

CHARITABLE HOSPITALS' LIABILITY FOR NEGLIGENCE: ABROGATION OF THE MEDICAL-ADMINISTRATIVE DISTINCTION

DELIMITING the extent of a hospital's liability for the negligent acts of its doctors, nurses, and employees has, during the past half-century, proven to be a particularly perplexing judicial problem.¹ Principles based upon variant reasoning and indicating no small degree of confusion have been propounded,² reflecting two largely incompatible influences: the theory that a charity should be favored by the law; and the theory that, like any legal entity, even a charitable institution has a duty to exercise due care in the course of its operations.

Originally, virtual unanimity³ obtained in exempting charitable hospitals from respondeat superior liability, owing to the widespread following of *McDonald v. Massachusetts General Hospital*.⁴ To rationalize this position, the courts generally have adopted either a trust fund theory,⁵ an implied waiver theory,⁶ a public-policy theory,⁷ or

¹ See Gerber and Tyree, *Liability of Hospitals for Negligence*, *The Modern Hospital*, May, 1957, p. 84; HARPER AND JAMES, *TORTS* §§ 29.16-17 (1956).

² In *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810, 812 (D.C. Cir. 1942), the Court said: ". . . the cases are almost riotous with dissent. Reasons are even more varied than results. These are earmarks of law in flux. They indicate something wrong at the beginning or that something has become wrong since then. They also show that correction though in process, is incomplete."

³ Decisions from almost every jurisdiction have advocated at some time a general rule of immunity. Gerber and Tyree, *supra* note 1, at 88.

⁴ 120 Mass. 432 (1876). This decision cited as its sole authority for non-liability of charities an English case, *Holliday v. St. Leonard's*, 11 C.B.N.S. 192, 142 Eng. Rep. 769 (1860). This English case, however, had been based on dictum in *Duncan v. Findlater*, 6 Clark & Fin. 894, 71 Eng. Rep. 934 (1839), which had been expressly overruled in *Mersey Docks Trustees v. Gibbs*, L.R. 1 H.L. 93 (1866). The *Holliday* case had itself been overruled. See *Foreman v. Mayor of Canterbury*, L.R. 6 Q.B. 214 (1871). "The charity immunity doctrine originated in England and was transplanted to this country by judicial accident." 20 U. CIN. L. REV. 412 (1951). Excellent discussions of this oddity appear in: *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942); *Andrews v. Y.M.C.A. of Des Moines*, 226 Iowa 374, 284 N.W. 186 (1939).

⁵ Arkansas, Maryland, Massachusetts and Oregon base charitable immunity on the trust fund theory. *Arkansas Valley Co-op. Rural Electric Co. v. Elkins*, 200 Ark. 883, 141 S.W.2d 538 (1940); *Loeffler v. Sheppard & Enoch Pratt Hospital*, 130 Md. 265, 100 Atl. 301 (1917); *Roosen v. Peter Bent Brigham Hospital*, 235 Mass. 66,

simply, a nonapplicability of respondeat superior theory.⁸ Analytically, however, these four theories exhibit but different facets of the same public policy consideration.⁹

Nevertheless, the more recent decisions, evincing increased dissatisfaction with the unqualified exemption rule, have effectively abrogated it in some respects in most jurisdictions.¹⁰ Illustrative is *President and*

126 N.E. 392 (1920); *Gregory v. Salem General Hospital*, 175 Ore. 464, 153 P.2d 837 (1944).

In Pennsylvania, the trust fund theory is still the principal basis for charitable immunity. *Bond v. City of Pittsburgh*, 368 Pa. 404, 84 A.2d 328 (1951); *Gable v. Sisters of St. Francis*, 227 Pa. 254, 75 Atl. 1087 (1910). *But cf.* note 38 *infra*, and text thereto.

The theory is also still applicable to the extent that the funds of the charitable institution are actually held in trust in Illinois, Tennessee and Colorado. *Moore v. Moyle*, 405 Ill. 555, 92 N.E.2d 81 (1950); *Vanderbilt University v. Henderson*, 23 Tenn. App. 135, 127 S.W.2d 284 (1938); *O'Connor v. Boulder Colo. Sanitarium Ass'n*, 105 Colo. 259, 96 P.2d 835 (1939).

