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# Notes and Comments: The Doctrine of Charitable Immunity—the Persistent Vigil of Outdated Law

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## THE DOCTRINE OF CHARITABLE IMMUNITY -THE PERSISTENT VIGIL OF OUTDATED LAW

*The doctrine of charitable immunity frees charitable institutions from any civil liability that may attach as a consequence of the charity's tortious acts. The doctrine has been somewhat delimited in Maryland, and after analyzing the historical and legal basis of the doctrine, the author maintains that the continued, qualified recognition of the doctrine in Maryland is inequitable and without present legal justification.*

### INTRODUCTION

At one time representing the majority rule in this country, the doctrine of charitable immunity<sup>1</sup> has been subjected to severe criticism within the past several decades. Many jurisdictions, through either legislative or judicial cognizance, have come to the realization that charities should answer for their torts as do other institutions and individuals. Consequently, one authority has characterized the doctrine as being in a state of "rapid overthrow of the immunity of charities, not yet fully accomplished."<sup>2</sup>

Maryland, however, remains one of the few jurisdictions in this country still adhering to the rule that as a matter of public policy, eleemosynary institutions should be immune from liability to tort claimants.<sup>3</sup> Despite the fact that there are currently two statutes in Maryland which somewhat limit the applicability and scope of the doctrine,<sup>4</sup> charitable immunity is still, in the words of a recent case, "alive and reasonably well in Maryland."<sup>5</sup>

1. "The term immunity means exemption from liability which, but for the charitable nature of the tortfeasor, would attach." Annot., 25 A.L.R.2d 29, 36 (1952). "In its legal sense, charity comprises four principal divisions: (1) Trusts for the relief of poverty and distress; (2) trusts for the advancement of education; (3) trusts for the advancement of religion; and (4) trusts for other purposes beneficial to the community not falling under any of the preceding heads." *Rabinowitz v. Wollman*, 174 Md. 6, 10, 197 A. 566, 568 (1938) citing 11 *C.J. Charities* § 18 (1917); RESTATEMENT OF TRUSTS § 368 (1935).

2. W. PROSSER, *LAW OF TORTS* 994 (4th ed. 1971).

3. *Howard v. Bishop Byrne Council Home, Inc.*, 249 Md. 233, 238 A.2d 863 (1968).

4. MD. ANN. CODE art. 48A, § 480 (1972) provides:

Each policy issued to cover the liability of any charitable institution for negligence or any other tort shall contain a provision to the effect that the insurer shall be estopped from asserting, as a defense to any claim covered by said policy, that such institution is immune from liability on the ground that it is a charitable institution.

MD. ANN. CODE art. 43, § 556A (1971) provides:

No hospital or related institution as defined in this subtitle shall be immune from liability for negligence or any other tort on the grounds that it is a charitable institution, provided, however, that a hospital or related institution which is a charitable institution and which is insured against such liability in an amount not less than \$100,000 shall not be liable for damages in excess of the limits of such insurance.

5. *Wood v. Abel*, 268 Md. 214, 240, 300 A.2d 665, 678 (1973). The *Wood* court, however, refused to extend the immunity doctrine to cover a negligent employee of the charity.

## HISTORICAL BACKGROUND

The doctrine of charitable immunity in its original form established an immunity from liability which was total and complete.<sup>6</sup> Initially, immunity was granted on the theory that public and private donations which supported a charity constituted a trust fund, and it would be a violation of the purposes for which the fund was set up and maintained to pay money out of that fund to a plaintiff injured by the charity. Maryland became the second American jurisdiction to adopt the so-called "trust fund" theory of immunity,<sup>7</sup> in the case of *Perry v. House of Refuge*.<sup>8</sup> The *Perry* court based its ruling on the English case of *Feoffees of Herriot's Hospital v. Ross*<sup>9</sup> in which Lord Cottenham, in *dictum*, said: "To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose."<sup>10</sup>

Later courts<sup>11</sup> (particularly in those jurisdictions abandoning the immunity doctrine) have been quick to point out that the English cases upon which the early American cases relied were overruled<sup>12</sup> in England prior to their being cited in this country. Nevertheless, with recognition of the theory by Pennsylvania,<sup>13</sup> charitable immunity soon attained prominence as the majority rule in this country.<sup>14</sup>

