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Recent Developments in Ohio's Charitable Immunity Law

Crawford Morris*

The last time we looked at this problem together was in January of 1957. At that time the Avellone decision, overruling nearly 50 years of Ohio law by making a hospital fully liable for the torts of its servants under the doctrine of respondeat superior, was scarcely six months old. At that time we observed: 3

This monumental decision raises two questions of extreme importance which seem to be left unanswered and which will unquestionably be the subject of further litigation. Those questions are:

1. Is the scope of the Avellone decision limited solely to hospitals or are all charities deprived of immunity?
2. Has Ohio adopted the New York Rule?

Time in its flight has brought us the answers to these two questions, at least insofar as our Supreme Court is concerned. And the answers furnished are illuminating not only for their legal context but also for the insight they furnish us into the inner workings of a Court's mental processes. Let us here re-examine each of these questions in turn.

Prologue: Hindsight is a wonderful thing. It teaches, if it teaches anything, the truth of that old saying: "Only a fool prognosticates the future." We note with some amusement (at ourselves) that in 1957 we played the fool and ventured to hazard a guess as to the ultimate answers time would bring to both of these questions. 4 We also note that time has proved our prognostications right on the first question and wrong on the

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1 6 Clev.-Mar. L. R. 47 (1957), Sequelae of Recent Hospital Tort Liability—Avellone v. St. John's Hospital, Revisited.
2 165 Ohio St. 467, 135 N. E. 2d 410 (1956).
3 See footnote 1, supra, at p. 47.
4 6 Clev.-Mar. L. R. 47 at p. 52 re question (1) and at p. 57 re question (2).
second question—a "batting average" of just .500 which we suppose is "about par for the course" of prognostication. But like all lawyers we can easily distinguish our failure on the second question for there the New York courts, whose rule Ohio was seeming to follow, later reversed themselves and repudiated their own rule, and Ohio, if it had even meant to adopt the New York rule, promptly followed suit.

I. Charities Other Than Hospitals

Recapitulation: In presentation of the Avellone case to the Supreme Court, both in brief and in oral argument, we had warned that the Ohio immunity rule applied to all charities and that any decision in the case at bar would logically extend to affect all charities alike, many of whom were small struggling organizations with very limited budgets. More specifically, the experience of the State of Washington, where the Supreme Court found itself forced to retreat from its repudiation of the immunity rule insofar as charities other than hospitals were concerned, was called to the attention of the Ohio Supreme Court as a reason for retaining the rather limited immunity in favor of all charities rather than to attempt to repudiate it insofar as the instant defendant, a hospital, was concerned, with the resultant loss of immunity for all other charities. Against such a background, the majority of the Ohio Supreme Court, in abolishing the tort immunity for the defendant hospital, was, it seemed to us, painstakingly careful to limit its language to the single instance of a charitable hospital. It was this factor that lead us to hazard our prognostication: It is the opinion of this writer that our Supreme Court meant and will continue by future decisions to limit the scope of the Avellone decision to the sole instance of charitable hospitals.

This aspect of the problem presented itself to the Supreme Court in 1960, in a case entitled Gibbon v. Y.W.C.A. Like the Avellone case, the Gibbon case came before the Supreme Court solely on the pleadings. Petition alleged that plaintiff's decedent, Jane Ann Gibbon, went to defendant Y.W.C.A.'s swimming pool and there drowned due to defendant's life guard's neglect in

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5 See 6 Clev.-Mar. L. R. 47 at pp. 48-50 for citation and decision of State of Washington cases.
6 6 Clev.-Mar. L. R. 47 at p. 52.
7 170 Ohio St. 280, 164 N. E. 2d 563.
certain particulars. Defendant's demurrer to the petition claiming the charitable immunity was sustained by the trial court. The Court of Appeals of Butler County reversed but certified the record to the Supreme Court for conflict with the decision of the Court of Appeals of Cuyahoga County in the similar case of Tomasella v. St. Cecilia's Church. The Supreme Court of Ohio reversed, and entered final judgment for the Y.W.C.A., holding in its syllabus:

1. A charitable or eleemosynary institution other than one which has as its purpose the maintenance and operation of a hospital, is, as a matter of public policy, not liable for tortious injury except (1) when the injured person is not a beneficiary of the institution, and (2) when a beneficiary suffers harm as a result of failure of the institution to exercise due care in the selection or retention of an employee. (Cullen v. Schmitt [1942], 139 Ohio St. 194, and Waddell, a Minor v. Young Women's Christian Assn. [1938], 133 Ohio St. 601, approved and followed.)

2. In an action by an administrator to recover damages under the wrongful death statute for the loss occasioned by the drowning of the decedent in a swimming pool maintained and operated by the defendant, Young Women's Christian Association, a charitable or eleemosynary institution, and allegedly caused by the negligence of an employee of the association, a demurrer to the petition filed by the association was sustained, and final judgment was entered by the Court of Common Pleas for the defendant, which judgment was reversed by the Court of Appeals. Held:

In the absence of facts establishing reasons for not applying a long-declared public policy, the doctrine of stare decisis should be applied and followed in order to avoid retroactive imposition of liability on such charitable institution which would result from the declaration of a different public policy. Legislative policy in this matter is committed to the General Assembly of Ohio which, under Section 28, Article II of the Ohio Constitution, may not enact retroactive laws or laws impairing the obligation of contracts.

