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## Church Liability for Negligence

Valentine A. Toth\*

THE CHARITABLE IMMUNITY DOCTRINE is less than one hundred years old.<sup>1</sup> During its relatively short history it has undergone many significant changes and qualifications.<sup>2</sup> Charitable immunities were established and widened during a period of time when charitable institutions, though mostly small and weak, took upon themselves important social and charitable tasks.<sup>3</sup> These were the years when public policy demanded the protection of the charitable institutions for the welfare of the general public.<sup>4</sup>

After the first world war several courts took the charitable immunity doctrine under close scrutiny. It was recognized by them that many American charities had become large and financially well supported organizations, able to indemnify those who might be injured by their negligence. This recognition prompted a few courts to abolish or to qualify the immunity doctrine.<sup>5</sup>

The third period in the history of the charitable immunity doctrine started in 1942 and ended in 1958. The beginning of this period was heralded by the often quoted opinion by Justice Rutledge against the immunities granted to charitable institutions.<sup>6</sup> This period, during which important jurisdictions discarded the immunity rule and many others qualified it, culminated in the decisions of the New York and New Jersey courts

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<sup>1</sup> *McDonald v. Mass. General Hosp.*, 120 Mass. 432, 21 Am. Rep. 529 (1876).

<sup>2</sup> *Oleck, Non-Profit Corporations and Associations*, 110 (1956); *Restatement of Torts*, Ch. 45, § 887 (1939); *Bruce v. Y. M. C. A.*, 51 Nev. 372, 277 P. 798, 802 (1929).

<sup>3</sup> *Annual Survey of American Law*, 396 (1957).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675 (1879); *Geiger v. Simpson M. E. Church*, 174 Minn. 389, 219 N. W. 463 (1928); *Bruce v. Central Methodist Church*, 147 Mich. 230, 110 N. W. 951 (1907); *Downes v. Harper Hosp.*, 101 Mich. 555, 60 N. W. 42 (1894); *Andrews v. Y. M. C. A. of Des Moines*, 126 Iowa 374, 284 N. W. 186, 205 (1939).

<sup>6</sup> *The President and Directors of Georgetown College v. Hughes*, 76 App. D. C. 123, 130 F. 2d 810 (App. D. C. 1942).

which abolished the immunities of all charities.<sup>7</sup> In this period courts and legal writers alike were almost unanimous in their prognostications that the days of charitable immunity were numbered.<sup>8</sup>

The fourth, and so far the last period of the history of these immunities started with the enactment of statutory law in New Jersey by which the charitable immunity doctrine has been re-established in that state.<sup>9</sup> Other enactments and attempts were made by other state legislatures, declaring or indicating that charitable immunities must be kept alive.<sup>10</sup> As a consequence several state courts have lost their bold and legally sound approaches to this tangled and difficult problem.<sup>11</sup> Contrary to earlier indications, they refused to widen the field of liability and declared that any drastic change must come from the legislature.<sup>12</sup> Proponents of the immunity doctrine were quick to warn against any change by court-made law, and demanded, in a series of legal articles, not only the maintenance but also the widening of this rule.<sup>13</sup>

This fourth period has put an end in many jurisdictions, at least for the time being, to desirable and expected changes toward greater or total liability.<sup>14</sup> In other jurisdictions qualifying decisions and new approaches could be expected.<sup>15</sup>

<sup>7</sup> Collopy v. Newark Eye and Ear Infirmary, 27 N. J. 29, 141 A. 2d 276 (1958); Benton v. Y. M. C. A. of Westfield, 27 N. J. 67, 141 A. 2d 298 (1958); Bing v. Thunig, 2 N. Y. 2d 656, 163 N. Y. S. 2d 312 (1957).

<sup>8</sup> Ball, The Liability of Charitable Institutions for Torts of Agents and Servants, 38 Ky. L. J. 105 (1949-50); Browne, Immunity from Tort Liability: A Church as a Charitable Institution, 36 Univ. of Detroit L. Rev. 169 (1958); Orlovsky, Charitable Immunity—The Road to Destruction, 32 Temple L. Q. 86, 99 (1958); Freezer, Tort Liabilities of Charities, 77 Univ. of Pa. L. Rev. 191 (1928).

<sup>9</sup> N. J. Stat. Ann. § 16: 1-53 (1958); N. J. Stat. Ann. § 2 A: 53 A-78 (1959).

<sup>10</sup> Morris, Recent Developments in Ohio's Charitable Immunity Law, 10 Clev.-Mar. L. Rev. 402, 420 (1961).

<sup>11</sup> Smith v. Duval City Welfare Board, 118 S. 2d 98 (Fla. 1960); Gibbon v. Y. M. C. A., 170 Ohio St. 280, 164 N. E. 2d 563 (1961).

<sup>12</sup> Joachim, The Policymakers: Courts or Legislatures?, 39 Boston Univ. L. Rev. 149 (1951); Brody, Modifying Charitable Immunity, 41 Boston Univ. L. Rev. 199 (1961); Simeone, Doctrine of Charitable Immunity, 5 St. Louis Univ. L. J. 357 (1959).

<sup>13</sup> Joachim, Charitable Immunity: Why Abandon the Doctrine of Stare Decisis?, 45 A. B. A. J. 822 (1959); Joachim, Liability for Charitable Institutions?, 63 Dick. L. Rev. 57 (1958).

<sup>14</sup> Smith v. Duval City Welfare Board, *supra* n. 11; Gibbon v. Y. M. C. A., *supra* n. 11.

<sup>15</sup> Browne, *supra* n. 8.

Churches are greatly affected by these legal developments. While it is true that the hottest controversy is centered around hospitals, YMCAs, and other charitable institutions, it is equally true that thousands of churches and millions of church-goers and church members are and will be affected by it.<sup>16</sup>

Since the church enjoys the greatest measure of this immunity rule, it is almost imperative that during this new period the basic and pertinent problems of church immunity should be categorized and surveyed in order to show the lack of justification for this privileged position. These problems may be divided into four categories: (1) the modern church as a charity; (2) constitutionality; (3) legality; (4) the social necessity of church immunity.<sup>17</sup>

These classifications can shed proper light upon the present status and the future developments of this doctrine.

## I. Clarification of Basic Issues.

### 1. *The religious society as a charity.*

In order to bring churches under the protection of the doctrine of charitable immunities a satisfactory answer must be given to the question: Is the church in the legal sense a charitable organization? At least two American courts<sup>18</sup> have looked to the more than 350 year old Statute of Elizabeth<sup>19</sup> and to the English court interpretations to supply them with a rationale. In construing that statute, the English courts have held that organizations which perform functions wholly analogous, are deemed within its spirit and intendment, are charitable in the legal sense, and that a religious society is charitable insofar as its objects serve charitable religious purposes implied in the statutes, i.e., those which tend directly or indirectly towards the instruction or edification of the public.<sup>20</sup> In the United States the classic legal definition of charities was given by Justice Gray in *Jackson v. Phillips*.<sup>21</sup> This definition, generally followed

<sup>16</sup> Holcomb, Torts—Charitable Institutions Other Than Hospitals—Liability of Y. M. C. A. for Negligence, 29 Univ. of Cincinnati L. Rev. 522 (1960); *Bell v. The Salvation Army*, 172 Ohio St. 326, 173 N. E. 2d 106 (1961); Landis: Yearbook of the American Churches for 1959, 288 (1958).

<sup>17</sup> Pfeiffer, Church, State and Freedom (1953); Gilkey, State Intervention in Matters of Religion, 27 Kan. L. R. 41 (1958).

<sup>18</sup> *Montgomery v. Carlton*, 99 Fla. 152, 126 So. 135 (1930); *Gladding v. St. Mathew's Church*, 25 R. I. 628, 57 A. 860 (1904).

<sup>19</sup> Charitable Gift Acts, 43 Eliz. I. c. 4 (1601).

<sup>20</sup> 4 Halsbury, Laws of England, Charities, 212, 221-222 (3d ed., 1952).

<sup>21</sup> 14 Allen 539 (Mass. 1867).

by the American courts, as well as the English court interpretations, are in agreement that churches are included in the category of legally recognized charities.

