THE PHYSICIAN'S RIGHT TO HOSPITAL STAFF MEMBERSHIP: THE PUBLIC - PRIVATE DICHOTOMY

> The rule is well established that a private hospital has a right to exclude any physician from practising therein. The action of hospital authorities in refusing to appoint a physician or surgeon to its medical staff, or declining to renew an appointment that has expired, or excluding any physician or surgeon from practising in the hospital, is not subject to judicial review. The decision of the hospital authorities in such matters is final.[1]

With the rapid advances that have been made in diagnostic techniques requiring the use of extensive (and expensive) machinery, access to hospital facilities is a practical necessity for a physician and his patients. However, the right of a physician to become a staff member of a hospital and, consequently, to use its facilities, depends to a great extent on whether the hospital is characterized as public or private. If the hospital is public, a licensed physician has the right to use its facilities for the treatment of his patients so long as he abides by the rules and regulations of the hospital. On the other hand, the board of directors of a private hospital has almost unlimited discretion in deciding whether a physician should have staff membership. This note examines in detail the right of a physician to staff membership in light of the traditional distinction made between public and private hospitals.

Traditionally, corporations were classified as either public or private. The distinction was first made by Mr. Justice Story in 1819:

> [P]ublic corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses to which it is devoted, either by the bounty of the founder or the nature and objects of the institution.[2]

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1. Shulman v. Washington Hosp. Center, 222 F. Supp. 59, 63 (D.D.C. 1963). Generally speaking, there are two types of hospitals: public and private. The private hospitals may be further subdivided into charitable (non-profit) and proprietary (profit-making) hospitals. The latter are beyond the scope of this note for two reasons. First, they represent a small percentage of the private hospitals. Second, and more important, the thesis of the note is that since public hospitals and private charitable hospitals are practically indistinguishable, they should be treated the same. Proprietary hospitals, on the other hand, are set up for a different purpose and provide a different function. It thus does no violence to the law to treat them as a separate entity.

2. Trustees of Darmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 668-69 (1819).

Because they took the corporate form, hospitals were similarly divided. A public hospital is defined as a hospital founded and operated by the government, supported by public funds, and run by government appointees for the good of the state.[3] Not surprisingly, a private hospital is generally defined as an institution which, although established by the permission of the legislature, is not supported by government funds, run by government officers, or subject to the control of the government.[4] Some courts have adopted a broader definition of a private hospital, holding that the sole test is whether the corporation has the power to elect its own officers;[5] if it does, the hospital is said to be private. Even a hospital which exists solely to serve the community as a public charity will not be classified as public unless it meets the above tests.[6]

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3. Shulman v. Washington Hosp. Center, 222 F. Supp. 59, 61 (D.D.C. 1963); Edson v. Griffin Hosp., 21 Conn. Supp. 55, 58, 144 A.2d 341, 343 (1958); Van Campen v. Olean Gen. Hosp., 210 App. Div. 204, 205 N.Y. Supp. 554 (1924), *aff'd per curiam,* 239 N.Y. 615, 147 N.E. 219 (1925); Khoury v. Community Memorial Hosp., Inc., 203 Va. 236, 123 S.E.2d 533 (1962); State *ex rel.* Sams v. Ohio Valley Gen. Hosp. Ass'n, 149 W. Va. 229, 140 S.E.2d 457 (1965); see BALLANTINE, CORPORATIONS § 7 (rev. ed. 1946); FLETCHER, PRIVATE CORPORATIONS § 58, at 279 (perm. ed. rev. repl. 1963).

4. *E.g.,* Edson v. Griffin Hosp., *supra* note 3; Levin v. Sinai Hosp., 186 Md. 174, 178, 46 A.2d 298, 300 (1946); Khoury v. Community Memorial Hosp., *supra* note 3, at 244, 123 S.E.2d at 538; State *ex rel.* Sams v. Ohio Valley Gen. Hosp. Ass'n, *supra* note 3.

5. *E.g.,* Shulman v. Washington Hosp. Center, 222 F. Supp. 59, 61 (D.D.C. 1963); Edson v. Griffin Hosp., *supra* note 3.

6. *E.g.,* Shulman v. Washington Hosp., Center, *supra* note 5; Edson v. Griffin Hosp., *supra* note 3; West Coast Hosp. Ass'n v. Hoare, 64 So. 2d 293 (Fla. 1953); Van Campen v. Olean Gen. Hosp., 210 App. Div. 204, 205 N.Y. Supp. 554 (1924), *aff'd per curiam,* 239 N.Y. 615, 147 N.E. 219 (1925).

Courts have refused to characterize a hospital as public, even if the legislature allows the hospital tax exemption as a charity, Levin v. Sinai Hosp., 186 Md. 174, 46 A.2d 298 (1946); Van Campen v. Olean Gen. Hosp., *supra;* State *ex rel.* Sams v. Ohio Valley Gen. Hosp. Ass'n, 149 W. Va. 229, 140 S.E.2d 457 (1965), or charitable immunity from tort actions, Van Campen v. Olean Gen. Hosp., *supra;* State *ex rel.* Sams v. Ohio Valley Gen. Hosp. Ass'n, *supra.* The fact that the hospital has received government funds for the care of indigents, Shulman v. Washington Hosp. Center, *supra;* Edson v. Griffin Hosp., *supra;* West Coast Hosp. Ass'n v. Hoare, *supra;* Van Campen v. Olean Gen. Hosp., *supra;* or for construction purposes, Shulman v. Washington Hosp. Center, *supra;* Stanturf v. Sipes, 224 F. Supp. 883, 891 (W.D. Mo. 1963), *aff'd,* 335 F.2d 224 (8th Cir. 1964), *cert. denied,* 379 U.S. 977 (1965); Akopiantz v. Board of County Comm'rs, 65 N.M. 125, 333 P.2d 611 (1959); Khoury v. Community Memorial Hosp., Inc., 203 Va. 236, 123 S.E.2d 533 (1962); State *ex rel.* Sams v. Ohio Valley Gen. Hosp. Ass'n, *supra,* does not transform a private hospital into a public one.

Often the receipt of funds under the Hill-Burton Act, 42 U.S.C. § 291 (1964), has provided the basis for plaintiff's argument. *E.g.,* Khoury v. Community Memorial Hosp., *supra.* The Hill-Burton Act provides federal funds for hospital construction which are administered through the state government. If a public hospital is defined as one supported by public funds and controlled by the government, it has been argued that the

I. Legal Consequences of Characterization as Public or Private

A. *Public Hospitals*

In *Hayman v. City of Galveston*,[7] the Supreme Court held that "it is not incumbent on the state to maintain a hospital for the private practice of medicine."[8] This decision became the basis for subsequent state holdings that a physician has no constitutional right to practice in a public hospital.[9] However, the right to practice one's profession has been recognized as a species of property which may not be taken away without due process of law.[10] Out of these two lines of cases has grown the idea that a licensed physician or surgeon has the right to use the facilities of a public hospital for the treatment of his patients so long as he abides by its rules and regu-

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receipt of funds under the Hill-Burton program and the attendant controls are sufficient to characterize the hospital as public. In rejecting this argument, the courts have relied on § 291(m) of the Hill-Burton Act, which reads:

> *Except as otherwise specifically provided,* nothing in this subchapter shall be construed as conferring on any Federal officer or employee the right to exercise any supervision or control over the administration, personnel, maintenance, or operation of any facility with respect to which any funds have been or may be expended under this subchapter. (Emphasis added.)

The courts read this section as divesting the federal government of any control or supervision it might have had as a result of the grant of government funds to the hospital. Under this interpretation of § 291(m), the relationship between the government and the hospital is held to be insufficient to support a finding that the hospital is a public facility. Control, say the courts, rests with the hospital, not the government. The courts reach this result despite the fact that the exceptions to the general rule of § 291(m)—that a Federal officer shall have no control over the hospital's action—are extensive and detailed. See 42 C.F.R. §§ 53.11-.165 (Supp. 1966). Furthermore, § 291(m) is titled "State control of operations," indicating that while the act prohibits certain federal supervision, it does so in order to reserve such control to the state, not to the hospital.

7. 273 U.S. 414 (1927).

8. *Id.* at 417.

9. Findlay v. Board of Supervisors, 72 Ariz. 58, 230 P.2d 526 (1951); Newton v. Commissioners, 86 Colo. 446, 282 Pac. 1068 (1929); West Coast Hosp. Ass'n v. Hoare, 64 So. 2d 293 (Fla. 1953); Bryant v. City of Lakeland, 158 Fla. 151, 28 So. 2d 106 (1946); State *ex rel.* Sams v. Ohio Valley Gen. Hosp. Ass'n, 149 W. Va. 229, 140 S.E.2d 457 (1965); see Dayan v. Wood River Township Hosp., 18 Ill. App. 2d 263, 152 N.E.2d 205 (1958); *cf.* Duson v. Poage, 318 S.W.2d 89 (Tex. Civ. App. 1958).

10. Dent v. West Virginia, 129 U.S. 114 (1889); *accord,* People v. Love, 298 Ill. 304, 131 N.E. 809 (1921). *But see* Alpert v. Board of Governors of City Hosp., 286 App. Div. 542, 142 N.Y.S.2d 534 (1955) (valuable privilege); Wallington v. Zinn, 146 W. Va. 147, 118 S.E.2d 526 (1961) (valuable right); *In re* Adkins, 83 W. Va. 673, 98 S.E. 888 (1919); Application for License to Practice Law, 67 W. Va. 213, 67 S.E. 597 (1910).

> The right to follow either one of these professions [medicine and law] is one of the fundamental rights of citizenship. A person's business, profession, or occupation is at the same time "property," within the meaning of the constitutional provision as to due process of law, and is also included in the right to liberty and the pursuit of happiness. People v. Love, *supra* at 310-11, 131 N.E. at 811.

lations.[11] Further, the courts have required that such rules be not "unreasonable."[12]

Generally, the rules and regulations of a hospital are not unreasonable if they bear "some reasonable relation" to the operation of the hospital and the welfare of the patients.[13] Thus, in *Rosner v. Eden Township Hosp. Dist.*,[14] the hospital's board of directors excluded the plaintiff on the ground that he was neither "temperamentally suitable for hospital staff practice," nor worthy in professional ethics or character. It was stipulated that "moral character" and competence with respect to "education, skill and experience"[15] were not in issue. The court found the grounds unreasonable, holding that in the operation of a hospital, it is likely that some disagreements over methods of treatment will arise. Since the prime concern of a hospital is the welfare of its patients, the court said that a physician should not be

11. Findlay v. Board of Supervisors, 72 Ariz. 58, 230 P.2d 526 (1951); Ware v. Benedikt, 225 Ark. 185, 280 S.W.2d 234 (1955); Hamilton County Hosp. v. Andrews, 227 Ind. 228, 84 N.E.2d 469 (1949); Henderson v. City of Knoxville, 157 Tenn. 477, 9 S.W.2d 697 (1928); State *ex rel.* Bronaugh v. City of Parkersburg, 148 W. Va. 568, 136 S.E.2d 783 (1964).

12. Findlay v. Board of Supervisors, *supra* note 11; Ware v. Benedikt, *supra* note 11; Martino v. Concord Community Hosp. Dist., 233 Cal. App. 2d 51, 43 Cal. Rptr. 255 (1965); Rosner v. Peninsula Hosp. Dist., 224 Cal. App. 2d 115, 36 Cal. Rptr. 332 (1964); Wyatt v. Tahoe Forest Hosp. Dist., 174 Cal. App. 2d 709, 345 P.2d 93 (1959); Bryant v. City of Lakeland, 158 Fla. 151, 28 So. 2d 106 (1946); Green v. City of St. Petersburg, 154 Fla. 339, 17 So. 2d 517 (1944); Hamilton County Hosp. v. Andrews, *supra* note 11; Jacobs v. Martin, 20 N.J. Super. 531, 90 A.2d 151 (1952); Henderson v. City of Knoxville, *supra* note 11; Group Health Co-op. v. King County Medical Soc'y., 39 Wash. 2d 586, 237 P.2d 737 (1951); State *ex rel.* Bronaugh v. City of Parkersburg, *supra* note 11; Johnson v. City of Ripon, 259 Wis. 84, 47 N.W.2d 328 (1951); Memorial Hosp. v. Pratt, 72 Wyo. 120, 262 P.2d 682 (1953); Shulman v. Washington Hosp. Center, 222 F. Supp. 59 (D.D.C. 1963) (dictum); West Coast Hosp. Ass'n v. Hoare, 64 So. 2d 293 (Fla. 1953) (dictum); Berberian v. Lancaster Osteopathic Hosp. Ass'n, 395 Pa. 257, 149 A.2d 456 (1959) (dictum); State *ex rel.* Sams v. Ohio Valley Gen. Hosp. Ass'n, 149 W. Va. 229, 140 S.E.2d 457 (1965) (dictum); see Rosner v. Eden Township Hosp. Dist., 58 Cal. 2d 592, 375 P.2d 431, 25 Cal. Rptr. 551 (1962); Mizell v. North Broward Hosp. Dist., 175 So. 2d 583 (Fla. Ct. App. 1965); Giles v. Breaux, 160 So. 2d 608 (La. Ct. App. 1964); Tuchman v. Trussell, 43 Misc. 2d 255, 250 N.Y.S.2d 913 (Sup. Ct. 1964); Khoury v. Community Memorial Hosp., 203 Va. 236, 123 S.E.2d 533 (1962) (dictum).

