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substance that would stupefy his senses, retard his muscular and nervous reaction, and impair, if not destroy, the perfect co-ordination of eye, brain and muscles that is essential to safe driving. After Miller voluntarily rendered himself unfit to operate a car properly he undertook to drive his automobile, a potentially lethal machine, down a well traveled highway. His conduct in doing this was distinctly anti-social, and the jury was amply authorized in saying by their verdict that he was exhibiting a 'wanton disregard of the rights and safety of others'."[51] The foregoing language is generally expressive of all jurisdictions in which punitive damages have been allowed in similar fact situations. In at least one instance the court has come close to declaring punitive liability as a matter of law.[52]

Conclusion

The broad principles of law governing the question of punitive damages in New York are fairly well defined. Neither public policy[53] nor criminal liability[54] have deterred the courts. Aggravated negligence will serve as a sufficient basis for such damages and all facts tending to prove wantonness and recklessness are admissible.[55] Provided, then, that the pleading is proper, even an admission by the defendant of liability for compensatory damages would not preclude the plaintiff from offering evidence of the defendant's intoxication on the question of punitive damages.[56] Noteworthy, too, is another course open to a plaintiff who has been injured by an intoxicated person. By statute he is permitted a cause of action against anyone who has unlawfully sold intoxicants to the inebriate or unlawfully assisted him in obtaining liquor, and against whom he has a right to recover punitive as well as compensatory damages.[57] Aside from this remedy, however, when the question of the drunken driver's liability for punitive damages is finally decided in New York, the courts will probably place considerable emphasis upon the fact of his intoxication in much the same manner as is now done in motor vehicle homicide cases.

STATUS OF THE LAW IN NEW YORK CONCERNING TORT LIABILITY OF HOSPITALS

Trust Fund Theory

As a general rule a master is liable for the torts of his servants committed in the course of their employment.[1] Some jurisdictions recognize as an exception

51. Miller v. Blanton, 213 Ark. 246, 248, 210 S.W.2d 293, 294 (1948).
52. Southland Broadcasting Co. v. Tracy, 210 Miss. 836, 50 So. 2d 572 (1951).
53. Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918).
54. Taylor v. Church, 8 N.Y. 452 (1853).
55. De Marasse v. Wolfe, ——Misc.——, 140 N.Y.S.2d 235 (Sup. Ct. 1955).
56. Sheldon v. Bauman, 19 App. Div. 61, 45 N.Y. Supp. 1016 (1st Dep't 1897).
57. N.Y. Civil Rights Law §16.

1. A citizen cannot sue the United States or a state without its consent under the theory that the sovereign can do no wrong. Prosser, Torts § 109 (2d ed. 1955). The federal government waived part of its immunity by the passage of the Federal Tort Claims Act

to this rule the immunity from suit enjoyed by charitable institutions. Attempts to justify this charitable immunity has led to the development of various legal theories. The earliest theory of charitable immunity, the trust fund theory, found its origin in *Heriot's Hospital v. Ross*[2] over one hundred years ago. The rationale was that the contributions to the hospital became part of a trust fund, and to pay damages from this fund would be contrary to the purpose for which the fund was established.[3] The *Heriot* case was later overruled in England,[4] but a Massachusetts court, apparently in ignorance of the fact that England had already repudiated the rule, introduced the trust fund doctrine into the *United* States in *McDonald v. Massachusetts General Hospital*,[5] and Maryland followed suit shortly thereafter.[6] It is interesting to note that the court in the *McDonald* case implied in dicta that recovery would have been allowed if the hospital had not exercised due care in the selection of its employees.[7] This is inconsistent with the fundamental principle of the theory.

Although the trust fund theory has been accepted in several jurisdictions,[8] it has met with general disapproval in this country.[9] The reasoning behind its rejection found it inconsistent with the fundamental idea of government to subjugate general laws to the will of any one person or group.[10] A more basic objection to the trust fund theory is that under its reasoning, a person may suffer a wrong and be left without adequate redress. Under a normal trust the trustee is a principal and is personally liable. However, in a charitable corporation, the directors do not hold title and therefore have no personal liability. If the property owned by the corporation is then considered a trust fund, the injured party

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in 1946. 28 U.S.C.A. § 1346. Approximately one-half of the states have also waived governmental immunity. See Nutting, Legislative Practice Regarding Tort Claims Against The State, 4 Mo. L. Rev. 1 (1939).

2. 12 Clark & Fin. 507, 8 Eng. Rep. 1508 (1846).

3. "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." Heriot's Hospital v. Ross, 12 Clark & Fin. 507, 513, 8 Eng. Rep. 1503, 1510 (H.L. 1846).

4. Mersey Docks v. Gibbs, L.R. 1 H.L. 93 (1866).

5. 120 Mass. 432 (1876).

6. Perry v. House of Refuge, 63 Md. 20 (1884).

7. ". . . [I]f due care has been used by them [the trustees] in the selection of their inferior agents, even if the injury has occurred by the negligence of such agents, it [the trust fund] cannot be made responsible." McDonald v. Massachusetts General Hospital, 120 Mass. 432 (1876).

8. Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910); Maretick v. South Chicago Community Hospital, 297 Ill. App. 488, 17 N.E.2d 1012 (1938).

