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lated in unambiguous language, that language is itself the best index of legislative intent.

Personally, I believe that the Section 302 of the Taft-Hartley law is so clear and unambiguous in its expression as to make reference to extraneous documentation unnecessary. Nevertheless that part of the extraneous documentation and external circumstances which has the highest quality (the evils to be remedied, the conference reports, the senate reports, the explanations given by Senators Taft, Byrd and Ball) confirm the construction which I have made.

That another view ever became popular; or that I myself had the initial impression that Section 302 of the Taft-Hartley law was meant to place restrictions upon the United Mine Workers of America Welfare and Retirement Funds, I can only attribute to certain false emphases given by the labor law services and the newspapers which copied them.

ENLARGEMENT OF TORT LIABILITY OF CHARITABLE HOSPITALS IN NEW YORK

Legal scholars are almost unanimous in the opinion that charities should be no more exempt from liability for the negligence of their employees than are private business corporations and individuals.¹ No such unanimity is to be found among the courts.² An exceedingly small minority of jurisdictions have imposed full liability.³ On the other hand, only the advocates of the "trust

1. COOLEY, TORTS 126 (Student's ed. 1930); HARPER, TORTS § 294 (1933); PROSSER, TORTS § 108 (1941); Appleman, *The Tort Liability of Charitable Institutions*, 22 A. B. A. J. 48 (1936); Feezer, *Tort Liability of Charities*, 76 U. OF PA. L. REV. 191 (1928); Zellman, *Damage Liability of Charitable Institutions*, 19 MICH. L. REV. 395 (1920). *But see* McCaskill, *Respondeat Superior as Applied in New York to Quasi-Public and Eleemosynary Corporations*, 6 CORN. L. Q. 56 (1920).

2. See the opinion of Rutledge, A. J., in *Georgetown College v. Hughes*, 130 F. 2d 810 (App. D. C. 1942), of which it has been said that it "... constitutes a document which should be of invaluable aid to any state legislature contemplating a change in this particular sphere of the law." *Obiter Dicta*, 12 FORD. L. REV. 89, 91 (1943).

3. *Mulliner v. German Evangelical Synod*, 144 Minn. 393, 175 N. W. 699 (1920) (pneumonia patient leaped to his death as a result of nurse's failure to exercise necessary supervision); *Welch v. Freshie Mem. Hosp.*, 90 N. H. 337, 9 A. 2d 761 (1939) (X-ray technician rendered negative report on condition of patient's ankle. Subsequent examination at another hospital revealed broken bones which had failed to knit properly. *Held*, hospital was liable if X-ray technician's negligence was proximate cause of plaintiff's injury); *cf.* *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4 (1915) (court, in holding the charity liable to a paying patient, expressly reserved its opinion as to non-paying patients); *Sessions v. Thomas D. Dee Memorial Hosp. Ass'n*, 94 Utah 460, 78 P. 2d 645 (1938) (although the question was decided on the pleadings, the court stated that a hospital whose general purposes were charitable could be held liable for the death of a paying patient). *Glavin v. Rhode Island Hosp.*, 12 R. I. 411 (1879), advocated the adoption of a doctrine closely akin to that now in effect in New York (see note 24 *infra*), but passage of R. I. Gen. Laws 1938, c. 116, § 95, restored immunity to the charitable institutions.

fund" theory⁴ purport to grant complete immunity,⁵ denying recovery to stranger, servant and beneficiary alike. Even here, however, exceptions have been made in special instances.⁶ The remaining jurisdictions have shown marked uniformity in permitting recovery to strangers⁷ and servants,⁸ and also to beneficiaries who have sustained injuries at the hands of employees carelessly selected.⁹

The Conflict

The real conflict exists in the decisions covering the rights of beneficiaries for torts committed upon them by employees who have been presumptively selected with care. In respect to charitable hospitals, courts have but rarely¹⁰ distinguished between paying and non-paying patients, the majority view being that payment for services received or treatments rendered will not impose liability where it would not have been imposed otherwise.¹¹

