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Liability of Hospitals, Doctors, and Nurses

by

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What liability, if any, attaches to hospitals, doctors, and nurses when patients contend they have not been properly treated and claim damages as a result?

As this question is one of current interest and there are so many points for discussion, it is felt that it should be considered and presented at this time.

In the very first instance, there must be a distinction made between doctors who are attached to a hospital and those who are members of a hospital staff; as also between nurses who are attached and those who are located at the hospital, and finally between the latter who are under the direct control of attached and staff surgeons and physicians and those who are not. It will appear as this article takes form why these distinctions are made.

However for the sake of clarity some enlargement of the above may be made forthwith. When we speak of doctors attached to a hospital, we mean those who because of arrangements already made between the doctor and the hospital may send patients there who require treatment beyond what can be given in a home or office, and where all facilities are avail-

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able. Such a patient is the patient of the doctor. The staff doctors are those who are on duty at the hospital, supplied by the hospital and who treat all patients brought to a hospital apart from those sent by attached physicians. In urgent cases no doubt they would treat the latter as well but we are no concerned herein with this ethical question.

Attached nurses are graduate nurses known as "specials" who are called to look after with more consistency and as their sole charge patients who are quite ill, as the special care they give could not be given by the ordinary nursing staff of the hospital who care for all patients therein. Those who are under the control of the hospital authority are the student nurses who live in the hospital or the graduate nurses hired by the hospital and who remain there to control the student nurses and to act in particular capacities.

Those nurses who are under the control of an attached or staff surgeon or physician are those who assist at operations, and those who give special treatments and carry out particular duties, all under the direction and control of an attached or staff surgeon or physician, in other word those who act outside their usual duties as members of the hospital staff.

In the case where fault is proven against any of the above what liability can be attached to a hospital?

It is admitted that a hospital cannot be responsible for the fault of any doctors or nurses attached to it only. These are hired by the patient and they only use the hospital as a means to an end. Any recourse in damages would lie against the particular doctor or nurse.

On the other hand what if fault can be established against a staff doctor or nurse? This is the bone of contention. There is no doubt that the doctor or nurse who commits the fault must personally support the damages as an attached

doctor or nurse must. The authors and jurisprudence are very clear in this regard.

Dalloz has said [1]:

La responsabilité du médecin ne peut faire de doute si le préjudice éprouvé est imputable à un fait étranger à l'art médical en lui-même . . . Bien plus, et alors même qu'il s'agit de faits de pratique, il peut y avoir lieu à responsabilité, lorsque le médecin a agi soit avec légèreté, spécialement s'il a, dans une ordonnance, commis une erreur matérielle, prescrit une substance au lieu d'une autre soit avec négligence, en omettant d'indiquer les précautions nécessaires pour les remèdes prescrits par lui, soit avec imprudence, en faisant des prescriptions inusitées, des essais hasardés, circonstance dans laquelle les tribunaux devront s'appliquer à distinguer l'étourderie ou l'audace d'un empirique de la confiance d'un savant.

He continued by asking:

Où est la limite de la responsabilité du médecin? *and gave answer as follows*: C'est au juge à la saisir et à la déterminer dans chaque espèce, selon les faits et les circonstances qui peuvent varier à l'infini, en ne perdant jamais de vue ce principe fondamental qui doit toujours lui servir de guide: qu'il faut, pour qu'un homme soit responsable d'un acte de sa profession, qu'il y ait eu faute dans son action, soit qu'il lui eût été possible, avec plus de vigilance sur lui-même ou sur ses actes de s'en garantir, ou que le fait qui lui est reproché soit tel que l'ignorance sur ce point ne lui était pas permise dans sa profession.

Fuzier-Herman has declared [2]:

Il y a faute de la part du médecin, lorsqu'il néglige de donner les soins usuels, lorsqu'il ne donne pas au traitement l'attention nécessaire, lorsqu'il se livre à la légère à des expériences risquées, et lorsque enfin, dans l'exercice de son art, il commet des fautes contre les règles scientifiques établies.

Planiol et Ripert have this to say [3]:

Le médecin est responsable de ses fautes dans l'exercice de sa profession. Sa responsabilité existe dans les mêmes conditions que les soins

[1] Dalloz, *Nouveau Code civil* (1903-05) vol. 3, under art. 1383, no. 1566, p. 769 and no. 1586, p. 770.

