LEGAL ASPECTS PERTAINING TO THE MEDICAL PROFESSION *

HERBERT V. BARBOUR
DETROIT

INTRODUCTION

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b. Some ways in which a physician may safeguard himself against malpractice suits before operation.

c. Action to be taken when suit is threatened or commenced.

d. When a physician is liable for malpractice and the evidence necessary to sustain judgment—

1. Expert testimony necessary, citing case of Ferrell v. Haze.
2. The doctrine of *res ipsa loquitur* does not apply.
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PRESENT CONDITIONS AS ILLUSTRATED BY REMARKS OF DR. HOWARD A. KELLY, BALTIMORE

As illustrating conditions as they to-day exist and the effect on men in your profession of high standing, I can do no better than quote from a recent article written by Dr. Howard A. Kelly of Baltimore, and which appeared in *The Journal of the American Medical Association*.

He entitled his article "The Menace of Irrational Legal Processes," in the first paragraph of which he states:

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*Read before the Wayne County Medical Society, on Monday, April 21, 1913.

it. The knife is then made to describe a circle of the largest possible diameter without going beyond the margin of the lens. The incision, if properly made, is circular, without interruptions and parallel with the margin of the lens. In making this circular incision the point of the knife will be hidden behind the iris to varying degrees of depth at different steps of the procedure. When approaching that section of the circle corresponding to the corneal incision, it is necessary, if an iridectomy has not been performed, to draw the iris out of the way of the advancing cystotome with a blunt iris hook so that the iris may not be injured and to prevent the iris from forcing the point of the knife out of its prescribed course.

It is absolutely necessary that the beginning and ending of the incision be continuous and that the knife engage the capsule at every point of the circle so as to leave no undivided gaps to hold the capsule and prevent its proper delivery. If the operator is not sure that the beginning and ending are at the same point (and no one can always be sure of that) it will be well for the end of the incision to overlap or parallel the first portion and then, by a slight movement at right angles, to unite the cuts. If this step of the operation has been properly performed the exsected anterior capsule can be removed en masse by means of the tenaculum hook or the tenaculum forceps.

The delivery of the lens will be accomplished by the usual method. The exsected segment of the capsule may be left to be delivered at the time of and together with the lens, but it is best to remove it separately and thus be sure that it is out. If left to be delivered with the lens it may rub off and be lost in the anterior chamber when one would have to fish for it. The usual flushing out of the anterior chamber with normal saline solution, the closing of the wound, the toilet and the subsequent after-treatment are in no ways departed from.

Irrespective of the advantages or disadvantages of an iridectomy so far as the delivery of the lens is concerned or the subsequent vision obtained, an iridectomy is an advantage in this operation. It enables the operator to make a much better circular incision and does less violence to the iris by the instrument rubbing against its pupillary edge than without an iridectomy. It is not necessary, but it is an advantage.

Extreme care must be exercised to prevent the delivery of the lens until the entire section has been completed. It is well known that at times the lens will expel itself, at least partly, as soon as the capsule has been incised. This unfortunate complication would prevent the purpose of this operation, as it would practically be impossible to excise the anterior capsule after the delivery of the lens. This can be prevented by an assistant holding the speculum and drawing it away from the eyeball as far as possible without danger of withdrawing it altogether. Traction of this character produces a suction effect within the eyeball and tends to hold the lens *in situ* until the surgeon is ready to deliver it. Any assistant in this work must be an expert and preferably a surgeon himself.

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in a malpractice suit against Dr. Guy L. Hunner. My own utter disgust with the methods of the legal profession is such that if I were to act on the impulse of the moment I would abandon my surgical work and retire to some distant field to escape as far as possible from the nauseating associations with courts and their wearing delays and postponements and their process of flagrant injustice."

Later I wish to revert to this paper when discussing some cures for the existing conditions.

SOME WAYS IN WHICH A PHYSICIAN MAY SAFEGUARD HIMSELF AGAINST MALPRACTICE SUITS BEFORE OPERATION

I take it that you are all interested in knowing just what constitutes malpractice in the law. The following definition has been sanctioned by many courts—that malpractice is nothing more than negligence which in the case of a physician consists in doing something which he should not have done in the treatment of a case, or in omitting to do something he should have done.

