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## Charitable Immunity from Tort Liability in Ohio: Present Status and Future Prospects

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## NOTES

### *Charitable Immunity From Tort Liability in Ohio: Present Status and Future Prospects*

THE DOCTRINE OF charitable immunity from tort liability was first announced in the English case of *Duncan v. Findlater*.<sup>1</sup> Following the lead of this early decision, Massachusetts was the first American jurisdiction to adopt the doctrine in *McDonald v. Massachusetts Gen. Hosp.*<sup>2</sup> From these initial decisions the doctrine grew in favor, expanded into other American jurisdictions, and widened in scope. The subject of widespread criticism almost since its inception, it is only within recent years that the concept of charitable immunity from tort liability has been reexamined. As a result, immunity has slowly begun to contract in application and diminish in scope. The current state of the immunity law varies from jurisdiction to jurisdiction without any consistent pattern.<sup>3</sup>

The purposes of this Note are: (1) to explore the Ohio position regarding charitable immunity from tort liability through a discussion of the bases for the doctrine, a survey of the Ohio history, and a look at the positions of other jurisdictions on the question; and (2) to demonstrate the concept's inherent weaknesses and inconsistencies which necessitate its abrogation.

#### I. THE BASES OF CHARITABLE IMMUNITY

The concept of charitable immunity has been rationalized upon at least four bases. First, the vague and all-inclusive argument of public policy has been a major pillar upon which the doctrine has rested.<sup>4</sup> A second basis is the oldest approach taken, that of the

<sup>1</sup> 6 Clark & F. 894, 7 Eng. Rep. 934 (1839). The dictum in this case was followed in *Feoffees of Heriot's Hosp. v. Ross*, 12 Clark & F. 507, 8 Eng. Rep. 1508 (1846). The doctrine was upheld as late as 1861, at which time it was restated in *Holliday v. Parish of St. Leonard's*, 11 C.B.N.S. 192, 142 Eng. Rep. 769 (1861).

<sup>2</sup> 120 Mass. 432 (1876). The court, in following the earlier English decisions, failed to realize that they had been repudiated by *Mersey Docks & Harbour Bd. Trustees v. Gibbs*, L.R. 1 H.L. 93, 11 Eng. Rep. 1500 (1866) and *Foreman v. Mayor*, L.R. 6 Q.B. 214 (1871).

<sup>3</sup> See PROSSER, TORTS § 127 (3d ed. 1964) for both a general discussion of the evolution of the law in this area and a collection of cases. The cases and points of view are too numerous to be included in this Note, but a discussion of the several positions is discussed in notes 57-62 *infra*.

<sup>4</sup> See, e.g., *Taylor v. Flower Deaconess Home & Hosp.*, 104 Ohio St. 61, 135 N.E.2d 287 (1922).

protection of trust funds.<sup>5</sup> It is reasoned that the charitable institution involved as the defendant in a tort action would no longer be able to serve the purpose for which it was established were its trust funds susceptible to depletion through the payment of tort judgments.<sup>6</sup> A third support for the immunity doctrine is offered by the theory that the beneficiary of a charity's services assumes the risk of harm and impliedly waives, by the mere acceptance of such services,<sup>7</sup> whatever rights of recovery for negligence he might have. It is argued that the charity serves the public in general and that it would not be equitable to award a judgment to any particular beneficiary.<sup>8</sup> Finally, recovery for torts committed by charities or their employees has been denied because the profit motive, generally present whenever a master employs servants, is held to be absent in the case of a charitable-institution employer concerned only with rendering service to the public.<sup>9</sup> The most widely applicable theory of immunity in Ohio has been that of public policy.<sup>10</sup> This justification for immunity combines the elements of all the other bases<sup>11</sup> and can be independently interjected whenever none of the other rationales are applicable.<sup>12</sup>

## II. HISTORY OF CHARITABLE IMMUNITY IN OHIO

### A. Total Immunity

The first Ohio case raising the issue of charitable immunity was *Taylor v. Protestant Hosp. Ass'n*,<sup>13</sup> a negligence action in which the plaintiff contended that a nurse's failure to count surgical sponges

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<sup>5</sup> See, e.g., *McDonald v. Massachusetts Gen. Hosp.*, 120 Mass. 432 (1876); *Fisher v. Ohio Valley Gen. Hosp. Ass'n*, 137 W. Va. 723, 73 S.E.2d 667 (1952).

<sup>6</sup> See, e.g., *Perry v. House of Refuge*, 63 Md. 20 (1885); *McDonald v. Massachusetts Gen. Hosp.*, *supra* note 5.

