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CASES NOTED

LIABILITY OF HOSPITALS FOR WRONGFUL DISCHARGE OF AN ADMITTED PATIENT

On the advice of her doctor, a mother took her eleven year old son to the defendant private hospital¹ for an appendectomy. After the hospital staff removed the boy's clothes, dressed him in a hospital gown, administered medication and examined him, he was required to leave, although violently ill; his mother could not produce two hundred dollars which the hospital demanded. As a result, the operation was performed several hours later at another hospital. The boy recovered compensatory damages² because his suffering was prolonged for that additional period of time. On appeal, *held*, affirmed: Although any applicant for medical and hospital services of a private hospital may be denied those services for any reason, or for no reason at all, the rule is not applicable after the hospital begins to treat a person, and it must not subsequently act unreasonably in discharging him.³ *Le Juene Rd. Hosp., Inc. v. Watson*, 171 So.2d 202 (Fla. 3d Dist. 1965).

Although this case found the private hospital liable for the wrongful discharge⁴ of a patient who had been admitted by the hospital's staff,⁵

1. A hospital is

any establishment that offers: (a) services more extensive than those required for room, board, personal services and general nursing care; and (b) facilities and beds for use beyond twenty-four hours by ten or more non-related individuals requiring diagnosis, treatment or care for illness, injury . . . and regularly make available at least: clinical laboratory services . . . treatment facilities for surgery . . . and one registered nurse on duty at all times

FLA. STAT. § 395.01 (1963).

In Florida, anyone may conduct a private hospital if the state licensing regulations are satisfied. The power to license and regulate the establishment, maintenance and operation of hospitals is entrusted to the State Board of Health. FLA. STAT. § 395.03 (1963).

2. The jury compensated the boy to the extent of \$5,000 which compensation was affirmed on appeal. The mother had been awarded \$10,000 punitive damages at trial, but this award was reversed on appeal because she had not been awarded compensatory damages. *Le Juene Rd. Hosp., Inc. v. Watson*, 171 So.2d 202, 204 (Fla. 3d Dist. 1965). See note 24, *infra*.

3. 171 So.2d at 203.

In other words, the hospital had initiated care and treatment of this patient and had taken further steps than those necessary to determine whether or not they were going to admit him.

4. *Wilmington Gen. Hosp. v. Manlove*, 174 A.2d 135 (Del. 1961); *Bourgeois v. Dade County*, 99 So.2d 575 (Fla. 1957); *Meiselman v. Crown Heights Hosp.*, 285 N.Y. 389, 34 N.E.2d 367 (1941).

5. *Le Juene Rd. Hosp., Inc. v. Watson*, 171 So.2d 202, 203 (Fla. 3d Dist. 1965). cf., *Birmingham Baptist Hosp. v. Crews*, 229 Ala. 398, 157 So. 224 (1934) (The acts of swabbing a child's throat, taking a specimen, administering oxygen and antitoxin were not enough to show that the hospital had undertaken the obligation to render services to that child. The hospital was found not liable for the child's subsequent death after his father was told to remove him from the hospital.); *O'Neill v. Montefiore Hosp.*, 11 App. Div. 2d 132, 202 N.Y.S.2d 436 (1960) (A nurse called a physician for the person seeking admission. It was questionable whether this was a personal favor by the nurse or a rendition of hospital

the defense that a private hospital is under no duty to admit any patient that it does not desire is a firmly established rule of law.⁶ This *harsh*⁷ rule still prevails because a private⁸ hospital is under no duty⁹ to care for an injured party until he is admitted.¹⁰ Unless a party is under a duty to

service and an assumption of duty. Hence, the hospital could be liable for the applicant's subsequent death if he was admitted to the hospital.)

6. If the person seeking admission had a highly contagious disease and the hospital had no duty, statutory or contractual, to accept that person for treatment, the hospital could expose itself to liability to other patients by doing so. *Birmingham Baptist Hosp. v. Crews*, 229 Ala. 398, 157 So. 224 (1934) (diphtheria); *Gadsden Gen. Hosp. v. Bishop*, 209 Ala. 272, 96 So. 145 (1923) (smallpox). Even if a private hospital had contracted with a person for out-patient services, the hospital could not be held negligent for failure to have a bed available for the person's necessary hospitalization. There is no duty to have the bed available for an out-patient whenever he may need one. *Costa v. Regents of Univ. of Cal.*, 116 Cal. App. 2d 445, 254 P.2d 85 (1953).

