THE TORT LIABILITY OF CHARITIES

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While the cases on this subject are legion, as one judge says in an opinion, the number of articles and notes discussing the subject in the law reviews is small. This is probably due chiefly to the fact that, while the courts are uncertain and divided to this day as to the proper theory upon which to rest their conclusions, they are for the most part in accord as to the result which should be reached. It is, therefore, the perhaps presumptuous purpose of this article to criticize this conclusion in certain types of cases, even though it does represent the overwhelming weight of authority.

The law on this topic can be and has been rather adequately summarized in one short paragraph by Mr. Carl Zollman in an article in the *Michigan Law Review*.¹ He says:

"To sum up: a number of states have, following the English dicta, exempted charities from all tort liability against beneficiaries as well as others on the ground that public policy demands that the trust fund be not diverted to paying damages. The great majority of courts, however, do justice to employees, strangers and invitees by holding the charity to the same degree of care exacted from other entities. In regard to beneficiaries they hold the charity liable for injuries resulting from the negligence of the trustees or managers in selecting incompetent servants, but not for the negligence of servants carefully selected."

This, the concluding paragraph of Mr. Zollman's article, ends with the statement of the reason for this rule which Mr. Zollman considers the most satisfactory among the many advanced in the numerous cases involving this question.

It is the theory of the present article that none of the reasons given for this immunity is satisfactory in the present day

¹*Damage Liability of Charitable Institutions* (1921) 19 MICH. L. REV. 395, 412.

and age, that the rule is unjust, anti-social and unsuited to modern conditions, and finally, that it should be abandoned. If this cannot be accomplished by decision, because of the innate conservatism of the courts, or because of the force of the principle of *stare decisis*, it should be the subject of legislation.

The writer believes that, from the view point of social justice, and in harmony with legal development in other questions, particularly in the law of torts, this rule belongs with the fellow-servant rule and other legal doctrines of that period, which have been largely abandoned, and that it deserves the same fate.

This immunity of charities from liability to their beneficiaries is one of several immunities from liability which remain in the law of torts as the modern heritage of the Georgian and Victorian period of English jurisprudence, in which property and the rights arising out of property were the favorites of the law. It is a remnant of that Old England, whose legal institutions and concepts are now shaking off that rigidity of form which was given them by the class-conscious thought of the bench, bar and legislature, which ruled England and formed the pattern for both English and American legal development until approximately the beginning of the present century. This earlier point of view is slowly but surely yielding to the influences of more general education, wider suffrage, the invasion of the bar and bench by recruits from the previously excluded social classes, and the development in all classes of society of the "social consciousness," that is, the consciousness that society owes to personality a degree of protection at least equal to that which it has so long accorded to property.²

It is perhaps superfluous to point out that the past developments in American law along this line are the natural result of the established regard of the American legal profession for English precedents, and for the usually excellent reasoning of the English opinions. This criticism of the rule under discussion is in no sense meant to indicate dissatisfaction with the judges who

² Pound, *Interests of Personality* (1915) 28 HARV. L. REV. 343, 445, which points out that in securing individual interests in personality, the law is securing a social interest.

worked out initially the theories for dealing with such problems. The judges of that day, as well as the rules of law they worked out, were the natural and probably the inevitable product of the times. But today, so greatly have social concepts changed as to society's duty to the individual that the law must inevitably incorporate these changing *mores* into legal rules.

The fact that the writer of a law review article believes the law should be otherwise than it is upon a particular legal problem may probably be regarded as an insufficient argument for the conclusion thus reached. The position here taken, that charities, whether they be corporations, trusts, or other forms of legal entity,³ should be liable, to the same extent as other employers, to pay damages for torts committed through the negligence of their employees, is no exception. In short it requires proof. It will probably be impossible to prove this contention to the satisfaction of the courts in a jurisdiction having precedents denying this liability. It will also be at least difficult to prove it to courts in states having no decisions upon the subject either way. If this view should come to prevail in any length of time short of several generations, it is probable that legislation would be necessary.

Now what are some of the points in favor of doing away with the immunity of charities? With the authority as it is, the arguments must obviously be put upon other grounds. Suppose one tries to think of this problem in terms of that abstraction called justice. What is justice in the present connection? Indeed, what is justice in any connection? Justinian defined it as the disposition to give every man his due. But the law, the customs, the sanctions of the particular time and place where an event occurs, must determine what is every man's due in reference to that event. Is it more just today that a patient, an inmate, or any other beneficiary of a charitable institution, whether supported by the endowment of one wealthy philanthropist or by the gifts of many persons, should be allowed to recover damages against the intending benefactor, or that the loss or suffer-

³ As to what is a charity see *Parks v. Northwestern Univ.*, 219 Ill. 381, 75 N. E. 991 (1905), 2 L. R. A. (N. S.) 556 (1906); Note (1888) 1 L. R. A. 417; 11 C. J. 303, n. 64.

ing to the individual should rest where it falls? ⁴ There are conflicting appeals to justice here, as in every case where one of two innocent persons must suffer in some manner from the consequences of another's malice, carelessness, or folly. It is admitted by the decisions that the charity is liable where its managers have committed the wrong of hiring an incompetent servant, and that servant has been guilty of the act which has produced the injury. In the type of case which raises the present problem the defendant itself has done no wrong *per se*. The defendant has set in motion another agency. The circumstances are such that the ordinary individual or corporation as master would be liable. The question simply is: does the doctrine of *respondeat superior* apply to this situation? One of the cases denying recovery says that the doctrine of *respondeat superior* is a harsh one and should be restricted.⁵ Justice is too often a question of conflicting rights, and we cannot always apply the convenient, if sometimes pragmatic, rule, so often resorted to in commercial or property questions, when a third party has dissipated value or wealth under circumstances such that one of two innocents must lose. That is, we cannot dispose of a personal injury by saying that the legal title shall prevail.

