Mary E. Schloendorff, Appellant, v. The Society of the New York Hospital, Respondent

Court of Appeals of New York
211 N.Y. 125; 105 N.E. 92
Decided April 14, 1914.

The Opinion:

In the year 1771, by royal charter of George III., the Society of the New York Hospital was organized for the care and healing of the sick. During the century and more which has since passed, it has devoted itself to that high task. It has no capital stock; it does not distribute profits; and its physicians and surgeons, both the visiting and the resident staff, serve it without pay. Those who seek it in search of health, are charged nothing, if they are needy, either for board or for treatment. The well-to-do are required by its by-laws to pay $ 7 a week for board, an amount insufficient to cover the per capita cost of maintenance. Whatever income is thus received, is added to the income derived from the hospital's foundation, and helps to make it possible for the work to go on. The purpose is not profit, but charity, and the incidental revenue does not change the defendant's standing as a charitable institution. (People ex rel. Society of N. Y. Hospital v. Purdy, 58 Hun, 386; 126 N. Y. 679.)

To this hospital the plaintiff came in January, 1908. She was suffering from some disorder of the stomach. She asked the superintendent or one of his assistants what the charge would be and was told that it would be $ 7 a week. She became an inmate of the hospital, and after some weeks of treatment the house physician, Dr. Bartlett, discovered a lump, which proved to be a fibroid tumor. He consulted the visiting surgeon, Dr. Stimson, who advised an operation. The plaintiff's testimony is that the character of the lump could not, so the physicians informed her, be determined without an ether examination. She consented to such an examination, but notified Dr. Bartlett, as she says, that there must be no operation. She was taken at night from the medical to the surgical ward and prepared for an operation by a nurse. On the following day ether was administered, and while she was unconscious a tumor was removed. Her testimony is that this was done without her consent or knowledge. She is contradicted both by Dr. Stimson and by Dr. Bartlett, as well as by many of the attendant nurses. For the purpose of this appeal, however, since a verdict was directed in favor of the defendant, her narrative, even if improbable, must be taken as true. Following the operation, and, according to the testimony of her witnesses, because of it, gangrene developed in her left arm; some of her fingers had to be amputated; and her sufferings were intense. She now seeks to charge the hospital with liability for the wrong.

Certain principles of law governing the rights and duties of hospitals when maintained as charitable institutions have, after much discussion, become no longer doubtful. It is the settled rule that such a hospital is not liable for the negligence of its physicians and nurses in the treatment of patients. (Hordern v. Salvation Army, 199 N. Y. 233;

Collins v. N. Y. Post Graduate Med. School & Hospital, 59 App. Div. 63, and cases there cited; Wilson v. Brooklyn Homeopathic Hospital, 97 App. Div. 37; Cunningham v. Sheltering Arms, 135 App. Div. 178; Bruce v. Central M. E. Church, 147 Mich. 230; U. P. R. Co. v. Artist, 60 Fed. Rep. 365; Hearns v. Waterbury Hospital, 66 Conn. 98; Hillyer v. St. Bartholomew's Hospital, L. R. [2 K. B. 1909] 820.) This exemption has been placed upon two grounds. The first is that of implied waiver. It is said that one who accepts the benefit of a charity enters into a relation which exempts one's benefactor from liability for the negligence of his servants in administering the charity. (Hordern v. Salvation Army, supra.) The hospital remains exempt though the patient makes some payment to help defray the cost of board. (Collins v. N. Y. Post Graduate Med. School & Hospital, supra; Wilson v. Brooklyn Homeopathic Hospital, supra; Cunningham v. Sheltering Arms, supra; McDonald v. Mass. Gen. Hospital, 120 Mass. 432; Downes v. Harper Hospital, 101 Mich. 555; Powers v. Mass. Homeopathic Hospital, 109 Fed. Rep. 294.) Such a payment is regarded as a contribution to the income of the hospital to be devoted, like its other funds, to the maintenance of the charity. The second ground of the exemption is the relation subsisting between a hospital and the physicians who serve it. It is said that this relation is not one of master and servant, but that the physician occupies the position, so to speak, of an independent contractor, following a separate calling, liable, of course, for his own wrongs to the patient whom he undertakes to serve, but involving the hospital in no liability if due care has been taken in his selection. On one or the other, and often on both of these grounds, a hospital has been held immune from liability to patients for the malpractice of its physicians. The reasons that have led to the adoption of this rule are, of course, inapplicable where the wrong is committed by a servant of the hospital and the sufferer is not a patient. It is, therefore, also a settled rule that a hospital is liable to strangers, i. e., to persons other than patients, for the torts of its employees committed within the line of their employment. (Kellogg v. Church Charity Foundation, 203 N. Y. 191; Hordern v. Salvation Army, supra.)

