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William J. Harbison

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# NOTES

## THE STANDARD OF CARE OWED BY A HOSPITAL TO ITS PATIENTS

### I. INTRODUCTION

Despite the great number of tort cases which have arisen between hospitals and their patients, comparatively little has been written upon the subject of the standard of care required of a hospital in its relationship with those who enter it for treatment. In this Note some of the types of problems arising out of this relationship will be examined.<sup>1</sup> Questions of substantive and procedural law will be treated together in order to present these problems more clearly.

Generally, public hospitals are excused from tort liability to their patients upon the ground of governmental immunity;<sup>2</sup> in most states charitable institutions enjoy some degree of limited liability upon one of several theories, all or most of which rest upon an underlying public policy.<sup>3</sup> Since supposedly no public policy favors the exemption from liability of private hospitals conducted for profit,<sup>4</sup> cases involving such institutions present most clearly the problems of the standard of care required in the hospital-patient relationship. Therefore only those cases and cases in which charitable institutions have

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1. The term "hospital" is used herein in a general sense and refers to the several types of institutions which receive the sick, injured, aged, etc., and undertake to provide services and treatment for them. The term "patient" is also used generally and refers to those entering a hospital for care and treatment.

2. *E.g.*, *University of Louisville v. Metcalfe*, 216 Ky. 339, 287 S. W. 945, 49 A. L. R. 375 (1926); *Benton v. City Hospital*, 140 Mass. 13, 1 N. E. 836 (1885); Borchard, *Government Liability in Tort*, 34 YALE L. J. 229, 248 (1925); Note, 48 YALE L. J. 81, 89 (1938).

3. For discussions of the various theories of the immunity of charitable institutions, see 2 BOGERT, TRUSTS AND TRUSTEES §§ 401 *et seq.* (1935); PROSSER, TORTS 1079 *et seq.* (1941); 3 SCOTT, TRUSTS § 402 (1939); Appleman, *The Tort Liability of Charitable Institutions*, 22 A. B. A. J. 48 (1936); Feezer, *The Tort Liability of Charities*, 77 U. OF PA. L. REV. 191 (1928); Notes, 14 B. U. L. REV. 477 (1934), 25 HARV. L. REV. 721 (1912), 31 HARV. L. REV. 479 (1918), 29 IOWA L. REV. 624 (1944), 19 MISS. L. J. 220 (1948), 34 YALE L. J. 316 (1925); 1 VAND. L. REV. 153 (1947); 1 VAND. L. REV. 470 (1948). For collections of cases upon the subject, see Notes, 14 A. L. R. 572 (1921), 23 A. L. R. 923 (1924), 42 A. L. R. 971 (1926), 62 A. L. R. 724 (1929), 86 A. L. R. 491 (1933), 109 A. L. R. 1199 (1937), 133 A. L. R. 821 (1941).

4. "The policy of the law forbids liability of a state or municipal hospital for the negligence of its servants and physicians; it being a governmental agency, . . . On similar grounds, the law exempts charitable institutions from liability for the negligence of its [*sic*] servants and agents. . . . In the case of a private hospital the capital invested is neither public money nor a trust fund. It is like capital invested in any other corporation conducted for profit. Hence there is no ground of public policy upon which it can be exempted from liability for negligence on the part of its servants or agents." *Jenkins v. Charleston Hospital*, 90 W. Va. 230, 110 S. E. 560, 561, 22 A. L. R. 323 (1922); *see Welch v. Frisbie Memorial Hospital*, 90 N. H. 337, 9 A. 2d 761, 763 (1939).

been held fully responsible to their patients<sup>5</sup> will be considered herein. Cases involving the liability of hospitals to employees, licensees, and persons other than patients are not within the scope of this Note. No express attention is given to the problems of the extent of damages, cause in fact, or legal cause, although in any discussion of duty these problems are involved to some extent.

As in all other situations in which there is a duty to use care, the duty resting upon a hospital towards its patients arises out of the relationship into which it enters with them. A hospital generally may make rules for the admission of patients, and, at least in the case of a private institution, there is no obligation to admit those seeking treatment unless they conform to such rules.<sup>6</sup> However, as in the case of physicians<sup>7</sup> or other persons,<sup>8</sup> once a hospital accepts a person for treatment, it may not with impunity refuse to treat him or treat him in a careless manner.<sup>9</sup> This is true regardless of the fact that the patient may have agreed to pay only a small amount for the services<sup>10</sup> or is furnished services gratuitously.<sup>11</sup> Once the relationship has arisen, the duty to use care is present, and the duty is not proportionate to the amount paid.

Ordinarily the hospital-patient relationship, like that of carrier and passenger, results from a contract, express or implied, by which the hospital undertakes to furnish certain types of services for a specified price. For failure to furnish the agreed service, or for furnishing it improperly, the hospital, like the carrier, may be liable for damages in a contract action.<sup>12</sup> By

5. In Tennessee, for example, a charitable hospital is liable in tort just as a private hospital; its only immunity is that judgment may not be collected from its trust property. *O'Quin v. Baptist Memorial Hospital*, 184 Tenn. 570, 201 S. W. 2d 694 (1947); *James v. Turner*, 184 Tenn. 563, 201 S. W. 2d 691 (1941); *Spivey v. St. Thomas Hospital*, 211 S. W. 2d 450 (Tenn. App. M. S. 1947); *Vanderbilt University v. Henderson*, 23 Tenn. App. 135, 127 S. W. 2d 284 (M. S. 1938). See also *Mulliner v. Evangelischer Diakonniessenverein*, 144 Minn. 392, 175 N. W. 699 (1920) (rejecting the rule of limited liability for charitable hospitals).

6. *E.g.*, *Birmingham Baptist Hospital v. Crews*, 229 Ala. 398, 157 So. 224 (1934) (child with contagious disease denied admission).

7. *Viita v. Dolan*, 132 Minn. 128, 155 N. W. 1077 (1916); *Barnes v. Gardner*, 170 Misc. 604, 9 N. Y. S. 2d 785 (Sup. Ct. 1939) (matter left in wound of charity patient); *Du Bois v. Decker*, 130 N. Y. 325, 29 N. E. 313 (1891) (physician treating patients in almshouse); PROSSER, TORTS 202 (1941).

8. *E.g.*, *Tullgren v. Amoskeag Mfg. Co.*, 82 N. H. 268, 133 Atl. 4 (1926) (employee, known to be ill, taken nearly home but permitted to walk part of way in hot sun); *Zelenko v. Gimbel Bros. Inc.*, 158 Misc. 904, 287 N. Y. Supp. 134 (Sup. Ct. 1935), *aff'd mem.*, 247 App. Div. 867, 287 N. Y. Supp. 136 (1st Dep't 1936) (department store undertook to aid sick customer).

9. *St. Louis S. W. R. R. v. Webb*, 170 Ark. 1089, 282 S. W. 966 (1926) (doctors of company hospital refused to operate on patient accepted by hospital despite knowledge of critical condition); see *Guilliams v. Hollywood Hospital*, 18 Cal. 2d 97, 114 P. 2d 1, 5 (1941). RESTATEMENT, TORTS § 320 (1934).

10. *Harris v. Woman's Hospital*, 14 N. Y. Supp. 881, 883 (N. Y. City Ct. 1891); *Wetzel v. Omaha Maternity & General Hospital Ass'n*, 96 Neb. 636, 148 N. W. 582 (1914); *Carver Chiropractic College v. Armstrong*, 103 Okla. 123, 229 Pac. 641 (1924).

11. See *Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n*, 32 Utah 46, 88 Pac. 691, 696, 8 L. R. A. (N.S.) 1161 (1907).

