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Charitable Immunity: The Plague of Modern Tort Concepts

Ronald M. Lipson

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JUSTICE CARDOZO once said: "Law is indeed, an historical growth, for it is an expression of customary morality which develops silently and unconsciously from one age to another." [1] His view was that if a rule continues to work an injustice, it should be retested and must eventually be reformed. This function of law comes to mind when one considers the tort liability of charitable institutions.

It is a general principle of tort law that liability is the result of negligent and tortious conduct,[2] and that a wrongdoer must be held accountable to the injured party. Some exceptions to this principle developed. Thus, certain defendants were given immunity from liability for conduct which would otherwise be tortious.[3] This immunity was given in order to protect the defendant himself or interests of social importance which he represented.

Among these "favorites" of the law have been, and still are to some extent, charitable institutions. Immunity for charities has come under much criticism in recent years. As one eminent authority said:

> To require an injured party to forego his cause of action for the wrongful acts of another when he is otherwise entitled thereto because the injury was committed by charity, is to require him to make an unreasonable contribution to charity against his will, and a rule of law imposing such burdens cannot be regarded as socially desirable nor consistent with sound policy.[4]

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1 Cardozo, The Nature of Judicial Process 104 (1921).

2 Noel v. Menninger Foundation, 175 Kan. 751, 762, 267 Pac. 2d 934, 942 (1954).

3 Prosser, Torts 770 (2d ed. 1955).

4 Harper, Torts 657 (4th ed. 1940).

For many years, the majority of American courts held that charities were immune from tort liability. It is ironical that this doctrine took hold in the United States. First pronounced in 1876, in a Massachusetts decision,[5] it was based on dicta from some early English cases, none of which dealt with tort liability of non-governmental charities. But in 1871, England had already repudiated the immunity rule.[6]

Thus, the Massachusetts court established this non-liability principle in total ignorance of the prior English rejection. A decade later, a Maryland court[7] followed the first American decision, and immunity was well on its way to becoming firmly entrenched in American tort concepts. Yet the courts themselves could not agree on the reasons justifying immunity. An Oklahoma court expressed this confusion in *Gable v. Salvation Army*,[8] when it stated:

> Even the most cursory research makes it apparent that there is no ground upon which the doctrine of non liability has been rested by one court that has not been assailed and criticized at length by some other court, notwithstanding the fact that they arrive at the same conclusion.[9]

The doctrine has been in a state of flux in recent years, and the trend is definitely away from immunity. Professor Prosser in 1955 predicted with confidence that immunity would be extinct in another decade.[10] It is believed that this trend is in the right direction.

It is the purpose of this paper to analyze the grounds upon which charitable institutions have been granted immunity from tort liability, to consider changing conditions and concepts affecting immunity, and finally, to discuss the extent to which the immunity exception should be abandoned.

Theories Supporting Immunity

The earliest theory followed in this country is known as the "trust fund" theory. It is based on the idea that the funds of a charity are held in trust for the beneficiaries of that trust,

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[5] McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529 (1876).

[6] Foreman v. Canterbury Corp., L. R. 6 Q. B. 214 (1871); Mersey Docks Trustees v. Gibbs, 11 H. L. Cas. 686, 11 Eng. Rep. 1500 (1866).

[7] Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495 (1895).

[8] 186 Okla. 687, 100 P. 2d 244 (1940).

[9] Id. at 689, 100 Pac. 2d at 246.

[10] Prosser, Torts 788 (2d ed. 1955). See also, Oleck, Non-Profit Corporations and Associations, Secs. 56-58 (1956).

and that to use these funds for anything other than the original purpose would defeat the donor's purpose and reduce the funds accordingly.

Fallacies and inconsistencies in this theory come to mind. If this theory were carried through in its entirety, it would bar everyone from recovery against a charity. Yet, even in those states basing immunity on this theory, beneficiaries were the only class consistently barred from recovery, while strangers to the institutions could often recover.[11] Certainly, the funds are depleted to the same extent whenever tort damages are paid out, regardless of the class of persons to which the injured person belongs!

In addition, it has been held that a donor of the charity has no intention generally of exempting his donation from tort claims.[12] Even if such an intent were present, a donor probably has no such power under the law. Thus, in *Cohen v. General Hospital Soc. of Connecticut,*[13] the court stated that immunity from tort liability for charitable associations cannot be based only on the fact that its funds are held in trust.

Moreover, immunity is inconsistent with the usual rules concerning trust funds. These have been held subject to tort claims based on the negligence of carefully selected servants, although judgment must first be obtained against the trustee.[14] The end result is the same as if the trust itself were held liable from the beginning. Hence, the general law of trusts affords no basis of immunity to charities solely because of its character as a trust.

