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Flagiello v. Pennsylvania Hosp.: Is Charitable Immunity Really Dead in Pennsylvania?

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FLAGIELLO v. PENNSYLVANIA HOSP.: IS CHARITABLE IMMUNITY REALLY DEAD IN PENNSYLVANIA?

Following the trend developed in other jurisdictions,[1] the Pennsylvania Supreme Court in *Flagiello v. Pennsylvania Hosp.*[2] has abolished the defense of charitable immunity for hospitals. This Note will examine the reasons used by the court in abrogating charitable immunity as to hospitals in an effort to determine whether or not they are applicable to other charitable organizations.

Mrs. Mary Flagiello suffered injuries due to a fall while she was a patient at the University of Pennsylvania Hospital in Philadelphia. She and her husband sued the hospital in trespass alleging that her injuries were caused by the negligence of the defendant's employees. The hospital moved for a judgment on the pleadings averring that it was an eleemosynary institution engaged in a charitable enterprise and was therefore immune from liability. The lower court granted the defendant's motion and plaintiff appealed to the Pennsylvania Supreme Court.

In Pennsylvania, charitable organizations have been immune from tort liability since 1888 when *Fire Ins. Patrol v. Boyd*[3] held that a "public charity, whether incorporated or not, is but a trustee and is bound to apply its funds in furtherance of the charity and not otherwise."[4] *Boyd* relied upon the English case of *Feoffes of Heriots Hosp. v. Ross*[5] which was tacitly overruled by *Mersey Docks Trustees v. Gibbs*[6] twenty two years before the *Boyd* decision. Thus, charitable immunity, already dead in England, was given a new life in Pennsylvania.

While the propriety of the immunity doctrine was rarely questioned, the Pennsylvania courts began to assign divergent explanations for its justification. They can be categorized as follows: (1) The "trust fund" theory, *i.e.*, that the funds and property of these institutions are held in trust and cannot be diverted to purposes other than those designated in the trust;[7] (2) that

1. PROSSER, TORTS § 127 (3d ed. 1964). The states which have abandoned charitable immunity completely are Alaska, Arizona, California, Delaware, Florida, Iowa, Kansas, Kentucky, Michigan, Minnesota, Montana, New Hampshire, New York, North Dakota, Oklahoma, Oregon, Utah, Vermont and Wisconsin. In addition Ohio and Washington have terminated the immunity as to charitable hospitals but left it as to other charitable organizations.

2. 208 A.2d 193 (Pa. 1965).

3. 120 Pa. 624, 15 Atl. 553 (1888).

4. *Id.* at 647, 15 Atl. at 557.

5. 12 Cl. & Fin. 507, 8 Eng. Rep. 1508 (1846).

6. XI H.L.C. 686, 11 Eng. Rep. 1500 (1866). *Feoffes* had relied upon the dicta of Lord Cottenham in Duncan v. Findlater, 6 C. & F. 894, 7 Eng. Rep. 934 (1839):

> To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose.

Id. at 897, 7 Eng. Rep. 936. *Duncan* was expressly overruled by *Mersey Dock*.

7. Fire Ins. Patrol v. Boyd, 120 Pa. 624, 15 Atl. 553 (1888). See also Parks

the doctrine of "*respondeat superior*" cannot be extended so as to apply to charitable institutions because such institutions are not operated for profit;[8] (3) the "implied waiver" theory, *i.e.*, that entering a hospital for treatment and accepting the services rendered is a "waiver" of all rights to claim damages for injuries suffered as a result of the negligence of the hospital or its employees;[9] (4) "*stare decisis*" requires the court's retention of the rule and any change in the law must be wrought by a legislative enactment.[10]

The "trust fund" theory assumes that charitable immunity fosters public donations and that all charitable organizations rely heavily on such donations for their existence. As was pointed out by Justice Musmanno in *Flagiello*: "In 1963, the fees received from patients in the still designated charitable hospitals throughout Pennsylvania constituted 90.92% of the total income of the hospitals."[11] Such statistics unquestionably illustrate the financial self-sufficiency of hospitals in Pennsylvania. Perhaps even more significant is the fact that the appellee-hospital was unable to convince the court that the imposition of liability would dissuade prospective donors from making contributions. The majority cited the opinion of Justice Rutledge in *Georgetown College v. Hughes*,[12] which held the contrary to be true. Justice Rutledge stated:

