NEW YORK LAW SCHOOL

NYLS Law Review

Volume 3
Issue 4 *NEW YORK LAW FORUM, VOLUME III, OCTOBER 1957, NUMBER 4*

Article 7

October 1957

TORTS-NEGLIGENCE: NEW YORK DOCTRINE GRANTING CHARITABLE HOSPITALS IMMUNITY FROM "MEDICAL" NEGLIGENCE OF EMPLOYEES ABANDONED IN FAVOR OF MORE MODERN CONCEPT

NOTE

TORTS—NEGLIGENCE—NEW YORK DOCTRINE GRANTING CHARITABLE HOSPITALS IMMUNITY FROM "MEDICAL" NEGLIGENCE OF EMPLOYEES ABANDONED IN FAVOR OF MORE MODERN CONCEPT.—An old rule of law that granted New York hospitals' immunity from the "medical" negligence of its employees has recently been abandoned. In a decision of major importance, the state's highest tribunal ruled that the ancient theory of non-liability ". . . 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."[1]

The impact of this decision can best be appreciated by reference to the sources of the immunity doctrine. Historically, there were four general views as to the extent of immunity of charitable corporations from tort liability. First, general immunity was granted. This was held in the first English case on the subject, which reasoned that it would be a breach of the trust to apply the trust funds to damages.[2] This reasoning was later discredited in England[3] and received but slight support in the United States.[4] The second view was that the doctrine of respondeat superior did not apply to charitable corporations. An English decision,[5] later overruled,[6] had suggested this view in the case of a public corporation, and, curiously enough, earlier American cases applied this reasoning to charitable institutions and ignored the subsequent English rejection.[7] Some American jurisdictions refused to follow the view rejected by the English courts by adopting a third position, namely, that an immunity should extend to torts by agents against the beneficiaries of the charity,[8] but not against outsiders.[9] Finally, there was a fourth view denying immunity altogether.[10]

These early theories supported the refusal of most American courts to hold a charity liable for the negligence of its servants. This attitude has been the source of much judicial conflict and controversy, and many theories and exceptions were advanced to rationalize the old rule. But the basic anomaly that under the charitable immunity doctrine, the injured party is, in effect, compelled to contribute his injury to the charity, has led to the increasing acceptance of the view that ". . . the consid-

1 Bing v. Thunig, 2 N. Y. 2d 656, 135 N. E. 2d 42 (1956).

2 Heriot's Hospital v. Ross, 12 Cl. & F. 507, 8 Eng. Rep. 1508 (1846).

3 Mersey's Docks, etc. Trustees v. Gibbs, L. R. 1 H. L. 93, 11 Eng. Rep. 1500 (1866).

4 Perry v. House of Refuge, 63 Md. 20, — Atl. — (1885); Parks v. Northwestern University, 218 Ill. 381, 75 N. E. 991 (1905); Fire Ins. Patrol v. Boyd, 120 Pa. St. 624, 15 Atl. 553 (1888).

5 Holliday v. St. Leonard, 11 C. B. n.s. 192, 142 Eng. Rep. 769 (1861).

6 It had been decided chiefly on the trust-fund doctrine and was therefore in effect reversed by the *Mersey Docks* case, see note 3 *supra*. Almost immediately afterwards, however, the express point again arose and Lord Blackburn held that a public corporation was liable on the theory of respondeat superior. Foreman v. Mayor, etc. of Canterbury, L. R. 6 Q. B. 214 (1870); *accord,* Gilbert v. Trinity House, 17 Q. B. D. 795 (1886).

7 Hearns v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 585 (1895); McDonald v. Mass. General Hospital, 120 Mass. 432, — N. E. — (1876); Jensen v. Maine Eye and Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910).

8 Powers v. Mass. Homeopathic Hospital, 109 Fed. 294 (1st Cir. 1901).

9 Hordern v. Salvation Army, 199 N. Y. 233, 92 N. E. 626 (1910); Kellog v. Church Charity Foundation of Long Island, 128 App. Div. 214, 112 N. Y. Supp. 566 (2d Dep't 1908).