In the case at hand, the wrong complained of is not merely negligence. It is trespass. Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages. (Pratt v. Davis, 224 Ill. 300; Mohr v. Williams, 95 Minn. 261.) This is true except in cases of emergency where the patient is unconscious and where it is necessary to operate before consent can be obtained. The fact that the wrong complained of here is trespass rather than negligence, distinguishes this case from most of the cases that have preceded it. In such circumstances the hospital's exemption from liability can hardly rest upon implied waiver. Relatively to this transaction, the plaintiff was a stranger. She had never consented to become a patient for any purpose other than an examination under ether. She had never waived the right to recover damages for any wrong resulting from this operation, for she had forbidden the operation. In this situation, the true ground for the defendant's exemption from liability is that the relation between a hospital and its physicians is not that of master and servant. The hospital does not undertake to act through them, but merely to procure them to act upon their own responsibility. That view of the relation has the support of high authority. The governing principle was well stated by Durfee, Ch. J., speaking for the Supreme Court of Rhode Island in Glavin v. Rhode Island Hospital (12 R. I. 411, 424): "If A. out of charity employs a physician to attend B., his sick neighbor, the physician does not become A.'s servant, and A., if he has been duly careful in

selecting him, will not be answerable to B. for his malpractice. The reason is, that A. does not undertake to treat B. through the agency of the physician, but only to procure for B. the services of the physician. The relation of master and servant is not established between A. and the physician. And so there is no such relation between the corporation and the physicians and surgeons who give their services at the hospital. It is true the corporation has power to dismiss them; but it has this power not because they are its servants, but because of its control of the hospital where their services are rendered. They would not recognize the right of the corporation, while retaining them, to direct them in their treatment of patients." This language was quoted and adopted in a recent case in England, where the subject of a hospital's liability was much considered. (Hillyer v. St. Bartholomew's Hosp., L. R. [2 K. B. 1909] 820.) In the Court of Appeal it was said by Farwell, L. J.: "It is, in my opinion, impossible to contend that Mr. Lockwood, the surgeon, or the acting assistant surgeon, or the acting house surgeon, or the administrator of anaesthetics, or any of them, were servants in the proper sense of the word; they are all professional men, employed by the defendants to exercise their profession to the best of their abilities according to their own discretion; but in exercising it they are in no way under the orders or bound to obey the directions of the defendants." (See also: Hall v. Lees, L. R. [2 K. B. 1904] 602; Evans v. Liverpool Corporation, L. R. [1 K. B. 1906] 160; Kellogg v. Church Charity Foundation, 128 App. Div. 214, 216; Hearne v. Waterbury Hospital, 66 Conn. 98; Laubheim v. De K. N. S. Co., 107 N. Y. 228.)

The defendant undertook to procure for this plaintiff the services of a physician. It did procure them. It procured the services of Dr. Bartlett and Dr. Stimson. One or both of those physicians (if we are to credit the plaintiff's narrative) ordered that an operation be performed on her in disregard of her instructions. The administrative staff of the hospital believing in good faith that the order was a proper one, and without notice to the contrary, gave to the operating surgeons the facilities of the surgical ward. The operation was then performed. The wrong was not that of the hospital; it was that of physicians, who were not the defendant's servants, but were pursuing an independent calling, a profession sanctioned by a solemn oath, and safeguarded by stringent penalties. If, in serving their patient, they violated her commands, the responsibility is not the defendant's; it is theirs. There is no distinction in that respect between the visiting and the resident physicians. (Hillyer v. St. Barth. Hosp., supra.) Whether the hospital undertakes to procure a physician from afar, or to have one on the spot, its liability remains the same.

I have said that the hospital supplied its facilities to the surgeons without notice that they contemplated a wrong. I think this is clearly true. The suggestion is made that notice may be gathered from two circumstances: from the plaintiff's statement to one or more of the nurses, and from her statement to the assistant administering the gas. To that suggestion I cannot yield my assent.

It is true, I think, of nurses as of physicians, that in treating a patient they are not acting as the servants of the hospital. The superintendent is a servant of the hospital; the assistant superintendents, the orderlies, and the other members of the administrative staff are servants of the hospital. But nurses are employed to carry out the orders of the physicians, to whose authority they are subject. The hospital undertakes to procure for the patient the services of a nurse. It does not undertake through the agency of nurses to render those services itself. The reported cases make

no distinction in that respect between the position of a nurse and that of a physician (Powers v. Mass. Hospital, supra; Ward v. St. Vincent's Hospital, 78 App. Div. 317; Cunningham v. Sheltering Arms, supra; Hillyer v. St. Bartholomew's Hospital, supra, at p. 827); and none is justified in principle. If there are duties performed by nurses foreign to their duties in carrying out the physician's orders, and having relation to the administrative conduct of the hospital, the fact is not established by this record, nor was it in the discharge of such duties that the defendant's nurses were then serving. The acts of preparation immediately preceding the operation are necessary to its successful performance, and are really part of the operation itself. They are not different in that respect from the administration of the ether. Whatever the nurse does in those preliminary stages is done, not as the servant of the hospital, but in the course of the treatment of the patient, as the delegate of the surgeon to whose orders she is subject. The hospital is not chargeable with her knowledge that the operation is improper any more than with the surgeon's.

