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Should Courts Set Doctors' Fees?

Russell J. Glorioso*

SHOULD COURTS SET doctors' fees? This short query has interesting ramifications. Initially, the question seems to demand an unqualifiedly negative answer. It is adverse to our system of free enterprise. It is socialized medicine. It is unconstitutional. Responses like these can be heard not only from the medical profession but from the conservative members of the public as well. Modern legislation, in attempting to regulate an ever-expanding population, is constantly moving towards more and more social control. Rephrase the initial question to read, "should courts regulate workmen's compensation or Medicare?" What then, would the same people answer? And, yet, we know that illness can bring financial disaster as well as other misery.

Are there or should there be laws setting compensation for doctors? This paper seeks to examine these question by analyzing court decisions and modern trends.

Peculiarity of Medical and Surgical Services

The logical starting point in approaching this problem is to look at the character of a physician's service. Fees are proffered for a unique service rendered, that of medical or surgical treatment, which includes all the correlated aspects of the medical profession. These services are given special recognition in the eyes of the law, which raises them to the status of necessities, which by law must be provided to a dependent by the parental head of the household, the father. The implications of this law are great. Sufficient for the moment is the characterization Stephen E. DeForest gave to these services when he referred to them as the "fourth necessity" next to food, shelter, and clothing.¹ An Ohio appellate case held that a husband is bound to pay for medical services rendered to his wife as necessities, and the service of an anesthesiologist was held to be in this category.² This case illustrates that as medical science expands its new facets continue to be treated as necessities.

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¹ De Forest, Do Doctors Have the Answer to Lawyers' Economic Problems?, 48 A. B. A. J. 442, 444 (1962) quoting Richard Carter in *The Doctor Business*, Ch. 1 (1958).

² *Cleveland Anesthesia Group v. Krulak*, 135 N. E. 2d 685 (Ohio App. 1956).

The importance of "a necessary" lies in the fact that if the one who has the obligation to provide it to another fails to act, a third person may have the service provided, and the party who failed to perform his duty remains liable at law for payment to the person who has performed the service.³

Physicians' Right To Compensation

Since it is apparent that services rendered by physicians and surgeons fall into a special class, does it follow that the means and method of compensation for these services also receive special treatment? Today more than ever before there is a trend toward prepayment plans to cover medical and surgical services. Most of these are in the form of personal medical insurance plans, with coverages as varied as the medical profession itself. Again, legislation has been provided to protect a person requiring medical services when injured on his job, by workmen's compensation acts which vary in scope from state to state. Finally, to provide for the aged, the Federal Government has recently enacted Medicare, the value and scope of which remains to be seen.

The right to compensation for services rendered by physicians and surgeons involves a contract, either express or implied, between the physician and the patient, with all the normal rights and duties which apply.⁴ In the absence of an express contract there is implied by law an agreement to pay for services rendered by a physician, except that if these services were intended to be and were accepted as a gift or act of benevolence, they cannot create a legal obligation to pay at the election of the physician. When this is the case, the burden of proof is on the person denying liability to show that no debt was in fact intended.⁵ At common law it was held that when one secures the services of a physician for himself or another, there arises an implied contract to pay for these services. However, there is an exception to this general rule which favors a neighbor or stranger who

³ *Porter v. Powell*, 79 Iowa 151, 44 N. W. 295 (1890), distinguished in *Cooper v. McNamara*, 92 Iowa 243, 60 N. W. 522, 523 (1894) which states that what are necessities in a given case must be determined by the facts in that case. The Porter case involved a severe attack of a dangerous disease requiring the services of a physician. There was not such an emergency in this case, the court maintained. See also *Lufkin v. Harvey*, 131 Minn. 238, 154 N. W. 1097 (1915).

⁴ 41 Am. Jur. 254, *Physicians and Surgeons*.

