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Medical Practice–The Line Between Malpractice and Negligence

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the corpus absolutely, remainder to B is dangerous because it appears that A does not have the power to appoint to herself. To save the marital deduction, it appears that a greater estate in A must be created, and it must be specifically stated that any proceeds from the disposal of the corpus are not to be subject to the same limitations as the original property. Because W. Va. Code ch. 36, art. 1, § 16 (Michie 1961) saves the remainder over after any interest in property is created, it is possible to create a qualified interest in A for life with a remainder over of any unconsumed property after the death of A. 37 W. Va. L. Q., supra. The following devise should, therefore, qualify an interest passing under W. Va. Code ch. 36, art. 1, § 16 (Michie 1961) for the marital deduction: to A for life with the general power to appoint to herself or to others by deed for any purpose, remainder to others. All proceeds from the disposal of any property by A shall be hers absolutely and not subject to any of the limitations imposed on the original property.

Edward Garfield Atkins

Medical Practice—The Line Between Malpractice and Negligence

Plaintiff, P, instituted an action against D, a private hospital, in connection with the alleged wrongful death of P's minor daughter. The child was admitted to the hospital with a serious heart condition. Before leaving, the doctor advised the mother that if the child should go into heart failure, she should have immediate medical treatment. According to the mother, the child's condition began to worsen shortly after the doctor left, at approximately 8:00 P.M., and the indication was she was suffering from progressive symptoms of heart failure. Between that time and midnight, the child's mother pleaded frantically for aid from the nurses on duty, but they virtually refused to even examine the child. As a result, the doctor was not advised of the situation until approximately 12:30 A.M. He came quickly and administered emergency treatment, but the child died the following evening. The trial court refused to admit testimony of a New York physician concerning usual standards of care employed by nurses because he neither lived in nor was familiar with the standards of care in the immediate area. At the conclusion of P's testimony, the trial court directed a verdict for D. Held, reversed, new trial granted.
This was not a malpractice action. The case was based solely on the negligence of nurses, and thus it was proper to admit testimony of physicians or other qualified persons concerning the usual standards of nursing care. Such standards need not relate merely to the general area in which the hospital is situated, nor is it necessary that the witness reside in or be familiar with the standards in that area. There were also other grounds for reversal, but they are not pertinent to this comment. *Duling v. Bluefield Sanatarium, Inc.*, 142 S.E.2d 754 (W. Va. 1965).

The principal error of the trial court in this case was to apply malpractice principles to a negligence action. In line with this, the appellate court mentions that the *similar localities* rule has long since replaced the *same community* rule in regard to the requisites for testimony in a malpractice action in West Virginia. *Schroeder v. Adkins*, 141 S.E.2d 352 (W. Va. 1965); *Maxwell v. Howell*, 114 W. Va. 771, 174 S.E. 553 (1934); *Browning v. Hoffman*, 86 W. Va. 468, 103 S.E. 484 (1920). However, whether testimony in malpractice cases is limited by the *same community* rule or the *similar localities* rule was of little importance in the principal case because it was not a malpractice action. The less stringent rules applicable to general negligence actions should have been applied.

Because this case involved the manner in which registered nurses performed their professional duties, the question arises as to why the court repeatedly emphasized that this was not a medical malpractice action but was based solely on the negligence of nurses. The opinion contains statements from which either of two different reasons for the court's ruling might reasonably be inferred. Because of this, and because of the factual situation, it is difficult to say with certainty why the court refused to treat this as a malpractice action.

There are several statements in the opinion suggesting that this was not a malpractice action because it involved nurses rather than doctors, and that nurses are not subject to malpractice suits. Some examples of these statements are:

... This is not a medical malpractice action. Neither lack of skill nor unskillful treatment is charged against Dr. Warden or any other physician. The action is based solely on the negligence and lack of due care on the part of nurses ...
The trial court erred in excluding testimony merely on the ground that he [the New York physician] was not acquainted with the proper and usual standards of accredited hospitals in the Bluefield area and of nurses employed by such hospitals. In this connection we repeat that this case does not involve a medical malpractice action. The plaintiff did not question the skill, competency or the methods of treatment employed by Dr. Warder or any other physician. It will be noted that the hypothetical questions [directed to a local doctor] and the answers thereto related to standards of nurses, not of physicians.

Other statements in the opinion indicate that this case was not considered a malpractice suit because there were no acts of commission complained of, rather only acts of omission. For instance:

The case is based solely on alleged negligence of nurses employed by the defendant hospital, as distinguished from their lack of skill or competency in caring for or treating the patient.

