

Michigan Law Review

Volume 19 | Issue 4

1921

Damage Liability of Charitable Institutions

Carl Zollman

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Common Law Commons](#), [Courts Commons](#), [Legal Remedies Commons](#), and the [Nonprofit Organizations Law Commons](#)

Recommended Citation

Carl Zollman, *Damage Liability of Charitable Institutions*, 19 MICH. L. REV. 395 (1921).

Available at: <https://repository.law.umich.edu/mlr/vol19/iss4/2>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

DAMAGE LIABILITY OF CHARITABLE INSTITUTIONS

THE question of the liability of charitable institutions to actions for damages presents great difficulties. This is not due however to a lack of cases. The question has peculiarly "engaged the attention of the bench and bar of the country. The problem has been scrutinized from every conceivable viewpoint. The arguments for and against have well nigh been exhausted, and little, if anything, new remains to be advanced".¹ In their opinions the courts have frequently gone back to certain English cases disregarding the points decided but stressing certain *dicta* which have been uttered by the judges which decided them. It is curious to note that none of these cases was really in point. *Duncan v. Findlader*, decided in 1839, involved a claim against the treasurer of a turnpike road which seems to have been a public corporation.² In *Mercy Docks v. Gibbs*, decided in 1864, the defendant was a corporation which provided docking facilities and the plaintiff claimed that a cargo of guano had come to grief on account of defendant's negligence.³ *Herriots' Hospital v. Ross*, decided in 1846, involved a claim for damages on the part of an applicant for rejection from the benefit of the charity.⁴ Though these and other English cases⁵ on their very face did not involve the question in which we are interested they have nevertheless been drawn on extensively and made to support propositions which would have astonished the judges who wrote the opinions. It would waste valuable space to no useful purpose to attempt to trace the use which has been made of these cases by American Courts. They will therefore be passed by hereafter without any further reference.

The question of exemption from tort liability has frequently come up in connection with municipal corporations such as counties, cities, towns, villages, and school districts. In such cases it is recognized individual grievances must not override the public good nor make

¹ 1918, *Magnuson v. Swedish Hospital*, 99 Wash. 399, 407, 169 Pac. 828.

² 6 Clark & F. 894, 2 Macl. & Rob. 911.

³ L. R., 1 Engl. and Irish 93 (affirmed, 11 H. L. Cas. 689).

⁴ 12 Clark & F. 507.

⁵ See 1901, *Powers v. Massachusetts Homœopathic Hospital*, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372; 1880, *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 423, 426, 427, 34 Am. Rep. 675.

that individual advantage must give way to the public welfare and the public funds the primary source of individual compensation.⁶ A municipality in performing charitable functions is acting as an agency of the sovereign and therefore enjoys the sovereign's immunity from suit.⁷ "In providing for the care of the poor, a police power which resides primarily in the sovereignty is exercised, and neither the sovereign nor the local governing body to whom such a power is delegated is responsible for the misfeasance of its officers".⁸ A municipality is not especially benefited by such work but is performing a service essential for the welfare of the public in preserving the peace, preventing the destruction of property or performing any other kindred obligation and public policy demands that it be given immunity from liability for the negligence of those who actually perform the duty.⁹ It has therefore been said that a county is not responsible for the acts of officers or employees which it appoints in the exercise of a portion of the sovereign power of the State, by the requirement of a public law, and simply for the public benefit, and for a purpose from which it as a corporation derives no benefit.¹⁰ "Where care and diligence are used in the selection of a physician the officers representing the county have done their duty, and where there is no breach of duty there can be no negligence".¹¹ The same holds good in regard to school districts,¹² boards of school commissioners,¹³ boards of education,¹⁴ towns,¹⁵ poor districts,¹⁶ and cities.¹⁷

⁶ 1888, *Ford v. Kendall Borough School District*, 121 Pa. 543, 549, 15 Atl. 812, 1 L. R. A. 607.

⁷ 1901, *Powers v. Massachusetts Homœopathic Hospital*, 109 Fed. 294, 49 C. C. A. 122, 65 L. R. A. 372 (affirming 101 Fed. 896).

⁸ 1885, *Summers v. Daviess County*, 103 Ind. 262, 264, 265, 2 N. E. 725, 53 Am. Rep. 512.

⁹ 1906, *Noble v. Hahnemann Hospital*, 98 N. Y. Supp. 605, 112 App. Div. 663, 18 Ann. N. Y. Cas. 365.

¹⁰ 1862, *Sherbourne v. Yuba County*, 21 Col. 113, 81 Am. Dec. 151.

¹¹ 1885, *Summers v. Davies County*, 103 Ind. 262, 263, 2 N. E. 725, 53 Am. Rep. 512.

¹² 1888, *Ford v. Kendall Borough School District*, 121 Pa. 543, 549, 15 Atl. 812, 1 L. R. A. 607.

¹³ 1902, *Weddle v. Frederick County*, 94 Md. 334, 51 Atl. 289.

¹⁴ 1876, *Finch v. Board of Education*, 30 Ohio St. 37, 27 Am. Rep. 414.

¹⁵ 1875, *Brown v. Vinalhaven*, 65 Me. 402, 20 Am. Rep. 709; 1860, *Biglow v. Randolph*, 80 Mass. (14 Gray) 541.

¹⁶ 1902, *Peasley v. McKean County Poor District*, 26 Pa. Co. Ct. Rep. 428.

¹⁷ 1872, *Ogg v. Lansing*, 35 Iowa 495, 499, 14 Am. Rep. 409; 1875, *Max-*

It does not stop here, however, but extends to other agencies and sub-agencies by which the work of the state is carried on. "If a municipal corporation which has a twofold character, one public and the other private, is exempt from liability for the negligence of its agents when in the exercise and performance of its powers and duties as an agency of the government, a public corporation which was created and exists for no other than governmental purposes must necessarily be exempt from such liability".¹⁸ On this ground federal soldiers' homes,¹⁹ State Insane Asylums,²⁰ Industrial Schools,²¹ houses of refuge,²² and city hospitals²³ have been exempted from liability. It has even been held that this exemption extends to a hospital where a city has entrusted its ambulance service to it.²⁴ Of course the mere fact that a city is the trustee of a charity does not exempt the charity from liability.²⁵ All these and similar cases, while they may present valuable analogies, are not germane to the subject under investigation and are therefore disregarded in the following pages.

