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Deflating Plaintiffs' Use of the Hippocratic Oath in Medical Negligence Cases

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Lawyers representing plaintiffs in medical negligence cases often ask doctors about their having taken the Hippocratic Oath. They want to gain a simple concession from the physician that they swore to uphold the principle of "primum non nocere," which means "first do no harm." Here is a typical exchange:

> Q: As part of your job, is one of your ultimate goals when you have a patient who comes into the emergency room, to keep them safe from harm?
>
> Yes.
>
> Q. And you take an oath to do that, right -- do no harm?
>
> A. That is correct. That's the Hippocratic Oath.

The concept that an oath can give rise to a duty, in and of itself, is not the problem. The problem with this line of questions is how plaintiffs try to elevate doing "no harm" to either the primary duty, or to some form of strict liability.

These "oath" questions are sometimes bundled within a longer sequence of "reptile" questions. (The so-called Reptile Theory, borne by the book *Reptile: The 2009 Manual of the Plaintiff's Revolution* by Don Keenan and David Ball, has been analyzed extensively elsewhere, including in DRI's *For The Defense* magazine. *See, e.g.*, John Crawford & Benjamin Johnson, "Strategies for Responding to Reptile Theory Questions," For The Defense, Dec. 2015; Bryan Stanton, "Proven Strategies to Outsmart the Reptile Theory," For The Defense, Dec. 2017; and Mike Bassett and Sadie Horner, "Just What Is the 'Reptile' and How Do I Combat Against It?" For The Defense, Mar. 2017.) The strength of the plaintiffs' Hippocratic Oath approach, like most "reptile" sequences, is based first on the doctor giving a simple "yes" answer when asked to agree that he or she took that oath, and second, that safety and doing "no harm" is their primary duty. The plaintiffs are looking for simple sound bites they can later display to a jury. Conceding these points can usually be avoided, however, because the Hippocratic Oath questions are built upon a complete myth; contrary to common belief, medical oaths do not contain such a statement of primary duty.

A Short History of Medical Oaths

The Hippocratic Oath is the earliest known expression of medical ethics in the western world. Like many ancient texts, its origins are unclear and its evolution extensive. It is named after Hippocrates, a Greek physician who reportedly lived from approximately 450–370 B.C.E. But modern scholars are quite certain he did not personally write the oath, asserting the view that it was written by a Pythagorean sect after studying what is known as the Hippocratic corpus, a collection of some sixty ancient Greek medical works associated with the teachings of Hippocrates. The authors of the corpus are also unknown.

To make the history even more convoluted, the original Greek version would not have been translated directly into English. It would have been translated first into Latin and then, centuries later, English, French, etc. Thus, there are several different translations of the original Hippocratic Oath. Subtle differences in translation of the ancient Greek, like subtle changes in the language of a statute, could be meaningful. Translations of the oldest known version can be found in scholarly articles and on the internet. *See, e.g.*, Brian Hurwitz and Ruth Richardson, *Swearing to Care: The Resurgence of Medical Oaths*, BMJ 315:1671–74 (1997); Peter Tyson, *The Hippocratic Oath Today* (2001), *available at* NOVA http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html; and AAPS http://www.aapsonline.org/ethics/oaths.htm. Unquestionably, as an ancient text, its origins arouse debate among historians and the oath has evolved in various ways over the last 2,000 years; different

people, generations and religions have had their say about its content.

In its original "Ionic" Greek, the Hippocratic Oath requires the nascent doctor to swear, by a number of healing Greek gods, to uphold certain ethical standards, including confidentiality and not performing abortions or euthanasia. The duty of care language says: "I will use treatment to help the sick according to my ability and judgment, but never with a view to injury or wrongdoing." And "... I will abstain from all intentional wrongdoing and harm,...." *See*, *e.g.*, version posted on Wikipedia (last visited Mar. 18, 2018). The invocation of deities in the Hippocratic oath was the enforcement mechanism; there would be cosmic consequences to breaking the oath.

There are a number of other oaths or prayers that developed over the centuries: the Osteopathic Oath, the Declaration of Geneva's Physician's Oath, the Prayer and Oath of Maimonides. The Declaration of Geneva says: "The health of my patient will be my first consideration." The Prayer of Maimonides was written in the twelfth century and does not contain primary duty language. Nor does its shorter cousin, the Oath of Maimonides. A more "modern" version, which still bears the name Hippocratic oath, was penned in 1964 by a medical dean named Louis Lasagna. Like the original, it does not contain a primary duty of patient safety.

Avoidance of harm is never, in any oath, elevated to a priority higher than is attempting to help. *See*, *e.g.*, Robert Shmerling, MD, *First, Do No Harm*, Harvard Health Blog (2015), posted at https://www.health.harvard.edu/blog/first-do-no-harm-201510138421.

The Rise of the Myth

The phrase "primum non nocere" does not appear in the original Hippocratic Oath. One good reason is that the phrase "primum non nocere" is Latin, not Greek. The phrase does not even appear in Greek in the Hippocratic corpus, the supposed foundation documents for the oath. The closest the corpus comes is: "The physician must ... have two special objects in view with regard to disease, namely, to do good or to do no harm." This avoidance of harm, sometimes referred to as non-maleficence, does appear in various medical oaths. But many medical historians believe this was an admonition against overtreatment, not a general statement of duty. And it has never been expressed as the primary duty.

