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Stuart Horowitz v. Plantation General Hospital

SC05-331

AND WE'LL`
TAKE THAT IN TO CONSIDERATION.,,
WE ARE READY FOR OUR SECOND`
CASE.`
HOROWITZ VERSUS PLANTATION`
GENERAL HOSPITAL.
MAY IT PLEASE THE COURT, MY`
NAME IS JOEL PERWIN, I'M HERE`
WITH CO-COUNSEL, TRIAL COUNSEL,`
MARK PUREDY AND ROSEANNE FLYNN.`
THEY BROUGHT TWO COMMON LAW`
CLAIMS ON BEHALF OF THEIR CLIENT`
AGAINST PLANTATION GENERAL,`
BASED UPON A DUTY ASSERTEDLY`
ARISING FROM A STATUTE, 458.322,`
PROVIDING THAT IT IS A`
CONTINUING CONDITION OF HOSPITAL`
STAFF PRIVILEGES --
YOU SAID COMMON LAW CLAIM.
YES.
LET'S JUST START THERE.`
IF THERE WAS NO STATUTE --
NO STATUTORY CLAIM.
OK.`
BUT THAT'S A STATUTE YOU'RE`
SAYING THE BEAM IS WRONG, THIS`
IS A COMMON LAW CLAIM AGAINST A`
HOSPITAL FOR FAILURE TO HAVE A`
FINANCIALLY RESPONSIBLE`
PHYSICIAN ON STAFF?
BASED ON A DUTY PRESCRIBED BY`
A STATUTE, WHICH HAD BEEN PASSED`
BUT WAS NOT APPLICABLE OR`
ADDRESSED IN BEING UNDER A`
TRADITIONAL COMMON LAW THEORY,`
AND THE --
WITHOUT THE STATUTE, ALL`
RIGHT, NO STATUTE EXISTS.
NO CAUSE OF ACTION.
AND IS THE COMMON LAW CLAIM A`
COMMON LAW CHAM FOR NEGLIGENCE.
AND STRICT LIABILITY.
STRICT LIABILITY CLAIM, THAT`
IF A HOSPITAL DOES KNOTS!!!!!!!!!!!!!! -- DOES NOT`
HAVE, THAT IF ITS STAFF`
PRIVILEGE DOCTORS DON'T HAVE`

INSURANCE OR ARE NOT OTHERWISE`
FINANCIALLY RESPONSIBLE, THAT`
THE HOSPITAL IS STRICTLY LIABLE?`
HAS A DUTY UNDER THE`
TRADITIONAL TRILOGY OF STATUTES`
DESIGNED TO PROTECT PEOPLE WHO`
CAN'T PROTECT THEMSELVES AND I'M`
GOING TO TALK ABOUT LANGUAGE IN`
THE STATUTE WHICH SAYS THAT, BUT`
THE POINT I WANT TO MAKE AT THE`
OUTSET IS THAT NEITHER THIS`
COMPLAINT NOR THE DECISION, NOR`
THE THREE DISTRICT COURT`
DECISIONS WHICH SUPPORT IT IT`
PURPORTED TO HOLD THAT THERE IS`
A STATUTORY CLAIM.`

WHAT THEY HELD WAS THAT THERE IS`
A STATUTORY DUTY, WHICH SUPPORTS`
A COMMON LAW CLAIM.`

ROBERT AND BAKER, NEGLIGENCE,`
MERCY HOSPITAL, STRICT`
LIABILITY, AND THE REASON THAT I`
SENT UP THE FOUNDATION DECISION,`
THE RECENT H.M.O. DECISION OF`
THIS COURT, THAT THIS COURT`
RECOGNIZED THAT EVEN IF THE`
STATUTE DOES NOT CREATE A CAUSE`
OF ACTION, IT MAY WELL SUPPORT A`
COMMON LAW CLAIM, THAT SAYS IF`
THE REQUISITES, IT WAS A THIRD`
PARTY BENEFICIARY CLAIM IN THAT`
CASE, IF THE REQUISITES OF THE`
COMMON LAW CAUSE OF ACTION ARE`
SATISFIED.

WELL, I THINK THAT'S WHERE`
WE'RE GOING.`

BECAUSE YOU GO RIGHT IN TO THAT.`
WHAT ARE THE PARAMETERS OF THE`
COMMON LAW CAUSE OF ACTION WITH`
REGARD TO A HOSPITAL MAKING`
CERTAIN, I GUESS IS THE`
APPROPRIATE PHRASE, THAT A`
PHYSICIAN HAS X NUMBER OF`
DOLLARS OF INSURANCE.`

LET'S TALK ABOUT WHAT IS THAT`
COMMON LAW CAUSE OF ACTION.

YES, SIR.`

MINDFUL THAT THERE'S NOTHING IN`
THE STATUTE THAT FORBIDS SUCH A`
CAUSE OF ACTION, AS OPPOSED TO`
CREATING ONE, A STATUTORY CAUSE`
OF ACTION, THAT THERE'S NOTHING`
IN THIS STATUTE WHICH FORBIDS`
THE RECOGNITION OF SUCH CAUSE OF`

ACTION, I THINK THERE ARE TWO`
FACTS.`

ONE IS THE LANGUAGE OF THE`
STATUTE WHICH I JUST QUOTED.`
AND THAT IS, THAT THERE IS A`
CONTINUING CONDITION OF HOSPITAL`
STAFF PRIVILEGES.`

NOW, IF DOESN'T SAY A CONTINUING`
CONDITION OF HOSPITAL STAFF`
PRIVILEGES FOR WHICH THE DOCTOR`
IS UNIQUELY RESPONSIBLE.

YOU'RE SAYING THE STATUTE`
NOW, RIGHT?

YES, SIR.`

THE LANGUAGE OF THE STATUTE.
IT DOESN'T SAY CONTINUING`
CONDITION FOR WHICH THE DOCTOR`
IS UNIQUELY RESPONSIBLE.`
HE'S THE RECIPIENT AND IT`
DOESN'T SAY A CONTINUING`
CONDITION FOR WHICH THE HOSPITAL`
IS RESPONSIBLE.`

IT'S THE ONE WHO CONFERS THE`
STAFF PRIVILEGES IN THE FIRST`
PLACE, RENEWS THEM AND`
MAINTAINS.`

NOW, IT SEEMS TO ME THAT IF`
SOMETHING IS CUYAMACA, IT'S AN`
IMPOSITION ON THE PERSON WHO`
PROVIDES THE BENEFIT, SUBJECT TO`
THE CONDITION, AND THE PERSON`
WHO RECEIVES THE BENEFIT,`
SUBJECT TO THE CONDITION.`

IF IT IS A CONDITION OF MY`
PROVIDING SOMETHING, THEN I HAVE`
TO ABIDE BY THAT CONDITION.`
AND THAT IS THE PLAIN LANGUAGE`
OF THIS STATUTE.

LET ME GET BACK TO YOUR`
QUESTION, THE ORIGINAL STATEMENT`
YOU MADE THAT THIS IS A COMMON`
LAW CAUSE OF ACTION.`

I DIDN'T READ THAT IN THE BRIEF.`
I DON'T THINK THAT YOU`
PARTICIPATED IN THE BRIEF, BUT`
THE POINT THAT I SAUVE IN THE`
BRIEF WERE JUST ON THE TABLE OF`
CONTENTS, POINTS ONE, SECTION`
458 CREATES A PRIVATE CIVIL`
CAUSE OF ACTION, AND POINT TWO,`
THE PRIVATE CIVIL CAUSE OF`
ACTION UNDER 458 APPLIES TO THE`
ACTION MALPRACTICE COMMITTED`
REGARDLESS OF LOCATION, AND`

THERE'S NO CITE WHO JESUS OR ANY OTHER SIMILAR CASE, SO IT SEEMS TO ME AT LEAST IN THIS COURT, THE ARGUMENT IS THAT THE STATUTE CREATES THE RIGHT OF ACTION.

