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Protected Negligence--The Doctrine of Tort Immunity for Charities

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NOTES

PROTECTED NEGLIGENCE—THE DOCTRINE OF TORT IMMUNITY FOR CHARITIES

The doctrine of tort immunity for charities came into existence in South Carolina in 1914. In *Lindler v. Columbia Hosp.*[1] the plaintiff was severely burned when, upon return from surgery in an unconscious state, she was lain on scalding hot water bottles placed in her bed by an employee. Hot water bottles were used to prevent post operative shock. The court, en banc, in a case of novel impression in this state, held that in the absence of negligence in retention of employees by the hospital there could be no recovery. The court used public policy as its basis to deny recovery by the plaintiff.[2] Only two of the five justices voted with the majority; the other three justices voted to hold the hospital liable.[3] The doctrine announced was not new; it had been in existence in the United States since 1876. The doctrine, announced for the first time in Massachusetts,[4] began on a shaky foundation, and its presence in modern law may be attributed largely to the reluctance of courts to break with stare decisis which, for purposes of the doctrine, has become iron-rigid against change. The purpose of this note is to explore the doctrine from its inception to the present, the several theories for its imposition, its exceptions, its inconsistencies and other criticisms, and its state at present in South Carolina.

A. *History*

The doctrine was imported to the United States from England via the case of *McDonald v. Massachusetts Gen. Hosp.*,[5] in which the negligence of an intern resulted in the plaintiff's injury. The court refused to impose liability saying that to subject the trust funds of the charity, derived from the contributions of the hospital's benefactors, to payment of damages would be a misdirection of the trust funds from the charitable purpose.[6] The court relied on an English case, *Holliday v. St. Leonard*,[7] which relied on dicta from an earlier English case,

1. 98 S.C. 25, 81 S.E. 512 (1914).
2. *Ibid.*
3. *Ibid.*
4. McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432, 21 Am. Rep. 495 (1876).
5. *Ibid.*
6. *Ibid.*
7. 11 C.B. (N.S.) 192, 142 Eng. Rep. 769 (1861).

Duncan v. Findlater,[8] which had nothing to do with charities. Maryland, nine years after the Massachusetts decision, also used English precedent to support its announcement of the doctrine.[9] In *Perry v. House of Refuge*[10] the Maryland court relied upon dicta in an 1846 case, *Feoffees of Heriot's Hosp. v. Ross*,[11] to support its decision. *Feoffees* in turn also relied on *Duncan v. Findlater*.[12] The error committed by both the Massachusetts and Maryland courts was that the English precedents had all been overruled prior to their use by the two American courts. *Feoffees* and *Duncan* were overruled in 1866 by *Mersey Docks Trustees v. Gibbs*,[13] and *Holliday* was overruled in 1871 by *Foreman v. Mayor of Canterbury*.[14] Hence before the infant doctrine was born in the United States the English courts had found it unacceptable and had abandoned it. Like the English courts the Rhode Island court also found it unacceptable and rejected it in the early days,[15] but an apprehensive legislature subsequently gave Rhode Island the doctrine by statute,[16] one of only two such statutes in existence at present.[17]

Only four courts had specifically rejected this doctrine by 1942.[18] Even during this period, however, it is doubtful that a majority of American jurisdictions adopted it,[19] and at present it is the minority view.[20] In 1942 Justice Rutledge, in *President*

8. 6 Clark & Fin. 894, 7 Eng. Rep. 934 (1839).
9. Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495 (1885).
10. *Ibid.*
11. 12 Clark & Fin. 507, 8 Eng. Rep. 1508 (1846).
12. 6 Clark & Fin. 894, 7 Eng. Rep. 934 (1839).
13. 11 Eng. Rep. 1500 (1866).
14. 6 Q.B. 214 (1871).
15. Glavin v. Rhode Island Hosp., 12 R.I. 411, 34 Am. Rep. 675 (1879).
16. R.I. GEN. LAWS ANN. § 7-1-22 (1956).
17. KANS. GEN. STAT. ANN. § 17-1725.
18. Florida, Minnesota, New Hampshire and Utah. Horty, *The Status of the Doctrine of Charitable Immunity in Hospital Cases*, 25 OHIO ST. L.J. 343, 353-59 (1964).
19. *See* Fisch, *Charitable Liability for Tort*, 10 VILL. L. REV. 71 (1964).
20. RESUME OF THE LAW IN THE UNITED STATES BY JURISDICTION—"Third parties" refers to strangers, invitees, employees and any other which would not fit into the category of a beneficiary. Since a study of the area of immunity is primarily one of hospitals, "patient" is used to indicate a beneficiary, except in the instances where (1) the jurisdiction distinguishes between a paying patient and a non-paying patient and (2) in jurisdictions which distinguish between hospitals and other charities as to liability; in the first case "non-paying" or "charity patient" is used which

also denotes beneficiary, in the second case "beneficiary" is used. See Horty, *The Status of the Doctrine of Charitable Immunity in Hospital Cases,* 25 OHIO ST. L.J. 343, 353-59 (1964).

ALABAMA—Alabama Baptist Hosp. Bd. v. Carter, 226 Ala. 109, 145 So. 443 (1933) (third parties can recover); Tucker v. Mobile Infirmary, 191 Ala. 572, 68 So. 4 (1915) (paying patient can recover). No cases on non-paying patients.

