

## Negligence: Abolition of the Defense of Charitable Immunity

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### Negligence: Abolition of the Defense of Charitable Immunity—

The plaintiff was a mentally ill, non-charity patient who alleged she re-fractured her hip and suffered other injuries in a fall from her hospital bed. According to the complaint the guard rails on the bed were not in a raised position, notwithstanding the express directions of her attending physicians. The defendant hospital denied these allegations and further moved for summary judgment on the ground that it was a charitable institution and as such was entitled to immunity from tort liability arising from negligence of the type alleged. The trial court denied summary judgment on the ground that questions of fact concerning the hospital's charitable status were presented. The Wisconsin Supreme Court affirmed the lower court's denial of the motion for summary judgment without considering the question of the hospital's status as a charitable institution. The court stated that it was "assuming that the defendant is a charitable hospital and operates as such," and its holding abolished the doctrine that a private charitable institution is not liable to paying patients for injuries caused by the negligence of its servants. *Kojis v. Doctors Hospital*, 12 Wis. 2d 367, 107 N.W. 2d 131 (1961).

By the holding of the *Kojis* case that charitable hospitals are liable to paying patients, Wisconsin thus becomes the nineteenth state to join a recent and growing trend to abolish the charitable immunity doctrine.<sup>1</sup> This trend was given great impetus by the "devastating"<sup>2</sup> opinion in the

<sup>1</sup> Arizona, *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P. 2d 220 (1951); Roman Catholic Church, Diocese of Tucson v. Keenan, 74 Ariz. 20, 243 P. 2d 455 (1952); Alaska, *Moats v. Sisters of Charity of Providence*, 13 Alaska 546 (1952); *Tuengel v. City of Sitka (D.C. Alaska)* 118 F. Supp. 399 (1954); California, *Malloy v. Fong*, 37 Cal. 2d 356, 232 P. 2d 241 (1951); Colorado, *St. Luke's Hospital Ass'n v. Long*, 125 Colo. 25, 240 P. 2d 917 (1952); Delaware, *Durney v. St. Francis Hospital*, 7 Terry, Del. 350, 83 A. 2d 7593 (1951); Florida, *Nicholson v. Good Samaritan Hospital*, 145 Fla. 360, 199 So. 344 (1940); *Suwannee County Hospital Corp. v. Golden*, 56 So. 2d 911 (Fla., 1952); *Wilson v. Lee Memorial Hospital*, 65 So. 2d 40 (Fla., 1953); Iowa, *Haynes v. Presbyterian Hospital Ass'n*, 241 Iowa 1269, 45 N.W. 2d 151 (1950); *Wittmer v. Letts*, 248 Iowa 648, 80 N.W. 2d 561 (1957); Kansas, *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P. 2d 934 (1954); But see footnote 44 *infra* where it would seem this has been changed by statute in Kansas; Michigan, *Parker v. Port Huron Hospital*, 361 Mich. 1; 105 N.W. 2d 1 (1960); Minnesota, *Mulliner v. Evangelischer Diakonniessenverein*, 144 Minn. 392, 175 N.W. 699 (1920); *Swiger v. City of Ortonville*, 246 Minn. 339, 75 N.W. 2d 217 (1956); New Hampshire, *Welsh v. Frisbie Memorial Hospital*, 90 N.H. 337, 9 A. 2d 761 (1939); *Kardulas v. Dover*, 99 N.H. 359, 111 A. 2d 327 (1955); New York, *Bing v. Thunig*, 2 N.Y. 2d 656, 163 N.Y.S. 2d 3, 143 N.E. 2d 3 (1957); North Dakota, *Rickbeil v. Grafton Deaconess Hospital*, 74 N.D. 525, 23 N.W. 2d 247 (1946); Oklahoma, *Gable v. Salvation Army*, 186 Okla. 687, 100 P. 2d 244 (1940); Puerto Rico, *Tavarez v. San Juan B.P.O.E.*, 68 Puerto Rico 681 (1948); Utah (apparently), *Brigham Young Univ. v. Lillywhite*, 118 F. 2d 836 (10th Cir. 1941); Vermont, *Foster v. Roman Catholic Diocese of Vermont*, 116 Vt. 124, 70 A. 2d 230 (1950); Washington, *Pierce v. Yakima Valley Memorial Hospital Ass'n*, 43 Wash. 2d 162, 260 P. 2d 765 (1953); *Jeffrey v. Whitworth College*, 128 F. Supp. 219 (D.C. Wash., 1955); and Wisconsin, *Kojis v. Doctors Hospital*, 12 Wis. 2d 367, 107 N.W. 2d (1961). See 25 A.L.R. 2d 29-200 and the 1960 and 1961 supplemental service for a more detailed analysis.