The majority of American courts look beyond the religious aspects of the church, and find it engaged in other benevolent and charitable activities such as to qualify it for charitable status on a wider basis than its religious nature alone.<sup>22</sup> In *Bianchi v. South Park*<sup>23</sup> the highest court of New Jersey says:

The church function . . . is not limited to sectarian teaching and worship. In modern view, exercises designed to aid in the advancement of the spiritual, moral, ethical and cultural life of the community in general are deemed within the purview of the religious society.

This legal recognition of the charitable character of the church enables legislatures and courts alike to grant to churches tax exemptions, tort immunities and other privileges, without exposing themselves to constitutional attacks.

## 2. *Is the church immunity rule constitutional?*

In 1956 the *Washington Law Review*<sup>24</sup> raised this interesting and slightly embarrassing question: Would an immunity from tort liability granted to churches constitute a violation of the separation of church and state under the Federal Constitution? Could this grant be considered to be state action and aid given to churches?

This question, to this writer's best knowledge, was never authoritatively answered. In construing the "establishment of religion" clause of the First Amendment, the United States Supreme Court, in an opinion by Justice Black, said this:<sup>25</sup>

The "establishment of religion" of the First Amendment means at least this: Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.

In a dissenting opinion Justice Black goes even a step further and points out that<sup>26</sup>

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<sup>22</sup> *Geiger v. Simpson M. E. Church*, supra n. 5; *Bianchi v. South Park Presb. Church*, 123 N. J. L. 325, 8 A. 2d 567 (1939).

<sup>23</sup> *Id.* (*Bianchi*) at 580.

<sup>24</sup> Comment, 31 Wash. L. R. 287, 298 (1956).

<sup>25</sup> *Everson v. Board of Education*, 330 U. S. 1, 18 (1946).

<sup>26</sup> *Zorach v. Clauson*, 343 U. S. 306, 318 (1951).

A state policy of aiding "all religions" necessarily requires a governmental decision as to what constitutes a religion. . . . Thus is created a governmental power to hinder certain religious beliefs by denying their character as such. . . . This provides precisely the kind of censorship which we have said the Constitution forbids.

The first part of this constitutional problem, namely whether the granting of immunities would constitute state action or aid, hardly could find a legally correct direct answer. This is the reason why many courts hasten to point out that churches are entitled to these immunities not because of their religious but because of their general charitable character.<sup>27</sup>

The second part of the constitutional problem, namely the constitutional prohibition against determining by governmental power what constitutes a religion, is usually bypassed by a legal fiction.

According to this legal fiction, in the eyes of the law a church is divided into two artificial entities.<sup>28</sup> One is the religious corporation and the other the spiritual church. Although each of these two bodies, *viz.*: the religious corporation and the spiritual church, may exist within the pale of the other, they are in no respect correlatives.<sup>29</sup> Thus, when the church is sued in negligence, the religious corporation, and not the spiritual church, is the defendant. This legal fiction helps the courts in two ways. First, in the immunity states they do not have to determine what constitutes a religion; they only go so far as to decide what constitutes a religious corporation or an unincorporated religious society. On the other hand, in the liability states a judgment can be rendered against a church without interference with the constitutional guarantees of religious freedom. With recognition of the charitable character of churches, and with the help of this legal fiction, state courts have been able to deal with church related tort problems without meeting insurmountable constitutional difficulties.

### 3. *Is the church immunity rule legally sound?*

Under general principles of tort law, liability for negligence or tortious conduct is the general rule. Any immunity is an

<sup>27</sup> Browne, *supra* n. 8.

<sup>28</sup> Harlem Church v. N. Y. Greater Corporation of Seventh Day Adventists, 260 N. Y. S. 517, 521, 198 N. E. 615 (1932); Bennet v. LaGrange, 153 Ga. 428, 112 S. E. 482, 486 (1922).

<sup>29</sup> Master v. Second Parish of Portland, 36 F. Supp. 918, 925 (D. C., D. Me., S. D., 1940), 124 F. 2d 622; 45 Am. Jur. 727.

exception. It is also a general principle that absence of a fee or price is no defense to tort.<sup>30</sup>

American courts find a foundation for the immunity rule in *stare decisis*, in various legal theories, and in public policy considerations.

(a) *Stare decisis*. The immunities of charitable institutions were first announced in the United States by the Massachusetts high court.<sup>31</sup> The Massachusetts court followed a short lived English rule which was based on a dictum in Lord Cottenham's opinion.<sup>32</sup> This immunity rule in England was held to be the law in 1846.<sup>33</sup> In 1861 the English rule was applied to churches also and the English high court held that the vestry of a parish was immune from tort liability.<sup>34</sup> But this rule in England was overruled shortly after this decision,<sup>35</sup> and was eliminated from the development of the English common law.<sup>36</sup>

When the question of charitable immunity was first raised in the United States,<sup>37</sup> the Massachusetts court based its decision on the early English immunity rule,<sup>38</sup> without recognizing that it already had been overruled. Other American decisions followed the *McDonald* rule, and the immunity of charities was gradually accepted by American jurisdictions.

Today, the proponents of *stare decisis* try to minimize the effect of the early English decisions on the development of the American immunity doctrine, and declare that not the overruled English decisions but sound public policy demands the following of the early American holdings.<sup>39</sup> Opponents of charitable immunities point out, on the other hand, the legal weakness of the early American decisions and the fact that the immunity doctrine in its inception was purely court-made law, and that

<sup>30</sup> Orlowsky, *supra* n. 8; *Heaven v. Pender*, 11 Q. B. 503, 509 (1883).

<sup>31</sup> *McDonald v. Mass. General Hosp.*, *supra* n. 1.

<sup>32</sup> *The Feoffees of Heriot's Hosp. v. Ross*, 12 Clark & F. 507, 8 Eng. Rep. 1508 (1846).

<sup>33</sup> *Ibid*; *Duncan v. Findlater*, 6 C&F 894, 7 Eng. Rep. 934 (1839).

<sup>34</sup> *Hollyday v. St. Leonard*, 11 C&F (N. S.) 192 (1861).

<sup>35</sup> *Foreman v. Mayor of Canterbury*, L. R. 6 Q. B. 214, 142 Eng. Rep. 769 (1871); *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93, 11 Eng. Rep. 1500 (1866).

<sup>36</sup> *Marshall v. Lindsley County Council*, 1 K. B. 516 (1935).

<sup>37</sup> *McDonald v. Mass. General Hosp.*, *supra* n. 1.

<sup>38</sup> *Hollyday v. St. Leonard*, *supra* n. 34.

<sup>39</sup> *Joachim, Charitable Immunity*, 38 Mich. S. B. J. 14 (1959).

thus the courts are the ones which should abolish it and not the legislature.<sup>40</sup>

(b) *Could legal theories supply "the firm foundation"?* American courts accepted or developed several legal theories in order to furnish the necessary legal foundation for the immunities of churches and other charitable corporations. Some of these could be applied to churches; others are applicable only to other charities.<sup>41</sup>

*The trust fund theory.* This theory, which is readily applied to churches, was originally developed by Lord Cottenham in his famous dictum.<sup>42</sup> It holds that

to give damages out of a trust fund would not be to apply it to those objects whom the author of the trust had in view, but would be to divert it to a completely different purpose.

According to this theory the assets of non-profit organizations are "trust funds" and may not be used to pay damages, since this would destroy the purpose for which the funds are supposed to be given and to be used. This theory seems to supply the legal foundation for the doctrine in most immunity states.<sup>43</sup> The basic weakness of this theory is that it runs directly contrary to the basic principles of the law of trusts. As Prof. Prosser points out, among other legal writers, trust funds are not exempted from liability for torts committed in administering the trust, and since the fund would not be exempt in the hands of the donor himself, the donor can scarcely confer such immunity upon the trustees.<sup>44</sup>

This theory really does not confer total immunity upon charities, but will prevent satisfaction of judgments where the satisfaction would deplete the "trust fund." Despite its legal weakness, this theory could be very useful where churches voluntarily purchase liability insurance, since it enables the courts to render judgments against churches up to the amount of the insurance. Such a judgment gives at least partial in-

<sup>40</sup> Brown, *Stare Decisis is Worth Its Weight in Reason: Abolish the Charitable Immunity Doctrine*, 46 A. B. A. J. 629 (1960).