ALASKA—Moats v. Sisters of Charity, 13 Alaska 546 (1952) (no immunity).

ARIZONA—Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951) (no immunity).

ARKANSAS—ARK. STAT. ANN. § 66-3240 (Supp. 1961) (direct action against insurer).

CALIFORNIA—Molloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951) (no immunity).

COLORADO—St. Lukes Hosp. Ass'n v. Long, 125 Colo. 25, 240 P.2d 917 (1952) (no immunity, but recovery can come from only assets not devoted to charitable use).

CONNECTICUT—Cashman v. Meriden Hosp., 117 Conn. 585, 169 Atl. 915 (1933) (patients cannot recover); Cohen v. General Hosp. Soc'y, 113 Conn. 188, 154 Atl. 435 (1931) (third persons can recover).

DELEWARE—Durney v. St. Francis Hosp., 46 Del. 350, 83 A.2d 753 (1951) (no immunity).

DISTRICT OF COLUMBIA—President & Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942) (no immunity); President & Directors of Georgetown College v. Heimbach, 251 F. Supp. 614 (D.D.C. 1966).

FLORIDA—Wilson v. Lee Memorial Hosp., 65 So. 2d 40 (Fla. 1953) (no immunity).

GEORGIA—Cox v. De Jarnette, 104 Ga. App. 664, 123 S.E.2d 16 (1961) (no immunity to the extent the charity has liability insurance, if it does have insurance).

HAWAII—No cases.

IDAHO—Bell v. Presbytery of Boise, 421 P.2d 745 (Idaho 1966) (no immunity).

ILLINOIS—Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 353 (1965) (no immunity).

INDIANA—St. Vincent's Hosp. v. Stine, 195 Ind. 350, 144 N.E. 537 (1924) (patients cannot recover); Winona Technical Institute v. Stolte, 173 Ind. 39, 89 N.E. 393 (1909) (no immunity as to third persons).

IOWA—Haynes v. Presbyterian Hosp. Ass'n, 241 Iowa 1269, 45 N.W.2d 151 (1950) (no immunity).

KANSAS—KANS. GEN. STAT. ANN. § 17-1725 (immunity by statute) was held unconstitutional by Neely v. St. Francis Hosp., 192 Kan. 716, 391 P.2d 155 (1964), therefore reestablishing liability.

KENTUCKY—Millikin v. Jewish Hosp. Ass'n, 348 S.W.2d 930 (Ky. Ct. App. 1961) (no immunity).

LOUISIANA—LA. REV. STAT. ANN. § 22:655 (direct action against insurer).

MAINE—Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910) (immunity as to patients). No cases as to third parties.

MARYLAND—MD. ANN. CODE art. 48A § 480 (1957) (direct action against the insurer).

MASSACHUSETTS—McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432, 21 Am. Rep. 495 (1876) (immunity to all).

MICHIGAN—Parker v. Port Huron Hosp., 361 Mich. 1, 105 N.W.2d 1 (1960) (no immunity).

MINNESOTA—Mulliner v. Evangelischer Diakonniessenverein, 144 Minn. 392, 175 N.W. 699 (1920) (no immunity).

MISSISSIPPI—Mississippi Baptist Hosp. v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951) (no immunity).

MISSOURI—Dille v. St. Luke's Hosp., 355 Mo. App. 436, 196 S.W.2d 615 (1946) (immunity to all).

MONTANA—Howard v. Sisters of Charity, 193 F. Supp. 191 (D. Mont. 1961) (no immunity). No state court cases.

NEBRASKA—Myers v. Drozda, 180 Neb. 183, 141 N.W.2d 852 (1966) (no immunity).

NEVADA—NEV. REV. STAT. ANN. § 41.480 (1961) (no immunity by statute).

NEW HAMPSHIRE—Welch v. Frisbie Memorial Hosp., 90 N.H. 337, 9 A.2d 761 (1939) (no immunity).

NEW JERSEY—Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958) (no immunity). But N.J. STAT. ANN. tit. 2A §§ 53A-7 to -11 limits recovery to no more than $10,000.

NEW MEXICO—Deming Ladies' Hosp. Ass'n v. Price, 276 Fed. 668 (8th Cir. 1921) (immunity to all). No state cases.

NEW YORK—Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 2 (1957) (no immunity).

NORTH CAROLINA—Rabon v. Rowan Memorial Hosp., 152 S.E.2d 485 (N.C. 1967) (no immunity where charity is a hospital). Cowans v. North Carolina Baptist Hosp., 197 N.C. 41, 147 S.E. 672 (1929) (no immunity to third parties); Hoke v. Glenn, 167 N.C. 594, 83 S.E. 807 (1914) (immunity as to beneficiaries).

NORTH DAKOTA—Rickbiel v. Grafton Deaconess Hosp., 74 N.D. 525, 23 N.W.2d 247 (1946) (no immunity).

OHIO—Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410 (1956) (no immunity where charity is a hospital, immunity otherwise).

OKLAHOMA—Gable v. Salvation Army, 186 Okl. 687, 100 P.2d 244 (1940) (no immunity as to third parties); Sisters of the Sorrowful Mother v. Zeidler, 183 Okl. 454, 82 P.2d 996 (1938) (no immunity as to paying patients). No cases as to charity patient.

