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A phase of the field of civil law which seldom comes within the experience of the average practitioner concerns itself with the negligence of physicians and surgeons in the practice of their profession, which is classified under the broad general term of malpractice. As the practice of medicine in its various branches tends to become a business rather than a personal relation, and the paternal position of the family physician faces into the limbo of forgotten things, it is likely that actions against doctors for their acts of negligence in the exercise of their art will become more, rather than less, frequent. When the medical profession laid aside as outmoded and unsanitary the shawl of the family doctor, who served as friend and confidant as well as physician, and assumed the efficient white jacket of specialization and commercialism, it likewise lost the armor of infallibility that the shawl concealed. Although present day methods are undoubtedly the better, they must stand alone in the full glare of the light of scientific merit, unprotected by the shadows of friendship.

As evidence of the former reluctance of patients to question the wisdom of their doctors, it is to be noted that relatively few cases have appeared in the records of the Supreme Court of Appeals of West Virginia concerning civil suits for malpractice by physicians, and a portion of these hereinafter considered do not involve this question directly. Even considering the numerical paucity of West Virginia decisions on the question, the cases thereunder run the entire gamut of topics involved, and are the subject of most thorough and excellent opinions. Practically every West Virginia case of this type is recognized as authority upon its subject in all jurisdictions, and a study of the general law of malpractice encounters many citations to the decisions of the Supreme Court of Appeals of West Virginia.

It is well established by precedent that the ordinary relation of physician and patient is more nearly consensual than contractual. The relation and rights and duties incident thereto have their inception in the position in which the parties find themselves placed through force of circumstance, rather than by any specific, voluntary agreement. Due to the peculiar nature of the relation,

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the remedies for violation of the duties thereof are twofold. If the unusual case of a special contract exists, then of course the remedy may be directly on that contract. If, however, no such contract is made, there is still the implied contract of service, upon which an action may be maintained. In either instance a breach of the professional duty involves a charge of negligence and an action may be maintained for the resulting injury. Text writers have sometimes said that the patient may have his election of an action for the tort, or may waive the tort and proceed on the contract, either express or implied. Whatever view is taken the result is the same; the injured party has his choice of remedies.

The law in West Virginia as to the dual nature of the remedy was first stated in *Kuhn v. Brownfield.*[1] That and subsequent cases have made it clear that either case or assumpsit may be maintained for malpractice. The court bases liability upon breach of an implied obligation arising from the employment.

The Duty

An orderly survey of authorities discloses that the cases naturally align themselves into groups: first, those arising out of a specific contract; second, those arising through the implications of the relation of physician and patient. The duties and liabilities incident to the former are of course dictated by the nature and wording of the contract of employment itself, and thus each such case must stand alone. As concerns the second group, however, we find a situation which provokes comment.

The duty of a physician to his patient, briefly stated, is laid down as follows:[2]

> "The physician is bound to bestow such reasonable ordinary care, skill and diligence as physicians and surgeons in the same neighborhood, in the same general line of practice ordinarily have and exercise in like cases."

In this statement of the law is contained the essential differentiation between ordinary actionable negligence and that special duty to which physicians and surgeons are bound, that is to say, the duty and liability of the physician are measured on a yardstick of care graduated on the basis of time and locality. It requires but a casual contemplation of the unique position of the

[1] 34 W. Va. 252, 12 S. E. 519 (1890).
[2] Lawson v. Conaway, 37 W. Va. 159, 168, 16 S. E. 564 (1892).

doctor to recognize the wisdom of such a rule of law, for if the standard were different, as the late Chief Justice Taft has so well said:[3]

> ". . . . few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the ills that flesh is heir to."

