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## The Malpractice Dilemma

To the physician and surgeon, "malpractice"<sup>1</sup> is an ill-favored word, nearly synonymous with quack and charlatan. "His reputation, his livelihood, his social position, and the entire medical profession are threatened when any suspicion of malpractice is aired."<sup>2</sup> That "malpractice" should convey overtones of moral turpitude<sup>3</sup> is an unfortunate, but significant factor in the present medico-legal quandary. "Malpractice," better connoted as "professional liability," implies only that the victim of actionable negligence should be compensated for the injuries flowing therefrom.

Activity in the area of "professional liability" has been intensified in recent years.<sup>4</sup> The decline of physician-patient intimacy, the trend towards specialization, a growing awareness of liability insurance and society's augmented "sympathy" towards the injured claimant have contributed far more to the increase than any substantive change in the law.

Fundamentally, the "malpractice" enigma is evidentiary, for the substantive elements of the tort are relatively clear. The general prerequisite of expert testimony, coupled with the medical profession's "conspiracy of silence" have created an anomalous "right," embarrassingly lacking the correlative "remedy."<sup>5</sup> It is an unearthing of this "remedy"

<sup>1</sup> "Malpractice may be defined as the failure upon the part of a physician or dentist properly to perform the duty which devolves upon him in his professional relation to his patient, a failure which results in some injury to the patient." REGAN, DOCTOR AND PATIENT AND THE LAW 17 (3rd ed. 1956).

<sup>2</sup> Shindell, *Medicine Versus Law; A Proposal for Settlement*, 151 A.M.A.J. 1078, 1079 (1953).

<sup>3</sup> Malpractice has been defined as "Any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, *evil practice*, or *illegal or immoral conduct*." BLACK, LAW DICTIONARY (4th ed. 1951). (emphasis supplied).

<sup>4</sup> "Some 5000 cases are now being tried each year with thousands of other cases settled out of court. Since 1950, one out of every 35 doctors insured under the New York State Medical Society's group insurance plan has been sued in the courts for malpractice." Newsweek, July 11, 1955. Although a recent study by the Law Department of the American Medical Association is inconclusive on this point. Stetler, *The History of Reported Medical Professional Liability Cases*, 30 TEMP. L.Q. 366, 377 (1957).

<sup>5</sup> "Malpractice is hard to prove. The physician has all of the advantage of position. He is, presumably, an expert. The patient is a layman. The physician knows what is done and its significance. The patient may or may not know what is done. He seldom knows its significance. He judges chiefly by results. Physicians, like lawyers, are loath to testify that a fellow craftsman has been negligent, especially when he is highly reputable in professional character, as are these defendants. In short, the physician has the advantage of knowledge and of proof." *Christie v. Callahan*, 124 F.2d 825, 827 (D.C. Cir. 1941). Also see works of Melvin M. Belli, one of the leading exponents of the plaintiff's position. Belli, *An Ancient Therapy Still Applied: The Silent Medical Treatment*, 1 VILL. L. REV. 250 (1956);

through judicial and extra-judicial circumvention of the "conspiracy," to which this note is devoted.

#### SUBSTANTIVE ELEMENTS OF THE TORT

"Malpractice" sounds in tort, being a composite of the basic elements of duty, breach of duty and injuries proximately resulting therefrom. The duty which the physician owes to his patient and the standard by which he is judged is clearly set forth in the leading Ohio decision of *Gillette v. Tucker*:

A surgeon and physician, employed to treat a case professionally, is under an obligation, which the law implies from the employment, to exercise the *average* degree of skill, care and diligence exercised by members of the *same profession*, practicing in the *same* or *similar* locality, in the light of the *present* state of medical and surgical science <sup>6</sup> (emphasis supplied).

Furthermore, if a physician represents himself as having greater skill than the general practitioner, as does a specialist, he must exercise that degree of skill and knowledge which is ordinarily possessed by physicians and surgeons who devote special attention and study to the area in which he has held himself out as an expert.<sup>7</sup>

The "science" of medicine is no more exacting than man's frailties will permit. It is more a highly specialized art, often involving a choice between discretionary paths. Society will neither hold the physician a warrantor, nor an insurer merely for following the wrong path.<sup>8</sup> But neither will the physician be permitted to hide behind the cloak of professional customs which are obviously dangerous. While conformity to custom will be weighed, it is not the controlling test.<sup>9</sup>

#### PROXIMATE CAUSE

The proverbial excuse that "the operation was a success, but the patient died" expresses the necessity of establishing the causal relationship

*Belli, Ready for the Plaintiff*, 30 TEMP. L.Q. 408 (1957); *BELLI, MODERN TRIALS* (1954)

<sup>6</sup> 67 Ohio St. 106, 65 N.E. 865 (1902); see also 70 C.J.S., *Physicians and Surgeons* § 41 (1951).

<sup>7</sup> *Beach v. Chollett*, 31 Ohio App. 8, 166 N.E. 145 (1928); 70 C.J.S., *Physicians and Surgeons* § 41 (1951)

<sup>8</sup> So held one of Ohio's earliest recorded malpractice decisions. In *Grindle v. Rush and Greene*, 7 Ohio 123, 125 (1836) the court stated: "The event is in the hands of Him who giveth life, and not within the physical control of the most skillful of the profession." Also see *Bowers v. Santee*, 99 Ohio St. 361, 124 N.E. 238 (1919); 70 C.J.S., *Physicians and Surgeons* § 47 (1951).

