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Charities' Changing Tort Immunity

In attempting to apply the judicial yardstick in measuring the position of charitable institutions, as to their tort liability in our present day society, the courts have cast a confusing pattern of decisions. When viewed on a nationwide scope the scene is a wardrobe of conflict and odd sized immunities. Charities in some states are fully cloaked in a mantle of immunity from tort liability, while similar charities in their sister states are stripped of all privileged protective raiment. Between these extreme views, shades of subtleties determine the dimensions of liability. In all but a few jurisdictions the legislature has remained silent.

Cases on the subject are characterized by riotous dissent, paradoxes of principle, fictional assumption of fact and consequence, by reasons more varied than results. These, it has been said, "are the earmarks of law in flux."¹

Decisions of the past dozen years have perhaps established a modern trend by removing the immunity. A very recent Kansas case has been typical of this trend.² It affected a sweeping alteration of previous policy in removing the immunity and placing charities on equal footing with all other corporations and individuals in society. This court follows along with other total liability states by requiring one to be just before being generous.

The vast majority of cases, it should be pointed out, involve property held by a charitable corporation, since incorporation has practically replaced the technical trust as the legal mode of constituting permanent charities.³ Hospitals are the most frequently attacked by claimants, although educational institutions, churches, and poor homes are similarly situated with respect to the immunity. In trust situations, where property is turned over to individual trustees or trust companies for charitable purposes, the duty of the trustee is merely to invest the trust funds and apply the income for charitable purposes. In such cases the question of tort liability seldom arises. When, however, property is turned over to a charitable corporation, as an outright gift, no technical trust is created and the corporation's duty is to follow the charitable purposes of its charter.⁴ While there is a real difference between a trustee's legal status and that of a corporation, ". . . it is not believed that there should be any distinction between the two situations as to tort liability."⁵

The courts in determining the charities' position as to liability are confronted by a sharp contrast of values. Strict immunity often means that the individual must go uncompensated for an injury received through no fault of his own; while strict liability may mean that the charity must forego its future good works by

¹ Mr. Justice Rutledge, in *President and Directors of Georgetown College v. Hughes*, 130 F. 2d 810, 812 (D.C. Cir. 1942).

² *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P. 2d 934 (1954).

³ *President and Directors of Georgetown College v. Hughes*, *supra*, p. 815.

⁴ 3 SCOTT, TRUSTS § 402 (1939).

⁵ 2A BOGERT, TRUSTS AND TRUSTEES § 401 (1949).

virtue of depletion of its funds through claims founded upon its negligence. This involves not only the protection of charity for the sake of charity but also safeguarding those other needy individuals destined to be deprived of future charitable benefits. In short, what must be weighed is the effect of liability upon society, as well as the effect of immunity upon the injured individual. Forming the background of this conflict is the rather clear and decided public policy of encouraging charitable activities. Of course, while not always mentioned, the availability of insurance is a modern factor tending toward liability.

The rule of immunity in this country had a very unusual beginning. The first American cases founded their legal justification upon the dictum of Lord Cottenham taken from the English cases of *Feoffees of Heriots Hospital v. Ross*⁶ and *Duncan v. Findlater*⁷ which had been followed in the English Case of *Holliday v. St. Leonard*.⁸ The substance of this dictum was overruled by the House of Lords when it next considered the question.⁹ There has never been any immunity in England since. On the contrary, it has been said, that diligent search revealed no immunity anywhere else in the world except the United States.¹⁰ Although overruled in 1866 by the English courts, this repudiated dictum was resurrected and introduced in America by *McDonald v. Massachusetts General Hospital*¹¹ and *Perry v. House of Refuge*.¹² The *Perry* case quoted this dicta as follows,

There is a trust, and there are persons intended to manage it for the benefit of those who are to be the objects of the charity. To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose.

