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Liability of Charitable Associations in Ohio

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INTRODUCTION

The question of whether a charitable association should be immune from tort liability has created a great difference of opinion among American courts. Unlike most problems in the field of torts, each side of the question supports its arguments in what may be termed "social justice." Which view will better serve the needs of a complex modern community is the heart of the problem. Those who would grant immunity from tort liability point to the great community benefit flowing from these associations. They urge that by their very nature charities are entitled to every legal benefit which the courts can properly give them. It is their position that the charitable association will be better able to serve the general community if it is not hampered financially and administratively by tort claims. The general benefit to the community will far outweigh any detriment which individuals may suffer from denial of compensation.

On the other hand, those who would deny immunity fervently advocate that the community welfare can only be measured by the well-being of the individuals who comprise the group.

They point out the dominant and ever increasing role played by the charity in modern living. This leads to a large number of injuries stemming from these activities. The financial well being of a great many of these institutions place them in a position where they can pay for injuries without seriously impairing their general benevolent activities. To allow these injuries to be borne solely by the individuals injured, results in a festering sore on society which cannot be healed by the general good that the community derives from these charitable activities. In short, someone must pay and the payment may be more intelligently made at the point where the injury occurs.

Seldom, if ever, are the courts faced with a more complex or difficult value judgment. The question of evaluating which of these views better serves the general community "good" is a question which cannot be masked in doctrinal analysis. The decisions of the courts in this area may be grouped generally into three classifications: (1) those granting complete immunity; (2) those granting partial immunity; and (3) those denying immunity.[1] In recent years there has been a distinct trend toward denial of immunity. The trend had its genesis in the case of *President and*

[1] For a detailed grouping of states see Annot., 25 A.L.R.2d 29, 142 (1952).

Directors of Georgetown College v. Hughes.[2] It has been said by an eminent writer that the *Georgetown College* case demolished the arguments in favor of immunity so completely as to change the course of the law.[3] Since this decision, ten states have abolished the immunity rule.[4] Ohio has recently taken a decisive step in this direction. In *Avellone v. St. Johns Hospital,*[5] the Supreme Court of Ohio held that a corporation not for profit, which has as its purpose the maintenance and operation of a hospital, is, under the doctrine of *respondeat superior,* liable for the torts of its servants. This decision takes Ohio out of the group of states which offer partial immunity and places it with those states which deny immunity. In so doing, the court overruled two previous supreme court cases[6] and parts of another.[7] The significance of this decision and its far-reaching implications calls for an analysis of the Ohio law relating to tort liability of charitable associations.

It will be the purpose of this note to trace the development of this law in Ohio and to examine future questions raised by the *Avellone* case with an eye toward suggesting possible future courses of Ohio law.

Development of the Ohio Rule of Partial Immunity

The Supreme Court of Ohio first considered the immunity question in 1911. In *Taylor v. Protestant Hospital Ass'n*[8] the decedent's representative alleged negligence after a nurse, in the employ of the hospital, allowed sponges to remain in the patient at the conclusion of an operation. The court held the hospital immune from liability since such associations were "masters different from others."[9] The court said that the hospital should be exempted from the usual application of *respondeat superior* because public policy encourages this type of charitable association. Thus,

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[2] 130 F.2d 810 (D.C. Cir. 1942).

[3] Prosser, Torts § 109 (2d ed. 1955).

[4] Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951); Malloy v. Fong, 37 Cal.2d 356, 232 P.2d 241 (1951); Wilson v. Lee Memorial Hospital, 65 So.2d 40 (Florida 1953); Haynes v. Presbyterian Hospital Ass'n, 241 Iowa 1269, 45 N.W.2d 151 (1950); Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934 (1954); Mississippi Baptist Hospital v. Holmes, 214 Miss. 906, 55 So.2d 142 (1951); Kardulas v. City of Dover, 99 N.H. 359, 111 A.2d 327 (1955); Rickbeil v. Grafton Deaconess Hospital, 74 N.D. 525, 23 N.W.2d 247 (1946); Foster v. Roman Catholic Diocese of Vermont, 116 Vt. 124, 70 A.2d 230 (1950); Pierce v. Yakima Valley Hospital Ass'n, 43 Wash.2d 162, 260 P.2d 765 (1953)

[5] 165 Ohio St. 467, 135 N.E.2d 410 (1956)

[6] Rudy v. Lakeside Hospital, 115 Ohio St. 539, 155 N.E. 126 (1926); Taylor v. Protestant Hospital Ass'n, 85 Ohio St. 90, 96 N.E. 1089 (1911).

