Volume 35 | Issue 2 Article 12

February 1929

Tort--Physician's Liability for Abandoning Patient

Harriet L. French
West Virginia University College of Law

the WORKMEN'S COMPENSATION ACT. Concurring Opinion of Maxwell, J., *Caldwell* v. *State Compensation Commissioner, supra, State* v. *District Court,* 131 Minn. 352, 155 N. W. 103, an attitude which, it is believed, is not at variance with the legislative intent, and will, on the whole, prove socially desirable.

—JOHN D. ALDERSON.

TORT — PHYSICIAN'S LIABILITY FOR ABANDONING PATIENT. — A physician undertook to care for a woman in childbirth, gave her medicine to stimulate delivery, and left saying that he would be back in a couple of hours. He failed to return when medical aid became necessary. The court held that he was liable in tort for the suffering caused the patient before another doctor could be procured and that it was no excuse that the physician was attending another woman in childbirth at the time and was unable to leave. *Young* v. *Jordan,* 145 S. E. 41 (W. Va. 1928).

As a general proposition where a physician has undertaken to care for a patient he becomes liable for the exercise of such skill and diligence as that of an ordinary, reasonably prudent physician in the same or similar circumstances. *Lawson* v. *Conaway,* 37 W. Va. 168, 16 S. E. 564; *Dye* v. *Corbin,* 59 W. Va. 266, 53 S. E. 147. Courts have uniformly held that the abandonment of a patient, who is in need of medical attention, without excuse or sufficient notice to enable him to procure another physician is actionable negligence. Some courts, as in the West Virginia case, therefore, have given damages in tort for malpractice upon such abandonment. *Barbour* v. *Martin,* 62 Maine 536; *Ritchey* v. *West,* 23 Ill. 329; *Gerken* v. *Plimpton,* 70 N. Y. S. 793; *Lawson* v. *Conaway, supra*; *Sinclair* v. *Brunson,* 212 Mich. 387, 180 N. W. 358. Other courts have held, where there was a contract of employment, actual or implied, that the abandonment was a breach of contract and have predicated liability upon that ground. *Hood* v. *Moffett,* 109 Miss. 757; 69 So. 664; *Ballou* v. *Prescott,* 64 Me. 305; *Lathrope* v. *Flood,* 135 Cal. 458, 67 Pac. 683.

Where the action is in tort the duty of care presumably arises from the fact that the physician has undertaken to care for the patient; he may not, therefore, abandon the case midway in its course. The situation is analagous to that in *Black* v. *Railway Company,* 193 Mass. 448, where the conductor on a train helped

a drunken man, who was unable to care for himself, off of the car and part of the way up some steps. The man fell and injured himself, and the railway company was held liable, for, although no duty existed to aid the man, by undertaking to do so the conductor became liable for the exercise of ordinary care; he could not leave him in a more precarious position than he was in before. The physician, likewise, by undertaking a case, makes himself liable to attend the patient as long as his services are needed, or the patient desires. *Gerken* v. *Plimpton, supra*; *Lawson* v. *Conaway, supra.*

The West Virginia court goes still further, however, and says that the fact that the physician was with another patient and unable to leave was no excuse, citing *Hood* v. *Moffett, supra*; and *Sinclair* v. *Brunson, supra.*

The former case was an action in contract, however, and appears to be an isolated case on the point. The court stated in that case that "Where a physician agreed without qualification to attend plaintiff—it was no excuse that at the time treatment became necessary he was engaged with another patient and could not leave, as the rule is: As a man consents to bind himself, so shall he be bound." The liability imposed here was clearly for breach of contract.

The situation is different, however, when the action is in tort. A case might well arise in which the physician was in no way negligent, and yet was forced to neglect one patient for another. In such a case this rule would certainly operate unjustly upon the physician and would be imposing liability without fault.

Sinclair v. *Brunson,* the other case cited by our court on this point, was an action for malpractice, where, among other things, it was charged that the physician failed to call to see the patient as often as was necessary. The court said: "We think it is not the law that doctors can take on so many patients that they will be excused if they neglect some of them and harm results from that neglect." The rule laid down here, however, seems to imply a prior negligence in the physician's taking on more patients than he could reasonably care for, and would not necessarily be in point in *Young* v. *Jordan.* The fact that two patients demand the physician's services at the same time does not mean that he has been negligent in taking both cases originally.

The court in *Young* v. *Jordan* limits the rule, however, to the facts in this case saying that "The fact that the defendant was

called to attend another patient does not excuse him in this case." Upon the actual facts here it would seem that the defendant was negligent in failing to give the patient notice or in procuring another doctor for her as he might have done. The conclusion reached here is no doubt correct and there is apparently no reason to fear that the court in another case would make an unwise extension of the rule.

—HARRIET L. FRENCH.

CRIMINAL LAW—GENERAL INSTRUCTIONS NOT IN HARMONY WITH THE EVIDENCE SHOULD NOT BE GIVEN.—Accused was convicted of first degree murder, and brought error. Defendant was a constable and had been threatened by deceased several days before the tragedy, deceased telling defendant to get his gun and blackjack so he could "take them off of him." There was further evidence that defendant was disliked by deceased. A few days later defendant was walking along the highway toward deceased's residence when deceased and a companion, both intoxicated and the latter displaying a pistol, were going up the steps of deceased's house. As defendant approached both men swore at him, and defendant seeing another constable signaled to him to assist in making an arrest, but it does not appear that the other heeded the signal. Deceased then walked toward the defendant, his companion having retired in the house, saying "what in the hell have you got to do with this?" at the same time having his hand in his hip pocket or behind him. Defendant called twice to halt, and fired a warning shot, and as this was without result, fired the shot which took effect. It does not appear whether deceased was armed or not. The court charged the jury "* * * If the intent to kill is executed the instant it springs into the mind, it is as truly murder as if it had dwelt there for a longer period." *Held*, "* * * Altho similar instructions have been approved by this court in particular cases, in view of the evidence and circumstances surrounding the fatal shot, and the absence of instructions dealing with murder in the first and second degrees or manslaughter, * * * the instruction * * * was misleading * * * and therefore constitutes reversible error", citing *State* v. *Manns*, 48 W. Va. 480, 37 S. E. 613; *Cobb* v. *Simon*, 119 Wis. 597, 97 N. W. 276; *State* v. *Shamblin*, 143 S. E. 230 (W. Va. 1928).