<sup>9</sup> *Ault v. Hall*, 119 Ohio St. 422, 164 N.E. 518 (1928), where surgeon, failing to remove sponge from patient's abdomen, attempted to shift responsibility by showing

between act and injuries resulting therefrom. Unlike the more common tort actions, such as auto collision, the plaintiff in the malpractice situation is usually suffering from physical maladies before the alleged negligence occurred. Whether the failure to cure is a result of the physician's negligence or inevitable by virtue of nature's divine authority, is often a matter of conjecture. A court's refusal to send questions of such a speculative nature to a jury, may make the establishment of "proximate cause" an insurmountable challenge.<sup>10</sup>

### DEFENSES

In malpractice, as in other actions founded on negligence, the usual defenses of contributory negligence<sup>11</sup> and assumption of risk<sup>12</sup> are available. In Ohio, a far more effective bar is a short one year statute of limitations.<sup>13</sup> Consequently, negligence is oftentimes discovered after the statute has run. The harshness has been mitigated through the interpretation that the statute does not begin to run until the termination of the physician-patient relationship.<sup>14</sup> The presence, in Ohio, of such legisla-

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it was customary for surgeons to rely on accuracy of nurses count. This case is oft cited for the general proposition that methods employed in any trade or business, however long continued, cannot avail to establish as safe in law that which is dangerous in fact. Conformity to custom or usage, however, is a matter proper to be submitted to the jury and weighed in determining whether or not ordinary care has been exercised. *Ribarin v. Kessler*, 78 Ohio App. 289, 70 N.E.2d 107 (1946).

<sup>10</sup> In *Kuhn v. Baker*, 133 Ohio St. 304, 13 N.E.2d 242 (1938), plaintiff, a 55 year old woman, was treated by defendant surgeon for a broken femur (thigh) bone. Upon removal of the splint, defendant forced the plaintiff to walk, although no X-Ray was taken. A union of the bones had not taken place and there was sufficient evidence to establish defendant's negligence and that the defendant had destroyed all possibility of the bones healing properly. Expert testimony was offered to the effect that had proper steps been followed there was only one chance in four that the bones would unite on resetting. Verdict was directed for the defendant because of lack of proof that the failure of bones to unite was probably caused by the negligent acts of the defendant. See PROSSER, TORTS § 44 (2 ed. 1955).

<sup>11</sup> *Geiselman v. Scott*, 25 Ohio St. 86 (1874) For a harsh application see *Champs v. Stone*, 74 Ohio App. 344, 58 N.E.2d 803 (1944) where patient was held guilty of contributory negligence, as a matter of law, for submitting to treatment by an intoxicated physician. Also see 70 C.J.S., *Physicians and Surgeons* § 51 (1951).

<sup>12</sup> Where plaintiff afflicted with epilepsy submitted to chiropractic treatment, knowing ill effects would result from discontinued use of medication; court applied "volenti non fit injuria." *Kirschner v. Keller*, 70 Ohio App. 111, 42 N.E.2d 463 (1942). Where prior to operation the doctor fully explains the risks involved, assumption of risk is a good defense. *Mainfort v. Giannestras*, 49 Ohio Op. 440, 111 N.E.2d 692 (C.P. 1951).

<sup>13</sup> OHIO REV. CODE § 2305.11.

<sup>14</sup> *Amstutz v. King*, 103 Ohio St. 674, 135 N.E. 973 (1921); *Bowers v. Santee*, 99 Ohio St. 361, 124 N.E. 238 (1919); *Gillette v. Tucker*, 67 Ohio St. 106, 65 N.E. 825 (1902). For a thorough treatment of the Statute of Limitations in Ohio malpractice actions see *Note*, 9 WEST. RES. L. REV. 92 (1957)

tion is indicative of a strong public policy aimed at the protection of its esteemed medical men, although it may have been partially influenced by an attorney-oriented legislature, attempting to protect its own skin under this guise.

PROOF — THE RIGHT WITHOUT THE REMEDY;  
EXPERT TESTIMONY REQUIREMENT

The mysteries of the "healing art" are beyond comprehension to the lay judge and jury. Consequently, the layman is incompetent to determine the standard of skill possessed by the ordinary physician or medical specialist. Neither is it within his ability to determine, with any degree of precision, causal relationships between the wrongful diagnosis or improper treatment and the ultimate injury. Thus, in the general malpractice case, the judge and jury must be dependent upon the testimony of experts.<sup>15</sup> Herein lies the crux of the malpractice dilemma, for this dependence upon a witness, generally non-existent or adverse to the plaintiff, usually results in non-suit and often discourages even the most courageous attorneys from accepting clients with meritorious malpractice claims.<sup>16</sup>

