

1983

Personal Liability for Directors of Nonprofit Corporations in Wyoming

Christine Chute

Follow this and additional works at: https://scholarship.law.uwyo.edu/land_water

Recommended Citation

Chute, Christine (1983) "Personal Liability for Directors of Nonprofit Corporations in Wyoming," *Land & Water Law Review*: Vol. 18 : Iss. 1 , pp. 273 - 311.

Available at: https://scholarship.law.uwyo.edu/land_water/vol18/iss1/7

This Comment is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

COMMENT

PERSONAL LIABILITY FOR DIRECTORS OF NONPROFIT CORPORATIONS IN WYOMING

I. BACKGROUND

The Role of Nonprofit Corporations in America

Those who write or speak of the role of nonprofit organizations in the United States are fond of repeating Alexis de Tocqueville's observation, made over 140 years ago: "Americans of all ages, all stations in life, and all types of disposition are forever forming associations. . . . In every case, at the head of any new undertaking while in France, you would find the government or in England some territorial magnate, in the United States you are sure to find an association."¹ De Tocqueville's observation holds true today. An estimated 20 million Americans, about one in ten, participated in private, voluntary, nonprofit human services organizations in 1980.² At the same time, these programs administered some four billion dollars in federal funds, either directly or as subcontractors.³ Americans claimed 39.9 billion dollars in charitable deductions on their income tax returns in 1980,⁴ and individuals gave more money to charity in that year than at any time in the past.⁵

Add the numbers of people who participate in purely social clubs, religious organizations, labor unions, co-ops and trade associations to the number of those involved in char-

Copyright© 1983 by the University of Wyoming.

1. De Tocqueville, *DEMOCRACY IN AMERICA* (Henry S. Commanger ed. 1947) quoted in *Giving in America: Toward a Stronger Voluntary Sector*, Report of the Commission of Private Philanthropy and Public Needs (Wash. D.C., 1975), pt. I, 40. Quoted in *Nonprofit Organization Participation in the Federal Aid System: The National Perspective: Hearing Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs*, 96th Cong., 2d Sess. pt. II, 309 (1980) (statement of Nat'l Conf. of Catholic Charities). Paraphrased in Gray, *Impact of Nonprofit Organizations*, in *TRENDS IN NONPROFIT ORGANIZATIONS LAW 1* (Oleck chair. 1977). Professor Howard Oleck also quotes de Tocqueville, noting that "Americans combine great individualism with 'an attitude towards community action that knows no counterpart in the world'." Oleck, *Non-profit Types, Uses, and Abuses: 1970*, 19 CLEV. ST. L. REV. 207, 210 (1970).
2. *Hearings*, *supra* note 1, Pt. II at 301.
3. *Id.* These figures include groups which are or were, in 1980, recipients of CETA, day care, Headstart, and Title XX monies, among others.
4. BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, *STATISTICAL ABSTRACT OF THE U.S. 1981*, No. 576 (102d ed.)
5. *Hearings*, *supra* note 1, Pt. II at 102.

itable activities, and the number of Americans participating in nonprofit ventures grows to include nearly every adult in some way.⁶ Wyoming is no exception to the general trend toward support of nonprofit corporations, as a comparison of the number of nonprofit corporations in 1978 and 1980 demonstrates:

	business corporations		nonprofit corporations	
	1978 ⁷	1982 ⁸	1978	1982
domestic	9187	11,803	2258	3066
foreign	4660	6937	179	216

In 1982, nonprofit corporations made up approximately 20% of all domestic corporations in Wyoming.

It is reasonable to assume that nearly everyone in Wyoming, especially practicing attorneys, knows someone who serves as a director on the board of a nonprofit corporation. Ask anyone who sits on one of these boards what their biggest headache as a board member is, and if they say that finding money to run their program is first, they are likely to say that avoiding lawsuits and personal liability are second. The two problems are closely related; although indemnification is available for some directors of nonprofit corporations, except in cases of misconduct,⁹ the promise of indemnification is often meaningless when the nonprofit corporation itself has few assets and little capital from which indemnification can be made. In addition, members of nonprofit boards in Wyoming sit without compensation,

6. In 1974, 59% of all volunteers were women and 41% men. Of the total population (civilian, noninstitutional, and 14 years of age and over), 23.5% volunteered some time to such groups as religious, educational, hospital, civic and community, social and welfare groups. The amount of private individual contributions to nonprofit, tax-exempt groups rose from 15.9 billion dollars in 1970, to 24.2 billion dollars in 1975, to 39.9 billion dollars in 1980, STATISTICAL ABSTRACT OF THE U.S., *supra* note 4, at 350, Nos. 575 and 576.

7. Oleck, NONPROFIT CORPORATIONS, ORGANIZATIONS AND ASSOCIATIONS 14 (4th ed. 1980), for 1978 figures.

8. Letter from Jacqueline Corklin, Director, Corporations, Office of the Secretary of State, State of Wyoming (June 29, 1982) (figures as of May 31, 1982).

9. WYO. STAT. § 17-6-103(a) (ix) (1977). Although this chapter is entitled Nonprofit Corporations Generally, it does not apply to all nonprofit corporations. A corporation must elect to be a chapter 6 corporation unless it is originally incorporated under chapter 6. WYO. STAT. § 17-6-108 (1977).

as volunteers,¹⁰ and are, therefore, likely to be philosophically committed to the goals of the corporation. Depletion of meager corporate assets to compensate for personal liability is likely to be seen as an evil that is not necessarily overcome by the fear of personal liability; it is, at the very least, a tough choice between destruction of the corporation and the possible loss of some personal assets. Those seeking damages from nonprofit corporations are more likely to name the directors as individual defendants when the corporation itself is small and does not have a great deal of wealth.

Although there is no single, widely accepted theory which accounts for or justifies the existence of nonprofit corporations,¹¹ scholars seem to agree that, for whatever reason, the rule of the ordinary commercial marketplace does not or should not apply to some enterprises. Harry Hansmann, a widely-respected legal theorist, explains the existence of nonprofit corporations as a result of " 'contract failure' — that is, situations in which, owing whether to the nature of the service in question or to the circumstances under which it is produced and consumed, ordinary contractual devices in themselves do not provide consumers with adequate means for policing the performance of producers."¹² In other words, nonprofit corporations are required where the ordinary rules of supply and demand do not result in quality goods or services as they do, at least theoretically, in the regular commercial marketplace. Nonprofit corporations, to that degree, fulfill a sort of public function by ensuring quality.

Other commentators seem to believe that at least some corporations are organized on a nonprofit basis because their particular product is more readily acceptable from a provider not seeking a profit.¹³ For certain types of goods

10. WYO. STAT. §§ 17-6-104 and 17-7-109 (1977).

11. Clark, *Does the Nonprofit Form Fit the Hospital Industry?* 93 HARV. L. REV. 1416, 1430 (1980).

12. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 506-07 (1981).

13. Clark, *supra* note 11, at 1447.

and services, such as the provision of health care or the organization of workers into unions, profit-making seems somehow inappropriate. This view is at least superficially consistent with the public interest or public function view of nonprofits. It implies that making a profit is "wrong" when attempted in some kinds of activities. In reality, this view is a rather cynical evaluation of the motives of the organizers of some nonprofit corporations. The organizers, knowing or sensing that the public thinks profiting from, for example, the provision of health care, is inappropriate, form a hospital corporation as a nonprofit in order to dispel the uneasiness a for-profit form might cause. The consumers' fears of being taken advantage of for the sake of a profit are assuaged by the organizers' decision to use a nonprofit form. One scholar, in discussing this view, labels it the "exploitation hypothesis" in a discussion of nonprofit hospitals.¹⁴

On the other hand, Professor Howard Oleck, an expert in the law of nonprofit organizations, "insist[s] that altruism and voluntarism, not economic concerns, are the true basis of nonprofit organization life."¹⁵ Probably, some sense of altruism underlies the formation of most nonprofit corporations.

Definition: What Is a "Nonprofit" Corporation?

"A nonprofit organization is one 'no part of the income or profit of which is distributed to its members, directors or officers,' . . . [or] 'one exclusively for a purpose or purposes, not for pecuniary profit or financial gain, and no part of the assets, income or profits of which is distributable to, or ensures [sic] to the benefit of its members, directors or officers, except to the extent permitted [by the relevant statutes].'"¹⁶ Most statutes defining "nonprofit" corporations recognize the legitimacy of reasonable compensation to

14. *Id.* at 1448.

15. Oleck, *supra* note 7, at 40.

16. *Id.* at 17 (quoting state statutes which have adopted the language of the Am. Bar Ass'n Model Nonprofit Corp. Act, § 2(c) (rev. ed. 1964) and the N.Y. Not-for-Profit Corp. Law § 102(a) (5) (10) (McKinney 1970)).

members, directors and officers for services rendered,¹⁷ and make distribution of remaining assets upon the dissolution of the organization.¹⁸ This definition embodies an "economic" approach to defining nonprofit corporations because it "makes the right of nonprofit incorporation depend on the economic relationship between the corporation and its members."¹⁹ An alternative is a "functional" approach which "enumerates the permissible purposes and activities of a nonprofit corporation."²⁰

Title 27 of the Wyoming Statutes, 1977 compilation, contains six separate chapters dealing with corporations which are or may be organized as nonprofit corporations. The difficulties posed by this proliferation of chapters will be a recurring theme of this comment.

Chapter 6 is entitled *Nonprofit Corporations Generally*, and contains two definitions of "nonprofit corporation," both of which are "economic" in approach. The first definition is not specifically identified as such, but states that "[n]onprofit corporations may be organized under this act²¹ for any one (1) or more lawful purposes, not for pecuniary profit."²² The second definition, not substantially different from the first, states that "'nonprofit corporation' shall mean, for the purposes of this act,²³ a corporation organized under any law of this state . . . for a purpose, other than the conduct of a business for profit and [which] shall include, but not [be] limited to, corporations organized for charitable, educational, religious, social and fraternal purposes, and industrial development corporations organized under the Wyoming Industrial Corporation Act."²⁴

17. 1 FLETCHER, *CYCLOPEDIA OF THE LAW OF CORPORATIONS*, § 68, at 328 (rev. perm. ed. 1974). This appears to be forbidden to some directors of Wyoming nonprofit corporations. See *supra* note 10.

18. 1 FLETCHER, *supra* note 17, § 68 at 328.

