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CONTRACTS -- RIGHT OF A PHYSICIAN TO RECOVER ON AN IMPLIED-IN-FACT CONTRACT

Seward R. Stroud
University of Michigan Law School

CONTRACTS — RIGHT OF A PHYSICIAN TO RECOVER ON AN IMPLIED-IN-FACT CONTRACT — At one time, under the Roman civil law, neither a physician[1] nor an advocate could recover in an ordinary action at law for services rendered.[2] The philosophical interpretation put upon such services was that, each case being sui generis both as to the value of the service to the patient and as to the skill and attainment required of the physician, a fixed and invariable salary could not be predicated upon this basis and therefore the compensation must depend upon the case. This compensation was not a matter of right but a gratuity or honorarium, as it was called, paid to the physician voluntarily and at the discretion of the party benefited. The profession of medicine was deemed to be of so high a nature that any absolute right to a fee would by its mercenary character taint and degrade the profession. Since at that time physicians did not generally practice medicine for a liveli-

[1] A physician under Roman civil law was one practicing medicine and so designating himself.

[2] Kennedy v. Broun, 13 C. B. (N. S.) 677, 143 Eng. Rep. 268 (1863); ORDRONAUX, JURISPRUDENCE OF MEDICINE, c. 2, § 9 (1869).

hood, but were men of wealth and leisure, who presumably pursued the science from higher motives, this theory worked no particular hardship on the physician. Moreover, a physician depending upon an honorarium for his services was not, under the Roman law, entirely without remedy. He could by an action "*de extraordinariis cognitionibus*," which was a collateral action not based upon any implied promise of reward, present his claim to a magistrate who would pronounce the extraordinary (*extraordinem*) remedy according to the circumstances (*causa cognita*) determining whether an amount ought to be paid and if so what amount.

The English common law adopted the principle of the civil law that physicians' services[3] were presumed to have been rendered gratuitously and therefore, in the absence of an express contract, no action was maintainable by a physician for services rendered.[4] English physicians were even more limited in gaining compensation for their services than their brethren under the Roman law, since they did not have the extraordinary remedy—"*de extraordinariis cognitionibus.*" As the science of medicine progressed and social forms changed, physicians became dependent upon their practice for a livelihood and no longer was medicine a rich man's hobby. In England the Medical Act of 1858 provided that physicians registered under the act could practice according to their qualifications and could demand and recover in any court of law reasonable fees for professional aid, advice, and visits.[5] *Gibbon v. Budd*[6] held that the effect of this statute was to reverse the presumption so that thereafter physicians were presumed to act with an expectation that compensation for services rendered would be made as of right.

The doctrine that physicians presumptively served for an honorarium or gratuitously so that there could be no recovery in the absence of an express contract was never accepted in the United States.[7] Various

[3] In England there were by statute three classes constituting the medical profession—physicians, surgeons, and apothecaries—each having its qualifications, rights, duties and liabilities. The presumption as to performance of services gratuitously applied only to the class described as physicians. ORDRONAUX, JURISPRUDENCE OF MEDICINE, c. 1, § 5 (1869).

[4] Chorley v. Bolcott, 4 T. B. 317, 100 Eng. Rep. 1040 (1791); Lipscombe v. Holmes, 2 Camp. 441, 170 Eng. Rep. 1211 (1810); Poucher v. Norman, 3 B. & C. 744, 107 Eng. Rep. 909 (1825); Battersby v. Lawrence, Car. & M. 278, 174 Eng. Rep. 506 (1841); Veitch v. Russell, 3 Q. B. 928, 114 Eng. Rep. 764 (1842).

[5] 21-22 Vict., c. 90, § 31 (1858).

[6] 2 H. & C. 92, 159 Eng. Rep. 39 (1863).

[7] Mooney v. Lloyd, 5 Serg. & R. (Pa.) 411 (1819); Judah v. McNamee, 3 Blackf. (Ind.) 269 (1833); Hewitt v. Wilcox, 1 Metc. (42 Mass.) 154 (1840); McPherson v. Cheadell, 24 Wend. (N. Y. S. Ct.) 15 (1840); Adams v. Stevens, 26 Wend. (N. Y.) 451 (1840); Simmons v. Means, 8 Sm. & M. (16 Miss.) 397 (1847); Starret v. Miley, 79 Ill. App. 658 (1898).

reasons for refusing to adopt this rule or presumption of the common law of England were presented by the courts. They varied from a refutation of the idea that any one occupation could be more noble or honorable than another, to the proposition that the presumption was destroyed by licensing statutes.[8]