10 Galvin v. Rhode Island Hospital, 12 R. I. 411, — Atl. — (1880).

erations of public policy against the immunity doctrine far outweigh those in support."[11]

Still, the problem remains purely a question of state law. In some states the fact that a charitable institution carries indemnity insurance does not create liability where such institutions are themselves immune from liability. Here, the insurance company is not liable either, although sound principles would indicate that if such is the law, the insurance is a nullity and the insurer has received a premium but has given nothing of value in return.[12] In other jurisdictions the insurer is liable only to the extent of the insurance coverage.[13] However, American judicial thinking, which formerly gave general acceptance to the immunity rule and its variations, now gives that doctrine a very modest majority. The tendency has definitely been in recent years to overrule the doctrine.[14]

In New York, the famous case of *Schloendorff* v. *New York Hospital*[15] was the most important of the earlier decisions. From this case a body of law developed making the liability of a hospital for injuries suffered by a patient, through the negligence of its employees, depend on whether the injury producing act was "administrative" or "medical." Under this rule the hospital would be liable for the administrative but not for the medical or professional negligence of its employees. The court assigned two reasons for this conclusion. The first was that one who seeks charity must be deemed to have waived any right to damages suffered through his benefactor's negligence. But this rule was not limited to charity patients and was expanded to cover both paying patients and private or profit-making hospitals.[16] The second reason which the court advanced was that the doctrine of respondeat superior did not apply to doctors and nurses as they were to be regarded as independent contractors rather than employees, due to their special skill and the lack of hospital control exerted over their work.

The medical-administrative distinction has long plagued the New York courts, and a consistent and clearly defined separation of the terms has proved to be highly

[11] President and Director of Georgetown College v. Hughes, 130 F. 2d 810 (D. C. Cir. 1942); *accord,* Pierce v. Yakima Val. Memorial Hospital Ass'n., 43 Wash. 2d 162, 260 P. 2d 765 (1953); Foster v. Roman Catholic Diocese of Vermont, 116 Vt. 124, 70 A. 2d 230 (1950).

[12] Williams v. Church Home, 223 Ky. 355, 3 S. W. 2d 753 (1928).

[13] Gorman v. St. Paul's Fire and Marine Insurance Co., 121 A. 2d 812 (Md. 1956).

[14] Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P. 2d 220 (1951); Silva v. Providence Hosp. of Oakland, 14 Cal. 2d 762, 97 P. 2d 798 (1940); Haynes v. Presbyterian Hosp. Assn., 241 Iowa 1269, 45 N. W. 2d 151 (1950); Noel v. Menninger Foundation, 175 Kan. 751, 267 P. 2d 934 (1954); Mississippi Baptist Hosp. v. Holmes, 214 Miss. 906, 56 So. 2d 709 (1952); Avellone v. St. John Hospital, 165 Ohio St. 467, 135 N. E. 2d 410 (1956); Pierce v. Yakima Val. Memorial Hosp. Ass'n., 43 Wash. 2d 162, 260 P. 2d 765 (1953). It is worthy of note, that there is general agreement among text writers and other commentators that the rule of immunity should be abandoned and the doctrine of respondeat superior applied. See, 2A Bogart, Trusts and Trustees § 401 (St. Paul 1953); Prosser, Torts § 109 (2d ed. St. Paul 1955); Bobbé, *Tort Liability of Hospitals in New York,* 37 Cornell L. Q. 419 (1952); Feezer, *The Tort Liability of Charities,* 77 U. Pa. L. Rev. 191 (1928); 163 Journal Amer. Med. Ass'n. 285 (1956).

[15] 211 N. Y. 125, 105 N. E. 92 (1914).

