

## DISSECTING PHILIPPINE LAW AND JURISPRUDENCE ON MEDICAL MALPRACTICE \*

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*I will follow that system of regimen which,  
according to my ability and judgement, I consider  
for the benefit of my patients, and abstain from  
whatever is deleterious and mischievous.  
– Hippocratic Oath*

### I. INTRODUCTION

Throughout history, people have consigned their fates and lives to the skill of their doctors.<sup>1</sup> To the medical profession, society entrusts the sacred duty of preserving the virtues of life and good health. Hence, only the most qualified individuals should engage in this profession.

Imbued with compelling state interest,<sup>2</sup> the license to practice medicine may, at any time and for cause, be revoked by the government.<sup>3</sup> After all, the practice of medicine is not only a right,<sup>4</sup> but also a privilege<sup>5</sup> earned through years of education and training. In addition to state regulation, the conduct of doctors is likewise strictly governed by the Hippocratic Oath, a code of discipline and ethical rules which doctors have imposed upon themselves in recognition and acceptance of their great responsibility to society.<sup>6</sup> If a doctor fails to give due regard to the health and welfare of his patient, as mandated by his oath, the law makes him accountable for such act or omission.

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<sup>1</sup> *Batiquin v. Court of Appeals*, G.R. No. 118231 (hereinafter “Batiquin”), 327 Phil. 965, 968, Jul. 5, 1996.

<sup>2</sup> See 61 Am.Jur. 2d §185 at 291 citing *Stevenson v. Yates*, 183 Ky. 196, 208 S.W. 820.

<sup>3</sup> *Reyes v. Sisters of Mercy Hospital*, G.R. No. 130547 (hereinafter “Reyes”), 396 Phil. 87, 107, Oct. 3, 2000.

<sup>4</sup> *Id.*

<sup>5</sup> See *Board of Medicine v. Ota*, G.R. No. 166097, 558 SCRA 234, Jul. 14, 2008, citing *Professional Regulation Comm., v. De Guzman*, G.R. No. 144681, 432 SCRA 505, Jun. 21, 2004.

<sup>6</sup> *Id.*

This paper seeks to dissect Philippine law and jurisprudence in the matter of medical malpractice in order to arrive at a definitive understanding of this emerging branch of tort law. It is conceded that, to this day, there is no law that explicitly governs or specifically penalizes, by way of civil or criminal liability, medical malpractice. Since the conclusion of a similar study more than six (6) years ago,<sup>7</sup> the law has remained the same. Currently, there are three (3) pending bills before the 15<sup>th</sup> Congress, namely House Bill Nos. 100<sup>8</sup> and 1616<sup>9</sup> and Senate Bill No. 2669<sup>10</sup> which all remain silent with respect to the matter of medical malpractice. However, with the recent slew of jurisprudence from the Supreme Court on the subject matter, this paper will show that there is currently an emerging and promising framework for medical malpractice in the Philippines.

It is the hope of the author that the strengthening and the eventual entrenchment of medical malpractice law within the Philippine jurisdiction will not only develop our civil law on torts and damages, but, more importantly, strengthen our existing medical institutions by testing the practice of medicine through the unforgiving standard of accountability under the rule of law.

## II. WHAT CONSTITUTES THE PRACTICE OF MEDICINE

The practice of medicine in the Philippines is governed by the Medical Act of 1959,<sup>11</sup> which repealed the Medical Law.<sup>12</sup> While it provides no clear-cut definition of the practice of medicine, Section 10 thereof provides:

**Section 10. Acts constituting practice of medicine.** A person shall be considered as engaged in the practice of medicine if he shall (a) **for compensation, fee, salary or reward in any form**, paid to him directly or through another, or **even without the same, physically examine any person**, and diagnose, treat, operate or prescribe any remedy for any human disease, injury, deformity, physical, mental or physical condition or any ailment, real or imaginary, regardless of the nature of the remedy or treatment administered, prescribed or recommended; or (b) **by means of signs, cards, advertisements, written or printed matter, or through the radio,**

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<sup>7</sup> See Joseph Joemer C. Perez et al., *Medical Malpractice Law in the Philippines: Present State and Future Directions*, 78 PHIL. L.J. 689 (2004).

<sup>8</sup> Introduced by Hon. Janette L. Garin, M.D. (Rep. for the 1<sup>st</sup> Dist. of Iloilo) and Hon. Walden F. Bello (Rep. for Akbayan Party List), available at [http://www.congress.gov.ph/download/basic\\_15/HB00100.pdf](http://www.congress.gov.ph/download/basic_15/HB00100.pdf) (last accessed Apr. 12, 2011).

<sup>9</sup> Introduced by Hon. Mar-len Abigail S. Binay (Rep. for the 2<sup>nd</sup> Dist. of Makati City), available at [http://www.congress.gov.ph/download/basic\\_15/HB01616.pdf](http://www.congress.gov.ph/download/basic_15/HB01616.pdf) (last accessed Apr. 12, 2011).

<sup>10</sup> Introduced by Hon. Sen. Franklin M. Drilon, available at <http://www.senate.gov.ph/lisdata/1068891461.pdf> (last accessed Apr. 12, 2011).

<sup>11</sup> Rep. Act No. 2382. This is the Medical Act of 1959.

<sup>12</sup> Old Administrative Code, as amended by Act No. 3111, ch. 31.

**television or any other means of communication, either offer or undertake** by any means or method **to diagnose**, treat, operate or prescribe any remedy for any human disease, injury, deformity, physical, mental or physical condition; or (c) **use the title M.D.** after his name. (Emphasis supplied)

Thus, section 11 of the Medical Act of 1959 explicitly lists exemptions therefrom to include those persons engaged in related fields involving healthcare as well as those engaged in other fields which have gained reasonable acceptance, *to wit*:

- (a) any medical student duly enrolled in an approved medical college or school under training, serving without any professional fee in any government or private hospital, provided that he renders such service under the direct supervision and control of a registered physician;
- (b) any legally registered dentist engaged exclusively in the practice of dentistry;
- (c) any duly registered masseur or physiotherapist, provided that he applies massage or other physical means upon written order or prescription of a duly registered physician, or provided that such application of massage or physical means shall be limited to physical or muscular development;
- (d) any duly registered optometrist who mechanically fits or sells lenses, artificial eyes, limbs or other similar appliances or who is engaged in the mechanical examination of eyes for the purpose of constructing or adjusting eye glasses, spectacles and lenses;
- (e) any person who renders any service gratuitously in cases of emergency, or in places where the services of a duly registered physician, nurse or midwife are not available;
- (f) any person who administers or recommends any household remedy as per classification of existing Pharmacy Laws; and
- (g) any psychologist or mental hygienist in the performance of his duties, provided such performance is done in conjunction with a duly registered physician.

Interestingly, in *Board of Medicine v. Ota*,<sup>13</sup> the Supreme Court held that a foreigner may be granted license to practice medicine in the Philippines so long as it can be shown that he possesses all of the qualifications and none of the disqualifications required by law for the practice of the medicine.<sup>14</sup> Notwithstanding Article XII, Section 14 of the 1987 Constitution, a foreigner must satisfactorily show that, in addition to possessing the qualifications required by the Medical Act, he is a citizen of a country which allows citizens of the Philippines to

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<sup>13</sup> G.R. No. 166097, 558 SCRA 234, Jul. 14, 2008.

<sup>14</sup> *Id.* at 245-247.

practice medicine under the same rules and regulations governing citizens thereof.<sup>15</sup>

Moreover, it is to be noted that Section 11(e) of the Medical Act is the closest Philippine equivalent of a *Good Samaritan Law*. A *Good Samaritan Law* is a statute that exempts from liability a person (such as an off-duty physician) who voluntarily renders aid to another in imminent danger but negligently causes injury while rendering the aid.<sup>16</sup> These statutes are enacted to encourage doctors to stop and give aid to strangers in emergency situations by providing that no physician who *in good faith* renders such aid shall be liable in civil damages as a result of acts or omissions in rendering such aid.<sup>17</sup> In certain jurisdictions, a Good Samaritan Law requires a person who is able to do so with no danger or peril to himself to come to the aid of another who is exposed to grave physical harm.<sup>18</sup>

### III. MEDICAL MALPRACTICE AND ITS ELEMENTS

Whenever a medical practitioner fails to meet the standards demanded of him by his profession, he may be held liable in an action in court premised on such breach of duty. Such action is more commonly known as a medical malpractice suit and, in our jurisdiction, is commonly enforced under the law on quasi-delicts.<sup>19</sup> “Malpractice” as the term is used with reference to physicians and surgeons, is bad or unskilful practice on the part of a physician or surgeon resulting in injury to the patient, or a physician’s breach of a duty imposed on him by law.<sup>20</sup> It is treatment by a surgeon or physician in a manner contrary to accepted rules and with injurious results to the patient; the bad professional treatment of disease, or bodily injury, from reprehensible ignorance or carelessness, or with criminal intent.<sup>21</sup>

In the American jurisdiction where our law on medical malpractice was derived, it has been reasoned that while malpractice generally arises from negligence, malpractice is not necessarily limited to acts of negligence; it may result either through lack of skill or neglect to apply it, if possessed, and it may be wilful, negligent or ignorant.<sup>22</sup> Thus, malpractice consists of any professional misconduct,

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<sup>15</sup> *Id.* at 245.

<sup>16</sup> BLACK’S LAW DICTIONARY (8<sup>th</sup> Ed. 2004).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, citing ROLLIN PERKINS & RONALD BOYCE, CRIMINAL LAW 661 (3rd ed. 1982).

<sup>19</sup> CIVIL CODE, tit. XVII, ch. 2.

<sup>20</sup> 70 C.J.S. §62 at 455.

<sup>21</sup> *Id.*, citing *Williams v. Elias*, 1 N.W.2d 121, 40 Neb. 656; *Grainger v. Still*, 85 S.W. 1114, 187 Mo. 197.

<sup>22</sup> 70 C.J.S. §62 at 455.

unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal and immoral conduct.<sup>23</sup>

Borrowing these principles, Philippine law has defined an action for medical malpractice to be a type of claim to redress a wrong committed by a medical professional that has caused bodily harm to a patient.<sup>24</sup> Unfortunately, the myopic view limiting actionable malpractice to cases of negligence seems to prevail in the Philippine jurisdiction. The first case to equate medical malpractice with “medical negligence” was *Garcia-Rueda v. Pascasio*<sup>25</sup> decided by the Supreme Court on September 5, 1997. This was followed by *Cruz v. Court of Appeals*<sup>26</sup> on November 8, 1997. This notwithstanding, there is nothing in our law that restricts actionable medical malpractice to acts of negligence. In fact, our laws on the practice of medicine, particularly the Medical Act<sup>27</sup> as well as the Code of Ethics of the Medical Profession provide for numerous acts and grounds constituting actionable malpractice. This restrictive interpretation of medical malpractice must be eliminated.

#### A. Physician – Patient Relationship

A physician-patient relationship is formed when a patient engages the services of a physician.<sup>28</sup> The relationship of physician and patient exists if the professional services of a physician are accepted by another person for the purposes of medical or surgical treatment.<sup>29</sup> The exact nature of this relationship has not been settled in the Philippine jurisdiction and even under American jurisprudence from which our law on medical malpractice originates. There is authority to the effect that the physician-patient relationship is not a contractual relationship. In a line of cases from American jurisprudence, it has been held that:

The duty of a physician or surgeon to bring skill and care to the amelioration of the condition of his patient does not arise from contract, but has its foundation in public considerations which are inseparable from the nature and exercise of his calling; it is predicated by the law on the relation which exists between physician and patient.<sup>30</sup>

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<sup>23</sup> *Id.* citing *Watts v. Cumberland County Hosp. System, Inc.*, 330 S.E.2d 242, N.C. App. 2, review denied 335 S.E.2d 27, 314 N.C. 548, reversed in part on other grounds 345 S.E.2d 201, 317 N.C. 321.

<sup>24</sup> *Cruz v. Court of Appeals*, G.R. No. 122445 (hereinafter “*Cruz*”), 346 Phil. 872, 876, Nov. 18, 1997.

<sup>25</sup> G.R. No. 118141 (hereinafter “*Garcia-Rueda*”), 344 Phil. 323, Sep. 5, 1997.

<sup>26</sup> *Cruz*, 346 Phil. 872, 876, Nov. 18, 1997.

<sup>27</sup> See Medical Act, §§24, 28.

<sup>28</sup> *Lucas v. Tuaño*, G.R. No. 178763 (hereinafter “*Lucas*”), 586 SCRA 173, 200, Apr. 21, 2009; *Garcia-Rueda*, 344 Phil. 323, 332, Sep. 5, 1997.

<sup>29</sup> 61 Am Jur 2d §130 at 247.

<sup>30</sup> *Kozan v. Comstock*, 270 F.2d 839, 80 A.L.R.2d 310 (5th Cir. 1959); *Dean v. Hershowitz*, 119 Conn. 398, 177 A. 262 (1935); *Norton v. Hamilton*, 92 Ga. App. 727, 89 S.E.2d 809, 57 A.L.R.2d 426 (1955).

This observation finds some support in Philippine law as art. 2176 of the Civil Code provides that a quasi-delict requires that there be no pre-existing contractual relations between the parties.<sup>31</sup> This finding, however, must be taken with a grain of salt as it is well settled in our jurisdiction that the fact that the parties are bound by contractual relations does not prevent the action based on tort from prospering. The existence of a contract does not bar the commission of a tort by one party against another and the consequent recovery of damages therefore, especially if it is the very commission of the tort that causes the breach of contract.<sup>32</sup>

However, the notion of a physician-patient relationship as a form of contract is consistent with the current medical malpractice doctrine whereby the duty of a physician is said to arise when the services of a physician are engaged by the patient.<sup>33</sup> Numerous authorities from American jurisprudence<sup>34</sup> espouse the view that the relationship of physician or surgeon and patient is one arising out of a contract, through express or implied consent. Such a view is likewise consistent with our law on contracts.<sup>35</sup> The relationship is created when a physician's professional services are rendered to and accepted by another person for purposes of medical care or treatment.<sup>36</sup> Whenever a person consults a doctor in relation with a medical condition, ailment, or disease, or his suspicion thereof, a contract is thereby created between them by implied consent. Thus, the voluntary acceptance of the physician-patient relationship by the affected parties creates a *prima facie* presumption of a contractual relationship between them.<sup>37</sup> The existence of such contract may be established depending on the questions of whether the patient knowingly entrusted himself to the care of the physician or whether the physician took affirmative action in accepting or treating the patient for his ailment.<sup>38</sup> The

<sup>31</sup> CIVIL CODE, art. 2176.

<sup>32</sup> Coca-Cola Bottlers Phils., Inc., v. Court of Appeals, G.R. No. 110295, 227 SCRA 292, Oct. 18, 1993, citing *Singson v. Court of Appeals*, G.R. No. 24837, 23 SCRA 1117, Jun. 27, 1968. See also *Air France v. Carrascoso*, 18 SCRA 155; *Vasquez vs. Borja*, 74 Phil. 560; *Cangco vs. Manila Railroad*, 38 Phil. 768; *Yamada vs. Manila Railroad*, 33 Phil. 8.

<sup>33</sup> *Cayao-Lasam v. Ramolete*, G.R. No. 159132 (hereinafter "Cayao-Lasam"), 574 SCRA 439, 454, Dec. 18, 2008; *Lucas*, 586 SCRA 173, 200, Apr. 21, 2009; *Cruz*, 346 Phil. 872, 883, Nov. 18, 1997; *Garcia-Rueda*, 344 Phil. 323, 332, Sep. 5, 1997.

<sup>34</sup> *Fruiterman v. Granata*, 276 Va. 629, 668 S.E.2d 127 (2008); *Kelley v. Middle Tennessee Emergency Physicians, P.C.*, 133 S.W.3d 587 (Tenn. 2004); *Irvin v. Smith*, 31 P.3d 934 (Kan. 2001); *Walker v. Rinck*, 604 N.E.2d 591 (Ind. 1992); *Tracy v. Merrell Dow Pharmaceuticals, Inc.*, 58 Ohio St. 3d 147, 569 N.E.2d 875 (1991); *Spencer v. West*, 126 So. 2d 423, 97 A.L.R.2d 1224 (La. Ct. App. 2d Cir. 1960).

<sup>35</sup> See generally CIVIL CODE, arts. 1305, 1315, 1318, and 1319. See also IV ARTURO TOLENTINO, CIVIL CODE OF THE PHILIPPINES 447 (1992); *Clarín v. Rulona*, 127 SCRA 512; *Leung Ben v. O'Brien*, 38 Phil. 182 citing *Manresa*.

