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## Torts—Overthrow of the Charities' Immunity Doctrine—Judicial Cognizance of Changing Public Policy Considerations

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ance in the principal case. It would seem that the participant should be able to control the publicity at least until the completion of the performance when it would become a subject for news, for example, in a newspaper in a reportorial fashion.

The television station and network as well as the sponsor did obtain some benefit from the telecast. If the act had not been televised the time would have had to have been filled with some other subject. The court stressed in *Witmark v. Bamberger*, 291 F. 776 (D. N. J. 1923) that a radio station is not an eleemosynary institution, but is conducted for profit, and the defendant must pay for the use of copyrighted music, even though it broadcast its slogan only at the beginning and at the end of the program as was done in the principal case. Television is not different from radio in this respect. Is it not true, therefore, that the television station used the performance for the purpose of trade? See, *Herbert v. Shanley*, 242 U. S. 591, 37 S. Ct. 232 (1917). *Associated Music v. Memorial Radio Fund*, 141 F. 2d 852 (2d Cir. 1944), *certiorari denied* 323 U. S. 766, 65 S. Ct. 120 (1944).

It may be contended that public policy supports the principal decision. If the contrary were held, any spectator at a sporting event would have a cause of action if televised. However, this would not necessarily be true. Only a performer whose act did not constitute *news* would have an action. The spectators are only incidental to the reporting of the event. The performance in itself is an entity and not merely incidental; and plaintiff is an independent contractor, not an employee of the football club that authorized the television of the game. Certainly, no harm can be done to extend the New York Civil Rights Law, if there need be an extension, to cover the situation in the principal case.

*Ralph L. Halpern*

## TORTS—OVERTHROW OF THE CHARITIES' IMMUNITY DOCTRINE— JUDICIAL COGNIZANCE OF CHANGING PUBLIC POLICY CONSIDERATIONS

Plaintiff was injured when the wheel-stretcher upon which she was riding escaped the grasp of a nurse's aide employed by the defendant, and overturned. The complaint charged defendant charity hospital with failure to exercise due care in the selection of its employees. At trial, a directed verdict was given to the defendant, and plaintiff's motion for retrial denied. Plaintiff appealed. The Supreme Court of Arizona held that the question of negligence should have gone to the jury, and, upon the plaintiff's request, reviewed the doctrine of Charities' Tort Immunity, and declared the policy overruled. *Ray et ux. v. Tuscon Medical Center*, 72 Ariz. 22, 230 P. 2d 220 (1951).

As a general rule, charities in the United States have been given plenary grants of immunity against tort claims arising out of the negligent acts of their employees. The courts have established four main rationales for this immunity:

(1) *The "Trust-Fund" theory.* The courts felt that to divert the contributions away from the charity would be to frustrate the donor's intent, and to inhibit further contributions. See further, 5 Am. and Eng. Ency. of Law (2nd Ed.) 923. *Brown v. St. Luke's Hosp. Ass'n.*, 85 Colo. 167, 274 P. 740 (1929). *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991 (1905). See also 20 U. Cin. L. Rev. 412-17, (My. 1951).

But since the advent of Liability insurance, the need for this protection has vanished, since the trust-funds will not be diverted, judgment-claims being paid by the insurance company. As to the inhibiting factor, it is slight, since the prospective donor will more than likely consider the cost of insurance as a normal cost of operation. *Wendt v. Servite Fathers*, 332 Ill. App. 618, 76 N. E. 2nd 342, (1947).

(2) *The inapplicability of Respondeat Superior in these situations.* This rule has been based upon the idea that the Agency situation (and its ensuing liability) only arises when there has been some gain or benefit running to the employer as a result of the employee's acts. The courts reasoned that because there was no benefit to be gained by the charity hospital from a negligent tort committed by the employee, this rendered *Respondeat Superior* inapplicable; ergo, no liability. *Southern Methodist Hosp. and Sanitorium of Tuscon v. Wilson*, 45 Ariz. 507, 46 P. 2nd 118 (1935), and 51 Ariz. 424, 77 P. 2nd 458 (1938). *Hearns v. Waterbury Hosp.*, 66 Conn. 98, 33 A. 595 (1895). This actually is a misconception of Agency law, (and was recognized as such in the *Ray* case, *supra*). There need be no showing of a benefit running to the master before he can be held vicariously liable in tort for his servant's negligent, or even willful acts. See 2 Mechem, Agency, sec. 1874 (2nd. Ed. 1914).

