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RECENT DECISIONS

AGENCY-EMPLOYER HELD LIABLE IN RESPONDEAT SUPERIOR FOR THE NEGLIGENCE OF ITS PHYSICIAN EMPLOYEE

Applicant for employment with defendant company was required to submit to a blood test. The physician employed by the company damaged the nerves in the applicant's arm while attempting to extract blood for analysis. *Held* (3-2): Where the physician is not engaged in treating the employee, and the negligent acts committed by the physician are solely for the benefit of the employer's business, the employer is liable for the negligence of the physician. *Mrachek v. Sunshine Biscuit, Inc.*, 286 App. Div. 105, 126 N. Y. S. 2d 383 (1st Dep't 1953).

Where an injured employee is treated by a physician working in an employer's medical department, the physician's acts are those of an independent contractor. *Schneider v. New York Telephone Company*, 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); *Stone v. Goodman*, 241 App. Div. 290, 271 N. Y. Supp. 300 (1st Dep't 1934). Thus, only the selection of an incompetent physician will impose liability on the employer. *Laubheim v. De Koninglyke, N. Y. Co.*, 107 N. Y. 228, 13 N. E. 78 (1887).

It must be noted that only the *medical* acts of physicians and nurses are capable of relieving the private corporate employer from liability. *Phillips v. Buffalo General Hospital*, 239 N. Y. 788, 146 N. E. 199 (1924). Thus in all cases the test is whether the act done was a medical act, *i. e.*, professional in character, as distinguished from an administrative act, *i. e.*, one not involving an exercise of professional skill and judgment. *Dillon v. Rockaway Beach Hospital*, 284 N. Y. 176, 180, 303 N. E. 2d 373, 374 (1940). The distinction is often a close one and New York Courts have held the following to be medical acts: the application of hot water bottles to a patient's feet by an orderly or nurse, *Sutherland v. New York Polyclinic Medical School and Hospital*, 298 N. Y. 682, 82 N. E. 2d 583 (1948); *Phillips v. Buffalo General Hospital*, *supra*; the leaving of a patient on top of a table by an orderly who, had he remained with the patient, would have performed the duties of a nurse. *Andrews v. The Roosevelt Hospital*, 259 App. Div. 733, 18 N. Y. S. 2d 447 (2d Dep't 1940). However, where a nurse places hot water bottles on a bed preparatory to receiving a patient, *Iacone v. New York Polyclinic Medical School and Hospital*, 269 App. Div. 955, 58 N. Y. S. 2d 244 (2d Dep't 1945)

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or fails to attach sideboard to a patient's bed, *Roselli v. Society of New York Hospital*, 295 N. Y. 850, 67 N. E. 2d 257 (1946), the act has been held to be administrative.

Some jurisdictions have applied a test that ignores the distinction between medical and administrative acts and have held that where an employer maintains a medical department and directs his employees to go to it for treatment, the employer is liable for the negligence of a physician, *Knox v. Ingalls Shipbuilding Corp.*, 158 F. 2d 973 (7th Cir. 1947); or nurse, *Ebert v. Emerson Electric Mfg. Co.*, 264 S. W. 453 (Mo. App. 1924).

The court in the present case stresses the fact that the applicant had no choice but to submit to a physical examination and blood test. Since she was not seeking medical attention, no physician-patient relationship could result and hence no medical act occurred. The requirement that a physician-patient relationship is necessary before an employer can escape liability is interesting in view of the fact that the New York Courts have previously stressed the nature of the act performed and not the relationship of the parties involved. *Sutherland v. New York Polyclinic Medical School and Hospital*, *supra*. Thus, a hospital is relieved of liability for the medical negligence of a physician, not because the relationship of physician and patient does not exist or because the patient remains the patient of the physician who sends him to the institution, but because a physician's medical acts are always those of an independent contractor. *Bakel 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).

The holding of the instant case was declared to be the correct rule of law in *Rannard v. Lockheed Aircraft Corp.*, 26 Cal. 2d 149, 157 P. 2d 1, (1945), where a prospective employee was injured by the negligence of a company physician. Even though a medical act was involved, the court held the unusual degree of the employer's self-interest necessitated the use of respondeat superior.

While the present decision imposes a new and significant legal obligation on employers who require a physical examination of job applicants, nothing in its rationale suggests a departure from the general rule that company physicians who render medical aid to injured employees act as independent contractors. If the case implies that the extraction of blood for analysis is not a medical act, it is submitted other courts may decline to follow such a determination.

Frank Dombrowski, Jr.