<sup>2</sup> PROSSER, *TORTS* 784 (2d ed. 1955). (It perhaps is interesting to note the dissent

landmark case of *President and Directors of Georgetown College v. Hughes*,<sup>3</sup> a case which influenced the court in the *Kojis* case as follows: "We were particularly impressed by the logic in the opinion of Justice Rutledge and the manner in which he answered the arguments for the rule in the light of present day conditions."<sup>4</sup>

Historically the courts of the various states have granted immunity to charitable institutions on several different theories. In a recent case<sup>5</sup> the Michigan court reviewed the charitable immunity doctrine and stated that aside from the trust fund theory which it had previously adopted, the immunity was based upon "the theory holding the doctrine of respondeat superior inapplicable to charitable institutions; the theory that such institutions are entitled to the rule of governmental immunity; the theory of implied waiver or assumption of risk; and the theory of public policy."<sup>6</sup> These diverse approaches demonstrate that the courts in the past consistently had felt that the immunity was desirable, but no one definite reason presented itself as a ground for their decisions. Seemingly, the modern trend of abolishing the doctrine indicates that the desirability is gone, whatever may have been the reasons for its creation.

In the *Kojis* case the court stated that the doctrine of immunity was originally based upon public policy in Wisconsin, evidently a policy that required the encouragement of "quasi-public" institutions that could not develop without such immunity. However, the court's present reasoning is that times have changed, the hospitals "are now larger in size, better endowed, and on a more-sound economic basis."<sup>7</sup> Therefore, the court felt these changed conditions required a change in public policy, a duty ordinarily left to the legislature. The Wisconsin court considered the argument that it was a question to be decided by the legislature rather than the court, but dismissed it despite the fact that it had held on previous occasions that matters of public policy are for the legislature and not the court. For instance, only eight years earlier in the *Smith* case,<sup>8</sup> the court stated:

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by Judge Putnam in *Avellone v. St. John's Hospital*, 165 Ohio St. 467, 135 N.E. 2d 410, 418 (1956), where he stated, "I desire only to point out that the arguments of Judge Rutledge failed to convince three members of his own court. . . . This would seem to cast grave doubt on the quoted statement from Prosser on Torts to the effect that the Rutledge opinion completely demolished all arguments against immunity."

<sup>3</sup> *President and Directors of Georgetown College v. Hughes*, 76 App. D.C. 123, 130 Fed. 2d 810 (1942).

<sup>4</sup> *Kojis v. Doctors Hospital*, 12 Wis. 2d 367, 372, 107 N.W. 2d 131, 133 (1961).

<sup>5</sup> *Parker v. Port Huron Hospital*, 361 Mich. 1, 105 N.W. 2d 1 (1960).

<sup>6</sup> *Id.* at 105 N.W. 2d 8.

<sup>7</sup> *Supra* note 4, at 372, 107 N.W. 2d at 134.

<sup>8</sup> *Smith v. Congregation of St. Rose*, 265 Wis. 393, 397-398, 61 N.W. 2d 896 (1953). Similarly, *Schwenkhoff v. Farmers Mut. Automobile Ins. Co.*, 6 Wis. 2d 44, 47, 93 N.W. 2d 867 (1959); and *Wait v. Pierce*, 191 Wis. 202 at 217, 209 N.W. 475 (1926).

We find it unnecessary to explore into this question of historical background because this court has long felt that the reasons for granting such immunity to charitable and religious corporations are archaic, and if this court were not bound by the rule of *stare decisis* but were passing on the question for the first time, we would accord very little weight to the historical reasons originally advanced in support of the rule of immunity. However, we feel that it is for the legislature and not the court to change the rule of immunity at this late date after its wide acceptance over the years in the prior decisions of this court.