It is interesting to note that the two reasons here assigned by the Supreme Court for the retention of the older charitable immunity rule insofar as charities other than hospitals are concerned notwithstanding the recent abolition of that rule by the

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8 Affirmed without opinion by Court of Appeals for Cuyahoga County. For opinion of trial court see 6 Ohio O. 2d 508.
same Court in the *Avellone* case insofar as charitable hospitals are concerned, are: (1) *stare decisis* which avoids the unfairness of retroactivity\(^9\) and (2) the legislature which can consider in committees all aspects of all charities and also avoid retroactivity. Yet both of these points had been strenuously urged upon the Supreme Court by the defense in the *Avellone* decision.\(^{10}\) Why had these same arguments fallen upon such deaf ears in 1956\(^{10a}\) in defense of a hospital and yet proved persuasive in 1960 in favor of the Y.W.C.A.? The difference, we submit, lies not so much in the different charitable undertakings of the two charitable defendants but in the time difference between the date of the two opinions and the importance to the Supreme Court of what had transpired in Ohio in the interim. For Courts are composed of judges, and judges are human beings. And elective judges, if they wish to survive as judges must, of necessity, be political human beings. And wise political human beings keep an ear attuned to the groundswell of public opinion.

In 1956, a wave of judicial decisions was sweeping the country abolishing charitable immunity in state after state. In the briefs filed on behalf of *Avellone* (by plaintiff and amicus curiae) it was claimed that these decisions represented the majority view.\(^{11}\) A careful analysis, however, showed that, while increasing in number, such decisions were still a distinct minority, and some recent decisions had reaffirmed this doctrine of charitable immunity.\(^{12}\) Nonetheless, there seemed to be an

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\(^9\) Recently we have had just such a situation: Accident in 1954 to a newborn. Charitable hospital trustees were then carrying relatively little insurance due to protection of charitable immunity law. 1955 child's attorney decides not to sue due to charitable immunity. 1956 Avellone decision. 1958 Attorney decides, due to Avellone decision, to sue. Suit is filed against the charitable hospital in an amount far exceeding the hospital's insurance limits as they existed on day of accident in 1954 which is the only insurance available to the hospital although hospital had substantially increased its insurance limits shortly after the Avellone decision and because of it.

\(^{10}\) Defendant's brief on the merits devoted no less than seven pages to "*stare decisis*" and no less than 13 pages to "the legislature."

\(^{10a}\) And yet prevailed back in 1936. See Lakeside Hospital v. Kovar, 131 Ohio St. 333, 2 N. E. 2d 857 at p. 343 where our Supreme Court in refusing to disturb the charitable immunity doctrine said:

> More than fourteen years have passed since this court declared that a public charitable hospital is not liable unless it has failed to exercise due care in the selection of its nurses, etc. We may well suggest, as other courts have done, that our legislature could, if it wished, change the law established by this court. It has not done so; it may not desire to do so.

\(^{11}\) See briefs filed on behalf of Avellone and defendant's brief, p. 20.

\(^{12}\) See defendant's brief, pp. 19–23.
"aura" that abolishing the charitable immunity doctrine by judicial decree was the modern, progressive and popular thing to do. With the exception of the previous judicial decisions offering immunity and a few statutes granting charities certain corporate and tax protection, Ohio had never clearly articulated its feelings of public policy towards charities. The Supreme Court, therefore, had no expression of the people's will before it to indicate the people's choice of a public policy toward charities.\(^{12a}\) It had only the clamorings of those members of the plaintiff's bar who had filed briefs on behalf of *Avellone* and who could hardly be said to represent the public, having a vested interest of their own to pursue. Accordingly, it felt free to redetermine for itself just what it thought Ohio's public policy ought to be concerning charitable hospitals, saying in its majority opinion: \(^{13}\)

Whatever the reason for the public policy that gave rise to the rule of immunity, public policy today, examined in the light of present day conditions, will not support such a rule.

Following the *Avellone* decision in 1956, the General Assembly took no steps in 1957. In 1959, however, substitute Senate Bill No. 241 was passed in the Senate by a vote of 29 to 1 and in the House by a vote of 93 to 32 to provide:

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

The Governor vetoed the bill, stating in his message:

I am motivated in this veto with the need for the protection of the individual who was injured by the acts of the agent of the aforesaid groups and whose injury may be so extreme as to deprive him of being able to earn a livelihood regardless of whether the negligence which lead up to the injury was gross or de minimus.

\(^{12a}\) 165 Ohio St. 467, at p. 476.