<sup>41</sup> Oleck, *op. cit. supra* n. 2.

<sup>42</sup> Herriot's Hosp. v. Ross, *supra* n. 32, at 513.

<sup>43</sup> Perry v. House of Refuge, 63 Md. 20 (1885); Davis v. Central Congreg. Society, 129 Mass. 367 (1880); Bruce v. Y. M. C. A., *supra* n. 2; Williams Adm'x v. Church Home for Females and Infirmary for Sick, 223 Ky. 355, 3 S. W. 2d 753 (1928).

<sup>44</sup> Prosser, *Law of Torts*, 785 (2d ed. 1955); Zollman, *Damage Liability of Charitable Institutions*, 19 Mich. L. R. 395 (1921).



demnity to the injured person, and prevents depletion of the "trust funds."

*The "exemption to the respondeat superior" theory.* This theory holds that a charity obtains no direct benefit from its agents and employees and, thus, a charity is not liable for the torts of its agents or servants.<sup>45</sup> Some jurisdictions which adhere to this unrealistic theory hold that a charity performs its whole duty when it tenders a competent servant to a beneficiary and that thereafter such a servant becomes the servant of the beneficiary rather than the servant of the charity.<sup>46</sup> The tender of a competent servant is, in most cases, the basis of the theory, and churches are often liable even in the immunity states when they are proved to have been negligent in the hiring of their servants.<sup>47</sup> An incompetent servant can subject a church to liability, even when hired with due care, especially in those cases where the injured person was not a recipient of the church's benefits.<sup>48</sup> The application of this theory could be met with disapproval especially on the part of those denominations which are under episcopal church government. The Roman Catholic church holds that

The scope of the bishop's authority can by no means be limited to strictly religious matters, but extends to questions of whatever nature which concern directly or indirectly the welfare of the church and the salvation of souls.<sup>49</sup>

Under this and similar church governments, the churches themselves deny that their clergymen, officers and employees would ever become the servants of the beneficiaries and not of the denomination.

This is one of the reasons why many courts disregard this theory and hold churches liable for the negligence of their officers and servants. In cases where the bishop has title to the

<sup>45</sup> 25 A. L. R. 65-67; *Avellone v. St. John's Hosp.*, 165 Ohio St. 467, 135 N. E. 2d 410 (1956).

<sup>46</sup> *Zollman*, *supra* n. 44, at 412.

<sup>47</sup> *Bruce v. Central Methodist Church*, *supra* n. 5.

<sup>48</sup> *Miss. Baptist Hosp. v. Holmes*, 214 Miss. 906, 55 So. 2d 142 (1951); *Waddell v. Y. M. C. A.*, 133 Ohio St. 601, 15 N. E. 2d 140 (1938); *Cullen v. Smith*, 139 Ohio St. 194, 39 N. E. 2d 146 (1942); *Durney v. St. Francis Hosp.*, 7 Terry 350, 46 Del. 350, 83 A. 2d 753 (1951); *Malloy v. Fong*, 37 Cal. 2d 356, 232 P. 2d 241 (1950); *Edwards v. Hollywood Canteen*, 27 Cal. 2d 802, 167 P. 2d 729 (1946); *Silva v. Providence Hosp.*, 14 Cal. 2d 762, 97 P. 2d 798 (1939); *Roman Cath. Church v. Keenan*, 74 Ariz. 20, 243 P. 2d 455 (1952).

<sup>49</sup> *Acta Apostolica Sedis* 14-7: *Benedict XV*, Letter, 15 Oct. 1921.

church property he is the defendant as a corporation sole. In *Casey v. The Roman Cath. Archbishop of Baltimore*<sup>50</sup> the court held that the archbishop was not a defendant in his capacity as a spiritual church leader, but that in his corporate capacity he was answerable as the master of a negligent employee. In a recent decision<sup>51</sup> the Ohio Supreme Court rendered judgment against a bishop. The reasoning of the Court was similar to the reasoning of the preceding case.

Several court decisions point out that by the force of his election or appointment a clergyman does not become an agent or an officer of the local religious corporation.<sup>52</sup> He could only become the agent or an officer of the local religious corporation if the local church elects or appoints him to such an office, or where he is made an agent or an officer by the charter or by-laws of the religious corporation.<sup>53</sup> When a clergyman or a layman is elected or appointed by the religious corporation to a corporate office, a rule promulgated by the Ohio Supreme Court may apply, especially where the church is governed by the "congregational system." According to this rule charities are unlike other masters. Their right to control agents and servants is greatly diminished by the fact that their servants are either volunteer workers or professional persons who won't necessarily follow or even accept the orders of the charities.<sup>54</sup>

*The "waiver theory."* This legal theory holds that one who accepts the benefits of a charity waives his rights to collect damages from that institution for the torts of its servants or agents. Prior to basic changes, this fictional agreement theory was followed by courts in New York, California and Michigan.<sup>55</sup> This theory is based on "the intentional or voluntary relinquish-

<sup>50</sup> 217 Md. 595, 143 A. 2d 628 (1955).

<sup>51</sup> *Blankenship v. Alter*, Archbishop Trustee, 171 Ohio St. 65, 167 N. E. 2d 922 (1960).

<sup>52</sup> *Fiske v. Beatty*, 201 N. Y. S. 441 (1923), 238 N. Y. 598, 144 N. E. 907 (1924); *Russian-Serbian Holy Trinity Church v. Kulik*, 202 Minn. 560, 279 N. W. 364 (1938); *Gibson v. Trustees of Pencader Presb. Church*, 25 Del. Ch. 317, 20 A. 2d 134 (1941); *Master v. Second Parish of Portland*, *supra* n. 29; *Casey v. R. Cath. Archbishop of Baltimore*, *supra* n. 50.

<sup>53</sup> *Fiske v. Beatty*, *supra* n. 52; N. Y. Relig. Corp. L. (Consol. Law, Ch. 52, § 2, 1951); N. J. Stat. Ann. T. 16 (1939).

<sup>54</sup> *Morris*, *supra* n. 10 at 416.

<sup>55</sup> *Bruce v. Central Methodist Church*, *supra* n. 5; *Hosp. of Saint Vincent de Paul v. Thompson*, 116 Va. 101, 81 S. E. 13 (1914); *Oleck*, *op. cit. supra* n. 2, at 110; *Restatement of Torts*, Ch. 45, § 887 (1939).

ment of a known right; or such conduct as warrants an inference of the relinquishment of such right.”<sup>56</sup> Massachusetts, Michigan and Virginia courts find the basis of the waiver in an implied contract. While it is true that in the case of hospitals and their patients some important elements of an implied contract may be present, it is difficult to find any implied contract between churches and the recipients of their usual benefits.<sup>57</sup> As applied to churches, the other weakness of the theory is the fact that a right must be known before it can be relinquished. In negligence cases a person must be aware of some obvious danger before he can waive his right to protection. Otherwise he finds himself waiving rights which he never dreamed existed. While an average church-goer cannot be fit into this category, the theory still might be applied to some volunteer church workers who may be aware of some obvious dangers while performing repair work and other manual labor for his church. In such a case, and apparently only in such a case, he may impliedly relinquish his right to protection. Parallel with this theory some courts speak of the “assumption of risk” theory also. But as Professor Prosser and other legal writers point out, the risk cannot be assumed in such situations where there is no general awareness of some obvious or ordinary risk.<sup>58</sup>

“*Governmental immunity*” theory. This theory claims that charitable institutions are entitled to the same immunities as those given to state and other public agencies, since charities are instrumentalities brought to life to aid in the performance of semi-governmental or public duties.<sup>59</sup> Applied to churches, this theory is constitutionally vulnerable and subject to objections from both state and church.<sup>60</sup> The Federal Tort Claims Act<sup>61</sup> weakened it by implication with respect to the agents of other charities also.<sup>62</sup>

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<sup>56</sup> *Rand v. Morse*, 289 F. 339, 344 (8 Cir. 1923).

<sup>57</sup> *Oleck*, *op. cit. supra* n. 2, at 110.

<sup>58</sup> *Prosser*, *op. cit. supra* n. 44, at 307 and 310.

