STATE HOSPITAL: Employees personally liable for negligent acts.

June 8, 1939

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Senator George D. Clayton, Jr.
State Senate
Jefferson City, Missouri

Dear Senator Clayton:

We wish to acknowledge receipt of your request for an opinion under date of May 31st, as follows:

> "Will you please advise me if an operator of an X-ray machine in a State Hospital would be held personally liable in the event of any malpractice claims being brought against the operator by any of the patients treated at the State Hospital."

7 C. J. Sec. makes the following statement with reference to the liability of the employees of asylums for their negligent acts (Section 9, p. 151):

> "However, such an institution being a mere instrumentality of the state government, brought into being to aid in the performance of governmental duty, the rule of respondeat superior does not apply to it; and, therefore, it cannot be made to respond in damages for a personal injury inflicted on another by one of its inmates or employees, although such injury results from negligence or malicious acts on the part of such inmate or employee, and although the statute creating it provides that it may sue and be sued. The liability for such acts is on the individual personally guilty of the negligence or misconduct causing the injury."

The above declaration finds support in the case of Ketterer's Adm'r. v. State Board of Control, 115 S. W. 200, l. c. 201; 131 Ky. 287; 20 A. L. R. (N. S.) 274. The court, in its opinion, said:

> "All the authorities relieve the state and such officials from responsibility in such cases and place the responsibility upon those persons who commit the acts which are the direct cause of the injury."

And in the case of Dunn v. Central State Hospital, 248 S. W. (Ky.) 216, l. c. 217, the court said:

> "Clearly the appellant could not maintain an action for personal injury against the Central State Hospital, a state institution, for the injury occasioned to her through the negligence of its employees, if any, in operating an electric motor truck in the regular line of their employment. She might, however, have had and maintained an action against the employees of the asylum operating the electric motor if their negligence was the proximate cause of her injury."

And again in the case of Johnson v. Hamilton County, 156 Tenn. 528; 1 S. W. (2d) 528, l. c. 529, the court in holding that a declaration against the superintendent of a county insane hospital, alleging that the defendant knowingly and wilfully placed a patient in a locked cell where razor blades were present, with resulting injury, stated a cause of action, said:

> "Certainly, no less can be required of the superintendent of a hospital receiving insane patients that such insane patients should not be knowingly and

> willingly placed in contact with means and instrumentalities for doing injury to themselves; and when it is charged that the defendant was guilty of such neglect of duty, and, in addition, 'well knew or by the exercise of reasonable care and prudence might, could, would, and should have known that the patient would inflict injury upon himself,' we think a cause of action is stated."

We have been unable to find any Missouri authorities construing the liability of employees of state hospitals for their negligent acts, but we are of the view that same would be in line with the authorities hereinabove set out.

We are, therefore, of the opinion that an operator of an X-ray machine in a state hospital would be held personally liable in the event of any malpractice claim being brought against the operator by any of the patients treated at the state hospital.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
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MW:VC