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Sequelae of Recent Hospital Tort Liability
Avellone v. St. John's Hospital, Revisited

R. Crawford Morris*

On July 18, 1956, the Supreme Court of Ohio handed down its decision in the case of Avellone v. St. John's Hospital, reversing nearly fifty years of Ohio law and repudiating the limited immunity doctrine as it had heretofore existed. Syllabus of the decision, which, under Ohio law, alone constitutes the holding of the Court, reads 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."

This monumental decision raises two questions of extreme importance which seem to be left unanswered and which will unquestionably be the subject of further litigation. Those questions are:

1. Is the scope of the Avellone decision limited solely to hospitals or are all charities deprived of immunity?

2. Has Ohio adopted the New York Rule?

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1 165 O. S. 467; 135 N. E. 2d 410 (1956); discussed in, Jacobson, Hospital Tort Liability, 5 Clev.-Mar. L. R. 118 (1956).

2 Taylor v. Protestant Hospital, 85 O. S. 90; 96 N. E. 1089 (1911), to Avellone v. St. John's Hospital (1956), ibid., n. 1.
Charities Other Than Hospitals

For nearly fifty years Ohio granted to all charities and organizations such as the Girl Scouts, Boy Scouts, Y. M. C. A.'s, and the like, a limited immunity as a matter of public policy, holding them liable to beneficiaries of the charity only for negligence in selecting or retaining their servants, but holding them immune from liability to such persons for the negligent acts of those servants. In presentation of the Avellone case to the Supreme Court, both in brief and in oral argument, it was made clear that the Ohio immunity rule applied to all charities and that any decision in the case at bar would logically extend to affect all charities alike, many of which are small, struggling organizations with very limited budgets.

More specifically, the recent experience of the State of Washington, wherein its Supreme Court found itself forced to retreat from its repudiation of the rule insofar as charities other than hospitals were concerned, was called to the attention of the Court as a reason for retaining the rather limited immunity in favor of all charities rather than to attempt to repudiate it insofar as the instant defendant, a hospital, was concerned, with the resultant loss of immunity for all other charities. Washington's experience was this:

Pierce v. Yakima Valley Memorial Hospital Association (Supreme Court of Washington, Sept. 1, 1953) involved a suit by a paying patient against a charitable nonprofit hospital, for personal injuries allegedly sustained by reason of the negligence of a nurse in injecting a foreign substance into plaintiff's left arm, causing pain and permanent injury. Defendant's demurrer to the complaint on the ground of the charitable immunity of that State was sustained by the trial court. Plaintiff declined to plead further and an order dismissing the action with prejudice was accordingly entered. Plaintiff then appealed to the Supreme Court. The Supreme Court, in a 6 to 3 decision, reversed and remanded with directions to overrule the demurrer, holding that a charitable nonprofit hospital should no longer be held immune from liability for injuries to paying patients caused by the negligence of employees of the hospital, overruling all previous decisions to the contrary. While the actual holding of the Court was, of course, limited to the case of the hospital

8 Ibid., n. 2.
4 43 Wash. 2d 162; 260 P. 2d 765 (1953).
charity before it, the language of the majority opinion makes it clear that the Court was aware that its decision could not be restricted to hospitals but would affect, as a matter of sheer logic, all charities. Said the majority in their opinion:

"Nor do we overlook the fact that the principles with which we are dealing have application also to such organizations as Y. M. C. A.'s, Y. W. C. A.'s and Red Cross. Such organizations have benefited much less than hospitals from changed economic conditions and social outlook.

"The public policy with which we are here concerned, however, must be based upon general conditions and the average situation. It cannot be designed to meet special cases or deal with particular instances of hardship."

One of the three dissenting judges remarked:

"But regardless of the origin of the error, the majority opinion bases its present determination to abandon our long-established policy upon the proposition that private charity has been displaced by a paternalistic government which will furnish free charitable services (as long as the taxpayers are financially able) and that hospitals, Y. M. C. A.'s, Boy Scouts, Red Cross chapters and other similar organizations do not any longer need encouragement. In my opinion, this proposition is without any factual support in this state at the present time.

* * *

"Charity is still a virtue and is entitled to the same encouragement that it has always received at the hands of this court.