I RESPECTFULLY DISAGREE.

I BELIEVE THE LANGUAGE WHICH YOU'VE READ, WHICH TALKS ABOUT A PRIVATE CIVIL CAUSE OF ACTION, CAN ENCOMPASS A TRADITIONAL COMMON LAW CLAIM BASED UPON A STATUTORY DUTY.

MR. PERWIN, I RESPECT YOU AS AN ADVOCATE, BUT WHEN AN ISSUE ON APPEAL SAYS WHETHER A STATUTE CREATES A PRIVATE CIVIL CAUSE OF ACTION, WITH NO MENTION THAT THIS IS A COMMON LAW CAUSE OF ACTION THAT IS ASSISTED BY A DUTY, I'M JUST CONCERNED THAT WE'RE JUST -- YOU KNOW, THAT THAT MAY BE ANOTHER ARGUMENT, BUT I DON'T SEE THAT AS BEING THE BASIS BY WHICH THIS CASE CAME UP TO THIS COURT.

WELL, LET ME PUT IT TWO WAYS.

ONE, IT IS A NECESSARY CONDITION OF AM STATUTORY CAUSE OF ACTION THAT THE STATUTE CREATE A DUTY AND THAT'S THE ISSUE THAT I DISCUSSED.

THEN THERE WAS A SECOND ASPECT, WHICH I CAN CERTAINLY DISCUSS.

NUMBER TWO --

WELL, LET'S DISCUSS MERCY.

ISN'T THAT THE CASE THAT WE'RE DEALING WITH HERE?

WELL, I HAVE ATTEMPTED TO SUGGEST THAT IT'S NOT NECESSARILY THE CASE.

SO YOU -- IF MERCY IS APPLICABLE HERE, THEN YOUR ARGUMENT CANNOT PREVAIL?

I HAVE ATTEMPTED TO SUGGEST THE CONTRARY, AND THAT IS THAT --

DID YOU CITE THE SEABOARD RAILROAD CASE?

WE DID ARGUE THE DUTY AND WE ARE RELYING UPON THREE CASES WHICH DO NOTHING MORE THAN RECOGNIZE THE DUTY AS A PREDICATE FOR A COMMON LAW CLAIM.

YOU'RE TALKING ABOUT THE
THREE ALLEGED CONFLICT CASES?

YES YOUR HONOR.

WITH NO HEYNAL CIES IN ANY OF
THOSE THREE CASES ABOUT HOW THEY
GET TO WHERE THEY GET, AND ALSO
WOULD YOU AGREE ALL THOSE THREE
CASES DEAL WITH EVENTS IN THE
HOSPITAL, THIS ONE, ASSUMING YOU
CAN GET THROUGH THE FIRST
BARRIER, YOU STILL HAVE TO TELL
US HOW SOMETHING THAT OCCURS
OUTSIDE OF THE HOSPITAL, HOW THE
HOSPITAL CAN BE VIE CARIOUSLY
LIABLE?

I WILL DO THAT AND I HOPE TO
GET TO THAT.

MY ARGUMENT IS ESSENTIALLY IF
YOU ESTABLISH DUTY, BREACH OF
DUTY AND CAUSATION BASED ON
FORESEEABILITY, THE DOCTOR'S
ABILITY -- HE'S GOT TO BE
COVERED AND IT'S CERTAINLY
FORESEEABLE, IF HE'S NOT
COVERED, HE COULD BE NEGLIGENT
ANYWHERE AND I'M GOING TO TRY TO
DEVELOP THAT AT GREATER LENGTH,
BUT THE -- JUSTICE WELLS, IT IS
A THRESHOLD QUESTION OF EVEN A
STATUTORY CLAIM, THAT THERE BE A
DUTY.

AND -- SO I NEED TO ESTABLISH
THE DUTY AS A PREDICATE TO
EITHER ARGUMENT.

NOW, I THINK THAT THE CASE LAW
THAT IS RELIED UPON ON THE
QUESTION OF A STATUTORY DUTY IS
INFORMED OBVIOUSLY BY THE
LEGISLATIVE PURPOSE AND INTENT.
DSH THE DECISION WHICH YOU
MENTIONED WHICH INFORMED BY THE
COMPREHENSIVENESS OF A
REGULATORY SCHEME AND ALSO BY
THE FACT THAT THE STATUTE HAS
BEEN AMENDED TO SPECIFICALLY
DECLARE THAT THERE WAS NO SUCH
CAUSE OF ACTION AND THERE ARE
STATUTES WHICH PRECLUDE IT, BUT
THIS STATUTE DOESN'T PRECLUDE
IT, AND --

LET ME SEE IF I UNDERSTAND
WHAT YOU'RE REALLY SAYING HERE.
ARE YOU CONCEDING THAT THERE IS
NO CAUSE OF ACTION UNDER THIS

STATUTE?

I AM NOT.

BUT I HAVE TO SATISFY YOU THAT
THAT THERE IS A STATUTORY DUTY.
THE STATUTE CLEARLY SAYS THAT
THE HOSPITAL SHOULD, YOU KNOW,
TRY TO DETERMINE AND ASCERTAIN
THAT THEIR STAFF DOCTORS ARE
FINANCIALLY RESPONSIBLE, SO WE
UNDERSTAND --

JUSTICE ENGLAND WOULD
VIOLENTLY DISAGREE WITH THAT.
OK.

THAT MAY BE TRUE, BUT YOU KEEP
GOING BACK TO A COMMON LAW CAUSE
OF ACTION, SO I'M REALLY
CONFUSED HERE AS TO WHETHER OR
NOT YOU ARE CONCEDED THAT THERE
IS NO STATUTORY CAUSE OF ACTION.

I AM NOT.

I AM NOT.

I AM SIMPLY MAKING THE POINT
THAT THAT CONCLUSION BY THE
COURT WOULD NOT NECESSARILY
REQUIRE APPROVAL.

BECAUSE THE DISCOVERY OF A DUTY
IN AND OF ITSELF WHICH FORM THE
PREDICATE FOR THE CAUSE OF
ACTION BROUGHT HERE AND THE
CAUSE OF ACTION SUSTAINED IN THE
THREE DISTRICT COURT DECISIONS
WHICH CONFLICT.

WOULDN'T THAT BE GETTING
THROUGH THE BACK DOOR, WHAT SHE
SAID YOU COULDN'T DO IN THE
FRONT DOOR.

MERCY SAYS EVEN THOUGH STATUTES
THAT CREATE A DUTY DON'T
NECESSARILY CREATE A PRIVATE
RIGHT OF ACTION, SO IF YOU'RE
SAYING AS SOON AS IT CREATES A
DUTY, EVEN IF THERE'S NO RIGHT
OF ARCS UNDER THE STATUTE, WE
HAVE A COMMON LAW RIGHT OF
ACTION.

AND FOUNDATION HEALTH SAYS
EVEN STATUTES WHICH DON'T CREATE
CAUSES OF ACTION CAN PROVIDE THE
PREED INDICATE FOR A COMMON LAW
CLAIM AND IT HAPPENS EVERY DAY
IN THE COURTS EVERYWHERE.
REGULATORY OBLIGATIONS,
STATUTORY OBLIGATIONS, SAFETY OF
PROBABILITY --

LET'S GO THROUGH AND ANALYZE`
THOSE, BECAUSE IT APPEARS MANY`
TIMES A STATUTE MAY DEFINE THE`
EXTENT OF WHAT THE DUTY IS`
THAT'S OTHERWISE RECOGNIZED`
THROUGH A REGULATORY SCHEME`
OR -- YOU'RE TALKING ABOUT`
PROBABILITY SAFETY.`

THERE IS AN UNDERLYING DUTY TO`
NOT BE NEGLIGENT, BUT UNDER`
THIS, I THINK YOU'RE GOING TO`
HAVE TO CONVINCING US THAT THERE`
IS SOME TYPE OF DUTY SEPARATE`
AND APART FROM THE STATUTE UPON`
WHICH THIS STATUTE CAN DEFINE,`
IF YOU WILL, WHAT THAT -- THE`
SCOPE OF WHAT THAT DUTY IS.`
THAT'S WHERE I THINK WE'RE`
HAVING A PROBLEM.