<sup>7</sup> See, e.g., *Powers v. Massachusetts Homeopathic Hosp.*, 109 Fed. 294 (1st Cir.), *cert. denied*, 183 U.S. 695 (1901); *St. Vincent's Hosp. v. Stine*, 195 Ind. 350, 144 N.E. 537 (1924).

<sup>8</sup> See *Taylor v. Flower Deaconess Home & Hosp.*, 104 Ohio St. 61, 135 N.E.2d 287 (1922).

<sup>9</sup> See, e.g., *Hearns v. Waterbury Hosp.*, 66 Conn. 98, 33 Atl. 595 (1895).

<sup>10</sup> See cases cited at notes 23, 30, 34 & 58 *infra*. The public policy upon which the maintenance of charitable immunity seems to be dependent is the preservation and expansion of charities. Charities are dependent for their continued existence upon the gifts of donors. Since these donors would be reluctant to contribute to a charity if they were afraid that their gifts might be depleted through tort judgments, public policy demands that these funds not be subjected to possible depletion through tort claims for damages.

<sup>11</sup> See cases cited notes 4-10 *supra*.

<sup>12</sup> See, e.g., *Avellone v. St. John's Hosp.*, 165 Ohio St. 467, 135 N.E.2d 410 (1956).

<sup>13</sup> 85 Ohio St. 90, 96 N.E. 1089 (1911).

properly as they were removed from a patient resulted in his death. The supreme court held that whether or not the patient involved was charged for the hospital's services, the doctrine of respondeat superior was not applicable to a charitable institution.<sup>14</sup> The court pointed out that public policy demanded support of a charity's worthy purposes and that a charity does not profit from the efforts of its servants because its work is for the public benefit.<sup>15</sup> Because of this difference, the liability of the servant could not be imputed to the charitable institution.<sup>16</sup>

### B. *The First Exception*

After an eleven-year period of total charitable immunity, the case of *Taylor v. Flower Deaconess Home & Hosp.*<sup>17</sup> again presented the issue to the Ohio Supreme Court. Once again a plaintiff had been injured by the negligent servant of a charitable institution. In reaching its decision, the court enunciated the first of two general exceptions which Ohio has since recognized regarding charitable immunity.<sup>18</sup> The court found that the defendant hospital had been negligent in the selection and retention of the servant and, although public policy favored charitable immunity, a stronger public policy demanded that the plaintiff recover in such a case.<sup>19</sup>

### C. *The Second Exception*

Within another eight years, the court announced and established the second and only other general exception to the immunity doctrine in Ohio. In *Sisters of Charity v. Duvelius*,<sup>20</sup> the plaintiff, a passenger in a hospital elevator, was injured as the result of an employee's negligence. Although the plaintiff was not a patient, the court held that while public policy would uphold the charity's immunity as to beneficiaries of its services, the institution would not be immune from liability to an innocent third person who was a non-beneficiary.<sup>21</sup> Furthermore, the court held that public policy demanded a high standard of care with respect to beneficiaries of a

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<sup>14</sup> *Id.* at 103, 96 N.E. at 1092.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> 104 Ohio St. 61, 135 N.E. 287 (1922).

<sup>18</sup> *Id.* at 73, 135 N.E.2d at 291.

<sup>19</sup> *Ibid.*

<sup>20</sup> 123 Ohio St. 52, 173 N.E. 737 (1930).

<sup>21</sup> *Id.* at 58, 173 N.E.2d at 739.

charity because if non-beneficiaries were to be denied protection from negligence, the care given to beneficiaries of the charitable services would tend to be of a lesser quality — a result to be avoided in view of the immunity from liability to them.<sup>22</sup> Thus, charitable institutions are held to the same standard of care toward third parties lawfully upon their premises that is imposed upon any private person or organization under similar circumstances.

#### D. Pre-1956 Trend

Following these initial Ohio decisions, the immunity doctrine was extended to other areas of tort law as rapidly as the term "charitable institution" could be defined.<sup>23</sup> A reading of the cases involving the full range of charitable institutions suggests that their common characteristic is the absence of the profit motive.<sup>24</sup> In these non-hospital charitable endeavors as in the hospital cases, the Ohio courts consistently held that the institution was immune from liability for its torts unless the injured person was not a beneficiary or the institution had failed to exercise due care in the selection or retention of a negligent employee.<sup>25</sup> Prior to 1956, therefore, charities in Ohio were virtually immune from all tort liability.