⁸ See *Wilcox v. Idaho Falls Latter Day Saints Hospital*, 59 Idaho 350, 82 P.2d 849 (1938), and cases there cited; *Powers v. Massachusetts Homoeopathic Hospital*, 109 Fed. 294 (1st Cir. 1901); *Bruce v. Central Methodist Episcopal Church*, 147 Mich. 230, 110 N.W. 951 (1907); *cf.* *Weston's Adm'x v. Hospital of St. Vincent of Paul*, 131 Va. 587, 107 S.E. 785 (1921).

⁹ See *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595; *Jurjevich v. Hotel Dieu*, 11 So.2d 632 (La. App. 1943); *Jones v. St. Mary's Roman Catholic Church*, 7 N.J. 533, 82 A.2d 187 (1951); *D'Amato v. Orange Memorial Hospital*, 101 N.J.L. 61, 127 Atl. 340 (1925); *Caughman v. Columbia Y.M.C.A.*, 212 S.C. 337, 47 S.E.2d 788 (1948). The trust fund theory has been expressly adopted as a vehicle to express the public policy of Kentucky. *Emery v. Jewish Hospital Ass'n*, 193 Ky. 400, 236 S.W. 577 (1921).

⁸ Charitable institutions have been held not subject to liability resulting from master-servant relationships because the hospital performs a quasi-public function and seeks no profit from its work. *Morrison v. Henke*, 165 Wis. 166, 160 N.W. 173 (1916).

⁹ "The 'trust fund theory' comprehends all that is involved in 'public policy,' with only an apparent difference in approach. This is true likewise of 'respondeat superior' and 'implied waiver.'" *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810, 825 (D.C. Cir. 1942).

¹⁰ "Almost every jurisdiction recognizes at least one of these modifications of rules [of qualified liability or qualified immunity] and some recognize several." Gerber and Tyree, *supra* note 1, at 93. A survey of the liability status of charitable institutions appears in 20 U. CIN. L. REV. 412 (1951). Absolute immunity exists only in a few states, among which are Massachusetts and Wisconsin. *Mastrangelo v. Maverick Dispensary*, 115 N.E.2d 455 (Mass. 1953); *Roosen v. Peter Bent Brigham Hospital*, 235 Mass. 66, 126 N.E. 392 (1920); *Schau v. Morgan*, 241 Wis. 334, 6 N.W.2d 212 (1942); *Schumaker v. Evangelical Deaconess Soc'y*, 218 Wis. 169, 260 N.W. 476 (1935); *cf.* *Smith v. Congregation of St. Rose*, 265 Wis. 393, 61 N.W.2d 896 (1953). Pennsylvania also appears to have retained full immunity. *Gable v. Sisters of St. Francis*, 227 Pa. 254, 75 Atl. 1087 (1910). *But see*, note 38 *infra*. No decisions have been found on the subject in New Mexico or South Dakota.

Directors of Georgetown College v. Hughes,¹¹ wherein Mr. Justice Rutledge¹² stated:

The rule of immunity is out of step with the general trend of legislative and judicial policy in distributing losses incurred by individuals through the operation of an enterprise among all who benefit by it rather than in leaving them wholly to be borne by those who sustain them. The rule of immunity itself has given way gradually. . . . It is disintegrating.¹³

Thus, liability has increasingly been imposed on charitable institutions for injuries to strangers and paying patients,¹⁴ and for negligence in the selection and retention of employees.¹⁵

¹¹ 130 F.2d 810 (D.C. Cir. 1942).

¹² All six justices concurred as to the hospital's liability, but were divided as to the reason for liability. Justices Miller and Edgerton agreed with Justice Rutledge's opinion adopting the rule of absolute liability; Chief Justice Groner, Justices Stephens and Vinson were of the opinion that the hospital should be liable because the person was a stranger to the charity.

¹³ 130 F.2d 810, 827.

¹⁴ Liability for injuries to strangers is based on the ground that such persons are not beneficiaries of the charity but, rather, are innocent, uninterested outsiders. Even if a charity may be exempted from liability to its beneficiaries, public policy could not allow the immunity to be extended to strangers. "A charity should not be permitted to inflict injury on some without the right of redress in order to bestow charity upon others." *Cohen v. General Hospital Soc'y of Connecticut*, 113 Conn. 188, 154 Atl. 435 (1931). In the *Cohen* case plaintiff was the husband of a patient waiting to remove the patient. *Accord: Lindroth v. Christ Hospital*, 21 N.J. 588, 123 A.2d 10 (1956) (plaintiff was a surgeon injured in the hospital elevator); *Daniels v. Rahway Hospital*, 10 N.J. Misc. 585, 160 Atl. 644 (1932) (plaintiff was driving his automobile on a public highway when struck by a hospital ambulance); *Cowans v. North Carolina Baptist Hospitals*, 197 N.C. 41, 147 S.E. 672 (1929) (plaintiff was a servant of the hospital).

