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Torts of Administrative Personnel of Hospitals

Rathuel L. McCollum*

IN LITIGATION against a hospital the plaintiff often alleges that the defendant is liable for damages because its servant or agent has caused his injury. Frequently the courts have spoken of hospital personnel as acting in either (1) a medical or professional capacity or (2) an administrative capacity. The former category is generally considered to be comprised of doctors and nurses, whereas the latter category comprises the remainder of the hospital staff, who are considered to be servants. In *Schloendorff v. Society of New York Hospital*¹ the court referred to the superintendent, assistant superintendents, orderlies and "other members of the administrative staff" as being servants of the hospital.

The purpose of this article is to review and analyze cases in which torts have been committed by hospital personnel who may be considered as administrative employees.

Obstructions Near Entrances and Exits

Failure of hospital employees to keep entrances and exits free of obstructions may result in injury to one walking on the premises. Thus, liability arose where a husband, while carrying his wife from the hospital building where she was a patient, tripped over an iron pipe which negligently had been placed and permitted to remain close to the exit.²

Another type of obstruction is one in which a chain was placed negligently across a walk leading to a private side door previously used as a public entrance to the hospital, without placing any notices nearby warning that the door was no longer used as a public entrance. The hospital was held liable for injuries sustained by a wife who tripped on the chain while approaching the entrance to visit her husband, a patient there.³

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¹ *Schloendorff v. Society of New York Hospital*, 211 N. Y. 125, 105 N. E. 92 (1914).

² *Cohen v. General Hospital Soc.*, 113 Conn. 188, 154 A. 435 (1931).

³ *Comess v. Norfolk General Hospital*, 189 Va. 229, 52 S. E. 2d 125 (1949).

The court pointedly reiterated the principle of law that an owner of premises must give notice or warning of any unsafe condition unknown to an invitee, unless the dangerous condition is open and obvious to a person exercising reasonable care for his own safety.⁴

Slippery Floors

The condition of floors of a hospital is a source of much concern. It is especially important during visiting hours. Often the janitors have mopped floors but the floors are not completely dry by the time visitors arrive. At other times the polishing wax has not dried sufficiently to be walked on without special care.

In *McLeod v. St. Thomas Hospital*⁵ the plaintiff, while visiting her husband, slipped and fell on a hospital floor and sustained injuries by reason of faulty construction of the tile and some slippery substance thereon. The defendant received judgment in the trial on the basis of charitable immunity. The Court sustained a demurrer to the plaintiff's replication that the hospital had liability insurance. Upon appeal the judgment was reversed and the case was ordered tried on the merits of the issue.

It should not be assumed that every fall on a slippery floor at a hospital will result in a judgment in favor of the victim. In a Louisiana case⁶ the plaintiff was visiting a sick friend and sustained injuries from a fall on the floor of the hospital corridor, which had been waxed. However, at the trial evidence showed that while the floor was being waxed by a hospital employee warning signs were posted in the corridor, warning the public of the slippery condition of the floor.⁷ The suit was dismissed and that judgment was affirmed on appeal.

In an action against a private non-charitable hospital, a private nurse attending a paying patient recovered for injuries sustained when she slipped on leaves and flower petals which had been allowed to remain on the floor of a corridor.⁸ Employees of the hospital had neglected to remove the debris.

Weather conditions may have considerable effect upon the question of negligence. That was a part of the problem presented

⁴ Prosser, *Law of Torts* 452 (2d ed. 1955).

⁵ *McLeod v. St. Thomas Hospital*, 170 Tenn. 432, 95 S. W. 2d 917 (1936).

⁶ *Lusk v. United States Fidelity & Guaranty Co.*, 199 So. 666 (La. 1941).

⁷ Prosser, *op. cit. supra*, n. 4.

⁸ *Bounds v. Baldwin*, 35 Ohio L. Abs. 434, 41 N. E. 2d 901 (1941).

in the case of *Doctors Hospital v. Badgley*.⁹ A visitor slipped and fell on a polished wet floor of the hospital lobby. Rain had fallen during the six hours elapsed time from the last mopping with a dry mop until the accident occurred. The court held that the question of negligence was one for jury.

