THE DIMINISHING DOCTRINE OF CHARITABLE IMMUNITY: AN ANALYSIS

The doctrine of charitable immunity, once sustained in one form or another by a majority of the states,[1] has lost considerable support and now represents a minority viewpoint.[2] Generally, the doctrine provides that a nongovernmental charitable organization[3] is not liable for injury or damage resulting from its negligence.[4] In its application, however, few courts have ever recognized the doctrine in this pure, unqualified form.[5] Instead, the courts have so inconsistently qualified, refined, limited and restricted the doctrine that its existence has become a study in chaos and confusion:[6]

> Paradoxes of principle, fictional assumptions of fact and consequence, and confused results characterize judicial disposition of these [tort] claims. From full immunity, through varied but inconsistent qualifications to general responsibility is the gamut of decision. The cases are almost riotous with dissent. Reasons [for sustaining the doctrine] are even more varied than results. These are earmarks of law in flux. They indicate something wrong at the beginning or that something has become wrong since then. They also show that correction, though in process, is incomplete.[7]

The purpose of this Note is to examine both the historical development of the doctrine of charitable immunity and the present construction and application of the doctrine by the courts.

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1 Annot., 25 A.L.R.2d 29 (1952).

2 *See, e.g.*, Rabon v. Memorial Hosp. Inc., 269 N.C. 1, 152 S.E.2d 485 (1967).

3 In the law of trusts, an organization is held to be charitable if it is established primarily for the relief of poverty, the advancement of education or religion, the promotion of health, or the furtherance of governmental or municipal functions. 4 A. SCOTT, TRUSTS §§ 369-73 (3d ed. 1967).

4 It should be noted that this immunity arises not from the *application* of general principles of tort law, but because such charitable organizations are *exempt* from the application of these principles.

5 "It is doubtful that the so-called 'rule' of full immunity ever represented the prevailing state of decision in this country. Conflict has existed from the beginning." President & Directors of Georgetown College v. Hughes, 130 F.2d 810, 817 (D.C. Cir. 1942).

6 *See, e.g.*, Ray v. Tucson Medical Center, 72 Ariz. 22, 26, 230 P.2d 220, 222 (1951), where the court stated:

> [A] study of the decisions of the various courts of the United States . . . strongly suggest [*sic*] the conclusion that the wishes of the individual members of the courts, rather than logical reasoning, have fathered the concept that corporate charitable institutions occupy a legal status so different from that of other corporate entities that they should be immune from liability for the torts of their servants. In an effort to distinguish them from other corporations the courts have resorted to subtle refinements and sophistry. They have invoked legal fictions and engrafted restrictions upon principles of law so well established and so fundamentally just that their soundness can no longer be questioned. The confused results of these decisions reached by reasons more confusing, lead us to exlaim with Pascal "How ludicrous is reason, blown with a breath in every direction!"

7 President & Directors of Georgetown College v. Hughes, 130 F.2d 810, 812 (D.C. Cir. 1942).

I. Underlying Principles

At common law, negligent or tortious conduct generally resulted in liability. Immunity was the exception.[8] Furthermore, charity,[9] by itself, was not sufficient to render the donor of the charity immune.[10] For example, where a doctor undertook to care for a patient gratuitously, he was still under a duty to use reasonable care, and where the patient suffered from the doctor's negligence the doctor was liable.[11] Thus, the doctrine of charitable immunity has been applied only to charity dispensed by or through a formal charitable institution such as a nonprofit corporation or a trust.

At the time the doctrine of charitable immunity made its appearance, and for a number of years thereafter, there was an urgent public need for institutional charities (especially hospitals), and the public interest demanded that they be encouraged. Therefore, notwithstanding the rationale used by the courts to allow such organizations to circumvent the general rule of liability, it is probably correct to say that a keen judicial awareness of this public need existed in those jurisdictions which sustained the doctrine. It is also probable that the continuing trend toward nonrecognition of the doctrine of charitable immunity was generated by a new public policy which, instead of seeking primarily to encourage the expansion of charitable institutions by affording them immunity, now emphasizes the welfare of the individual who is injured by the negligence of such an institution.

II. Origin

The doctrine of charitable immunity in the United States arose as a result of an ill-conceived and short-lived English decision. In the case of *Feoffees of Heriot's Hospital v. Ross*,[12] Lord Cottenham, relying on dicta in the 1839 case of *Duncan v. Findlater*,[13] stated that damages should not be awarded from a charitable trust fund since to do so would thwart the intention of the donor of the fund by allowing application of trust funds to purposes entirely different from those for which the trust was established. This case was followed in the 1861 case of *Holliday v. St. Leonard's*,[14] wherein the court refused to hold a public trust liable for injuries caused by a defect in a highway under its control.

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[8] *Id.*

[9] Charity, in the legal sense, is a gift for the benefit of an indefinite number of persons, either to bring them under the influence of education or religion, to relieve them from disease or suffering, to assist them to establish themselves in life, or to build and maintain public buildings or works or otherwise lessen the burdens of government. Johnson v. South Blue Hill Cemetery Ass'n, 221 A.2d 281 (Me. 1966).