<sup>59</sup> *Univ. of Louisville v. Hammock*, 127 Ky. 564, 106 S. W. 219 (1907); *Fordyce v. Woman's Christian Nat. Library Ass.*, 79 Ark. 550, 96 S. W. 155 (1906); Ghiardi, *Personal Injury Commentator* (1960 annual).

<sup>60</sup> *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940).

<sup>61</sup> Federal Tort Claims Act, 28 U. S. C. A. §§ 1346, 1402, 1504, 2110, 2401, 2411, 2412, 2671-2680 (1952 Supp.).

<sup>62</sup> *Status of Immunity Doctrine in the States*, 5 *Cath. Univ. L. Rev.* 100 (1948).

"Public policy" theory. This is more forthright than any of the other theories. It holds simply and bluntly that it is better for the public welfare if the injured person, rather than the charity, bears the burden of losses caused by the torts of agents or servants of charities.<sup>63</sup> This pronouncement receives controversial treatment by courts and legal writers alike.<sup>64</sup> Its opponents point out the lack of current justification, the nature of modern charities, the availability of liability insurance policy, and the legal unsoundness of the public policy itself. They demand that, since this public policy was first declared by courts, it should be changed by court-made law.<sup>65</sup> The highest court of New Jersey clearly accepted these arguments when it reversed itself and declared that from now on the public policy of that state would not recognize charitable immunities.<sup>66</sup> At least two important court decisions recognized this as early as 1928 and 1939.<sup>67</sup> The Minnesota Supreme court discarded the immunity rule in 1928 in a blistering opinion:

Charitable institutions must first compensate those who are injured and damaged by the negligence of their officers and servants . . . before going farther afield to dispense charity and to do good . . . Charitable, benevolent, and religious institutions have been and are doing immeasurable service for the physical and moral welfare of humanity. They should be encouraged and aided that their work may be done without injustice to others. They are relieved partly or wholly from the burden of taxation, but it would not be good public policy to relieve them from liability for torts or negligence. Where innocent persons suffer through their fault, they should not be exempted. . . . It is almost contradictory to hold that an institution organized to dispense charity shall be charitable and extend aid to others, but shall not compensate or aid those injured by it in carrying on its activities.<sup>68</sup>

<sup>63</sup> Torts: Charitable Immunity—Current Status of the Charitable Immunity Doctrine, 36 Notre Dame Lawyer 93 (1960); Joachim, *supra* n. 12.

<sup>64</sup> Joachim, *supra* n. 13; *contra*: Brown, *supra* n. 40; Orłowski, *supra* n. 8.

<sup>65</sup> State v. Culvert, 23 N. J. 493, 503, 129 A. 2d 298 (1957); Benton v. Y. M. C. A. of Westfield, *supra* n. 7; Lokar v. Church of Sacred Heart, 24 N. J. 549, 133 A. 2d 12 (1957); The President and Directors of Georgetown College v. Hughes, *supra* n. 6.

<sup>66</sup> Collopy v. Newark Eye and Ear Infirmary, *supra* n. 7, at 287.

<sup>67</sup> Geiger v. Simpson M. E. Church, *supra* n. 5; Andrews v. Y. M. C. A. of Des Moines, *supra* n. 5.

<sup>68</sup> Geiger v. Simpson M. E. Church, *supra* n. 5.

The Iowa Supreme Court went to the root of the "public policy" problem and took a similar position in *Andrews v. Y.M.C.A.*:

We do not believe that either sound reason or logic, or sound principles of law, or the demands of sound present day public policy, justify those adjudications . . . (which sustain the immunity of charities). . . . It is significant that public policy has never demanded legislation exempting charitable institutions from responsibility for their negligence. . . . When a legislature has not granted an exemption, it may be questionable whether the courts have such power. If they do grant such an exemption . . . it is only because the sound public policy of that state demands it. . . . But public policy is not static. It changes as the needs of the people, the mode of their living, and the manner and methods of doing business change.<sup>69</sup>

Any objective review of the legal theories used to grant to churches certain important immunities under the law of torts indicates that the charitable immunity doctrine is legally unsound and should be discarded in its entirety. Recent changes in public policy as expressed by legislatures and cautious court decisions are, nonetheless, obvious signs that at least in some jurisdictions we must live with this unsound and outdated doctrine. These legal theories, although unsound in many respects, will thus be used in some form in the majority of our jurisdictions. The results obtained by these courts will vary with the jurisdiction's theory as to immunity.<sup>70</sup>

#### 4. *Is church immunity socially desirable?*

One of the proponents of the immunity rule points out, in a recent article, that the American courts were led by sound considerations and not merely by an overruled early English decision in adopting this rule.<sup>71</sup> This argument has great historical validity, but it cannot be accepted today. Nobody would discard this rule only to correct a historical error<sup>72</sup> if by its maintenance the public good would still be served. It is admitted that in the last century public policy had to protect charities and churches in order to enable them to perform their

<sup>69</sup> *Andrews v. Y. M. C. A. of Des Moines*, *supra* n. 5, at 205.

<sup>70</sup> Ghiardi, *op. cit. supra* n. 59.

<sup>71</sup> Joachim, *Questionable Status of Charitable Immunity*, 32 *Conn. B. J.* 330, 343 (1958); Joachim, *supra* n. 12.

<sup>72</sup> *Andrews v. Y. M. C. A. of Des Moines*, *supra* n. 5.

desirable and semi-public duties. At the inception of the American immunity rule, churches and other charities were small and financially weak. For lack of important social legislation in the interest of public good, they had to take upon themselves certain tasks which taxed their financial structures. Any law suit which would have resulted in the award of substantial damages would not only have hindered them in the performance of these duties but would have wiped out many of these charities during times of great public need. This justification of the immunity rule today does not exist. This lack of current justification is pointed out by some courts by drawing a historical parallel between the charitable organizations of the past century and "modern huge institutions."<sup>73</sup> They are capable of carrying financial burdens and can inflict many injuries. For this reason alone, says the Supreme Court of Florida, today "a charitable institution should be just before being charitable or generous."<sup>74</sup> Recent publications, treatises and articles alike are practically unanimous in their demand for application of the rules of the law of torts to all charities. The New York court, in discarding the immunity rule, pointed out that modern life does not support the social desirability of such a protection, and said:

The rule of non-liability is out of tune with the life about us, at variance with modern-day needs, and with concepts of justice and fair dealing. It should be discarded.<sup>74</sup>

The New Jersey Supreme Court stressed that when social desirability of a legal doctrine ceases, it should be abolished:

One of the greatest virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court.<sup>75</sup>

Courts in discarding the immunity rule attempted on several occasions to answer the basic question: What is more desirable for the public: the immunity rule (when the injured individual) or the liability rule (when the charity) suffers the loss? A fairly recent legal publication summarizes the answers of many jurisdictions by stating that:

<sup>73</sup> *Ibid.*; *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P. 2d 220, 229 (1957).

<sup>74</sup> *Nicholson v. Good Samaritan Hosp.*, 145 Fla. 360, 199 So. 344, 348 (1940); *Bing v. Thunig*, *supra* n. 7, at 11; *Annual Survey of American Law*, *op cit. supra* n. 3.

<sup>75</sup> *State v. Culvert*, *supra* n. 65, at 503.

Charitable immunity may at one time have been necessary as a "protective tariff" for charities, but, in view of the relatively strong economic position of most charities today, and the availability of liability insurance at a modest cost, the reason for the rule has disappeared. Under such circumstances it is well within the proper sphere of the judiciary to discard the doctrine.<sup>76</sup>

Besides the lack of current justification some courts point out the moral insufficiency of the immunity rule. Dissenting opinions sometimes call it "protected negligence," saying that

it is an anomaly that the institutional doer of good asks exemption from responsibility for his own wrong, though all others must pay. The incorporated charity must respond as do private individuals, business corporations and others, when it does good in a wrong way.<sup>77</sup>

Justice Cohen of the Pennsylvania Supreme Court gives the only possible answer to the question: Who should bear the loss?

