

# Medico-Legal Responsibilities

T. L. FISHER, M.D.\*

Privileges are the reverse of the coin stamped responsibilities and the medical profession can continue to deserve and retain its privileges only by discharging its responsibilities; failure to accept and discharge its responsibilities, as well as being wrong ethically and professionally, carries legal penalties which may include revocation of the privileges. The profession, therefore, if it is to retain its privileges, must have a clear realization of its duties and some of the reasons for them.

The basic duty of the profession, the reason all other duties have been imposed on the profession, the reason the profession exists, is to give patients the best medical care available. The modern means of fulfillment of this duty, all the activities combined that allow the fulfillment of this duty, have become so varied and complex that they almost conceal the duty itself. These means include, at one extreme, basic research which, if it is to be basic research, can have no obvious relationship to the prime duty, yet without which nevertheless the prime duty cannot be fully discharged; they range through a variety of apparently unrelated efforts until, at the other extreme, they include work done by non-medical people—government efforts, for example, to make medical care more easily available. All these must be recognized and used not as ends in themselves but as means whereby doctors may give patients the best medical care possible.

This has been a professional goal since medicine was first recognized as a profession. Significant success came only when government, acting on professional advice, began helping the profession exclude quacks, charlatans, untrained and incompetent persons from its ranks and provided the means to ensure that members of the profession should be persons of high character who have the requisite knowledge and the training and ability to use that knowledge. The means of working toward this end, the legal lines of authority, should be known by all doctors. The authority originates with the Queen and the Imperial Parliament from which, by means of the British North America Act, it is delegated to the provinces, which act through the provincial legislatures by means of the various provincial medical acts. Because the work of the profession and its manner of work depend on specialized knowledge not possessed by others, the power to govern itself has been delegated to the profession which exercises it through provincial colleges of physicians and surgeons. These are legal bodies, some members of which are elected and some appointed, and they have the power and the responsibility to govern the profession.

Their authority begins to be exercised long before a man becomes a doctor. As soon as he becomes a candidate for the study of medicine he becomes subject to the authority of a college which determines the educational qualifications he must possess before he may study medicine. The college, as well, may lay down his curriculum of study and how long it shall be. When he has finished that study the college will not yet let him start the practice of medicine; first he must satisfy the college that he has acquired sufficient knowledge and possesses sufficient ability to practise. This decision is reached after examination of the candidate by men with sufficient knowledge to undertake such an examination.

For obvious reasons there must be some uniformity from province to province in the training and knowledge possessed by doctors. Partly to attain this, even though

\*T. L. Fisher, M.D., C.M. (McGill), F.A.C.P.; Senior Physician, Department of Medicine, Ottawa Civic Hospital; Consultant in Medicine, Royal Ottawa Sanatorium, Ottawa, Ont; Secretary-Treasurer, Canadian Medical Protective Association.

medical licensure is a provincial right, most provinces have delegated the examination to determine the fitness for licence to practice to another body, the Medical Council of Canada which operates under the Canada Medical Act. This body, it must be clearly understood, does not licence the doctor to practice, it simply judges his fitness to practice. It does influence the type and quality of the training potential doctors get but, broadly speaking, it accepts the provincial estimate of the adequacy of the students' training, an estimate the province conveys to the Council by granting the candidate an enabling certificate. The Council sets the examinations, written and oral, and from the results of these along with its own judgment of the qualifications and character of a candidate decides whether he is qualified to be recommended to the province for a licence to practice. If he is judged properly qualified the Council gives him a certificate which attests this and the candidate may then apply to the province of his choice for a licence to practice.

It will be apparent how great is the effort to protect patients from ill-informed and incompetent doctors. These preliminaries assure that every man who is allowed to hold himself out to people as a doctor of medicine shall have had adequate training, pre-medical and medical, and shall have demonstrated that he has taken advantage of the carefully planned training.

Immediately a doctor is licensed and starts work, whether post-graduate work or practice, he becomes subject to a number of provincial acts: the medical act of his own province administered by the college of physicians and surgeons of that province, public health acts, general hospital acts, mental hospital acts, hospital insurance commission acts. How detailed the direction some of them give may be illustrated by the provision in most hospital acts that doctors must write histories and report physical examinations on all hospital patients within stated, short periods, often two or three days of admission, must have them done before any surgery and, in the case of operations, must state a pre-operative as well as a post-operative diagnosis.