A private hospital is like a physician in the respect that neither has a duty to accept any person for treatment. *Findlay v. Board of Supervisors*, 72 Ariz. 58, 230 P.2d 526 (1951); *Buttersworth v. Swint*, 53 Ga. App. 602, 186 S.E. 770 (1936); *Hurley v. Eddingfield*, 156 Ind. 416, 59 N.E. 1058 (1901).

7. *Le Juene Rd. Hosp., Inc. v. Watson*, 171 So.2d 202, 203 (Fla. 3d Dist. 1965). (Emphasis added.) No rule other than permitting the trustees or governing board alone to have the right to determine who shall be admitted as patients would be sensible or workable. *Wilmington Gen. Hosp. v. Manlove*, 174 A.2d 135, 138 (Del. 1961).

8. The distinction between a public and a private hospital lies in the fact that the former is an instrumentality of the state, operated in the public interest, supported by public funds, and the authority of its management is derived from the state. *Hughes v. Good Samaritan Hosp.*, 289 Ky. 123, 158 S.W.2d 159 (1942); *Van Campen v. Olean Gen. Hosp.*, 210 App. Div. 204, 205 N.Y. Supp. 554, *aff'd*, 239 N.Y. 615, 147 N.E. 219 (1924). Private hospitals are supported by voluntary contributions and are managed by their own governing boards or trustees. *Edson v. Griffin Hosp.*, 21 Conn. Supp. 55, 144 A.2d 341 (Super. Ct. 1958); *Levin v. Sinai Hosp.*, 186 Md. 174, 46 A.2d 298 (1946); *Van Campen v. Olean Gen. Hosp.*, *supra*.

The "private" status of a hospital is not disturbed even when that hospital receives public funds. *Wilmington Gen. Hosp. v. Manlove*, 174 A.2d 135 (Del. 1961); *West Coast Hosp. Ass'n v. Hoare*, 64 So.2d 293 (Fla. 1953); *Levin v. Sinai Hosp.*, *supra*; *Van Campen v. Olean Gen. Hosp.*, *supra*.

FLA. STAT. ch. 155 (1963) pertains to "County Hospitals," i.e., public hospitals. With certain exceptions, "every [public] hospital . . . shall be for the benefit of the inhabitants of such county and of any person falling sick or being injured or maimed within its limits . . ." FLA. STAT. § 155.16 (1963).

9. A successful negligence action requires the plaintiff to establish four elements of equal importance:

- (1) a duty owed by the defendant to the plaintiff to use reasonable care to avoid injury to the plaintiff; (2) a failure of the defendant to live up to the duty so imposed—a failure to use due care under the circumstances; (3) a causal connection—that the defendant's act, in fact as well as legally, caused plaintiff's injury;
- (4) real, and not nominal, damage to the plaintiff.

Myers, Causation and Common Sense, 5 MIAMI L.Q. 238, 241 (1951). See also, PROSSER, TORTS § 30 (3d ed. 1964); RESTATEMENT, TORTS § 281 (1934). These four elements that make up the working analysis of negligence cases have also been termed: (1) the right-duty element; (2) the negligence element; (3) the causal relation element; and (4) the damage element. *Green, The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1022 (1928).

10. The admission of the applicant to the hospital need not be by filling out the required admission forms. Cases cited note 4 *supra*. Duty, in actions against hospitals based on negligence, is alleged as "patient's status as pay patient, or other facts showing defendant's duty to plaintiff." 4 FRUMER, BENOIT & FRIEDMAN, PERSONAL INJURY § 201, at 436 (1957).

exercise care toward the interests of another, a cause of action for negligence cannot be maintained.¹¹

Purely moral or humanitarian considerations ordinarily impose no legal obligations. Generally, a person is under no legal duty to volunteer aid to another who is sick or injured when this condition was not proximately caused by the former's negligence.¹² The judiciary has found no duty on the part of a person to act when it is not part of his "undertaking," even if he has it in his power, by taking some reasonable precaution, to minimize a dangerous situation. It does not matter how unreasonable or reprehensible the defendant's failure to act may be.¹³

