DePaul Law Review

Volume 11
Issue 2 *Spring-Summer 1962*

Article 11

Torts - Affirmative Duty - the Emergency Room in a Private Hospital - Wilmington Gen. Hosp. v. Manlove, 51 Del., 174 A.2d 135 (1961)

DePaul College of Law

A lack of precedent, or mere novelty in incident, is no obstacle to the award of equitable relief, if the case presented is referable to an established head of equity jurisprudence–either of primary right or of remedy merely . . . the court has the broadest equitable power to grant the appropriate relief."[25]

Thus the *Nutley* case, although not without foundation in New Jersey case law, is still a unique approach to labor relations law at the state level, and poses many interesting questions. If a court of Equity can rely upon a constitutional provision guaranteeing the rights of organization and collective bargaining, and its inherent equitable powers to provide an adequate remedy for any wrong, can it also order an election and certify a particular union as the authorized bargaining agent? Congress had to pass the National Labor Relations Act and establish the NLRB before the complex problems presented by certification elections could be met. If failure to certify a union can be deemed a wrong, then according to the reasoning of the Court in the *Nutley* case, the Equity court can provide an adequate remedy, such as a certification election. The *Highstown* case gives a good indication of how far the New Jersey Court can go in exercising the functions of a labor relations board. There the Court enjoined one union from picketing a plant after another union had been accepted as the bargaining agent by the employer on the basis of a privately held employee election. It would be a short step for the Court to order an election and certify the union itself.

Many states have constitutional provisions similar to the one relied upon by the New Jersey Court. It will be interesting to note the extent to which the New Jersey view will be adopted regarding those provisions.

[25] Cooper v. Nutley Sun Printing Co., 36 N.J. 189, 190, 175 A.2d 643, 644 (1961).

TORTS–AFFIRMATIVE DUTY–THE EMERGENCY ROOM IN A PRIVATE HOSPITAL

In attempting to obtain additional medical assistance because their doctor's treatment had been ineffective to ease their four month old son's high fever, insomnia, and diarrhea, Mr. and Mrs. Darius M. Manlove took their baby to the emergency room of Wilmington General Hospital and related his condition to the nurse on duty. The nurse explained to the parents that the hospital could not give treatment because the child was already under the care of a doctor, and there was a danger the medications would conflict. The nurse did not examine the baby but did make an unsuccessful attempt to reach the attending doctor. The Manloves returned home with the child who died about three hours later. The

parents sued the hospital to recover damages under the Wrongful Death Act. The defendant moved for summary judgment, which was denied by the trial court. On appeal, the Delaware Supreme Court, in affirming the denial of summary judgment and remanding the case, held that liability will accrue to a private hospital[1] which fails to grant admission and assistance in an unmistakable emergency, and that a question of fact was presented as to whether the nurse on duty was derelict in her duty in not recognizing an emergency from the symptoms related to her. *Wilmington Gen. Hosp. v. Manlove,* 51 Del. ——, 174 A.2d 135 (1961).

In cases involving negligence the statement is frequently made by the courts that a defendant will not be liable to a plaintiff unless he has breached a duty owed to the plaintiff. That duty may be imposed by either the common law itself,[2] as in the noted case, by statute,[3] or by contract.[4] While this rule may seem clear enough, like all statements of abstract principles, real difficulties arise in its application to the myriad fact situations of life in 1962, especially where a court is asked to impose an affirmative duty on a defendant who is acting gratuitously. The courts were naturally slow to impose affirmative duties to act in such circum-

[1] An Illinois Appellate Court [Olander v. Johnson, 258 Ill. App. 89 (1930)] classified hospitals for purposes of liability as public, charitable, and private. A public hospital is owned by the government and devoted to public uses, and such hospital is not liable for injuries to a patient caused by the negligence or misconduct of its employees or agents. The court defines a charitable hospital as one organized, not for the purpose of making a profit, but for charitable purposes; it is not liable for the torts or omissions of its professional staff unless it fails to exercise due care in their selection. A private hospital is one founded and maintained by a private person or corporation, and the court states that the liability of such a hospital for damages growing out of negligence is the same as that of natural persons.

