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Torts--Charitable Immunity--Hospital Not Liable for Injury Caused by Technician's Mistake in Determining Patient's Blood Factor (Berg v. New York Soc'y for the Relief of the Ruptured and Crippled, 286 App. Div. 783 (1st Dep't 1955))

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contain provisions whereby a lack of timely notice will be excused under specific circumstances. Thus extensions are allowed where the claimant was bereft of reason as a result of the accident [28] or where the claimant has a reasonable excuse.[29] In each of these cases the claimant would be allowed to file within a reasonable time after the disability ceases.

The instant case gives a more just interpretation of Section 50-e than the previous decisions. However, it should be borne in mind that the requirement of notice imposes a burden which is non-existent in suits involving private persons. The municipality thus has an advantage which is hardly in keeping with its decision to waive immunity from tort actions. Recognizing that the right to sue is statutory in origin and may be surrounded by conditions, it is not doubted that the municipality has the right to prescribe reasonable measures to protect itself against unfounded or fraudulent claims.[30] However, a notice requirement need not be harsh or inflexible; it should be fair to the claimant as well as to the municipality. It is submitted that a requirement that notice be filed within a reasonable time after the disability ceases would not unduly burden either the claimant or the municipality and would afford ample protection without impairing the rights of either party.[31]

TORTS — CHARITABLE IMMUNITY — HOSPITAL NOT LIABLE FOR INJURY CAUSED BY TECHNICIAN'S MISTAKE IN DETERMINING PATIENT'S BLOOD FACTOR. — A blood transfusion had been ordered for the plaintiff by her physician. A qualified laboratory technician of

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[28] See Ray v. Saint Paul, 44 Minn. 340, 46 N.W. 675 (1890). In construing the city charter, the court said: "It is, however, also provided that notice need not be given where the person injured shall, in consequence of the injury, 'be bereft of reason.'" *Id.* at 675.

[29] PA. STAT. ANN. tit. 53, § 2774 (Purdon Supp. 1954), McBride v. Rome TP., 347 Pa. 228, 32 A.2d 212 (1943) (where the court held that negligence of counsel furnished a reasonable excuse).

[30] See Brown v. Board of Trustees, 303 N.Y. 484, 104 N.E.2d 866 (1952); Sweeney v. City of New York, 225 N.Y. 271, 122 N.E. 243 (1919); 9 REP. N.Y. JUDICIAL COUNCIL 227 (1943).

[31] Several bills have been introduced to amend Section 50-e. Since the Joint Legislative Committee on Municipal Tort Liability was established to study such proposals, the policy of the legislature has been to defer approval until the committee makes its final report. In any serious study of amendments, the comment of the original draftor should be borne in mind: "It is my judgment that Section 50-e is sadly in need of a substantial over-hauling with a view of a liberalization of its provisions in behalf of claimants against public corporations." Prashker, Report on S. No. 3255, Int. 2986, introduced by Mr. Gittleson, N.Y. STATE BAR ASS'N COMMITTEE ON STATE LEGISLATION (1956).

defendant hospital performed a serological test, a necessary preliminary to a transfusion, to determine plaintiff's blood factor. Because of the technician's error in designating her blood factor, plaintiff was infused with the wrong type blood and serious injury ensued. The Court *held* that the technician's act bore such a close relationship to the treatment prescribed by the plaintiff's physician that the hospital was free from liability. *Berg v. New York Soc'y for the Relief of the Ruptured and Crippled,* 286 App. Div. 783, 146 N.Y.S.2d 548 (1st Dep't 1955).

An employer is generally held responsible for the negligence of his employees in the scope of their employment.[1] Massachusetts was the first jurisdiction in the United States to announce an exception to this rule in regard to charitable institutions.[2] Jurisdictions that grant immunity, in full or in part, usually have adopted one of four basic theories: 1) non-applicability of *respondeat superior;*[3] 2) trust fund;[4] 3) implied waiver;[5] 4) public policy.[6] However, the rules of charitable immunity have "been devoured in 'exceptions.'"[7] Some jurisdictions which adopt the trust fund theory have allowed recovery where there is property not exclusively used for the objects of the trust.[8] In other forums, recovery has been allowed upon a breach of contract theory.[9] The right to recover has also been based upon the

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[1] See Ramsey v. New York Cent. R.R., 269 N.Y. 219, 199 N.E. 65 (1935); Schediwy v. McDermott, 113 Cal. App. 218, 298 Pac. 107 (1931).

