

Immunity of Charitable Corporations for Negligence of Their Servants and Agents

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Conclusions.

The question of federal incorporation arises out of a need for certainty and the establishment of control by regulation of trade and corporate practices.

The power of Congress to charter corporations for certain purposes is established. Much sanction is found for the opinion that the power of such corporations to engage in manufacturing has a constitutional basis.

It seems that if such federal corporations should engage in purely intrastate activities which are incidental to the conduct of their business, the consent of each state would be a condition for such operation.

On the basis of precedent it would seem that Congress has the power to prohibit from interstate commerce those corporations engaging in such commerce which refuse to be federally incorporated or licensed.

Federal incorporation does not disturb the balance between the power of the states and the federal government.

It would appear, in a final analysis, that federal incorporation is not so much a policy of prohibition and restriction. It is one of guidance and leadership pointing toward a stabilized economic control.²⁵

MICHAEL J. O'REILLY.

IMMUNITY OF CHARITABLE CORPORATIONS FOR NEGLIGENCE OF THEIR SERVANTS AND AGENTS.

Origin of Immunity Doctrine.

The liability of a charitable corporation¹ for the torts of its servants has long been a favorite topic for discussion. The various

corporations which constitute less than one per cent of America's corporate enterprises. See, Hearings on the O'Mahoney Bill, *supra* note 1.

It is well to remember that the bill does not propose to stipulate the manner in which business is to be conducted. It merely *establishes a set of principles, of equitable national rules, to which business must adhere before engaging in commerce.* It is concerned with the public interest and the welfare of investors, consumers and labor.

²⁵ For further discussion of this question, reference may be made to the following: MORAWETZ, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS* (1886); WILGUS, *Federal License or Incorporation* (1905) 3 MICH. L. REV. 264-281; OLIPHANT, *CASES ON TRADE REGULATION* (1923); WILSON, *THE NEW FREEDOM* (1913); HENDRICK, *THE POWER TO REGULATE CORPORATIONS AND COMMERCE* (1906); TUGWELL, *INDUSTRY'S COMING OF AGE* (1927); COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* (1924); FRANK, *LAW AND THE MODERN MIND* (1930).

¹ HARPER, *THE LAW OF TORTS* (1933) §294. By charitable corporation is meant any corporation operated primarily for the benefit of the public rather than for private profit but which is not a direct agency of the government.

theories advanced for holding this type of corporation immune from liability in many instances, have resulted in a literal flurry of pros and cons.² Little room seemed to have been left for argument either way, when there appeared on the legal horizon of this state a decision³ that has once more thrust the issue forward and prompted the following analysis of the problem.

Charity has not always assumed the form of the well organized and richly endowed institution that is found at the present day.⁴ In fact its inception was an outgrowth of the development of the more humane religions. Organized charity quite naturally originated in the church.⁵ The church being at the time an integral part of the state, the latter's political doctrine, that the king can do no wrong, was very readily applied to the charitable undertakings of the former,⁶ and hence charities were made immune in their ministrations to the needy.⁷

Perhaps it is needless to point out that the non-liability of charitable corporations to a beneficiary for the negligence of their servants and agents, while acting within the scope of their employment, is the result of our profession's regard for the English judicial opinions on the matter.⁸ Strangely enough, none of the more important of these decisions,⁹ usually cited as authorities, were really in point with our problem. It was rather the *dicta* found in these cases¹⁰ that formed the background of the rulings of many distinguished American jurists. *Heriot's Hospital v. Ross*,¹¹ which has been relied on by nearly all cases applying the trust-fund theory,¹² involved an action for an order directing the admission of an applicant to a charity organized to aid fatherless boys, or in the alternative, a judgment for money damages

² *Daniels v. Rahway Hospital*, 160 Atl. 644 (1932); *Thomas v. Postal Tel. etc. Co.*, 48 S. W. (2d) 422, with Note (1932) 81 U. OF PA. L. REV. 93; (1931) 10 TENN. L. REV. 230; (1936) 6 BOSTON U. L. REV. 169.

³ *Sheehan v. North Country Community Hospital*, 273 N. Y. 163, 7 N. E. (2d) 28 (1937).

⁴ Feezer, *The Tort Liability of Charities* (1928) 77 U. OF PA. L. REV. 191.

⁵ See Note (1936) 2 JOHN MARSHALL L. Q. 234.

