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TRIAL OF MEDICAL MALPRACTICE CASES, by David W. Louisell and Harold Williams, Published by Matthew Bender & Co., Inc.; New York, N. Y. 1022 pp. (1960).

Malpractice litigation has become a menace, as well as an occupational hazard, for the practitioner of medicine. The rapid increase of claims and lawsuits threatens to impede the advance of the scientific practice of medicine.

Trial of medical malpractice cases was written by David William Louisell, a law professor, and one of his recent students, Harold Williams, M.D., LL.B., who was graduated from Jefferson Medical College in 1950 and from the University of California, LL.B., in 1959.

The chief value of this book lies in its subdivisions and subsections which aim to cure the lack of medical instruction of attorneys and law students. Unhappily, in the process of simplification, there are errors which impair the lawyer's comprehension of the physician's problems.

Chapter I—*The Problem of Medical Malpractice in Today's Society*

Awareness of malpractice among the general public is emphasized by the numerous feature articles found in the general press.[1] The authors reflect, consciously or unconsciously, certain prejudices and influences of their own experience.

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[1] E.g., Silverman, Medicine's Legal Nightmare, The Saturday Evening Post, April 11, 1959, April 18, 1959, April 25, 1959, condensed in Readers' Digest, July, August and September, 1959; You and Your Doctor, Life, Oct. 12, 1959, Oct. 19, 1959, Oct. 26, 1959, Nov. 2, 1959; Peters, When Your Doctor Fears His Patients, Good Housekeeping, Sept., 1959; James, Emotional Surgery, The American Weekly, June 7, 1959; Regan, Why Doctors Face So Many Lawsuits, Look, Nov. 1, 1955; Searing Report on Hospitals, Look, Feb. 3, 1958; Shalett, Can We Trust ALL Our Doctors?, Ladies' Home Journal, March, 1953; Wylie, The Doctors' Conspiracy of Silence, Redbook, March, 1952, condensed in Medical Economics, April 1952; Dusheck, When Doctors Make Mistakes, San Francisco News, March 25, 26, 27, 28, 29, 1957; Spivak, MD's in Court, The Wall Street Journal, Oct. 15, 1959; report of $290,000 settlement of malpractice case, Daily Palo Alto, Calif., Times, Sept. 19, 1956.

Chapter II—*Insight for the Lawyer into the Practice of Medicine*

There is an attempt here to appraise the physician as a member of the community. The effect of the physician on the patient is illustrated.

> Many physicians are unaware of the power they possess in relation to some of their patients. The blind faith with which some individuals follow advice often fills profound psychological needs of both patient and physician; but it is dangerous. The more blindly a patient follows his physician's words and ministrations, which are not accompanied by honest and understandable explanations, the more distressed he is likely to be when he discovers that something has been done incorrectly, to his damage. (¶ 2.03.)

The lawyer is introduced to the medical societies as well as to some of the salient features of the practice of medicine.

Chapter III—*The Fields of Medicine*

The practice of medicine has been catalogued according to its component specialties, illustrating the interdependence of physicians, their differences, and some antagonisms which arise among them. The annotations which illustrate malpractice cases are very revealing.

Chapter IV—*"Primary" Causes of Malpractice Suits*

Here there is an obvious projection of glaring errors, mistakes, mishaps, injuries, and human failings of physicians, well annotated by cases from the entire country. Illustrated are cases of abandonment, fraud, and deceit, as well as physician's breach of contract.

Chapter V—*"Secondary" Causes of Malpractice Suits—The World of Words*

The attorney is made aware of the origins of suspicion and why anger arose in the patient; about fee collections; missing explanations, and poor prognoses, as well as psycho-emotional factors.

Chapter VI—*The Lawyer's Insight into Physicians' Notions of Malpractice*

This chapter deals with the physician's own control of his confreres' actions, how he is judged, and the gradual development of the standard of practice expected of him.

Chapter VII—*Proof and Disproof*

These pages prepare the attorney to approach the physician. They deal with his sources of medical information and how to comprehend them. The language of the physician is broken down for the lawyer, with its general and anatomical prefixes and the latinized suffixes, as well as an explanation of anatomical positions. The methods of eliciting medical witnesses' expert testimony, obtaining hospital records, and physicians' office records, appear easier than they are in current practice.

Chapter VIII—*Is There a Malpractice Case?*

This chapter starts with the dictionary definition of "malpractice" as applied to physicians. Starting with a part of negligence law, the authors delve into the doctor's duty of care and the patient's responsibility to carry out the instructions of the physician. The question is raised whether malpractice action should be in tort or in contract. It is brought out that the geographic locality of the physician's practice often is no longer applied to his "standard of reasonable care of the ordinary practitioner within the same community. . . . It is elementary that to justify recovery the lack of due care must be the proximate cause of the injury. Many plaintiffs' cases flounder on proximate cause." (¶ 8.07.) The problems of abandonment and assault and battery are adequately annotated. These authors hold that a physician-patient relation is a fiduciary one; so that a physician's statement and promises to his patient must be judged by high standards applicable to fiduciaries. The problem of deceit is handled meticulously and detailed with cases. Some of the actions in tort are mentioned, such as invasion of the right of privacy, interference with the family relationship, interference with property rights, breach of confidential communications and injuries to third persons.

Chapter IX—*Is There a Defense to Malpractice Cases?*

It was reassuring to find these pages dealing with the defenses in malpractice cases. "The most common invoked defense, in a basic sense the one success of which is most satisfactory to the defendant, consists of a denial of all (or at least some) of the essentials of plaintiff's claim for relief." (¶ 9.01.) This requires the plaintiff to prove by preponderance of the evidence each essential of his claim.