While governmental agencies, though they perform charitable functions, must be eliminated from the discussion, non-charitable organizations in the technical sense of the word, though they may do much good in their several ways cannot be accorded any more considerate treatment. On the ground that they are not charities ceme-

milian v. New York, 62 N. Y. 160, 20 Am. Rep. 468 (affirming 2 Hun. 263, 4 Thomp. & C. 491).

¹⁸ 1899, *Mala v. Eastern State Hospital*, 97 Va. 507, 511, 47 L. R. A. 577, 34 S. E. 617.

¹⁹ 1903, *Overholser v. National Home for Disabled Volunteer Soldiers*, 68 Ohio St. 236, 247, 67 N. E. 487, 62 L. R. A. 936, 96 Am. St. Rep. 658; 1909, *Lyle v. National Home*, 170 Fed. 842.

²⁰ 1903, *White v. Alabama Insane Hospital*, 138 Ala. 479, 35 So. 454; 1906, *Leavell v. Western Kentucky Asylum*, 122 Ky. 213, 91 S. W. 671, 28 Ky. Law Rep. 1129, 4 L. R. A. (N. S.) 269.

²¹ 1894, *Williamson v. Louisville Industrial School*, 95 Ky. 251, 24 S. W. 1065, 44 Am. St. Rep. 243, 23 L. R. A. 200, 15 Ky. Law Rep. 629; 1903, *Corbett v. St. Vincent's Industrial School*, 177 N. Y. 16, 68 N. E. 997 (affirming 79 N. Y. Supp. 369, 79 App. Div. 334).

²² 1885, *Perry v. House of Refuge*, 63 Md. 20, 28, 52 Am. Rep. 495.

²³ 1869, *Murtaugh v. St. Louis*, 44 Mo. 479; 1867, *Richmond v. Long*, 17 Gratt 375, 94 Am. Dec. 461.

²⁴ 1906, *Noble v. Hahnemann Hospital*, 98 N. Y. Supp. 605, 112 App. Div. 663, 18 Ann. N. Y. Cas. 365.

²⁵ 1902, *Winnemore v. Philadelphia*, 18 Pa. Super. Ct. 625.

teries,²⁶ medical colleges,²⁷ protective departments,²⁸ or fire insurance patrols,²⁹ private sanitariums,³⁰ commerce hospitals,³¹ mutual benefit societies,³² agricultural societies,³³ and even Young Men's Christian Associations³⁴ have been denied exemption. With such and similar cases we are therefore not concerned. The exemptions of charities only in the strict and technical sense of the term is the subject of this paper.

The elimination of governmental agencies and non-charitable ventures still leaves certain other situations to be eliminated. Charities will be held to a fulfillment of their contracts just like any other person or corporation. While on ordinary principles they will not be liable on a contract made by one of their agents without authority,³⁵ an action of assumpsit for a breach of a contract to furnish certain accommodations is maintainable against them.³⁶ A patient may therefore recover from a hospital for the breach of a contract to furnish a competent nurse³⁷ or to take care of a sick child.^{37a}

²⁶ 1912, *East Hill Cemetery Co. v. Thompson*, 53 Ind. App. 417, 97 N. E. 1036, 1037; 1888, *Donnelly v. Boston Catholic Cemetery Ass'n*, 146 Mass. 163, 15 N. E. 505.

²⁷ 1907, *Medical College v. Rushing*, 1 Ga. App. 468, 473, 57 S. E. 1083.

²⁸ 1890, *Newcomb v. Boston Protective Department*, 151 Mass. 215, 24 N. E. 39, 6 L. R. A. 778; 1900, *Bates v. Worcester Protective Department*, 177 Mass. 130, 58 N. E. 274.

²⁹ 1909, *Coleman v. Fire Insurance Patrol*, 122 La. Ann. 626, 48 So. 130, 21 L. R. A. (N. S.) 810; 1910, *Rady v. Fire Insurance Patrol of New Orleans*, 126 La. 273, 52 So. 491, 139 Am. St. Rep. 511; 1915, *Sutter v. Milwaukee Board of Underwriters*, 161 Wis. 615, 618, 155 N. W. 127, Ann. Cas. 1917, E. 682.

³⁰ 1902, *Galesburg Sanitarium v. Jacobson*, 103 Ill. App. 26; 1914, *Green v. Biggs*, 167 N. C. 417, 421, 83 S. E. 553; 1906, *Stanley v. Schumpert*, 117 La. 255, 41 So. 565, 6 L. R. A. (N. S.) 306, 116 Am. St. Rep. 202.

³¹ 1907, *Gitzhoffen v. Holy Cross Hospital Ass'n*, 32 Utah 46, 88 Pac. 691, 8 L. R. A. (N. S.) 1161; 1907, *University of Louisville v. Hammock*, 127 Ky. 564, 32 Ky. Law Rep. 431, 106 S. W. 219.

³² 1903, *Brown v. La Societe Francaise*, 138 Cal. 475, 477, 71 Pac. 516.

³³ 1909, *Logan v. Agricultural Society*, 156 Mich. 537, 541, 121 N. W. 485.

³⁴ 1896, *Chapin v. Holyoke Y. M. C. A.*, 165 Mass. 280, 42 N. E. 1130.

³⁵ 1904, *Wilson v. Brooklyn Homœopathic Hospital*, 89 N. Y. Supp. 619, 97 App. Div. 37.

³⁶ 1912, *Armstrong v. Wesley Hospital*, 170 Ill. App. 81.

³⁷ 1899, *Ward v. St. Vincent's Hospital*, 57 N. Y. Supp. 784, 39 App. Div. 624 (see also s. c. 79 N. Y. Supp. 1004, 78 App. Div. 317).

