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Charitable Tort Immunity Under the First Amendment

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I. Introduction

The doctrine of charitable tort immunity was conceived in England in 1861. The case of *Holliday v. Leonard*[1] held that to apply funds in trust to satisfy a tort claim would be to thwart the intent of the donor. In 1871, *Holliday* was overruled[2] and since then charities in England have been liable for their torts.[3] Apparently unaware that the *Holliday* case had been overruled, the courts of Massachusetts[4] and Maryland[5] cited it as authority and established the immunity rule in America. From the beginning, the doctrine was not without its dissenters. In 1879, for example, Rhode Island rejected immunity.[6] The last ninety years in this country have seen the liability of charities move from complete liability to almost complete immunity and back to almost complete liability.[7] The doctrine has fallen into such disfavor that most modern commentators condemn it as an antiquated remnant of times long past and confidently predict its imminent demise.[8]

The doctrine, simply stated, is that a charity is not liable for its torts. It is an exception to the general rule that one is liable for the wrongs he commits and for those of his servants and agents when committed in the scope of their employment or agency.[9] Since 1942 the courts and the legislatures have increasingly repudiated or severely limited the immunity.[10] One or more of the following qualifications are applied in various combinations by many states: (1) Charities are immune only as to injuries done to beneficiaries of

1. 11 C.B.(n.s.) 192, 142 Eng. Rep. 769 (1861).
2. Foreman v. Mayor of Canterbury, 6 Q.B. 214 (1871).
3. Gilbert v. Corp. of Trinity House, 17 Q.B. 795 (1886).
4. McDonald v. Massachusetts Gen. Hosp. 120 Mass. 432 (1876).
5. Perry v. House of Refuge, 63 Md. 20 (1885).
6. Glavin v. Rhode Island Hosp., 12 R.I. 411 (1879). However, the legislature reinstated the doctrine with respect to hospitals. R.I. Gen. Laws Ann. § 7-1-22 (1956).
7. The first American case holding a charity immune was decided in 1876. McDonald v. Massachusetts Gen. Hosp., *supra* note 4. "Prior to 1942 only two or three courts had rejected the immunity of charities outright." Prosser, Torts § 127, at 1023 (3d ed. 1964) [hereinafter cited as Prosser]. "Today, only six jurisdictions stubbornly adhere to complete charitable tort immunity." Fisch, *Charitable Liability for Tort*, 10 Vill. L. Rev. (1965); see Note, 36 U. Det. L.J. 636, 643 (1959).
8. 1 Prosser, § 27, at 1023; 2 Scott, Trusts § 402 (1960); 3 Lipson, *Charitable Immunity; The Plague of Modern Tort Concepts*, 7 Clev.-Mar. L. Rev. 483 (1958); Posey, *Need for Uniformity in Doctrine of Charitable Immunity*, 23 Ga. B.J. 398 (1961); Note, 28 Chi.-Kent. L. Rev. 268 (1950); Note, 55 Dick. L. Rev. 148 (1950); Note, 37 N.C.L. Rev. 209 (1959); *supra* note 7.
9. President and Directors of Georgetown College v. Hughes, 130 F.2d 810, 812 (D.C. Cir. 1942).
10. See authorities cited note 7 *supra*.

the charity. Thus, paying patients, strangers, and employees can recover from the charity for negligence.[11] (2) Charities are liable for corporate negligence or administrative negligence such as the negligent selection and retention of employees.[12] (3) Charities are liable if the activity out of which the injury ocurred was a non-charitable activity.[13] (4) Charities are liable to the extent of non-trust property they hold or to the extent of liability insurance.[14]

According to a recent survey[15] six states[16] are committed to a doctrine of complete immunity. Twenty-two states, the District of Columbia, and Puerto Rico hold a charity liable just as any other individual or corporation. Nineteen other states apply one or more of the exceptions mentioned above. In a few states the legislatures have taken action. Louisiana[17] and Arkansas[18] statutes permit a direct action against the liability insurer. A Maryland statute[19] has been interpreted to estop the insurer and the insured from raising immunity as a defense to the extent of insurance coverage.[20] In Rhode Island the legislature has reinstated the immunity as to hospitals.[21] After the

11. Nebraska: Miller v. Concordia Teachers College, 296 F.2d 100 (8th Cir. 1961); Connecticut: Halliburton v. General Hosp. Soc'y, 133 Conn. 61, 48 A.2d 261 (1946); Georgia: YMCA v. Batey, 107 Ga. App. 417, 130 S.E.2d 242 (1963); Indiana: Richardson v. St. Mary's Hosp., 191 N.E.2d 337 (Ind. 1963); Louisiana: Jurjevich v. Hotel Dieu, 11 So. 2d 262 (La. 1943); North Carolina: Williams v. Randolph Hosp., 237 N.C. 387, 75 S.E.2d 303 (1963); Ohio: Gibbon v. YWCA, 170 Ohio St. 280, 164 N.E.2d 563 (1960), *reversing* 159 N.E.2d 911 (1959); Texas: Velan v. Lucey, 259 S.W.2d 302 (Tex. Civ. App. 1953); Virginia: Hill v. Leigh Memorial Hosp. 204 Va. 501, 132 S.E.2d 411 (1963); West Virginia: Meade v. St. Francis Hosp., 137 W. Va. 834, 74 S.E.2d 405 (1953); Wyoming: Bishop Randall Hosp. v. Hartley, 24 Wyo. 408, 160 Pac. 385 (1916). For more complete discussion see Annot., 25 A.L.R.2d 29, 89-108; 10 VILL. L. REV. 71 (1964).

