes of treatment may err, but the law will not hold you responsible for ill results growing out of errors of judgment. You engage under the law to treat this case in such a way that any injury which the woman suffers in its course or subsequently, cannot reasonably be traced to a neglect of competent and ordinary care and skill on your part as its proximate cause."

Such are the principles established by the common law as the intangible environment of the obstetric attendant for his guide and control under the usual circumstances of his employment. They are the rules which underlie and govern those actions of tort, commonly called malpractice suits, wherein the claim is set up that negligence and unskilfulness on the part of the medical attendant have caused injury and distress to his patient, and that money will be the proper remedy to heal the wrong imputed to him.

Some of these principles of law are vague and seem to require elucidation. What, for instance, do lawyers mean when they use such terms as "ordinary skill" and "reasonable diligence"; and how can a juryman interpret such phrases intelligently and justly? A leading authority discusses this topic as follows:[2]

"The general rule is that a medical man who attends for a fee is liable for such a want of ordinary care, diligence and skill upon his part as leads to the injury of his patient. To render him liable, it is not enough that there has been a less degree of skill than some other medical men might have shown, or a less degree of care than he himself might have bestowed; nor is it enough that he himself acknowledged some degree of want of care; there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result. A professed physician or surgeon is bound not only to use such skill as he has, but to have a reasonable degree of skill. . . . The standard of skill may vary according to circumstances, and may be different even in the same State or country. In country towns and unsettled portions of the country remote from cities, physicians, though well-informed in theory . . . do not enjoy the greater opportunities of daily observation and practice which large cities afford. It would be unreasonable to exact from one in such circumstances that high degree of skill which an extensive and constant practice in hospitals and large cities would imply a physician to be possessed of. . . . If the practitioner, however, frankly informs the patient of his want of skill, or the patient is in some other way fully aware of it, the latter cannot complain of the lack of that which he knew did not exist. . . . None but the most general tests of a physician's skill can be stated as rules of law. The great variance between the medical theories which find acceptance among different schools, each of which has its sincere and devoted adherents, and each being, in the estimation of its opponents, mere quackery, makes it impossible to assert that any particular system affords an exclusive test of skill. . . . Upon many points of practice, all schools are agreed, and indeed common sense and universal experience prescribe some invari-

[1] Read before the Obstetrical Society of Boston, November 9, 1889.

[2] A Treatise on the Law of Negligence. By Thomas G. Shearman and Amasa A. Redfield. Fourth edition, 1888. Vol. II. Section 606.

able rules, to violate which may generally be called gross negligence. Thus, a failure to remove the placenta after childbirth is highly culpable negligence."

And the New York Court of Appeals, in a decision upon certain issues raised in a malpractice suit, used the following phrases: "A physician having engaged to the performance of services requiring skill and care is liable for a want of the requisite skill or for an omission to exercise the proper care; and one who offers himself for employment in a professional capacity undertakes, (1) That he possesses that reasonable degree of learning and skill which is ordinarily possessed by the professors of the same art and science, and, which is ordinarily regarded by the community and by those conversant with the employment as necessary to qualify him to engage in such business; (2) That he will use reasonable and ordinary care and diligence in the exercise of his skill, and the application of his knowledge, to accomplish the purpose for which he is employed; (3) That he will use his best judgment in the exercise of his skill and the application of his diligence."