Under the doctrine of *respondeat superior,* persons must answer for the torts of their agents while acting in an agency capacity.[15] Yet many courts have closed their eyes to this commonly accepted legal concept and have exempted charities from liability for their servants' torts. These courts, apparently desirous of reaching a certain result for no valid reason other than that the defendant is a charity, simply state that *respondeat superior* does not apply. Sometimes the courts refer to con-

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[11] Medical and Surgical Memorial Hospital v. Cauthorn, 229 S. W. 2d 932 (Tex. Civ. App. 1949).

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

[13] 113 Conn. 188, 154 A. 435 (1931).

[14] Silva v. Providence Hospital, 14 Cal. 2d 762, 97 P. 2d 798 (1939).

[15] Mecham, Agency 237 (4th ed. 1952).

siderations of "public policy," and thus the desired conclusion is reached.

Other courts reason that a charity does not derive profits from the services of its employees, whereas an ordinary master derives financial benefit from his agent's services.[16] This distinction is not sound. *Respondeat superior* is based not on whether the master profits by the services, but on the extent of control which he exercises over his employees.[17]

The best reason, though, for rejecting this theory of immunity was given in a 1940 Florida case.[18] The court stated that the doctrine of *respondeat superior* was so much a part of "due process of law" as to require its recognition in cases of this kind in the absence of legislation to the contrary. The whole area of charitable immunity was originally a matter of judicial, rather than legislative, decision. This fact alone would warrant the application of *respondeat superior* to charities.

Many of the courts in deciding the liability of charitable institutions have reached results in between the extremes of absolute immunity and liability based on fault. Accordingly, peculiar degrees of immunity have arisen in various states. New York, for instance, until recently, provided one of the more important peculiarities. Its courts held that the *respondeat superior* doctrine was not applicable when the charity was a non-profit hospital and the employee was a doctor or nurse. Thus, a partial immunity was decreed only in the particular situation described. Such an employee was considered to be an independent contractor whenever performing professional or "medical" acts. The hospital where these acts were performed was not liable for torts committed by these named persons. This rule was set down in the landmark case of *Schloendorff v. Soc. of N. Y. Hospital.*[19] The reasoning behind this rule was that the hospital itself does not undertake to heal, but merely to make healers available.

Pitfalls of the New York rule come to mind. It is difficult under this theory to strictly distinguish a "medical" and an "administrative" act, the latter subjecting the hospital to liability if done negligently or tortiously. Situations can and do arise

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[16] Schumacher v. Evangelical Deaconess Soc., 218 Wis. 169, 260 N. W. 476 (1935).

[17] Lichty v. Carbon County Agricultural Ass'n., 31 F. Supp. 809, 811 (D. C. Pa. 1940).

[18] Nicholson v. Good Samaritan Hospital, 145 Fla. 360, 199 S. 344 (1940).

[19] 211 N. Y. 125, 105 N. E. 92 (1914).

when a doctor or nurse performs "administrative" functions. The question then arises whether or not the hospital would be liable in such situations. Or, on the other hand, would the hospital be immune where a qualified "administrative" worker performs a "medical" act on the theory that he too acted as an independent contractor?

The *Schloendorff* rule had been in effect since 1914. In recent years, many legal writers, and the New York courts themselves, questioned the validity of this hospital immunity doctrine. This doubt was resolved to some extent when the New York Court of Appeals in a 1956 case stated its belief that the "medical-administrative" distinction had "outlived its usefulness," at least, "in the case of physicians and nurses who are salaried members of the hospitals' personnel rather than outside professionals." [20] In that decision, the defendant-hospital was held liable for the act of its salaried blood technician who had performed a "medical" act in negligently making a blood test resulting in the death of the plaintiff's fetus.

Then in *Becker v. City of New York*,[21] decided in 1957, a city hospital was held liable for the negligent act of an employee nurse while performing a "medical" act. The court expressed further dissatisfaction with the New York doctrine. Thus the *respondeat superior* doctrine was applied to hold the city liable for the acts of employees even "medical" as well as "administrative" in nature.

The highest court in New York completely abandoned the last remnant of hospital immunity in the state in the case of *Bing v. Thunig*[22] decided only months ago. In rejecting the independent contractor idea both as to charitable and profit-making hospitals, the court stated that such a concept was "out of time with the life about us. . . ."

