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Torts--Charitable Immunity From Tort Liability in Kentucky

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TORTS—CHARITABLE IMMUNITY FROM TORT LIABILITY IN KENTUCKY—Plaintiff was a third floor tenant in an apartment building that had been devised jointly to the defendant charitable corporation to be used for its charitable purposes. The building was rented for commercial purposes, and the income from the property was devoted to defendant charity. Plaintiff sustained serious injury in the course of a fire that swept the building and instituted suit to recover for personal injuries allegedly caused by defendant's negligence in failing to provide adequate and safe exit ways and fire escapes as required by a Louisville ordinance and a state statute. Summary judgment was rendered for defendant on the basis of its affidavit alleging that the property was held in trust, that the income was devoted to the defendant's charitable endeavor, and invoking its immunity from liability for torts. *Held:* reversed and remanded for a trial on the facts. Due to a combination of three major factors, namely: (1) corporate negligence in failing to perform a statutory duty, (2) merely income producing property, and (3) injuries to a stranger to the charities, the plea of immunity is not available to the defendant. *Roland* v. *Catholic Archdiocese of Louisville,* 301 S.W. 2d 574 (Ky. 1957).

Charitable immunity was first adopted in this country by Massachusetts,[1] though to establish the doctrine the court relied on English precedents[2] which had already been repudiated in that country.[3] Later, a great majority of courts in this country accepted and adopted the doctrine of charitable immunity, and for many years it sailed along on a sea of various reasons for its existence and application.[4] Basically, the reasons flowed from the courts' determination of public policy: that public policy demanded charities be clothed in immunity from torts to prevent dissipation of their funds—the so-called trust fund theory[5] —and to foster their operations to the benefit of society.

In recent years, however, the increasing attack by writers and the courts on charitable immunity has resulted in a modern trend of decision to reject the immunity or limit its scope.[6] In doing this, the

[1] McDonald v. Massachusetts General Hospital, 120 Mass. 432 (1876); Maryland also adopted the doctrine in an early case, Perry v. The House of Refuge, 63 Md. 20 (1885); evidently neither court realized that the authorities they relied on had been repudiated.

[2] See Feoffees of Heriot's Hospital v. Ross, 12 Clark & F. 507, 513, 8 Eng. Rep. 1508, 1510 (1846), in which the "trust fund theory" was expounded; "To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose." (dictum). See also, Holliday v. St. Leonard, Shoreditch, 11 C.B. (N.S.) 192, 142 Eng. Rep. 769 (1861).

[3] See Mersey Docks v. Gibbs, 11 H.L. Cas. 686, 720, 732-734 (1866).

[4] Annot., 25 A.L.R. 2d 29 (1952).

[5] See note 2 supra.

[6] 2 Harper and James, Torts sec. 29.17 (1956 ed.); Prosser, Torts 784-788 (2d ed. 1955); 25 A.L.R. 2d 43-44 (1952).

courts have either rejected[7] and overruled the doctrine completely, or created various exceptions to its application, thereby limiting its scope. Some of the more important exceptions where liability has been imposed are: (1) if the injured party is a stranger to the charities, or (2) if the activity engaged in by the charity is commercial in character, or (3) if the negligence charged is a breach of statutory duties, or (4) if the charity was guilty of administrative negligence as opposed to the negligence of one of its employees.[8] Courts which have rejected the doctrine completely or have created exceptions to limit its scope generally say that the original policy reasons for the doctrine have disappeared. Although charities were weak in their infancy, they have now blossomed into big businesses capable of insuring themselves against liability and thereby spreading the risk, rather than allowing the damages to fall on the innocent parties who were injured.

The Kentucky Court recognized charitable immunity in an early case,[9] relying specifically on a Maryland case[10] which had based its decision on repudiated English precedents. Kentucky, in a line of cases[11] through *Forrest* v. *Red Cross Hospital*,[12] has been listed among those states allowing "complete immunity."[13] The reasons for immunity asserted by the court were: (1) public policy, (2) prevention of dissipation of the trust funds of the charity, and (3) implied waiver of negligence or assumption of risk by the injured party. In the *Red Cross Hospital* case, the court in a four to three opinion denied recovery to a paying patient at a charitable hospital for the negligence of an employee. In that case Judge Sims, speaking for the majority,[14] listed the previous reasons for immunity and vigorously asserted that

[7] President and Directors of Georgetown College v. Hughes, 130 F. 2d 810 (D.C. Cir. 1942). The devastating opinion of Judge Rutledge gave impetus to the modern trend of decision to reject charitable immunity.

[8] Annot., 25 A.L.R. 2d 112-138 (1952).

[9] Williamson v. Louisville Industrial School of Reform, 95 Ky. 251, 24 S.W. 1065 (1894).

[10] Perry v. The House of Refuge, 63 Md. 20 (1885).

[11] Averback v. Y.M.C.A. of Covington, 250 Ky. 34, 61 S.W. 2d 1066 (1933); Williams' Adm'x v. Church Home for Females and Infirmary for Sick, 223 Ky. 355, 3 S.W. 2d 753, 62 A.L.R. 721 (1928) (recovery denied for death of a paying resident even though the defendant had insurance coverage); Emery v. Jewish Hospital Ass'n, 193 Ky. 400, 236 S.W. 577 (1921) (recovery denied to an employee); Cook v. John N. Norton Memorial Infirmary, 180 Ky. 331, 202 S.W. 874 (1918) (recovery denied to a paying patient). See also Pikeville Methodist Hospital v. Donahoo, 221 Ky. 538, 299 S.W. 159 (1927); Illinois Central R. Co. v. Buchanan, 126 Ky. 288, 103 S.W. 272, 11 L.R.A. (N.S.) 711 (1907); University of Louisville v. Hammock, 127 Ky. 564, 106 S.W. 219, 14 L.R.A. (N.S.) 784 (1907).