⁶ BORCHARD, *GOVERNMENT LIABILITY IN TORT* (1924); (1924) 34 YALE L. J. 1.

⁷ Zollman, *Damaged Liability of Charitable Institutions* (1921) 19 MICH. L. REV. 395; see Note (1936) 2 JOHN MARSHALL L. Q. 234.

⁸ *Corbett v. St. Vincent's Industrial School*, 177 N. Y. 16, 68 N. E. 997 (1903); *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991 (1905); *Gable v. Sisters of St. Francis*, 227 Pa. 254, 75 Atl. 1087 (1910); 14 A. L. R. 572; see Note (1937) 14 TENN. L. REV. 468.

⁹ *Feoffees of Heriot's Hospital v. Ross*, 12 Clark & F. 507, 8 Eng. Reprint 1508 (1848); *Duncan v. Findlater*, 6 Clark & F. 894, 7 Eng. Reprint 934 (1839); *Mersey Docks v. Gibbs*, 1 H. L. Eng. 93, 14 Week Rep. 872 (1866).

¹⁰ See note 9, *supra*.

¹¹ 12 Clark & F. 507, 8 Eng. Reprint 508 (1848).

¹² *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991 (1905); *Downes v. Harper Hospital*, 101 Mich. 555, 60 N. W. 42 (1894); *Cook v. John N. Norton Memorial Infirmary*, 180 Ky. 331, 202 S. W. 874 (1918); *Tollefson v. City of Ottawa*, 228 Ill. 134, 81 N. E. 823 (1907).

for his wrongful exclusion.¹³ Another well-known English decision relied upon by the advocates of immunity, was *Duncan v. Findlater*,¹⁴ which involved the claim against the treasury of a turnpike road. It is interesting to note, that while these decisions were subsequently criticized and ignored as law by the British courts themselves,¹⁵ our tribunals continued, nevertheless, along the ill-directed highway, though their rulings resulted oft-times in obvious injustices to the injured parties.¹⁶

To uphold the doctrine of immunity, the courts have swung with agility from one theory to another. As soon as one proved unsound both in reason and law, another was hurriedly substituted for it. An understanding of some of the more important of these theories will give us a better appreciation of the problem.

*Trust Fund Theory.*¹⁷

One of the earliest of the theories advanced to bolster up the doctrine of immunity was the "Trust Fund" theory. Based on

¹³ The facts involve merely the question of liability for administrative details, and are so inapplicable to the question whether or not the trust might be liable for injuries actually inflicted upon others in the normal transaction of the business of the trust that it is difficult to see why it should ever have been regarded as establishing the law upon the latter question. It is only because of the opinions of the House of Lords where the case was taken upon appeal, that the decision became of any value upon the problem. They concluded that the moneys donated by the benefactors of a charity became part of a trust fund and to give damage out of said fund would be to divert it for a completely different purpose than the settlors intended.

¹⁴ 6 Clark & F. 894, 7 Eng. Reprint 934 (1839). (Case decided that where a statute authorized trustees to raise money for a turnpike road, they could not be used for any other purpose, such as the payment of claims for injuries caused by the negligence of the employees of the trustees. Held that if the thing done comes within the statute, no compensation could be made unless the statute authorized it; and it was not within the statute, why should the public fund be liable to make good the error of the responsible party. The case, of course, did not deal with the question of a charity).

¹⁵ *Hillyer v. St. Bartholomew's Hospital*, 2 K. B. (Eng.) 820 (1909); *Lavere v. Smith Falls Public Hospital*, 35 Ont. L. Rep. 98, 24 D. L. R. 866 (1915). The trust fund theory has no longer a footing in the English law.

¹⁶ *Roosen v. Peter Bent Brigham Hospital*, 235 Mass. 66, 126 N. E. 392 (1920); *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529 (1876); *Jensen v. Maine Eye & Ear Infirmary*, 107 Me. 408, 78 Atl. 898 (1910); *Trustees of Sheppard and Enoch Pratt Hospital*, 130 Md. 265, 100 Atl. 301 (1917); *Hamilton v. Cornwallis General Hospital Ass'n*, 146 Ore. 168, 30 Pac. (2d) 9 (1934).