Until 1956, Ohio followed a rule of partial immunity. This policy was set down by the Ohio Supreme Court in 1911 when it was held that a hospital was immune from the usual application of *respondeat superior* because "public policy encouraged this type of charitable association." [23] The scope of the Ohio immunity rule was later limited to beneficiaries of the charity.[24]

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[20] Berg v. N. Y. Society for Relief of Ruptured and Crippled, 1 N. Y. 2d 499, 136 N. E. 2d 523 (1956).

[21] 2 N. Y. 2d 226, 140 N. E. 2d 262 (1957).

[22] 2 N. Y. 2d 656, 143 N. E. 2d 3 (1957).

[23] Taylor v. Protestant Hospital Ass'n., 85 O. S. 90, 96 N. E. 1089 (1911).

[24] Sisters of Charity v. Duvelius, 123 O. S. 52, 173 N. E. 737 (1930).

In other words, Ohio had followed a partial immunity doctrine—*respondeat superior* was ignored if the plaintiff was a beneficiary of the charity, but not if he was a "stranger."

Another theory used by the courts to circumvent liability for charitable institutions is known as the "implied waiver" or "assumption of risk" theory. This view is applied only when the plaintiff is a beneficiary of the charity. Without stating why, the proponents of the view simply assume that one who accepts the benefits of a charity impliedly waives liability or assumes the risk of negligence in general,[25] or specifically, the negligence of an employee.[26]

This theory is illogical.[27] A waiver is based generally on a voluntary act of giving up a known right. An Arizona court, rejecting this theory, stated:

> The theory of implied waiver . . . is so thoroughly illogical that it is difficult to understand how it has gained the approval of any court. It not only denies the very individuals for whom the charity was intended, the benefit of the charity, but it makes it compulsory upon him, if injured by the negligence of an employee, to donate to charity the amount he would otherwise be entitled to recover.[28]

The irony of upholding such a theory was expressed by the same court when it mentioned the fact that the saving to the charity from such exemption may in turn be used to satisfy the judgment of a stranger for injuries which he may have sustained as a result of the same act of negligence.

One who has availed himself of the services of a charity does just that and no more; he agrees to accept the kindness offered by the institution, but does not knowingly waive liability for the charity's negligence. Rather than an immunity, a duty arises on the part of the charity. Like the Good Samaritan who is under no duty to act, once he volunteers, he must act with care or otherwise be subject to tort liability.

An unconscious or very ill hospital patient cannot impliedly waive his claim for negligence. One court said that such a patient "does not haggle about terms; he expects care not carelessness." [29] Likewise, neither can it be said that a small child

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[25] Winslow v. Veterans of Foreign Wars National Home, 328 Mich. 488, 44 N. W. 2d 19 (1950).

[26] Weston v. Hospital of St. Vincent, 131 Va. 587, 107 S. E. 785 (1921).

[27] Prosser, Torts 785 (2d ed. 1955).

[28] Ray v. Tucson Medical Center, 72 Ariz. 22, 31, 230 P. 2d 220, 226 (1951).

[29] Wendt v. Servite Fathers, 332 Ill. App. 618, 626, 76 N. E. 2d 342, 346 (1947).

in attending a church service knowingly waived the right to recover for negligence.[30] In fact, persons lacking legal capacity cannot generally give consent at all, and especially consent to waive claims for negligence.

This theory is based upon nothing but the assumption of an implied contract against future negligence.[31] And that assumption is debatable and another "rationalization" which the courts have deemed necessary to justify a desired result.

Admittedly, governmental agencies are immune from tort liability under one of the recognized exceptions to the general tort liability.[32] A few courts have reasoned that since these charitable institutions perform some of the same functions of the state and its agencies, they too should be given the same immunity. A Connecticut court, in determining whether a hospital set up by the state legislature was liable in tort, admitted that the defendant was a public charity in the popular sense of the term. However, although it was more closely allied with government than the usual defendant claiming immunity on this basis, in that it was a legislative creation, and received aid from the state by way of exemption from taxation and by state appropriation toward its support, nevertheless, the court held it not to be acting as a state agency. The distinction seemed to rest on the fact that while the benefits it bestows were public, its organization and management were private.[33]

To some extent, in light of our modern welfare concepts, every function of a charitable institution substitutes for what would otherwise be a governmental responsibility, and therefore every charity is acting as or in lieu of a state agency. To blindly apply this doctrine would be to give absolute immunity categorically.

It is interesting to note that charitable immunity decisions based on this theory are generally early-1900 cases, decided at a time when charities existed to aid in the performance of governmental or public duties and when governments either could not or would not, believing that the responsibility was not theirs, perform these same functions. As a passing comment, it is well to remember that in many cases, even governmental units, while

[30] Foster v. Roman Catholic Diocese, 116 Vt. 124, 132, 70 A. 2d 230, 235 (1950).