[2] Fuzier-Herman, *Code civil annoté* (1896-98) vol. 3, under arts. 1382-83, no. 546, p. 757.

[3] Planiol et Ripert (1930) t. 6 (*Obligations*, 1ère partie), n. 524, p. 718; n. 525, p. 719.

soient donnés en exécution d'un contrat ou que le médecin les ait donnés sans accord préalable. Dans les deux cas il est tenu de la même diligence . . . Il est responsable, conformément au droit commun, du préjudice causé par son imprudence ou sa négligence dans le diagnostic du mal et l'application du traitement, et dans l'exécution des opérations. No 525, p. 719. Il convient seulement de faire, avec les arrêts, la réserve suivante: quand la constatation d'une faute implique l'appréciation de la valeur d'un diagnostic ou d'un traitement, discutée entre les médecins, ce n'est qu'avec une grande prudence que les tribunaux peuvent condamner . . . Mais cette prudence et cette réserve n'ont plus de raison d'être lorsque la faute reprochée est une négligence dans l'application du traitement ou l'exécution de l'opération, telle que son appréciation ne soulève aucun débat scientifique. 11

La Cour de cassation de France has held [4]:

La responsabilité s'applique aux fautes dommageables commises par les médecins dans la pratique de leur art, lorsque la constatation de ces fautes, indépendante de l'examen de théories ou de méthodes médicales, a sa base dans les règles générales de bon sens et de prudence auxquelles est assujetti l'exercice de toute profession.

Our Cour of Appeal decided, in a case of an unknown appellant versus Rajotte [5] wherein it discussed the question of liability that:

Le chirurgien qui, au cours d'une opération s'effectuant dans des conditions normales, oublie une compresse dans l'abdomen de l'opéré, commet une faute qui engage sa responsabilité.

A year later it discussed again this question [6].

Nevertheless, cannot the hospital in which they practice be held along with them or alone for their faulty acts, especially in the case where the doctor or nurse supplied is not known to the patient not even by name.

Consider the person who has had an accident, is taken in a hospital ambulance to a particular hospital and is received and admitted thereat as a patient in a dazed or unconscious state. Cannot he rightly expect to be examined properly,

[4] D. P. 1862.1.419.
[5] *X* v. *Rajotte* (1938) 64 K. B. 484.
[6] *Nelligan* v. *Clément* (1939) 67 K. B. 328.

treated accordingly and eventually dismissed as cured. He has not been sent to the hospital by any particular physician nor has he demanded nor hired the services of any one at the hospital. He knows no one there not even by name. Does he not only deal with the hospital authority? Does he not only contract with the hospital? Thus if he is dismisssed harmed in any way due to a fault of a staff doctor or nurse, cannot the hospital be said to have not lived up to its contract and
12 his recourse lies against the hospital?

A contract is an agreement by which one or several persons bind themselves towards one or several others to give or to do or not to do something [7]. A hospital holds itself out to the public as an institution for the care of the sick. Does not this presume a competent medical and nursing staff, modern appliances and generally established preparedness for the care of the sick? One who goes there does so in such anticipation. If there is fault, negligence, want of care or skill or imprudence in his treatment in any way, such that he has a claim in damages, is not the hospital authority liable under its contract?

Does there have to exist a special contract, a written contract to claim from the hospital? *Corpus Juris* (1923) Vol. 30, Vo *Hospitals,* § 16, p. 466:

> However, it has been held that, where a contract exists binding a hospital to furnish a patient proper treatment, the hospital is liable to the patient for injuries sustained by him in consequence of the incompetence or negligence of a member of the hospital staff treating the patient at the instance of the hospital; and that in such case the hospital cannot be relieved of its liability by the devolution of performing its duty upon a stranger to the contract.

Although this follows from a special contract, as *Corpus Juris* also says, does this mean a written contract? Is a written contract necessary? Does there not exist an implied contract

[7] *Dig.* lib. 2, tit. 14.

or if not such a contract at least a quasi-contract which is defined as a contract that occurs by the fact that a person is legally bound towards another or binds himself towards another without an intervening agreement between them [8].

An old case, *Forest* v. *Cadot* [9] has held:

Le médecin ordinaire d'un malade qui requiert l'assistance d'un autre médecin sera présumé avoir agi comme *negotiorum gestor* de ce malade.