4. Two reasons are most commonly advanced in support of the theory: "To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose," *Heriots' Hosp. v. Ross*, 12 Clark & F. 507, 513, 8 Eng. Rep. 1508, 1510 (1846); and ". . . if the property of the charity was depleted by the payment of damages its usefulness might be either impaired or wholly destroyed . . .," *Farrigan v. Pevear*, 193 Mass. 147, 149, 78 N. E. 855 (1906), relying upon *McDonald v. Mass. Gen'l Hosp.*, 120 Mass. 432 (1876).

5. In a leading case among advocates of the trust fund theory, *Roosen v. Peter Bent Brigham Hosp.*, 235 Mass. 66, 126 N. E. 392 (1920), deceased, a paying patient, was given a deadly poison in lieu of Epsom salts. *Held*, to permit recovery would be unlawfully to divert the trust fund. See *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991 (1905) (student lost eye through negligence of professor); *Greatrex v. Evangelical Deaconess Hosp.*, 261 Mich. 327, 246 N. W. 137 (1933) (plaintiff's baby was given to another through negligence of nurse and never recovered); *Gregory v. Salem General Hosp.*, 175 Ore. 464, 153 P. 2d 837 (1944) (nurse negligently placed hot water bottle in plaintiff's bed).

6. *O'Connor v. Boulder Colo. San. Ass'n*, 105 Colo. 259, 96 P. 2d 835 (1939) (indemnity insurance); *Peden v. Furnam U.*, 155 S. C. 1, 151 S. E. 907 (1930) (creating a nuisance); *cf. Ratliffe v. Wesley Hosp. & Nurses' Training School*, 135 Kan. 306, 10 P. 2d 859 (1932) (negligent selection of employees). Compare *McKay v. Morgan Mem. Co-op Industries & Stores, Inc.*, 272 Mass. 121, 172 N. E. 68 (1930) with *Reavey v. Guild of St. Agnes*, 284 Mass. 300, 187 N. E. 557 (1933).

7. *E.g.*, *Henry W. Putnam Mem. Hosp. v. Allen*, 34 F. 2d 927 (C. C. A. 2d 1929); *Andrews v. Y. M. C. A.*, 226 Iowa 374, 284 N. W. 186 (1939).

8. *Gable v. Salvation Army*, 186 Okla. 687, 100 P. 2d 444 (1940); *cf. Bruce v. Central Meth. Epis. Church*, 147 Mich 230, 110 N. W. 951 (1907).

9. *Georgia Bap. Hosp. v. Smith*, 37 Ga. App. 92, 139 S. E. 101 (1927) (anaesthetist); *Taylor v. Flower Deaconess Home & Hosp.*, 104 Ohio St. 61, 135 N. E. 287 (1922) (student assistant); *Magnuson v. Swedish Hosp.*, 99 Wash. 399, 169 Pac. 828 (1918) (nurse).

10. See, *e.g.*, *Silva v. Providence Hosp. of Oakland*, 14 Cal. 2d 762, 97 P. 2d 798 (1939); *Nicholson v. Good Samaritan Hosp.*, 145 Fla. 360, 199 So. 344 (1940).

11. *Southern Methodist Hosp. and Sanitarium v. Wilson*, 45 Ariz. 507, 46 P. 2d 118 (1935); *cf. Morton v. Savannah Hosp.*, 148 Ga. 438, 96 S. E. 887 (1918); see *Susmann v. Y. M. C. A.*, 101 Wash. 487, 489, 172 Pac. 554, 556 (1918).

