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## *Physician's Use of Hospital Facilities: Right or Privilege?*

*Jewel Hammond Mack\**

Let's suppose that one day you saw a sign which read:

DOCTORS

*Bring your Patients to Welcome Hospital*

THE BEST IN THE NATION

Modern            Convenient            Reasonable

*The Interest of the Patient comes First*

*Before you make your choice, come in and talk with us*

*Immediate admittance for emergency patients.*

If the need for such a sign ever existed, the entire picture of modern hospital facilities would change, for the physician as well as for the patient.

For a revelation of the picture as it really exists today, one needs only to look at any recent public health statistics on available facilities for the practicing physician and his patients in most large metropolitan areas. They show how limited the situation is, in both public and private hospitals. Besides the fact that an overall shortage of facilities exists, in addition there are further limitations for some physicians who for one reason or another find themselves forced into still narrower limits even within the overall limits, while some physicians find themselves excluded altogether. In many instances the patient is delayed while he *himself* makes the necessary connections; or he finds himself forced to place his confidence in a physician not of his own choice; or, he may find himself excluded altogether.

The physician's primary concern is to keep his pledge to each and every one of his patients—to those who require hospital care as well as those who do not require hospitalization. Should he be forced into a limited "transient-type" practice, as far as hospitals are concerned, when he is certified to engage in a specialized field of medicine? To ask the question is to answer it.

It is a patient's right to choose his attending physician,

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whether the patient requires hospital care or not. Should the patient be forced to forsake the physician in whom he has placed his confidence, because his own physician has no hospital privileges; or, should he be forced to wait longer than he normally would, because his physician has privileges at only one hospital, which at the time has no available space? To ask that question, too, is to answer it.

In a recent case decision<sup>1</sup> the plaintiff (physician) sought to enjoin the defendant (hospital) from denying to him the use of its facilities in performing operations. He claimed that the rules and regulations of the hospital were arbitrary, and that the action of the board in curtailing his activities there without a hearing was illegal and in violation of his constitutional rights. The Court, in affirming the judgment for the defendant, based its decision on these factors:

- (1) The hospital was not a municipal corporation, but a private hospital; and
- (2) Injunction was an improper action to bring, because<sup>2</sup> the plaintiff could show no irreparable injury.

The latter point,<sup>3</sup> involving irreparable injury as discussed by the learned judge, raises this query: Can such injury to a physician who has dedicated himself to the aid of humanity be measured in terms of dollars and cents? Is not the well-being of the patient of foremost concern, regardless of the income of the physician? Usually, too, denial of hospital privileges results in diminution of the physician's income. Moreover, one disgruntled patient can do more harm than fifty satisfied ones can do good.

I am inclined to think that the decisive factors should be the qualifications<sup>4</sup> of the particular physician and the standards which the hospital is trying to maintain; not questions of tort or corporation law.

This brings us to the first point upon which the court based its decision, and the distinction upon which most courts base

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<sup>1</sup> *Edson v. Griffin*, 21 Conn. Sup. 55, 144 A. 2d 341, (1958), holding that private hospital has the right to exclude any physician practicing therein, within the sound discretion of its managing authorities.

<sup>2</sup> *Ibid.* Irreparable injury normally is an essential element of an action for injunction.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* A private hospital could properly limit a physician's right to practice in the hospital as he had practiced in the past; without regard to his qualifications.

decisions in such cases. The court differentiated between a *public corporation and a private corporation*, saying:<sup>5</sup>

The distinction between a public and private corporation has long been recognized. A public corporation is an instrumentality owned in the public interest, supported by public funds, and governed by those deriving their authority from the state. Public institutions such as state, county, and city hospitals and asylums are owned by the public and are devoted chiefly to public purposes. . . . On the other hand, a corporation organized by permission of the legislature, supported largely by voluntary contributions, and managed by officers and directors who are not representative of the state or any political subdivision, is a private corporation, although engaged in charitable work or performing duties similar to those of public corporations.<sup>6</sup>