[2] See McDonald v. Massachusetts General Hospital, 120 Mass. 432 (1876). It is interesting to note that the court, in granting charitable immunity in the field of torts, relied upon an English case that had been overruled some ten years previously. Holliday v. The Vestry of the Parish of St. Leonard, Shoreditch, 11 C.B. (n.s.) 192, 142 Eng. Rep. 769 (C.P. 1861), overruled by, "The Mersey Docks and Harbor Board," Trustees v. Gibbs, L.R. 11 H.L. 686, 11 Eng. Rep. 1500 (1866).

[3] See Hearns v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 595 (1895); *cf.* Bachman v. YWCA, 179 Wis. 178, 191 N.W. 751 (1922).

[4] See Loeffler v. Trustees of Sheppard & Enoch Pratt Hospital, 130 Md. 265, 100 Atl. 301 (1917); Foley v. Wesson Memorial Hospital, 246 Mass. 363, 141 N.E. 113 (1923). The trust fund theory is based on the principle that the funds are set aside for a specific purpose and should not be diverted to pay tort claims.

[5] See Wilcox v. Idaho Falls Latter Day Saints Hospital, 59 Idaho 350, 82 P.2d 849 (1938); Adams v. University Hospital, 122 Mo. App. 675, 99 S.W. 453 (1907).

[6] See Weston v. Hospital of St. Vincent of Paul, 131 Va. 587, 107 S.E. 785 (1921); *cf.* Southern Methodist University v. Clayton, 142 Tex. 179, 176 S.W.2d 749 (1943). Despite the different names given the theories, public policy is the underlying principle in all of them. Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220, 223 (1951) (dictum).

[7] Georgetown College v. Hughes, 130 F.2d 810, 817 (D.C. Cir. 1942).

[8] See St. Luke's Hospital Ass'n v. Long, 125 Colo. 25, 240 P.2d 917 (1952); Robertson v. Executive Committee of Baptist Convention, 55 Ga. App. 469, 190 S.E. 432 (1937).

[9] See Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915); Parrish v. Clark, 107 Fla. 598, 145 So. 848 (1933).

status of the plaintiff.[10] Furthermore, considerations such as the commercial nature of a charity-owned enterprise [11] or the status of the actual tort-feasor [12] have been held controlling in determining liability. In two states where charities are immune, statutes give the injured party a direct cause of action against the institution's insurance company, to whom the defense of charitable immunity is not available.[13] Similarly the existence of insurance has been held to preclude immunity when the trust fund would not be damaged by a successful action.[14]

New York has rejected the implied waiver theory and allowed recovery regardless of the status of plaintiff.[15] In the leading case of *Schloendorff v. The Society of the New York Hospital,*[16] the court declared a hospital liable only for the negligence of its servants and not for that of its doctors and nurses. This immunity was based upon the theory that professional people were independent contractors and therefore the hospital could exercise no control. The concept of immunity later underwent a mutation, and the nature of the act, rather than the one who performed it, became the controlling factor.[17] Thus, negligent supervision,[18] defective equipment [19] and negligence in the selection of medical personnel [20] have been held to be sufficient grounds for recovery. However, where the act is professional, non-charitable

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[10] See Henry W. Putnam Memorial Hospital v. Allen, 34 F.2d 927 (2d Cir. 1929); Sisters of Charity v. Duvelius, 123 Ohio St. 52, 173 N.E. 737 (1930).

