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Agency in Malpractice Cases: Funk v. Bohnam

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AGENCY IN MALPRACTICE CASES: *Funk v. Bonham*.

In an earlier comment in the Indiana Law Journal it was stated that a surgeon "was not responsible for the negligence of the nurses in incorrectly informing him that the sponges were removed when he was operating in a public hospital which he did not control, when the nurses were the employees of the hospital, and when he employed the nurses and the operating room in accordance with the regulations of the hospital."¹ The writer of the present comment believes this statement is not in accord with well established rules of agency and is not supported by authority. The following comment is offered in support of the writer's disagreement with the statement quoted above.

Various tests have been suggested by writers and courts for the purpose of determining which of two or more persons shall be considered the master of a particular servant in a given transaction. Control has been emphasized especially as the most significant test, some courts seeing in control the sole determining and ultimate fact.² Others have considered control merely the significant factor in determining "whose is the work being done," and have made this question the ultimate and decisive test of the master-servant relation.³ Again it has been insisted "that equally important with (1) control are the inquiries as to (2) who furnished the tools or mechanical devices employed at the time the tort was committed (3) who had the chance of profit, or (4) loss upon the enterprise in the course of which the tort occurred."⁴

In *Schloendorff v. Society etc.*, the plaintiff sought to impute to the hospital certain knowledge of a nurse respecting the operation performed upon the plaintiff. In rejecting this contention the New York Court of Appeals said:⁵

"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 these preliminary stages is done,

¹ Evidence in Malpractice Cases: *Funk v. Bonham*, by Paul L. Sayre, 2 Ind. Law Jour., 484, at 486.

² *Billig v. Southern Pac. Co.* (1922) 189 Cal. 477, 209 Pac. 241.

³ *Standard Oil Co. v. Anderson* (1908) 212 U. S. 215, 220.

"... We must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and to direct the servants in the performance of their work."

⁴ Powell's *Tiffany on Agency* §37. For distinctions between "general" and "special" servant see *Mechem on Agency*, Vol. II, §§ 1860 and 1863.

⁵ (1914) 211 N. Y. 125, 105 N. E. 92.

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."

In *Hillyer v. The Governors of the St. Bartholomew's Hospital*⁶ the judges of the English Court of Appeals agreed that a nurse, though a regular employee of the hospital, is the servant of the surgeon while assisting at an operation. Farewell, L. J., pointed out that during an operation the nurse is "at the disposal and under the sole orders of the operating surgeon . . ."; that "the surgeon is for the time supreme, and the defendants cannot interfere with or gainsay his orders." He adds:

"This is well understood and is indeed essential to the success of the operation; no surgeon would undertake the responsibility of operations if his orders and directions were subject to the control of or interference by the governing body. The nurses and carriers, therefore, assisting at an operation cease for the time being to be the servants of the defendants, inasmuch as they take their orders during that period from the operating surgeon alone, and not from the hospital authorities."

In *Spears v. McKinnon*⁷ the plaintiff had suffered an injury as a result of the assisting nurses' failure to remove sponges from the abdomen of the plaintiff at the close of an operation performed by the defendant. The lower court refused to admit testimony relative to a custom in the hospital and among physicians as to the conclusiveness of the count by attending nurses of the number of sponges used in an operation. According to the reviewing court "the theory of the appellants is that no liability rested upon them as physicians and surgeons on account of sponges or gauzes being left in the abdomen of appellee, because the duty of counting them, before and after the operation, was imposed upon the attendant nurse, who was in the employ of the hospital where the operation was performed." The court rejected this theory, quoting the following⁸ with approval:

". . . Surgeons cannot relieve themselves from liability for injury to a patient caused by leaving a sponge in the wound after an operation by an adoption of the rule requiring the attending nurse to count the sponges used and removed, and relying on such count as conclusive that all sponges have been accounted for."

The facts of *Funk v. Bonham*⁹ presented squarely to the In-

⁶ Court of Appeals (1909) 2 K. B. 820.

⁷ (1925) 270 S. W. 524.

⁸ 21 R. C. L., p. 388, section 83.

