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## Tort Immunity of Charities in Ohio

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# WESTERN RESERVE LAW REVIEW

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## NOTES

### *Tort Immunity of Charities in Ohio*

WHETHER, OR TO what extent, private charitable institutions shall be immune from liability for damages arising from the commission of torts by their employees, solely because such institutions are organized for charitable purposes, is a problem which has been the subject of considerable litigation in the United States in the past fifty years.<sup>1</sup> The problem has not yet been fully resolved, despite the unanimity of the text writers on the subject.<sup>2</sup>

To attempt to reconcile the decisions in the United States would be futile; the courts in the various jurisdictions have reached diametrically opposite conclusions upon similar facts. Justice Rutledge, after analyzing the cases involving the immunity of charitable institutions, said:

The cases are almost riotous with dissent. Reasons are even more varied than results. They indicate something wrong at the beginning or

<sup>1</sup> Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951); Perry v. House of Refuge, 63 Md. 20 (1885); McDonald v. Massachusetts General Hospital, 120 Mass. 432 (1876); Sheehan v. North Country Community Hospital, 273 N.Y. 163, 7 N.E.2d 28 (1937); Rudy v. Lakeside Hospital, 115 Ohio St. 539, 155 N.E. 126 (1926); Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087 (1910). See also cases collected in Note, 25 A.L.R.2d 29 (1952).

<sup>2</sup> The text writers have demonstrated the logical bareness of refusing to apply the same rules of tort liability to both charitable and non-charitable institutions. The logical basis of the doctrine will, therefore, not be labored here. See 2A BOGERT, TRUSTS AND TRUSTEES § 401 (1953); PROSSER, TORTS 1079 *et. seq.* (1949); 3 SCOTT, TRUSTS § 402 (1939); Comment, 14 U. OF DETROIT L.J. 74 (1951); 49 MICH. L. REV. 148 (1950); 13 OHIO ST. L.J. 291 (1952).

that something has become wrong since then. They also show that correction, though in process, is incomplete. . . .<sup>3</sup>

It is the purpose of the writer to analyze the present Ohio position regarding the vicarious liability of private charitable institutions in the light of modern tendencies in other jurisdictions to abandon the rule granting full immunity to charitable organizations and to predict, in some small measure, the effect of the trend in other states upon future decisions in Ohio.

In view of the fact that the American judicial system is the only one which recognizes the "immunity" rule,<sup>4</sup> and that all other systems of jurisprudence have either never distinguished between charities and non-charities with regard to tort liability, or have expressly repudiated such distinctions,<sup>5</sup> it is not surprising to note that the immunity rule—a historical curiosity—arose as a result of a judicial accident.

The immunity rule originated in England in 1846 by way of a dictum in *Heriot's Hospital v. Ross*,<sup>6</sup> a case involving a wrongful exclusion of the plaintiff from the benefits of the defendant, a charitable institution. Lord Cottenham, in dismissing the action, said:

To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose. . . .<sup>7</sup>

This dictum was repudiated in England shortly thereafter.<sup>8</sup>

The first case in the United States which considered the problem adopted the dictum in the *Heriot's Hospital* case and formulated it into a rule declaring charities to be immune from vicarious tort liability. In *McDonald v. Massachusetts General Hospital*,<sup>9</sup> the court held that a charity patient's

<sup>3</sup> *Georgetown College v. Hughes*, 130 F.2d 810, 812 (D.C. Cir. 1942).

<sup>4</sup> It should be noted that the word "immunity" as used here and by the courts means exemption from the application of general rules of tort, which, but for the charitable nature of the defendant organization, would apply. It does not mean an immunity arising from the application of general tort rules. Thus, it would be quite consistent for a court which had abandoned the immunity rule to direct a verdict for the defendant institution on the basis of general tort rules applicable to both charities and non-charities, e.g., that the tortfeasor was acting outside the scope of his employment.

<sup>5</sup> *Mersey Docks v. Gibbs*, 11 H.L. Cas. 686, 11 Eng. Rep. 1500 (1866); *Foreman v. Mayor of Canterbury*, L.R. 6 Q.B. 214 (1871); see *Georgetown College v. Hughes*, 130 F.2d 810, 813 (D.C. Cir. 1942); *Bond v. Pittsburgh*, 368 Pa. 404, 411, 84 A.2d 328, 332 (1951) (dissenting opinion); see Note, 25 A.L.R.2d 29, 43 (1952).

