

# Liability of Hospitals for the Negligence of Their Employees

Harry Lorber

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

## Recommended Citation

Lorber, Harry (1941) "Liability of Hospitals for the Negligence of Their Employees," *St. John's Law Review*: Vol. 15 : No. 2 , Article 10.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol15/iss2/10>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [lasalar@stjohns.edu](mailto:lasalar@stjohns.edu).

ing with them.<sup>69</sup> The common design has been to insure, in case of disaster, uniformity in the treatment of depositors and a ratable distribution of the assets.<sup>70</sup>

BERNARD SCHIFF.

#### LIABILITY OF HOSPITALS FOR THE NEGLIGENCE OF THEIR EMPLOYEES

The cases on the subject of charitable hospital liability "present an almost hopelessly tangled mass of reason such as is not often encountered in the law. . . . The question is one which the courts have been fertile in drawing subtle distinctions, many of them irrelevant to the point for discussion, or, at least, leading to no principle by which the conclusions reached can be reconciled."<sup>1</sup> An abundance of opinion reveals a marked dissatisfaction with the status of the law today, and evidences a positive desire that hospital liability conform to the changing *mores* of the times. For the purposes of this article, the subject of liability will be approached from the various agencies purporting to claim exemptions from tort liability. A discussion of the damage liability of charitable, state and municipal hospitals will be had in order.

#### *Charitable Hospitals*

One of the earliest cases in this country deciding that a charitable hospital is exempt from tort liability to a patient is that of *McDonald v. Massachusetts General Hospital*.<sup>2</sup> In the formation of the immunity rule, this case has been frequently cited and approved.<sup>3</sup> In turn, the only authority relied upon in that case was a decision of an English court.<sup>4</sup> That this case was shortly overruled and the subsequent status of the American decisions impaired is evidenced by the statement of Kennedy, L.J., "With the American . . . cases . . . I do not think it necessary to deal. They are not in agreement; in one of them [citing the *McDonald* case] the judgment appears to have been influenced by an English decision of *Holliday v. St. Leonard, supra*, which has been overruled by the House of Lords in *Mersey Docks v. Gibbs*."<sup>5</sup>

<sup>69</sup> *People v. Wiersema State Bank*, 361 Ill. 75, 197 N. E. 537 (1935).

<sup>70</sup> *Ibid.*

<sup>1</sup> Zollman, *Damage Liability of Charitable Institutions* (1921) 19 MICH. L. REV. 395, 408.

<sup>2</sup> 120 Mass. 432 (1876).

<sup>3</sup> *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4 (1915); L. R. A. (1915D).

<sup>4</sup> *Holliday v. St. Leonard*, 11 C. B. (N. S.) 192 (1861).

An examination of the later cases sustaining immunity reveals that they adopted language imported from some previous case, which in turn adopted language from still earlier cases. Few courts examine the question in the light of modern conditions. "There was a certain amount of 'goose-stepping'." <sup>6</sup> To uphold the doctrine of immunity, the courts "swung with agility from one theory to another."<sup>7</sup> As soon as one substantiation proved unsound in reason and law, another was hurriedly set forth. In succession, the courts initiated the trust fund theory, the waiver theory, and the inapplicability of *respondeat superior*.<sup>8</sup> The first of these doctrines was harbored for a while,<sup>9</sup> but was soon declared unsatisfactory<sup>10</sup> and repudiated by a number of American courts.<sup>11</sup> The waiver theory, too, was discarded as having no foundation in fact and reason.<sup>12</sup> The third approach, that *respondeat superior* does not apply,<sup>13</sup> is the most formidable of the group. It is of this theory that a learned author has declared: "Here we have a logical basis for the decision in question."<sup>14</sup> Similarly, this theory has been followed in the New York cases.<sup>15</sup> The question remains, however, whether this doctrine is sufficiently founded in fact and reason to support the consequences of its operation; or whether it does violence to the facts in saying that a charity patient coming to such an institution for aid, impliedly selects the attendants as his own.<sup>16</sup>

The rule of exemption from liability arose when charitable organizations, having their origin in the donations of benevolent persons or in grants from the state,<sup>17</sup> were supported by a few individuals and their resources were limited.<sup>18</sup> It was, therefore, in the best interests

<sup>5</sup> *Hillyer v. St. Bartholomew's Hospital*, 2 K. B. 820, 830 (1909).