Here then is a question of justice between the two parties most directly affected. But the claims of both upon the favor of justice are subject to the rights and welfare of society, and also subservient to the interests of that government in whose name and by whose machinery justice must be determined and

⁴ *Mulliner v. Evangelischer Diakonissenverein*, 144 Minn. 392, 175 N. W. 699 (1920). This case is quoted in this connection at p. 209 of this article. *Contra*: *Bachman v. Y. W. C. A.*, 179 Wis. 178, 191 N. W. 751 (1923). The dissenting opinion says, at 186, 191 N. W. at 754: "What reason is there for immunizing an association of this kind on account of the negligence of its servants, and placing the entire consequences of an injury upon an innocent third person or upon the family of such injured person . . . ? For an association like the defendant to claim immunity from the negligence of its servants is like a minister of the gospel pleading the statutes of limitations to avoid the payment of a just obligation. I think it is wrong in principle, is not in accordance with the prevailing doctrine in this country, and is not conducive to human welfare, and should not receive the sanction of this court." It should be noted however that the case was one in which a third party, and not a beneficiary, was suing the charity.

⁵ *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417 (1888); *Hearns v. Waterbury Hosp.*, 66 Conn. 98, 33 Atl. 595 (1895).

administered. What does this mean, but that the question must be settled by reference to social policy and in no other way? The law has its rules and its principles of legal policy, and will answer the questions put to it in terms of the policy of the law. Now what makes the policy of the law what it happens to be, in this or any other case, rather than just the contrary? Legal policy is but a reflection of a detail from the total ensemble of social policy. However, the law does not reflect social policy instantaneously as a mirror reflects the image of an object placed before it. Only after the waves or emanations from a particular manifestation of social conduct have shown upon the film of the law for some time does it absorb enough of the rays to produce a visible image. In other words, there must be a time exposure before the image of changed social phenomena and correspondingly changed social requirements become fixed in the law, just as is required by a photographic film which is exposed in a dimly lighted place. It would therefore seem that when society is sure enough of what it wants, and when that certainty has persisted for a sufficiently long time, the thing will ultimately come to pass.

Why is it just, at the present day, to hold charities liable in the type of situation here under discussion? It is submitted that the imposition of liability in such cases is justice now, even if it were not always so. This is so now because it has at this point in our social progress become evident that social policy, to be consistent with its development as a whole, must be interpreted as calling for the imposition of liability in such cases. The charity of times gone by, to the extent that it then existed, was a very different thing from the modern charity. Charity has become organized. Formerly, except as it was a part and creature of the Church, it was not organized at all, and depended upon the humane instincts of individuals or small informal groups. Some of the decisions, evidently influenced in part at least by this conception, have said that the Good Samaritan must not be discouraged by being mulcted in damages; yet as a private individual he would be held liable. The volunteer who does a job negligently is everywhere held liable. The courts do not even seem to stick at applying to him the doctrine of *respondeat superior*. As stated in a note in the American Law Reports:

"An individual is absolutely bound to make compensation for any injury negligently inflicted upon a stranger in the performance of any act which he undertakes, and the fact that he is actuated by a charitable motive is immaterial. . . . The fact that he attempts to delegate performance of the undertaking to another is immaterial, for *qui facit per alium, facit per se*." ⁶

The modern institution which is the usual defendant in these cases does not do charity in the manner of the Good Samaritan of old. It is a thing of steel and stone and electricity, of boards and committees, of card indices and filing systems, and of rules and regulations. The beneficiary, theoretically, may take its aid or leave it; practically, he must take it or perish.⁷ While it is true that he should be thankful for what society offers him of help and comfort through such agencies, it is society's real and ultimate purpose that he shall be bettered in mind, body and estate by what it does for him. Another result which should be sought, and undoubtedly is intended by our modern institutionalized relief of the socially-handicapped, is the shifting of the loss, at least partially, from the unfortunate victim of the injury to society. For example, if a crippled child be placed for treatment and correction of his deformity, in a hospital maintained by charity, the social object is twofold: first, that he shall not go through a life of unnecessary and preventable suffering, physical and mental; and second, that he shall not be a burden upon society as a pauper, but shall be placed as nearly as possible upon a parity with his fellows, in order that he may make a contribution to the economic life of the community instead of being a drain upon

⁶ Note (1921) 14 A. L. R. 573. For a general discussion see Bohlen, *Moral Duty to Aid Others as a Basis of Tort Liability* (1908) 56 U. OF PA. L. REV. 217, 316.

⁷ In *Hoke v. Glenn*, 167 N. C. 594, 83 S. E. 807 (1914), although recovery was allowed only because the charity was found negligent in employing an incompetent person, the court said, at 597, 83 S. E. at 809: "The beneficiaries of charitable institutions are the poor, who have very little opportunity for selection, and it is the purpose of the founders to give to them skillful and humane treatment. If they are permitted to employ those who are incompetent and unskilled, funds bestowed for beneficence are diverted from their true purpose, and, under the form of a charity, they become a menace to those for whose benefit they are established."

it.⁸ If the institution, through negligent injury to him, prevents the fulfillment of either of these objects, it has in that case and to that extent defeated the purpose for which it was created. Laying aside the loss and suffering of the individual, the institution whose negligent servant injures an inmate so that his economic value to society is reduced, has failed in its duty to society and to the members of society who have established and maintained it.

