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# *Contributory Negligence In Medical Malpractice*

*Diane Shelby**

THE PREFIX "MAL" means "bad". Medical malpractice, simply stated, is the bad practice of medicine. To the law, it is unskilled or negligent practice of medicine, as a profession, which causes injury.[1]

The best and most complete defense to a charge of malpractice is the allegation and proof of the absence of negligence.[2] It is also the most often used defense.[3] Of the less popular defenses, contributory negligence[4] on the part of the patient is probably the least attractive and the most difficult to maintain,[5] even though it has been held to be a complete bar to recovery in several cases difficult to categorize.[6]

Probably the main reason contributory negligence is not a popular defense is a monetary one. In a true malpractice action, even if sustained, contributory negligence is just that—negligence which proximately contributes to the injury.[7] The defendant doctor is still left liable for whatever part of the injury it is determined was caused by his negligence alone. This exception to the general rule, that an injured party cannot recover damages for an injury which he helped, even in the slightest degree, to create,[8] is the factor which lends much of the confusion to the cases. The rule for malpractice cases is very clearly stated in *Morse v. Rapkin,*[9] a New York case decided in 1965.

> There are situations in actions loosely labeled malpractice where the charge of dereliction is undistinguishable from the ordinary charge of negligence. The bulk of these actions are against hospitals, but it is conceivable that one could arise against a doctor. In such a case, applying the rule that contributory negligence defeats the action would be entirely proper. (Cite omitted.) But where the gravamen of the action is the improper professional treatment, the patient's failure to follow

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[1] 41 AM. JUR. *Phys. & Sur.*, § 78 (1942); 70 C. J. S. *Phys. & Sur.*, § 40 (1951); 42 OHIO JUR. 2d *Phys. & Sur.*, § 110 (1960).

[2] J. WALTZ and F. INBAU, MEDICAL JURISPRUDENCE 139 (1971).

[3] *Id.* at 139.

[4] For a discussion of the development and history of contributory negligence as a defense in malpractice cases, see Alderson, *Contributory Negligence in Medical Malpractice,* 12 CLEV.-MAR. L. REV. 455 (1963).

[5] See comments of the court as to common problems of deciding malpractice cases in Flynn v. Stearns, 52 N.J. Super. 115, 145 A.2d 33 (1958); See also discussion of sociological and practical considerations in the handling of this type of case discussed in Friedman, *Handling the Unique Problems of Medical Malpractice Actions,* 10 S.D. L. REV. 137 (Spring 1965); Coleman, *Malpractice and Contributory Negligence,* 60 J. NAT'L MED. ASSOC. 164 (March 1963).

[6] The distinction between ordinary negligence and negligence in the practice of a profession appears not to be made by many courts. The rules of law of negligence and malpractice are often interchanged, intermingled or ignored.

[7] W. PROSSER, LAW OF TORTS, § 64 (3rd ed. 1964).

[8] Hunter v. United States, 236 F. Supp. 411 (M. D. Tenn. 1964).

[9] 24 App. Div. 24, 263 N.Y.S. 2d 428, 430 (1965).

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instructions does not defeat the action. If the failure increases the extent of the injury, damages would be reduced to that degree. (Cites omitted.)

A second reason is that, generally, a defense of contributory negligence admits or implies negligence on the part of the party raising the defense.[10] Although studies have shown that, contrary to the belief held by most medical professionals, there is no appreciable loss of professional standing or monetary income after involvement in civil malpractice litigation, most are loath to admit to a charge of negligence.[11]

In the area of proof, a defense of contributory negligence is particularly difficult to maintain because of the unique features of the malpractice case—the usually long period of time (course of treatment) covered by the case, and the fact that the patient is assumed to put himself completely under the charge of the doctor or hospital and is in no position to harm himself.[12] The difficulty with the time aspect is that contributory negligence must be a direct cause, and exist contemporaneously with the negligent acts of the physician in the creation of the injury.[13] If a course of treatment lasts for three years, the difficulty in pinpointing and matching the specific actions of the defendant and plaintiff which together produced the injury becomes evident.

