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# Charitable Immunity: a Diminishing Doctrine

health.[18] The modern manufacturer intends his products to be distributed through various middlemen and eventually to reach unknown consumers scattered throughout the entire country. This procedure eliminates any chance of privity, yet the manufacturer is allowed to avoid liability because his product traveled in the channels of commerce as he intended. With the realization that the products which he presents to the public will inevitably cause harm in a certain percentage of cases, even when there has been no negligence on the part of the manufacturer, the need for rational reform in this area of the law becomes apparent. The antiquated theories of negligence and privity have no place in our modern law of products liability. Social policy today demands the protection of the consumer and the revaluation of law once necessary to protect our struggling industry but which has now outlived its usefulness. Manufacturing advances and the availability of insurance to the manufacturer have now put the manufacturer in what would ordinarily be the best position to absorb the losses caused by substandard products and the best position to distribute the effect of these losses throughout society. It is therefore submitted that products liability should be dealt with by a single type of claim which could take care of all the modern effects of manufacturing and distribution into account and not be hindered by the historical accident which has separated the field into the two distinct branches of tort and contract with conflicting approaches to a single problem.

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## CHARITABLE IMMUNITY: A DIMINISHING DOCTRINE

In 1876 the Supreme Judicial Court of Massachusetts decided a case which introduced the doctrine of charitable immunity into the law of the United States.[1] Since 1876 all but three states[2] have encountered opportunities to accept or reject the doctrine. Some have accepted it, either in pure or modified form;[3] others have rejected it.[4]

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[18]Rupp v. Norton Coca-Cola Bottling Co., 187 Kan. 390, 357 P.2d 802 (1960); Campbell Soup Co. v. Ryan, 328 S.W.2d 821, 822 (Tex. Ct. Civ. App. 1959); Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828, 829 (1942).

[1]McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432, 21 Am. Rep. 529 (1876).

[2]The three states in which the question of immunity has not been raised are Hawaii, New Mexico, and South Dakota.

[3]The following states have modified the doctrine or accepted it in pure form. The modification appears with the citation. In this footnote and footnote 4, infra,

In recent years a number of states have abrogated their charitable immunity doctrines.[5] There seems to be a definite trend toward treating a charity as any other business enterprise.

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the cited case either originated the doctrine for the jurisdiction or recognized the existing doctrine. *Arkansas:* Helton v. Sisters of Mercy of St. Joseph's Hosp., 234 Ark. 76, 351 S.W.2d 129 (1961); *Connecticut:* Haliburton v. General Hosp. Soc'y, 133 Conn. 61, 48 A.2d 261 (1946) (selection of employee); Cohen v. General Hosp. Soc'y, 113 Conn. 188, 154 Atl. 435 (1931) (stranger); *Georgia:* Morton v. Savannah Hosp., 148 Ga. 438, 96 S.E. 887 (1918) (selection of employee) (liability to paying patient); *Indiana:* St. Vincent's Hosp. v. Stine, 195 Ind. 350, 144 N.E. 537 (1924) (selection of employee); *Louisiana:* Jurjevich v. Hotel Dieu, 11 So. 2d 632 (La. Ct. App. 1943) (selection of employee); Bougon v. Volunteers of America, 151 So. 797 (La. Ct. App. 1934) (stranger); *Maine:* Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910); *Maryland:* Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495 (1885); *Massachusetts:* McDonald v. Massachusetts Gen. Hosp., supra note 1; *Missouri:* Dille v. St. Luke's Hosp., 355 Mo. 436, 196 S.W.2d 615 (1946); *Nebraska:* Marble v. Nicholas Senn Hosp. Ass'n, 102 Neb. 343, 167 N.W. 208 (1918) (stranger); *Nevada:* Bruce v. Y.M.C.A., 51 Nev. 372, 277 Pac. 798 (1929); *North Carolina:* Barden v. Atlantic Coast Line R.R., 152 N.C. 318, 67 S.E. 971 (1910) (selection of employee); *Rhode Island:* R.I. Gen. Laws Ann. § 7-1-22 (1956); *South Carolina:* Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948); *Texas:* Southern Methodist Univ. v. Clayton, 142 Tex. 179, 176 S.W.2d 749 (1943) (selection of employee); *Virginia:* Weston's Adm'x v. Hospital of St. Vincent of Paul, 131 Va. 587, 107 S.E. 785 (1921) (selection of employee); Hospital of St. Vincent of Paul v. Thompson, 116 Va. 101, 81 S.E. 13 (1914) (stranger); *Wyoming:* Bishop Randall Hosp. v. Hartley, 24 Wyo. 408, 160 Pac. 385 (1916) (selection of employee).