<sup>6</sup> 12 Clark & F. 507, 8 Eng. Rep. 1508 (1846).

<sup>7</sup> 12 Clark & F. 507, 513, 8 Eng. Rep. 1508, 1511 (1846).

<sup>8</sup> *Mersey Docks v. Gibbs*, 11 H.L. Cas. 686, 11 Eng. Rep. 1500 (1866); *Foreman v. Mayor of Canterbury*, L.R. 6 Q.B. 214 (1871).

<sup>9</sup> 120 Mass. 432 (1876).

claim for damages could not be satisfied against the funds of a private charitable hospital.<sup>10</sup>

Shortly thereafter, other states adopted the immunity rule as laid down in the *McDonald* case, but the reasons for so doing were many and varied. Some courts have adopted the immunity rule on the basis of what is known as the "trust fund" theory—that the funds of a charity cannot be diverted for the payment of tort claims because such funds are held in trust for the accomplishment of a particular charitable purpose.<sup>11</sup> Some of the decisions upholding the immunity of charitable institutions have been premised on the theory that the doctrine of respondeat superior is not applicable to charitable enterprises because the charity does not realize a profit from the services of its employees.<sup>12</sup> Still other cases have adopted the immunity rule on the basis of an "implied waiver" theory—that a beneficiary of a charitable institution waives any tort claims he may have against it by his acceptance of the benefits or services of the institution.<sup>13</sup> A fourth group

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<sup>10</sup> The court relied upon the early English cases of *Heriot's Hospital v. Ross*, 12 Clark & F. 507, 8 Eng. Rep. 1508 (1846) and *Holliday v. St. Leonard*, 11 C.B.N.S. 192, 142 Eng. Rep. 769 (1861), both of which had been expressly overruled in England prior to this decision. It should further be pointed out that, had these decisions not been overruled in England, they would not have been good precedent for use in the *McDonald* case in any event, since the *Ross* case dealt with a breach of trust, and did not consider tort liability of charities at all, and the *Holliday* case dealt only with the liability of a government-operated charitable institution.

<sup>11</sup> *Ettlinger v. Randolph-Macon College*, 31 F.2d 869 (4th Cir. 1929); *Union Pacific Ry. v. Artist*, 60 Fed. 365 (8th Cir. 1894); *Arkansas Valley Co-op. Rural Electric Co. v. Elkins*, 200 Ark. 883, 141 S.W.2d 538 (1940); *Emery v. Jewish Hospital Ass'n*, 193 Ky. 400, 236 S.W. 577 (1921); *Downes v. Harper Hospital*, 101 Mich. 555, 60 N.W. 42 (1894); *Jones v. St. Mary's Roman Catholic Church*, 7 N.J. 533, 82 A.2d 187 (1951). The trust fund theory of immunity has been rejected in some jurisdictions on the basis that the quasi-trust which arises as to funds of charitable institutions does not differ materially from the obligation imposed upon any non-charitable business enterprise to apply its property only to the purposes for which it was organized. *Cohen v. General Hospital Soc'y*, 113 Conn. 188, 154 Atl. 435 (1931); *Durney v. St. Francis Hospital*, 83 A.2d 753 (Del. Super. 1951).

<sup>12</sup> *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595 (1895); *Taylor, Adm'r v. Protestant Hospital Ass'n*, 85 Ohio St. 90, 96 N.E. 1089 (1911); *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 15 Atl. 553 (1888); *Schau v. Morgan*, 241 Wis. 334, 6 N.W.2d 212 (1942). This legal theory has been attacked as invalid since the concept of respondeat superior is predicated upon the authority and control which the master exercises over his servants, not upon whether the master realizes a profit therefrom. *Nicholson v. Good Samaritan Hospital*, 145 Fla. 360, 199 So. 344 (1940); *Gable v. Salvation Army*, 186 Okla. 687, 100 P.2d 244 (1940); see *Bachman v. Y.W.C.A.*, 179 Wis. 178, 183, 191 N.W. 751, 755 (1922) (dissenting opinion).

