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Eileen Kelley

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GENERALLY WHERE ONE HAS BEEN INJURED by another's wrongful conduct he is required to exercise ordinary care and reasonable prudence to seek medical treatment so as to minimize the defendant's damages. Failure to do so may diminish the amount of damages the injured person may recover. This is a fundamental principle of the law of damages, and not of tort.[1]

Reasonableness of Refusal

The questions which frequently plague the court are: what constitutes reasonableness, and when may a reasonably prudent man refuse to submit to medical or surgical treatment? A Wisconsin court[2] held that there is no duty to submit to corrective surgery. Consideration of such a possibility is only for purposes of assessing the damages for permanent injury. A jury charge by an Ohio court[3] stated that the injured party could proceed upon his own judgment in seeking medical treatment and is not bound to satisfy that of another. The court in *Butler v. Whitman*[4] stated that one need not submit to an operation, but may choose to bear the affliction and was entitled to damages.

In *Williams v. City of Brooklyn*[5] the plaintiff was not required to submit "blindly" to professional advice but was entitled and bound to exercise reasonable judgment. If his conduct in refusing to submit to surgery was that of a reasonably prudent man he should not be charged with negligence. Here plaintiff had fallen on a defective sidewalk and refused to undergo an operation for a hernia, though later admitting that his refusal had been a mistake.

A recent Pennsylvania decision[6] held that the court had

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* B.A., M. A., in Psychology, Bowling Green State University (Ohio), Third-year student at Cleveland-Marshall Law School.

1 Oleck, Damages to Persons and Property, Sec. 101, pp. 125-126 (1961 revision).

2 Powers v. Allstate Ins. Co., 10 Wis. 2d 78, 102 N. W. 2d 393 (1960).

3 City of Toledo v. Radbone, 3 Ohio C. C. R. (n.s.) 382, aff'd, 68 Ohio St. 687, 70 N. E. 1117 (1901).

4 193 Minn. 150, 258 N. W. 165 (1934).

5 33 App. Div. 539, 53 N. Y. S. 1007, 1009 (1898).

6 Bartunek v. Koch, ____ Pa. ____, 170 A. 2d 563 (1961).

properly charged the jury that if it believed the plaintiff knew his condition could be relieved by surgery, and that an ordinarily prudent man would undergo such an operation, such facts must be considered as elements reducing damages.

Whether a man acted reasonably is a question of fact.[7] The efforts which the injured person must make need only be reasonable under the particular circumstances.[8] One court[9] attempted to establish as a test for reasonableness in refusing to submit to surgery, not a willingness to do so but the injured party's right to guard life and limb from unreasonable peril.

The injured person's right to avoid, if he chooses, surgery which involves peril of life, however slight, anguish and undue risks to health that extend beyond the bounds of reason emerges as the exception to the general rule.[10] A refusal is unreasonable if the proposed surgery is free from danger to life, extraordinary suffering and offers a reasonable prospect of restoration or relief, supported by expert medical opinion.

The risks to one's life and the probability of success of the recommended surgery are major factors in determining whether a refusal is justified. In *Jones v. Eppler*[11] the plaintiff refused major surgery for back, leg and arm injuries because of possible fatal results, although his condition would have been greatly improved should the operation prove successful. The court held that he need not submit to surgery which might be attended with *some* risk of failure or death, and the plaintiff must be permitted to exercise his liberty of choice. The refusal could not be considered in mitigation of damages. This was the court's first opportunity to apply the rule to a personal injury case, but it noted that in an earlier holding the State Industrial Commission lacked jurisdiction to order an employee to submit to major surgery.[12]

The chances of the operating table are too grave to require the plaintiff to submit to a major operation to lessen her dam-

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[7] Budden v. Goldstein, 43 N. J. Super. 340, 128 A. 2d 730 (1957); Robinson v. Jackson, 116 N. J. L. 476, 184 Atl. 811, (Ct. Err. & App. 1936) 105 A. L. R. 1466; Thompson v. Quarles, 297 S. W. 2d 321 (Tex. Civ. App. 1956).

