SOME ASPECTS OF THE LEGAL RESPONSIBILITY OF MEDICAL MEN.*

BY

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HISTORICAL.

FROM the earliest times of which we have any authentic records, the responsibilities, liabilities, and privileges of medical men have been the subject of legislation. Yet the measure of that responsibility has varied greatly in times past, and amongst divers nations. The oldest known Code of Laws, promulgated by Hammurabi, King of Babylon, during the period 2285-2242 B.C., and which is believed by scholars of Assyriology to embody the best judicial decisions prior to that period, enacted the privileges, fees, and serious liabilities of those venturesome enough to practise medicine and surgery. After laying down a scale of fees which then, as now, varied with the social status of the patient, the code proceeds:

If the doctor has treated a gentleman for a severe wound with a lancet of bronze, and has caused the gentleman to die, or has opened an abscess of the eye for a gentleman with a bronze lancet, and has caused the loss of the gentleman's eye, one shall cut off his hands.

If a doctor has treated the severe wound of a slave of a poor man, and has caused his death, he shall render slave for slave.

If he has opened his abscess with a bronze lancet, and has made him lose his eye, he shall pay money, half his price.

In later times, when priests assumed the function of medical practitioners and performed surgical operations, they enjoyed almost complete immunity as far as legal liability was concerned, for their knowledge, being supposed to be of a divine origin, was looked upon as infallible. On the other hand, among the ancient Egyptians the surgeon who ventured beyond the boundaries of the rules then in vogue, was liable to suffer corporal punishment even though the practice was successful. Among the western Goths the unsuccessful ministrations of the surgeon, if resulting in death, were followed by his being handed over to the vengeance of the relations of the deceased.

CRIMINAL LIABILITY OF THE MEDICAL PRACTITIONER.

The motives actuating every medical man must be to heal, to relieve suffering, and to prolong life. If he intentionally use any means to shorten life he is guilty of murder, and since the law imputes to any person the intention of bringing about that which is the obvious consequence of any wilful act, if he use any means, knowing that the inevitable resultant consequence thereof will be the shortening of life, he is guilty of murder. Moreover, although any person (whether qualified or not) who professes by way of occupation to deal with the life or health of His Majesty's subjects is bound to possess competent skill to perform the task that he holds himself out to perform, and is also under a duty to treat his patients with care, attention, and assiduity (*R. v. Spiller*, 1832, 5 C. and P. 333), these correlative duties are even more emphatically binding upon duly qualified and registered medical practitioners than upon others (*R. v. Crook*, indictment for manslaughter, 1859).

It is culpable negligence for a practitioner to omit giving either to the patient or to the person immediately in charge thereof, necessary directions as to the use of a dangerous drug, substance, or thing (*R. v. Chamberlain*, 1867, 10 Cox, C.C. 486).

It is, however, admissible evidence for a defence on a trial for manslaughter of a patient to show the remedial effects upon other persons of the particular means which caused the death of the person in question (*R. v. Long*, 1830, 4 C. and P., 398-423); but even if the remedial measures employed were the actual cause of death, or if the death was in any sense accidental or due to an honest mistake on the part of the practitioner, or if the fatal result was one which even with skill he could not reasonably have foreseen, he is not guilty of any offence, and the court will discourage a conviction where a practitioner has, with the bona-fide intention of healing, exercised his best skill, as in the case of *R. v. Van Butchel*, where the prisoner passed a rectal bougie on the deceased, who had

a disease of the rectum. The instrument on being inserted caused great pain, and shortly after the patient died. *Post mortem* the rectum was found to have been perforated. The judge considered that this case did not even approach to manslaughter, and directed an acquittal.

It is improbable that any but very serious cases of malpraxis would be dealt with as crime at the present day, although, as a matter of strict law, even a technical assault, such as vaccinating without consent or examination against a patient's will, is a crime as well as a tort. To the honour of the profession, it may be added that such cases are of the rarest possible occurrence, and when they do occur juries are not eager to convict, except where they think that prisoner has shown culpable ignorance or inattention or rashness under all the circumstances of the case.

CIVIL LIABILITY OF THE MEDICAL PRACTITIONER.