[7] Lakeside Hospital v. Kovar, 131 Ohio St. 333, 2 N.E.2d 857 (1936).

[8] 85 Ohio St. 90, 96 N.E. 1089 (1911).

[9] *Id.* at 103, 96 N.E. at 1092.

the first decision of the court based the granting of immunity from tort liability on non-application of *respondeat superior*, the rationale being rooted in policy considerations.[10] The rule that a nonprofit hospital association is not liable for the torts of its servants under *respondeat superior* as against the claims of beneficiaries of the charity,[11] remained the law of Ohio until the *Avellone* case.[12]

The next case to come before the court was *Taylor v. Flower Deaconess Home and Hospital*.[13] The plaintiff charged the hospital with negligence in failing to exercise due and reasonable care in the selection of the servant who caused the injury. The court held the hospital liable for its negligence in this respect. The first *Taylor* case was clearly distinguished on the ground that the plaintiff there sought to charge the hospital with negligence through the application of *respondeat superior*. The negligence charged here was directly attributable to the management of the hospital. The court said,

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[10] States granting tort immunity to charitable associations have used several different legal doctrines to achieve the result. First, there is the "trust fund theory." Under this theory the funds of a charity are said to be trust property. To allow this money to be used to settle tort claims would be to divert the trust property thereby thwarting the charitable intent of the donors. Downs v. Harper Hospital, 101 Mich. 555, 60 N.W 42 (1894).

The second doctrine utilized in granting immunity is the non-application of *respondeat superior*. This theory is used in those states where the rationale for applying *respondeat superior* is based upon the fact that since it is the master who profits from the business activities, he must also pay when one in his employ wrongs another. In the charitable association the master does not profit. Hence, *respondeat superior* does not apply. Hearns v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 595 (1895). Another theory used by the courts in granting immunity is the "implied waiver theory." The court in this instance holds that in accepting the benefits of the charity, the injured party "waives" any rights he may have had. Cook v. John N. Norton Memorial Infirmary, 180 Ky. 331, 202 S.W 874 (1918).

Finally, the courts have used what is referred to as the public policy theory. This theory is usually combined with one of those previously mentioned. It is a frank statement of why another doctrine is being used. For instance, in *Taylor v. Protestant Hospital Ass'n*, 85 Ohio St. 90, 96 N.E.1089 (1911), the court says that *respondeat superior* should not be applied because public policy requires that the court give every protection possible for the purpose of furthering charitable activities.

[11] "The fact that a public charitable hospital receives pay from a patient for lodging and care does not affect its character as a charitable institution, nor its rights or liabilities as such in relation to such a patient." Taylor v. Protestant Hospital Ass'n, 85 Ohio St. 90, 96 N.E. 1089 (1911) No distinction has been drawn between a paying patient and a nonpaying patient in Ohio. Each is considered a beneficiary of the charity and the rules of immunity are applicable to each in the same manner.

[12] The court affirmed the general rule of immunity to nonprofit hospital associations in *Lakeside Hospital v. Kovar*, 131 Ohio St. 333, 2 N.E.2d 857 (1936) The court also held that there was no valid distinction between cases involving damage to the person of a patient and damage to his property. Rudy v. Lakeside Hospital, 115 Ohio St. 539, 155 N.E. 126 (1926).

[13] 104 Ohio St. 61, 135 N.E. 287 (1922).

> every principle of justice requires that they [management] use care in the selection of servants who have the oversight of patients.[14]

In this fact situation the denial of immunity was clearly based upon policy considerations.

In *Sisters of Charity v. Duvelius*,[15] the immunity of the hospital association was further restricted when the court indicated:

> We are in accord with the numerous cases which treat charitable institutions on the same basis as other corporations and individuals as to liability for negligence to *strangers* and invitees who are lawfully upon the premises of the institution.