^{37a} 1916, *Roche v. St. John's Riverside Hospital*, 160 N. Y. Supp. 401, 96 Misc. 289 (affirmed, 161 N. Y. Supp. 1143).

Another situation which must be eliminated has reference to injuries occurring in connection with business blocks or other property in which the funds of a charity are invested. It goes without saying that such property is used by tenants and the public in exactly the same manner as if it belonged to an individual or a corporation for profit. An exemption extended to it might well be disastrous to the charity. It might not be able to find tenants and would therefore be inconvenienced rather than benefited by its investment. It has therefore been held that where a charitable institution lets a part of its building to a tenant for purposes entirely disconnected with charity an employee of the institution may recover for injuries suffered while helping to carry out the contract between the charity and the tenant.³⁸ The negligent act of an elevator operator in such a building has therefore been held to be an incident to the management of the property chargeable as among the items of cost.³⁹

There is still another subject as to which charities will not be allowed to escape liability. They may not create a nuisance on their property and after a person has been injured plead their charitable character as a defense. "If, in their dealings with their property appropriated to charity, they create a nuisance by themselves or their servants, if they dig pitfalls in their grounds and the like, there are strong reasons for holding them liable to outsiders, like any other individual or corporation. The purity of their aims may not justify their torts".⁴⁰

The elimination of governmental and charitable agencies and of contract liability, nuisance and the like leaves the question of the liability of charities for personal injuries to beneficiaries, employees, invitees, and strangers as the proper subject of this paper. It is not astonishing in view of the high favor with which charities are regarded by the courts that there are jurisdictions which have gone to extremes in exempting charitable ventures from all claims for damages whether they have occurred to strangers or patients, whether

³⁸ 1911, *Holder v. Massachusetts Horticultural Society*, 211 Mass. 370, 97 N. E. 630.

³⁹ 1902, *Winnemore v. Philadelphia*, 18 Pa. Super. Ct. 625, 630.

⁴⁰ 1901, *Powers v. Massachusetts Homœopathic Hospital*, 109 Fed. 294, 304, 47 C. C. A. 122, 65 L. R. A. 372. See also cases cited in 1906, *Leavell v. Western Kentucky Asylum*, 122 Ky. 213, 217, 91 S. W. 671; 28 Ky. Law Rep. 1129, 4 L. R. A. (N. S.) 269.

they are the result of the negligence of attendants or the negligence of trustees or managers in selecting them. Where this doctrine of universal exemption obtains it is rested on the proposition that the funds of the corporation are the subject of a trust and that to suffer a judgment to be rendered against the corporation and to subject its property to the judgment would be an illegal diversion of trust estate. The Illinois Court therefore says that an institution "doing charitable work of great benefit to the public without profit, and depending upon gifts, donations, legacies and bequests made by charitable persons for the successful accomplishment of its beneficial purposes, is not to be hampered in the acquisition of property and funds from those wishing to contribute and assist in the charitable work, by any doubt that might arise in the minds of such intending donors as to whether the funds supplied by them will be applied to the purposes for which they intended to devote them, or diverted to the entirely different purpose of satisfying judgments recovered against the donee because of the negligent act of those employed to carry the beneficent purpose into execution".⁴¹ In Maine it has been argued that unless charitable institutions are exempted "private gift and public aid would not long be contributed to feed the hungry maw of litigation, and charitable institutions of all kinds would ultimately cease or become greatly impaired in their usefulness".⁴² The Pennsylvania Court has worked itself into a frenzy, exclaiming: "How much better than a thief would be the law itself, were it to apply the trust's funds contributed for a charitable object, to pay for injuries resulting from the torts or negligence of the trustee."⁴³ In South Carolina the court has concluded: "The exemption of public charities from liability in actions for damages for tort rests not upon the relation of the injured person to the charity, but upon grounds of public policy, which forbid the crippling or destruction of charities which are established for the benefit of the whole public to compensate one or more individual members of the public for injuries inflicted by the negligence of the corporation itself, or of its superior

⁴¹ 1905, *Parks v. Northwestern University*, 218 Ill. 381, 385, 75 N. E. 991, 2 L. R. A. (N. S.) 556 (affirming 121 Ill. App. 512).

⁴² 1910, *Jensen v. Maine Eye and Ear Infirmary*, 107 Me. 408, 411, 78 Atl. 898, 33 L. R. A. (N. S.) 141.

⁴³ 1888, *Fire Insurance Patrol v. Boyd*, 120 Pa. 624, 649, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745.

officers or agents, or of its servants or employees. The principle is that, in organized society, the rights of the individual must, in some instances, be subordinated to the public good. It is better for the individual to suffer injury without compensation than for the public to be deprived of the benefit of the charity".⁴⁴ Similar views have been expressed in Maryland,⁴⁵ Kentucky,⁴⁶ Arkansas,⁴⁷ Missouri,⁴⁸ and Tennessee.⁴⁹ The Massachusetts court has said that "if the property of the charity was depleted by the payment of damages its usefulness might be either impaired or wholly destroyed, the object of the founder or donors defeated and charitable gifts discouraged."⁵⁰ No lengthy criticism of this rule will be attempted. Those who like it are entitled to their preferences. The author prefers to agree with the opinion of the New Hampshire court that it is completely barren of argument in its favor.⁵¹ If natural persons must be just before they are generous charities certainly should not be allowed to perpetrate injustice to some in order to bestow charity on others. If public policy demands such a rule the legislature not the courts should make the first move.

Fortunately the great majority of the states do not recognize any such absolute exemption, but make a distinction not only between

⁴⁴ 1916, *Vermillion v. Woman's College of Due West*, 104 S. C. 197, 200, 201, 88 S. E. 649.

⁴⁵ 1885, *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; 1917, *Loeffler v. Sheppard and Enroch Pratt Hospital*, 130 Md. 265, 100 Atl. 301, L. R. A. 1917 D. 167.