[10] In President & Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942), the court stated: "Charity suffereth long and is kind, but in the common law it cannot be careless. When it is, it ceases to be kindness and becomes actionable wrongdoing."

[11] W. Prosser, Torts § 54 (3d ed. 1964).

[12] 8 Eng. Rep. 1508 (1846).

[13] 7 Eng. Rep. 934 (1839).

[14] 142 Eng. Rep. 769 (1861).

In 1866, however, the *Heriot's Hospital* case was repudiated in England in *Mersey Docks v. Gibbs*,[15] which held that the *Duncan* case only stood for the proposition that a trustee was not liable for the negligence of persons who were not his servants, and that the dicta[16] of Lord Cottenham in *Heriot's Hospital* was not binding upon the House of Lords. In the *Mersey Docks* case Lord Westbury stated, "It is much more reasonable, in such a case, that the trust or corporate property should be amenable to the individual injured, because there is then no failure of justice . . . ."[17]

It was not until after the repudiation of charitable immunity in England that the doctrine first arose in the United States. In the 1876 case of *McDonald v. Massachusetts General Hospital*,[18] the Massachusetts court—in sole reliance on *Holliday v. St. Leonard's*—[19] held that funds of a charitable hospital could not be diminished by a charity patient's claim for damages resulting from negligent treatment by one of the hospital's doctors if reasonable care had been used in selecting the doctor. Later, in the case of *Perry v. House of Refuge*,[20] the Maryland court held that the funds of the defendant charitable institution could not be used to compensate an inmate for an assault committed upon him by one of the defendant's officers. The court cited the *Heriot's Hospital* case in support of its holding. At the time these decisions were handed down, both of these American courts were apparently unaware that the sole authorities for their holdings had been repudiated in England.

Nevertheless, these two decisions established the doctrine of charitable immunity in the United States and represented the genesis of the circuitous trail of judicial confusion along which the doctrine has traveled. In applying the doctrine, few courts have resorted to any one theory with consistency, and it is impossible to find a common thread of logic in the decisions.[21]

III. Theories Supporting Immunity

The doctrine of charitable immunity was largely judicially-contrived,[22] and in jurisdictions which followed (or still follow) the doctrine, the decisions relied for support on one or more of five theories.

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15 11 Eng. Rep. 1500 (1866).

16 The rule in *Heriot's Hospital* dealt only with damages for breach of trust.

17 Mersey Docks v. Gibbs, 11 Eng. Rep. 1500, 1518 (1866). In Foreman v. Mayor of Canterbury, 6 Q.B. 214 (1871), the court held that the *Mersey* case also overruled the *Holliday* case. For the present English position, which fails to recognize charitable immunity altogether, *see* Gilbert v. Corporation of Trinity House, 17 Q.B. 795 (1886).

18 120 Mass. 432, 21 Am. Rep. 529 (1876).

19 142 Eng. Rep. 769 (1861).

20 63 Md. 20, 52 Am. Rep. 495 (1885).

21 "Even the most cursory research makes it apparent that there is no ground upon which this doctrine of nonliability has been rested by one court that has not been assailed and criticized at length by some other court, notwithstanding the fact that both arrive at the same conclusion in their decisions." Gable v. Salvation Army, 186 Okla. 687, 690, 100 P.2d 244, 246 (1940).

22 ***But see*** statutes cited notes 77-79 *infra*.

A. *Trust Fund Theory*

The first and oldest[23] of these theories is known as the "trust fund" theory. Under this theory, the courts note that since funds of the charity are held in trust, immunity should be allowed because: (1) the imposition of liability might destroy or hamper the usefulness of charities;[24] (2) to hold otherwise would thwart the donor's intent by allowing application of trust funds to purposes other than those for which the donor established the trust, and to persons not within the intended class of beneficiaries;[25] (3) it is beyond the power of trustees to divert trust funds for payment of damages, and therefore the court should not allow this to happen indirectly;[26] and (4) trust funds set apart for a particular purpose cannot be taken upon execution.[27]

Thus, where a wife sued a charitable hospital whose employees had negligently caused the death of her husband, the Michigan supreme court refused to permit recovery and stated that a contrary holding might result in destruction of the trust fund and permit diversion of funds from the purposes for which they were given.[28] The court concluded:

> Charitable bequests cannot be thus thwarted by negligence for which the donor is in no manner responsible. . . . [T]he law jealously guards the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed in its execution. The trustees of this fund could not by their own direct act divert it from the purpose for which it was given . . . . It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employés, though such acts result in damage to an innocent beneficiary.[29]

The trust fund theory, however, has been criticized and rejected by courts which have refused to recognize charitable immunity at all,[30] as well as by those which have upheld immunity on other theories,[31] because the theory is not supported by the law of trusts, and because the obligation of a charity to apply its funds only to charitable purposes is no different from the obligation of any business corporation to apply its funds to purposes for which the corporation

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[23] Haynes v. Presbyterian Hosp. Ass'n, 241 Iowa 1269, 45 N.W.2d 151 (1950).