Mr. Justice Rutledge, commenting on this dictum, observes that Lord Cottenham regarded the exemption of these funds as only an application of the well settled law of trusts.¹³ The English cases pointed to the fact that damages were to be paid from the pocket of the wrongdoer and that he should not be indemnified from the trust fund for his wrongdoing. However, the doctrine of *respondet superior* compelled the trustee to respond for the negligent acts of his servants even though he himself had not participated in the wrong. Since it has become more common for the charity to incorporate, the trustee's liability disappears, for there is no trustee to be liable. The different position of officers and directors shuts off recourse to their assets and strips the victim of all claims except against the negligent actor, although the dicta upon which the immunity was based had pointed the plaintiff to another source of recovery, i.e. the trustee.

Since the first cases, modifications and exceptions were abundant. Some of the courts having progressively run the gamut from complete immunity through

⁶ 12 Clark and Fen. 507, 8 Eng. Rep. 1508 (1846).

⁷ 6 Clark and Fen. 894, 7 Eng. Rep. 934 (1839).

⁸ 11 C.B.N.S. 192, 142 Eng. Rep. 769 (1861).

⁹ *Mersey Docks Trustees v. Gibbs*, 11 H.L. 686, 11 Eng. Rep. 1500 (1866).

¹⁰ 25 A.L.R. 2d 29, 43 (1952).

¹¹ 120 Mass. 432, 21 Am. Rep. 529 (1876).

¹² 63 Md. 20, 52 Am. Rep. 495 (1885).

¹³ *President and Directors of Georgetown College v. Hughes*, *supra*.

to a position of complete liability.¹⁴ Four main theories are applied to support the immunity granted to charitable corporations. One of these is the "trust fund theory" based upon Lord Cottenham's dictum which would not permit a diversion of the corporate fund held absolutely for charitable purposes. Another theory granted a qualified immunity when the injury was to a beneficiary, if the charity had used due care in the selection of its agents. The basis of this theory is the somewhat novel idea that the beneficiary waives his right to recover damages for torts inflicted by the charity when he accepts its benefits.¹⁵ A third theory is based upon the non-applicability of the well-settled agency principle of *respondeat superior*. It is said that since the charity receives no benefits from its servants, the ordinary relationship of principal and agent does not arise.¹⁶ This theory is somewhat difficult to understand since the doctrine of *respondeat superior* was founded upon the maxim *que facit per alium facit per se*. The fourth theory, known as "the public policy theory", although given a separate distinction, seems to be the foundation of the other three theories.¹⁷ This appears to be the more rational of all the immunity views since it meets squarely the social problems involved rather than stretching pre-existing legal concepts to suit the case.

Indeed, it is the weakness of the legal arguments supporting immunity, that has permitted courts to refute this privilege and place the charities again within the ordinary operation of the rules of tort liability. It remains without a doubt, however, even in these courts, that charities should be encouraged and favored as a fundamental principal of our social philosophy. To deny this is to either advocate a welfare state, wherein the government is solely charged with alleviation of suffering and ignorance, or else remain dispassionately passive to the plights from which, by nature, none of us are immune. No serious discussion in this country has advocated such a philosophy of abandonment nor is it conceived that a Leviathan of Welfare would be welcome. This is certainly the feeling expressed in a pointed Kentucky court opinion:

We are not convinced that the modern trend is away from the well-reasoned and long established rule that charitable institutions are not liable for torts. As we gather the reasoning in the opinions from those jurisdictions that have abandoned this well-rooted and salutary policy, it is based upon the theory that private charity has been displaced by a paternalistic government, if not a welfare state, which furnishes free charitable services to the indigent. However, there is still a school of thought in America which does not believe that private charity is a thing of the past and that all burdens of a suffering humanity should be placed in the lap of government, state and federal.¹⁸

The public policy toward tort immunity for charities then, is a matter of degree. The same social policy, when reflected by a court concerned with the injured individual's rights, would stop short of immunity while other courts, con-

¹⁴ 25 A.L.R. 2d 29, 170 (1952) referring to New York State.

¹⁵ *Bruce v. Y. M. C. A.*, 51 Nev. 372, 277 P. 798 (1929).

