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SOLUTION OF THE DISCLOSURE PROBLEM

WILLIAM F. CAHILL, B.A., LL.B., J.C.D.*

THE DEFENDANT'S ATTORNEY has several distinct obligations to the plaintiff. The moral virtue of justice obliges the lawyer to make restitution for the harm which the laborer has already sustained, and also to prevent further harm coming to the laborer as a consequence of the lawyer's wrongful conduct. The lawyer is obliged by charity to help the laborer in his financial and physical necessities.

The Lawyer Unjustly Harmed the Laborer

From the terms of the problem statement, two factual conclusions appear. The attorney wilfully made a false representation with intent that the laborer should rely upon it, and the laborer, relying upon this misrepresentation, deprived himself without compensation of any practical opportunity to recover on a good cause of action. In consequence of the same misrepresentation and reliance, the laborer is exposed to serious peril of having to endure a long period of suffering and disability.

The falsity of the lawyer's representation follows, not from any passive concealment, but from an active concealment which is equivalent to a positive statement that the fact concealed does not exist. The lawyer caused the laborer to view the physical examination made by the two doctors as a single transaction, undertaken to test the accuracy of the hospital record on the nature of the laborer's injuries. The nature of his injuries was the basic factor in the transaction of release and satisfaction which the parties then contemplated. The lawyer concealed not only the contents of the neurologist's report but even its existence and he did this deliberately and with the purpose of preventing the plaintiff from knowing

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that he was afflicted with Parkinson's disease. To advance this purpose, the lawyer offered freely to the plaintiff's attorneys and to the court the report of the orthopedist, which referred to the shoulder injury only and which, when thus presented alone, seemed to confirm fully the accuracy of the hospital record.

If x stands for the plaintiff's condition, a for shoulder injuries and b for brain pathology, the true fact is reflected by the formula $x = a + b$. The lawyer, purporting to describe x , in effect declared " $x = a$." Therefore, the lawyer lied wilfully to the laborer, intending that the laborer should be lead thereby to accept a release which, in spite of its general terms, was not intended to be a surrender of any rights in respect of injuries actively concealed from him by his adversary's agent. This release, if the manner of its procurement were known, would be held no bar at law to an action predicated upon the injuries thus actively concealed. But it will serve, as the lawyer intended it should serve, to make the plaintiff and his attorneys believe that the laborer has no cause of action against the defendant, and to create a bar in fact to the commencement of any action.

Is the claim of the plaintiff in respect of his Parkinsonism so unsubstantial or frivolous that one can say he has suffered no real harm by its loss? It has been so often decided as to be a truism that a plaintiff states a sufficient cause of action when he asserts a physical ill which reasonably may be related causally to an impact for which the defendant is legally responsible. With so much, the plaintiff has a clear right to go to the trier of the facts with honest proof of the causality he asserts.¹ His right to come into court is not extinguished, either legally or

¹ Cf. Cahill, *Natural Law Jurisprudence in Legal*

morally, because the defendant has honest and competent proofs which deny causation in the premises, nor even because it seems probable that the defendant will succeed but only at great cost. The medical literature we have seen suggests that if trauma causes Parkinsonism, it does so infrequently and that, especially when the first symptoms are discovered in a patient over fifty, the disease is referred only with considerable difficulty to trauma as a cause, or even as a precipitating factor. Yet the laborer has a legal and a moral right to present to the trier of facts evidence, if it is competent and honest, that his affliction had its origin in, or was at least precipitated by, his fall upon the defendant's step. The medical writers clearly admit the possibility of establishing such conclusions.

The Lawyer's Duty of Restitution

What has been said indicates that the lawyer's conduct meets all three of the moralists' tests for establishing a duty to make restitution for damages.² The lawyer acted with theological fault, for he acted freely and with realization that he was doing a morally evil thing, violative of the laborer's strict right, and effective to cause real damage to the laborer. The lawyer's act was, in objective fact, violative of the plaintiff's right not to be deprived of a cause of action by deceit — every man has the moral right not to be ousted or barred from enjoyment of a right of property by means of a lie. Finally, there is no doubt that the lawyer's conduct was, in the objective order, efficacious to deprive the plaintiff of his right without compensation.