> There are also reasons which take force away from the fears of dissipation and deterrence of donations. No statistical evidence has been presented to show that the mortality or crippling of charities has been greater in states which impose full or partial liability than where complete or substantially full immunity is given. Nor is there evidence that deterrence of donation has been greater in the former. Charities seem to survive and increase in both with little apparent heed to whether they are liable for torts. . . .[13]

Obviously, the basis of the immunity rule is not logically explained by the "trust fund" rationale.

The appellees argued in *Flagiello* that the doctrine of *respondeat superior*

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v. Northwestern Univ., 218 Ill. 381, 75 N.E. 991 (1905); Eads v. Young Women's Christian Ass'n, 325 Mo. 577, 29 S.W.2d 701 (1930); Williams v. Randolph Hosp., 237 N.C. 387, 75 S.E.2d 303 (1953).

8. Siidekum v. Animal Rescue League of Pittsburgh, 353 Pa. 408, 45 A.2d 59 (1946). See also Evans v. Lawrence Hosp., 133 Conn. 311, 50 A.2d 433 (1946); Emery v. Jewish Hosp. Ass'n, 193 Ky. 400, 236 S.W. 577 (1921); Thornton v. Franklin Square House, 200 Mass. 465, 86 N.E. 909 (1909).

9. Wilcox v. Idaho Saints Hosp., 59 Idaho 350, 82 P.2d 849 (1938); St. Vincent's Hosp. v. Stine, 195 Ind. 350, 144 N.E. 537 (1924); Duncan v. Nebraska Sanitarium, 92 Neb. 162, 137 N.W. 1120 (1912).

10. Michael v. Hahnemann Medical College, 404 Pa. 424, 172 A.2d 769 (1961); Bond v. Pittsburgh, 368 Pa. 404, 84 A.2d 328 (1951).

11. 208 A.2d at 198 (Pa. 1965).

12. 130 F.2d 810 (D.C. Cir. 1942).

13. *Id.* at 823.

was inapplicable to charities since they are non-profit organizations. This proposition had been previously accepted by the Pennsylvania Supreme Court in *Siidekum v. Animal Rescue League of Pittsburgh*.[14] However, such a restrictive interpretation of the doctrine does violence to the purposes for which it was created. Professor Prosser points out the fallacy of such an interpretation:

> . . . the vicarious liability of a master is certainly not limited to profitable businesses, and it rests rather upon his employment of the servant, his direction and control over the act, and the furtherance of an enterprise which he has set in motion. If he derives profit from the enterprise that might serve as an added reason for making him take the responsibility; but the reason for making him bear the loss in the first instance is complete without the addition.[15]

In refuting the *"respondeat superior"* argument, the majority in *Flagiello* point out that the imposition of liability on the hospital will induce it to exercise greater care and caution in selecting and training its personnel.[16]

Of all the arguments advanced by the proponents of the immunity rule, undoubtedly the "waiver theory" is the most indefensible. Based upon fiction, it completely ignores the realities of contractual requisites. A simple factual situation should explain. Consider the patient entering a hospital in an unconscious position, or the infant patient who is either too young to understand or be bound by the terms of a contractual waiver. Unquestionably, few hospitals would announce in advance a policy of requiring such a waiver as a condition of entrance, and few patients would enter under such a condition unless forced to do so by poverty.[17] Fortunately, the Pennsylvania courts have never utilized the "implied waiver" fiction in order to justify the rule of immunity.[18]

The dissenting opinion in *Flagiello* advocates a strict adherence to the doctrine of *stare decisis* as the basis for upholding charitable immunity.[19]

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14. 353 Pa. 408, 45 A.2d 59 (1946):
> However, as far as pennsylvania is concerned, the law on this subject is perfectly clear . . . that the rule of *respondeat superior* does not apply in the case of injuries occasioned by the negligence of the agents or servants of a charitable organization.

Id. at 416, 45 A.2d at 62.