\(^{13}\) This alone would seem to contra-indicate the abolition of a judicial doctrine of fifty years standing by retroactive court decree in a single case presenting only one narrow issue raised by the pleadings, whereas the legislature could hear from all groups and formulate a non-retroactive rule based upon the considered problems of all.
The Senate repassed the bill by a vote of 25 to 4 but in the House the affirmative vote of 64 to 22 for repassage failed to obtain the constitutional requirement of 3/5 of the members,\textsuperscript{14} so the bill failed.

Thus, in 1960 when the Supreme Court is faced once again with the task of formulating a public policy for the people of Ohio towards charities, it finds not a background "aura" of popularity against charitable immunity but instead a raging conflict among the people themselves as to just what their policy towards charities is to be. Some groups, through their legislators, are clamoring for overthrow of the \textit{Avellone} decision and restoration of at least some immunity\textsuperscript{14a} to all charities including hospitals. Others, through their Governor, seek to reaffirm the \textit{Avellone} decision. The legislature almost overrides the Governor's veto. The public policy of the people of Ohio toward charities is not so simple a thing in 1960 as it appeared to be in 1956. It now has virulent political overtones. The Supreme Court now feels that this is a matter solely for the legislature. It declines, in 1960, to extend to charities other than hospitals that same reasoning it felt public policy required toward hospitals in 1956. In its majority opinion, after exhaustively reviewing the political history of SB 241, as hereinabove set forth, our Supreme Court said:\textsuperscript{15}

This recent legislative development is portrayed for the sole purpose of indicating the conflict of opinion presently existing in the legislative process of our state government.

Defendant's question raises the further important question of whether changes in public policy in this field should be judiciously or legislatively declared. The power of the court to revise previously declared rules of public policy is unquestioned but the advisability of exercising such power presents the problem. Revision of an established policy should be made only when compelling reasons are set forth as in the \textit{Avellone} case. The majority of this court are of the opinion that similar compelling reasons have not been established in this case.

\textsuperscript{14} We are told the failure was due solely to the fact that by that time many of the legislators had returned home.

\textsuperscript{14a} It is interesting to note that S. B. 241 while it grants hospitals some of the immunity abolished by the \textit{Avellone} decision, does not restore hospitals to that immunity enjoyed by hospitals prior to the \textit{Avellone} decision; i.e., pre-\textit{Avellone} liability of hospital to patient only for administrative negligence or negligent selection or retention of employee; S. B. 241 liability only for gross negligence of employees.

\textsuperscript{15} 170 Ohio St. 280 at p. 286 and at p. 288. Emphasis ours.
If there is to be a change in our policy and law let the legislature do it after full hearings at which the representatives of all communities and charities affected may be heard. If public liability demands it the legislature can act as it did in enacting Section 4515.02 Revised Code limiting the liability the driver owes to his guest passenger.16

In the Avellone case the court felt the changed modern operating conditions of a nonprofit hospital required it to reject and abandon the previous declared public policy. Similarly compelling reasons are not established to the satisfaction of the majority in this case particularly in the light of the recent legislative developments recited herein showing the conflict of views in the area of charitable immunity or liability. Therefore, we decline to again declare an extension or modification of public policy. We feel that under these circumstances the doctrine of stare decisis should be applied and followed in order, if for no other reason, to avoid retroactive imposition of liability on a charitable institution which would result from the declaration of a different public policy—and we hold accordingly. Any legislative enactment declaring a different policy could only be prospective in its operation.

The logical inconsistency of abolishing charitable immunity for hospitals but retaining it for all other charities warned against in the dissenting opinion in the Avellone case17 and in a concurring opinion in the Gibbon case itself,18 was dismissed by the majority opinion on the basis of the State of Washington cases:19

Thus Washington now has the rule of ordinary negligence applied to charitable hospitals but still follow the rule of limited immunity as applied to other charitable institutions.

16 Exactly our argument to the Supreme Court in the Avellone case.
17 165 Ohio St. 467 at p. 479, Putnam J. dissenting:
This has been a principle of Ohio law since 1911. Although the instant case involves the liability of a charitable hospital, it can be seen from the above quotation that the same rule applies to all public charitable institutions. The defendant in its brief lists about one hundred charitable activities in Cleveland alone which participate financially in the Welfare Federation of Cleveland. There must be thousands of them in the state of Ohio. Included among them are the Boy Scouts, Girl Scouts, Salvation Army, Young Men's Christian Association, Young Women's Christian Association, various homes for the aged sponsored and kept up by various groups, various institutions for delinquent or dependent children, etc. All these are vitally affected by this decision. It cannot logically be circumscribed to be applicable to hospitals alone.
18 170 Ohio St. 280 at p. 296, Bell, J. concurring:
I can come to no conclusion other than that of Judge Putnam who, in dissenting in the Avellone case, said that the rule of the Avellone case "cannot logically be circumscribed to be applicable to hospitals alone."
19 170 Ohio St. 280 at p. 287.
This inconsistency, however, was highlighted by one judge\textsuperscript{19a} who in a separate opinion in the \textit{Gibbon} case but speaking for two other judges\textsuperscript{19b} as well as himself said: \textsuperscript{19c}

"I cannot, however, agree to the recognition of one rule for a charitable institution that operates a hospital and the perpetuation of a contrary rule for a charitable institution that does not."

