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**TORTS—LIABILITY OF A TORT-FEASOR FOR THE AGGRAVATED INJURIES RESULTING FROM A PHYSICIAN'S NEGLIGENCE IN TREATMENT OF THE ORIGINAL INJURY<sup>1</sup>**

In any tort case which results in serious physical injury to a person there arises in addition to the liability for the original tort the possibility of liability resulting from the malpractice or negligence of the attending physician. It would seem that in all instances where an aggravation of the original injury occurs there either should or should not be liability depending upon whether, legally speaking, the ultimate injury can be traced to the original injury as a proximate result thereof. But an examination of the cases shows that different rules of law will apply in different situations, depending upon which of the two parties concerned, the injured person or the tort-feasor, hires the physician. A review of several typical cases illustrating the distinctions that have been made and the reasons therefor will be given here along with a criticism of the reasons in the cases and the results thereof, plus a suggestion of a general rule of law applicable in all cases.

The first rule of law which will be considered is that which concerns the liability of the tort-feasor for the aggravated injuries when the injured person employs the physician. By unanimous authority it is held that if the injured person uses reasonable care in the selection of the physician the tort-feasor will be answerable for any aggravated injuries resulting from malpractice or negligence of the physician.

In determining liability in these cases the courts have relied upon the doctrine of "proximate cause." For example, in *Suelzer v. Carpenter*,<sup>2</sup> the court said that the risks incurred by the plaintiff were due to the fault of the defendant and that the aggravation of the original injury must be held the "proximate result" of the defendant's original negligence. The court further said that the only duty incumbent on the plaintiff was to use reasonable care in the selection of his physician. A much earlier case contains the statement that the malpractice of a physician comes within the "mischievous consequences that may reasonably be expected to result."<sup>3</sup> An early Maine case<sup>4</sup> and a modern Texas case<sup>5</sup> express the view

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<sup>1</sup> This note will not deal with the situation involving the negligent hiring of a physician by either the tort-feasor or the injured person.

<sup>2</sup> *e. g.* Notes (1920) 8 A. L. R., 506, 507.

<sup>3</sup> 183 Ind. 23, 107 N. E. 467 (1915)

<sup>4</sup> *Stover v. The Inhabitants of Bluehill*, 51 Me. 439 (1863) which contains this quotation from *Rigby v. Hewitt*, 5 Exch. 240 (1850)

<sup>5</sup> *Ibid.*

<sup>6</sup> *City of Port Arthur v Wallace*, 141 Tex. 201, 171 S. W 2d 480 (1943).

that so long as the plaintiff conducts himself as would a reasonably prudent man under the circumstances, which could include the hiring of a physician who negligently aggravates the harmful effect of the original injury, the tort-feasor will be answerable for all.

It may be concluded that if the aggravated injury is the "proximate result" of the original injury and the plaintiff used reasonable care in selecting the physician that he will be allowed to recover for the complete injury from the original tort-feasor. The defendant will not be liable, of course, where it can be shown that the resultant aggravated injury was not the "proximate result" of the original tort. This is brought out in the cases of *Purchase v. Seelye*<sup>8</sup> and *Bush v. Commonwealth*.<sup>9</sup> In the former case the attending surgeon mistakenly operated upon the plaintiff and in the latter case the attending physician communicated scarlet fever to the plaintiff. Both of these acts of negligence were held to be superseding causes which cut off the aggravated result from the original tort. The reason advanced for this conclusion in each instance was that the ultimate aggravation was a result of conduct which was not a normal incident of the risk.<sup>10</sup> In the former case the court advanced the following reasoning: "the unskillful or improper treatment must have been legally and constructively anticipated by the wrongdoer as a rational and probable result of the first injury. This is the true test of responsibility."<sup>11</sup> There are cases, the circumstances of which are very similar, which have arrived at the opposite conclusion.<sup>12</sup> Seemingly therefore, the determination of whether or not a certain resultant aggravation comes within the legal risk of the injury has been left to a very large extent with the courts with

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Some courts seem to impose liability for all consequences and ignore the theory of law of proximate cause; the only thing which would lessen the degree or extent of liability being the failure by the injured person to use reasonable care in selecting the physician. Relatively little regard was given in these cases to the question of whether or not the injury was an incident of the risk. *Scholl v. Grayson*, 147 Mo. 652, 127 S. W. 415 (1910) *Elliott v. Kansas City*, 174 Mo. 554, 74 S. W. 617 (1903), *Seeton v. Dunbarton*, 73 N. H. 134, 49 Atl. 944 (1905) *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359 (1906) *O'Donnell v. Rhode Island Co.*, 28 R. I. 245, 66 Atl. 578 (1907)

<sup>8</sup> 231 Mass. 434, 121 N. E. 413 (1918).

<sup>9</sup> 78 Ky. 268 (1880), See also, *Moss v. Pardridge*, 9 Ill. App. 490 (1881).

<sup>10</sup> PROSSER, TORTS (1941) 362.

<sup>11</sup> *Purchase v. Seelye*, 231 Mass. 434, 121 N. E. 413 (1918)

<sup>12</sup> *Youmans v. Padden*, 1 Mich. N. P. 127 (1870) as cited in note (1920) 8 A. L. R. 506, at 511 (where a physician erred in judgment and amputated a thumb) *Loeser v. Humphrey*, 41 Ohio St. 378, 52 Am. Rep. 86 (1884) (where the physician failed to use the "ordinarily approved treatment") *Selleck v. Janesville*, 100 Wis. 157, 75 N. W. 975 (1898) (where a diseased nervous system resulted from an improper treatment of a dislocated ankle).

great latitude for difference of judicial opinion. A sound criticism of the result reached in the above-mentioned cases is given in *Prosser on Torts*, where it is said, "It would seem that the risk of contagion and of the routine mistakes of hospital employees, would be a normal incident of an injury which requires hospital treatment."<sup>13</sup> In this criticism the writer concurs.

