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TORTS

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Chapter 6

Professional Liability

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Chapter 6

PROFESSIONAL LIABILITY

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I. INTRODUCTION*

A. DEFINITION AND SCOPE

1. The expression "professional liability" as used here connotes the responsibility in general of the professional person in the exercise of his profession. In addition to civil liability, this embraces obligations enjoined by the criminal and disciplinary laws.¹ This chapter is concerned, in the main, with the professional person's civil liability to make reparation for damage or injury caused by improper performance of the duties entailed in the discharge of professional functions.

B. PROFESSIONAL LIABILITY AND THE LAW OF TORTS

2. Save exceptionally,² professional liability has not hitherto been dealt with as an integrated and distinct topic. The efforts in various countries have been confined mainly to expanding the law applicable to individual professions, such as physicians, attorneys, architects, *etc.*³ Yet, an integrated treatment of professional liability generally would have particular usefulness for various reasons. It would highlight common problems, compare solutions worked out in individual professions and, above all, show the extent and manner in which general principles of civil liability have been adapted to the profes-

sional class.⁴ On this view an integrated treatment of professional liability in a separate chapter needs little justification.

The bulk of subject-matter under this head in most modern laws would appear, at first sight, to fall within the scope of the law of contract in a broad sense.⁵ Some justification is therefore required for including this comparative study in a volume devoted to the law of torts. For this purpose, it is useful to draw provisionally a line between the COMMON LAW, on the one hand, and other legal systems, on the other hand.

i. Common Law Systems

3. *Historical development.* – The position of professional liability in the COMMON LAW system is an outcome of historical development⁶ which has been described as "coterminous with the history of negligence".⁷ Negligence here refers not simply to careless conduct, but to a specific tort comparable to the general tort in the FRENCH Civil Code.⁸ Among the first reported negligence cases in the COMMON LAW were suits against persons who had undertaken to do something and who had injured the other contracting party by doing it badly or unskillfully.⁹

In fact, by the old writ of *assumpsit* – which in ENGLISH law preceded the development of the modern action in contract¹⁰ – persons engaged in

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Prof. L.A. Colombo: Latin America, Spain, Portugal; Dr. H. Ent: Austria; R. Faupel and M. Jungbäck: Germany; Prof. S. Jørgensen: Scandinavia; Prof. Koichi Bai: Japan; Dr. H. Luntz: Australia; Prof. M. Mattenci: Italy; M. Platzer: United States of America; Dr. H. Souleau: France; R. Terry: Ireland; Dr. Marija M. Toroman: Socialist countries.

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¹ WEST GERMANY: *Rabel* 4; USA: Comment, Professional Negligence: 121 U.Pa.L.Rev. 627, 645-649 (1973).

² FRANCE: *Savatier, J.; Tunc*, *Ebauche* 136-158. WEST GERMANY: *Deneke*, *Die freien Berufe* (Stuttgart 1956); *Kairat*, *Professions oder freie Berufe* (Berlin 1969). ENGLAND: *Eddy*; USA: *Roady and Andersen*; ITALY: *Cattaneo*.

³ See generally *Kötz* 613.

⁴ See *Giesen* 47 and *Tunc's* comment in his book review, *Rev.int.dr.comp.* 1977, 237.

⁵ See *Cheshire and Fifoot* 9.

⁶ See, *inter alia*, *Charlesworth and Percy* s. 12 and 1004; *Hadden* 240, 242; *Milsom*, *Historical Foundations of the Common Law* (London 1969); *Street* 206; *Schmitthoff*, *Der Zivilprozess als Schlüssel zum englischen Rechtsdenken*: *JZ* 1972, 38, 39-40; *Poulton* 346, 352.

⁷ *Wade*, Foreword to *Roady and Andersen* p.V.

⁸ Art. 1382-1383.

⁹ See generally *Winfield* 184, 186-190; *Prosser*, *Borderland* 381, 383, 389.

¹⁰ For a lucid account of how the writ (which originally sounded in tort) became expanded to contract, see *Cheshire and Fifoot*, Introduction 3-19.

a profession or a skilled trade were held liable for damage caused by their failure to exhibit a degree of competence, skill and care normal for persons engaged in such calling. Traditional doctrine had made professional negligence applicable to the occupations of farriers, smiths, innkeepers, surgeons, common carriers, and public officers.¹¹ At an early date, case law made duties of care in tort to operate against the professional not only for misfeasance but also for nonfeasance, *i.e.* where there was failure to act altogether. When later the action of assumpsit became the general action for breach of contract and it became possible to sue professionals in contract, ENGLISH courts nevertheless held that a distinct claim for damages would lie for breach of the duty of care imposed by law.¹² *Turner v. Stallibrass*¹³ established that an action in tort will lie where the plaintiff need not rely on any special contract. Where the plaintiff is entitled to a remedy even in the absence of a contract, such action is in tort.¹⁴

As we shall see, this solution is not the law at present followed by ENGLISH courts. But in the UNITED STATES actions in tort survive in many jurisdictions, irrespective of the existence of any alternative remedy in contract.¹⁵

4. *The modern conception.* – The principle underlying the modern conception in the COMMON LAW¹⁶ is that the exercise of professional functions, including the so-called liberal professions, in itself operates to impose a duty of care. Where there is a contract in fact, liabilities both in tort and in contract will co-exist. Where no binding contract exists, liability in tort ought to lie in any event.¹⁷ The law of tort thus continues to play a central role with respect to professional liability in the COMMON LAW countries. This clearly justifies a composite treatment of professional liability in this volume.¹⁸

ii. Other Legal Systems

5. *The "nature" of professional liability.* – The

¹¹ *Street* 207.

¹² *Brown v. Boorman* (1844), 11 Clark & Finlay 1, 8 E.R. 1003 (H.L.).

¹³ [1898] 1 Q.B. 56 (C.A.).

¹⁴ See *Poulton* 346, 366.

¹⁵ *Prosser*, *Borderland* 390-391, 407.

¹⁶ *Poulton* 367-370.

¹⁷ *Prosser*, *Torts* 618; see further *idem*, *Borderland* 384, 420-465. *Flint & Walling Mfg. Co. v. Becket*, 167 Ind. 491, 498, 79 N.E. 503, 505 (1906).

