
Charitable Institutions - Immunity From Tort Liability

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evidence. As has been stated before, the trend seems to be towards allowing such evidence, and it would seem that eventually the remaining courts which have not as yet ruled on this question should have no trouble when such a question arises, as the rule herein advocated seems clearly to be the more rational view.

CHARITABLE INSTITUTIONS—IMMUNITY FROM TORT LIABILITY

American courts seem to be drawing further and further away from the idea that charitable institutions should not be held liable in tort actions.

Ever since 1871, when the idea that a charitable institution might be immune from liability for its torts was first introduced into our system of laws, this concept has created such a divergence of legal opinion that it would seem to be almost irreconcilable as a basic legal concept.

The theory is simply that these institutions, such as hospitals, churches, YMCA's, universities and the like, because they exist mainly on donated trust funds and supposedly are not interested in making a profit, should be exempt from the application of general tort rules which otherwise would be applied.

HISTORICAL FALLACY

A brief glance at the history of the immunity doctrine will show that possibly with a little more research on the part of our early American jurists, the doctrine might never have appeared at all in the United States.

The doctrine declaring charitable institutions¹ immune from tort liability was first declared in this country in *McDonald v. Massachusetts General Hospital*,² where in sole reliance upon the English case of *Holliday v. St. Leonard*³ the court held that the funds of a charitable hospital could not be diminished by a charity patient's claim for damage resulting in unskilled treatment by the house surgeon, if due care had been exercised in selecting the surgeon. Nine years later, in 1885, in *Perry v. House of Refuge*,⁴ again solely on the strength of a second early English case⁵ the

¹ The majority of the cases herein discussed involve the tort liability of charitable or non-governmental corporations as distinguished from governmental charities. Cases involving the tort liability of the trustee of an unincorporated charitable trust have been included in so far as they present questions peculiar to the liability of the trust as distinguished from the liability of the trustee as an individual.

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

³ 11 C.B. N.S. 192, 123 E.R. 169 (1861). This case involved an action against the vestry of a parish. The court said this was a public body, clothed with a public trust, and refused to sustain an action for injury caused by a defect in a highway under its control.

⁴ 63 Md. 20, 52 Am. Rep. 495 (1885).

⁵ The decision was based on the case of *Heriots Hospital v. Ross*, 12 Clark & F. 507, 8 E.R. 1508 (1846), involving an action for wrongful exclusion from the benefits of the defendant charity, and not for personal injury inflicted in its operation.

Maryland Court of Appeals ruled that the funds of the defendant institution could not be used to compensate an inmate for an assault committed upon him by one of its officers in the infliction of punishment. These were the first two American decisions on the immunity doctrine.

It is interesting to note that both of the English cases relied upon by our courts were based upon the case of *Duncan v. Findlater*⁶ which was subsequently overruled by *Mersey Docks v. Gibbs*⁷ in 1866, before the immunity doctrine was incorporated into United States law. Again in 1871, in *Foreman v. Canterbury Corp.*,⁸ the English court stated that the *Holliday* case was in effect, though not by name, overruled by the House of Lords in the *Mersey Docks* case. Both American courts were apparently unaware of the fact that the sole authorities cited by them had been repudiated some ten years previous.

Today the rule in England, insofar as hospitals are not liable for an employee's negligence if the employee was selected with due care, is based upon the ground that professional workers are not servants of the hospital but independent experts performing service for the patient,⁹ or that the hospital has undertaken only to supply competent personnel but has not undertaken to guarantee the proper performance by such personnel of its duties.¹⁰ The law of Canada also turns upon similar considerations¹¹ and the immunity doctrine has been expressly rejected there.¹²

THE DOCTRINE—ITS THEORIES AND OBJECTIONS TO THEM

The law of immunity from tort liability of non-governmental charities is today recognized by our American courts as being in a great state of confusion both as to reasoning and to results.¹³

If an injured party was to bring an action in one of our state courts seeking recovery for tort liability against a non-governmental charitable corporation, any one of four decisions might be handed down, depending on the policy of the jurisdiction. For instance, if the suit were brought in

⁶ 6 Clark & F. 894, 7 E.R. 934 (1839).

⁷ 11 H. L. Cas. 686, 11 E. R. 1500 (1866).

⁸ [1871] 6 Q.B. 214.

⁹ *Hillyer v. St. Bartholomew's Hospital* [1909] 2 K.B. 820, 9 B. R. C. 1 (C.A.). Also see *Collins v. Hertfordshire County Council* [1947] K.B. 598, 1 All E.R. 633.

¹⁰ *Hall v. Lees* [1904] 2 K.B. 602 (C.A.).

¹¹ *Myberg v. Provost Municipal Hospital Board* [1927] Can. S. C. 226, 1 D. L. R. 969; *Sisters of St. Joseph v. Fleming* [1938] Can. S. C. 172, 2 D. L. R. 417. See also 14 Canadian Bar. Rev. 699 (1936).