. . . the party whose blameworthy conduct has caused injury to another must compensate the innocent party therefor.<sup>78</sup>

The reason for this and other similar answers is furnished by a dissenting justice of the Kentucky high court who said:

. . . if the immunity doctrine should be sweepingly applied then this court has created an artificial individual, who like in ancient tyrannical days can do no wrong.<sup>79</sup>

The undesirable social and legal effects of "protected negligence" prompted the Congress itself to pass the Federal Tort Claims Act of 1946. The Act says in essence that claims may be allowed against the United States for injury or loss

by negligent or wrongful act or omission of any employee of the government while acting within the scope of his employment, under circumstances where the United States, if a private citizen, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.<sup>80</sup>

Similar enactments by state legislations concerning charitable institutions would put an end to this controversial issue. Such legislation, unfortunately, is still not forthcoming.

<sup>76</sup> Annual Survey of American Law, *op. cit. supra* n. 3, at 396.

<sup>77</sup> *Knecht v. St. Mary's Hosp.*, 392 Pa. 75, 140 A. 2d 30, 40 (1958).

<sup>78</sup> *Ibid.*

<sup>79</sup> *Emery v. Jewish Hosp. Ass.*, 193 Ky. 400, 236 S. W. 577 (1921).

<sup>80</sup> Federal Tort Claims Act, *supra* n. 61.

On the contrary, recent developments have revealed that state legislatures are the foremost bastions of the charitable immunity rule.<sup>81</sup>

## II. Present and Future Developments.

### 1. *Most courts would find a satisfactory solution, if . . .*

After 1942, but especially between 1950 and 1958, most American jurisdictions recognized the need for a change in charitable immunities and some courts rejected them in their entirety, while others promised early rejection or pierced the shield of non-liability with many qualifications.<sup>82</sup> This trend is closely connected with one of the most exhaustive and often-quoted anti-immunity decisions in this field. In 1942 Justice Rutledge, in *The President and Directors of Georgetown University v. Hughes*, surveyed the whole field of charitable immunities and proved that they were historically unfounded, legally unsound and socially undesirable.<sup>83</sup> Justice Rutledge had this to say:

Paradoxes of principle, fictional assumptions of fact and consequence and confused result characterize judicial disposition of these claims. . . . From full immunity, through varied but inconsistent qualifications to general responsibility is the gamut of decisions. The cases are almost riotous with dissent. Reasons 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 also incomplete.<sup>84</sup>

This famous and often quoted opinion intensified the legal struggle of judges and legal writers against the immunity rule which had been under attack practically since its inception.<sup>85</sup> The first qualifying decisions in the wake of strong demands for its complete abolition did not affect churches in any great degree.<sup>86</sup> Hospitals were the primary targets of these decisions.

<sup>81</sup> Conn. S. J., 1955 Sess. 550-563; R. I. Gen. Laws, Ch. 116 § 95 (1938); N. J. Stat. Ann. *supra* n. 9.

<sup>82</sup> Browne, *supra* n. 8.

<sup>83</sup> *The President and Directors of Georgetown College v. Hughes*, *supra* n. 6.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Avellone v. St. John's Hosp.*, *supra* n. 45; *Pierce v. Yakima Valley Memorial Hosp. Assn.*, 43 Wash. 2d 162, 260 P. 2d 765 (1953); *Lyon v. Tumwater Ev. Free Church*, 47 Wash. 2d 202, 287 P. 2d 128 (1955).

<sup>86</sup> *Freezer, Tort Liabilities of Charities*, 77 Univ. of Penna. L. R. 191 (1928).



In 1950 and 1951 scores of states started to swing the pendulum towards total liability. The California high court in 1950 revoked the immunity doctrine and held a church liable for the injury of children sustained while driven home from Bible School.<sup>87</sup> Arizona followed suit and repudiated the immunity doctrine, making hospitals and churches liable for their negligent acts.<sup>88</sup> In 1951 Delaware overruled its earlier decisions and made charities subject to the doctrine of *respondeat superior* even when their servants were selected with proper care.<sup>89</sup> In the same year Mississippi held that charities were only liable for the negligent selection or retention of their servants, but the high court approvingly observed the availability of liability insurance.<sup>90</sup> In 1952 Alaska rejected the legal theories of charitable immunity rule, and in 1954 renewed its earlier decision making charities liable for their negligence.<sup>91</sup> Kansas in 1953 rejected the tort immunities of hospitals, and in 1954 repudiated the whole rule.<sup>92</sup> In the same year Washington abrogated the immunity rule as applied to hospitals, and in 1956 a very similar rule was promulgated by the Ohio high court.<sup>93</sup> In 1955 Nevada limited the immunity of churches and other charities to their beneficiaries.<sup>94</sup> In the following year Idaho overruled the "waiver theory" and held charitable hospitals liable to paying patients.<sup>95</sup> During the same years other jurisdictions have moved toward liability in some degree.

The most important effect however, was attributed to the decisions of the New York and New Jersey high courts which completely rejected the whole immunity rule.<sup>96</sup> The decisions of these two jurisdictions have often been followed or at least favorably observed by other states on many other occasions.

<sup>87</sup> Malloy v. Fong, *supra* n. 48.

<sup>88</sup> Roman Cath. Church v. Keenan, 74 Ariz. 20, 243 P. 2d 455 (1952); Ray v. Tucson Medical Center, *supra* n. 73.

<sup>89</sup> Durney v. St. Francis Hosp., *supra* n. 48.

<sup>90</sup> Miss. Baptist Hosp. v. Holmes, *supra* n. 48.

<sup>91</sup> Moats v. Sisters of Charity of Providence, 13 Alaska 546 (1952); Tuengel v. City of Sitka, 118 F. Supp. 399 (D. C. Alaska, 1954).

<sup>92</sup> Noel v. Menninger Foundation, 175 Kan. 751, 267 P. 2d 934 (1954).

<sup>93</sup> Pierce v. Yakima Valley Hosp. Assn., *supra* n. 85; Avellone v. St. John's Hosp., *supra* n. 45.

<sup>94</sup> Springer v. Federated Church of Reno, 71 Nev. 177, 283 P. 2d 1071 (1955).

<sup>95</sup> Wheat v. Idaho Falls Latter Saints Hosp., 78 Idaho 63, 297 P. 2d 1042 (1956).

<sup>96</sup> Bing v. Thunig, *supra* n. 7; Collopy v. Newark Eye and Ear Infirmary, *supra* n. 7.

For this reason their new public policy was heralded by legal writers as a sure sign of the impending defeat of the immunity rule in American jurisdictions.<sup>97</sup>

These expectations, alas, were premature and over-optimistic. It is true that in 1958 most courts were ready to weaken or to discard the immunity doctrine. At this point, however, some state legislatures entered the field and in two states, by statutory law, the liability doctrine was reinstated, and in many other states the courts decided to wait for legislative changes and not to go beyond the narrow issues presented by given cases. These developments have changed the prognostications of legal writers.<sup>98</sup> The charitable immunity doctrine is very much alive in some form in the majority of our jurisdictions and it can not be expected any more that it will swiftly and completely disappear from the American legal system.<sup>99</sup>

## 2. *Statutory laws favor immunities . . .*

Since 1958 it has become more obvious than ever that courts cannot deal with the problem of charitable immunity without interference from state legislatures. This was the year when the New Jersey state legislation re-established, to a great extent, the immunity rule discarded in the earlier part of the same year by the highest state court.<sup>100</sup> Since 1958 this reenactment has often been used by the proponents of charitable immunities to remind the courts that any change in public policy should come from the legislature.<sup>101</sup> These arguments in favor of legislative changes are mainly based on two contentions. The first contention desires to maintain *stare decisis* and maintains that since the American immunity rule is based on a sound and justifiable public policy this public policy cannot be changed short of legislative action.<sup>102</sup> The second contention deals with the retrospective effect of a court rule. According to this, if courts would abolish the charitable immunity rule, litigants whose claims are not barred by the Statutes of Limitations would enforce prior

<sup>97</sup> Simeone, *Doctrine of Charitable Immunity*, 5 St. Louis Univ. L. R. 357 (1959); Brown, *supra* n. 40.

<sup>98</sup> Gibbon v. Y. M. C. A., *supra* n. 41; Tomasella v. St. Cecilia Church, 6 Ohio Op. 2d 508 (1958).

