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Roland C. Braswell

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parties must be given freedom of contract.¹⁹ This view does not seem to be supported by reason, however, as it is a generally recognized principle that freedom of contract is always controlled by considerations of public policy²⁰

In the instant case, the great disparity of bargaining power was recognized, the court pointing out that the conditions were predetermined in favor of the bailee.²¹ Thus, the court's reasoning that a professional bailee in such a position cannot contract away his liability is clearly supported by the weight of authority and reason.

JAMES M. HOLLOWELL.

Charities—Liability for Torts of Employees

Liability is generally incurred by employers for the negligent conduct of their employees in the course of their employment.¹ However, at

bailee may contract to limit his liability for negligence. *Van Toll v. South Eastern R. R. Co.*, 12 C. B. N. S. 75, 142 Eng. Reprint 1071 (1862); *Rutter v. Palmer*, 2 K. B. 87 (1922). "The Federal courts permit the private bailee to limit his liability for negligence, but do not extend this privilege to public bailees, as it is considered that such an extension would be contrary to public policy." Note, 8 N. C. L. Rev. 282, 284 (1930). But in Note, 86 U. Pa. L. Rev. 772, 774 (1938), it is stated that "... the Federal courts . . . have upheld conditions exempting bailees from responsibility for negligence and have found that they violate no rule of public policy." Both cite *McCormich v. Shippy*, 124 Fed. 48 (2d Cir. 1903). However, the court there states, "There is no question of public policy involved. It is well settled that the parties in such a case have the right to provide by apt language against liability for negligence." It appears that the view expressed in *The University of Pennsylvania Law Review* is correct. See *Inland Compress Co. v. Simons*, 59 Okla. 287, 159 Pac. 262 (1916).

¹⁹ See *Munger Auto Co. v. American Lloyds of Dallas*, 267 S. W. 304 (Tex. Civ. App. 1924) (where the court held that the due process clause of the state constitution guaranteed the right of a garage keeper to make a contract limiting liability). See Note, 175 A. L. R. 12, 135 (1948).

²⁰ RESTATEMENT, CONTRACTS §§574, 575 (1932).

²¹ "... the constantly increasing number of automobiles render[s] the question of parking a matter of public concern. . . . People who work in the business sections of our cities and towns and who rely on automobiles for transportation find it difficult—sometimes impossible—to locate a place on the public streets where daily parking is permitted. They are driven to seek accommodation in some parking lot maintained for the service of the public. There they are met by predetermined conditions which create a marked disparity of bargaining power and place them in the position where they must either accede to the conditions or else forego the desired service." *Miller's Mutual Fire Insurance Assoc. v. Parker*, 234 N. C. 20, 24, 65 S. E. 2d 341, 343 (1951).

¹ Liability is based on the respondeat superior doctrine. The reason for the doctrine is that it is more just to make the person who has entrusted his employee with the power of acting in his business responsible for injury occasioned to another in the course of so acting, rather than leave the other, an entirely innocent party, to bear the loss or attempt a usually inadequate recovery from the employee. *Schedivy v. McDermott*, 113 Cal. App. 218, 298 Pac. 107 (1931); *Phillips v. Western Union Tel. Co.*, 270 Mo. 676, 195 S. W. 711 (1917); *Bernstein v. Western Union Tel. Co.*, 174 Misc. Rep. 74, 18 N. Y. S. 2d 856 (1940); *Wright v. Wright*, 229 N. C. 503, 50 S. E. 2d 540 (1948); *Hammond v. Eckerd's*, 220 N. C. 596, 18 S. E. 2d 151 (1942); *West v. F. W. Woolworth Co.*, 215 N. C. 211, 1 S. E. 2d 546 (1939).

an early date, charitable institutions² were declared to be an exception to this general rule.³ Since most courts from the beginning sought to qualify this exception, it is doubtful if there ever existed a doctrine of full immunity.⁴ Even courts that gave lip service to the full immunity doc-