As quickly as other jurisdictions were to adopt the immunity doctrine, so also were they to rest their decisions upon other than the "trust fund" theory. Several jurisdictions based the tort exemption on an "implied waiver" theory, or the reasoning that one, by accepting the gratuitous benefits conferred upon him by the charity, in effect "waived" his right to sue for negligence.<sup>15</sup> Other courts sought to buttress the "trust fund" theory by arguing that since the servants of the charitable institution were not engaged in conducting the master's business "for profit" that the doctrine of *respondet superior* should not apply where a plaintiff was injured by the negligent employee of

6. *Adkins v. St. Francis Hosp.*, 149 W. Va. 705, 143 S.E.2d 154 (1965).

7. Massachusetts was the first. *McDonald v. Mass. Gen. Hosp.*, 120 Mass. 432 (1876), followed the holding in *Holliday v. St. Leonard's*, 142 Eng. Rep. 769 (C.B. 1861), which adopted a similar *dictum* of Lord Cottenham's in *Duncan v. Findlater*, 7 Eng. Rep. 934 (H.L. 1839).

8. 63 Md. 20 (1885).

9. 8 Eng. Rep. 1508 (H.L. 1846).

10. 63 Md. at 27, quoting from 8 Eng. Rep. at 1510.

11. See, e.g. *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942); *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3 (1957).

12. See *Mersey Docks v. Gibbs*, L.R. 1 H.L. 93 (1866); *Foreman v. Mayor of Canterbury*, L.R. 6 Q.B. 214 (1871).

13. See *Fire Insurance Patrol v. Boyd*, 120 Pa. 624, 15 A. 553 (1888).

14. "[O]ther states followed ... each one speaking of the antiquity of the rule and assuming, as the tower of authority rose, that the doctrine was sunk in the solid rock of historical fact, ballasted with granite reason and buttressed with ever accumulating precedent." *Flagiello v. Pa. Hosp.*, 417 Pa. 486, 500, 208 A.2d 193, 200 (1965).

15. See, e.g., *Wilson v. Idaho Falls Latter Day Saints Hosp.*, 59 Idaho 350, 82 P.2d 949 (1938); *Cook v. John N. Norton Memorial Hosp.*, 180 Ky. 331, 202 S.W. 874 (1918); *Downs v. Harper Hosp.*, 101 Mich. 555, 60 N.W. 42 (1894).

the charity.<sup>16</sup> The simplest and most realistic approach, however, was taken by those courts which merely adopted, as a conclusion, that as a matter of public policy, charitable institutions should be immune from liability.<sup>17</sup>

While it is neither the intent nor purpose of this paper to undertake a detailed examination of the many exceptions to the rule which arose depending upon which theory or theories a particular court espoused in granting immunity, it should be noted that there being considerable confusion among states as to the reasons for and the extent of the doctrine, the "confusion expanded geometrically year by year as more states adopted the doctrine."<sup>18</sup> In some states adopting one or more of the various theories, exceptions arose where non-trust fund assets of a charity were available.<sup>19</sup> Under the "implied waiver" theory it has been held that a "stranger" to the charity, or one who was not a beneficiary of the charity, was entitled to damages.<sup>20</sup> Several states made the further distinction between paying and non-paying patients, allowing only the former the right of recovery.<sup>21</sup> Needless to say, the original rule of charitable immunity became "a relic in the multitude of departures."<sup>22</sup>

The eventual demise of the doctrine was signaled by the landmark opinion in *President and Directors of Georgetown College v. Hughes*.<sup>23</sup> In that case, Justice Rutledge, then sitting on the Court of Appeals for the District of Columbia wrote:

Human beings ordinarily are responsible for their own legally careless action. They respond also for negligent harms inflicted by their agents and employees. So do business corporations. Likewise, trustees and other fiduciaries are liable for their own negligence in administration and operation of the business or property committed to their control. Respondeat superior more and more has made them, as it has private corporations, responsible for wrongs done by their inferior functionaries.<sup>24</sup>

16. See, e.g., *Hearns v. Waterbury Hosp.*, 66 Conn. 98, 33 A. 595 (1895). *Morrison v. Henke*, 165 Wis. 166, 160 N.W. 173 (1916).

