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Malpractice Actions without Expert Medical Testimony

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FEAR OF MALPRACTICE ACTIONS against them is causing physicians to "run scared." Some physicians now say that they feel that the threat of legal action has materially altered the practice of medicine. Defensively, some medical doctors say that they are ordering additional X-rays and lab tests, just to have them on record. Others say they are just plain afraid to try new techniques and diagnostic treatments because of the specter of a malpractice action. Innovative techniques carry additional risks, and some doctors admit that in some risky situations they merely do what will keep them out of trouble rather than do what is best for the patient. Some other, more candid physicians admit that some doctors are not recording everything in patients' records for fear that the information some day will be used against them.[1]

To what extent is the fear of a malpractice action justified? In 1964 the American Medical Association published a survey in which it revealed that 17.8% of physicians had at least one malpractice claim made against them during their lifetime.[2] This percentage varied widely in different locations—29.2% of the California doctors experienced at least one action while in South Carolina only 7.7% experienced a malpractice action. Statistically, the article went on to say that the chances of an action per patient visit is approximately .00037% and suggested that the risk of medical malpractice action not be exaggerated.[3] The report, however, showed an increase from the previous survey conducted on the same matter from 1 in 7 doctors experiencing such an action in 1956 to approximately 1 in 5.6 in 1963. The situation probably is even worse now.

The *number* of malpractice cases is not the dangerous thing; it is the fear (and the consequences of such fear) that present the problem. One consequence of this fear is the alleged "conspiracy of silence" among the medical profession, administrators of hospitals, their insurers, and the defense lawyers (of whom it has been said they "are the chief

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1 The American Medical News, April 20, 1970, at 1, col. 1, presented in a two-part series the medical professions' concern over the problems of professional liability. In the first part of the series an overview of the problem was presented and the second part reported on the everyday effects of the practice of medicine and took a closeup view of the situation in California. Some of the everyday effects are summarized above.

2 First Results: 1963 Professional Liability Survey, 189 J.A.M.A. 858 (1963).

3 *Id.* at 860.

harbingers of doom on the subject").[4] Consequently, plaintiffs are all too often plagued by an inability to find a physician willing to give expert medical testimony on their behalf at trial. Justice Carter, in his dissent in *Huffman v. Lindquist,* expressed the problems of the plaintiff in obtaining expert medical testimony:

> Anyone familiar with cases of this character will know that the so-called ethical practitioner will not testify on behalf of a plaintiff regardless of the merits of his case . . . (P)hysicians who are members of medical societies flock to the defense of their fellow member charged with malpractice and the plaintiff is relegated, for his expert testimony, to the occasional lone wolf or heroic soul, who runs the risks of ostracism by his fellow practitioner and cancellation of his public liability insurance policy.[5]

The reasons for the medical profession's silence focus around their concern for the effect of malpractice actions on the care which patients will receive and, more importantly it seems, the impact on the economics of their medical practice. In *Bernstein v. Alameda-Contra Costa Medical Association,* a California doctor was expelled from his local medical association because he made disparaging remarks regarding his predecessor physician in an industrial accident action. He was later reinstated in the association by the District Court of Appeals of California.[6] In another California case, *Agnew v. Parks,* the plaintiff was unsuccessful in obtaining expert medical testimony, and he brought an action against the Los Angeles Medical Association alleging "a conspiracy to obstruct the orderly prosecution of a civil action."[7] The association was alleged to have threatened certain doctors with expulsion from the association and to report them to their insurance carriers causing cancellation of their malpractice insurance if they were to act as medical witnesses for the plaintiff. Membership in the local medical society is often the eligibility requirement for admission to the staff of local hospitals and in obtaining bed space in such hospitals. It may also affect the insurance rates of the doctor or determine whether he will be able to obtain insurance at all.[8]

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[4] Markus, Conspiracy of Silence, 14 Clev-Mar. L. Rev. 520 (1965); and see, Shapiro et al. (eds.), Medical Malpractice (Mich. Inst. Cont. Leg. Ed., 1965; Medical Malpractice: Patient Versus Physician (91st Congr. Subcomm. on Exec. Reorg., Nov. 20, 1969); and short analysis in, 2 Oleck (ed.), Encyc. of Negligence, Sec. 418 (1962).

