THE LIABILITY OF PHYSICIANS FOR PROFESSIONAL NEGLIGENCE

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> "What does the law know about negligence? Nothing, almost nothing, only what is too obvious to argue about."[1]

For thousands of years, men have been suffering from illnesses, diseases, and injuries, and to obtain relief they have relied upon physicians. The nature of this relation of physician and patient is what this article seeks to examine. Particularly, we are interested in the liability of physicians for negligence in their duties to their patients. Perhaps the first formal statement of these duties was made twenty five centuries ago, in what we know as the Hippocratic Oath[2] which even today is used in the graduation ceremonies in many medical schools, and which is of the following tenor:

> "I swear by Apollo the Physician, and Aesculapius, and Health and All-Heal, and all the gods and goddesses, that according to my ability and judgment, I will keep this oath and this stipulation — . . . I will follow that system of regimen which, according to my ability, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous; I will give no deadly medicine to anyone if asked, nor suggest any such counsel: . . . I will not cut persons laboring under the stone, but will leave this to be done by men who are practitioners of this work; into whatever houses I enter, I will go into them for the benefit of the sick, and will abstain from every voluntary act of mischief and corruption; . . . while I continue to keep this oath unviolated, may it be granted to me to enjoy life and the practice of the art, respected by all men, in all times, but should I trespass and violate this oath, may the reverse be my lot."

There is a dearth in Philippine jurisprudence on the subject. Reliance is therefore placed upon decisions in American cases. While such decisions are not binding upon Philippine courts, they are noted for whatever persuasive value they may have, bearing in mind too that our law on torts is derived, not only from the civil law which we have inherited from

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[1] Charles Curtis, quoted by William J. Curran in *Professional Negligence — Some General Comments*, 12 VAND. L. REV. 539 (1959).

[2] Named after Hippocrates, also known as the "father of medicine", although not formulated by him.

Spain, but also from the common law, legacy of half a century of American occupation.[3]

Negligence is the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do. It is the failure to exercise that degree of care which an ordinarily prudent and careful person would exercise under like circumstances.[4] Any negligent or unskillful performance by a physician of the duties which are devolved and incumbent upon him on account of his relations with his patients, or any want of proper care and skill in the performance of a professional act would constitute malpractice by the physician.[5] For such malpractice the law imposes certain liabilities.

The Civil Code[6] provides:

> Art. 20. Every person who, contrary to law, wilfully or negligently causes damage to another, shall indemnify the latter for the same.
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> Art. 2176. 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.
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> Art. 1173. The fault or negligence of the obligor consists in the omission of that diligence which is required by the nature of the obligation and corresponds with the circumstances of the persons, of the time, and of the place. x x x

The Revised Penal Code[7] provides:

> Art. 365. Any person, who, by reckless imprudence, shall commit any act which, had it been intentional, would constitute a grave felony, shall suffer the penalty of *arresto mayor* in its maximum period to *prision correccional* in its medium period; if it would have constituted a less grave felony, the penalty of *arresto mayor* in its minimum and medium periods shall be imposed; if it would have constituted a light felony, the penalty of *arresto menor* in its maximum period shall be imposed.
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> Any person who, by simple imprudence or negligence, shall commit an act which would otherwise constitute a grave felony, shall suffer the penalty of *arresto mayor* in its medium and maximum

[3] H. U. JARENCIO, TORTS AND DAMAGES IN PHILIPPINE LAW 12-13 (1972).
[4] BLACK'S LAW DICTIONARY, 1184 (4th ed., 1968).
[5] Hodgson v. Bigelow, 635 P. 497, 7 A. 2d 338 (1939).
[6] Rep. Act No. 386 (1950).
[7] Act No. 3815 (1932), as amended.

> periods; if it would have constituted a less serious felony, the penalty of *arresto mayor* in its minimum period shall be imposed.
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> x x x

The Philippine Medical Act of 1959[8] provides:

> Sec. 24. Any of the following shall be sufficient ground for reprimanding a physician, or for suspending or revoking a certificate of registration as physician;
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> x x x
>
> (5) Gross negligence, ignorance or incompetence in the practice of his or her profession resulting in an injury to or death of the patient;
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> x x x

The above provisions of law give to us the liability of the physician for negligence. Hence, he may be civilly liable for damages to the patient, and/or he may be criminally liable, and/or he may be reprimanded, suspended, or his registration revoked by the Board of Medical Examiners. In this article we are primarily concerned with his civil liability for damages.

The law relating to malpractice is simple and well-settled, although not always easy of application. A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices, and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine and surgery. Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge. The law holds him liable for an injury to his patient resulting from want of the requisite knowledge and skill, or the omission to exercise reasonable care, or the failure to use his best judgment. The rule in relation to learning and skill does not require the surgeon to possess that extraordinary learning and skill which belong only to a few men of rare endowments, but such as is possessed by the average member of the medical profession in good standing. Still, he is bound to keep abreast of the times, and a departure from approved methods in general use, if it injures the patient, will render him liable, however good his intentions may have been. The rule of reasonable care and diligence does not require the exercise of the highest possible degree of care, and, to render a physician and surgeon

[8] Rep. Act No. 2382 (1959), as amended.

liable, it is not enough that there has been a less degree of care than some other medical man might have shown, or less than even he himself might have bestowed, but there must be a want of ordinary and reasonable care, leading to a bad result. This includes not only the diagnosis and treatment, but also the giving of proper instructions to his patient in relation to the latter's own conduct. The rule requiring him to use his best judgment does not hold him liable for a mere error of judgment, provided he does what he thinks is best after careful examination. His implied engagement with his patient does not guarantee a good result, but he promises by implication to use the skill and learning of the average physician, to exercise reasonable care, and to exert his best judgment in the effort to bring about a good result.[9]

In an action to recover damages for malpractice, grounded in negligence, the plaintiff in order to prevail, must establish:

(1) the existence of a duty on the part of the defendant toward plaintiff to protect the latter from injury;

(2) the failure of the defendant to perform that duty; and

(3) that injury resulted to the plaintiff as the proximate cause of such failure on the part of the defendant.[10]

The issues to be resolved in malpractice cases involve questions of fact, not so much of law. And as a general rule, the burden is upon the plaintiff to establish his case by a preponderance of evidence.[11] The action for malpractice presents a claim of a hybrid nature. In one aspect, it may be viewed as based upon negligence; in another aspect as based upon breach of contract.[12] When the act complained of is a breach of the specific terms of the contract without any reference to the legal duties imposed by law upon the relationship created thereby, the action is in contract, but where there is a contract for services which places the parties in such a relation to each other that, in attempting to perform the promised service, a duty imposed by law as a result of the contractual relationship between the parties is violated through an act which incidentally prevents the performance of the contract, then the gravamen of the action is a breach of the legal duty, and not of the contract itself, and in such cases, allegations of the latter are considered mere inducement, showing the relationship which furnishes the right of action for the tort, but not the basis of recovery for it, and in such cases, the remedy is *ex delicto*.[13] The majority of the cases say that an action for malpractice is one that is essentially

