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Torts -- Charitable Immunity

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The decision in the principal case is harsh in that it necessitates circuity of action. Plaintiff can sue only the middleman, who in turn will sue the ice manufacturer in order to place liability at the point of origin. The biscuit company is placed in the anomalous position of being subject to liability without contractual privity, under the *Decker* rule, to a consumer who sustains injury by eating unwholesome biscuits. Yet the company which has been diligent in preventing injury to ultimate consumers by destroying the glass-contaminated dough cannot recover its loss from the ice manufacturer because of a lack of contractual privity.[27] It is submitted that this privity requirement is law for law's sake.[28]

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Torts—Charitable Immunity

The doctrine that charitable institutions[1] are immune from liability for torts committed by their servants evolved from dictum set forth in *Duncan v. Findlater*,[2] an English case decided in 1839. This doctrine was later recognized and followed in England for a brief period; it was completely discarded in 1866.[3]

McDonald v. Massachusetts General Hospital,[4] in 1876, was the first case to adopt the doctrine in this country, the court holding that a charity was immune from liability if it had exercised due care in the selection and retention of its servants. Since that time a majority of the states have followed the Massachusetts rule, but have differed greatly

of the buyer no longer is required to have privity with the buyer's vendor to recover for breach of implied warranty. But a suit by a buyer against a remote vendor is left unchanged, therefore the majority rule requiring privity in such a situation is left intact. *Legislation*, 15 U. PITT. L. REV. 331, 352-55 (1954).

[27] Of course plaintiff could sue defendant on grounds of negligence, but in this case this theory would be quite difficult to prove. PROSSER, TORTS § 84, at 505 (2d ed. 1955).

[28] Spruill, *Privity Of Contract as a Requisite for Recovery On Warranty*, 19 N.C.L. REV. 551, 565-66 (1941).

[1] An institution "is deemed to be eleemosynary or charitable where its property is derived from charitable gifts or bequests and administered, not for purpose of gain but in interest of humanity. . . ." Ettlinger v. Trustees of Randolph-Macon College, 31 F.2d 869, 870 (2d Cir. 1929).

[2] 6 Clark and Fin. 894, 7 Eng. Rep. 934 (H.L. 1839).

[3] The dictum of Duncan v. Findlater, *supra* note 2, was followed in Holliday v. St. Leonard's, 11 C.B.N.S. 192, 142 Eng. Rep. 769 (1861). However, this case was expressly overruled by Mersey Docks Trustees v. Gibbs, L.R. 1 H.L. 93, 11 Eng. Rep. 1500 (1866), thus repudiating the doctrine in England. See also Hillyer v. St. Bartholomew's Hospital [1909] 2 K.B. 820; Foreman v. Canterbury Corp., L.R. 6 Q.B. 214 (1871).

[4] 120 Mass. 432 (1876). This case was decided ten years after Mersey Docks Trustees v. Gibbs, *supra* note 3, had overruled the doctrine in England; but the Massachusetts court relies on Holliday v. St. Leonard's, *supra* note 3.

both as to the reasons for invoking the rule[5] and as to the situations in which the rule should be applied.[6] However, an examination of recent

[5] At least five theories have been used in upholding the immunity doctrine.
(1) *"Trust Fund" theory.* Under this theory the courts refuse recovery on the ground that the donor intended the funds to be used only for charitable purposes, and to allow them to be diverted therefrom would misappropriate the fund. See *e.g.,* Jensen v. Maine Eye and Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910); Perry v. House of Refuge, 63 Md. 20 (1885); McDonald v. Massachusetts Gen. Hospital, *supra* note 4; Adams v. University Hospital, 122 Mo. App. 675, 99 S.W. 453 (1907); Fire Ins. Patrol v. Boyd, 120 Pa. 624, 15 Atl. 533 (1888).
(2) *Inapplicability of respondeat superior.* This is based on the theory that a charity has performed its entire duty when it tenders to a beneficiary a competent servant, and from that instant he is the servant of the beneficiary rather than that of the charitable institution. See *e.g.,* Fordyce v. Woman's Christian Nat'l Library Ass'n, 79 Ark. 550, 96 S.W. 155 (1906); Hearns v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 595 (1895); Whittaker v. St. Luke's Hospital, 137 Mo. App. 116, 117 S.W. 1189 (1908).
(3) *"Governmental Immunity" theory.* Because of close association with the state, some courts have cloaked charitable institutions with an immunity like that of the state and its agencies. See *e.g.,* Fordyce v. Woman's Christian Nat'l Library Ass'n, *supra;* University of Louisville v. Hammock, 127 Ky. 564, 106 S.W. 219 (1907); Morrison v. Henke, 165 Wis. 166, 160 N.W. 173 (1917).
(4) *"Implied Waiver" theory.* This theory is based on the idea that when one enters a charitable institution and accepts its services he thereby waives all right to claim damages for injuries suffered as a result of the negligence of the institution or its servants. See *e.g.,* Wilcox v. Idaho Falls Latter Day Saints Hospital, 59 Idaho 350, 82 P.2d 849 (1938); Cook v. John N. Norton Memorial Infirmary, 180 Ky. 331, 102 S.W. 847 (1918); Bruce v. Young Men's Christian Ass'n, 51 Nev. 372, 277 Pac. 789 (1929).
(5) *"Public Policy" theory.* Some courts have stated that they are denying liability because it is against public policy. See *e.g.,* Hearns v. Waterbury Hospital, *supra;* Lindler v. Columbia Hospital, 98 S.C. 25, 81 S.E. 512 (1914); Weston v. Hospital of St. Vincent, 131 Va. 587, 107 S.E. 785 (1921).
For a discussion of the theories of immunity see Note, 30 N.C.L. REV. 67 (1951).