[5] 37 Cal. 2d 465, 484, 234 P. 2d 34, 46 (1951) (Carter, J., dissenting).

[6] 139 Cal. App. 2d 241, 293 P. 2d 862 (1956).

[7] 172 Cal. App. 2d 756, 343 P. 2d 118 (1959).

[8] The American Medical Association: Power, Purpose and Politics in Organized Medicine, 63 Yale L. J. 937, at 951 (1954).

The California Situation

"California is the focal point of everything that is troubling the medical liability field today" [9] according to the American Medical *News* report on the state of the problem. Yet the situation is not quite as bad as many would have you believe. In March, 1970 the California Court of Appeals found in *Bardessono v. Michels,* that it was reversible error to allow a jury to base a negligence finding on the common knowledge of laymen regarding injections where the injection was into an area crowded with bone, muscle, and tissue.[10] This is an excellent illustration of the reluctance of doctors to testify, even when they are on the witness stand.[11] The jury was instructed to "rely on the common knowledge among laymen that injections in the arm, as well as other parts of the body, do not ordinarily cause trouble unless unskillfully done, or there is something wrong with the serum, and you may also rely upon the testimony of expert witnesses." The court pointed out that there was no expert testimony at the trial on the standard of care, and further the trial court should not have instructed the jury that the common knowledge of laymen was adequate to determine whether the circumstances were such that injury does not ordinarily occur but for negligence. In previous California cases, unavailingly relied upon by plaintiff, the court refused to give instructions on *res ipsa loquitur* because there was strong expert testimony that the injury involved would not ordinarily occur in the absence of negligence.[12]

The *Bardessono* case is very similar to *LeMere v. Goren*[13] where causalgia resulted after an injection by the defendant doctor. There was medical testimony that such an injury could occur whether there was negligence or not. Although none of the medical witnesses testified that it was the type of injury which ordinarily does not occur in the absence of negligence, the jury could have drawn such an inference based on the testimony. The court held that it was reversible error not to allow the conditioned res ipsa instruction to the jury.

The Ohio View

Ohio law on the matter of expert testimony when the doctrine of common knowledge of laymen is not relevant has been recently articulated in *Hundemere v. Sisters of Charity of Cincinnati*[14], a 1969 case

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[9] American Medical News, *op. cit. supra* n. 1, at 8.

[10] 6 Cal. App. 3d 24, 85 Cal. Rptr. 595 (1970).

[11] *Id.* at 596-598.

[12] Wolfsmith v. March, 51 Cal. 2d 832, 337 P. 2d 70 (1959); Seneris v. Haas, 45 Cal. 2d 811, 291 P. 2d 915 (1955); and Bauer v. Otis, 133 Cal. App. 2d 439, 284 P. 2d 133 (1955).

[13] LeMere v. Goren, 43 Cal. Rptr. 898 (1965).

[14] Hundemere v. Sisters of Charity of Cincinnati, Inc., 22 Ohio App. 2d 119, 258 N.E. 2d 611 (1969).

involving an injection of the drug Levophed. The plaintiff sought to introduce the testimony of a former Army nurse who was a resident of New York City and who gave her testimony by way of deposition. Miss Aynes, the expert witness, had gained her knowledge of the drug by reading the instructions on a newly purchased package of that drug.[15] She had had no experience with the intravenous infusion of Levophed, nor did she have specific knowledge of the standard of care and treatment in the Cincinnati area. The court held that: (1) the rule of *res ipsa loquitur* did not apply, (2) expert testimony is necessary to establish the negligent injection of a drug, and (3) a plaintiff seeking recovery for the negligent intravenous infusion of a drug must establish the standard of care exercised by hospitals, doctors and nurses in the community.