The decision that seemingly set back justice for years evolved from the twin cases of *Fredericksburg Hospital and Clinic v. Springall* and vice versa.¹⁰ This was an action by a visitor against the hospital for injuries that she received in a fall on a floor of the hospital that had been treated with a liquid wax. The jury found: (1) that the floor was slick and slippery; (2) that the defendant caused such condition; (3) that such action constituted negligence; and (4) that there was no contributory negligence on the part of the plaintiff. Yet, the jury brought in a verdict for the defendant. To the credit of the trial judge, it must be said that he set aside the verdict as irreconcilable with the findings of fact. However, the defendant applied to the Civil Court of Appeals of Texas for a writ of mandamus to require the trial judge to render judgment on the verdict. The appellate court gave the judge the choice of rendering judgment or having the writ of mandamus issued. Upon judgment being given for the defendant, the plaintiff appealed to the Civil Court of Appeals. They said:

We are of the opinion that the record does not show as a matter of law, that appellee's acts were the proximate cause of Mrs. Springall's injury.¹¹

There *could* be logic in the reasoning of this Court. However, this writer doubts that one lifetime would be long enough to find it.

Elevator Injuries

It must be something of a shock to step where an elevator is supposed to be and find nothing under one's feet but empty space. This was the crux of the complaint in *Hospital of St. Vincent v. Thompson*.¹² The plaintiff had gone to the hospital to render necessary aid to a potential patient, and sustained in-

⁹ *Doctors Hospital v. Badgley*, 156 F. 2d 569 (D. C. Cir. 1946).

¹⁰ *Fredericksburg Hospital and Clinic v. Springall*, 220 S. W. 2d 692 (Tex., 1949); and *Springall v. Fredericksburg Hospital and Clinic*, 225 S. W. 2d 232 (Tex., 1949).

¹¹ *Springall v. Fredericksburg Hospital and Clinic*, supra, n. 10.

¹² *Hospital of St. Vincent v. Thompson*, 116 Va. 101, 81 S. E. 13 (1914).

juries as a result of the elevator shaft being left negligently unprotected. Although a beneficiary of the charity could not have recovered, the plaintiff, being a stranger to the charity, could maintain his action successfully.

Recovery was denied the plaintiff in *Emery v. Jewish Hospital Assn.*¹³ on the ground that *respondeat superior* did not apply to a charitable corporation. In this case the injured party was a boy alleged to be only 15 years of age when he was hired by the hospital to operate the elevator in violation of a state statute. He was injured while performing his duties. The Court of Appeals affirmed the trial court's action in overruling the plaintiff's demurrer to the defendant's answer.

In the frequently cited case of *Williams' Adm'x. v. Church Home for Females and Infirmary for Sick*¹⁴ a death action was filed. Plaintiff pleaded that while the intestate was entering an elevator in the home, the elevator was started through the gross negligence of the operator, an employee of the defendant, and that the intestate received injuries from which she died. The plaintiff contended further that the defendant had liability insurance on the elevator in the amount of \$5,000, and that by the terms of the policy the home was protected against loss in any death claims filed against it by any person suffering injuries on the elevator. A demurrer to the petition was sustained and the plaintiff appealed.

The Court of Appeals of Kentucky refused to retreat from its position holding charitable institutions exempt from liability for the torts of agents or employees.¹⁵ As to the liability insurance contract, the court held it to be a contract of indemnity only. Then it followed that if there be no loss, there is no liability on the part of the company. Thus, where the hospital servant could not bind his master for his torts, neither could the master's insurer be held liable.

Defective Equipment Furnished to Patients

The responsibility for *furnishing* suitable equipment for patients belongs to the hospital administrator and his subordinates, as distinguished from those qualified to *use* such equipment. In

¹³ *Emery v. Jewish Hospital Ass'n.*, 193 Ky. 400, 236 S. W. 577 (1921).

¹⁴ *Williams' Adm'x v. Church Home for Females and Infirmary for Sick*, 223 Ky. 355, 3 S. W. 2d 753, 62 A. L. R. 721 (1928).

¹⁵ *Emery v. Jewish Hospital*, *supra*, n. 13.

Miller et ux. v. Sisters of St. Francis et al.,¹⁶ the plaintiff alleged that the defendant failed to furnish a proper bassinet for a baby, who was placed in an adult bed adjacent to a radiator and as a consequence suffered a burn. At the conclusion of the plaintiff's evidence the defendant moved to strike certain testimony and also for a dismissal of the petition. Both motions were granted, whereupon the plaintiff appealed. The court stated that a hospital, even though it be a charity, is liable for failure to furnish proper equipment.

In *Cristini v. Griffin Hospital*,¹⁷ the plaintiff charged the hospital with negligence in failing to provide proper equipment for his baby. In this case the baby died. The administrator of the hospital testified concerning the steps taken to provide the equipment. He offered in evidence a circular issued by the manufacturer.