In a suit therefore, the liability of a hospital may depend on its status as either a public, charitable or private hospital. Status, however, is not solely determined by the hospital's corporate character, nor by the fact that it receives paying as well as charity patients, but is determined by whether it serves a public or private charity and by its type of management. Thus, a hospital may be created under a private corporate charter, and yet for purposes of liability, it may be classified by the courts as a charitable hospital if its purpose is to serve a private charity.

For detailed discussion of the above principles see the following cases: Wilmington Gen. Hosp. v. Manlove, 51 Del. ——, 174 A.2d 135 (1961); Olander v. Johnson, 258 Ill. App. 89 (1930); Taylor v. Protestant Hosp. Ass'n, 85 Ohio St. 90, 96 N.E. 1089 (1911), *rev'd on other grounds* in Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410 (1956); University of Louisville v. Hammock, 127 Ky. 564, 106 S.W. 219 (1907); Downes v. Harper Hosp., 101 Mich. 555, 60 N.W. 42 (1894), *rev'd on other grounds* in Parker v. Port Huron Hosp., 361 Mich. 1, 105 N.W.2d 1 (1960); Hennepin County v. Brotherhood of Church of Gethsemane, 27 Minn. 460. 8 N.W. 595 (1881); McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432, 21 Am. Rep. 529 (1876).

[2] Massey v. Worth, 39 Del. 211, 197 Atl. 673 (Super. Ct. 1938).

[3] Lynch v. Lynch, 39 Del. 1, 195 Atl. 799 (Super. Ct. 1937).

[4] Vaughn v. Menlove, 3 Bing. (N.C.) 468, 132 Eng. Rep. 490 (Ex. 1837); Langridge v. Levy, 2 M. & W. 519, 150 Eng. Rep. 863 (C.P. 1837).

stances. In the consideration of the noted case, it is profitable to examine some of the early situations, other than those involving hospitals, where the courts, for varying reasons and with varying rationales, found that a defendant had an affirmative duty to act even though the defendant was performing a gratuitous service. In an examination of the early railroad crossing cases, the landlord and tenant cases, the employer-employee cases and others, the genesis of a sophisticated doctrine in the law of torts which closely resembles promissory estoppel in equity can be recognized. Before examining the instant case further, it will be helpful to examine the reasoning of these other courts which treated different, but essentially analogous, situations, because that examination will give us a useful insight into the present problem.

It was long recognized, in the case of railroads, that if a member of the public who knew of a railroad's practice of keeping a flagman at a crossing was injured because the railroad withdrew its flagman, the railroad was liable to the person injured because it had breached a duty.[5] Thus, as early as 1886, the Wisconsin Supreme Court held that the defendant railroad was liable to a person who was injured because the defendant withdrew its crossing flagman and the plaintiff, knowing the flagman was normally there, started across the tracks and was struck by a train.[6] In the well known case of *Erie R.R. v. Stewart*,[7] the principle is succinctly stated that:

> [W]here the practice is known to the traveler upon the highway, and such traveler has been educated into *reliance* upon it, *some positive duty must rest upon the railway*. . . . The elements of *invitation* and *assurance* of safety exist in this connection . . . [the railroad] should not be permitted thereafter to say that no duty required, arose from or attached to these precautions.[8]

In summary, what this group of cases holds is that if the railroad company promises the public, expressly or impliedly, that it will provide crossing watchmen, and then acts on the promise by providing watchmen, and a member of the public is injured while acting in reliance on that promise, liability on the railroad results when the promise is not fulfilled.

Five years later the case of *Zelenko v. Gimbel Bros.*[9] arose. Here

[5] Erie R. R. v. Stewart, 40 F.2d 855 (6th Cir. 1930), *cert. denied*, 282 U.S. 843 (1930); Greenfield v. Terminal R. R. Ass'n of St. L., 289 Ill. App. 147, 6 N.E.2d 888 (1937); Westaway v. Chicago, St. P., M. & O. Ry., 56 Minn. 28, 57 N.W. 222 (1893); Burns v. North Chicago Rolling Mill Co., 65 Wis. 312, 27 N.W. 43 (1886).