⁵ *In re: McKeehan's Estate*, 358 Pa. 548, 57 A. 2d 907 (1948).

secures these services for a stricken person who is unable to secure the services for himself, but this exception does not apply to necessities.⁶

Standard for Compensation

Since experience reveals that compensation for the same service rendered by physicians of similar skill and stature varies widely from state to state and even within the same community, one may justly inquire as to the standard for setting fees. One buying medical insurance recognizes that his rates will fluctuate on the basis of locale and upon the amount of coverage he feels is necessary for his family and one in his particular station in life. These prepayment plans are evidently available to provide for the payment of medical fees, but are primarily available to allow sufficient reserve for the so-called implied contract to pay. This implied-contract implies at law a promise by the one receiving the service to pay the reasonable value of the service rendered.⁷ There has been so much litigation on the question of what constitutes reasonableness that it will be treated separately below. For the present, the mere fact that reasonableness is the criterion for medical fees will be considered.⁸ The categorical word "reasonableness" is generally used by courts, and then elements which constitute this reasonableness are considered in each case.

Ordinary Worth As Element of Reasonableness

There is a tendency to equate the phrase reasonableness with that of "ordinarily worth in the community," which is held to mean not the value to the patient treated but the reasonable value in the community where they are rendered, by the person who rendered them.⁹ A 1960 case seems to show the trend toward this attitude, but it is rather precise in wording so as not to equate reasonableness with ordinary worth on the professional

⁶ Cleveland Anesthesia Group v. Krulak, *supra* note 2.

⁷ Poulson v. Foster, 67 S. D. 372, 293 N. W. 361, 362 (1940), which refers to 21 R. C. L. p. 415 as authority for this statement.

⁸ Leading cases on the point of compensation based on implied contract as to the reasonable worth of the services are, Huntley v. Geyer, 43 N. D. 366, 175 N. W. 619 (1919); McGuire v. Hughes, 207 N. Y. 516, 101 N. E. 460 (1913); and Garrey v. Stadler, 67 Wis. 512, 30 N. W. 787 (1886).

⁹ Citron v. Fields, 34 Cal. App. 2d 51, 85 P. 2d 534 (1938), which was distinguished in Ventimiglia v. Hodgen, 112 Cal. App. 2d 658, 247 P. 2d 123, 125 (1952) on an evidence question. See also, Ely v. Wilbur, 10 A. 358, 441 (N. J. App. 1887).

market, when it states that the reasonableness of a physician's professional charge must be viewed in light of charges usually made for such services by men of similar professional standing, and under similar circumstances.¹⁰ This case is often cited today as giving the most extensive and accurate treatment of the elements which constitute reasonableness and one which makes "what other doctors are charging" an element to be considered and not a separate category on a par with and to be given equal consideration as the category of reasonableness.

The importance of this distinction may be clarified if a brief hypothetical example is considered. A local branch of the American Medical Association sets a reasonable suggested fee for an appendectomy in a range from \$200.00 to \$500.00. A group of surgeons from a given locale band together and decide among themselves that they will handle this type of case within a range of \$750.00 to \$1,000.00. A patient protests and refuses to pay more than \$500.00. The surgeon files a suit on the basis of implied contract to pay the reasonable value of his services, and presents in evidence that his charge of \$850.00 is what other physicians of similar standing charge for this service in this community. A court which followed the reasoning that this was a criterion unto itself would be bound to logically decide in favor of the surgeon. A court which followed what appears to be the better rule would state that this is but one element to be considered and that other factors must affect whether this is a reasonable or unreasonable charge, and would decide accordingly.

Other Considerations About Compensation

It is therefore evident that the only limitation upon the compensation of physicians and surgeons is the bounds of reason, and it is the doctor himself who decides what his fee will be in a given instance in spite of a suggested fee schedule proposed by the American Medical Association. A physician is not obliged to rate himself below a class to which, in his opinion, he properly belongs, merely because of his youth or comparative inexperience.¹¹ It is further the right and duty of each physician to determine the frequency of his visits and duration of his treatment and to be compensated accordingly.¹²

¹⁰ *Spencer v. West*, 126 So. 2d 423, 97 A. L. R. 2d 1224 (La. App. 1960), rehear. denied Feb. 2, 1961, cert. denied March 13, 1961.