OREGON—Hungerford v. Portland Sanitariam & Benevolent Ass'n, 235 Or. 412, 384 P.2d 1009 (1963) (no immunity).

PENNSYLVANIA—Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 208 A.2d 193 (1965) (no immunity).

RHODE ISLAND—R.I. GEN. LAWS ANN. § 7-1-22 (1956) (immunity by statute).

SOUTH CAROLINA—See text *infra*.

SOUTH DAKOTA—No cases.

TENNESSEE—McLeod v. St. Thomas Hosp., 170 Tenn. 423, 95 S.W.2d 917 (1936) (no immunity, but recovery limited to assets not devoted to charitable purposes).

TEXAS—Total immunity reaffirmed by Watkins v. South Crest Baptist Church, 399 S.W.2d 530 (Sup. Ct. Texas 1966).

UTAH—Sessions v. Thomas D. Dee Memorial Hosp. Ass'n, 94 Utah 460, 78 P.2d 645 (1938) (no immunity).

VERMONT—Foster v. Roman Catholic Diocese, 116 Vt. 124, 70 A.2d 230 (1950) (no immunity).

VIRGINIA—Protestant Hosp. v. Plunkett, 162 Va. 151, 173 S.E. 363 (1934) (immunity as to patients); Hospital of St. Vincent of Paul v. Thompson, 116 Va. 101, 81 S.E. 13 (1914) (no immunity as to third parties).

WASHINGTON—Friend v. Cove Methodist Church, 65 Wash. 2d 174, 396 P.2d 546 (1964) (no immunity).

WEST VIRGINIA—Adkins v. St. Francis Hosp., 149 W. Va. 705, 143 S.E.2d 154 (1965) (no immunity).

WISCONSIN—Kojis v. Doctors Hosp., 12 Wis. 2d 367, 107 N.W.2d 131 (1961) (no immunity).

WYOMING—Bishop Randall Hosp. v. Hartley, 24 Wyo. 408, 160 Pac. 385 (1916) (immunity as to patients). No cases as to third parties.

PUERTO RICO—Tavarez v. San Juan Lodge, 68 P.R.R. 681 (1948) (no immunity).

& Directors of Georgetown College v. Hughes,[21] wrote a lengthy, well-reasoned and oft-quoted opinion which has subsequently proved to be the major force in reversing the trend of the doctrine. Notwithstanding the fact that this was a dissenting opinion[22] it has served as the major precedent against the doctrine.

B. *Theories for Imposition of the Doctrine*

Traditionally the theories for the imposition of the doctrine have been separated into four categories: (1) Trust fund theory, (2) *respondeat superior* theory (the theory that *respondeat superior* does not apply to charities), (3) implied waiver theory, and (4) public policy theory.[23] It is apparent that the states in which the doctrine continues to survive cannot agree on one particular theory to use in support of the doctrine. All, however, are in basic agreement why they feel the doctrine is valid; namely, to hold otherwise would act to deplete the funds of the charity. The summary below points out these theories and the criticisms of each.

1. *The Trust Fund Theory*

The trust fund theory, the first used to support the doctrine, was initially set out in *McDonald v. Massachusetts Gen. Hosp.*[24] It is basically the idea that payment of damages would be a misdirection of the "trust funds" of the charity. Professor Scott described the scope of the theory in its broadest, purest form, saying:

> Under this theory the exemption of the institution is very broad. Under it a hospital, for example, is not subject to liability, whether the negligence is that of the directors or trustees or officers or that of its nurses or other employees; it is not subject to liability whether the person injured is a patient, either a paying patient or charity

21. 130 F.2d 810 (D.C. Cir. 1942).

22. The opinion was the opinion of the court; three of the six judges concurred in the result only. President & Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942).

23. *E.g.*, PROSSER, TORTS § 127 (3d ed. 1964); Fisch, *supra* note 19; Horty, *supra* note 18. Note, 20 SW. L.J. 163 (1966); Note, 32 TEMP. L.Q. 86 (1958). Justice Rutledge also used the categories in President & Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942).

24. 120 Mass. 432, 21 Am. Rep. 495 (1876).

> patient, or is a visitor or employee or a stranger, as for example a person who is injured on the sidewalk in front of the hospital or a person who is struck by an ambulance.[25]

The philosophy behind this theory is that property devoted to charitable purposes should not be diverted to the non-charitable purpose of paying damage claims, for it would deplete the funds of the charity and would, therefore, impair or destroy the object of the hospital's benefactors, and further, would discourage contributions because the benefactors would not contribute if they knew the funds would go to pay damage claims.[26]

The transparencies of this philosophy are obvious and there is no support for it at present. There has been no noticeable impairment of charities subjected to payment of damages in those jurisdictions without the doctrine.[27]

One weakness of the theory has been stated:

> [I]n the fact that it is contrary to the various decisions which have evolved methods of making other trust funds responsible for torts committed in administering the trust, and that since such funds would not be exempt in the hands of the donor himself, he can scarcely have the power, even if it were ever true that he had even the intention, to confer such immunity upon the object of his bounty. [Further] it proves too much, and is inconsistent with the numerous decisions which have held charities liable for damages for breach of contract, and for some kinds of negligence.[28]

Some of the other suggested criticisms of the theory are: (1) As far as defeat of the settlor's intent is concerned he should expect his trust to bear its own expenses and burdens, and, if not, then perhaps the law should not allow his intention to be carried out; (2) the possible discouragement of donations because of liability does not balance favorably with an uncompensated wrong done a person who is without fault; (3) there will probably be no other chance for compensation since the employees are generally judgment proof; (4) immunity tends

25. SCOTT, ABRIDGEMENT OF TRUSTS § 402 at 731-32 (1960).

26. BOGERT, TRUSTS 336-39 (4th ed. 1963); Note, 20 SW. L.J. 163 (1966). See *e.g.*, Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910).