If, however, it could be assumed that a nurse is a servant of the hospital, I do not think that anything said by the plaintiff to any of the defendant's nurses fairly gave notice to them that the purpose was to cut open the plaintiff's body without her consent. The visiting surgeon in charge of the case was one of the most eminent in the city of New York. The assistant physicians and surgeons were men of tested merit. The plaintiff was prepared for the operation at night. She said to the night nurse, according to her statement, that she was not going to be operated on, that she was merely going to be examined under the influence of ether, and the nurse professed to understand that this was so. "Every now and then I asked, 'Do you understand that I am not to be operated on?' 'Yes, I understand; ether examination.' 'But,' I asked, 'I understand that this preparation is for operation.' She said, 'It is just the same in ether examination as in operation -- the same preparation.'" The nurse with whom this conversation is said to have occurred left the ward early in the morning, and the operation was performed in her absence the following afternoon. Was she to infer from the plaintiff's words that a distinguished surgeon intended to mutilate the plaintiff's body in defiance of the plaintiff's orders? Was it her duty, as a result of this talk, to report to the superintendent of the hospital that the ward was about to be utilized for the commission of an assault? I think that no such interpretation of the facts would have suggested itself to any reasonable mind. The preparation for an ether examination is to some extent the same as for an operation. The hour was midnight, and the plaintiff was nervous and excited. The nurse soothed her by acquiescing in the statement that an ether examination was all that was then intended. An ether examination was intended, and how soon the operation was to follow, if at all, the nurse had no means of knowing. Still less had she reason to suspect that it would follow against the plaintiff's orders. If, when the following afternoon came, the plaintiff persisted in being unwilling to submit to an operation, the presumption was that the distinguished surgeon in charge of the case would perform none. There may be cases where a patient ought not to be advised of a contemplated operation until shortly before the appointed hour. To discuss such a subject at midnight might cause needless and even harmful agitation. About such matters a nurse is not qualified to judge. She is drilled to habits of strict obedience. She is accustomed to rely unquestioningly upon the judgment of her superiors. No woman occupying such a position would reasonably infer from the plaintiff's words that it was the purpose of the surgeons to operate whether the plaintiff forbade it or not. I conclude, therefore, that the plaintiff's statements to the nurse on the night before the operation are insufficient to charge the

hospital with notice of a contemplated wrong. I can conceive of cases where a patient's struggles or outcries in the effort to avoid an operation might be such as to give notice to the administrative staff that the surgeons were acting in disregard of their patient's commands. In such circumstances, it may well be that by permitting its facilities to be utilized for such a purpose without resistance or at least protest, the hospital would make itself a party to the trespass, and become liable as a joint tort feasor. (Sharp v. Erie R. R. Co., 184 N. Y. 100.) I do not find in this record the elements necessary to call that principle into play.

Still more clearly, the defendant is not chargeable with notice because of the plaintiff's statements to the physician who administered the gas and ether. She says she asked him whether an operation was to be performed, and that he told her he did not know; that his duty was to give the gas, and nothing more. She answered that she wished to tell some one that there must be no operation; that she had come merely for an ether examination, and he told her that if she had come only for examination, nothing else would be done. There is nothing in the record to suggest that he believed anything to the contrary. He took no part in the operation, and had no knowledge of it. After the gas was administered she was taken into another room. It does not appear, therefore, that this physician was a party to any wrong. In any event, he was not the servant of the hospital. His position in that respect does not differ from that of the operating surgeon. If he was a party to the trespass, he did not subject the defendant to liability.

The conclusion, therefore, follows that the trial judge did not err in his direction of a verdict. A ruling would indeed, be an unfortunate one that might constrain charitable institutions, as a measure of self-protection, to limit their activities. A hospital opens its doors without discrimination to all who seek its aid. It gathers in its wards a company of skilled physicians and trained nurses, and places their services at the call of the afflicted, without scrutiny of the character or the worth of those who appeal to it, looking at nothing and caring for nothing beyond the fact of their affliction. In this beneficent work, it does not subject itself to liability for damages though the ministers of healing whom it has selected have proved unfaithful to their trust.

The judgment should be affirmed, with costs.