[4]The following states have refused to grant immunity to charities. *Alabama:* Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915); *Alaska:* Tuengel v. City of Sitka, 118 F. Supp. 399 (D.C. Alaska 1954); *Arizona:* Ray v. Tuscon Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951); *California:* Silva v. Providence Hosp., 14 Cal. 2d 762, 97 P.2d 798 (1939); *Colorado:* St. Mary's Academy v. Solomon, 77 Colo. 463, 238 Pac. 22 (1925); *Delaware:* Durney v. St. Francis Hosp., Inc., 46 Del. 350, 83 A.2d 753 (Super. Ct. 1951); *Florida:* Nicholson v. Good Samaritan Hosp., 145 Fla. 360, 199 So. 344 (1940); *Illinois:* Marabia v. Mary Thompson Hosp., 309 Ill. 147, 140 N.E. 836 (1923); *Iowa:* Haynes v. Presbyterian Hosp. Ass'n, 241 Iowa 1269, 45 N.W.2d 151 (1950); *Minnesota:* Mulliner v. Evangelischer Diakonniessenverein, 144 Minn. 392, 175 N.W. 699 (1920); *Mississippi:* Mississippi Baptist Hosp. v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951); *Montana:* Howard v. Sisters of Charity, 193 F. Supp. 191 (D.C. Mont. 1961); *New Hampshire:* Kardulas v. City of Dover, 99 N.H. 359, 111 A.2d 327 (1955); *New York:* Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957); *North Dakota:* Rickbeil v. Grafton Deaconess Hosp., 74 N.D. 525, 23 N.W.2d 247 (1946); *Oklahoma:* Gable v. Salvation Army, 186 Okla. 687, 100 P.2d 244 (1940); *Tennessee:* Baptist Memorial Hosp. v. Couillens, 176 Tenn. 300, 140 S.W.2d 1088 (1940); *Utah:* Sessions v. Thomas D. Dee Memorial Hosp. Ass'n, 94 Utah 460, 78 P.2d 645 (1938); *Vermont:* Foster v. Roman Catholic Diocese, 116 Vt. 124, 70 A.2d 230 (1950).

[5]The following states have recently abrogated immunity doctrines. *Idaho:* Wheat v. Idaho Falls Latter Day Saints Hosp., 78 Idaho 60, 297 P.2d 1041 (1956); *Kansas:* Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934 (1954); *Kentucky:* Mullikin v. Jewish Hosp. Ass'n, 348 S.W.2d 930 (Ky. 1961); *Michigan:* Parker v. Port Huron Hosp., 361 Mich 1, 105 N.W.2d 1 (1960); *New Jersey:* Dalton v. St. Luke's Catholic Church, 27 N.J. 22, 141 A.2d 273 (1958); *Ohio:* Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410 (1956); *Oregon:* Hungerford v. Portland Sanitarium & Benevolent Ass'n, 235 Ore. 412, 384 P.2d 1009 (1963); *Pennsylvania:* Flagiello

The Supreme Court of Appeals of West Virginia decided to re-examine the charitable immunity doctrine in *Adkins v. St. Francis Hosp.*[6] Adkins entered the defendant hospital for treatment of an injury which had partially paralyzed his left side. His doctor ordered that he be given a bath, and an orderly wheeled him to the bathroom to comply with the doctor's instructions. While preparing the plaintiff for his bath, the orderly allowed him to fall on a hot radiator. The orderly left plaintiff on the radiator and went to seek assistance. The plaintiff, unable to move himself, suffered severe burns before the orderly returned with help and removed him from the radiator. The plaintiff sued the hospital for the burn injury. The defendant, answering that it was a nonstock, nonprofit hospital immune from tort liability, moved for and was granted summary judgment. The Supreme Court of Appeals granted appeal "for the specific purpose of re-examining and reconsidering the principles [supporting immunity] ... and to decide whether such principles should be adhered to or rejected."[7]

