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Reaching the Charitable Institution

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v. Yancey.[36] In this case the plaintiff's reputation was being visciously and systematically ruined by her spurned lover, and the lower court had denied her an injunction on the ground that there were no property rights involved. The Court of Civil Appeals held that the property right doctrine was notable mainly by its breach rather than its observance, and proceeded to enjoin the defendant from ever again speaking or writing to the plaintiff, or from ever speaking or writing about her to anyone else, or from ever molesting her in any way. The court refused to look for the usual fictitous property right and granted the injunction on the grounds that a person's personal life is worth just as much to her as her property, and is equally deserving of protection. Coercion, malice and intimidation, as well as a right of privacy could also have been found in this case, but the court chose to ignore them all, and relied on a statute allowing injunctive relief in any proper case.[37] The court felt that justice was more important than preserving an outmoded rule with fictions and exceptions.

With a little backsliding here and there[38] this opinion represents the tendency of the courts today. The realization that prevention of libel and slander in a proper case is far superior to a questionable cure in the law side of the court is becoming a fact. Whether the courts issue the injunction on the finding of a property right, or the finding of one of the exceptions to the rule requiring a property right, or only because they want to prevent a gross injustice, there is a trend in this country away from the outdated English dictim.

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REACHING THE CHARITABLE INSTITUTION

In 1846 an English court stated in a dictum that an institution performing a charitable function was not liable in a tort action for damages instituted by the injured plaintiff.[1] Twenty years later the English courts reversed themselves[2] but the American courts, evidently overlooking the reversal, resurrected the then dead rule.[3] So rose the doctrine of charitable immunity, which came to be sustained under such a varied rationale that it became an almost impregnable defense barring plaintiff's recovery. The increased application of the rule and the resulting failure of plaintiffs to avoid it was noted with growing concern. Both lawyers and judges have called upon their contemporaries and the legislature to analyze its value in the twentieth century world. A few courts have recently repudiated the doctrine,[4] but the change has been gradual and the number of juris-

36. Hawks v. Yancey, 265 S.W. 233 (Tex.Civ.App. 1924).
37. Ibid. at 265 S.W. 237.
38. Kwass v. Kersey, supra note 4.

1. Heriot's Hospital v. Ross, 12 Cl.&Fin. 507 (1846).
2. Mersey Docks v. Gibbs, 1 L.R.H.L. 93, 11 H.L.Cas. 686 (1866).
3. McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am.Rep. 529 (1876).
4. Prosser, Torts (1955), p.787, notes 68-85.

dictions still giving a complete or qualified immunity[5] indicates the transition is far from complete. The purpose of this article is to indicate to a plaintiff's attorney the necessary research in attempting to avoid the rule of immunity or to take advantage of its exceptions, and to state the arguments for the modern rule imposing liability.

Initially the institution itself may be attacked as being noncharitable. The organization is required to plead and prove[6] that it is charitable. This is often done by introducing the corporate charter[7] but in addition there must be a showing that the institution is presently charitable.[8] To conform to the legal definition of a charity the organization must show that it benefits some segment of the general public.[9] If this is not introduced the court will consider it a private charity and recovery is allowed.[10] However, benefits may accrue only to specified classes, and yet the organization remains charitable in nature.[11] The test is concerned with the indefiniteness of the group rather than its size.[12] If the fund is for named beneficiaries, even though for educational or religious purposes, the trust is considered too definite and noncharitable.[13] An organization composed of an exclusive membership deriving funds from assessments rather than contributions, and only incidentally benefiting a few, has been held to be noncharitable.[14]

Secondly, many courts grant only a qualified immunity. In such a jurisdiction plaintiff's recovery is dependent upon a correct analysis of his relationship to the charity. Generally plaintiffs are separated into three main groups: strangers to the charity,[15] servants or employees of the charity[16] and recipients of the charity,[17] paying and nonpaying. A visitor of a hospital patient,[18] a volunteer fireman taking a patient to the hospital,[19] or a nurse employed by a patient[20] have been held to be strangers