¹⁸ See *Esso Petroleum Co., Ltd. v. Mardon*, [1976] 2 All E.R. 5 (C.A.): "...in the case of a professional man the duty to use reasonable care arises not only in contract but is also imposed by the law apart from

same substantive justification is valid with regard to other legal systems. A closer examination of professional liability shows that, regardless of any systematic classification of responsibility in individual instances (in contract or in tort), liability is essentially founded on the professional's conduct in a given situation falling short of standards expected by law. Professional liability is essentially responsibility for breach of a "legal duty of care", regardless of whether such legal duty is contractual, statutory or otherwise. Thus, even where a contract exists, this kind of liability is not strictly "contractual" in the traditional narrow sense of the term, but one imposed independently by the law.¹⁹

6. *Duty of care towards third parties.* – It is a consequence of this nature of professional liability that absence of a contract does not preclude the recognition of a duty of care, which, in certain circumstances, may operate in favor of third parties. It is true that certain legal systems, such as the FRENCH, SWISS and GERMAN, apply contractual rules in such cases. But this transposition from the delictual to the contractual field is a consequence of the different organization of delictual and contractual responsibility in these particular countries. It does not affect the true nature of this liability which remains in essence tortious.²⁰

Other chapters in this volume will (1) review the present differences and the connection between liability in tort and liability in contract (ch. 12 s. 10-72), and (2) conclude that the nature of liability should not have any significant consequence (ch. 1 s. 44-48).

A composite treatment of professional liability is, therefore, justified also from the point of view of other legal systems.

C. BASES OF LIABILITY AND DELIMITATION OF ANALYSIS

i. Bases of Liability

7. *General aspects.* – The treatment of profes-

contract and is therefore actionable in tort...²¹ (*per Lord Denning*).

¹⁹ SWITZERLAND: *Jäggi*, *Zum Begriff der vertraglichen Schadensersatzforderung: Festgabe Schönenberger* (Fribourg 1968) 181-197. ENGLAND: *Treitel* 166-169; FRANCE: *Savatier*, *J.* 217-225, 311-325; WEST GERMANY: *Dunz* 21.

²⁰ WEST GERMANY: *von Caemmerer*, *Wandlungen des Deliktsrechts: Festschrift Deutscher Juristentag II* (Karlsruhe 1960) 49, 65; *Schmidt, Eike*, *Nachwort zu Rudolf v. Jhering, Culpa in contrahendo: Staub, Die positiven Vertragsverletzungen* (Berlin and Zürich 1969) 131-164. FRANCE: *Mazeaud and Tunc I* no. 90-2, 206-2; USA: *Comment, supra* n. 1.

sional negligence in the various legal systems is intimately associated with historical developments, doctrinal weaknesses or special needs. Examples are afforded by the requirement of "consideration" in the ENGLISH law of contract, the various ways in which delictual and contractual liability under different laws is organized, and the principle excluding concurrence of contractual and delictual claims in certain legal systems.

On the other hand, the relationship between *fault* and the concept that professionals do not ordinarily contract or undertake to bring about a specified result, *e.g.*, to cure the patient (*infra* s. 14) or win a case (*infra* s. 84), is dealt with by the various legal systems under different constructions and systematic classifications. The comparative method will lead, of course, to a comparison of the various solutions to certain individual problems in terms of practical results. However, to achieve a genuine comparative understanding of the solutions found in individual legal systems, it is essential that the position which such solutions occupy in the context of the respective system should first be clarified.

It should be noted, however, that the law of professional liability cannot remain unaffected by the trend observed in all countries towards either a "commercialization" of professionals or their integration as employees into labor relationships.²¹

Regardless of the differing peculiarities of various legal systems, liability for professional negligence essentially is based upon this idea: violation of a duty of care gives rise to liability only if the professional acted with fault. We shall briefly examine the two elements involved in this statement.

8. *Duty of care.* – Where a person sustains damage, the approach of the COMMON LAW is to consider whether in the circumstances the professional owes a duty of care.²² A similar approach is reflected in GERMAN law which uses terms such as *Schutzinteressen* (protected interests), *Schutzpflichten* (duties of protection) and *Verkehrssicherungspflichten* (duties of securing intercourse).²³ In countries such as FRANCE, AUSTRIA and the EUROPEAN SOCIALIST bloc, where a general tort liability exists, the enquiry is whether the professional was at fault, as measured against the partic-

ular standards which his profession imposes upon him.²⁴

It is generally agreed that recognition of a duty of care – the pivotal issue in the law of torts – is a matter of policy which varies with time and place. The binding effect of such duties of care in the absence of a contract is mainly justified by the confidence with which the public resorts to, and uses, the professional's services. Such confidence is the more understandable as the professional holds himself out to the public as possessing specialized knowledge and skills. The state itself reinforces such confidence by granting licences for the practise of the respective professions, usually only after official examination of the necessary qualifications.

9. *Liability for fault.* – The professional's liability is basically a *liability for fault* as understood in the special sense illustrated in the following sections. In this area of the law, the idea of liability based upon fault is still dominant – a feature which strikingly distinguishes it from certain other areas, where a trend toward liability without fault is observed. This is due to the traditional tendency of the courts in all countries to make allowance for the errors of professionals. They realize that a finding of negligence against a professional is a serious matter for him.²⁵ More than the adjudication of damages against him it is the injury to his reputation involved in a finding of negligence which is important. On the other hand, the existence and steady expansion of professional liability insurance in recent times has resulted in a relaxation of the courts' special treatment of professional liability, particularly where money claims are involved. This has disturbed the entire law of professional liability.

ii. *Delimitation of Analysis*

10. Since individual solutions have been developed in the light of the peculiarities of individual professions in different countries, as affected by historical causes, as well as the variety of services offered by such professions, it would seem appropriate to predicate our comparative analysis upon the position of certain individual professions.

In view of the different content of the obligations involved, the professions selected as best

²¹ See Savatier, *J.* 359-366.

²² ENGLAND: *Street* 272.

²³ WEST GERMANY: Note Lorenz on BGH 6 July 1965, *JZ* 1966, 143-145 with references.

²⁴ FRANCE: *Mazeaud and Tunc* I no. 206-2, 90-2, 416,

423, 439, 444; AUSTRIA: *Gschmitzer* 150; EAST GERMANY: *Becker* 54-61.

²⁵ As remarked by Denning, L.J., Foreword to *Edy*, p. VII.

sued to our purposes are the traditional professions of the physician, the attorney, and the architect. We shall concern ourselves in this survey primarily with the professional as a person,

i.e. his liability for his personal fault or error in the exercise of his profession, rather than his liability as a person in charge of any organized enterprise.²⁶

²⁶ See *Mazeaud and Tunc* I no. 671, 705-8.

II. PHYSICIANS

11. The term "physician" as used in this subchapter covers not only the generalist physician, but also the various specialists, such as surgeons, anaesthetists, dentists, etc. These various classes of physicians are considered in their different professional situations, i.e. either in individual or group practice, or as employees of, or as contracting parties with a private clinic, or as state employees.

We shall concentrate on two points in connection with the physician's liability, firstly, its legal classification and, secondly, the content of fault in general and of negligence in particular.

A. CLASSIFICATION OF PHYSICIAN'S LIABILITY

The physician's liability is classified as either contractual or non-contractual.

i. Contractual Approach

12. *General remark.* – Countries with a basically contractual approach include CENTRAL EUROPE (SWITZERLAND, GERMANY, AUSTRIA) and GREECE on the one hand, and the FRENCH influenced countries (FRANCE, BELGIUM, ITALY) on the other.