Liability for the doing or failure to do some act is based on contract expressed or implied, that is, in the absence of a special contract a physician impliedly contracts that he has the reasonable degree of learning and skill ordinarily possessed by physicians, and that he will use a reasonable degree of care in the exercise of his skill and his best judgment, and he is not responsible for unsuccessful treatment unless it results from his failure to exercise ordinary care or skill.

PROTECTIVE MEASURES

If a major operation is indicated, especially double oophorectomy, a consent in writing should be signed by the patient, in the presence of witnesses, who should sign as such. And should the patient not speak English, then the agreement should be read and explained by an interpreter, who in turn should sign his name, and stating that he had translated the agreement and that the patient understood it.

Another form is to obtain the consent to do whatever is necessary in the judgment of the physician, and have the consent signed and witnessed. Especially would I urge this in charity cases and among the poorer class of patients.

The result of the failure to adopt this practice was brought home to me very forcibly in a trial recently of one of your members. The surgeon diagnosed the case as an encysted ovary; his diagnosis proved correct, and eventually both ovaries were removed.

The patient claimed she had never consented to the operation and brought suit for damages. There was also an allegation of malpractice in the declaration, but the real claim was based on an operation without consent, or an assault and battery.

The patient was a foreigner, but fortunately the doctor and his assistant spoke German, and both testified that she understood the nature of the operation and consented. The first trial resulted in a verdict for two thousand dollars against the doctor. A motion for a new trial was granted and a second trial was had; the verdict this time being one of no cause of action. Now if the doctor had obtained a written consent, also signed by a German interpreter, a verdict never would have been rendered against him in the first instance.

PATIENT'S STATEMENT

Another very wise thing is to make a statement in advance to the patient, as nearly as possible, of the nature of the operation to be performed. This statement should be made in the presence of the nurse or assisting physician, and have some record of this statement placed on the hospital charts, which charts, by the way, are generally too brief. A case has been started in this city recently which illustrates the value of the practice just suggested. The suit is against two reputable doctors for the failure to remove an appendix. The fact is that so much pus was present when the operation was made that it was considered dangerous to do more than drain it, and I noticed recently that Dr. Carstens made the statement at one of your meetings that it was good surgery to do just what was done in this case.

However, suit has been started against both doctors, the one who performed the operation and the physician who assisted; the theory of liability being that the doctors stated they would remove the appendix, and that their failure to do so was negligence, and that much suffering resulted therefrom, and another operation is now necessary.

In my judgment it will be difficult for the plaintiff's attorney to get his case submitted to the jury, for in order to do so, the plaintiff must show by expert testimony that it was negligence not to remove the appendix, and further that the doctors stated that they would remove it. Now the doctors say that they told the patient that it would perhaps be necessary to do just what they did, and that they made no statement about positively removing the appendix. If some record had been made before the operation, which now appeared on the chart, it would practically dispose of the plaintiff's contention. I cannot, there-

fore, overestimate the value of keeping exact records of your treatment of a case, and keeping them on file for years after the patient has been treated, especially since it has been held that a child who has been operated on at the age of 11, may, after reaching the age of 21, bring suit for damages resulting from the operation.

Another precaution is noting carefully the time of a call so that if suit is brought for your failure to respond promptly you will know definitely when the call came and what time you responded. If it is impossible to respond promptly where you have contracted, either expressly or impliedly, to care for the patient, you should so advise the patient, and see that some one else is sent, unless from your diagnosis you are reasonably sure that you will have time to get there after treating the other patient.

I speak of this especially, since two suits have come to my attention recently, based solely on the failure to respond promptly to a call. Of course, if a doctor is engaged in treating another patient that he cannot leave when the call comes, his duty is then to the patient under treatment; but he should advise the one calling that it is uncertain when he can arrive, and that some one else should be called; that is, if his delay may result in suffering or other damage.

A case of this nature is difficult to defend, for if witnesses testify that the doctor was called on several occasions and failed to respond promptly, although promising to do so, the question will be left to the jury as to whether the doctor had been called and whether or not damages resulted from his failure to arrive in time. This is one of the few cases where expert testimony would not be necessary to sustain a verdict against a doctor, except, perhaps, to prove the damage.

