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Tort Liability of Hospitals

B. Joan Holdridge*

In recent years, hospitals have undergone changes both in their financial and physical structures. For example, they no longer are primarily charitable institutions, but in most cases are largely self-supporting from the fees collected from their patients. Furthermore, they have grown from small physical plants housing only a few patients to huge complex groups of buildings housing thousands of patients.

These changes have resulted in a general alteration of the attitude of the courts toward the liability of hospitals for their torts. From a position of almost total immunity the pendulum is rapidly swinging toward liability generally for their negligence.

Since most jurisdictions classify hospitals into three types: private, charitable, and public, when determining their liability for particular acts, this article will discuss each of these classes separately. However, for the sake of convenience, the general rules of liability will be set forth in the discussion of private hospitals.

Private Hospitals

A private hospital is generally liable in damages for injuries to patients proximately resulting from the negligence of nurses or other employees. The degree of care required is one of reasonable and ordinary care. This has been aptly stated to be "that degree of care, skill and diligence used by hospitals generally in that community, and by the express or implied contract of the undertaking." For, "the law demands reasonable care, such care as a reasonable man would take under the circumstances

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3 South Highlands Infirmary v. Galloway, supra n. 1 at 252.
existing, but no man is required to take measures against a
danger which the circumstances as known to him do not suggest
as likely to happen." 4 It is for this reason that a hospital has
never been held to be the insurer of the welfare of its patients.5

Since the extent of care required to be exercised by the
hospital depends on the condition of the patient, an act of omission
as well as commission may result in actionable negligence.6 Thus,
a greater degree of care must be exercised with respect to a newborn infant,7 a three-year old child,8 a person with suicidal
tendencies,9 or an insane person.10

The test for determining the proper care to be used is fore-
seeability. If the injury results from some harmful condition or act of the patient, the liability of the hospital for the injury de-
PENDS ON WHETHER THE CONDITION OR ACT OF THE PATIENT WAS ONE THAT COULD HAVE BEEN REASONABLY ANTICIPATED AND THE INJURY PREVENTED.11 There must be some indication that an injury will oc-
CUR FROM THE OMISSION OR COMMISSION OF A PARTICULAR ACT BEFORE LIABILITY WILL ENSUE.12

Since it is presumed that a hospital's physicians, nurses and attendants possess the requisite degree of learning, skill and ability necessary to the practice of their profession, and which those similarly situated possess, and that they will use diligence and their best judgment in the treatment and care of the patient,13 the hospital may even be held responsible for knowledge of the condition of the patient which could have been discovered by the exercise of such requisite skill and training.14 Not only must

5 Gray v. Carter, 100 Cal. App. 2d 642, 224 P. 2d 28 (1950); St. Luke's Hos-
    pital Ass'n. v. Long, 125 Colo. 25, 240 P. 2d 917, 31 A. L. R. 2d 1120 (1952);
6 Maki v. Murray Hospital, 91 Mont. 251, 7 P. 2d 228 (1932); Walls v. Boy-
    ett, 216 Ark. 541, 226 S. W. 2d 552 (1950); O'Quin v. Baptist Memorial Hos-
    pital, 184 Tenn. 570, 201 S. W. 2d 694 (1947).
7 Mahoney v. Harley Private Hospital, 279 Mass. 96, 180 N. E. 723 (1932).
8 St. Luke's Hospital Ass'n. v. Long, supra n. 5.
10 Bennett v. Punton Sanitarium Ass'n., 213 Mo. App. 363, 249 S. W. 666
    (1923).
    Turner, 184 Tenn. 563, 201 S. W. 2d 691 (1941).
12 Mesedahl v. St. Luke's Hospital Ass'n., 194 Minn. 198, 259 N. W. 819
    (1935); Lexington Hospital v. White, — Ky. —, 245 S. W. 2d 927 (1952).
13 Pangle v. Appalachian Hall, 190 N. C. 833, 131 S. E. 421 (1925); Googe v. 
14 Maki v. Murray Hospital, supra n. 6.
the mental and physical condition of the patient be considered, but also the conduct of the patient himself, both before and after admission to the hospital.\footnote{Hignite's Admx. v. Louisville Neuropathic Sanitorium, 223 Ky. 496, 4 S. E. 2d 407 (1928). See also Dahlberg v. Jones, 233 Wis. 6, 285 N. W. 841 (1939); Davis v. Springfield Hospital, — Mo. App. —, 196 S. W. 104 (1917), aff'd. 204 Mo. 626, 218 S. W. 696 (1920).} However, the hospital is under no duty to investigate the past history of the patient, only to take note of those facts given it at the time of the admission of the patient.\footnote{Mesedahl v. St. Luke's Hospital Ass'n., supra n. 12 at N. W. 823. “It would be a harsh rule indeed that would charge the authorities of a general hospital to go in search of the relatives of every patient entering it under the care of a physician of his own or his relative's selection, and ascertain, independently of the attending physician, the nature of the patient's ailment and then to exercise their own judgment as to treatment required.”}

It is not necessary that the precise injury that results be foreseeable, only that it is foreseeable that the particular act will result in some injury.\footnote{Santos v. Unity Hospital, 276 App. Div. 867, 93 N. Y. S. 2d 359, 361 (1949), in dissenting opinion, “... The defendant cannot escape liability for neglect of duty because it could not foresee the exact nature of the injury that might result from its conduct.”} Although it has been held that the injury must be likely to happen, rather than one that is more likely to happen than not,\footnote{Spivey v. St. Thomas Hospital, 31 Tenn. App. 12, 211 S. W. 2d 450 (1948).} a hospital has been held liable for not foreseeing its first case of intrapartum psychosis, an unusual mental derangement occurring at childbirth.\footnote{Flanagan v. Unity Hospital, 194 Misc. 2d, 87 N. Y. S. 2d 649, 651 (1949).} Even where it was not foreseeable that an injury would result, a hospital has been held liable for not exercising a proper degree of care.\footnote{Rice v. California Lutheran Hospital, 27 Cal. 2d 296, 163 P. 2d 860 (1945), where a nurse left a teapot of hot water on a bedside table of a patient under the influence of narcotics and the patient burned herself. But see Simmins v. South Shore Hospital, 340 Ill. App. 153, 91 N. E. 2d 135 (1950), where patient suffered a heart attack while unattended and fell from a narrow cart.}

