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Torts - Charitable Hospital Immunity - A Modified Doctrine Abrogated

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The case at bar likewise falls into this category. Here, the court took cognizance of the fact that

> Congress has recently enacted the Uniform Commercial Code, which specifically provides that the court may refuse to enforce a contract which it finds to be unconscionable at the time it was made. . . . The enactment of this section, which occurred subsequent to the contracts here in suit, does not mean that the common law of the District of Columbia was otherwise at the time of enactment, nor does it preclude the court from adopting a similar rule in the exercise of its powers to develop the common law for the District of Columbia.[36]

Thus, the true import of the instant case is readily ascertained by the language of the court. From this decision, it is evident that, even in the absence of section 2-302, the common law of the District of Columbia had the inherent means effectively to cope with the problem of unconscionable contracts.

In conclusion, although it is difficult to predict any specific trend from either *Walker* or those cases which have considered section 2-302, it appears that its application will not be limited merely to standardized form contracts or to contracts for the sale of goods. In the past, both judges and chancellors have granted relief from the oppressive features of grossly unfair contracts, and there is no logical reason why they should not continue to do so. The presence of section 2-302 will serve to provide additional impetus in this regard, and thus aid the courts in dealing with this problem. It is submitted, however, that though an effective tool has been placed at the court's disposal, caution should be exercised in its use. Contracts should be held intact where the intent of the parties clearly manifests a desire to enter into such an agreement. To declare an entire contract unenforceable due to one insignificant unconscionable clause is certainly as unjust and inequitable as permitting enforceability of that single clause.

Peter Apostal

[36] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

TORTS–CHARITABLE HOSPITAL IMMUNITY– A MODIFIED DOCTRINE ABROGATED

The plaintiff, Clarence Lee Adkins, brought action against the defendant hospital to recover damages for personal injuries inflicted upon him while he was a paying patient[1] in the hospital. The injuries sustained consisted of severe burns resulting from plaintiff's fall against a hot,

[1] Affidavits were presented to the court stating that the defendant hospital refused to admit the plaintiff until assurance was given that the bill for his care would be paid.

uncovered, steam radiator while being given a bath by a hospital orderly. Negligence was alleged against the hospital for allowing a radiator to be in such a dangerous condition and for being negligent in its employment of an incompetent orderly.[2] The circuit court[3] entered summary judgment for the defendant as a matter of law, ruling that a charitable hospital was not liable in tort to its patients. The state Supreme Court of Appeals reversed the lower court and held that such tort immunity no longer existed. *Adkins v. St. Francis Hospital of Charleston West Virginia*, 143 S.E.2d 154 (1965).

Appeal was granted by the Supreme Court of Appeals in order to reexamine and reconsider the doctrine of charitable immunity in relation to nonprofit, non-stock hospital corporations. In reversing the ruling of the lower court, and in remanding the case for a determination of its negligence aspects, this court for the first time completely abrogated the immunity doctrine.

Tort immunity of charitable institutions was originally recognized in the United States by Massachusetts in 1876[4] and again, nine years later, by a Maryland court.[5] Both of these decisions were in apparent disregard of the fact that the English cases which created their precedent[6] had been repudiated.[7] The promulgation of the immunity rule from this dubious beginning has been one of change, variation and modification. Justice

[2] Plaintiff had entered the hospital for treatment of a paralysis which had temporarily destroyed his eyesight and had impaired the use of his left arm and leg. Due to this condition he was unable to remove himself from the radiator, and the orderly, instead of doing so, left the plaintiff in this perilous situation while he went to obtain assistance. The orderly had recently been released from the penitentiary where he had served a sentence on a felony conviction.

[3] Action was instituted in the Court of Common Pleas on Kanawha County wherein the defendant, after answering the complaint, filed a motion to dismiss. Prior to the taking of any action upon this motion, the case, upon the motion of the parties, was transferred to the Circuit Court of Kanawha County.

[4] McDonald v. Mass. Gen. Hosp., 120 Mass. 432 (1876). The court held that the funds of a charitable hospital could not be diminished to satisfy the claim of a charity patient resulting from the negligence of a resident surgeon if due care had been exercised in his selection.

[5] Perry v. House of Refuge, 63 Md. 20 (1884). A Rhode Island court had previously refused to apply the immunity rule in a hospital case. See Glavin v. Rhode Island Hosp., 12 R.I. 411 (1879).