Theories upon Which Immunity Has Been Granted

Until recently the courts generally have been determined in their efforts to protect the charity from liability to beneficiaries injured at the hands of its employees. Varying grounds have been advanced to support such a policy. The "waiver" doctrine,¹² once extant in New York¹³ but now replaced by the "independent contractor" doctrine,¹⁴ is still in force in several jurisdictions.¹⁵ This approach, however, may not with consistency prevent recovery for injuries sustained by strangers and employees.¹⁶ The "trust fund" theory, referred to above,¹⁷ continues to have its adherents. The view that the non-profit characteristic of the institution precludes the application of the rule of *respondent superior* has received some support.¹⁸ Still another position taken has been that the charity is analogous to a governmental agency and performing a governmental function.¹⁹ When all other explanations have proved unsatisfactory, exemption has been granted on the broad, inarticulate and, it is submitted, unsatisfactory ground of public policy.²⁰

12. Patient or student who accepts the benefits is said to waive impliedly the right to hold the charity liable for injuries sustained at the hands of its employees.

13. *Hordern v. Salvation Army*, 199 N. Y. 233, 92 N. E. 626 (1910) (charity held liable for injuries sustained by mechanic engaged in repairing boiler on its premises); *Collins v. N. Y. Post Graduate Med. School*, 59 App. Div. 62, 69 N. Y. Supp. 106 (2d Dep't 1901) (charity freed from liability for negligence of surgeon in performing operation on one who had voluntarily requested treatment); see *Hamburger v. Cornell University*, 240 N. Y. 328, 339, 340, 148 N. E. 539, 543 (1925), in which the court, speaking through Cardozo, J., stated: "Immunity, if it exists in such conditions, would come from the recognition of what is known as the 'waiver' doctrine, or something akin thereto." *Contra*: *Sheehan v. North Country Community Hosp.*, 273 N. Y. 163, 7 N. E. 2d 28 (1938) (see note 22 *infra*); see *Phillips v. Buffalo General Hosp.*, 239 N. Y. 188, 189, 146 N. E. 199, 200 (1924), wherein the court expressed its dissatisfaction with the "waiver" doctrine by saying: "We are reluctant to permit an affirmance of the judgment to pass as an acceptance of the theory that defendant's exemption from liability must rest on the waiver doctrine."

14. See text accompanying note 21, *et seq.*

15. See, e.g., *Mikota v. Sisters of Mercy*, 183 Iowa 1378, 163 N. W. 219 (1918); *Williams' Adm'x v. Church Home for Females*, 223 Ky. 355, 3 S. W. 2d 753 (1928) (court affirmed three doctrines, i.e., public policy, trust fund, and implied waiver); *Hospital of St. Vincent of Paul v. Thompson*, 116 Va. 101, 81 S. E. 13 (1914) (stranger permitted to recover since doctrine of implied waiver held to apply to beneficiaries only).

16. E.g., in *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, 112 N. Y. Supp. 566 (2d Dep't 1908), the court, while recognizing the existence of the doctrine, held that it had no application to the case before it (stranger run over by ambulance) and reversed a judgment dismissing the complaint.

17. See notes 4 and 5 *supra*.

18. *Paterlin v. Memorial Hosp. Ass'n*, 247 Fed. 639 (C. C. A. 3d 1918); *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991 (1905).

19. *Schumacher v. Evangelical Deaconess Soc.*, 213 Wis. 169, 260 N. W. 476 (1935).

20. *D'Amato v. Orange Memorial Hosp.*, 101 N. J. L. 61, 127 Atl. 340 (1925).

"Independent Contractor" Doctrine in New York

Despite the view taken by some²¹ that *Sheehan v. North Country Community Hospital*²² negated completely the charity's immunity from liability to a beneficiary for the torts of its employees, subsequent decisions²³ have clearly affirmed New York's commitment to the "independent contractor" doctrine of immunity²⁴ when privately²⁵ conducted charities²⁶ are involved. Briefly stated, New York's position is as follows: if the tort is committed by one engaged in the performance of professional, as distinguished from merely admin-

21. See *Lee v. Glens Falls Hosp.*, 265 App. Div. 607, 612, 42 N. Y. S. 2d 169, 174 (3d Dep't 1943) (dissenting opinion), *aff'd*, 291 N. Y. 526, 50 N. E. 2d 651 (1943), *appeal denied*, 291 N. Y. 670, 51 N. E. 2d 940 (1943); *Georgetown College v. Hughes*, 130 F. 2d 810, 819 (App. D. C. 1942).