RESPECTFULLY, YOUR HONOR, I`
DISAGREE.`

I HAVE TO ESTABLISH A STATUTORY`
OBLIGATION.`

ONCE I ESTABLISH SUCH AN`
OBLIGATION, WHICH IS TO ASSURE`
FINANCIAL RESPONSIBILITY UNDER`
SUB A, WHICH SAYS IT'S A`
CONDITION OF STAFF PRIVILEGES,`
AND WHICH IS THE ONL WAY TO`
INTERPRET THE STATUTE THAT MAKES`
ANY SENSE, I HAVEN'T EVEN GOTTEN`
TO THAT ARGUMENT, I'VE`
ESTABLISHED A DUTY.

THERE'S NO LONGER A COMMON`
LAW DUTY.`

THAT'S A STATUTORY DUTY THEN.
BUT COMMON LAW DUTIES ARE`
BASED UPON STATUTORY OBLIGATIONS`
EVERY DAY, SO IF I ESTABLISH THE`
OBLIGATION, THEN THE QUESTION`
IS, IS IT A STRICT LIABILITY`
STATUTE BECAUSE IT RESPECTS A`
CLASS OF PEOPLE WHO CAN'T`
PROTECT THEMSELVES, WHICH THE`
PREAMBLE TO THIS STATUTE SAYS,`
IT SAYS PATIENTS CAN'T MAKE`
DECISIONS, OR IS IT A DUTY THAT`
IS THE PREDICATE FOR A`
NEGLIGENCE CLAIM --

LET'S LOOK AT WHAT THIS CAUSE`
OF ACTION WOULD BE, BECAUSE I'M`
FASCINATED BY IT.`

IT IS THAT THE -- THAT THE`
HOSPITAL HAD A DUTY TO ASSURE`

THAT ITS STAFF PRIVILEGE`
PHYSICIANS HAD INSURANCE.

CORRECT.

ALL RIGHT.`

AND THAT THEY VIOLATED THAT`
DUTY.

CORRECT.

AND AS A PROXIMATE CAUSE OR`
LEGAL CAUSE OF THAT BREACH, WHAT`
HAPPENED?

THEY INJURED THE INTENDED`
BENEFICIARY.`

THIS STATUTE THEY INJURED THE INTENDED
BENEFICIARY.

INJURED HER BY WHAT?

IN WHAT WAYS?

BY DEPRIVING HIM OF THE
ACTION OF THE FIRST.

SO IT DOESN'T MATTER THAT
WHEN MRS. HOROWITZ OR
MR. HOROWITZ, I AM SORRY,
MR. , MR. HOROWITZ WENT TO
SEE THE DOCTOR THAT HE
WONDERED OR ACQUIRED AS TO
WHETHER THE DOCTOR WAS STAFF
PRIVILEGED OR RELIED ANYWAY
TO THE HOSPITAL MAKING SURE
THE DOCTOR WAS FUNTIONLY
RESPONSIBILITY.

IT MATTERS NOT AT ALL?

THE PLAINTIFF NEGLIGENCE
DOESN'T DEPEND ON RELIANCE,
IT DEPENDS ON DUTY.

THERE IS A DUTY TO MAINTAIN
FINANCIAL RESPONSEK.

THE DUTY CERTAINLY EXTENDS
TO THE INTENDED BEN FISH
ARY, THIS STATUTE IS
DESIGNED TO PROTECT THE
PATIENT.

IN ANY CASE LAW FROM ANY
PART OF THIS COUNTRY THAT
WOULD RECOGNIZE THIS KIND OF
A COMMON LAW DUTY NOT THAT
IS THAT THE HOSPITAL'S
LIABILITY FOR THE NEGLIGENCE
IN WHAT THE DOCTOR, BUT
LIABLE BECAUSE THE DOCTOR
WAS NOT FINANCIALLY
RESPONSIBLE?

THERE IS NO CASE IN WHICH
A COMMON LAW DUTY OF THIS
KIND, I BELIEVE HAS BEEN
CREATED.

THAT IS WHAT BEAM SAID.
THERE IS NO STATE IN WHICH
THERE IS A STATUTE REQUIRING
FINANCIAL RESPONSIBILITY
UPON WHICH A CLAIM CAN BE
BASED.

IN THE HOSPITAL AS
CONDITION OF THE STAFF
PRIVILEGES IN THE HOSPITAL.
WHAT I AM TRYING TO SAY IS
THE NEXUS OF WHEN THEY ARE
NORTH,, IN THIS CASE, WHEN
YOU ARE NOT EVEN IN THE
HOSPITAL, WHERE THERE IS NO
ALLEGATIONS OF RELIANCE BY
THE PATIENT ON, YOU KNOW,
WELL, I PICK THIS DOCTOR
BECAUSE THIS DOCTOR WAS
STAFFED PRIVILEGE AT
PLANTATION HOSPITAL.
I PICK GOING TO PLANTATION
HOSPITAL BECAUSE I AM
ASSUMING THAT ALL OF THE
DOCTORS THAT GO THERE ARE,
WILL HAVE A CERTAIN AMOUNT
-- I MEAN SOMETHING OF THAT
NATURE THAT MIGHT BE COMMON
LAW KIND OF ALLEGATION.
LET ME PUT THINK IT WAY
-- FIRST, LET'S START HERE.
THE STATUTE MAKES NO
DISTINCTION IN REQUIRING
FINANCIAL RESPONSIBILITY
BETWEEN THE DOCTOR'S
PRACTICE.

POINT BANK BLANK.
THESE THINGS INTERACT.
THIS WOMAN HAD TESTS AT THE
HOSPITAL.
SHE WAS THEN TREATED AT THE
HOSPITAL.
SHE WAS BEING TREATED BY
STAFF PHYSICIAN PHYSICIAN.
NOW, I AM NOT SURE WHETHER
THERE WAS RELIANCE OR NOT,
BUT TO THE EXTENT THAT THE
HOSPITAL HAD A DUTY WHICH
EXTENDED TO HER AND UNDER
TRADITIONAL ELEMENTS, COMMON
LAW ELEMENTS OF NEGLIGENCE,
YOUR HONOR, IF YOU AGREE
WITH ME, THAT THE HOSPITAL
HAD A DUTY AND THERE IS JUST
NO OTHER WAY TO READ THIS

STATUTE TO MAKE ANY SENSE,
BECAUSE NOBODY ELSE -- I GOT
TO SNEAK THIS IN -- THE
STATE CAN'T POLICE IT.
THE PATIENT CAN'T POLICE IT.
THEN, THERE IS A DUTY TO
ENSURE, IS SHE WITHIN THE
FORESEEABLE SCOPE OF SUCH A
DUTY?

OF COURSE.

LET'S GO BACK TO WHO
ELSE.

THAT IS ONE OF THE ARGUMENT,
THOUSAND CREATE A PRIVATE
CAUSE OF ACTION, WHATEVER
YOU WANT TO CALL IT, BECAUSE
NO ONE ELSE COULD POLICE
THIS.

I THOUGHT THAT, THAT IS THE
458.320, ONLY IN TERMS OF
WHAT THE DOCTOR SHOULD DO.
ISN'T IT THE DEPARTMENT OF
HEALTH THAT IF THEY, IF THE
INSURANCE COMPANY NO LONGER
WRITES FOR THAT DOCTOR,
DOESN'T THE INSURANCE
COMPANY NOTIFY THE
DEPARTMENT OF HEALTH AND --
JUST THE LICENSEER.

