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Recent Decisions

TORTS — RESPONDEAT SUPERIOR LIABILITY OF CHARITABLE INSTITUTIONS

Plaintiff brought an action for wrongful death against the Young Women's Christian Association of Hamilton, Ohio.¹ The petition alleged that the decedent went to defendant's place of business, paid the thirty-five cents admission fee, and proceeded to enter the swimming pool, which was under the supervision of an employee of the defendant. It further alleged that the decedent was pulled from the pool in a state of suffocation and died minutes later. Six counts of negligence which proximately caused the decedent's death were set forth.

The trial court sustained the defendant's demurrer — for no cause of action stated — on the ground that the defendant is a charitable institution and, therefore, is immune from respondeat superior tort liability. The court of appeals reversed the judgment, following the decision of *Avellone v. St. John's Hospital*.² The supreme court reversed the court of appeals and sustained the demurrer.

The question decided by the supreme court was whether a charitable institution that is not a hospital should be granted the immunity from respondeat superior tort liability that has been given to eleemosynary institutions in the past. Prior to 1922, charitable institutions were entirely immune from such tort liability.³ *Taylor v. Flower Deaconess Home and Hospital*,⁴ decided in 1922, limited this immunity by declaring that charitable institutions would be liable for the negligent selection or retention of servants. In 1930, the supreme court placed a further restriction upon this immunity by holding that charitable institutions were liable to persons who were not beneficiaries of the charity for torts committed by their servants.⁵ A beneficiary of an eleemosynary institution would seem to be a person who is receiving the benefits of the charity, even though he makes some payment to the institution for its services. However, no definition of a beneficiary has been pronounced by the Ohio courts.

Various theories have been propounded to justify the immunity.⁶

1. *Gibbon v. YWCA*, 170 Ohio St. 280, 164 N.E.2d 563 (1960).

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

3. *Taylor v. Protestant Hosp. Ass'n*, 85 Ohio St. 90, 96 N.E. 1089 (1911).

4. 104 Ohio St. 61, 135 N.E. 287 (1922).

5. *Sisters of Charity of Cincinnati v. Duvelius*, 123 Ohio St. 52, 173 N.E. 737 (1930).

6. The *trust fund* theory declares that funds of a charity were given in trust to be used for charitable purposes. Damages for torts of the servants is not a charitable purpose. The *implied waiver* theory regards the patron of the charity as having impliedly waived his right to damages for torts of the servants of the charity. Another theory regards only the servant liable, since damages are to be paid out of the pocket of the wrongdoer. The rule of respondeat superior is an exception to this general rule. Charitable institutions should not

In 1956, however, the supreme court declared in the now renowned *Avellone* case,⁷ that regardless of previous justifications, certain charitable institutions could no longer receive the protection of immunity against respondeat superior tort liability. The court held that public policy now required that those charitable institutions which have grown tremendously through the use of the corporate structure accept their responsibility to the public, and recompense individuals whom they have wronged.

Just how far this decision has destroyed the immunity under respondeat superior has been an issue of great controversy. The *Avellone* decision, despite its great pronouncement of public policy, left important questions unanswered. What criteria will be used to determine whether or not an institution is one which is included within the doctrine of the *Avellone* case? Does the rule remove the immunity as to all beneficiaries, or just as to *paying* patients, as in the *Avellone* case? Since 1956 two lower court decisions involving hospitals have followed the *Avellone* case and held defendant hospitals liable for acts of their servants.⁸ Two other lower court decisions have refused to apply the *Avellone* doctrine to cases involving churches, on the ground that no changes have occurred in religious organizations recently to justify a reversal in public policy toward these organizations.⁹ However, in both of the latter cases the injuries were caused by falls in church parking lots, so that neither involved the doctrine of respondeat superior. *Gibbon v. YWCA*¹⁰ is the first case in which the supreme court has been able to amplify the *Avellone* doctrine.¹¹ It is also the first case in which a charitable institution other than a hospital has been implicated through the doctrine of respondeat superior.