[31] Id. at 133, 70 A. 2d at 235.

[32] Prosser, Torts 774 (2d ed. 1955).

[33] See note 13 supra.

enjoying immunity from tort liability, have nevertheless frequently accepted responsibility for such liability.

Public policy has been described by one court as fluctuating and varying with customs growing out of changing social, and political and economic conditions.[34] Some courts have acted as if these conditions remained stagnant for many decades, for they have continued to exempt charities from liability on the theory of public policy.

From the wide differences in the case results dealing with the liability of charitable institutions, it is evident that there is a great deal of conflict as to the correct public policy to follow in this area. It has been stated that non-public policy theories have little "inherent or real" merit to recommend them and are but "legal fictions" which the courts have "conceived" to be a demand of sound public policy.[35]

Changing Conditions and Concepts Affecting Immunity

If immunity for charitable institutions is based on "public policy," it follows that as the conditions upon which the "public policy" is based changes, so too, should the immunity doctrine. As one judge so aptly stated it: "Public policy as being in the public good, unlike the Ten Commandments, is not necessarily an ever enduring thing, but changes with the times and prospectives." [36]

So strong was the public policy for upholding immunity for charities that frequently the courts not only "rationalized" their way to the desired results, but even resorted to emotional arguments. Thus a 1918 Kentucky court[37] in holding a charitable hospital immune from liability for negligence to a patient, causing him injury and death, attacked another court's contrary opinion under similar facts. It compared liability for charities to an economic transaction which "reduces the relation of the parties to a cold proposition of business and to the level of demanding of each other an eye for an eye and a tooth for a tooth." The court went on to say that such a result was like extracting from the charity "a pound of flesh."

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[34] See note 28 supra at 25, 230 P. 2d at 222.

[35] Haynes v. Presbyterian Hospital Ass'n., 241 Iowa 1269, 1272, 45 N. W. 2d 151, 153 (1950).

[36] Ibid.

[37] Cook v. John N. Norton Memorial Infirmary, 180 Ky. 331, 337, 202 S. W. 874, 877 (1918).

The all important factor that caused many courts to establish immunity for reasons of public policy was the "charitable and public service features" of the institutions.[38] In balancing the interests between the injured party and the defendant charity, the great weight of authority favored the latter, until recent years.

The prevailing view was that it was better for the public at large that the individual bear his injury rather than that charities be liable in tort. The charity of the past, though, was a very different thing from the modern charity. Except as it was a part of the Church, it was not organized and depended upon "human instincts" of individuals and informal groups.[39] It is evident that the courts of the time did not want to discourage the "Good Samaritan" by subjecting him to tort damages.

That these charitable institutions were weak and small and required court coddling is evidenced by the statement of a Kansas Supreme Court judge when he said that state benevolence can only go so far and private charity must cover the rest.[40] It was his view that to subject charities to "damage suit industry" would halt or at least make scanty the contributions and donations to the defendant-Salvation Army and other such institutions. He casually stated that life was full of risk and it is better for the individual to assume the risk than for society to suffer from "a drying up of the springs of eleemosynary sustenance." This reasoning is questionable. It is submitted that donations would not decrease if the charities assumed an obligation which would be more in keeping with their generous spirit of aiding the unfortunate, among whom can certainly be included one wrongly or negligently injured.

A later Kansas court, in rejecting the previous reasoning and in holding a hospital liable in tort, admitted that originally there was a need for charity treatment of the suffering, which was then urgent, and said that the general good of society demanded encouragement.[41] Also, the concept of government originally did not include many of the social and welfare functions that we assume today are the government's responsibility. Immunity was one way to encourage private groups to undertake these pursuits.

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[38] Id. at 336, 202 S. W. at 877.

[39] See note 28 supra at 35, 230 P. 2d at 228.

[40] Webb v. Vought et al., 127 Kan. 799, 801-802, 275 P. 170 (1929).

[41] See note 2 supra at 758, 267 P. 2d at 939.

The courts began to recognize these changes by advocating varying degrees of immunity. In the famous case of *President and Directors of Georgetown College v. Hughes*[42] (the opinion which Prosser believes dealt a "devastating" blow to the immunity doctrine[43]), the judge stated that it was doubtful if the rule of "full immunity" ever represented the prevailing decision in the United States. In other words, the immunity doctrine, in effect, refers to what degree the exemption will be applied to charities.

