PHYSICIANS AND SURGEONS—MALPRACTICE—
EXTRAJUDICIAL ADMISSIONS OF THE DEFENDANT

Mrs. Jannivie Greenwood was examined by Dr. Henry W. Harris to determine if she were pregnant. After laboratory tests were made, Dr. Harris, a specialist in the field of gynecology with thirty-three years experience, informed Mrs. Greenwood that she was afflicted with a non-malignant internal tumor which should be removed immediately. The ensuing operation revealed no tumor but instead a pregnancy of three and one-half months. In a conversation with the patient's husband immediately after the operation the doctor stated, " . . . this is a terrible thing I have done, I wasn't satisfied with the lab report, she did have signs of being pregnant. I should have had tests run again, I should have made some other tests. . . . I am sorry." When confronted by the patient on the following morning and asked "What about it?" Dr. Harris replied, "I'm sorry, I should have made more tests on you."

As a result of Dr. Harris's misdiagnosis Mrs. Greenwood sued the doctor for malpractice. At the trial no expert testimony was introduced by the plaintiff except for the foregoing admissions by the defendant. The trial court sustained a demurrer to the plaintiff's evidence. The Oklahoma Supreme Court in reversing the trial court held: the extrajudicial admissions by the defendant were sufficient to satisfy the requirement of expert testimony to make a prima facie case of negligence. *Greenwood v. Harris,* 362 P.2d 85 (Okla. 1961) (Williams, C. J., Halley, Irwin, and Berry, J J., dissenting).

The only question on appeal was whether the defendant's admissions were sufficient to supply the expert testimony necessary to give to the jury a standard against which to compare the actions of the defendant. For the evidence to be held sufficient as against a demurrer, the admissions must be deemed to give rise to the inference that the misdiagnosis was the result of the failure of the defendant to use and apply the customary and usual degree of skill exercised by physicians in the community.[1] No question is presented as to the necessity of expert testimony. Without the benefit of expert testimony no layman could determine whether a

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[1]Muckleroy v. McHenry, 160 Okla. 139, 16 P.2d 123 (1932); Champion v. Kieth, 17 Okla. 204, 87 Pac. 845 (1906); McBride v. Roy, 177 Okla. 233, 58 P.2d 886 (1936); Stagner v. Files, 182 Okla. 475, 78 P.2d 418 (1938); Hembree v. Von Keller, 189 Okla. 439, 119 P.2d 74 (1941); Cooper v. McMurry, 194 Okla. 241, 149 P.2d 330 (1944); Crovella v. Cochrane, 102 So. 2d 307 (Fla. App. 1958).

physician was negligent in diagnosing a pregnancy as a tumor.[2] Nor is there any issue as to whether the defendant, if an expert, can supply the needed expert testimony.[3] This comment will be restricted to the sufficiency of the physician's admissions to establish the plaintiff's prima facie case.

The court cited the earlier Oklahoma decision of *Bungart v. Younger*[4] as controlling on the sufficiency of the extrajudicial admissions of a physician to supply the necessary expert testimony to make a prima facie case. In the *Bungart* case the defendant physician failed to find that the fibula was broken at the time he set the tibia, resulting in a permanent deformity to the plaintiff's leg. Witnesses testified that the doctor had stated that if he had found the broken fibula when he first examined the plaintiff and had treated it at that time, the leg would have healed without complication. The court held this testimony combined with other facts *including the testimony of another doctor* was sufficient to entitle the plaintiff to go to the jury.

The majority of the malpractice actions which have involved the sufficiency of a physician's extrajudicial admissions have arisen in California. Illustrative of the earlier California decisions is the case of *Markart v. Zeimer*[5] where the court clearly stated what it felt was necessary for an admission to meet the requirement of sufficient expert testimony. The plaintiff's evidence tended to show that the defendant during a hernia operation had severed the plaintiff's right spermatic artery or cord which eventually resulted in the loss of the plaintiff's right testicle. Plaintiff offered no expert testimony and argued that none was required under the alleged facts, and that if it were required the defendant's admissions were sufficient. Defendant had stated to the plaintiff, " . . . If you lose a testicle, one testicle [is] just as good as two."[6] To other witnesses the defendant had said, "We made a wrong operation on him."[7]

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[2] 7 WIGMORE, EVIDENCE § 2090 (3rd. ed. 1940); Pettigrew v. Lewis, 46 Kan. 78, 26 Pac. 458 (1891); Willet v. Johnson, 13 Okla. 563, 76 Pac. 174 (1904); Winters v. Rance, 125 Neb. 577, 251 N.W. 167 (1933); White v. Burton, 180 Okla. 499, 71 P.2d 694 (1937); Pilgrim v. Landham, 63 Ga. App. 451, 11 S.E.2d 420 (1940), a case which also involved the misdiagnosis of a pregnancy as a tumor. See Updegraff v. Gage-Hall Clinic, 125 Kan. 518, 264 Pac. 1078 (1928).