12. Connecticut, Indiana, Texas. See cases cited note 11 *supra;* Annot., 25 A.L.R.2d 29, 112-125.

13. Illinois: Klopp v. Benevolent Protective Order, 309 Ill. App. 145, 33 N.E.2d 161 (1941); Massachusetts: Grueninger v. President & Fellows of Harvard College, 343 Mass. 338, 178 N.E.2d 917 (1961); Missouri: Blatt v. Geo. H. Nettleton Home for Aged Women, 365 Mo. 30, 275 S.W.2d 344 (1955); North Carolina; Turnage v. New Bern Consistory, 215 N.C. 798, 3 S.E.2d 8 (1939); Ohio: Bell v. Salvation Army, 172 Ohio St. 326, 175 N.E.2d 738 (1961); South Carolina: Eisenhardt v. State Agric. & Mech. Soc'y, 235 S.C. 305, 111 S.E. 2d 568 (1959); Tennessee: Gamble v. Vanderbilt, 138 Tenu. 616, 200 S.W.510 (1918).

14. Colorado: Michard v. Myron Stratton Home, 144 Colo. 251, 355 P.2d 1078 (1960); Illinois: Tidwell v. Smith, 27 Ill. App. 2d 63, 169 N.E.2d 157 (1960); Tennessee: Anderson v. Armstrong, 180 Tenn. 56, 171 S.W.2d 401 (1943).

15. Fisch, *supra* note 7.

16. Since that survey Pennsylvania has abolished the immunity. 33 U.S.L. WEEK 1147, 2495 (Pa. March 22, 1965).

17. LA. REV. STAT. tit. 22, § 655 (1959). This is a general direct action statute not limited to charitable immunity actions.

18. ARK. STAT. ANN. § 66-3240 (1959).

19. Md. ANN. CODE art. 48A, § 85 (1957).

20. *Ibid.*

21. R.I. GEN LAWS § 7-1-22 (1956).

New Jersey courts repudiated the doctrine in 1958,[22] the legislature re-established the charity's immunity from suits by beneficiaries except for hospitals whose liability was limited to 10,000 dollars.[23] One state has repudiated the immunity concept except for religious activities.[24]

This article will not attempt an exhaustive survey of the law in every state, but will discuss the absolute immunity rule and its modifications as well as the theories which form the foundation for the rule. In addition, the constitutionality of the rule and its modifications under the fourteenth amendment will be considered. When the courts of a state grant immunity to churches and to church operated charities, an additional question arises under the first amendment guarantee of freedom from governmental establishment of religion. These questions will be discussed in relation to recent decisions of the Supreme Court.

II. Absolute Immunity

Five states at present follow a rule of absolute immunity: Arkansas,[25] Maine,[26] Massachusetts,[27] Missouri,[28] and South Carolina,[29] Those who argue for absolute immunity offer a number of broad policy reasons for its adoption. They have further formulated three distinct legal theories as its basis: the trust fund theory, the theory that respondeat superior is inapplicable to charities, and the governmental immunity theory.

A. *Policies Surrounding the Absolute Immunity Rule*

Who can question that charities benefit society? In some cases charities take over responsibilities that the state otherwise would have to fulfill. Private colleges and universities alleviate the state's burden of educating its people. Charitable hospitals, the Red Cross, and similar institutions relieve the state of the necessity of caring for the sick. Churches, the Salvation Army, and other institutions which feed the poor and hungry, care for orphans and the aged, and provide for the indigent, fulfill certain functions which the state would otherwise have to perform. The taxes saved by the state in not having

22. Benton v. YMCA, 27 N.J. 67, 141 A.2d 198 (1958); Callopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958); Dalton v. St. Luke's Catholic Church, 27 N.J. 22, 141 A.2d 273 (1958).

23. N.J. Rev. Stat. § 2A:53A-7 (Supp. 1964).

24. Pederson v. Immanuel Luthern Church, 57 Wash. 2d 576, 358 P.2d 549 (1961); Lyon v. Tamwater Evangelical Free Church, 47 Wash. 2d 202, 287 P.2d 128 (1955).

25. Holton v. Sisters of Mercy, 234 Ark. 76, 351 S.W.2d 129 (1961).

26. Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910).

27. Simpson v. Truesdale Hosp., 338 Mass. 787, 154 N.E.2d 357 (1958).

28. Schultz v. Missionaries of La Salette Corp., 352 S.W.2d 636 (Mo. 1961).

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

to perform these services and the fact that most charities are beneficial to society in general, provide the basis for a public interest in the continuance of their work. An expression of this policy is the aid given charities in the form of tax exemptions by both state and federal governments.

On the other hand, there are policy arguments for the repudiation of the doctrine. Since individuals who act charitably are nevertheless liable if they act negligently, why should not a charitable corporation also be liable? The corporate form does not ordinarily shield negligent activity from liability. As Justice Rutledge said:

> Whether the Good Samaritan rides an ass, a Cadillac, or picks up hitchikers in a Model T, he must ride with forethought and caution. . . . Charity suffereth long and is kind, but in the common law it cannot be careless. When it is, it ceases to be kindness and becomes actionable wrongdoing.[30]

There is a policy as old as the common law that he who wrongfully injures some innocent person should pay. The greater danger to society is that the injured victim of the charity's negligence without means of redress will find himself destitute and become a ward of the state.[31]

Modern charities are no longer the small, underfinanced, ramshackle operations they once were. Rather, they are operated like big business and should meet the obligations commensurate with this position. Charitable hospitals, nationally organized churches, research foundations, and universities are most often in a better position to absorb the loss of their own carelessness than the individual who is unfortunate enough to be injured.[32] The increased availability of liability insurance, a relatively modern development, means that charities no longer risk the complete depletion of their funds. The only increased burden of liability would be the cost of premiums to provide reasonable coverage. With the use of liability insurance the risk of loss from negligent injury would be spread among all of the beneficiaries of the charity through either a very slight increase in the rates, or a very slight decrease in the amount of funds available for use in the charitable purpose. The policy of spreading the burdens of a particular undertaking among all of those who would benefit

30. President & Directors of Georgetown College v. Hughes, *supra* note 9, at 813.

31. "It is more consonant with public policy that charitable institutions, who deal intimately with the health and lives of members of the public, be held to a reasonable standard of care in conducting their operations. It is public policy to encourge greater responsibility in order to discourage conduct harmful to life and limb." DETROIT BAR ASSOCIATION, COMM. REPORT, cited in Note, 36 U. DET. L.J. at 648.

