The Linacre Quarterly

Volume 13 | Number 3 Article 2

July 1945

The Doctor Goes to court

Vincent C. Moscato

THE DOCTOR GOES TO COURT*

VINCENT C. MOSCATO, M. D.

Chairman, Workmen's Compensation Committee
Erie County Medical Society
Buffalo, New York

THE doctor may be called upon to appear in trial courts of various jurisdictions. In the State of New York, he may appear in one of the federal courts, in the Supreme Court of the State, in one of the County Courts, in the Surrogate Court, and he may appear before the Workmen's Compensation Commission.

Moreover, the doctor may appear in court as a plaintiff, as, for example, when he himself sues for the reasonable compensation for his services; or as a defendant when, for example, he is sued in a malpractice action; or he may appear, as happens probably most frequently, as an expert witness.

PRIVILEGED INFORMATION

In whatever of these three capacities the physician appears in court he may be confronted with the obligations arising from his possession of privileged information. In the State of New York, the Civil Practice Act ** provides that a duly authorized physician shall not be allowed to disclose information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity unless the patient is a child under the age of sixteen or the information acquired by the physician indicates that the patient has been the victim of a crime. If the physician knows that the patient has been the victim of a crime, he may be required to testify in any legal or juridical proceeding in which the commission of such a crime is under inquiry. In order that the information possessed by a physician may be actually considered privileged information, the relation of physician to patient must exist. Therefore, for example, in an action involving negligence resulting in personal injuries, a physician employed by the defendant to examine the plaintiff, not for the purpose of treating the patient, but in order to ascertain the extent of his injuries, may testify freely, since in this instance the physician is not functioning in a physician to patient relationship.***

* Presented before the Staff Conference, Mercy Hospital, Buffalo, New York.
** Section 352.
*** *Editor's Note.* It is interesting to note that by implication there is here recognized a distinction between medical practice, that is, for example, the mere examination of the patient, and the physician to patient relationship.

Privileged information may be acquired by the physician, while attending the patient through the physician's examination of the patient or through observation or through statements made by the patient or others present at the time. Information gained at autopsies by doctors who did not attend the person during his illness but who are present at the autopsy, is not privileged since a deceased person cannot be a patient. It should be noted, however, that information acquired during an autopsy may still be confidential and must be treated as such, since such information may involve the rights of persons connected intimately or remotely with the deceased.

Patient-Physician Relationship

The point deserves emphasis that the payment of a fee is not essential to create the physician to patient relationship nor is employment by the patient essential in the development of such a relationship. In a recent case, a bell boy in a hotel summoned a physician to attend a guest who had taken poison. The guest, with curses, ordered the doctor from the room. It was held by the court subsequently, that the doctor was barred from giving any information while treating the guest.

Malpractice Suits

It is clear that a physician suing his patient for payment is under a legal handicap. Nevertheless, despite the section of the Civil Practice Act quoted above, a physician is not prohibited from testifying to such ordinary incidents and facts as are plain to the observation of anyone not having professional knowledge, that is, a physician may testify that he performed an operation on a certain person at a certain time, even though the physician does not describe the operation or the conditions disclosed by his examination. The physician may also testify that he attended a certain person on a certain date and that the person was ill. If the character of the sickness was not plain to the observation of laymen, but required expert skill to detect it, the physician may not testify that the patient was ill. The patient may claim whatever rights follow from the fact that his physician has privileged information concerning him. Hence, the patient has the right to decide whether to claim or to waive the privilege of such information. The Civil Practice Act of New York* provides for a waiver during a trial permitting the physician to testify freely, except to such information as would tend to disgrace the memory of a deceased patient. Once the privilege is waived it is waived for all times. In the absence of a waiver, hospital records are inadmissable as records because of the privilege. The same rule applies to a death certificate offered to show the cause of death. Although physicians are requested by law to report certain diseases, the records of these reports shall not be

* Section 354.

made public.* The law governing malpractice suits in the State of New York is excellently summarized in the following terms:**