<sup>36</sup> *United Calendar Mfg. Corp. v. Huang*, 94 A.D.2d 176, 463 N.Y.S.2d 497 (2d Dep't 1983).

<sup>37</sup> 61 Am Jur 2d §130 at 247, citing *Osborne v. Frazor*, 58 Tenn. App. 15, 425 S.W.2d 768, 35 A.L.R.3d 338 (1968).

<sup>38</sup> 61 Am Jur 2d §130 at 247.

relation of medical practitioner and patient continues until the physician's services are no longer needed or until terminated by the parties.<sup>39</sup> Accordingly, a physician or surgeon who operates on a patient without the latter's consent may be held answerable for damages.<sup>40</sup>

It may be inferred from the judicial pronouncements of our Supreme Court that a physician-patient partakes of the character of a contract as it is by far more consistent with ordinary experience than the former view.

The consideration, as an element of the contract, insofar as the doctor is concerned usually consists of ample compensation for his professional services by the patient. However, even if the physician's services were rendered gratuitously or at the request of a third party, the physician may still be held liable for an actionable malpractice.<sup>41</sup> On the other hand, the consideration on the part of the patient is the exercise, by the doctor, of a reasonable degree of care which may range from a diagnosis of his ailment, a cure to his sickness, or therapy to address a condition, consistent with the stringent standards of the medical profession, that will eventually lead to the patient's recovery and a restoration to his former or optimal state of health.

This interpretation of a physician-patient relationship taken in relation with relevant case law, leads to a conclusion that a physician-patient relationship is an element of medical malpractice cases.<sup>42</sup> It can be reasonably said that it is through this relation that the duty of a physician or surgeon towards a patient arises. Thus, in accepting a case, the physician, for all intents and purposes, represents that he has the needed training and skill possessed by physicians and surgeons practicing in the same field; and that he will employ such training, care, and skill in the treatment of the patient.<sup>43</sup> It is the very breach of that duty imposed by the physician-patient relationship that the law deems as actionable for damages.

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<sup>39</sup> 70 C.J.S. § 78.

<sup>40</sup> 61 Am Jur 2d §150 at 265.

<sup>41</sup> 61 Am Jur 2d §131 at 248.

<sup>42</sup> See Lucas, 586 SCRA 173, 200, Apr. 21, 2009; Cayao-Lasam, 574 SCRA 439, 454, Dec. 18, 2008; Cruz, 346 Phil. 872, 883, Nov. 18, 1997; Garcia-Rueda, 344 Phil. 323, 332, Sep. 5, 1997.

<sup>43</sup> See generally Lucas, 586 SCRA 173, 200, Apr. 21, 2009; Garcia-Rueda, 344 Phil. 332, Sep. 5, 1997.

## B. Duty of a Physician

Duty refers to the standard of behavior which imposes restrictions on one's conduct.<sup>44</sup> By the physician-patient relationship, a duty is imposed on the physician to use the same level of care that any reasonably competent doctor would use to treat a condition under the same circumstances.<sup>45</sup> Stated otherwise, in treating his patient, a physician is under a duty to the patient to exercise that degree of care, skill and diligence which physicians in the same general neighborhood and in the same general line of practice ordinarily possess and exercise in like cases.<sup>46</sup> For the lay Filipino, it is the very expertise of a physician, surgeon or, the reputation of a medical institution, coupled with the proven competence and reputation of its medical staff, which convinces him or her to entrust his or her very life or good health to treatment in exchange for hefty medical fees and therefore, the physician, surgeon, or medical institution has the reciprocal obligation to make good on its duty.

As to what particularly constitutes this standard, there has been no hard and fast rule delineating the duty demanded of a physician. Instead, what we have is an approximation of the standard demanded which we infer from the various pronouncements of the Supreme Court.

In *Carillo v. People*,<sup>47</sup> the duty of a physician has been said to include the duty to "serve the interest of his patient with the greatest of solicitude, giving them always his best talent and skill."<sup>48</sup> This doctrine however was tempered in succeeding cases. *Reyes v. Sisters of Mercy Hospital* lays down the current standard, which is "not what is actually the average merit among all known practitioners from the best to the worst and from the most to the least experienced, but the reasonable average merit among the ordinarily good physicians."<sup>49</sup> Another useful yardstick to determine whether or not a physician is guilty of actionable malpractice is enunciated in *Cruz v. Court of Appeals* in this wise: "[w]hether or not a physician has committed an 'inexcusable lack of precaution' in the treatment of his patient is to be determined according to the standard of care observed by other members of the profession in good standing under similar circumstances bearing in mind the advanced state of the profession at the time of treatment or the

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<sup>44</sup> *Flores v. Pineda*, G.R. No. 158996 (hereinafter "Flores"), 571 SCRA 83, 91, Nov. 14, 2008, *citing* C.R.A. MARTIN, LAW RELATING TO MEDICAL MALPRACTICE 361 (2<sup>nd</sup> ed.).

<sup>45</sup> *Cayao-Lasam*, 574 SCRA 439, 454, Dec. 18, 2008, *citing* *Reyes*, 396 Phil. 87, 96, Oct. 3, 2000. *See also* *Lockridge v. Oakwood Hosp.*, 285 Mich. App. 678, 777 N.W.2d 511 (2009).

<sup>46</sup> *Lucas*, 586 SCRA 173, 200, Apr. 21, 2009, *citing* *Snyder v. Pantaleo*, 143 Conn 290, 122 A2d 21 (1956). *See also* *Reyes*, 396 Phil. 87, 96, Oct. 3, 2000.

<sup>47</sup> G.R. No. 86890, 229 SCRA 386, Jan. 21, 1994.

<sup>48</sup> *Id.* at 396 *citing* CODE OF ETHICS OF THE MEDICAL PROFESSION, art. 1, §3.

<sup>49</sup> *Reyes*, 396 Phil. 87, 104, Oct. 3, 2000.



present state of medical science.”<sup>50</sup> Thus, the Supreme Court went on to rule that: “a physician is not an insurer of the good result of treatment” and that the “mere fact that a patient does not get well or that a bad result occurs through the course of treatment does not in itself indicate failure to exercise due care which gives rise to an actionable malpractice.”<sup>51</sup> The result is not determinative of the performance of the physician and he is not required to be infallible.”<sup>52</sup>

However, the phrases “degree of skill and diligence ordinarily exercised by the average members of the medical profession in the same or similar localities” and “due consideration to the state of the profession at the time” necessarily implies that the standard of care is not a fixed or rigid one as can be said of other professions or industries imbued with public interest. In fact, in *Reyes v. Sisters of Mercy Hospital*, the Supreme Court distinguished the standard of care and diligence demanded from medical practitioners from common carriers as the practice of medicine is already conditioned upon the highest degree of diligence and that there is no need to require extraordinary diligence from it. Notwithstanding such pronouncement, the standard must vary from case to case with due emphasis on the qualification and reputation of the physician or surgeon, the level of equipment and technology at his disposal, the locality where he serves, and other material and relevant circumstances which have a bearing on his ability to discharge the obligations demanded by his patient and the profession. With this in mind, we must, in proper cases, distinguish between a physician practicing medicine in a far-flung barrio of our archipelago as against a physician working for the premiere hospitals in our country whereby a stricter standard is demanded from the latter as against the former. This does not in any way mean that the standard of care is lower for medical practitioners situated in remote or rural areas without access to advanced medical equipment and facilities or who do not enjoy the support of a full complement of medical staff. Rather, it merely raises the bar for those medical practitioners who have access to sufficient resources which cannot justify any form of negligence or omission in due diligence which results in injury to a patient. Common sense dictates that a physician or surgeon employed with our country’s premiere hospitals should be held to a higher standard of care and diligence than other physicians whose capabilities are limited by the lack of manpower, facilities, and other medical resources.

From the foregoing, it can be concluded the standard or duty incumbent upon a medical practitioner is relative and is dependent on the mean competency of good doctors in the particular locality or field of practice. As the mere failure of a course of treatment to produce the desired effect does not of itself give rise to a

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<sup>50</sup> Cruz, 346 Phil. 872, 883, Nov. 18, 1997.

<sup>51</sup> Lucas, 586 SCRA 173, 204, Apr. 21, 2009.

<sup>52</sup> *Id.*, citing *Domina v. Pratt*, 13 A 2d 198 Vt. (1940).

showing of negligence on the part of the medical practitioner, it can be said that as long as the medical practitioner exercises that degree of care, skill and diligence that ordinarily characterizes the reasonable average merit among the ordinarily good physicians in the same general neighborhood and in the same general line of practice with due consideration to the advanced state of the profession at the time of treatment or the present state of medical science, the medical practitioner can be said to have fulfilled the duty of care and diligence required by law.

There is however, a significant risk in adopting such a standard of care which was borrowed from American law.<sup>53</sup> It is apparent that the aforementioned standard has been developed by the long history and experience of American society in implementing its medical malpractice laws as well as ensuring that the optimal quality of care served by their medical institutions. Considering that the realities of the Philippine medical and healthcare systems cannot be in any way similarly situated with the state of American medical and healthcare systems, the application of the American standard of care in our jurisdiction is susceptible of sanctioning iniquitous or even absurd interpretations. One of the logical consequences of having a flexible standard of care pegged at the “degree of skill and diligence ordinarily exercised by the average members of the medical profession in the same or similar localities” would be to justify a judgment exonerating a physician just because of the relative incompetence of all other medical practitioners in that particular locality and field of practice. The tendency to hold medical practitioners to a lower standard of care in certain areas would promote the decline in the quality of medical care which is the very evil sought to be prevented by a medical practice statute. Thus, the need of our legislature to frame a specific standard of care for medical practitioners that conforms to the Philippine reality pervading the practice of medicine becomes readily apparent.

### **C. Breach of Duty and Injury**

Generally, the injury contemplated by the law is bodily injury to or death of the patient.<sup>54</sup> Such injury is occasioned by reason of an act committed either through fault or negligence amounting to a breach of duty on the part of the medical practitioner. As pointed out earlier, breach of duty is the failure of the physician to exercise that degree of care, skill and diligence that ordinarily characterizes the reasonable average merit among the ordinarily good physicians in the same general neighborhood and in the same general line of practice. The law does not merely penalize negligence, but the failure to exercise the requisite care, skill and diligence which is not limited only to negligent acts. It covers acts

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<sup>53</sup> See 61 Am Jur 2d §189 at 297-299.

<sup>54</sup> Cruz, 346 Phil. 872, 876-77, Nov. 18, 1997.

committed by fault through lack of foresight or lack of skill resulting to injury suffered by a patient. It also includes the failure to take the necessary precautions to prevent foreseeable harm caused by a disability of the patient, known or should have been known by the physician, that increases the magnitude of risk to him.<sup>55</sup>

Hence, the Supreme Court has ruled that the following acts constitute breaches of duty of a physician: inadequacy of facilities, lack of provisions, untidiness of the clinic and failure to conduct pre-operation tests on the patient;<sup>56</sup> the act of seeing the patient for the first time only an hour before the scheduled operative procedure<sup>57</sup>; scheduling another procedure in a different hospital thirty minutes apart from the patient's scheduled operation causing the surgeon to be over three hours late for the procedure<sup>58</sup>; leaving of sponges or other foreign objects in the wound after the incision has been closed<sup>59</sup>; and failure to consider the patient's high blood sugar and subjecting the patient to an evaluative procedure which caused the patient's death due to complications from diabetes<sup>60</sup>.

It has been proposed that the law also contemplate of other injury suffered by the patient and be not limited to bodily injury in general.<sup>61</sup> This proposition would be a welcome development to the law on medical malpractice and would be more consistent with the definition of injury under the law on quasi-delicts which does not distinguish between bodily and non-bodily injury. This interpretation finds implied approval in *Ilao-Oreta v. Ronquillo*<sup>62</sup> where the Supreme Court held an obstetrician-gynecologist-consultant as liable for actual damages suffered by the plaintiff following her failure to arrive in time for the plaintiff's scheduled operation.

### *1. Indispensability of Expert Testimony*

Clearly, such standard or duty is not definite or specific by which one can conveniently determine and delineate for the benefit of medical practitioners. Generally, a physician is presumed to have conformed to the standard of care and diligence required of the circumstances.<sup>63</sup> He is also presumed to have the

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<sup>55</sup> Flores, 571 SCRA 83, 94-95, Nov. 14, 2008.

<sup>56</sup> Cruz, 346 Phil. 872, 876, Nov. 18, 1997.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Professional Services, Inc. v. Agana, G.R. No. 126927 (hereinafter "Professional Services, Inc."), 513 SCRA 478, Jan. 31, 2007; Batiquin, 327 Phil. 965, 968, Jul. 5, 1996.

<sup>60</sup> Flores, 571 SCRA 83, 91, Nov. 14, 2008.

<sup>61</sup> See Perez et al., *supra* note 7.

<sup>62</sup> G.R. No. 172406, 535 SCRA 633, Oct. 11, 2007.

<sup>63</sup> See Lucas, 586 SCRA 173, 206-207, Apr. 21, 2009; Cruz, 346 Phil. 872, 876, Nov. 18, 1997. See also 61 Am. Jur. 2d §309 at 417, *citing* Ayers v. Parry, 192 F.2d 181 (3d Cir. 1951), Rhodes v. De Haan, 184 Kan. 473, 337 P.2d 1043 (1959).

necessary knowledge to practice his profession.<sup>64</sup> Thus, it is a general rule in medical malpractice cases that the plaintiff bears the *onus* of proving the standard of diligence and care imposed on the physician was breached in consonance with the basic doctrine of “he who alleges proves”.<sup>65</sup> This standard level of care, skill and diligence is a matter best addressed by expert medical testimony, because the standard of care in a medical malpractice case is a matter peculiarly within the knowledge of experts in the field.<sup>66</sup>

In *Lucas v. Tunaño*, it was held that in the absence of a proven standard of level of care, skill and diligence for a particular course of care or treatment, there can be no finding of negligence against the medical practitioner. The Court went on further to say that without a standard of care, the Court will have no yardstick upon which to evaluate or weigh the attendant facts of this case to be able to state with confidence that the acts complained of, indeed, constituted negligence and, thus, should be the subject of pecuniary reparation.<sup>67</sup>

It is not enough that the standard or duty of the physician be merely defined. It is also essential that expert testimony establish the fact that the physician's conduct in the treatment and care falls below such standard.<sup>68</sup> Thus, the production of expert testimony as evidence in medical malpractice suits has been repeatedly held as indispensable. Medical negligence cases are best proved by opinions of expert witnesses belonging in the same general neighborhood and in the same general line of practice.<sup>69</sup> Courts give deference to expert opinion of qualified physicians and surgeons as the latter possess technical skills by which laymen in most instances are incapable of intelligently evaluating; hence the indispensability of expert testimonies.<sup>70</sup> To further stress the indispensability of expert medical testimony, the Supreme Court held in *Flores v. Pineda*<sup>71</sup> that the critical and clinching factor in a medical negligence case is proof of the causal connection between the negligence which the evidence established and the plaintiff's injuries.<sup>72</sup> Such connection can only be proven by expert medical testimony.

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<sup>64</sup> See 61 Am. Jur. 2d §309 at 417, *citing* *Eckleberry v. Kaiser Foundation Northern Hospitals*, 226 Or. 616, 359 P.2d 1090, 84 A.L.R.2d 1327 (1961).

<sup>65</sup> See *Garcia-Rueda*, 344 Phil. 323, 331, Sep. 5, 1997; *Cruz*, 346 Phil. 872, 885, Nov. 18, 1997. See also *Nikko Hotel Manila Garden v. Reyes*, G.R. No. 154259, 452 SCRA 532, Feb. 28, 2005.

<sup>66</sup> *Lucas*, 586 SCRA 173, 200, Apr. 21, 2009, *citing* *Johnson v. Superior Court*, 49 Cal. Rptr. 3d 52 (Cal. App. 3d Dist. 2006).

<sup>67</sup> *Id.* at 203.

<sup>68</sup> *Cruz*, 346 Phil. 872, 884, Nov. 18, 1997.

<sup>69</sup> *Lucas*, 586 SCRA 173, 201-202, Apr. 21, 2009.

<sup>70</sup> *Id.* at 202.

<sup>71</sup> *Flores*, 571 SCRA 83, 91, Nov. 14, 2008.

<sup>72</sup> *Id.* at 99.

