

Original Articles.

IGNORANCE AS A LEGAL EXCUSE FOR MALPRACTICE.¹

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It is not proposed to attempt in this brief paper an exhaustive examination of the subject indicated in the title, but only to glance at these interesting questions:—

I. How far can the ignorance of the physician be relied on in avoidance of criminal or civil liability for medical malpractice?

II. Does the law recognize any distinction, in respect of this liability, between different classes of practitioners?

A prosecution for malpractice, criminal or civil, ordinarily arises out of an offense of omission rather than commission; that is to say, out of the failure of the physician to apply due knowledge, skill, or diligence in his professional service. For positive misconduct, unwarranted by any claim or pretense of proper medical treatment, a physician undoubtedly may be liable to prosecution, as for assault or various kindred offenses, according to the facts. But with such cases, happily of rare occurrence, we have at present nothing to do. They fall into their proper divisions in the classification of the criminal law, and are not to be considered merely as cases of medical malpractice.

In England the extent of criminal liability for malpractice is settled by a long course of decisions.² It is there held that any person, learned or unlearned, who undertakes to deal with the life or health of another, is liable for manslaughter if the death of the patient results from his failure to use reasonable skill and diligence in his treatment. It seems, also, that he is there liable criminally, as for misdemeanor, for any injury to the patient caused by his default, though not resulting in loss of life.³ It is true that a criminal intent is an essential element of all criminal offenses, but this intent may be inferred from the circumstances of the case; and the English courts will draw this inference, or allow it to be drawn by the jury, from evidence of reckless or grossly ignorant maltreatment, endangering health or life, without proof of any actual purpose of the accused to do harm to his patient.

In this Commonwealth a different rule prevails, and although the leading Massachusetts case has been directly followed in but few reported cases in other States, it is believed to have been generally acquiesced in, and to express a doctrine which is or is likely to be generally adopted in this country.⁴ Samuel Thomson, whose name came to be bestowed upon the root-and-herb "school" of practitioners, was indicted in Essex in 1809 for the murder of Ezra Lovett, Jr., by giving him, on the ninth day of January, a poison called lobelia, of which he died the next day. The evidence showed that Thomson announced himself as a physician, and professed an ability to cure all fevers by means of his peculiar medicines, to which he gave various grotesque names not to be found in the Phar-

macopœia.⁵ He was called as a physician to attend Lovett, who was suffering from a cold, and subjected him for nine days to a course of sweats, emetics, and purgatives, which at the end of that period resulted in violent convulsions, collapse, and death. The court (Chief Justice Parsons and Justices Sewall and Parker) observed that the prisoner's ignorance was very apparent, and that it did not seem to admit of any reasonable doubt that the deceased lost his life by the prisoner's unskillful treatment; but that there was no evidence of express malice, nor that the prisoner was regardless of his social duty and bent on mischief, from which, if proved, malice might be inferred; and therefore held that he could not be convicted of murder. The prosecuting officer thereupon urged that the prisoner was guilty of manslaughter, in rashly and presumptuously administering to the deceased a deleterious medicine, which in his hands, by reason of his gross ignorance, became a deadly poison. But the court unanimously held that if the prisoner, notwithstanding his ignorance, acted with an honest intention and expectation of curing the deceased by his treatment, he was not guilty of manslaughter, although death was the consequence, unless, however ignorant of medical science in general, he had such knowledge of the dangerous character of his remedy that the jury might reasonably presume its administration to have been the effect of obstinate and willful rashness, and not of an honest intention and expectation to cure. There being no evidence sufficient, in the opinion of the court, to support the latter theory, Thomson was acquitted.

