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TORTS--LIABILITY OF A MUNICIPAL HOSPITAL EXTENDED TO A NURSE'S MEDICAL ACT UNDER SECTION 50 (d) OF THE GENERAL MUNICIPAL LAW AND SECTION 8 OF THE COURT OF CLAIMS ACT

COMMENT

TORTS—LIABILITY OF A MUNICIPAL HOSPITAL EXTENDED TO A NURSE'S MEDICAL ACT UNDER SECTION 50 (d) OF THE GENERAL MUNICIPAL LAW AND SECTION 8 OF THE COURT OF CLAIMS ACT.—The subject of hospital liability in New York State does not lend itself easily to cursory treatment much less hasty explanation. The purpose of this comment is to point out a recent enlargement of the law pertaining to public hospitals, specifically, the liability of a municipal hospital for the conduct of a nurse employee. At least some of the difficulty and ambiguity which is present in this area of tort is traceable to the manner in which the public hospital is differentiated from the private hospital. The private hospital may be profit-making[1] or charitable[2] while the public hospital is either state or municipal. The liability of public hospitals is different from the liability of private hospitals because of legislation which either explicitly or by judicial construction has removed certain immunities associated with private hospitals. In order to fully appreciate the increased statutory effect upon public hospital liability a brief analysis of the principles which govern private hospital liability is required.

To determine the liability of the private hospital for injuries caused by the negligent acts of its doctors, nurses, and other employees,[3] emphasis is placed upon whether or not the injurious act was administrative or medical in nature. The private hospital is liable under the doctrine of *Respondeat*

[1] Hayt, Hayt & Groeschel, Law of Hospital, Physician and Patient 169 (New York 1952). A profit-making hospital is organized with capital stock contributed into the corporation by stockholders.

[2] *Id.* at 65. Charitable hospitals pay no dividends, have no capital stock, and are supported by donation; accord, Schloendorff v. Society of the N. Y. Hospital, 211 N. Y. Hospital, 211 N. Y. 125, 105 N. E. 92 (1914).

[3] Generally there are three rules of thumb which the courts in the United States follow in determining whether or not the hospital is to be held liable for the negligent acts of their doctors, nurses, and other employees:

a. The trust fund principle offers a blanket immunity to charitable hospitals. The funds of such an institution are deemed to be the substance of a charitable trust, and the interests of public policy are foreign to a rule which would deplete the fund through payments of judgments. N. Y. rejected this view in Hordern v. Salvation Army, 199 N. Y. 233, 92 N. E. 626 (1910).

b. The implied waiver doctrine operates on the assumption that the plaintiff as the recipient of charitable attention waives the right to hold the benefactor liable for the negligence of its servants. See Sheehan v. North Community Hospital, 273 N. Y. 163, 7 N. E. 2d 28 (1937); Hamburger v. Cornell University, 240 N. Y. 328, 148 N. E. 539 (1925).

c. The Independent Contractor theory. The private hospital is liable for administrative negligence such as selection of unqualified personnel. This theory treats the hospital as a procurer of healers and not a *seller of medical services.* In N. Y. see Berg v. N. Y. Society for the Relief of the Ruptured and Crippled, 1 N. Y. 2d 499, 136 N. E. 2d 523 (1956). See generally—25 N. Y. U. L. Q. R. 612, see note 1, *supra,* at 170, criticism of charitable immunity, 22 ABAJ 48, 77 U. PENN. L. REV. 191, 34 YALE L. J. 316.

Superior if the act complained of is classified as administrative.[4] The private hospital avoids liability for medical or professional negligence of its doctors and nurses because the hospital-doctor relationship is considered to be one of employer and independent contractor.[5] The underlying logic of this judicial construction appears to be that the hospital procures healers[6] and does not exercise the supervision requisite for liability which is traditionally imposed upon employers for their servants' misconduct.

Tort liability of public hospitals is predicated solely on the doctrine of *Respondeat Superior* in New York.[7] The immunities associated with private hospitals have been done away with by statute.[8] The avenue of recovery for a personal injury, sustained as a result of the tortious conduct of doctors, nurses, and other hospital employees, is controlled by the principles inherent in the concept of this doctrine.[9]

The waiver of public hospital immunity is embodied in two separate statutes, section 50 (d) of the General Municipal Law as amended, and section 8 of the Court of Claims Act.[10] Section 50 (d) provides, "Every municipal corporation . . . shall be liable for . . . any resident physican, interne or

