Volume 10 | Issue 1 Article 3

1964

Charitable Liability for Tort

Edith L. Fisch

CHARITABLE LIABILITY FOR TORT

By EDITH L. FISCH*

§ 1. INTRODUCTION — LIABILITY FOR TORT

THE EXTENT to which a charity[1] is exempt from tort liability ranges from complete immunity in a small minority of states to full liability in others. Still another group of jurisdictions has adopted positions which reach neither of these two poles, but which are composed of various gradations and degrees of qualified or limited liability.

The doctrine of full charitable tort immunity was imported into this country in 1876 by a Massachusetts court,[2] apparently unaware that the English decision upon which its holding was based had been overruled.[3] Probably never representative of prevailing American opinion, this doctrine has been subjected to constant attack. Unfortunately, however, because legislative and judicial attempts to reach the liability goal have often emerged as distinctions and qualifications that fall short of complete abolition, a patchwork of law has been created. Judicial uncertainty and hesitancy concerning the extent to which immunity should be retained or eliminated has led to the limitation of liability-imposing decisions to their specific facts, thereby creating additional complexities. Occasional legislative reinstatement of immunity after its judicial extinction[4] has also contributed to the scrambling of tort immunity. Consequently, except for the complete liability and total immunity states, almost all jurisdictions have developed unique and

* Asst. Prof., New York Law School; A.B., 1945, Brooklyn College; LL.B., 1948, LL.M., 1949, J.S.D., 1950, Columbia University; Member: N.Y. City Bar, Nat'l Ass'n of Women Lawyers.

1. For a discussion of the tort liability of a governmental organization see 18 MCQUILLIN, MUNICIPAL CORPORATIONS §§ 53.01–53.171.

2. McDonald v. Mass. Gen. Hosp., 120 Mass. 432 (1876).

3. Holliday v. St. Leonard's, 142 Eng. Rep. 769 (1861). This case had adopted a dictum from Duncan v. Findlater, 7 Eng. Rep. 934 (1839) which was later repeated in the Feofees of Heriot's Hospital v. Ross, 8 Eng. Rep. 1508 (1846) to give damages out of a trust fund would not be to apply it to those objects whom the author of the trust had in view, but would be to divert it to a completely different purpose. The dictum of *Duncan, supra,* was overruled by Mersey Docks & Harbour Bd. Trustees v. Gibbs, 11 Eng. Rep. 1500 (1866) and *Holliday, supra,* was held to have been overruled by Mersey in Foreman v. Mayor of Canterbury, 6 Q.B. 214 (1871). For the present English position which completely discards charitable immunity see Gilbert v. Corp. of Trinity House, 17 Q.B. 795 (1886).

4. See § 4 *infra,* nn.36–39.

ever-changing variations and differentiations. In some states liability turns not only upon the status of the injured person in relation to the charity but also upon the nature of the breach of duty charged[5] or the purpose of the charity.[6] In one jurisdiction this last factor is of importance in limiting the amount of recovery.[7] In several other states execution of judgments is restricted to certain property held by the charity.[8]

Broadly categorized, it can be said that six states maintain complete tort immunity;[9] twenty-two states, the District of Columbia and Puerto Rico enforce full liability;[10] nineteen states impose varying degrees of qualified liability;[11] and three states (Hawaii,[12] New Mexico and South Dakota) lack determinative decisions. Where it exists the doctrine of charitable immunity extends to property loss and damages as well as personal injury.[13]

§ 2. COMPLETE IMMUNITY STATES

Today, only six jurisdictions stubbornly adhere to complete charitable tort immunity. In Arkansas,[14] Maine,[15] Massachusetts,[16] Miss-

5. See § 4 *infra*, nn.40–46.

6. See § 4 *infra*, nn.33–34, 55–59.

7. See § 4 *infra*, nn.36–69.

8. See § 4 *infra*, n.46.

9. See § 2 *infra*, nn.14–20.

10. See § 3 *infra*, nn.24–26.

11. See § 4 *infra*, nn.28–61.

12. See Luhi v. Phoenix Lodge, 31 Haw. 740 (1931) (liability was imposed on charity when injury resulted from tort occurring on property operated by charity for profit. Court found it unnecessary to pass upon question of exemption of charity from liability for tort).

13. McEvoy v. Hartford Hosp., 22 Conn. Sup. 366, 173 A.2d 357 (1961) (hospital not liable for loss of patient's jewelry).

14. Michael v. St. Paul Mercury Indemn. Co., 92 F. Supp. 140 (D. Ark. 1950); Helton v. Sisters of Mercy of St. Joseph's Hosp., 351 S.W.2d 129 (Ark. 1961) (hospital not liable for injuries to child in course of examination); Cabbiness v. City of North Little Rock, 307 S.W.2d 529 (Ark. 1957) (demurrer to complaint against boys club operating swimming pool sustained on ground of charitable immunity). *Cf.*, Fordyce & McKee v. Woman's Christian Nat. Lia. Ass'n, 79 Ark. 550, 96 S.W. 155 (1906) (court stated that property of charity was not subject to execution. The issue of whether immunity took the form of exemption from suit or exemption of charitable property from execution upon judgment does not appear to have been directly before the court).

15. Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910).

16. Boxer v. Boston Symphony Orchestra, 342 Mass. 537, 174 N.E.2d 363 (1959) (licensee); Simpson v. Truesdale Hosp., 338 Mass. 787, 154 N.E.2d 357 (1958); Bearse v. New England Deaconess Hosp., 321 Mass. 750, 72 N.E.2d 743 (1947) (patient); Reavey v. Guild of St. Agnes, 284 Mass. 300, 187 N.E. 557 (1933) (employee); Foley v. Wesson Memorial Hosp., 246 Mass. 363, 141 N.E. 113 (1923) (stranger).

ouri,[17] Pennsylvania[18] and South Carolina[19] a charity is exempt from suit for tort by every class of claimant.[20]

Although Arkansas is judicially committed to the full immunity concept, the rigors of the rule have been somewhat softened by legislation authorizing a direct action by an injured person against the liability insurer of an organization not subject to suit for tort.[21] But because this law does not require compulsory insurance[22] the charity may exclude its employees,[23] or, it would appear, any other group of possible claimants from coverage.

---

17. Schulte v. Missionaries of LaSalette Corp., 352 S.W.2d 636 (Mo. 1961) (charitable religious school not liable for negligence. In adhering to the immunity doctrine despite the fact that when introduced into this country it was based upon an overruled English opinion the court remarked that it was "not particularly concerned with the legitimacy or illegitimacy of the brain child of the House of Lords as expressed in Heriot's Hospital v. Ross, 12 Clark & F. 507." The court also ruled that the existence of liability insurance does not affect the question of liability); Kreuger v. Schmiechen, 364 Mo. 568, 264 S.W.2d 311 (1954) (tort action could not be maintained against members of governing body of church); Stedem v. Jewish Mem. Hosp. Ass'n of Kansas City, 239 Mo. App. 38, 187 S.W.2d 469 (1945) (beneficiary); Whittaker v. St. Luke's Hosp., 137 Mo. App. 116, 117 S.W. 1189 (1909) (employee).

18. Brown v. City of Pittsburgh, 409 Pa. 357, 186 A.2d 399 (1962) (pedestrian injured in front of church); Michael v. Hahnemann Med. College & Hosp., 404 Pa. 424, 172 A.2d 769 (1961) (action for negligence to hospital patient); Knecht v. St. Mary's Hosp., 392 Pa. 75, 140 A.2d 30 (1958) (action by patient against hospital); Siidekum v. Animal Rescue League, 353 Pa. 408, 45 A.2d 63 (1946) (stranger). The Pennsylvania immunity rule was held not to constitute a violation of the due process and equal protection clauses of the constitution in Weeks v. Children's Hosp. of Phila., 200 F. Supp. 77 (E.D. Pa. 1961) (action for injury to hospital patient). That charity has liability insurance does not affect its immunity from suit for tort. Fortagno v. Trachtenberg, 202 F. Supp. 177 (E.D. Pa. 1962).

19. Vermillion v. Woman's College of Due West, 104 S.C. 197, 88 S.E. 649 (1916) (invitee); Lindler v. Columbia Hosp., 98 S.C. 25, 81 S.E. 512 (1914) (paying patient).

20. See cases cited *supra* nn.14–19.

21. ARK. STAT. ANN. § 66-3240 (1959).

22. Ramsey v. Amer. Auto. Insur. Co., 356 S.W.2d 236, 238 (Ark. 1962) (cause of action "to the extent of the amount or amounts provided for in the insurance policy").