In my opinion, the ‘long-declared public policy’ mentioned in the majority opinion herein was abandoned in the \textit{Avellone} case in favor of another. If \textit{stare decisis} means \textit{anything}, then the latest ruling made by five members of this court in the \textit{Avellone} case should be recognized as an example of that doctrine * * *

\* * * When a foundation is removed, a structure which had been erected thereon ordinarily collapses. I can come to no conclusion other than that of Judge Putnam who, in dissenting in the \textit{Avellone} case, said that the rule of the \textit{Avellone} case “cannot logically be circumscribed to be applicable to hospitals alone.”

In a separate concurring opinion\textsuperscript{20} one other Judge evidently seeks to harmonize the \textit{Gibbon} case with the \textit{Avellone} case on the basis of the extent of the “payment” by the beneficiary, saying that in the \textit{Gibbon} case the 35 cents paid by plaintiff’s decedent was not a substantial equivalent for the benefits sought from the charity and therefore she was not a “paying” beneficiary whereas in the \textit{Avellone} case Avellone was a “paying” patient and a charity should have less liability to a “non-paying” patient than to a “paying” patient. With this reasoning we cannot agree.\textsuperscript{20a}

Our Supreme Court has never made such a distinction in any of its charitable immunity cases and, in fact, has specifically repudiated any such distinction. Thus, in the first decision creating the charitable immunity doctrine in 1911,\textsuperscript{20b} our Supreme

\textsuperscript{19a} Bell J. concurring in the judgment solely on the ground that the petition was insufficient to state a cause of action.

\textsuperscript{19b} Zimmerman and Matthias JJ.

\textsuperscript{19c} At pp. 295–6. Emphasis by the court.

\textsuperscript{20} Taft, J. at pp. 294–5.

\textsuperscript{20a} While there may be some analogy in the law of gratuitous bailment, licensee, social guest, etc. for such a distinction, as suggested by J. Taft neither the \textit{Avellone} nor the \textit{Gibbon} decisions were based on any such ground.

\textsuperscript{20b} Taylor v. Protestant Hospital, 85 Ohio St. 90, 96 N. E. 1089 (1911).
Court specifically held as against a paying patient: 20c

1. The fact that a public charitable hospital receives pay from a patient for lodging and care does not affect its character as a charitable institution, nor its rights or liabilities as such in relation to such a patient.

2. A public charitable hospital organized as such and open to all persons although conducted under private management is not liable for injuries to a patient of the hospital resulting from the negligence of a nurse employed by it.

In its opinion the Supreme Court said: 20d

We think this hospital owned and operated in the manner set out is a public charity and this without reference to whether some of the patients are what are termed pay patients or not.

* * * * *

"The fact that its funds are supplemented by such amounts as it may receive, from those who are able to pay wholly or entirely for the accommodation they receive, does not render it the less a public charity. All sums thus obtained are held upon the same trust as those which are the gifts of pure benevolence."

While allowing recovery in favor of a paying patient for the negligent selection of a nurse, the Supreme Court in 192220e again repudiated any distinction between a paying and a non-paying beneficiary of the charity, saying in its opinion: 20f

In our day there is a general tendency in all persons to resort to hospitals in cases which require surgical operations, or in cases of severe sickness and for obvious reasons it is desirable that such an institution should not be held out as devoted solely either to the poor or to the rich, and the degree of care required should in all cases be the same. The same rule should apply to a pay patient as to one who does not pay, and there is general agreement on this proposition.

In a case20g almost identical with the Gibbon case, the Supreme Court in 1938 denied recovery without making any such distinction, and even saying in its opinion: 20h

20c Ibid. Syllabus.
20e Taylor v. Flower Deaconess Home & Hospital, 104 Ohio St. 61, 135 N. E. 287 (1922).
20f Ibid at p. 74; Emphasis ours.
20g Waddell v. Y. W. C. A., 133 Ohio St. 601; 15 N. E. 2d 140 (1938).
20h Ibid at pp. 604-605. Emphasis ours.
Charity is not aid to the needy alone, but it embraces and includes all which aids man and seeks to improve his condition. Diffusion of useful knowledge, the acquirement of the knowledge of arts and sciences and the advancement of learning without any particular reference to the poor are considered charitable objects.

Furthermore, in the Avellone case, Avellone never did pay his bill and had to be sued by the hospital for it, which suit was followed by the malpractice case of Avellone against the hospital, and the record is silent as to whether or not Jane Gibbon’s .35¢ admission fee was a more “substantial equivalent” in terms of the total cost of maintaining the Y.W.C.A. swimming pool allocated among the number of persons swimming there than was Avellone’s (non-payment of his) bill\(^{21}\) in relation to the total cost of hospital administration. It may well be that hers was the more “substantial equivalent” on a per person unit basis, notwithstanding its lower monetary amount.

