

LIABILITY OF A CHARITABLE INSTITUTION FOR THE TORTS OF ITS AGENTS—An examination of the cases concerning the liability of a charitable institution for the negligent and wrongful acts of its agents reveals a wide divergence of opinion as to decisions and grounds for such decisions. On one hand we have the so-called Massachusetts rule which wholly exempts the charity from liability in all cases,¹ and on the other hand a set of cases which holds that such an institution is liable for the negligence of its agents on the same basis as an individual or any other corporation² These are the extreme views, and are in

the obligation thus assumed, but these were nothing more than the obligation frequently imposed in ordinary contracts between individuals and became as it were liquidated damages for the breach." It is well settled in New Jersey that calling the sum named a penalty or liquidated damages is not conclusive, if the intention appears otherwise, from the consideration of the whole agreement; if it be doubtful, from the whole agreement, whether it is intended to be a penalty or stipulated damages, it will be construed as a penalty, and if it is called a penalty, it will be held to be such, unless that construction is overcome by a very clear intention to the contrary, derived from other parts of the agreement. *Whitfield v. Levy*, 35 N.J.L. 149 (Sup. Ct. 1871); *Gibbs v. Cooper*, 86 N.J.L. 226, 90 Atl. 1115 (E. & A. 1914). *Sed quære*: From what agreement can the intention of the parties be gathered to rebut the presumption that the amount, named a penalty, is a penalty?

¹*Thornton v. Franklin Square House*, 200 Mass. 465, 86 N.E. 909 (1909); *Zoulalian v. New Eng. Sanatorium*, 230 Mass. 102, 119 N.E. 683 (1918). *Roosen v. Peter Bent Brigham Hosp.*, 235 Mass. 66, 126 N.E. 392 (1920) is one of the best examples of the Massachusetts doctrine that a hospital is exonerated even if the managers were guilty of negligence in selecting incompetent servants. *Kidd v. Mass. Homœopathic Hosp.*, 237 Mass. 500, 130 N.E. 55 (1921) illustrates exemption from liability if the injuries are sustained by one of the hospital's servants. Also in *Foley v. Wesson Memorial Hosp.*, 246 Mass. 363, 114 N.E. 113 (1923) the hospital was held not liable to a stranger who was injured on a public sidewalk, by a negligently driven hospital ambulance. See also *Benton v. Boston City Hosp.*, 140 Mass. 13, 1 N.E. 836 (1885). Other cases in accord with the Massachusetts rule are *Johnston v. City of Chicago*, 258 Ill. 494, 101 N.E. 960 (1913); *Fire Insurance Patrol v. Boyd*, 120 Pa. St. 624, 15 Atl. 553 (1888). The rule of non-liability under any circumstances has sometimes been referred to as the so-called Pennsylvania rule. Also see cases cited in 5 R. C. L. 122 note 19 and 11 C. J. 106 note 95. The principle of exemption was first stated in the House of Lords in England in 1839 in *Duncan v. Findlater*, 6 Clark and F. 894. The case is not in point as to facts, as the defendants were the trustees of a public turnpike rather than a charitable institution. It was held that such trustees were not liable for misfeasances of agents unless they directed the very act to be done or had personally co-operated in the negligence. The same tribunal later held that this was incorrect law in *Mersey Docks v. Gibbs*, 11 H. L. Case 686. In that case it was held that a corporation which was intrusted by statute to perform certain public works was liable in damages for negligence of its servants, although the tolls received were not applicable to the use of individual contractors, but were devoted only to the maintenance of the works. This is pertinent because jurisdictions in the United States have held that governmental agencies come under the same rule of law, and charitable institutions are comparable to such agencies in that neither conduct their activities for pecuniary profit. See *Benton v. Boston City Hosp.*, *supra*.

²*Geiger v. Simpson Methodist Epis. Church*, 174 Minn. 389, 62 A. L. R. 716 (1928); *Mulliner v. Evangelischer Diakonissenverein*, 114 Minn. 392, 175

the minority, as most of the jurisdictions qualify their decisions by considering whether the person who received the injury was a recipient of the benefits of the charity or whether he was a stranger.³ Although the cases comprising the majority are in apparent harmony as to result, they remain at variance in their reasoning.