13. *Central Europe and Greece.* – In SWISS law, the contract between physician and patient is classified as a mandate, whereas in GERMAN and GREEK law, as a contract for services.²⁷ The different classification is due to the fact that in GERMANY and GREECE the rules of mandate apply only to a gratuitous undertaking.

According to the prevailing view in GERMANY, a contract for services is implicit in every specified surgical operation.²⁸ A minority believes that it is a contract for work (*Werkvertrag*).²⁹ However,

²⁷ SWISS CO art. 394 ss.; WEST GERMAN CC § 611 ss.; GREEK CC art. 648 ss.

²⁸ *Staudinger and Nipperdey (-Mohnen and Neumann)* II 3 no. 185 preceding § 611 with references; but cf. comments by *Rabel* 75-79.

²⁹ *Palandt (-Gramm)* (ed. 24, 1965) no. 2a preceding § 611 with references; but cf. now *Palandt (-Putzo)* (ed. 34, 1975) no. 2a bb preceding § 611.

³⁰ *Enneccerus and Lehmann* § 150 no. I 2.

³¹ *Esser*, *Schuldrecht* II § 76 no. II 1; but see for AUSTRIAN law the remarks by *Gschnitzer* 72.

³² See *infra* s. 14-15; see also *Giesen* 47; *Dunz* 24.

³³ *Hübner and Drost* 6-7; *Soergel and Siebert (-Mühl)*

because one cannot predict the outcome and results of an operation,³⁰ this minority concedes that what is owed is simply the immediate result of the work, namely, performance of the operation itself with proper skill and care, not a cure nor even an improvement in the patient's health.³¹ This narrow interpretation of the purpose of the contract for work rests on the uncertainty and impossibility of predicting the outcome of a treatment since this clearly lies beyond the physician's control. This interpretation performs the same "function" as the FRENCH distinction between mere obligations for prudence and diligence on the one hand and obligations for a specified result on the other hand.³²

When no contract exists between physician and patient, the CENTRAL EUROPEAN laws will base the physician's liability upon extra-contractual rules, such as *negotiorum gestio* and tort. However, the physician must be treating the patient. In that event, the physician is generally liable to him for any damage that may occur through defective performance.³³

14. *France, Belgium and Italy.* – FRENCH and BELGIAN courts, as well as the majority of legal writers, have always acknowledged the possibility of a contract for medical services to exist between a physician and his patient. This contract has invariably been recognized as the basis for the physician's claim to fees. Most legal writers believe that this is a variation of the contract for work.³⁴ Whilst admitting the contractual character of the physician's liability, the FRENCH *Cour de cassation* has also expressly stated that this is a contract *sui generis* (*contrat innommé*).³⁵

Nevertheless, until 1936 where a physician through inadequate, careless discharge of his medical duties had caused damage, FRENCH and BELGIAN courts required the party seeking recov-

III no. 6 preceding § 677 and no. 3 preceding § 679; *Eberhardt* 66, 68, 197; *Rabel* 7-8.

³⁴ *Louage d'industrie* or *contrat d'entreprise*; see *Colin and Capitant (-Julliot de la Morandière)*, *Cours élémentaire de droit civil français* II (ed. 10 Paris 1948) no. 928, 1086.

³⁵ See the references in *Mazeaud and Tunc* I no. 148 n. 5ter; *Savatier*, J. 215-216; *Ryckmans and Meert-van de Put* I no. 223; *Savatier a.o.* no. 238; Cass.civ. 13 July 1937, D.H. 1937, 571 and opinion of Attorney-General *Matter* in Cass.civ. 20 May 1936, Gaz. Pal. 1936.2. 41.

ery to proceed under the general rule on tortious liability in CC art. 1382. The injured person thus had to prove the physician's fault, regardless of whether or not a contract with the physician existed. In doing this, the courts seemed to endorse the view of some writers,³⁶ according to whom the services of a professional person, especially physicians, by their very nature, repel a legally binding civil contract. But the court's deeper reason for adopting this approach has been the difficulty of defining precisely the content of the physician's primary obligation. If the claim for damages was to rest on contract, the rule of CC art. 1147 would necessarily apply. According to this provision, fault is presumed against the obligor until he disproves non-performance or defective performance or establishes that damage is due to an event for which he is not liable. On this view, the patient would only have to prove that he was not cured or that his health deteriorated or that he sustained some other damage occasioned by the treatment to cast on the physician the burden of proving that he was not at fault. It was correctly thought that such proof would be hard, if at all possible, for the physician to produce. It was further thought that such burden of proof would tend to render more difficult the performance of his task and paralyze both his activity and the progress of medical science to the ultimate detriment of patients.

But this conclusion was based on a faulty assumption concerning the physician's primary obligation. It was assumed that the subject of the contract between the physician and his client was the curing of the patient or the success of the operation. This, however, is contrary to the nature of things, considering that there are imponderable factors that determine the progress of the patient's health or the outcome of an operation or the side effects of a treatment. Once it was grasped that the physician does not undertake to cure a patient, but simply to apply his medical care diligently in conformity with the

rules of humanity and the data of medical science, the way had been paved for the FRENCH and BELGIAN courts to recognize the contractual character of the physician's liability in damages. The classical decision of the FRENCH *Cour de cassation* of 20 May 1936³⁷ endorsed the view that the relationship between the physician and his client is contractual, resulting in an obligation not to cure the patient, but to offer him medical help conscientiously and diligently, in conformity with the data and advances of medical science. As expressed in a more recent decision of the same court, such care must conform to the *current* data and advances of medical science, in the sense that the current level of scientific progress should be taken into consideration. Breach of this contractual obligation entails liability of a contractual character. FRENCH as well as BELGIAN courts have since accepted this view.³⁸

Non-contractual liability is only relevant in the case of damage to a third party or where services are rendered to a patient in a hospital or clinic when the patient is not in a position to consent to treatment.³⁹

The burden of proof that conscientious and diligent medical care in conformity with the rules and data of science have not been provided is on the injured person.⁴⁰ Such proof, however, sufficiently establishes the physician's failure to perform his obligation.⁴¹

This development was assisted by the theoretical work of legal writers, who revealed the fundamental distinction between obligations to produce a specified result (*obligations de résultat*) and obligations to be diligent and prudent (*obligations de moyens*).⁴² The key figure was *Demogue*.⁴³ The distinction has since received acceptance not only among FRENCH writers,⁴⁴ but also among the BELGIANS.⁴⁵ It is mainly the physician's primary obligation that serves as a model for the obligation for diligence. In fact, the physician is not treated as carrying responsibility for the results he has failed to achieve but for the means

³⁶ *Aubry and Rau*, *Cours de droit civil français* (ed. 5 Paris 1907) VI no. 446 p. 373 and IV no. 344 p. 533; for a refutation of this theory see *Savatier*, J. 203-206.

