Volume 68 | Issue 1 Article 15

December 1965

Torts--The Fall of the Charitable Immunity Doctrine

James Truman Cooper
West Virginia University College of Law

Thus, the issue as to whether privity is necessary in West Virginia for a suit on implied warranty is torn between dicta of the 1939 *Burgess* case and the 1956 federal case. It appears that the West Virginia position in regard to the privity question at issue in the principal case remains to be sufficiently answered in future litigation.

John I. Rogers, II

Torts—The Fall of the Charitable Immunity Doctrine

P, a patient in D hospital, fell against a hot radiator while being given a bath by a hospital orderly. *P's* action to recover damages for personal injuries was based on the alleged negligence of the orderly in failing to remove *P* from his peril. *P* also alleged negligence of *D* in the hiring and retention of the orderly. The trial court, relying on the doctrine of charitable immunity, entered summary judgment for *D*. *Held*, reversed. The court departed from stare decisis on the ground that charitable hospitals are no longer essentially charitable within the classical definition of the word. Today they are managed like business corporations and should be responsible for the torts of their servants while in the scope of their employment. *Adkins v. Saint Francis Hosp.*, 143 S.E.2d 154 (W. Va. 1965).

English courts introduced the doctrine of charitable immunity in *Duncan v. Findlater*, 7 Cl .& F. 894, 7 Eng. Rep. 934 (H.L. 1839), and *Feofees of Heriots Hosp. v. Ross*, 12 Cl. & F. 507, 8 Eng. Rep. 1508 (H.L. 1846). It was later repudiated in *Mersey Docks Trustees v. Gibbs*, L.R. 1 H.L. 93 (1866). Maryland and Massachusetts adopted the rule after it had been repudiated by English courts. *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495 (1885); *McDonald v. Massachusetts Gen. Hosp.*, 120 Mass. 432, 21 Am. Rep. 529 (1876).

Most state courts applied the doctrine in early decisions. Through the years many exceptions to the doctrine have been developed, but to delineate each would be impractical. In 1940, Oklahoma became one of the first states to abolish the charitable immunity doctrine. *Gable v. Salvation Army*, 186 Okla. 687, 100 P.2d 244 (1940). In the principal case Judge Caplan cited a leading case in this area, *President & Directors of Georgetown College v.*

Hughes, 130 F.2d 810 (D.C. Cir. 1942), which abrogated the charitable immunity doctrine because it was no longer applicable to modern society.

The charitable immunity doctrine was first announced in West Virginia in *Roberts v. Ohio Valley Gen. Hosp.,* 98 W. Va. 476, 127 S.E. 318 (1925). The court stated that the doctrine would be applicable to a charitable hospital with one exception. Only in the negligent hiring and retention of employees and resulting injury to a patient would the hospital be liable.

With immunity the rule and liability the exception, another case followed *Roberts,* adding that possession of liability insurance by the charitable corporation did not alter the doctrine of immunity. *Fisher v. Ohio Valley Gen. Hosp. Ass'n,* 137 W. Va. 723, 73 S.E.2d 667 (1952). A second step toward abolishment of the doctrine came in *Koehler v. Ohio Valley Gen. Hosp. Ass'n,* 137 W. Va. 764, 776, 73 S.E.2d 673, 679 (1952). Here it was held that a stranger or an invitee could recover when injured by the negligence of a charitable hospital employee.

At this point in the history of the doctrine in West Virginia, the only person who could not recover damages for his injuries was the most logical recipient, the patient. The court in the *Adkins* case ended this inequity by allowing the patient to recover upon the doctrine of respondeat superior. The court stated that recovery should be granted, whether the patient be paying or non-paying, because charity undertaken in a careless or wanton manner is an actionable wrong.

As the doctrine was not part of the common law of West Virginia, legislative action was not needed to abolish it. The doctrine of stare decisis may be abandoned, but only when urgent reason requires such departure. The modern characteristics of charitable hospitals being non-charitable within the usual context of the word charity, but more business-like in nature, necessitated the abolishment of the rule. As Judge Caplan emphasized, "Reason requires this result —justice demands it."

The *Adkins* case can be extended by analogy to all charitable organizations except those with governmental or municipal affiliations. Judge Caplan states ". . . [W]e elect to adhere to what we consider the better reasoned decisions and abrogate completely the

so-called immunity rule." West Virginia has never applied the doctrine to churches, colleges and other charities. However, the language of Judge Caplan and the trend illustrated by a Washington decision would seem to indicate that West Virginia would refuse to apply the doctrine of charitable immunity in such cases. The Washington court held that churches, colleges and other charities are liable to non-paying patrons or to paying patrons injured as a result of negligence of the charity's employees. *Friend v. Cove Methodist Church, Inc.*, 396 P.2d 546 (Wash. 1964).

Closely related to the doctrine of charitable immunity are the doctrines of governmental and parental immunity. A thorough analysis of these doctrines would be beyond the scope of this comment, but mention should be made of the possible effect of the *Adkins* decision on the future application of these doctrines in West Virginia.