19. *Nonprofit Corporations—Definition*, 17 VAND. L. REV. 336, 337 (1963).

20. *Id.*

21. This definition, according to its terms, is limited in application to WYO. STAT. §§ 17-6-101 to -109 (1977). 1959 WYO. SESS. LAWS Ch. 189, § 1.

22. WYO. STAT. § 17-6-101 (1977).

23. This definition, according to its terms, is limited in application to WYO. STAT. §§ 17-6-111 to -115 (1977).

24. WYO. STAT. § 17-6-111 (1977).

Chapter 7, entitled *Charitable, Educational, Religious and Other Societies*, defines the nonprofit corporations to which it applies in a "functional" fashion by listing the purposes for which they may be organized.²⁵ These purposes, as the chapter title indicates, include the establishment and maintenance of libraries, colleges and other educational institutions, hospitals, lodges and other benevolent societies, fire companies, churches, and parks.²⁶

Chapter 8 provides that churches and religious societies with "spiritual jurisdiction"²⁷ over at least six counties may incorporate for religious, missionary, educational or charitable purposes or for the limited purpose of acquiring and conveying property for their own use.²⁸ Chapter 9 deals with lodges, secret societies and other societies and allows the incorporation of any secret or benevolent society.²⁹ This chapter consists mostly of sections setting out powers over and rights to property.³⁰

Chapters 10 and 11 stand apart from the other chapters on nonprofit corporations in that they allow a corporation with the goal of seeking economic advantages for its members

25. *Supra* note 19.

26. WYO. STAT. § 17-7-101(a) (1977). As originally written by the Territorial Legislature, this list allowed the establishment of "independent companies and regiments of militia," a function which has since been dropped from the list of permissible purposes. WYO. COMP. LAWS Ch. 34, Art. II, §1 (1876). Certainly, the criticism that a functional approach tends to become "outmoded as social values change" is justified in this case. *See supra* note 19. The functional listing would appear to support Professor Oleck's conclusion that nonprofit corporations exist to fulfill an altruistic function in society. *See supra* note 15 and accompanying text. *But see* Hansmann, *supra* note 12.

27. WYO. STAT. § 17-8-101 (1977). Chapter 7 is not limited in its application to religious organizations with such wide-ranging "spiritual jurisdiction" and allows incorporation for the same purposes and with the same powers. WYO. STAT. §§ 17-7-101(a) (i), (ii) and 17-7-103 (1977). Requirements for incorporation and filing vary slightly. *Compare* WYO. STAT. § 17-7-101(a) (requiring three persons to incorporate) with § 17-8-103(a) (requiring five persons) and with § 17-8-110 (allows any one of specified persons to incorporate for religious purposes). The reason for the inconsistency within chapter 8 is by no means clear and appears to be just one example of oversight on the part of the legislature. Section 17-8-101 was originally adopted in 1884, section 17-8-110 in 1915, and the two were never reconciled with each other or with section 17-7-101(a).

28. WYO. STAT. § 17-8-109 (1977).

29. WYO. STAT. § 17-9-101 (1977). This section requires at least seven persons to associate to form a society and section 17-9-102 allows any such society to incorporate. Chapter 9, like chapters 7 and 8, is inconsistent with chapter 6 in the number of persons required to incorporate.

30. WYO. STAT. §§ 17-9-103, 104, 107, and 108 (1977).

to incorporate as a nonprofit corporation. Chapter 10, *Co-operative Marketing Associations*, allows five or more persons engaged in the production of agricultural products to engage in any activity in connection with the marketing or selling of agricultural products, by-products or machinery to incorporate on a nonprofit basis.³¹ These corporations are "deemed nonprofit" by statutory fiat, even though net profits are distributed as dividends,³² and even though they are organized to make profits for their members "as producers," because they are not organized to make profits for themselves as corporations.³³ The distinction seems extremely fine and is probably more a testimony to the political power of the agricultural segment of Wyoming's economy than to any altruistic motives on the part of those who organize these corporations.

Chapter 11, the Wyoming Industrial Corporation Act, allows fifteen or more persons³⁴ to incorporate, either for profit or as nonprofit corporations, to "promote, stimulate, develop and advance the business prosperity and economic welfare of Wyoming and its citizens" and to engage in various related activities.³⁵ Membership must include at least ten financial institutions before the Secretary of State can approve the articles of incorporation.³⁶ Chapter 10 and chapter 11 "nonprofit corporations" will not be a major topic of this comment.

Given the confusion inherent in the existence of no fewer than six sets of differing statutes purporting to deal with nonprofit corporations,³⁷ it is probably futile to attempt to develop a single unified theory of the law of nonprofit corporations in Wyoming. Some general areas can, however, be understood by a careful reading of the statutes and the meager case law. The law of other jurisdictions is also helpful. This comment will deal primarily with personal

31. WYO. STAT. § 17-10-103 (1977).

32. WYO. STAT. § 17-10-116 (1977).

33. WYO. STAT. § 17-10-102(e) (1977).

34. WYO. STAT. § 17-11-103(a) (1977).

35. WYO. STAT. § 17-11-103(c) (iii) (1977).

36. WYO. STAT. §§ 17-11-102(a) (iii) and 17-11-103(f) (1977).

37. WYO. STAT., Tit. 17, chs. 6-11 (1977).

liability of directors of nonprofit corporations, both charitable and non-charitable, including standards of care, sources of potential liability and standing to sue. It will conclude with some suggestions for legislative reform of the Wyoming nonprofit corporation laws. It will not deal with the large numbers of nonprofit organizations which are not incorporated.

II. THE LIABILITY OF DIRECTORS OF NONPROFIT CORPORATIONS

Standards for Liability: Which Standards Apply in Wyoming?

The directors of a business corporation are ordinarily not held liable for honest mistakes in judgment when they have acted in good faith and for the good of the corporation.³⁸ This standard of liability is called the "business judgment rule."³⁹ The Wyoming Business Corporation Act accepts this standard for directors of business (for profit) corporations.⁴⁰ No similarly clear statement of standards for the performance of directors of nonprofit corporations has developed in Wyoming. The Wyoming nonprofit corporation statutes do not establish a universally applicable standard of accountability,⁴¹ and the decisions of the Wyoming Supreme Court provide little guidance in this area, for the reason that few suits against nonprofit corporations or their directors have yet reached the Supreme Court. Although it might seem logical to fill in the gaps in the nonprofit corporations acts with appropriate provisions from the Wyoming Business Corporation Act,⁴² the Wyoming Supreme

38. 3A FLETCHER, *supra* note 17, at § 1039 (perm. ed. 1975).

39. *Id.*

40. WYO. STAT. § 17-1-133(b) (supp. 1982) reads in pertinent part:

A director shall perform his duties as a director including his duties as a member of any committee of the board upon which he may serve, in good faith, in a manner he reasonably believes to be in the best interests of the corporation, and with such care as an ordinarily prudent person in a like position would use under similar circumstances.

41. Chapters 6 through 9 do not specify a standard as does the Wyoming Business Corporation Act, *supra* note 40. Chapter 8, Churches and Religious Societies Generally, does say that chapter 8 corporations are subject to the general corporation laws of the state, "save as expressly provided." WYO. STAT. § 17-8-107 (1977).

42. WYO. STAT. § 17-1-101 through 17-3-104 (1977 & supp. 1982).

Court held in *American Legal Aid, Inc. v. Legal Aid Services, Inc.*⁴³ that the business corporation statutes are not applicable to nonprofit corporations.

This lack of standards is typical of state nonprofit corporation law,⁴⁴ and even the American Bar Association's proposed Model Nonprofit Corporation Act⁴⁵ is silent on the standard to which directors will be held. As will be explained in this comment, the confusion is especially apparent when the nonprofit corporation is charitable in nature. The uncertainty this causes makes the task of the nonprofit director even more difficult than it would otherwise be. Even if the directors think to seek legal advice on the potential for personal liability, Wyoming attorneys have little certainty to offer except the possibility of indemnification and advice to purchase insurance.⁴⁶ Wyoming is not unique in this regard; few states have established any clear statutory guidance for nonprofit directors.⁴⁷

There appear to be four possible standards for liability of directors:

1. Immunity from liability;
2. A gross negligence standard;
3. The business judgment rule; and
4. A trustee standard.

1. *Charitable immunity*

Historically, charitable organizations were immune from suits for damages to a great degree.⁴⁸ This immunity was often justified on various public policy grounds, including the ground that the property of a charity is held in trust for public and charitable uses and should not be diverted to other purposes, including the payment of damages.⁴⁹

43. 503 P.2d 1201, 1204 (Wyo. 1972). Chapter 8 is an exception to this general rule. *Supra* note 41.

44. KNEPPER, LIABILITY OF OFFICERS AND DIRECTORS § 9.04 (3d ed. 1978) [hereinafter cited as KNEPPER].

45. MODEL NONPROFIT CORP. ACT (rev. ed. 1964).

46. Indemnity is specifically available only to Chapter 6 corporations. WYO. STAT. § 17-6-103(a) (ix) (1977).

47. KNEPPER, *supra* note 44, at § 9.04.

48. Bishop Randall Hosp. v. Hartley, 24 Wyo. 408, 160 P. 385 (1916); Annot. 25 A.L.R.2d 29 (1952).

49. Bishop Randall Hosp. v. Hartley, 160 P. at 386 (1916).

The Wyoming Supreme Court adopted the principle of charitable immunity in 1916, in *Bishop Randall Hospital v. Hartley*.⁵⁰ In 1970, in *Lutheran Hospitals and Homes Society of America v. Yepsen*,⁵¹ under facts very similar to those in *Bishop Randall*, the Wyoming Supreme Court cut back on the availability of charitable immunity by redefining "charitable." The court's new definition seemed to depend on the source of the institution's funding. The hospital in *Yepsen* was found to be non-charitable, although non-profitable, because it received a major portion of its revenue by charging those patients able to pay for its services. The hospital also received funds from various governmental agencies for most of those patients who were unable to pay.⁵² The Lutheran Hospital in *Yepsen* tried, in fact, to make a profit and then turn the profit back into the hospital for improvements.⁵³

The extent to which charitable immunity extends from the corporation itself to its directors was not addressed in either *Bishop Randall* or *Yepsen*. If the purpose of immunity is to preserve charitable funds for the corporation's charitable purposes, charitable immunity should be extended to directors where those directors have a right to seek indemnity from the corporation. Some of the Wyoming nonprofit corporation statutes provide for indemnity, either directly⁵⁴ or by reference to the Business Corporation Act.⁵⁵

The usefulness of the doctrine of charitable immunity, as it might apply to directors, is limited by the type of

50. 160 P. 385 (1916). The court held that a charitable hospital was immune from a suit by a former patient for damages resulting from the negligence of a hospital employee, in the absence of a showing that the hospital was negligent in selecting or training the employee. The court said that even a hospital which charges those patients who can afford to pay can be charitable and, therefore, immune from suit even though the plaintiff himself was billed for services.

