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Liability of Surgeons for the Negligent Acts of Servants

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LIABILITY OF SURGEONS FOR THE NEGLIGENT ACTS OF SERVANTS

The doctrine of respondeat superior, literally meaning "let the master answer," is well established in the law of Pennsylvania.[1] The two classic tests of whether the master is liable for the acts of the servant are whether he has the actual or potential right of control[2] and whether the act was performed within the servant's line of duty and scope of employment.[3] Physicians and surgeons, like other persons, are subject to this doctrine.[4]

In the prior case of *McConnell v. Williams* the Pennsylvania Supreme Court aligned the law of this state with the majority of states in this country that have decided the question of whether a surgeon is liable for the negligent acts of a borrowed servant performed during the course of an operation.[5] In this case, Williams, the defendant-surgeon, was attempting to stop the hemorrhaging of Mrs. McConnell following a Caesarean section. While the defendant's attention was so absorbed, an intern, held by the court to be a borrowed servant, negligently placed too large a quantity of silver nitrate in the new born baby's eyes, and then failed to irrigate the eyes properly. This led to the total disability of one eye and the partial disability of the other. The court held the defendant's right of control of the borrowed servant's negligent act to be a question of fact for the jury. The decision was based on the rule that when different inferences can fairly be drawn from the evidence as to whom is the controlling master of the borrowed servant at the time the negligent act was committed, it is for the jury to determine the question of agency.[6] This case then leaves little doubt that the doctrine of respondent superior is applicable to a highly skilled surgeon employing an intern to assist him *in* the course of an operation; however, by *dicta* it denies liability for post-operative care, stating "as to all such care and attention they [servants] would clearly be acting exclusively on behalf of the hospital and not as assistants to the surgeon." [7]

It appears that the following facts in the recent case of *Yorston v. Pennell*[8] do not fall within the holding of the *McConnell* case which restricted liability

[1] Shaw v. Reed, 9 Watts and S. 72 (1845); Joseph v. U.A.W., 343 Pa. 636, 23 A.2d 470 (1942); Restatement (Second), Agency, § 219 (1958).

[2] Joseph v. U.A.W., 343 Pa. 636, 23 A.2d 470 (1942), (Camp director hired a farmer to take guests for a ride).

[3] Orr v. Wm. J. Burns Int. Detective Agency, 337 Pa. 587, 12 A.2d 25 (1940) (guard shot striker).

[4] McConnell v. Williams, 361 Pa. 355, 65 A.2d 243 (1949).

[5] *Id.*

[6] Dunmire v. Fitzgerald, 349 Pa. 511, 516, 37 A.2d 596, 599 (1944); Siidekum, Adm'r v. Animal Rescue League of Pittsburgh, 353 Pa. 408, 414, 45 A.2d 59, 62 (1946); Kissel v. Motor Age Transport Lines, Inc. 357 Pa. 204, 209, 53 A.2d 593 (1947).

[7] McConnell v. Williams, *supra* note 4 at 364.

[8] Yorston v. Pennell, 397 Pa. 28, 153 A.2d 255 (1959).

to the operating room. Plaintiff-Yorston was injured by a flying nail from a ramset gun. Upon entering the hospital, he carried with him a note from his family physician stating that he was allergic to penicillin. Dr. Hatemi, a resident surgeon, directed Rex, a fourth year medical student who was serving as a junior intern, to take the case history of Yorston. The taking of medical histories was not Rex's normal line of duty. The plaintiff showed the note to a nurse and to Rex. Rex, however, failed to record the allergy on the medical history. At approximately the same time, Dr. Hatemi obtained permission from defendant-Dr. Pennell, a staff surgeon, to perform an operation to remove the nail. Under the hospital rules, a resident surgeon had to obtain a staff surgeon's permission to operate. Under these same rules, the plaintiff became Pennell's patient from the moment permission was granted. Operative procedure and the prescription of antibiotics as part of the post-operative care were discussed at this consultation, but penicillin was not specifically mentioned. During the course of the operation, Rex remembered that he failed to note the allergy. To remedy the situation, Rex went to the operating room, and told an unknown person of the existence of plaintiff's allergy. This person at some unknown later time made a notation of the allergy on the medical history form. This notation having been made after Dr. Hatemi's reading of the form, a dosage of 600,000 units of penicillin was prescribed. Plaintiff protested each of the three shots administered to him by nurses. During the course of the administration of these shots, Yorston protested to Dr. Pennell about his allergy, but the doctor just walked away.[9] After the third shot, Dr. Pennell stopped the administration of the antibiotic. In a short time after his release from the hospital, the plaintiff suffered a violent reaction to the penicillin which necessitated his return to the hospital. As a direct result of this reaction, the plaintiff suffered permanent, disabling injuries. As the plaintiff was covered by workmens' compensation, Dr. Pennell sent a bill to the insurer, who later paid it, for one hundred dollars for the operation and eighty dollars for visits. Dr. Pennell was not paid by the hospital, which was a charitable institution. He maintained an office at the hospital for which he paid rent, and he customarily charged fees for services rendered to his private patients. He also signed all hospital forms concerning the patient during his stay in the hospital. Upon these facts, the supreme court refused to overrule the trial court's refusal to grant a motion *non obstante veredicto* and held that it was a question of fact for the jury as to whether the defendant had the requisite right of control to establish the negligent intern as his servant within the scope of employment.

