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THE LIABILITY OF CHARITABLE INSTITUTIONS FOR TORTS OF AGENTS AND SERVANTS

By Edward M. Ball*

Mr. I. S. Sick, a patient at Memorial Hospital, is severely burned when a nurse employed by the hospital negligently places hot water bottles against his body before wrapping them in flannel. The process of wrapping hot water bottles is a standard procedure prescribed by the rules of the hospital. Mrs. Sick was visiting her husband when she slipped and fell on a freshly waxed hallway F Hall, a janitor, had applied the wax on the hall floor but had forgotten to put out signs as required by the hospital rules indicating a dangerous condition. Memorial Hospital is a nonprofit corporation owned and operated by a benevolent society which has dedicated the hospital to the betterment of the health of the community Its expenses are paid in part by fees which are charged to patients who are financially able to pay part or all of their fees, but fees charged the paying patients are not fixed with the idea of the paying patients carrying the entire financial burden of the Memorial Hospital. Mr. Sick is a financially responsible and able person who has been paying the full charges as fixed by Memorial Hospital for his care and treatment. A goodly portion of the financial burden of the hospital is met by voluntary contributions and also by income from certain trusts created solely for the purpose of supplying income to the hospital. At times Memorial Hospital has shown a profit, which profit is put right back into the hospital for the purpose of expansion and medical scholarships for the research laboratory of the hospital. The Gibraltar Assurance Association has issued an insurance policy to Memorial Hospital wherein the Association has agreed to pay any loss of the insured to the extent of the latter's legal liability Mr. and Mrs. Sick, as individuals, sue Memorial Hospital for the injuries which each has received as the result of the negligent acts of the nurse and janitor. Both parties plaintiff are willing to stipulate that

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the administration of Memorial Hospital has used due care in the selection and employment of both the nurse and the janitor. What result?

Were this question to be submitted to the judiciary of the several states, a myriad of variant opinions would be rendered. "Paradoxes of principle, fictional assumptions of fact and consequence, and confused results characterize judicial disposition of these claims."[1]

It is not the purpose of this article to survey all the case law of this country and England, for to do so would require more space than seems warranted. The decisions range from complete immunity from tort liability to virtually complete liability with a gradient of sometimes fine distinctions and exceptions in between. An attempt will be made to present the more basic rules and the reasons therefor.

Private corporations, trustees of private trusts, administrators and executors have always been held liable for negligence, either by reason of such personal misconduct on the part of the officer, trustee, etc., or based upon the principle of *respondeat superior*[2] Should liability be any the less because the corporation is a charitable one or because a trustee is administering a charitable trust?

In 1846, Lord Cottenham stated "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."[3] Although dictum,[4] the language

[1] President and Directors of Georgetown College v Hughes, 130 F 2d 810, 812 (App. D.C. 1942) containing an excellent discussion of this problem.

[2] *Respondeat Superior* doctrine—applicable to corporate liability, STEVENS, HANDBOOK ON THE LAW OF PRIVATE CORPORATIONS, (1936) § 78; HARPER, LAW OF TORTS (1933) § 293. Doctrine applied to agents or servants of a trustee: RESTATEMENT, TRUSTS, § 264 (1935). " under the principle of respondeat superior, torts, committed by the agents or servants of the trustee in the course of the administration of the trust subject the trustee to liability to the same extent as though he were not a trustee (see RESTATEMENT, AGENCY, § § 212-267) The principle of respondeat superior is applicable although the trustee receives no benefit from the trust." Comment b. of § 264. See discussion on this point in 2 SCOTT, TRUSTS (1939) § 264; LORING, A TRUSTEE'S HANDBOOK, Shattuck revision (1940) § 88, 3 (Part 2) BOGERT, TRUSTS AND TRUSTEES (1946) § 732.

[3] The Feoffees of Heriot's Hospital v. Ross (1846) 12 Clark & F 507, 513, 8 Eng. Rep. 1508, 1510.

