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Physicians and Surgeons—Malpractice—Extrajudicial Admissions of the Defendant

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always controlling weight to the use of the word "royalty," few persons would argue that it should be done at the expense of long settled land titles.

An unfortunate, though probably unavoidable, result of the instant case is that it is now extremely unlikely that the Montana court will ever give controlling effect to the word "royalty," if it is used in an oil and gas conveyance which contains any conflicting language looking toward a mineral interest.

In any event it is clear both from the principal case and from prior decisions, that an instrument intended to convey a share in production should state that the interest transferred is a "royalty in and to all oil and gas produced and saved" from the land.[28] If on the other hand, the parties intend the instrument to convey all or part of the minerals in place, the instrument should convey the "minerals in, under and upon the land."[29]

EDWARD W. BORER

PHYSICIANS AND SURGEONS—MALPRACTICE—EXTRAJUDICIAL ADMISSIONS OF THE DEFENDANT—Plaintiff had his gall bladder removed and a T-tube inserted, extending from the common duct to the outside of the abdomen. After plaintiff returned home from the hospital, he went to defendant physician's office to have the T-tube irrigated with a solution of alcohol and ether. Immediately following the irrigation, plaintiff became desperately ill and had to return to the hospital for an extended time. In an action against the defendant for malpractice, the plaintiff alleged that the physician was negligent in the irrigation of the T-tube and that, as a result of such negligence, plaintiff's liver was irrigated and severe injury caused. The defendant died pending the action and his estate was substituted as party defendant. An expert medical witness stated at the trial that it was not an accepted medical practice to irrigate the liver with an alcohol-ether solution. He also stated that in his opinion the liver of the plaintiff had not been irrigated. Plaintiff's daughter testified that the defendant admitted to her that he had irrigated the liver through the T-tube with pressure, and that the irrigation had caused the subsequent pain and irritation. The district court granted a nonsuit on the ground that the plaintiff failed to show by expert testimony that the irrigation of the T-tube had been performed negligently and that the liver had been irrigated. On appeal to the Supreme Court of Montana, *held,* reversed. The admission of the defendant was sufficient to show negligence. *Thomas v. Merriam,* 337 P.2d 604, (Mont. 1959) (Justice Castles and Dist. Judge Shea, dissenting).

The Montana Supreme Court has defined malpractice as "bad or unskillful practice . . . and comprises all acts and omissions of a physician or surgeon as such to a patient as such, which may make the physician or surgeon either civilly or criminally liable."[1]

In proof of malpractice there are usually three separate considerations —establishment of the applicable standard of care, proof of the defendant's

[28] *Ibid.* See also 3A SUMMERS, OIL AND GAS 241 (perm. ed. 1958).
[29] SUMMERS, *op. cit. supra* note 28, at 242.
[1] Bakewell v. Kahle, 125 Mont. 89, 93, 232 P.2d 127, 129 (1951).

conduct, and conclusion that the conduct was not in accordance with the required standard of care and therefore negligent. In the ordinary case proof of the standard of care must be made by expert testimony,[3] but it need not be if the injury is outside the area of treatment so that even a layman knows that it cannot be a normal incident of careful treatment,[4] and it need not be if there is expert testimony directly on the conclusion that the defendant was negligent,[4] for implicit in such testimony is the applicable standard of care. Proof of the defendant's conduct may be made by either expert or lay witnesses.[5] The conclusion of negligence is to be drawn by the trier of fact, but they may base their conclusion upon simple testimony by an expert that the defendant was negligent under the circumstances.

The crux of the majority's decision in the instant case is the following paragraph:[6]

> Here the admission made by Dr. Merriam [defendant] to Mrs. Thorson [plaintiff's daughter] was sufficient to show negligence. It was an admission that he irrigated the liver through the "T" tube with pressure using a solution of ether and alcohol, which was shown by medical testimony to be contrary to the accepted medical practice. Negligence of a doctor like any other issue may be shown by his own admissions.

In so condensing their reasoning the majority have left the exact basis of their ruling unclear.

