

# Torts - Charitable Immunity as a Screen to Insurer's Liability - Gorman v. St. Paul Fire Ins. Co.

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**Torts — Charitable Immunity As A Screen  
To Insurer's Liability**

*Gorman v. St. Paul Fire Ins. Co.*<sup>1</sup>

The plaintiff's wife, while a patient in Suburban Hospital in Montgomery County, was injured through the negligence of a nurse. The plaintiff brought an action against the Hospital alleging the above facts and claiming \$150,000.00 damages. The hospital filed a general issue plea and a special plea that it was an eleemosynary institution and hence immune from liability. Thereupon, the plaintiff brought suit against the insurance company, alleging that the Hospital was insured in the amount of \$100,000.00 against liability for negligence. The policy was required by statute to contain a provision to the effect that the insurer shall be estopped from asserting the defense of the insured that it is immune from liability on the ground that

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<sup>1</sup> 210 Md. 1, 121 A. 2d 812 (1956).

it is a charitable institution.<sup>2</sup> The trial court sustained a demurrer to this action from which the plaintiff appealed. On appeal, the demurrer was sustained; the statute does not contemplate or permit a direct action against the insurer by a tort claimant in advance of some determination of the liability on the part of the insured.

This case is an attempt to recover in tort for harm resulting from the conduct of a non-managerial employee of a charitable institution. There have been several views expressed by the courts of the United States regarding the liability of charitable institutions for torts.<sup>3</sup> Of the lines of reasoning advanced to support the immunity of charitable institutions, Maryland and some other states adopted the so-called trust fund theory,<sup>4</sup> to the effect that since the funds and property are held in trust and any awards made for tort damage are outside the purposes designated in the trust, that compensation to injured parties would be use of funds for a purpose never intended by the settlor. This reasoning assumes that the preservation of the charitable trust is more desirable than giving compensation from such funds for injury incurred by their use. The trust fund theory was introduced in 1848 in England.<sup>5</sup> In 1866, it was repudiated.<sup>6</sup> The theory was first adopted in the United States by the Supreme Judicial Court of Massachusetts in 1876.<sup>7</sup> This court cited early English cases as authority but did not mention the later cases that changed the law, which indicated that the court probably was not cognizant of them. If this view is followed unequivocally the result is that damage to third parties having no connection with the institution and resulting from the most irresponsible management can occur without liability.

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<sup>2</sup> Md. Code (1951), Art. 48A, Sec. 82:

"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>3</sup> See 4 SCOTT, TRUSTS (2nd ed., 1956), Sec. 402-402.2, 2893.

<sup>4</sup> *Perry v. House of Refuge*, 63 Md. 20 (1885); *Loeffler v. Trustees of Sheppard and Enoch Pratt Hospital*, 130 Md. 265, 100 A. 301 (1917); *Liability of Charitable Corporations and Trusts for Their Torts*, 5 Md. L. Rev. 336 (1941); *Dille v. St. Lukes Hospital*, 355 Mo. 436, 196 S. W. 2d 615 (1946); *Crossett Health Center v. Crowell*, 221 Ark. 874, 256 S. W. 2d 548 (1953); *Gregory v. Salem General Hospital*, 175 Ore. 464, 153 P. 2d 837 (1944); *Bond v. City of Pittsburgh*, 368 Pa. 404, 84 A. 2d 328 (1951).

<sup>5</sup> *Heriot's Hospital v. Ross*, 12 Clark & Fin. 507, 8 Eng. Rep. 1508 (1846). For detail of this case in relation to its aftermath see annotation, 14 A. L. R. 572, 574, and comprehensive superseding annotation in 25 A. L. R. 2d 29.

<sup>6</sup> *Mersey Docks v. Gibbs*, 11 H. L. C. 686, 11 Eng. Rep. 1500 (1866).

<sup>7</sup> *McDonald v. Massachusetts General Hospital*, 120 Mass. 432 (1876).

Implied waiver is another theory which the courts have used to bar recovery: the patient is presumed to have waived the right to recovery by submitting to treatment or care in the institution.<sup>8</sup> This is obviously a fiction and the lack of logic is most apparent when it is applied to the unconscious patient who must enter the institution for emergency treatment. If we exempt this class of patients from the rule, and allow third persons within that class who have no connection with the institution to recover, we allow results unjustifiably inconsistent.