¹¹ *Succession of Percival*, 139 La. 938, 72 So. 467 (1916).

¹² *Ebner v. Mackey*, 186 Ill. 297, 57 N. E. 834 (1900).

Since a doctor performs services he is entitled to recover for them in the same manner as any other person who performs services for another.¹³ When a physician seeks to recover for these services the burden is upon him to prove their value.¹⁴ Where a dentist showed neither reasonable value of his services nor an express contract to pay for the services and materials he used in treating a patient, a judgment in his favor and an order denying a motion for a new trial were reversed.¹⁵ A case decided only three years later appears to have extended this rule. There, a petition seeking to recover the balance of compensation due was held to be defective because it failed to allege that the charge made was the reasonable value of the services.¹⁶

It is sometimes overlooked that whenever a malpractice suit is brought against a member of the medical profession there is a dearth of expert witnesses, often referred to as "the conspiracy of silence." But the same experts who were otherwise occupied and unavailable to testify as to malpractice, flock to present testimony on behalf of a brother practitioner who has brought a suit to recover compensation. These men suddenly are inspired as to what is and is not reasonable, relying on the rule that expert medical testimony is admissible as to the reasonable value of medical services.¹⁷ Perhaps this attitude is responsible in part for courts holding that expert testimony, even though undisputed, is not conclusive, and that it remains a jury question to determine the value of the services on the evidence before it.¹⁸ The ultimate weight to be given to the testimony of experts remains for the jury, whose members are not required to surrender their judgment on the question or to even give controlling influence to the opinions of scientific witnesses.¹⁹ What is perhaps the latest rul-

¹³ *Spencer v. West*, *supra* note 10.

¹⁴ *Poulson v. Foster*, *supra* note 7, here using 9 Ency. Ev. 828 and quoting from *Huntley v. Geyer*, *supra* note 8 at p. 620.

¹⁵ *Ibid.*

¹⁶ *Miracle v. Barker*, 59 Wyo. 92, 136 P. 2d 678, 680 (1943), in the first instance (note 15), the court implied the allegation of reasonableness by way of the nature of the action. In this case, the court demanded an express allegation but did eventually consider this petition amended on the theory that in the case at bar it was the reasonable value of services that was at issue, so in effect reached the same conclusion by circumlocution.

¹⁷ *Citron v. Fields*, *supra* note 9.

¹⁸ *Fowle v. Parsons*, 160 Iowa 454, 141 N. W. 1049, Annot. 42 L. R. A. 769 (1899). See also *Bushnell v. Bushnell*, 103 Conn. 583, 131 A. 432 (1925).

¹⁹ *Miracle v. Barker*, *supra* note 16.

ing on this question states that it is almost axiomatic that the question of credibility of testimony is always present, and for this reason it frequently happens that both courts and juries discount opinion evidence to a considerable extent, which is their prerogative.²⁰

What Constitutes Reasonable Fee

All of these considerations seem to circumvent the real issue at hand; what constitutes *reasonableness*? This question has been reserved until now because it leads to a natural conclusion and answers the initial query posed. Some common sense observations should be made before turning to case law. Initially, there is time and place, the when and where the services were rendered. A service performed in a farm house, during the depression, is unquestionably different from one performed in a large metropolitan hospital today. Why a service was rendered certainly has bearing, if only to determine whether this was an emergency situation. What and how, present such questions as the nature, intricacy, character, and difficulty of the service as well as the professional standing, specialty, and reputation of the attending physician. How much was done by way of time spent, time lost from other business pursuits, and the actual benefit received by the patient certainly enter into a determination of reasonableness. A final element might be *who* was treated, but this requires an expanded treatment below.