<sup>6</sup> Wolfe, J. (concurring) in *Sessions v. Thomas D. Dee Memorial Hospital*, 94 Utah 460, 78 P. (2d) 645, 654 (1938).

<sup>7</sup> Note (1938) 12 ST. JOHN'S L. REV. 99, 101.

<sup>8</sup> Feezer, *The Tort Liability of Charities* (1928) 77 U. OF PA. L. REV. 191; (1938) 38 COL. L. REV. 1485; Note (1938) 12 ST. JOHN'S L. REV. 99.

<sup>9</sup> *Herriot's Hospital v. Ross*, 12 Clark and F. 507 (1846) (trust assets are not available for payment of damages—inconsistent with purpose). *Powers v. Homeopathic Hospital*, 109 Fed. 294 (C. C. A. Mass. 1901); *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453 (1907).

<sup>10</sup> *Mersey Docks and Harbor Trustees v. Gibbs*, L. R. 1 H. L. 93 (1864).

<sup>11</sup> *Cohen v. General Hospital*, 113 Conn. 188, 154 Atl. 435 (1931); *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, 112 N. Y. Supp. 566 (2d Dept. 1908); *Hospital of St. Vincent v. Thompson*, 116 Va. 101, 81 S. E. 13 (1914).

<sup>12</sup> "A patient entirely unskilled in legal principles, his body racked with pain, his mind distorted with fever, is held to know by intuition, the principle of law that the courts after years of travail have at last produced." Fraser, J., dissenting in *Lindler v. Columbia Hospital*, 98 S. C. 25, 36, 81 S. E. 512, 515 (1914); (1932) 81 U. OF PA. L. REV. 93.

<sup>13</sup> *Phillips v. Buffalo General Hosp.*, 239 N. Y. 188, 146 N. E. 199 (1924).

<sup>14</sup> BURDICK, *LAW OF TORTS* (4th ed. 1926) 145; Zollman, *Damage Liability of Charitable Institutions* (1921) 19 MICH. L. REV. 395.

<sup>15</sup> *Schloendorff v. N. Y. Hospital*, 211 N. Y. 125, 105 N. E. 92 (1914); (1932) 81 U. OF PA. L. REV. 93; see note 8, *supra*.

<sup>16</sup> See note 15, *supra*.

<sup>17</sup> BURDICK, *LAW OF TORTS* (4th ed. 1926) 140.

<sup>18</sup> "Tolerance of such liabilities might eventuate in the destruction of the

of the public that these institutions were nurtured. Today, however, charity is being dispensed by large, well-endowed corporations, whose modern multiplication has apparently reduced this danger and rendered more equitable the payment of compensation to those so injured. Thus the demands of the public welfare, for protection from liabilities for wrongs committed in their conduct, have become less imperative as compared with the needs of the injured individual.<sup>19</sup> Their economic aspects are non-profit rather than charitable.<sup>20</sup>

Most jurisdictions enforce ordinary tort liability against charitable organizations where employees<sup>21</sup> or strangers<sup>22</sup> are injured. As to beneficiaries alone, is such an institution exempt from liability for injury caused by the negligent acts of its employees in the scope of their professional employment?<sup>23</sup> Coincidentally, most of the cases in which beneficiaries have sued charitable hospitals and been denied recovery, are those where the injury was caused by the negligence of a doctor or nurse. It is at this point that the inconsistency and confusion of the courts is at its height. A determination of whether the act is "administrative" or "professional" is sought.<sup>24</sup> If the act is administrative, a recovery is permitted; if professional, no recovery.<sup>25</sup> It is difficult to reconcile the judicial "juggling" of the doctrine of *respondeat superior*. If the doctrine is applicable, should it not be a determining factor in both cases? Either *respondeat superior* applies or it does not. If the charity or other exempted body is immune, *respondeat superior* is irrelevant; if not, it can clearly be invoked. If this theory has any foundation in logic, reason or fact it would be sufficient to bar recovery in any instance whether the act be administrative or professional. Can the doctrine be made applicable when a servant is performing a menial function and then mysteriously disappear when the act is termed "professional". If the relationship of master and servant exists for one purpose, it is a retreat from realism to say that it is lacking for another purpose. In New York, a membership corporation may be formed to establish and maintain a hospital.<sup>26</sup> "Thus a hospital duly incorporated under the Membership Corporations Law undoubtedly holds itself out as being able to diag-

---

charity and discourage donors to the detriment of the public welfare." *Lincoln Memorial University v. Sutton*, 163 Tenn. 298, 43 S. W. (2d) 195, 196 (1931).