The reason for this is obvious. A verdict in a malpractice action cannot be based on speculation or conjecture.<sup>73</sup> Mere injury suffered by the plaintiff during the course of treatment does not justify an award of damages in his favour.<sup>74</sup> The causes of the injuries involved in malpractice actions are determinable only in the light of scientific knowledge and as such, it has been recognized that expert testimony is usually necessary to support the conclusion as to causation.<sup>75</sup>

Generally, to qualify as an expert witness, one must have acquired special knowledge of the subject matter about which he or she is to testify, either by the study of recognized authorities on the subject or by practical experience.<sup>76</sup> Thus, in *Reyes* the Supreme Court upheld the non-reliance by the lower courts on the so-called expert witness presented by the plaintiff. In the said case, the patient died from typhoid fever and his heirs sued the doctor and the hospital for medical malpractice. To support their contention they presented the testimony of a doctor who later appeared to have no extensive experience in typhoid fever cases. Said the Court:

First. While petitioners presented Dr. Apolinar Vacalares as an expert witness, we do not find him to be so as he is not a specialist on infectious diseases like typhoid fever. Furthermore, although he may have had extensive experience in performing autopsies, he admitted that he had yet to do one on the body of a typhoid victim at the time he conducted the postmortem on Jorge Reyes. It is also plain from his testimony that he has treated only about three cases of typhoid fever...

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He is thus not qualified to prove that Dr. Marlyn Rico erred in her diagnosis. Both lower courts were therefore correct in discarding his testimony, which is really inadmissible.<sup>77</sup>

## 2. Doctrine of *Res Ipsa Loquitur* as Exception

Although generally, expert medical testimony is relied upon in malpractice suits to prove that a physician has done a negligent act or that he has deviated from the standard medical procedure, the Supreme Court in *Ramos v. Court of*

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<sup>73</sup> *Id.*

<sup>74</sup> Lucas, 586 SCRA 173, 201, 204, Apr. 21, 2009.

<sup>75</sup> Cayao-Lasam, 574 SCRA 439, 454, Dec. 18, 2008; Cruz, 346 Phil. 872, 884, Nov. 18, 1997, *citing* 61 Am. Jur. 2d, 510.

<sup>76</sup> *Id.* at 447.

<sup>77</sup> Reyes, 396 Phil. 87, 100-101, Oct. 3, 2000.

*Appeals*<sup>78</sup> held that the doctrine of *res ipsa loquitur* may be availed by the plaintiff to impute a finding of *prima facie* negligence against a physician. *Res ipsa loquitur* is a maxim for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's *prima facie* case, and present a question of fact for defendant to meet with an explanation.<sup>79</sup> Where the thing which caused the injury complained of is shown to be under the management of the defendant or his servants and the accident is such as in ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from or was caused by the defendant's want of care. This shifts the burden of proof is shifted to the defendant to establish that he has indeed observed due care and diligence.<sup>80</sup> When the doctrine of *res ipsa loquitur* is availed by the plaintiff, the need for expert medical testimony is dispensed with because the injury itself provides the proof of negligence.<sup>81</sup> The rationale of the application of the doctrine is explained as follows:

The doctrine of *res ipsa loquitur* is simply a recognition of the postulate that, as a matter of common knowledge and experience, the very nature of certain types of occurrences may justify an inference of negligence on the part of the person who controls the instrumentality causing the injury in the absence of some explanation by the defendant who is charged with negligence. It is grounded in the superior logic of ordinary human experience and on the basis of such experience or common knowledge, negligence may be deduced from the mere occurrence of the accident itself. Hence, *res ipsa loquitur* is applied in conjunction with the doctrine of common knowledge.<sup>82</sup>

However, it must be pointed out that *res ipsa loquitur* is not a rule of substantive law but a mere procedural rule, and as such, does not create or constitute an independent or separate ground of liability.<sup>83</sup> Further, it must be stressed that the applicability of the doctrine of *res ipsa loquitur* does not dispense with the requirement that proof of negligence needs to be adduced. It does not automatically shift the *onus* from the plaintiff to the defendant. To invoke the rule of *res ipsa loquitur*, the plaintiff must first prove its essential elements:

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<sup>78</sup> *Ramos v. Court of Appeals*, G.R. No. 124354, 378 Phil. 1198, December 29, 1999 (hereinafter "*Ramos v. Court of Appeals* (Decision)") and subsequently affirmed in *Ramos v. Court of Appeals*, G.R. No. 124354, 430 Phil. 275, Apr. 11, 2002 (hereinafter "*Ramos v. Court of Appeals* (Resolution)").

<sup>79</sup> *Id.* at 1219.

<sup>80</sup> *Batiquin*, 327 Phil. 965, 978-979, Jul. 5, 1996.

<sup>81</sup> *Ramos v. Court of Appeals* (Decision), at 1221, *citing* SOLIS, MEDICAL JURISPRUDENCE 239 (1988).

<sup>82</sup> *Id.* at 1219.

<sup>83</sup> *Id.* at 1220; *Batiquin*, 327 Phil. 965, 979-980, Jul. 5, 1996.

1. The accident is of a kind which ordinarily does not occur in the absence of someone's negligence;
2. It is caused by an instrumentality within the exclusive control of the defendant or defendants; and
3. The possibility of contributing conduct which would make the plaintiff responsible is eliminated.<sup>84</sup>

Of the foregoing elements, the most important is the exclusive control of the thing which caused the damage.<sup>85</sup> The applicability of *res ipsa loquitur* is generally restricted to situations in malpractice cases where a layman is able to say, as a matter of common knowledge and observation, that the consequences of professional care were not as such as would ordinarily have followed if due care had been exercised.<sup>86</sup> The doctrine can only be invoked when and only when, under the circumstances involved, direct evidence is absent and not readily available.<sup>87</sup>

Thus, the doctrine of *res ipsa loquitur* has found application in situations where surgeons leave a foreign object inside the patient's body<sup>88</sup>, where the brain damage is suffered by a patient following a standard gallbladder operation<sup>89</sup> and where the patient suffers an injury caused by instruments within the exclusive control of the surgeon<sup>90</sup>. It does not apply to cases involving the merit of the physician's treatment as it is a matter that is placed beyond the realm of common understanding.<sup>91</sup> Thus, the doctrine of *res ipsa loquitur* found no application in a case where a patient died barely two (2) days from admittance allegedly due to the faulty choice and administration of an antibiotic when it appeared that the patient was already gravely ill from typhoid fever even before he was admitted to the hospital for treatment.<sup>92</sup>

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<sup>84</sup> *Cantre v. Go*, G.R. No. 160889 (hereinafter "Cantre"), 522 SCRA 547, 556, Apr. 27, 2007; *Ramos v. Court of Appeals* (Decision), at 1220  *citing* *Voss vs. Bridwell*, 364 P2d 955, 970 (1961) and similar cases.

<sup>85</sup> *Ramos v. Court of Appeals* (Decision), at 1220.

<sup>86</sup> *Id.* at 1223.

<sup>87</sup> *Batiquin*, 327 Phil. 965, 980, Jul. 5, 1996.

<sup>88</sup> *Id.* *See also* *Professional Services, Inc.*, 513 SCRA 478, Jan. 31, 2007.

<sup>89</sup> *Ramos v. Court of Appeals* (Decision).

<sup>90</sup> *See Cantre*, 522 SCRA 547, 556, Apr. 27, 2007.

<sup>91</sup> *Ramos v. Court of Appeals* (Decision), at 1219-24.

<sup>92</sup> *See Reyes*, 396 Phil. 87, 107, Oct. 3, 2000.

### D. Causation

To hold a medical practitioner liable, causation of the act of the medical practitioner leading to the injury must be proven within a reasonable medical probability and based upon competent expert testimony.<sup>93</sup> If the medical practitioner's negligence is not the immediate cause of the injury, he may still be held liable if it is proven by a preponderance of evidence that the act or omission complained of is the proximate cause of the injury suffered by the plaintiff. Proximate cause of an injury is that cause, which, in the natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.<sup>94</sup> Thus, it can be said that an injury or damage is proximately caused by an act or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.<sup>95</sup> In prosecuting his case, a plaintiff must plead and prove, not only that he had been injured and defendant has been at fault, but also that it is the defendant's fault that proximately caused the injury which must be proven within a reasonable medical probability and upon competent expert testimony.<sup>96</sup> *Cayao-Lasam v. Ramolete* is particularly instructive in illustrating the element of proximate cause as applied to cases of medical malpractice. As will be discussed later on, if it would be determined from the evidence that the plaintiff is guilty of contributory negligence and such negligence was the proximate cause of the injury, the medical malpractice case, a physician will be absolved of liability regardless if he was likewise guilty of negligence himself.

## IV. PARTIES LIABLE

### A. Physicians and Surgeons

As the author of the act causing the injury, it is the erring physician or surgeon who generally bears liability for damages suffered by virtue of art. 2176 of the Civil Code. His liability is predicated upon the concurrence of the four (4) elements of an actionable malpractice: duty, breach, injury, and proximate

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<sup>93</sup> Flores, 571 SCRA 83, 99, Nov. 14, 2008.

<sup>94</sup> *Vda. de Bataclan v. Medina*, 102 Phil. 181, 186 (1957).

<sup>95</sup> *Cayao-Lasam*, 574 SCRA 439, 458, Dec. 18, 2008,  *citing* *Ramos v. Court of Appeals* (Decision), at 1236.

<sup>96</sup> Flores, 571 SCRA 83, 99, Nov. 14, 2008.



causation.<sup>97</sup> Upon the establishment of these elements, liability attaches to the physician and he is held liable for damages suffered by the plaintiff.

However, the foregoing describes the conventional physician-patient relationship wherein a patient only sees one physician, usually a general practitioner, for all of his health concerns. The practice of medicine however has generally veered away from general practice and is currently a highly specialized profession. A doctor has even called it “superspecialization” wherein there are different types of specialist for one diseased organ.<sup>98</sup> To illustrate, he describes the situation as thus:

If one has a heart problem, he/she may need to see a general heart specialist called a general cardiologist, then another heart specialist called an electrophysiologist for one’s abnormal heart beat or arrhythmia, and another heart specialist called an invasive cardiologist for opening the clogs in one’s heart arteries. Problems in one’s bowels or liver will likewise send one to different types of liver specialists.<sup>99</sup>

Thus, it has become the norm that a patient engages the services of more than one doctor in attending to his needs as demanded by his condition, which at times are at a number sufficient to constitute a personal retinue of servants. In fact, some Filipinos have regarded the number of specialists and consultants one consults regularly as a status symbol.<sup>100</sup> This new reality of the practice of medicine poses a significant challenge to medical malpractice law as to whom liability must attach when there is injury suffered by the patient in the course of treatment due to negligence.

This is most relevant in the field of surgery where a patient is not only treated by a surgeon, but is, in addition, attended to by at least an anaesthesiologist to facilitate the administration of anaesthesia, and if applicable, another doctor whose specialty involves the part to be subjected to surgery. Generally, a member of a surgical team is liable only to the extent of his/her role in the surgery.<sup>101</sup> Thus, an anaesthesiologist was held liable due to negligence in the administration of

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<sup>97</sup> Lucas, 586 SCRA 173, 200, Apr. 21, 2009, *citing* Garcia-Rueda, 344 Phil. 323, Sep. 5, 1997.

<sup>98</sup> Rafael Castillo, M.D., *The PCP and the Filipino Internist*, Phil. Daily Inquirer, Feb. 12, 2009, *available at* <http://showbizandstyle.inquirer.net/lifestyle/lifestyle/view/20090213-189228/The-PCP-and-the-Filipino-internist>

<sup>99</sup> Rafael Castillo, M.D., *The PCP and the Filipino Internist*, Phil. Daily Inquirer, Feb. 12, 2009, *available at* <http://showbizandstyle.inquirer.net/lifestyle/lifestyle/view/20090213-189228/The-PCP-and-the-Filipino-internist> accessed on March 25, 2010.

<sup>100</sup> *Id.*

<sup>101</sup> See generally Ramos v. Court of Appeals (Decision); Ramos v. Court of Appeals (Resolution); Nogales v. Capitol Medical Center, G.R. No. 142625 (hereinafter “Nogales”), 511 SCRA 204, 230, December 19, 2006.

anaesthesia or in other procedures necessary or incidental to such procedure.<sup>102</sup> A resident physician was absolved from liability, notwithstanding the negligence of the OB-GYN when it was shown that her only role in a failed delivery that resulted in the death of the patient was to take a routine internal examination and that she was not present at the delivery room when the negligent act occurred.<sup>103</sup> In the same case, an anaesthesiologist was absolved from liability when it was found that he was not negligent in the administration of anaesthesia and that no liability can attach to him as his field of specialization did not cover obstetrics and gynecology.<sup>104</sup>

A question however, arises as to the liability of a surgeon who heads the surgical team in a botched procedure or perhaps a physician who is assisted through the course of treatment by numerous specialists who may, by their own careless acts, cause injury to a patient. This question finds primordial importance considering in situations such as these where it is almost impossible to impute or prove a finding of negligence with absolute precision. To answer, again in the absence of positive law to provide for the remedies in such situations, the Supreme Court has adopted appropriate doctrines from American jurisprudence to address this vacuum in our law. Thus, the doctrines of negligence *per se*, “Captain of the Ship” and “Borrowed Servant” have found application in Philippine medical malpractice suits.

### 1. Negligence Per Se

The doctrine of negligence *per se* was enunciated in *Teague v. Fernandez*<sup>105</sup> and affirmed in *Añonuevo v. Court of Appeals*<sup>106</sup> where the Supreme Court laid down the rule as follows:

The mere fact of violation of a statute is not sufficient basis for an inference that such violation was the proximate cause of the injury complained. However, if the very injury has happened which was intended to be prevented by the statute, it has been held that violation of the statute will be deemed to be proximate cause of the injury.

The generally accepted view is that violation of a statutory duty constitutes negligence, negligence as a matter of law, or, according to the decisions on the question, negligence *per se* for the reason that non-observance of what the legislature has prescribed as a suitable precaution is failure to observe that care which an ordinarily prudent man would observe,

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<sup>102</sup> See *Ramos v. Court of Appeals* (Decision); *Ramos v. Court of Appeals* (Resolution).

<sup>103</sup> *Nogales*, 511 SCRA 204, 230, December 19, 2006.

<sup>104</sup> *Id.* at 230-31.

<sup>105</sup> G.R. No. L-29745, 51 SCRA 181, Jun. 4, 1973.

<sup>106</sup> G.R. No. 130003, 441 SCRA 24, Oct. 20, 2004.

and, when the state regards certain acts as so liable to injure others as to justify their absolute prohibition, doing the forbidden act is a breach of duty with respect to those who may be injured thereby; or, as it has been otherwise expressed, when the standard of care is fixed by law, failure to conform to such standard is negligence, negligence *per se* or negligence in and of itself, in the absence of a legal excuse. According to this view it is immaterial, where a statute has been violated, whether the act or omission constituting such violation would have been regarded as negligence in the absence of any statute on the subject or whether there was, as a matter of fact, any reason to anticipate that injury would result from such violation.<sup>107</sup>

In essence, the doctrine of negligence *per se* creates a presumption of *prima facie* negligence against a tortfeasor for violation of a statutory duty. Under this doctrine, the violation of statutory duty is negligence.<sup>108</sup> Where the law imposes upon a person the duty to do something, his omission or non-performance will render him liable to whoever may be injured thereby.<sup>109</sup>

What prevents this doctrine from applying full force in the realm of medical malpractice is the fact that the statutory duty of a medical practitioner is not delineated in clear and absolute terms. Despite the relativity of the statutory duty of a medical practitioner, our Supreme Court has applied this doctrine in the cases of *Garcia, Jr., v. Salvador*<sup>110</sup> and *Professional Services, Inc. v. Agana*<sup>111</sup>.

In *Garcia, Jr.*, the Supreme Court upheld the liability of a clinical laboratory for releasing a false positive result for hepatitis after it committed a violation of sec. 2 of R.A. No. 4688<sup>112</sup> and DOH Administrative Order No. 49-B Series of 1988<sup>113</sup> which required clinical laboratories to be placed under the technical and administrative supervision of licensed physician duly qualified in laboratory medicine.

In *Professional Services Inc.*, the Supreme Court ruled in this wise:

(t)he act of “leaving of sponges or other foreign substances in the wound after the incision has been closed is at least *prima facie* negligence by the operating surgeon... To put it simply, such act is considered so inconsistent

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<sup>107</sup> *Id.* at 37-38 (citations omitted).

<sup>108</sup> *Garcia, Jr., v. Salvador* G.R. No. 168512, 518 SCRA 568, 575, March 20, 2007.

<sup>109</sup> *Id.*

<sup>110</sup> *Garcia, Jr., v. Salvador*, 518 SCRA at 575.

<sup>111</sup> *Professional Services Inc.*, 513 SCRA 478, Jan. 31, 2007.