12. *Gooch v. Buford*, 262 Fed. 894 (6th Cir. 1920) (action on contract held not barred by verdict for negligence in not providing special nurse); *Ward v. St. Vincent's*

far the greater number of cases between hospitals and patients, however, are actions in tort rather than in contract, and are brought, not for breach of the contractual obligation, but for breach of the legal duty arising when the contract was made. "The duty imposed by law substantially coincides with the contract, but it arises out of the mere undertaking to perform the service and would exist if there were no contract at all. . . ." <sup>13</sup>

## II. THE DUTY TO USE DUE CARE

Generally an individual's duty to use care arises out of his relationship with another.<sup>14</sup> The standard for determining when this duty has been breached is generally expressed as that care which would be exercised by a reasonably prudent person under the same or similar circumstances.<sup>15</sup> As applied to hospitals, the usual statement of the standard of care to be employed in the treatment of a patient is "such reasonable care and attention for his safety as his mental and physical condition, if known, may require."<sup>16</sup> Only reasonable care under the same or similar circumstances is required as in the case of other private corporations or individuals;<sup>17</sup> and although this at times may be a very great amount of care indeed,<sup>18</sup> nevertheless the jury may be instructed that "this is always limited by the unbending rule that no one is required to guard against or take measures to avert that which under the circumstances is not likely to happen, or, more accurately, which a reasonable person under the circumstances would not anticipate as likely to happen. The law only requires . . . that care to avert danger which a reasonable man would take under the circumstances as they exist—and no man does or is required to take measures to avert a danger which the circumstances as

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Hospital, 39 App. Div. 624, 57 N. Y. Supp. 784 (1st Dep't 1899); Archibald v. Hill Sanatorium, 121 Misc. 193, 201 N. Y. Supp. 86 (Sup. Ct. 1923). Where a nurse acted beyond the scope of her employment in stealing patient's ring, a hospital was held not liable for negligence; but the court indicated that a contract action against it might lie. *Vannah v. Hart Private Hospital*, 228 Mass. 132, 117 N. E. 328, L. R. A. 1918A 1157 (1917).

13. PROSSER, TORTS 293-94 (1941).

14. *Heaven v. Pender*, 11 Q. B. D. 503 (1883).

15. PROSSER, TORTS 224 (1941); GREEN, JUDGE AND JURY c. 5 (1930); Seavey, *Negligence—Subjective or Objective*, 41 HARV. L. REV. 1, 9 (1927); Terry, *Negligence*, 29 HARV. L. REV. 40, 41 (1915).

16. *Wetzel v. Omaha Maternity & General Hospital Ass'n*, 96 Neb. 636, 148 N. W. 582, 583 (1914); see also *Emory University v. Shadburn*, 47 Ga. App. 643, 171 S. E. 192, 193 (1933), *aff'd mem.*, 180 Ga. 595, 180 S. E. 137 (1935); *Paulen v. Shinnick*, 291 Mich. 288, 289 N. W. 162, 163 (1939); *Davis v. Springfield Hospital*, 204 Mo. App. 626, 218 S. W. 696, 699 (1920); *Danville Community Hospital v. Thompson*, 186 Va. 746, 43 S. E. 2d 882, 886 (1947). For collections of cases, see Notes 22 A. L. R. 341 (1923), 39 A. L. R. 1431 (1925), 124 A. L. R. 186 (1940).

17. Notes, 8 FORD. L. REV. 378, 381 (1939), 48 YALE L. J. 81 (1938).

18. *E.g.*, *Runyan v. Goodrum*, 147 Ark. 481, 228 S. W. 397, 13 A. L. R. 1403 (1921) (duty to furnish X-ray equipment must be performed with high degree of care); *Spivey v. St. Thomas Hospital*, 211 S. W. 2d 450 (Tenn. App. M. S. 1947) (patient known to be delirious leaped from window; hospital liable despite precautions taken, including strapping patient to bed and tying sheets over him).

known to him do not suggest as reasonably likely to happen.”<sup>19</sup> A few courts have insisted that not only is there a duty to use care under the known circumstances but also a duty to investigate and learn of the patient’s physical and mental condition;<sup>20</sup> however, the general standard would probably include this duty to investigate as part of the hospital’s undertaking and it probably does not amount to a separate and special duty apart from that imposed by the use of “reasonable care.”

In applying the general standard of reasonable care to physicians and surgeons, the courts make the standard more particular, and by analogy some courts have applied to the hospital-patient relationship the standard used in the physician cases. Generally, physicians are required to use that amount of skill, knowledge and diligence which others of the same school of medical thought in good standing employ in similar circumstances and in similar localities.<sup>21</sup> In applying this standard to the hospital cases some courts have stated that a hospital must employ “that degree of care, skill, and diligence used by hospitals generally in the community.”<sup>22</sup> This rule has not generally been followed, however, and some courts have openly rejected it as applied to the duty of the hospital, although admitting that it may be correctly applied in determining the responsibility of the institution for the professional conduct of its doctors and nurses.<sup>23</sup> One court which held that it was not error to instruct the jury according to the professional standard also said, “Broadly speaking, ordinary care, that care which persons of common prudence exercise under like conditions, is the degree of care recognized by the courts throughout the country. . . . The hospital is liable for want of ordinary care, whether from incompetency of the nurse, or failure of duty by a fully qualified nurse.”<sup>24</sup>

In instructions to the jury the courts express only in broad terms how the standard of reasonable care under the circumstances is to be applied to the

19. *Davis v. Springfield Hospital*, 204 Mo. App. 626, 218 S. W. 696, 699 (1920); *Wood v. Samaritan Institution, Inc.*, 156 P. 2d 470, 471 (Cal. App. 1945), *rev'd*, 26 Cal. 2d 847, 161 P. 2d 556 (1945); *Paulen v. Shinnick*, 291 Mich. 288, 289 N. W. 162, 164 (1939) (“omniscience” not required of a hospital); *Fetzer v. Aberdeen Clinic*, 48 S. D. 308, 204 N. W. 364, 366, 39 A. L. R. 1423 (1925); *Nelson v. Rural Education Ass’n*, 23 Tenn. App. 409, 425, 134 S. W. 2d 181 (M. S. 1939).

20. *Durfee v. Dorr*, 123 Ark. 542, 186 S. W. 62, 63 (1916); *Piedmont Hospital v. Anderson*, 65 Ga. App. 491, 16 S. E. 2d 90, 93 (1941); *Mesedahl v. St. Luke’s Hospital Ass’n*, 194 Minn. 198, 259 N. W. 819, 820 (1935); *Maki v. Murray Hospital*, 91 Mont. 251, 7 P. 2d 228 (1932).

21. *E.g.*, *Cook v. Moats*, 121 Neb. 769, 238 N. W. 529 (1931); *Spead v. Tomlinson*, 73 N. H. 46, 59 Atl. 376 (1904); *Hardy v. Dahl*, 210 N. C. 530, 187 S. E. 788 (1936); *Coon v. Shields*, 88 Utah 76, 39 P. 2d 348 (1934); *Williams v. Marini*, 105 Vt. 11, 162 Atl. 796 (1932).

22. *Birmingham Baptist Hospital v. Branton*, 218 Ala. 464, 118 So. 741, 744 (1928); see also *South Highlands Infirmary v. Galloway*, 233 Ala. 276, 171 So. 250, 253 (1936); *Hogan v. Clarksburg Hospital Co.*, 63 W. Va. 84, 59 S. E. 943, 945 (1907).

23. *Hayhurst v. Boyd Hospital*, 43 Idaho 661, 254 Pac. 528, 529 (1927).