<sup>13</sup> *Powers v. Massachusetts Homeopathic Hospital*, 109 Fed. 294 (1st Cir. 1901); *Murtha v. New York Homeopathic Medical College*, 228 N.Y. 183, 126 N.E. 722 (1920); *Sisters of Charity v. Duvelius*, 123 Ohio St. 52, 173 N.E. 737 (1930); *Weston's Adm'x v. Hospital of St. Vincent*, 131 Va. 587, 107 S.E. 785 (1921). The implied waiver theory has been criticized as being an illusion in fact and a fic-

of cases has recognized the immunity rule on the ground of public policy.<sup>14</sup>

It has been suggested that each of these theories upholding the immunity rule rests fundamentally upon public policy, and that the various theories are distinct and separate only insofar as the courts have worked out separate legal fictions by which to reach a desired result.<sup>15</sup> If this is true, it is difficult to understand why the public policy of Kansas<sup>16</sup> should demand complete immunity for its charitable institutions, while the public policy of Minnesota<sup>17</sup> insists that charitable institutions be held accountable for the torts of their employees in the same manner as are non-charitable enterprises.

The various jurisdictions in the United States are not cleanly split between full liability and complete immunity. Many of them have adopted the general immunity rule with diverse and inconsistent modifications.<sup>18</sup> A study of the cases in Ohio which have considered the immunity problem will be helpful, not only to those who are interested in the Ohio law alone, but also as an example of case law in a state which stands somewhere between the extremes of complete immunity and full liability.

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tion in law, since there is no actual or intentional assumption of the risk of negligence by the beneficiary of the charity in the typical situation. *Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942); *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P.2d 220 (1951).

<sup>14</sup> *Currier v. Dartmouth College*, 117 Fed. 44 (1st Cir. 1902); *Hinman v. Berkman*, 85 F. Supp. 2 (D. Mo. 1949); *Taylor, Adm'r v. Protestant Hospital Ass'n*, 85 Ohio St. 90, 96 N.E. 1089 (1911); *Bond v. Pittsburgh*, 368 Pa. 404, 84 A.2d 328 (1951); *Wilson v. Evangelical Lutheran Church*, 202 Wis. 111, 230 N.W. 708 (1930). The public policy theory of sustaining the immunity rule has been rejected by some courts on the basis that modern public policy differs substantially from that which existed at the origin of the immunity rule, and that the need for protecting charities from being submerged by tort claims has long since passed. *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P.2d 220 (1951); *Haynes v. Presbyterian Hospital Ass'n*, 241 Iowa 1269, 45 N.W.2d 151 (1950); *Mississippi Baptist Hospital v. Holmes*, 55 So.2d 142 (Miss. 1951), *aff'd*, 56 So.2d 769 (Miss. 1952).

<sup>15</sup> *Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942); *Andrews v. Y.M.C.A.*, 226 Iowa 374, 284 N.W. 186 (1939).

<sup>16</sup> *Leeper v. Salvation Army*, 158 Kan. 396, 147 P.2d 702 (1944).

<sup>17</sup> *St. Paul-Mercury Indem. Co. v. St. Joseph's Hospital*, 212 Minn. 558, 4 N.W.2d 637 (1942).

<sup>18</sup> *O'Connor v. Boulder Colorado Sanitarium Ass'n*, 105 Colo. 259, 96 P.2d 835 (1939) (recovery allowed against charity which had insurance for such purpose); *Cohen v. General Hospital Soc'y*, 113 Conn. 88, 154 Atl. 435 (1931) (recovery allowed by stranger, but not by a beneficiary of charity); *Medical College v. Rushing*, 1 Ga. App. 468, 57 S.E. 1083 (1907) (paying beneficiary can recover, whereas a charity patient cannot); *Moore v. Moyle*, 405 Ill. 555, 92 N.E.2d 81 (1950) (only non-trust assets can be levied upon to satisfy judgment in tort); *Old Folks' & Orphan Children's Home v. Roberts*, 91 Ind. App. 533, 171 N.E. 10 (1930) (recovery allowed where charity was negligent in selection or retention of employee who caused the injury); *Cowans v. North Carolina Baptist Hospitals*, 197 N.C. 41, 147 S.E. 672 (1929) (recovery allowed by employee of charity).

Although there had been two prior lower court decisions,<sup>19</sup> the first Ohio Supreme Court statement on the question appeared in 1911 in *Taylor v. Protestant Hospital Association*,<sup>20</sup> in which the court held that hospitals, as charitable corporations, are immune from liability imposed by the doctrine of respondeat superior on the basis of public policy, a rule which was subsequently applied to charitable institutions other than hospitals.<sup>21</sup> It is clear that in Ohio the legal theory upon which the immunity rule rests is public policy<sup>22</sup> although trust fund theory language has been used in at least one case.<sup>23</sup>

Several exceptions to the doctrine of immunity have been recognized by Ohio courts.