Even these authoritative statements of what the law regards as professional skill and proper care, leave the matter in an indefinite and unsatisfactory state for the apprehension of the medical mind. The terms "ordinary" and "reasonable" and "proper," which the lawyer likes to use with so much vain repetition, are relative terms; they convey no definite and adequate idea to serve as a standard which will help in determining disputed questions in medical practice. Who shall decide what is "ordinary" and what is "reasonable?" Who shall determine how much higher the standard of obstetric skill should be in Boston, with its medical school opportunities, its excellent lying-in hospital, its abundant consultation advantages and its highly organized Obstetrical Society, than it should be in Mashpee or in Sandisfield? Or who shall adjudge to what greater degree of accountability the graduate of the Harvard Medical School should be held, than the graduate of the South Dakota College of Physicians and Surgeons? It is clear that the decision of such questions rests finally with the jury and is registered in its verdict; and it is probable that in most instances, the ordinary but not always reasonable juryman is influenced in his conclusions upon these matters, less by the definitions and instructions of the learned judge in his charge than by other considerations, such as the sympathy-compelling pathos of the plaintiff as she tells the story of her alleged injuries and sufferings, or the clearness and emphasis of the testimony, with which the witnesses, including the experts, unfold the evidence in the case, or the eloquence, more or less effective, of the counsel. And in this connection it is reassuring to record the fact that the principles of law, above set forth, however difficult they may seem to be as practical guides, have been in effect, a shield rather than a menace, to the interests of defendant physicians, and that the cases are fortunately few in number in which it can be said that unjust and unfounded verdicts have been returned by juries upon the issue of imputed negligence and unskilfulness; where verdicts against the defendant have been recorded, the testimony has usually left little question that the decision was right, because the negligence charged was really inexcusable on any sensible grounds.

The immunity from blame in the eye of the law that an "error of judgment" carries, raises the interesting question of the distinction to be made, as a matter of definition, between such an error and a culpable lack of skill. One can easily suppose cases as illustrations, in which it would be extremely difficult to differentiate the error of judgment, which excuses the physician, from the error of omission or commission which would condemn him; and it would be a natural course in such instances for the medical man, compelled to answer as a defendant, to plead just such a false turn in his judgment as the cause of certain ill results he would gladly have avoided. But the facts in the case should be clear and unequivocal to give force to such a plea. The forceps are a highly useful instrument in obstetric practice, but if applied too early, through an error of judgment, they might do grievous harm for which the attendant would not be held accountable under this rule; but, if he applied the forceps upside down, or neglected before applying them correctly, to empty the patient's bladder, or used traction with a degree of violence that no one could justify, his treatment would properly be esteemed unskilful. Ergot is a remedy of established utility in midwifery; but it might be used at such a stage or in such a dose as to do serious damage; and it would be a nice question whether such untoward results grew out of an error of judgment in the application of the remedy, or were more reasonably chargeable to a blameworthy want of skill in selecting it for use at all in the case.

Upon this topic of the relation of mistakes of judgment to malpractice suits, Elwell observes:[3] "The physician is not responsible for the errors of an enlightened judgment where good judgments may differ. Good skill necessarily implies good judgment and when that judgment is properly brought to bear, any risk or any injury that may result from mistakes of this kind is upon the employer alone. Where, then, there are reasonable grounds for doubt and difference of opinion, the professional man, after the exercise of his best judgment, supposing that he possesses the necessary knowledge, is not responsible for errors of judgment or mistakes. He will be charged with error, or should be, only when such errors could not have arisen except from want of reasonable skill and diligence. . . . He must apply, without mistake, what is settled in his profession."

And Shearman and Redfield remark upon this point:[4] "A physician, like an attorney, is not answerable in a given case for the errors of an enlightened judgment; but also like an attorney, he cannot interpose his judgment contrary to that which is settled. . . . He cannot try experiments with his patients to their injury."

These learned writers appear to have overlooked the fact that if the principles of law stated by them were taken literally as a guide, they would be an insuperable bar to all progress in medical science. The pioneer in the new world of ideas and practice, places himself in greater jeopardy than he realizes when he applies for the first time his novel remedies and untried methods. The first etherization, the first laparotomy, the first hysterectomy, the first of any of the great beneficient measures and operations which we have come to regard as fully established, were done under a fortunate ignorance of the law or an equally fortunate indifference to its penalties; and humanity is the gainer.

[3] A Medico-Legal Treatise on Malpractice, Medical Evidence and Insanity. By John J. Elwell, M.D., Member of the Cleveland Bar, etc. Page 29.

[4] Loc. cit. Section 612.

