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Hospital Privileges Revisited

Irwin N. Perr, M.D.*

THE EXTENT OF THE RIGHT of the physician to practice medicine in a hospital is a socially important problem which has been the subject of many legal cases. In a previous article in this review it was contended that a physician has a right to practice in any hospital of his choice, the express statement being made that present policies are detrimental to public welfare. The issue (at least in part) as then presented was this:¹

Do the hospitals exist primarily as corporations (business entities), of primary concern only as "private preserves" governed solely as their administrators wish? . . .

Put otherwise, the issue is: Do doctors exist for the convenience of hospitals, or hospitals for the convenience of doctors? Should public interests or hospital management interests come first?

The answers are obvious. The law as it is now is contrary to the public's interests.

The purpose of this discussion is to elaborate upon and, hopefully, to clarify many of the issues involved in this delicate problem. To do so, existing law will be reviewed, with special attention directed to the reasons (good or bad) for the law as it stands.

If the issues could be condensed into one statement, it might be this: Inasmuch as the primary purposes of the hospital are to treat the ill, to do research into the causes of illnesses, to develop better methods of treatment, and to train those who must administer to the sick, how can these purposes best be accomplished, so that the hospital and the doctor can do their work most efficiently in order that patient care will be maintained at the highest possible level?

This statement is somewhat long and offers little in the way of explicit legal problems, but it highlights a social problem with legal ramifications in many directions.

When one attempts to analyze a certain trend in law, one must ask several basic questions:

1—What is the present law? If there is a general uniformity of opinion, what factors have led to such agreement?

2—What are the defects of existing policy and existing law?

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¹ Mack, J., *Physician's Use of Hospital Facilities: Right or Privilege?* 8 Clev.-Mar. L. R. 437, 443 (1959).

3—If defects in the social system are present, to what degree are they present? Are the remedies to be sought through social, economic, political, or legal action? To determine this, who are the persons allegedly injured and what specific problems are involved in such cases?

4—If legal action is needed to correct any injustice, what is the legal remedy to be sought?

5—If the remedy sought is adopted, what will be the defects of the alleged remedy? Will the alleged remedy create more inequity than existed previously?

As applied to this subject, to answer these questions in detail would require a volume. Therefore, the problems will be presented merely in a brief factual manner (hopefully, but doubtfully, impartial). Some aspects will require some elaboration. The reader may ponder this presentation and then attempt to answer for himself the questions just listed.

Private and Public Hospitals

The law distinguishes between private and public hospitals, although it will be seen that there is much overlapping.

To put it simply, the private hospital generally is a private corporation with the rights and privileges allowed by law to such entities. Public corporations are instrumentalities of the state, founded and owned by it in the public interest, supported by public funds, and governed by managers deriving their authority from the state; while corporations organized under legislative permission, but supported mainly through voluntary gifts, performing duties similar to those of public corporations, and engaged in charitable work, though affected with a public interest and receiving donations from the government are "private corporations" and not "public corporations."² A hospital, although operated solely for the benefit of the public and not for profit, is nevertheless a private institution if founded and maintained by a private corporation with the authority to elect its own officers and directors.³ If the hospital be subject to public authority, state or municipal, it is more likely to be a public institution, but if the hospital be supported by patient fees or if the only public support is by contract for the care of the indigent, then it is private. In *Eaton v. Board of Managers of James Walker Memorial*

² *Hughes v. Good Samaritan Hospital*, 289 Ky. 123, 158 S. W. 2d 159 (1942). *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 671, 4 L. Ed. 629 (1819). See also *Natale v. Sisters of Mercy*, 243 Iowa 582, 52 N. W. 2d 701 (1952); *Levin v. Sinai Hospital of Baltimore City*, 186 Md. 174, 46 A. 2d 298 (1946); *Edson v. Griffin Hospital*, 21 Conn. Sup. 55, 144 A. 2d 341 (1958); *West Coast Hospital Ass'n. v. Hoare*, 64 So. 2d 293 (Fla. 1953); *Akopianz v. Board of County Com'rs*, 65 N. M. 125, 333 P. 2d 611 (1958).

³ *Washingtonian Home of Chicago v. City of Chicago*, 157 Ill. 414, 41 N. E. 893, 29 L. R. A. 798 (1895).

*Hospital*⁴ (discussed below), the hospital received public funds amounting to only 4.6% of its income, and this was on a contractual, not a contributory basis. Courts usually will not interfere with the internal management of a corporation, but will leave questions of policy and management to the honest decisions of the officers and directors, and this rule applies to private hospitals.⁵

Public Hospitals

Turning for the moment to public hospitals, there is some variance in the application of rules, due to both statutory problems and corporate stipulations. Licensing of a physician by a state gives him no absolute right to membership on the medical staff of a public hospital; the board of a public hospital has the right to oust even a licensed physician for violation of the board's rules, which however must be fair and reasonable, with notice and a hearing in accordance with due process of law. The board of a hospital may oust a licensed physician from staff membership, for example, on the ground of lack of medical skill.⁶

In the *Dayan* case, a physician was removed from the associate medical staff after fourteen years. Fourteen charges were filed against him; thirteen were upheld (nine unanimously, four by majority vote). The court said that obviously a refusal to abide by the rules and regulations of a hospital might bear no relation to the physician's professional competence, yet make him unacceptable as a staff member. While licensing by the state is a prerequisite to staff membership, it is not the only condition. The physician here was removed for lack of competence; the court rejected the physician's claim that he should be sole judge of his own competence in surgery and obstetrics as well as general practice, and stated that it is hardly surprising that the physician failed to find approval, personally or socially.