The law of torts rarely finds a duty that *compels* a person to perform an act rather than merely *control* the act he performs; it has been suggested, however, that the idea of an "affirmative duty" to act rather than misfeasance is the more modern concept in legal science.¹⁴ This would shift the basis of personal liability from that which a man does, to that which he ought to do.¹⁵ These "affirmative duties," however, seem to be

11. *United States v. Marshall*, 230 F.2d 183 (9th Cir. 1956); *Schmidt v. United States*, 179 F.2d 724 (10th Cir.), *cert. denied*, 339 U.S. 986 (1950); *Russell v. Jacksonville Gas Corp.*, 117 So.2d 29 (Fla. 1st Dist. 1960); *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

12. *Allen v. Hixson*, 111 Ga. 460, 36 S.E. 810 (1900) (allowing another to bleed to death); *Hurley v. Eddingfield*, 156 Ind. 416, 59 N.E. 1058 (1901) (a physician failed to attend a man who was close to death); *Osterlind v. Hill*, 263 Mass. 73, 160 N.E. 301 (1928) (lessor of overturned canoe failed to respond to drowning man's cries); *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 44 Atl. 809 (1898) (a child was injured because of failure to remove him from the proximity of dangerous machinery).

13. *Ibid.*

14. *Snyder, Liability for Negative Conduct*, 35 VA. L. REV. 446, 479 (1949); *Carpenter, Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 229, 396, 471 (1932).

In Holland, refusal to aid a person "in danger of death" resulted in a fine of 300 florins and imprisonment of up to three months if aid could have been given "without reasonable fear of danger to himself or another" and if the death of the person in distress followed. DUTCH PENAL CODE art. 450, as translated into English in SEAVEY, KEETON & KEETON, *CASES ON TORTS* 157 (1957). For other laws establishing criminal liability for non-feasance see Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 HARV. L. REV. 817, 1073, 1101-1106 (1961).

It is questionable whether the Florida courts will ever find a man guilty of manslaughter for failing to give his wife needed medical attention. The First District avoided the issue by deciding that the husband's conduct was not the cause of death in *Neveils v. State*, 145 So.2d 883 (Fla. 1st Dist. 1962). Similarly, a father was held not guilty of manslaughter when he failed to furnish medical aid to a badly burned child. *Bradley v. State*, 79 Fla. 651, 84 So. 677 (1920) (this failure to act was predicated upon a religious belief of the child's father).

15. The community at large does not think it unjustifiable to impose affirmative duties on any group, as the spirit of reform is bringing the law more in harmony with moral principles. Ames, *Law and Morals*, 22 HARV. L. REV. 97, 113 (1908). This is not to say that the community or a group will act when they are confronted with a moral duty to render aid. Newspapers and magazines are continuously informing their readers of the most frightening aspect of the present crime problem—public apathy. These words describe the public attitude toward criminal acts and human suffering. *E.g.*, Luce, *Without Portfolio*, *McCall's*, Sept., 1964, vol. 91, p. 18; Kofoed, *Which the Criminals, Where's the Justice?* *Miami Herald*, July 20, 1965, § D, p. 21, col. 6; *Miami Herald*, July 19, 1965, § A, p. 13, col. 4; *N.Y. Times*, July 2, 1964, p. 17, col. 7; *N.Y. Times*, March 28, 1964, p. 18, col. 2.

imposed only in situations in which one has voluntarily created a relationship with others from which he expects to obtain a benefit, *i.e.*, a "consideration" of sorts moving to the person under the alleged duty.¹⁶

Typical of those burdened with this duty to render assistance are master-servant,¹⁷ carrier-passenger,¹⁸ host-invitee,¹⁹ and other businesses engaged in "public callings" such as warehouses and public utilities which are obligated to serve all.²⁰ A hospital, public or private, is a business that is affected with a public interest.²¹ Its duty to serve could arise as with other businesses listed as "public callings."²²

An inroad upon this "no duty" rule was made in *Wilmington Gen. Hosp. v. Manlove*²³ when the Supreme Court of Delaware established a cause of action for the wrongful death of an infant who died shortly after

16. McNiece & Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272, 1289 (1949). These writers contend that liability for non-feasance has existed for centuries in the areas of tort law involving benefit to the obligor and it would be but a small extension to impose liability for breach of a clear moral obligation—even if there is no relationship involving a benefit which creates a duty to act.