² A charitable institution is variously defined by the courts as one that is for the relief of a certain class of persons, either by alms, education or care, and is supported in whole or part at public expense or by charity. See *City of Vicksburg v. Vicksburg Sanatorium*, 117 Miss. 709, 78 So. 702 (1918) (privately owned corporation treating paying patients held to be charitable institution); *Rockaway Beach Hosp. and Disp. v. Dillon*, 284 N. Y. 176, 30 N. E. 2d 373 (1940) (hospital held to be charitable institution); *Bruce v. Y.M.C.A.*, 51 Nev. 372, 277 Pac. 798 (1929) (Y.M.C.A. held to be charitable institution); *Utica Trust and Deposit Co. v. Thompson*, 87 Misc. 31, 149 N. Y. Supp. 392 (1914) (where a gift or bequest is left to a "charitable institution" the court will not let the gift or bequest fail for uncertainty, it will pick an appropriate institution); PROSSER, *TORTS* 1079 (1941); Zollman, *Damage Liability of Charitable Institutions*, 19 MICH. L. REV. 395 (1921).

³ The doctrine of tort immunity for charities originated in England, by way of *dicta* in the following cases: *Duncan v. Findlater*, 6 Clark and Fin. 894, 7 Eng. Reprint 934 (1839); *The Feoffees of Heriot's Hosp. v. Ross*, 12 Clark and Fin. 507, 8 Eng. Reprint 1508 (1846). These *dicta* were later adopted as a direct holding in *Holliday v. Saint Leonard*, 11 C. B. N. S. 192 (1861). The doctrine was then expressly repudiated in England: *Mersey Docks Trustee v. Gibbs*, L. R. 1 H. L. 93 (1866); *Foreman v. Mayor of Canterbury*, L. R. 6 Q. B. 214 (1871). Massachusetts and Maryland adopted as a rule the doctrine which had been repudiated in England, giving it a new lease on life in America. *McDonald v. Mass. Gen. Hosp.*, 120 Mass. 432, 21 Am. Rep. 529 (1876); *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495 (1895).

⁴ In twelve states strangers are allowed to recover against the charity: *Evans v. Memorial Hosp.*, 133 Conn. 311, 50 A. 2d 443 (1946); *Cashman v. Meriden Hosp.*, 117 Conn. 587, 169 Atl. 915 (1933); *St. Vincent's Hosp. v. Stine*, 195 Ind. 350, 144 N. E. 537 (1924); *Lusk v. United States Fidelity and Guaranty Co.*, 199 So. 666 (La. App. 1941); *Erwin v. St. Joseph Hosp.*, 324 Mich. 114, 34 N. W. 2d 480 (1948); *Bruce v. Henry Ford Hosp.*, 245 Mich. 394, 236 N. W. 813 (1931); *Wright v. Salvation Army*, 125 Neb. 216, 249 N. W. 549 (1933); *Beanchi v. South Park Presbyterian Church*, 123 N. J. L. 328, 8 A. 2d 567 (1939); *Herndon v. Massey*, 217 N. C. 610, 8 S. E. 2d 914 (1940); *Cullen v. Schmit*, 139 Ohio St. 194, 39 N. E. 2d 146 (1942); *Basabo v. Salvation Army*, 35 R. I. 22, 85 Atl. 120 (1912); *City of McAllen v. Gartman*, 81 S. W. 2d 147 (Tex. Civ. App. 1935); *Weston's Adm'x v. Hosp. of St. Vincent of Paul*, 131 Va. 587, 107 S. E. 785 (1921); *Heckman v. Sisters of the Charity of Providence*, 5 Wash. 2d 699, 106 P. 2d 593 (1940).

Eleven states apparently adhere to full immunity. See Note 5 *infra*. This term is used to denote non-liability on the basis of respondeat superior. The charity may still be liable for its *own* negligence.

In six states strangers and paying beneficiaries may recover but the question has been reserved as to non-paying beneficiaries: *Carter v. Alabama Baptist Hosp. Board*, 277 Ala. 560, 151 So. 62 (1933); *England v. Hosp. of Good Samaritan*, 14 Cal. 2d 791, 97 P. 2d 813 (1939); *Nicholson v. Good Samaritan Hosp.*, 145 Fla. 360, 199 So. 344 (1940); *Robertson v. Executive Committee of Baptist Convention*, 55 Ga. App. 469, 190 S. E. 432 (1937); *Wilcox v. Idaho Falls Latter Day Saints Hosp.*, 59 Idaho 350, 82 P. 2d 849 (1938); *Sessions v. Thomas Dee Memorial Hosp.*, 94 Utah 460, 78 P. 2d 645 (1938).