Thus, by 1930 the immunity from tort liability of a nonprofit hospital association had dwindled to those cases wherein the plaintiff was a beneficiary of the charity and was not charging negligent selection or retention of a servant.[16]

In the first decision affecting a charitable association other than a hospital, the hospital immunity rule was extended.[17] The plaintiff charged a Y.W.C.A. with negligence, proceeding under *respondeat superior*. The legal basis for extension was secondary authority[18] and citation of foreign jurisdictions[19] without comment. There was no discussion as to why the rule should apply generally to all public charitable institutions. This automatic extension indicates how deep rooted the basic immunity concept had become.

In a subsequent case,[20] the court affirmed a directed verdict for a defendant church association, stating in the first branch of the syllabus:

> A charitable or eleemosynary institution is not liable for tortious injury except (1) when the injured person is not a beneficiary of the institution, and (2) when a beneficiary suffers harm as a result of failure on the part of the authorities of the institution to exercise due care in the selection or retention of an employee.[21]

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[14] *Id.* at 73, 74, 135 N.E. at 291.

[15] 123 Ohio St. 52, 173 N.E. 737 (1930).

[16] Under the law as it existed at this time, if an orderly in the employ of the hospital spilled scalding water on a patient and his visitor in the same negligent act, the visitor could recover from the hospital for his injuries while the patient-beneficiary would be barred from recovery.

[17] Waddell v. Y.W.C.A., 133 Ohio St. 601, 15 N.E.2d 140 (1938).

[18] The court after setting forth the rule applying to hospital associations said, "The rule pertains not only to hospitals, but is applicable in the case of all public charitable institutions. 2 RESTATEMENT OF LAW OF TRUSTS, 234, Section 402; 10 AMERICAN JURISPRUDENCE, 692."

[19] Bruce v. Y.M.C.A., 51 Nev. 372, 277 Pac. 798 (1929); Basabo v. Salvation Army, 35 R.I. 22, 85 Atl. 120 (1912); Bachman v. Y.W.C.A., 179 Wis. 178, 191 N.W 751 (1922).

[20] Cullen v. Schmit, 139 Ohio St. 194, 39 N.E.2d 146 (1942).

[21] *Id.* at 194, 39 N.E.2d at 146 (Syllabus 1).

This was the first time that the court stated the rule to include all charitable or eleemosynary institutions. The *Y.W.C.A.* case[22] was approved and once again there was no discussion concerning the wisdom of extending the hospital rule of immunity to other forms of charitable associations.[23]

The immunity concept, though shaken by exceptions, remained an integral part of Ohio law as the court approached the *Avellone* case.[24]

AVELLONE BREAKTHROUGH

In this case the plaintiff directly attacked the last island of hospital immunity. The plaintiff charged that he was negligently permitted to fall from a hospital bed furnished by the defendant. The hospital answered with a general denial and set up as a "separate defense" that it was a hospital association not for profit, and thus not liable for the torts of its employees as against beneficiaries of the charity. The plaintiff demurred to the "separate defense" on the ground that on its face it was insufficient in law. The trial court overruled the demurrer and the plaintiff, not wishing to plead further, dismissed the action. Plaintiff's sole ground of appeal was that the trial court erred in failing to sustain his demurrer to defendant's "separate defense." The court of appeals affirmed the judgment of the trial court[25] and allowance of a motion to certify brought the case before the Supreme Court. In a 5 to 2 decision, the judgment of the trial court was reversed and the case was remanded for further proceedings.

Judge Mathias, speaking for the majority, reviews the previous decisions of the court. He recognizes that various legal doctrines[26] have been used to grant immunity to charitable associations. Viewing the cases from an overall standpoint, he concludes that though the language of the court has varied from case to case, the essence of decision has always been rooted in general public policy considerations. Once having reached this point, the question of the case and the courts' answer are frankly stated.

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[22] Waddell v. Y.W.C.A., 133 Ohio St. 601, 15 N.E.2d 140 (1938).

[23] Emphasis is placed upon this factor, for now that the *Avellone* case has changed the rule concerning hospital associations to one of liability, the question of extension to other forms of charitable associations receives renewed importance.

[24] In the last case to come before the court prior to *Avellone*, the court announced that the defendant, Cleveland Museum of Natural History, was liable for injuries resulting from the negligent selection and retention of a servant. Newman v. Cleveland Museum of Natural History, 143 Ohio St. 369, 55 N.E.2d 575 (1944). This extended to charities other than hospitals the rule set forth in *Taylor v. Flower Deaconess Home and Hospital*, 104 Ohio St. 61, 135 N.E. 287 (1922)

[25] Trial court affirmed without opinion.

