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tury doctrine of immunity for charitable hospitals while an increasing number of states turn toward a rule of liability more in keeping with twentieth century public policy.

JEANNE OWEN

Torts—Physician and Surgeon—Liability for Acts of Assistants—Respondeat Superior

An action for damages, involving two appeals to the North Carolina Supreme Court, arose out of the death of plaintiff's intestate following an operation performed by defendant physician. At the trial stage nonsuits were entered as to defendant's hospital and nurse, and a verdict was rendered in favor of the physician. On appeal the nonsuits were affirmed and a new trial was ordered as to the physician because of error in the trial judge's charge to the jury. On retrial, a verdict was again rendered in favor of the physician. This was reversed and another trial ordered as to the physician, the court holding that the trial judge erred when he instructed the jury that the nurse was not an "employee" of the physician and that the physician would not be responsible for the negligence of the nurse, thus excluding the doctrine of respondeat superior from consideration.

The responsibility of a physician for the acts of his assistants has been the subject of litigation in other courts, and the resulting decisions make it clear that a physician may be liable in this situation (1) for his own negligence, in causing or allowing an assistant to injure a patient, or (2) for the assistant's negligence, which is imputed to the physician under the principles of agency.

A physician may be personally negligent in employing, retaining or using an incompetent assistant, as when he engages a layman to administer chloroform. It is his legal duty to see that the entire treatment of his patient is carried on correctly, but he may properly delegate simple tasks to his assistants, and thereby relieve himself of legal responsibility.


3 Id. at 225, 67 S. E. 2d at 60.

4 The judge instructed the jury in such a manner as to require expert testimony to establish the physician's liability, and this was held error. The court also held that the trial judge erred in not admitting a written report offered in evidence by the plaintiff. "Jackson v. Joyner, 236 N. C. 259, 72 S. E. 2d 589 (1952)."


6 Spears v. McKinnon, 168 Ark. 357, 270 S. W. 524 (1925); Funk v. Bonham, 151 N. E. 22 (Ill. Ct. App. 1926); Hunner v. Stevenson, 122 Md. 40, 89 Atl. 418 (1913); Guell v. Tenney, 262 Mass. 54, 159 N. E. 451 (1928); Saucier v. Ross,
Thus a physician may authorize a nurse to place hot water bottles or hot flat-irons against the body of a patient after an operation, and he is not liable for the nurse's negligence in doing this. However, some courts will not allow the physician to escape responsibility by assigning an assistant the task of counting the gauzes or sponges used in a surgical operation, and relying on the assistant to determine that all the gauzes placed in the patient's body have been removed. Other courts are not so strict, and reason that the physician bears such complicated and varied responsibilities that he should be allowed to delegate more important tasks to his assistants, including the counting of gauzes. The physician is also liable for negligently instructing or supervising an assistant who is administering treatment, and the assistant is not liable in this situation when he does no more than carry out the specific instructions of the physician or otherwise meets the legal duty required of him. In each of these situations, it is the physician's own negligence that is the basis for his liability, if any, and the doctrine of respondeat superior is not applied.

