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Physicians—Statute Relieving Physicians, Surgeons, and Nurses from Civil Liability for Emergency Care—Neb. Laws c. 110, p. 349 (1961)

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Notes

PHYSICIANS—STATUTE RELIEVING PHYSICIANS, SURGEONS AND NURSES FROM CIVIL LIABILITY FOR EMERGENCY MEDICAL CARE—Neb. Laws c. 110, p. 349 (1961).

I.

Jane Doe is injured in an automobile accident, and is negligently treated by a physician who is the first person to reach the scene. As a result of the physician's negligence, Jane's injuries fail to heal properly and she files a malpractice suit against the doctor.

Prior to the 1961 Session of the Nebraska Legislature the outcome of Jane's suit would have depended upon the common-law rules applicable to such cases. This the legislature has attempted to change by its enactment of the following statute:¹

[N]o person [physician, surgeon or nurse licensed under Nebraska law] . . . who renders emergency care at the scene of an emergency gratuitously and in good faith, shall be held liable for any civil damages as a result of any act or omission by such person in rendering the emergency care or as a result of any act or failure to act to provide or arrange for further medical treatment or care for the injured person.

In view of this statute the very existence of Jane's cause of action is in doubt.

II.

Can the state legislature, in one short paragraph, so simply and decisively sweep away a common-law right? Perhaps not. The Nebraska Constitution, Article I, section 13 states: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due

¹ Neb. Laws c. 110, p. 348 (1961).

Similar statutes have been enacted in several other states. They include: CAL. BUS. & PROF. CODE § 2144 (Supp. 1961); ME. REV. STAT. ANN. c. 66, § 9-A (Supp. 1961); N.D. CENT. CODE § 43-17-37 (Supp. 1961); N.D. CENT. CODE § 43-17-37 (Supp. 1961); OKLA. STAT. ANN. tit. 59, § 518 (Supp. 1961); S.D. Laws c. 137, p. 155 (1961); Tex. Laws c. 317, p. 681 (1961); UTAH CODE ANN. § 58-12-23 (Supp. 1961); WYO. STAT. ANN. § 33-343.1 (Supp. 1961).

All apply to physicians and surgeons. The South Dakota and Utah statutes extend also to osteopaths, and the California statute extends to midwives. The Texas and Wyoming laws apply to "all persons" rendering aid in an emergency. All are applicable to "emergencies" with the exception of the Maine statute, which concerns "accidents."

course of law, and justice administered without denial or delay."² In Nebraska this constitutional guaranty has been held to be a restriction on the legislature as well as on the other branches of government.³ Under such an interpretation the general rule is that the legislature is prohibited from abolishing a common-law remedy for injuries to person or property.⁴ It may change the remedy or form of procedure, attach conditions precedent to its exercise, or abolish old and substitute new remedies, but it cannot deny a remedy entirely.⁵

Exceptions to this rule have been made as to the abolition of actions for alienation of affections,⁶ criminal conversation,⁷ seduction⁸ and breach of contract to marry.⁹ Such exceptions have

² See *Fender v. Waller*, 139 Neb. 612, 618, 298 N.W. 349, 352 (1941), where the court declares: "Litigants are entitled to access to the courts of the land when they have probable cause and reasonable basis for believing an injury has been done to their lands, goods, person or reputation."

In *Wilfong v. Omaha & C. B. St. Ry.*, 129 Neb. 600, 611, 262 N.W. 537, 542 (1935), the Nebraska court upheld the plaintiff administrator's claim for damages due to pain and suffering of the decedent. In so doing, the court discussed the constitutional issue and concluded: "In a broad sense the claim for personal injury recognized and created by this constitutional provision, as applied to torts, is 'a chose in action'."

³ *First Trust Co. v. Smith*, 134 Neb. 84, 115, 277 N.W. 762, 777-78 (1938). Note the comprehensive discussion of this constitutional provision, *id.* at 106-15, 277 N.W. at 773-78.

⁴ See *Taylor v. Hubbell*, 188 F.2d 106 (9th Cir.), *cert. denied*, 342 U.S. 818 (1951); *Stewart v. Houk*, 127 Ore. 589, 271 Pac. 998 (1928); *City of Janesville v. Carpenter*, 77 Wis. 288, 46 N.W. 128 (1890).