In all cases of skilled or professional labour, where a man publicly practises a profession, he holds himself out as being properly equipped for its due performance. He represents and undertakes, therefore, that he is possessed of the necessary and customary skill pertaining to that profession (*Harmer v. Cornelius*, 28, L.J.C.P., 85). He does not, if an attorney, undertake that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest degree of skill. There may be persons who have a higher education and greater advantages than he has, but he undertakes to bring to bear a fair, reasonable, and competent degree of skill (*Lamphier v. Phipos*, 8 C. and P., 479). Whether the practitioner be qualified or unqualified matters nothing. The legal wrong is the incompetent or negligent treatment, not treatment by one wanting a qualification. The qualified man is an expert, the unqualified man has put himself into the position of an expert, although in the case of one who did not assume to be a medical practitioner evidence of gross ignorance would be required to render him liable to damages in a civil court, whereas in the case of a regular practitioner the ratio would be such reasonable knowledge and skill as is usual among medical men.

The degree of skill requisite is such as may be expected in the circumstances of time and place from an average person in the profession, one neither specially gifted nor extraordinarily dull, and where the reasonable amount of skill proportioned to the duties that are undertaken is found, there is no liability for error of judgement in the application of knowledge. Each case depends upon its own circumstances, and where an injury has been sustained that could not have arisen except from the absence of reasonable skill, then there is liability (*Hart v. Frame*, 6 C. and F. 193). Nevertheless the standard of care and competence is variable, for example, that might be negligence in a doctor of repute who holds a recognized position on a hospital staff, which would not be so in the case of a village doctor in the wilds of Kerry. What constitutes a reasonable degree of skill cannot be defined. It is a question of fact to be determined by the jury in the light of the circumstances of each case.

Treatment involving probabilities of danger cannot be applied without communication to, and some expression of consent by, the patient, although the duty to forewarn the patient is discharged by a general intimation of likelihood of pain or danger without going into a scientific dissertation on the probabilities and peculiarities of the case.

A medical man is usually responsible for the torts of his apprentice or assistant if the act complained of be done under his directions, with his authority, and in the particular manner sanctioned by him, but not otherwise. Nor are doctors in a hospital responsible for the negligence of the nurses therein unless they are in close proximity to the patient at the time of the commission of the wrongful act, and consequently able to prevent it. If it be not the usual hospital practice for them to superintend every minor detail, a patient who goes there cannot complain if they omit to do so in his case.

Speaking generally, no one can be held responsible for another's negligence unless the relationship of master and servant or of principal and agent exists. Hence a qualified assistant or locumtenent is himself responsible for any negligence proved against him. He does not involve his

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principal unless the principal has employed him, knowing him to be incapable though qualified. And where, in a recent case, the plaintiff, a qualified medical man, sought to make the defendants, the governors of a hospital, liable for alleged negligence in conducting an operation upon him at the hospital, resulting in injury to his arm by burning and pressure while he was under the influence of an anaesthetic, it was held that the relationship of master and servant between the hospital staff and the governing body of the hospital did not exist, that if there was negligence, the operating surgeon who had control of the proceedings would be liable, but that the governors of the hospital were not liable for the negligence of the staff even if proved.

RELATIVE RESPONSIBILITY OF THE SURGEON AND ANAESTHETIST.

There does not appear to be any recorded case in England in which either criminal proceedings for culpable negligence or a successful civil action has been brought against a medical man on account of a death resulting from or occurring whilst under the influence of a general anaesthetic, which is probably the reason why no authoritative ruling laying down the exact degree of responsibility attaching to the operator and the anaesthetist respectively has ever been given. In all probability each case would be left to the jury to be decided in the light of the particular circumstances, but as the question has been the subject of much recent discussion the following observations, though unsupported by direct authority, are submitted for consideration.

It is well understood in the profession that the administration of an anaesthetic is a grave and responsible duty requiring undivided attention and unremitting vigilance on the part of the administrator, who, as such, has nothing to do with the operation *per se*, except in so far as it affects the administration. If negligence be proved in respect of such administration, the medical practitioner actually administering the anaesthetic is liable, not the surgeon who is engaged in the operation. But if the surgeon take upon himself to decide the particular kind of anaesthetic to be employed, or the apparatus to be used, or the amount of anaesthetic to be administered, he would probably be held jointly responsible with the anaesthetist for any unfortunate result to the patient—assuming negligence to be proved. Liability as against the administrator might arise from omitting the duty of careful physical examination, of previous appropriate preparation, or from leaving the patient before the administrator has had reasonable grounds for assuring himself that the case could be so left in safety.