These considerations, again, suggest another interesting inquiry. Who shall decide what is "settled?" Who shall say what is an experiment and what is not an experiment in a given case? In a broad sense, is anything ever settled in medicine? Is not, in fact, every method of treatment and every dose administered an experiment, in so far as it is related to the emergency or need that suggests it? And after how many experiments of this kind without actionable injury to his patient, may a physician reach the conclusion that the utility of that particular course is established? Take, for instance, the single example of antiseptic measures in obstetrics; is any one of us prepared to testify in court that the use of douches and injections of mercuric chloride solution, of the antiseptic pad, of soap and water and the nail-brush and all the other admirable preventive means to avert infection, has become so far the settled practice that it is no longer experimental; and, that the obstetrician who neglects to use these prophylactic measures should pay his patient money for every access of fever occurring during her puerperal period? We believe here in Boston, surely, that the importance of aseptic obstetrics is fully and clearly demonstrated. It would be like swimming against a strong current of opinion if any one living in this vicinity and familiar with the now classical proof of the value of antiseptic measures in midwifery which the Boston Lying-in Hospital has supplied, should attempt in court, in a case of septicæmia laid to his charge, to excuse himself under the plea that such antiseptic precautions were still far from general adoption or acceptance, and, in his opinion, were unnecessary. He would undoubtedly find it difficult, in this neighborhood, at least, to secure reputable experts, worthy the name, who would sustain him in that position. But can one reasonably apply this standard of prophylactic prudence to obstetric practice everywhere? The general practitioner among the hills, who, in his long years of unremitting toil, has had his thousand cases of midwifery, conducted in the old-fashioned way and all without a single septic accident, — is he, when his first patient succumbs to septicæmia, to be tried by the same standard of accountability which his city classmate recognizes; and shall he be condemned because he has not used the green tablets, of which he has never heard, and because his buggy does not include in its furnishings a full assortment of antiseptic appliances for obstetric emergencies? Assuredly not; nor is it fair to blame him unreservedly if, in his busy life of practice, he has not had the time or the opportunity to become familiar with the latest novelty in obstetric therapeutics or with the proper method of applying it. Who, then, to repeat our question, shall have authority to differentiate that which is experimental from that which is settled and demonstrated in midwifery practice? Shall it be the teachers in our medical schools? They are our leaders, truly, but so far in advance are they as exponents of the latest progress in obstetric science and art, that it would fare ill with most of us if our performances were tested by a comparison with the standard worthily set by them. Shall books of well-known and accepted authorities establish the line on which we must defend our conduct? Even if the rules of evidence permitted their use in court, such books quickly lose their value and are crowded to the rear by newer works. Will the transactions of learned Obstetrical societies serve as the best expression of that which is at once new and true? It has been seriously urged that these transactions should not be published in the current periodical literature because the expressions of men in discussing obstetric themes, as for example the very topic already alluded to, the use of antiseptics, might, and naturally would, set up a standard prematurely, to the harm of practitioners unfamiliar or incredulous concerning it. It is obvious, after all is said, that in actual practice, the twelve unlettered men in the seats of the jury will make the decision upon this matter in the same fashion as upon other medico-legal questions coming before them; and it is obvious, too, that this decision will be more or less enlightened and satisfactory as it is aided and nurtured by skilled evidence, adapted to the time and locality of the issue, unimpaired by prejudice and partisanship and representing fairly, that which has stood the test of professional experience.

In Germany, the obstetrician is relieved from the need of setting up his own standard of what is orthodox in the management of obstetric cases; for the government of the empire, in a truly paternal manner, promulgates rules for guidance in these emergencies. Under date of November 22, 1888, the Prussian Minister of Education issued a series of regulations for the use of midwives in their attendance upon lying-in women and these establish a line of conduct which obstetricians of the male sex in Germany would hardly feel like defying. The rules are too extended to quote at length, but they are explicit to the last degree in directing the details of cleanliness of the clothing, the hands, the instruments and the dressings and utensils which are brought near the patient; vaginal examinations are never to be made except under strict antiseptic precautions; and the entire behavior of the attendent is to be shaped as if the danger of infection was always imminent.[1]

