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New Medicolegal Standards of Skill and Care

*Howard L. Oleck**

CHANGES IN MEDICAL SCIENCE bring with them many concomitant changes in medicolegal standards of skill and care. In other words, new knowledge in the sense of pure medicine often requires new legal standards of skill and care in the light of that new knowledge.

The hard fact is that as medical knowledge increases the legal standard of skill and care of physicians rises. Indeed, sometimes it seems that it would be legally advantageous for doctors for medical advances to cease. The lower the body of medical knowledge generally, the lower is the legally required standard of a doctor's skill and care. Conversely, the higher the medical level rises, the higher the legal duty rises. This is an ironic state of affairs, justified by the duty of the law to protect the public.

For example, a recent study by doctors at the Albert Einstein Medical College revealed that anesthesia was deadly to white mice that had been exposed to radiation.¹ This suggests that persons suffering from radiation, who are likely to be in great need of anesthesia, can be given anesthesia only at the peril of their lives. A doctor thus may have to avoid giving anesthesia to a victim of radiation, lest he be held legally liable for malpractice. This new item of medical knowledge may well lead to the establishment of a new medicolegal standard of skill and care.

The example given was only an experiment on white mice. It may not hold true for humans, in the long run. But the example neatly illustrates the dilemma posed by the interaction of law and medicine.

Recent years have seen a host of developments in medical knowledge. Many of these developments have caused changes in legal standards. It is both interesting and instructive to examine a few of these developments and to conjecture about their possible effects on the law, and vice versa.

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¹ News Item, *N. Y. Times*, p. 8 (May 16, 1962). The study was conducted by Drs. H. L. Zauder and L. R. Orkin of Albert Einstein College of Medicine. Note that excessive doses of local anesthesia also produce serious reactions per se. Adriani, *Absorption and Systematic Toxicity of Local Anesthetics*, 25 *G. P.* 82 (1962).

The examples of medical reports and studies which are mentioned herein all were taken from *Oleck, Negligence and Compensation Service* (Central Book Co., Brooklyn 21, N. Y.), a medicolegal digest periodical issued bi-weekly. It is emphasized that these are only a few samples, out of a vast literature, and are confined to studies published within about one year preceding publication of this article.

It should first be noted that most of these new medical reports are yet to be verified by further experiments and tests. We are frankly conjecturing about most of the new developments described herein.

Catheterization is routine in many gynecologic and obstetric cases. But a recent study has shown that it is quite likely to introduce pathogenic bacteria. Infection was found to occur within three days in 95 percent of cases with indwelling catheters.² Thus, when infection occurs, malpractice may be found if the necessity of catheterization, and due care, cannot be shown by the physician.

Many antibacterial drugs now are widely used by physicians, notably penicillin, streptomycin, novobiocin, chloramphenicol, and tetracycline. But a recent study has shown that these may be deadly to very young infants, particularly to newborn babies, and most particularly to premature babies.³ Thus, a physician's use of the antibacterial drugs on babies may have to be justified if untoward results occur.

Research on the nature of suicide attempts among young people has shown that attempts increase with puberty, that boys are most likely to repeat such attempts, and that attempts increase in November, mostly in the afternoon or evening.⁴ Thus, unless an institution's provisions for dealing with suicide attempts take these facts into account, there may be actionable negligence on the part of its staff.

Knowledge of the harmful side effects of some drugs has been growing in recent years. In this instance specific legal provisions have resulted. Effective March 5, 1962, the United States Food &

² Kaye et al., Article, 86 Canadian Med. Assn. J. (1) 9 (1962).

³ Rubin, Article, 46 Nebr. St. Med. J. (12) 610 (1962). See also, Reports at meeting of Interstate Postgrad. Med. Assn. of No. Amer. at Cleveland, Nov. 14, 1961, in Cleveland Plain Dealer, p. 2 (Nov. 15, 1961).