The court charged, over the objections of the defendant, and without mentioning charitable immunity, that the defendant was liable for negligence, to which the defendant excepted. The jury found that the baby received the burns because an agent of the hospital acting within the scope of authority had dropped him.

Upon appeal the judgment was set aside and a new trial was ordered on the question of liability. As in the *Williams* case,¹⁸ the court held that liability insurance does not determine liability for torts. The opinion stated:

If the charitable institution is not liable for the negligence alleged, it cannot be made liable because it took out insurance which would cover a judgment against it.¹⁹

A different type of injury due to faulty equipment occurred in the case of *Holtfoth v. Rochester General Hospital*.²⁰ The plaintiff brought an action against the hospital for injuries sustained when the right leg rest of a wheel chair collapsed, causing the patient's right foot to strike the floor. Reversing the lower court, the Court of Appeals of New York held that the question whether the hospital administration exercised reasonable care to provide a wheel chair in a safe condition was for the jury to decide. A new trial was ordered.

¹⁶ *Miller et ux. v. Sisters of St. Francis et al.*, 105 P. 2d 32 (Wash. 1940).

¹⁷ *Cristini v. Griffin Hospital*, 134 Conn. 282, 57 A. 2d 262 (1948).

¹⁸ *Williams' Adm'x v. Church Home for Females and Infirmary for Sick*, supra, n. 14.

¹⁹ *Cristini v. Griffin Hospital*, 134 Conn. 282, 57 A. 2d 262, 264 (1948).

²⁰ *Holtfoth v. Rochester General Hospital*, 304 N. Y. 27, 105 N. E. 2d 610, 31 A. L. R. 2d 1113 (1952).

Negligence in Guarding Patients

Often injuries sustained by hospital patients are self inflicted. The question of negligence involves the duty of the hospital to provide adequate quarters and employees to prevent the patient from doing violence to himself. The intensity of pain may well be a factor in determining why the patient acted in the manner that he did. In *Downs v. Harper Hospital*²¹ the question of negligence on the part of the hospital trustees was presented. The plaintiff's decedent, who was insane, was placed in the defendant hospital. He was violent and was confined in a third floor room that was especially arranged for such patients. The decedent wrenched the iron framework from the window and jumped to his death. The court stated that the hospital was not liable, on the basis of charitable immunity. Negligence of the hospital trustees in the construction of the building would not affect the decision.

An action was brought in the case of *Mills v. Society of New York Hospital*²² for damages as a result of the death of a paying patient who committed suicide while on a walk in company with four other patients and only one hospital aide. The court held that a charitable hospital was not liable for such a death, on the basis that there was no administrative negligence.

A different result was reached in *Fowler v. Norways Sanitorium*.²³ The suicidal tendencies of the patient were known by both the hospital administrative officer (a physician) and the attendant under orders to guard him. Owing to the negligence of the attendant the patient committed suicide. Upon appeal by the plaintiff the court held that the question of the hospital's liability for the negligence alleged should be decided by the jury.

Falls Resulting in Injuries to Patients

Care necessary in handling of patients is a matter that cannot be overemphasized. Unable to move himself or care for himself, the patient must look to attendants for aid. Gentleness and caution are the orders of the day in such instances.

In *McCormack v. Jewish Hospital of Brooklyn*²⁴ an action

²¹ *Downs v. Harper Hospital*, 101 Mich. 555, 60 N. W. 42 (1894).

²² *Mills v. Society of New York Hospital*, 242 App. Div. 245, 274 N. Y. S. 233 (1934); *affd.* without opinion, 270 N. Y. 594, 1 N. E. 2d 346 (1936).

²³ *Fowler v. Norways Sanitorium*, 42 N. E. 2d 415 (Ind., 1942).

²⁴ *McCormack v. Jewish Hospital of Brooklyn*, 26 App. Div. 731, 283 N. Y. S. 737 (1935).

was brought against a hospital to recover for injuries sustained by a patient who fell while being carried down the stairs to the ambulance on a stretcher. The trial court dismissed the action. Upon appeal it was held that testimony to the effect that a person was injured while being carried on a stretcher down stairs to an ambulance sent by the hospital establishes a *prima facie* case of negligence.

A decision that caused reverberations throughout the country was rendered in *Avelone v. St. John's Hospital*.²⁵ The plaintiff alleged that he was admitted to the defendant hospital, as a paying patient, for surgery; that soon after his admission he was negligently permitted to fall from a bed furnished by the defendant, and that as a result he sustained injuries; then the defendant again negligently permitted him to fall out of a bed, whereby he sustained further injuries.