In the jurisdictions that allow immunity under certain circumstances it is universally agreed that a beneficiary of the charity is without recourse against the institution for torts arising from a servant's or agent's negligence.⁴ Also it is settled beyond dispute that a pay patient in a public charitable hospital receives its benefits in exactly the same manner as a gratuitous patient.⁵ The fact that the rules of the hospital require a payment from certain patients according to the circumstances, or the accommodation they received, does not detract from the eleemosynary character of the corporation, the payment in such instance being a donation to the general fund for the maintenance of the charity.

One ground on which a hospital or similar institution has escaped liability for the negligence of its agents is that of "waiver". It has been said that, if one accepts the benefits of a charity, he impliedly exempts his benefactor from responsibility for the carelessness of servants, qualified by the use of due care in the selection of agents as a prerequisite to such exemption.⁶

N. W. 699 (1920). Also see *McInerny v. St. Luke's Hosp. Assoc.*, 122 Minn. 10, 46 L. R. A. (N. S.) 548 (1913) which is not directly in point on the facts, but in which the court states that in no situation should there be an arbitrary rule of exemption unless created by the legislature. In accord is *Tucker v. Mobile Infirmary Assoc.*, 191 Ala. 572, L. R. A. 1915 D (1915) which holds that exemption from liability is a matter for the legislature and not for the court. For the general principle of liability see also *Hewett v. Womans Hosp. Aid Assoc.*, 73 N. H. 556, 64 Atl. 190 (1906); *Mersey Docks v. Gibbs*, *supra* note 1; and *Glavin v. Rhode Island Hosp.*, 12 R. I. 411, 36 Am. Rep. 675 (1879). The latter case, however, was later limited by *Basabo v. Salvation Army*, 35 R. I. 22, 85 Atl. 120 (1912).

³*Daniels v. Rahway Hosp.*, 10 N. J. Misc. 585, (Com. Pleas 1932); *D'Amato v. Orange Memorial Hosp.*, 101 N. J. L. 61 (E. & A. 1925); *Boeckel v. Orange Memorial Hosp.*, 108 N. J. L. 453 (Sup. Ct. 1932); *Simmons v. Wiley Methodist Epis. Church*, 112 N. J. L. 129 (E. & A. 1934). See also cases cited in 5 R. C. L. 123 note 3, and 11 C. J. 106 note 98, 99.

⁴*Roosen v. Peter Bent Brigham Hosp.*, *supra* note 1; *D'Amato v. Orange Memorial Hosp.*, *supra* note 3; *Boeckel v. Orange Memorial Hosp.*, *supra* note 3; *Society of N. Y. Hosp. v. Purdy*, 126 N. Y. 679, 28 N. E. 249 (1891); *Hordern v. Salvation Army*, 199 N. Y. 233, 92 N. E. 626 (1910); *Hearns v. Waterbury Hosp.*, 66 Conn. 98, 33 Atl. 595 (1895); *Powers v. Mass. Homœopathic Hosp.*, 109 Fed. 294, 65 L. R. A. 372 (1901); *Parks v. Northwestern Univ.*, 218 Ill. 381, 75 N. E. 991 (1905); *Bruce v. Central Methodist Epis. Church*, 147 Mich. 230, 10 L. R. A. (N. S.) 74 (1907); and cases cited in 5 R. C. L. 121 note 11.

⁵*Roosen v. Peter Bent Brigham Hosp.*, *supra* note 1; *D'Amato v. Orange Memorial Hosp.*, *supra* note 3; *Gable v. Sisters of St. Francis*, 227 Pa. St. 254, 75 Atl. 1087 (1910); *Phila. v. Penn. Hosp.*, 154 Pa. 9, 25 Atl. 1076 (1893). On this point there is not a case that holds that a pay patient is any less a beneficiary of the charity than those who do not pay.