<sup>112</sup> Also known as “The Clinical Laboratory Law”.

<sup>113</sup> Also known as the “Revised Rules and Regulations Governing the Registration, Operation and Maintenance of Clinical Laboratories in the Philippines”.

with due care as to raise an inference of negligence. There are even legions of authorities to the effect that such act is **negligence *per se***.<sup>114</sup>

The significance of such pronouncements on the efficacy of the negligence *per se* doctrine in the realm of medical malpractice suits cannot be overemphasized. It in effect qualified a particular act as a violation of a statutory duty of a medical practitioner tantamount to negligence *per se*. However, it bears stressing that the other elements of a medical malpractice action (proximate causation, expert medical testimony, and physician-patient relationship) must be satisfactorily shown to sustain a judgment of liability against a defendant. Just like the doctrine of *res ipsa loquitur*, the doctrine of negligence *per se* is merely a procedural convenience that recognizes *prima facie* negligence that furnishes a substitute for specific proof of negligence.<sup>115</sup>

## 2. Captain-of-the-Ship Doctrine

The “Captain-of-the-Ship” doctrine is defined as “the doctrine imposing liability on a surgeon for the actions of assistants who are under the surgeon’s control but who are employees of the hospital, not the surgeon.”<sup>116</sup> This doctrine was introduced in Philippine jurisprudence in *Ramos v. Court of Appeals*<sup>117</sup> where a surgeon was held liable after a woman who was scheduled for a standard *cholecystectomy*<sup>118</sup> suffered irreparable brain damage due to the negligence of the anaesthesiologist. The Court, speaking through Justice Kapunan defined the doctrine of “Captain-of-the-Ship” as follows:

Under this doctrine, the **surgeon is likened to a ship captain who must not only be responsible for the safety of the crew but also of the passengers of the vessel**. The head surgeon is made responsible for everything that goes wrong within the four corners of the operating room. It enunciates the liability of the surgeon not only for the wrongful acts of those who are under his physical control but also those wherein he has extension of control.<sup>119</sup> (Emphasis supplied)

Thus, the Supreme Court declared that a surgeon, as the so-called “captain of the ship”, has the responsibility to see to it that those under him perform their task in the proper manner<sup>120</sup> which necessarily transcends physical

<sup>114</sup> Professional Services Inc., 513 SCRA 478, 490, Jan. 31, 2007, *citing* Smith v. Zeagler, 157 So. 328 Fla. (1934), and cases cited.

<sup>115</sup> Batiquin, 327 Phil. 965, 977-978, Jul. 5, 1996.

<sup>116</sup> BLACK’S LAW DICTIONARY (8<sup>th</sup> ed. 2004).

<sup>117</sup> Professional Services Inc., 513 SCRA 478, Jan. 31, 2007.

<sup>118</sup> Cholecystectomy is the surgical excision of the gall bladder.

<sup>119</sup> Ramos v. Court of Appeals (Decision), at 1239.

<sup>120</sup> *Id.*

presence. In fact, the surgeon in that case, was precisely adjudged as negligent for being more than three hours late for the scheduled procedure. The doctrine was subsequently upheld by the Supreme Court in its Resolution<sup>121</sup> dated April 11, 2002 which denied the Motion for Reconsideration by the respondents which raised the argument that the trend in US jurisprudence is to reject the application of the “Captain-of-the-Ship” doctrine. The Supreme Court rejected this contention in this wise:

That there is a trend in American jurisprudence to do away with the Captain-of-the-Ship doctrine does not mean that this Court will *ipso facto* follow said trend. Due regard for the peculiar factual circumstances obtaining in this case justify the application of the Captain-of-the-Ship doctrine. From the facts on record it can be logically inferred that Dr. Hosaka exercised a certain degree of, at the very least, supervision over the procedure then being performed on Erlinda.

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While the professional services of Dr. Hosaka and Dr. Gutierrez were secured primarily for their performance of acts within their respective fields of expertise for the treatment of petitioner Erlinda, and that one does not exercise control over the other, they were certainly not completely independent of each other so as to absolve one from the negligent acts of the other physician.

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... It is quite apparent that they have a common responsibility to treat the patient, which responsibility necessitates that they call each other's attention to the condition of the patient while the other physician is performing the necessary medical procedures.<sup>122</sup>

The “Captain-of-the-Ship” doctrine was later cited in the cases of *Professional Services, Inc. v. Agana*<sup>123</sup> and *Cantre v. Go*<sup>124</sup> thus, solidifying its application Philippine medical malpractice law. In *Cantre*, the Supreme Court extended the application of the doctrine to include instruments within the exclusive control of the physician. It was held that surgeon's control over the assistants inside the operating room also translates to exclusive control over the instruments operated by the same assistants making any injury caused thereby, directly imputable on the surgeon.<sup>125</sup>

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<sup>121</sup> Ramos v. Court of Appeals (Resolution).

<sup>122</sup> *Id.* at 301-06.

<sup>123</sup> Professional Services Inc., 513 SCRA 478, Jan. 31, 2007.

<sup>124</sup> Cantre, 522 SCRA 547, 556, Apr. 27, 2007.

<sup>125</sup> *Id.* at 556-57.

### 3. Borrowed Servant Doctrine

Another doctrine that can find application is the “Borrowed Servant” doctrine which was cited in the Court of Appeals decision in *Nogales v. Capitol Medical Center*<sup>126</sup>. It is a doctrine in American medical malpractice law which imputes liability in a surgeon for the negligence committed by operating room personnel regardless of the identity of the employer of the latter. It has been defined as follows:

[O]nce the surgeon enters the operating room and takes charge of the proceedings, the acts or omissions of operating room personnel, and any negligence associated with such acts or omissions, are imputable to the surgeon. While the assisting physicians and nurses may be employed by the hospital, or engaged by the patient, they normally become the temporary servants or agents of the surgeon in charge while the operation is in progress, and liability may be imposed upon the surgeon for their negligent acts under the doctrine of *respondeat superior*.<sup>127</sup>

However, this doctrine has not been fully adopted in Philippine jurisprudence as the issue of its application by the Court of Appeals was not elevated to the Supreme Court for resolution.

## B. Hospitals

Generally speaking, a hospital is a place appropriated to the reception of persons sick or infirm in body or mind, to which people may resort for medical or surgical treatment.<sup>128</sup> Hospitals may be either public, such as those hospitals governed directly by the state, its officers, or those owned and operated by public corporations or government agencies<sup>129</sup>, or private which are those hospitals founded and maintained by private persons or a corporation.<sup>130</sup> Hospitals are generally incorporated bodies created by special law or charter or by incorporation under a general law.<sup>131</sup> It is not necessary, however, that hospitals be incorporated as they may be created by will or conveyance of charitably disposed persons, in which event, their powers and purposes are declared by way of trusts in the instrument of their creation.<sup>132</sup>

<sup>126</sup> CA-G.R. CV No. 45641, Feb. 6, 1998.

<sup>127</sup> *Id.* citing *Davis v. Glaze*, 182 Ga.App. 18, 354 S.E.2d 845, 849 (1987); *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687 (1944).

<sup>128</sup> 40 Am. Jur. 2d §2 at 851.

<sup>129</sup> 40 Am. Jur. 2d §20 at 863-864.

<sup>130</sup> 41 C.J.S. §1 at 332.

<sup>131</sup> 40 Am. Jur. 2d §4 at 852-853.

<sup>132</sup> *Id.* at 853.

As a general rule and in the absence of a statutory provision to the contrary, a hospital created and existing for purely governmental purposes and under the exclusive ownership and control of the state or a governmental subdivision is not liable for the negligence or misconduct of its employees.<sup>133</sup> This is because such hospitals are held to be governmental agencies brought into being to aid in the performance of the public duty of protecting society from the individual unfortunate or incompetent in mind, body, or morals.<sup>134</sup>

On the other hand, it has been opined by an eminent civilist that a private hospital cannot be held liable for the fault or negligence of a physician or surgeon in the treatment or operation of patients.<sup>135</sup> The foregoing view is grounded on the traditional notion that the professional status and the very nature of the physician's calling preclude him from being classed as an agent or employee of a hospital, whenever he acts in a professional capacity.<sup>136</sup> Physicians are said to be generally free to exercise their own skill and judgment in rendering medical services *sans* interference<sup>137</sup> owing to the highly developed and specialized nature of the practice of medicine.<sup>138</sup> Hence, when a doctor practices medicine in a hospital setting, the hospital and its employees are deemed to subserve him in his ministrations to the patient and his actions are of his own responsibility.<sup>139</sup> However, the traditional view has given way due to the modernization of the practice of medicine. Hospitals have become increasingly active in the supplying of and regulating medical care to patients and their role was no longer limited to furnishing room, food, facilities for treatment and operation, and attendants for its patients<sup>140</sup> and instead have become centers for healing and treatment due to the facilities available that would enable competent medical practitioners to fully care for the needs of their patients.

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<sup>133</sup> 41 C.J.S. §8 at 332 *citing* Olander v. Johnson, 258 Ill. App. 89.

<sup>134</sup> 40 Am. Jur. 2d §20 at 863 *citing* University of Louisville v. Metcalfe, 216 Ky 339, 287 SW 945, 49 ALR 375.

<sup>135</sup> V TOLENTINO 616.

<sup>136</sup> Professional Services, Inc., 513 SCRA 478, 497, Jan. 31, 2007, *citing* Arkansas M.R. Co. v. Pearson, 98 Ark. 442, 153 SW 595 (1911); Runyan v. Goodrum, 147 Ark. 281, 228 SW 397, 13 ALR 1403 (1921); Rosane v. Senger, 112 Colo. 363, 149 P. 2d 372 (superseded by statute on other grounds); Moon v. Mercy Hosp., 150 Col. 430, 373 P. 2d 944 (1962); Austin v. Litvak, 682 P. 2d 41, 50 ALR 4th 225 (1984); Western Ins. Co. v. Brochner, 682 P. 2d 1213 (1983); Rodriguez v. Denver, 702 P. 2d 1349 (1984).

<sup>137</sup> *Id.* at 498 *citing* Fridena v. Evans, 127 Ariz. 516, 522 P. 2d 463 (1980).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* *citing* Kitto v. Gilbert, 39 Colo App 374, 570 P. 2d 544 (1977).

<sup>140</sup> *Id.*

At present, hospitals of a strictly private character may be held or found liable to patients as well as to strangers for the negligence of their servants.<sup>141</sup> The mere fact that the compensation received is inadequate, or that no compensation is received, does not affect the application of the rule of liability.<sup>142</sup> American law recognizes that even hospitals have a duty to exercise that degree of care, skill, and diligence used by hospitals in the community, and required by the express or implied contract of undertaking.<sup>143</sup> In the Philippine jurisdiction, the following are the emerging trends which justify the imputation of liability on private hospitals.

*1. Vicarious Liability of an Employer under art. 2180 of the Civil Code*

The landmark case of *Ramos v. Court of Appeals*<sup>144</sup> erased all doubts as to whether there can be an employer-employee relationship between hospitals and doctors. The very words of the Supreme Court were of the following tenor:

In other words, private hospitals, hire, fire and exercise real control over their attending and visiting “consultant” staff. **While “consultants” are not, technically employees, ... the control exercised, the hiring, and the right to terminate consultants all fulfill the important hallmarks of an employer-employee relationship, with the exception of the payment of wages.** In assessing whether such a relationship in fact exists, the control test is determining. Accordingly, on the basis of the foregoing, we rule that for the purpose of allocating responsibility in medical negligence cases, an employer-employee relationship in effect exists between hospitals and their attending and visiting physicians.<sup>145</sup>

As such, a hospital can be held liable for the negligence of its doctor-employee based on art. 2180 of the Civil Code which considers a person accountable not only for his own acts but also for those of others based on the former’s responsibility under a relationship of *patria potestas*.<sup>146</sup> Article 2180 of the Civil Code which provides, *to wit*:

The obligation imposed by article 2176 is demandable not only for one’s own acts or omissions, but also for those of persons for whom one is responsible... Employers shall be liable for the damages caused by their

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<sup>141</sup> 40 Am. Jur. 2d §25 at 868  *citing* Gardner v. Newman Hospital, 58 Ga App 104, 198 SE 122 and other cases.

<sup>142</sup> Danville Community Hospital v. Thompson, 186 Va 746, 43 SE2d 882, 173 ALR 525.

<sup>143</sup> Garfield Memorial Hospital v. Marshall, 92 App DC 234, 204 F2d 721, 37 ALR2d 1270; Birmingham Baptist Hospital v. Branton, 218 Ala 464, 118 So 741; Thompson v. Methodist Hospital, 211 Tenn 650, 367 SW2d 134.

<sup>144</sup> Professional Services Inc., 513 SCRA 478, Jan. 31, 2007; *Ramos v. Court of Appeals* (Resolution), reconsideration denied.

<sup>145</sup> *Ramos v. Court of Appeals* (Decision), at 1240-41 (emphasis supplied, citations omitted).

<sup>146</sup> *Id.* at 1241  *citing* JOSE VITUG, COMPENDIUM OF CIVIL LAW AND JURISPRUDENCE 822 (1993).



employees... acting within the scope of their assigned tasks, even though the former are not engaged in any business or industry... The responsibility treated of in this article shall cease when the persons herein mentioned prove that they observed all the diligence of a good father of a family to prevent damage.

This is a codification of the American doctrine of *respondeat superior*<sup>147</sup> which holds an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency.<sup>148</sup> The vicarious liability of an employer is well-entrenched in our jurisdiction as it is founded on public policy that is: a deliberate allocation of risk of losses caused by torts of employees and that in holding an employer strictly liable, he is given the greatest incentive to be careful in the selection, instruction and supervision of his servants, and to take every precaution to see that the enterprise is conducted safely.<sup>149</sup> As such, the law mandates that liability for damages attach to employers for the negligent acts of their employees who are acting within the scope of their assigned tasks.

## 2. Vicarious Liability under the Doctrine of Apparent Authority

The doctrine of apparent authority, also known as “holding out theory” or doctrine of ostensible agency or agency by estoppel, is a means of imposing liability not based on contract but based on principle of estoppel.

The doctrine of apparent authority was introduced to medical malpractice actions in the case of *Nogales v. Capitol Medical Center*<sup>150</sup>. In that case the Supreme Court speaking through Justice Antonio T. Carpio, adopted the rationale of the Illinois Supreme Court in the case of *Gilbert v. Sycamore Municipal Hospital*<sup>151</sup> as follows:

[U]nder the doctrine of apparent authority a hospital can be held vicariously liable for the negligent acts of a physician providing care at the hospital, regardless of whether the physician is an independent contractor, unless the patient knows, or should have known, that the physician is an independent contractor. The elements of the action have been set out as follows:

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<sup>147</sup> Literally means “let the superior make answer”.

<sup>148</sup> BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>149</sup> *Victory Liner, Inc., v. Heirs of Malecдан*, G.R. No. 154278, December 27, 2002 citing WILLIAM L. PROSSER AND ROBERT E. KEETON, *THE LAW OF TORTS* 500-501 (1989). See also *Metro Manila Transit Corporation v. Court of Appeals*, 359 SCRA 18 (1998).

<sup>150</sup> *Nogales*, 511 SCRA 204, 230, December 19, 2006.

<sup>151</sup> 156 Ill.2d 511, 622 N.E.2d 788 (1993).

For a hospital to be liable under the doctrine of apparent authority, a plaintiff must show that: (1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; (2) where the acts of the agent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and (3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence.

The element of “holding out” on the part of the hospital does not require an express representation by the hospital that the person alleged to be negligent is an employee. Rather, the element is satisfied if the hospital holds itself out as a provider of emergency room care without informing the patient that the care is provided by independent contractors.

The element of justifiable reliance on the part of the plaintiff is satisfied if the plaintiff relies upon the hospital to provide complete emergency room care, rather than upon a specific physician.”

To apply the doctrine of apparent authority, the Court in *Nogales* laid down a two-factor test to determine the liability of a hospital through the acts of an independent contractor-physician. Those two factors are the representation factor<sup>152</sup> and the patient reliance<sup>153</sup> factor. This test is so made because the doctrine of apparent authority is a species of the doctrine of estoppel.<sup>154</sup> The doctrine of estoppel is embodied by art. 1431 of the Civil Code.<sup>155</sup> Estoppel rests on this rule: “[w]henever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it.”<sup>156</sup> The Court in applying estoppel in medical malpractice cases was guided by the ruling of the New York Supreme Court in *King v. Mitchell*<sup>157</sup> where it said:

As a general proposition, ‘[a] hospital may not be held for the acts of an anesthetist who was not an employee of the hospital, but one of a group of independent contractors.’ Vicarious liability for medical malpractice may be imposed, however, under an apparent, or ostensible, agency theory, ‘or, as it is sometimes called, agency by estoppel or by holding out.’