The pattern of degrees ranges from complete immunity to full liability in a growing number of states. In between is a group of states allowing partial immunity. Included in this intermediate group, was Ohio which, until 1956, allowed charitable immunity as to beneficiaries of the institutions, but imposed liability as to injured strangers. A stranger was considered to be a person who receives no benefit from the charity and is not employed by it.[44] On the other hand, a beneficiary was considered to be one who is receiving some type of benefit from the charity at the time of the injury.[45] The irony of not allowing an injured beneficiary to recover is that he, least of all, is able to bear the burden of his injury. This is shown by the very fact that he is a charity beneficiary.

It is believed that this distinction between strangers and beneficiaries, though on shaky ground, showed a clear understanding of the courts that changing conditions required a changing public policy. Most significant is the fact that in the past decade, while several states have moved from an area of immunity which was complete to one of partial or even no immunity, or from partial to no immunity, no jurisdiction has moved in the direction of immunity.[46]

Typical of this trend is California. In a 1951 case, its court rejected all bases of immunity.[47] There the court refused to consider the question of whether the injured plaintiff, a Bible school student, was a paying or non-paying pupil, but held that beneficiaries were no longer barred from recovery. It described the distinction between the class of injured parties as a "fiction."

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[42] See note 12 supra at 817.

[43] Prosser, Torts 787 (2d ed. 1955).

[44] Hinman v. Berkman, 85 F. Supp. 2, 4 (D. Mo. 1949).

[45] See note 30 supra at 132, 70 A. 2d 235.

[46] See note 28 supra at 29, 230 P. 2d at 224.

[47] Malloy v. Fong, 37 C. 2d 356, 232 P. 2d 241 (1951).

Also typical of the reversal which the courts have made in this area, because of new factors and changing conditions, is Iowa and Ohio. Iowa had for many years followed a rule of complete immunity for charities. Then in 1950, in *Haynes v. Presbyterian Hospital,*[48] the court reasoned that charitable institutions had reached the point where they should bear the responsibilities of tort liability.

In 1956, the Ohio Supreme Court, in the much discussed and analyzed case of *Avellone v. St. Johns Hospital,*[49] rejected the last remnant of hospital immunity in this state. While it is true that the case was decided on the pleadings, the court took cognizance of the changing concepts as related to this area. It seems the court wished to leave no doubt that beneficiaries of a charitable hospital, at least, would now be treated as any other injured person. More important, the court expressed the view that charitable hospitals have now come of age and must accept the responsibility which would subject them to tort liability. This is evidenced by the court's statement that:

> Up to this point in the development of the law, this court has apparently felt that the benefits to society as a whole, gained by granting immunity; weighed the former [charities] right in favor of the latter [plaintiff], and this was on the ground that such masters were "different from others," and immunity for them was "a valuable aid in securing the ends of justice."
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> In our opinion this conclusion is no longer justified.[50]

The dwindling immunity in New York has already been discussed. In 1956, Idaho, too, joined the parade of states abandoning immunity, and in 1958, New Jersey, also.[51] Significant is the fact that some states which still adhere to complete immunity, nevertheless recognize that the doctrine which they follow is no longer applicable. Illustrating this is a recent Wisconsin Supreme Court case, which in effect stated that if it were not bound by *stare decisis* but were deciding tort liability of charities for the first time, it would give "little weight" to the reasons

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[48] See note 35 supra at 1274, 45 N. W. 2d at 154.

[49] 165 O. S. 467, 135 N. E. 2d 410 (1956).

[50] Id. at 474, 135 N. E. 2d at 414.

[51] Wheat v. Idaho Falls Latter Day Saints, 78 Idaho 60, 297 P. 2d 1041 (1956); 3 cases in N. J., Dalton v. St. Luke's Catholic Church; Collopy v. Newark Eye & Ear Hospital; Benton v. Y. M. C. A. of Westfield; 141 A. 2d 273, 276, 298 (N. J. 1958).

upholding immunity.[52] Admitting the immunity rule to be "archaic," it felt that it was for the legislature and not the courts to change the rule.

However, Wisconsin has what it calls a "safe-place" statute which places a greater standard of care upon owners of publicly-used buildings to keep such structures safe for passersby and users. Charities are not immune from it. Thus, where a child was injured when he pressed against a hospital screen and fell out, the hospital was held liable for a statutory breach.[53] A 1957 case stipulated that although the defendant home for the aged would not be liable for common law negligence because of the immunity exception, it must answer where the plaintiff was injured when she slipped on a waxed floor, the presence of which was a violation of the "safe-place" statute.[54]

A second exception to the complete immunity rule in Wisconsin is in cases of injuries resulting from nuisances negligently caused. Thus the highest court of the state did not hesitate to hold a church liable for injuries to the plaintiff resulting from an icy sidewalk.[55] These cases and exceptions to the immunity doctrine clearly show the desire to escape a policy which the courts themselves recognize as not in keeping with the times.