17. "In the final analysis it seems that the immunity of eleemosynary institutions to tort claims is grounded on an assumed public policy against the enervation of public charities, established for the benefit of the whole community by compensation of isolated individuals for injuries inflicted by the negligence of the charities." *Sanner v. Trustees of Sheppard and Enoch Pratt Hosp.*, 278 F. Supp. 138, 139-40 (D. Md. 1968) *cert. den.*, 393 U.S. 982 (1968) *citing* 5 Md. L. Rev. 336, 340 (1941).

18. *Abernathy v. Sisters of St. Mary's*, 446 S.W.2d 599, 602 (Mo. 1969).

19. See, e.g., *St. Mary's v. Solomon*, 77 Colo. 463, 238 P. 22 (1925); *McLeod v. St. Thomas Hosp.*, 170 Tenn. 423, 95 S.W.2d 917 (1936).

20. See, e.g., *Cohen v. Gen. Hosp. Soc'y of Conn.*, 113 Conn. 188, 154 A. 435 (1931); *Winona Technical Institute v. Stolte*, 173 Ind. 39, 89 N.E. 393 (1909); *Bruce v. Cent. Methodist Episcopal Church*, 147 Mich. 230, 110 N.W. 951 (1907).

21. See, e.g., *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4 (1915); *Silva Providence Hosp.*, 14 Cal. 2d 762, 97 P.2d 798 (1939); *Sessions v. Thomas D. Dee Memorial Hosp. Ass'n*, 94 Utah 460, 78 P.2d 645 (1939).

22. *President and Directors of Georgetown Hosp. v. Hughes*, 130 F.2d 810, 817 (D.C. Cir. 1942).

23. 130 F.2d 810 (D.C. Cir. 1942).

24. *Id.* at 812.

The opinion went on to say:

Generally also charity is no defense to tort. For wrong done, it is no answer to say, "He did not pay and was not bound to pay for the service. I gave it to him." One who undertakes to aid another must do so with due care.<sup>2 5</sup>

The opinion, considered one of the most comprehensive and detailed ever undertaken on the subject, "reviewed all the arguments in favor of the immunity, and demolished them so completely as to change the whole course of the law."<sup>2 6</sup> By attacking the doctrine on both its historical<sup>2 7</sup> and theoretical<sup>2 8</sup> foundations the opinion reached the inevitable conclusion that, "the incorporated charity should respond as do private individual business corporations and others, when it does good in the wrong way."<sup>2 9</sup>

At the time of the *Georgetown Hospital* decision, scarcely four states had imposed unqualified liability on charities.<sup>3 0</sup> Full liability is now the law in a majority of jurisdictions.<sup>3 1</sup> In those states still adhering to earlier decisions, there exists for the most part only a qualified or partial immunity in which ultimate liability may depend upon the character of the institution,<sup>3 2</sup> the availability of non-trust fund assets

25. *Id.* at 812-13.

26. W. PROSSER, *LAW OF TORTS* 996 (4th ed. 1971).

27. "[A] rule of absolute immunity which grew out of dicta pointing the plaintiff to another source of recovery and involved an application or misapplication of the law of trusts to a corporate situation, hardly gains permanence from its origin." 130 F.2d at 817.

28. "For negligent or tortious conduct liability is the rule. Immunity is the exception." *Id.* at 812.

29. *Id.* at 828.

30. *Id.* at 819 n. 35.