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<sup>152</sup> *Nogales*, 511 SCRA 204, 223, December 19, 2006.

<sup>153</sup> *Id.* at 226.

<sup>154</sup> *Id.* at 223.

<sup>155</sup> Art. 1431. Through estoppel an admission or representation is rendered conclusive upon the person making it, and cannot be denied or disproved as against the person relying thereon.

<sup>156</sup> *Nogales*, 511 SCRA 204, 223, December 19, 2006, citing *De Castro v. Ginete*, 137 Phil. 453 (1969) citing Sec. 3, par. a, Rule 131 of the Rules of Court.

<sup>157</sup> 31 A.D.3d 958, 819 N.Y.S.2d 169 (2006).

Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to act on behalf of the principal. Also, the third party must reasonably rely upon the appearance of authority created by the principal. Finally, the third party must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal.<sup>158</sup>

The doctrine of estoppel is essentially grounded on equity intended to avoid a clear case of injustice.<sup>159</sup> Its application to medical malpractice cases may be essentially said to grant relief to parties who have suffered injury but find no remedy in positive law. Thus, pursuant to the dictates of equity and justice, courts are allowed to grant relief to the parties as clearly justified by the circumstances. From case law, the essential elements of estoppel are: (1) lack of knowledge and of the means of knowledge of the truth as the facts in question; (2) reliance, in good faith, upon the conduct and statements of the party to be estopped; (3) action or inaction based thereon of such character as to change the position or status of the party claiming the estoppel, to his injury, detriment or prejudice.<sup>160</sup> With respect to the foregoing, it has been said that the most important element of equitable estoppel is that the party invoking the doctrine must have been misled to one's prejudice.<sup>161</sup>

Akin to the elements of estoppel, the first element of the test for the applicability of the doctrine of apparent authority is the representation factor. The representation focuses on the manifestations and acts of the hospital which would lead a reasonable person to believe that the individual allegedly negligent was an employee of the hospital<sup>162</sup>. Such representation may be either express or implied. It is important to note that the essence of this factor is not the manner by which the hospital acted but whether such act or acts if taken singly or collectively by the hospital or its agents can persuade a reasonable person to believe that that the individual allegedly negligent was an employee of the hospital.

In applying the said test, the Supreme Court concluded in *Nogales* that there was sufficient representation, albeit implied, on the part of the part of the respondents that the negligent physician, although an independent contractor, was

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<sup>158</sup> *Id.* (emphases and citations omitted)

<sup>159</sup> *Manila Memorial Park Cemetery, Inc., v. Court of Appeals*, G.R. No. 137122, 344 SCRA 769, 778-779, Nov. 15, 2000; *La Naval Drug Corp., v. Court of Appeals*, G.R. No. 103200, 236 SCRA 78, 87-88, Aug. 31, 1994.

<sup>160</sup> *Phil. Savings Bank v. Chowking Food Corp.*, G.R. No. 177526, 557 SCRA 318, Jul. 4, 2008, *citing* *Kalalo v. Luz*, G.R. No. 27782, 34 SCRA 337, 347, Jul. 31, 1970.

<sup>161</sup> *Id. citing* *Vega v. San Carlos Milling Co., Ltd.*, G.R. No. 21549, Oct. 22, 1924.

<sup>162</sup> *Nogales*, 511 SCRA 204, 223, December 19, 2006.

an employee of the hospital as far as the patient was concerned. The Court first pointed out the staff privileges<sup>163</sup> granted by the hospital in favour of the doctors in the form of extending the use of its medical facilities and the services of its medical staff in the botched operation. The Court then examined the Consent to Admission and Agreement and Consent to Operation which were required signed by a representative of the patient by the hospital as a precondition for admission and treatment thereat.<sup>164</sup> The said documents taken collectively gave a clear impression that the hospital exercised supervision and control over its staff and physicians and thus placing the actions of the former under its responsibility. The Supreme Court concretized its conclusion of representation by the hospital by looking at the referral of the patient's condition to the hospital's Head of Obstetrics and Gynecology Department, thereby giving an impression that the negligent physician was a member of the hospital's medical staff in collaboration with its other employed specialists.<sup>165</sup>

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<sup>163</sup> *Id.* at 224.

<sup>164</sup> The Consent to Admission and Agreement provided:

KNOW ALL MEN BY THESE PRESENTS:

I, Rogelio Nogales, of legal age, a resident of 1974 M. H. Del Pilar St., Malate Mla., being the father/mother/brother/sister/spouse/relative/ guardian/or person in custody of Ma. Corazon, and representing his/her family, of my own volition and free will, do consent and submit said Ma. Corazon to Dr. Oscar Estrada (hereinafter referred to as Physician) for cure, treatment, retreatment, or emergency measures, **that the Physician, personally or by and through the Capitol Medical Center and/or its staff, may use, adapt, or employ such means, forms or methods of cure, treatment, retreatment, or emergency measures as he may see best and most expedient; that Ma. Corazon and I will comply with any and all rules, regulations, directions, and instructions of the Physician, the Capitol Medical Center and/or its staff; and, that I will not hold liable or responsible and hereby waive and forever discharge and hold free the Physician, the Capitol Medical Center and/or its staff, from any and all claims of whatever kind of nature, arising from directly or indirectly, or by reason of said cure, treatment, or retreatment, or emergency measures or intervention of said physician, the Capitol Medical Center and/or its staff.** (emphasis retained)

While the Consent to Operation provided:

I, ROGELIO NOGALES, x x x, of my own volition and free will, do consent and submit said CORAZON NOGALES to Hysterectomy, by the **Surgical Staff and Anesthesiologists of Capitol Medical Center and/or whatever succeeding operations, treatment, or emergency measures as may be necessary and most expedient; and, that I will not hold liable or responsible and hereby waive and forever discharge and hold free the Surgeon, his assistants, anesthesiologists, the Capitol Medical Center and/or its staff, from any and all claims of whatever kind of nature, arising from directly or indirectly, or by reason of said operation or operations, treatment, or emergency measures, or intervention of the Surgeon, his assistants, anesthesiologists, the Capitol Medical Center and/or its staff.** (emphasis retained, *Id.* at 225-226)

<sup>165</sup> *Id.* at 226.

The second factor is the patient's reliance on the manifestation and acts of the hospital.<sup>166</sup> It is characterized as an inquiry on whether the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence.<sup>167</sup> This is akin to the second element of estoppel, which is: reliance, in good faith, upon the conduct and statements of the party to be estopped.<sup>168</sup> This factor has been emphasized as the most important element of equitable estoppel is that the party invoking the doctrine must have been misled to one's prejudice.<sup>169</sup> Thus, it is essential that there must be a showing that the party injured has relied on the employment relationship between the hospital and the negligent physician in seeking treatment from the negligent physician. It must be pointed out that the application of the doctrine must be predicated on a positive act and not on a negative one. Thus, mere lack of knowledge as to the absence of an employer-employee relationship will not suffice. The reputation of the hospital has been "uniformly recognized" by courts as an important factor in determining whether or not the factor of reliance is present.<sup>170</sup> However, if the patient approached a hospital intending to receive care from a specific physician while in the hospital the factor of reliance has been held to be absent.<sup>171</sup> Another way to show that a patient relied on a hospital can often be established by an inference from evidence that support personnel were supplied by the hospital to assist the patient's personal physician, and the patient had no reason to believe they were anything other than hospital employees.<sup>172</sup> In the case of *Nogales*, the Supreme Court held that the plaintiffs relied upon a perceived employment relationship between the erring doctor and the hospital, which was of considerable reputation, when they accepted the doctor's services.<sup>173</sup>

In the case of *Professional Services, Inc., v. Agana*, the Supreme Court again had the opportunity to apply the doctrine of apparent authority, this time to impute liability on Medical City for the negligent acts of one its surgeons following a botched surgical operation. Thus, where the hospital publicly displayed in its lobby the names and specializations of the physicians associated or accredited by it "is now estopped from passing all the blame to the physicians whose names it proudly paraded in the public directory leading the public to believe that it vouched for their skill and competence."<sup>174</sup> The Supreme Court further reiterated

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.* citing *Diggs v. Novant Health, Inc.*, 628 S.E.2d 851 (2006).

<sup>168</sup> *Phil. Savings Bank v. Chowking Food Corp.*, G.R. No. 177526, 557 SCRA 318, 329, Jul. 4, 2008.

<sup>169</sup> *Id.* at 328-329.

<sup>170</sup> 6 Am. Jur. Proof of Facts 3d §8.

<sup>171</sup> 6 Am. Jur. Proof of Facts 3d §8 citing *Pamperin v. Trinity Memorial Hospital*, 144 Wis 2d 188, 423 NW2d 848 (1988).

<sup>172</sup> 6 Am. Jur. Proof of Facts 3d 457 §8 citing *Williams v. St. Claire Medical Center* 657 SW2d 590, 596 (1983, Ky App).

<sup>173</sup> *Nogales*, 511 SCRA 204, 226-227, December 19, 2006.

<sup>174</sup> *Professional Services Inc.*, 513 SCRA 478, 502-503, Jan. 31, 2007.

that the doctrine of apparent authority finds appropriate application in adjudging hospitals as vicariously liable for the tortious acts of its physicians as corporate entities that own and operate such hospitals can only act through other individuals – agents or in this case, physicians.<sup>175</sup> The nature of the liability pursuant to the doctrine of apparent authority is solidary in conformity with art. 2194 of the Civil Code.

### 3. *The Doctrine of Corporate Negligence*

The doctrine of corporate negligence was introduced in the landmark case of *Professional Services, Inc., v. Agana*<sup>176</sup>. It involved no less than the medical giant, Medical City General Hospital, one of the country's biggest and most successful hospitals<sup>177</sup>. The case was a complaint for damages filed by the Enrique Agana and Natividad Agana (later substituted by her heirs) against Dr. Miguel Ampil and Dr. Juan Fuentes for the injuries suffered by Natividad when Dr. Ampil and Dr. Fuentes neglected to remove from her body, two gauzes which were used in a hysterectomy performed on April 11, 1984 at the Medical City General Hospital.

When the case was elevated Supreme Court, the Supreme Court in its Decision dated January 31, 2007 adjudged PSI as primarily and solidarily liable with Dr. Ampil<sup>178</sup> pursuant to the ruling in *Ramos v. Court of Appeals*<sup>179</sup> wherein hospitals and its doctors were declared to be bound by employer-employee relations, under the doctrine of apparent authority<sup>180</sup> and the doctrine of corporate negligence. The doctrine of corporate negligence is a doctrine rooted in American jurisprudence which finds its origin in the case of *Darlington v. Charleston Community Memorial Hospital*<sup>181</sup> where the Supreme Court of Illinois adjudged the hospital as negligent "in failing to have a sufficient number of trained nurses attending the patient; failing to require a consultation with or examination by members of the hospital staff; and failing to review the treatment rendered to the patient." Other jurisdictions followed suit and the doctrine of corporate negligence was extended to cover the negligence of allowing a physician known to be incompetent to practice at the hospital.<sup>182</sup>

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<sup>175</sup> *Id.* at 503.

<sup>176</sup> *Professional Services Inc.*, 513 SCRA 478, Jan. 31, 2007.

<sup>177</sup> See The Medical City "The Capital of Health" available at: <http://www.themedicalcity.com/Site/MedicalCity/Home.aspx?SS=818> (last visited on March 18, 2010).

<sup>178</sup> *Professional Services, Inc.*, 513 SCRA 478, 498-500, Jan. 31, 2007.

<sup>179</sup> *Ramos v. Court of Appeals* (Decision).

<sup>180</sup> *Professional Services, Inc.*, 513 SCRA 478, 500, Jan. 31, 2007.

<sup>181</sup> *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326, 211 N.E. 2d 253.

<sup>182</sup> *Corleto v. Hospital*, 138 N.J. Super. 302, 350 A. 2d 534 (Super. Ct. Law Div.1975); *Purcell v. Zimbelman*, 18 Ariz. App. 75,500 P. 2d 335 (1972); *Hospital Authority v. Joiner*, 229 Ga. 140,189 S.E. 2d 412 (1972).

The doctrine of corporate negligence developed as response to the problem of allocating hospital's liability for the negligent acts of health practitioners, absent facts to support the application of *respondeat superior* or apparent authority.<sup>183</sup> It is an offshoot from the development of modern hospitals in recognition of the fact that the duty of providing quality medical service is no longer the sole prerogative and responsibility of the physician. Hospitals now tend to organize a highly professional medical staff whose competence and performance need to be monitored by the hospitals commensurate with their inherent responsibility to provide quality medical care.<sup>184</sup>

Under the doctrine of corporate negligence, the hospital owes a direct duty to its patients to ensure their safety and well-being while at the hospital.<sup>185</sup> In Philippine jurisdiction, this has been translated as the "duty to exercise reasonable care to protect from harm all patients admitted into its facility for medical treatment."<sup>186</sup> It has been also defined as a direct theory of liability against a hospital, which contemplates some form of systemic negligence by hospital, not simply a vicarious theory of liability based on the negligence of its employees.<sup>187</sup> The doctrine of corporate negligence has been described as "broader than the concept of negligent credentialing in that corporate negligence includes acts of direct hospital negligence, such as negligence in supervising patient care or in failing to enforce hospital guidelines regarding patient care."<sup>188</sup>

This doctrine has led to the recognition of additional duties on hospitals. Among these duties include: the use of reasonable care in the maintenance of safe and adequate facilities and equipment<sup>189</sup>; the selection and retention of competent physicians; the overseeing or supervision of all persons who practice medicine within its walls<sup>190</sup>; the formulation, adoption and enforcement of adequate rules and policies that ensure quality care for its patients<sup>191</sup>; to make a reasonable effort to monitor and oversee the treatment prescribed and administered by the physicians practicing in its premises.<sup>192</sup> Breach of any of the foregoing duties will justify a finding of direct liability against the hospital based on the doctrine of

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<sup>183</sup> Professional Services, Inc., 513 SCRA 478, 504, Jan. 31, 2007.

<sup>184</sup> *Id.* citing Purcell v. Zimbelman, 18 Ariz. App. 75, 500 P2d 335 (1972).

<sup>185</sup> 40A Am. Jur. 2d §26 citing Stroud v. Abington Memorial Hospital, 546 F. Supp. 2d 238 (E.D. Pa. 2008).

<sup>186</sup> Professional Services, Inc., 513 SCRA 478, 505, Jan. 31, 2007.

<sup>187</sup> 40A Am. Jur. §26 citing Stroud v. Abington Memorial Hospital, 546 F. Supp. 2d 238 (E.D. Pa. 2008); Pastore v. Samson, 900 A.2d 1067 (R.I. 2006).

<sup>188</sup> 40A Am. Jur. 2d §26 citing Larson v. Wasemiller, 738 N.W.2d 300 (Minn. 2007).

<sup>189</sup> Professional Services, Inc., 513 SCRA 478, 504-505, Jan. 31, 2007, citing Welsh v. Bulger, 548 Pa. 504, 698 A.2d 581 (1997).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 505 citing Bost v. Riley 262 S.E. 2d 391, cert denied 300 NC 194, 269 S.E. 2d 621 (1980).

corporate negligence. The defense of lack of knowledge or notice of certain facts to the hospital is not a defense. An operator of the hospital has actual or constructive knowledge of the procedures carried out within its premises.<sup>193</sup> Lastly, the nature of liability under the doctrine of corporate negligence is direct<sup>194</sup> as corporate negligence is in itself an actionable act for which the hospital can be sued under our law on quasi-delicts.

However, in a Resolution<sup>195</sup> dated February 2, 2010, the Supreme Court resolved a second Motion for Reconsideration filed by PSI which sustained the liability is not under the principle of *respondeat superior* for lack of evidence of an employment relationship with Dr. Ampil but under the principle of ostensible agency for the negligence of Dr. Ampil and, *pro hac vice*, under the principle of corporate negligence for its failure to perform its duties as a hospital.<sup>196</sup>

The ramifications of the deviation in legal hermeneutics by the Supreme Court cannot be overemphasized. By conveniently inserting the phrase “*pro hac vice*” the entire ruling of the Court in the case of *Professional Services, Inc., v. Agana* is breathed a new life of its own. The gravamen of the ruling by the Supreme Court is summarized by Justice Renato Corona own words, *to wit*:

All this notwithstanding, we make it clear that PSI’s hospital liability based on ostensible agency and corporate negligence applies only to this case, *pro hac vice*. **It is not intended to set a precedent and should not serve as a basis to hold hospitals liable for every form of negligence of their doctors-consultants under any and all circumstances.** The ruling is unique to this case, for the liability of PSI arose from an implied agency with Dr. Ampil and an admitted corporate duty to Natividad.<sup>197</sup> (Emphasis supplied)

Citing “circumstances peculiar to this case,” the Supreme Court in effect attempted to delimit the applicability of the doctrine of corporate negligence for the case of PSI and PSI alone. *Pro hac vice* is a Latin term meaning “for this one particular occasion.”<sup>198</sup> Thus, a ruling expressly qualified as *pro hac vice* cannot be relied upon as a precedent to govern other cases.<sup>199</sup>

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<sup>193</sup> *Id.* at 506.