<sup>19</sup> See note 20, *infra*; *Baptist Memorial Hospital v. Couillens*, 140 S. W. (2d) 1088 (Tenn. 1940).

<sup>20</sup> *Silva v. Providence Hospital*, 99 Cal. Dec. 20, 97 P. (2d) 798 (1939).

<sup>21</sup> *Hordern v. Salvation Army*, 199 N. Y. 233, 92 N. E. 626 (1910).

<sup>22</sup> *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 96 N. E. 406 (1911); 7 L. R. A. (n. s.) 481 (1906).

<sup>23</sup> *D'Amato v. Orange Mem. Hosp.*, 127 Atl. 340, 101 N. J. L. 61 (1925) (not liable for nurse); *Schloendorff v. Society of N. Y. Hospital*, 211 N. Y. 125, 105 N. E. 92 (1914) (not liable for act of doctor or nurse); *Phillips v. Buffalo General Hospital*, 239 N. Y. 188, 146 N. E. 199 (1924) (not liable for act of orderly performing duty of nurse).

<sup>24</sup> See note 23, *supra*.

<sup>25</sup> *Phillips v. Buffalo General Hospital*, 239 N. Y. 188, 146 N. E. 199 (1924).

<sup>26</sup> N. Y. MEMBERSHIP CORP. LAW §§ 4, 40.

nose, treat, operate and prescribe for human disease."<sup>27</sup> Such corporations do in fact possess legislative sanction to *practice* medicine by means of its staff of registered physicians and surgeons. And yet, when they are engaged in the very purpose for which they are formed, their servants are, quite paradoxically, construed to be servants of the beneficiary.<sup>28</sup> Obviously the principle of *respondeat superior* should apply. "The mistake is that *respondeat superior* is treated as a doctrine as broad in its application as liability itself." In reality, it is a question to be decided "only after the way is clear to find"<sup>29</sup> the hospital liable for a tort, should the relationship of master and servant be found to exist. *Respondeat superior* has been the big stumbling block in the reported decisions. The chief difficulty has been in determining whether a given act was professional or administrative. This in turn resulted in an anomaly in the law: a relationship of employer and employee on one hand and its total absence on the other.<sup>30</sup> The Supreme Court of Canada solved this problem most judiciously,<sup>31</sup> when it considered a nurse a servant of the hospital for all purposes regardless of the nature of the act involved.<sup>32</sup> The question seems to be not one of skill or the nature of the skill required in the performance of a given act, but rather of the nature of the hospital's duty towards a patient. If the hospital undertakes to provide certain treatments, there seems to be no reason to exonerate it for the negligent acts of persons who are in their employ and subject to their control.<sup>33</sup> Thus the hospital is not relieved from liability unless it can be clearly shown that the nurse had passed under the control of some third person,<sup>34</sup> and this regardless of the fact that the act was one requiring peculiar skill.<sup>35</sup>

It is a well established policy of the law that individuals must be just before they are generous. This would seem to be equally applicable to charitable institutions. "To require an injured individual to forego compensation for harm when he is otherwise entitled thereto, because the injury was committed by the servants of a charity, is

<sup>27</sup> *People v. Woodbury Dermatological Institute*, 192 N. Y. 454, 458, 85 N. E. 697, 699 (1908); see *Post, et al. v. Crown Heights Hospital, Inc.*, 173 Misc. 250, 17 N. Y. S. (2d) 409 (1940).

<sup>28</sup> HARPER, *LAW OF TORTS* (1933) § 293 ("Corporations commit torts by the same people who effect and consummate their legitimate activities").

<sup>29</sup> Fuller and Casner, *Municipal Tort Liability in Operation* (1941) 54 HARV. L. REV. 437, 439.