In reviewing the history of charitable immunity in Wisconsin, the court, in the *Kojis* decision, cites the *McDonald*<sup>9</sup> case which was the landmark decision in the annals of charitable immunity in America and the *Morrison*<sup>10</sup> case which was the first instance in which the Wisconsin court granted the immunity.

To understand the impact and possible extension of the *Kojis* decision, it is important to observe the development and the former limitations of the immunity theory in Wisconsin. The Wisconsin court has reversed its own precedent of forty-four year standing which had granted to charitable institutions an almost sacred immunity from liability for negligence. The doctrine had been established in the *Morrison*<sup>11</sup> case on the ground of public policy. There the court held that in suits by paying patients, the doctrine of respondeat superior should not be applied to such charitable institutions since they were performing a quasi-public function.<sup>12</sup> Then in the *Bachman*<sup>13</sup> decision the court held that the institution was immune from suit for the negligence of its employees causing injuries to strangers; in the *Schumacher*<sup>14</sup> case the court held that a charity was immune from liability even for the negligent selection of its employees. However, certain limitations were imposed: in the *Carlson*<sup>15</sup> case a municipal hospital was held liable when acting in a proprietary capacity; in the *Wilson*<sup>16</sup> case it was held that a charitable

<sup>9</sup> *McDonald v. Massachusetts Gen. Hosp.*, 120 Mass. 432 (1876).

<sup>10</sup> *Morrison v. Henke*, 165 Wis. 166, 160 N.W. 173 (1917).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Morrison v. Henke*, *supra* note 10, at 170, ". . . [J]ustice and sound public policy alike dictate that it should be exempt from the liability. . . ."

<sup>13</sup> *Bachman v. Y.W.C.A.*, 179 Wis. 178, 191 N.W. 751 (1922).

<sup>14</sup> *Schumacher v. Evangelical Deaconess Society*, 218 Wis. 169, 260 N.W. 476 (1935).

<sup>15</sup> *Carlson v. Marinette County*, 264 Wis. 423, 59 N.W. 2d 486 (1952).

<sup>16</sup> *Wilson v. Evangelical Lutheran Church*, 202 Wis. 111, 230 N.W. 708 (1930).

This was due to the interpretation given WIS. STATS. §101.01 (12) and (13) and §101.06; the charitable organization was liable because it was not excepted in the statutes. Sec. 101.01 (12) defines "public building" and (13) defines "owner." Sec. 101.06 reads as follows:

Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, and welfare of

institution was liable for the violation of the safe-place statute; in the *Smith*<sup>17</sup> case a charitable institution was held liable for a nuisance created or permitted by it. In summary, prior to the *Kojis* case charitable institutions in Wisconsin enjoyed a complete immunity aside from liability for nuisance and a violation of the safe-place statute.

The reasons advanced in the *Kojis* case for changing this rule of immunity seem to be based upon the changed conditions and character of charitable hospitals that have developed since the time the immunity was originally granted in 1917.<sup>18</sup> A corollary to this reason is the availability of liability insurance to the hospital. The *Kojis* court stated: "Insurance covering their liability is available and prudent management would dictate that such protection be purchased . . . the financial statement of the defendant [hospital] clearly shows that the judgment for damages in the present action would not cause it to suspend its operation or to be seriously hampered therein."<sup>19</sup> (Query: What would have been the holding if the demand of the complaint had been substantially larger and the hospital was in such a financial position that a recovery would have caused suspension of operations?)

There can be little argument concerning the fact that present-day hospitals are now larger and in better financial condition than they were forty years ago. But one might take issue with the logic of basing liability on the availability of insurance. The theory behind liability insurance is that the insured will be protected from a legally incurred liability. Logically the liability would have to be incurred before the insurance would have any bearing on the matter. As the Massachusetts court said in *McKay v. Morgan Memorial Co-op Industries and Stores*,<sup>20</sup> "The defendant by taking out insurance would not enlarge its liability for negligence, even though by reason of such insurance damages might

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such employees and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe.