In the light of this case it appears that one who deals with the sick cannot here be held to criminal liability except in case of wanton or reckless maltreatment, accompanied by knowledge of the probable consequences. Ignorance, however gross, exculpates him, if that alone occasions his default: not because ignorance is morally a justification or excuse of his conduct, but because it excludes the malice which is an essential ingredient of a crime. There is nothing in the case to show that the court made or admitted any distinction, in the application of the doctrine, between the learned and the unlearned, or between those who hold themselves out and publicly practice as physicians and those who make no profession of the art and no claim to the learning and skill required in its exercise. Thomson, to be sure, held himself out as a physician, and was shown to have commonly practiced as such, but no reason appears why the same rule should not have been applied to him had Lovett been the only patient he ever attempted to treat. Indeed, the reason of the rule applies with greater force to a person who undertakes to act as a physician only on a single occasion, and so far as they adopt it at all the courts will probably extend it alike to all persons employed for medical service, under whatever circumstances.

It would be useless to speculate upon the reasons which moved the court in Thomson's case to depart from the current of English authority. A sufficient reason, perhaps, is in the fact that upon sound and familiar principles of the law of homicide the decision seems to be a logical and necessary result from the circumstances shown in evidence. It is further countenanced by a *dictum* of Lord Chief Justice Hale, ap-

⁵ One he called "well-my-gristle," another "ram-cats." It is not supposed that the profession will be able to identify them by this description.

¹ Read before the Massachusetts Medico-Legal Society.

² See the English cases collated in 1 Leading Crim. Cases (Ben-nett), 56.

³ 1 Bishop Criminal Law, 558.

⁴ Commonwealth v. Thomson, 6 Mass. Reports, 134.

parently founded on an obscure case in the Year-books, which the Massachusetts court cited with approval, but which has not been followed in the later English cases, that if a physician, whether licensed or not, give a person a potion without intent to do him bodily harm but to cure or prevent disease, and death results, it is no homicide. "I hold their opinion to be erroneous," adds the Lord Chief Justice, "that think if he be no licensed chirurgion or physician that occasioneth this mischance that then it is felony, for physic and salves were before licensed physicians and chirurgions; and therefore if they be not licensed according to the statute they are subject to the penalties in the statute; but God forbid that any mischance of this kind should make any person not licensed guilty of murder or manslaughter."¹ This view of the subject, characteristic of Sir Matthew Hale, though exceptional in his time and country, is more nearly conformable to general principles than the doctrine of the later cases. The existence of the English rule is probably due to the fact that it had become firmly established by a course of decisions before the humanitarian influences of modern times had begun to moderate the ancient rigor of the criminal law.

To educated physicians the American rule may appear to involve an unjust discrimination against themselves. Ignorance being held to excuse its own consequences, the more ignorant the practitioner the greater, apparently, his chance of escape; while the casual mistake or misfortune of the qualified physician is more likely to bring punishment upon him from the very fact of his education and the consequent increased difficulty of establishing to the satisfaction of the jury the theory of ignorance. But the rule of law applies with impartial benevolence to all, and the discrimination, if any, arises out of the facts. The law cannot be reproached that

"— where ignorance is bliss
'Tis folly to be wise."

The extent of civil liability for malpractice, in respect of the persons against whom, and the circumstances under which, it arises, is less clearly defined in the books. The foundation of this liability is in the rule that he who offers his services to the public for employment in a special capacity is bound to possess and exercise a reasonable degree of the learning and skill ordinarily possessed by those who follow the same vocation in the same locality, and to use reasonable care and diligence in its application.² This rule is established in all countries where the common law prevails, and it affects all who profess any art requiring special skill or training. Professional persons are not held to insure the success of their efforts, nor to exercise the highest or even a high degree of skill; but they must be of average ability and diligence. Failing in this, they are answerable for resulting injuries. The principal issue of fact in actions for malpractice usually is whether the defendant has fulfilled these requirements. Under this rule it is obviously impossible for the ordinary physician to avoid liability if he fails in reasonable skill or care. Whether he be schooled or unschooled, "regular" or irregular, is immaterial. An action for malpractice may be maintained against him even if he be forbidden by express statute to practice medicine.³ If he offers himself to the community as a

common practitioner he is held to guarantee his reasonable fitness for the business, within the limits above stated. The public profession of his calling forbids him to plead ignorance. He has thereby led the public to believe that he is reasonably well equipped for his work, and all who employ him have a right to rely upon his own representations.