[9] Pike v. Honsinger, 155 N.Y. 201, 63 Am. St. Rep. 655, 49 N.E. 760 (1898).
[10] Halverson v. Zimmerman, 60 N.D. 113, 232 N.W. 754 (1930).
[11] See RULES OF COURT, Rule 31, sec. 1 and Rule 133, sec. 1.
[12] Giambozi v. Peters, 127 Conn. 380, 16 A. 2d 833 (1940).
[13] Yeager v. Dunnavan, 26 Wash. 2d 559, 174 P. 2d 755 (1946).

tortious in its nature but that the tort may be waived, allowing a suit in *assumpsit*. It seems that the obligation of a physician to his patient is really a relational obligation similar to the obligation of a public carrier to a passenger, and it is hard to say that the breach of the relational duty is either a tort or a breach of contract.[14] The action is neither purely tortious nor contractual, but as stated, is a hybrid.

THE EXISTENCE OF A DUTY

In General

The relation of physician and patient begins when the physician responds to the express or implied request that he attend the prospective patient and undertakes to render the service required of him.[15] The relationship results from an express or implied contract, either general or special, and the rights and liabilities of the parties thereto are governed by the general law on contracts.[16] The contract is consensual, that is, it is perfected by mere consent of the parties, and no formality is required for its efficacy.

The relationship was analyzed by T. S. Szasz and M. H. Hollender[17] who describe three distinct patterns which the relationship may take. The traditional pattern is describe as one of "Activity-Passivity". Characteristic of this pattern is the emergency situation of the patient on the operating table. Such a model places the physician in absolute control of the situation; there is no interaction between people because it is based on the effect of one person on another in such a way and under such circumstances that the person acted upon is unable to contribute actively, or is considered to be inanimate. The second pattern is described as "Guidance-Cooperation" and is employed in situations less desperate than the first. Although the patient is ill, he is conscious and has feelings and aspirations of his own. Since he suffers pain, anxiety, and other distressing symptons, he seeks help and is ready and willing to cooperate. The disidentification with the patient is less complete than in the first pattern. Because of the dominance of the physician in both these forms of the relationship, the ethical standards of the profession required that the physician consider himself in a position of trust. In its Code of Professional Ethics, the American Medical Association speaks of "service to humanity with full respect for the dignity of man." It talks of patients "entrusted" to the

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[14] Barnhoff v. Aldridge, 327 Mo. 767, 74 A.L.R. 1252, 38 S.W. 2d 1029 (1931).
[15] Brown v. Moore, 247 F. 2d 711 (1957).
[16] Spencer v. West, LA. App. 126 So 2d 423, 97 A.L.R. 2d 1224 (1960).
[17] *A Contribution to the Philosophy of Medicine — The Basic Models of the Doctor-Patient Relationship*, 97 ARCHIVES OF INTERNAL MEDICINE 585 (1956), discussed by Dr. Sidney Shindell in his book THE LAW IN MEDICAL PRACTICE, 16-18 (1966).

care of physicians and of the physicians meriting the "confidence" of patients. The Philippine Medical Association, in its Code of Medical Ethics of the Medical Profession in the Philippines, states: "On entering his profession a physician assumes the obligation of maintaining the honorable tradition that confers upon him the well deserved title of 'friend of man.'"[18] The third pattern is described as "Mutual Participation". As pointed out by Szasz and Hollender, "philosophically this model is predicated on the postulate that equality among human beings is desirable. It is fundamental to the social structure of democracy . . . This model is favored by patients who, for various reasons, want to take care of themselves (at least in part)."

Dr. Shindell continues —

> "It would appear that while our code of ethics tends to characterize the physician-patient relationship as either an 'activity-passivity' relationship, or a 'guidance-cooperation' relationship, our legal system tends to look on the relationship as one of 'mutual participation'. The body of laws under which we live insists that the patient is juridically the equal of the doctor and that their relationship is in the nature of a negotiated agreement between two equal parties.
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> "Szasz and Hollender also state that when the physician is unable to accept the patient as his equal, the relationship between the two breaks down. 'At such a juncture, the physician usually feels that the patient is uncooperative and difficult, whereas the patient regards the physician as unsympathetic and lacking in understanding of his personally unique needs.' When breakdown occurs under circumstances where there is also a failure to obtain the anticipated result of medical management, the patient may feel sufficiently injured to seek redress in the law. Because of the point of view taken by the legal system, which recognizes the right to such redress, it would seem important for the physician to be acquainted with the essentials of our law of contract so that he may understand the nature of the mutual relationship that the law recognizes."[19]

Compensation

There is a presumption that a duly qualified and registered practitioner renders his services 'for reward,' and to rebut that presumption the patient must prove that the doctor agreed that his services would be gratuitous. Assuming that there was no such agreement, and the patient refuses to pay, the doctor's only recourse is to sue. If the amount of the fee was not agreed upon in advance, he will be entitled to recover the reasonable value of his services.[20] However, regardless of the compensation, or

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[18] Art. I, sec. 2.

[19] *Supra*, note 17.

[20] W. C. J. MEREDITH, MALPRACTICE LIABILITY OF DOCTORS AND HOSPITALS 2 (1956).

whether there is any to be paid at all, the physician would be under the same duty as where compensation was given or promised [21]

In *Peterson v. Phelps*[22] there was no direct request to treat the finger of the plaintiff, no promise of payment for services, and no expectation of payment by the physician. The physician, while leaving the house of a patient he had been attending to, came upon the plaintiff and her employer who were discussing the plaintiff's aching finger. The physician was asked if he thought the trouble was a felon, and after looking at it, he gave his opinion that it was not, and suggested salt pork as an application. He met the plaintiff twice more under similar circumstances, and each time he examined her, opened the finger with a needle, and gave directions to continue with the salt pork. The court ruled that the aforesaid facts were persuasive of the relation of physician and patient; that the plaintiff had understood, and had a right so to do, that she was in the hands of a doctor who would properly treat the ailment. An agreement for compensation was not necessary; the obligation pay if being implied in law.

Where it has been agreed that the physician will serve gratuitously, courts have on occasion permitted a plaintiff to recover for injuries resulting from a failure to perform a gratuitous promise where some affirmative action in performance has been taken by the promisor, or where the plaintiff has been deterred from seeking other assistance in reliance on the promise. It was also recognized that the obligation to use reasonable care and skill in the treatment of a patient did not depend upon any financial benefit to the doctor but was equally applicable to gratuitous service for charity patients.[23]

Employment by Third Person

The fact that a physician was employed by a third person does not mean that the relation of physician and patient does not arise, and that the physician has no obligation. For example, the relation arises even where a mother brings her child to the physician for treatment. In *Hoover v. Williamson*[24] the defendant physician had been retained by the General Electric Co. to conduct X-ray examinations of the latter's employees, one of whom was the plaintiff. It was alleged by plaintiff that the examination had revealed to the defendant that the plaintiff had silicosis due to overexposure to silica dust, and that the defendant had concealed such condition from plaintiff, with the result that the plaintiff's lung condition

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[21] Persten v. Chesney, Mo. App., 212 S.W. 2d 469 (1948).

