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NEGLIGENCE-CHARITIES-IMMUNITY FROM TORT LIABILITY

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NEGLIGENCE—CHARITIES—IMMUNITY FROM TORT LIABILITY—When leaving a church service, plaintiff fell on ice that had formed as a result of poor drainage facilities on the public sidewalk outside defendant's church building. An action was brought based on negligence and the maintenance of a public

nuisance. Defendant's answer claimed a right as a privately conducted charity to immunity from tort liability. Plaintiff demurred, the demurrer was overruled, and the case was transferred to the Supreme Court for a decision on that issue. *Held*, decree overruling the demurrer reversed. Charitable institutions are not entitled to immunity from tort liability. *Foster v. Roman Catholic Diocese of Vermont*, (Vt. 1950) 70 A. (2d) 230.

Formerly one of four states that had no decision on this issue,¹ Vermont has in the principal case adopted the minority view that charitable institutions are liable without reservation for their torts.² Squarely opposed to the general rule of immunity first enunciated in this country in 1876,³ the decision is another manifestation of a trend toward liability long heralded by legal writers.⁴ These writers point to the increasing number of states which, although still acknowledging the general exemption, give damages to injured strangers⁵ and even to persons who are paying beneficiaries of a charity.⁶ Opposition to the immunity doctrine still has little unqualified judicial support⁷ despite its early

¹ Delaware, New Mexico, South Dakota, Vermont; 29 IOWA L. REV. 624 (1944).

² *Id.* at 626: Colorado, New Hampshire, Minnesota, New York, Oklahoma, Tennessee. Since 1944, North Dakota has adopted the rule of complete liability in a case of first impression, *Richbeil v. Grafton Deaconess Hospital*, 74 N.D. 525, 23 N.W. (2d) 247 (1946).

³ *McDonald v. Massachusetts General Hospital*, 120 Mass. 432 (1876). The rule had its origin in the dictum of an early English case, *Foefees of Heriot's Hospital v. Ross*, 12 C. & F. 507, 8 Eng. Rep. 1508 (1846), overruled in *Mersey Docks Trustees v. Gibbs*, 11 H.L. Cas. 685, 11 Eng. Rep. 1501 (1866).

⁴ Pottle, "The Tort Liability of a Charitable Institution," 5 GA. B.J. 25 (1942); Appleman, "The Tort Liability of Charitable Institutions," 22 A.B.A.J. 48 (1936); comments: 19 MISS. L.J. 220 (1948); 9 PITT. L. REV. 253 (1948); 27 NEB. L. REV. 571 (1948); 29 IOWA L. REV. 624 (1944); 6 UNIV. DET. L.J. 142 (1943); 16 WASH. L. REV. 245 (1941); notes: 36 ILL. B.J. 488 (1948); 16 UNIV. CHI. L. REV. 173 (1948); 23 NOTRE DAME LAWYER 606 (1948); 11 KANS. CITY L. REV. 228 (1943); 91 UNIV. PA. L. REV. 571 (1943); 15 FLA. L.J. 232 (1941).

⁵ *Cashman v. Merideon Hospital*, 117 Conn. 585, 169 A. 915 (1933); *St. Vincent's Hospital v. Stine*, 195 Ind. 350, 144 N.E. 537 (1924); *Servison v. Y.M.C.A.*, 230 Iowa 86, 296 N.W. 769 (1941); *Lusk v. U.S. Fidelity Co.*, (La. App. 1941) 199 S. 666; *Bruce v. Henry Ford Hospital*, 254 Mich. 394, 236 N.W. 814 (1931); *Wright v. Salvation Army*, 125 Neb. 216, 249 N.W. 549 (1933); *Rose v. Raleigh Filhan-Paul Morgan Memorial Hospital-Ann May Foundation*, 136 N.J.L. 553, 57 A. (2d) 29 (1948); *Herndon v. Massey*, 217 N.C. 610, 8 S.E. (2d) 914 (1940); *Cullen v. Schmidt*, 139 Ohio St. 194, 39 N.E. (2d) 146 (1942); *City of McAllen v. Gortman*, 81 S.W. (2d) 147 (Tex. Civ. App. 1935); *Walker v. Memorial Hospital*, 187 Va. 5, 45 S.E. (2d) 898 (1948); *Heckman v. Sisters of Providence*, 5 Wash. (2d) 699, 106 P. (2d) 593 (1940).