24. *South Highlands Infirmary v. Galloway*, 223 Ala. 276, 171 So. 250, 253 (1936).

particular case.<sup>25</sup> Among the "circumstances" which the jury may be told to consider are the "mental incapacity of the patient and the dangers which the surroundings indicate may befall such a patient in view of any peculiar mental traits exhibited by the patient. . . ." <sup>26</sup> The jury may be instructed to consider the patient's "mental condition and aberrations and what he is likely to do by reason thereof," <sup>27</sup> but they are also told that the mere fact that a patient is delirious will not put the hospital's servants on notice that he needs special attention.<sup>28</sup> Knowledge of the patient's condition possessed by the institution and its duty to have knowledge<sup>29</sup> may be mentioned to the jury. They are also told that the hospital's duty is measured "by the capacity of the patient to provide for his own safety."<sup>30</sup> According to some of the appellate courts, the fact that the hospital specializes in the treatment of nervous and mental cases may impose upon it a higher degree of care in learning the past history of the patient;<sup>31</sup> but ordinarily the type of hospital will only be one of the "circumstances" to be considered, and the jury are given no special instructions regarding it in the trial court.<sup>32</sup>

The rules of pleading, evidence and burden of proof are the same in hospital cases as in other negligence actions.<sup>33</sup> Substantial evidence of negligence must be produced before the case may go to the jury.<sup>34</sup> Many of the

25. *E.g.*, *Stansfield v. Gardner*, 56 Ga. App. 634, 193 S. E. 375, 384 (1937); *Hignite's Adm'x v. Louisville Neuropathic Sanatorium*, 223 Ky. 497, 4 S. W. 2d 407, 409 (1928); *Goldfoot v. Lofgren*, 135 Ore. 533, 296 Pac. 843, 849 (1931); *Fetzer v. Aberdeen Clinic*, 48 S. D. 308, 204 N. W. 364, 366 (1925); 41 C. J. S., *Hospitals* § 10 (1944).

26. *Fetzer v. Aberdeen Clinic*, 48 S. D. 308, 204 N. W. 364, 366 (1925); see also *Davis v. Springfield Hospital*, 204 Mo. App. 626, 218 S. W. 696, 699 (1926).

27. *Davis v. Springfield Hospital*, *supra* note 26.

28. *Fetzer v. Aberdeen Clinic*, *supra* note 26.

29. *Hignite's Adm'x v. Louisville Neuropathic Sanatorium*, 223 Ky. 497, 4 S. W. 2d 407, 409 (1928); *Mesedahl v. St. Luke's Hospital Ass'n*, 194 Minn. 198, 259 N. W. 819, 820 (1935); *Maki v. Murray Hospital*, 91 Mont. 251, 7 P. 2d 228 (1932); *James v. Turner*, 184 Tenn. 563, 568, 201 S. W. 2d 691 (1941).

30. *Robertson v. Towns Hospital*, 178 App. Div. 285, 165 N. Y. Supp. 17, 18 (2d Dep't 1917); *Valentin v. La Societe Francaise*, 76 Cal. App. 2d 1, 172 P. 2d 359, 361 (1946); *Fowler v. Norways Sanatorium*, 112 Ind. App. 347, 42 N. E. 2d 415, 418 (1942); *Tuisa Hospital Ass'n v. Juby*, 73 Okla. 243, 175 Pac. 519, 523 (1918); *Hogan v. Clarksburg Hospital Co.*, 63 W. Va. 84, 59 S. E. 943 (1907).

31. See *Mesedahl v. St. Luke's Hospital Ass'n*, 194 Minn. 198, 259 N. W. 819, 823 (1935).

32. *Hignite's Adm'x v. Louisville Neuropathic Sanatorium*, 223 Ky. 497, 4 S. W. 2d 407, 409 (1928); *Torrey v. Riverside Sanitarium*, 163 Wis. 71, 157 N. W. 552, 553 (1916); *James v. Turner*, 184 Tenn. 563, 568, 201 S. W. 2d 691 (1941). Similarly a doctor, although he is a specialist, will not be required to exercise a higher degree of care for that reason; the general standard is applied to him, and his special skill is merely a "circumstance" not requiring a special instruction. *Beach v. Collett*, 31 Ohio App. 8, 166 N. E. 145, 146 (1928).

33. 41 C. J. S., *Hospitals* § 10 (1944); *Notes*, 22 A. L. R. 341, 355 (1923), 39 A. L. R. 1431, 1436 (1925), 124 A. L. R. 186, 205 (1940). The declaration of the plaintiff may sound either in contract or in tort as a general rule. *Parrish v. Clark*, 107 Fla. 598, 145 So. 848 (1933). The fact that negligence is alleged does not necessarily prevent the action from being in contract. *Archibald v. Hill Sanatorium*, 121 Misc. 193, 201 N. Y. Supp. 86 (Sup. Ct. 1923).

34. *E.g.*, *Papini v. Alexander Sanitarium, Inc.*, 12 Cal. App. 2d 249, 55 P. 2d 270 (1936); *Pangle v. Appalachian Hall*, 190 N. C. 833, 131 S. E. 42 (1925). Preponderance of the evidence is required to prove that an injury was proximately caused by the hospital's negligence. *Phillipson v. Hunt*, 129 Ore. 242, 276 Pac. 255, 257 (1929). As to

questions arising in these cases are particularly suited to the use of expert testimony,<sup>35</sup> and in many instances evidence of custom and usage may be an important factor in proving the presence or absence of reasonable care.<sup>36</sup> In a number of situations the patient may rely upon the doctrine of *res ipsa loquitur*,<sup>37</sup> particularly where he has been burned while unconscious<sup>38</sup> or where he has been permitted to leap from a hospital window.<sup>39</sup>

The general standard of reasonable care on the part of the hospital has had many types of applications. For example, the hospital has been held liable for affirmative acts of negligence by its servants, such as the application of overheated water bottles,<sup>40</sup> the giving of a transfusion to the wrong patient,<sup>41</sup> the negligent injection of medicine into the patient's body,<sup>42</sup> and the preparation of the wrong medicine for him;<sup>43</sup> it has also been held for negative acts or omissions, such as leaving the patient unguarded for too long under the circumstances,<sup>44</sup> failure to detect hospital-inflicted injuries,<sup>45</sup>

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whether the records of a hospital may be introduced as evidence there is a split of authority. Notes 75 A. L. R. 279 (1931), 120 A. L. R. 1124 (1939).

35. *E.g.*, *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30 (1915); *Mesedahl v. St. Luke's Hospital Ass'n*, 194 Minn. 198, 259 N. W. 819 (1935); but where the issue is one which a layman is capable of deciding, the expert is not needed. *Mills v. Richardson*, 126 Me. 244, 137 Atl. 689 (1927); *Paulen v. Shinnick*, 291 Mich. 288, 289 N. W. 162 (1939).

36. *E.g.*, *Maki v. Murray Hospital*, 91 Mont. 251, 7 P. 2d 228, 230 (1932); *Morris, Custom and Negligence*, 42 Col. L. Rev. 1147, 1163 (1942).

37. *E.g.*, *Dierman v. Providence Hospital*, 31 Cal. 2d 290, 188 P. 2d 12 (1947) (explosion of anesthetic).

38. *E.g.*, *Timbrell v. Suburban Hospital, Inc.*, 4 Cal. 2d 68, 47 P. 2d 737 (1935); *Meyer v. McNutt Hospital*, 173 Cal. 156, 159 Pac. 436 (1916); *Quillen v. Skaggs*, 233 Ky. 171, 25 S. W. 2d 33 (1930).

39. *E.g.*, *Richardson v. Dumas*, 106 Miss. 664, 64 So. 459 (1914); *Maki v. Murray Hospital*, 91 Mont. 251, 7 P. 2d 228 (1932).

