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MEDICAL MALPRACTICE IN COLORADO

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I. INTRODUCTION

According to a recent estimate the cost of judgments, out-of-court settlements, investigation expenses and legal fees paid in malpractice cases by the American medical profession and their insurers now exceeds $45,000,000 each year.[1] This estimate would indicate that malpractice claims are far more prevalent and judgments recovered are far larger in other parts of the country than in Colorado. Just how prevalent are these claims? The American Medical Association has reported that about fourteen per cent of all its members in the United States have been subjected to such claims.[2] In California, where the claim rate seems to be the highest, one doctor in every four has been charged with malpractice.[3]

No doubt the average doctor upon first hearing of a malpractice claim against one of his colleagues is tempted to damn the claimant's attorney. But contrary to the opinions of most medical men, attorneys very seldom if ever are the initial instigators of medical malpractice claims. In fact a renowned and highly respected physician who claims many years of "wide experience advising doctors, helping defense attorneys, appearing in court . . . as an expert witness, and as a defendant . . . ,"[4] recently declared: "My observation

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1 Silverman, *Medicine's Legal Nightmare*, Saturday Evening Post, Apr. 11, 1959, p. 48. It is estimated that about 6,000 claims are filed in the United States each year. *Id.*, Apr. 18, 1959, pp. 31, 115. In England latest 12 month figures show that out of 3,223 malpractice cases tried in the Queen's Bench Division, 2,671 resulted in verdicts for the plaintiff-patient. AMA News, July 13, 1959, p. 5, col. 2.

2 Wesson, *Medical Malpractice Suits: A Physician's Primer for Defendants*, 8 Clev.-Mar. L. Rev. 254 (1959).

3 Wesson, *supra* note 2 at 254.

4 *Ibid.*

has been that *every* malpractice suit, *without any exception,* is instigated either directly or indirectly by a doctor."[5]

Unquestionably some malpractice claims are without foundation in fact or support in law.[6] Just as unquestionably some malpractice claims are well founded in both fact and law.[7] It is the ethical obligation of every attorney to discourage groundless claims and not to espouse unjust suits. It should be the ethical obligation of every fair minded physician to co-operate in obtaining justice for a patient who has been wronged by a fellow physician. The overriding duty of each profession is to the public. The problem of both groups is to determine which claims are justified and which are not. Since fair evaluation of claims can best be accomplished through understanding of the law governing them, this paper surveying, summarizing, and criticizing the sizable body of Colorado case law in the field is submitted in the hope that from increased knowledge will grow greater mutual understanding between our brother professions.

II. THEORY AND NATURE OF THE ACTION

At common law an action for negligent treatment by a physician generally was instituted by a writ of trespass on the case.[8] The older action in trespass was unavailable in most cases because almost always the patient had consented to the touching of his person and therefore he could not plead a direct, forcible trespass. But in cases where treatment was instituted without consent of the patient or continued against his will after he had discharged the physician, the doctor's touching or cutting of the patient's body might constitute trespass in the nature of battery or both assault and battery.[9] Moreover, where the patient's consent was limited to a particular treatment or operation and the doctor went beyond that treatment or performed some unauthorized operation, there might be a trespass action. Finally, there was sometimes available, as an alternative, an action in assumpsit based on breach of the physician's express contract to effect a cure or upon an implied contract to use due care in treatment.[10] Sometimes a single act might subject the practitioner to an action in trespass, case (negligence), or contract, at the option of the claimant.[11]

Abolition of common law pleading and of forms of actions has not eliminated the practical value of understanding these distinctions. The theory of the case is still highly significant. One must still plead facts which would have allowed a recovery on *some*

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5 *Ibid.* (Emphasis added.)

6 See, e.g., Locke v. Van Wyke, 91 Colo. 14, 11 P.2d 563 (1932).

7 For example, Dr. Paul R. Hawley, a director of the American College of Surgeons, is reported to have said recently that according to reliable estimates, "today one-half of the surgical operations in the United States are performed by doctors who are untrained or inadequately trained, to undertake surgery." N.Y. Times, May 28, 1959, § 1, p. 33. The *Times* reported Dr. Hawley as relating that one of the world's most distinguished surgeons has stated that at least half his practice consists of attempts to correct the bad results of surgery undertaken in community hospitals by doctors inadequately trained in this field. *Ibid.*

8 Shipman, Common Law Pleading 96 (1923).

9 See the discussion of this problem in Maercklein v. Smith, 129 Colo. 72, 74-78, 266 P.2d 1095, 1096 (1954); Cady v. Fraser, 122 Colo. 252, 254-55, 222 P.2d 422, 424 (1950).

10 Shipman, Common Law Pleading 96 (1923).

11 E.g., McClees v. Cohen, 158 Md. 60, 148 Atl. 124 (1930).

theory under the prior practice. Furthermore, the theory of the action may determine what statute of limitations governs it,[12] whether the plaintiff must prove actual damages to get his claim to the jury,[13] whether punitive damages may be recovered,[14] whether damages are limited to those within the contemplation of the parties when the relationship was entered,[15] whether the action survives death of a party,[16] whether release of a prior tortfeasor releases the physician called to treat injuries caused by that tortfeasor,[17] and whether malpractice insurance covers the claim.[18] Most of these problems have been dealt with in Colorado cases. This article will be limited to actions on claims for breach of contract, assault and battery, and negligence.[19]

A. Breach of Contract

It is fundamental that in the absence of an express contract to the contrary a physician by undertaking treatment in a particular case does not warrant a cure or even an improvement in the patient's condition.[20] The law recognizes that many of "the thousand natural shocks that flesh is heir to"[21] are incurable, and that intervening causes quite unrelated to the physician's ministrations "may sometimes thwart the highest skill employed in the accustomed or only procedure known."[22]

But Colorado cases often have declared that a physician when employed impliedly contracts: (a) that he possesses a reasonable degree of learning and skill equal to that ordinarily possessed by others of his profession, (b) that he will utilize reasonable skill and observe ordinary care and diligence in exercising his art and applying his special knowledge to accomplish the purpose of his employment, and (c) that in diagnosing the disease or injury and selecting the mode of treatment he will employ his best judg-

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12 For example, in Colorado, an assault and battery action is barred in one year. Colo. Rev. Stat. § 87-1-2 (1953). But actions in the nature of assumpsit and most actions in the nature of trespass on the case are governed by a six-year statute of limitations. *Id.* § 87-1-11(4)&(7). A statute whose constitutionality has never been authoritatively determined purports to bar "tort or implied contract" actions against anyone "licensed to practice medicine, chiropractic, osteopathy, chiropody, midwifery or dentistry" in two years. *Id.* § 87-1-6. For a more extensive discussion of this problem, see the text at note 210 *infra*.

13 It is of course elemental that proof of damages is essential to establish a claim based on negligence, but at least nominal damages will be presumed to flow from any assault or battery.

14 See Colo. Rev. Stat. § 41-2-2 (1953); Sams v. Curfman, 111 Colo. 124, 137 P.2d 1017 (1943).

15 This is a fundamental limitation applied, albeit with increasing liberality, to damages for breach of contract, but not applied at all to tort damages.

16 See Meffley v. Catterson, 132 Colo. 222, 287 P.2d 45 (1955), *overruled*, Publix Cab Co. v. Colorado Nat'l Bank, 338 P.2d 702 (Colo 1959). The survival statute involved in *Publix Cab Co.* was amended in 1957, and the problem has probably been eliminated as to actions arising under the later statute. *Compare* Colo. Rev. Stat. § 152-1-9 (1953), *with id.* § 152-1-9 (Cum. Supp. 1957).

17 *Compare* Froid v. Knowles, 95 Colo. 223, 33 P.2d 1116 (1934), *with* Hennig v. Crested Butte Co., 92 Colo. 459, 21 P.2d 1115 (1933). This problem is discussed in detail in the text at note 173 *infra*.

18 The legal division of the American Medical Association is presently concerned about this most practical problem. See series of four articles: *Malpractice Insurance Changes Needed*, beginning in the AMA News, May 18, 1959, p. 1, col. 2.

19 In at least one reported Colorado case a patient sued his physician on a false imprisonment theory. Meek v. City of Loveland, 85 Colo. 346, 276 Pac. 30 (1929).

20 Gleason v. McKeehan, 100 Colo. 194, 202, 66 P.2d 808, 811 (dictum) (1937); Locke v. Van Wyke, 91 Colo. 14, 20, 11 P.2d 563, 565 (dictum) (1932).

21 Shakespeare, *Hamlet*, Act III, scene 1.

22 Gleason v. McKeehan, 100 Colo. 194, 202, 66 P.2d 808, 811 (1937).

ment.[23] Thus it is theoretically possible that his failure to perform these implied promises will give rise to a breach of contract action. This possibility is recognized in the statute of limitations on medical malpractice which is expressly made applicable to actions based on implied contract.[24] A survey just completed by the American Medical Association's legal division indicates that among those who file claims against doctors, "suing for breach of contract has become more popular."[25] However, this theory of action has seldom been utilized in Colorado.[26]

Besides the possibility of *implied* contract, it is possible that a particular physician may at the time of employment promise to effect a cure or improvement and thereby create an *express* contract. Even if such representations were considered ethical, no wise practitioner would indulge in them, for such an agreement would render him liable without regard to fault if for any reason his treatment did not achieve the promised results. There may be a danger that in attempting to quiet a patient's fears or to reassure him, a doctor, without intending to guarantee a cure, might make remarks which the patient could reasonably interpret as such a guarantee. In such a case it is possible that a court might find a contractual obligation. The dangers to the doctor from such unintended contractual entanglements are magnified by the fact that many medical malpractice insurance policies probably do not cover liability of a doctor for failure to perform his contract to accomplish a cure or improvement of condition.[27]

B. Assault and Battery

Colorado case law indicates that a physician who treats or operates upon a patient without the latter's consent may be liable for assault and battery.[28] Other jurisdictions have held that a surgeon who has the patient's consent for a particular operation but goes beyond that consent to perform other or additional surgery is

23 Tadlock v. Lloyd, 65 Colo. 40, 43, 173 Pac. 200, 202 (1918); Bonnet v. Foote, 47 Colo. 282, 285, 107 Pac. 252, 254 (1910); McGraw v. Kerr, 23 Colo. App. 163, 167, 128 Pac. 870, 872-73 (1912).

24 Colo. Rev. Stat. § 87-1-6 (1953).

25 AMA News, June 29, 1959, p. 11, col. 1.

26 One attempt was made to rely on a contract theory, but the Supreme Court held that the complaint sounded in tort. Sams v. Curfman, 111 Colo. 124, 137 P.2d 1017 (1943).

27 See note 25 *supra*.

28 See the discussion in Cady v. Fraser, 122 Colo. 252, 255, 222 P.2d 422, 424 (1950). This was quoted with apparent approval in Maercklein v. Smith, 129 Colo. 72, 75, 266 P.2d 1095, 1096 (1954).

guilty of an assault and battery.[29] Colorado has rejected the latter position, at least for purposes of holding the one year limitation on assault and battery actions inapplicable to such a case.[30]

From the plaintiff's point of view this theory of action has certain distinct advantages. In such a case the doctor could be held strictly accountable for an unfortunate result without proof that he was guilty of the slightest negligence. In many cases the plaintiff by choosing this form of action would by-pass the hurdle of obtaining expert testimony to prove negligence. Moreover the law presumes that at least nominal damages flow from every assault and battery, and the plaintiff could get his case to the jury without proving any actual damages. Exemplary damages would be possible, since assault and battery are intentional torts.