[24] Bodenheimer v. Confederate Memorial Ass'n, 68 F.2d 507 (4th Cir. 1934); Downs v. Harper Hosp., 101 Mich. 555, 60 N.W. 42 (1894); Southern Methodist Univ. v. Clayton, 142 Tex. 179, 176 S.W.2d 749 (1944).

[25] Parks v. Northwestern Univ., 218 Ill. 381, 75 N.E. 991 (1905); Fire Ins. Patrol v. Boyd, 120 Pa. 624, 15 A. 553 (1888).

[26] Fordyce & McKee v. Woman's Christian Nat'l Library Ass'n, 79 Ark. 550, 96 S.W. 155 (1906).

[27] McLeod v. St. Thomas Hosp., 170 Tenn. 423, 95 S.W.2d 917 (1936). Some jurisdictions which have taken this view have held that, although a plaintiff may maintain an action in negligence against a charitable institution, the doctrine of charitable immunity restricts execution thereunder to property of the charity not directly used in the operation of the organization. O'Quinn v. Baptist Memorial Hosp., 184 Tenn. 570, 201 S.W.2d 694 (1947). *See also* Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950).

[28] Downs v. Harper Hosp., 101 Mich. 555, 60 N.W. 42 (1894).

[29] *Id.* at 559-60, 60 N.W. at 43.

[30] Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951).

[31] Andrews v. Y.M.C.A., 226 Iowa 374, 284 N.W. 186 (1939).

was organized.[32] Furthermore, the theory has been rejected for lack of statistical support of the hypothesis that abrogation of immunity would hinder the operation of charities. The increased use of liability insurance by charitable organizations has also had its impact on some courts which have examined the theory. In the leading case of *President & Directors of Georgetown College v. Hughes*,[33] the court noted:

> No statistical evidence has been presented to show that the mortality or crippling of charities has been greater in states which impose full or partial liability than where complete or substantially full immunity is given. Nor is there evidence that deterrence of donation has been greater in the former. Charities seem to survive and increase in both, with little apparent heed to whether they are liable for torts or difference in survival capacity.
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> Further, if there is danger of dissipation, insurance is now available to guard against it and prudent management will provide the protection. It is highly doubtful that any substantial charity would be destroyed or donation deterred by the cost required to pay the premiums. While insurance should not, perhaps, be made a criterion of responsibility, its prevalence and low cost are important considerations in evaluating the fears, or supposed ones, of dissipation or deterrence.[34]

B. *Inapplicability of Respondeat Superior*

Where employees of a charitable organization have acted negligently, some courts have based charitable immunity on the proposition that the doctrine of respondeat superior is not applicable to a charity, and therefore the charity is not liable for the negligence of its servants.[35]

> This contention is bottomed upon the thought that the rule has application only where the master derives some profit or advantage to himself from what his servant does, and since a charitable institution makes no personal pecuniary profit from the endeavors of its servants, the rule has no application to it, and it is not responsible for their negligent acts.[36]

Other courts, in disposing of suits against charitable hospitals, have stated that respondeat superior does not apply to such charitable organizations because these organizations undertake only to *procure* competent personnel (doctors and nurses), who then proceed to act not as agents of the hospital, but as independent contractors.[37] Thus, the charitable hospital is liable only for its "corporate negligence," which is negligence in selecting or retaining such personnel.[38]

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32 Cohen v. General Hosp. Soc'y of Conn., 113 Conn. 188, 154 A. 435 (1931).
33 130 F.2d 810 (D.C. Cir. 1942).
34 *Id.* at 823-24.
35 Crossett Health Center v. Croswell, 221 Ark. 874, 256 S.W.2d 548 (1953); Peden v. Furman Univ., 155 S.C. 1, 151 S.E. 907 (1930).
36 Andrews v. Y.M.C.A., 226 Iowa 374, 380, 284 N.W. 186, 190 (1939).
37 Schloendorff v. Soc'y of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914).
38 Miller v. Sisters of St. Francis, 5 Wash. 2d 204, 105 P.2d 32 (1940).

Although some jurisdictions still support the theory that the doctrine of respondeat superior does not apply to charitable organizations by holding that such organizations are liable only for corporate negligence,[39] this theory appears logically weak and has been severely criticized in some jurisdictions.[40] The New York Court of Appeals has stated:

> The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and manual workers . . . . Certainly the person who avails himself of "hospital facilities" expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility.[41]

The theory has also been attacked by those courts which have recognized that the application of the doctrine of respondeat superior depends upon the existence of a master-servant relationship at the time of the negligent act, not upon whether the master derived any pecuniary benefit from the relationship.[42]

C. *Implied Waiver*

The implied waiver theory has been applied by some courts to sustain the doctrine of charitable immunity in cases where the injured plaintiffs were beneficiaries of the charitable organizations. This theory rests upon the proposition that:

> [O]ne who becomes a beneficiary of the charity does so on the implied assent or condition that the trust property is not available to him for compensation in the event of his injury through the negligence of the trustees or their servants. In other words he [the beneficiary] enters into a relationship with his benefactor which exempts the latter from such responsibility. He assumes the risk in consideration of the gratuitous service rendered him.[43]