9. Powers v. Massachusetts Homeopathic Hospital, 109 Fed. 294 (1st Cir. 1901); Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915); Hordern v. Salvation Army, 199 N.Y. 233, 92 N.E. 626 (1910); Basabo v. Salvation Army, 35 R.I. 22, 85 Atl. 120 (1912); Hospital of St. Vincent of Paul v. Thompson, 116 Va. 101, 81 S.E. 13 (1914).

10. "The doctrine that the will of an individual shall exempt either persons or property from the operation of general laws is inconsistent with the fundamental idea of government. It permits the will of the subject to nullify the will of the people." Basabo v. Salvation Army, 35 R.I. 22, 85 Atl. 120, 127 (1912).

is precluded from recovery except perhaps from the normally financially incapable servant. It is not only inequitable, but also legally unsound, yet the states which have adopted it show no sign of abandoning it.

Rejection of Respondeat Superior

Immunity is sometimes granted under the theory that public policy dictates that respondeat superior should not apply in the case of charitable organizations.[11] It has been said: "The reason for this rule is, that acting for the benefit of the public . . . does not involve such a private pecuniary interest as lies at the foundation of the doctrine of respondeat superior."[12] However most courts refuse to accept this argument,[13] and hold that in the best interests of the public, respondeat superior should apply to charitable as well as to profit-making organizations.[14]

Implied Waiver Theory

The majority of the jurisdictions which recognize charitable immunity do so under the implied waiver theory. Under this doctrine, a patient who takes advantage of the services of a charitable institution impliedly waives his right to sue for injuries he may suffer.[15] This theory, of course, does not preclude recovery by a stranger who does not avail himself of the benefits of the charity, and

11. Farrigan v. Pevear, 193 Mass. 147, 78 N.E. 855 (1906); Bachman v. Young Women's Christian Ass'n, 179 Wis. 178, 191 N.W.751 (1922).

12. Farrigan v. Pevear, 193 Mass. 147, 78 N.E. 855, 856 (1906).

13. Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915); Welch v. Frisbie Memorial Hospital, 90 N.H. 337, 9 A.2d 761 (1939); Gable v. Salvation Army, 186 Okla. 687, 100 P.2d 244 (1940); Basabo v. Salvation Army, 35 R.I. 22, 85 Atl. 120 (1912).

14. ". . . [T]he defendant corporation, although it is a charitable corporation, is liable, as any other corporation, for injuries to third persons caused by the negligence of its servants . . . even though it is not shown or alleged that there has been any lack of care or diligence on the part of the defendant in the selection or retention of such servants or agents. We believe that public policy does not require any such exemption from liability as is claimed by the defendant in this case, but, on the contrary, that such exemption would be contrary to true public policy." Basabo v. Salvation Army, 35 R.I. 22, 85 Atl. 120, 129 (1912).

15. Powers v. Massachusetts Hemeopathic Hospital, 109 Fed. 294 (1st Cir. 1901); Hospital of St. Vincent of Paul v. Thompson, 116 Va. 101, 81 S. E. 13 (1914); Burdell v. St. Luke's Hospital, 37 Cal. App. 310, 173 Pac. 1008 (1918). In speaking of charitable organizations a court has said: "The purity of their aims may not justify their torts; but, if a suffering man avails himself of their charity, he takes the risks of malpractice, if their charitable agents have been carefully selected." Powers v. Massachusetts Homeopathic Hospital, supra at 304. But see Georgetown College v. Hughes, 130 F.2d 810, 826 (D.C. Cir. 1942), where the court in speaking of the implied waiver theory said: "Few hospitals would announce a policy of requiring such a waiver as a condition of entrance, and few patients would enter under such a condition unless forced to do so by poverty. In that case there could be no real choice. The idea of waiver, therefore, as implied from reception of benefits amounts merely to imposing immunity as a rule of law in the guise of assumed contract or renunciation of right, when all other reasons are found insufficient to support the distinction. When the benefit turns into injury which aggravates the original ill, all basis for the waiver and all 'consideration' for it fail."

thus cannot be held to have waived any rights. There is a split of authority among the jurisdictions which recognize the waiver theory, as to whether a paying beneficiary may recover against a charitable institution. Some courts deny recovery upon the ground that the payment made is an outright donation to the charity.[16] Other courts,[17] adopting a more realistic view, permit recovery, reasoning that the relationship is no different from the one which exists between a paying patient and a private, non-charitable hospital.

In the United States today eleven states grant full immunity[18] to charitable organizations under the trust fund theory. Two states impose liability, but recognizing the trust fund theory, limit execution of judgment[19] to non-charitable funds such as insurance and money obtained from paying patients. The states which apply the doctrine of implied waiver are divided into two categories. One group precludes suits by both paying and non-paying beneficiaries and permits only strangers to recover,[20] while the second group allows recovery by both strangers and paying beneficiaries.[21] Finally, four states recognize no doctrine of charitable immunity,[22] and impose full liability on eleemosynary institutions.

Legal writers have been vociferous in their criticism of the various theories of

16. Powers v. Massachusetts Homeopathic Hospital, 109 Fed. 294 (1st Cir. 1901); Bianchi v. South Park Presbyterian Church, 123 N.J.L. 325, 8 A.2d 567 (1939); Hospital of St. Vincent of Paul v. Thompson, 116 Va. 101, 81 S.E. 13 (1914).

17. Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915); Silva v. Providence Hospital, 14 Cal. 2d 762, 97 P. 2d 798 (1939); Sisters Of The Sorrowful Mother v. Zeidler, 183 Okla. 454, 82 P. 2d 996 (1938).

