Damage Liability of Charitable Corporations

Robert W. Hansen

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr
Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol19/iss2/3

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
CHARITABLE institutions have grown from medieval monasteries where the “humble men in black” ministered unto the sick and weary to the skyscraper hospitals and heavily-endowed educational institutions of this century. With this development has come a corresponding increase in importance of the judicial determinations affecting the tort liability of such eleemosynary institutions. Whether or not, or to what extent a charitable corporation is liable in tort for its negligence, or that of its servants or agents, is a question which has frequently been before the courts. The pendulum has swung from decisions granting such organizations a sweeping, unqualified immunity from damage liability to decisions refusing to grant even qualified exemptions from tort liability, holding that such institutions have no immunity from the commission of wrong not enjoyed by other corporations engaged in public service. This refusal to impose responsibility has been placed upon various grounds and the decisions purporting to explain the reasons are in hopeless conflict. Authorities are not wanting for almost every conceivable situation which might arise; when a state is not bound by one of its own precedents resort may be had to other jurisdictions for any one of several theories which best suits its fancy. It is to the task of collating and analyzing such varied and conflicting theories that this summary is dedicated.

Presently prevailing theories concerning the immunity from damage liability of charities can be traced to the reign of Her Majesty, Queen Victoria, when there was presented to the most august tribunal of the British Isles the question of whether or not a fatherless lad could hold the trustees of an orphan asylum liable in their corporate capacity as feoffees of the charity fund for damages alleged to have been suffered by his wrongful exclusion from such institution.

Retaining upon an earlier decision, the House of Lords denied recovery, holding that to give damages out of such trust fund would not be to apply it to those objects which the author of the fund had in mind, but would be to divert it to a completely different purpose, Lord Campbell remarking, “It seems to have been thought that if charity trustees are guilty of a breach of trust the persons damned thereby have a right
DAMAGE LIABILITY OF CHARITABLE CORPORATIONS

to be indemnified out of trust funds. That is contrary to all reason and justice and common sense. ** ** Damages are to be paid from the pocket of the wrongdoer not from a trust fund.** Although this decision did not purport to determine the liability of a charitable institution for actual injury inflicted upon others in the normal transaction of its business, from its holding and reasoning there has developed much of the law pertaining to the tort liability of charitable corporations.

Upon the rather insecure foundation of this somewhat inapplicable and since completely overruled English decision, several jurisdictions in this country have developed the theory of charitable corporation non-liability known as the "trust fund" theory, based upon the viewpoint that funds given for creation of charitable uses should not be diverted from the purposes for which the fund was established. It is said that to hold a charitable organization liable in tort for its negligence, or that of its servants or agents, would result in a serious depletion of the corpus of the trust fund, would permit trustees of such fund to do indirectly what the law will not permit them to do directly, would thwart the purpose of the charity, would cripple organizations which are performing a duty which the public owes to unfortunate humanity at large, and might discourage donors of such funds from

---


7 Harrington J. Noon, The Liability of Charitable Corporations Arising from Tort (1930) 5 Notre Dame Lawy. 389; Emery v. Jewish Hospital Ass'n., 193 500, 130 N.E. 55 (1921); Roosen v. Peter Bent Brigham Hospital, 235 Mass. 66, 126 N.E. 392 (1920); Roberts v. Kirkville College, (Mo. App.) 16 S.W. (2d) 625 (1929); Adams v. University Hospital, 122 Mo. App. 675, 99 S.W. 453 (1907); Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087 (1910).

8 " ** ** it would be against every principle of right and an outrage on justice to deplete a fund set aside for perpetual charity by using it in paying damages caused by the acts of those engaged in administering the trust. ** ** If an organization for charitable purposes founded upon the bounty of others who supply funds for the purpose of administering relief to those in need of relief and of extending care, aid, and protection to those who have no one to call upon by the ties of nature, may have its funds diverted from such kindly purpose, would it not inevitably operate to close the purses of the generous and benevolent who now do much to relieve the suffering of mankind?" Adams v. University Hospital, 122 Mo. App. 675, 99 S.W. 453 (1907); see also St. Mary's Academy v. Solomon, 77 Col. 463, 238 Pac. 22 (1925).