<sup>99</sup> Rosen v. Concordia Ev. Lutheran Church, 167 N. E. 2d 671 (Ohio App. 1960); Smith v. Duval City Welfare Board, *supra* n. 11.

<sup>100</sup> N. J. Stat. Ann., *supra* n. 9.

<sup>101</sup> Joachim, *supra* n. 13.

<sup>102</sup> Gibbon v. Y. M. C. A., *supra* n. 41; Md. Ann. Code, Art. 48 A § 85 (1951); Joachim, *supra* n. 13.

rights again against the charities. Although especially this second point has validity, the real reason for these demands is obviously different; advocates of the immunities know that legislatures apparently favor the immunity rule. The Rhode Island Supreme Court was the first in the United States which abrogated the immunity doctrine. The legislature reinstated it.<sup>103</sup> Several attempts were made by some state legislators to abolish the charitable immunity rule by statutes, but their attempts were rejected. Such a futile attempt was made, for instance, in 1955 in Connecticut.<sup>104</sup> In another immunity state, in Indiana in 1959 a bill was introduced to make eleemosynary institutions liable for injuries caused by negligence of employees or officers. This bill was defeated also.<sup>105</sup> In Ohio the General Assembly enacted Substitute Senate Bill No. 241 granting immunity to non-profit organizations operated for religious, charitable, educational and hospital purposes. It was vetoed by the governor and the House was unable to override it. In 1961 the Ohio Legislature re-enacted S. B. 241 into S. B. 187; the bill did not become law.<sup>106</sup> It is interesting that the bill restored to hospitals some measure of immunity, making them liable only for the gross negligence of their servants, but reduced all other charitable institutions to the same status, thus overruling the immunity granted such charities by the *Gibbons* case and earlier decisions.<sup>107</sup> Actual or possible legislative actions have made the courts of several jurisdictions very cautious. Not only in the so-called immunity states but in some other jurisdictions where qualified immunity is the rule, courts often decline to change public policy and bluntly declare that any drastic change must come from the legislature. An earlier policy declaration of the Massachusetts high court exemplifies the reluctance of some jurisdictions to making sweeping changes:

In previous decisions we have indicated as firmly as we can that any abolition of this rule must be by the Legislature.<sup>108</sup>

Arkansas, another immunity state, is similarly unwilling to change the immunity rule by court decisions. Any change should

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<sup>103</sup> *Glavin v. Rhode Island Hosp.*, 12 R. I. 411, 34 Am. Rep. 675 (1879); R. I. Gen. Laws Ann. § 95 (1938).

<sup>104</sup> S. B. 597, 1955 Sess., Conn. S. Journal, 1955 Sess. 550.

<sup>105</sup> *Joachim*, *supra* n. 71.

<sup>106</sup> Substitute Senate Bill 241 (1959); Senate Bill 187 (1961).

<sup>107</sup> *Ibid.*; *Morris*, *supra* n. 10.

<sup>108</sup> *Barrett v. Brooks Hosp. Inc.*, 338 Mass. 754, 157 N. E. 2d 638 (1959).

come from the legislature, declares the highest state court. Oregon<sup>109</sup> and Nevada,<sup>110</sup> where immunity is limited to beneficiaries, Mississippi<sup>111</sup> and other qualified-immunity states, leave eventual changes to the legislature. The Ohio Supreme Court, in *Gibbons v. Y. M. C. A.*, in which the court refused to go beyond the *Avellone* rule, has indicated also that any significant change in the rule must come from the legislature.<sup>112</sup> Other courts however did not wait for changes effected by the legislature. Justice Jacobs, in *Collopy v. Newark Eye and Ear Infirmary*, had this to say about judicial change of the charitable immunity doctrine:

Judges of an earlier generation declared the immunity because they believed it to be a sound instrument of judicial policy. When judges of a later generation firmly reach a contrary conclusion, they must be ready to discharge their own judicial responsibilities in conformance with modern concepts and needs.<sup>113</sup>

Justice Fuld, in *Bing v. Thunig*, speaking for the New York high court, pointed out that

. . . if adherence to precedent offers no justice but unfairness . . . it loses its right to survive and no principle constrains courts to follow it.<sup>114</sup>

But after the New Jersey legislature re-established the immunity rule, some courts in other jurisdictions were induced to use more caution.

### 3. *What is the law today?*

The charitable immunity rule affords to churches greater protection than to non-charitable corporations. This is clearly illustrated by the Ohio and the Washington courts, and it is indicated in judicial opinions of other jurisdictions.<sup>115</sup> Courts are much more willing to abrogate the immunity rule when

<sup>109</sup> *Landgraver v. Emmanuel Lutheran Charity Board*, 203 Ore. 489, 280 P. 2d 301 (1955).

<sup>110</sup> *Springer v. Federated Church of Reno*, *supra* n. 94.

<sup>111</sup> *Miss. Baptist Hosp. v. Holmes*, *supra* n. 48.

<sup>112</sup> *Gibbons v. Y. M. C. A.*, *supra* n. 11.

<sup>113</sup> *Collopy v. Newark Eye and Ear Infirmary*, *supra* n. 7 at 283.

<sup>114</sup> *Bing v. Thunig*, *supra* n. 7 at 9.

<sup>115</sup> *Hunsche v. Alten*, 76 O. L. A. 68, 145 N. E. 2d 386 (1957); *Lyon v. Tumwater Ev. Free Church*, *supra* n. 85.

hospitals are sued than in the case of other charitable corporations, especially churches.<sup>116</sup>

Contrary to prognostications of the late 1950's and barring unforeseen developments, it may be said that in the majority of the American jurisdictions we will live for years to come with the doctrine of total or qualified immunity of churches.

*No immunity states.* After the withdrawal of New Jersey, the following states rejected the doctrine of charitable immunity: Vermont, Minnesota, Iowa, New York, Arizona, California, Delaware, Washington, D. C., New Hampshire (by statute), North Dakota, Kansas and Utah. The highest court of Puerto Rico and Alaska have indicated also that they will reject the immunities of churches. In some other states we have similar trends, but after recent developments in favor of church immunities, prognostications of future trends and decisions would hardly be more than a guessing game.<sup>117</sup>

*Immunity states.* In these states not only churches but other charitable institutions are protected by court-made or by statutory immunity doctrines. In most of these states, however, demands by legal writers and dissenting opinions are trying to pierce the walls of charitable immunities.<sup>118</sup> In these states the immunity rule is not always entirely rigid. In Kentucky, for example, if the injured patient is paying for hospital care, recovery may be granted.<sup>119</sup> In Wisconsin gross negligence or breach of statutory duties render churches liable.<sup>120</sup> States like Ohio or Washington could be classified as immunity states concerning church liabilities, but it seems to be better procedure to enumerate in this category only those states which with the exception of border line cases recognize the immunity doctrine with

<sup>116</sup> *Foster v. R. C. Diocese of Vermont*, 116 Vt. 124, 70 A. 2d 230 (1950); *Andrews v. Y. M. C. A. of Des Moines*, *supra* n. 5; *Bing v. Thunig*, *supra* n. 7; *Malloy v. Fong*, *supra* n. 48; *Durney v. St. Francis Hosp.*, *supra* n. 48; *Geiger v. Simpson M. E. Church*, *supra* n. 5; *R. Cath. Church v. Keenan*, *supra* n. 88; *Noel v. Menninger Foundation*, *supra* n. 92.

<sup>117</sup> *Tavarez v. San Juan Lodge*, 68 Puerto Rico 681 (1948); *Moats v. Sisters of Charity of Providence*, *supra* n. 91; *Tuengel v. City of Sitka*, *supra* n. 91.

<sup>118</sup> *Knecht v. St. Mary's Hosp.*, *supra* n. 77.

<sup>119</sup> *City of Louisville v. O'Donaghue*, 157 Ky. 243, 162 S. W. 1100 (1914); *Roland v. Cath. Archdiocese of Louisville*, 301 S. W. 2d 57-4 (Ky. 1957).