[26] *Supra*, note 10.

> The determination involves simply the balancing of two "rights." On the one hand, there is the well recognized right of nonprofit hospitals to any benefit and assistance which society and the law can justly allow them — a right which they command by their very nature; and on the other hand we see the right of the individual injured by the negligence of a servant to look for recompense to the master of such servant, under *respondeat superior.*
>
> Up to this point in the development of the law, this court has apparently felt that the benefit to society as a whole, gained by granting immunity; weighed the former right in favor of the latter, and this was on the ground that such masters were "different from others," and that immunizing them was "a valuable aid in securing the ends of justice."
>
> In our opinion this conclusion is no longer justified.[27]

The court then notes the increased social legislation in Ohio which provides for payment of hospital bills for statutory beneficiaries.[28] Judge Mathias then states that, according to survey, one half of the gross charges incurred by patients in American hospitals in 1955 was paid for through hospitalization insurance.[29] Hospital associations are generally large well run organizations and,

> in many instances, the hospital is so "businesslike" in its monetary requirements for entrance and in its collections of accounts that a shadow is thrown upon the word, "charity."[30]

From all of these factors the court concludes that a nonprofit hospital association has a much *broader basis of payment* for services rendered than did such an organization 50 years ago.[31]

Then follows an extremely interesting discussion concerning the availability of liability insurance. The court points out that this form of organization can carry liability insurance. The court after stating this fact goes on to say that its discussion in this area,

> does *not concern the imposition of liability where none theretofore existed.* It concerns, rather, the public policy which has heretofore held institutions such as the defendant immune as to beneficiaries, under a liability which is pre-existent under the ordinary rule of *respondeat superior.*

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[27] Avellone v. St. John's Hospital, 165 Ohio St. 467, 473, 135 N.E.2d 410, 414 (1956).

[28] OHIO REV. CODE § 5105.07 (aid for the aged); OHIO REV. CODE § 5107.10 (aid for dependent children); OHIO REV. CODE §§ 4515.03-.11 (reimbursement to hospitals for the care of indigents injured by motor vehicles); OHIO REV. CODE §§ 5113.01, 5113.03, 5113.04 (poor relief); OHIO REV. CODE §§ 5103.12-.13 (care for crippled children).

[29] Avellone v. St. John's Hospital, 165 Ohio St. 467, 474, 135 N.E.2d 410, 414 (1956).

[30] *Id.* at 474, 135 N.E.2d at 415. It is interesting to note that prior to the institution of this action, Avellone was sued by St. John's Hospital to recover for services rendered during the period of his confinement.

[31] The rule of immunity was first announced in *Taylor v. Protestant Hospital Ass'n,* 85 Ohio St. 90, 96 N.E. 1089 (1911), just 45 years prior to the *Avellone* case.

> We emphatically state that we are not imposing a liability heretofore nonexistent merely because it may be indemnified by insurance.[82]

This statement tends to turn an otherwise frank opinion by the court, with respect to general policy considerations, into a bit of "legal mumbo jumbo." Whether the liability insurance discussion is utilized to eliminate an "exception" to a "general rule" of liability, or to impose liability where none existed before is of little consequence. Whether immunity was an "exception" or a "general rule" is a mere verbal quibble. The fallacy of the distinction is brought to light more fully when it is observed that the "ordinary rule of *respondeat superior*" is itself an "exception" to the general principle that one should not have to pay for the wrongs of others. It seems clear that the availability of liability insurance played at least some part in this court's decision to hold charitable hospitals liable for torts in an area where they were theretofore not liable.

Judge Mathias continues that if the losses suffered in these cases are not absorbed by the hospital under normal rules of *respondeat superior*, chances are high that the plaintiff or members of his family will become burdens upon society to be cared for by other nonprofit charitable associations.

From the foregoing factors, the court concluded that:

> Whatever the reason for the public policy that gave rise to the rule of immunity, public policy today, examined in the light of present day conditions, will not support such a rule.[83]

It is important to emphasize that *Avellone* is decided upon the pleadings. All that is "legally certain" is that nonprofit hospital associations are now liable for torts of their servants according to the rules of *respondeat superior* The tenor of the opinion, however, indicates that the decision may well have far reaching effects.