⁴ Bergstrand & Otto, Article, 51 Acta Paediatrica (1) 17 (Stockholm, 1962); dig. in 5 World-Wide Abstr. Gen. Med. (4) 6 (Apr. 1962). As to tests for probability of suicide attempts see Schwartzberg, Article, 54 Southern Med. J. (9) 1017 (1961).

Drug Administration ordered drug manufacturers to enclose in their packages printed statements about harmful side effects.⁵ It is not clear how much knowledge of such side effects must exist before a manufacturer becomes obliged to enclose warnings with the product. But the danger, and liability, are recognized, and may be ignored only at the manufacturer's peril.

Whether or not a blow or cut causes cancer in humans is not well settled. But there are medical authorities who do believe that acute or chronic trauma often will cause development of skin carcinomas.⁶ There have been some case decisions in which juries have held that trauma can be a cause of cancer.⁷ This poses a most delicate problem for physicians. If they follow the medical view that the cause of cancer is unknown they may be held by the courts to have been remiss. Here the medicolegal standard is vague indeed.

Treatment of fractured fingers usually is done with splinting, but often fixation is employed. A recent medical study stated that it is a bad mistake to use fixation except in certain types of injuries.⁸ Thus doctors who routinely use fixation procedures may be guilty of using improper technique in the light of the new knowledge revealed by this study.

Another interesting new development is found in the growing medical acceptance of use of the vacuum extractor in obstetrics in place of forceps, in the delivery room. It now is becoming standard practice in the world's delivery rooms.⁹ Thus use of a new device is legally good practice, as well as medically good practice. Yet this may lead to cases challenging the old

⁵ Note, 71 *Intnatl. Surg. Dig.* (3) 166 (Mar. 1962).

⁶ Bird, et al., Article, 54 *Southern Med. J.* (11) 1262 (1961). See also, pamphlet, *End Results and Mortality Trends in Cancer*, U. S. Govt. Printing Office Catalog No. FS 222/18:6 (1961). And see, Mider, *Status and Trends in Cancer Research*, 4 *World-Wide Abstr. Gen. Med.* (10) 34 (Nov. 1961). See also, McLaughlin, S., & T., *Study of Precancerous Epithelial Hyperplasia . . .* (in *Carcinoma of the Breast*, 153 *Annals of Surg.* 735 (1961)). And burn scars may become cancerous years later; Castenareo, Article, 94 *Calif. Med.* (3) 175 (1961).

⁷ See 13 *TAPA Bull.* (3) 4 (Mar. 1962) citing a Texas compensation case that ultimately was settled after the jury found causation. And see *Schwartz v. Heyden Chem. Corp.*, 219 *N. Y. Supp.* 2d 98 (1961). And elsewhere in this issue of this *Law Review* see, March, *Traumatic Cancer in Workmen's Compensation*.

⁸ Brooks, *Phalangeal Fractures*, 113 *J. La. State Med. Soc.* (10) 432 (1961). See also, Bojsen-Moller, J., & S., *Finger Tip Injuries*, 122 *Acta Chirurgica Scandinavica* 177 (1961), dig. in 71 *Intnatl. Surg. Dig.* (2) 84 (Feb. 1962) and 5 *World-Wide Abstr. Gen. Med.* (2) 24 (Feb. 1962).

⁹ Note, 71 *Intnatl. Surg. Dig.* (5) 319 (May 1962).

procedure of use of forceps, when injury is caused by the forceps, as sometimes happens.

Heart attacks in women have been found to be causally connected with industrial work, even where predispositive factors such as obesity, diabetes or hypertension are absent.¹⁰ This may introduce a higher standard of care in the use of women in industrial work, particularly where strain or exertion, such as heavy lifting, are involved in the work.