[11] McKay v. Morgan Memorial Co-op. Industries & Stores, Inc., 272 Mass. 121, 172 N.E. 68 (1930) (operated a series of stores); Rhodes v. Millsaps College, 179 Miss. 596, 176 So. 253 (1937) (rented part of a building as office space); Pearlstein v. A. M. McGregor Home, 79 Ohio App. 526, 73 N.E.2d 106 (1947) (operated apartment house); School Dist. v. Philadelphia, 367 Pa. 180, 79 A.2d 433, 435 (dictum), *cert. denied,* 342 U.S. 821 (1951) (engaged in mining).

[12] See Evans v. Lawrence & Memorial Assoc. Hospitals, Inc., 133 Conn. 311, 50 A.2d 443 (1946); Medical & Surgical Memorial Hospital v. Cauthorn, 229 S.W.2d 932 (Tex. Civ. App. 1949).

[13] ARK. STAT. ANN. § 66-517 (1947), Michael v. St. Paul Mercury Indemnity Co., 92 F. Supp. 140 (W.D. Ark. 1950); MD. ANN. CODE art. 48A, § 82 (1951).

[14] Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950). *Contra,* Cristini v. Griffin Hospital, 134 Conn. 282, 57 A.2d 262 (1948).

[15] See Sheehan v. North Country Community Hospital, 273 N.Y. 163, 7 N.E.2d 28 (1937) (patient); Johnsen v. Staten Island Hospital, Inc., 271 N.Y. 519, 2 N.E.2d 674 (1936) (mem. opinion) (stranger).

[16] 211 N.Y. 125, 105 N.E. 92 (1914).

[17] See Phillips v. Buffalo General Hospital, 239 N.Y. 188, 146 N.E. 199 (1924).

[18] See Santos v. Unity Hospital, 301 N.Y. 153, 93 N.E.2d 574 (1950); Van Patter v. Charles B. Towns Hospital, 246 N.Y. 646, 159 N.E. 686 (1927) (mem. opinion).

[19] See Woodhouse v. Knickerbocker Hospital, 39 N.Y.S.2d 671 (Sup. Ct.), *aff'd,* 266 App. Div. 839, 43 N.Y.S.2d 518 (1st Dep't 1943).

[20] See Howe v. Medical Arts Center Hospital, 261 App. Div. 1088, 26 N.Y.S.2d 303 (2d Dep't 1942); *cf.* White v. Prospect Heights Hospital, 278 App. Div. 789, 790, 103 N.Y.S.2d 859, 860 (2d Dep't 1951) (mem. opinion).

hospitals [21] and private corporations,[22] as well as charitable institutions, enjoy immunity.

The instant case, in marking one more act "medical" rather than "administrative," appears at first glance to be nothing more than a slight extension of the previously established New York rule. But when considered in the light of recently decided cases,[23] the real impact may be more correctly appraised. In *Perlmutter v. Beth David Hospital,*[24] the plaintiff was infused with diseased blood and suffered serious injury. The complaint, based on a theory of breach of implied warranty, was dismissed because the supplying of blood for a price by a hospital is not a sale but merely an incident of an entire contract for services to which implied warranties do not attach. Recently, in *Bing v. Thunig,*[25] the failure of a nurse to abide by the rule of a hospital in regard to changing contaminated sheets was deemed *not* sufficient to allow a recovery where burns resulted from this neglect. "With the operation in progress and respondent under anesthesia, it was not the duty of the nurses and anesthetist to interfere with the operation by substituting dry linen for linen which might be wet with some of the antiseptic, except at the direction of the surgeon." [26]

In the instant case it is not clear from the opinion exactly what constituted the negligent act.[27] However, it seems that it may have been an act which is *objectively* administrative in character—mere negligent recordation of the blood factor which had been correctly and scientifically determined. The Court, in designating the act "medical," considered it as essential to the over-all scope of the physician's treatment. Since determining the blood factor was vital to the blood transfusion, the *causal relationship* was immediate enough to warrant the conclusion that the whole operation was medical.

Thus in the principal case we have a negligent act without liability which may be characterized as: 1) objectively administrative; 2) causally related; but 3) not concurrent with the blood transfusion. The *Thunig* case carries the immunity further and includes acts which are: 1) objectively administrative; 2) merely incidental; but 3) con-

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[21] See Bakal v. University Heights Sanitarium, Inc., 277 App. Div. 572, 101 N.Y.S.2d 385 (1st Dep't 1950), *aff'd mem.*, 302 N.Y. 870, 100 N.E.2d 51 (1951).

