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TORT LIABILITY OF HOSPITALS IN NEW YORK

Sidney S. Bobbé*

It now appears to be the established law of New York that hospitals, whether profit-making or charitable, are immune from liability for the negligent treatment of patients by doctors, internes and nurses in their general employ.¹ Unlike other employers, hospitals have been freed from the responsibility of *respondeat superior*, which has been held inapplicable in the determination of liability for negligence in the treatment and care of patients.² The purpose of this article is to probe into the legal and social basis of charitable tort liability and to question its current application.

*MacDonald v. Massachusetts General Hospital*³ is usually cited as the earliest leading case in the development of the theory of tort immunity for charitable institutions. In that case, a charity patient had been operated upon negligently by a student doctor. The Supreme Court of Massachusetts decided that the patient could not hold the hospital liable, reasoning that the public and private donations which supported the charitable hospitals constituted a trust fund which could not be thus despoiled. The court reached this conclusion in reliance on the supposed authority of an English decision, *Holliday v. St. Leonard's*,⁴ which was cited for the broad proposition that a charity will not be held liable for the negligence of an agent. The Massachusetts court deciding the *MacDonald* case neglected to observe, however, that the *Holliday* case had been expressly and vigorously overruled in a subsequent unanimous decision by the House of Lords.⁵

* See Contributors' Section, Masthead, p. 439, for biographical data.

¹ *Bakal v. University Heights Sanitarium*, 277 App. Div. 572, 101 N. Y. S. 2d 385 (1st Dep't 1950), *aff'd without opinion*, 302 N. Y. 870, 100 N. E. 2d 51 (1951); *Roth v. Beth El Hospital, Inc.*, 110 N. Y. S. 2d 583 (2d Dep't 1952).

² See *Schloendorff v. N. Y. Hospital*, 211 N. Y. 125, 105 N. E. 92 (1914); *Phillips v. Buffalo General Hospital*, 239 N. Y. 188, 146 N. E. 199 (1924).

³ 120 Mass. 432 (1876).

⁴ 11 C. B. H. S. 192, 142 Eng. Rep. 769 (1861). The court in the *Holliday* case relied to a considerable extent on the earlier English case of *Duncan v. Findlater*, 6 Cl. & Fin. 894 (1839) but neither of these cases was directly in point. Both cases involved an action against trustees who were gratuitously administering public works, for injuries sustained because of the negligence of the men employed on the projects. No trust funds were available to pay damages and the court held that the trustees were not to be held personally liable since they were not personally at fault.

⁵ *Mersey Docks Trustees v. Gibbs*, L. R. 11 H. L. Cas. 686 (1866). The law of England today makes a charity liable for the negligence of its servants in the same way as private individuals would be under similar circumstances. See *Gold v. Essex County Council*, [1942] 2 K. B. 293, 2 All Eng. Rep. 237.

Until the *MacDonald* decision, rendered in 1876, no appellate court in the United States seems to have treated hospitals or charities as an exception to the general rule of *respondeat superior*. After the *MacDonald* decision, courts, though differing with the grounds of that decision, felt impelled to reach a like conclusion, and New York courts proved no exception. Before considering the development of the law in New York on this point, however, it is interesting and necessary to consider the treatment accorded the question by other states.

The reason given for exempting the hospital from liability in the *MacDonald* case was that the public and private donations received by the charitable hospital constituted a trust fund which could not be deploiled by tort claims arising out of negligence of its agents.⁶ Other states accepted this trust fund theory,⁷ and another English case, *Heriot's Hospital v. Ross*,⁸ was frequently mentioned as supporting precedent.⁹ Again, the English decision should not have been used as controlling authority, for the plaintiff in the *Heriot's Hospital* case was not suing for negligence at all, but was claiming damages on the ground that at the time when he qualified as a beneficiary of the trust fund, he had been improperly excluded from the benefits thereof. In adopting this rule of total immunity under the trust fund theory, courts generally disregarded the relationship of the claimant to the institution, and recovery was denied even to employees and third parties.¹⁰

The implausibility of the trust fund logic encouraged some courts to search for other supporting theories, and the next step in the evolution of the law on this subject is found in a federal case, *Union Pacific Railroad v. Artist*.¹¹ There, the charity was a hospital maintained in part

⁶ Massachusetts has also held the trust fund immune to claims arising out of the negligence of its trustees. See *Roosen v. Peter Brent Brigham Hospital*, 235 Mass. 66, 126 N. E. 392 (1920).

⁷ *Forydice & McKee v. Woman's Christian Nat. Library Ass'n*, 79 Ark. 550, 96 S. W. 155 (1906); *Jackson v. Atlanta Goodwill Industries, Inc.*, 46 Ga. App. 425, 167 S. E. 702 (1933); *Webb v. Vought*, 127 Kan. 799, 275 Pac. 170 (1929); *Emery v. Jewish Hospital Ass'n*, 193 Ky. 400, 236 S. W. 577 (1921); *Perry v. House of Refuge*, 63 Md. 20 (1884); *Dille v. St. Luke's Hospital*, 355 Mo. 436, 196 S. W. 2d 615 (1946); *Gregory v. Salem General Hospital*, 175 Ore. 464, 153 P. 2d 837 (1944); *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 15 Atl. 553 (1888).

⁸ 12 Cl. & Fin. 507 (1846). For a valuable discussion of this case, see note in 14 A. L. R. 572, 574 (1921).

⁹ See *Perry v. House of Refuge*, 63 Md. 20 (1884); *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 15 Atl. 553 (1888).

¹⁰ See cases cited in note 7. See also, *Exman v. Trustees of Boston University*, 270 Mass. 299, 170 N. E. 43 (1930); *Loeffler v. Trustees of Sheppard & Enoch Pratt Hospital*, 130 Md. 265, 100 Atl. 301 (1917).

¹¹ 60 Fed. 365 (1894).

by a railroad company for the benefit of its employees. A portion of a tube had been left in plaintiff's leg, and he claimed that this was the result of malpractice by a paid physician and the attendants in the hospital. Recovery was denied to the plaintiff for a variety of reasons, including the trust fund theory, but the most influential reason advanced by the court was contained in the following quotation:

Moreover the corporations or individuals that administer such trusts must after all leave the treatment of the patients to the superior knowledge and skill of the physicians. They cannot direct the latter, as the master may ordinarily direct the servant, what to do, and how to do it. If they did so, the physicians would be bound to exercise their own superior skill and better judgment, and to disobey their employer as, in their opinion, the welfare of the patients required it.¹²

This argument, rejecting the applicability of *respondeat superior* to charitable hospitals, contains at least one apparent fallacy. Exemption from the doctrine for the reason of superior knowledge and skill of the servant has never been applied in other situations. Such a reason is foreign to the very origins of the rule of *respondeat superior*. The first important case to apply that rule was one in which the owner of a ship was held responsible for the negligence of the ship's master,¹³ an occupation which certainly requires great skill and independent exercise of judgment.