In *Dye v. Corbin*,[4] which is a leading case upon the particular subject, the plaintiff, residing in a remote region of Ritchie County, suffered an injury to his ankle, which was diagnosed and treated as a dislocation by the local physician. Some six months later, the injury not healing satisfactorily, the plaintiff journeyed to Cincinnati, Ohio, and there by means of the radiograph determined that there was actually a fracture as well as a dislocation, and that the fracture had knitted improperly. Subsequently it became necessary to amputate the foot. In an action of trespass on the case against the attending physician, a verdict was directed for the defendant physician, which the Supreme Court of Appeals in affirming said:

> ". . . . a physician is not required to exercise the highest degree of skill and diligence possible in the treatment of an injury or disease unless he has by special contract agreed to do so. In the absence of such special contract, he is only required to exercise such reasonable and ordinary skill and diligence as are ordinarily exercised by the average of the members of the profession in good standing in similar localities and in the same general line of practice, regard being had to the state of medical science at the time."

And

> "Where a physician exercises ordinary skill and diligence keeping within recognized and approved methods, he is not liable for a result of a mere mistake of judgment. The physician is liable for an error in judgment where the error is so gross as to be inconsistent with that degree of skill which it is the duty of a physician to possess."

It will thus be seen that there can be no arbitrary standard of care laid down, but that the rule must necessarily be an elastic one, which can be equitably applied to any situation. Thus less is expected of a country doctor than a city physician; the latter has the advantage of more varied observation and experience and

[3] Ewing v. Goode, 78 Fed. 442, 443 (C. C. S. D. Ohio, 1897).
[4] 59 W. Va. 266, 270, 273, 53 S. E. 147 (1906).

is in closer touch with improvements in medical science.[5] The cases, as further stated, make a distinction, and a wise one, between errors in judgment and errors in execution.

The next important case in West Virginia, both in point of time and legal interest, is that of *Browning v. Hoffman*,[6] which was twice before the Supreme Court of Appeals, with Judge Poffenbarger rendering the opinion of the court in each instance. For the purposes of this discussion, the cases may be treated as one. The plaintiff suffered a fracture of the leg and was taken to the hospital of the defendant and there treated by the defendant, who was called out of town upon important business for a short period. During the absence of the defendant, and while the plaintiff was still in the hospital under the care of an assistant to the defendant, he developed a severe infection, which the plaintiff claimed was the result of the application of an improper cast by the defendant. The infection necessitated the amputation of the leg. The jury in each instance awarded a verdict for the plaintiff, and the Supreme Court of Appeals in turn, a new trial. The court recognized that a surgeon may adopt a method approved in the community and that if there be two or more approved methods he may choose between them.

It has been seen that the doctor's duty depends largely upon his good faith and honest effort, and for an honest error in judgment, as in making a diagnosis, there can be no liability, providing he has exercised due diligence in arriving at a decision and action upon it thereafter.[7]

Abandonment is a common ground for liability in malpractice cases. The duty in this respect is to continue attendance as long as reasonable and ordinary skill require, unless the employment is sooner terminated by the parties.[8] Circumstances may sometimes preclude personal attendance and justify temporary competent attendance by another under the doctor's personal direction.[9]

The court has laid down a very strict rule of liability for a breach of this duty. In a recent case the defendant physician had

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[5] Lawson v. Conaway, *supra* n. 2.

[6] 86 W. Va. 468, 103 S. E. 484 (1920), rehearing 90 W. Va. 568, 111 S. E. 492 (1922).

[7] Jenkins v. Hospital, 90 W. Va. 230, 110 S. E. 560 (1922); Vaughn v. Hospital, 100 W. Va. 290, 130 S. E. 481 (1925), rehearing 103 W. Va. 156, 136 S. E. 837 (1927).

[8] Lawson v. Conaway, *supra* n. 2.

[9] Browning v. Hoffman, supra n. 6.

undertaken to care for the plaintiff during childbirth, but the process being a slow one, he went to visit another patient in the same condition, and his presence being needed, he was unable to return to the plaintiff for several hours, during which time the plaintiff had been attended by another physician. The court in reversing a judgment for the defendant, lays down this very strict rule:[10]

> "After giving medicine to accelerate plaintiff's labor, it was the absolute duty of the defendant to remain where he could be reached when needed, or to provide a competent physician in his place. His engagement was to give the case close attention."