> "The law relating to malpractice is simple and well settled, although not always easy of application. A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices, and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine and surgery. Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge. The law holds him liable for an injury to his patient resulting from the want of requisite knowledge and skill or the omission to exercise reasonable care or the failure to use his best judgment. The rule in relation to learning and skill does not require the surgeon to possess that extraordinary learning and skill which belong only to a few men of rare endowments, but such as is possessed by the average member of the medical profession in good standing. Still he is bound to keep abreast of the times and a departure from approved methods in general use, if it injures the patient, will render him liable, however good his intentions may have been. The rule of reasonable care and diligence does not require the exercise of the highest possible degree of care, and to render a physician liable it is not enough that there has been a less degree of care than some other medical man might have shown, or less than even he himself might have bestowed, but there must be a want of ordinary and reasonable care leading to a bad result. This includes not only the diagnosis and treatment, but also the giving of proper instructions to his patient. The rule requiring him to use his best judgment does not hold him liable for a mere error of judgment provided he does what he thinks is best after careful examination. His implied engagement with his patient does not guarantee a good result, but he promises by implication to use the skill and learning of the average physician, to exercise reasonable care and to exert his best judgment in the effort to bring about a good result."

Expert Testimony

Lack of proper skill, failure to use good judgment, a departure from approved methods or failure to use reasonable care and diligence can only be proved by the testimony of medical men as expert witnesses. To

* Public Health Law, Section 25.
** Pike vs. Honsinger, 155 N. Y. 201.

illustrate: a physician defendant found the plaintiff suffering from a ruptured ectopic gestation. During the subsequent operation gauze packs, each with a small metal snap attached, were used. A count of the packs was kept by one of the clinic nurses and at the conclusion of the operation it appeared that all had been removed. The defendant examined the abdominal cavity before it was closed. He found no foreign substance. Some months later, one of the packs was located in the abdomen when an X-ray picture was taken and a second operation was necessary to remove it. When the surgeon was sued for malpractice the plaintiff's attorney claimed that the presence of the pack in the abdomen, several months after the operation, offered such obvious evidence of a want of care on the part of the surgeon, that expert testimony in the case was unnecessary. The court ruled, however, that this theory of the plaintiff was untenable. As a matter of fact, the defendant called an expert, as witness, who said that proper and approved methods were used in the operation; it being customary for a surgeon to rely on the nurse's count of sponges and packs. The defendant is not chargeable with the negligence of the nurses employed by the hospital.

The necessity for expert testimony applies only to an action in negligence. In an action brought on alleged assault and battery, the plaintiff need not call in medical experts. Such an action may ensue when a physician operates without consent, expressed or implied, or when the patient consents to one operation and the surgeon performs an operation different than the one for which he obtained permission, if, for example, the surgeon operates on the right eye of the patient instead of the left eye. Consent should be expressed, but it may be implied by circumstances, as, for example, in emergencies requiring immediate action to save life or limb.

In this State* the statute of limitations bars an action for malpractice or for assault after two years. An action for debt is barred after six years. There are times when it is "good policy" for a physician not to sue a disgruntled patient for payment until after two years have elapsed, should there be reason to believe that he may file a counter claim for malpractice.

Regarding the liability of hospitals, the rules vary according to the character of the institutions involved. Strictly public institutions, such as State hospitals, are not liable for the negligence of their agents, as these institutions are governmental agencies and the doctrine of *respondeat superior* does not apply.

Private institutions of an eleemosynary character which minister to public charity are generally not held liable for injuries to patients arising from the malpractice of its doctors or nurses.

Institutions of a strictly private character conducted purely for profit are liable to patients for the negligence of their servants and others

* New York.

connected with the institution. However, a charitable hospital must exercise care in the employment of its personnel in order to enjoy immunity, for if a charitable institution has negligently employed incompetent servants, it may be held liable for injuries to its patients.