32. See Noel v. Menninger Foundation, 175 Kan. 751, 758, 267 P.2d 934, 939 (1954). See also Michaie v. Hahnemann Medical College and Hosp., 404 Pa. 424, 172 A.2d 769 (1961).

from the undertaking is not a radical idea.[33] This, in fact, has been the modern trend exemplified by social legislation and judicial decisions. Examples of this trend are many: compulsory automobile liability insurance, social security, medicare, workmens compensation, and absolute liability for defects in products.

Thus viewed, the doctrine of immunity is an outmoded anachronism of days long past which has no validity in the modern world. As Dean Prosser said of the immunity in his treatise on torts:

> In short, the immunity of charities is clearly in full retreat; and it may be predicted with some confidence that the end of the next two decades will see its virtual disappearance from American law.[34]

It is submitted that this disappearance is an end result much to be desired and that its demise will be mourned by few.

B. *Theories Used by the Courts To Implement Absolute Immunity*

1. *The Trust Fund Theory.*—The trust fund theory was first adopted by the courts to establish immunity in America and is still the basis for the holdings of numerous courts.[35] This theory is based on the idea that the assets of charities are held in trust and these assets cannot be diverted to any purpose not authorized by the donor. Modern scholars have universally condemned the "trust fund" theory as illogical, unwise and invalid. Dean Prosser says:

> Its [the trust fund theory's] weakness lies in the fact that it is contrary to the various decisions which have evolved methods of making other trust funds responsible for torts committed in administering the trust, and that since such funds would not be exempt in the hands of the donor himself, he can scarcely have the power, even if it were true that he had even the intention to confer such immunity upon the object of his bounty.[36]

Professor Scott in his treatise on trusts says:

> Such a sweeping exemption [the trust fund theory] from liability of charitable institutions seems to be clearly against public policy. The institution should be just before it is generous.[37]

Three courts which employ the trust rationale decline to extend the immunity to non-trust property that the charity owns.[38] Thus, a charity is liable if it carries liability insurance or has some other non-

33. "What is at stake, so far as the charity is concerned is the cost of reasonable protection, the amount of the insurance premium as an added burden on its finances, not the awarding over in damages of its entire assets." President & Directors of Georgetown College v. Hughes, *supra* note 9 at 824.

34. PROSSER § 127, at 1024.

35. See notes 3-5 *supra;* SCOTT, TRUSTS § 402 (Abr. ed. 1960).

36. PROSSER § 127, at 1020.

37. SCOTT, *op. cit. supra* note 35, at 7320.

38. See note 14 *supra.*

trust property, but immune if it refuses to hold such property. Colorado requires that the existence of non-trust property be proved as a prerequisite to the maintenance of the action.[39] The other two courts in this group hold that immunity is directed only to trust property and not to the charity.[40] As a result, a judgment can be obtained from a charity, but execution on that judgment can levy only against non-trust property.

2. *Inapplicability of Respondeat Superior.*—Another theory used to support absolute immunity is the refusal to apply vicarious liability to a charity.[41] The reason given is that the master gets no pecuniary benefit from the work of the servant and, therefore, he should not be held responsible for the negligent act of the servant.[42] This theory is based on a misunderstanding of the reason for vicarious liability. The real policy behind respondeat superior is that the master should be liable because of the control he exercises over the servant.[43] In applying this theory some courts have held the charity liable where, in addition to the negligence of a servant, there is also negligence chargeable directly to the charity; such as the negligent selection or retention of employees.[44]

3. *Governmental Immunity.*—Many courts have cloaked the charity with sovereign immunity because of the quasi-public character of many charities and the similarity of charitable functions to governmental functions.[45] It is true that many charities provide services that would otherwise be provided by the state. This reasoning is similar to that used to justify property tax exemption of charities. Tax-exemption, however, is paid for by the public as a whole rather than by isolated individuals. If the public benefits from charities, the

39. Brown v. St. Luke's Hosp. Ass'n, 85 Colo. 167, 274 Pac. 740 (1929).

40. See Tidwell v. Smith, *supra* note 14; Anderson v. Armstrong, *supra* note 14.

41. See Annot., 25 A.L.R.2d 29 (1952).

42. Fordyce v. Woman's Christian Nat'l Library Ass'n, 79 Ark. 550, 96 S.W. 155 (1906); Hearns v. Waterbury Hosp., 66 Conn. 98, 33 Atl. 595 (1895); Blackman v. YWCA, 179 Wis. 178, 191 N.W. 781 (1922); Nicholas v. Evangelica l Deaconess Home, 281 Mo. 182, 219 S.W. 643 (1920).

43. Other justifications, however, have been given for the doctrine. The psychological identity of master and servant; the master's superior ability to respond in damages; the desire to encourage employers to avoid and prevent tortious invasions through safety programs, etc., and the possibility for passing the costs to the general public under a "cost of doing business theory," are but a few. Hacklett, *Why Is A Master Liable For the Tort of His Servant?* 7 HARV. L. REV. 107 (1893); Laski, The Basis of Vicarious Liability, 26 YALE L.J. 105 (1916); Morris, *Enterprise Liability and The Actuarial Process—The Insignificance of Foresight,* 70 YALE L.J. 554 (1961). See also Nicholson v. Good Samaritan Hosp., 145 Fla. 360, 199 So. 344 (1940); Gable v. Salvation Army, 186 Okla. 687, 100 P.2d 244 (1940); (Lichty v. Carbon County Agric. Ass'n, 31 F. Supp. 809, 811 (M.D. Pa. 1940).