[8] Cline v. City of St. Joseph, 245 S. W. 2d 695 (Mo. App. 1952); Thompson v. Quarles, *supra,* n. 7.

[9] Neault v. Parker-Young Co., 86 N. H. 231, 166 Atl. 289 (1933).

[10] Budden v. Goldstein, *supra,* n. 7 at 736.

[11] ____ Okla. ____, 266 P. 2d 451, (1953), 48 A. L. R. 2d 333.

[12] Accord, Williams Theatres Inc. v. Mickle, 201 Okla. 279, 205 P. 2d 513 (1949).

age, and the decision is solely hers, reasoned a Minnesota court.[13] Neither a court nor a jury should pass on the wisdom of her choice.

Gibbs v. Almstrom[14] held that the damages were not excessive although plaintiff refused surgery which might have cured complications arising from a broken nose. Recognizing that the plaintiff has a duty to minimize damages, the court said ". . . *no man is required to risk his life upon the operating table for any such purpose.*" (Emphasis added.)

In *McNally v. Hudson & Manhattan R. Co.*[15] the court said,

> "Although the peril of life seems to be very slight, nevertheless the idea is appalling to one's conscience that a human being should be compelled to take a risk of death, however slight that may be, in order that the pecuniary obligations created by law in his favor against his employer may be minimized."

The chances of success in the *McNally* case were substantial and proof had been offered that only forty-eight out of twenty-three thousand cases had been unsuccessful.

The case of *Overton v. City and County of Denver*[16] presents a situation which appears to be contra to the general holdings that the slightest risk need not be undertaken. Here, a fireman's pre-existing goiter condition was aggravated while fighting a fire. Medical witnesses testified that the chances of survival were at least eighty-five per cent if the goiter was removed. The order for suspension of further compensation payments until the operation was performed was upheld even though it was major surgery and plaintiff's own physician advised against it.

An exploratory operation on the skull, which had not more than a five per cent mortality rate, and in which plaintiff's condition might become worse if not performed, was reasonably refused.[17] An Illinois court[18] upheld a plaintiff's refusal to submit to surgery because of the uncertainty of results, although an

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[13] Maroney v. Minneapolis & St. Louis Ry. Co., 123 Minn. 480, 144 N. W. 149 (1913), 49 L. R. A. (n. s.) 756.

[14] 145 Minn. 35, 176 N. W. 173, 174 (1920).

[15] 87 N. J. L. 455, 95 Atl. 122, 123 (Sup. Ct. 1915), aff'd, 88 N. J. L. 729, 96 Atl. 293 (Ct. Err. & App. 1916).

[16] 106 Colo. 114, 102 P. 2d 474 (1940).

[17] Karberg v. Southern Pacific Co., 10 Cal. App. 2d 234, 52 P. 2d 285 (Dist. Ct. App. 1935).

[18] Howard v. Gulf, Mobile & Ohio R. R. Co., 13 Ill. App. 2d 482, 142 N. E. 2d 825 (1957).

orthopedic surgeon expressed "hope" that the proposed operation for back injuries might alleviate the pain and thought "it was worth a try."

Fear of the recommended dangerous operation has been held a proper basis for refusal.[19] In one situation the plaintiff feared surgery for a herniated intervertebral disc which, if performed, would eliminate his twenty-five per cent disability or would leave residual effects of not more than five per cent. He had known of two others who became paralyzed as a result of a similar operation. The plaintiff agreed that the physicians (who unanimously recommended surgery) knew more about it than he, but the plaintiff aptly summed up the feeling of all injured persons when he said, "it ain't their back." [20]

Use of a general anesthesia has been cited in several cases as factors considered when deciding that the complainant has not unreasonably refused major surgery.[21] But where only a local anesthetic was required for surgical correction of a hernia, and thus there was not any danger to life, plaintiff was denied compensation because he refused.[22] However in 1960 a Pennsylvania case[23] held that a seventy-year-old woman had a duty to minimize damages by submitting to treatment requiring a general anesthetic. The treatment involved only manipulations of the arm to break up adhesions. It was reasoned that the "general and widespread use of general anesthetics is such that a willingness to suffer rather than submit to treatment seems unreasonable no matter how sincere plaintiff's fear may be." The court surmised that either the jury believed plaintiff's refusal was unreasonable or that her pain and disability were not as annoying to her as it might have otherwise appeared.