Liability, it is apprehended, might also arise from committing the irregularity of assisting the surgeon while engaged in the administration of the anaesthetic (urgent necessity excepted).

But where a nurse or student is engaged in the administration of an anaesthetic under the direct supervision of a medical man, there (it is apprehended) the relationship of master and servant exists, the nurse or student being under the direct control of the medical man as to method, quantity, and kind of anaesthetic employed; hence the qualified man is responsible. Where circumstances compel an operator to accept the services of an unskilled or non-professional person, the operator must take the entire responsibility of the administration.

It is customary, though not the invariable practice, for the surgeon to select the anaesthetist, and generally control the procedure of the operation. If an operating surgeon can be properly charged with selecting an anaesthetist who has not had sufficient experience to enable him to give the anaesthetic properly, in case of a fatal result the surgeon might be held liable.

But apart from gross negligence, which is probably of the rarest occurrence, it is submitted that attempts to make medical practitioners liable to legal consequences for deaths occurring while an anaesthetic is being administered would damage humanity at large.

Moreover, where pure anaesthetics are administered, it would be difficult, in view of the fact that differences of opinion exist as to the exact manner in which anaesthetics act, to state the precise mechanism of the fatal issue, and hence the extent of the responsibility of the administrator.

CONSENT.

The law extends its protection to all, not only against actual hurt and violence, but against every kind of bodily interference and restraint not justified or excused by allowed cause; and, speaking generally, and apart from certain statutory requirements under the Workmen's Compensation Acts, a medical practitioner has no right to treat in any way, or even examine another, without his consent (persons in the public service and convicted prisoners excepted); and, should he do so, this technically amounts to an assault, which may give rise either to criminal proceedings, or to a civil action for damages. Even in cases where the patient actually consents, if such consent is obtained by fraud on the part of the practitioner he is guilty of assault—for example, if a parturient woman consented to be attended in childbirth by a medical practitioner because she relied on his fraudulent statement that he had not been lately attending any cases of scarlet fever, his attendance on her under such circumstances would amount to an assault.

Nevertheless, there are also circumstances in which a man's person may have to be dealt with promptly for his own obvious good, but his consent, or the consent of anyone having lawful authority over him, cannot be obtained in time. And it is not an assault for a competent surgeon if he perceives that an operation ought forthwith to be performed to save life to perform it without consent, such being a work of charity and necessity.

Generally speaking, it is implied that the practitioner shall, so long as the relationship of doctor and patient exists, do all that is necessary in his opinion for the welfare of his patient, within his province, subject to the proviso that when a dangerous or extensive medical or surgical proceeding is contemplated, the patient ought to be warned of the possible consequences, and given an opportunity of declining to undergo the treatment proposed.

Where a practitioner is requested by a mistress to examine a servant who is believed to be pregnant, it is highly important to obtain the consent of the servant both to the examination and to the making known to the mistress the information gained thereby.

The great importance of obtaining consent to such surgical proceedings as may be found necessary is obvious in these days when "explorations" may reveal a state of things requiring subsequently prolonged and extensive surgical proceedings.

The law of England in its relation to medical men is not, as is too commonly supposed, a professional mystery, nor is it a collection of decisions which "squint both ways."

Though possibly uncertain in some few particulars and incomplete in others, yet, viewed as a whole, it takes full, and even generous, cognizance of the anxieties and difficulties inseparable from medical practice, and in its dealings with medicine, as with other arduous and honourable callings, it embodies those notions of fair play, justice, and humanity by which Englishmen are governed in their public and private affairs.

NOTES ON A THIRTY DAYS' FAST.

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THESE notes are from personal experience of myself, a medical man, aged 46, height 5 ft. 7 in., whose weight for years prior to 1905 had averaged 11 st. 3 lb. net. Since that date I have been a purin-free vegetarian, and have dropped about 10 to 14 lb. in weight.

I felt, and was considered to be, in fairly good condition, but I undertook this fast to endeavour to satisfy myself whether the accumulation of waste and unnecessary material in the system is the real cause of much disease, and whether a prolonged fast is a sound method of elimination and as such conducive to bettered health.

Most of my observations are tabulated, the measurements, weights, blood counts, etc., being checked by another medical man. The morning records were taken in bed about 9 a.m., and those of the evening between 10 and 11 p.m., before retiring. The respiratory count, being my own, may unconsciously have been modified for the occasion. The spirometer records were taken by a Lowne's spirometer, and, though relatively correct, I