At least two factors discourage this form of action. First, a recent survey indicates that some medical malpractice insurance policies may exclude coverage of intentional torts generally or of treatment without consent,[31] and furthermore exemplary damages are not covered by liability insurance.[32] Second, a special one year statute of limitations probably would apply to some malpractice actions brought on this theory in Colorado.[33]

For the physician seeking to avoid assault and battery claims, the practical problem is what constitutes a sufficient consent to authorize treatment or surgery. Apparently Colorado law prescribes no technical requirement of a written, signed consent, even for serious and irreversible surgery.[34] But a clear, specific, written and *signed* consent from an informed and understanding patient, or one authorized to consent for him, can be a most effective lawsuit preventive.[35] One who relies on a patient's oral consent may find himself trying to convince a jury that the patient did consent, or that the operation performed was the one requested.[36] Failing that he may be held liable even if the operation was done in the most careful and skillful manner possible. Even worse, he may have to pay any judgment personally since, as has been noted, his malpractice insurance may not cover the battery involved in an operation without consent.[37]

No prudent surgeon should wield the scalpel without personally examining a properly signed consent form which clearly authorizes him to perform a particular operation on a named patient. He should be chary of relying on the assurances of others

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29 Cases collected in Annot., 56 A.L.R.2d 695 (1957).
30 Maercklein v. Smith, 129 Colo. 72, 266 P.2d 1095 (1954).
31 See note 37 *infra*.
32 Universal Indemnity Ins. Co. v. Tenery, 96 Colo. 10, 39 P.2d 776 (1934).
33 For a fuller discussion see text at note 210 *infra*.
34 See Maercklein v. Smith, 129 Colo. 72, 80, 266 P.2d 1095, 1099 (1954).
35 Taylor, *Fewer Malpractice Claims - Via Our American Way - Consent for Treatment*, Rocky Mt. Med. J. (May, 1955).
36 See, e.g., Wall v. Brim, 138 F.2d 478 (5th Cir. 1943) (whether surgeon who proceeded with major surgery after procuring consent for only minor surgery was guilty of assault was a jury question); Sullivan v. McGraw, 118 Mich. 39, 76 N.W. 149 (1898) (mixup on oral instructions resulting in surgery on the wrong leg).
37 In a recent survey, 22 medical malpractice insurers were asked if their policies would cover this situation: "Dr. Collins operated upon Mrs. King, with her consent, for an ovarian cyst. In the course of the operation he found that a radical hysterectomy was advisable and thereupon performed this procedure. Mrs. King brought suit against Dr. Collins charging assault and battery in that he went beyond the consent given.
"Response: Twelve companies would defend and pay. Ten firms qualified their positions, but would not refuse coverage." AMA News, May 18, 1959, p. 3, col. 2.

that proper consent forms have been executed and filed.[38] In addition to written authorization to perform the particular operation contemplated, it is often advisable to obtain the patient's general consent to perform other or further surgery whose need becomes apparent only after the patient is unconscious and the incisions for the intended operation have been made.[39] While it is true that courts generally are liberal in holding that an unconscious patient's consent to surgery reasonably required to prevent death or serious harm is assumed,[40] there is no direct Colorado authority recognizing this legal fiction, and there is respectable non-Colorado authority severely limiting it.[41]

A closely related problem is *who* may consent on behalf of another. While a parent may consent for a child of tender years,[42] and a spouse for an incompetent or unconscious husband or wife, generally a mentally competent adult, whether man or woman—married or unmarried—is master of his own person and is the only one capable of consenting to an operation on that person.[43] On this point the Colorado *Smith* case[44] seems to reach a highly questionable result. There the husband-patient claimed that the only operation he ever discussed with the defendant doctor was a circumcision. The defendant testified that the *only* conversation he had with the plaintiff prior to the day of the operation was a consultation in which he, the defendant, recommended a circumcision. But, said the defendant physician, "all subsequent discussion, including arrangements for, and instructions relative to, the operation, were made by him with plaintiff's wife, mostly by telephone."[45] The plaintiff agreed that "his wife did most of the talking . . ."[46] and admitted that when the date for the operation was set, he, the plaintiff, did not clearly request the circumcision previously recommended.[47] "Defendant . . . further testified that when plaintiff's wife called him to make definite plans for the operation he asked her what operation, whether circumcision or sterilization, to which

38 In Maercklein v. Smith, 129 Colo. 72, 266 P.2d 1095 (1954), the surgeon prior to performing a vasectomy inquired of the attending physician whether the latter had procured written, signed consents for this sterilization operation from the patient and his wife. The attending physician assured the surgeon that the consents had been obtained but he unwittingly had left them at his office. The Supreme Court held that the surgeon, in making this inquiry, "took every precaution that was reasonably required of him, and . . . there is no element of negligence left in the case as to him and he was entitled to a directed verdict." 129 Colo. at 82, 266 P.2d at 1100. Query: If the patient had consented to *no* operation, would the surgeon be protected against a claim for battery, as distinguished from negligence, by reasonable reliance on the assurance of the attending physician that proper consent had been given? It would seem that the attending physician would be powerless to consent on behalf of the patient to a serious battery. Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905).

39 See e.g., Maercklein v. Smith, 129 Colo. 72, 266 P.2d 1095 (1954); Stone v. Goodman, 241 App. Div. 290, 271 N. Y. Supp. 500 (1st Dep't 1934) (plaintiff's signed general consent to any treatment found necessary protected surgeon who operated for hernia on left side upon finding it was more critical than right side hernia for which operation had been requested). And see cases collected in Annot., 56 A.L.R.2d 695, 717-19 (1957).

Typical of the broad language in such general consent forms currently in use in Denver is the following: "I hereby give my consent to Dr. _____, a member of the staff of _____ hospital, to perform upon me any operation which in his judgment he deems necessary."

40 Prosser, Torts 84 (1955); Restatement, Torts § 62, Illustrations 5 & 6 (1934); Annot., 56 A.L.R.2d 695, 699-704 (1957).

41 E.g., Tabor v. Scobee, 254 S.W.2d 474 (Ky. 1951); Restatement, Torts § 54 (1934).

42 But cf. Green v. Jones, 136 Colo. 512, 319 P.2d 1083 (1957) (two-year old child held incapable of consenting to ride as guest in grandmother's car, and therefore not subject to guest statute defense).

43 Regan, Doctor and Patient and the Law 77 (3d ed. 1956).

44 Maercklein v. Smith, 129 Colo. 72, 266 P.2d 1095 (1954).

45 *Id.* at 78, 266 P.2d at 1098.

46 *Id.* at 79, 266 P.2d at 1098 (a not unlikely story).

47 Summarizing testimony, the court declared: "He admits, however, that he did not specify a circumcision operation, and that he just mentioned an operation." 129 Colo. at 79, 266 P.2d at 1098. Thus the court indicated its conclusion that the plaintiff was not a discriminating shopper but was willing to take any operation in stock.

he referred, because of Mrs. Smith's apparent difficulty in understanding what he meant, as the 'tube-tying' operation, and that she replied that was the operation to be done."[48]

The best that can be inferred from this evidence is that in performing an operation upon *Mr.* Smith the physician relied upon *Mrs.* Smith's choice of the operation to be performed even though she was apparently having difficulty in understanding what operation was being discussed. Inescapable is the conclusion that *Mr.* Smith, who was sterilized, never at any time *personally* consented to be sterilized. Yet, the Supreme Court reversed the trial court action in directing a plaintiff's verdict on liability and held that this evidence presented a jury issue whether the plaintiff had consented to the vasectomy.

Generally speaking it is prudent procedure to obtain the consent of both husband and wife if either is to be sterilized.[49] But if the *Smith* case be law in Colorado, a doubtful hypothesis, it is not necessary to obtain the consent of the husband, but only of the wife, if the husband is to be sterilized.[50] Happily for the male animal and for unborn generations, the case is unique and probably will never be followed on this point.

C. Negligence

The theory by far most important, because nearly all medical malpractice cases are based upon it, is negligence. Because of its paramount significance, a major portion of this paper will be devoted to the negligence theory.

III. NEGLIGENT MALPRACTICE

Those who engage in the healing professions, no more nor less than other men, may be liable in tort for damages caused others by their negligence. It has been said that: "Negligence in actions of this nature is no different than in other situations. It consists of doing something, which, under the circumstances, should not have been done, or in omitting to do that which should have been done."[51] While this generality is not untrue, it is incomplete. Medical malpractice law, although it is but an application of general negligence principles in a specific frame of reference, presents some special legal problems. Problems concerning the standard of care imposed upon practitioners, the specific acts or omissions which may be deemed negligence, and the burden of proving negligence

48 129 Colo. at 79, 266 P.2d at 1098.

49 Regan, *op. cit. supra* note 43. This is a statement of minimum precaution, and it assumes that the sterilization is a lawful operation. Present Colorado law apparently provides no express authority for performing a non-therapeutic sterilization, and some authorities have warned that even the consent of both spouses may not protect from civil, and possibly criminal, liability, a surgeon sterilizing either spouse in a state where the operation is unlawful. Miller and Dean, *Liability of Physicians for Sterilization Operations*, 16 A.B.A.J. 158 (1930); Smith, *Antecedent Grounds of Liability in the Practice of Surgery*, 14 Rocky Mt. L. Rev. 233, 276-84 (1942). Regan, *Malpractice and the Physician*, 147 A.M.A.J. 54 (1951). On the state of the law in Colorado, see letter from William L. Boatright, Attorney General, to Dr. F. H. Zimmerman, Acting Superintendent, State Hospital, Pueblo, Colorado, Aug. 30, 1928. And see Address by George E. Hall, Staff Associate, American Medical Association Law Department, to Congress on Medical Education and Licensure at Chicago, Ill., Feb. 7, 1955.

50 How many "barefoot and pregnant" wives would cheerfully "make all arrangements" to give such operations to their husbands, perhaps as presents for Father's Day!

51 Maercklein v. Smith, 129 Colo. 72, 81, 266 P.2d 1095, 1099 (1954).

in this kind of case are of particular significance. These problems will be discussed separately in the order indicated.

A. The Standard of Care

Generally speaking, negligence is conduct which falls below a standard established by law to protect others from an unreasonable risk of harm.[52] A doctor, like any other man, may be liable for injury to another proximately caused by his "failure to exercise that degree of care, prudence and forethought, which an ordinarily careful and prudent person would exercise under the same or similar circumstances."[53] This standard governs the physician as a man in his non-professional contacts with other men.

His conduct in the capacity of doctor is another matter. In addition to the minimum standard which all men must meet, men who hold themselves out to the public as having special skill, training and knowledge in a particular profession must meet a higher standard imposed only on those who follow that profession.[54] The special standard imposed on members of the medical profession has been oft repeated in Colorado cases.

In a 1957 case the Supreme Court reaffirmed its adherence to the long established standard that, "A physician is bound to accord his patients such reasonable care, skill and diligence as physicians in good standing in the same neighborhood in the same general line of practice ordinarily have and exercise in like cases."[55]

Earlier Colorado cases had not restricted the standard to the *same* neighborhood, but had measured a defendant's act by whether it would have been considered good medical practice in the *same* or *similar* localities.[56] The distinction might have practical importance in a case involving conduct of a doctor practicing in an area where all doctors have been negligent in keeping abreast of developments in the profession. That others also are negligent is not ordinarily a defense.[57]

The trend of later cases from other jurisdictions is to recognize as too narrow the standard of the "same locality" and substitute the phrase "the same or similar localities."[58] This broader rule may work to the advantage of a physician charged with negligence for using a treatment not in general use in his own community. He may be ahead of his fellows in adopting a new development already proven through wide use in *similar* localities. Such leadership should not be considered negligence.

Nevertheless the law continues to take into account the differ-

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52 Restatement, Torts § 282 (1934).

53 Maercklein v. Smith, 129 Colo. 72, 81, 266 P.2d 1095, 1099 (1954); Prosser, Torts 124 (1955).

54 For a very recent treatment of the special rules applying to physicians, pharmacists, architects, engineers, teachers, attorneys, abstractors, funeral directors, and accountants, see *A Symposium on Professional Negligence*, 12 Vand. L. Rev. 535-839 (1959).

55 Foose v. Haymond, 135 Colo. 275, 283, 310 P.2d 722, 726 (1957).

56 *E.g.*, Tadlock v. Lloyd, 65 Colo. 40, 42, 173 Pac. 200, 201 (1918). This view was incorporated in an instruction approved in Dixon v. Norberg, 113 Colo. 352, 357, 157 P.2d 131, 133 (1945).