#### E. Impact of *Avellone v. St. John's Hosp.*

An Ohio Supreme Court decision in 1956 led some observers to believe that Ohio had abrogated the charitable immunity doctrine. In *Avellone v. St. John's Hosp.*,<sup>26</sup> the court held that a charitable hospital was liable for the torts of its employees under the doctrine of respondeat superior. The plaintiff in that case was a patient in the defendant hospital and had twice been negligently permitted to fall from a hospital bed, suffering separate injuries on both occasions. The issue of immunity (and thus the existence of a cause of action) was determined by a consideration of several factors, among which were the changed nature of hospital organizations, the availability of liability and low cost hospitalization insurance,

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<sup>22</sup> *Ibid.*

<sup>23</sup> See, e.g., *Newman v. Cleveland Museum of Natural History*, 143 Ohio St. 369, 55 N.E.2d 575 (1944); *Gullen v. Schmidt*, 139 Ohio St. 194, 39 N.E.2d 146 (1942); *Waddell v. YWCA*, 133 Ohio St. 601, 15 N.E.2d 140 (1938); *Lakeside Hosp. v. Kovar*, 131 Ohio St. 333, 2 N.E.2d 857 (1936); *Rudy v. Lakeside Hosp.*, 115 Ohio St. 539, 155 N.E. 126 (1926).

<sup>24</sup> See cases cited note 19 *supra* and notes 30 and 34 *infra*.

<sup>25</sup> See cases cited note 23 *supra*.

<sup>26</sup> 165 Ohio St. 467, 135 N.E.2d 410 (1956).

and public policy.<sup>27</sup> It was found that public policy had changed in the half-century since the announcement of the immunity doctrine.<sup>28</sup> Judge Putnam's dissent contended, however, that the public policy underlying the doctrine had not changed, that the decision might be applied to the whole range of charitable institutions, and that the legislature rather than the courts should be the voice of change in this area.<sup>29</sup>

In general, the *Avellone* decision has been followed in subsequent Ohio cases involving charity-owned hospitals.<sup>30</sup> Moreover, hospitals operated by municipalities are liable for their torts on the ground that operating a hospital is a proprietary rather than a governmental function.<sup>31</sup> The hospital liability door, however, has not been completely opened, inasmuch as the courts have held that although they are willing to allow recovery against the institutions, the negligence must be both pleaded and proved.<sup>32</sup> To date, however, the fear expressed in the *Avellone* dissent — that once the doctrine of charitable immunity had been partially overcome there could be no logical basis for refusing to carry over its rejection into other charitable areas — has not been realized. While it is true that the decision has been followed in subsequent hospital cases,<sup>33</sup> immunity is still the rule found in other charitable areas.<sup>34</sup>

#### F. *Limitations Upon Avellone*

The first major test of the immunity doctrine's applicability to a

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<sup>27</sup> *Id.* at 473-77, 135 N.E.2d at 414-16.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Id.* at 480-82, 135 N.E.2d at 418-19 (dissenting opinion).

<sup>30</sup> See, e.g., *Jones v Hawkes Hosp.*, 175 Ohio St. 503, 196 N.E.2d 592 (1964); *Klema v. St. Elizabeth's Hosp.*, 170 Ohio St. 519, 166 N.E.2d 765 (1960); *Andrews v. Youngstown Osteopathic Hosp. Ass'n*, 147 N.E.2d 645 (Ohio Ct. App. 1956).

<sup>31</sup> See, e.g., *Hyde v. City of Lakewood*, 175 N.E.2d 323 (Ohio Ct. App. 1962); *Koubeck v. Fairview Park Hosp.*, 172 N.E.2d 491 (Ohio C.P. 1960).

<sup>32</sup> See, e.g., *Rush v. Akron Gen. Hosp.*, 171 N.E.2d 378 (Ohio Ct. App. 1957).

A potential plaintiff might also take care in the selection of a hospital. See *Wolf v. Ohio State Univ. Hosp.*, 158 N.E.2d 909 (Ohio Ct. App. 1958), *aff'd*, 170 Ohio St. 49, 162 N.E.2d 475 (1959), wherein it was held that the Ohio State University could not be sued for negligence. See also *Wierzbicki v. Carmichael*, 118 Ohio App. 239, 187 N.E.2d 184 (1963), holding that the trustees of a county hospital are neither jointly nor severally liable for negligence in the absence of malice or corruption.

<sup>33</sup> See cases at note 30 *supra*.