Two jurisdictions impose liability if the charity is protected by insurance: *O'Conner v. Boulder Colorado Sanitarium Ass'n*, 105 Colo. 259, 96 P. 2d 835 (1939); *Vanderbilt University v. Henderson*, 23 Tenn. App. 135, 127 S. W. 2d 284 (1938).

Six states apparently have no decisions involving strangers, but hold that the charity is not liable to beneficiaries: *Jensen v. Maine Eye and Ear Infirmary*, 107 Me. 408, 78 Atl. 898 (1910); *Miss. Baptist Hosp. v. Moore*, 156 Miss. 676, 126 So.

trine do not always follow it.⁵

The present area of conflict is the so called "stranger to the charity-beneficiary of the charity" distinction.⁶ The majority of the courts allow strangers to the charity such as visitors, bystanders, invitees and employees to recover against it, but refuse to allow beneficiaries of the charity to recover.⁷ A few jurisdictions draw a distinction between paying and non-paying beneficiaries, allowing the former to recover.⁸

Until recently, only five jurisdictions in the United States had com-

465 (1930); *Borgeas v. Ore. Short Line R. R.*, 73 Mont. 407, 236 Pac. 1069 (1925); *Bruce v. Y.M.C.A.*, 51 Nev. 372, 277 Pac. 789 (1929); *Rovers v. Ohio Valley Gen. Hosp.*, 98 W. Va. 476, 127 S. E. 318 (1925); *Bishop Randall Hosp. v. Hartley*, 24 Wyo. 408, 160 Pac. 385 (1916).

Seven states have now imposed unqualified liability. See notes 9 and 10 *infra*.

In Delaware, New Mexico, South Dakota, and Vermont the question has apparently never reached the courts.

⁵ The following jurisdictions have worked in these exceptions: *Arkansas Valley Co-op Rural Electric Co. v. Elkins*, 200 Ark. 883, 141 S. W. 2d 538 (1940) (strangers); *Moore v. Moyle*, 405 Ill. 555, 92 N. E. 2d 81 (1950); *Wendt v. Servite Fathers*, 332 Ill. App. 618, 76 N. E. 2d 342 (1947); *Maretick v. South Chicago Community Hosp.*, 297 Ill. App. 488, 17 N. E. 2d 1012 (1938) (patients); *Ratliffe v. Wesley Hosp. and Nurse Training School*, 135 Kan. 306, 10 P. 2d 859 (1932) (patient); *Emery v. Jewish Hosp. Ass'n*, 193 Ky. 400, 236 S. W. 577 (1921) (employee); *Loeffler v. Trustees of Sheppard and Enoch Pratt Hosp.*, 130 Md. 265, 100 Atl. 301 (1817) (stranger); *Zoulalian v. New England Sanatorium and Benevolent Ass'n*, 230 Mass. 102, 119 N. E. 686 (1918) (employee); *Eads v. Y.W.C.A.*, 325 Mo. 577, 29 S. W. 2d 701 (1930) (employee); *Hill v. President and Trustees of Tualatin Academy and Pacific University*, 61 Ore. 190, 11 Pac. 901 (1912) (invitee); *Gable v. Sisters of St. Francis*, 227 Pa. 254, 75 Atl. 1087 (1910) (paying patient); *Vermillion v. Women's College of Due West*, 104 S. C. 197, 88 S. E. 649 (1916) (invitee); *Waldman v. Y.M.C.A.*, 227 Wisc. 45, 277 N. W. 632 (1938) (invitee).

⁶ See *Bodenheimre v. Confederation Memorial Ass'n*, 68 F. 2d 507 (4th Cir. 1934) (plaintiff visiting the Ass'n was held to be a beneficiary); *Boeckel v. Orange Memorial Hosp.*, 108 N. J. L. 453, 158 Atl. 146 (1932) (Held visitors to be beneficiaries); *Bianchi v. Southe Park Presbyterian Church*, 123 N. J. L. 325, 8 A. 2d 567 (1939) (member of a girl scout troop meeting in the church was held to be beneficiary); *President and Dir. of Georgetown College v. Huges*, 130 F. 2d 810 (D. C. Cir. 1942).