51. 469 P.2d 409 (1970).

52. *Id.* at 412. The court said that charitable immunity should apply only to those institutions which are charitable "in fact" and not to those which receive major funds from patient payments or governmental sources. The ultimate logical effect of this limitation is to deem charitable only those organizations supported primarily by public contributions. *Id.*

53. *Id.*

54. WYO. STAT. § 17-6-103(a) (ix) (1977).

55. WYO. STAT. §§ 17-10-125 and 17-11-104(b) (1977) both provide for indemnification by incorporating either the Wyoming Business Corporation Act, § 17-1-105.1 (Supp. 1982), or chapter 6 of the general nonprofit corporation statute, § 17-6-101 to -117 (1977). See also WYO. STAT. § 17-8-107 (1977).

situations in which it may be invoked. The Wyoming Supreme Court has only specifically accepted immunity for charities in *Bishop Randall*.⁵⁶ There, the corporation was sued for damages in tort arising from the negligence of an employee. The court said that absent any independent negligence on the part of the corporation in selecting or training employees, the corporation could not be sued for damages.⁵⁷ Under those circumstances, a director could not ordinarily be held personally liable even without the application of charitable immunity. The corporation itself, and not its directors, has a master-servant relationship with corporate employees. Liability to third parties for injuries inflicted by corporate employees under theories of *respondeat superior* should not attach to the directors individually unless the director is personally at fault or voted to commit the tort.⁵⁸

The usefulness of charitable immunity as a defense is further limited by dicta in *Yepsen*.⁵⁹ Although the Wyoming Supreme Court did not abrogate the doctrine of charitable immunity, it clearly indicated that the availability of insurance lessens the need for a judicially-created form of immunity to preserve the assets of charities.⁶⁰ The court's narrow definition of "charity," based in part on what is perceived as a narrowing legislative view, also serves to limit the types of entities, corporate or otherwise, which may avail themselves of the defense of charitable immunity.⁶¹

If a corporation or its directors do decide to assert charitable immunity as a defense to a negligence action, immunity must be pleaded as an affirmative defense under

56. 24 Wyo. 408, 160 P. 385 (1916).

57. *Id.*, 160 P. at 386.

58. Brown, *The Not-For-Profit Corporate Director: Legal Liabilities and Protection*, 28 FED'N INS. COUNS. Q. 57, 62 (1977); *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 517 F.2d 1141, 1143-44 (4th Cir. 1975); *Galvan v. McCollister*, 224 Kan. 415, 580 P.2d 1324 (1978). The Wyoming Supreme Court's opinion in *Awe v. Univ. of Wyo.*, 534 P.2d 97, 102 (Wyo. 1975), supports this limitation on the applicability of immunity defenses. In that case, the court held that a suit against the University of Wyoming trustees was properly a suit against the State of Wyoming alone, but noted that the plaintiff had not alleged that the trustees were personally responsible for any negligence affecting the plaintiff.

59. 469 P.2d 409 (Wyo. 1970).

60. *Id.* at 411-12.

61. *Id.*

Rule 8(c) of the Wyoming Rules of Civil Procedure.⁶² Charitable immunity fits neatly into the definition of affirmative defense prescribed by the Wyoming Supreme Court in *Texas Gulf Sulphur Co. v. Robles*:⁶³

A general and almost universal identifying criterion of an affirmative defense is one in avoidance, or stated alternatively, a direct or implicit admission of plaintiff's claim and assertion of other facts which would defeat a right to recovery.⁶⁴

There is enough uncertainty about the status of charitable immunity, even after *Yepsen*, that it should be raised as an affirmative defense if the defendant corporation is arguably charitable "in fact" as contemplated in *Yepsen*.⁶⁵ The defendant corporation or directors should first show that the corporation is a charity. Second, they should argue that the Wyoming Supreme Court's concerns in limiting the defense in *Yepsen*⁶⁶ do not apply in their case.

2. *The gross negligence standard*

There is little support in the literature of nonprofit corporation law for a standard that subjects directors to personal liability only in cases of gross negligence.⁶⁷ Some courts do, however, consider whether the individual director serves on a full-time or part-time basis, is paid or unpaid, or has any special skills, in determining the appropriate standard of accountability.⁶⁸

Two cases from other jurisdictions seem to adopt a standard bordering on gross negligence. In *George Pepperdine Foundation v. Pepperdine*,⁶⁹ a California appellate court

62. Wyo. R. Civ. P. 8(c) states in pertinent part:

In pleading to a preceding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense.

63. 511 P.2d 963 (1973). This case held that employer immunity from suit under the Wyoming Workers' Compensation laws is an affirmative defense which, if not pleaded, is waived. *Id.* at 965.

64. *Id.* at 965.

65. *Supra* note 52 and accompanying text.

66. *Supra* notes 59-61 and accompanying text.

67. Pasley, *Non-Profit Corporations — Accountability of Directors and Officers*, 21 BUS. LAW. 621, 626 (1966); KNEPPER, *supra* note 44, at § 9.06.

68. Pasley, *supra* note 67.

69. 126 Cal.App.2d 154, 271 P.2d 600 (1954).

held that a complaint claiming that the founder and other directors of a nonprofit corporation had dissipated corporate assets through illegal and speculative transactions and general mismanagement failed to state a cause of action against the directors. Some of the language in *Pepperdine* indicated that in the absence of fraud or "corrupt motive,"⁷⁰ the directors would not be held liable. The real basis of the court's holding seemed to be, however, the court's outrage at the idea of suing the main benefactor of a charitable foundation for mismanaging "his own" foundation.⁷¹ Fortunately, for the safety of assets of nonprofit corporations, the California courts have not followed *Pepperdine*.⁷²

In *Beard v. Achenbach Memorial Hospital Association*,⁷³ the Tenth Circuit, applying Kansas law, said that directors must manage a nonprofit corporation honestly and "must exercise ordinary and reasonable care in the performance of their duties."⁷⁴ While this sounds like a statement of the business judgment rule, other language in the opinion points to a lower standard of accountability:

[Directors] are jointly and severally liable for losses of the corporation proximately resulting from bad faith, fraudulent breaches of trust, [and] gross or wilful negligence in the discharge of their duties. . . . [The directors' actions here] did not constitute any such reckless, extravagant, or wrongful conduct.⁷⁵

Although the gross negligence standard does recognize and respond to the volunteer nature of a nonprofit director's

70. *Id.*, 271 P.2d at 603, 605.

71. *Id.* at 604. The court asked:

[W]ould anyone be so crazy and cruel as to assert a claim against him [Pepperdine] for his carelessness in not holding intact the fortune which he intended to bestow on others? Who is "Foundation" otherwise than the shadow of George Pepperdine, if not his alter ego? If he as an individual could not be sued for negligently investing his own moneys intended for charitable uses, why should his own "Foundation" under the management of strangers prosecute an action to recover from the original donor and his friends what, through negligence, they lost for the Foundation?

Id.

72. *Holt v. College of Osteopathic Physicians & Surgeons*. 61 Cal. 2d 750, 394 P.2d 932, 937, 40 Cal. Rptr. 244 (1964).

73. 170 F.2d 859 (10th Cir. 1948).

74. *Id.* at 862.

75. *Id.*

position in Wyoming,⁷⁶ it seems neither necessary nor wise to adopt that standard. The nonprofit corporation itself, its members, and the public as a whole are all better served by applying a more stringent rule. A director who cannot or will not perform other than in a grossly negligent or reckless fashion serves no one.

While not speaking in terms of gross negligence, Chapter 6 of title 17 of the Wyoming Statutes, (Nonprofit Corporations Generally),⁷⁷ seems to recognize the inadequacy of a standard that holds directors liable only for misconduct. Section 17-6-103(a)(ix) of the Wyoming Statutes allows indemnification of a director, "except in relation to matters as to which he shall be adjudged in such action, suit or proceeding to be liable, for misconduct in the performance of duty."⁷⁸ In another context, the Wyoming Supreme Court has held that "misconduct" means "wrong intention and not mere error of judgment."⁷⁹ Misconduct differs, of course, even from gross negligence in that misconduct requires an intent element not found in negligence.⁸⁰ A director who engages in misconduct, unlike one who is "merely" grossly negligent, will not be protected by indemnification.

3. *The business judgment rule*

The business judgment rule⁸¹ is the most common standard of accountability for directors of nonprofit corporations.⁸² This standard is adopted by the Wyoming Business

76. Directors are prohibited from receiving compensation by WYO. STAT. §§ 17-6-104 and 17-7-109 (1977).

77. WYO. STAT. § 17-6-101 to -117 (1977).

78. WYO. STAT. § 17-6-103(a)(ix) (1977).

79. Matter of State Bank Charter Application, 606 P.2d 296, 302 (Wyo. 1980).

80. Moore v. Kondziela, 405 P.2d 778 (Wyo. 1965).

81. The business judgment rule is described as follows in 3A FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 1039 (perm. ed. 1975):

It is too well settled to admit of controversy that ordinarily the directors nor the other officers of a corporation are liable for mere mistakes or errors of judgment, either of law or fact. . . . [T]he law will not hold directors liable for honest errors, for mistakes of judgment, when they act without corrupt motive and in good faith, that is, for mistakes which may properly be classified under the head of honest mistake.

(footnotes omitted).

82. KNEPPER, *supra* note 44, at § 9.06; Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses and Missionaries, 381 F.Supp. 1003, 1013 (D.D.C. 1974).