⁴ *Eaton v. Board of Managers of James Walker Memorial Hospital*, 164 F. Supp. 191 (D. C. N. C., 1958), *aff'd*. 261 F. 2d 521 (4th Cir. 1958). See text below at note 32.

⁵ *Edson v. Griffin Hospital*, *supra*, n. 2.

⁶ *Dayan v. Wood River Twp. Hospital*, 18 Ill. App. 2d 263, 152 N. E. 2d 205 (1958); see also *Green v. City of St. Petersburg*, 154 Fla. 339, 17 S. 2d 517 (1944); *Alpert v. Board of Governors of City Hospital*, 286 App. Div. 542, 145 N. Y. S. 2d 534 (1955); *Jacobs v. Martin*, 20 N. J. 531, 90 A. 2d 151 (1952); *Bryant v. City of Lakeland*, 158 Fla. 151, 28 S. 2d 106 (1946); *Johnson v. Ripon*, 259 Wis. 84, 47 N. W. 328; *Dade County v. Trombly*, 102 S. 2d 394 (Fla. 1958); *Group Health Cooperative v. King Co. Medical Society*, 39 Wash. 2d 586; 237 P. 2d 737 (1951); also 280 S. W. 2d 236 (Ark. 1955); and see 41 C. J. S. 336, 24 A. L. R. 2d 850, 26 Am. Jur. 592.

In *Alpert v. Board of Governors of City Hospital* (*supra*), the court stated that there is no constitutional right to practice medicine in a public hospital but that valuable privileges are also entitled to protection of law, and a qualified physician, admitted to practice in a public hospital, acquires a species of tenure and cannot be capriciously excluded and thereby injured financially and professionally, without notice and an opportunity to be heard.

Many cases have dealt, both in private and in public hospitals, with the competence of the individual to practice medicine or a specific branch of medicine. While some variations will be presented below, a clear and beautifully written opinion is that of Justice Terrell in *Green v. City of St. Petersburg*⁷ as follows:

To contend that being a resident tax payer and practicing physician of the city gives him a constitutional right to the unrestricted use of the facilities of a hospital provided by the city presents a test of our constitutional theory that we have not heretofore been confronted with. It is a test that takes more for a solvent than mere dogma, or a pair of scissors, a pot of paste and an ipsi dixit. The practice of major surgery is a highly specialized field and is recognized as a delicate art. The majority of physicians admit that it requires special skill and training and do not (pretend to) enter that field. It is an art that cannot be acquired by technical training alone, but must come through actual practice and experience. Skill in materia medica in no sense connotes skill in major surgery. It is utterly futile to contend in our day that one be permitted to take a scalpel in hand and explore the cranium, the thorax, or the abdomen and patch the viscera, remove a tumor or amputate a limb before he demonstrates his qualification to do so. Most assuredly when a municipality furnishes a hospital, operating room, and the other facilities for doing this and is responsible to patients for the negligent use of these facilities, it has a right to know that they are placed in the hands of an expert. If this is not true, the city and the tax payer have no protection whatever.

It would project the doctrine of freedom and equality into unwarranted areas to hold that one could practice major surgery with facilities furnished by the city when he has nothing more than a diploma from a medical school and a certificate from the State Board of Medical Examiners to warrant his skill in that field. . .

Constitutional guarantees were not designed to intercept or stalemate progress in these factors; neither were they intended to hamper a community in raising the standard of its schools, hospitals, and other institutions, as high as reason and circumstances dictate. In this case, the people of St. Petersburg have elected to own and support a hospital of

⁷ *Green v. City of St. Petersburg, Fla.* supra, n. 6. In a concurring opinion, Justice Chapman said: "The challenged rules, obviously, were promulgated in behalf of the hospital and for the protection of patients undergoing major operations against possible unethical and unskilled licensed practitioners. It seems to me that such reasonable rules promote the interest of the public and general welfare and likewise encourage a high professional standard of requirements for major surgery. It is clear that these rules close the door against possible dope fiends, liquor heads, and practitioners not qualified to perform major surgical operations. The general interest of such patients must be protected simultaneously with advancement in the practice of surgery."

approved high standards and none of them are complaining. Appellant says that he should not be required to bring himself en rapport with the standards imposed by the community in which he proposes to practice. He does not intimate that the standards imposed are too high or out of line with those generally approved for the conduct of a first class hospital. If this thesis be sound, then there is no standard of excellence that the City can impose to protect itself against the assault made. . .