¹⁶ *Bond v. Pittsburgh*, 368 Pa. 404, 84 A 2d 328 (1951).

¹⁷ *Coughman v. Columbia Y. M. C. A.*, 212 S. Car. 337, 47 S.E. 2d 788 (1948).

¹⁸ *Forrest v. Red Cross Hospital*, 265 S.W. 2d 80, 82 (Ky., 1953).

sidering the broad class of beneficiaries, would extend the immunity at least to some classes of claimants. Difficult sociological and economic factors must necessarily be considered by courts having neither the leisure nor facilities for such a study. In the absence of a legislative declaration, it should not be surprising to find the cases decided either by forcing established legal principles onto the facts of the case or by the courts predisposition toward a particular social stand.

Considering only the immediate parties to the conflict, we find the injured person left without relief where the immunity is granted, and the charity burdened by claims where the immunity is denied. Professor Scott suggests that, perhaps the real reason for the immunity is the fear of ungrounded claims against the hospitals.¹⁹

It is now widely felt that risk distribution or insurance might solve the problem satisfactorily. The *Georgetown* case, noted:

The rule of immunity is out of step with the general trend of legislative and judicial policy in distributing losses incurred by individuals through the operation of an enterprise among all who benefit by it rather than in leaving them wholly to be borne by those who sustain them.²⁰

If the court adopts a rule of immunity the injured parties are left without relief. An attempt to remedy such a result in terms of insurance would practically require universal coverage. It can be expected that everyone at some time or another would be subjecting themselves, perhaps unknowingly, to the risk of injury by such an immune group. When liability is imposed upon the charity, it is left with a burden only partially minimized by its ability to secure insurance. With many charitable activities this would reduce the loss to a negligible amount. However, in other cases, particularly hospitals and such national emergency groups as the American Red Cross, the cost of insurance, when available, remains a sizeable burden. As said in the *Georgetown* case:

What is at stake, so far as the charity is concerned, is the cost of reasonable protection, the amount of the insurance premium as an added burden on its finances, not awarding over in damages of its entire assets.²¹

A recent Kentucky court expressed itself as follows:

If immunity from tort be abolished from charitable institutions, larger subscriptions and donations must be obtained to meet heavy premiums on liability insurance, and the present enormous operating expenses of such institutions will undoubtedly mount to dizzy heights. They are already so high that paying patients in moderate circumstances can hardly afford hospitalization of even moderate duration.²²

Again, a hospital publication, in discussing the recent trend toward liability, mentioned that some hospitals in Kansas, following the decision removing immunity, were notified that their insurance premiums would be raised as much as 300 per cent.²³

¹⁹ 3 SCOTT, note 4 *supra* at p. 2150.

²⁰ Note 13 *supra*, p. 827.

²¹ *Id.*, p. 824.

²² Note 18 *supra*, p. 82.

²³ Note 2 *supra*; *Health Legislation*, Hospital Progress, June, 1954, p. 70.

Both hardships considered, it would seem more simple and certain to approach the problem from the point of liability as the rule, and attempt to adjust the burden upon the institutions wherever needed. A complete evaluation of the experience figures of the various types of charities is needed. Aid is long overdue in effectuating our policy of encouragement by some means short of immunity and the consequent shift of responsibility to the injured party. Legislatures, it is believed, must inform themselves of the irregular and illogical holdings leaving our social policy wanting of just fulfillment. Can we not picture the faltering stride of willing workers to the scene of suffering, knowing full well of the need and yet conscious of their own peril, seemingly small as it may be.

A legislative study is needed before the decisions of today give way to the decisions of tomorrow based upon the decisions of yesterday.

Status of Immunity Doctrine in the States

I NO CASES ON POINT:

N.Mex., S.Dak.