* * *

"When we consider the great diversity of variant rules which might be adopted, and at the same time remember that the rule with which we are dealing does not apply to hospitals alone but to churches, educational institutions, Y. M. C. A.'s, social welfare organizations, and, in general, to the various organizations engaged in philanthropic, beneficent and charitable work, it is at once manifest that a change in the rule, particularly its complete abandonment, would have far-reaching, and, perhaps, unimagined and unintended consequences. . . ."

The dissent's warning was sound. Mother Carey's chickens came home to roost in Darrol Lee Lyon v. Tumwater Evangelical Free Church (Supreme Ct. of Wash., Aug. 18, 1955, Rehearing Denied Sept. 28, 1955). Here plaintiff was an injured child, but the defendant, instead of being a large charitable hospital,
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was a small charitable church. In order to get children to and from the Sunday School, the President of the congregation and one of the founders of the Church, himself drove the Church bus every Sunday. On one occasion he so operated the bus that a log came through the window, severely injuring the plaintiff, an eleven-year-old boy. The trial court dismissed the action on two grounds: First, that the plaintiff could not maintain an action in tort against the defendant charitable nonprofit corporation, and second, that there was failure of proof of negligence on the part of the President. Plaintiff appealed to the Supreme Court, arguing that the trial court’s holding was in violation of Pierce v. Yakima Valley Memorial Hospital Association, supra. The Supreme Court of Washington protected the Tumwater Evangelical Free Church by throwing about it the cloak of charitable immunity. In doing so it did not seem bothered in the least by its recent decision in the Pierce case, but readily distinguished that decision and limited it to the specific instance of a paying patient plaintiff and of a charitable hospital defendant. Notwithstanding the broad language in both the majority and dissenting opinions contained in the Pierce case decision concerning all charities, in affirming the trial court’s judgment in favor of Tumwater Evangelical Free Church, the same Supreme Court said: 8

“Appellant contends that the rule of charitable immunity has been rejected by the Pierce case, and that therefore the doctrine of respondeat superior applies to ecclesiastical bodies. That case did not reject the rule of charitable immunity, but merely modified it. There was only one question before us in the Pierce case, and it was stated in the first paragraph thereof: ‘Where a paying patient of a charitable, nonprofit hospital sustains injuries by reason of the negligence of a nurse, may such patient recover damages from the hospital?’ We held that such an institution ‘should no longer be held immune from liability for injuries to paying patients caused by the negligence of employees of the hospital.’ We do not wish to extend the above holding to apply to a nonprofit, religious organization which transports children, without charge, to and from Sunday school in order that they may receive a spiritual education and eventually become members of a church organization.’

While it is possible to distinguish the two cases on the grounds that the plaintiff in the Pierce case was a paying patient, whereas no charge was made to the Sunday School children for

8 Ibid at pp. 129-130.
the bus transportation to and from Sunday School, this would seem to be a distinction without a difference: first, because no patient in a hospital is a fully paying patient, but is partly or quasi paying;\(^9\) and second, because while the record is silent on this point, the probability is that Darrol Lee Lyon, like most Sunday School children, probably dropped his pennies in the plate each Sunday and thus in a sense paid partially for the spiritual education he was receiving. The only other distinction remaining is that the defendant in the *Pierce* case was a hospital, whereas the defendant in the *Lyon* case was a church. But this also seems to be a distinction without a difference, both being corporations, both being not for profit, and both being charitable in their purpose. Logically we can see no distinction between these two cases beyond the fact that the Supreme Court of Washington desired, as a matter of public policy of its own, to remove the immunity from hospitals but to retain it for smaller charities. This would seem to be a problem for the legislature and not properly for the court.

What then is the scope of the *Avellone* decision? When one is aware that the dilemma of the Supreme Court of Washington, as represented by the above two cases, was specifically called to the Court's attention with a warning that any decision in the *Avellone* case concerning the defendant hospital would apply equally to all charities, large and small alike, an interesting fact concerning the *Avellone* decision emerges. Both in the syllabus and in the majority opinion the Court has been painstakingly careful to limit its language to the single instance of a charitable hospital. The syllabus itself mentions only "a corporation not for profit which has as its purpose the maintenance and operation of a hospital." The majority opinion nowhere mentions, with the exception of quotations from other cases, any charity other than a hospital, and further contains this express statement:\(^{10}\)

"The present case has to do only with the pleadings and does not extend beyond the question of the 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*."