<sup>120</sup> *Wilson v. Ev. Lutheran Church of Reformation*, 202 Wis. 111, 230 N. W. 708 (1930); *Jaeger v. Lutheran Holy Ghost Congreg.*, 219 Wis. 209, 262 N. W. 585 (1930); *Zimmers v. St. Sebastian' Congreg.*, 258 Wis. 496, 46 N. W. 2d 820 (1951).

respect to every charitable institution.<sup>121</sup> These states are the following: Massachusetts, South Carolina, Connecticut, Pennsylvania, Arkansas, Kentucky, Missouri, Nevada, Oregon, Tennessee, Texas, West Virginia, Wisconsin, Wyoming and Nebraska.<sup>122</sup> It is worthwhile to note that most of our highly industrialized states are not among these jurisdictions. Illinois, which used to be one of the immunity states after its recent court decisions, has moved towards a more liberal qualified immunity doctrine.<sup>123</sup>

*Partial immunity states.* The remaining states are put in this category with great reluctance. Some of them are very close to the non-immunity states and some of them are still adhering to the doctrine of complete immunity,<sup>124</sup> especially when they deal with the liabilities of churches. Still, they must be placed in this category because in some degree or with regard to some charitable corporations, mostly hospitals, the principle of the immunity rule was discarded or at least disregarded.<sup>125</sup>

In these states the law of negligence is in a state of flux. Mr. Justice Douglas said in another connection:

. . . but there are few areas of law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between conflicting interests. This is why most legal problems end as questions of degree.<sup>126</sup>

This statement could be well applied to these partial immunity states where the courts attempt to balance the protection of the injured individuals against the interest of charities. The various courts use different methods to accomplish this. Some courts distinguish between beneficiaries of charities and strangers.<sup>127</sup>

<sup>121</sup> Hunsche v. Alten, *supra* n. 115; Rosen v. Concordia Ev. Lutheran Church, *supra* n. 99.

<sup>122</sup> Prosser, *op. cit. supra* n. 44, at 786.

<sup>123</sup> Wendt v. Servite Fathers, 332 Ill. App. 618, 76 N. E. 2d 342 (1947); Moore v. Moyle, 405 Ill. 555, 92 N. E. 2d 81 (1950); Slinker v. Gordon, 344 Ill. App. 1, 100 N. E. 2d 816 (1951).

<sup>124</sup> Howard v. South Baltimore General Hosp., 191 Md. 617, 62 A. 2d 816 (1956); Smith v. Duval City Welfare Board, *supra* n. 11; Landpover v. Emmanuel Lutheran Bld., 203 Ore. 489, 280 P. 2d 301 (1955); McDermott v. St. Mary's Hosp. Corp., 144 Conn. 417, 133 A. 2d 608 (1957).

<sup>125</sup> Avellone v. St. John's Hosp., *supra* n. 45.

<sup>126</sup> Estin v. Estin, 334 U. S. 541, 545 (1948).

<sup>127</sup> 124 A. L. R. 815; 101 A. L. R. 413; Gollob v. Congreg. Chel Moisse Chevre Tahilim, 119 Misc. 346, 196 N. Y. S. 517 (1922); Gibbon v. Y. M. C. A., *supra* n. 11; Silva v. Providence Hosp., *supra*, n. 48.

Other courts sustain the immunity rule if due care was exercised by charities in the selection of their agents or servants, and apply the *respondeat superior* doctrine if such care was not observed.<sup>128</sup> Some courts went as far as to hold that certain building codes were not applicable to religious corporations,<sup>129</sup> while others refused to grant immunity to religious corporations where the statutes spelled out liability for violation.<sup>130</sup> No wonder that legal writers make strong remarks about the law of negligence as applied to charities in some of these jurisdictions: "The cases on this subject present an almost hopelessly tangled mass of reason and unreason as it is not often confronted in the law."<sup>131</sup> It is only logical that the partial immunity states were the ones which have moved towards discarding of charitable immunities.<sup>132</sup>

Other states, like Ohio in the noted *Avellone* case, abolished the immunities of hospitals in a well defined and narrow field.<sup>133</sup> In later cases, however, widening of this rule was promptly refused.<sup>134</sup> It is pure speculation to connect this refusal with the New Jersey immunity statutes, but it should be noted that the Ohio court pointed out in a recent decision that the immunity rule should be changed by the legislature.<sup>135</sup> Washington is in a very similar situation.<sup>136</sup> It may be well said that future developments in these two states could be indicative of the future of the immunity doctrine.

#### 4. *Recent decisions affecting the immunity rule.*

Not even in the immunity states would the courts blanket with the immunity rule all the fund raising and other business activities of the church. The Massachusetts courts indicated as early as in 1930 that a charitable institution may be answerable for negligence arising out of its commercial activities con-

<sup>128</sup> 101 A. L. R. 413; *Bianchi v. South Park Presb. Church*, *supra* n. 22.

<sup>129</sup> *Jaeger v. Lutheran Holy Ghost Congreg.*, *supra* n. 120.

<sup>130</sup> *Geiger v. Simpson M. E. Church*, *supra* n. 5; *Wilson v. Ev. Luth. Church of Reformation*, *supra* n. 120.

<sup>131</sup> Zollman, *American Law of Charities* § 813.

<sup>132</sup> *Bing v. Thunig*, *supra* n. 7; *Malloy v. Fong*, *supra* n. 48; *Roman Cath. Church v. Keenan*, *supra* n. 48.

<sup>133</sup> *Avellone v. St. John's Hosp.*, *supra* n. 45.

<sup>134</sup> *Hunsche v. Alten*, *supra* n. 115; *Gibbon v. Y. M. C. A.*, *supra* n. 11.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Pierce v. Yakima Valley Memorial Hosp. Ass.*, *supra* n. 85; *Lyon v. Tumwater Ev. Free Church*, *supra* n. 85.

ducted for profit. This is true even when the profits of those activities are applied wholly to its charitable purposes. The court's opinion says

The distinction is between activities primarily commercial in character carried on to obtain revenue to be used for charitable purposes . . . where there is liability for negligence, and activities carried on to accomplish directly the charitable purposes of the corporation, incidentally yielding revenue . . . where there is no liability for negligence.<sup>137</sup>

The same principle was applied by the Ohio Supreme Court, in 1960, to churches. In *Blankenship v. Alter*<sup>138</sup> the syllabus says:

1. Immunity from civil liability for negligence accorded the charitable institutions, including religious organizations, depends upon the actual devotion of the institution to charitable purposes, and a charitable institution is liable for negligence in the operation of a business enterprise for profit not directly related to the purpose for which such institution was organized.

2. A church in conducting a game of chance on its premises for substantial profit is engaged in a business enterprise and is amenable to a tort action by a patron of the game who sustained personal injuries by a fall when a defective chair, supplied by the church in connection with the game, collapsed.<sup>139</sup>

The injured party was not a member of the church and merely played bingo. Whether a church member or a recipient of the charities benefits would recover is not quite clear, but an answer in the affirmative is indicated in the opinion:

St. Joseph's church engaged in a business enterprise dissociated from the purpose for which it was organized.<sup>140</sup>

While this decision is sound in reasoning and in its holding, it contains possible elements of danger. In such a clear case it was not difficult to establish the fact that the bingo game was "dissociated" from the purpose of the church. But in other cases where a court would be called to decide whether another activity of the church was or was not "directly related to the purpose for which such institution was organized," that court would in fact

<sup>137</sup> *McKay v. Morgan Co-operative Industries and Stores*, 272 Mass. 121, 172 N. E. 68, 69 (1930).

<sup>138</sup> *Blankenship v. Alter*, 171 Ohio St. 65, 167 N. E. 2d 922 (1960).

<sup>139</sup> *Ibid.*

<sup>140</sup> *Id.* 67.



decide what constitutes a religious purpose. Such a decision would always lie open to constitutional attack.

An "adjunctive use of property" is the other area where even immunity states may find churches liable. In a tax exemption case the Pennsylvania Supreme Court ruled that such a use is not religious in its nature, and thus not tax exempt.<sup>141</sup>

This decision may suggest the weakening of churches' immunity as to parking lots and other properties not directly connected with the religious activities of the church. During recent years sizable properties have been purchased by churches for parking lots and for church sites. The Pennsylvania rule or its application to misfeasance and malfeasance on such properties could have further implications.