Thus, the Supreme Court of Idaho, in holding the defendant, a charitable hospital, not liable for burns negligently inflicted upon a two year old patient by one of the defendant's nurses, stated:

> The doctrine [implied waiver theory] is that one who accepts the benefit either of a public or private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if his benefactor has used due care in selecting those servants. In such cases there is an assumption of risk by the patient who *seeks* and receives the

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[39] Baptist Memorial Hosp. v. McTighe, 303 S.W.2d 446 (Tex. Civ. App. 1957).
[40] Rabon v. Rowan Memorial Hosp. Inc., 269 N.C. 1, 152 S.E.2d 485 (1967).
[41] Bing v. Thunig, 2 N.Y.2d 656, 666-67, 143 N.E.2d 3, 8 (1957).
[42] Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951); Widell v. Holy Trinity Catholic Church, 19 Wis. 2d 648, 121 N.W.2d 249 (1963).
[43] Andrews v. Y.M.C.A., 226 Iowa 374, 381, 284 N.W. 186, 190 (1939).

services of a charity.[44]

The waiver theory has also been stretched to prevent recovery by one who not only was a paying patient at the defendant hospital, but who had no actual knowledge at the time he entered the hospital that the defendant was a charity hospital.[45]

That the waiver theory rests solely on legal fiction and is completely devoid of logic seems apparent. To say that one who enters a charitable hospital impliedly agrees that he will not hold the hospital liable for injuries he may suffer as a result of the hospital's negligence is contrary to reality. This theory becomes even more tenuous where the patient enters the institution unconscious or injured, or where the patient is a minor or insane. Furthermore, even where one enters a hospital with knowledge of its charitable character, but agrees to pay the entire cost of his treatment, certainly he is paying to receive negligence-free treatment.

For the above reasons, the implied waiver theory has been rejected in jurisdictions which view waiver as a voluntary and intentional relinquishment of a known right.[46]

D. *Governmental Immunity*

Some cases have held that since a private charitable organization performs functions which are so closely related to legitimate governmental functions, they should enjoy the same immunity which the state does.[47] Accordingly, the Supreme Court of Wisconsin, in holding a charitable hospital not liable for injuries to a patient resulting from the negligence of the hospital's staff, stated:

> The basis of the rule adopted by this court exempting charitable hospitals from liability for the negligence of their servants is . . . that, because these hospitals perform a quasi public function, akin to that performed by municipalities in performing governmental functions, justice and public policy require that the doctrine of respondeat superior shall not be applied.[48]

Most courts which have examined the governmental immunity theory, however, have held that it is insufficient to exempt a charity from liability.[49] The cases utilizing this theory arose at a time when state and local governments were

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[44] Wilcox v. Idaho Falls Latter Day Saints Hosp., 59 Idaho 350, 361, 82 P.2d 849, 853-54 (1938) (emphasis added).

[45] Weston's Adm'x v. Hospital of St. Vincent of Paul, 131 Va. 587, 107 S.E. 785 (1921).

[46] *See, e.g.*, Wendt v. Servite Fathers, 332 Ill. App. 618, 76 N.E.2d 342 (1947).

[47] In Jurjevich v. Hotel Dieu, 11 So. 2d 632, 638, (La. App. 1943), the court stated: The dispensing of charity in a community may be said to be of the utmost importance in the promotion of the public welfare, one of the primary purposes for which all governments are organized and to the extent that such institutions administer to the indigent sick, they are discharging governmental functions and, therefore, can be said to merit especial consideration.

[48] Schumacher v. Evangelical Deaconess Soc'y of Wis., 218 Wis. 169, 172, 260 N.W. 476, 477 (1935).

[49] Hewett v. Woman's Hosp. Aid Ass'n, 73 N.H. 556, 64 A. 190 (1906); Gable v. Salvation Army, 186 Okla. 687, 100 P.2d 244 (1940).

immune from tort liability. Therefore, the advent of state tort claims acts has made this theory quite useless today.

E. *Public Policy*

Charitable immunity has also been based upon general considerations of public policy.[50] Rather than comprising a true theory, however, these considerations may be more accurately described as reasons for permitting immunity without resort to any theoretical justification on which to base it. Thus, the Supreme Court of Iowa in the case of *Andrews v. Y.M.C.A.*,[51] concluded:

> The various doctrines which have been advocated in support of the immunity which we are considering, other than the public policy theory, have little of inherent or real merit to recommend them. They are but legal fictions which the courts have announced to make effective an immunity which they have conceived to be a demand of sound public policy.[52]

Generally, courts which have based charitable immunity on public policy grounds have held that it is better for the community and the public in general to require the injured individual to bear the loss rather than place the burden upon the negligent charitable organization.[53] It is interesting to note, however, that even among the courts which have relied upon this theory, there has been no uniformity or consistency as to the degree of immunity which public policy demands. Thus, consideratons of public policy have been relied upon to sustain complete immunity,[54] as well as immunity under various limitations and qualifications.[55]

As previously noted, however, most of these decisions were handed down at a time when charities operated on a small scale and were organized as private rather than corporate concerns. During this period it was felt that these charities required the protective shield of immunity in order to prosper and expand. Today, the increased size and financial strength of charitable organizations as well as the existence of liability insurance seems to lend little support to a public policy which favors charitable immunity.