13. Ware v. Benedikt, *supra* note 12; Rosner v. Peninsula Hosp. Dist., *supra* note 12; Hershey, *Legal Dangers in Obsolete Hospital Documents*, Hospitals, Aug. 1, 1964, p. 47; see Findlay v. Board of Supervisors, *supra* note 11; Wyatt v. Tahoe Forest Hosp. Dist., *supra* note 12; Bryant v. City of Lakeland, *supra* note 12; Green v. City of St. Petersburg, *supra* note 12; Giles v. Breaux, *supra* note 12; Alpert v. Board of Governors of City Hosp., 286 App. Div. 542, 142 N.Y.S.2d 534 (1955); Note, 17 STAN. L. REV. 900, 909 (1965); *cf.* Group Health Ins. v. Howell, 40 N.J. 436, 193 A.2d 103 (1963). *But see* Wallington v. Zinn, 146 W. Va. 147, 118 S.E.2d 526 (1961).

14. 58 Cal. 2d 592, 375 P.2d 431 (1962).

15. *Id.* at 594, 375 P.2d at 432.

stifled by a fear that he will be considered "temperamentally unsuitable."[16]

Temporary revocation of a physician's license at some earlier period has been held an unreasonable justification for rejection.[17] It was reasoned that if the state licensing board considered the physician competent and worthy of a license at the time of his application to the hospital, prior misconduct should not, of itself, cause his rejection.[18]

Courts are apparently willing to allow more stringent rules when the controversy involves the admission of surgeons and their regulation once

16. In asserting their views as to proper treatment and hospital practices, many physicians will become involved in a certain amount of dispute and friction, and a determination that such common occurrences have more than their usual significance and show temperamental unsuitability for hospital practice of one of the doctors is of necessity highly conjectural. In these circumstances there is a danger that the requirement of temperamental suitability will be applied as a subterfuge where considerations having no relevance to fitness are present. *Id.* at 598, 375 P.2d at 435.

17. Wyatt v. Tahoe Forest Hosp. Dist., 174 Cal. App. 2d 709, 714-15, 345 P.2d 93, 96-97 (1959). The plaintiff had been guilty of misconduct in the past for which he had been disciplined by the State Board of Medical Examiners. At the time of his application for staff membership, however, the State Board had reinstated him.

18. It has also been held unreasonable for the board of directors to delegate its authority to decide the question of staff membership to a private body, on the theory that the power to make hospital decisions is a power of the board alone which cannot be delegated. Apparently a private body is any group or organization other than the board itself. *E.g.*, Rosner v. Peninsula Hosp. Dist., 224 Cal. App. 2d 115, 122, 36 Cal. Rptr. 332, 336-37 (1964); *cf.* Group Health Ins. v. Howell, 40 N.J. 436, 444, 193 A.2d 103, 107-08 (1963).

Thus it has been held unreasonable to require membership on the active staff of the hospital—which staff had complete power to determine its own membership—before a physician might practice in the hospital, on the ground that this gave to the staff—a private group—a veto power over who might use the hospital. Hamilton County Hosp. v. Andrews, 227 Ind. 217, 226, 84 N.E.2d 469, 472, *cert. denied,* 338 U.S. 831 (1949); see Henderson v. City of Knoxville, 157 Tenn. 477, 9 S.W.2d 697 (1928) (dictum) (unreasonable to grant manager of hospital discretionary power to dismiss).

In a case in which a physician was denied reappointment to the staff of a public hospital until such time as he should be reappointed to the staff of a nearby private hospital, the court held such a rule unreasonable as being completely beyond the control of either the hospital, the physician or the courts. State *ex rel.* Bronaugh v. City of Parkersburg, 148 W. Va. 649, 136 S.E.2d 783 (1964).

A California hospital justified a by-law requiring all physicians applying for staff appointment to either have malpractice insurance or sufficient funds to cover any such claims themselves on the recent decisions holding charitable hospitals liable for the negligent torts of their servants. The court held that this amounted to a delegation of the power to appoint staff members to the insurance companies; refusal to insure amounted to refusal of staff privileges. This by-law was held unreasonable. Rosner v. Peninsula Hosp. Dist., *supra.*

Finally, while it has been held reasonable to require that all staff doctors conform to the code of ethics of the local professional societies, People *ex rel.* Replogle v. Julia F. Burnham Hosp., 71 Ill. App. 246 (1897), it is unreasonable to require membership in local medical societies, Hamilton County Hosp. v. Andrews, *supra,* or to require approval by them, Ware v. Benedikt, 225 Ark. 185, 188-89, 280 S.W.2d 234, 236 (1955).

they have become members.[19] These rules usually require, after initial admission to the medical staff, a period of probationary surgical staff membership during which time the surgeon is observed by senior staff members. Only following approval of the surgeon's work during this probationary period may a surgeon obtain senior surgical staff membership. These rules have been justified as necessary to protect the public from unskilled surgeons, and the hospital from negligence suits in those jurisdictions where charitable immunity has been abolished.[20]

Sometimes hospitals adopt by-laws which exclude certain groups en masse. The validity of these by-laws seems to depend on whether the group excluded is composed of medical doctors. Thus, rules excluding osteopaths or chiropractors have been held not unreasonable.[21] These holdings are justified on the basis that different schools of healing have different methods of operation. Therefore, say the courts, it is not unreasonable for the board of directors to want one harmonious system of medicine practiced in the

19. Green v. City of St. Petersburg, 154 Fla. 339, 17 So. 2d 517 (1944); Selden v. City of Sterling, 316 Ill. App. 455, 45 N.E.2d 329 (1942); Hamilton County Hosp. v. Andrews, *supra* note 18.

"It is clear that these rules close the door against possible dope fiends, liquor heads, and practitioners not qualified to perform major surgical operations." Green v. City of St. Petersburg, *supra,* at 346, 17 So. 2d at 520 (Chapman, J., concurring).

20. "When the City furnishes the facilities and takes the risk against their negligent use, it is not too much to require that he who wields the knife does so in the philosophy of the twentieth rather than in that of the eighteenth century." Green v. City of St. Petersburg, *supra* note 19, at 344, 17 So. 2d at 519.

For a discussion of the demise of the charitable immunity doctrine see Horty, *Status of the Doctrine of Charitable Immunity in Hospital Cases,* 25 OHIO ST. L.J. 343 (1964).

21. *E.g.,* Hayman v. City of Galveston, 273 U.S. 414 (1927); Newton v. Board of County Comm'rs, 86 Colo. 446, 282 Pac. 1068 (1929); Richardson v. City of Miami, 144 Fla. 294, 198 So. 51 (1940); Duson v. Poage, 318 S.W.2d 89 (Tex. Civ. App. 1958). *Contra,* Stribling v. Jolley, 241 Mo. App. 1123, 253 S.W.2d 519 (1953) (interpretation of state statute). The conflict between the AMA and the osteopaths is an old one, a full discussion of which is beyond the scope of this note. It should be pointed out, however, that in this struggle, the AMA, by one means or another, has managed to keep osteopaths off the staffs of most hospitals. Thus, in Wallington v. Zinn, 146 W. Va. 147, 118 S.E.2d 526 (1961), the Joint Committee on Accreditation of Hospitals rescinded accreditation for the sole reason that the hospital had osteopaths on its staff. When they were dismissed, accreditation was restored. In Duson v. Poage, *supra,* all medical doctors and registered nurses quit when the board of directors appointed two osteopaths to the staff, and would not return until they were removed.

Recently, the feud with the osteopaths has cooled, and it is doubtful whether the AMA and its local affiliates will long continue their policy of strict opposition to staff privileges for osteopaths. However, their feelings about chiropractors have not changed. The AMA's House of Delegates recently adopted a resolution which stated that "chiropractic is an unscientific cult whose practitioners lack the necessary training and background to diagnose and treat human disease." AMA News, Dec. 12, 1966, p.1, col. 2.

hospital. However, when the exclusion is aimed at medical doctors because, for example, they are members of a group health plan which the American Medical Association frowns upon, the exclusion has been held unreasonable.[22] Although osteopaths and chiropractors may be excluded because the welfare of the patients is best promoted by consistency among staff members as to basic concepts of healing, no such justification exists when the group excluded consists of licensed medical doctors. The latter's exclusion is based upon a dislike of their ideas, and is not related to the quality or type of care which they give their patients.

The right to practice one's profession has been recognized as a species of property, which cannot be taken away without due process of law. Thus, a physician may not be refused his initial bid for staff membership[23] or refused reappointment[24] unless he is given ample notice that such action is about to be taken. Furthermore, he is entitled to a hearing before the board of directors, with the right to be represented by counsel and to present and cross-examine witnesses.

In addition, if a physician qualifies under the hospital's rules as they existed at the time of his application, the hospital cannot amend its rules to disqualify the physician after he has filed suit to compel admission. As one court has said, once ground rules have been announced, the board cannot change "the rules while the game [is] in progress."[25]

Finally, the hospital rules must be applied uniformly.[26] If a board of directors attempts to apply a higher standard to the performance of one physician than it applies to that of others, a court will intervene.[27]

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22. Group Health Co-op. v. King County Medical Soc'y, 39 Wash. 2d 586, 237 P.2d 737 (1951). For a full discussion of the conflict between the AMA and its members on the one hand and the group practice plans on the other see Comment, 22 U. CHI. L. REV. 694 (1955), Comment, 63 YALE L.J. 938, 976-97 (1954).

23. Wyatt v. Tahoe Forest Hosp. Dist., 174 Cal. App. 2d 709, 715-16, 345 P.2d 93, 97 (1959); State *ex rel.* Sams v. Ohio Valley Gen. Hosp. Ass'n, 149 W. Va. 229, 140 S.E.2d 457 (1965) (dictum); Note, 15 RUTGERS L. REV. 327, 338-39 (1961).

24. Johnson v. City of Ripon, 259 Wis. 84, 87, 47 N.W.2d 328, 330 (1951).

25. Ware v. Benedikt, 225 Ark. 185, 280 S.W.2d 234, 237 (1955).

26. Alpert v. Board of Governors of City Hosp., 286 App. Div. 542, 145 N.Y.S.2d 534 (1955); see Rosner v. Eden Township Hosp. Dist., 174 Cal. App. 2d 592, 375 P.2d 431 (1962).

27. Giles v. Breaux, 160 So. 2d 608 (La. Ct. App. 1964). Michigan has relied on an interpretation of its public hospital statute, MICH. STAT. ANN. § 14.531 (1956), to decide these cases. See Albert v. Board of Trustees of Gogebic County Pub. Hosp., 341 Mich. 344, 67 N.W.2d 244 (1954).

> In no section of the act is there any suggestion that the hospital board may suspend, even partially, the license of a regularly licensed practitioner. Suspension is left with the State board of registration in medicine. . . .
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> The *license* of plaintiff Albert granted him by the State board *includes practice in public hospitals* and shall be presumed to continue in such public hospitals until

B. *Private Hospitals*

The test of reasonableness applied to public hospitals is not applied to private institutions. Instead, the rule has developed that a private hospital has the right to exclude any physician from practicing therein. Exclusion rests entirely within the sound discretion of the board of directors, which the courts will not review.[28] The only limitation on the board of directors is that they act within their statutory power and in conformance with the rules and regulations of the hospital.[29]

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suspended or interrupted by some clearly and lawfully empowered authority. *Id.* at 357, 67 N.W.2d at 250. (Emphasis added.)

In light of this holding, the court declared the following by-law invalid:

> The board of trustees reserves the right to remove any member of the medical staff or to deprive any physician or surgeon of the privileges of the hospital whenever, in their sole judgment, the good of the hospital or of the patients therein demand it; and it reserves the right at any time of making any changes in these rules, by amendment, addition, substitution, repeal or revision, as in its judgment may seem for the best interests of the hospital and those who are to become patients therein. *Id.* at 353, 67 N.W.2d at 248.

