Buffalo Law Review

Volume 3 | Number 1 Article 57

12-1-1953

Torts—Charitable Immunities

Irwin N. Davis

and the train started. After a third emergency halt, the motorman and conductor finally investigated and thereupon found decedent's body wedged under the train. Until this time, no steps had been taken to ascertain what was causing the emergency stops.

The court, after holding that a jury could reasonably infer that the fatal injuries did not occur until after the second stop, found that the invocation of the last clear chance doctrine was not forbidden as a matter of law. While the court fails to enunciate clearly the exact basis for its application, it indicates that the result is probably based on either of two grounds. First, Judge Froessel states that it is a question of fact whether defendant's conduct was "negligence so reckless as to betoken indifference to knowledge."[9] However, when the court in the *Woloszynowski* case indicated that last clear chance can be employed where defendant's negligence is merely "reckless" it was only stating dictim.[10] Furthermore, the presence of an element of wantonness obviates the necessity of invoking last clear chance since contributory negligence is not a bar to recovery when this element is present.[11] Secondly, it is pointed out that the defendant may have received "the requisite knowledge upon which a reasonably prudent man would act"[12] through the operation of the automatic braking equipment. The court indicates that the doctrine could be applied if defendant's lack of knowledge as to decedent's position came about through its own "wilful indifference to the emergency" or because of its "belatedly carrying out of its plain duty to investigate."

The court may be reasoning that the defendant had actual knowledge of the peril. Or, the decision may be based upon the rationale that the defendant should have known of the danger. This would allow for an application of the last clear chance doctrine upon an inference of knowledge. In view of the language of the court as applied to the peculiar facts of the case, the defendant's mere failure to act reasonably under the circumstances may be the underlying theory for applying the doctrine. At any rate, the decision in the instant case does little to clarify the Court of Appeals' position in regard to the last clear chance doctrine in New York.

Charitable Immunities

While various reasons have been forwarded in an attempt to justify the immunity which has been conferred upon charitable

9. *Id.* at 176, 111 N. E. 2d at 869.
10. See note 5 *supra.*
11. RESTATEMENT, TORTS § 482 (1938).
12. *Chadwick v. City of New York, supra* note 6 at 181, 93 N. E. 2d at 628.

institutions,[13] these attempts to rationalize the doctrine have been the subject of severe criticism.[14]

Early New York cases granted immunity to charitable organizations upon the theory that the recipient of the benefit agreed to "waive" the liability.[15] When it became apparent that the "waiver" theory was not appropriate in many cases, e. g. an unconscious patient, the courts developed the "independent contractor" approach.[16] Under this line of reasoning, the charity merely furnishes the facilities for services rendered by individuals.[17] In other words, a hospital only supplies those who heal and doesn't actually do the healing; the doctors and nurses are independent contractors.[18] In New York, therefore, a hospital is not liable for the negligent acts of a doctor or nurse,[19] but is held only to a duty to care in the selection of competent personnel.[20]

In *Bryant v. Presbyterian Hospital*,[21] plaintiff was a patient in the defendant hospital for about two weeks. During that time he was given hypodermic injections by nurses dressed "all in white." On the day before he was to leave the hospital, he was given an injection by a nurse in a "light blue kind of a striped uniform." This latter injection, which plaintiff claims was administered negligently by an incompetent, under graduate nurse resulted in severe pain and permanent physical injuries. Plaintiff, however, was unable to prove the identity of the person who administered the medication.

The majority of the court found the defendant not liable under the New York authorities. Judge Lewis reasoned for the majority that the meager description of the nurse who administered the injection did not prove that she was an undergraduate or that her proficiency in giving injections had not been the subject of careful selection and investigation. Hence the plaintiff

13. See 1 BFLO. L. REV. 177 (1951); PROSSER, TORTS 1079.

14. See Feezer, *The Tort Liability of Charities*, 77 U. OF PA. L. REV. 191 (1928); McCaskill, *Respondeat Superior as Applied in New York to Quasi-Public and Eleemosynary Institutions*, 5 CORNELL L. Q. 409, 6 CORNELL L. Q. 56 (1920); 48 YALE L. J. 81 (1938).

