
Torts - Charitable Hospital Liable to Patient for Injuries Caused by Negligence of Employees

DePaul College of Law

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

DePaul College of Law, *Torts - Charitable Hospital Liable to Patient for Injuries Caused by Negligence of Employees*, 7 DePaul L. Rev. 131 (1957)

Available at: <https://via.library.depaul.edu/law-review/vol7/iss1/16>

This Case Notes is brought to you for free and open access by the College of Law at Digital Commons@DePaul. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Digital Commons@DePaul. For more information, please contact digitalservices@depaul.edu.

TORTS—CHARITABLE HOSPITAL LIABLE TO PATIENT
FOR INJURIES CAUSED BY NEGLIGENCE
OF EMPLOYEES

The plaintiff, while a patient in defendant hospital, a charitable organization, was severely burned during the course of an operation performed by her personal physician. She had been made ready for the operation, before the surgeon's appearance, by the hospital anesthetist and two nurses also in the employ of the hospital. However, the employees made no pre-operation inspection and some of the alcoholic antiseptic, a potentially dangerous inflammable fluid which had been applied to the lumbar region of the patient's back, ran through the linens causing severe burns on the plaintiff's body. In an action for damages, the trial court entered judgment for the plaintiff. Defendant appealed on grounds that this was not an *administrative* act for which they might have been liable. The Appellate Division reversed and dismissed the complaint. Upon plaintiff's appeal, the Court of Appeals held that the hospital is liable to the patient for injuries sustained through the negligence of hospital employees acting within the scope of employment. *Bing v. Thunig and St. John's Episcopal Hospital*, 2 N.Y. 2d 656, 163 N.Y.S. 2d 3 (1957).

Thus, New York unequivocally and with finality joins the ever-increasing number of courts who in recent years have completely abandoned the old doctrine affording charitable hospitals immunity for the negligence of their employees.¹ The rejection of the immunity doctrine is evidenced in the decision of the instant case in which Judge Fuld noted:

The trend of decision throughout the country has more and more been away from nonliability. . . . In point of fact, a survey of recent cases—those decided since the middle 1940's—demonstrates, not only that the immunity rule has been rejected in every jurisdiction where the court was unfettered by precedent but that the doctrine has been overruled and abandoned in a number of states where nonliability had long been the rule.²

¹ *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810, 817 (App. D.C. 1942). The court here said: "It is perhaps impossible, if it were worthwhile, to make an exact summary of the present state of American decisions or to determine with accuracy what is the 'prevailing rule.' . . . This much, however, is sure. The immunity, so far as it ever existed, has disappeared largely as to all persons and classes of claimants. . . ."; *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P.2d 934 (1954); *Pierce v. Yakima Valley Memorial Hospital Ass'n.*, 43 Wash.2d 162, 260 P.2d 765 (1953); *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P.2d 220 (1951); *Durney v. St. Francis Hospital*, 7 Terry 350, 83 A.2d 753 (Del. 1951); *Haynes v. Presbyterian Hospital Ass'n.*, 241 Iowa 1269, 45 N.W. 2d 151 (1950); *Nicholson v. Good Samaritan Hospital*, 145 Fla. 360, 199 So. 344 (1940). Refer to 6 De Paul L. Rev. 176 (1956), for a complete listing of states accepting and rejecting the doctrine.

² *Bing v. Thunig and St. John's Episcopal Hospital*, 2 N.Y. 2d 656, 665, 163 N.Y.S. 2d, 3, 9 (1957).

The reason for the recent upsurge of cases refuting the immunity doctrine can be readily understood and the increasing attack upon the wisdom and workability of the rule most appreciated by a brief glance into the origin and background of the doctrine.

