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THE LAW OF SLANDER AS APPLICABLE TO PHYSICIANS.

THERE is, perhaps, no class of professional men more subject to abuse, and, it is believed, more powerless to obtain redress than physicians. About clergymen, the law has thrown its protecting arm and public opinion has been wont to overlook, if not to pardon their short-comings. The clergyman is a sort of privileged person, whose character is tried before and whose conduct is regulated by ecclesiastical tribunals to which the courts of law have relegated it. Lawyers can take care of themselves.

For alleged professional misconduct, incapacity or ignorance, for rumored unskilful treatment of diseases, physicians who choose may have recourse to legal proceedings. But to cowhide the editor or sue the newspaper for the circulation of a libel, may be said in either case to be social suicide. The physician must grin and bear it. But if he braves public opinion and asserts his rights, if he endeavors to obtain satisfaction at law, the chances are, to say the least uncertain. It is doubtful, as the law now stands, what charges of misconduct in a physician in a *single* instance are actionable. One court (*Camp* v. *Martin*, 23 Conn. 86) has held that words spoken of a physician, charging him *merely* with ignorance or misconduct in the treatment of a particular case were not actionable, *per se*. The words were, "If Dr. C. had continued to treat her, she would have been in her grave before this time. His treatment of her was rascally."

Another court (*Secor* v. *Harris*, 18 Barb. 425) has adopted a contrary view in a similar case, where the words were: "Dr. S. killed my children. He gave them teaspoon doses of calomel: it killed them; they died right off, the same day." This last is no doubt a more aggravated case, but it is difficult to understand the grounds upon which the principle was distinguished in the two cases. The court said in the last instance that in the rendition of its judgment it was borne out by the authorities, while in the first case, the court was equally confident after having examined the authorities that none could be found, analogous to the case at bar, to justify an action for damages *per se*. Both, however, united on one case (*Sumner* v. *Utley*, 7 Conn. 257), as being in point, and it is amusing to observe what different constructions the two opposing tribunals gave to a case which must certainly have decided one way or the other. The Connecticut court said it thought that the case referred to so far from varying the rule as they had given it, intended to sanction it, and quoted at length from C. J. HOSMER, as follows: "I readily admit that falsehood may be spoken of a physician's practice in a particular case, ascribing to him only such want of information and good management as is compatible with general knowledge and skill in his profession, and that when such a case arises, unless some special damage exists, his character will be considered as unhurt and no damages will be presumed. But on the other hand, it is indisputable that a calumnious report in a particular case may imply gross ignorance and unskilfulness, and do him irreparable damage. A physician may mistake the symptoms of a patient, or may misjudge as to the nature of his disease and even as to the power of the medicine, and yet his error may be of that pardonable kind that will do him no essential prejudice, because it is rather a proof of human imperfection than of culpable ignorance or unskilfulness. On the contrary, a single act of his, may evidence gross ignorance and such a deficiency of skill as will not fail to injure his reputation and deprive him of general confidence."

Now the New York court on the other hand, said that the doctrine laid down in the cases of *Poe* v. *Mondford*, Cro. Eliz. 620, and *Foot* v. *Brown*, 8 Johns. 64, both of which were adopted as authorities by the Connecticut court, had been repudiated. In the former, defendant charged plaintiff with having killed a patient with physic, and it was held, that the words were not actionable *per se*, and that the law only gave an action for words affecting a

man's credit in his profession, as charging him with ignorance or want of skill in general. In the latter the words were spoken of an attorney: "F. knows nothing about the suit, he will lead you on until he has undone you;" and it was held on the authority of the former that no special damage being shown, the action would not lie. Rejecting these two cases as unauthoritative. the New York court also quoted from the case of *Sumner* v. *Utley*, *supra*, as follows: "As a general principle it can never be admitted that the practice of a physician in a particular case may be calumniated with impunity unless special damage is shown. By confining the slander to particulars, a man may thus be ruined in detail. A calumniator might follow the track of the plaintiff and begin by falsely ascribing to the physician the killing of three persons by mismanagement, and then the mistaking of an artery for a vein, and thus might proceed to misrepresent every single case of his practice until his reputation should be blasted beyond remedy. Instead of murdering character by one stroke, the victim would be successively cut in pieces, and the only difference would be in the manner of effecting the same result."