Corporation Act for directors of business corporations.⁸³ Directors are expected to exercise the judgment of an ordinarily prudent person in conducting the affairs of the corporation,⁸⁴ but once they have exercised their judgment in good faith, they are insulated from personal liability.⁸⁵ Most statutory articulations of the business judgment rule specifically authorize a director to rely on committee or officers' reports and financial statements prepared by accountants.⁸⁶

In *Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries*,⁸⁷ the Federal District Court for the District of Columbia found itself faced with a lack of statutory directions for determining which standard of accountability to apply to the directors of a charitable nonprofit corporation. Noting that charitable corporations do "not fit neatly into the established common law categories of corporation and trust,"⁸⁸ the court opted to apply a corporate standard. The court's main reason for applying the corporate standard was that the functions of the directors of charitable corporations are "virtually indistinguishable" from the functions of the directors of business corporations.⁸⁹

Stern is notable both for its recognition of the lack of applicable statutory or precedential guidance and for its clear analysis and decision to adopt corporate, rather than trust, principles. The duties of a trustee ordinarily consist of managing the investment of the corpus to conserve assets and provide income.⁹⁰ The duties of a director of a nonprofit corporation, even one which is charitable, are ordinarily far broader than those of a trustee.

83. See *supra* note 40.

84. *Id.*

85. The business judgment standard presupposes some exercise of judgment. Total abrogation of responsibility, like bad faith, will result in a finding of personal negligence under this standard. 3A FLETCHER, *supra* note 38, at § 1039.

86. WYO. STAT. § 17-1-133(b) (Supp. 1982).

87. 381 F.Supp. 1003 (D.D.C. 1974).

88. *Id.* at 1013.

89. *Id.*

90. *Id.* See *infra* note 96.

As an example of the differences, consider the likely duties of the directors of a hypothetical small nonprofit group home for the developmentally disabled. They are probably responsible for hiring and supervising the chief staff person, setting personnel policies, developing admissions criteria, budgeting for operational costs, fund raising, and overseeing the day-to-day operation of the group home in a very general way. The group home may or may not have enough "excess" cash to require extensive investment management. These duties are much more similar to those of a corporate director than to those of a traditional trustee.⁹¹

The business judgment rule is an adequate standard for judging the conduct of directors of nonprofit corporations. Public policy is served by requiring directors to participate in good faith in the affairs of the corporation, while presuming the director's decisions are correct once that judgment is exercised.⁹² Qualified volunteer directors are less likely to be discouraged from participating in nonprofit corporations by this standard than by the more stringent trustee standard, yet the assets and the beneficiaries of the corporation are protected from misuses of board authority arising from fraud or misconduct.

4. *The trustee standard*

A trustee is ordinarily held to a standard similar to, but somewhat more stringent than, that to which a corporate director is held. At common law, trustees of charitable trusts could not delegate their powers and duties to officers or committees;⁹³ convey trust property without the specific authority of the trust instrument or a court of equity;⁹⁴ dissolve the trust or apply the assets to purposes other than those expressed in the trust instrument without application

91. In *Midatlantic Nat'l Bank v. Frank G. Thompson Foundation*, 170 N.J. Super. 128, 137, 405 A.2d 866, 871 (1979), the Superior Court of New Jersey recognized that even in the area of investment management, the function of the board of directors of a charitable corporation is much more like that of corporate directors than trustees.

92. *Brown*, *supra* note 58, at 69.

93. *Town of Cody v. Buffalo Bill Memorial Ass'n*, 64 Wyo. 468, 196 P.2d 196, 378; RESTATEMENT (SECOND) OF TRUSTS §§ 171 and 194 (1959).

94. *Town of Cody v. Buffalo Bill Memorial Ass'n*, 196 P.2d at 378; RESTATEMENT (SECOND) OF TRUSTS § 186, comment d, § 190 (1959).

to a court of equity;⁹⁵ or make investments other than those specifically approved by the instrument, state statute or court order.⁹⁶ Conservation, not experimentation, is the essence of a trustee's duties.⁹⁷

Chapter 7 of title 17 of the Wyoming Statutes specifically recognizes that property devised or given for nonsectarian educational purposes is held in a charitable trust.⁹⁸ Those who receive this property are given the power to incorporate⁹⁹ and broad powers to manage the property.¹⁰⁰ No other chapter of the Wyoming nonprofit corporation laws specifically makes directors into trustees.

In *Town of Cody v. Buffalo Bill Memorial Association*,¹⁰¹ the Wyoming Supreme Court applied the trustee standard to a charitable nonprofit corporation on the theory that where a grant of property is made to a charitable corporation to further general or specific charitable purposes, the corporation itself becomes a trustee.¹⁰² The Buffalo Bill Memorial Association (the Association) was incorporated under the laws of Wyoming¹⁰³ as a nonprofit corporation in March of 1917.¹⁰⁴ Its stated purposes were to "establish and maintain a historical society for the preservation of the history and antiquities of the County, . . . [and] to build, construct and maintain a historical monument or memorial statute in honor of, and to perpetuate the memory of, our late lamented fellow townsman, Honorable William F. Cody, (Buffalo

95. BOGERT, TRUSTS & TRUSTEES § 435 (rev. 2d ed. 1977).

96. *Id.* at § 396. The Wyoming statutes set an investment standard which requires, in part, the exercise of "judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital." WYO. STAT. § 2-3-301 (1977). This statute, by its terms, applies only to fiduciaries "acting under wills, agreements, court orders and other instruments." WYO. STAT. § 2-3-301 (1977).

97. *Blankenship v. Boyle* (329 F.Supp. 1089 (D.D.C. 1971) is one example of a particularly gross breach of trustees' duties.

98. WYO. STAT. § 17-7-113 (1977).

99. WYO. STAT. § 17-7-114 (1977).

100. WYO. STAT. § 17-7-115 (1977).

101. 64 Wyo. 468, 196 P.2d 369 (1948).

102. *Id.*, 196 P.2d at 377.

103. WYO. STAT. § 44-1001 (1945) now codified as WYO. STAT. § 17-7-101 (1977).

104. 196 P.2d at 373.

Bill)."¹⁰⁵ The Association received contributions from local citizens, including some land from Buffalo Bill's relatives, and eventually acquired fifty-five acres near the Town of Cody.¹⁰⁶ The Association then built the Cody Museum. Income from the museum was enough to maintain the property and pay expenses until World War II broke out and the tourist industry suffered a great decline.¹⁰⁷

Finding itself in financial straits and unable to repay even a \$500 debt, the Association deeded its real property to the Town of Cody, apparently intending only a temporary transfer until business improved. The Town of Cody paid off the Association's debts and managed the property until the Association asked the town to return the property after the war.¹⁰⁸ The town refused and sued to quiet title to the property.

The town argued that the Association was a corporation and that, as such, its directors had the power to convey the property. The town also argued that, even if the Association was a trustee, it had renounced its trust and substituted the town in its stead.¹⁰⁹ The Wyoming Supreme Court found that the property was held in trust; therefore, any attempted conveyance without the consent of a court of equity or without statutory authority was void.¹¹⁰ The Association had not applied to any court and the applicable nonprofit corporation statute did not specifically give the corporation the power to dispose of real property.¹¹¹ The court also held that the Association, as trustee, had no right, without the consent of a court of equity, to resign or to transfer its trusteeship.¹¹²

105. *Id.*

106. *Id.* at 372. Even Cornelius Vanderbilt gave to the Association.

107. *Id.*

108. *Id.*

109. 196 P.2d at 382.

110. *Id.* at 381.

111. *Id.* WYO. STAT. § 44-1003 (1945) authorized the corporation to "purchase or receive by gift, or otherwise, personal estate, such as may be necessary or proper for the purposes of such corporation, or to dispose of the same; to purchase or receive by gift, grant, devise or otherwise, *real estate*, such as may be necessary or proper for the purposes of the corporation." (emphasis added). This section is now codified as WYO. STAT. § 17-7-103 (1977) and has not been amended. Compare WYO. STAT. § 17-7-115 (1977) (which gives trustees of an incorporated nonsectarian educational trust the power to "sell all real and personal property coming into their hands.").

112. 196. P.2d at 383.

Accordingly, the court declared the transfer void and ordered a reconveyance.¹¹³

The *Buffalo Bill Memorial Association case*¹¹⁴ is still an important statement of the law of nonprofit corporations in Wyoming. The section of the Wyoming nonprofit corporation statutes which gives a chapter 7 corporation the power to acquire, but not to sell, real property has been recodified but never amended.¹¹⁵ The supreme court has never overruled the case and until and unless it does, the trustee standard still applies to charitable corporations, at least with respect to their dealings in corporate real property received as a donation or purchased with donated funds. Justice Blume, writing for the majority, made it quite clear that even an absolute grant to a charitable corporation, stating no express purpose for which the grant is to be used, is impressed with an implied trust that the property will be used for the purposes for which the corporation is organized.¹¹⁶ A chapter 7 charitable nonprofit corporation, it seems, must apply to the court for power to dispose of real property. The directors of any charitable corporation sit as trustees of any funds received by donation and will be held to that higher standard in dealing with those funds.

These rules are not made applicable to non-charitable nonprofit corporations by any language in *Buffalo Bill Memorial Association*, nor does there seem to be any reason to hold the directors of a non-charitable corporation to the higher standard.¹¹⁷ The continuing problem, however, is the identification of "charitable" corporations. *Buffalo Bill Memorial Association* defines "charitable" strictly in terms of the purposes for which nonprofit corporations could be

113. *Id.* at 381.

114. 64 Wyo. 468, 196 P.2d 369 (1948).

115. *See supra* note 103.

116. 196 P.2d at 377.

117. Non-charitable nonprofit corporations do not receive the tax advantages of charitable corporations, *see infra* note 217, and no other public policy reason for a higher standard than the business judgment rule occurs to this author. Professor Karst's argument that function (charity) and not form (corporation or trust) should determine the standard of accountability also applies only to charitable corporations. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*. 73 HARV. L. REV. 433, 435-36 (1960).

formed under the applicable statute: The Association's stated purposes were accepted by what is now chapter 7 of the non-profit corporation laws, as well as by some commentators. The corporation was accepted as charitable on those bases.¹¹⁸ The Supreme Court's focus in *Lutheran Hospitals and Homes Society of America v. Yepsen*,¹¹⁹ however, was on the source of the corporations' funding, even though the establishment of hospitals is recognized as a legitimate nonprofit purpose by the same section that was relied upon in *Buffalo Bill Memorial Association*.¹²⁰

The court's holding in *Buffalo Bill Memorial Association* and *Yepsen* can be reconciled in one of two ways. First, *Yepsen's* definition of "charitable" may overrule that used in *Buffalo Bill Memorial Association*. Second, the definition of "charitable" accepted in *Buffalo Bill Memorial Association* and the application of the trustee standard arguably apply only to dealings in donated property while *Yepsen's* definition may apply only to limit the availability of charitable immunity in actions against the corporation by third parties for damages arising from the negligence of corporate employees. In either case, what is clear is that very little is clear: The directors and officers of nonprofit corporations in Wyoming have no single and certain standard to follow in performing their duties.

