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NEW YORK ABANDONS CHARITABLE IMMUNITY DOCTRINE

The concept of granting an immunity from tort liability to a charitable institution has been questioned since its adoption in the United States. Even during the time Massachusetts was first accepting this doctrine,[1] Rhode Island was rejecting it.[2] This conflict continues to this day. "From full immunity, through varied but inconsistent qualifications to general responsibility is the gamut of decision."[3]

The earlier decisions, whether granting complete or only partial immunity, based the rule of immunity on the trust fund theory.[4] Various jurisdictions, however, finding dissatisfaction with this theory, advanced others: the implied waiver by the acceptance of benefits theory,[5] the independent contractor theory,[6] and the public policy theory.[7] The rule was also subjected to various distinctions: medical or administrative,[8] stranger or beneficiary,[9] and personal injury or

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[1]McDonald v. Massachusetts Gen. Hospital, 120 Mass. 432 (1876). The court based its decision on an English case, Holliday v. St. Leonard's, Schoreditch, 11 C.B. [N.S.] 192, 142 Eng. Rep. 769 (1861). The court apparently failed to note that the case had been overruled. See Foreman v. Mayor of Canterbury L.R. 6 Q.B. 214, 217-18 (1871).

[2]Glavin v. The Rhode Island Hospital, 12 R.I. 411 (1879). This case was later partially overruled by statute. R.I. Gen. Laws, c. 177, § 38 (1896).

[3]President and Directors of Georgetown College v. Hughes, 130 F.2d 810, 812 (D.C. Cir. 1942).

[4]This theory is that the charity holds its funds in trust for a particular charitable purpose, and that a recovery cannot be had from these funds as it would thwart the intent of the donor and allow the courts to divert the funds indirectly while prohibiting the trustees from doing so directly, thus breaching the trust. McDonald v. Massachusetts Gen. Hospital, 120 Mass. 432 (1876); Perry v. The House of Refuge, 63 Md. 20 (1885); Fire Ins. Patrol v. Boyd, 120 Pa. 624, 15 Atl. 553 (1888).

[5]This theory is that the individual by accepting the benefits of the charity waives his right to sue the charity for damages occasioned by the negligence of its servants in the administration of the charity. Powers v. Massachusetts Homoeopathic Hospital, 109 Fed. 294 (1st Cir. 1901); Wilcox v. Idaho Falls Latter Day Saints Hospital, 59 Idaho 350, 82 P.2d 849 (1938); Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914) (dictum).

[6]Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914); Hillyer v. The Governors of St. Bartholomew's Hospital, [1909] 2 K.B. 820. See Glavin v. The Rhode Island Hospital, 12 R.I. 411, 424 (1879) (dictum).

[7]Hearns v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 595 (1895); Bond v. Pittsburgh, 368 Pa. 404, 84 A.2d 328 (1951); Weston v. Hospital of St. Vincent of Paul, 131 Va. 587, 107 S.E. 785 (1921).

[8]Dillon v. Rockaway Beach Hospital & Dispensary, 248 N.Y. 176, 30 N.E.2d 373 (1940); Phillips v. Buffalo Gen. Hospital, 239 N.Y. 188, 146 N.E. 199 (1924). Cf. Hamburger v. Cornell University, 240 N.Y. 328, 148 N.E. 539 (1925).

[9]This distinction allows recovery by a stranger while denying recovery to a

property injury.[10] From the mass of decisions no single thread of consistency can be drawn. "The cases are almost riotous with dissent. Reasons are even more varied than results. These are earmarks of law in flux. They indicate something wrong at the beginning or that something has become wrong since then. They also show that correction, though in process, is incomplete."[11]

The efforts of the New York courts to find a satisfactory solution to this problem present an interesting example of the evolution of the tort immunity doctrine. The first important New York case was *Schloendorff v. Society of New York Hospital.*[12] Prior to this decision, New York had rejected the doctrine of complete immunity and the trust fund theory.[13] Hospitals had not been relieved of liability in cases involving injuries to strangers.[14] Judge Cardozo, speaking for the Court of Appeals, said that charitable immunity in New York was based on the waiver theory and the independent contractor theory.[15] The support given the waiver theory, however, was only dictum as it was inapplicable in this case which involved a trespass for an unauthorized operation. Under the independent contractor theory, doctors and nurses are considered independent contractors and not servants of the hospitals. This theory is based on the hospital's lack of control over doctors and nurses in the performance of their professional tasks because of the very high degree of skill required. An additional basis for this theory is the thought that hospitals do not undertake to treat patients, but merely attempt to procure, for the patients, persons who will treat them on their own responsibility. However, it would seem that public policy was strongly involved in the decision, for the court said: "A ruling would, indeed, be an unfortunate one that might constrain charitable institutions, as a measure of self-protection, to limit their activities.... In this benef-

beneficiary. Kellogg v. Church Charity Foundation, 203 N.Y. 191, 96 N.E. 406 (1911); Hordern v. Salvation Army, 199 N.Y. 233, 92 N.E. 626 (1910).