The medical profession, however, is not entirely deserving of the censure received for "closing ranks" at the scent of a malpractice claim.<sup>17</sup> A multitude of factors, social and economic, create the "conspiracy of silence." There is an honest belief among physicians, that they are, or may themselves become, the victims of designing patients with feigned claims. Such nuisance suits even though defeated, stigmatize the physician, as well as his entire profession. Then there is the professional "esprit de corps." The physician, through professional and social association, has developed a comradeship which makes it almost impossible to persuade him to testify against another physician — especially where both are from the same community. The heavy incidence of insurance premiums, along with the fear that testifying will result in cancellation of his own professional liability policy<sup>18</sup> are compelling economic in-

<sup>15</sup> *Hubach v. Cole*, 133 Ohio St. 137, 31 N.E.2d 736 (1938); *Modrzyński v. Lust*, 55 Ohio L. Abs. 106, 88 N.E.2d 76 (Ct. App. 1949); see Annot. 141 A.L.R. 5 (1942); 70 C.J.S. *Physicians and Surgeons* § 62 (1951)

<sup>16</sup> "Anyone familiar with cases of this character knows that the so-called ethical practitioner will not testify on behalf of a plaintiff regardless of the merits of his case." *Huffman v. Lindquist*, 37 Cal.2d 465, 234 P.2d 34, 46 (1951). See Belli, *An Ancient Therapy Still Applied: The Silent Medical Treatment*, 1 VILL. L. REV. 250 (1957)

<sup>17</sup> For a caustic reply to Belli, see Stekler, *Medical-Legal Relations — The Brighter Side*, 2 VILL. L. REV. 487 (1957).

<sup>18</sup> It has been alleged, although it is difficult to prove, that the real conspirators are the insurance companies who wield the whip that keeps the medical men silent.

fluences. Then too, there is the medical man's natural aversion to litigation, resulting from the fear of a brutal cross-examination, and loss of valuable time in the court room.<sup>19</sup> The pressures of local medical societies, fear of ostracism, and ambiguities of the medical canons<sup>20</sup> are the clinchers. The physician's reluctance to take the witness stand is therefore understandable, and any *real* solution to the problem will have to take these factors into consideration.

Although a reputable physician will rarely testify against another practitioner in his own community, it is possible in Ohio, and other liberal jurisdictions, to admit the testimony of experts from a *similar locality*.<sup>21</sup> It is not a prerequisite that the expert witness belong to the *same* school of medicine as the defendant — only that he be familiar with the defendant's school, and that the criterion by which the witness measures the defendant's treatment is that of defendant's own school of practice.<sup>22</sup>

The unavailability of expert testimony occasionally forces resourceful counsel to take unorthodox steps in order to avoid non-suit. In California, the plaintiff may call the defendant physician and elicit from him expert testimony, without making him his own witness.<sup>23</sup> The California statute is liberally construed so as to enable such testimony to establish the plaintiff's case, as well as supply the deficient expert testimony. In Ohio, although the defendant may be called as an adverse party under statute,<sup>24</sup> the plaintiff cannot thereby make out his case in chief.<sup>25</sup> Another technique employed in a "last ditch stand" is subpoenaing a physician at random, hoping to catch a naive practitioner and ob-

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Belli, *An Ancient Therapy Still Applied: The Silent Medical Treatment*, 1 VILL. L. REV. 250, 253 (1956).

<sup>19</sup> Hall, *Let's Understand Each Other*, 42 ILL. B.J. 690 (1954).

<sup>20</sup> Though categorically denied by the medical profession. Hall, *Let's Understand Each Other*, 42 ILL. B.J. 690 (1954).

<sup>21</sup> Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 865 (1902); Mutschman v. Petry, 46 Ohio App. 525, 189 N.E. 658 (1933); Ardoline v. Deegan, 149 Conn. 552, 102 A.2d 352 (1954); Carbone v. Warburton, 11 N.J. 418, 94 A.2d 689 (1953); Gist v. French, 136 Cal. App.2d 247, 288 P.2d 1003 (1955). Traditionally an expert could not testify in a malpractice case unless he was from the same community as the defendant. 70 C.J.S., *Physicians and Surgeons* § 43 (1951).

<sup>22</sup> In Willet v. Rowekamp, 134 Ohio St. 285, 16 N.E.2d 457 (1938) physicians in general practice were permitted to give their opinions relative to care exercised by the defendant chiropractor. See also Porter v. Puryear, 262 S.W.2d 933 (Tex. Civ. App. 1953), *reversed on other grounds*, 153 Tex. 82, 264 S.W.2d 689 (1954); Annot. 78 A.L.R. 694 (1931); 41 AM. JUR., *Physicians and Surgeons* § 130 (1942).

<sup>23</sup> Lawless v. Calaway, 24 Cal.2d 81, 147 P.2d 604 (1944)

<sup>24</sup> OHIO REV. CODE § 2317.07.

<sup>25</sup> Forthofer v. Arnold, 60 Ohio App. 436, 21 N.E.2d 869 (1938).

tain his expert testimony before he is silenced by external forces.<sup>26</sup> Such desperate efforts point up the difficulty of the expert witness problem, but are hardly recommended as its solution.

PROOF OF MALPRACTICE WITHOUT THE EXPERT WITNESS:  
TREATISES AS A SUBSTITUTE FOR EXPERT TESTIMONY

At common law, published texts, treatises and pamphlets were inadmissible as independent evidence under the "hearsay rule."<sup>27</sup> In Alabama, an exception is made to the "hearsay rule" in this area. The Alabama argument, set forth in 1857, still remains forceful.