[3] Bungart v. Younger, 112 Okla. 165, 239 Pac. 469 (1925); Lawless v. Calaway, 24 Cal. 2d 81, 147 P.2d 604 (1944); Lashley v. Koerber, M.D., 26 Cal. 2d 83, 156 P.2d 441 (1945); Seneris v. Haas, 45 Cal. 2d 811, 291 P.2d 915 (1955); Wickoff v. James, 159 Cal. App. 2d 664, 324 P.2d 661 (1958); Sheffield v. Runner, 163 Cal. App. 2d 48, 328 P.2d 828 (1958).

[4] *Supra* note 3.

[5] 67 Cal. App. 363, 227 Pac. 683 (1924).

[6] *Id.* at 685.

[7] *Ibid.*

The court in holding these admissions insufficient as the necessary expert testimony to establish the defendant's negligence stated:[8]

> What we want to know is whether or not such a mischance is one of the hazards of an operation for hernia such as plaintiff's was, and whether or not, in the exercise of reasonable skill and care as such is ordinarily possessed and exercised by surgeons practicing their profession in the city of Stockton and vicinity, such a cutting or severance would ever occur. The admissions do not go this far.

This approach was again followed by the California court in *Phillips v. Powell*,[9] a 1930 decision. Here the defendant was performing a tracheotomy on a five year old boy when the blade of his instrument broke and became inbedded in the fleshy portion of the boy's neck. The doctor stated to one of the plaintiff's witnesses, " . . . it is my fault in using that kind of blade in that kind of an operation."[10] Another witness testified that the doctor had reported that " . . . in spite of the bungling job, he thought the boy was going to pull through."[11] The court said of these statements:[12]

> We are of the opinion that these statements . . . did not constitute admissions that the defendants 'did not possess and use that reasonable degree of learning and skill which was ordinarily possessed by the members of their profession in good standing practicing in their vicinity,' which is the only standard by which the liability of the defendants may be determined.

The New Jersey court has seemingly followed this earlier California view in *Woody v. Keller*.[13] There the doctor had said that it was his fault and that everyone makes mistakes. The court in denying recovery on these admissions stated that the admission of a mistake is not enough, there must be proof of lack of care.[14] And, in a 1930 California case[15] the doctor's admission that he had used the wrong treatment was not considered evidence of negligence when the result was not what was expected or desired. The federal court in the fifth circuit decision of *Wall v. Brim*[16] held that the defendant physician's statement, " 'Uh, uh, I have done the wrong thing' . . . . "[17] and evidence that he had stated that he was in a

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[8] *Ibid.*
[9] 210 Cal. 39, 290 Pac. 441 (1930).
[10] *Id.* at 443
[11] *Ibid.*
[12] *Ibid.*
[13] 106 N.J.L. 176, 148 Atl. 624 (1930).
[14] *Id.*
[15] Donahoo v. Lovas, 105 Cal. App. 705, 288 Pac. 698 (1930).
[16] 138 F.2d 478 (5th Cir. 1943).
[17] *Id.* at 481.
[18] *Ibid.*

hurry as he was late to a golf game[18] were not sufficient to supply the necessary expert testimony.[19]

Starting with the 1945 decision of *Lashley v. Koerber, M.D.*[20] the California court has apparently reversed its earlier stand on the sufficiency of the physician's extrajudicial admissions. In the *Lashley* case, although quoting with approval the language of the *Markart*[21] case, the court found that there was evidence from which a jury could reasonably conclude that the defendant had not exercised the reasonable degree of skill and care ordinarily possessed by physicians practicing in that area. The defendant had not taken X-ray pictures of the plaintiff's fractured finger before reducing it, and when pictures were taken it was found the broken bones were markedly displaced. Plaintiff's husband testified the defendant had stated " 'that he *should* have' had an X-ray taken 'in the beginning' "[22] and that it was his fault.[23] The court held in reversing the judgment for nonsuit that " . . . where the statements are reasonably susceptible of more than one meaning, that meaning is to be placed on them which is favorable to the plaintiff."[24]

Two later California decisions have followed the view expressed in the *Lashley* decision. In *Wickoff v. James*[25] the defendant doctor's admission consisted of, "Boy, I sure made a mess out of things . . . . "[26] and in *Sheffield v. Runner*[27] the admission was, "I should have put her in the hospital."[28] Both decisions in citing the *Lashley* case held that an inference of negligence could be drawn by the jury from these admissions.

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[19] *Ibid*

[20] *Supra* note 3.