If the admission is taken at its strongest as one of intentional irrigation of the liver, the expert testimony that irrigation of the liver is violative of the standard of care for doctors in the community makes a sufficient case to survive nonsuit. If, however, the admission relates only to the unintended result of the treatment (which seems the realistic view of the evidence, since the doctor set out to irrigate the T-tube, not the liver) and the testimony of the standard of care relates only to the propriety of intentional irrigation of the liver (which seems clearly the intention of the wit-

[3]Loudon v. Scott, 58 Mont. 645, 194 Pac. 488, 12 A.L.R. 1487 (1920); Schumacher v. Murray Hospital, 58 Mont. 447, 193 Pac. 397 (1920); 70 C.J.S. *Physicians and Surgeons* § 62 (1951).

[4]Montana has recognized this exception to the expert testimony requirement in Maki v. Murray Hospital, 91 Mont. 251, 7 P.2d 228 (1932), and in Vonault v. O'Rourke, 97 Mont. 92, 33 P.2d 535 (1934). For a general discussion of *res ipsa loquitur* in malpractice cases see Prosser, *Res Ipsa Loquitur in California*, 37 CAL. L. REV. 183 (1949). For a case where neither *res ipsa loquitur* was invoked nor expert testimony required see Richeson v. Roebber, 349 Mo. 132, 159 S.W.2d 658, 141 A.L.R. 1 (1942).

[4]*E.g.*, Stokes v. Long, 52 Mont. 470, 159 Pac. 28 (1916), where expert witnesses said defendant's treatment of a broken leg was "vicious" and showed lack of the ordinary care and skill required. On the other hand the defendant would be likely to introduce evidence as to the standard of case in order to show he was not negligent.

[5]Ayers v. Parry, 192 F.2d 181, 184 (3d Cir. 1951); Donathan v. McConnel, 121 Mont. 230, 193 P.2d 819 (1948); 70 C.J.S. *Physicians and Surgeons* § 62(2)(1951). In Stevenson v. Gelsthorpe, 10 Mont. 563, 27 Pac. 404 (1891), the plaintiff sued for negligence in the treatment of a broken wrist. The court held that he should have shown with expert testimony that the alleged stiffness in the wrist was caused by defendant's negligence, although there was expert testimony as to the acceptable treatment. The stiffness could have resulted from the fracture regardless of the physician's best care, and it would be beyond a layman's ability to determine whether or not the stiffness was a result of negligence.

[6]Instant case at 607.

ness, when the statement is taken in context), a nonsuit seems proper because the standard of care is not applicable to the unintentional irrigation of the liver while attempting to irrigate the T-tube.

The court is certainly correct in stating that the negligence of a doctor may be shown by his admissions, but that general rule does not seem of any assistance in this case, since there was not implicit in the defendant's statement any acknowledgment of negligence nor (unless we take it as admitting intentional irrigation of the liver) any acknowledgment of an act which is shown by expert testimony to be violative of the required standard of care.[7]

In *Loudon v. Scott*[8] the patient died during an operation for a leg fracture, and the defendant physician admitted that he may have made a mistake in judgment by operating when the patient was in a weakened condition. The plaintiff based his case primarily upon this admission, but the court stated that the admission did not show lack of due care; thereby implying that the admission must show a lack of due care in order to provide evidence of negligence.

In other jurisdictions the use of a defendant's admission as expert testimony to prove his own negligence appears to have been liberalized over the years, in accord with a general trend to facilitate the plaintiff's proof of negligence in malpractice cases.[9] A 1924 California case[10] serves to point out the earlier position. The defendant physician, while performing an operation for a hernia, cut the spermatic cord and caused severe and permanent injury to the plaintiff. The only expert testimony offered by the plaintiff were extrajudicial admissions of the defendant to the effect that he had performed the "wrong operation" and that it was a "misoperation." The plaintiff contended that these admissions, coupled with the obvious injury, were sufficient to establish his prima facie case. The court disagreed and reversed a judgment for plaintiff for lack of expert testimony. They said the admission was not necessarily that the operation was carelessly or negligently performed, but that it was as likely only an admission that the defendant did not have the skill necessary to perform the operation properly. Thus the court seems to require that the admission be on unequivocal statement of negligence.[11]