[6] Burns v. North Chicago Rolling Mill Co., 65 Wis. 312, 27 N.W. 43 (1886).

[7] 40 F.2d 855 (6th Cir. 1930), *cert. denied*, 282 U.S. 843 (1930).

[8] *Id.* at 857 (Emphasis added.).

[9] 158 Misc. 904, 287 N.Y.S. 134 (Sup. Ct. 1935), *aff'd* in 247 App. Div. 867, 287 N.Y.S. 136 (1936).

plaintiff's intestate was taken ill in the defendant's store. Defendant undertook to aid her and left her in its infirmary for six hours without medical care. Intestate died as a result of such neglect. Plaintiff, as administrator of her estate, sued for damages; defendant moved to dismiss and the court denied the motion, holding that the defendant had assumed a duty toward plaintiff's intestate by meddling in affairs with which it had no legal concern, and that once the duty arose, its neglect was actionable. One can see in the decision a close relation to the railroad cases. Defendant, at the least, impliedly promised to aid his business invitee by assuming control of her once the injury had occurred. Intestate had a right to rely on defendant's implied promise, the neglect of which resulted in liability.

Even the area of landlord and tenant furnishes us with examples where courts have followed the doctrine that if a defendant makes an express promise to a plaintiff, then acts on the promise, and the plaintiff is injured while relying on that promise, liability will result if the defendant has been negligent. In *Bartlett v. Taylor*,[10] the defendant lessor was under no contractual duty to repair the leased premises but gratuitously ordered his lessee's heavy garage door repaired. Plaintiff, the lessee, was injured when the door fell on his head, and although the defendant argued that he had no duty and that his attempted repair was a gratuitous promise, the Supreme Court of Missouri, in affirming a judgment for plaintiff, held that the plaintiff had a right to rely on the assurance of safety implied in the repairs.

Employer cases furnish further examples of the principle under examination. In *Union Carbide & Carbon v. Stapelton*,[11] the defendant employer required its employees to submit to physical examination and X rays. It failed to reveal to the plaintiff that he was suffering from pulmonary tuberculosis which ultimately rendered plaintiff permanently disabled. Plaintiff sued the employer for damages, grounding his suit on defendant's negligence in failing to disclose plaintiff's condition. Affirming a judgment for the plaintiff, the Court of Appeals said:

> That the appellant [employer] had no obligation to give Stapelton a physical examination we can accept without qualification. But, when it undertook to do so, Stapelton was entitled to and did rely on the expectation that he would be told of any dangerous condition actually disclosed by the examination. The appellant was therefore liable for injury to Stapelton caused by its negligent omission to advise him of his tubercular condition.[12]

A similar case in New York presents slightly different problems.[13] There the plaintiff's employer gratuitously offered physical examinations

[10] 351 Mo. 1060, 174 S.W.2d 844 (1943).

[11] 237 F.2d 229 (6th Cir. 1956). [12] *Id.* at 232–3.

[13] Wojcik v. Aluminum Co. of America, 18 Misc.2d 740, 183 N.Y.S.2d 351 (Sup. Ct. 1959).

and X rays. It was the defendant's practice to inform the employees of adverse results only. The plaintiff, relying on this practice, developed tuberculosis and communicated the disease to his wife. Plaintiff and his wife sued the employer; defendant moved to dismiss and the court, denying the motion, held that defendant's negligent omission gave the plaintiff employee a cause of action. The court said further that since it was foreseeable that plaintiff's wife might contract the disease, the employer's negligent conduct as to his employee also constituted negligence as to the plaintiff's wife. One wonders where the court would set the outer limits of liability on the employer here. The principle under examination begins to crystallize. The defendants made gratuitous promises, either express or implied; they acted on those promises and the plaintiffs were injured after they relied on the defendants.

