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AGENCY

Hospital Liability For The Tortious Acts of Its Doctors And Nurses

It is a general proposition that an employer is liable for the torts of his employees committed in the course of employment.¹ In applying this rule to a particular case, it is thus necessary to determine, (1) whether one is an employee, and (2) whether the acts were committed in the course of employment. In regard to the first requirement, the law in New York, until the last term, was that hospitals were liable for the tortious administrative acts of doctors and nurses² but that these same doctors and nurses, although "employed" full time, would not render the hospital vicariously liable when performing medical acts.³ This rule was equally applicable to charitable and profit-making institutions⁴—the reason finally resting on the ground that when performing medical acts the actors were not employees but independent contractors and thus not within the doctrine of respondeat superior.⁵

In *Becker v. City of New York*⁶ the Court was faced with the problem of liability of the state (or its subdivision—in this case New York City) for the tortious medical acts of nurses "employed" in its hospital. In its anxiety to continue restricting the applicability of the rule of hospital non-liability,⁷ the Court engaged in peculiar statutory construction by stating that the legislature in enacting section 8 of the Court of Claims Act did not intend to apply the rule of hospital non-

1. See, e.g., *Higgins v. Watervliet Turnpike and R.R.*, 46 N.Y. 23 (1871).

2. *Dillon v. Rockaway Beach Hospital*, 284 N.Y. 176, 30 N.E.2d 373 (1940).

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

4. *Schloendorff v. Society of New York Hospital*, *supra* note 3 (charitable hospital); *Bakal v. University Heights Sanitarium*, 277 App. Div. 572, 101 N.Y.S.2d 385 (1st Dep't 1950), *aff'd*, 302 N.Y. 870, 100 N.E.2d 51 (1951) (profit-making hospital); *Schneider v. New York Telephone Co.*, 249 App. Div. 400, 292 N.Y. Supp. 399 (1st Dep't 1937), *aff'd*, 276 N.Y. 655, 13 N.E.2d 47 (1938) (non-hospital corporation).

5. The courts in New York originally stated two reasons for non-liability. In *Hodern v. Salvation Army*, 199 N.Y. 233, 92 N.E. 626 (1910), the court said that non paying patients waived any tort claim in accepting the care of charity. This waiver theory was repudiated in *Sheehan v. North Country Community Hospital*, 273 N.Y. 163, 7 N.E.2d 28 (1937). The second reason, as stated in *Schloendorff v. Society of New York Hospital*, *supra* note 3, was that hospitals merely procure services of doctors and nurses but do not undertake to render the services themselves through the agency of the nurses and doctors.

6. 2 N.Y. 2d 226, 159 N.Y.S.2d 174 (1957).

7. The court in *Berg v. New York Society for the Relief of the Ruptured and Crippled*, 1 N.Y.2d 499, 154 N.Y.S.2d 455 (1956), 6 BUFFALO L. REV. 227 (1957), held that the hospital was liable for the torts of non-professional employees even though performing medical acts. In *Mrachek v. Sunshine Biscuit*, 308 N.Y. 116, 123 N.E.2d 801 (1954), 5 BUFFALO L. REV. 168 (1956), the court restricted the immunity to injuries resulting from a course of treatment and a corporation was held liable for the negligent physical acts committed while examining a patient as a condition of employment.

liability to the states and its subdivisions.⁸ Section 8 of the Court of Claims Act states:

The state . . . waives its immunity from liability and . . . assumes liability . . . in accordance with the *same* rules of law as applied . . . against individuals or corporations . . . (Emphasis added).

Absent such a statute, the state would not be liable for injuries resulting from the negligence of its officers and agents.⁹ If the "evil" sought to be remedied was sovereign immunity, can it be said that the legislative remedy was broader than the "evil"¹⁰—that the state is to be liable although in the same situation a private corporation would not be?¹¹ The Court, in effect, so held. This determination can only be explained logically if the Court meant that doctors and nurses, at least those employed full time, were employees even though engaged in medical acts regardless of whether employed in a state, profit-making, or charitable hospital. The Court, four months later, in *Bing v. Thunig*,¹² concluded that full time doctors and nurses in private hospitals were employees even when performing medical acts. The reasoning of the Court was that hospitals attempt to cure patients and not merely to make healers available—that nurses and doctors regularly worked in hospitals in furtherance of the hospitals' purpose. These persons are engaged not in their own enterprises but in the hospitals'. Therefore the hospitals should bear the risk of their negligence.¹³