[22] 1915-A. Ann. Cas. 257, 123 Minn. 319, 143 N.W. 793 (1913).

[23] See A. H. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549 (1959) and the cases there cited.

[24] 236 Md. 250, 203 A. 2d 861 (1964).

became a serious and permanent disease. Overruling a demurrer of the defendant that the facts showed no physician-patient relationship, a Maryland court ruled that the physician may incur a tort obligation which is nonconsensual and independent of contract; that one who assumes to act, even gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.

Refusal to render Professional Services

In the absence of statute, the physician is under no legal obligation to render professional services to everyone who applies to him or seeks to engage him. Physicians are not public servants who are bound to serve all who seek them, as are innkeepers, common carriers and the like.[25] In one case, the defendant physician had been the family physician of the decedent for some years. Decedent became seriously ill, and sent for the defendant, but the defendant refused without any reason whatsoever, to attend to the decedent. At the time, the defendant physician was offered his fee for services, and there were no other patients of his who required his immediate services. He was informed that he was the only physician who could be procured in time to be of any use. The physician refused, as a result of which the decedent died. In an action for his alleged wrongful act in refusing to enter into the contract of employment, an Indiana court ruled in favor of the defendant physician, holding that in obtaining the state's license to practice medicine, the state did not require, and the licensee did not engage, that he would practice at all or on other terms that he might choose to accept.[26]

The same general principle applies in the Philippines, subject to certain qualifications. Hence the Code of Medical Ethics provides: "A physician is free to choose whom he will serve. He may refuse calls, or other medical services for reasons satisfactory to his professional conscience. He should, however always respond to any request for his assistance in an emergency."[27] In this connection, the Medical Act of 1959 gives the following as one of the grounds for reprimanding a physician, or for suspending or revoking a certificate of registration as physician: "x x x (12) violation of any provision of the Code of Ethics as approved by the Philippine Medical Association. Refusal of a physician to attend a patient in danger of death is not sufficient ground for revocation or suspension of his registration certificate if there is a risk to the physician's life."[28] Fur-

[25] Rice v. Rinaldo, Ohio App., 119 N.E. 2d 657 (1951).
[26] Hurley v. Eddingfield, 156 Ind. 416, 83 Am. St. Rep. 198, 59 N.E. 1058 (1901).
[27] Art. II, sec. 2.
[28] Rep. Act No. 2382 (1959), sec. 24.

thermore, the Civil Code provides that "(e)very person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith."[29] Commenting on this provision, Tolentino says:

> "The classical theory is that 'he who uses a right injures no one.' Traditionally, therefore, it has been a settled doctrine that no person can be held liable for damages occasioned to another by the exercise of a right. . . .
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> "The modern tendency . . . is to depart from the classical and traditional theory, and to grant indemnity for damages in cases where there is an abuse of rights, even when the act is not illicit. Law cannot be given an anti-social effect. If mere fault or negligence in one's acts can make him liable for damages for injury caused thereby, with more reason should abuse or bad faith make him liable. A person should be protected only when he acts in the legitimate exercise of his right, that is, when he acts with prudence and in good faith; but not when he acts with negligence or abuse."[30]

Scope of Duty

The relation of physician and patient is a consensual one wherein the patient knowingly seeks the assistance of the physician and the physician knowingly accepts him as a patient.[31] Once the relation is established, the physician undertakes certain responsibilities. The relation is by its very nature one of the most intimate. Its foundation is the theory that the physician is learned, skilled and experienced in the afflictions of the body about which the patient ordinarily knows little or nothing but which are of the most vital importance to him. Therefore, the patient must necessarily place great reliance, faith and confidence in the professional word, advice and acts of his doctor.[32]

The physician or surgeon is obligated to exercise the degree of care and skill that is ordinarily employed by members of the profession in the same line of practice in his own or similar localities. Failure to use such care or skill constitutes negligence. On the other hand, he is not an insurer of health or a guarantor of results. He undertakes only to abide by the prevailing standards and to utilize the skill possessed generally by others practicing in his field and to accord the care that they would ordinarily extend in similar circumstances. He must have latitude for the exercise of reasonable judgment, and is not liable for a mere error of judgment.[33]

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[29] CIV. CODE, art. 19.
[30] 1 A. M. TOLENTINO, CIVIL CODE OF THE PHILIPPINES 56-57 (1968 Ed.).
[31] Findlay v. Board, 7 Ariz. 58 230 P. 2d 526 (1952).
[32] Adams v. Ison, 249 S.W. 2d 791 (1952).
[33] Johnston v. Rodis, 151 F. Supp. 345 (1957).

Doctors are not guarantors of a cure. They do not warrant a good result. They are not insurers against mishaps or unusual consequences. Furthermore, they are not liable for honest mistakes of judgment. The same rule protects dentists and lawyers. The reason that the law builds such a protective barrier for the professional man is that otherwise he would be open game for every patient or client who did not come out well. The peril of being a physician or surgeon would be forbidding. The law recognizes that he must exercise his judgment, about which experts may differ, under challenging circumstances. He is held only to the standard of using his best judgment, even though it may turn out to be wrong. If he applies reasonable skill, no matter how disastrous the outcome, he may not be sued for damages. The law holds that the patient takes an inherent risk when he submits himself to the doctor. There is an implied contract between them in which he is told in effect, "Medicine is not an exact science. I will use my experience and best judgment. You take the risk that I may be wrong. I guarantee nothing."[34]

Contracts to Cure

A physician and his patient are at liberty to contract for a particular result, and if that result be not attained, the patient has a cause of action for breach of contract. This cause of action is to be distinguished from an action for malpractice, even though they both may arise out of the same transaction. The latter action, as stated earlier, is predicated upon the failure of the physician to exercise requisite medical skill or care and is tortious in nature. The action in contract is based upon a failure to perform a special agreement. Negligence, the basis of an action for malpractice, is foreign to the action for contract.[35] In order that the special contract be valid, or to allow a recovery for its breach at law, it must be supported by a consideration.[36] Mere expressions of opinion, or predictions as to the probable duration of the treatment and plaintiff's resulting disability, and the fact that these estimates were exceeded would impose no contractual liability upon the physician.[37]