Some jurisdictions, although refusing to permit absolute immunity, have nevertheless resorted to the above theories to sustain a qualified or limited immunity based upon such considerations as whether the victim of the charity's negligence was a servant,[56] a stranger,[57] or a beneficiary;[58] whether the charity itself was negligent in its hiring policies;[59] or whether the plaintiff's in-

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50 Vermillion v. Woman's College of Due West, 104 S.C. 197, 88 S.E. 649 (1916).
51 226 Iowa 374, 284 N.W. 186 (1939).
52 *Id.* at 412, 284 N.W. at 206.
53 Bond v. Pittsburgh, 368 Pa. 404, 84 A.2d 328 (1951).
54 *Id.*
55 Ettlinger v. Trustees of Randolph-Macon College, 31 F.2d 869 (4th Cir. 1929).
56 Edwards v. Hollywood Canteen, 27 Cal. 2d 802, 167 P.2d 729 (1946).
57 Viosca v. Touro Infirmary, 170 So. 2d 222 (La. App. 1964).
58 Wiklund v. Presbyterian Church of Clifton, 90 N.J. Super. 335, 217 A.2d 463 (1966).
59 Miller v. Sisters of St. Francis, 5 Wash. 2d 204, 105 P.2d 32 (1940).

juries resulted from the charity's exercise of charitable or noncharitable activities.[60]

IV. Charitable Immunity in Iowa

The first Iowa case to deal with the doctrine of charitable immunity arose in 1895.[61] In this case the plaintiff, an employee of the defendant railroad, was injured while on the job and received gratuitous treatment in a hospital provided by the defendant for such purposes. When the plaintiff sued to recover for negligent treatment he received by one of the defendant's doctors, the court held that where an employer voluntarily furnishes injured employees with free medical services, he is immune from liability for the negligence of those he hires to perform such charitable services as long as he exercises reasonable care in hiring such personnel.

The next consideration of the doctrine came in 1918 in *Mikota v. Sisters of Mercy*,[62] where the decedent received fatal injuries as a result of the negligence of the defendant's nurses. When sued by the decedent's administrator, the defendant demurred on the basis of the charitable immunity doctrine. The court held that the demurrer was properly sustained by the trial court. The court went on to discuss the various theories in support of the doctrine but, without adopting any single theory, followed the general rule at that time that, absent negligence in the selection of employees, charitable institutions were not liable to their beneficiaries for the torts of their employees.

Twenty-one years later in the case of *Andrews v. Y.M.C.A.*,[63] another estate sought to recover for the negligently-caused death of its decedent. The decedent, a WPA worker, was doing repair work in the defendant's building when he received fatal injuries as a result of the negligent operation of an elevator by one of the defendant's employees. The court recognized the rule established in the *Mikota* case, but held that this rule must be restricted to beneficiaries of the charity, and that immunity would not extend to strangers, invitees, or employees. The court stated:

> We have great respect for those courts, who, in their opinions noted herein, have held that charitable organizations were exempt from responsibility in damages to persons injured through the negligence of those organizations, although such persons were in nowise beneficiaries thereof, but we do not believe that either sound reason and logic, or sound principles of law, or the demands of sound present-day public policy, justify those adjudications.[64]

The court went on to make clear for the first time that its position with respect to the immunity doctrine was based upon what it considered to be sound public policy when it stated that:

> The various doctrines which have been advocated in support of the immunity which we are considering, other than the public policy

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60 Grueninger v. President & Fellows of Harvard College, 343 Mass. 338, 178 N.E.2d 917 (1961).

61 Eighmy v. Union Pac. Ry. Co., 93 Iowa 538, 61 N.W. 1056 (1895).

62 183 Iowa 1378, 168 N.W. 219 (1918).

63 226 Iowa 374, 284 N.W. 186 (1939).

64 *Id.* at 410-11, 284 N.W. at 205.

> theory, have little of inherent or real merit to recommend them. They are but legal fictions which the courts have announced to make effective an immunity which they have conceived to be a demand of sound public policy.[65]

In the 1941 case of *Servison v. Y.M.C.A.*,[66] the plaintiff, a minor and a paying member of the Y.M.C.A., sued the defendant to recover for injuries sustained when he fell on the floor of the defendant's shower room. A unanimous court summarily rejected the plaintiff's argument that the qualified liability recognized in the *Andrews* case should be extended to include *paying* beneficiaries, and denied his claim on the basis of the strict immunity rule in the *Mikota* case.

