On Medical Jurisprudence

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When the Dean of the Medical School so kindly and courteously extended to me the invitation to participate in this series of lectures on Medical Jurisprudence, I immediately accepted chiefly because of two reasons. First, I saw in his invitation the opportunity to approach and consider a large body of statutes, legal doctrines, dogma and rules of decisions which bear upon and which affect both the medical practitioner and the lawyer. Secondly, I welcomed the opportunity to visit with a group of professional students in our important kindred profession of medicine. The kinship that exists between law and medicine was once referred to by the late Mr. Justice Benjamin Nathan Cardozo in the following manner:

"Our professions--yours and mine--medicine and law--have divided with the years, yet they were not far apart at the beginning. There hovered over each the nimbus of a tutelage that was supernatural, if not divine. To this day each retains for the other a trace of the thaumaturgic quality distinctive of its origin. The physician is still the wonderworker, the soothsayer, to whose reading of the entrails we
resort when hard beset. We may scoff at him in health, but we send for him in pain. The judge, if you fall into his clutches, is still the Themis of the Greeks, announcing mystic dooms. You may not understand his words, but their effects you can be made to feel. Each of us is thus a man of mystery to the other, a power to be propitiated in proportion to the element within it that is mystic or unknown."

Verily then, it may be said that the lawyer is a man of mystery to the medical man and by the same token medical science is largely a mystery to the lawyer. We marvel at your prowess, at your scientific technique and at your accomplishments bordering almost at times on the impossible—-but I must not follow my inclinations further in this regard. I should rather strive to bring to you today some observations on medical legal problems with which you as medical practitioners may possibly be confronted.

The term "Medical Jurisprudence" illudes definition. It has been referred to as jurisprudence as applied to medicine. Obviously this is a play on words. I take it that if the term
"Medical Jurisprudence" means anything at all, is as a means of co-ordinating medical and legal knowledge useful to both professions so that members of the legal profession on the one hand may be assisted in solving legal problems with the aid of medical science, and on the other hand, members of the medical profession may be assisted in determining what legal rights and obligations arise out of the relationship that exists between physician and patient, and what obligations and duties arise out of adherence to the high calling of being a medical practitioner. The subject is, of course, vast. The points of contact between medicine and the law are numerous. It has, accordingly, been necessary for me to limit myself to a consideration of a few of the aspects of medical jurisprudence which I thought that you might perhaps find of greatest interest.

Perhaps the most important single aspect of medical jurisprudence deals with the regulatory power that exists in the various states which does much to insure high educational qualifications and proper professional qualifications as a condition
to the granting of a license or permission to practice medicine.

In the leading American case of *Dent v. West Virginia*, the Supreme Court of the United States in an exhaustive opinion held that each state of the Union, under its so-called police power and in the interest of the public health, is vested with the power to legislate and regulate the medical profession so that no person who has not shown himself to possess the proper qualifications shall be allowed to practice medicine. In sustaining this authority in the State - the Supreme Court of the United States said:
"The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. . . . Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other as well as their influence upon the mind. The physician must be able to detect readily the presence of disease and prescribe appropriate remedies for its removal. Everyone may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the state to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. . . . No one has a right to practice medicine without having the necessary qualifications of learning and skill."
Pursuant to this power practically all of the States in the Union have passed acts designed to regulate the practice of medicine in its various branches. As you will know in Louisiana, our general regulatory statute is Act 56 of 1914 as amended by Act 54 of 1918 - which statute regulates the practice of medicine, surgery and midwifery and which seeks to prevent the practice of medicine by persons who are not properly qualified according to the terms of the Act.

In the leading Louisiana case of Louisiana State Board of Medical Examiners v. Fife (1927, 162 La. 681, 111 So. 58) the validity of the Louisiana statutes was sustained. The case involved a suit brought by the Louisiana State Board of Medical Examiners to obtain an injunction prohibiting Fife from practicing medicine without a license and to recover the fines and penalties imposed under the Louisiana statutes for practicing medicine without a license. The defendant, a chiropractor, contended that he was not engaged in the practice of medicine, and further, that the statute as applied to the practice of chiropractics was
unconstitutional as depriving him of his liberty and property without due process of law, since osteopaths, dentists, chiropodists and trained nurses were all excepted from the operation of the Louisiana statute in question and that failure to make provision for chiropractics in a separate statute was a discrimination and a violation of provisions of both State and Federal Constitutions.