A doctor, of course, may refuse absolutely to attend a case if he wishes, however inhuman his action may appear, and even if he is the only available physician, and even though the patient, or another, offers to pay the customary fee for the service asked. When this point was first decided it was urged by attorneys for the plaintiff, that in states where physicians had to register and be licensed, they were compelled to render service when called. The court held, however, that the law was a preventive and not a compulsive measure; that the license granted under the law was a permission to practice medicine, but that the state does not require, and that the licensee does not engage, that he will practice at all, or on other terms than he will choose to accept. But if the doctor does accept the employment, then the law holds that a contract exists, and a physician is held for the non-fulfilment, as any other individual, except that special rules of evidence have gradually grown up covering the trial of civil malpractice cases, in order to protect physicians against injustice.

Another suggestion as to preventive measures is to impress on the nurses and assistants to use care to see that sponges are all accounted for. Because of the frequent discovery of sponges in the abdomen of patients subsequent to operations, and the ruling of courts, the question has become one of vital importance, not only to the operating surgeon, but to interns, nurses and other assistants.

In deciding this question, and this was one of the questions raised in the case of which Dr. Kelly speaks, the courts, especially *nisi prius* courts, have generally adopted the view that leaving a sponge in the patient's body at the time of operation was conclusive of negligence, and I think I can safely say that that is the prevailing rule in the courts of this country to-day. However, there is hope, for when this question was recently before the Supreme Court of Ohio, it was given a very careful examination and a new rule adopted there. In discussing the case the court says:

"Our first impression was that a sponge could not possibly be thus left in the body of a patient by an operating surgeon without personal negligence on his part. But our examination of the evidence before us, particularly the expert testimony of distinguished surgeons, convinces us, not only that our first impression was wrong in general, but also, under the circumstances of this particular case, the defendant in his own conduct may have very well exercised all the care the law imposed on him. The actual negligence if any (and there must have been negligence somewhere), being attributable probably to some member of the hospital staff."

The method of counting sponges was explained in detail — how they were first counted by the person in charge of the sterilizing department, and placed in packages and not opened until brought into the operating-room, where they were again counted; that when they had been removed after the operation, a count is again called for, and if the number used and those not used correspond with the original number they are considered accounted for. The fact was further shown that it would be impossible for the operating surgeon to personally make an exploration after the sponges for the reasons given by the defendant; that is, extra handling of the intestine or abdominal organs would add greatly to the shock; and secondly, if there has been pus there is danger of carrying infection to other organs than those primarily involved. This

again might necessarily prolong the operation and add to the shock and lessen the chance for recovery.

The court in this case held that if the surgeon had the right to direct and control what the assistants and nurses did even though they were furnished by the hospital, they would then be his agents and he would be responsible for their negligence. But, if the hospital authorities had such right of control, then the defendant would not be responsible, even though the nurses and assistants were negligent. A case involving this point was recently tried in the state of Michigan, but it was not decided, as a verdict was directed for the defendant on another point.

I take it that all of you have temporary control and direction over the assistants and nurses furnished to assist in operations so that you might be held responsible for any act of negligence of theirs at the operation. Hence, the best practice is to insist on well-trained interns and nurses.

Of course, a doctor could secure a waiver for any negligence of the nurses or assistants furnished by a hospital if the patient was willing to sign such a waiver, but I feel sure that none of you would wish to ask your patients to do so.

In conclusion of this first topic, I would not advise the taking of a statement waiving all claims for damages that may result, as such a waiver has been held voidable, and its existence would be an indication that the physician anticipated an unsuccessful result, and hence, should not have undertaken the operation.

ACTION TO BE TAKEN WHEN SUIT IS THREATENED OR COMMENCED

Suppose now that after taking all possible measures to protect yourself, a suit for malpractice is threatened or commenced, what would a physician do to protect himself and to aid the attorney who is to defend him?

Perhaps the best suggestion is to tell you to *keep quiet*. The defense of many cases has been jeopardized by statements made or alleged to have been made by the doctor before or after an operation, and before and after suit is threatened or started. In themselves, the statements may have been harmless, but when passed along they always become grossly distorted. Just at present I am placed in an embarrassing position by a statement of a doctor defendant to the plaintiff's attorney, the last person in the world, of course, to whom he should have said anything.