Sources of Liability

The sources of potential personal liability for the directors of nonprofit corporations are many. One of the chief benefits of incorporation is, of course, the limitation of personal liability. The extent to which the corporation stands as a barrier between the individual director and personal liability depends on precisely what is required of the director. The following is a brief survey of some causes of action upon which directors of nonprofit corporations have been sued personally and found liable, coupled with a discussion of the reasons the directors were found liable.

118. 196 P.2d at 376.

119. 469 P.2d 409 (1970).

120. Wyo. STAT. § 17-7-101 (1977).

1. ERISA: Employee Retirement Income Security Act

The Employee Retirement Income Security Act¹²¹ (ERISA) provides standards for the management of employee benefit plans. The Act is long, complex and somewhat daunting. It is also a source of liability for directors actively engaged in managing covered employee benefit plans.¹²² The Act sets a "prudent man standard of care" for one involved as a fiduciary in the management of any covered plan.¹²³ The Tenth Circuit held in *Eaves v. Penn*,¹²⁴ that an officer and director of a corporation can be a fiduciary within the meaning of the Act. Although *Eaves v. Penn* involved a director of a business corporation, there is no exception in the Act for nonprofit corporations.¹²⁵

The fiduciary under ERISA is required to diversify the plan to minimize losses and to act solely in the interests of the plan's beneficiaries.¹²⁶ A fiduciary can also be liable for breaches by co-fiduciaries.¹²⁷ Directors of nonprofit corporations with plans that fit within the coverage of this Act are well advised to either seek professional management of the plan or to obtain insurance coverage of their management of the plan or both.¹²⁸

Directors of Wyoming nonprofit corporations with covered pension plans are doubly in danger because most of the Wyoming nonprofit corporation acts do not specifically give those corporations the power to establish pension plans for employees.¹²⁹ The director who votes for the establishment of a pension plan and then fails to manage it in compliance

121. 29 U.S.C. §§ 1001 - 1381 (1976).

122. The Act covers employee benefit plans established by an employer engaged in any activity affecting commerce. 29 U.S.C. § 1003 (1974). An "employee benefit plan" appears to include even one which provides merely medical insurance or vacation benefits for employees. 29 U.S.C. § 1002(1) and (3) (1974). The fiduciary standards, however, apply only to those plans which include pension plans. 29 U.S.C. § 1051(1) (1974).

123. 29 U.S.C. § 1104 (1974).

124. 587 F.2d 453, 458 (10th Cir. 1978).

125. *Brown, supra* note 58, at 74-75. There is a very narrow exemption for "church plans" which cover primarily those employees engaged in the ministry and related "trades or businesses." 29 U.S.C. §§ 1002(33) and 1003(b) (2) (1974).

126. 29 U.S.C. § 1104(a) (1976). See section 1106 for prohibited transactions.

127. 29 U.S.C. § 1105 (1976).

128. *Brown, supra* note 58, at 75.

129. *Infra* note 180 and accompanying text.

with ERISA's strict standards may find herself liable to the corporation because the establishment of the plan was ultra vires, and liable to the covered employees for a breach of duty and resulting losses.

2. Civil rights

The federal Civil Rights Acts¹³⁰ prohibit discrimination against certain classes of people in the provision of certain benefits and in the exercise of certain protected rights. Discrimination in public accommodations,¹³¹ public education,¹³² federally assisted programs,¹³³ and employment¹³⁴ is prohibited. Other portions of the Civil Rights Acts prohibit discrimination based on race in general,¹³⁵ in property rights,¹³⁶ and discrimination under color of state law.¹³⁷

The United States Supreme Court's decision in *Rendell-Baker v. Kohn*,¹³⁸ has virtually eliminated private nonprofit corporations from the coverage of 42 U.S.C. § 1983, which prohibits discrimination under color of state law. The Court held that a private school in *Rendell-Baker* was a private contractor, performing services for the government, and, as such, not subject to the prohibitions of § 1983 because state action was lacking. This elimination of private nonprofit corporations from § 1983 would seem to hold true regardless of the degree to which the corporation is funded

130. 42 U.S.C. §§ 1971 - 2000 (1976 & Supp. 1980). See generally Lambeth *Civil Rights Trends in Nonprofit Organizations*, in TRENDS IN NONPROFIT ORGANIZATIONS 71 (Oleck chair, 1977).

131. 42 U.S.C. § 2000a (1976 & Supp. 1980). This section excludes private clubs and other establishments which are not "in fact open to the public, except to the extent that the facilities of such establishment are made available" to the public. 42 U.S.C. § 2000a(e) (1976). Discrimination on the basis of race, color, religion or national origin is prohibited. 42 U.S.C. 2000a(a) (1976).

132. 42 U.S.C. 2000c (1976 & Supp. 1980). "Public school" includes any school "operated wholly or predominantly from or through the use of governmental funds or property," whether private or not. 42 U.S.C. § 2000(c) (1976). Discrimination on the basis of race, color, religion, sex or national origin is prohibited. 42 U.S.C. § 2000c-6(a) (2) (1976).

133. 42 U.S.C. § 2000d (1976 & Supp. 1980).

134. 42 U.S.C. § 2000e (1976 & Supp. 1980). Bona fide private membership clubs are excluded, as are employers of less than 15 persons. 42 U.S.C. § 2000e(b) (1976). Discrimination on the basis of race, color, religion, sex or national origin is prohibited. 42 U.S.C. § 2000e-2 (1976).

135. 42 U.S.C. § 1981 (1976).

136. 42 U.S.C. § 1982 (1976 & Supp. 1980).

137. 42 U.S.C. § 1983 (1976 & Supp. 1980).

138. 50 U.S.L.W. 4825 (June 25, 1982) (No. 80-2102).

from public sources, so long as it is an independent entity not run by the state or state officials.¹³⁹

Sections 1981 and 1982 reach private, as well as public, conduct.¹⁴⁰ These sections, which apply by their terms only to discrimination based on race,¹⁴¹ have been successfully used to hold nonprofit corporations and their directors liable for damages. In *Tillman v. Wheaton-Haven Recreation Association, Inc.*¹⁴² the United States Supreme Court held that a private nonprofit recreation association was not a private club and, therefore, had violated both § 1981 and § 1982 by excluding blacks from membership and entrance as guests. The Court said that the private club exception, even if applicable to § 1981 and § 1982, did not apply in that case because membership was open to every white person in the neighborhood and only one person had been excluded by vote of the directors in eleven years.¹⁴³

On remand,¹⁴⁴ the Fourth Circuit Court of Appeals held that, since a director who actually votes for the commission of a tort by the corporation may be personally liable, the Association's directors could be sued for damages.¹⁴⁵ The directors' good faith reliance on the advice of their attorney was no defense to personal liability because bad intent was not essential to an action under the Civil

139. The private nonprofit corporation in this case was a school which received nearly all of its students through referrals from public agencies and 90-99% of its funds from public sources. The school itself was located on private property and run by a board of directors not appointed by any public official. *Id.* at 4826.

140. *Runyon v. McCrary*, 427 U.S. 160, 173 (1976).

141. 42 U.S.C. § 1981 (1976) reads:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens

142. 42 U.S.C. § 1982 (1976 & Supp. 1980) reads:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

143. 410 U.S. 431 (1973).

144. *Id.* at 438, 438 n. 9.

145. *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 517 F.2d 1141 (4th Cir. 1975).

146. *Id.* at 1144.

Rights Acts and because ignorance of the law was no defense.¹⁴⁶

Directors can be held liable for compensatory damages¹⁴⁷ and for attorney's fees¹⁴⁸ for violations of the Civil Rights Acts. The Plaintiff does not have to show out-of-pocket losses to collect compensatory damages for the violation of a federal civil right.¹⁴⁹ Emotional and mental distress are compensable items of damage.¹⁵⁰

3. Breaches of duty

As outlined above, directors of nonprofit corporations will generally be liable for any tort they vote to commit.¹⁵¹ They may also be liable for damages that arise from their failure to supervise and exercise their managerial responsibilities and for breaches of their duty of loyalty to the corporation.

In *Raven's Cove Townhomes, Inc. v. Knuppe Development Co., Inc.*¹⁵² the California Court of Appeals held that a homeowner's association organized as a nonprofit corporation could sue its former directors for damages arising from the directors' failure to supervise and manage the corporation. The homeowner's association sued for damages to individual townhome units and not just for losses sustained by the corporation as a whole, which had no property rights in individual units. The individual directors, who were also the owners of the development company that had built the townhomes, failed to assess individual townhome owners to establish an adequate reserve fund to maintain the exterior of the townhomes and the landscaped areas.¹⁵³ They

146. *Id.* at 1146.

147. *Id.*

148. *Id.* at 1147-48; 42 U.S.C. § 1988 (1976 & Supp. 1980); Annot., 16 A.L.R. FED. 621, § 5 (1973).

149. *Endress v. Brookdale Community College*, 144 N.J. Super. 109, 364 A.2d 1080, 1097 (1976).

150. *Donovan v. Reinbold*, 433 F.2d 738, 742 (9th Cir. 1970).

151. See *supra* notes 144-46 and accompanying text. See also *State v. Civic Action Comm.*, 238 Iowa 851, 28 N.W.2d 467 (1947) (directors who personally participate in abuse of process and defamation held personally liable).

152. 114 Cal. App. 3d 783, 171 Cal. Rptr. 334 (1981).

153. *Id.*, 171 Cal. Rptr. at 344.

also failed to supervise the maintenance activities which were the primary function of the Association.¹⁵⁴ The court also noted that the directors slighted their duties to the association in favor of their own interests as developers, thereby indulging in self-dealing and breaching their duty of loyalty to the association.