The Louisiana Supreme Court specifically held that chiropractics comes within the definition of the practice of medicine as provided in Section 13 of the Act, that the statutory regulations were a proper exercise of the police power and as such the regulations adopted were reasonable. In the course of its opinion the Supreme Court of Louisiana observed:

"... No person has a natural or absolute right to practice medicine or surgery. It is a right granted upon condition. Allopathic State Board of Medical Examiners v. Fowler, 50 La. Ann. 1358, 1874, 24 So. 809; Lewis v. State 69 Tex. Cr. R. 593, 155 S. W. 523; And, although a state cannot prohibit the practice of medicine and surgery, and would hardly undertake to do such a thing, still it is well established that, under its police power, it may regulate, within reasonable bounds, for the protection
of the public health, the practice of either, by defining the qualifications which one must possess before being admitted to practice the same, and, to make these regulations effective, to require the one intending to engage in the practice, to possess, before engaging therein, a certificate from the proper authority showing that he possesses the required qualifications."

The Fife case raises a question which has provoked much litigation, that is, what constitutes the practice of medicine? Our Louisiana statute defines the practice of medicine as follows: (Section 9 of Act 1918)

"That the term practice of medicine, surgery, midwifery as used in this act is hereby defined to mean holding one's self to the public as being engaged within this state in the business of diagnosing, treating, curing, or relieving any bodily or mental disease, condition, infirmity, deformity, defect, ailment, or injury in any human being other than himself; whether by the use of any drug, instrument or force, whether physical or psychic, or of whatever nature, or any other agency or means; or who shall examine any such person or material from such person; whether such drug, instrument, force, or other agency or means is to be applied or used by the patient or by any other
person, or be for compensation of any kind or be gratuitous; or attending a woman in childbirth without the aid of a licensed physician, surgeon or midwife; or using any other title than optician, to indicate that one is engaged in the business of refracting or fitting glasses to the human eye."

Section 21 of the Act of 1914 as amended by Section 12 of the Act of 1918 provides:

"That this law shall not apply to the giving of family remedies in cases of emergency; or to legally licensed dentists, pharmacists, osteopaths, practicing according to existing laws; or to any one attending in an emergency a woman in childbirth; or to anyone serving full time without salary or professional fees on the resident medical staff of any legally incorporated municipal or state hospital or asylum; nor to prohibit the practice of Christian Science or religious rules or ceremonies as a form of religious worship, devotion or healing, providing that the person administering or making use of, or assisting or prescribing such, rely on faith and prayer alone, and do not prescribe or administer drugs or medicine nor perform surgical or physical operations nor assume the title of, or hold themselves out to be, physicians or surgeons."
The courts of other states under similar statutory provisions, have been zealous in protecting the medical profession from unlicensed practitioners. The recent New York case is illustrative of a long line of decisions dealing with faith healers. In *People v. Hickey*, 283 N.Y. Supp. 968, an investigator testified that the defendant treated her for pains under the arch of her foot and in the calves of her legs by pressing with his hand under the arch until the pain became unbearable.

The investigator was given a receipt which stated that the cost of the full treatment was $25.00, to be refunded if not satisfied.

The defendant's cards bore the words "Healer" and "By Appointment".