But let us suppose that our hypothetical colleague, whom we left at the bedside of his patient, has done all that the law requires in the care of his case, that he has to the best of his ability used ordinary and reasonable skill and diligence and has avoided all measures that could be called experimental, he may, nevertheless, through circumstances and conditions over which he has no control, find himself a defendant in an action of tort brought by his patient. Perhaps her perineum has been inadequate to sustain the pressure and the dilatation forced upon it by the presenting head, however skilfully and persistently the attendant may have tried to avert the disaster. Perhaps, as she convalesces, she finds a disgusting leakage of urine through a fistula in the vesico-vaginal septum, and she remembers that the doctor used forceps to deliver her; but forgets that she consented to their use only after hours of ineffectual labor during which the child's head lay low down, without progress, pressing upon the very spot that is now the seat of her misery. Perhaps she discovers, as she leaves her lying-in chamber, that there is something wrong in her locomotion and that the bones above her genitals slip as she walks. Perhaps her convalescence was rendered tedious and her life was endangered through the development of a puerperal fever which a kind friend has informed her was a "poisoning of the blood." In any of these events, whatever has happened out of the ordinary course to make her condition after her confinement unlike that of other women, it is easiest to blame the attending physician; and the next step is

[1] The Medical News, January 19, 1889, p. 83.

equally easy, the initial step in the proceedings for getting satisfaction. However clear the attendant's conscience may be that whatever has occurred he is not blameworthy; however positive his memory may be that he has done nothing and has omitted nothing in his obstetric attendance on this woman that was in violation of the soundest teaching and the tests of experience, these will not save him from the trouble and expense of defending himself against the charge of negligence and unskilfulness as it is formulated and openly made in court. The story is an old and familiar one. Too often the motive that initiates the suit and urges it forward is a most unworthy one and is scarcely to be distinguished from the wickedness of blackmail. Too often it is nurtured and stimulated by lawyers more hungry for plunder than ambitious for a good name. Too often it is abetted by medical men ready to share with the lawyer the chances of pecuniary gain to be secured in the event of a verdict for the plaintiff and willing therefore to put the needed emphasis into their strongly partisan testimony. Sometimes, no doubt, a case of tort is well founded and the woman who appears as complainant really believes in the justice of her complaint and candidly accuses her physician of carelessness; but such apparently well-founded instances are exceptional, as we all know, and cannot bear comparison with the number of actions brought with discreditable motives. Over these suits the physician is powerless to bring any control; however good his defence may be he cannot prevent a trial, with all its annoyances and costs, except by adopting the course of paying money to settle the claim out of court, — a course which any self-respecting medical man with a clear conscience will not adopt, though sorely tempted to escape thereby all the wretched risks and miseries of a jury trial. This constant menace of unjust lawsuits which every physician, and especially every surgeon, has constantly before him, as the law is practised now, is an evil which we may properly criticise and denounce. There is one remedy for it which might well have general application; if every complainant of the class we are considering were required upon initiating her suit, to demonstrate her sincerity in the justice of her cause by filing a sufficient bond, with sureties, to indemnify the defendant physician for all the costs of the trial if the jury should give a verdict unfavorable to her claim, we should hear far less of these iniquitous suits than we now do.

Thus far we have been discussing obstetric cases as they occur under the ordinary relations of practice wherein the attendant is employed with the implication or promise that payment will be made for the services rendered. The law regards accountability for results from nearly the same point of view when the services are rendered gratuitously. Judge Cooley makes a distinction between voluntary services and those that are gratuitous. He writes:[6] "Where friends or acquaintances are accustomed to give, and do give, to each other voluntary services without expectation of reward, either because other assistance cannot be procured or because the means of the parties needing help will not enable them to engage such as may be within reach, the law will not imply an undertaking for skill even when the services are such as professional men alone are usually expected to render. And when there is no undertaking for skill the want of it can create no liability. . . . But when one holds himself out to the public as having professional skill and offers his services to those who accept them on that supposition, he is responsible for want of the skill he pretends to, even when his services are rendered gratuitously."