5. Prosser, Torts (1955), p.786, notes 60-67.
6. White v. Central Dispensary and Emergency Hospital, 69 App.D.C. 122, 99 F.2d 355 (D.C.Cir. 1938).
7. New York State Labor Relations Board v. Mt. Pleasant Weschester Cemetery, 208 Misc. 50, 143 N.Y.S.2d 478 (1955).
8. White v. Central Dispensary and Emergency Hospital, 69 App.D.C. 122, F.2d 355 (D.C.Cir. 1938).
9. Bianchi v. South Park Protective Dept., 123 N.J.L. 325, 8 A.2d 567 (1939).
10. Newcomb v. Boston Protective Dept., 151 Mass. 215 24 N.E. 39 (1890); contra, Fire Ins. Patrol v. Boyd, 120 Pa.St. 624, 15 A. 553 (1888).
11. Kitchen v. Pitney, 94 N.J.E. 485, 119 A. 675 (1923).
12. Kentucky Christian Missionary Soc. v. Moren, 267 Ky. 358, 102 S.W.2d 335 (1937).
13. Restatement Trusts § 375 (1935).
14. Newcomb v. Boston Protective Dept., 151 Mass. 215, 24 N.E. 39 (1890). A related issue is the diversification of today's charities. In Chapin v. Holyoke Young Men's Christian Ass'n., 165 Mass. 280, 42 N.E. 1130 (1896), the court felt that much of the work of the corporation was of a charitable nature. There remained social purposes such as lectures, theatrical and other entertainment, a gymnasium and other sports, and food and coffee were sold. The court held that it was not a charitable institution but one established for the particular benefit of its members.
15. Henry W. Putman Memorial Hosp. v. Allen, 34 F.2d 927 (2d Cir. 1929).
16. Gable v. Salvation Army, 186 Okla. 687, 100 P.2d 244 (1940).
17. Robertson v. Executive Committee of Baptist Convention, 55 Ga.App. 469, 190 S.E. 432 (1937).
18. Walker v. Memorial Hosp., 187 Va. 5, 45 S.E.2d 898 (1948).
19. Kolb v. Monmouth Memorial Hosp., 116 N.J.L. 118, 182 A. 822 (1936).
20. Rose v. Raleigh Fitkin-Paul Morgan Memorial Hosp., 136 N.J.L. 553, 57 A.2d 29 (1948).

to the charity and able to recover against it. An employee of the charity has also been considered a person without its benefits and allowed to recover.[21] Finally recipients of a charity have been classified as paying and non-paying. The general rule is that liability will not be determined upon the question of whether the patient did or did not pay.[22] However a patient who pays for services stands a better chance of being considered apart from the "beneficiary" classification than a nonpaying patient.[23]

Some jurisdictions, one of which is Wyoming,[24] allow recovery only when the charity has been negligent in selecting its servants. It is sufficient to allege that an employer was negligent in employing and retaining an incompetent servant.[25] Once this is denied, recovery hinges on the selection of competent and relevant evidence of the servant's negligence and the employer's actual or implied knowledge of that fact.[26] Proof that the employee lacked intelligence to perform the job,[27] that the employee was insufficiently instructed in his duties[28] or a showing of specific acts of incompetency and bringing them home to the knowledge of the master or company[29] has been enough to show that an employer should have known of an incompetent employee. A careful attorney should also be prepared to show that these negligent acts were related in time and occurred frequently.[30] For an employee to be incompetent there must be sufficient repetition of his negligent acts to charge those around him with knowledge; since even the prudent person is occasionaly negligent.[31]

Another possible argument is that the institution is insured and the loss will not fall on it or deplete its funds.[32] It could be contended that charitable corporations which are insured should bear their share of the burden. Some courts hold that there can be no absolute immunity, or even a qualified immunity, if the organization is protected by insurance; since protection of the trust fund has been the reason for the rule of absolute immunity.[33] At present the position of the Wyoming Supreme Court on the question of the effect of liability insurance on an immunity