40. Burns from hot water bottles give rise to a very large percentage of the hospital cases. Note, 48 YALE L. J. 81, 82 (1938). Among the many cases on the point see *Timbrell v. Suburban Hospital, Inc.*, 4 Cal. 2d 68, 47 P. 2d 737 (1935); *Meyer v. McNutt Hospital*, 173 Cal. 156, 159 Pac. 436 (1916); *Quillen v. Skaggs*, 233 Ky. 171, 25 S. W. 2d 33 (1930); *Iacono v. New York Polyclinic Medical School*, 269 App. Div. 955, 58 N. Y. S. 2d 244 (2d Dep't 1945), *aff'd mem.*, 296 N. Y. 502, 68 N. E. 2d 450 (1946); *Fawcett v. Ryder*, 23 N. D. 20, 135 N. W. 800 (1912); *Stuart Circle Hospital Corp. v. Curry*, 173 Va. 136, 3 S. E. 2d 153, 124 A. L. R. 176 (1939). Other types of burns frequently give rise to litigation; see, *e.g.*, *Piedmont Hospital v. Anderson*, 65 Ga. App. 491, 16 S. E. 2d 90 (1941) (electric heating pad); *Cornell v. United States Fidelity & Guaranty Co.*, 8 S. 2d 364 (La. App. 1942) (incubator); *Post v. Crown Heights Hospital, Inc.*, 173 Misc. 250, 17 N. Y. S. 2d 409 (Sup. Ct. 1940) (hot medicine); *Flower Hospital v. Hart*, 178 Okla. 447, 62 P. 2d 1248 (1936) (light bulb on bed); *Danville Community Hospital v. Thompson*, 186 Va. 746, 43 S. E. 2d 882 (1947) (incubator).

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

42. *Parrish v. Clark*, 107 Fla. 598, 145 So. 848 (1933).

43. *Stanley v. Schumpert*, 117 La. 255, 41 So. 565, 6 L. R. A. (N.S.) 306 (1906); *Collins v. Hertfordshire County Council*, [1947] 1 K. B. 598. *Contra*: *Steinert v. The Brunswick Home, Inc.*, 172 Misc. 787, 16 N. Y. S. 2d 83 (Sup. Ct. 1939), *aff'd mem.*, 259 App. Div. 1018, 20 N. Y. S. 2d 459 (2d Dep't 1940).

44. *Emory University v. Shadburn*, 47 Ga. App. 643, 171 S. E. 192 (1933), *aff'd mem.*, 180 Ga. 595, 180 S. E. 137 (1935); *Hayhurst v. Boyd Hospital*, 43 Idaho 661, 254 Pac. 528 (1927); *Croupp v. Garfield Park Sanitarium*, 147 Ill. App. 7 (1909); *Maki v. Murray Hospital*, 91 Mont. 251, 7 P. 2d 228 (1932); *Wetzel v. Omaha Maternity & General Hospital Ass'n*, 96 Neb. 636, 148 N. W. 582 (1914); *Robertson v. Towns*

or to discover symptoms of a disease,<sup>46</sup> or to prevent the development of an obviously present disease.<sup>47</sup>

### III. SPECIFIC DUTIES

The general duty to use care applied in all negligence cases would cover adequately the problems arising out of the hospital-patient relationship. But here, as in some other situations involving special relationships—such as that of employer-employee at common law<sup>48</sup>—the courts have been accustomed to refer to more specific duties which rest upon the institution. These duties are still expressed in terms of a standard of reasonableness and are not reduced to definite rules of conduct. They are used in instructions to the jury and have the effect of calling the jury's attention to particular activities or undertakings in which the hospital is held to the usual standard of reasonable action. Some of the more important of these duties will now be examined.

One very large group of cases involves the duty of the hospital to use care in furnishing to the patient premises and equipment which are safe and adapted to his condition. For failure to furnish such premises in a careful and reasonable manner there will be liability. For example, the hospital will be held liable when the roof is allowed to leak upon a helpless patient who contracts high fever as a result,<sup>49</sup> or when water collects in the patient's room during a rainstorm because of defective windows and the patient is made ill from the dampness.<sup>50</sup> The patient may recover from the hospital when he is shocked because of defective wiring on electrical fixtures,<sup>51</sup> or when frightened and made ill by the explosion of a defective electric fan.<sup>52</sup> As a rule the patient may rely upon the institution to supply safe furnishings, such as beds,<sup>53</sup> his position is that of an invitee or business guest<sup>54</sup> and he must avoid only equipment containing obvious or known defects. Not only must the hospital

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Hospital, 178 App. Div. 285, 165 N. Y. Supp. 17 (2d Dep't 1918); *Goldfoot v. Lofgren*, 135 Ore. 533, 296 Pac. 843 (1931). Even if a patient has not contracted for a special nurse, his condition may be such that the hospital is under an obligation to keep him under constant supervision. *Durfee v. Dorr*, 123 Ark. 542, 186 S. W. 62 (1916); *Stansfield v. Gardner*, 57 Ga. App. 634, 193 S. E. 375 (1937); *Hignite's Adm'x v. Louisville Neuropathic Sanitorium*, 223 Ky. 497, 4 S. W. 2d 407 (1928).

45. *Guilliams v. Hollywood Hospital*, 18 Cal. 2d 97, 114 P. 2d 1 (1941); *Gilstrap v. Osteopathic Sanatorium Co.*, 224 Mo. App. 798, 24 S. W. 2d 249 (1929); *cf. Giusti v. Weston Co.*, 165 Ore. 565, 108 P. 2d 1010 (1941) (failure to discover true nature of injury inflicted outside of hospital).

46. *Hansch v. Hackett*, 190 Wash. 97, 66 P. 2d 1129 (1937).

47. *Valentin v. La Societe Francaise*, 76 Cal. App. 2d 1, 172 P. 2d 359 (1946).

48. PROSSER, TORTS 505 *et seq.* (1941).

49. *Tulsa Hospital Ass'n v. Juby*, 73 Okla. 243, 175 Pac. 519 (1918).

50. *Bailey v. Long*, 175 N. C. 687, 94 S. E. 675 (1917).

51. *Baker v. Leland Stanford Jr. Univ.*, 133 Cal. App. 243, 23 P. 2d 1071 (1933).

52. *Gardner v. Newnan Hospital*, 58 Ga. App. 104, 198 S. E. 122 (1938).

53. *Welsh v. Mercy Hospital*, 65 Cal. App. 2d 473, 151 P. 2d 17 (1944); *cf. Meshel v. Crotona Park Sanitarium*, 154 Misc. 221, 276 N. Y. Supp. 989 (N. Y. City Ct. 1935).

54. *Welsh v. Mercy Hospital*, *supra* note 53.

premises be safe; they must also be kept reasonably clean and sanitary.<sup>55</sup> The institution may be liable also when the premises are not adapted to the condition of the patient; for example, hospitals have been held liable for not having windows sufficiently secured to prevent the escape of delirious patients,<sup>56</sup> and for failing to provide sideboards for the beds of those known to be restless or likely to fall off.<sup>57</sup>

Similar to the duty to furnish safe premises is the duty to use care in supplying to doctors and nurses adequate facilities for the treatment of patients. The equipment supplied to X-ray technicians,<sup>58</sup> to nurses,<sup>59</sup> and to doctors in operating rooms<sup>60</sup> must be in good order; the degree of care required in this regard is very high,<sup>61</sup> and for failure to furnish such equipment in good condition the hospital will be responsible to the injured patient. In this respect its duty is said to be that of the owner of chattels who supplies them to third persons with knowledge of the manner in which they are to be used.<sup>62</sup> Nevertheless, this duty on the part of the hospital is limited by the skill and experience of the doctors and nurses; if the equipment is such that a trained nurse should recognize its unfitness and not use it, the negligence of the nurse will cut off the liability of the hospital, provided she is not its servant<sup>63</sup> and provided that the emergency of the situation does not demand that the equipment be used regardless of its condition. At least one court has felt that even if a hospital negligently maintains its operating room, the patient should be allowed to recover only from the independent physician

55. *Woodlawn Infirmary v. Byers*, 216 Ala. 210, 112 So. 831 (1927) (dirty premises evidence of negligence of hospital where patient died of tetanus); *see Croupp v. Garfield Park Sanitorium*, 147 Ill. App. 7 (1909) (duty to have premises clean stressed but evidence insufficient to show injury resulted from breach of the duty); *Moses v. St. Barnabas Hospital*, 130 Minn. 1, 153 N. W. 128 (1915) (same).