¹² *Donaldson v. St. John's General Public Hospital*, 30 New Br. 279 (1890); *La-verne v. Smith's Falls Public Hospital*, 35 Ont. L. 98, 26 D. L. R. 346 (1915).

¹³ See the following cases: *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P. 2d 220 (1951); *Nicholson v. Good Samaritan Hospital*, 145 Fla. 360, 199 So. 344 (1940); *Gable v. Salvation Army*, 186 Okla. 687, 100 P. 2d 244 (1940); *Foster v. Roman Catholic Diocese*, 116 Vt. 124, 70 A. 2d 230 (1950).

Arizona, plaintiff would be allowed to maintain the action because here charities are liable in tort to the same extent as individuals or private corporations,¹⁴ but if the action were brought in Arkansas, it would be dismissed, since here such a charity enjoys complete immunity¹⁵ from tort liability.¹⁶ On the other hand, if the action should be brought in Illinois, plaintiff would be allowed to maintain the action and recover a judgment, and the immunity of the defendant would extend only to protecting its trust property from being taken on execution of this judgment,¹⁷ or if the same action were brought in West Virginia, plaintiff would find that such a charity enjoys a "partial immunity" dependent upon plaintiff's status as a servant of the charity, as a stranger, or as a beneficiary of the charity's bounty, and also dependent upon the nature of the negligence involved.¹⁸

There seem to be five prevailing theories upon which decisions are based wherein immunity is granted.

The trust fund theory.—Since the funds of a charity are held in trust for some beneficial purpose, the courts will not permit these funds to be attacked and depleted in a tort action. This, it is felt, would thwart the donor's intent and impair the usefulness of charitable institutions.¹⁹ It is also argued that donors would not contribute to such a trust if the funds could be depleted by tort liability.

But it has been said that the donor has neither the power under the law²⁰ nor any intention in fact²¹ to exempt charities from the operation of the general laws of the land. Judge Hays, in *Haynes v. Presbyterian Hospital Association*,²² speaking of the trust fund theory said:

¹⁴ *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P. 2d 220 (1951); overruling *Southern Methodist Hospital & Sanitarium v. Wilson*, 45 Ariz. 507, 46 P. 2d 118 (1935).

¹⁵ The term complete immunity in referring to tort liability is not precisely accurate since it has been held that although the charity enjoys a complete immunity it will still be liable for damage resulting from the maintenance and operation of a nuisance. See *Smith v. Congregation of St. Rose*, 265 Wis. 393, 61 N.W. 2d 896 (1953); but see *Fields v. Mountainside Hospital*, 22 N.J. Misc. 72, 35 A. 2d 701 (C.C. 1944).

¹⁶ *Michael v. St. Paul Mercury Indem. Co.*, 92 F. Supp. 140 (D.C. Ark., 1950); *Arkansas Valley Co-op Rural Electric Co. v. Elkins*, 200 Ark. 883, 141 S.W. 2d 538 (1940).

¹⁷ *Moore v. Moyle*, 405 Ill. 555, 92 N.E. 2d 81 (1950). *Slenker v. Gordon*, 344 Ill. App. 1, 100 N.E. 2d 354 (1951), recognizing rule.

¹⁸ *Meade v. St. Francis Hospital of Charleston*, 74 S.E. 2d 405 (W.Va., 1953).

¹⁹ *Southern Methodist University v. Clayton*, 142 Tex. 179, 176 S. W. 2d 749 (1943); *Weston v. Hospital of St. Vincent*, 131 Va. 587, 107 S. E. 785 (1921).

²⁰ *Cohen v. General Hospital Soc.*, 113 Conn. 188, 154 Atl. 435 (1931).

²¹ *President & Directors of Georgetown College v. Hughes*, 130 F. 2d 810, (App. D.C., 1942).

²² 241 Iowa 1269, 1273, 45 N.W. 2d 151, 154 (1950).

No doubt at the outset of the theory the need for charity . . . was urgent and the general good of society demanded encouragement thereof. At that time, hospitals, being the particular so called charity which we have before us, were relatively few in number, and were created and conducted solely by funds donated by public spirited people. . . . The granting of immunity from liability for the negligence of their employees may have been proper as a basis for encouraging such charity. Today the situation is vastly different. The hospital of today has grown into an enormous business. They own and hold large assets, much of it tax free by statute, and they employ many persons. . . . Thus it is evident that times have changed, and are now changing, in the business, social, economic, and legal worlds. The basis for, and the need of such encouragement is no longer existent.