BUT THAT IS HOW, IF THEY
DON'T, IF THEY KNOW LONGER
HAVE THOSE, THE INSURANCE,
IT IS, IN FACT, THAT THEY
MAY NOT BE -- THEY MAY NOT
HAVE THEIR LICENSE RENEWED?
CORRECT.

WELL, THAT IS PRETTY GOOD
WAY TO POLICE WHETHER
SOMEBODY IS OR IS NOT
FINANCIALLY RESPONSIBILITY.
DIFFERENT NUMBERS.

AS YOU ANSWER YOUR
QUESTION, I REMIND YOU ARE
IN INTO REBUTTAL.

AND CERTAINLY CAN'T RUN
AROUND CHECKING EVERY STAFF
PHYSICIAN'S APPOINTMENT
RENEWAL AN MAINTENANCE, ONLY
HOSPITALS CAN DO THAT, NOW,
IF THE HOSPITAL SHOULD KEEP
INFORMED OF THE DOCTOR'S
LICENSE OR STATUS, THAT MAY
BE, THAT MAY BE PART OF THE
PROBLEM.

BUT THERE IS NO WAY
HOSPITALS OR PATIENTS CAN
POLICE THIS AND THERE IS NO
OTHER WAY TO READ THIS
STATUTE HAN TO IMPOSE SUCH A
DUTY.

MR. ENGLAND?

MAY IT PLEASE THE COURT
ARTHUR ENGLAND ON BEHALF OF
PLANTATION GENERAL.

UNTIL THE ARGUMENT TODAY
AFTER READING THE BRIEFS AND
THE RECORD, I THOUGHT THIS
WAS QUITE DIFFERENT CASE.

I THOUGHT THAT THEY WERE,
THE HOROWITZS TIED UP IN
KNOT, BY, THAT I DON'T MEAN
THE KIND THAT SAILORS USE.
I MEAN THESE KNOTS.

THE HOROWITZ ACKNOWLEDGED
YOU IN THEIR BRIEF FLOIRX
COMMON LAW CAUSE OF ACTION
FOR THE RECOVERY THEY SEEK
TAKING NO COMPLAINT ABOUT
THE DECISION WHATSOEVER.

THE HOROWITZ ADMITTED THAT
SECTION 458-320 IS NOT AN
EXPRESSED CREATION OF A
PRIVATE BECAUSE OF ACTION.
THEY DID NOT ADDRESS THIS
COURT'S EX PRESSED STATEMENT
IN MURPHY, THAT IS THE
PRIMARY FACTOR CONSIDERED BY
THE COURT AS LEGISLATIVE
INTENT AND THAT IS IT IS NOT
ENOUGH THAT THE STATUTE "WAS
CREATED TO MERELY DESURE THE
SAFETY AND THE WELFARE OF
THE PUBLIC" THEY DID NOT
DISPUTE THE REQUIREMENT IN
FLORIDA PHYSICIAN'S UNION,
WHICH SUGGESTS THE HOSPITALS
ARE INTENDED NOT TO BE
INSURERS AN DIDN'T IDENTIFY
ANY LEGISLATIVE HISTORY.

ARE YOU REFERRING TO A
CASE? I AM SORRY, THE LAST
STATEMENT?

THEY HAVE TO HAVE A
STRONG INDICATION OF
LEGISLATIVE INTENT THEY FIND
NO FAULT WITH THAT.

THEY DID NOT IDENTIFY ANY
LEGISLATIVE HISTORY FOR YOU.

SUGGESTING THE INSURANCE
THEORY THEY ARE NOW
SUGGESTING.

THEY DID NOT CHALLENGE THE
ANALYSIS OF SECTION 45325
SUB2 BY EITHER THE 4th
DISTRICT IN THE CASE, THE
CAREFUL STATUTORY ANALYSIS
OR BY JUDGE GREEN AND HER IN
THE MERCY HOSPITAL.

MR. ENGLAND, IN REGARD TO
YOUR OPPOSITION, THAT THE
HOSPITALS ARE THE ONLY, THE
ONLY ENTITY THAT REALLY HAS
ANY ANY MEANS OF
ENFORCEMENT, DOES THAT HAVE
A PLACE IN THIS DISCUSSION
AT ALL AND IF NOT WHY NOT.
IF SO, WHY SO?

THREE-PART QUESTION.

WELL, NO.

NO PLACE AT ALL?

NO, OF COURSE NOT.

WHY NOT?

THE STATUTE IS VERY
CLEAR.

IN CONSIDERATION OF, THAT
IS THE ONLY PLACE THAT IT
CAN BE ENFORCED.

YES.

CAN BE MONITORED,
WHATEVER THE WORD YOU WANT
TO USE.

WHY DOES THAT NOT HAVE A
PLACE?

BECAUSE UPON LICENSE, A
PHYSICIAN HAS TO DEMONSTRATE
FINANCIAL RESPONSIBILITY.

THAT IS THE STATUTE TORY
SCHEME.

IT IS DEMONSTRATED AT THE
DEPARTMENT OF HEALTH AND THE
BOARD OF MEDICINE.

CONTINUING DUTY AND ANY
CHANGE, IN THE INSURANCE
HAVE TO BE NOTIFIED.

IF THOSE INSTITUTIONS WHICH
NOTIFY THE HOSPITAL THAT
THESE LICENSES ARE GRANTED.

WHAT DOES THE HOSPITAL HAVE
UNDER THE STATUTE?

THIS STATUTE WAS EXPRESS AND
EXQUISITE AS TO WHAT THE
HOSPITALS HAVE.

IT PROVIDES, AND I BELIEVE IT IS SUBSECTION 460, THAT A HOSPITAL HAS A DUTY, IT IS SET THAT YOU WAY, FOR CONFIDENCE OF THE PHYSICIAN, AND RISK MANAGEMENT, AND IT GOES ON TO SAY, THAT A FAILURE TO ENSURE THAT DUTY MAKE THEM LIABLE, BUT IT IS THOSE DUTY, YOUR HONOR, NOT FINANCIAL RESPONSIBILITY, THIS STATUTE PUTS FINANCIAL RESPONSIBILITY SQUARELY ON THE PHYSICIAN.

LET ME ASK YOU THIS.

WE HAVE ANOTHER CASE PENING HERE.

THAT CONSIDERS THE INNER PLAY BETWEEN WHETHER STATUTE CREATE AS PRIVATE RIGHT OF ACTION, WHETHER VIOLATION OF A STATUTE, IF THERE IS NO PROIV VIT RIGHT OF ACTION CAN CONSTITUTE EVIDENCE OF MEJ GENCE.

CAN YOU EXPLAIN TO ME THE INNER PLAY IN THOSE TWO CONCEPTS, IT SEEMS LIKE IT IS VERY TRICKY UNDER MURPHY WHETHER SOMETHING SOMETHING CREATE AS PRIVATE RIGHT OF ACTION DEFERMD BY LEGISLATIVE INTENT, THEN WE HAVE THE WHOLE LINE OF CASES THAT SAY, WELL, A VIOLATION OF STATUTE CAN CONSTITUTE EVIDENCE OF NEGLIGENCE, WHETHER IT IS NEGLIGENCE OR NOT IS ANOTHER ISSUE.

BUT SRPLY VIOLATION OF A STATUTE CAN BE EVIDENCE OF IT.

I WILL BE HONEST WITH YOU, YOUR HONOR, I DIDN'T BECOME PRIPED TO DO THAT BECAUSE PIT IS NOT CITED IN ANY BRIEF IN THE CASE.

THIS IS A WHOLE NEW THEORY THAT CAME UPON JOEL STANDING UP HERE.

AS PRACTICING LAWYER,.