This case was, of course, an aggravated one, and in all likelihood the decision will be limited in its application as a precedent.

In a somewhat similar case the defendant physician in his treatment of the plaintiff administered to her a drug capable of producing serious results and then absented himself for several days. The evidence discloses that the defendant had requested another physician to care for his practice for a few days, but had failed to inform the plaintiff of the arrangement or to advise the substitute physician of the plaintiff's condition and treatment.[11] The court held that defendant's conduct constituted abandonment of the patient.

It would seem, therefore, that while the court is inclined to be lenient with the physician who in the exercise of honest effort fails either through mistake or other innocent cause to effect a good result, it is, on the other hand, very strict in requiring attention and attendance upon the patient by the physician who has undertaken the treatment.

Liability of the Physician in the Absence of Personal Negligence

We have thus far considered the liability of the physician for lack of skill or attention, both of which may be classified as negligence. There are in addition to these bases of liability, others wherein personal negligence is absent. First, we have operations performed without the consent of either the patient or some one authorized to give such consent.

> "Except in very extreme cases, a surgeon has no legal right to operate upon a patient without his consent, nor upon a child without the consent of its parent or guardian."[12]

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[10] Young v. Jordan, 106 W. Va. 139, 141, 145 S. E. 41 (1928).
[11] Howell v. Biggart, 108 W. Va. 560, 152 S. E. 323 (1930).
[12] See Browning v. Hoffman, 90 W. Va. 568, 581, 111 S. E. 492 (1922).

This dictum is in accord with the general law that such an operation must not be performed without the consent of some one authorized to give it, except in such emergency as would imply consent. Although no very definite rule is laid down as to how the existence of such an emergency is to be determined, it is to be logically supposed that the courts will be guided in this regard by the testimony of physicians as to the established practice. It should be observed that liability in such a case is grounded on trespass to the person and not malpractice.[13]

The second ground of liability wherein there is absence of personal negligence by the physician is for the negligent act of an assistant or nurse under the supervision and direction of the defendant physician. We find no West Virginia case four square upon this point, but that the physician is liable for the negligence of his assistant or a nurse under his supervision is tacitly recognized in several cases. In one case[14] the defendant physicians were partners maintaining a private hospital in which an operation was performed on the plaintiff by one of the defendants, and of which operation she complained. She based her action against the partners upon the alleged breach of the implied contract, so that although the case does not depend upon the agency principle, nevertheless it does not expressly repudiate it, and by implication accepts the rule. In the second *Browning v. Hoffman* case the plaintiff offered an instruction based upon negligence of an attending nurse. The court in referring thereto said:[15]

> "As she was competent and experienced there was no negligence on the part of the defendants in relying upon her judgment in matters properly entrusted to her, and an honest mistake on her part, if made, would not have been negligence any more than such a mistake on the part of a physician would be."

By inference, therefore, since the liability of the defendant physician is not denied, had negligence existed on the part of the nurse, it can be assumed that liability is recognized.

Liability of Third Parties

A kindred subject now discussed parenthetically is that of the liability of third persons generally for the negligence of physicians. Such third persons are usually of two groups, first, hospitals em-

[13] Rolater v. Strain, 39 Okla. 572, 137 Pac. 96 (1913).
[14] Cook v. Coleman, 90 W. Va. 748, 111 S. E. 750 (1922).
[15] *Supra* n. 6, at 582.

ploying physicians, or, second, employers who by contract with their employees maintain a medical service for them.