It is the boast of this age of advancing art, the collected learning of the  
past ages has been transmitted to us. Shall we withhold the benefits of  
this heritage, from the contests of the courtroom <sup>28</sup>

When balancing the unavailability of expert testimony against the desire to make use of eminent authority, and considering the trustworthy state of mind of the authority, writing with neither motive to misrepresent, nor view towards litigation, the "hearsay" objection seems indeed flimsy.<sup>29</sup>

Opponents to the introduction of such published material into evidence contend that it will confuse the jury and that it may be obsolete by the time of the trial. Whenever technical evidence is offered, however, there is the risk of confusing the jury. Nor is there a guarantee that the live witness is himself up to date on current developments. Under our adversary system it is the task of counsel to resolve such questions while the trial progresses.

Several states have enacted statutes, permitting introduction of published treatises, periodicals and books, at the court's discretion, where the author is recognized as an expert in his profession.<sup>30</sup> Ohio thus far is

<sup>26</sup> Belli, *An Ancient Therapy Still Applied: The Silent Medical Treatment*, 1 VILL. L. REV. 250, 259 (1956).

<sup>27</sup> 32 C.J.S., *Evidence* § 718 (1942); *Note* 2 U.C.L.A. L. REV. 252 (1954-55).

<sup>28</sup> *Stoudenmeier v. Williamson*, 29 Ala. 558, 567 (1897); see also *City of Dothan v. Hardy*, 237 Ala. 603, 188 So. 264 (1939); *Blakeney v. Alabama Power Co.* 222 Ala. 394, 133 So. 16 (1931).

<sup>29</sup> 6 WIGMORE, *EVIDENCE* § 1690-92 (3rd ed. 1940).

<sup>30</sup> NEV. REV. STAT. § 51:040 (1953); and MASS. GEN. LAWS (Ter. Ed.) c, 233, § 79c (1949) as follows:

"A statement of fact or opinion on a subject of science or art contained in a published treatise, periodical, book or pamphlet shall, in the discretion of the court, and if the court finds that it is relevant and that the writer of such statement is recognized in his profession or calling as an expert on the subject, be admissible in actions of malpractice provided (the party offering the evidence) shall give the adverse party notice of such intention."

Also see the *Model Code of Evidence*, rule 529 (1942)

content to follow the common law.<sup>31</sup> If, however, the reluctance of the physician to testify is not abated, Ohio would do well to adopt a more liberal attitude in this area.

#### HOSPITAL RECORDS AS EVIDENCE

Evidence from hospital records will not substitute for expert testimony, but is useful as proof of the details of diagnosis and treatment, thereby showing that the plaintiff's injury may be attributable to the defendant's acts or omissions. At common law, hospital records were excluded under the "hearsay rule."<sup>32</sup> The trend, however, is towards admitting such evidence either as a "hearsay" exception,<sup>33</sup> or under a statute.<sup>34</sup> Such evidence though clearly "hearsay," is admitted upon the premise that records kept in the course of business, with no motive to falsify, will be accurate.

Ohio is among the states adopting, in substance, the *Uniform Business Records Act*,<sup>35</sup> under which records of observable facts, transactions, occurrences or events incident to the treatment of the patient and helpful to an understanding of the medical or surgical aspects of his hospitalization are admissible.<sup>36</sup> It is necessary, however, to use such evidence with caution as there is always the possibility of alterations. Whenever possible, original documents should be secured, in preference to photostatic copies.<sup>37</sup>

#### ESTABLISHING MALPRACTICE WITHOUT EXPERT EVIDENCE: COMMON KNOWLEDGE AND NON-TECHNICAL ISSUES

Although in the great majority of professional liability cases, it is incumbent upon the plaintiff to produce expert testimony, there are a

<sup>31</sup> *Hallworth v. Republic Steel Corp.*, 153 Ohio St. 349, 91 N.E.2d 690 (1950).

<sup>32</sup> *Jordon v. Apter*, 93 Conn. 302, 105 Atl. 620 (1919); *Griebel v. Brooklyn Heights Ry. Co.*, 95 App. Div. 214, 88 N.Y. Supp. 767 (1906); Annot., 75 A.L.R. 386 (1931); REGAN, DOCTOR AND PATIENT AND THE LAW 271 (3rd ed. 1956).

<sup>33</sup> *Globe Indemnity Co. v. Reinhart*, 152 Md. 439, 137 Atl. 43 (1927); *Adler v. N.Y. Life Ins. Co.*, 33 F.2d 827 (8th Cir. 1929); *Barfield v. South Highlands Infirmary*, 191 Ala. 553, 68 So. 30 (1915); Annot., 75 A.L.R. 378 (1931); REGAN, DOCTOR AND PATIENT AND THE LAW 271 (3rd ed. 1956).

<sup>34</sup> For states adopting the *Uniform Business Records Act*, see HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 331 (1956); also see 5 WIGMORE, EVIDENCE § 1520, (3rd ed. 1940).

<sup>35</sup> OHIO REV. CODE § 2317.40.

