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"PUBLIC BENEFIT ACTIVITIES" of a hospital, university or welfare agency have been looked upon with special favor by the law for many decades—a genuine kind of legalistic paternalism. They being institutions of beneficent motive, the policy of the judiciary has been to aid them through notable departures from the rules. Arguments to the contrary met a stone wall of "public policy," a doctrine here blessed and there cursed since the day the law took on the blush of social consciousness.

One such departure is exemplified in the immunity from liability for the tortious conduct of their employees that hospitals have enjoyed. Thus, a patient injured through negligence while in the care of a hospital often had no recourse, no matter how severe the injury or how gross the negligence, in the past; and if he died, his dependents were similarly left without remedy.

A Brief History

The precedent for this departure was laid down in American courts in an 1876 Massachusetts ruling[1] and was followed closely by a Maryland decision in 1885.[2] Both courts, thinking that they were following earlier English rules, answered this question in the negative:

> Should a non-profit hospital, some of whose funds are obtained through gifts and charitable contributions, given with the intent that they shall be used in furtherance of the good will, be made to pay from these funds for the wrongful conduct of its servants, particularly where the injured party, as a patient, is a beneficiary of the charity?

In short, the major premise in law that all wrong-doers must pay was altered to except the charitable institution.

Oddly enough, both the Massachusetts and the Maryland courts, in following the English cases, were apparently unaware that the earlier rulings were each reversed by the same English

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1 McDonald v. Massachusetts General Hospital, 120 Mass. 432.

2 Perry v. House of Refuge, 63 Md. 20.

courts, the last in 1871, five years before the Massachusetts case.[3] Hence, if *stare decisis* were the justification for the first American court ruling, it was obsolete when laid down, and all subsequent accords in this country may have been similarly misled. Many courts have since made reference to this fact: the Massachusetts court resurrected a rule five years after it had been repudiated in England.

Arguments Pro

This conclusion, however, sidesteps the real issues in the controversy. Courts have long thought hospitals to be masters unlike others, and that the doctrine of respondeat superior does not apply to them "because they derive no benefit from what their servants do, in the sense of that personal and private gain . . ." [4] There is the further inclination to weigh the wrongs, as in *Magnuson v. Swedish Hospital,* where the court stated: "While the application of the rule to individual cases may sometimes seem harsh and the result regrettable, there are very few doctrines of law of which the same may not be said with equal truth. When viewed in the light of a broader vision, however, we are convinced that the individual hardships wrought are offset many times over by the encouragement and stimulation which the rule of nonliability gives to the establishment and maintenance by private charity of institutions devoted to the care of the halt, the lame and the blind, and to the relief of those suffering from physical or mental disease and affliction." [5]

Public policy is perhaps the strongest rationale invoked in support of the exemption. It was given one of its boldest expressions by the Supreme Court of South Carolina in 1948, which held: "The exemption . . . rests not upon the relation of the injured person to the charity, but upon grounds of public policy, which forbids the crippling or destruction of charities which are established for the benefit of the whole public . . . The principle is that, in organized society, the rights of the individual must, in

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[3] The dictum of non-liability set forth in Duncan v. Findlater, 7 Engl. Reprint 934 (1839) was reversed in Mersey Docks Trustees v. Gibbs, 11 Engl. Reprint 1500 (1866), and the similar rule (which the Mass. court cited as its sole authority) in Holliday v. St. Leonard's, 142 Engl. Reprint 769 (1861) was overruled in 1871 in Foreman v. Mayor of Canterbury, L. R. 6 Q. B. 214.

[4] Muller v. Nebraska Methodist Hospital, 160 Nebr. 279 (1955).

[5] Magnuson v. Swedish Hospital, 99 Wash. 399, 169 P. 828 (1918).

some instances, be subordinated to the public good. *It is better for the individual to suffer injury without compensation than for the public to be deprived of the benefit of the charity.* The law has always favored and fostered public charities in ways too numerous to mention, because they are most valuable adjuncts of the state in the promotion of many of the purposes for which the state itself exists." [6] (Emphasis added.)

Again, in *Weiss v. Swedish Hospital*: "When we consider the great diversity of variant rules which might be adopted, and at the same time remember that the rule with which we are dealing does not apply to hospitals alone but to churches, educational institutions, Y. M. C. A.'s, social welfare organizations, and in general, to the various organizations engaged in philanthropic, benevolent, and charitable work, it is at once manifest that a change in the rule, particularly its complete abandonment, would have far-reaching and, perhaps, unimagined and unintended consequences . . ." [7]

There is also the "trust fund" theory upon which non-liability was based. It holds that "as a charitable institution, its funds are held in trust for the particular charitable purpose for which they were given, that it is a breach of trust to apply such funds to any other purpose, that payment of damages in tort actions is not a purpose contemplated by the trust, and that, therefore, such funds cannot be diverted to the payment of such damages . . ." [8]

Arguments Contra

The "trust" theory was attacked in a very recent case on this question, *Avellone v. St. John's Hospital,* 165 O. S. 5, decided July 18, 1956, when the Ohio Supreme Court reversed its 45-year-old rule and held the hospital answerable in tort.