<sup>34</sup> See, e.g., *Sturdevant v. Youngstown Dist. Girl Scout Council, Inc.*, 118 Ohio App. 489, 195 N.E.2d 914 (1962); *Bell v. Salvation Army*, 172 Ohio St. 326, 175 N.E.2d 738 (1961); *Matthews v. Wittenberg College*, 113 Ohio App. 387, 178 N.E.2d 526 (1960); *Rosen v. Concordia Evangelical Lutheran Church, Inc.*, 111 Ohio App. 54, 167 N.E.2d 671 (1961); *Gibbon v. YWCA*, 170 Ohio St. 280, 164 N.E.2d 563 (1960); *Hunsche v. Alter*, 145 N.E.2d 368 (Ohio C.P. 1957).

charity other than a hospital arose in the 1960 decision of *Gibbon v. YWCA*.<sup>35</sup> In that case, the plaintiff was the father of a decedent who had died in a swimming pool where entry was restricted to those who paid an admission and where the defendant supplied a lifeguard whose negligence was alleged to have been the proximate cause of death. Supporters of the non-liability position should have had reason to believe that the *Avellone* decision would be extended to other charitable enterprises,<sup>36</sup> despite the decision in *Tomasello v. Hoban*,<sup>37</sup> wherein the court had held that *Avellone* applied only to hospitals. The court explained, however, that it had granted certification because of the conflicting appellate decisions in *Tomasello* and *Gibbon*.<sup>38</sup>

Following a lengthy discussion of the law in which prior Ohio cases as well as decisions from other jurisdictions were included, the court held that it could not find the same compelling reasons to impose liability in *Gibbon* as had been present in *Avellone*.<sup>39</sup> While concurring in the judgment, Judge Bell indicated that he did so solely on the ground that the petition had failed to state a cause of action.<sup>40</sup> In the final paragraph of his concurring opinion, he wrote:

When a foundation is removed, a structure which had been erected thereon ordinarily collapses. I can come to no conclusion other than that of Judge Putnam who, in dissenting in the *Avellone* case, said that the rule of the *Avellone* case "cannot logically be circumscribed to be applicable to hospitals alone."<sup>41</sup>

Even though the *Gibbon* court was unanimous in its decision, three judges concurred only because of the insufficiency of the petition to state a cause of action.<sup>42</sup> Therefore, hope was not yet lost that *Avellone* would be extended. Nonetheless, three subsequent cases have practically closed the issue of charitable immunity in Ohio with reference to other than a hospital setting.<sup>43</sup> Although

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<sup>35</sup> 170 Ohio St. 280, 164 N.E.2d 563 (1960).

<sup>36</sup> 165 Ohio St. at 478, 135 N.E.2d at 417 (dissenting opinion).

<sup>37</sup> 155 N.E.2d 82 (Ohio C.P. 1958), *aff'd without opinion*, No. 708449, Ct. App. Cuyahoga County (1959).

<sup>38</sup> 170 Ohio St. at 282-83, 164 N.E.2d at 565-66.

<sup>39</sup> *Id.* at 293-94, 164 N.E.2d at 572.

<sup>40</sup> *Id.* at 295, 164 N.E.2d at 573.

<sup>41</sup> *Id.* at 296, 164 N.E.2d at 574.

<sup>42</sup> *Id.* at 295, 164 N.E.2d at 573.

<sup>43</sup> See *Bell v. Salvation Army*, 172 Ohio St. 326, 175 N.E.2d 738 (1961); *Sturdevant v. Youngstown Dist. Girl Scout Council, Inc.*, 195 N.E.2d 914 (Ohio Ct. App. 1962); *Matthews v. Wittenberg College*, 113 Ohio App. 387, 178 N.E.2d 526 (1960).

the courts have been consistent in establishing liability in the hospital area,<sup>44</sup> and have even extended it to torts arising out of medical as well as administrative functions,<sup>45</sup> the Ohio courts have been equally consistent in their refusal to extend *Avellone*.<sup>46</sup> Curiously, in a case involving a municipal enterprise other than a hospital, the supreme court found liability because the operation of a city swimming pool is a proprietary rather than a governmental function.<sup>47</sup> Just as it is wise for the potential plaintiff to avoid admittance to a state-owned hospital,<sup>48</sup> it may be equally wise for him to swim in a municipal pool rather than one owned by a charitable organization. This last illustration exposes one of the inconsistencies in the law which causes observers to question the soundness of adhering to such a position.