[6] Duncan v. Findlater, 6 Clark & F. 894, 7 Eng. Rep. 934 (1839); Heriot's Hosp. v. Ross, 12 Clark & F. 507, 8 Eng. Rep. 1508 (1846); Holliday v. St. Leonard's, 11 C.B. (N.S.) 192, 142 Eng. Rep. 769 (1861). Though these cases did not involve a charitable institution's tort liability, they did set forth in dictum the principle that trust funds could not be diverted to pay damages as this would thwart the objective of the trust authors.

[7] Mersey Docks & Harbour Bd. v. Gibbs, 11 H.L.C. 686, 11 Eng. Rep. 1500 (1866); Foreman v. Mayor of Canterbury, 6 Q.B. 214 (1871).

Rutledge, in deciding a District of Columbia case in 1942, a case which has been extensively quoted in many recent opinions,[8] observed:

> [The] "rule" has not held in the test of time and decision. Judged by results, it has been devoured in "exceptions." Debate has gone on constantly, not so much as to whether, but concerning how far it should be "modified," with ever widening modification.[9]

The purpose of this note is primarily to emphasize the trend towards a recognition of charitable hospital liability as distinguished from its immunity in the past. Its secondary objective is to point out that the reasons for which immunity was originally granted are no longer prevalent. The decision in *Adkins* overrules the doctrine by considering the future permanent good of the public, rather than that of a particular interest,[10] and by overcoming the traditional arguments favoring immunity.

This doctrine of charitable immunity was presented to the West Virginia courts for the first time in *Roberts v. Ohio Valley General Hospital.*[11] The court decided that a charitable hospital should not be held liable for the negligence of its employees. It reasoned that, in order to foster and preserve charitable institutions, the law should deal with them more leniently than with institutions conducted solely for private gain.[12] However, the court did not adopt a total immunity policy. Instead, it provided for liability to be imposed whenever the hospital was negligent in the selection and retention of its employees.[13]

Immunity, in this modified form, was ratified in a subsequent holding by the court with the additional exception that the possession of liability insurance by a charitable hospital had no effect on immunitization.[14] Reiteration and adoption followed immediately, with the court placing still another qualification on the immunity rule by allowing a visitor to, or an invitee of a charitable hospital to maintain an action against it if an injury was caused by an employee's negligence.[15] The result of these decisions in West Virginia was to leave the patient as the only person who could not recover for injuries sustained through the sole negligence

[8] Granger v. Deaconess Hospital of Grand Forks, 138 N.W.2d 443, 445 (N. Dak. 1965).

[9] President & Directors of Georgetown College v. Huges, 130 F.2d 810, 817 (D.C. Cir. 1942).

[10] 143 S.E.2d 154, 163 (1965).

[11] 98 W. Va. 476, 127 S.E. 318 (1925).

[12] *Id.* at 479, 127 S.E. at 319.

[13] *Id.* at 480, 127 S.E. at 320.

[14] Fisher v. Ohio Valley Gen. Hosp. Ass'n., 137 W. Va. 723, 73 S.E.2d 667 (1952); Meade v. St. Francis Hosp., 137 W. Va. 834, 74 S.E.2d 405 (1953).

[15] Koehler v. Ohio Valley Gen. Hosp. Ass'n., 137 W. Va. 764, 776, 73 S.E.2d 673, 679 (1952).

of the hospital's employees. This was the standing of the law when the *Adkins* case was considered.

Application of the immunity doctrine throughout the country has been similar to its history in West Virginia. Five states at present retain full charitable immunity;[16] twenty-two states have completely reflected the doctrine;[17] nineteen states profess a modified or qualified form of immunity;[18] and, four have rendered no decision.[19] Usually, those jurisdictions which modify the doctrine, either allow an action against a charity in cases where injury results from the failure to exercise due care in its employment practices,[20] or where injury occurs to someone other than a patient of the hospital (such as a stranger, invitee or employee).[21] Another

[16] Arkansas, Maine, Massachusetts, Missouri and South Carolina. See generally, Fisch, *Charitable Liability for Tort*, 10 VILL. L. REV. 71, 72 (1964), wherein the writer states that six jurisdictions stubbornly adhere to complete immunity. However, subsequent to the article's publication, one of the states abrogated the doctrine. Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 208 A.2d 193 (1965). It should be noted that by a direct action statute, Arkansas permits suit by the injured party directly against the insurers of the charitable institution, and requires that the charitable nature of the insured may not be interposed by the insurer. ARK. STAT. ANN. § 66–3240 (Supp. 1963). However, a charitable institution is not required to carry liability insurance. Ramsey v. American Auto Insur., 356 S.W.2d 236 (Ark. 1962).