Many causes of action are predicated on negligence in that the patient was left unattended. Thus, where a nurse left an expectant mother unattended and the patient jumped or fell from a window in the labor room, the court held that: “It is not expecting too much, where the expectant mother goes to the hospital, that she should have constant and uninterrupted hospital observation and attendance during her labor period.”\footnote{Flanagan v. Unity Hospital, supra n. 19 at 651. See also Murray v. St. Mary's Hospital, 280 App. Div. 803, 113 N. Y. S. 2d 104 (1952); Garfield Memorial Hospital v. Marshall, 92 App. D. C. 234, 204 F. 2d 721, 37 A. L. R. (Continued on next page)
The length of time the nurse is absent is not, in itself, determinative of negligence, but it may be evidence of negligence. For example, an absence of five minutes if a patient is on a bed pan could be negligence.\textsuperscript{22} One of twenty minutes, where a person is bedfast and "needs to answer a call of nature," may foreseeably result in an injury-producing accident.\textsuperscript{23} Still another case has held that leaving a patient recovering from typhoid fever without proper wraps for two hours is negligence and that the patient's contracting pneumonia was foreseeable.\textsuperscript{24}

Some courts have held that where a patient's condition makes it necessary, it is the duty of the hospital to give him constant attention.\textsuperscript{25} Therefore, if a patient is insane, the hospital owes a duty to protect him from any possible self-harm or other reasonably apprehended danger, even if this should require a twenty-four hour unbroken watch.\textsuperscript{26} And a prima facie case of negligence is established if the hospital, knowing of suicidal tendencies, leaves the patient unattended and he injures himself.\textsuperscript{27} It has even been held to be actionable negligence to fail to bar the windows or anticipate a suicidal scheme where the patient is under constant surveillance.\textsuperscript{28} But then a decision to the contrary; for example, a hospital was held not to be negligent where it admitted a patient who had twice attempted to commit suicide and it did not restrain him, the court holding that the hospital had only a duty to observe him and give him medical treatment.\textsuperscript{30} In another case, it was held unforeseeable that a patient would com-

(Continued from preceding page)

\textsuperscript{22} Croupp v. Garfield Park Sanitarium, 147 Ill. App. 7 (1909).

\textsuperscript{23} Jefferson Hospital, Inc., v. Van Lear, 185 Va. 74, 41 S. E. 2d 441 (1947).

\textsuperscript{24} Hayhurst v. Boyd Hospital, surpa, n. 2.

\textsuperscript{25} U. S. v. Gray, supra, n. 2; South Highlands Infirmary v. Galloway, supra, n. 1; Emory University v. Shadburn, 47 Ga. App. 643, 171 S. E. 192 (1933), affd. 180 Ga. 595, 180 S. E. 137 (1935).

\textsuperscript{26} Hawthorne v. Blythewood, Inc., supra, n. 9; U. S. v. Gray, supra, n. 2.


\textsuperscript{29} Paulen v. Shennick, 291 Mich. 288, 289 N. W. 162 (1939), where a patient complained she was warm, causing the attendant to open the window, and then dropped her thimble under a radiator. While the attendant had her back turned in an attempt to locate the thimble, the patient jumped out the window.

\textsuperscript{30} Hohmann v. Riverlawn Sanatorium, 103 N. J. L. 458, 135 A. 817 (1927).
mit suicide where he was undergoing treatment for dementia praecox, one of the characteristics of which is a tendency to commit suicide.\textsuperscript{31}

Courts have also held that constant attendance upon the patient is a requisite where he is delirious.\textsuperscript{32} Thus a hospital has been held liable for the death of a patient who jumped from a third floor window when the attendant left for five minutes, it having been previously necessary to strap the patient in bed to prevent him from injuring himself.\textsuperscript{33} The hospital may even be liable if a member of the family volunteers to watch over the patient and fails to do so properly,\textsuperscript{34} or where members of the family have been informed that private nurses are necessary and they were not employed.\textsuperscript{35} On the other hand a hospital was not liable where the delirious patient jumped out a window while unattended, there having been no previous indication of suicidal tendencies.\textsuperscript{36} And one court has even held that the hospital's liability depended on whether a delirious patient had jumped or fallen to his death, since his committing suicide was not foreseeable.\textsuperscript{37}

Liability also may ensue where the patient is allowed to escape, or injure himself in such an attempt. For example, where a patient was permitted to walk about without restraint, the sanitarium, knowing of the patient's desire to escape, was held liable for his death by being run over by a train.\textsuperscript{38} Similarly, where a patient had delusions of persecution, the hospital could reasonably anticipate that she would attempt to escape.\textsuperscript{39} But where a patient appeared to be suffering only from mental depression and had always been "mild and docile," the court held that it was


\textsuperscript{32} Emory University v. Shadburn, supra, n. 25; Brawner v. Russell, 50 Ga. App. 840, 179 S. E. 228 (1935); Spivey v. St. Thomas Hospital, 31 Tenn. App. 12, 211 S. W. 2d 450 (1948).

\textsuperscript{33} Wetzel v. Omaha Maternity & General Hospital Assoc., 96 Neb. 636, 148 N. W. 582 (1914).

\textsuperscript{34} Tate v. McCall Hospital, 57 Ga. App. 824, 190 S. E. 906 (1938).

\textsuperscript{35} Rural Ed. Ass'n. v. Anderson, — Tenn. App. —, 261 S. W. 2d 151 (1953).

