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Torts - Charitable Immunity - Liability for Negligence of Employees

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The clerical error involved in the instant case would seem to be a mistake of fact which caused involuntary payment. Under those circumstances the plaintiff would be permitted to recover in most jurisdictions unless refunds were expressly forbidden by statute. The cases cited by the majority in support of their decision do not stand for the proposition that a mistake of fact is a voluntary payment. Those decisions turned upon the negligence of the taxpayer[14] and a mistake of law.[15] Obviously the county was not entitled to the full amount of money paid. Even in Michigan the plaintiff would have been entitled to recover the excess if the court had construed the payment to be involuntary.[16]

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TORTS — CHARTIABLE IMMUNITY — LIABILITY FOR NEGLIGENCE OF EMPLOYEES. — Plaintiff, a paying patient instituted a suit against defendant nonprofit hospital for injuries sustained due to the negligence of defendant's employee in permitting the patient to fall from a hospital bed furnished by the defendant. The Ohio Supreme Court affirmed the lower court's overruling of defendant's demurrer and *held* that a nonprofit corporation which had for its purpose the maintenance and operation of a hospital may be liable for the torts of its servants under the doctrine of respondeat superior. *Avellone v. St. John's Hospital,* 135 N.E.2d 140 (Ohio 1956).

It is generally held that a charitable institution is liable for its torts,[1] but immunity is usually granted to such institutions for the torts of their employees.[2] Where third parties are involved an exception is sometimes made and the institution is then held liable for their employees' torts.[3] In certain jurisdictions liability of the institution is based on whether or not the patient is paying for the services;[4] other jurisdictions use the corporate negligence of the institution in the selection of their employees as the basis for liability.[5]

The rationale advanced in favor of immunity varies: (1) Some courts adopt the trust fund theory, which is that the object of the trust fund of the charity would become frustrated and ultimately destroyed if subjected to such liability;[6] (2) others argue that it would be against public policy not to allow immunity,[7] because gifts to a charitable institution should be encouraged, but to subject them to tort liability is to discourage potential donors,[8] furthermore,

14. See Bateson v. City of Detroit, 143 Mich. 582, 106 N.W. 1104 (1906).
15. See General Discount Corp. v. City of Detroit, 306 Mich. 458, 11 N.W.2d 203 (1943).
16. See Blanchard v. City of Detroit, 253 Mich. 491, 235 N.W. 230 (1931) ("If payment of a tax is involuntary, in absence of statutory provisions to the contrary, it may be recovered although there is no express statutory provision therefore.").

1. See 3 Scott, Trusts, § 402 (1939).
2. *Ibid.*
3. See, *e. g.*, Alabama Baptist Hospital Board v. Carter, 226 Ala. 109, 145 So. 443 (1933) (Wife of patient recovered for injuries sustained from falling on hospital stairs).
4. See, *e. g.*, Tucker v. Moblie Infirmary Ass'n., 196 Ala. 572, 68 So. 4 (1914).
5. See Fisher v. Ohio Valley Gen. Hospital Ass'n., 137 W. Va. 723, 73 S.E.2d 667 (1952) (Corporate negligence may also include the purchase of any faulty equipment or supplies by the institution).
6. See, *e. g.*, Morton v. Savannah Hospital, 148 Ga. 438, 96 S.E. 887 (1918); Greatrex v. Evangelical Deaconess Hospital, 261 Mich. 327, 246 N.W. 137 (1918).
7. See, *e .g.*, Southern Methodist University v. Clayton, 142 Tex. 179, 176 S.W.2d 749 (1943); Weston v. Hospital of St. Vincent, 131 Va. 587, 107 S.E. 785 (1921).
8. Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910).

any change in the immunity doctrine should come from the legislature and not the courts;[9] (3) one court has reasoned that charitable institutions derive no personal or private gain from the acts of thier servants and therefore they should not be subjected to liability for their acts;[10] (4) still other courts apply the implied waiver theory that the patient assumes the risk of the employees negligence, if reasonable care was used in the selection of the employees;[11] (5) Louisiana favors the use of the public function theory, arguing that such institutions are engaged in the performance of a public function, and therefore should be awarded the same priviledges as other governmental agencies.[12] It has also been held that attendants in charitable hospitals are not the servants of the hospital under the master servant rule, but are the servants of the patient while in his attendance.[13]

The minority ruling is that a charitable institution is answerable for the negligence of its employees and servants by the ordinary rules of agency, including the principles of respondeat superior.[14] It is apparent that this minority rule is becoming the modern trend.[15] The major reason for this transition is that charitable institutions are more financially solvent today than they were when the immunity doctrine was instituted;[16] thus stare decisis is not standing in the way of progress.

A logical result was reached by the Illinois Supreme Court,[17] holding that charitable institutions were liable for the torts of their employees, and that the judgment could not be collected from the trust fund, but must be levied on the profits. This decision could seemingly satisfy both the immunity and non immunity arguments by taking the "middle of the road" approach.

A case similar to the instant case has never been before the North Dakota courts, but in view of the Supreme Court's opinion in the case of *Rickbiel v. Grafton Deaconess Hospital*[18] it is suggested that they may follow the minority rule.[19]

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WILLS — REVOCATION — EFFECT OF CONTRACT FOR SALE OF PREVIOUSLY DEVISED REAL PROPERTY. — Decedent executed a will in which he made specific devises of real property to the defendants. Subsequently he executed a contract for deed of the devised property. A declaratory judgment action was brought by the executor to determine whether the devisees or the residuary legatees receive the proceeds of the contract for deed. In reversing the Dis-

9. Forrest v. Red Cross Hospital, 265 S.W.2d 80, 82 (Ky. 1954) (dictum); Smith v. Congregation of St. Rose, 265 Wis. 393, 61 N.W.2d 896, 898 (1954) (dictum).
10. See Morrison v. Henke, 165 Wis. 166, 160 N.W. 173 (1916).
11. St. Vincent's Hospital v. Stine, 195 Ind. 350, 144 N.E. 537, 540 (1924) (dictum); Williams v. Randolph Hospital, 237 N. C. 387, 75 S.E.2d 303, 305 (1953) (dictum).
12. See Jurjevic v. Hotel Dieu, 11 So.2d 632 (La. 1943).
13. See Basabo v. Salvation Army, 35 R. I. 22, 85 Atl. 120 (1912).
14. See, *e. g.*, Swigerd v. City of Ortonville, 246 Minn. 339, 75 N.W.2d 217 (1956); St. Paul Mercury Indem. Co. v. St. Joseph's Hospital, 212 Minn. 558, 4 N.W.2d 637 (1942); Foster v. Roman Catholic Diocese of Vermont, 116 Vt. 124, 70 A.2d 230 (1950).
15. See, *e. g.*, Noel v. Menninger Foundation, 175 Kan. 75, 267 P.2d 934 (1954); Pierce v. Yakima Valley Memorial Hospital Ass'n., 43 Wash.2d 162, 260 P.2d 765 (1953). (Since 1950 eight states have repudiated the immunity doctrine).
16. Hayes v. Presbyterian Hospital Ass'n., 241 Iowa 1269, 45 N.W.2d 151 (1950); Durney v. St. Francis Hospital, 46 Del. 350, 83 A.2d 753, 758 (1950).
17. Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950).
18. 74 N. D. 525, 23 N.W.2d 247 (1946).
19. *Id.* at 258, 259, 260.