*Compliments Of*

**JOHN CORDON**

*Jeweller*



WATCHES, DIAMONDS, JEWELRY

GIFTS FOR ALL OCCASIONS



Phone 423-6913

475 Barrington St. Halifax, N. S.

*Compliments Of*

**DIANA SWEETS**

*For The Best in Homecooking,  
Respect and a Smile*



POP

JOE and TOM

These acts influence or govern a doctor's work and, because each directs how some part of his work shall be done, it is the doctor's duty to know the relevant parts of these laws as they apply to the work he is doing; ignorance of the law is no excuse for failing to observe it. A doctor, for example, was asked to certify for admission to a mental hospital a patient whom he had known for some years to be mentally deranged. Though the doctor had not seen the patient recently and did not see him at the time, he nevertheless signed the committal papers wherein it was stated he had examined the patient. When the patient was discharged from the hospital he straightway threatened the doctor with suit on the grounds that he had not been insane at the time of his committal and that the doctor had signed a false statement. It would have been impossible to defend this doctor successfully; he did not know of his own knowledge that at the time of committal the patient actually needed to be committed; he did not see him and signed falsely that he did. That the doctor thought he knew the patient so well he did not need to visit him to complete the certificate and that he said he did not know the act specified he must visit him constituted no valid excuse. The doctor had to make a financial settlement.

In addition to these specific acts, each governing some part of a doctor's work, there is another and important body of law governing much of what a doctor may or may not do, the vast body of law called common law, which, in countries whose derivation is British, has grown up about all ordinary daily activities, privileges and responsibilities, manner and quality of work. Much of this law has not been written as statutes or acts, much of it has been promulgated by court decisions about ordinary, everyday things, decisions which proved to be so basic they could be applied to matters and occurrences other than those which gave rise to them. For example, negligence has been defined by Meredith (1) as a breach of one's duty to someone else by "the omission to do something which the average prudent person would do or doing something the average prudent person would not do". This definition, it can be seen, does not refer to medicine or things medical, yet it is big enough to embrace them and to form the basis of a judgment when it is claimed a doctor was negligent in a professional sense.

How this definition will be applied to a doctor when his conduct is questioned will be determined largely by the doctor himself: he will be expected to possess the knowledge and the skill in the application of the knowledge, that he held himself out to patients as possessing. The doctor who says he is and acts as though he were a general practitioner will, if his work be questioned, be judged as a general practitioner, one with a wide knowledge of the whole field of medicine but not necessarily with a profound knowledge of a small segment of medicine.

It needs to be remembered that a doctor by his actions can make claims for himself without stating them; his willingness to accept responsibility in specialized fields may imply, under some circumstances, a claim to special knowledge as strongly as though he spoke his claim; his willingness, or eagerness, on the other hand, under appropriate circumstances to seek advice and help from those with special qualifications in a special field will add confirmation to the statement that he is a general practitioner. Seeking specialized advice when it is necessary not only protects a doctor against charges that he allowed abroad false impressions of his field of competence but helps ensure what is the aim of all medical practice, the best possible care of patients.

The doctor who says he is and acts as though he were a specialist, if his work be questioned, will be judged by different standards. He may not be expected to have the wide knowledge of medicine that the general practitioner has but he will be expected to have and to have used a more detailed, precise and extensive knowledge in

the specialty he professes. Meredith says (2) "a specialist, for example, holds himself out as possessing special skill and knowledge, and it is his duty to have and exercise the degree of skill of an average specialist in his field. At the same time he would be expected to possess and exercise a greater degree of skill in that particular field than would a general practitioner."

Both groups, general practitioner and specialist, have a duty, an obligation, to continue their study throughout their professional lives, to keep themselves informed of advances in the art of medicine. The most easily available means of continuous self-education is to read reliable, current medical journals; medical meetings and planned refresher courses spice the reading with personal contacts with leaders of the profession. Whatever the means, the duty remains to keep one's knowledge up-to-date. In "Medical Negligence" (3) Lord Nathan says: "It may very well be negligent for a practitioner to adhere to a once-approved but now outworn and discredited practice."

The doctor who possesses adequate knowledge and skill for the duties he professes to be able to undertake has still another obligation to his patients. His work must not be slipshod, it must not be unduly hurried, such investigation and such confirmation of diagnosis as is possible must be made, such continued observation and such attempts as are necessary to recognize possible complications must be made. No matter how well informed the doctor may be, no matter how high a degree of skill he may have attained, to refute a charge of negligence he must be able to demonstrate he applied these things carefully.

None of these capabilities the law demands doctors must have, knowledge, skill, care, is easily demonstrable and susceptible to precise measurement; each is, rather, variable, ill-defined and imprecise. How, then, when it is charged a doctor lacked them, does a court reach a decision?

