

Charities - Tort Liability of Eleemosynary Institutions to Recipients of Their Services

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registry laws shall apply.⁴ This position is further supported by the few decisions in point.⁵

Under the Chandler Act the procedure requiring recordation by the trustee is clearly set out: Ten days after his qualification the trustee must record, in each county where the bankrupt owns real property, a certified copy of the order approving his bond.⁶ Such document, when recorded, shall impart the same notice that a deed or other instrument affecting property, if recorded, would impart.⁷

Where, as in the principal case, the trustee fails to record the documents, as directed by the Act, and a loss occurs, an action should lie against the trustee upon his official bond. Section 50 (b)⁸ of the Act provides that this bond shall be conditioned on the faithful performance of his official duties, one of which is to record the order approving his bond, and that an action may be brought on such bond by any person injured.⁹

W. J. B.

CHARITIES—TORT LIABILITY OF ELEEMOSYNARY INSTITUTIONS TO RECIPIENTS OF THEIR SERVICES—An action was brought against a charitable hospital for injuries sustained by a patient through the negligence of the institution's agents. The defense was that a charitable institution cannot be subjected to tort liability. *Held*, such institutions are exempt from liability for injuries to beneficiaries regardless of whether the employees negligently causing such injuries were selected with due care. *Wilcox v. Idaho Falls Latter Day Saints Hospital*, 59 Idaho 350, 82 P. (2d) 849 (1938).

By the great weight of American authority, eleemosynary

4. Section 21(f) of the Chandler Act provides: "A certified copy of any order or decree entered in a proceeding under this title . . . if recorded, shall impart the same notice that a deed or other instrument affecting property, if recorded, would impart." 52 Stat. 853, 11 U.S.C.A. 44(f) (Supp. 1939).

5. *Beach v. Faust*, 2 Cal. (2d) 290, 40 P. (2d) 822 (1935); *Vombrack v. Wavra*, 331 Ill. 508, 163 N.E. 340 (1928). The court in the latter case said: "Rules concerning a transfer of property are primarily a matter of state regulation. . . . In the absence of specific or particular provisions of the Bankruptcy Act, the law of the state determines the efficiency of acts and transactions to effect the transfer of the title to property, the time of the passing of the title, and whether the recording or filing of an instrument is required, and, if so, as to whom it will be void for the failure to record it." (331 Ill. at 511, 163 N.E. at 342.) The court further pointed out that it was manifest that the provisions of the act were designed to afford notice to third persons and to provide protection to those relying upon the public records.

6. Chandler Act, § 47(c), 52 Stat. 861, 11 U.S.C.A. § 75(c) (Supp. 1939).

7. Chandler Act, § 21(f), 52 Stat. 853, 11 U.S.C.A. § 44(f) (Supp. 1939).

8. Chandler Act, § 50(b), 52 Stat. 863, 11 U.S.C.A. § 78 (Supp. 1939).

9. Chandler Act, § 50(n), 52 Stat. 864, 11 U.S.C.A. § 78 (Supp. 1939).

institutions¹ are immune from tort liability to recipients of their services;² but there is a wide divergence of opinion as to the underlying basis of this immunity.³ In this country, freedom from tort liability was first based on the theory that the monies of a charity are a trust fund which should not be depleted for purposes other than those contemplated by the trust.⁴ Many courts found that if this theory were extended to its logical conclusion, too broad and too absolute an immunity would be granted.⁵ In searching for a more restricted basis for immunity, the courts in some jurisdictions applied principles of waiver,⁶ and stated that a person who accepts the benefits of a charity voluntarily enters into a relationship which exempts his benefactor from liability.⁷

1. The purpose of a corporation and its manner of operating determine its charitable character. See *Silva v. Providence Hospital of Oakland*, 87 P. (2d) 374, 375 (Cal. App. 1939), and cases therein cited. Cf. *Maretick v. South Chicago Community Hospital*, 297 Ill. App. 488, 493, 17 N.E. (2d) 1012, 1015 (1938). But the fact that a corporation's income exceeds its operating expenses does not make it any the less a charitable corporation if the excess of income be used for carrying on the charitable purposes for which it was organized. *Miller v. Mohr*, 198 Wash. 619, 89 P. (2d) 807 (1939).