He is well within his right to seek relief against unreasonable application of a rule but not against one that requires the same standard of excellence from (him) that it requires of all in his class.

*Bryant v. City of Lakeland*⁸ illustrates the nature of the rules found in most hospitals. The regulations of hospitals standardize care, keeping it at a high ethical and professional level. Here the rules provided that (1) physicians attend 75% of the meetings of the Staff, keep accurate records, and complete records within seventy-two hours after discharge, and (2) no patient may be taken to surgery unless the following are on the patient's chart: complete physical examination, pre-operative diagnosis, and laboratory report. They also required, in all cases of therapeutic abortion, that there be two consultations with other physicians, one of whom must be an obstetrician. A doctor was charged with non-compliance with the regulations and unprofessional conduct. The hospital board held meetings on January 16, 1946, which the doctor attended, on February 12, and March 8, which he did not, on March 12, when formal charges were made to him, on March 15, when he did not appear, finally resulting in the recommendation of suspension on March 21. On April 4, the City Commissioners met and suspended him; he did not appear, but later filed suit for malicious conspiracy. The court said that it is not incumbent upon the city to maintain a hospital for the private practice of medicine, nor does a physician have a constitutional or statutory right to practice his profession in the city's hospital. Reasonable rules and regulations may be prescribed as to qualifications to practice in public hospitals as well as to the procedures of the practice. It is obvious that this type of restriction is inherently beneficial, if applied reasonably, without discrimination or prejudice.

This case illustrates the protection given to the physician by

⁸ *Bryant v. City of Lakeland*, supra, n. 6. In *Dade County v. Trombly*, supra, n. 6, the hospital required that physicians be graduates of approved medical schools, have approved internships, and be competent in the line of work or type of medicine practiced. Here the doctor had not been graduated from an approved medical school, did not serve in an approved residency, and to aggravate matters, two of his references stated that he was not qualified to do major surgery which he wished to do and the third reference said that he was qualified only for certain procedures. The court, of course, said that the right to practice was a privilege, not a right.

the right to present his case. In another public hospital case,⁹ a suspension was declared void because the doctor had had no hearing. That the doctor has some protection against the whims of a city administration was seen in the *Jacobs v. Martin* case¹⁰ where the city and its directors had failed to adopt rules and regulations governing qualifications to do major surgery. The director of the hospital, a member of the city government, claimed that he could act "at his pleasure." The court ruled that this was arbitrary and contrary to public policy and good administration.

In *Henderson v. City of Knoxville*¹¹ a physician was accused by the staff of splitting fees, which in Tennessee was under statutory prohibition. He was reinstated because of insufficient evidence that he had solicited patients directly. In a Wyoming case¹² the hospital trustees sought a declaratory judgment from the court that they could suspend a physician if he failed to comply with the rules.

A very important case where the courts intervened to prevent the exclusion from public hospitals of physicians who were employed by a group health cooperative was *Group Health Cooperative v. King County Medical Society*.¹³ This case will undoubtedly be the reference point for many subsequent decisions.

The situation in each state must be evaluated in the light of its own statutes, some examples of which are presented below.

⁹ *Johnson v. Ripon*, supra, n. 6. A regulation for the suspension of a right of a duly licensed physician residing in a municipality owning and operating a public hospital is not reasonable unless provision is made for notice and hearing.

¹⁰ *Jacobs v. Martin*, supra, n. 6.

¹¹ *Henderson v. City of Knoxville*, 157 Tenn. 477, 9 S. W. 2d 697, 60 A. L. R. 652 (1928). The governing body of a hospital may properly permit all licensed physicians to practice therein, and it has been held that any licensed physician, as long as he stays within the law, has the right to practice in the public hospitals of the state.

¹² *Board of Trustees of Memorial Hospital of Sheridan County v. Platt*, 72 Wyo. 120, 262 P. 2d 682 (1953).

¹³ *Group Health Cooperative v. King County Medical Society*, supra, n. 6; see also 280 S. W. 2d 236 (Ark. 1955) for certain aspects of this case based on requirements of membership in a county medical society. Where exclusion of group health cooperative's physician from public hospital on sole ground that physicians were practicing group medicine was unreasonable, arbitrary, capricious, and discriminatory, the public hospital and its officers and agents and commissioners and physicians attached to its medical staff would be enjoined from following any course of conduct having for its purpose such exclusion of cooperative's physician from the medical staff of the public hospital. Persons acting for municipal hospital in selection of medical staff members may not do so in an unreasonable, arbitrary, capricious or discriminatory manner, whether such persons are the elected commissioners or members of the medical staff and whether the hospital is being operated in a governmental or proprietary capacity. Private hospitals have the right to exclude licensed physicians from the use of their facilities, such exclusion resting within the discretion of the managing authorities. Where the acts of public officers are arbitrary, tyrannical, or predicated upon a fundamentally wrong basis, the courts may interfere to protect the rights of the individuals.