As a general rule, a request for services under such circumstances that a reasonable person would infer an intent to pay for them amounts to an offer, and a contract is created by performance of the services.[9] Under this general rule it is clear that a physician may recover from a patient the value of services rendered to the patient at the patient's request in the absence of some objective circumstance negating the implied (from the facts) intention to pay.[10] Also, under the same general rule, a third person requesting services for the benefit of another may be liable for them if the inference of an intent to pay is justified by the circumstances.[11]

However, it has often been stated that there is an exception to the general rule where there is a request by a third party for the services of a physician, that in such a case the person soliciting the service is liable in any event only if he was under a legal duty to provide medical services for the patient attended. Unfortunately, there is confusion as to the reason for this rule, due in large part apparently to a failure to distinguish between quasi (implied-in-law) contracts and implied-in-fact contracts. *Crane v. Baudouine*[12] is typical of this type of case.[13] Here, after stating the general rule as to implied-in-fact contracts, the court said there could be no recovery on an "implied" contract since

[8] See cases cited supra, note 7. In a great many of the states, licensing statutes make the right to sue as a physician conditional on being licensed.

[9] 1 WILLISTON, CONTRACTS, rev. ed., § 36 (1936); 1 CONTRACTS RESTATEMENT, § 5 (1932).

[10] Garrey v. Stadler, 67 Wis. 512, 30 N. W. 787 (1886); Clark v. Diefendorf, 109 Conn. 507, 147 A. 33 (1929). Where an injured person is unconscious or unable to request the services of a physician, a physician rendering services may recover on quasi-contract principles. 8 COL. L. REV. 58 (1908); 46 HARV. L. REV. 528 (1933). Also cases are collected in 12 L. R. A. (N. S.) 1090 (1908).

[11] 1 WILLISTON, CONTRACTS, rev. ed., § 36, at p. 96 (1936). But see ibid., note 9, to the effect that the inference that the third person expected the person receiving the benefits to pay may be justified under certain circumstances.

[12] 55 N. Y. 256 (1873).

[13] See also Rankin v. Beale, 68 Mo. App. 325 (1897); McQuire v. Hughes, 207 N. Y. 516, 101 N. E. 460 (1913); Hunicke v. Meramec Quarry Co., 262 Mo. 560, 172 S. W. 43 (1914); Vernaglia v. Cirota, 156 N. Y. S. (S. Ct.) 432 (1915); Whitney & Chadbourne v. Holloway, 194 Iowa 1333, 190 N. W. 930 (1922), noted 8 Iowa L. BUL. 272 (1923); Lawrence v. Anderson, 108 Vt. 176, 184 A. 689 (1936). The dissenting opinion in McQuire v. Hughes, supra, would explain Crane v. Baudouine as a mere denial of quasi-contractual liability in the absence of a legal duty on the third party to furnish medical services.

there is no benefit received by the third party in the absence of a legal duty to furnish medical services. However, this fact should not bar recovery on an implied-in-fact contract, since it is not necessary that there be a benefit to the promisor: a detriment to the promisee is sufficient consideration.[14] If there is a legal duty on the part of the third party to furnish medical services, as in the typical parent and minor child case, there may well be a stronger inference than there would otherwise be that the requesting party intended, and the physician had good grounds to believe, that the third party would pay for the services.[15] The establishment of this fact alone would not be conclusive, however, if we are still speaking of implied-in-fact contracts. But probably the ground for allowing recovery where there is a legal duty resting upon the third party is quasi-contractual rather than any implied-in-fact contract theory, though the cases do not make this clear.

Another reason commonly stated for the exception to the rule is that public policy demands it.[16] There is again, in these cases, the same failure to make it clear whether the exception as stated is applicable to implied-in-fact contracts or whether it is limited to recovery on a quasi-contractual basis. In *Boyd v. Sappington*,[17] one of the earliest cases in point, it was held that there must be an express contract in order that a physician recover from a third party; at least in this case the exception was applied to an attempt to establish an implied-in-fact contract.[18] The reasoning proceeds upon the ground that people should feel free to call physicians whenever there is need for one, without fear of thereby incurring liability for the services rendered. If a person labors under the fear that he may thereby incur liability, the assumption is that he will hesitate to call a physician. However, if a person knew it to be the law that he might render himself liable for services rendered where he requested them, could we not also

[14] 1 WILLISTON, CONTRACTS, rev. ed., §§ 102, 113 (1936); 1 CONTRACTS RESTATEMENT, § 75(2) (1932).

