

# Torts: *Bing v. Thunig*: The End of Hospital Immunity in New York

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## RECENT DECISIONS

**Torts: Bing v. Thunig: The End of Hospital Immunity in New York**—In preparing the plaintiff for an operation, a hospital-employed nurse spilled an inflammable antiseptic on his sheets. The plaintiff was seriously burned when the liquid was ignited by a cauterizing iron being used by the plaintiff's doctor. The plaintiff sued the doctor and the hospital. The trial court instructed the jury that the hospital would be liable only if it was found that the act of the nurse was an administrative act as opposed to a medical act. The jury found that it was an administrative act and the plaintiff received judgment against both. On review, the Appellate Division held that the nurse's act was medical, therefore, the hospital was not liable. Finally, the Court of Appeals held against the hospital.<sup>1</sup> They ruled that the hospital could be held liable for any negligent act of an employee that was committed within the scope of his employment.<sup>2</sup>

The court specifically overruled the fifty-year old *Schloendorff* case.<sup>3</sup> The *Schloendorff* rule made a hospital's liability, for the acts of its employees, dependent on the nature of the injury-producing act. If the act were found to be medical, the hospital was immune from liability. If the act were found to be administrative, then the hospital became liable.

The *Schloendorff* case reasoned as follows: (1) The doctrine of vicarious liability would not apply to situations involving a hospital and a doctor, or a hospital and nurse, since they were independent contractors when treating patients. This was due to the special skill needed and the hospital's lack of control over them, in the exercise of that skill. (2) That the imposition of liability might limit the services offered by charitable institutions by depleting their funds and forcing them to restrict their activities.<sup>4</sup> The administrative-medical act distinction arose when the court excluded certain acts of nurses from the immunity rule. This was done on the theory that in the performance of administrative duties, the nurse remained a servant of the hospital.<sup>5</sup> The only apparent reason for this distinction, was an intent to compromise between complete liability and complete immunity.<sup>6</sup>

In the principal case, the court pointed out that the weakness of the rule was evidenced both by the inconsistent decisions<sup>7</sup> and by the

<sup>1</sup> *Bing v. Thunig*, 2 N.Y. 2d 656, 163 N.Y.S. 2d 3, 143 N.E. 2d 3 (1957).

<sup>2</sup> This article concerns only the liability of the hospital. The doctor's liability was not brought up on this appeal.

<sup>3</sup> *Schloendorff v. The Society of the New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Bobbe, Tort Liability of Hospitals in New York*, 37 CORNELL L. Q. 419 (1952).

<sup>7</sup> An improperly capped water bottle was held to be a negligent, administrative

exceptions,<sup>8</sup> resulting from its application. Its fault was due to the lack of a valid basis for the distinction. The holding that doctors and nurses were independent because they exercised special skills, was not based on sound logic. Other skilled people, such as mechanics and pilots, have been held to be servants.<sup>9</sup> Skill alone does not outweigh the fact that the hospital may employ and discharge a doctor, nurse, or intern; it pays their wages; it can assign and reassign them to various duties; and often it trains them. It can truly be said that the hospital does control them. The fear that a voluntary hospital will suffer, unless the immunity rule is retained, is no longer in accord with fact. They are given wide community support. They can secure liability insurance. They operate in an efficient and business-like manner. There is little danger that subjecting them to lawsuits will result in ruin. This is illustrated by looking to the states that apply the respondent superior doctrine to hospitals.<sup>10</sup> The court further pointed out that the rule had been applied in situations involving profit-making hospitals,<sup>11</sup> so that institutions which were paid for services were protected by an immunity rule originally designed to safeguard only charitable hospitals.

The court declared:

"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."<sup>12</sup>

The hospital's employees can be classed into doctors and other employees. In the latter group are included nurses, interns, and technicians. Administrative personnel, such as janitors, need not be con-

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act in *Iacono v. New Polyclinic Medical School and Hospital*, 296 N.Y. 502, 68 N.E.2d 450 (1946). But a hot water bottle that was allowed to remain for too long a time on the patient, was said to be a medical act, *Sutherland v. New York Polyclinic Medical School and Hospital*, 298 N.Y. 682, 82 N.E.2d 583 (1948).

<sup>8</sup> Courts no longer applied the rule to public hospitals, *Liubowsky v. State of New York*, 285 N.Y. 701, 34 N.E.2d 385 (1941). Nor would the courts use the rule where the act was committed by a non-professional employee (a technician who required only six weeks training), *Berg v. New York Society for the Relief of the Ruptured and Crippled*, 1 N.Y.2d 499, 154 N.Y.S.2d 455 (1956).

<sup>9</sup> See note 1 *supra*.

<sup>10</sup> See: *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942), *Cohen v. General Hospital Society of Connecticut*, 113 Conn. 188, 154 Atl. 435 (1931); *Durney v. St. Francis Hospital*, 7 Terry 350, 83 A. 2d 753 (1951).

<sup>11</sup> *Bakal v. University Heights Sanitarium*, 302 N.Y. 870, 100 N.E.2d 51 (1951).

<sup>12</sup> 2 N.Y.2d at 667, 163 N.Y.S.2d at 11, 143 N.E.2d at 8.

sidered here, since the *Schloendorff* rule did not exempt them from the application of the respondeat superior doctrine.