In *Selden v. City of Sterling*¹⁴ it was stated that the object of a statute, giving all physicians equal privileges in treating patients in public hospitals, is the prevention of discrimination, and the statute does not prevent directors of public hospitals from adopting rules to maintain a standard of proficiency for the public safety and welfare.

Private Hospitals

The basic law as applied to private hospitals has been well stated in *Van Campen v. Olean General Hospital*.¹⁵

The selection and retention of physicians to treat patients admitted to the hospital are matters of judgment and discipline. The power to appoint usually implies the power to remove. In common experience, instances are not unusual where some physicians disagree with hospital management. When such disagreement becomes so pronounced as to interfere with orderly management and discipline, and when there is persistent violation and disobedience of necessary rules and regulations, we think the directors may bring the inharmonious conditions to an end by summary action. They are not required, in our judgment, to give notice and conduct a trial in every such case. . .

The law does not require a corporation like defendant to furnish its services and accommodations to everyone who applies, whether patient or physician. There can be no absolute right in individuals to claim the benefits of its privileges. Such a thing would be impossible. There must be discretion vested in the management to make selection for applicants with regard to accommodations available. . . Nor do we deem it such discrimination, if from a large number of physicians it selects members of its visiting staff with regard, not only to their medical skill, but to their adaptability to the rules and discipline of the institution. Even in public hospitals, the same rule in the selection of . . . physicians must apply.

The principles as stated are well established.¹⁶

¹⁴ *Selden v. City of Sterling*, 316 Ill. App. 455, 45 N. E. 2d 329 (1942).

¹⁵ *Van Campen v. Olean General Hospital*, 210 App. Div. 204, 205 N. Y. S. 554 (1924), *aff'd*, 239 N. Y. 615, 147 N. E. 219 (1925).

¹⁶ *Strauss v. Marlboro County General Hospital*, 185 So. Car. 425, 194 S. E. 65 (1937); *Levin v. Sinai Hospital of Baltimore City*, *supra*, n. 2; *Hughes v. Good Samaritan Hospital*, *supra*, n. 2; *People ex rel. P. S. Replogle v. The Julia F. Burnham Hospital*, 71 Ill. App. 246 (1896); *State ex rel. Wolf v. LaCrosse Lutheran Hospital Ass'n.*, 181 Wis. 33, 193 N. W. 994 (1923); *West Coast Hospital Ass'n. v. Hoare*, *supra*, n. 2; *Harris v. Thomas*, 217 S. W. 1068 (Tex. 1920); *Loewinthan v. Beth David Hospital*, 9 N. Y. S. 2d 367 (1938); *Joseph v. Passaic Hospital Ass'n.*, 26 N. J. 557, 141 A. 2d 18 (1958); *Glass v. Doctor's Hospital*, 213 Md. 44, 131 A. 2d 254 (1957); *Akopianz v. Board of County Com'rs.*, *supra*, n. 2; *Edson v. Griffin Hospital*, *supra*, n. 2; *Natale v. Sisters of Mercy*, *supra*, n. 2; *Eaton v. Board of Managers of James Walker Memorial Hospital*, *supra*, n. 4.

Based on the corporate status of hospitals, the board of directors must function within the stipulations of the corporate constitution. Thus, in one case, a physician was removed from the staff of a hospital in accordance with an amendment adopted contrary to the rules of the constitution. A court of equity granted relief by enjoining his removal from the staff.¹⁷

The governing body of a hospital may make reasonable rules and regulations concerning qualifications of physicians allowed in the hospital. Thus, in one very interesting case¹⁸ a physician was removed from the staff after the board of directors adopted a by-law involving medical ethics. Included in this code, taken from the standards of the American Medical Association, was the prohibition against public advertisements, promises of radical cures, public hand bills, and the keeping secret of the contents of medicines. The plaintiff, "in order to obtain patronage, resorted to public advertising, and printed handbills or circulars wherein he promised radical and wonderful cures, and boasted of his superior medical knowledge, skill and success; invited persons affected with diseases to employ him; set forth certificates showing that extraordinary successes attended his treatment in many different cases, and proffered to examine patients and give medical advice without charge." He also, prior to service, had patients sign over their wages. "It appeared also, the appellant, in the newspapers and by way of circulars, advertised as an incorporated 'Medical and Surgical Institute and Sanitarium,' having a president and secretary, when in fact there was no such corporate company" (this being a violation of the criminal statutes of the state). Turning down his plea, the court said: Under the by-law, he had but to abandon practices which the common judgment of his professional brethren branded as discreditable and which are so commonly resorted to by quacks and charlatans.

In a case which illustrates another reason for removal, based on incompatibility,¹⁹ a physician was removed from the staff of a hospital which he had originally founded as a proprietary hospital, and which he later turned over to a non-profit corporation and a board of trustees who were prominent men in the community. He refused to accept the authority of the board, but attempted to run the hospital as he had in the days when he and his family owned the hospital. The court commented that it was regrettable that the appellant could no longer participate in the activities of the institution that he had founded, but that "he himself is responsible for the fact that he has no redress. . . . The record is replete with evidence that Dr. Glass was an obstacle in

¹⁷ *James A. Stevens v. The Emergency Hospital of Easton*, 142 Md. 526 (1923).