⁷ See *Zollman, Damage Liability of Charitable Institutions*, 19 MICH. L. REV. 395, 412 (1921); *RESTATEMENT, TRUSTS* §402 (1935). For collections of cases, see *Notes*, 14 A. L. R. 572 (1921); 23 A. L. R. 923 (1923); 30 A. L. R. 445 (1924); 33 A. L. R. 1369 (1924); 42 A. L. R. 971 (1926); 62 A. L. R. 724 (1929); 109 A. L. R. 1199 (1937); 124 A. L. R. 814 (1940); 133 A. L. R. 821 (1941); 160 A. L. R. 256 (1946).

⁸ *Cohen v. General Hosp. Soc. of Connecticut*, 113 Conn. 188, 154 Atl. 435 (1931); *Hearn v. Waterbury Hosp.*, 66 Conn. 98, 33 Atl. 595 (1895); *Winona Technical Institute v. Stalte*, 173 Ind. 39, 89 N. E. 393 (1909); *Bruce v. Central Methodist Episcopal Church*, 147 Mich. 230, 110 N. W. 951 (1907); *Bruce v. Henry Ford Hosp.*, 254 Mich. 394, 236 N. W. 813 (1913); *Marble v. Nicholas Senn. Hosp.*, 102 Neb. 343, 167 N. W. 208 (1918); *Daniels v. Rahway Hosp.*, 10 N. J. Misc. 585, 160 Atl. 644 (1932); *Cowans v. North Carolina Baptist Hosp.*, 197 N. C. 41, 147 S. E. 672 (1929); *Herndon v. Massey*, 217 N. C. 610, 8 S. E. 2d 914 (1940); *Pflugfelder v. Convent of Good Shepherd*, 55 Ohio App. 158, 9 N. E. 2d 4 (1936); *Basabo v. Salvation Army*, 35 R. I. 22, 85 Atl. 120 (1912); *Armen-darez v. Hotel Dieu*, 145 S. W. 1030 (Tex. Civ. App. 1912); *Hospital of St. Vincent of Paul v. Thompson*, 116 Va. 101, 81 S. E. 13 (1914); *Hechman v. Sisters of the Charity of Providence*, 5 Wash. 2d 699, 106 P. 2d 593 (1940).

pletely overruled the charity immunity doctrine.⁹ Now two other jurisdictions have joined this group. In both of these cases, plaintiffs, while patients in the defendant hospitals, were injured through the alleged negligence of employees. The courts held the charities liable for their employees' torts on the same basis as other employers and expressly overruled prior decisions to the contrary.¹⁰

The North Carolina court agrees with the majority, distinguishing between strangers to the charity and beneficiaries of the charity, and denies recovery to the latter group. The latest North Carolina decision is *Herndon v. Massey*.¹¹

The immunity of charities from liability for torts of their employees has been based upon four considerations: (1) the trust fund theory, (2) the inapplicability of the doctrine of respondeat superior, (3) implied waiver, (4) public policy.

Courts resorting to the trust fund theory say that liability would violate the donor's intention; would misappropriate the fund to unauthorized purposes and to persons not within the intended class of beneficiaries; and would in effect indemnify the trustees,¹² if the charity is organized as a trust,¹³ against the consequence of their own or their

⁹ *Borwege v. City of Owatonna*, 190 Minn. 394, 251 N. W. 915 (1933); *Welch v. Frisbie Memorial Hosp.*, 90 N. H. 337, 9 A. 2d 761 (1939); *Dillon v. Rockaway Beach Hosp. and Disp.*, 284 N. Y. 176, 30 N. E. 2d 373 (1940) ("... it is now settled that even a charitable hospital is liable for the acts of its servants."); *Richbeil v. Grafton Hosp.*, 74 N. D. 525, 23 N. W. 2d 247 (1946); Oklahoma's reports appear to place it in the full liability group, although the only cases found involve strangers and paying patients: *Sisters of the Sorrowful Mother v. Zeidler*, 183 Okl. 454, 82 P. 2d 996 (1938) (paying patient); *Gable v. Salvation Army*, 186 Okl. 687, 100 P. 2d 244 (1940) (stranger). In addition to these jurisdictions, England, Canada and New Zealand have adopted the full liability doctrine. *Hillyer v. Governors of St. Bartholomew's Hosp.*, 2 K. B. 820 (1909); *Powell v. Streatham Manor Nursing Home*, [1935] A. C. 243; *Lindsey County Council v. Marshall* [1937] A. C. 97, 1 K. B. 516 (1935); *Lanere v. Smith Falls Public Hosp.*, 35 O. L. R. 98, 26 D. L. R. 346 (1915). See Goodhart, *Hospitals and Trained Nurses*, 54 L. Q. REV. 553 (1938); Wright, *Liability for Negligence of Nurses and Doctors*, 14 CAN. B. REV. 699 (1936).