22. 273 N. Y. 163, 7 N. E. 2d 28 (1938). In that case, plaintiff, a paying patient in the hospital of defendant, a charitable corporation, was injured in a collision between the ambulance of the defendant and another vehicle. The charitable hospital was held liable for the negligence of a mere servant, *i.e.*, the ambulance driver.

23. *Lee v. Glens Falls Hosp.*, 265 App. Div. 607, 42 N. Y. S. 2d 169 (3d Dep't 1943), *aff'd*, 291 N. Y. 526, 50 N. E. 2d 651 (1943), *appeal denied*, 291 N. Y. 670, 51 N. E. 2d 940 (1943) (see text accompanying note 29 *infra*); *Steinert v. Brunswick Home*, 172 Misc. 787 16 N. Y. S. 2d 83 (Sup. Ct. 1939), *aff'd*, 259 App. Div. 1018, 20 N. Y. S. 2d 459 (2d Dep't 1940), *appeal denied*, 260 App. Div. 810, 22 N. Y. S. 2d 822 (2d Dep't 1940) (paying patient denied recovery for injuries suffered as result of nurse's negligence in preparing wrong solution for injection on ground that her act was non-professional); *Andrews v. Roosevelt Hosp.*, 259 App. Div. 733, 18 N. Y. S. 2d 447 (2d Dep't 1940), *reargument denied*, *Re Petrides' Estate*, 259 App. Div. 831, 19 N. Y. S. 2d 1022 (2d Dep't 1940) (patient, left unattended by interne and orderly, died as result of fall from table in examination room. The hospital was held not liable since failure to attend patient was negligence in performance of non-administrative act).

24. The relationship between the hospital and its physicians was described by Cardozo, J., in *Schloendorff v. New York Hosp.*, 211 N. Y. 125, 129, 105 N. E. 92, 93 (1914), as follows: "It is said that this relation is not one of master and servant, but that the physician occupies the position, so to speak, of an independent contractor, following a separate calling, liable, of course, for his own wrongs to the patient whom he undertakes to serve, but involving the hospital in no liability if due care has been taken in his selection. . . ." The learned Judge, further on in his opinion, made the following observation in respect to nurses: "It is true, I think, of nurses as of physicians, that in treating a patient they are not acting as the servants of the hospital." *Id.* at 132, 105 N. E. at 94.

25. See note 44 *infra*.

26. It would seem that the "independent contractor" doctrine, logically applied, should lead to the same result in cases involving hospitals conducted for profit. See *Renouf v. N. Y. Central R. R.*, 254 N. Y. 349, 351, 173 N. E. 218, 219 (1930), in which Pound, J., speaking for the court, said: "This rule of relationship between employer and nurse is not limited in its application to charitable corporations, although it has often been applied to relieve such corporations from liability for the negligent acts of physicians and nurses employed by them in the treatment of patients." *But cf.* *Post v. Crown Heights Hosp.*, 173 Misc. 250, 17 N. Y. S. 2d 409 (Sup. Ct. 1940), wherein a non-charitable hospital was held liable for injuries to a patient resulting from an interne's negligent administration of an injection.

istrative, duties, if there is no negligence in the selection of the employee, and if the hospital believes in good faith, and without notice to the contrary, that no tort is being committed or contemplated, liability may not be imposed upon the hospital however negligent the wrongdoer may be in the performance of his duty.²⁷