It is clear that where the directors or trustees of the charitable institution have been negligent in the selection or retention of the employee who was responsible for the claimed injury the immunity rule does not apply.<sup>24</sup> The burden of showing a lack of due care in the selection or retention of such employees is upon the plaintiff, however, and must be pleaded as an element of his cause of action in order to make out a prima facie case.<sup>25</sup>

It is also well-settled in Ohio that where the plaintiff is a stranger, or non-beneficiary of the defendant-charitable institution, the immunity rule does not apply.<sup>26</sup> The problem of when an individual is classed as a beneficiary of a charity, however, is not clear;<sup>27</sup> but although the plaintiff is a

<sup>19</sup> *Johnson v. Lawrence Hospital for Women*, 12 Ohio Dec. 802 (Franklin Com. Pl. 1902); *Conner v. Sisters of the Poor*, 7 Ohio N.P. 514 (Cincinnati Super. Ct. 1900).

<sup>20</sup> 85 Ohio St. 90, 96 N.E. 1089 (1911).

<sup>21</sup> *Waddell v. Y.W.C.A.*, 133 Ohio St. 601, 15 N.E.2d 140 (1938).

<sup>22</sup> *Newman v. Cleveland Museum of Natural History*, 143 Ohio St. 369, 55 N.E.2d 575 (1944); *Cullen v. Schmit*, 139 Ohio St. 194, 39 N.E.2d 146 (1942); *Waddell v. Y.W.C.A.*, 133 Ohio St. 601, 15 N.E.2d 140 (1938); *Sisters of Charity v. Duvelius*, 123 Ohio St. 52, 173 N.E. 737 (1930); *Rudy v. Lakeside Hospital*, 115 Ohio St. 539, 155 N.E. 126 (1926); *Taylor v. Flower Deaconess Home*, 104 Ohio St. 61, 135 N.E. 287 (1922); *Taylor, Adm'r v. Protestant Hospital Ass'n*, 85 Ohio St. 90, 96 N.E. 1089 (1911).

<sup>23</sup> *Lakeside Hospital v. Kovar, Adm'r* 131 Ohio St. 333, 2 N.E.2d 857 (1936).

<sup>24</sup> *Newman v. Cleveland Museum of Natural History*, 143 Ohio St. 369, 55 N.E.2d 575 (1944); *Waddell v. Y.W.C.A.*, 133 Ohio St. 601, 15 N.E.2d 140 (1938); *Lakeside Hospital v. Kovar, Adm'r* 131 Ohio St. 333, 2 N.E.2d 857 (1936); *Taylor v. Flower Deaconess Home*, 104 Ohio St. 61, 135 N.E. 287 (1922); *see Cullen v. Schmit*, 139 Ohio St. 194, 196, 39 N.E.2d 146, 147 (1942).

<sup>25</sup> *Waddell v. Y.W.C.A.*, 133 Ohio St. 601, 15 N.E.2d 140 (1938); *Lakeside Hospital v. Kovar, Adm'r* 131 Ohio St. 333, 2 N.E.2d 857 (1936).

<sup>26</sup> *Cullen v. Schmit*, 139 Ohio St. 194, 39 N.E.2d 146 (1942); *Sisters of Charity v. Duvelius*, 123 Ohio St. 52, 173 N.E. 737 (1930); *Lovich v. Salvation Army, Inc.*, 81 Ohio App. 317, 75 N.E.2d 459 (1947); *Esposito v. Stambaugh Auditorium Ass'n*, 49 Ohio L. Abs. 507, 77 N.E.2d 111 (1946); *Pflugfelder v. Convent of the Good Shepherd*, 55 Ohio App. 158, 9 N.E.2d 4 (1936).