31. See *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942); *Howard v. Sisters of Charity*, 193 F. Supp. 191 (D. Mont. 1961); *Tuengel v. City of Sitka*, 118 F. Supp. 399 (D. Alas. 1954); *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P.2d 220 (1951); *Malloy v. Fong*, 37 Cal. 2d 356, 232 P.2d 241 (1951); *Durney v. St. Francis Hosp.*, 46 Del. 350, 83 A.2d 753 (1951); *Nicholson v. Good Samaritan Hosp.*, 145 Fla. 360, 199 So. 344 (1940); *Bell v. The Presbytery of Boise*, 91 Idaho 374, 421 P.2d 745 (1966); *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965); *Harris v. Young Women's Christian Ass'n*, 250 Ind. 491, 237 N.E.2d 242 (1968); *Sullivan v. First Presbyterian Church*, 260 Iowa 1373, 152 N.W.2d 628 (1967); *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P.2d 934 (1954); *Mullikin v. Jewish Hosp.*, 348 S.W.2d 930 (Ky. 1961); *Garlington v. Kingsley*, —La.—, 289 So. 2d 88 (1974); *Colby v. Carney Hosp.*, 356 Mass. 527, 254 N.E.2d 407 (1969); *Parker v. Port Huron Hosp.*, 361 Mich. 1, 105 N.W.2d 1, (1960); *Mulliner v. Evangelischer Diakonissenverein*, 144 Minn. 392, 175 N.W. 699 (1920); *Miss. Baptist Hosp. v. Holmes*, 214 Miss. 906, 55 So. 2d 142 (1951); *Abernathy v. Sisters of St. Mary's Hosp.*, 446 S.W.2d 599 (Mo. 1969); *Kardulas v. Dover*, 99 N.H. 359, 111 A.2d 327 (1955); *Bing v. Thunig*, 2 N.Y. 2d 656, 143 N.E.2d 3, (1957); *Rickbiel v. Grafton Deaconess Hosp.*, 74 N.D. 525, 23 N.W.2d 247 (1946); *Hungerford v. Portland Sanitarium and Benevolent Ass'n*, 235 Ore. 412, 383 P.2d 1009 (1963); *Flagiello v. Pennsylvania Hosp.*, 417 Pa. 486, 208 A.2d 193 (1965); *Howle v. Camp Amon Carter*, 470 S.W.2d 629 (Tex. 1971); *Sessions v. Thomas D. Dee Memorial Hosp.*, 94 Utah 460, 78 P.2d 645 (1938); *Foster v. Roman Catholic Diocese*, 116 Vt. 124, 70 A.2d 230 (1950); *Adkins v. St. Francis Hosp.*, 149 W. Va. 705, 143 S.E.2d 154 (1965); *Christy v. Schwartz*, 49 Wis. 2d 760, 183 N.W.2d 81 (1971).

32. See, e.g., *Howard v. Bishop Byrne Council Home, Inc.*, 249 Md. 233, 238 A.2d 863 (1968); *Myers v. Drowda*, 180 Neb. 183, 141 N.W.2d 852 (1966) (non-profit charitable hospitals not exempt from tort liability); *Rabon v. Rowan Memorial Hosp.*, 269 N.C. 1, 152 S.E.2d 485

such as liability insurance,<sup>33</sup> or in some states, the status of the particular plaintiff.<sup>34</sup>

### THE MARYLAND VIEW

Maryland has developed a somewhat unique stance in regard to the doctrine of charitable immunity. This is perhaps attributable to the fact that in this state the doctrine is a product of both the courts and the legislature.<sup>35</sup> The courts have, in the absence of legislation, strictly adhered to the trust fund theory. In *Loeffler v. Trustees of Sheppard and Enoch Pratt Hospital*,<sup>36</sup> while recognizing that some states had adopted a policy of holding the charity liable to paying patients or non-beneficiaries of the charity, the court noted that the trust fund theory, as adopted in *Perry* was "without qualification"<sup>37</sup> and thereupon denied recovery to the plaintiff, who was injured in the course of fighting a fire on the charity's premises.<sup>38</sup>

The Maryland courts have gone even so far as to indicate that, in the absence of legislation to the contrary, a defendant charity could nonetheless plead immunity even when the charity had a liability insurance policy in effect.<sup>39</sup> Recognizing, however, that many charities voluntarily procured liability insurance<sup>40</sup> and that "except to the extent to the premiums voluntarily paid, there would be no invasion of the trust funds,"<sup>41</sup> in 1948 the State legislature passed the following law amending the insurance code in order to prevent insurers from

(1967) (charitable immunity abolished as applied to hospitals); *Fournier v. Miriam Hosp.*, 93 R.I. 299, 175 A.2d 298, (1961) (1962) (statute granting immunity to charitable hospitals held constitutional).

33. See, e.g., *Michard v. Myron Stratton Home*, 144 Colo. 251, 355 P.2d 1078 (1960) (execution may be levied on non-trust property); *Mack v. Big Bethel A.M.E. Church, Inc.*, 25 Ga. App. 713, 188 S.E.2d 915 (1972) (income producing rental property of charitable non-profit corporation held not immune from execution of a judgment for tort); *Webb v. Blount Memorial Hosp.*, 196 F. Supp. 114 (E.D. Tenn. 1961).