### G. *Charitable Immunity in Other Jurisdictions*

Since Ohio has reached inconsistent conclusions in the area of charitable immunity, the Ohio position should be compared with the case law of other jurisdictions. As noted above,<sup>49</sup> the application of the doctrine differs from jurisdiction to jurisdiction without a discernible pattern. Very few of the states, however, have not been called upon to accept or reject it.<sup>50</sup> In a slight majority of jurisdictions, the concept has either been abrogated or never existed.<sup>51</sup> The remaining states, although holding charities to be im-

<sup>44</sup> See, e.g., *Richardson v. Doe*, 176 Ohio St. 370, 199 N.E.2d 878 (1964); *Jones v. Hawkes Hosp.*, 175 Ohio St. 503, 196 N.E.2d 592 (1964); *Andrews v. Youngstown Osteopathic Hosp. Ass'n*, 147 N.E.2d 645 (Ohio Ct. App. 1956); *Koubeck v. Fairview Park Hosp.*, 172 N.E.2d 491 (Ohio C.P. 1960).

<sup>45</sup> See, e.g., *Kelma v. St. Elizabeth's Hosp.*, 170 Ohio St. 519, 166 N.E.2d 765 (1960).

<sup>46</sup> See, e.g., *Bell v. Salvation Army*, 172 Ohio St. 326, 175 N.E.2d 738 (1961); *Blankenship v. Alter*, 171 Ohio St. 65, 167 N.E.2d 922 (1960); *Sturdevant v. Youngstown Dist. Girl Scout Council, Inc.*, 195 N.E.2d 914 (Ohio Ct. App. 1962); *Matthews v. Wittenberg College*, 113 Ohio App. 387, 178 N.E.2d 526 (1960); *Hunsche v. Alter*, 145 N.E.2d 368 (Ohio C.P. 1957).

<sup>47</sup> *Hack v. City of Salem*, 174 Ohio St. 383, 189 N.E.2d 857 (1963).

<sup>48</sup> See note 32 *supra*.

<sup>49</sup> See text accompanying notes 4-12 *supra*.

<sup>50</sup> Only Hawaii and South Dakota have no noted cases in the area. Montana has only a federal court decision, *Howard v. Sisters of Charity*, 193 F. Supp. 191 (D. Mont. 1961), which held that there was no immunity from liability. New Mexico, in a federal court decision, *Deming Ladies' Hosp. Ass'n v. Price*, 276 Fed. 668 (8th Cir. 1921) recognized immunity.

<sup>51</sup> Twenty-three states have no charitable immunity: *Alabama Baptist Bd. v. Carter*, 226 Ala. 109, 145 So. 443 (1932); *Moats v. Sisters of Charity*, 13 Alaska 546 (1952); *Ray v. Tuscon Medical Center*, 72 Ariz. 22, 230 P.2d 220 (1951); *Malloy v. Fong*, 37 Cal. 2d 356, 232 P.2d 241 (1951); *Durrey v. St. Francis Hosp., Inc.*, 46 Del. 350, 83



mune, recognize a wide variety of exceptions generally similar to those found in Ohio.<sup>52</sup> Very few jurisdictions apply the doctrine to all charities.<sup>53</sup>

Several states have mixed positions.<sup>54</sup> At least two states reinstated the immunity doctrine by statute after the courts had ruled that charities were to be liable for their torts just as any other organization.<sup>55</sup> In no state, however, has immunity been reestablished by judicial decision once the courts have abrogated it. Finally, no jurisdiction extends immunity to profit-making, charitable institutions.<sup>56</sup>

A.2d 753 (1931); *Nicholson v. Good Samaritan Hosp.*, 145 Fla. 360, 199 So. 344 (1940); *Wheat v. Latter Day Saints' Hosp.*, 78 Idaho 60, 297 P.2d 1041 (1956); *Haynes v. Presbyterian Hosp. Ass'n*, 241 Iowa 1269, 45 N.W.2d 451 (1950); *Neely v. St. Francis Hosp. & School of Nursing, Inc.*, 192 Kan. 716, 391 P.2d 155 (1964); *Mullikin v. Jewish Hosp. Ass'n*, 348 S.W.2d 930 (Ky. 1961); *Parker v. Port Huron Hosp.*, 361 Mich. 1, 105 N.W.2d 1 (1960); *Mullinger v. Evangelischer Diakonissenverein*, 144 Minn. 392, 175 N.W. 699 (1920); *Myers v. Drozda*, 180 Neb. 183, 141 N.W.2d 852 (1966); *Welch v. Frisbie Mem. Hosp.*, 90 N.H. 337, 9 A.2d 761 (1939); *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957); *Rickbeil v. Grafton Deaconess Hosp.*, 74 N.D. 525, 23 N.W.2d 247 (1946); *Gable v. Salvation Army*, 186 Okla. 687, 100 P.2d 244 (1940); *Hungerford v. Portland Sanitarium & Benevolent Ass'n*, 235 Ore. 412, 384 P.2d 1009 (1963); *McLeod v. St. Thomas Hosp.*, 170 Tenn. 423, 95 S.W.2d 917 (1936); *Sessions v. Thomas D. Dee Mem. Hosp. Ass'n*, 94 Utah 460, 78 P.2d 645 (1938); *Foster v. Roman Catholic Diocese*, 116 Vt. 124, 70 A.2d 230 (1950); *Pierce v. Yakima Valley Mem. Hosp. Ass'n*, 43 Wash. 2d 162, 260 P.2d 765 (1953); *Kojis v. Doctors' Hosp.*, 12 Wis. 2d 367, 107 N.W.2d 131 (1961).