In a brief *amicus curiae* submitted on behalf of the plaintiff by the Cleveland (O.) law firm of Harrison, Spangenberg & Hull, hospitals were described as being "big business," and "less than three per cent of the total hospital income (in Cuyahoga County with a 1,500,000 population) now comes from charitable donors." The 1955 income of that community's hospitals was set at $60,000,000. Of that amount, $58,000,000 was said to come from

[6] Gaughman v. Columbia Y. M. C. A., 47 S. E. (2d) 788.
[7] Weiss v. Swedish Hospital, 16 Wash. (2d) 446, 133 P. (2d) 978 (1943).
[8] Cohen v. General Hospital Society, 113 Conn. 191 (1931).

private sources "with the vast majority of this sum coming from hospitalization insurance plans paid for in advance by the patient."

Cited at length by the Ohio court is the now-famous opinion of Judge Rutledge, which reads in part:

> ". . . Insurance must be carried (by hospitals) to guard against liability to strangers. Adding beneficiaries cannot greatly increase the risk or premium. This slight additional expense cannot have the consequences so frequently feared in judicial circles, but so little realized in experience. To offset the expense will be gains of eliminating another area of what has been called 'protected negligence,' and the anomaly that the institutional doer of good asks exemption from responsibility for its wrong, though all others must pay. The incorporated charity should respond as do private individuals, business corporations and others, when it does good in the wrong way." [9]

The public policy doctrine, when applied against the rule, took this form:

> " 'Public policy' simply means that policy recognized by the state in determining what acts are unlawful or undesirable, as being injurious to the public or contrary to public good. It is not quiescent but active. A policy adopted today as being in the public good, unlike the Ten Commandments, is not necessarily an ever-enduring thing. As times and prospectives change, so changes the policy . . ." [10]

It is now 80 years since the rule was founded in the United States. During that period, hospitals have grown from small, needy charities where only the very sick or dying went, to huge edifices, now averaging 500 beds, which

> "own and hold large assets, much of it tax free, by statute, and employ many persons . . . Also, we take judicial notice of the extensive use of the many types of hospital insurance, as well as liability insurance by the institutions. Thus it is evident that times have changed and are now changing in the business, social, economic and legal worlds. The basis for and the need of such encouragement is no longer existent." [11]

It has been stated that prior to 1942, the rule was virtually universal in the United States, and that following Judge Rutledge's "devastating opinion," there has come

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[9] President and Directors of Georgetown College v. Hughes, 130 F. (2d) 810 (1942).

[10] Haynes v. Presbyterian Hospital Assn., 241 Iowa 1269, 45 N. W. (2d) 151.

[11] Ibid, pages 1273-4.

> "a flood of recent decisions holding that a charity is liable for its torts to the same extent as any other defendant. In addition to the District of Columbia, the immunity is now repudiated in Arizona, Alaska, California, Colorado, Delaware, Florida, Iowa, Kansas, Minnesota, New Hampshire, New York within the limits of its peculiar independent contractor theory, North Dakota, Oklahoma, Peurto Rico, Utah, Vermont and Washington (and now Ohio)." [12]

That the courts have engaged in a good deal of soul-searching when asked to review the rule is evident throughout the recent decisions bearing on the subject. Judge Hamley, writing the majority opinion in *Pierce v. Yakima Valley Memorial Hospital Association* in 1953 observed that

> "if we were to judge the question before us solely upon a factual basis—whether there still prevail the conditions or circumstances which led our court, in 1918, to find that public policy required immunity—the considerations discussed above strongly indicate a negative answer. When we add to these considerations the searching criticisms which have been leveled at the justness and legal soundness of the rule, its repudiation seems almost compelled." [13]

The Ohio court, in writing on the *Avellone* case, considered "the other side of the picture—the patient injured, killed or maimed by the negligence of servants of the hospital."

It enumerated the following: A. "A nurse had, by negligence in counting the sponges used in an operation, allowed a sponge to remain in the patient's body, causing her death." B. "A student assistant was alleged to have negligently administered to the patient an injection of scalding hot water immediately following an operation on him for appendicitis and while he was under the influence of ether." C. "It was alleged that the patient died by virtue of the negligent infusion of boric acid instead of a saline solution." [14]

The rule, now discarded by the Ohio court, had denied recovery in each of these cases.