The words of Chief Justice Shaw in an early Massachusetts case dealing with *respondeat superior* should be an adequate reminder of the basis of the doctrine:

This rule is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master that the latter shall be answerable *civiliter*. . . . The maxim *respondeat superior* is adopted in that case, from general considerations of policy and security. . . .¹⁴

To exempt the master from liability merely because the servant must exercise initiative and judgment in the skilled practice of his occupation would be to qualify the doctrine to the point of annihilation.

Actually, this argument was advanced in the *Union Pacific* opinion as but a lame support for the principle that total exemption from liability should be allowed because of the charitable nature of the institution. Thus:

¹² *Id.* at 367.

¹³ *Boson v. Sandford*, 2 Salk. 440 (1691).

¹⁴ *Farwell v. Boston & Worcester Ry.*, 4 Met. 49 (Mass. 1842).

If one contracts to treat a patient in a hospital—and out of it for that matter—for any disease or injury, he undoubtedly becomes liable for any injury suffered by the patient through the carelessness of the physicians or attendants he employs to carry out the contract. If one undertakes to treat such a patient for the purpose of making profit thereby, the law implies the contract to treat him carefully and skillfully and holds him liable for the carelessness of the physicians and attendants he furnishes. *But this doctrine of respondeat superior has no just application where one voluntarily aids in establishing or maintaining a hospital without expectation of pecuniary profit.*¹⁵ (Emphasis added.)

A prior Pennsylvania decision had expressed similar sentiments:

[To allow a recovery] would be carrying the doctrine of *respondeat superior* to an unreasonable and dangerous length. The doctrine is at best . . . a hard rule. I trust and believe it will never be extended to the sweeping away of public charities. . . .¹⁶

Such statements ignore the obligation generally assumed by one who undertakes the performance of a duty,¹⁷ and the decision of non-liability is based on an entirely different ground from that of the superior knowledge and skill of the attending physician. That knowledge and skill, after all, is the same whether the hospital be run for profit or charity.

Other courts suggested that *respondeat superior* should not be applied to charitable institutions on the ground that the doctrine was intended only to make corporations and employers liable for acts of their servants from which they might derive a benefit in the sense of personal and private gain.¹⁸ Upon analysis, these various arguments seem to lack a logical legal basis and become rationalizations indulged in by the courts to sustain *a priori* conclusions. Frequently the simple reason behind these rationalizations is the public policy of the jurisdiction to foster and encourage charitable institutions; but the following quotation from a decision by a Rhode Island court shows that public policy can be given as a reason for liability as well as immunity:

Is it not better and safer for the court to follow out the analogies of the law, and then if the legislature is of the opinion that public policy de-

¹⁵ Union Pacific R. R. v. Artist, 60 Fed. 365, 367 (1894).

¹⁶ Fire Ins. Patrol v. Boyd, 120 Pa. 624, 647, 15 Atl. 553, 557 (1888).

¹⁷ See Murtha v. N. Y. Homeopathic Hospital, 228 N. Y. 183, 186, 126 N. E. 722 (1920) where Cardozo, J. commented on the defendant's liability by saying: "It set its hand to the task, and must answer for the doing." See also Glanzer v. Shepherd, 233 N. Y. 236, 135 N. E. 275 (1922).

¹⁸ See Hearn v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 595 (1895); Taylor v. Protestant Hospital Ass'n, 85 Ohio St. 90, 96 N. E. 1089 (1911); Morrison v. Henke, 165 Wis. 166, 160 N. W. 173 (1916).

mands a limitation of the liability, it is in its power to interfere and grant an entire or partial exemption.¹⁹

Another approach to the problem was suggested by a Michigan court in *Downes v. Harper Hospital*.²⁰ There, a charitable hospital was charged with having negligently failed to prevent an insane person from committing suicide. Exemption was granted for the reasons: (1) the trust fund doctrine (2) the policy consideration that the recipient of charitable benefits should not be permitted to sue his benefactor who was attempting to promote the public good. The court said:

[By permitting a recovery] the trust fund might be entirely destroyed and diverted from the purpose for which the donor gave it. Charitable bequests cannot be thus thwarted by negligence for which the donor is in no way responsible. . . . Those voluntarily accepting the benefit of a charity accept it upon this condition. . . .²¹

In a subsequent Michigan case,²² the court was presented with the question of the liability of a charity to one not a beneficiary, a person who was injured while working on a church building. The church was held liable, but in a dictum the court reaffirmed the theory that a beneficiary cannot sue the charity. An example of the harshness of this rule is seen in still another Michigan case²³ where a hospital was held not liable to a father for its negligence in giving his baby to the wrong person. Here, compensation had been made for the benefits conferred by the charity—the father had paid a dollar a day for the care of his baby, but the paying patient was considered a beneficiary. Again the public policy argument is given considerable weight in denying recovery to a beneficiary²⁴ but in determining public policy courts should be reminded of

¹⁹ *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 435 (1879). The legislature of Rhode Island later enacted a statute of general exemption of charitable hospitals. R. I. Gen. Laws 1909, c. 213. For decisions using public policy as a ground for immunity, see *Hearn v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595 (1916); *Dille v. St. Luke's Hospital*, 355 Mo. 436, 196 S. W. 2d 615 (1946); *Schumacher v. Evangelical Deaconess Soc.*, 218 Wis. 169, 260 N. W. 476 (1935).

²⁰ 101 Mich. 555, 60 N. W. 42 (1894). See also *Wilcox v. Idaho Falls L. D. S. Hospital*, 59 Idaho 350, 82 P. 2d 849 (1938); *St. Vincent's Hospital v. Stene*, 195 Ind. 350, 144 N. E. 537 (1924); *Herndon v. Massey*, 217 N. C. 610, 8 S. E. 2d 914 (1914); *Weiss v. Swedish Hospital*, 16 Wash. 2d 446, 133 P. 2d 978 (1943).

²¹ 101 Mich. 555, 60 N. W. 42 (1894). Thus, the insane patient was deemed to have contracted away the hospital's liability.

²² *Bruce v. Central Methodist Church*, 147 Mich. 230, 110 N. W. 951 (1907).

²³ *Greatrex v. Evangelical Deaconess Hospital*, 261 Mich. 327, 246 N. W. 137 (1933).

²⁴ See, for example, *Weston's Administratrix v. Hospital of St. Vincent of Paul*, 131 Va. 587, 107 S. E. 785 (1921) where the court denied recovery to a paying patient whose baby was killed as a result of a nurse's negligence on the grounds of public policy.

