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## MALPRACTICE IMMUNITY FOR THE PHYSICIAN: UNCONSTITUTIONAL, UNFAIR AND UNNECESSARY LEGISLATION

In August of 1963, the Pennsylvania General Assembly enacted a law<sup>1</sup> which purports to abolish a right of action for the negligence of a physician. The act exempts physicians from civil liability for malpractice arising from negligent treatment or care rendered at the scene of an accident or emergency.<sup>2</sup> Gross negligence and acts or omissions intentionally designed to harm are specifically excluded from this otherwise blanket immunity. There is no liability for negligence. Prior to this enactment, the physician would have been treated the same as any other "Good Samaritan." This law purports to accord him an immunity which this author believes to be unconstitutional, unfair and unnecessary.

### THE ACT IS UNCONSTITUTIONAL

The act is unconstitutional in that it abolishes a cause of action for negligence in complete derogation of the common law and in violation of the Commonwealth's constitution. In the Declaration of Rights of the Pennsylvania Constitution, every man is guaranteed a right of action for injury to his person.<sup>3</sup> This has been interpreted as being a limitation on the powers of the legislature. In *Passenger Railway Co. v. Boudrou*,<sup>4</sup> in holding limitation of damages to be unconstitutional, the court said:

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1. 12 P.S. § 1641.

2. Any physician . . . who happens by chance upon the scene of an emergency or who arrives on the scene of an emergency by reason of serving on an emergency call panel or similar committee of a county medical society or who is called to the scene of an emergency by the police or other duly constituted officers of the State or a political subdivision or who is present when an emergency occurs and who, in good faith, renders emergency care at the scene of an emergency, shall not be liable for any civil damages as a result of any acts or omissions by such physician or practitioner in rendering the emergency care, except any acts or omissions intentionally designed to harm or any grossly negligent acts or omissions which result in harm to the person receiving emergency care. 12 P.S. § 1641. Good faith is defined in 12 P.S. § 1642 but is not considered as adding anything to the substantial nature of the law.

3. Pa. Const. art. 1, § 11 provides: All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay . . . . Article 1 is entitled Declaration of Rights.

4. 92 Pa. 475 (1880). See also *Dolan v. Linton's Lunch*, 397 Pa. 114, 152 A.2d 887 (1959).

Its authority is in conservation of the reserved right to every man, that for an injury done him in his person, he shall have remedy by due course of law. The people have withheld power from the legislature and the courts to deprive them of that remedy, or to circumscribe it. . . .<sup>5</sup>

To further protect against encroachment on rights of the individual, the drafters of the constitution provided for the retention of common law rights of action not inconsistent with that document.<sup>6</sup>

Under the Emergency Acts, damages are denied to one injured by the negligence of a physician rendering emergency care. A limitation of damages for personal injury was early held unconstitutional as violative of the Declaration of Rights in the state's constitution. The court in the *Boudrou*<sup>7</sup> case said:

Nothing less than the full amount of pecuniary damage which a man suffers from an injury to him in his lands, goods or person, fills the measure secured to him in the Declaration of Rights. As well might it be attempted to defeat the whole remedy as a part . . . . A limitation of recovery to a sum less than the actual damage, is palpably in conflict with the right to remedy by the due course of law.<sup>8</sup>

On only one occasion has a limitation of damages been permitted and this was by constitutional amendment to provide for workmen's compensation.<sup>9</sup> That amendment specifically and in unambiguous terms prohibits such limitation in all other cases: ". . . but in no other cases shall the General Assembly limit the amount to be recovered for injuries. . . ."<sup>10</sup> If the General Assembly cannot limit a recovery, can they circumvent this constitutional prohibition by abolishing the right of action and in effect say no damages are recoverable? Clearly they cannot. Language of an early lower court decision which was affirmed by the Pennsylvania Supreme Court is most appropriate in this context:

It would also be a violation of section 21 of Article III, which says, 'No Act of the General Assembly shall limit the amount to be recovered . . . for injuries to persons or prop-

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5. *Passenger Railway Co. v. Boudrou*, 92 Pa. 475, 481, 482 (1880).

6. Schedule No. 1 (Adopted with the Constitution) § 2 provides: All laws in force in this Commonwealth at the time of the adoption of this Constitution not inconsistent therewith, and all rights, actions, prosecutions and contracts shall continue as if this Constitution had not been adopted.

7. *Passenger Railway Co. v. Boudrou*, 92 Pa. 475 (1880).

8. *Id.* at 482.