57 "Even an entire industry, by adopting careless methods to save time and effort or money, cannot be permitted to set its own uncontrolled standard." Prosser, Torts 136 (1955). In Weiss v. Axler, 137 Colo. 544, 328 P.2d 88 (1958), the court held that custom and usage in applying a hair wave product could not affect the test of due care if the usage failed to comply with the manufacturer's directions for use of his product.

58 Prosser, Torts 134 (1955).

ences in opportunities and facilities in dissimilar communities and recognizes that the country doctor cannot be held to the standard applied to him who practices in a metropolitan medical center.[59] So too the law recognizes that a general practitioner cannot be expected to have as much skill or knowledge as a specialist.[60]

In some cases the plaintiff admits that the defendant doctor was both careful and skillful in carrying out the treatment given, but claims that he was negligent in the first instance in *choosing* the wrong treatment procedure. In such a case the key issue of negligence depends on whether the treatment selected was one which reasonably skilled, prudent and careful practitioners in the same or similar localities would have approved for the plaintiff's ailment.[61] Only expert testimony can establish this standard.[62]

The last mentioned standard applies only to negligence in the choice of treatment for an ailment whose proper treatment is well established among medical men at the time the defendant acts. Where the medical authorities are not in accord on the proper treatment or where no effective procedures have been proven by legitimate experimentation, the physician is free to exercise his own judgment. With wise restraint, the law refuses to interfere with that judgment, lest physicians be deterred from exerting their best efforts in doubtful cases. An 1895 Colorado case stated the rule, which is still good law,[63] that, "in a case involving doubt, or when there are reasonable grounds for a difference of opinion as to the nature of the disease and the proper mode of treatment, if a physician or surgeon possessing the requisite qualifications applies his best skill and judgment, with ordinary care and diligence, to the examination and treatment of a case, he is not responsible for an honest mistake or error of judgment as to the character of the disease or the best mode of treatment."[64] This is a sensible rule and one which avoids imposing on physicians a stricter standard of liability than that imposed on other professional men.

In interpreting the rule concerning errors of judgment, the Colorado court has been most reluctant to second-guess the physician and most lenient in giving him the benefit of the doubt.[65] For example, in a 1937 case where five physicians condemned the procedure followed by the defendant, but ten others approved it, the high court reversed a jury verdict for the plaintiff and ordered a non-suit without a new trial.[66] It would seem that in such a case there is at least a question of fact for the jury, especially when one considers how difficult it is to get even one physician to fully express his real feelings in an action against another doctor.

59 *Ibid.*

60 See Dixon v. Norberg, 113 Colo. 352, 357, 157 P.2d 131, 133 (1945); Prosser, Torts 133 (1955).

61 See the discussion in text at notes 94-99 *infra* and authorities there cited. Even a treatment procedure amounting to criminal misconduct cannot be held to be medical malpractice without expert testimony that it violated the usual standards of care. See McKay v. State Board, 103 Colo. 305, 311-13, 86 P.2d 232, 236 (1938).

62 Norkett v. Martin, 63 Colo. 220, 165 Pac. 256 (1917); McGraw v. Kerr, 23 Colo. App. 163, 171, 128 Pac. 870, 873 (1912).

63 See, e.g., Gleason v. McKeehan, 100 Colo. 194, 66 P.2d 808 (1937); Brown v. Hughes, 94 Colo. 295, 30 P.2d 259 (1934).

64 Jackson v. Burnham, 20 Colo. 532, 539, 39 Pac. 577, 579 (1895).

65 Cases cited note 62 *supra*. "While it is true that physicians 'are not responsible for the errors of an enlightened judgment where good judgments may differ, . . . they will be charged . . . only where such errors could not have arisen except from want of reasonable skill and diligence.' " Jackson v. Burnham, 20 Colo. 532, 537-38, 39 Pac. 577, 579 (1895).

66 Gleason v. McKeehan, 100 Colo. 194, 66 P.2d 808 (1937).

Whether the present Supreme Court would be inclined to take such a case from the jury is at best a matter of conjecture.

Honest mistake of judgment is available as a defense only if it appears that the physician used reasonable care in exercising that judgment.[67] One who has the utmost skill and learning may nevertheless be liable if he fails to apply his ability in gathering facts on which to base a judgment of the treatment to follow.[68] Whether reasonable care is employed in exercising judgment is usually a question of fact for the jury.[69]

The rule restricting medical practitioners to the use of proven and generally recognized methods of treatment is intended to protect the public against injury through unwarranted experimentation with new methods and untried theories. At this point it is important to note two Colorado cases which espouse a novel test of negligence for cases where the treatment procedure is questioned. In *Brown v. Hughes*[70] the 1934 court, without citing any authority, declared: "The defendants herein must first have left and abandoned all knowledge acquired in the fields of exploration and adopted some rash or experimental methods before they approached the danger zone of liability."[71] In the court's words, the issue was, "Does the evidence here evince want of skill or a reckless disregard of consequences?"[72] The error was compounded by repetition in another case three years later.[73] In the latter case the court concluded that the jury had no right to find the defendant liable for a death following an operation condemned by five medical witnesses. Said the opinion: "The defendant did not undertake a wholly new experiment but, according to the evidence, followed a method that had previously been used with success by himself, and a procedure—admittedly rare—but known to have been sometimes used."[74] Certainly the law should be reluctant to stifle new methods and improved treatments but the test laid down in these two cases requires that a plaintiff prove what is tantamount to gross negligence if not willful wrongdoing. Considering that in this kind of case the only proof acceptable must come from the defendant's fellow practitioners, the practical impossibility of meeting such a test is obvious. It is submitted that these two cases are without foundation in reason, policy or law and should be repudiated at the first opportunity.

In addition it must be borne in mind that in determining whether a particular procedure is medically approved, the question must be answered according to the tenets of the school of practice to which the defendant belongs.[75] Under this rule an osteopath's procedures and treatments are to be tested against the standard of methods among osteopaths.[76] It follows that what is negligence if done by a medical doctor may not be negligence when done by a chiropractor and vice versa. This is a judicial recogni-

67 Foose v. Haymond, 135 Colo. 275, 283, 310 P.2d 722, 727 (1957).
68 Jackson v. Burnham, 20 Colo. 532, 538, 39 Pac. 577, 579 (1895).
69 See, e.g., Foose v. Haymond, 135 Colo. 275, 283, 310 P.2d 722, 727 (1957).
70 94 Colo. 295, 30 P.2d 259 (1934).
71 *Id.* at 303, 30 P.2d at 262.
72 *Ibid.*
73 Gleason v. McKeehan, 100 Colo. 194, 197, 66 P.2d 808, 809 (1937).
74 *Id.* at 202, 66 P.2d at 811.
75 Bolles v. Kinton, 83 Colo. 147, 150-51, 263 Pac. 26, 27 (1928) (osteopaths).
76 *Ibid.* And see McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870 (1912).

tion that medicine is yet an incomplete science and no one school of practitioners has a monopoly on knowledge of effective treatment methods. Furthermore, one must not forget that methods forbidden by the standards in one type of locality may be quite acceptable in another. It should be noted, however, that the trend of later cases from other states is toward holding all who practice the healing arts close to the high standards of the medical profession proper. These cases reason that advances in medical knowledge, combined with tremendous improvements in communications media, make it easier for all practitioners regardless of locality or school of practice to have the minimum knowledge required to protect the public.[77]

These standards of care can best be understood by considering instances where the Supreme Court has applied them to particular acts or omissions claimed to constitute negligence.

B. Acts or Omissions Constituting Negligence

It is of course elemental, in this context as elsewhere, that "negligence may consist of either wrongful action or wrongful inaction."[78] Stated another way, a physician's negligence may consist "in his doing something which he should not have done, or in omitting to do something which he should have done."[79]

Negligent omission. Plaintiffs in Colorado cases have alleged negligence through inaction in the form of failure properly to diagnose an ailment[80] or injury,[81] failure to X-ray where a possible fracture was indicated,[82] failure to direct immobilization of a fractured limb[83] and failure, after setting a fractured bone, to use reasonable care to ascertain whether it has remained in proper position.[84]

In one suit the claimant alleged, but could not prove, that the attending physician had been asked to bring a specialist into the case but had failed or refused to do so.[85] A somewhat similar early case held that a physician called to treat the plaintiff for typhoid fever was not guilty of malpractice in failing to comply with the latter's request that an oculist be brought into the case to treat a serious eye condition, at least in absence of proof that the typhoid fever had caused the eye ailment.[86]

Occasionally, the threat of legal liability may interfere with good medical practice. Such an instance might occur where a physician decides that for medical reasons it would be better if the patient does not immediately realize the gravity of his condition. If the serious condition improves or disappears this will be considered good therapy. But if not, the doctor may be sued by an

77 McCoid, *The Care Required of Medical Practitioners*, 12 Vand. L. Rev. 549, 569-81 (1959).

78 Pearson v. Norman, 106 Colo. 396, 399, 106 P.2d 361, 363 (1940).

79 McGraw v. Kerr, 23 Colo. App. 163, 169, 128 Pac. 870, 873 (1912).

80 Jackson v. Burnham, 20 Colo. 532, 39 Pac. 577 (1895) (improper diagnosis of penis infection resulting in gangrene and amputation of penis).

81 Foose v. Haymond, 135 Colo. 275, 310 P.2d 722 (1957) (diagnosis of foot fracture as sprain); Coakley v. Hayes, 121 Colo. 304, 215 P.2d 901 (1950) (plaintiff failed to prove alleged failure to diagnose and treat displaced cervical vertebra); Bonnet v. Foote, 47 Colo. 282, 107 Pac. 252 (1910) (fracture diagnosed as bruise); McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870 (1912) (fractured arm diagnosed as dislocated shoulder).

82 Foose v. Haymond, 135 Colo. 275, 310 P.2d 722 (1957) (fracture diagnosed, without X-ray, as sprain); Bolles v. Kinton, 83 Colo. 147, 263 Pac. 26 (1928) (hip fracture diagnosed as contusion in spite of perceptible shortening of leg and inversion of foot).

83 Foose v. Haymond, *supra* note 82; McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870 (1912).

84 Craghead v. McCullough, 58 Colo. 485, 146 Pac. 235 (1915).

85 Cady v. Fraser, 122 Colo. 252, 222 P.2d 422 (1950).

86 Jones v. Vroom, 8 Colo. App. 143, 45 Pac. 234 (1896) (of doubtful precedent value today).

irate patient claiming that the condition was not diagnosed properly or that it was negligence not to fully inform him of the seriousness of his malady.[87] Similarly it may be alleged as the basis of a claim that upon discharge the physician neglected to inform the patient that further treatment would be required.[88] Courts in other jurisdictions have frequently stated "that the relation between the physician and his patient is a fiduciary one and therefore the physician has an obligation to make a full and frank disclosure to the patient of all pertinent facts related to his illness."[89]

Negligent omission may involve occurrences having neither relation to nor bearing upon the physician's technical skill. Thus it is obvious negligence for a surgeon to allow an unconscious patient to roll off an operating table quite without regard to the standard of skill and care observed by the surgeon while actually performing the surgery.[90] Likewise failure to take the minimum precautions necessary to assure that the patient gets the operation intended for him and not that requested by another would seem to present a clear case of negligence.[91]

Finally, in the category of negligent malpractice by omission would fall the cases where it is charged that the patient's condition was unnecessarily aggravated or death resulted because of the physician's general inattention and failure to respond to urgent requests for aid.[92] Although a doctor may have no legal duty to undertake care of a particular patient in the first instance, once he commences treatment he "cannot discharge a case and relieve himself of the responsibility for it simply by staying away without notice to the patient."[93]

Negligent affirmative acts. Colorado cases have dealt with two distinct kinds of affirmative action constituting negligent malpractice. The first type consists of adopting a procedure or prescribing a treatment other than the procedures and treatments generally considered acceptable and effective remedies for the disease or injury involved.[94] If an unproven or otherwise unacceptable method is chosen and injury results, the physician may be liable even though, once adopted, the procedure is carried out with the utmost care and skill. Thus a doctor who prescribed a poultice instead of the usual minor surgery was required to pay damages in spite of his plea that at most he was guilty of an honest mistake on a matter of judgment.[95] Similarly, a surgeon and dentist who co-operated in

87 See, e.g., Pearson v. Norman, 106 Colo. 396, 106 P.2d 361 (1940) (physician claimed he properly diagnosed and treated spine fracture but admitted he did not tell patient, his wife or his son of the condition; patient claimed physician had diagnosed and treated injury as "a bad bruise and shake-up"). See Taylor, *Doctor's Duty to Speak*, 24 The Linacre Quarterly 67 (1957).