21. Gable v. Salvation Army, 186 Okla. 687, 100 P.2d 244 (1940).
22. Canney v. Sisters of Charity of House of Providence, 15 Wash.2d 325, 130 P.2d 899 (1942).
23. Tucker v. Mobile Infirmary Ass'n., 191 Ala. 572, 68 So. 4 (1915); Sessions v. Thomas D. Dee Memorial Hosp. Ass'n., 94 Utah 460, 71 P.2d 645 (1938); Silva v. Providence Hosp. of Oakland, 14 Cal.2d 762, 97 P.2d 798 (1939), (rehearing den. Jan. 26, 1940); Robertson v. Executive Committee of Baptist Convention, 55 Ga.App. 469, 190 S.E. 432 (1937). Institution liable to pay patient, but recovery restricted to income derived from pay patients or from other non-charitable sources.
24. Bishop Randall Hosp. v. Hartley, 24 Wyo. 408, 160 Pac. 385 (1916). See also Note, 5 Wyo. L.J. 143 (1951).
25. Williams v. U.P.R.R. Co., 20 Wyo. 392, 124 Pac. 505 (1912).
26. Strickland v. Foughner, 63 Ga.App. 805, 12 S.E.2d 371 (1940).
27. Leary v. William Webber Co., 210 Mass. 68, 96 N.E. 136 (1911).
28. Peters v. Southern Pac. Co., 160 Cal. 48, 116 Pac. 400 (1911).
29. First Nat. Bank of Montgomery v. Chandler, 144 Ala. 286, 39 So. 822 (1905).
30. Rosentiel v. Pittsburgh Rys. Co., 230 Pa. 273, 79 A. 556 (1911).
31. Ibid.
32. Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950).
33. Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950); Wendt v. Servite Fathers, 332 Ill.App. 618, 76 N.E.2d 342 (1947).

is uncertain. There is some indication that the immunity disappears,[34] but some immunities have been held to be unaffected.[35]

Finally the court should be asked to consider the reasons for liability. It has been ably argued that the big business aspect of modern charitable institutions, and continued expansion of charities, make them able to bear the losses they cause without hampering their charitable activities.[36] Charities and charitable work, along with nearly everything else in the American scene, have found it relatively easy to enlarge. In view of this tremendous growth it is logical to assume that more attention should be directed to the needs of the particular plaintiff in relation to the ability of that particular charity to give him some relief.

Other jurisdictions have found additional support for holding a charity to the standard of absolute liability. Kansas considered charitable immunity in relation to the State Constitution and concluded that the immunity doctrine was contrary to the Bill of Rights of that state.[37] Another jurisdiction has imposed liability, and for one of its reasons stated that it is for the legislature, not the courts, to create and grant immunity.[38]

The above mentioned suggestions are not the real solution, however. They only constitute some of the methods by which an injured plaintiff has won his case. Ultimately lawyers and judges should redefine the term "charitable institution." There has been a considerable change in ninety years from the struggling, one-doctor, temporary locations to the modern institution staffed by many personnel and efficiently operated. At their inception a money judgment would have destroyed the majority of charities. Today that form of reasoning is not true. They are larger, more capable of paying and in most instances protected by insurance. Until these basic propositions are recognized the plaintiff's attorney must attempt to categorize the institution and the plaintiff into some isolated channel where the mantle of immunity momentarily loses its protective power.

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34. McKinney v. McKinney, 59 Wyo. 204, 135 P.2d 940 (1943). In the McKinney case three separate views were expressed concerning a husband's immunity in a suit instituted by his wife. Blume, J. argued that a wife could sue her husband if liability insurance existed.

35. Ball v. Ball, 73 Wyo. 29, 269 P.2d 302 (1954). The Ball case involved parental immunity in the father-sin relationship. It was held that such a suit was contrary to public policy and the presenec of insurance made no difference. Price v. State Highway Commission, 62 Wyo. 385, 167 P.2d 309 (1945). In the price case the court felt insurance had no bearing on the case since the Commission could not consent to a suit against the state when the law did not permit such a suit.

36. Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934 (1954): President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C.Cir. 1942).

37. Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934 (1954).

38. Mississippi Baptist Hosp. v. Holmes, 214 Miss. 906, 55 So.2d 142 (1951).