<sup>30</sup> Note (1938) 16 CAN. BAR REV. 655.

<sup>31</sup> *Sisters of St. Joseph v. Fleming*, 2 D. L. R. 417 (1938).

<sup>32</sup> Goodhart, *Hospitals and Trained Nurses* (1938) 54 L. Q. REV. 553; Note (1938) 16 CAN. BAR REV. 566.

<sup>33</sup> See note 31, *supra*; *Wardell v. Kent County Council*, 2 K. B. 768 (1938); *Post, et al. v. Crown Heights Hospital, Inc.*, 173 Misc. 250, 17 N. Y. S. (2d) 409 (1940).

<sup>34</sup> Where the control shifts to that of the operating surgeon, the hospital is not liable. *Kamps v. Crown Heights Hospital, Inc.*, 251 App. Div. 849, 296 N. Y. Supp. 776 (2d Dept. 1937); *Alderhold v. Bishop*, 94 Okla. 203, 221 Pac. 752 (1923); *Emerson v. Chapman*, 138 Okla. 270, 280 Pac. 820 (1929); *Peter-son v. Richards*, 73 Utah 59, 272 Pac. 229 (1928).

<sup>35</sup> Note (1940) 18 CAN. BAR REV. 776.

to require him to make an unreasonable contribution to the charity, against his will, and a rule of law imposing such burdens cannot be regarded as socially desirable or consistent with sound policy."<sup>36</sup> This view is in accord with the modern trend of decisions holding a charitable corporation liable quite as though it was operating for a profit and not different than in the case of any other corporation.<sup>37</sup> For no one is obliged by law to assist even a stranger. However, once he has undertaken to render assistance the law imposes upon him a duty of care towards the person assisted.<sup>38</sup> This situation is apparently analogous to that of a charitable institution, but the courts seem determined to draw lines of demarcation. For years, courts have been making inroads upon the rule of non-liability, and have to some extent whittled away its effectiveness. But recent cases recognizing the dubious and fallacious reasoning advanced on behalf of the immunity rule have taken the position that the reasons having disappeared, the rule should fall with it. "It would be rare indeed that any philanthropist would fail to give to a charitable use because he feared that the institution he created or contributed to might be sued for negligence, and some of its funds be required to compensate for the negligence." He would probably add, "Better justice with the funds at home than charity abroad."<sup>39</sup> There seems, therefore, to be no good reason why any charity should be exempted from tort liability under modern conditions.<sup>40</sup> If a person is injured and no recompense is given from any source, the result is apt to be that a certain number of persons will become public charges, and a feeling of social injustice will be implanted in the minds of the victims.<sup>41</sup>

A desirable solution to the problem has been reached<sup>42</sup> in Colorado<sup>43</sup> and Tennessee,<sup>44</sup> whose courts rule that exemption from liability extends no further than necessary to protect the charitable trust from diversion. Thus a tort judgment may be allowed against the institution, though only to be satisfied to the extent of any insurance, which will not affect or deplete the trust property. Legislation should be invoked to compel all charitable institutions to carry policies for

<sup>36</sup> HARPER, LAW OF TORTS (1933) 657; see note 20, *supra*.

<sup>37</sup> Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915); Mulliner v. Evangelischer Diakonissenverein, 144 Minn. 392, 175 N. W. 699 (1920); Sessions v. Thomas D. Dee Memorial Hospital, 94 Utah 460, 78 P. (2d) 645 (1938).

<sup>38</sup> McLeod v. Ranson, 215 Mass. 257, 102 N. E. 429; Owl Drug Co. v. Crandall, 80 P. (2d) 952 (Ariz. 1938).

<sup>39</sup> Sessions v. Thomas D. Dee Memorial Hospital, 94 Utah 460, 78 P. (2d) 645, 654 (1938).

<sup>40</sup> Sheehan v. North Country Community Hospital, 273 N. Y. 163, 7 N. E. (2d) 28 (1937); (1937) 14 N. Y. U. L. Q. REV. 534. Charitable hospitals in New York will probably be subject to all ordinary rules of vicarious liability; see note 29, *supra*.

<sup>41</sup> 2 BOGERT, TRUSTS AND TRUSTEES (1935) § 401.