[17] Alaska, Arizona, California, Delaware, Florida, Idaho, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Utah, Vermont and Wisconsin. See generally, Fisch, *supra* note 16 at 74. See also, Note, 19 U. PITT. L. REV. 119, n. 19 (1957); Annot., 25 A.L.R. 2d 29 (1952).

[18] Alabama, Colorado, Connecticut, Georgia, Illinois, Indiana, Louisiana, Maryland, Nebraska, New Jersey, North Carolina, Ohio, Rhode Island, Tennessee, Texas, Virginia, Washington, West Virginia (prior to the *Adkins* case) and Wyoming. See generally, Fisch, *supra* note 16.

[19] Hawaii, Montana, New Mexico and South Dakota. However, liability has been found by a Hawaii court where a tort was committed on charity-owned property that was used for business purposes. Lyhi v. Phoenix Lodge, 31 Haw. 740 (1931). Also, a federal court, sitting in Montana, has ruled that a charitable hospital is not immune from liability for the negligence of its employees. Howard v. Sisters of Charity of Leavenworth, 193 F.Supp. 191 (D.C. Mont. 1961). Another federal court, sitting in New Mexico, has ruled that charitable hospitals are not liable where they exercised due care in the selection of their employees. Deming Ladies Hosp. Ass'n. v. Price, 276 Fed. 669 (8th Cir. 1921).

[20] Roberts v. Ohio Valley Gen. Hosp., *supra* note 9; Cashman v. Meriden Hosp., 17 Conn. 585, 169 Atl. 915 (1933); President & Directors of Georgetown College v. Huges, *supra* note 7; Burgess v. James, 73 Ga. App. 857, 38 S.E.2d 637 (1946); St. Vincent's Hosp. v. Stine, 195 Ind. 350, 144 N.E. 537 (1924); Jordan v. Touro Infirmary, 123 So. 726 (La. App. 1922); Baptist Hosp. v. Moore, 156 Miss. 676, 126 So. 465 (1930); Hoke v. Glen, 167 N.C. 594, 83 S.E. 807 (1914); Baptist Memorial Hosp., v. McTighe, 303 S.W. 2d 446 (Tex. Civ. App. 1957); Bishop Randall Hosp. v. Hartley, 24 Wyo. 408, 160 Pac. 385 (1916).

[21] Koehler v. Ohio Valley Gen. Hosp. Assn., *supra* note 13; Cohen v. Gen. Hosp. Soc'y., 113 Conn. 188, 154 A. 435 (1931); Winona Technical Institute v. Stolte, 173 Ind. 39, 89 N.E. 393 (1909); Bougon v. Volunteers of Am., 151 So. 797 (La. App. 1934);

modification has been to hold the charitable institution totally responsible for its negligence, but to either limit its financial liability,[22] or to exempt its charity assets from judgment.[23] With immunity thus being modified or eliminated, charitable immunity does not exist in total. What does exist is a modified immunity that is constantly including new areas of exemption and combining them with areas already excluded in other jurisdictions. No state has reverted to total immunity once it has recognized non-immunity.[24]

Justifications advanced in favor of the immunity doctrine reveal four fundamental theories: trust fund; non-applicability of *respondeat superior;* implied waiver; and public policy. The original and most popular argument pursued is the trust fund theory, expressing the view that the funds of a charity are held in trust for charitable purposes, and therefore, the courts should not permit any payments to be made from these funds to satisfy tort liability claims.[25] The basic arguments introduced to support this theory are that any such diversion of funds would substantially impair the usefulness of the charitable institution, thwart the donor's intent, discourage donations to the fund and cause funds to be used for purposes other than those for which the trust was created, thereby depleting the trust fund.[26]

Marble v. Nicholas Senn Hosp. Ass'n., 102 Neb. 343, 167 N.W. 208 (1918); Cowans v. North Carolina Baptist Hosp., 197 N.C. 41, 147 S.E. 672 (1929); Gable v. Salvation Army, 186 Okla. 687, 100 P.2d 244 (1940); Hospital of St. Vincent of Paul v. Thompson, 116 Va. 101, 81 S.E. 13 (1914); Heckman v. Sisters of Charity, 5 Wash. 2d 699, 106 P.2d 593 (1940).