By unanimous decision the court decided to abrogate the charitable immunity doctrine. In the opinion by Judge Caplan, the court examined first the nature of defendant hospital concluding that even though it was referred to as a charitable institution, it behaved more like a business, because it received its support mainly from paying patients. The classic charitable institution rendered gratuitous services to those who could not afford to pay and derived its support

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v. Pennsylvania Hosp., 417 Pa. 486, 208 A.2d 193 (1965); *Washington:* Pierce v. Yakima Valley Memorial Hosp. Ass'n, 43 Wash. 2d 162, 260 P.2d 765 (1953); *West Virginia:* Adkins v. St. Francis Hosp., infra note 6; *Wisconsin:* Kojis v. Doctors Hosp., 12 Wis. 2d 367, 107 N.W.2d 131 (1961).

[6]143 S.E.2d 154 (W. Va. 1965).

[7]Supra note 6, at 157. Before the Adkins case, West Virginia had a qualified immunity for charities. Roberts v. Ohio Valley Gen. Hosp., 98 W. Va. 476, 127 S.E. 318 (1925), initiated the qualified doctrine of immunity, by holding that the defendant had failed to allege due care in selecting and retaining the employee-nurse.

Koehler v. Ohio Valley Gen. Hosp., 137 W. Va. 764, 73 S.E.2d 673 (1952), announced the "stranger" exception to the immunity doctrine. In Koehler the plaintiff was a patient of a doctor who carried on a private practice in the defendant hospital. Plaintiff went to see the doctor and slipped on a newly-waxed ramp in the hospital. She sued the hospital for her injuries and was finally allowed to recover. The court reviewed the decisions in other jurisdictions and decided to make the defendant liable to an invitee or a stranger. The court held that the plaintiff was an invitee of the hospital and that the defendant was liable for injuries caused by the negligence of the hospital's employees.

The two cases above were accepted and approved in Meade v. St. Francis Hosp., 137 W. Va. 34, 74 S.E.2d 405 (1953). In Meade the plaintiff's decedent was a baby girl, born in defendant hospital. The baby was healthy but the hospital failed to care for her property and she choked, strangled, and died the day after she was born. The court felt that the weight of authority was in favor of immunity and reaffirmed its stand regarding the doctrine.

from voluntary contributions. The court concluded that "charitable" did not properly describe the nature of defendant's business. The court went on to examine the charitable immunity doctrine from its beginning in England, through its development in the United States, to its status in West Virginia. The court examined the doctrine and decided that no reason existed for retaining it. Its decision seems based on the premise that charities now do not rely so much on voluntary contributions as on income for services rendered and should therefore be treated as businesses. Although the court said that the doctrine has been abrogated, only future cases can determine whether a true charity, or a charity other than a hospital, will have tort immunity.

The doctrine of charitable immunity was announced in two English cases, *Duncan v. Findlater*[8] and *Feofees of Heriot's Hosp. v. Ross.*[9] The *Duncan* case dealt with trustees of a public road and *Heriot's* case dealt with refusal to admit a patient and not with the negligence of the hospital. In both cases the doctrine was only dictum; Lord Cottenham went further than was necessary for the decision by announcing in general language that trust funds could not be diverted to pay damages. In *Holliday v. St. Leonard*[10] the *Duncan* dictum was applied. By 1871 all of these cases had been overruled; England no longer had charitable immunity.[11] Massachusetts in 1876[12] and Maryland in 1885[13] decided cases dealing with charitable liability for torts. On the strength of the overruled English cases, apparently failing to realize that they had been overruled, these courts decided that charities should enjoy complete immunity. After the Massachusetts court had adopted the immunity doctrine, Rhode Island faced the problem and refused to follow Massachusetts.[14] On this admittedly shaky basis rests the modern American doctrine of charitable immunity.

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[8]6 Clark & Fin. 894, 7 Eng. Rep. 934 (1839).

[9]12 Clark & Fin. 507, 8 Eng. Rep. 1508 (1846).

[10]11 C.B. 192 (1861).

[11]Duncan v. Findlater, supra note 8, was overruled by Mersey Docks Trustees v. Gibbs, [1866] L.R. 1 H.L. 93 and Holliday v. St. Leonard, supra note 10, was overruled by Foreman v. Mayer of Canterbury, [1871] L.R. 6 Q.B. 214. As a result of these cases, the immunity doctrine in England had been abrogated five years before it was instituted in Massachusetts and fourteen years before it appeared in Maryland.

