IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

NORFOLK PROTESTANT HOSPITAL,
(Defendant Below)
Plaintiff-in-Error,

vs.

ELIZABETH M. PLUNKETT, (Plaintiff Below)
Defendant-in-Error.

PETITION FOR A REHEARING.

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THE RELIANCE PRESS OF NORFOLK, VA., INC.

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To the Honorable Justices of said Court:

Your petitioner, the Norfolk Protestant Hospital, respectfully prays that this Honorable Court will grant a rehearing in the case of Norfolk Protestant Hospital vs. Elizabeth M. Plunkett, in which an opinion was handed down on March 22, 1934, affirming a judgment of the Chancery Court of the City of Norfolk against your petitioner in the sum of $1,500.00.

THE DUTY OF THE HOSPITAL.

Your petitioner is a charity institution and has a very high rating and enjoys a very high reputation as a hospital, having among its staff many of the most eminent physicians and surgeons of the City of Norfolk; and with the very greatest deference we suggest that the conclusions expressed by the Court are not in keeping with the case of *Weston's*

Adm'x. vs. *Hospital of St. Vincent de Paul,* 131 Va. 587, as applied to the facts in this case; and that the opinion, if allowed to stand, will result in great harm and irreparable injury to your petitioner. In the Weston case, this Court, at page 598, said:

> "The best interest of society does not demand of a charitable institution offering its ministrations to the destitute sick anything more in respect to its nurses than that it shall exercise ordinary care in their selection and retention."

It is evident that strict rules should not apply in considering a case of this kind. Hospitals should be encouraged in their good work and protected so far as is consistent with public safety and the public good. As this Court said in the Weston case, supra, at page 602:

> "That these great public charities should be maintained for the public good cannot be questioned, and if as a result an individual injury is sometimes suffered, it is equally plain that it is better that the individual should suffer than that the public charity should not be carried on. Now, public charities, privately conducted from mere benevolence, are great adjuncts to such charities conducted by the State or municipality, and are great favorites with the courts, and while it may not be safe or desirable to place them above the law, it is manifestly desirable that they should be encouraged in their good work, and to this end protected so far as it is consistent with public safety and the public good from pecuniary liability to those who accept their benefits. Such is the conclusion of a great majority of the courts in this country, though founded on a diversity of reasoning, and we have the assurance of the wisest of men that 'in the multitude of counsellors there is safety'."

While this Court, in that case, declared that hospitals such as petitioner, "are great favorites with the courts" and should be "protected so far as is consistent with public safety and the public good," and while, in the present opinion, as in the Weston case, the Court has recognized that the burden is on the plaintiff to show a lack of ordinary care on the part of the hospital in the matter of the selection and retention of nurses, we respectfully submit that the Court has not followed the liberal policy which was recognized in the Weston case as being proper, nor has it placed the burden of proof on the plaintiff, especially in its holding that the hospital had been negligent in the employment and retention of the nurse, Miss Hudson. Petitioner urgently prays that its action in selecting and retaining Miss Hudson be viewed in the light this Court has indicated such matters should be viewed, and that the Court will do that most difficult of things and judge the hospital's action in the instant case from the standpoint of foresight rather than hindsight. If this is done, we submit the evidence in this case, considered as a whole, will not justify the finding that the hospital has been guilty of such negligence as will justify holding it liable.

There is an analogy between the duty of the hospital to use reasonable care in the selection and retention of its nurses and the duty of the master to use reasonable care in the employment and retention of his servants, though the rule is not so strict in the case of a hospital, which, as this Court has declared, is a great favorite with the courts and enjoys their protection so far as is consistent with public safety and public good. Even in the case of master and servant, the liability of the master depends upon the existence of *three* facts:

"Firstly, it must appear that the servant whose negligence caused the injury was incompetent.

"Secondly, that the injury resulted from such servant's incompetency; in other words, a master is not liable for injuries to one servant by the negligence of another on the ground of the unskilfulness of the latter, unless the injury resulted from such unskilfulness. . . .

"Thirdly, it is not sufficient that the fellow servant was incompetent and that the injury resulted therefrom, but the master must have neglected to exercise the required care in the selection and retention of the servant by whose negligence or incompetency the injury was caused." 12 Am. & Eng. Ency. of Law (2nd Ed.) 918-9.

The above, in abbreviated form, is stated to be the law *in Norfolk & W. R. Co.* v. *Phillips*, 100 Va., at page 367-8. This Court said on page 368: "A master is not liable for injuries to one servant by the negligence or unskilfulness of another, on the ground of unskilfulness or incompetency of the latter, unless the injury resulted from *such unskilfulness or incompetency.*" Surely, no higher duty can rest on the hospital in this case.