Where an operation is a minor one and unattended by any risks, the injured party is required to submit to surgery or his damages will be lessened.[24] In *Leitzell v. Delaware L. & W. R.*

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[19] Edwards v. Traveler's Ins. Co., 304 S. W. 2d 489 (Tenn. Sup. Ct. 1957), 25 Tenn. L. Rev. 405 (1958); Williams Theatres Inc. v. Mickle, *supra,* n. 12.

[20] Walker v. International Paper Co., 230 Miss. 95, 92 So. 2d 445 (1957).

[21] Thompson v. Quarles, *supra,* n. 7; Jones v. Eppler, *supra,* n. 11.

[22] O'Brien v. Albrecht Co., 206 Mich. 101, 172 N. W. 601 (1919), 6 A. L. R. 1257.

[23] Hilscher v. Ickinger, 194 Pa. Super. 237, 166 A. 2d 678 (1960), Application for Allocation granted and appeal allowed, Feb. 27, 1961.

[24] Goodwin v. Giovenelli, 117 Conn. 103, 167 Atl. 87 (1933); Joliet Motor Co. v. Industrial Board, 280 Ill. 148, 117 N. E. 423 (1917); Jenkins v. American Automobile Ins. Co., 117 So. 2d 837 (La. App. 1959).

Co.[25] the court held that plaintiff need not undergo surgery, but if the effect of his refusal would be to retain permanently a condition which might be relieved by a simple operation which a prudent man would undergo, then this should be considered by the jury in assessing damages. "No compensation should be allowed for damages that might reasonably be averted." [26]

In *Evans v. Stearns-Roger Manufacturing Company*[27] the court searched the record and was unable to find any case involving surgery for removal of a herniated vertebra in which the injured workman's refusal to submit to corrective surgery was permitted to reduce the amount of his award.

However, it appears that not all serious major operations where the benefits to be derived are problematical may be refused. In *Hays v. Industrial Commission*[28] three physicians testified that the plaintiff's disability resulting from a herniated intervertebral disc would be reduced to about ten per cent as a working unit, and the successfulness of such operations was from fifty to eighty-five per cent. Without surgery the claimant would suffer an eighty-five to one hundred per cent disability. The Colorado supreme court upheld the Commission's decision that if the claimant exercised his option to refuse, he could not receive full compensation for the balance of his life. The Commission reasoned that "the contemplated surgery is now a common practice and the skill of those in the field is readily apparent from the large percentage of successful results." The court said that even if the operation did not yield favorable results, the claimant could be no worse off, because one cannot be more than one hundred per cent totally disabled. It appears that the risk of death from the surgery was not considered by the court or the Commission.

Conflicting Medical Testimony

Generally the complainant may justifiably refuse surgery where medical experts differ as to its probable success in effecting a cure.[29] A New York court[30] said, "Disagreements among

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[25] 232 Pa. 475, 81 Atl. 543, (1911), 48 L. R. A. (n. s.) 114.

[26] *Ibid.*

[27] 253 F. 2d 383 (C. A. New Mex. 1958), see 4 Oleck, Neg. & Comp. Ser. 7 (No. 1) Oct. 1, '58.

[28] 138 Colo. 334, 333 P. 2d 617 (1958).

[29] Boa v. San Francisco-Oakland Terminal Rys., 182 Cal. 93, 183 P. 2d 1, (1920).