Disregarding for the moment the relatively small number of malpractice cases where true contributory negligence is found, and the cases where only malpractice is found, the remainder of the cases divide themselves into two distinct groups. In one category are the cases where the doctor was not negligent at all in his practice of medicine, the injury complained of occurring through some wilful and negligent conduct of the patient. In the other cases, the alleged contributory negligence occurred subsequent to the doctor's alleged negligence. In the second group, it is interesting to note the number of "bad result" cases. In these cases the doctor never expected a complete cure. The patient is discharged with instructions for self-help or referred to another physician. He fails to take advantage of either, and, consequently, the final results of the treatment are even less than the doctor expected. The patient sues, and, because medicine is not an exact science and juries are not always ruled by logic or the weight of the evidence, in a surprising number of suits, wins.

Undeniably, the patient has a right to recover damages for injury and to have a judicial decision as to the extent or existence of such injury, but the potential for corruption of sound legal principles is

[10] 39 OHIO JUR. 2d *Negligence*, § 85 (1959).

[11] LEVINE, *Medical Malpractice*, LEGAL ESSAYS OF THE PLAINTIFF'S ADVOCATE 127 (1961); SANDOR, *The History of Professional Liability Suits in the United States*, 163 J.A.M.A. 459 (1957).

[12] *See* authorities cited at note 3 *supra*.

[13] *Cf.*, Annot. 50 A. L. R. 2d 1046 (1956).

evident. Here, as in no other area of the law, the plaintiff is allowed to have money damages despite the fact that his disability has been increased or even created by his own actions.

Judging from the rise in the number of articles in professional journals and symposia on the subject, it appears that the "bad result" case is becoming a disturbing area for several professions.[14] For doctors and insurance men, it is disturbing because it is becoming a growing proportion of the increasing number of malpractice cases and awards in malpractice cases have been reaching unprecedented heights.[15] The legal profession is concerned because the cases are often inconsistent.

The discussion which follows will highlight developments in the major areas of malpractice litigation brought in the past ten years where contributory negligence was raised as a defense.

**Proximate Cause**

The plaintiff in *Somma v. U. S.*[16] failed to correctly fill in a form. Consequently X-ray films which showed active tuberculosis were not sent to his family physician. The disease went untreated for years. During the months after it was discovered that the disease was in active state, the defendant made no effort to advise the plaintiff of the urgency of his condition or to urge him to see his personal physician. In deciding the case for the government, the court, applying Pennsylvania law, said:

> . . . Plaintiff is not entitled to recover if any negligence of his with regard to his health contributed, in even slight part to the incident of May 29, 1956, and the damages resulting therefrom.

Although this is labeled a malpractice case, it would appear from the decision that the rules for ordinary negligence had been applied.

An opposite result was reached the same year in *Wheatley v. Heidemann.*[17] The parents of a two-year-old girl took the child to an osteopath. The doctor failed to correctly diagnose an infection of the eye, and the eye was later removed. The parents, suing as next friends for their daughter, were charged with contributory negligence in knowing the osteopath's limitations and still continuing with him. The court declared:

> Of course if the parents' negligence were the sole proximate cause . . . it would be a good defense. But if defendant's negligence

[14] THE MEDICO-LEGAL READER 235 (S. Polsky ed. 1956).

[15] R. LONG, THE PHYSICIAN AND THE LAW, 240 (2nd ed. 1959); Shindell, *A Survey of the Law of Medical Practice,* 193 J.A.M.A. 1108 (September 1965), *cont'd* 194 J.A.M.A. 527 (October 1965); STAFF OF SENATE SUBCOMMITTEE ON EXECUTIVE REORGANIZATION, 91ST CONGRESS, 1ST SESSION, REPORT ON MEDICAL MALPRACTICE: "THE PATIENT VERSUS THE PHYSICIAN" (1969).

[16] 180 F. Supp. 519, 525 (E.D. Pa. 1960).

[17] 251 Iowa 695, 102 N. W. 2d. 343 (1964).

. . . was a substantial factor in causing the injury, negligence of either parent would not be a defense.[18]

Florida has consistently held that contributory negligence is a complete bar to recovery. In 1964 in the case of *General Hospital of Greater Miami, Inc. v. Gager*[19] it so held, and in 1966, in *Musachia v. Rosman*[20] the court said:

> It is only when negligent acts on the part of the plaintiff have a direct and proximate causal relation, or contribute in some appreciable degree, to the injury that recovery is precluded.

Two "bad result" cases in juxtaposition show that the law is still developing in some states on the question of contributory negligence as a proximate cause and complete bar to recovery. In 1966, in *Paull v. Zions First National Bank*,[21] the plaintiff's arm was manipulated by surgical procedure. Alleged infection at the site of the incision, severing of a nerve, and formation of scar tissue caused loss of mobility. The court decided that the failure to exercise the arm, as directed, was the cause of the injury, i.e., that at the time of the suit mobility of the arm was still not restored.