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

28. PROSSER, *op. cit. supra* note 23, at 1020.

to foster careless conduct by the charity; and (5) the public interest in seeing that an injured party is compensated outweighs the social advantage of assuring the funds of a charity are not depleted.[29]

The *Restatement of Trusts* in the original publication stated that the charity was immune,[30] but in the *Restatement (Second) of Trusts* the position has changed and there is a disavowel of any immunity under the trust fund theory.[31] Professor Scott says the immunity under this theory is clearly against public policy and continues that a trust should "be just before it is generous."[32]

2. *Respondeat Superior Theory*

The theory that *respondeat superior* is not applicable to charities is based on the philosophy that since there is no profit derived from the work performed by its employees the charity should not be liable for the torts committed by them.[33] Historically, profit was not the basis for *respondeat superior;* its basis was not so narrow. It arose from the right of the master to select, direct and control the servant in his endeavors for the master. The courts, however, apparently found the pull of immunity stronger than that of the well-established doctrine of *respondeat superior* and consequently established this exception to the doctrine.[34] It appears that courts fashioning this exception to *respondeat superior* allowed the historical grounds for it to become lost in an effort to find a satisfactory basis on which to rest the doctrine of immunity.[35]

3. *Implied Waiver Theory*

The implied waiver theory is founded upon the beneficiaries' assumption of risk. When an individual accepts charity, he is considered to have waived his right to hold the charity liable in tort for any injuries he may sustain by the negligence of the charity or its employees.[36] This sounds very much like the

29. BOGERT, *op. cit. supra* note 26.
30. RESTATEMENT, TRUSTS § 402 (1935).
31. RESTATEMENT (SECOND), TRUSTS §§ 247, 264, 278-79 (1959).
32. SCOTT, *op. cit. supra* note 25, at 732.
33. *Ibid*; Note, 20 SW. L.J. 163 (1966).
34. Note, 20 SW. L.J. 163, 164 (1966).
35. See Fisch, *supra* note 19.
36. *E.g.*, Powers v. Massachusetts Homoepathic Hosp., 109 Fed. 294 (1st Cir. 1901).

beneficiary has assumed the risk of accepting charity; it is hardly palatable that one who enters a hospital for treatment has assumed the risk of some danger of injury from the negligence of hospital employees. The patient enters the hospital because he needs better treatment than he could get at home. If the average patient were aware of the fact that he was assuming such risk, he might choose to stay at home. It is hardly believable that one who enters a hospital for professional care assumes the risk that he may be tortiously injured. The implied waiver theory suggests that a charity may contract away its duty of due care.

Other weaknesses of the theory are readily apparent. It constitutes a breach of the general rule that one may not contract away his duty of due care. It also gives rise to questions of enforceability as a contract; it ignores the prerequisites of capacity to contract.[37] It assumes a patient has the capacity to make an enforceable contract whether he is a minor, an unconscious victim of an automobile accident, a person devoid of mental competence, or a person who is so racked with pain that he could obviously not act as a free agent. This would be captioned duress in ordinary contracting circumstances. Combining the ability of the charity to contract away its duty of due care with the assumed capacity of the patient to contract, the court finds an agreement through which immunity can be enforced. Such an agreement which is questionable in contract law and clearly against public policy is unconscionable.

4. *Public Policy Theory*

This theory is simply that it would be against public policy to allow recovery for damages which would thereby impede the ability of the charity to carry on its work. It is better for the individual to suffer than for the public to endure the loss of the services rendered by the charity.[38] Behind this theory are three suggested sub-theories which have been used to support it.[39] The first, that the exemption from liability allows the funds to be concentrated on the charitable purpose, sounds like and has its roots in the trust theory, and the criticisms of the trust fund theory are generally applicable. The second, that the

37. *E.g.*, Gamble v. Vanderbilt Univ., 138 Tenn. 616, 200 S.W. 510 (1917). See Note, 32 TEMP. L.Q. 86 (1958).

38. Note, 20 SW. L.J. 163, 164 (1966).

39. The theories are suggested in Fisch, *supra* note 19.

donor would not have contributed if he had known his contributions would be used to pay damages, does not hold true. There is no evidence that charities lose contributors in liability states because the charity is held responsible for its failure to exercise reasonable care.[40] The donative intent is to benefit others by the donor's benevolence; it is not limited only to those helped by the charity. As suggested before, if the intent is so limited it may be unwise for the law to allow the donor's intention to be carried out.[41]

The third sub-theory, that the payment of damages would destroy the charity, may have been justifiable in 1876, but it is not now. It fails to recognize the change that has swept the area of charities since the inception of the doctrine of immunity. The days of the log cabin charity are gone. The list of contributors is no longer made up solely of well-meaning private citizens; governmental and foundation grants are among the major sources of revenue to fund the charity.[42] It can hardly be said that a payment of a judgment for damages would place the charity in irreparable financial straits at present.