As is usually the case, a decision announcing a new rule of law presents perplexing questions left unanswered by the opinion. The *Avellone* case is no exception.

Extension of Avellone Rule to Other Charitable Associations

The most obvious question arising from the *Avellone* case is whether the rule of total liability under the doctrine of *respondeat superior* applies to charitable associations other than nonprofit hospitals. In drafting the

[82] Avellone v. St. John's Hospital, 165 Ohio St. 467, 475, 135 N.E.2d 410, 415 (1956).

[83] *Id.* at 476, 135 N.E.2d at 416. Judge Mathias quoted liberally from the opinion in *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942).

Avellone syllabus, the court specifically limits the holding to "A corporation not for profit, which has as its purpose the maintenance and operation of a hospital "[34] Furthermore, the opinion gives no indication that the rule announced is to be extended to any other form of charitable institution. The court when "weighing" policy considerations places on the scales factors which could not be considered if the defendant were a *small* church association — *i.e.*, "hospitalization insurance" — "well run business associations" — "ready availability of liability insurance." This indicates that the new rule does not necessarily apply to charities other than non-profit hospital associations.

On the other hand, the dissent[35] in *Avellone* insists that the rule must be applied generally to all forms of charitable associations. As a basis for this conclusion, the dissenting judges cite the general application of the immunity rule as set forth in *Waddell v. Y.W.C.A.*[36] and that the rule " cannot *logically* be circumscribed to be applicable to hospitals alone."[37] (Emphasis supplied) The *Waddell* case, as has been previously pointed out, extended the rule of *immunity* to defendants other than hospital associations on the basis of secondary authority without any discussion of the advisability of such a move. Further, a case granting immunity is not necessarily authority for withdrawing that immunity. The *Waddell* case is therefore not conclusive legal authority for the dissent's position that there must be a single rule governing all eleemosynary institutions.

As to the dissenting view that the rule cannot "logically" be circumscribed to hospitals alone, it is the writer's belief that the court would be inconsistent if it fails to "re-weigh" the policy considerations when a case involving a different form of eleemosynary institution arises. The interest to be weighed in the case of the liability of a children's fresh air camp, for example, may prove far different from those interests which

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[34] Avellone v. St. John's Hospital, 165 Ohio St. 467, 135 N.E.2d 410 (1956).

[35] Two court of appeals judges, both sitting by designation pursuant to *Article IV, Section 2 of the Ohio Constitution*, dissented. The dissent would have continued the present immunity on the grounds that; 1) elimination of immunity cannot logically be circumscribed to hospitals alone but must be extended to all eleemosynary institutions — this result being unwise; 2) Mr. Justice Rutledge's opinion in the *Georgetown College* case did not abolish arguments in favor of immunity for he failed to convince 3 members of his own court; and 3) the court should not juggle the public policy concept so readily — such change should be effectuated by the legislature. The dissent is not persuasive in the sense that it throws up "road blocks" against change without discussing the real issue of the case — that of spreading the loss.

[36] 133 Ohio St. 601, 15 N.E.2d 140 (1938).

[37] Avellone v. St. John's Hospital, 165 Ohio St. 467, 479, 135 N.E.2d 410, 418 (1956).

are considered in the case of "a large well run corporation,"[38] as are most nonprofit hospitals today. The activities of the typical fresh air camp are made possible only through direct charitable contributions by the public. The broader base of payment for services rendered"[39] which the court considered as an important factor in *Avellone* would not be a consideration if the defendant were a fresh air camp. The same statement may be made of a small church association. If "logic" means that a rule should not be extended unless the vital considerations used in arriving at the rule remain the same, then "logic" would indicate that the *Avellone* rule *should not* be extended to areas where the policy considerations are different.