Spinal cervical disc injuries most usually are diagnosed by physicians by the use of myelograms. But a recent study emphasized that the myelogram is not the sole nor even necessarily the best diagnostic approach. Careful study of other signs and symptoms also are useful indicia, and may lead to quicker relief.¹¹ This suggests that lack of a myelogram may not necessarily excuse a physician's failure to properly diagnose and treat a cervical disc lesion injury.

Since 1959 a new technique permits direct examination and diagnosis of lung cancer.¹² When a reasonable length of time for the dissemination of this knowledge among physicians has passed (perhaps already), a medical practitioner may be charged with a duty to know of this new technique. Then failure to use it with reasonable skill and care may suffice as the ground for a charge of legally actionable malpractice.

The presence of coronary heart disease, where it is suspected, now can be revealed by medically developed exercise tests.¹³ It is easy to see that failure to use these tests, where the possibility of coronary heart disease is indicated and the tests are feasible, may spell out culpable negligence.

Medical attribution of complaints of pain to malingering should be made by physicians only with great caution, in view of new knowledge of the nature of such complaints. A study has shown that some people are literally pain-prone, usually being depressive, pessimistic and moral masochists in their nature, showing neurotic symptoms and being hard to distinguish from malingerers.¹⁴

¹⁰ Blackman & Kologlu, Article, 61 N. Y. St. J. Med. (18) 3079 (1962).

¹¹ Hudson & Rogers, Cervical Disc Lesions, 57 W. Va. Med. J. (10) 368 (1962). And see, Wise, Article, 17 Rheumatism (4) 74 (1961).

¹² Palva, Article, 53 Acta Oto-Laryngologica (6) 578; dig. in 5 World-Wide Abstr. Gen. Med. (2) 24 (Feb. 1962).

¹³ Dimond, Article, 24 Circulation (4) 1:736; dig. in 5 World-Wide Abstr. Gen. Med. (2) 18 (Feb. 1962).

¹⁴ Simpson, Article, 48 II Med. J. Australia (4) 139 (1961); dig. in 5 World-Wide Abstr. Gen. Med. (2) 3 (Feb. 1962).

Hospital staphylococcus epidemics have seriously worried hospital staffs recently. One chief method of taking precautions against staph epidemics has been the treatment of nasal infection carriers. Now it is known, however, that this method is inadequate, as an experiment with disinfecting of nasal matter has shown no conclusive results.¹⁵ Reliance on this method, then, may not be sufficient to indicate the taking of adequate precautions against the spreading of staph infections in a hospital.

Preserved blood, used massively in transfusions, seems to cause a tendency to hemorrhage, according to a recent study with animals, apparently due to changes in the clotting mechanism.¹⁶ Thus, the massive use of preserved blood is now known to be possibly dangerous, and may have to be justified on grounds of necessity or emergency, or on some other basis, where it is used with resultant hemorrhage effects. Whether or not this holds true for humans, of course, is not yet known, but the implication of this study is clear.

Heart attacks sometimes are painless infarctions, but do show changes in blood pressure, pulse and venous conditions. Such cases must be distinguished from asymptomatic myocardial infarctions. In the latter case electrocardiograms do reveal trouble where no other proof may be available.¹⁷ This indicates that the EKG should be used as a check on other diagnostic procedures. Failure to use it may well be culpable negligence.

Contrary to propaganda stories of successful autologous surgical transplantations of tissue or organs (emanating mostly from Soviet sources), most such transplantations still are failures.¹⁸ The chief problem is transplantation immunity. It follows that physicians must be very cautious in making prognostications about transplantations.

Establishment of new services and information sources for physicians are likely to affect the physician's standards of skill and care. For example, a new telephone and/or mail information

¹⁵ Henderson & Williams, Nasal Disinfection, etc., 2 Brit. Med. J. 330 (Aug. 5, 1961). But see, attributing the cause to nasal carriers, White, Article, 58 J. Laboratory & Clin. Med. (2) 273 (1961). And see, generally, Artz & Grogran, The Staphylococcal Problem, 27 Amer. Surgeon 253 (Apr. 1961).