\textsuperscript{36} Breeze v. St. Louis & S. F. Ry., 264 Mo. 258, 174 S. W. 409 (1915).

\textsuperscript{37} Davis v. Springfield Hospital, supra, n. 15.


\textsuperscript{39} Emory University v. Shadburn, supra, n. 25.
not foreseeable that the patient might attempt to escape and injure herself.\textsuperscript{40}

Failure by the hospital to use some physical means, such as side boards, to prevent the patient from falling from bed and injuring himself, is generally actionable negligence.\textsuperscript{41} The mere fact that the patient is old and partially paralyzed does not place a duty on the hospital to put side rails on his bed.\textsuperscript{42} However, it may be a question of fact for the jury whether the patient had sufficient control of his faculties to be left alone,\textsuperscript{43} or whether a child is old enough to sleep in a bed without side rails.\textsuperscript{44} It has also been held to be a question of fact for the jury as to whether placing a three-year old boy in an adult size bed with rails so far apart that he squeezed his body between them, thus catching his head so that he strangled, was such negligence as to be actionable.\textsuperscript{45}

The hot-water bottle is a frequent villain in hospital tort cases.\textsuperscript{46} Whether the burn was caused by negligence,\textsuperscript{47} or even whether the condition complained of was a burn or not,\textsuperscript{48} has


\textsuperscript{41} Silva v. Providence Hospital, 14 Cal. 2d 762, 87 P. 2d 374 (1939); Baptist Memorial Hospital v. Marrable, 244 S. W. 2d 567 (Tex. Civ. App., 1951); Morningside Hospital & Training School v. Pennington, 189 Okla. 170, 114 P. 2d 943 (1941), where patient's left leg was chained to bed and he fell head-first on concrete; Beckford v. Carson C. Peck Memorial Hospital, 266 App. Div. 875, 43 N. Y. S. 2d 20 (1943); Baptist Convention v. Ferguson, 213 Ga. 441, 99 S. E. 2d 150 (1957); Hospital Authority v. Shubert, 96 Ga. App. 222, 99 S. E. 2d 708 (1957); Adams v. Ricks, 91 Ga. App. 494, 86 S. E. 2d 329 (1955).

\textsuperscript{42} Cochrane v. Harrison Memorial Hospital, 42 Wash. 2d 264, 254 P. 2d 752 (1953), where patient fell from bed while attempting to reach washbasin at nurse's direction.

\textsuperscript{43} South Highlands Infirmary v. Galloway, supra n. 1; Ford v. Vanderbilt University, 40 Tenn. App. 87, 289 S. W. 2d 210 (1955), Spivey v. St. Thomas Hospital, supra, n. 18.

\textsuperscript{44} Maxie v. Laurel General Hospital, 130 Miss. 246, 93 So. 817 (1922), where an eight-year old boy fell out of bed.

\textsuperscript{45} St. Luke's Hospital Ass'n. v. Long, supra, n. 5.


\textsuperscript{47} Durney v. St. Francis Hospital, 46 Del. 350, 83 A. 2d 753 (1951).

\textsuperscript{48} Norwood Hospital v. Brown, 219 Ala. 445, 122 So. 411 (1929); Mahoney v. Harley Private Hospital, supra, n. 7.
been held to be a question of fact for the jury. The hospital may also be liable where burns result from the use of an electric lamp. But a hospital is not liable where the burn results from the contributory negligence of the patient.

A hospital may be liable where it negligently permits the transmission of a contagious disease or infection. However, it was held not to be liable where the alleged negligence was in admitting the patient to the hospital without informing her of the presence of an infectious disease. Of course, the hospital will not be liable where there is no evidence that the alleged negligence is the cause of the infection. Liability has also been denied where a patient was given a transfusion of blood containing serum hepatitis and he attempted to recover under the theory of breach of warranty.

In the case of blood transfusions, liability has been allowed where a patient was given a transfusion of the wrong type of blood due to mislabeling by a technician, and where a techni-
nicious negligently determined the blood type. The hospital was also held liable where an intern and a nurse gave the wrong patient a transfusion and the blood was allowed to flow into the patient's tissues rather than into the vein.

Since a hospital has a duty to provide proper and safe equipment for the treatment of the patient, any breach of this duty will result in a cause of action. Thus, where a drainage hole in a delivery table was not properly padded and the plaintiff's baby dropped through the hole, hitting its head on a pan below, the hospital was liable. So also, where a patient is injured by a defective wheelchair, bed, lamp, electric fan, or x-ray equipment, the hospital is liable. Even a bed which has negligently been allowed to become wet due to a leak in the roof is such defective equipment as to cause liability to arise. But it has been held that where a hospital provides an article which is obviously unfit for the use for which it is furnished, and the patient's physician and nurse use it in violation of all of the standards of care of medical practice, the hospital cannot be chargeable with any injurious effect which may result from.

Hospitals have also been held liable in damages for injuries...
resulting from negligent handling of the patient by their ambulance attendants, administration of an excessively hot douche by a nurse, failure properly to diagnose an abnormal condition or to administer the proper drug, and for negligent operation of x-ray equipment.

Patients injured by other patients may recover where it is foreseeable that a patient may attempt to harm another. Liability is predicated upon the theory that a hospital is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming a patient, and this duty is directly proportional to the patient’s inability to look after his own safety.

Quite frequently it is impossible for a patient to point his finger at the exact cause of his injury. As one court has put it: “The passenger sitting awake in a railroad car at the time of a collision, the pedestrian walking along the street . . . , are surely not more entitled to an explanation than the unconscious patient on the operating table.” It is for this reason that the use of


69 Mills v. Richardson, 126 Me. 244, 137 A. 689 (1927).

70 Hansch v. Hacket, 190 Wash. 97, 66 P. 2d 1129 (1937), where staff physician's cursory examinations of expectant mother failed to reveal symptoms of eclampsia contravis which caused death of patient; Edwards v. West Texas Hospital, 89 S. W. 2d 801 (Tex. Civ. App., 1953), where staff physician diagnosed plaintiff's condition as abdominal tumor when in fact it was a second undelivered fetus; Stansfield v. Gardner, supra, n. 11, where fractures of back were not detected.