23. *Ibid* (Salvation Army employee).

§ 3. COMPLETE LIABILITY STATES

Twenty-two states,[24] the District of Columbia[25] and Puerto Rico[26] have completely rejected the doctrine of charitable tort immunity. In

24. *Alaska*: Moats v. Sisters of Charity of Prov., 13 Alaska 546 (1952).
Arizona: Roman Catholic Church v. Keenan, 74 Ariz. 20, 243 P.2d 455 (1952); Ray v. Tucson Med. Center, 72 Ariz. 22, 230 P.2d 220 (1951).
California: Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 24 (1951).
Delaware: Durney v. St. Francis Hosp., 46 Del. 350, 83 A.2d 753 (1951).
Florida: Wilson v. Lee Memorial Hosp., 65 So. 2d 40 (1953) (hospital patient); Nicholson v. Good Samaritan Hosp., 145 Fla. 360, 199 So. 344 (1940) (paying patient in hospital).
Idaho: Wheat v. Idaho Falls Latter Day Saints Hosp., 78 Idaho 60, 297 P.2d 1041 (1956).
Iowa: Baker v. United States, 226 F. Supp. 129 (D. Iowa 1964); Haynes v. Presbyterian Hosp. Ass'n, 241 Iowa 1269, 45 N.W.2d 151 (1950).
Kansas: McAtee v. St. Paul's Mission of Maryville, 190 Kan. 518, 376 P.2d 823 (1962) (church corporation); Marks v. St. Francis' Hosp. & School of Nursing, 179 Kan. 268, 294 P.2d 258 (1956); Noel v. Menninger Found., 175 Kan. 751, 267 P.2d 934 (1954).
Kentucky: Mullikin v. Jewish Hosp. Ass'n of Louisville, 348 S.W.2d 930 (Ky., 1961); Gillum v. Good Samaritan Hosp., 348 S.W.2d 924 (Ky., 1961); Hillard v. Good Samaritan Hosp., 348 S.W.2d 939 (Ky., 1961).
Michigan: Parker v. Port Huron Hosp., 361 Mich. 1, 105 N.W.2d 1 (1960).
Minnesota: Miller v. Macalester College, 115 N.W.2d 666 (Minn. 1962) (college); Swigerd v. City of Ortonville, 246 Minn. 339, 75 N.W.2d 217 (1956); St. Paul-Mercury Indem. Co. v. St. Joseph's Hosp., 212 Minn. 558, 4 N.W.2d 637 (1942).
Mississippi: Mississippi Baptist Hosp. v. Holmes, 55 So. 2d 142 (Miss. 1951), suggestion of error overrules, 56 So. 2d 709 (Miss. 1952).
Montana: Howard v. Sisters of Charity of Leavenworth, 193 F. Supp. 191 (D. Mont. 1961).
Nevada: NEV. REV. STAT. § 41.480 (1961) "No non-profit corporation, association or organization shall be immune from liability for the injury or damage caused any person, firm or corporation, as a result of the negligent or wrongful act of such non-profit corporation, association or organization, or its agents, employees or servants acting within the scope of their agency or employment."
New Hampshire: Dowd v. Portsmouth Hosp., 193 A.2d 788 (N.H. 1963); Wheeler v. Monadnock Comm. Hosp., 103 N.H. 306, 171 A.2d 23 (1961); Welch v. Frisbie Mem. Hosp., 90 N.H. 337, 9 A.2d 761 (1939).
New York: Favale v. Roosevelt Pub. School Dist. No. 2, 193 N.Y.S.2d 202 (1959); Bing v. Thunig, 2 N.Y.2d 660, 163 N.Y.S.2d 3, 143 N.E.2d 3 (1957).
North Dakota: Rickbeil v. Grafton Deaconess Hosp., 74 N.D. 525, 23 N.W.2d 247 (1946).
Oklahoma: Gable v. Salvation Army, 186 Okla. 687, 100 P.2d 244 (1940); Sisters of Sorrowful Mothers v. Zeidler, 183 Okla. 454, 82 P.2d 996 (1938).
Oregon: Wicklander v. Salem Memorial Hosp., 385 P.2d 617 (Ore. 1963); Hungerford v. Portland San. & Benev. Ass'n, 384 P.2d 1009 (Ore. 1963).
Utah: Brigham Young Univ. v. Lillywhite, 118 F.2d 836 (C.A. 10th 1941) (injury to college student); Sessions v. Thomas D. Dee Memorial Hosp. Ass'n, 94 Utah 460, 78 P.2d 645 (1938).
Vermont: Foster v. Roman Catholic Diocese of Vt., 116 Vt. 124, 70 A.2d 230 (1950).
Wisconsin: Widell v. Holy Trinity Catholic Church, 19 Wis. 2d 648, 121 N.W.2d 249 (1963); Duncan v. Steeper, 17 Wis. 2d 226, 116 N.W.2d 154 (1962).

25. President & Dir. of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942).

26. Puerto Rico Gas & Coke Co. v. Frank Rullan & Associates, 189 F.2d 397 (1st Cir. 1951); Tavarez v. San Juan Lodge, 68 P.R.R. 681 (1948).

these jurisdictions a charity is subject to suit for tort to the same extent as any other individual or organization.[27]

§ 4. QUALIFIED LIABILITY STATES

A qualified liability status exists in another nineteen states. In all but one of these[28] the existence of liability or indemnity insurance has no significance in determining the liability of the charity.[29]

Seven states in this group follow the so-called "beneficiary" rule only maintaining immunity against a participant, recipient or beneficiary of the charity if the injury or damage does not result from failure of the charity to exercise due care in the selection or retention of an employee. The charity is subject to liability to all other claimants including employees, invitees and strangers. Phrased differently, charitable immunity remains except: (1) where the person injured or damaged is not a beneficiary of the charity and (2) where a beneficiary is injured as a result of the failure of the charity to exercise due care in the selection and retention of employees.[30]

---

27. See cases cited *supra* nn.24–26. See also Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1963), *reversing* 199 F. Supp. 682 (D. Iowa 1962) (church liable for copyright infringement of musical composition by its choral instructor).

28. See § 4 *infra* nn.51–54.

29. See *e.g.* Stoolman v. Camden County Council Boy Scouts, 77 N.J. Super. 129, 185 A.2d 436 (1962); Herndon v. Massey, 217 N.C. 610, 8 S.E.2d 914 (1940); Meade v. St. Francis Hosp., 137 W.Va. 834, 74 S.E.2d 405 (1953).

30. *Indiana*: Richardson v. St. Mary's Hosp., 191 N.E.2d 337 (Ind. 1963) (paying patient in hospital); St. Vincent's Hosp. v. Stine, 195 Ind. 350, 144 N.E. 537 (1924) (hospital not liable to paying patient).

Louisiana: Jurjevich v. Hotel Dieu, 11 So. 2d 632 (La. 1943) (charitable hospital immune from liability for negligence of employee to paying patient); Bougan v. Volunteers of Amer., 151 So. 797 (La. 1934) (charity liable for negligence of employee in causing injury to stranger). See also nn.31–33 *infra*.

Nebraska: Miller v. Concordia Teachers College of Seward, 296 F.2d 100 (8th Cir. 1961) (educational corporation not liable for injuries received by student shot by intoxicated fellow student. Student was deemed a beneficiary not an invitee of college); Marble v. Nicholas Senn Hosp. Ass'n of Omaha, 102 Neb. 343, 167 N.W. 208 (1918) (hospital liable to invitee); Duncan v. Nebraska San. Benev. Ass'n, 92 Neb. 162, 137 N.W. 1120 (1912) (paying hospital patient refused recovery).

North Carolina: Williams v. Randolph Hosp., 237 N.C. 387, 75 S.E.2d 303 (1953) (paying patient refused recovery where hospital was not negligent in selection and retention of employees); Cowans v. North Carolina Baptist Hosp., 197 N.C. 41, 147 S.E. 672 (1929) (employee may recover for administrative negligence of charity).

Rhode Island: Basabo v. Salvation Army, 35 R.I. 22, 85 Atl. 120 (1912) (charity liable for death of stranger run over by its horse and wagon). R.I. GEN. LAWS § 7-1-22 (1956) provides that no charitable hospital "shall be liable for the neglect of its officers, agents or employees in the management or inmates of such hospital." This statute was held not to violate the due process or equal protection clauses of the federal constitution in Fournier v. Miriam Hosp., 175 A.2d 298 (R.I. 1961). *Cf.* Glavin v. R.I. Hosp., 12 R.I. 411 (1879) (hospital held liable for injuries to patient).