[10]This distinction is that immunity will be granted if the injuries sustained are personal in nature, but the injured party will be allowed to enjoin a charity from maintaining a nuisance and will be awarded damages for injury to his property caused by the nuisance. Love v. Nashville Agricultural and Normal Institute, 146 Tenn. 550, 243 S.W. 304 (1922).

[11]President and Directors of Georgetown College v. Hughes, 130 F.2d 810, 812 (D.C. Cir. 1942).

[12]211 N.Y. 125, 105 N.E. 92 (1914).

[13]Kellogg v. Church Charity Foundation of Long Island, 203 N.Y. 191, 96 N.E. 406 (1911); Hordern v. Salvation Army, 199 N.Y. 233, 92 N.E. 626 (1910).

[14]Kellogg v. Church Charity Foundation of Long Island, 203 N.Y. 191, 96 N.E. 406 (1911). Cf. Hordern v. Salvation Army, 199 N.Y. 233, 92 N.E. 626 (1910).

[15]Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914).

icent work it does not subject itself to liability for damages, though the ministers of healing whom it has selected have proved unfaithful to their trust."[16]

Under the *Schloendorff* rule hospitals were immune from liability only where a beneficiary was injured through the negligence of a doctor or nurse. It did not bar liability if an employee inflicted the injury or if someone other than a beneficiary were injured. Since the *Schloendorff* rule was announced, it has been weakened, modified, limited and finally overruled.

Bernstein v. Beth Israel Hospital[17] weakened the rule. In this case an intern, under an obligation to work for the hospital in return for room and board, injured himself while performing an autopsy. He sued the hospital for damages after he suffered blood poisoning caused by his injury. The court held that he qualified as an "employee" under the workmen's compensation act, and could therefore recover damages from the hospital. Judge Cardozo distinguished the *Schloendorff* case on the grounds that *Bernstein* dealt with the relationship existing between the intern and the hospital, whereas the *Schloendorff* case dealt with the relationship that existed between the patient and the hospital. Following the reasoning of this case, if an intern, while performing a medical act, had negligently injured both himself and a patient, he apparently could have recovered for his injuries under the workmen's compensation act, but the patient would have been denied recovery under the *Schloendorff* rule. It seems illogical that a person could have been considered both a servant and an independent contractor at the same time in the performance of a single act.

Phillips v. Buffalo Gen. Hospital[18] modified the *Schloendorff* rule by substituting the nature of the injury-producing act for the "payroll designation" of the person causing the injury as the standard for imposing liability. In this case, a patient was injured when an orderly negligently applied a hot water bottle. The court held that liability could not be imposed simply because the injury-producing act was performed by an orderly rather than by a nurse. The court reasoned that a more valid standard for liability would be the nature of the injury-producing act. In this case, the act was held to be a medical act pertaining to the treatment of the patient. Therefore, the hospital was immune regardless of who performed the act. However, liability would have been imposed even if the act had been performed by a

[16]Id. at 95.
[17]236 N.Y. 268, 140 N.E. 694 (1923).
[18]239 N.Y. 188, 146 N.E. 199 (1924).

doctor or a nurse if the court had found it to be an administrative act.

The medical-administrative distinction announced in the *Phillips* case, and followed thereafter, was intended to clarify the law. Unfortunately, it only added confusion to the *Schloendorff* rule. Because of this distinction, a hospital could be liable for the administrative acts of doctors and nurses and not be liable for the medical acts of an employee. The so-called hot-water bottle cases illustrate this. The placing of a hot-water bottle in a bed, prior to the patient's getting in bed, was held to be an administrative act and the patient was allowed to recover for burns inflicted.[19] However, when a hot-water bottle was placed in a bed while the patient was in the bed, immunity was granted. Since professional judgment was involved in deciding whether or not to remove the hot-water bottle, the court held that a medical act was involved.[20] Another example of the subtlety of this distinction is shown by *Berg v. New York Soc'y for Relief of Ruptured and Crippled.*[21] The court, by way of dictum, said that a blood test preparatory to a transfusion was a medical act. This case has been interpreted as meaning that it would be a medical act to give a patient the wrong type of blood in a blood transfusion.[22] However, in a previous case, the court held that the giving of a blood transfusion to the wrong patient was a non-medical act.[23]

The line that can be drawn between a medical and an administrative act is a tenuous one. The distinction is too elusive to provide a satisfactory basis for judicial decision. Although the *Berg* case helped clear up some of the confusion by holding that the medical-administrative distinction could not be applied in cases where the injury-producing act was performed by an employee, the confusion still ex-

[19]Iacono v. New York Polyclinic Medical School and Hospital, 269 App. Div. 955, 58 N.Y.S.2d 244 (2d Dep't 1945).