Interstate activities of large church agencies and denominational agents create interesting problems in the field of conflict of laws. Such a case is presented by *Kaufman v. American Youth Hostels*.<sup>142</sup> This was a wrongful death action decided by the New York courts. A New York non-profit organization was sued for a negligent act alleged to have been committed in Oregon. The *lex loci* (Oregon) recognized the immunity rule, while the law of the forum (New York) rejected it. The defendant non-profit organization defended with the immunity rule of Oregon. The New York court held that Oregon granted immunity from torts committed within its jurisdiction only for its own charitable organizations. Since a foreign corporation is not protected by the Oregon rule, the New York non-profit corporation would be held liable by Oregon state courts for the same negligent act. The New York court gave judgment to the plaintiff, stating that there were no indications that Oregon would have held the New York corporation immune from torts committed in Oregon.

#### 5. Churches could protect themselves in liability states also.

(a) *Liability insurance.* Since the second world war the availability of liability insurance policies has been one of the most important practical reasons against the immunity doctrine of churches and other charitable institutions. Justice Rutledge dealt with this practical problem also.<sup>143</sup> While it is true that

<sup>141</sup> *Second Church of Christ Scientist v. City of Philadelphia*, 157 A. 2d 54 (Pa. 1960).

<sup>142</sup> *Kaufman v. American Youth Hostels*, 13 Misc. (N. Y.) 2d 8 (1958).

<sup>143</sup> *The President and Directors of Georgetown College v. Hughes*, *supra* n. 6; *Miss. Baptist Hosp. v. Holmes*, *supra* n. 48.

liability insurance cannot be the criterion of tort liability, still since its availability, the cost of reasonable insurance protection and not the amount of the damage claim should be balanced against the right of individuals to be compensated for wrongful injury.<sup>144</sup> Proponents of the immunity rule are quick to point out that *stare decisis* cannot be disregarded merely for such practical reasons. A recent Ohio decision deals with the question of insurance and stresses also that liability insurance is a poor excuse for making churches liable.<sup>145</sup> One writer hastens to point out the rising cost of this insurance wherever the immunity rule is abrogated. Ohio serves as an illustration in this article, and the author states that since the *Avellone* rule the price of the liability insurance covering hospitals has steadily been increased: first by 300% and in 1959 by 700%.<sup>146</sup>

The majority of legal writers and many courts are of a different opinion. Courts usually allow recovery against churches even in some of the immunity states, up to the amount of the liability insurance, using the trust fund theory to justify their rule. This solution is called equitable since the trust funds are not depleted and the injured party still may have at least partial indemnity. In Arkansas, where the churches are immune, a statute permits the injured person to recover from the insurer.<sup>147</sup> Other courts recommend the purchase of liability insurance policies as a matter "of good business judgment."<sup>148</sup>

The New Jersey Superior court held in 1954 that a claim for charitable immunity is an affirmative defense.<sup>149</sup>

It is, therefore, recommended that churches should have a provision in their insurance contracts in which the insurer agrees not to set up this affirmative defense. On the other hand the insurance company may interpose any other defense available to a natural person or a private corporation.<sup>150</sup>

<sup>144</sup> *Ibid.*

<sup>145</sup> *Rosen v. Concordia Ev. Luth. Church, supra n. 99.*

<sup>146</sup> *Joachim, supra n. 12.*

<sup>147</sup> *Ark. Stat. §§ 66, 517 (1947); O'Connor v. The Boulder Colorado Sanatorium, 105 Colo. 259, 96 P. 2d 835 (1939).*

<sup>148</sup> *Howard v. South Baltimore General Hosp., supra n. 124; Stadem v. Jewish Memorial Hosp., 239 Mo. App. 38, 55 S. W. 2d 142 (1951); Miss. Baptist Hosp. v. Holmes, supra n. 48; McCleod v. St. Thomas Hosp. 170 Tenn. 423, 95 S. W. 2d 917 (1936).*

<sup>149</sup> *Rafferseder v. Raleigh Fitkin-Paul Morgan Memorial Hosp., 30 N. J. 82, 103 A. 2d 383 (1954); Taylor v. Knox County Board of Education, 292 Ky. 767, 167 S. W. 2d 700 (1942).*

<sup>150</sup> *Flowers v. Board of Commissioners of County of Vanderburgh, 168 N. E. 2d 224 (Ind. 1960).*

Courts favoring the purchase of liability insurance point out that the price of the liability insurance could be absorbed by the paying patients of a hospital or by the members of churches. An ever increasing number of churches are purchasing liability insurance because they are aware of the ethical aspects of the problem. In the congregation served by this writer as its pastor such an insurance policy has been in force for a number of years. At least on two occasions members of the congregation were injured on the church premises. The insurer made a satisfactory settlement on both occasions. The membership of the congregation expressed great relief after the settlement. In the budget of this average-size congregation the expense of the liability insurance policy is not significant. This writer disagrees both on ethical and practical grounds with a prominent writer and crusader for the immunity doctrine who bluntly states that the individual should carry the burden of losses rather than the charitable institution.<sup>151</sup>

(b) *The degree of care required from churches.* In the liability states it is important to establish the degree of care required by the law for the protection of a certain class of people. The degree of care varies, depending whether the law puts church members, church-goers, or church workers in the class of invitees or licensees. The first test applied by courts for such a classification was the so-called "older test": (1) Was there an invitation or encouragement to enter from the occupier of the premises? (2) Did the occupier derive a benefit from the visit, or did the occupier and the visitor derive mutual benefits?<sup>152</sup>

The new test is set out in §332 of the *Restatement of the Law of Torts*. This test is often called the "economic test," or the business visitor test. In applying this test most courts require the occupier to derive some actual or potential economic benefit from the presence of the visitor.<sup>153</sup>

The "older test" would seem to show that a church-goer or a church member should be made a licensee. It is clear that the benefits are mutual. Since the primary reason for the church's invitation and the visitor's presence is not economic, and the benefits are intangible spiritual benefits, the test of the Restatement cannot apply to churches without reservation.

<sup>151</sup> Joachim, *supra* n. 12; Gallagher v. Humphrey, L. R. 6 L. T. R. (N. S.) 684 (1862).

<sup>152</sup> Paubel v. Hitz, 339 Mo. 274, 96 S. W. 2d 369 (1936); Brosnan v. Kaufman, 294 Mass. 495, 2 N. E. 2d 441 (1936).

<sup>153</sup> Restatement of the Law of Torts, § 332 (1939).

This seems to be the rule in *McNulty v. Hurley*,<sup>154</sup> a case based on sound principles. The plaintiff's action was based on the contention that a churchgoer was an invitee. The court rejected this contention and said:

A person who enters a religious edifice for purpose of attending church service, does so for his own convenience, pleasure and benefit and is at best a licensee.<sup>155</sup>

Concerning church workers, where the church has the primary benefit a New Jersey rule seems to be the more desirable. That state's court gave judgment to a Sunday School teacher and held that she was a "business invitee" since the church derived benefit from her presence. Here again the test of the Restatement was disregarded and the church was held to the highest degree of care without deriving any economic benefit from the teacher's presence.<sup>156</sup>

It seems to this writer that along the line of these two decisions an equitable solution could be found by giving the church-goer the status of a licensee and the church worker the status of an invitee.

### Conclusion.

Most churches have accepted or at least tacitly approved the immunity rule. This is the main reason for its existence. It is obvious that neither courts nor legislatures would change it in many jurisdictions without first looking to the attitude of the churches. The churches themselves must, therefore, take a clear stand concerning the fate of this doctrine. Consistent with their divine teachings and high moral ideals the churches should reject the immunity doctrine. This would help the law to find a legally sound, socially desirable public policy in this field.

Until such time, churches should protect themselves with liability insurance, and whenever possible with workmen's compensation coverage. On the other hand the law should clearly define the degree of care required from churches.

Most local congregations are unaware of this problem. Thus, the initiative and the responsibility lies with their denominational leaders.

<sup>154</sup> *McNulty v. Hurley*, 97 S. 2d 185 (Fla. 1957).

<sup>155</sup> *Id.*, at 186; *Coolbaugh v. St. Peter's Roman Cath. Church*, 142 Conn. 536, 115 A. 2d 662, 664 (1955).

<sup>156</sup> *Atwood v. First Presb. Church*, 26 N. J. Super. 607, 98 A. 2d 350 (1953).