It is good to beat your adversary with his own weapons, and while the case of *Sumner* v. *Utley*, decided in effect that slanderous words spoken of a physician were actionable *per se*, the court in *Camp* v. *Martin*, *supra*, notwithstanding, drew a favorable conclusion for holding that in its case slanderous words were *not* actionable *per se*. It is true that the case of *Sumner* v. *Utley* was somewhat stronger than either of the other two, and may have furnished grounds for the distinction that was drawn between gross ignorance in a single instance, and gross ignorance generally in the treatment of diseases, but there seems to us to be little, if any, difference between a case where the words were that a doctor killed his patient, and one where they alleged that if he had continued to treat the patient she would have been dead by this time, so far as the presumption of incapacity is concerned. In *Sumner* v. *Utley* the words imputed gross ignorance generally and particularly. The defendant said of the physician: "He has killed three and ought to be hung—damn him. They all died through his mismanagement. I have understood that he left an after-birth, and the man that would do that ought to be hung;" and on another occasion, addressing himself to Mrs. H., who had employed plaintiff as her physician, said: "He was the means of her sickness by

cutting an artery in her head—damn him; you ought not to pay him a cent; if Mr. H. had taken him up for it, it would have cost him $100. It ought to be put in the newspapers." The rule may be said to be as Chief Justice HOSMER put it, though it does not appear to be very clear: "This then is the correct principle, that the misrepresentation of a physcian's practice in a particular case, if it does not warrant the presumption of damage is not actionable, unless special damages are averred and proved; but if from the nature of the calumny damages are inferable, the words are actionable."

The question still remains, when do the misrepresentations of a physician's practice in a particular case warrant the presumption of damage? It is allowed that slanderous words alleging gross ignorance generally, or such ignorance or thorough incapacity as unfits him for the proper exercise of his profession, are actionable *per se*. To say of a physician that "He is a quack;" (*Pickford* v. *Gutch*, Dorchester Assizes, 1787); or "He is an empiric and a mountebank;" (Vin. Abr. Act. for Words, S. a. 12); or "He is a quack; if he shows you a diploma it is a forgery;" (*Moises* v. *Thornton*, 8 Term Rep. 303);" or "He is no doctor; he bought his diploma for $50;" (*Bergold* v. *Puchta*, 2 Thomp. & C. (N. Y.) 532); or "He is a drunken fool and an ass and never was a scholar;" (*Cawdry* v. *Tetley*, Godb. 441); or "He has killed six children in one year:" (*Carroll* v. *White*, 33 Barb. 615); or "It is a world of blood that he has to answer for in this town through his ignorance. He was the death of J. P. He killed his patient with physic;" (*Tutty* v. *Alewin*, 11 Mod. 221); or "I wonder you had him to attend you. Do you know him. He is not an apothecary; he has not passed any examination. He is a bad character; none of the medical men here will meet him. Several have died that he has attended to, and there have been inquests held upon them;" (*Southee* v. *Denny*, 1 Ex. 196.) In all these cases it has been held that damages are inferable without proof; but to say of a physician, "He is so steady drunk that he cannot get business any more;" (1 Ohio 83 n.); or "He is a two-penny bleeder;" (*Foster* v. *Small*, 3 Whart. 138); or to charge an allopathic physician with having met homœopathists in consultation, and that in the opinion of the profession it was improper to do so and against etiquette, and further, that in the opinion of the profession it was disgraceful to meet a homœopathic in consultation (*Clay* v. *Roberts*, 8 L. T. N.

S. 397); or to charge him with adultery not necessarily touching him in his profession without showing that it was connected with his profession (*Ayre* v. *Craven*, 2 Ad. & E. 2), have been held not actionable *per se*.

While the authorities are generally agreed as to charges of gross ignorance or incapacity in the exercise of the duties of the physician, it is not easy to determine what words are actionable in themselves in special instances. In analogous, and even in precisely similar, cases, the courts are divided. Where the words were: "He killed my child; it was the saline injection that did it;" (*Edsall* v. *Russell*, 4 M. & G. 1090); or, "He has killed my child by giving it too much calomel," (*Johnson* v. *Robertson*, 8 Porter 486), they have been held actionable *per se*. And, on the contrary, the words, "He has killed his patient with physic," (*Poe* v. *Mondford*, *supra*), or "In my opinion, the bitters A fixed for B, were the cause of his death," (*Jones* v. *Diver*, 22 Ind. 184), or "He gave my child too much mercury, or he made the medicines wrong through jealousy, because I would not allow him to use his own judgment," (*Edsall* v. *Russell*, *supra*), have been held not actionable in themselves.

In the examination of these cases, it will be found that where the physician is charged with killing his patient, the words have been held actionable on account of the imputation of crime which they import, and the only case in which such language has been held not actionable, is that of *Poe* v. *Mondford*, of an early origin. This case was rejected by the court in *Secor* v. *Harris*, on the ground that it was decided at a time when the doctrine of *mitior sensus* prevailed. And as for the case of *Jones* v. *Diver*, the court held that the words were not actionable, because they did not import a charge of murder; that if the defendant had said that "the bitters Dr. D. gave John Smith, caused his death; there was enough poison in them to kill ten men," he would have been held guilty of the charge, and the words would have then been actionable.

How such words necessarily import the crime of murder or manslaughter, in the absence of any expression of intention, is not quite clear. This was not the ground of the decision in a case of a non-professional, charged with having destroyed the life of a patient by mistaken, but well-meant, efforts to save his life: *March* v. *Davison*, 9 Paige (N. Y.) 580. But even if the words do not import the charge of crime or of gross incapacity generally, there seems to