Still another facet was unturned—that of constitutional rights—when the Supreme Court of Kansas reversed, in 1954, its own immunity doctrine set forth in 1916. In discarding nonliability, the court noted that

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[12] Prosser on Torts 787, Sec. 109 (2d Ed., 1955).

[13] Pierce v. Yakima Valley etc., 43 Wash. (2d) 173.

[14] Avellone v. St. John's Hospital, supra.

"it is somewhat surprising to note that in none of the decisions establishing the immunity doctrine in this state was the question ever presented or consideration given to the provisions of our constitution. Section 18 of our bill of rights reads: 'All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay' . . . Neither our constitution nor our statute says anything about releasing charitable, educational or religious organizations from liability for negligence which results in personal injuries to another . . . It is the primary duty of the courts to safeguard the declaration of right and remedy . . . To exempt charitable and non-profit corporations from liability for their torts is plainly contrary to our constitutional guarantees. It gives to certain favored ones, selected arbitrarily, immunity from that equal liability for civil wrongs which is a sign of equality between citizens . . . In short, it destroys equality and creates special privilege." [15]

Lineup of the States

The years following the first laying-down of the rule saw changes being wrought by the courts confronted with it. Among the three major categories of complainants—the stranger, the employee, and the patient or beneficiary—the rule was relaxed or changed in many ways and by many courts, with the result that in recent years, the rule has become a tangled maze of exceptions and contradictions.

But the trend is unmistakable. On a roll call, only seven jurisdictions would grant complete immunity to hospitals. They are Arkansas, Kentucky, Maine, Maryland, Missouri, Oregon and South Carolina.

Partial immunity (where in the majority the hospital is liable only if negligence can be proved in the hiring of an employee) is permitted by Connecticut, Idaho, Indiana, Louisiana, Massachusetts, Michigan, Nebraska, New Jersey, North Carolina, Pennsylvania, Rhode Island, Texas, Virginia, West Virginia, Wisconsin and Wyoming.

In Rhode Island, listed above, the immunity is established by statute. In Maryland, while the courts there hold to the nonliability, a statute overcomes it so long as the hospital carries liability insurance.

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[15] Noel v. The Menninger Foundation, 175 Kan. 763.

To Prof. Prosser's list of those 19 jurisdictions denying immunity (*supra*) must be added three states, Georgia, Illinois and Tennessee, where execution on a tort judgment may be levied against liability insurance or other non-trust property.

The lineup is now: 23 jurisdictions favoring immunity in one form or another; 22 denying it, and the remaining ones either doubtful or having no reported cases.

Summary

The plaintiff's attorney in the *Avellone* case (*supra*), Ellis B. Brannon of Cleveland, O., whose arguments before the Ohio Supreme Court ended in a reversal of the non-liability rule, made this comment to the writer:

> "A tortured version of an archaic rule has been modified in Ohio. The fairness of the decision affords the charity, the complainant and the insurer an opportunity to adjust to case situations which will require amplification of legal principles not especially spelled out in the court's decision. It would seem that Ohio courts should apply the New York rule, distinguishing between a medical act and an administrative one, which preserves the role of the private physician as an independent contractor (as in the case of *Schloendorff v. Society of New York Hospital,* 211 N. Y. 125). This places all participants in a position to enjoy a rule intended to be expansive enough to cover new situations as they arise."

Another attorney and member of the Michigan and New York bars, Milo O. Bennett, carried in the frontispiece of his work, "That Book About Hospitals" (1953), an excerpt from stenographer's minutes, which may bear repeating:

> ". . . The Court: There are many other eleemosynary institutions in this country that have the benefit of immunity, churches for instance. If you put hospitals in the class of commercial institutions, why should not churches also be deprived of their immunity and also be left at the mercy of all the greedy personal injury claimants who come along?
>
> Mr. Bennett: In a moment I want to take an exception to that remark from the bench about greedy personal injury plaintiffs, but first, your Honor will, of course, permit me to answer the Court's question. It is this. There is no similarity between a church and a hospital in their functions. Lord knows there is no similarity in their behavior toward the human beings who attend. That ghastly shroud of immunity can be stripped from the hospitals without affecting at all the tax-exemptions and freedom from liability of our

places of worship. But let me say this, your Honor, very respectfully: if and when church attendance becomes compulsory, as hospital attendance most certainly is, and they charge you a pew rent of ten to fifty dollars a day in advance for every twenty-four hours you spend there, and a grouchy usher may seat you in a pew giving off fatal electric shocks, or they give you prussic acid in the communion wine, or you may suffer in your church any of the other hundred same disasters that happen in hospitals day after day, interminably, then—if your Honor can conceive of that time ever coming —then, your Honor, churches should also be stripped of their immunities. Then, your Honor, they will be no better than the hospitals. Have I answered your Honor's question?

The Court: You have no need to shout. My hearing is perfect."