⁵ *Mattson v. City of Astoria*, 39 Ore. 577, 65 Pac. 1066 (1901); *accord*, *Gallegher v. Davis*, 37 Del. 380, 183 Atl. 620 (1936) (upholding an automobile guest statute) (excellent policy discussion, *id.* 183 Atl. at 624); *Fellows v. Seymour*, 171 Misc. 833, 13 N.Y.S.2d 803 (Sup. Ct. 1939) (workmen's compensation substituted for common-law remedies against employers); *Vanderbilt v. Hegeman*, 157 Misc. 908, 284 N.Y. Supp. 586 (Sup. Ct. 1935).

⁶ *Langdon v. Sayre*, 74 Cal. App. 2d 41, 168 P.2d 57 (2d Dist. 1946); *Pennington v. Stewart*, 212 Ind. 553, 10 N.E.2d 619 (1937); *Hanfgarn v. Mark*, 274 N.Y. 22, 8 N.E.2d. 47, *remitter amended*, 274 N.Y. 570, 10 N.E.2d 556, *appeal dismissed*, 302 U.S. 641 (1937). *But see Wilder v. Reno*, 43 F. Supp. 727 (M.D. Pa. 1942) (dictum strongly questioning the constitutionality of a statute abolishing actions for alienation of affections and breach of contract to marry).

⁷ *Langdon v. Sayre*, 74 Cal. App. 2d 41, 168 P.2d 57 (2d Dist. 1946); *Bunten v. Bunten*, 15 N.J. Misc. 532, 192 Atl. 727 (Sup. Ct. 1937); *Vanderbilt v. Hegeman*, 157 Misc. 908, 284 N.Y. Supp. 586 (Sup. Ct. 1935).

⁸ *Langdon v. Syre*, 74 Cal. App. 2d 41, 168 P.2d 57 (2d Dist. 1946); *Bunten v. Bunten*, 15 N.J. Misc. 532, 192 Atl. 727 (Sup. Ct. 1937).

⁹ *Thibault v. Lalumiere*, 318 Mass. 72, 60 N.E.2d 349 (1945); *Vanderbilt*

been justified either on the ground that they were not property rights,¹⁰ or that they were not "fundamental" rights¹¹ entitled to constitutional protection. As explained by one court, these actions "have resulted in grave abuses, and their continuance is detrimental to the public interest."¹²

Here, however, the right of action abolished by the Nebraska statute is clearly not within the above exceptions. There are, in fact, no reported cases in Nebraska involving malpractice actions arising from treatment provided in emergencies, and as a result no evidence of abuse may be deduced or documented.

At least one court, though, has gone beyond the enumerated exceptions in holding that common-law remedies could be abolished not only when a reasonable substitute was provided, but also when such abolition was a reasonable exercise of the police power.¹³ The language of the Nebraska Constitution would not appear to justify such an interpretation, but if such a rationale were applied, the court doing so would necessarily be forced to resolve the ensuing question of whether or not this statute is a legitimate exercise of the police power.¹⁴

III.

The test of police power validity is whether the statute has any real, substantial relation to the public health.¹⁵ The apparent purpose of such a "Good Samaritan" law as this, as shown by its legislative history,¹⁶ is to encourage medical personnel to render

v. Hegeman, 157 Misc. 908, 284 N.Y. Supp. 586 (Sup. Ct. 1935). *But see* Wilder v. Reno, 43 F. Supp. 727 (M.D. Pa. 1942).

¹⁰ See *Lebohm v. City of Galveston*, 154 Tex. 192, 275 S.W.2d 951 (1955).

¹¹ *Vanderbilt v. Hegeman*, 157 Misc. 908, 284 N.Y. Supp. 586 (Sup. Ct. 1935).

¹² *Vanderbilt v. Hegeman*, 157 Misc. 908, 911, 284 N.Y. Supp. 586, 591 (Sup. Ct. 1935); *accord*, *Langdon v. Sayre*, 74 Cal. App. 2d 41, 168 P.2d 57 (2d Dist. 1946).

¹³ *Lebohm v. City of Galveston*, 154 Tex. 192, 275 S.W.2d 951 (1955) (charter provision exempting city from liability for injuries caused by defective streets held invalid).

¹⁴ This would again require a balancing by the courts of the importance of the public benefit sought to be promoted against the seriousness of the restriction of private right sought to be imposed. See, e.g., *Richardson v. Beattie*, 98 N.H. 71, 95 A.2d 122 (1953).

¹⁵ See *Liggett Co. v. Baldrige*, 278 U.S. 105 (1928); *Great Atl. & Pac. Tea Co. v. Mayor & Comm'rs*, 367 Ill. 310, 11 N.E.2d 388 (1937) *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960) (public health measures must have some reasonable relation to the proposed ends).

