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Malpractice Used as a Hospital Defense

Carl H. Miller*

Hospital immunity in negligence and other torts of agents and employees is disappearing steadily. The course of decisions in many states has been consistently in the direction of elimination of "charitable" immunity of hospitals.¹

Seeking another line of defense, hospital administrators have re-examined the parties generally involved in a medical negligence action—patient, physician and hospital. Hospital administrators realized quickly that in order to remain free from general negligence liability, the main onus of tort responsibility would have to be shifted to the physician (or even the nurse) whenever and wherever possible.

The first step necessary to this end was the disassociation of the hospital-physician relation from the broad principle that an employer is liable to a third person for any injury which proximately results from tortious conduct of an employee acting within the scope of his employment.² This disassociation took many forms and they met with varying degrees of success. The most successful revolved around the theory that the hospital-physician relation was not that of master-servant, but rather of principal and independent contractor.³ This theory had as a base the argument that inasmuch as hospitals, generally corporations, are not competent to practice medicine, they can in no way control, and

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therefore cannot be responsible for, the professional medical acts of their staff members.\(^4\)

Another theory, used primarily in regard to operating room torts\(^5\) and in a few post-operative situations,\(^6\) results from the concept that the surgeon in charge of an operation has complete control of everyone assisting him in the operating room.\(^7\) Hospitals, taking full advantage of agency law in this particular instance, argue that with control comes responsibility and therefore the surgeon is chargeable with the negligence of hospital employees assisting him. This theory has, in some cases,\(^8\) been repudiated by courts holding that certain duties are routine and so much a part of standard hospital practice that to hold the surgeon liable would place an undue burden upon the already burdened practitioner.

Where the primary physician-patient relation is with a doctor maintaining his own practice, hospitals have been quick to point out to the courts that this established the basic responsibility for any negligence on the part of the physician.\(^9\) This is

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\(^7\) See 60 A. L. R. 147.

\(^8\) Covington v. Wyatt, 196 N. C. 367, 145 S. E. 673 (1928); Harris v. Fall, 177 F. 79, 27 L. R. A. N. S. 1174 (7th Cir., 1910); Harlan v. Bryant, 87 F. 2d 170 (7th Cir., 1936); Hohenath v. Smith, 72 App. D. C. 343, 114 F. 2d 494 (D. C. Cir., 1940); Stewart v. Manasses, 224 Pa. 221, 90 A. 574 (1914).

\(^9\) Barfield v. South Highlands Infirmary, 191 Ala. 553, 68 So. 30 (1915); Hendrickson v. Hodkin, 250 App. Div. 619, 294 N. Y. S. 382, rev'd on other

(Continued on next page)
generally argued from the point that (1) hospitals only furnish the facilities, and (2) the physician has contractually (expressly or impliedly) assumed the liability for his patient's safety.

The newest line of defense by hospital administrators is through the use of physicians' malpractice itself. Although the idea of using the malpractice of a physician as a defense is basically not new, the attrition of charitable immunity has brought it into prominence as an effective defensive weapon. The advantages in obtaining from the court a ruling that an injury was the result of malpractice instead of negligence can best be illustrated by several recent cases.

In Morwin v. Albany Hospital the hospital, in view of a decision which abolished the rule that a staff doctor was to be considered an independent contractor, had been held liable for the negligence of a staff doctor under the theory of respondeat superior. The charge to the jury had been a general negligence charge and on appeal the reviewing court reversed the decision on the basis of that charge being erroneous. The court held that medical acts and the negligent performance thereof, for which the hospital was being held liable, fell into classification of negligence known as malpractice. Malpractice is defined generally as bad, wrong, or injudicious treatment of a patient, professionally and in respect to the particular disease or injury, resulting in injury, unnecessary suffering or death to the patient, and proceeding from ignorance, carelessness, want of proper professional skill, disregard of established rules or principles, neglect, or a malicious or criminal intent. Since malpractice does require an answer to whether an act was carried out with sufficient professional skill and knowledge, it naturally requires expert testimony to the effect that what was done was negligent, or could have been done better or in another way. The charge having been one of general negligence, and expert testimony not having

(Continued from preceding page)


10 Mayers v. Litow & Midway Hospital, supra n. 3.
11 Harding v. Liberty Hospital Corp., 177 Cal. 520, 171 P. 98 (1918).
13 Bing v. Thunig, supra, n. 3.
been introduced, the court concluded that the jury should have found the hospital not liable, and reversed the decision of the lower court.

