

# Charitable Immunity: Prior Abrogation of the Doctrine of Charitable Immunity Applicable to Churches

Margaret M. Huff

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### Repository Citation

Margaret M. Huff, *Charitable Immunity: Prior Abrogation of the Doctrine of Charitable Immunity Applicable to Churches*, 47 Marq. L. Rev. 268 (1963).

Available at: <http://scholarship.law.marquette.edu/mulr/vol47/iss2/10>

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allow recovery in such a case where an apparent injustice is without substantive basis. Any wrong suffered by plaintiff has been at the hands of the agent, and any feelings of inequity which may accompany the *Ingalls*<sup>24</sup> decision will be mitigated in light of plaintiff's cause of action against the agent.<sup>25</sup>

In conclusion, this decision, which limits an insurance agent's apparent authority, rests on sound principles of agency and contract law.

PAUL J. CLULO

**Charitable Immunity: Prior Abrogation of the Doctrine of Charitable Immunity Application to Churches**—Plaintiff, a member of defendant church, tripped over a permanently extended kneeler and was injured. In a suit against the church, the court in re-examining the doctrine of immunity as applied to religious institutions, found the doctrine of *respondeat superior* applicable to the defendant church.<sup>1</sup>

In Wisconsin prior to 1962, three institutions enjoyed immunity from the torts of their employees—governmental, charitable, and religious. Of the five theories available on which to base this immunity,<sup>2</sup> Wisconsin's rule was based on the inapplicability of *respondeat superior* to these institutions. The immunity rule was first expressed in *Morrison v. Henke*,<sup>3</sup> in which the defendant hospital was found immune from liability for the negligence of its nurse because it derived no profit in aiding the needy.<sup>4</sup> This immunity was applied in favor of the government in *Appelbacher v. State*,<sup>5</sup> where it was pointed out that to deny the application of *respondeat superior* to the state in its exercise of a

<sup>24</sup> *Ibid.*

<sup>25</sup> See, Note, *Liability of an Insurance Agent for Malpractice*, 11 KAN. L. REV. 184 (1962), and Note, *Liability of an Insurance Agent in Procuring and Maintaining Insurance for an Owner*, 12 VAND. L. REV. 839 (1939).

<sup>1</sup> *Widell v. Holy Trinity Catholic Church*, 19 Wis. 2d 648, 121 N.W. 2d 249 (1963).

<sup>2</sup> *Parks v. Northwestern University*, 218 Ill. 381, 75 N.E. 991 (1905) (The trust fund theory); *Cohen v. General Hosp. Soc.*, 113 Conn. 188, 154 Atl. 435 (1931) (public policy theory); *Taylor v. Protestant Hosp. Assn.*, 85 Ohio St. 90, 96 N.E. 1089 (1911) (inapplicability of *respondeat superior*); *Wilcox v. Idaho Falls Latter Day Saints Hosp.*, 59 Idaho 3502, 82 P. 2d 849 (1938) (waiver theory); *University of Louisville v. Hammock*, 127 Ky. 564, 106 S.W. 219 (1907) (agencies of the government theory).

<sup>3</sup> 165 Wis. 166, 160 N.W. 173 (1917), followed in *Schumacher v. Evangelical Deaconess Society*, 218 Wis. 169, 260 N.W. 476 (1935).

<sup>4</sup> *Morrison v. Henke*, 165 Wis. 166, 170, 170 N.W. 173, 175 (1917): "The maxim of *respondeat superior* is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third party may sustain from it."