<sup>194</sup> *Id.* citing *Fridena v. Evans*, 127 Ariz. 516, 622 P. 2d 463 (1980). See also 40A Am. Jur. 2d §26.

<sup>195</sup> *Professional Services, Inc. v. Agana*, G.R. No. 126297, Feb. 2, 2010 (hereinafter *Professional Services, Inc. v. Agana* (*En Banc* Resolution)).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* (Emphasis supplied).

<sup>198</sup> BLACK’S LAW DICTIONARY (6<sup>th</sup> Ed. 1990).

<sup>199</sup> *Partido ng Manggagawa and Butil Farmers Party v. Commission on Elections*, G.R. No. 164702, 484 SCRA 671, March 15, 2006.



Notwithstanding the ruling by the Supreme Court *en banc* imputing the liability of PSI on the basis of the doctrine of corporate negligence *pro hac vice*, the reservation by the Court's ruling as *pro hac vice* must not and cannot be read to mean that the doctrine of corporate negligence is no longer good law. The doctrine of corporate negligence is based on the duty imposed on hospitals "to exercise reasonable care to protect from harm all patients admitted into its facility for medical treatment."<sup>200</sup> The doctrine of corporate negligence does not impose any additional duty on hospitals. It merely recognizes the inherent responsibility of hospitals to provide quality medical care.<sup>201</sup> Such inherent responsibility partakes of a positive duty imposed on a hospital, albeit a juridical entity, to exercise such requisite level of diligence and care in the conduct of its business in providing quality medical care. As was explained at length earlier, it is the very breach of that duty that the law considers as an actionable malpractice for which liability may be imposed on the hospital consistent with our law quasi-delicts.

In fact, it is the very Supreme Court *en banc* that recognized the self-imposed corporate duty of hospitals to its patients:

Moreover, regardless of its relationship with the doctor, the hospital may be held directly liable to the patient for its own negligence or failure to follow established standard of conduct to which it should conform as a corporation.<sup>202</sup>

Such self-imposed standards by hospitals are in fact common knowledge among the people for being hallmark of premier hospitals that serve as its badge of honor to assure prospective patients of the quality of services they offer and the excellence of its specialists. Take for example the following Mission Statement of one of the country's top hospitals:

To deliver excellent healthcare through caring and highly competent professionals, utilizing world-class technology and research. This we shall do in the most financially viable way without losing sight of our primary purpose - to be of service to God and mankind.<sup>203</sup>

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<sup>200</sup> Professional Services, Inc., 513 SCRA 478, 505, Jan. 31, 2007.

<sup>201</sup> *Id.* at 504 citing Purcell v. Zimbelman, 18 Ariz. App. 75, 500 P2d 335 (1972).

<sup>202</sup> Professional Services, Inc. v. Agana, (*En Banc* Resolution), citing PEDRO SOLIS, MEDICAL JURISPRUDENCE 321 (1988) and U.S. district and appellate court cases. See also Darling v. Charleston Community Memorial Hospital, 14 A.L.R. 3D 860 (Ill. Sept. 29, 1965)

<sup>203</sup> St. Luke's Medical Center Mission Statement available at: [http://www.stluke.com.ph/home.php/sb/Vision\\_Mission\\_Values](http://www.stluke.com.ph/home.php/sb/Vision_Mission_Values) (last visited March 19, 2010). See also the Capitol Medical Center, Inc. Mission Statement available at: <http://www.capitolmedical.org/vision.htm> accessed on March 19, 2010 and Makati Medical Center, "Who We Are" available at <http://www.makatimed.net.ph/default/who-we-are> (last visited March 19, 2010).

Such mission statements evince an inherent commitment and duty undertaken by hospitals toward quality and excellent health care. They recognize the standard of high quality and excellence to which the name of their institution has been equated. However, the very reputation of being an international hospital renowned for its high quality of healthcare, superior facilities and excellent physicians and surgeons carries with it the concomitant duty to live it up to those standards that these institutions have set for themselves in their continuous quest to emerge as the premier provider of healthcare in the country. The existence of such duty thus shall carry along with it the consequences wrought by a breach of that duty as such breach is rendered actionable by our law on torts, particularly the Civil Code provisions on quasi-delicts and our jurisprudence on medical malpractice.

### C. Health Maintenance Organization

Next to hospitals and doctors, health maintenance organizations (HMOs) are the next most important health institutions relied upon by the people. In fact, no less than the Supreme Court has enunciated the importance of the HMO system in *Philippine Health Care Providers, Inc., v. Commissioner of Internal Revenue*<sup>204</sup> in the following tenor:

HMOs arrange, organize and manage health care treatment in the furtherance of the goal of providing a more efficient and inexpensive health care system made possible by quantity purchasing of services and economies of scale. They offer advantages over the pay-for-service system (wherein individuals are charged a fee each time they receive medical services), including the ability to control costs. They protect their members from exposure to the high cost of hospitalization and other medical expenses brought about by a fluctuating economy.

An HMO is defined by Section 4(o)(3) of Republic Act No. 7875<sup>205</sup> as an “entity that provides, offers, or arranges for coverage of designated health services needed by plan members for a fixed prepaid premium.” Under Section 4(o) thereof, an HMO is classified as a health care provider. Like doctors and hospitals, in order to hold health care providers liable for medical malpractice, the same elements need to be proven: duty, breach, injury and proximate causation. The test of the existence negligence for health care providers has been defined in the case of *Garcia, Jr., v. Salvador* as: “[d]id the health care provider either fail to do something which a reasonably prudent health care provider would have done, or that he or she did something that a reasonably prudent health care provider would

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<sup>204</sup> G.R. No. 167330, 600 SCRA 413, Sept. 18, 2009.

<sup>205</sup> Also known as “The National Health Insurance Act of 1995”.

not have done; and that failure or action caused injury to the patient; if yes then he is guilty of negligence".<sup>206</sup>

As can be surmised from the from the words of the Supreme Court in *Philippine Health Care Providers, Inc., v. Commissioner of Internal Revenue*, HMOs are clearly businesses impressed with great public interest. Considering the importance of HMOs and the immense amount public interest involved it would be to further public interest that the quality of services provided by HMOs be kept optimum by imposing upon them the duties that have made the medical profession and hospitals highly professional and competent institutions.

In this regard, it is modestly proposed that the doctrines of corporate negligence and apparent authority that were adopted in *Professional* can be extended to cover HMOs considering that HMOs, like hospitals, have an inherent responsibility to provide quality medical care<sup>207</sup>. Thus, in an American case<sup>208</sup>, it was held that the doctrine of institutional negligence may be applied to health maintenance organizations (HMOs), whereby the HMO must act as a "reasonably careful" HMO under the circumstances. In another American case<sup>209</sup>, a health maintenance organization is vicariously liable for the negligence of its consulting physician, where the physician is brought in as a consultant by the HMO physician, the HMO has some ability to control the consulting physician's behavior since that physician answers to the patient's primary care-taker, an HMO doctor, and where it appears that the physician's actions in performing health care fall within the HMO's regular business. Likewise, HMOs are corporate entities that can only act through its agents and their operation relies heavily on their respective its accredited hospitals, clinics and physicians whereby its members-subscribers can avail of appropriate health care. Such accreditation of hospitals, clinics and physicians can be tantamount to estoppel that will prevent HMOs from denying liability for the tortious acts committed by the same institutions or persons it paraded to the public as associated with or accredited by them.

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<sup>206</sup> Garcia, Jr., v. Salvador G.R. No. 168512, 518 SCRA 568, 574-575, March 20, 2007, citing Garcia-Rueda, 344 Phil. 323, 331, Sep. 5, 1997.

<sup>207</sup> See generally Rep. Act No. 7875, §37.

<sup>208</sup> Jones v. Chicago HMO Ltd. of Illinois, 191 Ill. 2d 278, 246 Ill. Dec. 654, 730 N.E.2d 1119 (2000).

<sup>209</sup> Schleier v. Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc., 876 F.2d 174 (D.C. Cir. 1989).

## V.      ENFORCING LIABILITY FOR MEDICAL MALPRACTICE

From the foregoing, it is reasonable to conclude that the law provides for different remedies available to an injured party as the breach of duty on the part of the medical practitioner may give rise to administrative, civil and criminal liability depending on the act or omission that comprises the act of malpractice.<sup>210</sup> Thus, an action for medical malpractice may be brought as an administrative, civil or criminal action depending on the nature of the act as well as attendant facts and circumstances.

### A. How is an actionable malpractice enforced: Criminal Liability

#### 1. *Under the Revised Penal Code*

The breach of duty of a physician may also constitute a criminal act punishable under the Revised Penal Code (RPC) and other special penal laws provided all of the elements of the felony or offense are present in the act. Generally, a breach of a physician's duty is committed through negligence on the part of the medical practitioner which often results in either death or injury of the patient. Such negligence is punished as a quasi-offense under the Revised Penal Code.<sup>211</sup> Further, provisions of the RPC penalizing abortion<sup>212</sup>, giving assistance to suicide<sup>213</sup> and administering injurious substances and beverages<sup>214</sup> find relevant application to doctors and other medical practitioners.

#### 2. *Illegal Practice of Medicine under the Medical Act*

A unique facet of criminal liability as a means to sue on an actionable malpractice is section 28 of the Medical Act which penalizes individuals engaged in the illegal practice of medicine either with imprisonment of not less than one (1) year to no more than five (5) years or by a fine of not less than one thousand pesos with subsidiary imprisonment in case of insolvency. While the "illegal practice of medicine" is not defined by the Medical Act of 1959, one can elucidate its definition from the law as engaging in any act or acts that constitute the practice of medicine under section 10 of the Medical Act of 1959 and if he:

1. Has not attained the age of twenty-one (21) at the time the acts constituting the practice of medicine were committed;
2. Has not passed the corresponding Board Examination; or

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<sup>210</sup> See Perez, *supra* note 7 at 692.

<sup>211</sup> REV. PENAL CODE, art. 365. See Carillo v. People, *infra* note 80.

<sup>212</sup> Art. 259 in relation to art. 256.

<sup>213</sup> Art. 253.

<sup>214</sup> Art. 264.

3. Is not a holder of a valid Certificate of Registration duly issued to him by the Board of Examiners.

Section 10 however, is to be read in connection with section 11 of the Medical Act which enumerates the exemptions from the definition from the practice of medicine.

Philippine jurisprudence is replete with examples of what constitutes the illegal practice of medicine. As early as 1908, in the case of *United States v. Divino*,<sup>215</sup> the Supreme Court recognized the criminal liability of a person who attempts to treat a person of ill despite lacking the requisite medical training to practice medicine under the law. In that case, the Court convicted the accused of imprudence as defined under the Old Penal Code for wrapping a piece of clothing which had been soaked in petroleum around the victim's feet and then lighted the clothing for an hour and a half, thereby causing severe injuries to the latter in an attempt to cure ulcers in her feet. The Court recognized however, as a mitigating factor, that the accused had no intention to cause an evil but rather to remedy the victim's ailment.

*People v. Buenviaje*,<sup>216</sup> involved a woman chiropractor who maintained an office in Manila and represented herself as a doctor by treating the head and body of her assistant for the purpose of curing him of the ailments, diseases, pains and physical defects from which he pretended to suffer. She offered and advertised her services as a physician by means of cards, letterheads, and signs which she exposed on the door of her office as well as in newspapers which were published and circulated throughout the City of Manila. In her advertisements and related publication she prefixed to her name the letters 'Dra.' for the purpose of causing the public to believe that she was a doctor. She demurred to the Information claiming that it charges her with more than one (1) offense and that to require chiropractors to take the medical examinations for the practice of medicine amounts to a prohibition of their practice which is unconstitutional. The Supreme Court brushed aside such arguments and found her of violating the Medical Law as penalized by section 2678 of the Old Administrative Code, as follows:

The offense here penalized is "violation of the Medical Law." The statute makes no distinction between illegal practice of medicine and illegally advertising oneself as a doctor. Both are in violation of the Medical Law and carry the same penalty. They are merely different ways or means of committing the same offense and both of these means are closely related to each other and usually employed together.

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<sup>215</sup> 12 Phil. 175 (1908).

<sup>216</sup> 47 Phil. 536 (1925).

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Under the second assignment of error the appellant argues in substance that chiropractic has nothing to do with medicine and that the practice of that profession can therefore not be regarded as practice of medicine. There is no merit whatever in this contention. Assuming without conceding that chiropractic does not fall within the term "practice of medicine" in its ordinary acceptance, we have the statutory definition contained in section 770 of the Administrative Code and which clearly includes the manipulations employed in chiropractic. The statutory definition necessarily prevails over the ordinary one.

Under the same assignment of error the defendant also argues that the examination prescribed by section 776 of the Administrative Code for admission to the practice of medicine, embraces subjects which have no connection with chiropractic and that to require chiropractors to take that examination is unreasonable and, in effect amounts to prohibition of the practice of their profession and therefore violates the constitutional principle that all men have the right to life, liberty and the pursuit of happiness and are entitled to the equal protection of the law.

There is very little force in this argument. The subjects in which an examination is required by section 778 of the Administrative Code, as amended by Act No. 3111, relate to matters of which a thorough knowledge seems necessary for the proper diagnosis of diseases of the human body and it is within the police power of the State to require that persons who devote themselves to the curing of human ills should possess such knowledge.<sup>217</sup>

In *People v. Vda. De Golez*,<sup>218</sup> the Supreme Court, albeit by way of *obiter dictum*<sup>219</sup>, pronounced that a person who treats another despite the fact that he or she does not possess the necessary technical knowledge or skill to do so and causes the latter's death may be convicted of homicide through reckless imprudence, ratiocinating, as follows:

We agree with appellant that the order of dismissal is erroneous, in that the crime of illegal practice of medicine is a statutory offense wherein criminal intent is taken for granted, so that a person may be convicted thereof irrespective of his intention and in spite of his having acted in good faith and without malice; i.e., even if he was not motivated by an evil desire to injure or hurt another, but by an honest desire to cure or alleviate the pain of a patient. In fact, as defined by Section 2678 of the Revised

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<sup>217</sup> *Id.*, at 539-541.

<sup>218</sup> 108 Phil. 855 (1960).

<sup>219</sup> Despite finding the order of dismissal by the trial court to be erroneous, the same was upheld as its reversal would violate the constitutional right of the accused against double jeopardy.

Administrative Code (the law then in force), the offense consists in the mere act of practicing medicine in violation of the Medical Law, even if no injury to another, much less death, results from such malpractice. When, therefore, the patient dies, the illegal practitioner should be equally responsible for the death of his patient, an offense independent of and distinct from the illegal practice of medicine.<sup>220</sup>

In *People v. Ventura*,<sup>221</sup> accused who claims himself to be a “naturopathic physician” and routinely heals patients without the use of drugs and medicines was likewise convicted for treating human ailments without the license to practice medicine under the Medical Law. The Court rejected his claim that countless people including medical practitioners, members of Congress, provincial governors, city mayors and municipal board members and even the Chairman of the Board of Medical Examiners impliedly assented to his practice without the requisite license as they all solicited his services for the reason that:

We cannot allow the bargaining away of public health and safety for the semblance of benefit to a few government officials, people or even municipalities.

Similarly, there is no such thing as implied license to practice drugless healing by the mere fact that the Chairman of the Board of Medical Examiners had permitted appellant to serve free in the Central Luzon Sanitarium in Tala, Caloocan, Rizal, or that countless people persisted in engaging his services. For one thing, these people might have contracted his services on the mistaken notion that he was duly licensed to practice his profession; for another, a repetition of illegal acts can never make them legal.<sup>222</sup>

Furthermore, the Supreme Court rejected his claim of acquittal based on the Medical Act recognizing physiotherapy as a science and that he does so upon the recommendation of duly registered physicians. The Court found strong evidence to the effect that the accused alone diagnoses his patients' ailments and applies the remedies therefor without written order or prescription by a registered physician.