[15] As to master's duty to furnish medical aid to servant, see L. R. A. 1915C 789. As to liability for medical services for inmates of public institutions, see 44 A. L. R. 1285 (1926).

[16] Meisenbach v. Southern Cooperage Co., 45 Mo. App. 232 (1891); Jesserich v. Walruff, 51 Mo. App. 270 (1892); Starret v. Miley, 79 Ill. App. 658 (1898); Norton v. Rourke, 130 Ga. 600, 61 S. E. 478 (1908); Spicer v. Williamson, 191 N. C. 487, 132 S. E. 291 (1926); Weakley County Hospital v. Kentucky-Tennessee Light & Power Co., 171 Tenn. 662, 107 S. W. (2d) 226 (1937).

[17] 4 Watts (Pa.) 247 (1835).

[18] The defendant was the father of the patient, who was thirty-two years old and lived with the defendant. The court said "and it is very clear, that had the defendant been a stranger, however urgent he may have been, and whatever opinions the physician may have formed as to his liability, he would not have been chargeable, without an *express* engagement to pay." 4 Watts (Pa.) 247 at 248.

assume that he knew that he could preclude the possibility of liability if he informed the physician at the time he was called that he did not intend to be liable for the services? But assume the third party would hesitate to call a physician; if the general rule be applied to such cases, do we actually achieve our goal of prompt medical attention for the sick and injured by making such an exception to the general rule? Is it not at least arguable that, if such exception is established, the physician when called by a third party will hesitate before responding? Are we to assume that the physician is more willing to run the risk of contributing his services gratuitously than the third party is to assume the risk of liability? There is, of course, no legal duty on the part of a physician to attend at every request.[19]

It would seem that the ordinary principles of the implied-in-fact contract would meet the situation without our recognizing any exception to the general rule. Under these principles the mere fact that the request has been made by a party not receiving the benefits may be some ground for an inference that the third party did not intend to pay therefor.[20] So also in the case of an emergency there may be an inference that the third party calling a physician did not intend to pay, but the general principles of implied-in-fact contracts will adequately cover these cases while still protecting the physician under more normal circumstances. Many courts have recognized that the ordinary principles of implied-in-fact contracts do apply to such cases.[21] These courts either limit the application of the so-called exception to the rule to the cases in which recovery is sought on a quasi-contractual theory, or else they say that the fact there is no legal duty to provide medical services simply raises a presumption against an intent to pay. They do not make it an absolute rule to preclude recovery on implied-in-fact contract

[19] Childers v. Frye, 201 N. C. 42, 158 S. E. 744 (1931).

[20] 1 WILLISTON, CONTRACTS, rev. ed., § 36, at p. 96 (1936).

[21] Smith v. Watson, 14 Vt. 332 (1842); Bradley v. Dodge, 45 How. Prac. (N. Y. Com. Pl.) 57 (1873); Raoul v. Newman, 59 Ga. 408 (1877); Curry v. Shelby, 90 Ala. 277, 7 So. 922 (1890); Foster v. Meeks, 18 Misc. 461, 41 N. Y. S. 950 (1896); Grattop v. Rowheder, 1 Neb. (Unoff.) 660, 95 N. W. 679 (1901); Morrell v. Lawrence, 203 Mo. 363, 101 S. W. 571 (1907); Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553, 116 S. W. 461 (1908); Ghio v. Schaper Bros. Mercantile Co., 180 Mo. App. 686, 163 S. W. 551 (1914); Fruin v. Glassnap, 97 Conn. 504, 117 A. 547 (1922); Becker v. Humphries, 34 Ga. App. 644, 130 S. E. 379 (1925); Valentine v. Morgan, 207 Iowa 232, 222 N. W. 412 (1928); Benton v. Stadler, 203 Wis. 536, 234 N. W. 739 (1931); Stanton v. American Zinc Co., 264 Ill. App. 541 (1932); Hannon v. Interstate Power Co., 65 S. D. 493, 275 N. W. 358 (1937); Shields Constr. Co. v. Cowan, 270 Ky. 173, 109 S. W. (2d) 585 (1937); Broadway v. Jeffers, 185 S. C. 523, 194 S. E. 642 (1938). In general, as to liability of one who solicits the services of a physician or surgeon for another, see 46 L. R. A. (N. S.) 577 (1913); 32 YALE L. J. 186 (1922).

principles under the circumstances. This would seem to be the wiser view. Moreover, it has the obvious merit of making it unnecessary to recognize any exception to the general rules of implied-in-fact contracts.

Seward R. Stroud