<sup>5</sup> 160 Wis. 565, 575, 152 N.W. 144, 147 (1915): "The doctrine of *respondeat superior*, while an ancient one in English law, is not one that rests upon direct primary principles of justice. These principles require that the person actually committing the wrong should alone respond in damages. The doctrine rests rather upon secondary principles deduced from primary conceptions of justice. It rests upon the idea that where an enterprise is carried on for the financial benefit of a master, it is considered just that he should answer for the tort of his servant in conducting it because he is deemed to profit financially by its being carried on."

governmental function is not to deny an injured person a remedy, for the cause of action still exists against the person who actually committed the wrong.<sup>6</sup> *Bachman v. Y.M.C.A.*<sup>7</sup> extended the immunity to religious institutions where the court enunciated the policy reasons for the rule.<sup>8</sup>

Immunity has been explained as a doctrine which absolves from liability a defendant otherwise liable for tortious conduct in order to protect the interests which he represents.<sup>9</sup> The refusal to apply *respondet superior* to charities has been criticized on the premise that because they control their employees, and control is the basis of the doctrine, they should be liable regardless of their financial profit from the enterprise. In considering this argument, it becomes apparent that public policy is inextricably involved with the immunity doctrine. Thus once it has been decided that immunity should exist for the public good, the control factor as a basis of liability becomes irrelevant.

The first departure from the policy of immunity occurred in the case of *President and Directors of Georgetown College v. Hughes*,<sup>10</sup> which attacked the trust fund theory stating that insurance was available to guard against dissipation of the fund.<sup>11</sup> The insurance factor became more emphatically a basis of liability in *Pierce v. Yakima Valley Memorial Hosp. Ass'n.*<sup>12</sup> where the court quoting from the *Georgetown College* case said:

<sup>6</sup> *Id.* at 576, 152 N.W. at 148: "The application of the doctrine of *respondet superior* to the state when exercising a governmental function doesn't leave a person injured remediless. He has his cause of action against the person or persons actually committing the wrong. . . . It merely refuses to extend the master's liability to cases where he does not profit by the enterprise he is engaged in, . . ."

<sup>7</sup> 179 Wis. 178, 191 N.W. 751 (1922).

<sup>8</sup> *Id.* at 180, 191 N.W. at 752: "The fundamental reason why a charitable organization should not be held liable under the doctrine of *respondet superior* is not based upon any situation that the injured person may occupy toward the charitable corporation, but upon the inherent and well recognized distinction between such charitable corporations, organized as they are with the primary and principal purpose of assisting the sick, unfortunate or needy or other instances of deserving humanity, and without provision for or expectation of receiving financial returns for such particular service, compared with corporations which are primarily and principally organized for or in expectation of private gain."

<sup>9</sup> PROSSER, TORTS §108, at 1063 (1st ed. 1941).

<sup>10</sup> 130 F. 2d 810 (1942).

<sup>11</sup> *Id.* at 814: ". . . if there is danger of dissipation, insurance is now available to guard against it and prudent management will provide the protection. It is highly doubtful that any substantial charity would be destroyed or donation deterred by the cost required to pay the premiums. While insurance should not, perhaps, be made a criterion of responsibility, its prevalence and low cost are important considerations in evaluating the fears, or supposed ones, of dissipation or deterrence. The rule of immunity is out of step with the general trend of legislative and judicial policy in distributing losses incurred by individuals through the operation of an enterprise among all who benefit by it rather than in leaving them wholly to be borne by those who sustain them."

<sup>12</sup> 43 Wash. 2d 162, 260 P. 2d 765, 770 (1953): "We realize of course, that not all present day hospitals are large and well-financed, and that there are some hospitals today which render a great deal of gratuitous service. This is especially true of church-maintained institutions . . . nor do we overlook the

What is at stake, so far as the charity is concerned is the cost of reasonable protection, the amount of the insurance premiums as an added burden on its finances, not the awarding over in damages of its entire assets.<sup>13</sup>

The policy reason for the decision was that: "It is a principle of law, as well as of morals, that men must be just before they are generous. . . ."<sup>14</sup>