Theory holding doctrine of respondeat superior inapplicable.—The doctrine of “respondeat superior” in its simplest form merely says that a master will be liable for the torts of his servant if done within the scope of the servant’s employment. Some cases have held that merely because of the charitable nature of the defendant, the doctrine of respondeat superior does not apply since the charity receives no profits from the acts of its employees.²³ This has been rejected in some courts by a ruling that the master’s liability is predicated not on whether he receives a profit from his servant’s work,²⁴ but on the authority and control which he exercises over them.²⁵

Governmental immunity theory.—Some courts have rested immunity on the ground that charitable institutions because of their intimate association with the state are entitled to the immunity of the state and its agencies.²⁶ But this theory has been vastly repudiated,²⁷ even where the charity was exempt from state taxation, and received state appropriations for its support.²⁸

Implied waiver or assumption of risk theory.—Some courts have reasoned that by accepting the benefits of a charity the beneficiary waives

²³ *Bachman v. YWCA*, 179 Wis. 178, 191 N.W. 751 (1922); *Morrison v. Henke*, 165 Wis. 166, 160 N.W. 173 (1917).

²⁴ *Nicholson v. Good Samaritan Hospital*, 145 Fla. 360, 199 So. 344 (1940); *Gable v. Salvation Army*, 186 Okla. 687, 100 P. 2d 244 (1940).

²⁵ *Lichty v. Carbon County Agricultural Ass’n*, 31 F. Supp. 809 (D.C. Pa., 1940).

²⁶ *University of Louisville v. Hammock*, 127 Ky. 564, 106 S.W. 219 (1907), stating that charitable institutions are exempt from liability for negligent injury to patients on the ground that they are mere instrumentalities brought into being to aid in the performance of governmental or public duty; *Schumacher v. Evangelical Deaconess Soc.*, 218 Wis. 169, 260 N.W. 476 (1935).

²⁷ *Lichty v. Carbon County Agricultural Ass’n*, 31 F. Supp. 809 (D.C. Pa., 1940); *Murtha v. New York Homeopathic Medical College and Flower Hospital*, 228 N.Y. 183, 126 N.E. 722 (1920); *Gable v. Salvation Army*, 186 Okla. 687, 100 P. 2d 244 (1940); *Old Folks’ & Orphans Children’s Home v. Roberts*, 91 Ind. App. 533, 171 N. E. 10 (1930).

²⁸ *Cohen v. General Hospital Soc.*, 113 Conn. 188, 154 Atl. 435 (1931).

liability, or assumes the risk of negligence.²⁹ This argument is logically weak and based upon a fiction,³⁰ since it is impossible to say in fact that the recipient of benefits, say a hospital patient, has knowingly agreed to relinquish any claims for negligence. This is borne out especially when we deal with desperately ill or unconscious patients when admitted to the hospital or with infants or insane persons who have no legal capacity to so give away their rights.³¹

The public policy theory.—The fifth theory allowing immunity is public policy, which is not really a theory at all, but rather a frank statement of the reason for immunity without resort to theoretical justifications which are themselves statements of policy in theoretical form.³² All of these theories propounded may be said to rest finally upon public opinion. But it is startling to find that within the United States, public policy justifies such inconsistent rules as the one denying any immunity and the rule granting complete immunity.³³ A prime example of the misuse of public policy is an existing situation in South Carolina where a charity has been held to be immune for tort liability resulting in injury or death to an individual, but has been liable in tort for the existence of a nuisance.³⁴ These decisions are based on the public policy of the state.

Thus it is seen that each of the theories upon which immunity is granted have been greatly criticized and their weak points exposed by the courts that have rejected them.

Aside from decisions granting complete immunity and those holding charities liable as individuals are a small number of states which allow a suit to be brought and a judgment obtained, but limit recovery on the

²⁹ *Averback v. YMCA*, 250 Ky. 34, 61 S.W. 2d 1066 (1933); *Winslow v. Veterans of Foreign Wars Nat. Home*, 328 Mich. 488, 44 N.W. 2d 19 (1950); *Sisters of Charity v. Duvelius*, 123 Ohio St. 52, 173 N.E. 737 (1930).

³⁰ *President & Directors of Georgetown College v. Hughes*, 130 F. 2d 810, (App. D.C., 1942); *Nicholson v. Good Samaritan Hospital*, 145 Fla. 360, 199 So. 344 (1940); *Foster v. Roman Catholic Diocese*, 116 Vt. 124, 70 A. 2d 230 (1950); *Wendt v. Servite Fathers*, 332 Ill. App. 618, 76 N.E. 2d 342 (1947).

³¹ *Wendt v. Servite Fathers*, 332 Ill. App. 618, 76 N.E. 2d 342 (1947). To the same effect are: *President & Directors of Georgetown College v. Hughes*, 130 F. 2d 810 (App. D.C., 1942); *Mississippi Baptist Hospital v. Holmes*, 212 Miss. 564, 55 So. 2d 142 (1951), *sugg. of error overr.*, 213 Miss. 244, 56 So. 2d 709 (1952); *Foster v. Roman Catholic Diocese*, 116 Vt. 124, 70 A. 2d 230 (1950); *Vanderbilt U. v. Henderson*, 23 Tenn. App. 135, 127 S. W. 2d 284 (1938).