[21] At 444 the court said, "It is true that an extrajudicial statement amounting to no more than an admission of bona fide mistake of judgment or untoward result of treatment is not alone sufficient to permit the inference of breach of duty; the statement 'must be an admission of negligence or lack of the skill ordinarily required for the performance of the work undertaken.' (Markert v. Zeimer (1924), 67 Cal. App. 363, 371, 227 P. 683, 685.)."

[22] Lashley v. Koerber, M.D., *supra* note 3, at 444.

[23] The word "fault" has been construed as supporting the inference that the plaintiff was damaged as a proximate result of the defendant physician's negligence in Scott v. Sciaroni, 66 Cal. App. 577, 226 Pac. 827, 829 (1924); but was no more than an admission of a bona fide mistake or misfortune and thus insufficient to establish negligence in Phillips v. Powell, *supra* note 9, at 443. Rarely does a physician actually speak of negligence, but when he has, it has been interpreted as an admission of liability. See Woronka v. Sewall, 320 Mass. 362, 69 N.E.2d 581 (1946) at page 582 when the defendant in speaking of the plaintiff's delivery said, " . . . she had a very hard delivery, and it was a burning shame to get that on top of it, and it was because of negligence when they were upstairs."

[24] Lashley v. Koerber, M.D., *supra* note 3, at 444.

[25] *Supra* note 3.

[26] *Id.* at 663.

[27] *Supra* note 3.

[28] *Id.* at 830.

In all of the above cases it should be noted that the only expert testimony admitted into evidence was the admission of the defendant physician.

In Oklahoma, as in California, all inferences must be resolved in favor of the party against whom a directed verdict is being contemplated.[29] But, in first deciding that the extrajudcial admissions of the defendant physician are competent to supply the necessary expert testimony, the Oklahoma court based its decision on the *Bungart*[30] case. However in that case there was other expert testimony against which the jury could compare the admissions of the defendant.[31] Clearly a much stronger case for the plaintiff is presented when there is other favorable expert testimony against which the defendant's admissions may be compared. Had the decision in the instant case been predicated solely on the *Bungart* case, then, it would seem that the decision would be highly questionable.

However, in light of the recent trend of the law in this area as evidenced by the later California decisons of *Lashley*,[32] *Wickoff*[33] and *Sheffield*[34] the Oklahoma court would appear to be on solid ground in reversing the defendant's demurrer. Certainly an inference of negligence may be found in the defendant's admissions. But, as expressed by two members of the court in the dissent,[35] the admissions inferred only that the defendant was sorry, knowing now that a mistake had been made. The defendant could have

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[29]Chickasha Inv. Co. v. Phillips, 58 Okla. 760, 161 Pac. 223 (1916).

[30]*Supra* note 3.

[31]The court in the *Bungart* case in speaking of the defendant's admissions at page 472 said, "These declarations, if made, were made by an expert assuming to treat plaintiff with ordinary skill and care, and tended to prove a want of ordinary skill and care in such treatment. This was competent evidence for the purpose offered, and, together with all of the other facts and circumstances in evidence, including the testimony of Dr. Freeman, made such a case as entitled plaintiff to go to the jury." However in the *Greenwood* case the court cited only the syllabus by the court which stated, "In such a case, where expert evidence is required to make a cause of action, and there is evidence of declarations against interest proved to have been made by defendant, himself an expert and assuming to treat plaintiff with ordinary skill and care, which, with all the other facts and circumstances in evidence, tends to show a want of ordinary skill and care in such treatment and to show a casual relation of such want of skill and care with the resulant detriment complained of, such evidence is sufficient, as against a demurrer thereto, to entitle plaintiff to go to the jury." It is difficult to read into the words "with all the other facts and circumstances in evidence" the extremely important fact that a second physician testified and that the case did not go to the jury solely on the defendant's admissions. It is submitted that the *Bungart* decision is clearly distinguishable from the instant case and should not have been held as controlling on the sufficiency of the physician's extrajudicial admissions.

[32]*Supra* note 3.

[33]*Supra* note 3.

[34]*Supra* note 3.

[35]Justice Halley concurred in the dissenting opinion written by Justice Berry. Chief Justice Williams and Justice Irwin did not write dissenting opinions.

meant knowing what I know now I should have run more tests, and not that he had fallen below the required standard in not running more tests. It would seem from these later cases that a physician discusses at his peril an unsuccessful, although not necessarily negligently conducted, operation with the patient, his relatives or friends.

Unanswered by the court is the question of why the plaintiff failed to produce other expert testimony. Perhaps, in the light of the increasing difficulty involved in finding a physician who will testify for the plaintiff in a malpractice action,[86] the view contained in this case and the resulting relaxation in the interpetation of the extrajudicial admission will become common in malpractice actions.

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[86]For an interesting and informative discussion of this problem see BELLI, READY FOR THE PLAINTIFF 91-104 (1956).