¹⁷ 2 PERRY, JARVIS—A TREATISE ON THE LAW OF TRUST AND TRUSTEES (6th ed. 1911) § 745, pp. 1214-15; *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453 (1907); *Hogan v. Chicago Lying-In Hospital*, 335 Ill. 42, 166 N. E. 461 (1929); *Farrigan v. Peveav*, 193 Mass. 147, 78 N. E. 855 (1906); *Gable v. Sisters of St. Francis*, 227 Pa. 234, 75 Atl. 1087 (1910); *Wildoner v. Central Poor District of Luzerne County*, 267 Pa. 375, 110 Atl. 175 (1920).

Heriots Hospital v. Ross,¹⁸ it held that the fund created by the benefactors of a charity was intended as a trust, and that there would be an illegal diversion of the trust *res*, from the purposes for which it was set apart, if it was employed to pay damages caused by the negligence of the charity's employees.¹⁹ The weakness of the argument was soon recognized in many jurisdictions, and New York in particular quickly rejected this concept.²⁰

*Waiver Theory.*²¹

The courts of numerous jurisdictions have held that a recipient of charity impliedly exempts his benefactor by contract for injuries inflicted upon himself by the servants of the charitable corporation.²² This theory is logically weak for it rests on the patent fiction that a patient has *voluntarily* relinquished a known right by coming to the hospital or any other charitable institution for aid.²³ After serving in New York for a short time, as a basis for a number of decisions,²⁴ it was indicated in the case of *Hamburger v. Cornell University*,²⁵ that its use had come to an end.

¹⁸ 12 Clark & F. 507, 8 Eng. Reprint 508 (1848).

¹⁹ *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991 (1905). ("The funds and property thus acquired are held in trust and cannot be diverted to the purpose of paying damages for injuries caused by the negligent or wrongful acts of its servants and employees to persons who are enjoying the benefit of the charity. An institution of this character, doing charitable work of great benefit to the public without profit, and depending upon gifts, donations, legacies, and bequests made by charitable persons for the successful accomplishment of its beneficial purposes, is not to be hampered in the acquisition of property and funds from those wishing to contribute and assist in charitable work, by any doubt that might arise in the minds of such intending donors as to whether the funds supplied by them will be applied to the purposes for which they intended to devote them, or diverted to the entirely different purposes of satisfying judgments recovered against the donee because of negligent acts of those employed to carry the beneficial purpose into execution").

²⁰ *Hordern v. Salvation Army*, 199 N. Y. 233, 92 N. E. 626 (1914); *Kellogg v. Church Charity Foundation of Long Island*, 203 N. Y. 191, 96 N. E. 406 (1911).

²¹ *Schloendorff v. Society of New York Hospital*, 211 N. Y. 125, 105 N. E. 92 (1914); *Phillips v. Buffalo General Hospital*, 207 App. Div. 640, 202 N. Y. Supp. 572 (4th Dept. 1924), *aff'd*, 239 N. Y. 188, 146 N. E. 199 (1924).

²² *Powers v. Massachusetts Homeopathic Hospital*, 109 Fed. 294 (C. C. Mass. 1901); *Conklin v. John Howard Industrial Home*, 244 Mass. 222, 112 N. E. 606 (1916); *Van Tassel v. Manhattan Eye & Ear Hospital*, 39 N. Y. State R. 781, 15 N. Y. Supp. 620 (1891); *Mikota v. Sisters of Mercy*, 183 Iowa 1378, 168 N. W. 219 (1918); *Bruce v. Young Men's Christian Ass'n*, 51 Nev. 372, 277 Pac. 798 (1929).

²³ *Phillips v. Buffalo General Hospital*, 239 N. Y. 189, 146 N. E. 199 (1924).

²⁴ *Collins v. New York Post-Graduate Medical School*, 59 App. Div. 63, 69 N. Y. Supp. 106 (2d Dept. 1907); *Joel v. Woman's Hospital*, 89 Hun 73, 35 N. Y. Supp. 37 (1895); *Schloendorff v. Society of N. Y. Hospital*, 211 N. Y. 125, 105 N. E. 92 (1914).

²⁵ 226 N. Y. 625, 123 N. E. 868 (1919).