18. Included in this group are Arkansas, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Missouri, Oregon, Pennsylvania, South Carolina and Wisconsin. Arkansas Valley Cooperative Rural Elec. Co. v. Elkins, 200 Ark. 883, 141 S.W.2d 538 (1940); Maretick v. South Chicago Community Hospital, 297 Ill. App. 488, 17 N.E.2d 1012 (1938); Loeffler v. Trustees of Sheppard & Enoch Pratt Hospital, 130 Md. 265, 100 Atl. 301 (1917); Farrigan v. Pevear, 193 Mass. 147, 78 N.E. 855 (1906); Bachman v. Young Women's Christian Ass'n, 179 Wis. 178, 191 N.W. 751 (1922). See also cases cited in Georgetown College v. Hughes, 130 F.2d 810, 818 (D.C.Cir. 1942).

19. O'Connor v. Boulder Colorado Sanitarium Ass'n, 105 Colo. 259, 96 P.2d 835 (1939); Vanderbilt University v. Henderson, 23 Tenn. App. 135, 127 S.W.2d 284 (1938).

20. Connecticut, Indiana, Iowa, Louisiana, Michigan, Nebraska, New Jersey, North Carolina, Rhode Island, Texas, Virginia and Washington are in this group. Andrews v. Young Men's Christian Ass'n, 226 Iowa 374, 284 N.W. 186 (1939); Bianchi v. South Park Presbyterian Church, 123 N.J.L. 325, 8 A.2d 567 (1939); Hospital of St. Vincent of Paul v. Thompson, 116 Va. 101, 81 S.E. 13 (1914). See also cases cited in Georgetown College v. Hughes, 130 F.2d 810, 821 (D.C. Cir. 1942).

21. This category includes Alabama, California, Florida, Georgia, Idaho, Oklahoma and Utah. Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915); Silva v. Providence Hospital, 14 Cal. 2d 762, 97 P.2d 798 (1939); Sisters Of The Sorrowful Mother v. Zeidler, 183 Okla. 454, 82 P.2d 996 (1938). See also cases cited in Georgetown College v. Hughes, 130 F.2d 810, 819 (D.C. Cir. 1942).

22. McInerny v. St. Luke's Hospital Ass'n, 122 Minn. 10, 141 N.W. 837 (1913); Welch v. Frisbie Memorial Hospital, 90 N.H. 337, 9 A.2d 761 (1939); Sheehan v. North Country Community Hospital, 273 N.Y. 163, 7 N.E.2d 28 (1937); Avellone v. St. John's Hospital, 165 Ohio St. 467, 135 N.E.2d 410 (1956).

immunity, and favor full liability.[23] They point out that the doctrines are based on rather dubious legal fictions and cause undue hardship to injured persons who often find themselves without a remedy.[24] A good intention is usually no defense to a tort, and it is well established that even a volunteer who undertakes a duty is required by law to exercise reasonable care.[25]

Downfall of Charitable Immunity in New York

The law in New York has run the gamut in relation to the doctrine of charitable immunity, before finally repudiating all of the theories and imposing full liability on eleemosynary institutions. This comment will deal solely with the tort liability of hospitals. Although hospitals have been deprived of charitable immunity in this state, they may at times escape tort liability under the independent contractor theory.

The trust fund theory was repudiated in New York in *Hordern v. Salvation Army*.[26] The court stated that the implied waiver theory was the law of New York, but permitted plaintiff to recover since he was a stranger and could not be deemed to have waived his rights.

A landmark case on the subject of hospital liability was *Schloendorff v. Society Of The New York Hospital*[27] which was decided in 1914 when charitable immunity was still the vogue. A surgeon operated on plaintiff, a paying patient, without her consent. The court maintained that plaintiff was a beneficiary of the charity in spite of the fact that she was a paying patient, considering such payment a contribution to the charity. However, this case involved a battery, and the court was unwilling to extend the implied waiver theory to intentional torts. The court held that the relation existing between the hospital and the surgeon was not one of master and servant so as to bring the case within the doctrine of respondeat superior. The surgeon was an independent contractor, and the hospital was not liable for his torts if it had exercised due care in selecting him. A hospital does not undertake to treat a patient itself, but merely

23. Prosser, Torts §109 (2d ed. 1955); Harper, Torts §294 (1933); Note, 29 Iowa L. Rev. 624 (1944); Note, 2 Vanderbilt L. Rev. 660 (1949).

24. ". . . [T]he immunity of charitable corporations in tort is based upon very dubious grounds. It would seem that a sound social policy ought, in fact to require such organizations to make just compensation for harm legally caused by their activities under the same circumstances as individuals before they carry on their charitable activities. The policy of the law requiring individuals to be just before generous seems equally applicable to charitable corporations. To require an injured individual to forego compensation for harm when he is otherwise entitled thereto, because the injury was committed by the servants of a charity, is to require him to make an unreasonable contribution to the charity, against his will, and a rule of law imposing such burdens can not be regarded as socially desirable nor consistent with sound policy." Harper, Torts §294 (1933).

25. "One who undertakes to aid another must do so with due care. Whether the Good Samaritan rides an ass, a Cadillac, or picks up hitchhikers in a Model T, he must ride with forethought and caution. . . . Charity suffereth long and is kind, but in the common law it cannot be careless. When it is, it ceases to be kindness and becomes actionable wrongdoing." Georgetown College v. Hughes, 113 F.2d 810, 813 (D.C. Cir. 1942).