56. *Wood v. Samaritan Institution, Inc.*, 26 Cal. 2d 847, 161 P. 2d 556 (1945); *Paulen v. Shinnick*, 291 Mich. 288, 289 N. W. 162 (1939); *Spivey v. St. Thomas Hospital*, 211 S. W. 2d 450 (Tenn. App. M. S. 1947).

57. *Ranelli v. Society of New York Hospital*, 295 N. Y. 850, 67 N. E. 2d 257 (1946); *Bickford v. Peck Memorial Hospital*, 266 App. Div. 875, 43 N. Y. S. 2d 20 (2d Dep't 1943); *cf. Silva v. Providence Hospital*, 87 P. 2d 374 (Cal. App. 1939), *aff'd*, 14 Cal. 2d 762, 97 P. 2d 798 (1939) (charitable hospital held upon basis of implied contract with paying patient for not furnishing sideboards).

58. *Runyan v. Goodrum*, 147 Ark. 481, 228 S. W. 397, 13 A. L. R. 1403 (1921).

59. *Butler v. Northwestern Hospital*, 202 Minn. 282, 278 N. W. 37 (1938) (defective clamp on rubber tubing); *Woodhouse v. Knickerbocker Hospital*, 39 N. Y. S. 2d 671 (Sup. Ct. 1943), *aff'd mem.*, 266 App. Div. 839, 43 N. Y. S. 2d 518 (1st Dep't 1943) (defective incubator for infants); *see Payne v. Santa Barbara Cottage Hospital*, 2 Cal. App. 2d 270, 37 P. 2d 1061, 1062 (1934).

60. *Delling v. Lake View Hospital Ass'n*, 310 Ill. App. 155, 33 N. E. 2d 915 (1941).

61. *See Runyan v. Goodrum*, 147 Ark. 481, 228 S. W. 397, 403, 13 A. L. R. 1403 (1921).

62. *Butler v. Northwestern Hospital*, 202 Minn. 282, 278 N. W. 37, 38 (1938); *Woodhouse v. Knickerbocker Hospital*, 39 N. Y. S. 2d 671, 674 (Sup. Ct. 1943), *aff'd mem.*, 266 App. Div. 839, 43 N. Y. S. 2d 518 (1st Dep't 1943); *RESTATEMENT, TORTS* § 318 (1934).

63. *Payne v. Santa Barbara Cottage Hospital*, 2 Cal. App. 2d 270, 37 P. 2d 1061 (1934). However, the nurse has no duty to investigate the mechanical parts of apparently good equipment in order to discover defects. *Ratliffe v. Wesley Hospital*, 135 Kan. 306, 10 P. 2d 859 (1932); *Butler v. Northwestern Hospital*, 202 Minn. 282, 278 N. W. 37 (1938).

who chooses to use the facilities, and not from the hospital itself.<sup>64</sup> This position, however, is not in keeping with that taken in the *Restatement of Torts*<sup>65</sup> and has not been generally followed.

Since in treating patients a hospital is dealing with persons not in normal physical health and often not mentally balanced, another very important specific duty resting upon it is the duty to use care in protecting patients from dangers which often would not threaten normal persons.<sup>66</sup> This duty includes safeguarding the patient from self-inflicted injuries;<sup>67</sup> it is well illustrated in the many cases where the hospital has been found negligent in allowing patients to leap from hospital windows and fire escapes.<sup>68</sup> In instructing the jury the courts always stress that a hospital is not an insurer of the safety of its inmates.<sup>69</sup> But if the agents of the hospital know from all of the acts and statements of the patient that he is likely to harm himself, or if they should anticipate this from his condition, then the liability of the hospital in fact approaches the point of being absolute when the patient does leap from a window<sup>70</sup> or when he commits suicide.<sup>71</sup> But if the patient has apparently been tractable and if he has shown no tendency toward violence, the jury may find that his action was completely unforeseeable and beyond the scope

64. *Robinson v. Crotwell*, 175 Ala. 194, 57 So. 23 (1911).

65. §318 (1934).

66. One measure of the hospital's duty to use care in treating and protecting the patient is the ability of the latter to protect and care for himself. See note 30 *supra*. Quite often it is only the incapacity and helplessness of the patient which render the rules of contributory negligence inapplicable to the particular case. *Fetzer v. Aberdeen Clinic*, 48 S. D. 308, 204 N. W. 364, 367, 39 A. L. R. 1423 (1925). If the patient could reasonably have avoided harm to himself he will be held contributorily negligent. *Dittert v. Fischer*, 148 Ore. 366, 36 P. 2d 592 (1934) (patient who had learned to operate heating pad unable to recover for burns received when he left it on and went to sleep). But if the patient is negligent only after an injury has been received through the negligence of the hospital, he may still recover for injury itself; his negligence only goes in mitigation of damages. *Jenkins v. Charleston General Hospital*, 90 W. Va. 230, 110 S. E. 560, 22 A. L. R. 323 (1922).

67. *Emory University v. Shadburn*, 47 Ga. App. 643, 171 S. E. 192 (1933), *aff'd mem.*, 180 Ga. 595, 180 S. E. 137 (1935); *Hignite's Adm'x v. Louisville Neuropathic Sanatorium*, 223 Ky. 497, 4 S. W. 2d 407 (1928); *Mulliner v. Evangelischer Diakonissenverein*, 144 Minn. 392, 175 N. W. 699 (1920); *Pangle v. Appalachian Hall*, 190 N. C. 833, 131 S. E. 42 (1925); *James v. Turner*, 184 Tenn. 563, 201 S. W. 2d 691 (1941); *Vanderbilt University v. Henderson*, 23 Tenn. App. 135, 127 S. W. 2d 284 (M. S. 1938).

68. *Durfee v. Dorr*, 123 Ark. 542, 186 S. W. 2d 62 (1916); *Fowler v. Norways Sanatorium*, 112 Ind. App. 347, 42 N. E. 2d 415 (1942); *Davis v. Springfield Hospital*, 204 Mo. App. 626, 218 S. W. 696 (1920); *Robertson v. Towns Hospital*, 178 App. Div. 285, 165 N. Y. Supp. 17 (1918); *Wetzel v. Omaha Maternity & General Hospital Ass'n*, 96 Neb. 636, 148 N. W. 582 (1914); *Spivey v. St. Thomas Hospital*, 211 S. W. 2d 450 (Tenn. App. M. S. 1947); *Torrey v. Riverside Sanitarium*, 163 Wis. 71, 157 N. W. 552 (1916). See note 36 *supra*.

69. *Stansfield v. Gardner*, 56 Ga. App. 634, 193 S. E. 375, 381 (1937); *Paulen v. Shinnick*, 291 Mich. 288, 289 N. W. 162 (1939); *Maki v. Murray Hospital*, 91 Mont. 251, 7 P. 2d 228 (1932); *Harris v. Woman's Hospital*, 14 N. Y. Supp. 881 (N. Y. City Ct. 1891); *Hogan v. Clarksburg Hospital Co.*, 63 W. Va. 84, 59 S. E. 943 (1907).