³² See note in 25 N.Y.U. Law Rev. 612, 613 (1950).

³³ See *Roman Catholic Church, Diocese of Tucson v. Keenan*, 74 Ariz. 20, 243 P. 2d 455 (1952); *Mulloy v. Fong*, 37 Cal. 2d 356, 232 P. 2d 241 (1951); *Wilson v. Lee Memorial Hospital*, 65 So. 2d 40 (Fla., 1953); Granting immunity see *Bond v. Pittsburgh*, 368 Pa. 404, 84 A. 2d 328 (1951); *Baldwin v. St. Peters Congregation*, 264 Wis. 626, 60 N.W. 2d 349 (1953).

³⁴ *Peden v. Furman U.*, 155 S.C. 1, 151 S.E. 907 (1930), showing liability for maintaining a nuisance; *Vermillion v. Woman's College*, 104 S.C. 197, 88 S.E. 649 (1916), showing no liability for injuries because of public policy.

judgment to the amount of the non-trust funds held by the charity.³⁵ This immunity then merely protects the trust funds of the charity.

And there is a fourth group of courts that tend to grant a limited immunity dependent on a number of factors which again vary with the jurisdiction. In many cases the immunity of a charity depends upon the status of the victim and will rise or fall on whether or not the injured party was a servant of the charity,³⁶ a stranger,³⁷ a beneficiary, or a paying patient.³⁸ Also cases have hinged upon the question of negligence by the charity; was it corporate or administrative negligence; or was the charity negligent in selecting its employees or in supplying instrumentalities? These are generally the important issues where partial immunity is the rule. In some of the cases a charity has been held not to be immune for negligence chargeable to the charity itself, as distinguished from negligence committed by subordinate employees.³⁹ In others, the charity has been granted immunity, even though the negligence is chargeable, not only to subordinate employees, but directly to the charity itself.⁴⁰ The soundness of this distinction between corporate and other negligence has been questioned in cases which deny immunity entirely. In *Ray v. Tucson*⁴¹ the court stated:

There can be no sound reason given for such distinction upon either of the theories assigned for the rule. . . . A corporation can only act through its employees and the fact that the inquiry is due to the negligence of one who is charged with the management of the institution does not change the fact that he too is an employee. The distinction is based solely upon a legal fiction. . . . If the doctrine of respondeat superior does not apply to charitable institutions, that ends it.

Because of these differences in our courts' decisions, many questions have arisen to confront modern jurists. "There are two sides to every story" would seem to be the governing maxim in attempting to correlate the court's answers to these problems. For instance, in a situation where

³⁵ Colorado, Illinois, Tennessee.

³⁶ Denying immunity—*Kress v. Newark*, 8 N.J. 562, 86 A. 2d 185 (1952). Sustaining immunity—*Reavey v. Guild of St. Agnes*, 284 Mass. 300, 187 N.E. 557 (1933).

³⁷ Denying immunity—*Edwards v. Hollywood Canteen*, 27 Cal. 2d 802, 167 P. 2d 729 (1946). Sustaining immunity—*Southern Methodist v. Clayton*, 142 Tex. 179, 176 S.W. 2d 749 (1943); *Felan v. Lucey*, 259 S.W. 2d 302 (Tex. Civ. App., 1953).

³⁸ Denying immunity—*Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P. 2d 220 (1951). Sustaining immunity—*Jones v. St. Mary's Roman Catholic Church*, 7 N.J. 533, 82 A. 2d 187 (1951); *Williams v. Randolph Hospital Inc.*, 237 N.C. 387, 75 S.E. 2d 303 (1953); *Rafferteder v. Raleigh Fitkin-Paul Morgan Memorial Hospital*, 30 N.J. Super. 82, 103 A. 2d 383 (1954).

³⁹ *White v. Providence Hosp.*, 80 F. Supp. 76 (D.C. Dist. Col. 1943); *Haliburton v. General Hospital Soc.*, 133 Conn. 61, 48 A. 2d 261 (1946).

⁴⁰ *Jones v. St. Mary's Roman Catholic Church*, 7 N.J. 533, 82 A. 2d 187 (1951); *Williams v. Union County Hospital Ass'n*, 234 N.C. 536, 67 S.E. 2d 662 (1951).