And Shearman and Redfield make this remarkable observation on the same subject: "Inasmuch as gratuitous services are more generally rendered by young and unexperienced physicians, than by those who are well established in their business, a presumption arises naturally that one who renders such service is not possessed of great skill and is not supposed to be by the patient. This presumption may be overcome by proof to the contrary, and the physician must be judged by that standard to which he led the patient to believe he had attained; or, if he has done nothing to mislead the patient upon this point, his responsibility will be measured by the degree of skill which he is proved actually to possess."

This doctrine of the presumption of want of skill attaching to services rendered without expectation or claim of emolument is probably correct in its broadest relations; but it has a strange sound when we apply it to the attending physicians and surgeons of our great hospitals, our lying-in institutions and our dispensaries and infirmaries.

But the incivilities of the so-called civil proceedings which we have been studying, do not exhaust the interest which the law takes in our profession. There is a kind or a degree of negligence and unskilfulness which, while offering no bar to an action of tort, is also sufficient ground for the State's interference and may become a subject of investigation on a criminal charge. It is when the death of a patient is charged to the carelessness or ignorance of the attending physician that the machinery for criminal prosecutions is set in motion for his discipline. All law writers use nearly identical terms in their definition of the degree of dereliction which should constitute criminal malpractice; and this general definition is so well expressed by Mr. Bishop in his work on Criminal Law that I quote it:[7] "Every act of gross carelessness, even in the performance of what is lawful, and *a fortiori* of what is unlawful, and every negligent omission of legal duty, whereby death ensues, is indictable either as murder or manslaughter. If a man take upon himself an office or duty requiring skill and care, — if, by his ignorance, carelessness, or negligence, he cause the death of another, he will be guilty of manslaughter. . . . If a person, whether a medical man or not, profess to deal with the life or health of another, he is bound to use competent skill and sufficient attention; and if he cause the death of another through a gross want of either, he will be guilty of manslaughter."

It is, then, that degree of malpractice which the law characterizes as "gross" which renders the practitioner liable to punishment under a criminal charge. As in the law of civil malpractice, so here, definitions hardly define; for the term "gross" conveys a relative and not an absolute meaning, and in many cases where a man's liberty, or possibly his life, depended on the decision, a real difficulty might easily arise in applying it. When we remember that such a decision is to come from twelve unenlightened and perhaps preju-

[6] A Treatise on the Law of Torts, or the Wrongs that arise Independently of Contract. By Thomas M. Cooley, LL.D. Page 778.

[7] Volume I, section 314.

diced jurymen, we may well contemplate with something like awe, the immunity of medical men and feel a sense of gratitude that all puerperal deaths are not made the subject of judicial investigation. On the other hand, however obdurate the criminal law may be in theory, the leading cases which are reported demonstrate that, in practice, medical defendants under the accusation of criminal malpractice have been dealt with leniently; and this fact should be re-assuring. For example, a doctor named Williamson, was indicted for the murder of his patient, whom he had delivered and who died in consequence of his attempts to drag away a prolapsed uterus by great force, mistaking it for a part of the placenta, which he supposed to be retained in the vagina. The womb was lacerated and the mesenteric artery was torn asunder. The doctor, in his defence, said that he had acted according to the best of his judgment and he called fourteen women to testify to his skill and kindness when he attended them in labor. Chief Justice Ellenborough, in his instructions to the jury, said:[8] "There has not been a particle of evidence adduced, that goes to convict the defendant of the crime of murder; but still it is for you to consider whether the evidence goes so far as to make out a case of manslaughter. To substantiate that charge, the defendant must have been guilty of criminal misconduct arising either from the grossest ignorance or the most criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct which was essential to make out a case of manslaughter. It does not appear that, in this case, there was any want of attention on his part; and from the evidence of the witnesses on his behalf, it appears that he had delivered many women, at different times, and from this he must have had some degree of skill. It would seem that, having placed himself in a dangerous situation, he became shocked and confounded. I think that he could not possibly have committed such mistakes in the exercise of his unclouded faculties; and I own that it appears to me that, if you find the prisoner guilty of manslaughter, it will tend to encompass a most important and anxious profession with such dangers as would deter reflecting men from entering into it." The prisoner was acquitted.