This case illustrates well several of the reasons that make malpractice a potent defensive argument. In pleading malpractice, hospitals are advantageously served by the increased difficulty of proof that the plaintiff must overcome to win his case. A negligence action is generally within the scope of knowledge and experience of the average layman; but malpractice removes the charge from this level and by its nature necessitates the introduction of expert testimony.\textsuperscript{15} The difficulties which may arise in a situation involving expert medical testimony have been reiterated so often\textsuperscript{16} as to preclude the necessity for any further discussion. Contiguous with this problem, however, one cannot overlook the increased expense of litigation, an all too real stumbling block in the path of many a plaintiff.

In \textit{Davis v. Eubanks}\textsuperscript{17} the negligent injection of penicillin brought an injury action by the patient's administratrix against a nurse and the hospital. The hospital in its answer maintained it was in a demurrable position inasmuch as the statute of limitations for malpractice\textsuperscript{18} provided a bar to the action. The argument was defensively successful and the court held that a nurse could be guilty of malpractice within the meaning of the statute of limitations, which provided that an action must be brought within one year of the accrual of the cause. The court went on to point out that where the statute of limitations was effective as a bar to the action against the nurse, an employee of the hospital, it was also effective as a bar to the action against the hospital. This case points out what is probably the most attractive consideration in the use of malpractice as a hospital defense. That is, generally, the statute of limitations limits the time available to bring the action to a shorter period in malpractice than in negligence.

This extension of the meaning of malpractice to include nurses\textsuperscript{19} is a breakthrough in its use as a defensive weapon. Prior to this a long line of decisions had, in general, consistently held that the negligence of nurses would fall upon either the hos-

\textsuperscript{15} Prosser, Torts 134 (2nd ed. 1955).
\textsuperscript{17} 167 N. E. 2d 386 (Ohio, 1960).
\textsuperscript{18} Ohio Rev. Code § 2305.11.
pital,\textsuperscript{20} or under the borrowed servant doctrine, upon the directing
physicians.\textsuperscript{21} Typifying the majority position, we find Isen-
stein \textit{v. Malcomson},\textsuperscript{22} in which the hospital requested that the
complaint be dismissed on the ground that the action, against a
hospital for the negligence of a nurse, was not brought within
the two year period required by the statute of limitations in
malpractice actions. The court rejected this contention, holding
that malpractice must be considered in its primary meaning; and
according to such usage and acceptance, it has regularly been in-
tended to import improper treatment or culpable neglect of a
patient by a \textit{physician or surgeon}. The court went on to state
that in no instance had it been found to have possible application
to a nurse.

Additional impetus for the growing use of defensive mal-
practice comes from the increased possibility of practical and
procedural error\textsuperscript{23} by the plaintiff; not to mention the conceiv-
ability of a confusion of issues in the minds of the jurors, which
is illustrated below.

The extremes to which several courts have been persuaded
to go in accepting the hospital’s use of defensive malpractice are
worth noting. In \textit{Robinson \textit{v. Crotwell}}\textsuperscript{24} the plaintiff submitted
to an operation to relieve a disease of the nerve, tic douloureux,
upon the suggestion of the physician-owner of the hospital. As
a result of the operation the plaintiff was left permanently dis-
figured and with a $2 \frac{1}{2}$ inch by $1 \frac{1}{2}$ inch hole in his skull. In an
appeal from a judgment for the plaintiff, the court held that the

\begin{footnotesize}
\begin{enumerate}
\item Minogue \textit{v. Rutland Hospital}, supra, n. 5.
\item 227 App. Div. 66, 236 N. Y. S. 641, 643 (1929).
\item 175 Ala. 194, 57 So. 23 (1911).
\end{enumerate}
\end{footnotesize}
physician-owner of the hospital could not be held liable for the
malpractice of the operating surgeon since the only thing he did
was to administer the anesthetic and advise against the com-
pletion of the operation due to the patient’s ebbing vitality. The
court added that the fact that the operating room was so in-
adequately furnished as to be partially responsible for the in-
completion of the operation was the responsibility of the surgeon
and not that of the physician-owner. Black v. Fischer brought
to the court a situation where the offending physician was also
the managing stockholder of the defendant sanitarium. The sani-
tarium demurred on the ground that if there was any liability, it
was upon the surgeon and not the hospital. In sustaining this
point the court speciously declared that there was no control of
the agent sufficient to hold the master liable for his torts.