72 Thomas v. Lobrano, — La. App. —, 76 So. 2d 599 (1955); Marble v. Nicholas Senn Hospital Ass'n, 102 Neb. 343, 167 N. W. 208 (1918), where doctor holding plaintiff was injured; Rabasco v. New Rochelle Hospital Ass'n, 266 App. Div. 971, 44 N. Y. S. 2d 293 (1943), where father holding child to be X-rayed was shocked; Taylor v. Beekman Hospital, 270 App. Div. 1020, 62 N. Y. S. 2d 637 (1946).


74 Sylvester v. Northwestern Hospital of Minneapolis, 236 Minn. 384, 53 N. W. 2d 17 (1952).

HOSPITAL TORT LIABILITY

the doctrine of *res ipsa loquitur* is generally allowed in cases of injury during the period when the patient is unconscious. It has been applied where the patient has been burned, has fallen, or been injured during the operation. Furthermore the doctrine has been held to be applicable even where there are a number of defendants, as in operation cases. However, it should be remembered that *res ipsa loquitur* raises only a sufficient inference of negligence to establish a prima facie case, and the defendant is entitled to introduce evidence to overcome this rebuttable inference. And, of course, as in other negligence actions, where the acts constituting the alleged negligence are known and set forth in detail, the doctrine of *res ipsa loquitur* is eliminated, even if the case is such that the doctrine might otherwise have been properly applied. Nor is the doctrine applicable where the condition complained of could have arisen from some other cause than the alleged injury or accident, or

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76 Dierman v. Providence Hospital, 31 Cal. 2d 290, 177 P. 2d 603 (1947); Seneris v. Haas, 45 Cal. 2d 811, 291 P. 2d 915 (1955); Millias v. Wheeler Hospital, 47 Cal. App. 2d 241, P. 2d 684 (1952); West Coast Hospital Ass'n v. Webb, — Fla. —, 52 So. 2d 803 (1951); Andrepont v. Ochsner, — La. App. —, 84 So. 2d 63 (1955); Las Vegas Hospital Ass'n v. Gaffney, 64 Nev. 225, 180 P. 2d 594 (1947).

77 Dierman v. Providence Hospital, supra, n. 76; Quillen v. Skaggs, 233 Ky. 171, 25 S. W. 2d 33 (1930); Adams v. University Hospital, 122 Mo. App. 675, 99 S. W. 452 (1907); Las Vegas Hospital Ass'n v. Gaffney, supra, n. 76; Pliss v. 83d Foundation, — Misc. —, 69 N. Y. S. 2d 727 (1947); Danville Community Hospital v. Thompson, 186 Va. 746, 43 S. E. 2d 746, 43 S. E. 2d 882, 173 A. L. R. 525 (1947).

78 Gallachicco v. State, — Misc. —, 43 N. Y. S. 2d 439 (1943), where mental defective fell down elevator shaft; Maki v. Murray Hospital, supra, n. 6; Morningside Hospital & Training School v. Pennington, supra, n. 41; Richardson v. Dumas, 106 Miss. 664, 84 So. 2d 194 (1947).


80 Quillen v. Skaggs, supra, n. 77.

81 Quillen v. Skaggs, supra, n. 77.


83 White v. Executive Committee of Baptist Convention, 65 Ga. App. 840, 16 S. E. 2d 605 (1941); Hazard Hospital Co. v. Combs, 263 Ky. 252, 925 S. W. 2d 35 (1938); Mahoney v. Private Hospital, supra, n. 7; Collings v. Northwestern Hospital, 20 Minn. 333, 277 N. W. 910 (1938); Wallstedt v. Swedish Hospital, 220 Minn. 274, 19 N. W. 2d 426 (1945); Poor Sisters of St. Francis v. Long, 190 Tenn. 434, 220 S. W. 2d 659 (1950).
where the instrumentality causing the injury is not in the sole control of the hospital. 84

Hospitals often base their defense to actions in negligence on the theory that the doctor, nurse, intern or technician who performed the negligent act was an independent contractor, 85 or that the employee was working under the direction of an independent contractor (borrowed servant doctrine), 86 or that the act was professional in character and thus would be ultra vires if performed by the hospital. 87

The independent contractor concept, as a defense, has been strongly criticized recently in that other corporations, such as airlines, are liable for the negligent acts of professionals, such as pilots, working for them. 88 Therefore, there have been several recent decisions in which a hospital has been held liable for the negligence of its staff physician when acting within the course and scope of his employment. 89 But, under the majority rule, a hospital was not even liable where it owned the x-ray equipment, employed the technicians who operated it, and shared in the profits with the roentgenologist who supervised it;

84 Phillipsen v. Hunt, 129 Or. 242, 270 Pac. 255 (1929); Ware v. Culp, 24 Cal. App. 2d 22, 74 P. 2d 283 (1937), where heating pad was operated by private nurse; Dittert v. Fischer, 148 Or. 366, 36 P. 2d 592 (1934), where heating pad was operated by patient; Mahoney v. Harley Private Hospital, supra, n. 7; Wallstedt v. Swedish Hospital, supra, n. 83; South Highlands Infirmary v. Galloway, supra, n. 1; White v. Executive Committee of Baptist Convention, supra, n. 83.

85 Stewart v. Crook Sanatorium, 17 Tenn. App. 589, 59 S. W. 2d 259 (1933), where physician was also president and general manager of hospital; Pendland v. French Broad Hospital, 199 N. C. 314, 154 S. E. 406 (1930); Johnson v. City Hospital Co., 196 N. C. 610, 146 S. E. 573 (1929); Jeter v. Davis, 33 Ga. App. 733, 127 S. E. 898 (1925); Mayers v. Litoro, 316 P. 2d 351 (1957).