This thought, that the charity which has negligently injured a beneficiary,⁹ defeats its purpose, has been suggested in some judicial opinions, but this type of reasoning is usually based upon considerations referring to the individual welfare of the beneficiary involved. The judiciary has, so far as may be inferred from the cases discovered in this study, generally failed to recognize the obligation which charity, according to the theory of modern sociology, owes to society, and which it shifts to other shoulders if it be immune from liability for negligent injury to its beneficiaries. This may be due to historical causes arising out of the religious and public origin of charitable institutions. As has been stated, the immunity extends only to institutionalized charity and not to the individual Good Samaritan. The doctrine has been long established that public institutions, with two exceptions, *viz.*, the maintenance of public highways and the performance of non-governmental functions, are not liable in tort. The functions performed by charities, when they are carried on by the government or its local subdivisions, are of the sort clearly recognized as governmental functions. The king could do no wrong, hence government is not liable for tort.¹⁰ Charity began

⁸ As an indication of the fact that the right of the child to equality of opportunity has become a prominent item in the social consciousness of today, it may be recalled that it was emphasized by Mr. Hoover in his address of Aug. 12, 1928, accepting the Republican nomination for the presidency.

⁹ *Supra* notes 3 and 7.

¹⁰ The immunity of municipalities from tort liability is also under fire. See Borchard, *Government Liability In Tort* (1924-27) 34 YALE L. J. 1, 129, 229, 36 *ibid.* 1, 757, 1039. There are two recent cases in Oklahoma holding that a city may be held liable in tort for negligent injury to patients in a city hospital. *City of Shawnee v. Roush*, 101 Okla. 60, 223 Pac. 354 (1924); *City of Pawhuska v. Black*, 117 Okla. 108, 244 Pac. 1114 (1926). The Oklahoma court takes the position that in running a hospital at which paying patients are accepted, it is acting in a quasi-private matter. However, this conception of a

when the Church and State were one and likewise the Church could do no wrong. Therefore charities, which were in earlier times regarded as works of piety, established and maintained for the welfare of the souls of the benefactors, could not be guilty of wrong, particularly for the wrongs of employees selected with reasonable care and in good faith. Indeed one can read between the lines of some of the opinions relating to charities and charitable trusts, not only in tort cases but in other connections, the suggestion that the judges were more concerned with the souls of the creators of charitable trusts than with the bodies of their beneficiaries.¹¹

In the arguments thus far presented in this paper no attempt has been made to state or classify the cases involved. Decisions are almost altogether against the thesis herein contended for. The decisions in three states which have held in favor of the beneficiary of a charity have not apparently had any substantial influence upon other jurisdictions, and in one of these three states the legislature by statutory enactment has forbidden the further application of this point of view.¹² It remains to take up briefly the authorities as they show the development of this field

city hospital as private is not generally supported by authority. Also the fact that the plaintiff in a particular case is a paying patient does not seem to the present writer as extremely important, inasmuch as the cases exempting hospitals from liability do not make a distinction on this ground. These decisions are in line with an increasing tendency in a number of states to hold municipalities liable in tort even in connection with their governmental functions. (1925) 34 YALE L. J. 316, 322, commenting on the first of the Oklahoma cases, says: "The Oklahoma case, *supra*, imposes the responsibility of any profit making corporation. This, it is submitted, best serves the welfare of society. The modern tendency, through various forms of insurance—fire, accident, life, workmen's compensation acts, and the like . . . is to shift the burden from the innocent victim to the community."

¹¹ As to the suggestion that the imposition of tort liability upon charities will tend to discourage donors from founding and maintaining them, it is said in (1925) 34 YALE L. J. 316, 322: "The cases that adopt rules relieving charitable corporations from responsibility, wholly or in part, indicate the fear that any other policy will result in the disappearance of charities through the failure of donations and the dissipation of funds. Even if some reason for fear be admitted, a distinction should be drawn between private charities and those created and supported by the state. The public charity has the taxing power of the state to support it. In England, Canada, and those states where absolute responsibility is imposed, these fears have hardly been realized. . . . The cases sentimentalize much about the unfairness of subjecting the 'Good Samaritan' to an action for damages. The alternative is that those must suffer whom the charities were designed to benefit."

¹² R. I. GEN. LAWS (1923) §3561.

of the law, and to analyze somewhat the various theories on which the immunity of charities in tort actions has been based in the decisions of the courts.¹³

THE TRUST-FUND THEORY

Some of the cases have said that the fund created by the benefactors of the charity would be diverted from the purpose for which it was set apart, if it should be employed to pay damages for injuries caused by the employees of the charity. This theory has been used as a way of explaining why a beneficiary of the charity should not recover, but its soundness has been tested in a number of cases involving various aspects of the general proposition, with the result that it has been repudiated by the majority of jurisdictions. If this theory be sound, a charity could not be held liable in tort to any plaintiff, so far as trust funds might be necessary to discharge the liability. On the other hand, if the charity has in hand income derived from other sources, as, for example, from fees collected from paying patients, then this theory should not prevent recovery even by a plaintiff who is a beneficiary of the charity, so long as his judgment is satisfied from such funds.