A hospital under common agency principles should be held responsible for the negligence of agents in matters within the scope of their authority. The measure of care and attention that the law exacts is tempered by the capacity of a patient to attend to his own safety.[16] Constant attention is not ordinarily required.[17]

The court, however, at least by dictum adopts the view that a private charitable hospital is not subject to vicarious liability.[18] This rule, while in accord with the weight of authority, is subject to criticism and has been repudiated in some jurisdictions.[19] The reasoning in support of it, — that such institutions "administer trust funds, and it is not just that they be dissipated with (tort) liabilities . . . .",[20] suggests the alarming idea that a settlor can insulate his charitable bequest from liability for tort. It is, moreover, a strange quality of charity that insists that the institution be irresponsible when it increases the need of one object of charity so that it may keep going to aid others irresponsibly. A private hospital cannot escape liability upon the ground that the attending physician is an independent contractor,[21] and a charitable institution should be held to the same rule. State and municipal institutions are not liable in tort because of their governmental character. The immunity might well be qualified by statute.

Another such type of liability is that of an employer to an employee who is treated by a physician retained by the employer for the purpose of treating the employee. The law in this regard has been thus stated:[22]

> "Where an incorporated lumber company agrees with an employee in consideration of monthly deductions therefor from his wages, to furnish and obtain a skilled physician to attend to and treat him for any sickness of accident occurring while in its service, it is bound thereby to select and retain for that purpose a physician having the knowledge and skill ordinarily possessed by other members of the profession in the same community."

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16 Hogan v. Hospital, 63 W. Va. 84, 59 S. E. 945 (1907).
17 *Ibid.*
18 *Supra* n. 16.
19 Geiger v. Simpson Methodist-Episcopal Church, 174 Minn. 389, 219 N. W. 463 (1928).
20 See Jenkins v. Hospital, *supra* n. 7, at 233.
21 Vaughn v. Hospital, *supra* n. 7.
22 Neil v. Lumber Co., 71 W. Va. 708, syl. 1, 77 S. E. 324 (1913).

For breach of this duty the employer will be liable to the same extent that the doctor would be in a malpractice action. It seems that here the liability is not based upon agency, but upon the assumpsit theory predicated upon the contract between the employer and employee. The court makes a distinction between an action by the employee patient against the doctor for his tort and against the employer on his contract.[23]

Another case, although not exactly of the type here considered, but embodying the same principles, is *Tompkins v. Insurance Company*,[24] wherein the plaintiff, who carried a policy of accident insurance with the defendant company, suffered an injury, was treated by his own physician, and in compliance with his policy and with specific instruction from the defendant company, submitted himself to the defendant's physician for the purpose of examination. In making such examination, the company's physician removed a plaster cast from the injured member, did not replace it, and advised the plaintiff as to a course of procedure which plaintiff claimed resulted in injury. The court there held the insurance company liable for such injury on the ground of agency, although the examining physician did not have authority from the company to prescribe for claimant.

Defenses

That contributory negligence of the plaintiff is ordinarily a bar to recovery is, of course, a general principle of tort law. Doubtless this is so as a general matter in malpractice cases.[25] The rule has been qualified in later cases, which distinguish between concurrent and subsequent contributory negligence. They treat the latter as a basis for mitigating damages, but not for defeating the action.

> "If . . . . the patient being competently advised of the necessity of further diagnosis and treatment within the period of such relation and within a reasonable time after the date of the wound, ignores it, and neither returns to the hospital nor procures treatment elsewhere until after the trouble has become irremediable, his right of recovery is limited to such damages as accrued before his negligence occurred, if the prior and subsequent damages can be separated by the jury."[26]

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[23] Ashby v. Coal Co., 95 W. Va. 372, 121 S. E. 174 (1924); Hinkelman v. Steel Co., 171 S. E. 538 (W. Va. 1933).
[24] 53 W. Va. 479, 44 S. E. 439 (1903).
[25] Lawson v. Conaway, *supra* n. 2.
[26] Jenkins v. Hospital, *supra* n. 7, syl. 5.

This seems a just and equitable rule. Whether or not it is practicable is another matter. Even so, in a proper case the defendant is entitled to have the jury instructed as to its powers in this regard.

It appears that malpractice actions, whether the form be assumpsit[27] or case,[28] must be commenced within one year after the cause of action arose. Thus suit must be brought promptly to preclude the defense of the statute of limitations.