¹⁶ Sunada, S., S., S., & S., Hemorrhagic Tendency After Massive Transfusion of Preserved Blood, 50 Surgery 437 (1961). And see note 23, *infra*.

¹⁷ Schulze, Article, 1 Medizinische (40) 24046 (1961); dig. in 5 World-Wide Abstr. Gen. Med. (1) 2 (Jan. 1962).

¹⁸ Von Scheiffarth, Article on Immunopathologic Problems, 86 Deutsche Med. Wochenschrift 1329 (1961); dig. in 71 Intnatl. Surg. Dig. (1) 11 (Jan. 1962).

service makes available to physicians complete data on any drug, on a routine or emergency basis. This service, centered in Washington, D. C., costs \$15/year, and had a file of 15,000 separate drug descriptions by late 1961.¹⁹ Availability of this service may make less easily excusable a physician's lack of data on available drugs.

Some doctors have attributed the causation of allergies to emotional factors in the patient afflicted with allergy. But a recent study of allergic factors has shown no causation, but serious aggravational effects in family emotional patterns.²⁰ It now may not suffice for a physician to quickly attribute the original causation of allergy to purely emotional factors in the patient. The physician should go beyond this point in investigating causation, if he is to show proper skill and care. For example, wheezing in very young infants now is said usually not to be caused by hypersensitivity as formerly believed, but is attributed to heredity.²¹

Burns are well known to result in bad scars and deformities. But a new method of "sanding" the skin of a freshly burned person prevents formation of scars and deformities.²² Failure of a physician to employ this technique now may amount to negligence, in some cases, if preventable scars and deformities result.

Unnecessary blood transfusions sometimes are caused by a surgeon's overestimation of blood loss and of the need for transfusion. But modern methods of checking on blood loss are available, such as sponge weighing and colorimeter estimation.²³ Failure to use scientific methods, rather than guesswork, may be negligent if untoward results follow a transfusion that may have been unnecessary. The difficulty of proving the necessity, of course, remains. After all, to a large extent the physician's work consists of making an educated guess about a situation or problem.

An increase in the medically acceptable amount of radiation dosage that may safely be given now is possible, thanks to development of a new method of cooling of the skin while treat-

¹⁹ A. P. Article, Cleveland Plain Dealer, p. 12 (Jan. 9, 1962). The service is called "Mediphone."

²⁰ Dubo, et al., Article, 59 J. Pediatrics (3) 402 (1961).

²¹ Crawford, Article, 54 Southern Med. J. (8) 867 (1961).

²² Article, Sanded Burns Tell No Tales, 2 Medical World News (23) 33 (Nov. 10, 1961).

²³ Note (short report on speech by two U. S. A. F. medical officers), 2 Medical World News (23) 6 (Nov. 10, 1961). And see note 16, *supra*.

ment is being given.²⁴ This suggests that where large doses of radiation are involved it may be bad medical practice not to use this new method when it can safely and effectively be used.

Parenthetically, it should be remarked that physicians themselves are quite aware of the disparity between standards and practices in many cases. For example, a medical profession authority recently revealed that about half of the surgery done in the United States is done by "unqualified" doctors, *i.e.*, by doctors who lack the qualification training for certification as surgeons. This shocking fact was revealed by a survey conducted by the American College of Surgeons, reported by Dr. Robert S. Myers, Executive Assistant Director of the A. C. S.²⁵ The situation is worst in small hospitals.

It now is known that certain drugs cause harm to the fetus when administered to a pregnant woman. Thus iodides may cause goiter or hypothyroidism in the fetus, and the danger of certain other drugs in this respect also now is known.²⁶ Clearly, a physician should use caution in employing these drugs on pregnant women. In fact it may be culpable to employ them on a pregnant woman at all, ordinarily. Analogously, use of x-rays on a pregnant woman now is known to cause injury to the fetus, including fatal leukaemia caused by ionizing, diagnostic radiation in utero.²⁷ Use of x-ray on a pregnant woman, especially near the fetus, should be kept to a minimum, or avoided entirely if possible.