Duration of Relation

On engaging a physician to treat his case a patient impliedly engages him to attend throughout that illness, or until his services are dispensed with. The patient places himself in the hands of the physician and thereafter relies on the judgment and knowledge of the physician rather than on his own. A part of the correct treatment of the case is the careful

[34] L. NIZER, MY LIFE IN COURT 400 (1972).
[35] Colvin v. Smith, 276 A.D. 9, 92 N.Y.S. 2d 794 (1949).
[36] Wilson v. Blair, 65 Mont. 155, 27 A.L.R. 1235, 211 P. 289 (1922).
[37] Hawkins v. McGee, 84 N.H. 114, 146 A. 641 (1929).

and proper determination by the physician of the moment when the relation shall end. When the physician takes charge of a case and is employed to attend a patient, his employment, as well as the relation of physician and patient continues until ended by the consent of the parties, or revoked by the dismissal of the physician, or until his services are no longer needed.[38] Likewise it may be ended when reasonable notice is given by the physician so that the patient may engage the services of another physician.[39] Unwarranted abandonment of the case will render the doctor liable in damages.[40]

And of course, force majeure excuses the failure of performance. If circumstances render performance impossible, there is termination without fault. Also a change in law may intervene between the entering into the agreement and the time of performance, thereby rendering performance impossible.[41]

THE FAILURE TO PERFORM THAT DUTY: THE STANDARD OF CONDUCT

In General

It is only when the standards which a physician is required to attain are known that it becomes at all possible to decide whether the particular conduct complained of amounts to a breach of his duty to take care. When an ordinary layman is charged with negligence in a personal injury action, the standard of care or diligence required by the Civil Code is that of "a good father of a family." Hence, "(t)he fault or negligence of the obligor consists in the omission of that diligence which is required by the nature of the obligation and corresponds with the circumstances of the persons, of the time and of the place. . . If the law or contract does not state the diligence which is to be observed in the performance, that which is expected of a good father of a family shall be required."[42] This standard of "a good father of a family" has been equated with the common law standard of "a reasonable man."[43] Negligence in the common law is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do; or doing something which a prudent and reasonable man would not do.[44]

When a physician is involved in an action for negligence, there are also standards by which as such physician he is to be judged. His legal

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[38] Halverson v. Zimmerman, *supra*, note 10.
[39] Groce v. Myers, 224 N.C. 165, 29 S.E. 2d 553 (1944).
[40] Burnett v. Layman, 133 Tenn. 323, 181 S.W. 157 (1915).
[41] SHINDELL, *supra*, note 17 at 24-26.
[42] CIVIL CODE, art. 1173.
[43] JARENCIO, *supra*, note 3 at 100.
[44] NATHAN, MEDICAL NEGLIGENCE 20 (1957).

duty requires that he possess that reasonable degree of learning and skill ordinarily possessed by members of his profession and of his school of medicine, in the community where he practices or similar communities, having due regard for the advance in medical or surgical science at the time, and that he will use such learning and skill in his treatment of the patient with ordinary care and diligence. In case of doubt as to which of two or more courses is to be pursued, he must use his best judgment. He does not guarantee good results, and no civil liability arises merely from bad results; nor if bad results are due to some cause other than his treatment; but where he fails to possess ordinary learning and skill, or fails to use ordinary care and diligence, and injury results therefrom, he is liable for the injury to the patient in a civil action for damages. The principles apply to diagnosis as well as treatment thereafter.[45] McCoid notes the following as common elements found in the cases:

(1) a reasonable or ordinary degree of skill and learning;
(2) commonly possessed and exercised by members of the profession;
(3) who are of the same school or system as the defendant;
(4) and who practice in the same or similar localities;
(5) and exercise of the defendant's good judgment.[46]

In applying the standards of conduct, all the facts of the particular case should be considered, lest a too rigid application of such standards result in injustice.

School or System of Medicine

In calling a physician, a person is presumed to elect that the treatment shall be according to the system or school of medicine to which such physician belongs. Physicians accepting professional employment are required to exercise such reasonable care and skill as is usually exercised by doctors in good standing of the same school of practice.[47]

A school of medicine relates to the system of diagnosis and treatment. While the law recognizes that there are different schools of medicine, it does not favor, or give exclusive recognition to, any particular school or system of medicine as against the other. A school of medicine, in order to be entitled to recognition under this rule must have rules and principles of practice for the guidance of all its members, with respect to principles, diagnosis, and remedies which each member is supposed to observe in any given case.[48]

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[45] James v. Grigsby, 114 Kan. 627, 220 P. 267 (1923).
[46] *Supra*, note 23.
[47] Hardy v. Dahl, 210 N.C. 530, 187 S.E. 788 (1936).
[48] Bryant v. Briggs, 331 Mich. 64, 49 N.W. 2d 63 (1951).

The school or system of medicine may refer to dentistry, nursing, X-ray technician's work, and veterinary medicine, each of which is to be judged by the principles and practice of the specialty. The regular practice of medicine may also be distinguished from other disciplines of healing and therapy, the principal ones being osteopathy, chiropractic, Christian Science, "drugless healing" and other forms of treatment which rely upon such natural elements as heat, light, water, "nature food" or massage.[49]

A physician is entitled to have his treatment of his patient tested by the rules and principles of the school of medicine to which he belongs, and not by those of some other school, because a person professing to follow one system or school of medicine cannot be expected by his patient to practice any other, and if he performs the treatment with ordinary skill and care in accordance with his school of practice, he is not answerable for bad results.[50] And a physician of one school who follows the methods used in another school must use the skill and care required of a practitioner of the latter school.[51]

Even within a particular school of practice, there are physicians who differ as to the proper medical procedure. The principle is that a physician who follows the practice espoused by a reputable minority is not to be treated as having committed malpractice by doing so.[52] The law does not permit a physician to be at the mercy of his expert competitors, whether they agree with him or not; where there are various recognized methods of treatment the physician is at liberty to follow the one he thinks best, and he is not liable for malpractice because expert witnesses give their opinion that some other method would have been preferable.[53]

Many of the various "schools" of practice are now abandoned and a single regular school of practice has been formulated. At the same time there have developed subdivisions within such regular school in the form of specialties which deal with distinctive portions of the body, such as dermatology (diseases of the skin), gynecology and urology (diseases of the sexual organs of females and the urinary tracts of female and male patients), neurology, (dealing with the nervous system), and so forth. There are also specialties dealing with given ailments or forms of treatment such as psychiatry, plastic surgery, radiology, anesthesiology, and the like.[54] It has been suggested that the courts may properly qualify the required standard of conduct in terms of a medical specialty. Hence, one who holds himself out as a specialist in the treatment of a certain organ, injury, or disease, is bound to bring to the aid of one so employing

[49] See McCoid, *supra*, note 23.
[50] Klimkiewicz v. Karnick, 372 P. 2d 736 (1962).
[51] Bryant v. Briggs, *supra*, note 48.
[52] See McCoid, *supra*, note 23.
[53] Sims v. Callahan, 112 So. 2d 776 (1959).
[54] See McCoid, *supra*, note 23.

