Torts -- Hospital's Liability -- Standard of Care

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the estate planner is prepared to litigate with the Commissioner and risk the loss of his client's marital deduction, a form of bequest should be employed which is acceptable under section 4.01 of Rev. Proc. 64-19. If the estate planner still prefers to use the pecuniary interest formula, it should be amended to comply with section 2.02 of Rev. Proc. 64-19 by adding: (1) a clause requiring the executor, when satisfying the bequest, to distribute assets, including cash, having an aggregate fair market value at the date, or dates, of distribution amounting to no less than the amount of that bequest, as finally determined for federal estate tax purposes, or (2) a clause requiring the executor to distribute assets, including cash, fairly representative of appreciation or depreciation in the value of all property thus available for distribution in satisfaction of the marital bequest. Consideration should also be given to the use of a fractional share formula which complies with the provisions of section 4.02 of Rev. Proc. 64-19. This formula has not received the attention shown the pecuniary interest formula because of the complexity of its administration. It was thought to require a fraction of each asset to be distributed to each beneficiary.

It is suggested that whichever path is employed to escape its thrust, Rev. Proc. 64-19 may achieve a beneficial result by inspiring reviews of wills and testamentary plans, reviews which are often long overdue.

Thomas E. Capps

Torts—Hospital's Liability—Standard of Care

In Darling v. Charlestown Community Memorial Hosp., action was brought by a patient to recover damages for personal injuries allegedly caused by the hospital's negligence. The court held that, even though there was no deviation from the local standard of care, the hospital was negligent for failing to adhere to its own regulations which required that it provide qualified physicians. The questions presented by the decision are whether a court should allow hospital rules in as evidence of a higher standard of care and, if it does, would such rules impose an undue burden on a layman administrator in requiring him to ensure that

24 Casner, op. cit. supra note 8, at 798.
a physician is competent. Since the trend is to reject charitable immunity, it will be assumed for the purpose of this note that all hospitals are liable in tort.\(^2\)

The liability of a hospital may be predicated upon the doctrine of *respondeat superior* which holds the principal liable for the tortious act of his servant if such act was committed while furthering a purpose of the principal.\(^8\) Under this agency theory, the hospital has been held responsible for the negligence of an elevator operator,\(^4\) a nurse,\(^5\) an intern,\(^6\) and a physician.\(^7\) In determining whether a doctor or nurse is the servant of the hospital, most courts apply the test of whether they are subject to the hospital's control or right of control in regard to the work to be done and the manner of performing it.\(^8\) However, a physician or a nurse employed by the hospital may become the temporary servants of a self-employed

\(^2\) At one time most jurisdictions held that a charitable hospital was immune from liability for the tortious acts of its employees. Illinois, the jurisdiction deciding *Darling*, has repudiated the immunity doctrine. See Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950). Other jurisdictions still hold that a non-profit hospital is exempt from liability, but even these courts will vary as to whether such exemption is complete or partial. Nevertheless, the trend is to reject complete immunity from liability. See President & Director of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942); *Prosser, Torts* § 127 (3d ed. 1964); Note, 37 N.C.L. Rev. 209 (1959); Note, 30 N.C.L. Rev. 67 (1951).


\(^4\) *Sisters of Charity v. Duvelius*, 173 Ohio St. 52, 173 N.E. 737 (1930).

\(^5\) Birmingham Baptist Hospital v. Branton, 216 Ala. 326, 113 So. 79 (1927) (failure of nurse to call doctor in time to deliver child); Goff v. Doctor's Gen. Hosp., 166 Cal. App. 2d 314, 333 P.2d 29 (1958) (failure to call doctor when aware bleeding above normal); Pensacola Sanitarium v. Wilkins, 68 Fla. 447, 67 So. 124 (1914) (burning the patient by leaving hot water bottle in bed). In Byrd v. Marion Gen. Hosp., 202 N.C. 337, 162 S.E. 738 (1932), the court stated that a nurse has the affirmative duty to exercise reasonable care, skill and judgment in the treatment of the patient's case. This is generally the standard of conduct required of a nurse.


doctor who then becomes responsible for their negligence. On the other hand, some courts hold that *respondeat superior* is inapplicable between the hospital and the physician employee. The rationale used in these cases is that a hospital can not control the professional activities of a doctor because the hospital is not competent to practice medicine. When the physician is not a servant but is an independent contractor, it is generally agreed that the hospital is not liable for his malpractice under *respondeat superior*.