The case of *Conowingo Power Co. v. State of Maryland*[14] represents an even further extension of the concept of duty under inquiry. The deceased was an employee of Bethlehem Steel Co. which was erecting a bridge over the defendant's electric wires. The defendant's "trouble" man had disconnected the high voltage wires, but had warned the workers of some other, lower voltage wires. Later the "trouble" man reconnected the high voltage lines without telling the construction company. Deceased was trying to position a section of drainage pipe suspended by a steel cable from the bridge and was electrocuted when the cable touched the high voltage lines. In suit for wrongful death, defendant appealed from the denial of a motion for a directed verdict. The Circuit Court of Appeals held that defendant was guilty of negligence in reconnecting its high voltage wires without notice because the workers had relied on the defendant's representations of apparent safety.

Another example is the case of *Abresch v. Northwestern Bell Tel. Co.*[15] Plaintiff, on discovering his business building was on fire, dialed "O" and asked the operator to call the fire department. The operator failed to do so. Realizing the fire department had not been summoned, plaintiff contacted them himself, but by the time the fire trucks arrived, the building was consumed by fire. Plaintiff sued for damages alleging negligence; the defendant's motion for summary judgment was granted. The Minnesota Supreme Court reversed, holding that if defendant had voluntarily induced others to rely on it for help and then failed to act, its failure would result in tort liability. Here is a plaintiff claiming a defendant had made an implied promise to summon aid in emergency situations. In the past the defendant had acted on that promise by furnishing aid; the plaintiff, relying on the promise, sustained injury when defendant failed to perform.

[14] 120 F.2d 870 (4th Cir. 1941).

[15] 246 Minn. 408, 75 N.W.2d 206 (1956).

A more tenuous extension of this "affirmative duty" concept is *Schuster v. City of New York*.[16] Plaintiff's intestate gave information to the police which led to the arrest of Willie Sutton. The deceased received threats on his life but the police gave him only partial protection. Nineteen days after Sutton's arrest, deceased was shot by an unknown assailant. Plaintiff, the father of the deceased, sued alleging negligence. Defendant's motion to dismiss was sustained by the trial court, but the Court of Appeals, reversing, held that in this case there existed a relationship from which a duty to furnish police protection arose. Even though there were vigorous dissents, this case illustrates that the majority of the court found a "duty relationship": a promise by the city to aid those who supplied information on Sutton's whereabouts, action on the promise in supplying partial protection to the deceased, and his reliance on that promise and damage.

The pliancy of the principle is further evidenced by another New York case[17] in which plaintiff was assaulted in the defendant's subway station and sued to recover damages. Recognizing the high degree of care which a carrier must exercise toward its passengers, the New York Appellate Court reversed the trial court's dismissal holding, that whether a policeman was present at other stations and whether the defendant transit authority was negligent in performing its duties were questions of fact for the jury.

In short then, in all these cases there is a defendant who makes an express or implied promise and then acts on that promise, and a plaintiff who, relying on the defendant's promise, suffers injury or damage. With this summary in mind, an examination of the duties a private hospital must discharge is now relevant. As to whether or not there is a duty on a private hospital to maintain an emergency room, the Supreme Court of Missouri said: "While Barnard [Free Skin and Cancer Hospital] is and has been operating a free clinic there is no duty anywhere placed upon its directors to do so, and if it should cease doing so, that would not destroy Barnard's legal entity and functional integrity."[18] Without any such duty incumbent on the private hospital, the question arises whether there is any duty to admit every applicant. Of six courts facing this problem, one has given a clear negative answer,[19] and five courts by way of dicta

[16] 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1958).

[17] Amoruso v. New York City Transit Authority, 12 App. Div.2d 11, 207 N.Y.S.2d 855 (1960).

[18] Taylor v. Baldwin, 362 Mo. 1224, 1243, 247 S.W.2d 741, 751 (1952).

[19] Birmingham Baptist Hosp. v. Crews, 229 Ala. 398, 157 So. 224 (1934).

have arrived at a negative conclusion.[20] Thus the rule seemed to be that private hospital authorities themselves would determine who would or would not receive treatment in the hospital, and no common law duty compelled them to admit anyone not desired by them, nor were they bound by a contractual or statutory duty charging them with any duty to admit or render service.