34. See, e.g., *Vitolo v. St. Peter's Church*, 118 N.J. Super. 35, 285 A.2d 570 (1972) (The court based its decision on the New Jersey statute which specifically allows immunity when beneficiaries are the victims of the tort. N.J.S.A. 2A: 53A-7 (Supp. 1974-75)); *Memorial Hosp., Inc. v. Oakes*, 200 Va. 878, 108 S.E.2d 388 (1959) (liability as to beneficiaries only where the charity fails to exercise due care in selection and retention of employees).

35. See, e.g., *Howard v. Bishop Byrne Council Home, Inc.*, 249 Md. 233, 238 A.2d 863 (1968); *Loeffler v. Trustees of Sheppard and Enoch Pratt Hosp.*, 130 Md. 265, 100 A. 301, (1917); *Perry v. House of Refuge*, 63 Md. 20 (1885) and MD. ANN. CODE art. 48A, § 480 (1971); MD. ANN. CODE art. 43, § 556A (1971).

36. 130 Md. 265, 100 A. 301 (1917).

37. *Id.* at 271, 100 A. at 303.

38. *Id.* at 266, 100 A. at 301.

39. See *Thomas v. Prince Georges County*, 200 Md. 554, 92 A.2d 452 (1952).

40. As said in 10 Am. Jur. 645, "Charities" sec. 84, "where there is a general overriding intention to establish a trust for charitable purposes, but some of the particular purposes to which the fund may be applied are not strictly charitable the trust is good and the court will give effect to the general charitable trust, but the trustees are restricted from applying the fund to purposes or in ways which are objectionable."

*Rabinowitz v. Wollman*, 174 Md. 6, 11, 197 A. 566, 568 (1938).

41. *State v. Arundel Park Corp.*, 218 Md. 484, 488, 147 A.2d 427, 428 (1959).

using the charitable immunity doctrine to avoid payment of liability claims:

Each policy issued to cover the liability of any charitable institution for negligence or any other tort shall contain a provision to the effect that the insurer shall be estopped from asserting, as a defense to any claim covered by said policy, that such institution is immune from liability on the ground that it is a charitable institution.<sup>42</sup>

While the statute may have had a great effect upon liability insurers, the effect upon the charities themselves was negligible. They still enjoyed the immunity in that if they decided not to purchase any insurance they would still have full immunity, and if they did purchase insurance, the liability was only to the extent of insurance available to cover a particular loss covered by the policy.<sup>43</sup> Although this legislation presented the first inroad to the potential demise of the doctrine, it also reflected a recognition of the doctrine's continuing existence. The fact remains that the statute does not provide any incentive to procure insurance. While the purchase of insurance may indicate a feeling of moral obligation on the part of a charity, a failure to do so would be of no consequence; the doctrine still applies.

With recognition of the doctrine of charitable immunity by the legislature, the courts became even more adamant in their refusal to abandon the doctrine. In *Howard v. South Baltimore General Hospital*,<sup>44</sup> the Maryland Court of Appeals stated "the principle that charitable corporations are free from tort liability has long been a basic part of the law of this state;"<sup>45</sup> and further, "the legislature has accepted the doctrine announced by this court and dealt with the matter in its own fashion."<sup>46</sup> The court thereupon denied recovery to the plaintiff, a paying patient of a charity hospital.

In 1966, the legislature made its second incursion into the field of charitable immunity, which had a much more profound effect upon certain charities, specifically, hospitals and related institutions.<sup>47</sup> The applicable statute reads as follows:

No hospital or related institution as defined in this subtitle shall be immune from liability for negligence or any other tort on the grounds that it is a charitable institution; provided, however that a hospital or related institution which is a charitable institution and which is insured against such liability

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42. MD. ANN. CODE art. 48A, § 480 (1972).

43. See *Cornelius v. Sinai Hosp.*, 219 Md. 116, 148 A.2d 567 (1959).

44. 191 Md. 617, 62 A.2d 574 (1948).

45. *Id.* at 618, 62 A.2d at 575.

46. *Id.* at 620, 62 A.2d at 575.

47. Related institutions are classified as nursing homes or care homes. See MD. ANN. CODE art. 43, § 556 (e) (1971).

in an amount not less than \$100,000 shall not be liable for damages in excess of the limits of such insurance.<sup>4 8</sup>

The statute is self-explanatory; hospitals can no longer invoke the doctrine of charitable immunity. It is apparent, however, that the legislature maintained strong feelings about the doctrine, as evidenced by the fact that even the hospital's liability remains limited where there is a liability insurance policy in the amount of \$100,000.

