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Merrill C. Hoyt

his case was best expressed by an Illinois appellate tribunal[69] when it stated:

> While with reference to diseases in the human body, only men versed in the science of surgery or medicine are qualified to pass judgment on treatment given in a particular case, it does not need the aid of expert testimony for any intelligent person to form an opinion as to the impropriety of leaving a foreign object in a wound.

Thus, when the standard of care required of the physician is obvious to the average juror, a non-expert, lay witness can testify. The most frequent type of case which the court would hold that a lay witness can be used to testify to the standard of care required is when there is an external injury observable by anyone.[70]

When a more complicated issue on the standard of care required is involved, the standard must be established by an expert-physician. However, in case of gross negligence, the departure from such standard may be shown by the testimony of a lay witness. Once the expert has established what the standard should have been, the lay witness may tell what actually transpired, that is, what techniques the defendant did use. The jury may then ascertain whether the conduct described by the lay witness was at variance with what the expert declared ought to have been done.[71]

HOWARD M. HOFFMANN
GERALD J. SMOLLER

CONTRIBUTORY NEGLIGENCE AS A DEFENSE IN MALPRACTICE LITIGATION

The gist of an action against a physician or surgeon for malpractice is usually negligence rather than breach of contract.[1] Thus, in Illinois, the plaintiff must allege in his complaint that he was in the exercise of due care or was free from contributory negligence at the time of the injury.[2] Once the issue of contributory negligence has been raised by the pleadings, the plaintiff has the burden of proving that he was in the exercise of due care at the time.[3]

69 *Supra* note 66.

70 Richisen v. Nann, 340 P.2d 793 (Wash. 1959). See also, Annot., 81 A.L.R.2d 637 (1962).

71 See Annot., 81 A.L.R.2d 637 (1962).

1 26 I.L.P. *Medicine and Surgery* § 36 (1956); 70 C.J.S. *Physicians and Surgeons* § 57 (1951). A charge of negligence is grounded on a failure to use due care. However, arising out of the doctor-patient relationship is a contractual duty, express or implied, to use due care; thus a breach of contract.

2 *Ibid.*

3 McIlvain v. Gaele, 128 Ill. App. 209 (4th Dist. 1906).

The conduct[4] alleged to constitute contributory negligence[5] may occur during any of three time periods. The plaintiff's acts may occur prior to, contemporaneous with or after the negligent conduct of the physician.

Before Treatment

A patient's conduct prior to treatment cannot constitute the contributory negligence which relieves a physician or surgeon from liability for malpractice. The reasons supporting this result are grounded in the very concept of contributory negligence. Most courts explain the defense of contributory negligence in terms of proximate cause. "[T]he plaintiff's negligence is an intervening or insulating cause, between the defendant's negligence and the result."[6] It is said that the plaintiff's act, and not the defendant's, is the cause of the injury. In malpractice cases, the injury complained of is that inflicted by a doctor who has breached a duty owed to his patient while treating him. As to that injury, the plaintiff's prior activities cannot be said to be a proximate cause. It would not seem to be foreseeable that one who suffers a physical injury through his own negligence will suffer further injury due to improper care received at the hands of the physician selected to treat the initial injury.

Another element of contributory negligence, closely related to proximate cause, is the concept of particular risk. Contributory negligence bars recovery only when the injury is caused by the risk or hazard to which the plaintiff's negligent conduct exposes him.[7] Unless the plaintiff's negligent conduct exposes him to the foreseeable risk of a particular injury which is caused by the malpractice of his doctor, that conduct will not bar the action. The risk one is exposed to by disregarding a lowered railroad crossing gate is that of being struck by a train, not the risk of tripping over improperly laid rails[8] and not the risk of suffering further injury through the malpractice of a physician.

It might be argued that negligence in selecting a physician would be conduct prior to treatment which could constitute contributory negligence

[4] For a discussion as to what kind of conduct has been held to constitute contributory negligence, see Annot., 50 A.L.R.2d 1043 (1956). Some of the acts mentioned are (a) failure to return for further treatment, (b) not following instructions, (c) refusal of suggested treatment, (d) failure to consult another physician when dissatisfied with treatment being received, and (e) ordering the doctor to treat in a manner which he does not recommend.

[5] Contributory negligence may no longer be a complete defense to a malpractice action in Illinois. In a recent appellate court case, the doctrine of comparative negligence has apparently been adopted. If the Supreme Court of Illinois does not reverse that decision, defense attorneys may be expected to place greater emphasis upon assumption of risk, for it is a complete bar to recovery. See Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284 (2d Dist. 1967).