*Service . . . to the DENTAL PRO-  
FESSION IN THE MARITIME  
PROVINCES*

**MARITIME DENTAL  
SUPPLY  
Company Limited**

HALIFAX, N. S.—ST. JOHN, N. B.

*Compliments Of*

**WEBSTER'S CHINA & GIFTS  
LIMITED**

Halifax Shopping Centre

•

**WEBSTER & SMITH COMPANY  
LIMITED**

Wholesale China and Glass

178 GRANVILLE ST.

HALIFAX, N. S.

For purposes of this discussion courts may be thought of as places where disputes are brought; where an impartial person, trained and with a wide knowledge of the law, can hear both sides and reach a decision by applying law and decisions from previous judgments. The court may not, probably will not, have detailed knowledge of medicine and its practice; perhaps it is better so because, rather than try to decide from its own knowledge about the propriety of the practice that has been questioned, the court seeks advice from persons who are particularly well-informed about such matters—other doctors. It does not matter that doctors, when asked to inform courts about these matters, are called witnesses and often one or more are brought by each side to bolster the argument that side is putting forth, the fact remains that they are used by a court to inform it about the practice in question. It does not matter, either, that these experts may disagree on what each considers good practice; that way courts learn that medicine may be practised, that patients may be treated, in different ways but that the different modes of practice and methods of treatment may be equally good, that a method of treatment, for example, which is poor in the hands of a man untrained and unskilled in its use may be excellent in the hands of another doctor trained and skilled in its use.

Courts, then, ask other doctors their opinions of the matter in question, learn from them what would have been done under the same circumstances by an ordinarily good doctor in the same field as the doctor being tried. Courts, in the light of these opinions, decide whether or not a doctor had reasonable knowledge and skill for the work he held himself out as able to do and whether or not he used reasonable care in the application of his knowledge and skill.

Courts reach their decisions by bringing to bear on the problems not only their own legal knowledge and the knowledge from the doctors used as experts but a great deal of common sense, common sense that is the distillation of much previous legal

# PERSONAL CHEQUING ACCOUNT

We give you a statement of  
your account every month and a free  
wallet-size chequing kit.

CANADIAN IMPERIAL  
BANK OF COMMERCE

*Over 1260 branches to serve you*



experience gained dealing with medical matters. Courts do not demand, or expect, for example, that doctors will always be right in their diagnoses or treatments, they do not expect that the doctors will always be successful in the work they do for patients. Even if, in a case where the doctor's work is called into question, the result has been poor, that fact will not necessarily weigh in the court's decision. If it is not to weigh, however, the doctor must be able to demonstrate to the court's satisfaction that he had fulfilled the criteria of competent practice; that the poor result occurred in spite of his best efforts and not because of something less than his best.

Courts do not demand, either, that a doctor's competence and ability must be the highest possible; they recognize that men's capacities differ and vary, some men are more able and some less. As long as a doctor can demonstrate that he possessed adequate knowledge and skill for the work he undertook and applied them carefully he will not be penalized because it can be made apparent that another doctor might have had better judgment or more skill. A famous British judge, Lord Hewart (4) stated it this way: "The jury should not exact the highest, or a very high, standard, nor should they be content with a very low standard. The law requires a fair and reasonable standard of care and competence." Lord Nathan supplements this by saying: "Thus a medical man is certainly not answerable merely because some other practitioner might possibly have shown greater skill or knowledge."

In addition to his ability, by virtue of training and skill, to treat a patient, a doctor must seek and obtain his patient's consent before he administers any treatment whether it be diagnostic or therapeutic. A doctor must not treat a patient if that patient refuses to consent to the treatment. The doctor may have a heavy duty laid on him in a serious case or one of great urgency to persuade a patient that treatment is in his best interests or necessary to save his life, but if in spite of a doctor's greatest efforts the patient still refuses the doctor must not treat. There is only one exception to this rule and that is when a patient's illness or injury is of a kind or of such severity that the patient cannot appreciate his own need or give the necessary permission and where the delay necessary to obtain the consent would jeopardize the patient's recovery or life; then and only then may a doctor proceed without permission to do what is necessary. Indeed, a doctor who failed in these circumstances to do what is necessary for his patient might be legally liable for the results of his failure. Even under these circumstances, however, the doctor may not proceed further without permission than the point at which the patient's recovery allows him again to make his own decisions; from then on, as under all other circumstances, the patient must consent before the doctor can treat.

