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A "Traditionalist's" Approach to Teaching *O'Brien* and to Ideology in the Classroom

Richard W. Bourne*

The goal of our program on "Ideology in the Classroom"¹ initially was to explore the proper role of ideology in the classroom with the help of representatives of critical race theory, law and economics, feminist legal thought, and critical legal studies. From the perspective of the original planners of the program, the discussion of a case like *O'Brien v. Cunard Steamship Co.*,² were viewed simply as a means to that end. During the implementation of the program, a second set of goals began to emerge: each of the "representatives" saw participation in the program as an opportunity to "showcase" his or her "school" so as to demonstrate the clarity of its vision to the uninitiated and perhaps to win over a few academic converts.

My initial goal in writing about *O'Brien* was to discuss how our attempt at ideological interchange worked out and to indicate whether we were able to develop much in the way of conclusions about the extent to which it is appropriate for a teacher to allow her jurisprudential bent to color what happens in the classroom. As we started to put these papers together for publication, someone suggested that we include in the package a "traditionalist's" approach to teaching *O'Brien*. By default I won the honor of writing that piece. This paper has thus come to serve a dual purpose: to set out a "traditionalist's" view of how one might teach *O'Brien* and to discuss the larger issues we tried to develop initially, the "proper" role of ideology in the classroom.

A disclaimer of sorts is in order. What is a "traditionalist?" I'm not sure I know. If what is meant is "bad"³ then I have been "set up" to be shallow,

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1. The initial program is briefly described in Richard W. Bourne, *Five Approaches to Legal Reasoning in the Classroom: Contrasting Perspectives on O'Brien v. Cunard S.S. Co.*, 57 MO. L. REV. 351 (1992).

2. 28 N.E. 266 (Mass. 1891), reprinted at 57 MO. L. REV. 347.

3. This may in fact be what some mean. Several of my colleagues' papers attack the traditional emphasis on doctrinal analysis; one suggests this breeds denigration of litigants to stick figures in doctrinal argument, Tauyna L. Banks, *Teaching Laws with Flaws: Adopting a Pluralistic Approach to Torts*, 57 MO. L. REV. 443, 446 (1992), while others indicate it simply masks and perpetuates injustice. Jay M. Feinman, *The Ideology of Legal Reasoning in The Classroom*, 57 MO. L. REV. 363, 368 (1992); Ann C. Shalleck, *Feminist Legal Theory and the Reading of O'Brien v. Cunard*, 57 MO. L. REV. 371, 378 (1992).

insensitive, and unjust. More likely, what is meant is simply "pre-crit." Aside from the fact that this category is too broad to be coherent—it includes at least formalism, positivism, realism, and the "legal process" and virtually every American school before the 1970's—this definition of the category forces one into admitting that he is hopelessly and incorrigibly dated.

I prefer a different definition of "traditionalist," one which allows me to represent myself where I am right now. I think most mainstream American law teachers are uncommitted jurisprudential agnostics; certainly many of us are. We learned at the feet of legal realists and believers in the legal process but are not true believers in the teaching of any "schools." We have been sufficiently affected by more modern scholarship to doubt our mentors and borrow heavily and eclectically from contemporary writing, but we remain as deeply skeptical of its claims to the truth as we are regarding earlier legal literature.

I. TEACHING *O'BRIEN* AS A TRADITIONALIST

The doctrinal analysis of *O'Brien* in my introductory piece⁴ is, like the discussions set out in the panelists' papers,⁵ much longer than one would attempt in dealing with a minor case in a torts casebook. Since the edited versions of the case contain no reference to the negligence or agency arguments, it would probably be unwise to explore those issues in class.

This leaves the consent issue as fair game. It is hard to imagine the students not coming to appreciate the coercive atmosphere in which the vaccination took place or the peculiar susceptibility of the plaintiff to coercion. Someone would be bound to ask what Ms. O'Brien's damages were, and one would hope that the answer could include not only the temporary blister eruptions for which she sued but also the full indignity a proper Victorian would associate with mass physical examinations and medical treatment by male physicians of female patients. When the students see how tolerant the court is of Cunard's insensitivity to *this* young woman's freedom and dignity, it should not be difficult for them to devise a fair variety of explanations, including the view that status as a poor foreigner warranted a discount of the worth of her liberty and dignity and that the need to prevent the spread of small pox legitimated assembly line coercion of poor people. These explanations are not mutually exclusive; indeed, one suspects they may

4. Bourne, *supra* note 1.

5. See Banks, *supra* note 3; Feinman, *supra* note 3; Shalleck, *supra* note 3; Robert H. Lande, *A Law & Economics Perspective on a "Traditional" Torts Case: Insights For Classroom and Courtroom*, 57 MO. L. REV. 399 (1992).

have been combined under a xenophobic world view which associated the dangers of contagion with poor immigrants.⁶

Cutting away from this critique, we hopefully could inquire whether it is clear the court was wrong in tolerating a degree of coercion exercised under less than humane circumstances; given the risks of spread of disease and the costs providing immunization through individualized medical care, one could ask whether most people in the society, including the immigrant communities which settled in and around Boston, were not better served by coercion than they would have been with readily available alternatives.

Finally, *O'Brien* provides an occasion for at least brief discussion of the distribution of legal services in this country, and how such services are used in litigation. The record indicates a total of eight doctors testified for *O'Brien* or the steamship company, making the *O'Brien* case an extremely early "battle of the experts." This is doubly surprising, given the apparent low value of the damages she suffered—there is no suggestion of permanent disfigurement or other losses in the record—and the weakness of her case. It is a real mystery how Mary *O'Brien*, who traveled in steerage to reach America, could get a lawyer to represent her, pay for a medical expert to testify for her, and finance a lawsuit through the Massachusetts courts, all within two years of her arrival stateside. At her trial, one doctor testified that her injuries were typical of injuries sustained by a fair percentage of steerage passengers who had been inoculated aboard ship while immigrating to Boston. Students could inquire briefly whether Mary *O'Brien* may have received help from an organization in the Irish-American community in Boston or from a society of opponents to mandatory vaccinations, and what role if any religious or ethnic conflicts in Victorian America may have played in creating the *O'Brien* litigation.

6. In this regard, one argument in defendant's brief is noteworthy:

Having in view the [port] health regulations . . . and considering the large number of steerage passengers, and *the familiar facts as to the character, habits and degree of intelligence of such passengers* it is reasonable that they should be directed to pass in review to be examined by the doctor, with a view toward carrying out the requests of the Board of Health. Whether it would have been reasonable to use . . . force . . . need not be discussed, because no force was used. But whether they were directed or merely requested to assemble in . . . steerage and pass in review, . . . their act must under the circumstances be considered a voluntary compliance with a reasonable requirement.

Defendant's Brief at 2, 57 MO. L. REV. 491 (emphasis added).

II. THE PANELISTS' PAPERS: TEACHING *O'BRIEN* FROM AN OPENLY IDEOLOGICAL PERSPECTIVE

I profited from learning from Professors Shalleck, Banks, Feinman and Lande, and believe students would too. In the end, however, I think their classes would suffer from ideological overload. Some of the difficulties I experience may result from limitations of the format we had.⁷ *O'Brien* may simply be an inadequate vehicle with which to "showcase" how a teacher's ideology affects his or her teaching, and when you ask four teachers to do it, their desire to demonstrate the clarity and strength of their vision may lead them vainly to try to fit too much into too little. But whatever the reasons, I find myself conscientiously objecting to much of the teaching I heard during the program and now see coming through the papers.

I think I understand why I am dissatisfied with Professor Lande's methodology. His goal seems to be to illustrate how economics can inform judicial decision-making by simply engaging in a cost/benefit analysis of the choices given to the parties and to courts, and then to attempt to explain the limits beyond which economic analysis is of little or no help. Much of the economic analysis is commonsensical. Economics may explain that, in the end, there was a choice to be made between permitting coercion and assuring the immigrants were inexpensively inoculated, on the one hand, or upholding individual autonomy and weakening the willingness of companies like Cunard to continue to provide free vaccinations, on the other. In a sense, it teaches that dignity costs. But it does not answer the value question, which is how much is dignity worth?

I do not understand Professor Lande to say that it does. What he does do, however, is suggest that economics provides us with the logic and jargon⁸ scientifically to make rational choices⁹ in answering efficiency questions, which he concedes constitute only a part—but a large one—of what lawmaking is about. I hate the jargon. I think my students would, too. More importantly, I find the "science" label seductive. I don't trust seductive labels,¹⁰ and don't want my students to trust them, either.

Since I knew there was no such thing as a free lunch before I took economics, and learned from Professor Lande that his technique can't really

7. See Bourne, *supra* note 1, at 351.

8. Professor Lande adds mathematics but happily indicates we do not need it. Lande, *supra* note 3, at 401.

9. The "science of rational choice" is from Posner. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (3d ed 1986).

10. The first time I read about the "science" of jurisprudence was when analyzing Langdell's formalistic apology for the case method. Maybe my experience with Langdell explains why I resist the allure of "science."

tell me whether a product is worth the price I continue to resist joining the law and economics school.

My response to the feminist and pluralistic approaches of Professors Shalleck and Banks is more complicated. Their work contains powerful insights from a perspective the law has long needed and only recently begun to receive. Because each poses questions with a voice I can not share but only hope to emulate, I find them morally enervating. I regularly borrow from these approaches in teaching and will continue to do so. But I have trouble buying into either's analysis in its entirety. For example, I find it hard to believe that gender or ethnicity has much to do with how the *O'Brien* case came out. In my view, the result would likely have been the same had the plaintiff been Mary O'Brien's father, or even an Anglo-Saxon male from across the ocean. Wealth is what makes the difference, but only because, in the regime of the era, rich people would have been able to obtain more individualized and sensitive health care services which steerage passengers could ill afford. A more communitarian regime might have demanded that the services rendered to underprivileged people like Mary O'Brien be offered in a more humane and less degrading way. Seeing the issues of the case from the point of view of the "outsider" may enhance our feeling that justice requires a more generous regime because the outsiders are members of the community, too. But one must remember that dignity does cost, and before one is going to purchase it one must at least decide who should finance it.

