IMMUNITY OF NON-HOSPITAL CHARITIES RE-EXAMINED

Gibbon v. Y.W.C.A.
170 Ohio St. 280, 164 N.E.2d 563 (1960)

The parent-administrator of a deceased child brought a wrongful death action claiming that the defendant's servant was negligent in allowing his daughter to drown in a swimming pool owned and operated by the Y.W.C.A. The Ohio Supreme Court, basing its decision on *stare decisis*, sustained the defendant's demurrer, holding that a charitable or eleemosynary institution, other than one which has as its purpose the maintenance and operation of a hospital, is, as a matter of public policy, not liable for the tortious acts of its servants.

The concept of immunity of charitable institutions for the torts of their servants was first introduced in the United States in an 1876 Massachusetts decision,[1] which was based on dicta from earlier English cases.[2] The doctrine was soon adopted by other courts, and by 1952 there were only fifteen states which adhered to the traditional total liability rule. Today, there are three basic rules governing the extent to which a nongovernmental charitable association is liable for the torts of its employees: complete immunity, partial immunity, and total liability.[3]

The theories underlying the immunity concept can be placed into four categories. (1) The trust fund theory hinges on the notion that payment of liability claims would violate the intended use of the donations since it would permit appropriation to "unauthorized beneficiaries." The theory is that this is a violation of the trust agreement, and that it would deter potential donors from contributing to charities.[4] (2) Other courts have taken the view that *respondeat superior* cannot be applied to a charity because a charity usually does not derive profits from the services of its employees, such gain being necessary, it is argued, for an employer to be vicariously liable.[5] (3) The implied waiver theory is based on the conception that a beneficiary, by accepting the benefits of the charity, implicitly agrees to waive any tort claim that may arise against the institution.[6]

Although the three theories discussed above have all been said to

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

[2] Mersey Docks v. Gibbs, 11 H.L. Cas. 686, 11 Eng. Rep. 1500 (1866); Holliday v. St. Leonard, 11 C.B. N.S. 192, 142 Eng. Rep. 769 (1861); Heriot's Hosp. v. Ross, 12 Clark & F. 507, 8 Eng. Rep. 1508 (1846).

[3] See Annot., 25 A.L.R.2d 74-96 (1952) for a general discussion of the three theories with a complete categorization of states; President & Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942), footnotes 20-46 at 817-822.

[4] Leeper v. Salvation Army, 158 Kan. 396, 147 P.2d 702 (1944); Williams v. Church Home of Females, 223 Ky. 355, 3 S.W.2d 753 (1928); Jones v. St. Mary's Roman Catholic Church, 7 N.J. 533, 82 A.2d 187 (1951).

[5] Fordyce v. Woman's Christian Nat. Library Ass'n, 79 Ark. 550, 96 S.W. 155 (1906); Schumacher v. Evangelical Deaconess Soc'y, 218 Wis. 169, 260 N.W. 476 (1935).

[6] Wilcox v. Idaho Falls Latter Day Saints, 59 Idaho 350, 82 P.2d 849 (1935); Winslow v. V.F.W. Home, 328 Mich. 488, 44 N.W.2d 19 (1950).

ultimately rest on public policy,[7] there is a distinctly separate theory based on this concept. Public policy recognizes that charitable associations operate for the benefit of society, and therefore, in certain cases, recovery must be denied to an individual because the interest of society requires that the financial status of the charity be protected. Nevertheless, public policy permits a particular court to adopt whatever rule it sees fit depending upon the social and economic surroundings in that jurisdiction.[8]

Ohio allows partial immunity for charities based on public policy.[9] After an early decision granting immunity to a charitable hospital for the torts of its employees,[10] the supreme court denied immunity to a hospital which (1) failed to use reasonable care in the selection of its negligent servant,[11] or (2) where the injury was to a stranger or invitee lawfully upon the premises.[12] The immunity rule was subsequently extended to other charitable institutions,[13] although only once did the supreme court intimate that immunity should be given to all charities.[14] Thus, before 1956, Ohio limited the immunity doctrine to cases where a carefully chosen employee negligently injured a benefactor of the charity. This partial immunity was furthur eclipsed in *Avellone v. St. John's Hospital*, where it was announced, ". . . a corporation not for profit which has as its purpose the maintenance and operation of a hospital is, under the doctrine of *respondeat superior*, liable for the torts of its servants."[15] Although the court was careful to limit its ruling to hospitals, the rationale of the decision was thought by many to eliminate charitable immunity in all areas.[16]

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[7] Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951); See generally, Annot., 25 A.L.R.2d 74 (1952).

[8] For cases basing immunity on the public policy doctrine, see Cohen v. General Hosp., 113 Conn. 188, 154 Atl. 435 (1931); Gregory v. Salem Gen. Hosp., 175 Ore. 464, 153 P.2d 837 (1944); Wilson v. Evangelical Lutheran Church, 202 Wis. 111, 230 N.W. 708 (1930).

[9] For Ohio cases discussing immunity in terms of public policy, see Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410 (1956); Waddell v. Y.W.C.A., 133 Ohio St. 601, 15 N.E.2d 140 (1938); Lakeside Hosp. v. Kovar, 131 Ohio St. 333, 2 N.E.2d 857 (1936); Taylor v. Flower Deaconess Home & Hosp., 104 Ohio St. 61, 135 N.E. 287 (1922).