⁴⁶ 1894, *Williamson v. Louisville Industrial School*, 95 Ky. 251, 24 S. W. 1065, 23 L. R. A. 200, 24 Am. St. Rep. 243; 1907, *University of Louisville v. Hammock*, 127 Ky. 564, 570, 106 S. W. 219, 32 Ky. Law Rep. 431.

⁴⁷ 1905, *Woman's Christian National Library Ass'n v. Fordyce*, 79 Ark. 532, 541, 86 S. W. 417; 1911, *Morris v. Nowlin Lumber Co.*, 100 Ark. 253, 268, 140 S. W. 1.

⁴⁸ 1907, *Adams v. University Hospital*, 122 Mo. App. 675, 679, 99 S. W. 453; 1909, *Whittaker v. St. Luke's Hospital*, 137 Mo. App. 116, 117 S. W. 1189.

⁴⁹ 1907, *Abstein v. Waldon Academy*, 118 Tenn. 24, 102 S. W. 351, 11 L. R. A. (N. S.) 1179.

⁵⁰ 1906, *Farrigan v. Pevear*, 193 Mass. 147, 149, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484. See the discussion of the Massachusetts situation in 1910, *Horden v. Salvation Army*, 199 N. Y. 233, 236, 92 N. E. 626, 139 Am. St. Rep. 889, 32 L. R. A. (N. S.) 62.

⁵¹ 1906, *Hewett v. Woman's Hospital Aid Ass'n*, 73 N. H. 556, 564, 64 Atl. 190, 7 L. R. A. (N. S.) 496.

beneficiaries and other persons but also between the negligence of subsidiary employees of a charity and that of its authorities in employing or retaining them.⁵² The feeling which has led to the latter distinction has been well expressed in a federal case as follows: "It would be intolerable that a good Samaritan, who takes to his home a wounded stranger for surgical care, should be held personally liable for the negligence of his servant in caring for that stranger."⁵³ The situation of course is different where the principal has been negligent in the selection of these servants. "The beneficiaries of charitable institutions are the poor, who have very little opportunity for selection, and it is the purpose of the founders to give to them skillful and humane treatment. If they are permitted to employ those who are incompetent and unskilled, funds bestowed for beneficence are diverted from their true purpose, and, under the form of a charity, they become a menace to those for whose benefit they are established".⁵⁴ Though the distinction just pointed out has been branded as a "compromise between two irreconcilable principles",⁵⁵ it is well established.⁵⁶ It has therefor been held that where a charitable hospital had delegated the duty of placing hot bottles in beds to an incompetent and wholly inexperienced person employed to wash dishes and run errands it is liable for the injury thereby sustained by the plaintiff on the ground that it did not exercise ordinary care in its selection of servants.⁵⁷ A complaint by an injured patient alleging negligence in the selection of patients on the part of the hospital which negligence caused the plaintiff's injury has therefore been held not to be demurrable.⁵⁸

Negligence on the part of trustees and managers is naturally rare and so are the cases which involve such negligence. Negligence, on

⁵² 1914, *Hoke v. Glenn*, 167 N. C. 594, 83 S. E. 807, Ann. Cas. 1916 E. 250.

⁵³ 1901, *Powers v. Massachusetts Homeopathic Hospital*, 109 Fed. 294, 304, 47 C. C. A. 122, 65 L. R. A. 372.

⁵⁴ 1914, *Hoke v. Glenn*, 167 N. C. 594, 597, 83 S. E. 807, Ann. Cas. 1916 E. 250.

⁵⁵ 1906, *Fordyce v. Woman's Christian National Library Ass'n*, 79 Ark. 550, 557, 96 S. W. 155, 7 L. R. A. (N. S.) 485.

⁵⁶ 1917, *Goodman v. Brooklyn Hebrew Orphan Asylum*, 165 N. Y. Supp. 949, 178 App. Div. 682. See also 1918, *Magnuson v. Swedish Hospital*, 99 Wash. 399, 169 Pac. 828.

⁵⁷ 1914, *St. Paul's Sanitarium v. Williamson*, 164 S. W. 36 (Tex. Civ. App.).

⁵⁸ 1914, *Hoke v. Glenn*, 167 N. C. 594, 83 S. E. 807, Ann. Cas. 1916 E. 250.

the other hand, of servants is correspondingly frequent and has therefore been quite often investigated by the courts. The conclusion that a charity is not liable for such negligence is almost unanimous.⁵⁹ The drift of all the cases clearly indicates a general conviction that an eleemosynary corporation should not be held liable for an injury due only to the neglect of a servant and not caused by its corporate negligence in the failure to perform a duty imposed on it by law".⁶⁰ "It would be a hard rule indeed—a rule calculated to repress the charitable instincts of men—that would compel those who have freely furnished such accommodations and services to pay for the negligence or mistakes of physicians or attendants that they had selected with reasonable care".⁶¹ The duty of trustees in the exercise of charitable functions does, therefore, not extend beyond the requirement of using reasonable care to select competent servants and the demands of substantial justice are met if they are not charged with the negligence of those so employed.⁶² Numerous cases illustrating this proposition could well be cited.⁶³ Nor will the mere fact that the plaintiff was a pay patient⁶⁴ and disclaims any right of exe-

⁵⁹ 1916, *Bishop Randall Hospital v. Hartley*, 24 Wyo. 408, 160 Pac. 385, Ann. Cas. 1918 E. 1172.

⁶⁰ 1895, *Hearns v. Waterbury Hospital*, 66 Conn. 98, 123, 33 Atl. 595, 31 L. R. A. 224.

⁶¹ 1894, *Union Pacific Railroad Co. v. Artist*, 60 Fed. 365, 368, 9 C. C. A. 14, 19 U. S. App. 612, 23 L. R. A. 581. Followed 1895, *Pierce v. Union Pacific R. Co.*, 66 Fed. 44, 13 C. C. A. 323, 32 U. S. App. 48.

⁶² 1906, *Farrigan v. Pevear*, 193 Mass. 147, 151, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484.