9. Pa. Const. art. 3, § 21 (Amendment of November 2, 1915).

10. *Id.*

erty.' If the Legislature cannot limit the amount of damages to be recovered, it cannot prohibit an action, for that would be saying no damages at all shall be recovered.<sup>11</sup>

Proponents of "Good Samaritan Immunity" for the physician argue that physicians refuse to render emergency assistance because of fears of malpractice actions.<sup>12</sup> Thus, as a basis for so sweeping an exercise of legislative power, the act is advanced as an exercise of police powers in encouraging emergency treatment and aid by physicians. It is readily admitted that under current case law, there is no duty to be a "Good Samaritan."<sup>13</sup> However, does the refusal of some unknown number of physicians to abide by their ethical oath justify, under a valid exercise of police powers, an encroachment upon and abrogation of the rights of the overwhelming majority? The answer must be no.

Rights may be limited in their enjoyment by the legislature acting under their police powers for purposes of preserving public health, safety and morals.<sup>14</sup> In all cases dealing with the exercise of such broad and all pervasive powers, decisions on the propriety of the exercise of police powers are couched in terms of limitation.<sup>15</sup> In all, the underlying theory is that while a presumption of constitutionality exists, there must, however, be some reasonable relationship between

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11. *Flaccus v. Smith*, 47 Pitts. 129, 131 (1899), *aff'd* 199 Pa. 128, 48 Atl. 894 (1901).

12. Kearney, *Why Doctors Are "Bad" Samaritans*, Reader's Digest, May, 1963.

13. The Pennsylvania Supreme Court in a recent decision said that there is no duty to go to the rescue of a person in a position of peril. *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959). But see *Wilmington General Hospital v. Manlove*, 174 A.2d 135, 140 (1961) in which the Delaware court speaking of a private hospital said: "As above indicated, we are of opinion that liability on the part of a hospital may be predicated on the refusal of service to a patient in case of an unmistakable emergency, if the patient has relied upon a well-established custom of the hospital to render aid in such a case . . ." See also PROSSER, TORTS, at 338-9 (3rd ed. 1964), in which he says: "This process of extension [of a duty] has been slow, and marked with caution; but there is reason to think that it may continue until it approaches a general holding that the mere knowledge of serious peril, threatening death or great bodily harm to another, which an identified defendant might avoid with little inconvenience, creates a sufficient relation, recognized by every moral and social standard, to impose a duty of action."

14. *Lutz v. Armour*, 395 Pa. 576, 151 A.2d 108 (1959); *Commonwealth v. Major*, 2 D. & C.2d 150 (1954); *Gambone v. Commonwealth*, 375 Pa. 547, 101 A.2d 634 (1954).

15. "But, as likewise there stated, the power is not unrestricted; its exercise, like that of all governmental powers, is subject to constitutional limitations and judicial review. . . ." *Gambone v. Commonwealth*, 375 Pa. 547, 551, 101 A.2d 634 (1954).

the enactment and some evil to be remedied.<sup>16</sup> If an evil does exist—the refusal of physicians to render emergency care for fear of malpractice suits—it is still not remedied by the act. There is no duty to render aid so that a physician can still refuse to become involved. If the law is to be meaningful, it must be assumed that the physician knows of its existence. He must also know that he may be susceptible to malpractice for gross negligence. How will he know that his treatment will not be construed as grossly negligent and thus not under the cloak of immunity? If he fears malpractice suits, will he now become aware of degrees of negligence as a basis for stopping or not stopping at the scene of an emergency? To say that there is a chance that some might stop where before they wouldn't have is just grasping at straws to justify so radical a departure from common law notions of responsibility for negligence.

The law is also unconstitutional as violative of two provisions of the state's constitution prohibiting class legislation and special immunities.<sup>17</sup> It is unconstitutional to grant to any class or individual a special privilege or immunity that all others are denied. Here, the law grants the cloak of immunity for negligence to physicians only. Is there any reason why the nurse, policeman or passerby is denied the same privilege that the doctor is accorded?

These provisions against class legislation were early held to mean that class legislation is essentially unconstitutional.<sup>18</sup> Cases involving such legislation have been before the courts on numerous occasions.<sup>19</sup> On one such occasion, the court formulated the appropriate rule as follows:

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16. See for example *Commonwealth v. Major*, 2 D. & C.2d 150, 154 (1954) wherein the court said: "It is doubtful whether the validity of this ordinance can be sustained as an exercise of the broad police power of the borough. For it to be valid, the courts must be able to see that the enactment has for its object the prevention of some offense, or manifest evil, or the preservation of the public health, safety, morals or general welfare."