Courts have allowed exception to the immunity rule on the basis that a paying patient, like a stranger, is not a beneficiary of the hospital's charitable activities. *Wheat v. Idaho Falls Latter Day Saints Hospital*, 297 P.2d 1041 (Idaho 1956); *Mississippi Baptist Hospital v. Holmes*, 214 Miss. 906, 55 So.2d 142 (1951). The *Mississippi Baptist Hospital* case contains an excellent discussion explaining why each of the complete immunity theories is inapplicable. See note 36 *infra*. Immunity is based on the giving and receiving of charity rather than on the nature of the hospital or institution. *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4 (1915). Liability to a paying patient on the basis of an implied contract of reasonable care was refused in *Roosen v. Peter Bent Brigham Hospital*, 235 Mass. 66, 126 N.E. 392 (1920). However, ". . . [most] states that accept the rule of the hospital's immunity make it applicable to paying and non-paying patients alike." Gerber and Tyree, *supra* note 1, at 95, and cases there cited.

¹⁵ A charitable hospital is held liable for the negligent selection and retention of its employees on the ground that the institution itself, rather than an employee, is negligent.

This more recent trend is well exemplified by decisions in New York, where the first indication of reluctance to follow the *McDonald* rule was evidenced in the adoption of a unique qualification, known as the *Schloendorff* rule.¹⁶ Recognizing that there were certain acts performed by doctors and nurses which, although unrelated to their professional or medical activities, bore some relationship to the administration of the hospital, this latter rule imposed liability on the hospital if a negligent injury occurred in connection therewith.¹⁷ That this rule did not operate without some dissatisfaction, however, is illustrated in

The selection and retention is often referred to as a "corporate act" to justify the exemption from immunity to the respondeat superior doctrine. *Edwards v. Grace Hospital Soc'y*, 130 Conn. 568, 36 A.2d 273 (1944); *Norfolk Protestant Hospital v. Plunkett*, 162 Va. 151, 173 S.E. 363 (1934). An interesting approach was taken in *Haliburton v. General Hospital Soc'y of Connecticut*, 133 Conn. 61, 48 A.2d 261 (1946), where the court said that a charitable hospital is liable for the negligent acts of an employee, but that it becomes exempt from this liability upon the careful selection and retention of employees.

" . . . [i]t should be pointed out that most of the courts' pronouncements on this subject have not resulted from direct decisions on the question. . . . Instead, it appears that they are, largely, the result of dicta. . . . In jurisdictions adhering to the rule of immunity, the matter is rather generally accepted." Gerber and Tyree, *supra* note 1, at 98.

¹⁶ This "rule" is named after a 1914 case, *Schloendorff v. Soc'y of New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914).

It should be pointed out, however, that in *Hordern v. Salvation Army*, 199 N.Y. 233, 92 N.E. 626 (1910), the New York court, while repudiating the trust fund theory, apparently adopted a modified implied waiver theory. This was expressly rejected in *Sheehan v. North Country Community Hospital*, 273 N.Y. 163, 7 N.E.2d 28 (1937).

¹⁷ Actually *Schloendorff* was a refusal to extend the implied waiver theory to intentional torts, and embodied a modified independent contractor theory. The court there merely suggested the medical-administrative dichotomy.

The independent contractor idea continued to be useful to New York courts and was extended in *Phillips v. Buffalo General Hospital*, 239 N.Y. 188, 146 N.E. 199 (1924), where a hospital was held not to be liable for an orderly's tort, while the orderly was performing a job usually handled by a nurse.

The suggestion made in *Schloendorff* was again recognized in the Appellate Division, in *Brown v. St. Vincent's Hospital*, 222 App. Div. 402, 226 N.Y.S. 317 (1928): "In conducting this business the corporation [a charitable hospital] must have employees, who are charged with administrative functions. To such persons it is, of course, liable on its contract of employment, and it may incur liability for the acts of such employees under the doctrine of respondeat superior. . . ." In 1940, the New York court acknowledged that it had become settled that even a charitable hospital is liable for the acts of its servants, stating that "the liability depends not so much upon the title of the individual whose act or omission caused the injury, as upon the character of the act itself." *Dillon v. Far Rockaway Beach Hospital*, 284 N.Y. 176, 180, 30 N.E.2d 373, 374 (1940).