The Kentucky court, which has been consistent in its holdings that contributory negligence will only mitigate damages, held, under a similar fact pattern, in *Blair v. Eblen*:[22]

> Negligence on the part of the patient, which occurs wholly subsequently to the physician's malpractice which caused the original injuries sued for, is not a complete defense to any recovery against the physician, but serves to mitigate the damages, preventing recovery to the extent the patient's injury was aggravated or increased by his own negligence . . . sustained prior to his contributory negligence.

Finally, in the 1970 case of *Germann v. Matriss*,[23] everyone except the court seemed to be confused. Plaintiff's wife had died of tetanus which, it was alleged, had entered her mouth on an improperly sterilized denture and been deposited in the open socket of a recently extracted tooth. The defendant dentist charged contributory negligence in that the patient had removed the dentures against his instructions. In commenting on the defense's charge of contributory negligence, the court ruefully said in deciding for the defendant:

> If the fatal spore entered a tooth socket because the denture was removed, such fact would establish only that the proximate cause of the fatal disease was not the allegedly negligent steriliza-

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[18] *Id.* at 712, 102 N. W. 2d at 353. If the parents' negligence were the "sole proximate cause" it would appear that contributory negligence would *not* be a good defense to the child's right to recover; rather, the showing of the defendant's freedom from negligent action would be a better defense.

[19] 160 So.2d 749 (Fla. Ct. App. 1964).

[20] 190 So.2d 47, 50 (Fla. Ct. App. 1966) quoting Bessett v. Hackett, 66 So.2d 694 (Fla. 1953).

[21] 18 Utah 2d 183, 417 P.2d 759 (1966).

[22] 461 S.W.2d 370 (Ky. Ct. App. 1970).

[23] 55 N. J. 193, 260 A.2d 825 (1970).

> tion which permitted a spore to be on the denture when Dr. Matriss . . . inserted it . . . Such fact would demonstrate that the efficient producing cause of the tetanus was a cause for which the doctor was not responsible.[24]

**Patient's Duty To Use Ordinary Care To Protect Himself**

Corresponding to the doctor's duty to use care and skill in his practice of medicine[25] is the patient's duty to use ordinary care in protecting himself from obvious or foreseeable injury.[26]

The court in *Fleishmann v. Richardson-Merrill, Inc.*[27] refused to extend the doctor's duty beyond the patient's voluntary termination of treatment.[28] The plaintiff had taken drugs by prescription to control high blood pressure. When the prescription ran out, she called the physician's office and obtained the trade name of the drug. For two years she purchased and took the drug without prescription. The drug was subsequently found to cause blindness. Although, upon learning of the harmful effect of the drug, she immediately stopped taking it, she suffered blindness and sued the doctor. The court decided that the doctor had no continuing duty to warn patients of possible harmful treatment after the patient had terminated the doctor-patient relationship. Further, if the patient and doctor learned of the harmful effects at the same time (which they did), it was as incumbent on the patient to protect herself as it was on the doctor to warn her.

The court in *Ambur v. Zim Israel Navigation Co.*[29] stated:

> Under the . . . circumstances, I find that there was no malpractice by Dr. Yaulus . . . since plaintiff failed to acquaint Dr. Yaulus with the full history of his ailment sufficient to enable the physician adequately to treat him.

In that case, a 51-year-old rabbi failed to give his complete history of heart trouble to the ship's doctor who was attending him to treat a seizure the plaintiff had sustained before the ship had come into port. The doctor allowed him to disembark and tour Israel, where he suffered more seizures with resulting damage to his heart.

A 1970 case, *Ray v. Wagner*,[30] upholds the patient's duty to protect himself but also seems to extend the physician's duty to warn the patient of possible harm even after the patient has indicated termination of the doctor-patient relationship. Plaintiff had a positive result on the Pap smear test for uterine cancer. The doctor was unable to contact her to tell her the results of the test as she had given false information about her address, her place of employment, and her

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[24] *Id.* at 210, 260 A.2d at 834. This flaw in the reasoning of the defense had passed unnoticed by the trial judge and attorneys for both sides.

[25] R. Long, *supra* note 15, at 1; 70 C. J. S. *Phys. & Sur.*, § 41 (1951).

[26] R. Long, *supra* note 15, at 75; 65 C. J. S. *Negligence*, § 4 (3) (1966).

