THE LEGAL RESPONSIBILITY OF THE GYNECOLOGIST

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IT SEEMS preposterous, almost, to present this subject to you. But we have never discussed it in all of the forty-four years of our existence. The subject, of course, is serious, for it has affected many of us. Three thousand cases have reached the upper courts of our country. The writer is thankful that he has been spared this ordeal, though he may hear of it tomorrow. For our mutual protection it would be wise to discuss it.

The writer learns from one of the large liability insurance companies that 17 per cent of all the physicians insured by them during the years 1929, 1930 and 1931, inclusive, register as gynecologists or obstetricians. It is also shown that incurred losses by all practitioners except these two specialists is 57.2 per cent, while the losses on gynecologists and obstetricians is 51.3 per cent. In other words we are singled out for special attention. This alone deserves our study, attention, and discussion as a matter of self-protection. If we receive special recognition by the laity, preparedness in the shape of high insurance protection is a duty. The above figures are only from those who report themselves as gynecologists and obstetricians, or who are registered in the Directory of the American Medical Association as such, and not those who are general practitioners or surgeons.

It is apparent that as soon as our profession declares openly that we are able to do things particularly well, in other words profess special knowledge, so soon will we be called upon to be liable in a special degree.[9,11,14,19,21] The gynecologist at present is the person in question. It is one of the objectionable features of specialism. We go before the public and the profession generally and offer our services where special knowledge of the diseases of the female pelvic organs is required. Of late we are demanding special recognition because some of us have become members of the American Board of Gynecologists. This special recognition carries with it added responsibility. The most important point here is that we shall not have the backing of the court that a general practitioner has when the court will instruct a jury by saying: "The defendant, the general practitioner, possesses such a degree of learning and skill as is ordinarily possessed by the physician and the surgeon in the locality where he practises."[15,23] We as gynecologists must possess the very highest skill and learning in applying that knowledge to our patients. Nothing could be fairer than this. Our opinion as to the treatment and after-care need not, however, be standardized or measured

by common practice, among practitioners in this line, and because we consider ourselves authorities in this work. Our own results and judgment must ever in court be a criterion of our actions. In this our colleagues will stand by and protect us. We shall be told this when we are brought before the court as defendants in a malpractice suit. An action for malpractice is an action in negligence. So simple a thing as to overlook a piece of gauze left in the vagina on the patient's discharge should be guarded against. Much more serious is the result of foreign material left in a wound.[22]

It behooves us to guard against any chance of thus being treated. While we naturally have always been on the alert in self-defense and ever have in mind to follow the Golden Rule, we may, nevertheless, innocently make an error which gives cause for complaint. Fatigue and worry and technical obstacles may be at the base but that, in a court of law, does not clean our skirts. We may overlook, and that gives the patient a perfect right to complain.

In a way we shall always be obliged to engage assistants, be they doctors or nurses, but we shall always be liable for their actions both morally and in a legal way. Let us remember that the patient's rights are preëminent, and these rights we must and do respect. While we surgeons must ever protect one another against fake accusations, there must be a limit to such protection if we wish to retain the respect of the court as well as the laity. Let it once be known that we protect each other whether guilty or not, neither the court nor the jury will listen to our evidence nor believe a word we say. If the accusation has any foundation for gross or criminal negligence it will be well to withdraw our support and let the court decide. In withdrawing our support we, nevertheless, must be mindful that the whole and only truth shall be placed before the court and jury. Let us not forget that there is an immense amount of uncalled for gynecological surgery and mutilation performed. Unless we curb our experimental surgery and base it on true pathology and on experimental surgery on the lower animals, there will soon be a demand for a why and a wherefore. Where we might fail, however, is that our action is not based on the true pathology as understood at this date. Belief and opinion have no place in the court today when it is contrary to present day pathological data and experience. Pathological views that were considered right in the past and that have been abandoned are no excuse for our actions and would surely fail in a court of justice. It would be eminently unfair to our colleagues to ask them to protect us under these conditions. A report of the pathologist that normal organs have been removed is not to our credit and will be a factor in court. The pathologist often enough at this date finds fault with our work. But on the other hand he may be complaisant and thus protect the operator. However, if sections or whole organs are de-

chiefs of departments to see that they carry enough insurance to cover themselves, their whole staffs and the state.

May I cite one case that happened in Minnesota? An otologist was sued for operating on the wrong mastoid. He had told the patient that the left mastoid should be operated upon, but when the time came for operation the right mastoid was in worse condition than the left and required operation. He was sued for $10,000 and had to pay it.