The weakness of the trust-fund theory has become apparent by reason of the refusal of the courts to apply it, in the majority of jurisdictions, against persons other than the beneficiaries of the charity. Where the plaintiff is a stranger to the charity, the weight of authority today is that he may recover.¹⁴

¹³For a very complete collection of authorities adopting the various theories upon which this doctrine of non-liability of charities is rested, see Note (1921) 14 A. L. R. 573; (1925) 34 YALE L. J. 316; (1924) 72 U. OF PA. L. REV. 443.

¹⁴Kellogg v. Church Charity Foundation, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481 (1911) (plaintiff injured by ambulance negligently driven on the highway); Basabo v. Salvation Army, 35 R. I. 22, 85 Atl. 120, 42 L. R. A. (N. S.) 1144 (1912) (plaintiff injured by vehicle of defendant due to negligent driving by defendant's servant). This case has the effect of making it clear that the Rhode Island statute referred to, *supra* note 12, is limited to beneficiaries. Many earlier cases putting their decisions on the trust-fund theory have been narrowed by the later refusal of the courts deciding them to deny liability to outsiders or even to employees. But a few recent cases have gone the length of holding that a charity owes no liability to outsiders. Bachman v. Y. W. C. A., *supra* note 4; Foley v. Wesson Memorial Hosp., 246 Mass. 363, 141 N. E. 113 (1923); (1924) 22 MICH. L. REV. 259; (1925) 34 YALE L. J. 319, n. 10.

Similarly, where the plaintiff is an employee of the institution,¹⁵ the weight of authority holds the charity liable, and where the plaintiff is an invitee¹⁶ coming for a business or social purpose, connected either with the charity itself or with an inmate, it is generally held that the institution is liable to him, quite on the same basis as if it were a private individual or corporation.

It is likewise held by the majority of jurisdictions that the exemption of charities from liability to beneficiaries applies only to those cases in which the charity (*viz.*, the managers or trustees) has used due care in the selection of the employees whose negligence later causes the injury complained of.¹⁷ However, Massachusetts, one of the jurisdictions most consistent in applying the trust-fund theory, has also declared in this class of cases that there is no distinction between the liability of a charity as an employer for the negligence of its servants in the course of their employment, and for its own negligence in selecting incompetent servants.¹⁸ That is, the charity is liable in Massachusetts in neither case. This extreme position, contrary to the weight

¹⁵ *Bruce v. Central M. E. Church*, 141 Mich. 230, 110 N. W. 951 (1907); *Hewitt v. Women's Hosp. Aid Ass'n*, 73 N. H. 556, 64 Atl. 190 (1906); see *Thomas v. German Benevolent Ass'n*, 168 Cal. 183, 141 Pac. 1186 (1914). *Contra*: *Farrigan v. Pevear*, 193 Mass. 147, 78 N. E. 855 (1906). In Massachusetts the strict application of the trust-fund theory exempts charities from the operation of the Workman's Compensation Act. *Zoulalian v. New England Sanatorium Ass'n*, 230 Mass. 102, 119 N. E. 686 (1918); *Whittaker v. St. Luke's Hosp.*, 137 Mo. App. 116, 117 S. W. 1189 (1909).

¹⁶ *Marble v. Nicholas Senn Hosp.*, 102 Neb. 343, 167 N. W. 208 (1918) (physician called in by hospital patient for specific services); *Hordern v. Salvation Army*, 199 N. Y. 233, 92 N. E. 626 (1910) (mechanic coming on the premises as invitee of the defendant institution to make repairs); *Hospital of St. Vincent v. Thompson*, 116 Va. 101, 81 S. E. 13 (1914) (friend who brought patient into the hospital held entitled to have the premises in a safe condition). *Contra*: *Loeffler v. Shepard & E. P. Hosp.*, 130 Md. 265, 100 Atl. 301 (1917); *Benton v. City Hosp.*, 140 Mass. 13, 1 N. E. 836 (1885) (where plaintiff came on implied invitation to remove patient ready for discharge).

¹⁷ *Zollman*, *supra* note 1, at 403, n. 63; Note (1921) 14 A. L. R. 573, 599; 11 C. J. 375, n. 97. There are a number of states in which are found decisions denying recovery ostensibly for the reason that due care was used in the selection of the servant whose negligence is the cause of the complaint, but which at the same time have cases asserting the theory of complete immunity.

¹⁸ In *Tribble v. Sisters of the Sacred Heart*, 137 Wash. 326, 242 Pac. 372 (1926), the plaintiff, while still under an anaesthetic, was burned by means of a hot-water bottle negligently left in the bed by a probationer, and it was left to the jury to determine whether the institution was guilty of negligence in the selection of the probationer. In a jurisdiction where liability turns upon this point, it would seem correct to treat it as a jury question.

of authority, was taken by the Massachusetts court when the precise question came before it in 1920,¹⁹ notwithstanding its earlier dictum in *McDonald v. Mass. General Hosp.*,²⁰ said to be the first American case involving the liability of charities for tort. The dictum was expressed as follows:

"The liability of the defendant corporation can extend no further than this; if there has been no neglect on the part of those who administer the trust and control its management, and if due care has been used by them in the selection of their inferior agents, even if injury has occurred by the negligence of such agents, it cannot be made responsible."

If the trust-fund theory is the proper explanation of this immunity of charities from tort liability, it should in all consistency result in their freedom from liability arising from any injuries in connection with the property in which the trust fund is invested, whether for the primary purpose of the charity, or merely for income. However, it is recognized, even in Massachusetts, that the defendant charity will be held liable²¹ in such cases.²²

¹⁹ *Roosen v. Peter Bent Brigham Hosp.*, 235 Mass. 66, 126 N. E. 392 (1920), 14 A. L. R. 563 (1921).