15. PROSSER, *op. cit. supra* note 1, § 127.

16. Justice Musmanno states:
> Human nature being what it is, administrators of a hospital, cognizant that the hospital is insulated from tort liability, may be less likely to exercise maximum scrutiny in selecting personnel than if the hospital were held monetarily liable for the slipshod, indifferent, and neglectful conduct of employees.

208 A.2d at 202 (Pa. 1965).

17. 130 F.2d 810 (D.C. Cir. 1942).

18. PROSSER, *op. cit. supra* note 1, § 127.

19. Justice Bell stated: "I am very greatly disturbed by the virtual extirpation of

While the stability and certainty wrought by the doctrine provide necessary standards to guide man's conduct, the majority in *Flagiello* have refused to blindly perpetuate the immunity law on that basis alone. Justice Musmanno points out that courts must be sensitive to the changes in the times which may require the abandonment of an antiquated law.[20] The eminent Mr. Justice Cardozo once warned of the pitfalls of *stare decisis:*

> . . . we must not perpetrate an obsolete rule by blind adherence to the principle of *stare decisis.* Although adherence to that principle is generally a wise course of judicial action, it does not rigidly command that we follow without deviation earlier pronouncements which are unsuited to modern experience and which no longer adequately serve the interests of justice. Surely, the orderly development of the law must be responsive to new conditions and to the persuasion of superior reasoning.[21]

While it is safe to assume that the immunity of hospitals in Pennsylvania has been abrogated by *Flagiello,* the decision makes no reference as to its possible effect on other charitable organizations.[22] Rather the majority concludes: "We, therefore, overrule *Michael v. Hahnemann* and all other decisions of identical effect, and hold that the hospital's liability must be governed by the same principles of law as apply to other employers."[23] Assuming that the inclusion of the word "identical" indicated the court's intent to restrict the decision to hospital cases, Pennsylvania may have decided to follow the courts of Ohio and Washington which have promulgated a policy of partial imunity for charitable institutions other than hospitals.

Thus in *Pierce v. Yakima Valley Memorial Hosp.*,[24] the Supreme Court of Washington held that a charitable hospital is liable for the torts of its

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the principle of *stare decisis,* on which the House of Law was built." 208 A.2d at 213 (Pa. 1965).

20. In discussing the legal justification for abandoning *stare decisis,* Justice Musmanno states:

> Of course, the precedents here recalled do not justify a light and casual treatment of the doctrine of *stare decisis* but they proclaim unequivocally that where Justice demands, reason dictates, equality enjoins and fair play decrees a change in judge-made law, courts will not lack in determination to establish that change.

208 A.2d at 207, 208 (1965).

21. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150, 151 (1921).

22. The dissenting opinion, however, construes the majority opinion as extirpating all charitable immunity. Justice Bell states:

> By eliminating charitable immunity for nonprofit, charitable hospitals, the majority opinion likewise abolishes it for churches, schools, and universities, homes for the blind, homes for the aged, homes for the crippled or retarded or homeless children, Catholic Home Shelter and five other Catholic child-care institutions, convents, religious organizations of many denominations, the Salvation Army, the Y.M.C.A., and in short for every other charity. . . .

208 A.2d at 210 (Pa. 1965).

23. *Ibid.*

24. 43 Wash. 2d 162, 260 P.2d 765 (1953).

servants. Two years later the same court in the case of *Lyon v. Tumwater Evangelical Free Church*,[25] held a nonprofit religious organization immune from liability. The court stated:

> Appellant contends that the rule of charitable immunity has been rejected by the *Pierce* case, and therefore the doctrine of *respondeat superior* applies to ecclesiastical bodies. We do not wish to extend the above holding to apply to a *nonprofit, religious organization* which transports children, without charge, to and from Sunday school in order that they may receive a spiritual education and eventually become members of a church organization.[26]

A similar situation has arisen in Ohio. In *Gibbon v. Y.W.C.A.*,[27] the Supreme Court of Ohio refused to extend the earlier decision of *Avellone v. St. John's Hosp.*,[28] which abolished immunity for charitable hospitals. The court in *Avellone* reasoned that the capacity of hospitals to finance liability costs had increased sufficiently to eliminate the need for special protection.[29] However, in *Gibbon* there was no like showing of the financial independence of religious organizations and thus the court refused to overturn the immunity rule.[30]