[6] Some states allow complete immunity from liability. See *e.g.,* Jensen v. Maine Eye and Ear Infirmary, *supra* note 5(1); Conklin v. John Howard Industrial Home, 224 Mass. 222, 112 N.E. 606 (1916); Steden v. Jewish Memorial Hospital Ass'n, 239 Mo. App. 38, 187 S.W.2d 469 (1945). Others limit execution of judgment to nontrust property. See *e.g.,* Saint Mary's Academy v. Solomon, 77 Colo. 463, 238 Pac. 22 (1925); Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950); McLeod v. St. Thomas Hospital, 170 Tenn. 432, 95 S.W.2d 917 (1936).
Some states allow immunity to be invoked as against strangers. See *e.g.,* Jackson v. Atlanta Goodwill Industries, 46 Ga. App. 425, 167 S.W. 702 (1933); Foley v. Wesson Memorial Hospital, 246 Mass. 363, 141 N.E. 113 (1923). Others say the immunity doctrine does not apply as against strangers. See *e.g.,* Winona Technical Institute v. Stolte, 173 Ind. 39, 89 N.E. 393 (1909); Bruce v. Central Methodist Episcopal Church, 147 Mich. 230, 110 N.W. 951 (1907).
Immunity does not extend to torts committed by one servant against another servant, according to some states. See *e.g.,* Cowans v. North Carolina Baptist Hospitals, Inc., 197 N.C. 41, 147 S.E. 672 (1929). However, other states say the immunity doctrine does apply in this situation. See *e.g.,* Emery v. Jewish Hospital Ass'n, 193 Ky. 400, 236 S.W. 577 (1921); Reavy v. Guild of St. Agnes, 284 Mass. 300, 187 N.E. 557 (1933).
Some states make no distinction between paying and non-paying beneficiaries, and say that both are subject to the doctrine of immunity. See *e.g.,* Williams v. Randolph Hospital, Inc., 237 N.C. 387, 75 S.E.2d 303 (1952); Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087 (1910). Others do make such a distinction and say that a charitable institution is liable to a paying beneficiary. See *e.g.,* Sisters of Sorrowful Mother v. Zeidler, 183 Okla. 454, 82 P.2d 996 (1938).
For a complete listing of cases, see Annot., 25 A.L.R.2d 29 (1952).

decisions reveals that an increasing number of jurisdictions have held charities liable for the torts of their servants on the same basis as privately operated institutions,[7] reaching this result either (1) by initially refusing to follow the doctrine of immunity, or, more important, (2) by overruling earlier decisions which did follow the rule.

Collopy v. Newark Eye and Ear Infirmary[8] is a recent decision exemplifying this modern trend. In this case the plaintiff sought to recover against the defendant hospital, a charitable institution, for injuries allegedly due to the negligence of the hospital's servant. The lower court granted defendant's motion to dismiss, relying on *D'Amato v. Orange Memorial Hospital*,[9] the case establishing the doctrine of charitable immunity in New Jersey. On appeal, the decision was reversed. The supreme court, in reviewing the various theories of immunity,[10] decided that the only one which could be considered valid was the "public policy" theory. As to this theory, the court stated:

> It may perhaps be that when *D'Amato* was rendered in 1925 it accurately represented the then prevailing notions of public policy. But times and circumstances have changed[11] and we do not believe that it faithfully represents current notions of rightness and fairness. Due care is expected of all, and when an organiza-