⁴¹ 72 Ariz. 22, 230 P. 2d 220 (1951).

a charity, though immune from liability, may be liable for breach of contract upon allegation of facts which may also give rise to a cause of action in tort, the courts are divided as to whether the charity may be held liable for the breach of contract. The majority of the courts that have ruled on the question have held that the charity cannot be held liable by changing the action from tort to one of contract,⁴² but some courts have refused immunity on this point.⁴³

The question arises as to whether a charity may claim payment for its services after it has committed a tort, if the charity cannot be sued by the injured party. In *Beverly Hospital v. Early*⁴⁴ the court held that the hospital's suit was in effect, on the "common counts," and that it was not necessary to consider whether the hospital's immunity would protect it from claims set up in recoupment, but was merely contesting the issue raised by the hospital as to the value of its services.

Concerning joint tortfeasors the rule seems to be that the immunity of a charity from tort liability defeats a claim of a joint tortfeasor for contribution or indemnity.⁴⁵

In addition to the grounds relied upon in rejecting the specific theories in support of immunity, the courts advocating abandonment of the immunity rule have pointed out that the rule found its way into the law through misconceptions or misapplication of previously established principles,⁴⁶ that it is doubtful whether the administration of justice has ever been well served by the rule,⁴⁷ that in any event the rule has become outmoded⁴⁸ and is an anachronism,⁴⁹ that it is a principle of law as well as of morals that men must be just before they are generous,⁵⁰ that a charity

⁴² See *Durney v. St. Francis Hospital*, 83 A. 2d 753 (Del., 1951); *Forrest v. Red Cross Hospital Inc.*, 265 S.W. 2d 80 (Ky., 1954); *Lovich v. Salvation Army*, 81 Ohio App. 317, 75 N.E. 2d 459 (1947); *Field v. Mountainside Hospital*, 22 N.J. Misc. 72, 35 A. 2d 701 (C.C., 1944).

⁴³ *Jurjevich v. Hotel Dieu*, 11 So. 2d 632 (La. App., 1943).

⁴⁴ 292 Mass. 201, 197 N.E. 641 (1935). As to the right of a paying patient to recover his payments, see *Armstrong v. Wesley Hospital*, 170 Ill. App. 81 (1912).

⁴⁵ *Bond v. Pittsburgh*, 368 Pa. 404, 84 A. 2d 328 (1951).

⁴⁶ For cases recognizing the proposition stated above, see the following: *President & Directors of Georgetown College v. Hughes*, 130 F. 2d 810 (App. D.C., 1942); *Mississippi Baptist Hospital v. Holmes*, 212 Miss. 564, 55 So. 2d 142 (1951); *Foster v. Roman Catholic Diocese*, 116 Vt. 124, 70 A. 2d 230 (1950).

⁴⁷ *Stearns v. Schenectady Day Nursery*, 262 App. Div. 638, 31 N.Y.S. 2d 277 (1941), *aff'd* without opp. 288 N.Y. 574, 42 N.E. 2d 24 (1942).

⁴⁸ Dissenting opinion in *Bond v. Pittsburgh*, 368 Pa. 404, 84 A. 2d 328 (1951).

⁴⁹ *Robinson, J.*, concurring in *Miller v. Sisters of St. Francis*, 5 Wash. 2d 204, 105 P. 2d 32 (1940).

⁵⁰ *Silva v. Providence Hospital*, 14 Cal. 2d 762, 97 P. 2d 798 (1939); *Nicholson v. Good Samaritan Hospital*, 145 Fla. 360, 199 So. 344 (1940); *Forest v. Red Cross Hospital, Inc.*, 265 S.W. 2d 80 (Ky., 1954); *Turnage v. New Bern Consistory*, 215 N.C. 798, 3 S.E. 2d 8 (1939).

should not be permitted to inflict injury upon some without the right of redress, in order to bestow charity upon others,⁵¹ because the result would be to compel the victim to contribute to the charity against his will;⁵² that the law's emphasis generally is on liability rather than on immunity for wrongdoing,⁵³ and that in particular the modern tendency of the law is to shift the burden from the innocent victim to the community at large,⁵⁴ and to distribute losses incurred by individuals through the operation of an enterprise among all who benefit by it rather than to leave them wholly to be borne by those who sustained them;⁵⁵ and that immunity tends to foster neglect, while liability tends to induce care and caution;⁵⁶ and that all persons, organizations, and corporations stand on an equality before the law and all should be bound alike or excused alike;⁵⁷ that the charitable nature of a tortfeasor cannot place it above the law set up for all;⁵⁸ and that protection of life and limb by organized society is of greater importance to mankind than any species of charity, and is superior to property rights.⁵⁹ Judge Wertz of the Supreme Court of Kansas speaking of the immunity doctrine recently said:

It gives to certain favored ones, selected arbitrarily, immunity from that equal liability for civil wrongs which is a sign of equality between citizens. . . . It takes from individuals the right to assert in the courts claims against all

⁵¹ *President & Directors of Georgetown College v. Hughes*, 130 F. 2d 810 (App. D.C., 1942); *Cohen v. General Hospital Soc.*, 113 Conn. 188, 154 Atl. 435 (1931); *Foster v. Roman Catholic Diocese*, 116 Vt. 124, 70 A. 2d 230 (1950).