There is a concept of hospital liability that does not require negligence of an employee or servant before the hospital will be answerable in tort for injuries suffered by a patient. This legal obligation to compensate arises from the negligence of the hospital itself. Findings of corporate negligence have usually been limited to administrative acts and omissions, such as not providing a nurse, not furnishing proper and safe equipment, not exercising due care in the selection and retention of a physician, and not having available another physician when the patient's doctor is absent. The court in *Darling* applied this concept of corporate liability to a situation in which the hospital was negligent for failing to ensure that only qualified doctors were permitted to use its facilities.

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11 *E.g.*, Burns v. Eno, 213 Iowa 881, 240 N.W. 209 (1932). In *Smith v. Duke Univ.*, 219 N.C. 628, 14 S.E.2d 643 (1941), the court held that a hospital, unless it was negligent in selecting a doctor for a patient, would not be liable for the negligence of a doctor who was neither an employee nor a servant of the hospital for the purpose of treating patients, but who was a member of its staff.


15 In *Yeates v. Harms*, 393 N.W.2d 982 (Kan. 1964), a physician testified that a doctor would be negligent if he absented himself from a case without making arrangements for another doctor to look after his patient. This same expert also testified that a hospital would be negligent if it failed to have available another doctor when a patient's physician was absent.

16 The plaintiff in *Dayan v. Wood River Township Hosp.*, 18 Ill. App. 2d 263, 152 N.E.2d 205 (1958), was denied reappointment to the hospital staff on the grounds that he had failed to keep abreast of current medical pro-
In order to hold a hospital liable, it is necessary for a jury to decide whether there has been a deviation from that degree of care, skill, and diligence used by hospitals in that community. It is the general rule that the standard of care for a hospital and a doctor is established by the medical profession in the local area. The reason for this reliance on the local standard, especially in the case of a doctor, is the lack of a jury's medical knowledge and ability to decide whether or not due care was exercised. There are decisions, however, that have held that the local standards concerning a hospital are not always conclusive of due care when relied upon by the hospital as a defense. This exception to the local standard rule has generally been applied only to non-medical services that are usually rendered by all hospitals regardless of locality. In these cases, the fact that the administration merely utilized the means at hand in the community will not exonerate the hospital from liability.

Besides being held to a local standard of care, a hospital may also procedures and that he failed to call early consultation in difficult cases. In upholding the right of the hospital to deny the plaintiff the right to use its facilities, the court stated:

A hospital is not an annex to every doctor's office where the same freedom of practice as exists in the office continues. Nurses and other employees of the hospital are under the direction and control of doctors from time to time, and costly equipment and facilities are made available for their use. Liability might well be made to fall upon the hospital if their personnel or equipment were permitted to be subject to the control of one lacking in some of the necessary professional skills.

Id. at 270, 152 N.E.2d at 208. The New York court in Hendrickson v. Hodkin, 276 N.Y. 252, 11 N.E.2d 899 (1937), held the hospital liable on the theory of corporate negligence for allowing an incompetent person to use its facilities.


In Tvedt v. Haugen, 70 N.D. 338, 294 N.W. 183 (1940), the court applied the same rationale to a physician. It was stated in the opinion that today, with the rapid methods of transportation and easy means of communication, the horizons have been widened, and the duty of a doctor is not fulfilled merely by utilizing the means at hand in the particular village where he is practicing. So far as medical treatment is concerned, the borders of the . . . community have in effect, been extended so as to include those centers readily accessible where treatment may be had which the local physician . . . is unable to give.

Id. at 349, 294 N.W. at 18.
have to conform to a statutory standard of reasonable care.\textsuperscript{20} Most courts have regarded a violation of a statute as negligence per se or as a presumption of negligence.\textsuperscript{21} The better view, but a minority one, is that a statutory violation is only evidence of negligence.\textsuperscript{22} When the standard is not imposed by the state but is adopted by the hospital itself, some courts have held that the private rule is admissible as evidence of the hospital’s standard of care.\textsuperscript{23} These same decisions, however, have said that a private rule would probably not be admitted as evidence unless all the hospitals in the community have adopted the same regulation. The court in \textit{Darling} did not specifically say that all hospitals in the local area had to accept and approve a private rule before it could be used as evidence. Thus, the principal case indicates that a hospital may be held to a standard of care higher than the local standard.