[12]Supra note 1.

[13]Maryland adopted the immunity rule in Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495 (1885), relying upon Heriot, supra note 9.

[14]Glavin v. Rhode Island Hosp., 12 R.I. 411, 34 Am. Rep. 675 (1879), refused to accept immunity. The case was repudiated by the legislature, supra note 3, and now charities enjoy immunity in Rhode Island.

The theory in *Heriot's* case was that the hospital's trust funds would, contrary to the donor's wishes, be diverted by tort liability. Courts still apply this trust fund theory.[15] It has been applied in various forms by courts saying that diversion would impair the usefulness of the charity,[16] that the trustees have no authority to divert the funds from their intended purposes,[17] or that the funds are not subject to execution.[18] Critics of the immunity doctrine point out that charities still exist in states with no immunity and that their usefulness has not been impaired. They also say that donations to the charities have not diminished in jurisdictions with no immunity.[19]

The second theory advanced in support of charitable immunity is implied waiver. Courts advancing this theory argue that a person entering a charitable institution as a beneficiary waives the right to recover from the institution for injuries received while there; that is, the person assumes the risk of injury when he enters the institution.[20] It is difficult to comprehend how a new-born baby or an unconscious person could assume any risk or waive any right to recover.[21] It is also worth noting that many times people enter a charitable hospital simp-

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[15]Arkansas Valley Co-op Rural Elec. Co. v. Elkins, 200 Ark. 883, 141 S.W.2d 538 (1940); Forrest v. Red Cross Hosp., Inc., 265 S.W.2d 80 (Ky. 1954); Williams v. Randolph Hosp., Inc., 237 N.C. 387, 75 S.E. 2d 303 (1953); Gregory v. Salem Gen. Hosp., 175 Ore. 464, 153 P.2d 837 (1944); Knecht v. St. Mary's Hosp., 392 Pa. 75, 140 A.2d 30 (1958).

[16]Ettlinger v. Trustees of Randolph-Macon College, 31 F.2d 869 (4th Cir. 1929); Cook v. John N. Norton Memorial Infirmary, 180 Ky. 331, 202 S.W. 874 (1918); Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910); Vermillion v. Woman's College, 104 S.C. 197, 88 S.E. 649 (1916); Southern Methodist Univ. v. Clayton, 142 Tex. 179, 176 S.W.2d 749 (1943).

[17]Fordyce v. Woman's Christian Nat'l Library Ass'n, 79 Ark. 550, 96 S.W. 155 (1906); Parks v. Northwestern Univ., 218 Ill. 381, 75 N.E. 991 (1905); Downs v. Harper Hosp., 101 Mich. 555, 60 N.W. 42 (1894).

[18]St. Mary's Academy v. Solomon, 77 Colo. 463, 238 Pac. 22 (1925); Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950); Anderson v. Armstrong, 180 Tenn. 56, 171 S.W.2d 401 (1943); McLeod v. St. Thomas Hosp., 170 Tenn. 423, 95 S.W.2d 917 (1936).

[19]Cohen v. General Hosp. Soc'y, 113 Conn. 188, 154 Atl. 435 (1931); Bond v. City of Pittsburgh, 368 Pa. 404, 84 A.2d 328 (1951) (dissenting opinion).

[20]Powers v. Massachusetts Hemoeopathic Hosp., 109 Fed. 294 (1st Cir. 1901); Wilcox v. Idaho Falls Latter Day Saints Hosp., 59 Idaho 350, 82 P.2d 849 (1938); Averback v. Y.M.C.A., 250 Ky. 34, 61 S.W.2d 1066 (1933); Williams' Adm'x v. Church Home for Females, 223 Ky. 355, 3 S.W.2d 753 (1928); Nicholas v. Evangelical Deaconess Home & Hosp., 281 Mo. 182, 219 S.W. 643 (1920); Bruce v. Y.M.C.A., 51 Nev. 372, 277 Pac. 798 (1929).

