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LAW IMPLIES FROM THE EMPLOYMENT of a doctor a contract that the doctor will diagnose and treat his patient with that degree of skill and learning which is possessed by the average member of his profession in the community in which he practices. A doctor licensed to practice is presumed to possess such skill and learning. He does not incur liability for his mistakes if he has used methods, in his diagnosis and treatment, recognized and approved by the average member of the medical profession practicing in his community. A doctor's negligence in departing from the standard of practice in his community must be established by medical testimony, except in those cases where the negligence is so grossly apparent that a layman would have no difficulty in recognizing it.[1]

A bad medical result in and of itself is not, *in the usual case*, evidence of negligence.[2] A bad result in connection with other facts may, however, be considered by the jury, under proper instructions, in arriving at the ultimate fact of negligence.[3] And, in some cases where it is apparent to the ordinary layman that the result could not have occurred but for negligence, the doctrine of *res ipsa loquitur*, or its equivalent by whatever name it may be called, applies.[4]

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[*Editor's Note:* This article is the substance of a lecture delivered recently before a national audience of attorneys.]

1 Sawdey v. Spokane Falls, 30 Wash. 349, 70 P. 972 (1902); Williams v. Wurdemann, 71 Wash. 300, 128 P. 639 (1912); Peterson v. Hunt, 197 Wash. 255, 84 P. 2d 999 (1938); Crouch v. Wychoff, 6 Wash. 2d 273, 107 P. 2d 339 (1940); Helland v. Bridenstine, 55 Wash. 470, 104 P. 626 (1909); Swanson v. Hood, 99 Wash. 506, 170 P. 135 (1918); Fritz v. Horsfall, 24 Wash. 2d 14, 163 P. 2d 148 (1946).

2 Gruginski v. Lane, 177 Wash. 121, 30 P. 2d 970 (1934); Howatt v. Cartwright, 128 Wash. 343, 222 P. 496 (1924).

3 Prather v. Downs, 164 Wash. 427, 2 P. 2d 709 (1931).

4 Helland v. Bridenstine, 55 Wash. 470, 104 P. 626 (1909) (a case involving a gonorrheal infection following the use of an unsterilized speculum); Wharton v. Warner, 74 Wash. 470, 135 P. 235 (1913) (a part of an instrument became detached and was left in the body of the patient); Wynne v. Harvey, 96 Wash. 379, 165 P. 67 (1917) (a silk thread of too large a size

A specialist is held to a higher degree of care than a general practitioner. The law requires that he use in diagnosis and treatment that degree of professional skill usually possessed and used by specialists engaged in like practice in the same or similar communities.[5]

If the doctor was negligent in assembling data necessary and essential for a diagnosis, and if he failed to make use of available diagnostic aids, and such failure on his part proximately caused the result complained of, this spells out an actionable malpractice case.[6]

Some other acts of negligence are sometimes overlooked: The doctor may have violated some health regulation or statute.[7] A surgeon operating with the consent of his patient is privileged only to perform the particular operation for which the consent has been given. If he performs surgery in addition to that to which the patient has given his consent or for which he obtains a consent from the patient's spouse, parent, or other closely related individual, the surgeon is liable for damages.[8] It is only in those cases where the patient's life is in danger that the surgeon can escape liability for surgery that goes beyond that for which consent was given.[9]

Sometimes the explanation for an unexpected result is that the doctor mistook one patient for another. In such cases the element of the patient's consent is, of course, lacking and the doctor is liable for damages thus caused.[10]

If the patient is not warned of possible danger of any intended treatment and given the opportunity of refusing it, and

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was used by the operating surgeon and it, together with a sponge, was left in the body); Alonzo v. Rogers, 155 Wash. 206, 283 P. 709 (1930) (a piece of hypodermic needle was found in the gum after an attempted tooth extraction); Tennant v. Barton, 164 Wash. 279, 2 P. 2d 735 (1931) (after a tonsil operation, followed with bad results, a piece of hypodermic needle was found imbedded in the throat).

