

## **Torts - Non-Profit Hospital Liable to Paying Patient for Negligence**

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### **Recommended Citation**

DePaul College of Law, *Torts - Non-Profit Hospital Liable to Paying Patient for Negligence*, 6 DePaul L. Rev. 176 (1956)

Available at: <https://via.library.depaul.edu/law-review/vol6/iss1/18>

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led by the great bulk of the community, they are subject to the privileged which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims."<sup>19</sup>

Again, the privilege is not unlimited and may be exceeded when a photograph is discovered to be indecent.<sup>20</sup> As was noted by the dissenting opinion, the majority of the court refused to examine the photograph in question for unknown reasons. In order for any court to determine whether or not a particular act violates common decencies and, therefore, exceed the privilege, an act must be such that a reasonable man *can see* that it might and probably would cause mental distress and injury to one possessed of ordinary feelings and intelligence, situated in like circumstances of the plaintiff.<sup>21</sup> In two decisions cited by the majority to support its position, the courts very carefully examined the photographs in an attempt to discover if they were indecent before dismissing the cause.<sup>22</sup> It is submitted that the instant case would be of greater value to this growing body of law had the court examined the photograph.

Thus, once the right is recognized by a court, it must then be determined if the privilege granted the press to invade an individual's right to privacy is applicable. If it is, then the facts must be thoroughly examined to ascertain whether or not any one of them violates common decencies. The press should not be allowed under the guise of "news interest" to invade an individual's right to privacy indiscriminately. However, because of the practical difficulty confronting newspaper editors in determining borderline cases at the risk of liability, the courts will undoubtedly continue to deal liberally with newspaper publications and therefore repeatedly rely on the "privilege" to defeat recovery.

<sup>19</sup> Restatement of Torts, § 867, Comment C.

<sup>20</sup> It was said in: *Gill v. Curtis Pub. Co.*, 38 Cal. 2d 273, 231 P. 2d 565 (1951); *Barber v. Time*, 348 Mo. 1199, 159 S.W. 2d 291 (1942); *Nelvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931) that the privilege to disseminate news should not be abused so as to violate common decencies.

<sup>21</sup> *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P. 2d 133 (1945).

<sup>22</sup> *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E. 2d 344, 348 (1956). That court said: "We might point out in this connection that from an observation of the pictures attached to the record, it appears that a person viewing them could not identify the deceased"; *Abernathy v. Thornton*, 263 Ala. 496, 83 So. 2d 235, 236 (1956). The court stated, "No mention was made of the plaintiff in the news story and nothing therein or on the accompanying photograph showed any relationship between the plaintiff and the deceased."

## TORTS—NON-PROFIT HOSPITAL LIABLE TO PAYING PATIENT FOR NEGLIGENCE

Plaintiff, a paying patient, brought an action against the defendant, a non-profit hospital, for damages resulting from personal injuries sustained

when plaintiff, while a patient in the defendant hospital, was negligently permitted to fall from a hospital bed. While being treated for these injuries the defendant again negligently allowed the plaintiff to fall out of a hospital bed and sustain further injuries. Defendant set up as a separate defense the fact that it was a charitable institution. Plaintiff demurred to the separate defense. The trial court overruled the demurrer and dismissed the case when the plaintiff failed to plead further. Plaintiff appealed to the Court of Appeals which affirmed the judgment. An allowance of a motion to certify the record brought the cause to the Supreme Court of Ohio for review. The Supreme Court reversed for the plaintiff and thus overruled its previous decisions by allowing a paying patient to recover for a tort against a defendant charitable institution. *Avellone v. St. John's Hospital*, 135 N.E. 2d 410 (Ohio, 1956).

Ohio thus has followed what is considered the modern trend towards the abrogation of the immunity doctrine allotted to charitable institutions earlier in American case history.