Practice, 4 CATHOLIC LAWYER 23, 34-35 (Winter 1958).

² Cf. Cahill, *Some General Criteria of Morality*, 4 CATHOLIC LAWYER 41, 55 (Winter 1958).

It would be possible to deny the lawyer's fault if we supposed he did not understand that sound morality is reflected in the trite doctrine of the law that deceit is no less malicious when done by active concealment than when accomplished by verbal statements which are contrary to the speaker's knowledge. Or the lawyer might be said not to have incurred the duty of restitution if he did not understand that the plaintiff had a strict moral right not to be deprived in fact of his legal right to sue. There may be some men who have come to believe that the use of any means, not described with explicit detail in a criminal statute or in an opinion ordering disbarment, is justified if it is dedicated to the purpose of success — the success of a client, of course. Since this lawyer has manifested some qualms of conscience, he cannot be one of these. To suppose that the lawyer did not act here with foresight that his action was capable and calculated to produce the effect he intended it to have would be absurd.

In order to incur the duty of restitution for damage, the person who has culpably and effectively inflicted unjust damage need not have had a subjective realization that the duty to restore would be a necessary moral consequence of his conduct. It appears that the defendant's attorney has been ignorant that his conduct imposed upon him the duty to make the plaintiff whole, and that only after a month had passed from the time the release was fraudulently procured did he begin to doubt whether he was now under some obligation to help the laborer. Clearly, he has not increased his primary guilt by failing to perform, during the period of his ignorance, the duty of restitution. He has, by making inquiry as to his present duties, fulfilled the basic moral obligation not to continue a line of conduct or

of inaction when one doubts its moral righteousness, without using all means reasonably available to resolve such doubt. But the theological fault which is a premise to the duty of restitution for damage requires that there be, at the moment when the wrongful act is done or when its effective production of harm is wilfully permitted to continue, actual advertence to three objects only: the immorality of the act, its character as a violation of the strict right of another person, and its probable capacity to harm that person. For such theological fault to be incurred, it is not required that the duty of restitution shall have been realized subjectively at the time the fault was committed or when its harmful efficacy was wilfully permitted to continue.

The Lawyer's Duty to Save the Laborer from Increased Suffering and Disability

It seems clear that the lawyer alone has in his hands the means of saving the laborer from a very considerable additional period of great suffering and serious disability. While the defendant and the neurologist may know the facts which indicate the laborer's present perilous situation and its remedy, the lawyer appears to be the only person who, in addition to knowing the facts, understands adequately the danger which now impends for the laborer because the laborer has been deceived with respect to them.

The laborer's peril arises out of two interrelated sets of circumstances. The medical circumstances are set out in the statement: If the laborer does not have treatment of his disease in its early stages, the degree and the duration of the pain, suffering, and disability which characterize the advanced stages of Parkinson's disease

will be very much aggravated. Clearly the laborer will not get early treatment unless he comes to realize his affliction. The circumstances flowing from the lawyer's deceit very seriously diminish the likelihood that the laborer will come to this realization in time to get treatment early enough effectively to postpone and ameliorate the disease's advanced stages. The man's conduct, as described in the statement, indicates that he is inclined not to consult physicians except when he is suffering from an acute complaint and believes that the doctors have or can find a remedy; he sought treatment once, at the hospital, in such circumstances. Later, he had headaches, and he might have been led by this fact to have an examination which would uncover the Parkinsonism. But the lawyer has made him believe that competent medical men explored that symptom without being able to suggest its cause or cure. The early symptoms of paralysis agitans may be attributed readily, by a patient of this man's age, culture and experience, to approaching senility. It is quite likely that the lawyer's deceit in respect of the headaches will lead the laborer to assume an attitude of hopeless endurance toward the early symptoms of shaking and stiffness.

The lawyer's moral responsibility for the harm here threatening the laborer differs from his conscientious accountability for the laborer's loss of his cause of action. No harm in respect of pain, suffering or disability seems to have been actually inflicted up to this time. If the lawyer had disclosed the neurologist's report, the patient could have had for his headaches no treatment more effective than common headache remedies. A delay of one month in commencing treatment for Parkinsonism seems not to have any real significance in the prognosis

for the advanced development of that disease. Therefore, we cannot say the lawyer has a duty to repair or compensate for any harm already inflicted upon the laborer's health.