17. Pa. Const. art. 1, § 17: "No *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed." Pa. Const. art. 3, § 7: "The General Assembly shall not pass any local or special law. . . . Granting to any corporation, association or individual any special or exclusive privilege or immunity. . . ."

18. In *Ayars' Appeal*, 122 Pa. 266, 281, 16 Atl. 356 (1888) the court said: "The underlying principle of all the cases is that classification. . . is essentially unconstitutional, unless a necessity therefor exists. . . ."

19. *Clark v. Meade*, 377 Pa. 150, 157, 104 A.2d 465 (1954) in which the court said: "The Act of 1953 clearly grants to individuals, in violation of the Article, a special or exclusive privilege or immunity. . . ."; *Kurtz v. Pittsburgh*, 346 Pa. 362, 31 A.2d 257 (1943); *Laplacca v. Phila. R. T. Co.*, 68 Pa. Super. 208 (1917), *aff'd* 265 Pa. 304, 108 Atl. 612 (1919).

The basis for classification must be reasonable and proper and founded upon a real, and not merely artificial, distinction between the members of the class and the general public, and based upon 'a necessity springing from manifest peculiarities, distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class, separately, that would be useless and detrimental to others.' . . .<sup>20</sup>

As will be discussed shortly, it is not only the physician who may be subjected to liability for rendering emergency assistance. Any Good Samaritan rendering emergency care in a negligent manner can be held responsible in damages for his negligence. This being so, what are the manifest peculiarities to justify class legislation for the physician?

In a somewhat analogous situation, the Pennsylvania Superior Court had before it an enactment granting to attorneys of record a lien for compensation upon their client's cause of action.<sup>21</sup> The court held the statute to be unconstitutional and remarked:

Such grouping is subject, however, to the qualification that the basis for classification must be reasonable and proper and founded upon a real, and not merely artificial, distinction between the members of the class and the general public. . . .<sup>22</sup>

### THE ACT IS UNFAIR

Even if the act could be construed as constitutional, it is, nevertheless, basically unfair. The physician is given all the benefits for merely doing his job while the truly Good Samaritan is given no consideration. Under the *Restatement of Torts*,<sup>23</sup> one rendering emergency aid from humanitarian instincts would be held liable for

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20. *Kurtz v. Pittsburgh*, 346 Pa. 362, 368, 31 A.2d 257 (1943).

21. *Laplace v. Phila. R. T. Co.*, 68 Pa. Super. 208 (1917), *aff'd* 265 Pa. 304, 108 Atl. 612 (1919).

22. *Laplace v. Phila. R. T. Co.*, 265 Pa. 304, 308, 108 Atl. 612 (1919).

23. RESTATEMENT, TORTS § 324 (1934) provides as follows: "One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge; (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him."

his negligence. That Pennsylvania will follow this Section is a reasonable inference based upon strong dicta in a 1955 decision.<sup>24</sup>

The physician who is granted that enviable immunity for his negligence is highly trained and, in most cases, has the benefit of some years of experience for rendering of care. If the layman renders care in the identical negligent manner as the physician, he can be held liable in damages. It is unfair and greatly disproportionate that one without medical training is held to a higher duty of care than one with medical training and experience.

At least one state's "Good Samaritan" law provides immunity only for the physician rendering gratuitous emergency aid.<sup>25</sup> The Pennsylvania counterpart does not require that humanitarian quality of gratuitousness. Consequently, under traditional applications of quasi-contractual principles and restitutionary remedies, such a physician, negligent or not, could recover for the reasonable value of his services.<sup>26</sup> The non-medical Good Samaritan cannot expect the law to imply a contract for his services regardless of how professional the services might be. The *Restatement of Restitution* lays down the rule as follows: ". . . a person who acts entirely from motives of humanity is not entitled to restitution . . ." <sup>27</sup> Where one undertakes to do that which he is under no duty to do, he does so gratuitously and cannot expect to recover for the benefit that may have been bestowed.<sup>28</sup>

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24. In *Karavas v. Poulos*, 381 Pa. 358, 368, 113 A.2d 300 (1955) the court said: "Under this section of the Restatement the good Samaritan incurs a responsibility avoided by those who 'pass by on the other side' . . ." Liability was denied on other grounds.

25. Neb. Laws c. 110, p. 349 (1961). See also Note, 41 Neb. L. Rev. 609 (1961).

26. RESTATEMENT, RESTITUTION § 114 Comment *c* (1937). See also the following Pennsylvania cases enunciating that principle: *McKeehan Estate*, 358 Pa. 548, 57 A.2d 907 (1948); *Pfeiffer v. Kraske*, 139 Pa. Super. 92, 11 A.2d 555 (1939); *Gibb's Estate*, 266 Pa. 485, 110 Atl. 236 (1920).