As we view this problem, there should be no difference between a “paying” and a “nonpaying” patient for no matter how much is paid by a “paying” patient to a charity, that payment never begins to be a substantial equivalent to the benefits received, i.e., the college student’s tuition doesn’t begin to pay for what the college pays out of its general endowment fund to educate him. In this sense all beneficiaries of charitable institutions are, at best, but quasi-paying beneficiaries, or, to view the matter the other way, all are quasi-dependents.

Sequelae: While in the Gibbon case the Supreme Court answered our problem of whether the Avellone decision applied to charities other than hospitals by holding that it does not, in a later case it limited the scope of the Gibbon case somewhat. Thus in Blankenship v. Alter, Archbishop Trustee,\(^ {22}\) St. Joseph’s Church, to raise money for the church, regularly conducted a bingo game open to the public and attended by some 1,500 players. Plaintiff who was not a member of the church attended the game solely to play bingo and attempt to win money and was injured when she sat on a metal chair which was defective and collapsed. Plaintiff sued the church for her injuries. In the trial court plaintiff obtained a verdict and judgment. The Court of

\(^{21}\) It should be noted that even where paid the average patient does not pay the cost of the bill but only the cost of the Blue Cross insurance premium.

\(^{22}\) 171 Ohio St. 65; 167 N. E. 2d 922 (1960).
Appeals affirmed the judgment but certified the case as in conflict with the case of Tomasella v. St. Cecilia's Church.23

The Supreme Court affirmed the judgment in favor of plaintiff, holding in its syllabus:

1. Immunity from civil liability for negligence accorded to 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 purposes of which the institution was organized.

2. A church in conducting a game of chance on its premises for a 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.

In its opinion the Supreme Court said: 23a

It might be that this case could be decided on the basis that plaintiff was a stranger to any religious or charitable ministrations of St. Joseph's Church * * * However, we prefer to place our decision on a somewhat broader ground.

Immunity from civil liability for negligence accorded to 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. * * *

* * * By conducting a business enterprise of the kind described, * * * the church stepped out of its ordinary and accepted sphere and thereby lost the immunity from tort liability it might have asserted in different circumstances.

Comment: Evidently this is a matter of the degree of the business involved. Compare Cullen v. Schmit24 wherein recovery was denied plaintiff for injury sustained in a fall on the stairs of a church where she was going after attending the church services to attend the sale of religious articles in the basement of the church on the grounds that she was a beneficiary of the church religious services and the sale of the religious articles in the basement was not a commercial enterprise but

23 See footnote 8, supra.
23a 171 Ohio St. 65 at pp. 66-67.
24 139 Ohio St. 194, 39 N. E. 2d 146.
was held following and in connection with the religious service of the church.

This non-hospital charitable institution aspect of the problem has been further confused by the very recent per curiam opinion of a divided court in *Bell v. The Salvation Army.* 24a Here amended petition in the Cleveland Municipal Court alleged:

* * * defendants * * * operate a hotel * * * for profit and conduct a business * * * for profit and invite the general public as patrons * * * Plaintiff states * * * he was a patron * * * of the hotel * * * that he paid valuable considerations for the privilege of using and staying at said hotel * * * and was assaulted by defendant's employees * * *.

Defendant's demurrer to this was sustained by the Municipal Court and the Court of Appeals on the grounds of the charitable immunity. Motion to certify was allowed by the Supreme Court which reversed and remanded for trial. In its per curiam opinion of reversal, the majority of the Supreme Court said: 24b

There are at least three exceptions to the doctrine of immunity for nonhospital charitable institutions, to wit; (1) where the injured person is not a beneficiary of the institution (Gibbon, Admr. v. Y.W.C.A., 170 Ohio St., 280, 164 N. E. 2d 503; Cullen v. Schmit, 139 Ohio St. 194, 39 N. E. 2d 146); (2) where a beneficiary suffers harm as a result of the failure of the institution to exercise due care in the selection or retention of an employee (Waddell, a minor v. Y.W.C.A., 133 Ohio St. 601, 15 N. E. 2d 140; Cullen v. Schmit, supra); and (3) where the institution operates a business enterprise for profit not directly related to the purposes for which such institution was organized (Blankenship v. Alter, Archbishop, Trustee, 171 Ohio St. 65, 167 N. E. 2d 922). Of course, one who deals with business enterprise is a nonbeneficiary of the charitable institution under exception number [1] also.

A plaintiff, therefore, may state a cause of action against a charitable nonhospital institution by alleging facts which raise a reasonable inference that one or more of the exceptions to the immunity doctrine exist. Is such inference raised from the facts alleged in the amended petition here in issue?

24a 172 Ohio St. 326 (decided June 14, 1961) per curiam opinion concurred in by Zimmerman, Taft, Matthias and Bell JJ.; Weygandt, C.J., Radcliff and O'Neill JJ., dissenting.