Obtaining permission is not the stumbling block it might seem at first glance. Most treatment is given patients without formal permission having been sought or obtained. Patients by their actions imply permission; they come of their own free will to doctors, having come they submit without any objections to examination, they accept advice and follow it. Such conduct constitutes implied permission and implied permission, if the circumstances are such as to confirm the implication, is valid. Experience has shown however that there are circumstances and occasions when implied permission should be regarded by doctors as insufficient; written permission should be sought and obtained. Generally speaking, written permission should be obtained where treatment, diagnostic or therapeutic, is likely to be painful; where bodily functions will be changed permanently; where treatment is mutilating—removal of organs, amputation of limbs. This written permission should be dated, signed by the patient in the presence of another person and witnessed by that person.

Even such written consent may be held by a court to be valid only if it has been preceded by an adequate explanation from the doctor. It should be, but unfortunately sometimes seems not to be, obvious that the patient must know what he is giving per-

mission for. The explanation should be carefully suited to the understanding of the patient, neither more technical and involved than can be understood by a dull person nor so vague and general as to be uninformative to an intelligent person; the explanation must be explanatory to the person for whom it is intended. It should lead to a request for permission for the specific procedure or treatment that is to be done and this should be named in the consent form. If for any reason more has to be done to a patient than was covered by the permission and if the patient makes a legal complaint of unauthorized treatment, medical or surgical, courts do not look kindly on blanket permissions, forms that purport to give the doctor permission to do whatever in his judgment proves necessary.

In a case that came to trial in 1955, Judge Doiron, in the Queen's Bench, Judicial District of Saskatoon, where the validity of a signed permission form was one point at issue and the lack of preliminary explanation another, said of these points: "The second part of the consent as to 'performing any further or other operation which may in his opinion be necessary' poses a rather serious problem. I cannot accede to the proposition that this consent covers such a wide field, and, of course, the latter part of the exhibit that the plaintiff acknowledged that the effects and results of such operation was explained to her is contrary to fact."

All courts recognize the occasional necessity for a doctor, without additional permission, to do more than was originally planned; if the extra proves to have been an inseparable part of the procedure for which consent was obtained, and if it was necessary that it be done immediately, a doctor will not be judged culpable for having done it; if the extra procedure, however, even though necessary ultimately, was not a logical extension of the original treatment and could have awaited further permission, courts may not recognize the extra as something for which permission was given.

In the same case mentioned above which had to do with the necessary but not immediately necessary removal of ovaries in a patient who thought only her appendix was to be removed, Judge Doiron said: "In my opinion the defendant acted in accordance with his best judgment and was possessed of the knowledge and skill to perform the operation, but in the final analysis it is for the patient to decide whether she consents to the operation and have the surgeon of her choice perform it . . . I am convinced on the evidence that the operation was necessary, but the failure to inform plaintiff and obtain her consent is a trespass on her person".

Another judge (6) said the same thing this way: "No amount of professional skill can justify a substitution of the will of the surgeon for that of the patient."

Doctors must, also, maintain professional confidence. This is primarily an ethical concept; it carries, however, legal overtones. The ethical rule was best stated by Hippocrates in the Hippocratic Oath: "And whatsoever I shall see or hear in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be wholly secret." (7) This, like all things in the Code of Ethics, is for the benefit of patients; unless they can be sure knowledge of their private affairs will be secret to their doctors they may not divulge information doctors need to make diagnoses and decide on treatment. The legal overtones of this ethical concept are as applicable, no more and no less, to doctors as to any other citizens. After saying that "everyone recognizes the ethical obligation upon a doctor to preserve in confidence the affairs of his patients", Dr. Kenneth Gray (8), in his book 'Law and the Practice of Medicine', goes on to say there is "support to the view that there is a legal obligation upon a medical practitioner to maintain secrecy regarding his patients' affairs." The more important point, however, is that no person, doctor or anyone else, has the right to divulge information, irrespective of how he learned it,

that may unnecessarily harm another and if he does so he may be responsible in damages for any harm done. Dr. Gray quotes Kitchin (9) as saying: "The essence of the Law is that every man has a right to maintain the estimation in which he stands in the opinion of others unaffected by false statements to his discredit. A man is therefore entitled to damages from a person who makes statements about him which expose him to hatred, ridicule, or contempt, or which tend to injure him in his trade or profession or in any office he may hold." So a doctor, though no more legally liable than another for the harm his remarks may do must be more careful than another about what he divulges because in the ordinary course of his professional work he may learn things that others would be unlikely to know.

In only one province in Canada may a doctor, on the ground that his information came to him in his capacity as a patient's doctor, refuse to answer questions about a patient in court. In all other provinces the doctor must divulge to the court whatever information he possesses that the court thinks it must have. It is considered that a doctor's duty to society overrides his obligation to a patient. Under these circumstances, of course, as long as such a statement is honest and unbiased, no successful action could be brought by an aggrieved patient against the doctor because of what the doctor had divulged. A doctor should, as a working rule, under any other circumstances consider that he must never, without a patient's consent, divulge to any third person any information about the patient.