¹⁶ See notes 37 and 38 *infra*.

aid in emergency situations. But such an obligation or responsibility may already exist. If so, the statute clearly could have no relation to the public health since it would merely be encouraging performance where performance is already due. This could scarcely be construed as a legitimate exercise of the police power.

The general rule, however, is that there is "no duty to answer the call of one who is dying and might be saved, nor . . . to play the part of a good Samaritan and bind up the wounds of a stranger who is bleeding to death."¹⁷ But this doctrine has already been whittled away by the "special relationship" situations,¹⁸ and the courts might well extend the humanitarian reasoning of such decisions to medical emergencies. A step in this direction was taken in a recent Delaware case where the Delaware Supreme Court said that a hospital may be liable for refusal of service to a patient in case of an unmistakable emergency.¹⁹ Moral revulsion against the general rule may eventually result in the imposition of a legal duty on one to come to the aid of a fellow human in peril, so long as little personal inconvenience is involved.²⁰ Perhaps this same moral revulsion will have an immediate influence on the courts in their interpretation of this statute.

An important consideration in determining whether there is any justification for such a statute is the adequacy of protection given by the common law. As to physicians treating people in emergencies, there is much evidence that such protection is ample. First, the requisite degree of skill which one is ordinarily required to exercise is merely that of a reasonable man in like circumstan-

¹⁷ PROSSER, *TORTS* 184 (2d ed. 1955), citing *Allen v. Hixson*, 111 Ga. 460, 36 S.E. 810 (1900), and *Hurley v. Eddingfield*, 156 Ind. 416, 59 N. E. 1058 (1901).

¹⁸ As examples of the special relationship holdings, see *Hutchinson v. Dickie*, 162 F.2d 103 (6th Cir. 1947) (owner of cabin cruiser under duty of reasonable care to rescue guest who fell overboard); *L. S. Ayres & Co. v. Hicks*, 220 Ind. 86, 40 N.E.2d 334 (1942) (department store owed duty of reasonable care to aid an invitee injured on the premises); *Szabo v. Pennsylvania R.R.*, 132 N.J.L. 331, 40 A.2d 562 (Ct. Err. & App. 1945) (master must render aid to helpless servant); *Middleton v. Whitridge*, 213 N.Y. 499, 108 N.E. 192 (1915) (liability for aggravation of illness of passenger who rode five hours on defendant's street car in unconscious condition).

¹⁹ *Wilmington Gen. Hosp. v. Manlove*, 174 A.2d 135, 140 (Del. 1961). This was an action for wrongful death of an infant who died shortly after treatment was refused at the emergency ward of the defendant private hospital. The court affirmed a denial of defendant's motion for summary judgment.

²⁰ See PROSSER, *TORTS* 185 (2d ed. 1955).

ces.²¹ A physician is not held to the same prudence of judgment and discretion in an emergency as he is under normal conditions.²² Second, he is required only to "possess the skill and learning which is possessed by the average member of his profession in good standing in that or similar localities, and to apply that skill and learning with reasonable care."²³ Third, the burden of proof in malpractice actions has consistently been placed on the plaintiff.²⁴ Fourth, the doctrine of *res ipsa loquitur* has not been unfair to physicians, and has in fact been rejected in most malpractice suits.²⁵ Fifth, the courts have usually succeeded in placing a sensible limit on the amount of damages awarded in such actions.²⁶ Sixth, malpractice insurance would seem to provide ade-

²¹ RESTATEMENT, TORTS § 283 (1934). See *In re Estate of Johnson*, 145 Neb. 333, 342, 16 N.W.2d 504, 510 (1944), where the court states the rule for a "reasonable physician" as follows: "A patient is entitled to an ordinarily careful and thorough examination, such as the circumstances, the condition of the patient, and the physician's opportunities for examination will permit"

²² RESTATEMENT, TORTS § 296 (1934); *accord*, *Kelly v. Gagnon*, 121 Neb. 113, 236 N.W. 160 (1931); PROSSER, TORTS 135, 137-38 (2d ed. 1955).

However, importance is attached to the fact that many activities require that those engaged in them shall have a natural aptitude or special training empowering them to cope with dangerous situations arising in the course of such activities. RESTATEMENT, TORTS § 296, comment c. at 797 (1934).

²³ *Ramberg v. Morgan*, 209 Iowa 474, 477, 218 N.W. 492, 495 (1928); *accord*, *Stohlman v. Davis*, 117 Neb. 178, 182, 220 N.W. 247, 249 (1928).

²⁴ See *Davis v. Virginian Ry.*, 361 U. S. 354 (1960); *Bruce v. United States*, 167 F. Supp. 579 (N.D. Cal. 1958); *Winters v. Rance*, 125 Neb. 577, 251 N.W. 167 (1933); *McGuire v. Rix*, 118 Neb. 434, 225 N.W. 120 (1929).