28. Levin v. Doctors Hosp., 233 F. Supp. 953 (D.D.C. 1964), *rev'd on other grounds,* 354 F.2d 515 (D.C. Cir. 1965); Shulman v. Washington Hosp. Center, 222 F. Supp. 59, 63 (D.D.C. 1963); Edson v. Griffin Hosp., 21 Conn. Supp. 55, 144 A.2d 341 (1958); Wilmington Gen. Hosp. v. Manlove, 174 A.2d 135 (Del. 1961); West Coast Hosp. Ass'n v. Hoare, 64 So. 2d 293 (Fla. 1953); Natale v. Sisters of Mercy, 243 Iowa 582, 52 N.W.2d 701 (1952); Foote v. Community Hosp., 195 Kan. 385, 405 P.2d 423 (1965); Clark v. Physicians & Surgeons Hosp., Inc., 131 So. 2d 144 (La. Ct. App. 1961); Levin v. Sinai Hosp., 186 Md. 174, 46 A.2d 298 (1946); Van Campen v. Olean Gen. Hosp., 210 App. Div. 204, 205 N.Y.S. 554, *aff'd per curiam,* 239 N.Y. 615, 147 N.E. 219 (1924); Berberian v. Lancaster Osteopathic Hosp. Ass'n, 395 Pa. 257, 149 A.2d 456 (1959); Khoury v. Community Memorial Hosp., Inc., 203 Va. 236, 123 S.E.2d 533 (1962); Henderson v. City of Knoxville, 157 Tenn. 477, 9 S.W.2d 697 (1928) (dictum); State *ex rel.* Bronaugh v. City of Parkersburg, 148 W. Va. 568, 136 S.E.2d 783 (1964) (dictum); Johnson v. City of Ripon, 259 Wis. 84, 47 N.W.2d 328 (1951) (dictum); State *ex rel.* Wolf v. La Crosse Lutheran Hosp. Ass'n, 181 Wis. 33, 193 N.W. 994 (1923); see Hughes v. Good Samaritan Hosp., 289 Ky. 123, 158 S.W.2d 159 (1942); Strauss v. Marlboro County Gen. Hosp., 185 S.C. 425, 194 S.E. 65 (1937); Weary v. Baylor Univ. Hosp., 360 S.W.2d 895 (Tex. Civ. App. 1962); North Broward Hosp. Dist. v. Mizell, 148 So. 2d 1 (Fla. 1962) (dictum); Alpert v. Board of Governors of City Hosp., 286 App. Div. 542, 145 N.Y.S.2d 534 (1955) (dictum). *But see* Cowan v. Gibson, 392 S.W.2d 307 (Mo. 1965); Greisman v. Newcomb Hosp., 40 N.J. 389, 192 A.2d 817 (1963).

29. Edson v. Griffin Hosp., *supra* note 28; Levin v. Sinai Hosp., *supra* note 28; Joseph v. Passaic Hosp. Ass'n, 35 N.J. Super. 450, 114 A.2d 317 (Ch. 1955), *aff'd,* 26 N.J. 557, 141 A.2d 18 (1958); Van Campen v. Olean Gen. Hosp., *supra* note 28; Group Health Co-op. v. King County Medical Soc'y, 39 Wash. 2d 586, 237 P.2d 737 (1951).

Since most courts are unyielding in their application of the sound discretion rule, often the only question in these cases is whether the hospital is public or private. *E.g.,* West Coast Hosp. Ass'n v. Hoare, *supra* note 28, at 295. This question is usually settled by looking at the hospital's charter. If under the tests described earlier, the charter shows the hospital to be private, the case is over.

Once a court has found that a hospital is a private institution, not only is it not required to notify a physician of the reasons for his dismissal from the hospital staff, but it is not even required to notify the physician that he has been dismissed.[30] Thus, in *Natale v. Sisters of Mercy*,[31] the court found that no charge had been preferred against the plaintiff; no notice given that his dismissal was being considered; no opportunity offered to appear before the board; and no hearing given. The hospital did not even extend plaintiff the courtesy of notifying him that he had been dismissed; he learned of the dismissal through a friend.[32] The court found that since the hospital was a private institution, its internal management was entirely within the power of its board of governors, which was not required to assign any reasons—even unreasonable ones—for its actions. All decisions were entirely within its sound discretion.[33]

In *Khoury v. Community Memorial Hosp.*,[34] plaintiff complained that he had not been given a fair hearing. The court, after determining that the defendant was a private hospital, reasoned :

> Since we have held that . . . [plaintiff] had no contractual, constitutional or statutory right to the use of the hospital facilities, and since the trustees acted in their sound discretion to deny him such use, we are of the opinion that he was not entitled to a hearing with respect to his exclusion therefrom. We need not consider, therefore, whether the hearing which was accorded him was a fair one.[35]

It should be apparent from these cases that sound discretion actually means absolute discretion. The vast majority of courts appear to look initially to the hospital's articles of incorporation to see if it is privately controlled. If so, the board of directors has absolute discretion in managing the hospital, including the right to decide who should and should not practice medicine therein.

II. Potential Remedies Available to Physicians Denied Staff Membership in a Private Hospital

Despite the general rule that the decision to preclude a physician from practicing in a private hospital rests within the sound discretion of the hospital's board of directors, numerous actions have been instituted against private hospitals on a variety of legal theories.

30. Natale v. Sisters of Mercy, 243 Iowa 582, 52 N.W.2d 701 (1952).
31. *Ibid.*
32. *Id.* at 592, 52 N.W.2d at 707.
33. Natale v. Sisters of Mercy, *supra* note 30.
34. 203 Va. 236, 123 S.E.2d 533 (1962).
35. *Id.* at 242, 123 S.E.2d at 539

A. *Breach of Contract*

Most courts recognize that the relationship between hospital and physician is contractual.[36] Consequently, a generally recognized exception to the rule of non-interference with the internal affairs of a private hospital is that the hospital is liable for breach of its contract with the physician.[37] In the absence of or in addition to any express contractual provisions, the terms of the contract are those provisions contained in the hospital's by-laws.[38]

A by-law often invoked requires that notice of charges, a hearing before the board, and an opportunity to defend be given to a staff member before he may be dismissed.[39] If such a by-law exists, the courts usually enforce it, preventing the removal of any physician without a hearing. In these cases, the courts still adhere to the general rule that they cannot interfere with the internal workings of a private corporation. However, relief is given on the theory that the hospital has breached the terms of a contract.[40]

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36. *E.g.*, Berberian v. Lancaster Osteopathic Hosp. Ass'n, 395 Pa. 257, 149 A.2d 456 (1959).

37. Berberian v. Lancaster Osteopathic Hosp. Ass'n, *supra* note 36; Johnson v. City of Ripon, 259 Wis. 84, 47 N.W.2d 328 (1951).

38. Shulman v. Washington Hosp. Center, 222 F. Supp. 59 (D.D.C. 1963); Levin v. Sinai Hosp., 186 Md. 174, 46 A.2d 298 (1946); Raymond v. Cregar, 38 N.J. 472, 185 A.2d 856 (1962); Loewinthan v. Beth David Hosp., 210 App. Div. 204, 9 N.Y.S.2d 367 (1938); Berberian v. Lancaster Osteopathic Hosp. Ass'n, *supra* note 36.

It is important to note that two sets of by-laws may be involved: those of the board of directors and those of the medical staff. The board's by-laws are considered to be superior to those of the staff. *The Law in Brief*, Hospitals, Sept. 1, 1963, p. 90. Thus, recent cases have held that when the by-laws of the staff contain a requirement for a hearing before dismissal and there is no such provision in the directors' by-laws, the latter prevail and the physician or surgeon may be dismissed without a hearing. Manczur v. Southside Hosp., 16 Misc. 2d 989, 183 N.Y.S.2d 960, (Sup. Ct. 1959). The Texas court went so far as to hold that even when the staff by-laws have been *approved* by the board, the board is not bound by them and need not follow any procedure which they prescribe. Hershey, *Hospital Law*, Hospitals, April 16, 1963, p. 8. *Contra*, Berberian v. Lancaster Osteopathic Hosp. Ass'n, *supra* note 36.

39. Levin v. Sinai Hosp., *supra* note 38; Raymond v. Cregar, *supra* note 38; Loewinthan v. Beth David Hosp., *supra* note 38; Berberian v. Lancaster Osteopathic Hosp. Ass'n, *supra* note 36. In some cases, this right is asserted in refusal-to-reappoint situations. Even if it is valid when the physician is removed prior to the expiration of his contract, it would seem tenuous here. If a contract exists, it exists only for the time period specified, which is usually one year. At the end of this period, the parties are free to enter into a new agreement. The provisions of the contract, by which both were bound while it was in effect, should not be carried over and applied to the period after the contract's expiration. This, of course, assumes that there is no by-law provisions calling for notice and hearing before failure to reappoint.

40. Cases cited note 39 *supra*. Thus the Pennsylvania court, in examining a set of by-laws which required "adequate hearing and thorough investigation" by the executive committee of the general staff and an "appeal, with legal counsel, before a joint meeting" of the staff's executive committee and the hospital's board of directors, held that although

Other by-laws are occasionally placed in issue. For example, the Physicians and Surgeons Hospital of Shreveport, Louisiana, had adopted the following by-law:

> Nothing in the by-laws shall be construed to mean that any physician who is a member in good standing of the Shreveport Medical Society can be prevented from visiting and treating patients in the P & S Hospital although that physician may not be an active member of the staff of said hospital.[41]

Plaintiff, who was a member in good standing of the medical society, filed suit for a judgment recognizing his right to treat his patients in the hospital, ordering his admission to the visiting staff, and granting injunctive relief restraining the hospital from interfering in any way with the treatment of his patients. The trial court dismissed for failure to state a cause of action. The Court of Appeal held that, in light of the by-law, the hospital could not refuse access to the hospital to the plaintiff or his patients.[42] While holding that a private hospital was free to admit or refuse any physician, the court said that it was bound by its by-laws.[43]

Thus, on familiar contract principles, the courts have been willing to dilute the absolute discretion of private hospitals. On its face, this appears to be a significant exception to the sound discretion rule; however, this is not so. First, most hospital staff contracts are for only a one-year period and are renewable at the option of the hospital.[44] Thus, a hospital may rid itself of a physician simply by refusing to renew his contract. Second, at least one court has held that a hospital may abolish a by-law under which a physician is asserting a claim even after the action has begun. Thus, when the

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the hospital had had total discretion in this area, it had voluntarily restricted its freedom of movement by means of this by-law, a contractual obligation which had to be followed if a physician were to be removed. Berberian v. Lancaster Osteopathic Hosp. Ass'n., *supra* note 36, at 263, 149 A.2d at 459.

In a New Jersey case in which the plaintiff had been summarily removed from the major surgical staff, he appealed on the basis of a by-law requiring a hearing at which he might defend himself against such action. The court held that where a procedure is stipulated in the by-laws, it must be followed, and non-compliance with it renders the board's action invalid even though the board had inherent power to take the action in question. Jacobs v. Martin, 20 N.J. Super. 531, 537, 90 A.2d 151, 154 (Essex County Ct. 1952).

41. Clark v. Physicians & Surgeons Hosp., Inc., 121 So. 2d 752, 753, (La. Ct. App. 1960).

42. *Id.* at 754.

43. *Ibid.* Obviously this court was using a third party beneficiary theory to bind the hospital. Since the by-law granted rights to physicians not on the staff at the time of its adoption, this is the only ground on which the court could grant relief.

44. See, *e.g.*, Shulman v. Washington Hosp. Center, 222 F. Supp. 59, 60 (D.D.C. 1963); Levin v. Sinai Hosp., 186 Md. 174, 46 A.2d 298, 301 (1946) (dictum).

Physicians and Surgeons Hospital case was remanded for trial on the merits, the hospital had removed the by-law in question. The Court of Appeal held that while a private hospital is bound by its by-laws, the by-laws are not permanent and unchangeable.[45] The hospital created the right which the physician was asserting, and it could remove it.

B. *Interference with Business*

Some cases have been instituted on the theory that the board's refusal to appoint the physician or surgeon to the staff, or the decision to drop him from it, was an attempt to interfere with his practice of medicine.[46] However, this attempt to apply tort principles to the directors' actions has met with little success.