*Public Policy Theory.*²⁶

Closely akin to the theory of implied waiver is that of public policy, which holds that to subject a charitable corporation to liability is against public policy, since it is better that "one suffer injury without compensation than for the public to be deprived of the benefit of the charity."²⁷ No further argument, the author feels, is necessary to refute this concept than the sound legal contention advanced by the court in *Glavin v. Rhode Island*.²⁸ "In our opinion", the court stated, "the argument (the one advanced for upholding the theory of public policy) will not bear examination". The public is doubtless interested in the maintenance of a great public charity, such as the Rhode Island Hospital is; but it also has an interest in obliging every person and every corporation which undertakes the performance of a duty to perform it carefully, and to that extent, therefore, it has an interest against exempting any such person and any such corporation from liability for its negligence. The court cannot undertake to say that the former interest is so supreme that the latter must be sacrificed to it. Whether it shall or not is not a question for the court but for the legislature."²⁹

*New York Theory.*³⁰

In New York a special application or exception to the doctrine of *respondeat superior* has been adhered to. Doctors and nurses, the courts opined, were not mere servants and agents of a charitable corporation, but were rather independent contractors for whom the hospital had provided a place to aid the suffering.³¹ "The hospital, it-

²⁶ *Duncan v. Nebraska Sanatorium etc. Ass'n*, 92 Neb. 162, 137 N. W. 1120 (1912); *Currier v. Dartmouth College*, 117 Fed. 144, 54 C. C. Ga. 430 (1902); *Lindler v. Columbia Hospital*, 98 S. C. 25, 81 S. E. 512 (1914); *Vermillion v. Women's College of Due West*, 104 S. C. 197, 88 S. E. 649 (1916).

²⁷ *Vermillion v. Women's College of Due West*, 104 S. C. 197, 200, 88 S. E. 649 (1916). The rule excepting charities from liability for their torts is merely an exception to the rule of *respondeat superior*, itself based on public policy.

²⁸ 12 R. I. 411 (1880).

²⁹ Following the advice given by this opinion, the Rhode Island legislature soon passed an act giving charitable corporations such an immunity.

³⁰ *Hamburger v. Cornell University*, 240 N. Y. 328, 148 N. E. 543 (1925); *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 96 N. E. 406 (1911); *Barr v. Brooklyn Children's Aid Society*, 190 N. Y. Supp. 296 (1920); *Mills v. Society of N. Y. Hospital*, 274 N. Y. Supp. 233 (1934); *Grawunder v. Beth Israel Hospital Ass'n et al.*, 242 App. Div. 56, 272 N. Y. Supp. 171 (2d Dept. 1934).

³¹ See note 30, *supra*. *Wilson v. Brooklyn Homeopathic Hospital*, 97 App. Div. 37, 89 N. Y. Supp. 619 (2d Dept. 1904); *Cunningham v. Sheltering Arms*, 135 App. Div. 178, 119 N. Y. Supp. 1033 (1st Dept. 1909); *Bernstein v. Beth Israel Hospital*, 236 N. Y. 268, 140 N. E. 694 (1923) (The Hospital undertakes not to heal or attempt to heal through the agency of others but merely to supply others who will heal on their own responsibility).

was alleged, does not undertake to act through them, but merely to procure them to act on their own responsibility."³² "The doctrine of *respondet superior* could not be invoked, for there was no relationship of master and servant upon which to predicate it; and as a necessary consequence thereof, the hospital could not be held for the wrongs of these parties. The hospital's immunity from liability for the errors of its physicians and nurses was applied in the case of a university, also held to be a charitable institution. Here, a like immunity for wrongs of professors, instructors or other members of its staff of teachers was declared to exist.³³ The only burden placed upon the shoulders of the hospital or school was the duty to select the faculty or doctors with due care. However, the question of whether or not there would be liability for the ordinary acts of administrative agents acting in an administrative capacity was an undecided one in New York until the advent of *Sheehan v. North Country Community Hospital*.³⁴ The highest court had never given a direct opinion on the problem prior to this case. True it is that Judge Cardozo, in *Hamburger v. Cornell University*,³⁵ indicated that liability would have to be shouldered by the corporation, but the allegation was pure *dicta* after an admission that the question was an open one. In truth, nine years after the *Hamburger* case, a lower tribunal stated:

"The exemption of charitable corporations from liability for the negligence of its agents and servants upon one theory or another has been firmly established in the law of almost every state * * *. As between the dispenser of public benevolence and the unfortunate victim of negligence, the law has determined to protect the former at the expense of the latter. As a matter of public policy no distinction can be made between administrative and non-administrative acts."³⁶

This fallacious reasoning was completely overcome by the most recent decision on the subject.³⁷

Sheehan v. North Country Community Hospital.³⁸

For the first time in the history of the Court of Appeals was the question squarely presented, in the above case, as to whether a char-

³² *Schloendorff v. Society of N. Y. Hospital*, *supra* note 30.

