

Law Review Article as Supplementary Brief

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Law Review Article as Supplementary Brief

In the January, 1925, *Docket*, an article appeared on "Office Conferences." The writer, in describing the use of law reviews by the law firm of Miller and Brady, Toledo, Ohio, says that in at least one case, an article in the *Michigan Law Review* enabled one of the members of such firm to secure a favorable decision, even though the local precedent pointed the other way. He added: "Our court was moved to follow the more progressive and modern decisions of courts of other jurisdictions and reject the local precedent, by arguments based on the *Law Review* article."

Shortly after the appearance of this *Docket*, Professor Zollmann of the Marquette University School of Law, was advised by Professor John Baker Waite, editor-in-chief of the *Michigan Law Review*, that the *Docket* article referred to an article since republished as Chapter 19 of *American Law of Charities*, which he had contributed and which was published in Vol. 19, Page 395 under the title: "Damage Liability of Charitable Institutions." Naturally, he became interested and wished to know in what particular case he had been so unconsciously effective. A letter to Mr. Paul A. Leidy, the writer of the *Docket* article, brought the information that *Taylor v. Deaconess Home and Hospital*, 104 Ohio St. 61, 135 N. E. 287, was the case. Mr. Leidy stated in his letter that he had procured a memorandum of Albert H. Miller, Esq., who had

handled the case from the trial court until judgment had been finally collected and added: "You will appreciate the humor of the situation, on reading his memo., when you grasp the fact that this was the first time in the history of the Ohio Supreme Court that a copy of any law review had been actually filed with the court as a 'Supplemental Brief.' You can almost see the opposing attorneys laughing when they saw this peculiar brief. And you can feel them 'laughing on the other side of their faces,' when the members of the court began to read their copies of the *Review* and commenced to question the opposing attorneys."

The memorandum itself will doubtless prove of interest. It reads as follows:

You asked me to give you the inside story regarding our use of Professor Zollmann's article on the liability of public charitable hospitals appearing in the *Michigan Law Review* sometime back, before the Supreme Court of Ohio.

This is one of my favorite stories. Although I doubt if you will find Professor Zollmann's article or the *Michigan Law Review* or either one of them cited by the court in its decision in the case, the fact is that such citations could easily have been made the controlling authority.

It was a very close case. Taylor had been admitted as a patient to the Flower Hospital in Toledo, and was operated upon for appendicitis. He had a special graduate nurse.

Immediately following his operation he was brought down to his room, still unconscious, in deep sleep and under the influence of general anaesthesia, ether, and placed in his bed. Whereupon, the hospital essayed to administer to him a clysis, which is an injection of warm water.

A student nurse was assigned to this duty, who theretofore had burned a baby in a minor way and had been reprimanded on various occasions for carelessness. This student nurse prepared the clysis, brought it in and administered it to Taylor in his unconscious state. The water, instead of being warm, was scalding hot, and seriously burned him internally.

Taylor brought suit, basing his action upon the claim that it was the duty of the hospital to exercise ordinary care in the selection of its servants, and in this regard, the hospital had failed to use due care and was likewise negligent in carelessly administering the clysis to Taylor.

The trial court held with us and judgment was rendered against the hospital for \$12,000. This was reversed by the Court of Appeals, following a late Massachusetts case, upon the ground that there was no liability on the part of the hospital for negligence of any sort.

The case was appealed to the Supreme Court. It was there briefed exhaustively by both sides. The question was a new one in Ohio, as theretofore we merely had the rule, announced by the Supreme Court in a previous case, that the hospital was not liable for negligence of its servants selected with due care.

The time came near for oral argument. About a week before the case was set, I noticed in the *Michigan Law Review* the article by Professor Zollmann. It was a fair statement of law by an impartial investigator, and rather inclined to our claim that the hospital was liable for failure to exercise ordinary care in the selection of its servants, when damage results to third persons due to the negligence of such servants negligently selected. I immediately wired to my friend, John Barker Waite at Ann Arbor, and asked him to send me fifteen copies of that *Michigan Law Review*. He did so by special delivery. Whereupon, we filed a supplemental memorandum in the Supreme Court, merely calling the attention of the court to this article in the *Michigan Law Review*, and attached as a part of this supplemental memorandum seven copies of the article. This was in conformity with the rules of the court, just five days prior to the time of hearing.

When the case came on for early argument, I shall never forget how much fun the counsel on the other side enjoyed, presumably at our expense, for filing a magazine article as authority. It was the joke of the Judiciary Building.

But in a few moments the case was called. Seven judges, clothed in their silken gowns and traditionary dignity, reached almost simultaneously for a strange looking pamphlet on the bench before them. In a twinkling of the eye, there were seven judges reading Professor Zollmann's article.

We had the burden of opening and closing the case. In our oral argument we referred to Professor Zollmann's article and quoted from it. And these quotations were given such weight by the court that when opposing counsel entered upon their argument, they were questioned at length by the court, as to many of the things which Professor Zollmann had to say. And needless to say, opposing counsel were compelled to admit that whatever humor there was in the situation, was not to their liking.

In the course of a few weeks the Supreme Court reversed the Court of Appeals and affirmed the judgment of the trial court. Application was made by the hospital for rehearing, and this was later denied. Judgment was thereupon collected.

This is, indeed, an encouraging sign. The *Harvard Law Review* has been cited frequently by courts as has, among others, the MARQUETTE LAW REVIEW. The function of the law teacher is not only analytical but constructive. When courts are actuated by such articles in reaching their decisions, the real worth of such work becomes apparent. It should be and we trust that it will be an incentive to others to contribute articles to such journals and we congratulate Professor Zollmann and the *Michigan Law Review* on this deserved mark of recognition.

JOHN McDILL FOX.