5. *Summary*

Obviously the courts using these theories are "mingling their assets." It is not unusual to find a court using two of the theories; the Massachusetts court used the trust fund and public policy theories[43] and another used the public policy and *respondeat superior* theories.[44] Arguably the only difference between public policy and *respondeat superior* is in name only.[45] Neither holds the master liable for the tort of the servant; the one says that public policy prevents liability, the other says *respondeat superior* does not apply in order to protect the public good. The essence of both of these theories is protection of the public good. The public good also underlies the trust fund and waiver theories. As a result it is apparent that all courts have found a supposed public good in fostering the doctrine, but,

40. PROSSER, *op. cit. supra* note 23, at 1021.

41. BOGERT, *op. cit. supra* note 26.

42. *E.g.*, Knecht v. St. Mary's Hosp., 392 Pa. 75, 140 A.2d 30 (1950) (dissenting opinion). See Fisch, *supra* note 19.

43. McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432, 21 Am. Rep. 495 (1876).

44. Vermillion v. Women's College of Due West, 104 S.C. 197, 88 S.E. 649 (1915).

45. See Note, 32 TEMP. L.Q. 86 (1958).

unable to agree upon a single basis, they have fabricated a fictitious trust device, a misapplication of *respondeat superior*, a questionable contract theory (waiver), and the judicially-legislated public policy in an attempt to support the doctrine of immunity.

C. *Inconsistencies in the Application of the Doctrine*

Applications of the doctrine have been diverse and at times inconsistent. The courts in the jurisdictions where the doctrine continues in existence have expanded the exceptions to the application of the doctrine to the extent that the exceptions are the rule and the rule is the exception. Even the states with the most rigid doctrine allow exceptions in application. An exception is allowed, for instance, when the charity has been negligent in the selection and retention of employees.[46] Some states differentiate between the beneficiary and third persons (strangers, invitees, employees), permitting recovery of damages by the latter.[47] Others differentiate between paying and charity patients.[48]

The third person beneficiary distinction cannot be justified under any of the theories except waiver. Under the other theories payment of damage claims to third persons is a misdirection of the trust funds and a depletion of the assets just as payment to a beneficiary would be.[49] This creates an exception to the applicability of the *respondeat superior* theory. Further, why should an employee be allowed to recover while the beneficiary cannot? The employee owes his livelihood to the charity; who owes more?[50]

If the doctrine of immunity is applied solely to patients in the area of charitable hospitals it is manifestly unfair to the paying patient, for it could not be contended that one who pays for all the services rendered by the hospital is a recipient of charity.[51] It is also indefensible as applied to the indigent who is unable

46. *E.g.*, Morton v. Savannah Hosp., 148 Ga. 438, 96 S.E. 887 (1918); McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432, 21 Am. Rep. 495 (1876); Lindler v. Columbia Hosp., 98 S.C. 25, 81 S.E. 512 (1914).

47. *Compare* Cohen v. General Hosp. Soc'y, 113 Conn. 188, 154 Atl. 435 (1931) *with* Cashman v. Meriden Hosp., 117 Conn. 585, 169 Atl. 915 (1933).

48. *E.g.*, Morton v. Savannah Hosp., *supra* note 46 (by implication).

49. President & Directors of Georgetown College v. Hughes, 130 F.2d 810, 823 (D.C. Cir. 1942).

50. *Id.* at 825-27.

51. Horty, *supra* note 18, at 346-47.

to pay; he has no choice in the matter. He, above all, cannot bear the burden of an uncompensated injury and should be the first to recover. Of all persons he is the one the benefactor would desire to have protected by indemnification for the carelessly inflicted injury.[52] In a society that emphasizes rights of the individual, the charity patient becomes an unfortunate exception to the modern maxim that the protection of an individual's rights should not depend upon his financial condition.[53]

Some states allow recovery by the injured party when the charity has liability insurance.[54] However, what seems to be an important weakening of the doctrine becomes, through analysis, something less than a major exception. The charity may prevent any recovery by simply not purchasing liability insurance. Even if the charity is sufficiently benevolent to purchase insurance it may exclude any group from coverage, whether invitee, employee, stranger, or beneficiary.[55] As a result when statutes in some states read that the injured has a direct action against the insurer, and go on to estop the insurer from using the defense that the insured had charitable immunity,[56] the effect is negligible. Even in states without such legislation some courts permit recovery via insurance. None of these states requires the charity to purchase liability insurance.

Another exception to the immunity of the charity is that the charity is liable when an injury results from negligence in the conduct of a commercial enterprise owned by the charity. If the charity operates, for example, a parking lot[57] or office building[58] or some other profit-making enterprise[59] divorced from the charity and an injury is suffered through negligent opera-

52. President & Directors of Georgetown College v. Hughes, 130 F.2d 810, 827 (D.C. Cir. 1942).

53. Note, 32 TEMP. L.Q. 86, 90 (1958).

54. Cox v. De Jarnette, 104 Ga. App. 664, 123 S.E.2d 16 (1961); Luse v. United States Fid. & Guar. Co., 199 So. 666 (La. App. 1941). See ARK. STAT. ANN. § 66-3240 (Supp. 1961); LA. REV. STAT. ANN. § 22:655 (Supp. 1963); MD. ANN. CODE art. 48A, § 480 (1957).