At two points, the practice of obstetrics comes into special relations with the criminal law: first, when craniotomy, cephalotripsy, decapitation or evisceration is performed; and secondly, when premature labor is induced. With a brief allusion to these topics I will conclude a paper already too extended for your patient indulgence. When the obstetric attendant, in the presence of conditions justifying a truly formidable operation which has for its purpose the saving of the mother's life at the cost of the fœtal life, proceeds to destroy the living child within the womb, does he violate any law in the criminal code? The answer is in the negative. So long as the child is within the womb or indeed within the maternal passages, it is regarded by the law as a part of the mother's body. Having no independent circulation and deriving its life *in utero* wholly from the mother through the placenta, it is not a "person" and cannot die by violence within the meaning of the law. Until it is "wholly born and has an existence of its own, it is considered *par viscerum matris* and cannot therefore be the subject of murder."[9] So that it follows that the destruction of the life of the fœtus may be brought about within the womb of the mother by the accoucheur in the operation of craniotomy, or in any other way, and the law finds nothing wrong in the act; the only requirement within the legal purview being that to avoid the element of felony, the mutilation must be so complete that the child shall die while still unborn; for, if perchance, as has unfortunately happened on rare occasions to obstetricians, the child is delivered and separated from the mother while still exhibiting some signs of life, however feeble, after the head had been crushed, it is a subject of infanticide, excusable killing perhaps, but in law, not to be distinguished, save in its motive, from infant murder under ordinary conditions. The thing to be insisted upon is that the mutilation shall be thorough and lethal beyond a doubt before delivery is attempted; the act and its effects should be wholly upon the fœtal side of the line.

But how does the matter stand if the operation has for its object, not the mutilation and death of the child in order that its diminished volume may safely emerge from the narrow maternal passages; but the induction of labor, the intent being in each case the promotion of the mother's safety? There is a section in the Public Statutes of Massachusetts which affords an answer to this question in explicit terms; it is Section 9 of Chapter 207, and is as follows: "Whoever with intent to procure miscarriage of a woman, unlawfully administers to her or advises or prescribes for her, or causes to be taken by her, any poison, drug, medicine, or other noxious thing, or unlawfully uses any instrument or other means whatever with the like intent, or with like intent, aids or assists therein, shall if the woman dies in consequence thereof, be imprisoned in the State prison not exceeding twenty nor less than five years, and, if the woman does not die in consequence thereof, shall be punished by imprisonment in the State prison not exceeding seven years nor less than one year, and by fine not exceeding two thousand dollars."

Interpreted broadly and comprehensively, this statute makes no exception of cases in which labor is artificially induced under circumstances that would justify the procedure for the saving of the mother's life or the preservation of her health, as, for example, in cases of deformed pelvis, obstinate vomiting, uræmia or insanity. It is absurd to conceive that any reputable physician would ever be called upon to defend himself in court under an indictment charging him with crime under such circumstances. But the fact remains that the law strictly regarded, considers as criminal those acts whose intent is the induction of abortion, and the burden of showing the excusability of the acts is properly placed upon the accused physician. The word "unlawfully" as it is used in the statute, would seem to modify this view and would appear to relieve an act done in good faith, for a beneficient purpose, from the imputation of crime, since a crime involves not only an unlawful act but a malicious intent; but it is clear that the circumstances attending the commission of the act should be such as would furnish a full justification and excuse and negative the presumption of a criminal motive.