I WOULD PREFER TO STAY IN THE CASE, YOUR HONOR, OF WHAT I KNOW ABOUT THE

RECORD.

THANK FOUR THE COMPLIMENT.

LET ME GO BACK TO

SOMETHING YOU SAID.

YOU MENTIONED AND, OF

COURSE, THE BRIEF IS

DISCUSSED, THE COURSE OF

ACTION THAT SET FORTH IN

756.110 WHICH IS THE ONE

THAT LIABILITY FOR A FAILURE

TO EXPRESS DUE CARE IN

FULFILLING ONE OF OR TWO OF

THESE DUTY.

THAT IS WHAT YOU ARE

REFERRING TO?

YES, YOUR HONOR.

THE DUTYS HAVE TO DO WITH

THE COMPREHENSIVE RISK

MANAGEMENT PROGRAM.

CONFIDENCE OF STAFF.

ALL RIGHT.

NOW, THE QUESTION THAT I

HAVE ABOUT THAT IS THAT YOU

ARE -- WE HAVE TO GOT ASSUME

THAT THE CONFIDENCE REFERS

TO MEDICAL CONFIDENCE AS TO

OPPOSED TO FINANCIAL

CONFIDENCE.

CORRECT?

YES.

ALL RIGHT.

NOW, ON THE OTHER HAND,

IF YOU LOOK AT THE PURPOSE

OF 458 IN 301 WHICH IS WHERE

THE FINANCIAL RESPONSE

REQUIREMENTS ARE SET OUT, IT

SAYS THE PRIMARY LEGISLATIVE

PURPOSE IN THIS CHAPTER

WHICH WOULD BE 458 TO ENSURE

THAT EVERY PHYSICIAN

PRACTICING IN THE STATE

MEETS MINIMUM REQUIREMENTS

FOR SAFE PRACTICE.

LEGISLATIVE INTENT

PHYSICIANS FALL BELOW

MINIMUM COMPETENCY OR

OTHERWISE PRESENT A DANGER

SHOULD BE PROHIBITED FROM

PRACTICING IN THE STATE.

IT DOESN'T SAY A THING

ABOUT FINANCIAL

RESPONSIBILITY.

AT THE SAME CHAPTER THAT

458.320 IS WHICH IS

FINANCIAL RESPONSIBILITY.
YOUR HONOR, THAT IS WHY
PUT THE ENTIRE STATUTE AS MY
APPENDIX.

YES, THE STATUTE SAID
FINANCIAL RESPONSIBILITY.
YES, IT PUT IN THE 100,000
AND 250,000 DOLLAR
REQUIREMENT ON PHYSICIANS TO
CAR RITE.

NOTHING IN THE INTRODUCTION
YOU JUST READ, THE WHEREAS
CLAUSE, SUGGEST AS
RESPONSIBILITY, EITHER
FINANCIAL RESPONSIBILITY,
EVEN OF A PHYSICIAN, LET
ALONE FOR THE HOSPITALS
WHICH ARE GIVEN
RESPONSIBILITIES AN
LIABILITY.

THE STATUTE IS CONSTRUCTED
TO CREATE DISCIPLINARY
CONSEQUENCE, IF YOU WILL, A
REGULAR TORY STATUTE, FOR
PHYSICIANS WHO DO NOT COMPLY
WITH A LOT OF THINGS
INCLUDING FINANCIAL
DISCLOSURE AND JUSTICE
QUINCE, I HAVE TO SAY, I
KNOW THAT WAS A STATEMENT
MADE IN THE HAST OF
DISCUSSION, BUT THERE IS
NOTHING IN THIS STATUTE,
THAT SAYS THERE IS A
FINANCIAL RESPONSIBILITY OF
THE HOSPITALS FOR THE
PHYSICIANS.

IT JUST DOESN'T SAY THAT.
IT SAYS WHAT THEIR
CONSEQUENCES ARE FOR NOT
POLICING RISK MANAGEMENT AND
CONFIDENCE, BUT NOT AS IT
DOES HAVE CONSEQUENCE FOR
LOSS OF FINANCIAL
RESPONSIBILITY FOR THE
HOSPITAL, ONLY FOR THE
PHYSICIANS.

THEN, I WANT TO TAKE YOU TO
ONE STEP FURTHER BECAUSE
THIS CLAIM IS BASED ON A TWO-
STEP PROCESS.

THIS CLAIM IS NOT JUST THAT
THE DOCTOR DIDN'T CARRY THE
INSURANCE, THIS CLAIM, AND

THE ARGUMENT MADE, AT LEAST IN THE BRIEF, I DON'T KNOW WHAT WE'LL HEAR LATER, THIS CLAIM IS PREDICATED ON OBLIGATION FOR UNSATISFIED JUDGMENT WHICH GETS TO THE NEXT LEVEL, WHAT IS THAT LEVEL?

WELL, THAT IS YEARS DOWN THE ROAD, THAT HAS NOTHING TO DO WITH CARRYING INSURANCE AND THE FACTS OF THIS CASE BEAR THAT OUT.

DR. 'S MALPRACTICE TOOK PLACE IN JANUARY 1996.

A LAWSUIT WAS FILED AGAINST HIM IN 1997.

A FINAL JUDGMENT IN DECEMBER 17th, '99, GET! HE HAD LOST THE LICENSE TO PRACTICE MEDICINE ON JANUARY 31st, '98, THE YEAR BEFORE.

SO OBVIOUSLY, THE HOSPITAL WAS NO LONGER, HE WAS NO LONGER ON THE STAFF.

HIS CAUSE OF ACTION AGAINST THE HOSPITAL OCCURRED ACCORDING TO THE CASES ON WHICH THEY RELY ON JANUARY 16th, 2000.

WHEN A FINAL JUDGMENT FOR DOCTOR AGAINST THE DOCTOR BECAME FINAL ON THE EXPERTS RAISING OF THE 3-DAY APPEAL PERIOD.

A SUIT WAS NOT FILED AGAINST THE HOSPITAL UNTIL FEBRUARY 5 OF 2001 AND A WHERE IT OF EXECUTION RETURNED ON SATISFIED ON MAY 9th, 2001.

YOU TELL ME HOW IT IS POSSIBLE FOR A HOSPITAL TO HAVE ANY MAINTENANCE OF CONTROL, RESPONSIBILITY, STAFF PRIVILEGE, FINANCIAL RESPONSIBILITY A OWN THING AND THIS IS FIVE, MORE THAN FIVE YEARS AFTER THE ALLEGED OCCURRENCE WITH ALL THAT INTERVENED.

STATUTE HAS AN IMPOSSIBILITY BUILT IN IF THEIR THEORIES CORRECT.

WELL, ISN'T, I MEAN, AGAIN,

I THINK THAT, I WOULD ASSUME
THEY WOULD AGREE THAT THE
LIABILITY CAN NOT BE FOR
WHAT OCCURRED IN SUBSEQUENT
TO THE TIME THAT HE WAS IN
-- THAT THE MALPRACTICE
OCCURRED.

WELL, LET'S GO BACK TO WHAT
THEY STIPULATED.

YOU BELIEVE PERWIN SAID
SOMETHING ELSE THAT WAS NOT
CONSISTENT WITH THE RECORD.
THE STIPULATION OF THE CASE
OF THE SUMMARY JUDGMENT WAS
THE ONLY NEGLIGENCE WAS IN
DOCTOR'S OFFICE.

THAT EVERYTHING THAT
HAPPENED IN THE HOSPITAL HAD
NOTHING TO DO WITH HER
INJURY.

NOW, HE SAID THERE WAS
INTERACTION.

NO, NO, NO.

THE NEGLIGENCE WAS
COMPLETED.

ACCORDING TO THE STIPULATION
ON WHICH THIS CASE IS BASED
AT THE TIME OF THE INJURY IN
THE PRIVATE OFFICE.