In the same year the *Pierce* decision was rendered, the Wisconsin Supreme Court stated in *Baldwin v. St. Peter's Congregation*<sup>15</sup> that any alteration of the doctrine of charitable immunity was for the legislature to make, for "(I)t is peculiarly within the province of the legislature to determine questions of public policy."<sup>16</sup> The court's dissatisfaction with the rule, however, was seen in cases which circumvented it on a nuisance theory,<sup>17</sup> leading to the statement in *Widell* that:

. . . it is inconsistent and illogical to hold a religious institution liable for nuisance and in some cases for a breach of a standard of care greater than common-law negligence and yet grant immunity for the same acts or breach of a lesser degree of care under the label of common-law negligence.<sup>18</sup>

The *Widell* decision was based on violation of the safe-place statute<sup>19</sup> (the "standard greater than common-law negligence" in the above quotation) which removed certain aspects of charitable operation from the protection of the immunity rule. This statute has been construed as imposing a broader duty on an employer with regard to the public place, and a narrower duty on the owner of it.<sup>20</sup> This statute would seem to

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fact that the principles with which we are dealing have application also to such organizations as Y.M.C.A.'s, Y.W.C.A.'s, and Red Cross. Such organizations have benefitted much less than hospitals from changed economic conditions and social outlook. . . . The public policy with which we are here concerned, however, must be based upon general conditions and the average situation."

<sup>13</sup> *Pierce v. Yakima Valley Memorial Hosp. Ass'n, id.*, 260 P. 2d at 771 quoting President and Directors of Georgetown College, 130 F. 2d 810 (1942).

<sup>14</sup> *Ibid.*

<sup>15</sup> 264 Wis. 626, 60 N.W. 2d 343 (1953).

<sup>16</sup> *Id.* at 631, 60 N.W. 2d at 352: "Since [1922] the question has been approached in one way or another, but the conclusion has always been that the legislature of this state, in the exercise of its constitutional powers, altered the rule of charitable immunity but to a limited extent only, when a charitable institution owning a public building was required to construct, repair and maintain such public building so as to render the same safe. . . . It is peculiarly within the province of the legislature to determine questions of public policy."

<sup>17</sup> *Smith v. Congregation of St. Rose*, 265 Wis. 393, 61 N.W. 2d 397 (1957).

<sup>18</sup> *Widell v. Holy Trinity Church, supra* note 1, at 655, 121 N.W. 2d at 253.

<sup>19</sup> WIS. STAT. §§101.01, 101.06 (1961).

<sup>20</sup> *Baldwin v. St. Peter's Congregation*, 264 Wis. 626, 628, 60 N.W. 2d 349, 350 (1953): "The employer has a broad duty with respect to structures and also with reference to devices and other property installed. The obligation of the owner of a public building, however, is to construct, repair or maintain it so as to render it safe . . . and relates to the building, not to temporary conditions which may negligently be permitted to exist within the building . . . a narrower duty."

indicate the legislature's views as to the extent the immunity doctrine should be abrogated, and therefore one would think that the *Baldwin* decision would controll the *Widell* situation, but instead the court justifies total abrogation of the doctrine by stating "that they (religious organizations) already have liability for acts of higher degrees of negligence under the safe-place statute and for nuisances which liability they can and have in many cases minimized by insurance."<sup>21</sup>

In less than ten years from its reaffirmation of the immunity doctrine, the court made a complete about-face in *Kojis v. Doctor's Hospital*,<sup>22</sup> holding that charitable hospitals are liable to paying patients for the negligence of their employees for the reason that hospitals "are now larger in size, better endowed, and on a more sound economic basis." Governmental immunity was abrogated in *Holytz v. City of Milwaukee*<sup>23</sup> and held to apply "broadly to torts, whether they be by commission or omission" and to relate to "all public bodies within the state. . . ." The application of the *Holytz* reasoning was made prospective to July 15, 1962, but it was applied before that time in *Marshall v. Green Bay*<sup>24</sup> because of the fact that the city carried liability insurance by which it "waived its immunity."<sup>25</sup> A thought provoking dissent pointed out that a defendant, otherwise not liable, became responsible *because* he purchased insurance; this is in direct contrast with the purpose of insurance—that the person who buys it does so to protect himself in the event he is found to be responsible.