[6] Prosser, Torts § 64 (3d ed. 1964).

[7] *Ibid.*

[8] Prosser, Torts § 64 (3d ed. 1964); *Hudson v. Lehigh Valley R.Co.*, 54 Pa. Super. 107 (1913). (Failure to stop, look and listen; struck by descending crossing gate.)

and bar recovery.[9] However, it is not the selection of an incompetent physician that causes an injury. It is the submission to treatment by one who is incompetent or drunk[10] that is the efficient cause of the injury, and such submission is contemporaneous with treatment rather than prior to it.

During Treatment

More commonly, it is the conduct of a patient during the course of treatment which is pleaded as a bar to malpractice.

The leading case in Illinois on contributory negligence is *Wesley v. Allen*.[11] There, by way of a much cited dictum, the court said,

> [I]f a patient is guilty of contributory negligence which is an active and efficient contributing cause of the injury occasioned by the malpractice of his physician he is not entitled to recover. In other words, contributory negligence simultaneous and cooperating with the fault of the physician and entering into creation of the cause of action and forming an element in the transaction which constitutes the cause of action will bar a recovery.[12]

Frequently the contributory negligence complained of is a failure to cooperate with the physician. One of the earliest Illinois cases to rule that a failure to cooperate would bar an action was *Haering v. Spicer*.[13] In that case, the defendant-doctor was called to treat the plaintiff two days after she had been injured. Due to the inflamed and swollen condition of the plaintiff's injured shoulder and her resistance to the examination, it was difficult to discover the extent of the injury. Only by use of a general anesthetic could a more thorough examination have been made, and for that an assistant would have been required. The evidence conflicted as to whether the defendant knew from the examination he did make that the plaintiff's shoulder was dislocated. The evidence also conflicted as to whether the defendant requested that the patient's husband obtain an assistant for the defendant-doctor. The appellate court reversed the trial court and held that the jury should have been instructed that it is the duty of a patient to follow all reasonable advice and, if the doctor requests needed assistance,

9 When one selects a physician whom he knows is incompetent, he is aware of the danger and may be said to have voluntarily assumed the risk. In such cases, contributory negligence and assumption of risk overlap. See Prosser, Torts § 67 (3d ed. 1964).

10 Champs v. Stone, 74 Ohio App. 334, 58 N.E. 803 (1944).

11 235 Ill. App. 322 (4th Dist. 1925). In *Wesley v. Allen*, the plaintiff, while in the scope of his employment, injured his finger. He alleged that the defendant failed to amputate it but instead carelessly dressed it. As a result, the finger became so badly infected that plaintiff permanently lost the use of his right hand and arm. The court, based its decision on the statute of limitations and an estoppel due to accepting as full satisfaction of his injuries an award of $2856 under the Workmen's Compensation Act. Nevertheless, this case has been widely cited for the definition of contributory negligence. See 26 I.L.P. *Medicine and Surgery* § 33 (1956), and 41 Am. Jur. *Physicians and Surgeons* § 80 (1942).

12 *Supra* note 11, at 324.

13 92 Ill. App. 449 (3d Dist. 1900).

and the plaintiff refuses or neglects to procure it, the physician cannot be held liable for an injury which would have been prevented had assistance been procured.

Another early Illinois case of similar import is *Littlejohn v. Arbogast.*[14] In that case, the plaintiff suffered serious injuries to his back and hip due to a fall. The defendant was called in to treat the injuries. The vital issue to be decided was whether the defendant was negligent in failing to properly treat the dislocated hip. The defendant contended that he knew of the dislocated hip, but did not immediately set it, for such action would have seriously endangered the plaintiff's life, as the plaintiff was also suffering from a dangerous spinal injury. After the plaintiff had somewhat recovered, he refused to allow the defendant to administer the anesthetic necessary to reduce the dislocation. The court, in reversing the trial court, held that the patient was under a duty to submit to the necessary treatment prescribed by his physician and, when he refused, the physician could not be held liable for injuries flowing from his failure to administer the refused treatment.

In both of these cases, the plaintiff suffiered injury due to improper treatment being rendered. However, in both cases, the plaintiff was the cause of the treatment being improper. It was the patient's failure to cooperate with the doctor that caused the injury and prevented the doctor from performing acts which would have resulted in no injury being done.