(3) *The "Implied-Waiver" theory.* That is, that when a beneficiary entered a charitable establishment, there was an implied agreement on his part not to sue for any subsequent negligence. *Powers v. Homeopathic Hosp.*, 109 Fed. 294, (1st Cir. 1901) *certiorari denied*, 183 U. S. 695 (1901). *Wilcox v. Latter Day Saints Hosp.*, 59 Ida. 350, 82 P. 2nd 849 (1938). This theory had advanced so far that Cardozo, J., in *Schloendorff v. Society of New York Hosp.*, 211 N. Y. 125, 105 N. E. 92 (1912), maintained that even a paying patient might have waived his right to sue, in that, "the payment might be considered a contribution to the charity." (This is no longer the New York law. *Phillips v. Buffalo General Hosp.*, 239 N. Y. 188, 146 N. E. 199 (1924) ).

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This theory has been successfully met with the contention that it is far too much to expect a sick, legally-unlettered patient to realize that upon entering this particular type of institution, he is voluntarily discarding an otherwise substantial right. See 19 Mich. L. Rev. 395-412, (1921).

(4) *The New York theory.* Vicarious liability in tort actions has been attached inclusively to charity hospitals in New York, with one notable exception. This one grant of immunity from the usual liability is extended to the employer if the injuries complained of occur not through the negligence of a person working as a servant; *Sheehan v. North County Community Hosp.*, 273 N. Y. 163, 7 N. E. 2d 28 (1937), (ambulance driver); *Dillon v. Rockaway Beach Hosp. and Dispensary*, 284 N. Y. 176, 30 N. E. 2d 373 (1940), (hospital attendant); or, as part of the administrative or clerical staff; *Bakal v. University Heights Sanitarium, Inc. et al.*, 277 App. Div. 572, 101 N. Y. S. 2d 385, (1st Dept. 1950), 26 N. Y. U. L. Rev. 366 (1951); but rather in a third category, which the courts have termed "professional" 25 N. Y. U. L. Rev. 612, 613 (1950). This class has been narrowed to include doctors, and sometimes registered nurses. *Bakal v. University Heights Sanitarium, supra.* By dint of his "professional" character, the doctor, (or nurse), is not considered an employee, but rather an independent contractor, and hence personally liable for the tort. *Matter of Renouf v. New York Central R.R. Co.*, 254 N. Y. 349, 173 N. E. 218 (1930). *Schneider v. New York Telephone Co.*, 249 App. Div. 400, 402, 292 N. Y. S. 399, 401 (1st Dept. 1938), *aff'd.* 276 N. Y. 655, 13 N. E. 2d 47 (1938). Respondeat Superior now being inapplicable, the hospital is saved harmless from any vicarious liability, being treated not as the employer, but as the mere procurer of the curative facilities. *Schloendorff v. Society of New York Hosp., supra.*

In similar situations, not involving charities, the very precise criteria used in determining whether an actor is a servant, agent, or independent contractor are strictly applied. See Restatement, Agency, sec. 220, (1933). It is obvious that these criteria, if correctly applied in the charity-tort situations, would, in many instances, preclude any conclusion save that of the presence of the normal agency relationship. Nevertheless, stare decisis is allowed to override the factual demands, and in the eyes of the law, the "professional" employee continues to be regarded as an independent contractor, with all the liabilities incident to that status. For a criticism of this doctrine, see Prosser, Torts, 1079-81 (1941).

(5) *That the dominant "Public policy" considerations are against recovery in these situations.* *Fields v. Mountainside Hosp.*, 22 N. J. Misc. 72, 35 A. 2d 701 (1944). *Southern Methodist Hosp. and Sanitorium of Tuscon v. Wilson, supra.* Since this elusive concept was not only a separate rationale for immunity in itself, but also provided at least the psychological basis for the other four, it

proved to be the greatest stumbling-block in the path of more inclusive liability. See also, 22 A. B. A. J. 48, (1936).

Because of the ultimate harshness of these rules against liability, the courts soon began developing a varied array of exceptions. While being otherwise immune, the charity employers have been held liable in these instances:

(a) if they were negligent in the selection of their employees. The *Wilson* case, *supra*. *Hearns v. Waterbury Hosp.*, *supra*. (This was the Arizona rule previous to the *Ray* case, and therefore, the plaintiff necessarily framed her complaint under this sole exception.) *Accord: Hoke v. Glenn*, 167 N. C. 594, 83 S. E. 807 (1914). *Contra: Adams v. University Hosp.*, 122 Mo. App. 675, 99 S. W. 453 (1907).

(b) if the plaintiff was not a beneficiary, but a paying patient. *Tucker v. Mobile Infirmary Ass'n.*, 191 Ala. 572, 68 So. 4 (1915). *Nicholson v. Good Samaritan Hosp.*, 145 Fla. 360, 199 So. 344 (1940). *Sesstons v. Thomas D. Leo Memorial Hosp. Ass'n.*, 94 Utah 460, 78 P. 2nd 645 (1938). *Contra: under the waiver theory, supra, the Schloendorff case, supra. St. Vincent's Hosp. v. Stine*, 195 Ind. 350, 144 N. E. 537 (1924).

