Wyoming Law Journal

Volume 5 | Number 3 Article 8

December 2019

# Tort Liability of Charities

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In an action for negligence the defendant may implead an insurance company which had contracted with the defendant to pay loss from liability imposed by law upon the defendant and to defend litigation against the defendant where the insurer has refused to defend the action in spite of the fact that the policy provides that no action shall lie against the insurer unless the claim has been fixed and rendered certain either by judgment or by agreement between the parties with the written consent of the insurer.[16]

Under such procedures as adopted by some courts the insurer may defend the insured and still reserve its defense on the policy in respect of forfeiture for non-coverage and where it does so no waiver or estoppel may be invoked to preclude the company from asserting non-liability. If the insurer were impleaded to defend every suit until freedom from liability was shown there would be no possible opportunity for a second suit upon the liability under the policy or of the obligation to defend.

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## TORT LIABILITY OF CHARITIES

Action by Mary Foster against the Roman Catholic Diocese of Vermont to recover for injuries sustained in a fall on ice which had allegedly formed on the public sidewalk as a result of negligent construction of the church premises. Plaintiff was leaving the morning services when the accident occurred. The defendant answered that due care had been used and the defendant should be exempt from liability on the ground that it was a charitable institution. The plaintiff's demurrer was overruled, the answer said to be sufficient, and the case came before the Supreme Court of Vermont on the plaintiff's exceptions to the court's overruling the demurrer. *Held,* order overruling the demurrer reversed and the cause is remanded. The defendant charity is not entitled to immunity from liability merely because it is a privately conducted charitable institution. *Foster v. Roman Catholic Diocese of Vermont,* 70 A. (2d) 230 (1950).

Action by Harold E. Haynes against the Presbyterian Hospital Association for injuries resulting from the alleged negligence of the defendant's servants. The defendant is a non-profit corporation organized under the laws of the State of Iowa. The plaintiff was a paying patient in the defendant's hospital when he received the injuries complained of. *Held,* the incorporated charity should respond as do private individuals, business

16. Jordan v. Stephens v. Standard Accident Insurance Company, 9 F. R. Service, 7 F.R.D. 140 (W.D. Mo. 1945).

corporations, and others, when it does good in the wrong way. *Haynes v. Presbyterian Hospital Association,* 45 N.W. (2d) 151 (1950).

Widely divergent views have been adopted in extending immunity from tort liability to charitable organizations. In support of immunity, some courts have adopted the trust fund theory. These decisions are based on the theory that the purpose of the trust would be frustrated if the funds were subject to liability.[1]

This theory was first expressed in the case of *Heriot's Hospital v. Ross,*[2] decided in England in 1846. When the charity is incorporated, the trust fund theory, though not applicable in form is applied in substance as public policy. Cases following this line deny liability on the grounds that it would be against public policy to deplete the funds of the charity.[3] Some jurisdictions prefer to deny liability on the basis that the doctrine of respondeat superior cannot apply and the charity is only liable for the selection of its servants.[4] There is still another view denying liability, these case are those in which the charitable institution is operated by the state, a governmental function, and the state cannot be liable for its torts.[5]

However, there is no complete immunity. The numerical weight of authority favors holding a charitable institution liable if it has been negligent in the selection of its servants.[6] The only case decided on this point in Wyoming has adopted this view.[7] The court held there was no liability unless the servant had been negligently selected or was incompetent for the position held by him. Another view denying immunity is that the charity is liable for its torts to a stranger.[8] In a case in which a stranger is involved, the courts employ the ordinary rules of negligence applicable to a corporation.[9] Also some courts say that the charity owes a duty not to be negligent toward its servants.[10] Other courts have reached a compromise position by allowing satisfaction of judgments only out of property that is not used for charitable purposes. The cases hold that the cause of action is not barred, but only property used outside the purposes of the charity is subject to execution.[11] Therefore, an action may be maintained

1. Parks v. Northwestern University, 121 Ill. App. 512, affirmed in 218 Ill. 381, 75 N.E. 991, 2 L.R.A. (N.S.) 556, 4 Ann. Cas. 103 (1905).
2. Heriot's Hospital v. Ross, 12 C & F 507 (1846).
3. Jensen v. Maine Eye and Ear Infirmary, 107 Me. 408, 78 A. 898, 33 L.R.A. (N.S.) 141 (1910).
4. Taylor v. Protestant Hospital Association, 85 Ohio St. 90, 96 N.E. 1089, 39 L.R.A. (N.S.) 429, 1 N.C.C.A. 438 (1911); Morrison v. Henke, 160 N.W. 173, Annotation, 14 A.L.R. 590.
5. McDonald v. Mass. General Hospital, 120 Mass. 432 (1876).
6. Haliburton v. General Hospital Society of Connecticut, 133 Conn. 61, 48 A.(2d) 261 (1946).
7. Bishop Randall Hospital v. Hartley, 24 Wyo. 408, 160 Pac. 385, Ann. Cas. 1918 E., 1172 (1916).
8. Kellog v. Church Charity Foundation of Long Island, 203, N.Y. 191, 96 N.E. 406 (1911).
9. Marble v. Nicholas Senn Hospital Association, 102 Neb. 343, 167 N.W. 208 (1918).
10. Bruce v. Central M. E. Church, 147 Mich. 230, 110 N.W. 951, 10 L.R.A. (N.S.) 74, 11 A.E. Ann. Cas. 150 (1907).
11. O'Connor v. Boulder Sanitarium Assoc., 105 Colo. 259, 96 P.(2d) 835, 133 A.L.R. (1939).