Berg v. New York Soc. for the Relief of the Ruptured and Crippled.¹⁸ There, the Appellate Division refused to apply the rule to exculpate a hospital for a negligently performed "medical" act, since the tort had been committed by a technician, without professional or medical status.¹⁹ It further suggested that the Court of Appeals reappraise the underlying rationale of the medical-administrative dichotomy, pointing out that a hospital is virtually the only employer exempt from liability for its employees' negligence.²⁰

This opportunity to reconsider the scope of the charitable immunity rule was presented to the New York Court of Appeals in the recent case of *Bing v. Thunig*.²¹ There, the plaintiff, severely burned in the course of an operation owing to the negligence of the defendant hospital's nurses,²² recovered in the trial court against the hospital and the doctor who performed the operation. The Appellate Division reversed as to the hospital, however, on the ground that the injury resulted from a "medical" rather than an "administrative" act.²³ The Court of

¹⁸ 1 N.Y.2d 499, 136 N.E.2d 523 (1956). See Note, 10 Sw. L.J. 317 (1956). Many difficulties and injustices under the *Schloendorff* rule because of the sharp line drawn between a medical and an administrative act are noted. Acts of preparation immediately before an operation, for example, have become defined as medical acts, ". . . no matter how simple or how far removed from the concept of a professional act. . . ." Consequently, those definitions must be deemed arbitrary and unsatisfactory because they do not have as their focal point the element of discretion which is paramount in the underlying rule." 10 Sw. L.J. 317, 318 (1956).

¹⁹ "She was a salaried employee doing routine work requiring a minimum of skill and training. Therefore, . . . we hold that this particular hospital as the employer of this particular young woman is liable for her negligence." *Berg v. N.Y. Soc'y, for the Relief of the Ruptured and Crippled*, 1 N.Y.2d 499, 502, 136 N.E.2d 523, 524 (1956).

²⁰ "Modern hospitals hire on salary not only clerical, administrative and house-keeping employees but also physicians, nurses and laboratory technicians of many kinds. Not only do they furnish room and board to patients but they sell them services which are medical in nature. . . . What reason compels us to say that of all employees working in their employers' businesses, the only ones for whom the employers can escape liability are the employees of hospitals?" *Berg v. N.Y. Soc'y for the Relief of the Ruptured and Crippled*, 1 N.Y.2d 499, 502, 136 N.E.2d 523, 524 (1956).

²¹ 2 N.Y.2d 656, 143 N.E.2d 3 (1957).

²² "[The nurses] had been instructed, not only to exercise care that none of the [inflammable] fluid dropped on the linen [on which the plaintiff was lying], but to inspect it and remove any that had become stained or contaminated. However, they made no inspection, and the sheets originally placed under the patient remained on the table throughout the operation." *Bing v. Thunig*, 2 N.Y.2d 656, 660, 143 N.E.2d 3, 4 (1956).

²³ *Bing v. Thunig*, 1 App.Div.2d 887, 149 N.Y.S.2d 358 (1956). Three of the Appellate Division judges voted to reverse, two to affirm. The decision of the majority was on the ground that the doctor was primarily responsible that no in-

Appeals,²⁴ responding to the challenge raised in the earlier *Berg* decision, then reversed and specifically repudiated the *Schloendorff* rule,²⁵ declaring that there is no longer any reason to immunize a hospital from respondeat superior liability.²⁶ Furthermore, the court dealt summarily with the contention that doctors and nurses are independent contractors,²⁷ pointing out that other highly-skilled employees are considered servants for the purpose of imposing vicarious liability upon their employers,²⁸ and, moreover, the identical acts would, if performed in a New York public hospital, subject the institution to liability.²⁹

Fundamental to this willingness to apply respondeat superior liability to charitable institutions is an awareness of changing public policy

flammable gasses were in the area of the operation, and that the evidence did not establish any instructions or rules requiring the nurses to do anything with respect to removal of the contaminated linen. The dissenters decided that it was a hospital rule that nurses remove such contaminated linen and that failure to do so would be administrative negligence.