³⁷ Cass.civ. 20 May 1936, S. 1937.I.321, D. 1936.I.88, *Gaz.Pal.* 1936.2.41. See generally *Mazeaud and Tunc* I no. 148 and the references therein.

³⁸ FRENCH Cass.civ. 28 June 1960, J.C.P. 1960.II.11787 with note *R. Savatier*, *Rev.trim.dr.civ.* 1961, 112; see the references in *Ryckmans and Meert-van de Put* I no. 519.

³⁹ *Mazeaud and Tunc* I no. 508.

⁴⁰ Cf. Cass.civ. 23 June 1936, D.H. 1936, 344. As to clinics in particular, see Cass.civ. 6 March 1945, D. 1945, 217; *Cour Paris* 25 April 1945, D. 1946, 190,

note *Tunc*.

⁴¹ *Mazeaud and Tunc* I no. 148 p. 188.

⁴² See *idem* I no. 103-2 to 103-5 and the references therein.

⁴³ *Demogue* V no. 1237, VI no. 599.

⁴⁴ See *supra* n. 43, *infra* n. 47.

⁴⁵ Cf. *van Ryn*, *Responsabilité aquilienne et contrats en droit positif* (Paris 1933) no. 14; *De Page*, *Droit civil II* (ed. 3 Brussels 1960) no. 596; *Dalcq*, *Traité de la responsabilité civile I* (ed. 2 Brussels 1967) no. 515. On the appeal which this doctrinal discovery has had for the laws of other countries, see references in *Mazeaud and Tunc* I no. 103-2.

he has employed, *i.e.*, for diligent performance of the services. In terms of the practical administration of the law, the value of the distinction lies in the different burden of proof in each of these two categories.⁴⁶ The criterion for this distinction – which at the same time is a feature of the obligation itself – is the intrinsic uncertainty of the ultimate outcome.⁴⁷ Such outcome is dependent upon such unpredictable factors that the physician cannot possibly be treated as at fault if certain results do not follow. Indeed, it is more appropriate to regard a failure to achieve expected results as accidental, unless otherwise proved.

Under the ITALIAN Civil Code of 1942, the relationship between a physician and a client is treated as contractual and subject to the provisions of the special chapter on intellectual professions.⁴⁸ ITALIAN legal writers have accepted the FRENCH distinction between obligations to produce a specified result and obligations of diligence and prudence.⁴⁹

ii. Non-Contractual Approach

15. The non-contractual approach prevails in the COMMON LAW, SCANDINAVIA, JAPAN and the SOCIALIST COUNTRIES OF EASTERN EUROPE.

16. *England.* – It would seem that in ENGLISH practice in most cases of private treatment there is a contract between the patient and the physician. In conformity with general rules, a contract presupposes that the services to the patient entail some direct or indirect reward (consideration) from the patient himself or from a third person. The contractual consideration need not always be pecuniary. Even the patient's consent to treatment (which may be implied) may be sufficient consideration.⁵⁰ This is apparently based on the view that treatment or examination without a patient's consent amounts to trespass or assault. Theoretically, this explanation is certainly rather unconvincing. However, it may serve the good practical purpose of satisfying the (doubtful) requirement of consideration and thus facilitating the assumption of a contract.

⁴⁶ *Mazeaud and Tunc* I no. 103-3 n. 2, no. 103-5, 694-4.

⁴⁷ *Tunc*, La distinction des obligations de résultat et des obligations de diligence: J.C.P. 1945.I.449; cf. *Savatier*, J. 270-271; also *Mazeaud and Tunc* I no. 103-4 p. 118. See, however, *Frossard*, La distinction des obligations de moyens et des obligations de résultat (Paris 1965), Forword *Nerson*.

⁴⁸ Art. 2229-2238.

⁴⁹ *Bianchi d'Espinoza and Zhara Buda* 532.

The physician's liability in contract depends on what he contracted to do under the express or implied terms of the contract. Breach of a contractual duty of care is dealt with according to the rules of contract law.

Where a breach of contract is at the same time a tortious act, more specifically a tort of negligence, the physician is also liable in tort. The relationship between physician and patient being classified as a relation based on the performance of a profession (*supra* s. 3), the tort liability preceded the contractual liability and survives it.

The two causes of action are quite separate and the injured party may choose his remedies.⁵¹ This means that a contract, and therefore, consideration, is not essential for the plaintiff to succeed. A duty of care on the part of the physician needs no consideration moving from the plaintiff.⁵² *Diplock*, L.J. considered⁵³ that an accurate statement of the law was best set out in the judgment of *Greer*, L.J.:

“The distinction in the modern view, for this purpose, between contract and tort may be put thus: where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract”.⁵⁴

It can properly be said that there exists, based merely on status, a relationship which gives rise to a duty of care not dependent upon the existence of a contract between the parties.

Since the institution of the National Health Service in 1948, treatment in ENGLAND is most commonly given under it, the doctor being paid a salary by the state. Accordingly, there is no contract between physician and patient, the liability arising solely in tort. It is most unlikely that this would affect the standard or level of duty, for, as has just been pointed out, a minimum acceptable standard of conduct is implied by the

⁵⁰ *Everett v. Griffiths*, [1920] 3 K.B. 163, 193 (C.A.) per *Scrutton*, L.J.

⁵¹ Leading case: *Brown v. Boorman*, *supra* n. 12. See further *Fish v. Kaspar*, [1948] 2 All E.R. 176 (K.B.); *Salmond and Heuston* 10.

⁵² *Poulton* 346, 368.

⁵³ In *Bagot v. Stevens Scanlan & Co., Ltd.*, [1966] 1 Q.B. 197, 205, [1964] 3 All E.R. 577.

⁵⁴ In *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K.B. 399, 405 (C.A.).

law in any given situation.⁵⁵ Nowadays, care must be taken as much in the performance of a gratuitous undertaking, such as treatment under the National Health Service, as of one for reward.⁵⁶ The duty of care arises from the fact that the physician does something to a human being which may cause physical injury unless it is done with proper care and skill.⁵⁷ In relations between physician and patient, it is well settled that the physician owes a duty of care to the patient.⁵⁸ An example of liability to a person with whom the physician had no contractual relationship can be seen in the AUSTRALIAN case of *Samios v. Repatriation Commission*⁵⁹ where a consultant radiologist was held liable for failing to detect a dislocation which should have been revealed by X-ray films sent to him by a hospital. Such duty is, in truth, simply a legal duty, imposed by law on the physician.⁶⁰ Whether such duty should be implied and what standard of behavior the law should require of the physician⁶¹ are questions of policy.