*People v. Carmen*<sup>223</sup> is a case of recent vintage, which involved the prosecution of members of a cult accused of killing a boy whom they believed, was possessed by a “bad spirit”. In attempting to exorcise the spirit, the accused repeatedly submerged the boy head-first in a drum of water followed by forcing him to drink a gallon of water while tied to a bench and thereafter repeatedly

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<sup>220</sup> *People v. Vda. De Golez*, 108 Phil. at 858.

<sup>221</sup> 4 SCRA 208 (1962).

<sup>222</sup> *Id.*, at 214.

<sup>223</sup> G.R. No. 137268, 355 SCRA 267, Mar. 26, 2001.

pounding the boy's head against the said bench. The boy died from the severe trauma suffered from the attempted exorcism. The accused were convicted by the trial court for murder and was accordingly sentenced with the penalty of *reclusion perpetua*. On appeal, the Supreme Court modified the verdict to reckless imprudence resulting to homicide. In ruling that the lack of medical skill amounts to reckless imprudence, the Court said:

Article 365 of the Revised Penal Code, as amended, states that reckless imprudence consists in voluntarily, but without malice, doing or failing to do an act from which material damage results by reason of inexcusable lack of precaution on the part of the person performing such act. Compared to intentional felonies, such as homicide or murder, what takes the place of the element of malice or intention to commit a wrong or evil is the failure of the offender to take precautions due to lack of skill taking into account his employment, or occupation, degree of intelligence, physical condition, and other circumstances regarding persons, time, and place.

The elements of reckless imprudence are apparent in the acts done by accused-appellants which, because of their lack of medical skill in treating the victim of his alleged ailment, resulted in the latter's death. As already stated, accused-appellants, none of whom is a medical practitioner, belong to a religious group, known as the Missionaries of Our Lady of Fatima, which is engaged in faith healing.<sup>224</sup>

Citing *United States v. Divino*,<sup>225</sup> the Supreme Court justified such ruling on the ground that the accused had no intent cause evil against the boy as they merely attempted to treat him of his ailment notwithstanding their lack of medical training. The Supreme Court further drew parallel with the case *People v. Vda. De Golez*,<sup>226</sup> where the penalty imposed was likewise homicide through reckless imprudence.

It is clear from the foregoing that criminal prosecution will lie against those who violate the law governing the practice of medicine or if negligence is of a gross character as to constitute criminal negligence. Notwithstanding the repeal of the Medical Law in 1959, the Medical Act likewise prohibits under the pain of fine or imprisonment, the "illegal practice of medicine" and such conviction will be sustained regardless of whether or not the illegal practice was done for a fee.<sup>227</sup> Thus, the jurisprudential value of the foregoing precedents remains. As was said in *People v. Ventura*, under the immutable police power of the State, it may prescribe

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<sup>224</sup> *Id.*, at 279.

<sup>225</sup> 12 Phil. 175 (1908).

<sup>226</sup> 108 Phil. 855 (1960).

<sup>227</sup> *People v. Hatani*, 227 SCRA 497 (1993).



such regulations as in its judgment will secure or tend to secure the general welfare of the people and to protect them against the consequences of ignorance and incapacity as well as of deception and fraud and logically, to ensure compliance with such laws the State may impose penalties as may be commensurate to the fulfilment of such goal subject to the safeguards under the Constitution.<sup>228</sup>

## B. How is an actionable malpractice enforced: Civil Liability

The third and most common remedy available is a civil action for damages based on a quasi-delict. The legal basis therefore is article 2176 of the Civil Code which provides, *to wit*:

Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called a quasi-delict and is governed by the provisions of this Chapter.

Based on the foregoing provision, the elements for an action based on quasi-delict are: (a) damages suffered by the plaintiff, (b) fault or negligence of the defendant, and (c) the connection of cause and effect between the fault or negligence of the defendant and the damages inflicted on the plaintiff.<sup>229</sup> However, for medical malpractice, the Supreme Court has enunciated the following four essential elements that constitute an action for medical malpractice namely: duty, breach, injury, and proximate causation.<sup>230</sup> The concurrence of the foregoing elements is essential to justify a recovery for damages based on the negligent act.

As was mentioned earlier, there is currently no law that governs medical malpractice. Furthermore, there is a dearth of cases featuring this novel concept of law.<sup>231</sup> Noteworthy however is the fact that the Supreme Court has taken the opportunity of laying down the doctrine in medical malpractice cases in the several controversies brought before its attention by expanding the scope of our law on quasi-delicts as a means to secure relief in cases of actionable malpractice. From

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<sup>228</sup> 4 SCRA 213 (1962).

<sup>229</sup> Phil. Bank of Commerce *v.* Court of Appeals, G.R. No. 97626, 269 SCRA 695, 702-703, March 14, 1997; FGU Insurance Corp., *v.* Court of Appeals, G.R. No. 118889, 287 SCRA 718, 720-721, March 23, 1998.

<sup>230</sup> Flores, 571 SCRA 83, 91, Nov. 14, 2008; Reyes, 396 Phil. 87, 96, Oct. 3, 2000; Garcia-Rueda, 344 Phil. 323, 332, Sep. 5, 1997.

<sup>231</sup> The earliest authority for damages based on medical malpractice was the case of *Chan Luyay v. St. Luke's Hospital* (10 C.A. Reports 415 [1966]) wherein the Court of Appeals, in absolving the physician sued, held that the negligence of the physician must be the proximate cause of the injury. *Chan Luyay* was cited as authority in the cases of *Cruz* (346 Phil. 872, 876, Nov. 18, 1997), and *Lucas* (586 SCRA 173, 207, Apr. 21, 2009). As of the writing of this paper, there have been only thirteen (13) cases that reached the Supreme Court involving issues of medical negligence.

these cases, it is observed that the Supreme Court has ruled with uniformity that a physician-patient relationship<sup>232</sup> and expert medical testimonial evidence<sup>233</sup> are likewise elements of a suit for medical malpractice. In cases of medical negligence, intent is immaterial because where negligence exists and is proven, it automatically gives the injured a right to reparation for the damage caused, provided that all other elements of a case for medical malpractice are met.<sup>234</sup>

### **C. How is an actionable malpractice enforced: Administrative Liability**

A state, in the exercise of its police power, has the power to regulate the practice medicine within reasonable and constitutional limitations.<sup>235</sup> The license to practice medicine is a privilege or franchise granted by the government.<sup>236</sup> As such, it may be validly revoked by the government pursuant to such grounds as may be provided by law.

The administrative grounds for reprimand, suspension or revocation of a physician's certificate of registration are provided for by section 24 of the Medical Act. The most applicable provision of the said section is paragraph 5 thereof which provides that: "gross negligence, ignorance, or incompetence in the practice of his or her profession resulting in an injury or death of the patient" is a ground for disciplinary sanction against a physician or surgeon. Likewise applicable is paragraph 12 thereof which provides that a violation of any provision of the Code of Ethics for Physicians as approved by the Philippine Medical Association may likewise be penalized with reprimand, suspension, or revocation a physician's certificate of registration. Furthermore, the Code of Ethics of the Medical Profession provides for the different duties of physicians to their patients, to the community, to their colleagues, to the profession and to other professionals. A violation of these duties constitutes unethical and unprofessional conduct which may subject an erring member of the medical profession to either a reprimand, suspension of, or revocation of the license to practice medicine.<sup>237</sup>

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<sup>232</sup> See Cayao-Lasam, 574 SCRA 439, 454, Dec. 18, 2008; Reyes, 396 Phil. 87, 96, Oct. 3, 2000; and Garcia-Rueda, 344 Phil. 323, 332, Sep. 5, 1997.

<sup>233</sup> See Lucas, 586 SCRA 173, 207, Apr. 21, 2009; Flores, 571 SCRA 83, 92, Nov. 14, 2008; Reyes, 396 Phil. 87, 96, Oct. 3, 2000; Garcia-Rueda, 344 Phil. 323, 332, Sep. 5, 1997; Cruz, 346 Phil. 872, 884-885, Nov. 18, 1997.

<sup>234</sup> Cantre, 522 SCRA 547, 556, Apr. 27, 2007.

<sup>235</sup> 61 Am Jur 2d §9 at 141.

<sup>236</sup> Professional Regulation Comm., v. De Guzman, G.R. No. 144681, 432 SCRA 505, 523, Jun. 21, 2004.

<sup>237</sup> CODE OF ETHICS OF THE MEDICAL PROFESSION, art. VII, §2.

An aggrieved party may sue an erring physician on the ground of administrative liability before the Board of Medicine of the Professional Regulatory Commission (PRC). The PRC is an administrative agency created by Presidential Decree No. 223 which is vested by law with a blanket authority for the supervision, regulation and licensing of the different professions.<sup>238</sup> The administrative regulation of the medical profession is exercised primarily by the Board of Medicine subject to the appellate review of the PRC.<sup>239</sup> Likewise, other erring or negligent medical practitioners, such as but not limited to nurses, radiologists and laboratory technicians and the like, may be held administratively liable in an action for the suspension or revocation of their license to practice, before the appropriate professional Board.

It is interesting to note that in *Pascual v. Board of Medical Examiners*<sup>240</sup>, the Supreme Court held that in an administrative hearing against a medical practitioner for alleged malpractice, the Board of Medical Examiners cannot, consistently with the self-incrimination clause, compel the person proceeded against to take the witness stand without his consent.

## VI. DEFENSES AVAILABLE

### A. Presumption of Due Diligence Performed

Doctors are protected by a special rule of law. They are not guarantors of care. They are not insurers against mishaps or unusual consequences.<sup>241</sup> In addition, a physician is presumed to have conformed to the standard of care and diligence required of the circumstances.<sup>242</sup> He is also presumed to have the necessary knowledge to practice his profession.<sup>243</sup> When the qualifications of a physician are admitted, there is an inevitable presumption that in proper cases, he takes the necessary precaution and employs the best of his knowledge and skill in attending to his patients.<sup>244</sup> These presumptions arise from the judicial recognition that "the practice of medicine is already conditioned upon the highest degree of diligence."<sup>245</sup> According to the Supreme Court there exist sufficient safeguards to

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<sup>238</sup> Pres. Decree No. 223 (1973), §5.

<sup>239</sup> §6.

<sup>240</sup> G.R. No. L-25018, 28 SCRA 344, May 26, 1969.

<sup>241</sup> Cayao-Lasam, 574 SCRA 439, 461, Dec. 18, 2008; Cruz, 346 Phil. 872, 875-876, Nov. 18, 1997.

<sup>242</sup> See Lucas, 586 SCRA 173, 200, Apr. 21, 2009; Cruz, 346 Phil. 872, 876, Nov. 18, 1997; 61 Am. Jur. 2d §309, citing *Ayers v. Parry*, 192 F.2d 181 (3d Cir. 1951); *Rhodes v. De Haan*, 184 Kan. 473, 337 P.2d 1043 (1959).

<sup>243</sup> See 61 Am. Jur. 2d §309 citing *Eckleberry v. Kaiser Foundation Northern Hospitals*, 226 Or. 616, 359 P.2d 1090, 84 A.L.R.2d 1327 (1961).

<sup>244</sup> Cruz, 346 Phil. 872, 885, Nov. 18, 1997.

<sup>245</sup> Reyes, 396 Phil. 87, 107, Oct. 3, 2000.

ensure that the medical provision is governed high standards of quality and diligence, *to wit*:

The practice of medicine is a profession engaged in only by qualified individuals. It is a right earned through years of education, training, and by first obtaining a license from the state through professional board examinations. Such license may, at any time and for cause, be revoked by the government. In addition to state regulation, the conduct of doctors is also strictly governed by the Hippocratic Oath, an ancient code of discipline and ethical rules which doctors have imposed upon themselves in recognition and acceptance of their great responsibility to society.<sup>246</sup>

With the foregoing presumptions in their favour, it is the general rule medical malpractice cases that the plaintiff bears the *onus* of proving the standard of diligence and care imposed on the physician and that said standard was breached in order for recovery of damages to be decreed by the court.

#### **B. Compliance with the Requisite Standard of Diligence**

Indisputably, the best defense in a case founded on a quasi-delict is the presentation of proof that the requisite standard of diligence demanded by the circumstances has been satisfied by the medical practitioner upon whom negligence or a breach of duty is imputed. It may be well to recall that the first and foremost element of a medical malpractice suit is a breach of duty of a physician. The breach of duty more often than not is in the form of an act causing damage to another committed through either fault or negligence of the medical practitioner. As mentioned earlier, there is no hard and fast rule as to what does a duty of a physician consist of. The duty of a physician is a relative concept that partakes of different levels of diligence as demanded by the circumstances.

The essence of liability against a physician for medical malpractice is the breach of duty of a physician causing damage to his patient committed either through his own fault or negligence where such act is either the immediate or proximate cause of the injury. As was discussed at length earlier, the standard or duty incumbent upon a medical practitioner is relative and is dependent on the mean competency of good doctors in the particular locality or field of practice. It can be reasonably concluded that the standard imposed on a medical practitioner is a that exercise of degree of care, skill and diligence that ordinarily characterizes the reasonable average merit among the ordinarily good physicians in the same general neighborhood and in the same general line of practice with due consideration to

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<sup>246</sup> *Id.*

the advanced state of the profession at the time of treatment or the present state of medical science.

As to what constitutes such proof, again we look to jurisprudence as a guide. Well-settled is the rule that in order to settle the factual issue of whether or not a medical practitioner has exercised the requisite degree of skill and care in the treatment of his patient in medical malpractice cases, expert testimony is essential.<sup>247</sup>

The best case that illustrates the efficacy of this defense is the case of *Reyes v. Sisters of Mercy Hospital*<sup>248</sup> wherein the patient was admitted into respondent hospital two (2) days before his untimely death complaining of recurring fever and convulsions symptomatic of typhoid fever which was then prevalent in the area. The respondent physician followed normal diagnostic procedures for typhoid fever which yielded a positive result thus, *chloromycetin*, a common antibiotic used to treat typhoid fever, was administered to the patient. However, despite treatment, the patient died barely two (2) days from admission to the hospital. His heirs filed a case for damages against the physician and hospital. The heirs claimed that the proximate cause of death was not typhoid fever but the wrongful administration of *chloromycetin*. To support their claim, they invoked the doctrine of *res ipsa loquitur* claiming that the mere fact that the patient died within two (2) days of being admitted into the hospital gives rise to presumption that there was negligence on the part of the physician and the hospital.

The Supreme Court rejected the claims of the plaintiffs claiming the doctrine of *res ipsa loquitur* cannot apply. Citing the ruling in *Ramos v. Court of Appeals*<sup>249</sup>, the Court held that doctrine of *res ipsa loquitur* can have no application in a suit against a physician or a surgeon which involves the merits of a diagnosis or of a scientific treatment. The physician or surgeon is not required at his peril to explain why any particular diagnosis was not correct, or why any particular scientific treatment did not produce the desired result.<sup>250</sup> Anent the specific acts of negligence allegedly committed the respondent physician, the Supreme Court absolved her from any liability claiming that not only did the plaintiffs fail to adduce expert testimony to prove negligence on the part of the respondent physician.<sup>251</sup>

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<sup>247</sup> Flores, 571 SCRA 83, 92, Nov. 14, 2008.

<sup>248</sup> 396 Phil. 87, 107, Oct. 3, 2000.

<sup>249</sup> *Ramos v. Court of Appeals* (Decision); *Ramos v. Court of Appeals* (Resolution).

<sup>250</sup> *Id.* at 1223.

<sup>251</sup> *Reyes*, 396 Phil. 87, 100, Oct. 3, 2000.

Furthermore, the Court found that the absolution of the respondent physician was more than justified in light of the expert evidence presented in her favour. Thus, the Supreme Court ended its analysis of the case as follows:

Indeed, the standard contemplated is not what is actually the average merit among all known practitioners from the best to the worst and from the most to the least experienced, but the reasonable average merit among the ordinarily good physicians. Here, Dr. Marlyn Rico did not depart from the reasonable standard recommended by the experts as she in fact observed the due care required under the circumstances. Though the Widal test is not conclusive, it remains a standard diagnostic test for typhoid fever and, in the present case, greater accuracy through repeated testing was rendered unobtainable by the early death of the patient. The results of the Widal test and the patient's history of fever with chills for five days, taken with the fact that typhoid fever was then prevalent as indicated by the fact that the clinic had been getting about 15 to 20 typhoid cases a month, were sufficient to give upon any doctor of reasonable skill the impression that Jorge Reyes had typhoid fever.