DR. FRANCIS REDER, ST. LOUIS, MO.—It was with a great deal of interest that I followed Dr. Ill's paper. Those of you who have been fortunate enough not to have been sued—not exactly a malpractice suit—do not know how uncomfortable it makes one feel. The unfortunate lot fell to me, some years ago, to be summoned in court for a rather strange cause. I rather blamed myself because I did not take both parties into consideration when I performed the operation. The patient was a woman, about sixty years old, suffering from extreme prolapse, procidentia. The condition almost invalided her. Her husband was sixty-six years of age. I was consulted and made it clear to both parties what had to be done. Consent was given and the operation performed. It was a splendid success. I felt very well pleased with my work. When I presented my bill for $150.00 there was no response. I sent a friend, who was a collector, to see what could be done. The husband refused to pay. It was not long afterward that I received a summons to court. This man had sued me for disturbing his peace. It did not take me long to find out how I happened to disturb his peace. He and his wife had been continually quarreling after the wife's return home from the hospital. I made elaborate drawings in order to make clear to the court what had to be done in such a case. I had some of the court's sympathy because I was asked if the condition could be remedied. My answer was in the affirmative. The court directed me to proceed. The husband was instructed to report to the court promptly when peace was restored, whereon he was to pay the bill of $150.00.

The people were honest and my bill was paid shortly after restoration had been effected to the satisfaction of both parties. I assure you I felt very uncomfortable for a time.

DR. J. F. BALDWIN, COLUMBUS, OHIO.—I can plead guilty of having been sued for malpractice, having had two experiences. In the first case, after the laborious presenting of the plaintiff's evidence for nine days, the case was, on motion of the defense, taken from the jury and thrown out of court, since not a "scintilla" of evidence had been presented against me. In the other case, the suit never came to trial because the plaintiff's attorney, for reasons which need not be given, suddenly found it convenient to go to Canada between two days, and never returned. Several times suits have been threatened; but I have never had occasion to worry over any of them.

I know a great deal more about these suits than the ordinary physician, not only because of personal experience, but because for a good many years I have been chairman of the committee on malpractice suits of our local medical society, and am, therefore, officially consulted by a good many doctors who are threatened with suits. In addition, I have a son-in-law who is the legal representative in central Ohio of the Physicians Defense Company, of Chicago, and through him I have become very familiar with the weak points presented so frequently by the prosecution.

I have come to feel that the physician should be very careful of his records, particularly in connection with surgical cases. I enter every detail in dictating

to the stenographer, and always review her notes before they are entered in permanent form. I am careful to see that the names of visitors are inserted, since visitors will frequently corroborate the operator's statements, or will even remember something which he, himself, had failed to enter in his records.

Our Ohio law requires a suit for malpractice to be brought within one year. This is a great, but not improper, advantage for the physician, since with a longer delay he might forget some important points by which to refute the testimony of the plaintiff. As is perhaps a universal custom in our courts, written notes can not be admitted as testimony, but the doctor is permitted to use his notes to enable him to refresh his memory. In my own work, I am not infrequently called in as a witness in divorce suits, or something of that sort, and almost invariably the attorneys on both sides permit me to read my full notes connected with the case, and that ends it, with the answering, occasionally, of questions of explanation by one or the other of the attorneys.

The last verdict of any importance in our local courts against a physician (now dead) was rendered against him largely because of his negligence in some of the points that I mention. His attorney, on several occasions, tried to get him to come to his office to discuss, with other physicians who would be witnesses, the details of his case; but he did not come near. During the trial a member of the jury, who was suffering from a cold, asked the judge if it would be all right for him to have the doctor give him a prescription; there being no objection from the opposing attorney, the doctor examined him and promised to bring him some medicine in the afternoon when the court reconvened. When the afternoon came, however, the doctor had forgotten all about it; and one can readily imagine the attitude of that juryman over this personal manifestation of carelessness. The verdict was for $7,000.00.

Our local doctors were somewhat amused, some years ago, when a brother doctor, who was notoriously financially absolutely worthless, carried off the honors by being sued for $100,000.00. Needless to say the case never came to trial.

DR. Q. U. NEWELL, ST. LOUIS, MO.—I am interested in the X-ray treatment of pregnant patients as outlined by Dr. Ill. I delivered a young lady, yesterday morning, of a male baby weighing 5 pounds and 8 ounces. She consulted a doctor when three months pregnant and it was diagnosed a fibroid. The Zondek-Ascheim test was made and was negative. This patient was given one X-ray treatment each week for three months, making twelve X-ray treatments given on an abdomen containing a baby, from the third to the sixth week of gestation. At about the sixth month the Zondek-Ascheim test was positive. When I first saw the patient she was seven months pregnant and yesterday morning she was delivered. The child had a deformity of the penis, one eye was absent and the other eye may be crippled. I have not yet had an ophthalmologist examine it.

I have another patient who will be delivered in a month, whose condition was diagnosed as a fibroid and she was treated with X-ray eight times. Then the bleeding stopped and at the second or third month of pregnancy several additional X-ray treatments were given. The baby is due within a month and I shall be interested to see whether the X-ray treatments have any effect upon the child.

DR. EDWARD J. ILL, NEWARK, N. J. (closing).—The only thing I have to say is to assure the last speaker that there is no question at all that irradiation in early pregnancies is uncalled for and should be carefully guarded against.