The harm to follow upon the postponement of treatment was not directly intended by the lawyer to be a result of his deceit, though he did so intend the plaintiff's damage in respect of the cause of action.³ Yet this danger of greater suffering and disability which menaces the laborer is objectively related to the lawyer's wrongful deceit, not as a merely indirect or accidental effect thereof, but as a direct effect of the lawyer's fraud.⁴ That a man afflicted with a disease will not seek treatment for it is a direct and natural result of the act by which another deceives the patient, making him believe not only that he has not such a disease, but also that conditions for which he might seek independent diagnosis and treatment are beyond the diagnostic and remedial powers of medical specialists. Although this pending result of his fraud was not the purpose intended by the lawyer when he deceived the laborer, and although he has recognized this danger only now, a month after his deceit achieved the objective he did intend, still justice obliges the lawyer to prevent this evil result from being actualized as a direct effect of his wrongful conduct.

The distinction between the direct and the indirect effects of an act is so important a factor in our moral evaluation that we must do our best to clarify this distinction. Take it that *A*, *B* and *C* are amateur yachtsmen and strangers to each other. *B* and *C* are on trial runs, and therefore have experts aboard. As *A* overtakes *B*, he hails,

³ Cf. Cahill, *Some General Criteria of Morality*, 4 CATHOLIC LAWYER 41, 48 (Winter 1958).

"I think my rudder is out of line, and I feel something else is wrong." *B* answers, "I have a marine architect and engineer here. Sail past, and I'll have them look you over." The experts tell *B* that *A* has a list which, to their practiced eyes, is a certain indication that *A*'s keel is nearly detached. They declare that if *A* were aware of the condition of his keel he would realize that he must soon shorten sail or run certain risk of capsizing. *B* has no purpose to harm *A*, but he does not want the trouble of taking *A* in tow, which he would be expected to do if *A* had to shorten sail in the sea now running. The experts also tell *B* that *A*'s rudder is out of line, and *B* calls to *A*, "You're right, your rudder is out of line." Then *A* sails past *C*, whose experts remark to *C* upon all the facts and indications which *B*'s experts have noted. *A* hails *C*, as he had hailed *B*, but *C*, lying, answers, "I can't hear you."

A's present peril is an effect of both lies — he is in danger because he does not know the condition of his keel, and both lies are effective to keep him in ignorance of that fact. But *B*'s lie is calculated, in and of itself, to stop further investigation or inquiry through which *A* may discover his peril, while *C*'s lie has not that inherent tendency. If, for example, *A* finds an opportunity to make inquiry of a Coast Guard cutter which is running a parallel course, though not so close to *A* as the other yachts, *C*'s lie has no tendency, *de se*, to make *A* pass up that opportunity; but in *B*'s lie that tendency is inherent. *A*'s peril is a direct effect of *B*'s lie, but it is only an indirect effect of *C*'s.

The determination that the laborer's peril is a direct, rather than an indirect, effect of the lawyer's lie will morally qualify the lawyer's moral obligation to relieve the

peril. Though the parties be strangers one to another, both justice and charity oblige the one to prevent the occurrence of damages to the other as a direct effect of his conduct. In the absence of any special relation which imposes other duties, charity alone requires one to prevent another's harm which is only an indirect effect of one's act or omission. As *B*, if he has now means of signaling *A*, is bound by charity and by justice to warn *A*, so is the lawyer bound to relieve the laborer's peril; the lawyer's obligation is not one of charity only, as is the obligation of *C* to warn *A*.

The chief practical import of the conclusion that the lawyer here is bound by both justice and charity, rather than by charity only, will appear when we discuss the causes which may excuse performance of this duty. The principles which excuse performance of charitable obligations are much less strict and rigorous than those which permit postponement of performance of a duty imposed by the virtue of justice.