Running through the articles of Professors Shalleck, Banks and Feinman is a sense that the law contains intrinsic "biases." The Feinman piece intimates that the rules privileging tortfeasors to invade another if they reasonably believe the other has consented are so biased, stating unequivocally that the law is quicker to find consent in personal torts than it is in property invasions, and suggests as a possible corrective a rule in which the sole question is whether the victim in fact has consented.¹¹ Professor Banks makes the kindred point that under the Restatement (Second) of Torts defendant bears the burden of proof regarding plaintiff's consent in suits for invasion of property but not in suits involving invasion of one's person,¹² and intimates that the distinction provides extra protection for the interests of "wealthy propertied men in England and this country."¹³ Professors Banks and Shalleck argue the law of consent unjustly ignores power differentials between plaintiffs like O'Brien and defendants like the doctor.¹⁴ Professor Shalleck believes that the court is pursuing a sexist ideology masked by surface neutrality when it manipulates the concept of consent to destroy

11. Feinman, *supra* note 3, at 364.

12. See Banks, *supra* note 3, at 452, n. 37-38.

13. *Id.* at 453.

14. See Banks, *supra* note 3, at 444; Shalleck, *supra* note 3, at 371.

O'Brien's claim.¹⁵ Most critically, these writers argue that the "traditional" legal education emphasis on doctrine perpetuates the injustices of intrinsically biased law by preventing students from seeing the bias or developing the flexibility to employ lawyerly techniques to correct its injustices.¹⁶

Much of the discussion of bias I find illuminating. I particularly liked Professor Feinman's discussion of word pictures¹⁷ and the point of Professor Banks¹⁸ that Ms. O'Brien's conditioning likely made her an easy target for intimidation.

Having said that, I must add that I find the charge of bias grossly overdrawn. Certainly it is not well supported by the evidence addressed in these papers. One can easily quarrel with the particular curricular emphasis of most law schools, but in the end curricula are likely to be organized along some doctrinal boundaries, and for starting points Torts and Contracts sound a bit more reasonable than Oppression and Domination. The *O'Brien* court was certainly fudging consent and pretending not to be doing so, but just what "ideology" it was pushing or why post feminist consciousness is of particular help in exposing what it was doing are beyond me. Power differentials between an English ship's doctor and a young Irish girl are relevant to whether she was in fact intimidated into submission, if that was the question for the *O'Brien* court; Justice Knowlton's failure to acknowledge such differentials indicates to me that he really was not much concerned whether intimidation occurred or not.

I must confess bafflement at the dark suggestion that the law makes it easier for tortfeasors to invade a victim's person than her property. The claim is overdrawn and at least partially inaccurate.¹⁹ While one can concede that

15. Shalleck, *supra* note 3, at 383-84.

16. See Banks, *supra* note 3, at 448; Feinman, *supra* note 3, at 368.

17. Feinman, *supra* note 3, at 367-69.

18. Banks, *supra* note 3, at 454.

19. Professor Feinman cites the RESTATEMENT (SECOND) OF TORTS § 164 (1977) for the proposition that a plaintiff can be liable who mistakenly invades the land of another unless the mistake is caused by the possessor. Presumably he wishes us to contrast this with the law of battery, which requires intent to cause harmful or offensive contact with another. See RESTATEMENT (SECOND) OF TORTS § 16 (1977).

There are several problems with this analysis. First, trespass to land requires an intentional invasion of another's land; the chief issue where mistake arises relates to who owns or has a right to possess the land. This issue should never arise in personal torts, since nobody owns the body of the victim but the victim herself. More importantly for the present inquiry, the law makes no distinction between consent as a defense to personal invasions and for property invasions. Under section 892 of the Second Restatement, consent may be actual or apparent. Apparent consent, which occurs when one's "words or conduct are reasonably understood by another to be intended as consent . . . [is] as effective as consent in fact." RESTATEMENT (SECOND)

many rules are inherently "biased" and not intrinsically "reasonable," I fail to see why the rule laid down in *O'Brien* regarding objective manifestation of consent is one of them²⁰ or why an alternative focusing on subjective intent of the victim is in any sense an improvement.²¹ In short, the rule in *O'Brien*, while not necessary or inevitable, was probably the right rule. The essential problem was in its application.

Professor Banks' argument regarding burdens of proof is a bit less baffling; it at least lends some support to the notion that the law prefers property over personal values.²² But only some. When those rules were first applied in civil cases, it seems likely that, in personal and property tort cases alike the only people who were plaintiffs were rich, white and male. This pedigree certainly means that the distinction was developed without any special sensitivity to women's concerns, but it hardly proves that the

OF TORTS § 892 (1977). Illustration 2 involves a request by A for permission to "short cut through B's driveway. B says nothing, but waves his arm in manner appearing to indicate that A is to go ahead. A does so. Even though B is in fact unwilling for A to use his driveway and intends his gesture as a denial of permission, A is justified in acting under the apparent consent and is not liable for trespass." *Id.* § 892 illus. 2. The comments to sections 892 and 892A, especially comment c of the latter, indicate the rule is identical regarding wrongs to person or to property. *Id.* §§ 892, 892A cmt c.

20. In Professor Feinman's critique of the objective manifestation of consent rule he suggests consideration of an alternative, one in which "the objective manifestations are trumped by lack of subjective consent, and then says this brings us to issues like these relating to consent to rape. Here he cites SUSAN ESTRICH, *REAL RAPE* (1987). *REAL RAPE* does not suggest that subjective intent should "trump" "objective manifestations. In *REAL RAPE*, Professor Estrich attacks the view of "consent" she finds in American rape law because it focuses on whether the victim has been sufficiently aggressive in resisting intercourse and not on whether the assailant could reasonably apprehend that the victim did not fully and freely consent. As I understand her, she is not attacking the "reasonable person" standard but simply is demanding that it be fairly applied.

21. Professor Estrich does not disagree regarding rape. In her view there is of course an interest in "fair warning." It is simply that the burden should be on the man, not the woman, to inquire whether consent exists and to honor any reasonable signal—crying, "no," etc.—that it does not. *Id.*

22. The RESTATEMENT (SECOND) OF TORTS § 10 (1977), "privileges" conduct which would otherwise be tortious on essentially two grounds, consent and public policy; the latter legitimates even nonconsensual invasions where the actor is serving some paramount public interest. Comment c always requires the actor to prove the basis for her privilege in the nonconsensual contexts, whether or not the injury goes to the plaintiff's property or personal interests. *Id.* cmt. c. The comment c distinction between tortious injuries to property and person thus applies only regarding consensual privileges.

distinction reflects classist, racist, or sexist values. It is possible that the distinction reflects a view of statistical probabilities: that in most personal touching cases consent in fact exists while the opposite is true in most property cases. It is possible that the courts might like to have required plaintiffs to prove nonconsent in all cases, but because plaintiffs might lack access to proof in the property cases shifted the burden to defendant there in order to assure well informed decision-making. Whatever the basis for the distinction it seems irresponsible without stronger proof to suggest its purpose is to devalue the dignity of poor people, racial minorities, or women.²³

Professor Shalleck's discussion of gender and the law touches a lot of feminist bases: we learn the value of story telling about women to unmask the law and ground the search for a more just order;²⁴ the male bias of judges which influences them to see force from the point of view of its wielder rather than its object;²⁵ and the historical context in which this case arose which enables a male judge to affirm the ascendancy of a technocratic, impersonal, and domineering style of medical practice espoused by the male leaders of the medical profession in the 1890's.²⁶ The problem with the paper is that it involves an extraordinary amount of speculation. Whatever else he appears, the ship's doctor in this case is hardly the modern technocrat of immunology, and it strains credulity to assert that the judges in the case so viewed him. Intimating that male judges are into force and can't understand coercion because they are men involves a kind of gender stereotyping which is hardly scientific and which ought to make one very uncomfortable. Finally, story telling is useful, and certainly going behind the court's opinion for a closer glimpse at the record is very revealing; the central difficulty is that in this case the story is one in which gender is unlikely to have played a major role.

The argument here is not that ethnicity and gender did not affect *O'Brien*, or that the law does not contain biases, or that "traditional" legal discourse does not frequently mask these biases. I believe that the law all too frequently is unfair to "outsiders," and that its biases are subtle and need to be exposed

23. Argument that the burden of proof proves the law disfavors the party to whom the allocation is made and favors her opponent is always tricky business, since such burdens are allocated for a variety of reasons. The suggestion that the law prefers property interests to personal concerns because of the allocation made by comment c to RESTATEMENT (SECOND) OF TORTS § 10 (1977), of course means that the law favors personal invaders over property takers. See *supra* note 22. The notion that the law prefers child molesters to thieves is counterintuitive. If one believes it, one also can believe the law also prefers molesters to policemen. Before swallowing this line, I want a bit more research into the matter.

24. Shalleck, *supra* note 3, at 372.

25. *Id.* at 372-77.

26. *Id.* at 378-85.

and explored in class so as to make our students better lawyers and more sensitive people. My argument is with emphasis and pedagogy. Mary O'Brien's case is simply the wrong case to prove the ethnicity or gender points. Doubtless her Irishness and femaleness affected *O'Brien v. Cunard Steamship Co.* The problem is, they probably didn't affect it very much. There is certainly *no* presently available evidence to suggest otherwise. My students would feel I was stretching it if I spent much time on those aspects of *O'Brien*. If I went further, and tried to prove my point by adverting to Real Rape²⁷ or property trespasses or the gendered paradigm for "good" medical services, I think they would feel I was pushing a line. In any case, I hope they would feel that way. I would.

I cannot deny I teach from an ideological perspective. This perspective is post realist, but it retains the profound skepticism the realists taught.²⁸ I unabashedly crib ideas, from feminism, pluralism, critical studies, economics and a number of other ways of looking at the law and legal institutions because these help me gain insight into how they work and whether their effects seem fair. I try never to wander very far without the skepticism, however, because it helps me to avoid overstating an argument, or overteaching a case. Perhaps these papers illustrate the risks of doing that.

III. THE ROLE OF IDEOLOGY IN THE CLASSROOM

At first glance, use of the format of having each teacher "showcase" his or her ideological perspective through discussion of a case like *O'Brien* to get to the proper role of ideology in the classroom seems extraordinarily indirect. There are two basic reasons for the indirection. Right off, we feared that a more direct discussion of ideology would lead to a clash of values in which little information or wisdom would be exchanged. When one "ideologue" is asked to talk directly about the proper role of ideology in the classroom, there is a tendency for him or her to try to sell you on his or her version of truth and to compete with the other sellers by putting down their versions. The decibel level of the discussion goes up and the audience turns off. As a review of these papers will indicate, this happened, to a very minor extent, at our program,²⁹ but there the sell was much softer and easier to take.

27. See *supra* note 20.

28. See John P. Dawson, *Legal Realism and Legal Scholarship*, 33 J. LEGAL EDUC. 406 (1983). Dawson said the realists' messages "could be reduced . . . to two. The first was the overriding need for skepticism" *Id.* at 407. The second was that lawyers were not competent to manage the legal system without the aid of other disciplines. *Id.* at 408.