55. Ramsey v. American Auto. Ins. Co., 356 S.W.2d 236 (Ark. 1962) (plaintiff, an employee, could have recovered if the insurance policy had not excluded employees from its coverage).

56. See statutes cited note 54 *supra*.

57. Eiserhardt v. State Agricultural & Mechanical Soc'y, 235 S.C. 305, 111 S.E.2d 568 (1959).

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

59. *E.g.*, Grueninger v. President & Fellows of Harvard College, 343 Mass. 338, 178 N.E.2d 917 (1961) (student insurance plan).

tion of that enterprise, the charity is liable. Similar to this is the exception that a charity is not immune to judgment of damages, but the property and funds devoted to the charity are not subject to payment of damages.[60] In both of the above exceptions the non-charitable assets, property or enterprise which are used to produce funds which are used by the charity to carry on its work are subject to payment of damages. The argument that these are not funds or property devoted to the charity but are somehow separate and do not come under immunity is of doubtful merit. The "profits" are merely another source of contribution to the charity; they are part of the funds and property devoted to the charitable purpose and belong within the coverage of immunity if it exists.

A final exception to the doctrine is allowed when the charity creates a nuisance which damages neighboring property. Thus, where a charity has been involved in a trespass to land, the charity has been held liable.[61] Realistically, to allow the doctrine to obtain here would be to greatly extend immunity, but, technically, this is also another exception to the doctrine, and tends also to reduce the effect of immunity to piecemeal application. It gives the charity immunity to only certain select torts. Related to this is an equitable remedy. It is apparent, even in states that have the strict doctrine that when a charity is so conducted as to become a nuisance to neighboring property, the owners of the adjoining property may enjoin the continuance of the nuisance.[62]

A patient who has been injured through the negligence of a charity may be partially compensated for his loss indirectly by refusing to recognize the hospital bill.[63] Though full compensation for his injury may not be recovered, such negligent action by the charity will reduce or cancel the patient's obligation to the hospital. The details and importance of this exception are explained in more detail under the section on South Carolina law, to be considered next.

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60. St. Lukes Hosp. Ass'n v. Long, 125 Colo. 24, 240 P.2d 917 (1952); McLeod v. St. Thomas Hosp., 120 Tenn. 423, 95 S.W.2d 917 (1936).

61. Peden v. Furman Univ., 155 S.C. 1, 151 S.E. 907 (1930).

62. SCOTT, *op. cit. supra* note 25 at 733.

63. *E.g.*, Beverly Hosp. v. Early, 292 Mass. 201, 197 N.E. 641 (1935).

D. *The State of the Doctrine in South Carolina*

The doctrine of immunity remains strong in South Carolina; it was upheld as recently as 1966 in *Decker v. Bishop of Charleston.*[64] The charity was held immune even though it had liability insurance. The court indicated it was bound by stare decisis, and that if the doctrine was to be changed it should be done by the legislature.[65] This language is comparable to that of several other state courts that had previously upheld the doctrine and have subsequently overruled the doctrine by decision.[66] As in other jurisdictions the doctrine in South Carolina has reached the "last ditch" defense. South Carolina, however, reached this defense in 1948,[67] and has continued to repeat it though it has had opportunities to change it.[68]

The doctrine arose in South Carolina, as noted earlier, in *Lindler v. Columbia Hosp.*[69] Justice Fraser, dissenting, criticized the theories of the doctrine, and stated that charitable immunity came from governmental immunity and that governmental immunity had been slackened by statute.[70] Noteworthy here is that since only two of the five Supreme Court justices voted for the doctrine, the doctrine may not have been introduced by this case had the court not sat en banc; the majority of the nine-to-six vote included seven circuit judges.[71]

However, in *Vermillion v. Women's College of Due West*[72] the court reaffirmed the doctrine, and continued to explain that its adoption was

> upon grounds of public policy, which forbid[s] the crippling or destruction of charities which are established for the benefit of the whole public to compensate one or

64. 247 S.C. 317, 147 S.E.2d 264 (1966).

65. *Ibid.*

66. Parker v. Port Huron Hosp., 361 Mich. 1, 105 N.W.2d 1 (1960); Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958); Hungerford v. Portland Sanitarium & Benevolent Ass'n, 235 Or. 412, 384 P.2d 1009 (1963); Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 208 A.2d 193 (1965); Friend v. Cove Methodist Church, 65 Wash. 2d 174, 396 P.2d 546 (1964). However, the New Jersey Legislature in a cautious moment enacted a limit to the liability of a charity. N.J. STAT. ANN. tit. 2A §§ 53A-7 to -11 (liability limited to $10,000).

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

68. Decker v. Bishop of Charleston, 247 S.C. 317, 147 S.E.2d 264 (1966).

69. 98 S.C. 25, 81 S.E. 512 (1914).

70. Lindler v. Columbia Hosp., 98 S.C. 25, 81 S.E. 512 (1914).

71. *Ibid.*

72. 104 S.C. 197, 88 S.E. 649 (1915).