The recognition in ENGLISH law of a definite legal duty of care arising from the mere relationship between physician and patient and independently of any contract corresponds to the figures of "social contact" (*sozialer Kontakt*)⁶² and *de facto*-contracts (*faktische Vertragsverhältnisse*) of GERMAN law. The latter are the basis for duties of diligence and protection where neither a contract nor the conditions for *negotiorum gestio* exist.⁶³ However, the consequences are quite different in the two legal systems. In ENGLAND, a violation of the duty of care will support an action in tort, whereas in GERMANY the rules of contractual liability become applicable, even though no contract exists.

17. *United States*. — AMERICAN courts recognize the right of an injured person to seek recovery from an incompetent or negligent doctor, upon whose services or special skill the injured party has relied. However, AMERICAN courts have

exhibited disagreement and inconsistency regarding the theory underlying actions for malpractice.

Much of the early development of professional liability of medical practitioners appears to have been based upon a "contractual" undertaking of a person holding himself out as belonging to a certain profession to exercise his profession with the skill commonly possessed by those engaged in it. But earlier decisions, antedating in this respect any fully developed theory of negligence as a separate basis of action, held a physician also liable in tort for malpractice, whenever foreseeable, unreasonable risk of personal injury to the plaintiff was involved. It was thus left to the plaintiff to elect between proceeding either in contract or in tort.⁶⁴

Although more recent decisions have not abandoned the view that the relationship between physician and patient is contractual and certain implied undertakings attach to it,⁶⁵ the emphasis today seems to be far more upon the law of negligence as a basis of liability.⁶⁶ A Circuit Court of Appeals has described the nature of the malpractice action as follows:

"It is true that usually a consensual relationship exists and the physician agrees impliedly to treat the patient in a proper manner. Thus, a malpractice suit is inextricably bound up with the idea of breach of implied contract. However, the patient-physician relationship, and the corresponding duty that is owed, is not one that is completely dependent upon contract theory... On principle then, we consider a malpractice action as tortious in nature whether the duty grows out of a contractual relation or has no origin in contract."⁶⁷

The last sentence of the above quotation presents the majority view. The gravamen of an action for medical malpractice, absent an express contract warranting cure, is usually held to be tortious.⁶⁸ An IDAHO court put this rule in the following terms:

⁵⁵ *Hadden* 240, 243-249.

⁵⁶ *Fleming*, Introduction 137.

⁵⁷ *Charlesworth and Percy* s. 1014, 1019.

⁵⁸ *Pippin v. Sheppard* (1822), 11 Price 400, 147 E.R. 512 (Exch.); *Gladwell v. Steggall* (1839), 5 Bing. (N.C.) 733, 132 E.R. 1283. For AMERICAN law see *McCoid* 17-21.

⁵⁹ [1960] W.A.R. 219.

⁶⁰ *Winfield*, *Province of the Law of Tort* (Cambridge 1931) 40, 64; *Street* 206, 208.

⁶¹ See *Treitel* 124.

⁶² About which see *Larenz* I (ed. 10, 1970) 92 n. 3 with references.

⁶³ See note *Lorenz*, *supra* n. 23.

⁶⁴ See on this development *McCoid* 14; *Prosser*, *Torts* 616-618.

⁶⁵ E.g., *Amer v. Akron City Hospital*, 351 N.E.2d 479 (S.Ct. Ohio 1976): Physician-patient relationship is contractual in character, either express or implied, and obligation thereby imposed upon physicians is to utilize requisite degree of care, not only in initial medical treatment of patient, but to continue to utilize such care thereafter as the case may require during continuance of physician-patient relationship.

⁶⁶ *McCoid* 15.

⁶⁷ *Kozan v. Comstock*, 270 F.2d 839, 844 (5 Cir. 1959).

⁶⁸ *Harney* 248.

"The gist of a malpractice action is negligence and not a breach of the contract of employment. While the contract rule is still used occasionally... it is generally recognized as being more of a device than a valid rule of law."⁶⁹

On the other hand, the mere refusal of a physician in breach of an agreement, to treat a patient, or to perform his service in a particular manner, supports only an action in contract. For example, after a stillborn delivery, a woman has been permitted to recover contractual damages for a physician's failure to perform a Caesarean section which had been agreed upon by the parties,⁷⁰ and a surgeon has been found guilty of breaching a contract by allowing another surgeon to operate on his patient.⁷¹

Although, it is generally accepted that a physician does not promise or undertake to accomplish an absolute cure when he undertakes to treat a patient,⁷² breach of specific agreements for guaranteed results or cures or of duties which are purely contractual as well as of those which impose higher standards of care are actionable on a contractual basis.⁷³

Generally, however, a patient can always sue in tort once the physician has undertaken to treat the patient and has been negligent or has failed to comply with accepted standards.⁷⁴ Where the remedy for breach of duty is considered to lie in tort, any allegation as to contract will be treated merely as a matter of persuasion to show the relationship between the parties.

As *Prosser* observes in a more general context "there has been a failure to think the thing through, and the courts have been little concerned with principles while preoccupied with the problem at hand. The borderland of tort and contract... [is] poorly defined. But the very uncertainty of the rules has permitted a degree of flexibility" which enables the court in each case to look to the purpose of the rule of law in question.⁷⁵

18. *Scandinavia*. – In SCANDINAVIAN law there is no complete agreement among writers whether the physician's liability is to be classified as contractual or tortious. As the physician-patient relation is usually based on contract, it would seem obvious that claims for insufficient treatment should be handled according to the rules of liability in contract. Since no SCANDINAVIAN country has any legislation governing physicians' liability, the law must be ascertained from rulings of the courts. Legal usage shows that the physician's profession is subject, in principle, to the general rules of the law of negligence. Accordingly, a physician is liable in damages when he has failed to maintain the safeguards of a competent and conscientious practitioner, and this has caused injury.⁷⁶

19. *Japan*. – In JAPAN, a negligent physician is liable to the patient in tort under the general tort of CC art. 709. Theoretically, a patient can also sue on the ground of the doctor's breach of contract (CC art. 415), but such suits are rare in practice.⁷⁷

20. *Socialist countries*. – The character of the physician's liability in SOCIALIST laws is in the first place conditioned by the fact that in many SOCIALIST countries the bulk of physicians are employed by state-owned hospitals or polyclinics. Their liability is, therefore, of the same order as that of any employee in any enterprise.

This means that the hospital alone is liable to the injured person under civil law,⁷⁸ and this will usually be a contractual liability.⁷⁹ The physician, in turn, is only liable to the hospital, under the rules of labor law.⁸⁰

B. ELEMENTS OF THE PHYSICIAN'S DUTY AND FAULT

21. *The questions raised*. – Once it is conceded

⁶⁹ *Billings v. Sisters of Mercy of Idaho*, 86 Ida. 485, 389 P.2d 224, 230 (1964).

⁷⁰ *Stewart v. Rudner*, 349 Mich. 459, 84 N.W.2d 816 (1957).

⁷¹ *Howell v. Carpenter*, 19 Mich.App. 233, 172 N.W.2d 549 (1969).