This 1956 decision may be termed a culmination of the historical abolition of the immunity doctrine of charitable institutions in Ohio. In 1911 its courts established a rule of complete immunity but in 1922 recognized an exception to this rule by imposing liability upon a charitable institution for injury caused by the negligent selection of servants by the institution. This was the only exception recognized until 1930 when the court charged a charitable institution with tort liability for those who were strangers, i.e., those not beneficiaries of its charity. After the decision of 1930, Ohio courts were granting immunity only as to patients termed "beneficiaries of the charity" who could not prove the negligent selection or retention of servants on the part of the institution. Quoting from the Ohio case being noted:

In the final analysis the partial immunity of non-profit hospitals obtaining in Ohio at the present time . . . is based solely upon the general ground of public policy.<sup>1</sup>

From this conclusion the court reasoned that there was no longer a basis for immunity because, with the development of the various government aid programs which also provide for payment of hospital bills and the widespread use of hospitalization insurance, the reasons for sustaining such a public policy no longer exist.

In Illinois, the immunity of charitable institutions is limited to the protection of the trust fund initially set up to finance the institution. Prior to 1950 such institutions in Illinois enjoyed complete immunity, but in that year a decision was rendered extending the previous doctrine and estab-

<sup>1</sup> *Avellone v. St. John's Hospital*, 135 N.E. 2d 410 (Ohio, 1956).

lishing the theory of complete liability except for the protection of the trust fund.<sup>2</sup>

This decision was based on the theory that immunity was designed to protect the trust fund and, therefore, recovery out of non-trust funds or assets should be allowed. Affirming this decision in 1954, the court concluded that, "the rule is that immunity exists against the dissipation of public funds in paying a tort judgment, but it is not a defense to tort action."<sup>3</sup> Thus the court settled a question left open until that time—whether the lack of non-trust or public funds was a defense against the action or merely against the execution of the judgment.

Joining with Illinois in limiting immunity only to the protection of the trust fund are two other jurisdictions, Tennessee and Colorado.<sup>4</sup>

The most recent changes involving this area of tort liability have occurred in Washington, Kansas and Idaho.<sup>5</sup> In 1953, the Supreme Court of Washington overruled its previous decisions by holding that a non-profit hospital is no longer immune from the liability for injuries to paying patients caused by the negligence of its employees. Previous to this decision, non-profit hospitals in that jurisdiction enjoyed immunity with respect to beneficiaries only where there was no negligence in the selection and retention of the employee. Though they did not decide the point, it appears from the reasoning that such hospitals would also be liable to non-paying patients and thus bring such institutions in Washington under a complete liability status.

The Supreme Court of Kansas then followed in 1954 with its new ruling divesting charitable institutions of any immunity. Quoting from the court:

We now hold that charitable institutions are liable for torts of their servants from which injury proximately results to a third person, whether stranger or patient, and whether the patient is a paying or a non-paying patient.

Going further, the court stated that to exempt such institutions is contrary to "constitutional guarantees," and "in short destroys equality and creates special privilege."

In the same year as the principal case, Idaho also overruled previous decisions and charged a charitable hospital with liability to a paying patient for injuries resulting from the negligence of its management or employees.

<sup>2</sup> Moore v. Moyle, 405 Ill. 555, 92 N.E. 2d 81 (1950).

<sup>3</sup> Tracy v. Davis, 123 F. Supp. 160 (E.D. Ill., 1954).

<sup>4</sup> Edwards v. King's Mountain Memorial Hospital Ass'n, 118 F. Supp. 417 (E.D. Tenn., 1954); St. Luke's Hospital Ass'n v. Long, 125 Colo. 25, 240 P. 2d 917 (1952).

<sup>5</sup> Wheat v. Idaho Falls Latter Day Saints Hospital, 297 P. 2d 1041 (Idaho, 1954); 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).

The Washington case of *Pierce v. Yakima Valley Memorial Hospital Ass'n*<sup>6</sup> developed a brief history of the trend since 1943:

Since . . . 1943 four jurisdictions have abandoned the immunity rule, and in the process, have overruled earlier decisions.<sup>7</sup> . . . Four other jurisdictions have, during the same period, rejected immunity rule as a matter of first impression.<sup>8</sup> . . . During this ten-year period no appellate court has joined the group which favors immunity either as a matter of first impression or by overruling earlier decisions which reject the doctrine.

