OPINION
65-207

March 17, 1965 (OPINION)

Miss Lucille V. Paulson, R.N.

Executive Director

North Dakota State Board of Nursing

RE: Nurses - Student Nurses - Liability

This is in reply to your letter of March 12, 1965, in regard to liability of student nurses.

Your letter states:

> "There seems to be a growing concern for provision of malpractice insurance for students in schools of nursing in both hospital operated programs and college programs.
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> "In the process of learning and developing skill in the many technical procedures involved in the nursing care of patients, students may be assigned to perform these procedures, presumably after instruction and supervised practice and after instructors have considered them to be competent to do so safely.
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> "However, the question is this, in case of an error and unfavorable reaction following some procedure performed by a student, is the student (as a 'learner' and not a qualified nurse) protected legally from lawsuit? Or, in this situation, who would be legally responsible?"

Under our present system of law it would be difficult to say or suggest that, as a theoretical legal matter, anyone is under any circumstances "protected" from a lawsuit. The student nurse like any other individual can theoretically be subjected to lawsuit for her conduct as a student nurse. As a practical matter, in a properly handled lawsuit, it seems doubtful that the student nurse would be held to the same degree of skill, experience and knowledge as a graduate nurse.

Likewise, as a matter of practicality, it seems doubtful that the average student nurse would have the assets available for a possible response in damages for a legal injury that the average institution, or professionally qualified individual utilizing her services would, with the result, that it would probably be more desirable to obtain a judgment against such institution or professionally qualified individual for a serious personal injury. As to the responsibility of the institution or other professionally qualified individual, we must look to the general law of master and servant and to the doctrine of respondent superior.

A graduate nurse may well be in the legal position of an independent contractor. As stated in Parkes v. Seasongood, 152 Fed. 583, quoted in Moody v. Industrial Acci. Commission (a California decision) 269 Pac. 542, 60 A.L.R. 299, at page 302 of the A.L.R. report:

> "'Ordinarily a trained nurse, performing her usual duties with the skill which is the result of training in that profession, does not come within the definition of a servant, but rather is one who renders personal services to an employer in the pursuit of an independent calling.' * * *"

In Brown v. St. Vincent's Hospital, 222 App. Div. 402, 226 N. Y. Suppl. 317, the court said in regard to the services of a trained nurse:

> "The general rule is well settled that in such a case the hospital does not accept responsibility by contract, or become liable in tort for the acts of physicians, surgeons, or nurses who treat patients in the institution * * *."

The distinction is perhaps better shown by the statement of the court in Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 52 L.R.A. (N.S.) 505, 105 N.E. 92, Ann. Cas. 1915C, 581:

> "It is true, I think, of nurses, as of physicians, that, in treating a patient, they are not acting as the servants of the hospital. The superintendent is a servant of the hospital; the assistant superintendents, the orderlies, and the other members of the administrative staff are servants of the hospital. But nurses are employed to carry out the orders of the physicians, to whose authority they are subject. The hospital undertakes to procure for the patient the services of a nurse. It does not undertake, through the agency of nurses, to render those services itself. The reported cases make no distinction in that respect between the position of a nurse and that of a physician, * * * and none is justified in principle. If there are duties performed by nurses foreign to their duties in carrying out the physician's orders, and having relation to the administrative conduct of the hospital, the fact is not established by this record, nor was it in the discharge of such duties that the defendant's nurses were then serving. The actions 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 those preliminary stages is done, 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. * * *"

Thus it would seem that the trained nurse by reason of her training and skill in her profession, and the nature of her personal responsibility, might in proper circumstances be considered independent of the institution or professionally qualified persons involved in the situation, and thus the institution or professionally qualified persons might well come within the legal definition of

"servant" of the institution or doctor, and the institution or doctor might well as the "master" in such circumstances be liable for such student's tortious conduct. However, as an "independent contractor" the nurse would be solely liable for the injury; as a "servant" the student nurse would not be excused from liability, even though the person in the position of "master" might well also be liable.

As stated in 35 Am. Jur. 1019, Master and Servant, Section 584:

> "584. GENERALLY. - That an employee or a servant is personally liable for injuries to third persons by reason of tortious acts of the former committed outside the scope of his employment goes without question, but a somewhat more difficult question is presented when an injury to a third person results from some act or omission of an employee in the performance or nonperformance of his duties to his employer. The employer is accountable, of course, for any injury from the tortious conduct of his employee which is committed at his command or direction, or is within the scope of the employee's authority, and as a general rule, the employee also may be held accountable at the suit of a third person who has sustained injury by reason of such tortious conduct. In other words, both employer and employee may be required to respond in damages for a wrongful act of the employee which appears to have been within the scope of the employee's duties, and in many jurisdictions they may be sued jointly. An employee who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal except where he is exercising a privilege of the principal, or a privilege held by him for the protection of the principal's interests. Liability of the employee in such cases is based not upon agency, but upon the ground that he is a wrongdoer and, as such, responsible for any injury he may have caused. It is based upon the common-law obligation that every person must so act or use that which he controls as not to injure another. The only disputable legal proposition concerning the personal liability of an employee for injuries occurring to a third person through the performance or nonperformance of duties which the employee owes to his employer relates to tortious conduct which may be classed as nonfeasance. A theory has been advanced by a number of courts that an employee is liable for acts of malfeasance and misfeasance committed while acting for his employer and within the scope of his employment but is not liable for mere nonfeasance. It is now, however, generally recognized that the test of liability of an employee or servant for injuries to a third person is whether there has been a breach of some duty which he owes to such third person.
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> "The general rule may be stated to be that a servant or employee who violates a duty which he owes to a third person is answerable to such person for the consequences of his conduct whether it may be described as malfeasance, misfeasance, or nonfeasance. It is equally clear, however, that no cause of action accrues in favor of a third person against an employee for loss sustained as a result of the employee's failure to perform a duty owing only to his employer. Although a third

> person may suffer loss as a result of an employee's failure to perform his duties to his employer, if that breach of duty to the employer is unaccompanied by any act or omission of the employee which breaches a duty owing to the third person, no cause of action accrues in favor of the latter against the employee."

To conclude, the student nurse as such is not protected legally from a lawsuit, and although in particular circumstances others also might be responsible for her tortious conduct, she also is legally responsible for her own torts.

HELGI JOHANNESON

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