Generally, one is free to select those with whom he will do business without regard to his motive or the injury which it may inflict.[47] Aside from this, however, the courts have held that one may not intentionally cause loss or damage to another in his business relations, with malice and without justification.[48] The rationale is that a person's business is a species of property, and is entitled to protection.[49]

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45. Clark v. Physicians & Surgeons Hosp., Inc., 131 So. 2d 144 (La. Ct. App. 1961). Maryland has indicated that its equity courts may properly oversee a physician's contract rights in the hospital's constitution and by-laws, and grant injunctive relief if they are being violated. They may also pass upon the validity of amendments to the by-laws to determine the physician's right to relief under them. Levin v. Sinai Hosp., *supra* note 44, at 180, 46 A.2d at 301 (dictum).

46. Cowan v. Gibson, 392 S.W.2d 307, 309 (Mo. 1965); see Willis v. Santa Ana Community Hosp. Ass'n, 58 Cal. 2d 806, 810, 376 P.2d 568, 570 (1962); *cf.* Harris v. Thomas, 217 S.W. 1068 (Tex. Civ. App. 1920).

47. RESTATEMENT, TORTS § 762 (1939) provides:

> One who causes intended or unintended harm to another merely by refusing to enter into a business relation with the other or to continue a business relation terminable at his will is not liable for that harm if the refusal is not
> (a) a breach of the actor's duty to the other arising from the nature of the actor's business or from a legislative enactment, or
> (b) a means of accomplishing an illegal effect on competition, or
> (c) part of a concerted refusal by a combination of persons of which he is a member.

This is true even though the actor does so maliciously with the sole intent of injuring the plaintiff. *Id.* at § 762, comment *c.*

48. *E.g.,* Louis Kamm, Inc. v. Flink, 113 N.J.L. 582, 175 Atl. 62 (Ct. Err. & App. 1934).

49. *E.g.,* Dent v. West Virginia, 129 U.S. 114 (1889). See note 10 *supra* and accompanying text.

The right to conduct one's business without the wrongful interference of others is one that has been recognized by the common law at least since 1621. Garret v. Taylor, Cro. Jac. 567, 79 Eng. Rep. 485 (K.B. 1621). An action will lie for intentional interference with business if the actor's conduct was malicious, unjustifiable, and results in damage

Courts have been reluctant to apply this rule to cases based on a hospital's refusal to admit a doctor to staff membership. The reasoning behind this reluctance is as follows: plaintiff must have been injured by a tortious act if he is to recover; the act complained of is simply the refusal of defendant board of directors to admit plaintiff physician to the staff of the hospital; however, defendant hospital is a private institution; admission to the staff of a private hospital is within the sound discretion of the board of directors; therefore, since the board was at liberty to accept or reject plaintiff's application in its discretion, there was no tortious interference with his business.[50] Obviously, the key to denial of relief here, as in nearly all private hospital cases, is the court's holding that admission to the staff is within the board's sound discretion. It is this factor which makes the board's action not tortious.

However, a recent Missouri case, *Cowan v. Gibson*,[51] alleged an interference with plaintiff's business by the doctors and board members of a private hospital in refusing to renew his annual appointment.[52] The case came before the Missouri Supreme Court on an appeal from an order sustaining defendant's demurrer. The court held that the hospital's private status was immaterial, and ruled that if the allegations were true, this was not the exercise of *any* discretion—much less "sound" discretion.[53]

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to the plaintiff. Note, 56 YALE L.J. 885 (1947). If the malice involved is more than merely the intentional doing of a harmful act without justification or excuse, and amounts to actual malevolence or ill will, exemplary damages may be recovered in addition to actual damages. Pratt v. British Medical Ass'n, [1919] 1 K.B. 244.

50. See cases cited note 28 *supra.*

51. 392 S.W.2d 307 (Mo. 1965).

52. Staff appointments conveniently run from year to year so that under traditional theories, if the board wanted—for any reason—to be rid of a certain physician, they had only to wait for his one year contract to expire. See cases cited note 44 *supra.*

53. Cowan v. Gibson, 392 S.W.2d 307 (Mo. 1965) (by implication). After stating the general rule, text accompanying note 1 *supra*, the court went on:

> In view of this admittedly applicable general rule the problem upon this appeal is whether . . . there are any allegations which would prima facie remove the cause from the operation of the general rule and therefore entitle him to a hearing . . . upon its merits.
>
> . . . .
>
> All in all, as a matter of substance there is more involved here than the hospital's mere denial of the doctor's application for reinstatement to staff and hospital privileges, it is asserted that he lost these but in addition the allegations in their totality charge the tortious conduct of an improper interference with the plaintiff's business and profession all to his financial loss and to at least the financial benefit of the individual doctors. Cowan v. Gibson, *supra* at 308-09.

1. *Interference with Contract*

The tort of interference with contract dates from the early common law.[54] The rule has developed that an action will lie for an unprivileged inducement of one of the parties to a contract not to keep his part of the bargain.[55]

54. PROSSER, TORTS 950 (3d ed. 1964).

55. RESTATEMENT, TORTS § 766 (1939). The principle had its beginning in Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853). Miss Johanna Wagner, a well known opera singer, was engaged by the plaintiff to perform for a season exclusively at the Queen's Theatre, London, of which he was the manager. Before the season opened, the defendant persuaded her to break her contract, and in consequence she never appeared for the plaintiff. He accordingly sued the defendant for damages, but the claim was resisted on the ground that Miss Wagner's position as an artiste lay outside the purview of the action for enticement which was confined to "servants" within the meaning of the Statute of Labourers. This argument was rejected in favor of the broader view that any malicious interference with contractual relations was an actionable wrong, and it did not matter whether the servant had repudiated the contract before commencing his performance or thereafter. This decision was subsequently approved by the Court of Appeal, and later expanded to contracts other than for personal service.

Again, the courts are interested in protecting that property interest which the parties to a contract have. Downey v. United Weatherproofing, 363 Mo. 852, 858, 253 S.W.2d 976, 980 (1953). A contract is seen as a right that is good against the world, one in which both parties have a stake, and to the performance of which both parties are entitled. PROSSER, *op. cit. supra* note 54, at 954.

Virtually any type of contact will suffice for the purpose, so long as it is not illegal or void as against public policy. But the contract need not be enforceable. The courts apparently assume that even if a contract is voidable, the nature of man is such that he will do that which he has promised to do, though the law would not punish him for its breach. *Id.* at 955.

Interference with contract actions generally make malice an element of the action. RESTATEMENT, TORTS § 766, comment *m*, special note (1939). However, the malice required need not amount to spite or malevolence, but merely purposeful interference without justification. While this definition has thus eliminated spite as a requirement, it is still important as bearing on the actor's motive. FLEMING, TORTS 716-17 (1957). Spite may also help to determine whether the defendant was acting under any of the privileges or justifications, as these depend largely on his motives. "If the actor does not act for the purpose of advancing the interest for the protection of which the privilege is given, he is not exercising the privilege and is not protected by it." RESTATEMENT, TORTS § 766, comment m (1939). Thus, even though a privilege is claimed or may be plausible, if it be shown that the defendant was actually motivated by pure malevolence, the privilege is disallowed. *Id.* at §§ 766, comment *m*, 768.

There are no hard and fast rules, as in defamation, for determining whether or not a privilege exists. All that can be said is that several factors must be taken into account and balanced against each other. Factors which are deemed important are (1) the nature of the actor's conduct, (2) the nature of the expectancy with which his conduct interferes, (3) the relations between the parties, (4) the interest sought to be advanced by the actor and (5) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other. FLEMING, *op. cit. supra* at 718. The burden of proving justification rests on the defendant. The fact that he intentionally interfered with the performance of a contract is prima facie evidence of liability. PROSSER, *op. cit. supra* note 54, at 967.

The term "inducing breach of contract" is not limited to those situations in which *A* convinces *B* not to carry out his bargain with *C*, but also includes any act of *A* which has the intended effect of preventing, impairing, or burdening the performance of the contract.[56] Thus, the action has been allowed when it is the plaintiff himself who has been prevented, by exclusion from the premises or deprivation of essential tools or machinery, from performing the contract and obtaining its benefits.[57]

However, the majority of courts have refused to allow such an action based on a denial of hospital staff membership. The courts refuse to examine the hospital's motives as long as the acts complained of do not violate the hospital's charter.[58] The decision of the board of directors is a matter in their sound discretion, and is not open to judicial inquiry.

At least one court,[59] however, has been willing to look beyond the "sound discretion" rule and hold actionable an allegation that the defendants conspired *"to interfere with the contractual rights between plaintiff and his patients, and to force plaintiff's said patients to discontinue their contractual arrangements with plaintiff and seek the services of defendants."*[60]

2. *Interference with Prospective Advantage*

Closely analogous to inducing breach of contract is the tort of interference with prospective economic advantage. While the courts were long reluctant to protect economic relations unformalized by contract, cases started to appear in England in the mid-1800's which recognized the cause of action. By 1893, it was firmly established.[61] The principle was adopted by the

56. FLEMING, *op. cit. supra* note 55, at 714; see RESTATEMENT, TORTS § 766, comment *d.* (1939).

57. FLEMING, *op. cit. supra* note 55, at 715; PROSSER, *op. cit. supra* note 54, at 959.

58. The issue is never even joined. The courts first decide that the hospital is "private"; they then announce the existence of the "sound discretion" rule. Applying this rule to the case at hand, they hold the dismissal from the staff (or refusal to appoint) was within the board's discretion and thus there is no tort issue left in the case. For a good example of this simplistic reasoning see the unpublished trial court opinion in Cowan v. Gibson, reproduced in Brief for Appellant, pp. 6-9, Cowan v. Gibson, 392 S.W.2d 307 (Mo. 1965).

> ". . . attorney's [sic] for the plaintiff . . . concede that the Lockwood Memorial Hospital Association was . . . a private hospital.
>
> ". . . the members of the Board of Directors of a private hospital may use their discretion in determining what doctors may practice in that hospital.
>
> ". . . But in a situation such as we have here, it would seem to me that it would prevert [pervert?] and destroy the very meaning of the word discretion to hold that the exercise of discretion . . . might be reviewed or controlled by this or any other tribunal." *Id.* at 8-9.

59. Cowan v. Gibson, 392 S.W.2d 307 (Mo. 1965).

60. *Id.* at 309. (Emphasis added by the court.)

61. PROSSER, *op. cit. supra* note 54, at 974. In that year, the Court of Queen's

American courts[62] and is now established as stated in section 766 of the *Restatement of Torts.*[63]

To recover under this theory, it must be shown (1) that the defendant acted maliciously, at least in the sense of intending to interfere,[64] (2) that but for the defendant's action, a contract would have been entered into,[65] and (3) that such contracts were not entered into, with consequent damage to the plaintiff.[66]

Since competition is a valuable and protected interest, most decisions have turned on the defendant's motive. If he is actually—and honestly—engaging in a competitive enterprise, courts are unlikely to find a tort. But if the motive for his interference with the business of the plaintiff is not so much to further his own economic interests as to harm those of the plaintiff, he is likely to be held liable.[67]

Bench decided Temperton v. Russell, [1893] 1 Q.B. 715, 62 L.J.Q.B. 412, in which it declared that the principles of liability for interference with contract extended beyond existing contractual relations, and that a similar action would lie for interference with relations which were merely prospective or potential. *But see* FLEMING, *op. cit. supra* note 55, at 721:

> Not until the end of the nineteenth century did the courts finally commit themselves to the view that, in the absence of conspiracy (involving a combination) or the use of illegal means, no liability is incurred for intentionally procuring others to refuse to make or renew contracts with the plaintiff, even if such action is taken with the sole aim of thereby harming him in his trade or employment. At one time, there was some support for the broad proposition that "he that hinders another in his trade or livelihood is liable to an action for so hindering him," but it is now settled that interference with economic relations, which are merely in prospect and not yet cemented by contract, is not actionable at the suit of the person disappointed unless inherently unlawful means are employed for the purpose.

62. *E.g.,* Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947); Shell Oil Co. v. State Tire & Oil Co., 126 F.2d 971 (6th Cir. 1942); Buckley & Scott Utilities, Inc. v. Petroleum Heat & Power Co., 313 Mass. 498, 48 N.E.2d 154 (1943).

63. The drafters of the Restatement took the position that while protection should be greater in those cases in which actual contracts were in existence, "some protection is appropriate against unjustified interference with reasonable expectancies of commercial relations even when an existing contract is lacking." RESTATEMENT, TORTS § 766, comment *b* (1939). Thus, while there is no general duty to do business with a person, there *is* a general duty not to interfere with his reasonable expectancies. Downey v. United Weatherproofing, Inc., 363 Mo. 852, 858, 253 S.W.2d 976, 980 (1953).