[27] 94 N. J. Super. 90, 226 A.2d 843 (Super. Ct. App. Div. 1967).

[28] R. Long, *supra* note 15, at 7.

[29] 310 F. Supp. 1033 (S. D. N. Y. 1969).

[30] 286 Minn. 539, 176 N.W.2d 101, 103 (1970).

husband's place of employment. As a result, treatment was delayed many months and plaintiff was rendered sterile. On appeal of a decision for the doctor, the court said in regard to the doctor's trying to contact the plaintiff even after she had ceased consulting him and had not paid her bill:

> While it seems clear that defendant had a duty to take whatever steps were reasonable to notify plaintiff of the results of the test she took in August, *it was for the jury to decide whether the failure to reach plaintiff was the result of negligence on the part of the doctor,* and, if so, whether such negligence proximately caused the condition which resulted from her ultimate condition. (Emphasis supplied.)

**Patient's Right To Rely On Physician's Competence**

Concurrent with the patient's duty to save himself from obvious harm is his right to rely on the competence of his doctor.[31] He is not required to suspect every act of his physician, or to get a second opinion, and, even though the results of the treatment may be unsettling, he may reasonably rely on assurances from his doctor. The principle has been adhered to in most of the recent cases, even though in a few cases the right seems to have been extended to the very edge of reasonableness.

In *Favalora v. Aetna,*[32] a 71-year-old woman was admitted to hospital for tests to determine why she was experiencing fainting spells. Her physician did not indicate to the hospital the fact of the spells and no medical history was taken. During the taking of X-rays, she fell from the table and broke her leg. Contributory negligence was charged in that she failed to inform the radiologist that she was subject to fainting spells. The court said:

> She was under no duty to reiterate her entire medical history to each of the hospital personnel with whom she came in contact but was entitled to rely upon the skill of her personal physician and the competence of the specialists into whose care and keeping she had been committed for examination.
>
> ... [C]onformity with the standard of care observed by other medical authorities of 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 it fails to guard against injury to the patient from a reasonably foreseeable contingency.[33]

*Rahn v. U. S.*[34] decided in 1963, awarded $75,000 damages to the plaintiff. The defendants, military physicians, had not been able to correctly set plaintiff's broken wrist. This fact had been noted in the medical records. Therapy was recommended to the plaintiff and she accepted it. The immobility and misalignment of her wrist, how-

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[31] Favalora v. Aetna Cas. & Surety Co., 144 So.2d 544 (La. Ct. App. 1962).

[32] *Id.*

[33] *Id.* at 550.

[34] 222 F. Supp. 775 (S.D. Ga. 1963).

ever, were not improved. All during the course of treatment, the plaintiff had been reassured by the doctors that everything was all right. She did not discover the truth until she requested her medical records. The court noted:

> The plaintiff had a right to rely upon the defendant for her treatment without her calling others in to determine whether the defendant's agent were (sic) properly treating her, and she was not bound to consult other doctors unless she was fully aware that the defendant's agents were not properly treating her.[35]

A later case, *Johnson v. U. S.*[36] decided in 1967, came to the conclusion that even though the plaintiff had been in constant pain and had been unable to use his arm, he was not required to consult another physician who might have discovered the fact that a nerve had been sutured to the wrong tendon and thus have prevented the plaintiff's long period of lost wages. He was permitted damages for the entire period.

## CONCLUSION

One writer has suggested that contributory negligence is a good defense and should be used more frequently.[37] This area, however, as the preceding has attempted to show, is still developing. Some states have instituted malpractice screening committees composed of both lawyers and physicians.[38] Their purpose is to stem the increase in the "nuisance suit", if possible, and to clarify the law in the area of malpractice by seeing that truly justiciable cases come to trial.[39] Perhaps, when the cases are clarified before trial the defense of contributory negligence, properly applied in the correct cases, will be more frequently seen.

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[35] *Id.* at 780.

[36] 271 F. Supp. 205 (W.D. Ark. 1967).

[37] Trostler, *Contributory Negligence as It Applies to Medical Malpractice*, 34 RADIOLOGY 76 (1940).

[38] Karcher, *Malpractice Claims Against Doctors: New Jersey's Screening Procedure*, 53 A.B.A.J. 328 (1967).

[39] Similar committees have been set up in Arizona, Idaho, New Mexico, Virginia, New York, Nevada, Pennsylvania, California, and Utah. The California and Utah plans have panels of doctors advised in the law by members of the local bar association.