Writing for the majority, Mr. Justice Herbert stated that the demurrer to the petition can be sustained on the ground that the petition does not state facts constituting negligence. However, the broader basis of the decision rested upon public policy, which Mr. Justice Herbert's discussion justified on the ground that both lower courts had decided the question on the policy issue of the immunity doctrine. He felt that the *Avellone* case¹² removed the immunity

come within the exception. The *public policy* theory simply states that institutions with such beneficial aims should be encouraged; therefore, they should be exempt from the rule of respondeat superior.

7. *Avellone v. St. John's Hosp.*, 165 Ohio St. 467, 135 N.E.2d 410 (1956).

8. *Kletrovetz v. Grant Hosp.*, 105 Ohio App. 236, 152 N.E.2d 149 (1957); *Andrews v. Youngstown Osteopathic Hosp. Ass'n*, 147 N.E.2d 645 (Ohio Ct. App. 1956), *appeal dismissed*, 166 Ohio St. 228 (1957).

9. *Tamasello v. Hoban*, 155 N.E.2d 82 (Ohio C.P. 1958); *Hunsche v. Alter*, 145 N.E.2d 368 (Ohio C.P. 1957).

10. 170 Ohio St. 280, 164 N.E.2d 563 (1960).

11. Although the *Avellone* doctrine was mentioned in *Wolf v. Ohio State Univ. Hosp.*, 170 Ohio St. 49, 162 N.E.2d 475 (1959), the case was decided on another point. The Ohio State University Hospital was held to be part of the sovereign, and thus not amenable to suit.

only with respect to *paying* patients. Therefore, especially in the light of recent legislative developments,¹³ he found no compelling reason to extend or modify the *Avellone* decision. Moreover, he reasoned that the decision in the instant case would avoid any retroactive imposition of liability on charitable institutions, since no new or different public policy was set forth therein. But was the decedent in the *Gibbon* case a *paying* patron? Mr. Justice Herbert never answered this question. Is the YWCA different in its basic nature from St. John's Hospital? The answer from the decision appears to be yes, but no distinctions are mentioned. Thus, the *Gibbon* decision, instead of clarifying the *Avellone* case, has only prolonged and intensified the confusion in this important area of the law.

As previously indicated, the majority of the court admittedly did not wish to declare further public policy in view of the legislature's attempted action in its last session.¹⁴ It is interesting to note that Governor DiSalle vetoed the bill because he felt that the need for protection of the individual who is injured through the negligence of a servant of a charitable institution is greater than the need of charitable institutions to be protected. This is precisely the reasoning used in the *Avellone* case.

Three of the seven justices concurred in the judgment only, on the ground that the petition did not state facts constituting negligence. The concurring opinion written by Mr. Justice Bell¹⁵ stated that the rule of the *Avellone* case must not be limited to hospitals alone. Mr. Justice Taft, in a second concurring opinion,¹⁶ criticized the majority opinion. He felt that the majority should have considered whether the decedent made a payment to the defendant which would represent a substantial equivalent to the benefits sought to be received from the institution. From this the court could then have decided what standard of care should be required of the institution. This question is of vital importance because the issue was not raised in the *Avellone* case. There, the patient did pay a substantial amount to the institution. Mr. Justice Taft, questioning whether or not thirty-five cents was a substantial amount for the benefits sought to be received, concurred with the majority opinion.

The *Gibbon* decision has serious limitations which could nullify its future significance. Since the petition failed to state facts constituting negligence by the defendant, the portion of the majority opin-

12. *Avellone v. St. John's Hosp.*, 165 Ohio St. 467, 135 N.E.2d 410 (1956).

13. The Ohio Legislature came within a few votes of overriding Governor DiSalle's veto of a bill to restore the immunity of all charitable institutions from respondeat superior tort liability for injuries to beneficiaries, except in cases involving gross negligence. S.B. 241, 103d Ohio General Assembly (1959).

14. See discussion note 13, *supra*.

15. *Gibbon v. YWCA*, 170 Ohio St. 280, 295, 164 N.E.2d 563, 573 (1960) (concurring opinion).

16. *Id.* at 294, 164 N.E.2d at 272 (concurring opinion).