Causes Which May Excuse Postponement of a Performance Due in Justice

No cause will excuse performance of a negative duty imposed by justice. If justice forbids an act, the act is evil, and evil may never be done as a means of accomplishing a good purpose.

Performance of an affirmative duty of justice may be postponed, even indefinitely, without moral guilt, provided that the performance is excused and continues to be excused by physical or moral impossibility.⁵

Physical impossibility would excuse the

⁵ Cf. Cahill, *Some General Criteria of Morality*, 4 CATHOLIC LAWYER 41, 49 (Winter 1948).

yachtsman *B*, for example, if the weather prevented him from overtaking *A* and from sending *A* any effective signal. But unless the laborer has disappeared without leaving a trace, there is no imaginable physical impossibility which will excuse the lawyer's duty to make the laborer aware of his infirmity. If the lawyer is penniless and he cannot get his client to meet the entire cost, he is excused from his duty to compensate the laborer's financial loss in respect of his cause of action.

Moral impossibility of performance raises more difficult problems. Consideration of the order of goods or values in which the person wronged and the wrongdoer will suffer and comparison of the quanta of the respective detriments are helpful indications.

When we compare the plaintiff's financial loss in the fraudulent release with the money cost of the lawyer's restitution, it is probable that a great disparity will excuse the lawyer — say his cost would be double the fair value of the other's loss, and that this loss had not reduced the plaintiff to penury. If the parties suffer in different orders of value, the lawyer may be excused by a very serious loss in a higher order, though the relative quantum of his loss is not clearly greater than the plaintiff's. A certainty or a great probability that disbarment would be involved might well excuse postponement of this duty. A loss of reputation incidental to the revelation of his fraud would seem to have been a risk assumed in the act of willful fraud, and would not excuse — unless the disgrace were so great and so nearly certain that one could say it will totally ruin the lawyer's career.

To excuse performance of the duty to save the laborer from his peril of greatly increased and prolonged suffering and dis-

ability, no money loss, as such, would seem to suffice. But a great detriment in the same order of values or in a higher order might excuse postponement of the duty to make the laborer aware of his perilous state of health. That peril respects a detriment in the order of the "goods of life." Thus, if the lawyer grievously risks lifelong penury, his loss is not in the order of property only, but passes over into the order of "goods of life." A prison term, considerably longer than the added period of illness which menaces the laborer, would be a detriment in the same order as the laborer's, and might be considered more grave.

We are not given a statement of the lawyer's financial condition, nor an assessment of the value of the claim of which the plaintiff was defrauded. But it is clear that the duties to save the laborer from physical peril and to re-establish his right to sue on his claim can be accomplished by the lawyer without immediate expenditure. Ultimately, of course, the lawyer will have to make contribution to the satisfaction of a new release or of a judgment, but it is only a practical certainty of an exorbitantly unjust demand or award, or of actual penury, which will excuse the lawyer from incurring that risk.

It does not appear that the lawyer risks prison or disbarment or a crushing disgrace, if he approaches his task with the aid of the court. The court should be willing to help the parties make a fair composition of the matter. The lawyer should fully state the facts to the court, except that, with unmistakable clarity, he should indicate that he is making no admission in respect of the intent or advertence with which he acted. The lawyer may say that reflection upon the consequences of his conduct has urged upon him a conscientious duty to

appeal to the good office of the court.⁶ He should declare his readiness to meet from his own resources any expense in excess of the sum his client should have had to pay, absent the fraud, for a release which included the cause of action for brain injury, or for satisfaction of a reasonable judgment upon that claim.

Conflicting Obligations

When one is under a moral duty which forbids a performance imposed by another moral obligation, the performance is morally impossible and is therefore excused. Do the obligations of the defendant's attorney, to his client and to his profession, excuse his performance of the duties to make restitution for the harm the laborer has suffered and to save the laborer from future peril?

Since the client is the beneficiary of the professional duties here in issue, this problem does not arise if the client consents to the lawyer's performance of his obligations to the laborer. If the client, not wishing to incur the trouble and expense incidental to reopening the laborer's release, refuses this consent, the lawyer must consider whether his obligations to his client excuse him from the duties he owes the plaintiff laborer.