9 "Charitable bequests cannot be thus thwarted by negligence for which the donor is in no manner responsible. ** ** The law jealously guards the charitable trust fund and does not permit it to be frittered away by the negligent acts of those employed in its execution." Downes v. Harper Hospital, 101 Mich. 555, 60 N.W. 42 (1894).

10 "An institution of this character 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 beneficent purpose 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
continuing to grant the bequests and donations by which such institutions are kept alive.  

By what authority a charitably inclined individual can attach to a charitable trust a condition that funds are not to be used to compensate for injuries done in the necessary fulfillment of its purposes is not clear. Such individual could not escape liability for his own acts or those of his agents: how can he by the simple mechanism of incorporation or creation of a fund render such resources immune from liability? For, although it is argued that this "should be interpreted not as a desire to protect the private desires of the creator of the trust so much as a necessity to preserve the interest of the public in the fund, since the private desire is important only in that it is a dedication to public purposes," and that "when the private desire and public desire coincide and when the dedication to public purposes is made the private desire to accomplish a public purpose will not be defeated," nonetheless, it would seem that this theory permits the will of an individual to exempt property from the operation of general laws, thus allowing the will of the subject to nullify the will of the people.

Therefore, although some courts have argued that every charitable bequest contains an implied provision that the funds may be used to defray liability occurring as a result of the administration of the trust, or that donations to a trust do not carry an implied condition that persons maimed in the administration of the trust shall not be compensated against the donee because of the negligent acts of those employed to carry the beneficent purposes into execution." Parks v. Northwestern University, 218 Ill. 381, 75 N.E. 991 (1905).

"The reason given for this rule is that the charity is without any pecuniary compensation performing a duty which the public owes to unfortunate humanity at large and that it is a trust committed to the custodian of such funds by the charitably disposed in aid of the poor and needy sick and that it would be contrary to public policy to discourage the persons who contribute such funds and to divert them to purposes which the donor did not have in contemplation." Emnery v. Jewish Hospital Ass'n., 193 Ky. 400, 236 S.W. 577 (1921); but see J. Thomas' dissent in same decision, "* * * if the trust fund theory is sound, as enhancing and protecting a sound public policy it is difficult to perceive why a municipality could through its negligence be made to appropriate any part of its trust fund, created entirely by donations of its citizens, in the form of taxes, and this, too, though the corporation be indebted to the limit allowed by the Constitution."

12 O. L. McCaskill, Respondeat Superior as Applied in New York to Quasi-public and Eleemosynary Corporations (1920) 6 Corn. L. Q. 56.


14 "All persons who undertake to do charity whether directly or by means of corporations, agents, or trustees must necessarily know that all human agencies are liable to err and in the administration of such a trust expect mismanagement and acts of negligence upon the part of those to whom the work is entrusted. Therefore, necessarily, there attaches to such a trust a condition that the funds shall be used to defray any and all liability that may occur as a result of the administration of the trust." Love v. Nashville Agricultural & Normal Institute, 146 Tenn. 550, 243 S.W. 304 (1922).
sated, it would seem that the preferable rule would definitely state that no one, no matter how elevated his motive, or how humane his purpose, should be permitted to set up the machinery of his charitable organization with immunity to injury caused by the negligence of those administering such trust.

And, although it has been contended that to deplete a fund set aside for perpetual charity would be against every principle of right and an outrage on justice, it is submitted that, if the purpose of the trust is toward good and not evil, to alleviate suffering and not to increase it, courts declaring unqualified and unrestricted immunity are perverting and thwarting the underlying purpose of all charitable bequests when they compel families of an injured person to contribute their support and his life to so-called charity. Be that as it may, in jurisdictions endorsing the "trust fund" theory, a charitable corporation enjoys a complete, unrestricted, and unqualified exemption from damage liability because "an immunity so grounded admits of no exception."

15 "In conducting the affairs of a hospital its officers and agents are as liable to commit acts of negligence as are the officers and agents of a railroad or other business corporation. Experience shows that negligence—the failure to exercise ordinary care—is to be expected when men engage in industrial pursuits. The donors of the property for hospital purposes were not ignorant of this fact and are presumed to have given the trust property knowing that it might be required for the liquidation of claims in tort, as well as for claims in contract, incurred in carrying out the purposes of the trust." Hewett v. Woman's Hospital Aid Ass'n., 73 N.H. 556, 64 Atl. 190 (1906).