<sup>42</sup> Note (1941) 21 N. C. L. REV. 245.

<sup>43</sup> O'Connor v. Association, 96 P. (2d) 835 (Colo. 1939).

<sup>44</sup> Vanderbilt University v. Henderson, 23 Tenn. App. 135, 127 S. W. (2d) 284 (1939) (recovery to extent of liability insurance).

general indemnity.<sup>45</sup> Such a view is more consonant with progressive public policy in initiating liability insurance to remove similar disabilities in other fields.<sup>46</sup>

### *State Liability in New York*

It is axiomatic that a sovereignty cannot be sued unless it consents.<sup>47</sup> In New York this accession has been manifested in Section 8 of the Court of Claims Act.<sup>48</sup> The state has, by statute, waived its immunity from liability for the torts of its officers and employees, and has expressly assumed liability. It was not with little difficulty, however, that the courts finally applied it to professional employees in a state hospital. The bugaboo of charitable immunity influenced the courts even in the face of an express legislative enactment; and when presented with facts definitely within the purview of the statute, they proceeded to adjudicate on the rules of charitable hospital immunity. Recently, however, in an action brought against the state for injuries sustained in a state hospital, the court took a definite stand.<sup>49</sup> The patient's death was caused by the administration of unneutralized salvarsan by persons employed at the hospital, when the treatment prescribed was neo-salvarsan. Notwithstanding the state furnished competent doctors and nurses, the court found that there was negligence in administering the drug, and allowed recovery. The state relied on the decision of *Schloendorff v. Society of New York Hospitals*.<sup>50</sup> Held, "Section 12a [now Section 8] of the Court of Claims Act became law in 1921. Prior to that time the State had not waived immunity, nor had it assumed liability." The statute "in effect provides that the doctrine of *respondet superior* does apply to the State. Hence the cases cited by the State are no longer authority under the set of facts in this case."<sup>51</sup> This decision is in harmony with the declared public policy of the state that persons damaged by the torts of those acting as its officers and employees need not contribute their losses to the purposes of government. "We think it would not be a harmonious policy that would require this plaintiff to put up

---

<sup>45</sup> 3 SCOTT, TRUSTS (1939) § 402 ("A policy of general indemnity might be interpreted as to save harmless from such claims as could be enforced against it if it were not a charitable institution").

<sup>46</sup> See note 42, *supra*. Workmen's Compensation Unemployment Insurance and contemplated automobile liability insurance.

<sup>47</sup> EDGAR AND EDGAR, LAW OF TORTS (2d ed. 1936) § 23.

<sup>48</sup> N. Y. Laws 1939, c. 860.

<sup>49</sup> *Liubowsky v. State*, 260 App. Div. 416, 23 N. Y. S. (2d) 633 (3d Dept. 1941).

<sup>50</sup> See note 23, *supra*.

<sup>51</sup> *Liubowsky v. State*, 260 App. Div. 416, 418, 23 N. Y. S. (2d) 633, 635 (3d Dept. 1940). The dissent follows the immunity rule. *Gaccione v. State*, 173 Misc. 367, 18 N. Y. S. (2d) 161 (1940) (state held liable for failure to safeguard inmate).

with her injuries on the score that the appellant is a charitable corporation."<sup>52</sup>

### *Municipal Liability*

The doctrine of municipal immunity from tort had an inauspicious beginning in 1798.<sup>53</sup> It was then expressed that if tort actions were permitted the public would suffer a great inconvenience. On this account, it was considered more equitable that the injured individual should suffer, rather than incommode the entire public. This reason smacks of the fallacious and dubious arguments used in support of charity immunity, but its acceptance into the law is unquestioned.