<sup>36</sup> *Weis v. Weis*, 147 Ohio St. 416, 72 N.E.2d 245 (1947); *Mutschman v. Petry*, 46 Ohio App. 525, 189 N.E. 658 (1933); *McCormick, The Use of Hospital Records as Evidence*, 26 TUL. L. REV. 371 (1952).

<sup>37</sup> *Belli, An Ancient Therapy Still Applied: The Silent Medical Treatment*, 1 VILL. L. REV. 250, 275 (1956).

number of exceptions and limitations to this rule.<sup>38</sup> Such an exception is generally found to exist in cases wherein the physician's or surgeon's want of skill or lack of care is so gross as to be within the comprehension of laymen and to require only common knowledge and experience to understand it.

Ohio has held that, in a malpractice action, it is not requisite that the plaintiff offer expert testimony in order to have the case submitted to the jury, where a violation of the defendant's duty is otherwise made to appear.<sup>39</sup>

Thus, where a surgeon removed a child's tonsils and adenoids, and failed to visit the child in response to an urgent telephone call from the father, the court said:

The rule is recognized in Ohio, and we believe properly so, that expert testimony is not always required to enable a jury to determine whether a physician has been guilty of negligence or malpractice, and this is particularly so where the conduct of a treatment administered by the physician is of such of character as to warrant the inference of want of care or negligence in the light of knowledge and experience of the jurors themselves as ordinary laymen.<sup>40</sup>

#### BATTERY CASES

It is a well established rule that "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages."<sup>41</sup> Only

<sup>38</sup> REGAN, DOCTOR AND PATIENT AND THE LAW § 29 (3rd ed. 1956); Annot. 141 A.L.R. 5 (1942) Often quoted is the following illustrative passage from Evans v. Roberts, 172 Iowa 653, 658, 154 N.W. 923, 925 (1915) and Vergeldt v. Hartzell, 1 F.2d 633, 636 (8th Cir. 1924) "If a surgeon, undertaking to remove a tumor from a person's scalp, lets his knife slip and cuts off his patient's ear, or, if he undertakes to stitch a wound on the patient's cheek, and, by an awkward move thrusts his needle into the patient's eye, or, if a dentist, in his haste, leaves a decayed tooth in the jaw of his patient and removes one which is perfectly sound and serviceable, the charitable presumptions, which ordinarily protect the practitioner against legal blame where his treatment is unsuccessful, are not here available. It is a matter of common knowledge and observation that such things do not ordinarily attend the service of one possessing ordinary skill and experience in the delicate work of surgery. It does not need scientific knowledge or training to understand that, ordinarily speaking, such results are unnecessary and are not anticipated, if reasonable care be exercised by the operator."

<sup>39</sup> Bradshaw v. Wilson, 87 Ohio App. 319, 94 N.E.2d 706 (1950); Smith v. McDougall, 65 Ohio App. 152, 29 N.E.2d 441 (1940); Slosser v. Lagorin, 44 Ohio App. 253, 188 N.E. 210 (1933); Francis v. Brooks, 24 Ohio App. 136, 156 N.E. 609 (1926).

<sup>40</sup> Wharton v. Long, 18 Ohio L. Abs. 147, 150 (Ct. App. 1934) (Although holding expert testimony necessary to establish causal relationship between defendant's failure to attend and the resulting injury)

<sup>41</sup> Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914)

in cases of emergency may the physician violate this rule with impunity.<sup>42</sup> Typically, the issue in the "battery" case revolves around the non-technical question of the patient's consent and therefore expert testimony is not required.<sup>43</sup>

### JUDICIAL NOTICE

Occasionally "common knowledge" has been expanded into a form of "judicial notice."<sup>44</sup> Some courts, for instance, will, in the absence of expert testimony, take "judicial notice" of the fact that a failure to make use of the X-Ray to diagnose a fracture amounts to a failure to exercise that degree of care and diligence ordinarily exercised by physicians of good standing.<sup>45</sup> Likewise, courts have taken "judicial notice" that an infection was caused by the doctor's negligence where an unsterile instrument was used.<sup>46</sup>

### RES IPSA LOQUITUR

No development in the arena of medico-legal relations has occasioned more approbation and cheer to the plaintiff's counsel and more despair to the medical profession than the incorporation of three old Latin terms into the field of malpractice litigation. Indeed, "res ipsa loquitur"<sup>47</sup> (i.e. the thing speaks for itself) has come a long way from the case in which a barrel rolled out of a warehouse window on to a passing pedes-

<sup>42</sup> Annot., 76 A.L.R. 551 (1932); Annot., 139 A.L.R. 1374 (1942); REGAN, DOCTOR AND PATIENT AND THE LAW, § 11 (3rd ed. 1956).

<sup>43</sup> Performance of an operation upon a minor child, without obtaining parental consent, raises an interesting "battery" problem. See 9 WEST. RES. L. REV. 101 (1957).

<sup>44</sup> For general discussion see 9 WIGMORE, EVIDENCE § 2580 (3rd ed. 1940), 1957 Supp. p.263 *et seq.*

<sup>45</sup> Agnew v. Los Angeles, 97 Cal. App.2d 557, 218 P.2d 66 (1950) See also Lippold v. Kidd, 126 Ore. 160, 269 Pac. 210 (1928).