[5] Atkins v. Clein, 3 Wash. 2d 168, 100 P. 2d 1 (1940).

[6] Peterson v. Hunt, 197 Wash. 255, 84 P. 2d 999 (1938); Just v. Littlefield, 87 Wash. 299, 151 P. 780 (1915); Hoover v. McCormick, 247 S. W. 718 (Ky., 1923); James v. Grigsby, 220 P. 267 (Kans., 1923); Whitson v. Hillis, 215 N. W. 480 (Md., 1927); McBride v. Saylin, 56 P. 2d 941 (Calif., 1936).

[7] Atkins v. Clein, n. 5, above.

[8] Physician's and Dentist's Business Bureau v. Dray, 8 Wash. 2d 38, 111 P. 2d 568 (1941).

[9] Wells v. Van Nort, 125 N. E. 910 (Ohio, 1919); 34 Am. Jur. 85; 21 R. C. L. 392; 26 A. L. R. 1036.

[10] Samuelson v. Taylor, 160 Wash. 369, 295 P. 113 (1931); Gill v. Selling, 267 P. 812 (Ore., 1928); 76 A. L. R. 563; 13 A. L. R. 2d 151.

as a result thereof is injured through the treatment, the doctor is liable in damages.[11]

Another ground of liability is discontinuance of treatment before the patient is cured. Implicit in this is also the rule that a doctor is liable if he fails to visit and treat his patient.[12]

A malpractice *case* can be proved by circumstantial evidence.[13] Not every *issue* in such a case can be so proved. The standard of practice existing in the community obviously cannot be so proved. There must be direct evidence on that point. In some cases, proximate cause cannot be so proved. In other cases it can. I suggest the possibility of proving proximate cause by the use of hospital records, and by the use of medical textbooks in those states where the same are admissible in evidence. Frequently the "standards of practice" as well as "proximate cause" can be proven by pretrial depositions. It is often easy, by such depositions, to develop facts which result in the raising of an issue which will entitle the case to go to the jury.

If you are successful in getting the defendant doctor to make vehement denials of the facts claimed, it is ordinarily quite easy, with a proper question, to get him to say that if such facts had existed, he would have made a different diagnosis and followed a different course of treatment, because to do otherwise would have been bad practice.

The doctor, of course, should be required to produce all of his records at the time the deposition is taken, and they should be identified as an exhibit and offered as part of the deposition. Thus they are impounded with the Notary and are available to the attorneys for inspection or copy. After this, and after impounding the hospital records, the depositions of other doctors practicing in the community, skilled in the particular subject matter, should be obtained. Of course, such depositions must be delayed until after careful review of the records already impounded with the Notary. In those states which have adopted rules for pre-trial discovery, such as are found in the Federal Rules of Civil Procedure, one may take the depositions of ex-

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[11] Hunter v. Burroughs, 96 S. E. 360 (Va., 1918); Paulsen v. Gunderson, 260 N. W. 448 (Wis., 1935).

[12] Gray v. Davidson, 15 Wash. 2d 257, 130 P. 2d 341 (1942); Murgatroyd v. Dudley, 184 Wash. 222, 50 P. 2d 1025 (1935); Gross v. Partlow, 190 Wash. 489, 68 P. 2d 1034 (1937); Adams v. Henry, 131 N. W. 62 (Mich., 1911); Blackburn v. Curd, 106 S. W. 1186 (Ky., 1908); Tanner v. Aiken, 101 N. W. 769 (Ia., 1904); Sinclair v. Brunson, 180 N. W. 358 (Mich., 1920); 41 Am. Jur. 216, § 100 et seq.; 60 A. L. R. 664; 21 R. C. L. 389.

[13] Atkins v. Clein, see n. 5, above.

perts, even though they have never seen nor examined your client. Rule 26 of the Federal Rules of Civil Procedure authorizes such depositions.

It has been my experience, that if you keep the questions on a sound, professional, hypothetical, academic basis, that you will, in all probability, elicit the testimony which you desire.