⁶*Powers v. Mass. Homœopathic Hosp.*, *supra* note 4. This case is an

The principle most frequently enunciated, on which immunity rests, is that the funds of a public charity are subject to a charitable trust; and to allow them to be diminished by judgments for the torts of its agents and servants would be a violation of the trust.⁷ An early Massachusetts case qualifies the rule by stating that there shall be no liability if the hospital has used due care in the selection of its agents, thereby raising the correlative inference that there should be liability if the hospital was guilty of lack of due care.⁸ However, the later Massachusetts cases hold that a hospital is exonerated even though its managers and officers were careless in the selection of incompetent servants, thereby carrying the "trust fund" theory to its natural result.⁹ If that theory is made the basis for immunity, there is no reason for a distinction between negligence of agents carefully selected and negligence in those selecting the agents. Massachusetts also maintains that in determining liability, there is no reason to distinguish between direct beneficiaries of the charity and total strangers.¹⁰ A judgment in favor of either would amount to a depletion of trust funds, which are held to be absolutely inviolate.

Another Massachusetts case holds that a hospital maintained by the city of Boston is no more liable for the negligence of its servants and officers than the city would be; that the hospital is no more than an agent of the municipality and therefore not liable for negligence in activities undertaken as a department of government.¹¹

In direct antithesis to the Massachusetts holdings are the adjudications demanding that a charitable institution be liable in all events, in

illustration of the Massachusetts rule before it became formulated into the strict doctrine of exemption under any circumstances. See *Roosen v. Peter Bent Brigham Hosp.*, *supra* note 1 for the later viewpoint.

⁷The theory is that donors to charitable uses contemplate that their gifts be used only to meliorate the sufferings of the sick, poor, and needy, and not to pay judgments arising from tortious claims; that allowing such funds to be used for the latter purpose would discourage donors in giving to charities. See *Roosen v. Peter Bent Brigham Hosp.*, *supra* note 1; *Kidd v. Mass. Homœopathic Hosp.*, *supra* note 1; *Foley v. Wesson Memorial Hosp.*, *supra* note 1; *Gable v. Sisters of St. Francis*, *supra* note 5.

⁸*MacDonald v. Mass. Hosp.*, 120 Mass. 432, 21 Am. Rep. 529 (1876). In accord are *Farrigan v. Pevear*, 193 Mass. 147, 78 N. E. 855 (1906); *Powers v. Mass. Homœopathic Hosp.*, *supra* note 4; *Hearns v. Waterbury Hosp.*, *supra* note 4; and *Eighmy v. Union Pac. R.*, 93 Ia. 538, 27 L. R. A. 296 (1895).

⁹*Roosen v. Peter Bent Brigham Hosp.*, *supra* note 1; *Kidd v. Mass. Homœopathic Hosp.*, *supra* note 1.

¹⁰*Foley v. Wesson Memorial Hosp.*, *supra* note 1; *Kidd v. Mass. Hom. Hosp.*, *supra* note 1.

¹¹*Benton v. Boston City Hosp.*, 140 Mass. 13, 1 N. E. 836 (1885). *Fire Insurance Patrol v. Boyd*, *supra* note 1 is in accord; the doctrine set forth is comparable to that in the English case of *Duncan v. Findlater*, *supra* note 1, which was later criticized by *Mersey Docks v. Gibbs*, *supra* note 1. See also *STORY ON AGENCY*, 9th Ed., Sec. 321, 322, wherein it is pointed out that persons engaged in public service and acting for public objects should not be held responsible for those employed under them. The author states that the doctrine of *respondet superior* is inapplicable to those performing public functions.