[22] N.J. STAT. ANN. tit. 2A, §§ 53A-7, 8 (1959), wherein the legislature imposed a $10,000 limitation on damages awardable to a patient, but no limit extends to actions brought by strangers or employees.

[23] Michard v. Myron Stratten Home, 144 Colo. 251, 355 P.2d 1078 (1960); St. Lukes Hosp. Ass'n. v. Long, 125 Colo. 25, 240 P.2d 917 (1952), wherein property of funds dedicated to charitable use are judgment proof; McLead v. St. Thomas Hosp., 170 Tenn. 423, 95 S.W.2d 917 (1936), wherein execution under judgment may be had only against property not directly and solely designated for charitable use; Moore v. Moyle, 405 Ill. 55, 92 N.E.2d 81 (1950), holding that no execution is allowed on trust fund assets; however, liability insurance coverage will allow recovery. It should be noted that the Illinois court, in Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253 (1965), overruled its prior decision in Moore v. Moyle, *supra,* and held that a hospital could not limit its liability as a charitable corporation to the amount of its liability insurance.

[24] Adkins v. St. Francis Hosp., 143 S.E.2d 154, 161 (1965).

[25] McDonald v. Mass. Gen. Hosp., *supra* note 4; Perry v. House of Refuge, *supra* note 5. As previously mentioned, these two cases introduced charitable immunity into this country. In deciding these cases, the courts primarily relied upon a trust fund presentation.

[26] Park v. Northwestern University, 218 Ill. 381, 75 N.E. 991 (1905); Webb v. Vought, 127 Kan. 799, 275 Pac. 270 (1929); Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910); Downes v. Harper Hosp., 101 Mich. 555, 60 N.W. 42 (1894).

Judge Caplan, in his opinion in the *Adkins* case, found this theory to be wholly without merit and in rejecting it he stated:

> The many qualifications of the immunity rule [in West Virginia and in other states] serve to emphasize the complete fallacy of the trust fund theory. If, thereunder, a charitable hospital is liable and must expend funds for the wrongful injury to a patient for the negligent employment and retention of employees; if, thereunder, such entity is liable for the negligent injury of a stranger or invitee; why, then, under that theory, should it not be liable to a patient who, through no fault of his own, was injured by the negligent conduct of an employee? If the fund is liable in the first two instances then certainly it should be in the last.[27]

Not only is the application of this theory incongruous, its fundamental propositions cannot be supported. Today, charity is a big business, where both the donor and the donee (who administers the charity) take the form of a corporation. Such large scale operations incur salaries, costs and other expenses similar to business generally.[28] The *Adkins* decision further points out that the charitable aspect of hospitals is diminishing. Operating funds for a hospital are in part obtained through contributions, but the major portion of its expenses are covered by charges made for the care and treatment of paying patients, whether the patient directly pays the charges or indirectly pays them through hospitalization insurance premiums. Hospitals perform a necessary service and expect to be justly compensated.[29]

Today, the general exterior appearance of hospitals resemble the sky-scraping steel and glass structures of giant business corporations. Internally, they are equipped with machines and instruments often superior in inventive achievement to those of industry. Personnel is at the highest level of training. The modern hospital operates on a businesslike basis in the conduction of its affairs; and, in that stature, it must be on the same footing as other corporations with regard to their obligations arising from the torts of their servants.[30] If depletion of trust funds will impair the usefulness of the charity, so will depletion of industry's capital impair the usefulness of a company.

It has also been argued that donors, objecting to the use of their contributions to pay tort claims, might be discouraged from making future gifts.[31] However, there is not the slightest indication that donations are

[27] *Supra* note 24 at 143 S.E.2d at 160. *Accord,* Bruce v. Y.M.C.A., 51 Neb. 372, 386, 277 Pac. 798, 802 (1929): "If a trust fund is sacred for the reason generally given, why is not it sacred in every kind of case?"

[28] Parker v. Port Huron Hosp., 361 Mich. 1, 24, 105 N.W.2d 1, 13 (1960).

[29] *Supra* note 24, at 158. See also *supra* note 1, where plaintiff had difficulty gaining admittance until the hospital was assured of receiving compensation.

[30] *Id.* at 159.