88 E.g., Cady v. Fraser, 122 Colo. 252, 255, 222 P.2d 422, 424 (1950).

89 McCoid, *The Care Required of Medical Practitioners*, 12 Vand. L. Rev. 549, 586 (1959).

90 Beadles v. Metayka, 135 Colo. 366, 311 P.2d 711 (1957).

91 But cf. Maercklein v. Smith, 129 Colo. 72, 266 P.2d 1095 (1954).

92 See, e.g., Tadlock v. Lloyd, 65 Colo. 40, 173 Pac. 200 (1918) (physician admitted child's life might have been saved had he received proper attention when it was first asked).

93 Bolles v. Kinton, 83 Colo. 147, 149, 263 Pac. 26, 27 (1928) (physician held jointly liable for negligence of another to whom case had been turned over).

94 E.g., Jackson v. Burnham, 20 Colo. 532, 39 Pac. 577 (1895) The facts of this leading case are set out in note 95 *infra*.

95 Jackson v. Burnham, *supra* note 94. There the plaintiff, suffering pain from a swollen penis, sought the defendant physician's care. Examination disclosed that the foreskin was adhering to the head of the penis, causing a constriction or strangulation and preventing proper circulation of blood. The usual and accepted treatment for this unhappy condition was to slit the foreskin, thus eliminating constriction and restoring circulation. Instead of following that procedure, however, the defendant applied and kept on the organ a tight "flaxseed meal poultice" which further constricted the organ causing gangrene and eventual amputation. *Held*: Jury verdict of $5,000 for the plaintiff affirmed.

administering a general anaesthetic to a patient known to have a weak heart and then extracted his tonsils plus sixteen impacted teeth, failed to convince a jury they were not liable for the patient's death.[96]

The procedure adopted must be appropriate to the case at hand, and thus the question of proper diagnosis may overlap the problem of choice of treatment. A method considered safe for removing foreign objects from the throat may not be approved for removing them from the esophagus.[97] Measures effective for dislocated shoulders may not be advisable for fractured arms.[98]

Whether a particular procedure or treatment is acceptable must be proved as part of the plaintiff's case and generally the only acceptable evidence is expert medical testimony.[99]

In a second and more common form of malpractice by affirmative negligence, the negligence involved is not the adoption of an incorrect diagnosis or treatment but consists of performing an approved procedure in a careless or otherwise substandard manner. Thus where a physician in treating a fractured collar bone employed the proper method but so carelessly set the bone that the fragments overlapped causing a crippling deformity, it was held that a verdict for the patient was justified.[100] This form of negligence may occur in diagnosis[101] or in treatment.[102] For example, in a given case proper diagnostic examination might justify use of an X-ray, but if serious burns result, a jury might conclude that the X-ray was improperly used.[103] Colorado case law examples of affirmative negligence in treatment range from maladministration of drugs[104] to tearing of the patient's esophagus while attempting to remove a bone lodged in her throat.[105]

This type of affirmative negligence frequently occurs where an approved surgical operation is performed in a negligent manner. Thus where the surgeon performing an appendectomy severs the patient's intestine,[106] or otherwise cuts[107] or injures[108] some part of the anatomy not properly involved in the intended operation, the negligence may sometimes be obvious even to a layman and no expert testimony should be required to establish negligence.

96 Brown v. Hughes, 94 Colo. 295, 30 P.2d 259 (1934) (but the Supreme Court reversed, finding no evidence the defendants' acts caused the death).

97 Dixon v. Norberg, 113 Colo. 352, 157 P.2d 131 (1945).

98 McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870 (1912).

99 See note 62 *supra*. A recent illustration of how difficult it is to obtain clear medical testimony to establish the point appears in Foose v. Haymond, 135 Colo. 275, 282-83, 310 P.2d 722, 725-26 (1957).

100 Craghead v. McCullough, 58 Colo. 485, 146 Pac. 235 (1915); Bonnet v. Foote, 47 Colo. 282, 107 Pac. 252 (1910) (fracture diagnosed and treated as mere bruise).

101 See, e.g., Coakley v. Hayes, 121 Colo. 303, 215 P.2d 901 (1950).

102 See notes 104 and 105 *infra*.

103 Lamme v. Ortega, 129 Colo. 149, 267 P.2d 1115 (1954) (Supreme Court reversed jury verdict for failure of plantiff to prove injury was caused by X-ray).

104 Hedgpeth v. Schoen, 109 Colo. 341, 125 P.2d 632 (1942) (injection of arsenic solution in treating trenchmouth).

105 Dixon v. Norberg, 113 Colo. 352, 157 P.2d 131 (1945) ($7,000 verdict for plaintiff upheld).

106 Edwards v. Quackenbush, 112 Colo. 337, 149 P.2d 809 (1944) ($18,000 jury verdict for the plaintiff upheld).

107 Cf. Maercklein v. Smith, 129 Colo. 72, 266 P.2d 1095 (1954) (plaintiff claimed he had asked for circumcision but was given a sterilization operation by mistake).

108 See McBrayer v. Zordel, 127 Colo. 443, 257 P.2d 962 (1953).

Of like kind are the cases where surgeons have left foreign objects inside patients,[109] cases once so numerous as to evoke from the Colorado court the comment that, "Their perusal would almost lead to the conclusion that certain surgeons use such incisions as waste baskets."[110] In such cases also the negligence is manifest. Even proof by the defendant surgeon that a sponge count came out correctly may not be conclusive to clear him.[111] It follows that if the surgeon had notice immediately following the operation that the sponge count did not check, his inaction thereafter would seem to constitute strong evidence of negligence.[112]

One need not spend years in medical school or specialized practice to discern that in cases such as these somebody has been negligent.[113] They are not unlike the classic Mississippi case where the court, with typical Southern reserve, declared: "We can imagine no reason why, with ordinary care, human toes could not be left out of chewing tobacco, and if toes are found in chewing tobacco, it seems to us that somebody has been very careless."[114] To paraphrase, the layman can imagine no reason why, with ordinary care, sponges and surgical instruments cannot be left out of human beings, and if such foreign objects are found in a patient after an operation, it would appear that somebody has been negligent. This of course involves the very practical problem of the plaintiff's burden of proving negligence and the extent to which that burden may be lightened by the doctrine of *res ipsa loquitur*.

IV. Burden and Manner of Proof

A. Proof by Expert Testimony

In many medical malpractice cases the plaintiff has the burden of proving the standard of care as part of his case.[115] If he fails to prove the standard, the case cannot go to the jury, for the jury will not be allowed to set up a standard of its own.[116] This rule applies where it is claimed that the defendant

109 *E.g.*, Smedra v. Stanek, 187 F.2d 892 (10th Cir. 1951); Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957); Rosane v. Senger, note 110 *infra*.

110 Rosane v. Senger, 112 Colo. 363, 368, 149 P.2d 372, 374 (1944).

111 Daly v. Lininger, 87 Colo. 401, 406, 288 Pac. 633, 636 (1930) (dictum).

112 See Smedra v. Stanek, 187 F.2d 892 (10th Cir. 1951) (trial court erred in refusing to admit evidence that just after the operation a nurse informed surgeon that the sponge count did not come out right, and in rejecting testimony of a statement by surgeon that he had been delayed in surgery because count did not check).

113 See the discussion in Daly v. Lininger, 87 Colo. 401, 405-07, 288 Pac. 633, 636 (1930).

114 Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365, 366 (1918).

115 Norkett v. Martin, 63 Colo. 220, 165 Pac. 256 (1917); McGraw v. Kerr, 23 Colo. App. 163, 171, 128 Pac. 870, 873 (1912).

116 *Ibid.*

has employed a treatment not generally recognized in the profession. Here the essence of the negligence is in deciding to do what was done, not in the manner of doing it, and obviously a lay witness cannot say whether doctors generally would react to particular symptoms by employing a particular procedure, operation or medication. In such cases, therefore, the standard to be applied by the trier of facts must be established by expert medical testimony, and cannot be otherwise established.[117] Furthermore, if different schools of medicine recognize different standards or methods of treating a particular condition, the expert testimony required should come from adherents of the school which the defendant follows.[118] Defendants should be careful lest in seeking to exculpate themselves by describing their usual methods and precautions they incidentally provide the plaintiff with otherwise unobtainable expert testimony establishing a standard.[119]

Once the standard of care has been established by medical testimony, the plaintiff must produce evidence that it has been violated. If the case concerns a charge that the defendant engaged in a medically unacceptable procedure, the necessary expert evidence will often take the form of answers to hypothetical questions. For example, in *Dixon v. Norberg*[120] the plaintiff claimed that her esophagus had been injured by the defendant's unorthodox procedure in trying to remove a pork bone which had lodged there. After the plaintiff testified describing her condition, the defendant's treatment procedure, and the resulting injury, the plaintiff's attorney called medical witnesses to establish that the defendant's procedure in the case constituted negligence. These medical specialists, "in answer to hypothetical questions, testified that, assuming the existence of a bone in the esophagus and a probing for it in the manner related by plaintiff, such a procedure was not good practice considering the present standards in the profession for a general practitioner and would be dangerous to the patient."[121] Similar procedure has been followed in other cases requiring expert evidence.

Occasionally the courts have mentioned the practical difficulties encountered by plaintiffs seeking expert testimony.[122] It is natural for medical men, out of empathy or sympathy, to be reluctant to testify against a colleague embroiled in legal difficulties. But it is difficult to understand the usual explanation to the effect that a code of ethics forbids such testimony. For professional men whose first duty is to the patients they serve to refuse to testify fully and frankly in order to right a wrong against one of those patients is bad enough. But to so refuse on the ground that to tell the truth

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117 *Ibid.* In Daly v. Lininger, 87 Colo. 401, 405, 288 Pac. 633, 636 (1930), the Colorado court quoted with apparent approval as follows: "It is true that there is a large class of malpractice cases in which the question or matter under investigation is so intricate and abstruse, or so little understood, that ordinary jurors would in all probability know nothing about the same, but must be guided by opinions of witnesses having special knowledge. In this class of cases the plaintiff fails to make a case for the jury in the absence of a properly qualified expert witness."

118 Bolles v. Kinton, 83 Colo. 147, 263 Pac. 26 (1928) (osteopaths).

119 This happened in Bolles v. Kinton, *supra* note 118. The defendant's admission eliminated the plaintiff's burden on this point in Pearson v. Norman, 106 Colo. 396, 106 P.2d 361 (1940).

120 113 Colo. 352, 157 P.2d 131 (1945).

121 *Id.* at 356, 157 P.2d at 133.

122 See, e.g., Tadlock v. Lloyd, 65 Colo. 40, 44, 173 Pac. 200, 202 (1918). A nationwide survey indicated that "only about 15 per cent of all doctors would be willing to tell a patient he had been injured by the negligent treatment of another doctor. Only about 7 per cent would agree to appear voluntarily as a witness for such a patient in court." Silverman, *supra* note 1 at 116.

would be unethical compounds the original wrong and perverts the meaning of ethics. No self-respecting lawyer seeks from any witness, medical or otherwise, anything but the truth.[123] No self-respecting doctor should suppress the truth, even if it happens to be evidence in a lawsuit against another doctor. In the long run the "conspiracy of silence" among medical men will hurt them far more than it will help them. This is already obvious in the form of judicial departures from the once universal rule requiring expert testimony to establish negligence in a malpractice case.