Immunity has also been based on the idea that the doctrine of *respondeat superior* cannot apply to charities because they receive no benefit in the form of profits from the efforts of their servants.<sup>9</sup> However, some proponents of this view hold the charity liable if the trustees or the board of directors themselves are negligent in failing to select competent employees.<sup>10</sup> To allow immunity on this theory is to allow limited immunity so that the same wrong and injury resulting from the activities of the charity may or may not be the subject of a suit, depending merely upon the culpability of the trustees.

Another view takes the position that it is against public policy to hold the charitable institution liable,<sup>11</sup> apparently on the theory made explicit in some cases that it is better to let one party suffer than to allow the general group of beneficiaries to suffer.<sup>12</sup> Of course, the individuals making up the group would suffer in a very nominal amount and it seems odd that an institution generally dedicated to benefit

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<sup>8</sup> *Farrigan v. Pevear*, 193 Mass. 147, 78 N. E. 855 (1906); *Hospital of St. Vincent of Paul v. Thompson*, 116 Va. 101, 81 S. E. 18 (1914); *Downs v. Harper Hospital*, 101 Mich. 555, 60 N. W. 42 (1894); *Wilcox v. Idaho Falls Latter Day Saints Hospital*, 59 Idaho 350, 82 P. 2d 849 (1938); *St. Vincent's Hospital v. Stine*, 195 Ind. 350, 144 N. E. 537 (1924); *Bruce v. Young Men's Christian Ass'n.*, 51 Nev. 372, 277 P. 798 (1929).

<sup>9</sup> *Taylor v. Protestant Hospital Ass'n.*, 85 Oh. St. 90, 96 N. E. 1089 (1911); *Hoke v. Glenn*, 167 N. C. 594, 83 S. E. 807 (1914); *Southern Methodist University v. Clayton*, 142 Tex. 179, 176 S. W. 2d 749 (1943); *Vermillion v. Woman's College of Due West*, 104 S. C. 197, 88 S. E. 649 (1916); *Morrison v. Henke*, 165 Wis. 166, 160 N. W. 173 (1916).

<sup>10</sup> *Hoke v. Glen*, *ibid.*

<sup>11</sup> *Cook v. John N. Norton Memorial Infirmary*, 180 Ky. 331, 202 S. W. 874 (1918); *Duncan v. Nebraska Sanitarium and Benev. Ass'n.*, 92 Neb. 162, 137 N. W. 1120 (1912); *Taylor v. Flower Deaconess Home and Hospital*, 104 Oh. St. 61, 135 N. E. 287, 289, 23 A. L. R. 900 (1922); *Weston's Adm'x. v. Hospital of St. Vincent of Paul*, 131 Pa. 587, 107 S. E. 785, 792, 23 A. L. R. 907 (1921).

<sup>12</sup> *Vermillion v. Woman's College of Due West*, 104 S. C. 197, 88 S. E. 649, 650 (1916); *Ettlinger v. Trustees of Randolph-Macon College*, 31 F. 2d 869, 872 (4th Cir., 1929).

the public should be allowed to injure one of that group and then turn him out without aid.<sup>13</sup>

Another court has reasoned that charitable institutions and trusts should be immune from liability because they are performing a quasi-public duty; the institution is doing something really governmental and immunity rests on this.<sup>14</sup> It is hard to see the validity of this approach when government itself has frequently accepted responsibility for tort damage and the courts have made distinctions between governmental and proprietary powers.

There has been a strong trend in the United States to do away with the charitable immunity doctrine. So many different, inconsistent reasons have been advanced to allow immunity that the whole doctrine seems like a huge, imperfect pot patched diligently by many ingenious tilters but never quite made to hold water. Several states have recently, by case law, departed from the various theories to allow recovery now without immunity.<sup>15</sup> Some jurisdictions were wiser and allowed full liability from the beginning.<sup>16</sup>

For a long time insurance played no part in the consideration of the courts. Now, two jurisdictions put new emphasis on the existence of liability insurance in favor of the institution.<sup>17</sup> It is contended by the adherents of this view that even though the injured party recovered, there would be no detriment to the trust fund since recovery could be had from the insurer. Therefore, those courts allowed recovery limited to the amount of the insurance; however, there are still many jurisdictions that hold that liability insurance does not affect the rule.<sup>18</sup>

<sup>13</sup> See also 5 Md. L. Rev., *supra*, n. 4, 340.