29. There were a few put downs. Consider, for example, Professor Banks put down of traditional education as "almost always privileged, white and elitist." Banks,

Second, a full blown direct discussion of ideology in the classroom would likely turn audiences away. This is because many of our faculty are more or less classic liberals who are flat out opposed to ideology in the classroom. These people use the word *ideology* in the strong pejorative sense of a self—consciously adopted, rigid intellectual construct; for them, teaching it smacks of indoctrination, the very opposite of intellectual inquiry. Since ideology in the classroom for them would be anathema, there would be no reason to come.

Our strategy of focusing on how we would teach *O'Brien* avoided these problems and got a tremendous boost from an unforeseen source: the professionalism of our teachers. Most of us are interested in how to teach effectively. This career goal crosses the ideological spectrum. People came because they were curious and they stayed because they picked up ideas.

Whether our fears were real or not is impossible to determine. What happened was positive: teachers did come, the decibel level stayed low, and we listened to one another a lot. In the process of discussing *O'Brien* we began to cross ideological bridges. In part, this was a function of the openness of our speakers. For example, Professor Shalleck pushed feminism but never really claimed more than that gender issues affected what was going on in *O'Brien* in myriad and profound ways; Professor Lande advocated use of economics but only as one more arrow in the quiver of problem solving lawyers.³⁰ The speakers did not present their discussions of *O'Brien* as built upon all encompassing highly structured ideological systems; instead, all that we were asked to do was to consider the case as seen by speakers who come to the law with fairly articulable, relatively discrete ways of looking at the world. The definitional change of ideology to *Weltanschauung* disarms kneejerk opponents of ideology in the classroom before discussion starts. After all, doesn't everyone have an identity, a frame of reference, a point of view? Can a teacher shed that without objectifying not only her students but herself?

IV. THE PROBLEM OF COERCION

Though we began to cross ideological barriers, we by no means collapsed them. During the question and answer session following the presentations, one teacher said that he was still a bit troubled by the issue of illegitimate

supra note 3, at 443. In addition, most of the panelists went on and on about how his or her "school" would approach the case way beyond how any one of them would likely teach the case in a real course. This in part could be justified as a way of assuring we were all familiar with their viewpoints, but it went so far beyond that as to render that explanation inadequate.

30. Lande, *supra* note 5, at 436-439.

coercion in the classroom. One of the panelists responded by first adverting to the point just made: that one cannot teach without an ideology. He then suggested that this means everyone pushes a line, whether this is acknowledged or not, and that hence the issue of coercion is an inevitable one in all classrooms. The only difference between the "ideologues" and "traditionalists," he added, was that the former are at least fully conscious of their commitments and therefore better able to control coercion than the latter.

I did not understand this argument to be a cynical dismissal of the questioner. It may be that we all have points of view we cannot fully transcend and that a level of coercion is inevitable in education. To acknowledge these as true is not to argue we shouldn't try to go beyond our personal limitations or not to coerce our students. To sin is human, but humans rightly try not to sin. Truly objective search for truth is beyond any journalist, but that some try harder than others and should continue to do so is something perusal of the back issues of the *New York Times* and *Pravda* would readily reveal.

What I understand the concern to be is simply that everyone is capable of coercing others into accepting one's own viewpoint, that everyone does in fact have a viewpoint, and that people who know what their viewpoint is are no more likely to coerce others than are those who do not. I agree, but only partially. Of course everyone has a point of view which shapes and colors the way people, places and things are perceived. It is also difficult to argue that a teacher who is ignorant about herself, to the point of denial that she has a world view, is going to be less coercive than one who knows who she is and where she is coming from. Blind coercion is as coercive as the sighted variety. Finally, one can hardly deny that the degree to which one is coercive is likely more a function of the degree of respect one has for self and others than of whether one is a member of this or that school of jurisprudence. Thus one must concede that those who are unreconstructed legal process types or, like me, jurisprudential agnostics, can be as overbearing and controlling of students as any *aficionado* of a more modern "school."

But that is not quite all of it. I said we "can be." "Likely" is a different story. It takes a certain kind of person to wander from the fold, to adopt the teaching of a "new school" and reject the old. Such persons exhibit a special kind of courage. It helps sustain that level of courage to believe one is on to the truth. And once one has seen the truth, it is hard to tolerate falsehood. According to the cliché, devotion and single mindedness are intimately linked. It is no accident that over the centuries nonsubscribers have frequently found devotees of militant faiths quite coercive.

This is not to say that the new jurisprudence is inherently coercive. All teachers can strive to avoid it. A modicum of humility about our ability to know or teach the truth helps. Open acknowledgment of the partial, incomplete, often tentative state of our particular visions, such as was made by our panelists, goes a long way toward minimizing the risk of coercion. So

also does a spirit of inquiry, especially one which includes the view that other people should be listened to because what they have to say just might be right. Behind both humility and willingness to listen are self respect and respect for others, character traits which exist or not without regard to ideological labels.

V. CONCLUSION

The work of our "Ideology" panelists helped all of us understand what the court in *O'Brien* was doing and should have done. The perspectives of Mary O'Brien, as an adolescent, a foreigner, a woman and a poor person, helped us to see how easy it was to overbear her will. The likely biases of an English doctor and a Yankee Protestant court helped explain why both were willing to treat her abject submission as affirmative assent in a way which discounted her freedom of choice and bodily integrity. Economic theory taught us that there is no free lunch, and aided in our understanding why the defendant was willing to overbear her will and why the court was willing to sanction this overbearing. Learning new perspectives helped expand our ability to understand how decisions of all the actors in the play—Mary O'Brien, the ship's doctor, the court—were formed. Moreover, a clash of ideals—including those emphasizing individual autonomy and communitarian values—was appealingly revealed. This helps us redecide how the decisions in *O'Brien* should have been made.

Interchanges like our "Ideology" workshop aid in promoting faculty development. Our teachers talked to one another and learned from one another. Hearing different voices enlarged the respect we had for different speakers at the same time that it expanded our capacities to be good teachers and enhanced our sense of the worth of that calling. We got together to discuss diversity and found unity, too. That is a real high.

Whether we crossed new frontiers in jurisprudence is doubtful. I would be surprised if we learned much more than that it helps to be "well educated," both in the formal sense of knowing something of other disciplines besides law and in the informal sense of having heard and thought about what people different from ourselves experience and think. Getting either kind of education is a formidable task. The law is a big field, and our training in it narrows us; the law is an elite profession with its own institutions, traditions and goals, and these necessarily narrow us still further.

It is daunting, for example, to realize how limited is our capacity to understand poor people and how they interact with the law. We have lawyers who represent poor people and who are members of groups which intersect poorer segments of our community. But I know no law teachers who themselves are really poor, and few who come from poor families or live out their lives with poor people. The law teachers among us who speak for the poor may try, but we cannot genuinely speak with their voices; however much

we attempt to represent the feelings and aspirations of others, there will inevitably be filtering and distortion.

Still, expanding the boundaries of jurisprudence was not in any immediate sense our goal. What we wanted was a program which would get us engaged in the process. I think we accomplished that.

SUPERIOR COURT

Suffolk, SS

MARY E. O'BRIEN, *per proch. ami*,

v.

CUNARD STEAMSHIP COMPANY (*Limited*).

PLAINTIFF'S EXCEPTIONS.

Action of tort or contract, to recover damages alleged to have been received by the plaintiff, a steerage passenger, from being improperly vaccinated on the high seas, without right, on board of the steamship "Catalonia."

The pleadings are made a part of this bill of exceptions.

The declaration contained three counts.

The first count was for an assault.

The second count was for negligently and unskillfully performing the operation, and inoculating the plaintiff with a substance other than pure virus or vaccine matter.

The third count was for breach of the contract of carriage in unwarrantably interfering with the plaintiff by vaccinating her, and by performing the operation in a negligent manner, and with impure virus or vaccine matter.

It appeared that the plaintiff, a young Irish girl, seventeen years old, had taken passage with her father and younger brother, in the steerage on board of the "Catalonia," one of the steamships belonging to the defendant, with other emigrants, to the number of three or four hundred, under a ticket issued by the defendant to the father for himself and the two children, and sailed from Queenstown for Boston on the fourth day of July, 1889; that about three days before arrival in Boston, the plaintiff, with others of the female steerage passengers, was vaccinated on the left arm by the surgeon of the ship.

The plaintiff testified that on the day on which the vaccination occurred, she was sitting with others of the female passengers on deck, when one of the steerage stewards came up, and said they were all to go below; that she with the others went below, not (*2) knowing for what purpose, into the steerage; that the staircase leading to the steerage, about half way down, had a landing or platform from which the steps led on either side into the steerage; that when they got below into the steerage there were about two hundred women passengers assembled there, and she learned by talking with them that they were to be vaccinated; that the surgeon of the vessel, with two stewards, stood

upon the landing; that the passengers were then formed in line and passed in turn before the surgeon, who examined their arms, and passing some of them by, proceeded to vaccinate those that had no mark; that while the others were being passed by the surgeon, the plaintiff stood about fifteen feet away from him, and she did not hear him say anything to any of them; that upon being passed by, either with or without being vaccinated, they each received from one of the stewards a card, and were then allowed to pass on deck; that when her turn came he told her to take her jacket off, and she showed him her arm; he looked at it and said there was no mark; she should be vaccinated. She told him she was vaccinated before, and it left no mark; that he then said nothing; that he should vaccinate her again, and began to cut it, scraping her arm with a penknife, then breaking the top off a glass tube he blew what was in it down in the vaccination, and then he told her to keep the dirt out of it, and that was all. He rubbed it in with the blunt side of the penknife. That two stewards were standing by, one of whom had a towel and a glass of water; that the doctor dipped the towel into the glass of water, and rubbed it over her arm; cleaned it before he cut the pock; that she saw them make no other use of the towel and the glass of water. Her father was not present, and she did not have an opportunity to see him before she went below; that the doctor did not ask her whether she wished to be vaccinated, and no interval of time elapsed between his saying she must be vaccinated and the act of vaccination; that she did not verbally consent to the vaccination; that he gave her a ticket or card, which she produced at the trial, and which read as follows, on one side:

"CUNARD LINE
S.S. CATALONIA
Vaccinated.
I. T. M. GIFFEN
Surgeon."

On the other side—

"PASS
Keep this card, to avoid detention at quarantine
and on railroads in the United States."