16 Daniels v. Rahway Hospital, (N.J.L. 1932) 160 Atl. 644.

17 "Charity funds are things apart from ordinary matters of business or trade. In the thoughts and consciences of men, charities are not loaded with the burdens put upon other matters. Charity suggests different considerations and treatment from matters of ordinary business, and hence there has arisen out of the conscience a principle which protects it in its beneficent and perpetual purpose. The greatest authority has said that, though prophecies shall come to naught and tongues shall cease, and knowledge shall vanish away, yet 'charity never faileth.' To repeat a thought already suggested, every one, in the present or in the future, coming within the object of a charity, has a right to the enjoyment of its benefits, and no one has a right to appropriate to himself in the settlement of claims, the fund whereby such benefits are secured. To permit it to be done would be not only setting aside the purpose of the donor, but would, in its results, allow the claim of one person to exclude the rights of all others who may come after him. It would be a matter of grave concern and regret if funds set apart for support of our charitable institutions should be made subject to the assaults of the damage claimant." Adams v. University Hospital, 122 Mo. App. 675, 99 S.W. 453 (1907).

18 "* * * the plaintiff appealed for an education to charity and it plucked out her eye; she asked for bread and it gave her a stone. This is not the Charity of the Book of Books describing charity for 'charity suffereth long and is kind.' The reasons that existed in the early days of this country for encouraging the efforts of philanthropy in building and equipping hospitals and institutions of education should no longer be so controlling, for such efforts have resulted in the erection and maintenance of such institutions enjoying endowments and revenues beyond the imagination of the early lawmakers." J. Hasbrouck, dissenting in Hamburger v. Cornell University, 204 App. Div. 664, 199 N.Y. Supp. 369 (1923); to the same effect see McIlvain v. St. Luke's Hospital Assn., 122 Minn. 10, 141 N.W. 837 (1913).

Resisting the extremes to which the logic of the "trust fund" theory impelled them, many courts and text writers bitterly criticized the doctrine, some expressly repudiated all attempts to grant immunity to charitable corporations, and others, while giving lip service to the viewpoint, obviously squirmed under its implications. It remained for Judge Lowell, in the now historic case of Powers v. Mass. Homopathic Hospital, to present a new fiction or rationalization to justify legally the exemption of charitable corporations from damage liability. In that case he held,

"That a man is sometimes deemed to assume a risk of negligence, so that he cannot sue for damages caused by the negligence is familiar law. One who accepts the benefit either of a public or of a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants. To paraphrase the illustration put by the learned judge before whom this case was tried, it would be intolerable that a good Samaritan who takes to his home a wounded stranger for care should be held liable personally for the negligence of his servant in caring for that stranger. Were the heart and means of that Samaritan so large that he was able not only to provide for one wounded man but to establish a hospital for the care of a thousand it would be no less intolerable that he should be held liable personally for the negligence of his servants in caring for any one of those thousand men. We cannot perceive that the position of the defendant differs from the case supposed. The persons whose money has established this hospital are good Samaritans perhaps giving less of personal devotion than did he but by combining their liberality thus enabled to deal with suffering on a larger scale."

This analogy has been subjected to some criticism; at least one commentator asserts that since trustees act only in their representative capacity and inasmuch as their charitable inclinations and purity of purpose are not subject to change, the good Samaritan illustration to its logical conclusion for all torts committed by such association." Hospital of St. Vincent v. Thompson, 116 Va. 101, 81 S.E. 13 (1914).

20 For a well reasoned and well analyzed criticism see Bruce v. Young Men's Christian Assn., 51 Nev. 372, 277 Pac. 798, 801 (1929).

21 Tucker v. Mobile Infirmary Assn., 191 Ala. 578, 68 So. 4 (1915); Glavin v. R. I. Hospital, 12 R.I. 411, 34 Am. Rep. 575 (1878) (overruled by statute of Rhode Island legislature); Cohen v. Gen'l Hospital Soc. 113 Conn. 188, 154 Atl. 435 (1931); Geiger v. Simpson M. E. Church, 174 Minn. 389, 219 N.W. 463 (1928); McInerney v. St. Luke's Hospital, 122 Minn. 10, 141 N.W. 837 (1913). This line of authority criticized as a "Shylock view of the matter" that "reduces the relation of the parties to a cold proposition of business and to the level of demanding of each other an eye for an eye and a tooth for a tooth." Cook v. John N. Norton Memorial Infirmary, 180 Ky. 331, 202 S.W. 874, L.R.A. 1918E 647.