⁶³ 1905, *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N. S.) 556 (affirming 121 Ill. App. 512); 1876, *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; 1909, *Thornton v. Franklin Square House*, 200 Mass. 465, 467, 86 N. E. 909, 22 L. R. A. (N. S.) 486; 1891, *Van Tassel v. Manhattan Eye and Ear Hospital*, 60 Hun. 585, 15 N. Y. Supp. 620, 39 N. Y. St. Rep. 781; 1893, *Haas v. Missionary Society*, 26 N. Y. Supp. 868, 6 Misc. Rep. 281; 1895, *Joel v. Woman's Hospital*, 35 N. Y. Supp. 37, 2 N. Y. Ann. Cas. 264, 69 N. Y. St. Rep. 430; 1907, *Bruce v. Central Methodist Episcopal Church*, 147 Mich. 230, 236, 110 N. W. 951, 10 L. R. A. (N. S.) 74; 1909, *Cunningham v. Sheltering Arms*, 119 N. Y. Supp. 1033, 135 App. Div. 178 (affirming 115 N. Y. Supp. 576, 61 Misc. Rep. 501); 1913, *Wharton v. Warner*, 75 Wash. 470, 135 Pac. 235.

⁶⁴ 1894, *Downes v. Harper Hospital*, 101 Mich. 555, 60 N. W. 42, 45 Am. St. Rep. 427, 25 L. R. A. 602; 1904, *Wilson v. Brooklyn Homœopathic Hos-*

cution except against the fund derived from pay patients⁶⁵ ordinarily make any difference. It is not usual or desirable that the ministrations of a charitable hospital should be confined exclusively to the poor or indigent. Those of moderate means and not a few rich people resort to such hospitals for treatment especially in surgical cases. From patients not indigent a payment is commonly permitted or required. But the degree of care in all cases should be the same. Certain luxuries may be given to those who pay for them, but no greater care should be given to the rich person than to the pauper.⁶⁶ Nor will it make any difference that the institution is unincorporated,⁶⁷ or that the patient is committed to it instead of seeking it,⁶⁸ or that the negligence is very gross, such as operating on the right side for an inguinal hernia located on the left side.⁶⁹

Not all the states however have seen their way clear to exempt a charity from liability to a pay patient for the negligence of a nurse or physician. Such patients have therefore been allowed to recover in Rhode Island and Alabama for the negligence of an interne,⁷⁰ or a nurse⁷¹ selected with due care by the hospital. Similarly a charitable hospital in Georgia which accepted a patient for compensation and without her husband's consent performed an autopsy on her body "to gratify professional curiosity" has been held liable in damages for the mental suffering and injury caused to the patient's surviving spouse.⁷² It is interesting to note however that the Rhode Island case was subsequently overruled by the legislature by providing that "no hospital incorporated by the General Assembly of this state, sustained in whole or in part by charitable contributions or

pital, 89 N. Y. Supp. 619, 97 App. Div. 37; 1909, *Cunningham v. Sheltering Arms*, *supra*; 1900, *Conner v. Sisters of the Poor*, 10 Ohio S. & C. P. Dec. 86, 7 Ohio N. P. 514; 1901, *Powers v. Massachusetts Homœopathic Hospital*, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372 (affirming 101 Fed. 896).

⁶⁵ 1910, *Gable v. Sisters of St. Francis*, 227 Pa. 254, 75 Atl. 1087, 136 Am. St. Rep. 879.

⁶⁶ 1901, *Powers v. Massachusetts Homœopathic Hospital*, *supra*.

⁶⁷ 1906, *Farrigan v. Pevear*, 193 Mass. 147, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484.

⁶⁸ 1915, *Smith v. State*, 154 N. Y. Supp. 1003, 169 App. Div. 438.

⁶⁹ 1901, *Collins v. New York Post Graduate Medical School and Hospital*, 69 N. Y. Supp. 106, 59 App. Div. 63.

⁷⁰ 1879, *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675.

⁷¹ 1915, *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4, L. R. A. 1915 D 1167.

⁷² 1907, *Medical College v. Rushing*, 1 Ga. App. 468, 57 S. E. 1083.

endowments, shall be liable for the neglect, carelessness, want of skill or for the malicious acts, of any of its officers, agents or employees in the management of, or for the care or treatment of, any of the patients or inmates of such hospital".⁷³

It will be next in order to pass in review the various grounds on which charities have been exempted from liability for the torts of their carefully chosen employees. The argument already noticed that it is a diversion of a trust fund to permit such a liability is clearly insufficient to explain the distinction between the negligence of trustees and managers and the negligence of servants and employees. It must be clear as day that a judgment given on either ground will equally divert the trust fund. "Certainly liability for negligence in the selection of servants may impair the integrity of the trust estate just the same as liability for the negligence of servants though of course not so frequently".⁷⁴ Followed to its logical conclusion the trust theory must result in an absolute immunity from damages of any character.⁷⁵ "If the rule exists it must necessarily apply to all torts and in all cases".⁷⁶ While the theory can therefore be used in supporting a total exemption of charities from tort liability it will not serve to support the distinction above pointed out.

Some courts have attempted to justify the rule by arguing that the rule of *respondet superior* has no application to the situation. The Connecticut court has therefore stated that this rule is one of public policy to the effect that an injury done by one who is irresponsible must be answered for by his superior, when for his own convenience and emolument such superior has given the wrongdoer the opportunity to commit the injury; that a charity does not come within its reason as it derives no benefit from the acts of its servants and that therefore the rule has no application to it.⁷⁷ Similarly, the Massachusetts court has said that acting for the benefit of the public solely in representing a public interest does not involve such a private pe-

⁷³ GENERAL LAWS RHODE ISLAND, 1896, page 538.

⁷⁴ 1910, *Hordern v. Salvation Army*, 199 N. Y. 233, 237, 92 N. E. 626, 139 Am. St. Rep. 889, 32 L. R. A. (N. S.) 62.

⁷⁵ 1915, *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 582, 68 So. 4, L. R. A. 1915 D 1167.

⁷⁶ 1911, *Kellogg v. Church Charity Foundation*, 112 N. Y. Supp. 566, 569, 128 App. Div. 214.