A contrary opinion had been issued by the Ohio Supreme Court in *Jones v. Hawks Hospital of Mount Carmel* in 1964. But in that case the subject of inquiry was found to be within the common, ordinary knowledge and experience of mankind. The plaintiff, in an advanced stage of labor, had been restless since being admitted to the hospital and had attempted several times to climb over the guard rails. The nurse left the ward for a period of from one to five minutes on an unrelated matter. During her absence the plaintiff fell from the bed sustaining injuries (some of them permanent).[16]

Matters which can be decided from ordinary and common experience may be decided by the jury.[17] However, the Ohio Supreme Court in *Oberlin v. Friedman,* held that no presumption of negligence results from the mere fact of injury nor from the unsuccessful results of surgery, but rather the burden of proof is on the plaintiff to show the negligence of the defendant and that such negligence was the proximate cause of the plaintiff's injury.[18]

A more liberal approach to the problem of the conspiracy of silence was taken in another Ohio case, *Oleksiw v. Weidener,*[19] in which questions asked of the defendant required expert testimony by him. At the trial objections to such questions were sustained by the court. Section 2317.07 of the Ohio Revised Code provides that:

> At the instance of the adverse party, a party may be cross examined as if under cross examination like any other witness . . .

The Supreme Court of Ohio, in explaining the purpose of Section 2317.07 of the Revised Code, indicated that a person has no right to

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[15] *Id.* at 123.

[16] Jones v. Hawkes Hospital of Mt. Carmel, 175 Ohio St. 503, 196 N.E. 2d 592 (1964).

[17] 21 O. Jur. 2d 451.

[18] 5 Ohio St. 2d 1, 213 N.E. 2d 168 (1965); Siverson v. Weber, 22 Cal. Rptr. 337, 372 P. 2d 97 (1962).

[19] 2 Ohio St. 2d 147, 207 N.E. 2d 375 (1965); State v. Braiwin, 224 Md. 156, 167 A. 2d 117 (1961).

remain silent in a judicial proceeding, since the withholding of relevant testimony obstructs the administration of justice. A civil defendant does not enjoy the same privilege against self incrimination that a criminal defendant enjoys. Both California and New York have allowed similar questioning of the defendant as an expert witness.[20]

Other Jurisdictions

Malpractice actions resulting from injections of the drug Levophed are quite common and the law in other jurisdictions regarding the necessity of medical expert testimony is similar to that in Ohio.[21]

In *Grantham v. Goetz,* a Pennsylvania case, the plaintiff suffered a severe chemical burn on his leg as a result of the extravasation[22] of a drug administered intravenously while he was being treated for shock. He was nonsuited at the trial. He appealed charging that the defendant was negligent in not providing the standard of care necessary under the circumstances. Although the plaintiff was able to offer expert medical testimony, that "constant attention" was required under the circumstances, he was unable to produce evidence that the defendant had not exercised the degree of care required of reasonable men in like circumstances.[23] In fact, the only expert testimony offered by the plaintiff tended to refute the very proposition that it was eliciting—that the standard of care in that community had not been met by the defendants.

In a New Jersey case, *Renrick v. City of Newark,* the same drug (Levophed) infiltrated the tissue surrounding the veins and surgery was required to repair the damages caused by the drug.[24] Here, however, plaintiff offered no expert medical testimony and requested that the doctrine of *res ipsa loquitur* be invoked relying on *Toy v. Rickert.*[25] The fact situation in that case, however, varied from the case in question in that the issue was whether a needle had been injected in an unorthodox manner and at an unorthodox site. The New Jersey Superior Court sustained the trial court's dismissal holding that the infiltration of the drug into the tissues did not permit a finding of negligence absent expert testimony.

An Illinois case, *Graham v. St. Lukes Hospital,*[26] aptly illustrates

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[20] Lawless v. Calaway, 24 Cal. 2d 81, 147 P. 2d 604 (1944); McDermott v. Manhattan Eye, Ear and Throat Hosp., 15 N.Y. 2d 20, 255 N.Y.S. 2d 65, 203 N.E. 2d 469, 474 (1964).

[21] Hundemere v. Sisters of Charity of Cincinnati, Inc., *supra* n. 14.