The directors were held liable for the cost of repairs to the landscape and the townhomes and for the value of any loss of use suffered during their tenure.¹⁵⁵ The court awarded the association nominal attorney's fees because the directors had breached their fiduciary duties of loyalty and supervision.¹⁵⁶

In *Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries*,¹⁵⁷ the District Court for the District of Columbia found that the directors of a non-profit hospital had breached their fiduciary duties to the hospital by failing to manage corporate assets and by self-dealing. The court found that a director breached his duty to manage without self-interest if, while on a finance committee, he: (1) failed to supervise those who made day-to-day financial or investment decisions; (2) knowingly permitted the hospital to do business with a company in which he had a substantial interest without disclosing that interest and without considering the hospital's best interests; (3) actively participated in or voted for a decision allowing the hospital to do business with a company in which he had a substantial interest; and (4) "failed to perform his duties honestly, in good faith, and with a reasonable amount of diligence and care."¹⁵⁸

154. *Id.*

155. *Id.* at 345.

156. *Id.* For a shocking example of breach of the duty of loyalty, see *Brown v. Memorial Nat'l Home Found.*, 16 Cal. App. 2d 513, 329 P.2d 118 (1958), *cert. denied*, 358 U.S. 943 (1959).

157. 381 F. Supp. 1003 (D.D.C. 1974).

158. *Id.* at 1015. The directors had delegated investment responsibility to the corporate Treasurer and exercised little control over his decisions. As a result, as much as one million dollars of the hospital's invested money was held in no-interest checking accounts in financial institutions in which some directors had substantial interests. *Id.* at 1010-11.

Neither *Stern* nor *Tillman* are astonishing in their determinations that directors were liable for breaches of fiduciary duties. In both cases, self-dealing by the directors, to the detriment of the corporation, was apparent. Both cases also involved directors who failed to participate actively in the management of the corporation and to adequately supervise decisions made for the corporation by others. In both cases, the failure to manage and self-dealing had, or could have had, fairly serious consequences for the corporation.

The Wyoming nonprofit corporation statutes greatly limit the extent to which a director can do business with the corporation. Chapter 7 forbids officers of some types of corporations to receive any salary or remuneration from the corporation and flatly prohibits an officer from entering into contracts of any sort with the corporation during his tenure as an officer.¹⁵⁹ Chapter 6 prohibits any director from receiving any salary or "directly or indirectly any profit or pecuniary advantage" from the corporation.¹⁶⁰ These sections are clearly designed to prohibit any form of self-dealing and directors of corporations organized under either of these chapters must keep this prohibition in mind.

4. *Liability for ultra vires acts*

The Wyoming Business Corporation Act¹⁶¹ adopts what has been termed a "modern view"¹⁶² of ultra vires acts. When ultra vires actions are taken by a corporation or, more accurately, by its board of directors, the actions are not automatically invalid for that reason; the ultra vires nature of an action can, however, be raised in a proceeding by a shareholder to enjoin the act, by the Attorney General

159. WYO. STAT. § 17-7-109 (1977) prohibits officers of corporations from receiving compensation or from making contracts with the corporation. Chapter 8 contains no such prohibition for officers of church or religious corporations. Chapter 9 (Lodges, Secret and Other Societies) contains no prohibition of contracts between directors and nonprofit corporations organized under chapter 9.

160. WYO. STAT. § 17-6-104 (1977).

161. WYO. STAT. §§ 17-1-101 to -1011 (1977 & Supp. 1982).

162. Pasley, *Organization and Operation of Non-Profit Corps.—Some General Considerations*; 19 CLEV. ST. L. REV. 239, 242 (1970).

to dissolve the corporation,¹⁶³ or by the corporation against its officers or directors.¹⁶⁴

The Wyoming Nonprofit Corporation Acts contain no specific statement as to the result of an ultra vires action by the directors of a nonprofit corporation. Is the act void because it is beyond the corporate powers, or merely voidable? Or, as in the case of the business corporation, neither void nor voidable once completed?

An idea of how the Wyoming courts might approach the question of what remedy applies to ultra vires acts by nonprofit corporations is provided in *Town of Cody v. Buffalo Bill Memorial Association*.¹⁶⁵ The court decided that the law of charitable trusts applied to property donated to a charitable corporation and that without authorization by a court of equity, the directors had no power to convey the property.¹⁶⁶ The Wyoming Supreme Court ordered a reconveyance to the Association and held that the Association's prior conveyance of land to the town was void.¹⁶⁷

The implications of this decision are wide-ranging because all property conveyed to a charitable corporation without conditions as to its use is deemed "impressed with a trust for the accomplishment of the corporate purposes."¹⁶⁸ If the Wyoming courts adhere to *Buffalo Bill Memorial Association*, a court of equity will void as ultra vires a sale of real property by a charitable corporation, at least where property donated to the corporation is involved. This view is at odds with the modern position adopted by the Wyoming Business Corporation Act¹⁶⁹ in that the act would not void

163. See *infra* the discussion of quo warranto found at notes 209-18 and accompanying text.

164. Wyo. STAT. § 17-1-106 (1977).

165. 64 Wyo. 468, 196 P.2d 369 (1948). See *supra* notes 101-13 and accompanying text.

166. 196 P.2d at 383.

167. *Id.* at 384.

168. *Id.* at 377 (quoting *Wellesley College v. Attorney General*, 313 Mass. 722, 49 N.E. 2d 220, 224 (1943)). See *supra* notes 101-13 and accompanying text.

169. *Supra* notes 161-64 and accompanying text.

an ultra vires transaction. Nonprofit corporations are thus subject to more active scrutiny by the courts.¹⁷⁰

If one accepts the view that nonprofit corporations — at least those that are charitable — perform a public function in return for special privileges, the protective function performed by voiding an ultra vires act is sensible: The public's interest is much more effectively preserved from wrongdoing. However, allowing ultra vires acts to be voided does little to encourage a more professional and business-like approach to responsibilities on the part of those who sit as directors of nonprofit corporations.¹⁷¹

The powers available to nonprofit corporations are not the same as those available to business corporations. There are few specific limitations placed on the powers of nonprofit corporations, but there are glaring differences between statutory powers granted to nonprofit corporations and those granted to business corporations. The differences between the powers granted various types of nonprofit corporations and those granted business corporations set traps for unwary directors.

The Model Nonprofit Corporation Act¹⁷² gives nonprofit corporations virtually the same powers¹⁷³ that the Wyoming Business Corporation Act¹⁷⁴ gives to for-profit corporations.¹⁷⁵ In fact, both before and after the 1979 amendments¹⁷⁶ to the Wyoming Business Corporation Act, the

170. See also *Bentley v. Whitney Benefits*, 41 Wyo. 11, 281 P. 188 (1929) (decided under WYO. STAT. § 5410 (1920) now codified as WYO. STAT. § 17-7-115 (1977) which specifically mentions the sale of property as one corporate power. There is language in the decision which indicates that the corporation must, nevertheless, petition the court of equity for permission to sell). *Id.*, 281 P. at 190.

171. If the ultra vires act is such as to merit an action in quo warranto, the directors can be personally liable in damages to anyone who suffers from their actions. WYO. STAT. § 1-31-128 (1977).

172. MODEL NONPROFIT CORP. ACT (1964).

173. *Id.* at § 5.

174. WYO. STAT. §§ 17-1-101 to -1011 (1977 & Supp. 1982).

175. WYO. STAT. § 17-1-104 (1977 & Supp. 1982).

176. The 1979 amendments repealed subsections (xv) and (xix) of WYO. STAT. § 17-1-104 and amended subsection (xiv). Subsection (xiv) gave Wyoming corporations the power to transact any lawful business in aid of the United States in time of war. Subsection (xix) gave corporations the power to become members of partnerships, limited partnerships, joint ventures or similar associations. This latter power was reinstated and even broadened

wording of its powers section is identical in most respects to the powers section of the Model Nonprofit Corporation Act. This is not surprising because both the Model Business Corporation Act, upon which the Wyoming Business Corporation Act is based,¹⁷⁷ and the Model Nonprofit Corporation Act were drafted by the American Bar Association's Committee on Corporate Laws, Section of Corporation, Banking and Business Law.¹⁷⁸

Even a brief glance at the powers sections of the various Wyoming nonprofit corporation statutes reveals that the stated powers of nonprofit corporations are more limited than those of their for-profit counterparts. For example, a chapter 6 nonprofit corporation, unlike a business corporation, does not have the power to alter its corporate seal,¹⁷⁹ to pay pensions to its employees,¹⁸⁰ to make guarantees,¹⁸¹ or to lend money and use its credit to assist its employees.¹⁸²

A chapter 7 nonprofit corporation has even more limited stated powers,¹⁸³ but the trustees of a religious society formed under chapter 7 can exercise all "such powers as are or may

in subsection (xvii) of section 17-1-104, as amended in 1979. WYO. STAT. § 17-1-104 (xvii) (Supp. 1982), LAWS 1979, Ch. 153, §§ 2 and 3. Subsection (xv), allowing indemnity, was expanded and recodified as WYO. STAT. § 17-1-105.1 (Supp. 1982).

177. *True v. Hi-Plains Elevator Mach., Inc.*, 577 P.2d 991, 1000 (Wyo. 1978).

178. MODEL NONPROFIT CORP. ACT, Preface to 1964 ed. at vii-x.

179. Compare WYO. STAT. § 17-1-104(a) (iii) with § 17-6-103(a) (ii) (1977).

180. Compare WYO. STAT. § 17-1-104(a) (xvi) (1977) with § 17-6-103 (1977).

181. Compare WYO. STAT. § 17-1-104(a) (viii) (1977) with § 17-6-103(v) (1977).

182. Compare WYO. STAT. § 17-1-104(a) (vi) (Supp. 1982) with § 17-6-103 (1977).

183. WYO. STAT. § 17-7-102(b) (1977) recognizes that a chapter 7 nonprofit corporation can be of perpetual duration. Section 17-7-103 provides that chapter 7 corporations:

shall have power to sue and be sued, plead and be impleaded, in all courts of law and equity whatsoever; to have and use a common seal, and alter the same at pleasure; to contract and be contracted with in pursuance of the powers of such corporation; to purchase or receive by gift, or otherwise, personal estate, such as may be necessary or proper for the purposes of such corporation, and to dispose of the same; to purchase or receive by gift, grant, devise or otherwise, real estate, such as may be necessary or proper for the purposes of the corporation.

Remember that the Wyoming Supreme Court has interpreted this section literally to deny a chapter 7 charitable corporation the power to sell real estate. *Supra* notes 109-13.