B. Proof Without Expert Testimony

All too often attorneys, frustrated by the near impossibility of obtaining medical testimony to establish the standard of care and the fact of negligence, advise against pursuing a well founded claim or settle for far less than the case is worth. This may be a mistake. There is abundant Colorado authority recognizing that in certain types of medical malpractice cases no expert evidence is required to establish negligence.[124] Only where the negligence charged is that the defendant treated the injury or disease by a procedure or operation not acceptable to his own school must the standard of care be established solely by medical testimony.[125]

On the other hand, where it is alleged that a procedure admittedly proper for the ailment involved has been negligently performed, and the matter under investigation is so simple that laymen as well as experts can understand it, negligence may be established without medical testimony.[126] Indeed, it may even be error to admit expert testimony in some cases of this nature.[127] Thus where an oral surgeon continued to operate after profuse bleeding had blocked his vision, and he accidentally severed a nerve, it was held prejudicial error to instruct the jury that only expert evidence could be considered in determining whether the defendant had been negligent.[128] Again, where an osteopath treating a stiff neck employed the procedure generally approved by osteopaths, *i.e.*, manipulation, but applied force so great that paralysis immediately resulted, it was not necessary for another osteopath to explain to the jury that there may have been negligence.[129]

In cases where it is possible to prove negligence without expert testimony or by a combination of expert and lay testimony, the quantum of evidence necessary to take the case to the jury is no greater than in other kinds of cases. Any pertinent evidence having a fair tendency to sustain the alleged negligence will suffice for this purpose.[130]

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123 This was acknowledged recently by a noted surgeon and authority on malpractice. Wesson, *Medical Malpractice Suits: A Physician's Primer for Defendants*, 8 Clev.-Mar. L. Rev. 254, 255 (1959).

124 *E.g.*, Farrah v. Patton, 99 Colo. 41, 59 P.2d 76 (1936); Daly v. Lininger, 87 Colo. 401, 288 Pac. 633 (1930).

125 Cases cited notes 115 and 124 *supra*.

126 Daly v. Lininger, 87 Colo. 401, 407, 288 Pac. 633, 636 (1930). "But there is an obvious distinction between a claim of negligence in the choice of methods of treatment and a charge of negligence in the actual performance of the work or treatment after such choice is made . . . . As to the second—a charge of negligent performance—where there is any evidence tending to show such negligence the case is for the jury, as in other cases of negligence, whenever upon the evidence the minds of reasonable men might differ." Farrah v. Patton, 99 Colo. 41, 45-46, 59 P.2d 76, 78 (1936).

127 See Farrah v. Patton, 99 Colo. 41, 45, 59 P.2d 76, 78 (1936) (dictum); Daly v. Lininger, 87 Colo. 401, 405-06, 288 Pac. 633, 636 (1930) (dictum).

128 Daly v. Lininger, 87 Colo. 401, 408-09, 288 Pac. 633, 637 (1930).

129 Farrah v. Patton, 99 Colo. 41, 59 P.2d 76 (1936).

130 *Id.* at 44, 59 P.2d at 77, Daly v. Lininger, 87 Colo. 401, 407, 288 Pac. 633, 636 (1930).

However, it has long been established that mere proof that the patient died or that the treatment failed is no evidence whatever of the physician's negligence.[131] This follows from the previously discussed rule that in absence of expression contrary, a physician does not warrant a cure or favorable result.[132] Thus it has been held that proof that an injured limb is defective after treatment is not evidence of negligent treatment.[133] Nor was the death of a cardiac patient following a combined tonsilectomy and wholesale extraction of teeth considered evidence of negligence.[134]

Occasionally, even in cases where it would seem to the layman that the injury could not have occurred in the ordinary course of events without negligence, the Colorado court has required a high degree of precision and detail in the plaintiff's evidence of negligence. This reached an extreme in the 1953 case of *McBrayer v. Zordel.*[135] There a four-year-old girl sued a surgeon and anesthetist for loss of four teeth knocked out during a tonsilectomy. The plaintiff's evidence included testimony that immediately prior to the operation the teeth had been sound and strong. This the surgeon admitted. In addition the plaintiff's mother and father testified that immediately after the operation the surgeon and anesthetist placed the blame for the occurrence upon each other. At the trial both doctors denied this and each claimed he had no idea how the teeth were loosened. For the defendants, ten experts testified that during such operations baby teeth are often knocked out even though reasonable care is used.

The trial jury found for the plaintiff, but on writ of error the Supreme Court not only reversed but ordered the complaint dismissed. This disposition of the case was based in part upon the Supreme Court's view that there was no evidence of any negligence to take the case to the jury. Said the court, "it was not shown by any evidence *exactly* how the incident occurred, and neither of the operating doctors seemed to know, but said that without any apparent cause or reason, it happened frequently in such operations."[136] Such a result is quite acceptable to anyone willing to suppose that four firm and healthy teeth (not properly involved in any operation) are quite likely to drop out of a child's mouth simultaneously and of their own accord while the child is lying immobile.[137] That supposition is as reasonable as expecting a four-year-old child who was unconscious at the time of the occurrence to describe in detail "exactly how the incident occurred . . ."[138] when two physicians who were present, conscious, and presumably attentive claimed they didn't know how it happened. In a not dissimilar leading California case where five doctors and hospital per-

131 Brown v. Hughes, 94 Colo. 295, 306, 30 P.2d 259, 263 (1934); Locke v. Van Wyke, 91 Colo. 14, 20, 11 P.2d 563, 565 (1932). "God forbid that the law should apply any rule so rigorous and unjust as that to the relations and responsibilities arising out of this noble and humane profession . . . . If . . . failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon, causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume a financial responsibility for nearly all the ills that flesh is heir to." McGraw v. Kerr, 23 Colo. App. 163, 170, 128 Pac. 870, 873-74 (1912).

132 See text at note 20 *supra.*

133 McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870 (1912).

134 Brown v. Hughes, 94 Colo. 295, 30 P.2d 259 (1934).

135 127 Colo. 438, 257 P.2d 962 (1953).

136 *Id.* at 443, 257 P.2d at 965 (emphasis added).

137 " 'If the law supposes that,' said Mr. Bumble, 'the law is a ass, a idiot.' " Dickens, Oliver *Twist.*

138 127 Colo. at 443, 257 P.2d at 965.

sonnel were present when a patient rendered unconscious for an appendectomy somehow received a shoulder injury, and all five were unable or unwilling to explain how the injury occurred, all were held liable.[139] Thus did one of the nation's leading courts express its exasperation at the "conspiracy of silence."

Happily the present Colorado court does not seem to require detailed evidence of specific negligent acts in similar cases where a layman is justified in inferring from the result that someone must have been negligent.[140]

C. Res Ipsa Loquitur

Any meaningful discussion at this date of the Colorado *res ipsa loquitur* doctrine must begin and end with the truly remarkable 1958 case of *Weiss v. Axler*.[141] Although not a medical malpractice case, *Weiss'* broad interpretation and liberal application of the *res ipsa* rule provide a precedent of landmark significance for future malpractice litigation.

In *Weiss v. Axler* the plaintiff sought damages for loss of her hair following a permanent wave treatment in the defendant's beauty salon. Her complaint contained a general allegation of negligence, and in addition averred specific negligence of the beauty operator either in using too strong a wave solution or in allowing the solution to remain in the hair too long. As evidence of the specific negligent acts, the plaintiff testified that the defendant had orally stated his opinion that the damage had resulted from either too strong a solution or too long an exposure.

The defendant denied any negligence and denied making the claimed admission against interest.

Over objection the trial court instructed the jury on the law governing *res ipsa loquitur*. The jury found for the plaintiff. On writ of error, the defendant contended that the case was not a proper one for application of *res ipsa loquitur*, especially in view of the fact that the plaintiff had introduced evidence of specific acts of negligence and therefore there was no need to infer negligence occurring in some unknown manner.

139 Ybarra v. Spangard, 93 Cal. App.2d 43, 200 P.2d 445 (1949). The California rationale for applying *res ipsa loquitur* in the case appears in Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944).

140 *E.g.*, Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957) (sponge case); Beadles v. Metayka, 135 Colo. 366, 311 P.2d 711 (1957) (unconscious patient fell off operating table). *Accord*, Weiss v. Axler, 137 Colo. 544, 328 P.2d 88 (1958). *Compare* Edwards v. Quackenbush, 112 Colo. 337, 343-44, 149 P.2d 809, 812 (1944).

141 137 Colo. 544, 328 P.2d 88 (1958), 35 *DICTA* 307.

The court, in a scholarly opinion by Mr. Justice Frantz, reviewed the hopelessly confusing and contradictory prior Colorado case law on *res ipsa*, then seized the opportunity presented to clear these muddy waters. Unanimously[142] the court *held*: (a) the case was a proper one for application of the *res ipsa loquitur* doctrine, and (b) evidence of particular acts of negligence does not preclude reliance on *res ipsa*.[143] Concerning the procedural effect of *res ipsa loquitur* the court declared: (1) whether the doctrine applies to the particular case is a question of *law* to be determined by the trial judge upon the plaintiff's evidence,[144] (2) once the trial judge determines that the doctrine applies, there arises a "compulsive presumption of negligence"[145] which is a presumption of *law*, not fact,[146] and (3) this presumption shifts the burden of *proof* (not merely the burden of going forward with evidence) and is "conclusive as a matter of law"[147] unless the defendant satisfies the jury "by a preponderance of the evidence that he was not negligent."[148]

"Thus," said the court, "the sole question in a *res ipsa loquitur* case is: has the defendant *overcome* the prima facie case of negligence against him by establishing by evidence satisfactory to the jury that he was not negligent?"[149] The presumption is not necessarily destroyed by a mere explanation from the defendant showing how the injury occurred or that he was not negligent. It is for the jury to decide not only whether the defendant's explanation is sufficiently convincing to justify exonerating him, but also whether the defendant's witnesses are worthy of belief.[150]

Although the opinion left several questions unanswered,[151] it certainly represents great progress in a murky area of the law. More important perhaps, it indicates that the present Supreme Court believes that a trial should be an effective search for truth and that where the very nature of an occurrence indicates that someone must have been careless, the party having best access to the true facts must bear the onus of producing them or suffer the consequences.

Does the *Weiss v. Axler* rationale apply to medical malpractice cases? A 1912 Colorado Court of Appeals dictum indicated that the fact that a fractured bone healed in imperfect position could not be treated as evidence of negligence, and the doctrine of *res ipsa*

142 Mr. Justice Day did not participate in the decision.
143 137 Colo. at 561, 328 P.2d at 97.
144 *Id.* at 558-59, 328 P.2d at 96.
145 *Id.* at 559, 328 P.2d at 96.
146 *Ibid.*
147 *Ibid.*
148 *Id.* at 559-60, 328 P.2d at 96-97.
149 *Id.* at 559, 328 P.2d at 97 (emphasis added).
150 *Id.* at 559-60, 328 P.2d at 97.
151 For example, does the rule that it is for the judge, not the jury, to decide *whether res ipsa* applies (this determination being made upon the plaintiff's evidence) in effect deprive the defendant of jury trial on the issue of credibility to be accorded the plaintiff's witnesses? Mr. Justice Frantz was careful to point out that in determining whether the *defendant* meets the burden of overcoming the *res ipsa* presumption, the credibility of the defendant's witnesses remains a jury issue. Considering Judge Frantz's recently demonstrated concern for preserving inviolate the right of jury trial in minor criminal offenses, it is likely that the *Weiss* rule will be qualified to assure jury trial on the credibility of all witnesses. Compare Canon City v. Merris 137 Colo. 169, 323 P.2d 614 (1958).