Professor Scott's statement: "The [charitable] institution should be just before it is generous."²⁵

Closely connected to the Michigan doctrine denying the right of a *beneficiary* to sue is the theory of implied waiver, a fictional concept which has been expressed as follows:

One who accepts the benefit either of a public or a private charity enters into a relation which exempts the benefactor from liability for the negligence of his servants in administering the charity. . . .²⁶

The parallel was drawn between such a case and that of the Good Samaritan who takes a wounded stranger to his home for surgical care. It was thought intolerable that such a benefactor should be held personally liable for the negligence of his servant in caring for the stranger; but certainly there is a plain distinction between taking a stranger into a private home and establishing an institution for rendering professional care and treatment.²⁷ It is difficult to imagine how such an assumption of risk by a beneficiary is evidenced, particularly where the patient is delirious, unconscious, incompetent or simply does not know what a waiver is. For this reason, the logic of the theory has justifiably been criticized.²⁸

The doctrine of complete immunity gained many adherents in the early stages of its development, but from the very beginning at least one voice was raised against it, although somewhat equivocally, *i.e.*, *Glavin v. Rhode Island Hospital*.²⁹ The hospital was held liable to a paying patient for the negligence of an interne who performed an operation himself instead of calling in the regular surgeon. The court defended a public policy favoring liability by saying:

The public is doubtless interested in the maintenance of a great public charity such as the Rhode Island Hospital; but it also has an interest in obliging every person and every corporation which undertakes the performance of a duty to perform it carefully. . . .³⁰

²⁵ 3 SCOTT, TRUSTS 2150 (1939).

²⁶ Powers v. Mass. Homeopathic Hospital, 109 Fed. 294, 303 (1st Cir. 1901). See also Wilcox v. Idaho Falls L. D. S. Hospital, 59 Idaho 350, 82 P. 2d 849 (1938); Cook v. John E. Norton Memorial Infirmary, 180 Ky. 331, 202 S. W. 874 (1918).

²⁷ Thus, the doctor who as a "Good Samaritan" gives free treatment is nevertheless chargeable with responsibility for his own negligence. Du Bois v. Decker, 130 N. Y. 325, 29 N. E. 313 (1891).

²⁸ Nicholson v. Good Samaritan Hospital, 145 Fla. 360, 199 So. 344 (1940); Mulliner v. Evangelischer Diakonniessenverein, 144 Minn. 392, 175 N. W. 699 (1920); Welch v. Hospital, 90 N. H. 337 (1939); Foster v. Roman Catholic Diocese of Vermont, 116 Vt. 145, 70 A. 2d 230 (1950); Silva v. Providence Hospital, 14 Cal. 2d 762, 97 P. 2d 798 (1939).

²⁹ 12 R. I. 411 (1879).

³⁰ *Id.* at 425.

The court rejected the trust fund and implied waiver theories and held the charity subject to the doctrine of *respondeat superior*,³¹ not, however, because of the interne's negligence in *performing* the operation, but because he had negligently failed to call in a surgeon to perform a *difficult* operation. It took pains to point out that the hospital would not have been liable for the malpractice of the interne in performing minor acts of surgery, or of the physician, inasmuch as the hospital merely undertook to procure their services for the patient, and not to act as their master. Yet if the interne or house doctor was on the paid staff of the hospital, it would seem wholly unrealistic to say that they were not the servants of the hospital. Unfortunately, however, this broad and unwarranted generalization *as to facts* was later to be adopted in New York and elsewhere as stating fixed principles of law.

Those states which favor immunity rely on firmly-entrenched precedent, but recent case law,³² decided in jurisdictions where the problem was one of first instance, point to an increasing trend away from such immunity. Leading text-writers have long favored the doctrine of liability.³³

With this background the development of theories regarding the tort liability of charitable institutions in New York may be more meaningful.

DEVELOPMENT OF NEW YORK LAW ON TORT LIABILITY

The first case to reach the New York Court of Appeals was *Hordern v. Salvation Army*,³⁴ and it held that the charity was liable to an employee for the negligence of a fellow servant. The employee was not considered a beneficiary by the court. The defense argued that there was no liability because the rule of *respondeat superior* had no relation to a charity. The *Hordern* case might have been disposed of on the basis of an earlier decision,³⁵ but, instead, the Court proceeded to re-examine

³¹ See *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4 (1915); *McInerney v. St. Luke's Hospital*, 122 Minn. 10, 141 N. W. 837 (1913); *City of Shawnee v. Roush*, 101 Okla. 60, 223 Pac. 354 (1924).

³² See note 28. See also *President and Directors of Georgetown College v. Hughes*, 130 F. 2d 810 (D. C. Cir. 1942).

³³ 3 SCOTT, TRUSTS § 402 (1939); 2 BOGERT, TRUSTS AND TRUSTEES § 401 (1935); HARPER, TORTS § 294 (1933); PROSSER, TORTS 1079 (1941). See also Feezer, *The Tort Liability of Charities*, 77 U. OF PA. L. REV. 191 (1928).

³⁴ 199 N. Y. 233, 92 N. E. 626 (1910); *accord*, *Kellogg v. Church Charity Foundation of Long Island*, 203 N. Y. 191, 96 N. E. 406 (1911) (plaintiff was run over by defendant's ambulance—judgment for plaintiff was reversed and a new trial ordered because of failure to prove that the ambulance driver was an employee of the defendant).

³⁵ See *Rector of Church v. Burkhardt*, 3 Hill. 193 (N. Y. 1842) where the N. Y. Supreme Court held a religious corporation liable for injuries received by a pedestrian from a falling wall. This decision had never been questioned and had been thought of as conclusive against the doctrine of total immunity.

the cases in other states and first concluded that the trust fund doctrine and the theory of complete charitable immunity should not prevail. On this point, the court remarked:

The doctrine that the will of an individual shall exempt either person or property from the operation of general laws is inconsistent with the fundamental idea of government. It permits the will of the subject to nullify the will of the people. Nor can I conceive any ground upon which a court can hold that effect can be given to that will when it relates to property devised or conveyed for the purpose of a charitable trust. . . .³⁶

Although the question of the right of a beneficiary of the charity to sue was not involved in the *Hordern* case, the court nevertheless took occasion to comment on that situation by way of dictum, and said:

. . . [T]he immunity of charitable corporations for the torts of their trustees or servants has been made dependent on the relation that the plaintiff bore to the corporation . . . [and all jurisdictions recognized] that the beneficiary of a charitable trust may not hold the corporation liable for the neglect of its servants. This is unquestionably the law of this state.³⁷

In addition to the cited authorities, which the Court believed had made that proposition "unquestionably the law of this state," the Court also relied on the reasoning adopted by the *Powers* case,³⁸ thereby accepting the theory of implied waiver. None of the cited authorities relied upon in the *Hordern* case was a decision of the Court of Appeals, and, even more striking, each of the cases thus relied upon was, in the last analysis, based upon authorities in other states upholding the very doctrine which the Court of Appeals was in the act of repudiating—the trust fund doctrine.