[30] Bordanaro v. Burstiner, 151 N. Y. S. 2d 450, 453 (Tr. T. 1956).

doctors frequently occur about results to be expected. He [plaintiff] need not serve as a guinea pig."

The testimony of two plastic surgeons differed as to the probability of successfully making scars less conspicuous. One would not guarantee results but said that he had performed a number of similar operations with success, but plaintiff's physician doubted the advisability of the operation on the basis that the scars might become worse. The higher court held proper instructions to the jury that if there is a difference in expert opinion as to the advisability and results of operations, there is no duty to submit to surgery and failure to do so is not unreasonable.[31]

Failure and Delay to Obtain Medical Care

When an injured person has failed to obtain medical treatment when he reasonably should have, his failure becomes a mitigating factor in assessing damages. "If an injured person neglects to take care of himself, the consequences are his own affair and he harmed only himself. No others' rights have been abused." [32]

Plaintiff in *Gardner v. Sumner*[33] became ill from drinking root beer containing foreign matter. The court held that his failure to consult a physician, either by telephone or in person, would not materially affect the monetary award, but would go to the "bona fides" of his claimed illness, to be considered by a jury.

The evidence was conflicting as to whether plaintiff had consulted a physician in *Devou v. Searles*.[34] He had sustained what at first appeared to be a minor hand injury, but which subsequently became worse. A request for a jury charge was refused which stated that defendant would not be responsible if the jury found that a reasonably prudent man would have consulted a physician under the same circumstances. The court said such a charge was inconsistent with an earlier holding[35] that a person need only proceed on his own judgment and not satisfy that of another. A mistake would not bar recovery.

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[31] Ouillette v. Sheerin, 297 Mass. 536, 9 N. E. 2d 713 (1937).

[32] *Supra,* n. 9 at 290.

[33] 40 Ala. App. 340, 113 So. 2d 523 (1959).

[34] Devou v. Searles, 12 Ohio App. 329 (1920).

[35] *Supra,* n. 3 at 384.

A new trial was ordered upon failure to charge the jury that plaintiff could not recover for aggravation of his injuries where he failed to seek medical care until several days after sustaining the injury, and evidence showed that part of the injury could have been quickly cured at small cost and without danger by proper treatment.[36]

Varicose veins developed when plaintiff failed to use his best judgment immediately in *Murphy v. Southern Pacific Co.*[37] Instead he gave the injury such medical treatment necessary at the time. The medical witnesses differed as to what caused varicosity of veins. The court commented that where expert opinion could not agree as to the origin, "it would be more than a presumption to expect a common layman to believe that from a contusion the serious consequences of which he is now suffering could follow." [38]

An award of $2,000 was considered excessive and reduced by $500 in *Carr v. Grain Dealers Mutual Ins. Co.*[39] because plaintiff failed to consult a specialist upon the attending physician's advice, although the latter felt there were no serious residual effects from the accident.

The general rule applying to refusal to submit to hazardous treatment was recognized by a Wisconsin court[40] but it rejected plaintiff's appeal for gross inadequacy of award because she did not seek treatment until three days following the accident. She had been advised to do so at once. After consulting with a doctor she did not follow his prescribed treatment nor would she be hospitalized for a thorough examination. The recommended treatment did not involve any hazards. The court further stated that not only is plaintiff "obliged to exercise reasonable care . . . This obligation included the seeking of medical care as well as the following of the advice of the physician consulted. . . ."

Delay in obtaining treatment did not preclude an injured person from recovery when she developed serious back and spine injuries from what at first appeared to be a mere wrenched leg and it did not appear that the delay aggravated the injury.[41]

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[36] Texas & Pacific Ry. Co. v. White, 101 Fed. 928 (5th Cir. 1900), 62 L. R. A. 90.

[37] 31 Nev. 120, 101 Pac. 322 (1909).

[38] *Id.* at 328.

[39] 124 So. 2d 198 (La. App. 1960).