Introduction of an entirely new medical procedure often introduces new problems of medicolegal standards of skill and care for that procedure. For example, a new method of anesthesia, being tested at the University of Mississippi, employs electricity instead of chemicals.²⁸ This experiment has not yet reached the point of definitiveness that warrants attention by the legal profession, but may soon be positive and widespread enough to merit its own standards.

Lack of prompt splintage of ankle fractures often leads to further damage to the injured ankle; yet hospitals are said to

²⁴ Article, Radiation Damage Cooled Down, 2 Medical World News (23) 54 (Nov. 10, 1961).

²⁵ N. Y. Times, p. 39 (Oct. 5, 1961).

²⁶ Sandberg, Drugs in Pregnancy, 94 Calif. Med. 287 (May 1961).

²⁷ Court, & D., & H. et al., Incidence of Leukaemia After Exposure to Diagnostic Radiation in Utero, 2 British Med. J. 1539 (Nov. 1960); dig. in 70 Intnatl. Surg. Dig. (9) 574 (Sept. 1961).

²⁸ Memo., 7 Negl. & Comp. Serv. (3) 17 (Nov. 1, 1961).

frequently overlook this basic procedure.²⁹ Failure to completely treat an injury, of course, and failure to do so with reasonable promptness, may lead to legal liability if further damage results.

A court decided acceptance of lowering of a standard of medical care has occurred in the case of hospital transfer carts. A Texas court has ruled that hospitals need not use patient transfer carts with secure tops nor with brakes. This was in a case where an obstetric patient fell when a stretcher type (removable) cart top fell off the cart. The court said that, as such old-style carts are widely used, it is not negligent not to have and use the safer type.³⁰

Hypodermic injections are usually made into the upper outer quadrant of the buttock. Misdirection of the needle, or too deep injection, may injure the peroneal or tibial or gluteal or sciatic nerves, causing a peculiar gait that may last a year or more.³¹ This fact provides an evidentiary standard of skill and care, as gait peculiarities may indicate unskilled or careless injection.

It should be remarked that the following of one of two conflicting medical theories or doctrines is not legally actionable if bad results occur, even when the opposing school of medical thought says that the first method is dangerous.³² This should be kept in mind when estimating the degree of authority of a given medical procedure. Often there are more acceptable ways than one of seeking a desired medical result.

Use of steroids in treating intractable asthma or other allergies long was viewed as unsafe and uncertain. Now, after a ten year study, this treatment has been accepted as safe and useful when conventional treatment is not sufficient.³³ Thus, with time and testing a firm medicolegal standard has been established in this case.

Statutory establishment of legal standards for medical problems is comparatively infrequent. In the problem of abortion, however, statutes have been enacted in many countries. Compared with the statutes of Eastern European nations, the Ameri-

²⁹ MacKinnon, Article, 41 *Manitoba Med. Review* (4) 217 (1961).

³⁰ *Davidson v. Methodist Hospital of Dallas*, 348 S. W. 2d 400 (Tex. Civ. App., 1961).

³¹ Perret, *Intramuscular Injections*, 56 *Medizinische Klinik (Munich)* (17) 746 (1961); dig. in 4 *World-Wide Abstr. Gen. Med.* (8) 4 (Sept. 1961).

³² *Gielski v. State of N. Y.*, 9 N. Y. 2d 834, 175 N. E. 2d 455 (1961).

³³ *Baldwin, et al.*, Article, 32 *J. of Allergy* (2) 109 (1961).

can abortion statutes are very strict and narrow.³⁴ While these statutes deal primarily with the legal permissibility of abortion in certain cases, they also affect the methods and standards of carrying out legal abortions.