Notwithstanding this removal of a large class of charitable organizations from the charitable immunity protection, the doctrine was called upon in 1968 to shield an allegedly negligent charity which did not fall within the Hospital statute. In *Howard v. Bishop Byrne Council Home, Inc.*,<sup>4 9</sup> the plaintiff was seriously injured when he was struck by a falling tree which had been cut by an employee or servant of the charity. After a comprehensive review of the law of Maryland and other jurisdictions,<sup>5 0</sup> once again the court concluded that in view of the legislative action which had been taken, it was not within the province of the court to abrogate the immunity rule.<sup>5 1</sup> Despite the court's recognition of the inequities of the rule, it was content to place the burden of any change on the legislature and otherwise adhere to *stare decisis*.<sup>5 2</sup>

Finally, in a more recent case, *Wood v. Abel*,<sup>5 3</sup> while the question of overruling charitable immunity was not directly presented to the court, the court refused to extend the immunity doctrine to cover a negligent employee of the charity.<sup>5 4</sup> In doing so, however, the court did manage to maintain its adherence to the "trust fund" theory of *Perry*, stating:

[T]here is no sound reason for extending the cloak [of immunity] to a negligent employee. Recovery against him can in no way do violence to the "trust fund" theory, upon which

48. MD. ANN. CODE art. 43, § 556A (1971).

49. 249 Md. 233, 238 A.2d. 863 (1968).

50. The *Byrne* court noted that eight states agreed with Maryland that eleemosynary institutions should be immune from liability to tort claimants. See *Howard v. Bishop Byrne Council Home*, 249 Md. 233, 237, 238 A.2d 863, 865 (1968) n.2. Since the time of that decision, three of those states have abandoned the immunity. See *Colby v. Carney Hosp.*, 356 Mass. 527, 254 N.E.2d 407 (1969); *Garlington v. Kingsley*, \_\_\_La. \_\_\_, 289 So. 2d 88 (1974); *Howle v. Camp Amon Carter*, 470 S.W.2d 629 (Tex. 1971).

51. "We again restate our opinion that the General Assembly has completely investigated the immunity question, and the present statutes are tangible evidence that the legislature arrived at a solution which it deemed satisfactory." *Howard v. Bishop Byrne Council Home*, 249 Md. 233, 241-42, 238 A.2d 863, 868 (1969).

52. Cf. Justice Brand's dissent in *Landgraver v. Emmanuel Lutheran Charity Board*, 203 Ore. 489, 526, 280 P.2d 301, 317 (1955) which states:

It must first be borne in mind that the rule of *stare decisis* has no application unless the facts on which the earlier case was decided are substantially the same as those now before the court. We need not contend that the earlier cases in this state were bad law. We do contend that the changes which have occurred in the size and activities of charities ... now present a different problem based on new facts.

53. 268 Md. 214, 300 A.2d 665 (1973).

54. See 33 MD. L. REV. 500 (1973).

the doctrine is predicated. Nothing has been presented here to support a conclusion that recovery against Wood would lead to an invasion of trust funds held by the Association, if there are any.<sup>55</sup>

### SUMMARY

At the time of its inception in the latter half of the nineteenth century, the trust fund theory protected all charities.<sup>56</sup> Like the various exemptions from different forms of taxation, it is quite probably true that it was granted to charitable institutions "in order that their field of usefulness might be enlarged,"<sup>57</sup> at a time when the possibility existed that a substantial award in a single negligence action might destroy the charity.<sup>58</sup> Therefore, criticism of the earlier cases may be somewhat unjustified in view of the nature and size of the institutions at that time. What must be done, however, is to examine the present state of law *vis a vis* the modern-day charity.

The modern-day charity bears little resemblance to its predecessor. From their humble beginning as institutions depending upon "the humane instincts of individuals or small informal groups,"<sup>59</sup> charities have gradually evolved into "a thing of steel and stone and electricity, of boards and committees, of card indices and filing systems, and of rules and regulations."<sup>60</sup> In those jurisdictions which have recognized that charitable corporations are "big business" and subject to the tort liabilities the same as any other business, it has been demonstrated that they are more than able to withstand substantial judgments without either resulting in the termination of their activities or any diminishment of donations.<sup>61</sup> Similarly, the simple fact that charities can procure liability insurance should defeat any argument that donations would be used for the payment of damages to a tort victim.