<sup>52</sup> A total of nineteen states have held charities immune from tort liability, some by judicial decision: *St. Lukes Hosp. Ass'n v. Long*, 125 Colo. 25, 240 P.2d 917 (1952); *Cashman v. Meriden Hosp.*, 117 Conn. 585, 169 Atl. 915 (1933); *Burgess v. James*, 73 Ga. App. 857, 38 S.E.2d 637 (1946); *Moore v. Moyle*, 405 Ill. 555, 92 N.E.2d 81 (1950); *St. Vincent's Hosp. v. Stine*, 195 Ind. 350, 144 N.E. 537 (1924); *Jensen v. Maine Eye & Ear Infirmary*, 107 Me. 408, 78 Atl. 898 (1910); *Perry v. House of Refuge*, 63 Md. 20 (1885); *McDonald v. Massachusetts Gen. Hosp.*, 120 Mass. 432 (1876); *Dille v. St. Luke's Hosp.*, 355 Mo. 436, 196 S.W.2d 615 (1946); *Springer v. Federation Church*, 71 Nev. 177, 283 P.2d 1071 (1955); *Hoke v. Glen*, 167 N.C. 594, 83 S.E. 807 (1914); *Knecht v. St. Mary's Hosp.*, 392 Pa. 75, 140 A.2d 30 (1958); *Lindler v. Columbia Hosp.*, 98 S.C. 25, 81 S.E. 512 (1914); *Baptist Mem. Hosp. v. McTighe*, 303 S.W.2d 446 (Tex. Civ. App. 1957); *Norfolk Protestant Hosp. v. Plunkett*, 162 Va. 151, 173 S.E. 363 (1934); *Koehler v. Ohio Valley Gen. Hosp. Ass'n*, 137 W. Va. 764, 73 S.E.2d 673 (1952); *Bishop Randall Hosp. v. Hartley*, 24 Wyo. 408, 160 Pac. 385 (1916); and others by statute: N.J. STAT. ANN. tit. 2A, §§ 53:A-7 to -11, (Supp. 1965); R.I. GEN. LAWS ANN. § 7-1-22 (1956).

The degree of immunity varies from state to state, without logical pattern, few, if any, of the states having charitable immunity under all possible circumstances.

<sup>53</sup> New Jersey limits recovery to ten thousand dollars. Rhode Island provides immunity by operation of a state statute. Illinois and Georgia allow recovery if there is liability insurance. See cases and statutes cited notes 51-52 *supra*.

<sup>54</sup> *E.g.*, Arkansas (ARK. STAT. ANN. § 66-3240 (1966)); Louisiana (LA. REV. STAT. ANN. § 22:655 (1959)); Mississippi (unclear, shifting position).

<sup>55</sup> New Jersey and Rhode Island. See note 52 *supra*.

<sup>56</sup> See, *e.g.*, *Blankenship v. Alter*, 171 Ohio St. 65, 167 N.E.2d 922 (1960) (bingo game). *But see, e.g.*, *Cullen v. Schmidt*, 139 Ohio St. 194, 39 N.E.2d 146 (1942);

### III. INHERENT WEAKNESSES OF THE IMMUNITY CONCEPT

As indicated previously,<sup>57</sup> the Ohio courts have long recognized two general exceptions to the immunity rule and have found liability whenever the institution has been held negligent in the selection or retention of an employee or whenever an innocent third party who is a non-beneficiary of the charitable institution has been injured.<sup>58</sup> An analysis of these two exceptions as well as other special exceptions which the courts have made and applied from time to time, when compared with the bases for which the doctrine was established and has been maintained, reveals that their application logically destroys the bases for immunity even as to persons not falling within the excepted categories.