²⁵ Cases rejecting the application of *res ipsa loquitur* include *Quick v. Thurston*, 290 F.2d 360 (D.C. Cir. 1961); *McDaniel v. Wolcott*, 115 Neb. 675, 214 N.W. 296 (1927); *Tady v. Warta*, 111 Neb. 521, 196 N.W. 901 (1924).

Cases adopting the doctrine include *Dietze v. King*, 184 F. Supp. 944 (E.D. Va. 1960); *James v. Spear*, 170 Cal. App. 2d 17, 338 P.2d 22 (3d Dist. 1959).

Note, however, that the decision to accept or reject *res ipsa loquitur* is based on the individual fact situation before the court, so it cannot be said that any jurisdiction has *per se* accepted or rejected the doctrine for malpractice suits.

²⁶ See, e.g., *Sinz v. Owens*, 33 Cal. 2d 749, 205 P.2d 3 (1949) (\$17,500 recovery for improper treatment of leg fractures excessive; new trial granted); *McCrain v. City of New York*, 12 App. Div. 2d 482, 207 N.Y.S.2d 685 (1st Dep't 1960) (\$115,600 recovery for failure to essay a myelogram held grossly excessive; plaintiff required to accept \$60,000); *Bowles v. Walder*, 9 App. Div. 2d 942, 195 N.Y.S.2d 775 (2d Dep't 1959) (\$70,000 recovery for elbow injury held excessive; new trial unless plaintiff accepts \$25,000); *Mullen v. McLaughlin*, 4 App. Div. 2d 753, 164

quate financial protection.²⁷

It would thus appear that physicians or nurses rendering emergency medical treatment would normally have adequate common-law protection against unwarranted liability. Furthermore, there is no evidence to indicate that the courts have ignored these basic protections and permitted excessive recoveries in malpractice actions. There are no reported cases in Nebraska arising from treatment provided at the scene of an emergency. Nor were any cases found in other jurisdictions. Although there may have been some litigation of this nature in the lower state courts, the absence of appellate opinions is indicative of the paucity of controversy on the subject and casts considerable doubt on the wisdom and discretion of those who refrain from rendering assistance for fear of liability.

IV.

The statute is susceptible to further objections based on ambiguity and uncertainty. "Emergency" could be defined in numerous ways. One might infer that the term applies only to the situation where a physician inadvertently comes upon the emer-

N.Y.S.2d 612 (2d Dep't 1957) (\$36,861 recovery for roentgen dermatitis held excessive by \$9,361).

Among the larger verdicts awarded have been: *Shehee v. Aetna Cas. & Sur. Co.*, 122 F. Supp. 1 (W.D. La. 1954) (\$64,116 for improper esophagoscopy necessitating a long series of operations); *Gluckstein v. Lipsett*, 93 Cal. App. 2d 391, 209 P.2d 98 (1st Dist. 1949) (\$115,000 for plastic surgery on breasts resulting in disfigurement and humiliation); *Marchese v. Monaco*, 52 N.J. Super. 474, 145 A.2d 809 (App. Div. 1958) (\$56,000 recovery; mycifradin injections caused deafness).

Malpractice recoveries in Nebraska have involved much smaller sums. See, e.g., *Mangiameli v. Ariano*, 126 Neb. 629, 253 N.W. 871 (1934) (\$15,000 recovery against dentist for failing to diagnose osteomyelitis of jaw while extracting a tooth; \$7,500 remittitur ordered); *Mosslander v. Armstrong*, 90 Neb. 774, 134 N.W. 922 (1912) (\$2,000 recovery for improper treatment of injured foot); *Leisenring v. La Croix*, 68 Neb. 803, 94 N.W. 1009 (1903) (\$1,140 recovery for negligent treatment of fractured leg).

²⁷ According to the Physicians', Surgeons' and Dentists' Professional Liability Manual, issued by the National Bureau of Casualty Underwriters, Nebraska physicians may obtain coverage of \$100,000 per claim and \$300,000 in the aggregate for a one year period for a premium ranging from approximately \$50 to \$200, depending on the services provided by the physician.

Usual exclusions include: agreements guaranteeing results; services rendered while under the influence of liquor or drugs; and fraudulent, criminal or malicious acts.

Malpractice recoveries in excess of \$100,000 have been extremely rare. See cases cited note 26 *supra*.

gency scene. But it might also be applicable when he is called to the scene; and perhaps even when he is called to a police station to treat a victim.