<sup>46</sup> Barham v. Widing, 210 Cal. 206, 291 Pac. 173 (1930); Mastro v. Kennedy, 57 Cal. App.2d 499, 134 P.2d 865 (1943).

<sup>47</sup> PROSSER, TORTS § 42 (2d ed. 1955) describes "res ipsa loquitur" as one type of circumstantial evidence which arises where:

"a. The accident is of a kind which ordinarily does not occur in the absence of someone's negligence, and  
b. The apparent cause of the accident is such that the defendant would be responsible for any negligence connected with it, and  
c. The possibility of contributing conduct which would make the plaintiff responsible is eliminated." "Some authority suggests the additional requirement that the evidence as to the explanation of the accident must be more readily accessible to the defendant than to the plaintiff." See also 2 HARPER AND JAMES, THE LAW OF TORTS § 19.5 *et seq.* (1956); 3 BELLI, MODERN TRIALS § 327 (1954)

trian,<sup>48</sup> to the case of the patient who awoke from an appendectomy operation with a mysteriously injured shoulder.<sup>49</sup>

Though contextually, the comparison between the pedestrian and the unconscious patient may seem remote, both plaintiffs are really in a strikingly analogous predicament. In both situations, the plaintiffs are unaware of the pending danger. The pedestrian knows little more of the negligent activities of the warehouse employees than the unconscious patient knows of the operative steps taken by his surgeon. In either case, the knowledge of any negligent acts is exclusively within the sealed lips of the defendant. In either case, the injury is of a nature which human experience has discovered generally does not occur in the absence of negligence. And so the court, in effect, will now say: Mr. Defendant, the plaintiff has shown facts sufficient to warrant an inference (presumption in some jurisdictions)<sup>50</sup> of negligence, which the jury may consider, along with the evidence which you offer to rebut that inference. The plaintiff escapes non-suit for lack of expert testimony and most likely has won a verdict.

The expansion of "res ipsa" into the malpractice area has not been without obstacles. In *Ewing v. Goode*<sup>51</sup> Justice Taft, then serving on a federal circuit court in Ohio, made the following persuasive and oft quoted statement:

A physician is not a warrantor of cures. If the maxim, "res ipsa loquitur" were applicable to a case like this, and a 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 financial liability for nearly all of the "ills that flesh is heir to."<sup>52</sup>

However, where a surgeon neglects to remove sponges or forceps from his patient's abdomen even Justice Taft would probably relent, for one does not need an expert, in such instance, to inform him that the surgeon was guilty of a gross lack of skill and care.<sup>53</sup>

"Res ipsa loquitur" has also been applied where a patient under surgery awakes from the operation to discover an injury to a healthy part of his body, or to a part of his body "remote" from the "area of operation,"<sup>54</sup>

<sup>48</sup> *Byrne v. Boadle*, 2 H&C 722, 159 Eng. Rep. 299 (1863), where the "doctrine" was for the first time uttered.

<sup>49</sup> *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687 (1944).

<sup>50</sup> PROSSER, TORTS § 43 (2d ed. 1955)

<sup>51</sup> 78 Fed. 442 (C.C.S.D. Ohio 1897)

<sup>52</sup> *Ewing v. Goode*, *supra* at 443.

<sup>53</sup> *Tiller v. Von Pohle*, 72 Ariz. 11, 230 P.2d 213 (1951); *Ales v. Ryan*, 8 Cal.2d 82, 64 P.2d 409 (1936); REGAN, DOCTOR AND PATIENT AND THE LAW § 30 (3rd ed. 1956); Annot., 162 A.L.R. 1265 (1946)

<sup>54</sup> *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687 (1944), where an appendectomy

in cases of X-Ray burns,<sup>55</sup> in cases where injuries were received from mechanical devices and in a variety of other situations.<sup>56</sup>

Unquestionably California has wielded a heavy sword in the "res ipsa loquitur" thrust into medical immunity. Traditionally, the "doctrine" was applicable only where the injury was caused by an instrumentality or agency, within the *exclusive control* of the defendant.<sup>57</sup> In *Ybarra v. Spangard*,<sup>58</sup> *exclusive control* was strikingly expanded to mean *collective control* or *right to control* as "res ipsa loquitur" was applied against all the doctors and hospital employees connected with the operation.<sup>59</sup> It has also been questionable whether "res ipsa" can prevail where the plaintiff introduces specific evidence of the defendant's negligence or where the plaintiff obtains expert testimony. The California courts have held that specific charges of negligence can be made and yet "res ipsa loquitur" may be relied upon.<sup>60</sup> Ohio has held *contra*.<sup>61</sup> Also, in California the plaintiff may call an expert witness and still rely upon "res ipsa loquitur."<sup>62</sup>

A rose by any other name is still a rose and the same is true of "res

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was performed on patient under anesthetic and there was an injury to shoulder after the patient recovered consciousness. In *Emrie v. Tice* 174 Kan. 739, 258 P.2d 332 (1953), where X-ray injury to part of body not intentionally exposed, "res ipsa loquitur" was held applicable. See also Annot., 162 A.L.R. 1307 (1946).