⁷² *Watterson v. Conwell*, 258 Ala. 180, 61 So.2d 690 (1952).

⁷³ *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (1929) (contract action); *Robins v. Finestone*, 308 N.Y. 543, 127 N.E.2d 330 (1955); *Colvin v. Smith*, 276 A.D. 9, 92 N.Y.S.2d 794 (1949). See also *Prosser*, Torts 165.

⁷⁴ See, e.g., *Yeager v. Dumnavan*, 26 Wash.2d 559, 174 P.2d 755 (1946); see also *Regan* 17, 29-30.

⁷⁵ *Prosser*, Borderland 451.

⁷⁶ Information from Prof. *Jørgensen's* report.

⁷⁷ The authors owe this information to the manuscript of a lecture by Prof. *Koichi Bai* entitled "Physician's Negligence Liability in Medical Malpractice Civil Cases in Post-War Japan".

⁷⁸ See, e.g., the EAST GERMAN Law of 12 May 1969, GBl. I 34; *Becker* 48.

⁷⁹ See *Becker* 49.

⁸⁰ According to information supplied by Dr. *Toroman* of the Institute of Comparative Law, Belgrade. On POLISH law see *Szpunar* 86, 89; *Grzybowski*. On HUNGARIAN law see *Eörsi*, Polgari no. 569; EAST GERMANY: *Becker* 47, 50; but see OG 8 Dec. 1956, NJ 1956, 478, which speaks of the physician-patient relationship as being a contract *sui generis*.

that there exists an obligation of diligence (duty of care), what are the elements of such obligation? And, correspondingly, what are the elements of fault where there is a breach of such obligation? The latter question has two aspects: firstly, what or how much care is owed in general and, correspondingly, for what degree of negligence is the physician liable? Secondly, what is the specific care owed in individual situations and, correspondingly, of what does negligence consist in such situation?

i. *The Contents of the Physician's Duty*

22. *In principle, no specific result owed.* – It is accepted in all laws that the physician does not in principle undertake to bring about a specific result such as the cure of a patient, success of an operation, etc., but only to use care in making a diagnosis consistent with the data and current rules of science and of using due care in the treatment or performance of the operation, etc.⁸¹ Therefore, it is generally admitted that, unless expressly contracted,⁸² a physician is not liable for failure to cure a patient, since his obligation does not normally include any warranty that cure or prophylaxis will follow.⁸³ As Chief Justice *Tindal* has said:⁸⁴

“Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable and competent degree of skill.”⁸⁵

In the same sense the Court of Civil Appeals of TEXAS held: “But in the absence of a special contract, a doctor does not insure or guarantee

results or even that surgery will be beneficial.”⁸⁶

An apparent exception is the case of a physician engaged in general practice who, although without specialized knowledge and experience, undertakes in a non-emergency situation treatment which requires specialized knowledge and experience. If the treatment fails, the conclusion will readily be drawn that this is due to the physician's unskillfulness. But the physician's liability in the context does not arise because of the poor result. It arises out of a fault, to which the adverse result and the damage are attributable, the fault being the physician's failure to refer the patient to a specialist. The competent practitioner will know when a case is beyond his skill; thereupon, it becomes his duty either to call in a more skilful person or to order the removal of the patient to a hospital where skilled treatment is available.⁸⁷ Similarly, when a consultant has taken over responsibility for a treatment, the competent practitioner may act on the specific instructions given to him by such consultant.⁸⁸ The principle which seems to emerge is that it is care, not skill, which is owed to the patient. That means that negligence does not consist in the lack of skill, but in undertaking the work without the necessary skill.⁸⁹

The rule concerning the scope of the physician's obligation and his non-liability in principle for the result *per se*,⁹⁰ derives from the very nature of the medical function, particularly the nature of the services expected by the public and rendered by the physician who has often to grapple with unknown forces frequently beyond his control. In fact, there is an important difference between the professional activities of a physician (or, in some measure, of an attorney) from those, for example, of an architect, or of persons holding themselves out as possessing special skills in general. Contrary to the latter persons, the physician is generally unable to rely on scientific facts and

⁸¹ See *supra* s. 13, 14 and 17.

⁸² *Charlesworth and Percy* s. 1013; *Rabel* 79; *Hübner and Drost* 4.

⁸³ FRANCE: *Mazeaud and Tunc* I no. 148; *Savatier*, R. 31-33; *Savatier*, J. 270-278, 325. BELGIUM: *Ryckmans and Meert-van de Put* I no. 229; ENGLAND: *Charlesworth and Percy* s. 1001; *Treitel* 726-727. USA: *Prosser*, Torts 165; *Curran* 7-8. SWITZERLAND: *Keller* 354; WEST GERMANY: *Rabel* 22, 75-79; *Esser*, Schuldrecht II § 76 II p. 144; *Giesen* 47.

⁸⁴ In *Lanphier and Wife v. Phipos* (1838), 8 Car. & P. 475, 173 E.R. 581, [1835-1842] All E.R. Rep. 421 (C. P.).

⁸⁵ See also FRENCH Cass.civ. 20 May 1936, *supra* n. 37.

⁸⁶ *Hood v. Philipps*, 537 S.W.2d 294 (Tex.Civ.App. 1976).

⁸⁷ FRANCE: *Savatier* a.o. no. 246; BELGIUM: *Ryckmans and Meert-van de Put* I no. 521; WEST GERMANY: *Gaisbauer* 221; *Geigel* 804; *Giesen* 49. USA: *McCoid* 61; Restatement of Torts (1934) § 299 comment d.

⁸⁸ *Junor v. McNichol*, The Times of 26 March 1959 (H.L.).

⁸⁹ *Salmond and Heuston* § 80(2) p. 223.

⁹⁰ See, e.g., *Loudon v. Scott*, 58 Mont. 645, 194 P. 488 (1920); also in *Prosser and Smith* 210, 212: “The gravamen of this case is negligence, and negligence cannot be inferred from the fact alone that the patient died...”.

calculations likely to assure complete certainty and safety. Rather he is confronted with unknown factors and numerous contingencies, the more so as, in spite of its progress, science has not so far been able to unravel everything concerning the human organism.⁹¹