Though the courts tend to speak in terms of "treatment," the time which is important when dealing with contributory negligence is much narrower in scope. The controlling moment is that moment which coincides with the physician's negligent act. In the *Wesley* case, the court's language does relate to that instant. The words "simultaneous and cooperating with the fault of the physician and entering into creation of the cause of action and forming an element in the transaction which constitutes the cause of action will bar a recovery"[15] can have no other meaning.

In deciding the *Wesley* case, the Illinois court cited a West Virginia decision, *Jenkins v. Charleston Gen. Hosp. and Training School,*[16] as persuasive authority. There, the plaintiff went to the hospital for X-rays of his broken arm. Before the plates were developed, the plaintiff left. He later received by mail a letter saying that the splints would not have to be removed. However the hospital radiologist had not properly X-rayed the arm and thus the letter informing the plaintiff that his arm would not have to be reset was incorrect. The plaintiff's own doctor removed the splints two weeks later and saw that the arm was crooked. He advised the plaintiff to return to the hospital. The plaintiff's failure to follow this advice resulted

14 95 Ill. App. 605 (3d Dist. 1900).
15 *Supra* note 12.
16 90 W.Va. 230, 110 S.E. 560 (1922).

in permanent injury to his arm. The defendant hospital charged that in not returning to the hospital after being advised to do so by his own physician the plaintiff was guilty of contributory negligence which barred recovery. The court disagreed with this contention and said that the contributory negligence which bars recovery must be contemporaneous with the main fact charged as negligence, and that negligence of a plaintiff which occurs subsequent to the defendant's negligence though still during the course of treatment, merely mitigates damages. If the plaintiff has negligently done something to contribute to his own injury, but can show what amount of injury is attributable to defendant's lack of care, he may recover to that extent.

These cases suggest that though the plaintiff may be negligent during the course of treatment, he may still recover if his negligent acts occur subsequent to the negilgence of the defendant. The important moment in time is the time during which the medical practitioner performs the act that is alleged to be negligent. If some negligent act of the patient has an adverse effect on the physician's treatment at the time he administers that treatment, and, if not for the patient's acts, the injury complained of would not have occurred, then the cause of action may be defeated by the defense of contributory negligence.

After Treatment

As previously mentioned, though courts frequently speak in terms of treatment rather than specific acts, it is clear that the important instant is that when the acts complained of occur. For that reason, negligence of the plaintiff during and after treatment, but subsequent to the negligence of the physician, will be herein discussed.

In general, an injured person is under a duty to mitigate his damages.[17] This duty is bound up in the rule of avoidable consequences. The rule of avoidable consequences operates on the negligence of a plaintiff which takes place subsequent[18] to the legal wrong that has occurred, but while some damages can still be averted. Subsequent negligence operates to aggravate the injury already done, and the rule of avoidable consequences bars recovery of those damages that could have been avoided had the plaintiff adhered to the standard of the reasonable man.[19]

The decisions in Illinois follow this line of reasoning. The court, by way of a dictum in *Wesley v. Allen,* summed up the rule most adequately:

17 Devlin v. Chicago City Ry. Co., 210 Ill. App. 7 (1st Dist. 1918).

18 The problem raised when the plaintiff's neglect is contemporaneous with or prior to the defendant's and contributes to the extent of the injury sustained, though not to the cause, is more difficult to resolve. Decisions are split as to whether the plaintiff should recover for the entire injury sustained, or only for those injuries not flowing from his own acts. In either case, however, the plaintiff does recover something. See Prosser, Torts § 64 (3d ed. 1964).

19 Prosser, Torts § 64 (3d ed. 1964).

> Where the negligence of the patient is subsequent to the malpractice and merely aggravates the injury inflicted by the physician, it only affects the amount of the damages recoverable by the patient. Such negligence will simply prevent a recovery to the extent that the damages were thereby enhanced or increased.[20]

It has been held in Illinois and other jurisdictions that the plaintiff is under a duty to follow the reasonable directions of his doctor, and, in the absence of directions, he is required to exercise the ordinary care of a reasonable man in a like situation.[21] If he does not, and this conduct is subsequent to any negligence of his physician, there will be no compensation recovered to the extent that this conduct aggravates the injury initially caused by the physician. Subsequent negligence on the part of the patient does not discharge the doctor's liability, but it does mitigate the damages.[22]

