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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 reevaluation 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.

JAMES F. DOUTHAT

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. Since 1876 all but three states have encountered opportunities to accept or reject the doctrine. Some have accepted it, either in pure or modified form; others have rejected it.


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

3The 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. There seems to be a definite trend toward treating a charity as any other business enterprise.


The Supreme Court of Appeals of West Virginia decided to re-examine the charitable immunity doctrine in *Adkins v. St. Francis Hosp.* 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." 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...
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 and Feoffees of Heriot's Hosp. v. Ross. 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 the Duncan dictum was applied. By 1871 all of these cases had been overruled; England no longer had charitable immunity. Massachusetts in 1876 and Maryland in 1885 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. On this admittedly shaky basis rests the modern American doctrine of charitable immunity.

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87 Clark & Fin. 507, 8 Eng. Rep. 1508 (1846).
88 1 C.B. 192 (1861).
89 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.
90 Supra note 1.
91 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.
92 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. It has been applied in various forms by courts saying that diversion would impair the usefulness of the charity, that the trustees have no authority to divert the funds from their intended purposes, or that the funds are not subject to execution. 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.

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. It is difficult to comprehend how a new-born baby or an unconscious person could assume any risk or waive any right to recover.
ly because they have no choice, which would seem to negate the voluntaryness 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. 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 if its earnings are not called “profits.”

Finally, courts use the catchall phrase “public policy” to justify granting immunity to charities. 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. These courts use stare

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22Fordyce 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 65 (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. 304, 6 N.W.2d 212 (1942).


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.

Virginia26 and certain other states, while not abrogating chari-

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25Foley 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, 103 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.

26In 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 Admin’x v. Hospital of St. Vincent of Paul, 131 Va. 587, 107 S.E. 785 (1921). The Supreme Court of Appeals 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 Admin’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 Admin’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, 201 Va. 703, 133 S.E.2d 559 (1963), and Memorial Hosp., Inc. v. Oakes, 200
table immunity, have attempted to qualify it. Two important qualifications have developed. One of these is called the "stranger" exception. This exception holds that a non-trespassing non-beneficiary of the charity, such as a person visiting a patient in a hospital, 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." 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."

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.

For cases applying this exception see note 3, supra.

For states applying this exception see note 3, supra.

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." The doctrine has been severely criticised by text and law review writers. 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. Because of the changed character of charitable institutions and because of the availability of relatively inexpensive liability insurance, there is little 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."

16Supra note 5.
17As 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 contents and said that nothing turned on the fact that a charity carried liability insurance.