[21]Wendt v. Servite Fathers, 332 Ill. App. 618, 76 N.E.2d 342 (1947); Mississippi Baptist Hosp. v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951); Phillips v. Buffalo Gen. Hosp., 239 N.Y. 188, 146 N.E. 199 (1924); Vanderbilt Univ. v. Henderson, 23 Tenn. App. 135, 127 S.W.2d 284 (1938); Gamble v. Vanderbilt Univ., 138 Tenn. 616, 200 S.W. 510 (1918); Foster v. Roman Catholic Diocese, 116 Vt. 124, 70 A.2d 230 (1950).

ly because they have no choice, which would seem to negate the voluntariness needed for waiver or assumption of risk.

Another theory in support of charitable immunity contends that the doctrine of respondeat superior is inapplicable to charities.[22] Supporters of this theory argue that respondeat superior is applied because the employer derives benefit and profit from the work of his employees and should be liable for their negligence. They then conclude that the charity derives no benefit from its employees, as the charity does not operate for, nor can it show, a profit. This theory ignores the present character of most charities and could hardly be applied to a modern charity, even it its earnings are not called "profits."

Finally, courts use the catchall phrase "public policy" to justify granting immunity to charities.[23] This theory actually incorporates the three theories already discussed, and urges that it is against public policy to hold a charity liable for tort damages because the benefits to the charity are greater than the detriment suffered by the injured party. This theory is weak in that it too ignores the fact that charities such as hospitals, churches, and colleges also exist in states with no immunity rule and that the public does not seem to have been plausibly harmed by this lack of immunity. Furthermore, it can just as plausibly be argued, the injured party has a right to recover for his injuries and "public policy" demands that as a member of the public, he be protected. It seems anomalous that a person should enter a hospital for treatment, sustain an injury while there, and finally have to pay for his original treatment and for treatment for the new injury.

The courts which refuse to abrogate the doctrine adhere to one or more of the above theories and then try to bolster their position by saying that the doctrine is so firmly entrenched in the law that they do not feel justified in abrogating it.[24] These courts use stare

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[22]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); Roberts v. Kirksville College, 16 S.W.2d 625 (Mo. Ct. App. 1929); Taylor v. Protestant Hosp. Ass'n, 85 Ohio St. 90, 96 N.E. 1089 (1911); Southern Methodist Univ. v. Clayton, 142 Tex. 179, 176 S.W.2d 749 (1943); Schau v. Morgan, 241 Wis. 334, 6 N.W.2d 212 (1942).

[23]Byrd v. Blue Ridge Rural Elec. Co-op, Inc., 118 F. Supp. 868 (W.D.S.C. 1954); Blatt v. George H. Nettleton Home, 365 Mo. 30, 275 S.W.2d 344 (1955); Rafferzeder v. Raleigh Fitkin-Paul Mogan Memorial Hosp., 33 N.J. Super. 19, 109 A.2d 296 (1954); Landgraver v. Emanuel Lutheran Charity Bd., 203 Ore. 489, 280 P.2d 301 (1954); Baldwin v. St. Peter's Congregation, 264 Wis. 626, 60 N.W.2d 349 (1953).

[24]Jurjevich v. Hotel Dieu, 11 So. 2d 632 (La. Ct. App. 1943); Thibodaux v. Sisters of of Charity, 123 So. 466 (La. Ct. App. 1929); Howard v. South Baltimore Gen. Hosp., 191 Md. 617, 62 A.2d 574 (1948); Jones v. St. Mary's Roman Catholic Church, 7 N.J. 533, 82 A.2d 187 (1951); Miller v. Mohr, 198 Wash. 619, 89 P.2d 807 (1939).

decisis as a reason for not acting. This reasoning allows dubious doctrine to outlive any usefulness and be applied merely because of its age. Although a court should be slow to deviate from precedent, if such precedent is clearly wrong stare decisis should not be used to perpetuate the error.

Although some courts express dissatisfaction with the immunity doctrine, they say that, if a change is to be made, the legislature must make it.[25] As the history of charitable immunity shows, the courts themselves created the doctrine: they should be able to destroy it.

