

# Charitable Corporations: Liability in Tort

David Keyser

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### Repository Citation

David Keyser, *Charitable Corporations: Liability in Tort*, 26 Marq. L. Rev. 163 (1942).

Available at: <http://scholarship.law.marquette.edu/mulr/vol26/iss3/6>

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## RECENT DECISIONS

**Charitable Corporations—Liability in Tort.**—Plaintiff was injured by an intoxicated person in the barroom of the Elks Club, defendant, which sold liquor to members at a profit under a dramshop license. A statute provided:

"Every . . . person who shall be injured, in person or property . . . by any intoxicated person . . . shall have a right of action . . . against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such person . . ." Ill. Revised Stat. (1939) Ch. 43, Sec. 135.

In view of the statute the defendant was held liable despite the fact that it was a charitable corporation. *Klopp v. Benevolent Protective Order of Elks, Lodge No. 281*, 309 Ill. App. 145, 33 N.E. (2d) 161 (1941).

Generally, charitable corporations have been held immune from tort liability because of the trust fund theory, i.e. imposing liability would divert the funds of the corporation to purposes not intended by the donors of the corporation, *Parks v. Northwestern University*, 218 Ill. 381, 75 N.E. 991 (1905); *Adams v. University Hospital*, 122 Mo. App. 675, 99 S.W. 453 (1907); or because of an implied waiver if the injured person was a recipient of the benefits of the charity, *Powers v. Mass. Homeopathic Hosp.*, 109 Fed. 294 (C.C.A. 1st, 1901); or because the charitable corporation is not engaged in an enterprise for its own financial benefit and therefore the doctrine of "respondeat superior" does not apply to the acts of its agents, *Schloendorff v. Society of N. Y. Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914); *Bachman v. Y. W. C. A.*, 179 Wis. 178, 191 N.W. 751 (1922); or because it would be against public policy since it would discourage the charitably inclined, *Ettlinger v. Trustees of Randolph-Macon College*, 31 F. (2d) 869 (C.C.A. 4th, 1929).

Various inroads have been made into the apparent inflexibility of these statements of the law. Some jurisdictions hold that a charitable corporation is immune from liability only where the injured person is a recipient of the benefits of the charity. *Lusk v. U. S. Fidelity and Guaranty Co.*, 199 So. 666 (La. 1941). Thus a charitable hospital was held not to be immune from suit for injuries received by the wife of a patient when she slipped on floor of hospital. *McLeod v. St. Thomas Hospital*, 170 Tenn. 423, 95 S.W. (2d) 917 (1936).

Likewise, a charitable corporation has been held liable for injuries to its employees since they are not recipients of the benefits of the charity. *Hughes v. President and Directors of Georgetown College*, 33 F. Supp. 867 (D.C. D.C., 1940); *Gable v. Salvation Army*, 186 Okla. 687, 100 P. (2d) 244 (1940).

Others hold a charitable medicinal institution liable for administrative negligence as distinguished from medical negligence. *Robey v. Jewish Hospital of Brooklyn*, 5 N.Y.S. (2d) 14, 254 App. Div. 874 (1938). Thus in *Volk v. City of New York*, 284 N.Y. 279, 30 N.E. (2d) 596 (1940) a hospital was held liable for injuries resulting where a patient was treated with injection of decomposed morphine solution, not because the treatment was negligent but because the hospital was negligent in allowing the decomposed solution to lie around—an administrative failure.

Likewise, although a charitable hospital is not liable for a doctor's malpractice, it may be held liable for negligence in selecting doctors who are incompetent and unfit to perform the work assigned to them. *Roewekamp v. N. Y. Post Graduate Medical School and Hospital*, 4 N.Y. S. (2d) 751, 254 App. Div. 265 (1938).

If the injured person is a paying patient he may be entitled to recover since he is not a recipient of the benefits of the charity. *England v. Hospital of the Good Samaritan*, 14 Cal. (2d) 791, 97 P. (2d) 813 (1939). But some courts hold that the determining factor is not whether the injured person himself is a paying patient or a recipient of charity but rather whether the institution is maintained for the purpose of profit or for that of services. *Southern Methodist Hospital and Sanitarium v. Wilson*, 45 Ariz. 507, 46 P. (2d) 118 (1935).

Also, it is held that a charitable institution is liable for injuries to a paying patient resulting from a collision between its ambulance, in which the plaintiff was being taken to her home, and another vehicle, the collision occurring because the ambulance driver employed by the defendant was negligent. *Sheehan v. North Country Community Hospital*, 273 N.Y. 163, 7 N.E. (2d) 28, 109 A.L.R. 1197 (1937).

A charitable institution may be held liable for the negligent treatment of a patient if it is insured. *O'Connor v. Boulder Colorado Sanitarium Association*, 105 Colo. 259, 96 P. (2d) 835 (1939). But contra see *Herndon v. Massey*, 217 N.C. 610, 8 S.E. (2d) 914 (1940). In the *O'Connor* case the court held that the trust fund theory does not bar an action against the charity but does bar the levying of execution on any property which is part of the charitable trust. Hence, if the charity is insured, the injured person can recover because the funds of the charity are not touched.

Wisconsin appears to be as reluctant as any state to force a charitable institution to part with its money. The Supreme Court of Wisconsin holds that charitable institutions are not liable to patients, *Morrison v. Henke*, 165 Wis. 166, 160 N.W. 173 (1917), nor to strangers, *Bachman v. Y.W.C.A.*, 179 Wis. 178, 191 N.W. 751 (1922), nor for the negligent selection of employees, *Schumacher v. Evangelical Deaconess Society of Wisconsin*, 218 Wis. 169, 260 N.W. 476 (1935). In the *Schumacher* case the court said,

"If a charitable hospital is exempt from liability for negligent acts of its incompetent employees committed upon its patients, it is exempt from liability for negligence of its managing agents in selecting those incompetent employees. Precisely the same reason lies for exemption in both cases, and it lies to precisely the same extent."

The only ruffle on these serene statements of the law is Justice Doerfler's dissent in the *Bachman* case, *supra*:

"For an association like the defendant to claim immunity from the negligence of its servants is like a minister of the gospel pleading the statute of limitations to avoid payment of a just obligation."

Wisconsin has, however, made charitable institutions liable for failure to maintain a safe public building under the "safe place" statute, WIS. STAT. (1941) Sec. 101.01, 101.06; *Wilson v. Evangelical Lutheran Church*, 202 Wis. 111, 230 N.W. 708 (1930) but this change was due to legislative enactment and not to a change in judicial outlook.

In the principal case the change in liability was due to legislative enactment. The liability of charitable corporations has been extended both by judicial and legislative changes; however, in Wisconsin this extension of liability has been due principally to legislative changes.

DAVID KEYSER.