[40] Collova v. Mutual Service Casualty Ins. Co., 8 Wis. 2d 535, 99 N. W. 2d 740, 743 (1959).

[41] Hamelin v. Foulkes, 105 Cal. App. 458, 287 Pac. 526 (1930).

Suit was brought against defendant-physician in *Dobbs v. Stellar*[42] for his negligent use of a fluoroscope when examining plaintiff's hand. Plaintiff did not undergo the recommended amputation promptly nor would he submit to an incision being made. Subsequently the amputation was performed, but there was some conflicting testimony that if the amputation had been performed when first suggested, it would have effected a speedier cure. The jury was instructed that if plaintiff exercised reasonable diligence and means to prevent its aggravation, he was not obligated to undergo surgery promptly when advised by his doctor solely to minimize the defendant's damages.

Selection of Physician

Ordinary care and reasonable judgment need only be exercised in selecting a physician or surgeon. *Loesser v. Humphrey*[43] held that it was not error to include in the jury charge that plaintiff may still recover damages if he selected a physician of good standing and reputation, although such physician may not have used the most appropriate or best remedies in caring for the injuries. The plaintiff was not bound to call upon the most eminent or distinguished physician before defendant would be held liable.

One case[44] held that it was not a defense that the surgeon was not skilled or failed to give the best or proper treatment, so long as the plaintiff followed the physician's treatment, and he had been selected with ordinary care. A similar holding was found in an Ohio case[45] where the trial court erroneously charged the jury that the complainant's increased pain might have been a result of improper treatment.

The *Boa*[46] case further held it was error to admit evidence of improper medical treatment where there is no evidence showing that plaintiff had knowledge of the physician's want of skill or that she continued his services after learning the facts.

The tort-feasor becomes liable, therefore, for all consequences naturally flowing from his wrongful conduct, and this includes those results where the physician's negligence has ag-

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[42] 77 Cal. App. 2d 411, 175 P. 2d 607 (1946).

[43] 41 Ohio St. 378 (1884).

[44] *Supra*, n. 29.

[45] Heintz v. Caldwell, 16 Ohio C. C. R. 630 (1898).

[46] *Supra*, n. 29 and 44.

gravated the original injury.[47] Proximate causation is the basis of the liability.

The courts refuse to interfere in a patient's selection of which physician's advice to follow. A Kentucky court[48] tersely commented that the patient must be accorded a certain discretion in his selection of doctors whose advice he wishes to heed. The courts will not require that a person follow one doctor's recommendation in preference to another, especially when the latter is a physician selected by the opposition. The court implied that it might make the selection if it is shown that the complainant's own choice is that of an unskilled physician or if he refused to make a choice. In the case at bar, several of the defendant's expert medical witnesses testified that the recommended surgery was not hazardous, but claimant's own physician and one of defendant's doctors did not recommend the operation. Claimant's refusal, held to be reasonable under these circumstances, was based on his physician's opinion that the surgery might bring more serious results than those suffered from the original injury.

Costs and Expenses

The medical expenses incurred in surgery necessary or recommended because of defendant's negligence would ordinarily constitute an element of damages recoverable from the tortfeasor.[49] However, the factor of expenses involved in obtaining such services has been considered in determining whether plaintiff acted in a reasonable manner. In *Ledbetter v. Hammond Milk Corp.*[50] a private physician's claim had been denied by the trial court, which said that plaintiff, an indigent Negro, could have obtained treatment at a nearby charity hospital. Reversing this decision, the appellate court commented that neither law nor equity showed reason why an individual could not incur just debts from private treatment, although he may be unemployed or impecunious. "We cannot decide where a patient should have received treatment for injuries after the treatment has been made." [51]

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[47] Seymour v. Carroll, 43 Ohio App. 60, 28 Ohio N. P. (n. s.) 491 (1932).

[48] Kentucky-Jellico Coal v. Lee, 289 Ky. 81, 158 S. W. 2d 385 (1942).