The next link in the developing chain was the case of *Schloendorff v. New York Hospital*.³⁹ There, plaintiff sustained serious injuries because of an unauthorized operation performed by a voluntary, visiting surgeon, and it was alleged that defendant's nurses, as well as the hospital's house doctor, participated in the tort by knowingly preparing plaintiff for the unlawful operation. Judgment was awarded in favor of the defendant, the Court of Appeals saying:

Certain principles of law governing the rights and duties of hospitals when

³⁶ *Hordern v. Salvation Army*, 199 N. Y. 233, 239, 92 N. E. 626, 628 (1910).

³⁷ *Id.* at 237, 92 N. E. at 627. As authority for this statement, the court cited *Collins v. N. Y. Post Graduate Medical School*, 59 App. Div. 63, 69 N. Y. Supp. 106 (2d Dep't 1901); *Joel v. The Woman's Hospital*, 89 Hun 73, 35 N. Y. Supp. 37 (2d Dep't 1894); *Haas v. Missionary Society of the Most Holy Redeemer*, 6 Misc. 281, 26 N. Y. Supp. 868 (C. P. 1893).

³⁸ See note 26 *supra*.

³⁹ 211 N. Y. 125, 105 N. E. 92 (1914).

maintained as charitable institutions have, after much discussion, become no longer doubtful. It is the settled rule that such a hospital is not liable for the negligence of its physicians and nurses in the treatment of patients.⁴⁰

The theory of implied waiver which the *Hordern* case had adopted was not applicable in this situation, since the unauthorized operation constituted a trespass as to which there could be no such waiver. The true ground for the defendant's exemption from liability was held to be that the relation of the physician to the hospital was that of an independent contractor rather than a servant. As far as the visiting surgeon was concerned, there was ample justification for this ruling. But the Court also refused to consider either house doctors or nurses as servants of the hospital, declaring as to the latter:

. . . [N]urses are employed to carry out the orders of the physicians, to whose authority they are subject. The hospital undertakes to procure for the patient the services of a nurse. It does not undertake through the agency of nurses to render those services itself. . . . The acts of preparation immediately preceding the operation are necessary to its successful performance, and are really part of the operation itself. . . .⁴¹

Of course, no one would argue that a hospital should be made liable for the acts of a nurse in merely carrying out a doctor's orders. Indeed, such an act, if carefully performed, could not be deemed negligence at all. But what about the independent act of negligence of the nurse, either in the manner of carrying out those orders or in the performance of general nursing duties? Certainly the *physician* is not her master in those instances, and he is not liable for such negligence.⁴² Assuredly, unless the rule of *respondeat superior* is to be abandoned, her general employer, the hospital, should be liable.^{42*}

As to the house doctor, the Court in the *Schloendorff* case found that he, like the visiting physician, was "pursuing an independent calling, a profession sanctioned by a solemn oath, and safeguarded by stringent penalties. If, in serving their patient, they violated her commands, the

⁴⁰ *Id.* at 128, 105 N. E. at 93.

⁴¹ *Id.* at 132, 105 N. E. at 94.

⁴² *Blackburn v. Baker*, 227 App. Div. 588, 237 N. Y. Supp. 611 (3d Dep't 1929); *Guell v. Tenney*, 262 Mass. 54, 159 N. E. 451 (1928); *Perionowsky v. Freeman*, 4 F. & F. 977 (1866).

^{42*} For cases where private hospitals have been held liable for a nurse's negligence, see *Casey v. Beck*, 58 Idaho 281, 72 P. 2d 856 (1937); *Parrish v. Clark*, 107 Fla. 598, 145 So. 848 (1933). For authority for holding charitable hospitals liable in such situations, see *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4 (1915); *Silva v. Providence Hospital of Oakland*, 14 Cal. 2d 762, 97 P. 2d 798 (1939); *Mulliner v. Evangelischer Diakonniessenverein*, 114 Minn. 392, 175 N. W. 699 (1920).

responsibility is not the defendant's; it is theirs. There is no distinction between the visiting and the resident physicians."

Thus, the skill or profession of the doctor, not the fact of his employment, was made determinative of the question of whether he was in fact a servant—a test which, as we have seen, is without legal or logical basis. One might with equal justice say that the owner of any kind of public transportation is not responsible as master for the acts of its skilled employees engaged in flying its airplanes, driving its buses or locomotives or sailing its ships; or that the employer of lawyers or accountants would be free from responsibility for their negligence.

Authority for this interpretation of the legal position of house doctors and nurses was derived by the court in the *Schloendorff* case in considerable measure from what had been said in the case of *Glavin v. Rhode Island Hospital*, as well as from a contemporary English case, *Hillyer v. St. Bartholomew's Hospital*.⁴³ The decision in the latter case was that a patient could not recover against a hospital for acts of nurses or orderlies who were merely carrying out the orders of the patient's own operating surgeon in the operating room. It is true that the *Hillyer* opinions contained a dictum which would indicate that a charitable hospital was not liable generally for the negligence of its house doctors or nurses, but this dictum had been clarified by the English courts before the *Schloendorff* case was decided.⁴⁴ Although English law concerning this point has not always been clear,⁴⁵ recent decisions clearly hold that the *Hillyer* case is not authority for exemption for the negligence of doctors or nurses, and that hospitals, both private and charitable, will be held liable for the negligence of a house doctor or nurse in the performance of their general duties, under the rule of *respondeat superior*.⁴⁶

The motivating theme of the *Schloendorff* opinion, however, appears to manifest itself in the highly sympathetic expressions on the social utility of charitable hospitals, for example:

⁴³ L. R. 2 K. B. 820 (1909).

⁴⁴ See *Smith v. Martin and Kingston-upon-Hull Corp.*, 2 K. B. 775 (1911) where Farwell, L. J., whose opinion in the *Hillyer* case had been relied upon by the Court of Appeals, said: "In *Hillyer's* case the nurse and carriers were treated as being servants for whose acts the hospital would be liable, but the plaintiffs failed to prove any case against them." (Emphasis added.) In other words the hospital was held not liable because it was not a negligent act for the nurses merely to carry out the orders of the visiting surgeon.

⁴⁵ See *Strangways-Lesimere v. Clayton*, 2 K. B. 11 (1936); *Wardell v. Kent County Council*, 54 T. L. R. 1026 (1938).