The first case squarely facing the problem of duty to admit was *Birmingham Baptist Hosp. v. Crews*.[21] In that case, Mr. Crews brought his two year old daughter to the defendant hospital. While a doctor was confirming a tentative diagnosis of diphtheria, the nurse administered oxygen, and a few minutes later the doctor administered 20,000 units of antitoxin. A short time thereafter another doctor gave her an additional 20,000 units of antitoxin; the child appeared to respond to this emergency treatment. The hospital supervisor, however, refused to admit the child, ostensibly because the rules prohibited admittance to a person suffering from a contagious disease. Mr. Crews returned home with the child who died fifteen minutes after his arrival. The parents brought suit under the Wrongful Death Act, alleging that the hospital's wrongful refusal to admit constituted negligence. The Supreme Court of Alabama, in denying liability said:

> Defendant is a private corporation, and not a public institution, and owes the public no duty to accept any patient not desired by it.... The evidence must show that defendant became due to render the service by having undertaken to provide it, when there was otherwise no duty to do so, or by having rendered a treatment in an emergency, without undertaking to provide full hospital service, but that such treatment was known to be likely to and did create a condition which was extremely dangerous unless further partial (at least) hospital service was rendered until that hazard which defendant voluntarily created was passed, and that the death of the child was accelerated by the failure of the defendant to discharge such duty.[22]

Here is a private hospital which at least made an implied promise to aid society by setting up its emergency ward; the plaintiff, relying on that implied promise, brings his child to the emergency room where the defendant treats and then turns her away. In short, the plaintiff is no longer the one acted upon; he is the actor by accepting the implied invitation of treatment, but this court saw no duty on the hospital's part, and consequently no liability.

[20] Levin v. Sinai Hosp., 186 Md. 174, 46 A.2d 298 (1946); Goodall v. Brite, 11 Cal. App.2d 540, 54 P.2d 510 (Dist. Ct. App. 1936); Olander v. Johnson, 258 Ill. App. 89 (1930); Van Campen v. Olean Gen. Hosp., 210 App. Div. 204, 205 N.Y.S. 554 (1924); McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432, 21 Am. Rep. 529 (1876).

[21] 229 Ala. 398, 157 So. 224 (1934).

[22] *Id.* at 399, 157 So. at 225.

A court in New York faced a similar problem in 1960.[23] In this case, John J. O'Neill awakened about 5:00 A.M. because of severe chest pains. He and his wife decided to go to the hospital which was three blocks away for treatment. Unable to get a cab, the couple walked to the hospital whereupon O'Neill presented himself at the emergency room. The nurse on duty refused to admit him because he was a member of a hospital insurance plan, and the hospital did not take such cases. The nurse did, however, voluntarily call a hospital insurance plan doctor, and O'Neill related his symptoms to him by telephone. The doctor agreed to see Mr. O'Neill in a few hours when the insurance plan's clinic would be open. Mrs. O'Neill requested an examination of her husband because of the emergency situation, but such examination was refused. A few minutes after the O'Neills returned home, he suffered a fatal heart attack. In a wrongful death action by Mrs. O'Neill against the doctor and the hospital, the trial court held for defendants. On appeal, the Appellate Division unanimously reversed as to the doctor, and a majority of three judges reversed as to the defendant hospital, holding that:

> With respect to the action against the hospital, there is also a question of fact presented which should have been submitted to the jury. That question is whether the conduct of the nurse in relation to the deceased was in the nature of a personal favor to him or whether her conduct was that of an attaché of the hospital trying to discharge her duty, and if so, whether what she did was inadequate. So, too, whether the alleged request of the nurse for an examination of Mr. O'Neill, following the telephone conversation with Dr. Craig, and the nurse's refusal to have Mr. O'Neill examined at the hospital constituted negligent conduct, would also be a question for the jury.[24]

The two dissenting judges thought the nurse's conduct was by way of personal favor and could see no basis for liability on the hospital's part.[25] But the majority may be said to have seen in the deceased's action an acceptance of the hospital's implied invitation to treat an emergency case and a negligent refusal to act in that emergency with death as the result. Again the plaintiff acts on the promise, but in this case, twenty-six years after the *Crews* case, a divided court sees a valid theory of liability.