However, the case of *Morris v. Despain*[23] illustrates that not every failure to follow a doctor's instructions results in a mitigation of damages. In that case, Mrs. Despain suffered a fracture of her left femur. The leg was improperly set so that the knee was turned inward 30 to 90 degrees and the leg rendered useless. Mrs. Despain refused to allow the defendant to rebreak and reset the leg. She was 69 years old at the time and such a procedure might have endangered her life. The court held that though plaintiff[24] is under a duty to mitigate damages, the law does not require her to risk her life. Thus, though the damages caused by the doctor's negligent treatment could have been reduced, the court affirmed the trial court, which had instructed the jury that in this case Mrs. Despain's refusal of further treatment was not to be considered in determining the defendant's liability or in assessing damages. The appellate court said that a defendant need not risk her life before the law would allow her to sustain a claim for damages.

Conclusion

Though plaintiff may be charged with negligent conduct that occurred before, during, or after treatment, only that conduct which occurs simultaneously with the alleged misconduct of defendant will serve to completely

20 235 Ill. App. 322 (4th Dist. 1925).

21 70 C.J.S. *Physicians and Surgeons* § 51, 67 (1951); 41 Am. Jur. *Physicians and Surgeons* § 80 (1942). For Illinois cases not specifically dealing with medical malpractice, but concerning mitigation of damages in general, see 11 Ill. Digest, *Damages* § 62 (1939).

22 Doyle v. Owen, 150 Ill. App. 415 (2d Dist. 1909).

23 104 Ill. App. 452 (2d Dist. 1902).

24 The discussion in this article has been limited to the patient as the allegedly negligent plaintiff. However, there is case law to the effect that the negligence of a minor's parents in caring for and nursing such child is to be regarded as the negligence of the child. See Sanderson v. Holland, 39 Mo. App. 233 (1889). *Contra*, Wheatley v. Heideman, 251 Iowa 695, 102 N.W.2d 343 (1960); Nelson v. Harrington, 72 Wis. 591, 40 N.W. 228 (1888). The case of *Haering v. Spicer*, 92 Ill. App. 449 (3d Dist. 1900), suggests that the negligence of those having charge of the patient may be imputed to the patient in bar of an action for malpractice. The evidence introduced by the appellant physician tended to show that he requested the patient's husband to procure an assistant for the doctor. This was held to be such contributory negilgence as to defeat the suit for malpractice.

discharge defendant of his liability. Negligence which occurs prior to the defendant's negligence is of no effect at all. Negligence which occurs subsequent to the defendant's negligence can only serve to mitigate damages.

MERRILL C. HOYT

ASSUMPTION OF RISK AS A DEFENSE IN MALPRACTICE LITIGATION

William Prosser, in his treatise on Torts,[1] discusses three situations that give rise to the defense of assumption of risk. The first occurs when the plaintiff has expressly given his consent to relieve defendant from a duty and has decided to take his chances of injury from a known risk. The second occurs when the plaintiff, with knowledge of the risk, voluntarily enters into some relation with the defendant which will probably result in encountering the known danger. The third situation exists when the plaintiff becomes aware of a risk already created by the negligence of the defendant and elects to continue in the face of the danger.

All three require that the plaintiff has knowledge of the danger that is to be encountered and voluntarily elects to meet it. If the plaintiff's decision to take the risk is in itself unreasonable, below the standard of the reasonable man, the conduct is a form of contributory negligence. Due to this overlap, many courts fail to distinguish between contributory negligence and assumption of risk.[2]

The difficulty in applying assumption of risk to cases of medical malpractice is that plaintiff must be shown to have had knowledge of the risk assumed and to have voluntarily chosen to meet that risk. Proving these two elements is difficult at best. A patient may be aware of the dangers inherent in various medical procedures, but he rarely has any real choice in selecting the treatment given. When he is offered alternatives, both being thoroughly explained, the charge of negligence is most often grounded in an improper execution of the technique or procedure selected, rather than in an improper selection of the technique or procedure utilized.

Another factor, peculiar to cases of surgery and emergency treatment, which makes assumption of risk inapplicable is the usual unconsciousness of the patient at the time of the alleged negligence of the physician. A patient who has neither control over what is being done, nor awareness of the physician's activities, cannot be said to have had knowledge of the risk assumed coupled with a voluntary election to meet it. However, under such circumstances, it would be equally difficult to prove contributory negligence.

1 Prosser, Torts § 67 (3d ed. 1964).
2 *Ibid.*