⁴⁶ See *Gold v. Essex County Council*, 2 K. B. 293, 2 All Eng. Rep. 237 (1942), where Lord Greene, M. R., says:

"Nursing, it appears to me, is just what the patient is entitled to expect from the

A ruling would indeed be an unfortunate one that might constrain charitable institutions, as a means of self-protection, to limit their activities. . . .⁴⁷

The fears thus expressed seem to lack foundation. Charitable hospitals in those jurisdictions which refuse immunity have not been so constrained;⁴⁸ and, of course, insurance is available to cover such contingencies.

Is an interne an employee of a hospital for the purposes of workmen's compensation, though the hospital would not be liable for his negligence because of his status as an "independent contractor"? That was the question presented to the Court of Appeals in *Bernstein v. Beth Israel Hospital*,⁴⁹ where an interne claimed the benefit of the Workmen's Compensation Law as a result of injuries received by him while performing an autopsy in the defendant-hospital. The Court, per Cardozo, J., held that he was such an employee and attempted to distinguish this situation from the *Schloendorff* case by saying:

There the question arose, not between hospital and physician, but between hospital and patient. We held that a physician, while engaged in the treatment of a patient, does not charge a public hospital with liability for negligence or trespass. Such a hospital undertakes, not to heal or attempt to heal through the agency of others, but merely to supply others who will heal or attempt to heal on their own responsibility. *Liability in such cases is to be determined by the contract, express or implied, between the hospital and patient.* Liability in this case is to be determined by the contract, express or implied, between hospital and physician. We think the relation *inter se* is to be characterized as a relation of employment. (Emphasis added.)⁵⁰

Observe (1) that the decision in the *Schloendorff* case is characterized

institution, and the relationship of the nurses to the institution supports the inference that they are equipped to nurse the patients. . . . The idea that in the case of a voluntary hospital the only obligation which the hospital undertakes to perform by its nursing staff is, not the essential work of nursing, only so-called administrative work, appears to me, with all respect to those who have thought otherwise, not merely unworkable in practice, but contrary to the plain sense of the position. If correct, it would mean that a hospital undertakes to carry up the patient's tea by its nurse and is liable if the nurse negligently spills the hot water on the patient; but that the true function of a nurse, namely that of nursing, is not one which the nurse is employed to perform on behalf of the hospital. . . ."

See also Goodhart, *Hospitals and Trained Nurses*, 54 L. Q. REV. 553 (1938).

⁴⁷ 211 N. Y. 125, 135, 105 N. E. 92, 95 (1914).

⁴⁸ See *Tucker v. Mobile Infirmary Association*, 191 Ala. 572, 68 So. 4 (1915); *Nicholson v. Good Samaritan Hospital*, 145 Fla. 360, 199 So. 344 (1940); *Mulliner v. Evangelischer Diakonniessverein*, 144 Minn. 392, 175 N. W. 699 (1920); *Welch v. Frisbie Memorial Hospital*, 90 N. H. 337, 9 A. 2d 761 (1939).

⁴⁹ 236 N. Y. 268, 140 N. E. 694 (1923).

⁵⁰ *Id.* at 270, 140 N. E. at 694.

as applying only to public hospitals (2) that a contract is implied between a hospital and the patient, precluding liability—a theory since completely disavowed, but unfortunately, without a disavowal of these authorities.⁵¹ To hold that a person, while doing one specific kind of work, can be an employee and yet not an employee at the same moment, is an indication of the lengths to which the courts were forced to go to justify arbitrary limitations of liability. Certainly a hospital is more than mere walls and an administrative staff. The person who avails himself of hospital facilities expects that it will attempt to cure him, and does not expect the nurses and internes to act “on their own responsibility.”

The *Schloendorff* case had expressly stated that a hospital would be liable for the negligent act of an orderly,⁵² but an important qualification was added to this illustration in *Phillips v. Buffalo General Hospital*.⁵³ There, plaintiff was burned by a hot water bottle which an orderly had negligently placed against her while she was unconscious following an operation. The court determined that the nature of the act, not the skill or profession of the person performing it (which originally had been the basis for limiting liability), decided the question of the hospital's liability or immunity. Judgment was awarded in favor of the charitable hospital, and in holding that negligence in the course of medical treatment was not imputable to the hospital, Judge Pound, speaking for the court, said:

The distinction is sought to be made between exoneration from liability for the negligence of physicians and nurses employed by the hospital to care for its patients and for the negligence of cooks, maids and orderlies who also act for the hospital in its care of patients. It is difficult to place such distinction on the unshifting rock. If a nurse should carelessly apply one hot water bottle and an orderly apply another to the same patient at the same time, and two burns were thus produced, it would require an acute mind to formulate satisfactorily the rule of liability which would exempt the hospital in the one case and hold it in the other.⁵⁴

The paradoxical result was that a hospital could not be held liable for any acts of its servants, whether professionally skilled or not, provided their acts were directly connected with curing the patient!

The principle of the *Phillips* case found further application the next year in *Hamburger v. Cornell University*,⁵⁵ where a charitable university

⁵¹ See *Sheehan v. North Country Community Hospital*, 273 N. Y. 163, 7 N. E. 2d 28 (1937).

⁵² 211 N. Y. 125, 132, 105 N. E. 92, 94 (1914).

⁵³ 239 N. Y. 188, 146 N. E. 199 (1924).

⁵⁴ *Id.* at 190, 146 N. E. at 200.

⁵⁵ 240 N. Y. 328, 148 N. E. 539 (1925).

was exempted from liability for the errors of its professors, instructors and other members of its teaching staff. It was alleged in the *Hamburger* case that an instructor had distributed an incorrect chemical to his class for a laboratory experiment which later exploded in a student's face, causing the loss of an eye. Again Judge Cardozo spoke for the court, saying:

We think a hospital's immunity from liability for the errors of surgeons and physicians is matched in the case of a university by a like immunity from liability for the errors of professors or instructors or other members of its staff of teachers. . . . The governing body of a university makes no attempt to control its professors and instructors as if they were its servants. By practice and tradition, the members of the faculty are masters, and not servants, in the conduct of the classroom. They have the independence appropriate to a company of scholars. . . .⁵⁶

But *respondeat superior* does not depend upon the exercise of control. It arises from the assumption of an obligation—in this instance, the obligation to instruct with due care, and, in the case of a hospital, the obligation to attempt to cure. Surely, lack of "control" would have been no excuse if a stranger had been injured by the explosion. In an analogous situation where a teacher had instructed a child in poking a fire, resulting in injuries to the child, an English court held that the relation of master and servant did exist and that the *respondeat superior* theory should be applied with full force and vigor.⁵⁷

With the trust fund theory effectively rejected and the implied waiver theory questioned, it is difficult to understand the repeated references to the charitable nature of an institution as granting it a special immunity. For instance, the court in the *Hamburger* case states:

With us, a hospital or university owes to patients or to students whatever duty of care and diligence is attached to the relation as reasonably implicit in the nature of the undertaking and the purpose of the charity⁵⁸

If one undertakes to give medical treatment, or to teach, it should be reasonably implicit that one undertakes to do it carefully, regardless of its charitable nature.