17. Here the duty of reasonable care was limited to emergency situations where immediate medical attention was required. *Burns v. Bakelite Corp.*, 17 N.J. Super. 441, 86 A.2d 289 (1952); *Rival v. Atchison, T. & S.F. Ry.*, 62 N.M. 159, 306 P.2d 648 (1957); *Petersen v. Alkema*, 123 Utah 604, 261 P.2d 175 (1953).

18. *Trichel v. City of Monroe*, 43 So.2d 284 (La. App. 1949); *O'Leary v. Metropolitan Transit Authority*, 339 Mass. 328, 159 N.E.2d 91 (1959); *Continental So. Lines, Inc. v. Robertson*, 241 Miss. 796, 133 So.2d 543 (1961).

19. *L. S. Ayers & Co. v. Hicks*, 220 Ind. 86, 40 N.E.2d 334 (1942) (A six year old boy accompanied his mother to defendant's store where he caught his fingers in an escalator. Defendant was not negligent in causing the initial injury, but was held liable for aggravation of injuries in failing to exercise reasonable care in stopping the escalator.); *Depue v. Flateau*, 100 Minn. 299, 111 N.W. 1 (1907) (Defendant owed the plaintiff cattle buyer a duty of reasonable care, since he invited the latter for supper. Upon discovering that the buyer had become seriously ill the defendant started him on his way home. He fell from his carriage and was found the next morning).

20. RESTATEMENT (SECOND), TORTS § 314 A (Tent. Draft No. 5, 1960); PROSSER, TORTS § 54 (3d ed. 1964).

21. The rules regarding the maintenance and operation of private hospitals are to be designed to promote "safe and adequate treatment of individuals in hospitals in the interest of public health, safety and welfare." FLA. STAT. § 395.07 (1963). (Emphasis added.)

Many times private hospitals receive public funds. Cases cited note 8 *supra*.

22. "The most common examples of such a duty are cases where action is directed toward the person of another or his property A like principle applies, however, where action is directed toward the governance of conduct." *Glanzer v. Shepard*, 233 N.Y. 236, 240, 135 N.E. 275, 276 (1922) (Cardozo, J.). *But see Hurley v. Eddingfield*, 156 Ind. 416, 59 N.E. 1058 (1901) (The court stated that comparing the duty of a physician with public calling cases "missed the mark.").

The duty to use care was imposed on those engaged in a trade or calling as a *common* practice from very early law. The duty to serve, however, was placed on all trades and callings during the time of the Black Death in England (1348 A.D.), which may account for the confusion of the word "common" with "public." The "duty to serve" was then imposed on the businesses known today as "public callings" and the main factor that determined if a business came within this class was the importance of the business to the public. *Arterburn, The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411, 428 (1927).

23. 174 A.2d 135 (Del. 1961). This case was noted as a private hospital's duty to admit an unmistakable emergency in the following periodicals: 62 COLUM. L. REV. 730 (1962); 14 STAN. L. REV. 910 (1962); 40 TEXAS L. REV. 732 (1962); 31 U. CNCL. L. REV. 183 (1962); 64 W. VA. L. REV. 234 (1962).

the defendant private hospital refused treatment in its emergency ward. Jurisdictions which follow this decision may find a private hospital liable for refusal to care for a person if: (1) the hospital maintains an emergency ward; (2) the situation was an unmistakable emergency; and (3) the patient knew it was customary for the hospital to treat such cases. When the maintenance of an emergency ward has become well established as a part of the main business of the hospital, a seriously injured person who relies on the established custom of the hospital to render aid should be treated.²⁴ Refusal might well result in worsening the condition of the injured person because of the time lost in a useless attempt to obtain medical aid.²⁵

The question then presents itself: Why should the duty of a private hospital to admit patients be limited to emergency patients in an emergency ward as in the *Manlove* case? If it is the established custom of a

24. *Wilmington Gen. Hosp. v. Manlove*, 174 A.2d 135, 140 (Del. 1961).