places too strict a rule upon hospital trustees; others argue that inasmuch as the Biblical individual did not hold himself out to be competent and qualified to treat or attempt to treat the sick and since he was not in the business of providing hospital facilities and medical services the standard the analogy suggests is far too lenient. Probably, however, the analogy is in the main a fairly accurate one; the difficulty with the theory of an implied agreement to waive damage claims which the illustration presumably indicates is that it is, as applied to present conditions, essentially fictitious and the danger is, as in all legal fictions, that it permits the doctrine to enter new fields from which it would have been excluded had their true character been known.

Where this criterion is applied, or this rule utilized, it exempts charitable corporations from damage liability only if they have exercised due care in selecting their employees and servants. Upon principle, it would appear to make charitable organizations liable for injuries suffered by strangers through the negligence of hospital employees, for it is difficult to see how any agreement to waive damage claims could be implied as against a total stranger. Moreover, certain cases come to mind in which it seems almost impossible to spell out a waiver of a right of action; for example persons temporarily deranged or temporarily unconscious are conveyed to hospitals for emergency

24 * * * and in the case of the individual instance of the action of the good Samaritan, * * * it would not constitute an undertaking on his part to render the service of care of the wounded persons but merely to furnish to the latter the use of the house as it stood and such ministering care as the facilities and servants in that home—chosen not for that but for other purposes and not held out to be suitable or competent for that purpose—might perchance render in the emergency in which the stranger is found until such time as he or those owing him the duty to act in the premises may obtain from some other source some actual undertaking of the rendering of the service of care. Whereas, in the case of a hospital, the material distinction is that it conducts a business of rendering the service of care in question; it holds itself out as undertaking to perform such services; it tenders such services as an actual undertaking on its part; and when such tender is accepted by anyone the duty of performing the undertaking attaches." J. Sims, dissenting in *Weston v. Hospital of St. Vincent*, 131 Va. 587, 107 S.E. 785 (1921).
26 "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 acquiescence in this intent by all persons who accept the benefit of the charity and in that way spell out a waiver by such persons of any responsibility by 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 an outsider to a person run over on the highway by the ambulance of such an institution, by the negligence of the driver." *Kellogg v. Church Charity Foundation*, 203 N.Y. 191, 96 N.E. 406 (1911).
operations, children too young to understand the meaning of contracts are treated in medical centers, individuals so debilitated by disease that they have no power of understanding are often hospitalized. How can such persons be held to have agreed to an exemption? This doctrine has been severely criticized upon principle, especially as applied to pay patients in charitable hospitals; probably it will never be more than a minority rule followed only in a numerically unimposing number of jurisdictions.

These two theories have not exhausted the ingenuity which American jurists brought to the task of rationalizing the position in which their solicitude for the welfare of eleemosynary institutions placed them. In some jurisdictions the courts preferred to rest their decisions upon the principle that "since these 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." It has been said that a fundamental requisite upon which the rule of respondeat superior operates is missing, namely, that there is an absence of any private or pecuniary gain on the part of the charitable institution by the acts of its servants.

As a matter of fact, some jurisdictions go farther, holding that natural persons administering the charity, particularly in the case of those attending a patient in a charity hospital, are not servants within the meaning of the word "servants" in that the corporation receives neither pecuniary benefit nor profit from their services, and that therefore, the rule of respondeat superior does not apply. This rule has met with disapproval in some quarters. Adherence to the exemption from the respondeat superior rule probably grants a charity exemption

27 Gamble v. Vanderbilt University, 138 Tenn. 616, 200 S.W. 510 (1917). "How an agreement to waive away a claim for damages for one life, one's arm, one's leg or one's eye can be implied where there is utter ignorance on the part of the recipient of charity that such an unconscionable deprivation of human right follows the acceptance of charity, I cannot fathom," J. Hasbrouck dissenting in Hamburger v. Cornell University, 204 App. Div. 664, 199 N.Y. Supp. 369 (1923).

28 "She has depended upon no charity; she has sought none but was to pay a reasonable price for what she received. * * * We are unable to conceive upon what principle the theory of 'implied assent' could be applied to one who pays full price and without regard to the nature of the institution from which she receives her service. * * * It is a principle of law as well as morals that men must be just before they are generous." Tucker v. Mobile Infirmary Assn., 191 Ala. 572, 68 So. 4 (1915).