The question whether a charitable institution could be held liable to a beneficiary for the torts of its ordinary servants and employees was conclusively answered in *Sheehan v. North Country Community Hospital*,⁵⁹ Plaintiff, a pay-patient in defendant charitable hospital was

⁵⁶ *Id.* at 337, 148 N. E. at 542.

⁵⁷ See *Smith v. Martin and Kingston-upon-Hull Corp.*, 2 K. B. 775 (1911). See note 44, *supra*.

⁵⁸ 240 N. Y. 328, 338, 148 N. E. 539, 542 (1925).

⁵⁹ 273 N. Y. 163, 7 N. E. 2d 28 (1937).

injured while being driven home in defendant's ambulance when its driver negligently collided with another vehicle. The court, in awarding judgment for the plaintiff, explicitly rejected the implied waiver theory, asserting the doctrine was a fiction, and stated:

. . . that to impose liability is to beget careful management and that no conception of justice demands that an exception to the rule of respondeat superior be made in favor of the resources of charity and against the person of a beneficiary injured by the tort of a mere servant or employee functioning in that character. . . .⁶⁰

Mention was also made of the fact that the public policy of the state favored this trend because the state had withdrawn its own exemption from tort liability, and that a harmonious policy would require that charities be given no greater immunity than the state.

The effect of this decision was not as sweeping as might be supposed. For one thing, it merely held that a hospital or other charitable institution could be sued by a beneficiary for the acts of negligence of its *ordinary* servants or employees, and the question of liability for the negligence of doctors, nurses and other skilled employees was left untouched. Subsequent cases have shown judicial adherence to the theory that liability must depend on the nature of the act of negligence, continuing to hold that if it be an act connected with the treatment of a patient, liability on the part of the hospital does not exist unless the act is what is known as an administrative act.

THE NATURE OF THE ACT OR OMISSION

The distinction made in the *Phillips* case between the acts of ordinary servants or employees and the torts of persons engaged in special duties of a more responsible nature is the law of New York today. This kind of differentiation has led to strange and unpredictable results. As far as hospitals are concerned, it is accepted that the status of the tortfeasor is "determined by the nature of the work he is employed to do rather than the payroll designation of his position."⁶¹ When this test was applied in the *Phillips* case, a hospital was held not liable for the misfeasance of an orderly in applying a scalding hot water bottle to a patient. In a more recent application of this test, in *Dillon v. Rockaway Beach Hospital*,⁶² the defendant hospital was held liable to a patient who was burned by an electric light negligently left under the sheets by an attendant making the bed. The act of making a bed was of the

⁶⁰ *Id.* at 166, 7 N. E. 2d at 29.

⁶¹ *Phillips v. Buffalo General Hospital*, 239 N. Y. 188, 190, 146 N. E. 199, 200 (1924).

⁶² 284 N. Y. 176, 30 N. E. 2d 373 (1940).

kind performed by a servant, and the court emphasized that the crucial inquiry was to be addressed to the character of the act itself, not the general nature of the work for which the tortfeasor had been employed.⁶³

The test which evolved from the *Phillips* and *Dillon* decisions has found continued application in subsequent cases. The negligent use of hot water bottles is a favorite subject of this type of litigation. The general holding has been that the negligence is in the course of treatment where the scalding hot water bottle is applied to the patient's body, and therefore the hospital is not liable;⁶⁴ but this same act has been held an administrative one with liability imposed on the hospital where a nurse had placed a hot water bottle in bed *prior* to the reception of the patient.⁶⁵ The distinction is a tenuous one at best and is neither realistic nor workable.

Another recurring situation is one where hospital personnel have failed to place sideboards on the bed or to take special precautions to protect a delirious or restless patient from rolling out of bed. Again, fine distinction have been drawn—such nonfeasance is considered of a medical or professional nature which exempts the hospital from liability,⁶⁶ but the result is otherwise where a doctor or head nurse sees the danger and orders a subordinate to install sideboards or to protect the patient in other ways.⁶⁷

Where a nurse and an interne mistakenly administered a blood transfusion to the wrong patient, the court held the hospital liable, reasoning that the professional nature of the employees' duties ceased upon their entry into the wrong room.⁶⁸ If the same interne and the same nurse had

⁶³ *Id.* at 180, 30 N. E. 2d at 374.

⁶⁴ *Phillips v. Buffalo General Hospital*, 239 N. Y. 188, 146 N. E. 199 (1924); *Sutherland v. N. Y. Polyclinic Hospital*, 273 App. Div. 29, 75 N. Y. S. 2d 135 (1st Dep't 1947); *Kaps v. Lenox Hill Hospital*, 51 N. Y. S. 2d 791 (Sup. Ct. N. Y. County 1944).

⁶⁵ *Iacano v. N. Y. Polyclinic Hospital*, 269 App. Div. 955, 58 N. Y. S. 2d 244 (2d Dep't 1945), *aff'd mem.*, 296 N. Y. 502, 68 N. E. 2d 450 (1946).

⁶⁶ *Lee v. Glen Falls Hospital*, 265 App. Div. 607, 42 N. Y. S. 2d 169 (3d Dep't 1943), *aff'd mem.*, 291 N. Y. 526, 50 N. E. 2d 651 (1943); *Pierson v. Charles S. Wilson Memorial Hospital, Inc.*, 273 App. Div. 348, 78 N. Y. S. 2d 146 (3d Dep't 1948). *But cf.* *Bickford and Carson v. Peck Memorial Hospital*, 266 App. Div. 875, 43 N. Y. S. 2d 20 (2d Dep't 1943); *Petry v. Nassau Hospital*, 267 App. Div. 996, 48 N. Y. S. 2d 227 (2d Dep't 1944).

⁶⁷ *Ranelli v. Society of N. Y. Hospital*, 269 App. Div. 906, 56 N. Y. S. 2d 481 (2d Dep't 1945), *aff'd mem.*, 295 N. Y. 850, 67 N. E. 2d 257 (1946); *Grace v. Manhattan Eye, Ear & Throat Hospital*, 276 App. Div. 955, 95 N. Y. S. 2d 185 (1st Dep't), *aff'd mem.*, 301 N. Y. 660, 93 N. E. 2d 926 (1950); *Gordon v. Harbor Hospital Inc.*, 275 App. Div. 1047, 92 N. Y. S. 2d 101 (2d Dep't 1949); *Pivar v. Manhattan General, Inc.*, 110 N. Y. S. 2d 786 (1st Dep't 1952).