Lashley v. Koerber[12] and *Wickoff v. James*[13] illustrate the more liberal view now prevailing in California and other jurisdictions.[14] In the *Lashley* case a defendant had remarked that he should have had an x-ray taken of a fracture and it was his fault that he had not. The fracture failed to heal properly, causing permanent injury to the plaintiff. In the *Wickoff* case the defendant surgeon admitted to the plaintiff's husband that he "made

[7]Expert testimony did establish that it was an acceptable practice to irrigate a T-tube with a solution of alcohol and ether, as the defendant did in this case. Instant case at 606.
[8]58 Mont. 645, 194 Pac. 488, 12 A.L.R. 1487 (1920).
[9]See generally Annot., 141 A.L.R. 5 (1942).
[10]Markart v. Zeimer, 67 Cal. App. 363, 227 Pac. 683 (1924).
[11]See also Quickstad v. Tavenner, 196 Minn. 125, 264 N.W. 436 (1936); Donahoo v. Lovas, 105 Cal. App. 705, 288 Pac. 698 (1930).
[12]26 Cal. 2d 83, 156 P.2d 441 (1945).
[13]159 Cal. App. 2d 664, 324 P.2d 661 (1958).
[14]*Accord*, Sheffield v. Runner, 163 Cal. App. 2d 48, 328 P.2d 828 (1958); Scott v. Sciaroni, 66 Cal. App. 577, 226 Pac. 827 (1924); Bungardt v. Younger, 112 Okla. 165, 239 Pac. 469 (1925); Allen v. Giuliano, 144 Conn. 573, 135 A.2d 904 (1957).

a mess of things'' during an operation on the plaintiff. The admissions were the sole expert testimony presented by either plaintiff. Judgments of non-suit were reversed in both cases, the California court stating that the admissions were ambiguous, and that it was for the jury to decide whether they were admissions of negligence.

It is important to note that each of the above admissions contained the element of fault, even though they could also be interpreted as innocent statements. Thus, where the plaintiff is attempting to prove his case solely by defendant's admissions, the courts continually state that the admission to be sufficient must be one of negligence or lack of skill and not an admission of a mere mistake in judgment or *untoward result of treatment.*[15]

In contrast, the ruling in the instant case might be interpreted as saying that an admission of an untoward result of treatment coupled with expert testimony which establishes only that intentionally to obtain such result is not acceptable medical practice amounts to an admission of negligence.

While upon the strongest view of the evidence, taken out of context, the Montana Supreme Court may be justified in reversing a nonsuit in the instant case, it would seem that its statements relating to the establishment of malpractice through the admissions of the defendant should be applied only with caution.

JOHN A. ALEXANDER

CRIMINAL LAW—CONVICTION ON ACCOMPLICE TESTIMONY—SUFFICIENCY OF CORROBORATING EVIDENCE — Defendant was convicted of first degree burglary on the testimony of an accomplice and other evidence. The accomplice testified that while drinking in a bar he was approached by defendant and invited to participate in a burglary; that as he remained outside the victim's apartment, defendant forced the latch with a blue banded strip of celluloid and entered; that after taking money and traveler's checks they retired to a bar. Independent evidence established that the two were together before and after the burglary; that defendant had in his possession a celluloid strip with a blue band; that the defendant was arrested wearing some of the clothing purchased by the accomplice with the stolen money while on a shopping spree with defendant. On appeal to the Supreme Court of Montana, *held,* affirmed. The testimony of the accomplice was sufficiently corroborated. *State v. Harmon,* 340 P.2d 128 (Mont. 1959) (Justices Bottomly and Adair dissenting).[1]

Under early Montana law the testimony of an accomplice was sufficient in itself to sustain a conviction.[2] When the statutes were codified by the territorial legislature in 1871 the requirement of corroboration was added.[3]

[15]Lashley v. Koerber, 26 Cal. 2d 83, 156 P.2d 441, 444 (1945). See generally 70 C.J.S. *Physicians and Surgeons* § 62 (1951).

[1]The dissenting opinion considers at length other less important evidence presented in the instant case.

[2]Laws of the Territory of Montana, 1864, Criminal Practice Act § 12, at 178.

[3]Laws of the Territory of Montana, 1871-1872, Criminal Practice Act § 316, at 238. The law provided that "a conviction cannot be had on the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense or the circumstances thereof."