We will now consider the doctor on the witness stand. If he appears as a voluntary witness, he is entitled to a fee for his time and services. If he is compelled to appear under subpoena he will in this State* receive $0.50 per day, plus $0.08 per mile of travel, beyond three miles. The "subpoena" may be a *subpoena duces tecum* requiring the physician to bring his records with him.

The doctor testifies to facts and opinions. Generally a witness must testify to facts only, as it is for the jury to draw conclusions and inferences from the facts. However, the opinions of experts are admitted on the grounds of necessity. The administration of justice requires that a jury shall receive the assistance of those especially qualified by experience and study to express an opinion on questions of fact relating to science or art.

Physicians may give opinions as to matters connected with their profession, even though they have not made the matter in question a specialty. A medical witness who has not examined the person under consideration may state, in answer to a hypothetical question, whether in his opinion a certain physical condition would probably result from a given cause. A doctor who has knowledge of the case may express his opinion as to the probability of the patient's recovery or the probable continuance, duration, or permanence of the disability. He will not be permitted to express an opinion as to future consequences which are contingent, speculative, or merely possible. There must be a reasonable certainty that such consequences will result.

A question which embodies facts claimed to have been proved and which requests the witness's opinion as to probable effects produced by these facts on the matter under investigation, is a hypothetical question. The expert is expected to assume that the things mentioned in the question have been proved and to base his answer only on such an assumption and not on any knowledge which he may have on the case personally, unless, of course, the tenor of the question makes other demands on the witness.

It is an important rule of law that hear-say is not admitted as evidence, and, therefore, scientific books or reports are excluded as hear-say when offered as proof of the facts asserted in them. Such books, however, may be used on the cross examination of an expert in a proper case. Thus, for the purpose of affecting the expert's credibility, the cross examiner may call his attention to books upon the subject and ask whether or not authors whom he admitted to be good authority had not expressed

* New York.

opinions different from his. The reference to the books is not for the purpose of making their statements part of the evidence but solely to assist in ascertaining the weight to be given the testimony of the witness. Where the expert has referred to a book as supporting his views, it may be read on cross examination, to establish an alleged fact.

The testimony of medical experts is admissible to explain X-ray plates which have been properly introduced as evidence. It is improper to permit an X-ray specialist to testify from his notes concerning a picture when he did not take the picture or/and had not seen the patient; when the picture was not produced and the person who took the picture was not called as a witness. Mere testimony that the plate which the expert saw, bore the name of the patient is not sufficient to establish the alleged relationship between the plate and the patient.

Diverse Problems for the Expert

Regarding the "pathometer" or "lie dectector," the New York Court of Appeals has rejected its use as evidence, on the ground of an absence of general scientific acceptance of its alleged efficacy and reliability.

By statute, in this State,* whenever the parentage of a child is in question the result of blood tests are received in evidence only when they definitely establish non-paternity.

Also by statute, the Court may admit evidence of the amount of alcohol in a motorist's blood, as shown by analysis of blood, urine, saliva, or breath, if the blood sample is taken within two hours of the time of the motorist's arrest.

Regarding mental diseases, the diagnoses of dementia praecox, paranoia, and paresis must be reported to the Court with the utmost awareness of the implied consequences of such claims. Usually, the diagnosis of mental disease is considered by the Court chiefly for the purpose of committing the patients to institutions. When an expert witness is called in a case involving criminal liability, insanity is accepted by the law as an excuse only upon proof that at the time of the criminal act the defendant was laboring under a defect of reason to such an extent as not to know the nature of the act he was performing nor to know that the act was wrong.

Competence of the Testator

A last will and testament may be contested on the ground of lack of testamentary capacity of the testator at the time when the will was made. If the testator had a full and intelligent consciousness of the nature and effect of the act in which he was engaged, a knowledge of the

* New York.

property he possessed, and an understanding of the disposition he wished to make of it by will, and of the persons and objects he desired to participate in his bounty, he had sufficient capacity to make a will. The question involved is not whether the testator was sane or insane before or after he made the will, but whether he had testamentary capacity at the time he executed the instrument. It may be that his mind was not sound at the time but that this did not influence the distribution of his possessions. The will of a drunkard or of a drug addict is not invalid unless his mind was so distorted that he did not have the testamentary capacity defined above at the time of making the will. A testator may suffer from delusions which do not affect this capacity. A person may be competent to engage in complicated business transactions and nevertheless be subject to certain delusions destroying his testamentary capacity.