In most states the use of malpractice as a defensive tool, to
replace charitable immunity, is limited by the theory that, under
the doctrine of respondeat superior, a hospital will be held liable
for the negligence or malpractice of its physicians. The destruc-
tion of the independent contractor idea for the non-liability of
hospitals, however, still leaves the most important advantage,
that of a short statute of limitations. This aspect of the problem
requires some detailed consideration.

It would be contrary to the basic rules of agency for a
court to hold a hospital liable for the torts of an agent, after
the statute of limitations had erected a bar to an action against
that particular agent. The most obvious approach then, since
the limitations rule is statutory, is to seek a change through the

25 30 Ga. App. 109, 117 S. E. 103 (1923); see also Barfield v. South Highland
Infirmary, 191 Ala. 553, 68 So. 30 (1915); Jeter v. Davis-Fischer Sanitorium
Co., supra n. 3; in Runyan v. Goodrum, supra n. 3, hospital was held not liable for negligence on the part of an x-ray technician who was not a
doctor because of the special knowledge technician supposedly had.

26 Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675 (1879);
Brown v. La Societe Francaise, 138 Cal. 475, 71 P. 516 (1903); Vaughan v.
Memorial Hospital, 100 W. Va. 290, 130 S. E. 481 (1925); Gilstrap v. Oste-
opathic Sanitorium Co., 224 Mo. App. 798, 24 S. W. 2d 249 (1929); Bellandi v.
Park Sanitarium Ass'n., 214 Cal. 472, 6 P. 2d 508 (1931); Edwards v. West
Texas Hospital, 89 S. W. 2d 801 (Tex. Civ. App., 1935); Hansch v. Hacket,
190 Wash. 97, 66 P. 2d 1129 (1937); White v. Central Dispensary & Emer-
gency Hospital, 69 App. D. C. 122, 99 F. 2d 355, 119 A. L. R. 1002 (1938);
Stuart Circle Hospital Corp. v. Curry, 173 Va. 136, 2 S. E. 2d 153 (1939);
Giusti v. C. H. Weston Co., 165 Or. 525, 108 P. 2d 1010 (1941); Treptau v.
Behrens Spa, 247 Wis. 438, 20 N. W. 2d 108 (1945); Rice v. California Lu-
theran Hospital, 27 Cal. 2d 916, 163 P. 2d 860 (1945); Grigalaukas v. United
States, 103 F. Supp. 543 (D. C. Mass., 1951); Lexington Hospital, Inc. v. 
White, 245 S. W. 2d 927 (Ky., 1952); Moeller v. Hauser, 237 Minn. 368, 54 
N. W. 2d 639, 57 A. L. R. 2d 364 (1952); Waynick v. Reardon, 236 N. C. 
997 (1953); Wilson v. Lee Memorial Hospital, 65 So. 2d 40 (Fla., 1953); 
Garfield Memorial Hospital v. Marshall, 92 App. D. C. 234, 204 F. 2d 721, 
37 A. L. R. 2d 1270 (D. C. Cir., 1953); Miami v. Brooks, 70 So. 2d 306 (Fla., 
(1955); Bing v. Thunig, supra n. 3; Brown v. Moore, 247 F. 2d 711 (3rd 
Cir. 1957).
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legislative process. Here another fallacy arises, well illustrated by two recent legislative enactments. In New Jersey a decision rendered in 1958 in Collopy v. Newark Eye and Ear Infirmary\(^{27}\) ended the charitable immunity that hospitals in that state had enjoyed up until that time. In 1959, even before enough time had elapsed for a decent burial, the state legislature of New Jersey limited the liability of charitable hospitals to $10,000.\(^{28}\) Similarly, the Kansas courts voided the charitable theory of immunity in Noel v. Menninger Foundation.\(^{29}\) Shortly thereafter, the state legislators saw fit to restore immunity by limiting hospital liability to the extent of the insurance carried by each particular hospital.\(^{30}\) This leaves the determination of hospital liability solely in the hands of the hospital administrators, a perfect solution from the viewpoint of hospital administrators. To think that statutes of limitations will be lengthened by state legislatures requires a naive view of the influence of various medical lobbying groups, and extreme optimism in regard to legislative liberality.