64. PROSSER, *op. cit. supra* note 55, at 976.

65. Goldman v. Feinberg, 130 Conn. 671, 675, 37 A.2d 355, 356 (1944).

66. *Ibid.* As in interference with contract, there are also certain privileged situations in which one may interfere with prospective contracts without incurring liability. PROSSER, *op. cit. supra* note 55, at 977. The two actions are quite similar. The interest in free competition allows a certain freedom to interfere with relations as yet uncemented by contract. *Id.* at 979; Mogul Steamship Co. v. McGregor, Gow & Co., [1889] 23 Q.B.D. 598, *aff'd,* 1892 A.C. 25.

67. Pratt v. British Medical Ass'n, [1919] 1 K.B. 244. The action will be privileged if the defendant's *primary* purpose is to further a legitimate interest. This assumes, of course, that illegal means are not used. No matter how praiseworthy the objective, illegal

In an action based on denial of staff membership, the difficulty of a plaintiff's case lies in the first requirement—that defendant acted maliciously. Since, in similar actions to obtain staff membership, the courts have foreclosed an inquiry into the hospital's motives, it is doubtful that they would allow a similar inquiry in an action for interference with prospective advantage. This is so even if the actions of the board of directors were aimed at damaging the economic interests of the plaintiff rather than furthering those of the hospital.

C. *Concerted Wrongful Activities*

1. *Common Law Conspiracy*

The action for damages caused by a conspiracy developed at common law as one of the actions on the case.[68] The gist of the action is not the conspiracy itself, since the simple agreement to commit a tort in the future cannot be a tort. Rather, something must be done pursuant to the agreement which, by itself, would create a cause of action against the individual actor. "It is only where means are employed, or purposes are accomplished, which are themselves tortious, that the conspirators who have not acted but who have promoted the act will be held liable."[69]

Several actions have been brought on the conspiracy theory; the results are varied. In *Loewinthan v. Beth David Hosp.*,[70] plaintiff alleged a conspiracy to remove him from the staff of defendant hospital. The New York court refused to allow the action, holding that "the liability is for damages in the commission of a wrongful act, or of a legal act by wrongful means, and not for the agreement to commit it."[71] This is, of course, the traditional definition of conspiracy. However, the court proceeded to interpret the action out of existence by holding that "where the conspiracy results in the commission of that which would be an actionable tort, whether committed by one or by many, then the cause of action is the tort, not the conspiracy."[72] Thus, while initially recognizing the general definition of conspiracy, the court held that if anyone actually comes within the definition, then the action should be not for the conspiracy, but for the tortious act.[73]

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means cannot be justified. *Ibid.* The justification interposed must be as broad as the act sought to be justified, and such justification must be one the law will recognize.

68. Rosen v. Alside, Inc., 248 S.W.2d 638, 643 (Mo. 1952).

69. PROSSER, *op. cit. supra* note 54, at 260.

70. 9 N.Y.S.2d 367 (Sup. Ct. 1938).

71. *Id.* at 373.

72. *Ibid.*

73. It is not clear from the opinion whether the court would have allowed an action against all of the conspirators as joint tortfeasors, since this was not pleaded. However,

Cases arose in California and Missouri involving conspiracies among the staff physicians and the hospitals' boards of directors to keep the plaintiff physicians from obtaining staff membership.[74] Both courts refused to allow this to be carried out under the guise of sound discretion, and ruled against the hospitals.

The California court, after finding that the plaintiff's credentials were in order, held that a cause of action was stated when it was "alleged that a physician of highest qualifications is denied access to necessary hospital facilities as the result of a conspiracy designed to restrain competition and deprive him of his practice in order to benefit competing members of the conspiracy."[75]

The Missouri court discussed the general rule regarding the operation of private hospitals and indicated that while it would abide by the rule in appropriate situations, it would not follow the general rule blindly in every case involving private hospitals. The pleadings of the plaintiff alleged a conspiracy which was causing substantial harm to the plaintiff, and, thus, he had stated a valid cause of action.[76] These courts appear willing to examine a hospital's "sound discretion" in light of the normal expectations of reasonable men, and to award damages to a physician for injury arising from a conspiracy on the part of a hospital, its directors, and staff, if, in fact, a conspiracy can be proved.

2. *Unjustified Refusal to Deal*

It will be noted that in the rules defining the common law action of conspiracy, some tortious act is required.[77] If no one commits a tortious act, or if all of the legal acts put together do not add up to a wrongful result, the action is dismissed.

Of late, it has been recognized that in some instances the conspiracy itself might be wrongful—even though no member of it does any tortious act—simply because the action taken by the group against outsiders is *unjustifiable*.[78] Section 765 of the *Restatement of Torts* states:

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the court did indicate that the only time it would entertain a civil action for conspiracy would be when the agreement is to violate the criminal law. *Ibid.* (dictum).

74. Willis v. Santa Ana Community Hosp. Ass'n, 58 Cal. 2d 806, 376 P.2d 568 (1962); Cowan v. Gibson, 392 S.W.2d 307 (Mo. 1965).

75. Willis v. Santa Ana Community Hosp. Ass'n, *supra* note 74, at 810, 376 P.2d at 570.

76. Cowan v. Gibson, 392 S.W.2d 307, 309 (Mo. 1965).

77. Note 69 *supra* and accompanying text.

78. RESTATEMENT, TORTS § 765 (1939).

> Persons who cause harm to another by a concerted refusal in their business to enter into or to continue business relations with him are liable to him for that harm, *even though they would not be liable for similar conduct without concert,* if their concerted refusal is not justified under the circumstances.[79]

Under this rule, the acts of the conspirators need not be legally wrongful; it is enough if they are unjustified under the circumstances. The determination of justification is a balancing process which includes the following factors: (1) the objects and interests of the conspirators, (2) the hardship caused the plaintiff and his opportunities for mitigating it, (3) the appropriateness of the means chosen to reach the conspirators' desired ends, and the availability of less harmful means, (4) the relationship between the conspirators and the plaintiff and their relative economic power, and (5) the effects of the conspiracy on the societal interest in business enterprise and competition.[80]

Only one case involving the denial of hospital facilities has considered section 765. In *Blank v. Palo Alto-Stanford Hosp. Center*,[81] defendant hospital center entered into a contract with defendant doctors which gave the latter complete supervision of the center's radiology department, including the exclusive right to perform diagnostic radiology. Plaintiff, a radiology specialist, was thus prohibited from performing diagnostic radiology in the

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79. *Id.* § 765(1). (Emphasis added.)

80. RESTATEMENT, TORTS § 765 (1939). None of these factors is superior to any other, nor can a result be reached by examining the situation and adding up the factors for each side. The *Restatement* makes it clear that these factors are to be used merely as guidelines in determining whether a given action is justifiable or not. Thus, it is felt that no matter how laudable may be the interest which the conspirators are endeavoring to advance, a "concerted refusal to deal is not justified if it goes far beyond the promotion of that interest and is unduly oppressive or is otherwise prejudicial to a paramount social interest." *Id.* at comment *d.* Clearly, if such a refusal is based solely on spite or ill will toward the plaintiff, the action is not justified.

It must be emphasized at this point that one interest to which the courts apparently accord great consideration is that of advancing the business of the conspirators. *Ibid.* This goes back to an English case, Sorrell v. Smith, [1925] A.C. 700, in which the House of Lords held that if the real purpose of the combination is not to injure another, but to forward or defend the trade of those who enter into it, no wrong is committed and no action will lie, although damage to another ensues, provided that the purpose is not effected by illegal means. The American courts will allow such business competition as justification even though the damage to the plaintiff caused by the conspiracy was intended as the means for advancing that interest. RESTATEMENT, TORTS § 765, comment *d* (1939). The English courts take the same view but seem to carry it a little further. They will not uphold an action against the combination unless its purpose is "wholly destructive, by prevailnig community standards." FLEMING, *op. cit. supra* note 55, at 729.

81. 234 Cal. App. 2d 377, 44 Cal. Rptr. 572 (1965).

center, although he was allowed to read any of the X-ray films of the department if requested to do so by a patient. The trial court, deciding for the defendants, made no finding as to whether the hospital was public or private since it found that the contract between the defendants was a reasonable method for the hospital to operate its radiology department. Plaintiff, in requesting the court to rule on the reasonableness of the hospital's action, relied, *inter alia,* on section 765. The appellate court upheld the finding of the trial court that the action of the hospital in entering into the contract was reasonable. Among other factors, the decision was justified by the fact that the contract method of operating the radiology department assured the hospital of the immediate availability of professional radiologists. The court was impressed by the additional finding that if the department were open to all qualified radiologists, substantial complications in operation would result which would interfere with proper patient care. Further, there was no material damage to the public resulting from the contract method of operating the radiology department. The significance of this opinion as a possible inroad into the sound discretion rule is limited by the fact that no attempt was made to decide whether the hospital facility was public or private. The court simply assumed "for purposes of this appeal"[82] that a private hospital did not have an unrestricted right to enter into such a contract.[83] Furthermore, the court did not attempt to determine the justification for the hospital's acts in light of the five factors suggested in the *Restatement.*

3. *Antitrust Violations*

When a common law action is brought against the parties to a conspiracy to create a monopoly in the medical field, the plaintiff may be allowed to recover.[84] But when the action is based on antitrust legislation—state or federal—many problems arise.

Actions based upon the Sherman Act are rare. Because the Supreme Court has yet to hold that the practice of medicine can be "interstate commerce," it does not come within the terms of the Act.[85] However, section

82. *Id.* at 385, 44 Cal. Rptr. at 576.

83. Had the trial court made the specific finding that the center was a private facility, it is open to question whether the court would have reached the issue of the reasonableness of the hospital's action.

84. Willis v. Santa Ana Community Hosp. Ass'n, 58 Cal. 2d 806, 26 Cal. Rptr. 640, 376 P.2d 568 (1962); Cowan v. Gibson, 392 S.W.2d 307 (Mo. 1965).

85. The "interstate commerce" requirement of the Sherman Act is the most serious obstacle to the effective use of this remedy, which has been tried only in cases involving group health associations. Few such associations maintain large, multi-state practices. For

3, which applies the Act to the District of Columbia,[86] does not require a finding of interstate commerce. No suits which involve hospital staff privileges have been brought in the District on a Sherman Act theory. However, a brief examination of the past application of antitrust principles to the practice of medicine in the District serves to indicate how such a case would probably fare.

The Court of Appeals has twice held the practice of medicine to be included within the word "trade."[87] These cases involved an attempt by the American Medical Association to eliminate the local group health plan. However, on appeal, the Supreme Court refused both times to consider the question.[88] The Court said that inasmuch as petitioner Group Health, Inc. was engaged in doing business and the petition alleged a conspiracy to restrain that business, it was unnecessary to decide whether the practice of medicine was "trade."[89] The Court further noted that it was meaningless, for the purposes of the Act, to distinguish between "business" in the traditional commercial sense and the rendition of medical services. "Whether the conspiracy was aimed at restraining or destroying competition, or had as its purpose a restraint of the free availability of medical or hospital services in the market, [it is] . . . within the scope of the statute."[90]

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example, in United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952), the Court concluded:

> The Government did show that Oregon Physicians' Service made a number of payments to out-of-state doctors and hospitals, presumably for treatment of policyholders who happened to remove or temporarily to be away from Oregon when need for service arose. These were, however, few, sporadic and incidental. *Id.* at 338-39.

Thus, the federal antitrust act will not be of great assistance unless the government does away with the "few, sporadic and incidental" rule, or the plans are set up on a multistate basis.

86. 26 Stat. 209 (1890), 15 U.S.C. § 3 (1964).

87. United States v. American Medical Ass'n, 130 F.2d 233 (D.C. Cir. 1942), *aff'd,* 317 U.S. 519 (1943); United States v. American Medical Ass'n, 110 F.2d 703 (D.C. Cir.), *cert. denied,* 310 U.S. 644 (1940).

88. American Medical Ass'n v. United States, 317 U.S. 519, 528 (1943). In 1950, the Court once again refused the opportunity to "intimate an opinion on the correctness of the application of the term [trade] to the professions." United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 492 (1950).

89. American Medical Ass'n v. United States, *supra* note 88, at 528.

90. *Id.* at 529.

An action brought under the Cartwright Antitrust Act was dismissed by the California court on the ground that the professions were not specifically mentioned in the act. If the legislature did not specifically say that the professions constituted "trade" the court would not do so. Willis v. Santa Ana Community Hosp. Ass'n, 58 Cal. 2d 806, 809, 26 Cal. Rptr. 640, 642, 376 P.2d 568, 570 (1962) (recovery allowed under common law conspiracy theory).