A second problem not answered because not raised in *Weiss* is the question whether, assuming the plaintiff proves facts upon which the trial judge determines that *res ipsa* applies, and further assuming that the defendant puts in no evidence whatever to explain the occurrence, *must* the trial judge direct a verdict in favor of the plaintiff? This result would seem to follow if the presumption raised is a true presumption of law. However, such a rule would be a distinct minority position, if not a unique position. Again, the jury would not be able to reject the plaintiff's testimony as untrue. For a discussion of this second unsettled problem, see Dittman, *One Year Review of Evidence*, 36 *DICTA* 53, 55 (1959).

loquitur could not be applied.[152] But this seems to be no more than a proper application of the well settled rule that mere proof of an unfortunate result is not evidence of negligence.[153]

Medical malpractice cases should be treated the same as other kinds of negligence cases for purposes of determining whether *res ipsa loquitur applies.* Professional men should be entitled to the same legal protections afforded others, and the usual perequisites for application of *res ipsa* should apply.[154]

It is doubtful whether *res ipsa loquitur* could ever apply to a case where the claimed negligence is that the defendant employed a procedure not medically approved for the ailment being treated. Since the only recognized standard of care in such cases depends upon contemporaneous expert opinions from other doctors practicing in localities similar to that where the alleged negligence occurred, it would seem to follow that the plaintiff's burden to prove the standard could not be discharged by *res ipsa loquitur.* Here the case would fail to meet the usual condition limiting the doctrine to cases where the occurrence is "of a kind which ordinarily does not occur in the absence of someone's negligence . . . ."[155]

However, where the negligence charged is the careless performance of a medically approved procedure, there would seem to be no objection to applying *res ipsa loquitur* if the usual conditions are met. For example, what if *Weiss v. Axler* had involved not chemical injuries incurred during a hair wave treatment administered by a beauty operator, but similar injuries received during a scalp treatment administered by a dermatologist? Should the court have applied a different rule of law?

Some might insist that the 1952 case of *St. Luke's Hospital Association v. Long*[156] stands in the way of applying *res ipsa loquitur* to medical negligence. There a three year old child, in the hospital for removal of his tonsils and adenoids, was strangled when he slipped, while asleep, through the side rails of a hospital bed and caught his head between them. Although the plaintiffs' evidence did not show exactly how the unfortunate incident happened, the defendant, by affirmative evidence, "explained and made known the cause of the death and disclosed all its knowledge and means of information as to the accident."[157] The court indicated that on the plaintiff's evidence alone *res ipsa loquitur* would have properly applied, but held that the defendant's full disclosure gave the plaintiffs "equal knowledge and means of information and the *res ipsa* doctrine could no longer be invoked."[158] It seems clear that on this point, *i.e.,* that the defendant's explanation may deprive the plaintiff's *res ipsa loquitur* case of its character as such a case, *Weiss v. Axler* has overruled the *Long* case.[159]

152 McGraw v. Kerr, 23 Colo. App. 163, 169, 128 Pac. 870, 873 (1912).

153 See text at note 131 *supra* and cases cited in that footnote.

154 The prerequisites for applying the doctrine in Colorado are set out in Zimmerman v. Franzen, 121 Colo. 574, 589-91, 220 P.2d 344, 352 (1950). And see Prosser, Torts 201 (1955).

155 Prosser, Torts 201 (1955).

156 125 Colo. 25, 240 P.2d 917 (1952).

157 *Id.* at 31, 240 P.2d at 921.

158 *Ibid.*

159 "The defendant's explanation does not per se destroy the presumption; the conviction of the jury (or the court in a trial to it) that the explanation exonerates the defendant dissipates the presumption." Weiss v. Axler, 137 Colo. 544, 560, 328 P.2d 88, 97 (1958). This would also seem to follow from the rule of *Weiss* that evidence of specific negligence may sometimes co-exist in the case with the *res ipsa* doctrine. *Id.* at 561, 328 P.2d at 97.

In other jurisdictions there is a fast growing body of authority applying *res ipsa loquitur* to medical malpractice cases.[160] It may or may not be significant that one leading California malpractice case[161] applying *res ipsa* was quoted with approval in *Weiss v. Axler*[162] and cited with apparent approval in a 1957 Colorado malpractice case which was tried on a *res ipsa* theory.[163] There is no reason to expect that *res ipsa loquitur* will not be applied in future Colorado malpractice cases.

D. Burden of Proving Causation

One final point on the plaintiff's burden of proof deserves thorough discussion in a separate article and therefore will receive but brief mention here. This is the claimant's obligation to prove that the defendant's negligent act caused the injuries. Many a plaintiff's bark has sailed serenely past the straits of negligence only to be wrecked on the rocky coast of causation.[164]

Proof of causation has a dual aspect. As usual in negligence cases the legal test of proximate cause must be met. Nearly always in malpractice cases the additional hurdle of medical cause is present. True, in an occasional case nothing but an identifiable doctor's negligence could account for the injury, as in some "sponge" cases. In a rare case, too, the mere proximity in time between the physician's ministrations and appearance of the patient's injury symptoms may be sufficient. For example, where an osteopath suddenly and with great force twisted the plaintiff's neck, and the plaintiff instantaneously experienced nausea, terrific pain and paralysis, the Supreme Court felt that causation had been sufficiently shown to take the case to the jury.[165]

In most malpractice cases, however, proof of causation requires medical testimony. Thus where the question was whether a particular trauma caused an eye infection which did not develop until several months later, medical testimony that the infection *possibly* could have resulted from the trauma was held insufficient to support a jury verdict.[166] In malpractice cases, as in other personal injury cases, evidence that the cause-effect relationship is a possibility is not sufficient; opinion evidence must indicate at least a probability.[167]

Once the plaintiff by competent evidence has established that the defendant's act *probably* was the efficient cause of the injuries, it would seem that the defendant would have the burden of going forward with contrary evidence or with evidence of some other

160 Discussions of the modern cases appear in McCoid, *The Care Required of Medical Practitioners*, 12 Vand. L. Rev. 549, 621-31 (1959); Note, 23 Mo. L. Rev. 203 (1958); Comment, 30 So. Calif. L. Rev. 80 (1956); Note, 9 Stanford L. Rev. 731 (1957).

161 Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944) (unconscious patient received shoulder injury during appendectomy).

162 137 Colo. at 549, 328 P.2d at 91.

163 Beadles v. Metayka, 135 Colo. 366, 371, 311 P.2d 711, 714 (1957).

164 *E.g.*, Brown v. Hughes, 94 Colo. 295, 305, 30 P.2d 259, 263 (1934) "The burden was on plaintiff to show that the acts of the defendants complained of were the direct cause of death . . . . There is no evidence in this case, which would support a verdict, that death would not have otherwise ensued. The burden is not met by a showing that it might have resulted from the operations complained of, and jurors should not be left to conjecture as to the efficient and proximate cause. The possibility of death as a result of such operations is not sufficient. There should be evidence eliminating the intervention of other causes which might exist."

165 Farrah v. Patton, 99 Colo. 41, 59 P.2d 76 (1936).

166 Hanley v. Spencer, 108 Colo. 184, 115 P.2d 399 (1941).

167 Lamme v. Ortega, 129 Colo. 149, 267 P.2d 1115 (1954). And see note 164 *supra*.

cause independent of his own act.[168] But there is some Colorado authority indicating that the plaintiff's affirmative showing that the defendant probably caused the injury must be accompanied by evidence "eliminating the intervention of other causes which might exist."[169]

After the burden of proving negligence, causation and damages has been met, the plaintiff will have to meet and overcome whatever defenses the defendant has raised.

V. DEFENSES

The usual defenses to negligence liability are available in medical malpractice cases on the same terms as in other cases. For example, the plaintiff may be guilty of contributory negligence in failing to follow his physician's advice to remain in the hospital for further treatment or diagnosis[170] or failing to seek other medical care after becoming dissatisfied with the defendant physician's ministrations.[171]

For the most part the law governing defenses presents few problems peculiar to malpractice law. One possible exception is the defense of mistake of judgment, which has already been discussed.[172] Two others are the defenses of release and statute of limitations.

A. Release

The nature and theory of the plaintiff's claim may be important in determining whether the defense of release is available to the defendant. This defense is the plea that the plaintiff has released another and the release operates to bar the malpractice claim.[173] For example, in *Sams v. Curfman*[174] the plaintiff was injured when his car collided with a creamery company truck. The injuries he thus received were treated by the defendant physicians. First the plaintiff sued the creamery company and its driver, receiving a sizable cash settlement in return for signing a release in the usual broad terms. The physicians were not parties to the action thus compromised and they were not mentioned in the release.

Soon after settling the first lawsuit, the plaintiff filed a second, entirely separate, action against the physicians. This suit asked compensatory and exemplary damages for "gross negligence and wrongdoing" in diagnosis and treatment of the same injuries involved in the first action.

The doctor-defendants pleaded in bar the settlement and release with the creamery company, and the trial judge granted the defendants judgment on the pleadings. In the Supreme Court, the

168 Hedgpeth v. Schoen, 109 Colo. 341, 342-43, 125 P.2d 632 (1942) "Where an efficient, adequate cause for injuries has been found, it must be considered as the true cause, unless another, not incident to it, but independent of it, is shown to have intervened."

169 See, e.g., Lamme v. Ortega, 129 Colo. 149, 155, 267 P.2d 1115, 1118 (1954); Brown v. Hughes, 94 Colo. 295, 306, 30 P.2d 259, 263 (1934).

170 This defense was raised but not passed on in Pearson v. Norman, 106 Colo. 396, 106 P.2d 361 (1940). See McGraw v. Kerr, 23 Colo. App. 163, 168, 128 Pac. 870, 873 (1912) (dictum), "A patient is bound to submit to such treatment as his surgeon prescribes . . . . If he will not, his neglect is his own wrong or mistake for which he has no right to hold his surgeon responsible."

171 Hanley v. Spencer, 108 Colo. 184, 187, 115 P.2d 399, 400 (1941) (court indicated such conduct is contributory negligence as matter of law).

172 See text at notes 63-69 *supra*.

173 Cases on this problem from other jurisdictions are collected in Annot., 40 A.L.R.2d 1075 (1955).

174 111 Colo. 124, 137 P.2d 1017 (1943).

plaintiff argued that his complaint for malpractice alleged both a tort and a breach of contract. He contended that the contract action against the physicians should not be barred by his settlement of a tort action against the creamery company. Moreover, he asserted, there was no causal connection between the wrong of the creamery company driver and the later malpractice.

Defendants countered that the action against the doctors was in form and nature a tort action, that it asked damages which would have been recoverable in the initial action as proximately caused by the creamery's original wrong, and that the one cause of action for those damages had been settled and co-liable tortfeasors released.

The high court, after a brief struggle with the issue whether the complaint sounded in tort or contract, held that the complaint set out a tort cause of action, and therefore it was barred by the release. By implication, at least, the opinion indicates that an action against the physicians for breach of contract would not have been barred by settling the claim against the prior tortfeasor.

The *Sams* case points out a pitfall for plaintiffs' attorneys. They should not be tempted, in cases involving medical malpractice in treating injuries caused by a prior tortfeasor, to settle with the wrongdoer whose tort brought the claimant to the doctor's office, even where the original tort caused minor damage in comparison with the malpractice, or where the original tortfeasor's liability is highly doubtful. Even assuming such a settlement would not bar a later contract claim against the physician, damages for breach of contract might be severely limited, and of course no exemplary damages are available in a contract action.[175]

It might be noted that, strictly speaking, the *Sams* rationale may not apply today. The court carefully specified that the complaint was governed by rules of pleading which did not allow commingling of tort and contract theories in a single cause of action. It is possible that under the present more liberal pleading[176] the court would hold in similar circumstances that if the facts alleged stated a claim on a contract theory, settlement of a tort claim against a prior wrongdoer would not bar the contract action against the doctors. Moreover, the whole idea that a release of one joint, concurrent or consecutive tortfeasor releases all others has justification in neither logic nor legal history and has been severely criticized.[177] This is another area where the Supreme Court of Colorado, which of late has so dramatically demonstrated its determination not to adhere blindly to unsound or unjust precedents,[178] may greatly improve the law if given the opportunity.

The Colorado court has already recognized certain limitations on the harsh rule that the release of a prior tortfeasor releases a physician who negligently treats injuries caused by that tortfeasor. Thus where the initial injury is covered by workmen's compensation, the injured workman may, in some cases, accept his compen-

175 Sams v. Curfman, 111 Colo. 124, 127-28, 137 P.2d 1017, 1018 (1943) (dictum).

176 Colo. R. Civ. P., Rule 8 (3) allows setting out in a complaint, "two or more statements of a claim or defense alternately or hypothetically, either in one count . . . or in separate counts . . . ." The same rule provides that a plaintiff may state as many claims as he has regardless of consistency.