44. See Anuot., 25 A.L.R.2d 29, 112-30 (1952). For a good discussion of the problems the courts have encountered in trying to distinguish corporate from individual negligence, see 36 U.DET. L.J. at 639.

45. See Annot., 25 A.L.R.2d 29, 67 (1952).

public should pay the bill rather than individuals. Also, it might be noted that the citadel of governmental tort immunity is under assault.

C. *Constitutionality of Absolute Immunity*

The due process clause of the fourteenth amendment grants every individual the right to be free in his person and property from tortious invasion.[46] When such an invasion occurs the courts should be open to all persons regardless of their status to seek redress for these wrongs. To close the courts to an innocent claimant merely because of the charitable character of the defendant is to deprive the claimant of the right to be free from tortious invasion.[47] When the remedy enforcing a right is taken away, the right itself is also taken. Substantive due process also requires that the law itself must be fair, reasonable, not arbitrary or capricious and free from unreasonable discrimination.[48] It could be argued that substantive due process prohibits the state from establishing charitable immunity. In effect, the doctrine of immunity takes the property of a claimant, *i.e.*, the damages to which he would ordinarily be entitled, and forces the claimant to contribute it to charity. It could not be said to be a fine or a penalty because the claimant has done no wrong. On the contrary, the claimant is picked out to make this charitable contribution not of his own volition, but by the fortuitous circumstance of injury. Assuming that the entire public is benefitted by charitable institutions, should not the public foot the bill rather than placing the burden on the few individuals who are injured.[49] Despite the appeal of this reasoning, it seems to have been adopted by only one court. Florida's equivalent of the "due process clause" is a "due course of law" clause[50] as follows:

> All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by

46. FORKOSCH, CONSTITUTIONAL LAW § 385 (1963).

47. "Law may be said to deprive him of such rights, even if state law never purported to admit that he had them. A common-law rule would seem to be as effective a deprivation as a statute, even if it does not depart from the law as laid down in previous decisions of the state court." HALE, FREEDOM THROUGH LAW 247 (1952).

48. "And the guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." Nebbia v. New York, 291 U.S. 502, 525 (1934).

49. "No conception of justice demands that an exception to the rule of respondeat superior be made in favor of a charity and against the person of a beneficiary. . . ." Shcehan v. North County Community Hosp., 273 N.Y. 163-64, 7 N.E.2d 28-29 (1937).

50. Skipper v. Schumacher, 124 Fla. 384, 169 So. 58, *cert. denied*, 299 U.S. 507 (1936).

> due course of law, and right and justice shall be administered without sale, denial or delay.[51]

The Florida Supreme Court in *Nicholson v. Good Samaritan Hospital*,[52] held that the doctrine of respondeat superior was so much a part of "due course of law" as to require its use when applied to charities.[53] On the other hand, the doctrine of respondeat superior is itself an exception to the rule that a person is liable only for his own wrongful acts.[54] Vicarious liability merely gives the plaintiff an additional person from whom he may recover. It is more in the nature of a privilege than a right.[55] If a claimant has his cause of action against the principal tortfeaser, this should be enough to satisfy due process. The Constitution does not profess to provide a solvent defendent for every claimant.[56] The question, in short, is whether a state can constitutionally free a charity from vicarious liability that is forced on all other enterprises.

It may be helpful, in our inquiry, to compare the charitable immunity theory with the concept of workmen's compensation. These remedial statutes took away the workman's common-law action for negligence and replaced it with a statutory action with limited recovery. The Supreme Court held that these laws did not violate due process as to the workman because a reasonable substitute was given for the right taken.[57] Limited recovery was enforced on the workman, but in exchange he was freed from the common-law defenses of contributory negligence, assumption of risk, and the fellow servant rule.[58] In addition, the strong public need for such

51. FLA. CONST., Declaration of Rights § 4.

52. *Supra* note 43.

53. *Ibid.*

54. "Common-sense is opposed to making one man pay for another man's wrong unless he has actually brought the wrong to pass according to the ordinary canons of legal responsibility." Holmes, *Agency*, 5 HARV. L. REV. 1, 14 (1891). See also Fleming, *Vicarious Liability*, 28 TUL. L. REV. 161 (1954).

55. A number of outstanding scholars have had difficulty justifying respondeat superior as anything but a fiction used to accommodate public policy. See, *e.g.*, BATY, VICARIOUS LIABILITY (1916). PROSSER § 68; MECHEM, AGENCY §§ 350-53 (4th ed. 1952); Holmes, *supra* note 54; Fleming, *supra* note 53. "Thus the proposition that as between two equally innocent persons, he who initiated the enterprise must bear the loss, while often stated, would virtually eliminate negligence as a basis of tort liability." MECHEM, *supra* §353.

56. An analogy could be made to procedural due process. It is conceded that procedural due process only requires a state to give a claimant one day in court. A second chance on appeal is not required to satisfy due process. Griffin v. Illinois, 351 U.S. 12 (1956); McKane v. Darston, 153 U.S. 684 (1894). The same reasoning could be used to say that substantive due process only requires that a claimant have an action against the wrongdoer and does not require that he be given a second chance against the wrongdoer's employer. On the other hand, Douglas v. California, 372 U.S. 353 (1963), requires that if an appeal is granted to all, it cannot be withheld in a discriminatory fashion or it will run afoul of the equal protection clause.

57. New York Cent. R.R. v. White, 243 U.S. 188 (1917).

58. *Ibid.*

legislation was cited as a reason for holding the laws constitutional.[59] These elements are not present for the injured victim of a charity's negligence. There is no substitute remedy given to replace the right of action against the charity, nor is there such a strong need for the immunity, as has been pointed out previously.

