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Charitable Trusts: Immunity from Tort Liability

Stephen Fisk Steen

NOTES

CHARITABLE TRUSTS: IMMUNITY FROM TORT LIABILITY.—In a recent Pennsylvania[1] case plaintiff, a pedestrian and "stranger," fell on a negligently maintained sidewalk which abutted premises owned by the charitable Society of St. Vincent de Paul. A state statute[2] provided that municipal authorities might require sidewalks to be kept in repair, and if the property owner failed to do so the municipality might do the necessary work and assess the cost thereof upon the property. The city of Pittsburgh had also passed an enabling ordinance[3] which imposed a duty of repair on every abutting property owner. Frances Bond brought suit against the municipality to recover for her injury and the municipality of Pittsburgh joined the Society of St. Vincent de Paul as additional defendant. Upon judgment for plaintiff, the society was granted judgment in their favor, non obstante verdicto, and the municipality appealed from both judgments. The Supreme Court of Pennsylvania, with dissent, held that "the doctrine of immunity of charitable organizations from tort liability includes actions of assumpsit brought by a municipality under a claim of indemnity as well as tort actions brought by injured persons."

The doctrine of charitable immunity itself is usually voiced as follows: "It would be against all law and all equity to take those *trust funds, so contributed* for a special, charitable purpose, to compensate injuries inflicted or occasioned by the negligence of the agents or servants of the (charity)."[4]

"In this way the trust fund might be entirely destroyed and diverted from *the purposes for which the donor gave it.*"[5]

Particular notice should be made of the emphasis placed upon frustration of donor's intention, and this language should be contrasted with the language as used by Lord Cottenham in *Feoffees of Heriot's Hospital* v. *Ross:*[6] "To give damages out of *a trust fund* would not be to apply it to those objects whom the author of the fund had in view, but would divert it to a completely different purpose."

At first reading the words sound alike, but, when the background of Lord Cottenham's decision is examined, the words will be seen to frame a picture concerning the nature of the trust fund, and not one of donor's intent. Professor McCaskill[7] has pointed out that Lord Cottenham in the *Heriot's Hospital* case, after citing many cases wherein governmental agencies were held to be not liable, held that the trustees were not liable in their corporate character. The particular case used by Lord Cottenham in his decision, *Duncan* v. *Findlater*,[8] held that a *public fund* for maintenance of highways was not liable for tortious injury. Lord Cottenham was basing his decision on the ground that Heriot's Hospital Trust was a *public fund.*[9]

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[1]Bond et al. v. City of Pittsburgh, 84 A.2d 328 (Pa., 1951).

[2]Act of May 16, 1891, P.L. 75, § 11, 53 P.S., § 771.

[3]Ordinance of Pittsburgh of 1930, No. 161.

[4]Fire Insurance Patrol v. Boyd et al., 120 Pa. 624, 15 Atl. 553, 557 (1888).

[5]Gable et al. v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087 (1910).

[6][1846] 12 Clark & Fin. 507, 513, 8 Eng.Rep. 1508.

[7]O. L. McCaskill, *Respondeat Superior as Applied in New York to Quasi-Public and Eleemosynary Corporations,* 5 CORNELL L.Q. 409, 6 CORNELL L.Q. 56 (1921).

[8][1839] 6 Clark & Fin. (Eng.) 894.

[9]"[The trust] differed from the funds in the hands of public agents in that they had a private origin, but after the dedication this private characteristic, if it had not disappeared entirely, was at least subordinated to the public interest, and the origin was immaterial." *Supra* note 7, 6 CORNELL L.Q. 56, 65 (1921).

But cf. Lester W. Feezer, *The Tort Liability of Charities,* 77 U.PA.L.REV. 191 (1928): "This immunity of charities from liability is one of several immunities from liability which remain in the law of torts as the modern heritage of the Georgian and Victorian period of English jurisprudence, . . . the class-conscious thought of the bench, bar and legislature . . . ruled England and formed the pattern for both English and American legal development. . . ."

Further, an examination of *Mersey Docks & Harbor Trustees* v. *Gibbs*,[10] the case which purportedly repudiates Lord Cottenham's "trust fund" doctrine, in light of the McCaskill analysis, did not in actuality repudiate Lord Cottenham, but repudiates the interpretation of *Heriot's Hospital* as employed by the courts which followed the lead of *McDonald* v. *Mass. Genl. Hosp.*[11] *Mersey Docks* was found to be a private trading company and not a public fund.

The present English position of holding charitable trusts liable in torts is clearly seen in *Hillyer* v. *St. Bartholomew's Hospital*.[12] This case enunciated the position which is followed in the Empire,[13] as well as in at least three American jurisdictions.[14] California[15] is probably the latest of the American jurisdictions to follow this position, which is characterized as the modern trend.