Section 17-7-104 gives the members of chapter 7 corporations the power to adopt bylaws for specified purposes, including to regulate the powers of the directors. Section 17-7-105 gives the corporation the power to raise money "in such manner as may be agreed upon by the articles of association or their bylaws." WYO. STAT. § 17-7-105 (1977).

be conferred upon them by the by-laws of such corporation.¹⁸⁴ Such a corporation could argue that no limit is imposed by the general powers section of chapter 7. There is no similar broad grant to the directors of other chapter 7 charitable, educational or fraternal corporations.

Chapter 8 nonprofit corporations (churches and religious societies) seem to possess only those limited powers expressed in sections 17-8-112 and 17-8-113 of the Wyoming Statutes.¹⁸⁵ Notably lacking among the powers explicitly granted to Chapter 8 corporations are the power to make guarantees, the power to pay pensions to employees, and the power to become a partner. These powers may, however, be inferred by section 17-8-107 of the Wyoming Statutes, which provides that chapter 8 nonprofit corporations "shall be subject to the laws of this state in respect to corporations which are applicable to them, save as herein expressly provided." Nowhere in chapter 8 is it "expressly provided" that the general business corporation laws do not apply. In order to give meaning to section 17-8-107, that section must be interpreted to mean that the Business Corporation Act applies where not inconsistent with chapter 8. The unanswered question, of course, is whether the specification of very limited powers is *necessarily* inconsistent with the assumption by the corporation of powers contained in the Business Corporation Act, but not set out in chapter 8.

Chapter 9 also grants a limited number of powers to lodges and other societies,¹⁸⁶ which do not include the power

184. WYO. STAT. § 17-7-110 (1977).

185. WYO. STAT. § 17-8-112 (1977) allows a chapter 8 corporation, after making and filing its articles of incorporation to:

acquire and possess, by donation, gift, bequest, devise, or purchase, and to hold and maintain property, real, personal, and mixed, and to grant, sell, convey, rent, or otherwise dispose of the same as may be necessary to carry on or promote the objects of the corporation; and shall have authority to borrow money and to give written obligations therefor, and to secure the payment thereof by mortgage or other lien, upon real or personal property, when necessary to promote said objects.

WYO. STAT. § 17-8-113 (1977) provides that:

Such corporation shall have the power to contract and be contracted with, to sue and be sued, plead and be pleaded in all courts of justice, and to have and use a common seal by which all deeds and acts of such corporation may be authenticated.

186. Chapter 9 corporations have the power to sue and be sued, to contract and be contracted with, and use a common seal, WYO. STAT. § 17-9-102. (1977);

to borrow money. An interesting comparison between the chapters dealing with traditional nonprofit corporations¹⁸⁷ and chapter 10, Cooperative Marketing Associations, and chapter 11, the Wyoming Industrial Corporation Act, can be made. Both chapter 10 and chapter 11 allow nonprofit corporations organized under their authority the broadest of powers, including the power to do anything necessary to carry out the powers specifically granted by the acts.¹⁸⁸

The powers sections of the various nonprofit corporation statutes illustrate the confusion caused by the existence of six separate statutes. The most complete listing of powers is contained in chapter 6, *Nonprofit Corporations Generally*, but chapter 6 does not apply to all nonprofits. A corporation organized under any other chapter may elect to become a chapter 6 corporation and thereby assume these broader powers, but unless it does so, the corporation is limited by those powers specifically contained in the chapter under which it was formed.¹⁸⁹ Directors who wish to vote for an action which is in any way out of the ordinary, including the establishment of a pension plan or the sale of corporate realty, should scrutinize the chapter under which they received their charter to be certain that they can validly exercise that power. Otherwise, the act may be ultra vires and void.

5. *Piercing the nonprofit corporate veil*

A nonprofit corporation, like any other, may be pierced when the corporate form is misused. In *Wilson v. Nobell*,¹⁹⁰ an incorporated nonprofit research foundation was pierced for the benefit of its founder's creditors. The nonprofit

the power to hold and possess personal property, and sell and dispose of the same, WYO. STAT. § 17-9-104 (1977); and the authority to make bylaws, WYO. STAT. § 17-9-105 (1977).

Section 17-9-103 gives a chapter 9 corporation the power to "take, by purchase, grant, devise, gift or otherwise, any town lot or tract of land, . . . sell and dispose of the same, and execute deeds of conveyance." WYO. STAT. § 17-9-103 (1977).

187. "Traditional" nonprofit corporations are those organized for educational, religious, charitable, and fraternal purposes.

188. WYO. STAT. §§ 17-10-109 and 17-11-104 (1977).

189. WYO. STAT. § 17-6-108 (1977).

190. 119 Cal. App. 2d 341, 259 P.2d 720 (1953)

corporation was held to be the alter ego of the founder, dominated and controlled by him and his wife. The corporation had purchased the founder's scientific equipment and formulas for less than adequate consideration and had collected all the profits from his inventions. The founder himself had little money and no assets. The court held that, under these circumstances, fraud or injustice would result if the corporation were not held liable for the founder's individual debts and ordered the corporate veil pierced.¹⁹¹

The *Nobell* case is, of course, the reverse of the sort of situation in which the directors of nonprofit corporations would usually be concerned about piercing. Ordinarily, the question will arise in connection with an attempt to hold the directors personally liable for the debts of the corporation. The standard of accountability applied to directors in other sorts of cases is not germane to determining when a nonprofit corporation will be pierced. The criteria for piercing business corporations should apply to nonprofits because the interests to be protected are the same in each case: Piercing avoids injustice to corporate creditors which may result from a misuse of the corporate form. The creditor's interests are the same whether the debtor corporation is nonprofit or for-profit.

The Wyoming Supreme Court's most recent statement on piercing is contained in *Amfac Mechanical Supply Co. v. Federer*.¹⁹² In *Federer*, the court held that under certain circumstances, proof of fraud or bad faith is not required to pierce a corporate veil. There, the corporation was badly undercapitalized,¹⁹³ corporate and personal funds of the director-shareholders were commingled,¹⁹⁴ and corporate formalities were almost completely disregarded by the directors.¹⁹⁵ The corporation consistently repaid a loan from the directors at the rate of \$1000 per month in preference to

191. *Id.*, 259 P.2d at 724.

192. 645 P.2d 73 (Wyo. 1982).

193. *Id.* at 79.

194. *Id.* at 78-79.

195. *Id.* at 82. No minutes were kept of meetings, no resolution passed authorizing the corporation to borrow from the directors, and corporate funds were not kept separate from the directors' personal funds.

other creditors.¹⁹⁶ The court held that these circumstances were enough to justify piercing even without a specific showing of bad faith or fraud by the directors.

Directors of nonprofit corporations should carefully heed the lessons of *Federer*. All corporations should be adequately capitalized before starting business. Because many nonprofits start as small groups of concerned citizens trying to fill a perceived gap in community services, this may be difficult. Some of the Wyoming nonprofit corporation acts do allow assessments on issued shares to raise money.¹⁹⁷ The main problem, of course, is getting started, especially since a contributor can expect no return on investment until dissolution.¹⁹⁸ In this regard, the best advice to one forming a nonprofit is probably, "Start small and stay within your budget."

Observance of corporate formalities is vital. Corporate funds must be kept separate from personal funds. Meetings must be held, minutes kept, and by-laws observed. Any attorney advising nonprofit directors should stress the importance of formal action by the board of directors as a prerequisite to continued protection from personal liability.

Standing

Wyoming Statutes allow all nonprofit corporations to sue and be sued.¹⁹⁹ The nonprofit corporation statutes do not, however, provide specifically for a type of action by members similar to shareholders derivative suits on behalf of business corporations.²⁰⁰ Nor do the nonprofit corporation statutes specifically contemplate action by or on behalf of the corporation against its directors. This section will explore standing to sue present or former directors. The standing of certain "third parties" to sue in cases of tort and to pierce the corporate veil has already been discussed.²⁰¹

196. *Id.* at 81.

197. WYO. STAT. §§ 17-6-102(a) (viii) and 17-7-106 (1977). Both chapters 6 and 7 forbid the payment of dividends except upon liquidation. WYO. STAT. §§ 17-6-102(a) (viii) and 17-7-108 (1977).

198. WYO. STAT. §§ 17-6-102(a) (viii) and 17-7-108 (1977).

199. WYO. STAT. §§ 17-6-103(a) (i) and 17-7-103 (1977).

200. WYO. STAT. § 17-1-141.1 (Supp. 1982).

201. See *supra* notes 128-57 and accompanying text.

1. *The Attorney General*

The attorney general of a state²⁰² is usually given the power and the duty to police charitable trusts on behalf of the public.²⁰³ This responsibility is said to be given to the attorney general because he represents the members of the public who are the beneficiaries of a charitable trust.²⁰⁴ The Attorney General of Wyoming apparently has the authority to sue to enforce charitable trusts.²⁰⁵ Whether that power can be expanded to allow for general supervision of all nonprofit corporations is a question not answered by any Wyoming statute.²⁰⁶

Even if the attorney general has the power or duty to supervise nonprofit corporations on his own initiative, the office currently has no staff person charged with that duty.²⁰⁷ The Office of the Attorney General does not have enough staff attorneys to undertake extensive supervision of charities or nonprofit corporations in general, except as specific abuses are brought to the attention of the attorney general or his deputies.²⁰⁸

The attorney general does have the power to bring a quo warranto action against a corporation that violates the laws under which it is created or governed, commits an act

202. The general powers and responsibilities of the Wyoming Attorney General are contained in WYO. STAT. §§ 9-2-501 to -599 (1977 & Supp. 1982).

203. BOGERT, *supra* note 95, at § 411.

204. *Id.*

205. Wyoming has adopted the common law of England as it existed before 1607. WYO. STAT. § 8-1-101 (1977). In England at that time, the attorney general was empowered to sue to enforce charitable trusts. SCOTT, 4 THE LAW OF TRUSTS § 391 (3d ed. 1967). The district court ordered the Wyoming attorney general to appear on behalf of the members of the public "as the beneficiaries of the property" when the actions of charitable trustees were challenged in *Bentley v. Whitney Benefits*, 41 Wyo. 11, 281 P. 188 (1929).

The attorney general has specific statutory duties with regard to trusts for educational purposes. WYO. STAT. § 9-2-421 (1977). There is also some indication that the prosecuting attorney of a county is empowered to sue to enforce charitable trusts in WYO. STAT. § 1-31-129 (1977).

206. The attorney general is required to represent the state in all suits which "may be instituted by or against the state of Wyoming." WYO. STAT. § 9-2-505(a) (1977 & Supp. 1982). Therefore, if other agencies sue nonprofit corporations, for whatever reason, the attorney general would represent the plaintiff state agency.