[7] President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942); Brigham Young University v. Lillywhite, 118 F.2d 836 (10th Cir. 1941); Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951); Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951); St. Luke's Hospital Ass'n v. Long, 125 Colo. 25, 240 P.2d 917 (1952); Durney v. St. Francis Hospital, 46 Del. 350, 83 A.2d 753 (Super. Ct. 1951); Wilson v. Lee Memorial Hospital, 65 So. 2d 40 (Fla. 1953); Wheat v. Idaho Falls Latter Day Saints Hospital, 78 Idaho 60, 297 P.2d 1041 (1956); Haynes v. Presbyterian Hospital Ass'n, 241 Iowa 1269, 45 N.W.2d 151 (1950); Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934 (1954); Mulliner v. Evangelischer Diakonniessenverin, 144 Minn. 392, 175 N.W. 699 (1920); Mississippi Baptist Hospital v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951); Welch v. Frisbie Memorial Hospital, 90 N.H. 337, 9 A.2d 761 (Sup. Ct. 1939); Collopy v. Newark Eye and Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (Sup. Ct. 1958); Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3 (Ct. App. 1957); Richbeil v. Grafton Deaconness Hospital, 74 N.D. 525, 23 N.W.2d 247 (1946); Avellone v. St. John's Hospital, 165 Ohio St. 467, 135 N.E.2d 410 (1956); Gable v. Salvation Army, 186 Okla. 687, 100 P.2d 244 (1940); Glavin v. Rhode Island Hospital, 12 R.I. 141 (1879); Foster v. Roman Catholic Diocese, 116 Vt. 124, 70 A.2d 230 (1950); Pierce v. Yakima Valley Memorial Hospital Ass'n, 43 Wash. 2d 162, 260 P.2d 765 (1953).

[8] 27 N.J. 29, 141 A.2d 273 (Sup. Ct. 1958).

[9] 101 N.J.L. 61, 127 Atl. 340 (Ct. Err. & App. 1925).

[10] See note 5 *supra*.

[11] Charitable institutions themselves have changed since the rule was initiated. "Then they were largely small institutions, many connected with churches, and of limited means. Today they have become, in many instances, big businesses, handling large funds, managing and owning large properties and set up by large trusts or foundations. It is idle to argue that donations for them will dry up if the charity is held to respond for its torts the same as other institutions or that the donors are giving the funds or setting up large foundations for charitable purposes with the expectation that the charities they benefit will not be responsible like other institutions for negligent injury. Such charities enjoy endowments and resources beyond anything thought of when the matter of immunity was first being considered." Foster v. Roman Catholic Diocese, 116 Vt. 124, 134, 70 A.2d 230, 236 (1950).

> tion's negligent conduct injures another there should, in all justice and equity, be a basis for recovery without regard to whether the defendant is a private charity.[12]

Thus, New Jersey, by overruling its prior decisions, effectively abandoned the doctrine of charitable immunity.

This same result was reached a year earlier in a New York decision,[13] where the court, reasoning along the same lines as the New Jersey court, rejected the immunity doctrine, stating that "a distinction unique in the law should rest on stronger foundations than those advanced."[14]

Courts generally have not gone from the extreme of full immunity to no immunity in one decision. Instead, the process usually follows this pattern: (1) the courts initially state the general rule that charitable institutions are immune from liability if they exercise due care in selecting and retaining their servants; (2) the rule, thus established, is "devoured" by many exceptions;[15] and (3) from this point, the rule is then completely discarded. This is borne out by the developments leading up to the principal case.[16]

This "devouring" of the rule by exceptions, evidenced by the great variance of rules and reasons therefor, is a strong indication that something is wrong and that correction, though in process, is incomplete.[17] In such a state of flux, it would seem that the rule should be critically re-examined by all courts as to its fundamental soundness and compatibility with present day needs and modern ideas of justice.[18]

North Carolina first held to the general rule that the only duty imposed on the charitable institution was that of exercising reasonable care in selecting and retaining its servants;[19] then an exception was made whereby an injured servant of a charitable institution did not have to show lack of due care in selection or retention of the negligent servant

[12] 27 N.J. at 39, 141 A.2d at 282.

[13] Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3 (Ct. App. 1957). This recent decision destroyed the last remnants of charitable immunity in New York.

[14] Bing v. Thunig, *supra* note 13 at 663, 143 N.E.2d at 7.

[15] "The 'rule' has not held in the tests of time and decision. Judged by results it has been devoured in 'exceptions.'" President and Directors of Georgetown College v. Hughes, 130 F.2d 810, 817 (D.C. Cir. 1942).