Is it not on the whole, salutary that this view of the legal relations of fœticide should be maintained? Aside from ethical questions involved in the deliberate destruction of fœtal human life, in operations to pro-

[8] Elwell: Loc. cit., p. 205. [9] Tidy's Legal Medicine, II, p. 249.

cure miscarriage before the seventh month of utero-gestation, is it not best that the practitioner when in the presence of a crisis which seems to him to indicate the need of terminating the pregnancy by instrumental measures should fortify himself at every point and be sure he is right before proceeding to do what in the abstract may be deemed an unlawful act? The abortionist, whose motives and performances have no justification and are wholly criminal, works in darkness and in secrecy; but the physician, who, with clear conscience and pure motives, obeying a higher law than that written in statutes, assumes the formidable responsibility of destroying the life of an unborn child, even if in so doing he theoretically violates a legislative enactment, should place his actions in the strongest possible contrast with those of the professional law-breaker; he should, by a candid recognition of the emergency, by open consultation with skilled advisers, by ingenuous explanation of the gravity of the case to the pregnant mother and her family, and by obtaining their free consent to his proposal that the life of the unborn child shall be forfeited as a necessary sacrifice for that mother's sake, place himself and his acts above suspicion of unlawful intent. In other words, let the induction of a miscarriage be regarded as a most serious thing in its legal as well as its ethical relations; and let the obstetrician by adopting simple measures of prudence and precaution establish his ability to meet and refute charges imputing crime, and indeed offer the most effectual obstacle to the expression of such charges by vindictive or evil-disposed persons.

THE OBSTETRICAL SOCIETY OF BOSTON.

CHARLES W. TOWNSEND, M.D., SECRETARY.

NOVEMBER 9, 1889, the President, DR. J. P. REYNOLDS, in the chair.

DR. DRAPER read a paper entitled

THE LEGAL RELATIONS OF OBSTETRICS.[1]

DR. BAKER said it makes no difference whether our services are gratuitous or not; the patient in either case is able to bring a suit. Where the services are gratuitous, a contract is made by the physician's receipt, not of money, but of experience or ability to teach. In a case concerning the Massachusetts General Hospital, it was claimed and decided that a case could not be brought against a charitable institution as such, as that had no funds reserved to defray expenses in such cases, but the institution could be sued for the neglect of the surgeon if he did not show a reasonable amount of skill, just as it might be sued for the neglect or carelessness of any of its servants.

There were, perhaps, no better means for justice than a jury of twelve intelligent men such as might be found in country districts, but to be at the mercy of such jurymen as were found in a large city was not the pleasantest situation. Physicians were partly to blame, for they often give certificates to efficient men, excusing them on the score of slight ill-health from serving on the jury; they should consider whether, if they themselves were defendants, they would like to have these men excused.

He could not help feeling in what a constant danger physicians were placed, owing to the construction of the law; hence, we, as a profession, should have some means of protection or combined defence, perhaps some small assessment yearly which would make a sum for the defence of any physician. The strong necessity of economy sometimes forces a physician to settle a suit, even against his wish to defend himself. A plan, such as he proposed, would prevent this blackmail, and justice would have its course.

[1] See page 49 of the Journal.

Dr. Chadwick asked whether it would not be worth while to appoint a committee of three to consider the expediency of such a plan in the Society.

Dr. W. L. Richardson thought that this should be done by a larger society, and one proviso made that no man should enter the Society after he had been already mixed up in a law-suit.

The President deferred the motion of Dr. Chadwick till later in the discussion.

Dr. Draper, in reply to a question, said that anyone has full license to sue a doctor without any restriction whatsoever.

Dr. Baker said that the court has power to require a bond from the claimant, in order to defray expenses, if it sees fit.

Dr. Lyman suggested that something might be done in order to require the court always to demand such bond.

Dr. Richardson said that the Legislature would never pass such a law, for that would prevent a poor person, who had a just grievance, from bringing a suit.

Dr. Homans said that a suit can be brought against any physician whether in a hospital or not.

Dr. Edw. Reynolds mentioned a case brought against a house-officer.

Dr. Baker remarked that the suit was generally brought against the man who had most money.