Although the *O'Neill* case has been mildly questioned,[26] the *Manlove* case apparently rests on this slim reed of precedent. The question is one of either imposing a legal duty on the hospital or showing its breach of an

[23] O'Neill v. Montefiore Hosp., 11 App. Div.2d 132, 202 N.Y.S.2d 436 (1960).

[24] *Id.* at ——, 202 N.Y.S.2d at 440.

[25] *Id.* at ——, 202 N.Y.S.2d at 441 (dissenting opinion). McNally, J., with whom Stevens, J., concurred, said: "It is my view that the conduct of the nurse was by way of favor and I fail to see any legal basis for liability on the part of the hospital."

[26] Thornton & McNiece, *Torts and Workmen's Compensation,* 35 N.Y.U.L. REV. 1535 (1960).

existing duty, and the court addressed itself to these questions with little enthusiasm. Although the defendant stressed the rule of the hospital under which it refused medical treatment to one already under a doctor's care, the court did not consider it controlling and stated:

> Its significance here appears to lie in the fact that it impliedly recognizes that in case of "frank"—*i.e.* unmistakable—emergency there is some duty on the part of the hospital to give help. . . . [The] maintenance of such [an emergency] ward to render first-aid to injured persons has become a well-established adjunct to the main business of a hospital. If a person, seriously hurt, applies for such aid at an emergency ward, relying on the established custom to render it, is it still the right of the hospital to turn him away without any reason? In such a case, it seems to us, such a refusal might well result in worsening the condition of the injured person, because of the time lost in a useless attempt to obtain medical aid.
>
> Such a set of circumstances is analogous to the case of the negligent termination of gratuitous services, which creates a tort liability. RESTATEMENT, TORTS, *Negligence* § 323.[27]

The court was not unmindful of the difficulties in the rule's practical application. Since the services of the interns are in great demand throughout the hospital, the duty falls on the nurse on duty to make the initial decision of whether an emergency does or does not exist. In each case the question then becomes "was her determination . . . within the reasonable limits of judgment of a graduate nurse, even though mistaken, or was she derelict in her duty . . . in not recognizing an emergency from the symptoms related to her?"[28] It is submitted that any prudent, not to say humane, nurse would summon the interne, thereby fully satisfying her duty in cases of even slightest doubt.

Summarily, the court clarifies the *O'Neill* case and solidifies its suggestions. The defendant makes an implied promise to treat emergencies by setting up its emergency room; the plaintiff relying on that invitation responds to it and seeks aid. The hospital does precisely nothing, but the court imposes on it a liability for its very failure to act.

No Illinois case treating this subject has been discovered. However, a private hospital's liability for damages growing out of negligence is the same as the liability of natural persons in Illinois,[29] and today, if a plaintiff brings an action against a charitable institution, he could recover a judgment, and the immunity of the defendant would extend only to the protection of its trust property from execution.[30] Perhaps the view of Illinois courts when faced with the problem of liability for a failure to admit might be prophesied by this statement:

[27] Wilmington Gen. Hosp. v. Manlove, 51 Del. ——, ——, 174 A.2d 135, 139 (1961).

[28] *Id.* at ——, 174 A.2d at 141. [29] Olander v. Johnson, 258 Ill. App. 89 (1930).

[30] Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950).

In a sense every man, regardless of financial standing, when suddenly taken sick or injured is a public charge, at least for the time being. It is a common instinct and duty to render immediate assistance in such cases, and it is no less a collective obligation extending to organized society than it is an individual duty. If there is any difference in the measure of the duty of the public and that of individuals, the obligation resting upon society is stronger than that of the individual. The duty of an individual to relieve distress is of a moral nature only. That imposed upon society is more nearly a legal obligation by reason of the fact that the purpose to promote the interests and advance the general welfare of the people is expressly declared in constitutions and legislative enactments. If not within the strict letter of the law, the acceptance and treatment of emergency cases is clearly within its spirit.[31]

