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Torts--Charitable Immunity

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course had absolute priority. The cases were both decided on their facts, the court finding that the plaintiffs had in fact not made the turns with reasonable safety, which is the statutory requirement.

The opinion rendered in the principal case was contrary to the legislative intent and overruled established case law. It contributes to a mechanical jurisprudence in an area of conduct singularly in need of more flexible treatment. There is a compelling need for a more ample explanation for the result reached than was provided in this case.

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TORTS—CHARITABLE IMMUNITY—Decedent died from injuries allegedly received in a fall from a hospital bed while he was a patient in defendant's hospital. His administratrix charged that the injuries resulted from the negligence of the hospital and its agents. The defendant answered that it operated a non-profit, non-stock corporation, for purely charitable purposes, and was not liable for negligence under the doctrine of charitable immunity. Plaintiff's motion to strike was overruled and the complaint dismissed. *Held*: Reversed. Despite its previous contrary position, the court reasoned that charitable immunity was based upon expediency rather than right, and, standing alone, it was not a sufficient defense. *Mullikin v. Jewish Hosp. Ass'n*, 348 S.W.2d 930 (Ky. 1961).

The *Mullikin* decision placed Kentucky among a number of jurisdictions which have recently denied charitable immunity.[1] The Kentucky court overruled a precedent which was established in 1894, when a purely charitable institution was held immune from an action for assault upon an inmate by an institution employee.[2] Although the Kentucky court continued to uphold charitable immunity

[1] Wheat v. Idaho Falls Latter Day Saints Hosp., 78 Idaho 60, 297 P.2d 1041 (1956); Parker v. Port Huron Hosp., 105 N.W.2d 1 (Mich. 1960); Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958); Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3 (1957); Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410 (1956); Kojis v. Doctors Hosp., 12 Wis.2d 367, 107 N.W.2d 131 (1961). See Rodkey, *Charitable Immunity—A Tale of a Law in Flux*, 48 Ill., B.J. 644 (1960), listing twenty-one jurisdictions with no immunity and twenty jurisdictions with qualified immunity in 1960, and the Hosp. L. Manual, Negligence II, charts A, A 1 & A 2 (Atty's vol. 1961), listing only seven states with total immunity. A now out-dated survey is found in Annot., 25 A.L.R.2d 29, 143-200 (1952). *Contra*, Tomlinson v. Trustees of Univ. of Pa., 164 F. Supp. 352 (E.D. Pa. 1958); Muller v. Nebraska Methodist Hosp., 160 Neb. 279, 70 N.W.2d 86 (1955); Memorial Hosp. Inc. v. Oakes, Adm'x, 200 Va. 878, 108 S.E.2d 388 (1959). See Joachim, *Questionable Status of Charitable Immunity*, 32 Conn. B.J. 330, 331 (1958) listing fifteen reasons given for the charitable immunity doctrine.

[2] Williams v. Ind. School of Reform, 93 Ky. 251, 24 S.W. 1065 (1894).

in decisions as late as 1954[3] and 1955,[4] the doctrine was eroded in 1957 by *Roland v. Catholic Archdiocese*,[5] in which the court held that a charitable corporation had no immunity from tort liability for violation of a statutory duty to provide fire escapes where a stranger was injured on property held only for income production. The dictum in the *Roland* opinion indicated that the doctrine would soon be rejected.[6]

Although the facts of the *Mullikin* decision are limited to a charitable hospital, the language of the court is broad enough to sustain unlimited rejection of the immunity as indicated by the following passage from the opinion:

> The rule is that charity is no defense to tort. Immunity of charitable institutions such as we have in this case is indeed an exception which seems to have crept into our law under the pressure of expediency. Upon applying the simple test of right and wrong we are forced to the conclusion that the *charitable nature of a wrongdoer should create no exception to the rule of liability.* Nor is there any reason under the rule of right why the principle of respondeat superior should not apply. . . . It has not been right, is not now right, nor could it ever be right for the law to forgive any person or *any association of persons for wronging any other person.*[7]
>
> [W]e think it unwise to distinguish between paying patients, non-paying patients and other persons who may be negligently injured. (Emphasis added.)[8]

Denial of the charitable immunity defense to a church in a subsequent decision[9] strengthens the broad language of the *Mullikin* decision.