<sup>14</sup> *Schau v. Morgan*, M.D., 241 Wis. 334, 6 N. W. 2d 212 (1942).

<sup>15</sup> See for example: *Avellone v. St. John's Hospital*, 165 Oh. St. 467, 135 N. E. 2d 410 (1956); *Foster v. Roman Catholic Diocese of Vermont*, 116 Vt. 124, 70 A. 2d 230, 25 A. L. R. 2d 1 (1950); *Haynes v. Presbyterian Hospital Ass'n.*, 241 Iowa 1269, 45 N. W. 2d 151 (1950); *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P. 2d 934 (1954); *Pierce v. Yakima Valley Memorial Hospital Ass'n.*, 43 Wash. 2d 162, 260 P. 2d 765 (1953); *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P. 2d 220 (1951); *Mississippi Baptist Hospital v. Holmes*, 214 Miss. 906, 55 So. 2d 142, 25 A. L. R. 2d 12 (1951), and annotation at p. 29.

<sup>16</sup> *Durney v. St. Francis Hospital*, 7 Ter. (Del.) 350, 83 A. 2d 753 (1951); *Tucker v. Mobile Infirmary Association*, 191 Ala. 572, 68 So. 4 (1915); *Gable v. Salvation Army*, 186 Okla. 687, 100 P. 2d 244 (1940).

<sup>17</sup> *O'Connor v. Boulder Colorado Sanatorium Ass'n.*, 105 Colo. 259, 96 P. 2d 835, 133 A. L. R. 819 (1939), noted in 53 Harv. L. Rev. 873 (1940); *Moore v. Moyle*, 405 Ill. 555, 92 N. E. 2d 81 (1950).

<sup>18</sup> *Muller v. Nebraska Methodist Hospital*, 160 Neb. 279, 70 N. W. 2d 86 (1955); *Kreuger v. Schmiechen*, 364 Mo. 568, 264 S. W. 2d 311 (1954); *Cristim v. Griffin Hospital*, 134 Conn. 282, 57 A. 2d 262 (1948); *Stedman v. Jewish Memorial Hospital Ass'n.*, 239 Mo. App. 38, 187 S. W. 2d 469 (1945);

The trust fund theory of immunity of charitable institutions to tort liability was first recognized in Maryland in 1885 when an inmate brought suit against the House of Refuge for an assault upon him by an officer of the institution.<sup>19</sup> Another case went to the Court of Appeals in 1917 when a fireman was injured through the defective condition of a fire escape and the court affirmed its prior holding.<sup>20</sup> No other important case arose until 1948 when, following the adoption of the present statute requiring all policies of insurance taken out by charitable institutions to contain a clause estopping the insurer from asserting the institution's immunity, a suit was brought against a Baltimore Hospital for injury to one of its patients.<sup>21</sup> The claim was based in part on the theory that the injured party was a paying patient, a factor not present in earlier cases, but the Court did not accept this contention. In reaffirming the earlier cases the Court reviewed the history of the immunity doctrine in Maryland. Another attempt to recover was made when a patient was injured in a Prince George's County Hospital. The Court in discussing the problem of charitable immunity argued that in the absence of statute even an insured charitable institution is not liable for torts.<sup>22</sup> However, insurance was not mentioned in this case until the plaintiff asked for a new trial to bring it into issue. The Court questioned:

"Should the Act of 1947 be strictly construed as applicable only to a suit by the insured against the insurer? Or is it, directly or indirectly, applicable in a suit against the insured by a tort claimant, so as to estop the insured (or the insurer as conducting the insured's defense) to the extent of the collectible insurance?"<sup>23</sup>

There seems to be an implication in the present statute that the Legislature intended to adjust the inequity resulting from the payment of insurance premiums by charities

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Dille v. St. Lukes Hospital, 355 Mo. 436, 196 S. W. 2d 615 (1946); Meade v. St. Francis Hospital of Charleston, 137 W. Va. 834, 74 S. E. 2d 405 (1953); DeGroot v. Edison Institute, 306 Mich. 339, 10 N. W. 2d 907 (1943); Woods v. Overlook Hospital Association, 6 N. J. Super. 47, 69 A. 2d 742 (1949); Enman v. Trustees of Boston University, 270 Mass. 299, 170 N. E. 43 (1930); Herndon v. Massey, 217 N. C. 610, 8 S. E. 2d 914 (1940).