The Maryland court, while suggesting that a conspiracy to monopolize the field of

Thus, if a case were brought against a combination the purpose of which was to keep physicians off the staffs of District hospitals, public or private, the Court would be likely to uphold a verdict for the physicians on the ground that the purpose of the conspiracy was to restrain the free availability of medical services by refusing staff positions to the plaintiff-doctors. If the Court were to recognize that the practice of medicine can be interstate commerce, the same principles would be applied to the other sections of the Sherman Act.

In contrast to the lack of direct federal precedent is the landmark Washington case of *Group Health Co-op. v. King County Medical Soc'y.*[91] The local medical society had conspired with, among others, a public hospital and a private hospital to restrain trade in the field of contract medicine.[92] The part played by the two hospitals was the adoption of rules and by-laws which required membership in the medical society in order to gain admission to their staffs. The society, for its part, refused to admit anyone who was a member of Group Health.[93] The court held that under the state constitution,[94] which was merely a codification of the common law on the subject,[95] three elements must be present in order to constitute a prohibited monopoly. There must be (1) an agreement to (2) fix prices, limit production, or regulate the transportation of (3) some product or commodity.[96] Turning to the dictionary for a definition of "product," the court found that Webster included "the products of the brain"[97] and concluded that whether this definition should be used was to be decided in the context of the underlying objective of the constitutional provision.

> As our constitutional provision bespeaks the common law, so it should be permitted to afford the same protection and serve the same broad public interest which is available at common law. *Monopolies affecting*

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medicine might be contrary to the prohibition of monopolies in the State Declaration of Rights, held that since the hospital was not destroying competition or restraining the free availability of hospital or medical services, no violation was proved. Levin v. Sinai Hosp., 186 Md. 174, 46 A.2d 298 (1946).

91. 39 Wash. 2d 586, 237 P.2d 737 (1951).

92. Contract medicine is a type of risk pooling arrangement whereby a group of doctors agrees to take care of all the medical needs of a group of people for a stated periodic fee.

93. Group Health Co-op. v. King County Medical Soc'y, 39 Wash. 2d 586, 593, 237 P.2d 737, 742 (1951).

94. WASH. CONST. art. 12, § 22.

95. Group Health Co-op. v. King County Medical Soc'y, 39 Wash. 2d 586, 638, 237 P.2d 737, 765 (1951).

96. *Id.* at 635, 237 P.2d at 764.

97. *Id.* at 637, 237 P.2d at 765.

> *price or production in essential service trades and professions can be as harmful to the public interest as monopolies in the sale or production of tangible goods.* The constitutional provision was designed to safeguard this public interest from whatever direction it may be assailed. The language used must therefore be liberally construed with that end in view.[98]

The court further noted that the term "restraint of trade" was applied to the practice of medicine at common law.[99] Thus, it appeared to construct a framework for holding both defendant hospitals guilty of establishing a prohibited monopoly. Under the principles stated above, the court did find the rules adopted by the public hospital "unreasonable, arbitrary, capricious and discriminatory." However, it held that the private hospital—which was, after all, a private corporation—could adopt, in its sound discretion, any rules which it desired.[100]

III. Racial Discrimination and Equal Protection

While the traditional concepts of corporation law have stood as an impregnable wall allowing the directors of a private hospital complete freedom in managing the internal affairs of the corporation, a small but important breakthrough, based on the equal protection clause of the fourteenth amendment, has occurred in two cases.[101] In each case, the court found that the state or federal government, or both, had become so "involved in the conduct of . . . otherwise private bodies that their activities are also the activities of these governments and performed under their aegis,"[102] that the action of the hospitals constituted state action.

A. *Hill-Burton Act*

In *Simkins v. Moses H. Cone Memorial Hosp.*,[103] a large amount of federal funds had been given, through the state treasurer's office, to the defendant under the Hill-Burton hospital construction act.[104] In its appli-

98. *Id.* at 638, 237 P.2d at 765. (Emphasis added.)

99. *Ibid.*

100. *Id.* at 667, 237 P.2d at 780. While it is enough for our purposes to indicate the difference in treatment accorded the two hospitals, it should be noted that all of the other defendants were enjoined from conspiring to deny the plaintiffs staff membership.

101. Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963).

102. *Id.* at 966; *accord,* Eaton v. Grubbs, *supra* note 101, at 715.

103. 323 F.2d 959 (4th Cir. 1963).

104. Pursuant to the Hill-Burton Act, 42 U.S.C. § 291 (1965), grants are made by the federal government to public and private hospitals to assist in the construction of

cation for the funds, the hospital had specifically stated that citizens of the community would be discriminated against solely because of their race.[105] In accord with this statement, the hospital denied the use of its facilities to the plaintiffs—Negro physicians and their patients. The plaintiffs filed suit against the hospital, claiming that it was actually an arm of the state and that its acts were thus within the ambit of the fourteenth amendment. The District Court held that the hospital was not subject to the anti-discrimination requirements of the fourteenth amendment because it had not become an instrumentality of the state.[106] In reversing the decision, Judge Sobeloff held that it was unnecessary for the hospital actually to have become an "instrumentality of government;" it was sufficient if the government had become so involved in the operations of the hospital that the hospital's activities were also those of the government and were performed "under its aegis."[107] Using this criterion, the court found sufficient involvement and granted relief.

The court rejected the argument that mere donation of funds does not constitute control, and relied on the extensive system of regulations which the government required before funds would be granted.[108] With this system of regulations in mind—plus the large amount of federal money involved—Judge Sobeloff declared that the government had become so involved in the actions of the hospital that the actions of the two were no longer distinguishable.

Two additional theories were recognized by the court. The intent of the Hill-Burton Act was to establish a statewide system of hospitals (in each state) to satisfy the needs of the people, which were not being met under existing circumstances. To this end, if a state desired to receive funds for hospital construction, it was required to designate a state agency to oversee the operation, set up regulations, and disperse the money. Under this theory, a state, upon joining the program, assumed the responsibility of planning an adequate hospital program for all of its citizens. If this was done,

new hospital facilities. Grants are made by the Surgeon-General in accordance with a statewide plan submitted by an authorized state agency after it has made an inventory of existing facilities, determined hospital construction needs, and developed construction priorities according to federal standards.

105. Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959, 962 (4th Cir. 1963). As originally enacted in 1946, the Hill-Burton Act permitted individual hospitals to discriminate on the basis of race if they submitted a statement to that effect in advance. To the extent that the Act allowed this, it was declared to be unconstitutional in this case. *Id.* at 969.

106. *Id.* at 966.

107. *Ibid.*

108. *Id.* at 967. For a discussion of this argument see note 6 *supra.*

it mattered not that the instrumentalities chosen were "private" rather than "public"—they were all so involved with the state as to fall within the prohibitions of the fourteenth amendment.[109]

In addition, reservation of control under the Hill-Burton Act is left with the states. Included in this control is the fact that states must pass legislation requiring each hospital to meet minimum standards before any federal grants can be made.

B. *Reverter Clause*

In *Eaton v. Grubbs,*[110] the situation was quite different. First, the hospital had received very little money from the government;[111] second, an action had already been brought against the hospital, and it had prevailed on the strength of the private corporation theory.[112] However, both *Simkins* and *Burton v. Wilmington Parking Authority*[113] had been decided prior to the bringing of the second *Eaton* action.[114] In *Burton,* the Supreme Court found, under the particular facts involved in that case, that the action of a privately-owned restaurant located in a public building constituted state action.[115] In *Simkins,* the Fourth Circuit stated that much doubt had been

109. *Id.* at 968. As this issue goes to press, we note that the Fourth Circuit—again in an opinion by Judge Sobeloff—has further tightened its anti-discrimination requirements. In Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 35 U.S.L. WEEK 2526 (4th Cir. Mar. 9, 1967) (hospital received large amount of Hill-Burton funds), the court held that if there are no Negroes on the hospital staff and a qualified Negro applies, there is a prima facie inference of discrimination if he is rejected by a secret vote taken without a hearing.

110. 329 F.2d 710 (4th Cir. 1964).

111. *Id.* at 713.

112. Eaton v. Board of Managers of James Walker Memorial Hosp., 261 F.2d 521 (4th Cir. 1958).

113. 365 U.S. 715 (1961). In *Burton* a Negro plaintiff was refused service in a privately-owned restaurant which was located in a parking garage owned and operated by the Wilmington Parking Authority. The Authority had been created by the City of Wilmington pursuant to a Delaware statute, DEL. CODE ANN. tit. 22, §§ 501-515 (1953). The statutory purpose of the Authority was to provide adequate parking facilities for the convenience of the public and thereby relieve the parking crisis, which threatened the welfare of the community. DEL. CODE ANN. tit. 22, § 501(7) (1953). The court found that the denial of service to the plaintiff constituted a denial of equal protection through state action. The court relied on the fact that the land and building were publicly owned, and the fact that the costs of land acquisition, construction, and maintenance were defrayed entirely out of public monies.

114. Eaton v. Grubbs, 329 F.2d 710, 712 (4th Cir. 1964).

115. While we have attempted a brief statement of the *Burton* case in the text, we recognize the danger of this. As a recent commentator has stated, "it would be futile, indeed it would completely disregard the Court's admonition, to attempt to state the principle of law that emerges from or governs this case. This is its disturbing feature." Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent,* 61 COLUM. L. REV. 1458, 1462 (1961).

cast on the validity of the first *Eaton* case by the *Burton* decision.[116] Soon afterward, Eaton again filed suit; it was held that the first case did not constitute res judicata, because of the change of circumstances brought about by *Burton* and *Simkins*.[117]

In *Eaton,* the land upon which the hospital stood had been donated by the state. The original grant contained a reverter clause which provided that if the land ever ceased to be used as a hospital, it would revert to the state. The court found the reverter clause, by which the state exercised control over the hospital, to be a most significant factor. It held that while a purely private hospital—*i.e.,* one with no contacts with the state—might be able to do as it pleased, this particular hospital was under state control. It was not free, without suffering a reversion of the land, to cease being a hospital if it objected to the rules that the state imposed.[118]

The court further indicated that while this hospital did not participate in the Hill-Burton program, as did the Moses H. Cone Hospital in *Simkins,* it was still subject to all of the regulations set up by the state agency responsible for administering Hill-Burton.[119] Since it was subject to those regulations, *even though it did not receive any assistance under the program,* this involvement between the state and the hospital at least contributed to the finding of state action.[120]

If this factor were given controlling importance, any hospital in a state which is participating in the Hill-Burton program may be held to be so involved with the state as to come within the prohibitions of the fourteenth amendment. No action at all would be required on the part of a hospital to have it declared intimately connected with the state. It could be so found even though it had accepted no funds or assistance of any kind and had expressly disclaimed any desire to participate. The only requirement would be the desire of the *state* to participate in the national program. When this factor is present, *all* hospitals in the state would be involved in the state's master plan, and their action would be state action. In such a state, the "private" hospitals would no longer be able to exercise total discretion, at least to exclude Negro physicians solely on the basis of race.

Conclusion

It is no longer open to question that to practice medicine successfully, a doctor requires access to hospital facilities.[121] The complexity of modern

116. Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959, 968 (4th Cir. 1963).
117. Eaton v. Grubbs, 329 F.2d 710, 712 (4th Cir. 1964).
118. See *id.* at 713.
119. *Ibid.*
120. *Id.* at 715.
121. Rosner v. Eden Township Hosp. Dist., 58 Cal. 2d 592, 598, 375 P.2d 431, 434

medicine and advanced diagnostic techniques makes the use of hospital facilities mandatory for proper diagnosis and treatment of disease.[122] But in order to take advantage of these facilities, a physician or surgeon must be on the medical staff of a hospital.[123] If a physician is not allowed to use hospital facilities, his medical career is greatly limited.[124] His income may drop precipitously[125] and he may become nothing more than a referral service for those physicians who do have staff privileges.[126] In addition to its monetary value, staff membership is a matter of prestige.[127] A physician gains prestige with every appointment he receives and, conversely, loses it with every rejection or expulsion. Rejections are permanent blots on a physician's record which follow him wherever he goes.[128] Each hospital to which he applies for staff membership wants to know what action has been taken by other hospitals, and each rejection, for whatever reason, is held against him.[129]

Furthermore, there are some situations in which staff membership in a *particular* hospital is crucial, as in a town with only one hospital. In such a case, if the physician is refused staff privileges, he is out of a job. The board of directors of that one hospital has the power of professional life

(1962); Wyatt v. Tahoe Forest Hosp. Dist., 174 Cal. App. 2d 709, 715, 345 P.2d 93, 97 (1959); State *ex rel.* Bronaugh v. City of Parkersburg, 148 W. Va. 568, 573, 136 S.E.2d 783, 787 (1964).