70. *E.g.*, *Spivey v. St. Thomas Hospital*, 211 S. W. 2d 450 (Tenn. App. M. S. 1947). See note 18 *supra*.

71. *E.g.*, *Hignite's Adm'x v. Louisville Neuropathic Sanatorium*, 223 Ky. 497, 4 S. W. 2d 407 (1928).

of the hospital's responsibility.<sup>72</sup> As mentioned previously,<sup>73</sup> there may be a duty upon the sanitarium specializing in nervous and mental cases to inquire into the past history of the patient and to learn upon admitting him more facts than an ordinary general hospital will be required to know.<sup>74</sup>

Another specific duty of the hospital is that of safeguarding the patient from injury inflicted by third persons, including other patients<sup>75</sup> and the hospital's own employees.<sup>76</sup> In this respect its duty is very much like that owed by a carrier to its passengers.<sup>77</sup> Thus a hospital may be held liable when medical students improperly examine a female patient,<sup>78</sup> or when an attendant abuses a patient and compels him to fight with a third person.<sup>79</sup> By reason of his relationship with the institution, the patient is "entitled to reasonably kind treatment so far as the nature of his malady [will] . . . allow."<sup>80</sup> At least one case has suggested by way of dictum that the duty of protection would extend to a situation where a stranger entered the premises and harmed the patient;<sup>81</sup> while no cases on the point have been found, there seems to be no valid objection to such responsibility.

Another specific duty resting upon the hospital is the duty to use care in the selection of physicians, nurses and specialists when it undertakes to furnish their services.<sup>82</sup> For failure to furnish competent staff physicians or to select competent doctors if it contracts to furnish medical service, the hospital will be liable to the patient.<sup>83</sup> It is part of its undertaking that its

72. *Harris v. Woman's Hospital*, 14 N. Y. Supp. 881 (N. Y. City Ct. 1891); *James v. Turner*, 184 Tenn. 563, 201 S. W. 2d 691 (1941).

73. See notes 31, 32 *supra*.

74. See *Mesedahl v. St. Luke's Hospital Ass'n*, 194 Minn. 198, 259 N. W. 819, 823 (1935).

75. *University of Louisville v. Hammock*, 127 Ky. 564, 106 S. W. 219, 14 L. R. A. (N.S.) 784 (1907) (patient with delirium tremens insufficiently guarded, and injured plaintiff, a fellow patient); cf. *Papini v. Alexander Sanitarium, Inc.*, 12 Cal. App. 2d 249, 55 P. 2d 270 (1936) (evidence insufficient to prove decedent killed by fellow patient but duty to protect recognized). The duty of the hospital in a situation like the *Hammock* case is that of one having a dangerous person in charge. RESTATEMENT, TORTS § 319 (1934).

76. *E.g.*, *Lord v. Claxton*, 62 Ga. App. 526, 8 S. E. 2d 657 (1940) (physician who owned hospital drugged plaintiff and kept her in hospital while others defrauded her); *Rickbeil v. Grafton Deaconess Hospital*, 23 N. W. 2d 247 (N. D. 1946) (hospital held for libel of patient by employee); RESTATEMENT, TORTS § 320 (1934).

77. PROSSER, TORTS 198 (1941); RESTATEMENT, TORTS § 315 (1934); Harper and Kime, *The Duty to Control the Conduct of Another*, 43 YALE L. J. 886, 903 (1934).

78. *Inderbitzen v. Lane Hospital Co.*, 124 Cal. App. 462, 12 P. 2d 744 (1932), *rehearing denied*, 124 Cal. App. 469, 13 P. 2d 905 (1932).

79. *Galesburg Sanitarium v. Jacobson*, 103 Ill. App. 26 (1902).

80. *Id.* at 28; cf. *Stone v. Eisen Co.* 219 N. Y. 205, 114 N. E. 44 (1916).

81. See *Vannah v. Hart Private Hospital*, 228 Mass. 132, 117 N. E. 328, 329 (1917).

82. *E.g.*, *Black v. Fischer*, 30 Ga. App. 109, 117 S. E. 103 (1923); *Stacy v. Williams*, 253 Ky. 353, 69 S. W. 2d 697 (1934); *Howe v. Medical Arts Center Hospital*, 261 App. Div. 1088, 26 N. Y. S. 2d 957 (2d Dep't 1941); *Pangle v. Appalachian Hall*, 190 N. C. 833, 131 S. E. 42 (1925). This rule applies to charitable hospitals as well as to private institutions. *E.g.*, *England v. Hospital of the Good Samaritan*, 16 Cal. App. 2d 640, 61 P. 2d 48 (1936); *Mikota v. Sisters of Mercy*, 183 Iowa 1378, 168 N. W. 219 (1918); Note, 48 YALE L. J. 81, 86 (1938).

83. *Howe v. Medical Arts Center Hospital*, 261 App. Div. 1088, 26 N. Y. S. 2d 957 (2d Dep't 1941) (incompetent nurse); *Goldfoot v. Lofgren*, 135 Ore. 533, 296 Pac.

physicians or those whom it procures will meet the standard of skill, education and ability usually applied to their profession.<sup>84</sup> There have, however, been few indications that the hospital must set any standards for the independent physicians and nurses who use its facilities or that it will be liable for permitting such use by incompetent physicians.<sup>85</sup> That a private hospital may set the standards for those who use its facilities as practitioners is clear.<sup>86</sup> And if its officers knowingly permit a layman to attempt to treat a patient, the hospital may be liable to the latter;<sup>87</sup> the same is true if they knowingly permit any other unlawful medical acts to be done on the premises.<sup>88</sup> But apparently no court has yet required the hospital to exclude duly licensed but incompetent professional persons.

### *Respondeat Superior*

The group of hospital cases presenting the greatest conflict of authority are those in which the hospital is sued for the negligent conduct of a doctor or nurse. Most of these cases are concerned with the doctrine of *respondeat superior* rather than with the actual standard of care owed by the institution to the patient; yet it is pertinent at this point to examine some of them in connection with the latter subject.

All courts are agreed that a hospital is not liable for the negligent conduct of doctors and nurses who are in the employment of the patient, and who merely use its facilities for the purposes of treatment.<sup>89</sup> Over these servants of the patient the hospital has no control, and it should not be responsible for their conduct.

Much more difficult is the situation where the hospital's own staff physicians negligently treat the patient or where the hospital contracts to fur-

843 (1931) (same); *cf.* *Rowencamp v. Post Graduate Medical School and Hospital*, 254 App. Div. 265, 4 N. Y. S. 2d 751 (2d Dep't 1938), *rev'd*, 256 App. Div. 957, 10 N. Y. S. 2d 669 (2d Dep't 1939) (evidence insufficient to prove negligence in selection of doctor but liability recognized where proof is adequate); *Smith v. Duke University*, 219 N. C. 628, 14 S. E. 2d 643 (1941) (same). See note 80 *supra*.

84. *Pangle v. Appalachian Hall*, 190 N. C. 833, 131 S. E. 42, 43 (1935).

85. Note, 48 *YALE L. J.* 81, 85 (1938).

86. *Hughes v. Good Samaritan Hospital*, 289 Ky. 123, 158 S. W. 2d 159 (1942); *Harris v. Thomas*, 217 S. W. 1068 (Tex. Civ. App. 1920); *State ex rel. Wolf v. La Crosse Lutheran Hospital Ass'n*, 181 Wis. 33, 193 N. W. 994 (1923).