[22] Mrachek v. Sunshine Biscuit, Inc., 308 N.Y. 116, 120, 123 N.E.2d 801, 803 (1954) (dictum).

[23] See Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792 (1954); Bing v. Thunig, 135 N.Y.L.J. 9, col. 5 (App. Div. 2d Dep't March 6, 1956).

[24] 308 N.Y. 100, 123 N.E.2d 792 (1954), 29 ST. JOHN'S L. REV. 305.

[25] 135 N.Y.L.J. 9, col. 5 (App. Div. 2d Dep't March 6, 1956).

[26] *Ibid.*

[27] "We do not know in this case whether the laboratory technician made the blood test negligently, or whether the blood test was properly made, but the result erroneously reported by the technician or by some clerk." Berg v. New York Soc'y for the Relief of the Ruptured and Crippled, 286 App. Div. 783, 786, 146 N.Y.S.2d 548, 551 (1st Dep't 1955) (dissenting opinion).

current with the operation. The shield of immunity before and during operations is nearly complete, leaving possible room for recovery only where objectively administrative acts are: 1) incidental and 2) not concurrent with the operation. Thus, a person receiving a blood transfusion in New York today must be prepared to assume most of the risk of injury.[28]

Even if public policy did at one time warrant the doctrine of immunity for charitable organizations, conditions have changed radically and the trend reveals a gravitation towards the just imposition of liability.[29] "With today's ready availability of liability insurance it is difficult to believe that the satisfactory functioning of charitable institutions requires a gratuitous license to kill or maim." [30] However, as the law stands in New York today, we are forcing the victim of a negligent medical act to make an unreasonable contribution [31] to the tortious charitable organization by a denial of a cause of action. In addition to the consideration that immunity fosters carelessness,[32] charities should be required to be *just* before they are *generous*.[33] The aberrational concept of granting immunity even when a charity "does good in the wrong way," [34] is the creation of the courts. Recently, opportunities have been presented to the New York Court of Appeals in which it could have eliminated immunity. However, the Court chose only to reaffirm its prior position.[35] It then appears that if we are to find any relief from this inequitable situation, it must come from the legislature.

TORTS — FEDERAL TORT CLAIMS ACT — GOVERNMENT HELD LIABLE FOR NEGLIGENT OPERATION OF A LIGHTHOUSE. — Plaintiff brought an action under Section 1346(b) of the Federal Tort Claims

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[28] A blood transfusion meets all the requirements of either the lay or legal definition of an "operation." See WEBSTER'S NEW INTERNATIONAL DICTIONARY 1707 (2d ed. 1946); BLACK, LAW DICTIONARY 1243 (4th ed. 1951).

[29] See Georgetown College v. Hughes, 130 F.2d 810, 827 (D.C. Cir. 1942). This may be illustrated by the fact that both the Federal Government and New York State have waived their exemption. See Federal Tort Claims Act, 28 U.S.C. § 1346 (1952); N.Y. CT. CL. ACT § 8.

[30] Thornton & McNiece, *Torts, 1955 Survey of N.Y. Law*, 31 N.Y.U.L. REV. 344, 363 (1956).

[31] See Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220, 226 (1951).

[32] See Georgetown College v. Hughes, *supra* note 29 at 824.

[33] See 3 SCOTT, TRUSTS § 402, at 2150 (1939).

[34] Georgetown College v. Hughes, 130 F.2d 810, 828 (D.C. Cir. 1942).

[35] See Mrachek v. Sunshine Biscuit, Inc., 308 N.Y. 116, 123 N.E.2d 801 (1954); Bakal v. University Heights Sanitarium, Inc., 302 N.Y. 870, 100 N.E.2d 51 (1951) (no opinion), *affirming*, 277 App. Div. 572, 101 N.Y.S.2d 385 (1st Dep't 1950).