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[9] At this point the writer enters a caveat concerning the possibility of Pennell's personal negligence. However, the trial court refused to submit this issue to the jury. The supreme court found Pennell liable on the theory of respondeat superior, so it did not discuss the issue of personal negligence.

That different inferences can fairly be drawn from the *Yorston* fact situation is undoubtedly true; this is true in regard to almost any statement of facts. Nevertheless, the rule in this state is that when different inferences as to a fact situation may fairly be drawn as to who was the controlling master at the time of the commission of the negligent act, it is for the jury to determine the question of agency.[10] The application of this rule to the present case leaves no doubt that the trier of fact has determined that, at the time of the commission of the negligent act, the controlling master of both Hatemi and Rex was the defendant.[11]

In the *Yorston* appeal the court based its decision on conventional agency doctrines. Both Hatemi, the resident surgeon, and Rex, the junior intern, were borrowed servants subject only to Pennell's right of control and working only for his benefit within the scope of employment; thus the two requisites of the test of the master servant relationship were fulfilled.[12] Dr. Hatemi became the servant of the defendant when permission to operate was given and the operative procedure was approved by Dr. Pennell; Rex became the defendant's servant through a subservancy when he took the case history, as this was not his normal line of duty.[13] Having established the subservancy of Rex, the court held his knowledge and negligence was imputable to Pennell because Hatemi had the implied authority to use Rex.

In a vigorous dissent Mr. Justice Benjamin R. Jones argued that the plaintiff was not Dr. Pennell's patient; hence no duty arose upon which negligence could be based. In addition the dissent argued that the doctrine of the *McConnell* case should not be extended to include pre and post-operative acts.[14] The master should not be held liable for his subservant's negligent acts outside the operating room. The dissent quotes the *McConnell* case and states that liability should not include any act not performed "during the course of and as an integral part of the operation." [15] The dissent would deny liability because the agency was solely for the benefit of the hospital [16] and the negligent act did not occur during the course of the operation.[17] In conclusion, the dissent rationalizes its attack on the majority rule thusly:

> Under the majority view, however, this doctrine is now to be used for converting the operating room into a combat information center where in-

[10] Cases cited note 6 *supra.*
[11] Yorston v. Pennell, *supra* note 8.
[12] McGrath v. Edward G. Budd Mfg. Co., 348 Pa. 619, 623; 36 Atl. 2d 303, 305 (1944).
[13] The court did not cite authority for this conclusion. For the author's rationalization see note 21.
[14] See dissent in Yorston v. Pennell, *supra* note 8.
[15] *Id.* at 51.
[16] *Id.* at 53.
[17] *Id.* at 52.

formation as to and liability for the *previous* negligent actions of hospital employees—unrelated to the success or failure of the operation—may be transmitted and transferred to the operating surgeon, and for insuring employees of a convenient receptacle where their negligent actions may be discarded whether or not they have any relation to the successful performance of the operation.[18] (Emphasis added.)

It undoubtedly cannot be denied that the rule promulgated by the dissent has considerable merit because it is based upon sound public policy. As is pointed out in the conclusion of the brief for the defendant-appellant in the *Yorston* case,[19] the rule, as adopted by the majority, will tend to increase the burden of the staff surgeon in overseeing the care of patients in cases where he is not performing the operation. This burden will be increased both as to his time and as to his finances. Also the rule will tend to make surgeons wary of tutoring resident surgeons and interns due to the increased risk of liability for their negligent acts. This tutoring, performed without compensation in most instances, is definitely socially desirable in that practical medical experiences and knowledge is in this way transferred from one generation to the next.

In spite of the dissent's strong protest[20] based on law and public policy and the view of the majority of courts in this country at present,[21] the majority view in the *Yorston* case would seem to be a justifiable extension of liability in this area. First, Dr. Pennell had the requisite right of control of Dr. Hatemi during the course of the operation; this is evidenced by the necessity of Hatemi's obtaining his permission in order to operate. In this manner, Dr. Pennell became liable for Hatemi's negligent acts, and had constructive notice of facts Hatemi knew or should have known. This argument is strengthened by the fact that Dr. Pennell had the choice of operating himself, or of allowing Hatemi to operate; in this way, he chose Dr. Hatemi. Second, a servant is authorized to appoint another servant if the original servant is in a position where custom normally permits such appointment or the master's business reasonably requires such an appointment.[22] The defendant could reasonably expect Hatemi to appoint a servant such as Rex to carry on duties not primarily involved with surgery. Even a layman could capably perform the task of inquring as to an allergy and recording its existence on a chart. Also delegations of this type would appear to be customary and necessary in the complex, daily procedure of hospital administration.