⁷⁷ 1895, *Hearns v. Waterbury Hospital*, 66 Conn. 98, 123-126, 33 Atl. 595, 31 L. R. A. 224.

cuniary interest as lies at the foundation of the doctrine of *respondeat superior*.⁷⁸ And the Wisconsin court has stated that "since charitable hospitals perform a quasi-public function in ministering to the poor and sick without any pecuniary profit to themselves, the doctrine of *respondeat superior* should not be applied to them in favor of those receiving their charitable services".⁷⁹

The trouble with this theory is that it proves too much. If a charity is not to be responsible on this ground for the negligence of its employees it should equally not be held liable for the negligence of its officers and managers. If it is not to be liable to its patients it should equally be exempt from liability as against strangers. There would, therefore, seem to be no distinction whether the servant carelessly injures one while in the hospital or in the street.⁸⁰ The trustees "could not in case of a tort committed by one of their members apply the funds in their hands to the payment of a judgment recovered therefor".⁸¹ A charity thus freed from legal restraint instead of being a blessing might very well become a curse. Instead of doing charity it might be doing injustice.

Some courts have hit upon a waiver theory to explain the situation. It has been said that any citizen who accepts the service of a charitable hospital does so upon the implied assurance that he will assert no complaint which has for its object or for its result a total or partial destruction of the institution itself.⁸² From this it is concluded that by accepting the benefit he by implied contract exempts his benefactor from liability for the negligence of the carefully chosen servants of the charity.⁸³ The objection to this theory is that

⁷⁸ 1906, *Farrigan v. Pevear*, 193 Mass. 147, 150, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484.

⁷⁹ 1916, *Morrison v. Henke*, 165 Wis. 166, 170, 160 N. W. 173. See cases cited in 1908, *Kellogg v. Church Charity Foundation*, 112 N. Y. Supp. 566, 568, 128 App. Div. 214.

⁸⁰ 1906, *Noble v. Hahnemann Hospital*, 98 N. Y. Supp. 605, 607, 112 App. Div. 663, 18 N. Y. Ann. Cas. 365.

⁸¹ 1888, *Fire Insurance Patrol v. Boyd*, 120 Pa. 624, 647, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745.

⁸² 1907, *Adams v. University Hospital*, 122 Mo. App. 675, 679, 680, 99 S. W. 453.

⁸³ 1914, *Thomas v. German General Benevolent Society*, 168 Cal. 183, 188, 141 Pac. 1186; 1906, *Farrigan v. Pevear*, 193 Mass. 147, 149, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484; 1901, *Powers v. Massachusetts Homœopathic Hospital*, 109 Fed. 294, 303, 304, 47 C. C. A. 122, 65 L. R. A. 372.

it does violence to the facts. "A patient entirely unskilled in legal principles, his body racked with pain, his mind distorted with fever, is held to know, by intuition, the principle of law that the courts after years of travail have at last produced."⁸⁴

It will not be necessary to accept any of the above theories. There is a logical explanation based on facts which clarifies the situation. The doctrine of qualified immunity where no negligence appears in the selection or retention of agents or servants can properly and logically be rested in most cases upon the theory that the physicians and surgeons in attendance upon patients in hospitals or the nurses who are under their direction are not the servants of the hospital in the true sense because as to the nature and manner of their service they are not under the direction of the defendant, but that they become and remain the servants of the patient as long as they are in attendance upon him and that hence the charity has performed its full duty when it has exercised due care in the selection of competent persons for such service.⁸⁵ Hence the New York Court has held that a hospital is not responsible for an unauthorized operation performed on a patient by the doctors and nurses connected with it.⁸⁶ A hospital in Maine has been absolved from blame for the death of a patient by falling out of a window where the patient occupied a private room being placed there by her physician who retained full charge of her case and directed the nurses and house doctors who gave her such attention as her case called for.⁸⁷ Even the Rhode Island court in holding a hospital liable for the negligence of a nurse has expressly recognized that where the hospital does not agree to do more than furnish hospital accommodations, leaving the patient to find his own physician or surgeon the hospital is plainly not liable for their torts on the ground that they are not its servants.⁸⁸

In order to recover it will therefore be necessary to show that the relation of master and servant actually existed at the time of the in-

⁸⁴ 1914, *Lindler v. Columbia Hospital*, 98 S. C. 25, 36, 81 S. E. 512. The extract is from the dissenting opinion.

⁸⁵ 1912, *Basabo v. Salvation Army*, 35 R. I. 22, 28, 29, 85 Atl. 120, 42 L. R. A. (N. S.) 1109.

⁸⁶ 1914, *Schloendorff v. New York Hospital*, 211 N. Y. 125, 105 N. E. 92, 52 L. R. A. (N. S.) 505, Ann. Cas. 1915 C. 581.

⁸⁷ 1910, *Jensen v. Maine Eye and Ear Infirmary*, 107 Me. 408, 78 Atl. 898, 33 L. R. A. (N. S.) 141.

⁸⁸ 1879, *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 423, 34 Am. Rep. 675.

jury. It follows that a hospital which keeps an ambulance at a livery stable the owner of which furnishes the horse and driver, is not responsible for a collision caused by the negligence of such driver. It does not employ the driver, though it can bring such pressure to bear as would force the owner of the stable to discharge him.⁸⁹ A university has been held not to be liable for the acts of its agents in setting gopher guns on its campus through which the plaintiff was injured. Though the preservation of its grounds are desirable it is not organized to engage in landscape gardening.⁹⁰

It has been seen that the distinction with which we have just been dealing is well established. It has also been seen that the mental process by which it has been reached is far from uniform. In fact the cases on this subject present an almost hopelessly tangled mass of reason and unreason such as is not often encountered in the law. They show a marked difference in the process by which they reach results. This appears in the tests adopted to ascertain what is a corporate duty and a corporate neglect, in the confusion of the quasi trust imposed on each corporation with the relation of a strictly legal trustee to his trust fund and especially in the various means by which courts have sought to escape from the patent injustice of applying the extreme doctrine of *respondeat superior* to the personal defaults of the employees of charitable institutions.⁹¹ The question is one on which the courts have been fertile in drawing subtle distinctions, many of them irrelevant to the point for decision, or, at least, leading to no principle by which the conclusions reached can be reconciled.⁹² Many of the opinions rest on reasons or grounds which may well be challenged as fallacious.⁹³ However, "the identity of conclusion reached, though by different roads, is a strong proof of its correctness".⁹⁴

⁸⁹ 1911, *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913 A. 883.