[4] Plaintiff alleged that he was a candidate for admission to the charitable hospital under the terms of the testator's will, which will

of the case has been picked up by many states' courts in this country and applied to personal injury actions brought against charities, particularly those administered by the so-called "charitable corporations." Strong as the language of Lord Cottenham may appear to be, the doctrine of the case was later repudiated[5] in England and today it may be stated that England applies the doctrine of *respondeat superior* with regard to the tort liability of charitable institutions.[6]

What are the reasons for making these fine distinctions with regard to tort liability as between charitable institutions and institutions conducted for profit? There are four rather basic reasons for the granting of immunity, either complete or partial, two of which have already been noted. These four are (1) as stated in the *Heriot's Hospital* case,[7] to permit a recovery of damages against a trust fund would divert those funds from purposes for which they were originally given. This theory is commonly called the "trust fund theory", (2) the doctrine of *respondeat superior* is not applicable to charitable institutions, (3) as distinguished from a stranger to the charity, one who accepts benefits from the charity impliedly waives any claim to damages which may result from the negligent acts of agents or servants of the institution, and (4) public policy in fostering donations to charitable institutions—possible donors are supposed to be more inclined to give when they know that their gifts will not be used to satisfy actions for personal injuries. (What price public policy?) It is to be noted that in many respects theories one and four are virtually the same.

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directed that the residue of the testator's estate be used to erect and maintain a hospital for the "poor fatherless boys" of the community and for their relief and education. He asked the court to grant him admission and for damages. The action was not one for damages as result of injuries, rather one for the wrongful exclusion from the benefits of a charity.

[5] Mersey Docks Trustees v. Gibbs (1866) 11 H.L. 686 wherein Lord Westbury stated that "Trustees may render the property of their beneficiaries liable to third persons for an act done by them in the exercise of their trust."

[6] Collins v. Hertfordshire County Council (1947) K.B. 598 wherein a hospital was held liable for maintaining a negligent system as to administration of drugs and for negligence of resident house surgeon and pharmacist, but not for negligence of operating surgeon, an independent contractor. Noted in 63 L. Q. REV. 410 (1947)

[7] *Supra*, note 3.

Illinois has been one of the states most consistently using the trust fund theory in according full immunity without regard to whether the plaintiff is a beneficiary or a stranger to the charity [8] The immunity of charitable institutions had been so absolute in Illinois that if the institution carried liability insurance the plaintiff could not recover even to the extent of the insurance proceeds[9] yet a later case held that if the charitable institution carried insurance the defense of immunity is not available.[10]

Massachusetts, in 1876,[11] adopted the early English rule of complete immunity In a later case the plaintiff attempted a distinction between due care in the selection of servants or agents and negligence of the managers in selecting incompetent subordi-

[8] Parks v Northwestern University (1905) 218 Ill. 381, 75 N.E. 991 "The funds and property thus acquired are held in trust, and cannot be diverted to the purpose of paying damages for injuries caused by the negligent or wrongful acts of its servants and employees to persons who are enjoying the benefit of the charity. An institution of this character, doing charitable work of great benefit to the public without profit, and depending upon gifts, donations, legacies, and bequests made by charitable persons for the successful accomplishment of its beneficial purposes, is not to be hampered in the acquisition of property and funds from those wishing to contribute and assist in the charitable work, by any doubt that might arise in the minds of such intending donors as to whether the funds supplied by them will be applied to the purposes for which they intended to devote them, or diverted to the entirely different purposes of satisfying judgments recovered against the donee because of the negligent acts of those employed to carrying the beneficient purpose into execution." Immunity applied with regard to suits brought by strangers: Johnson v City of Chicago (1913) 258 Ill. 494, 101 N.E. 960.

[9] Piper v. Epstein (1945) 326 Ill. App. 400, 62 N.E. 2d 139 holding that the reason for procuring the insurance is found in the policy requiring the insurer to investigate and defend all claims and actions for damages, whether groundless or not, based on negligence of officers and agents of the hospital. Rule of Parks case was reiterated and affirmed in Piper v. Epstein.