[10] Taylor v. Protestant Hosp. Ass'n, 85 Ohio St. 90, 96 N.E. 1089 (1911).

[11] Taylor v. Flower Deaconess Home & Hosp., *supra* note 9.

[12] Sisters of Charity v. Duvelius, 123 Ohio St. 52, 173 N.E. 737 (1930).

[13] Cullen v. Schmit, 139 Ohio St. 194, 39 N.E.2d 146 (1942) (church failed to light stairway properly and plaintiff was injured); Waddell v. Y.W.C.A., *supra* note 9 (ten-year-old child was injured when defendant's employee instructed her to dive into deep water).

[14] Cullen v. Schmidt, *supra* note 13 at 194.

[15] Avellone v. St. John's Hosp., *supra* note 9 at 467, syllabus 1. For a good discussion of the development of Ohio's partial immunity rule, see 7 Clev.-Mar. L. Rev. 483 (1957). Also in 8 W. Res. L. Rev. 194 (1957) there is an excellent historical discussion and a worthwhile appraisal of the Avellone decision.

[16] See Justice Putnam's dissent in Avellone v. St. John's Hosp., *supra* note 9 at 479, "Although the instant case involves the liability of a charitable hospital, it can be seen . . . that the same rule applies to all charitable institutions." Also see 39 B.U.L.

The *Gibbon* decision thus once again crystallizes Ohio's partial immunity position.[17] The result is undesirable in that it not only leaves the application of the immunity rule to other charitable institutions in a state of uncertainty, but also it is a throwback to a doctrine which has no place in the law today. While it may be true that a Y.W.C.A. substantially differs from a hospital in size, financial worth, and services rendered, such distinctions are totally inadequate as a legal basis for the application of an immunity doctrine. There is no sound reason today for not holding charitable organizations responsible for their torts. These institutions have increased in both size and number even to the extent of competing with private enterprise in several areas. Socio-economic factors may at one time have dictated that charities be protected due to their limited finances; however, the availability of liability insurance and changing public policy, today emphasizing human values and individual needs, make this protection outmoded and an anachronism.

The court's reliance on *stare decisis* is not only totally inconsistent with its approach in other areas, but is actually an umbrella which enabled it to ignore present-day conditions.[18] The court had a perfect opportunity to continue the progressive approach announced in *Avellone*. Instead, it chose to bury Ohio deeper in the archaic rules of a bygone era. As one writer has said,

> The courts which have granted immunity to charitable organizations appear to have usurped the legislative function of declaring public policy and making changes in the law in accord therewith. It would

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Rev. 349 (1959). The *Avellone* court based its decision on two grounds: changing public policy and the availability of liability insurance.

[17] It should be pointed out that after *Avellone* and prior to *Gibbon*, two Ohio lower court opinions refused to deny immunity to churches. In Tomasello v. Hoban & St. Cecelia's Church, 6 Ohio Op.2d 508, 155 N.E.2d 82 (C.P. 1958) and Hunsche v. Alter, 76 Ohio L. Abs. 68, 145 N.E.2d 368 (C.P. 1957), church organizations were held not liable for injuries to their "guests." The Tomasello decision was affirmed by the court of appeals, but neither it nor the *Hunsche* case were appealed to the supreme court. Neither court adequately distinguished *Avellone*, but merely concluded churches should be immune.

[18] The court may have been influenced by the fact that the General Assembly in 1959 passed Substitute Senate Bill No. 241 which granted all charities immunity (except where their servants were grossly negligent) where there was injury or death to a beneficiary. The bill was promptly vetoed by the Governor and did not get the necessary vote to override the veto. It seems at best questionable to rely on a vetoed bill as an expression of public policy by the legislature. Disregarding the fate of the above bill, the court has not been reluctant to overrule their holdings in other areas where changes were needed in order to foster "fulfillment of expectations"; see Avellone v. St. John's Hosp., *supra* note 9; Damm v. Elyria Lodge, 158 Ohio St. 107, 107 N.E.2d 337 (1952) (allowing the wife of a member of a voluntary unincorporated association to maintain a tort action against the defendant—common law doctrine of legal identity of husband and wife abolished); Williams v. Transit Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949) (plaintiff allowed to bring suit for prenatal injuries even though no such action was recognized in Ohio before this time).

> be strange for these same courts to sit back and wait for the legislature to reverse the value judgments the courts have made.[19]

The court in the *Gibbon* case chose to rest on *stare decisis* to an unjustifiable extent. *Stare decisis* breeds uniformity and conservatism; however, it should not prevent innovations where conditions demand such change. Adherence to precedent caused the court to overlook such factors as the transformation to an economy emphasizing individual values as compared to property interests, the widespread availability of liability insurance, and the changed status of charities with reference to size and financial position. That the immunity rule has no place in modern society is perhaps most fully reflected in the recent trend in other jurisdictions toward complete liability.[20] These states have fully recognized that charitable organizations no longer need to be classified differently from the "Good Samaritan" or private enterprise. In short, these jurisdictions have realized that, "Charity suffereth long and is kind, but . . . it cannot be careless. When it is, it ceases to be kindness and becomes actionable wrongdoing."[21]

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[19] 38 Colum. L. Rev. 1485, 1489 (1938).

[20] See Annot., 25 A.L.R.2d 74 (1952) (Supp. 1959, at 2079); 7 Clev.-Mar. L. Rev. 493 (1957).

[21] President & Directors of Georgetown College v. Hughes, *supra* note 3, 813.