Authorities are agreed that caring for the poor, sick and injured is essentially a public duty with which the state is primarily charged.<sup>54</sup> To the extent that a local or municipal corporation exercises this function, it partakes of the state's prerogative and is exempt from liability for negligence.<sup>55</sup> This doctrine, though widely adhered to, has been severely criticized.<sup>56</sup> In fact, the legislature has in many instances abrogated the common law rule and imposed liability on the city for the governmental acts of its agents.<sup>57</sup> In the absence of statute, too, we find the courts adjudicating with a view to further limit the non-liability rule and impose liability as justice demands it. A series of recent decisions exemplify this liberal trend and point out that the courts are no longer desirous of sustaining the contention that the city was exercising a sovereign governmental power.<sup>58</sup> In *Volk v. City of New York*,<sup>59</sup> the plaintiff became ill from an injection of a

<sup>52</sup> *Sheehan v. North Country Community Hospital*, 273 N. Y. 163, 166, 7 N. E. (2d) 28 (1937); 109 A. L. R. 1197 (1937). As to private hospitals see *Hendrickson v. Hodkin*, 276 N. Y. 252 (1937); *Post, et al. v. Crown Heights Hospital, Inc.*, 173 Misc. 250, 17 N. Y. S. (2d) 409 (1940).

<sup>53</sup> *Russell v. Men of Devon*, 2 Term Rep. 607 (1798); (1932) 1 BROOKLYN L. REV. 85.

<sup>54</sup> 1 SHEARMAN AND REDFIELD, NEGLIGENCE (5th ed. 1898) 266.

<sup>55</sup> *Maximilian v. New York*, 62 N. Y. 160 (1875); *Danaher v. Brooklyn*, 119 N. Y. 241, 23 N. E. 745 (1890); see note 54, *supra*, § 253; see PRASHKER, CASES ON LAW OF MUNICIPAL CORPORATIONS (1927) 200; 2 DILLON, MUNICIPAL CORPORATIONS (1890) 1200; WHITE, NEGLIGENCE OF MUNICIPAL CORPORATIONS (1920).

<sup>56</sup> *Borchard, Governmental Responsibility in Tort* (1928) 28 COL. L. REV. 735; *Tooke, The Extension of Municipal Liability in Tort* (1932) 19 VA. L. REV. 97; see note 29, *supra*.

<sup>57</sup> Note (1940) 26 CORNELL L. Q. 145; *Derlicka v. Leo*, 281 N. Y. 266, 22 N. E. (2d) 367 (1939); N. Y. GEN. MUN. LAW § 50(a), (b), (c), (d) (L. 1937).

<sup>58</sup> *Engels v. City of New York*, 281 N. Y. 650, 22 N. E. (2d) 481 (1940); *Nathanson v. City of New York*, 282 N. Y. 556, 24 N. E. (2d) 983 (1939) (noted in (1940) 9 BROOKLYN L. REV. 341); *Duren v. City of Binghamton*, 283 N. Y. 467, 28 N. E. (2d) 979 (1940) (the court assumed that the city was exercising a governmental function).

<sup>59</sup> 284 N. Y. 279, 30 N. E. (2d) 596 (1940).

decomposed morphine solution. The court allowed recovery even though both the negligence of the city and of the administering nurses contributed to the injury; "the defendant was negligent in the performance of an administrative duty in failing to have available for the nurses a fresh morphine solution."<sup>60</sup> In this connection it is interesting to note a recent legislative mandate as regards the malpractice of a physician in a city hospital.<sup>61</sup> "Every municipal corporation . . . shall assume the liability, to the extent that it shall save him harmless, of any physician . . . rendering medical services . . . gratuitously to a person in a public institution maintained in whole or in part by the municipal corporation, for damages for personal injuries . . . sustained . . . by reason of the malpractice of such physician . . ." <sup>62</sup> Under this section, a new remedy against the municipality is created in favor of injured persons. The common law liability against the physician exists, but he has a right to insist that in accord with the statute, he be saved harmless.<sup>63</sup>

### Conclusion

Public policy is sometimes found to exist from the fact that the legislature has spoken frequently and consistently on a subject and thus assumed a fixed position with reference thereto.<sup>64</sup> In New York the adoption of numerous statutes waiving immunity constitute a recognition and acknowledgment of a moral duty demanded by principles of equity and justice.<sup>65</sup> It declares that no longer will the state use the "mantle of sovereignty" to protect itself from such consequences as follow the negligent act of its employees. Similarly, there seems to be no good reason why, under modern conditions, any charity should be exempted from tort liability.<sup>66</sup> Therefore it is submitted:

(1) That there is no basis in fact or reason for exempting a charitable institution from the doctrine of *respondeat superior*. If there be any need for protecting a charitable trust from diversion, the legislature should compel such organizations to carry general policies of indemnity. This would serve both to make for consistent determinations, and award compensation in the best interests of justice and equity.