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[18] *Id.* at 56.

[19] See the conclusion of the brief for appellant in Yorston v. Pennell, *supra* note 8.

[20] Yorston v. Pennell, *supra* note 8, at 56.

[21] MECHEM, OUTLINES OF THE LAW OF AGENCY, § 438 (4th ed. 1952).

[22] RESTATEMENT (SECOND), AGENCY § 283 (1958); Moldawers Appeal, 121 Pa. Super. 163, 169, 183 Atl. 349, 351 (1936).

Furthermore, Rex was Hatemi's servant within the scope of employment at the time Rex's negligent act was committed. This would mean that the knowledge of Rex concerning the allergy was imputable to Hatemi and thus to the defendant.[23] With this constructive knowledge, Hatemi was negligent in prescribing the penicillin. Hatemi, at the time of the commission of the negligent act, was the servant of the defendant, and thus his negligence was imputable to Pennell. Hence, it would seem that Pennell could be held liable for either Rex's failure to record or Hatemi's prescription with constructive knowledge. The dissent seems to misapply the agency rules by making the test *actual,* direct control in the operating room itself.[24] This is not the true test of agency; the true test is whether the master had the actual potential right of control at the time the negligent act was committed.[25] Thus it can be seen that the *potential* right of control is all that need be found. It would seem highly frivolous to say that a surgeon does not have a potential right of control over an intern preparing one of his patients for an operation. The point at which preparation for the operation ceases and the actual operation begins would seem to defy even the most well-reasoned rule. As far as the protection of the patient from preventable injuries at the hands of servants is concerned, any such attempt to draw a line would tend to be arbitrary and would fail to go to the merits of the case.

In addition it should be pointed out that there is also very sound public policy behind applying the rules of law to find liability in cases of pre-operative and post-operative negligence by borrowed servants. Adopting the rule of this case provides a means of redress for preventing injuries arising out of pre-operative surgical care.[26] Admittedly, the court in the *McConnell* case limited the application of respondeat superior to the operating room exclusively,[27] but the same sound reasons exist beyond it. It should be noted that under the rules of the hospital, Yorston became Dr. Pennell's patient when Pennell gave Hatemi permission to operate. As Yorston was a patient to whom services had been rendered, Dr. Pennell was entitled to a fee. If a surgeon is willing to benefit from the aid of servants and subservants by receiving payment for their work, he should also be made to give compensation for their incompetence before, during, and after the operation. Limits will unquestionably have to be drawn by the courts to circumscribe the surgeon's liability because even his potential right of control ceases sometime before and sometime after the operation. However, this liability should not be arbitrarily limited to the physical boundaries

[23] RESTATEMENT (SECOND), AGENCY § 283 (1958); Isaac v. Donegal & Conoy Mut. Fire Ins. Co., 308 Pa. 444, 162 Atl. 300 (1932).
[24] Yorston v. Pennell, *supra* note 15.
[25] Joseph v. U.A.W., *supra* note 2.
[26] 34 MINN. L. REV. 266 (1950).
[27] McConnell v. Williams, *supra* note 4.

of the operating room, but it should be decided on the merits of the facts of each case. It cannot be denied that such a rule will serve as a stimulant to greater care in operations and in their surrounding circumstances. The protection of patients in this highly vital and dangerous area of operative procedures should, in this writer's opinion, be of prime importance to the courts. Finally as had been pointed out by one of the eminent authorities on agency law, the doctrine of respondeat superior has, as one of its important purposes, the spreading of the cost of liability over the community.[28] It is also true today that the doctor not covered by malpractice insurance is very rare. As a practical matter, society can much more easily bear the costs of such liability through insurance than can the party suffering the trauma.

The *Yorston* case represents a justifiable extension of liability of the surgeon to acts of servants not committed in his immediate presence. As long as the courts and legislature continue to sustain the doctrine of charitable immunity in spite of the common use of insurance by charitable organizations, the rule in the present case will remain necessary to protect subjects of surgery in this highly dangerous and crucial area of human endeavor. This extension is based on sound public policy considerations and need not abuse agency rules of long-standing. Whether this same extension will be granted by the courts in the area of post-operative care was answered in the negative by *dicta* in *McConnell v. Williams.* Bearing in mind that spotting a trend is always a hazardous business, it is submitted that the *Yorston* case impliedly overrules this *dicta.*

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[28] See SEAVEY, *Speculations as to "Respondeat Superior,"* in HARVARD LEGAL ESSAYS 433, 450, 451 (1934).