A third ground of defense little known and little used, but clearly the law of this jurisdiction, arises out of the situation wherein the attending physician brings an action to recover for his services to the patient, and the patient subsequently institutes an action for alleged malpractice. If the patient makes a general appearance to the physician's action he must rely on malpractice as a defense or by way of recoupment and if he does not do so, his cause of action is lost.[29] The patient may appear to disclaim the waiver of his claim.

There is a marked division of authority upon this proposition, both among the courts of other jurisdictions and text writers. The above-cited decision was the subject of an able and vigorous dissent, which well presented the logic of the opposite view. The argument on the one side is that one who is brought into court is bound to present every defense that he may have to an action, lest he be forever barred therefrom. On the other hand is presented the very reasonable position that the action of the physician for the value of his services is an action on the contract whereas the claim of the patient is essentially a tortious one and, therefore, the two matters need not be litigated in the same suit. Of course, actions for malpractice can be treated, and indeed pleaded, as contractual, but in any event malpractice constitutes an independent cause of action as well as a defense to the claim for medical service.

The dissenting opinion contains the additional argument that the disproportionate amounts of the two claims precluded their trial in the same courts under West Virginia statutes; that the claim of the physician was for too small an amount for the circuit court, and that of the patient for too large an amount for the justice court. Such a position is not tenable in view of the qualifications placed upon the rule in the majority opinion quoted, to

[27] Kuhn v. Brownfield, *supra* n. 1.
[28] Neil v. Lumber Co., *supra* n. 22.
[29] See Lawson v. Conaway, *supra* n. 2.

the effect that the patient may appear in the physician's action against him and have the records show that he does not waive his right.

The rule as thus laid down is not unduly harsh when it is fully considered, for the patient debars himself from his right of an action only by his own election, for if he fails to appear and judgment is rendered against him by default, he is not harmed, as he may appear and disclaim a waiver of his alleged right; but if he elects to defend the action brought by the physician, he should in the public interest, be required to raise all defenses available to him. Regardless of the conflicting principles involved and the many arguments which may be presented on both sides, the statement above is the law of this jurisdiction.

Another interesting defense in such actions arises where the plaintiff injured by the negligent act of a third party, is treated by a physician who is guilty of malpractice in such treatment, and subsequently executed a release of the original tort-feasor. Such a release constitutes a discharge of liability of the offending physician, according to a recent decision. In that case the plaintiff was a minor. The physician was selected by the plaintiff's father, and after treatment was rendered, a statutory compromise was effected, which the Supreme Court of Appeals held to be a satisfaction of all immediate and direct damages flowing from the original injury, including malpractice by the attending physician. The court said:[30]

> "It is a general rule that if an injured person uses ordinary care in selecting a physician . . . . the law regards an injury resulting from mistakes of the physician or his want of skill, or a failure of the means employed to effect a cure, as a part of the immediate and direct damages which naturally flow from the original injury."

Soon after the enunciation of this broad rule, it became necessary for the court to limit its application by confining the scope of such releases to matters which might fairly be said to have been within the contemplation of the parties at the time of the execution of the release.[31] In this case the release was executed prior to the conclusion of the treatment by the physician. The Supreme Court of Appeals distinguishes the two cases by the fact that in the former the release of the original wrongdoer was executed

[30] Mier v. Yoho, 171 S. E. 538, syl. 1 (W. Va. 1933).
[31] Conley v. Hill, 174 S. E. 884 (W. Va. 1934).

subsequently to the physician's treatment, whereas in the latter case the release of the original tort-feasor preceded the treatment.

Certainly the rule as originally laid down, without the qualifications in the second case, was capable of gross misinterpretation, and could well lead to large injustice. However, the qualifications placed upon the rule remedy its patent defect where it is made affirmatively to appear that a release of the subsequent damages is intended by the parties. The objection to the rule is, of course, that there are in fact two distinct torts. The original tort-feasor is liable only for the injury he has done and not for aggravation of it by the plaintiff's physician. Although the damages resulting from the two torts may not be separable, a method of expediency in arriving at a basis of compensation is no justification for the establishment of a precedent not based upon true legal principles.