2. For a long list of some of the later authorities in support of the non-liability of charitable institutions for the negligence of their agents to a beneficiary of its charity, see *Andrew v. Young Men's Christian Ass'n of Des Moines*, 284 N.W. 186, 192 (Iowa 1939). See also Annotations in (1921) 14 A.L.R. 572 and (1937) 109 A.L.R. 1199. A wrong consisting of making false and fraudulent representations comes within the rule that charitable institutions are not responsible for the torts of its agents. *Boardman v. Burlingame*, 123 Conn. 646, 197 Atl. 761 (1938).

But, for an early case holding charities responsible in tort, see *Glarin v. Rhode Island Hospital*, 12 R.I. 411, 34 Am. Rep. 675 (1879). In accord: *Tucker v. Mobile Infirmary*, 191 Ala. 572, 68 So. 4, L.R.A. 1915D, 1167 (1915). In *Rhodes v. Millsaps College*, 179 Miss. 596, 176 So. 253 (1937), the court held that a charitable institution entering into an independent business apart from its charity, even though to secure funds for its charitable purposes, is liable in tort.

3. For an excellent discussion of the conflicts in the decisions on this subject, see *Andrews v. Young Men's Christian Ass'n of Des Moines*, 284 N.W. 186 (Iowa 1939).

4. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529 (1876). In brief, the "trust fund" theory is as follows: all funds donated to a charity are held in trust for a particular charitable purpose; it is a breach of trust to apply them to any other purpose; the payment of damages is not a purpose contemplated by the trust; and therefore, the trust funds must not be diverted for such payment.

5. "Some of them . . . fearful of a rule which practically placed charitable institutions above and beyond the law with respect to non-liability for their negligence, began to modify the rule. . . . If the trust fund doctrine is sound, an institution, engaged in public, charitable, eleemosynary, or religious work, could not be held responsible in tort to any plaintiff. . . ." *Andrews v. Young Men's Christian Ass'n of Des Moines*, 284 N.W. 186, 189 (Iowa 1939).

6. *Powers v. Massachusetts Homeopathic Hospital*, 109 Fed. 294 (C.C.A. 1st, 1901); *Silva v. Providence Hospital of Oakland*, 87 P. (2d) 374 (Cal. App. 1939).

7. *Bardinelli v. Church of All Nations*, 23 Cal. App. 713, 73 P. (2d) 1264 (1937); *Silva v. Providence Hospital of Oakland*, 87 P. (2d) 374 (Cal. App. 1939).

Other courts have held charities free from liability for tortious acts by refusing to apply the doctrine of *respondet superior* to non-profit institutions.⁸ In the last analysis, however, the immunity of charitable institutions, if defensible at all, must be grounded on considerations of public policy.⁹ Judges have felt that persons anxious to donate to these institutions should not be discouraged by fear that the money intended for charity will be dissipated in damage suits. Some courts, realizing the weaknesses of the other theories, have openly based their decisions upon public policy alone.¹⁰ But many have hesitated to deny recovery solely on

8. *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595, 31 L.R.A. 224 (1895). See also *Miller v. Mohr*, 198 Wash. 619, 633, 89 P. (2d) 807, 813 (1939). In *Thibodaux v. Sisters of Charity of the Incarnate Word*, 11 La. App. 423, 424, 123 So. 466, 467 (1929), the court quoted with approval the following language from *Hearns v. Waterbury Hospital*, supra: "On the whole, substantial justice is best served by making a master responsible for the injuries caused by his servant acting in his service, when set to work by him to prosecute his private ends, with the expectation of deriving from that work private benefit. This has at times proved a hard rule, but it rests upon a public policy too firmly settled to be questioned. We are now asked to apply this rule, for the first time, to a class of masters distinct from all others, and who do not and cannot come within the reason of the rule. . . . We think the law does not justify such an extension of the rule of *respondet superior*."