But with reference to a class which hangs upon the outer verge of the medical profession, the inquiry is more difficult. There are in most communities, especially in great cities, numbers of persons — styling themselves clairvoyants, mesmerists, seers, *et id omne genus* — who do not profess to be physicians, who neither have nor pretend to have any professional knowledge or training, nor any scientific qualifications of whatever character for medical practice, who yet are constantly resorted to by multitudes of people for the treatment of disease. Beyond this, it occasionally happens that a person of another vocation, entirely unaccustomed to deal with the sick, is called to stand in the physician's place. It is said that a case of this character, in which a woman in labor lost her life under the hands of a shoemaker, acting for the nonce as accoucheur, is of recent occurrence in this city. Whether such persons can be held to civil liability for the consequences of their treatment, whatsoever they may be, must be considered still an open question. A hurried examination of the reports fails to disclose any direct adjudication of the point. Some light is reflected upon it from the circumstance that in many of the published cases the courts seem to rest upon the defendant's public offer of his services as a material element in the foundation of the action. The logical process which leads to a judgment against a physician for malpractice, when ignorance is relied on as an excuse, runs thus: (1) The plaintiff has been injured by the negligence or unskillfulness of the defendant; (2) the defendant says that he acted in good faith, and was ignorant of the patient's condition or the character of the remedy prescribed, etc.; (3) but he shall not now be heard to say he is ignorant, since he professed skill; (4) therefore he shall make good his default in damages. Obviously this argument does not apply to one who makes no profession of skill, nor of anything else except that he is a "clairvoyant" or what not. The common and public practitioner of medicine has undertaken to exercise skill, but this man has undertaken nothing save, perhaps, to do his best under the circumstances. If he does this, it is difficult to see how he can be held answerable for the consequences.

Another argument against his liability may possibly be drawn from the analogy between the action for malpractice and the ordinary action for negligence. The former rests upon the rule already stated, that he who professes especial skill must exercise it; the latter upon the rule or principle that every person shall so conduct himself as not to injure others. Between these rules there is a close relation, indeed; there is no essential difference between them, save that one is adapted only to particular cases, while the other is of general application to all the ordinary affairs of life. Ultimate analysis might show that the action for malpractice, unless founded in contract, rests alone upon the simple rule against negligence, modified to meet the special circumstances of the case. The essential elements of a cause of action for negligence are: (1) an injury to the plaintiff (2) resulting from the negligence of the defendant, (3) to which no negligence of

¹ 1 Hale's Pleas of the Crown, 429.

² Small v. Howard, 128 Mass. Reports, 131, and cases there cited.

³ Musser's Executor v. Chase, 29 Ohio State Reports, 577.

the plaintiff contributed. If the third of these elements is wanting, that is to say, if the plaintiff has been guilty of any neglect or want of due care, to which the injury is in any material part attributable, he cannot maintain his action. The law will not hold one liable for an injury to another whose own default contributes to it, nor will it attempt to apportion the blame between them. Such an injury must lie where it falls. This principle of contributory negligence is constantly applied in actions of malpractice, with the result that the physician is not legally responsible for injuries attributable in any degree to the fault of the patient as an originating cause.¹ And the application of the principle to the case now supposed, of an action against an unskilled person for an injury done in a case which he has not professed himself competent to treat, seems to reënforce the argument against his liability, since it lays upon the plaintiff the disability which results from his own failure to exercise due care. If he calls an ordinary physician, relying, as he has a right to rely, upon his public profession of skill, and following his directions accordingly, no want of care can be imputed to him. But if he voluntarily chooses for the performance of a difficult and perilous task a person who neither has nor claims to have any special fitness for it, it is no hardship if he is left to bear the consequences of his own imprudence. In this conclusion the medical profession will probably concur with cheerful unanimity.