The defendant also gave her a card stating that he specialized in curing fallen arches without surgery or medical applications and guaranteed results. It was the contention of the defendant that he treated by prayer, placing the tips of his finger on the outer part of the body affected by pain and seeking to cure through the power of God. He claimed that he was a member of a church invested
with these special healing powers. The New York court held that his conduct constituted the practice of medicine and that treatments given by the defendant for which he received compensation did not come within the exception of practice of the religious limits of any church. The court's contention was that the church was being used as a cloak for the defendant's medical practice. Similar results have been reached in cases dealing with Christian Science, particularly where a fee is charged. It should be noted the Christian Science is specifically enumerated in the Louisiana statutory exceptions, but this must necessarily be understood to mean that the mere teaching that disease will disappear as a result of prayer is not the practice of medicine. Similarly it has been held that clairvoyants and spiritualists may conduct themselves in such a manner as to be engaged in practicing medicine without a license. In fact, a very interesting array of respectable authority may be marshalled for the purpose of sustaining the position of organized medicine in its efforts to protect
the public from imposition. These regulatory statutes referred to and the interpretation that has been placed upon them by the courts have been attacked as a discrimination in favor of the allopathic school of medicine and as tending to create a monopoly, but the public interest transcends any such argument. The inescapable foundation of the successful treatment of all human diseases is diagnosis, and in the last analysis it is the allopath alone who is qualified to lay that proper foundation.
The celebrated dictum of Charles Macklin that "the law is a sort of hocus-pocus science, that smiles in yer face while it picks yer pocket; and the glorious uncertainty of it is of mair use to the professors than the justice of it" has been believed by the actual facts as demonstrated in the legal principles which the courts have drawn up to protect the medical profession in cases of alleged malpractice.

The leading case laying down these principles is the case of Pike v. Honsinger, 155 N. Y. 201, wherein the doctor's duty to his patient was succinctly and aptly stated as follows:

"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 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.' Then after emphasizing that every physician 'is bound to keep abreast of the times,' and that he may not depart from 'approved methods in general use,' the court continued: 'The rule of reasonable care and diligence does not require the exercise of the highest possible degree of care. . . . 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.'

An analysis of this rule discloses three essential obligations which the law imposes upon a physician and surgeon who takes charge of a case: (1) That he must possess 'that reasonable degree of learning and skill' that is 'ordinarily possessed by physicians and surgeons in the locality where he practices,' such as is ordinarily regarded by those conversant with the employment 'as necessary to qualify him in practicing medicine and surgery.' The words 'reasonable' and 'ordinarily' are the key words. The physician is not required to have 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'. But it is not even to the general average of the profession which the individual must conform, it is enough if he possesses such a degree of learning and skill as is 'ordinarily' possessed by the physician and surgeon in the locality where he practices. Nothing could be fairer than this rule. The doctor is not required to be a genius or a superman of medicine or surgery,
he is merely required to possess and use 'the skill and learning of the average physician.' He is not judged by the high standards which may be attained in some unusually competent medical centre, but merely by that standard which is set him by his brethren in the community where he works."

The Louisiana cases are in harmony with the principles as set forth above. Thus in the case of Roark v. Peters,

162 La. 111, 110 So. 106 (1926) -

In Roark v. Peters, 162 La. 111, 110 So. 106, (1926), an sponge was left in the plaintiff's abdomen after an operation had been performed on her. Suit was brought against the surgeon to recover damages on the grounds of malpractice. The evidence showed that every reasonable precaution was taken to account for all the sponges before the wound was closed. The court held that in view of the fact that reasonable precautions had been taken, and that the operation had been skillfully performed, the defendant was not liable. In the course of the opinion the court quoted with approval from Cassingham v. Berry, 67 Okl. 134, 150 P. 139 as follows:

"... And it is a matter of common knowledge, based upon everyday experience, that, even in the exercise of the utmost care, all men do make mistakes. And it was not error, under the pleadings and evidence in this case, for the court to instruct the jury that, though they believed the defendant left the sponges in the body of deceased and her death was the natural and proximate result thereof, yet if they also believed from the evidence that the defendant, in performing this operation, exercised ordinary care in keeping track of the sponges and seeing to it that they were all removed before the incision was closed, he could not be held liable for negligence. . . ."