The mere fact that the hospital receives State aid, financial assistance from the General Assembly, special grants from surrounding towns, or contributions from the United Fund or Community Chest, does not change its status when the majority of its income is derived from *charges* for its services. Generally, moreover, equity will not interfere with internal management of a private corporation, unless its acts are fraudulent, illegal, or *ultra-vires*.<sup>7</sup>

The real test is whether or not, under the charter or corporate powers granted, the hospital administration has reserved the right to manage and control its own affairs.<sup>8</sup> Courts will not interfere with the internal management of a private corporation, but will leave questions of policy and management solely to the honest decisions of the officers and directors; and this rule applies to private hospitals.<sup>9</sup>

In the *Levin* case,<sup>10</sup> a physician who was denied hospital privileges alleged, *inter alia*, that the rules and regulations of the medical staff constituted a restraint of trade in violation of

<sup>5</sup> *Ibid.* See, generally, Oleck, *Non-Profit Corporations & Assns.* (1956).

<sup>6</sup> See also, *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 17 U. S. 518, 669, 4 L. Ed. 6291 (1819); *Hughes v. Good Samaritan Hospital*, 289 Ky. 123, 126, 158 S. W. 2d 159 (1942).

<sup>7</sup> *West Coast Hospital Ass'n. v. Hoare*, 64 So. 2d 293, 296 (Fla., 1953); *Hayman v. City of Galveston*, 273 U. S. 414, 416, 47 S. Ct. 363, 71 L. Ed. 714 (1927).

<sup>8</sup> *Levin v. Sinai Hospital of Baltimore*, 186 Md. 174, 178, 46 A. 2d 298 (1946); *Washington Home of Chicago v. City of Chicago*, 157 Ill. 414, 422, 425, 41 N. E. 893, 29 L. R. A. 798 (1895).

<sup>9</sup> *Ibid.* *Levin v. Sinai Hospital*.

<sup>10</sup> *Ibid.* See also: *Raney v. Montgomery County Comm.*, 170 Md. 183 A. 548 (1936); *Goldsmith v. Mead Johnson & Co.*, 176 Md. 682, 7 A. 2d 176, 125 A. L. R. 1339 (1939).

the Sherman Anti-Trust Act (15 U. S. C. A., secs. 1-3) in that the defendant's officers and agents had "combined and conspired to prevent him from treating his patients . . . (and that the) action of the defendant, its officers and agents, has restricted the practice of his profession and injured his reputation and professional standing; that the rules and regulations of the medical board, the governing body of the medical staff, which were approved as by-laws by the board of officers, are arbitrary and discriminatory, as he has been refused private rooms for his patients on many occasions, and the object of the creation of (the) 'courtesy staff' was to limit the privileges to those who were empowered to make a private sanitarium out of this public institution." Again the question of private vs. public corporation was raised, and decided as in the above-cited case. As to the constitutional question, the Court said that a *monopoly* is more than a "*mere privilege*" to carry on a trade or business or to deal in a specified commodity. It is an *exclusive* privilege which prevents others from engaging therein. A grant of privileges, even though monopolistic in character, does not constitute a monopoly in the constitutional sense, when it is reasonably required for the protection of some public interest, or when given in return for some public service, or when given in reference to some matter not of common right.<sup>11</sup>

In the *West Coast* case<sup>12</sup> there was a physician with these qualifications:

Doctor of Medicine	-----	University of Virginia
U. S. Navy Hospital	-----	1 year apprenticeship
World War II	-----	18 mos. in Pacific Theatre, performing over two hundred (200) major surgical operations.

Resident in Surgery, Pathology and Gynecology; Fellow of Royal College of Surgeons in Canada; and Diplomate of American Board of Surgery.