American authorities, as a whole, are split into three principal groups: Absolute immunity, partial immunity, absolute liability. Of the three groups, the first and the last are composed of a relatively small number of states, while the preponderance of states is to be found in the second group which proclaims a partial immunity. The utter confusion of the decisions coming from this group stems from the fact that discovery of a sound basis for immunity is quite nebulous, and from the fact that the constricting coils of stare decisis at times present a formidable prison.[16]

It is doubtful that any rule of full-immunity ever represented the prevailing state of decision in this country.[17] Immunity has disappeared largely as to all persons and classes of claimants save one, the so-called beneficiary-of-the-charity class. Nevertheless, judicial discussion has established the pattern of immunity as the rule. Such discussion, in the first instance, fails to recognize that immunity is itself an exception to the general rule of liability for tortious conduct.

In essence, the problem resolves itself into one involving two conflicting public policies. Public policy, on the one hand, seeks to protect and encourage charities, while, on the other hand, it is important to prevent any loss of earning power and property in the case of individuals and their families.[18]

In those jurisdictions whose public policy indicates that there should be at least a partial immunity, one finds language that immunity is extended because of defendant's *charitable character*, that there is a *"trust fund"* immunity, that *respondeat superior* is inapplicable to charitable institutions, that *public policy* favors immunity, that there is an *implied waiver*, and that the institution is imbued with a public interest

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[10][1866] L.R. 1, H.L. 93.

[11]*See* note 10 *supra*.

[12]120 Mass. 432 (1876); [1909] 2 K.B. 820.

[13]*See* cases collected in Georgetown College v. Hughes, 130 F.2d 810, 76 U.S. App. D.C. 123 (1942).

[14]*Okla.*, Sisters of the Sorrowful Mother v. Zeidler, 82 P.2d 996, 183 Okla. 454 (1938), (paying patient).

N.Y., Dillon v. Rockaway Beach Hospital & Dispensary, 283 N.Y. 176, 30 N.E.2d 373 (1940), (patient).

N.H., Welch v. Frisbie Memorial Hospital, 90 N.H. 337, 9 A.2d 761 (1939), (patient).

[15]*Calif.*, Malloy v. Fong, 37 Cal.2d 356, 232 P.2d 241 (1951), (beneficiary).

[16]"Each modification has the justification that it is a step in result, if not in reason, from the original error toward eventual correction." Rutledge, J., *supra* note 13, at page 827; Bruce v. Y.M.C.A., 51 Nev. 372, 277 Pac. 798 (1929).

[17]Note that at the time when McDonald v. Mass. Genl. Hosp., *supra* note 11, was adopting a doctrine of immunity, the courts of Rhode Island, in Galvin v. Rhode Island Hospital, 12 R.I. 411 (1879), severely criticized the McDonald decision and returned a contrary result, saying that public policy also had an interest in obliging every person and every corporation which undertakes the performance of a duty to perform it carefully.

[18]BOGERT, THE LAW OF TRUSTS AND TRUSTEES, § 401 (1st ed., 1935).

in the performance of *sovereign functions*. All, save the last, of these enunciations, however, are seen to be the same doctrine with but a different name. They are the "trust fund" theory of immunity. This doctrine comprehends all that is contained as basis for all the others.[19] Of the last enunciation, *sovereign function*, more will be said below.

The very case which first spoke of *implied waiver*, *Powers* v. *Mass. Homeopathic Hospital*,[20] a federal case, also raised another doctrine, the doctrine of *negligent selection* of servants. Whatever may have been the reason for employing the disguise of *implied waiver* to maintain an immunity, waiver by implication is obviously contrary to the general law applicable to both contracts and torts. These are the doctrines, however, which have been adopted by a large number of the western jurisdictions.[21]

The federal courts, at various times, have been involved in this question of charitable immunity, and it is significant to watch the development of the doctrine as it came under their influence. Probably the first instance of this question is to be found, collaterally, in the famous *Dartmouth College* case of 1819.[22] The "trust fund" doctrine was rejected in *Putnam Memorial Hospital* v. *Allen* in 1929,[23] but they proceeded to replace this with the "implied waiver-negligent selection" doctrine, as enunciated in the *Powers* case in 1899.[24] In 1929, they thought that they were helpless in the face of a rule of public policy for immunity which was so well settled that it could not be questioned or overturned.[25] It is of interest to note that the case used to support their decision at this point was a South Carolina case.[26] South Carolina is admittedly a jurisdiction which bases immunity solely on reasons of public policy. In 1934, the Circuit Court of Appeals[27] affirmed the decision of the District Court of Virginia,[28] and reiterated the rule that the federal courts will follow its own decisions as laying down applicable law, in the absence of decisions of local courts deciding the exact question *contra*. In this instance the Supreme Court denied certiorari.[29] Finally, in 1940, the District Court of Pennsylvania[30] said that liability is the general rule, and that exceptions will be made only where the nature of the organization sought to be charged therewith dictates otherwise or parties *expressly*[31] contract contrarily. The court then went on to reject the "trust fund," the "nonrespondeat superior," and "implied waiver" doctrines, which have been described as but variations of the same thing, but left open the question of immunity based on public

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[19]*Supra* note 13, p. 824; *cf.* Feezer, *supra* note 9, p. 206.

