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The Liability of Charitable Corporations Arising from Tort

By Harrington J. Noon

The subject of liability of charitable corporations is so voluminous that we are compelled to treat briefly the subdivision: liability of charitable corporations arising from tort. The liability of such corporations, whose funds are provided by benevolences, has been construed in a diversity of decisions, holding such corporations either totally exempt from tort liability, or only liable to a limited extent.

The doctrine of total exemption of charitable corporations for tort under modern decisions has many limitations. In jurisdictions where total exemption prevails, the non-liability is based either on the public policy or the trust fund theory, or upon the theory that the rule of respondeat superior does not apply.

Courts that have arrived at their decisions under the public policy theory hold that the charitable corporation is a mere trustee of the funds for the benefit of the public generally, and that the rights of the individual must be subrogated to the public good, as the question of public policy is determined upon the consideration of what on the whole will best promote the general welfare. Lindler v. Columbia Hospital, 81 S.E. 512 (S.C.); Woman’s Christian Nat’l Library Ass’n v. Fordyce, 86 S.W. 417 (Ark.) Other courts hold that depleting such funds by awarding damages for the torts of servants would act to discourage such gifts to charity because the donor would have just reason to believe that his donation would ultimately be used to pay a judgment.

The basis of the trust fund theory is essentially that funds given for the creation of charitable uses should not be diverted from the purpose for which the fund was established; that such funds in trust cannot be diverted from their use by allowing damages to be awarded for the tortious acts of servants retained by the charitable corporation. It follows, therefore, if we consider such funds as mere trusts
for the benefit of the charity, allowing damages to be awarded from such funds would be an unlawful diversion of the trust fund. It would be contrary to all reason and justice, for damages under the circumstances would be paid not from the pocket of the wrongdoer but from the trust fund, which makes a variance from the original intention of the donor that it was to be used in the furtherance of charity. *Downes v. Harper Hospital*, 101 Mich. 555, 60 N.W. 42; *Boyd v. Insurance Patrol*, 113 Pa. St. 269.

In the case of *Alston v. Walden Academy*, 11 L.R.A. (ns) 1179, the courts held the trust fund theory of total exemption should apply even though the charter of the defendant charitable institution provided that it could sue and be sued. Such a decision unmistakably shows the trend of the courts toward the total exemption rule.

In many jurisdictions the rule of total immunity of charitable corporations for the torts of its servants has been made dependent upon certain qualifications and limitations as to the care to be exercised in the selection of its servants. In *Greene v. Biggs*, 83 S.E. 553 (N.C.), it stated what appears to be the generally recognized rule:

"That a private charitable institution which has exercised due care in the selection of its employees cannot be held liable for injuries resulting from their negligence."

The inference of the rule is that there is liability if due care is not exercised in the selection of agents and employees. This principle has been brought out in *McDonald v. Mass. General Hospital*, 21 Am. Rep. 529 (Mass.), which holds that charitable institutions are liable in tort where it is shown they have failed to exercise reasonable care in the selection of their employees. The contrary rule was stated in *Basabo v. Salvation Army*, 85 Atl. 120 (R.I.), which held that charitable corporations are liable even though they have not lacked diligence in the selection or retention of their servants. Courts opposed to the rule in *McDonald v. Hospital* contend they cannot reconcile such a rule with the trust fund theory, in that it is repugnant in a primary sense, that is, it tends to deplete the trust fund.
The principle upon which charitable corporations are usually held exempt from the application of the doctrine of respondeat superior in tort is concisely stated in 5 Am. and Eng. Enc. Law, 2nd page 923:

"First, that if this liability were admitted the trust might be wholly destroyed and diverted from the purpose for which it was given, thus thwarting the donor's intent, as the result of negligence for which he was in no wise responsible; second, that since the trustees cannot divert the fund by their direct act from the purpose for which they were donated, such funds cannot be indirectly diverted by the tortious or negligent acts of the managers of the funds or their agents or employees."

This principle was followed in Parks v. Northwestern, 75 N.E. 991 (111), courts holding that the rule cannot be strictly applied to charitable corporations contend that the fundamental requisite upon which the respondeat superior rule operates is missing, namely, that there is an absence of any private pecuniary gain on the part of the charitable institution by the acts of their servants. Hearns v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 595; Farrigan v. Pevear, 147 Mass. 150, 78 N.E. 855.

The decisions in a minority of jurisdictions present the view that the relationship of the plaintiff to the charitable corporation must be considered, on the principle that a person who is a beneficiary of a charitable trust assumes the risk of such torts as the agents of the charitable institution might commit when he enters into the contract to accept such benefits. The ground on which liability is denied in such cases is that of assumed risk. Powers v. The Mass. Homeopathic Hospital, 65 L.R.A. 372. Collins v. The New York Post Graduate Med. School, 69 N.Y. Supp. 106.

So far we have viewed the tort liability of charitable corporations only in their relationship to persons who are at the time of the complained of tort beneficiaries of the charity. But, in regard to their liability for torts to third parties, or strangers to their benefits, charitable corporations are held liable in damages to the same degree as an in-
dividual or as a private organization. *Horden v. Salvation Army*, 199 N.Y. 233, 92 N.E. 626.

From the cases reviewed it is evident that the trend of the various courts, with minor limitations, is toward the principle of total exemption. However, to confine the basis of the liability or non-liability within the scope of a single rule, of total exemption, would, in most instances, foster injustice by sponsoring an arbitrary attitude of irresponsibility, breed malicious contempt toward ordinary diligence, and ultimately void the intention of the benefactor. To counteract the evil effect of such a rule limitations on total exemption should be based on the maliciousness or grossly negligent conduct of the servant or employees to avoid injustice being done the beneficiaries.

Lord Campbell concisely briefs the status of charitable corporations in tort actions in the following language:

"It seems to have been the thought that, if charity trustees have been guilty of a breach of trust, the persons damaged thereby have a right to be indemnified out of the trust fund. That is contrary to all reason, justice and common sense. Such a perversion of the intention of the donor would lead to most inconvenient consequences. The trustees would in that case be indemnified against the consequences of their own misconduct, and the real object of the charity defeated."