Volume 7 | Issue 2 Article 6

1961

Agency - Borrowed Servant Doctrine - Surgeon Is Responsible for the Pre-Operative Negligence of Anesthetist

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CASE NOTES

AGENCY—BORROWED SERVANT DOCTRINE—SURGEON IS RESPONSIBLE FOR THE PRE-OPERATIVE NEGLIGENCE OF ANESTHETIST.

Rockwell v. Stone (Pa. 1961).

Plaintiff brought a malpractice action against two physicians for negligence resulting in the amputation of his arm. Dr. Kaplan, a surgeon, was to remove a bursa from the plaintiff's left arm, and for this purpose had him enter a hospital in which Dr. Stone was the chief of the anesthesiology department. Plaintiff, in accord with routine hospital procedure, was to receive an injection of sodium pentothal, an anesthesia selected by the anesthesiology department, in the induction room immediately before entering the operating room. A hospital resident physician, acting under Dr. Stone's direction, administered the drug, which was injected into the right arm in such a manner that complications set in which were not corrected, although known to Dr. Stone. As a result, three days later the arm had to be amputated. Dr. Kaplan performed the operation to remove the bursa immediately after the injection, but he was not informed of the complications which had developed. The trial court entered a judgment on a jury verdict against both Dr. Stone and Dr. Kaplan. On appeal by Dr. Kaplan, the Supreme Court of Pennsylvania affirmed, *holding* that the surgeon was responsible as principal for the negligence of the doctor in charge of administering anesthesia to the patient.[1] *Rockwell v. Stone,* 404 Pa. 474, 173 A.2d 54 (1961).

The so-called borrowed servant problem arises when the servant is in the general employ of one master but is under the direction and control of a second person for a particular purpose.[2] In most jurisdictions, only one of these employers will be held,[3] and which one it will be is determined by looking to see who had the right of control over the servant at the time of the particular wrongful act.[4] The Pennsylvania courts,

1. The court also held Dr. Kaplan directly negligent in not noticing the condition of the plaintiff's arm during the operation, in not inquiring into Dr. Stone's presence in the operating room during the operation, and in not inquiring about plaintiff's reaction to the anesthesia. 173 A.2d 54, 55. The court also affirmed the judgment against Dr. Stone. Rockwell v. Stone, 404 Pa. 561, 174 A.2d 48 (1961).

2. Baltimore Transp. Co. v. State, 184 Md. 250, 40 A.2d 678 (1945); Larson v. LeMere, 220 Minn. 25, 18 N.W.2d 696 (1945); MECHEM, OUTLINES OF AGENCY §§ 453-468 (4th ed. 1950).

3. Atwood v. Chicago, R.I. & P. Ry., 72 Fed. 447 (W.D. Mo. 1896); Moseman v. L. M. Penwell Undertaking Co., 151 Kan. 610, 100 P.2d 669 (1940).

4. McFarland v. Dixie Machinery Co., 348 Mo. 341, 153 S.W.2d 67 (1941); McGarth v. E. G. Budd Co., 348 Pa. 619, 36 A.2d 303 (1944).

however, adhere to their own doctrine that both employers may be held liable.[5] Even under this Pennsylvania rule, however, where the case involves a servant who is the general employee of a hospital but who is also the special employee of a surgeon for certain acts, only the surgeon can be held liable in practice because the hospital is immune from suit,[6] although in other states the charitable immunity doctrine has been repudiated[7] or at least broken down.[8] Of course, a doctor-employer is responsible for the acts of his own employees on the same basis and to the same extent as any other employer.[9] Generally, it is also held that a surgeon is liable for the discretionary acts of hospital staff members which take place in the operating room during the operation;[10] in other cases, however, where the duties performed were those done in everyday hospital procedure by the members of the operating room staff, the surgeon has not been held liable for such "ministerial" duties.[11] The courts thus impose no liability on a doctor who has ordered certain normal, "ministerial" tasks which are negligently performed on the ground that the hospital alone is responsible as the general employer for all of its regular procedures.[12] Some courts have gone so far as to hold on this basis that the surgeon is never liable for the negligent acts of nurses under his direction.[13] Normally, no responsibility is imputed to the physician for the negligence of hospital employees in post-operative care procedures.[14] In situations like the one involved in the instant case, the surgeon generally has not been held responsible for the negligence of the anesthetist,[15] and in one recent case it was said that the two positions involve separate and special fields in which neither doctor can be held responsible for the acts of the other.[16]