As to those cases where the negligent physician was hired by the tort-feasor, the general rule is that the tort-feasor is not liable for the physician's negligence if he used reasonable care in selecting him.<sup>14</sup> In following this rule in the case of *Union Pacific R. Co. v. Artist*,<sup>15</sup> the court stated that no liability would attach for the aggravated injury if the tort-feasor gratuitously furnished the hospital accommodations and medical treatment. It was further stated that his only duty in such a case was to select a competent physician. Continuing, the court said that the doctrine of *respondent superior* would not apply. The reason given was that the furnishing of the gratuitous services was simply to undertake to "exercise ordinary care in the selection of physicians and attendants who are reasonably competent and skillful, and (the tort-feasor) does not agree to become personally responsible for their negligence or mistakes."<sup>16</sup> In addition, the court stated that these persons "must, after all, leave the treatment of the patients to the superior knowledge and skill of the physicians. They cannot direct the latter, as the master may ordinarily direct the servant, what to do, and how to do it."<sup>17</sup> An exception to the general rule stated above has been made in the case of medical services furnished by the tort-feasor for profit.<sup>18</sup> This situation arises where a corporation or company maintains a hospital or medical personnel for the company employees and derives a profit from the running of said hospital or from the services of said personnel.<sup>19</sup> In this situation the courts have been unanimous in declaring that liability for the aggravated injury must fall on the tort-feasor, the company.<sup>20</sup> Such a distinction as has been drawn between gratuitous and non-gratuitous services has been justified on the ground that where one furnished physicians and

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<sup>13</sup> PROSSER, TORTS (1941) 362, n. 74.

<sup>14</sup> Notes (1920) 8 A. L. R. 506, 515.

<sup>15</sup> 60 Fed. 365 (1894).

<sup>16</sup> *Id.* at 367.

<sup>17</sup> *Id.* at 368.

<sup>18</sup> *Kam v. Arizona Cooper Co.*, 14 Ariz. 566, 133 Pac. 412 (1913); *Bowman v. Southern Pacific Co.*, 55 Cal. App. 734, 204 Pac. 403 (1921); *Owens v. Atlantic Coast Lumber Corp.*, 108 S. C. 258, 94 S. E. 15 (1917); *Texas & Pacific Coal Co. v. Connaughten*, 20 Tex. Civ. App. 642, 50 S. W. 173 (1899); *Neil v. Flynn Lumber Co.*, 71 W. Va. 708, 77 S. E. 324 (1913).

<sup>19</sup> *Ibid.*

<sup>20</sup> No cases have been discovered which have held contra or which included dicta which might indicate that a different result would ever be reached so long as the element of profit existed.

facilities, for profit, on the one hand, one was considered a master who had the power of control; whereas, in the cases where the physician is merely procured for the benefit of the employees, without profit to the employer, " the company could not be held to have agreed to treat the injured employee through the agency of a physician, but only agreed to procure him the services of one, <sup>21</sup>

Aside from the exception just noted it is seen that the law has followed two different lines of reasoning in arriving at the results afore-mentioned. By the use of the doctrine of "proximate cause" liability for the aggravated injury has been placed on the tort-feasor who left to the injured person the responsibility of employing a physician to attend his injury while the theory of "duty" has operated to absolve the tort-feasor of further blame where he could show reasonable care in selecting the physician. An answer as to why these two different views have been applied to almost identical situations with opposite results will not be ventured. No reason for such practice has been found in the cases.

Having considered the present theories of law regarding the two general classes of cases and having found their application seemingly to be inconsistent the following question arises: Should not one principle of law apply in both cases which would lead to similar decisions regardless of who hires the physician?

It is suggested that the question should be answered in the affirmative. The following reasons are put forth as supporting this contention. First, it is believed that the doctrine of "foreseeability" will, in the great majority of cases, work justice. Liability, under this doctrine, is based upon the actual foreseeability of the original tort and if the event of aggravation by the physician, although itself actually unforeseeable under the circumstances, occurs as a natural or proximate result, there should attach liability for all. Second, it is believed that in the application of this doctrine liability should result regardless of whether the tort-feasor or the injured person hired the physician. For example, if A should injure B and the injury were later aggravated by C, a physician, no matter which of the two, A or B, hired him, so long as they used reasonable care in doing so, if the original injury was actually foreseeable as a result of A's conduct and the aggravation is the "natural and proximate result" thereof, B should be awarded damages from A for the resultant injury. If such aggravation was not the "natural or proximate result" of the original injury B's remedy should be confined to what he might obtain from the physician.

In concluding it might be well to formulate a rule of law to govern liability in both classes of cases, which might read as follows:

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<sup>21</sup> Richardson v. Carbon Hill Coal Co., 6 Wash. 52, 32 Pac. 1012 (1893)

Any person who negligently injures another is liable not only for the immediate injuries suffered as a result thereof, but also for any aggravation of those injuries caused by the malpractice or negligence of a physician where it is shown that the aggravated injuries were the natural and proximate result of the original injury which was itself foreseeable.

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