(c) if plaintiff was not a patient, but rather a "stranger to the charity." *Sisters of Charity v. Duvelius*, 123 Ohio St. 52, 173 N. E. 737 (1930), (a nurse not in defendant's employ.) *Van Ingen v. Jewish Hosp. of Brooklyn*, 227 N. Y. 665, 126 N. E. 524 (1924), (a passenger in a private car—hit by defendant's ambulance).

(d) if defendant charity permits employee to perform medical duties, when he has no competency in the matter. *White v. Prospect Heights Hosp.*, 278 App. Div. 789, 103 N. Y. S. 2nd 859 (2nd Dept. 1951).

(e) if plaintiff is an invitee. *Alabama Baptist Hosp. Board v. Carter*, 226 Ala. 109, 145 So. 443 (1933). *Cohen v. General Hosp. Soc. of Conn.*, 113 Conn. 188, 154 A. 435 (1931). *McLeod v. St. Thomas Hosp.*, 170 Tenn. 423, 95 S. W. 2nd 917 (1936). *Hosp. of St. Vincent in City of Norfolk v. Thompson*, 116 Va. 101, 81 S. E. 13 (1914).

(f) if plaintiff is an employee of the charity. *Cowans v. North Carolina Baptist Hosp.*, 197 N. C. 47, 147 S. E. 672 (1929). See also, Prosser, Torts 1079-1085 *supra*.

Although the doctrine of Charities' Tort Immunity has met with steadily increasing criticism both in the courts, and the authorities (3 Scott, Trusts, 2418-

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50 (1939); Harper, Torts, 294 (1933), only two other jurisdictions have also cast aside the bonds of stare decisis, and have declared the policy overruled, charities henceforth being fully liable for the torts of their employees, like any other corporation. *Porto Rico Gas and Coke Co. v. Frank Rullan and Assoc., Rullen v. U. S., U. S. v. Foard et al.*, (3 cases), 189 F. 2nd 397 (1st Cir. 1951). *Malloy v. Fong*, 37 A. C. 356, 232 P. 2nd 241 (1951). See also, Cal. Code Civ. Proc., sec. 1714; Puerto Rico Civil Code, sec. 1802-3; 39 Cal. L. Rev. 455 (1951).

It is submitted that the principal case not only takes proper cognizance of the changing social and economic conditions, and thus better enables the law to keep "abreast of the times," but also that the *Ray* case may well be a foretelling of a nation wide overthrow of the Charities' Tort Immunity Doctrine.

*Robert Alan Thompson*

## CONTRACTS—AGREEMENTS NOT TO COMPETE—POWERS OF EQUITY TO SCALE DOWN UNREASONABLE TERMS

Defendant sold his bakery located in Boston, Mass. to plaintiff. Defendant agreed in the bill of sale that he would "not engage in the bakery business directly or indirectly for a period of seven years within a radius of seven miles of Boston." The following year defendant entered the employ of another baker in the city at a weekly salary. Plaintiff sought to enjoin defendant from engaging in the bakery business according to the terms of the bill of sale. The lower court found the limitations of seven years and seven miles unreasonable. The judge found it reasonable however, to restrain defendant from engaging in the bakery business "directly or indirectly" within a radius of four miles from plaintiff's bakery, and for a period of four years. The court then held that defendant had violated the new "reasonable" restrictions, and issued an order restraining defendant from continuing in such business. On appeal the Supreme Judicial Court of Massachusetts affirmed. *Thomas et al v. Paker* — Mass —, 98 N. E. 640 (1951).

Early English and American decisions evince a strong tendency to strike down covenants not to compete. *Mitchell v. Reynolds* 1 Pere Williams 181 (1711). *Noble v. Bates*, 7 Cow. 307 (N. Y. 1827). For history of restrictive covenants see *Hall Mfg. Co. v. Western Steel*, 227 Fed. 588, at 592 (6th circuit 1915). *Diamond Match Co. v. Roeber* 106 N. Y. 463, 13 N. E. 419, (1887). Also see Restatement, Contracts, sec. 513, (1932), 5 Williston, Contracts sec. 1633, 1636, (Revised Edition, 1937). 6 Corbin, Contracts, sec. 1379 (First Edition 1951). However, modern authority upholds such covenants when two requirements are satisfied. The covenant must be (1) ancillary or subordinate to the main purpose of the contract and (2) reasonably necessary for the protection of the business and goodwill. See Justice Taft's noted dictum in *Addyston Pipe and Steel Co. v. U. S.*