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5. Siidekism, Adm'r v. Animal Rescue League of Pitt., 353 Pa. 408, 45 A.2d 59 (1946); Gordon v. Byers, 309 Pa. 453, 164 Atl. 334 (1928).

6. Michael v. Hahnemann Medical College Hosp., 404 Pa. 424, 172 A.2d 769 (1961).

7. Mullikin v. Jewish Hosp. Ass'n of Louis., 348 S.W.2d 930 (Ky. 1961); Mulliner v. Evangelisher Diakonniessenverin, 144 Minn. 392, 175 N.W. 699 (1920).

8. Christi v. Board of Regents of the Univ. of Mich., 111 N.W.2d 30 (Mich. 1961).

9. Simons v. Northern Pac. Ry., 94 Mont. 355, 22 P.2d 609 (1933).

10. Ales v. Ryan, 8 Cal. 2d 82, 64 P.2d 409 (1936); McGowen v. Sisters of Most Precious Blood, 208 Okla. 130, 253 P.2d 830 (1953); McConnell v. Williams, 361 Pa. 355, 65 A.2d 243 (1949); Minogue v. Rutland Hosp. Inc., 119 Vt. 336, 125 A.2d 796 (1953).

11. Clary v. Christiansen, 83 N.E.2d 644 (Ohio App. 1948); Benedict v. Bondi, 384 Pa. 574, 122 A.2d 209 (1956).

12. Hothenthal v. Smith, 114 F.2d 494 (D.C. Cir. 1940); Seneris v. Haas, 45 Cal. 2d 811, 291 P.2d 915 (1955); Meadows v. Patterson, 21 Tenn. App. 283, 109 S.W.2d 417 (1937).

13. Watson v. Fahey, 135 Me. 376, 197 Atl. 402 (1938). See also Parkes v. Seasongood, 152 Fed. 583 (R.I. 1907) *(dictum)*.

14. Hothenthal v. Smith, *supra* note 12; Stewart v. Manasses, 244 Pa. 221, 90 Atl. 574 (1914).

15. Huber v. Protestant Deaconess Hosp. Ass'n of Evansville, 127 Ind. App. 655, 133 N.E.2d 864 (1956).

16. Dohr v. Smith, 104 So. 2d 29 (Fla. 1958).

The seven Pennsylvania cases in this area can be placed in five categories, involving negligence before the operation,[17] during the operation,[18] after the operation,[19] during certain therapy treatments,[20] and in exercise of purely "ministerial" functions.[21] Until the decision in *Yorston v. Pennell,*[22] the "captain of the ship" concept,[23] under which a surgeon was held responsible only for negligent acts taking place in the operating room and during the operation was the *only* basis for recovery in Pennsylvania.[24] The court in *Yorston* allowed recovery from the surgeon for a negligent act happening previous to the operation. That case involved the negligent taking of a patient's case history, at the direction of the surgeon, by a junior intern who, although qualified to take such histories, was not normally required to do so.