[31] *Supra* notes 4, 6 and 25.

discouraged or that charities are handicapped in states where immunity is denied.[32] Nor is there evidence that deterrence of donations has been greater in states where immunity has been modified. Charities seem to survive and increase regardless of the liability policy.[33] In point are the donations of the Ford Foundation to over 5,100 institutions and organizations, totaling $1,900,000,000 since 1950, as of 1963.[34] Its recipients include charitable organizations located in states which do not recognize charitable immunity.[35] The Rockefeller Foundation grants[36] are another example of donations continuing to be made to charities located in liability states.

Another justification presented for recognition of immunity is the theory that *respondeat superior* does not apply to charitable hospitals. Under the general rule, the law imposes liability upon an employer for the tortious acts of his employees which occur within the scope of their employment because the employees are engaged in making a profit for the employer. Since a charity does not engage in profit making practices, liability for acts of employees does not exist.[37] The court's rejection of this theory in *Adkins* was based on the position of charitable hospitals today, as previously discussed.

Respondeat superior more and more has made trusts, as it has private corporations, responsible for wrongs done by their inferior functionaries.[38] An insistence upon the doctrine and damages for negligent injury serves a two-fold purpose, for it both assures payment of an obligation to the person injured, and gives warning that justice and the law demand the exercise of care.[39] Evidently the court felt no need to investigate the basic assumption of the doctrine that *respondeat superior* is a function of profit rather than a derivation of the right to direct, control and select the employee.[40]

The third justification for allowing immunity is the theory of implied waiver. Under this line of reasoning, a person, by accepting the benefits of the charity, impliedly agrees not to hold the charity liable for its acts.[41]

[32] Flagiello v. The Pennsylvania Hosp., 417 Pa. 486, 510, 208 A.2d 193, 205 (1965).

[33] President & Directors of Georgetown College v. Huges, *supra* note 9 at 823.

[34] FORD FOUNDATION, 1963 ANNUAL REPORT. [35] *Id.* at 161–69.

[36] FORD FOUNDATION, 1961 ANNUAL REPORT 61.

[37] Hearns v. Waterbury Hosp.., 66 Conn. 98, 33 Atl. 595 (1895); Taylor v. Protestant Hosp. Ass'n., 85 Ohio St. 90, 96 N.E. 1089 (1911); Fire Ins. Patrol v. Boyd, 120 Pa. 624, 15 Atl. 553 (1888).

[38] *Supra* note 24 at 160–61. [39] *Ibid.*

[40] Fisch, *supra* note 17 at 88.

[41] Bruce v. Y.M.C.A., *supra* note 27; Wilcox v. Idaho Latter Day Saint Hosp., 59 Idaho 350, 82 P.2d 849 (1938); See generally, Annot., 25 A.L.R. 2d 29, 68–69.

The logical rebuttal to this theory would be an inquiry concerning the giving of such assent of waiver by a person admitted to the hospital while unconscious, or that given by an infant or by the insane.[42] And, no waiver can be implied to a patient who does not accept the benefits of the charity, but instead pays for them.[43]

Ratification of an immunity doctrine has also been sought on the basis of a general public policy theory.[44] As viewed by the court in deciding the *Adkins* case, public policy denotes a question of public rights against the rights of an individual. The court stated:

> [It] appears to convey the thought that it is more important to provide the public with the best medical care at the lowest possible cost than it is to provide indemnification to the individual who may have been tortiously injured.[45]

This argument is contrary to the principles of justice recognized today by our courts. These principles demand that the right of an individual to his day in court, when he is injured by the negligent acts of another, be upheld.[46]

Granting of tort immunity to charitable hospitals can no longer be justified on the basis of past decisions in light of their modern business policies and tendencies. It is thereby concluded that future decisions will follow the pattern continued by *Adkins*. With other recent cases[47] also advocating abrogation of charitable immunity, and with a discernible trend in the related fields of governmental immunity and parental immunity,[48] liability for wrong done will remain the rule and immunity the exception.

Donald Glassberg

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

[43] Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915).

[44] Roberts v. Ohio Valley General Hosp., *supra* notes 11 and 12; Jensen v. Maine Eye & Ear Infirmary, *supra* note 26.

[45] *Supra* note 24 at 161. [46] *Ibid.*

[47] Darling v. Charleston Community Memorial Hosp., *supra* note 23; Flagiello v. Pennsylvania Hosp., *supra* note 32.

[48] See generally, Note, 15 DE PAUL L. REV. 229 (1965), wherein the writer discusses the case of Termano v. Termano, 1 Ohio App. 2d 504, 205 N.E.2d 586 (1965), and concludes that parental liability will eventually replace the parental immunity doctrine.