The trend illustrated seems to stem from a realization that general tort principles should prevail even as to charities. In balancing the interests between the institutions and the injured individual, public policy today demands protection for the latter. Supporting this is the fact that the immunity rule is an exception to tort concepts where the emphasis is on liability rather than immunity for wrongdoing.[56]

Also coming into consideration is what is known as the "Good Samaritan" maxim. As pointed out, an individual may not be under a duty to act, but when he does act, he must do so with care or else be subject to liability for his negligent wrongdoing.[57] It is submitted that if there are no exceptions to tort liability for a private "Good Samaritan," then there is no valid

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[52] Smith v. Congregation of St. Rose, 265 Wis. 393, 397, 61 N. W. 2d 896, 898 (1953).

[53] Wright v. St. Mary's Hospital, 265 Wis. 502, 61 N. W. 2d 900 (1953).

[54] Watry v. Carmelite Sisters, 274 Wis. 415, 80 N. W. 2d 397 (1957).

[55] See note 52 supra.

[56] See note 35 supra at 1274, 45 N. W. 2d at 154.

[57] 25 N. Y. U. L. Rev. 612, 626 (1950).

reason why a charitable association should not be treated the same.

Case after case abandoning the immunity doctrine has emphasized that the hardships and burdens of charitable organizations of the past have to a large extent ceased to exist. Unlike in former years, they are most certainly in a better position to bear the loss than the injured individual. The extent to which charities have grown was acknowledged by one Kansas court when it stated:

> These institutions of today have, in many instances, grown into enormous businesses, handling large funds, managing and owning vast properties, much of it tax free by statute, set up by large trusts or foundations enjoying endowments and resources beyond anything thought of when the matter of immunity was first considered.[58]

In effect, the court was stressing the fact that in balancing the interests between the charity and the injured individual, the former has reached a position where it can now absorb the loss. Also, it was an admission that the factors affecting the balance of interests had shifted away from charities.

Very important is the fact that the old fear of depletion of funds arising from tort damages is no longer strong, in that insurance against such liability has become widely accepted and is now available. Insurance has achieved importance in this area only recently. It is argued by some that charities should not be further burdened by this sizable expense of operation. It has been suggested that rather than being detrimental to charities, the cost of insurance will be more than offset by the gain of eliminating continuous litigation expenses because of the unsettled question of immunity versus liability.[59]

It is to be remembered that a substantial amount of the money donated to charity is absorbed not only in strictly charitable pursuits, but also for salaries, rents and other overhead necessary for the operation of the institution. Besides, charities, no doubt, carry fire insurance on their property, and yet this is considered a normal part of overhead which few would question as a necessary expense. Certainly, insurance against tort liability would also be justified as a necessary expense of operation. The writer submits that as charities no longer use the horse and buggy as their means of transportation, likewise, they should

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[58] See note 41 supra.

[59] See note 12 supra at 828.

not continue to utilize a "horse-and-buggy" method which results in unjust treatment of an injured party.

The effect of insurance destroys the immunity theory that the trust property was not to be impaired. Thus the Illinois Supreme Court set aside its generally-followed trust fund theory and held a charitable university liable where the university was insured against liability.[60] The court reasoned that the exemption for charities is not immunity from suit for a tort, but the protection actually given to the trust fund iself. And liability insurance provided the needed protection.

In Maryland, where charitable immunity is recognized, the state legislature enacted a statute which the courts have interpreted to mean that hospitals carrying liability insurance are estopped to assert immunity to the extent of collectible insurance.[61] But most of the courts upholding the immunity doctrine declare that the existence of liability insurance has no effect whatever on their desired results of finding immunity for charities. Typical of the reasons advanced by these courts for the non-effect of insurance is that a plaintiff negligently injured by an insured charity would recover, while a plaintiff injured in and by an uninsured charity would not, and that such a distinction has no logical basis.[62]

Admittedly such reasoning logically follows the immunity concept of tort liability. However, its validity cannot depend on logic when the premise upon which that logic is based rests on questionable ground. Such reasoning is predicated on the validity of the immunity doctrine itself, the very applicability of which is here being questioned.

So important has insurance become today that many courts take judicial notice of different types of insurance, including liability insurance. One court so doing suggested that this was just evidence of the changing times as related to the "business, social, economic and legal worlds." [63] It was a clear statement that financial encouragement and protection for charitable institutions, to the detriment of injured-individuals, were no longer necessary or desirable.