[10] Wendt v. Servite Fathers (1947) 332 Ill. App. 618, 76 N.E. 2d 342, *rehearing denied* 12/29/47. Court stated that it felt bound to apply the doctrine of the Parks case whenever the facts required but that it was reluctant to extend the rule beyond the scope of that case. It further found that there was nothing in the Parks case which would justify the conclusion that the exemption from liability is absolute. In disposing of the Piper case (note 9) the court stated "If the absolute immunity rule enunciated in the Piper case were to prevail, it would seem a sheer waste of money for a charitable corporation to purchase insurance protection. We hold that where insurance exists and provides a fund from which tort liability may be collected so as not to impair the trust fund, the defense of immunity is not available."

[11] McDonald v. Massachusetts General Hospital (1876) 120 Mass. 432.

nate agents, but the court disposed of the plaintiff's contention by readopting the rule of absolute immunity [12] Certain exceptions must be noted to the Massachusetts rule where the charitable institution was held liable when its property was not devoted to its charitable purposes although the profits were devoted directly to charitable purposes.[13] Massachusetts thus makes a distinction when the tort is committed in using property directly for charitable purposes and when profits from the use of property are charitably dispensed. It is submitted that this distinction is more apparent than real, especially since the "profits" in either situation are used exclusively for charitable purposes. Further, some fact situations will prove exceedingly troublesome to characterize one way or the other. As to the carrying of liability insurance, Massachusetts accords with an earlier Illinois view in that the charity's liability is not enlarged by reason of such insurance.[14]

Missouri holds to the doctrine of full immunity, making no distinctions between actions brought by strangers or by beneficiaries of the charity [15] A recent Missouri case treats the trust fund theory and the one of public policy as virtually the same,[16] this being the contention of this writer. As to the effect of

[12] Roosen v. Peter Bent Brigham Hospital (1920) 235 Mass. 66, 126 N.E. 392. Charity relieved from using due care in selecting servants; Glaser v. Congregational Kehillath Israel (1928) 263 Mass. 435, 161 N.E. 619; Bearse v. New England Deaconess Hospital (1947) 321 Mass. 750, 72 N.E. 2d 743. *Contra,* Taylor v Flower Deaconess Home and Hospital (1922) 104 Ohio St. 61, 135 N.E. 287; Hamburger v. Cornell University (1925) 240 N.Y. 328, 148 N.E. 539. Positive duty in both cases to use due care in the selection of employees. New York holds that plaintiff has burden of proving that the duty was disregarded.

[13] Holder v. Massachusetts Horticultural Society, (1912) 211 Mass. 370, 97 N.E. 630; McKay v Morgan Memorial Co-operative Industries and Stores Inc. (1930) 272 Mass. 121, 172 N.E. 68; Reavey v. Guild of St. Agnes (1933) 284 Mass. 300, 187 N.E. 557.

[14] McKay v. Morgan, etc., *supra,* note 12. Enman v Trustees of Boston University (1930) 270 Mass. 299, 170 N.E. 43.

[15] Eads v. Y. W C. A. (1930) 325 Mo. 577, 29 S.W 2d 701, Roberts v. Kirksville College of Osteopathy and Surgery (1929) (Mo. App.) 16 S.W 2d 625; Hope v. Barnes Hospital (1932) 227 Mo. App. 1055, 55 S.W 2d 319.

[16] Dille v. St. Luke's Hospital (1946) 355 Mo. 436, 196 S.W 2d 615, wherein the court stated "while the cases seem to treat the two theories, trust fund and public policy, under separate heads, at the bottom they are the same, the trust fund doctrine being as some of the cases say, the 'child' or 'offspring' of the doctrine public policy. This is also true as to the nonapplicability of the rule of respondeat superior."

liability insurance on the immunity of charitable institutions, Missouri accords with Massachusetts.[17]

Another state following the pattern of complete or absolute immunity is that of Kentucky The courts of that state have specifically adopted the trust fund theory,[18] although several opinions hold that virtually all of the theories are equally tenable.[19] An exception to the Kentucky rule should be noted where a charitable institution of the state was held liable in damages and enjoined from polluting a stream.[20] Granted, that this was not a personal injury case, yet the reasoning of the Kentucky court in holding charities exempt from liability under the trust fund theory for personal injuries is equally fitted to the property damage cases. Possibly this is, as one writer states, a "special or unusual circumstance"[21] that cannot be otherwise classified. This state holds further that the procurement of an indemnity insurance policy shall not affect the liability of the charity on the hypothesis that no diversion of the trust funds would result.[22]

[17] Dille v St. Luke's Hosp., *supra* n. 16; Stedem v Jewish Memorial Hospital Association of Kansas City (1945) 239 Mo. App. 38, 187 S.W 2d 469.