26. 199 N.Y. 233, 92 N.E. 626 (1910).

27. 211 N.Y. 125, 105 N.E. 92 (1914).

procures physicians for this purpose. The plaintiff maintained that the hospital was liable nevertheless, since the nurse involved in the case was a servant of the hospital. To this argument the court replied that the nurse was not a servant of the hospital since " . . . nurses are employed to carry out the orders of the physicians, to whose authority they are subject."[28] Thus we see the Court of Appeals, unable to apply the waiver theory because of the unusual facts of the case, employing a new approach to the question of hospital liability. This was the birth of the independent contractor theory which applies today in New York to negligent[29] as well as intentional torts.

The deterioration of the idea of charitable immunity which had begun in the *Hordern* case gained momentum in *Phillips v. Buffalo General Hospital.* A judgment for plaintiff, a paying patient who was injured through the negligence of an orderly, was reversed by the Appellate Division on the ground of implied waiver. The Court of Appeals affirmed the dismissal of the complaint on the basis of the independent contractor theory, holding that at times, as in the instant case, an orderly is an independent contractor when he performs the work of a nurse.[30] The court severely criticized the waiver theory, and made it quite clear that its affirmance was not based on that doctrine.[31]

Since the criticism of the waiver theory in the *Phillips* case was merely dicta, the doctrine was technically still valid law until 1937 when it was repudiated by a square holding in *Sheehan v. North Country Community Hospital.*[32] This case marked the termination of charitable immunity in New York; henceforth there would be no distinction in the tort liability of charitable and profit-making hospitals in this state.[33] Once the doctrine of immunity began to erode, the courts of New York were unable to find any logical terminus short of full liability.

Liability of Hospitals in New York Today

Hospitals may be separated into three categories: charitable, public, and proprietary or private.[34] The first two classes have in the past enjoyed immunity in varying degrees, but, as we have seen, the doctrine of charitable immunity has been completely repudiated in New York by case decision. The same effect was achieved in reference to public hospitals when New York state waived its im-

28. Schloendorff v. Society Of The New York Hospital, 211 N.Y. 125, 132, 105 N.E. 92, 94 (1914).

29. Sutherland v. New York Polyclinic Medical School & Hospital, 273 App Div. 29, 75 N.Y.S.2d 135 (1st Dep't 1947), aff'd mem., 298 N.Y. 682, 82 N.E.2d 583 (1948).

30. 239 N.Y. 138, 146 N.E. 199 (1924). This holding has been overruled by Berg. v. New York Soc'y For The Relief of The Ruptured and Crippled, 1 N.Y.2d 499, 154 N.Y.S.2d 455 (1956).

31. "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." Phillips v. Buffalo Gen. Hospital, 239 N.Y. 188, 189, 146 N.E. 199 (1924).

32. 273 N.Y. 163, 7 N.E.2d 28 (1937).

33. See Bakal v. University Heights Sanitarium, 277 App. Div. 572, 101 N.Y.S.2d 385 (1st Dep't 1950), aff'd mem., 302 N.Y. 870, 100 N.E.2d 51 (1951).

34. See Goldwater v. Citizens Cas. Co., 7 N.Y.S.2d 242 (N.Y. City Munic. Ct. 1938); 25 Fordham L. Rev. 143, 145 (1956).

munity to suit by the passage of section eight of the Court of Claims Act.[35] It has been held that this waiver of state immunity also acts as a waiver of the immunity of its political subdivisions.[36] Therefore, a public hospital may be sued as readily as a charitable or private one.

The independent contractor doctrine is an exception to the general rule of imputed liability under the rule of respondeat superior. Under the independent contractor theory a hospital is not liable for torts committed by doctors and nurses[37] if due care has been exercised in their selection.[38] This is based on the reasoning that the hospital acts only to procure for the patient the services of these individuals, and in no way controls their professional judgment and actions in actually conferring these services. However, where no professional skill or judgment is required, the ordinary rules of respondeat superior apply in determining the hospital's liability.[39] Therefore, we observe the courts applying the "professional administrative" test in order to decide whether or not the hospital is liable. In *Dillon v. Rockaway Beach Hospital* the court said: "The liability [of the hospital] depends not so much upon the title of the individual whose act or omission causes the injury, as upon the character of the act itself."[40] This test was followed until the Court of Appeals recently held in *Berg v. New York Society For The Relief of The Ruptured and Crippled*[41] that the hospital can escape liability under the independent contractor theory only when the negligence occurs in the performance of a professional act by a *doctor* or *nurse*. Thus it is no longer a defense for the hospital to claim that an orderly was performing the professional duties of a nurse,[42] or that a technician was engaged in a task which required professional skill and judgment.[43]

The Court of Appeals has imposed a further limitation on the independent contractor doctrine by recently holding: "We look to the 'medical-administrative' distinction only when the negligence occurred during *treatment or care* of a patient and where the physician acts *independently*."[44] Therefore we see that in New York today a hospital can escape tort liability under the independent

35. "The state hereby waives its immunity from liability . . . and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations. . . ." N.Y. Court of Claims Act § 8.

36. McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419 (1947); Bernadine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945).

37. Schloendorff v. Society of The New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914).

38. A hospital is liable for negligence in the performance of a professional act by a nurse if it did not exercise due care in selecting her. Bryant v. Presbyterian Hospital, 304 N.Y. 538, 110 N.E.2d 391 (1953).