In accord: *Zimmers v. Sebastian's Congregation*, 258 Wis. 496, 46 N.W. 2d 820 (1951); *Grabinski v. St. Francis Hospital*, 266 Wis. 339, 63 N.W. 2d 693, (1954); *Bent v. Jonet*, 213 Wis. 635, 252 N.W. 290 (1934); *Jaeger v. Evangelical Lutheran Holy Ghost Congregation*, 219 Wis. 209, 262 N.W. 585 (1935); *Wright v. St. Mary's Hospital of Franciscan Sisters*, 265 Wis. 502, 61 N.W. 2d 900 (1953); *Baldwin v. St. Peter's Congregation*, 264 Wis. 626, 60 N.W. 2d 349 (1953); *Watry v. Carmelite Sisters*, 274 Wis. 415, 80 N.W. 2d 397 (1957).  
<sup>17</sup> *Smith v. Congregation of St. Rose*, 265 Wis. 393, 61 N.W. 2d 896 (1953).  
 "Nuisance, unhappily, has been sort of a legal garbage can." Prosser, *Nuisance Without Fault*, 20 TEXAS L. REV. 399, 410 (1942).

<sup>18</sup> *Supra* note 10.

<sup>19</sup> *Kojis v. Doctors Hospital*, *supra* note 4, at 372, 107 N.W. 2d, at 134.

<sup>20</sup> 272 Mass. 121, 126, 172 N.E. 68, 70 (1930). In accord: *Schau v. Morgan*, 241 Wis. 334, 6 N.W. 2d 212 (1942); *Enman v. Trustees of Boston University*, 270 Mass. 299, 170 N.E. 43 (1930); *Stonaker v. Big Sisters Hospital*, 116 Cal. App. 375, 2 P. 2d 520 (1931); *Williams v. Church Home*, 223 Ky. 355, 3 S.W. 2d 753 (1928); *Mississippi Baptist Hospital v. Moore*, 156 Miss. 676, 126 So. 465 (1930). *Contra*: *O'Connor v. Boulder Colorado Sanatorium Ass'n*, 105 Col. 259, 96 P. 2d 835 (1939).

be paid to the plaintiff without diverting funds for charitable purposes." Not even the so-called "deep-pocket" theory of legal liability can justify the conclusion that since you have insurance you are to be held liable. Liability should rest on firmer footing—on more logical reasoning. Insurance is a loss spreading, risk sharing device. The premiums received by the insurance company must at least equal the claims paid plus operating expenses. Hospitals must obtain this money to pay premiums. If hospitals that are charitable in nature are to be held liable, as they now are in Wisconsin, and therefore should avail themselves of insurance protection, it will mean higher operating costs which will in turn mean higher charges for paying patients.

Since the *Kojis* case involved a paying patient, the court limited its decision to paying patients in charitable hospitals. With regard to non-paying patients, Justice Rutledge said in the *Georgetown* case, "Retention [of immunity] for the non-paying patient is the least defensible and most unfortunate of the distinction's refinements. . . . He should be the first to have reparation, not last and least among those who receive it."<sup>21</sup> Remembering that our court was "particularly impressed" with Justice Rutledge's reasoning, it would seem that now a non-paying patient at a charitable hospital will be able to recover in Wisconsin.

The *Kojis* decision is predicated upon the defendant's classification as a charitable hospital, but by analogy it can readily be extended to include all charitable institutions (other than those with state and municipal affiliations) such as orphanages, homes for the aged, schools, etc. They are all, like the hospitals, performing a quasi-public function by ministering to the needy without pecuniary profit and as such have enjoyed the same immunity in the past. Their basic difference from other private endeavors of the same general type is their non-profit aspect.<sup>22</sup> It can be assumed that they are now better endowed, larger in size, and have insurance available. At least, there is no doubt now that wise and prudent management would dictate that they also buy such insurance,<sup>23</sup> since the trend is definitely away from such immunity.

The Wisconsin court has mentioned in several charitable immunity

<sup>21</sup> 130 Fed. 2d 810, 827 (1942).