The changing conditions and concepts described required a

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[60] Moore v. Moyle, 405 Ill. 555, 92 N. E. 2d 81 (1950).

[61] Gorman v. St. Paul Fire & Marine Insurance Co., 210 Md. 1, 121 A. 2d 812 (1956).

[62] Cristini v. Griffin Hospital, 134 Conn. 282, 57 A. 2d 262 (1948).

[63] See note 35 supra at 1273, 45 N. W. 2d at 154.

changing public policy. As illustrated, many courts have taken cognizance of such changes and have accordingly rejected the immunity doctrine in varying degrees. If the law is not to remain stagnant in this area, it is up to the courts, which first recognized immunity, to now abandon it as not being applicable to our times.

The Abandonment of Charitable Immunity

There is little doubt but that the abandonment of charitable immunity is supported by the great weight of authority among legal scholars. The writer agrees that this is a correct view. The natural question stemming from such an opinion is to what extent charitable immunity should be rejected by the courts.

Admittedly, the changing social, economic and political conditions previously discussed are more applicable to certain associations, charitable in nature, than to others. Thus different institutions vary as to size, financial worth, purpose, services rendered, donations received, etc. Many present day hospitals are large and financially secure while others are not; like distinctions can be made among different churches, schools, Y. M. C. A. and Red Cross groups, etc.

Should the courts recognize these differences when considering the issue of liability versus immunity for these charities? It is the writer's belief that they should not, and that the immunity exception should be abandoned as to all charities. Such an opinion was set forth in *Pierce v. Yakima Valley Memorial Hospital*,[64] where the Washington Supreme Court stated that public policy, as related to this area under consideration, "must be based on general conditions and the average situation." It went on to state that it cannot "be designed to meet exceptional cases or deal with particular instances of hardship." These words were uttered by the Washington Court in overturning the charitable immunity which had been the public policy followed there for many years. In that case, the defendant nonprofit hospital was held liable for injuries inflicted by its servants upon a paying patient of the hospital.[65]

Two years later, the same Court, in *Lyon v. Tumwater Evangelical Free Church*,[66] was faced with the question of tort liability of a church. The court held the church immune from

[64] 43 Wash. 2d 162, 171, 260 P. 2d 765, 770 (1953).

[65] Ibid.

[66] 47 Wash. 2d 202, 287 P. 2d 128 (1955).

liability for injuries to the plaintiff, one of several children transported in a bus to and from Sunday School without charge, the accident being caused by the alleged negligence of the bus driver.

In the *Pierce* case, the court rendered an opinion which in effect stated that the new public policy, as illustrated by the above quotation, would, as it should, be applicable to all charities. The court in deciding the liability of the defendant hospital recognized that all charities would be affected by the decision when it said: "nor do we overlook the fact that the principles with which we are dealing have application also to such organization as Y. M. C. A.'s, Y. W. C. A.'s and Red Cross." [67]

It appears to the writer that the Court in the *Lyon* case did what constitutes a judicial "somersault." In refusing to extend liability to the defendant church, it limited its holding of the *Pierce* case to hospitals only. The court suggests that the *Pierce* case did not reject charitable immunity but rather "modified" it.[68]

Perhaps the difference in the results of the two cases rests not on the different character of the defendant charities involved but rather on the now outmoded policy of distinguishing between a beneficiary and a stranger in order to determine who may recover against the charity. In the *Pierce* case, the plaintiff was a paying patient or a stranger to the charity hospital, while in the *Lyon* case, the plaintiff was a beneficiary of the church and therefore a member of a class which was frequently barred from recovery against a charitable institution. It is significant that the Court in refusing to extend liability to the defendant church simply made a statement to that effect and failed to distinguish between hospitals and other charitable institutions such as churches.

As said, the Ohio Supreme Court in 1956, in the *Avellone* case rejected the last remnant of hospital partial immunity in Ohio.[69] And this partial immunity had been applicable to all charitable institutions in Ohio.[70] In the *Avellone* case, the Court, limited by the pleadings in the case, stated in effect that "hospitals not for profit" will now be liable under the *respondeat superior* doctrine for the torts of its servants and employees.

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[67] See note 64 supra.

[68] See note 66 supra at 204, 287 P. 2d at 129.

[69] See note 49 supra.

[70] Waddell v. Y. W. C. A., 133 Ohio St. 601, 15 N. E. 2d 140 (1938).