This latter branch of the subject still lies largely in the region of conjecture, and these suggestions are not offered with confidence as a statement of the law, but as having a possible bearing upon the determination of a question which has, fortunately, only an indirect interest for reputable physicians.

REPORT OF A SUMMER COURSE IN OBSTETRICS.²

BY C. M. GREEN, M. D.

IN the summer of 1881 it was my fortune to instruct a class of six students in a course of clinical obstetrics. The material was kindly furnished me by the District Physicians of the Boston Dispensary, and was derived chiefly from the lowest class of the north and southeast parts of the city. The observations which I summarize below were made by the students; in most instances, however, they were verified by myself.

	Cases.	Males.	Females.	Sex not Recorded.	Putrid Cases.
Multiparæ.	27 ²	11	15	1	1 male; 1 fem.
Primiparæ.	8	5	2		
Total . .	35	16	18	1	2

Mortality: maternal *nil*; infantile *nil*.

Abnormal symptoms during pregnancy: vomiting in early months four cases, one of which was obstinate; vomiting in last months one case; this was a case of twin pregnancy, and the gastric disturbance was prob-

¹ Hibbard v. Thompson, 109 Mass Reports, 286.

² Read before the Boston Society for Medical Improvement, January 28, 1882.

³ Including two cases of twin pregnancy.

ably due to the upward pressure of the greatly distended uterus.

Edema of legs four cases, unattended by albuminuria.

Frequent micturition one case, relieved by a swathe.

Varix of labia one case, accompanied by severe cramps in the legs.

Ante-partem hæmorrhage one case; about one ounce of blood escaped from the vagina on the sixth and again on the second day before delivery. The placenta was not prævia, but was very probably partly seated in the cervical zone, and the slight uterine contractions commonly occurring in the last weeks of pregnancy probably partially detached it.

POSITION AND PRESENTATION.

O. L. A.	O. R. A.	O. R. P. ⁴	S. L. A.	S. R. A.	Uncertain.	Total.
23	6	4	1	1	2	37

It is worthy of notice that of the head presentations eighteen per cent. were O. R. A., or right occipitocotyloid, a larger proportion than is usually found in a large number of cases; and that twelve per cent. were O. R. P., or right occipito-sacro-iliac, which is rather less than the usual ratio.

AVERAGE DURATION OF THE STAGES OF LABOR.

	1st Stage.	2d Stage.	3d Stage.
Primiparæ . .	11 h. 13 m. (22 cases.)	56 m. (22 cases.)	19 m. (20 cases.)
Multiparæ . .	24 h. 20 m. (8 cases.)	2 h. 7 m. (7 cases.)	21 m. (6 cases.)

CASES OF ESPECIAL INTEREST.

a. Cases of twins:—

(1.) A multipara, aged thirty-six, bore twins after a labor of ten hours. The children were male and female, and both presented the occiput. The second fœtus, which was smaller than the first, was born with membranes intact, or, as popularly designated, with a caul. There was a single large placenta, with a dividing ridge and two cords.

(2.) A multipara, aged twenty-seven, gave birth to two boys, the first presenting O. L. A., the second S. R. A. The diagnosis of twins was made by the student by abdominal palpation and auscultation. The placenta was double, and there were two cords.

b. Case of miscarriage, with dead fœtus:—

This case is of interest as affording a clear history of the cause of death of the fœtus. July 5th, when about six and one half months pregnant, while on Boston Common seeing the fireworks with her little boy, the latter being lost in the crowd, she spent two or three hours seeking for him, and returned home much fatigued. From this time she ceased to feel fœtal motion, and experienced the sensation of having a cold, hard lump in the lower part of the abdomen. A month later she was delivered of a dead fœtus with macerated epidermis.

c. Case of brow presentation:—

This occurred in an Italian woman, aged thirty-five, whose two previous labors had lasted three and two days respectively, but which had terminated without operative interference. The woman had been in labor over thirty-six hours before the head passed the superior strait. On the occurrence of the first strong pain pressure

⁴ In one case the head became extended and the brow presented.