25. The hospital naturally would not be liable for the initial injury or illness, but they would be liable for the aggravated injury or illness which the jury would measure monetarily by the additional pain and suffering that the plaintiff endured. *Le Juene Rd. Hosp., Inc. v. Watson*, 171 So.2d 202, 204 (Fla. 3d Dist. 1965). *Cf.*, *L. S. Ayers & Co. v. Hicks*, 220 Ind. 86, 40 N.E.2d 334 (1942); *Zelenko v. Gimbel Bros.*, 158 Misc. 904, 287 N.Y. Supp. 134 (Sup. Ct. 1935). For a discussion of the advocate's problems in helping the jury decide a monetary award for pain and suffering, see generally Comment, 15 U. MIAMI L. REV. 85 (1960).

There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant.

Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219 (1908).

But *stare decisis* dictates that if *D* undertakes to provide services to the public, absent a duty to do so, and *P* relies on *D*'s past performances and is injured as a result, liability could be imposed. *Kurzweg v. Hotel St. Regis Corp.*, 309 F.2d 746 (2d Cir. 1962) recently held a New York hotel operator liable for negligence in a similar factual situation. The hotel furnished a doorman although it was under no duty to do so. The plaintiff stepped out of a double-parked taxicab and walked toward the hotel. Because the doorman did not assist her, she was injured by a car which backed into her. Allegedly, the plaintiff's injuries were caused by the doorman's negligent failure to act.

"It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." *Glanzer v. Shepard*, 233 N.Y. 236, 239, 135 N.E. 275, 276 (1922) (Cardozo, J.). *Accord*, *United States v. Lawter*, 219 F.2d 559 (5th Cir. 1955); *Erie R.R. v. Stewart*, 40 F.2d 855 (6th Cir.), *cert. denied*, 282 U.S. 843 (1930) (railroad was not under a legal duty to have a watchman at a crossing; however, the railroad was held liable for failure to give adequate warning after having voluntarily provided a watchman); *Illinois Cent. R.R. v. Applegate's Adm'x*, 268 Ky. 458, 105 S.W.2d 153 (1937) (railroad did not have a legal duty to slow down or sound signals at a crossing, but had established the custom of sounding such signals); *Burns v. Bakelite Corp.*, 17 N.J. Super. 441, 86 A.2d 289 (1952).

Even if there is no relationship present that would impose an affirmative duty, there is a duty to avoid any affirmative acts which could make a situation worse. Does the name "hospital," when relied upon by a layman as a place that would heal his ills, constitute an affirmative act in itself? This could cause delay in reaching aid, and thus impose a duty on the hospital. This may not be considered a "passive" act of the hospital. The relationship of the hospital to the community—the hospital's presence alone—could be construed as actual encouragement on their part for one in need of aid to stop there.

private hospital to admit patients recommended by certain doctors, notwithstanding the lack of an emergency and the lack of an emergency ward, the applicant's reliance²⁶ on this custom should force the hospital to admit him. Consequently, liability should be imposed on the hospital for any added pain and suffering that a person needlessly endures.²⁷ If a person who is in need of hospital care relies upon the hospital's tacit representations of competency and care to others with like needs, the duty to admit which arises by estoppel should not be limited to the emergency ward.²⁸

Many cases which imposed liability for actions or failure to act in the name of "negligence," where there were physical injuries, could have reached the same result because the plaintiff "relied on a gratuitous promise."²⁹ For example a motorist's failure to signal for a turn which leads another to a collision is surely negligence; but the injury also resulted because the plaintiff believed that the actor would continue giving signals as he had done in the past.³⁰ If a person by word or conduct negligently causes another to believe in the existence of a certain state of things whereby the latter is induced to act so as to change his own position injuriously, an estoppel may arise.³¹ If a volunteer has worsened the plaintiff's position by affirmatively misleading him, or inducing his reliance, or deterring other would-be volunteers, a duty of ordinary care is owed.³²

26. The element of "reliance" would probably have to be proved by actual prior contact with the hospital or secondary knowledge that the particular hospital provided such care in the past. *Cf.*, *Illinois Cent. R.R. v. Maxwell*, 292 Ky. 660, 167 S.W.2d 841 (1943); *Mixon v. Brechtel*, 174 So. 283 (La. App. 1937); *Cooper v. Powder Puff, Inc.*, 184 So. 593 (La. App. 1938). The representation relied on need not result from an express statement; it could be implied, either from acts, silence or other conduct. *Davis v. Evans*, 132 So.2d 476 (Fla. 1st Dist. 1961); *State v. Missouri Utilities Co.*, 339 Mo. 385, 96 S.W.2d 607 (1936).