<sup>19</sup> Perry v. House of Refuge, 63 Md. 20 (1885).

<sup>20</sup> Loeffler v. Sheppard-Pratt Hosp., 130 Md. 265, 100 A. 301 (1917).

<sup>21</sup> Howard v. South Baltimore General Hospital, 191 Md. 617, 62 A. 2d 574 (1948).

<sup>22</sup> Thomas v. Prince George's County, 200 Md. 554, 92 A. 2d 452 (1952), noted in 14 Md. L. Rev. 170 (1955).

<sup>23</sup> *Ibid.*, 560.

for which they receive nothing in return and to give relief to parties suffering tortious damage from an insured charitable institution or its agent. However, the legislative purpose is not clear and, therefore, perhaps the most significant statement in the instant case is an *obiter dictum* in reference to the statute, in which the Court said:

"We think the Legislature had in mind the fact that the insurer usually conducts the defense of the action by the tort claimant against the insured, and to the extent of the collectible insurance, and to that extent only, the insured is estopped from raising the defense of immunity."<sup>24</sup>

This may indicate that they will answer the second of the above questions in the affirmative.

Practical problems of pleading beset plaintiffs' attorneys in this type of case, but, an acceptable solution has been suggested. Judge Horney and Judge Niles have both written opinions in which they set forth the pattern of pleadings that they feel is proper.<sup>25</sup> They suggest that there be an allegation in the declaration that "although the defendant is a charitable institution it is not immune from suit". Note that this allegation does not mention insurance. The defendant may answer with a special plea that it is an eleemosynary institution and not amenable to suit which is the acceptable plea where there is no insurance. Then, plaintiff may allege the existence of insurance by replication or, if necessary, make use of deposition and discovery to determine the existence or amount of insurance and incorporate his findings in a claim for damages in an appropriately amended declaration. Finally, if the jury awards damages in excess of the collectible insurance, the trial court, on a motion for a new trial could require the plaintiff to file a *remittitur* for the excess damages or grant a new trial. Of course, in spite of the suggested approach, which seems to anticipate any possible pitfalls and to avoid the irregularities of pleading previously objected to, no one can be certain whether the Court of Appeals will find it acceptable.

The definitive solution to this irritating problem could, and should, come from the Legislature. In its passage of Section 82 of Article 48A it apparently recognized that any reason which may have been given for allowing insured

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<sup>24</sup> Gorman v. St. Paul Fire Ins. Co., 210 Md. 1, 7, 121 A. 2d 812 (1956).

<sup>25</sup> Karr v. Johns Hopkins Hospital, Daily Record, May 1, 1953; Phillips v. Epworth Methodist Church, Inc., Daily Record, March 18, 1955.

charitable institutions total immunity from tort liability has long since lost its force, that an imposition of liability, at least where there is liability insurance, would not place an undue burden on such institutions. Such an approach is certainly in accord with a very strong and highly acceptable national trend.<sup>26</sup> A most effective arrangement would be the repeal and re-enactment of Section 82 to provide simply that any insured charitable institution is liable for its torts, or the torts of its agents in the course of employment, to the extent of the amount of its insurance coverage.<sup>27</sup> If this is done a great deal of litigation will become unnecessary and a complex problem will be ended after more than nine years of doubt and question. Or, it might be desirable that the legislature should consider adoption of the later view of the English courts and many American jurisdictions that charitable institutions may be held responsible in tort (without regard to whether or not they carry insurance against such liability).

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<sup>26</sup> *Supra*, ns. 13, 14.

<sup>27</sup> It might be desirable for the Legislature to provide a direct action against the insurer, as some states have done, either in a separate action or by way of joinder. See ARK. STAT. ANN. (Off. ed., 1947), Sec. 66-517 construed in *Michael v. St. Paul Mercury Indemnity Co.*, 92 F. Supp. 140 (W. D. Ark., 1950).