Dr. Davenport said that a hospital cannot be sued if it is proved that the hospital has used due care in the selection of its officers.

Dr. Draper said that on broaching the subject of mutual defence, we were entering on rather dangerous grounds. The great objection to such a plan as Dr. Baker proposed was, that a physician would appear in court to the jury as backed up by a trade-union, and this, he thought, would prejudice the jury against him. As a substitute he proposed that physicians should join some insurance company for this purpose, as, for example, the Massachusetts Employers' Liability Company.

He then asked the following question: "What should be the conduct of a physician in case a woman out of wedlock comes into his hands after being operated on by a criminal abortionist? What are his duties to his patient, to society, to law in such an instance?"

Dr. Lyman thought this was a very important and difficult subject to deal with. His rule was to call a consultation at once, as otherwise there might be danger of being considered as implicated in the criminal act.

Dr. Richardson said that these cases were not confined to those out of wedlock, and as the patient either says she does not know anything about it, or, if she does admit it, refuses to give the name of the abortionist, he does not think we can do anything but take care of the patient. Nothing can be proved against the abortionist, and for himself, he never thought that in attending such cases there was any danger of being considered an originator of the trouble.

Dr. Blake said that he often declined to attend such cases, but if he did not, he always obtained the counsel of the medical examiner.

Dr. Chadwick urged the importance from prudential motives of always having a consultation in these cases.

Dr. Strong asked whether a physician was liable for not reporting to a medical examiner a case whose illness he considered was due to a criminal abortion.

Dr. Lyman was particularly perplexed as to what was the duty of a physician when called to such a case in an unmarried woman in a good family where secrecy was imperatively demanded. To shoulder the case alone, as he had done under such circumstances, was assuming a great responsibility, for it might bring one's good name into question.

Dr. Homans and Dr. Richardson both thought that this should be done, and that the risk to the physician was not great.

Dr. Draper, in closing the discussion, said that physicians are under no obligation to attend cases ill from a criminal abortion; calls to such patients may be declined or accepted as one sees fit; but having once begun attendance, it is our duty to continue, subject to the legal rules for ordinary medical services. Where the family or the patient is unknown, a consultation is a matter of prudence; but where the patient is known and is reliable, a consultation is unnecessary for the attendant physician's safety, and might excite scandal to his detriment as well as that of the patient.

Where in such a case the patient is doing well, it is our duty simply to attend to her and promote her recovery. The law does not require medical men to be either detectives or informers, and if we should attempt such a part through mistaken zeal, we should, as a rule, inexcusably exceed our duty to the patient, make a sensation unnecessarily, fail almost invariably in our object to bring a criminal abortionist to justice, and find our efforts to that end return against ourselves like a boomerang.

If the patient is about to die and, under a sense of impending death, wishes to make a declaration of the facts relating to the induction of the abortion, the attending physician is, under the law, competent to take the statement, and should report it to the proper authorities after her death. Such declarations are now received as evidence in Massachusetts courts in accordance with a law enacted the present year.

If the patient dies, the attendant's sense of duty to the State should lead him to report the case forthwith to a medical examiner, and not attempt to conceal it under an equivocal certificate of the cause of the death. Under the present methods of conducting inquests in Massachusetts, sensations are avoided; and the physician, who reports a case under these circumstances, may feel that he has freed himself from the imputation of blame in covering crime or creating public scandal.

The law does not regard the physician as accessory to the crime simply because he signs the death certificate, giving a cause of death which, though true, is not the whole truth. But it is a nice question how far he could go in the concealment of the facts of a crime, if they are known to him and are not simply suspected, before he became legally as well as ethically responsible.

The medical examiner has no right to interfere officially in a case of criminal abortion before the death of the patient; it is not a part of his duty to take dying declarations.

Dr. Forster showed a syphilitic placenta from a case of miscarriage at the sixth month. The placenta was largely fibrous, being red in but a small portion. The patient had been married a year and developed a chancre one week after marriage.