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\(^9\) For every dollar the patient pays, the hospital spends several dollars out of its general endowment fund to cover the cost of the care provided.

\(^{10}\) 165 O. S., at p. 478 (1956).
However, the dissenting opinion warns the majority: 11

"Although the instant case involves the liability of a charitable hospital, it can be seen from the above quotation that the same rule applies to all public charitable institutions. The defendant in its brief lists about one hundred charitable activities in Cleveland alone which participate financially in the Welfare Federation of Cleveland. . . . All these are vitally affected by this decision. It cannot logically be circumscribed to be applicable to hospitals alone."

It seems unmistakably clear that the intention, and expressed holding embodying that intention, of the majority of the Court, limits the scope of the Avellone decision solely to charitable hospitals. Confirmation of this requires further litigation, which we are informed 12 has already presented itself, a demurrer having been filed to the separate charitable defense set up by a defendant charity which is not a hospital, presently pending a ruling before a trial court of this State. It remains but for that case to find its way to our Supreme Court, to force clarification of the Avellone decision in this regard, just as the Turnwater case did in the State of Washington. It is the opinion of this writer that our Supreme Court meant to and will continue by future decision to limit the scope of the Avellone decision to the sole instance of charitable hospitals.

The New York Rule

The majority opinion in the Avellone decision, in reaching its conclusion, stated: 13

"We, thus, conclude that a corporation not for profit, which has as its purpose the maintenance and operation of a hospital, is, under the doctrine of respondeat superior (and the various rules and exceptions applicable thereto), liable for the torts of its servants, . . ."

and then went on to say: 14

"and leave for future determination the application of this doctrine to the facts of the instant case as may be proved on trial. For instance, we are not deciding that persons working in a hospital, such as doctors and nurses, under circumstances where the hospital has no authority or right of control over them, can bind the hospital by their negli-

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11 165 O. S. 479 (1956).
12 At a lecture of this writer to the Annual Meeting of the Common Pleas Judges' Association in Columbus, Ohio on December 7, 1956, one trial judge so reported to this writer.
13 165 O. S. 477 (1956).
14 165 O. S. 477-478 (1956).
gent actions. See Schloendorff v. Society of New York Hospital, 211 N. Y., 125, 105 N. E. 92, 52 L. R. A. (N. S.), 505.”

When this language is considered in the light of the briefs and oral arguments presented to the Supreme Court, the question arises as to whether or not Ohio has adopted the New York rule, and if it has, just what this will mean in terms of future litigation.

In its numerous decisions upholding the doctrine of charitable immunity over its nearly fifty year period of existence, the Supreme Court of Ohio had based its reasoning upon the fact that charities are “masters different from others.” The difference lies in the fact that the fundamental basis on which rests the harsh doctrine of respondeat superior, which imposes upon one the responsibility for the acts of another, is the right to control the details of the manner and method of the work performed. In the case of charities and especially of hospitals, such right to control is considerably diminished by the fact that the servant is either a volunteer worker or a professional person such as a nurse or intern who, as a practical matter, is more apt to follow her own theories and training in carrying out her professional duties, or else to obey the exacting orders of the doctor in charge of the case, than the routine orders of the hospital. In an age of specialization, with the necessity of increasing reliance upon independent experts, the reason for the rule seems more valid than ever before. All of this was carefully presented to the Court, with the appeal that the immunity should be retained.