Dr. Rico was also justified in recommending the administration of the drug chloromycetin, the drug of choice for typhoid fever. The burden of proving that Jorge Reyes was suffering from any other illness rested with the petitioners. As they failed to present expert opinion on this, preponderant evidence to support their contention is clearly absent.<sup>252</sup>

The foregoing clearly emphasizes the role of expert medical testimony in medical malpractice suit as the law requires expert opinion of medical professionals for parties to prove their respective cause of action or defense. However, in order for the so-called medical experts' testimony to have any probative value, the said expert must be so qualified. Philippine jurisprudence requires that the witness testifying before the court must belong to "the same general neighborhood and in the same general line of practice as defendant physician or surgeon."<sup>253</sup> Thus in the aforementioned case of *Reyes v. Sisters of Mercy Hospital*<sup>254</sup>, the plaintiff was barred from recovering because they did not present an expert witness on infectious diseases when the disease that caused the untimely demise of the patient was typhoid fever. In contrast, the case of *Ramos v. Court of Appeals*<sup>255</sup> involved the testimony of a pulmonologist which was presented by the defendant physicians to counter the claim of the plaintiffs that the anaesthesiologist involved in the botched operation was negligent causing the patient to suffer massive brain damage. The Supreme Court rejected the testimony as the anesthetic accident was caused by a rare drug-induced bronchospasm which

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<sup>252</sup> *Id.* at 104 (citations omitted).

<sup>253</sup> Lucas, 586 SCRA 173, 201-202, Apr. 21, 2009.

<sup>254</sup> Reyes, 396 Phil. 87, 100, Oct. 3, 2000.

<sup>255</sup> *Ramos v. Court of Appeals* (Decision); *Ramos v. Court of Appeals* (Resolution).

falls within the fields of anesthesiology, allergology, and clinical pharmacology and not within pulmonary medicine which was the field of expertise of the witness. Moreover, the disqualification of the witness to render expert testimony on the matter is emphasized by his own admission that he does not possess the practical experience gained by a specialist or expert in the administration and use of Thiopental Sodium which allegedly triggered the allergy leading to the devastating bronchospasm.<sup>256</sup>

Section 49 of Rule 130 of the Rules of Court provides that “opinion of a witness on a matter requiring special knowledge, skill, experience or training which he is shown to possess, may be received in evidence.” Thus, the qualification of a medical practitioner to testify as an expert witness will pivot depending on the facts and antecedents of the case particularly the nature of the injury suffered, the procedure involved, the types of drugs administered and other analogous circumstances. The admissibility of expert opinions in medical malpractice cases cannot be overemphasized as it is indeed the “the critical and clinching factor” in these cases.<sup>257</sup> Without such evidence in favour of the defendant physician, the presumption of due diligence enjoyed by a physician or medical practitioner will be rebutted if the evidence on record sufficiently sustains a conclusion that the requisite standard of diligence demanded by law has not been complied with and more often than not, such a conclusion may be amply supported by the mere proof of injury coupled with the application of *res ipsa loquitur*.

### C. Negligence of the Plaintiff as Proximate Cause of the Injury

Mention must be made however, in cases where both parties are negligent. In these cases, the doctrine of contributory negligence comes to the fore. Article 2179 of the Civil Code<sup>258</sup> provides that the injured party bears the damages caused by the injury when his own act is the proximate cause thereof. However, if the injured party's negligence is merely contributory, it does not absolve the tortfeasor of any liability but rather only mitigates the award of damages in favour of the former. Contributory negligence is the act or omission amounting to want of ordinary care on the part of the person injured, which, concurring with the defendant's negligence, is the proximate cause of the injury.<sup>259</sup> In general, negligence by the injured party is considered as contributory. However,

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<sup>256</sup> *Id.* at 1234-36.

<sup>257</sup> *Id.* at 99 *citing* 61 Am. Jur. §359 at 527.

<sup>258</sup> Art. 2179. When the plaintiff's own negligence was the immediate and proximate cause of his injury, he cannot recover damages. But if his negligence was only contributory, the immediate and proximate cause of the injury being the defendant's lack of due care, the plaintiff may recover damages, but the courts shall mitigate the damages to be awarded.

<sup>259</sup> Cayao-Lasam, 574 SCRA 439, 459-460, Dec. 18, 2008, *citing* Ma-ao Sugar Central Co., Inc. v. Court of Appeals, G.R. No. 83491, Aug. 27, 1990, 189 SCRA 88, 93.

if it is proven by the defendant that the immediate cause of an accident resulting in an injury is the plaintiff's own act, which contributed to the principal occurrence as one of its determining factors, the latter cannot recover damages for the injury.<sup>260</sup>

The case of *Cayao-Lasam v. Ramolete*<sup>261</sup> clearly illustrates the distinction between the situation where the injured party is the proximate cause of the injury and where the injured party's negligence is merely contributory. The said case involved a patient who was admitted to the hospital due to complications arising from pregnancy. A Dilatation and Curettage (D&C) Procedure was done on the patient. The patient was then discharged the next day. Barely two months later however, the patient came back with worse symptoms forcing the doctors to perform a hysterectomy.<sup>262</sup> The patient then sued the surgeons and the hospital for negligence.

In resolving that case, the Court surmised that a patient has a certain level of diligence as demanded by the circumstances as follows:

It is undisputed that [the plaintiff] did not return for a follow-up evaluation, in defiance of the petitioner's advise. [The plaintiff] omitted the diligence required by the circumstances which could have avoided the injury. The omission in not returning for a follow-up evaluation played a substantial part in bringing about [the plaintiff's] own injury. Had [the plaintiff] returned, petitioner could have conducted the proper medical tests and procedure necessary to determine [the plaintiff's] health condition and applied the corresponding treatment which could have prevented the rupture of [the plaintiff's] uterus. The D&C procedure having been conducted in accordance with the standard medical practice, it is clear that [the plaintiff's] omission was the proximate cause of her own injury and not merely a contributory negligence on her part.<sup>263</sup>

The Court therefore concluded that the plaintiff in the said case was not entitled to recovery.

What the ruling in the *Lasam* case teaches us is that while a physician is under a duty to provide care and treatment with a degree of care, skill and diligence which physicians in the same general neighborhood and in the same general line of practice, there is a concurrent duty or obligation on the part of the patient to follow the prescribed course of treatment provided by the physician. From this we can infer that the culpable failure on the part of the patient to follow

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<sup>260</sup> *Id. citing* Taylor v. Manila Electric Railroad and Light Co., 16 Phil 8 (1910).

<sup>261</sup> *Cayao-Lasam*, 574 SCRA 439, 454, Dec. 18, 2008.

<sup>262</sup> Surgical removal of the uterus which results in the inability to become pregnant.

<sup>263</sup> *Cayao-Lasam v. Ramolete*, 574 SCRA 439, 459, Dec. 18, 2008.



the course of treatment prescribed by the physician constitutes contributory negligence.<sup>264</sup> If it is proven by the defendant that the said failure on the part of the patient is the proximate cause of the latter's injury, then Article 2179 of the Civil Code will bar recovery by the plaintiff.

#### D. Independent Contractor

Given the highly specialized and highly technical nature of health care today, hospitals have moved from their traditional role as mere providers medical services which can be operated with less capital. In fact, until the mid-nineteenth century, hospitals were generally charitable institutions, providing medical services to the lowest classes of society, without regard for a patient's ability to pay.<sup>265</sup> Its primary function was to furnish room, food, facilities for treatment and operation and attendants to patients. However, the great strides of development by civilization in the field of medicine and medical care, harked the end of charitable and personal nature of the medical practice. It has since emerged as a profit-oriented industry offering numerous medical services under high quality standards of care to its patients. Such nature prevents hospitals to be operated by a single proprietor. Normally hospitals are operated by juridical persons such as partnerships and corporations which have the capacity to raise and maintain the necessary amount of capital indispensable to the operations of a hospital.

While in theory, a hospital, as operated by a juridical entity, cannot practice medicine<sup>266</sup>, in reality it utilizes doctors, surgeons and medical practitioners in the conduct of its business of facilitating medical and surgical treatment.<sup>267</sup> Thus, within that reality, there are three (3) relationships that intertwine and co-exist in the daily operations: (1) between the hospital and the doctor practicing within its premises; (2) between the hospital and the patient being treated or examined within its premises and (3) between the patient and the doctor.<sup>268</sup>

Under the present state of our law, a hospital is normally held liable for the negligence of its employed physicians through the vicarious liability of employers as provided for by article 2180 of the Civil Code. The said provision holds persons specifically employers, accountable not only for his own acts but

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<sup>264</sup> See 61 Am. Jur. 2d., §280.

<sup>265</sup> Howard Levin, *Hospital Vicarious Liability for Negligence by Independent Contractor Physicians: A New Rule for New Times*, U. Ill. L. Rev. 1291 (2005).

<sup>266</sup> Section 8, Rep. Act No. 2382.

<sup>267</sup> See *Acebedo Optical Co. Inc., v. Court of Appeals*, G.R. No. 100152, 314 SCRA 315, Mar. 31, 2000.

<sup>268</sup> *Professional Services, Inc. v. Agana* (*En Banc* Resolution).

also for those of others based on the former's responsibility under a relationship of *patria potestas*.<sup>269</sup>

It is apparent from a cursory reading of the pertinent law that an employer-employee relationship is an essential element for vicarious liability to attach to hospitals under article 2180. As mentioned earlier, the traditional notion of the professional status and calling of a physician precludes the existence of an employer-employee relationship between a physician and the hospital in the performance of a physician's professional capacity.<sup>270</sup> This view was espoused in the case of *Schloendorff v. Society of New York Hospital*.<sup>271</sup> Nonetheless, the doctrine enunciated in the case *Ramos v. Court of Appeals*<sup>272</sup> has settled that there is an employer-employee relationship between hospitals and doctors. However, such finding of an employer-employee relationship is founded upon the presence of control exercised by the purported employer over the purported employee.<sup>273</sup> In the absence of such element of control, there can be no employer-employee relationship, instead what is present is an principal-independent contractor relationship. An independent contractor is defined in the case of *Chavez v. National Labor Relations Commission*<sup>274</sup> as follows one who carries on a distinct and independent business and undertakes to perform the job, work, or service on its own account and under its own responsibility according to its own manner and method, free from the control and direction of the principal in all matters connected with the performance of the work except as to the results thereof.

Thus, where there is no employer-employee relationship but rather a principal-independent contractor relationship, there can be no finding of liability pursuant to Article 2180 or the principle of *respondeat superior*. However, the defense that an erring physician is an independent contractor of the hospital does not by itself bar recovery. Pursuant to the doctrines of apparent authority and corporate negligence, a hospital may be held liable for the negligent act of an independent contractor.

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<sup>269</sup> *Ramos v. Court of Appeals* (Decision) at 1241, citing JOSE VITUG, COMPENDIUM OF CIVIL LAW AND JURISPRUDENCE 822 (1993).

<sup>270</sup> *Arkansas M.R. Co. v. Pearson*, 98 Ark. 442, 153 SW 595 (1911); *Runyan v. Goodrum*, 147 Ark. 281, 228 SW 397, 13 ALR 1403 (1921); *Rosane v. Senger*, 112 Colo. 363, 149 P. 2d 372 (superseded by statute on other grounds); *Moon v. Mercy Hospital*, 150 Col. 430, 373 P. 2d 944 (1962); *Austin v. Litvak*, 682 P. 2d 41, 50 ALR 4th 225 (1984); *Western Ins. Co. v. Brochner*, 682 P. 2d 1213 (1983); *Rodriguez v. Denver*, 702 P. 2d 1349 (1984).

<sup>271</sup> 211 N.Y. 125, 105 N.E. 92, 52 L.R.A., N.S., 505 (1914)

<sup>272</sup> *Ramos v. Court of Appeals* (Decision); *Ramos v. Court of Appeals* (Resolution).

<sup>273</sup> See *Calamba Medical Center, Inc. v. National Labor Relations Commission*, G.R. No. 176484, 571 SCRA 585, Nov. 25, 2008.

<sup>274</sup> G.R. No. 146530, 448 SCRA 478, Jan. 17, 2005,

### E. Waivers, Release or Consent Forms

Waivers, release or consent forms are commonplace in hospitals the execution of which have long formed part of standard operating procedure before treatments and surgical procedures. A typical example of such document is a consent form seeking the patient's consent to or authorizing the hospital and its medical staff in administering any form of recognized medical treatment while being confined with the hospital or a consent form seeking the patient's consent to be subjected to a certain operation or diagnostic procedure as part of treatment.<sup>275</sup> These consent forms are normally accompanied by waivers or release forms which seek to hold free the hospital and its employees from "any and all claims" arising from or by reason of the treatment or operation. These documents are in the nature of contracts of adhesion which are strictly construed against the drafters thereof, in this case, hospitals.<sup>276</sup> Persons in desperate need of medical care for their very survival are literally at the mercy of the hospital thus clearly illustrating the nature of such contracts as contracts of adhesion.<sup>277</sup> The character of such blanket release in favour of hospitals "from any and all claims" has been characterized as contrary to public policy and thus void for including a waiver of claims arising from bad faith and gross negligence.<sup>278</sup> Likewise, the Court was quick to add that waivers and releases from claims arising due to simple negligence may be valid but nonetheless will not operate to bar recovery but rather will merely mitigate liability according to the circumstances.<sup>279</sup>

## VII. CONCLUSION

In this article, the author hopes to have illustrated the existence of a working framework insofar as medical malpractice is concerned despite the absence of enabling legislation. The Supreme Court has, and will continue, to make binding precedents further enriching this budding field of law in the Philippine jurisdiction. Notwithstanding the lack of a law governing medical malpractice, the flexibility of the existing laws coupled with the resourcefulness and ingenuity of both the bar and the bench have, to the mind of the author, sufficed to provide Philippine society with a viable legal framework by which it can secure accountability from those who claim to well-versed in the craft of healing.

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<sup>275</sup> See Nogales, 511 SCRA 204, 230, December 19, 2006.

<sup>276</sup> *Id.* at 228.

<sup>277</sup> *Id.* at 228-229.

<sup>278</sup> *Id.* at 228.

<sup>279</sup> *Id.* citing CIVIL CODE, art. 1172.

By no means however, should this mean that the need for a law governing medical malpractice may be dispensed with. On the contrary, the importance of an effective medical malpractice law cannot be overemphasized. In a world where technology has made and continues to make exponential strides, the law can spare no time in catching-up in order to properly protect the society for which it exists and seeks to protect. It cannot be denied that the framework borrowed from American precedents has and will serve as valuable guidance for the bar, the bench, and the executive branch in the regulation of the practice of medicine and ultimately the protection of the general public. However, just as it is the province of the courts to say what the law is, it is equally the province of Congress to lay down what shall be the law of the land. While our judiciary must be lauded for dispensing justice despite the silence and ambiguity of our laws, there is an inherent danger in abrogating the function of lawmaking to those beholden only to the law. Thus, Congress must be called to fulfill its duty, not only to ensure that our laws remain just and apace with the complexities which pervade Philippine society, but more importantly to serve as a check on a perhaps overzealous judiciary especially in a field so imbued with public policy. Alas, a cursory perusal of the bills pending debate on the Congressional floor appear to have overlooked the sheer importance of setting a clear cut standard for our medical practitioners that guarantees to the public an adequate, reasonable, if not superb medical service. Whether Congress shall adopt the wisdom of the precedents so eloquently laid down by our magistrates of justice is for it to decide. But what cannot be denied is that our society necessitates a framework of accountability tailored to meet the exigencies of the practice of medicine in the Philippines especially in a distressing age permeated by a culture of impunity.

Though it can be said that the practice of medicine is already conditioned upon the highest degree of diligence,<sup>280</sup> nothing better ensures the quality of one's practice than the Sword of Damocles of accountability. With every consultation, incision, examination, diagnosis and prescription made, a physician, surgeon, hospital, or any entity engaged in the profession of life and death must be scrutinized and tested under our society's most stringent standards. At the same time, accountability serves as the most compelling incentive being innately intertwined with the human instinct of self-preservation.

Thus, with every disease cured, life saved, and well-being ensured through the faithful adherence to standards of the highest order, a medical practitioner not only serves public interest nor the profession, but ultimately, himself. Physicians, surgeons, and other medical practitioners and staff are but human and are clearly cannot be expected to be infallible. However, neither can they be expected to be

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<sup>280</sup> Reyes, 396 Phil. 87, 107, Oct. 3, 2000.

sloppy, careless, or slipshod. A mistake, through gross negligence or incompetence or plain human error, may spell the difference between life and death. It is in this sense that the doctor plays God on his patient's fate.<sup>281</sup>

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<sup>281</sup> Ramos v. Court of Appeals (Decision), at 1209.