The idea first had its inception in England in 1839 through dictum in *Duncan v. Findlater* which was later overruled.³ It found its way into America in 1876 in the case of *McDonald v. Massachusetts General Hospital*⁴ wherein the court based its decision on another English case which was also reversed.⁵ Thus, following the lead of the Massachusetts court, an English doctrine was revived in America which was already discarded in England. Unfortunately, the doctrine of immunity in the United States has been imbued with inconsistency and confusion, principally because of the variety of theories which have been applied to the rule. As Justice Rutledge declared in the case of *President and Directors of Georgetown College v. Hughes*:

Paradoxes of principle, fictional assumptions of fact and consequence, and confused results characterize judicial disposition of these claims. . . . The cases are almost riotous with dissent. Reasons are even more varied than results. . . . They indicate something wrong at the beginning or that something has become wrong since then.⁶

Among the varied reasons referred to in the quotation above, there are four which deserve special mention. The first is the "trust fund theory" used by the court in the *McDonald* case⁷ wherein it was ruled that the public and private donations received by the charitable hospital constituted a trust fund, which could not be despoiled by tort claims arising out of negligence of its agents. Several jurisdictions adopted this line of reasoning,⁸ but because of changing economic, social and business conditions, the theory has almost unanimously been rejected today. As expressed in *Avellone v. St. John's Hospital*:

The policy that the funds of a non-profit hospital should not be diverted for any purpose other than the purpose for which it was organized, causing a deple-

³ 6 Cl. & Fin. 894, 7 Eng. Rep. 934 (1839), overruled by *Mersey Docks Trustees v. Gibbs*, H.L. Cas. 116 (1866), where the court indicated that the *Duncan* case did not purport to lay down a rule of absolute immunity but rather that it treated the hospital's funds as an application of the law of trusts.

⁴ 120 Mass. 432, 21 Am.Rep. 529 (1876).

⁵ *Holliday v. St. Leonard's*, 11 C.B.N.S. 192, 142 Eng.Rep. 769 (1861), reversed by *Foreman v. Mayor of Canterbury*, L.R. 6 Q.B. 217 (1871).

⁶ 130 F. 2d 810, 812 (App. D.C., 1942).

⁷ *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529 (1876).

⁸ *Dille v. St. Luke's Hospital*, 355 Mo. 436, 196 S.W. 2d 615 (1946); *Gregory v. Salem General Hospital*, 175 Ore. 464, 153 P.2d 837 (1944); *Webb v. Vought*, 127 Kan. 799, 275 Pac. 170 (1929); *Emery v. Jewish Hospital Ass'n.*, 193 Ky. 400, 236 S.W. 577 (1921).

tion of the hospital's resources, and thus immunizing them from liability no longer has any foundation in our present day economy. Under present conditions a hospital may fully protect its funds by the use of liability insurance, and, since such funds may be used to recompense those who are injured through the negligent selection of servants and strangers, there is no reason why such funds may not be used in the purchasing of insurance which will protect not only the hospital and its funds but also any person injured through its negligence or the negligence of servants.⁹

The second theory on which courts declare charities immune from liability is that of "public policy" whereby they maintain it is better for the community and the public in general that the individual bear the loss rather than the charitable institution. Strictly speaking, this is not a theory at all, but a mere statement of why the courts should adopt the doctrine of immunity. The "public policy" concept is generally denied for reasons best given in *Haynes v. Presbyterian Hospital Ass'n.*, where the court states:

No doubt at the outset of the theory, the need for charity in the way of treatment of the suffering was urgent and the general good of society demanded encouragement thereof. . . . Today, the situation is vastly different. The hospital of today has grown into an enormous business. They own and hold large assets, much of it tax free, by statute, and employ many persons. . . . The basis for, and the need of such encouragement is no longer existent. . . . The fact that the courts may have at an early date, in response to what appeared good as a matter of policy, created an immunity, does not appear to us a sound reason for continuing the same, when under all legal theories, it is basically unsound and especially so, when the reasons upon which it was built, no longer exists.¹⁰

The other two theories, which are the defenses of the hospital in the case at hand, are those of "implied waiver" and the "non-applicability of the rule of respondeat superior." The most important of the early decisions in New York in which the preceding two theories were first adopted (and which persisted until the decision of the instant case) was *Schloendorff v. New York Hospital*.¹¹ In that case, plaintiff was admitted to a hospital with a stomach disorder. After several weeks of unsuccessful treatment, an operation became necessary. As a result of the operation gangrene set in in the patient's arm, causing said arm to be amputated. The

⁹ 165 Ohio 467, 474, 475, 135 N.E. 2d 410, 415 (1956). Consult *Non-Profit Hospital Liable to Paying Patient for Negligence*, 6 De Paul L. Rev. 176 (1956), for a broader analysis of the case.