²⁰ 120 Mass. 432, 436 (1876).

²¹ *Holder v. Mass. Horticultural Soc.*, 211 Mass. 370, 97 N. E. 630 (1912). The plaintiff, an employee of the defendant, was injured by a defective elevator in a part of the building which was leased by the defendant to tenants, and not used for any purpose connected with the charity. It was held that the defendant was liable. The court said that the fact that the rent was applied to the general charitable purposes of the society was wholly immaterial. To the same effect see *Stewart v. Harvard College*, 12 Allen 58 (Mass. 1866). In *Winnemore v. Philadelphia*, 18 Pa. Super. 625 (1902), property had been left by Stephen Girard to be invested in a building, and the income was to be applied to Girard College. The plaintiff was an employee of a tenant in this building and was injured through the negligence of the elevator operator. The court held that the charitable trust was liable. And in *Gamble v. Vanderbilt Univ.*, 138 Tenn. 616, 200 S. W. 510 (1917), the plaintiff's intestate was a lawyer who was a tenant in a building owned by the defendant. He was killed by the fall of a defective elevator. The building housed the law school of the defendant, but was chiefly rented out for offices. It was held that the trust-fund doctrine, in which the court reaffirmed its faith, could not be extended to relieve the revenues from the invested funds from liability for negligence. The court did not have to decide whether the principal of trust funds could be employed to pay such a judgment, but intimated that it could not.

²² It should be noted that a charity, even though it be a governmental agency, is liable for nuisance. *City of Paducah v. Allen*, 111 Ky. 361, 63 S. W. 981 (1901); *Love v. Nashville Institute*, 146 Tenn. 550, 243 S. W. 304 (1921); *Zollman*, *supra* note 1, at 399. Also where a duty is cast directly upon the charity itself by statute, it is in some places held that the duty cannot be dele-

THE WAIVER THEORY

Another theory which has come to be the favorite one in what is probably the majority of the jurisdictions denying liability to beneficiaries, is usually referred to as the waiver theory. This theory became prominent in 1901²³ when a federal court, having occasion to examine the question, found the more general statements as to the impropriety of depleting trust funds, the inapplicability of *respondeat superior*, and "public policy," unsatisfactory to explain the cases and reconcile them as they then existed, and so it declared that persons seeking the services of a hospital agreed to waive any right to hold it liable for injuries. This theory in its turn has been criticized in a number of cases. The Tennessee court,²⁴ after indicating its disposition to adhere to the trust-fund theory, says:

"There are cases from time to time occurring, and not altogether infrequent, to which it is, as it seems to us, impossible to apply it—patients conveyed to hospitals in a demented condition, persons temporarily unconscious from injuries and who require immediate surgical and other attention, those who are so debilitated by diseases as to have no power of understanding the terms of a contract, children too young to understand the meaning of a contract, or to make or be bound by one in any form, or even to understand the nature of the work to be done for them. How can such persons be held to waive a right of action which the law gives to them? How can they be held to have agreed to an exemption? Manifestly the only sound theory is that of an exemption based on public policy."

In other words, it seems to be the conviction of this court that the beneficiary does not waive a right of action because, for reasons of public policy, he never had one.

gated, and hence liability will be imposed because it does not then depend upon the doctrine of *respondeat superior*. 11 C. J. 376. See *infra* note 43.

²³ *Powers v. Mass. Homeopathic Hosp.*, 109 Fed. 294 (C. C. A. 1st, 1901). There are cases based on this theory in a number of states. It formerly prevailed in New York but has apparently been abandoned there. See *infra* p. 204.

²⁴ *Gamble v. Vanderbilt Univ.*, *supra* note 21, at 629, 200 S. W. at 512. See also McCaskill, *Respondeat Superior as Applied in New York to Quasi-Public and Eleemosynary Corporations* (1920) 6 CORN. L. Q. 56, criticizing the waiver theory.

Mr. Zollman in his article²⁵ puts his criticism of this theory as follows:

"The objection to this theory is that it does violence to the facts, 'A patient entirely unskilled in legal principles, his body racked with pain, his mind distorted with fever, is held to know, by intuition, the principle of law that the courts after years of travail have at last produced.'"²⁶

It seems that another criticism of the waiver theory exists, in that many courts adopting it make no distinction between pay patients and free patients in the application of this line of reasoning. The pay patient has not received the consideration of free service to support such a waiver upon the theory of contract.²⁷

So it seems that whatever theory is adopted as a basis for exempting charities from tort liability, if the exemption be confined to beneficiaries, as in the general rule, it becomes necessary to define this term.²⁸ In the determination of this point the weakness of the waiver theory becomes especially apparent.

Running through the cases adopting one theory or another are various statements to the effect that *respondeat superior* does not apply as against a charity, because that theory is intended only to support recovery of damages against a defendant who will receive, or who at least expects to receive, financial benefit from the transaction in which the delinquent agent is engaged when the event occurs which is the basis of the action.²⁹

²⁵ *Supra* note 1, at 339.

²⁶ This is quoted by Mr. Zollman from the dissenting opinion in *Lindler v. Columbia Hosp.*, *infra* note 32.