The defendant denied that it was negligent, and as a separate defense alleged that it was a corporation not for profit, maintaining and operating a charitable hospital. A demurrer to the separate defense was overruled and the action was dismissed.

Upon appeal, the Supreme Court of Ohio reviewed prior decisions on the subject of the doctrine of *respondeat superior* and the current shift in legislative and judicial policy concerning hospital immunity. The syllabus of the decision is as follows:

(1) A corporation not for profit, which has as its purpose the maintenance and operation of a hospital, is under the doctrine of *respondeat superior*, liable for the torts of its servants. (*Taylor, Admr. v. Protestant Hospital Assn.*, 85 Ohio St. 90, *Rudy v. Lakeside Hospital*, 115 Ohio St. 539, and paragraphs one and two of the syllabus of *Lakeside Hospital v. Kovar, Admr.*, 131 Ohio St. 333, overruled.)

(2) In an action to recover damages for injury to a patient alleged to have been caused by the negligence of a non-profit hospital, an answer filed by the defendant, which alleges that it is a corporation not for profit maintaining and operating a public charitable hospital, does not state a defense and is subject to demurrer.

The distinction made between the relation of a hospital to doctors and nurses and that existing between a hospital and other personnel is quite important. The court pointed out that they were not deciding that persons such as doctors and nurses, under circumstances where the hospital has no authority or right

²⁵ *Avelone v. St. John's Hospital*, 165 Ohio St. 467, 135 N. E. 2d 410 (1956).

of control over them, can bind the hospital by their negligent acts. They stated the following:

The present case has to do only with the pleadings and does not extend beyond the question of liability of a hospital for the negligence of those employees who can and do make the hospital answerable for their actions under the doctrine of *respondeat superior*.²⁶

Thus, in litigation against a hospital in Ohio involving a tort committed by a member of the staff, the question of control exercised over the tortfeasor is of utmost importance. The decision in one of the chief law-making states is of great importance in all the states.

False Imprisonment of Patients

False imprisonment is the confinement of a person within certain boundaries fixed by the wrongdoer, without legal justification, by an act or breach of duty intended to result in such confinement.²⁷ The fact that the plaintiff considered that he was being restrained is not sufficient unless he had reasonable ground to believe that force would be used to prevent him from attaining his liberty.

Where a patient enters a hospital for treatment he does not thereby surrender legal control of his person to the hospital authorities. In *Cook v. Highland Hospital*²⁸ the plaintiff brought an action for damages for false imprisonment. She was sane, but entered the hospital not knowing that it was an institution for the insane. Subsequently she was detained against her will. The fact that the head of this private asylum believed in good faith that he was entitled to imprison a patient who desired to leave was held to be no defense and the hospital was liable for damages.

The situation in *Boardman v. Burlingame*²⁹ was different from the prior case discussed. Here the plaintiff was a former inmate of a hospital for mental diseases. The action for damages was based on the ground that the plaintiff was induced by fraud and deceit practiced by employees to remain in the hospital for several months. A judgment for the plaintiff was set aside.

²⁶ *Ibid.*, at 478.

²⁷ Prosser, *op. cit. supra*, n. 4, at 48.

²⁸ *Cook v. Highland Hospital*, 168 N. C. 25, 84 S. E. 352 (1915). See also *Hoffman v. Clinic Hospital*, 213 N. C. 669, 197 S. E. 161 (1938).

²⁹ *Boardman v. Burlingame*, 123 Conn. 646, 197 A. 761 (1938).

Traffic Accidents Involving Hospital Vehicles

Operation of a hospital ambulance in densely populated areas with heavy traffic is indeed a formidable problem. However, the privileged "emergency" nature of the vehicle does not give its driver a right to throw caution to the winds. Where the vehicle is driven negligently, accidents are likely to occur, and liability may be found.

An action was brought for injuries sustained in a collision between an ambulance and a taxicab in which the plaintiff was riding, in *Murtha v. New York Homeopathic Medical College and Flower Hospital*.³⁰ The court refused to grant immunity to the defendant even though the ambulance service was supplied pursuant to a statute which granted to emergency-trip ambulances the privilege to ignore some traffic laws.

In *Daniels v. Rahway Hospital*³¹ the court held the hospital liable to the plaintiff, who had no beneficial relation to the hospital and was injured in a collision between the hospital ambulance and an automobile, due to the negligence of the ambulance driver.