him that degree of skill and knowledge which is ordinarily possessed by those who devote special study and attention to that particular organ, injury or disease, its diagnosis and its treatment, in the same general locality, having regard to the state of scientific knowledge at the time.[55]

Locality of Practice

Previously, one of the standards applied in malpractice cases in the United States was whether or not the physician had exercised that degree of care and skill possessed by members of his profession in the same locality where he practiced. The basis of this rule was that a physician in a small community did not have the same opportunities and resources as did a physician practicing in a large city to keep abreast of advances in his profession; hence, he should not be liable to the same standard of care and skill as that employed by doctors in other communities or in larger cities. The rule had two practical difficulties: (1) the scarcity of professional men in the community who were qualified or willing to testify about the local standard of care and (2) the possibility of a small group, who, by their own laxness or carelessness, could establish a local standard of care that was below that which the law required. The fact that several careless practitioners might settle in the same place cannot affect the standards of diligence and skill which local patients have a right to expect. Negligence cannot be excused on the ground that others in the same locality practice the same kind of negligence. No degree of antiquity can sanction a usage bad in itself. Broadening the rule to include similar localities or similar communities alleviated to a certain extent the first practical difficulty of the locality rule, as additional witnesses were more easily availed of. But it did little to remove the deficiencies springing from the second. In later cases the similar locality rule was modified by admitting the testimony of a physician who was familiar with the standard of general practitioners in the same general neighborhood.[56]

The locality rule has thus declined in importance. Local practice within geographic proximity is now regarded as one, but not the only factor to be considered.[57] But the rule has retained some of its vigor. The emphasis is now properly placed less upon the geographic location, and more upon the character of the defendant's practice, in terms of the opportunities for experience and acquisition of information concerning developments in medical science and techniques. By doing this, as by tending toward acceptance of a single "school of medicine," the courts may achieve a relatively uniform standard of practice throughout the country.[58]

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[55] Rann v. Twitchell, 82 Vt. 79, 20 L.R.A. (N.S.) 1030, 71 A. 1045 (1909).
[56] See Pederson v. Dumouchel, 431 P. 2d 973 (1967).
[57] *Id.*
[58] See McCoid, *supra*, note 23

In England, the locality rule has never been used in malpractice cases and it is thought that the courts would reject a contention that the requisite standard may differ from one part of the country to another. The ordinary medical practitioner should exercise the same degree of skill and care whether he carries on his work in the town or the country, in one place or another. The fact that several incompetent or careless practitioners happen to settle at the same place cannot affect the standard of diligence and skill which local patients have a right to expect.[59]

Insofar as the Philippines is concerned, it would seem that the locality rule should still be given some application, particularly in a situation where the physician practicing in the rural areas could not have the same opportunities for experience and acquisition of information concerning developments in medical science and techniques.

Exercise of Good Judgment

Physicians are not held liable for honest errors of judgment, they are allowed a wide range in the exercise of their judgment and discretion and to hold one liable for malpractice it must be shown that the course which he pursued was clearly against the course recognized as correct by members of his profession.[60]

Obviously, there cannot be a royal road to the recovery of a patient under any circumstances. Cases are abundant with instances where patients, in pitiable conditions because of serious ailments, have been cured in the hands of ordinary physicians. Yet there have been cases where because of unforeseen and unforeseeable circumstances arising in the interim, there were regrettable results despite all available scientific and medical skill that had been ministered. If we were to hold responsible a physician, who might have done all his best, for any lamentable result from his patient's illness, we would open unnecessarily the floodgates of actions against physicians. No physician is expected to place a premium, much less a guarantee, upon the successful result of his undertaking. All that is needed is that he has employed conscientiously his best judgment such as the circumstances may require. If he observed ordinary care and attention and employed his skill as his best judgment would dictate, all his actions being in keeping within the bounds of universally recognized approved methods of practice — after the requirements of a proper examination or investigation of the case had been complied with — he is supposed to have performed his duty. He cannot be held responsible for his act if there is no affirmative proof of gross negligence having been committed by him

[59] See NATHAN, *supra*, note 44 at 21-22.
[60] Blackwell v. Southern Florida Sanitarium & Hospital Corp., Fla. App., 174 So. 2d 43 (1965).

in the discharge of his duty and negligence could only be presumed in cases where there is a preponderance of evidence that he had failed to do the best he could. The presumption of negligence cannot arise from the mere fact that the ministration of physician has been unsuccessful or failed to produce the expected results. For much could be attributed to the twists of nature. Good faith in the performance of one's commitment must be expected of physicians. They must be supposed as human, as any human being is, and no less. And gross negligence charged upon them can only be established by means of culpable, evident omissions to take such precaution and care as one in his right senses and good judgment would require one to take.[61]

Customary Practice as the Standard of Care

Evidence of custom or a relatively well defined and regular usage among a group of persons, frequently a trade or occupational group, is generally admissible in the determination of the proper standard of conduct in negligence actions. In some cases, custom has become, almost exclusively, the measure of due care; good medical practice is the standard, and it is a standard which like other standards is to be established by expert medical testimony as to what is accepted as good practice by reputable members of the profession practicing under similar conditions. Reliance upon professional custom as the primary test of conduct might be explained historically by the fact that before the law of negligence had fully developed, the older English cases had dealt with physicians in terms of the knowledge, skill and care which they held themselves out to the public as possessing, *i.e.,* at least that commonly had by members of their profession. Another is the lack of capacity of any layman trier of fact, be he judge or juryman, to evaluate adequately the conduct of a doctor or to determine what a reasonable and prudent man under the same circumstances would have done or refrained from doing. A third explanation is that a "preferred position" is granted by the courts to the medical profession in recognition of the peculiar nature of the professional activity. The qualified practitioner of medicine has undertaken long years of study to acquire knowledge of man, his body and its illnesses and the means of combating such ailments, coupled with an intensive training of the senses and mind of the physician to respond to stimuli in a manner best described as "the healing art". A large measure of judgment enters into the practice of this art. That judgment should be free to operate in the best interests of the patient. If the "judge" is himself to be judged by some outsider who relies on after-acquired knowledge of unsatisfactory results or unfortunate consequences in reaching a decision as to liability,

[61] Abaya v. Favis, CA-G.R. No. 23574-R, February 20, 1963, 59 O.G. 8249 (Dec. 1963), 3 C.A.R.J. 450 (1958).

the medical judgment may be hampered and the doctor may become hesitant to rely upon his developed instinct in diagnosis and treatment. If, on the other hand, the doctor knows that his conduct is to be evaluated in terms of what other highly trained medical practitioners would have done or would accept as competent medical practice, he is more likely to pursue his own judgment when he is confident of the diagnosis and line of treatment, and is more likely to provide good medical service for his patient. While no absolute proof of the deterring effect of a non-professional standard of conduct is available, the concern expressed by doctors at the growing number of malpractice claims and some statements of hesitancy to engage in free use of medical judgment support this conclusion.[62]

