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case of "watered" stock, the fraud theory is still followed by the majority, but the statutory obligation doctrine is attracting increasing attention. Although an individual creditor may still bring a bill in equity against any of the unpaid shareholders in behalf of all creditors similarly situated, the accepted practice in Washington today is to have a receiver appointed to bring suit for each stockholder's proportionate share of the corporate indebtedness.

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TORT LIABILITY OF CHARITABLE CORPORATIONS

The protective and friendly attitude with which the courts and legislatures have viewed charities is reflected in the rule of non-liability for torts committed by such eleemosynary institutions.[1] The rationales for this exemption may be briefly classified into five main groups. The first and most all inclusive is the trust fund doctrine based on an early English case and exemplified by the Massachusetts decisions.[2] Under this theory a charitable institution can not be held liable for the negligence of servants and employees or administrative officials.[3] Nor is the court concerned with the status of the plaintiff as beneficiary, employee or stranger.[4] The trust fund can not be diverted from the charitable purposes for which it was intended to compensate for one injured in the execution of these duties.

The non-applicability of the rule of *respondeat superior* is also suggested as a basis for the freedom from liability.[5] The public policy behind the usual application of the rule is felt to be lacking in this situation since the master does not profit by the employment of the servant. An interesting variation of this rule is suggested by the New York court which held that the master servant relationship, itself, did not exist between the hospital and its doctors, internes, or nurses.[6]

[1] This same attitude is reflected in the tax statute granting exemptions to charities. WASH. LAWS 1939, c. 206 § 8; REM. REV. STAT. (Supp. 1939) § 1111. Also see the Unemployment Compensation Act, WASH. LAWS 1937, c. 162 § 19; REM. REV. STAT. (Supp. 1939) § 9908-119, and Virginia Mason Hospital Association v. Larson, 109 Wash. Dec. 323, 114 P. (2d) 976 (1941), interpreting it.

[2] Heriot's Hospital v. Ross was cited by the Massachusetts court as authority for granting immunity. McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529 (1876). The true interpretation of this early English case has been the basis of much discussion. See Tucker v. Mobile Infirmary Ass'n., 191 Ala. 572, 68 So. 4 (1915).

[3] Kidd v. Massachusetts Homeopathic Hospital, 237 Mass. 500, 130 N. E. 55 (1921); Rosen v. Peter Bent Brigham Hospital, 235 Mass. 66, 126 N. E. 392 (1920).

[4] Emery v. Jewish Hospital Ass'n., 193 Ky. 400, 236 S. W. 577 (1921) (injury to servant); Loeffler v. Trustees of Sheppard & Enoch Pratt Hospital, 130 Md. 265, 100 Atl. 301 (1917) (injury to stranger); Reavey v. Guild of St. Agnes, 248 Mass. 316, 187 N. E. 557 (1933) (injury to servant); Foley v. Wesson Memorial Hospital, 246 Mass. 363, 141 N. E. 113 (1923) (stranger injured by negligence of ambulance driver).

[5] Southern Methodist Hospital & Sanatorium v. Wilson, 45 Ariz. 507, 46 P. (2d) 118 (1935); Hearns v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 595 (1895).

[6] Phillips v. Buffalo General Hospital, 239 N. Y. 188, 146 N. E. 199 (1924); In Matter of Bernstein v. Beth Israel Hospital, 236 N. Y. 268, 140 N. E. 694 (1923).

A somewhat less rigid approach is the doctrine of waiver,[7] *i.e.*, that a patient, student, or other beneficiary by accepting the services of the institution impliedly waives any right to hold the charity liable for torts committed against him.[8] Jurisdictions following this view generally permit strangers and employees to recover since there is no conduct from which a contract to release the institution from liability can be implied.

The analogy to a governmental agency and the contention that a governmental function is being performed has also been advanced.[9] Finally the broad plea of public policy has found favor in many jurisdictions;[10] and even in the preceding cases it is actually the basis in most jurisdictions for granting immunity to charitable corporations. The need for encouraging gifts to charity, the fear that the enforcing of tort liability will discourage bequests, and the feeling that the public is benefitted by protecting the funds from depletion through numerous lawsuits are a few of the reasons behind such a position.