As to the trust funds of the charitable organization, even if there were the slightest possibility that they would be depleted in this era of low-cost liability insurance — unless, of course, the trust funds would have to be used in order to pay the liability insurance premiums — they would be affected in a recovery by a non-beneficiary of the charitable purpose no less than by a judgment awarded to a beneficiary. Similarly, despite the status of the party who obtains a judgment, the funds are depleted whether or not the charity was negligent in selecting or retaining any particular servant. The defenses of assumption of the risk and implied waiver of recovery rights as well as the non-application of the doctrine of respondeat superior are equally enforceable against a beneficiary and a non-beneficiary of a defendant charitable institution. Thus, it is illogical to limit recovery to non-beneficiaries.

There remains for discussion only the final basis for the immunity doctrine, that of public policy. It is a combination of the other three bases coupled with independent considerations which have long been cited by the Ohio courts as the primary basis for their decisions in this area.<sup>59</sup> In addition, it is evident that if the reasons for denying recovery are inconsistent or illogical as applied

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Rosen v. Concordia Evangelical Lutheran Church, Inc., 111 Ohio App. 54, 167 N.E.2d 671 (1960), in which the court held that the plaintiff, who had been injured on church grounds at a picnic, could not recover in the absence of a showing that the grounds were operated as a business.

<sup>57</sup> See notes 17-22 *supra* and accompanying text.

<sup>58</sup> See cases cited note 23 *supra*. See also, *e.g.*, Gibbon v. YWCA, 170 Ohio St. 280, 164 N.E.2d 563 (1960); Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410 (1956).

<sup>59</sup> See cases cited note 23 *supra*.

to the other immunity bases, they are no less illogical and inconsistent when applied to the public policy rationale.

### *A. The Changed Nature of the Charitable Institution*

It has been written that the trend of modern American tort law is directed toward the abrogation of immunity, even in the sometimes parallel immunity area of municipal law.<sup>60</sup> One reason for this movement is that the conceptual image of the charitable institution has changed with the passage of time. Modern charities in Ohio, as in other jurisdictions, are big businesses. An Ohio hospital patient, whether he has hospitalization insurance or not, pays for the services rendered. He should not have to assume the risk of negligent treatment to any greater extent than does either the person who visits him while he is confined or the person who is hospitalized but who cannot afford to pay for his treatment. It should make no difference whose swimming pool one chooses to frequent or whose bingo game or card party one attends.

### *B. The Insurance Factor*

Apart from any theoretical or conceptual reasons for the abrogation of charitable immunity lies an economic factor at least as important. Low-cost liability insurance is available no less reasonably to charitable institutions than to profit-making organizations and private individuals. Since the cost of such insurance, even at reasonable rates, would most probably be reflected in the price of services performed for its beneficiaries, the charity would very likely not be monetarily damaged. Regardless of this factor, however, the cost is inherently small.

The availability of insurance provides an economic justification upon which either the courts or the legislatures could put an end to the doctrine. Even if lawmakers insist on maintaining the concept, however, a statute requiring mandatory insurance coverage would retain the form of charitable immunity while eliminating its illogical results, thereby permitting a plaintiff to recover on a meritorious claim.

### *C. The Ohio Trend*

As was mentioned earlier,<sup>61</sup> although not all of the states have

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<sup>60</sup> See generally PROSSER, TORTS §§ 125-29 (3d ed. 1964).

<sup>61</sup> See text accompanying notes 55-56 *supra*.

abandoned the doctrine of charitable immunity, no case has been found in which a court readopted the concept once it has been discarded. In light of the decision in *Avellone v. St. John's Hosp.*,<sup>62</sup> therefore, it is unlikely that Ohio will again by judicial decision grant a hospital immunity from tort liability, although *Gibbon v. YWCA*<sup>63</sup> indicated that other charitable institutions are still entitled to protection. The courts have rendered their opinion after a balancing of the individual's right to redress of a wrong against the desire to protect charities which benefit the general public. It is submitted that the charity could take inexpensive steps to protect its resources, and once this end were accomplished, the balancing approach would no longer be valid, since the general public would lose none of whatever benefits it could derive from the continued operation of the charitable institution.