BUT THAT, BUT THE ISSUE
IS, AT THAT POINT, IS
WHETHER HE, THE DOCTOR DID
OR DID NOT HAVE --
IT IS.

OF COURSE.

EYE MEAN, THAT IS WHAT --
ASSUMING WE WENT FURTHER,
SAID THERE IS SOME CAUSE OF
ACTION.

DO YOU KNOW, YOUR HONOR,
AS WE STAND HERE TODAY, WE
DON'T KNOW IF HE DID OR
DIDN'T.

WE HAVE NO IDEA BECAUSE THIS
ALL CAME UP WITH THEIR
SOLUTE FIVE YEARS LATER
PUTTING IN FRONT OF THEM A
JUDGMENT AGAINST DR. DREW
FROM A TRIAL WHICH HE DIDN'T
ATTEND.

WE DON'T KNOW IF HE HAD
CARRIED INSURANCE THEN,
WHETHER HE HAD ESCROW,
WHETHER IT LAPSED, WHETHER

HE CANCELED THE INSURANCE.
WE KNOW NOTHING ABOUT IT.
WE BEING THE HOSPITAL?
WE, THE HOSPITAL.
LET'S GO BACK TO WHAT THE
BECAUSE OF ACTION, IF IT
EXISTED WOULD BE, IS THAT
THE DOCTORS WHO ARE TO BE
GRANTED STAFF PRIVILEGES
MUST HAVE MORE INSURANCE OR
AN INDICATION THAT THEY ARE
GOING TO HAVE A LETTER OF A
CREDIT THAN THOSE THAT DON'T
HAVE STAFF.

ABSOLUTELY.
YOU WILL GET THAT OUT OF THE
WHEREAS CLAUSE BECAUSE THEY
WERE TRYING TO PROTECT THE
LOSS OF THE HIGH-RISK, MORE
EXPENSIVE PROCEDURES, THEY
LIST THESE DOCTORS.
FROM THE HOSPITAL'S POINT
OF VIEW, THEY WOULD PREFER
TO HAVE FINANCIALLY
RESPONSIBILITY PHYSICIANS ON
STAFF.

I DON'T KNOW IF THEY CARE.
WHAT DO THEY CARE?
WELL, THEY CARE IN CASE
THERE IS AN IN SHOE OF, YOU
KNOW, WHO THE DEEP POCKET IS
GOING TO BE.

DOWN THE? I
IF THEY ARE NOT LIABLE,
THEY DON'T CARE.
THIS CUTE CAME OUT --
THEY CARE IF UNDER THIS
THEORY THEY COULD BE SUED
FOR NOT HAVING A MEDICALLY
CONFIDENT DOCTOR.

OH, THAT IS CORPORAL
NEGLIGENCE.

THEY DON'T CLAIM THIS IS THE
CORPORATE NEGLIGENCE WRONG
CREDENTIAL IN THE CASE.
BUT DOES THE HOSPITAL,
BEFORE THEY GRANT STAFF WERE
PRIVILEGE, NEED TO CHECK TO
SEE IF SOMEBODY HAS GOT
INSURANCE OR NOT?

NO, THEY DON'T.

I DON'T SEE A STATUTORY
OBLIGATION.

YOU DON'T KNOW ANYTHING IN

THE RECORD THAT SUGGESTS
THAT.
THE DEPARTMENT OF HEALTH HAS
TO.
SO DOES THE BOARD OF
RENAISSANCE.
THE STAFF PRIVILEGES THAT
THEY HAVE TO -- NO, THE
CONDITION OF LICENSE, YOUR
HONOR.
A CONDITION.
THEY HAVE MIXED THE TWO BY
SAYING, OH, LOOK THERE IS
\$250,000 OF HIGHER DOLLAR
VOLUME FOR PEOPLE ASSOCIATED
WITH THE HOSPITAL.
THAT DOESN'T SAY THE
HOSPITAL HAS AN OBLIGATION,
IT NOWHERE SAYS THAT
ANYWHERE IN THE STATUTE.
WELL, LET ME ASK YOU A
QUESTION:
WAS THE ALLEGATION HERE THAT
THE PHYSICIAN AT THE TIME
THE INCIDENT OCCURRED DID
NOT HAVE THE SHURNANCE?
THERE IS NO ALLEGATION.
THE ALLEGATION IS THAT THEY
HAVE UNSATISFIED JUDGMENT.
COVERAGE?
PARDON ME.
SIMILAR TO AN ARGUMENT OF
COVERAGE, THE HOSPITAL IS
SUPPOSED TO PROVIDE SOME
SORT OF END COVERAGE.
IT HASN'T GOTTEN THAT
SOPHISTICATED YET.
THEY HAVEN'T TALKED ABOUT
WHAT KIND OF POLICY POLL
SPHI THE DOCTOR HAD A POLICY
THEN IT LONG EXPIRED EVEN IF
HE HAD THE COVERAGE.
THIS SUIT IS BASED ON AN
UNSATISFIED JUDGMENT
CREATING A DUTY OUT OF THE
STATUTE AND FORGET THE
COMMON LAW, BECAUSE THAT IS
NOT BRIEFED.
THAT WAS NOT ON THE TRIAL
COURT.
I WAS NOT IN THE DISTRICT
COURT.
IT DOESN'T COME HERE UNTIL
THE ARGUMENT TODAY.

THERE IS NO COMMON LAW CAUSE
OF ACTION DEEMED STAND
AGAINSTS THAT QAIR RY.
IT HAS NEVER BEEN CHALLENGEDED
BY THE HOROWITZS AND THE
ALLEGED DUTY ARISES OUT OF
THIS STATUTE SOLELY.

MR. ENGLAND, LET ME GET
BACK TO THE PART I WAS AT
LEAST FOCUSING ON.

IT SAYS PHYSICIANS WHO
PERFORM SURGERY AND IN AN
AMBULATORY SURGICAL CENTER
AND AS A CONTINUING
CONDITION OF HOSPITAL STAFF
PRIVILEGES.

THAT IS WHAT THEY ARE
RELYING ON.

WHAT SECTION ARE YOU
READING?

4583202.

THAT IS NOT MIXING.

THAT HAS NOTHING TO DO WITH
LICENSING.

YOU GOT THE SAME LINE --

A CONTINUING KCHB
HOSPITAL STAFF PRIVILEGES
MUST ALSO ESTABLISH
FINANCIAL RESPONSIBILITY.

AND ALL THEY ARE SAYING, AND
I MAY NOT AGREE WITH IT.

OKAY.

AS FAR AS THE ULTIMATE
CONCLUSION, BUT IT IS SAYING
THAT IT IS BY, THAT THEY
HAVE TO ESTABLISH FINANCIAL
RESPONSIBILITY AS A
CONTINUING CONDITION OF
STAFF PRIVILEGES, THAT
IMPLIES THAT IT IS THE
HOSPITAL THAT THEY HAVE TO
ESTABLISH FINANCIAL
RESPONSIBILITY TO.

EXCEPT, YOUR HONOR, THE
STATUTE SAYS THEY HAVE TO
DEMONSTRATE IT TO THE
DEPARTMENT OF HEALTH AND TO
THE BOARD OF MEDICINE, BUT
LOOK AT SUBSECTION 1 WHICH
HAS EXACTLY THE PARALLEL
THAT YOU JUST READ.

A CONDITIONS OF LICENSING
PRIOR TO AS 100,000 FOR
PEOPLE WHO ARE NOT STAFF

PHYSICIANS.

THOSE ARE TWO ON THE SAME
POD WHICH IS THE LEGISLATURE
WANTED FINANCIAL
RESPONSIBILITY.

WELL, I THINK THE BEST
HOOK, BUY DON'T KNOW THAT
YOU GET THERE.