Modernly the tendency has been away from the stringent rule of the trust fund doctrine. In the majority of states, strangers[11] and employees[12] have been able to recover for torts committed against them. Even as to the so-called beneficiary of the charity a more moderate view has also been adopted in many jurisdictions. A charitable institution is liable for its negligence in the selection and retention of its servants but not for the negligence of those servants prudently selected.[13] In California this doctrine has been extended to even a

[7] Powers v. Massachusetts Homeopathic Hospital, 109 Fed. 284 (C. C. A. 1st, 1901); Stonaker v. Big Sisters Hospital, 116 Cal. App. 375, 2 P. (2d) 520 (1931) (this case has been overruled in effect by a later case—see note 24 *infra);* Adams v. University Hospital, 122 Mo. 675, 99 S. W. 453 (1907).

[8] The fact that the patient pays for his service does not seem important, as the court continues to treat him as a recipient of the benefits of the charity. Stoner v. Big Sisters Hospital, *supra* note 7; Barr v. Brooklyn Children's Aid, Soc., 190 N. Y. Supp. 296 (1921).

[9] Schumacher v. Evangelical Deaconess Soc. of Wisconsin, 218 Wis. 169, 260 N. W. 476 (1935). The government agency argument has found little favor in more recent cases and has been advanced but seldom since the earlier decisions.

[10] Ettlinger v. Trustees of Randolph-Macon College, 41 F. (2d) 869 (C. C. A. 4th, 1929); Vermillion v. Woman's College of Due West, 104 S. C. 197, 88 S. E. 649 (1916) (public policy argument used to defeat recovery by stranger).

[11] 109 A. L. R. 1199; Hughes v. President and Directors of Georgetown College, 33 F. Supp. 867 (App. D. C., 1940) (stranger); Wright v. Salvation Army, 125 Neb. 216, 249 N. W. 549 (1933) (injury to stranger); Marble v. Nicholas Senn Hospital Ass'n. of Omaha, 102 Neb. 343, 167 N. W. 208 (1918) (stranger injured by negligence of x-ray operator); Van Ingen v. Jewish Hospital, 182 App. Div. 10, 169 N. Y. Supp. 412 (1918) (stranger injured by ambulance driver). *Contra*: Bachman v. Young Women's Christian Ass'n, 179 Wis. 178, 191 N. W. 751 (1923) and cases cited in note 4 *supra.*

[12] Cowans v. North Carolina Baptist Hospital, 197 N. C. 41, 147 S. E. 672 (1929); Gable v. Salvation Army 186 Okla. 687, 100 P. (2d) 244 (1940).

[13] 109 A. L. R. 1199, 1202. In the following cases recovery allowed: Georgia Baptist Hospital v. Smith, 37 Ga. App. 92, 139 S. E. 101 (1927); Old Folks' and Orphan Children's Home, Etc., v. Roberts, 91 Ind. App. 533, 171 N. E. 10 (1930); Taylor v. Flower Deaconess Home and Hospital, 104 Ohio St. 61, 135 N. E. 287 (1922). In Southern Methodist Hospital &

greater degree in that the burden of proof to establish due care in the selection has been placed upon the charity itself.[14]

In other jurisdictions the harshness of the rule of non-liability has been tempered by an interesting interpretation of the exemption. In *Vanderbilt University v. Henderson*,[15] a paying patient sued for damages caused by a negligent injury and asserted that the trust fund would not be depleted because of the existence of an insurance policy. The court admitted the rule of non-liability in that state but determined that it extended no further than the protection of the trust property. The decision continued:

> "This, we think, is a recognition that a charitable institution is liable for a tort of its agent and may be pursued to judgment; but that the institution's trust property cannot be taken to satisfy such judgment; and that where such institution has liability insurance, such insurance is not trust property of the institution and may be appropriated to the satisfaction of such judgment."

After judgment, however, (which was limited to the policy) the plaintiff discovered that the insurance was solely an indemnity contract and he was unable to collect. He petitioned for a rehearing to have the judgment extended to include the entire charity as such but the court refused on the ground of protecting the trust property. A similar rule was applied in the *Morton* case,[16] where the court took cognizance of the fact that a section was reserved exclusively for paying patients, and that the greater portion of the patients was not the recipient of charity. A judgment was entered to be satisfied exclusively by the income from the non-charitable sources.[17]

Another method of holding eleemosynary institutions liable is to distinguish between the type of torts committed. Thus even in Massachusetts a tort committed in the procurement of funds will subject the institution to damages. The court held that there was "a distinction between activities primarily commercial in character," and "activities carried on to accomplish directly the charitable purposes of the corporation," and this was true even though the profit from the commercial activities were used exclusively for charitable purposes.[18] In *Gamble v. Vanderbilt University*,[19] a similar rule was applied since the court felt that the activities resulting in the injury complained of

Sanatorium of Tucson v. Watson, 51 Ariz. 424, 77 P. (2d) 458 (1938) recovery was denied because of insufficient proof of negligence.