31 10 FLETCHER, CYCLOPEDIA CORPORATIONS (Perm. ed. 1931) c. 54 § 4930; See Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914).

32 "That doctrine itself (respondeat superior) had its origin in considerations of public policy. It doubtless will be in the future as it always has been devel-
from liability for injuries caused by the negligence of its servants, whether the person injured was a beneficiary, servant, or stranger, at least in the absence of statutes of general application. However, it would seem that this rule would not exempt such institutions from the non-delegable duty of exercising due care in the selection of its servants, agents, and employees. While it may be true that the rule of respondeat superior is "a hard rule at best" and despite learned arguments advanced to establish that the rule of respondeat superior was never intended to apply to any persons except those who received some profit or other emolument from the activities of their servants, it is submitted that this rule, unless it be interpreted as a statement of public policy and nothing more, mistakes the foundation of the master's liability which is based on the maxim "qui facit per alium, facit per se," that it assumes men to be exempt from the consequences of negligence operated, modified, or extended as the necessities of new social and economic conditions demand and the exemption of liability of such organizations, subject to the condition of care in the selection or retention of servants, which condition is so frequently found in the decisions of the courts on the subject indicates the general judgment that the exemption from the operation of the rule of respondeat superior which experience has shown to be a valuable aid in securing the ends of justice should not be sweeping and complete but should be surrounded by such safeguards as will prevent the neglect of a duty which the hospital can and should perform." Taylor v. Flower Deaconness Home & Hospital, 104 Ohio St. 61, 135 N.E. 287 (1922).

33 "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 instances 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." Bachman v. Young Women's Christian Assn., 179 Wis. 178, 191 N.W. 751 (1922).


35 "There are undoubtedly acts performed by agents of a corporation which may be attributed to the corporation itself and which do not depend upon the rule of respondeat superior. It is true that all corporations, being in a sense fictitious, must act through means of personal agents, but we have long since gotten away from the opinion, which obtained early in the history of corporations, that they are without soul, mind, hands, or body and therefore not chargeable with either wrongful acts of commission or of omission. The souls and minds of natural persons shape their course, direct their operations, and control their activities, and whatever is done by those who shape a corporation's course is the conduct of the corporation itself; and where the corporation itself conducts the affairs in such a way as to do injury to others, it ought to be held accountable and no rule of immunity ought to be extended to it unless demanded by reason of public policy." Love v. Nashville Agricultural & Normal Inst., 146 Tenn. 550, 243 S.W. 304 (1922).

36 C. H. Taylor, Charities—Liability for Torts (1927) 2 U. of Cinn. L. Rev. 72; City Hospital of Akron v. Lewis, 47 Ohio App. 465, 192 N.E. 150 (1934); Taylor v. Flower Deaconness Home & Hospital, 104 Ohio St. 61, 135 N.E. 287 (1922).


38 Hearns v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 95 (1895).

because they are on missions of mercy, and that its logical extension would require courts to exempt clergymen and doctors whose motive and service to humanity are of an identical nature from the consequences of the negligence of their agents, a step to which no court seems willing to go.

Yet another so-called theory of liability exemption is the "public policy" theory, the viewpoint that judicial refusal to permit damage claimants to recover against charities is founded on the ground that public policy encourages the support of charitable institutions and protects their resources from the maw of litigation. In one sense, these "considerations of public policy" as one court has termed them, are the bases of all of the various theories herein analyzed, for "underlying all of them is the matter of public policy and it is upon this that the rule may be said finally to rest." Courts which have advanced, adopted, and defended the "trust fund" theory, the "implied waiver" theory, the "inapplicability of respondeat superior" theory have done so because they have felt that it would be contrary to public policy to permit recovery against a charity, at any rate if due care had been exercised in selecting and retaining employees and attendants; at least one cannot escape the definite impression that all of the various theories, ingenious and plausible as they may appear, are but rationalizations of the standpoint to which the jurists' sympathies and inclinations impelled them. It is admitted that in organized society the rights of the individual must in some instances be subordinated to the public good; in the field of damage liability of charitable corporations many courts have felt that, at least under certain conditions, it is better for the individual to suffer injury without compensation than for the public to be deprived of the benefit of the charity; although other jurists have felt that charities should compensate those injured by the negligence of their servants before going farther afield to dispense charity.