The case arose over a fractured arm. The plaintiff claims the doctor did not tell him that the arm was fractured. The doctor states, and I think truthfully so, that he knew the condition of the arm and that it was at the request of the patient he did not set it; that the patient told him he wanted it dressed and bandaged, and he would have it set by his own doctor when he reached his home, which was not far distant. It seems the patient did not go to his doctor at once, and that the arm became badly swollen, and whether his own doctor ever told him it was or was not fractured, we can never know, as the doctor has since died. Then, just before the cause of action was barred by the statute of limitations, the patient commenced suit against the doctor who first attended him, and the principal charge in the declaration is that the defendant told the patient that his arm was not broken, and that the other doctor relied on this statement, and that the patient now has a "flail arm." To sustain this charge the plaintiff's lawyer says that he could take the stand and swear that the doctor defendant told him that he advised the plaintiff his arm was not broken.

If this statement was made to the lawyer, and he cannot deny, but only explain it, his case will be weakened at the very outset.

Besides *keeping quiet,* you should immediately send a notice of the suit or threatened suit to Dr. F. B. Tibbals, Detroit, and also the insurance company, provided you carry indemnity insurance; a subject which I shall take up later. Then, for your own benefit make a complete statement in writing of every material fact and obtain similar written statements from others, who have any knowledge of the operation or treatment, also carefully preserve all records of your treatment. This will serve to refresh your memory at the time of trial, which is generally not reached in less than a year after the summons is issued.

Next, find out if possible who the doctor is who followed you on the case, and you can perhaps discover through the aid of the Medicolegal Committee what his testimony will be at the trial and be prepared to combat it.

As I have stated before, in almost every malpractice case in this state it is necessary for the plaintiff to prove his claim by expert testimony; that is, a licensed physician of the same school of medicine as the defendant doctor, must swear to evidence of malpractice.

WHEN A PHYSICIAN IS LIABLE FOR MALPRACTICE AND THE EVIDENCE NECESSARY TO SUSTAIN JUDGMENT

Generally the plaintiff can secure a witness in his behalf, and frequently several, who have never seen the case, but will make the right answer to

the hypothetical question. It then becomes necessary for the defendant to secure expert witnesses in his defense and I can assure you that the successful defense depends largely on those disinterested witnesses; great care should be made in their selection. Procure some one who will be absolutely fair, not too willing to talk, and not too anxious to show his learning to the court or jury. In other words, an expert witness should not talk too learnedly, although he should possess abundant knowledge, should never use a technical term where it can be avoided, should be fair and convey the impression of fairness to a jury.

Not long ago I represented one of your members in a malpractice suit, and while the doctor was not in the slightest to blame, the case was a very serious one, as hernia followed the operation, and the patient had evidently refused to have it repaired in order that she might exhibit it to the jury at the time of the trial and arouse sympathy. Dr. Carstens very generously agreed to give whatever time was necessary to assist the doctor in his defense, and he proved to be an excellent selection. He explained the necessity of the operation so clearly, and the probable consequences if the operation had not taken place, and admitted frankly that hernia might follow any operation, and he admitted with the same frankness that the same thing had happened to him, and he believed that it had to all surgeons who had operated with great frequency for many years. He compared the failure of flesh and skin to properly grow together with the failure at times of bones to knit, and admitted that in many cases it was impossible to explain why.

The point I wish to make in speaking of this is that it was the fairness, the directness, the unassuming air, the avoidance of technical terms and the clear statements of Dr. Carstens that made the jury see and understand, and helped us so materially in the defense of the case, and undoubtedly influenced the jury in their verdict of not guilty. This is the form of the verdict in an action of assault and battery, and as I have said, it is an assault and battery, under some circumstances, to operate without the consent of the patient.

EXPERT TESTIMONY NECESSARY

I wish to explain here, just briefly, the necessity of expert testimony as shown in the recent Michigan case of *Ferrell vs. Haze,* and how generally it is impossible to have a case submitted to the jury unless some physician has given evidence of malpractice.

In this case the attorney for the doctor asked the court to instruct the jury as follows:

"The question whether the loss of plaintiff's foot was attributable to anything that the plaintiff claims the defendant did or omitted to do, is a scientific question which the jury cannot determine for itself, and can only be answered by an expert; and inasmuch as no expert or medical man or surgeon has stated that the loss of the foot, in his opinion, came from anything the defendant did or omitted to do, therefore I charge you that you cannot take the loss of the foot into consideration in this case or hold the defendant liable therefor."