⁶ *Alabama Baptist Hospital Board v. Carter*, 226 Ala. 109, 145 S. 443 (1933); *Silva v. Providence Hospital*, 14 Cal. (2d) 762, 97 P. (2d) 798 (1939); *Nicholson v. Good Samaritan Hospital*, 145 Fla. 360, 199 S. 344 (1940); *Robertson v. Executive Committee of Baptist Convention*, 55 Ga. App. 469, 190 S.E. 432 (1937); *Henderson v. Twin Falls County*, 56 Idaho 124, 50 P. (2d) 597 (1935); *Brigham Young University v. Lillywhite*, (C.C.A. 10th, 1941) 118 F. (2d) 836.

⁷ For an opinion repudiating immunity and discussing all aspects of the question, see *President and Directors of Georgetown College v. Hughes*, (App. D.C. 1942) 130 F. (2d) 810, where Justice Rutledge spoke for three of a court of six. Also, *Borwege v. City of Owatonna*, 190 Minn. 394, 251 N.W. 915 (1933); *Mullinger v. Evangelischer Diakonissenverein*, 144 Minn. 392, 175 N.W. 699 (1920); *Welch v. Frisbie Memorial Hospital*, 90 N.H. 337, 9 A. (2d) 761 (1939); *Sheehan v. North Country Community Hospital*, 273 N.Y. 163, 7 N.E. (2d) 28 (1937); *Dillon v. Rockaway Beach Hospital*,

introduction.⁸ Of the seven states that allow recovery, two will not permit an execution on the funds used for charity,⁹ and one minimizes the result by refusing to apply the doctrine of respondeat superior to charitable institutions in cases involving professional employees.¹⁰ The principal case is a judicial vindication of the almost universal criticism of the accepted rule and the bases on which it has been justified. Both the trust fund theory,¹¹ which has long been rationalized as effectuating the intent of the donor of funds for charity, and the waiver theory, applied only to beneficiaries, have been shown to be without factual foundation. The third rationale of immunity is the general policy favoring charities which stemmed in part from their weak and struggling position at the time of the introduction of the doctrine. This public policy argument is certainly not applicable to the large, impersonal, and wealthy charitable corporations of today, but, if valid, might well apply to the small autonomous church. In refusing to recognize a right to immunity of this kind of case, this court has acknowledged the logical difficulty and obvious injustice of holding any important segment of society exempt from the duty to use ordinary care in conducting its activities.

Jean Engstrom, S.Ed.

284 N.Y. 176, 30 N.E. (2d) 373 (1940); *Richbeil v. Grafton Deaconess Hospital*, supra note 2; *Sisters of Sorrowful Mother v. Zieder*, 183 Okla. 454, 82 P. (2d) 996 (1938); *Gable v. Salvation Army*, 186 Okla. 687, 100 P. (2d) 244 (1940). See also, *Mersey Docks Trustees v. Gibbs*, supra note 3; *Laverse v. Smith's Falls Public Hospital*, 25 Ont. L. Rep. 98, 9 B.R.C. 13 (1915).

⁸ *Glavin v. Rhode Island Hospital*, 12 R.I. 411, 34 Am. Rep. 675 (1879).

⁹ *O'Conner v. Boulder Colorado Sanitarium Assn.*, 105 Colo. 259, 96 P. (2d) 835 (1939); *Vanderbilt v. Henderson*, 23 Tenn. App. 135, 127 S.W. (2d) 284 (1938).

¹⁰ *Hamburger v. Cornell University*, 240 N.Y. 328, 148 N.E. 539 (1925).

¹¹ The trust fund theory assumes that the assets of a charitable institution are a trust to be used exclusively for designated charitable purposes; the diversion of these funds to pay judgments would endanger effectuation of the primary purpose.