³³ *Hamburger v. Cornell University*, 240 N. Y. 328, 148 N. E. 543 (1925).

³⁴ 273 N. Y. 163, 7 N. E. (2d) 28 (1937).

³⁵ See note 30, *supra*.

³⁶ *Stearns v. Ass'n of the Bar of New York*, 154 Misc. 71, 276 N. Y. Supp. 390 (1934).

³⁷ *Sheehan v. North Country Community Hospital*, 273 N. Y. 163, 7 N. E. (2d) 28 (1937).

³⁸ See note 37, *supra*.

itable institution, (not itself in default of any non-delegable duty), should be exempt from liability to a beneficiary for personal harm caused by the negligence of one acting as its mere servant or employee. The issue was evoked in an action brought by a patient of the defendant hospital, a charitable institution, to recover for personal injuries sustained through a collision between the ambulance in which she was riding and another vehicle, alleged to have been occasioned through the negligence of both. As would be expected the defense interposed was the time-worn doctrine that a charitable corporation is immune from liability to a beneficiary for an injury caused through the negligence of its servants or agents. The court weighed both sides thoroughly and this time unflinchingly stepped forward and proclaimed, "that to impose liability is to beget careful management; and that no conception of justice demands that an exception to the rule of *respondet superior* be made in favor of the resources of a charity and against the person of a beneficiary injured by the tort of a mere servant or employee functioning in that character. It is our judgment that the greater weights are in this scale."

The inequity of applying the doctrine of immunity in numerous instances was early recognized by the courts and they sought to curtail its effect, no matter what particular theory they happened to be relying on at the moment. Practically every case holding a charitable corporation not liable stated an exception where the servant or agent was negligently selected.³⁹ To enable the charity to protect itself behind the shield of immunity, it was necessary to show due care in the selection of the employees, who later turned out to be the tortfeasors. "What difference can it make whether the tort is that of the corporation itself or its superior officers and agents or that of its servants? Liability for one would as effectually embarrass or sweep away the charity as the others. It would, therefore, be illogical to admit liability for one and deny it to the other."⁴⁰

A further encroachment on the doctrine was the refusal to exempt charities from liability to their own servants.⁴¹ They were able to

³⁹ *Sisters of Charity of Cincinnati v. Duvelius*, 123 Ohio St. 52, 173 N. E. 737 (1930); *Wilson v. N. Y. etc. College*, 122 Misc. 452, 204 N. Y. Supp. 175 (1924); *Williams v. Union Pacific R. R.*, 20 Wyo. 392, 124 Pac. 505 (1912); *Jackson v. Atlantic Goodwill Industries, Inc.*, 46 Ga. App. 425, 167 S. E. 702 (1933); *Nicholson v. Atchison, Topeka & Santa Fe Hospital Ass'n*, 97 Kan. 480, 155 Pac. 920 (1916).

⁴⁰ *Vermillion v. Women's College of Due West*, 104 S. C. 197, 88 S. E. 649 (1916).

⁴¹ *Horden v. Salvation Army*, 199 N. Y. 233, 92 N. E. 626 (1910); *Hewett v. Woman's Hospital Aid Ass'n*, 73 N. H. 556, 64 Atl. 190 (1906) (Nurse collected for hospital's negligence in failing to notify her that a certain disease was contagious. Since property of defendant is held for general purpose of maintaining a hospital without other specific limitations, it is no more exempt from being appropriated to payment of damages occasioned by negligence of hospital than is the property of any individual which he holds for commercial or charitable purposes, for the consequences of his negligence).

bring action and recover the same as any employee of a corporation could, where there had been a breach of duty towards him. The responsibility of the charitable corporation was not held to be less in this respect, than that which is shouldered by any private individual or entity.⁴² Perhaps even more strongly was the liability held to exist towards strangers.⁴³ It most assuredly is a patent contradiction to exempt a charity from liability towards beneficiaries while at the same time allowing a stranger to recover.⁴⁴ We may note, furthermore, that it has never been greatly disputed that charitable corporations are liable for breach of contract;⁴⁵ and it is difficult to understand, therefore, why the charity should not be as liable for breach of a duty imposed by law as it is for a breach of duty imposed by their own acts.⁴⁶