That which is complained of in this case is not the wrong or unskillful application of remedies, but the neglect to give that reasonable and ordinary care and attention which was needed and due to plaintiff after being received into the hospital . . . . [quoting from Hogan v. Clarksburg Hosp. Co., 63 W. Va. 84, 59 S.E. 943 (1907).]

A private hospital may be held liable for injuries sustained by a patient as a result of the mere negligence of a physician employed by the hospital, as distinguished from the physician's unskillful treatment of the patient. [citing Jenkins v. Charleston Gen. Hosp. 90 W. Va. 230, 110 S.E. 560 (1922).]

It appears then that two possible bases exist for the court's refusal to treat this as a malpractice action. (1) The substantive law and rules of evidence relating to malpractice suits are never applicable in suits against nurses; or (2) the law of malpractice is applicable to nurses when they affirmatively care for or treat a patient in an unskillful or incompetent manner, but is not applicable when they merely neglect or refuse to treat a patient. Because it is arguable that either of these two suggested rationale
might have prompted the court's ruling, the principal case is deprived of some of its potential value in predicting the course of future West Virginia cases involving nurses.

In viewing the problem on a national scale, there is a split of authority in the United States concerning the first basis, i.e., whether a nurse is subject to malpractice law. *Davis v. Eubanks*, 83 Ohio L. Abs. 28, 167 N.E.2d 386 (C.P. 1960), found that a registered nurse was a professional person who might be guilty of malpractice. The court there quoted from *Bouvérs, Law Dictionary*, which defines "malpractice" as "[b]ad or unskillful practice in a physician or other professional person, whereby the health of a patient is injured." Conversely, a New York court held that in its primary meaning "malpractice" denotes the improper treatment or culpable neglect of a patient by a physician, and that the term had not been found to apply to a nurse. *Isenstein v. Malcomson*, 227 App. Div. 66, 236 N.Y.Supp. 641 (1929).

Most American cases involving nurses have drawn no distinction between malpractice and negligence. Annot., 51 A.L.R.2d 971 (1957). In most of the cases reported under the cited annotation, however, it appears that the factual situations and the issues involved did not require a ruling on the question of whether malpractice law should apply. It is interesting to observe that in the principal case, the court would probably have reached very much the same result that it did, even had it considered the case a malpractice action. The court pointed out that even in malpractice suits, negligence can be established without expert testimony in cases where the negligence or want of skill is so obvious as to dispense with the need for expert testimony.

If the principal case stands for the proposition that malpractice law is never applicable to nurses, then it must also stand for the proposition that legally speaking, the standards of skill and competency of registered nurses are everywhere the same. The lady working as a combination receptionist, bookkeeper and nurse in a small one-doctor clinic in an isolated rural community is held to the same standards of skill and competency as her counterpart who practices in a large modern medical center. Perhaps this is the law, but it seems strange that the courts would recognize the inequity of such a rule in the case of doctors, and yet would apply that rule to the doctors' professional associate, the registered nurse.
If, however, the line is to be drawn on the second of the court's apparent bases, i.e., an act of commission against omission, another problem arises. Many times the distinction is not clear, and a court in another jurisdiction might be hesitant in holding as the West Virginia court did in Jenkins v. Charleston Gen. Hosp., supra. In that case the failure of a doctor to discover an injury on examination was held mere negligence. How does one distinguish between omission and commission in medical treatment? In many cases it might be a question of fact upon which reasonable men could differ, the end result being a certain amount of unpredicability in this area.

Members of the bar will probably differ over the real significance of the principal case. With the recent elimination of the charitable immunities doctrine in West Virginia, Adkins v. Saint Francis Hosp., 143 S.E.2d 154 (W. Va. 1965), it seems reasonable to expect a substantial increase in malpractice and negligence actions against hospitals. Perhaps this will hasten the day when West Virginia's law respecting the liability of nurses will be clarified.

Fred L. Fox, II

Public Records—Availability for Inspection

Petitioner, P, a corporate newspaper publisher, sought a writ of mandamus to compel respondent, R, the state treasurer, to permit P to inspect certain records which R was required by statute to keep. These were records of state monies on deposit in designated bank depositories. Held, writ awarded. The records were public records, P had an interest in them and the inspection was for a useful and legitimate purpose; therefore, P was entitled to inspect the records. This right is subject to reasonable regulations to protect against loss or destruction of such records and to avoid unreasonable disruption of the functioning of the office in which they are maintained. State ex rel. Charleston Mail Ass'n v. Kelly, 143 S.E.2d 136 (W. Va. 1965).

The principal case illustrates two problems which have confronted the courts on numerous occasions and which, it is logical to assume, will continue to demand the attention of the courts. The problems are: (1) what are public records, and (2), who is entitled to inspect them?