However, there was a danger inherent in such an argument which was foreseen and also presented to the Supreme Court. That danger was that a compromise be effected whereby the charity be granted immunity for those acts of its servants over which it did not have as a practical matter the full right of control possessed by a normal employer, but that it be held liable for all acts of its servants where it possessed such full right of control. In the case of the hospital this would mean that any act of a nurse which was not a carrying out of her professional duties, but was merely a routine administrative act,

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15 Taylor v. Protestant Hospital, 85 O. S. 90 at p. 102, 96 N. E. 1089 (1911); Taylor v. Flower Deaconess Home and Hospital, 104 O. S. 61, 135 N. E. 267 (1922); Rudy v. Lakeside Hospital, 115 O. S. 539, 155 N. E. 126 (1926); Sisters of Charity v. Durelius, 123 O. S. 52, 173 N. E. 737 (1930); Lakeside Hospital v. Kovar, 131 O. S. 333, 2 N. E. 2d 857 (1936); Waddell v. YWCA, 133 O. S. 601, 15 N. E. 2d 140 (1938); Cullen v. Schmidt, 139 O. S. 194, 39 N. E. 2d 148 (1942).
render the hospital liable if negligently performed, but that any act in the performance of her professional duties would not render the hospital liable, no matter how negligently performed. This is the New York rule. While logically appealing as a workable compromise, it has proved in fact to be extremely illogical, unworkable, and to lead to an enormous amount of litigation benefiting no one but the legal profession, and adding to the ever-growing volume of litigation clogging our court dockets.

The New York rule sprang from Schloendorff v. Society of New York Hospital, supra. That case involved a paying patient’s suit against a charitable hospital for a claimed technical assault and battery in the nature of an operation without consent. The trial court directed a verdict for the defendant hospital, which was affirmed by the Appellate Division, and also by the Court of Appeals, Judge Cardozo writing the opinion. In that opinion Judge Cardozo, in holding that any knowledge on the part of the nurse concerning plaintiff’s instructions authorizing the performance of an examination under ether, to ascertain the character of her tumor, but forbidding any operation to remove the tumor, did not charge the hospital with notice that the surgeons were operating without the patient’s consent, took occasion to say:

"The conclusion therefore follows that the trial judge did not err in his direction of a verdict.

"... Nurses—in treating a patient... are not acting as the servants of the hospital... but... are employed to carry out the orders of the physicians to whose authority they are subject. The hospital undertakes to procure for the patient the services of a nurse. It does not undertake, through the agency of nurses, to render those services itself... If there are duties performed by nurses foreign to their duties in carrying out the physicians orders, and having relation to the administrative conduct of the hospital, the fact is not established by this record, nor was it in the discharge of such duties that the defendant nurses were then serving... The acts of preparation immediately preceding the operation... are really part of the operation itself."

From this language the New York rule arose, which simply is that a hospital is not liable for those acts of its servants

17 211 N. Y. 125; 105 N. E. 92 (1914).
18 Ibid at p. 94.
19 It seems unsettled in New York whether or not the New York rule applies to hospitals for profit as well as to charitable hospitals, the inference being that it applies to both alike. See 25 A. L. R. 2d 29 at pp. 170-173.
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debated to be "professional" acts, i.e. those involved in carrying out the professional duties of treating the patient, but is liable for those acts deemed "administrative" acts, i.e., in carrying out routine, purely administrative duties (where negligently performed). The impracticality of this apparently logical rule can be seen by the sad history of just one of the innumerable cases created by the rule.

In Berg v. New York Society, plaintiff entered defendant's hospital for treatment of rheumatoid arthritis, treatment consisting in part of blood transfusions, which required that plaintiff's blood be determined, including its R. H. factor. A blood sample was taken from plaintiff, and the necessary test was performed by the laboratory technician employed in the hospital's laboratory. It was mistakenly reported that plaintiff's blood was type A-R. H. positive, whereas in fact her blood was type A-R. H. negative. In reliance on this report R. H. positive blood was transfused into plaintiff, which caused her injury in the nature of a still-born child. The trial court held that the mistake was not a professional act but an administrative act for which the hospital was liable. The Appellate Division reversed the trial court, holding that the act was a professional act, not an administrative act for which the hospital could not be liable. There was a vigorous dissenting opinion, claiming that the act was administrative and not professional. In its opinion the majority stated:

"Of course, the realities of hospital procedure are not polarized into 'medical' and 'administrative' acts. It may be presumed that almost all acts which a hospital performs for its patients inevitably relate in some degree to the medical care and treatment of those patients. The determination of whether any one such act is 'medical' or 'administrative' often hinges on blending borderline considerations which, as may be supposed, invite delicate distinctions for the reconciliation of some of the decisions, e.g., compare Volk v. City of New York, 284 N. Y. 279, 284-285, 30 N. E. 2d, 596, 597, 598, with Steinert v. Brunswick Home, Inc., supra.