The Kentucky court had previously relied upon the questionable theories of public policy, trust fund depletion, and implied waiver in justifying the charitable immunity doctrine through the years.[10] Because tort liability threatened the effectiveness and existence of the typically small, donation-financed charity, which performed services to needy and destitute, public policy warranted the protection of charitable immunity. Under the trust fund theory, tort liability was a diversion of funds given only for benevolent uses by the

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[3] Forrest v. Red Cross Hosp., 265 S.W.2d 80 (Ky. 1954).

[4] St. Walburg Monastery of Benedictine Sisters v. Feltner's Adm'r, 275 S.W.2d 784 (Ky. 1955).

[5] 301 S.W.2d 574 (Ky. 1957).

[6] See Oberst, *Recent Developments in Torts; Decisions of the Court of Appeals at the 1956-57 Terms*, 46 Ky. L.J. 193, 196 (1957).

[7] Mullikin v. Jewish Hosp. Ass'n, 348 S.W.2d 930, 931, 932 (Ky. 1961).

[8] *Id.* at 935.

[9] Sheppard v. Immanuel Baptist Church, S.W.2d (Ky. 1961).

[10] Forrest v. Red Cross Hosp., 265 S.W.2d 80 (Ky. 1954); Williams' Adm'x. v. Church Home for Females & Infirmary for Sick, 223 Ky. 355, 3 S.W.2d 753 (1928); Pikeville Methodist Hosp. v. Donahoo, 221 Ky. 538, 299 S.W. 159 (1927); Emery v. Jewish Hosp. Ass'n, 193 Ky. 400, 236 S.W. 577 (1921); Cook v. John N. Norton Memorial Infirmary, 180 Ky. 331, 202 S.W. 874 (1918).

charity. The implied waiver theory presumed the beneficiary of the charity impliedly waived a claim against the charity and assumed the risk by accepting its services. All of these theories have been criticized by legal writers,[11] but the Kentucky court continually repeated them until the *Mullikin* decision, although opinions in 1954[12] and 1957[13] indicated that a reappraisal would eventually be necessary.

In the *Mullikin* case, counsel for defendant presented two problems on rehearing[14] which point up the considerations involved in judicial rejection of charitable immunity: (1) whether the judiciary should change the doctrine in the face of stare decisis and legislative inaction;[15] and (2) whether liability should be applied only prospectively.

The doctrine of stare decisis[16] has not had the restrictive force upon change in tort law that it has had in areas of contracts and vested property rights.[16a] Stability in tort law is, perhaps, less important than in property law, because tort doctrines which become outmoded by social and economic evolution may be overruled without impairing any vested interest. The changes that charitable institutions and society have undergone in this century reasonably warrant the present trend of charitable immunity reappraisal. The argument that the judiciary should not reverse a long standing doctrine because of tacit legislative approval through its failure to change the rule is deceptively plausible but potently unsound. The failure of a legislature to legislate means a number of things. It may mean that no strong force has contended for such action. Persons not yet injured are unlikely to assume they will be, and legislative change comes too late to benefit those who are already victims of the immunity doctrine. Charitable institutions, on the other hand, have a continuing, mutual interest in opposing change. An adoption by the court of the legislation-by-inaction argument would tranfer the entire burden of tort principles to the already overburdened legislatures.

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[11] Brown, *Stare Decisis is Worth Its Weight in Reason: Abolish the Charitable Immunity Doctrine*, 46 A.B.A.J. 629 (1960); 2 Harper & James, Torts §29.16 (1956); Prosser, Torts §109 (2d ed. 1955); Rodkey, *supra*, note 1.

[12] Forrest v. Red Cross Hosp., 265 S.W.2d 80 (Ky. 1954).

[13] Roland v. Catholic Archdiocese, 301 S.W.2d 574 (Ky. 1957).