---

43 As cases founded upon "public policy" theory see Lindler v. Columbia Hospital, 98 S.C. 25, 81 S.E. 512 (1914); Magnusson v. Swedish Hospital, 99 Wash. 399, 169 Pac. 229 (1908); Weston v. Hosp. of St. Vincent of Paul, 131 Va. 587, 107 S.E. 785 (1921); Love v. Nashville Agricultural & Normal Institute, 146 Tenn. 550, 243 S.E. 304 (1922); Hoke v. Glenn, 167 N.C. 594, 83 S.E. 807 (1914).
44 Geiger v. Simpson M. E. Church, 174 Minn. 389, 219 N.W. 463, 465 (1928). "While such institutions should be encouraged and those who are charitably inclined should likewise be encouraged to support them, this encouragement must not be carried to the point where injustices will be done to others." Sisters of Charity v. Duwellis, 123 Ohio St. 52, 173 N.E. 737 (1930). "We do not believe that a policy of irresponsibility best subserves the beneficent purpose for which the hospital is maintained. We do not appreciate the public policy which would require the widow and children of deceased rather than the cor-
While the "public policy" theory at least possesses the not unimportant virtue of requiring no legalistic fiction or involved syllogistic argument to explain its existence, it is hardly a satisfactory foundation upon which to ground the damage liability of charitable corporations for the reason that it affords no objective standard or criterion by which to determine liability. Public policy, in this as in other cases, is too likely to vary with the individual reactions, sympathies, and backgrounds of individual judges to constitute a satisfactory ratio decidendi by which to determine liability, although some claim that such flexibility is its greatest value. Adoption of or adherence to this theory would in no manner clarify the muddled state of the law concerning tort liability of non-profit corporations if such a thing were possible, it might heighten and increase the confusion.

Is there then no Promised Land of judicial clarity toward which the wilderness-weary Israelites can be led? Is the field of the law concerning the damage liability of charitable corporations to remain in utter confusion unto the end? It is the deliberate conviction of the writer that as long as courts of last resort persist in building legal fictions and advancing legalistic theories to justify considering charities apart from other community enterprises and persist in following such fictions and theories to whatever illogical extremes their implications extend, confusion and contradiction are inevitable. It is the position of the writer that tort liability, in this field, as in others, should be ascertained by determining what duty was owed by the person against whom damages are claimed and by then determining whether or not there was a failure to observe such duty, or in other words, whether there was negligence.

Fifty years ago an authority on the law of torts wrote, "* * * where negligence in the performance of a legal duty is brought home to any one, and another has suffered damages therefrom, an action will lie." It is submitted that application of this elementary rule to the law of charities would afford substantially equivalent protection to charities generally and would do so without involving the spinning of webs of legal theory. In every case, the law would ask the questions, What duty was owed by this hospital or university? What did it undertake to do? What was its obligation to the plaintiff? Much of the confusion in this phase of the law arises from a lack of understanding of what a
hospital or charity undertakes to do; realistic and accurate statement of such duty or obligation would indicate what the institution can and should be expected to do. More than that no fair minded persons could expect and no law would attempt to require.

Mr. Justice Benjamin N. Cardozo, while a member of the court of last resort of the state of New York, wrote a decision concerning the liability of an educational institution to a student injured while doing laboratory work within its classrooms. The decision indicates and embodies an approach to the problem of damage liability of charitable corporations which is sorely needed in the law today; it states the standard of care to be applied to such institutions as follows:

"With us a hospital or university owes to patients or to students whatever duty of care and diligence is attached to the relation as reasonably implicit in the nature of the undertaking and the purpose of the charity. All that is thus included is not susceptible of enumeration in advance of the event. It cannot be less however than appropriate investigation of the character and capacities of the agencies of service from the highest to the lowest. This is a duty that devolves upon the corporation itself and one not to be shaken off by delegation or surrender."