While the majority in *Flagiello* goes to great lengths to refute the fictions used to support the immunity rule, it would seem that the real basis of the decision is the change in the financial stability of hospitals.[31] It is their characterization as a business which separates them from other charitable organizations.[32]

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25. 47 Wash. 2d 202, 287 P.2d 128 (1955).
26. *Id.* at 204, 287 P.2d at 130.
27. 170 Ohio St. 280, 164 N.E.2d 563 (1960).
28. 165 Ohio St. 467, 135 N.E.2d 410 (1956).
29. The court stated:

> . . . the availability of liability insurance and the existing power to purchase it with hospital funds, coupled with the increased base of remuneration for services rendered and the efficient business-like management of modern hospitals certainly tend to negate the argument that to hold the hospital liable . . . would defeat the charitable purpose. . . .

Id. at 474, 135 N.E.2d at 415.

30. *Contra*, Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951).
31. Thus Justice Musmanno states:

> Whatever the law may have been regarding charitable institutions in the past, it does not meet the conditions of today. Charitable enterprises are no longer housed in ramshackly wooden structures. They are not mere storm shelters, to succor the traveler and temporarily refuge those stricken in a common disaster. Hospitals today are growing into mighty edifices in brick, stone, glass and marble. Many of them maintain large staffs, they use the best equipment that science can devise. . . . But they do all this on a business basis, submitting invoices for services rendered—and properly so. And if a hospital functions as a busines institution, by charging and receiving money for what it offers, it must be a business establishment also in meeting obligations it incurs in running that establishment.

208 A.2d at 196 (Pa. 1965).

32. It is interesting to note that the religious organizations argued that they were

The result reached indicates that the Pennsylvania Supreme Court may be willing to entertain data on the financial self sufficiency of each charitable institution as a case involving it arises. An adjudication based on such data would seem to put the court in the position of legislating on the status of a particular organization without hearing the views of all interested parties. Such a course of action can only produce the chaos and uncertainty which the law abhors. Consider the position of the rural Y.M.C.A. after learning that its urban counterpart has lost its shield of immunity. Can it now proceed with any amount of assurance that if the situation arises, it may also lose its protection? Obviously not.

It is therefore suggested that the legislature, with its vast amount of investigatory resources, is better able to fashion statutory distinctions of immunity based on varying financial capacities. Moreover, it could formulate standards, which operating prospectively,[33] would obtain the desired stability. Perhaps the system practiced in New Jersey could be utilized. In 1958, the New Jersey Supreme Court struck down the immunity rule for hospitals,[34] churches,[35] and other charitable institutions.[36] The legislature reacted by enacting a statute immunizing religious, charitable, and educational organizations, but affirming liability as to nonprofit hospitals, limiting it to 10,000 dollars.[37]

The result reached in *Flagiello* is undesirable merely because it leaves the application of the immunity doctrine in a state of uncertainty. Because the courts have not *expressly* abolished charitable immunity completely, it appears that the only solution lies in the form of legislative enactment. Failure to do so will result in the continued perpetuation of an unsound doctrine.

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similar to hospitals in that they also served a charitable purpose. See Bianchi v. South Park Presbyterian Church, 123 N.J.L. 325, 8 A.2d 567 (1939). Now the same charities which once argued they were like nonprofit hospitals in order to obtain the protection of the immunity doctrine, must argue the converse—that they are not like hospitals—in order to retain the same protection.

33. A judicial abolition of immunity would operate retroactively. See Gregory v. Salem General Hosp., 175 Or. 464, 153 P.2d 837 (1944).

34. Callopsy v. Newark Eye & Ear Infirmary, 27 N.J.2d 29, 141 A.2d 276 (1958).

35. Dalton v. St. Luke's Catholic Church, 27 N.J.2d 22, 141 A.2d 273 (1958).

36. Benton v. Y.M.C.A. of Westfield, 27 N.J.2d 67, 141 A.2d 298 (1958).

37. N.J. STAT. ANN. § 2A:53A-7 to -11, (1958).