The first case in which the New York Court of Appeals was presented with the question of recovery by a beneficiary of a hospital for injuries sustained by the negligence of a mere servant or employee was decided in 1937. The action was brought in *Sheehan v. North Country Community Hospital*.³² The plaintiff, a paying patient, was being removed to her home in the hospital ambulance and was injured, through the negligence of the driver, in a collision between the ambulance and another vehicle. The court decided that the hospital was liable, citing *Schloendorff v. Society of New York Hospital*.³³

The federal courts were called upon to decide the case of *Henry W. Putnam Memorial Hospital v. Allen*,³⁴ where there was no controlling state decision. Mary K. Allen brought the action against the hospital and Samuel C. Haynes to recover for personal injuries incurred in a collision between the automobile

³⁰ *Murtha v. New York Homeopathic Medical College and Flower Hospital*, 126 N. E. 722 (N. Y. 1920).

³¹ *Daniels v. Rahway Hospital*, 10 N. J. Misc. 585, 160 A. 644 (1932).

³² *Sheehan v. North Country Community Hospital*, 7 N. E. 2d 28, 109 A. L. R. 1197 (N. Y. 1937).

³³ *Schloendorff v. Society of New York Hospital*, supra, n. 1.

³⁴ *Henry W. Putnam Memorial Hospital v. Allen*, 34 F. 2d 927 (2d Cir., 1929).

driven by her and the hospital ambulance driven by Haynes. A verdict and judgment were rendered for the plaintiff. Both defendants appealed from the judgment of the District Court of the United States for the district of Vermont. Unhampered by any prior binding state decisions, the Court of Appeals affirmed the judgment.

Negligence of Hospital Technicians

At law, hospital technicians at one time may have been "neither fish nor fowl," but today they may be either. Gradually, the picture is coming into focus, as to their legal status.

In *National Homeopathic Hospital v. Phillips*³⁵ an action had been brought to recover for the death of the plaintiff's decedent. The petition alleged that, while the deceased was a patient at the defendant hospital, death resulted from a transfusion of incompatible blood that had been tested and reported, erroneously, by a technician in the hospital as being compatible. The court stated:

The main question was whether such a relationship prevailed between the hospital and technician as to render the hospital liable upon the principle of *respondeat superior*. The trial court held a master and servant relationship did exist, and submitted the question of negligence to the jury, which returned a verdict for the plaintiff.

We think the court was right. The undisputed evidence showed that the laboratory was an established part of the hospital. By arrangement with an outside physician it was operated under his overall direction. The technician was hired and paid by the hospital. In this case the hospital, in usual course, ordered a laboratory test. The technician, without the presence or supervision of the physician, made the test and submitted her report directly to the hospital. Relying thereon the hospital made the transfusion. In our opinion the facts clearly established the responsibility of the hospital for the acts of its technician. . . .

The court pointed out that this responsibility was not affected by the fact that, even though agreeable to statutory requirements, the technical work in the laboratory was put under the "direction" of a physician.

Another blood-typing error was involved in the case of *Berg v. New York Society for the Relief of the Ruptured and Crip-*

³⁵ *National Homeopathic Hospital v. Phillips*, 181 F. 2d 293 (D. C. Cir., 1950).

pled.³⁶ Mrs. Berg was given the wrong type of blood in a transfusion, due to the error of the laboratory technician who analyzed a sample of the patient's blood.

At trial of the action brought against the attending physician and the hospital, the court, sitting without a jury, awarded judgment against the hospital, holding it liable for the laboratory technician's negligence in reporting the blood classification. Upon appeal to the Court of Appeals of New York, after reversal by the intermediate appellate court, the judgment of the trial court was reinstated. Although the court called the blood test a "medical act" in that it was preparatory to a transfusion, they decided against the hospital under the doctrine of *respondet superior*, because the laboratory was "no independent practitioner" but "a salaried employee doing routine work which required a minimum of skill and training."

A different type of technician was involved in the case of *Mississippi Baptist Hospital v. Moore*.³⁷ The plaintiff alleged that she fell and injured her arm, that her attending physician advised her that he was afraid that the arm had been fractured, and that it would be necessary for her to have an x-ray picture made to discover whether or not this was a fact. She further alleged that the defendant did take a picture of her arm, which picture did not disclose the true condition thereof and that the arm was treated for a sprain and not for a break, and because of the improper treatment the arm had become permanently and totally impaired. The trial court rendered judgment for the plaintiff. The Supreme Court of Mississippi reversed the judgment and rendered judgment for the defendant, stating in paragraph 4 of the syllabus as follows:

A plaintiff in a suit for negligence in taking an X-ray picture, by reason of which picture a fracture was not disclosed, must prove with reasonable certainty that the injury would not have resulted had a proper picture been made and proper treatment administered.