Surgery on patients who have heart disease used to be viewed by physicians as insuperably dangerous. But a recent study has disclosed that the presence of heart disease in fact is not an insuperable risk when the operation is short and the anesthetist is skillful.³⁵ This may well justify a surgeon's taking of risks with a heart diseased patient that formerly would have been deemed to be culpably dangerous.

Some medical matters are so obvious that laymen (*e.g.*, a jury, or a judge sitting as the trier of facts) can decide whether or not a given incident amounted to actionable negligence. No expert testimony is required when the situation obviously indicates negligence. Thus, when a dentist, drilling a tooth, slipped, and the drill went through the lip of the patient down to the chin, no expert testimony for the plaintiff was necessary.³⁶ Everyone knows that the medicolegal standard of skill and care was not met in this case.

Any estimation of what is (or should be) the proper medicolegal standard in a given case usually depends on the expert opinion of other physicians. But these opinions are not always reliable, as courts and lawyers long have complained. Physicians generally are prone to protect each other when laymen question the conduct of a physician. An American Medical Association meeting in New York City recently reported that a three year study of physician's self-disciplinary procedures showed a clear policy of physicians to conceal each other's errors and misconduct. In 35 states no record of any medical professional discipline at all was found.³⁷ This often-excoriated medical "conspiracy of silence" deeply affects the law's efforts to find the truth and the proper standard of skill and care, in many cases, especially in lawsuits for medical malpractice.

³⁴ See the comparison of statutes and methods of U. S., U. S. S. R., Bulgaria, Hungary, Poland, Czechoslovakia, Yugoslavia, Denmark, Finland and Sweden, in Tietze & Lehfeldt, *Legal Abortion in Eastern Europe*, 175 *J. A. M. A.* 1149 (Apr. 1, 1961).

³⁵ Nachlas, & A., & G., *Influence of Arteriosclerotic Heart Disease on Surgical Risk*, 101 *Amer. J. Surgery* 447 (Apr. 1961).

³⁶ *Merola v. Stang*, 130 S. 2d 119 (Fla. App., 1961); and see 141 A. L. R. 12.

³⁷ A. P. Report, *Cleveland Plain Dealer*, p. 1 (June 27, 1961); *N. Y. Times*, p. 1 (June 27, 1961). See also, Note, *Overcoming the "Conspiracy of Silence"*: Statutory and Common-Law Innovations, 45 *Minn. L. R.* 1019 (1961).

Even if the physicians' "conspiracy of silence" were not a fact (as it apparently is), the need for medicolegal standards of skill and care would continue to exist. And ultimately those standards must be set by the law, not by the sole discretion of the medical profession. Of course the legal standards depend on the medical standards, and in a real sense the medical standards automatically delineate the medicolegal standards. But the law exists for the protection of the public, not for the convenience of any particular profession or group. And the public reposes its trust in the courts, legislatures and lawyers as its chosen exponents and guardians of the law.

It thus is the duty of "law men" to study every field of human activity in order to develop suitable law to govern every field of human activity. This, in very brief form, is what this short paper has sought to sketch for the subject of some recent changes in the field of medicine. This paper is a mere thumbnail sketch of a few recent developments in the medical field. There are literally thousands of new developments that well merit study and analysis in far greater depth than has been essayed here.

It is hoped that this paper will interest others in this fascinating and important subject, and in analogous subjects such as new engineering developments and their legal effects, and the like. It may well be that continuing studies of such subjects should be inaugurated and carried on by joint committees of lawyers and doctors, lawyers and engineers, and lawyers cooperating with members of various other professions.

It is emphasized that most of the medical developments discussed hereinabove are not yet absolutely established medical conclusions. There is a wide range in the professional status of the various medical journals and periodicals cited; some are very authoritative and some are not. Nor are the comments on their probable legal effects yet definite legal conclusions. Time, more research, and then the fiery crucible of legal action will be their ultimate tests. Some of the possibilities have been suggested here.