[4] Under the classification of administrative acts numerous situations have been ruled upon; "supplying stale drugs for the use of patients"—Volk v. City of New York, 284 N. Y. 279, 30 N. E. 2d 596 (1940); a defective hot water bottle in Iacono v. N. Y. Polytechnic Hospital, 269 App. Div. 955, aff'd, 296 N. Y. 502 (1945); failing to install sideboards on the patient's bed, Ranelli v. The Society of N. Y. Hospital, 295 N. Y. 850, 67 N. E. 2d 257 (1946); administering of a blood transfusion to the wrong patient by an intern, Necolayff v. Genessee Hospital, 270 App. Div. 648, aff'd, 296 N. Y. 936 (1947). Chapter 16, Liability of Charitable Hospitals to Patients, see note 1, *supra* at 179. Examples of acts termed Medical in nature, see Kaplin v. State of N. Y., 95 N. Y. S. 2d 890, aff'd, 100 N. Y. S. 2d 693 (1950). A drill point was left in the head of the humerous and doctor did not remove because of patient's condition. Infection followed. Bryant v. Presbyterian Hospital, 304 N. Y. 538, 110 N. E. 2d 391 (1953). A student nurse's hypodermic injection considered a medical act.

[5] Holding doctor to be a servant of the private hospital. See Stuart Circle Hospital Corp. v. Curry, 173 Va. 136, 3 S. E. 2d 153 (1939); Giusti v. C. H. Weston Company, 165 Ore. 525, 108 Pac. 2d 1010 (1941).

[6] Schloendorff v. Society of N. Y. Hospital. See note 2, *supra*. The leading case on private hospital liability in N. Y. is Berg v. N. Y. Society for Relief of the Ruptured and Crippled, see note 3, *supra*, "Whatever the ultimate fate of the independent contractor rule, this case need not be pushed into this mould." See also 25 Can. Bar. R. 646.

[7] Becker v. City of New York, 2 N. Y. 2d 226, — N. E. — (1957); Liubowsky v. State of N. Y., 285 N. Y. 701, 34 N. E. 2d 385 (1941); Robinson v. State, 292 N. Y. 631, 55 N. E. 2d 506 (1944).

[8] The General Municipal Law § 50 (d), C. 681 (1950); L. 1956 C. 514 and L. 1956 C. 897 (1956); the New York Court of Claims Act § 8, C. 860 (1939).

[9] RESPONDEAT SUPERIOR. The master who puts the servant in a position of trust or responsibility is justly held responsible when the servant exceeds the strict line of his duty or authority. Cohen v. Dry Dock E. B. & R. Co., 69 N. Y. 170 (1877); The test of the masters' liability for the wrongful act of the servant is not that the act was expressly authorized by the master. In most cases where master has been held liable for the negligent or tortuous act of the servant, the servant not only acted without express authority but in violation of his duty to his master. Rounds v. D. L. & W. R. Co., 64 N. Y. 129 (1876).

[10] Court of Claims Act, § 8. See note 8, *supra*.

any other physician or dentist rendering medical services of any kind or dental services of any kind to a person without receiving compensation from such person in a public institution maintained in whole or in part by the municipal corporation . . . for personal injuries . . . by reason of the malpractice of such resident physician or dentist." In contrast to the rule applied to private hospitals, doctors are treated as employees and not as independent contractors.[11]

Section 8 of the Court of Claims Act is more general and comprehensive in establishing the state's liability[12] for the tortious conduct of its employees. The language of the statute leaves much room for judicial discretion as to the applicability of its provisions.

"The state hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the Supreme Court against individuals and corporations."

Exercise of this discretion has led to the application of section 8 to the hospitals maintained by the state[13] and one decision adjudged that municipal corporations were within the contemplation of its reasoning.[14] The stage was thus appropriately set for the application of section 8 to municipal hospitals in *Becker* v. *City of New York.*[15]

Becker was treated in a hospital operated by the City of New York. In preparation for an intravenous pyelogram, the patient was given an injection of dye for the purpose of outlining the kidney for X-ray tests. The hypodermic needle was negligently inserted into the median nerve, which is located in the vicinity of the vein into which the dye is injected. The injection was performed by a nurse-employee of the hospital.

Judge Froessel posed a query as to whether the city may escape liability on the ground that the act was medical in nature,[16] even though the nurse was within the scope of her employment in making the injection.[17]

The reply to this question is that the fine distinction between medical and administrative acts, important in the framing of private hospital liability, is not a factor in formulating the a priori basis of public hospital liability. However, the administrative-medical distinction may play a part

[11] Gen. Mun. Law. See note 8, *supra*. . . . Every such resident physician, interne or any other physician or dentist for the purpose of this section, shall be deemed an employee of the Municipal Corp. . . . even though the Municipal Corp. derives no special benefit on its corp. capacity. L. 1956, C. 514 eff. April 10, 1956, extended liability to include podiatrists in rendering podiatry services in municipal hospitals.