¹⁰ 241 Iowa 1269, 1273, 45 N.W. 2d 151, 154 (1950). In *Pierce v. Yakima Valley Memorial Hospital Ass'n.*, 43 Wash.2d 162, 167, 260 P.2d 765, 767, 768 (1953), where the court was asked to overrule a great line of cases based on public policy, Justice Hanley said: "The factors upon which any public policy is based—the relevant factual situation and the thinking of the times—are not static. They change as conditions change. . . . We therefore believe it to be appropriate. . . to re-examine the public policy . . . in the light of present conditions and present-day thinking."

¹¹ 211 N.Y. 125, 105 N.E. 92 (1914).

court exempted the hospital from liability for negligent treatment on grounds of implied waiver, pronouncing that one who accepts the benefits of a charity does so on the implied assent or condition that the trust property is not available to him for compensation and that he assumes the risk in consideration of the gratuitous services rendered him.¹² Other jurisdictions adopted a similar line of reasoning¹³ but its efficacy was subsequently mitigated by many exceptions and qualifications, an example of which is set forth in *Wendt v. Servite Fathers*:

This theory is purely fictitious and certainly cannot be applied to the many patients who are desparately ill or unconscious when admitted to a hospital or to infants and insane persons who have no legal capacity to so will away their rights.¹⁴

The other and last defense of the hospital in the instant case, but perhaps the most important of the four, is that of the "non-applicability of the rule of respondeat superior." In the *Schloendorff* case¹⁵ the court noted that the relationship between the physicians and nurses with that of the hospital is not one of servant and master, but that they should be regarded as independent contractors because of the skill and personal discretion they must exercise. The independent contractor theory has, however, one glaring fallacy; exemptions from the immunity doctrine for the reasons of superior knowledge and skill have never been applied in any situation other than in cases of the medical profession.¹⁶ In fact, in one of the earliest cases to apply the rule of respondeat superior the owner of a ship was held responsible for the negligence of the ship's captain—a position which certainly required great skill and independent exercise of judgment.¹⁷ The *Georgetown College* case summed up the theory as follows:

For negligent or tortious conduct liability is the rule. Immunity is the exception. Human beings ordinarily are responsible for their own legally careless action. They respond also for negligent harms inflicted by their agents and employees. So do business corporations. . . . Respondeat superior more and more has made them, as it has private corporations, responsible for wrongs done by their inferior functionaries. Generally also charity is no defense to tort.¹⁸

Thus, the theories on which the old doctrine of immunity has been based have become dotted with refinements and qualifications, and the

¹² *Ibid.*

¹³ *Winslow v. Veterans of Foreign Wars Nat. Home*, 328 Mich. 488, 44 N.W. 2d 19 (1950); *Sisters of Charity of Cincinnati v. Duvelius*, 123 Ohio St. 52, 173 N.E. 737 (1930); *Cook v. John N. Norton Memorial Infirmary*, 180 Ky. 331, 202 S.W. 874 (1918).

¹⁴ 332 Ill.App. 618, 626, 76 N.E. 2d, 342, 345 (1947).

¹⁵ *Schloendorff v. New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914).

¹⁶ *Tort Liability of Hospitals in New York*, 37 Corn. L.Q. 419 (1952).

¹⁷ *Boson v. Sandford*, 2 Salk. 440 (1691).

¹⁸ 130 F.2d 810, 812 (App. D.C., 1942).

courts in recent years have either modified the theories or repudiated them altogether.¹⁹ Many of the legal writers in the field concur in the repudiation of the immunity doctrine and join in the decision handed down by the court in the instant case:

The rule of nonliability is out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing. It should be discarded. To the suggestion that *stare decisis* compels us to perpetuate it until the legislature acts, a ready answer is at hand. It was intended, not to effect a "petrifying rigidity," but to assure the justice that flows from certainty and stability. If, instead, adherence to precedent offers not justice but unfairness, not certainty but doubt and confusion, it loses its right to survive, and no principle constrains us to follow it.²⁰

Although in Illinois the courts generally hold that the immunity doctrine still applies,²¹ some inroads have been made in changing the rule. The first case in Illinois covering the doctrine was *Parks v. Northwestern University*.²² The court there held that the charitable institutions were exempt from liability because:

The trust fund might be wholly destroyed and diverted from the purpose for which it was given, thus thwarting the donor's intent, as a result of negligence for which he was nowise responsible.²³