23. *Exceptions.* — Where the physician uses a known treatment of which the outcome is certain, the element of uncertainty may be absent, as far as the specific result of the processes applied is concerned. In such cases the physician may be obliged to achieve a specific result.⁹² If the specific result does not occur or if damage or injury is caused by such activity, the physician is presumed at fault. To be absolved from liability, he must prove that the damage is due to a fact for which he is not responsible. This view has been accepted by FRENCH and BELGIAN courts in certain instances involving transfusion of contaminated blood, inaccuracy of laboratory tests, or use by a dentist of defective appliances made by himself.⁹³ The courts recognize an obligation for security (*obligation de sécurité*) to rest with hospitals for patients admitted therein as well as with physicians concerning their patients' life, bodily integrity and health. This in principle is an obligation for a specific result. It means that if damage or injury occurs, the patient has only to prove the causal nexus between the damage and the physician's default or the failure of any instrument used by him to raise a presumption of fault. This rule applies only where damage or injury arises from an illness other than that for which the treatment was primarily applied and one which occurs incidentally.⁹⁴ It is, therefore, correctly remarked in general that the courts are particularly cautious in this domain and will not award damages unless the cause of damage is attributable to a proved or certain negligence or incompetence.⁹⁵ For any medical handling

must perforce reckon with the secret and obscure forces of nature.⁹⁶

Another exception to the limited scope of a physician's obligations is presented by a promise to achieve a specific medical result, as contrasted with the general duty of diligence. However, the scope of such a promise may not always be clearly defined. There is a tendency to interpret such a promise, wherever possible, merely as an agreement to use the proper skill and care to accomplish the result.⁹⁷

ii. *The Degree of Care Owed in General*

a. *The Pretended Particularity of Professional Negligence*

24. *No liability for slight negligence?* — With regard to the degree of care owed by the physician in general, a number of legal writers, mostly FRENCH, took the view that physicians were not liable for slight negligence.⁹⁸ This view found favor with the FRENCH lower courts.⁹⁹ A similar view is not unfamiliar to SWISS law.¹⁰⁰ This view still prevails in the ITALIAN case law with respect to emergencies and serious cases,¹⁰¹ and finds legislative support in the provision of the ITALIAN CC art. 2236 relating to intellectual professions. It provides that where a person in order to perform his obligation, must resolve particularly complex technical problems requiring a background and specialization above the level of the average professional, he will not be liable for slight negligence but only for gross negligence and fraud.

So, too, the GERMAN CC § 680 provides that a person who acts in an emergency with a view to averting a hazard to another person shall be liable only for fraud or gross negligence, not for slight negligence.¹⁰² A similar provision can be

⁹¹ FRANCE: *Mazeaud and Tunc* I no. 103-4; *Chamard and Monzein* 106-108. WEST GERMANY: *Hübner and Drost* 12; *Rabel* 78. SWITZERLAND: *Keller* 354; ENGLAND and AUSTRALIA: *Fleming*, Torts 109-110 and the decisions referred to in n. 30.

⁹² *Staudinger and Nipperdey* (-Mohnen and Neumann) II 3 no. 156 preceding § 611.

⁹³ See cases and references to decisions in *Mazeaud and Tunc* I no. 148 n. 55 and 6; *Ryckmans and Meert-van de Put* I no. 230, 535 *ad finem*; *Savatier*, J. 274-277; *Savatier a.o.* no. 295.

⁹⁴ For relevant cases and references to decisions see *supra* n. 93, to which add *Mazeaud and Tunc* I no. 159-2.

⁹⁵ *Ryckmans and Meert-van de Put* I no. 230 p. 173.

⁹⁶ *Penneau* no. 217-223; *Rabel* 79.

⁹⁷ *Prosser*, Torts 165 n. 69.

⁹⁸ *Demogue* III no. 264; note *R. Savatier*, D. 1939.1. 49.

⁹⁹ See references in *Mazeaud and Tunc* I no. 507-510; *Rodière* 576; *Josserand*, *La renaissance de la faute lourde sous le signe de la profession*: D.H. 1939 Chr. 29.

¹⁰⁰ See BG 20 Feb. 1940, BGE 66 II 34, 36; 22 Dec. 1953, BGE 79 II 438; 12 Dec. 1961, BGE 87 II 372. Also see references in *Keller* 354-355.

¹⁰¹ See references in *Cattaneo* 79 ss.; *Comporti*, *Esposizione al pericolo e responsabilità civile* (Naples 1965) 318-319.

¹⁰² About the conditions under which this provision could exceptionally be applied to the physician's liability, see *Rabel* 79-81. In principle only the general rule of negligence is applicable; *Soergel and Siebert* (-Schmidt) II § 276 no. 35.

found in the GREEK CC art. 732. These justifications for excluding slight negligence are obviously influenced by historical distinctions derived from ROMAN law.

However, there are also substantial justifications for the exception in favor of physicians. It takes duly into account the nature of the emergency conditions under which the medical practitioner has often to perform his functions and the unforeseeable circumstances and factors involved. In this sense it was felt that it would not be equitable to hold the physician liable for slight negligence, seeing that he is called upon to make crucial decisions in haste and to act without delay, using such means as happen to be at his disposal.¹⁰³ It was felt that recognition of the physician's liability for any negligence, including its slighter forms, would tend to stifle the physician's initiative and would, at all events, assail the very essence of the liberal profession as resting on the client's confidence in his physician.¹⁰⁴

b. Return to the General Rule

25. *The standard: The reasonable medical practitioner.* – The theory of an *a priori* immunity of the physician for slight negligence does not, however, meet practical requirements, because it neglects the patient's reasonable interest in enjoying at all times as diligent a care as possible on the part of the physician. This circumstance has brought about a change in the case law of the countries referred to above. It may now be said that at present in practically all countries the general rule requires a physician to exercise complete care, that is, his own best ability, skill and care which should not lie below the care that would be shown in the circumstances by a reasonable, careful physician. Correspondingly, he is liable for any degree of negligence.¹⁰⁵ This rule does not, of course, disregard the peculiar nature of the physician's services as indicated earlier (*supra* s. 14-15). It develops this liability not by an *a priori*

reduction of the care owed by the physician, but by making allowance for the specific conditions under which the physician actually offers his professional services and which conditions must be taken into account before finding a physician liable.¹⁰⁶ To generalize specific circumstances and then come back to particular circumstances with a distinction between gross and slight negligence, is, as has been aptly remarked, a sinuous course.¹⁰⁷

26. *The standard in the Common Law.* – In ENGLISH law the doctrine has long been accepted that, in principle, "the degree of care which (a defendant) must exercise corresponds to the degree of negligence for which he is liable".¹⁰⁸ This means that the defendant must do what is reasonable in the circumstances.¹⁰⁹ The same is generally true with reference to AMERICAN law.¹¹⁰

The concept of negligence makes allowances for such specific circumstances as the urgency of the situation, the impossibility of transportation to a hospital, the scantiness or complete lack of drugs, instruments or disinfectants, and even the physician's frame of mind as affected by the pressure and other stress conditions. Only in the light of all these specific circumstances can it be determined whether or not negligence exists. In other words, in order to find whether the physician has, in the circumstances, employed the care he owed, it is first considered whether his conduct conforms to the standard of conduct to which a prudent, diligent physician of the same skill and perhaps in the same geographic area would have adhered in the circumstances.¹¹¹

It is interesting to note an observation of *J.C. Fleming*, who finds that in the COMMON LAW a discrepancy exists between legal theory and law in action. He says:

"...it is imperative for a realistic appraisal of the legal process to recognize the discrepancy, which is so marked in this context, between verbal theory, as reflected in jury instructions or court opinions on the one hand, and law in action on the other. In fact, there is a noticeable variance in the standard applied to different relations, in accordance with current notions

¹⁰³ Keller 355; Rodière no. 1424.