II COMPLETE IMMUNITY:

Ark., Colo., Ill., Ky., Mass., Md., Mo., Nev., Ore., Pa., S.Car., Tenn.,
Tex., W.Va., Wis., Wy.²⁴

²⁴ Ark., *Fordyce v. Womens Christian Nat. Asso.*, 70 Ark. 550, 96 S.W. 155 (1906) (Ark. Stat. § 66-517 provides direct cause of action against the insurer.); Colo., *St. Mary's Academy v. Solomon*, 77 Colo. 463, 238 Pac. 22 (1925) (No bar to tort action that defendant is charity but trust funds immune from execution of judgment); see also 240 P. 2d 917; Ill., *Moore v. Moyle*, 405 Ill. 55, 92 N.E.2d 81 (1950) (non trust funds may be recovered against.); Ky., *Forrest v. Red Cross Hospital*, (Ky., 1954) 265 S.W.2d 80.; Mass., *Roosen v. Peter Bent Brigham Hospital*, 235 Mass. 66, 126 N.E. 392 (1920); Md., *Loeffler v. Sheppard & E. P. Hospital*, 130 Md. 265, 100 Atl. 301 (1917) (Statute prevents insurer from asserting immunity) Md. Laws of 1947, c. 900 p. 2161; Mo., *Dille v. St. Lukes Hospital*, 355 Mo. 436, 196 S.W. 2d 615 (1946); Nev., *Bruce v. Y.M.C.A.*, 51 Nev. 372, 277 Pac. 798 (based on implied waiver, but indicated charities in themselves are not immune.); Ore., *Gregory v. Salem General Hospital*, 175 Ore. 464, 153 P. 2d 837, (1944) (based on trust funds and public policy theories.); Pa. *Bond v. Pittsburgh*, 368 Pa. 2d 404, 84 A. 2d 328 (1951) (no recovery allowed against non-trust assets, the claim of a joint tortfeasor is also defeated but immunity does not extend to purposes foreign to charity; includes breach of duty.); S. Car., *Caughman v. Columbia Y.M.C.A.*, 212 S. C. 337, 47 S.E. 2d 788; Tenn., *McLeod v. St. Thomas Hospital*, 170 Tenn. 423, 95 S.W. 2d 917 (No bar to action that defendant is charity but execution may issue against only non-trust assets.); Tex., *Felan v. Lucey*, 259 S.W. 2d 302 (1953) (hospital liable to its servants for corporate negligence; liable if furnishing faulty equipment to treat patients.); W. Va., *Roberts v. Ohio Valley General Hospital*, 98 W. Va. 476, 127 S.E. 318 (1925) (hospital held liable because of its failure to allege due care in selecting employees.); Wis., *Schau v. Morgan*, 241 Wis. 334, 6 N.W. 2d 212 (1942) (Exemption from common law duties, liable under statutory enactments unless specifically exempted.); Wy., *Bishop Randall Hospital v. Hartley*, 24 Wy. 408, 160 Pac. 385 (1916) (plaintiff must allege and prove the hospital failed to use due care in selection of nurses.)

III NO IMMUNITY:

Ariz., Calif., Del., Iowa, Kan., Minn., Miss., N.Dak., N.H., N.Y., Vt., Wash.²⁵

B. No decisions as to non paying beneficiaries, liability to all others.

Ala., Conn., Fla., Ga., Okla., Ut.²⁶

IV PARTIAL IMMUNITY: AS TO BENEFICIARIES, LIABILITY TO STRANGERS.