Some writers[32] suggest that the bedrock of the hospital's liability in the *O'Neill* case is the doctrine that one who undertakes a task must perform it with ordinary care, and in the *Manlove* decision, Chief Justice Southerland equates defendant's action with the negligent termination of gratuitous services which creates a tort liability.[33] If the rule is stated obliquely in *O'Neill*, it is certainly plain enough in the *Manlove* case. The court avoids the tangle of distinguishing misfeasance and nonfeasance which other courts have deemed the controlling consideration in such cases. Once the emergency room is provided, if the applicant, knowing of its existence, applies for treatment in an emergency, arbitrary refusal of service resulting in the applicant's damage creates a liability. If an applicant accepts the implied invitation of an emergency room at a private hospital, and admission or treatment is denied him to his detriment, liability springs from the denial.

It is suggested that the *Manlove* case represents an extension of a long existing principle of tort law into a new field. Objections may possibly be raised that its rule imposes an impossible burden on private hospitals. It is submitted that it does not for at least three reasons. First, they can close their emergency rooms if they so choose. Second, by the operation of an emergency room they expressly invite the public to use the first-aid facility and impliedly suggest that the public not go elsewhere

31 Jentink v. County of Lake, 244 Ill. App. 370, 376–77 (1927).

32 Thornton & McNiece, *Torts and Workmen's Compensation*, 35 N.Y.U.L. Rev. 1535 (1960).

33 Wilmington Gen. Hosp. v. Manlove, 51 Del. ——, 174 A.2d 135 (1961), citing Restatement, Torts, *Negligence* § 323 (1934): "(1) One who gratuitously renders services to another, otherwise than by taking charge of him when helpless, is subject to liability for bodily harm caused to the other by his failure, while so doing, to exercise with reasonable care such competence and skill as he possesses or leads the other reasonably to believe that he possesses. (2) One who gratuitously renders services to another, otherwise than by taking charge of him when helpless, is not subject to liability for discontinuing the services if he does not thereby leave the other in a worse position than he was in when the services were begun."

for treatment, and a wrongful denial of its service could well be a substantial injury to an injured or sick person. Third, existence and knowledge of the emergency room is the basis on which the community relies on its facilities in time of emergency and for the arbitrary denial of its services which results in injury the private hospital should not escape liability. The imposition of liability on the private hospital for its refusal to render treatment or admission in any emergency may well be a manifestation by the courts of "their vitality and consecration to the proposition that the purpose of law in society is to aid in the solution of the multiple problems of that society."[34]

[34] Dooley, *Ten Years of Developments in the Law of Negligent Torts*, 10 DE PAUL L. REV. 503, 537 (1961).

TORTS–EXTENSION OF PRENATAL INJURY DOCTRINE TO NONVIABLE INFANTS

Action was brought on behalf of a child born with subnormal mental faculties who was also hampered by substandard development requiring special medical attention. It was alleged that the defendant's negligent operation of her automobile resulted in an accident involving the mother of the injured child. It was further alleged that the aforementioned negligence of the defendant resulted in injury to the child who was then in the mother's womb. At the time of the incident, the child's mother was approximately one month pregnant. The trial court dismissed the action on the basis that the child was not a viable[1] foetus, capable of extra-uterine survival, at the time of the accident and therefore the infant had no identity apart from the mother. In reversing the trial court's decision, the Appellate Court of Illinois held that an infant, who was born alive and survives, can maintain an action to recover for prenatal injuries, medically provable as resulting from the negligence of another, even if it had not reached the state of a viable foetus at the time of the injury. *Daley v. Meier*, 33 Ill. App.2d 218, 178 N.E.2d 691 (1961).

In allowing a cause of action for injuries sustained while a nonviable infant, Illinois becomes one of a handful of jurisdictions which have recently extended the area of recovery for prenatal injuries to any injury, occurring prior to birth, which can be proved as resulting from the negligence of another. Relief for prenatal injuries had previously been re-

[1] "Viable. Not born dead. Capable of living, said of a fetus that can live outside of the uterus." MALOY, MEDICAL DICTIONARY FOR LAWYERS 567 (2d ed. 1951). "Viable. Livable, having the appearance of being able to live." BLACK, LAW DICTIONARY 1737 (4th ed. 1951).