The shortcomings in this approach are apparent. It would require each form of charitable association to be considered individually in determining the immunity or liability question. In a modern community where there are 100 or more different charitable associations,[40] the administration of the law would become extremely complicated. Lawyers, lower court judges and charity officials would face a long and difficult period of uncertainty. This situation would lead to much litigation, further burdening our already overcrowded dockets. The opportunity for settlement would be greatly diminished, in that each form of charitable association may seek appellate review so that the court may consider its particular policy considerations. These are problems which necessarily follow a decision which "balances the interests," and which is restricted to the factual situation therein presented. This, of course, tends to narrowly restrict the application of the rule derived therefrom. Though this type of decision brings about difficult problems of administration in the law, it is submitted that when society is complex it may reasonably follow that the law is of necessity complex.

The State of Washington has recognized that different forms of eleemosynary institutions require different rules. In 1953 the Supreme Court in *Pierce v. Yakima Valley Memorial Hospital Ass'n*,[41] held the defendant nonprofit hospital responsible for the torts of its servants. Two years later in *Lyon v. Tumwater Evangelical Free Church*,[42] the court specifically limited the rule of liability announced in the *Pierce* case to situations where the plaintiff was a paying patient of a nonprofit hos-

[38] *Id.* at 474, 135 N.E.2d at 415.

[39] *Ibid.*

[40] The Welfare Federation of Cleveland lists 100 or more financially participating charities. Avellone v. St. John s Hospital, 165 Ohio St. 467, 479, 135 N.E.2d 410 418 (1956)

[41] 43 Wash.2d 162, 260 P.2d 765 (1953)

[42] 47 Wash.2d 202, 287 P.2d 128 (1955)

pital association. In the *Lyon* case a child was injured through the negligent operation of a school bus while being transported to Sunday school. The Washington court summarily distinguished a religious benevolent society from a hospital association. Whether the Ohio courts will draw such a distinction remains to be seen.

APPLICATION OF RESPONDEAT SUPERIOR

Judge Mathias raises in *Avellone* the question of future application of *respondent superior:*

> We, thus, conclude that a corporation not for profit, which has as its purpose the maintenance and operation of a hospital, is, under the doctrine *respondeat superior (and the various rules and exceptions applicable thereto),* liable for the torts of its servants, and leave for future determination the application of this doctrine to the facts of the instant cases as may be proved on trial. For instance, we are not deciding that persons working in a hospital, such as doctors and nurses, under circumstances where the hospital has no authority or right of control over them, can bind the hospital by their negligent actions.[43]

There are at least three possible approaches in solving this question. First, there is the traditional view that a doctor or nurse is too highly skilled and responsible to be classified as a servant under the doctrine. This theory is still the law of England[44] but a comparatively recent case indicates that change is imminent.[45] A few American jurisdictions follow this course by classifying professional employees of a hospital as "independent contractors."[46] This embraces the traditional approach of *respondeat superior.* If the employer has no control over the employee he shall not be made to respond for his employee's negligence. It is thought that the hospital-employer, in hiring professional services, cannot have that measure of control over the professional activities of its employees as to render it liable under the doctrine.

Were the Ohio court to adopt this view, there could be no recovery in the *Avellone* situation. It may be assumed that most injuries in a hospital would result from the activities of "professional help." Therefore, the acceptance of this view of *respondeat superior* would tend to immunize the hospital to essentially the same extent as prior to *Avellone.* The ground for granting such immunity would merely shift from the

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[43] Avellone v. St. John's Hospital, 165 Ohio St. 467, 477, 135 N.E.2d 410, 417 (1956).

[44] Hillyer v. St. Bartholomew's Hospital, (1909) 2 K.B. 820 (C.A.)

[45] Gold v. Essex County Council, (1942) 2 All. E.R. 237 (C.A.).

[46] Norwood Hospital v. Brown, 219 Ala. 445, 122 So. 411 (1929); Runyan v. Goodrum, 147 Ark. 481, 228 S.W 397 (1921); Iterman v. Baker, 214 Ind. 308, 15 N.E.2d 365 (1938).

charity theory to the doctrinal basis of *respondeat superior*. The *Avellone* case professes to spread the loss of injury where it may best be met. It can reasonably be assumed that the court will not negate this desired result.