<sup>55</sup> *Lewis v. Casenburg*, 157 Tenn. 187, 7 S.W.2d 808 (1928); see REGAN, DOCTOR AND PATIENT AND THE LAW 223 3d ed. 1956; Annot., 162 A.L.R. 1326 (1946).

<sup>56</sup> "Res ipsa loquitur" held applicable against a dentist for injuries received when an X-Ray machine fell on patient's face while she was reclining in dental chair. *Bence v. Benbo*, 98 Ind. App. 52, 183 N.E. 326 (1932). Where dentist's drill slipped, penetrating floor of mouth "res ipsa loquitur" held applicable. *Vergeldt v. Hartzell*, 1 F.2d 633 (8th Cir. 1924); see Annot., 162 A.L.R. 1265 (1946).

<sup>57</sup> PROSSER, TORTS § 42 (2d ed. 1955).

<sup>58</sup> 25 Cal.2d 486, 154 P.2d 687 (1944); see PROSSER, RES IPSA LOQUITUR IN CALIFORNIA, in *Selected Topics on the Law of Torts* (1953), where Mr. Prosser hints that application of "res ipsa loquitur" in *Ybarra v. Spangard* is indication of public policy to increase burden upon the surgeon. See also the recent case of *Senaris v. Haas*, 281 P.2d 278 (Cal. 1955).

<sup>59</sup> For strict Ohio application of "exclusive control" in malpractice cases see *Blackman v. Zeligs*, 90 Ohio App. 304, 103 N.E.2d 13 (1951)

<sup>60</sup> *Doke v. Pacific Crane & Rigging Co.*, 80 Cal. App.2d 601, 182 P.2d 284 (1947).

<sup>61</sup> In *Sieling v. Mahrer*, 113 N.E.2d 373 (Ohio Ct. App. 1953), a malpractice action, the court held that "res ipsa" is inapplicable when specific acts of negligence are pleaded. The holding is not reconcilable with other Ohio "res ipsa" decisions. See also, *Keltenbach v. Cleveland, Columbus, Cincinnati Highway Inc.*, 82 Ohio App. 10, 80 N.E.2d 640 (1948); and Note, 6 WEST. RES. L. REV. 164 (1955).

<sup>62</sup> *Costa v. Regents of University of California*, 116 Cal. App.2d 445, 254 P.2d 85 (1953). Action was against hospital and certain doctors for alleged improper diagnosis and treatment of cancer which resulted in necrosis and osteomyelitis. The court held that the refusal to allow plaintiff to produce expert medical evidence in support of "res ipsa loquitur" necessitated reversal.

*ipsa loquitur.*" Thus in Ohio where a surgeon permitted sponges to remain in his patient's abdomen, subsequent to a gall bladder operation, the court held that the failure to remove such sponges was *prima facie* evidence of negligence.<sup>63</sup> In the more recent case of *Bradshaw v. Wilson*,<sup>64</sup> the plaintiff's fractured arm was treated by the defendant surgeon. In performing an open operation the defendant knowingly permitted a piece of dead bone from the fracture to remain in the flesh and cause drainage of the wound for months. When the plaintiff subsequently received treatment from another surgeon the wound shortly healed. Such facts were held sufficient to create an *inference* of negligence on the part of the defendant. Expert testimony was held not necessary.

Critics of the "res ipsa loquitur" extension label it a "sympathy" doctrine, annihilating any semblance of liability predicated on fault.<sup>65</sup> The patient was unconscious. Only the surgeon knows what happened. The surgeon had better be able to explain, else he must pay.<sup>66</sup> Obviously the law has not become so harsh. The recent California decision of *Salgo v. Leland Stanford Jr.*<sup>67</sup> has, to the elation of the medical profession, applied brakes limiting the scope of the "doctrine."

The real problem is that those who censure the "doctrine" fail to recognize that we exist in a socio-economic environment and that judicial decisions are ultimately derived from the dictates of that environment. Such decisions therefore, must be considered in the light of society's present trend towards individual security and welfare. The physician's "conspiracy of silence" defeats the plaintiff's "right" to recovery. But the

<sup>63</sup> *Ault v. Hall*, 119 Ohio St. 422, 164 N.E. 518 (1928)

<sup>64</sup> *Bradshaw v. Wilson*, 87 Ohio App. 319, 94 N.E.2d 706 (1950). Many other states silently give effect to the theory behind "res ipsa" though not in express terms. See Annot., 162 A.L.R. 1265 (1946).

<sup>65</sup> *Morris, Res Ipsa Loquitur — Liability Without Fault*, 163 A.M.A.J. 1055 (1957); *Stetler, Medical-Legal Relations — The Brighter Side*, 2 VILL. L. REV. 487 (1957).

<sup>66</sup> For an interesting comment on the extension of "res ipsa" into the areas of *calculated risk* (matters beyond the scope of medical control) see 30 SO. CALIF. L. REV. 80 (1956).