Several cases have considered these elements, but since factual situations change from case to case, no one decision purports to be a glossary of reasonableness. One case not willing to go so far as to say that customary charges should be considered, merely looked to the admissions and charges made by the same physician to his other patients.²¹ A leading case, after an extensive listing of possibilities, concluded by adding that among the elements should be included anything which tends to increase the burden of the services performed by the physician.²²

²⁰ Louth v. Kaser, 405 P. 2d 276, 280 (Wyo. 1965).

²¹ In Re: McKeehan's Estate, *supra* note 5.

²² Spencer v. West, *supra* note 10.

Consideration of Patient's Ability To Pay

A problem arises with the consideration of *who* the patient is, because it implies another question: should the patient's ability to pay for the services rendered, enter as an element into the determination of reasonable value of medical services? The majority rule on this matter maintains that financial ability, taking in both wealth and poverty, cannot be considered in arriving at the determination of reasonable value of a doctor's services.²³ Some of the minority views hold that the ability of a patient to pay for services rendered is a real consideration and should be given weight as an element in the determination of the reasonableness of compensation for physicians and surgeons.²⁴ At least one minority case holds that financial ability may be considered, but not necessarily.²⁵

The majority rule is based on the reasoning that if compensation were lowered for the poor it would follow that the rich man should pay more. These courts continue this reasoning to state that if a physician treats the indigent he may consider the inability to recover the value of his services and thereby regulate the charge.²⁶ Notice that the majority view was generally based on cases prior to 1910. It appears that these early cases have been widely distinguished by later cases and there are many more

²³ *Morrissett v. Wood*, 123 Ala. 384, 26 So. 307 (1899) as distinguished in *Duggar v. Pitts*, 145 Ala. 358, 39 So. 905, 906 (1905), on a procedural matter. A dissenting opinion was rendered by Judge McClellan regarding ability to admit certain testimony in *Blount v. Blount*, 158 Ala. 242, 48 So. 581, 585 (1909); *Morrell v. Lawrence*, 203 Mo. 363, 101 S. W. 571 (1907), distinguished in *State v. Kramer*, 309 S. W. 2d 655, 659 (Mo. App. 1958), which holds that in the event a child is weak of body or mind, or is in some other way unable to care for himself, even though this child is of age, that is has reached majority, the parent remains responsible at law for his care and maintenance, which is an obvious exception to the general rule. Further distinguished in *Glen v. Thompson*, 45 S. W. 2d 948, 951 (Mo. App. 1932), which states that although one can consider inability to pay to the extent that one is so indigent that compensation may be lowered, on the basis of that same reasoning one cannot introduce wealth of the patient to charge more than the ordinary fee. Also distinguished in *St. Vincent's Sanatorium v. Murphy*, 209 S. W. 2d 560, 566 (Mo. App. 1948), where this differed from the leading case, by here submitting the patient's ability to pay to the jury in order to assist them in determining whether or not the services received were indeed necessary. Finally a dissenting opinion was rendered by Judge Nipper in *Morfit v. Thompson*, 219 Mo. App. 506, 282 S. W. 113, 116 (1926) where the Judge felt that *both* parents should be liable for the necessaries of a minor.

²⁴ *Levitan's Succession*, 143 La. 1025, 79 So. 829 (1918); also *Young Brothers v. Succession of Von Schoeler*, 151 La. 73, 91 So. 551, 553 (1922).

²⁵ *Spencer v. West*, *supra* note 10.

²⁶ *Annot.* 97 A. L. R. 2d 1232 (1960).

states following the minority rule today than in 1910, but it still remains the minority.²⁷ Even in those jurisdictions holding the majority view, that is, opposed to considering the ability to pay, there exists an exception in favor of consideration of such proof where it is shown that there is evidence of a recognized usage or custom in the medical profession in a given area to consider a patient's ability to pay in order to arrive at a fee for medical services.²⁸ There has also been at least one case completely opposed to the logic that lower fees for the indigent means higher ones for the rich.²⁹

Perhaps the most succinct statement on this matter can be found in a Pennsylvania case which adheres to the minority view.