27. See note 25 *supra*.

28. Although the *Manlove* case was not supported by previous hospital "admission" cases, it was predicated on the theory that if a hospital holds itself out to treat emergency situations, it should be estopped to deny admission to its emergency ward.

29. Justice requires that a defendant pay for the harm caused by the foreseeable reliance upon the performance of his "promise." Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 926 (1951). *Accord*, RESTATEMENT, TORTS § 323 (1934).

30. *Cf.*, *Haralson v. Jones Truck Line*, 223 Ark. 813, 270 S.W.2d 892 (1954); *Sweet v. Ringwelski*, 362 Mich. 138, 106 N.W.2d 742 (1961).

31. Estoppel is basically a tort principle. Seavey, *supra* note 29, at 919. The essential elements of estoppel are:

(1) a representation by the party estopped to the party claiming the estoppel as to some material fact, which representation is contrary to the condition of affairs later asserted by the estopped party; (2) a reliance upon this representation by the party claiming the estoppel; and (3) a change in the position of the party claiming the estoppel to his detriment, caused by the representation and his reliance thereon.

Davis v. Evans, 132 So.2d 476, 481 (Fla. 1st Dist. 1961); *State v. Missouri Utilities Co.*, 339 Mo. 385, 402, 96 S.W.2d 607, 614 (1936).

32. *Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *Frank v. United States*, 250 F.2d 178 (3d Cir. 1957), *cert. denied*, 356 U.S. 962 (1958); *Marsalis v. La Salle*, 94 So.2d 120 (La. App. 1957); cases cited note 27 *supra*.

The issue regarding a private hospital's duty to accept any applicant arises only when the hospital refuses the injured persons request to render aid. But this request for treatment alone should give rise to a relationship which imposes a duty of "humanitarianism" and liability upon the hospital for breach of a doctrine³³ based upon the precepts of morality and natural justice. The goal sought is that each person (not only hospitals) should exercise ordinary care for the preservation of another after seeing him in peril or about to become imperiled, when the injury may be averted without the likelihood of injury to others or to the actor.³⁴

A Good Samaritan doctrine could then protect the hospital from subsequent actions for malpractice if it had acted in good faith. Under the common law, a physician could ignore an injured person with complete impunity. The Good Samaritan could be liable for subsequent injuries while the passerby would not be penalized.³⁵ In an attempt to induce a physician to render volunteer assistance in rescue operations, Good Samaritan statutes have been passed granting him immunity from actions for malpractice if he acted in good faith.³⁶ These statutes could be extended to include hospitals.

33. Although the "last clear chance" or "humanitarian" doctrine evolved to permit recovery because the remedy on the basis of primary negligence was inadequate, its application to the subject matter of this article could be in order.

The Missouri humanitarian rule is generally applicable where (1) the plaintiff is in a position of peril; (2) defendant has actual notice of plaintiff's peril; (3) defendant then had the ability to avoid injury without endangering himself or others; (4) defendant failed to exercise ordinary care; (5) his failure caused injury to the plaintiff. *Price v. Nicholson*, 340 S.W.2d 1, 5 (Mo. 1960); *Largo v. Bonadonna*, 269 S.W.2d 879, 882 (Mo. 1954); *Banks v. Morris & Co.*, 302 Mo. 254, 267, 257 S.W. 482, 484 (1924).

The "last clear chance" doctrine was born in England, with the landmark decision of *Davies v. Mann*, 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. 1842), and was adopted by the Florida courts in *Merchant Transp. Co. v. Daniel*, 109 Fla. 496, 149 So. 401 (1933). As applied in Florida, this doctrine has greater depth because the defendant does not actually have to discover the victim's peril; it is sufficient that he should have in the exercise of reasonable care. *James v. Keene*, 133 So.2d 297 (Fla. 1961). See generally, Comment, 17 U. MIAMI L. REV. 582 (1963).

Although this doctrine's applicability has been limited to situations in which at least one of the parties was operating an instrument of transportation, its basic concept—that the party with the ability to save life or property should be made to do so—could also apply to *Refused Admission Private Hospital* cases.