39. Necolayff v. Genesee Hospital, 270 App. Div. 648, 61 N.Y.S.2d 832 (4th Dep't 1946), aff'd, 296 N.Y. 936, 73 N.E.2d 117 (1947).

40. 284 N.Y. 176, 180, 30 N.E.2d 373, 374 (1940).

41. 1 N.Y.2d 499, 154 N.Y.S.2d 455 (1956).

42. See Andrews v. Roosevelt Hospital, 259 App. Div. 733, 18 N.Y.S.2d 447 (2d Dep't 1940).

43. See Berg. v. New York Soc'y For The Relief of The Ruptured and Crippled, 276 App. Div. 783, 146 N.Y.S.2d 548 (1st Dep't 1955); Rabasco v. New Rochelle Hospital Ass'n, 266 App. Div. 971, 44 N.Y.S.2d 293 (2d Dep't 1943).

44. Mrachek v. Sunshine Biscuit, Inc., 308 N.Y. 116, 122, 123 N.E.2d 801, 804 (1954).

contractor doctrine only when the tort was committed during treatment or care, by a doctor or nurse who was selected with due care, and who, at the time, was engaged in the independent performance of a professional act.

What Is A Professional Act?

Two of the requisites for the satisfaction of the independent contractor theory, i.e., due care in selection and the undergoing of actual treatment at the time the tort occurred, present no problem, being a question of fact in each case. The difficulty arises in attempting to determine whether the act in question is an administrative or professional one. The distinction is the basis of the independent contractor theory in that the hospital merely procures professional services for the patient, while it actually renders administrative services to him through its servants.[45] It is necessary to review the decisions, many of which seem to be in direct conflict, in order to arrive at some rules which can be applied in a given case in order to determine whether a given act is professional or administrative.

Hot Water Bottle Cases

In *Iacono v. New York Medical School and Hospital*,[46] a nurse put hot water bottles in plaintiff's bed to warm it while plaintiff was in the operating room. The bottles were not removed, plaintiff was burned, and the hospital was held liable for administrative negligence. An opposite result was reached in *Sutherland v. New York Polyclinic Medical School and Hospital*,[47] although the only fact distinguishing it from the *Iacono* case was that the nurse put the bottles in the bed while the patient was occupying it, and refused to remove them when the patient complained. The court found for the defendant, holding that the nurse was guilty of a failure of professional judgment. The *Sutherland* case was cited and followed in *Wisner v. Syracuse Memorial Hospital*[48] which arose on identical facts. In *McGuinn v. Knickerbocker Hospital*[49] the nurse burned the patient with the hot water bottle during the course of surgery, and this court also held it a professional act.

These cases are easily reconcilable if one keeps in mind the standard set forth in the *Dillon* case, which states that it is the nature of the act, rather than the title of the actor which determines whether the negligent act is professional or

45. "The legal basis for the distinction is that medical service, although procured by the hospital, is professional service rendered to the patient by a doctor or nurse, and not service rendered by the hospital through the agency of the doctor or nurse. Administrative work, on the other hand, is part of the hospital service and is performed by servants of the hospital, for whose administrative acts the hospital is responsible." Sutherland v. New York Polyclinic Medical School and Hospital, 273 App. Div. 29, 30-31, 75 N.Y.S.2d 135, 136 (1st Dep't 1947).

46. 269 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).

47. 273 App. Div. 29, 75 N.Y.S.2d 135 (1st Dep't 1947), aff'd mem., 298 N.Y. 682, 82 N.E.2d 583 (1948).

48. 274 App. Div. 1087, 86 N.Y.S.2d 150 (4th Dep't 1949).

49. 89 N.Y.S.2d 32 (Sup. Ct. 1949), aff'd, 276 App. Div. 1079, 97 N.Y.S.2d 186 (1st Dep't 1950), aff'd, 302 N.Y. 633, 97 N.E.2d 760 (1951).

administrative. The *Berg* case has repudiated only that part of the rule which states that the hospital is not responsible for the professional act of one other than a doctor or nurse. The converse still holds true; the hospital is liable for the *administrative* negligence of a doctor or nurse. In the *Iacono* case the negligent act was the failure to remove the hot water bottles before the patient was returned to the bed. This was an act which could have been performed by anyone; it required no professional judgment or skill. The fact that a nurse rather than an orderly failed to perform it is immaterial under the aforesaid rule. In the *Sutherland* and *Wisner* cases the nurse was dispensing medical treatment to the patient. Although it may seem ironic, the fact that the patients complained to the nurses in both cases did much to doom their causes of action. The nurse in each case, exercising her professional judgment, apparently decided that the therapeutic value of the hot water bottle treatment outweighed the obvious discomfort which it caused the patient. Therefore we must conclude that the negligent act will usually be deemed a professional one whenever some discretion is required in determining how to apply a certain treatment, or when to terminate it. From the *McGuinn* case we may infer that any act done by a surgeon or nurse during surgery will be held to be professional. This would seem to be a valid assumption since it is obvious that the hospital has no control over these actions. The surgeon is definitely an independent contractor; the nurse who assists him, if not an independent contractor, must be considered his servant rather than the hospital's during the course of the operation.[50]

Where Patient Falls From Bed or Table

It is more difficult to reconcile the cases where, due to the negligence of hospital personnel, a patient is injured when he falls from a bed or table. The negligence in this type of case usually involves failure to actually watch the patient or failure to erect side boards on the bed. The difficulty in determining the true state of the law concerning this problem stems from the apparent reluctance of the Court of Appeals to write an opinion when this type of case comes before it. The standard procedure has been for that tribunal to affirm without opinion or merely by memorandum decisions.