no way distinguishing it from an individual or any other corporation.¹² A New Hampshire case in attacking the "trust fund" theory declares that donors of property to charitable uses are aware of the fact that officers and agents of such corporations are just as apt to commit torts as are the agents of any other corporation, and that such donors are presumed to know, when they make their gifts, that they may be used to pay claims in tort as well as in contract.¹³ A recent Minnesota case in holding for unqualified liability expressed great dissatisfaction with the contrary view, stating that public policy did not favor exemption, which curiously enough is the ultimate basis of the adverse decisions on the subject.¹⁴ In another case in the same jurisdiction, where a patient of a hospital was suing for injuries, it was pointed out that it was more just and more in keeping with charitable purposes first to compensate those injured by their own negligence before seeking new subjects on which to dispense charity.¹⁵ A California opinion criticized the "trust fund" theory when it was interposed as a defense in an action against the Salvation Army, declaring that giving exemption on this ground was showing an unnecessary solicitude for the organization and an anticipation of dangers that really do not exist.¹⁶

New Jersey and New York are characteristic of that large group of jurisdictions that base their decisions on the relationship which the injured bears toward the institution.¹⁷ In New Jersey a patient, gratuitous or paying, cannot recover against a hospital for injuries resulting from the negligence of physicians, nurses, or employees.¹⁸ In *D'Amato v. Orange Memorial Hosp.*¹⁹ the decision is based on the

¹² *Geiger v. Simpson Meth. Epis. Church*, *supra* note 2; *Mulliner v. Evangelischer Diakonniessenverein*, *supra* note 2; *Tucker v. Mobile Infirmary Assoc.*, *supra* note 2; *Hewett v. Womans Hosp. Aid Assoc.*, *supra* note 2.

¹³ *Hewett v. Hosp. Aid Assoc.*, *supra* note 2.

¹⁴ *Geiger v. Meth. Epis. Church*, *supra* note 2.

¹⁵ *Mulliner v. Evangelischer Diakonniessenverein*, *supra* note 2.

¹⁶ *Phoenix Assurance Co. v. Salvation Army*, 83 Cal. App. 455, 256 Pac. 1106 (1927). The court says:

"It is not at all likely that prospective donors to charities will withhold their benefactions merely because the institutions to which they contemplate donations may be compelled to render that justice which the law exacts from other corporations * * * we think that this state should not be added to the list of those whose courts have encouraged—as in some degree they surely have—the agents of charitable institutions to render less than due care for the security of life, limb, and property, the very things which it is the sole purpose of such institutions to preserve and protect."

¹⁷ *Schloendorff v. Society of N. Y. Hosp.*, 149 App. Div. 415, 133 N. Y. S. 1143, *Aff.* 211 N. Y. 125, 105 N. E. 92 (1914); *Daniels v. Rahway Hosp.*, *supra* note 3; *D'Amato v. Orange Memorial Hosp.*, *supra* note 3; *Boeckel v. Orange Memorial Hosp.*, *supra* note 3; *Simmons v. Wiley Meth. Epis. Church*, *supra* note 3. Also see 11 C. J. 106 notes 98, 99, for cases in other jurisdictions.

¹⁸ *D'Amato v. Orange Memorial Hosp.*, *supra* note 3. In this case a nurse attempted to transfer a pay patient from a chair to a bed. The patient fell and was injured as a result of the nurse's carelessness.

¹⁹ *Supra* note 3. For facts see *supra* note 18.

broad ground of public policy, with the familiar explanation that the payment for board and medical services is merely a contribution toward the general charitable fund. The court cites a leading New York case which arrives at the same conclusion, but on the theory that the relation between a hospital and its physicians and nurses is not one of master and servant, thus eliminating the application of the rule of *respondeat superior* at the outset.²⁰ The rule laid down in the *D'Amato* case²¹ is found to be elastic, as it is later applied to a different set of circumstances.²² It was stretched to cover the case of a mother who slipped and fell on some stairs in the hospital, after having visited her daughter, a patient there. In that case the hospital was without liability, as the mother of the patient was said to stand in the same relationship to the hospital as would the daughter had she been suing.²³ The mother, rather than being considered a mere invitee, was theoretically placed in the body of the child, and thus received the same benefits as the child. This reasoning, a combination of more fiction than logic, illustrates how far the New Jersey courts will go to exonerate the hospital from liability, and that, if circumstances permit, the trust fund is as jealously guarded as in Massachusetts. When, in *Daniels v. Rahway Hosp.*,²⁴ it became necessary for the New Jersey courts to take a stand as to liability in damages to a stranger, it was decided that, if the injured was in no way a recipient of the benefits of the charity, there is liability. The court holds that when the injuries are received by a person on the public highway through the negligent operation of