[12] See note 8, *supra;* also 3 N. Y. L. F. 95.

[13] Bernardine v. City of N. Y., 294 N. Y. 361, 62 N. E. 2d 604 (1944).

[14] Liubowsky v. State of New York, see note 7, *supra.* Patient died of injection of wrong drug by a doctor aided by a nurse . . . state hospital liable. Robinson v. State, see note 7, *supra,* negligent medical care by state physician, state liable. Originally state assumed liability under § 12 (a) of the Court of Claims Act (L. 1920, C. 922, 1921) which was superseded by § 8 (1939).

[15] Becker v. City of New York, see note 7, *supra.*

[16] Bryant v. Presbyterian Hospital, see note 4, *supra.*

[17] Becker v. City of New York, see note 7, *supra* at 232.

in determining whether the servant was acting within the scope of his employment.

The *Becker* decision has a distinct effect upon the tort liability of municipalities under section 50 (d) of the General Municipal Law. Specifically, the application of section 8 of the Court of Claims Act qualifies the intention of the legislature to exclude certain classes of hospital employees from the purview of section 50 (d). The Appellate Division, First Department, has held that the city was not liable under section 50 (d) for the medical negligence of a nurse employed by a city hospital.[18] The Court there resorted to the administrative-medical distinction of the independent contractor rule and denied recovery on the ground that there was neither improper selection of the nurse as an employee nor a finding of administrative misconduct in the nurse's act.

Another decision rendered under the unrevised section 50 (d) apparently distinguished hospital salaried physicians (interns and resident physicians) from physicians gratuitously offering their services to the community. Recovery was not granted in this case because the physician was salaried and section 50 (d) was construed to be applicable to "physicians gratuitously offering services" only.[19]

However, the addition in the 1956 amendment of "resident physicians and interns" coupled with the replacement of the phrase "gratuitously offering services" by the phrase "without receiving compensation from such person", expressly includes salaried physicians within the class of physicians freely donating their services outlined in the original enactment. The term gratuitous is held to apply to the specific relationship between the doctor and the patient and the fact that the physician is employed by the hospital does not change the nature of these services. Thus the modification placed upon 50 (d) by the court in the *Schmidt* case was erased by the 1956 statutory amendment and the class of persons for whose employment the municipal hospital is liable was further enlarged.

Prior to the *Becker* case, the courts restricted themselves to the legislative intent in interpreting section 50 (d) of the General Municipal Law to indemnify physicians who have given their services gratuitously in public institutions against claims of malpractice. Liability of municipalities was limited to the express wording of the statute in conformity with the principle of strict statutory construction. The resulting confusion pays homage to two conflicting principles—the governmental interest in public health[20] through establishment and maintenance of hospitals, and the rationale which makes the employer responsible for the substandard conduct of his employee. By adopting the governmental principle to exclude certain kinds of hospital employees, the effect of section 50 (d) upon municipal hospitals was

[18] Volk v. City of New York, 284 N. Y. 279, 30 N. E. 2d 596 (1940).

[19] Schmidt v. Werner, City of New York, 277 App. Div. 520, 100 N. Y. S. 2d 860, aff'd without opinion, 303 N. Y. 754, 103 N. E. 2d 540 (1950).

[20] See note 1, *supra* at 193, concerning maintenance of Public Health—a Governmental function; also, 62 C. J. S. 278 § 133; 26 Am. Jur. 594, § 13.

something less than a complete waiver of municipality liability. The concept of the state's sovereign immunity[21] trickled down to the municipal corporation as far as nurses are concerned. Thus, under section 50 (d) the ghost of the independent contractor rule remained in the periphery of municipal hospital liability.

It was left to Judge Froessel in the *Becker* case to interpret section 8 as providing the requisite waiver of sovereign immunity not found under section 50 (d) which now completes the blanket of state and municipal liability for the negligence of doctors, nurses, and other employees of public hospitals. Judge Froessel, voicing the opinion of the six judges taking part in the decision, stated that in enacting the Court of Claims Act "the legislature did not intend to apply the private hospital rule of independent contractor to the state and its subdivisions." In accordance with the holding in *Jackson* v. *State*,[22] the Court of Appeals affirmed its position that the statute waives immunity not only from suit but also from liability.

[21] See note 1, *supra* at 193.
[22] 261 N. Y. 134, 184 N. E. 735 (1933).