The trial judge refused to give the instruction and a verdict was returned for the plaintiff. The Supreme Court held that this instruction should have been given and reversed the case.

THE DOCTRINE OF RES IPSA LOQUITUR DOES NOT APPLY

The doctrine of *res ipsa loquitur* has often been spoken of in medical cases and generally held not to apply. In other words, *the failure to cure or even improve a patient is not in itself any evidence of negligence on the part of the physician.* I will speak further of this point in discussing the education of courts.

LIABILITY FOR ASSISTANTS

The question has often been asked me whether the alleged lack of skill or negligence of a surgeon performing an operation could be imputed to a physician who assisted, and especially where the attending physician had recommended and hired the surgeon for the operation. This question has been squarely passed on in this state in the case of *Brown vs. Bennett.*

Here an action of trespass was brought against two defendants, one of whom had advised the operation, made arrangements therefore and procured the services of the surgeon to operate. One of the allegations of the plaintiff was that a sponge had been left in the abdomen and damage resulted. A joint judgment was obtained against the doctors in the lower court and an appeal was taken, and in reversing the judgment, the court said:

"The defendants were not engaged in a trespass, neither was employed by the other. Each was required to exercise ordinary care and skill, but direction and control of the operation was with one man. Whether responsibility for what occurred is rested upon contract or upon negligent performance of duty, there is no rule of law which under the undisputed facts imputes want of care or skill on the part of one to the other."

The case was reversed and a new trial ordered; but it has been held, and is perhaps the general

rule, that a surgeon is responsible for the negligence of his assistant, and that the assistant is also liable for his own negligence.

Courts have very generally held that partners in the practice of medicine are all liable for injury to a patient resulting from the negligence of any one of the partners acting in the scope of their partnership business.

In a case for malpractice in the courts of Minnesota against a firm of doctors, it was said:

"The partners in the practice of medicine are sureties for the faithful performance of their engagements by each of them."

And in Iowa one partner was held liable for the negligence of another partner in superintending the return of a patient from the operating-room of a hospital to her apartment.

LIABILITY FOR ACTS OF NURSES

A physician is generally not liable for the failure of a nurse to properly administer medicines or treatment, if he has used reasonable care in supervising her work. But it is good practice for a physician to see that his instructions to the nurse are in writing, and that his calls to look after the patient are always noted on the chart. These written evidences are of great value in determining whether the physician exercised proper supervision.

It has also been decided that if a physician leaves his practice to another and recommends him to his patient that he is not responsible for the acts of such physician, provided he was not aware of any reason why he should not have made the recommendation, or provided the person recommended was not under his control.

OPERATIONS WITHOUT CONSENT

Where a patient is in possession of his faculties and in such physical health as to be able to consult about his condition, and where no emergency exists making it impracticable to consult with him, his consent is a prerequisite to an operation. However, if he voluntarily submits and there has been no misrepresentation, most courts will hold that his consent may be presumed. A more difficult question arises where there is an emergency, for then a physician may be liable if he does operate, and vice versa.

It has been held and undoubtedly correctly, that where an emergency arises calling for immediate action for the preservation of life or health of the patient, and it is impracticable to obtain consent, it is the duty of the physician to perform such operation as good surgery demands without such consent.

In the case of *Luka vs. Lowrie,* decided in this state, it was held that a surgeon is not liable for amputating the foot of a child without first obtaining the consent of the parents, where the foot was crushed and instant action may have been necessary to save the life of the child, and the parents could not have been consulted without delay.

Another question often arises as to the duty of a physician if in the course of an operation he discovers conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life of the patient.

The Supreme Court of Minnesota held that under these circumstances the physician would be justified in extending the operation to overcome the conditions even though no express consent had been given. This is perhaps the general rule, but to be absolutely safe, I would always advise obtaining consent in writing before performing any major operation, especially among the poorer class of patients.

STATUTE OF LIMITATIONS

An important change in our law is the amendment shortening the time in which malpractice suits may be instituted from three to two years.