[14] Lewis *et ux.* v. Young Men's Christian Ass'n., 206 Cal. 115, 273 Pac. 580 (1928); *contra*: Waddell v. Young Women's Christian Ass'n., 133 Ohio St. 601, 15 N. E. (2d) 140 (1938).

[15] 23 Tenn. App. 135, 127 S. W. (2d) 284 (1938).

[16] Morton v. Savannah, 148 Ga. 438, 96 S. E. 887 (1918).

[17] The case presents very clearly the distinction which the court draws between the source of the funds. A petition which merely alleged injury by a negligent servant, without alleging defendant's negligence in selection, was held not to be subject to demurrer as far as it affected funds derived from non-charitable patients; but it was demurrable as far as it attempted to subject the trust funds to the judgment.

[18] McKay v. Morgan Memorial Co-op Industries & Stores, Inc., 272 Mass. 121, 172 N. E. 68 (1930); *Cf.* Reavey v. Guild of St. Agnes, 284 Mass. 300, 187 N. E. 557 (1933).

[19] 138 Tenn. 616, 200 S. W. 510 (1918) (plaintiff was injured by a defective elevator in an office building owned by the defendant.)

were too remote from the charitable purposes.

In some jurisdictions charitable corporations are held liable under general statutory provisions. Thus in *Howard v. Children's Hospital of the Protestant Episcopal Church*,[20] the hospital was held liable for wrongful possession of a corpse, although the defendant argued that it should be exempt from the application of the statute imposing liability. Likewise in *McInerny v. St. Luke's Hospital Ass'n of Duluth*,[21] an employee was injured as a result of an unguarded mangle. The plaintiff argued that the defendant was liable because of failing to comply with the statutory requirement of a safety device for this type of machine. The court sustained this interpretation refusing to place charities above the law. Some jurisdictions, however, interpret the statutes as not applicable to charitable institutions.[22]

A growing minority of jurisdictions have completely repudiated the doctrine of non-liability and apply the rule of *respondeat superior* with equal vigor against charitable and business corporations.[23] Recently California has adopted this position after a series of cases tending toward this liberal approach.[24] New York has also adopted this view but in this connection it is to be remembered that that jurisdiction does not consider doctors, nurses, and others similarly situated, as servants of the hospital, thus modifying to a great degree the effect of the decision.[25] The reasons advanced for destroying the immunity are generally based upon considerations of public policy, the feeling that it is unjust to inflict the whole burden of the negligence upon the injured person or his family.[26] The fact that most charities, today, are non-profit rather than charitable,[27] the belief that liability will improve the degree of care exercised, and the illogic of the reasons for allowing the immunity[28] are other factors noted by the courts.

In Washington, the court has had several opportunities to pass

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[20] 37 Ohio App. 144, 174 N. E. 166 (1930).

[21] 122 Minn. 10, 141 N. W. 837 (1913).

[22] Zoulalian v. New England Sanatorium & Benevolent Ass'n., 230 Mass. 102, 119 N. E. 686 (1918).

[23] Tucker v. Mobile Infirmary Ass'n. 191 Ala. 572, 68 So. 4 (1915); Cohen v. General Hospital Soc., 113 Conn. 188, 154 Atl. 435 (1931); Geiger v. Simpson Methodist-Episcopal Church, 174 Minn. 389, 219 N. W. 463 (1928); Mullinger v. Evangelischer Diakonniessenverein of Minnesota Dist. of German Evangelical Synod of N. A., 144 Minn. 392, 175 N. W. 699 (1920); Welch v. Frisbie Memorial Hospital (N. H.) 9 A. (2d) 761 (1939); Sisters of the Sorrowful Mother v. Zeidler, 183 Okla. 454, 82 P. (2d) 996 (1938). See also Sessions v. Thomas D. Dee Memorial Hospital Ass'n., 94 Utah 460, 78 P. (2d) 645 (1938); Glavin v. Rhode Island Hospital, 12 R. I. 411, 43 Am. Rep. 675 (1879) committed Rhode Island to this minority position. However, the legislature by express statute has now again exempted charitable institutions from liability.

[24] Silva v. Providence Hospital of Oakland, 14 Calif. (2d) 762, 97 P. (2d) 798 (1939), and cases cited therein tracing the history of the exemption in California.