Recovery Denied

In *Andrews v. Roosevelt Hospital*,[51] an interne and an orderly placed the patient on a narrow table in the examining room, and the patient fell from the table soon after both of them left the room. The court in denying recovery ruled that the departure of the interne was due to a failure of his professional judgment. The court also refused to predicate liability on the action of an orderly who usually engages in administrative tasks. It was held that his duty as an orderly terminated when he delivered the patient to the examining room,

50. ". . . [N]urses are employed to carry out the orders of the physicians, to whose authority they are subject." Schloendorff v. Society Of The New York Hospital, 211 N.Y. 125, 132, 105 N.E. 92, 94 (1914).

51. 259 App. Div. 733, 18 N.Y.S.2d 447 (2d Dep't 1940).

and had he remained when the interne left he would be performing the *professional* task of attending the patient.[52]

The decision in *Lee v. Glens Falls Hospital*[53] hinged on the question of what constitutes "caring for a patient." The patient after her operation was placed in a bed upon which side boards were erected. Although the surgeon told her to keep close watch on the patient, the nurse left the room, and the patient was injured when, in a semi-conscious state, she fell while attempting to climb over the side boards. The Appellate Division by a three to two decision affirmed the dismissal of the complaint, holding that the nurse had been engaged in the professional act of caring for the patient. The dissent maintained that the nurse had been engaged in the administrative duty of preventing the patient from climbing out of bed, a task which requires neither judgment nor skill.

In *Pierson v. Wilson Memorial Hospital*,[54] a two year old child was admitted to the defendant hospital and put in a crib, the sides of which were approximately two feet high. The child's father warned the nurse that the infant was unusually active and would probably climb from the crib unless he was restrained in some way. No restraint was ordered, and the child fell and was injured while trying to climb over the side of the crib. Judgment for plaintiff was reversed on the ground that the decision whether or not to use additional restraint was a professional one.[55]

Recovery Allowed

The *Bickford v. Carson C. Peck Memorial Hospital*[56] involved a woman who, while in labor and under the influence of drugs, fell from a bed which wasn't equipped with side boards. In allowing a recovery by the plaintiff, the court stated: "The negligence, as found by the jury, was of an administrative nature, in that the servants of the defendant assigned the plaintiff to a particular bed for occupancy and continued her in it up to the time of the accident."[57]

The fact situation of the *Andrews* case arose again in *Petry v. Nassau Hospital*.[58] The patient was placed on a table in the emergency room and, while left unattended by a nurse, fell from the table. The Appellate Division in a memorandum decision affirmed a judgment for plaintiff, citing the *Bickford* case.

One of the few undisputed rules in this field of law was set forth in *Rancili v. Society Of The New York Hospital*.[59] The plaintiff underwent an operation

52. In view of the holding of the Berg case, i.e., the hospital is liable for even the professional nurse, a court today would predicate liability on the departure of the orderly under these facts.

53. 265 App. Div. 607, 42 N.Y.S.2d 169 (3d Dep't), aff'd, 291 N.Y. 526, 50 N.E.2d 651 (1943).

54. 273 App. Div. 348, 78 N.Y.S.2d 146 (3d Dep't 1948).

55. The court stated in dicta that there would have been administrative negligence if a decision to use additional restraint had been made but not executed.

56. 266 App. Div. 875, 43 N.Y.S.2d 20 (2d Dep't 1943).

57. Bickford v. Carson C. Peck Memorial Hospital, 266 App. Div. 875, 43 N.Y.S.2d 20, 21 (2d Dep't 1943).

58. 267 App. Div. 996, 48 N.Y.S.2d 227 (2d Dep't), appeal denied, 293 N.Y. 937, 57 N.E.2d 753 (1944).

59. 269 App. Div. 906, 56 N.Y.S.2d 481 (2d Dep't 1945), aff'd mem., 295 N.Y. 850, 67 N.E.2d 257 (1946).

and was put into a bed which had no side boards. Since the patient was restless, the head nurse decided that side boards should be erected. Her order was not carried out and plaintiff fell from the bed. The trial court held the hospital liable on the ground of administrative negligence. Although a decision whether or not to use side boards may have been an act of professional judgment, once the decision to use them was made, failure to carry out the decision was administractive negligence. The Appellate Division affirmed upon the authority of the *Petry* and *Bickford* cases. This rule was reaffirmed in the case of *Pivar v. Manhattan General, Inc.*[60] which also held that a medical decision made by a physician cannot be overruled by a special nurse hired by the patient. Once a physician orders something done, failure to carry out these directives by the hospital employees constitutes administrative negligence, regardless of countermanding orders by a nurse.

It is extremely difficult to reconcile these decisions and to extract many clear-cut principles of law. It would seem that the *Andrews* case is no longer the law in this state. The *Petry* case which involved nearly identical facts was subsequently decided in the same judicial department, and resulted in a contrary finding. It is fair to assume that it is administrative negligence to leave a patient unattended on an examining table, regardless of the title of the one doing so. No amount of professional judgment can justify leaving a patient unattended in what any reasonable man would recognize as a precarious position.