¹⁰⁴ See discussion in Savatier, *J.* 325-333; Penneau no. 217-223.

¹⁰⁵ See, e.g., FRENCH Cass.civ. 30 Oct. 1963, D. 1964, 81 with comment *R. Savatier*: "Toute faute du médecin engage sa responsabilité" (Any fault of the doctor makes him liable); also discussion in *Mazeaud and Tunc* I no. 509-511 with references to FRENCH and BELGIAN decisions; *Ryckmans and Meert-van de Put* I no. 517; *Savatier, J.* 325, 330, 333. ITALY: see references *supra* n. 101; SWITZERLAND: *Keller* 355.

¹⁰⁶ Rodière 577; *Mazeaud and Tunc* I no. 429-432.

¹⁰⁷ Rabel 80.

¹⁰⁸ *Lord Chelmsford* in *Giblin v. McMullen* (1868), 2 A.C. 317, 337, 16 E.R. 578 (P.C.).

¹⁰⁹ *Street* 125 pointing out that attempts to introduce categories of ordinary, gross and slight negligence have been successfully resisted by ENGLISH courts; *Salmond and Heuston* § 80(2): "Different degrees of negligence not recognised".

¹¹⁰ See *Prosser and Smith* 214-216.

¹¹¹ *Clerk and Lindsell (-Dias)* no. 856; *Street* 102. USA: *Prosser and Smith* 214.

of social responsibility and other factors bearing on the allocation of risks. For example, the standard tends to special stringency in the case of defendants like motorists and employers, who offer a well-recognized focus for loss distribution, particularly where insurance is either compulsory or widely held. In contrast, a discernable pattern of leniency prevails in judging the conduct of medical men whose professional reputation is peculiarly vulnerable to adverse verdicts...".¹¹²

iii. *The Specific Scope of the Duty of Care*

27. "Good medical practice". - The specific scope of the duty of care owed by the physician in a given situation is determined by the rules of medical science and art as adhered to by a prudent, diligent physician (conduct *lege artis*). Both from a legal standpoint and the rules of medical ethics these rules do not contain a command (*Geltungsanordnung*) as a matter of principle.¹¹³ However, they become legally binding since they are referred to by legal rules.¹¹⁴ Thus, the physician owes diligent conduct; and conduct *lege artis* is what in principle is regarded as diligent.¹¹⁵ In other words: "Good medical practice is the standard",¹¹⁶ which is to say, what is customary and usual in the profession.¹¹⁷

28. *The necessity of expert testimony*. - In view of the layman's ignorance as to medical matters, expert opinion is in principle required in order to ascertain the conduct *lege artis* and, correspondingly, to establish the physician's negligence in deviating from the standard of conduct required of the diligent physician.¹¹⁸

More precisely, as illustrated by FRENCH law,¹¹⁹ the medical fault may appear under three aspects: Firstly, in a given situation the physician's

conduct may be in conflict with the humanitarian principles which anyone exercising the medical function must respect and comply with; secondly, it may be that the medical fault consists in negligent conduct as currently conceived; thirdly, it may be that the physician fails to meet the minimum requirements of professional skill.

As far as the first two aspects are concerned, courts are in a position to and do ascertain the duties involved without having to resort to specialists or experts for help. But when it comes to a violation of the rules of good medical practice, the courts feel the need for expert aid. Naturally they retain the right to evaluate and eventually to reject the opinions of experts.¹²⁰ Again, in determining whether a scientific medical theory qualifies as "data of medical science" to which the physician must adhere, resort to expert opinion is equally necessary.¹²¹

In the UNITED STATES and other COMMON LAW countries, such as CANADA, civil liability cases are tried before civil juries,¹²² which are actually the tribunals of fact. Since juries composed of laymen are normally incompetent to pass judgment on questions of medical science or technique, it has been held in the great majority of malpractice cases that there can be no finding of negligence in the absence of expert testimony to support it.¹²³ Thus, without expert testimony the jury is not permitted to find that what is customarily done is negligent.¹²⁴ On the other hand, in charging the jury, the judge will usually make it clear that they should consider expert opinion and the reasons given for it, but that they are not obliged to accept it if in their judgment it is unsound. Where expert opinions are in conflict, the jury is instructed to resolve the conflict by accepting

¹¹² Fleming, Torts 120-121; cf., Salmond and Heuston § 80(2). For the USA cf., Prosser and Smith 214-216.

¹¹³ Larenz, Methodenlehre der Rechtswissenschaft (ed. 2 Berlin a.o. 1969) 182.

¹¹⁴ WEST GERMANY: Herschel 617; FRANCE: Mazeaud and Tunc I no. 94; ENGLAND: Friche 653-659.

¹¹⁵ Rabel 37; Hübner and Drost 12.

¹¹⁶ Regan 30; see also McCoid 70.

¹¹⁷ Prosser, Torts 167-168.

¹¹⁸ See generally USA: Morris, Testimony 1; McCoid 72, 78-85; Curran 4-6. WEST GERMANY: Franzki and Franzki 2225, 2228.

¹¹⁹ Savatier a.o. no. 310.

¹²⁰ Ryckmans and Meert-van de Put I no. 518-519. As regards the limits of expert opinion in ENGLISH law see Phipson (-Buzzard, Amlot and Mitchell), Phipson on Evidence (ed. 11 London 1970) no. 1280, and Hammelmann, Expert Evidence: 10 M.L.R. 32-39 (1947). See the Practice Notes at [1967] 3 All E.R. 208,

[1968] 1 All E.R. 447.

¹²¹ See note Carbonnier, D. 1955, 745; also further references in Savatier a.o. no. 315.

¹²² In ENGLAND trial by jury in civil cases is practically extinct: see Jacob, Adams a.o. (ed.), Annual Practice 1966 vol. I (London 1965) Ord. 36 r. 2 note "Discretion", and Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 & 24 Geo. 5, c. 36) s. 6. In any case it is restricted to actions of fraud, libel, seduction, false imprisonment, breach of promise to marry and malicious prosecution. See the judgment of the full Court of Appeal in *Hope v. Great Western Railway Co.*, [1937] 2 K.B. 130 (C.A.).

¹²³ *Shea v. Phillips*, 213 Ga. 269, 98 S.E.2d 552 (1957); see Prosser, Torts 167 and, generally, Morris, Testimony 1.

¹²⁴ *Trindle v. Wheeler*, 133 P.2d 425 (Cal.C.A. 1943) reversed on other grounds, 23 Cal.2d 330, 143 P.2d 932 (1943).