Equal protection of the laws means that all differences of treatment by the law must be based on a reasonable classification. As previously stated, individuals acting charitably are not immune from liability if they are careless in their actions. But when charity takes on the corporate form it is immune from responsibility for its negligent acts. By granting immunity to corporate charities and not to individuals acting charitably, the state is discriminating against individuals. Is this discrimination reasonable? If charity is in the public interest and it should be protected, it should not matter whether the one acting charitably is an individual or a corporation. It seems unreasonable to deny immunity for a careless charitable act merely because the actor is not a corporation.[60]

Assuming that it is a proper state function to subsidize charities, the question still remains whether the state can force certain individuals to subsidize the charities when the only basis of classification for this group of individuals is that they must have been injured by the charity. The discrimination becomes clearer when an analogy is made to taxation. The immunity has the same economic effect as if the state levied a tax to subsidize charities. If such a tax were levied, the taxing event would be determined by the degree of care exercised toward the taxpayer by someone else. The rate and base of the tax would not be founded on the amount of benefit received, as in ad valorem property taxes; nor on the ability of the taxpayer to pay, as in income taxes; nor on some voluntary act of the taxpayer, as in the sales tax, gift tax, or excise tax; nor on some event that is certain to happen to all men, as in estate and inheritance tax. To the contrary, it would be based on the extent of the injury received from the charity and its servants. It is paid not in money, but in pain and suffering, medical bills, loss of earnings and disabilities that ordinarily the tortfeasor or his master would be required to pay. Clearly, such a tax would be so arbitrary and discriminatory as to violate the equal protection clause of the fourteenth amendment.

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59. *Ibid.*

60. "It is a strange distinction, between a charitable institution and a charitable individual, relieving the one, holding the other for like service and like lapse in like circumstances." President & Directors of Georgetown College v. Hughes, *supra* note 9 at 813. Further, doctors and lawyers who do much charitable work are liable for their negligence. Doctors cannot incorporate and thus avoid liability, but hospitals which perform a similar service are immune.

Should not the state be prohibited from doing indirectly what it obviously could not do directly?

III. BENEFICIARY WAIVER RULE

Refusing to adopt absolute tort immunity, several courts have followed a partial immunity approach in the beneficiary waiver or assumption of risk rule.[61] According to this rule, one who accepts the benefits of a charitable institution impliedly assents to hold it exempt from liability on claims based upon the negligence of its servants.

At one time the justification for this theory was valid but its validity has become less clear in light of modern developments. Justice Musmanno, dissenting in *Michael v. Hahnemann Medical College & Hospital*,[62] emphasized the fallacy of this rule by comparing the ancient charities with modern ones.

> It is historically true, and it is a tribute to the soundness of the human heart that it is true, that there was a time when good men and women, liberal in purse and generous in soul, set up houses to heal the poor and homeless victims of disease and injury. They made no charge for this care. . . .
>
> Hospitals then were little better than hovels in which the indigent were gathered for the primitive cures available. The wealthy and the well-to-do were cared for in their homes . . . And if it happened that some poor mortal was scalded by a sister of mercy, who exhausted from long hours of vigil and toil, accidentally spilled a ladle of hot sonp on a hand extended for nourishment, there was no thought of lawsuits against the philanthropists who made the meagre refuge possible. . . . A successful lawsuit against such a feeble structure might well have demolished it and have thus paralyzed the only helping hand in a world of unconcern for rag-clothed sick and the crutchless disabled.[63]

Justice Musmanno goes on to point out that modern charities are in a different situation. They are in fact quite wealthy and operated on a businesslike basis. "And if the hospital is a business for the purpose of collecting money, it must be a business for the purpose of meeting its obligations."[64] The extreme wealth of charities and the ready availability of liability insurance have obviated the need for the beneficiary rule.

There is seldom any contention that the rule is anything but a fiction.[65] Generally, when one goes to a hospital, for instance, he expects to receive the best care available. There is certainly no

61. See cases cited note 11 *supra*.
62. 404 Pa. 424, 172 A.2d 769 (1961).
63. *Id.* at 457, 172 A.2d at 786.
64. *Ibid.*
65. PROSSER § 127. "The theory of implied waiver. . . is so thoroughly illogical that it is difficult to understand how it has gained the approval of any court. It not only

real voluntary and intentional relinquishment of a right of action, which is the basis of a waiver. The theory is also criticized because of the difficulty of determining who is a beneficiary.[66] Servants,[67] paying patients,[68] private nurses,[69] persons accompaning a patient,[70] members of church,[71] have all been held to be strangers to the charity and thus, allowed to recover.[72] On the other hand, church members have been held to be beneficiaries.[73]

IV. Constitutional Validity of Charitable Immunity When Applied to Churches

In recent years, the Supreme Court has made some sweeping decisions interpreting the first amendment's guarantees of freedom from establishment of religion and the right to the free exercise of religion.[74] "Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental incroachment on religion."[75] The establishment clause prohibits governmental support or sanction of religion, while the free exercise clause prohibits any governmental obstacle placed in the path of religion. When government through the legislature or the courts grants an immunity from tort liabliity to religious institutions, this is an obvious financial aid to religion. The question is whether this indirect subsidy constitutes an establishment of religion prohibited by the first amendment. A similar question is presented with reference to tax advantages given religious institutions. Legal scholars have disagreed both as to the principles employed by the Court and as to those which should be

denies the very individuals for whom the charity was intended the benefit of the charity, but it makes it compulsory upon him, if injured by the negligence of an employee, to donate to charity the amount he would otherwise be entitled to recover." Ray v. Tucson Medical Center, 12 Ariz. 22, 31, 230 P.2d 220, 226 (1951).

66. 130 F.2d 810, 826 (D.C. Cir. 1942).

67. Annot., 25 A.L.R.2d 29, 89 (1952).

68. *Id.* at 106.

69. *Id.* at 109.

70. *Ibid.*

71. *Id.* at 108.

72. *Id.* at 110. *Contra,* Makar v. St. Nicholas Ruthenian Greek Catholic Church, 78 N.J. Super. 1, 187 A.2d 353 (1963).