Does the defendant have a strict right to safeguard his present position? It seems he has not. Even if the defendant has had no moral responsibility in the fraudulent conduct of his attorney, he now knows that the position he enjoys, in having a practical immunity from suit by the laborer, is an advantage to which he is not morally entitled, for it was procured unjustly. He is,

therefore, subject to the moral duties of a "possessor bonae fidei rei alienae" — from the moment he discovers that he is withholding a right from its true owner, he is bound to restore that right. Consequently, he acts unjustly, from a moral point of view, if he declines to make restitution to the laborer and forbids his attorney to do so.

Yet are not the duties of confidence and fidelity, imposed upon the attorney by law, made for the common good, so that the immorality of an individual client's position does not absolve the attorney of these obligations? Clearly, this question must be answered affirmatively, but the answer is subject to distinct limitations. The duty of confidence is not unqualified. Our courts have held that an attorney may not claim privilege as to communications made to him in connection with his client's suit, not made by the client himself, but by a person whom the attorney interviewed as a prospective witness for the client's cause.⁷ Under that rule, the neurologist's report in this case is not privileged. The decision of Judge Morrow in *In re Boone*⁸ has become a classic description of the attorney's duties of confidence and fidelity to his client. Yet that opinion carefully states some of the limits of these duties: "He is not allowed to divulge information and secrets imparted to him by his client or acquired during their professional relation, except, perhaps, in very rare circumstances. . . ."⁹ ". . . [D]isclosures made by a client to his attorney involving crimes mala in se or, as in the matter at hand, the prostitution of justice itself, are not protected by the privi-

⁶ Compare Opinion 673, OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYER'S ASSOCIATION 389 (1956).

⁷ See *Bergmann v. Manes*, 141 App. Div. 102, 125 N. Y. Supp. 973 (2d Dep't 1910).

⁸ 83 Fed. 944 (N.D. Cal. 1897).

⁹ *In re Boone*, 83 Fed. 944, 953 (N.D. Cal. 1897).

lege. . . ."¹⁰ "The obligation of an attorney . . . was never understood or intended to justify an attorney in misleading the court itself. . . ."¹¹

It does not appear that, either because the lawyer himself has practiced the fraud, or because the deceit was practiced in pre-trial, the Canon on Discovery of Imposition and Deception¹² should not be construed to cover the problem case here. "When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the Court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps."

Causes Which Discharge an Obligation Imposed by Charity Only

Since the virtue of justice imposes the duties of the lawyer in respect of the plaintiff's accrued damages and of the peril to the laborer's health, the more lenient principle which excuses obligations of charity alone has no application in this case. If it were shown, however, that there was lacking some element essentially necessary to establish either of these duties as flowing from justice, then that duty would stand as an obligation of charity only, and its per-

¹⁰ *Id.* at 960.

¹¹ *Id.* at 962.

¹² Canon 41, AMERICAN BAR ASSOCIATION CANONS OF PROFESSIONAL ETHICS.

formance might be excused by operation of the more lenient principle.

There would be such lack, for example, if closer and more competent analysis of the facts showed: that the concealment of the neurologist's report was passive only, and not unjust; that at least one of the tests for the duty to make reparation for damages was not met; that the laborer's condition will not be ameliorated by early treatment; that he will get early treatment though the lawyer should not warn him; or that, though the peril is real, it is only an indirect effect of the lawyer's fraud.¹³

The obligation affected by such a correction of the findings offered by the present writer would be a duty of charity and not of justice. Charity obliges us to save others from harm, whatever be the evil which affects or threatens them, and especially if harm is a result of our own conduct, though only indirect. Duties of charity are subject to two limitations. Charity never obliges at the cost of equal harm or peril to one's self. And a truly serious harm or peril (though it be not so grave as the neighbor's, or affect an inferior order) will excuse one from aiding his neighbor in any but the most serious necessities.

If either of the duties which the defendant's attorney owes to the plaintiff were imposed by charity only, performance thereof might be excused by a serious risk of notable loss to the lawyer, in money or in reputation.

¹³ *Cf.* Cahill, *Some General Criteria of Morality*, 4 CATHOLIC LAWYER 41, 50-52 (Winter 1958).