177 See, e.g., Prosser, Torts 244 (1955).

178 See, e.g., Publix Cab Co. v. Colorado Nat'l Bank, 338 P.2d 702 (1959); Canon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1958).

sation award and release his employer without necessarily sacrificing his action for medical malpractice. Whether this is possible in a particular case turns on the theory of the action and the relation of the party sued to the plaintiff.

For example, in *Hennig v. Crested Butte Co.*[179] the injured workman, after accepting a compensation award and releasing his employer, brought action against the *employer* for injuries allegedly sustained through malpractice of a physician who had been employed by the defendant-employer to treat the workman. Apparently the plaintiff sought to hold the defendant, the employer of *both* the physician and the plaintiff, vicariously liable for the physician's alleged malpractice. This, said the Supreme Court, could not be done in the face of a release of the same defendant after payment of a compensation claim filed for the same injury and all disability arising from or connected with it.

It should be noted that the *Hennig* case said nothing about the right of an already compensated workman to sue the *doctor* whose negligent treatment may have greatly aggravated the injury incurred on the job. *Hennig* was an action against the *employer*. There are many reasons for allowing a separate medical malpractice action after settlement of the original workmen's compensation claim. First, the compensation act was intended as humanitarian, beneficial protection for injured workmen, not as a refuge for negligent doctors. The latter are strangers to the act,[180] and, unlike covered employers, have not exchanged the disadvantage of liability without fault for the advantage of liability limited in amount. The act's purpose of benefitting workmen should not be perverted into denying them a common law action probably included in the Bill of Rights guarantee of a remedy for every wrong.[181]

Second, the amount of a workmen's compensation award has little or no relation to the actual pecuniary loss of the claimant. Such an arbitrary and often pitifully inadequate award should not be substituted for an opportunity to obtain satisfaction in the form of damages commensurate with the injury. There has already been too much judicial confusion of "satisfaction" of claims with "release" or tortfeasors.[182] Legislative deprivation of this claim for compen-

179 92 Colo. 459, 21 P.2d 1115 (1933)
180 See the discussion of this point in Froid v. Knowles, 95 Colo. 223, 228, 36 P.2d 156, 158 (1934).
181 Colo. Const. art. II, § 6. The Colorado court indicated concern on this issue in Froid v. Knowles, 95 Colo. 223, 234, 36 P.2d 156, 161 (1934).
182 See Prosser, Torts 243-46 (1955).

satory damages might well constitute a taking of property without due process.[183]

Third, the claim against the employer is essentially separate and different from the malpractice claim. The job-incurred injury is generally separated in time, place and causation from the malpractice injury. The employer and the doctor usually are not joint nor even concurrent tortfeasors. The employer's liability is not based on fault but is relational, arising out of the contract relation of employer and employee. The physician's liability, on the other hand, is nearly always in tort.[184] Often the damages may be divisible or at least capable of apportionment. For example, an employee may incur a hernia from on-the-job strain. If, in preparing him for a hernia operation, the surgeon negligently allowed him to fall off the operating table and fracture an arm,[185] there would be no problem whatever in allocating damages to the separate injuries. Yet even in this kind of case it is not clear that the workman would have a separate claim against the surgeon if the surgeon had been employed by the workman's employer.

Fortunately it appears settled in Colorado that the injured employee has a separate claim for malpractice against a physician whom the employee himself selects and pays to treat an injury covered by workmen's compensation.[186] Therefore a settlement of the workmen's compensation claim in such a case does not bar a later action against the workman's personal physician for malpractice.[187] It is submitted that the rule should be the same when the physician is selected and paid by the employer or his compensation insurance carrier. Mere formalities, such as who retained and paid the physician, do not affect the inherent separateness of the claims, and they should not determine whether settlement of one bars the other.

B. Statute of Limitations

The statute of limitations as a defense presents special problems in malpractice cases. At least two of these problems have been dealt with by the Colorado Supreme Court and are worthy of discussion here. They are the problems encountered by courts when asked to decide: (a) when the statute of limitations begins running or is tolled, and (b) which of several possibly applicable statutes of limitations properly applies in a particular case.

A third problem, the question whether the special two year Colorado malpractice statute is constitutional, has never been raised for decision by the Supreme Court. However, the question has more than academic interest and will be discussed briefly here.

When statute begins running—tolling. The weight of authority holds that a statute of limitations governing malpractice begins to

183 See Rosane v. Senger, 112 Colo. 363, 370, 149 P.2d 372, 375 (1944) (medical malpractice). "A legal right to damage for an injury is property and one can not be deprived of his property without due process."

184 "It will aid our study, we think, if we shall keep in mind that the liability of a tort-feasor is predicated on fault, that of an employer under the compensation act, on relationship." Froid v. Knowles, 95 Colo. 223, 226, 36 P.2d 156, 158 (1934).

185 Compare the facts in Beadles v. Metayka, 135 Colo. 366, 311 P.2d 711 (1957), 34 DICTA 351.

186 Froid v. Knowles, 95 Colo. 223, 36 P.2d 156 (1934).

187 *Ibid.*

run when the act or omission alleged as malpractice occurs.[188] The majority seem to enforce this view even where the malpractice is not discovered until after the statute has barred any action.[189] Other courts, however, have held that the statute does not commence running until the malpractice results in injury.[190] The latter view seems more consistent with the broader rule that statutes of limitations do not start running until a claim accrues, at least when it is considered that actual loss or damage is an indispensable element of a negligence claim.[191] Still another minority view holds that the statute does not run prior to the time the plaintiff discovers or by reasonable diligence should have discovered the malpractice.[192]

The Colorado Supreme Court has never directly declared which of the above views it prefers, and on at least one occasion has expressly declined to decide when the statute commences to run,[193] while seeming to hold, in effect, that the statute does not run until discovery of the injury.

Two Colorado cases[194] have involved the problem of tolling the statute of limitations. The first, and most dramatic, was *Rosane v. Senger*.[195] There the defendants had left a gauze pad in the plaintiff's abdomen during surgery performed on her in 1930. After more than ten years of suffering without realizing the cause, the plaintiff learned through exploratory surgery performed by another doctor that the gauze pad left behind in the prior surgery had been causing her discomfort. Thus it appeared from the plaintiff's own evidence not only that injury, *i.e.* damage, had occurred, but also that she had discovered the *fact* of injury (although not the precise cause) more than two years before she brought suit. She instituted action in 1941, over eleven years after the *act* alleged as malpractice, but only about one year after she first learned of that act. The Supreme Court opinion does not state whether the defendant surgeons knew they had left the pad inside the plaintiff, nor is there a recital of any specific attempt by them to conceal their mistake.

As seen by the court the issue was: "Does justifiable delay, due to plaintiff's ignorance of the *cause* of a *known injury,* stop the running of the statute when plaintiff has used every reasonable effort to ascertain that cause and been frustrated solely by defendants' *concealment?* In other words under such circumstances, when did the cause of action accrue?"[196]

The Supreme Court, acknowledging but repudiating the contrary majority view, held that the statute commenced running only upon the plaintiff's discovery that the pad had been left inside

188 Regan, Doctor and Patient and the Law 244-45 (1956); 41 Am. Jur. Physicians and Surgeons § 123 (1942); 70 C.J.S. Physicians and Surgeons § 60 (1951). Cases collected in Annots., 74 A.L.R. 1317 (1931), 144 A.L.R. 209 (1943).

189 See, e.g., Becker v. Porter, 119 Kan. 626, 240 Pac. 584 (1925). And see authorities cited in note 188 *supra*.

190 E.g., Carter v. Harlan Hospital Ass'n, 265 Ky. 452, 97 S.W.2d 9 (1936); Meredith, Malpractice Liability of Doctors and Hospitals 206-07 (1956).

191 Prosser, Torts 165 (1955).

192 This is the rule in California. Ehlen v. Burrows, 51 Cal. App. 2d 141, 124 P.2d 82 (1942).

193 See Rosane v. Senger, 112 Colo. 363, 367, 149 P.2d 372, 374 (1944).

194 *Ibid.* And see Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957).

195 112 Colo. 363, 149 P.2d 372 (1944).

196 *Id.* at 367, 149 P.2d at 374. (Emphasis added.) Note that the question when the cause of action accrues is technically different from the question whether certain facts toll the statute, but the court lumped the two as one issue.

her. In reference to the prevailing rule that the statute is tolled only by *fraudulent* concealment,[197] the opinion declared: "We are not impressed with the reasoning which supports the materiality of fraud."[198] The court reasoned that whether the concealment was fraudulent or not made no practical difference to the plaintiff, for without knowledge of facts upon which to base a complaint, "the victim (would be) equally helpless regardless of the motive for concealment."[199] Further the court expressed concern that strict enforcement of the majority position might raise serious constitutional questions.[200]

Clearly the *Rosane* case establishes that to toll the statute no fraud in the sense of scienter or actual intent to deceive need be shown. But throughout the opinion the court indicates that *concealment* is the effective ingredient. Yet nowhere is there mention of what constituted concealment in this case. It is not even stated that the defendants *knew* they had left the pad inside the plaintiff. This poses the question whether the court really *held* that mere ignorance of facts constituting the claim tolls the statute. If this be the proper interpretation, the case created a new and not generally recognized exception to the general rule that the plaintiff's mere ignorance of facts giving him an action does not delay the running of the statute of limitations.[201] The latter rule has been recognized in Colorado,[202] but in a case rejected in *Rosane* as not in point[203] and later modified if not overruled by legislation.[204]

Colorado's apparent adherence to the liberal minority view that ignorance of the facts constituting a cause of action tolls the statute was affirmed if not extended in the 1957 case of *Davis v. Bonebrake*.[205] There the plaintiff alleged that during a hysterectomy done August 17, 1951, the defendant surgeons left a sponge in her abdomen. A second operation was performed September 5, 1951, and the plaintiff learned in October, 1953, that the latter operation had been done for the purpose of removing the sponge left behind in the first operation. The complaint was filed October 16, 1953, more than two years after both operations, but shortly after the plaintiff obtained specific knowledge of the alleged malpractice.

The plaintiff contended that the defendants had been guilty of fraudulent concealment which tolled the statute. The defendants cited testimony of the plaintiff as showing that she knew, or with reasonable care should have known, shortly after the first operation that something had been left inside her. Specifically, the plaintiff had testified in a deposition that shortly after the first operation she noticed on her abdomen a lump about the size of a partially opened fist. The following cross-examination occurred:

> "Q. Now, you thought that it was a foreign object of some kind, didn't you, Mrs. Bonebrake? A. Well, I didn't think you could grow something just that fast . . . .

197 Cases cited in Annots., 74 A.L.R. 1317 (1931), 144 A.L.R. 209 (1943).
198 Rosane v. Senger, 112 Colo. 363, 369, 149 P.2d 372, 375 (1944).
199 *Ibid.* (Parenthetical matter added).
200 *Id.* at 370, 149 P.2d at 375.
201 See Note, 17 Rocky Mt. L. Rev. 124 (1944).
202 Miller v. Industrial Comm'n, 106 Colo. 364, 105 P.2d 404 (1940).
203 Rosane v. Senger, 112 Colo. 363, 369, 149 P.2d 372, 375 (1944).
204 See Industrial Comm'n v. Newton Co., 135 Colo. 594, 600, 314 P.2d 297, 301 (1957).
205 135 Colo. 506, 313 P.2d 982 (1957).

Q. But you believe (sic) that it was not something that was part of you, is that correct? A. Well, I felt—I mean —there was something there."[206]

Plaintiff further testified that she knew something was wrong but had no idea precisely what the matter was. In addition she claimed that she had questioned the doctors and the surgical nurse seeking information but had been rebuffed. Eventually she had learned from the surgical nurse that the second operation had been performed to correct the error of the first.

On appeal of a trial court judgment for the plaintiff, the Supreme Court held that the evidence presented a jury issue whether the plaintiff knew about the malpractice more than two years before she filed action. An additional ground for affirming the trial court on this point, said the high court, was that, at best, the plaintiff's testimony as to what occurred during the allegedly negligent operation "cannot arise above that of the conjecture of a non-observer of the event."[207] The court indicated that such testimony is incompetent to establish "discovery" by the plaintiff which would start the statute of limitations running.