Some of the advantages of hospitals, as to defensive malpractice, are threatened by the theory that a hospital may be liable for the professional acts of its staff. In Seneri v. Haas\(^{31}\) paralysis developed from the negligent injection of a spinal anesthetic. The court discarded the various immunity theories and claimed that it was for the jury to determine whether the anesthesiologist was the "ostensible agent" of the hospital. If so, the hospital would be liable for the negligent acts of the anesthesiologist. The court went on to say that the patient was not on notice and had no duty to inquire as to agency relations, but could generally look to the hospital for medical services, which included the acts of its professional staff. In Brown v. Moore\(^{32}\) a patient in a proprietary sanitorium, shortly after electro-shock treatment, was permitted to walk about. During the course of this walking about, he fell down a flight of stairs and broke his neck. The district court held that the doctrine of respondeat superior did not apply. On appeal this was reversed by the circuit court. The court held that whether the partners who operated the sanitorium held out or represented the physician to be their employee to administer treatment to the patient, so as to render them liable under respondeat superior, was for the jury to decide. Whether or not these two decisions will establish a trend still remains to be seen, but they do seem in keeping with the erosion of charitable immunity.\(^{33}\)

\(^{28}\) Ch. 90, Laws 1959.
\(^{30}\) S. B. 239.
\(^{31}\) Supra n. 26.
\(^{33}\) For a state by state analysis of the present status of charitable immunity see Horty, Hospital Law Manual (Vol. 2, 1959).
Malpractice on several occasions has been found to be a double edged weapon, much to the woe of hospital administrators. In *Clary v. Christiansen* an practitioner vigorously defended a malpractice charge, and returned the liability to the hospital. The physician maintained that the nurse, in preparing the operating room and supplies, was not his employee, and that her negligence was attributable to the hospital as he had no right to control and supervise. Similarly, a Tennessee court recently held, in *Rural Educational Ass’n v. Bush* that a hospital was liable, under respondeat superior, for an improper sponge count conducted by the operating room nurse. The court reasoned illuminatingly that, although the surgeon is in complete control of the operating room, certain duties of attending nurses “do not involve professional skill or decision on the part of the surgeon.”

That hospitals will continue to use malpractice defensively seems clear. In many cases the practitioner’s and/or patient’s attorney will be unable to cope with this, but if he is to be in the best possible position in protecting his client he must examine closely the physician-hospital administrator relation. A reassessment of that relation should then be worked into one of the following avenues of argument: (1) Malpractice used defensively is akin to the “administrative vs. medical act” distinction, which has been rejected by the courts as impossibly confusing; (2) It violates the public policy which declares hospital liability to be the same as that of any employer or principal; (3) It allows administrators to subordinate physicians (who have little enough actual control of hospitals) and to make scapegoats of physicians and nurses; (4) It is an unwise division of negligence into “class categories”; (5) It ignores the patient’s actual reliance on the hospital to which he pays fees; (6) It is not equitable in its effect.

A “horrible example” of the results of use of malpractice as a defense is seen in a recent case: *Weinstein v. Prostkoff*. There a nurse anesthetist’s negligence in carrying out an obstetrician’s orders to anesthetise a woman in childbirth apparently led to the death of the woman in the delivery room. Thereafter a chain of ugly events followed. The hospital records were altered. Hospital personnel blamed the obstetrician, who was at most only passively negligent, if that. At the trial, defense counsel misbe-
haved. There was an all around mess of lying and of passing the buck. The jury apparently was thoroughly confused by the malpractice aspects. It found the doctor liable, but not the nurse nor the hospital. The judge set aside the verdict as a miscarriage of justice, and ordered a new trial. It was a shocking illustration of the worst possibilities of the "defense" of malpractice.

In Shutts v. Siehl, nurses refused to loosen a patient's cast without the doctor's approval. The doctor did not approve the patient's request, conveyed by the nurses. When harm to the patient followed, the court directed a verdict for the hospital; but a verdict for the doctor was reversed due to error in the instructions to the jury. The pattern of shifting the onus to the doctor is visible in this case.

The final effect of hospital denial of the respondeat superior principle, however, is found in Sands v. Klein. There a hospital actually cross-claimed against the doctor, arguing that his negligence was active and its negligence was passive. The court summarily brushed aside this argument, holding that both were negligent, in that case, and that it was ineffective because they were joint tort feasors in pari delicto. But the boldness of the attempt is illuminating. In a very recent case the idea of active vs. passive negligence, and indemnification of the hospital by the doctor seems to be accepted.

The danger of the use of malpractice as a defense for hospitals, at the expense of the professional staff members, as predicted, has become very apparent. It depends on the idea of primary and secondary liability, where, as in New York, that concept of indemnification is accepted.

42 Oleck, supra, n. 36.