Virginia: Hill v. Leigh Memorial Hosp., 204 Va. 501, 132 S.E.2d 411 (1963) (beneficiary of hospital); Roanoke Hosp. Ass'n v. Hayes, 204 Va. 703, 133 S.E.2d 559 (1963) (hospital not immune from tort injury to private

Legislation in Louisiana, one of the "beneficiary" rule states, authorizes a direct action by an injured person against the insurer.[31] Under this statute, immunity from liability constitutes a personal defense available to the charity but unavailable to the insurer of the charity,[32] and, hence, in this jurisdiction even a beneficiary can maintain a suit against the insurer.

Six jurisdictions have developed variations or modifications of the "beneficiary" rule. Ohio, while applying the rule to all other charities,[33] has encroached upon the qualified liability concept by removing nonprofit hospitals from the cloak of immunity[34] on the ground that the financial capacity of such organizations justifies abolition of special protection.[35] New Jersey adhered to the "beneficiary" rule[36] until charitable immunity was completely swept away by a series of judicial decisions in 1958.[37] The legislature, however, promptly revived the

---

duty practical nurse who was invitee); Memorial Hosp. Inc. v. Oakes, 200 Va. 878, 108 S.E.2d 388 (1959) (hospital not liable to paying patient for negligence of employees); Hospital of St. Vincent of Paul v. Thompson, 116 Va. 101, 81 S.E. 13 (1914) (stranger to charitable hospital entitled to recover).

West Virginia: Meade v. St. Francis Hosp. of Charleston, 137 W.Va. 834, 74 S.E.2d 405 (1953) (charitable hospital not liable to paying patient); Koehler v. Ohio Valley Gen. Hosp. Ass'n, 73 S.E.2d 673 (W.Va. 1952) (charitable hospital not liable to invitee).

Wyoming: Bishop Randall Hosp. v. Hartley, 24 Wyo. 408, 160 Pac. 385 (1916) (hospital not liable to patient absent negligence in selection and retention of employees). Although Wyoming appears not to have expressly passed on charitable liability to persons other than beneficiaries, from the language of the decision this jurisdiction seems to have adopted the "beneficiary" rule.

31. LA. REV. STAT. tit. 22 § 655 (1959). For action brought against liability insurer of church see Juhas v. Amer. Cas. Co. of Reading, Pa., 140 So. 2d 676 (La. 1962).

32. Stamos v. Std. Acc. Ins. Co., 119 F. Supp. 245 (D. La. 1954) (court rules against insurer who moved to dismiss on ground that insured was a charity and under Louisiana law not liable for tort damages sustained by beneficiary); Humphreys v. McComiskey, 159 So. 2d 380 (La. 1964); D'Antoni v. Sara Mayo Hosp., 144 So. 2d 643 (La. 1962) (suit by patient against insurer and hospital); Lusk v. U.S.F. & G. Co., 199 So. 666 (La. 1941).

33. Sturdevant v. Youngstown Dist. Girl Scout Council, Inc., 195 N.E.2d 914 (Ohio 1962) (action by beneficiary against girl scout council); Matthews v. Wittenberg College, 178 N.E.2d 526 (Ohio 1960) (nonprofit religious institution of learning not liable for injury to student absent failure of institution to exercise due care in selection and retention of employee); Bell v. Salvation Army, 169 N.E.2d 636 (Ohio 1960) (paying beneficiary); Gibbon v. Y.W.C.A., 170 Ohio St. 280, 164 N.E.2d 563 (1960), *reversing* 159 N.E.2d 911 (1959) (recovery in wrongful death action arising from drowning of decedent in swimming pool maintained by defendant denied); Hunsche v. Alter, 76 Ohio L. Abs. 68, 145 N.E.2d 368 (1957) (nonprofit religious organization).

34. Jones v. Hawkes Hosp. of Mt. Carmel, 196 N.E.2d 592 (Ohio 1964); Klema v. St. Eliz. Hosp. of Youngstown, 166 N.E.2d 765 (Ohio 1960); Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410 (1956); Andrews v. Youngstown Osteopathic Hosp., 147 N.E. 645 (Ohio 1956).

35. Avellone v. St. John's Hosp., *supra* n.34.

36. Rose v. Raleigh Fitkin-Paul Morgan, etc. Foundation, 136 N.J.L. 553, 57 A.2d 29 (1948).

37. Dalton v. St. Luke's Catholic Church, 27 N.J. 22, 141 A.2d 273 (1958); Collopy v. Newark Eye & Ear Infr., 27 N.J. 29, 141 A.2d 276 (1958); Benton v. Y.M.C.A., 27 N.J. 67, 141 A.2d 298 (1958).

"beneficiary" rule[38] with a limited modification sanctioning liability up to $10,000 to a beneficiary of a charitable hospital.[39]

Three other states, Connecticut,[40] Indiana[41] and Texas,[42] have eroded the "beneficiary" rule to the extent of imposing liability where the charity negligently exercises or breaches a non-delegable duty such as the selection or supplying of proper equipment or facilities for the carrying out of the charitable purpose.[43] Thus a hospital has been held liable to a patient for burns caused by an improvised heat cradle[44] and for injuries resulting from the injection of a deleterious solution.[45]

Qualification of liability in Colorado, Illinois and Tennessee takes the form of immunity of charitable assets rather than immunity from

---

38. N.J. STAT. ANN. 2A:53A-7 (1959). See Anasiewicz v. Sacred Heart Church of New Brunswick, 74 N.J. Super. 532, 181 A.2d 787 (1962) (invited wedding guest held to be beneficiary of church).

39. N.J. STAT. ANN. 2A:53A-8 (1959). This statute was construed in Stoolman v. Camden County Council Boy Scouts, 77 N.J. Super. 129, 185 A.2d 436 (1962) (boy scout council not liable for negligence to cut scout); Makar v. St. Nicholas Church, 78 N.J. Super. 1, 187 A.2d 353 (1963) (statute held constitutional in personal injury action by parishioner against church); Mayer v. Fairlawn Jewish Center, 71 N.J. Super. 313, 177 A.2d 40 (1961), *aff'd in part and rev'd in part on another ground*, 38 N.J. 549, 186 A.2d 274 (1962) (plaintiff present at religious social center in his capacity as employee of another organization found to be invitee and not beneficiary).

40. McEvoy v. Hartford Hosp., 22 Conn. Sup. 366, 173 A.2d 357 (1961) (hospital not liable to patient for loss of jewelry absent "corporate negligence"); Berube v. Salvation Army, 21 Conn. Sup. 487, 157 A.2d 493 (1960) (visitor to premises allowed to recover); Martino v. Grace-New Haven Community Hosp., 146 Conn. 735, 148 A.2d 259 (1959) (patient refused recovery where hospital was not negligent in selection of employees); Coolbaugh v. St. Peter's Roman Catholic Church of Bridgeport, 142 Conn. 536, 115 A.2d 662 (1955) (parishoner in attendance at church who was injured by wire on church lawn held not an invitee and thus unable to recover where religious corporation had not been negligent in selection of sexton).

41. Ball Memorial Hosp. v. Freeman, 196 N.E.2d 274 (Ind. 1964). For other applications of beneficiary theory holding hospital not liable to paying patient see, Richardson v. St. Mary's Hosp., 191 N.E.2d 337 (Ind. 1963); St. Vincent's Hosp. v. Stine, 195 Ind. 350, 144 N.E. 537 (1924).

42. Goelz v. J.K. & Susie L. Wadley Research Inst. & Blood Bank, 350 S.W.2d 573 (Tex. 1961) (research institute and blood bank not liable for negligence of its employees); Penaloza v. Baptist Memorial Hosp., 304 S.W.2d 203 (Tex. 1957) (hospital not liable to patient for negligence of nurse); Felan v. Lucey, 259 S.W.2d 302 (Tex. 1953) (liability imposed upon archbishop who as trustee had title to Catholic cemetery as against a visitor injured by fall of monument); Southern Methodist Univ. v. Clayton, 167 S.W.2d 749 (Tex. 1944) (charity liable to employee); Hotel Dieu v. Armendarez, 210 S.W. 518 (Tex. 1919) (charity liable for negligent selection and retention of agent).