> more individual[s] . . . for injuries inflicted by the negligence of the corporation itself, or of its superior officers or agents, or of its servants or employees. The principle is that, in organized society, the rights 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.[73]

The court went on to say that this was *an exception to the respondeat superior doctrine*, and though the tort-feasor himself may be financially unable to respond in damages the law did not undertake to provide a solvent defendant for every wrong.[74] This case involved an injury which occurred when a balcony fell on the decedent while he was attending a function at a college.[75] This case is significant because it expands immunity to cover strangers as well as beneficiaries.

Caughman v. Columbia Y.M.C.A.[76] further expanded the doctrine to provide immunity where an employee was the injured party.[77] There is significance here also because this decision established a charity as an exception to the workmen's compensation laws.[78] The opinion, by Justice Oxner, exhibits a strong impression that the charity should be liable, but the court resigned itself to relying on the legislature to make such a change.[79]

The doctrine reached its most extreme application in the Western District Federal Court when a rural electric cooperative was given charitable immunity.[80] This error was short-lived; the decision was reversed on appeal.[81] Shortly thereafter, in *Bush v. Aiken Elec. Co-op.*,[82] Justice Oxner, again speaking for the court, stated that the fact that an enterprise was non-profit did not make it a charity.[83] The opinion again ques-

73. *Id.* at 201, 88 S.E. at 650 (emphasis added).
74. *Id.* at 197, 88 S.E. at 649.
75. *Ibid.*
76. 212 S.C. 337, 47 S.E.2d 788 (1948).
77. *Ibid.*
78. *Ibid.*
79. *Ibid.*
80. Byrd v. Blue Ridge Elec. Co-op., 118 F. Supp. 868 (D.S.C.), *rev'd*, 215 F.2d 542 (4th Cir. 1954).
81. Byrd v. Blue Ridge Elec. Co-op., 215 F.2d 542 (4th Cir. 1954).
82. 226 S.C. 442, 85 S.E.2d 716 (1955).
83. *Ibid.*

tioned the merits of the doctrine, but continued to insist that the burden of change rested on the legislature.[84]

The doctrine as it stands in South Carolina does have some exceptions. The first was announced simultaneously with the birth of the doctrine; it is administrative negligence in selection and retention of employees.[85] To illustrate, if the hospital hired a nurse, and during her tenure until the time of the injury in question she had a record of having committed negligent acts, the hospital could be held liable for administrative negligence. The hospital would also be liable if, at the time of the injury, the employee tort-feasor were performing in a capacity without the scope of her employment.

Another exception to the doctrine deals with the negligent operation of a commercial enterprise by the charity. In *Eiserhardt v. State Agricultural & Mechanical Soc'y*[86] the court said that even though the defendant was organized along the lines of a charity (the court did not say whether defendant was a charity or not) the fact that the defendant may be a charity would not be a bar to liability; immunity did not extend to a commercial enterprise operated by a charity, here a parking lot.[87]

The final exception to the doctrine in South Carolina is that liability is placed upon a charity for the creation of a nuisance. In *Peden v. Furman Univ.*[88] the court held the university, a charity under the doctrine, liable for damages due to trespass to neighboring property. The court said the eleemosynary organization was liable because it cannot conduct itself in such a way as to prevent others from the enjoyment of their own property.[89]

There is a possibility that the injury to the beneficiary may be used in hospital cases, to some extent, to relieve the beneficiary's burden. In *Mullins Hosp. v. Squires*,[90] a case involving governmental immunity rather than charitable immunity, the court allowed the negligent injury as a defense to the hospital's suit for payment for services. While a counterclaim for the injury would not lie, the court said that an action for

84. *Ibid.*
85. Lindler v. Columbia Hosp., 98 S.C. 25, 81 S.E. 512 (1914).
86. 235 S.C. 305, 111 S.E.2d 568 (1959).
87. *Ibid.*
88. 155 S.C. 1, 151 S.E. 907 (1930).
89. *Ibid.*
90. 233 S.C. 168, 104 S.E.2d 161 (1958).

recoupment would be proper.[91] This should be applicable to charities, and is supported by Massachusetts,[92] which, with South Carolina, is one of the few states that continues to follow a relatively strict doctrine. The court explained that no answer in recoupment was required to reduce the charity's claim in quantum meruit; all the defendant needs to show is that the plaintiff failed to perform the contract exactly. The plaintiff must show that the work done is worth what it seeks, and the defendant, by showing he was injured by the plaintiff, establishes that the plaintiff has not performed the contract properly.[93] Although this provides nothing in the way of relief for innocent injured parties who are not patient-beneficiaries, it does aid the injured patient-beneficiary in that he is not burdened with paying for the services of the charity. Obviously, the non-paying charity patient receives no benefit from this indirect compensation.

E. *Conclusion*

"[T]he immunity of charities is clearly in full retreat; and it may be predicted with some confidence that the end of the next two decades will see its virtual disappearance from American law."[94] Whether or not justifiable historically, the doctrine is clearly without justification now. Granting immunity to charities is comparable to granting it to large commercial corporations; the modern charity is operated on the scale of a large corporation.[95] It no longer has only private benefactors; the federal government and large foundations contribute generously to charities. The community fund drives, in which campaigns are carried on with business-like efficiency, provide another fertile source of operating funds. Businesses and employers strongly encourage employees to give generously,[96] and civic-minded members of the community enthusiastically work to provide donations for the charity.