That upon receiving this card she went up on deck. She further testified to various symptoms following the vaccination, and that in December she was again vaccinated, and that vaccination took, gave her no trouble, and healed up in three weeks.

On cross examination she testified, among other things, as follows:—

(*3) Q. Then you knew before you went to the doctor that you were to be vaccinated, if you had not the vaccination marks, did you? A. Yes sir; when I was below.

Q. And you knew, did you not, that if you did not have the vaccination marks, the doctor would not give you a card, and then you would have to be vaccinated at quarantine? You knew that, didn't you? A. No; I didn't know then, until the woman said if there wasn't marks on us we would be vaccinated.

Q. Didn't you understand that if you had no marks, and were not vaccinated on the ship, you would have to be stopped at quarantine and be vaccinated there? A. Yes.

Q. You understood that, didn't you? A. Yes.

Q. Who told you that? A. A woman

Q. The woman who was with you? A. Yes.

Q. The steerage passengers about you talked about that, and said that if you were not vaccinated on the ship, and had no marks, you would be vaccinated at quarantine, didn't they? A. No.

Q. Well, who did say that to you? A. There was a woman down stairs said it, when people passed up. He was looking at their arms, and then she said he would vaccinated anybody who hadn't the mark.

Q. You said, just now, that you knew if you had no mark, and were not vaccinated on the ship, you would have to stop at quarantine and be vaccinated? A. No.

Q. You didn't know that? A. No.

Q. Do you mean to say that you did not know that if you had no mark, and were not vaccinated on the ship, you would have to be vaccinated at quarantine? A. No.

Q. You didn't know that? A. No.

Q. What did you mean, just now, by saying that somebody told you that if you had no mark, and were not vaccinated on the ship, you would have to be vaccinated at quarantine? A. I meant that I would have to be vaccinated on the ship.

Q. What did you mean by saying that you would have to be vaccinated at quarantine, if you were not vaccinated on the ship? A. I didn't mean to say that.

Q. You didn't understand the question, perhaps? A. No.

Q. Do you know what quarantine is? A. No.

Q. You don't know anything about quarantine? A. No.

Q. Didn't you know that the ship stopped at quarantine, and that the quarantine doctor came around and examined the passengers? A. Yes.

Q. And you handed him a card, didn't you when he came to you? A. Yes.

Q. Did he look at your arm? A. Yes.

Q. And he passed you by? A. Yes.

Q. Now, don't you know that if you had not had that card, and he was not satis(*4)fied with the vaccination on your arm, the quarantine doctor would have kept you at quarantine until you were vaccinated? A. I don't know whether he would or not.

Q. Can you read? A. Yes.

Q. Didn't you see printed notices all over the ship about the vaccination?
A. I saw them, but I didn't read them.

Q. You read them enough to know what they were, didn't you? A. No.

Q. When did you see them? A. Well, I often passed them.

Q. Then those printed notices about vaccination were up there for some time before this vaccination happened? A. Yes.

Q. And are you sure you didn't read them? A. Yes.

Q. Didn't anybody tell you what they were? A. No.

Q. Hadn't you heard before you went to be vaccinated what those notices meant, that were all over the ship? A. No; I didn't know anything about it.

Q. You had not heard at all? A. No.

Q. Nobody told you? A. No.

Q. Hadn't you heard the subject of vaccination talked about among the passengers? A. No.

Q. Not at all? A. No.

Q. Why didn't you read these notices that were posted up? A. They didn't give me any trouble.

Q. You were not so busy on board ship that you hadn't time to read them? A. I didn't see anybody read them.

Q. Nobody read them? A. No.

Q. What did you suppose they were there for? A. I don't know.

Q. You were not seasick at all, were you? A. No, sir.

Q. You were perfectly well, and about? A. Yes.

Q. And the weather was not very bad, was it? A. No.

Q. There would have been no difficulty, then, in reading them, if you had cared to? A. No.

Q. How do you know now, then, that these notices that you saw on board the ship were about vaccination? A. I didn't know they were about vaccination.

Q. How do you know it now? You said just now that they were, didn't you? A. No; I didn't. I say I seen the notices, but I didn't read them.

Q. And you don't know that they were about vaccination, now? A. No.

Q. Didn't you say, a few moments ago, that you did know that these notices were about vaccination? A. No; I didn't.

Q. You didn't say so? A. No.

(*5)Q. Didn't mean to say so, at any rate? A. No.

Q. Now, when you got to the doctor, you told him that you had been vaccinated before, but had no mark, did you? A. Yes.

Q. And what did he say, precisely, to you in reply? A. He said nothing. He said there was no mark, and I must be vaccinated again.

That there was nobody by except the two stewards; that she held up her arm to be vaccinated, and the doctor vaccinated her; that she held back till the last because she was afraid to go up, when there was no mark on her arm; that she did not tell him that she didn't want to be vaccinated; that no one touched her; that she knew from her mother that she had been vaccinated when a baby; that there was no means of exit except where the surgeon stood; that when she got down stairs there was no means of getting away; the doctor was on the landing, and she couldn't go up.

The plaintiff's father, Charles O'Brien, testified that he did not know that his daughter was to be vaccinated; that he did not consent to it, was not consulted about it, and knew nothing about it until it was done; but said and did nothing about it afterwards; that on the same day he went down into the steerage with the other male steerage passengers to be examined for vaccination; that he could not say whether it was before, or after, the women had been down; that men were housed down before they knew what was to be done.

The steerage matron, Mrs. Holden, testified for the defendant if a woman had no mark, the doctor refused to give her a ticket, and said, "Are you willing to be vaccinated? If not, it is no interest to me, but I am willing to do it. I can't give you a ticket; you cannot pass quarantine unless vaccinated." I told the women to bare arms for examination; the steerage steward stood with the tickets up at the top of the companionway.

The steerage matron testified, in cross examination, that when the women had gone down into the steerage for examination, they were not allowed to go up until they had been examined; that the steerage steward stood at the door leading to the deck, and would let no one pass him without the doctor's orders.

The steerage steward testified that he stood at the door leading to the deck to give tickets to those whom the doctor passed, or vaccinated; that he only let those go up that the doctor gave him orders to let pass, and that all the steerage passengers were told to go down for examination; that no one was compelled to go down against their will, and if any one objected to being vaccinated, the doctor simply told him (the steward) not to give him a card.

It appeared that in March, 1888, the surgeon received an appointment to the Cunard service from the general manager of the company, who had the selection of all the surgeons and physicians to serve as such on the steamships of the Cunard Company (*6) and had since continued in the Cunard service as surgeon upon different steamships belonging to the line; that upon the voyage in question, he was ship's surgeon of the "Catalonia"; that the virus, or vaccine matter, used by him was supplied him by the company, and that he did not inquire into the source from which the company obtained it; that the steerage passengers are always examined for vaccination, and some of them

vaccinated by the ship's surgeon upon the voyages of the ships belonging to the Cunard company coming to this port. It appeared that the plaintiff was vaccinated again on her leg, about six months after arrival.

There was no evidence of want of care or precaution by the defendant in the selection of the surgeon, or in the procuring of the virus, or vaccine matter.

The defendant put in evidence, which was uncontradicted, that the virus was furnished by the firm of druggists who obtained it from a government vaccinating officer, who used precautions to supply only the best virus, and that it was the best virus, taken only from healthy subjects, and was put up in hermetically-sealed glass capillary tubes, and that this is the best method of putting up vaccine virus when it is to be kept any time, and is the method adopted for putting up virus to be carried on long voyages, or for use in the tropics, both here and in England. Specimens were exhibited at the trial, and may be referred to. These tubes were kept wrapped in cotton wool, in a cool place, on the ship.

Dr. Henry G. Clark testified that he examined the plaintiff, as an expert, about a month after her arrival; that she was then suffering from an eruption almost over her whole body, with blisters, which he took to be a disease called pemphigus, and that she had a very bad ulceration on her arm where the vaccination took place; to wit it was not true vaccination,—not the true vaccine disease,—but an ugly ulcer-poison; that her condition, both as to the eruption and to the ulcer, was owing to the vaccination; that virus spoils, if it is exposed at all to the air; that it might in any case; that there is a difference between virus which is merely stale, and produces no effect, and virus which is from dissecting, or things of that kind; that it is very poisonous indeed; produces erysipelas, sometimes a fatal inflammation; where it is simply stale, it produces no effect at all; that her condition was not the result of vaccination with stale virus, but was from some active poison,—local poison; that if the capillary tubes were not properly sealed, the matter, if liquid, would spoil in a short time; if there were any air in the tube it would spoil; that in using a tube that was imperfectly made, and in which the virus had decomposed, he should think a careful doctor would discover it, if he had the sense of smell; that if he smelled it, he could not avoid it; that he had had no experience as to capillary tubes not properly sealed that he thought it very likely, in that case, the matter would spoil, if it was liquid,—as he supposed it was,—in a short time, but one would hardly undertake to examine it; we always expect them to be in good order; they are packed in good order; that they only cases he had ever seen before of arms as bad as this, were cases where the matter had been kept too long, and become poisonous; that the matter used must have become decomposed, and not matter that had some foreign virus in it originally; he didn't remember more than a dozen cases, out of twenty or thirty thousand, of as bad an ulcer as that, in normal vaccination; that he had seen as severe sores from normal health vaccination, but always

in unhealthy, scrofulous children; that he never saw so bad a sore on a person otherwise healthy, unless something had happened to it,—unless the vaccination was torn, scratched, or something happened to it to aggravate it,—to provoke it; that matter must have been decomposed; that it might be without the fault of the doctor, whom he did not undertake to blame; that if it had been kept for a long time, it was liable to have been spoiled, even in an air-tight bottle; and that even if it had been kept but a short time in a hermetically sealed glass tube, he should connect the symptoms with impure virus; that he didn't charge any fault on anybody; that he should say it was due to that. His opinion was, it was not true vaccine matter; if it had been, it would have taken properly, and the second vaccination would not have taken; that he should think there was no way of telling whether virus enclosed in hermetically sealed glass tubes is good or bad by looking at it, unless it has become turbid; if it had decomposed, it would smell very badly on opening the tube; that it might be made wholly inert by time.

He testified, on cross examination, that all the symptoms except the eruption might be produced by vaccination with pure virus; and this eruption, he was of opinion, was a disease called pemphigus, of which he had known but three cases, which he had never known or heard to have been occasioned by vaccination before this, and which he believed to be spontaneous in the cases he had known; that he had seen so little of the disease, and so little was known about it, that he didn't know what caused it; but he was of opinion that plaintiff had it, and that it was caused, in her case, by the vaccination.