43. Medical & Surgical Memorial Hosp. v. Cauthorn, 229 S.W.2d 932 (Tex. 1949) (hospital liable to patient for injuries caused by improvised heat cradle); Sullivan v. Sisters of St. Francis, 374 S.W.2d 294 (Tex. 1963) (summary judgment denied when defendant failed to show that death did not result from "administrative negligence"); Bader v. United Orthodox Synagogue, 148 Conn. 449, 172 A.2d 192 (1961) (failure to provide porch railings). *Cf.* Killen v. Brazoport Memorial Hosp., 364 S.W.2d 411 (Tex. 1963) (failure to promulgate a written safety rule requiring use of warning signs when mopping floor was not a breach of non-delegable duties since the duty of supervision of cleaning personnel, and establishing procedures for them might be delegated to a director of housekeeping personnel).

44. Medical and Surgical Memorial Hosp. v. Cauthorn, *supra* n.43.

45. Ball Memorial Hosp. v. Freeman, 196 N.E.2d 274 (Ind. 1964) (doctrine of res ipsa applied).

suit.[46] In these jurisdictions a charity is not immune from suit for tort, and liability extends to all classes of persons. "Charitable property," however, is exempt from execution upon a judgment while insurance funds or other non-trust property may be levied upon.[47]

In Georgia the modification of the "beneficiary" theory takes the form of allowing the beneficiary to recover to the extent of liability insurance carried by the charity not only where there has been negligence in the employment or retention of incompetent employees,[48] but also where there has been no failure to use such care.[49] Absent administrative negligence or insurance the charity is immune from suit for tort by a beneficiary.[50]

Judicial interpretation of legislation in Maryland has cut into the immunity rule. A statute in that jurisdiction requires a policy issued to cover the liability of any charitable institution for negligence or any other tort to provide that "the insurer shall be estopped from asserting, as a defense to any claim covered by said policy, that such institution is immune from liability on the ground that it is a charitable institution."[51] Since this has been judicially interpreted as prohibiting a direct action against the insurer,[52] it became necessary, in order to make this legislation meaningful, to construe it as estopping the insured from asserting immunity as a defense — to the extent of the collectible insurance.[53] Thus the full immunity from suit which ordinarily applies in Maryland[54] is inapplicable to a charity carrying liability insurance; the existence of such insurance in effect destroys charitable immunity.

When in 1953 a charitable hospital was held liable for an injury to a paying patient resulting from the negligence of a nurse by a decision which extensively discussed the immunity rationale and proclaimed

46. *Colorado*: Michard v. Myron Stratton Home, 355 P.2d 1078 (Colo. 1960); St. Luke's Hosp. Ass'n v. Long, 125 Colo. 25, 240 P.2d 917 (1952); O'Connor v. Boulder Colo. San. Ass'n, 105 Colo. 259, 96 P.2d 835 (1939).
Illinois: Tidwell v. Smith, 169 N.E.2d 157 (Ill. 1960); Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950).
Tennessee: Spivey v. St. Thomas Hosp., 31 Tenn. App. 12, 211 S.W.2d 450 (1947) (hospital patient); Anderson v. Armstrong, 180 Tenn. 56, 171 S.W.2d 401 (1943); McLeod v. St. Thomas Hosp., 170 Tenn. 423, 95 S.W.2d 917 (1936) (stranger).

47. See cases cited *supra* n.46.

48. Cox v. De Jarnette, 104 Ga. App. 662, 123 S.E.2d 16 (1961).

49. Y.M.C.A. v. Bailey, 107 Ga. App. 417, 130 S.E.2d 242 (1963); Hipp v. Hospital Auth. of City of Marietta, 104 Ga. App. 174, 121 S.E.2d 273 (1961) (hospital negligent in selecting orderly with criminal record as a peeping tom held liable to paying patient for his torts).

50. Hospital Auth. of City of Marietta v. Misfeldt, 99 Ga. App. 702, 109 S.E.2d 816 (1959); Executive Comm. of Baptist Conv. v. Ferguson, 95 Ga. App. 393, 98 S.E.2d 50 (1957), *rev'd on another ground*, 213 Ga. 441, 99 S.E.2d 150 (1959); Morton v. Savannah Hosp., 148 Ga. 438, 96 S.E. 887 (1918).

51. MD. CODE ANN. art. 48A, § 85 (1957).

52. Gorman v. St. Paul Fire & Marine Ins. Co., 210 Md. 1, 121 A.2d 812 (1956).

53. State v. Arundel Park Corp., 218 Md. 484, 147 A.2d 427 (1959).

54. Cornelius v. Sinai Hosp. of Baltimore, Inc., 219 Md. 116, 148 A.2d 567 (1959).

that "court-declared policy" of that state invalid[55] it appeared that Washington had banished the immunity doctrine.[56] Two years later, however, in *Lyon v. Tumwater Evangelical Free Church,*[57] the same court held that a nonprofit religious organization which transported children by bus to Sunday school without charge was immune from liability for injury to a child caused by the alleged negligence of the bus driver. In reaching its decision the court stated that the rule of charitable immunity had not been rejected but merely modified to the extent of permitting a paying patient in a charitable hospital to recover for injuries caused by the negligence of its employees.

The *Lyon* decision unfortunately introduced into the law of this jurisdiction a distinction based upon the nature of the charity committing the tort. In 1961 a Washington court again applied the doctrine of charitable immunity to a religious organization[58] basing its decision on the ground that the plaintiff had accepted the immunity doctrine. The court did state, however, that "were that doctrine challenged, this court might be inclined to re-evaluate it, but we cannot properly decide the case upon an issue which has not been raised or argued."[59]

In Alabama a charity is liable for its torts to its employees, invitees and paying beneficiaries.[60] The issue of liability to a non-paying beneficiary is still open.[61]

§ 5. EXCULPATORY CLAUSES

Judicial elimination of charitable immunity brought with it attempts to circumvent the rule by contract. In one case this took the form of a release from liability for future negligence imposed as a condition for admission to a charitable research hospital. This exculpatory provision which exempted the hospital "from any and all liability for the negligent or wrongful acts or omissions of its employees if the hospital has used due care in selecting its employees" was declared invalid as contrary to public policy. The court explained that:

> the integrated and specialized society of today, structured upon mutual dependency, cannot rigidly narrow the concept of the public

55. Pierce v. Yakima Valley Memorial Hosp., 43 Wash. 2d 162, 260 P.2d 765 (1953).

56. See Jeffrey v. Whitworth College, 128 F. Supp. 219, 225 (D. Wash. 1955) stating that in Washington a charitable corporation no longer enjoys immunity for damages in tort.

57. 47 Wash. 2d 202, 287 P.2d 128 (1955).

58. Pederson v. Immanuel Lutheran Church, 358 P.2d 549 (Wash. 1961) (church). *Cf.* Haugen v. Central Lutheran Church, 361 P.2d 637 (Wash. 1961) where the defense of charitable immunity appears not to have been urged.

59. Pedersen v. Immanuel Lutheran Church, *supra* n.58, at 549–50.

60. Baptist Hosp. v. Carter, 226 Ala. 109, 145 So. 443 (1933), *aff'd,* 227 Ala. 560, 151 So. 62 (1933) (invitee); Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915).

61. Tucker v. Mobile Infirmary Ass'n, *supra* n.60.

interest. From the observance of simple standards of due care in the driving of a car to the performance of the high standards of hospital practice, the individual citizen must be completely dependent upon the responsibility of others. The fabric of this pattern is so closely woven that the snarling of a single thread affects the whole. We cannot lightly accept a sought immunity from careless failure to provide the hospital service upon which many must depend. Even if the hospital doors were open only to those in a specialized category, the hospital cannot claim isolated immunity in the interdependent community of our time. It too, is part of the social fabric, and prearranged exculpation from its negligence must partly rend the pattern and necessarily affect the public interest.[62]

§ 6. CHARITABLE CHARACTER OF ALLEGED TORTFEASOR

While immunity from tort does not turn upon whether the party seeking this status is a corporation, trust or unincorporated association,[63] charitable character constitutes an affirmative defense that must be alleged and proved in the same manner as any other fact.[64] The burden of proof is upon the one asserting that defense,[65] and unless established, immunity will not be granted.[66] The charter, articles of association or declaration of trust showing an organization to be charitable in its creation and powers is prima facie evidence of its charitable purpose,[67] and, because it is presumed that a charity operates in accordance with its stated purposes,[68] unless evidence to the contrary is intro-

62. Tunkl. v. Regents of Univ. of Cal., 32 Cal. Rptr. 33, 383 P.2d 441 (1963).

63. Widell v. Holy Trinity Catholic Church, 19 Wis. 2d 648, 121 N.W.2d 249 (1963) (corporation); Cox v. De Jarnette, 104 Ga. App. 664, 123 S.E.2d 16 (1961) (trust); Felan v. Lucey, 259 S.W.2d 302 (Tex. 1953) (trust); Herndon v. Massey, 217 N.C. 610, 8 S.E.2d 914 (1940) (unincorporated association).