[18] Emery v Jewish Hospital Association (1921) 193 Ky. 400, 236 S.W 577 wherein the majority opinion stated that "The diversion of such funds in such a way would probably destroy the institution, and a wise public policy forbids such a result." A strong dissent distinguished the liability of the charity to a patient from that to an employee. The judge believed that the only feasible ground for extending immunity to be the implied waiver theory and even this theory is doubtful to him. The dissent further suggested that the whole doctrine of immunity is placed upon sentimental grounds rather than reason and logic.

[19] Cook v. J. W Norton Memorial Hospital (1918) 180 Ky. 331, 202 S.W 874; Averback v Y. M. C. A. of Covington (1933) 250 Ky. 34, 61 S.W 2d 1066; Williams v Church Home (1928) 223 Ky. 355, 3 S.W 2d 753.

[20] Herr et al v. Kentucky Lunatic Asylum (1895) 97 Ky. 458, 30 S.W 971, same, 110 Ky. 282, 61 S.W 283 (1901)

[21] Appleman, *The Tort Liability of Charitable Institutions*, 22 A.B.A.J. 48, 50 (1936).

[22] Williams v Church Home, *supra* note 19. Compare with Taylor v. Knox County Board of Education (1942) 292 Ky 767, 167 S.W 2d 700, 145 A.L.R. 1333. In the Taylor case the court found that the insurance policy was not an indemnity policy but was a liability policy issued for the benefit of injured third parties who may sue the insurer, the court stating " act does not make the board liable for the torts of its agents and employees, but it does permit the board to be sued and a judgment obtained which, when final, shall measure the liability of the insurance carrier to the injured third party for whose benefit the insurance policy was issued. *In no event, of course, can the judgment be collected out of school funds.*" (Italics supplied)

In New York, the courts of that state have specifically rejected the trust fund theory [23] Prior to 1937 a beneficiary of the charity could not recover for personal injuries due to the negligence of agents or servants of the charity except for the failure to use due care in the selection of such incompetent persons whereas strangers to the charity could recover the same as under the usual rules as to tort liability [24] In 1937, the Court of Appeals stated that the question was presented for the first time in that court whether a charitable institution (not itself in default in the performance of any non-delegable duty) should be declared exempt from liability to a beneficiary for personal injuries caused by the negligence of one acting as its mere servant or employee.[25] A later case held the New York rule to be that "it is now settled that even a charitable hospital is liable for the acts of its servants."[26]

In 1913 the Supreme Court of Minnesota declared that if public policy requires a charity to be exempt from liability, the pronouncement should be by the legislature and not by the courts.[27] A later case declared the Minnesota rule to cover the

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A statute specifically provided that boards of education may set aside funds to provide for liability and indemnity insurance against negligence of the drivers and operators of school busses owned or operated by the board.

[23] Hamburger v. Cornell University (1925) 240 N.Y. 328, 148 N.E. 539; Hodern v Salvation Army (1910) 199 N.Y. 233, 92 N.E. 626; Kellogg v. Church Charity Foundation of Long Island (1911) 203 N.Y. 191, 96 N.E. 406.

[24] Schloendorff v Society of New York Hospital (1914) 211 N.Y. 125, 105 N.E. 92; Grawunder v Beth Israel Hospital Association et al (1934) 272 N.Y.S. 171, Hamburger v. Cornell University, *supra,* note 23; Stearns v. Association of the Bar of New York (1934) 276 N.Y.S. 390.

[25] Sheehan v North Country Community Hospital et al (1937) 273 N.Y. 163, 7 N.E. 2d 28, the court stating "We think it would not be a harmonious policy that would require this plaintaiff to put up with her injuries on the score that appellant is a charitable hospital." Plaintiff was a paying patient. Same, at 273 N.Y. 580, 7 N.E. 2d 701.