73. Makar v. St. Nicholas Rutherian Creek Catholic Church, *supra* note 72.

74. Sherbert v. Verner, 374 U.S. 398 (1963) (requirement that in order to reeeive unemployment benefits one must be willing to work on Saturday violated free exercise as to one whose religion forbade working on Saturday); Abington School Dist. v. Schemp, 374 U.S. 203 (1963) (Lord's Prayer case); Engel v. Vitale, 370 U.S. 421 (1962) (Regent's Prayer case); Zorach v. Clauson, 343 U.S. 306 (1952) (released time program off school premises); McCollum v. Board of Educ., 333 U.S. 203 (1948) (released time on school premises); Everson v. Board of Educ., 330 U.S. 1 (1947) (school transportation for students of parochial schools).

75. Engel v. Vitale, *supra* note 74, at 430 (Black, J.).

employed to determine the limits of governmental connection with religion.[76]

Commentators have proposed at least four different views as to the present meaning of the first amendment in light of recent cases: (1) no-aid or absolute separation view,[77] (2) neutrality or primary purpose view,[78] (3) aid or cooperation view,[79] and (4) accomodation or no hostility view.[80]

A. *No Aid or Absolute Separation*

The foundation for this theory is found in the famous dictum of Mr. Justice Black in *Everson v. Board of Education.*[81] This case held that the use of public funds to transport parochial school children to school did not violate the establishment clause. Justice Black stated in dictum a rule that was so broad and comprehensive that it was not even followed in the instant case.

> The 'establishment of religion' clause 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. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance, or non-church attendance. *No tax in any amount, can be levied to support any religious activities or institutions,* whatever they may be called or whatever form they may adopt to teach or practice religion. Neither the state nor the federal government can openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and state.[82]

It should be pointed out that the case in which this statement appears did not follow it, but validated an obvious aid to religion.

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76. KAUPER, RELIGION & THE CONSTITUTION (1964); KATZ, RELIGION & AMERICAN CONSTITUTIONS (1964); KURLAND, RELIGION & THE LAW (1961); LITTEL, *Church, State, and University,* in RELIGION & THE PUBLIC ORDER (1964).

77. Abington School Dist. v. Schemp, *supra* note 74 at 229-30 (Douglas, J., concurring); PFEFFER, CHURCH, STATE & FREEDOM (1953); STOKES & PFEPPER, CHURCH & STATE IN THE UNITED STATES (1964).

78. Abington School Dist. v. Schemp, *supra* note 74, at 217-22 (Clark, J.) KURLAND, *op. cit. supra* note 76; KAZ, *op. cit. supra* note 76.

79. DRINAN, RELIGION, THE COURTS & PUBLIC POLICY (1963); RICE, SUPREME COURT & PUBLIC PRAYER (1964); Drinan, *The Constitutionality of Public Aid to Parochial Schools,* in THE WALL BETWEEN CHURCH & STATE 55 (1963); Gorman, *A Catholic View,* in THE WALL BETWEEN CHURCH & STATE 41 (1963).

80. Abington School Dist. v. Schemp, *supra note* 74, 230-34 (Brennan, J., concurring). KAUPER, CIVIL LIBERTIES & THE CONSTITUTION (1962); KAUPER, RELIGION & THE CONSTITUTION (1964).

81. 330 U.S. 1 (1947).

82. *Id.* at 15-16. (Emphasis added.)

Its statement that "no tax in any amount, can be levied to support any religious activities or institutions," has been rejected by Congress in the recent Aid to Education Act.[83] Mr. Justice Black, however, gives an excellent statement of the no-aid rule which has been quoted in several subsequent cases.[84]

The no-aid theory reflects the fear of many that allowing one religion or all religions to gain control of the public purse would result in depriving others of their religious freedom. It would also lead different sects to compete with each other for the aid of the government and bring religious controversies out of the churches and into the public arena.[85] Mr. Justice Jackson, dissenting, in *Everson* said that the first amendment

> was intended not only to keep the state's hands out of religion, but to keep religion's hands off the state, and above all, to keep bitter controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse.[86]

The *McCollum*[87] and *Torcaso*[88] cases could be said to support the absolute separation doctrine. *McCollum* held that public schools cannot provide a released time program of religious instruction on the school premises. The *Torcaso* case held that a state requirement that a notary public make an oath to his belief in God before receiving his commission was invalid. *McCollum* must be considered in light of *Zorach*,[89] which upheld a released time program conducted away from the school premises. The Court has validated Sunday closing laws,[90] an obvious aid to the christian religion and a hindrance to a Sabbatarian. In the *Jensen*[91] case, the court held that an exception to the general law of jury duty must be made for someone whose religion forbids him to serve on a jury. In *Sherbert*,[92] the Court required that an exception be made to an unemployment benefit law for one whose religion forbade working on Saturday.

In light of these cases, it is apparent that the Court has found it impossible to erect a wall of complete separation. Absolute separation would invalidate such things as: chaplains in the armed forces, chaplains in prisons, religious inscriptions on coinage, currency and

83. 77 Stat. 368 (1963), 20 U.S.C. § 716 (1964).
84. Engel v. Vitale, *supra* note 74, Zorach v. Clauson, *supra* note 74.
85. KATZ, *op. cit. supra* note 76, at 25-26.
86. Everson v. Board of Educ., *supra* note 74, at 26-27.
87. McCollum v. Board of Educ., 333 U.S. 203 (148).
88. Torcaso v. Watkins, 367 U.S. 488 (1961).
89. Zorach v. Clauson, *supra* note 74.
90. Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961); McGowan v. Maryland, 366 U.S. 420 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961).
91. *In re* Jensen, 375 U.S. 14, *remanded* 267 Minn. 136, 125 N.W.2d 588 (1963).
92. Sherbert v. Verner, *supra* note 74.