But conformity with the standard of care showed by other medical authorities in good standing in the same community cannot be availed of as a defense in a malpractice action when the criterion relied upon is shown to constitute negligence in that if fails to guard against injury to a patient from a reasonably foreseeable contingency. In a case where it was shown by a member of the profession that whereas the procedure followed by defendant is indeed practiced by other members in the community, nevertheless, it is recognized by members of the same profession not only as being faulty but also contrary to what members of the profession have been taught in medical institutes of learning, it was held that reliance could not be made upon customary practice.[63]

State of Medical Science

In judging the degree of skill in a given case regard is to be had to the advanced state of the profession at the time. Discoveries in the natural sciences for the last half-century have exerted a sensible influence on all the learned professions, but especially on that of medicine, whose circle of truths has been relatively much enlarged. The physician who assumes to exercise the healing arts is bound to be up to the improvements of the day. The standard of ordinary skill is on the advance, and he who would not be found wanting, must apply himself with all diligence to the most accredited sources of knowledge.[64] Accordingly, physicians are required to keep abreast of and use the best modern methods of treatment, and in so doing they may not unduly and narrowly restrict or confine their responsibility to the immediate place where they are practicing. The duty of a physician to his patient is measured by conditions as they exist, and not by what they have been in the past or may be in the future. Today, with the rapid methods of transportation and easy means of communication, the horizons have been widened, and the duty of a

[62] See McCoid, *supra*, note 23.
[63] Favalora v. Aetna Casualty & Surety Co., La. App., 144 So. 2d 544 (1962).
[64] McCoid, *supra*, note 23 at 575, citing McCandless v. McWha, 22 P. 261 (1853).

physician is not fulfilled merely by utilizing the means at hand in the particular village where he is practicing.[65]

Instances of failure to measure up to this standard would include the failure to use X-ray for diagnosis of fractures or dislocations, failure to administer silver nitrate solution to a newborn baby's eyes to prevent infection, and failure to give tetanus antitoxin or to incise a "puncture wound" in accordance with generally accepted practice.[66]

Experimentation

A physician is not limited to the most generally used of several approved methods of treatment and the use of another mode known and approved by the profession is proper, but every new method of treatment should pass through an experimental stage in its development and a physician is not authorized in trying untested experiments on patients.[67] It is true that the great advances in medical science have come about by the courage of pioneers, whose efforts often met with ridicule from their professional brethren. It is true that doctors even yet disagree. It is also true that charlatans masquerading as doctors defraud the public to their own enrichment by promising to cure cancer with innocuous ointments, and these endanger the lives of patients by depriving them of sound medical advice. Between these two extremes, there is a twilight zone where doubts might perplex. Such issues are to be resolved by the Board of Medical Examiners.[68]

A distinction should be drawn between "therapeutic innovation" directed primarily to obtaining relief or cure for the ills of a particular patient, which appears to be accepted as a not uncommon practice in most medical offices, and experimental research which has been defined as "a sequence resulting from an active determination to pursue a certain course and to record and interpret the ensuing observations" primarily for the purpose of advancing scientific knowledge. In the former, the rule is that experimentation is undertaken at the physician's peril. This rule protects the community against reckless experiments, while it admits the adoption of new remedies and modes of treatment in cases where their benefits have been demonstrated, or where, from the necessity of the case innovation must be permitted. Here, each patient may present a new and novel problem to the physician and innovation is permitted where the particular circumstances of the case call for it. In experimental research, there is a "standard patient" on whom the knowledge derived from the experiment may be applied. Experimentation on human beings for the

[65] Flock v. J. C. Palumbo Fruit Co., 63 Idaho 220, 118 P. 2d 707 (1941).
[66] See McCoid, *supra*, note 23.
[67] Board of Medical Registration v. Kaadt, 76 N.E. 2d 669 (1949).
[68] Brinkley v. Hassig, 83 F. 2d 351 (1936).

purpose of scientific research was discussed in the Nuremburg War Crimes trials where the Tribunals laid down precepts for "permissible medical experiments." Today, the American Medical Association recognizes that experimentation on humans, where conducted by reputable and qualified investigators who have obtained understanding and enlightened consent from the subjects and have taken adequate precautions against risk of serious injury, disability or death, is not improper medical practice. Of course, within the area of permitted experimentation there is room for negligent conduct on the part of the investigator, but it is almost certain that the courts will treat the consent of the subject as limited to careful conduct of experimental research, that is, the consent of the subject is given to the experiment being performed on him, not to negligent conduct in pursuit of the experiment.[69]

INJURY RESULTING AS A PROXIMATE CAUSE OF NEGLIGENCE

Although a physician may be negligent in the performance or omission of some duty owned to the patient, no liability attaches unless the patient thereby suffers injury. There is no liability unless the physician's negligence is the proximate cause of the injury.[70]

Proximate Cause

The defendant in a negligence case is not liable for the plaintiff's injury unless he has in fact caused it. Causation is a matter of what has in fact occurred. The fact of causation is essential to liability, but does not alone determine it since other considerations may prevent it although causation is established. If the defendant's act or omission was a substantial factor in bringing about the result, it will be regarded as a cause in fact. Ordinarily it will be such a substantial factor if the result would not have occurred without it.[71]

The proximate cause of an injury is that cause, which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is that cause, acting first and producing the injury, either immediately or by setting other events in motion, all constituting a natural and continuous chain with its predecessor, the final event in the chain immediately effecting the injury as a natural and probable result of the cause which first acted, under such circumstances that the person responsible for the first event should, as an ordinarily prudent and intelligent person, have

[69] See McCoid, *supra*, note 23.
[70] L. J. REGAN, DOCTOR AND PATIENT AND THE LAW 230 (1956).
[71] W. L. PROSSER, HANDBOOK OF THE LAW OF TORTS 218 (1955).

reasonable ground to expect at the moment of his act or default that injury to some person might probably result therefrom.[72]

Proximate cause was held in *Burford v. Baker*[73] to have been sufficiently established by evidence that upon complaints by the plaintiff of pain and discomfort in his hip when walking after an accident, the defendant failed to take an X-ray of the injury and diagnosed it as a bruise or arthritis, and directed the plaintiff to exercise the leg and not to favor it, together with expert testimony that there was actually a fracture or separation of the femoral epiphysis of the hip and that any weight-bearing or exercise would tend to twist the head and neck of the femur and be very detrimental, and that the destruction of the bone and distortion of the joint, which made cure impossible, were chiefly due to premature weight-bearing and if proper treatment had been given these results would not have followed. The fact that the plaintiff was afflicted with a glandular deficiency which might have caused the fracture without the intervention of any trauma, and that the end result might have been the combined result of several factors, was held not to affect the defendant's liability, the court saying that he was not charged with having caused the fracture, but only with having negligently failed to discover and treat it, and that contribution of other factors to the ultimate damage would not free the defendant from liability.