[22] Extravasation is the process of passing by infiltration as effusion from a proper vessel or channel into the surrounding tissue.

[23] 401 Pa. 349, 164 A. 2d 225 (1960).

[24] Renrick v. City of Newark, 74 N.J. Super. 200, 181 A. 2d 25 (1960).

[25] 53 N.J. Super. 27, 146 A. 2d 510 (App. Div. 1958).

[26] 46 Ill. App. 2d 147, 196 N.E. 2d 355 (1964).

the results of the "conspiracy of silence" on a plaintiff's ability to present expert medical testimony. The plaintiff was admitted to the hospital to be operated on for a hysterectomy. The operation was successful, but the plaintiff alleged that on the following day a nurse hurriedly entered her room, lifted her pajama top and injected a hypodermic needle into her back. She experienced excruciating pain and was tended to by interns and two nurses. The next day she was examined by Dr. Edwards who alluded to her mishap and prescribed hot packs. In the years following the plaintiff suffered pain, physical deformity and required several operations to remedy the condition. During the trial Dr. Edwards denied any knowledge of the injection or treatment for back ailments. An insurance claim signed by Dr. Edwards describing the site of the injection and its location was rejected as hearsay evidence because the plaintiff had not established a basis for it. Also, the records of the hospital referred only to the "site of the injection" with no description of where the site was located on the body. Although the court admitted that "the burdens [*sic* of proof] which the plaintiff must bear are difficult to meet," [27] it upheld the nonsuit because no prima facie case of negligence had been established.

Certain types of medical testimony have not been accepted by the courts. In a workmen's compensation action to recover for the loss of a testicle and for other injuries, the plaintiff offered the testimony of a chiropractor as to treatment for pain in his shoulders and neck. The Louisiana Court refused to recognize chiropractors as experts in view of the fact that they were not permitted to practice in Louisiana.[28] Contesting the testimony of the chiropractor was an orthopedist who had treated the plaintiff and had discovered pre-existing arthritis and found evidence of cervical strain. He had discharged him as fully recovered with no residual disability.

Court Answers To The Problem

The doctrine of *res ipsa loquitur* has been the most frequent substitute for medical expert testimony. This doctrine, however, has been severely criticized, and has been poorly articulated by the courts. E. Crawford Morris[29] has suggested that the doctrine has been "perverted" by the courts into a "rule of sympathy" wherein the courts, rather than turn an innocent patient out without compensation for injury, have used the doctrine as a method of social legislation.[30] Morris

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[27] *Id.* at 361.

[28] Tuggles v. United States Fidelity and Guaranty Co., 228 S. 2d 671 (La., 1969).

[29] Of the firm of Arter, Hadden, Wykoff and Van Duzer of Cleveland.

[30] Speech by E. Crawford Morris delivered to Medical-Legal symposium of the American Medical Association at San Francisco, Louisville, and New York in March and April, 1961. The speech represented the first half of a debate (obviously the defendant's half) on the use of the res ipsa doctrine in medical malpractice actions.

alleges that the courts actually rely on two unrelated doctrines in the law: (1) one under which a carrier (railroad) has to explain the accident since it has superior knowledge (*i.e.*, in effect switching the burden of proof to defendant doctors); and (2) liability without fault which amounts to a method of socialized spreading of the risk.

Criticism of the use of the doctrine of *res ipsa* is highly justified in some areas. For example, where common knowledge of laymen (jurors) has been permitted to determine whether a physician has been negligent in cases where forceps are left inside the plaintiff.[31] But these vary from actual *res ipsa* cases because they involve *prima facie* cases of negligence where omissions have been alleged and proven.