²⁰ *Schloendorff v. Soc. of N. Y. Hosp.*, *supra* note 17. Cases taking this view very logically regard the physician as an independent contractor, following a separate calling, and liable for his own torts to a patient, but not involving the hospital in any way if due care has been used in his selection. Nurses may fall into the class of the hospital's servants; but if they take orders directly from the physician they are considered to be the latter's rather than the hospital's agent. Orderlies and other employees of the hospital are regarded as servants in the strict sense of the word. See also *Union Pac. R. v. Artist*, 60 Fed. 365, 23 L. R. A. 581 (1894); and *McDonald v. Mass. General Hosp.*, *supra* note 8. Also see *MICHEM, AGENCY*, 2nd Ed., Vol. II, Sec. 1858, wherein it is pointed out that it is necessary that the relation of master and servant really exist before the former can be held liable for the torts of the latter. This condition precedent is easily overlooked.

²¹ *Supra* note 3. For facts see *supra* note 18.

²² *Boeckel v. Orange Memorial Hosp.*, *supra* note 3.

²³ In the *Boeckel* case, *supra* note 3, the court said:

"To the extent that her need went, that need being a mother's wish to be with a sick child and to speed the latter's recovery by the inspiration of the home presence; she was a recipient of the same benevolence, a beneficiary of the same charitable services that the defendant was rendering to suffering humanity."

Contrast this view with that in *Schloendorff v. N. Y. Soc. Hosp.*, *supra* note 17, where the court classes as a "stranger" a patient who was operated upon without the patient's consent. It is obvious that New York and New Jersey differ in their reasoning on the facts although they are in apparent harmony as to result.

²⁴ *Daniels v. Rahway Hosp.*, *supra* note 3.

the hospital's ambulance by its employee driver, public policy no longer favors exemption, but rather demands that the institution be liable.²⁵ When the same precise question confronted our appellate courts for the first time, the result was similar to that reached in the *Daniels* case.²⁶ A church was held liable for injuries received to a person, through the negligent operation of the church's truck by its servant, the injured being at the time of the accident on the public highway and having no beneficial relation to the church.²⁷ The court, while favoring exemption on the ground of public policy when the tortious injuries are received by a beneficiary, points out that that reason cannot be invoked with equal justice in the case of one completely outside the charity's ministrations, neither seeking nor receiving its bounty. The court feels that public policy demands that no kind of organization shall be permitted with impunity to commit wrongs against those in no way participating in the institution's benevolence.

It is possible that the reason for the great confusion and contrariety of opinion as to the liability of a charitable institution for the torts of its agents is that most of the courts have attached more importance to that high-sounding theory of public policy than to concrete legal principles. Some of the courts say directly that public policy is the basis of their decisions; others stress the doctrine of waiver or the inviolability of trust funds. In the final analysis, each court has obtained its own result by weighing the policy that shields the funds given for the benefit of humanity against the policy demanding that an individual shall be made whole in damages for injuries to his person or property. Because of the fact that the two public policies come into opposition, and that each court has its own idea of the comparative weights, there probably will be little harmony in result as long as such tenuous reasons alone are made the basis of decisions.

From the mass of cases a small minority stands out which rests its holdings on clear-cut legal principles. That group upholds the immunity of a charitable institution for the torts of its agents on the simple ground that, when a charitable institution is involved, the rule of *respondeat superior* is not applicable.²⁸ To arrive at this result,

²⁵ *Daniels v. Rahway Hosp.*, *supra* note 3. This rule, laid down for the first time in this case had been anticipated in the D'Amato case, *supra* note 3, and in the Boeckel case, *supra* note 3, where the opinion, though not in so many words adopting the similar New York rule, had indicated strong approval of it. The fact that in the Boeckel case the court went to such lengths to disassociate the plaintiff from the status of a stranger inferred that New Jersey favored the New York rule of liability toward strangers.