86 Byrd v. Marion General Hospital, 202 N. C. 337, 162 S. E. 738 (1932); Randolph v. Oklahoma City General Hospital, 180 Okla. 513, 71 P. 2d 607 (1937).


88 Stuart Circle Hospital Corp. v. Curry, supra n. 47 at 183: "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 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 needed service provides inducement for the patient to enter the hospital. The patient comes to the hospital for advice, aid and treatment."

89 Vaughan v. Memorial Hospital, 100 W. Va. 290, 130 S. E. 481 (1925); Gilstrap v. Osteopathic Sanatorium, 224 Mo. App. 798, 24 S. W. 2d 749 (1929); Edwards v. West Texas Hospital, supra, n. 70; Garfield Memorial Hospital v. Marshall, supra, n. 21; Moeller v. Hauser, 237 Minn. 368, 54 N. W. 2d 639 (1952).
the roentgenologist being deemed an independent contractor.\textsuperscript{90} Another recent case held that it was a question of fact for the jury whether an anesthetist employed by the hospital was an independent contractor or an agent of the hospital.\textsuperscript{91}

Criticism of the rule that a hospital is not liable for the torts of its servants when they are under the direction of an outside physician is also growing. One court even suggested that for a physician, during an operation, to remove his attention from the patient to examine for probable errors in the routine duties of his trained assistants would probably be construed to be a negligent act in itself.\textsuperscript{92} Nevertheless, courts are still holding that the hospital is not liable for the actions of its nurses under the direction of the patient’s physician.\textsuperscript{93}

A few jurisdictions hold that whether or not a hospital is liable for the acts of its employees depends on whether the acts are administrative or medical.\textsuperscript{94} Since the selection and employment of the staff is administrative, all jurisdictions hold that negligence in selecting the staff is actionable by any patient injured thereby.\textsuperscript{95} This administrative-medical distinction has led to some ridiculous decisions.\textsuperscript{96} For example, placing a lamp


\textsuperscript{92} Cornell v. United States Fidelity & Guaranty Co., — La. App. —, 8 So. 2d 364 (1942), where the court said “By the same token, a physician would be required to examine and test the sterile condition of every instrument and the potency of every medicine used by him and supplied by the hospital.” See also Cavero v. Franklin General Benevolent Society, 36 Cal. App. 2d 301, 223 P. 2d 471 (1950).

\textsuperscript{93} Minogue v. Rutland Hospital, Inc., — Vt. —, 125 A. 2d 796 (1956); Swigard v. City of Ortonville, 246 Minn. 339, 75 N. W. 2d 217 (1956); St. Paul-Mercury Indemnity Co. v. St. Joseph’s Hospital, 212 Minn. 558, 4 N. W. 2d 637 (1942); Aderhold v. Bishop, 94 Okla. 203, 221 Pac. 752 (1923).

\textsuperscript{94} Fowler v. Norway Sanatorium, supra, n. 28.

\textsuperscript{95} Wilson v. Brooklyn Homeopathic Hospital, 98 App. Div. 37, 89 N. Y. S. 619 (1904); Pangle v. Appalachian Hall, supra n. 13; Canney v. Sisters of Charity of House of Providence, 15 Wash. 2d 325, 130 P. 2d 899 (1942).

\textsuperscript{96} Some of these unrealistic distinctions led an English court in Gold v. Essex County Council, 2 K. B. 293, 2 All. Eng. Rep. 237, 239 (1942) to say: “Nursing, it appears to me, is just what the patient is entitled to expect from the 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, but only so-called administrative work, appears to me, with all respect to those who have thought otherwise, not merely unworkable in

(Continued on next page)
too close to an infant in an effort to raise its temperature is a medical act\(^97\) but the negligent use of a vaporizer is an administrative act.\(^98\) Applying a scalding hot water bottle to the plaintiff while in bed is medical negligence,\(^99\) but placing it in the bed while he is temporarily absent therefrom is administrative negligence.\(^100\) Leaving a mentally disturbed person alone near an open window with the result that the patient commits suicide is administrative negligence,\(^101\) but when the deranged person is left to jump under a passing bus, the negligence is medical.\(^102\) Giving the wrong patient a blood transfusion is an administrative act,\(^103\) but the taking of the blood is a medical act.\(^104\) Giving an injection with an improperly sterilized hypodermic needle is administrative,\(^105\) but improperly administering a hypodermic injection is medical.\(^106\) Failing to decide that side boards should be used is medical,\(^107\) but failing to place side boards on a bed after a nurse decided that they were necessary is administrative,\(^108\) and so on ad infinitum. One court even held that an intern was an independent contractor when he injured a patient by an act characterized as medical, but that he was an

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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. . . ."

\(^97\) Cadicano v. Long Island College Hospital, supra, n. 49.
\(^101\) Santos v. Unity Hospital, supra, n. 17; Gries v. Long Island Home, supra, n. 27.
\(^103\) Necolayff v. Genessee Hospital, supra, n. 57.
\(^104\) Berg v. New York Soc. for Relief of Ruptured & Crippled, supra, n. 56.
\(^106\) Bryant v. Presbyterian Hospital in City of New York, 309 N. Y. S. 38, 110 N. E. 2d 391 (1953).
\(^107\) Grace v. Manhattan Eye, Ear & Throat Hospital, 276 App. Div. 955, 95 N. Y. S. 2d 185 (1950).
\(^108\) Ranelli v. Society of New York Hospital, 236 N. Y. 268, 140 N. E. 694 (1920).
employee of the hospital entitled to compensation since he happened to injure himself by the same act.\textsuperscript{109}

Just recently, New York, which originated the medical-administrative test,\textsuperscript{110} apparently completely abandoned it as unworkable and against public policy as it exists today, although in a case just decided in the Appellate Division, it was held that mere evidence of \textit{negligence} is not sufficient to hold a hospital liable for the \textit{malpractice} of its physician.\textsuperscript{111} Thus, there is once again doubt as to the exact position of New York as regards hospital liability. It will be interesting to see if that case is heard by the Court of Appeals, and, if so, exactly how they will decide it.