[20]Sutherland v. New York Polyclinic Medical School and Hospital, 298 N.Y. 682, 82 N.E.2d 583 (1948).

[21]1 N.Y.2d 499, 136 N.E.2d 523 (1956).

[22]Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 4 (1957).

[23]Necolayff v. Genesee Hospital, 270 App. Div. 648, 61 N.Y.S.2d 832 (4th Dep't 1946), aff'd, 296 N.Y. 936, 73 N.E.2d 117 (1947). For additional illustrations compare Peck v. Charles B. Towns Hospital, 275 App. Div. 302, 89 N.Y.S.2d 190 (1st Dep't 1949) (using improperly sterilized needle in a hypodermic injection is an administrative act), with Bryant v. Presbyterian Hospital, 304 N.Y. 538, 110 N.E.2d 391 (1953) (improperly administering a hypodermic injection is a medical act). Also compare Ranelli v. Society of New York Hospital, 295 N.Y. 850, 67 N.E.2d 257 (1946) (failure to place sideboards on a bed when they are necessary is an administrative act), with Grace v. Manhattan Eye, Ear, & Throat Hospital, 301 N.Y. 660, 93 N.E.2d 926 (1950) (failure to decide if sideboards are necessary or not is a medical act).

isted in cases where the injury was produced by negligent doctors or nurses.

Although the waiver theory had been criticized in prior decisions,[24] it was not formally rejected until *Sheehan v. North Country Community Hospital*[25] denounced it as a fiction. Another reason for rejecting this theory was to bring judicial doctrine into harmony with the trend of abandoning governmental immunity in other types of activity.[26]

In the lower New York courts, two views developed as to the scope of the *Schloendorff* rule. The narrow view was that the rule was applicable only to charitable hospitals,[27] while the broader view was that both private and charitable hospitals were protected.[28] The Court of Appeals adopted the broader view in *Bakal v. University Heights Sanitarium, Inc.*[29] With this decision, it would seem that charitable immunity ceased to exist and that the immunity thereafter granted to hospitals must have been based on other grounds. If the immunity was based on the charitable nature of the hospital, how could a private hospital be immune from liability for injuries suffered by paying patients? With the extension of the immunity rule to protect private hospitals the immunity was no longer a charitable one, although the courts continued to speak of it as such.

Through the gradual erosion of the *Schloendorff* rule by court decision, New York reached the point where the immunity rule protected a hospital in only one type of case. Only non-publicly owned hospitals[30] were protected and these only in cases where a patient was injured by a doctor or nurse negligently performing a medical act.

New York took the final step and overruled the immunity rule in *Bing v. Thunig*.[31] In this case, the plaintiff was prepared by the hospital anesthetist and two nurses for an operation to correct a fissure of

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[24]Hamburger v. Cornell University, 240 N.Y. 328, 148 N.E. 539, 543 (1925); Phillips v. Buffalo Gen. Hospital, 239 N.Y. 188, 146 N.E. 199, 200 (1924).

[25]273 N.Y. 163, 7 N.E.2d 28 (1937).

[26]The court cited Court of Claims Act § 12-a.

[27]Post v. Crown Heights Hospital, 173 Misc. 250, 17 N.Y.S.2d 409 (Sup. Ct. 1940); Meshel v. Crotona Park Sanitarium, 154 Misc. 221, 276 N.Y. Supp. 989 (N.Y. City Ct. 1935).

[28]Steinert v. Brunswick Home Inc., 172 Misc. 787, 16 N.Y.S.2d 83 (Sup. Ct. 1939), aff'd mem., 259 App. Div. 1018, 20 N.Y.S.2d 459 (2d Dep't 1940).

[29]302 N.Y. 870, 100 N.E.2d 51 (1951).

[30]Public hospitals are liable under the doctrine of respondeat superior. See Becker v. City of New York, 2 N.Y.2d 266, 140 N.E.2d 262 (1957), wherein the court refused to invoke the charitable immunity rule because of a statute which waived the state's immunity from tort liability.