Regarding hospital records, these are now admissible as evidence in the various courts of the State, and it is no longer required that for their acceptance as evidence all who took part in making them need to be called into court as witnesses.* A hospital record can be used to prove certain material dates, the services rendered, the daily observations of the patient's condition, the doctor's diagnosis, etc., etc., whether the doctor is or is not present in Court. In view of this important law, it is well to remember at all times that careful, complete, and accurate records should be kept on hospital charts so that a true history of the patient may be presentable as evidence at all times.

The medical witness should have no personal interest in the outcome of the case. Contingent fees are incompatible with good ethics. If a physician's fee depends on the outcome of the trial, his testimony will surely betray him.

Comments and Discussion

This paper of Dr. Moscato's presents, in summary form, many, if not all, of the features of the physician's relation to the courts. While Dr. Moscato discusses this from the viewpoint of a physician-lawyer, he necessarily touches upon many moral questions involved in medical practice, as well as in legal practice. Many phases of the moral questions involved in the two professions of law and medicine become focused in the obligations of one person when the physician deals with the court, as, for example, when he himself is the defendant in a malpractice suit or when he appears as an expert witness. And so, Dr. Moscato touches upon such moral problems as those associated with privileged information, the patient-physician relationship, the physician's malpractice, malpractice suits, the functions and obligations of the expert witness, the court's

* Civil Practice Act, Section 374-A.

competence in judging the parentage of children, the physician's place in assisting a testator to make a will, and the moral competence of the testator. Each of these problems is apt to arise with more or less weight and insistence in the daily experience of the physician, and Dr. Moscato has, therefore, done a great service in presenting his paper before the staff conference of the Mercy Hospital, Buffalo, New York. The Editor of *The Linacre Quarterly* is grateful to him for permission to publish this paper.

1. *Privileged Information.* Questions arising from the protection or use of privileged information, as is well known, occur frequently in a physician's practice. In these days when there is a tendency in certain groups to place health, personal or community, above all other considerations, forgetful of the fact that one may not commit moral wrong even for the sake of preserving his health any occasion upon which the sanctity of privileged information can be re-stated should be grasped by those in responsible positions. To emphasize again the obligation of preserving professional secrecy, what the theologian calls the *secretum commissum*, it is well known that even the judge or a higher superior cannot abrogate the natural law with reference to the preservation of such a secret. The patient has a right to expect that the physician will maintain the professional secret, even under extreme strains to his self-interest; otherwise the foundation of confidence in our personal relations with one another would give way to the greater detriment of society than, for example, if we were to expose society to a smaller injury through the revelation of such a secret. Needless to say, the subject demands the utmost cautious, conservative, but also large-minded study and opinions concerning such matter demand competence not merely of one person but of many, particularly in this case a meeting of minds of the physician and the theologian.

2. *The Patient-Physician Relationship.* The patient-physician relationship implies all of the moral problems involved in the safeguarding of privileged information, but it implies much more. The safeguarding of privileged information is only one phase of that relationship. The patient gives the physician much more than his confidence and his trust with reference to diseases, the existence of which is to be kept a secret. He entrusts to his physician, if he really desires to avail himself of the physician's best medical care, information concerning himself and his family, his business, his recreation, his environment, his past experiences, and his future plans, all this going far beyond disease as narrowly understood. The physician becomes a counselor, an adviser, an inspirer, a planner, a guide, and performs many more functions which in an ideal relationship again imply ethical and spiritual values, too complex and numerous to be easily analyzable. These concepts, too, will be seriously imperiled by

various forms of routinized medicine and impersonal medical practice. It behooves those deeply concerned with the preservation of the sanctities of medical practice not only to state and re-state their convictions, but especially to give to the world examples of the finest flowerings of mutual trustfulness, competence, and effectiveness, so that the practice of the physician may not belie his ethical protestations, or better still, so that the influence of the worthy physician may be traceable unmistakably in the lives of his patients.