[14] Petition for Rehearing of Appellee, pp. 11, 22-25.

[15] In Forrest v. Red Cross Hospital, 265 S.W.2d 80, 82 (Ky. 1954) the attitude of the court was expressed in the following passage:

> It is our . . . view that if there is to be a change in the public policy in this state on the subject, it should be made by the legislature and not this court.

[16] See Brown, *supra*, note 11. But see Joachin, *Charitable Immunity: Why Abandon the Doctrine of Stare Decisis*, 45 A.B.A.J. 822 (1959).

[16a] Pound, *Some Thoughts About Stare Decisis*, 13 NACCA L.J. 19, 22 (1954).

The argument that the court should deny immunity only prospectively also has weaknesses. Kentucky ordinarily applies judicial changes retrospectively as well as prospectively.[17] Contract, statutory, and vested rights are notable exceptions where solely prospective application may be made in order to leave undisturbed such rights made in reliance upon court interpretations.[18] Prospective operation of judicial decisions, like legislative relief, would be of no benefit to injured victims who could expect to benefit only from decisions operating in their normal retroactive fashion. On the other hand, the backward-reaching effects of a court decision compel the judge to weigh carefully the need to depart from established precedent.

On rehearing, the Kentucky court refused counsel's plea to limit liability to prospective application. Two cases involving charitable hospitals were decided under the newly announced rule only a few days following the *Mullikin decisions*.[20] Hence the only limitation on the retrospective application of the *Mullikin* rule is the one-year statute of limitations,[21] even though "the learned trial judge ruled in *exact conformity with the case law of this state. . . .*" (Emphasis added.)[22]

Legislative or judicial limitations of charitable immunity have been adopted in a few states. The Rhode Island Legislature enacted statutory immunity[23] for charitable hospitals *after* a court rejection of the immunity doctrine.[24] New Jersey's legislature enacted a limit of $10,000.00[25] on beneficiary recovery after judicial rejection of the charitable immunity doctrine.[26] After rejection of charitable immunity for a non-profit hospital,[27] the Washington court refused to extend liability to a non-profit religious organization.[28] Since 1956, charitable

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[17] Note, 47 Harv. L. Rev. 1403 (1934), and for the relationship of this practice to the declaratory theory of judicial determination see 41 Harv. L. Rev. 678 (1928).

[18] Bishop v. Bishop, 343 S.W.2d 587 (Ky. 1961); Hanks v. McDanell, 307 Ky. 243, 210 S.W.2d 784 (1948); Commonwealth v. Whitelaw, 302 Ky. 526, 195 S.W.2d 71 (1946); Button v. Drake, 302 Ky. 517, 195 S.W.2d 66 (1946); Wilson v. Goodin, 291 Ky. 144, 163 S.W.2d 309 (1942); Payne v. Covington, 276 Ky. 380, 123 S.W.2d 1045 (1938).

[20] Gillum v. Good Samaritan Hosp., 348 S.W.2d 924 (Ky. 1961); Hillard v. Good Samaritan Hosp., 348 S.W.2d 939 (Ky. 1961).

[21] Ky. Rev. Stat. §413.140(1) (1958).

[22] Mullikin v. Jewish Hosp. Ass'n., 348 S.W.2d 930, 931 (Ky. 1961).

[23] Gen. Laws of R.I. Ann. tit. 7, ch. 1, §22 (1956).

[24] Glavin v. Rhode Island Hosp., 12 R.I. 411 (1879).

[25] N.J. Rev. Stat. §2A: 53A-8 (1959).

[26] Benton v. Young Men's Christian Ass'n, 27 N.J. 67, 141 A.2d 298 (1958); Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958); Dalton v. St. Luke's Catholic Church, 27 N.J. 22, 141 A.2d 273 (1958).

[27] Pierce v. Yakima Valley Memorial Hosp. Ass'n, 43 Wash.2d 162, 260 P.2d 765 (1953).

[28] Lyon v. Tumwater Evangelical Free Church, 47 Wash.2d 202, 287 P.2d 128 (1955).