\textbf{Charitable Hospitals}

The law dealing with the immunity of charities from liability in damages for torts is confused, to say the least. On one side are the jurisdictions which grant no immunity at all. On the other, those which grant absolute immunity from liability. And somewhere in the middle, those which grant a limited immunity depending upon the victim's status as a servant, stranger or beneficiary of the charity, and the nature of the negligence charged.

Thus, in Alabama,\textsuperscript{112} Alaska,\textsuperscript{113} Arizona,\textsuperscript{114} California,\textsuperscript{115}

\textsuperscript{111} Bing v. Thunig, 2 N. Y. 2d 656, 667, 163 N. Y. S. 2d 3, 11, 143 N. E. 2d 3, 8 (1957), where the court said: "Hospitals should, in short, shoulder the responsibilities borne by everyone else. There is no reason to continue their exemption from the universal rule of respondeat superior. The test should be, for these institutions, whether charitable or profit-making, as it is for every other employer, was the person who committed the negligent injury-producing act one of its employees and, if he was, was he acting within the scope of his employment." See also Morwin v. Albany Hospital, 7 A. D. 2d 582, 185 N. Y. S. 2d 85, 88 (1959) in which the court said: "In order to hold a hospital liable under Bing v. Thunig, there must be negligence. If the acts complained of as being negligent are such as require professional skill and knowledge, then it is a case of malpractice. Being malpractice, the case must conform to the evidential rules long invoked in such cases. Any argument that Bing v. Thunig altered the standard of proof in malpractice cases is without foundation."
\textsuperscript{112} Alabama Baptist Hospital Bd. v. Carter, 226 Ala. 109, 145 So. 443 (1932); Tucker v. Mobile Infirmary Assn., 191 Ala. 572, 68 So. 4, L. R. A. 1915D 1167, 10 N. C. C. A. 361 (1915).
\textsuperscript{114} Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P. 2d 220 (1951).
\textsuperscript{115} Silva v. Providence Hospital, 14 Cal. 2d 762, 97 P. 2d 798 (1939); England v. Hospital of Good Samaritan, 14 Cal. 2d 791, 97 P. 2d 813 (1939), affg. 88

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Delaware, Florida, Idaho, Iowa, Kansas, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Dakota, Ohio, Puerto Rico, Utah, Vermont, and Washington (twenty jurisdictions in all), charitable hospitals are liable for their torts to the same extent as a private person or a private corporation. It is probable that the

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116 Durney v. St. Francis Hospital, 83 A. 2d 753 (Del., 1951).

117 Nicholson v. Good Samaritan Hospital, 145 Fla. 360, 199 So. 344, 133 A. L. R. 809 (1940); Wilson v. Lee Memorial Hospital, 65 So. 2d 40 (Fla., 1953); Bourgeois v. Dade County, 99 So. 2d 575 (Fla., 1957).


119 Haynes v. Presbyterian Hospital Assn., 241 Iowa 1269, 45 N. W. 2d 151 (1950); Witmer v. Letts, 80 N. W. 2d 561 (Iowa, 1957).


121 Mulliner v. Evangelischer Diakonissenvereen, 144 Minn. 392, 175 N. W. 699 (1920); St. Paul—Mercury Indem. Co. v. St. Joseph's Hospital, 212 Minn. 558, 4 N. W. 2d 637 (1942); Borwege v. Owatonna, 190 Minn. 394, 251 N. W. 915 (1933); McNerney v. St. Luke's Hospital Assn., 122 Minn. 10, 141 N. W. 837, 46 L. R. A. N. S. 548 (1913); Maki v. St. Luke's Hospital Assn., 122 Minn. 444, 142 N. W. 705 (1913); Nelson v. Swedish Hospital, 241 Minn. 551, 64 N. W. 2d 38 (1954); Swigerd v. Ortonville, 246 Minn. 339, 75 N. W. 2d 217 (1956); Clements v. Swedish Hospital, 89 N. W. 2d 162 (Minn., 1958); Mattson v. St. Luke's Hospital, 89 N. W. 2d 743 (Minn., 1958).


123 Welch v. Frisbie Memorial Hospital, 90 N. H. 337, 9 A. 2d 761 (1939); Hewett v. Woman's Hospital Aid Assn., 73 N. H. 556, 64 A. 190, 7 L. R. A. N. S. 496 (1906); Kardelas v. Dover, 79 N. H. 559, 111 A. 2d 327 (1955).

124 Collopy v. Newark Eye & Ear Infirmary, 27 N. J. 29, 141 A. 2d 276 (1958); but judgments are limited by statute to no more than $10,000.00.


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

127 Avellone v. St. John's Hospital, 165 Ohio St. 467, 60 Ohio Ops. 121, 135 N. E. 2d 410 (1956).

128 Talvarez v. San Juan Lodge, 68 Puerto Rico 681 (1948).


131 Pierce v. Yakima Valley Memorial Hospital Assn., 43 Wash. 2d 162, 260 P. 2d 765 (1953).
District of Columbia,132 and Oklahoma,133 also subscribe to the theory of total liability, but it has not been definitely settled in either jurisdiction. In Hawaii,134 a charity is not immune when engaged in non-charitable activities, but there has been no decision as to charitable immunity itself.