He was denied hospital privileges, and brought action. The Supreme Court of California, in reversing the decision of the

<sup>11</sup> *Levin v. Sinai Hospital*, supra, n. 8. See also: *Bryant v. City of Lakeland*, 158 Fla. 151, 28 So. 2d 106, 110 (1947). Even though the hospital be a public hospital, petitioner as a physician had no right (per se) to practice in the hospital, it being a privilege rather than a right. *Hughes v. Good Samaritan Hospital*, 289 Ky. 123, 128 S. W. 2d 159 (1942). A private hospital may be supported by appropriations by the state, the county, or a municipality, without thereby becoming a public hospital.

<sup>12</sup> *West Coast Hosp. Ass'n. v. Hoare*, and *Hayman v. City of Galveston*, both supra, note 7.

lower court for the plaintiff, again decided this question on the distinction between public and private corporations, saying that the defendant hospital was a private corporation.

In an Iowa case<sup>13</sup> the court said:

The decisive factor in this action is the fact that the Sisters of Mercy Hospital is a private corporation and has operated Mercy Hospital as a private business. The fact that its services are available to the public does not make it a public corporation, whether for pay or as charity. Being a private corporation, the Sisters of Mercy had the right to make rules and regulations respecting patients and physicians, and to conduct the hospital as they saw fit, as long as its acts or omissions were not fraudulent, illegal, ultra-vires, intentionally, negligently, or otherwise wrongfully injurious to another. In which event, it would be liable as any other private corporation, so offending.

The West Coast decision stated the rule very bluntly, thus:

A physician has no vested or constitutional right to practice in a hospital, but merely a privilege which may be granted or denied even though his qualifications are of the highest, and without assigning any reason therefor.<sup>14</sup>

Most authorities base their views of the constitutionality of such exclusion not even upon the application of reasonable rules necessary to maintain an accredited standing, but upon the corporation law right of a private corporation to manage its own internal affairs.<sup>15</sup> The fact that hospitals supposedly exist only as facilities for *medical treatment* is blandly ignored.

Would the situation be the same for hospitals that are public or quasi-public corporations? As stated in American Jurisprudence:<sup>16</sup>

It seems to be the practically unanimous opinion that private hospitals have the right to exclude licensed physicians from the use of the hospital and that such exclusion rests within the sound discretion of the managing authorities. This is not, however, the rule applied to public hospitals, since a regularly licensed physician and surgeon has a right to practice in the public hospital of the state so long as he stays within the law and conforms to all reasonable

<sup>13</sup> Natale v. Sisters of Mercy of Council Bluffs, 52 N. W. 2d 701, 708 (Iowa, 1952). See also: Van Campeu v. Olean General Hospital, 21 App. Div. 204, 205 N. Y. S. 554, 239 N. Y. 615, 147 N. E. 219 (1925); Piedmont Memorial Hospital v. Guilford County, 218 N. C. 673, 12 S. E. 2d 265 (1940); and Oleck, supra, n. 5.

<sup>14</sup> West Coast case, supra, n. 7, 12.

<sup>15</sup> Henderson v. Knoxville, 157 Tenn. 477, 9 S. W. 2d 697, 60 A. L. R. 652 (1928). See also: 26 Am. Jur., Sec. 9, p. 592.

<sup>16</sup> 26 Am. Jur., Sec. 9 p. 592.

rules and regulations of the institutions. Neither a city nor the authorities of a public hospital can prescribe rules or regulations for the conduct of physicians and surgeons practicing in such hospital that contravene or conflict with state laws.

In one case<sup>17</sup> the court said:

To contend that being a resident taxpayer and practicing physician of the City gives him a constitutional right to the unrestricted use of the facilities of a hospital provided by the City presents a test of our constitutional theory that we have not heretofore been confronted with . . . When the City furnished the facilities and takes the risk against their negligent use, it is not too much to require that he who wields the knife does so in the philosophy of the twentieth, rather than in that of the eighteenth century.