It is also important to remember that the statute of limitations runs from the time of the injurious act complained of, and not from the time when the damage is developed. It has been held that an action for malpractice survives in favor of an executor, but it has never been decided in this state, whether or not, if the deceased lives for one year after the alleged act of malpractice, the statute runs two years from the appointment of an administrator, or whether the year that has already elapsed will be counted against such administrator or executor. It seems to me that the courts should hold that it runs from the time of the act performed, and ceases at the time of death, and commences to run immediately again on an appointment of an administrator.

THE REMEDY

We now come to the question of the remedy for existing conditions, and I want to again refer to the remarks of Dr. Kelly. In speaking further of the case in which he was witness he says:

"Dr. Hunner operated on a woman with a large perinephritic tuberculous abscess. The lower pole of the kidney was calcareous and tuberculous; he did a remarkable conservative operation, resecting the diseased portion and saving a good organ which has healed perfectly and given no further trouble. The surrounding tuberculous abscess cavity naturally demanded

prolonged drainage until it healed, in about seven months. During this period there was a trifle fecal drainage for a short time. Dr. Hunner in three days removed the substantial drain inserted by him at the operation, but his resident later left in the suppurating wound a tiny sliver of gauze just large enough to fill half an ordinary thimble. This appeared and was pulled out some weeks later by the physician at the patient's home in the country. A trap was then set for Dr. Hunner in the form of a letter complaining of carelessness and hoping that no axes, saws, etc., were still concealed in the wound. He replied indulgently, 'I am sorry we were so careless', and expressed the hope that there were no axes and saws, etc., still to be extracted, and advised her as to further conduct. The patient gradually in the intervening months developed a pulmonary tuberculosis from which she now suffers to a marked degree."

An alleged expert testified in behalf of the plaintiff that the tiny drain caused both the fistula and the pulmonary tuberculosis, and the jury brought in a verdict of $1,000 against the doctor for damages, notwithstanding the fact that the best surgeons of Baltimore testified in favor of Dr. Hunner. It was this verdict that made Dr. Kelly feel like retiring to some distant field.

In speaking of the consequences of such a trial he says:

"In other words, such trials with the publicity attending them, circulating unjust and distorted criticisms of the work of our best men, and implying that carelessness and neglect of patients are habitual, tend to influence the public against the profession and to make patients eager to search for fancied wrong and overanxious to assess large damages for imaginary neglect."

And, in closing, he says:

"We see here the outcome of our nation-wide utter neglect in attending to the ethics and the morals of the communities in which we live, the natural sequence of being too busy with the subordinate questions of 'science' and making money to think of the infinitely more important questions of ethics."

There is a great deal of truth in what the learned doctor has said, but you will all notice that he has really failed to place the blame where it belongs. For had it not been possible to secure a surgeon to testify in answer to a hypothetical question in favor of the plaintiff, the court would never have submitted the case to the jury, and would have directed a verdict in favor of the doctor. I have nothing to say in favor of the lawyer who seeks such cases, *but you must all remember that it is only possible for that lawyer to succeed because he can generally purchase a favorable opinion from some member of your profession.* You are all more or less acquainted with the hypothetical question and the ability to always procure doctors who will answer it favorable to the questioner.

The hypothetical question was so humorously yet so correctly discussed in the *Saturday Evening Post* recently that I cannot refrain from quoting from it:

"The jury being chosen, the trial proper now begins and continues until the defendant's cash reserve runs low. The big scene comes — the hypothetic question is brought in on a truck and is read to the alienists. In every murder trial where insanity is the defense, alienists are introduced. They should not be confused with the alienators who figure in divorce cases only.

"An alienist is a family doctor who hated the nightwork. He mounts the stand and the hypothetic question is read to him. A hypothetic question is organized on the same principle as a certain train that used to run on a narrow-gauge road down in our country years ago. You could climb aboard anywhere, go as far as you pleased, enjoy a pleasant nap en route and drop off at a point that looked exactly like the one where you got on. So it is with the hypothetic question. Outside of persons who were alienists by profession, I never knew but one man who ever tried to make out the true meaning of a hypothetic question. He came by this tendency honestly. It was in his blood. He was a cousin of the man who wrote the Lord's Prayer on the back of a postage stamp; and his uncle was the person who spent two years figuring out the number of seeds in a prize pumpkin in order to win a cash prize of five dollars.