⁶⁸ *Necolayff v. Genesee Hospital*, 270 App. Div. 648, 61 N. Y. S. 2d 832 (4th Dep't 1946), *aff'd without opinion*, 296 N. Y. 936, 73 N. E. 2d 117 (1947). See also *Lainen v. Tonsil Hospital*, 36 N. Y. S. 2d 55 (App. Term 1st Dep't 1942) where it was held a

administered the wrong blood to a patient supposed to receive a transfusion, that apparently would have been categorized as a medical act for which the hospital would not be liable. Such distinctions make legal concepts meaningless.

Another group of cases involves the negligence of hospital personnel in dispensing drugs and medicines. In *Volk v. City of New York*,⁶⁹ a nurse under medical treatment was given a deleterious medicine; yet this was termed an administrative act and the hospital was held liable because there was concurring negligence by the supervising nurse who had failed to destroy the medicine. Administrative negligence was also found in *Luibowsky v. State of New York*⁷⁰ where a patient was given the wrong drug through the negligence of the pharmacist in the general employ of the state hospital. Both the *Volk* and *Luibowsky* cases concerned publicly-owned hospitals and the decisions might be explained, although not justified, on the ground of allegedly broader liability imposed upon such hospitals. The *Luibowsky* opinion argued that the *Schloendorff* case did not govern the liability of a state-owned hospital because at the time the latter case was decided the state had not assumed responsibility for the torts of its officers and employees; the court therefore held Section 12-a of the Court of Claims Act controlling, which provided that the doctrine of *respondere superior* should be applicable to the state, thereby making the distinctions applied in other cases unnecessary.

New York courts might take notice of a recent English decision⁷¹ which examines once more the status of physicians and concludes that hospitals should be liable for the negligence of resident house physicians. The test laid down by the court was whether the negligent physicians were performing their duties under a contract *for* service or a contract *of* service. If the former, they are considered independent contractors and the hospital is not liable. It seems reasonable that such a distinction should be made in determining a hospital's liability, but New York has refused to recognize such a difference. The Court of Appeals has said: "Whether the hospital undertakes to procure a physician from afar, or to have one on the spot, its liability remains the same."⁷²

question of fact for the jury whether the premature discharge of an infant from the hospital was an administrative or medical default.

⁶⁹ 284 N. Y. 279, 30 N. E. 2d 596 (1940).

⁷⁰ 260 App. Div. 416, 23 N. Y. S. 2d 633 (3d Dep't 1940), *aff'd mem.*, 285 N. Y. 701, 34 N. E. 2d 385 (1941).

⁷¹ *Collins v. Hertfordshire County Council* 1 All Eng. Rep. 633 (1947).

⁷² *Schloendorff v. New York Hospital*, 211 N. Y. 125, 132, 105 N. E. 92, 94 (1914). This statement was made on the authority of the *Hillyer* case, which the English courts do not accept as authority for this proposition. See notes 46 and 71 *supra*.

There are, of course, certain acts for which a hospital cannot escape responsibility and in these situations a consideration of the above distinctions is unimportant. Such acts, for example, include a failure to employ competent personnel⁷³ and negligence in procuring safe equipment or facilities.⁷⁴

LIABILITY OF PRIVATE HOSPITALS

Because of the obvious inapplicability of the trust fund and implied waiver theories, there was little difficulty in holding a private hospital liable for the torts of its administrative personnel.⁷⁵ The courts encountered more difficulty, however, when they considered the question of the liability of a private hospital for the negligence of the nurses and doctors on its staff. A divergence of opinion resulted in the lower courts, one view holding that the *Schloendorff* rule, exempting hospitals from liability for the negligence of its doctors and nurses while acting in their professional capacities, applied only to charitable institutions.⁷⁶ This viewpoint accorded the nurses and internes the status of servants of the hospital. Other cases interpreted the *Schloendorff* decision as applying to all hospitals, whether private or charitable.⁷⁷ *Steinert v. Brunswick Home Inc.*⁷⁸ is an example of the latter view. A patient was denied

⁷³ *White v. Prospect Heights Hospital*, 278 App. Div. 790, 103 N. Y. S. 2d 860 (2d Dep't 1951); *Howe v. Medical Arts Center*, 261 App. Div. 1088, 26 N. Y. S. 2d 957 (2d Dep't 1941), *aff'd mem.*, 287 N. Y. 698, 39 N. E. 2d 303 (1942); *Roewekamp v. N. Y. Post Graduate Medical School & Hospital*, 254 App. Div. 265, 4 N. Y. S. 2d 751 (2d Dep't 1938), *rev'd on appeal*, 256 App. Div. 957, 10 N. Y. S. 2d 669 (2d Dep't 1939) (on the ground that the conclusion that the defendant should have known of doctor's incompetence was unwarranted by the evidence).

⁷⁴ *Woodhouse v. Knickerbocker Hospital*, 39 N. Y. S. 2d 671 (Sup. Ct. N. Y. County 1943).

⁷⁵ *Hendrickson v. Hodkin*, 276 N. Y. 252, 11 N. E. 2d 899 (1937); *Van Patter v. Towns Hospital*, 213 App. Div. 863, 209 N. Y. Supp. 935 (1st Dep't 1925), *aff'd mem.*, 246 N. Y. 646, 159 N. E. 686 (1927).

⁷⁶ *Meshel v. Crotona Park Sanitorium, Inc.*, 154 Misc. 221, 276 N. Y. Supp. 989 (City Ct. Bronx County 1935); *Post v. Crown Heights Hospital*, 173 Misc. 250, 17 N. Y. S. 2d 409 (Sup. Ct., Kings County 1940). See also *Hannon v. Siegel-Cooper Co.*, 167 N. Y. 244, 60 N. E. 597 (1901), where the Court of Appeals held an employer of a dentist liable to a patient for malpractice. When the question was examined free of the charitable nature of the employer, and considered solely as a question of master and servant, there was no hesitation in holding that the dentist, though a skilled professional man, was the servant for whose malpractice the employer was liable.

⁷⁷ *Kamps v. Crown Heights Hospital, Inc.*, 251 App. Div. 849, 296 N. Y. Supp. 776 (2d Dep't 1939), *aff'd mem.*, 277 N. Y. 602, 14 N. E. 2d 184 (1938); *Steinert v. Brunswick Home, Inc.*, 172 Misc. 787, 16 N. Y. S. 2d 83 (Sup. Ct. Nassau County 1939), *aff'd mem.*, 259 App. Div. 1018, 20 N. Y. S. 2d 459 (2d Dep't 1940).