64. Grueninger v. Pres. & Fellows of Harvard College, 178 N.E.2d 917 (Mass. 1961) (charitable immunity is an affirmative defense and hence complaint is not open to demurrer); Olson v. River View Cemetery Ass'n, 349 P.2d 279 (Ore. 1960); Rivera v. Misericordia Hosp., 15 Wis. 2d 351, 112 N.W.2d 918 (1962); *Cf.* Bell v. Salvation Army, 172 Ohio St. 326, 175 N.E.2d 738 (1961) (court judicially noticed charitable character of Salvation Army). For a discussion of the factors that enter into charitable character see § 6.

65. Barrett v. Brooks Hosp., Inc., 338 Mass. 754, 157 N.E.2d 638 (Mass. 1959); Ackerman v. Physicians and Surgeons Hosp., 298 P.2d 1026 (Ore. 1956).

66. Lichty v. Carbon County Agr. Ass'n, 31 F. Supp. 809 (E.D. Pa. 1940) (agricultural association); Allison v. Mennonite Publications Bd., 123 F. Supp. 23 (W.D. Pa. 1954) (nonprofit corporation established to own a church publication house in libel action); Ackerman v. Physicians & Surgeons Hosp., 207 Ore. 646, 298 P.2d 1026 (1956) (hospital); Busch v. Aiken Elec. Corp., Inc., 226 S.C. 442, 85 S.E.2d 716 (1955) (rural electric cooperative); Grossett Health Center v. Croswell, 256 S.W.2d 548 (Ark. 1953).

67. Maretick v. So. Chicago Comm. Hosp., 297 Ill. App. 488, 17 N.E.2d 1012 (1938); Boxer v. Boston Symphony Orchestra, 174 N.E.2d 363 (Mass. 1961), *modifying*, 339 Mass. 369, 159 N.E.2d 336 (1959); Barrett v. Brooks Hosp., Inc., 338 Mass. 754, 157 N.E.2d 638 (1959); Sessions v. Thomas D. Dee Memorial Hosp. Ass'n, 89 Utah 222, 51 P.2d 229 (1935); Rivera v. Misericordia Hosp., 15 Wis. 2d 351, 112 N.W.2d 918 (1962) (articles of incorporation not conclusive).

68. Memorial Hosp. v. Oakes, 200 Va. 878, 108 S.E.2d 388 (1959).

duced, the affirmative defense may be established by the introduction of these documents.[69] Generally, however, such proof does not preclude the opponent from introducing evidence as to charitable status since this issue is determined not alone by the powers and purposes of an organization but also by the manner in which it is conducted. Hence, the opponent is entitled to present evidence showing the true character of the institution by revealing the nature of its operations.[70]

Self denomination by a party as a hospital, orphan home or memorial association does not dispense with the necessity for proof of charitable character since such organizations are not per se charitable,[71] nor is the granting of tax exemption by the state or federal government conclusive.[72]

§ 7. EXCEPTIONS FROM IMMUNITY — UNRELATED PROFIT MAKING ACTIVITIES

Excepted from immunity are those torts which occur on property owned and operated by a charity for profit, or which arise out of an activity carried on by a charity for profit.[73] As sometimes phrased, a charity is not immune from tort liability where the activity out of which the alleged liability arose is not directly related to the charitable purpose for which the charity was organized.[74]

Apart from the established ruling that devotion of all profits to its charitable purposes does not constitute the required direct connection,[75] the activities which fall within the stated test depend upon the facts in each case.[76] Conduct of a bingo game by a religious organization,[77]

69. *Ibid.*

70. Krpan v. Otis Elev. Co., 226 F. Supp. 293 (E.D. Pa. 1964) (charter showing defendant to be nonprofit corporation is not sufficient to warrant summary judgment); Southern Methodist Hosp. & San. v. Wilson, 45 Ariz. 507, 46 P.2d 118 (1935); Eiserhardt v. State A. & M. Soc. of S.C., 11 S.E.2d 568 (S.C. 1959); Memorial Hosp. v. Oakes, 200 Va. 878, 108 S.E.2d 388 (1959). *Cf.* Maretick v. So. Chicago Comm. Hosp., 297 Ill. App. 488, 17 N.E.2d 1012 (1938).

71. See cases cited *supra* n.66. See also Sessions v. Thomas D. Dee Memorial Hosp. Ass'n, 89 Utah 222, 51 P.2d 229 (1935).

72. Krpan v. Otis Elev. Co., 226 F. Supp. 293 (E.D. Pa. 1964).

73. Grueninger v. Pres. & Fellows of Harvard College, 178 N.E.2d 917 (Mass. 1961) (allegation that activities giving rise to injury were primarily commercial sufficient); Reavey v. Guild of St. Agnes, 284 Mass. 300, 187 N.E. 557 (1933); Bell v. Salvation Army, 172 Ohio St. 326, 175 N.E.2d 738 (1961) (allegation that defendant operated hotel for profit sufficient against demurrer); Rhodes v. Millsops College, 179 Miss. 596, 176 So. 253 (1937). Also see cases cited *infra* nn.75–81.

74. Blatt v. Geo. H. Nettleton Home for Aged Women, 365 Mo. 30, 275 S.W.2d 344 (1955).

75. *Ibid.*

76. Klopp v. Benev. Protective Order, 309 Ill. App. 145, 33 N.E.2d 161 (1941) (organization which dispensed intoxicating liquor under dramshop license liable for tort); Carpenter v. Y.M.C.A., 324 Mass. 365, 86 N.E.2d 634 (1949) (operation of playground and payment of small fee for supervising play of plaintiff did not render defendant liable for tort). Also see cases cited *infra* nn.77–81.

77. Blankenship v. Alter, 171 Ohio St. 65, 167 N.E.2d 922 (1960).

operation of a parking lot as a commercial venture by an agricultural and mechanical society[78] and operation of an office building by a charity[79] have subjected the charity to liability for injuries occurring on the property or arising out of the profit-making activity even though the proceeds have been devoted to charitable objectives. On the other hand, the sale of religious articles at a profit by a church using the proceeds for religious purposes did not result in removal of its immunity.[80] Nor did the imposition of a small fee to attend a luncheon in the church render it liable to a member of the ladies aid society injured at the luncheon where the payment constituted a contribution to church purposes.[81]

§ 8. TORT AS A DEFENSE

Even in a jurisdiction granting immunity the commission of a tort by a charity may be established as a defense. A patient sued by a hospital[82] for board, room and attendance was thus permitted to show that he was severely burned as a result of the negligence of the hospital employees, in order to prove that the services of the hospital were of no value. This was permissible even though the defendant could not have instituted suit against the hospital for negligence.[83]

§ 9. NUISANCE

A charity can be subjected to an injunction or to liability for damages as a result of the creation or maintenance of a nuisance,[84] even where the nuisance arises out of negligence.[85]

Whether the tort constitutes negligence or nuisance, while often difficult to determine, is of importance in those jurisdictions where tort exemption remains since the successful framing of a complaint in nuisance rather than negligence results in avoidance of the immunity rulings. This is clearly revealed by comparing *Smith v. Congregation*

78. Eiserhardt v. State Agric. & Mech. Soc. of S.C., 111 S.E.2d 568 (S.C. 1959).
79. Blatt v. Geo. H. Nettleton Home for Aged Women, 365 Mo. 30, 275 S.W.2d 344 (1955); Gamble v. Vanderbilt Univ., 138 Tenn. 616, 200 S.W. 510 (1918).
80. Cullen v. Schmidt, 139 Ohio St. 194, 39 N.E.2d 146 (1942).
81. Pedersen v. Immanuel Lutheran Church, 358 P.2d 549 (Wash. 1961).
82. Beverly Hosp. v. Early, 292 Mass. 201, 197 N.E. 641 (1935).
83. *Ibid.*
84. Kestner v. Homopathic Medical & Surgical Hosp., 245 Pa. 326, 91 Atl. 659 (1914) (injunction granted against hospital); Peden v. Furman Univ., 155 S.C. 1, 151 S.E. 907 (1930) (error to have directed verdict for defendant in suit for damages and to enjoin it from using its athletic field for sports purposes when field was too small and resulted in balls being batted on to plaintiff's premises); Love v. Nashville Agr. & Normal Inst., 146 Tenn. 550, 243 S.W. 304 (1922) (nuisance arising out of contamination of plaintiff's well by sewage of charity enjoined and damages imposed); Smith v. Cong. of St. Rose, 265 Wis. 393, 61 N.W.2d 896 (1953) (injury to stranger caused by icy sidewalk).
85. Smith v. Cong. of St. Rose, *supra* n.84.

of St. Rose,[86] with *Fields v. Mountainside Hospital.*[87] In the former case a stranger who fell on ice caused by the overflow of water to the sidewalk was permitted to recover on the basis of nuisance in maintaining a clogged water spout; in the latter the use of defective medical apparatus and equipment was found not to constitute a nuisance in a suit by a paying patient against a hospital, leaving the plaintiff without a remedy in tort.