[49] 15 Am. Jur. Damages, Sec. 71.

[50] 126 So. 2d 658 (La. App. 1961).

[51] *Id.* at 663.

In *Sette v. Dakis*[52] the court disallowed plaintiff's expenditures for treatment incurred after he had been advised to undergo surgery. Had he submitted to an operation, the need for the treatment would have been obviated. The expenses of such an operation and the costs entailed for the six weeks' disability were allowed, however.

A Louisiana court[53] held that plaintiff's damages could be minimized because she refused surgery, perhaps because of lack of funds. The court noted that such surgery could have been performed at a local charity hospital without expense.

In *Carney v. Scott*[54] the plaintiff left the hospital only because he was being harassed for payment he was unable to make. A physician put a cast on his leg and assisted the plaintiff in his exit. The court held that he could not be charged with a lack of ordinary care in so doing.

The court reasoned in *Maroney v. Minneapolis and St. Louis Ry. Co.*[55] that the cost of an operation was not evidence with which to measure the plaintiff's damages. The question appeared to revolve around plaintiff's refusal to submit to major surgery, and the court felt that its cost ($200) should not be a material element in assessing damages in the amount of $1,900. The reasoning was based on the risks involved in the surgery and that plaintiff was the sole person to decide whether to submit to a hazardous operation.

The cost of simple, minor surgery was a mitigating factor where a scar could, with probable success, be reduced to a very fine linear one.[56] The court felt that a reduction of $1,000 was not unreasonable when the operation cost only $200.

Damages were denied in *Owens v. Baltimore & Ohio R. R. Co.*[57] because plaintiff, in refusing to abstain from work upon doctor's orders, aggravated his injury. The court held that ". . . he is entitled to recover to the extent of the damages without his fault, but not that portion caused by his subsequent acts."

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[52] 133 Conn. 55, 48 A. 2d 271 (1946).

[53] Donovan v. New Orleans R. & Light Co., 132 La. 239, 61 So. 216 (1930), 48 L. R. A. (n. s.) 109.

[54] 325 S. W. 2d 343 (Sup. Ct. Ky. 1959).

[55] *Supra*, n. 13 at 150.

[56] Goodwin v. Giovenelli, *supra*, n. 24 at 89.

[57] 35 Fed. 715 (Cir. Ct. S. D. Ohio 1888).

Summary

The reasonableness of the ordinarily prudent man appears to be the standard used when an injured person is confronted with the dilemma of whether to submit to surgery. He may consider the probability of success and the risks to his life, and his choice of physician need only be made using ordinary care and reasonable judgment. What is reasonable is a question of fact and depends on the particular circumstances. If medical opinion conflicts, this is a justifiable basis for refusal to have the contemplated surgery. Operations deemed to be major generally may properly be refused.

A plaintiff must not aggravate his injuries by any lack of proper care or failure to seek treatment. The courts will only award damages for those injuries which are not a result of the plaintiff's negligent conduct.

It has been questioned[58] that the exception of not having to submit to major surgery tends to abrogate the standard of reasonableness and may be too simple a solution. It is substituting a fixed, arbitrary rule in the place of one allowing flexibility when determining a man's reasonableness in a situation. Can it not be conceived that a reasonably prudent man might choose to undergo a dangerous and serious operation in some instances, especially when the prognosis is a deterioration in bodily functioning without such surgery?

The *Hays* case may offer an indication of a change in thinking. Up to that time, major surgery involving the back could be properly refused, but this Court held that a refusal was improper, due to the skill and advancement of medical science. The *Hilscher* case in Pennsylvania holds substantially the same for the use of general anesthetia. Are these "outlandish" cases and contra to the "well-established" rule of law, or is this line of reasoning providing the defendant with a new trend and tactic with which to minimize his pecuniary obligations?

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[58] Workman's Compensation—Refusal of Operation, 25 Tenn. L. Rev. 405 (1958).