The rule that immunity from liability must be granted to the state seems to have originated from the assumption that the King can do no wrong. *Downs v. Lazzelle*, 102 W. Va. 663, 136 S.E. 195 (1926). W. VA. CONST. art. 6, § 35 (Michie 1961) provides, "The State of West Virginia shall never be made defendant in any court of law or equity . . . ." Notwithstanding this constitutional immunity, several West Virginia cases have allowed recoveries against county courts, boards of education, municipalities and other organizations created for governmental purposes. However, recovery always seems to turn upon whether the negligent activity complained of was proprietary, as distinguished from governmental. *Ward v. County Court of Raleigh County*, 141 W. Va. 730, 738, 93 S.E.2d 44, 48 (1956).

West Virginia courts strongly adhere to the doctrine of governmental immunity, allowing recovery only when negligence occurs in a proprietary act. Other states have limited the doctrine. An Illinois court refused to apply the doctrine to a school district, allowing a student to recover for injuries received in an accident caused by the negligence of a school bus driver. The court stated that it had created the doctrine of school district immunity and did not need legislative help to abrogate it. *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill.2d 11, 25, 163 N.E.2d 89, 96 (1959).

In 1961 a California court completely abolished governmental immunity without legislative aid. *Muskopf v. Corning Hosp. Dist.*,

55 Cal.2d 211, 359 P.2d 457 (1961). The legislature refused to recognize this judicial decision and ordered a two year moratorium on suits against the state until an exhaustive study of the problem could be made. Subsequently the legislature substantially abolished governmental immunity in California. CAL. GOV'T CODE ANN. § 945 (Deering Supp. Oct. 1963).

West Virginia seems destined to continue to abide by the doctrine of governmental immunity, allowing recovery only upon the basis of negligence in proprietary functions. In any event, governmental immunity involves questions somewhat beyond the scope of this comment.

Another question raised by the principal case is whether the abolition of the charitable immunity doctrine will have any effect upon the doctrine of parental immunity. In West Virginia an unemancipated minor cannot recover in a tort action against a parent. The reasoning is that it is better for an occasional wrong to go unpunished than for family life to be subjected to turmoil. *Securo v. Securo*, 110 W.Va. 1, 156 S.E. 750 (1931).

However, one West Virginia case has allowed a child to recover from her parent. *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932). The child, a passenger on a bus driven by her father, received injuries from hot water spurting from a negligently maintained radiator. This case is distinguishable from *Securo v. Securo* in that the parent was covered by liability insurance in the *Lusk* case. In allowing the child to recover, the court stated that a recovery would not destroy the domestic tranquility of the family. Because the reason for immunity was no longer present, the rule failed. Despite this case the doctrine of parental immunity seems to be soundly entrenched in West Virginia. In this aspect West Virginia is in line with a large majority of states.

An analysis of state decisions concerning charitable immunity indicates a definite trend toward abolition of the doctrine. In a recent Illinois decision, *Darling v. Charleston Community Memorial Hosp.*, 34 U.S.L. WEEK 2178 (Ill. Sept. 29, 1965), the court held that a charitable hospital was liable for its torts and that its liability was not limited to the amount of insurance coverage. Many state courts are applying the rationale that a rule should not be applied when the reason for its existence fails. A few states, having abolished charitable immunity, have followed with the abolish-

ment of governmental immunity. The doctrine of parental immunity, however, continues to be firmly applied by the states. It is not probable that the *Adkins* decision will have any effect on the application of the doctrines of governmental and parental immuity in West Virginia.

James Truman Cooper

ABSTRACTS

Conflicts of Law—Collateral Attack of Foreign Divorce Decrees

The petitioner was granted a divorce in the State of Florida in 1945. The award of alimony purported to bind the husband's estate. Under Florida law such an arrangement is not valid without an express agreement of the parties. The husband made no appeal for correction of the decree. After her husband's death in 1958, the petitioner instituted an action in a West Virginia circuit court in order to determine her rights in the estate. The trial court held the divorce decree to be invalid and unenforceable to the extent that it would be binding upon the husband's estate. On appeal the West Virginia Supreme Court upheld the collateral attack. Certiorari was then granted by the United States Supreme Court, and the decision was reversed based upon the reply by the Florida appellate court to certain certified questions. *Aldrich v. Aldrich*, 378 U.S. 540 (1964).

Article IV, section 1, of the federal constitution requires that a judgment of one state be given full faith and credit in every other state. As a consequence it is generally held that a collateral attack may be maintained only for fraud in procurement or lack of jurisdiction. *Gavenda Bros. v. Elkins Limestone Co.*, 145 W. Va. 732, 116 S.E.2d 910 (1960).

The problem in the instant case involves jurisdiction. Prior to the rendering of this decision by the United States Supreme Court, courts were divided over the issue of a defective judgment providing a basis for collateral attack. Some courts advanced the view that erroneous exercise of jurisdiction established a ground for collateral attack. *West End Irrigation Co. v. Garvey*, 117 Colo. 109,