122. Wyatt v. Tahoe Forest Hosp. Dist., *supra* note 121; State *ex rel.* Bronaugh v. City of Parkersburg, *supra* note 121.

123. Alpert v. Board of Governors of City Hosp., 286 App. Div. 542, 145 N.Y.S.2d 534 (1955); Duson v. Poage, 318 S.W.2d 89, 98 (Tex. Civ. App. 1958); Group Health Co-op. v. King County Medical Soc'y, 39 Wash. 2d 586, 604, 237 P.2d 737, 755 (1951).

124. Cases cited note 121 *supra.*

125. Greisman v. Newcomb Hosp., 40 N.J. 389, 394, 192 A.2d 817, 820 (1963); Horty, *The Legal Right of Physicians to Hospital Privileges,* 44 CHI. B. RECORD 373 (1963); Ludlam, *Medical Staff Privileges—Legal Snares for the Hospitals,* Hospitals, Aug. 1, 1964, p. 38.

126. Brief for Relator, p. 8, State *ex rel.* Sams v. Ohio Valley Gen. Hosp. Ass'n, 149 W. Va. 229, 140 S.E.2d 457 (1965).

127. Horty, *supra* note 125, at 373.

128. *E.g.,* Rosner v. Eden Township Hosp. Dist., 58 Cal. 2d 592, 375 P.2d 431 (1962). In this case, the board of directors refused to accept plaintiff largely because of his record at other hospitals.

> With respect to temperamental suitability, the board found that Dr. Rosner was "unable to get along with" the chief of surgery at City of Hope Hospital, had "unpleasantries" at Patton State Hospital, was "unable to get along at" Bella Vista Hospital, had "trouble" or was "unable to get along with" anesthesiologists at two other hospitals, and was "unable to get along with" the medical staff at Levine Hospital of Hayward. *Id.* at 595, 375 P.2d at 432.

129. At this point it should be recalled that a private hospital need not assign a reason for dropping a staff member or refusing to appoint a physician to its staff; consequently, the record may show only that the doctor in question has either been rejected or excluded from staff membership.

and death over every physician or surgeon who wishes to remain in the community.[130] The specialist may also find himself at the mercy of one hospital, even if he decides to practice in a relatively large community, because there may be few hospitals which are properly equipped to allow him to practice his specialty.

However, there are countervailing arguments for giving a hospital great latitude in deciding who may practice there. The basic argument is that a hospital is responsible for the welfare of its patients.[131] To fulfill this obligation, the hospital must make certain, by establishing rigid standards, that the members of its staff are competent. Hospitals reject the argument that licensing procedures provide adequate standards to test the competency of physicians.[132] It is said that licensing laws provide only a minimum standard for certification and do not guarantee that a doctor meets the standards which an individual hospital feels are necessary to protect its pa-

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130. The following examples involved one-hospital towns located, respectively, in New Jersey, Pennsylvania and New York. In each case, the physician was denied the use of the facilities with the results indicated:

> The Law Division found that the Newcomb Hospital did not confine itself to any specialized branch of medicine and had assumed the position and status of the only general hospital open to the public within the convenient accessibility of the inhabitants of the metropolitan area of Vineland, including Newfield; that the plaintiff had suffered economic and other harm because he was not permitted to admit his patients to the hospital or to serve them professionally once they were admitted, or to use the emergency room services of the hospital; that his patients suffered restrictions in their choice of physicians or hospital facilities because of the plaintiff's inability to attend them professionally at the hospital, and that this was not minimized by the fact that the plaintiff was permitted to visit them at the hospital without, however any opportunity to read their charts or prescribe for them. Greisman v. Newcomb Hosp., 40 N.J. 389, 394, 192 A.2d 817, 820 (1963).

> It is obvious that the plaintiff will suffer irreparable harm unless injunctive relief be granted him. The corporate defendant is the only osteopathic hospital in Lancaster County. Elsewhere, the nearest of such hospitals is at York, some 30 miles distant from Lancaster, and at Harrisburg, approximately 40 miles away. For all practical purposes, therefore, the corporate defendant's hospital is the only one to which Dr. Berberian can conveniently and satisfactorily have his many obstetrical and other patients admitted. Berberian v. Lancaster Osteopathic Hosp. Ass'n, 395 Pa. 257, 261, 149 A.2d 456, 457 (1959).

> If his patients require hospitalization, they must retain another physician. Since the nearest other hospitals are considerably distant, petitioner alleges that his exclusion from the city hospital at Fulton will effectively destroy his practice and deprive him of the right to practice medicine in that area. Alpert v. Board of Governors of City Hosp., 286 App. Div. 542, 545, 145 N.Y.S.2d 534, 536 (1955).

The first two cases involved "private" hospitals, the third one was public. In *Greisman,* the court held that in such a situation, the hospital would have to consider plaintiff's application. In *Berberian,* the court found that the hospital's by-laws required a hearing and sent the case back for one.

131. Greisman v. Newcomb Hosp., *supra* note 130, at 403, 192 A.2d at 825.

132. For an interesting discussion of each side of the licensing argument *compare* Note, 74 YALE L.J. 151, 159-60 (1964), *with* Note, 74 YALE L.J. 1313, 1321-22 (1965). For a critique of the standards and procedures in present medical licensure laws see Hansen, Medical Licensure and Consumer Protection (Nov. 1962).

tients.[133] Furthermore, even if licensing laws did insure that the physician was qualified at the time of his licensing, there is no periodic re-examination to determine if he has kept abreast of modern medical techniques.[134] The licensing procedure is also said to be inadequate because a license grants the holder the privilege of performing the most delicate operations, even though it certifies only that he has a general knowledge of medicine.[135] The license to practice, the argument continues, is only an indication of classroom knowledge, not practical competence.[136] In addition, since in some jurisdictions the hospital is liable for any injuries caused by staff members to patients, the hospital (or its insurance company) demands wide discretion in deciding who will be least likely to expose the hospital to a lawsuit.[137] Hospitals also argue that the hospital staff must be able to operate as a unit; apart from the question of individual professional competence, the members of a hospital staff must be compatible. If for some reason a physician cannot get along with other staff members, the hospital must have the right to remove him.[138]

As in all legal controversies, there is validity in the positions of both parties. In requiring that the rules promulgated by a public hospital bear a reasonable relation to the welfare of its patients, the courts consider both the need of a hospital to have some control over the physicians who practice in it and that of a qualified physician to have access to hospital facilities. In fact, the reasonableness rule is nothing more than a balancing process. In contrast, the sound discretion rule applied to private hospitals simply refuses to consider the physician's need for hospital facilities. The holding that a court will not review the private hospital's decision results in consideration of only the hospital's needs, since it is the hospital which makes the decision. Unless the hospital, on its own volition, decides that a physician shall be heard, he is left without a voice in the decision to admit or exclude him from staff membership. Furthermore, the fact that the hospital's decision may be based on a motive which bears no relation to the welfare of the hospital's patients is of no importance.[139] The only justification

133. Ludlam, *supra* note 125, at 38; Note, 17 STAN. L. REV. 900, 901 (1965).

134. Ludlam, *supra* note 125, at 38.

135. Note 17 STAN. L. REV. 900, 901 (1965).

136. See Dayan v. Wood River Township Hosp., 18 Ill. App. 2d 263, 268, 152 N.E.2d 205, 207 (1958).

137. See Rosner v. Peninsula Hosp. Dist., 224 Cal. App. 2d 115, 36 Cal. Rptr. 332 (1964); *cf.* Group Health Ins. v. Howell, 40 N.J. 436, 193 A.2d 103 (1963).

138. Van Campen v. Olean Gen. Hosp., 210 App. Div. 204, 205 N.Y. Supp. 554, *aff'd per curiam,* 239 N.Y. 615, 147 N.E. 219 (1924).

139. See, *e.g.,* State *ex rel.* Sams v. Ohio Valley Gen. Hosp. Ass'n, 149 W. Va. 229, 140 S.E.2d 457 (1965).

behind the sound discretion rule, as applied, is found in classic corporation law. Since the business decisions of a private corporation are said to be within the discretion of the corporation's directors, the same rule is said to apply to a private hospital.[140] There are a number of objections to this reasoning.

First, there is much authority that the rule governing the actions of the boards of directors of private corporations is not a rule of absolute discretion:

> If in the course of management, directors arrive at a decision, within the corporation's powers . . . and their authority, *for which there is a reasonable basis, and they act in good faith,* as the result of their independent discretion and judgment, and uninfluenced by any consideration other than what they honestly believe to be the best interests of the corporation, a court will not interfere with internal management and substitute its judgment for that of the directors. . . .[141]

Although a "business" decision by the board of directors is rarely set aside in practice,[142] the fact remains that the board of directors is not given absolute discretion but is required to have a reasonable basis for its decision *and* to act in good faith.

Second, even if the courts' interpretation of the sound discretion rule as applied to private corporations is correct, a strong argument can be made that the private hospital differs significantly from the private corporation. The primary goal of the private hospital is not that of making a profit; rather its "existence is for the purpose of faithfully furnishing facilities to the members of the medical profession in aid of their service to the public."[143] A hospital, even a private one, exists to serve the public and to furnish medical facilities to the members of the medical profession. Thus, the actions of the board of directors of a hospital should not be entirely insulated from public scrutiny. As the Supreme Court said in *Munn v. Illinois:*[144]

> When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good,

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140. *E.g.,* Van Campen v. Olean Gen. Hosp., 210 App. Div. 204, 205 N.Y. Supp. 554, *aff'd per curiam,* 239 N.Y. 615, 147 N.E. 219 (1924).

141. HENN, CORPORATIONS § 233 (1961). (Emphasis added.)

142. *E.g.,* Helfman v. American Light & Traction Co., 121 N.J. Eq. 1, 187 Atl. 540 (1936); BALLANTINE, CORPORATIONS 160-61 (1946).

143. Greisman v. Newcomb Hosp., 40 N.J. 389, 404, 192 A.2d 817, 825 (1963).

144. 94 U.S. 113 (1876).

> to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.[145]

Even if a private hospital cannot properly be described as a private corporation, the question remains as to the validity of the distinction between public and private hospitals apart from traditional corporation law. As has been discussed, the decisive factor in determining whether a hospital is public or private is often what the hospital happens to label itself in its charter.[146] There is no attempt to distinguish between the two on the basis of purpose or function, undoubtedly because no such distinction exists. With the development of such programs as Hill-Burton, both depend to a great extent on the government for financial support.[147] It makes little sense to hold that the actions of one group of hospitals will be subject to court scrutiny while those of the other will not, when the purpose of both is to provide medical facilities to the people of the community and when both provide those facilities in exactly the same manner. Yet this was precisely the result reached in *Group Health Co-op. v. King County Medical Soc'y.*[148] The court held that a public hospital had violated state antitrust laws by conspiring with a local medical society to restrain trade in the field of contract medicine, while a private hospital—which had performed exactly the same act—was held not guilty.[149]

This case is of additional interest in that it represents a flagrant example of a court's allowing the sound discretion rule to cloud the real issues. The sound discretion rule has no relevance to the question of whether the private hospital helped to create a monopoly under the Washington constitution, which required only a showing of an agreement to fix prices, limit production, or regulate the transportation of some product or commodity.[150]

If the physician and the public have a valid interest in seeing that the decisions of a hospital's board of directors are made with the welfare of the hospital's patients in mind, and if there is no valid reason for distinguishing between public and private hospitals, then the courts should no longer refuse to review the decision of a private hospital which denies a physician staff membership. The questions which then arise are how effective review

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145. *Id.* at 126.

146. For a discussion of the tests used to determine whether a hospital is public or private see notes 2-6 *supra* and accompanying text.

147. See Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied,* 376 U.S. 938 (1964).

148. 39 Wash. 2d 586, 667-70, 237 P.2d 737, 780-81 (1951).

149. *Ibid.*

150. WASH. CONST. art. 12, § 22.

can be carried out, and what remedies should be open to the physician to question his exclusion from staff membership.

Any remedy based on traditional contract law is ineffectual at best[151] because the contracts involved are for a one-year period only, and are renewable at the hospital's option. To avoid an action based on contract, the hospital has only to wait for the contract period to expire. The possibility that the hospital may be allowed to amend its by-laws after the commencement of the action further reduces the utility of an action based on contract.

Some relief is made available by decisions such as *Simkins* and *Eaton,* in which the courts held that Negro physicians could not be denied the use of hospital facilities because of their race.[152] However, these decisions are obviously of limited utility.