The principal effect of the doctrine of *res ipsa loquitur* is to switch the burden of going forward with proof from the plaintiff to the defendant, who usually tries to dispel the possible inference of negligence by proffering evidence in explanation of the facts.[32] The theory is that the defendant has placed himself in a place of special responsibility toward the plaintiff or public. A narrow and reasonable view has been suggested by Professor Jaffe: "If a defendant has not taken the pains to find out what lies in his power, or if he evades explanation at a crucial point, or if his evidence suggests mendacity . . . [he] must submit to the jury or to a directed verdict." [33]

Other expert testimony is available in the form of medical texts. This is a limited avenue for the plaintiff. Usually the rule is that evidence of the contents of the text is available only for the impeachment of an adverse witness and then only if he acknowledges that the text is authoritative.[34] In *Stone v. Proctor,* a North Carolina case in which the plaintiff alleged negligence on the part of a physician in the administration of electroshock therapy, the court permitted the introduction of a document entitled *Standards for Electroshock Treatment.* It had been approved by the Council of the American Psychiatric Association to establish the standards required in the administration of Electroshock therapy to patients.[35] The defendant acknowledged the authenticity and applicability of the document to the area in which he practiced, and this was sufficient to warrant its admission as evidence.[36]

Several states, including Nevada and Massachusetts, permit (by statute) the use of treatises.[37] The introduction of treatises, however,

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[31] *E.g.*, Swanson v. Hill, 166 F. Supp. 296 (D.N.P. 1958); Tiller v. Van Pohle, 72 Ariz. 11, 230 P. 2d 213 (1951).

[32] Cho v. Kempler, 177 Cal. App. 2d 342, 2 Cal. Rptr. 167 (D. C. App. 1960).

[33] Jaffe, Res Ipsa Loquitur Vindicated, 1 Buffalo L. Rev. 1 (1951).

[34] 7 Am. Jur. Proof of Facts 485 (1960).

[35] 259 N.C. 633, 131 S.E. 2d 297 (1963).

[36] 32 C.J.S. Evidence 625.

[37] Mass. Gen. Laws Ann. Ch. 233, § 79C (1959); Nev. Rev. Stat. § 51.040 (1961).

is frequently criticized as a violation of the hearsay rule because the author is not available for cross examination.

Another method to prove the standard of care in the injection of certain drugs is to introduce the instructions of the manufacturer of the drug. The plaintiff in *Hundemere*,[38] however was unsuccessful in using such instructions to prove the standard of care required by introducing them through his expert. The court held that the expert, although familiar with the instructions of the manufacturer, was not aware of the standard of care in the community.

In an action for wrongful death which occurred during the extraction of teeth and in the administration of an anesthetic (sodium pentathol), the Supreme Court of Idaho found that it was error to exclude from evidence the instruction sheet of the drug manufacture:

> The author was a third party in no wise interested in the outcome of the litigation. It is a recognized pharmaceutical concern. It bears the same liability for damages to users of this product that manufacturers generally bear for negligence . . . True it is not conclusive evidence . . . but it is prima facie proof of a proper method of use . . .[39]

The court remanded for a new trial on this and other grounds. This method has found limited acceptance, however, and has not been permitted as conclusive proof of the standard of care in a community to date.

A less popular and less reliable method of eliciting expert medical testimony is to use the defendant himself to prove the standard of care in the community and to prove that he did not meet that standard. States often provide, by statute, that an adverse party may be called to the stand and be cross examined by the party calling him.

In *Oleksiw v Weidener*,[40] the Supreme Court of Ohio held that the expert testimony of the defendant could be elicited, relying upon § 2317.07 of the Ohio Revised Code which allows that an adverse witness may be examined as if under cross examination.

The Supreme Court of California held similarly in the *Lawless* case where a physician diagnosed an attack of appendicitis as acute ptomaine poisoning. The court reversed the finding of the lower court because it had limited the scope of examination of the defendant who was called as an adverse witness under § 2055 of the California Code of Civil Procedure. The statutes "were enacted to enable a party to call his adversary and elicit his testimony without making him his wit-

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[38] Hundemere v. Sisters of Charity of Cincinnati, Inc., *supra* n. 14.

[39] Julien v. Barker, 272 P. 2d 718 at 724 (1954).