Virginia[26] and certain other states, while not abrogating chari-

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[25]Foley v. Wesson Memorial Hosp., 246 Mass. 363, 141 N.E. 113 (1923); DeGroot v. Edison Institute, 306 Mich. 339, 10 N.W.2d 907 (1943); Magnuson v. Swedish Hosp., 99 Wash. 399, 169 Pac. 828 (1918); See also, Miller v. Sisters of St. Francis, 5 Wash. 2d 204, 105 P.2d 32 (1940) (concurring opinion). In one state, Rhode Island, the legislature has acted to re-establish the immunity doctrine after the Supreme Court had refused to accept it. Absent such action on the part of legislatures, the courts themselves should feel free to deal with the doctrine. See supra notes 3 & 14.

[26]In Virginia, charities enjoy the same immunity as did charities in West Virginia before Adkins, supra notes 6 & 7. The "stranger" exception was initiated in Virginia in Hospital of St. Vincent of Paul v. Thompson, 116 Va. 101, 81 S.E. 13 (1914). In Thompson the plaintiff accompanied a friend to defendant hospital. Plaintiff looking for an entrance, walked through an ordinary, unmarked door and fell down an elevator shaft. Usually the top of the elevator was even with the floor and could be walked on, but an employee of the defendant had forgotten to raise the elevator to the floor level. The court held that the plaintiff could recover from the defendant on the theory that she was a "stranger." Thus, Virginia never granted complete immunity but started with a qualified immunity.

The "corporate negligence" exception was first discussed in Virginia in Weston's Adm'x v. Hospital of St. Vincent of Paul, 131 Va. 587, 107 S.E. 785 (1921). The Supreme Court of Apeals reaffirmed Thompson, supra, and went on to hold that a charitable institution could be held liable to a paying patient if corporate negligence could be shown. The facts were that plaintiff's new-born daughter died of burns incurred when a nurse placed a hot water bottle too near the baby. The court held there was no evidence of negligence in the selection or retention of the nurse and, on this finding, refused to allow the plaintiff to recover. The dissenting judges felt that a patient in such a hospital was entitled to reasonably efficient care and that liability instead of immunity would help to assure such care. It is on the basis of this weak decision that subsequent Virginia cases and the doctrine itself rest.

In a later case, Norfolk Protestant Hosp. v. Plunkett, 162 Va. 151, 173 S.E. 363 (1934), a unanimous court upheld the qualifications set forth in Weston's Adm'x, supra. The plaintiff in Plunkett was injured by a nurse working under orders from the head nurse. The head nurse had an inferior education and had never graduated from nursing school. The defendant had received complaints about her incompetence but had done nothing about them. The court applied Weston's Adm'x, supra, and held that the defendant had been negligent in selecting and retaining the head nurse. The plaintiff was allowed to recover in this case for the "corporate negligence" of the defendant.

Recent Virginia cases have expressed disfavor with the qualified immunity doctrine but have refused to abrogate it, contending that the General Assembly, and not the court, must act, if action is to be taken. See Roanoke Hosp. Ass'n v. Hayes, 204 Va. 703, 133 S.E.2d 559 (1963), and Memorial Hosp., Inc. v. Oakes, 200

table immunity, have attempted to qualify it.[27] Two important qualifications have developed. One of these is called the "stranger" exception.[28] This exception holds that a non-trespassing non-beneficiary of the charity, such as a person visiting a patient in a hospital,[29] can recover for injuries sustained while at the institution. Thus such an injured visitor can recover from the hospital though the paying patient he is visiting cannot. The second qualification is that the institution is liable for "corporate negligence."[30] The most common form of this negligence is in the selection and retention of employees. If the institution has been negligent in selecting or retaining an employee, it can be held liable for injuries caused by this employee. This exception applies to anyone injured by the employee, not just to a stranger.

These two qualifications destroy the theories behind the immunity doctrine itself. If trust funds would be diverted by paying damages to a paying patient of a charitable hospital, they would equally be diverted by paying a stranger or a victim of "corporate negligence." Also, inapplicability of respondeat superior and assumption of the risk would seem to apply equally to strangers and patients, to corporate negligence as well as to mere employee negligence. And "public policy" would be defeated by allowing a stranger to recover or by allowing anyone to recover for corporate negligence. These exceptions to the rule are "the earmarks of law in flux. They indicate something wrong at the beginning or that something has become wrong since then. They also show that correction, though in the process, is incomplete."[31]

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Va. 878, 108 S.E.2d 388 (1959). By so deciding, the court has kept Virginia in that decreasing minority of states still applying immunity in either its pure or qualified form. Supra note 3. Seventeen states continue to apply the immunity doctrine in either pure or modified form. On the other hand, thirty states now have no charitable immunity doctrine. Eleven of these thirty have changed from immunity to liability in the last twelve years. In continuing to apply the doctrine the Virginia court has attempted to support the application on a public policy theory, as have many courts which still cling to the doctrine. Supra note 23.