<sup>27</sup> *E.g.*, *Esposito v. Stambaugh Auditorium Ass'n, Inc.*, 49 Ohio L. Abs. 507, 77

paying recipient of the charity, he comes within the rule that beneficiaries of a charity cannot maintain an action in tort against the charitable institution.<sup>28</sup>

The question of whether a breach of a statutory duty as distinguished from a common law duty, by a charitable institution imposes liability upon it, notwithstanding its characteristic immunity, has been raised but not completely settled in Ohio. The supreme court has not yet decided the question, and two court of appeals cases have reached opposing results.<sup>29</sup>

Other attacks upon the doctrine have met with little success<sup>30</sup> in Ohio. The fact that the action is brought on a theory of implied contract or warranty does not of itself render the immunity rule inapplicable, if the action basically sounds in tort.<sup>30</sup> Whether the charitable institution is incorporated or not apparently makes no difference.<sup>31</sup> The rule applies whether the action is predicated upon negligence or nuisance,<sup>32</sup> and whether the claim is for personal injuries or property damage.<sup>33</sup>

The fact that the charitable institution carries liability insurance does not affect its liability,<sup>34</sup> but at least one case has stated by way of dictum that where a charitable institution contributes to the Ohio Workmen's Compensation Fund, an employee, although a beneficiary, may maintain an action against the Industrial Commission.<sup>35</sup>

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N.E.2d 111 (1946), (patron of an independent lessee of premises owned by charitable institution is a beneficiary of the charity); *Sisters of Charity v. Duvelius*, 123 Ohio St. 52, 173 N.E. 737 (1930) (special nurse employed by private patient and allowed access to defendant hospital is not a beneficiary of the charity); *Newman v. Cleveland Museum of Natural History*, 143 Ohio St. 369, 55 N.E.2d 575 (1944) (purchaser of ride on elephant at zoo operated by charitable institution is a beneficiary of the charity); *Burgie v. Muench*, 65 Ohio App. 176, 29 N.E.2d 439 (1940) (one who participates in an organization affiliated with a church, although not a church member, is a beneficiary of its charity); *City Hospital of Akron v. Lewis*, 47 Ohio App. 465, 192 N.E. 140 (1934) (hospital patient is a beneficiary).

<sup>28</sup> *Taylor v. Flower Deaconess Home*, 104 Ohio St. 61, 135 N.E. 287 (1922).

<sup>29</sup> *Lovich v. Salvation Army, Inc.*, 81 Ohio App. 317, 75 N.E.2d 459 (1947) (immunity rule applies to breach of pure food laws by charitable institution); *Howard, Adm'r v. Children's Hospital*, 37 Ohio App. 144, 174 N.E. 166 (1930) (immunity rule does not apply to breach of a statute imposing absolute liability upon one who takes unlawful possession of the body of deceased person).

<sup>30</sup> *Rudy v. Lakeside Hospital*, 115 Ohio St. 539, 155 N.E. 126 (1926) (implied contract); *Lovich v. Salvation Army, Inc.*, 81 Ohio App. 317, 75 N.E.2d 459 (1947) (breach of warranty).

<sup>31</sup> *Winton Place Methodist Episcopal Church v. Splain*, 16 Ohio App. 331 (1922).

<sup>32</sup> *Ibid.*

<sup>33</sup> *Rudy v. Lakeside Hospital*, 115 Ohio St. 539, 155 N.E. 126 (1926).

<sup>34</sup> *Emrick v. Pennsylvania R.R. Y.M.C.A.*, 69 Ohio App. 353, 43 N.E.2d 733 (1942).

<sup>35</sup> *Myers v. Elyria Memorial Hospital Co.*, 30 Ohio L. Abs. 674 (Ohio App. 1938).

Most of the Ohio cases have not attempted to distinguish between torts committed in the course of charitable and non-charitable activities,<sup>36</sup> with the possible exception of *Pearlstein v. A. M. McGregor Home*,<sup>37</sup> a recent court of appeals decision which indicated by way of dictum that a tort committed by a charitable institution in the course of a non-charitable activity may be actionable.

It is, therefore, proper to classify Ohio as a state which recognizes qualified immunity of charitable institutions. Whether the qualifications which have been adopted in Ohio are logically consistent is doubtful.<sup>38</sup> That the cases seem to have been decided more on the basis of precedent than reason seems evident from some of the language used by the supreme court:

While [charitable] institutions should be encouraged . . . this encouragement must not be carried to the point where injustice will be done to others. . . . It is believed that the duty to exercise care to prevent injury to strangers will result in the exercise of greater care to patients. . . .<sup>39</sup>

The court has remained silent, however, on the issue of whether a duty to exercise care to prevent injury to patients or other beneficiaries of charity as well as to non-beneficiaries, would be an even greater deterrent to negligence.