The origin of the specific phrase "first do no harm" in association with a medical oath, whether in English or Latin, is controversial. The research about the origins of the phrase in association with medicine is too extensive to repeat here. (For discussion of the origin of the phrase, see Daniel Sokol, *First Do No Harm Revisited*, BMJ 347 (2013); Cedric Smith, MD, Origin and *Uses of Primum Non Nocere--Above All, Do No Harm!*, J. Clin. Pharmacol., Apr. 2005, at 45(4):371–77.; and Wikipedia.) Suffice it to say it did not originate with Hippocrates, Galen or Pare', as theorized by a few. Smith's paper notes that the phrase barely appears in print in association with medicine until after the 1960s. Cedric Smith, MD, *Origin and Uses of Primum Non Nocere--Above All, Do No Harm!*, J. Clin. Pharmacol., Apr. 2005, at 45(4):371–77. The phrase "primum non nocere" probably crept into the discussion in the 1600s or 1800s. The historical literature points to either the Englishman Worthington Hooker in the 1600s, a French physician, Auguste Francois Chomel, in the early 1800s, and then, in about 1860, by either Dr. Thomas Inman or Dr. Thomas Sydenham. But the exact phrase still never appears in any medical oath found in the literature. And the concept of non-maleficence is not the same as primum non-nocere.

How predominant is the use of medical oaths to begin with? There are several interesting studies worthy of consideration. In 1970 Crawshaw published his study about the predominance of medical oaths. Ralph Crawshaw, MD, *The Contemporary Use of Medical Oaths*, Journal of Chronic Disease 145–50 (Vol. 23, 1970). Building on an earlier work by Irish, he polled 97 medical school deans about whether and what oaths were used by their classes of 1969. He disseminated three oaths: the original (from a 1947 Encyclopedia Britannica translation), the "modern" version used at Ohio State University in 1957, and the Declaration of Geneva. Eighty five schools replied. Seven (8 percent) used no oath, while 78 (92 percent) did. The original Hippocratic Oath was used by 14 (17 percent), the modernized version by 24 (29 percent) and the Declaration of Geneva by 20 (24 percent). Other oaths were used by 25 (30 percent). He did not get into any detail about the use, or absence, of "primum non nocere" or non-maleficence.

In 1989 Crawshaw and colleagues followed up on his earlier work on polled 126 American medical schools. Of those, 119 replied. *See* Ralph Crawshaw, MD, Letter to the Editor, *Is Alive and Well In North America*, BMJ 309:952 (1994). They reported the use of the oath of Geneva (33), the classic Hippocratic oath (three), a modified Hippocratic oath (67), the prayer of Maimonides (four), a covenant (one), other oaths (eight), an unknown oath (one), and no oath (two).

There is even a study about the contents of various oaths used. In 2000, Kao and colleagues published their study of the subject. Audiey Kao, MD, PhD and Kayhan Parsi, PhD, *Content Analyses of Oaths Administered at U.S. Medical Schools in 2000*, Acad. Med., Sept. 2004, at 79(9):882–87. They obtained the oath, if one existed, from every one of the 141 accredited medical schools in the United States, and then analyzed them. There were 122 allopathic schools, and 19 osteopathic. All 19 osteopathic schools used the osteopathic oath. Less than half (49.2 percent) of all U.S. allopathic schools administered the Hippocratic Oath or a modified version of it. Almost one quarter (24.6 percent) of the allopathic schools' oaths had been written by medical students or others at the school. Eighteen schools offered more than one oath option to their medical students. The content of the oaths varied in many key respects, such as whether abortion or euthanasia was a covered subject. As to the key subject about which we are concerned—a statement of primary duty—Kao and his co-authors concluded that: "… fewer explicitly characterized the need for non-maleficence or the "first do no harm" principle (24 percent)." Kao's article did not identify any oaths using primum non-nocere, and in that quote improperly conflate such a primary duty with non-maleficence.

It can be argued that the Hippocratic Oath has been superseded by modern ethical codes, such as that of the AMA's *Code of Medical Ethics*. But it is understandable that doctors are asked to take a short, supposedly ancient oath at entry into medical school, as opposed to reading the statement of a voluntary, modern organization like the AMA. It adds to the grandeur or solemnity of the occasion.

Why This Matters in Tort Cases

While all versions of medical oath have some duty element to them, the scope of that duty is a critical issue in medical negligence cases. What duties the plaintiff extracts from the witness should not be inconsistent with American tort law, and should accurately be based on an oath actually administered at a medical school, American or otherwise.

By putting "do no harm" "first," the Plaintiff is suggesting a duty inconsistent with American tort law. It smacks of absolute liability if harm occurs. The original Hippocratic oath is more in keeping with American tort law in two respects. First, by emphasizing "ability and judgment," it is comparable to modern expressions of the standard of care, which emphasize reasonableness in comparison with peer expectations. Second, by using the phrase "never with a view to injury," the original oath injects the distinction between negligence and intentional conduct, a notion emphasized in the later passages quoted above, about abstaining from intentional harm.