The ruling of the court was that: "... Inasmuch as the testimony conclusively shows that every reasonable precaution was taken to account for all sponges used in the operation before the wound was closed, that the operation was so properly and skillfully performed that the life of both mother and child was saved, and that there is no charge in the petition of any want of skill in the performance of the operation, we do not consider it necessary to review [the decisions cited by both counsel] them.
The rule of *res ipsa loquitur* has no application to cases of malpractice. This is well illustrated by the decision of Judge Taft in the case of *Ewing vs. Goode* decided by Judge Taft while he was on the United States Circuit Court of Ohio.
In the Ewing case the plaintiff who was suffering from a cataract of her right eye consulted a physician specializing in eye diseases. Subsequently she developed glaucoma and her physician operated for the relief of this condition. The sight of her right eye was lost, and the vision of the left eye then became impaired. She sued her doctor for malpractice, and offered no expert testimony to establish that the doctor's negligence did in fact cause the injury. She claimed that the facts spoke for themselves, _res ipse loquitur_. In directing a verdict in favor of the physician, Judge Taft said: 'Before the plaintiff can recover she must show by affirmative evidence—first, that defendant was unskilful or negligent and second, that his want of skill or care caused injury to the plaintiff. If either element is lacking in her proof she has presented no case for the consideration of the jury. The naked facts that defendant performed an operation on her eye, and that pain followed, and that subsequently the eye was in such bad condition that it had to be extracted, establish neither the neglect and unskillfulness of the treatment, nor the causal connection between it and the unfortunate event. A physician is not a warrantor of cures. If the maxim, _res ipse 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 could be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the ills that flesh is heir to.'
In cases involving medical science 'with respect to which a layman can have no knowledge at all,' declared the future Chief Justice of the United States, 'the court and jury must be dependant on expert evidence. There can be no other guide, and where want of skill or attention is not thus shown by expert evidence applied to the fact, there is no evidence of it proper to be submitted to the jury.'

The decision in Ewing v. Goode, has been cited with approval by the Louisiana courts. Thus in Mournet v. Summer, 19 La. App. 346, 139 So. 728 (1932) it was held:

"A physician or surgeon undertaking the treatment of a patient is not required to exercise the highest degree of skill possible. He is only required to possess and exercise that degree of skill and learning ordinarily possessed and exercised by the members of his profession in good standing practicing in similar localities and it is his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning and to act according to his best judgment."

"The burden is upon the plaintiff to establish by a fair preponderance of the evidence the allegations of his petition charging . . . . 'negligence, carelessness, want of skill and malpractice' in the
methods employed and in the manner he treated plain-
tiff..." Mournet v. Summer, supra.

"The rule is well established that a physician
or dentist cannot be held liable for the death of a
patient under his treatment, where there is no
evidence to show negligence or lack of skill on his
part, sufficient to overcome the prima facie presumption
in his favor made by the evidence that the treatment
adopted by him was the usual and customary one. The fact
that a patient died under such circumstances does not
raise any presumption of negligence or lack of skill on
his part." Mournet v. Summer, supra.

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maxim, 'Res Ipsa Loquitur,' were applicable to a case
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courageous enough to practice the healing art, for they
would have to assume financial liability for nearly all
the 'ills that flesh is heir to.'" (Ewing v. Goode, 78
Fed. 442, 443) cited with approval in Mournet v. Summer,
supra."

In Stern v. Lang, 106 La. 738, 31 So. 305, the syllabus
by the Court read as follows:

"The action was one sounding in tort, for the
alleged unskillful and negligent manner the
defendant, as a physician, performed the duty he had assumed. The rule is well settled that the oculist who treats a patient must exercise in that regard the care and skill usually exercised by oculists in good standing. He may be rendered liable for his gross mistakes."

"It was not shown by a proponderance of testimony that defendant, through want of skill or negligence, committed a mistake for which he can be held pecuniarily liable. Experts testified that he followed the established practice, and it is not shown that he committed a gross error, the proximate cause of the injury of which plaintiff complains."


The rules in malpractice actions may be summarized as follows:

"First, in the overwhelming majority of malpractice cases a plaintiff cannot make out his case without expert testimony. The necessity for it is the rule, the dispensing with it the exception.

Second, a bad result does not import negligence,—the rule of res ipsa loquitur does not apply—and thereby obviate the necessity for expert testimony, except in the instances enumerated in rules four and five.

Third, in every case in which the point at issue involves a question requiring for its correct solution scientific or expert knowledge, expert testimony must be adduced before a jury can be permitted to consider it. Any question involving
in any way the propriety of the treatment, however obvious the question may appear to the layman, requires expert testimony for its solution.