This puts such an injured party in the position of attempting to prove *what might not have happened*. Could anything be more ridiculous?

³⁶ *Berg v. New York Society for the Relief of the Ruptured and Crippled*, 136 N. Y. S. 2d 528 (1954); *revd.*, 283 App. Div. 783, 146 N. Y. S. 2d 548 (1955); judgment of trial court reinstated, 1 N. Y. 2d 499, 154 N. Y. S. 2d 455, 136 N. E. 2d 523 (1956).

³⁷ *Mississippi Baptist Hospital v. Moore*, 126 So. 465 (Miss., 1930).

Libel by Hospital Personnel

One of the types of action infrequently brought against a hospital is that of libel. In *Rickbeil v. Grafton Deaconess Hospital*,³⁸ the secretary of the hospital, acting within the scope of his employment, dictated an alleged libelous letter to his private stenographer, who, at his direction transcribed her notes, wrote the letter and mailed it to the plaintiff as directed by the secretary. The court held that this constituted publication within the law of libel, regardless of whether the relation between the secretary and the stenographer was that of master and servant or of co-employees of the hospital. Thus the hospital was not immune from liability for this tort, although it was a non-profit charitable corporation.

Suppose that two patients having identical names were confined to the same hospital. Upon discharge of both of them one paid his bill in full but the other one defaulted. Should the hospital address a letter and cause it to be delivered to the one who had paid his bill accusing him of failure to do so, this would constitute libel if it could be shown that publication of the letter occurred.

Miscellaneous Torts

A hospital may be held liable where a student nurse flings open a door, striking a special nurse³⁹; where an attendant negligently leaves an electric lamp on a patient's bed and it subsequently falls into the bed, burning the patient⁴⁰; or where employees retain possession, unlawfully, of the body of a deceased person.⁴¹ However, in a Maryland case the hospital was held not liable to a fireman for injuries sustained while in the performance of his duties on the hospital premises.⁴² Here the court would not hold the hospital liable for the negligence of its employees in allowing the fire escape to become defective. Apparently that merely is one of the hazards of the fireman's trade!

³⁸ *Rickbeil v. Grafton Deaconess Hospital*, 74 N. D. 525, 23 N. W. 2d 247, 166 A. L. R. 99 (1946).

³⁹ *President and Directors of Georgetown College v. Hughes*, 130 F. 2d 810 (D. C. Cir., 1942).

⁴⁰ *Dillon v. Rockaway Beach Hospital and Dispensary*, 284 N. Y. 176, 30 N. E. 2d 373 (1940).

⁴¹ *Howard v. Childrens Hospital*, 37 Ohio App. 144, 174 N. E. 166 (1930).

⁴² *Loeffler v. Sheppard and Enoch Pratt Hospital*, 130 Md. 265, 100 A. 300 (1917).

The recent case of *Morwin v. Albany Hospital*⁴³ deserves special attention. There the hospital, with no charitable immunity for negligence, under the New York rule, sought to avoid liability for a staff anesthetist's possible negligence. It argued, in effect, that he, being a doctor, was guilty of malpractice; and only doctors, not hospitals, can commit malpractice. Both the legal profession and the medical profession await the final disposition of this case with intense interest.

Conclusions

In jurisdictions where the doctrine of charitable immunity does not offer hospitals complete protection from liability for torts of their agents or employees, the status of the actual tortfeasor is of prime importance. If he belongs to that class who are considered *servants* or *administrative employees*, the hospital is liable for his torts committed in the course of his employment.

An employee of a hospital engaged in duties other than the practice of medicine, and under the control of the hospital, is an administrative employee, under the view generally expressed in decisions hitherto. But the negligence of a hospital administrator in either hiring or failing to discharge an incompetent resident staff member should bind the hospital for the torts of such person as well as for the torts of a cleaning woman. This is true even though the tortfeasor was, at the time of his wrongful act or omission, "engaged in the practice of medicine," because surely he was serving the purpose of the hospital. There seems to be no good reason why the doctrine of *respondeat superior* should not apply in such an instance.

⁴³ *Morwin v. Albany Hospital*, 7 A. D. 2d 582, 185 N. Y. S. 2d 85 (Supr. Ct., App. Div., 3rd Dept., Apr. 23, 1959).