[40] Oleksiw v. Weidener, *supra* n. 19.

ness . . . They are remedial in character and should be liberally construed in order to accomplish their purpose." [41]

Finally, the Court of Appeals of New York, relying on Civil Procedure Laws & Rules, 4501, 4512, permitted the plaintiff in *McDermott* to call the defendant doctor to the stand and to question him both as to the facts and as an expert in order to establish the standard of care prevailing in the community.[42]

Using the defendant as an expert witness has several obvious shortcomings. Seldom is such a witness likely to strengthen the case of the plaintiff and oftentimes his testimony will be more damaging than helpful.

Conclusion

The doctrine of *res ipsa loquitur* in malpractice actions serves a very useful function, since the burden in effect is switched to the defendant physician to dispel the possible inference of negligence. The doctrine, however, has not been clearly enunciated by the courts and has been invoked both when *prima facie* cases of negligence have been asserted and proved[43] and when specific acts of negligence have been proven.[44] Use of the doctrine should be limited, and upon the proffering of information by the defendant to dispel a possible inference, the traditional doctrine that he who asserts must prove should be enforced by the courts.

Expanding the number of experts available to the plaintiff in order to counter the conspiracy of silence would greatly alleviate his burden in obtaining experts. The present requirement that the standard of care in the community be established by expert testimony places a limitation on the number of experts available to a plaintiff for two reasons. First, there may well be personal involvement among physicians of similar skills in the same area, and presumably they would be reluctant to testify against one another; and, second, pressure exerted by the local medical association may effectively limit such testimony.[45] Traditional limitations because of communication and transportation have all but disappeared and it is not uncommon for physicians to refer patients to practitioners in other localities, oftentimes hundreds of miles away. This is especially true as the degree of specialty increases. Relaxation of the locality rule would thus serve to expand the number of experts available to a plaintiff.

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[41] Lawless v. Calaway, *supra* n. 20 at 608.

[42] McDermott v. Manhattan Eye, Ear & Throat Hospital, *supra* n. 20.

[43] Tiller v. Van Pohle, 72 Ariz. 11, 230 P. 2d 213 (1951).

[44] Salgo v. Leland Stanford Jr. Board of Trustees, 154 Cal. App. 2d 560, 317 P. 2d 170 (Dist. Ct. App. 1957).

[45] Berstein v. Alameda-Contra Costa Medical Association, *supra* n. 6.

Several states have already taken steps to alleviate the burden on the plaintiff by allowing the defendant's testimony to establish the standard of care in a community, using procedural rules which permit the cross examination of the defendant doctor.[46] This is an acceptable method, but its obvious shortcomings from the plaintiff's point of view will probably limit its use.

Also, the use of medical texts has found some acceptance in the courts and will enable the plaintiff to present expert testimony without a physician testifying as to the standard of care in a community.[47] Adducing an admission that the text is authoritative requires skillful examination of the defendant physician by the plaintiff's attorney, and this fact is the primary limitation of this method.[48]

The most dangerous result which could occur, it seems, would be the evolution of a rule of liability without fault. This would amount to a socialized spreading of the risk, with the burden falling on society (and therefore on the patient) rather than on the negligent or inept physicians. The medical profession cannot, and should not, be a insurer that every diagnosis and resultant treatment will be successful, for the practice of medicine is not an exact science and often a treating physician is selecting from among a number of acceptable persons or alternatives.

Finally, *real* self-policing of the medical profession is necessary, and should be done by the local medical associations. Compliance with a statement of the Judicial Council of the American Medical Association, that "a physician should expose, without fear or favor, incompetent or corrupt, dishonest or unethical conduct on the part of members of the profession," will be the best answer to the outrageous medical conspiracy of silence. Although the greatest impact of such a conspiracy is felt by an injured plaintiff, who is unable to find relief in the courts, it also affects the medical profession itself in terms of increasing insurance costs, reaction by the public in favor of restrictions on the effective practice of medicine, and the spectre of increasingly unclear and burdensome legal doctrines.

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[46] Oleksiw v. Weidener, *supra* n. 19; Lawless v. Calaway, *supra* n. 20; and McDermott v. Manhattan Eye, Ear and Throat Hosp., *supra* n. 20.

[47] Stone v. Proctor, *supra* n. 35.

[48] 32 C.J.S. 625, *supra* n. 36.