In ten jurisdictions, Arkansas,135 Kentucky,136 Maryland,137 Massachusetts,138 Missouri,139 Oregon,140 Pennsylvania,141 Rhode

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132 President and Directors of Georgetown College v. Hughes, 76 App. D. C. 123, 130 F. 2d 810 (1942), where three judges held that charities enjoy no immunity from tort liability, but case presented no facts requiring such a holding. The question was left open in White v. Central Dispensary & Emergency Hospital, 69 App. D. C. 122, 99 F. 2d 355, 119 A. L. R. 1002 (1938), while a trial court has held that such a hospital is immune from liability where there is no claim that the personnel was negligently selected by the hospital or that the hospital itself was negligent. White v. Providence Hospital, 80 F. Supp. 76 (D. C. D. C., 1943).


139 Dille v. St. Luke's Hospital, 355 Mo. 435, 196 S. W. 2d 615 (1946); Hamburger v. Berkman, 85 F. Supp. 2 (D. C. Mo., 1949); Specten v. Jewish Memorial Hospital Asso., 239 Mo. App. 38, 187 S. W. 2d 469 (1945); Whittaker v. St. Luke's Hospital, 137 Mo. App. 116, 117 S. W. 1189 (1918); Adams v. University Hospital, 127 Mo. App. 675, 99 S. W. 453 (1907); Nicholas v. Evangelical Deaconess Home & Hospital, 281 Mo. 182, 219 S. W. 643 (1920); Roberts v. Kirksville College, 16 S. W. 2d 625 (Mo. App., 1929); Kreuger v. Schmiechen, 284 S. W. 2d 311 (Mo., 1954).

140 Gregory v. Salem General Hospital, 175 Or. 464, 153 P. 2d 837 (1944); Ackerman v. Physicians & Surgeons Hospital, 207 Or. 646, 298 P. 2d 1026 (1956).

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Island, South Carolina, and Wisconsin, the courts give absolute immunity to charitable hospitals for damage in torts.

Three states, Colorado, Illinois, and Tennessee, allow recovery by either a paying patient or a beneficiary of the charity, but execution under a judgment cannot be levied against the charitable trust property, only against the income from paying patients.

Three jurisdictions, Maine, Nebraska, and Nevada, hold that a charity is liable to its servants and strangers for negligent torts, but is not liable to beneficiaries of the charity, even if they are paying patients.

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142 Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675 (1879) held hospital liable; subsequently statute passed giving charitable hospital absolute immunity.

143 Ludler v. Columbia Hospital, 98 S. C. 25, 81 S. E. 512 (1914).

144 Morrison v. Henke, 165 Wis. 166, 160 N. W. 173 (1916); Schau v. Morgan, 241 Wis. 334, 6 N. W. 2d 212 (1942). But immunity does not extend to breach of statutory duty: Grabenski v. St. Francis Hospital, 266 Wis. 339, 63 N. W. 2d 693 (1954); Watey v. Carmelite Sisters, etc., 274 Wis. 415, 80 N. W. 2d 397 (1957).


146 Marabia v. Mary Thompson Hospital, 309 Ill. 147, 140 N. E. 836 (1923); Wattman v. St. Luke's Hospital Assn., 314 Ill. App. 244, 41 N. E. 2d 314 (1942); Mater v. Silver Cross Hospital, 285 Ill. App. 437, 2 N. E. 2d 138 (1936); Armstrong v. Wesley Hospital, 170 Ill. App. 81 (1912).

147 McLeod v. St. Thomas Hospital, 170 Tenn. 423, 95 S. W. 2d 917 (1936); Baptist Memorial Hospital v. Coulsen, 176 Tenn. 300, 140 S. W. 2d 1088 (1940); O'Quinn v. Baptist Memorial Hospital, 184 Tenn. 570, 201 S. W. 2d 694, 22 N. C. C. A. N. S. 1 (1947); Vanderbilt University v. Henderson, 23 Tenn. App. 135, 127 S. W. 2d 284 (1938); Spivey v. St. Thomas Hospital, 31 Tenn. App. 12, 211 S. W. 2d 450 (1947); Edwards v. Kings Mountain Memorial Hospital Assn., 118 F. Supp. 417 (D. C. Tenn., 1954).


149 Marble v. Nicholas Senn Hospital Assn., 102 Neb. 343, 167 N. W. 208 (1918); Sibelia v. Paxton Memorial Hospital, 121 Neb. 860, 238 N. W. 751 (1931); Duncan v. Nebraska Sanitarium & Benev. Assn., 92 Neb. 162, 137 N. W. 1120, 41 L. R. A. N. S. 973, Ann. Cas. 1913E 1127 (1912); Muller v. Nebraska Methodist Hospital, 160 Neb. 279, 70 N. W. 2d 86 (1955); Cheathan v. Bishop Clarkson Memorial Hospital, 160 Nev. 297, 70 N. W. 2d 96 (1955).

HOSPITAL TORT LIABILITY

In eight jurisdictions, Connecticut, Indiana, Louisiana, Michigan, Texas, Virginia, West Virginia, and Wyoming, charitable hospitals are liable not only to strangers and their servants, but also to a beneficiary, whether a paying patient or not, if they have been negligent in the selection and retention of their employees or other administrative acts. In

151 Cohen v. General Hospital Soc., 113 Conn. 188, 154 A. 435 (1931); Haliburton v. General Hospital Soc., 133 Conn. 61, 48 A. 2d 261, 20 N. C. C. A. N. S. 505 (1946); Richards v. Grace-New Haven Community Hospital, 137 Conn. 508, 79 A. 2d 353 (1951); Tochetti v. Cyril & Julia C. Johnson Memorial Hospital, 130 Conn. 123, 36 A. 2d 381 (1944); Evans v. Lawrence & Memorial Associated Hospitals, 133 Conn. 61, 48 A. 2d 261, 20 N. C. C. A. N. S. 505 (1946); Richards v. Grace-New Haven Community Hospital, 20 Conn. Supp. 19, 119 A. 2d 743 (1955); McDermott v. St. Mary's Hospital Corp., 144 Conn. 417, 133 A. 2d 834 (1957); Parowski v. Bridgeport Hospital, 144 Conn. 531, 134 A. 2d 834 (1957).