The defendants called Dr. Bowen, who had seen plaintiff at the hospital, and prescribed for her skin trouble about a month after she landed; Dr. White, who saw her Nov. 18, 1889, as an expert for the defendant; Dr. Richardson, who examined her as expert for the defendant about a month after her arrival; Dr. McCullom, the city physician, and Dr. Cogswell, the port physician, who did not see the plaintiff until the trial, April 26, 1890; who all testified that the disease form which she suffered was true vaccine disease, of unusual but not excessive severity; that the eruption was of a kind frequently associated with vaccine disease, and also very frequent in newly landed steer(*8)age passengers; that there was no indications of impure virus having been used; that the scar on her arm was a true vaccine scar; and that the re-vaccination, in January, had taken so slightly as to indicate that the vaccination complained of had been effectual.

Dr. Clark and Dr. Finnegan, called by the plaintiff, the latter of whom, as attending physician of the plaintiff, performed the vaccination upon her leg, after the healing of her arm, testified upon this subject that the last vaccination was a genuine take, that the ordinary vesicle formed, and that the scab came off in two weeks, and the wound healed in three; that, from the fact of its taking, they would infer that the vaccination on board ship had not taken, and was a spurious one.

Dr. Charles H. Cogswell, the port physician of the port of Boston, called for the defendant, testified to the practice and rules of the quarantine station as to vaccination; that the mark on her arm was a healthy vaccination mark, while the mark on her leg would indicate an insufficient vaccination, except for the presence of the recent vaccination shown by the mark on the arm; that the symptoms did not indicate blood poisoning; that he did not think he had ever seen any results of vaccination with impure or corrupt virus; should expect vaccination with such virus would result in blood poisoning; that one could judge by looking at the capillary tubes whether the lymph or virus was good or not; that it is transparent when good, but, if impure, it would be cloudy; that he had seen a capillary tube containing turbid virus on a steamship of the Allen Line; that he would be able to discover it, if the virus were turbid; that if virus was much discolored he would reject it, and should examine the tube before using it, to discovery whether it was good or not; that he should not use the same towel for wiping his lancet which he had used for cleaning off the arms of patients, as there would be some danger of conveying, in that way, impurities from one person to another; that one towel would be enough for two or three hundred people to wipe the lancet with, if it were sufficiently large; towhead exposure to air of virus in a capillary tube would not produce decomposition in a short time, and might not produce it at all; it might become stale; towhead, if it was putrid, the same effect would be produced as by introducing putrid matter into the system in any other way; he would not expect a very serious blood poisoning from the matter contained none of these tubes.

Dr. Maurice H. Richardson examined plaintiff, as expert for defendant, about a month after she landed, especially with a view of blood poisoning, and testified that she had a vaccination scar, such as is often seen, and other symptoms which he described, that there was no evidence of blood poisoning; that if the lymph had been putrid, there would have been no evidence of vaccination; that impure lymph would not produce such a scar; that there was nothing more than a health vaccination, a genuine case of cow (*9) pox; that the scar on the leg did not indicate a perfect vaccination, but such as might occur after a previous vaccination. On cross examination, he said that virus, if impure, might contain the germs of other disease, and the person vaccinated with it might get the disease of the germ; it would not cause real vaccination scars; that if the ends of the capillary tubes were unsealed, it would cause a change in the virus; towhead it would cause a difference in the appearance, which he should think would be apparent if held up to the light; that blowing in the matter from the tube was a proper mode of using it; that if the disease germs got into a capillary tube, the amount of virus contained in it would be sufficient to set up blood poisoning; never knew case of virus kept too long giving trouble; if old, it does not take—nothing worse; even if not hermetically sealed, tubes packed as described would keep, because disease germs cannot get through cotton wool.

Dr. Giffen, the ship's surgeon; testified, among other things, that his materials used in vaccination were a clean towel, antiseptic solution, consisting of carbolic acid in water, vaccine tubes and lancets; that he always dipped his lancet in the antiseptic solution before using it, and wiped it on a clean towel, lest the antiseptic should destroy the virus and prevent its acting.

On cross examination he was asked, How many towels do you have? A. Generally one.

Q. You use the same towel to wipe your lancet on? A. Yes; always have a clean towel.

Q. To start with? A. Yes; perfectly clean.

Defendant was allowed to put in and read to the jury, against the plaintiff's objection, the following order of the Board of Health of the city of Boston, admitted to have been in force at the time of the plaintiff's arrival:—

Ordered, That all immigrants, on arrival at quarantine, be subjected to examination, as regards their protection from small-pox.

That all persons under ten years of age, who have not recently been successfully vaccinated or re-vaccinated, be considered as unprotected from the effect of the contagion of small-pox (persons having had an attack of small-pox excepted).

That the examination of all immigrants by the medical officers of steamships within twenty-four hours after leaving port, and the vaccination of those who give evidence of insufficient protection through previous vaccination, if considered by the medical officer at quarantine to have been faithfully and intelligently performed, excepts immigrant passengers from such examination at quarantine as may be necessary to determine whether or not such passengers are protected from the effect of the contagion of small-pox, (*10) except where small-pox exists or has existed on board the vessel on the passage to this port.

That a certificate or card in the hand of such passenger or the parent or guardian of the passenger, on which shall be written or printed "Protected," and signed by the medical officer of the steamship, be understood to indicate that such passenger is sufficiently protected by previous vaccination or through the vaccination made on shipboard. All passengers not having such certificate shall be considered and treated as exposed or unprotected.

That the medical officers of passenger steamships be required to verify, under oath, the number of persons considered protected by vaccination and small-pox.

That all persons not protected be vaccinated or subjected to a quarantine of observation, and for each vaccination the port physician shall impose and collect the sum of twenty-five cents, to be by him paid to the city treasurer.

By order of the Board of Health,

S.H. DURGIN, *Chairman*.

To the reading and admission of these regulation, as above, the plaintiff duly excepted.

The defendant was also allowed, subject to the plaintiff's objection, to show that the quarantine officials, on the arrival of the steamer, made an examination of all the steerage passengers, and passed all having tickets similar to the one produced in this case, and vaccinated or detained at quarantine for fourteen days all not having such tickets, or good, clear vaccination marks.

To the admission of this testimony the plaintiff also excepted.

Dr. Cogswell testified for the defendant, under objection and exception by the plaintiff, that the quarantine regulations herein referred to were in force in the port of Boston last July as to the vaccination of emigrants, under approval of the President of the United States. The usual course of proceedings at the quarantine station, under the regulations, is, all passengers are collected on one side of the ship, and passed before the physician. Those who have refused to be vaccinated on the ship, we vaccinate, if willing, if not they have to go to Gallop's Island for fourteen days, after which they are let go. Those who have the tickets from the ship's surgeon are considered as certified to as protected, and passed without examination.

It also appeared that notices were posted about the ship in various languages, of which the one in English read as follows:—

(*11)IMPORTANT NOTICE

VACCINATION.

Passengers are informed that, unless they are provided with a certificate of vaccination, they may be detained at quarantine on arrival. The ship's medical officer is prepared to give certificates to those unprovided, who can show satisfactory vaccination marks. Passengers needing vaccination should at once apply to the ship's medical officer, who is provided with every requisite.

Upon the above evidence, which was all the evidence bearing on the questions raised by the pleadings except the amount of damages, the defendant's counsel requested the Court to rule that the plaintiff could not maintain her action upon either the first or second counts. The Court so ruled, and directed a verdict for the defendant.

To the above rulings the plaintiff duly excepted, and prays that her exceptions may be allowed.

E.N. HILL,
FREDERIC CUNNINGHAM
Attorneys for Plaintiff.

Exceptions allowed.

HAMILTON B. STAPLES,
Justice Superior Court.

Copy,

Attest

[signature omitted]

Clerk.

PLAINTIFF'S DECLARATION.

First count. And the plaintiff says, that on or about the twelfth day of July, 1889, the defendant, by its agents, with force and arms assaulted the said plaintiff in and on board of a certain ship or vessel called the "Catalonia," then on the high seas, and then and there with force and violence, did cut and lacerate the plaintiff with a sharp instrument, and inoculated into the blood and system of the plaintiff some foreign matter by which the plaintiff became poisoned and diseased, and became covered with sores, and afflicted with humors, and otherwise sick; and the plaintiff says that in consequence of the said ill treatment she suffered greatly in body and mind for a long time, and was put to great expense and loss of time.

Second count, for one and the same cause of action.

And the plaintiff says, that the defendant, by its agents, pretending to be skilled in (*12) the practice of vaccination and inoculation of virus into the human system, did undertake to vaccinate the plaintiff, and cut the plaintiff's arm, and inoculated into the plaintiff's arm and system pure and health virus; and the defendant, while pretending and undertaking as aforesaid, did carelessly and unskillfully cut, lacerate and wound the plaintiff with some foreign substance, not pure and healthy virus; in consequence whereof, the plaintiff became poisoned, diseased, and became covered with sores and humors, and otherwise sick, and suffers greatly in body and mind for a long time, and was put to great expense and loss of money.

Third count, for one and the same cause of action.

And the plaintiff says, that the defendant is a common carrier of passengers, the owner of a number of steamships plying regularly between the ports of Liverpool and Queenstown, in the Kingdom of Great Britain and Ireland, and Boston, in the United states of America; that the defendant, by its agents, some time in the early part of July 1889, sold the plaintiff a ticket, whereby she was entitled to be carried in one of the steamships of the defendant, in the steerage, from said Queenstown to Boston aforesaid that by the sale of the ticket the defendant undertook to provide the plaintiff with steerage passage in one of the steamships between the ports aforesaid, to provide for her good treatment and against personal rudeness and every wanton and unnecessary interference with her person upon the voyage aforesaid; that relying upon said undertaking and contract of the said

defendant, the plaintiff went on board of the "Catalonia," one of the steamships belonging to the defendant, and sailed from Queenstown for Boston; that on or about the twelfth day of July, 1889, in violation of its said undertaking and agreement, while in the prosecution of said voyage, the defendant, by its agents, did unnecessarily, unreasonably, without right, and contrary to the wish of the plaintiff, cut, lacerate and wound the arm of the plaintiff, and inoculate into the plaintiff's blood and system some foreign substance; in consequence whereof, the plaintiff became poisoned and diseased, and became covered with sores and afflicted with humors, and otherwise sick and lame, and suffered greatly in body and mind for a long time, and was put to great expense and trouble.

By her Attorney,
FREDERIC CUNNINGHAM.

ANSWER.