The dubious reasons for holding a charity immune from liability are now, in the opinion of the author, defunct. It must be constantly borne in mind that the rule of exemption arose at a time when very few individuals supported the charities; and hence their resources were of necessity very limited. That type of charity is now a thing of the past.⁴⁷ The modern philanthropic corporation with its board of directors, with its appeal to the many rather than the few, and with its usually large resources at hand is quite different from the charitable institution of yesteryear. We have always maintained that where an individual seeks to aid another, he is liable in damages for

⁴² See note 41, *supra*.

⁴³ *Van Ingen v. Jewish Hospital of Brooklyn*, 99 Misc. 655, 164 N. Y. Supp. 832 (1917) (A charitable corporation is liable for its servants' negligence except to its beneficiaries and patients. Hospital held liable where its ambulance driver negligently ran over a person while answering a police call); *Basabo v. Salvation Army*, 35 R. I. 22, 85 Atl. 120 (1912) ("The defendant corporation although it is a charitable corporation is liable as any other corporation, for injuries to third persons caused by the negligence of its servants and agents while employed for its purposes, even though it is not shown or alleged that there has been any lack of care or diligence on the part of the defendant in the selection or retention of such servants or agents."); *Gallon v. House of Good Shepherd*, 158 Mich. 361, 122 N. W. 631 (1909); *Alabama Baptist Hospital Board v. Carter*, 226 Ala. 109, 145 So. 443 (1932).

⁴⁴ *Daniels v. Rahway Hospital*, 160 Atl. 644 (1932).

⁴⁵ *Ward v. St. Vincent's Hospital*, 39 App. Div. 624, 57 N. Y. Supp. 784 (1st Dept. 1899); *Roche v. St. John's Riverside Hospital*, 96 Misc. 289, 160 N. Y. Supp. 401 (1916), *aff'd*, 178 App. Div. 885, 161 N. Y. Supp. 1143 (2d Dept. 1916) (*Held*, that assuming defendant was a charitable hospital, which fact did not appear in the pleadings, it was liable for breach of contract to care for an infant, by which he was permitted to be burned by getting against a steam pipe).

⁴⁶ It is well to note that charities are liable for the nuisances they create, *i.e.* digging pitfalls on their grounds in which strangers are hurt. *Powers v. Massachusetts' Homeopathic Hospital*, 109 Fed. 294, 304 (C. C. Mass. 1901); see 28 Ky. L. Rep. 1129.

⁴⁷ *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4 (1915); *Mulliner v. Evangelischer Diakonniessenverein*, 144 Minn. 392, 175 N. W. 699 (1920); see (1932) 81 U. OF P. A. L. REV. 93.

any injuries occasioned thereby through negligence to the beneficiary.⁴⁸ The same would hold true had an agent of the benefactor, rather than the benefactor himself, inflicted the injuries.⁴⁹ Why, therefore, should we refuse to attribute the same liability to a charitable corporation? Judge Loughran, in *Sheehan v. North Country Community Hospital*,⁵⁰ has readily contradicted the arguments of those who claimed that, "there can be no principle of natural justice which would require one engaged in charitable work to be liable to the recipients of his charity for the wrongs of others."⁵¹ What principle of natural justice is there which requires the widow and children of the deceased, rather than the corporation, to suffer the loss incurred through the fault of the corporation's employees it is hard to see. It is necessary for a charitable corporation to administer its functions through agents in the same way as any other corporation. It harms and benefits third parties exactly as they are harmed and benefited by others. To the injured party the loss is the same as though the injury had been sustained through the negligence of a private agency. Why, therefore, should the courts compel the person damaged to contribute the amount of his loss to even the most worthy institution?⁵²

The latest edict⁵³ of the highest tribunal in the Empire State on the question of a charitable corporation's liability has not said anything about the institution's liability for the negligences of its doctors and surgeons. As one can see, no change of responsibility has been brought about in respect to their torts; and a change in the court's position on this issue does not seem likely. Sound principles of agency have been relied on to make corporations immune for their torts.⁵⁴ Even the most eminent jurists have steadily proclaimed that they will not hold the charity liable where a doctor or professor has been found lacking in care, while at the same time indicating that liability will be imposed for the wrongs of the mere servants.⁵⁵ Therefore, we may state that under the present law of New York a char-