Would this not be true for a hospital? As a *negotiorum gestor* is one who is bound by virtue of a quasi-contract which exists between him and the person for whom he acts for all obligations which result from an express mandate (C. C. 1043).

This question of contract or quasi-contract does not appear to have been raised in the cases before our Courts, at any event no comment has been made in the decisions nor do the authors appear to have touched upon it.

On the other hand it has been held that a hospital is not liable for the faults committed by the staff doctors and nurses. The case in point is that of *Petit* v. *Hôpital Ste-Jeanne d'Arc* [10] which held as follows:

The surgeon exercising his professional functions in a hospital is not the servant of the latter in the sense that he binds his principal by his acts. The hospital authority merely holds itself out as providing an institution where patients will be able to meet with skilled persons who will attend them. When such authority retains the services of competent and qualified medical advisers and nurses and has provided fit and proper appliances for the treatment of patients, it has fully met its legal obligations and is not responsible for negligence of doctors and nurses while acting in the exercise of their professional functions and knowledge.

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[8] Pand. lib. 3, t. 5, C. C. 1041.
[9] (1895) 1 R. J. 173.
[10] (1940) 78 S. C. 564.

This holding is based on an English case of *Hillyer* v. *Governors of St. Bartholomew's Hospital* [11] which held:

The only duty undertaken by the governors of a public hospital towards a patient who is treated in the hospital is to use due care and skill in selecting their medical staff. The relationship of master and servants does not exist between the governors and the physicians and surgeons who give their services at the hospital, and the nurses and other attendants assisting at an operation cease for the time being to be the servants of the governors, inasmuch as they take their orders during that period from the operating surgeon alone and not from the hospital authorities.

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Corpus Juris (*loc. cit.*) says in this regard:

A hospital, which has exercised due care in selecting its professional staff, is not liable for an injury caused by the negligent or tortious act of a member of such staff occurring during the course of his professional duties, at least in the absence of special contract; and the rule has been held to apply to the negligent or tortious acts of physicians, resident physicians and surgeons.

Exemplification may be given as follows: If A out of charity employs a physician to attend B his sick neighbour, the physician does not become A's servant and A, if he has been duly careful in the selection of a physician will not be responsible to B for his maltreatment. The reason is A does not undertake to treat B through the agency of the physician but only to procure for B the services of the physician.

Objection might be made to this example on the grounds that the good neighbour does not habitually procure physicians, does not control them, does not remunerate them and does not dispense with their services for whatever may be the cause, as a hospital may do.

Still the above appears to be the accepted jurisprudence. Although should it apply to all cases and not only to those where one is sent to a hospital by an attached physician or where one asks for a resident physician on admittance or

[11] (1909) 2 K. B. 820.

agrees to accept the resident who proffers his services is open to discussion.

The hospital apart from any contractual obligation is certainly responsible for the damages caused to a patient by the fault of a nurse or intern on the staff who are looking after a patient generally or as a matter of routine. They are more than under the control of the hospital authority here, there exists a master and servant relationship which cannot be denied.

Reference is made herewith to *Nyberg* v. *Provost Municipal Hospital Board* which held [12] that a public hospital board is liable for the negligence of even qualified nurses employed by it, in the performance of all duties other than those done under the direct orders of a physician or surgeon in the course of an operation.

The cases *Sisters of St. Joseph v. Fleming* [13], *Lavere* v. *Smith Falls Public Hospital* [14] in which judgment was rendered by the Supreme Court of Canada also found likewise. There are numerous American court judgments in which the hospital is to support the damages caused through the negligence of its nurses. Reference may be made to some of the leading ones (cited at 30 *Corpus juris*, p. 467), *Longuy* v. *La Société Française* [15], *Malcolm* v. *Evangelical Lutheran Hospital* [16], *Meyer* v. *McNutt Hospital* [17] and *International etc. R. Co.* v. *Logan* [18].

It is hoped that from the foregoing which is far from complete some better insight may be obtained in regard to the liability of hospitals, doctors, and nurses.

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[12] (1927) S. C. R. 226.
[13] (1938) S. C. R. 172.
[14] (1916) 26 D. L. R. 346.
[15] (Cal. A.) 198 P. 1011.
[16] (Nebr.) 185 N. W. 330.
[17] 173 Cal. 156; 159 P. 436.
[18] 36 Tex. Civ. A. 279; 818 W. 812.