The defendant denies each and ever allegation in the plaintiff's writ and declaration, and in each and every count thereof contained.

By its Attorneys,
RUSSELL & PUTNAM.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

To the Sheriffs of our several Counties, or their Deputies

GREETING

[seal omitted] WE COMMAND you to attach the good or estate of [the following italicized portions are hand written] *Cunard Steamship Company, Limited, a corporation or [word unreadable] under the Laws of Great Britain and Ireland and having a usual place of business in Boston in said County to the value of Ten Thousand Dollars, and summon the said defendant if it may be found in your precinct to appear before our Justices of our SUPERIOR COURT to be holden at Boston, within and for our said County of Suffolk, on the first Monday of October next; then and there in our said Court to answer unto Mary E. O'Brien of Cambridge in the County of Middleied and Commonwealth aforesaid, a minor, who brings this suit by Charles O'Brien her [word unreadable] friend in an action of tort and contract, the Plaintiff being doubtful to which class the said action properly belongs.*

To the damage of the said plaintiff (as she says) the sum of *ten thousand* Dollars, which shall then and there be made to appear with other due damages. And have you there this writ with your doings therein.

Witness, LINCOLN FLAGG BRIGHAM, ESQUIRE, at Boston, the *sixth* day of *September* in the year of our Lord, one thousand eight hundred and eighty-nine

[signatures ommitted for reproduction] CLERK

Copy. Attest:

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SUPREME JUDICIAL COURT FOR THE COMMONWEALTH.

SUFFOLK, SS.

JANUARY SITTING, 1891.

MARY E. O'BRIEN, *per pro ami*, v. CUNARD STEAMSHIP COMPANY.

BRIEF FOR THE PLAINTIFF.

The Court below erred, 1, in ruling upon the first count of the declaration that there was no evidence of assault.

2. In ruling upon the second count that there was no evidence of negligence, and therefore directing a verdict for the defendant.

FIRST COUNT

EVIDENCE OF ASSAULT.

The question for this Court is this: Is there any evidence, however slight, tending to show that the operation was performed without the consent of the plaintiff?

If there is any such evidence, then the case should have gone to the jury, even though such evidence was contradicted and controlled by other evidence in the case.

Forsyth v. Hooper, 11 Allen, 421.

Denny v. Williams, 3 Allen, 1.

For if done without her consent, express or rightfully implied, it was an assault. At the outset, a distinction must be drawn between mere submission and positive consent.

It is no answer to a claim for an assault that the plaintiff submitted to it, if the circumstances are such that resistance would have seemed useless; consent obtained by a show of superior force, or under such circumstances that the will cannot be said to have acted freely, is not consent in contemplation of law.

Reg. v. Lock, L.R. 2 C.C., Res. 10, and cases cited.

Rex v. Nichols, R.& R., C.C. 130.

The plaintiff contends that the operation in this case was performed under circumstances which were calculated to produce upon her mind the impression that it would be (*2) useless to resist, and that she submitted to it under the compulsion of superior force and against her own will.

It appears that she was only seventeen years old, that she was on shipboard, and subject to the somewhat arbitrary discipline or control ordinarily exercised over steerage passengers.

Exceptions, page 1, line 13, *et seq.*

That she went below upon the orders of the steerage steward, without being told or knowing for what purpose.

Exceptions, page 1, line 20, *et seq.*

That when she got down below she learned from some of the other women that they were to be vaccinated.

Exceptions, page 2, line 4.

That the surgeon of the ship, with two stewards, stood upon the landing of the staircase, which was the only means of exit: "that the doctor was on the landing, and she couldn't go up."

Exceptions, page 2, line 5.

Exceptions, page 3, line 10.

That when they got down there they were not allowed to go up until they had been examined; that the steerage steward stood at the door leading to the deck, and would let no one pass him without the doctor's orders.

Exceptions, page 5, line 25.

Thus we have evidence that the plaintiff was shut in without her leave being asked, and compelled to go through an examination, whether she wanted to or not: her wishes were not consulted at all. It further appeared that the passengers were then formed in line, and passed in turn before the surgeon, who examined their arms, and vaccinated those who had no mark, and the plaintiff did not hear him say anything to any of them. It may be added that on the same day the men were "housed down" before they knew what was to be done.

Exceptions, page 5, line 16, *et seq.*

Exceptions, page 2, lines 6-9.

(*3) That the plaintiff held back till the last one, because she was afraid to go up when there was no mark upon her arm, and there was nobody by but the two stewards when she was vaccinated by the doctor.

Exceptions, page 5, line 7.

That she told the doctor she had been vaccinated before, but had no mark; that he made no reply, except that there was no mark, and she must be vaccinated again.

Exceptions, page 5, line 2, *et seq.*

That the doctor did not asked her whether she wished to be vaccinated, and no interval of time elapsed between his saying she must be vaccinated and the act of vaccination.

Exceptions, page 2, line 22.

Thus we have evidence that the plaintiff, after being got, without telling her for what purpose, into a place from which there was no exit except by undergoing an examination, did not wish to have the operation performed, for she held back until the last one, being afraid to go up because there was no mark upon her arm, and she was afraid they would vaccinate her. This is certainly some evidence that she did not want to be vaccinated, and that an impression that her wishes would not be regarded was produced upon her mind. This is strengthened by the fact that she told the doctor she had been vaccinated before, which was a strong a remonstrance as could be expected of a young girl under the circumstances, and from which it would be fair to argue to the jury that she had expressed her dissent to the operation. There is also evidence in the above from which it would be fair to argue that, from what the doctor told her, she had a right to assume that remonstrance would be useless, and that she was give no opportunity to remonstrance, for the operation followed at once upon his saying that she must be vaccinated again.

It was submitted that the plaintiff had the right to a finding by the jury upon the question whether, upon all of the above facts, the doctor had a right to assume that the plaintiff consented to the operation, and that it would not be unreasonable to say, upon this evidence, she did not. A verdict in her favor upon this question would not be so manifestly against the weight of the evidence as to require that it should be set aside. It is difficult to understand how it can be said that there is not any evidence, however slight, to warrant such finding.

(*4)SECOND COUNT.

EVIDENCE OF NEGLIGENCE

The plaintiff further concludes that she has introduced evidence which plainly tends to show negligence of the physician in performing the operation. It appears by the testimony of Dr. Clark that her injuries were the result of being vaccinated with matter, or virus, that had decomposed.

Exceptions, Page 6, line 23.

Exceptions, page 7, lines 11 and 14, and 15, 16, *et seq.*

That there is a distinction between decomposed virus and virus which is merely stale; that the former is highly poisonous, while the latter is inert and harmless.

Exceptions, page 6, lines 27-31, *et seq.*

That in using a tube in which the virus was decomposed, a careful doctor would discover it, if he had the sense of smell; that if he smelled it, he could not avoid it.

Exceptions, page 6, line 34, *et seq.*

That one could judge by looking at the capillary tubes whether the virus was good or not; that it is transparent when good, but if impure it would be cloudy; that if virus was much discolored it should be rejected, and the tube should be examined before use, to discover whether it was good or not, and that it sometimes is impure.

Exceptions, page 8, line 18, *et seq.* (Dr. Cogswell.)

That if the ends of the capillary tubes were unsealed, it would cause a change in the virus; that it would cause a difference in the appearance, which would be apparent if held up to the light.

Exceptions, page 9, line 5, *et seq.* (Dr. Richardson.)

Thus we have testimony that impure, decomposed virus was in fact used, and that the physician could and would have discovered if it he had used ordinary care in looking at or smelling it beforehand.

If decomposed virus was used, and a physician using ordinary care can discover when virus is decomposed, the conclusion seems to be inevitable that the physician, in this case, did not use ordinary care; it is no mere presumption: if decomposed virus (*5) was in fact used, and, when capable of discovery, was not in fact discovered, there was certainly negligence.

Furthermore, if negligence on the part of the physician is shown, by which the injuries might have happened, that is sufficient to make out a *prima facie* case, without showing, by actual proof, that the injuries did happen from such negligence.

If negligence is shown on the part of the defendant from which under all the circumstances of the case, the jury can properly infer that the injury happened, the case should be submitted to the jury to determine whether such negligence was the proximate cause of the injury or not.

Holbrook v. R.R. Co., 12 N.Y. 236

Craudall v. Transp. Co., 16 Fed. Rep. 75

Ross v. R.R. Co., 6 Allen, 87.

Evidence of negligence may be entirely circumstantial and inferential, but none the less for the jury.

Thus, in addition to the above evidence of negligence, from which the injuries may have arisen, there is evidence that before vaccinating the plaintiff the doctor rubbed the arm of the plaintiff with his towel and cleaned it off.

Exception, page 2, line 18, *et seq.*

That he used only one towel for all the passengers, which he also used to wipe his lancet on,

Exceptions, page 9, line 18, *et seq.*

and that it is improper to use the same towel for wiping the lancet which is used for cleaning off the arms of the patients, for there is danger of conveying in that way impurities from one person to another.

Exceptions, page 8, line 23, *et seq.*

This is evidence of negligence on the part of the doctor by which the injuries might have happened, and the jury should have been permitted to pass upon the question whether they did arise from that cause or not.

LIABILITY OF DEFENDANT FOR ACTS OF SURGEON

But the defendant contends that, even if it be shown that the injuries arose by the portions of the surgeon, he is not an agent of the defendant for whose acts the defendant is liable.

(*6)It appears by the bill of exceptions, page 1, line 19, that the act was performed by the surgeon of the ship, and that he used the virus furnished by the owners.

See also

Exceptions, page 2, line 5.

Exceptions, page 6, line 3.

Moore v. Fitchburg R.R., 4 Gray, 463.

By the fifth section of Act of Congress, Agus. 2, 1882 (22 U.S. Stats. at large, 188), it is provided,—

"And every steamship or vessel carrying or bringing emigrant passengers or passengers other than cabin passengers, exceeding fifty in number, shall carry a duly qualified and competent surgeon or medical practitioner, *who shall be rated as such in the ship's articles*, and who shall be provided with surgical instruments, medical comforts, and medicines proper and necessary for diseases and accidents incident to sea voyages, and for the proper medical treatment of such passengers during the voyage, and with such articles of food and nourishment as may be proper and necessary for preserving the health of infants and young children, *and the services of such surgeon or medical practioner* shall be promptly given in anycase of sickness or disese to any of the passengers, or to any infant or young child of any such passengers, who may need his services. For a violation of either of the provisions of this

section the *master of the vessel* shall be liable to a penalty not exceeding two hundred and fifty dollars."