Whenever the issue is whether the physician is liable for the negligence of his assistants, the problem arises as to what establishes the relationship of principal and agent. If it appears that the assistant is in the pay of the physician, and is acting under the immediate control of the physician, the relationship is said to exist. Again, the relationship obviously exists whenever the assistant is in the pay of the physician and is carrying out his general duties, or following some general instruction of the physician, although not under his immediate control. Not 112 Miss. 306, 73 So. 49 (1916); Niebel v. Winslow, 88 N. J. L. 191, 95 Atl. 995 (1915); Stewart v. Manasses, 244 Pa. 221, 90 Atl. 574 (1914); Jackson v. Hansard, 45 Wyo. 201, 17 P. 2d 659 (1933); Jewison v. Hassard, 26 Man. L. R. 571, 28 Dom. L. R. 584 (Canada 1916). 8 Olson v. Bolstad, 161 Minn. 419, 201 N. W. 918 (1925) (flat-irons); Dalsgaard v. Meierding, 140 Minn. 443, 168 N. W. 584 (1918) (flat-irons); Stewart v. Manasses, 244 Pa. 221, 90 Atl. 574 (1914) (hot water bottle); Malkowski v. Graham, 169 Wis. 398, 172 N. W. 785 (1919) (hot iron). 9 Spears v. McKinnon, 168 Ark. 357, 270 S. W. 524 (1925); Ault v. Hall, 119 Ohio St. 422, 164 N. E. 518 (1928); Jackson v. Hansard, 45 Wyo. 201, 17 P. 2d 659 (1933); Walker v. Holbrook, 130 Minn. 106, 153 N. W. 305 (1915). 10 Funk v. Bonham, 151 N. E. 22 (Ill. Ct. App. 1926); Hunner v. Stevenson, 122 Md. 40, 89 Atl. 418 (1913); Guell v. Tenney, 262 Mass. 54, 159 N. E. 541 (1928); Niebel v. Winslow, 88 N. J. L. 191, 95 Atl. 995 (1915); Jewison v. Hassard, 26 Man. L. R. 571, 28 Dom. L. R. 584 (Canada 1916). 11 Davis v. Rodman, 147 Ark. 385, 227 S. W. 612 (1921); Kershaw v. Tilbury, 214 Calif. 679, 8 P. 2d 109 (1932); Everts v. Worrell, 58 Utah 238, 197 Pac. 1043 (1921); Lawson v. Crane, 83 Vt. 115, 74 Atl. 641 (1909); Miles v. Hoffman, 127 Wash. 653, 221 Pac. 316 (1923). 12 Davis v. Rodman, 147 Ark. 385, 227 S. W. 612 (1921); Kershaw v. Tilbury, 214 Calif. 679, 8 P. 2d 109 (1932); Everts v. Worrell, 58 Utah 238, 197 Pac. 1043 (1921); Lawson v. Crane, 83 Vt. 115, 74 Atl. 641 (1909); Miles v. Hoffman, 127 Wash. 653, 221 Pac. 316 (1923). 13 Davis v. Rodman, 147 Ark. 385, 227 S. W. 612 (1921); Kershaw v. Tilbury, 214 Calif. 679, 8 P. 2d 109 (1932); Everts v. Worrell, 58 Utah 238, 197 Pac. 1043 (1921); Lawson v. Crane, 83 Vt. 115, 74 Atl. 641 (1909); Miles v. Hoffman, 127 Wash. 653, 221 Pac. 316 (1923). 14 This, again, is more specifically described as the "employer-employee" relationship. More specifically, this is the "employer-employee" relationship. More specifically, this is the "employer-employee" relationship. More specifically, this is the "employer-employee" relationship. 15 Miles v. Hoffman, 127 Wash. 653, 221 Pac. 316 (1923).
all decisions are so clear cut, however, there being many instances where the assistant who aids the patient’s physician is paid and retained by the hospital, or by the patient himself. The weight of authority in these situations is that the assistant is the agent of the physician when and if the latter is in “control” of the assistant.4

The courts will ordinarily consider the physician in “control” when he is in charge of treatment, and is present in the room with the patient and the assistant during the administration of treatment.5 It is important that the physician be present in the room, and that the operation or treatment still be in progress, for there is no “control” whenever the physician is not present, or during “after-treatment,” even though the assistant, not an “employee,” may be acting in obedience to the physician’s orders.6 If the physician is liable under the doctrine of respondeat superior, it is of course necessary to show that the assistant was negligent, because this basis for liability is the negligence of the assistant which is imputed to the physician.

Cases wherein a physician’s liability is based on his own negligence in causing an assistant to injure a patient, and those where in liability is based on the negligence of his assistant, are often much alike.7 Therefore it is difficult to determine what reasoning the court has used in establishing the liability of the physician, unless the court specifically

426 (1940) (Assistant physician, retained by employer physician as an employee, turned a patient over to a nurse, also an employee, who placed the patient in the hands of a “girl in blue,” also an employee; patient sued the assistant physician and alleged that she was injured by the acts of the “girl in blue,” but the court held that he was not liable, for one employee is not responsible for the negligence of a fellow employee).


6 Hohenthal v. Smith, 114 F. 2d 494 (D. C. Cir. 1940); Harlan v. Bryant, 87 F. 2d 170 (7th Cir. 1936); Harris v. Fall, 177 Fed. 79 (7th Cir. 1910); Sheridan v. Quarrier, 127 Conn. 279, 16 A. 2d 479 (1940); Messina v. Societe Francaise, 170 So. 801 (La. Ct. App. 1936); Blackman v. Zeligs, 90 Ohio App. 304, 103 N. E. 2d 13 (1951); McConnell v. Williams, 361 Pa. 355, 65 A. 2d 243 (1949); Meadows v. Patterson, 21 Tenn. App. 283, 109 S. W. 2d 417 (1937).

7 Jackson v. Hansard, 45 Wyo. 201, 17 P. 2d 659 (1933) (Physician held liable for his own negligence in allowing an assistant to leave a gauze in a patient’s body); Armstrong v. Wallace, 37 P. 2d 467 (Cal. Ct. App. 1934) (Physician held liable for negligence of an assistant under his “control,” who left a gauze in the patient’s body).
explains itself. The writer suggests that this distinction should be spelled-out, because it may have the very practical significance of determining whether a judgment will be ordered against the assistant, and in the absence of the agency relationship or the assistant's negligence, the physician may be personally liable for a failure to exercise the proper degree of skill, care and judgment that he owes his patient.