34. *Cf.*, *Price v. Nicholson*, 340 S.W.2d 1, 8 (Mo. 1960) (dictum); *Banks v. Morris & Co.*, 302 Mo. 254, 267, 257 S.W. 482, 484 (1924) (dictum).

35. *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 260, 44 Atl. 809, 811 (1898); PROSSER, TORTS § 54, at 339 (3d ed. 1964).

36. California was the first state (1959) to enact a statute which relieved medical practitioners of civil liability for malpractice when they rendered emergency care in good faith at the scene of an emergency. CAL. BUS. & PROF. CODE § 2144 (1960). This was to encourage emergency treatment to injured persons. Similar statutes have since been adopted in thirty states.

New Mexico, Tennessee, and Texas extend immunity beyond medical practitioners to all persons rendering emergency care. N.M. STAT. ANN. § 12-12-3 (Supp. 1963); TENN. CODE ANN. § 63-622 (Supp. 1964); TEX. REV. CIV. STAT. art. 1a (Supp. 1964). See generally Comment, 64 COLUM. L. REV. 1301 (1964).

Although black letter law still allows private hospitals to select with impunity the applicants they will admit, "changing social conditions lead constantly to the recognition of new duties. No better general statement can be made, than that the courts will find a duty where, in general, reasonable men would recognize it and agree that it exists."⁸⁷

ELLIOTT HARRIS

APPEAL—ACCEPTANCE OF THE BENEFITS OF A DIVORCE DECREE

Appellant was granted a divorce from the appellee in 1951. The divorce decree provided alimony for the appellant in the amount of 500 dollars per month. In 1964, the circuit court, in a post-decretal order, reduced the alimony award to 400 dollars per month. After accepting two payments, the appellant appealed from the modified order. The appellee moved to dismiss the appeal, *held*, dismissed: one who has accepted the benefits of a divorce decree is estopped from subsequently appealing from the benefits. *Fort v. Fort*, 167 So.2d 315 (Fla. 1st Dist. 1964).¹

The majority of case law, dealing with the availability of appeal to one who has accepted the benefits of a judgment,² holds that the dissatisfied winning party is estopped from taking the appeal from the specific benefits accepted.³ Courts have founded their use of estoppel on various theories, all of which reach the same end result—dismissal of the appeal. Some of the more prevalent theories are that: an appellant cannot take two inconsistent positions, both accepting the award and appealing therefrom;⁴ an appellant consents to a release of errors when

37. PROSSER, TORTS § 53, at 334 (3d ed. 1964).

1. The majority was of the opinion that the appellant should have complied with the provisions of FLA. R. APP. P. 3.8 (1962 Revision) in order to avoid dismissal of her appeal. This rule provides that a wife may petition the trial court for a subsistence allowance pending appeal.

2. *E.g.*, *Shannon Copper Co. v. Potter*, 14 Ariz. 481, 131 Pac. 157 (1913); *Morton v. Superior Ct.*, 65 Cal. 496, 4 Pac. 489 (1884); *Stallings v. Shell Petroleum Corp.*, 54 Ga. App. 359, 188 S.E. 50 (1936); *Holt v. Rees*, 46 Ill. 181 (1867); *Knapp v. Brown*, 45 N.Y. 207 (1871). See generally, Annot., 169 A.L.R. 986 (1941).

3. *San Bernardino County v. Riverside County*, 135 Cal. 618, 67 Pac. 1047 (1902). The appellee must file a motion to dismiss in the appellate court when attacking the right to the appeal. See also *Cohen v. Cohen*, 102 Cal. App. 2d 624, 228 P.2d 54 (1951); *Bass v. Ring*, 210 Minn. 598, 299 N.W. 679 (1941); *Sherman v. Sherman*, 89 Ore. 130, 173 Pac. 572 (1918); *Wallace v. Wallace*, 371 S.W.2d 918 (Tex. 1963).

4. "[T]he right to proceed on a judgment and enjoy its fruits, and the right to attack it on appeal, are totally inconsistent positions, so that the party's election to pursue the one course must be taken as an abandonment of the other." *Knebel v. Knebel*, 189 S.W.2d 464, 466 (Mo. Ct. App. 1945).