[27]Supra note 3.

[28]For cases applying this exception see note 3, supra.

[29]Alabama Baptist Hosp. Bd. v. Carter, 226 Ala. 109, 145 So. 443 (1932); Lusk v. United States Fid. & Guar. Co., 199 So. 666 (La. Ct. App. 1941); Walker v. Memorial Hosp., 187 Va. 5, 45 S.E.2d 898 (1948).

[30]For states applying this exception see note 3, supra.

[31]President & Directors of Georgetown College v. Hughes, 130 F.2d 810, 812 (D.C. Cir. 1942). The court there divided 3-3 on the question of immunity, so that the status of immunity in the District of Columbia is not settled. The able opinion of Judge Rutledge, concurred in by Judges Miller and Edgerton, thoroughly examined the immunity doctrine and rejected it. The judge said, "if the charity can assume

Looking at the rule of charitable immunity today it seems that the reasons for its existence have ceased. Many charitable institutions are conducted now as any other business and have lost the character of the struggling charity helping the destitute and depending on benevolent donors as its main support. Colleges charge tuition, hospitals operate mainly on income derived from paying patients, and many churches receive enough funds from their congregations to build mammoth structures and hire staffs to conduct their business affairs. These charitable institutions have lost the aura of charity and have begun to look like any other business. Courts are beginning to look to the character of the charity as did the West Virginia court and are no longer satisfied with looking merely to the corporation charter. A true charity might still need immunity but even this possibility seems unlikely.

The doctrine of charitable immunity has been called "a plodding ox on a highway built for high speed vehicles."[32] The doctrine has been severely criticised by text[33] and law review writers.[34] The present trend seems to be away from immunity, and, it is interesting to note that no court has yet changed from liability to immunity.[35] Because of the changed character of charitable institutions and because of the availability of relatively inexpensive liability insurance,[36] there is little

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the risk as to all the rest of the world and survive, it can do so for those it is designed to help." Id. at p. 826. The other three judges felt that the defendant should be liable to the plaintiff, on the theory that the plaintiff was a "stranger."

[32]Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 208 A.2d 193, 201 (1965).

[33]Bogert, Trusts & Trustees § 401 (2d ed. 1964); Prosser, Torts § 127 (3d ed. 1964). See also Annot., 25 A.L.R.2d 29 (1952); 15 Am. Jur. 2d, Charities § 153 (1964).

[34]E.g., 16 U. Chi. L. Rev. 173 (1948); 38 Colum. L. Rev. 1485 (1938); 33 Ill. L. Rev. 601 (1939); 49 Mich. L. Rev. 148 (1950); 37 Va. L. Rev. 1159 (1951); 34 Yale L.J. 316 (1924). For an excellent discussion of present Virginia law on the immunity doctrine see, *Hospital Tort Liability & Immunity*, 49 Va. L. Rev. 622 (1963). The constitutionality of immunity statutes is discussed in Comment, 22 Wash & Lee L. Rev. 199 (1965).

[35]Supra note 5.

[36]As one judge said, "while insurance should not, perhaps, be made a criterion of responsibility, its prevalence and low cost are important considerations in evaluating the fears, or supposed ones, of dissipation or deterrence." Supra note 31, at 824. By obtaining insurance all charities could respond in damages for injuries to the persons the charities are supposed to benefit. In an important West Virginia case, Fisher v. Ohio Valley Gen. Hosp. Ass'n, 137 W. Va. 723, 73 S.E.2d 667 (1952), the plaintiff, a paying patient, fell because of the negligence of the defendant's nurse. Plaintiff was not a "stranger" so he did not have the benefit of that exception. He also was unable to prove "corporate negligence" and thus lost the benefit of the second exception. In a direct attack on the doctrine itself, the plaintiff showed that the defendant carried liability insurance and would therefore avoid the supposed consequences of liability. The court rejected the plaintiff's contentions and said that nothing turned on the fact that a charity carried liability insurance.