15 *Schloendroff v. Society of New York Hospital*, 211 N. Y. 125, 129, 105 N. E. 92, 93 (1914); *Hordern v. Salvation Army*, 199 N. Y. 233, 92 N. E. 626 (1910).

16. *Schloendroff v. Society of New York Hospital, supra* note 15.

17. *Hamburger v. Cornell University*, 240 N. Y. 328, 148 N. E. 539 (1925).

18. *Philips v. Buffalo General Hospital*, 239 N. Y. 188, 146 N. E. 199 (1924); *Matter of Bernstein v. Beth Israel Hospital*, 236 N. Y. 268, 270, 140 N. E. 694, 695 (1923).

19. *Schloendroff v. Society of New York Hospital, supra* note 15.

20. *Hamburger v. Cornell University, supra* note 17; *Philips v. Buffalo General Hospital, supra* note 18; *Schloendroff v. Society of New York Hospital, supra* note 15; see *Sheehan v. North County Community Hospital*, 273 N. Y. 163, 7 N. E. 2d 28 (1937), which held the hospital liable for the negligence of an ambulance driver as "its mere servant or employee." See also 1 BFLO. L. REV. 177, 179 (1951).

21. 304 N. Y. 538, 110 N. E. 2d 391 (1953).

was denied recovery not only because he failed to prove the identity of the person involved, but also because of the lack of proof that care by the defendant hospital was disregarded in the selecton of whoever was the administering nurse.[22]

Judge Froessel, dissenting, argued that even though a hospital's failure to carefully select a duly qualified (i. e. registered) nurse may be the only basis of liability in the usual case, a different situation arises when other than duly qualified personnel are selected to perform a medical act. The mere fact that a person is an undergraduate nurse is insufficient to presume her competence.[23] Therefore, the dissent felt that the defendant should have the burden of justifying the selection of a student nurse when harm results.

The dissent in the instant case recognizes that changes in economic and social conditions may have invalidated the original policy considerations behind the immunities doctrine.

Foreseeable Consequences

Plaintiff, in *Owen v. Rochester-Penfield Bus Co.*,[24] suffered a severe case of frostbite while a passenger on defendant's bus. During the course of the trip, the driver stopped the vehicle and left the door open for about fifteen minutes. Since no one could get frozen feet when the temperature is above 32 degrees, it must have been below freezing on the bus. Plaintiff, unknown to the driver, had a heart condition which rendered her more susceptible to frostbite than the average person in normal health.

The Appellate Division dismissed the complaint on the grounds that plaintiff's injuries did not come within the realm of reasonable foreseeability.[25] The Court of Appeals, however, determined that a jury could find that the defendant had failed to furnish reasonable heat to plaintiff and that as a result thereof, she suffered frostbite.[26] Judicial notice was taken of the then effective Public Service Commission rule adopted pursuant to

22. "The plaintiff does not advance his case materially by fastening upon the defendant a duty of diligent selection. The burden is still his to prove that the duty was disregarded." *Hamburger v. Cornell University, supra* note 17 at 339, 148 N. E. at 542.

23. See *Howe v. Medical Art Center Hospital*, 261 App. Div. 1088, 26 N. Y. S. 2d 957 (2d Dep't 1941), *aff'd* 287 N. Y. 698, 39 N. E. 2d 303 (1942).

24. 304 N. Y. 457, 108 N. E. 2d 606 (1952).

25. *Owen v. Rochester-Penfield Bus Co.*, 278 App. Div. 5, 103 N. Y. S. 2d 137 (3d Dep't 1951).

26. The trial judge charged—"The test here is whether or not this bus company failed to furnish reasonable heat to the plaintiff." Since no exceptions were made to this charge, it became the law of the case, *Imbrey v. Prudential Insurance Co.*, 286 N. Y. 434, 440, 36 N. E. 2d 651, 654 (1941), and plaintiff was not deemed an abnormal person.