But, in *Mulliner v. Evangelischer Diakonissenverein*, 144 Minn. 392, 396-397, 175 N.W. 699, 700-701 (1920), the court stated: "Another reason urged is that such corporations do not come within the main purpose of the rule of public policy which supports the doctrine of *respondet superior* because they derive no gain from the service rendered. This contention does not seem to us a just one. This corporation must administer its functions through agents as any other corporation does. It harms and benefits third parties exactly as they are harmed or benefited by others. To the person injured the loss is the same as though the injury had been sustained in a private hospital for gain. . . . We do not approve the public policy, which would require the widow and children of deceased rather than the corporation, to suffer the loss incurred through the fault of the corporation's employes, or in other words, which would compel the persons damaged to contribute the amount of their loss to the purposes of even the most worthy corporation."

9. "All of these theories have to a greater or less extent entered into the formulation of the rule of law which has now become too well settled to be questioned or overturned. Underlying all of them is the matter of public policy, and it is upon this that the rule may be said finally to rest." *Ettlinger v. Trustees of Randolph-Macon College*, 31 F. (2d) 869, 872 (C.C.A. 4th, 1929).

10. *Ettlinger v. Trustees of Randolph-Macon College*, 31 F. (2d) 869 (C.C.A. 4th, 1929); *Boardman v. Burlingame*, 123 Conn. 646, 197 Atl. 761 (1938); *Kolb v. Monmouth Memorial Hospital*, 116 N.J.L. 118, 182 Atl. 822 (1936); *Vermillion v. Woman's College of Due West*, 104 S.C. 197, 88 S.E. 649 (1916). Cf. *Gamble v. Vanderbilt University*, 138 Tenn. 616, 200 S.W. 510, L.R.A. 1918C, 875 (1918).

In *Ettlinger v. Trustees of Randolph-Macon College*, supra, the court used this language: "A policy of the law which prevents him who accepts the benefit of a charity from suing it for the torts of its agents and servants, and thus taking for his private use the funds which have been given for the benefit of humanity, which shields gifts made to charity from 'the hungry maw of litigation' and conserves them for purposes of the highest importance to the state, carries on its face its own justification, and without the aid of metaphysical reasoning, commends itself to the wisdom of mankind. It is significant that almost without exception the courts, while giving different reasons for the rule, have not hesitated to apply it where the one

grounds of public policy; and, by attempting to rest their conclusions on a doctrinal basis, have been faced with embarrassing inconsistencies.¹¹

It is submitted, however, that even the "public policy" theory is an unsatisfactory basis for the granting of immunity. At the present time, "the rule is unjust, anti-social and unsuited to modern conditions, and . . . should be abandoned."¹²

The first case on this subject to arise in Louisiana was *Jordan v. Touro Infirmary*.¹³ The defendant hospital was sued for injuries resulting from a negligent act committed by a nurse while performing duties in an operating room under a surgeon's orders.¹⁴ The court pointed out that the nurse was not a servant of the hospital at the time the negligent act was committed. It then went further, and proceeded to state that, even if she were a servant, a charitable agency is not liable in tort to recipients of its services.¹⁵ The *dictum* in the *Jordan* case has been accepted and followed in subsequent decisions.¹⁶

The Louisiana cases are uniform in holding that the status of the injured party as a paying patient is immaterial in determining liability;¹⁷ the character of the charitable institution is

seeking to enforce liability against a charitable institution is one who has accepted benefits from it."

11. See authorities cited in notes 2 and 3, *supra*.

12. Feezer, *The Tort Liability of Charities* (1928) 77 U. of Pa. L. Rev. 191.

13. 123 So. 726 (La. App. 1922).

14. No decision of the Louisiana Supreme Court dealing with the tort liability of charities was found by this writer.

15. See *Jordan v. Touro Infirmary*, 123 So. 726, 727-731 (La. App. 1922).

16. *Foye v. St. Francis Sanitarium and Training School for Nurses*, 2 La. App. 305 (1925); *Thibodaux v. Sisters of Charity of the Incarnate Word*, 11 La. App. 423, 123 So. 466 (1929). But see *Rome v. London & Lancashire Indemnity Co.*, 169 So. 132, 136 (La. App. 1936).