27. RESTATEMENT, RESTITUTION § 114 Comment *c* (1937).

28. *Pascarella v. Kelley*, 378 Pa. 18, 105 A.2d 70 (1954), reversed on other grounds; *Etter v. Edwards*, 4 Watts 63 (1835); *Bartholomew v. Jackson*, 20 Johnson 28, 11 Am. Dec. 237, 238 (1822) in which the court announced the appropriate rule as follows: "The plaintiff performed the service without the privity or request of the defendant, and there was, in fact, no promise, express or implied. If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as gratuitous, and it therefore forms no ground of action. . . ."

## THE ACT IS UNNECESSARY

The basis for "Good Samaritan Immunity" for the physician is advanced as a method of alleviating his fears of malpractice suits which it is said holds him back from rendering emergency care when called upon.<sup>29</sup> It is a rather broad assumption that the physician as a professional man refuses to perform the tasks of his profession for fear of negligence suits. It might well be that the physician's reluctance to stop at the scene of an accident is that same feature of human nature that holds most people back from being a "Good Samaritan." Most refuse to stop at the scene of an accident for they simply do not want to become involved. This is basic to man as man and can we say that physicians do not also react to an emergency in the same way?

Risk of malpractice liability in furnishing emergency treatment has been exaggerated out of all proportion. It is interesting to note that counsel for the American Medical Association has been quoted as agreeing with this exaggeration of risk statement.<sup>30</sup> A research of reported cases has failed to disclose one single malpractice suit anywhere resulting from negligence in rendering emergency care. Arguably, claims may have been advanced and settled so that no reported decision would be available. However, the likelihood of all being settled if in fact so many are presented is, to say the least, incredible. This tends to prove that there is no great incidence, if any, of malpractice suits arising from rendering of emergency treatment.

If the evil that is supposed to exist really existed—that physicians refuse to render emergency care from unfounded fears of malpractice suits—could not the legislature exercise its police powers and prescribe an affirmative duty on the part of physicians to render such aid when called upon or suffer the revocation of their license? Undoubtedly the legislature could prescribe such a duty consistent with the high standards demanded by the licensing statutes regulating physicians.<sup>31</sup> After all, the practice of medicine is by license which is a privilege subject to regulation by the licensor.

In all probabilities, courts would be prone to handle the Good Samaritan fairly so that this statutory immunity serves no purpose

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29. Kearney, *Why Doctors Are "Bad" Samaritans*, Reader's Digest, May, 1963.

30. Averbach, *Good Samaritan Laws*, Case and Comment, March - April, 1964.

31. 63 P.S. § 405 sets up qualifications for licensure which are rather demanding. 63 P.S. § 407 prescribes examinations by course and allows the Board some discretion in determining acceptability for licensure.



of protection against unfounded suits. A jury composed of ordinary individuals takes into consideration the exigencies of the situation and would arrive at a fair and impartial judgment accordingly. This fear of malpractice suits is unwarranted by the current trend of case law generally. It is a well known fact that malpractice at best is most difficult to prove and that there are no great number of suits instituted in this Commonwealth. Physicians are disinclined to testify against one another which makes the possibilities even more remote.

### CONCLUSION

Recognizing that an exaggerated and unsupported fear may plague some small group of physicians, can we warrant so drastic a legislative enactment on what in fact does not exist? We are now struggling to overcome Charitable Tort Immunity,<sup>32</sup> which has been struck down or modified out of effectiveness in most jurisdictions. Can we now afford to embark on an era of "Good Samaritan Immunity"? And if we do, precedence being what it is, where will it end? Justice Musmanno put it in words most appropriate:

The Law at one time proclaimed and upheld the rule (proved a million times wrong) that the king can do no wrong. In America the rule was changed to read that the government could do no wrong. Then it was said that hospitals could do no wrong, but all the while unoffending persons were being injured, crippled and even killed through the negligence of government employees and hospital employees; and recovery was constantly being denied the victims or the victims' families because of so-called rules of immunity which have no place in a code of equality and justice.<sup>33</sup>

The Emergency Act which proclaims that the physician is immune in certain cases of wrong doing has no place in our code of equality and justice.

EDWARD G. O'CONNOR

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32. *Michael v. Hahnemann M.C. & Hospital*, 404 Pa. 424, 172 A.2d 769 (1961).

33. *Id.* at 457.