²⁷ *Cf.* *Morton v. Savannah Hosp.*, 148 Ga. 438, 96 S. E. 887 (1918). For the citation of other cases which deal with the question whether the injury may be regarded as arising from the breach of a contractual duty rather than from tort, see Note (1925) 34 YALE L. J. 321, n. 21; also case note to the Minnesota case imposing liability, *supra* note 4, in (1920) 18 MICH. L. REV. 539.

²⁸ As to who is a beneficiary see an excellent note in (1923) 8 CORN. L. Q. 146, 148, in which, after reviewing a number of cases, it is stated: "Thus it is seen that it is not because of a well established meaning of the word 'beneficiary,' that liability or nonliability of a charitable institution is determined as a legal conclusion, but, on the other hand, it is apparent that the significance of the word is the offspring of the policy adopted, and that its meaning is determined by the extent to which the doctrine of exempting charitable institutions from liability is adopted."

²⁹ Note (1910) 58 U. OF PA. L. REV. 426 (this point is amplified).

THE NEW YORK THEORY

The most recently devised theory for the explanation of this immunity from tort liability comes from New York, and is in a sense a special application of the general principle of *respondeat superior*. It is as a proponent of this theory that Mr. Zollman writes the article already referred to in the Michigan Law Review. He states it as follows:

"The doctrine of qualified immunity where no negligence appears in the selection or retention of agents or servants can properly and logically be rested in most cases upon the theory that the physicians and surgeons in attendance upon patients in hospitals or the nurses who are under their direction are not the servants of the hospital in the true sense because as to the nature and manner of their service they are not under the direction of the defendant, but that they become and remain the servants of the patient as long as they are in attendance upon him and that hence the charity has performed its full duty when it has exercised due care in the selection of competent persons for such service." ³⁰

The following statement from the opinion in the New York case which is a leading exponent of this theory presents it as follows: ³¹

"A hospital opens its doors without discrimination to all who seek its aid. It gathers in its wards a company of skilled physicians and trained nurses, and places their services at the call of the afflicted, without scrutiny of the character or the worth of those who appeal to it, looking at nothing and caring for nothing beyond the fact of their affliction. In this beneficent work, it does not subject itself to liability for damages though the ministers of healing whom it has selected have proved unfaithful to their trust."

³⁰ *Supra* note 1, at 407.

³¹ *Schloendorff v. New York Hosp. Soc.*, 211 N. Y. 125, 135, 108 N. E. 92, 95, 52 L. R. A. (N. S.) 505 (1914), 37 Ann. Cas. 581 (1915). This doctrine was reaffirmed by the New York Court of Appeals in *Phillips v. Buffalo General Hosp.*, 239 N. Y. 188, 146 N. E. 199 (1924); a case where the plaintiff was a paying patient and where the negligent servant was an orderly employed by the hospital. The effect of such a case seems to indicate that the result is reached simply because it is against the policy of the State of New York to allow recovery by beneficiaries, and yet the court finds difficulties in the way of a general application of the trust-fund theory.

Do not the criticisms of the waiver theory apply similarly to this New York theory, at least where it is applied as a general explanation of non-liability to all beneficiaries? The logic of this theory is reasonable enough as applied to a pay patient in a hospital who is permitted to summon his own physician to attend him, and who pays the physician directly for his services. He cannot expect to hold the institution liable for the negligence of a physician who stands in such relation to him. The same applies to the patient who is injured by the negligence of a special nurse devoting her time solely to his care. However, as Mr. Zollman says of the waiver theory, "It does violence to the facts" to say that a patient who is attended by those physicians or nurses who may be sent to do so by the institution in accordance with its own rules, and who has no financial relation with these members of the staff, has impliedly selected them as his own.

The statements from *Lindler v. Columbia Hosp.*³² and from *Gamble v. Vanderbilt Univ.*,³³ with reference to the waiver theory, may likewise be made of the argument that the inmate impliedly designates the institution's staff as his own agents, and must look solely and directly to them in case of injury through their negligence. The beneficiary is the *raison d'être* of the charity, but he may become the victim of the system and of its rules. He has no voice, directly or indirectly, in the selection of any of the persons who serve him, except in the case of a pay patient in a private hospital who selects and pays his own physician and special nurse. Suppose the beneficiary is injured by unwholesome food prepared in the general kitchens, whether served by staff nurses or by his own special nurse. Or suppose the elevator drops, either because of a defective mechanism which the hospital carelessly omitted to repair after learning of the danger, or because of reckless operation by the employee of the institution. Has the beneficiary designated the culpable employees as his own, whether he be paying for his accommodations or not? The above suggestions are perhaps couched in terms too limited, in that they seem to contemplate a hospital patient as the in-

³² 68 S. C. 25, 81 S. E. 512 (1914). The dissenting opinion is quoted by Zollman, *supra* note 1, at 399.

³³ *Supra* note 21.

jured person. May we extend this New York theory to the babies in a home for foundlings?

Another important point in connection with this theory is the proposition that the states adopting it do recognize liability for failure to use due care in selecting competent employees, thus conceding, unconsciously perhaps, that the persons employed on the staff of the institution are after all its employees rather than those of the beneficiaries.³⁴

THE PUBLIC-POLICY THEORY

Hence, it is submitted that, after all, the only theory which can consistently be employed to support the principle of exemption from liability is that of public policy, and, that, in the last analysis, public policy is the real reason why this exemption from tort liability has been extended to charities in much the same fashion that it pertains to municipal corporations.³⁵ In fact some cases have said that the exemption of the charity from liability should exist because it does a quasi-governmental work by performing a function which the government must otherwise undertake. The public-policy theory will explain both those cases which deny all liability and those which deny liability only to beneficiaries. It is then finally for the courts to interpret the public policy of their own several jurisdictions in this regard.