It is quite clear from the *Pivar* and the *Ranelli* cases and from dicta in the *Pierson* case that once a professional decision has been made, the hospital is liable for administrative negligence if it fails to carry out that decision.[61] It would also seem apparent from the holding of the *Pierson* case and dicta in the *Pivar* and *Ranelli* cases that the decision whether or not to use some means to prevent the patient from falling or climbing from a bed, as opposed to an examining table, is a professional one.

The *Lee* and *Bickford* cases cannot be reconciled either with each other or with any other cases in point. The court in the *Lee* case indulged in the circular reasoning that since caring for a patient is the job of a professional person, all of the aspects of caring for a patient require professional training and judgment. Some aspects of caring for a patient undoubtedly require professional training, but merely preventing the patient from climbing out of bed certainly does not. The court, while paying lip-service to the well established rule that it is the character of the act rather than the title of the actor which determines whether or not the act is a professional one, actually contravened this rule. In addition, the court failed to realize that there was administrative negligence when the nurse failed to carry out the surgeon's professional directive that a close watch be kept on the patient. The language of the court in the *Bickford* case[62] on the

60. 279 App. Div. 522, 110 N.Y.S.2d 786 (1st Dep't 1952).

61. See note 55 supra.

62. "The negligence, as found by the jury, was of an administrative nature, in that the servants of the defendant assigned the plaintiff to a particular bed for occupancy and continued her in it up to the time of the accident." Bickford v. Carson C. Peck Memorial Hospital, 266 App. Div. 875, 43 N.Y.S.2d 20, 21 (2d Dep't 1943).

other hand would seem to completely ignore the professional-administrative distinction, and impose almost absolute liability on the hospital.

Suicide Cases

The law seems fairly well settled when the hospital is charged with negligence in failing to prevent a patient from injuring himself. Here the doctrine of foreseeability rather than the professional-administrative distinction appears to be the most important factor. In *Martindale v. New York*[63] the plaintiff's intestate was admitted to a state mental hospital. The hospital authorities were aware of the fact that she had an uncontrollable desire to escape, but a nurse left the patient unattended long enough for her to jump from a window. Judgment for plaintiff was affirmed by the Court of Appeals. In another case[64] the intestate was admitted to the defendant hospital to undergo treatment for drug addiction. An attendant permitted her to enter a drug store alone, where she purchased some veronal. When the intestate returned to the hospital, she took the drug and died as a result thereof. The hospital was held liable. The result of allowing the decedent to enter the drug store alone was clearly foreseeable, and permitting her to do so was administrative negligence.

Administrative Duties Impinging On Professional Activities

A new approach to the professional-administrative distinction and its relation to foreseeability was introduced in the case of *Santos v. Unity Hospital.*[65] Plaintiff's intestate was left alone in the labor room of the defendant hospital while the nurse went into the hall to answer the telephone. The patient became mentally deranged due to intrapartum psychosis and jumped through the unbarred window to her death. The trial court charged the jury that it could infer negligence from either the defendant's failure to have bars on the windows or from the fact that the nurse left the decedent temporarily unattended. The Court of Appeals held that this charge was correct since it did not instruct the jury that the lack of bars on the windows was, of itself, negligence. On the contrary, the charge permitted the jury to consider the absence of bars along with all the other facts as proof of negligence on the part of the hospital. Only one question of fact had to be decided, i.e., was it negligence on the part of the hospital to give the nurse the *administrative* duty of the phone, thus requiring her to leave the patient unattended in a room with unbarred windows?[66]

Any doubts as to the true import of the *Santos* decision were clarified by the

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63. 269 N.Y. 554, 199 N.E. 667 (1935). See also Gries v. Long Island Home, Ltd., 274 App. Div. 938, 83 N.Y.S.2d 728 (2d Dep't 1948), wherein the defendant sanitarium was aware that the decedent had suicidal tendencies, and was held liable for leaving him unattended, during which time he jumped to his death.

64. Van Patter v. Charles B. Towns Hospital, 213 App. Div. 863, 209 N.Y. Supp. 935 (1st Dep't 1925), aff'd mem., 246 N.Y. 646, 159 N.E. 686 (1927).

65. 301 N.Y. 153, 93 N.E.2d 574 (1950).

66. The court assumed that the nurse while attending the patient was engaged in a professional act. The court also held that the suicide was foreseeable because intrapartum psychosis, although rare, is recognized by doctors as a risk connected with childbirth.

Court of Appeals in *Cadicamo v. Long Island College Hospital.*[67] In this case a nurse placed a bare electric bulb close to the bedding of a newborn infant in order to raise its temperature. The nurse then took some bottles to the basement to be washed, and when she returned the crib was in flames. The Court of Appeals reversed a judgment for defendant, and held that the *Santos* case was controlling.[68] The court ruled that although the application of heat was a professional decision by the nurse, the taking of bottles to the basement was an administrative task. The court stated: "We doubt whether at any time in the development of the law defendant could claim immunity as to an act with which it had thus interfered through the obtrusion of administrative functions into the professional area."[69]

Miscellaneous Cases

Negligence has been alleged in regard to various other aspects of hospital routine,[70] and, as we have seen, recovery is dependent on a showing of administrative negligence when a doctor or nurse is involved. The issue of the status of an act incident to the performance of a professional act arose in *Rabasco v. New Rochelle Hospital Ass'n.*[71] An x-ray technician asked plaintiff to hold his child on the table, thus causing plaintiff to stand so close to the machine that he received an electric shock. Judgment of the trial court dismissing the complaint was reversed by the Appellate Division. It was held that the jury could have found that the technician was guilty of administrative negligence in instructing the plaintiff to stand so close to the machine instead of summoning a nurse to hold the child.[72]

A case in which the court allowed recovery on the basis of some rather dubious reasoning was *Necolayff v. Genesee Hospital.*[73] An interne and nurse who were to give a blood transfusion to a certain patient inadvertently entered the wrong room. When the patient told them that she wasn't supposed to receive blood, they told her that her daughter had just donated it. In spite of the patient's protests and claim that she had no daughter, the transfusion was given. Judg-

67. 308 N.Y. 196, 124 N.E.2d 279 (1954).