In conclusion there are some general remarks that should be made about legal actions against doctors. Basically there is one reason and one reason only for a legal action against a doctor: some patient thinks the doctor was wrong. That the doctor may not have been wrong is unimportant if the patient feels strongly enough

## **STUDLEY PHARMACY LIMITED**

(FADER'S PHARMACY LTD.)

—§—

**6085 Coburg Road  
HALIFAX, NOVA SCOTIA**

—§—

**Phone 423-8159**

With the Compliments of

**Henry Birks & Sons (Mar.) Ltd.**

**Two Halifax Locations**

**495 BARRINGTON ST.**

**Tel. 422-6531**

•

**HALIFAX SHOPPING  
CENTRE**

**Tel. 454-8621**



that he was. It is very rare that a doctor has not contributed in some way to this feeling; he may have been, though fortunately he rarely is, careless or hurried in his work; he may have, and this is commoner, simply left the impression he was casual or hurried; he may have failed to give any explanation or he may have talked so much he confused the patient; there are so many small and unimportant things a doctor may have done or left undone, as well as some important things, that nearly always, as an action unfolds, it will be found the doctor contributed in some way to it.

In one very small group of cases this may not be true. There are a few people who try to blame somebody for anything bad that happens to them and the unfortunate doctor who treats one of these patients for something from which full recovery is not possible may expect to be blamed for something he could not prevent.

Commoner, however, are the people who simply do not understand what happened to them or why it happened and the trouble these people cause is due generally to failure on the part of doctors to inform them adequately about their illness or injury. This therefore is a preventable cause of trouble.

There is a still larger group of cases which arise because patients misunderstand or simply fail to understand some part of their doctor's handling of their illness. Some actions of this kind get to court and most of them are decided in favour of the doctors.

This leaves a small, hard core of cases, perhaps twelve or fifteen a year from among 18,000 to 20,000 practising doctors, in which doctors failed in their duty in some respect; some are obviously indefensible and financial settlement has to be made before they ever get to court; others get to court and if the doctors have failed, decisions are almost invariably against them. Carelessness is the outstanding characteristic of all these derelictions of duty.

These figures contradict the impression that many such actions are brought against Canadian doctors; in fact, very few are brought. The reasons are several. Canadians, generally speaking, are not a litigious people; the Canadian profession, generally speaking is conscientious and competent; the sense of responsibility of the Canadian legal profession discourages frivolous and nuisance actions; Canadian courts are notably fair and impartial and this discourages actions of little or no merit reaching court.

These latter two points have a tremendous effect on the manner of medical practice in Canada. Were doctors under the necessity of practising with a constant awareness that any slight slip and any poor result, whether or not preventable, probably would result in legal reprisals they could not be single-minded in acting in what they think to be the best interests of patients; they would be too busy trying to practise so that they would be legally invulnerable. When doctors must constantly be considering their own legal protection patients suffer because doctors, just to protect themselves, do more or less than otherwise they would.

#### REFERENCES:

1. Meredith, William C. J.: "Malpractice Liability of Doctors and Hospitals". The Carswell Company Limited, Toronto. (1956) p. xiii.
2. Meredith: *op. cit.* p. 62.
3. Nathan, Right Hon. Lord: "Medical Negligence". Butterworth and Co. (Publishers) Limited, London. (1957) p. 26.
4. Quoted by Nathan, *op. cit.* p. 21.
5. Nathan, *op. cit.* p. 21.
6. Garrison, J.: *Bennan v. Parsonnet* (1912) 83 N.J.L.R. 20, at 26.
7. Code of Ethics, Canadian Medical Association (1956).
8. Gray, Kenneth G.: "Law and the Practice of Medicine". The Ryerson Press, Toronto. (1947) p. 35.
9. Gray: *op. cit.* p. 36.

# DALHOUSIE UNIVERSITY

---

— Leading university in the Maritimes —

The Dalhousie Medical School maintains one of the largest continuing postgraduate systems for medical education in North America. Many regional courses are conducted in medical centres throughout the four Atlantic Provinces. The Department of Post Graduate Medicine will be glad to organize a course in your community.

For information please write to Dr. L. C. Steeves, head of the department, care of Dalhousie University, Halifax, N. S.

**All Maritime Doctors**

***10 % Discount***

---

**On All Medical Books**



**write:**

**STUDENTS' MEDICAL BOOK STORE**

**CARLETON STREET : HALIFAX**