against a charitable organization, even if it has procured liability insurance. But where the courts do not follow the trust fund theory, and where a charitable hospital is not otherwise liable for the torts of its agents, it is not rendered liable by the fact that it has procured insurance against such liability.[12]

There is a growing minority of courts that no longer extend immunity to charitable oganizations. A few courts simply reject the immunity on the grounds that any pursuit of man will involve negligence, and the donors realize this when contributing to the institution.[13] Following this trend some courts say the donors anticipate the liquidation of tort claims as well as any claim arising out of a contract.[14] The theories advanced by the courts have been scrutinized from every possible angle, and little, if anything, new remains to be advanced. "Every different reason propounded for the legal conclusions have fatal defects."[15]

As pointed out in the *Foster* case, and has been observed by many writers, no one of the many views favoring immunity from tort liability on the part of charities can be supported as a result aside from the question of public policy.[16] The result of immunity does not flow from an application of existing law in related fields, but is extended because of a sympathy with the purposes and results of charitable ventures and a desire to protect the beneficial results. The social advantages of the charitable venture have been considered, as a matter of policy, to outweigh the social advantages of requiring the charity to be fully responsible for the injuries to individuals. In order to preserve the broader advantage of the charitable services, disadvantages in the form of injury in individual cases must be tolerated.

Since the immunity in question is primarily an expression of policy, factors bearing upon the policy are important in predicting the course of future decisions in the field. The charities which struggled for existence in the day of earlier decisions were tempting objects for judicial protection. Now, however, the status of the charity in the social structure has changed to such an extent that a change in judicial attitude, such as that expressed in the principle case, should be expected.

That the period, during which charitable institutions enjoyed favored treatment, is approaching its close is emphasized in the light of the attack upon charitable institutions in recent tax trends. The Treasury Department has estimated that approximately nine billion dollars of competitive in-

12. Mississippi Baptist Hospital v. Moore, 156 Miss. 676, 126 So. 465, 67 A.L.R. 1106 (1930).
13. Geiger v. Simpson M. E. Church, 174 Me. 389, 219 N.W. 463, 63 A.L.R. 716 (1928).
14. Hewett v. Woman's Hospital Aid Association, 73 N.H. 556, 64 A. 190 (1906).
15. 14 Bos. U.L.R. 477 (1934).
16. 19 Mich. L. R. 395 (1928), 22 A.B.A.J. 48 (1936), 34 Yale L. J. 316 (1924), 48 Yale L. J. 81 (1938), 77 Un of Pa. L. R. 191 (1928).

come was escaping federal taxation annually by virtue of section 101 (6) [17] of the Internal Revenue Code. Under a 1950 amendment to the Internal Revenue Code, Section 302 (a), Revenue Act of 1950, this situation no longer exists. The exemptions extended by the old section have been limited by the new amendment. Charities are no longer small and financially weak and as the tax figures indicate, they have become big business with billions of dollars invested in them.

That charities are no longer weak was well stated by Lester W. Freezer. "The modern institution which is the usual defendant in these cases does not do charity in the manner of the good samaritan of old. It is a thing of steel and stone and electricity, of boards and committees, of card indices and filing systems, and of rules and regulations."[18]

The decisions in the principle cases add weight to the growing trend of an unsympathetic attitude toward the charitable institution and the removal of its immunity from tort liability.

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## A LOYALTY OATH FOR CANDIDATES

The State of New Jersey in 1949 enacted statutes[1] providing that candidates for nomination or for election to the legislature or to the office of governor must, in addition to taking an oath to support the constitution, take an additional oath in the following terms: "That I do not believe in, advocate or advise the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in the government established in the United States or in this state; and that I am not a member of or affiliated with any organization, association, party, group or combination of persons, which approves, advocates, advises or practices the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in either of the governments established; and that I am not bound by any allegiance to any foreign prince, potentate, state or sovereignty whatsoever." Persons elected to office must likewise take the same oath prior to assumption of office.

James Imbrie and others, with the aid and collaboration of the American Civil Liberties Union, brought proceedings to test the validity of these statutes. The trial court rendered judgment supporting the

17. The Tax Magazine, August 1950.
18. 77 Univ. of Pa. L. R. 191 (1928).

1. N.J. Laws of 1949, c. 21-25.