24b Ibid at pp. 328-329.
May it reasonably be inferred that plaintiff is a non-beneficiary of the institution under exception number [1], supra? The plaintiff alleges simply that he paid a 'valuable consideration' for his lodging. We hold that such allegation sufficiently raises the issue of whether plaintiff paid or was obligated to pay a fee for his accommodation which was substantially equivalent to the benefit he was to receive from such accommodation. If plaintiff was obligated to or did pay a sum of money to the defendant which sum was substantially commensurate to the benefits he was to receive, he was a nonbeneficiary of the institution so far as the transaction here in question is concerned. Whether such sum paid by plaintiff was in fact substantially equivalent to the benefits conferred may depend upon numerous facts, i.e., the actual amount of the sum paid, the nature and character of the accommodation, the obligation to pay, the cost of accommodations in hotels of similar character, the purpose of the operation of the business enterprise, etc. In other words, the status of the plaintiff will depend upon the evidence adduced at the trial. We have no way of forecasting what the evidence may be. We hold simply that the allegation of payment of a 'valuable consideration,' under the facts of this case, sufficiently raises the issue of the status of the plaintiff in relation to the institution. * * *

Clearly the theory of plaintiff's case is not founded on exception number (2), supra, relating to negligence in the selection of employees. Consequently, we turn now to a consideration of exception number (3), supra, to wit, are facts alleged which raise a reasonable inference that defendant was operating a business enterprise for profit not reasonably related to the purpose for which such institution was organized? * * * 

Again, in ruling upon a demurrer, a court may take judicial notice of the fact that one function of the Salvation Army includes providing temporary sleeping quarters for indigents and other persons of unfortunate circumstances. However, a court may not extend that observation to mean that every hotel operated by such organization is operated for such nonprofit reasons. There is nothing to prevent such an organization from operating for investment purposes or otherwise, a hotel for profit. In short, whether the hotel in question was operated for profit and whether its function was directly related to the purpose for which the Salvation Army was organized are matters of proof from evidence to be submitted at the trial of this cause.

That part of this per curiam opinion which deals with exceptions (2) and (3) would seem to be correct, (2) not being involved and (3) logically following from the Blankenship case for
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if the Salvation Army was running this particular hotel for the purpose of making a profit then it was not acting as a dispenser of charity in so doing and plaintiff, as a patron therein would not be a beneficiary of a charitable function of defendant at the time complained of and therefore fully entitled to maintain his suit against defendant insofar as a demurrer is concerned.

That part of this per curiam opinion dealing with exception (1), however, gives us considerable trouble. If the Supreme Court means to imply by its statement of exception (1) that the Gibbon case and the Cullen case involved a non-beneficiary plaintiff who was permitted to recover from a non-hospital charity, the Supreme Court is in error. Plaintiff's decedent in the Gibbon case and plaintiff in the Cullen case were both beneficiaries of the charitable defendant involved and neither suit was allowed to be maintained against the defendant charity. However, in each case, the syllabus does state that a non-beneficiary plaintiff in a proper case could maintain a suit against a charity. In other words while the Ohio law is that "(1) where the injured person is not a beneficiary of the institution" he may sue the non-hospital charitable institution, neither the Gibbon case nor the Cullen case involved a non-beneficiary. The point is important because in its discussion of exception (1) the Supreme Court seems to adopt the reasoning asserted in a concurring opinion in the Gibbon case with which we are in complete disagreement as previously discussed herein.24c

In the Gibbon case, this concurring opinion sought to distinguish the Avellone decision (hospital liable to a beneficiary for the negligence of the servants) from the Gibbon decision (Y.W.C.A. not liable to a beneficiary for the negligence of its servants) on the grounds that Avellone had paid or was obligated to pay a sum of money "substantially equivalent" to the benefits conferred upon him by the charity whereas Jane Gibbon had paid a sum lesser than this and, therefore, the hospital must respond to Avellone whereas the Y.W.C.A. need not respond to Jane Gibbon, although, as we have discussed earlier in this article, the two decisions themselves were not based upon any such theory nor did the record indicate that such magnitude of payments were true in fact. Here the Supreme Court seems to be embracing this reasoning on the ground that if plaintiff can prove he made a payment "substantially equivalent to the bene-

24c See footnote 20, supra.
fits conferred" by the charity, he then ceases to be a beneficiary and becomes a non-beneficiary by that fact alone. We cannot accept this argument for two reasons: first, theoretical; if the defendant is pursuing its charitable function in conferring the benefit on the plaintiff (desired by the plaintiff) its non-liability status should remain the same regardless of whether or not the payment for the benefit by the plaintiff is less than, equal to or greater than the value of the benefit conferred\(^{25}\) and conversely, if the defendant is pursuing a business profit function in conferring the benefit on the plaintiff its liability status (under existing case law) should not be altered by the value of the payment even if the plaintiff paid nothing for the benefit conferred as is often the case; second, practical; the determination of whether or not a given beneficiary-plaintiff's payment is "substantially equivalent to" the value of the benefit conferred upon him by the charity would seem to be so difficult an economic theory and accounting problem as to render any rule dependent thereon completely unworkable and impracticable as a basis for the imposition or non-imposition of legal liability.