207. Interview with Walter Perry III, Senior Assistant Attorney General, State of Wyoming, in Cheyenne, Wyoming (Sept. 15, 1982). This situation is not uncommon. See Oleck, *supra* note 1, at 232-37.

208. Interview with Walter Perry III, Senior Assistant Attorney General, State of Wyoming, in Cheyenne, Wyoming (Sept. 15, 1982).

which "amounts to a surrender of its corporate rights," or misuses or exceeds its lawful powers or privileges.²⁰⁹ Not every ultra vires act, however, will form a basis for an action in quo warranto and substantial harm to the public must result for quo warranto to lie.²¹⁰ The remedy in a quo warranto proceeding is ouster, either from corporate status altogether or from continued performance of the offensive act.²¹¹

If the corporation is ousted because of the misconduct of its officers or directors, anyone injured by that misconduct may sue directors and officers personally for resulting damages.²¹² The availability of this remedy is somewhat expanded in that a quo warranto action may be brought on the relation of a private party with leave of the court,²¹³ as well as by the attorney general. Where quo warranto is available to challenge corporate existence²¹⁴ or the right of a director to hold office,²¹⁵ it is an exclusive remedy.²¹⁶

Given the nature of and special privileges accorded to nonprofit corporations,²¹⁷ quo warranto seems a particularly

209. WYO. STAT. § 1-31-102 (1977).

210. [T]he misuser must be such as to work or threaten a substantial injury to the public, or such as to amount to a violation of the fundamental condition of the contract by which the franchise was granted, and thus defeat the purpose of the grant; and ordinarily the wrong or evil must be one remediable in no other form of judicial proceeding.

State v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N.W. 1020, 1025 (1889). Compare WYO. STAT. § 17-1-106(iii) (1977) (which makes no mention of public harm as a requirement for ouster for ultra vires acts).

211. WYO. STAT. § 1-31-118 (1977). WYO. STAT. § 17-1-106(iii) (1977) provides for either remedy against a business corporation which exceeds its powers.

212. WYO. STAT. § 1-31-128 (1977).

213. WYO. STAT. § 1-31-104 (1977).

214. WYO. STAT. § 1-31-102 (1977).

215. WYO. STAT. § 1-31-101 (1977).

216. *Dickerson v. City Council of Buffalo*, 582 P.2d 80, 83 (Wyo. 1978) held that quo warranto was the exclusive remedy available to challenge the legal existence of a board member's right to sit on a city-county joint powers board, a public corporation. Compare *Town of Cody v. Buffalo Bill Memorial Ass'n*, 64 Wyo. 468, 196 P.2d 369 (1948) (where a nonprofit corporation board exceeded its powers, but a quiet title action was maintained against the corporation).

217. See *supra* text accompanying notes 11-15. Nonprofit corporations are granted the following special privileges in Wyoming:

—sales to religious and charitable corporations are exempt from state excise tax, WYO. STAT. § 39-6-505(vi) (1977);

—sales to religious and charitable organizations and to nonprofit corporations which provide meals or services to senior citizens are exempt from state sales tax, WYO. STAT. § 39-6-405(a)(xii) (1977);

appropriate remedy for abuses. Many nonprofit corporations serve a public function or are organized to benefit the public as a whole, so that substantial harm to the public is likely to result from any serious abuse of corporate powers. The misuse of nonprofit corporation status with its attendant privileges — especially exemption from various taxes — would seem enough of a public harm to justify *quo warranto* as a remedy. This “public injury” requirement would seem to obviate the need for any other sort of personal involvement or injury on the part of the private relator. In those cases where the relator did suffer individual harm, a successful ouster might allow a damages remedy against the directors as individuals.²¹⁸

2. *The corporation*

The nonprofit corporation itself, by action of its board of directors, has standing to sue former directors. The corporation’s statutory power to sue²¹⁹ is one which logically must be exercised by the board of directors acting in its official capacity.²²⁰

3. *Beneficiaries of a charitable corporation*

The beneficiaries of a trust generally have standing to sue to enforce the trust.²²¹ Members of the general public, as the beneficiaries of a charitable trust, do not generally

—some properties of nonprofit corporations are exempt from state property tax, WYO. STAT. § 39-1-201(a) (1977);

—charitable, religious, benevolent and community organizations are exempt from licensing requirements for dance hall operators, WYO. STAT. § 33-13-104 (1977);

—certain exemptions to the licensing requirements for circuses, menageries and other “open air” entertainments, WYO. STAT. § 33-6-101 (1977);

—charitable and religious organizations are exempt from the bonding requirements for nonresident employers, WYO. STAT. § 27-1-106 (1977);

—nonprofit corporations under the Wyoming Industrial Corporation Act are exempt from securities registration, WYO. STAT. § 17-11-118 (1977) and some taxes, WYO. STAT. § 17-11-119 (1977).

Charitable corporations which qualify under § 501(c) of the Internal Revenue Code, 26 U.S.C. § 501(c) (1976), are also exempt from federal income tax.

218. *Supra* note 212.

219. *Supra* note 199.

220. In *Raven's Cove Townhomes v. Knuppe Dev.*, the homeowners association was found to have standing to sue former directors on behalf of members of the association for damages suffered due to the former directors' mismanagement of the corporation. 115 Cal. App. 3d 797, 171 Cal. Rptr. 334 (1981). See *supra* notes 152-56 and accompanying text.

221. BOGERT, *supra* note 95, at § 951 (rev. 2d ed. 1982).

have a sufficient interest in the charity to maintain suit against the trustees.²²² Ordinarily, the public interest is protected by the attorney general.²²³ The same rule generally applies to the beneficiaries of a charitable corporation.²²⁴

*Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries*²²⁵ represents an exception to these general rules. In that case, patients of a nonprofit hospital were allowed to maintain a cause of action for breach of trust against the directors of the hospital even though the applicable statute did not specifically authorize them to do so. The court held that the patients could sue only to prevent continued injury to the hospital and not to recover personal damages, apparently believing that individual damages were impossible to determine.²²⁶

4. Members

All of the Wyoming nonprofit corporation statutes recognize that the corporation may have members,²²⁷ but the powers associated with membership are not clear. Members of nonprofit corporations are not specifically provided with a vehicle similar to the shareholders' derivative suit²²⁸ to enforce directors' obligations to the corporation.

Courts have generally held that mere contributors to a charity do not have standing to sue to enforce directors' duties.²²⁹ As one commentator notes, "Certainly no one would argue that the man who contributes five dollars to the Red Cross should be permitted to bring suit against its officers for violation of their duty; such a rule would be the practical equivalent of conferring standing on the entire population."²³⁰

222. Karst, *supra* note 117, at 437.

223. See *supra* notes 204-20 and accompanying text (referring to the powers of the attorney general to sue to enforce charitable trusts); Holt v. College of Osteopathic Physicians and Surgeons, 61 Cal. 2d 750, 394 P.2d 932, 40 Cal. Rptr. 244 (1964).

224. Holt v. College of Osteopathic Physicians and Surgeons, 394 P.2d 932, 936 (1964).

225. 367 F.Supp. 536 (D.D.C. 1973).

226. *Id.* at 540-41.

227. WYO. STAT. §§ 17-6-106, 17-7-104, 17-9-106, 17-10-110, and 17-11-106 (1977).

228. WYO. STAT. § 17-1-141.1 (Supp. 1982).

229. Karst, *supra* note 117, at 447.

230. *Id.*

The only remedy for members who are dissatisfied with the operation of a nonprofit corporation may be to oust the officers from office at the next election. The new board of directors can then pursue any claims the corporation may have against the directors. To the extent that this solution is inadequate, this situation should be corrected by legislation to provide a remedy similar to the shareholders' derivative suit.²³¹

5. *Minority directors*

Minority directors should be able to sue majority directors to enjoin ultra vires acts. In *Bentley v. Whitney Benefits*,²³² one of the directors of a charitable corporation petitioned the Wyoming District Court for a determination of the corporation's authority to sell certain real estate. The court ordered the attorney general to intervene on behalf of the potential beneficiaries, but the director was allowed to maintain his petition, apparently without objection.

In *Holt v. College of Osteopathic Physicians & Surgeons*,²³³ Justice Traynor, speaking for the California Supreme Court, held that minority directors had standing to sue their fellow directors. The court drew on the law of charitable trusts to hold that a co-director, like a co-trustee, has a sufficient interest in the charity to bring an action.²³⁴ The court also noted that relying on the attorney general alone to police charities was unsatisfactory because of the attorney general's lack of information about the operations of a specific corporation.²³⁵ Affording standing to minority directors overcomes this problem to a great extent because, as members of the board, they are privy to board decisions.

III. CONCLUSION

Although many Wyoming residents participate actively as directors of nonprofit corporations, the Wyoming stat-

231. *Id.* Professor Karst suggests a number of ways to recognize the interests of members and major contributors and still avoid frivolous strike suits.

232. 41 Wyo. 11, 281 P. 188 (1929).

233. 61 Cal. 2d 750, 394 P.2d 932, 40 Cal. Rptr. 244 (1964).

234. *Id.*, 394 P.2d at 937.

235. *Id.* at 935.

utes are, in large part, confusing and outdated. No clear standard for holding directors accountable is set. No specific mechanism is provided to insure director accountability to members.

The Wyoming Legislature can largely remedy this difficult situation by adopting the Model Nonprofit Corporation Act with an added section setting a duty of care. The duty of care should be similar to the business judgment rule established for directors of Wyoming business corporations and not a trustee or gross negligence rule. The new act should apply to all nonprofit corporations except those currently covered by chapters 10 and 11.

Until and unless the legislature acts, directors of nonprofit corporations should familiarize themselves with the chapter under which the corporation was formed. Each chapter sets forth varying powers and duties. Directors must be careful not to exceed their powers. Directors of charitable corporations should apply to the court for instructions when they are uncertain as to the extent of their powers or duties. Directors of corporations not organized under chapter 6 should consider electing chapter 6 status to obtain the advantages of indemnification.

Americans have always been volunteers. The existence of uncertainties as to the limits of personal liability has not and will not deter dedicated volunteer directors from participating in worthwhile causes. Nevertheless, some legislative action providing a degree of order and certainty not currently available in the statutory scheme will be a great step towards making the role of director of a nonprofit corporation an easier one to fulfill.

CHRISTINE CHUTE