public buildings, prayers opening judicial and legislative sessions, tax exemption of church property, deductions for religious contributions, tax benefits for clergymens' living quarters and many other things which are well established. Carried even further, an absolute wall of separation would require that churches be denied fire and police protection, sewage, and other governmental service. Churches could not pay property taxes.[93] Obviously, only the most vehement and unreasonable separationist can advocate complete separation. Religion is a basic part of the lives of many Americans, a part of our heritage. It cannot be ignored by the government. The logical end of the "no-aid" doctrine is a government that is hostile to religion. If the government is hostile to religion the "free exercise" of religion will be inhibited, and such inhibition would be equally invalid.[94]

If the Court were to apply the strict separation theory, the charitable immunity would certainly fail. It is not doubted that freedom from tort liability is a great aid to religion. The immunity could even be considered an aid to one religion over another. It would aid the organized religion over the individual religion. The individual who is opposed to organized religion, but is a religion unto himself would be liable whereas the organized religion would be free from liability. The immunity could be considered an indirect tax levied for the support of religion and therefore invalid.[95] The language of Mr. Justice Black quoted above would point to that result. However, the dicta of Mr. Justice Black was not followed even in *Everson* and although it was quoted in *McCollum, Torcaso,* and *Schemp,* it was conspicuous in its absence in *Zorach* and *Engel.* Congress has rejected this view in enacting the Aid to Education Act which provides government funds for parochial schools.[96]

B. *Neutrality or Primary Purpose*

In the *Schemp* case the Court struck down regulations requiring recitation of the Lord's prayer in the public schools.[97] Choosing not to use the precedent of the *Engel* case the Court, through Mr. Justice Clark, theorized that government should deal with religion in an attitude of "wholesome neutrality." That is, government must neither be favorable nor hostile to religion. This test does not preclude some incidental aid to religion as did the strict separation theory. Mr. Justice Clark's test is stated as follows:

93. Abington School Dist. v. Schemp, *supra* note 74, at 260 (Brennan, J., concurring).
94. *Id.* at 299.
95. The tax analogy is more fully developed in the text accompanying note 60 *supra.*
96. *Supra* note 83.
97. Abington School Dist. v. Schemp, *supra* note 74.

> What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the constitution. That is to say that to withstand the strictures of the establishment clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[98]

Examples can be seen in federal loans to church operated schools,[99] federal funds given to church operated hospitals under the Hill-Burton Act,[100] and aid to private church operated colleges and universities.[101] In *Schemp* the Court said that the use of religious means (the Lord's prayer) to achieve the secular end of good citizenship had as its primary effect the advancement of religion. Professor Kurland, also, comes to the conclusion that neutrality should be the test.[102] Kurland's test is:

> The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.[103]

In testing the immunity of charities against the neutrality theory, it is necessary to divide religious activities into two basic catagories: (1) Charitable activities operated by a church. These activities are functions that it would be appropriate for the state to serve, such as hospitals, schools, and orphans homes. These could be called the social or welfare enterprises of churches. (2) Churches themselves and strictly religious activities such as worship, sacrament, indoctrination, and ordination. These functions are always inappropriate for the government except when it is necessary to protect the free exercise of religion. For example, chaplains in the armed services are necessary in order to protect the servicemen's freedom to worship. The first category includes activities in which the whole public has an interest and in which the state actively participates. To do away with the immunity as to church operated charities and not as to other private charities would be a "classification in terms of religion" which "imposes a burden" on religion.[104] Thus, we see an example where free exercise can limit the scope of the establishment clause. Immunity when applied to church operated charities would probably be upheld under the neutrality theory. To use the words of Mr.

98. *Id.* at 222.
99. National Educational Defense Program, 20 U.S.C. §§ 401 (1964).
100. 78 Stat. 447, 42 U.S.C. § 291 (1964).
101. *Supra* note 83.
102. KURLAND, *op. cit. supra* note 76, at 112.
103. *Ibid.*
104. *Ibid.*

Justice Clark,[105] the primary purpose of the immunity is to encourage and benefit all charities. Because of the public secular interest in education and care for the sick, the courts can benefit charities. The primary effect is not to aid religion but to enable all charities to carry on their public functions at a lower cost. One commentator has said that "the establishment clause precludes aid to religion as such but not aid extended to religious activities incidental to a broader classification which rests on a legitimate secular basis."[106]

The issue is not nearly so clear when applied to churches and purely religious functions. The first question raised is whether a church in its purely religious functions is a charity. If one defines a charity as a non-profit organization, then a church would qualify. However, if the definition further requires that it must perform a function which relieves the state of its duties, then a church would not qualify.

It might be argued that churches serve a secular function in developing moral character and responsibility in the citizenry and, therefore, the purpose of the immunity is to advance this secular purpose.[107] This same reasoning could be used to justify a state church or the granting of direct subsidies to churches. These purely religious functions, if performed by the state directly, would certainly be invalid. Be that as it may, the fact remains that the primary effect of the immunity is to aid the church in carrying on strictly church functions; and, therefore, is invalid under the second part of Justice Clark's test.

C. *Aid or Cooperation View*

This view completes the swing of the pendulum from no-aid to neutrality to active aid and support of religious institutions. This is commonly called the Catholic view. Its advocates contend that neutrality of government is invalid because "absolutely-no-help hurts and, therefore violates the principle of absolutely-no-harm."[108] To state the argument affirmatively, government, rather than ignoring religion, can recognize that churches "perform a useful and desirable function, even a public purpose, and that within the limits imposed by the Constitution their activities may be encouraged and favored by the state."[109] Some would construe the first amendment to mean

105. Abington School Dist. v. Schemp, *supra* note 74.

106. KAUPER, *op. cit. supra* note 76, at 65.

107. For a discussion of these same principles when applied to tax exemption, see Kauper, *Tax Exemption for Religious Activities,* in THE WALL BETWEEN CHURCH & STATE 112-13 (Oaks ed. 1963).