The turning point arrived nine years later in the case of *Haynes v. Presbyterian Hospital Association*,[67] where the Iowa supreme court expressly overruled the *Mikota* and *Servison* cases and abandoned the doctrine of charitable immunity altogether. In this case the plaintiff, a paying patient at the defendant hospital, sued for injuries allegedly received through the negligence of the defendant's nurses. His petition was dismissed in the trial court, but the supreme court unanimously reversed. Basing its decision on a change in public policy, the court stated that, "A policy adopted today as being in the public good, unlike the Ten Commandments, is not necessarily an ever-enduring thing. As times and prospectives change, so changes the policy."[68] To support its change of policy, the court went on to note:

> No doubt at the outset of the theory the need for charity in the way of treatment of the suffering was urgent and the general good of society demanded encouragement thereof. At that time hospitals, being the particular so-called charity which we have before us, were relatively few in number and were created and conducted solely by funds donated by public spirited people. Their doors were open to all alike irrespective of race, color, creed, or ability to pay. There was little, if any, paternal care granted by the state. The granting of immunity from liability for the negligence of their employees may have been proper as a basis for encouraging such charity.
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> Today the situation is vastly different. The business of the hospitals of today has grown into an enormous one. They own and hold large assets, much of it tax free, by statute, and employ many persons . . . . Also we take judicial notice of the extensive use of the many types of hospital insurance, as well as liability insurance by the institutions. Thus it is evident that times have changed and are now changing in the business, social, economic and legal worlds. The basis for and the need of such encouragement is no longer existent.[69]

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65 226 Iowa 374, 412, 284 N.W. 186, 206 (1939).
66 230 Iowa 86, 296 N.W. 769 (1941).
67 241 Iowa 1269, 45 N.W.2d 151 (1950).
68 *Id.* at 1272, 45 N.W.2d at 153.
69 241 Iowa 1269, 1273, 45 N.W.2d 151, 154 (1950).

V. Present Status of the Doctrine

For purposes of examining the present status of the doctrine of charitable immunity in other jurisdictions, the states which have considered the doctrine[70] can be grouped into three major categories: those states which rely upon the doctrine to grant relatively complete immunity, those states which apply the doctrine in a limited manner, and those which have completely abandoned the doctrine.

At the present time, only six states—Arkansas,[71] Maine,[72] Maryland,[73] Massachusetts,[74] Missouri,[75] and South Carolina[76]—fall within the complete immunity category. Three of these states (Arkansas, Maine, and Maryland), however, have statutes which provide that if the charity is insured an action by one injured through the charity's negligence will lie directly against the insurer to the extent of the coverage,[77] or that a charitable organization shall be considered to have waived its immunity to the extent of its insurance coverage,[78] or that no charitable hospital shall be immune unless it is insured in an amount not less than $100,000 and then only to the extent a judgment exceeds such coverage.[79]

Twelve states and the District of Columbia comprise the limited immunity category.[80] These jurisdictions recognize the doctrine of charitable immunity,

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70 The question of charitable immunity has not been raised in Hawaii, New Mexico, and South Dakota.

71 Ark. Stat. Ann. § 66-4913 (1966); Helton v. Sisters of Mercy of St. Joseph Hosp., 234 Ark. 76, 351 S.W.2d 129 (1961).

72 Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 A. 898 (1910).

73 Howard v. Bishop Byrne Council Home, Inc., 249 Md. 233, 238 A.2d 863 (1968); Cornelius v. Sinai Hosp. of Baltimore, Inc., 219 Md. 116, 148 A.2d 567 (1959).

74 Mastrangelo v. Maverick Dispensary, 330 Mass. 708, 115 N.E.2d 455 (1953).

75 Schulte v. Missionaries of La Salette Corp. of Mo., 352 S.W.2d 636 (Mo. 1961).

76 Lindler v. Columbia Hosp., 98 S.C. 25, 81 S.E. 512 (1914).

77 Ark. Stat. Ann. § 66-3240 (1966); Md. Ann. Code art. 48A, § 480 (1968).

78 Me. Rev. Stat. Ann. tit. 14, § 158 (Supp. 1968).

79 Md. Ann. Code art. 43, § 556A (Supp. 1967).

80 *Colorado*: St. Luke's Hosp. Ass'n v. Long, 125 Colo. 25, 240 P.2d 917 (1952) (charity is liable, but charitable assets exempt from execution). *Connecticut*: Cohen v. General Hosp. Soc'y of Conn., 113 Conn. 188, 154 A. 435 (1931) (liable to strangers, but liable to beneficiaries only for corporate negligence). *District of Columbia*: President & Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942); White v. Providence Hosp., 80 F. Supp. 76 (D.D.C. 1943) (liable only for corporate negligence). *Georgia*: Cox v. DeJarnett, 104 Ga. App. 664, 123 S.E.2d 16 (1961); Executive Comm. of the Baptist Convention v. Ferguson, 95 Ga. App. 393, 98 S.E.2d 50 (1957) (immunity waived to extent of insurance coverage; otherwise, liable to paying patients, and to others for corporate negligence). *Indiana*: St. Vincent's Hosp. v. Stine, 195 Ind. 350, 144 N.E. 537 (1924) (liable to strangers, but liable to beneficiaries only for corporate negligence). *But see* Ball Memorial Hosp. v. Freeman, 245 Ind. 71, 196 N.E.2d 274 (1964) which suggests by way of dicta that the doctrine may soon be abandoned as to charitable hospitals. *Louisiana*: D'Antoni v. Sara Mayo Hosp., 144 So. 2d 643 (La. Ct. App. 1962) (liable to strangers, but liable to beneficiaries only for corporate negligence). *New Jersey*: N.J. Rev. Stat. §§ 2A:53A-7, 8 (Supp. 1968) (charitable hospital liable to patients for employee negligence up to $10,000; other charities liable only to non-beneficiaries). *Ohio*: Tomasello v. Hoban, 60 Ohio Op. 2d 508, 155 N.E.2d 82 (Ct. C.P. 1958); Avellone v. St. John's Hosp., 165 Ohio St. 341, 135 N.E.2d 410 (1956) (no immunity as to charitable hospitals; other charities have qualified immunity). *Rhode Island*: R.I. Gen. Laws Ann. § 7-1-22 (1956) (only charitable hospitals liable, and then only to beneficiaries for corporate negligence). *Tennessee*: Baptist Memorial Hosp. v.