[25] Sheehan v. North Country Community Hospital, 273 N. Y. 163, 7 N. E. (2d) 28 (1937).

[26] Mulliner v. Evangelischer Diakonniessenverein of Minnesota Dist. of German Evangelical Synod of N. A.; Cohen v. General Hospital Soc. of Conn., both *supra* note 23.

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

[28] Mulliner v. Evangelischer Diakonniessenverein of Minnesota Dist. of German Evangelical Synod of N. A., *supra* note 23; Sheehan v. North Country Community Hospital, 273 N. Y. 163, 7 N. E. (2d) 28 (1937).

upon the tort liability of charitable institutions. In the first case, *Richardson v. Carbon Hill Coal Co.*,[29] our court apparently adopted the majority rule as regards the rights of a beneficiary to sue. In that case it was determined that a charitable corporation was not liable for the negligence of its servants unless it was negligent in the selection of its employees. In the *Magnuson* case,[30] although our court discussed the various theories for immunity, it did not adopt any of them. It, however, did suggest that non-liability except for negligence in selection was desirable since it would tend to encourage the establishment of such charitable institutions—thus apparently using the broad general policy as the reason for the decision. In subsequent cases our court continued to reassert the doctrine[31] of liability only for lack of due care in the employment of servants.

An interesting situation was presented, however, in an action which arose from the negligent injury to an unemployed worker whom the Red Cross had hired at a small wage.[32] The question involved was the applicability of the Workmen's Compensation Act. The court found that charities were not covered by the provisions thereof since the usual profit from the employment was lacking, and the court again fell back upon its usual approach to the problem of charitable exemption.

In addition there have been two recent cases which clearly presented this question to our court. In *Hickman v. Sisters of Charity*,[33] a visitor at a nurses' graduation exercise was injured by a defect in the approach to the hospital. The defendant contended that it was a charitable institution and the plaintiff a recipient of its benefits. The court, however, rejected the argument, holding that the plaintiff, an invitee, was entitled to recover, following the majority view in other jurisdictions as to the right of a stranger to recover.

The rights of a paying patient were discussed in *Miller v. Sisters of St. Francis*,[34] in which our court adopted administrative negligence as a basis for liability. The case involved a nine-day-old baby whom the nurse had left on an adult bed near a radiator while she left the room. When she returned, the infant was found against the radiator and seriously burned. The court instead of denying recovery upon the theory of the negligence of the nurse in leaving the child unattended, placed the decision upon the lack of sufficient cribs, and thus it held:

> "A hospital, even though it be a charitable institution such as the one involved in this case, is liable for failure to furnish proper equipment if damages result from that failure. This is what is called administrative negligence, as distinct from failure to exercise due care in the selection of proper physicians and nurses."

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[29] 6 Wash. 52, 32 Pac. 1012 (1893); 10 Wash. 648, 39 Pac. 95 (1895).

[30] Magnuson v. Swedish Hospital, 99 Wash. 399, 169 Pac. 828 (1918).

[31] Miller v. Mohr, 198 Wash. 619, 89 P. (2d) 807 (1939); Bise v. St. Luke's Hospital, 181 Wash. 269, 43 P. (2d) 4 (1935); Tribble v. Missionary Sisters of the Sacred Heart, 137 Wash. 326, 242 Pac. 372 (1926); Wharton v. Warner, 75 Wash. 470, 135 Pac. 235 (1913). See also Note (1926) 1 WASH. L. REV. 282.

[32] Thurston County Chapter, American National Red Cross v. Dept. of Labor & Industries, 166 Wash. 488, 7 P. (2d) 577 (1932).

[33] 5 Wash. (2d) 699, 106 P. (2d) 593 (1940).

[34] 5 Wash. (2d) 204, 105 P. (2d) 32 (1940).

The possibility of classifying numerous situations as administrative negligence seems apparent and it is suggested that the case is itself indicative of a more liberal attitude than prior cases. The concurring opinion written by Justice Robinson favorably presents the arguments for the complete abandonment of the tort liability exception.