It would be impossible to practice medicine if one obsessed in the first instance about avoiding harm. Patients seeking medical care are often already in some peril. The diagnostic and treatment process always entails some risk, as does doing nothing at all. The practice of medicine is—to some degree—the art of weighing and balancing risk versus reward.

While avoiding harm is a laudable goal, it is completely unrealistic in medical practice, and an unattainable goal of medical ethics. In Smith's words: "… as many ethicists and physicians have pointed out, merely avoiding harm does not meet the challenges of promoting positive actions to improve health, cure disease, and alleviate suffering." Cedric Smith, MD, *Origin and Uses of Primum Non Nocere--Above All, Do No Harm!*, J. Clin. Pharmacol., Apr. 2005, at 45(4):371–77; citing Lasagna, Shelton and Rogers.

Further, Daniel Sokol, a barrister in London, points out that what constitutes "harm" is by no means always clear, because medical decisions are always a balance of risk versus benefit, some of which are subjective value judgments. He suggests that a more accurate formulation of the principle would be "first do no net harm." *See* Daniel Sokol, *First Do No Harm Revisited*, BMJ 347, f6426 (2013).

Preparing the Physician Witness

How can we prepare witnesses to deal with this line of questions?

First, counsel should find out in the preparation sessions whether the witness even knows which oath he or she took. Were they told the origins of their oath, or its title? Do they remember the content, and whether it contained the phrase so often quoted? The plaintiff's whole approach might be cut off early if the doctor does not know what oath he or she took, and what duties it contained.

For example, the original oath swears to several Greek gods like Apollo and Panacea, and then generally "all the gods and goddesses." That is not exactly in step with modern religious thought. It is pretty unlikely that a modern physician took an oath swearing to a group of Greek gods and goddesses. As a stand-alone point it may not be effective, but a thoroughly prepared witness could keep it in mind as an example of how the original oath has changed and is not in step with modern American thought. And American juries are unlikely to subconsciously enforce an oath which relies on a smorgasbord of gods.

Next, the vast majority of articles about defending against the reptile theory emphasize that witnesses, whenever possible, should avoid agreeing with absolute statements. For example, the lawyer may ask "do you agree that safety is your first priority when you see a patient?" The uninitiated witness may say "yes," because they are scared to appear foolish by disagreeing with such a basic statement. But the well-prepared witness might say: "no, I do not agree. My duty is to make a reasonable assessment and disposition based on the information available." Or they may say that safety is a relative term; everything they do, or do not do for patients, involves risk of harm. By doing so the witness removes or reduces the power of the plaintiff's intended individual sound bite and, thus, reduces or eliminates the power of a chain of them. It disrupts the plaintiff's lawyer's flow and devolves the questioning into abstract, historic or philosophical debate, far removed from the facts of the case.

Here is a hypothetical example of how it could play out in a medical negligence case:

Q: Did you take the Hippocratic Oath?

A: I am not sure if I did.

Q: Doesn't every medical student take it?

A: No, there are many different oaths.

(in the case of someone who did take it....)

A: I am not sure if I took the original or a modernized version of it. (or "not the original one, no.")

Q: And regardless of which oath you took, did it say your first duty is to do no harm?

A: Do you mean the original Hippocratic Oath, or the modern version?

Q: The one you took to become a doctor.

A: I do not remember the exact language of that oath. That was ten years ago.

Q: Regardless of what oath you took, would you agree that your first duty is to do no harm?

A: No. First of all, that is not what the original oath says and I am not aware of any medical oath that makes that our first duty. (Or no, my duty is defined by Ohio law, not an ancient Greek text which has been changed repeatedly in the last 2,000 years.)

Clearly the plaintiff's lawyer is not getting where he or she wants to be.

The more modern versions of the oath often caution the physician to avoid the "twin traps of overtreatment and therapeutic nihilism." (Therapeutic nihilism is a contention that it is impossible to cure people of their condition through treatment. It is connected to the idea that many so-called cures do more harm than good, and that one should instead encourage the body to heal itself.) In a case in which the plaintiff's lawyer is advocating the usual more of everything —more tests and more treatment—the "overtreatment" issue may come in handy, such as the doctor being prepared to convey the thought that—"you know that oath you asked me about? It says not to overtreat, and I thought ordering every conceivable test may be just that."

It also has to be considered that oaths taken by medical students have no connection to medical licensure, unlike the oaths lawyers must take. Of what value is an oath that has no legal or deistic enforcement mechanism? Could one argue that, as an improper statement of the duty of care under state tort law, the Hippocratic Oath question should not even be permitted in evidence? Is it worth filing a motion in limine to exclude one misleading question about medical oaths? Probably not, but if Plaintiff's counsel does not get their sound bites at deposition, they may skip the questions at trial. Regardless, well-prepared witnesses will not be perpetuating the myths of the Hippocratic Oath.

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