All of these three requirements, which also exist all the more strongly as to hospitals, must be met by the plaintiff. None of them, we submit, has been met in the present case. The evidence shows affirmatively that Miss Harwood (R. p. 56, 71-2) and Miss Hudson (R. p. 56, 72-3) were thoroughly competent; there is no testimony to show that either of them was not a competent nurse and fully qualified to perform the service required. And there is no evidence to show that the accident was the result of any "unskilfulness or incompetency" on the part of Miss Hudson. The evidence

does not show, we submit, that the hospital neglected to exercise the required care in either the selection or the retention of the nurse "by whose negligenc or incompetency the injury was caused," nor in the selection of the other nurse, Miss Hudson. If we are right as to *any of these three contentions*, the judgment cannot stand.

For our present purposes we may assume that Miss Harwood was negligent in inserting the catheter in the wrong orifice. The catheter and the solution used were in accordance with the direction of the patient's private physician. R. pp 57, 58, 84, 89. *The sole cause of the injury suffered by the plaintiff was the improper insertion of the catheter and the injection of the solution in the bladder instead of the vagina.* The evidence shows that this was done by Miss Harwood and not by Miss Hudson. It does not appear to be contended that petitioner is liable for Miss Harwood's negligence. The evidence does not establish, as we shall show, that any injury resulted from the examination made by Dr. Pope.

REASONS FOR REHEARING.

We suggest the following, among other reasons, why this case should be reheard by the Court:

Miss Brickhouse, the Superintendent.

There is a suggestion in the opinion that Miss Brickhouse had not done her full duty in the premises, because she had visited the plaintiff only once during her stay of fifteen days. There is no such charge in the declaration. When the case was tried she was superintendent of nurses, but when the accident occurred, two years before, she was superintendent of the Hospital, Dr. Cul-

pepper not having then assumed the duties of general manager, and she was a very busy woman. Mrs. Plunkett did not complain because Miss Brickhouse did not visit her. Her visiting duties were being fully taken care of by competent supervisors, who kept her advised concerning what was going on. R. 75-6. Nor was she negligent in keeping advised as to the nurses. She discussed with the supervisors practically every day the 60 odd nurses and how they were performing their duties. R. p. 77. She regarded Miss Harwood and Miss Hudson as being absolutely qualified for the duty they performed. R. pp. 70-73. There is no evidence that they were not so qualified. There is no evidence that there was ever any complaint made to her against either of them in connection with their professional qualifications. She was not negligent in the selection and retention of either of them, as we will point out in discussing the two nurses.

Miss Harwood, the Nurse Who Gave the Douche.

Miss Harwood is the nurse who gave the douche, and having inserted it in the wrong orifice, we may assume that there was some negligence on her part; but her record had been excellent in all respects (R. pp. 52, 56, 71), and however negligent she may have been in the instant case, it cannot be held, and the Court does not hold, that, under *Weston* vs. *Hospital*, *supra*, petitioner was liable for her negligence.

Miss Hudson, the Other Nurse.

The other nurse was Miss Hudson, and if she was not incompetent, *or* if she was not guilty of negligence resulting in the injury complained of, *or* if the hospital was not guilty of negligence in her employment and retention, the plain-

tiff's case must fall. Negligence, if any, on the part of the hospital in the selection and retention of Miss Hudson can not be the basis of any recovery because she did not commit the act charged to have been negligently done and upon which the plaintiff's case is founded. Miss Hudson did not give the douche. She was in the room part of the time, and she directed Miss Harwood, a thoroughly competent nurse, to give the douche pursuant to the patient's private physician's orders. Miss Hudson did not know, and had no reason to assume that this competent nurse had inserted the catheter in the wrong orifice, which was immediately adjoining the correct one. She had no reason to suspect that anything was wrong when she told Miss Harwood to "go ahead and push it in." R. 53. In fact, the plaintiff's evidence shows that Miss Hudson was not in the room when the catheter was inserted, and that, when the patient complained that it burned her, Miss Hudson inquired if it hadn't burned her before, showing that she thought Miss Harwood had inserted the catheter properly. R. p. 52-3. It took no more force to insert it in the bladder than had been previously used in giving the patient a douche. R. 85. The evidence shows that most patients complain when given a douche. R. 85. She was not the nurse who caused the injury. She was not the employee of the hospital who the declaration alleged "did negligently, carelessly and improperly insert a certain instrument into the said Elizabeth M. Plunkett." R. p. 22. While the declaration deals with the employees in the plural, the evidence shows that only one nurse inserted an instrument into the patient, and that nurse was Miss Harwood. The evidence eliminates Miss Hudson from that charge. While Miss Hudson directed Miss Harwood to give the douche, she