THE POLICY FAVORING LIABILITY

It is again submitted that it is against the spirit of modern social thought and practice to hold that a charitable institution should not pay damages under the same circumstances as any

³⁴ See *Barr v. Children's Aid*, 190 N. Y. Supp. 296 (1921).

³⁵ Professor Borchard in his article, *supra* note 10, at 249, says: "But whatever justification the doctrine of immunity may have in respect to ordinary charitable trusts—and it is submitted it has very little—none of the reasons prevail when the institution is owned or operated by the city, which has the taxing power to secure funds for the vindication of its responsibility for negligence and therefore is in no danger of having its existence suddenly terminated." See Note (1918) 31 HARV. L. REV. 479. The self-styled "thesis" with which Professor Borchard's article is concluded, (1924) 34 YALE L. J. 1, 129, 229, 258, serves, almost without alteration, to express what this article is intended to bring out with reference to charities. Professor Borchard is of course dealing with municipal corporations and their similar immunity. Particularly apt is his characterization of this immunity as "bad social engineering."

other employer whose servant by his negligence has injured a third party, even though such injured person be a beneficiary of the charity. Professor Lyman P. Wilson, of Cornell University, in the introductory notes in his new *Casebook on Torts*, makes a statement which applies peculiarly to just the type of problem which is the topic of the present discussion.

"The field of torts, then, includes those socially imposed (as distinguished from individually assumed) private duties, which, in the light of changing experience, it seems necessary to assert in promoting the common welfare of society. The problem of recognition and enforcement of these duties has more and more come to be recognized as a problem of social desirability and less and less a mere matter of arranging fixed rules into a definitely logical system. In any study of torts the emphasis must now be placed upon the effort to determine which claims in society are, in the light of growing experience and changing conditions, entitled to gain or keep recognition. No rule or principle is too venerable to be criticised; each must be measured by the social values which it offers."³⁶

By way of conclusion attention is called to the meager authority in favor of holding charities liable, even to beneficiaries, for the torts of their carefully selected employees.

In *Glavin v. Rhode Island Hosp.*,³⁷ the plaintiff lost his arm through the alleged negligence of the hospital interne in the manner of treatment and in the failure to send for one of the surgeons who was attached to the staff and who was available upon call for the purpose of attending to cases for which he might be needed. The plaintiff paid a small sum for board and hospital attendance. It was held to be error to direct a verdict for the defendant upon the ground that the defendant was a public charity. It may fairly be said that in this case the court repudiates the doctrine that charities are not liable to beneficiaries for torts committed by their employees. While of course not deciding that question, the court distinguishes the situation where the injury complained of is due to the negligence of a physician

³⁶ WILSON, CASES ON THE LAW OF TORTS (1928).

³⁷ 12 R. I. 411 (1880).

not actually employed by the charity, but simply serving upon its staff without compensation as a volunteer for the purpose of giving treatment to patients in the hospital, and compares this situation to that of the individual who employs a physician to attend a sick friend unable to afford the service himself. The court also discusses the manner of paying such judgment as might be rendered in a case like this, and, while indicating that some of the property of the charity might not be subject to execution, says:³⁸ "We also understand that the doctrine is that the corporate funds can be applied, notwithstanding the trust for which they are held, because the liability is incurred in carrying out the trusts and is incident to them." The suggestion in the opinion, that if charities were to be immune from liability in such cases, the immunity must be conferred by the legislature, was seized upon at the very next session of the Rhode Island Legislature,³⁹ and the case is hence no longer law in that state.

The next American case to hold a charity liable to a beneficiary was *Tucker v. Mobile Infirmary Ass'n*,⁴⁰ decided in Alabama in 1915, by which time a large body of contrary authority had been established, whereas there were but a few cases on this point when the Rhode Island case was decided. In the *Tucker* case the plaintiff alleged that she was scalded by boiling water through the negligence of a nurse employed by the defendant. The plaintiff was a paying patient. The defendant had judgment on the pleadings and upon appeal by the plaintiff from a nonsuit the judgment was reversed. In this case the court first of all decided that it was immaterial whether the case be regarded as one of tort or of contract. It conceded that the weight of authority would exempt the defendant from liability upon the facts and said:⁴¹ "But it sometimes happens that in order to reach a safe harbor one must row against the current." The court concluded that, as to a paying patient at least, a hospital should not be exempt from liability for the torts of its servants, merely because it derives no profit from its operations. The

³⁸ *Ibid.* 428.

³⁹ *Supra* note 12.

⁴⁰ 191 Ala. 572, 68 So. 4 (1915).

⁴¹ *Ibid.* 601, 68 So. at 12.

court expressly states that it is not to be understood as deciding the case of a totally free patient whose situation was otherwise the same. One member of the Alabama court dissented in this case, basing his opinion upon the trust-fund theory.

In the case of *Mulliner v. Evangelischer Diakonniessenverein*,⁴² decided in Minnesota in 1920, we again find a court denying the charity its traditional exemption from liability. In this case a paying patient in the delirium of fever jumped from a second-story window and was killed by the fall. Leaving him unattended after his previous behavior in the same delirium was considered sufficient evidence of negligence, and the issue was whether the charity should be exempt from liability. Judgment for the plaintiff was affirmed.