<sup>22</sup> *Bachman v. Y.W.C.A.*, *supra* note 13, at 180, 191 N.W. at 752. "The fundamental reason why a charitable organization should not be held liable under the doctrine of respondeat superior is not based upon any situation that the injured person may occupy towards 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 instance of deserving humanity, and without provision for or expectancy of receiving financial returns for such particular service, compared with corporations which are primarily and principally organized for or in expectation of private gain." See also Wisconsin Statutes, Chapters 181 and 187, especially Wis. STAT. §181.02(4) "Nonprofit corporation means a corporation, no part of the income of which is distributable to its members, directors or officers."

<sup>23</sup> *Supra* note 19.

cases that the institutions are immune due to the similarity of their functions with those of municipalities which have been held to be immune. For instance, the *Schumacher* case:

The basis of the rule adopted by this court exempting charitable hospitals from liability for the negligence of their servants is . . . that, because these hospitals perform a quasi-public function, akin to that performed by municipalities in performing governmental functions, justice and public policy require that the doctrine of respondeat superior should not be applied.<sup>24</sup>

The abolition of charitable immunities in the *Kojis* case could be the foreshadowing of the abolition of municipal immunities. The same reasoning for denying immunity is applicable in both situations. The person injured should be granted the same right to recover in the one instance as in the other. Municipal immunity has recently been abolished in Illinois<sup>25</sup> and in California.<sup>26</sup> The California opinion referred to such governmental immunities as "an anachronism, without rational basis, . . . [which] has existed only by force of inertia. . . . None of the reasons for its continuance can withstand analysis."<sup>27</sup> In the *Britten*<sup>28</sup> case the Wisconsin court discussed the distinction between granting immunity to the municipality when acting in a governmental capacity and holding it liable in a proprietary capacity, and went on to state:

The doctrine that immunity from liability should be granted to the state and municipalities while engaged in governmental operations rests upon a weak foundation. Its origin seems to be found in the ancient and *fallacious notion* that the king can do no wrong. The rule is one of such long standing and has become so firmly established as a parcel of Wisconsin's jurisprudence, however, that we should hesitate to abandon it. We consider that if it is to be abandoned it is only proper that the request therefor should be made to the legislature. *But we do consider that the precedent . . . [lacks] support in both logic and reason. . . .* [Emphasis added.]<sup>29</sup>

<sup>24</sup> *Schumacher v. Evangelical Deaconess Society of Wisconsin*, *supra* note 14, at 172, 260 N.W. at 477. Also *Morrison v. Henke*, *supra* note 10, at 170-71, 160 N.W. at 174; *Smith v. Congregation of St. Rose*, *supra* note 8, at 397, 61 N.W. 2d at 898, such immunities are archaic; *Apfelbacher v. State*, 160 Wis. 565, 152 N.W. 144 (1915).

<sup>25</sup> *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill. 2d 11, 163 N.E. 2d 89 (1959). A charitable institution in Illinois enjoys complete immunity upon the "trust fund theory." *Parks v. Northwestern University*, 218 Ill. 381, 75 N.E. 991 (1905). However, this immunity is limited to just the trust property and would not prevent execution on property which is not in trust, in a tort action. *Moore v. Moyle*, 405 Ill. 555, 92 N.E. 2d 81 (1950).

<sup>26</sup> *Muskopf v. Corning Hospital District*, 11 Cal. Rptr. 89, — P. 2d — (1961). (Public convenience does not outweigh individual compensation.) A non-governmental charitable institution has no immunity in California. *Malloy v. Fong*, 37 Cal. 2d 356, 232 P. 2d 241 (1951).

<sup>27</sup> *Muskopf v. Corning Hospital District*, *supra* note 26, at 92.

<sup>28</sup> *Britten v. Eau Claire*, 260 Wis. 382, 51 N.W. 2d 30 (1952).

<sup>29</sup> *Id.* at 386. See also *Smith v. Congregation of St. Rose*, *supra* note 8, at 397, 61 N.W. 2d at 898. (Reasons for immunities archaic.)