§ 10. WORKMEN'S COMPENSATION ACTS

It frequently becomes important to determine whether the employees of a charity are covered by a workmen's compensation act. To the extent that the act either expressly includes or excludes charitable employees the problems of coverage are ameliorated.

In Georgia the employees of institutions maintained and operated as public charities are specifically excluded;[88] while in Idaho employment by a charitable organization is not within the act unless coverage is elected by the employer.[89] In Arkansas, institutions maintained and operated wholly as public charities are excluded.[90] The New York act excepts a clergyman, sexton, christian science reader or member of a religious order, as well as persons "engaged in a professional or teaching capacity in or for a religious, charitable or educational institution."[91]

Other statutes expressly include charities. The Massachusetts act specifically includes "laborers, workmen and mechanics employed by religious, charitable or educational institutions."[92] Hospitals, public service, eleemosynary, religious or charitable corporations or associations engaged in extra hazardous enterprises or businesses are included in Illinois.[93]

A statute which expressly excludes a particular charitable relationship from the scope of the word "employee" is generally construed as including the area not excluded.[94]

86. *Ibid. Cf.* Cox v. DeJarnette, 104 Ga. App. 669, 123 S.E.2d 16 (1961) (slippery condition of steps and landing when wet with rain did not constitute a nuisance).
87. 22 N.J. Misc. 72, 35 A.2d 701 (1944).
88. GA. CODE ANN. § 114.07 (1956).
89. IDAHO CODE § 72-105A (1959).
90. ARK. STAT. ANN. § 81-1302 (1960).
91. N.Y. WORKMEN'S COMP. LAW § 201(5) (McKinney, 1963). Also excepted are "volunteers in or for a religious, charitable or educational institution, or persons participating in and receiving rehabilitative service in a sheltered workshop" or recipients of charitable aid from a religious or charitable institution or who performs work in return for aid.
92. MASS. ANN. LAWS ch. 152 § 1(4) (1958). See *In re* Brewer's Case, 141 N.E.2d 281 (Mass. 1957) (act held applicable to student nurse who paid tuition to charitable hospital but worked at hospital for room and board).
93. ILL. STAT. ANN. ch. 48, § 138.1 (Smith-Hurd, 1962).
94. See CAL. LABOR LAW § 3352 excluding as "employee" a person performing services in return for aid or sustenance only, received from any religious, charitable or relief organization. This statute was unsuccessfully invoked by the employer in

Absent express inclusion or exclusion, whether a workmen's compensation act occupies the whole field or was intended to exclude charities, raises a problem of statutory construction.[95] The legislature is generally found to have intended inclusion of charities in those jurisdictions in which a charity is not exempt from tort liability to its employees.[96] Injuries sustained by a minister employed by a church,[97] an inmate employed by the Salvation Army[98] and an excavation worker employed by a church association[99] have been held compensable in these jurisdictions.

In states where a charity is exempted from liability for negligence to its employees the courts are sharply divided. South Carolina[100] and Washington[101] have concluded that a charity does not come within the act absent a plain legislative intention to change the rules exempting it from tort liability to its employees. Missouri has taken the opposite position on the theory that the act "is not merely cumulative to or supplemental of the common law and existing statutes, but rather creates entirely new rights and remedies, regardless of whether they may have existed theretofore or not."[102] Both Tennessee[103] and Pennsylvania[104] have similarly held that if it were intended to exclude charities from the workmen's compensation law the legislature would have made this intention expressly known.

Thus, although holdings can be found in some immunity states denying coverage by the workmen's compensation act, the majority of states having acts that do not expressly include charities have reached a contrary conclusion. The majority rule is better reasoned; compensation acts have substituted a different system of statutory law for the common law tort theory. The limits of compensation are not restricted

State Subsequent Injuries Fund v. Indus. Acc. Comm., 16 Cal. Rptr. 323 (1961) (finding bona fide employment relationship).

95. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948).

96. Hartford Acc. & Ins. Co. v. Dept. of Ind. Relations, 139 Cal. App. 632, 34 P.2d 826 (1934) (dictum). See also cases cited *infra* nn.97-99.

97. Taylor v. St. Paul's Universalist Church, 109 Conn. 178, 145 Atl. 887 (1929); Meyers v. S.W. Region Conf. Ass'n of Seventh Day Adventists, 230 La. 310, 88 So. 2d 381 (1956) *reversing* 79 So. 2d 595 (1955).

98. Schneider v. Salvation Army, 217 Minn. 448, 14 N.W.2d 467 (1944).

99. Gardner v. Trustees of Main St. Methodist E. Church, 217 Iowa 1390, 250 N.W. 740 (1933).

100. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948).

101. Thurston County Chapter, Amer. Nat. Red Cross v. Dept. of Labor and Ind. of Wash., 166 Wash. 488, 7 P.2d 577 (1932) (Red Cross not employer within workmen's compensation act).

102. Hope v. Barnes Hosp., 227 Mo. App. 1058, 55 S.E.2d 319 (1932) (death of hospital employee held compensable).

103. Smith v. Lincoln Memorial Univ., 304 S.W.2d 70 (Tenn. 1957) (charitable educational institution not exempt from workmen's compensation act).

104. Schreckengost v. Gospel Tabernacle, 188 Pa. Super. 652, 149 A.2d 542 (1959) (deceased who performed services for church was within workmen's compensation act).

by the limits of tort liability.[105] This has been clearly explained by a Missouri court which has pointed out that the act "creates entirely new rights and remedies, regardless of whether they may have existed theretofore or not. For instance, as a basic proposition, the act affords a right and a remedy to an employee for an injury occasioned without wrong, human fault, or negligence, while at common law an injury received in that manner was neither actionable nor remedial. It also affords him a right and a remedy under circumstances where the employer though himself at fault would have had a complete defense at common law. Consequently, the employer is incorrect in its assertion that because the claimant, without the act would have had no cause of action, he can be accorded no right and remedy pursuant to its provisions."[106]

Where a workmen's compensation act provides for the election of its provisions by an employer, a charitable employee becomes covered by the act when his employer accepts its provisions.[107]

§ 11. PERSONAL LIABILITY OF TRUSTEE, DIRECTOR, MANAGER AND EMPLOYEE FOR TORT

To what extent is a trustee of a charitable trust or a director, manager, employee or agent of a charitable corporation or association individually liable for a tort committed in the administration of the charity?[108] Tort immunity does not extend to the members of governing boards or other employees of a charitable corporation in their individual capacities.[109] Similarly, while the charitable immunity doctrine

105. LARSON, WORKMEN'S COMPENSATION LAW § 50.43 (1952).

106. Hope v. Barnes Hosp., 227 Mo. App. 1058, 55 S.E.2d 319 (1932).

107. VT. STAT. ANN. tit. 21, § 618 (1959) (a charitable, religious, educational or other corporation, institution, association, partnership or individual engaged in a business, trade or occupation which is not carried on for the sake of pecuniary gain, may voluntarily come within the provisions of this chapter). See also Calvert v. Ill. Power & Light Corp., 291 Ill. App. 243, 9 N.E.2d 443 (1937); Monteleone v. Center Storage Warehouse, Inc., 68 N.Y.S.2d 369 (1946).