⁵² *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P. 2d 220 (1951); *Mississippi Baptist Hospital v. Holmes*, 212 Miss. 564, 55 So. 2d 142 (1951); *Foster v. Roman Catholic Diocese*, 116 Vt. 124, 70 A. 2d 230 (1950).

⁵³ *Haynes v. Presbyterian Hospital Ass'n*, 241 Iowa 1269, 45 N.W. 2d 151 (1950).

⁵⁴ *President & Directors of Georgetown College v. Hughes*, 130 F. 2d 810 (App. D.C., 1942); *Forest v. Red Cross Hospital, Inc.*, 265 S.W. 2d 80 (Ky., 1954).

⁵⁵ *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P. 2d 220 (1951); *Mississippi Baptist Hospital v. Holmes*, 212 Miss. 564, 55 So. 2d 142 (1951).

⁵⁶ *Mississippi Baptist Hospital v. Holmes*, 212 Miss. 564, 55 So. 2d 142 (1951); *Welch v. Frisbie Memorial Hospital*, 90 N.H. 337, 9 A. 2d 761 (1939); *Sheehan v. North Country Community Hospital*, 273 N.Y. 163, 7 N.E. 2d 28 (1937); *Foster v. Roman Catholic Church*, 116 Vt. 124, 70 A. 2d 230 (1950). Also see dissenting opinion of Doefler, J., in *Bachman v. YWCA*, 179 Wis. 178, 191 N.W. 751 (1922).

In *De Fraithe v. YMCA*, 49 Pa. D. & C. 652, 655 (1943), the court quoted from 31 Harv. L. Rev. 482, as follows: "A negligently administered charity may aim at inducing us all into the Kingdom of Heaven, but it is socially essential to make it adequately careful of the methods employed."

⁵⁷ Dissenting opinion in *Webb v. Vought*, 127 Kan. 799, 275 Pac. 170 (1929). The principal case was recently overruled by *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P. 2d 934 (1954).

⁵⁸ *Cohen v. General Hospital Soc.*, 113 Conn. 188, 154 Atl. 435 (1931); *Forest v. Red Cross Hospital, Inc.*, 265 S.W. 2d 80 (Ky., 1954); see also *Bruce v. Central Methodist Episcopal Church*, 147 Mich. 230, 110 N.W. 951 (1907).

⁵⁹ *Doefler, J.*, dissenting in *Bachman v. YWCA*, 179 Wis. 178, 191 N.W. 751 (1922).

who tortiously assail their person and property and to recover judgment for the injuries done. . . . In short it destroys equality and creates special privilege.⁶⁰

LIABILITY INSURANCE

A new development arose in the history of the immunity doctrine when charitable institutions began to take out liability insurance. Charities in an immunity jurisdiction desire a policy of this type because by the agreement the insurance company usually agrees to defend all such tort actions, valid or otherwise, and to pay for the expense of the trial. Such policies also guarantee to pay the full amount of any judgment rendered against the charity in such an action. In the states that do not grant any immunity such a policy is a sound business investment and a necessary expenditure. But in the states granting a full or partial immunity it would seem that the courts should reconsider where a liability policy is involved. For instance, in a jurisdiction allowing immunity on the trust fund theory, the logic behind the theory falls when it is seen that the money to pay the judgment would come from the insurance and thus would not dissipate the trust fund. However, the fact that a charity has liability insurance has been reconciled by the courts granting immunity, even where the basic reason is the trust fund theory.⁶¹

The court in *Stedem v. Jewish Memorial Hospital*⁶² felt that if the existence of liability insurance would alter the liability of the charity this might eventually dissipate the trust funds to some extent, in that the amount of premiums charged in this type of policy is calculated to some extent upon the amount of risk involved, that the charity might be compelled under such a rule to pay higher premiums, and also, to the extent of the excess of the premiums paid, the funds of the institution would be dissipated.

But this line of reasoning has been criticized on the ground that it proceeds on the illogical theory that an injured party cannot recover from a charity because this would dissipate the trust funds, but that whether there be a diversion of the trust or not, there can be no recovery for the same reason.⁶³

Liability insurance does make a difference in those states that adhere

⁶⁰ *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P. 2d 934, 943 (1954). The Supreme Court of Kansas herein overruled their previous policy granting immunity, and held that charitable institutions are liable for the torts of their servants from which injury proximately results to a third person, whether stranger or patient and whether the patient is a paying or a non-paying patient.

⁶¹ *McKay v. Morgan Memorial Co-op Industries & Stores*, 272 Mass. 121, 172 N.E. 68 (1930); *Enman v. Trustees of Boston U.*, 270 Mass. 299, 170 N.E. 43 (1930); *Stedem v. Jewish Memorial Hospital*, 239 Mo. App. 38, 187 S.W. 2d 469 (1945).