It should be noted that prior to the *Kojis* case the Wisconsin court stated that the charitable immunity doctrine was archaic but its abolition was for the legislature, a function which the court adopted for itself in the *Kojis* case. The Wisconsin court had held municipalities liable for violation of the safe-place statute<sup>30</sup> and for creating or permitting a nuisance,<sup>31</sup> the same exceptions it had made to the charitable immunity doctrine<sup>32</sup> before the *Kojis* decision. The argument that it was for the legislature and not for the courts to make the change from immunity to liability seems to be weakened, if not totally destroyed by the *Kojis* decision. Having noted the striking similarity between the decisions concerning governmental and charitable immunities, it would hardly be surprising or startling for the Wisconsin court to take the next short step and abolish municipal immunities, a step taken by the California court with the following explanation:

Only the vestigial remains of such governmental immunity have survived; its requiem has long been foreshadowed. For years the process of erosion of governmental immunity has gone on unabated. The Legislature has contributed mightily to that erosion. The courts, by distinction and extension, have removed much of the force of the rule. Thus in holding that the doctrine of governmental immunity for torts for which its agents are liable has no place in our law we are making no startling break with the past but merely take the final step that carries to its conclusion an established legislative and judicial trend.<sup>33</sup>

In Wisconsin and many other jurisdictions, an unemancipated minor may not maintain an action against his parents to recover for injuries due to negligence.<sup>34</sup> Most of these cases arise out of automobile accidents, and the Wisconsin court has been most consistent in denying recovery.<sup>35</sup> Many reasons have been propounded why such recovery should be denied, *viz.*: (1) the great danger of fraud between child and parent if insurance is involved (2) the possibility that the child might die and the recovery would be inherited by the parent tortfeasor (3) depletion of the family coffers, and (4) the disruptive tendency such suits would have on family harmony. In Wisconsin a wife has been allowed to sue

<sup>30</sup> *Heiden v. City of Milwaukee*, 222 Wis. 92, 275 N.W. 922 (1937).

<sup>31</sup> *Rogb v. City of Milwaukee*, 241 Wis. 432, 6 N.W. 2d 222 (1943).

<sup>32</sup> *Supra* notes 15, 16 and 17. See also *Prosser supra* note 2, at 774-780 for a review of municipal immunities and his interpretation of "proprietary" and "governmental" functions. The decision of the *Muskopf* case, *supra* note 26, also has an excellent discussion.

<sup>33</sup> *Supra* note 26, at 95.

<sup>34</sup> See 19 A.L.R. 2d 423-462 (1951).

<sup>35</sup> *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927); *Zutter v. O'Connell*, 200 Wis. 601, 229 N.W. 74 (1930); *Groh v. W. O. Krahn, Inc.*, 223 Wis. 662, 271 N.W. 374 (1937); *Lasecki v. Kabara*, 235 Wis. 645, 294 N.W. 33 (1940); *Cronin v. Cronin*, 244 Wis. 372, 12 N.W. 2d 677 (1944); *Fidelity Savings Bank v. Aulik*, 252 Wis. 602, 32 N.W. 2d 613 (1948); and *Schwenkhoff v. Farmer's Mutual Automobile Ins. Co.*, 6 Wis. 2d 44, 93 N.W. 2d 867 (1959).

<sup>36</sup> *Supra* note 34 and *PROSSER, TORTS 675-677* (2d ed. 1955).



the husband because of a statute giving her the right to maintain actions in her own name.<sup>37</sup> One might wonder whether there is a greater danger of fraud where the child sues the parent than where the wife sues the husband. The possibility that the wife might die and the husband recover part of the recovery would be greater than the possibility of the child predeceasing the tortfeasor parent. As a practical matter the child probably would not sue unless there was insurance involved. Furthermore, it would seem that a suit by a wife against the husband would be much more disruptive of the family harmony than an action by a child against its parent.

Dean Prosser said, ". . . the height of inconsistency is reached by some courts which permit action by the wife but deny it to the child."<sup>38</sup> And further, "the retreat from the common law rule as to parent and child has lagged behind that as to husband and wife, apparently for no better reason than the absence of such statutes as the Married Women's Acts. It is however under way."<sup>39</sup>

Two years before the *Kojis* decision, the Wisconsin court in the *Schwenkhoff* case made the following statement in denying recovery to an unemancipated minor, ". . . attention is called to the fact that the Wick<sup>40</sup> decision [the original Wisconsin decision denying an unemancipated minor the right to sue a parent in tort for negligence] was based upon public policy [and] that matters of public policy are to be resolved by the legislature. . . ."<sup>41</sup> As has been previously pointed out, in the *Kojis* case an immunity question involving public policy was resolved by the court.