Bonebrake indicates the lengths to which the Supreme Court will go to avoid enforcing the two-year statute of limitations. Mr. Justice Day, in a dissenting opinion, asserted that the majority opinion in effect had repealed the statute.[208] This general attitude of the court toward the special malpractice statute of limitations is extremely significant in a context yet to be discussed, the question whether the special statute is unconstitutional.[209]

Which statute of limitations applies. The leading Colorado case governing applicability of limitations is the *Smith* case.[210] There the complaint alleged that the plaintiff had employed the defendant surgeon to perform a circumcision operation, but the defendant, "without Plaintiff's authorization did then and there commit an unlawful battery . . . by performing upon Plaintiff's person a surgical operation known as a Vasectomy which rendered the Plaintiff sterile . . . ."[211] No circumcision was performed. It was not claimed that the vasectomy was performed in any but the most careful and expert manner; the sole complaint was that the claimant did not get the operation he asked for.

Alert defense counsel moved to dismiss on the ground that the action, by the plaintiff's own characterization, constituted a suit for "an unlawful battery" and since it had not been commenced within one year after the defendant's act, it was barred by the one year statute of limitations governing battery cases.[212] The trial court denied the motion, holding the special two year malpractice statute of limitations[213] applicable. After taking evidence, the trial judge

206 *Id.* at 510-11, 313 P.2d at 985.
207 *Id.* at 513, 313 P.2d at 986.
208 *Id.* at 524, 313 P.2d at 992.
209 See text at note 225 *infra.*
210 Maercklein v. Smith, 129 Colo. 72, 266 P.2d 1095 (1954).
211 129 Colo. at 74, 266 P.2d at 1096.
212 Colo. Rev. Stat. § 87-1-2 (1953), provides: "All actions for assault and battery . . . shall be commenced within one year after the cause of action shall accrue, and not afterwards."
213 Colo. Rev. Stat. § 87-1-6 (1953): "No person shall be permitted to maintain an action, whether such action sound in tort or implied contract, to recover damages from any person licensed to practice medicine, chiropractic, osteopathy, chiropody, midwifery or dentistry on account of the alleged negligence of such person in the practice of the profession for which he is licensed or on account of his failure to possess or exercise that degree of skill which he actually or impliedly represented promised or agreed that he did possess and would exercise, unless such action be instituted within two years after such cause of action accrued."

directed a verdict for the plaintiff on the issue of liability, leaving only the question of damages to the jury.

On writ of error, the Supreme Court of Colorado upheld the trial court decision that the special two year medical malpractice statute of limitations applied. The high court, however, acknowledged that negligence in treatment and treatment without employment present claims basically different in nature. "The one is based on the existence of a contract and authority for service, and the other upon the lack of such contract or authority. The one is based on lack of care or skill in the performance of services contracted for, and the other on wrongful trespass on the person regardless of the skill or care employed."[214] Distinguishing a prior case[215] where the complaint had alleged battery in continuing treatment after the patient's consent had been revoked by discharging the physician, the Supreme Court ruled that the special two year statute governing malpractice applies wherever the doctor's act occurs while there is in force a contract of employment from which a professional relation to the patient arises. The court reasoned that the gist of the action was an alleged negligent act, not in lack of surgical skill but in failure to observe "that degree of care which, as practitioners, they owed to their patient in the practice of their profession."[216]

The opinion indicated that wherever the basic relationship of physician and patient is established, malpractice is not classifiable, for purposes of statutes of limitations, as either battery or negligence, but is a kind of hybrid. Said the court, "While an unauthorized operation is, in contemplation of law, an assault and battery, it also amounts to malpractice, *even though negligence is not charged.*"[217]

Thus it appears settled in Colorado that the special two-year medical malpractice statute of limitations applies to either negligent or intentional acts of a doctor who has been employed to perform *some* treatment or operation. But this by no means solves all the problems.

Although the special two-year malpractice statute of limitations applies even to claims founded on treatments or operations *beyond* the patient's consent, it probably does not apply to actions arising from treatment or surgery *without* consent. A dictum in the 1954 *Smith* case declared that if the patient consents "to no operation at all, then clearly it is a case of assault and battery, which would be barred by the (one-year) statute of limitations."[218]

The *Smith* opinion carefully distinguished the facts there presented from the facts alleged in the earlier case of *Cady v. Fraser.*[219] In *Cady* the plaintiff claimed "malpractice similar to an assault"[220] consisting of the physician's continuing treatment after the plain-

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214 129 Colo. at 75, 266 P.2d at 1096, quoting Cady v. Fraser, 122 Colo. 252, 255, 222 P.2d 422, 424 (1950).
215 Cady v. Fraser, *supra* note 214.
216 129 Colo. at 78, 266 P.2d at 1098.
217 *Id.* at 77, 266 P.2d at 1098.
218 *Id.* at 80, 266 P.2d at 1099 (dictum).
219 122 Colo. 252, 222 P.2d 422 (1950).
220 *Id.* at 254, 222 P.2d at 423.

tiff had told him to "get off the case . . . ."[221] Although the precedent value of *Cady* is weakened by the fact that there the plaintiff's claim died for lack of proof, the significance of the case lies in the fact that in *Smith* the Supreme Court took pains to distinguish the facts *alleged* in *Cady*.[222] Thus the *Smith* opinion clearly implied that facts such as those pleaded in *Cady* would present a claim in the nature of assault and battery, subject to a one-year statute of limitations. This rationale affirms the fundamental proposition that the physician-patient relation is consensual[223] and indicates that the relationship may be terminated by the patient's withdrawing a consent previously given. Treatment after withdrawal of consent would amount to trespass. *A fortiori* it would seem that a physician who renders treatment without ever obtaining consent in the first instance commits battery and, if the patient is conscious, both assault and battery.[224] An action seeking damages for such conduct would have to be brought within one year. Under the *Smith* rationale it would seem proper to infer that a malpractice claim based on a breach of contract theory would be governed by the two-year malpractice limitation rather than the statute of limitations governing other contract actions.

Constitutionality of the special statute of limitations on malpractice. The *Smith* precedent, obviating many problems inevitably present where the inherent unlikeness of various kinds of malpractice claims is recognized, rests on the bald assumption that the special two year statute of limitations is constitutional. If that statute is not constitutional, a question never decided by the Colorado Supreme Court, then, presumably, a malpractice claim would be barred in one year or six years depending on whether it was in the nature of battery, negligence, or breach of contract. Thus a consideration of the constitutionality of the special two year medical malpractice statute becomes imperative.

The Colorado Constitution guarantees that, "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person . . . and right and justice should be administered without sale, denial or delay."[225] In a 1934 case[226] the Supreme Court indicated that this provision might be offended by legislation abrogating the common law rule that, "a physician or surgeon is beholden for injury to his patient resulting from malpractice."[227] The court there implied that an attempt by the legislature to substitute a workmen's compensation claim for an employee's malpractice action against his physician would be unconstitutional.

In a 1944 case involving the special medical malpractice statute, the court served notice that, "A legal right to damage for injury is property and one cannot be deprived of his property without due process."[228] More recent opinions indicate that the present Supreme Court, to the credit of its incumbents, will not meekly

221 *Ibid.*
222 129 Colo. at 75, 266 P.2d at 1096-97.
223 41 Am. Jur. Physicians and Surgeons §§ 71, 108 (1942).
224 Cases collected in Annots., 76 A.L.R. 562 (1932), 139 A.L.R. 1370 (1943).
225 Colo. Const. art. II, § 6.
226 Froid v. Knowles, 95 Colo. 223, 36 P.2d 156 (1934).
227 *Id.* at 234, 36 P.2d at 161.
228 Rosane v. Senger, 112 Colo. 363, 370, 149 P.2d 372, 375 (1944).

tolerate legislative denials of or infringements upon constitutional rights.[229]

But the Colorado Constitution poses a more potent threat to the special malpractice statute of limitations. The constitution expressly forbids the general assembly to pass "special laws . . . for limitation of civil actions . . . ."[230] Prior to 1925, there was no special statute of limitations on malpractice in Colorado. Presumably members of the healing professions were then shielded only by the same limitations statutes applied to others, including other professional men liable to malpractice claims. But by the 1920's the American Medical Association was making its influence felt in legislatures across the land. In 1925 the Colorado legislature passed the present special statute.[231] With magnanimous generosity, or perhaps with one eye on the constitutional prohibition of class legislation and the other on the electorate, the statute's protection was extended to not only the more orthodox practitioners of medicine and surgery, but, in addition, to anyone licensed to practice, "chiropractic, osteopathy, chiropody, midwifery or dentistry . . . ."[232] This broad coverage may somewhat bolster the statute against a contention that it is class legislation.

Notably, however, the statute does not protect a nurse or hospital from an action for the same *kind* of negligence, possibly the same *act* of negligence, for which an action against the named practitioners would be barred. This points up the essential weakness of the statute. It is not in essence a legislative declaration that a certain *type* of action—malpractice—is a disfavored action and will be barred unless promptly instituted. It is not like the statute barring actions for assault and battery, false imprisonment, or slander and libel after one year. Those actions are barred whether the defendant be a doctor, lawyer or Indian chief. There the basis for legislative classification is the nature of the action, not the profession of the defendant. But the malpractice statute is solely for the benefit of a favored class of medical practitioners, and bars *all* actions whether based on "tort or implied contract."[233] What non-arbitrary and non-discriminatory reason exists for classifying all "tort or implied contract" malpractice actions against a doctor differently from the same *kinds* of actions against a nurse or a lawyer? The arbitrariness of the classification would be immediately apparent to physicians if the legislature should provide that all negligence actions be barred in *two years,* except that negligence actions against a practitioner of "medicine, chiropractic, osteopathy, chiropody, midwifery or dentistry . . . ."[234] should not be barred in less than *ten years.* That the Colorado Supreme Court is not thoroughly in sympathy with the special statute is indicated by recent decisions

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229 See e.g., Canon City v. Merris, 137 Colo. 169, 174, 323 P.2d 614, 617 (1958). "Expedience may not override the Constitution of Colorado; it should not dethrone rights guaranteed thereunder."
230 Colo. Const. art. V, § 25.
231 Colo. Rev. Stat. § 87-1-6 (1953).
232 *Ibid.*
233 *Ibid.*
234 *Ibid.*

severely limiting its scope.[235] Given an opportunity, the court might seriously consider invalidating the statute altogether.

VI. CONCLUSION

As should be obvious from the above discussion, the medical malpractice area is one of great technical and practical difficulty for the lawyer. For the doctor the increasing frequency of malpractice claims presents a growing threat to professional reputation as well as financial solvency. Physicians should not be distracted from concentrating their best efforts on behalf of a patient by the ever-present storm cloud of potential legal liability. This is an area calling for greater cooperation of the medical and legal professions in the public interest. The public interest would be served by more stringent enforcement of the lawyer's duty not to accept claims not well founded in fact, law and basic justice. A professional man's most valuable asset is his reputation for competence in his chosen field. An attorney as a professional man should refuse to have any part in damaging the reputation of another professional man unless convinced that the claimant has really been injured and that his claim has genuine and provable merit.

The Colorado Medical Society and the Colorado Bar Association are presently working to establish a joint medical-legal board to hear and screen malpractice cases. If a claim is found to have merit, the medical society will aid the claimant in obtaining needed expert evidence. If a claim is found to be without merit, the claimant will be left to his usual legal remedies. It is the hope of both cooperating groups that this screening process will be effective in helping claimants' attorneys determine for themselves whether claims they are pressing should be litigated. If the plan functions properly, it should eliminate many groundless claims not only short of actual trial, but prior to release of publicity which may cause irreparable damage to an entirely innocent doctor. This is an effort at interprofessional cooperation which should have the sincere support of every man of good will in either profession.

235 E.G., Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957) (Mr. Justice Day, dissenting, argued that the majority opinion had in effect repealed the statute of limitations); Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944) (ignorance of plaintiff or impossibility of bringing suit tolls the statute even though no fraudulent concealment by defendant is shown).