¹⁰ *Ray v. Tucson Medical Center*, 230 P. 2d 220 (Ariz. 1951); *Haynes v. Presbyterian Hosp.*, 241 Iowa 1269, 45 N. W. 2d 151 (1950).

¹¹ 217 N. C. 610, 85 S. E. 2d 914 (1940); See Note, 19 N. C. L. REV. 245 (1941). Cf. *Flanner v. Saint Joseph Home*, 227 N. C. 342, 42 S. E. 2d 225 (1947).

¹² Since the adaptation of the trust to business as well as family purposes, and those of managing property generally, recourse to the trust res has been much more frequent in recent years. Under modern trust law, a trustee is exonerated or reimbursed from the trust res for liability incurred in carrying out the trust purpose. Uniform Trust Act §§13 and 14; Fulda and Pond, *Tort Liability of Trust Estates*, 41 COL. L. REV. 1332 (1941); Kerr, *Liability of the Trust Estates for Torts of the Trustee's Servants*, 5 TEX. L. REV. 368 (1927). By express provisions, North Carolina statutes on Trusts and Trustees are made inapplicable to trustees of charitable trusts. N. C. GEN. STAT., §§36-36(b), 36-37(5) (1943).

¹³ Courts do not hesitate to hold an individual liable for failure to exercise due care even though his endeavors are charitable. See Note, 22 VA. L. REV. 58 (1935); *President and Dir. of Georgetown College v. Huges*, 130 F. 2d 810, 815 (D. C. Cir. 1942); "But when the charity is incorporated, somehow charity plus incorporation creates a certainty of immunity neither can attain apart from the other." Only

subordinate's misconduct.¹⁴ The apparent fear here is that donors would be deterred from creating charities and from adding to their funds by subsequent donations. Yet most of these same courts allow strangers to the charity to recover.¹⁵ There is a failure to see that so-called dissipation and deterrence will take place whether damages are paid to strangers to the charity or to a beneficiary of the charity. Moreover, with the increased use of accident and liability insurance by charitable institutions, there would appear to be little or no losses actually incurred by them even if they were held liable for their employees' torts.¹⁶ Likewise this theory would have no application where the charity was not created or supported by donors.

Some jurisdictions hold that the doctrine of respondeat superior is inapplicable to charitable institutions.¹⁷ The reasoning given to support this theory is that charities are not operated for profit and that they stand in the relationship of a "good Samaritan" to the beneficiary. This loses sight of the fact that application of the doctrine of respondeat superior depends upon whether the relationship of employer and employee exists at the time of the tort.¹⁸ It does not depend upon the employer's being organized for profit nor upon the relationship of the injured person to the employer.¹⁹ Some jurisdictions have limited this

four cases have been found where *unincorporated* charitable associations, not constituted as trusts, have been held immune to liability for their employees' torts. *Farrigan v. Perear*, 193 Mass. 147, 78 N. E. 885 (1906); *Herndon v. Massey*, 217 N. C. 610, 8 S. E. 2d 914 (1940); *Burgie v. Muench*, 65 Ohio App. 176, 29 N. E. 2d 439 (1940); *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 15 Atl. 553 (1888).