"A good, long hypothetic question though, which reads the same backward or forward, will hold an alienist spell-bound by the hour, and when it is finished he invariably has the right answer. I never knew of an instance where the alienist failed to make the answer that was agreeable to the side for which he was working."

The ability to procure experts to answer questions in the way desired is such a well-known fact that it is useless for me to dwell on it. In most cases the doctors undoubtedly give honest opinions, *but if they would only refuse to testify against members of their own profession the services of a lawyer for your defense would be unnecessary.* But since it seems impossible to eliminate experts who testify against their fellow practitioners, some other remedies must be developed and some of these rest solely with your membership.

First, I would suggest higher qualifications to secure a license from the state, and also an examination of the fitness of a man in his profession before admitting him into this society, for if he is worthy of membership by qualification in character and education he is worthy of the defense and protection of your society.

Second, I would suggest a closer union among doctors. For instance, it is almost impossible to secure one lawyer to testify against another, while it is always easy to secure a doctor to testify against another, and furthermore, the surprising fact is that I find in nearly every malpractice case the suggestion of a suit comes from some one in your own profession.

This society is doing a great work in bringing the physicians closer together and making it very difficult for anyone to successfully prosecute a suit for damages even though a great many of them are started.

The next important thing to consider is how to educate the courts and perhaps in some cases, the jury. The courts generally do not seem to grasp or understand that the duty of the doctor is simply to exercise only his best judgment, and that the failure to cure is no evidence in itself of negligence. But as I have stated, some courts have recently seemed to grasp the idea of the defense and to have adopted certain rules for the trial of malpractice cases for the protection of physicians.

Justice Jaggard of Minnesota wrote an opinion which has helped to educate many other judges, and from which I am going to quote, as the learned justice grows fairly eloquent in his defense of the doctors. In reversing a case in the lower court, he said:

"Indeed, the peculiarities of the subject-matter with which medical men deal constitute another abundant justification for the exception. Those peculiarities concern, in the first place, the constitution of the human mind and body, and in the second place, the nature of his science itself. On the human subject-matter with which physicians have to do, the remarks of Woodward, J., in *McCandless vs. McWha,* 25 Pa., 951, have become classical. *Smother vs. Hanks,* 34 Iowa, 286, 11 Am. Rep., 141. Judge Upton has, however, improved them: 'The surgeon does not deal with inanimate or insensate matter like the stonemason or brick-layer, who can choose his materials and adjust them according to mathematical lines, but he has a suffering human being to treat, a nervous system to tranquilize, and an excited will to regulate and control. Where a surgeon undertakes to treat a fractured limb, he has not only to apply the known facts and theoretical knowledge of his science, but he may have to contend with very many powerful and hidden influences, such as want of vital force, habits of life, hereditary disease, the state of the climate. These or the mental state of his patient may often render the management of a surgical case difficult, doubtful and dangerous; and may have greater influence on the result than all the surgeon may be able to accomplish, even with the best skill and care, *Williams vs. Poppleton,* 3 Ore., 139, 147.

"Physicians and surgeons deal with progressive and inductive science. On two historic occasions the greatest surgeons in our country met in conference to decide whether or not they should operate upon the person of a president of the United States. Their conclusion was the final human judgment. They were not responsible in law, either human or divine, for the ultimate decree of nature. The same tragedy is enacted in a less conspicuous way every day in every part of the country. The same principles of justice apply. Shall it be held that in such cases, where there is a fundamental difference among physicians as to what conclusion their science applied to knowable facts would lead to, than what they, with their knowledge, training and experience are unable to decide, and what in the nature of human limitations, is not susceptible of certain determination shall be autocratically adjudged by twelve men in a box, or by one man on the bench, or by a larger number in an appellate court, none of whom are likely to have the fitness or capacity to deal with more than the elements of the controversy? All the court can properly do if an action for negligence should be brought in such a case would be to direct a verdict for the physician. In *Williams vs. Poppleton,* 3 Ore., 139, 145, Upton, J., said of a charge of negligence in the reduction of a dislocation: 'In cases like this the court and jury do not undertake to determine what is the best mode of treatment or to decide questions of medical science upon which surgeons differ among themselves.'"