68. "In both cases, it was the administrative requirements of the hospital which took from the patient the competent care and supervision to which she was entitled and which constituted the additional factor that generated a tragedy." Cadicamo v. Long Island College Hospital, 308 N.Y. 196, 203, 124 N.E.2d 279, 282 (1954).

69. Id. at 202, 124 N.E.2d at 281. When the court referred to the development of the law, it was obviously referring to the development of the independent contractor doctrine, rather than to the development of hospital liability in general.

70. See, e.g., Volk v. City of New York, 284 N.Y. 279, 30 N.E.2d 596 (1940). The supervisor of nurses had declared a certain morphine solution unfit for use, but failed to have it destroyed. When plaintiff was given an injection of this solution and thereby was injured, she received a judgment based on the administrative negligence of the supervisor.

71. 266 App. Div. 791, 44 N.Y.S.2d 293 (2d Dep't 1943).

72. Today, in light of the Berg case, the hospital would be liable even if the technician were found guilty of only professional negligence. Nevertheless, the Rabasco decision is still authority for the proposition that all acts incident to the performance of a professional act are not necessarily professional themselves.

73. 270 App. Div. 648, 61 N.Y.S.2d 832 (4th Dep't 1946).

ment for plaintiff was affirmed, the court holding that there was administrative negligence, notwithstanding the fact that the actual giving of a transfusion is a professional act. In speaking of the mistake made by the interne and nurse the court said: "their entrance into the wrong room caused the professional nature of their errand to cease."[74] The court then went on to say that every employee of a hospital has a duty to protect patients, a duty which the interne and nurse had failed to perform. The legal soundness of this language must be questioned, for to say that the interne has an administrative duty to protect the patient from the interne's own professional negligence would be to destroy the distinction between professional and administrative acts. The result of this case, however, can be justified under the holding of the *Rabasco* case, i.e., acts incident to the performance of a professional act are not necessarily professional acts themselves. Liability could have been based upon the fact that the interne and nurse failed to exercise reasonable care in ascertaining whether the plaintiff was in fact the patient for whom the transfusion was intended, especially in light of her protests.

CONCLUSION

The independent contractor doctrine as applied in New York to determine hospital liability has been subject to a great deal of valid criticism.[75] The theory is based on the premise that physicians, internes and nurses are not subject to supervision by hospital authorities, which is more true in theory than in fact. The law has at times considered these persons servants,[76] and it would seem likely that hospitals do also. In the latest attack on the doctrine, the Court of Appeals hinted that the rule has outlived its usefulness,[77] and will soon be repudiated, at least in so far as it exempts the hospital from liability for the professional acts of *salaried* doctors and nurses.[78] This should come as no

74. Necolayff v. Genesee Hospital, 270 App. Div. 648, 653, 61 N.Y.S.2d 832, 836 (4th Dep't 1946).

75. See, e.g., Lee v. Glens Falls Hospital, 265 App. Div. 607, 616, 42 N.Y.S.2d 169, 177 (3d Dep't 1943), where the dissenting opinion stated: ". . . the patient is accepted under an implied agreement that he will receive such reasonable care and attention as the hospital knows or should know his condition to require. There is no longer any good reason why a hospital, charitable, public, or otherwise, should not be responsible to paying patients for the neglect of all its employees—medical as well as administrative."

76. In Matter of Bernstein v. Beth Israel Hospital, 236 N.Y. 268, 140 N.E. 694 (1923), an interne was held to be an "employee" under the Workmen's Compensation Act. In Mrachek v. Sunshine Biscuit, Inc. 308 N.Y. 116, 123 N.E.2d 801 (1954), the court found that the company doctor was a servant, although the actual holding of liability seems to have been based on another ground.

77. "Therefore, without reviewing or revising the whole Schloendorff v. Society of New York Hosp. rule . . . and without determining whether the rule itself has outlived its usefulness, we hold that this particular hospital . . . is liable for her [technician's] negligence." Berg v. New York Soc'y For The Relief of The Ruptured and Crippled, 1 N.Y.2d 499, ——, 154 N.Y.S.2d 455, 456 (1956).

78. "Modern hospitals hire on salary not only clerical, administrative and housekeeping employees but also physicians, nurses and laboratory technicians of many kinds. . . . What reason compels us to say that of all employees working in their employer's businesses (including charitable, educational, religious and governmental enterprises) the only ones for whom the employers can escape liability are the employees of hospitals?" Ibid.

surprise to anyone who has observed the process of evolution through which the law in New York has gone in reaching its present state. The repudiation of the doctrines of governmental and charitable immunity and the numerous limitations which the courts have placed on the independent contractor doctrine, indicate that the evolution is still in progress and will not be complete until hospitals are held liable for the torts of *every* person in their employ.