The fact that the doctrine of charitable immunity is not necessarily equitable has been at least partially recognized by the Maryland legislature. While it is true that what little recognition there has been of the doctrine has resulted in the limitation of the doctrine, what has also resulted is the perpetuation of a rule which should have been discarded years ago.<sup>62</sup>

55. 268 Md. 214 at 242-43, 300 A.2d at 679.

56. *Adkins v. St. Francis Hosp.*, 149 W. Va. 705, 143 S.E.2d 154 (1965).

57. *Howard v. South Baltimore Gen. Hosp.*, 191 Md. 617, 619, 62 A.2d 574, 575 (1948).

58. "[T]he trust fund might be entirely destroyed, and diverted from the purpose which the donor gave it." *Loefler v. Trustees of Sheppard and Enoch Pratt Hosp.*, 130 Md. 265, 270, 100 A. 301, 303 (1917).

59. *Freezer, The Tort Liability of Charities*, 77 U. Pa. L.Rev. 191, 195 (1928).

60. *Id.* at 196.

61. *Pierce v. Yakima Valley Memorial Hosp. Ass'n*, 43 Wash. 2d 162, 171, 260 P.2d 765, 770 (1953).

62. "Whatever the law may have been regarding charitable institutions in the past, it does not meet the conditions of today." *Flagiello v. Pennsylvania Hosp.*, 417 Pa. 486, 493, 208 A.2d 193, 196 (1965). *Accord*, *Abernathy v. Sisters of St. Mary's Hosp.*, 446 S.W.2d 599 (Mo. 1969); *Pierce v. Yakima Valley Memorial Hosp. Ass'n*, 43 Wash. 2d 162, 260 P.2d 765 (1953).

As the law stands in Maryland today, satisfaction of a judgment against a charity with the exception of charitable hospitals, depends upon whether or not the organization in question has voluntarily procured a liability insurance policy and whether or not that particular policy is designed to cover the type of claim involved. For example, where a charity is insured for general liability only, and is sued for a tort not covered by the particular policy (e.g. professional negligence, libel, false arrest, etc.) unless the basis of the suit falls within the boundaries of coverage provided, the injured plaintiff cannot recover.<sup>63</sup>

There also remains the question that if trust fund assets can properly be spent to pay premiums on liability insurance, can there be any reason left why the trustee could not use these funds to pay the liability itself in the absence of insurance? Finding no valid answer to the above question, the court in *Darling v. Charleston Community Memorial Hospital*,<sup>64</sup> wrote:

[A] doctrine which limits the liability of charitable corporations to the amount of liability insurance that they see fit to carry permits them to determine whether or not they will be liable for their torts and the amount of that liability, if any. Whether or not particular assets of a charitable corporation are subject to exemption from execution in order to satisfy a judgment does not determine liability.<sup>65</sup>

It is a strange doctrine indeed when insurance becomes the ultimate criterion of liability. It is even a stranger doctrine which holds that where immunity is given to a charity on a theory that the trustee or administrator is without power to dissipate trust funds through the payment of damages, yet allows the trustee to waive the immunity by failing to defend on that ground.<sup>66</sup>

The remnants of the doctrine as it exists in Maryland today basically protect two types of charities. First, those who recognize the law as it is and realize that it is unnecessary to procure liability insurance (in view of the fact that the trust fund theory will exempt them from liability), and second, those charities which quite possibly might not have sufficient monetary resources to purchase insurance. With due acknowledgement to the fact that there exist today charitable institutions which are already financially strained, can it be said that this is sufficient reason to exempt them from all tort liability?<sup>67</sup> The

63. See *Cornelius v. Sinai Hospital*, 219 Md. 116, 148 A.2d 567 (1959).

64. 33 Ill. 2d 326, 211 N.E.2d 253 (1965) cert. den., 386 U.S. 946 (1965).

65. *Id.* at 337-38, 211 N.E.2d at 260.

66. Md. R. Civ. P. 323 § b reads in part: "The defense of total or partial charitable . . . immunity shall be raised by motion pursuant to this rule. . . ."