In *Anderson v. Stump*[74] the defendant's testimony that the patient, a pregnant woman, was peculiarly susceptible to infection at the time when he examined her, and that he did not know whether the glove which he used in the examination had been sterilized or not, together with the plaintiff's testimony that the examination had been made by the doctor in his street clothes and without a glove, was held to justify the conclusion that the infection which subsequently developed in the plaintiff's vagina was the result of the defendant's lack of care.

But in *McKinnon v. Polk*[75] the failure of the doctor to wear gloves in packing the plaintiff's vagina after a miscarriage was held not to justify a verdict for the plaintiff, where the evidence indicated that the blood poisoning allegedly resulting therefrom had existed before the doctor was called, and it appeared that the plaintiff had been sick almost a week before the defendant was called, had taken douches and treated herself as best she could, although she had knowledge of her two prior miscarriages and their attendant needs, difficulties, pains and dangers. Proof which goes no further than to show that injury could have occurred in the way alleged does not warrant the conclusion that it did so occur, when the injury could have occurred with equal probability due to some other cause.

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[72] Bataclan v. Medina, 102 Phil. 181 (1957).
[73] 53 Cal. App. 2d. 301, 127 P. 2d 941 (1942).
[74] 42 Cal. App. 2d 761, 109 P. 2d 1027 (1941).
[75] 219 Ala. 167, 121 So. 539 (1929).

Burden of Proof

As in most negligence cases, the burden of proving the defendant physician's negligence in a malpractice case is upon the plaintiff. The law accords the medical practitioner the presumption that he has done his duty,[76] and to maintain his action, the plaintiff is required to prove not only negligence or unskillfulness amounting to malpractice, but also that the act of malpractice was the proximate cause of injury.[77] The mere proof of a possibility that the plaintiff's injuries resulted from the defendant's negligence or culpable want of skill is insufficient. Thus, where there are two or more causes which might have produced the injury for only one of which the defendant is responsible, and there is no evidence to show to which cause the injury is actually attributable, a verdict should be directed for the defendant.[78]

It is however not necessary that the circumstances should establish the negligence of the defendant as the proximate cause of the injury with such absolute certainty as to exclude every other conclusion, and it is sufficient if there is substantial evidence upon which to reasonably support the judgment.[79] If it were necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science.[80] In civil cases, the party having the burden of proof must establish his case by a preponderance of evidence.[81]

Expert Testimony

The negligence of a physician is as we have noted never presumed but must be proved, and this may be done either by expert testimony showing that the standard of medical practice of the community was not followed, or it may be inferred from proved facts and inferences which by common knowledge may be drawn from them.[82] Expert testimony is necessary since the causes of the injuries ordinarily involved in the malpractice action are determinable only in the light of scientific knowledge. The cause and cure of a particular disease is peculiarly within the knowledge of medical men and not a matter of common knowledge. In the absence of such expert testimony there is nothing upon which the court can base its finding on the proximate cause of the injury, the court not

[76] Hanners v. Salmon, 216 Ky. 584, 288 S.W. 307 (1926).
[77] Kuhn v. Banker, 133 Ohio St. 304, 115 A.L.R. 292, 13 N.E. 2d 242 (1938).
[78] *Id.*
[79] Barham v. Widing, 210 Cal. 206, 291 P. 173 (1930).
[80] Dimock v. Miller, 202 Cal. 668, 262 P. 311 (1927).
[81] RULES OF COURT, Rule 133, sec. 1.
[82] Bruce v. U.S., 167 F. Supp. 579 (1958).

being permitted to conjecture or speculate, but must have substantial evidence upon which to base its decision.[83]

For purposes of determining qualifications of an expert witness in a malpractice suit, such witness must have had basic educational and professional training as general foundation for his testimony, but it is a practical knowledge of what is usually and customarily done by physicians under circumstances similar to those which confronted the defendant with a charge of malpractice that is of controlling importance in determining the competency of such expert to testify to the degree of care against which the treatment given is to be measured.[84]

The expert testimony which establishes the plaintiff's case may be that of the defendant. Courts will presume that the defendant in a malpractice action when testifying will state his case as favorably to himself as possible. The extrajudicial admissions of the defendant have the same legal competency as direct expert testimony to establish critical averments of the complaint.[85]

The plaintiff cannot rely on excerpts from standard medical authorities, used in the questioning of medical witnesses, as evidence of proximate cause, since such works could be used only to discredit testimony, or to test its weight, and not as original evidence to sustain the issues in a case.[86]

Although it is necessary that experts be called to establish matters peculiarly within the knowledge of experts there are also facts which may be ascertained by the ordinary use of the senses of a non-expert. In cases where the negligence and harmful results are sufficiently obvious as to lie within common knowledge, a verdict may be supported without expert testimony. The testimony of an expert that a needle left in a finger would cause infection and gangrene, together with lay testimony that the plaintiff had run a needle into her finger and that the defendant had not extracted it when she had gone to him for care, was sufficient to support a judgment for plaintiff, even while it may be argued that it was a matter of common knowledge that a needle accidentally embedded in a finger might cause infection if not promptly extracted.[87]

The rule requiring expert testimony as to causation does not exclude the testimony of laymen as to various observed effects of the treatment, or other matters affecting the question of causation. Facts relating to the treatment and condition of the patient might be stated by lay witnesses although they might be incompetent to give an opinion as to the value

[83] Anderson v. Nixon, 104 Utah 262, 139 P. 2d 216 (1943).
[84] Huffman v. Lindquist, 234 P. 2d 34 (1951).
[85] Lashley v. Koerber, 26 Cal. 2d 83, 156 P. 2d 441 (1945).
[86] Bowles v. Bourdon, 219 S.W. 2d 779 (1949).
[87] Wires v. Little, 27 Cal. App. 2d 240, 80 P. 2d 1010 (1938).

or effect of such facts from a medical or surgical point of view.[88] The statements and the acts of the defendant, as well as appearances and manifest conditions which were observable by anyone, might be given by non-expert witnesses, and such testimony might show a course of conduct with ensuing results of such a character as to warrant the inference of a want of care.[89]

In general, the medical expert witnesses called to testify in a malpractice suit have no firsthand knowledge of the facts of the case. They are usually called upon to express an opinion in reply to a hypothetical question. This form of question assumes the existence of the facts recited in it, based upon the evidence which has been offered in the case. A good deal of latitude is allowed in the choice of facts assumed in the hypothetical question; to conform to the questioning party's theory, disputed facts may be omitted. However, undisputed facts may not be left out, and every assumption in the question must have some evidence to sustain it. Furthermore, the question must be fair and reasonable; it must not be unfair and misleading.[90]