The North Carolina decisions are fundamentally in accord with the weight of authority in other jurisdictions, except for a dictum in the principle case. There the court awarded a non-suit to the nurse on first appeal, and on later appeal found reversible error in the trial judge's charge that the negligence of the nurse could not be imputed to the physician. This seems inconsistent because the non-suit indicated that the nurse was not negligent, but the dictum explained that under these circumstances the nurse need not stand responsible for his own "tortuous act," although he might have been negligent and the physician might be liable for the nurse's negligence under the doctrine of respondeat superior. This was said to be an exception to the law of agency.

Frequently the assistant is not joined in the action, and his liability, which would show whether he was negligent and help to determine whether the doctrine of respondeat superior was a part of the court's reasoning, is not in issue.


In Bowditch v. French Broad Hospital, 201 N. C. 168, 159 S. E. 350 (1931) where the hospital arranged for a nurse to serve a patient and help a physician, and the nurse was paid by the patient, the Court indicated that the nurse might be an independent contractor or an agent of the physician, but held that she was not the agent of the hospital.

Where a nurse placed an improper and harmful solution in a newborn baby's eyes while the physician was occupied with the mother, the nurse was held not to be the agent of the physician. Covington v. Wyatt, 196 N. C. 367, 145 S. E. 673 (1928), discussed in 7 N. C. L. Rev. 330 (1929). This may mean that the court will apply the "control" test of agency in narrow fashion, or it may be explained that an emergency or complicated task destroys the physician's "control" over the assistant. No cases were found in which a physician was held liable for the negligence of his assistant under the doctrine of respondeat superior, although such a decision was explicitly authorized in Nash v. Royster, 189 N. C. 408, 412, 127 S. E. 356, 359 (1925).

In Byrd v. Marion General Hospital, 202 N. C. 337, 162 S. E. 738 (1932), a nurse, employed by a hospital but acting under the direction of an attending physician, injured a patient. The patient sued the managing physician of the hospital and the nurse, but not the attending physician. The court reversed a jury verdict against the managing physician only, and held that since the nurse was not negligent, the managing physician could not be liable. The court states the rule of the Byrd case in these words: "... if the physician [referring to the attending physician who was not joined] is present and undertakes to give directions, or ... stands by, approving the treatment administered by the nurse, unless the treatment is obviously negligent and dangerous, ... in such event the nurse can then assume that the treatment is proper under the circumstances, and such treatment, when the physician is present, becomes the treatment of the physician and not that of the nurse." Id. at 343, 162 S. E. at 741.


Id. at 262, 72 S. E. 2d at 592 ("... it is observed that the principle ... stands as an exception to the general rule that an agent who does a tortuous act is
possible explanation of this dictum is that the court took a decision indicating that a physician might be liable for his own negligence in causing an assistant to injure a patient, and read into it an application of the doctrine of respondeat superior.

It is submitted, in the light of decisions of this and other jurisdictions, that the test for determining the liability of any physician or any assistant, free from all exceptions, should be the ordinary one of whether each was negligent; or if the assistant alone is negligent, whether the agency relationship existed.

ROY W. DAVIS, JR.

Wills—Revocation—Attempted Revocation of Unexecuted Copy

The testatrix's notation of "Null and Void, S.H.K." at the top of an unexecuted carbon copy of her will was recently held by the Pennsylvania Supreme Court to be an effective revocation. The court found the notation to be "other writing" within the meaning of that jurisdiction's statutory provision regarding revocation of testamentary papers.

Although the intention of the testator to nullify may be evidenced by his words and actions, the privilege of execution or revocation of wills is granted by the state, and as a corollary, the testator must act in complete accord with the controlling statute in order to make or nullify a will. Ordinarily, the statutes provide three permissible methods of revocation of a will: (1) execution of a subsequent will or codicil; (2) making of some other writing declaring the will revoked; and (3) by tearing, burning, cancelling, or obliterating the document itself. Thus the distinction between a "cancellation" as a method of revocation and not relieved from liability by the fact that he acted at the command or under the direction of his principal.

Such an exception is clearly contradicted in Ybara v. Spangard, 25 Cal. 2d 486, 492, 154 P. 2d 687, 690 (1945): "Any defendant who negligently injured him [the patient], and any defendant charged with his care who so neglected him as to allow injury to occur, would be liable. The defendant employers would be liable for the neglect of their employees; and the doctor in charge of the operation would be liable for the negligence of those who became his temporary servants for the purpose of assisting in the operation." For a statement of the law applicable to situations herein discussed, see Hohenthal v. Smith, 114 F. 2d 494 (D. C. Cir. 1940).

The testatrix in the principal case did not have the original document but after writing on the carbon, she wrote her attorney stating that she had cancelled her will.


Revocation by a subsequent will or codicil is not within the purview of this note. For a discussion of this, see Zacharias and Maschinot, Revocation and Revival of Wills, 25 Chi-Kent L. Rev. 185, 201 (1947).