¹⁸ *People ex rel. P. S. Replogle v. The Julia F. Burnham Hospital*, *supra*, n. 16.

¹⁹ *Glass v. Doctors' Hospital*, *supra*, n. 16.

the control of the hospital by the board, that he was not amenable to discipline, which he often required, and that his presence led to an inharmonious working of the hospital. It is clear that he was either unable, or refused, to comport himself effectively and agreeably within the framework of the charitable hospital conducted on a high plane by a public spirited and sincere board of trustees, as such hospitals generally are conducted, and that this attitude created the situation which justified the exercise of an honest discretion by the board leading to his elimination from the scene."

Another case of refusal to reappoint to medical staff for failure to comply with hospital rules was *Joseph v. Passaic Hospital Assn.*²⁰ where a physician was removed after many years on the staff of the hospital.

Thus, the basic law concerning private hospitals is that based on the powers vested in a private corporation. Those who would attack this system must consider the following questions: (1)—Who is to maintain control and authority?, and (2)—if private corporations such as hospitals lose the power to control their own affairs, where shall such a deviation from present public policy stop? Would this extend to all charitable and benevolent organizations or even further? What would be the effect on all corporate law?

To summarize this aspect, the comment of the court in *West Coast Hospital v. Hoare*²¹ is worthy of study.

Private hospitals had been in existence for a long period of time. They were organized by people with social conscience and who desired to utilize their means and talents for research and for the relief of suffering humanity. The ownership, control, and management of such hospitals were left with those who conceived and organized them or with the managing authorities provided for in the plan of organization and management. Such managing authorities had the power and the authority to enlarge and expand such institutions, to carry on research and determine what persons should be granted the privilege of practicing the healing arts in such institutions. It is doubtful if many of the great private hospitals of this country would have been established and would have rendered the service which has been rendered if the managing authorities had been subject to the control of regulation of the government or public officials as to what persons should be granted the privilege of practicing in such institutions.

²⁰ *Joseph v. Passaic Hospital Ass'n.*, supra, n. 16.

²¹ *West Coast Hospital Ass'n. v. Hoare*, supra, n. 2. Here the hospital was deemed a private corporation as the annual contribution from the city amounted to only one percent of the total annual revenue.

Surgery, Medical Specialization and Hospital Privileges

Let us now turn to discussion of some of the groups allegedly injured by present law. A large number of cases dealing with hospital privileges concern restrictions on the right to practice surgery.²²

Typical cases are those of *Hughes v. Good Samaritan Hospital*²³ and *Edson v. Griffin Hospital*.²⁴ In the former case a general practitioner was barred from performing surgical operations in the defendant hospital. The hospital, to remain accredited, required that surgeons be endorsed by the American College of Surgeons.

In the latter case, a physician, who had been on the staff of a hospital for eleven years, was denied the right to use the facilities of the hospital in performing certain major surgical procedures. He called the rules arbitrary and unreasonable; but the court pointed out that the rules were similar to those of standard hospitals. Testimony from nationally recognized authorities classed them as reasonable and in accord with modern hospital practice. The hospital board refused to make an exception in his case, because he lacked sufficient training.

Other cases are repetitious. The main points are these: In the first decade in the twentieth century, American medicine, hospitals and medical education all functioned at a primitive, poorly organized level. Thanks to the work of Abraham Flexner, American medical education was revolutionized. In a massive step, one-half of the medical schools were closed. Many were diploma mills, selling certificates after, in some cases, only a few weeks of instruction or even none at all. In the last fifty years, tremendous advances in knowledge and specialization took place. The American Medical Association and the various hospital associations made their most notable contributions to our society in this sphere. Slowly and inevitably, in all aspects of medicine, the specialist took over specialized care; and as he did so, self-proclaimed experts were gradually eliminated from the scene. Today, in the large city hospitals, to become a member of a specialized department of medicine requires specialized training in that field. The general practitioner was slowly eliminated from performing those procedures in which he had not been trained. Many of the legal cases, thus, have been brought by those fighting the increasing number of restrictions. There can be no doubt

²² *Jacobs v. Martin*, supra, n. 6; *Dade County v. Trombly*, supra, n. 6; *Green v. City of St. Petersburg*, supra, n. 6; *Dayan v. Wood River Twp. Hospital*, supra, n. 6; *Strauss v. Marlboro County General Hospital*, supra, n. 16; *State ex rel. Wolf v. LaCrosse Lutheran Hospital Assn.*, supra, n. 16; *Akopianz v. Board of County Com'rs*, supra, n. 2—(a hospital built by a county and leased to an association is a private hospital. The decision denying medical and surgical privileges is not subject to judicial review). Also *Hughes v. Good Samaritan Hospital*, supra, n. 2; *Edson v. Griffin Hospital*, supra, n. 2.