To illustrate: suppose two applications for staff membership are filed with a hospital receiving assistance under the Hill-Burton Act—one by a Negro physician and one by a white physician. Under *Simkins,* the Negro physician cannot be refused on the ground of race. But what if the hospital—acting as it always has, in the exercise of its sound discretion—simply tells both doctors that their applications have been rejected? In all likelihood, the Negro doctor will claim that his rejection was based on race. For this reason, it is likely that the board will simply give an ostensibly valid reason rather than face a court fight every time a Negro doctor applies for staff membership. The private hospital will thus be moving toward the standard of reasonableness required of public hospitals. No longer may it arbitrarily deny the use of its facilities to any doctor who applies, unless it wants to litigate the question every time a Negro is rejected. If it does go to court in order to prove that the grounds are not racial, the hospital must give some other ground for its decision. Furthermore, the reasons given will have to be reasonable or they will be held a subterfuge for discrimination in violation of the fourteenth amendment.[153]

Meanwhile, the white doctor, who has been similarly rejected, is without a remedy.[154] No one will assume that he is being denied his constitutional rights simply because he is arbitrarily denied access to a hospital. The

151. For a full discussion of the remedy of breach of contract see notes 36-45 *supra* and accompanying text.

152. The Civil Rights Act also provides that no person in the United States shall be discriminated against under "any program or activity receiving Federal financial assistance." 78 Stat. 252, 42 U.S.C. § 2000d (1964). For a full discussion of the effect of the *Simkins* and *Eaton* cases see notes 102-20 *supra* and accompanying text.

153. See Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959, 967-68 (4th Cir. 1963), *cert. denied,* 376 U.S. 938 (1964).

154. See State *ex rel.* Sams v. Ohio Valley Gen. Hosp. Ass'n, 149 W. Va. 229, 140 S.E.2d 457 (1965).

hospital may still reject him without offering any explanation. The courts will have reached the anomalous position of holding that, in practice, a private hospital has absolute discretion to refuse a white physician admission, but only limited discretion to refuse admission to a Negro.

There are several forms of action which appear well suited to a case in which a physician is refused admission to the staff of a private hospital. However, the majority of courts refuse to entertain such actions on the ground that the sound discretion rule insulates the hospital from liability.[155]

For example, an action will normally lie when one intentionally causes damage to another in the latter's business relations, when the former acts with malice and without justification.[156] This action would seem appropriate when a physician loses patients because the board of directors refuses to admit him to the staff of a private hospital in order to force him out of business. The elements of the tort, damage to plaintiff's business relations and unjustified and malicious conduct, are present. Yet the majority of courts refuse to entertain the action, holding that the hospital was acting in its sound discretion.[157]

The action of conspiracy can also provide a useful framework for resolving the issues in these cases. The gist of this action is not the conspiracy itself, but rather a tortious act in furtherance of a legitimate goal or an innocent act in furtherance of a wrongful goal.[158] Unfortunately, a court could easily refuse a physician relief under this theory on the ground that the hospital's acts were in its discretion; therefore, there could be no tortious act or wrongful goal. At least one court, however, has allowed a conspiracy action despite the sound discretion rule when "a physician of the highest qualifications is denied access to necessary hospital facilities as the result of a conspiracy designed to restrain competition and deprive him of his practice in order to benefit competing members of the conspiracy."[159] Thus, this court has taken the reasonable position that it will not allow the sound discretion rule to serve as a barrier to an examination of whether a conspiracy existed. If a wrong was committed, the court will give relief.

One commentator, however, has termed a civil action for conspiracy "not an appropriate or practical method of questioning the reasonableness of a hospital's restrictions."[160] Two reasons are given to justify this statement:

155. *E.g.*, Shulman v. Washington Hosp. Center, 22 F. Supp. 59, 63 (D.D.C. 1963).

156. For a discussion of this action see notes 46-53 *supra* and accompanying text.

157. See note 50 *supra* and accompanying text.

158. For a full discussion of this action see note 69 *supra* and accompanying text.

159. Willis v. Santa Ana Community Hosp. Ass'n, 58 Cal. 2d 806, 376 P.2d 568, 26 Cal. Reptr. 640, (1962); *accord*, Cowan v. Gibson, 392 S.W.2d 307 (Mo. 1965).

160. Note, 17 STAN. L. REV. 900, 911 (1965).

(1) the action is one for damages, and thus does not afford a proper mode of relief to the physician refused staff membership; and (2) if injunction were available, the doctor would have to prove not only his competence but also the conspirators' unethical conduct.[161]

As to the first objection, there is no reason why the action should be limited to one for damages, although if damages could be proved, they would compensate the physician to a limited degree. The theory of equity is that an injunction will issue when the harm or threatened harm to the plaintiff is such as may be termed "irreparable."[162] If the action taken by the alleged conspirators will produce such injury, an injunction should issue. Thus, to conclude that the only available remedy is one for damages is to miss the point of the cases. Conspiracy to induce breach of contract, for example, has been enjoined by the courts,[163] and the theory of those cases could be applied when such action is alleged by a physician.

Furthermore, it is not indicated why unethical conduct on the part of the defendant physicians and board members would be any more difficult to prove than the wrongful agreements necessary to all conspiracy actions.[164]

Although there is little authority on the question, an action based on an unjustifiable refusal to deal seems extremely appropriate in these hospital cases.[165] Liability under this theory exists when "persons cause harm to others by a concerted refusal in their business to enter into or continue business relations even though they would not be liable for similar conduct without concert, if their concerted refusal is *not justified* under the circumstances."[166] Applying the five factors which the *Restatement* suggests should be used in determining justification,[167] the following analysis is suggested when a doctor has been denied the use of hospital facilities:

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161. *Ibid.*

162. This term has sometimes been defined as that sort of injury "that ought not to be submitted to on the one hand, or inflicted on the other." Nashville, C. & St. L. Ry. v. McConnell, 82 Fed. 65 (M.D. Tenn. 1897); Central of Ga. Ry. v. Americus Const. Co., 133 Ga. 392, 65 S.E. 855 (1909); Chicago Gen. Ry. v. Chicago, B. & Q.R.R., 181 Ill. 605, 54 N.E. 1026 (1899); HIGH, INJUNCTIONS 36 (4th ed. 1905); 2 WOOD, NUISANCES 1126 (3d ed. 1893).

163. Annot., 84 A.L.R. 43, 85 (1933).

164. Perhaps all that is meant here is that all actions in which physicians are called on to testify to the competence of their brothers are difficult (as in malpractice cases). However, even if this is true, it does not justify dismissing the action any more than it justifies doing away with all malpractice actions. The fact that a case is difficult to prove does not mean either that it should not be brought or that it would not afford ample relief.

165. For a full discussion of this action see notes 77-83 *supra* and accompanying text.

166. RESTATEMENT, TORTS § 765 (1939). (Emphasis added.)

167. *Ibid.*

(1) *The objects and interests of the conspirators.* As staff members and directors of a hospital, their interest must be the health and safety of the patients and the good of the hospital. If the refusal to admit the plaintiff is based on the interests of the patients, there will probably be no recovery. If, on the other hand, they are motivated by a desire to monopolize the practice of medicine in the area or to injure the plaintiff in his business dealings with his patients, the courts should allow recovery.

(2) *The hardship caused the plaintiff.* In these cases, the hardship is obvious.[168] A physician is relegated to the position of little more than a first aid station or a referral service for other physicians (who *do* have staff positions) if he has no access to a hospital. In addition, his opportunity to mitigate this hardship is limited. There are several possibilities. If the plaintiff is situated in a small town where the defendant hospital is the only one available, his chances to mitigate the hardship are virtually nil.[169] The fact that there is a hospital in the next town is of no value to a plaintiff who desires to practice medicine in a particular town. If his patients must go to the next town for hospitalization, they will find a more convenient physician. The results would be the same if there were a small number of private hospitals which had conspired to exclude the plaintiff. The opportunity to mitigate hardship increases as the size of the town—and thus, usually, the number of hospitals—increases. But unless a public hospital is available to the physician, his chances will be slight.[170]

The action taken by the board of directors of one hospital seems to follow a physician for the rest of his career.[171] If it becomes known that he has been refused admission to the staff of a certain hospital, a shadow is cast on future applications to other hospitals. Since the so-called private hospitals are privileged to act in their sound discretion, and thus need assign no reason for their actions, the physician's record may only report that he has been rejected or dismissed.

(3) *The appropriateness of the means chosen to reach the conspirators' desired ends, and the availability of less harmful means.* The appropriateness of the means chosen must be examined in light of two general goals which may be involved. If the aim of the conspirators is to injure the plaintiff or set up a monopoly, the means chosen are irrelevant. Since the goal is illegal, it should not matter what means are used to achieve it—the conspiracy should be restrained. On the other hand, many hospitals con-

168. See notes 121-30 *supra* and accompanying text.

169. See Greisman v. Newcomb Hosp., 40 N.J. 389, 192 A.2d 817 (1963).

170. See notes 28-35 *supra* and accompanying text.

171. See notes 128-29 *supra* and accompanying text.

tend that all they are doing is trying to uphold their high standards and that their only interest is the welfare of the patient.[172] When the hospital directors honestly feel that they must act as they do in order to uphold the hospital's standards, the means chosen should be examined by an impartial third party, the court, to determine their appropriateness.

(4) *The relationship between the physician and the hospital and their relative economic power.* There are three possible relationships. In the first, the physician has staff privileges under a contract for one year with the hospital. In the second, the physician's one year appointment has run out and the board—in its sound discretion—has failed to reappoint him. In the third situation, the physician has never had staff privileges. In all three, the balance of economic power is obviously weighted in favor of the hospital. It is the physician who needs the use of the hospital, and the physician, in all three instances, has no bargaining power. The fact that he is presently under a contract is of little value; the hospital may refuse to renew it when it expires.

(5) *The effect of the conspiracy on the social interest in business enterprise.* The effect of such a conspiracy on competition would, of course, be greatest in a one-hospital town. A conspiracy by the directors and staff of the hospital to keep a given physician off the staff would directly limit competition.[173] The evil, however, is not limited to this situation. Since any person may have need of hospitalization, and since it is doubtful whether anyone examines the hospital affiliation of his family physician, the public has an interest in seeing that every qualified physician is fully able to practice his art. The social interest in the successful practice of every licensed physician is probably greater than in any other occupation. Elimination of some competition may be helpful to some individual doctors, but not to the public at large. If there exists a problem in that unqualified physicians are allowed to practice, then the problem is in the licensing laws. Once a physician has been licensed to practice, hospital boards ought not to be permitted to sit as private licensing agencies.[174]

172. See, *e.g.*, State *ex rel.* Sams v. Ohio Valley Gen. Hosp. Ass'n, 149 W. Va. 229, 140 S.E.2d 457 (1965).

173. In larger cities, it is doubtful that all hospitals would join together in this manner. However, it is not unheard of. See United States v. American Medical Ass'n, 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943); United States v. American Medical Ass'n, 110 F.2d 703 (D.C. Cir.), *cert. denied*, 310 U.S. 644 (1940); Group Health Co-op. v. King County Medical Soc'y, 39 Wash. 2d 586, 237 P.2d 737 (1951).

174. The AMA's House of Delegates has recently adopted a report, the conclusion of which was "that every ethical licensed doctor of medicine who needs and desires them should have staff privileges in at least one accredited community hospital." AMA News, Dec. 12, 1966, p. 9, col. 2.

Despite the desirability of the balancing process which this theory embraces, one can expect many courts to hold that justification for the acts of the hospital does exist, since those acts are within the board's sound discretion. However, if we remove this traditional rule, based on principles of corporation law which are themselves of doubtful authority, there exists a legal framework within which to decide these cases. This framework provides for a weighing of the contending policy factors, *i.e.*, the right of a hospital to protect its patients and itself from incompetent physicians and the right of a competent doctor to practice his profession. In this action, plaintiff-physician must show that the hospital acted without justification—that its action was not based on its concern for the welfare of its patients. A disinterested court can decide how, under a particular set of facts, the two competing interests should be reconciled.

Finally, it has been demonstrated that limited court review of the actions of the board of directors will not hamper the efficient administration of the hospital. Courts have always been willing to hold the directors of a public hospital to a standard of reasonableness.[175] There is nothing to suggest that such a rule places any undue restrictions on the functioning of public hospitals or that private hospitals are better run because their directors are not so limited. In fact, it is submitted that if a board of directors knows that the courts will require it to meet a standard of reasonableness or to show some justification for its acts, the board will likely reach well-reasoned decisions, rather than decisions based on personal preference or greed.

175. Rosner v. Peninsula Hosp. Dist., 224 Cal. App. 2d 115, 36 Cal. Rptr. 332 (1964).