An examination of the cases in this area makes it apparent that Pennsylvania, with *Yorston* and now with the present case, is among the most liberal jurisdictions in allowing an action against the surgeon or physician for wrongs of hospital employees working in conjunction with him. There is no doubt that the plaintiff in the instant case suffered a severe loss and that he will be unable to recover against the hospital.[25] This, however, is not a sufficient basis on which to extend the master-servant doctrine to include the surgeon. The court emphasized that Dr. Kaplan chose the hospital, that he chose a general rather than a local anesthetic, and that he had the right of control over Dr. Stone by his own and Dr. Stone's admissions. Only the last of these provides a substantial basis for holding Dr. Kaplan liable. Right of control is to be found by going back to the time and circumstances of the "employee's" negligent act; it is a conclusion of law to vest responsibility.[26] The anesthetist in the present case was in charge of a separate department. The negligent act took place entirely out of the presence of Dr. Kaplan. Both doctors admitted that the anesthetist would stop administering the anethesia if told to do so by the surgeon. It is questionable, however, whether this fact indicates "control". Both men were acting for the good of the patient. The willingness to stop might be equally indicative of a professional courtesy based on the experience and knowledge of the surgeon. If Dr. Stone had told Dr. Kaplan to stop the operation because the anesthesia was producing ill effects or the anesthetic apparatus was faulty, Dr. Kaplan undoubtedly would have stopped, relying on the anesthetist's learned opinion. This would hardly have demonstrated "control". It had been twenty years since Dr. Kaplan

17. Yorston v. Pennell, 397 Pa. 28, 153 A.2d 255 (1959).
18. Benedict v. Bondi, *supra* note 11; McConnell v. Williams, *supra* note 10.
19. Scacchi v. Montgomery, 365 Pa. 377, 75 A.2d 535 (1950); Shull v. Schwartz, 364 Pa. 554, 73 A.2d 402 (1950); Stewart v. Manasses, *supra* note 14.
20. Powell v. Risser, 375 Pa. 60, 99 A.2d 454 (1953).
21. See Benedict v. Bondi, *supra* note 11; Stewart v. Manasses, *supra* note 14.
22. 397 Pa. 28, 153 A.2d 255 (1959).
23. McConnell v. Williams, 361 Pa. 355, 65 A.2d 243, 246 (1949).
24. See notes 17 and 18 *supra.*
25. See note 6 *supra.*
26. MECHEM, OUTLINES OF AGENCY § 415 (4th ed. 1951).

had participated in anesthesiology work. His current knowledge of anesthesia was garnered by reading. Dr. Stone's knowledge of surgery was probably obtained through study and observation; he was an anesthetist. The duties performed by each doctor were different specialties within a single profession. The two physicians were specialists in a field where specialization is common for the betterment of health and the well-being of the sick. The "captain of the ship"[27] concept of a surgeon in the operating room is a valid one, but should not be extended. As stated by the Florida court: "It is clear to us that [the surgeon] and the anesthetist were working in highly expert fields peculiar to each and that despite the common goal . . . their responsibilities were not inextricably bound together."[28]

As far as the classification of the Pennsylvania cases is concerned, this case clearly fits into the pre-operation stage, since the negligent act happened in another room before the actual operation commenced.[29] The doctrine established in *Yorston v. Pennell* departs from the established principle of no responsibility for pre-operative and post-operative procedures. It includes within the scope of the surgeon's liability the ordering of a hospital employee by the surgeon to do an act not normally required to be done by him. The facts in the instant case cannot be included within the *Yorston* rationale. Here, the anesthetist was to supply the anesthesia for the patient in the hospital once notified of his need. The anesthesiology department was in the hospital for just that purpose. Dr. Stone normally performed or provided for the performance of the services of the department. *Yorston* made an exception to the general rule of non-liability for pre-operative care because the intern in that case was doing something ordinarily not required of him at the specific request of the surgeon. The instant case clearly goes beyond this and materially extends the surgeon's liability to include the negligent acts of hospital employees.

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27. McConnell v. Williams, 361 Pa. 355, 65 A.2d 243, 246 (1949).
28. Dohr v. Smith, 104 So. 2d 29, 32 (Fla. 1958).
29. Benedict v. Bondi, *supra* note 11.