The second approach to the application of *respondeat superior* finds no valid reason for exempting a hospital or other organization from liability for the negligence of a professional employee. The majority of American jurisdictions follow this view.[47] Although these cases generally involved profit-making corporations, they are nevertheless authority in this area for *Avellone* holds that nonprofit masters are no longer "masters different than others."[48] The rationale behind this view does not look upon *respondeat superior* as a concept to be rationally and logically applied in all types of cases. It is a device whereby injuries may be compensated for by one who is in the best position to absorb the cost. To exclude hospitals from liability on the basis that their employees are highly trained and skillful technicians, would create a large area wherein the doctrine would be inoperable. This result would require many injured persons to suffer the loss of injury alone. The essential question under the modern view of *respondeat superior* is the fact of employment. The general problems of "scope of employment" are also applicable under this approach. Since the Ohio court was outwardly interested in "spreading the loss" in *Avellone* it would be consistent in adopting the view which places little importance upon the question of "control."

The final approach to be discussed is that followed by the New York courts.[49] It is somewhat of a "hybrid" concept. The question of whether the hospital is liable depends upon whether the activity from which the injury flowed was "professional" or "administrative." If it was "profes-

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[47] Knox v. Ingalls Shipbuilding Corp., 158 F.2d 973 (5th Cir. 1947); Woodburn v. Standard Forgings Corp., 112 F.2d 271 (7th Cir. 1940); Giusti v. C. H. Weston Co., 165 Ore. 525, 108 P.2d 1010 (1941); Stuart Circle Hospital Corp. v. Curry, 173 Va. 136, 3 S.E.2d 153 (1939); Treptan v. Behrens Spa, 247 Wis. 438, 20 N.W.2d 108 (1945); Noren v. American School of Osteopathy, 298 S.W 1061 (Mo. App. 1927).

[48] Taylor v. Protestant Hospital Ass'n, 85 Ohio St. 90, 103, 96 N.E. 1089, 1092 (1911).

[49] Dillon v. Rockaway Beach Hospital, 284 N.Y. 176, 30 N.E.2d 373 (1940). In discussing the New York rule, it is interesting to note that when Judge Mathias raised the problem of *respondeat superior* in *Avellone*, he cited the case of *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914). The case cited does not present the modern New York approach to the problem, however. The *Schloendorff* case sets forth the proposition that the doctrine of *respondeat superior* should never be applied to professional employees of a hospital association. It is the writer's opinion that the case was cited for the purpose of illustrating the problems presented, rather than as an indication that the Ohio court will follow the holding when the question comes before the court.

sional" no liability results. If "administrative" — liability. At first blush the rule seems logical. However, examination of the cases reveals some peculiar results. The fact of employment and the duties for which the person is employed are unimportant. An orderly may be rendering a "professional" service if he is doing what a nurse would normally do.[50] If the New York rule were carried to its logical extremity, a non-employee of the hospital, such as a visiting doctor, could render the hospital liable if he were performing an administrative function. Conversely, the hospital could be held not responsible for the acts of an employee hired to perform the most menial of tasks, if it be determined that the specific act causing the injury was "professional" in nature. Lower court cases are in a state of turmoil in New York. The validity of the administrative-professional distinction may be questioned because of numerous technical exceptions which have been made.[51]

CONCLUSION

The Ohio court in the *Avellone* case faced the problem of charitable immunity unflinchingly. The social issues were presented and thoroughly discussed. There was no resort to doctrinal analysis for the purpose of masking what the judges were really doing. The court made a social prediction to the effect that the needs of the modern community will be better served if hospital associations are required to pay for the torts of their servants on the same basis as noncharitable associations. To agree or disagree with this prediction is the prerogative of all who recognize the problem presented.

In a strict legal sense the *Avellone* case has said merely that a "special defense" setting forth the charitable nature of a hospital association is now subject to demurrer. However, the considerations utilized in the opinion cannot be limited to the case. They are cogent realities of life in a modern community, and must be brought into focus at any time the question of charitable immunity comes before the court.

Ohio is on the threshold of shaping a new area of law. When the future is unknown, extreme care must be taken to avoid the pitfalls. Since *Avellone* was determined on the pleadings, the full impact of the decision will not be known until it is determined (1) whether the rule announced will apply generally to all charitable associations and; (2) which view will be followed in the application of *respondeat superior.* A blind application of the rule to include all eleemosynary institutions could result in

[50] Phillips v. Buffalo General Hospital, 239 N.Y. 188, 146 N.E. 199 (1924).

[51] For an excellent discussion and a review of the New York cases, see Note, 25 N.Y.U. L. REV. 612 (1950).