²⁴This decision was not unanimous. Chief Judge Conway, in a separate opinion, concurred in the result but dissented to the abandonment of the medico-administrative act distinction on the ground that the survival of small, voluntary hospitals depended on this exemption from liability. *Bing v. Thunig*, 2 N.Y.2d 656, 667, 143 N.E.2d 3, 8 (1957).

²⁵Two reasons were given in the *Schloendorff* case for exempting hospitals from liability for the negligence of doctors and nurses performing medical acts. The first was that one who accepts charitable treatment must be deemed to have waived any right to recover for injuries due to the benefactor's negligence, but this since has been abandoned as a fiction. See *Phillips v. Buffalo General Hospital*, 239 N.Y. 188, 146 N.E. 199 (1924); *Sheehan v. North Country Community Hospital*, 273 N.Y. 163, 7 N.E.2d 28 (1937). The second reason, that such professional persons as doctors and nurses should be deemed independent contractors, is thus the basic proposition under consideration.

²⁶"Hospitals should, in short, shoulder the responsibilities borne by everyone else. There is no reason to continue their exemption from the universal rule of respondeat superior." *Bing v. Thunig*, 2 N.Y.2d 656, 666, 143 N.E.2d 3, 8 (1957).

²⁷"The second ground—that professional personnel, such as doctors, nurses and internes, should be deemed independent contractors, though salaried employees—is inconsistent with what they have been held to be in every other context and, to a large extent, even this one." *Bing v. Thunig*, 2 N.Y.2d 656, 663, 143 N.E.2d 3, 6 (1957).

²⁸Under the *Schloendorff* rule, the skill or profession of the doctor became the criterion of the hospital's liability rather than the fact of his employment" . . . a test which . . . is without legal or logical basis. One might with equal justice say that the owner of any kind of public transportation is not responsible as master for the acts of its skilled employees engaged in flying its airplanes, driving its buses or locomotives or sailing its ships; or that the employer of lawyers or accountants would be free from responsibility for their negligence." *Bobbe, Tort Liability of Hospitals in New York*, 37 CORNELL L.Q. 419, 428 (1951).

²⁹See *Becker v. City of New York*, 2 N.Y. 1 220, 140 N.E.2d 262 (1957).

considerations.³⁰ Courts initially were reluctant to hold charitable institutions liable for the tortious conduct of their employees, fearing that the resultant large outlays in assessed damages might cause their disappearance and so force the state to assume their functions.³¹ The need for this type of indirect subsidy, however, is no longer significant, in that charities have become better organized and in that hospitals have become big businesses with large asset holdings and are, accordingly, better enabled to withstand such suits.³² Thus, a hospital should no longer be excused from the usual rules of liability for negligence simply for fear that the charitable function it performs may thus be impaired.³³ A second factor underlying the change in judicial attitude toward respondeat superior liability is the increased availability of hospital liability insurance.³⁴ Since hospitals normally expect to carry a number of forms of insurance,³⁵ the additional burden of liability insurance would hardly

³⁰ See *Avellone v. St. John's Hospital*, 165 Ohio St. 467, 135 N.E.2d 410 (1956); *Pierce v. Yakima Valley Memorial Hospital Ass'n*, 43 Wash.2d 162, 260 P.2d 765 (1953); *Haynes v. Presbyterian Hospital Ass'n*, 241 Iowa 1269, 45 N.W.2d 151 (1950). See note 36 *infra*, indicating the many states which have adopted a rule of full liability.

³¹ "We need both the large and small voluntary hospital. The alternative is public hospitals supported by county or State or stock county hospitals operating as businesses organized for profit." *Bing v. Thunig*, 2 N.Y.2d 667, 668, 143 N.E.2d 9, 10 (1957) (concurring opinion). *Bobbe, supra* note 28, suggests, however, that those charitable hospitals in states without the immunity rule have survived.

³² An excellent résumé of the change in conditions is given in *Andrews v. YMCA of Des Moines*, 226 Iowa 374, 284 N.W. 186 (1939). See also, *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P.2d 220 (1951); *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942). The Kentucky court, on the other hand, stated: "We are not convinced. . . . If immunity from tort be abolished from charitable institutions, larger subscriptions and donations must be obtained to meet heavy premiums on liability insurance, and the present enormous operating expenses of such institutions will undoubtedly mount to dizzy heights." *Forest v. Red Cross Hospital*, 265 S.W.2d 80, 82 (Ky. 1954).

³³ *Bobbe, supra* note 28.