Fourth, there are border-line cases, but the mere leaving of a foreign body does not import negligence, so as to dispense with expert testimony. Usually in such case a plaintiff makes out a prima facie case by merely establishing the presence of the foreign body. This, however, may be fully met by the defendant through establishing by expert testimony that the retention of the foreign body did not result from the defendant's departure from approved methods. Thus, in surgical sponge cases where the surgeon was justified in relying on the nurses' count and had executed a reasonable search himself; in broken needle cases where the proper treatment was used, but it is shown that with the best of care and skill needles break; in X-ray cases where the plaintiff is not shown to be a non-idiosyncratic or where the rays were necessary to combat the disease, and could do so only through the destruction of intermediate tissues,—in these and similar cases if such expert testimony is adduced by the defendant and is not broken down or rebutted by the plaintiff, there is no case for a jury to consider.

Fifth, where a physician's failure to use due care is so obvious that by no stretch of the imagination could a scientific question of any kind be said to be involved, such for example, as where a surgeon undertaking to remove a tumor from his patient's scalp lets his knife slip and cuts off his patient's ear,—expert testimony is not needed."
III. Miscellaneous medico-legal matters -

(a) Operations without consent will be deemed an assault. In the language of Chief Judge Cardozo, "Every human being 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.... This is true except in cases of emergency where the patient is unconscious and where it is necessary to operate before consent can be obtained."

(b) Matters pertaining to compensation.

"Persons practicing as physicians without a license, can lawfully claim no remuneration for their services as such. There is no principle better settled, than that no action can lie on a contract, the consideration of which is prohibited by law. We cannot listen to a claim which originates in the violation of our statutes." Dickerson v. Gordy, 5 Rob. 489 (La. 1845).

"In determining the amount which constitutes fair remuneration, for medical services, many factors must be taken into consideration, some of which are the skill and reputation of the physician, the time which
he devotes to the case, and the inconvenience and expenditure to which he may be subjected. Another important fact to be considered is the amount of the estate and the ability of the patient to pay."

Gelpi v. Wilbert, 19 La. App. 170, 119 So. 455 (1928)

In that case a $500 fee for a surgical operation was held excessive and reduced to $350, despite the reputation of the plaintiff, it being shown that the defendant was financially unable to pay such a large fee.

In Succession of Levitan, 143 La. 1025, 79 So. 829 (1918) it was held that where medical services prove to be beneficial to the patient, and the charge for these services is neither unreasonable nor inconsiderate, as compared with the financial ability of the patient, same should be allowed.

To the effect that a physician's charge for services may properly be based on the patient's ability to pay, see


The mere fact that a doctor has just graduated from school is no excuse for refusing to pay the usual fee sanctioned by the
custom of the community in which he lives. Succession of Percival, 139 La. 958, 72 So. 467 (1916).

"... Our learned brother was also of opinion that a young practitioner has no right to charge or expect to be paid, the fees charged by those who are older and whose reputations have been established, and hence, he allowed opponent but $3.00 each, for day visits, and $6.00 for night visits, although according to the evidence, the customary charges by specialists, appear to be $5.00 and $10.00 respectively. It may happen however, that the knowledge of the schools goes beyond that upon which reputations have been founded, and that the later graduate, bringing, with his diploma, the latest discoveries, is more competent to deal with a particular case than the earlier, with the experience of a past generation. However that may be, any physician has the right, in the absence of a custom of his own, to charge for his visits, day or night, at least the fee sanctioned by the custom of the community in which he lives; nor is he obliged, in so doing, to rate himself below the class to which, in his opinion, he properly belongs; and, in such a case, the burden rests upon the patient, who refuses to pay, to show a better reason for such refusal than that the physician is comparatively fresh from the seats of learning ... "
If advice is to be given to physicians as to the method of avoiding litigation, the following might be stated:

"First, the best way to avoid a lawsuit is not to deserve one. If you give your whole heart and mind and conscience to your cases, and devote your highest efforts in the performance of your duty to your patient, you are likely to avoid trouble. I say you are likely to avoid trouble, you cannot be certain to avoid it with some patients no matter what you do. If you have early indications that your patient is of a litigious disposition, you would do well to terminate your relations with him at the first available opportunity.

Second, be careful of your diagnosis. Make sure before you arrive at a conclusion that you have ascertained, weighed and duly considered every relevant factor, including every detail of the history, and that you have sufficiently considered every special circumstance in the case before you. Be sure not to neglect the help
of every diagnostic aid which science has made available. Among the
more obvious of these would be the X-ray, urine and blood tests,
pathological and microscopical examinations. If you have an honest
doubt as to the correctness of your diagnosis, after you have done
your best, call in another doctor whom you consider more competent,
to confirm your diagnosis.