[12] 265 S.W. 2d 80 (Ky. 1954); Cammack, Moremen and Combs, JJ., dissenting.

[13] See Annot., 25 A.L.R. 2d 158 (1952).

[14] Sims, Milliken and Stewart, JJ., who were in the majority and are members of the present court, joined in the unanimous decision in the Roland case.

to take away the immunity of charitable institutions from tort actions would saddle them with ruinous insurance premiums. A substantial minority of the court dissented without opinion. Whether the minority thought the time had come to overrule the doctrine or to limit its scope in some way, perhaps by classifying a paying patient as a stranger to the charities, does not appear.

Then came the *Roland* case, where the Court in a unanimous opinion imposed liability on the defendant charity. The opinion, by Commissioner Stanley, emphasized the concurrence of three major factors in the case, each of which has been made the sole basis for exceptions to the application of charitable immunity in some other jurisdictions.[15] These factors or exceptions were: (1) the allegations were of corporate negligence in violating a statutory duty, (2) the property concerning which there was negligence was commercial property, the income from which was devoted to the charities, and (3) the injured person was a stranger to the charities. Also, in the course of the opinion the Court pointed to the availability of liability insurance to protect such institutions from liability for negligence, and recognized that in the beginning charities were of limited means, but now had grown to have large funds with which to carry on their activities. It is evident that in the *Roland* case the Court agreed that the time had come for a re-evaluation of charitable immunity. Such re-evaluation could either call for the complete reversal of the whole doctrine, or for the creation of exceptions limiting the scope of its application. Obviously, the Court utilized the latter approach by recognizing three exceptions and imposing liability on the charity where all three were present.

In a recent case,[16] the Kansas court found itself in a similar situation to that of the Kentucky Court in the *Roland* case. Previously Kansas had been characterized as a "complete immunity" jurisdiction,[17] but in holding a charitable hospital liable for the negligence of its employee in causing the death of a patient, that court for all practical purposes completely overruled the doctrine of charitable immunity. In so doing the court suggested liability insurance and, like the Kentucky Court in the *Roland* case, recognized that charities now have grown into big businesses capable of insuring themselves and thereby protecting their funds.

What then, is the effect of the recognition of exceptions to the application of the doctrine of charitable immunity and the reasoning in

[15] See note 8 supra.
[16] Noel v. Menninger Foundation, 175 Kan. 751, 267 P. 2d 934 (1954).
[17] See Annot., 25 A.L.R. 2d 157, 158 (1952).

the *Roland* case, upon the reasons for immunity the Court has asserted in previous cases? It appears that the reasons for the immunity have become hollow in the face of the exceptions to its application the court recognized in the *Roland* case. The Court had previously asserted immunity to protect the trust funds of a charity, but allowing a stranger to the charities to recover is just as much a dissipation of the trust funds as allowing a charity patient to recover.[18] In the past, the Court has denied recovery to a paying patient and even an employee of the charity on the grounds that this constitutes a dissipation of the trust funds.[19] It seems that an employee of a charity or a paying patient is, in most respects, as much a stranger to the charities as the plaintiff in the *Roland* case. Insurance coverage, suggested by the Court itself, will constitute a dissipation of the trust funds due to the payment of premiums. To allow a plaintiff to recover on the grounds that the activity engaged in by the charity is commercial in character, is nonetheless a dissipation of the trust funds.

The fact that the Court pointed to the availability of liability insurance and recognized that charitable institutions now have large funds with which to carry on their activities, also tends to show that a re-evaluation of the public policy behind charitable immunity has been made since the decision in *Forrest* v. *Red Cross Hospital,* where the Court rejected the idea of insurance on the grounds that it would saddle charitable institutions with ruinous premiums. Also, it cannot be assumed that the Court, on the facts of the *Roland* case alone, was suggesting liability insurance as a means to cover the liability imposed.

Lastly, had the policy of protecting the trust funds of a charity had any vitality at the time of the *Roland* case, it could have been reaffirmed by holding that the plaintiff impliedly waived the negligence of the charity; this being a reason for immunity the Court had asserted in previous cases. Therefore, it seems that the exceptions to the application of immunity and the reasoning of the Court in the *Roland* case have for all practical purposes eviscerated the reasons asserted for applying charitable immunity.

In conclusion, the result and reasoning in the *Roland* case is more in line with the modern trend of decision to either overrule the doctrine of charitable immunity or, by creating exceptions, to limit the scope of its application. The reasoning in the case tends to show that a re-evaluation of the public policy behind the whole doctrine of immunity has been made, and that in the future more liability will be imposed

[18] Cf. Mississippi Baptist Hospital v. Holmes, 55 So. 2d 142, 153 (1951).
[19] Emery v. Jewish Hospital Ass'n, 193 Ky. 400, 236 S.W. 577 (1921); Cook v. John N. Norton Memorial Infirmary, 180 Ky. 331, 202 S.W. 874 (1918).

on charitable institutions in Kentucky. So far as the decision places Kentucky among those states which adhere to some sort of partial liability, the result will create confusion as to what the law will be in the future, plus expensive litigation. Therefore, it appears that the reasons the Court has asserted for immunity have been repudiated by the exceptions to its application, and the better approach would seem to be a clear reversal of the doctrine of charitable immunity in Kentucky.

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