It has often been said of the United States Supreme Court that its decisions follow the national election returns.<sup>64</sup> In every major case before the Ohio Supreme Court involving a plaintiff's attempt to recover for negligence against a charitable institution, the court has announced that its decision has been made in accordance with compelling public policy, balancing one interest against another. As to hospitals, the court in 1956 found that public policy had changed.<sup>65</sup> Many observers, including Judge Putnam, concluded that if public opinion had changed as to charities, it had changed toward the full range of charitable enterprises.<sup>66</sup> Subsequent decisions have denied, however, that there has been a change in public opinion. In support of this view, courts have stated that the legislature is the proper forum for the announcement of public policy.<sup>67</sup>

Regardless of what the student of modern tort law would hope public policy on this important question to be, it is apparent that the Ohio General Assembly has definite views of its own. The *Gibbon* court pointed out that in the years immediately following

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<sup>62</sup> 165 Ohio St. 467, 135 N.E.2d 410 (1956).

<sup>63</sup> 170 Ohio St. 280, 164 N.E.2d 563 (1960).

<sup>64</sup> Although this is basically a political scientist's phrase, consider the rulings in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), which dealt a major blow to new deal legislation, and *NLRB v. Jones & Laughlin Steel Corp.* 301 U.S. 1 (1937), which was decided by virtually the same Court only two years later, following Franklin D. Roosevelt's sweeping 1936 presidential election margin.

<sup>65</sup> *Avellone v. St. John's Hosp.*, 165 Ohio St. 467, 135 N.E.2d 410 (1956). See cases cited note 31 *supra*.

<sup>66</sup> *Id.* at 479, 135 N.E.2d at 418.

<sup>67</sup> See cases cited note 46 *supra*.

the *Avellone* decision, the General Assembly took steps to clarify its conception of public policy in the area of charitable immunity.<sup>68</sup>

Although the bill was originally passed by an overwhelming majority in both houses of the General Assembly, it fell short by several votes of the requisite sixty percent majority needed to override the governor's veto.<sup>69</sup> Whether or not the statute was enacted into law is not important to this discussion. However, the original General Assembly vote indicates the legislative view concerning the question of charitable immunity. If the Ohio Supreme Court follows the election results,<sup>70</sup> and if the General Assembly's vote rather than the veto of a governor who has since been defeated in a bid for reelection adequately represents public opinion on this matter, then the supreme court cannot very well extend *Avellone* and was perhaps incorrect from a public policy standpoint in reaching its decision in that case.

In view of the legislature's position regarding the immunity issue, it is understandable that the courts continue to decide as they have in this type of case. What is not understandable, however, is the position of the General Assembly. When thinking in terms of politics rather than law, perhaps the position of the General Assembly is all too clear. Behind every elected representative stands a wide array of pressures and pressure groups seeking to influence his decisions. With the sole exception of the non-profit hospital, against which liability has already been judicially established, and proprietary municipal functions, against which the immunity barriers have been lowered, if not totally removed, the remaining immune institutions include, for example, such organizations as the

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<sup>68</sup> 170 Ohio St. at 285-86, 164 N.E.2d at 567 quotes from the Senate Bill No. 241 as follows:

A nonprofit corporation, society, or association organized exclusively for religious, charitable, educational or hospital purposes shall not be liable by reason of the acts of its servants or agents for loss or damage arising from injury to or death of a beneficiary to whatever degree of the works or services of such nonprofit corporation, society, or association, unless such injuries or death are caused by the gross negligence of the agent or servant of such corporation, society, or association acting within the scope of his employment.

Payment to a nonprofit corporation, society, or association for its works or services shall not exclude a person from being in a class of a beneficiary of such works or services.

The bill was passed in the Ohio Senate by a vote of 29 to 1 and in the House of Representatives by a 93 to 32 margin. Governor Michael DiSalle vetoed the measure, and, upon reconsideration, the Senate was 25 to 4 in favor of passage and the House vote was 64 to 22, not quite the sixty percent needed to pass a bill over the veto of the governor, but very close indeed.

<sup>69</sup> OHIO CONST. art. II, § 16.

<sup>70</sup> Judges from all levels of courts are elected rather than appointed in Ohio.

Young Men's and Young Women's Christian Associations, churches, and various veterans' groups. Several representatives and many of their constituents maintain personal memberships in one or more of these charitable organizations, a considerable number of which are represented by organized lobbies. Upon proper reflection, one could not honestly conclude that continued immunity from tort liability for any or all of these groups is in the best interests of public policy.

#### IV. CONCLUSION

A review of the Ohio decisions indicates that the judicial notion of public policy has shifted toward the abolition of charitable immunity from tort liability. This trend is unquestionably sound in light of the fact that the rationales upon which immunity has rested have been rendered ineffectual by exceptions. It is hoped that the General Assembly will either acquiesce in the judicial movement toward abolition or take the initiative by enacting legislation which will eliminate a rule of law which is no longer justified.

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