In order to understand more fully the position which Ohio has taken, and to better evaluate possibilities for future decisions in this state, as well as elsewhere, it is important to consider the present trend in other jurisdictions toward the view that a charitable institution is not exempt from tort liability solely because of its charitable purposes.

This trend toward stripping charitable institutions of their traditional immunity is based almost entirely upon changing concepts of public policy.<sup>40</sup> With the gradual shift of emphasis from the protection of property rights to the preservation of human values it is natural that in the area

<sup>36</sup> *Cullen v. Schmit*, 139 Ohio St. 194, 39 N.E.2d 146 (1942); *Esposito v. Stambaugh Auditorium Ass'n*, 49 Ohio L. Abs. 507, 77 N.E.2d 111 (1946); *Emrick v. Pennsylvania R.R. Y.M.C.A.*, 69 Ohio App. 353, 43 N.E.2d 733 (1942).

<sup>37</sup> 79 Ohio App. 526, 528, 73 N.E.2d 106, 107 (1947). The writer submits that this case should not be lightly regarded, for if a charitable institution loses its immunity from tort liability in non-charitable activities a mortal blow is struck at the doctrine itself, since any tortious act may be construed to be non-charitable by definition, *i.e.*, a tortious act is per se non-charitable, and hence actionable.

<sup>38</sup> It would seem that serious questions could be raised as to the logic of a rule which allows a stranger, but not an employee or beneficiary, to recover against a charitable institution in the name of public policy.

<sup>39</sup> *Sisters of Charity v. Develius*, 123 Ohio St. 52, 58, 173 N.E. 737, 740 (1930).

<sup>40</sup> "In response to what appeared good as a matter of public policy at an early date, many of the courts have created an immunity, which, under all legal theories, is basically unsound, and especially so when the reasons upon which it was founded no longer exist. . . . when the reason for the existence of a declared public policy no longer obtains, the court should, without hesitation, declare that such policy no



of tort liability of charitable institutions the same tendency should manifest itself.<sup>41</sup> To date, thirteen states and the District of Columbia have expressly repudiated the immunity rule and have imposed full liability upon charitable and non-charitable institutions alike.<sup>42</sup> Whether other jurisdictions which presently recognize the immunity rule will follow the lead of these states remains to be seen.

What course will Ohio follow in future considerations of the immunity rule? A proper analysis of the various possibilities depends upon the answers to three questions:

1. Can the immunity rule be circumvented within the bounds of established Ohio decisions?
2. Have any social, economic or political changes intervened since the establishment of the rule in Ohio which may be sufficient to change the public policy of the jurisdiction?
3. What persuasive effect, if any, will the present trend toward full liability in other jurisdictions have upon the Ohio courts?

Perhaps the greatest obstacle to reversal of the immunity rule in Ohio is precedent. For more than fifty years the courts have repeatedly stated their adherence to the immunity doctrine. It should be noted, however, that

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longer exists. . . ." *Mississippi Baptist Hospital v. Holmes*, 55 So.2d 142, 152 (Miss. 1951).

<sup>41</sup> "During the past two decades both the Federal Congress and the legislatures of practically all of the states have in various forms declared a public policy to exist in this country that is diametrically opposed to that invoked . . . to sustain the immunity of charitable institutions. . . . As examples, practically every state has enacted a workmen's compensation law; occupational disease disability laws . . . and employment security acts . . . . In addition to these laws federal legislation has encompassed the entire field of welfare and social security." *Ray v. Tucson Medical Center*, 72 Ariz. 22, 33, 230 P.2d 220, 229 (1951).