II. Has Ohio Adopted "The New York Rule"?

Recapitulation: In its numerous decisions upholding the doctrine of charitable immunity over its nearly fifty year period of existence, the Supreme Court of Ohio had based its reasoning upon the fact that charities are "masters different from others." The difference lies in the fact that the fundamental basis on which rests the harsh doctrine of respondeat superior, which imposes upon one the responsibility for the acts of another, is the right to control the details of the manner and method of the work performed. In the case of charities and especially of hospitals, such right to control is considerably diminished by the fact that the servant is either a volunteer worker or a professional person such as a nurse, or intern who, as a practical matter, is more apt to follow her own theories and training in carrying out her professional duties, or else to obey the exacting orders of the doctor in charge of the case, than the routine orders of the hospital. In an age of specialization, with the necessity of increasing reliance upon independent experts, the reason for the rule seems more valid than ever before. All of this was care-

\(^{25}\) See footnote 20b-20h, supra, citing and discussing 85 Ohio St. 90, 104 Ohio St. 61 and 133 Ohio St. 601 to this effect.
fully presented to the Supreme Court in the *Avellone* case with the appeal that the immunity should be retained. However, there was a danger inherent in such an argument which was foreseen and also presented to the Supreme Court. That danger was that a compromise be effected whereby the charity be granted immunity for those acts of its servants over which it did not have, as a practical matter, the full right of control possessed by a normal employer, but that it be held liable for all acts of its servants where it possessed such full right of control. In the case of the hospital this would mean that any act of a nurse which was not a carrying out of her professional duties, but was merely a routine administrative act, would render the hospital liable if negligently performed, but that any act in the performance of her professional duties would not render the hospital liable, no matter how negligently performed. This is the New York rule. While logically appealing as a workable compromise, it had proved in fact to be extremely illogical, unworkable and to lead to an enormous amount of litigation benefiting no one but the legal profession, and adding to the ever-growing volume of litigation clogging our court dockets. All of this was brought to the attention of our Supreme Court in the *Avellone* case, with an urgent appeal that Ohio not adopt the New York rule with its confusing borderline refinements.

The majority opinion in the *Avellone* decision, in reaching its conclusion, stated:

> We, thus, conclude that a corporation not for profit, which has as its purpose the maintenance and operation of a hospital, is, under the doctrine of respondeat superior (and the various rules and exceptions applicable thereto), liable for the torts of its servants, * * *

and then went on to say:

> and leave for future determination the application of this doctrine to the facts of the instant case as may be proved on trial. For instance, we are not deciding that persons working in a hospital such as doctors and nurses, under circumstances where the hospital has no authority or right of control over them, can bind the hospital by their negligent actions. See Schloendorff v. Society of New York Hospital, 211 N. Y. 125, 105 N. E. 92, 52 L. R. A. (N. S.) 505.

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27 See 6 Clev.-Mar. L. R. 47 at pp. 54-56.
When this language was considered in the light of the briefs and oral arguments presented to the Supreme Court, the question arose as to whether or not the Supreme Court of Ohio was adopting the New York rule.

It was our opinion in 1957 based upon the above quoted language from the Avellone decision that our Supreme Court meant to adopt and apply the New York rule. However, later in 1957 the New York Court of Appeals abolished the New York rule by specifically overruling Schloendorff v. Society of New York Hospital in the case of Bing v. Thunig.

The following year the case of Klema v. St. Elizabeth's Hospital of Youngstown reached the Supreme Court of Ohio. This case involved the death of a patient after an operation allegedly due to the negligence of the anesthetist during the operation. The anesthetist, a graduate of Rome, Italy, was licensed to practice in Italy but not in Ohio and was employed by the defendant hospital first as an intern and later, and at the time of the operation in question, as a resident in anesthesia on the hospital staff. Concerning the anesthetist's status at the time in question, the Supreme Court said:

since the anesthetist was not licensed as a physician in Ohio, it would be possible to consider him as any other medical employee and avoid the problems hereinafter listed. However, in order to meet head-on a problem which has been inevitable since the decision in Avellone v. St. John's Hospital, 165 Ohio St. 467, 135 N. E. 2d 410, we prefer to consider the anesthetist as if he were a physician licensed to practice medicine in Ohio and on the staff of a hospital as a resident physician. Review of the record in this case reveals sufficient disparity in the evidence to warrant submitting a question of liability to jury, and sufficient credible evidence to support the verdict returned by the jury.

