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## Agency--Liability of a Corporation for Torts of a Hired Physician

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## Recent Decisions

### AGENCY — LIABILITY OF A CORPORATION FOR TORTS OF A HIRED PHYSICIAN

It was defendant bakery's practice to subject each applicant to a blood test given by the bakery's physician in order to determine whether or not the applicant was suffering from a communicable disease. The plaintiff, a woman, applied for employment with defendant and was sent to the room in defendant's plant where the pre-employment examinations were held. After plaintiff had been given a physical examination, she was subjected to the customary blood test. The physician made several unsuccessful attempts to remove blood from plaintiff's arm. The probing of the arm which accompanied the physician's attempts caused plaintiff pain and eventual loss of feeling in her arm and hand.

Plaintiff brought an action for injuries against defendant because of the alleged negligence of the physician employed by defendant. It was determined at the trial that the physician had been negligent, that his employer, defendant, was responsible for the negligent act, and that plaintiff was entitled to \$30,000.<sup>1</sup> The New York Supreme Court, Appellate Division, upheld the decision except as to damages, which they reduced.<sup>2</sup> Defendant then appealed.

The sole issue before the appeals court was whether the defendant, a private industrial corporation, is derivatively liable for the negligence of a physician whom it employs to test job applicants. The New York Court of Appeals affirmed the lower court and found defendant liable for the physician's negligence.<sup>3</sup>

The court concluded that the physician was a servant of the defendant and held the defendant liable for the servant's tort under the doctrine of respondeat superior.<sup>4</sup> Several factors led to the conclusion that the physician was a servant rather than an independent contractor. The physician was performing the blood test in obedience to defendant's order without using his own discretion in determining whether or not such a test was necessary. There was no doctor-patient relationship between the physician and plaintiff. The physician was a regular employee of defendant. The physician's act was done solely for the purpose of furnishing to defendant a report of the physical condition of plaintiff.

<sup>1</sup> *Mrachek v. Sunshine Biscuit Inc.*, 116 N.Y. Supp.2d 20 (1954).

<sup>2</sup> *Mrachek v. Sunshine Biscuit Inc.*, 283 App. Div. 105, 126 N.Y. Supp.2d 383 (1954).

<sup>3</sup> *Mrachek v. Sunshine Biscuit Inc.*, 123 N.E.2d 801 (N.Y. Ct. App. 1954).

<sup>4</sup> "let the master respond the master is liable for the torts of his servant committed in the course of employment." *MECHAM, AGENCY* 237 (4th Ed. 1952).

In determining the liability of an employer for the tort of a physician in its employ courts have expressed five seemingly divergent views:

1.) The physician in diagnosing and treating cases is an independent contractor acting on his own behalf and therefore the doctrine of respondeat superior does not apply.<sup>5</sup> This view constitutes the approach of the majority of courts which have had the issue litigated before them. The justification for this position is usually stated to be that physicians are engaged on the understanding that they are to exercise their profession to the best of their abilities according to their own discretion, and in exercising it they are in no way under the employer's orders or bound to obey his directions.

2.) The employer is liable for the negligent acts of a physician in its employ in cases in which it appears that the employer secured the attendance of the physician for his own purposes or ends. Under these conditions the physician is a servant. Some courts have applied this rule to situations in which physicians were employed to make working conditions more attractive, reduce lost workingtime caused by accidents,<sup>7</sup> or render a pecuniary benefit to the employer.<sup>8</sup>

3.) The employer is liable for the negligent acts of a physician in its employ when the employer contracts to furnish satisfactory medical care.<sup>9</sup> Thus, the employer is held liable for not furnishing adequate medical care which is either an express or implied violation of an existing contract.

4.) The employer is liable for the negligence of a physician under its employ when the physician is performing administrative acts.<sup>10</sup>

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<sup>5</sup> "Generally a physician in diagnosing and treating cases is an independent contractor and not an agent of one who has employed him to treat another and an action based upon his negligence and unskillfulness cannot be maintained against the employing person unless such person was guilty of negligence in the selection of the physician." *Woodburn v. Standard Forgings Corp.*, 112 F.2d 271 (7th Cir. 1940). See also *Timmons v. Fulton Bag and Cotton Mills*, 45 Ga. App. 670, 166 S.E. 40 (1932); *Stanley's Adm'r v. Duvin Coal Co.*, 237 Ky. 813, 36 S.W.2d 630 (1931); *Oliver v. Ford Motor Co.*, 267 Mich. 299, 255 N.W. 287 (1934); *Tutino v. Ford Motor Co.*, 111 N.J. L. 437, 168 Atl. 749 (1933); *Schneider v. N.Y. Telephone Co.*, 292 N.Y. Supp. 399, 13 N.E.2d 47 (1938); *Gosnell v. Southern Ry. Co.*, 202 N.C. 234, 162 S.E. 569 (1932); *Crawford v. Davis*, 136 S.C. 95, 134 S.E. 247 (1926).

<sup>6</sup> *Pittsburgh Ry. Co. v. Sullivan*, 141 Ind. 83, 40 N.E. 138 (1895).

<sup>7</sup> *Ebert v. Emerson Electric Mfg. Co.*, 264 S.W. 453 (Mo. App. 1924). (The maintenance of a medical department was compared to the maintenance of rest rooms, gymnasiums, etc., in order to obtain an adequate supply of labor for the employer).

<sup>8</sup> *Illinois C. R. Col. v. Buchanan*, 126 Ky. 288, 103 S.W. 272 (1907).

<sup>9</sup> *Virginia Iron Co. v. Odle's Adm'r.*, 128 Va. 280, 105 S.E. 107 (1920).

<sup>10</sup> "While a hospital may not be liable for medical treatment by doctors or nurses, provided reasonable care has been exercised in their selection, it will be liable for any of their negligent acts or omissions not directly concerned with medical treatment but in respect of which the doctors and nurses could be considered as servants of the hospital." *CLERK AND LIDSELL, TORTS* 274 (3d Ed. 1947).