To this historical development may be added the three decisions noted above plus this Ohio ruling, thus setting forth a complete development of the trend from 1943 to 1956.

From a brief analysis of these decisions, it is easy to detect the obvious digression from what was once the unanimous doctrine of complete immunity to the new and growing doctrine which holds non-profit institutions liable for torts in the same capacity as individuals and private corporations.

Today there are nine states that still adhere to the theory of complete immunity. Sixteen states and the District of Columbia may be categorized as jurisdictions granting partial immunity, and seventeen states plus Alaska and Puerto Rico hold for complete liability. Three states grant immunity only to the extent of protecting the trust fund and three jurisdictions have no decision on the subject.<sup>9</sup>

An analysis of the problem reveals that the trend seems to be toward a more balanced and equitable solution of the problem, since it now ap-

<sup>6</sup> *Pierce v. Yakima Valley Memorial Hospital Ass'n*, 43 Wash. 2d 162, 260 P. 2d 765 (1953).

<sup>7</sup> *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P. 2d 220 (1951); *Haynes v. Presbyterian Hospital Ass'n*, 241 Iowa 1269, 45 N.W. 2d 151 (1950); *Mississippi Baptist Hospital v. Holmes*, 214 Miss. 906, 55 So. 2d 142 (1951); *Tavarez v. San Juan*, 68 Puerto Rico 681.

<sup>8</sup> *Moots v. Sisters of Charity of Providence*, 13 Alaska 546 (1952); *Rickbeil v. Grafton Deaconess Hospital*, 74 N.D. 525, 23 N.W. 2d 247 (1946); *Foster v. Roman Catholic Diocese of Vermont*, 116 Vt. 124, 70 A. 2d 230 (1950); *Durney v. St. Francis Hospital*, 83 A. 2d 753 (Del. Super., 1952).

<sup>9</sup> Complete Immunity: Arkansas, Kentucky, Maine, Maryland, Massachusetts, Missouri, Oregon, Pennsylvania, South Carolina.

Partial Immunity: Connecticut, Georgia, Idaho, Indiana, Louisiana, Michigan, Nebraska, Nevada, New Jersey, North Carolina, Rhode Island, Texas, Virginia, West Virginia, Wisconsin, Wyoming.

Complete Liability: Alabama, Arizona, California, Delaware, Florida, Iowa, Kansas, Minnesota, Mississippi, New Hampshire, North Dakota, New York, Ohio, Oklahoma, Utah, Vermont, Washington.

Protection of Trust: Colorado, Illinois, Tennessee.

No decision: Montana, New Mexico, South Dakota.

See 4 De Paul L.R. 56, 65 for classification, adjusted by recent decisions noted in above text.

pears that through the change of times and circumstances these institutions are now able to protect themselves and no longer need the help of the courts. Therefore, it would be contrary to good judgment and justice to allow the individual to suffer alone without redress against those who were responsible for the injury.

In this development there appears but one weakness. The public policy theory which was the main foundation for the immunity doctrine included a balancing of rights, viz., the rights of the charitable institution to any benefit and assistance that society and law could allow them versus the right of the individual to recover from the master of such servant injuring him. In weighing these rights of the individual in an attempt to balance it against the right of the institution, it was noted that many of the injured parties would only become wards of some other charity if they were not allowed to collect. This was held to be a weighty consideration on the part of the individual's rights and its influence upon society in the problem. Yet in those jurisdictions in which the doctrine of immunity has been gradually abrogated, invariably the last survivor has always been the immunity against actions in tort by patients—and in particular non-paying patients—the real charity case. This seems inconsistent because, if the courts looked upon this problem in the light of the greatest benefit to society, which is what public policy actually means, then it appears that when this wall of immunity was penetrated, the prime consideration should have been given to the most needy, the class of non-paying charity patients. Instead, all other less needy classes of individuals were allowed to collect before this right was restored to the charity patient.<sup>10</sup>

<sup>10</sup> Note discussion of immunity doctrine in 4 De Paul L.R. 56 (1954).