Since the *Avellone* case, the Ohio Supreme Court has made no further pronouncements which would suggest whether or not the immunity doctrine is to be abandoned as to charitable institutions other than hospitals. However, recently, an Ohio Common Pleas Court was faced with the question of tort liability of a church in the case of *Hunsche v. Alter.*[71] The court drew an analogy between the two previously cited Washington cases and the *Avellone* case with the case it was now deciding. Interpreting the second Washington case as limiting charitable liability only to hospitals, it thereupon held the defendant church immune from tort liability.

Admitting that the Washington court failed to state why a distinction should be made between hospitals and other charitable institutions, the court then proceeded to make such a distinction. Without intending to, nor perhaps realizing that it had done so, the court actually hit the heart of the matter as to why no distinction should be made at all between the various types of charities. The court suggests that modern hospitals are in better position than other types of charities. But it fails to consider the fact that all hospitals are not necessarily in the same "desired" position. Also, there is among the different types of charities—churches, schools, hospitals, Y. M. C. A. groups, etc. wide differences in relative positions.

The early pronouncements of immunity were rendered as to hospitals. Later, the courts upholding immunity did not hesitate to extend the doctrine to all charitable institutions, believing that they should be treated alike. Thus a Missouri court, in *Eads v. Y. W. C. A.*, recognizing the generally-followed immunity for charitable hospitals, said: "There can be no logical reason why the same rule of exemption applied to charitable hospitals should not apply to a charitable association such as the Y. W. C. A." [72]

If the reason for extending the immunity rule to all charities was a recognition that they are of the same character and should be given equal treatment in the law, there is no justification in attempting to distinguish between them now. And as many courts are now holding hospitals liable in tort at the present time, then it follows that the general rules of tort liability should now be extended to all forms of charitable institutions.

To abandon the immunity doctrine as to hospitals only, or

[71] 76 Ohio L. Abs. 68, 145 N. E. 2d 368 (C. P. 1957).

[72] Eads v. Y. W. C. A., 325 Mo. Sup. 577, 591, 29 S. W. 2d 701, 707 (1930).

as to other hand-picked charities, and to continue to apply the doctrine to the other associations, would be an approval of arbitrary legal standards. The only valid reason for making a distinction between the various charities is the ability or inability of such institutions to bear the cost of either the actual tort damages or liability insurance premiums.

If the courts make such a distinction, they will be closing their eyes to important realities of tort liability principles. It is conceded that charities bestow many good deeds and function for the most honorable of services. But so do many private individuals act as Good Samaritans! And the fact of the matter is that these Good Samaritans and any other private group or corporation are liable for their negligent and tortious conduct, regardless of their financial status. It must be remembered that liability is generally based on fault and not on purpose of action or financial ability.

Finally, the abandonment of immunity as to a particular charity—hospitals—is an admission of the nonapplicability of the doctrine altogether. As the Washington court in the *Pierce* case said:

> 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." [73]

The nonapplicability of immunity to one charity reaches all charities, for if it never existed for hospitals, neither did it exist for any other charity. And neither should it now.

Conclusion

Exemption from tort liability is often referred to as the "immunity rule." As pointed out earlier, immunity is not a rule but an exception, the rule being liability for negligent or tortious conduct. It is this rule of liability rather than immunity which the law emphasizes. Unless good reasons exist to the contrary, such emphasis should be maintained.

The theories used to support charitable immunity were a means to a desired result. But a result of immunity is no longer desired because of changed conditions which include, among other factors, the growth of charities, the availability of liability insurance, and changing public policies. Most important is the

[73] See note 64 supra at 167, 260 P. 2d at 768.

modern tendency of the law to shift the burden from the innocent victim to the community at large, and to distribute the losses incurred by individuals through the operation of an enterprise among all who benefit by it rather than among those who sustained injury.[74]

That charitable institutions continue to perform beneficial and worthwhile functions in our society is not denied. In fact such undertakings are to be encouraged. But men and corporations alike are required to be just before being charitable.[75] Charity, therefore, is no defense; *charity* refers to motive and not duty. And like the private Good Samaritan, charities should be held to a duty which makes them answerable for their tortious and negligent acts.

The primary function of the law is justice, and when a principle of the law no longer serves justice, it should be discarded. It is hoped that more courts will recognize that immunity does not serve that end, and will accordingly abandon immunity as to all charities.

> Charity suffereth long and is kind, but . . . it cannot be careless. When it is, it ceases to be kindness and becomes actionable wrongdoing.[76]

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[74] Lokar v. Church of the Sacred Heart, 24 N. J. 549, 565, 133 A. 2d 12, 22 (1957).

[75] Anno., 25 A. L. R. 2d 29, 76 (1952).

[76] See note 12 supra at 813.