In affirming the judgment of both the trial court and the Court of Appeals entered on the jury verdict for plaintiff, the Supreme Court said:

30 170 Ohio St. 519, 166 N. E. 2d 765 (decided April 20, 1960).
31 Ibid at p. 520.
32 The Supreme Court also held that the 2 year wrongful death statute of limitations provided by R. C. 2125.02 and not the 1 year malpractice statute of limitations provided by R. C. 2305.11 governed this wrongful death action based upon alleged malpractice.
33 170 Ohio St. 467 at pp. 525-527. Emphasis added.
In the Avellone case * * * this court held that a corporation not for profit which has for its purpose the maintenance and operation of a hospital is, under the doctrine of respondeat superior, liable for the torts of its servants. Specifically reserved from that decision, however, was the question whether "persons working in a hospital such as doctors and nurses under circumstances where the hospital has no authority or right of control over them can bind the hospital by their negligent actions." A similar reservation must, of course, be made here.

The leading case in this country which held that there was immunity for the "medical" acts of hospital employees was Schloendorff v. Society of New York Hospital, 211 N. Y. 125, 105 N. E. 92. * * * That case, however, was specifically overruled by the New York Court of Appeals and Bing v. Thunig, 2 N. Y. 765; 143 N. E. 2d 3.

Following the adoption of the Schloendorff rule, a series of cases in New York alone clearly demonstrated the unworkability of any rule which attempts to distinguish between "medical" acts and "administrative" acts. * * *

Recognizing this inconsistency, the New York Court in the opinion by Judge Fuld in the Bing case, supra, the reasoning of which we find compelling in our judgment herein, said:

"hospitals should in short, shoulder the responsibilities borne by everyone else. There is no reason to continue their exemption from the universal rule of respondeat superior. The test should be for these institutions, whether charitable or profit-making, as it is for every other employer, was the person who committed the negligent injury-producing act, one of its employees, and if he was, was he acting within the scope of his employment."

The nature of the act done, whether it is administrative or medical, cannot justify a difference in the legal theory of liability. The test should be, simply, was the act done performed in the service of the employer, and was the act done in the scope and course of the employee's duty. Obviously, such a test will, so far as a hospital is concerned, relieve from, or subject to, liability in exactly the same manner and according to the same rules as any other employer is relieved or "subjected."

The syllabus reads in part as follows:

2. A corporation not for profit, which has as its purpose the maintenance and operation of a hospital, is, under the doctrine of respondeat superior, liable for the negligent acts of its employees, irrespective of whether those acts are administrative or medical.
Conclusion

It is now almost five years since our Supreme Court announced its decision in the Avellone case. During these five years, the two problems created by the Avellone decision have, like "Mother Carrie's chickens" "come home to roost." Our Supreme Court has resolved each in turn, one in favor of charitable immunity for all charitable institutions except those that have the misfortune to run hospitals, the other further against hospitals for all acts of all servants.

However, this matter does not seem to be yet resolved. As the Supreme Court observed in its Gibbon decision, this is a matter for the legislature. It is indeed! In 1961 the Ohio Legislature, undaunted by the Governor's veto of S. B. 241 in 1959, reenacted S. B. 241 into S. B. 187. The legislative history of S. B. 187 shows stormy progress: passed by the Senate by a substantial margin; opposed vigorously in the House by leading plaintiffs' attorneys and reportedly even by a plaintiff-attorneys association's paid lobbyist, it failed to pass the House by 5 votes, was called for reconsideration by the House and then passed by a modest margin. As this article "goes to press" this bill lays on the Governor's desk awaiting signature into law—or veto. The prognosticators are prognosticating a veto.

This time we decline to prognosticate.

[Editor's Note: On June 30th, Governor DiSalle vetoed S. B. 187. His veto message was substantially the same as his veto message in 1959 regarding S. B. 241.]

34 The Avellone case was decided July 18, 1956.
35 S. B. 187 would seem to raise "Mother Carrie's chickens" of its own: (1) while it restores hospitals to some measure of immunity making them liable only for gross negligence of their servants, it reduces all other charitable institutions to the same status, thus overruling the immunity granted such other charities by the Gibbon case and earlier cases (Cullen v. Schmit, 139 Ohio St. 194; Waddell v. Y. W. C. A., 133 Ohio St. 601) (2) it creates a legal concept relatively new to Ohio law—namely "gross negligence" which will require further judicial decision to define (and to differentiate from wanton misconduct, an already well defined but somewhat obscure legal concept); (3) it renders charities liable solely in the event of gross negligence on the part of its servants, therefore there would seem to be no liability for acts of hospital servants of a nature greater than gross negligence such as intentional or willful acts or even wanton misconduct, which would seem to include assault and battery, operations without consent, etc.
36 Senate: passed by vote of 28 to 9 on April 11, 1961; House: 65 votes for but 70 needed—reconsidered and passed by vote of 78 to 50 on June 15, 1961.
37 Cleveland Press—May 18, 1961, page B-14, Cols. 1 and 2:
A well-heeled lobby has appeared on the Columbus scene to fight the proposal to give charitable institutions immunity from suits over acts of their employees. The lobby is being financed by The Ohio Chapter of Claimants Attorneys.
38 Cleveland Press—June 16, 1961, page B-6, Col. 1.