Whether or not the employee is to be classified as an independent contractor ". . . is determined by the *nature* of the work he is employed to do rather than the payroll designation of his position."²⁸ The determination of the "nature" of the act has resulted in some finely spun distinctions. In *Lee v. Glens Falls Hospital*²⁹ a paying patient was injured when she fell from a bed upon which sideboards had been attached, during the temporary absence of a nurse employed by the hospital. The Appellate Division, two justices dissenting, held her act to be professional in nature and therefore not such as would cast liability upon the hospital. But in *Ranelli v. Society of New York Hospitals*³⁰ where a head nurse failed to attach sideboards to a patient's bed, after having concluded that they were necessary, the hospital was held liable for her negligence on the ground that the attachment of sideboards to a bed was a purely administrative act. Her decision to attach was said to be of a professional nature; her failure to attach was purely administrative. With respect to as routine an act as placing a hot water bottle in a bed, it was held in

27. *Schloendorff v. New York Hosp.*, 211 N. Y. 125, 105 N. E. 92 (1914); *cf. Hendrickson v. Hodkin*, 276 N. Y. 252, 257, 11 N. E. 2d 899, 901 (1937), cited by the Appellate Division in *Necolayff v. Genesee Hosp.*, 270 App. Div. 643, 61 N. Y. S. 2d 832 (4th Dep't 1946), *aff'd without opinion*, 296 N. Y. 936, 73 N. E. 2d 117 (1947). In the *Hendrickson* case, *supra*, the Court of Appeals reversed a dismissal of the complaint as to the defendant non-charitable hospital and observed, per Hobbs, J.: "The evidence . . . justified the . . . finding that the hospital admitted appellant *knowing* that the purpose of his being there was for an improper treatment by a layman . . ." (italics supplied); and (at 258, 11 N. E. 2d at 902): ". . . the basis of liability is not the negligence of the doctor or nurse in charge, but the wrongful conduct of the executive manager and superintendent acting within the scope of his authority. . ." citing the *Schloendorff* case, *supra*. *Dillon v. Rockaway Beach Hosp.*, 284 N. Y. 176, 181, 30 N. E. 2d 373, 375 (1940), also cited by the Appellate Division in the *Necolayff* case, *supra*, is clearly distinguishable as the Court of Appeals held, by a unanimous court, that ". . . the act is of a kind performed by a servant, and it is undisputed that such is the character of the act in the case at bar."

28. (Italics supplied). *Phillips v. Buffalo General Hosp.*, 239 N. Y. 188, 160, 146 N. E. 199, 200 (1924); *Dillon v. Rockaway Beach Hosp.*, 284 N. Y. 176, 30 N. E. 2d 373 (1940).

29. 265 App. Div. 607, 42 N. Y. S. 2d 169 (3d Dep't 1943), *aff'd*, 291 N. Y. 526, 50 N. E. 2d 651 (1943), *appeal denied*, 291 N. Y. 670, 51 N. E. 2d 940 (1943).

30. 49 N. Y. S. 2d 898 (Sup. Ct. 1944), *aff'd on reduction of verdict*, 269 App. Div. 906, 56 N. Y. S. 2d 481 (2d Dep't 1945), *aff'd*, 295 N. Y. 850, 67 N. E. 2d 257 (1946); *cf. Petry v. Nassau Hosp.*, 267 App. Div. 996, 48 N. Y. S. 2d 227 (2d Dep't 1944) (patient left unattended on a table that had no sides on it but it did not appear that a decision as to their necessity had been made by anyone); *Bickford v. Peck Memorial Hosp.*, 266 App. Div. 875, 43 N. Y. S. 2d 20 (2d Dep't 1943) (maternity patient injured in fall from bed. It was held to be a question of fact as to whether defendant should have supplied a bed with sideboards).