but extend its application only to certain types of charities, or to a particular scope of negligence, or to a limited category of plaintiffs.[81]

The twenty-nine remaining states, including Iowa, which have dealt with the doctrine of charitable immunity appear to have completely abolished it.[82] Thus, it is apparent that the doctrine no longer enjoys the support of the majority of United States jurisdictions.

VI. Conclusion

The foundation upon which the doctrine of charitable immunity once rested has been severely eroded by the passage of time. This is justifiably so. During the period when many charitable institutions were in their infancy the doctrine perhaps served a beneficial public need. Many charities began as small-scale operations and frequently derived their sole support from a single donor or trust fund whose resources were limited. It is perhaps true, as proponents of the trust fund theory argued,[83] that many of these charities would

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Couillens, 176 Tenn. 300, 140 S.W.2d 1088 (1940) (charitable hospitals liable, but charitable assets exempt from execution). *Texas*: Baptist Memorial Hosp. v. McTighe, 303 S.W.2d 446 (Tex. Civ. App. 1957) (liable to any plaintiff for corporate negligence). *But see* Watkins v. Southcrest Baptist Church, 399 S.W.2d 530 (Tex. 1966) where the court warns that the doctrine will soon be abandoned completely. *Virginia*: Norfolk Protestant Hosp. v. Plunckett, 162 Va. 151, 173 S.E. 363 (1934) (liable to strangers, but liable to beneficiaries only for corporate negligence). *Wyoming*: Bishop Randall Hosp. v. Hartley, 24 Wyo. 408, 160 P. 385 (1916) (liable to *patients* only for corporate negligence).

[81] *See* authority cited note 10 *supra*.

[82] *Alabama*: Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915) (liability to charity patient not discussed). *Alaska*: Tuengel v. City of Sitka, Alas., 118 F. Supp. 399 (D.C. Alas. 1954). *Arizona*: Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951). *California*: Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951). *Delaware*: Durney v. St. Francis Hosp., 46 Del. 350, 83 A.2d 753 (1951). *Florida*: Nicholson v. Good Samaritan Hosp., 145 Fla. 360, 199 So. 344 (1940). *Idaho*: Wheat v. Idaho Falls Latter Day Saints Hosp., 78 Idaho 60, 297 P.2d 1041 (1956) (liability to charity patient not discussed). *Illinois*: Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253 (1965). *Kansas*: Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934 (1954). *Kentucky*: Mullikin v. Jewish Hosp. Ass'n of Louisville, 348 S.W.2d 930 (Ky. Ct. App. 1961). *Michigan*: Parker v. Port Huron Hosp., 361 Mich. 1, 105 N.W.2d 1 (1960). *Minnesota*: Mulliner v. Evangelischer Diakonniessenverein, 144 Minn. 392, 175 N.W. 699 (1920). *Mississippi*: Mississippi Baptist Hosp. v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951) (dicta). *Montana*: Howard v. Sisters of Charity of Leavenworth, 193 F. Supp. 191 (D. Mont. 1961). *Nebraska*: Myers v. Drozda, 180 Neb. 183, 141 N.W.2d 852 (1966). *Nevada*: Nev. Rev. Stat. § 41.480 (1965). *New Hampshire*: Welch v. Frisbie Memorial Hosp., 90 N.H. 337, 9 A.2d 761 (1939). *New York*: Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3 (1957). *North Carolina*: Rabon v. Rowan Memorial Hosp. Inc., 269 N.C. 1, 152 S.E.2d 485 (1967). *North Dakota*: Rickbeil v. Grafton Deaconess Hosp., 74 N.D. 525, 23 N.W.2d 247 (1946). *Oklahoma*: Sisters of the Sorrowful Mother v. Zeidler, 183 Okla. 454, 82 P.2d 996 (1938) (liability to charity patient not discussed). *Oregon*: Hungerford v. Portland Sanitarium & Benevolent Ass'n, 235 Ore. 412, 384 P.2d 1009 (1963). *Pennsylvania*: Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 208 A.2d 193 (1965) (dicta). *Utah*: Sessions v. Thomas D. Dee Memorial Hosp. Ass'n, 94 Utah 460, 78 P.2d 645 (1938). *Vermont*: Foster v. Roman Catholic Diocese of Vt., 116 Vt. 124, 70 A.2d 230 (1950). *Washington*: Pierce v. Yakima Valley Memorial Hosp. Ass'n, 43 Wash. 2d 162, 260 P.2d 765 (1953) (dicta). *West Virginia*: Adkins v. St. Francis Hosp. of Charleston, W. Va., 149 W. Va. 705, 143 S.E.2d 154 (1965). *Wisconsin*: Kojis v. Doctors Hosp., 12 Wis. 2d 367, 107 N.W.2d 131 (1961). *Iowa*: Haynes v. Presbyterian Hosp., 241 Iowa 1269, 45 N.W.2d 151 (1950).