⁴⁸ *Slater v. Illinois Cent. R. R.*, 209 Fed. 480 (C. C. Tenn. 1911); *Dyche v. Vicksburg S. P. R. R.*, 79 Miss. 361, 30 So. 711 (1901); HARPER, *THE LAW OF TORTS* (1933) § 81 (Where one is hurt by reason of defendant's blameless and innocent conduct, defendant is under no duty to aid him, but if he undertakes to render assistance, it must be done with reasonable care).

⁴⁹ *Northern Central R. R. v. State*, 29 Md. 420, 96 Am. Dec. 545 (1848); see note 48, *supra*.

⁵⁰ 273 N. Y. 163, 7 N. E. (2d) 28 (1937).

⁵¹ *Wallace v. Casey Co.*, 132 App. Div. 35, 44, 116 N. Y. Supp. 394 (2d Dept. 1909).

⁵² *Mulliner v. Evangelischer Diakonniessenverein*, 144 Minn. 392, 175 N. W. 699 (1920).

⁵³ *Sheehan v. North Country Community Hospital*, 273 N. Y. 163, 7 N. E. (2d) 28 (1937).

⁵⁴ *Schloendorff v. Society of New York Hospital*, 211 N. Y. 125, 105 N. E. 92 (1914); *Hillyer v. St. Bartholomew's Hospital*, 2 K. B. 820 (1909); *Aderhold v. Bishop*, 94 Okla. 203, 221 Pac. 752 (1925); *Schneider v. New York Telephone Co.*, 249 App. Div. 400, 292 N. Y. Supp. 399 (1st Dept. 1937).

⁵⁵ See note 54, *supra*.

*itable corporation will be held liable for the torts of its mere servants and agents but not for those whom the court considers to be independent contractors.*⁵⁶

ROBERT I. RUBACK.

RIGHTS OF HOLDERS OF PREFERRED STOCK TO DIVIDENDS IN CON-
JUNCTION WITH DISTRIBUTION OF SURPLUS TO COMMON
STOCKHOLDERS.

A legal problem arises when the certificate of incorporation or other certificate creates preferred stock, entitling the holder to a specific preferential dividend before anything is paid to the common stockholders, but contains no provision whatever respecting its right to share in any surplus profit in excess of the stipulated dividend.¹ Three different accountings can be made of the surplus in the distribution of dividends in such event. 1. The preferred will receive its stipulated dividend; the common will receive an equal share and the balance will be divided *pro rata* between both classes. 2. The preferred will receive its stipulated dividend, and the common will receive the balance even though it may be in excess of the amount paid to the preferred. 3. The preferred will receive its stipulated dividend and then share with the common in the balance, so that the preferred will always get the greater share to the extent of its preference.² The problem can be framed simply. Does the preferred stockholder, in the absence of a contractual provision, have any right at all to participate in the distribution of the dividend fund, after it has been paid the amount of the preference?

Two theories have been adopted by the courts in arriving at a solution. 1. The preferred stockholder presumptively yields nothing in compensation for the benefits he receives; that he has and holds

⁵⁶ Doctors, nurses, professors, instructors, etc.

It is interesting to note that since this article has been submitted for publication, one similar to it has been published in 12 *IND. L. J.* 96 and reprinted in the *New York Law Journal* of Nov. 13, 1937 under the heading of "The Liability of Charitable Corporations for Torts of Servants". The author, building his article around *Sheehan v. North Country Community Hospital*, 273 *N. Y.* 163, 7 *N. E. (2d)* 28 (1937), arrives at practically the same conclusion as the present writer. He states that "There is ample reason to believe that other courts will be influenced by this present view (to apply the doctrine of respondeat superior to charitable corporations where the tort is committed by a mere employee while acting in that capacity) because New York decisions are considered to be the leading authorities in this branch of law".

¹ 12 *FLETCHER, CYC. CORP.* (Perm. ed.) § 5448.

² Thompson, *Respective Rights of Preferred and Common Stockholders in Surplus Profits* (1921) 19 *MICH. L. REV.* 463.