A concurring opinion in the *Schwenkhoff* case discussed the objection of disrupting the family harmony.

Perhaps it would be no more disruptive of the family relationship to destroy the father's immunity from an action for personal injuries brought by his child than it has been to destroy the husband's immunity from similar action by his wife. Perhaps, because the problem more frequently arises in connection with injuries caused by the operation of automobiles, it would be better simply to require that the automobile liability insurer of a parent be directly liable to an injured child, notwithstanding the parent's immunity by reason of his parenthood.<sup>42</sup>

Again, it is illogical to justify liability by insurance protection, and

<sup>37</sup> Wait v. Pierce, *supra* note 8. Wis. STAT. §246.07 (1959).

" . . . any married woman may bring and maintain an action in her own name for any injury to her person or character the same as if she were sole."

<sup>38</sup> *Supra* note 36, at 676.

<sup>39</sup> *Id.* at 677.

<sup>40</sup> Wick v. Wick, *supra* note 35. Note especially the strong dissent.

<sup>41</sup> Schwenkhoff v. Farmer's Mutual Automobile Ins. Co., *supra* note 35 at 47, 93 N.W. 2d at 869, *aff'd*, 11 Wis. 2d 97, — N.W. 2d — (1961).

<sup>42</sup> *Ibid.*

this reasoning is especially true where it is admitted that no liability exists in the absence of such protection, but, as the *Kojis* case demonstrates, logical objections impose no barrier to the Wisconsin court if insurance is involved. Although Missouri seems to be the only jurisdiction which has completely abolished the parent's immunity, at least seventeen other jurisdictions hold the parent liable for willful or wanton negligence.<sup>43</sup> The Wisconsin court is now demonstrating an ability to resolve questions based upon public policy. Since the availability of insurance would protect the family coffers, and since the wife is permitted to sue the husband, it is not a remote possibility that an unemancipated minor will be allowed to recover from his parent in negligence cases.

In conclusion, the *Kojis* case not only destroys charitable immunities,<sup>44</sup> but, also, it casts grave doubts as to the future longevity of defenses such as governmental immunity and parental immunity in Wisconsin.

DONALD F. FITZGERALD

**Respondeat Superior, Basic Test for Application of Doctrine—**  
Plaintiff was injured when the automobile in which she was a passenger was struck by another auto driven by an employee of co-defendants. Flodeen, the employee, was a day laborer of Tracy and Son Farms, a co-partnership engaged in general farming.

In the normal routine of employment, laborers reported to the home farm of Tracy and Son, where they received assignments to work in designated fields. Transportation was customarily furnished by the employer to carry the workers to the particular fields to which they had been assigned.

On the day of the accident, Flodeen drove his car to the home farm where he received his assignment to drive a tractor in a designated field. A truck, with driver, was on hand to take him and the other workers to the fields. The weather threatened rain, and Flodeen told the foreman that he would drive his own car to the field, so that if rain began and field work was discontinued he would not

<sup>43</sup> *Supra* note 34.

<sup>44</sup> Judicial decisions abolishing the immunity have been reversed by statute in three states. (1) Rhode Island: *Glavin v. Rhode Island Hospital*, 12 R.I. 411 (1879); changed by sec. 38, ch. 177, R.I. Gen. Laws (1896); R.I. Gen. Laws §7-1-22 (1956); *cf.* 44 MARQ. L. REV. 153 at 159-160; see *Morrison v. Henke*, 165 Wis. 166, 169, 160 N.W. 173 (1917). (2) Kansas, *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P. 2d 934 (1954) overruled by statute, Laws of Kansas (1959) Chapter 127. (3) New Jersey has many cases denying immunity but a statute was recently passed, though held not retroactive, granting immunity to charitable associations from liability to any persons who suffer damages from the negligence of any agents or servants of the charitable associations. L. 1959, c. 90, on June 11, 1959, N.J.S.A. 2A: 53 A-7 *et seq.* See 25 A.L.R. 2d 29-200 in the 1960 and 1961 supplements.