108. See Note, *Liability of Supervisory Employees,* 38 ORE. L. REV. 350 (1959).

109. Hinman v. Berkman, 85 F. Supp. 2 (D. Mo. 1949); Roberts v. Kirksville College of Osteopathy & Surgery, 16 S.W.2d 625 (Mo. 1929); O'Neilly v. Odd Fellows Home of Oregon, 89 Ore. 382, 174 Pac. 148 (1918); See Helton v. Sisters of Mercy of St. Joseph's Hosp., 351 S.W.2d 129 (Ark. 1961); Rivera v. Misericordia Hosp., 15 Wis. 2d 251, 112 N.W.2d 918 (1962) (hospital employee); *Cf.* Latell v. Walsh, 181 N.E.2d 729 (Ohio 1961) (bishop of diocese and pastor of church were sued individually as persons having control of church premises by member who was injured when he fell over guardwall on church premises. Judgment in favor of defendants was affirmed on the ground that "where a trustee of a religious charitable eleemosynary organization is sued individually for negligence and the acts or omissions upon which the claim is based were his duty or obligation only because of his position as such trustee, the immunity given to the church attaches to his individual act or omission unless it can be shown that there was such an act, or such an omission, as to amount to a violation of the trust." The court commented that imposition of "a personal duty upon the trustee of church property to eliminate from such properties all possible dangerous situations would be unreasonable and would defeat the immunity from suits by beneficiaries normally enjoyed by the religious organization").

precludes suit against a trustee in his representative capacity,[110] a trustee may be individually liable for his personal misconduct.[111]

While liable for acts of misfeasance or malfeasance,[112] trustees, executive officers and members of the governing board of a charity are not responsible for nonfeasance,[113] or, in modern phraseology, for torts in which they did not participate.[114] Thus members of the executive committee of an incorporated university were individually liable for permitting use of an elevator with knowledge of its defective condition,[115] while the trustees of an incorporated hospital were excused from responsibility for injuries sustained in a similar manner absent evidence of their negligence either by commission or omission.[116]

Only those trustees or members of the board who are personally at fault are subject to liability.[117]

§ 12. CONFLICT OF LAWS AND LAW APPLICABLE IN FEDERAL COURTS

Traditionally the existence and nature of tortious liability is determined by the law of the place of the wrong,[118] and, hence, the issue of charitable immunity is generally governed by the law of the jurisdiction in which the tort occurred.[119] That the charity was organized in a state other than the one in which the tort was committed has, therefore, been found to be without significance in determining the applicable law.[120]

The usual rule, however, has not been applied where a strong public policy against the maintenance of such an action exists in the

110. Burgess v. James, 73 Ga. App. 857, 38 S.E.2d 637 (1946).

111. St. Mary's Academy v. Soloman, 77 Colo. 463, 238 Pac. 22 (1925); Pease v. Parsons, 273 Mass. 111, 173 N.E. 406 (1930). See, Note, *Tort Liability of the Trustee of a Charitable Trust: A Qualified Immunity,* 44 VA. L. REV. 1317 (1958).

112. Pease v. Parsons, 259 Mass. 86, 156 N.E. 4 (1930); Scott v. Burton, 173 Tenn. 148, 114 S.W.2d 956 (1938).

113. Eads v. Y.W.C.A., 325 Mo. 577, 29 S.W.2d 701 (1930) (members of board of trustees not individually liable when employee sustained injuries while operating elevator).

114. Paterline v. Memorial Hosp. Ass'n of Monongahela City, 247 Fed. 639 (3rd Cir. 1918), *cert. denied,* 246 U.S. 665 (1918) (directors of incorporated hospital not individually liable for death of patient by accidental poisoning, absent proof showing an act of commission or omission); Scott v. Burton, 173 Tenn. 148, 114 S.W.2d 956 (1938) (members of board of trustees of incorporated college held not individually liable for injuries sustained by student in jumping from dormitory during a fire, absent proof that the trustees knew of accumulation of trash which caused fire. Court stated that it did not make distinction between misfeasance and malfeasance the basis of its decision). See also RESTATEMENT (SECOND), TRUSTS § 402.

115. Gamble v. Vanderbilt Univ., 138 Tenn. 616, 200 S.W. 510 (1918).

116. Simon v. Pelouze, 263 Ill. App. 177 (1931).

117. Pease v. Parsons, 273 Mass. 111, 173 N.E. 406 (1930).

118. Jeffrey v. Whitworth College, 128 F. Supp. 219 (E.D. Wash. 1955); Allison v. Mennonite Pub. Bd., 123 F. Supp. 23 (W.D. Pa. 1958).

119. Hooten v. Civil Air Patrol, 161 F. Supp. 478 (E.D. Wis. 1958); Matute v. Carson Long Inst., 160 F. Supp. 827 (W.D. Pa. 1958).

120. Keffrey v. Whitworth College, 128 F. Supp. 219 (E.D. Wash. 1955) (law of Idaho where tort occurred held to govern rather than law or forum where college was organized).

state of the forum court, and here the immunity rule will be applied.[121] It also appears that since the decision of *Babcock v. Jackson*,[122] in 1963, New York has abandoned the "place of tort" theory in favor of the "grouping of contacts" doctrine in cases involving a choice of law in tort litigation. In *Kaufman v. American Youth Hostels, Inc.*,[123] decided prior to *Babcock*, the traditional test was applied and the law of the place of the wrong was held to govern where a charity organized under the law of the forum, operated as a foreign corporation in the state where the tort occurred. That *Babcock* broadly changed this rule is revealed by *Blum v. American Youth Hostels, Inc.*,[124] where on facts similar to those in *Kaufman*, the court held that the law of the foreign state where the tort occurred could not be used as a defense to plaintiff's action. In so holding the court found that *Babcock* "discarded the inflexible rule that substantive rights and liabilities are invariably determined by the law of the place of the tort," and noted that the "issue here as in *Babcock v. Jackson* . . . is not whether defendant violated some standard of conduct imposed by the law of Oregon, but whether defendant because of its status in that state is immune from liability. As to the issue of immunity, it is New York which has the superior claim for the application of its law; the place where the plaintiffs resided and defendant was incorporated; where their relationship arose and where the trip began and was to end, rather than Oregon, the place where the accident occurred."[125]

Federal courts follow local state law in determining liability,[126] and may look to decisions in other jurisdictions where the state whose law is determinative has not passed upon the question.[127]

§ 13. VALIDITY AND FUTURE OF IMMUNITY RULE

The immunity rule, in those states in which it still adheres, is based on one or more of four theories, each of which has been severely attacked by the courts of some states and vigorously defended by those

121. Menardi v. Thea. Jones Evang. Ass'n, 154 F. Supp. 622 (E.D. Pa. 1957).

122. 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

123. 6 A.D.2d 223, 177 N.Y.S.2d 587 (1958), *modified*, 5 N.Y.2d 1016, 158 N.E.2d 128 (1959) (New York court applied Oregon rule of immunity to corporation organized in New York. In so holding the court rejected the rationale of Heinemann v. Jewish Agr. Soc., 178 Misc. 897, 37 N.Y.S.2d 354 (1942), *aff'd*, 266 A.D. 907, 43 N.Y.S.2d 746 (1943) (where New York law was applied when tort was committed in New Jersey on ground that plaintiff had arranged in New York for acceptance of benefactions of defendant).

124. 40 Misc. 2d 1056, 244 N.Y.S.2d 351 (1963).

125. *Id.* at 1057, 244 N.Y.S.2d at 352.

126. Higgons v. Pratt Inst., 45 F.2d 698 (2d Cir. 1930); Paterline v. Memorial Hosp. Ass'n of Monongahela City, 247 Fed. 639 (3rd Cir. 1918).