87. *Hendrickson v. Hodkin*, 276 N. Y. 252, 11 N. E. 2d 899 (1937), 22 *MINN. L. REV.* 283 (1938).

88. *E.g.*, *Grawunder v. Beth Israel Hospital Ass'n*, 242 App. Div. 56, 272 N. Y. Supp. 171 (2d Dep't 1934), *aff'd mem.*, 266 N. Y. 605, 195 N. E. 221 (1934) (unlawful autopsy on body); *see* *Schloendorff v. New York Hospital*, 211 N. Y. 125, 105 N. E. 92, 95 (1914).

89. *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30 (1915); *Kamps v. Crown Heights Hospital, Inc.*, 251 App. Div. 849, 296 N. Y. Supp. 776 (2d Dep't 1937), *aff'd mem.*, 277 N. Y. 602, 14 N. E. 2d 184 (1938); *Hendrickson v. Hodkin*, 250 App. Div. 619, 294 N. Y. Supp. 982 (2d Dep't 1937), *rev'd on other grounds*, 276 N. Y. 252, 11 N. E. 2d 899 (1937); *Penland v. French Broad Hospital, Inc.*, 199 N. C. 314, 154 S. E. 406 (1930); *Holland v. Eugene Hospital*, 127 Ore. 256, 270 Pac. 784 (1928).

nish the services of a physician and that physician is negligent. In these cases the courts have split sharply. As mentioned previously, the courts are agreed that the hospital must use care in selecting staff physicians or doctors whose services it has contracted to supply. But if a doctor who has been carefully selected nevertheless fails to use due care in the particular case, some courts have felt that the hospital ought not to be responsible.<sup>90</sup> A few courts have exempted the institution upon the ground that it may not practice medicine and therefore may not be held for negligence in medical treatment, even if it contracts to furnish such treatment.<sup>91</sup> Others have exempted the hospital simply because it cannot control the professional acts of its physicians and have treated the doctor as an independent contractor as to these acts.<sup>92</sup> These courts have attempted to draw a distinction between "professional" and "administrative" acts, and if the physician is performing only the latter the hospital can be held liable.<sup>93</sup> With the exception of "administrative" acts, this group of courts would limit the obligation of the hospital towards the patient to the selection of a competent physician.<sup>94</sup>

Other courts, however, have applied the rule of *respondeat superior* more broadly and have held the hospital liable for the negligent professional acts of physicians whom it had power to employ and discharge.<sup>95</sup> These courts hold that if a hospital undertakes, through those whom it employs, to furnish medical services in addition to the routine services of furnishing facilities, nurses, and equipment, it is liable for the negligence of those rendering the

90. *E.g.*, *Rosane v. Senger*, 112 Colo. 363, 149 P. 2d 372 (1944), 17 ROCKY MT. L. REV. 124; *Black v. Fischer*, 30 Ga. App. 109, 117 S. E. 103 (1923); *Iterman v. Baker*, 214 Ind. 308, 15 N. E. 2d 365 (1938); *Stacy v. Williams*, 253 Ky. 353, 69 S. W. 2d 697 (1934); *see Kamps v. Crown Heights Hospital, Inc.*, 251 App. Div. 849, 296 N. Y. Supp. 776, 777 (2d Dep't 1937), *aff'd mem.*, 277 N. Y. 602, 14 N. E. 2d 184 (1938); *Steinert v. The Brunswick Home, Inc.*, 172 Misc. 787, 16 N. Y. S. 2d 83, 85 (Sup. Ct. 1939), *aff'd mem.*, 259 App. Div. 1018, 20 N. Y. S. 2d 459 (2d Dep't 1940).

91. *Black v. Fischer*, 30 Ga. App. 109, 117 S. E. 103 (1923); *Iterman v. Baker*, 214 Ind. 308, 15 N. E. 2d 365 (1938). *But cf.* *Stuart Circle Hospital Corp. v. Curry*, 173 Va. 136, 3 S. E. 2d 153, 124 A. L. R. 176 (1939).

92. *Rosane v. Senger*, 112 Colo. 363, 149 P. 2d 372 (1944), 17 ROCKY MT. L. REV. 124; *Hoke v. Harrisburg Hospital, Inc.*, 281 Ill. App. 247 (1935); *see In re Renouf*, 254 N. Y. 349, 173 N. E. 218, 219 (1930); *Mieryjeski v. Bay Ridge Sanitarium*, 237 App. Div. 851, 261 N. Y. Supp. 927 (2d Dep't 1932); *Steinert v. The Brunswick Home, Inc.*, 172 Misc. 787, 16 N. Y. S. 2d 83 (Sup. Ct. 1939), *aff'd mem.*, 259 App. Div. 1018, 20 N. Y. S. 2d 459 (2d Dep't 1940).

93. *Fowler v. Norways Sanitorium*, 112 Ind. App. 347, 42 N. E. 2d 415 (1942); *Dillon v. Rockaway Beach Hospital*, 284 N. Y. 176, 30 N. E. 2d 373 (1940); *Post v. Crown Heights Hospital, Inc.*, 173 Misc. 250, 17 N. Y. S. 2d 409 (Sup. Ct. 1940); *CLERK AND LINDSELL, TORTS 272-74* (9th ed., Potter, 1937); 14 BROOKLYN L. REV. 293 (1948).

94. *Black v. Fischer*, 30 Ga. App. 109, 117 S. E. 103 (1923); *Stacy v. Williams*, 253 Ky. 353, 69 S. W. 2d 697 (1934); *Iterman v. Baker*, 214 Ind. 308, 15 N. E. 2d 365 (1938).

95. *Brown v. La Societe Francaise*, 138 Cal. 475, 71 Pac. 516 (1903); *Valentin v. La Societe Francaise*, 76 Cal. App. 2d 1, 172 P. 2d 359 (1946). *Gilstrap v. Osteopathic Sanatorium*, 224 Mo. App. 798, 24 S. W. 2d 249 (1929); *Stuart Circle Hospital Corp. v. Curry*, 173 Va. 136, 3 S. E. 2d 153, 124 A. L. R. 176 (1939); *Vaughan v. Memorial Hospital*, 100 W. Va. 290, 130 S. E. 481 (1925); *Treptau v. Behrens Spa, Inc.*, 247 Wis. 438, 20 N. W. 2d 108 (1945).

treatment and may not claim that they are independent contractors.<sup>96</sup> Even if statutes prohibit the practice of medicine by a hospital, an institution holding out as its agent one who negligently renders professional services may be held upon estoppel;<sup>97</sup> and if it agrees to furnish such services it may be held upon its contract.<sup>98</sup>

Other and similar problems and splits of authority are found in connection with the negligence of nurses and internes.<sup>99</sup> Particularly has the "borrowed servant" doctrine been important in limiting the liability of a hospital for the negligence of nurses and internes acting under the orders of physicians.<sup>100</sup> However, it has been pointed out that even if a nurse follows the orders of the patient's own doctor, she may still be under the control of the hospital, and it may be responsible if she fails to give any treatment reasonably required in addition to or in spite of the orders of the doctor.<sup>101</sup> Some courts, as in the case of physicians, have attempted to distinguish the "administrative" acts of nurses and internes from their "professional" acts, and the results have at times been very artificial and difficult to justify.<sup>102</sup>

The better rule in all of these cases would seem to require an examina-

96. *E.g.*, *Jenkins v. Charleston General Hospital*, 90 W. Va. 230, 110 S. E. 560, 22 A. L. R. 323 (1922).

97. *Hedlund v. Sutter Medical Service Co.*, 51 Cal. App. 2d 327, 124 P. 2d 878 (1942). *But cf.* *Hull v. Enid General Hospital Foundation*, 194 Okla. 446, 152 P. 2d 693 (1944).