testified, as a witness for Mrs. Plunkett, that *she was not supervising the giving of the same*, that the girl who was giving it was capable, and that it was not necessary for her to be there. R. p. 52. The injury wasn't the result of the "unskilfulness or incompetency" of Miss Hudson. Phillips case, supra. Miss Hudson was thoroughly qualified for the service required. R. pp. 56, 72-3. It cannot be said that the hospital was liable because Miss Hudson was the ranking nurse, for she selected a nurse to perform the duty whom she, and every one who testified on the subject, considered "thoroughly competent to perform this service." R. p. 56, 71, 74.

The opinion holds that "the defendant was negligent in the selection and retention of *the* nurse"—meaning, of course, Miss Hudson. Stress is laid on the fact that she did not have a high school education. The evidence does not show that a high school education was required at the time of Miss Hudson's selection in 1927. Dr. Culpepper testified that "since last July" (1932), the State Board required that the nurse must graduate from high school. He thought that before that time only graded school, and probably a year of high school was required, but he was uncertain. R. 60. Miss Brickhouse testified that *at the time* Miss Harwood was selected she required three years high school (R. 74), but she did not say that she had a similar requirement when Miss Hudson was employed more than a year before, nor does she say that when Miss Harwood came the three years was a state requirement, indeed, there is no statutory requirement until one applies for a certificate as a registered nurse. Code, sec. 1707. Miss Hudson says she went through the 10th grade in the very small town where she lived, and when asked whether

that was a high school she said "no." R. 53. Doubtless, all of the grades in this "very small town" were in one building, and she must have had in mind the building where she attended school, for under the school regulations the 9th, 10th, 11th and 12th grades are high school in the larger cities, and that the 8th, 9th, 10th and 11th grades are high school in the counties and smaller cities. When we filed our brief we did not know that the 8th grade was high school in the small cities and counties, but we are now so informed by the president of the local school board. The latter rule would most undoubtedly apply in the "very small town" where Miss Hudson lived. She, therefore, had three years of high school. Besides, she came to petitioner from another hospital. R. 75. Miss Brickhouse thought it important that applicants should have attended high school because "the particular work they have to study in order to become graduate nurses it is necessary for them to have that much preliminary work." R. 75. The fact that she accepted her shows that Miss Brickhouse thought Miss Hudson had sufficient education to qualify for the training course. Miss Hudson confirmed the superintendent's judgment when she went through the nurses' school and graduated with such high standing that she was made the head nurse on her floor. Later she passed the State Board and became a registered nurse. She evidently had all of the preliminary work that was necessary. There is not a suggestion in the record that she was not sufficiently educated, or that she was not in every respect qualified, to perform her duties as a nurse. Before the plaintiff's injury, there is no suggestion in the record that she had ever been guilty of any infraction of the rules except to be absent without leave when she was off duty. Subsequently, she

was dismissed because she was caught climbing in her window in the nurses' home at 2 o'clock in the morning. R. 77. The undisputed evidence is that she was thoroughly competent to perform the service Mrs. Plunkett required. R. 56, 72-3.

Much stress was laid on the fact that when Mrs. Plunkett went to the hospital fifteen days before the accident the room to which she was assigned by the Clerk of the Hospital (R. 22) was in an untidy condition. It was Miss Hudson's business to see that the room was tidy and after the last patient left the room had been made tidy. R. 57. But about two weeks had intervened and the room had been made untidy in the meantime. There is no evidence as to when the room had been made untidy, or that Miss Hudson knew that it had been made so, or even that she knew that the room was going to be used that day by Mrs. Plunkett or any one else. It had doubtless been used as a sitting room by persons interested in some ill patient in a nearby room, as frequently occurs, and that may have occurred, so far as the record shows, the day before which was Saturday and a great visiting day at hospitals. Nor is there any evidence that the condition of the room had the remotest connection with the accident that occurred fifteen days later. We do not think this evidence should have been allowed to go to the jury as it was of no evidential value as affecting the issues in this case. This incident certainly could not be considered as evidence that the hospital was negligent in retaining a very efficient nurse, against whose record as a nurse there was no blot.