<sup>67</sup> 317 P.2d 170 (Cal. App. 1957). The plaintiff, whose lower extremities had been permanently paralyzed as result of an aortography was awarded \$250,000. Reversed due to an improper charge on question of "res ipsa loquitur." In the decision the court makes the following points: 1. "Res ipsa loquitur" is applicable in malpractice actions only where it is a matter of common knowledge among layman or medical men or both that the injury would not have occurred without negligence, and the "doctrine" is not applicable in every case in which injury occurred while patient was under anesthesia. 2. In absence of agreement that attending physician would perform the aortography, which was procedure customarily performed by hospital personnel, attending physician could not be held liable to his patient for negligence of the hospital team. 3. Manufacturer's brochure, containing recommendations as to usage of drug, is admissible, but cannot establish as a matter of law the standard of care required of physician in use of the drug.

law is not inflexible; the judge induced by public policy, invokes "res ipsa loquitur" and the plaintiff is compensated. Though the expansion of "res ipsa loquitur" into the malpractice area is yet far from receiving universal acceptance, the "handwriting is clearly on the wall." The ground has but been broken in California — the frontier is certain to expand.

### EXTRA-JUDICIAL SOLUTIONS

Clearly, judge-made rules and legislation can be but temporary expedients in the "malpractice dilemma." If the function of the trial is to search out the "truth" there can be no substitute for fair and impartial expert testimony. Avoidance of the present impasse will necessitate a much greater degree of understanding between the legal and medical professions.

The American Medical Association has done much towards educating its members as to the nature of the malpractice problem. Medical periodicals bombard physicians with all sorts of excellent matter on subjects ranging from "res ipsa loquitur" to "professional liability insurance."<sup>68</sup> Legal medicine courses have been incorporated into the curriculum of many of our medical schools.<sup>69</sup> The medical student, by learning the basic functions of trial law can better comprehend the concept of examination and cross-examination. Such education is helpful, for it no doubt generally appears to the average medical witness that one attorney is trying to establish the truth, while the opposing counsel is trying equally hard to suppress it. For the practitioner, The American Medical Association sponsored in October, 1955 a series of medico-legal symposia in Chicago, Omaha, and New York City, wherein a part of each program at each meeting was designed to acquaint physicians with their independence in litigation and to dispel their fears of testifying in court.<sup>70</sup>

Much of the creative thought in this area revolves around various types of cooperative programs between bar and medical society, through which impartial testimony could be obtained in meritorious cases. One recent proposal involves the creation of a board, having rotating members of both practicing physicians and attorneys who would screen and determine the merit of cases prior to the filing of the action. If the case were found to be justified, a stipulation of fact would be prepared. The bar would censure an attorney filing an action after the impartial board rendered against it. Likewise, the medical society would censure a phy-

<sup>68</sup> See series beginning in the February 2, 1957 issue of the A.M.A.J., Also, numerous features in *MEDICAL ECONOMICS* — Riss Ed. published for benefit of medical students and interns.

<sup>69</sup> Hall, *The Physician and the Law*, 158 A.M.A.J. 257 (1955)

<sup>70</sup> 159 A.M.A.J. 1638 (1955).

sician for not fully testifying.<sup>71</sup> Such a plan, however, may be criticized as imposing a prior restraint which could conceivably bar legitimate actions from the courtroom.

"Grievance" committees have been established by medical societies in all states for the purpose of hearing complaints made against members of the profession.<sup>72</sup> While serving a useful purpose in screening out obviously false claims, such committees are subject to criticism for the accelerated difficulty in obtaining expert testimony when such committee rules no negligence.

At best, extra-judicial solutions are for the future. Impartial boards and committees have yet to be worked out and proved. Education and understanding are a slow and painful process. Unfortunately, the fearless medical witness is not yet in sight.

#### CONCLUSION

The "malpractice dilemma" has been called a study in "frustration."<sup>73</sup> It is indeed a frustration from which neither attorney, physician nor plaintiff is immune, and the depressing situation is by no means ameliorated by the incessant prattle of charges and countercharges between two esteemed professions. Unfortunately, a martian attitude can but cloud the real issues from sight; for after tempers cool, all can see that neither physician nor attorney is to blame. At the root of the problem one finds the judicial process itself; a system which teases the victim of what it calls actionable negligence; tells that victim he should be compensated for his injuries; but imposes such formidable barriers in proving that negligence, that recovery is had only in cases of the grossest character. The victim is left with a "right" without a "remedy," or realistically, "no right" at all. Such an anomaly doubtlessly arose in a pro-physician society and the reverence in which the physician was held manifested itself in the long list of decisions strictly adhering to the expert testimony requirement.

There is, however, a brighter side to the plaintiff's picture, as weight is building up on his side of the scale. It is not so much that our society holds the medical man in less esteem than did our forefathers, but that today the individual's welfare is given far greater stature. Thus, counterbalances are finding their way into the reports — expanded concepts of "res ipsa loquitur" and "common knowledge," admissions of hospital rec-

<sup>71</sup> Shindell, *Medicine Versus Law: A Proposal for Settlement*, 151 A.M.A.J. 1078 (1953).

<sup>72</sup> Hall, *Let's Understand Each Other*, 42 ILL. B.J. 690 (1954)

<sup>73</sup> Polsky, *The Malpractice Dilemma: A Cure For Frustration*, 30 TEMP. L.Q. 359 (1957).