⁶² 239 Mo. App. 38, 187 S.W. 2d 469 (1945).

⁶³ *Bougon v. Volunteers of America*, 151 So. 797 (La. App., 1934).

to the rule exempting trust property from execution. Here such policies are not considered as part of the trust fund and therefore may be introduced into evidence to show that the charity has non-trust assets which are subject to execution of a judgment rendered against it.⁶⁴

The general rule which seems to have evolved from all this is that the immunity of a charity from tort liability, as distinguished from exemption of its trust property from execution, is not lost, or otherwise affected, by the fact that the charity carries liability insurance.⁶⁵

SUMMARY AND CONCLUSION

At the present time there are ten states which grant a complete immunity to charitable institutions.⁶⁶ Sixteen states have adopted a rule of partial immunity,⁶⁷ and in three states⁶⁸ immunity is limited to exempting trust property from execution under a tort judgment.

On the other hand, sixteen states have adopted,⁶⁹ or tend to adopt,⁷⁰ a total liability doctrine. Such a rule is also adhered to in Puerto Rico.

Whether the District of Columbia is a total liability or a partial immunity jurisdiction is an open question at the present time. In Hawaii a

⁶⁴ See *St. Luke's Ass'n v. Long*, 125 Colo. 25, 240 P. 2d 917 (1952); *Moore v. Moyle*, 405 Ill. 555, 92 N.E. 2d 81 (1950).

⁶⁵ *Christini v. Griffin Hospital*, 134 Conn. 282, 57 A. 2d 262 (1948); *Moore v. Moyle*, 405 Ill. 555, 92 N.E. 2d 81 (1950); *Williams v. Church Home for Females*, 223 Ky. 355, 3 S.W. 2d 753 (1928); *McKay v. Morgan Memorial Co-op Industries and Stores*, 272 Mass. 121, 172 N.E. 68 (1930); *Enman v. Trustees of Boston University*, 270 Mass. 299, 170 N.E. 43 (1930); *De Groot v. Edison Institute*, 306 Mich. 339, 10 N.W. 2d 907 (1943); *Mississippi Baptist Hospital v. Moore*, 156 Miss. 676, 126 So. 465 (1930); overruled in *Mississippi Baptist Hospital v. Holmes*, 212 Miss. 564, 55 So. 2d 142 (1951); *Dille v. St. Luke's Hospital*, 355 Mo. 436, 196 S.W. 2d 615 (1946); *Herndoz v. Massey*, 217 N.C. 610, 8 S.E. 2d 914 (1940); *Sudekum v. Animal Rescue League*, 353 Pa. 408, 45 A. 2d 59 (1946); *Meade v. St. Francis Hospital of Charleston*, 74 S.E. 2d 405 (W.Va., 1953); *Schau v. Morgan*, 241 Wis. 334, 6 N.W. 2d 212 (1942); *Tovarez v. San Juan Lodge*, 68 Puerto Rico 681 (1948); *Stonaker v. Big Sister's Hospital*, 116 Cal. App. 375, 2 P. 2d 520 (1931); *Emrich v. Pennsylvania YMCA*, 69 Ohio App. 353, 43 N.E. 2d 733 (1942); *Vanderbilt University v. Henderson*, 23 Tenn. App. 135, 127 S.W. 2d 284 (1938) recognizing the rule; *Woods v. Overlook Hospital Ass'n*, 6 N.J. Super. 47, 69 A. 2d 742 (1949).

⁶⁶ Arkansas, Kentucky, Maine, Maryland, Massachusetts (excepting torts committed in the course of noncharitable activities), Missouri, Oregon, Pennsylvania (excepting torts committed in the course of noncharitable activities), South Carolina and Wisconsin (excepting breach of a statutory duty).

⁶⁷ Connecticut, Georgia, Idaho, Indiana, Louisiana, Michigan, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Texas, Virginia, Washington, West Virginia and Wyoming.

⁶⁸ Colorado, Illinois and Tennessee.

⁶⁹ Arizona, California, Delaware, Iowa, Minnesota, New Hampshire, North Dakota, Rhode Island (apart from statutory law), and Vermont.

⁷⁰ Alabama, Florida, Kansas, Mississippi, New York, Oklahoma and Utah.

charity is not immune from tort liability incurred in the course of non-charitable activity, but the question of immunity itself has not yet been decided in a reported case. Alaska seems to follow a rule disallowing immunity.⁷¹

In three states no reported cases have been found.⁷²

The numerical weight of American jurisdictions,⁷³ as between the immunity and liability doctrines, lies with the immunity doctrine, but the trend of recent decisions has been away from immunity and towards liability.⁷⁴

In England the doctrine of immunity was quickly overthrown while in its early stages of infancy. Sad to say, in our own country, it has been allowed to grow and flourish. As charitable institutions began to expand their enterprises and take on the form of big business the idea that they were immune from tort liability grew with them until, like everything else that has an insecure foundation, the idea has slowly begun to subside. The historical foundation upon which the doctrine rests has been seen to be no foundation at all. In this day and age it is foolhardy to say that the majority of these institutions are not members of that class known as "big business." Why not then exempt all "big business" from tort liability? If a clerk of a large department store injures a buyer, why not permit the buyer to sue only the clerk? The store is big business; therefore, it should be immune from this tort action.