The Court, on the last page of the opinion, observed:

> "It is not sufficient to say that a nurse is competent simply because she is capable of discharging

> the manual duties incumbent upon her as a nurse. It is a matter of common knowledge that the welfare of a patient is as much the responsibility of the nurse as it is of the physician. If she is lacking in educational preparation, if she is guilty of indiscretions that impair her physical or mental status; if she is lacking that moral character which imbues the patient with confidence, then it cannot be said that she is a competent person to be placed in charge of a helpless patient."

We submit that the record does not show that she was lacking in any professional requirement; she was fully qualified professionally as well as manually. It does not show that she was lacking in educational preparation; the record and her accomplishments show the contrary. It does not show that she was "guilty of indiscretions that impair her physical or mental status," or that she was lacking in moral character. It is not the serious thing that it used to be for a girl to be out at night. "Five other girls did the same thing the same night." R. p. 54. There is no suggestion of wrong doing while they were out, or that her physical or mental status was in any way impaired. Doubtless a dance was on. With the very greatest deference, we submit that there is nothing in the record to prove that this young woman was guilty of any of these very serious charges. So far as we know, Mrs. Plunkett was imbued with confidence in her, and there is no reason shown why she should not have been; and, so far as the record shows, she spent the intervening days as comfortably and as happily, in that section of the hospital over which Miss Hudson had supervision, as could be expected of one who had undergone a surgical operation. Surely, the events shown by the record to have transpired before the accident

occurred—and no other may be considered—would not justify a finding that the hospital was guilty of negligence because it did not discharge Miss Hudson, who had accomplished the studies connected with her training so satisfactorily, and had performed her duties during her three years at the hospital so efficiently, that she had been made the head nurse on her floor. Should she have been discharged, and was the hospital negligent in not discharging her before the accident? We respectfully submit that the answer should be—no.

If she should not have been discharged before the accident, then that of itself determines this case in favor of the petitioner. Besides, as we have shown above, it was not she, but Miss Harwood, who inserted the catheter in the wrong place and caused the injury.

Dr. Pope, the Interne.

It is alleged in the declaration that the interne was guilty of negligence in making a manual examination of the plaintiff that resulted in injury to her, for which the petitioner should be held liable, and there are references in the opinion which create the impression that the court was impressed with that view. Dr. Pope was called hurriedly to a patient who as the result of an accident was apparently in great pain. It was necessary for him to see what the injury was. He hastened to make a manual examination of the injured part without waiting to sterilize his hands or to put on rubber gloves. It was "very unpleasant to have the examination at that time," as the court quotes the patient as saying, but the examination was necessary and there is no evidence that it resulted in any injury to the plaintiff. Dr. Hargrave found her womb in

good condition, and the treatments he gave were for the relief of the bladder. R. 62. None of the prominent physicians who testified stated that the examination caused any injury. Dr. Pope's examination resulted in his ascertaining the nature of the injury and applying a soothing remedy. He then went out and called the patient's private physician. While the opinion implies that Dr. Pope was negligent, the evidence shows that he acted very coolly, very practically and very efficiently and did no harm. R. 44, 54-5, 78-83. Dr. Pope visited the patient very seldom because "Dr. Hargrave did not desire the interne to see much of his patients." R. 82. Besides, Dr. Pope was highly educated (R. 78, 81), and there is no suggestion of negligence in his employment or retention.

THE BURDEN OF PROOF.

The burden was on the plaintiff to prove that the hospital was guilty of negligence in failing to exercise due care in the selection and retention of the nurse responsible for the injury. In *Weston* vs. *Hospital,* 131 Va., at page 611, this Court said:

> "Upon the authorities cited, and upon principle, we are of opinion that the duty which the defendant-in-error owed to the decedent was the exercise of due care in the selection and retention of the nurse in charge of the patient; *that negligence in respect of this duty has not been shown.*"

See also the authorities cited at pages 5 et seq. of our reply brief. The Court, on page 2 of the opinion, recognized that the burden of proof was on the plaintiff in this respect. The burden was also on the plaintiff to show, in this case, that Miss Hudson was guilty of negligence causing

the injury, and that she was not competent to perform the duty then being performed. The burden of proof has not been sustained in any of these respects.

At pages 14 et seq. of the record, we pointed out certain improper evidence admitted by the Court. We will not discuss that question further, but we still respectfully contend that said evidence was improperly allowed to go to the jury and was very prejudicial to petitioner.

For the foregoing reasons, your petitioner earnestly prays that the Court will grant a rehearing and will set aside the judgment of the trial court, and enter such order as may be right and proper in the circumstances.

Respectfully submitted,

NORFOLK PROTESTANT HOSPITAL.

By

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