108. Gorman, *supra* note 79, at 45.

109. KAUPER, *op. cit. supra* note 80, at 114.

that government can and should aid theistic religion as opposed to non-theistic religion, but should not discriminate between the various theistic religions.[110] Others view the establishment clause only as a prohibition against an established church and nothing more.[111] While this view is held by a number of scholars, the Supreme Court has never adopted it and is not likely to do so.

D. *Accomodation or Prevention of Hostility*

A middle-of-the-road view has been advocated which, while preventing deep involvement by the government, would still accomodate the institutions of government to religion to prevent hostility. This theory, proposed by Mr. Justice Brennan in his concurring opinion in *Schemp* and by Professor Kauper, recognizes that Americans are a religious people and that because of that heritage, religion is an integral part of their lives. Recognizing that a conflict exists between the establishment clause and the free exercise clause, these men propose that government "cannot be indifferent to religion in American life, and that far from being hostile or even neutral, it may accommodate its institutions and its programs to the religious interest of the people."[112]

Mr. Justice Brennan was quick to point out that the *Schemp* decision did not invalidate tax exemptions which, "incidentally benefit churches and religious institutions, along with many secular charities and non-profit organizations. . . . For religious institutions simply share benefits which government makes generally available to educational, charitable and eleemosynery groups."[113] The limits, as laid down by Justice Brennan, seem to be: The Constitution enjoins those involvements of religious with secular institutions which: "(a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends where secular means would suffice."[114] Mr. Justice Brennan believes that the wall of separation should be drawn where the dangers feared by the founders are present in modern activties and not where the founders previously would have drawn the line.[115] The above language would grant charitable immunity to "welfare enterprises" of religious groups. If the state is going to grant immunity to charities generally, it must give the immunity to religious charities that are engaged in the same activities in order to prevent hostility to religion. On the

110. RICE, *op. cit. supra* note 79.
111. MORRELL, THE FIRST AMENDMENT (1964).
112. KAUPER, *op. cit., supra* note 76, at 69.
113. Abington School Dist. v. Schemp, *supra* note 74, at 301.
114. *Id.* at 231.
115. *Ibid.*

other hand, purely religious functions would apparently be excluded. Immunity in tort, if applied to purely religious activities, would be using the instruments of the state to further religion.

Tax exemption most nearly parallels the problem of tort immunity. The question of tax exemption for religious institutions has not been passed on by the court.[116] Professor Kauper concludes that tax exemption under neutrality or accomodation would be upheld as to "welfare enterprises" that a church operates if the enterprise would be appropriate for the government or a non-religious charity to operate. On the other hand, he recognizes that tax exemption for a house of worship and other completely religious enterprises constitutes a direct aid to religion.[117] A case arising in Alabama has held that a tax on religious garb used solely for religious purposes is invalid because it is a tax on religion in violation of the free exercise clause.[118] This principle could be distinguished from taxation of church buildings because they serve other functions such as social gatherings, boy scout meetings, recreational activities, civic activities. Another problem is presented if the state taxes church property used for other purposes and exempts other eleemosynary activities. This would constitute hostility toward religion which under the accomodation theory would be invalid. Kauper predicts that the court will uphold the tax exemption even though it is a direct aid to religion because of its universal application and the long established history of tax exemption.[119]

If one assumes that the same public interest is served by granting immunity from liability in tort to church operated charities as is served by the tax exemption, it is easy to conclude that the immunity is serving a secular purpose with only incidental benefits accruing to religion. Kauper's reasoning could just as easily apply to immunity as to exemption.

> [G]overnment, in recognition of the place in our pluralistic system of private, voluntary and non-profit enterprises that serve purposes consistent with the public interest may appropriately relieve them of obligations otherwise imposed by law in order to further their freedom to operate.[120]

There are, however, three basic distinctions between tax exemption and the tort immunity. First, charitable tort immunity does not have

116. "[N]othing actually held by the Supreme Court to date compels the conclusion that tax exemptions for religious purposes are unconstitutional." Kauper, *supra* note 107, at 115.

117. *Id.* at 113-14.

118. Toolen v. State, In Equity, No. 58-983, Cir. Ct. Mobile County, Ala., July 29, 1963, discussed in RELIGION AND THE PUBLIC ORDER 267 (1964).

119. Kauper, *supra* note 107, at 113, 114.

120. *Id.* at 114.

121. See notes 4-5 *supra* and accompanying text.

122. *Ibid.*

the long and consistent history that gives the tax exemption a preferred position. Tort immunity was not introduced into this country until 1876.[121] Second, charitable tort immunity was never universal in this country. From the beginning, some courts rejected it as being opposed to public policy.[122] Third, the state is forcing, not the public as in tax exemption, but an individual to contribute to a church to which he might be strongly opposed.

V. Conclusion

The absolute separation doctrine and the cooperation doctrine can be virtually excluded as theories which the Court might adopt. Under both the accomodation and neutrality theories, immunity of church supported welfare and social institutions would probably be upheld where immunity was granted other charities. The immunity of the churches themselves is on somewhat shakier ground. Under the neutrality test, there is no real secular purpose served in granting the immunity. The primary effect is to aid religion. Under the accomodation test there is no conflict with free exercise to require churches to be responsible for their own negligence. Tort immunity is not merely accomodating government institutions to the religious interest of the people. It is forcing individuals to subsidize a purely religious institution.

Only one case has been presented with first amendment objections to the tort immunity.[123] That case rejected the arguments summarily.

Despite the strong arguments against the constitutionality of tort immunity when applied to churches, it is predicted that neither the state courts nor the Supreme Court will strike down something in which so many people have a special interest. Because of the close connection that the immunity has with tax exemption and the long history of tax exemption the courts will probably hold them both constitutional.

I. Stephen North

123. Makar v. St. Nicholas Ruthenian Greek Catholic Church, *supra* note 72.