The same problem arises with the term "emergency care." This could refer to all medical care rendered in an emergency situation, or it might be limited to unusual or unforeseen demands on the physician's skills at such a time. Resolution of this question is, of course, quite basic to the application of the statute.

In addition, the courts may have difficulty in determining if a physician has acted "gratuitously."²⁸ A doctor coming to the aid of an unconscious accident victim may recover in quasi-contract for the reasonable value of his services.²⁹ Perhaps he could refrain from exercising that right and thereby contend that he acted gratuitously within the meaning of the statute.³⁰ A more troublesome situation would arise if the physician plans to send the patient a bill, is sued for malpractice before it is mailed, and then tears up the bill and alleges that he acted gratuitously.³¹

Similar perplexities are occasioned by use of the term "in good faith."³² One wonders if the line will be drawn at gross negligence—wantonness—wilfulness—or if still another standard will be devised. An inquiry might be made as to whether an intoxicated individual can provide "good faith" assistance.

To the judiciary falls this troublesome task of discovering legislative intent in a maze of ambiguous semantics.³³ In Nebraska the courts often resort to legislative history,³⁴ but for this particular statute it is of little value. The only testimony at the

²⁸ "Gratuitous" is defined as "without valuable or legal consideration" in BLACK, LAW DICTIONARY (4th ed. 1951).

²⁹ *Cotnam v. Wisdom*, 83 Ark. 601, 104 S.W. 164 (1907).

³⁰ Tex. Laws c. 317, p. 681 (1961), omits from liability protection that care rendered for remuneration or with the expectation of remuneration, and that rendered by a person who was present at the scene soliciting business or seeking to perform a service for remuneration.

³¹ Under these circumstances, it would be wise for a physician to refrain from collecting for emergency medical care until after the patient has made a successful recovery.

³² The meaning of the term varies with the circumstances in which it is used. Compare *Dupuy v. Joly*, 197 La. 19, 200 So. 806 (1941), with *Appel v. Morford*, 62 Cal. App. 2d 36, 144 P.2d 95 (2d Dist. 1943), and with *Hilton v. Clements*, 137 Neb. 791, 291 N.W. 483 (1940).

³³ See *Ledwith v. Bankers Life Ins. Co.*, 156 Neb. 107, 54 N.W.2d 409 (1952); *Hansen v. Dakota County*, 135 Neb. 582, 283 N.W. 217 (1939).

³⁴ See *School Dist. v. Marshall*, 160 Neb. 832, 71 N.W.2d 549 (1955); *Placek v. Edstrom*, 148 Neb. 79, 26 N.W.2d 489 (1947).

committee hearing was by the senator who introduced the bill, and by two local physicians.³⁵ The introducer's statement of purpose was inconclusive.³⁶ The statement of the committee chairman in advancing the bill to general file was copied almost verbatim from the introducer's statement. Debate on the measure was minimal and insignificant, and there was only one dissenting vote on final passage.

Perhaps a liberal judicial interpretation of the language in this statute could withstand objections of vagueness and uncertainty. On the other hand, it is a statute in derogation of the common law, and as such should be strictly construed.³⁷

V.

Tort liability is based primarily on an analysis of social policy with its underlying risk-bearing and loss-distributing factors. In most areas of the law, the movement has been toward extending liability.³⁸ This, in contrast, is a "no liability" statute. Should not the courts consider who is better able to bear the risk and distribute the loss—the innocent injured party (who might be permanently disabled), or the negligent physician, surgeon, or nurse? Legislators and the courts should give due consideration to the precedent being established by these statutes. It has taken many years to dent the doctrine of charitable immunities. Are we now willing to embark upon an era of "Good Samaritan immunities"?

Clayton Yeutter, '63

³⁵ *Hearing Before the Committee on Public Health & Miscellaneous Subjects*, Nebraska Legislature, 72d Sess. (March 16, 1961).

³⁶ It states: "This bill provides to relieve the responsibility of physicians and surgeons [later amended to add nurses] who render emergency care at the scene of an accident or such like event . . ." However, a few lines later the following statement is made: "The bill is not designated to alleviate any responsibility . . ." Just what may be deduced from this is purely conjectural.

³⁷ See *Davis v. Walker*, 170 Neb. 891, 908, 104 N.W.2d 479, 489 (1960).

³⁸ See, e.g., *Le Blanc v. Louisiana Coca Cola Bottling Co.*, 221 La. 919, 60 So. 2d 873 (1952); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); *Colton v. Foulkes*, 259 Wis. 142, 47 N.W.2d 901 (1951); and the various Workmen's Compensation statutes.