98. See note 12 *supra*.

99. 1 VAND. L. REV. 153 (1947).

100. If the hospital's employee can be found to be acting under the control of a physician, the hospital will not be liable for the employee's negligence. *E.g.*, *Hull v. Enid General Hospital Foundation*, 194 Okla. 446, 152 P. 2d 693 (1944). The problem of determining whether a nurse or interne is under the control of the physician and when under the control of the hospital is very difficult. A famous English case stated that the moment a nurse stepped into the operating arena she left the hospital's control. *Hillyer v. Bartholomew's Hospital*, [1909] 2 K. B. 820 (C. A.) Subsequent English and Dominion cases have repudiated this rule, however, so that at present hospitals are usually held liable for the negligence of nurses whether acting under a physician's orders, and therefore "professionally," or not. *Dunphy, Liability of a Hospital for the Negligence of its Staff*, 17 AUSTR. L. J. 82 (1943), 21 AUSTR. L. J. 302 (1947); *Goodhart, Hospitals and Trained Nurses*, 54 L. Q. REV. 553 (1938); *Note*, 16 CAN. B. REV. 654 (1938); 10 AUSTR. L. J. 317 (1936).

101. *Valentin v. La Societe Francaise*, 76 Cal. App. 2d 1, 172 P. 2d 359 (1946); *Wetzel v. Omaha Maternity & General Hospital Ass'n*, 96 Neb. 636, 148 N. W. 582 (1914); *Broz v. Omaha Maternity & General Hospital Ass'n*, 96 Neb. 648, 148 N. W. 575 (1914); *Flower Hospital v. Hart*, 178 Okla. 447, 62 P. 2d 1248 (1936).

102. *Compare Sutherland v. Polyclinic Medical School and Hospital*, 273 App. Div. 29, 75 N. Y. S. 2d 135 (1st Dep't 1947), 14 BROOKLYN L. REV. 293 (1948), *aff'd mem.*, 298 N. Y. 682, 82 N. E. 2d 583 (1948) (applying hot water bottle a "professional" act; hospital not liable), *with Iacono v. Polyclinic Medical School and Hospital*, 269 App. Div. 955, 58 N. Y. S. 2d 244 (2d Dep't 1945) (applying hot water bottle an "administrative" act; hospital liable.) *Compare Ranelli v. Society of New York Hospital*, 295 N. Y. 850, 67 N. E. 2d 257 (1946) (leaving patient unguarded on bed an "administrative" act), *with Andrews v. Roosevelt Hospital*, 259 App. Div. 733, 18 N. Y. S. 2d 447 (2d Dep't 1940) (leaving patient unguarded on table a "professional" act). *Compare Steinert v. The Brunswick Home, Inc.*, 172 Misc. 787, 16 N. Y. S. 2d 83 (Sup. Ct. 1939), *aff'd mem.*, 259 App. Div. 1018, 20 N. Y. S. 2d 459 (2d Dep't 1940) (negligent injection of medicine before operation a "professional" act), *with Post v. Crown Heights Hospital, Inc.*, 173 Misc. 250, 17 N. Y. S. 2d 409 (Sup. Ct. 1940) (negligent injection of medicine after operation an "administrative" act).

tion into what the hospital has undertaken to do for the patient. If it has undertaken to furnish the professional services of doctors and nurses on its staff,<sup>103</sup> then the mere fact that it cannot control all the details of their acts would seem to be no reason to excuse it from liability. In this respect the hospital would seem to be in a position no different from that of any other employer of skilled persons.<sup>104</sup> If, on the other hand, the hospital undertakes to furnish its facilities only, it should not be liable for the negligence of doctors and nurses. And although the "borrowed servant" rule may at times have some validity in this field, there seems to be very little realism in the attempted distinction between "professional" and "administrative" acts.

#### IV. CONCLUSION

As can be seen from the foregoing, the courts have imposed rather high requirements in several aspects of the relationship between hospital and patient. Nevertheless the liability of the hospital is in no sense absolute. For instance, its duty to protect the patient from harm by its employees does not render it liable when an employee strikes a patient in self-defense<sup>105</sup> nor when force becomes necessary to restrain an unruly inmate.<sup>106</sup> One recent Tennessee case excused a general hospital from liability when police entered the premises and killed a violent and delirious patient while attempting to subdue him;<sup>107</sup> the court indicated that even if the institution had been a mental hospital the result would have been the same.

The hospital serves a vital function in the life of the community. It is essential that it be held to a high degree of care; but on the other hand, its

103. There are many statements, particularly in the New York cases, that a hospital undertakes to provide only food, facilities, routine attendance and skilled independent contractors, and that medical care is no part of its undertaking toward the patient. See, e.g., *In re Renouf*, 254 N. Y. 349, 173 N. E. 218, 219 (1930); *Steinert v. The Brunswick Home, Inc.*, 172 Misc. 787, 16 N. Y. S. 2d 83, 85 (Sup. Ct. 1939). This view seems to be rather unrealistic in the light of the skill and knowledge required for membership upon the staffs of many institutions. Certainly most hospitals hold themselves out as offering medical treatment. "The object, aim and purpose of a hospital, the reason for its establishment and operation, is to render and perform medical treatment and nursing of a skilled character. . . . The patient comes to the hospital for advice, aid, and treatment. . . ." *Stuart Circle Hospital Corp. v. Curry*, 173 Va. 136, 3 S. E. 2d 153, 157, 124 A. L. R. 176 (1939).

104. E.g., *Tetting v. Hotel Pfister*, 221 Wis. 141, 206 N. W. 249 (1936) (professional man may be servant even though his employer cannot control his actions other than to hire or discharge); RESTATEMENT, AGENCY § 233 (1933); 10 AUST. L. J. 317, 318 (1936). Even if the doctor is considered an independent contractor, as no doubt he should be in many instances, nevertheless the institution might well be held liable where it has agreed to furnish his services; the hospital might be held as the employer of an independent contractor engaged to perform an extremely hazardous or a non-delegable duty. See *Jenkins v. Charleston General Hospital*, 90 W. Va. 230, 110 S. E. 560, 562, 22 A. L. R. 323 (1922); RESTATEMENT, AGENCY § 214, comment *b* (1933).

105. *Nelson v. Rural Education Ass'n*, 23 Tenn. App. 409, 134 S. W. 2d 181 (M. S. 1939).

106. See *Galesburg Sanitarium v. Jacobson*, 103 Ill. App. 26, 28 (1902); Smith, *Legal Responsibility for Surgical Practice* in THOREK, *SURGICAL ERRORS AND SAFEGUARDS* 990 (4th ed. 1943).

107. *O'Quin v. Baptist Memorial Hospital*, 184 Tenn. 570, 201 S. W. 2d 694 (1947).

liability must not be so broad that operation of it becomes a financial hazard. While the modern tendency to make even charitable as well as private institutions liable for the negligence of their servants seems justifiable and wholesome,<sup>108</sup> nevertheless the courts must also have regard for the social necessity of the institutions. Although the availability of liability insurance may do much to relieve the burden of responsibility resting upon hospitals,<sup>109</sup> policy considerations must always be important in hospital cases. A general policy favoring such useful institutions may be the real basis for many of the decisions which have cut off liability of even private hospitals in cases where there is apparently little other reason to excuse them.<sup>110</sup>

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108. Note, 19 Miss. L. J. 220 (1948); 1 VAND. L. REV. 153 (1947); 1 VAND. L. REV. 470 (1948).

109. 7 APPELMAN, INSURANCE LAW AND PRACTICE § 4502 (1942); 1 VAND. L. REV. 470 (1948).

110. Particularly does this seem to be true in the cases where liability has been cut off on the basis of "professional" conduct. See note 102 *supra*.