The defense of contributory negligence in a medical malpractice case is not a bar to the action, but may be considered only in mitigation of damages.[14]

Frequently, defense counsel claim that the plaintiffs have the burden of proving what portion of their alleged damage was due to the original ailment, and what portion to the alleged negligence, and that, failing so to do, they cannot recover. Such is not the law.[15]

According to sections (a), (d) and (d) (2) of the above mentioned Rule 26 of the Federal Rules of Civil Procedure you are entitled to take not only the deposition of the defendant doctor, but also those of any other doctor. You will note that Rule 26 (d) (2) provides that the "deposition of a party * * * may be used by an adverse party for any purpose." This rule means *exactly what it says, and under it, "any part or all" of the* defendant doctor's deposition may be used as substantive evidence and may be offered by the plaintiff in his case-in-chief.[16]

Admissions of a party, wherever made and under whatever circumstances made, are, and have, from time immemorial, been admissible in evidence. The fact that the admissions were elicited during the taking of a deposition does not make them one whit different than if they had been uttered by the defendant at the corner drug store. The only question is, are the offered admissions relevant or material to the issues in the case.

Rule 26 is a potent weapon with which you may establish by medical proof, from the defendant doctor himself, the standards of practice in his community. The standard of practice, with respect to many diseases and conditions, is the same throughout the United States. Of course, you will not know what this stand-

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[14] Sauers v. Smits, 49 Wash. 557, 95 P. 1097 (1908); Gould v. McKenna, 27 Am. Rep. 705 (Penna., 1878); Beadle v. Pain, 80 P. 903 (Ore., 1905); DuBois v. Decker, 29 N. E. 313 (N. Y., 1891); 14 L. R. A. 429.

[15] McCormick v. Jones, 152 Wash. 502, 278 P. 181 (1929) (burden of proof is on the respondent, doctor, when there is contributory negligence on the part of the patient).

[16] Pfotzer v. Aqua Systems, 162 F. 2d 779 (CCA, 2, 1947); Snodgrass v. Kohen et al., 96 F. Supp. 292, 294 (D. C., 1951).

ard of practice is unless you have had medical advice *in advance,* or have made careful research of available medical treatises.

Early in your examination of the doctor, elicit in great detail the particular courses of study that he pursued in medical college; the names of the textbooks which he studied with regard to the injury in question; and the textbooks that he has in his own library on the subject in question. If he has mentioned one of the authorities on whom you rely, you are free to read from such textbooks and ask him if he agrees or disagrees with the statement you read.

If the defendant doctor has not mentioned the particular textbooks upon which you relied, you may ask him if the medical profession, as such, considers Dr. X as an authority on the particular condition you are dealing with. It is not necessary that he, the defendant doctor, recognizes your text writer as an authority. It is only necessary that the text writer be recognized by the medical profession as an author.

If you fail to prove the standards of practice or causation by your pre-trial deposition of the defendant doctor, then you should proceed with depositions of other doctors.

As a strictly legal proposition, by the overwhelming weight of judicial authority, a doctor must respond to a subpoena, whether it be to appear in court, or to appear before a Notary Public to give his deposition, and testify fully concerning all the knowledge he may have of the particular patient involved; and also give professional expert opinions, even though he has not been paid or tendered an expert's fee. Furthermore, under some decisions doctors who have never seen the particular patient involved, and even though they be specialists, must respond to a subpoena and give their professional expert opinion concerning any medical question asked them, and this without payment of or promise to pay an expert fee.[17]

But I recommend to lawyers that they do not rely upon this strictly legal obligation of the doctor. I suggest that they should make adequate arrangements with the doctor, and that he be paid for his time in those cases where he is not an attending physician.

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[17] People v. Conte, 122 P. 450 (Calif., 1912); Dixon v. People, 48 N. E. 108 (Ill., 1897); Re Haves, 156 S. E. 791 (N. C., 1931); San Francisco v. Superior Court, 231 P. 2d 26 (Calif., 1951); State ex rel. Berge v. Superior Court, 154 Wash. 144, 281 P. 335 (1925); 25 A. L. R. 2d 1418; 73 A. L. R. 1179; 58 Am. Jur. 503; 13 C. J. 27.