The rule of non-liability was originally applied to a charitable hospital,¹⁴ the Court fearing that liability might eventually destroy these institutions.¹⁵ However, the reasoning of the rule¹⁶ forced the Court into anomalies. The logic demanded application also to profit-making organizations.¹⁷ Then the Courts

8. In so holding the Court expressly stated what was implied when the court in *Robison v. New York*, 292 N.Y. 631, 55 N.E.2d 506 (1944) affirmed a judgment against the state for the tortious medical acts of a state physician, apparently basing it on the reasoning of an earlier remand in the same case, 263 App. Div. 240, 32 N.Y.S.2d 388 (4th Dep't 1942)—the reasoning being the same as in the instant case.

9. *Smith v. New York*, 227 N.Y. 405, 125 N.E. 841 (1920).

10. The state shall be liable *only* to the extent of a private individual or corporation. *Douglas v. New York*, 254 App. Div. 392, 394, 5 N.Y.S.2d 681, 683, (3rd Dep't 1938).

11. As has been seen a non-state hospital whether charitable or profit-making is not liable for the tortious medical acts of doctors and nurses. See notes 3, 4 *supra*.

12. 2 N.Y.2d 656, 163 N.Y.S.2d 3 (1957).

13. For an economic basis for the theory of respondeat superior and what factors to evaluate in determining whether one should be vicariously liable see, Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L. J. 584, 720 (1929).

14. *Schloendorff v. Society of New York Hospital*, *supra* note 3.

15. *Id.* at 135, 105 N.E. at 95.

16. That is, that physicians and nurses are independent contractors when treating patients.

17. *Bakal v. University Heights Sanitarium; Schneider v. New York Telephone Co.*, *supra* note 4.

engaged in a compromise between total immunity and the doctrine of respondeat superior,¹⁸ resulting in the distinction between medical and administrative acts.¹⁹ *Becker v. City of New York* added more confusion by holding in substance that the state and its subdivisions' liability was greater than a private hospitals'. However, full cycle was finally reached, the Court in *Bing v. Thunig* discarding the notion that the determination of whether a doctor or a nurse is an employee depended on the nature of the acts performed rather than on the relationship between the hospital and the nurse or doctor. As a result, there is no longer a privilege for any type of hospital, whether state, charitable, or profit-making, nor any necessity for making nice distinctions as to the nature of the act. The Court upset precedent of many years to, ". . . bring the common law of this state, on this question, into accord with justice . . ." ²⁰

Non Enforceability Of Joint Venture

"When individuals determine to conduct business through a corporation, . . . they are not at one and same time joint venturers and stockholders, fiduciaries and nonfiduciaries, personally liable and not personally liable." This is the declaration of the Court in *Weisman v. Awnair Corporation of America*,²¹ affirming the Appellate Division's reversal²² of an order of Supreme Court denying defendant's motion to dismiss the complaint.

Plaintiff brought an action for an injunction and an accounting against a manufacturing corporation, its wholly-owned subsidiary distributing corporation, and two individual defendants who were officers, directors and stockholders in the manufacturing corporation, and with whom plaintiff had made an agreement that he would organize a corporation which would be given the exclusive right to distribute the manufacturer's product in a certain territory, the stock in the new corporation to be issued sixty per cent to him and forty per cent to the individual defendants or their nominees. He had organized the corporation and it had operated for some time when the manufacturing corporation, on about seven weeks notice, ceased to supply the new corporation with its products and proceeded to market them in the area through an newly-organized wholly-owned subsidiary

The Court said that the facts pleaded in the complaint indicated only the existence of a joint venture among three individuals, no corporation being a party to it, and that this joint venture could not be carried on by individuals through

18. *Bobbe, Tort Liability of Hospitals in New York*, 37 CORNELL L. Q. 419, 438 (1952).

19. See note 2 *supra*.

20. *Woods v. Lancet*, 303 N.Y. 349, 351, 102 N.E.2d 691, 692 (1951).

21. 3 N.Y.2d 444, 165 N.Y.S.2d 745 (1957).

22. 2 A.D.2d 685, 152 N.Y.S.2d 649 (2d Dep't 1956).