A fifth bar is the acceptance by the plaintiff of the benefits of workmen's compensation fund for an injury received in the course of his employment, in the treatment of which injury a physician acting for the employer has been guilty of malpractice. On this state of facts the court has reasoned that since the action of the doctor came within the compensation act he should not be personally liable.[32] If there is substance in the idea that the threat of liability for malpractice tends to make doctors more careful, why remove that sanction here?

This case is very similar in its facts to an earlier decision wherein the opposite result was reached.[33] However, the cases can be distinguished by the fact that in the later case the action was in tort directly against the attending physician for the aggravation of the injury, whereas the action in the earlier case was against the employer for damage as a result of the breach of its contract to provide a competent physician. The court said in the earlier case that the employee's contract with the defendant company for medical services removed the case from the contemplation of the Workmen's Compensation Law.

The Trial

Assuming that the plaintiff has finally reached the stage of the proceedings wherein he is permitted to present his case to a jury, he is confronted by many more difficulties. Of course, in common with every other plaintiff, he must assume the burden of

[32] Hinkleman v. Steel Co., *supra* n. 23.
[33] Ashley v. Coal Co., *supra* n. 23.

proof, and perhaps his burden is even heavier than that of the ordinary plaintiff.

If, as the cases hold, there is no presumption of negligence attached to the defendant by virtue of poor results to the patient,[34] and if the rule of *res ipsa loquitur* does not apply,[35] how must the plaintiff sustain his allegations? In this connection a division of the subject into two heads is perhaps advisable: first, the evidence itself; second, witnesses.

It is obvious that in malpractice cases expert testimony is required to establish, for example, whether or not the recognized standards of practice have been complied with.

> "In determining these questions the evidence of the physicians and surgeons should have peculiar weight. The ordinary layman does not know whether a particular surgical treatment accords with the standard or usual treatment sanctioned by the profession in that or similar localities. The patient cannot fix a standard of his own, neither can the jury."[36]

There is a more recent decision to the effect that cases may arise where there is such marked want of skill that lay witnesses may be called upon to establish it without any expert testimony whatever.[37] The idea, at best, should be exploited sparingly.

Of course a witness may testify only to matters within his personal knowledge;[38] but he is entitled to refresh his memory from a document made by another furnished him in the usual course of business.[39] And a surgeon under whose direction and for whose use X-ray plates were made, may introduce them in evidence although they were not taken or developed in his presence.[40]

Testimony that a hospital excluded operations therein by other than members of the staff is admissible in evidence[41] as is testimony of another physician as to advice he gave to the plaintiff at the time of the injury.[42] Variance between the testimony of an expert witness in two trials of the same case, or between the testimony of one expert and that of another, does not render such

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[34] Dye v. Corbin, *supra* n. 4.
[35] Vaughn v. Hospital, *supra* n. 7.
[36] *Id.* at 103 W. Va. 163.
[37] Buskirk v. Bucklew, 176 S. E. 603 (W. Va. 1934).
[38] Browning v. Hoffman, *supra* n. 6.
[39] *Ibid.*
[40] Jenkins v. Hospital, *supra* n. 7.
[41] Browning v. Hoffman, *supra* n. 6.
[42] *Ibid.*

testimony inadmissible.[43] It would seem that a witness when competent may testify not only as to physical facts but as to his motives and intentions by showing that he acted in a certain manner for a certain reason.[44] Another exception to the rule heretofore enunciated concerning the importance of expert testimony is that a lay witness who was familiar with the facts should have been permitted to testify to the plaintiff's ability to perform manual labor before and after the alleged injury.[45]

Further in derogation of the common rules, it has been held that where the declaration charges want of skill and care in general terms and no specific act, the defendant physician may introduce evidence of his reputation for skill and care in his professional duties.[46]