Can there be any question that the surgeon of the vessel, under this statute, is the agent of the owners?

See Exceptions, page 11, 1st paragraph.

It must be presumed that, being the surgeon of the ship, he was the surgeon provided in compliance with this statute. If so, he was one of the crew of the ship, whom the owners of the ship are required to carry and pay, and whose services they are required to furnish to any of the passengers needing them, and for his failure to give those services promptly and properly, not the *surgeon*, but the *master*, the representative of the owners in our ports, is made liable to a penalty. He was acting in the ordinary course of his employment, was using supplies of the ship furnished by the defendant in pursuance of the business of the defendant and for its benefit. The surgeon of a vessel is a seaman, one of the crew, and as such has a lien upon her for his wages.

U.S. v. Thompson, 1 Sumner, 170, and cases cited in note.

(*7) If he were an independent professional man, in no respect of the crew, or the [unreadable] servant of the owners, would he have a lien?

The case of a doctor in a summer hotel (relied on in the Court below as analogous to the case at bar) whose room or board is given him by the landlord for the sake of having him in the house, and who is paid by the patrons of the hotel who choose to employ him, is entirely different; in such a case he is not, of course, the agent of the landlord, and the latter is not liable for his tortious acts. The same is true of a doctor sent by a railroad company to attend a person injured by an accident, where the doctor is not regularly employed by the company, but merely sent and paid in a particular case.

But to say that the owners are not responsible for the negligence of the regularly employed and paid surgeon of the ship is going beyond the bounds of common sense and public policy, as manifested by the above statute. If not liable for the negligence of the regularly public policy, as manifested by the above statute. If not liable for the negligence of surgeon, why should they be liable for that of a pilot, engineer, electrician or any other person regularly employed on board in a distinct profession or employment?

It is submitted that the case of *Laubheim v. S.S. Co.*, N.Y. 223, relied upon by the defendant, is wrongly decided. It ignores entirely the doctrine of *respondent superior*, and proceeds upon the ground that the owners are responsible only for their own personal negligence. The three cases cited by the Court in support of this proposition do not support any such thing.

The first holds that a master is not liable to a *servant* for the negligence of a *fellow servant*, arising from the habits of drinking acquired after he was hired, if the master was duly careful in his selection.

Chapman v. R.R. Co., 55 N.Y. 579

The second holds that a hospital which is a *public charity*, is not liable for negligence of one of the surgeons employed by it if it has been duly careful in his selection.

McDonald v. Hospital, 120 Mass. 432.

The third holds that a railroad is not liable for the negligence of a surgeon sent by it to attend a person injured while a passenger if due care was used in his selection.

Secord v. R.R. Co., 18 Red. Rep. 221.

This last case points out the very distinction for which we contend: that the rule laid down in it does not apply where the plaintiff has no choice but to accept the services of the surgeon offered by the defendant. At page 223, Shiras, J., says: "There is a difference between a person whose services are offered, that may or may not be accepted, and a conductor or brakeman that is put on the train, and whose services we might accept. When a man goes upon a train he has no choice about the conductor, brake man or anything else. the company assumes that they are responsible for the performance of their duty in such respects. But with regard to a surgeon of that character, the plaintiff could have refused to take him as his surgeon, and could have taken any other surgeon as he deemed it best to do." In the case at bar the surgeon was the surgeon of the ship, one of the regular crew. In proceeding as he did, he was acting under the regulations of the company, in the usual course of his duty on board, and entirely within the scope of his employment; his services were not sought by the plaintiff, but were thrust upon her for the advantage of the company in avoiding delay at quarantine.

Why, then, is the surgeon not the agent of the owners?

Where is the sense of holding, in the case of a pilot, that the owners *are* liable for his negligence even when they have had no power of selection, being obliged by law to take the first one that offers? and in the case of a surgeon that they are *not* liable for his negligence, though they have had the opportunity of selecting him, unless in such selection they have been wanting in due care? especially when the pilot is employed only for a single service, and the surgeon is one of the regular crew of the ship.

"The China," 7 Wallace, 53.

The plaintiff submits that the defendant is liable for the tortious acts of the surgeon, and that there is, to say the very least, some evidence of assault upon which the jury could legally find a verdict for the plaintiff in the first count, and of negligence to sustain the second, and that the Court below, therefore, erred in directing a verdict for the defendant.

Upon the exceptions relating to the admission of evidence (see Exception, page 9, line 23 *et seq.* page 10, lines 18 *et seq.*, and 24 *et seq.*), if arguable under this bill of exceptions, the plaintiff submits that the evidence, being purely matter n justification and not pleaded by the defendant, is not admissible.

Cooper v. McKenna, 124 Mass. 284.

Levi v. Brooks, 121 Mass. 501.

Blake v. Damon, 103 Mass. 199.

Mulry v. Mohawk Valley Ins. Co., 3 Gray, 541.

E. N. HILL,

F. CUNNINGHAM,

Counsel for Plaintiff

SUPREME JUDICIAL COURT.

BUFFOLK.SS.

JANUARY TERM, 1891.

O'BRIEN V. CUNARD STEAMSHIP COMPANY

BRIEF FOR DEFENDANTS.

The plaintiff was vaccinated by the defendants' surgeon while on a voyage from Liverpool to Boston. Subsequently to her arrival she suffered from the consequences of vaccination, and sued the company on two grounds set forth in the first two counts of her declaration. The first count is for an assault. The second is for malpractice by the defendants' surgeon in carelessly and unskillfully inoculating her with impure virus.

It appeared that by the quarantine regulation in force in Boston at the time of her arrival, all immigrants were subject to examination at quarantine and to be vaccinated by the quarantine officers, unless on examination they should appear to be sufficiently without further examination any passenger holding a card, signed by the medical officer of the ship indicating that such passenger had been examined, and if not already protected under oath the number of persons considered protected. (Report. pages 9, 10.) During the voyage a notice had been posted at various places on the ship, informing passengers that unless they were provided with certificates of vaccination they might be detained at quarantine on arrival, and notifying them that the ship's medical officer was prepared to give certificates and to vaccinate. (Page 11.) This notice had been frequently seen by the plaintiff, who could read. (Page 4.)

On a day near the close of the voyage, and after this notice had been several days posted, the passengers were collected in the steerage and passed in review before the ship's doctor, who examined them one at a time to see whether they required vaccination, passed those that did not require it, and vaccinated those that were not sufficiently protected, each passenger as he passed receiving from an attendant a card certifying that he was protected. (Page 2.) The plaintiff received such a card. She showed it to the quarantine officer, who looked at her arm and passed her, and she kept an produced it at the trial.

(*2)The surgeon was appointed by the defendants, and supplied by them with virus for vaccination. There was no evidence to want of care in the selection of the surgeon or in the procuring of the virus. (Page 6.) Nor was there any evidence of want of skill in the surgeon or of malpractice by him in his case, except such inferences as may be drawn from the results of the vaccination.

The court ruled that the evidence would not warrant a finding for the plaintiff on either count, and defendants content that that ruling was correct, and that the exceptions should be overruled.

I.

There was no evidence of an assault.

Having in view the health regulations of the port (page 9), especially the requirements that all passengers not having the doctor's certificate should be required to verify under oath the number of persons considered protected; and considering the large number of steerage passengers, and the familiar facts as to the character, habits and degree of intelligence of such passengers, it was reasonable that they should be directed to pass the Board of Health. It was reasonable, for the purpose of such examination, that they passengers should be gathered in the stoerage, where they could pass out one by one for inspection and receipt of their certificates. Whether it would have been reasonable to use any degree of force to secure such examination need not be discussed, because no force was used. But whether they were directed or merely requested to assemble in the stoerage and pass in review, if they did it without force or threat, their act must under the circumstances be considered a voluntary compliance with a reasonable requirement made in their own interest; and when they were thus passed in review, and the plaintiff was told that she required vaccination, and made no resistance or objection, but submitted to the vaccination, and took and kept and used the certificate which protected her from quarantine examination, her submission must be deemed to have been voluntary.

The plaintiff testified to no force and to nothing which could fairly be construed as a command.

No did she testify to any protest or resistance, or to anything that could fairly be construed as an objection on her part to the act complained of.

She says (page 1) that she went below with other female passengers on deck upon a steward coming up and saying "they were all to go below"; that when she went down she did not know for what purpose (page 2), but soon learned it by talking with other passengers (page 2); that she knew she had no vaccination marks (page 3), and (*3)held back till the last, because of that knowledge (page 3). Her attention must therefore have been called before to the question whether she needed vaccination or not; and she said she had seen the notices about vaccination, but denied that she had read them (page 4). She showed the doctor her arm and told him she had been vaccinated when a baby, but it left no mark (page 2); he did not ask her whether she wished to be vaccinated, and she did not verbally consent (page 2); she held up her arm to be vaccinated (page 5). She took the certificate of vaccination, made use of it to escape quarantine, and kept it presumably "to avoid detention at quarantine and on railroads," as advised on the back of the card (page 2).

The only reasonable inference to be drawn by the doctor from such conduct was that she wished to be vaccinated. the only fact having any tendency to a different conclusion was the statement that she "had been vaccinated before, but it left no mark." But knowing, and properly presuming that she knew, that she could not pass quarantine without vaccination, he would naturally infer from that statement, not that she did not wish him to vaccinate her, but that she thought it unreasonable she should have to be vaccinated at all. On the other hand, the holding up her arm could not be construed otherwise than as an assent, if not a request, to be vaccinated.

In the existing state of the law and of public opinion as to vaccination it must be assumed that it was for her interest to be vaccinated, as well as for the public good. Her assent would therefore be presumed, in the absence of express dissent.

The jury had the opportunity to know her secret objections and fears; but the doctor had no such opportunity. He cannot be held to have made an unlawful assault upon her unless he had reason to know that she objected to his treatment; and we submit that he had none.

II.

The evidence would not sustain a charge of malpractice against the surgeon.

The charge is, negligently inoculating the plaintiff with impure virus.

No evidence was offered of any want of care in selecting or using the virus.

On the other hand, it was positively shown, without contradiction, that the virus as obtained from the best sources, and put up in the best manner. (Page 6.)

The method of using the virus was described by the plaintiff (page 2), and no evidence was offered that it was not a proper and usual mode among physicians. For anything that appears in the testimony, it is the only way employed by physicians with ? put up in glass tubes.

Dr. Clark, the expert upon whose testimony the plaintiff's case depends, and (*4)who thinks the virus must have been spoiled, says that the doctor could not be expected to find it out; "one would hardly undertake the examine it", "we always expect them to be in good order"; "it might be without the fault of the doctor, whom he did not undertake to blame." (page 7.)