Further discussing this same case, and bearing on the doctrine *res ipsa loquitur,* the learned judge quotes from an opinion of Judge Thayer and from an opinion of Judge Taft as follows:

Judge Thayer says:

"No presumption of the absence of proper skill and attention arises from the mere fact that the patient does not recover. * * * God forbid that the law should apply a rule so rigorous and unjust as that to the relations and responsibilities arising out of this noble and humane profession."

Judge Taft says:

"A physician is not a warrantor of cures. If the maxim *res ipsa loquitur* were applicable * * * and a failure to cure were held to be evi-

dence, 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.' If apart from the fact of death, there is no liability—and that is the conclusion in this case—that fact does not create it."

In the defense of a doctor in suits for malpractice the attorney should always try and educate the court, and at the outset of a trial furnish the court some sound decisions to read, to put his mind in a receptive condition. However, when experts can be procured to testify positively to malpractice, no matter what the opinion of the judge is, he is obliged to submit the question to a jury and a verdict very frequently is returned against the doctor, which brings me to the last point for discussion, and that is whether or not a doctor should carry indemnity insurance against suit for malpractice.

This question has been asked me so frequently that I feel justified in expressing my opinion, at the same time assuring you that I have no stock in any corporation insuring doctors (the risk is too hazardous).

In my opinion a doctor would be exercising good business judgment to carry a policy of insurance, such for instance, as that written by the Medical Protective Company of Fort Wayne, Ind., which provides for the payment of any judgment rendered up to $5,000, at a very small cost. Especially do I believe in carrying insurance at this time, for the Employees' Compensation Act, recently passed in this state, has robbed a certain class of attorneys of much of their former business, and they may now turn their attention to the doctors.

I would like to mention one other question, not for the purpose of discussing it, but in hopes of hearing it discussed or reading some comments.

The suggestion which I have in mind is how far this society should go in defending its own members where some member is convinced there is evidence of malpractice. In other words, should one of your members pass judgment on one of his fellow practitioners and express that judgment to the jury, or should it be left to the court and jury to say, as a matter of law, whether or not there is evidence of malpractice? Personally, I very much prefer the latter, for in my experience I have found that most malpractice suits are started after a physician has made demand for payment of his bill, or through the jealousy of some other physician.

1101-8 Ford Building.

A REPORT ON ONE OF DR. FRIEDMANN'S NEW YORK CLINICS*

N. M. KASSABIAN, M.D.
COOPERSVILLE, MICH.

I arrived in New York City a total stranger on March 19, 1913; my credentials were a few letters of introduction to some of the well-known medical men of that metropolis—one of them an editor, and another an author of international repute. It might have taken me much longer to gain the attention and courtesy I did receive, had it not been for these letters so kindly furnished me by one of my Grand Rapids confrères.

One of the first things I did after my arrival in New York was to go to the German Hospital, where I had the pleasure of meeting Dr. Meengs, a confrère whom I had known for a few years in Grand Rapids as a member of the Kent County Medical Society. He received me most cordially and I was exceedingly glad of this opportunity of renewing our acquaintance. Dr. Meengs gave me every assistance in securing the desired information concerning Dr. Friedmann. He introduced me to Drs. Seeligman and Kamerer, both very well known in New York circles. These gentlemen were of the opinion that it would be premature to pass any opinion in regard to Dr. Friedmann's method of treating tuberculosis and of the results thus far obtained.

The clinical observations that have been made from patients treated by Dr. Friedmann were not of a sufficiently satisfactory nature to allow one to draw any definite conclusions. These gentlemen, as well as most of the conservative element among the medical fraternity, maintained that so long as the United States government health officers were making a thorough bacteriological test and examination of the Friedmann turtle bacilli, we should refrain from making any hasty remarks or references as to the merits or demerits of his treatment until the United States government physicians were ready to make their formal report.

Some men, however, have been very severe; in fact, harsh, in their criticism of Dr. Friedmann. One man particularly, namely, Dr. Heinrich Stern of New York City, editor of the *Archives of Diagnosis*, without objecting to the publicity I might give to his statements, put his criticism in the following words: "He is not the first one to employ turtle serum in the treatment of disease in general and tuberculosis in particular. No proof has yet been forthcoming that he really uses turtle serum. He has not permitted anyone,

* Read before the Kent County Medical Society, April 23, 1913.

dence, 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.' If apart from the fact of death, there is no liability—and that is the conclusion in this case—that fact does not create it."

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