[16] The rule was laid down in D'Amato v. Orange Memorial Hospital, 101 N.J.L. 61, 127 Atl. 230 (Ct. Err. & App. 1925). An exception as to strangers was made in Simmons v. Wiley Methodist Episcopal Church, 112 N.J.L. 129, 170 Atl. 237 (Ct. Err. & App. 1934). Recovery by a servant was allowed. Rose v. Raleigh Fitkin-Paul Morgan Memorial Hosp., 136 N.J.L. 553, 57 A.2d 29 (Ct. Err. & App. 1948). Thus only the "beneficiaries" of charities were barred from recovery at the time of the *Collopy* case, note 8 *supra*.

[17] President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942).

[18] "[S]*tare decisis* has no legitimate application to doctrines of the law of torts built upon a mistaken foundation persisting in the books after that foundation has been undermined, which are out of accord with general principles recognized today, so that if they are rejected the general law is clarified rather than unsettled." 13 NACCA L.J. 23 (1954).

[19] Barden v. Atlantic Coast Line Ry., 152 N.C. 318, 67 S.E. 971 (1910).

as a prerequisite to recovery;[20] and it would seem that charitable immunity would not be invoked as against a stranger to the charity,[21] although there is no case in North Carolina holding squarely on this point. Thus when *Williams v. Randolph Hospital, Inc.*[22] came before the court, the immunity rule of North Carolina was very similar to that in New Jersey when the principal case arose. However, the North Carolina court adopted a much different attitude from that taken by the court in the principal case.[23] The New Jersey court carefully reviewed the theories of immunity and then discarded the doctrine entirely. The North Carolina court merely mentioned the "trust fund," "implied waiver," and "public policy" theories and refused to discuss their merits or demerits. It did agree that they may be subject to some meritorious criticism, but said that "the numerical weight of authority is on the side of immunity." Then it stated that a number of jurisdictions have reached the same result as that of qualified immunity by holding the doctrine of respondeat superior inapplicable as between the charity and its employees.[24]

Since the latter theory is discussed separately and approved by the court, the inapplicability of respondeat superior to charitable institutions,[25] as against beneficiaries of such institutions, is apparently the basis for the doctrine of immunity in North Carolina.

One's liability for the negligence of his alleged servant is generally determined by his right and power to direct and control the servant in the performance of his duty at the instant the negligent act or omission occurs.[26] Applying this test to the situation where the negligence of an employee of a charity results in an injury to a beneficiary, it seems clear that the charity, having the right and power to direct and control its employees, would be the true master; it is only through the use of a legal fiction that the *beneficiary* can be said to be the master in such a situation.[27] There is no sound legal principle under which respondeat superior should be held inapplicable to a charitable institution and at the same time applicable to an institution privately owned and operated.[28] Thus, it appears that the inapplicability of respondeat superior to charitable institutions is as indefensible as the other theories of immunity

[20] Cowans v. North Carolina Baptist Hospitals, Inc., 197 N.C. 41, 147 S.E. 672 (1929).
[21] See Williams v. Union County Hospital Ass'n, Inc., 234 N.C. 536, 67 S.E.2d 662 (1951) (by implication).
[22] 237 N.C. 387, 75 S.E.2d 303 (1953).
[23] For a discussion of the North Carolina law on this subject, see Note, 32 N.C.L. Rev. 129 (1953).
[24] 237 N.C. at 390, 75 S.E.2d at 305.
[25] See note 5 *supra*.
[26] P. F. Collier & Son Distributing Corp. v. Drinkwater, 81 F.2d 200, 202 (4th Cir. 1936).
[27] Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951).
[28] Mississippi Baptist Hospital v. Holmes, 214 Miss. 106, 55 So. 2d 142 (1951).

which, as the North Carolina court has agreed, may be "subject to some measure of meritorious criticism."

However, the court indicates that even if respondeat superior were applicable, the principle of stare decisis would require that any departure made from the rule of immunity be made by the legislature—due to the great weight of authority in North Carolina established over many years.[29] But, if the reasons for the rule are at best doubtful, why should stare decisis be applied without at least reviewing the rule? North Carolina has agreed that: "Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence on all future time, it becomes the duty as well as the right of the court to consider them carefully and to allow no previous error to continue, if it can be corrected."[30]

Though declaration of public policy is primarily a legislative function, the courts also have authority to declare a public policy which already exists—and to base their decisions on that ground.[31] Immunity, basically unsound under all legal theories, could only have been created by the courts in response to what appeared at the time to be proper as a matter of public policy.[32] Therefore, when the need for such a public policy no longer obtains, the court should declare that it no longer exists; and especially is this true where it was initiated by the courts instead of the legislature.[33]

For negligent or tortious conduct, liability is the rule, and immunity the exception.[34] The avowed purpose of the rule of immunity is to protect the charity. Actually, it clothes charitable and non-profit organizations with special privileges not available to other organizations.[35] It seems clear that most authorities would agree today that: (1) the need for the rule no longer exists; (2) the underlying reasons for the rule are not valid; and (3) the charitable institution is no longer the small institution it was when the rule was initially formulated. This being true, why should not the law itself—even assuming it to have been justifiable when initially made[36]—change so as to reflect these facts?