*Phillips v. Buffalo General Hospital*³¹ that such an act was nursing and therefore non-administrative though performed by an orderly. But, in a more recent case, a nurse's act of placing a hot water bottle in a bed for the purpose of preventing shock to a patient just operated upon was held to be administrative since the patient was not in the bed when the bottle was placed therein.³²

Necolayff v. Genesee Hospital

The case of *Necolayff v. Genesee Hospital*,³³ recently affirmed without opinion by the Court of Appeals spotlights more vividly the extent to which courts will go in their reasoning when they seek to adhere to the principle of stare decisis on the one hand and yet provide relief for obvious wrong on the other. In the *Necolayff* case the original plaintiff³⁴ was a paying patient at the hospital of defendant. She had retained her own surgeon, physician and nurse. On the second day preceding her scheduled discharge from the hospital, a blood transfusion, prescribed for another patient by the latter's private physician, was mistakenly administered to plaintiff, over her protest, by an interne and nurse, employees of the hospital. Resulting injuries to plaintiff were described, in part, as severe nervous shock leading to a subsequent, three-month confinement in a state institution for the insane. The trial court decided as a matter of law that the charity was liable for the tortious conduct of the interne and nurse. The Appellate Division, one justice dissenting, affirmed upon the ground that the professional nature of the employees' work had ceased upon their entry into the wrong room and, therefore, that the hospital was liable under the rule of *respondeat superior*.

The Appellate Division conceded that the interne and nurse ". . . were properly qualified and were assigned to do some professional work."³⁵ It also conceded that no degree of error on the part of the interne and nurse could have imposed liability on the hospital had such error been committed while they were administering the transfusion to the proper patient.³⁶ The transfusion, however, was not administered to the proper patient. That the employees in the *Necolayff* case were guilty of negligence, if not trespass and assault, is not to be disputed.³⁷ But upon what ground can the liability of the hospital be predi-

31. 239 N. Y. 188, 146 N. E. 199 (1924).

32. *Iacono v. N. Y. Poly. Med. School and Hosp.*, 260 App. Div. 955, 58 N. Y. S. 2d 244 (2d Dep't 1945), *aff'd*, 296 N. Y. 502, 68 N. E. 2d 450 (1946).

33. 270 App. Div. 648, 61 N. Y. S. 2d 832 (4th Dep't 1946), *aff'd without opinion*, 296 N. Y. 936, 73 N. E. 2d 117 (1947).

34. Subsequent to the decision of the Appellate Division, the original plaintiff died, whereupon the administrator of her estate was substituted in her place.

35. 270 App. Div. 648, 653, 61 N. Y. S. 2d 832, 836 (4th Dep't 1946), *aff'd without opinion*, 296 N. Y. 936, 73 N. E. 2d 117 (1947).

36. *Ibid.*

37. *Ibid.* The court then said: "To avoid such negligence or act of misconduct would be the duty of the hospital, and yet here such negligence and misconduct were committed by the very persons whom the hospital employed for certain duties and thus gave them access to the rooms and persons of patients." *Ibid.* As to the first portion of the quoted

cated? The Appellate Division solved this by holding that "Their [the employees'] entrance into the wrong room caused the professional nature of their errand to cease." Thus, by a purely accidental and, it would seem, irrelevant fact, a conceded professional act (the administering of a blood transfusion) was transformed into one purely administrative. It is extremely difficult to reconcile this holding with that in *Schloendorff v. New York Hospital*³⁸ in which a paying patient who had consented to an ether examination but who had informed physicians and nurses employed by the charitable hospital of her refusal to undergo an operation of any sort was denied recovery for injuries sustained as the result of the unauthorized operation. Both in the *Schloendorff* case and in the *Necolayff* case the wrong complained of was not merely negligence but trespass and, it is submitted, no more notice was chargeable to the New York Hospital in the former case than was chargeable to the Genesee Hospital in the latter.³⁹

As for the possibility in the *Necolayff* case that the hospital had been negligent in its duty of supervision, the Appellate Division itself acknowledges that "Through some mistake (*and the record does not show what mistake or whose mistake*) the interne Moody entered Mrs. Necolayff's room and gave her this transfusion."⁴⁰