<sup>60</sup> *Id.* at 286, 30 N. E. (2d) 596.

<sup>61</sup> N. Y. GEN. MUN. LAW § 50d (L. 1937, c. 483).

<sup>62</sup> See note 61, *supra*.

<sup>63</sup> *Derlicka v. Leo*, 281 N. Y. 266, 22 N. E. (2d) 367 (1939), *rev'g*, 256 App. Div. 215, 9 N. Y. S. (2d) 463 (1st Dept. 1939).

<sup>64</sup> *Campbell v. City of New York*, 244 N. Y. 317, 324, 155 N. E. 628 (1927).

<sup>65</sup> *Jackson v. State*, 261 N. Y. 134, 184 N. E. 735 (1933).

<sup>66</sup> *Hansen, Damage Liability of Charitable Corporations* (1935) 19 MARQ. L. REV. 92; *Feezer, The Tort Liability of Charities* (1928) 77 U. OF PA. L. REV. 191.

(2) That Section 8 of the Court of Claims Act has transformed an unenforceable obligation into an actionable right and applies the rule of *respondet superior* to the state.

(3) That insofar as some courts have been lax in extending Section 8 to include political subdivisions of the state, as was obviously intended by its general language, the statute be amended to bring these local bodies within its purview.

It is only by express legislative enactment that we can hope to align the mass of confusing decisions on the subject of charitable, state and municipal hospital liability.

HARRY LORBER.

---

## CERTAIN ASPECTS OF THE DEVELOPMENT OF SECTION 29 OF THE NEW YORK WORKMEN'S COMPENSATION ACT

### *Introduction*

When the New York Workmen's Compensation Law first became effective,<sup>1</sup> the remedy of the employee injured in the course of certain specified employments<sup>2</sup> was exclusively in compensation, unless the injury resulted proximately from the tortious act of a third person,<sup>3</sup> or unless the employer failed to provide compensation insurance as required by the law.<sup>4</sup> Where the employee was injured by the negligence or wrong of a third person, Section 29 provided that he could claim compensation or pursue his common law remedy against the tortfeasor.<sup>5</sup> He could not do both, except to the extent

---

<sup>1</sup> The Workmen's Compensation Law was enacted by N. Y. Laws 1913, c. 816 (eff. Dec. 16, 1913) as Chapter 67 of the Consolidated Laws. Constitutional authorization to enact this law (N. Y. Const. Art. I, § 19) was not given to the legislature until Jan. 1, 1914. To assure the constitutionality of the statute the legislature reenacted it by N. Y. Laws 1914, c. 41. A previous attempt to enact a workmen's compensation law was made by the legislature by N. Y. Laws 1910, c. 647, but it was declared unconstitutional in *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431 (1911).

<sup>2</sup> The law covers certain hazardous employments, and all employments, with certain exceptions, in which four or more operatives are engaged. N. Y. WORK. COMP. LAW § 3.

<sup>3</sup> Prior to N. Y. Laws 1934, c. 695, a co-employee was a "third person"; *Judson v. Fielding*, 227 App. Div. 430, 237 N. Y. Supp. 348 (3d Dept. 1929); *Shelter v. Grobsmith*, 143 Misc. 380, 257 N. Y. Supp. 353 (1932).

<sup>4</sup> N. Y. WORK. COMP. LAW § 11; N. Y. WORK. COMP. LAW § 52 (the employer's failure to comply with the Act is a misdemeanor).

<sup>5</sup> *Traveler's Ins. Co. v. Brass Goods Mfg. Co.*, 239 N. Y. 273, 146 N. E. 377 (1925); *Schubert v. Finkelstein*, 244 N. Y. 483, 155 N. E. 906 (1927); *Miller v. New York Rys.*, 171 App. Div. 316, 157 N. Y. Supp. 200 (2d Dept. 1916); *Roecklein v. American Sugar Refining Co.*, 222 App. Div. 540, 226 N. Y. Supp. 375 (2d Dept. 1928); *Sabatino v. Crimmins*, 102 Misc. 172, 168 N. Y.