Thus, Illinois adopted the early trust fund theory and held that even though the fund might be protected if the hospital carried insurance indemnifying it against liability, this did not change the situation.²⁴ However, in 1950 the Illinois Supreme Court qualified the complete immunity holding when it said that beyond the necessity of the protection of the trust funds, the rule of respondeat superior was effective and recovery against a charitable institution could be had if the institution were protected by liability insurance.²⁵ Chief Justice Thompson in that case said:

The decision in the *Parks* case, handed down 44 years ago, should be re-examined in the light of modern concepts. . . . Reason and justice require an extension of the rule in an attempt to inject some humanitarian principles into the

¹⁹ *Ibid.*, at 818, 819, 820, 821 for a complete listing of such cases.

²⁰ *Bing v. Thunig and St. John's Episcopal Hospital*, 2 N.Y. 2d 656, 667, 163 N.Y.S. 2d 3, 11 (1957); *Prosser, Torts* § 109 (2d ed., 1955); *Bogert, Trusts* § 401 (1953); *Scott, Trusts* § 402 (1939).

²¹ *Hogan v. Chicago Lying-in Hospital*, 335 Ill. 42, 166 N.E. 461 (1929); *Lenahen v. Ancilla Domini Sisters*, 331 Ill. App. 27, 72 N.E. 2d 445 (1947); *Wattman v. St. Lukes Hospital Ass'n.*, 314 Ill. App. 244, 44 N.E. 2d 314 (1942); *Moretick v. South Chicago Community Hospital*, 297 Ill.App. 488, 17 N.E. 2d 1012 (1938).

²² 218 Ill. 381, 75 N.E. 991 (1905).

²³ *Ibid.*, at 384 and 993.

²⁴ *Piper v. Epstein*, 326 Ill.App. 400, 62 N.E. 2d 139 (1945).

²⁵ *Moore v. Moyle*, 405 Ill. 555, 92 N.E. 2d 81 (1950).

abstract rule of absolute immunity. The law is not static and must follow and conform to changing conditions and new trends in human relations to justify its existence as a servant and protector of the people.²⁶

This extension in the Illinois rule may be the necessary first step toward complete abandonment of the old immunity doctrine.

²⁶ *Ibid.*, at 564, 565 and 86, 87.

UNEMPLOYMENT COMPENSATION—LAYOFF AND EXPECTATION OF STRIKE IS LOCKOUT AND THEREFORE COMPENSATORY

Kendall Refining Co. resisted the claims of several of its employees for Unemployment Compensation, contending that their unemployment resulted from a strike. The employees were members of the Oil Workers International Union. Sixty days before its contract was about to expire, the union and the company began negotiations for a new agreement. Four days before the end of the old contract term, union officials informed the company that a vote had been taken authorizing a strike, but that no date had been set. The next day, the company submitted a written proposal for an orderly shutdown of the plant in the event of a strike. The union rejected this and submitted a counterproposal which proved unsatisfactory to the company. The day after the contract expired, employees reported for work and were informed by the company that the plant was closed. The question presented to the court was whether these employees were disqualified from receiving unemployment compensation because of participation in a labor dispute or whether, under Pennsylvania law, they were eligible for benefits because their employer had locked them out. The Pennsylvania Superior Court held they were entitled to benefits because they had been locked out. *Kendall Refining Co. v. Unemployment Compensation Board of Review*, 184 Pa. Super. 95, 132 A. 2d 749 (1957).

All states have in effect some provision disqualifying from unemployment compensation benefits claimants whose idleness results from a labor dispute at their place of employment.¹ Eight states, including Pennsylvania, specifically exclude a lockout from the definition of a labor dispute, thus making employees whose idleness is so caused eligible for benefits.² A few states which disqualify where idleness results from a strike rather than from a "labor dispute" permit benefits when idleness is caused by a

¹ For a comprehensive discussion of the labor dispute disqualification from unemployment compensation benefits refer to Williams, *The Labor Dispute Disqualification, A Primer and Some Problems*, 8 *Vanderbilt L. Rev.* 338 (1955).

² *Ibid.*, at 365. The states are: Arkansas, Connecticut, Kentucky, Minnesota, Mississippi, New Hampshire, Ohio and Pennsylvania.