The major source of funds for hospitals is insurance. In 1958 it was estimated that half of the gross charges for hospital care were paid by insurance benefits. Recent figures show that,

91. *Ibid.*
92. Beverly Hosp. v. Early, 292 Mass. 201, 197 N.E. 641 (1935). This case involved a charitable hospital.
93. *Ibid.*
94. PROSSER, TORTS § 127 at 1024 (3d ed. 1964).
95. Knecht v. St. Mary's Hosp., 392 Pa. 75, 140 A.2d 30 (1958) (dissenting opinion). See also Note, 32 TEMP. L.Q. 86, 92 (1958).
96. Note, 20 SW. L.J. 163, 170 (1966).

of every one hundred Americans, seventy-one have hospital insurance, sixty-three have surgical insurance, and forty-three have medical insurance coverage. Most dramatic is the climb in number of people with hospital insurance; in 1941 only twelve million were covered, while in 1958 the number had increased to one hundred twenty-three million.[97]

Another type of insurance also makes the doctrine unrealistic. Liability insurance is available for the charity at reasonable rates; the effect of payment does not appreciably deplete the funds of the charity.[98] Some states, in no more than a token effort to ease the doctrine, have given the injured a direct action against the insurer; this practice is of little significance because the charity is under no legal duty to purchase the insurance.[99] Other states have rejected or abolished the doctrine altogether, which has in effect forced the charities to purchase insurance. Even in states where the doctrine still exists charities have insurance in anticipation of the day when they will no longer have the cloak of immunity to hide behind.[100] The charity in *Bishop of Charleston* for example, was insured.[101]

Significant as far as governmental aid to charities is concerned is that the Federal Government acts indirectly to support charities. The taxpayer is allowed as much as a thirty percent deduction annually from income tax for contributions to charity, and under the estate[103] and gift tax laws[104] the testator or donor has no limit on what may be bequeathed or given to a charity tax-free. These tax benefits are also found in state laws.[105]

The doctrine of immunity violates the general law of torts[106] and the doctrine of *respondeat superior*. It is clearly inconsonant with donative intent. It tends to foster negligence[107] and

97. *Ibid;* Note, 32 TEMP. L.Q. 86, 92 (1958).

98. President & Directors of Georgetown College v. Hughes, 130 F.2d 810, 823-24 (D.C. Cir. 1942). See also Note, 32 TEMP. L.Q. 86, 93 (1958).

99. See statutes cited note 54 *supra,* and accompanying text.

100. Note, 32 TEMP. L.Q. 86, 93 (1958).

101. Decker v. Bishop of Charleston, 247 S.C. 317, 147 S.E.2d 264 (1966).

102. INT. REV. CODE OF 1954, § 170.

103. INT. REV. CODE OF 1954, § 2055.

104. INT. REV. CODE OF 1954, § 2522.

105. *E.g.,* S.C. CODE ANN. § 65-259(10) (1962) (20% on income tax).

106. Note, 32 TEMP. L.Q. 86 (1958).

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

leaves the injured party with no remedy, as the tort-feasor is generally judgment-proof.[108] It protects a charity well able to afford payment of damages while placing the financial burden on the individual who is most often the one least able to bear it. Simply, it allows the charity to be generous without being just.

The doctrine hangs by a final thread in several states where the courts, though they created the doctrine by decision, remain fearful of cutting the thread. The position that stare decisis binds the court is clearly indefensible.

> *Stare decisis* channels the law. It erects lighthouses and flies the signals of safety. The ships of jurisprudence must follow that well-defined channel which, over the years, has proved to be secure and trustworthy. But it would not comport with wisdom to insist that, should shoals rise in a heretofore safe course and rocks emerge to encumber the passage, the ship should nonetheless pursue the original course, merely because it presented no hazard in the past. The principle of *stare decisis* does not demand that we follow precedents which shipwreck justice.[109]

Stare decisis has not held up as a defense of the doctrine. To illustrate, a recent North Carolina case[110] holding to stare decisis cited seven jurisdictions[111] in accord with it on the point of stare decisis. Since the North Carolina decision five of the seven jurisdictions found stare decisis not compelling[112] and abolished the doctrine, and one enacted a statute giving direct action against the insurer.[113] Only one of these states continues to rely upon stare decisis to uphold the immunity doctrine.[114]

The doctrine, if it were ever justified, is out of pace with modern law. The injustices of this crumbling anachronism in

108. BOGERT, TRUSTS 336-39 (4th ed. 1963).

109. Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 510-11, 208 A.2d 193, 205 (1965).

110. Williams v. Randolph Hosp., 237 N.C. 387, 75 S.E.2d 303 (1953). This case was reversed as it applied to hospitals by Rabon v. Rowan Memorial Hosp., 152 S.E.2d 485 (N.C. 1967).

111. The jurisdictions were Maryland, Massachusetts, Michigan, New Jersey, Oregon, Pennsylvania and Washington.

112. See cases cited note 66 *supra*.

113. MD. ANN. CODE art. 48A, § 480 (1957).

114. Massachusetts continues to follow the doctrine announced in McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432, 21 Am. Rep. 495 (1876).

the law continue in jurisdictions which honor stare decisis at the expense of justice and fairness. It appears that, until the legislatures abolish or amend these short-lived, greatly criticized, universally controversial, judge-made laws, the doctrine will remain. But hopefully, with the wave of cases abolishing the doctrine despite stare decisis, the more reluctant courts will soon follow suit.

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