A doctor who pursues the methods generally is use by educated physicians cannot be held guilty of malpractice.

The reasoning by which the plaintiff's case is supported is substantially this:

1. The jury would be warranted in finding that the plaintiff's symptoms were due to impure virus, because Dr. Clark thinks so.

2. Having thus found that the virus was impure, they would be warranted in finding that the doctor negligently administered it, because they might find that if he had held the tube up to the light he might have seen that the virus was turbid, and therefore impure.

The first proposition is based wholly on Dr. Clark's opinion. Aside from that opinion, the facts point to normal vaccination as the cause of the plaintiff's sufferings. But that opinion was shown on cross examination to be without foundation, and wholly unworthy of serious consideration. It was essential to its validity that he should be able to say that the symptoms could only be explained by impure virus. If they were consistent with normal vaccination, the reason for his opinion failed. But he was obliged to admit that all the symptoms except the eruption might have been produced by vaccination with pure virus (page 7); and as to the eruption, "he was of opinion it was a disease or heard to have been occasioned by vaccination before this, and which he believed to have been spontaneous in the cases he had known; that he had seen so little of the disease, and so little was known about it, that he didn't know what caused it." (Page 7.)

After this statement of his knowledge on the subject. We submit that it is wholly immaterial that he still chose to insist that "he was of opinion that plaintiff had it, and that it caused in her case by the vaccination." An opinion so wholly without foundation in the reasons given for it, is not a fit basis for the verdict of a jury in a suit for malpractice. The court below would properly have set aside a verdict based on such evidence, and therefore properly took the case from the jury.

Pleasant v. Fant, 22 Wall. 116, 122.

Sheurman & Redfield on Negligence, 4th Ed. § 56.

The plaintiff's second proposition is based on certain statements obtained on cross examination from Dr. Cogswell, a witness for defendant, whose opinion, however, is wholly against the plaintiff. He testified that he had never seen any results of vaccination with impure or corrupt virus; that one could judge by looking at the capillary tubes whether the virus was good or not, by seeing whether it was transparent or cloudy; that if virus was much discolored, he would reject it and should examine the tube before using it, to discover whether it was good or not.

There is no testimony that Dr. Giffen did not examine the tube, or that it was turbid; but having established that it was impure, because Dr. Clark thinks the sore and eruption were caused by its impurity, and that it must have been cloudy because Dr. Cogswell thinks pure lymph is clear, it follows, according to the plaintiff's reasoning, that Dr. Giffen cannot have examined it carefully before using it, or he would have found but its impurity, and that, therefore, he was negligent in administering it.

We submit that the plaintiff cannot sustain the burden of proving malpractice without some substantially established fact, from which a

reasonably direct inference can be drawn. There must be somewhere near the issue a solid basis of fact to reason from. If, for instance, it was reasonably certain that the plaintiff's suffering were not the result of normal vaccination, it might fairly be inferred that there was something wrong about the virus. And if it were reasonably certain that the virus was bad, and that bad virus necessarily becomes turbid, it might, perhaps, be inferred that it closely examined by the doctor at the time of using, its badness would have been detected; and if it were reasonably certain that a close examination would have detected the bad virus, it might perhaps, be inferred (notwithstanding Dr. Clark's statement to the contrary) that physicians generally examine and ascertain whether it is bad or not before using; and that Dr. Giffen must either have failed to examine it, or must have used it notwithstanding it as bad; and so at last we might reach the proposition at issue, via., Dr. Giffen's negligence.

But not one of these successive propositions is either reasonably certain or even supported by the weight of the evidence.

Upon the fundamental proportion, the weight of expert testimony was that the plaintiff's sufferings were normal, and a natural result of the vaccine disease.

Upon the next proposition, it was denied by the weight of testimony, that either the sore or the eruption could have been occasioned by bad virus, or resembled blood poisoning. (Pages 8, 9.)

Upon the third point no one testified that physicians generally examine vaccine cases to see whether they are clear. On the contrary, Dr. Clark says they always assume them to be in good order, as they obviously must. The statement by Dr. Cogswell of what he would do in a hypothetical case, is not admissible to show what good practice requires. The conduct of the doctor must be shown to have varied from general professional usage, if he is to be held for malpractice. Of this there is not a scintilla of evidence.

[The following in italics is handwritten] *Smith v. Diamond*, 6 N.W. Supp. 242

(*6)Not only is the proposition maintained by the plaintiff supported merely by a series of baseless conjectures, each assumed to rest on the next preceding as an established fact, but it is in itself contrary to common experience and common sense. Everybody knows that physicians vaccinate patients by the score and the hundred; that they do not undertake, and are not expected, to prepare or examine the vaccine matter; that against the most serious dangers of infection by lymph taken from diseased persons no examination could possible do any good; that the preparation of vaccine material is a special art, like the preparation of drugs, and the physician can only see that he gets it from a proper source. He cannot be held for malpractice merely because it turns out bad, if he gets it from a proper quarter.

It is suggested that the plaintiff's injury may have been occasioned not by impure virus, but by some impurity from some other person communicated through the towel or the lancet.

To this we submit:—

1. That plaintiff's injury was due not to normal, but to improper, vaccination.

2. That it was due not to bad virus, as her experts think, but to some impurity independent of the virus.

3. That such impurity came not from any subsequent exposure, but from some fellow-passenger, through the doctor's lancet and towel.

(*7)4. That the doctor negligently failed to sue the usual and proper modes of preventing such contagion.

The sole facts upon which to found this structure of inferences are that the doctor vaccinated her with others, using a lancet, towel and antiseptic fluid; and that she had an unusually sore arm, together with an eruption whose character or origin are in doubt.

It would be wholly unreasonable to hold a physician guilty of malpractice, in the absence of any evidence that his practice was unusual or irregular, upon a series of uncertain inferences, to be drawn by the jury from doubtful opinions of experts who themselves think the doctor was not in fault. [Handwritten] *Smith v. Dumond, supra*.

Upon the most favorable view of plaintiff's testimony it is as consistent with due care as with negligence on the part of the doctor, and cannot therefore support a verdict for malpractice.

Smith v. First National Bank, 99 Mass. 603

Baulec v. N.Y. & H.R.R., 59 N.Y. 356, 366.

III.

The defendant's entire duty to the plaintiff was to sue all reasonable care to secure pure virus and a competent physician.

It is conceded that they performed their duty in both particulars (page 6).

They are, therefore, not liable to the plaintiff for the malpractice of the surgeon.

Mcdonald v. Mass. Gen. Hospital, 120 Mass. 432.

Laubheim v. De. K.N.S.S. Co., 107 N.Y. 228.

Secord v. St. Paul Railway Co., 18 F.R. 221.

The extent of the defendants' duty is a question of law, to be determined by the Court from its knowledge of the nature and character of defendants' business.

That business is the running of a great steamship line. They undertake to navigate the care, and are doubtless responsible for the careless navigation of their servants to charge of their ships.

But they do not undertake the practice of medicine. By the well-known usages of all civilized communities, sometimes enforced by positive statute, that is the exclusive province of the medical profession. They undertake only to furnish a reasonably competent physician, and having done so, they are not responsible for his want of care, because it is exercised in his business and not in theirs.

The last two cases cited above are decided upon this ground.

The opinion in the case of McDonald rests mainly on the charitable character of (*8) the defendant company. But the position here taken is also distinctly relied on in opinion of the Court in that case, 120 Mass. 436.

And if a hospital, whose business might with some plausibility be said to be a practice of medicine, is not responsible for the malpractice of physicians selected with due care, a *fortiori* a steamboat company is not so responsible.

Indeed, we submit with confidence that if the case required it, the decision would have to be, that no one but the physician himself can ever be responsible for his negligent (aside from wilful) malpractice.

He cannot lawfully be another's servant, but must always, under all circumstances and by whomsoever employed, exercise his own professional judgment, and be governed thereby in his practice.

The liability of a master for the acts of his servants rests upon his right to be obeyed, and his presumed power to enforce obedience.

Quarman v. Burnett, 6 M. & W. 499, 509.

Shearman & Redfield on Negligence, § 142, n.

Cooley on Torts, page 532.

"And it is this right to control the conduct of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant."

Bennett v. N.J.R.R. & T. Co., 36 N.J.L. 225, 227.

Little v. Hockett, 116 U.S. 366, 376.

The Bernina, 12 P.D. 58, 66.

It would be unreasonable to hold, and the law does not hold, an employer responsible for the negligence of an employee in matters where he cannot lawfully control his action.

It must now be taken to be settled that the passenger in a public conveyance or hired carriage is not responsible for the driver's negligence, because he has no lawful control over the driver.

Little v. Hackett, 116 U.S. 366, 376.

The Bernina, 12 P.D. 58, 66.

Lake Erie, etc., R.Co. v. Steinbrenner, 47 N.J.L. 161.

The employer of a physician to attend another has even less lawful control over the physician's methods of treatment than the passenger in a public carriage has over the conduct of the driver.

The case of the pilot, for whose negligence the courts of the United States and Massachusetts hold the ship responsible, is not an exception. It rests partly upon the [indecipherable word] that public policy makes the ship responsible for its safe navigation by public [indecipherable word] as well as by servants of its own selection; partly upon the power of the master [indecipherable word] and control the pilot; and partly upon the found that it is a rule of the [indecipherable word] admiralty law, and not of the common law.

The China, 7 Wall. 53, 67.

Yates v. Brown, 8 Pick, 23.

No such reasons apply to the ship's surgeon.

GEORGE PUTNAM,
THOMAS RUSSELL,
for the Defendant.

[The following italicized portions are hand written.]

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, *Sept. 1st 1891*

In the Case of

Mary E. O'Brien, per proch ami

vs.

Cunard Steamship Co. (Limited)

pending in the Superior Court, for the County of Suffolk,

ORDERED, That the Clerk of said Court in said County make the following entry under said case in the docket of said Court, viz.:

Exceptions overruled

Sept. 1, 1891.

BY THE COURT,

COPY,

Henry A. Clapp CLERK

ATTY.

[signature omitted] *Clerk of Superior Court.*

BRIEF STATEMENT OF THE GROUNDS AND REASONS OF THE DECISION.

[The following italicized portions are handwritten.]

There was no evidence to warrant the jury in finding that an assault was committed on the plaintiff.

The defendant is not liable for negligence of the ships' surgeon in his mode of treatment of passengers whom he attends professionally and there was no evidence of negligence on the part of the defendant.

The evidence excepted to was rightly admitted.