<sup>42</sup> *Alabama*: *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4 (1915); *Arizona*: *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P.2d 220 (1951), *overruling* *Southern Methodist Hospital v. Wilson*, 51 Ariz. 424, 77 P.2d 458 (1938); *California*: *Malloy v. Fong*, 37 Cal.2d 356, 232 P.2d 241 (1951); *Delaware*: *Durney v. St. Francis Hospital*, 83 A.2d 753 (Del. Super. 1951); *District of Columbia*: *Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942); *Florida*: *Nicholson v. Good Samaritan Hospital*, 145 Fla. 360, 199 So. 344 (1940); *Iowa*: *Haynes v. Presbyterian Hospital Ass'n*, 241 Iowa 1269, 45 N.W.2d 151 (1950), *overruling* *Mikota v. Sisters of Mercy*, 183 Iowa 1378, 168 N.W. 219 (1918); *Minnesota*: *Mulliner v. Evangelischer Diakonissenverein*, 144 Minn. 392, 175 N.W. 699 (1920); *Mississippi*: *Mississippi Baptist Hospital v. Holmes*, 55 So.2d 142 (Miss. 1951), *overruling* *Mississippi Baptist Hospital v. Moore*, 156 Miss. 676, 126 So. 465 (1930); *New Hampshire*: *Welch v. Frisbie Memorial Hospital*, 90 N.H. 337, 9 A.2d 761 (1939); *North Dakota*: *Rickbeil v. Grafton Deaconess Hospital*, 74 N.D. 525, 23 N.W.2d 247 (1946), *overruling* *Boetcher v. Budd*, 61 N.D. 50, 237 N.W. 650 (1931); *Rhode Island*: *Glavin v. Rhode Island Hospital*, 12 R.I. 411 (1879); *Utah*: *Brigham Young University v. Lillywhite*, 118 F.2d 836 (10th Cir. 1941); *Vermont*: *Foster v. Roman Catholic Diocese*, 116 Vt. 124, 70 A.2d 230 (1950).

early in the development of the rule in Ohio, the supreme court pointed out that the application of the doctrine should not be rigid, that inasmuch as the doctrine is founded upon public policy, it should be changed to fit the needs of a dynamic society when necessary.<sup>43</sup> In addition, the lower court decision of *Pearlstein v. A.M. McGregor Home* presents a possible means of attack upon the doctrine within the confines of precedent.<sup>44</sup> Should legislation, however, be required, as has been intimated by the supreme court,<sup>45</sup> in order to overthrow the Ohio case law a simple statute would provide such effect.<sup>46</sup>

The changed social, economic and political conditions prevalent in Ohio, as well as in other jurisdictions, have made it clear that public policy demands the rejection of the immunity rule in its entirety. With the advent of greater emphasis upon human values as opposed to property rights, the increased insurance coverage available and the concentration of charitable institutions into evergrowing economic units, the fear that charitable institutions could not survive if subjected to tort liability becomes an archaic phobia as well as an unjust rule of law. The fact that charitable institutions in states which recognize full liability of charities have been able to withstand the legal attacks upon them is pragmatic proof that the immunity rule is a mere crutch which has become useless with the convalescence of the patient.

Any prediction of the persuasive effect of opinions in other jurisdictions

<sup>43</sup> ". . . [the immunity] doctrine . . . had its origin in considerations of public policy. It doubtless will be in the future, as it always has been, developed, modified or extended as the necessities of new social and economic conditions demand." *Taylor v. Flower Deaconess Home*, 104 Ohio St. 61, 73, 135 N.E. 287, 297 (1922).

<sup>44</sup> See note 37 *supra*.

<sup>45</sup> "We may well suggest . . . that our legislature could, if it wished, change the law [as to the tort liability of charitable institutions] established by this court. It has not done so; it may not desire to do so." *Lakeside Hospital v. Kovar, Adm'r*, 131 Ohio St. 333, 343, 2 N.E.2d 857, 865 (1936). It is interesting to note that the Ohio courts had no such qualms about invading the realm of the legislature when the immunity rule was originally adopted in Ohio, in spite of the fact that the rule is a distinct exception to the ordinary rules of tort liability.

<sup>46</sup> *E.g.*, Charitable institutions operating in this state shall have no special immunity from tort liability purely because of their charitable purposes, but shall be liable as, and subject to the same rules of law as, business enterprises of a non-charitable nature.

<sup>47</sup> *State v. Phillips*, 85 Ohio St. 317, 97 N.E. 976 (1912); *Leonardi v. Leonardi*, 21 Ohio App. 110, 153 N.E. 93 (1925).

<sup>48</sup> *Damm v. Elyria Lodge*, 158 Ohio St. 107, 107 N.E.2d 337 (1952), 4 WEST. RES. L. REV. 83.

<sup>49</sup> *Signs v. Signs*, 156 Ohio St. 566, 103 N.E.2d 743 (1952), 4 WEST. RES. L. REV. 80.

<sup>50</sup> *Cowgill, Adm'r v. Boock, Adm'r*, 189 Ore. 282, 218 P.2d 445 (1950); *Minkin v. Minkin*, 336 Pa. 49, 7 A.2d 461 (1939).

<sup>51</sup> *Georgetown College v. Hughes*, 130 F.2d 810, 813 (D.C. Cir. 1942).