

I have been assigned a subject of imposing breadth: JURISPRUDENCE and ITS RELATIONSHIP to NURSING. I plead guilty of being a student of and having some familiarity with jurisprudence; but I will not likewise plead to relationships with nursing or nurses, except to admit I doubt, on the occasions my health required their solicitous and skillful attention, that I was a rewarding and desirable patient. I recall very vividly an operation I had to undergo about a year ago. After the operation I became rather distended with gas. I suppose as a lawyer you might say even on my back, weakened from drugs and surgery, I was true to my profession, I was full of hot air. They had a stomach pump in me and I was being fed intravenously. Some orderly or something dressed in white came in to clean me and the room up. She tugged at the stand that the stomach pump was on, clumsily pushed the glucose or dextrose bottle to the side, which by the way was attached to me by way of a needle, and seemed very much annoyed with me when I groaned and beseeched with my eyes and grimaced face more gentle movement of the objects in the room attached to my needle pricked and scalpel punctured body. I kind of got the feeling that she was more set on clearing me out of the hospital and society permanently than on cleaning the room and me up. I suppose a patient prone on his back is prone to view with a jaundiced eye the necessary operations of Florence Nightingales. What did Shakespeare say? "When I was sick, you gave me bitter pills."

Of course, I did not come here to recount my jousts with the men and women in white, although it is perhaps a sign of old age that I have related what I have. Older people,

particularly women, seem to get a morbid pleasure from recounting their operations and displaying their scars. Fear not; I do have the presence of mind not to make a spectacle of myself by exhibiting my operation cicatrixes.

I approach this subject somewhat in the manner a novice surgeon might approach a very fat patient on the table, there is so much to deal with I do not know where to start in.

Law: its meaning and relationship to medical practice

Forensic medicine is taking on greater and greater importance. Personal injury litigation has become a specialized field of law. Lawyers need to know much about medicine and doctors and nurses need to know much about law. But even more important for the welfare of society there is a great need for more cooperation and mutual understanding. We are all members of important professions which mean we have a responsibility to render public service that only incidentally should bring personal financial gain. Since you are concerned with nursing education, I will deal primarily with nursing. Although there are many significant differences and distinctions in the law as far as nurses and doctors are concerned, I should say at the outset, ". . . A nurse is regarded as especially equipped to render professional services to patients when called on to do so, and accordingly, nurses are grouped with doctors and lawyers rather than with cooks and chambermaids." In other words, nurses are judged by the law by professional standards of conduct. This is the reason why you are required to get special training for

certification and registration. As nurses, you are expected to have special skills.

The presumption and requirement that you have special skills impose special standards of competence ^{and} conduct upon you toward the state and public, hospitals, physicians, and patients. I will deal only very briefly with your relationship with the state and public. From my reading of the outline of subjects to be dealt with here, I noticed that this phase of the subject has, I believe, been assigned to others. Suffice it to say that the growing importance of nursing has resulted in the enactment of many statutes affecting nursing. Articles 4513 through 4528c of Vernon's Civil Texas Statutes Annotated deal with the Board of Nurse Examiners, the accreditation of nursing and educational programs, the certification of registered nurses, and licensed vocational nurses.

The purpose of such a statute is to protect the general public against incompetent and unskilled nurses, and it is with this in mind that our courts interpret such acts. 36 Dickson L. Rev. 117 (1931). Article 4525 provides for the filing of complaints in County Courts by the Board of Nurse Examiners to revoke certificates where a nurse is guilty of "gross incompetency, malpractice, dishonesty, intemperance or any other act derogatory to the morals and standing of the profession of nursing."

This brings me to the subject of negligence and malpractice, which I am instructed you are especially interested in me talking about. I will discuss it in connection with the nurse's

relation to the hospital, physician, and patient.

I need not quote statistics to emphasize the increased incidence of civil suits against doctors for malpractice and negligence. There used to be a kind of gentlemen's agreement among professionals, especially medical doctors, not to participate in the prosecution of suits against each other. The fraternal cohesion among doctors has caused some annoyance among personal injury lawyers, although lawyers are just as brotherly when malpractice suits ^{are} brought by legal clients against lawyers for bungling cases.

Medical societies have re-acted by more responsibly policing themselves, I suspect not too little influenced by the skyrocketing insurance premiums imposed upon the profession for protection against such, now more frequently, ruinous suits. Personal injury lawyers in California are breaking new ground in this area--and I might say they are breaking many doctors in the process. Malpractice suits are messy matters that should be guarded against as you guard against diseases. But do not expect a diminution of cases; the success of the California lawyers is spreading. I might say the increased knowledge in medical science of the lawyers has a lot to do with this. Perhaps, increased knowledge in law of doctors might be a healthy antidote, or should I say anti-biotic, to this spreading virus of malpractice litigation--I am getting mixed up in my metaphors and medical terms, I believe anti-biotics are not effective against viruses.

A nurse's position is quite similar to a doctor's with qualification. "Nurses should be liable to no higher degree

of care than physicians or surgeons. The same standard of care would seem to be applicable relative to the duties of a nurse toward the patient, as those of a physician toward the patient. . . .The degree of care and skill required of physicians and surgeons is not the highest possible, but only that which is reasonable and ordinary, and in determining the standard of care and skill which the law requires, the state of scientific knowledge at the time must be considered. Ibid, 123.