²³ *Hughes v. Good Samaritan Hospital*, supra, n. 2.

²⁴ *Edson v. Griffin Hospital*, supra, n. 2.

that restrictions in this sphere have been beneficial to the community at large, as well as in raising the level of professional practice, both individually and in the hospital. Justice Terrell's words in this regard, may well be remembered.²⁵

Today, American medicine is the most specialized in the world; it is also in the forefront of world medicine. The age of specialization, despite those who lament the "good old days," is only beginning. Nothing must be allowed to interfere with the standardization of medical care at ever higher levels.

Quacks, Faddists, and Other Practitioners of the Healing Arts

The laws of the various states regarding the practice of medicine are riddled with the customs of antiquity. In many states the public has very little protection against all forms of nonsense performed in the name of medicine. In some states, especially in the West and Southwest, so-called "hospitals" advertise cancer cures based on secret chemical treatments. While some actions to control this "medicine" are taken under Federal law, these states have inadequate statutory safeguards.

Other so-called "schools of medicine" have various degrees of legislative acceptance. Osteopathy is the school outside of orthodox medical channels with the highest standards; yet osteopathy is poorly set up at this point for the specialized practice of medicine, except in certain isolated areas. Various laws give privileges to chiropractors, naturopaths, mechanotherapists, Christian Scientists, practitioners of naprapathy and a whole host of other "healers." These are denied privileges in hospitals associated with the American Hospital Association and American Medical Association.

Generally, rules and regulations which operate to exclude practitioners of various particular schools or systems of medicine or treatment, such as osteopathy or chiropractic, have been upheld as against various objections in the case of both public and private institutions.²⁶

In the *Hayman* case²⁷ the Supreme Court ruled that the exclusion of osteopaths from a city hospital did not violate a Texas law that no preference shall be given by law to any schools of medicine.

*Harris v. Thomas*²⁸ was a prominent case in this regard. The plaintiff was restricted in his use of facilities at a Catholic insti-

²⁵ *Supra*, n. 7.

²⁶ *Hayman v. Galveston*, 273 U. S. 414, 47 S. Ct. 363, 71 L. Ed. 714 (1927); *Newton v. Board of Com'rs*, 86 Colo. 446, 282 P. 1068 (1929); *Richardson v. Miami*, 144 Fla. 294, 198 S. 51 (1940); *Lambing v. Board of Commissioners*, 45 Idaho 468, 263 P. 992 (1928); *Re Osteopathy in Hospitals*, 8 Pa. D & C 273 (Pa., 1926), *Harris v. Thomas*, 217 S. W. 1068 (Tex. 1920); *Duson v. Poage*, 318 S. W. 2d 89 (Tex. 1958); *contra: Stribling v. Jolley*, 241 Mo. App. 1123, 253 S. W. 2d 519 (1952).

²⁷ *Hayman v. Galveston*, *supra*, n. 26.

²⁸ *Harris v. Thomas*, *supra*, n. 26.

tution. He stated that he was licensed to practice medicine, osteopathy, and surgery, that he had been graduated from the School of Osteopathy in Kirksville, Missouri, in 1898, and that he had received a medical degree from the Pacific Medical College in Los Angeles in 1915. The rest of the staff, all M. D.'s, threatened to resign from the staff; the nurses refused to care for his patients. He also claimed that a rule requiring the presence of three doctors at surgery was designed to hamper him. At this time, Catholic hospitals were being standardized on a national basis; he claimed that this was an attempt to create a monopoly. The Sisters in charge of the hospital did not take an active role in the case, expressing a willingness to abide by the court's ruling. He claimed that he had been slandered and was being damaged at the rate of \$5,000 per year. The defendant doctors alleged that he was licensed as an osteopath, not as a physician or surgeon, that he had obtained his D. O. degree after a one-year course, that the Pacific Medical College was not a recognized school, that he attended this school for six weeks as a subterfuge so that he could advertise himself as an M. D. They also pointed out that in 1907, the Medical Board of Texas had established that osteopathy at that time did not teach therapeutics, drugs, and other subjects taught in medical schools. He lost.

In *Duson v. Poage*²⁹ an osteopath was excluded from a county hospital after the M. D.'s and R. N.'s resigned and the vocational nurses threatened to resign. They claimed that the hospital could not receive accreditation, that the nurses and interns training could not be approved, and that insurance collections were hampered as long as an osteopath remained on the staff. The court held that osteopaths may be excluded from the hospital staff, saying that: "If in a given community, the hospital can best be operated by the exclusion of osteopaths, we find no inhibition in law to such exclusion."

A striking contradiction to the above case occurred in Missouri,³⁰ where an osteopath was allowed staff privileges, in compliance with the wording of a Missouri statute preventing discrimination against any school of medicine. The presence in Missouri of a large osteopathic school also may have been a factor.