²⁶ *Daniels v. Rahway Hosp.*, *supra* note 3.

²⁷ *Simmons v. Wiley Meth. Epis. Church*, *supra* note 3.

²⁸ *Farrigan v. Pevear*, *supra* note 8; *Hearns v. Waterbury Hosp.*, *supra* note 4; *Parks v. Northwestern Univ.*, *supra* note 4; *Powers v. Mass. Hom. Hosp.*, *supra* note 4. See also *Fire Ins. Patrol v. Boyd*, *supra* note 1, which is not in point on the facts as a charitable institution is not involved, but which contains a good discussion of *respondeat superior* as not applying to public organizations. Also see (1901) 1 COL. L. REV. 485 and (1907) 7 COL. L. REV. 353.

the reason for the rule itself must be analyzed. Ordinarily, a person is answerable only for his own wrongdoing. Why is it that, when a certain relationship exists, a person is liable in damages for the tort of another? Various reasons have been assigned for that rule which holds the master liable for the torts of his servant, the most important being that the master ought to answer for those acts which he commands and directs and from which he reaps the benefits.²⁹ Also, when a master has been guilty of lack of due care in the selection of servants, there is reason for him to be held for the wrongful acts of the servants. As the rule is a hard one at best, and has been criticized by innumerable authorities, there is all the more reason to be careful in considering whether or not it fits the facts before applying it.³⁰ Assuming the rule and the reasons for it to be sound, it is difficult to see a justifiable application of it to cases in which a charitable institution which has used due care in the selection of its agents is sought to be held. Where the so-called "master" is a home for indigent boys³¹ or a public hospital,³² organized for dispensing relief to unfortunate persons, there is lacking that private pecuniary benefit from the servant's activities that seems to be the basis of the doctrine of *respondeat superior*. In the same category fall all true charitable institutions whose primary object is to alleviate physical and mental suffering, rather than to derive monetary or other material profit.

WORKMEN'S COMPENSATION AND THE CONFLICT OF LAWS—In general our law is territorial and not personal.¹ This does not mean that rights and duties can be enforced only in the territory of the jurisdiction which created them, it does mean that such law does not ordi-

²⁹ See POLLOCK, TORTS, 5th Ed., p. 72. For an outline of the theories and rationale of *respondeat superior* see MECHEM, AGENCY, 2d Ed., Vol. II, Sec. 1856. Beside the historical reasons from Roman Law, i.e., the *pater familias* doctrine and *qui facit per alium, facit per se*, it has been said that the master should be held when he has been guilty of negligence in the selection of servants; if he has used due care in the selection of servants he still should be liable because he is the one who puts the force in motion, or because he is the one who gets the benefits, or because a master is more pecuniarily responsible than a servant. In analyzing these theories, all of which have been criticized, two stand out as being the most sound legally, viz., that where the master has been guilty of negligence in the selection of servants and where he has not been guilty of such negligence but has reaped the benefits from the servant's undertaking he should be held. Also see STORY, AGENCY, 9th Ed., Sec. 321, 322, 452.

³⁰ *Respondeat superior* doctrine is criticized in (1916) 26 YALE L. JOUR. 105-107; (1923) 23 COL. L. REV. 444, 452; BATY, VICARIOUS LIABILITY, Chap. VIII, p. 148 (1916). For other discussions of history and rationale of the doctrine of *respondeat superior* see HOLMES, AGENCY, (1891) 4 HARV. L. REV. 345; (1891) 5 HARV. L. REV. 1; WIGMORE, (1894) 7 HARV. L. REV. 315, 383, 441.

³¹ *Farrigan v. Pevear*, *supra* note 8.

³² *Powers v. Mass. Hom. Hosp.*, *supra* note 4.

¹ *Davis v. N. Y. & N. F. R. Co.*, 143 Mass. 570, 56 N.E. 888 (1900); *Whitford v. Panama R. Co.*, 23 N.Y. 465 (1861).