⁹ (No. 1229, Appellate Court of Indiana, Mar. 10, 1926), 151 N. E. 22; cited by Appellate Court in *Hurst v. Reeder*, 157 N. E. 101 and in *McCoy v.*

diana Appellate Court the question whether the master-servant relation exists between a surgeon who is operating on his patient in a public hospital and the assisting nurses who are regular employees of the hospital. As a result of the mistake of the assisting nurses the "surgical sponge in question was left in and sewed up in the abdomen of appellee by the appellant at the time he performed said operation." This exact question had not been considered by either the Supreme or Appellate Court of Indiana, but both Courts have had occasion to state the test of the existence of a master-servant relation in other situations. The Supreme Court has said:¹⁰

"The real test is, Was the Appellee, at the time he sustained his injury, under the power and control of appellant and subject to its orders and directions in the doing of the work at hand?"

The Appellate Court has stated the test to be as follows:¹¹

"The true test in such cases is to ascertain who directed the movement of the person committing the injury. When one person lends a servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

In disposing of the master-servant point in *Funk v. Bonham* the Appellate Court does not cite any Indiana decision as authority either on the facts or on principle; but does cite a Massachusetts decision¹² and apparently relies on it as being on all fours with the facts of *Funk v. Bonham*. In this connection the court says:

"It has been expressly held that a surgeon who performs an operation at a hospital, not owned and controlled by himself, and who is assisted in such operation by nurses, not his employees, but employees of such hospital, is not responsible for the mistake or negligence of such nurses in failing to correctly count the sponges used in such operation, whereby a sponge is left and sewed up in the body cavity of the patient, *Baker v. Wentworth*, 29 N. E. 589, 155 Mass. 338. The only question which therefore remains is as to the personal negligence of the appellant herein."¹³

Buck, 157 N. E. 456 on a question of evidence, the later cases not involving the agency question.

¹⁰ *Marion Shoe Co. v. Epley* (1914) 181 Ind. 219, 104 N. E. 65.

¹¹ *Sargent Paint Co. v. Petrovitzky* (1919) 71 Ind. App. 367, 124 N. E. 883, 885. See also *Parkhurst v. Swift* (1903) 31 Ind. App. 521, 68 N. E. 620.

¹² *Baker v. Wentworth* (1892) 155 Mass. 338, 29 N. E. 589.

¹³ *Funk v. Bonham*, 151 N. E. 22, 24 (1926).

The writer fails to find in the Massachusetts case sufficient support for the Appellate Court's sweeping statement. The particular acts constituting the alleged negligence do not appear in the report. It is a fair inference from the statements of the reviewing court that the claim against the surgeon was based (1) on the surgeon's personal negligence and (2) on the negligence of the nurses in their treatment of the patient after the operation, it being sought to impute the latter negligence to the surgeon as proprietor or manager of the hospital.

The following excerpts from the report of the Massachusetts case support the above statements :

"The defendant set up in defense that the operations were not performed nor his wife treated with proper care and skill, and also that the nurses at the hospital where the operations were performed were negligent and careless in their treatment of the defendant's wife."

"The only exceptions taken in this case relate to the admission of evidence. One of the issue was whether the plaintiff was responsible for the negligence of nurses in the hospital where the defendant's wife was attended after the surgical operations were performed upon her. As bearing on this question it was competent to show that the plaintiff was not the proprietor or manager of the hospital and that it was in charge of the Sisterhood of St. Margaret . . ."

"It was immaterial that the defendant's wife supposed it to be the plaintiff's private hospital inasmuch as neither the plaintiff nor any one acting for him every made any representation to that effect."

In view of the past decisions of the Indiana Appellate and Supreme Courts which have adopted "control" as the distinctive and characteristic fact in the master-servant relation, and in view of the very respectable authority which holds that the master-servant relation exists between the operating surgeon and the attending nurse furnished by the hospital, and in view of the unsatisfactoriness of the one authority expressly relied upon by the Court in *Funk v. Bonham*, the writer feels that the members of the Indiana bar are entitled to a fuller and more adequate consideration, by the Supreme or Appellate Court, of the soundness of the agency doctrine announced in *Funk v. Bonham*.

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