As to the value of such expert testimony, the Missouri Supreme Court has said that where experts are called to testify, their statements are not to be considered as evidence of facts, but are of advisory nature, and they are permitted to express opinions because of the peculiar knowledge they possess, but courts are in no wise bound to blindly accept their ideas but after receiving the advice of experts are permitted to use their own judgment in passing upon the things concerning which the opinions are given, and they are necessarily permitted to disregard the testimony of such experts as may appear to them unreasonable.[91]

Res Ipsa Loquitur

Generally, the proof of a physician's negligence must be established by the testimony of medical expert witnesses, and can be established in no other way. The application of the principle of *res ipsa loquitur* creates in the case an inference of negligence on the part of the defendant; it relieves the plaintiff of the necessity of proving the alleged malpractice by the testimony of medical experts; it places upon the defendant the burden of giving an explanation to offset the inference of negligence.[92] If the facts and circumstances relied upon to sustain the allegation of negligence are closely and immediately connected with the accident there is said to arise a presumption of negligence which is described as a case in which "the

[88] Longfellow v. Vernon, 57 Ind. App. 611, 105 N.E. 178 (1941).
[89] Hubach v. Cole, 130 Ohio St. 137, 12 N.E. 2d 283 (1938).
[90] REGAN, *supra*, note 70 at 199.
[91] Heyberg v. Henske, 153 Mo. 63, 55 S.W. 83 (1899).
[92] REGAN, *supra*, note 70 at 214.

thing speaks for itself." In such a case, all that it is necessary for the plaintiff to do is to prove the fact of the harm and the circumstances under which it occurred.[93]

There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.[94]

For the principle to be applicable in malpractice suits, it must be proven (1) that the agency or instrumentality causing the injury is under the control and management of the defendant, and (2) that the circumstances must be such that common knowledge and experience would justify the inference that the accident is of a kind which normally would not occur unless someone is negligent.[95]

The principle has been held applicable in malpractice suits chiefly in the following types of cases: (1) slipping instruments; (2) foreign bodies left in the tissues; (3) burns from hot-water bottles, hot compresses, etc.; (4) X-ray injuries; (5) infection through the use of an unsterilized needle or instrument; and (6) injury to a portion of anesthetized patient's body outside the field of treatment or operation.[96]

There appears to be little question that the doctrine of *res ipsa loquitur* is inapplicable in malpractice actions when its invocation is sought solely upon the fact that the treatment was unsuccessful or terminated with poor or unfortunate results, and this conclusion is but in accord with, or resulting from, the universally recognized propositions that the mere fact of a poor or unsuccessful result does not raise a presumption or inference of negligence, does not constitute evidence in itself of negligence, does not establish a *prima facie* case, and does not shift to the defendant the necessity of carrying the burden of proof or going forward with the evidence.[97]

A few cases will suffice to illustrate the application of the principle in malpractice actions. In *Kelly v. Yount*[98] the defendant-physician's nurse requested a person, who had brought her child to the office, to assist in holding another child upon the X-ray table during examination. The voluntary assistant was burned by the electric current and injured by a fall on the floor. Applying the principle of *res ipsa loquitur* the court said

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[93] JARENCIO, *supra*, note 43 at 151.
[94] *Ibid.*, at 153, citing Scott v. London & St. Katherine Docks Co., 1865, 3 H. & Co., 596.
[95] Hale v. Heninger, 393 P. 2d 718 (1964).
[96] REGAN, *supra*, note 70 at 215.
[97] 162 A.L.R. 1267 (1946).
[98] 338 Pa. 190, 12 A. 2d (1940).

that it was necessary for the defendant to produce affirmative proof of his own freedom from fault; no such evidence being presented, judgment was rendered against the defendant. In *Stawicki v. Kelley*[99] the court said that, notwithstanding the nurse's count, a duty remained with the defendant to examine independently to make sure that no foreign body remained in the patient's body. However, in *Blackburn v. Baker*[100] the possible inference of negligence because a sponge was left in the abdomen was destroyed when expert witnesses testified that proper and approved methods were in the operation. And where the patient's X-ray burn appeared over a much larger area than that which was being given treatment by the physician, the principle was likewise held applicable.[101] And in *Ybarra v. Spangard*[102] it was pointed out that without the aid of the principle of *res ipsa loquitur,* a patient who receives permanent injuries of a serious character while unconscious, obviously the result of someone's negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability, and that if this were the state of the law of negligence, the courts, to avoid gross injustice, would be forced to invoke the principles of absolute liability, irrespective of negligence, in actions by persons suffering treatment under anesthesia. The court said that the suit was properly brought against the operating and assisting surgeons since plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants and it was manifestly unreasonable for them to insist that he identify any one of them as the person who did the alleged negligent act.

SOME GENERAL OBSERVATIONS

The relation of physician and patient is as we have noted, founded on the theory that the physician is learned, skilled and experienced in the afflictions of the body about which the patient ordinarily knows little or nothing but which are of the most vital importance to him. Therefore, the patient must necessarily place great reliance upon his physician. In accepting the trust, however, the physician does not undertake to warrant a cure; only that he will exercise his best judgment in treating the patient.

Medicine being the inexact science it is, the actual results of medical treatment sometimes fall short of the expectations of the physician and the patient. As a consequence, a malpractice action is brought against the physician. The single most difficult problem for an aggrieved patient

[99] 113 N. J. Law. 551, 174 A. 896 (1934).
[100] 227 A.D. 588, 237 N.Y.S. 611 (1929).
[101] Martin v. Eschelman, Tex. Civ. App., 33 S.W. 2d 827 (1930).
[102] 25 Cal. 2d 486, 162 A.L.R. 1258, 154 P. 2d 687 (1944).

has been the matter of proving the physician's negligence. We have already pointed out the necessity of expert testimony in most cases. However the specter of a conspiracy among physicians to simply bury their mistakes continues to haunt aggrieved patients as physicians expert in their particular fields have shown hesitancy in testifying against their colleagues; even as the problem of obtaining expert testimony has been somewhat minimized now in the United States. Also application of the principle of *res ipsa loquitur* has somewhat alleviated the plaintiff's burden of proof. On the other hand, the increase in successful malpractice actions in the United States has had the effect of discouraging physicians from acting at all. A corrollary problem is the high rates of premiums for malpractice insurance resulting from ever-increasing damages awarded to plaintiffs in malpractice actions.

The sound health of the populace requires that more persons be encouraged to enter and practice the medical profession. At the same time, care should be taken that those who do enter and practice the profession are competent. Some balance should be struck between the right of a patient to receive the best medical attention he could without fear of negligence by his physician, and the right of a physician to exercise his best judgment without fear of a malpractice suit when something goes wrong.