In the first *Browning* case it was held error to permit the introduction of evidence concerning an outmoded method of treatment upon the question of choice of methods.[47] Testimony that the plaintiff withdrew from the defendant's hospital and refused to permit another operation because of her lack of confidence in the defendant, is inadmissible.[48] It has been held that even though one of the acts relied on as negligence was a violation of law, the fact that it did constitute such violation was not admissible on the issue of negligence.[49] Admissions of assisting nurse as to the manner of performing the operation, if made some days after the operation, have been excluded as hearsay.[50] It has been held that the fact that it became necessary to amputate a patient's leg to save his life is evidence for the jury to consider in determining whether or not the physician treating the original injury was guilty of negligence.[51]

There is apparent conflict between the decisions in *Browning v. Hoffman*,[52] and *Vaughn v. Hospital*,[53] as to the weight to be given to the evidence of physicians and surgeons concerning the standard of the community. The former decision approved an instruction to the effect that the jury should give to expert testi-

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[43] *Ibid.*
[44] Lawson v. Conaway, *supra* n. 2.
[45] *Ibid.*
[46] Dudley v. Grace Hospital, 112 W. Va. 461, 164 S. E. 470 (1932).
[47] Browning v. Hoffman, *supra* n. 6.
[48] Cook v. Coleman, *supra* n. 14.
[49] *Ibid.*
[50] *Ibid.*
[51] Maxwell v. Howell, 173 S. E. 553 (W. Va. 1934).
[52] *Supra* n. 6.
[53] *Supra* n. 7.

mony such weight and credit as they should think it entitled to receive; on the other hand, the opinion in the *Vaughn* case declares that in determining the compliance of the defendant with the requisite standards "the evidence of physicians and surgeons should have peculiar weight." These apparently divergent views can be reconciled only by consideration of the fact that the testimony in the *Vaughn* case was concerned solely with the question of standards of the profession, a matter peculiarly within the knowledge of the expert witness, whereas the instruction approved in the *Browning* case referred to the question of the testimony of experts generally. We take it that despite the approval of this instruction by the court, the law of West Virginia remains that the standard of a particular community must be established by the testimony of expert witnesses.

Verdict

Assuming that despite the many obstacles thrown in the way of the plaintiff, he does make a case against the defendant for his negligence, there may be difficulties as to the amount of recovery. The only West Virginia decision discussing the amount of recovery directly in this type of case is that of *Neil v. Lumber Company,*[54] wherein it was held that $3000.00 was not excessive for a 21 year old boy whose leg was substantially shortened by the failure of the physician to set it properly. Among the cases, which were reversed upon other grounds, but wherein the amount of the verdict was not attacked as excessive, are *Browning v. Hoffman,*[55] where $5000.00 was awarded to an 18 year old plaintiff for the amputation of a leg, and *Vaughn v. Hospital,*[56] where $4695.00 was awarded to the plaintiff for the loss of a foot.

So it seems there is not categorical distinction between the damages which may be awarded in cases of this type and in others involving personal injury. The courts are somewhat loath to permit punitive damages in cases of medical malpractice, but in a proper case such damages may be allowed.

Conclusion

The foregoing discussion contains excerpts from or citations to every reported West Virginia decision upon this topic. There has been no attempt at comprehensive comment or criticism. The

[54] *Supra* n. 22.
[55] Browning v. Hoffman, *supra* n. 6, rehearing.
[56] Vaughn v. Hospital, *supra* n. 7, rehearing.

purpose in the main of the discussion, aside from whatever value it may have as the only compilation of West Virginia authorities upon this subject, is to call to the attention of the bar a matter of vital interest. The professions of law and medicine are so closely allied that in matters involving a charge of professional misconduct their interests should be identical. Such a charge against a member of either profession, no matter how groundless, works an almost irreparable injury. Properly viewed, the primary interest of the public and the secondary interest of the professions are not only consistent but go hand in hand. In behalf of both it is important that the law involving charges of professional malpractice be not only fundamentally sound and correctly interpreted, but well understood by the profession at large.