Although the recent trend has been toward general liability of non-profit hospitals for torts, this liability has been based on the doctrine of *respondeat superior*. But the legal relation of *respondeat superior*<sup>18</sup> does not exist between a non-staff, practicing physician and a hospital. Thus the argument of liability for "negligent use of facilities," as stated in the *Green* case, has to rest solely on the idea of upholding such standards as will insure the best welfare of the citizens of the community. That case, however, did state that rules regarding qualifications of surgeons to use facilities of the hospital must be reasonable.<sup>19</sup>

This merely begs the question: "What are reasonable regulations?" Are they necessarily impartially and not arbitrarily enforced? In the last cited case the plaintiff was said not to have met the standards set by the American Medical Association and American College of Physicians and Surgeons. Nevertheless, as a practicing physician, he was allowed restricted privileges.

One court has even held that though the hospital in question was a public hospital, owned and operated by the municipality:

Even though the hospital be a public hospital, petitioner as a physician had no right (*per se*) to practice in the hospital, it being a privilege rather than a right.<sup>20</sup>

<sup>17</sup> *Green v. City of St. Petersburg*, 154 Fla. 339, 342, 17 So. 2d 517 (1944). Standard of skill cannot be judged by experience alone. *Selden v. City of Sterling*, 316 Ill. App. 455, 462, 45 N. E. 2d 329 (1942).

<sup>18</sup> *Avellone v. St. John's Hospital*, 165 Ohio St. 467, 135 N. E. 2d 410 (1956). N. Y. abandoned the charitable immunity doctrine in *Bing v. Thunig*, 143 N. E. 2d 3 (N. Y., 1957). But see: *Morwin v. Albany Hospital*, 7 A. D. 2d 582, 185 N. Y. S. 2d 85 (1959); which seems to shift liability from the hospital to the staff physician (e. g., as for malpractice).

<sup>19</sup> *Harris v. Thomas*, 217 S. W. 1068 (Tex. Civ. App., 1920). See also: *City of Miami v. Oates*, 10 So. 2d 721 (Fla., 1942).

<sup>20</sup> *Bryant v. City of Lakeland*, 158 Fla. 151, 28 So. 2d 106, 110 (1946).

In another case, where there was no question whether or not the hospital was public, the court said:

It is not incumbent upon the City to maintain a hospital for the private practice of medicine, nor does a physician have a constitutional right to practice his profession in the City's hospital.<sup>21</sup>

In another case, the physician brought before the court the question of the constitutionality of a statute.<sup>22</sup> The court held that the physician did not have sufficient interest in the subject matter of the action to test the constitutionality—his interest being only that infinitesimal interest that a physician has in one patient; therefore, there could be no injury to him.

Most physicians, however, will strongly disagree with that view. The doctor's interest in each and every patient's well-being is surely more than "infinitesimal," and this interest has a direct bearing first on the well-being of his patient, and secondly, on the success of the physician's practice. A sound medical practice is not built by treatment of "transient" patients, where the physician can only send his patients to other, hospital-privileged doctors. If the physician is not only trained but certified, as able to take care of his patients at hospital as well as at his office or home, it is obviously wrong for him not to be allowed to do so. As evidenced by the cases cited herein, it seems that the law on this point, as it exists today, has far-reaching injurious effects.

The issue is clear: Do the hospitals exist primarily as corporations (business entities), of primary concern only as "private preserves" governed solely as their administrators wish?

Or do the hospitals exist primarily as facilities for medical aid to the public; as instrumentalities for physicians to use in aiding the public?

Put otherwise, the issue is: Do doctors exist for the convenience of hospitals, or hospitals for the convenience of doctors? Should public interests or hospital-management interests come first?

The answers are obvious. The law as it is now is contrary to the public's interests.

<sup>21</sup> Hayman v. City of Galveston, *supra*, note 7; Newton v. Board of County Commissioners of County of Weld, 86 Colo. 446, 282 P. 1068 (1929).

<sup>22</sup> Tilleston v. Ullman, 129 Conn. 84, 26 A. 2d 582, 588, 318 U. S. 44, 87 L. Ed. 603, 63 S. Ct. 493 (1943).