. . . physicians should not have their services valued, as you would commodities in trade, by a fixed standard; what would be a proper charge for the same service to a man fully able to pay would be excessive to a man of limited means, and what would be willingly done for the indigent, without thought of financial reward, should be compensated for by one who can afford to pay on the scale which doctors of repute measure as the proper one.³⁰

Notice that there is no demand that those able to pay the scale must pay more than the reasonable value of services rendered to them, but merely that if a physician gets a certain percentage of paying patients the ratio of the indigent which he treats should rise proportionately. This plan is one of self-help and can, if properly adapted, diminish the imminent danger of socialized medicine.

Where Do Courts Come In

Having examined physicians' and surgeons' compensation and the elements of reasonableness, one should also consider abuses of the wide discretion allowed to medical practitioners in the setting of their own compensation, and also whether or not the courts should intervene.

It is an essential principle of law that when a matter is litigated and there is a dispute regarding the material facts that these facts will be presented to a jury (trier of facts) to decide,

²⁷ *Ibid.*

²⁸ *Ibid.*, in footnote.

²⁹ *Womack v. Burka*, *supra* note 24.

³⁰ *Pfeiffer v. Dyer*, 295 Pa. 306, 311, 145 A. 284, 285 (1929).

in most cases. It is also well established that in a trial by jury, in an action to recover the reasonable value of services rendered by physicians and surgeons, the question of value is to some extent in the control of the trial court, which may set aside an unreasonable verdict.³¹ Expanding this rule, a recent Louisiana appellate court stated that it is the duty of the courts, in the absence of an express contract, to determine whether the charges sued upon are in fact unreasonable, and if so to make a proper deduction, after weighing all the factors making the services rendered more onerous than usual, and justifying an increase over the usual and customary charges made for such services by men of similar professional standing and under the same circumstances.³² A more recent case in the same court goes on to say that once it has been found that the physician abused his privilege of fixing his fees, by going beyond the bounds of reasonableness, the court will not hesitate to reduce such charges.³³

The jurisdiction of a court over these matters is more forcefully brought out in a Maryland decision which holds in part that where there is evidence of the time, labor, care and skill given by a surgeon in relation to the illness of a person, as well as of his standing and skill in the profession, the court sitting as a trier of facts is itself authorized to appraise the value of the services rendered, notwithstanding the absence of expert witnesses.³⁴ This case points out that the elements of reasonableness of the fee are all taken into consideration and are not always adverse to the physician and surgeon. More explicit in other cases is the fact that, although the opinion of other physicians and surgeons is competent on the question of valuation of services, it is not so conclusive as to replace the judgment of the court, whose duty it is to pass on the question of value of services rendered, which matter is within the sound discretion of the court.³⁵

What conclusions can be drawn from the case law regarding physicians fees? The primary consideration of this paper was whether courts should set doctors' fees. The answer remains

³¹ *Miracle v. Barker*, *supra* note 16.

³² *Spencer v. West*, *supra* note 10.

³³ *Loomis v. Travelers Insurance Company*, 169 So. 2d 544, 546 (La. App. 1964).

³⁴ *Brown v. Hebb*, 167 Md. 535, 175 A. 602 (1934).

³⁵ *In Re: McKeehan's Estate*, *supra* note 5.

“no,” but a *qualified* no. A legislative enactment setting doctors’ fees would be a plunge into socialized medicine in a country whose socio-economic structure is based upon free enterprise, and the result would be that the courts would actually set general fees. It is evident that each case differs to some degree as to facts and that therefore each case must be decided on its peculiar merits. As long as courts are called upon to pass judgment on the question of reasonableness there will be some regulation of doctors’ fees. But this is not undesirable. One court has observed that if the courts do not act, and if medical fees continue to increase and become an impossible burden, governmental regulation will be urged as a correction in spite of the general apprehension of socialized medicine.³⁶

³⁶ *Spencer v. West*, *supra* note 10 at 426.