Third, before consenting to treat or operate upon a patient
inquire honestly of yourself whether you are in fact competent to
treat or operate for the particular malady which confronts you.
If you have an honest doubt upon this subject, call in one of your
professional brethren expert in the particular subject involved and
see to it that he is employed as a consultant, or that he actually
renders the treatment or performs the operation.

Fourth, in all cases of surgery, consider carefully whether
in fact a surgical operation is required. In case of doubt, con-
sider whether the less radical rather than the more radical course
is the procedure of choice. Never neglect the most rigid attention
to all antiseptic precautions. Remember that Lister stressed the
necessity of sterile surgery. Give heed not only to the sterility
of the operator and his instruments, but to all those who partici-
pate in the operation. Make sure that a careful sponge count is
made. After calling for the count and before closing the incision,
verify the count by a careful manual examination of the operative
field. Put a record of this examination on the hospital chart.
It is wise to have in the operating room a written chart upon which
the sponges inserted and removed could be recorded.
Fifth, make sure that all your instruments and appliances are of the approved design and make, and are in proper working order. This applies not only to the operative instruments, but to the operating table, chairs and other appliances. Be careful that your surgical needles are secured from some well recognized manufacturer, and that the needle used is of a size and strength adequate to the demands that will be placed upon it.

Sixth, be careful in your choice of anaesthesias. Some anaesthesias are proper under some circumstances and not in others. What one is proper depends upon a variety of circumstances, among which are the strength and age of the patient, the kind of heart he has, etc., etc. Be careful to inquire whether cocaine has been administered within a short time before the administration of the general anaesthesia. Wherever possible, inquire also from the patient's history whether he has any idiosyncrasy for any particular form of anaesthesia. Make sure also that care has been employed in the matter of enemas, and in seeing to it (except in emergencies involving life or death) that the anaesthetic, if it is a general one, is not administered to a patient with food in the stomach. Consider carefully whether or not a general or a local anaesthetic is the one of choice. This may depend on a variety of circumstances, including the condition of the patient, the nature of the operation, etc., etc. It is true of course, that even where all of these precautions are taken the patient may die while under the anaesthesia. Death of itself under these circumstances is,
of course, no evidence of negligence on the part of the anaesthetist.

Seventh, keep careful records. This applies not only to the records of the office, but to the records of the operation and of the hospital aftercare. Before operating, it is wise to have the patient consent in writing to the operation. This record should contain a brief statement showing that the patient understands the nature of the operation. Where a patient insists upon leaving the hospital against the doctor's advice, make sure that a statement is signed by the patient setting forth that fact. When one physician desires, or through circumstances beyond his control is forced to relinquish a case to another physician, cause the patient to consent to this course in writing.

Eighth, one of the most productive sources of litigation is that of X-ray therapy and diathermy. Do not work in this field unless you understand it. X-ray therapy and diathermy are highly technical specialties. New discoveries and new theories are being constantly evolved. The proper factors of dosage and other factors require a knowledge of the best and most recent thought upon the subject. Inquire of the patient whether he has been exposed to a previous X-ray within a time that would render it unsafe for you to subject him to a new exposure. Consider the fairness or lack of fairness of the patient's skin. Give thought to the patient's occupation. Do not leave your patient unattended. Make sure that your machine is in perfect working order and that there are no loose wires with which the patient or his friends may come in contact.
Ninth, keep abreast of the times. Read the medical journals and the new text books. Keep your knowledge fresh and up-to-date. Attend your county medical meetings where you will often hear papers of great scientific value.

Tenth, be conservative in your prognosis. Unjustifiable promises often lead to disappointment,—sometimes to malpractice actions. In treating your patient or his family, exercise the highest degree of good faith. Be scrupulously honest in your advice and treatment.