I AM CONCERNED THAT YOU
DON'T EVEN RECOGNIZE THE
HOSPITALS WOULD HAVE WHETHER
THEY HAVE A CAUSE OF ACTION
THAT THERE WOULD BE IF THIS
IS CONTINUING A CONDITION OF
HOSPITALS.

HE KAY.

STAFF PRIVILEGES THAT
THE HOSPITAL WOULD AT LEAST
HAVE SOME DUTY TO INQUIRE IF
IT IS PHYSICIANS DO OR DON'T
NOT COMPLY WITH THIS
STATUTE.

THEY HAVE THE INFORMATION
BECAUSE IT CAME FROM THE
DEPARTMENT OF HEALTH.

YOUR HONOR, LET ME BUT 3E
QUESTION A DIFFERENT WAY.

TO ME, THEY ARE
RESPONSIBILITY IN THE PART
OF HOSPITALS IF THEY ARE NOT
DOING DENYING TO ENSURE THAT
THOSE ARE STAFF PRIVILEGES
CONTINUE TO COMPLY WITH THIS
SUBSECTION.

YOUR HONOR, AS JUSTICE OF
THIS COURT, I THINK YOU ARE
OBLIGATED BY MERCY TO ASK A
QUESTION, AS THE STATUTE
WHICH IS LEGISLATIVE
STATUTE, WE DON'T HAVE A
DOUBT ABOUT THAT, WE HAVEN'T
CONTESTED THAT.

DOES IT EXPRESS THE
PRIVATE BECAUSE OF ACTION.
THE ANSWER IS NO.

I WAS RESPONDING TO YOU
SAYING THE HOSPITAL IS NO
WHERE INVOLVED IN THIS
SCHEME.

I THINK THAT THAT IS AN
OVERSTATEMENT OF WHAT
EXISTS.

IF I HAVE OVERSTATED OR
MISSTATED PLEASE DON'T HOLD

IT AGAINST MY CLIENT, I AM
SORRY.

YOU HAVE TO FIND AN INTENT
OF THE LEGISLATURE.

I UNDERSTAND WHAT MURPHY
SAYS.

AI DEGREE WITH YOU.

I THINK THAT IS WHY THEY
HAVE A TOUGH ROAD.

BUY ALSO THINK THIS
LANGUAGE.

I MAY HAVE OVERSTATED IT.

I JOIN JUSTICE QUINCE IN
SAYING SOMETHING IN THE HEAT
OF THE ARGUE.

WE ACCEPT YOUR
OVERSTATEMENT.

LET'S FINISH.

LET ME JUST MAKE THIS
POINT ABOUT THE STATUTE AS A
WHOLE.

I CAN NOT FIND AND I DOUBT
YOU WILL BE ABLE TO FIND AND
THEY HAVEN'T SUGGEST ANYWAY
TO FIND A DIFFERENCE BETWEEN
A STAFF PHYSICIAN WHO HAS
\$250,000 IN INSURANCE,
\$250,000 IN AN ESCROW, \$2
50U THOUSAND IN A LETTER OF
CREDIT ORS AGREED TO PAY
\$250,000.

AND BE LIABLE IF HE IS NOT
TO LOSE HIS LPS.

YET, THAT LAST, ON A PARITY,
IS EXACTLY WHAT THE THIRD
DISTRICT RECENTLY SAID COULD
NOT POSSIBLY BE CREATE A
CAUSE OF ACTION.

IF THERE IS NO DISTWOINTION
BETWEEN THEM, HOW CAN THE
OTHERS?

LET ME ASK YOU THIS:

THE COME PLANT ANT ON THE
CASE WAS BASED ON NEGLIGENCE
AND STRICT LIABILITY,
CORRECT?

I DIDN'T SEE THAT ON THE
COMPLAINT, YOUR HONOR.

I IN HAVEN'T SOON THE
COMPLAINT.

IT SEEMS FROM THE PETITION
NER'S BRIEF THAT THEY SAY IT
WAS BASED ON NEGLIGENCE AND
STRICT LIABILITY.

IT WASN'T BASED ON THE
STATUTE.

WELL, IT WAS BASED ON --
THERE WAS TWO-FOUND
COMPLAINT.

IT WAS -- FIRST STATUTORY
BECAUSE OF ACTION.

THE SECOND WAS NEGLIGENCE.

I DON'T REMEMBER SEEING, I
COULD BE WRONG, YOU DON'T
REMEMBER.

I BELIEVE IT IS ON 153 OF
THE RECORD.

DON'T REMEMBER SEEING THAT.

AS FAR AS THE NEGLIGENCE
ASPECT, HOW DOES THIS PLAY
INTO IT?

YOU KNOW MURPHY TALKS ABOUT
A CIVIL BECAUSE OF ACTION ON
THE STATUTE.

RIGHT.

THEY ARE ALLEGE
NEGLIGENCE.

WERE YOU NEGLIGENT IN NOT
KEEPING TRACK OF YOUR
LAWYERS.

THEN, THEY WOULD HAVE TO
PROVE A DUTY AND DUTY AND
ALL OF THAT, BUT WHY ISN'T
THE FACT THAT THEY DIDN'T
COMPLY WITH THE STATUTE
SOMETHING THAT IS ADMISSIBLE
AS EVIDENCE, DOESN'T
NECESSARILY GET THERE YOU,
IT DOESN'T PROFZ NEGLIGENCE
IT MAY NOT PROVE A DUTY.
YOUR HONOR, THAT IS A
VERY DIFFERENT CASE THAN
THIS CASE.

THIS WAS PREVENTED BY BOTH
PARTIES ON SUMMARY JUDGMENT
ON THE BASIS OF THE
STATUTORY THROUGHOUT THE
BRIEF, THE ACADEMY BRIEF,
MR. PERWIN'S BRIEF IS
REFERRED TO AS A STATUTORY
BECAUSE OF ACTION.

I HAVE TO SAY THIS NOTION OF
A COMMON LAW BECAUSE OF
ACTION ARISING OUT OF THE
DUTY FROM A STATUTE WHICH
DOESN'T HAVE A STATUTORY
DUTY IS A CURVE BALL THAT
CAME AT ORAL ARGUMENT TODAY.

NOT IN THE RECORD.

I WASN'T IN THE TRIAL COURT.

THE DISTRICT COURT DIDN'T

HAVE.

I LOOK AT WHAT HE SAID AT

THE END OF HIS OPINION TO BE

PERFECTLY CLEAR, THE

LEGISLATURE HAS NO, HAS

IMPLIED NO DAMAGE REMEDY,

WHETHER IT BE BASED ON

STRICT LIABILITY, NEGLIGENCE,

CONTRACT, CONTRIBUTION,

CRIMINAL PUNISHMENT OR ANY

OTHER LEGAL THEORY.

THE CREATIVE MINDS OF

LAWYERS CAN DIVIDE.

HE WASN'T IN ANY DOUBT ABOUT

WHAT THE CASE WAS AT THAT

LEVEL.

YOUR HONOR, I HAVE TO SAY

THAT THIS WAS AS IS POINTED

OUT A NEGLIGENT ACT IN A

PRIVATE OFFICE.

IT IS POSSIBLE FOR YOU TO

DECIDED THAT CASE ON THAT

BASIS BECAUSE QUITE CLEARLY

EVERONE OF THE ARGUMENTS

MADE HERE ARE GEARED TO THE

IN HOSPITAL, THE DISTRICT,

THE TRIAL JUDGE REFERRED TO,

WELL, WHEN THEY GO INTO

SURGERY, THEY CAN SAY

WHETHER THEY HAVE IT.

WELL, LET ME ASK YOU

SOMETHING ON THAT ISSUE

BECAUSE, I THINK, IF THERE

IS AN EXPRESSED DIRECT

CONFLICT, THEN, IT IS ONE OF

OUR OBLIGATION AS THE COURT

TO RESOLVE THE CONFLICT, ARE

YOU ARGUING THAT THERE IS NO

EXPRESSED AND DIRECT?