No Louisiana decision has extended the doctrine so as to grant immunity to charitable corporations for torts causing injuries to persons who are not the recipients of their services. See *Bougon v. Volunteers of America*, 151 So. 797 (La. App. 1934). In accord: *Unser v. Baptist Rescue Mission*, 157 So. 298 (La. App. 1934). Nor has the rule been extended to protect insurance companies which underwrite the liability of charitable institutions; they cannot avail themselves of defenses provided for the purpose of keeping eleemosynary agencies from being hindered in the discharge of their charitable functions. *Messina v. Societe Francaise de Bienfaisance*, 170 So. 801 (La. App. 1936). Cf. *Vanderbilt University v. Henderson*, 127 S.W. (2d) 284 (Tenn. App. 1938).

17. *Jordan v. Touro Infirmary*, 123 So. 726 (La. App. 1922); *Foye v. St. Francis Sanitarium and Training School for Nurses*, 2 La. App. 305 (1925); *Thibodaux v. Sisters of Charity of the Incarnate Word*, 11 La. App. 423, 123 So. 466 (1929); *Bougon v. Volunteers of America*, 151 So. 797 (La. App. 1934). In accord: *Boardman v. Burlingame*, 123 Conn. 646, 197 Atl. 761 (1938); *Miller v. Mohr*, 198 Wash. 619, 89 P. (2d) 807 (1939). But see *England v. Hospital of the Good Samaritan*, 70 P. (2d) 692, 693 (Cal. App. 1937). Cf. *Robertson v. Executive Committee of Baptist Convention*, 55 Ga. App. 469, 190 S.E. 432 (1937).

not affected by the imposition of a charge upon those able to pay.

From the Louisiana jurisprudence, it is apparent that, regardless of the precise ground of immunity,¹⁸ a charity is not liable for the torts of qualified servants. There is no Louisiana decision dealing with the liability of a charitable institution for the negligence of its managers in selecting incompetent subordinate agents. In a number of cases there are sporadic statements to the effect that a charitable hospital is not liable for the torts of servants *selected with due care*.¹⁹ The significance of such statements is not clear. One might infer that liability will be imposed where there is a lack of due care in the selection of servants.²⁰ On the other hand, it might be contended that such statements were merely precautionary and bounded the issue presented by the particular facts under consideration.²¹

F. H. O'N.

CHATTEL MORTGAGE—SECURITY CLAUSE AS A POTESTATIVE CONDITION—The vendee of an automobile executed notes secured by a chattel mortgage which the vendor transferred to the plaintiff. Acting under a clause of the mortgage which gave the mortgagee the right to declare the notes immediately due and payable if he deemed himself insecure, the plaintiff obtained an order of executory process against the vendee. *Held*, the clause in question is null as a potestative condition under Articles 2024 and 2034 of the Civil Code. *Motors Securities Co., Inc. v. Tullos*, 178 So. 634 (La. App. 1938).

18. All of the various theories of immunity are discussed in the Louisiana cases; from the cases as a whole it is not clear upon which theory Louisiana courts base their decisions.

19. See *Jordan v. Touro Infirmary*, 123 So. 726, 730-731 (La. App. 1922); *Thibodaux v. Sisters of Charity of the Incarnate Word*, 11 La. App. 423, 428, 123 So. 466, 470 (1929).

20. In the following cases, where the servants were not selected with due care, the charity was held liable: *St. Paul's Sanitarium v. Williamson*, 178 Tex. Civ. App. 108, 164 S.W. 36 (1914); *Roberts v. Ohio Valley General Hospital*, 198 W.Va. 476, 127 S.E. 318 (1925). Cf. *Lindler v. Columbia Hospital of Richland County*, 98 S.C. 25, 81 S.E. 512 (1914). See also *Rhodes v. Millsaps College*, 179 Miss. 596, 618-620, 176 So. 253, 255 (1937).

21. As was said by the Massachusetts court of a similar statement in *Roosen v. Peter Bent Brigham Hospital*, 235 Mass. 66, 70, 126 N.E. 392, 394 (1920): "It simply showed the extent of the decision. It does not purport to be a comprehensive or exclusive statement. The correlative assertion, to the effect that there is liability of the hospital in cases where there has been carelessness on the part of the managers in the selection of servants and agents, is neither expressed nor implied." For cases holding charitable agencies immune from liability for negligence in the selection of agents, see *Ettlinger v. Trustees of Randolph-Macon College*, 31 F. (2d) 869 (C.C.A. 4th,