The purpose of taking the deposition of medical specialists is to establish, (1) the standards of practice, both as to diagnosis and treatment, and (2) the reasons and necessity which resulted in the establishment of said standards of practice.

If you do have with you some of the medical books which the witness has said are recognized as authoritative by the medical profession, you may, while examining the witness on pretrial deposition, ask him if he agrees with certain appropriate statements which you read from the textbook that he has stated is recognized by the medical profession.

It is essential that the lawyer establishes, not only the nature and extent of his client's injury, but also the fact that the client's condition resulted proximately from the negligence which has been proved.

When proving by a medical witness the permanency of the client's condition, a problem in terminology may arise. Damages may not be awarded for such future effects based upon evidence which is conjectural or speculative. For this reason, it is frequently urged that the medical witness must testify that his opinion as to such future effects, is based upon a "reasonable medical certainty," or a "reasonable medical probability." There are indeed very few medical opinions which can be predicated upon a "reasonable medical certainty." The law only requires that a litigant produce the best evidence available. If medical science has not progressed to the point where a sincere, qualified doctor can honestly express an opinion to a reasonable medical certainty as to the future consequences of an injury,—is that any reason why the doctor should be prevented from stating his opinion as to the "possible" consequences of the injury based upon his learning and experience? What medical science has learned as to "possible" consequences of similar injuries, is relevant and material. I realize that a difference of opinion exists with reference to this question, but the Washington and California courts support my opinion.[18]

Another point to be remembered is that, in some states, an expert medical witness, as distinguished from the treating physician, may not be permitted to relate the history given him by the patient, if objection is made upon the ground of hearsay.

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[18] Dillon v. Burnett, 197 Wash. 371, 85 P. 2d 656 (1938); Nagala v. Warsing, 36 Wash. 2d 615, 219 P. 2d 603 (1950); Mellis v. Merritt, 44 Wash. 2d 181, 265 P. 2d 1058 (1954); Bauman v. San Francisco, 108 P. 2d 989 (Calif., 1940); Cordiner v. Los Angeles Traction Co., 91 P. 436 (Calif., 1907).

The treating physician, however, may testify as to the patient's history for the reason that it was an essential predicate to treatment by him. If in the case of an expert who examined only for the purpose of testifying, a lawyer is met with the objection of hearsay, then the lawyer must of course propound a hypothetical question which encompasses the client's complete medical history as testified to, as well as pertinent evidence pertaining to the occurrence in which the trauma took place.

Another way of establishing the causal relation between the alleged malpractice and the condition of which you complain, is by the use of the Uniform Evidence Act, which has been adopted by a great many of the states: "A record of an act, condition, or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

Thus, a hospital record, if it meets the requirements of the Act, is admissible in evidence at the discretion of the court. Such a hospital record then may be considered not only as to the medical facts recorded therein, but also as to medical opinions recorded there. In this way you may be able to prove the necessary facts of causation.[19]

These are the main points in a malpractice action. It should be understood, of course, that other law and procedure applicable to personal injury cases generally also apply to such actions.

[19] Cantrill v. American Mail Line, 42 Wash. 2d 590, 257 P. 2d 179 (1953); Reed v. Order of United Commercial Travelers, 123 F. 2d 252 (1941); Hunter v. Derby Foods, Inc., 110 F. 2d 970, 133 A. L. R. 255 (1940); Freedman v. Mutual Insurance Co., 135 A. L. R. 1249 (Penna., 1941); Natwick v. Moyer, 163 P. 2d 936 (Ore., 1945); Weis v. Weis, 169 A. L. R. 668 (Ohio, 1947); Gallagher v. Portland Traction, 182 P. 2d 354 (Ore., 1947); Gunter v. Claggett, 151 P. 2d 271 (Calif., 1944).