The most cogent objection to the abrogation of immunity was expressed in the dissenting opinion of Justice Hill in the *Pierce* case:

The courts were not intended as policy making bodies, and their limitations for the exercise of such a function are readily apparent. They act retroactively and without notice to any but the litigants; the legislature acts only prospectively and *after all interested parties have had an opportunity to be heard*. . . . After hearing only the litigants on a matter which affects directly or indirectly, hundreds of charitable organizations, and of which they have had no notice, the majority does what the legislature would not be permitted to do, *i.e.* change the public policy of the state *ex post facto*.<sup>26</sup>

Since the *Widell* decision, the immunity of parents from the tort claims of their children against them has been abrogated,<sup>27</sup> and the next

<sup>21</sup> *Widell v. Holy Trinity Catholic Church*, *supra* note 1, at 656, 121 N.W. 2d at 254.

<sup>22</sup> 12 Wis. 2d 367, 107 N.W. 2d 131, 107 N.W. 2d 292 (1961).

<sup>23</sup> 17 Wis. 2d 26, 115 N.W. 2d 618 (1962).

<sup>24</sup> 18 Wis. 2d 496, 118 N.W. 2d 715 (1963).

<sup>25</sup> *Id.* at 501, 118 N.W. 2d at 718.

<sup>26</sup> *Pierce v. Yakima Valley Memorial Hosp. Ass'n*, 43 Wash. 2d 162, 260 P. 2d 765, 775 (1953).

<sup>27</sup> *Goller v. White*, 20 Wis. 2d 402, —N.W. 2d— (1963).

logical conclusion is that eleemosynary educational institutions will no longer be immune from liability.

The court, it seems, sees the availability of insurance as a panacea for the suffering of those injured by accidents, and this without any investigation by court or counsel as to the ability of religious institutions in particular to finance insurance coverage. This writer questions whether this type of decision reflects a trend in the law to minimize the negligence factor in a move toward strict liability.

MARGARET M. HUFF

**Municipal Immunity: Purchase of Liability Insurance by a Municipality Waives Immunity**—In the recent case of *Marshall v. City of Green Bay*,<sup>1</sup> the Wisconsin Supreme Court held that the city's purchase of a liability policy in which the insurer renounced the defense of governmental immunity constituted a waiver by the city of municipal immunity for the tortious acts of its employees.

The action was brought by the injured wife and her husband and involved injuries sustained by the wife while tobogganing on a toboggan hill operated by the city outside of the corporate limits of Green Bay. The injured wife was thrown from the toboggan when it hit a rough area consisting of frozen hummocks. It was alleged that the city was negligent in allowing the rough area to exist and in not warning users of the hill of the danger.

Plaintiffs sued the city after disallowance of their claim by the common council. The city carried insurance covering any liability for its operation, supervision and maintenance of the toboggan hill. The policy provided that the insurance company should be notified and should defend any action on the policy at its own expense and could not claim that the city was free from liability because of the performance of governmental functions. It further provided that no action could be brought against the insurer unless the amount of the city's obligation to pay were first determined either by a judgment against the city after trial or by a written agreement between the city, the claimant and the insurer.

The city demurred to the complaint, and the trial court delayed ruling on the demurrer to await the decision in the pending case of *Holytz v. City of Milwaukee*.<sup>2</sup> After the *Holytz* decision which abolished municipal immunity prospectively, the trial court sustained the city's demurrer and the plaintiffs appealed. On appeal plaintiffs contended that their complaint stated a cause of action because:

(1) They were as diligent in pursuing their claims and in challenging governmental immunity as were the plaintiffs in *Holytz*

<sup>1</sup> *Marshall v. City of Green Bay*, 18 Wis. 2d 496, 118 N.W. 2d 715 (1963).

<sup>2</sup> *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962).