It is suggested that from a logical as well as a humanitarian approach the conclusion reached by the minority of jurisdictions is a more satisfactory solution to the problem. The logical fallacies in all of the rationales supporting the majority position have been pointed out in a number of cases.[35] However, the very fact that most jurisdictions recognize the propriety of strangers and servants recovering for a tortious injury seems to impair the validity of all the suggested rationales except the doctrine of implied waiver because the reasons advanced would operate as effectively against such persons as against the patients. The waiver theory also has been subjected to criticism on the ground that the waiver is entirely fictitious, particularly in the case of minors, insane persons, and patients who were unconscious at the time of their admission to the hospital.[36]

In addition, there are other considerations which seem to support the argument for liability: First, the widespread practice of such charitable institutions to carry insurance to cover tort liability[37]—while it is true the mere fact of insurance protection is no reason for enforcing liability,[38] yet it does serve to protect the trust fund from depletion and thus destroys the reason for granting the immunity: second, the business basis upon which most of these institutions are operated freeing them from dependency upon bequests or trusts for charitable purposes;[39] the economic development of these corporations into enterprises well able to withstand a lawsuit without disaster;[40] in addition the ignorance of the general public of the existence of the exemption and their belief that they will be entitled to recover for improper care;[41] and finally the injustice of forcing the individual to

[35] Tucker v. Mobile Infirmary Ass'n., 191 Ala. 572, 68 So. 4 (1915); Mulliner v. Evangelischer Diakonniessenverein of Minnesota Dist. of German Evangelical Synod of N. A., *supra* note 23.

[36] Phillips v. Buffalo General Hospital, 239 N. Y. 188, 146 N. E. 199 (1924), 3 SCOTT, TRUSTS (1939) § 402.

[37] The following cases discussed the effect of the existence of an insurance policy but recovery thereon was not allowed: Levy v. Superior Court, 74 Cal. Ap. 225, 239 Pac. 1100 (1925); Enman v. Trustees of Boston University, 270 Mass. 299, 170 N. E. 43 (1930); Greatrex v. Evangelical Deaconess Hospital, 261 Mich. 327, 246 N. W. 137 (1933); Herndon v. Massey, 217 N. C. 610, 8 S. E. (2d) 914 (1940). In the following cases, recovery was allowed because of the factor of insurance: O'Connor v. Boulder Colorado Sanitarium Ass'n., 105 Colo. 259, 96 P. (2d) 835 (1939); Vanderbilt University v. Henderson, 23 Tenn. Ap. 135, 127 S. W. (2d) 284 (1938). For a discussion of the effect of an insurance policy upon liability see Note (1940) 20 B. U. L. REV. 330.

[38] Levy v. Superior Court, 74 Cal. Ap. 171, 239 Pac. 1100 (1925).

[39] Modernly, there has been a tendency for the courts to examine into the financial structure of the institution, noting particularly the profits obtained by the operation of the hospital. Silva v. Providence Hospital of Oakland, 14 Calif. (2d) 762, 97 P. (2d) 798 (1940); England v. Hospital of Good Samaritan, 16 Calif. App. (2d) 640, 61 P. (2d) 48 (1936).

[40] Session v Thomas D. Dee Memorial Hospital, 94 Utah 460, 78 P. (2d) 645 (1938).

[41] England v. Hospital of Good Samaritan, *supra* note 39; McLeod v.

suffer the cost of the negligence of the corporation.[42]

The arguments against the destruction of this exception aside from those of public policy generally are based on the assertion that any other rule than immunity would subject such institutions to innumerable suits—many unfounded; that officials and servants would find it necessary to devote a large portion of their time defending lawsuits neglecting their ordinary duties; and finally that the funds would be needlessly depleted. The validity of these objections is subject to doubt. With the widespread use of insurance, the funds are adequately protected; while the expense of litigation and the difficulties in establishing liability will serve as a deterrent to the dissatisfied patient.[43]

Thus in the light of all these factors it would seem that the courts would do well to keep in mind Prof. Scott's suggestion that such institutions should be just before they are generous.[44]

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St. Thomas Hospital, 170 Tenn. 423, 95 S. W. (2d) 917 (1936).

[42] Mulliner v. Evangelischer Diakonniessenverein of Minnesota Dist. of German Evangelical Synod of N. A., *supra* note 23; for other reasons supporting the minority position see Note (1938) 38 COL. L. REV. 1485.

[43] The question as to the liability of the institution to a charity patient has apparently not been discussed directly by the case. On the basis of logic and fairness, it would seem that such a person should be equally entitled to recover. In this connection see Old Folk's & Orphan Children's Home v. Roberts, 91 Ind. App. 533, 171 N. E. 10 (1930), where an orphan was allowed to recover for the defendant's failure to employ competent servants.

[44] 3 SCOTT, TRUSTS (1939) § 402.