⁹⁰ 1912, *Hill v. Tualatin Academy*, 61 Ore. 190, 198, 121 Pac. 901.

⁹¹ 1895, *Hearns v. Waterbury Hospital*, 66 Conn. 98, 123, 33 Atl. 595, 31 L. R. A. 224.

⁹² 1909, *Whittaker v. St. Luke's Hospital*, 137 Mo. App. 116, 118, 117 S. W. 1189.

⁹³ 1908, *Kellogg v. Church Charity Foundation*, 112 N. Y. Supp. 566, 567, 128 App. Div. 214.

⁹⁴ 1901, *Powers v. Massachusetts Homœopathic Hospital*, 109 Fed. 294, 304, 47 C. C. A. 122, 65 L. R. A. 372.

Hospitals maintained by railroad companies and other corporations either exclusively out of their own funds or in whole or part out of deductions made in the wages of its employees for the purpose of providing attendance to sick and injured employees present an interesting problem. On the one hand employers of large numbers of workmen should certainly be encouraged to establish hospitals for their employees by exempting them from damage suits for the negligence of their properly selected employees.⁹⁵ On the other hand it may well be said that it is in the pecuniary interest of such employers to maintain a state of health and capability among its employees as instrumentalities of its business, which consideration in a real sense results in a profit.⁹⁶ In determining whether such a hospital is a charity the question whether the fund taken from the wages of its employees is used to make a profit or is so small as to be insufficient for the purpose makes an important difference.⁹⁷ If the fund is raised with a view to financial profit it will not be entitled to any consideration as a charity.⁹⁸ Where, however, it is maintained solely by the company,⁹⁹ or is not maintained with a view to profit though a deduction is made from the wages of its beneficiaries¹⁰⁰ it will be

⁹⁵ 1915, *Nicholson v. Atchison, Topeka & Santa Fe Hospital Ass'n*, 97 Kans. 480, 155 Pac. 920.

⁹⁶ 1909, *Zumwalt v. Texas Central R. Co.*, 56 Tex. Civ. App. 567, 571. 121 S. W. 1133 (reversed, 103 Tex. 603, 132 S. W. 113).

⁹⁷ 1900, *Hanway v. Galveston Ry. Co.*, 94 Tex. 76, 58 S. W. 724.

⁹⁸ 1899, *Texas & Pacific Co. v. Connaughton*, 20 Tex. Civ. App. 642, 50 S. W. 173; 1902, *Sawdey v. Spokane Falls & N. R. Co.*, 30 Wash. 349, 70 Pac. 972, 94 Am. St. Rep. 880; 1908, *Phillips v. St. Louis & S. F. R. Co.*, 211 Mo. 419, 111 S. W. 109, 124 Am. St. Rep. 786.

⁹⁹ 1895, *Eighmy v. Union Pacific R. Co.*, 93 Iowa 538, 61 N. W. 1056, 27 L. R. A. 296.

¹⁰⁰ 1916, *Arkansas Midland Ry. Co. v. Pearson*, 98 Ark. 399, 411, 135 S. W. 917, 34 L. R. A. (N. S.) 317; 1915, *Nicholson v. Atchison, Topeka & Santa Fe Hospital Ass'n*, 97 Kans. 480, 155 Pac. 920; 1903, *Haggerty v. St. Louis, K. & N. W. R. Co.*, 100 Mo. App. 424, 74 S. W. 456; 1910, *Barden v. Atlantic Coast Line R. Co.*, 152 N. C. 318, 328, 67 S. E. 971; 1903, *Poling v. San Antonio & A. P. R. Co.*, 32 Tex. Civ. App. 487, 75 S. W. 69; 1900, *Galveston H. & S. A. R. Co. v. Hanway*, 57 S. W. 695 (affirmed 94 Tex. 76, 58 S. W. 724); 1910, *Texas Cent. R. Co. v. Zumwaldt*, 103 Tex. 603, 132 S. W. 113 (reversing 56 Tex. Civ. App. 567, 121 S. W. 1133); 1910, *Wells v. Ferry Baker Lumber Co.*, 57 Wash. 658, 107 Pac. 869, 29 L. R. A. (N. S.) 426; 1895, *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 556, 648, 39 Pac. 95; 1894, *Union Pacific Ry. Co. v. Artist*, 60 Fed. 365, 9 C. C. A. 14, 19 U. S. App.

treated as a charity and hence will not be held responsible for the negligence of its carefully selected surgeons and other employees. Where, however, it has failed to exercise ordinary care in the selection of these servants it will be held to be liable.¹⁰¹ Hence a complaint alleging that the plaintiff became a member of the fund and that he was injured through the negligence of its physician is demurrable for not stating that the association failed to exercise proper care in their selection.¹⁰²

It has been seen that some courts hold that a waiver on the part of the beneficiary of a charity is the real ground of exemption. This certainly does not apply to a person who is not a beneficiary. "The law may imply an intention on the part of the donors of the charitable funds that such funds shall be used for the charitable purpose only, and then imply an acquiescence in this intention by all persons who accept the benefit of the charity, and in that way spell out a waiver by such persons of any responsibility of the institution for the negligence or torts of its servants. If the courts want to exempt such institutions, this may be a tenable, though some may think a rather ingenious or far fetched ground on which to do it. But no such acquiescence or waiver can be attributed to outsiders".¹⁰³ There are no valid grounds upon which it can be held that the rights of those who are not beneficiaries of a trust can be in any way affected by the will of its founder. The rights of such persons are created by general laws, and the duties of those administering the trust to respect those rights are also created by general laws. A person should not be allowed to nullify the law of the state, even in creating a public charity. If the advantage accruing from such a charity is to be the ground for exemption the argument should be addressed to the legislative and not to the judicial branch of the government.¹⁰⁴

712, 23 L. R. A. 581. Followed 1895, *Pierce v. Union Pacific R. Co.*, 66 Fed. 44, 13 C. C. A. 323, 32 U. S. App. 48.