Georgia, and possibly North Carolina, the charitable hospital may be liable to the paying patient regardless of whether the negligence is administrative or medical.

No cases could be found reported in Montana, New Mexico and South Dakota.

Of course, wherever liability is permitted, it is under the same rules as are outlined in the section above on private hospitals.

**Public Hospitals**

In the absence of a statute abrogating immunity, the liability of a hospital operated by a governmental unit or agency depends upon whether the hospital is maintained and operated in the exercise of a governmental or of a proprietary function.

A governmental unit or agency is generally immune from liability for torts committed in connection with operating a hospital where it is operated in performance of governmental functions; while it is generally liable where it is operated in performance of a proprietary or "corporate" function. There is no general standard used by the courts to determine whether the

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HOSPITAL TORT LIABILITY

maintenance of the hospital is governmental or proprietary. It has been said that if the hospital is operated for the purpose of conserving public health, treating indigent patients, and applying money receipts to expenses, then generally it will be held to be the exercise of a governmental function;\textsuperscript{163} but operating a hospital for the purpose of making a pecuniary profit probably will be held to be performance of a proprietary function.\textsuperscript{164} The fact that a charge for service is imposed on those able to pay does not, of itself, affect the immunity of the governmental unit or agency;\textsuperscript{165} nor does the fact that a paying patient is the victim of the negligence alter the immunity rule.\textsuperscript{166} Furthermore, if the hospital is a charitable one, the rules applicable to charitable hospitals, i.e., as to whether there is immunity or not, may be controlling.\textsuperscript{167}

Although a few jurisdictions have rested their decisions on the ground that no mandatory duty was imposed by statute upon the governmental unit to operate a hospital,\textsuperscript{168} the majority sustain immunity even though the statute under which the hospital was created is only permissive.\textsuperscript{169} And it has been generally held that a governmental unit is not liable for damages resulting from tortious acts that are wholly outside the powers conferred upon it by its charter or other legislative enactments.\textsuperscript{170}


\textsuperscript{165} Moore v. Walker County, 236 Ala. 688, 185 So. 175 (1938); Latham v. Santa Clara County Hospital, 104 Cal. App. 2d 336, 231 P. 2d 513 (1951); Martinson v. Alpena, supra, n. 161; Gillies v. Minneapolis, supra, n. 162; Schroeder v. St. Louis, supra, n. 161; Shaffer v. Monongalia General Hospital, — W. Va. —, 62 S. E. 2d 795 (1950); Madison v. San Francisco, supra, n. 161; Waterman v. Los Angeles County General Hospital, 123 Cal. App. 143, 266 P. 2d 221 (1954).

\textsuperscript{166} Moore v. Walker County, supra, n. 165; Madison v. San Francisco, supra, n. 161; Dallas v. Cramer, supra, n. 164.


\textsuperscript{168} Henderson v. Twin Falls County, supra, n. 162; Okmulgee v. Carlton, supra, n. 162.

\textsuperscript{169} Ware County v. Cason, 189 Ga. 78, 5 S. E. 2d 339 (1939); Young v. Worcester, 253 Mass. 481, 149 N. E. 204 (1925); Martinson v. Alpena, supra, n. 161.

\textsuperscript{170} Laney v. Jefferson County, supra, n. 161; Calkins v. Newton, 36 Cal. App. 2d 262, 97 P. 2d 336, 231 P. 2d 995 (1951); Dallas v. Smith, 130 Tex. 225, 107 S. W. 2d 872 (1937); Latham v. Santa Clara County Hospital, supra, n. 165.
Some jurisdictions appear to differentiate between hospitals operated by municipal corporations and those operated by counties, holding that a county necessarily performs a governmental function in establishing such a hospital.171 This is probably due to the fact that a county is considered to be a quasi-corporate entity which exists only for the political convenience of the state,172 whereas a municipal corporation exists for the convenience of the people.173

In New York174 and in the federal jurisdiction175 statutes have been passed which waive the governmental immunity from liability and suit, thus making the doctrine of respondeat superior applicable. Under the federal statute, the existence and extent of liability is governed by the law of the place where the tort was committed.176 This means that even though the statute has abrogated the immunity of the United States Government, if a state does not hold liable a charitable hospital (e.g., and the particular governmental hospital in question is a charitable hospital) then no liability will arise.177 New York has also passed a statute which makes its cities liable for torts committed by their employees in hospitals, even to the extent of liability for the malpractice of its physicians and surgeons when they are acting within the course and scope of their employment.178

Several other states now have statutes abrogating their immunity to suit, but many of the courts in these states have held that such statutes do not abrogate the state’s immunity to liability for damages.179 Thus they have not resulted in any great change in the general liability of governmental units.

173 Culler v. Jackson Tp., Putnam County, — Mo. —, 249 S. W. 2d 393 (1952).
175 Gen. Mun. Law §§ 50 et seq.
Conclusion

As can be readily seen from the foregoing, the law governing tort liability of hospitals is now in a state of flux. Some of the defenses, such as ultra vires and the borrowed servant doctrine, are being disallowed. Use of the doctrine of *res ipsa loquitur* is increasing. And, possibly most important of all for the patient, the concept that nurses, interns and even technicians may be independent contractors is rapidly dying out. The hospital's immunity for torts of staff physicians is also on the wane. Charitable and governmental immunity are being discarded, which is a good thing since it is inconceivable in this day and age that we would deny recovery from a charity which can readily be adequately protected by insurance or a governmental entity, merely because of the old and out-moded doctrine that the king (government) can do no wrong. It therefore appears that in the very near future all hospitals will be liable for any tort committed by an employee within the course and scope of his employment.