¹⁴ In the following cases, the courts relied primarily on the trust fund theory in holding the charities immune. *Arkansas Valley Co-op Rural Electric Co. v. Elkins*, 200 Ark. 883, 141 S. W. 2d 583 (1940); *St. Mary's Academy of Sisters v. Solomon*, 77 Colo. 463, 238 Pac. 22 (1925); *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991 (1905); *Webb v. Vought*, 129 Kan. 799, 275 Pac. 170 (1929); *Jesen v. Maine Eye and Ear Infirmary*, 107 Me. 408, 78 Atl. 898 (1910); *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495 (1885); *MacDonald v. Mass. Gen. Hosp.*, 120 Mass. 432, 21 Am. Rep. 529 (1876); *Downes v. Harper Hosp.*, 101 Mich. 555, 60 N. W. 42 (1894); *Eads v. Y.M.C.A.*, 325 Mo. 577, 29 S. W. 2d 701 (1930); *Gable v. Sisters of St. Francis*, 227 Pa. 245, 75 Atl. 1087 (1910); *Abston v. Waldon Academy*, 118 Tenn. 24, 102 S. W. 351 (1907).

¹⁵ See note 7 *supra*.

¹⁶ North Carolina has a long established doctrine that evidence of insurance is ordinarily incompetent. *Flanner v. Saint Joseph Home*, 227 N. C. 342, 42 S. E. 2d 225 (1947); *Duke v. Comm'r*, 214 N. C. 570, 190 S. E. 918 (1938); *Scott v. Bryan*, 210 N. C. 478, 187 S. E. 756 (1936). See N. C. GEN. STAT. §160-191.5 (Supp. 1951) (a cause of action exists against a municipality only if it has insurance, yet no evidence of such insurance is permissible). See note 25 *infra*.

¹⁷ *Evans v. Lawrence Hosp.*, 133 Conn. 311, 50 A. 2d 433 (1946); *Lovich v. Salvation Army*, 80 Ohio App. 285, 75 N. E. 2d 459 (1947); *Bachman v. Y.M.C.A.*, 179 Wisc. 178, 191 N. W. 751 (1922).

¹⁸ *Ray v. Tucson Medical Center*, 230 P. 2d 220 (Ariz. 1950); *Wright v. Wright*, 229 N. C. 503, 50 S. E. 2d 540 (1948); *Hammond v. Eckerd's*, 220 N. C. 596, 18 S. E. 2d 151 (1942); *West v. F. W. Woolworth Co.*, 215 N. C. 211, 1 S. E. 2d 546 (1939).

¹⁹ *Ray v. Tucson Medical Center*, *supra* note 18; RESTATEMENT, AGENCY §§1-14 (1933).

doctrine of immunity to beneficiaries of the charity,²⁰ but it would seem that if a stranger may invoke the doctrine of respondeat superior, then a beneficiary, whether he be paying or non-paying, may likewise invoke it.

In other jurisdictions, the injured party is confronted with an implied waiver theory; *i.e.*, when one enters a charitable institution, by accepting the services rendered, he waives all right to claim damages for injuries suffered as a result of the negligence of the charity or its employees.²¹ This theory is based entirely on legal fiction. In some instances this fiction is based upon physical impossibilities. In the case of a patient who is unconscious from whatever cause when he enters, or of a very young child, there could not be an actual implied waiver of any right. Thus it would appear that the waiver theory amounts merely to imposing immunity as a matter of law when other reasoning is found insufficient to support it.

Finally, there are courts supporting non-liability upon a public policy theory.²² Public policy, when declared, is a crystallized conception of what the legislatures or the courts deem better for the public at large. It is not quiescent, but actively changing with the times. In the early days of the nonliability theories, the general good of society may have demanded this form of encouragement of charitable institutions. But today the standing of charitable institutions is vastly different.²³ If public policy ever required that charities should be immune from liability

²⁰ See note 7 *supra*.

²¹ In the following cases, the courts refused to allow the injured party to recover, basing their decisions on an implied waiver. *Power v. Mass. Homoeopathic Hosp.*, 109 Fed. 294 (1st Cir. 1901); *Stonaker v. Big Sisters Hosp.*, 116 Cal. App. 375, 2 P. 2d 530 (1931); *Wilcox v. Idaho Falls Latter Day Saints Hosp.*, 59 Idaho 350, 82 P. 2d 849 (1938); *St. Vincent's Hosp. v. Stine*, 195 Ind. 350, 144 N. E. 537 (1924); *Bruche v. Central Methodist Episcopal Church*, 147 Mich. 230, 119 N. W. 951 (1907); *Bruche v. Y.M.C.A.*, 51 Nev. 372, 277 Pac. 789 (1929); *Hospital of St. Vincent of Paul v. Thompson*, 116 Va. 101, 81 S. E. 13 (1914).