Conclusion

Notwithstanding the fact that the *Sheehan* case⁴¹ did not go so far towards imposing full liability as was first thought,⁴² recent cases have disclosed a marked tendency on the part of New York courts to hold the charity liable whenever possible.⁴³ Only in the light of this trend is it possible to understand the result reached in the *Necolayff* case. Unfortunately, the distinctions

statement, *i.e.*, the duty of the hospital, see note 40 *infra*, and accompanying text; as to the second, *i.e.*, that the tort was committed by the "very persons" to whom the hospital had given access to the persons and rooms of patients, it is submitted that it is extremely difficult to conceive of anyone more likely to commit it.

38. 211 N. Y. 125, 105 N. E. 92 (1914); see, also, note 27 *supra*.

39. Moreover, the language employed in the *Schloendorff* case does not lend itself to an interpretation which would support the court's reasoning in the more recent decision. Thus, the court in the *Schloendorff* case said (at 131, 105 N. E. at 94): "One or both of those physicians . . . ordered that an operation be performed on her in disregard of her instructions. The administrative staff of the hospital believing in good faith that the order was a proper one, and without notice to the contrary, gave to the operating surgeons the facilities of the surgical ward. The operation was then performed. The wrong was not that of the hospital; it was that of physicians, who were not the defendant's servants, but were pursuing an independent calling. . . . If, in serving their patient, they violated her commands, the responsibility is not the defendant's; it is theirs."

40. (Italics supplied.) 270 App. Div. 648, 651, 61 N. Y. S. 2d 832, 834 (4th Dep't 1946).

41. 273 N. Y. 163, 7 N. E. 2d 28 (1938).

42. See notes 21, 22 and 23 *supra*, and accompanying text.

43. See cases cited in notes 22, 30 and 32 *supra*. For a discussion of the liability of churches for injuries sustained therein, see a series of three articles commencing in N. Y. L. J., Oct. 17, 1945, p. 920, col. 1.

which the courts have made in their effort to reach the desired result has led to decisions which if not altogether unsound are at least questionable. The court in the *Necolayff* case abandoned the test heretofore uniformly applied in determining whether an act was administrative or professional (the nature of the act itself) and substituted as the controlling factor the place of its performance or, at least, the circumstances surrounding it. While perhaps doing justice in this most recent instance, such strained judicial rationalization renders more uncertain this branch of the law. If public policy demands the imposition of full liability upon all charitable institutions, the legislature rather than the judiciary should provide the necessary relief.⁴⁴ Litigants and lawyers should not be left to depend upon the nice and, it would seem, almost imperceptible distinctions which the courts have seemingly marked out in an attempt to reconcile the rights of the injured patient with the public service performed by our hospitals.

44. The State, in respect to the institutions which it maintains, has expressly waived its sovereign immunity. COURT OF CLAIMS ACT § 12-a, N. Y. Laws 1929, c. 467, now § 8, N. Y. Laws 1939, c. 860, *Bernadine v. City of New York*, 294 N. Y. 361, 62 N. E. 2d 604 (1945); *Holmes v. County of Erie*, 291 N. Y. 798, 53 N. E. 2d 369 (1944); *Bloom v. Jewish Board of Guardians*, 286 N. Y. 349, 36 N. E. 2d 617 (1941), 11 FORD. L. REV. 101 (1942); see *Paige v. State of New York*, 269 N. Y. 352, 357, 199 N. E. 617, 619 (1935) (dissenting opinion). As Loughran, J., speaking for the Court of Appeals in *Sheehan v. North Country Community Hosp.*, 273 N. Y. 163, 166, 7 N. E. 2d 38, 39 (1938), so aptly remarked, ". . . the now declared public policy of the State is that persons damaged by the torts of those acting as its officers and employees need not contribute their losses to the purposes of government."