In general, doctors are considered to be independent contractors,<sup>13</sup> even in the case of staff doctors.<sup>14</sup> However, where the injury-producing act was committed by a resident doctor in the course of routine medical care the hospital has been held liable.<sup>15</sup>

If the doctor is held to be an independent contractor, it becomes crucial to determine the status of other employees because the hospital can avoid liability if the negligent actor is solely the servant of an independent contractor at the time of the act.<sup>16</sup>

The hospital's liability for the injury-producing acts of its nurses and other employees, can be grouped into three general classes: (1) The independent acts of such employees; (2) The acts of the nurse and employee performed in the presence of the doctor; (3) the acts of such nurse or employee performed while rendering medical treatment prescribed by a doctor, but not done in his presence.

The injury-producing act upon which the hospital's liability was based in the *Bing* case was that of the nurse. The act was not performed in the presence of the doctor nor was it specifically directed by him. Such an act is clearly one done as a servant of the hospital and not as an independent contractor.

The question arises in the principal case: If the doctor were present, at the time the inflammable liquid was applied, would the hospital be relieved of all liability for the nurse's act? The doctor's control, in the operating room, has been held to make him the exclusive master of all acts performed in his presence.<sup>17</sup> A better view would be to let the facts of each case govern. Thus, a nurse-anesthetist would be the servant of the hospital, although the negligent act occurred during an operation, in the doctor's presence.<sup>18</sup>

The area of greatest difficulty arises where the nurse or other hospital employee performs medical treatment prescribed by a physician but not performed in his presence.<sup>19</sup> When the employee commits a negligent, injury-producing act under these circumstances, he should

<sup>13</sup>*Ybarra v. Spangaro*, 25 Cal. App. 2d 486, 154 P.2d 687 (1944); *Hull v. Enid General Hospital Foundation*, 194 Okla. 446, 152 P.2d 693 (1944).

<sup>14</sup>*Mayers v. Litow*,—Cal. App. 2d—, 316 P.2d 351 (1957). However, the court stressed that an agency relationship was not shown by the facts. The doctors were not being paid by the hospital; financial and other arrangements were made between the patient and the hospital, and there was no other conduct or words from which the plaintiff could infer an agency relationship.

<sup>15</sup>*Moeller v. Hauser*, 237 Minn. 368, 54 N.W.2d 639 (1952).

<sup>16</sup>RESTATEMENT, AGENCY §227 (1933).

<sup>17</sup>*Swigerd v. City of Ortonville*, 246 Minn. 339, 75 N.W.2d 217 (1956); *St. Paul-Mercurp Indemnity Co. v. St. Joseph's Hospital*, 212 Minn. 558, 4 N.W.2d 637 (1942); *Aderhold v. Bishop*, 94 Okla. 203, 221 Pa. 752 (1923).

<sup>18</sup>*Cavero v. Franklin General Benevolent Society*, 36 Cal. App., 2d 301, 223 P.2d 471 (1950).

<sup>19</sup>*Swigerd v. City of Ortonville*, 246 Minn. 339, 75 N.W.2d 217 (1956).

be considered a servant of the hospital. At the most, the hospital has merely divided its control over the employee and not relinquished it completely to the doctor. In such a case, there is an inference that the original service continues and the employee remains in the hospital's employment during the performance of any work entrusted to him by the hospital.<sup>20</sup>

The application of the doctrine of respondeat superior to hospitals, places the liability of the hospital on the familiar principles applied to all other employers. It assures the injured person that he can look to the proper party for compensation.

"Certainly, person who avails himself of 'hospital facilities' expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility."<sup>21</sup>

FRANCIS SEROOGY

**Contracts: Impossibility of Performance Caused by Promisor's Negligent Mistake**—Plaintiff was third party beneficiary of a contract entered into by her father, the deceased, with her mother, which contract was embodied in a divorce decree. Under the agreement, deceased promised to continue paying premiums upon an insurance policy in which plaintiff was named beneficiary. Unknown to both contracting parties, the policy in question had lapsed some twelve years prior to the divorce agreement. When plaintiff discovered this fact, after her father's death, she filed a claim against his estate for the face value of the policy. Defendant, the executrix of his estate, contended that the nonexistence of the insurance policy at the time the alleged contract was entered into prevented any contract from having been formed. The trial court ruled in favor of plaintiff and defendant appealed. *Held*: Judgment affirmed. The nonexistence of the essential subject matter to a contract does not void the contract when the promisor, due to his own negligence, failed to discover the facts which made performance by him impossible. *In re Zellmer's Estate*, 1 Wis. 2d 46, 82 N. W. 2d 891 (1957).

The established rule concerning the effect of the nonexistence of the subject matter of a contract may be briefly stated as follows:

"Where parties assume to contract and there is a mistake with reference to any material part of the subject, there is no contract because of the want of mutual assent necessary to create one; and in this connection it has been said that mistake does not so much affect the validity of a contract, as it does to

<sup>20</sup> RESTATEMENT, AGENCY §227, comment *b* (1933). But see the *Swigerd* case, *supra* note 19, where the court held that when an employee is acting pursuant to a doctor's instructions, the hospital is liable only if the injury-producing act is "administrative." Like the *Schloendorff* rule, this bases the whole question of responsibility on the nature of the act alone, rather than on all of the facts involved in the particular case.

<sup>21</sup> 2 N.Y.2d at 667, 163 N.Y.S.2d at 11, 143 N.E.2d at 8.