To be fair to osteopaths, the standards of osteopathic schools have risen in recent years, and in the past few years, there have been periodic negotiations between the American Medical Association and the American Osteopathic Association for greater collaboration. Thus, in the near future, changes in the *modus vivendi* may occur. At this time the biggest handicap that osteopaths face is limited opportunities in their own hospital network for adequate specialty training. In any event, the lawyer should

²⁹ *Duson v. Poage*, *supra*, n. 26.

³⁰ *Stribling v. Jolley*, *supra*, n. 26.

be aware that at present, medicine and osteopathy are, in general, mutually exclusive schools of medical practice, and that presently many states limit by statute the type of practice allowed to osteopaths.

As to other schools of medicine, there is little that can be said as to any justification for their existence.

Religious Factors

Information as to the exclusion of physicians based on religious factors from hospital practices is sparse. No case on point was encountered. I have heard of complaints based on the dictation of medical policies in hospitals run by religious groups counter to the beliefs of individual doctors or medical practices in general. Those who are critical state that in some communities the only hospital is run by a specific religious group (with public contributions for hospital support) and that the hospital itself dictates some medical policy. This is obviously an uncommon situation, especially in cities where the number of hospitals allows alternatives. Those who would justify such a practice can point simply to the fact that those organizing and supporting a hospital would do so in accordance with their religious beliefs.

One interesting case was *Natale v. Sisters of Mercy*.³¹ A physician was removed from the medical staff of a Catholic hospital because he had not complied with the hospital rules in becoming a member of the county medical society, or with the requirement of good character and conduct in accord with generally accepted moral standards; also on the ground that the hospital was a private corporation. Actually, the basic factor in the case was the notoriety of the divorce case of the physician. The couple had been married by a Justice of the Peace with the idea that if the marriage were successful, there would be a church marriage. The wife was a suspicious person, who perpetually accused the husband of infidelity, and at the divorce proceedings there were mutual airings of extramarital affairs. The court said: "It is our conclusion, and it is virtually conceded by defendants, that the impelling reason for the action which they took against the plaintiff was the unfavorable newspaper and radio notoriety connected with the divorce proceedings." Thus, in this case, the doctor was excluded because of the notoriety of his amorous affairs. Therefore, a church-run hospital has the authority to set the standards for the moral behavior of its physicians.

Racial Factors

That there is discrimination against certain racial groups—primarily Negroes—in the use of hospital facilities, cannot be denied. This practice varies considerably in accordance with general area and within each area. Obviously the most stringent

³¹ *Natale v. Sisters of Mercy*, supra, n. 2.

restrictions occur in the Southland, in accordance with the peculiarities of the customs of the people of that area. Discrimination here is almost total, with Negro physicians being denied membership in state medical societies, and almost all rights in hospitals, even to the extent in some places of denial of the right to treat Negro patients. In the North, practices vary considerably, and I do not have sufficient information concerning this topic.

A pertinent case is that of *Eaton v. Board of Managers of James Walker Memorial Hospital*.³² In this case, three Negro physicians sought a declaratory judgment as to their right to practice in a North Carolina hospital. They based their claim on the fact that the hospital was a public hospital; but they were denied because of the ruling that the hospital was a private corporation receiving public support by contract and that only to the extent of 4.6% of the hospital's income. The court said:

The plaintiffs rightfully confine their effort on this appeal to showing that the hospital is an instrumentality of the State. They do not argue that the exclusion of qualified physicians solely because of their race from an institution devoted to the care of the sick is indefensible, as they might well do if this Court was the proper forum to determine the ethical quality of the action. As a Federal Court, we are powerless to take into account this aspect of the case. We may not interfere unless there is State Action which offends the Federal Constitution.

The court gave as an example of the latter the case of *Kerr v. Enoch Pratt Free Library of Baltimore City*.³³ There the court struck down the exclusion of Negroes from a library training course conducted by an instrumentality of the state.

The extent of the problems facing Negro physicians is described in the Proceedings of the Imhotep National Conference on Hospital Integration.³⁴ Obviously, discrimination facing physicians does not differ greatly from that facing Negroes in other facets of our society. It might even be said that in some regards, progress in medicine is in advance of other concurrent social problems. One handicap facing Negro physicians is that a relatively small number of Negro physicians are certified in medical specialties. For instance, in 1956, of 60,644 certified medical specialists in the United States, only 283 were Negroes. Whether this is due to economic factors which force Negro physicians into practice earlier than other doctors, or whether it reflects discrimination in obtaining advanced medical education, or

³² *Eaton v. Board of Managers of James Walker Memorial Hospital*, supra, n. 4.

³³ *Kerr v. Enoch Pratt Free Library of Baltimore City*, 149 F. 2d 212 (4th Cir. 1945).

³⁴ Proceedings, Imhotep National Conference on Hospital Integration, Washington, D. C., March 8-9, 1957.

whether it is due to other factors, I do not know. On the other hand, in Chicago, where 68 of 236 Negro physicians were certified specialists (in 1956), only fifteen physicians had hospital appointments and these in seven of the approximately seventy hospitals in Chicago.³⁵

That a problem exists is undeniable. The extent of the problem, the means of improving the situation and the role of the law in this social problem are subjects worthy of special consideration. As with many other aspects of the prejudices that plague the American scene, the exact means of handling these problems are not easily discerned. But inevitably, one way or another, society will demand that the grosser abuses be eliminated. On the positive side of our sociological ledger, there have been many advances in this particular field in the last ten years, primarily in the North and West.