[31]2 N.Y.2d 656, 143 N.E.2d 3 (1957).

the anus. In the preparation the nurses applied an inflammable alcoholic antiseptic. The nurses knew of the potential danger of this antiseptic and were cautioned to use care in its application. They were instructed to remove all sheeting that became contaminated with the solution. The doctor was not present during the application and appeared about fifteen minutes later to perform the operation. He used a heated electric cautery to mark the fissure prior to the actual searing of the tissue. When this instrument was applied to the fissure there was "a smell of very hot singed linen."[32] The area was doused with water and the operation proceeded. Upon later examination it was discovered that the plaintiff had suffered severe burns and that the linen was burned in several places. The hospital tried to avoid liability on the grounds of the medical-administrative distinction, contending that the nurses' failure to remove the contaminated sheeting was a medical act for which no liability could be imposed. The court, however, reviewed the history of the immunity rule in New York, took note of the modern trend in other jurisdictions and among legal writers favoring the imposition of liability, and concluded that "hospitals should, in short, shoulder the responsibilities borne by everyone else. There is no reason to continue their exemption from the universal rule of *respondeat superior.* The test should be ... 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."[33] The fiction that doctors and nurses are not employees, merely because of their skill and because of the hospital's lack of control over their professional acts, was rejected. The usual tests used in determining whether or not a person is an employee or an independent contractor were adopted to determine if doctors or nurses are employees of the hospital. In the *Bing* case, it was held that the nurses were employees of the hospital and liability was imposed.[34]

New York has, by overruling the immunity doctrine, kept pace with the recent trend. Since Judge Rutledge's opinion in the *Georgetown College* case,[35] the immunity doctrine has rapidly fallen into disrepute. Eight state appellate courts and Puerto Rico have overruled

[32]Id. at 4.

[33]Id. at 8.

[34]Chief Judge Conway, in a separate opinion, concurred in the result. However, he would have imposed liability on the ground that the nurses' failure to remove the contaminated sheeting was an administrative act. He would not have overruled the Schloendorff rule as he felt that it had justified itself over the years by protecting small hospitals. Id. at 9.

[35]President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942).

prior decisions and abandoned the immunity doctrine since 1942.[36] During the same time, five jurisdictions have rejected this doctrine as a matter of first impression.[37] No appellate court has adopted this doctrine since before 1942.[38] This trend away from immunity has been almost universally supported by the text writers.[39]

Although different theories have been formulated by various courts to support immunity from tort liability, public policy seems to be the underlying reason for granting immunity. The rule is the modern heritage of the Georgian and Victorian ideas of jurisprudence in which property rights were paramount to the rights of the individual.[40] But since that time public policy has caused the law to shift the losses due to injury from the innocent individual to the community at large. The change in public policy is reflected in workmen's compensation acts, social security acts, and welfare laws. The changes in public policy are gradual and the mutations caused in the law are even more gradual. There is no Polaroid camera in law which can catch and picture in a minute the changes in public policy. These pictures are visible on the legal film only after a long time-exposure during which the film is exposed to the rays of public policy.[41] During the past few years, the changes in public policy have begun to show in the development of the law.

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[36]Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951); Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951); Haynes v. Presbyterian Hospital Ass'n, 241 Iowa 1269, 45 N.W.2d 151 (1950); Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934 (1954); Mississippi Baptist Hospital v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951), 56 So. 2d. 709 (1952); Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3 (1957); Avellone v. St. John's Hospital, 165 Ohio St. 467, 135 N.E.2d 410 (1956); Pierce v. Yakima Valley Memorial Hospital Ass'n, 43 Wash. 2d 162, 260 P.2d 765 (1953); Tavarez v. San Juan Lodge, 68 P.R. 681 (1948).

[37]President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942); Durney v. St. Francis Hospital Inc., 46 Del. (7 Terry) 350, 83 A.2d 753 (1951); Rickbeil v. Grafton Deaconess Hospital, 74 N.D. 525, 23 N.W.2d 247 (1946); Foster v. Roman Catholic Diocese of Vermont, 116 Vt. 124, 70 A.2d 230 (1950); Moats v. Sisters of Charity of Providence, 13 Alaska 546 (1952).

[38]Research failed to disclose any adoption of the immunity rule except by the Washington court which apparently reversed its opinion as expressed in Pierce v. Yakima Valley Memorial Hospital Ass'n, supra note 36, in Lyon v. Tumwater Evangelical Free Church, 47 Wash. 2d 202, 287 P.2d 128 (1955), which limited the doctrine of the Pierce case to its facts. It is still not definitely clear whether the court will impose full liability as implied by the Pierce case or only limited liability as implied by the Lyon case.

[39]Harper, Torts § 294 (1933); Prosser, Torts 784-88 (2d ed. 1955); 4 Scott, Trusts § 402 (2d ed. 1956); Appleman, The Tort Liability of Charitable Institutions, 22 A.B.A.J. 48 (1936); Feezer, The Tort Liability of Charities, 77 U. Pa. L. Rev. 191, 192 (1928).

[40]Feezer, The Tort Liability of Charities, 77 U. Pa. L. Rev. 191 (1928).

[41]Id. at 195.