Among the positive defenses utilized by physicians is assumption of risk, which is detailed in the discussion of *Hales v. Rames*[2] and contributory negligence, i.e. *Gerber v. Day*.[3] There are several cases discussed dealing with emergency situations, recognizing that the practice of medicine often requires that decisions be made and actions taken under circumstances of genuine stress.

Chapter X—*Depositions, Discovery and Pre-Trial Conferences in Malpractice Cases*

The integrated use of discovery and depositions not only of the plaintiff but of the defendant and of witnesses, and the interrogation of any and all individuals even remotely connected with the suit is well handled by illustrative hypothetical cases. The method of obtaining the opinion of adverse experts is illustrated in the case of *Lewis v. United Airlines Transport Corp.*[4]

Chapter XI—*Handling the Malpractice Case for Plaintiff*

The strategy and tactics of litigation involving medical issues and proof of medical facts are carried to the readers by a detailed hypothetical malpractice action. It starts with the interview with the client and the preliminary analysis by the plaintiff's lawyer. Convinced that there is liability of the physician, the lawyer seeks physical evidence and one or more defendants. The attorney is vitally interested in depositions of each and every person connected with the plaintiff's injury; not only the surgeon but also the associate physicians, anesthesiologist, and nursing personnel. The importance of, and method of obtaining, hospital records are shown in this hypothetical case. The chapter sums up the plaintiff's case by observations that should be brought to the jury:

1. Thorough education of the jury to the medical realities, with constant explanation of technical terms in lay language—using alternative lay terms when necessary to evoke indications of the jury's understanding, even at the cost of repetition which as to simpler data would be avoided;

2. Stress of the uncontradicted and conceded facts;

3. Emphasis on the fundamental that a verdict for the plaintiff does not imply criminal conduct, nor condemn the defendant

[2] 162 Mo. App. 46, 141 S. W. 917 (1911).

[3] 119 Cal. App. 446, 6 P. 2d 535 (1931).

[4] 32 F. Supp. 21 (W. D. Pa. 1940).

in his profession, especially where the defendant has sought to inculcate the opposite psychology;

4. Effective use of demonstrative materials, diagrams, models, etc.;

5. Explanation of why plaintiff's expert evidence quantitatively is more than defendant's;

6. Importance of common sense in addition to medical detail in deciding the issue of negligence;

7. Thorough explanation in lay language of *res ipsa loquitur*, with emphasis on its essential reasonableness, where plaintiff is depending on this doctrine;

8. Adequate attention to damages.

Chapter XII—*Handling the Malpractice Case for Defendant*

It is emphasized that the best preparation for handling the defense is a thorough comprehension of plaintiff's factual, medical and legal predicates. Besides a complete understanding of the demurrers and preliminary motions, the defendant attorney should dwell on the quality of the physician's records and the hospital records, if hospitalization is involved; the appearance and personality of the defendant physician; fees—whether they are standard; the reputation of the physician in the community.

Chapter XIII—*Statutes of Limitations in Malpractice*

These pages present detailed information on the statutes of limitations as they apply to malpractice actions, especially as to tort, contract, assault and battery, wrongful death, and negligence. This chapter contains the statutes of limitations of each of the fifty states and the District of Columbia.

Chapters XIV and XV—*Res Ipsa Loquitur*

These are the applicable tenets of *res ipsa loquitur,* so well developed in California legal procedures. Here it is said that the "conspiracy of silence" of the medical profession in malpractice cases gave great impetus to the development and extension of the doctrine of *res ipsa loquitur.* The effect of the doctrine on the medical profession, the physician's reluctance to testify, and its effect on procedural developments of a malpractice suit are important to attorneys.

Chapter XVI—*Vicarious Liability in Malpractice*

In malpractice cases, the situations in which vicarious liability principles are most likely to be applicable are those where

physicians are charged (under respondeat superior) with their employees' negligence. Illustrative cases are presented of the various relationships of the physician and his employee, the physician and his partner, the physician and his substitute, and the physician and hospital employees.

Chapter XVII—*Charitable & Governmental Hospitals—Liability and Immunity*

Malpractice per se is not the true subject of this section, but rather the relation of the various types of hospitals to injured patients. The recent change in the rationale of immunity of charitable hospitals, non-profit hospitals, and governmental hospitals, is discussed.

Chapter XVIII—*Damages*

The basic law of damages of tort cases undergoes no major changes when applied to malpractice actions, but there are presented special problems with regard to the measure of damages. The authors illustrate compensatory damages as to pecuniary losses, physical and mental disturbances of the patients, and pain and suffering.

Chapter XIX—*Future Sources of Actions—Exploitation & Prevention*

The future of the development of malpractice suits will accompany progress and increase of variety of techniques and additional medication used by the medical profession.

Chapter XX—*Malpractice Insurance—Protection and Entrapment*

"There is probably nothing in the ordinary physician's daily life which disturbs his equanimity as much as the possibility of a malpractice suit, especially as reflected in the premium cost of malpractice insurance, the possibility of financial distress in case of judgment greater in amount than his insurance coverage."

The principal value of this volume is to the young attorney and law student, who might well appreciate having in convenient form, if to some extent on an elementary level, material dealing with many phases of the malpractice problem. The whole makes for pleasant casual reading. Perhaps the defect of the book is that it attempts to do too much.