Eleventh, be tactful and just to your fellow practitioners. Do not indulge in needless criticism. The fact that you form or act upon a conclusion different from that of your predecessor affords in and of itself no just basis for condemning his judgment or his action. Careless remarks, oftentimes unjust, have not infrequently led to litigation."
The doctor-patient privilege may be analyzed as follows:

"(a) that the privilege extends to duly licensed physicians or professional or registered nurses; (b) the facts thus privileged consist of 'any information' which the physician or nurse acquired in attending a patient in a professional capacity; and which was necessary to enable him to act in that capacity; (c) the rule is mandatory, it does not authorize the physician to elect whether or not he will disclose such a confidential communication, the statute says that he 'shall not be allowed to disclose' it."
I. Introductory remarks

Law, medicine,

Judge Cardozo

Scope of medical profession

Medical legal problems

Scope of lectures

(a) Regulatory aspects

What constitutes practice of medicine?

(b) Medical man has many contacts with law

as witness, as official examiner,
as expert, as defendant, and in suits for fees.

Great need of medical profession
Accrued interest on bonds and net premium from sale of bonds should be credited to sinking fund 285 P. 59.
Louisiana State Board of Medical Examiners v. Cronk, 157 La. 318
102 So. 415 (1924)

The Plaintiff board sued out an injunction to restrain the defendant, a chiropractic, from further practicing his profession on the grounds that he held no certificate from the board, as provided by Act 56 of 1914. Defendant holds a license from the State of Louisiana and from the Parish of Alexandria; he contends that he is not practicing medicine, and that the licenses he holds are sufficient to entitle him to practice.

Held: That "Chiropractic" being the science of adjusting displaced vertebrae of the spinal column, by hand, comes within the definition of the "practice of medicine" as provided in § 13 of the Act. The court further held:

"It is well settled that neither a state nor a municipal license entitles a licensee to pursue his business in violation of the criminal laws of the state, or in violation of the ordinances of a city. The possession of such licenses by defendant is therefore unavailing as a defense.

It is also equally as well settled that the state, in the legitimate exertion of her police power for the protection of the public health, is fully authorized to make provisions deemed necessary for that purpose and to determine what is, or shall constitute, the practice of medicine. Such provisions, being enacted for the public good and the general welfare, cannot be construed as an illegal interference with the constitutional right of every citizen to earn a living. [Citing cases.]"

No person has a natural or absolute right to practice medicine or surgery. It is a right granted upon condition. Allopathic State Board of Medical Examiners v. Fowler, 50 La. Ann. 1358, 1374, 24 So. 809; Lewis v. State 59 Tex. Cr. R. 593, 155 S. W. 523; And, although a state cannot prohibit the practice of medicine and surgery, and would hardly undertake to do such a thing, still it is well established that, under its police power, it may regulate, within reasonable bounds, for the protection of the public health, the practice of either, by defining the qualifications which one must possess before being admitted to practice the same, and, to make these regulations effective, to require the one intending to engage in the practice, to possess, before engaging therein, a certificate from the proper authority showing that he possesses the required qualifications. Louisiana State Board of Medical Examiners v. Fife, 162 La. 61, 111 So. 58 (1926). Aff'd. 274 U. S. 720, 47 S. Ct. 590, 71 L. Ed. 1324 (1927) [Act of 1914 as amended was attacked as being unconstitutional, but court held act valid.]

In Jordan v. Touro Infirmary, 123 So. 726, (1922) the plaintiff while undergoing an operation, was severely scalded when an attending nurse at the orders of the physician applied hot water bags to his feet. Suit was brought against the hospital to recover damages on the grounds that the hospital was responsible for the negligent acts of its servant (the nurse). It was held that a nurse is not the hospital's servant while performing duties in the operation room under the orders of the surgeon; and therefore, the hospital was not responsible for the negligence of the nurse in question. The Court said:

"As we have seen from the testimony that the nurses are absolutely under the orders of the surgeons in the operation room and in no manner controlled by the officers of the defendant, it has no responsibility for the acts of the nurses. They may be considered, pro-hac vice, as the servants of the surgeon. In this case, the surgeon was employed by plaintiff himself."
Physicians required to register birth of every child within 10 days from the date thereof. [Act 237 of 1918 § 12]

They must report to Board of Health, every case of venereal disease he attends. [Act 61 of 1918 § 4]

They must keep record of heroic drugs purchased or received by them, and of amount of such drugs administered to patients or otherwise dispensed by them. [Act 252 of 1918 § 14]; [Act 14 2nd Z. S. of 1934 § 9.]