"Such a highly refined line of distinction may suggest reappraisal of the underlying rationale, perhaps through legislative action."

22 Ibid at pp. 551-552.
23 Ibid at p. 551.
However, the Court of Appeals again reversed this case, holding that the act was an administrative and not a professional act for which the hospital was liable. In its opinion the court said:

"Without reviewing or revising the whole Schloendorff v. Society of New York Hosp. rule (1914, 211 N. Y. 125, 105 N. E. 92, 52 L. R. A., N. S., 505), and without determining whether the rule itself has outlived its usefulness, we hold that this particular hospital as the employer of this particular young woman is liable for her negligence.

"Whatever be the ultimate fate of the Schloendorff rule, this case need not be pushed into the Schloendorff mold."

The Berg case clearly shows the vice of the New York rule and the confusion and despair that it has caused the New York courts. That vice is simply this: In order to determine whether or not immunity or liability (if negligence is proved) is to be the rule of a particular case, that case must be litigated so that its own particular set of facts may be analyzed and ruled "professional" or "administrative." The borderline distinctions are so refined that there is virtually no agreement in the courts, which leads to the twin evils of (1) multiplicity of litigation and (2) uncertainty and chaos in the law, perhaps the greatest social evil of all. The situation is so severe that the New York courts are crying out against the Schloendorff rule and begging for legislative action to correct it.

All of this was brought to the attention of our Supreme Court during oral argument of the Avellone case, with an urgent appeal that Ohio not adopt the New York rule with its confusing borderline refinements. Notwithstanding all of this, the lan-

25 Ibid at pp. 456-457.
26 As our Supreme Court said in City of Youngstown v. Fishel, 89 O. S. 247 at p. 252; 104 N. E. 141 (1914):

"The doctrine of precedents owes its origin and observance to a recognition of the necessity for stability and uniformity in the construction and interpretation of the law, and no argument is necessary to support the view that the administration of justice calls for well-settled rules in such matters, ...."

27 With the exception of the Court of Appeals decision (1 N. Y. 2d 499) which was rendered after oral argument and shortly before the announcement of the Avellone decision. See also Cadicamo v. Long Island College Hospital, 131 N. Y. S. 2d 287 (1953), affirmed in 130 N. Y. S. 2d 889 (1954), but reversed in 124 N. E. 2d 279 (1954).
28 For further refinement of the New York rule see the recent decision of the Supreme Court of Minnesota in Swigerd v. City of Ortenville, 75 N. W. 2d 217 (1958), where the court held:
guage of the majority opinion in the *Avellone* case²⁹ leaves little
doubt in the writer's mind that our Supreme Court meant to
and will in the future adopt and apply the New York rule, al-
though this serious problem is also left to future determination
by further litigation.

**Conclusion**

Without consideration of the merits of retaining the chari-
table immunity doctrine as it had existed in Ohio for nearly
fifty years, up to the *Avellone* decision,³⁰ it is clear that our
Supreme Court in repudiating the immunity doctrine has created
two serious problems which can be resolved only by further
litigation, and one of which may well lead Ohio into a chaos of
legal confusion and a morass of multiplicity of litigation, until
ultimately our courts will cry out, as the New York courts have
done, for our legislature to come to the rescue and save us from
this monster of judicial creation—the New York rule.

(Continued from preceding page.)

"We adopt the rule that the hospital is liable for the negligence of
its nurses in performing mere administrative or clinical acts which acts
though constituting a part of the patient's prescribed medical treatment
do not require the application of the specialized technique or the un-
derstanding of a skilled physician or surgeon."

²⁹ See footnote 13, supra.

³⁰ The doctrine of stare decisis alone would seem to require retention of
this doctrine by the courts. If public policy did require its abolition, that
would seem to be a matter for the legislature, which is best equipped to
examine the problems of all charities and to formulate our public policy
thereon without the devastating result of the retroactive effect of judicial
decision. [The writer.]