[26] Dillon v. Rockaway Beach Hospital and Dispensary (1940) 284 N.Y. 176, 30 N.E. 2d 373. Martucci et al. v Brooklyn Children's Aid Society (C.C.A. 2d 1943) 133 F 2d 252. There are several New York cases holding that the hospital is not liable on ground that the employee was not an employee of the hospital but of the patient, *viz.* a special nurse. Kaps v. Lenox Hill Hospital, 51 N.Y.S. 2d 791 (1944), *aff'd.* 269 App. Div. 830, 56 N.Y.S. 2d 415 (1945), Fisher v Sydenham Hospital, Inc. (1941) 176 Misc. 7, 26 N.Y.S. 2d 389.

[27] McIrney v St. Luke's Hospital Association (1913) 122 Minn. 10, 141 N.W 837. Action by an employee against defendant hospital for injuries received from unguarded machinery.

entire field of tort liability, applying the rule to charities the same as in the case of individuals and private corporations, the court in unequivocal language states its reasons thus

"To the person injured the loss is the same as though the injury had been sustained in a private hospital for gain. In this case the deceased paid for the services he expected, but this may not be a controlling factor. We do not believe that a policy of irresponsibility best subserves the beneficient purposes for which the hospital is maintained. We do not approve the public policy which would require the widow and children of deceased rather than the corporation, to suffer the loss incurred through the fault of the corporation's employees, or in other words, which would compel the persons damaged to contribute the amount of their loss to the purposes of even the most worthy corporation. We are of the opinion that public policy does not favor exemptions from liability "[28] Later cases in Minnesota accord with this view.[29]

New Hampshire, at an early date, rejected the trust fund theory as unsound,[30] and a much later case has rejected all the theories regarding immunity and placed charitable institutions on the same basis as private corporations.[31] Oklahoma apparently follows the rule as to no exemption from liability[32] as does Tennessee.[33]

Between these two poles lies a multitude of varying reasons and policies for granting partial immunity The usual method is to make a distinction between a stranger to the charity and one receiving benefits therefrom, the charity being held liable under the doctrine of *respondeat superior* to strangers and employees

[28] Mulliner v. Evangelischer Diakonniessenverein of Minnesota District of German Evangelical Synod of North America (1920) 144 Minn. 392, 175 N.W 699.

[29] High v Supreme Lodge of the World, Loyal Order of Moose (1943) 214 Minn. 164, 7 N.W 2d 675; Geiger v Simpson Methodist Episcopal Church of Minneapolis (1928) 174 Minn. 389, 219 N.W 463.

[30] Hewett v. Hospital Aid Association (1906) 73 N.H. 556, 64 Atl. 190.

[31] Welch v. Frisbie Memorial Hospital (1939) 90 N.H. 337, 9 A. 2d 761. *Compare,* Sandwell v Elliott Hospital (1943) 92 N.H. 41, 24 A. 2d 273.

[32] Sisters of the Sorrowful Mother v Zeidler (1938) 183 Okla. 454, 82 P 2d 996; Gable v Salvation Army (1940) 186 Okla. 687, 100 P 2d 244.

[33] Spivey v. St. Thomas Hospital, 211 S.W 2d 450 (Tenn. App. 1947) *Cert. denied* 3/5/48, *rehearing denied* 5/3/48.

of the charity and exempt as to beneficiaries except for personal fault in the administration of the institution. Usually the implied waiver theory is applied as to beneficiaries. The Restatement of Trusts takes the position that the charity shall have no immunity as against suits brought by third persons but shall be exempt, as to beneficiaries, if the trustee is not personally at fault, in that he has failed to use due care in the selection of the negligent employee or that other personal blame may be attributed to him.[34] Professor Scott believes the Restatement rule to represent "the clear weight of authority"[35] Due to the definite tendency of some of the courts to revise their views with respect to this partial immunity, it is doubted by this writer that the Restatement view will long remain the majority rule. Among those states holding the charity liable to a stranger, but not to a beneficiary except for failure to use due care, etc. are Louisiana,[36] Arizona,[37] Michigan,[38] and New Jersey,[39] the latter state apparently making no change as to immunity when personal fault is attributable to the managers of the institution. The jurisdictions giving the charity a very limited immunity have either ignored or disposed of the various fictional theories except the seemingly justifiable one of public policy Oklahoma at one time placed paying patients in the same category as strangers to the charity and permitted them to recover whether or not due care was used in the selection of the negligent agent or servant,[40]

[34] RESTATEMENT, TRUSTS § 402 (1935) Comment g. " It is immaterial that the person who was injured paid nothing for the benefits which he received. The fault of the trustee may be in negligently selecting or retaining incompetent employees, or in permitting the premises upon which the trust is carried on to be in a dangerous condition, or in failing to make proper rules for the operation of the charitable institution."