Physicians have lien & privilege on crop of patient for medical services but it shall not be for more than 15 dollars. [Act 129 of 1880]

The prescription of 3 years applies on all actions for money due to physicians, etc. for visits, operations and medicines. [R. C. C. Art. 3538]

Physicians not compelled to be witnesses in Civil Cases when living more then 10 miles from court and life of patients might be endangered. [Act 103 of 1877]

Physicians exempt from jury service, [Art. 174 Code of Criminal Procedure]

Communications between physician and patient are privileged as well as results of investigations made of, and opinions based on, physical or mental conditions of patient. [This does not apply to physicians who are by law directed to conduct examination of persons and report such examinations to the court.] Art. 476 Code of Criminal Procedure.

Physicians and surgeons who have professionally attended a person during the last illness, can not receive donations inter-vivos or mortis causa from the deceased with the exception of remunerative donations, or when there is close relationship. [R. C. C. Art. 1489]
Duties of Coroner: [See Arts. 28-40 Code of Criminal Procedure]

Duty of coroner to conduct post-mortem examination of the body of deceased persons when he has reason to believe death occurred under suspicious circumstances. It is also his duty to disinter the body for the purposes of holding an inquest.

Coroner may summon witnesses, and compell their attendance by attachment. Has power to summon attendance of surgeons and pathologists when necessary.

If at the inquest, the coroner's jury finds that a crime has been committed, coroner has power to detain such witnesses as he thinks proper for the prosecution of the case.

The proces-verbal of the inquest is evidence of death and of cause thereof.

It is made the duty of the coroner to arrest or to cause the arrest of any person accused at the inquest.

Duty of coroner to hand over all valuables found in body of deceased to clerk of court.

Physicians or surgeons in charge of hospital having first knowledge of violent death of any person under suspicious circumstances, or knowledge of death caused by abortion, must immediately notify the coroner. No one will be allowed to remove the body without permission from the District Attorney and of the Coroner. [Act 366 of 1938, amending Art. 39 of the Code of Cr. Procedure]

A coroner is to be elected in every parish, except in Orleans parish where there shall be two coroners.[R. S. 649]

The coroner shall be a conservator of the peace. [R. S. 651]. Except in the Parish of Orleans, the Coroner may also be ex officio the parish physician and health officer.[Act 241 of 1926], and he can not be required to give testimony in any case in court in line of duty as coroner. [Act 241 of 1926 § 4.] Coroner prohibited from accepting private practice. [Act 34 of 1926, § 3]
In 1914, Act number 56 was passed by the Legislature to regulate the practice of medicine, surgery and midwifery, and to prevent the practice of same by persons not authorized and qualified according to the provisions thereof. Several sections were amended in 1918, by Act 54 of that year.

The most important sections of the act are as follows:

§ 1. To the effect that no person shall practice medicine unless possessing qualifications and requirements of this act.

§ 2. Must be U. S. Citizen, 21 years of age; diploma of college in good standing; successful in examination by board in following subjects:

Anatomy, physiology, chemistry, physical diagnosis, pathology, bacteriology, hygiene, surgery, theory and practice, materia medica, obstetrics, gynecology.

Board may in its discretion waive examination in favor of any one having been examined and admitted to practice in other states.

§ 3. Board is composed of practicing physicians appointed by the governor.

§ 5. Midwives are to be examined on such subjects as board thinks proper, and unless qualified they can not practice, except in emergency cases.

§ 9. Upon passing examination the board issues a certificate which entitles the physician to practice upon recordation of same with the clerk of court in the parish or parishes where practice intended. Certificate is to be renewed annually by the secretary treasurer of the board, unless same is cancelled for cause.

§ 13. Defines the practice of medicine as follows:

"The term practice of medicine, surgery, midwifery as used in this act is hereby defined to mean holding oneself to the public as being engaged within this state in the business of diagnosing, treating, curing, or relieving any bodily or mental disease, condition, infirmity, deformity, defect, ailment, or injury in any human being other than himself; whether by the use of any drug, instrument or force, whether physical or phycic, or of what other nature or any
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