The rule requires that the defense of total or partial immunity be raised and determined at an early stage in the proceedings. A failure to do so will result in a waiver of the defense; any judgment for the plaintiff will be binding on the charity.

67. "There are, no doubt, many of the latter struggling for existence. . . . The injured party suffers no less damage by the carelessness of 'little' than he does by that of the 'big' charitable institution." *Abernathy v. Sister's of St. Mary's Hosp.*, 446 S.W.2d 599, 604 (Mo. 1969).

social benefits to be derived from either of these two classes of charities would at the very least seem questionable. As was stated in the case of *Widell v. Holy Trinity Catholic Church*:<sup>68</sup>

When an institution owes a duty of care to another and, as a result of carrying on its activities through agents whether the enterprise or activity involves financial gain or not and no matter how lofty the purpose or motive, injures another . . . the breach of duty ought not to be excused or justified on the grounds of the laudable purpose or the public benefit of the activity causing the injury.<sup>69</sup>

Despite all the arguments in favor of total abrogation of the doctrine, the posture of the Maryland courts seems to be quite firm. However, this has also been the case with many other jurisdictions in which the charitable immunity was eventually abandoned.<sup>70</sup> In the *Georgetown Hospital* case, Justice Rutledge remarked: "Opinions continue to speak in the set pattern, often when holding to only the last remnant of irresponsibility."<sup>71</sup> That statement might adequately sum up the Maryland position. *Stare decisis* has taken on an added significance in Maryland in view of the fact that the Maryland Court has held that legislative recognition of the judicial rule prevents it from overruling its prior decision.<sup>72</sup> If the court is to adhere to this position in the future it might be well for the legislature to reconsider the Hospital Statute with a view to applying it to all charitable institutions. There is no rational justification for distinguishing between hospitals and other charities. The injured party suffers no less at the hands of one than the other.<sup>73</sup> If the hospital is to be held liable, albeit limited, so too should the charities that provide services other than medical care.<sup>o</sup>

## CONCLUSION

The present state of the law in Maryland today, while providing in some cases an adequate source of recovery for many plaintiffs injured at the hands of a charity, can nonetheless result in the denial of recovery based upon an archaic doctrine which does not take into consideration modern-day concepts of tort liability nor the nature of

68. 19 Wis. 2d 648, 121 N.W.2d 249 (1963).

69. *Id.* at 656, 121 N.W.2d at 254.

70. *See, e.g.*, *Adkins v. St. Francis Hosp.*, 149 W. Va. 705, 719, 143 S.E.2d 154, 163 (1965), in which the court stated: "Consideration of the future and permanent good of the public, rather than that of a particular interest, requires a departure from the cases heretofore decided by this Court, wherein the doctrine of charitable immunity was embraced." *Accord*, *Mullikin v. Jewish Hosp.*, 348 S.W.2d 930 (Ky. 1961); *Bell v. The Presbytery of Boise*, 91 Ida. 374, 421 P.2d 745 (1966).

71. *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810, 817 (D.C. Cir. 1942).

72. *See Howard v. South Baltimore General Hosp.*, 191 Md. 617, 62 A.2d 574 (1948).

73. *See Abernathy v. Sisters of St. Mary's Hosp.*, 446 S.W.2d 599, 604 (Mo. 1969).

the institutions the law protects. To persist in the application of particular laws to certain types of charities, holding some liable while others not, with recovery dependent upon the extraneous factor of whether the charity voluntarily procures liability insurance, seems illogical. As one court has stated: "The public policy with which we are here concerned . . . must be based upon general conditions and the average situation. It cannot be designed to meet exceptional cases or deal with particular instances of hardship."<sup>74</sup>

Liability fosters care, immunity neglect.<sup>75</sup> While it is indeed socially and morally admirable to encourage the good works of charity and recognize their benefit to society, there is a social, moral and, in most states, legal obligation on the part of any individual or corporation to compensate an injured party for the damages it causes. "Charity suffereth long and is kind," remarked Justice Rutledge, "but in the common law it cannot be careless."<sup>76</sup>

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74. *Pierce v. Yakima Valley Memorial Hosp. Ass'n*, 43 Wash. 2d 162, 171, 260 P.2d 765, 770 (1953).

75. *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810, 824 (D.C. Cir. 1942).

76. *Id.* at 813.