[29] Williams v. Randolph Hospital, Inc., 237 N.C. 387, 75 S.E.2d 303 (1953). Prior to this case, there were three cases in which all of the necessary elements—a charitable institution, a beneficiary, and a servant who, though carefully selected and retained, had been negligent—were present: Williams v. Union County Hospital Ass'n, 234 N.C. 536, 67 S.E.2d 662 (1951); Herndon v. Massey, 217 N.C. 610, 8 S.E.2d 914 (1940); Barden v. Atlantic Coast Line Ry., 152 N.C. 318, 67 S.E. 971 (1910).

[30] Mason v. A. E. Nelson Cotton Co., 148 N.C. 492, 510, 62 S.E. 625, 631 (1908).

[31] Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951).

[32] Mississippi Baptist Hospital v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951).

[33] *Ibid.*

[34] President and Directors of Georgetown College v. Hughes 130 F.2d 810 (D.C. Cir. 1942).

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

[36] *But see,* Pierce v. Yakima Valley Memorial Hospital Ass'n, 43 Wash. 2d

This is the attitude taken by the New Jersey court in the principal case. It is submitted that this should be the attitude taken by *any* court in reviewing the subject.

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Torts—Lookout—Duty to Maintain at Green Light

In the recent case of *Currin v. Williams*,[1] plaintiff entered the intersection with a green light in his favor but without maintaining a lookout for traffic approaching on the intersecting street. Defendant entered the intersection from plaintiff's left while the traffic control signal facing him was red. Though not conclusive, there was some evidence to support a conclusion that had plaintiff looked he would have been put on notice that defendant was not going to stop. *Held:* Plaintiff's failure to look to the right and the left when he entered the intersection on the green light was not contributory negligence as a matter of law, but the issue of contributory negligence was properly submitted to the jury.

Since, in accidents of this nature, failure to maintain a lookout is invariably alleged, it is essential that attorneys know (1) what is meant by *lookout*,[2] (2) what constitutes the motorist's duty to maintain a lookout, and (3) what effect automatic traffic signals have upon that duty.

In its inception, *lookout* was probably a nautical term designating that member of a ship's crew charged with the duty of keeping watch for danger.[3] Stated quite simply, the duty of a motorist to maintain a lookout is analogous to the duty of that crew member; the motorist must keep watch for possible danger.[4] Quite naturally, one indispen-

162, 260 P.2d 765 (1953). There the court says: "Ordinarily, when a court decides to modify or abandon a court made rule of long standing, it starts out by saying that 'the reason for the rule no longer exists.' In this case it is correct to say that the 'reason' originally given for the rule of immunity never did exist." *Id.* at 167, 260 P.2d at 768.

[1] 248 N.C. 32, 102 S.E.2d 455 (1958).

[2] One of a number of descriptive words usually accompanies the word lookout. See, *e.g.*, Wright v. Ponitz, 44 Cal. App. 2d 215, 112 P.2d 25 (1941) (*ordinary careful* lookout); Wilder v. Cadle, 227 Ky. 486, 13 S.W.2d 497 (1929) (*reasonable* lookout); Broussard v. Hotard, 4 So. 2d 563 (La. App. 1941) (*sharp* lookout); Wright v. Pegram, 244 N.C. 45, 92 S.E.2d 416 (1956) (*proper* lookout); Murray v. Atlantic Coast Line R.R., 218 N.C. 392, 11 S.E.2d 326 (1940) (*reasonably careful* lookout).

[3] See Devore v. Schaffer, 245 Iowa 1017, 65 N.W.2d 553 (1954).

[4] There are four classes of hazards which the motorist must guard against: (1) defects or hazards of the road surface, (2) objects or persons standing or moving in the path of the approaching vehicle, (3) objects or hazards which, without negligence, may enter or attempt to enter the path of the vehicle prior to, or at the time of, its passage, (4) objects or persons which negligently enter or attempt to enter the path of the vehicle prior to, or at the time of, its passage. Barrett, *Mechanics of Control and Lookout in Automobile Law*, 14 TUL. L. REV. 493, 507 (1940).