[83] *See, e.g.*, Holliday v. St. Leonard's, 142 Eng. Rep. 769 (1861).

have been financially unable to continue in operation had they been required to respond in damages for their negligence. Since it was in the public interest that these charities expand and continue to provide such urgently-needed services as hospital and medical care to the needy, the immunity doctrine was viewed as a means of supporting the public interest.

Today, however, the financial strength of charitable organizations has increased to a level sufficient to allow many of these organizations to sustain national and international operations. These organizations, therefore, no longer need the protection bestowed upon them in some states by the doctrine of charitable immunity. Furthermore, the availability of liability insurance makes the possibility that a charitable organization would suffer large financial losses through the imposition of tort liability even less likely.

The trend toward nonrecognition of the doctrine of charitable immunity reflects a growing judicial cognizance that it is the individual (often an indigent) who has been injured through the negligence of a charitable organization—rather than the organization itself—who deserves the protection of the law. Indeed, one's injuries are not rendered less serious because they resulted from the negligence of a charity rather than a profit-making business. Therefore, to continue to allow charitable institutions to hide behind the veil of immunity would encourage careless and negligent conduct by these organizations. Public policy, with its current emphasis on the welfare of the individual, no longer supports such immunity. It may be concluded, therefore, that as the untenability of the arguments supporting the doctrine of charitable immunity becomes increasingly obvious, more jurisdictions will be added to the now-predominant list of states which have abolished the doctrine altogether.

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Case Notes

Attorney and Client—ATTORNEY'S PURCHASE OF AN INTEREST IN THE SUBJECT MATTER OF ATTORNEY-CLIENT RELATIONSHIP IS NOT A BREACH OF ETHICAL RESPONSIBILITY IF THE TRANSACTION IS FULLY DISCLOSED TO HIS CLIENT.—*Nadler v. Treptow* (Iowa 1969).

Defendant-client engaged plaintiff-attorney to handle certain of her legal affairs, including the purchase of a particular building. Numerous complications surrounding the title delayed a consummation of the proposed transaction. In addition, defendant did not have the necessary finances. Subsequently, however, plaintiff purchased the building, taking title in his own name. The attorney-client relationship between plaintiff and defendant was terminated, allegedly because of defendant's feeling that plaintiff had taken advantage of her. Soon thereafter, plaintiff initiated an action to collect attorney fees. In her answer, defendant generally denied the accuracy of said fees, and counterclaimed charging that plaintiff's purchase of the building was not in the defendant's best interests, and constituted "self dealing" on the part of the plaintiff. The trial court entered judgment for the plaintiff and disallowed the counterclaim. *Held*, affirmed, four justices dissenting. An attorney's purchase of an interest in the subject matter of his employment is not a breach of his ethical responsibility as long as the facts of the transaction are fully disclosed to his client. Neither the fact that the client was not damaged by the purchase, nor a showing of good faith on the part of the attorney will mitigate the requirement of full and complete disclosure. *Nadler v. Treptow*,—Iowa—, 166 N.W.2d 103 (1969).

The duty thrust upon an attorney at the creation of an attorney-client relationship may be characterized as highly fiduciary[1] in nature, and requiring the utmost degree of loyalty and good faith. A fiduciary relationship can be said to exist, as between an attorney and his client, as a matter of law.[2] The relationship between attorney and client has been likened to that existing between principal and agent,[3] trustee and *cestui que trust*,[4] and tenants in common.[5]

Ideally, an attorney's conscience should serve as his sole guide in his relations with clients. Numerous occasions have arisen, however, in which the

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[1] A fiduciary relation "exists where there is special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of one reposing the confidence." BLACK'S LAW DICTIONARY 753-54 (4th ed. 1968).

[2] Gaffney v. Harmon, 405 Ill. 273, 90 N.E.2d 785 (1950).

[3] Byars v. Stone, 186 Va. 518, 42 S.W.2d 847 (1947).

[4] Vrooman v. Hawbaker, 387 Ill. 428, 56 N.E.2d 623 (1944); Healy v. Gray, 184 Iowa 111, 168 N.W. 222 (1918).

[5] Hill v. Coburn, 105 Me. 437, 75 A. 67 (1909).