D.C., Idaho, Ind., La., Me., Mich., Mont., Nev., N.Car., N.J., Ohio, R.I., Va.²⁷

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²⁵ Ariz., *Ray v. Tuscon Medical Center*, 230 P. 2d 220 (Ariz. 1951) (overruled previous immunity.); Calif., *Maloy v. Fong*, 37 Calif. 2d 356, 231 P. 2d 241 (1951); Del., *Durney v. St. Francis Hospital*, 46 Del. 350, 83 A. 2d 753 (lower court decision.); Iowa, *Haynes v. Presbyterian Asso.* 241 Iowa 1269, 45 N.W. 2d 151, (1950) (overruled previous immunity.); Kan., *Noel v. Menninger, Foundation*, 175 Kan. 751, 267 P. 2d 934 (1954); Minn., *Mulliner v. Evangelischer Diakonissenverein*, 144 Min. 392, 175 N.W. 699 (1920); Miss., *Mississippi Baptist Hospital v. Holmes*, 214 Miss. 906, 55 So. 2d 142 (on suggestion of error January 28, 1952, 56 So. 2d 709); N. Dak., *Rickbel v. Grafton Deaconess Hospital*, 74 N. D. 525, 23 N.W. 2d 247 (1946) (court felt a statute would be required to grant immunity.); N.H., *Welch v. Frisbie Memorial Hospital*, 90 N.H. 337, 9 A. 2d 761 (1939) (no immunity in absence of legislative declaration.); N.Y., *Dillon v. Rockaway Beach Hospital*, 284 N.Y. 176, 30 N.E.2d 373 (1940) (immune for negligence of doctors, internes, and nurses in their general employ.); Vt., *Foster v. Roman Catholic Diocese*, 116 Vt. 124, 70 A. 2d 230; Wash., *Pierce v. Yakima Valley Hospital*, 43 Wash. 2d 162, 260 P. 2d 765.

²⁶ Ala., *Alabama Baptist Hospital Board v. Carter*, 226 Ala. 109, 145 So. 443 (1932); Conn., *Cohen v. General Hospital Society*, 113 Conn. 188, 154 Atl. 435 (1931); Fla., *Nicholson v. Good Samaritan Hospital*, 145 Fla. 360, 199 So. 344 (1940) (indications of absolute liability.); Ga., *Burgess v. Jamar*, 73 Ga. 857, 38 S.E. 2d 637 (1946) (no decision by highest court regarding liability to strangers.); Okla., *Gable v. Salvation Army*, 186 Okla. 687, 100 P. 2d 244 (1940) (strongly indicates liability to non paying beneficiaries.); Ut., *Sessions v. Thomas D. Dee Memorial Hospital Asso.*, 94 Utah 460, 78 P. 2d 645 (1939).

²⁷ D.C., *President and Directors of Georgetown College v. Hughes*, 130 F. 2d 810 (1942), *White v. Providence Hospital*, (D.C. Dist. Col. 1943) 80 F. Supp. 76 (1943) (held hospital immune when a patient was injured.); Idaho, *Wilcov v. Idaho Falls Latter Day Saints Hospital*, 59 Idaho 350, 82 P. 2d 849; Ind., *Old Folks and Orphan Childrens Home v. Roberts*, 83 Ind. App. 546, 149 N.E.188(1925); La., *Thibodaux v. Sisters of Charity*, 11 La. App. 423, 123 So. 446 (1929) (Supreme Court case approving immunity.); Me., *Jensen v. Maine Eye and Ear Infirmary*, 107 Me. 408, 78 Atl. 898 (1910) (held immunity against paying beneficiaries—no other cases.); Mich., *Winslow v. Veterans of Foreign Wars Nat. Home*, 328 Mich. 488, 44 N.W. 2d 19 (1950); Mont., *Borgess v. Oregon Short Line Railroad*, 73 Mont. 407, 236 Pac. 1069; Neb., *Wright v. Salvation Army*, 125 Neb. 216, 245 N.W. 549 (1933); N.C., *Williams v. Union County Hospital Asso.*, 234 N.C. 536, 67 S.E. 2d 662 (1951); N.J., *Boeckel v. Orange Memorial Hospital*, 108 N.J.L. 453, 158 Atl. 832 (1932); Ohio, *Cullen v. Schmit*, 139 Ohio St. 194, 39 N.E.2d 146 (1942); R.I., *Glavin v. Rhode Island Hospital*, 12 R.I. 411, 34 Am. Rep. 675 (1879), Statute grants immunity regarding beneficiaries, (R.I. General Laws c. 116 § 95, 1938—changed previous judicial strict liability.); Va., *Weston's Adminx. v. The Hospital of St. Vincent of Paul*, 131 Va. 587, 107 S.E. 785 (1921).