Let us get down to cases. Cases are tedious, but a lawyer cannot talk very well without being tedious. In Smith v. American Cystoscope Makers, Inc. 44 Wash. 2d 202, 266 P. 2d 792 (1954) and action was brought for malpractice against a doctor, and a salesman of a hospital supply company was joined in. The plaintiff suffered two third degree burns on either thigh during a prostatic resection. Plaintiff received three jolting shocks during the operation. A Wappler Electro-Surgical Unit was used for the operation. The Court discharged the jury holding evidence insufficient to establish malpractice or negligence. Malpractice consist in doing or refraining from doing something which recognized standards of medical practice require. Recognized standards of medical practice are measured by standard medical practice in the community. No testimony or evidence was given in the case to establish such practice or show deviation from such standard. Probably a friendly doctor could not be obtained to so testify for the plaintiff. Medical testimony must be given in this kind of case. An exception to this rule is where negligence is so grossly apparent that a laymen would have no difficulty in recognizing it.

Surgery cases where sponges are left in the patient might fit such an exception. Incidentally, nurses are usually involved in these cases. A doctor usually cannot absolve himself of liability because of a nurse's negligence or error here. See Ault v. Hall, 119 Ohio St. 442, 164 N.E. 518 (1928), Nice questions of agency are involved here--master-servant doctrine. Although I am taking too long, I must get into this important subject. However, I am now trying to establish and state the general standard of care imposed upon doctors and thus nurses.

Before I go into this master-servant problem, I should like to here point out that demonstrative evidence is in part overcoming some of the problems of obtaining medical testimony to establish standard practice and deviation from same. Skill in posing hypothetical questions regarding procedure, diagnosis, and reading into evidence authoritative medical treatises have made it possible to overcome a little of the reluctance of professionals to testify against each other. I know of no case, at least none comes to mind, where a doctor came right out and said another doctor was negligent. We are here dealing with a problem of proof. Ybarra v. Spangard, 25 Cal. 2d 486, 154 P. 2d 687 (1944) 93 Cal. App. 2d 43, 208 P. 2d 445 (1949) is very significant because in this case all of the doctors, nurses, and hospital employees connected with an operation were held liable, in part because none would testify to the facts, and thus, no doubt some innocent parties were held liable with those actually at fault. The plaintiff underwent

an operation for appendicitis and woke up with a traumatic injury to his shoulder. The doctrine of res ipsa loquitur was applied. This latin maxim literally translated means the thing speaks for itself. This doctrine is invoked (and by the way this is an excellent example of circumstantial evidence) where:

- a. The accident is of a kind which ordinarily does not occur in the absence of someone's negligence, and
- b. The apparent cause of the accident is such that the defendant would be responsible for any negligence connected with it, and
- c. The possibility of contributing conduct which would make the plaintiff responsible is eliminated.

Some authority suggests the additional requirement that evidence as to the explanation of the accident must be more readily accessible to the defendant than to the plaintiff. Prosser On Torts, 199 (1955)

The implications of Ybarra case and its application of the res ipsa doctrine are farreaching and its reverberations are sounding loud in California and its echoes can be heard here in Texas and other parts of the country.

I believe I have already talked long enough, but I feel that, at the risk of aneasthetizing all of you, I must say more about the nurse's relation with the hospital, doctor, and patient. The complexity and intricacy of these matters do not admit of short, simple statements. Yet I will try to be very brief. From a standpoint of a hospital's responsibility for a nurse's action, she is not regarded as the hospital's servant just as a doctor is not so regarded, thus the hospital is not ordinarily liable for a nurse's negligence. For the purposes

of Workmen's Compensation, of course, you want to be regarded as servants or employees of hospitals. Of course, it is hardly possible to so classify a special nurse. Public hospitals generally are not liable for the negligence of either doctors or nurses. Private hospitals are more frequently held liable.

"Whatever may be the rule as to the master and servant relationship between the nurse, the hospital and the patient, the great weight of authority establishes the principle that nurses, in the discharge of their duties, must obey and diligently execute the orders of the physician or surgeon in charge of the patient, unless, of course, such order is so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to the patient from the execution of such order or performance of such direction. Certainly, if a physician or surgeon should order a nurse to perform an obviously negligent act, no nurse would be protected from liability for damages for undertaking to carry out the orders of the physician. 54 Dick. L. Rev. 280, 284 (1950).

Regardless of who employs a nurse, the surgeon is the master in the operating room and cannot tolerate any other voice in the control of his assistants, but even here the nurse may incur legal liability. Saint Paul Mercury Indemnity Co. v. St. Josephs Hospital, 212 Minn. 551 (1942). In a case where a laparotomy sponge was left in the plaintiff's abdomen following a Caesarian section a \$10,000 verdict was rendered against the hospital, the operating surgeon, the student nurse

and the operating nurse taking part in the operation. On appeal the judgment was set aside as to the student nurse, since in these circumstances the super-vising nurse was responsible, but the judgment against the other defendants was affirmed.

Of course, a nurse is under a duty to exercise care in attending and nursing her patient.

I am now going to prematurely draw my remarks to a close. I have said nothing regarding the special problems of nurses in administering drugs and anesthetics, as witnesses, and in regard to confidential communications. Nothing has been said about criminal liability for participating or aiding in an illegal operation, such as an abortion. The refinements and ramifications of the master-servant problem have hardly been adequately dealt with. Worst of all I have not told a single droll story regarding nurses and doctors who are the brunt of so many jokes and cartoons in magazines and books--this is because my memory failed to recall a single racy story. And surely it breaks my heart that I do not have time to inflict more pain and suffering upon you by relating more of my tender experiences at the hands of the ladies in white during my sojourns, travels, and travails in the cloistered catacombs of the nursing and healing faiths. I hope my broken heart will infect your hearts with indulgence so that you will honor me in the future with another invitation to visit you here at your fine school on this great college campus.

Thank you.