²² *Emery v. Jewish Hosp.* 193 Ky. 400, 236 S. W. 577 (1821); *Ducan v. Nebraska Sanitarium and Benevolent Ass'n*, 92 Neb. 162, 137 N. W. 1120 (1912); *D'Anato v. Orange Memorial Hosp.*, 101 N. J. L. 61, 127 Atl. 340 (1925); *Lindler v. Columbia Hosp.*, 98 S. C. 25, 81 S. E. 512 (1914); *Weston's Adm'x v. Hospital of St. Vincent of Paul*, 131 Va. 587, 107 S. E. 785 (1921). See *Ray v. Tucson Medical Center*, 230 P. 2d 220, 223 (Ariz. 1951).

²³ Many hospitals of today have grown into enormous businesses employing many persons. They own and hold large assets, tax free by statute. Moreover, the state has become paternal as evidenced by numerous statutes such as those for the relief of soldiers, sailors and marines; support for the poor; county homes; indigent tuberculosis patients; medical and surgical treatment of indigent persons.

Many courts are taking judicial notice of the extensive use of the many types of hospital insurance, as well as liability insurance by charitable institutions. Notes, 20 B. U. L. REV. 330 (1940); 53 HARV. L. REV. 873 (1940); 24 MINN. L. REV. 696 (1940); 12 ROCKY M. L. REV. 135 (1940); 14 TENN. L. REV. 468 (1937). In Louisiana, the plaintiff may sue the insurance company directly and the defense of charity is not available. *Lusk v. United States Fidelity and Guaranty Co.*, 199 So. 666 (La. App. 1941).

for the torts of their employees that policy would appear no longer to exist.²⁴

It is believed that charities today should respond as do private individuals, business corporations and others, when their employees commit a tort.²⁵ This could be accomplished by legislation or by court decisions as in the Arizona and Iowa cases.

ROLAND C. BRASWELL.

Constitutional Law—Effect of Press Publicity on Criminal Defendant

In *Shepard v. Florida*,¹ the concurring justices² point to aspects of the case ignored by a per curiam decision which reversed a rape conviction because of discrimination against Negroes in jury selection.³

The concurring opinion pointed to the "lynch" atmosphere that controlled the area following the alleged offense, attributing it to racial prejudice.⁴ A mob attempted to take the prisoners from jail; the home of the parents of one defendant was burned as were two other Negro homes. All Negroes abandoned the area until military units restored order. Prejudicial articles, daily accounts of the mob actions, and a cartoon showing four electric chairs demanding "No Compromise—Supreme Penalty" appeared in the local newspapers. No confession was introduced in evidence yet the press printed reports that the defendants had confessed, and the sheriff was credited as being the source of the information. These published reports were never repudiated or retracted. Although motions to delay the trial and for change of venue were denied, extraordinary and observable precautions were adopted by the trial judge to prevent violence in the court-room.

Justice Jackson calls the jury discrimination a trivial matter when compared with these elements:

²⁴"The fact that the courts may have at an early date, in response to what appeared good as a matter of policy, created an immunity, does not appear to us a sound reason for continuing the same, when under all legal theories, it is basically unsound and especially so, when the reasons upon which it was built, no longer exist." *Haynes v. Presbyterian Hosp.*, 241 Iowa 1269, 1274, 45 N. W. 2d 151, 154 (1950).

²⁵See SCOTT, TRUSTS §402 (1939); HARPER, TORTS §294 (1933); PROSSER, TORTS 1079 (1941); Applaman, *The Tort Liability of Charitable Institutions*, 22 A. B. A. J. 48 (1936); Feezer, *The Tort of Charities*, 77 U. OF PA. L. REV. 191 (1928); See Notes, 14 B. U. L. REV. 477 (1924); 22 VA. L. REV. 58 (1935); 48 Yale L. J. 81 (1938).

¹ 71 Sup. Ct. 549 (1951).

² Justice Jackson with whom Justice Frankfurter joined, 71 Sup. Ct. 549 (1951).

³ Citing *Cassell v. Texas*, 339 U. S. 282 (1950).

⁴ But see *Shepard v. State*, 46 So. 2d 880, 883 (Fla. 1950) "The inflamed public sentiment was against the crime with which the appellants were charged rather than the defendants' race."