Should such a rule be admissible in evidence on behalf of a plaintiff? A hospital should be allowed to prescribe rules controlling those permitted to use its facilities. If the court allows these rules to be introduced as evidence, it would seem that the more cautious a hospital is by adopting regulations for the safety of its patients, the more likely it will be held negligent in situations where other hospitals not having similar regulations would probably not be held negligent. Giving the private rule the effect of evidence of the standard could tend to discourage a hospital from adopting any rule.\textsuperscript{24} A fallacy in the argument against admission is the as-

\textsuperscript{20} In addition to the private rules of the hospital, the plaintiff in \textit{Darling} was permitted to offer in evidence the rules and regulations of the Illinois Dept. of Public Health promulgated under the Hospital Licensing Act of 1953, ILL. REV. STAT. ch. 111 1/2, §§ 142-157 (1954).


\textsuperscript{23} Moeller v. Hauser, 237 Minn. 368, 54 N.W.2d 639 (1952); Judd v. Park Ave. Hosp., 37 Misc. 2d 614, 235 N.Y.S.2d 843 (Sup. Ct.), aff’d, 235 N.Y.S.2d 1023 (1962); Corwin v. Univ. of Rochester, 147 N.Y.S.2d 571 (Sup. Ct. 1955). In Stone v. Proctor, 259 N.C. 633, 131 S.E.2d 297 (1963), the court held that an adopted rule promulgated by the American Psychiatric Association could be introduced as evidence of the standard of care a psychiatrist should adhere to. This case was cited in Wilson v. Lowe’s Asheboro Hardware, 259 N.C. 660, 131 S.E.2d 501 (1963), which held that an advisory safety code voluntarily adopted by the defendant was admissible to establish negligence. For discussion of these two unprecedented cases, see \textit{Torts, 11th Annual Survey of North Carolina Case Law}, 42 N.C.L. Rev. 721, 727-28, 736-37 (1964).

\textsuperscript{24} Although a hospital was not involved in Tonda v. St. Paul City Ry., 71
assumption that any violation of a rule will automatically result in liability. Actually, such rules would not be an absolute standard, but would only be evidence to be considered by the jury. Thus, a hospital would be free to introduce evidence to show that a violation of its rules was not negligence. If the rule calls for more than is reasonable under the circumstances, it should be excluded by the court. Therefore, since no absolute standard is imposed by a hospital rule, the result reached in the Darling decision should be followed by the courts.

But, since the administrator was a layman, did the court in Darling impose an unreasonable responsibility upon him to see that only competent physicians were allowed to use the hospital facilities?

It is this writer's opinion that under the facts of the case no unreasonable obligation was placed upon the administrator. Not being a doctor, the administrator would be held to the standard of what a reasonable man would have done under the circumstances, not to what a doctor would have done. The plaintiff's evidence clearly showed that the administrator had not exercised reasonable care to ensure that the hospital's doctors were qualified. He requested neither the medical staff nor the governing board to examine the competency of the physician who treated the plaintiff. Under the facts presented, the court rightly held that the administrator had failed to exercise reasonable care in supervising the conduct of the hospital and the competency of its personnel.26

The principal case is a departure from the idea that all hospitals in the community must adopt the same rules before a hospital regulation will be admissible in evidence. It is submitted that the result of the Darling case should be followed, since by the admission of the hospital rules, the jury would not be bound to decide negligence

Minn. 438, 74 N.W. 166 (1898), the reason advanced by the court for not admitting the defendant's rules in evidence was that a person should not be penalized by the admission of self-adopted rules requiring greater care than the law requires.

26 Most hospitals in this country have been approved by the Joint Commission on Accreditation of Hospitals and have agreed to follow the rules promulgated by the Joint Commission. If the particular jurisdiction will allow the defendant's rules to be admitted in evidence, the establishing of the administrator's obligation to see that consultants are called may be made easier in that the accreditation standard may specifically place the responsibility upon the administrator to ensure that consultations are called. Several standards are presented and their possible effect on the hospital are discussed in Ames, Modern Techniques in the Preparation and Trial of a Medical Malpractice Suit, 12 Vand. L. Rev. 649, 652-57 (1959).
solely on the basis of the local standard but would have a choice as to whether the local standard or the hospital rules were reasonable under the circumstances.

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