¹⁰¹ 1907, *Illinois Central Ry. Co. v. Buchanan*, 126 Ky. 288, 103 S. W. 272, 31 Ky. Law Rep. 722 (reversing 27 Ky. Law Rep. 1193, 88 S. W. 312); 1893, *Richardson v. Carbon Hill Coal Co.*, 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338.

¹⁰² 1903, *Plant System Relief and Hospital Department v. Dickerson*, 118 Ga. 647, 650, 45 S. E. 483.

¹⁰³ 1908, *Kellogg v. Church Charity Foundation*, 112 N. Y. Supp. 566, 570, 128 App. Div. 214.

¹⁰⁴ 1907, *Bruce v. Central M. E. Church*, 147 Mich. 230, 252, 253, 110 N. W. 951, 10 L. R. A. (N. S.) 74.

A charity founded to benefit mankind should not be allowed to avoid doing justice to its very employees. It, like other persons, must be made to be just before it is generous. Besides a rule which exempts it from liability may actually prevent its growth or even bring about its extinction. It might conceivably become impossible for it to procure employees if these employees are not protected from injustice. A young woman employed by a hospital at ten dollars a month who as an additional consideration receives instruction and gathers experience in practical nursing has, therefore, been allowed to recover damages from the hospital for contracting diphtheria from a patient whom she was ordered to nurse without being told the nature of his ailment.¹⁰⁵ Other similar cases have been decided by other courts.¹⁰⁶

What is true of an employee certainly holds doubly good in regard to a stranger. It would be manifestly unjust and contrary to public policy to hold that a person run over and injured on a public highway by a horse and wagon belonging to a charity and driven negligently by its servant would not be entitled to recover against the charity while a person similarly injured by the negligence of the employee of an express company would be allowed to recover against it. A hospital therefore is liable for such an injury though it has not been negligent in selecting its servant.¹⁰⁷ Persons negligently run over by the ambulance of a hospital,¹⁰⁸ or by the automobile of a library¹⁰⁹ have, therefore, recovered damages for their injuries.

Midway between servants and strangers there are invitees who have certain rights the breach of which is attended with legal con-

¹⁰⁵ 1906, *Hewett v. Woman's Hospital Aid Ass'n*, 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496.

¹⁰⁶ 1907, *Bruce v. Central M. E. Church*, 147 Mich. 230, 110 N. W. 951, 10 L. R. A. (N. S.) 74; 1913, *McInerny v. St. Luke's Hospital Ass'n*, 122 Minn. 10, 15, 141 N. W. 837; 1912, *Armendarez v. Hotel Dieu*, 145 S. W. 1030, 1031 (Tex. Civ. App.); 1914, *Hotel Dieu v. Armendarez*, 167 S. W. 181 (Tex. Civ. App.).

¹⁰⁷ 1912, *Basabo v. Salvation Army*, 35 R. I. 22, 43, 44, 85 Atl. 120, 42 L. R. A. (N. S.) 1109.

¹⁰⁸ 1908, *Kellogg v. Church Charity Foundation*, 112 N. Y. Supp. 566, 128 App. Div. 214; 1917, *Van Ingen v. Jewish Hospital of Brooklyn*, 164 N. Y. Supp. 832, 99 Misc. 655 (affirmed, 169 N. Y. Supp. 412, 182 App. Div. 10).

¹⁰⁹ 1913, *Johnson v. Chicago*, 258 Ill. 494, 101 N. E. 960 (affirming 174 Ill. App. 414). But see 1906, *Fordyce v. Woman's Christian Library Ass'n*, 79 Ark. 550, 96 S. W. 155, 7 L. R. A. (N. S.) 485.

sequences.¹¹⁰ Hence a physician injured in a hospital while accompanying a patient has been allowed recovery. Similarly mechanics injured while making repairs on the premises of a charitable institution have recovered the same as if the damage had occurred on the property of any other owner.¹¹¹

To sum up: A number of states have, following English *dicta*, exempted charities from all tort liability against beneficiaries as well as others on the ground that public policy demands that the trust fund be not diverted to paying damages. The great majority of the courts, however, do justice to employees, strangers and invitees by holding the charity to the same degree of care exacted from other entities. In regard to beneficiaries they hold the charity liable for injuries resulting from the negligence of the trustees or managers in selecting incompetent servants, but not for the negligence of servants carefully selected. This rule applies also to the various relief funds created by corporations, provided that these funds are not used for the purpose of making a financial profit. It does not apply of course, to non-charitable ventures or to charities which are conducted by the public authorities. While the rule is well established the reason given by the courts to support it are very various indeed. The most satisfactory reason advanced is that a charity has performed its whole duty when it tenders to a beneficiary a competent servant and that thereafter such servant becomes the servant of the patient rather than the servant of the charity.¹¹²

CARL ZOLLMAN.

Milwaukee, Wis.

¹¹⁰ 1914, *Hospital of St. Vincent v. Thompson*, 116 Va. 101, 81 S. E. 13, 51 L. R. A. (N. S.) 1025. But see 1885, *Benton v. City Hospital*, 140 Mass. 13, 1 N. E. 836, 54 Am. Rep. 436.

¹¹¹ 1918, *Marble v. Nicholas Senn Hospital Ass'n*, 123 Neb. 343, 167 N. W. 208.

¹¹² 1909, *Hordern v. Salvation Army*, 199 N. Y. 233, 92 N. E. 626, 139 Am. St. Rep. 889, 32 L. R. A. (N. S.) 62; 1909, *Gartland v. New York Zoological Society*, 120 N. Y. Supp. 24, 135 App. Div. 163.