Some Comments on Hospital Functioning

The basic law on the subject of hospital privileges has been covered. For one to have some understanding of the law in a certain field, it is necessary to have an idea of that *field* as well as of the applicable law. The nature of hospital functioning as it exists necessitates certain policies. If one is to change these policies, one must keep in mind the accompanying effect on current hospital practices. The absolute impracticality of certain suggestions will then become clear.

For instance, the suggestion that hospitals should have totally open hospital staffs has been made. It has been shown that restrictions have been placed in order to keep out the poorly trained, the quacks, and the unethical. State laws in general are archaic, inadequate and practically useless for the raising of standards. The present medical system has raised the standards despite existing statutory law. The legal system does not lend itself to this problem, as standards must vary from one hospital to another, based on location, resources, etc. The standard at a university hospital cannot be maintained in a poor rural area (or even a rich rural area). The best tool that society has for maintenance of high standards is local authority, reasonably applied. It is not necessary to reiterate, at this point, the various controls in hospitals.

A second point concerns the nature of hospitals. Some hospitals deal with general medicine, others deal in ultra-specialized techniques. Some hospitals have a prime interest in medical education, and it is this aspect that is an overriding factor in staff appointments. It must be remembered that, in general, it is often the hospital with the most restrictions that is the best hospital because it has the most rigid standards. A university hospital often has a tremendous staff of ultra-specialists. The general practitioner may be almost totally excluded, because

³⁵ Ibid.

he does not have the specialized background for specialized teaching or research. Not only that, but the usual university hospital, with its accent on teaching, turns out great numbers of specialists who cannot possibly be absorbed by the hospital staff. There is a useful social factor in this in that the specialists then trickle out to the community in general.

Each hospital represents a different and unique situation. One large hospital in Cleveland, with high standards for hospital appointment, has a staff of one hundred and sixty-eight doctors who treat patients in medical-surgical facilities totaling two hundred and seventy-five beds. This large training hospital had a 1958 occupancy rate in the medical-surgical wards of 96.8%, which is a fantastic percentage. Therefore, one cannot argue that beds are sitting empty, depriving patients and doctors of their use. This hospital has eighteen interns and forty-eight residents. About twenty to thirty doctors finish training each year. Obviously it is impossible for this hospital to absorb all of its own trainees, much less doctors from elsewhere.

Another Cleveland hospital of three hundred and twenty-five beds (all types) has an attending staff of seventy to seventy-five doctors, eight interns, and twenty residents. This hospital can absorb its own trainees. It has a training program in surgery; but it has no training program in pediatrics. Therefore, its pediatricians must come from outside the institution. This hospital has an occupancy rate of 95%, which is extremely high when one takes into account the need to hold some emergency beds, the fluctuations in obstetrics and pediatrics, and the influence of holidays.

There are other factors to consider. As a concomitant of staff appointment, doctors are required to spend a certain amount of time in free clinic work and in teaching interns and residents. The hospital administration, as represented by its medical board, must maintain control over who is to do these activities.

Other hospitals assume certain identities based on religious factors and association with specific nationality groups.

The organizations of hospitals differ. In some the doctor has primarily the duty of caring for his patients. In others he must comply with a large teaching or charity or research program.

It is also important to keep in mind that relatively few hospitals are public corporations. Many are associated with religious groups, universities, or other charitable organizations. In order to be successful in the solicitation of funds, especially in the large cities, identification with the group that supports the hospital is fostered. Is this to be denied? If Al Capp wishes to interest his friends in establishing a hospital for the care of Lower Slobbovians, to be staffed by Lower Slobbovian doctors, is this to be denied?

There are many other factors to be considered but this brief sketch will give some ideas of the problems involved.

Conclusion

It is the opinion of this writer that the laws relating to hospital privileges basically are sound and in the public interest. There is no clear reason to overthrow the accumulated wisdom of the last hundred years. American hospitals have become the best in the world because of the freedom with which they have been allowed to function. This does not militate against the constant march for improvement. As can be seen, there are cases where individuals are handicapped in their use of hospitals. These situations reflect social problems, not defects in existing laws which, like our Constitutional rights, sometimes are somewhat unsatisfactory in their application.

Basically then, no physician has an absolute right to practice in a hospital. It would be a sad day if such a right were ever to exist. For it is the qualifications and restrictions on the privilege to practice in a hospital that have helped to eliminate the quack, the poorly trained, the maladjusted, and the numerous others who have plagued the American medical profession and the public.

The policies of law as to hospitals have vastly benefited our society. Those who claim that they are contrary to public policy have a great burden of proof. Those who would listen to the harbingers of change have a greater one.