[16] Bakel v. University Heights Sanitarium, 320 N. Y. 870, 100 N. E. 2d 51 (1951); Steinert v. Brunswick Home, 172 Misc. 787, 16 N. Y. S. 2d 83 (Sup. Ct. Nassau Co. 1939), *aff'd,* 259 App. Div. 1018, — N. Y. S. 2d — (2d Dep't 1940), *leave to appeal denied,* 284 N. Y. 822, — N. E. — (1940). See, 3 N. Y. Law Forum 212 (1957), for comparison of New York Public and Private Hospital tort liability.

elusive.[17] From such distinctions, only rough delineations of policy could be determined. The long standing dissatisfaction with the application of this rule finally led to its ultimate rejection in the instant case. Judge Fuld in his opinion declared that the court did "not consider it either wise or necessary again to become embroiled in an overnice disputation" as to whether the negligence in the present case "should be labeled administrative or medical."

The court stressed that: "The doctrine of respondeat superior is grounded in firm principles of law and justice. Liability is the rule, immunity the exception. It is not too much to expect that those who serve and minister to members of the public should do so, as do all others, subject to that principle and within the obligation not to injure through carelessness."

"Hospitals should, in short, shoulder the responsibilities borne by everyone else. The test should be, for these institutions whether charitable or profit-making, as it is for every other employer, was the person who committed the negligent injury-producing act one of its employees and, if he was, was he acting within the scope of his employment."

It should be noted that in a separate opinion, Judge Conway concurred in the result of the case, but indicated his dissatisfaction with pronouncing the ultimate fate of the *Schloendorff* rule. "We should . . . not go on to overrule the . . . (old) . . . doctrine," because, in his opinion, voluntary hospitals are not conducted as a business and the former doctrine of immunity has permitted the survival of many hospitals, particularly in smaller communities.

Thus, the basic issue presented in tort cases involving charities appears to be the problem of where the public interest is best served. The protection of the injured individual is opposed to the danger that the effectiveness of public benefactors may be curtailed through oppressive recoveries. But it would seem that a charity's personality will suffer no less detriment if it is allowed to be less responsible than a private enterprise. If the publis seeks benefit, if men search to benefit the public, justice demands that due care should be taken not to harm those intersts met in the process. At the time the immunity rule originated, not only was there the possibility that a substantial award in a single negligence action might destroy a hospital, but concern was felt that such a recovery might discourage generosity and "constrain . . . (them), as a measure of self-protection, to limit their activities."[18]

This factor was considered in the present decision, and the court determined that today's hospital is different from its predecessors in that it receives wide community support, employs a large number of people and operates its plant in a business-like fashion. As a consequence of this, public policy may best be advanced by making such a hospital liable for its negligence. "Insistence upon respondeat superior and damages for negligent injury serves a two-fold purpose, for it both assures payment of an obligation to the person injured and gives warning that justice and the law demand the exercise of care."[19]

[17] Iacono v. New York Polyclinic Med. School & Hosp., 296 N. Y. 502, 68 N. E. 2d 450 (1946); Sutherland v. New York Polyclinic Med. School & Hosp., 298 N. Y. 682, 82 N. E. 2d 583 (1948); Necolayff v. Genesee Hosp., 296 N. Y. 936, 73 N. E. 2d 117 (1947); Berg v. New York Soc. for Relief of Ruptured & Crippled, 1 N. Y. 2d 499, 136 N. E. 2d 523 (1956); Peck v. Charles B. Towns Hosp., 275 App. Div. 302, 89 N. Y. S. 2d 190 (1st Dep't 1949); Bryant v. Presbyterian Hosp. in City of N. Y., 304 N. Y. 538, 110 N. E. 2d 391 (1953); Ranelli v. Society of N. Y. Hosp., 295 N. Y. 850, 67 N. E. 2d 257 (1946); Grace v. Manhattan Eye, Ear & Throat Hosp., 301 N. Y. 660, 93 N. E. 2d 926 (1950).

[18] Scholendorff v. New York Hospital, 211 N. Y. 125, 105 N. E. 92 (1914).

[19] See note 1, *supra*.