[20]109 F. 294 (1st Cir., 1899).

[21]Calif. (prior to 1951), Idaho and Nev. have used the doctrine of implied waiver, and Ariz., Kans., Utah, Wash. and Wyo. have used the doctrine of negligent selection.

Ore. and Colo. have used the doctrine of the "trust fund."

Okla. and Calif. (*post* 1951) have extended liability without qualification.

[22]Trustees of Dartmouth College v. Woodward, 4 Wheat. (U.S.) 518 (1819). This case is usually regarded as a constitutional-law case, but, Story, J., established therein the difference between public and private corporations.

[23]34 F.2d 927, 929 (2d Cir., 1929).

[24]Note 20 *supra*.

[25]Ettlinger v. Trustees of Randolph Macon College, 31 F.2d 869 (4th Cir., 1929).

[26]Vermillion v. Women's College of Due West, 104 S.C. 197, 88 S.E. 649 (1916).

[27]Bodenheimer v. Confederate Memorial Assn., 68 F.2d 507 (4th Cir., 1934).

[28]*Ibid.*, 5 F.Supp. 526 (D.C. Va., 1934).

[29]*Ibid.*, 292 U.S. 629 (1933).

[30]Lichty v. Carbon County Agricultural Assn., 31 F.Supp. 809 (M.D. Pa., 1940).

[31]Notice the change in language from the Putnam case, *supra* note 23, which extended immunity on a doctrine of implied waiver.

interest—*sovereign function.*[32] Ultimately, in 1942,[33] Rutledge, J., deciding the question of liability of charitable corporations for the torts of their servants resulting in damage to strangers, said that it did not matter whether the injured party were a "stranger" or a "beneficiary."[34]

This line of cases indicates the trend of decision in the American jurisdictions, a position already attained in the English and Dominion courts.

The second major question raised in the principal case is the question of imposing liability upon charitable institutions when the injured party has suffered damage as a result of the charitable institution's violation of a statute and local ordinance. The liability of an owner under such statute is to the municipality alone, to the extent of the fine or penalty prescribed thereby, and any breach of the duty thus owing by the property owner to the municipality does not constitute negligence per se or negligence to a third person.[35]

This was the position argued for by the majority opinion in the principal case, saying that if the charity is obliged to pay for the cost of the repairs when made by the municipality it will merely be paying for an improvement to its property or benefit actually received, and there will be no improper diversion of its funds, but only an expenditure similar to any other made by it for the purpose of keeping its property in good order and repair.[36]

As intimated earlier, the one principle of immunity which is seldom used, and which, in light of the modern trend of cases, is probably the last open and apparently clear path for those desiring to maintain an immunity for charitable funds, is the principle of "*public interest-sovereign function.*" This principle is as old as the statement that "The king can do no wrong!" Though many of the governmental units have, by legislation, provided for the bringing of suit against the government, the language of such legislation is always strictly construed.

This avenue of approach has by no means been closed. In fact, in jurisdictions of immediate importance, *e.g.*, California, the way has been left clear.[37]

It is significant to observe that the three cases which usually touch off any discussion of charitable immunity from tort liability, *e.g.*, *Duncan* v. *Findlater, Feoffees of Heriot's Hospital* v. *Ross*, and *Mersey Docks Trustees* v. *Gibbs*,[38] were all cases which, though interpreted as bases for many and diverse principles, actually turned on the question of whether they were such agencies as were imbued with a public interest.[39]

Liability of municipal corporations is neither the general rule nor actually an exception to the general rule. Liability must largely turn on the nature of the particular function being undertaken by the municipality at the time injury was done to

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[32]"Before this court could grant immunity on this (sovereign function) doctrine, the organization involved would have to be more closely allied with governmental functions."

[33]President & Directors of Georgetown College, *supra* note 13.

[34]"Whether the one or the other is denied recovery, the distinction is without justice or legal justification. Retention for the nonpaying patient is the least defensible and most unfortunate of the distinction's refinements." Note 13 *supra*, at 827.

[35]*Cf.* note, 3 HAST. L.J. 73 (1951).

[36]*Supra* note 1, p. 331.

[37]Pa., *supra* note 4: "It is one of the recognized functions of municipal government to suppress and extinguish fires."

Federal, *supra* note 48.

Calif., People v. San Joaquin, etc., Assn., 151 Cal. 797, 91 P. 740 (1907). Provided that the institution is under the exclusive control and management of the state.

[38]*Supra* notes 6, 7 and 9.

[39]The reader is specifically referred to the very erudite discussion of McCaskill, *supra* note 7.