⁷⁸ 172 Misc. 787, 16 N. Y. S. 2d 83 (Sup. Ct. Nassau County 1939), *aff'd mem.*, 259 App. Div. 1018, 20 N. Y. S. 2d 459 (2d Dep't 1940), *leave to appeal denied*, 284 N. Y. 822, 31 N. E. 2d 517 (1940).

recovery for injuries received when a nurse in the employ of a private hospital negligently handed the wrong solution to the operating doctor. The court held that there was no logical distinction between private and charitable hospitals, in that both merely undertook to supply doctors and nurses who would treat patients on their own responsibility; therefore, the distinctions discussed above between medical and administrative torts were applied.

The position taken in the *Steinert* case was followed by the Appellate Division in *Bakal v. University Heights Sanitarium*.⁷⁹ In the *Bakal* case, the plaintiff, while being prepared for an operation, was burned by an electric plate which had been negligently applied by a nurse regularly employed by defendant private hospital. The Appellate Division was squarely faced with the issue whether or not a private hospital operated for profit is liable for a nurse's negligent acts which are related to a patient's medical care. The *Schloendorff* case was relied upon as exempting private hospitals from such liability, and judgment was awarded to the defendant.

As a matter of law, the author does not believe that the *Schloendorff* decision intended to exempt private as well as charitable hospitals from liability for the torts of doctors, internes, and nurses in their treatment of patients.⁸⁰ But granting the premise that a charitable hospital is not within the rule of *respondeat superior* in determining liability for medical torts, it would seem that, as a matter of logic, the same thing should hold true in regard to private hospitals. But that result should be a *caveat* that the premise itself is wrong. To grant a business enterprise an exemption from responsibility for the acts of the very persons who are employed to further its purposes is to make a mockery of the principle of *respondeat superior*. To grant such exemption for the negligent treatment of a patient who enters a hospital expecting the expert care implicit in the very word "hospital" is to perpetrate a cruel jest.

Those states which have shielded charitable institutions from tort liability have at the same time held private hospitals fully responsible for the same acts.⁸¹ In supporting such a result, a Virginia court has said:

⁷⁹ 277 App. Div. 572, 101 N. Y. S. 2d 385 (1st Dep't 1950), *aff'd without opinion*, 302 N. Y. 870, 100 N. E. 2d 51 (1951). The Appellate Division was divided 3-2. See note 1 *supra*.

⁸⁰ See quotation cited in note 40 *supra*. Judge Cardozo, in writing the *Schloendorff* opinion, made it clear that the defendant was being excused from liability because of its charitable nature.

⁸¹ See *Mahoney v. Harley Private Hospital*, 279 Mass. 96, 180 N. E. 723 (1932); *Tulsa Hospital Association v. Juby*, 73 Okla. 243, 175 Pac. 519 (1918); *Stuart Circle*

The object, aim and purpose of a hospital, the reason for its establishment and operation, is to render and perform medical treatment and nursing of a skilled character. It is the facility for affording the patient a higher and greater degree of nursing and medical attention than would be ordinarily possible outside of a hospital that makes it desirable. The opportunity to render such service enables a hospital to make a higher charge than a hotel or boarding house. The desirability of securing the medical service provides inducement for the patient to enter the hospital. The patient comes to the hospital for advice, aid and treatment. . . .⁸²

A paradoxical situation is the result. In those jurisdictions where the principle of complete immunity for charitable institutions was first introduced, private hospitals are fully liable for the torts of those employed to carry out their work, whether professional or administrative. In "liberal" states, such as New York, which have rejected all the theories granting such exemption as unsound, private hospitals have been able to hide behind a fiction invoked to protect charitable institutions, namely, that persons performing services which require professional skill are not servants of the hospital but rather independent contractors.

CONCLUSION

It seems superfluous today to argue that no special privilege of immunity should attach to a hospital merely because of its charitable nature. Concepts of what is owed the poor have changed since Charles Dickens' time, when this question of exemption first arose. The assets of a charity are in little danger of being despoiled by law suits, for they can be adequately protected by insurance. Even if there were such a danger, the more important consideration should be the protection of the patient where the hospital is negligent. To exempt such institutions from liability, even partially, is to put a premium on negligence and negate the very meaning of charity.

Public policy in the United States has shown a definite trend away from such immunity, as illustrated by the withdrawal of the Federal Government,⁸³ New York,⁸⁴ and other states of their exemption from suit. Cities in New York may now be sued for the negligence of voluntary doctors serving in city hospitals.⁸⁵ This was undoubtedly done for the

Hospital v. Curry, 173 Va. 136, 3 S. E. 2d 153 (1939). See also cases collected in 22 A. L. R. 333 (1923), 39 A. L. R. 1432 (1925), 124 A. L. R. 186 (1940), AM. JUR., *Hospitals* § 814.

⁸² Stuart Circle Hospital v. Curry, 173 Va. 136, 3 S. E. 2d 153 (1939).

⁸³ U. S. Federal Tort Claims Act, 28 U. S. C. § 931 (1946).

⁸⁴ N. Y. Court of Claims Act, § 12a, N. Y. Laws 1939, c. 860.

⁸⁵ GENERAL MUNICIPAL LAWS, § 50-d, N. Y. Laws 1937, c. 483 as amended by N. Y. Laws 1950, c. 681. See Schmid v. Werner, 277 App. Div. 520, 100 N. Y. S. 2d 860 (1st Dep't 1950), *leave to appeal granted*, 98 N. E. 2d 109 (1951).

protection of such doctors, but the peculiar result is that those hospitals may now be sued for the acts of doctors *not* in their employ and not for the acts of doctors or nurses who *are* in their employ.

The law of New York today holds a hospital liable whether private or charitable, for those torts of servants and employees which may be characterized as administrative acts, but not liable for those torts which are of a medical nature. These distinctions were the result of a judicial policy of compromise between the doctrines of *respondeat superior* and total immunity for charitable institutions. Neither modern trends nor modern conditions justify these distinctions, and they have done little but add confusion to the state of the law. There is no reason to continue the exemption for these institutions, whether charitable or profit-making, from the ordinary rule that a master is liable for the torts of his servants and employees, committed in the scope of their employment.

Recently, the Court of Appeals, in upsetting a precedent of many years which had denied a remedy for pre-natal injuries, said that the question is whether courts shall follow such a precedent, or shall "bring the common law of this state, on this question, into accord with justice."⁸⁶ It decided to make the law conform to right.

It should do no less in the specific field which this article has explored.

⁸⁶ Woods v. Lancet, 303 N. Y. 349, 102 N. E. 2d 691 (1951).