127. Ellsworth v. Brattleboro Retreat, 68 F. Supp. 706 (D. Conn. 1946).

of others. Agreement as to the inherent invalidity of each of these foundations for the immunity doctrine is all but unanimous among the commentators.[128]

(a) *Trust Fund Theory*

Oldest of the grounds for exemption, the trust fund theory, rests on the thesis that since a charity holds its funds in trust only for its charitable purposes, payment of tort damages from such funds would constitute a breach of that trust. Inconsistent with the numerous judicially recognized exceptions to the immunity rule, this reasoning is open to an unanswerable query; if "a trust fund is sacred for the reason generally given, why is it not sacred in every kind of case?"[129] Moreover, the duty of a charity to devote its property only to charitable purposes does not differ from that of a business corporation to use its property only for the purposes for which it has been organized.[130] Also, in so far as a trustee not personally at fault is entitled to reimbursement from trust funds if he satisfies a judgment obtained against him, trust funds are accorded only indirect not ultimate immunity.[131]

(b) *Respondeat Superior*

In instances where the tort has been caused by an employee, charitable immunity has on occasion been predicated on the ground that the principle of respondeat superior has no applicability to a charity. The rationale of these decisions is that respondeat superior is a rule of policy which is justified because the employer obtains profits and receives the benefit of the acts of his employees.[132] But because a charity derives no "profits" the rule therefore has no validity when applied to such an organization. The error in this reasoning arises from the assumption that respondeat superior is a function of profit rather than a derivative of the right to direct, control and select the agent.[133]

---

128. See *e.g.*, Lipson, *Charitable Immunity: The Plague of Modern Tort Concepts*, 7 CLEV.-MAR. L. REV. 483 (1958); Posey, *Need for Uniformity in Doctrine of Charitable Immunity*, 23 GA. B.J. 398 (1961); Notes, 28 CHI.-KENT L. REV. 268 (1950); 38 COL. L. REV. 1485 (1938); 55 DICK. L. REV. 392 (1951); 49 MICH. L. REV. 148 (1950); 37 N.C.L. REV. 209 (1959); 2 SW. L.J. 244 (1958); 36 U. DET. L.J. 636 (1959).

129. Bruce v. Y.M.C.A., 51 Neb. 372, 277 Pac. 798 (1929).

130. Cohen v. General Hosp. Soc. of Conn., 113 Conn. 88, 154 Atl. 435 (1931).

131. Gable v. Salvation Army, 186 Okla. 687, 100 P.2d 244 (1940).

132. Fordyce & McKee v. Woman's Christian Nat. Library Ass'n, 79 Ark. 550, 96 S.W. 155 (1906).

133. Widell v. Holy Trinity Catholic Church, 19 Wis. 2d 648, 121 N.W.2d 249 (1963).

(c) *Implied Waiver*

The implied waiver theory is founded on an implied assumption of risk of injury or waiver of liability by a charitable beneficiary. By accepting the charitable benefits or services the beneficiary impliedly promises not to hold the charity liable for its negligence.

Obviously a fiction, this theory could only pertain to the beneficiary of a charity and would neither extend to employees or strangers nor to persons who, because of age or lack of consciousness, are legally incapable of making such an implied promise.

(d) *Public Policy*

Public policy as the basis for charitable tort immunity take several forms. One is the theory that exemption from liability protects charitable assets from use for any purpose other than the one for which the charity was organized and, as such, is an aspect of the favored treatment principally applicable to charities.[134]

The belief that exemption from liability acts as a stimulus to charitable activities while liability constitutes an obstacle is another prong of the public policy argument. It is urged that knowledge that his contribution could be consumed in payment of a judgment resulting from the negligent conduct of an employee might deter a potential donor.[135] This position loses force when the intention of the charitable donor is analyzed. Obviously the donor desires to benefit others. Were the charity not held to some degree of care in rendering its services, the donor's intention would be defeated.[136]

Finally it has been said that "in organized society, the right of the individual must, in some instances, be subordinated to the public good. It is better for the individual to suffer injury without compensation than for the public to be deprived of the benefit of the charity."[137] In other words, the preservation of charitable funds outweighs any right of the injured person to compensation. Basically this argument arises from the fear that liability, even in a single case, might destroy the charity. However forceful this belief may have been in earlier times, it has become outmoded by changing conditions.

At one period in our history there were few hospitals or other charitable organizations, and what few there were had minimal assets.

134. Landgraver v. Emanuel Lutheran Charity Bd., 203 Ore. 489, 280 P.2d 301 (1955).
135. Michael v. Hahnemann Med. College & Hosp., 404 Pa. 424, 172 A.2d 769, 774 (1961) (concurring opinion).
136. Parks v. Northwestern Univ., 218 Ill. 381, 75 N.E. 991 (1905).
137. Vermillion v. Woman's College of Due West, 104 S.C. 197, 88 S.E. 649 (1916).

At that time it might well be that they were entitled to the encouragement and assistance that could be afforded by immunity from liability. The charitable organization of today is a much different enterprise. Highly organized and frequently aided by governmental and foundation funds, modern charity constitutes big business. Hospitals, universities and religious organizations have extensive assets and endowments, own valuable property and operate businesses.[138] The basis for such encouragement no longer exists.

The change in the economic status of charitable organizations and the corresponding lessening of charitable immunity from tort was well expressed by Mr. Justice Musmanno in his dissenting opinion in *Michael v. Hahnemann Medical College and Hospital*,[139] where he explained that:

> [I]t is historically true, and it is a tribute to the soundness of the human heart that it *is* true, that there was a time when good men and women, liberal in purse and generous in soul, set up houses to heal the poor and homeless victims of disease and injury. They made no charge for this care. They felt themselves richly rewarded in the knowledge that they were befriending humanity.
>
> Hospitals then were little better than hovels in which the indigent were gathered for the primitive cures available. The wealthy and the well-to-do were cared for in their homes. The hospital or infirmary was more often than not part of the village parish. Charity in the biblical sense prevailed. And if it happened that some poor mortal was scalded by a sister of mercy, who exhausted from long hours of vigil and toil, accidentally spilled a ladle of hot soup on a hand extended for nourishment, there was no thought of lawsuits against the philanthropists who made the meagre refuge possible. But if, following such a mishap, litigation should have been initiated in the courts, it is not difficult to understand why judges would be reluctant to honor such a complaint, convinced on the basis of humanity, that an enterprise utterly devoid of worldly gain should be exempt from liability. A successful lawsuit against such a feeble structure might well have demolished it and have thus paralyzed the only helping hand in a world of unconcern for the rag-clothed sick and the crutchless disabled.
>
> The situation today is quite different. Charitable enterprises are not housed in ramshackly wooden structures. They are not mere storm shelters to succor the traveler and temporarily refuge those stricken in a common disaster. Hospitals today, to a large extent, are mighty edifices, in stone, glass and marble. They maintain large staffs, they use the best equipment that science can devise, they utilize the most modern methods in devoting them-

138. Widell v. Holy Trinity Catholic Church, 19 Wis. 2d 648, 121 N.W.2d 249 (1963).
139. 404 Pa. 424, 172 A.2d 769 (1961).

> selves to the noblest purpose of man, that of helping one's stricken brother. But they do all this on a business basis, and properly so. . . . And if the hospital is a business for the purpose of collecting money, it must be a business for the purpose of meeting its obligations.[140]

The availability of liability insurance to charities is also a factor in the tort immunity picture. This eliminates the possibility that a substantial judgment might compel a small institution to close its door. Today, it is the "cost of reasonable protection against liability and not the awarding over in damages of a charity's entire assets" which is at stake.[141]

The trend toward a general seeping away of the immunity doctrine has grown stronger and gained momentum rapidly in the past few years.[142] The growing practice is for charitable institutions to voluntarily obtain liability insurance for the benefit of persons injured or damaged by torts for which they are responsible.[143]

Well on the path to full repudiation, the current of judicial thought is in the direction of extinction of the doctrine of charitable immunity. The law in states that persist in clinging to this obsolete principle will become increasingly riddled with judicial and legislative exceptions that will chip away the outlines of the rule and undermine its foundations. Injured or damaged claimants will repeatedly urge the courts to abandon the doctrine, and, to escape the rigors of the exemption rule, will resort to semantic subterfuges by framing complaints in terms of nuisance or contract rather than negligence. As a result, the law in these states will become confused and uncertain; a pattern already apparent in Georgia,[144] Maryland,[145] New Jersey,[146] Ohio[147] and Washington.[148]

Present social conditions, the interests of justice and the need for clarification of the law combine to require the judiciary and legislatures of those jurisdictions which still adhere to this incongruity to relinquish their wavering hold on this theory and to respond to the needs and economic realities of our twentieth century society by discarding all remnants of this crumbling anachronism.

---

140. *Id.* at 457, 172 A.2d at 786.

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

142. Prior to 1942 only six states were considered to have full liability status. See Note, *Charitable Tort Immunity in Michigan,* 36 U. DET. L.J. 636 (1959). For the present status of the doctrine see sections 1–4 *supra.*

143. State v. Arundel Park Corp., 218 Md. 484, 147 A.2d 427 (1959).

144. See *supra* § 4 nn.48–50.

145. See *supra* § 4 nn.51–54.

146. See *supra* § 4 nn.36–39.

147. See *supra* § 4 nn.33–35.

148. See *supra* § 4 nn.55–59.