3. *Malpractice and Malpractice Suits.* That a physician's reputation is legally and ethically hazarded has been stated many times. The ease with which in some jurisdictions malpractice suit can be instituted is apt to lend encouragement to both the ignorant and the malicious who are aided and abetted, sometimes, by some of the less worthy members of the legal profession. It is altogether too common today to find persons who accept the fact that they can sue a physician for malpractice as a moral sanction for such a suit. It is easy to forget that the law may permit certain practices because it cannot prevent their occurrence, but that such an attitude on the part of the law is not to be mistaken for a moral sanction. A person may do a physician a grievous and a lasting wrong by a malpractice suit, even though the plaintiff may win the suit. There is an endless number of distinctions to be made with reference to individual instances when one attempts to judge the legitimacy of a malpractice suit or the legitimacy of accepting the judgment resulting from such a suit.

4. *Expert Testimony.* The principles governing the moral aspects of expert testimony before a court are, of course, clear enough, but their application in individual instances is beset with numerous difficulties. Needless to say, the witness must qualify first and foremost by his knowledge and skill as an expert. Even if he has not professedly stated his qualifications he must be prepared to prove them on inquiry from duly constituted authority. But, what is even more important, he implicitly claims such required knowledge and skill when he accepts a call to act as expert witness. A deep appreciation of "the finer shades of truth," of the effacement of self-interest, of scrupulous objectivity, of delicate discrimination in the use of implications in language, all of this and many equally intangible refinements of character and competence can either elevate the appreciation of the physician in the minds of his hearers, clients, witnesses, and auditors alike, or can justifiably damn him in their opinion. The attitude of the court in a given jurisdiction will have much weight in increasing or decreasing the appreciation of the medical profession. All of this is, of course, to be said with even greater emphasis of those who make a habit of appearing as expert witnesses. The conflicting opinions of physicians testifying on the two sides of an argument con-

cerning mental competence of a plaintiff or a defendant is, of course, difficult to understand by the non-medical laity. People who are accustomed to think in terms of dogmatic assertions or denials cannot evaluate alternatives in a sequence of probabilities, especially when shades of probabilities are involved. Where morality, that is, truthfulness or prevarication, is likely to enter into the finer discriminations in the statements made by experts, it is again a matter for only the expert to judge, the expert psychiatrist or the expert moral theologian, or the expert trial lawyer or judge. Here, certainly, is a field where even angels would fear to tread. The important thing that should be emphasized, however, is how much under these conditions is demanded of a physician who takes his profession and the ethical demands of his profession seriously.

5. *The Physician and the Making of Wills.* The patient-physician relationship is apt to result in particularly vexing problems when doubt is cast upon the mental or moral competence of the patient to make a will or when the relationship develops into one between a testator and a physician. While some physicians take the position that they are never to advise with reference to such matters, it may still happen that a physician might be morally obligated either to his patient or to the patient's relatives to express opinions and to communicate judgments or that he may be obligated in charity to do what he can to assist in vindicating the rights of parties who, without the physician's participation, would be seriously injured. It is almost useless to discuss these principles, segregated from actual facts because the circumstances of each case become so vastly influential in judging of a particular instance. Thus, for example, in Dr. Moscato's paper there is defined the requirement for establishing the minimal capacity for making a will. The criteria, at first sight, seem to be objectively easily applicable, but when we really try to determine whether a testator had "testamentary capacity," the judgment on such a point cannot be based merely upon a literal application of any merely legally established criteria. Moral problems for the physician participating in such controverted cases are too numerous and complex to invite participation by any than those who have a highly developed sense of moral values. There is no place in these problems for reckless rashness nor for indifference to ethical right or wrong.

The Editor of *The Linacre Quarterly* wishes again to thank Dr. Moscato for this valuable contribution. A. M. S., *S.J.*