NO, ON THE CONCONTRARY.

I AM ASKING WHILE WE COULD

WIN IT.

THE OTHER CASES WERE IN THE

HOSPITAL.

THE JUDGE FARMER AND HIS

DESTHINTION CASE DID NOT

MAKE THAT DISTUPTION BETWEEN

PRIV VAUP AND I WOULD HOPE

YOU WOULD RECK YOU SIL THE

CONFLICT ON THE BASIS THAT

NO CAUSE OF ACTION EXISTS

ANY PLACE UPPER THIS STATUTE.
NONE IS EXPRESSED.
NONE IS IMPLIED.
WITHOUT ASSISTANCE, YOU
HAVE USED UP YOUR TIME.
THANK YOU.
THANK YOU, YOUR HONOR.
> WE HAVE A COUPLE MINUTE,
SIR.
THANK YOU, YOUR HONOR.
MAY IT PLEASE THE COURT,
FIRST, OBVIOUSLY, THE
STATUTE DOES MAKE AN
EXPLICIT DEMAND ON
HOSPITALS.
WE THINK ON HOSPITALS BY
ESTABLISHING A CONTINUING
CONDITION OF HOSPITAL STAFF
INDEPENDENT OF ANY
CONDITIONS OF LICENSE.
YOU KNOW, CAN YOU TELL ME
BECAUSE I THOUGHT THAT
MR. ENGLAND RAISED AN
INTERESTING POINT.
THIS BECAUSE OF ACTION
DOESN'T APPROVE UNTIL 2000.
RIGHT.
SO WHEN IS IT THAT THEIR
-- WHEN DID THE BRECH OCCUR?
ASUMING KUNLDER YOUR THEORY.
IT OCCURRED IN THE FAILURE
TO ENSURE FINANCIAL
RESPONSIBILITY AS BY THE
JUDGMENT AT A TIME WHEN THE
DOCTOR WAS ON STAFF.
NONE OF THIS -- SO IN 1996?
RIGHT.
AT THE TIME.
WHILE HE WAS ON STAFF.
IF SOMETHING HAPPENS WHERE
HE GETS OFF STAFF, THE
HOSPITAL'S DUTY ENDS.
LET'S TAKE THE SITUATION
WHERE IT IS A CLAIMS-MADE
POLICY WHICH MOST OF THEM
ARE IN PROFESSIONAL
LIABILITY NOW.
THAT DOES NOT KICK IN TO
PROVIDE ANY COVERAGE UNTIL
THE CLAIM IS MADE.
THE POLICY MAY VIN SPIRED.
ACROSS THE HOOK.
THAT IS THE ANSWER.
IT IS CONFINED BY THE

TERMS OF THE STAFF BY THE
STAFF PRIVILEGES.
IF THE PLAINTIFF DOESN'T GET
RECOVERY.
THE HOSPITAL IS OFF THE
HOOK.
IT IS AS SIMPLE AS THAT.
IN SOME CASES, THE HOSPITAL
WILL OB IN THE HOOK.
THE DECISIONS FOUND NO
COMMON LAW CAUSE OF ACTION
WHEN THERE WAS NO STATUTE.
ONCE THERE WAS STATUTE.
IT IS ACCEPTED PRINCIPAL,
THAT A COMMON LAW CAN BE
PRED CATED ON A STATUTORY
OBLIGATION.
MY CONCERN WITH THAT
ARGUMENT THAT IS EVEN IN
YOUR AMICUS BRIEF.
WE HAVEN'T REALLY LITIGATED
THE CASE AT LEAST IN THE
CASE UNDER.
I WENT BACK AND LOOKED AT
THE BRIEF.
IT IS COMPLETE WITH
ASSERTION THERE IS A
STATUTORY DUTY WHICH IS THE
PREDICATE FOR THE CLAIM.
THE THREE DISTRICT COURTS
AND THE COUNSEL IS QUITE
RIGHT THAT THE DISTRICT
COURT DECISION IN THE CASE
ABOUT A STATUTORY CAUSE OF
ACTION BUT CONFLICTS WITH
THREE DECISION WHICH TALK
ONLY ABOUT DUTY.
YOU KNOW, MR. PERWIN, IT
JUST, IT STRIKES, AT LEAST,
ME, THAT AS, AGAIN, AS THE
EXCELLENT LAWYER THAT YOU
ARE, THAT YOU ARE GOING TO
PICK YOUR BEST BATTLE HERE.
AND IT SEEMS THAT IF YOU --
YOU SAY YOU ARE NOT
ABANDONING THE IDEA THAT
THIS IS TOTALLY A STATUTORY
CAUSE OF ACTION, BUT BY NOT
REALLY SAYING THAT MERCY
CONTROL, IT SEEMS THAT YOU
ARE IMPLYING OR AT LEAST
CONCEDING WITH THAT SAYING
THAT MERCY WOULDN'T GET
WHERE YOU YOU WANT TO GO.

LET ME SAY YOU WHY.
YOU DECIDED THAT WAS NOT
YOUR BEST ARGUMENT, THOUGH.
THAT IS NOT THE BEST
ARGUMENT, MURPHY APPLIED.
JUSTICE ENGLAND CONTINUES TO
SAY THERE IS COMPREHENSIVE
REGULATORY SCHEME WHICH
SOMEHOW PUSHES OUT THIS
CLAIM.

NO.

THERE IS NOTHING IN THIS
STATUTE WHICH PROVIDES ANY
MECHANISM FOR ENFORCING THIS
PARTICULAR PROVISION.

THAT IS THE ASSURANCE OF
HOSPITAL STAFF PRIVILEGES
WHERE I DIFFERENT FROM THE
REQUIREMENTS OF LICENSE.
NOTHING TO DO WITH THE
HIGHER NUMBERS DEALING WITH
STAFF PRIVILEGE, NOTHING,
THE ONLY LANGUAGE IN THE
STATUTE WHICH ENFORCES THIS
PROVISION IS CONTINUING
CONTINUE OF HOSPITAL STAFF
PRIVILEGE, THERE IS WHOLE
ARGUMENT ABOUT THIS
COMPREHENSIVE REGULATION IS
A RED HERRING, NONE OF IT
DISCUSSIONS FINANCIAL
RESPONSEABILITY AND THE ONLY
WAY TO ENFORCE IT IS TO
RECOGNIZE AN OBLIGATION BY
HOSPITALS SO IF WE ARE GOING
TO THE QUESTION WHETHER
THERE IS A STATUTORY CLAIM,
WE HAVE TO LOOK FOR
LEGISLATIVE INTENT.
LEGISLATIVE INTENT
ESTABLISHED A DUTY AND IT
ESTABLISHED NO OTHER
MECHANISM OF ENFORCEMENT.
HOW CAN THIS STATUTE HAVE
ANY MEANS UNLESS IT CREATE
AS BECAUSE OF ACTION AT THE
INSTANCE OF PATIENT, FOR THE
ONES WHO ARE HURT BY ITS
VIOLATION.

THERE IS NO OTHER WAY TO DO
IT.

THE STATE CAN'T DO IT.

IT CAN NOT POSSIBLY POLICE
THE RENEWAL AN INSURANCE OF

HOSPITAL STAFF FOR EVERY
STAFF.
THE PATIENT CAN'T DO IT.
IN A STATUTE WHICH SAYS
PATIENTS CAN'T MAKE INFORMED
DECISIONS.
THAT IS A PREAMBLE.
ONLY THE DOCTORS CAN DO IT
AND FOR THAT REASON, WE
RESPECTFULLY SUBMIT THAT THE
ORDER THAT THE DISTRICT
COURT SHOULD BE REVERSED.
THANK YOU VERY MUCH THE
ARGUMENTS.
THE COURT WILL TAKE ITS
MORNING RECESS.
PLEASE RISE.