Adoption of this approach requires a realistic analysis of "the nature of the undertaking" of a present day hospital or charitable institution. In the case of the hospital, such institution hardly duplicates the medicine show savant's willingness to guarantee recovery from serious illness. It does not even undertake the duties of medical men or to give medical advice but merely that patients shall have competent medical advice and assistance: if it has employed competent, skillful, and duly qualified medical men or hospital attendants, it has done all that it is possible for it to do. Or, in the words of Justice Cardozo,

"Such a hospital undertakes not to heal or attempt to heal through the agency of others but merely to supply others who will heal or attempt to heal on their own responsibility. * * * A patient resorting to the hospital gains the benefit of facilities that would otherwise not be available. If these are furnished he has no other remedy for the errors of surgeons or physicians, carefully selected, who have given him treatment in a ward than he would have if the same men upon the recommendation of the hospital had given him treatment at home. By fair implication he must look to them alone. * * * We think a hospital's immunity from liability for errors of physicians and surgeons is matched in the case of a university by a like immunity from liability for the errors of professors or instructors or other members of its staff of teachers. * * * There is indeed a duty to select them with due care."

It is apparent that this approach to the problem of a charitable corporation’s liability for torts committed by its employees does not abolish nor cripple the immunity from damage claims today possessed by such institutions. As a matter of fact it does not alter such exemption, for, the overwhelming weight of authority in this country establishes that, except as to strangers, or servants, a charitable corporation is not responsible for the negligence of its servants and attendants, unless it has been guilty of a want of ordinary care in the selection or retention of such servants. However, while approaching the subject of dam-

---

age liability of charities from the standpoint of the duty or undertaking of non-profit hospitals and similar institutions may not alter the prevailing rulings, it definitely obviates the necessity of developing and defending intricate theories.

It is suggested that such theories assumed that hospitals and similar institutions were insurers of the efficacy of the treatment provided and guarantors of the ability and competence of attendants and employees, and attempted to exempt such institutions from liability therefor. If so, they have succeeded only in granting immunity from a non-existent liability. For, while a hospital undertakes to use care in the selection and retention of its doctors and nurses and holds itself out to the public as offering its comforts and facilities as they are, its obligation does not extend further than the furnishing of trained and experienced medical and surgical practitioners. Such obligation has been carefully set forth in an English case as follows: "The duty which the law implies in the relation of the patient and the corresponding liability are limited. The governors of a public hospital by their admission of the patient to enjoy in the hospital the gratuitous benefit of its care do, I think, undertake that the patient whilst there shall be treated only by experts, whether surgeons, physicians, or nurses, of whose professional competence they have taken reasonable care to assure themselves; and further that those experts shall have at their disposal for the care and treatment of the patient fit and proper apparatus and appliances. But I see no ground for holding it to be a right legal inference from the circumstances of hospital and patient that the hospital authority makes itself liable in damages if members of its professional staff of whose competence there is no question act negligently toward the patient in some matter of professional care or skill."

The corporation or individual that administers such charitable trusts must after all leave the treatment of the patients to the superior knowledge and skill of the physician. They cannot direct the latter, as the master may ordinarily direct the servant what to do and how to do it. They do not undertake to act through such agents but merely to procure them to act upon their own responsibility. The only responsibility devolving upon such organizations is to exercise reasonable care in

---

52 Union P. R. Co. v. Artist, 60 Fed. 365 (C.C.A. 8th, 1894).
53 Schloendorf v. Society of N. Y. Hospital, 211 N.Y. 125, 105 N.E. 92 (1914).
selecting and retaining those whom they trust to care for those placed in their custody,\(^{54}\) for employees and servants selected with ordinary care will execute the charity with but few mistakes.\(^{55}\) No one can determine the duty owed by charitable institutions under every possible set of facts; however, it is submitted that only by ascertaining what such obligation actually is can a proper and sensible approach to the subject of damage liability of charitable corporations be attained.

Many years have passed since the English jurists saw fit to protect the resources of Heriot's Hospital from the onslaught of damage claimants. Charitable institutions have developed into the heavily endowed medical centers and mighty educational institutions of our era. Facilities for public liability insurance have been extended. Trained hospital attendants, medical experts, and experienced instructors are no longer uncommon. With such changes the doctrine of unqualified exemption from damage liability, permitting hospital administrators to send butchers armed with cleavers to perform delicate operations with impunity to consequences, has largely passed into the discard. In its place there has developed and, let us hope, there will continue to develop a qualified, guarded, and restricted exemption from damage liability arising from and limited by the obligation or actual undertaking of the charitable institution to the damage claimant.

\(^{54}\) Weston v. Hospital of St. Vincent, 131 Va. 587, 107 S.E. 785 (1921).