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Article 11

Torts - Physicians - Malpractice

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fication based on the marriage relation is not such an arbitrary and unreasonable prerogative as would place it in conflict with the due process clause of the Fourteenth Amendment. Pointing out that the ruling in Schlesinger vs. Wisconsin (supra), is not germane to the question because there there was no likely relation between the statute and the alleged evil to be remedied, he upholds the assumption of legislative authority to meet practical exigencies. "Unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said the limit of legislative power has been abused. To hold otherwise, would be to substitute judicial opinion of expediency for the will of the Legislature, a notion foreign to the American constitutional system."[6] Applying this construction of constitutional limitations to the instant case, he further cites Income Tax Cases, 134 N.W. 673, (Wis.), where the court said, "Classification is justifiable in case there is some substantial difference of situation which suggests the advisability of difference of treatment. We think there is clearly such a difference in this, that experience has demonstrated that otherwise there will be many opportunities for fraud and evasion of the law which the close relation of husband and wife or parent and child makes possible if not easy."

The dissenting view goes on to say that the principal case is not analogous to the attempt to take one person's property for the purpose of paying another person's debt which would constitute a denial of the due process clause, since even though certain Wisconsin statutes declare a separation of property interests, it should not be overlooked that there is an actual community of interest where husband and wife live together and each would usually get the benefit of the income of the other.

SOL GOODSIT

TORTS—PHYSICIANS—MALPRACTICE. *Cook* v. *Moats*, ___ Neb. ___, 238 N.W. 529. The defendant has been a regularly licensed and practicing osteopathic physician in the City of Blair, Nebraska, for twelve years. The plaintiff had a pain in her right leg and hip for some time. She went to the defedant for treatment. On May 6, 1930 in giving her a treatment and bending her knee firmly upward toward the body, pressing his weight upon it and twisting the same, the femur was fractured. Some time before this she had had one of her breasts removed for cancer, and the X-ray photographs taken after the frac-

[6] Purity Extract and Tonic Co. vs. Lynch, 226 U.S. 192, 33 S. Ct. 44, 57 L. Ed. 184.

ture show that she had a well-developed carcinoma of the femur or large bone of the leg which weakened it to at least fifty per cent of its usual strength at the time it was broken by the manipulations of the defendant. The defendant knew that this operation had been performed. Any physician of any school, upon learning that an entire breast had been removed for lumps would suspect the same might be caused by cancer, and would know that cancer might develop in the bones of such a patient, and if it did, that such bones would be weakened and could not bear the pressure of twisting that it might be possible to employ in the care of another patient. The plaintiff recovered and the court said, "Malpractice may consist in a lack of skill or care in diagnosis as well as in treatment."

According to 48 C. J. 1112, "Malpractice" is bad practice, either through lack of skill or neglect to apply it, if possessed. The term has been variously defined as, the negligent performance by a physician or surgeon of the duties which are devolved and incumbent upon him on account of his contractual relations with his patient: bad or unskillful practice by a physician or surgeon, whereby the patient is injured, the 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, pregnancy, or bodily injury, from reprehensible ignorance or carelessness, or with criminal intent. "Malpractice" is either wilful, negligent, or ignorant.

In 180 Wis. 238 it is said, "a physician is required to exercise only that degree of care, diligence, judgment, and skill which other physicians of good standing in the same school or system of practice usually exercise in the same or similar localities under like or similar circumstances, havng due regard to the advanced state of the medical profession at the time in question." And "Malpractice may consist in a lack of skill or care in diagnosis as well as in treatment." These rules of law are supported by: 170 Wis. 579; 183 Wis. 446; and 197 Wis. 405.

In 193 Wis. 588 a doctor used a certain method of treatment which was recommended to him by a famous English physician. The practice was an accepted practice in the profession although the physician did not know it, and the court held that, "His ignorance is immaterial if his practice is right." This is also supported by 158 Wis. 184 and 147 N.W. 1033.

The writer's conclusion is that "Malpractice" in Wisconsin is the failure of a physician or surgeon to diagnose or treat according to that degree of care, diligence, and skill which other physicians of good standing in the same school or system of practice usually exercise in the same or similar localities under like or similar circumstances, hav-

ing due regard to the advanced state of the medical profession at the time in question.

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MASTER AND SERVANT—JOINT EMPLOYERS—WORKMEN'S COMPFNSATION. *Murphy Supply Co., Appellant,* vs. *Frederickson et al, Respondent,* ___.Wis.___., 239 N.W. 420. This is an appeal from a decision affirming a judgment given by the Industrial Commission in favor of Frederickson. The point in question was whether or not one joint employer was solely liable in damages to employee injured on that employer's premises.

The Murphy Supply Co., appellant, and the Morley Co. have their respective business establishments within a half-block of each other; and neither believing that it individually could afford a night watchman agreed some twenty years ago to jointly employ a man in that capacity. The Morley Co. which occupied a larger amount of floor space than the Murphy Co. was to hire the many and pay him $105 per month; of that sum the appellant agreed to contribute $40. Fredrickson, who had been a night watchman for five or six years, commenced working for the Morley and Murphy Cos. on April 3, 1930. While he was making his rounds in the Murphy Co. he fell into an opening in the floor sustaining the injuries that resulted in his disability.

The Appellant admitted the Respondent's right to recover damages, but contended (1) that the respondent was the employee of the Morley Co. and not of appellant company; (2) that even if appellant is liable at all the Morley Co. must be jointly liable because the respondent was employed jointly by both companies.

The Supreme Court disposed of the first question in short order holding that the Morley Co. was not singly the employer because the nature of the Morley Co.'s business was not that of furnishing night watchmen, nor did they make a profit on Frederickson's services in the instant case. But as they both agreed to employ the night watchman in common, they were joint employers of the respondent.

The important point of the case, however, is the decision in regard to the appellant's second contention, the matter of joint liability of joint employers in damages to employee. In rendering its decision the court recalled the case of Borgnis vs. Falk Co., 147 Wis. 327, as saying that the intention and purpose of the Workmen's Compensation Act was to place the burden on the particular industry in which the injury occurred. That rule was inferred in the late case of Conveyor's Corp. vs. Industrial Commission of Wisconsin, 200 Wis. 512, where the Con-