Minnesota already had a decision⁴³ to the effect that an employee could recover against a charity for injury to him, caused by contact with machinery not guarded as required by statute. The court in the *Mulliner* case said:⁴⁴ "We do not find any satisfactory ground for distinction between liability for an act or omission which disobeys a statute and one which disobeys a rule of the common law, and it is difficult for us to find any just reason for distinction between liability to any employee and liability to a patient." The court criticizes the trust-fund theory as well as the argument that it is contrary to public policy to apply the principle of *respondeat superior* to a charity.

While the plaintiff's decedent in this case was in fact a paying patient, the court nevertheless says:⁴⁵

" . . . but this may not be a controlling fact. We do not believe that a policy of irresponsibility best subserves the beneficent purposes for which the hospital is maintained. We do not approve the public policy which would require the widow and children of deceased, rather than the corporation to suffer the loss incurred through the fault of the corporation's employees, or, in other words, which would compel the persons damaged to contribute the amount of their loss

⁴² *Supra* note 4.

⁴³ *McInery v. St. Luke's Hosp.*, 122 Minn. 10, 141 N. W. 837 (1913); see *Maki v. St. Luke's Hosp.*, 122 Minn. 444, 142 N. W. 705 (1913).

⁴⁴ *Supra* note 4, at 396, 175 N. W. at 700.

⁴⁵ *Supra* note 4, at 397, 175 N. W. at 701.

to the purpose of even the most worthy corporation. We are of the opinion that public policy does not favor exemption from liability."

The Minnesota Supreme Court has very recently produced another decision⁴⁶ in which a church is held liable to a member who was injured by the falling of a defective piano, while he was trying to move it in order to facilitate its use in connection with a social function at the church. The court considered the church society a charitable institution, and, after reviewing the authorities, elected to reaffirm the stand it had taken in the *Mulliner* case.

It was pointed out in the Michigan Law Review, relative to the *Mulliner* case,⁴⁷ that "the court used language broad enough to include charity patients, but as that question was not before the court, its remarks in this regard are simply dictum." The above mentioned case note concludes: "Modern tendency seems to lean toward basing the exemption upon the contractual relation which arises by reason of the giving and receiving of charity, and this, it is submitted, represents the correct logical basis for the decisions."

Obviously this newest Minnesota case does not depend upon the contractual relation above suggested. The plaintiff as a member of the church was undoubtedly contributing something to its financial resources in return for which he was doubtless receiving the spiritual enrichment which he sought. But neither party had necessarily any contractual relation to the other, and indeed the court did not consider or refer to any such factor in the situation.

There are two fairly recent dissenting opinions which may be mentioned as indicating a feeling on the part of some members of the judiciary that, as the Minnesota court says, "Public policy does not favor exemption from liability." In *Bachman v. Y. W. C. A.*,⁴⁸ the dissenting judge does not even agree with

⁴⁶ *Geiger v. Simpson M. E. Church*, 219 N. W. 463 (Minn. 1928).

⁴⁷ (1920) 18 MICH. L. REV. 539, 541.

⁴⁸ *Supra* note 4; (1923) 21 MICH. L. REV. 698; (1923) 2 WIS. L. REV. 246.

the doctrine of immunity as against beneficiaries, although in the particular case he was arguing against its extension by the Wisconsin court to strangers to the charity. Judge Doerffler says: ⁴⁹ "Exemption from liability for negligence in cases of private institutions should be founded solely upon acts of the Legislature, and such exemption is particularly a province of the Legislature." He also points out that the legislature has exempted certain charities from taxation and "surely such exemptions would not have been within the proper field of determination for the courts." ⁵⁰

Similar thoughts about the social value of this immunity policy were doubtless in the mind of the dissenting Judge Frazer in the South Carolina court ⁵¹ when he wrote:

"We do not think it wise or safe to allow an institution to exist with unlimited power to do evil and make that institution powerless to repair the evil because some good man or woman has contributed a fund and intended thereby to do good. . . . We think the courts ought to hold the fund, first to repair the evil done by itself, because the purpose of the trust is to do good, and not evil. We know a trust fund cannot be diverted to a different purpose from that for which it was created. That is established law and we want to further the purpose of the trust. The purpose of the trust is to relieve suffering, and to increase it, when, in the administration of the trust, suffering is increased, the purpose fails. The courts that declare immunity are destroying and not maintaining the trust."

Along the same line of thought is another comment from the dissent in the *Bachman* case ⁵² mentioned above, which, it would seem, cannot be denied if the law is really the social science we are coming to consider it. "The protection of life and limb by organized society is of greater importance to mankind

⁴⁹ *Supra* note 4, at 185, 191 N. W. at 754.

⁵⁰ At a later point in this opinion, *supra* note 4, at 187, 191 N. W. at 755, it is said: "Charity, from the modern viewpoint, is an attribute of justice, and springs from the Christian doctrine of service to mankind, and is not only a privilege, but a duty, at least in the moral sense."

⁵¹ *Lindler v. Columbia Hosp.*, *supra* note 32, at 39, 81 S. E. at 517.

⁵² *Supra* note 4, at 187, 191 N. W. at 755.

than any species of charity, and it is superior to the rights of property."

It has not been the purpose of this article to go into the authorities bearing upon this topic of the tort liabilities of charities in those jurisdictions outside of the United States. The situation apparently is that charities are held liable in tort on the same basis as other corporations in at least England and Canada. Cases are collected in the various annotations and in a number of the law review notes already mentioned herein.⁵³

⁵³ See the recent Canadian case of *Eek v. High River Municipal Hosp.*, [1926] 1 D. L. R. 91 (Ont.).