If this sounds a little too caustic, perhaps an illustration of only one of many unjust instances will lend flavor to the argument.

The case of *Greatrex v. Evangelical Hospital*⁷⁵ is indicative; the plain-

⁷¹ *Tuengel v. Sitka*, Alaska, 118 F. Supp. 399 (D. C. Alaska, 1954). But see *Moarts v. Sisters of Charity*, 13 Alaska 546 (D.C. Alaska, 1952).

⁷² Montana, New Mexico and South Dakota.

⁷³ In England and Canada charities enjoy no immunity from tort liability.

⁷⁴ *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P. 2d 934 (1954); In *Pierce v. Yakima Valley Memorial Hospital Ass'n*, 260 P. 2d 549 (Wash., 1953), the Supreme Court of Washington expressly overruled previous decisions and held a charitable hospital liable to a paying patient regardless of whether the hospital had been guilty of administrative negligence, or whether it had exercised due care in the selection of its servants. Previously these had been the criteria for ascertaining liability.

To the effect that this trend has been recognized by the courts see the following cases: *Durney v. St. Francis Hospital*, 7 Terry 350, 83 A. 2d 753 (Del., 1951); *Langheim v. Dennison Fire Dept. Swimming Pool Ass'n*, 237 Iowa 386, 21 N.W. 2d 295 (1946); Concurring opinion of Robinson, J., in *Miller v. Sisters of St. Francis*, 5 Wash. 2d 204, 105 P. 2d 32 (1940); quoted with approval by Millard, J., dissenting in *Weiss v. Swedish Hospital*, 16 Wash. 2d 446, 133 P. 2d 978 (1943), where he said that the next generation of judges will abandon the rule if the present one does not. *O'Connor v. Boulder Colorado Sanitarium Ass'n*, 105 Colo. 259, 96 P. 2d 835 (1939); concurring opinion of Wolfe, J., in *Sessions v. Thomas D. Dee Memorial Hospital Ass'n*, 94 Utah 460, 78 P. 2d 645 (1938); *Nicholson v. Good Samaritan Hospital*, 145 Fla. 360, 199 So. 344 (1940).

⁷⁵ 261 Mich. 327, 246 N.W. 137 (1933).

tiff brought his wife and week-old baby to the defendant hospital. Nine days later the wife died and plaintiff left the baby at the hospital until he became settled, being assured that for \$1.00 per day the child would receive the best of care. At about this time, the daughter of one Vlemminck gave birth to a child at the hospital, the result of an incestuous relationship between her and her father. She too left her baby at the hospital. Vlemminck came for the child and was given plaintiff's baby by accident. Later the mistake was discovered but Vlemminck claimed that he had given the baby to strangers passing through the city. The child was never recovered and there was strong suspicion that Vlemminck had disposed of the baby. Plaintiff was not allowed to recover from the hospital either in tort or in contract.

Can we reasonably say that the father felt he was leaving his child in one nurse's care? Is it not more logical to say that he left the baby under the care of the hospital? Here is a case involving extreme mental anguish, and yet immunity of a so called charitable institution prevented any recovery. Natural justice and the moral law seem to be considerably outweighed by "immunity." But this is not an exceptional case. It is the general rule in a large number of states. Fortunately, as has been stated, the trend today is away from immunity and towards liability. It is to be hoped that our courts will soon rid themselves of this doctrine completely, so that eventually we may say that in the American legal system, for every wrong that occurs, there is an existing legal remedy.

PRIVILEGED COMMUNICATION

ATTORNEY-CLIENT

Generally, there is privileged communication between a client and his attorney relevant to matters about which the attorney is giving legal advice. This is found in early common law by virtue of a theory that the attorney by his oath and honor would not divulge the secrets of his client. Under this theory the attorney had the ability to waive the privilege if his conscience would permit. Over the years this theory was weakened by the courts, and by the last quarter of the 1700's was entirely repudiated.¹

By the time this doctrine was repudiated, however, a new theory had found its way into the thinking of the courts to justify the same general rule. It was said that the privilege belonged not to the attorney, but to the client. It is important during litigation for the attorney to know all of the facts so that he might better protect the interests of his client. If the client were to believe that his statements to his attorney could be

¹ Wigmore, Evidence, § 2290 (3d ed., 1940).