³⁴ "If it thus protects itself why should it not spend part of its donated funds in premiums for public liability insurance, . . . ? Everyone who donates for its charity expects it to carry such protection." *Andrews v. YMCA of Des Moines*, 226 Iowa 374, 394, 284 N.W. 186, 206 (1939). There is no reason for a charity not to spend part of its funds on insurance, as on any expense. "The necessity of such insurance is foreseeable and the exact cost of it may be calculated by the intending donor. Such donor would be no more discouraged by this item of expense than by the item of wages, or light and heat, or similar costs." *Appleman, The Tort Liability of Charitable Institutions*, 22 A.B.A.J. 55 (1936). See also, 6 U. CHI. L. REV. 518 (1939).

³⁵ "Insurance must be carried to guard against liability to strangers. Adding beneficiaries cannot greatly increase the risk or the premium." *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810, 828 (D.C. Cir. 1942). See note 34 *supra*.

be a prohibitive imposition, especially in view of the more just apportionment of the risk of loss which would thereby be achieved.

The decision in *Bing v. Thumig* may well induce other states to adopt a doctrine of full liability for charitable institutions.³⁶ Some courts seem extremely reluctant to take this step, however, feeling that such a determination of public policy should properly be left to the legislature.³⁷ But notwithstanding such compunctions, a Pennsylvania federal court has already been sufficiently encouraged to cast doubt on the long-standing acceptance of the charitable immunity rule, and, significantly, perhaps, on the need for legislative action to effect the change.³⁸ The *Bing* decision, therefore, may well prove to be instrumental in conforming the law in this area to the socio-economic realities of today.

³⁶ See Gerber and Tyree, *supra* note 1, at 154, which indicates that most states, at last count, follow some rule in the "twilight zone" between absolute immunity and liability. Some jurisdictions hold charitable hospitals unqualifiedly responsible for the negligence of servants in the course of employment. *Tuengel v. City of Sitka*, 118 F. Supp. 399 (D. Alaska 1954); *Moats v. Sisters of Charity of Providence*, 13 Alaska 546 (1952); *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P.2d 220 (1951); *Durney v. St. Francis Hospital*, 46 Del. 350, 83 A.2d 753 (1951); *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P.2d 934 (1954); *Mulliner v. Evangelischer Diakonissenverein*, 144 Minn. 392, 175 N.W. 699 (1920); *Welch v. Frisbie Memorial Hospital*, 90 N.H. 337, 9 A.2d 761 (1939); *Rickbeil v. Grafton Deaconess Hospital*, 74 N.D. 525, 23 N.W.2d 247 (1946); *Avellone v. St. John's Hospital*, 165 Ohio St. 467, 135 N.E.2d 410 (1956); *Foster v. Roman Catholic Diocese*, 116 Vt. 124, 70 A.2d 230 (1950); *Pierce v. Yakima Valley Memorial Hospital*, 43 Wash.2d 162, 260 P.2d 765 (1953).

Other states have not expressly adopted a rule of complete liability, but have demonstrated a propensity to repudiate the charitable immunity theories. *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4 (1915); *Nicholson v. Good Samaritan Hospital*, 145 Fla. 360, 199 So. 344 (1940); *Gable v. Salvation Army*, 186 Okla. 687, 100 P.2d 244 (1940); *Sessions v. Thomas D. Dee Memorial Hospital Ass'n*, 94 Utah 460, 78 P.2d 645 (1938).

³⁷ North Carolina is typical of those states which maintain that the doctrine of charitable immunity is too well settled to be changed by decision. "For us to withdraw immunity from charitable institutions at this time, against the existing background of decisions of this Court, would in effect be an act of judicial legislation in the field of public policy." *Williams v. Randolph Hospital*, 237 N.C. 387, 391, 75 S.E.2d 305 (1953).

³⁸ *Gable v. Sisters of St. Francis*, 227 Pa. 254, 75 Atl. 1087 (1910) had made it clear, apparently, that immunity was to be the law of Pennsylvania and that any change would be left to the legislature. A recent federal decision there, however, said: "It is possible, of course, in view of the *Bing* decision . . . that the Supreme Court of Pennsylvania might adopt the enlightened rule of the *Bing* case. . ." *Brown v. Moore*, 247 F.2d 711, 718 (3rd Cir. 1957), suggesting, perhaps, that Pennsylvania should also change its position. This may foreshadow a judicial overthrow of the long-standing immunity rule in that state.