[35] 3 SCOTT, TRUSTS § 402 (1939).

[36] Jurjevich et al. v. Hotel Dieu, 11 So. 2d 632 (La. App. 1943) (paying patient), Lush v. United States Fidelity and Guaranty Company, 199 So. 666 (La. App. 1941).

[37] Southern Methodist Hospital and Sanatorium v. Wilson (1935) 45 Ariz. 507, 46 P 2d 118.

[38] De Groot v. Edison Institute (1943) 306 Mich. 339, 10 N.W 2d 907; Bruce v Henry Ford Hospital (1931) 254 Mich. 394, 236 N.W 813.

[39] Fair v. Atlantic City Hospital (1946) 25 N.J. Misc. 65, 50 A. 2d 376 holding that hospital not liable to a patient for negligence of managers; Rose v. Raleigh Fitkin-Paul Memorial Hospital (1947) 25 N.J. Misc. 311, 53 A. 2d 178; Kolb v. Monmouth Memorial Hospital (1936) 116 N.J.L. 118, 182 Atl. 822.

[40] City of Shawnee v. Roush (1923) 101 Okla. 60, 223 Pac. 354; Carver Chiropractic College v. Armstrong (1924) 103 Okla. 123, 229 Pac. 641.

but later cases contain strong indications that a nonpaying patient will be accorded the same protection.[41] California apparently had adopted the Restatement rule until 1939 when the Supreme Court of the state had opportunity to pass upon the liability of a charity to a paying patient, the court holding that the charity was liable without regard to any failure of due care upon the part of the administration in the selection of the negligent servant.[42]

Since the dictum in the *Heriot's Hospital* case,[43] uniformity of opinion has been a goal to be achieved rather than a reality Fictive foundations have been the bases upon which many jurisdictions have grounded their decisions. Bemuddled reasoning necessarily points the way toward confusion of result and decision. It must be recognized that the trend in this country is definitely toward uniformity of reason and result—toward liability without qualification. Some of those states having unqualified immunity have taken the position of a qualified immunity or liability, whichever way one cares to consider the problem. Other states, having a rule of partial immunity, have dropped the qualification and have slipped into the rule of absolute liability the same as in the case of private corporations.

Insurance may be carried to protect the charity from any possible drain on its resources by reason of actions brought for personal injuries by either strangers or beneficiaries of the charity The premiums costs are exceedingly low as compared to forcing an innocent party to suffer a loss which occurred by reason of the negligence of another. A wise public policy should dictate that charitable institutions should be as responsible for

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[41] *Supra,* note 32.

[42] Silva v Providence Hospital of Oakland (1939) 14 Cal. 2d 762, 97 P 2d 798, *rehearing denied* 1/25/40, wherein the court stated that modern hospitals are rarely maintained upon donations of one charitably disposed person; they are a business enterprise, may receive some donations but generally depend upon paying patients. England v Hospital of the Good Samaritan (1939) 14 Cal. 2d 791, 97 P 2d 813 where court stated in referring to Silva case, that "This court has now decided that charitable organizations are not exempt from liability for wrongs negligently committed by their employees."

In neither of the above cases was the liability of the charitable institution to a nonpaying patient specifically decided, although the language of the court would certainly indicate an intention to accord a nonpaying patient the same protection. *But cf* Edwards v. Hollywood Canteen (1946) 27 Cal. 2d 802, 167 P 2d 729.

[43] *Supra,* note 3.

their actions as are individuals and private corporations. Benevolence is a trait to be admired, fostered and attuned to present day living. To insulate a charitable institution from liability by reason of its character is a paradox of legal fiction.

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